

**BEFORE THE TRIAL CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**FILING DETAILS**

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**NUON CHEA'S REPLY TO CO-PROSECUTORS' RESPONSE TO NUON CHEA'S  
 RULE 87(4) REQUEST FOR ADMISSION INTO EVIDENCE OF DOCUMENTS BY  
 ROBERT LEMKIN (2-TCW-877) AND ANOTHER RELATED DOCUMENT PRIOR TO  
 THE TESTIMONY OF WITNESS [REDACTED] (2-TCW-829)**

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## I. INTRODUCTION

1. On 22 June 2016, the Co-Lawyers for Nuon Chea (the “Defence”) filed a request to consider and obtain additional evidence related to documents provided to the Supreme Court Chamber by Robert Lemkin as well as a related article published by the Cambodia Daily Weekend on 18 June 2016 (the “Lemkin Evidence Request”).<sup>1</sup> On 28 June 2016, the Co-Prosecutors filed their response which comprised a new request for investigation (the “Co-Prosecutors’ Response and New Request”).<sup>2</sup> On 29 June 2016, the Defence requested to file a response to the Co-Prosecutors’ Response and New Request. On 30 June 2016, the Trial Chamber rejected the Defence’s request to respond but granted it a right of reply.<sup>3</sup> Pursuant to Article 8.4 of the Practice Direction on the Filing of Documents Before the ECCC and in accordance with the Trial Chamber Directions Regarding Responses, Replies to Responses and Filing in One Language Only Under Exceptional Circumstances<sup>4</sup>, the Defence hereby submits the instant reply to the Co-Prosecutors’ Response and New Request (the “Reply”).

## II. ARGUMENTS

2. As they did in their response to the Supreme Court Chamber<sup>5</sup>, the Co-Prosecutors have again chosen to focus single-mindedly on escalating their smear campaign against Robert Lemkin by casting offensive aspersions as to his professional competencies and his intellectual honesty, instead of addressing the substance of the evidence. Furthermore, the Co-Prosecutors’ Response and New Request appears particularly irrational. On the one hand, the Co-Prosecutors vehemently challenge the credibility of Robert Lemkin, and hence, the reliability of the material sought by the Defence. On the other hand, the Co-Prosecutors do not object to the admission of any of the documents, thus assuming that they are *prima facie* relevant and reliable.<sup>6</sup> Even more peculiar is the new request from the Co-Prosecutors to elicit more evidence from Robert Lemkin.

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<sup>1</sup> **E416**, ‘Nuon Chea’s Rule 87 (4) Request for Admission Into Evidence of Documents by Robert Lemkin and Another Related Document Prior to the Testimony of Witness [REDACTED] (2-TCW-829)’, 22 Jun 2016 (“Lemkin Evidence Request”).

<sup>2</sup> **E416/1**, ‘Co-Prosecutors’: Response to Nuon Chea’s Rule 87 (4) request to Admit into Evidence Documents Provided by Robert Lemkin and a Cambodia Daily Article; and, 2) Related Investigatory Request Pursuant to Rule 93’, 28 Jun 2016 (“Co-Prosecutors’ Response and New Request”).

<sup>3</sup> Email from the Defence Legal Consultant to the Supreme Court Chamber Senior Legal Officer, 29 Jun 2016 (**Attachment 1**).

<sup>4</sup> **E64**, ‘Trial Chamber Directions Regarding Responses, Replies to Responses and Filing in one Language only Under Exceptional Circumstances’, 10 Mar 2011.

<sup>5</sup> **F2/4/3/3/3**, ‘Co-Prosecutors’ Response to Nuon Chea’s Response to Questions on the Supreme Court Chamber’s Additional Investigation into Footage in the Possession of Filmmakers Rom Lemkin and Thet Sambath’, 23 Jul 2015.

<sup>6</sup> **E289/2**, ‘Decision on Civil Party Lead Co-Lawyers’ Internal Rule 87(4) Request to Put Before the Chamber New Evidence (E289) and KHIEU Samphan’s Response (E289/1)’, 14 Jun 2013, para. 26.

