

**BEFORE THE SUPREME COURT CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**Submissions from Mr KHIEU Samphân's Defence Concerning the Additional
Investigation Ordered**

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Before:

The Supreme Court Chamber

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MAY IT PLEASE THE SUPREME COURT CHAMBER

1. On 1 April 2015, the Supreme Court Chamber (“the Supreme Court”) ordered an additional investigation, whose prime purpose was to explore whether the footage in the possession of Robert LEMKIN and Thet SAMBATH could be obtained within a reasonable period of time and what specific information could be derived from it.¹
2. As part of the additional investigation, the Delegate Judges of the Supreme Court heard Robert LEMKIN,² who subsequently imparted excerpts of a forthcoming article which summarise the content of a series of interviews of four persons (“the Notes”).³ Meanwhile, the Witness Support Unit contacted THET Sambath, who did not consent to disclosure of the footage.⁴
3. On 15 June 2015, the Supreme Chamber directed from the Defence for NUON Chea written submissions by Monday, 13 July 2015 on (i) whether the Notes should be admitted into evidence; and (ii) whether any further action should be taken by the Delegate Judges or the Chamber in relation to the information which emerged from the additional investigation. The Supreme Court requested the other parties to file their responses to NUON Chea’s submissions by 23 July 2015.⁵
4. On 13 July 2015, the Defence for NUON Chea filed its written submissions on the matters.⁶
5. The Defence for Khieu Samphân (“the Defence”) hereby makes its submissions in response.

I. Admission of the Notes into evidence

6. The Defence concurs with the Defence for NUON Chea that the Notes must be admitted into evidence pursuant to Internal Rules 108(7) and 104(1).⁷ It would add that the Notes are directly available and that none of the grounds of inadmissibility laid down by rule 87(3) apply.

¹ Interim Decision on Part of Nuon Chea's First Request to Obtain and Consider Additional Evidence in Appeal Proceedings of Case 002/01, 1 April 2015, **F2/4/3**, paras. 24 and 25.

² Written Record of Witness Interview – Robert T.F. Lemkin, 18 May 2015, **F2/4/3/1**.

³ Robert Lemkin’s Notes on Ruos Nhim’s Political Agenda, 29 May 2015, **F2/4/3/3.1** (“the Notes”).

⁴ Report in Response to Supreme Chamber Decision F2/4/3, 22 May 2015, **F2/4/3/2**.

⁵ Decision Requesting Submissions on the Additional Investigation, 15 June 2015, **F2/4/3/3**.

⁶ Nuon Chea’s Response to Questions on the Supreme Court Chamber’s Additional Investigation into Footage in the Possession of Filmmakers Rob LEMKIN and THET Sambath, 13 July 2015, **F2/4/3/3/1** (“the Nuon Chea Response”, notified to the parties on 14 July 2015).

⁷ Nuon Chea Response, paras. 3-8.

II. Further action to be taken

7. The Defence further concurs with the Defence for NUON Chea that the Delegate Judges should re-interview Robert LEMKIN and interview THET Sambath to obtain additional information on the evidence they took.⁸ The Defence is further of the view that in so doing the Delegate Judges should ask Robert LEMKIN and THET Sambath to make contact with the four persons to whom the Notes refer and to furnish those persons with information on the protective measures which may be implemented in prospect of appearance before the Supreme Court.
8. These persons could be willing to give evidence before the ECCC. First, they agreed to be filmed and to give their account, whilst stating that they wished to remain anonymous.⁹ Whereas the Defence does not know which technical means were used at the time to preserve their anonymity, it does, however, know that various, possible protective measures – some of which have already been used effectively before the Trial Chamber – provide the ECCC with very reliable means of taking their evidence, whilst safeguarding anonymity.¹⁰ Second, on 12 and 13 August 2014, *viz.* a matter of days after the trial Judgement was handed down in Case 002/01, THET Sambath told Voice of America Khmer that the persons he had interviewed – from whom he “learnt the truth while the tribunal [...] does not”¹¹ – “really want to speak”¹² and “will go and speak out if they are provided with a security assurance.”¹³ Lastly, there is nothing to suggest that these persons have ever been informed of existing protective measures at the ECCC.
9. Accordingly, the Defence takes the view that the Supreme Court should prepare a very informative document explaining, in practical terms, all of the protective measures which it could implement in the event of appearance before it. In the document, the Supreme Court should also state that should such appearance not take place, the footage could be disclosed to the Court and classified as “strictly confidential”, setting out the guarantees of confidentiality that that entails in practical terms. The document should also contain the contact details of staff of the Witness Support Unit and state the urgency of the situation and the importance of the appeal proceedings to the ascertainment of the truth.
10. Thereafter, the Delegate Judges should request that Robert LEMKIN and THET Sambath impart the explanatory document to the four persons in question in the Notes. Robert LEMKIN is privy to the identity of the persons and could perhaps contact them

⁸ Nuon Chea Response, para. 9.

⁹ Notes, p. 1 (ERN EN 01106928).

¹⁰ See in particular Internal Rules 28 and 29.

¹¹ Interview given by THET Sambath to VOA Khmer on 12 and 13 August 2014, transcribed in [NUON Chea’s] Request to Obtain and Consider Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01, 1 September 2014, F2, p. 3 (ERN EN 01022845).

¹² *Ibidem*, p. 5 (ERN EN 01022847).

¹³ *Idem*.

to this end. In any event, THET Sambath is in a position to do so and should, therefore, agree to convey the explanatory document to them, unless for commercial reasons of exclusivity, he is minded to obstruct the “thorough research”, which he publicly declared that he wants the Court undertake.¹⁴

11. Lastly, for the purposes of its secure transmission by third parties living outside of Cambodia, the explanatory document should be placed online, on the Court’s website, so that Mr LEMKIN and Mr THET may suggest over the telephone to the four witnesses that they themselves consult it directly.
12. Moreover, the Delegate Judges should request that Robert LEMKIN disclose, in its entirety, his forthcoming article from which his NOTES were excerpted. That article of ten thousand words, summarizing information gathered between 2007 and 2011, could in fact contain information, whose relevance Robert LEMKIN might perhaps have underestimated.¹⁵ It could, if need be, be treated as confidential, pending publication.
13. Lastly, the Supreme Court should in time and at the very least call Robert LEMKIN to give evidence.
14. So the Defence submissions stand at this juncture.

Mr KONG Sam Onn	Phnom Penh	[signed]
Ms Anta GUISSÉ	Paris	[signed]
Mr Arthur VERCKEN	Paris	[signed]

¹⁴ *Ibid.*, p. 8 (ERN EN 01022850).

¹⁵ Written Record of Witness Interview – Robert T.F. Lemkin, 18 May 2015, F2/4/3/1, A6 and A38.