3. The Co-Prosecutors' Response and New Request is one more example of the double standard applied to the Defence's evidentiary requests. Indeed, while devoting most of their Response to an effort to discredit Robert Lemkin, the Co-Prosecutors conspicuously omit to mention that they had previously sought to rely heavily on the film Robert Lemkin and Thet Sambath made, relying upon them repeatedly at trial<sup>7</sup>, submitting to the Supreme Court Chamber in September 2014 that "[t]he investigative skills of Thet Sambath cannot be questioned"<sup>8</sup>, and attempting to guard against this obvious contradiction by absurdly attempting to distinguish Robert Lemkin from Thet Sambath.<sup>9</sup>

#### A. Reply to the Co-Prosecutors' Response

##### (i) *Transcripts*

4. The Co-Prosecutors do not object to the Defence's Request to have the Transcripts provided by Robert Lemkin admitted into evidence. However, the Co-Prosecutors claimed that "the transcripts have been proven unreliable",<sup>10</sup> and further, engaged in gratuitous and despicable criticism against Robert Lemkin's professionalism, going as far as to challenge his intellectual honesty and his integrity. The Defence wishes to address the following points listed by the Co-Prosecutors as "factors" diminishing the probative value of the Transcripts.
5. **Identities of the interviewees:** First of all, the Co-Prosecutors state that the identities of the four interviewees remain unclear, as does their background and position during the relevant period. However, as confirmed by Robert Lemkin himself, W2 is clearly identified as [REDACTED] (2-TCW-829)<sup>11</sup>. The individuals referred to as W1 and W3 in Lemkin's Transcripts, as already explained by the Defence<sup>12</sup> and confirmed by the Supreme Court Chamber<sup>13</sup>, are very likely witnesses already requested by the Defence, respectively [REDACTED] (2-TCW-961) and [REDACTED] (2-TCW-959).
6. The Defence furthermore notices that the Co-Prosecutors apply an obvious double standard again. Indeed, the Defence raised the issue of the identification of Alexander Hinton's sources during his testimony before the Trial Chamber,<sup>14</sup> and further filed a

<sup>7</sup> See, **F2/4/3/3/4**, 'Nuon Chea's Reply to Co-Prosecutors' Response to Nuon Chea's Questions on the Supreme Court Chamber's Additional Investigation Into Footage in the Possession of Filmmakers Rob Lemkin and Thet Sambath', 29 Jul 2015 ("Reply to Co-Prosecutors on Lemkin's Notes"), paras. 13-15.

<sup>8</sup> **F2/2**, 'Co-Prosecutors' Response to Nuon Chea Defence First and Second Requests to Obtain and Consider Additional Evidence in Connection With the Appeal Against the Trial Judgement in Case 002/01', 16 Sep 2014, para. 10.

<sup>9</sup> See, **F2/4/3/3/4**, Reply to Co-Prosecutors on Lemkin's Notes, para. 14.

<sup>10</sup> **E416/1**, 'Co-Prosecutors' Response and New Request', para 4 (k).

request for additional investigation in order for the parties to be provided with Hinton's material to be able to assess the reliability of his sources.<sup>15</sup> Strangely, the Co-Prosecutors objected to the Defence's request, arguing notably:

The Request's rationale would mean that all experts called before the Chamber would be required to provide every piece of underlying primary source research material that support their expert opinion. This would clearly undermine the purpose of calling experts and would prohibitively delay proceedings.<sup>16</sup>

7. **Alleged promises and motivation of the interviewees.** The Co-Prosecutors shamelessly submit that “there is nothing to indicate what, if any, promises were made to the interviewees or the motivations of the interviewees to participate”<sup>17</sup>. This is one of the Co-Prosecutors' worst unsubstantiated allegations against Robert Lemkin's intellectual honesty. It is also peculiar, to say the least, that the Co-Prosecutors take pains to stress such a concern that did not appear to trouble the Co-Prosecutors with regard to the thousands of individuals whose evidence has already been admitted in this case. In particular, the Co-Prosecutors never questioned the “motivation” of alleged victims of genocide interviewed by Ysa Osman, nor did they ask Alexander Hinton about the “promises” he might have made to the individuals he interviewed. However, both Ysa Osman and Alexander Hinton testified as experts in Case 002/02, whereas the Defence requested Robert Lemkin to appear as a mere witness.
8. **Criticism about methodology:** The Co-Prosecutors further levelled a wide range of criticism at Robert Lemkin's methodology.<sup>18</sup> Surprisingly again, the Co-Prosecutors have never required the same standard to be applied to individuals who came to testify as experts. Furthermore, it is interesting to note that the methodology described by Robert Lemkin regarding the conduct of the four witnesses' interviews is very similar to the methodology allegedly applied by the Co-Prosecutors' requested expert Alexander

<sup>11</sup> **F2/4/3/3/5**, ‘Third Interim Decision on the Additional Investigation’, 20 Aug 2015 (“Third Interim Decision”), fn. 15.

<sup>12</sup> See **E416**, ‘Lemkin Evidence Request’, EN 01298440, para 13.

<sup>13</sup> **F2/4/3/3/5**, ‘Third Interim Decision’, ERN 01132013: “There is a substantial likelihood that the two persons mentioned in the Notes and named in *Behind the Killing Fields* are among the persons the testimony of whom is sought by Nuon Chea in the Case 002/01 appeal proceedings”.

<sup>14</sup> T. 15 Mar 2016 (Alexander Hinton, **E1/402.1**), p. 19 from [09.38.26] (...) I think it should be clear to all parties whether Teap is, in fact, the person that we think Teap is. Otherwise, we're introducing evidence which we should be able to verify. [09.39.38] MR. SMITH: (...) I would submit that if counsel would like to conduct some questions on who Teap is in relation to those particular interviews, that he should, during his own cross-examination”; p. 23 [09.45.08] MR. SMITH: (...) These are all relevant questions, but counsel can ask those questions in his examination.

<sup>15</sup> **E405**, ‘Nuon Chea's Request for Investigative Action in Relation to Alexander Laban Hinton’, 9 May 2016, paras. 11-13.

<sup>16</sup> **E405/1**, ‘Co-Prosecutors' Response to Nuon Chea's Request for Investigative Action in Relation to Alexander Hinton’, 19 May 2016, para. 8.

<sup>17</sup> **E416/1**, ‘Co-Prosecutors' Response and New Request’, para 4 (c).

<sup>18</sup> See **E416/1**, ‘Co-Prosecutors' Response and New Request’, paras. 4 (d), (e), (f), (g), (h).

Hinton. Indeed, Robert Lemkin explained that “the people were interviewed numerous times (...) and efforts were made to triangulate or corroborate the information by asking other people about information that one person had given”,<sup>19</sup> whereas Alexander Hinton stated that he “tried to work through triangulation in the sense that if someone said something I tried to triangulate with other people who can confirm, in one way or the other, about the historical events.”<sup>20</sup>

9. As it has already stated before the Supreme Court Chamber, the Defence submits that Robert Lemkin’s material is manifestly more reliable than any of the interviews taken by François Ponchaud, Philip Short or Steve Heder, and which were relied upon consistently throughout the Case 002/01 Judgement as key evidence in support of highly disputed questions of fact.<sup>21</sup> Moreover, the Defence does not seek to admit Lemkin’s opinion into evidence, or to call Lemkin as an expert witness. It only seeks to admit into evidence his original sources and first-hand account of the interviews he initiated, planned, attended and thoroughly reviewed.
10. Lastly, the Defence stresses that it has undertaken many efforts to have Robert Lemkin testify before the Chamber in order to enable the Parties to question and cross-examine him, notably, regarding these methodological issues.<sup>22</sup>
11. **The transcripts are torture-tainted evidence:** The Defence submits once again that, it was entirely reasonable for Lemkin and Sambath to show interviewees Ruos Nhim’s confession to elicit their opinion as to whether it fully reflected Nhim’s traitorous activities. Moreover, the Co-Prosecutors never complained about the admission into evidence of WRIs of people who were shown confessions before being interviewed by the Co-Investigating Judges<sup>23</sup>, nor did they object to the admission of many books heavily based on the content of confessions.<sup>24</sup>
12. Unlike the Co-Prosecutors, who objected to the Defence’s request to be provided with Alexander Hinton’s sources<sup>25</sup>, the Defence has always sought more transparency in

<sup>19</sup> **F2/4/3/1**, Lemkin’s WRI, ERN 01097184, A20.

<sup>20</sup> T. 15 Mar 2016 (Alexander Laban Hinton, **E1/402.1**), pp. 123-124.

<sup>21</sup> See also **F2/4/3/3/4**, ‘Reply to Co-Prosecutors on Lemkin’s Notes’, 29 Jul 2015, para. 17.

<sup>22</sup> In Case 002/02, *see, e.g.*, **E335/1**, ‘Nuon Chea’s Response to the Co-Prosecutors’ request to call that Sambath as a Priority Witness, 26 Jan 2015; **E335/1/1**, ‘Nuon Chea’s response to Questions of the trial Chamber related to the defence’s Rule 87 (4) Request to summon Robert Lemkin, 31 Jul 2015; **E395**, Nuon Chea’s Third Witness request for the Case 002 Security Centres and ‘Internal Purges’ Segment’, 8 Apr 2016.

<sup>23</sup> **E3/80**, ‘Written Record of Interview – MEAS Voent’, 3 Mar 2010, ERN 00491657.

<sup>24</sup> See, e.g.: **E3/2653**, The Cham Rebellion, Ysa Osman; **E3/1664**, Voices from S-21, David Chandler.

requesting Robert Lemkin and the three witnesses identified in Thet Sambath's book to come to testify, and in seeking to have all of Lemkin's underlying material admitted into evidence. The Defence is once again disappointed by the double standard applied by the Co-Prosecutors since it serves nothing more than the established schoolyard debate between the Parties, instead of contributing to the ascertainment of the truth.

**(ii) Notes**

13. Similarly, the Co-Prosecutors do not object to the admission of Robert Lemkin's Notes into evidence but firmly challenge their reliability, pointing out alleged flaws in Robert Lemkin's methodology. The Defence refers the Chamber to the section above regarding the methodological issues and reiterates that the Co-Prosecutors will have a chance to address such matters during their cross-examination of Robert Lemkin, if the Chamber schedules him to testify.

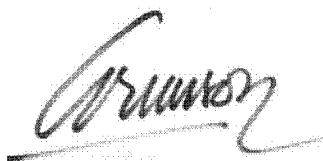
**(iii) Article**

14. The Defence also noticed that the version of the article which was attached to its request, and which is a scan of an original copy of the newspaper, omits part of a sentence. Therefore the Defence herewith attached an electronic copy of the article<sup>26</sup>.

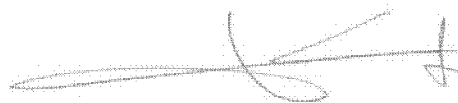
**B. Response to the Co-Prosecutors' Request for Investigative Action**

15. The Co-Prosecutors added a new investigative request to their response and asked the Chamber, pursuant to Rule 93, to seek to obtain from Robert Lemkin "any additional footage and/or transcripts of interviews with Nuon Chea, Khieu Samphan, and any witnesses referred to in the transcripts or Notes". The Defence does not object to the Co-Prosecutors' request but stresses again its peculiarity considering the longstanding lack of regard the Co-Prosecutors evidently have for Robert Lemkin's work.

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<sup>25</sup> E405/1, 'Co-Prosecutors' Response to Nuon Chea's Request for Investigative Action in Relation to Alexander Hinton'.

<sup>26</sup> 'Cambodia Daily Weekend', 18-19 Jun 2016, English version: <https://www.cambodiadaily.com/weekend1/factions-or-fiction-114272/>, Khmer version: <http://www.cambodiadailykhmer.com/32489> (**Attachment 2**).