

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

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**REPLY TO CO-PROSECUTORS' RESPONSE TO REQUESTS TO OBTAIN AND
CONSIDER ADDITIONAL EVIDENCE IN CONNECTION WITH THE APPEAL
AGAINST THE TRIAL JUDGMENT IN CASE 002/01**

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Pursuant to ECCC Internal Rules (the ‘Rules’) 104(1) and 108(7) and Article 8.4 of the Practice Direction on Filing,¹ the Co-Lawyers for Nuon Chea (the ‘Defence’) hereby submit this reply to the Co-Prosecutors’ response to Nuon Chea’s first and second requests to obtain and consider additional evidence in connection with its forthcoming Appeal Against the Trial Judgment in Case 002/01:

I. PROCEDURAL HISTORY

1. On 1 September 2014, the Defence filed a request to consider and obtain additional evidence in connection with an interview given by Thet Sambath to VOA Khmer in August 2014 (‘First Request’).² The Defence argued that the interview itself constituted (i) exculpatory evidence with regard to the structure of the CPK and Nuon Chea’s criminal responsibility for the crimes allegedly committed at Tuol Po Chrey and (ii) proof of a tangible impact of active government interference on Nuon Chea’s ability to present a defence.³ The Defence further argued that the interview confirmed the prior account of Thet’s co-director and co-producer Rob Lemkin that both men are in possession of highly relevant and directly exculpatory evidence. The Defence sought admission of an audio recording of Thet’s interview into evidence and requested the Supreme Court Chamber to summons Thet and Lemkin to testify and seek to obtain the evidence in their possession.⁴ On 2 September 2014, the Defence filed a second request to consider additional evidence in connection with an interview given by former Trial Chamber Judge Silvia Cartwright in November 2013 and a book published by former Co-Investigating Judge Marcel Lemonde in January 2013 (‘Second Request’).⁵ The Defence argued that Judge Cartwright’s interview established that national side judges on the Trial Chamber are biased against Nuon Chea due to their personal experiences in Democratic Kampuchea, while Judge Lemonde’s book demonstrated the pervasive nature of government interference in proceedings before the ECCC. The Second Request sought the admission of a video recording of Judge Cartwright’s interview and

¹ *Practice Direction ECCC/01/2007/Rev.7*, ‘Filing of Documents before the ECCC’.

² Document No. **F2**, ‘Request to Obtain and Consider Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01’, 1 September 2014 (‘First Request’).

³ First Request, paras 14-16.

⁴ First Request, paras 17-18.

⁵ Document No. **F2/2**, ‘Second Request to Consider Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01’, 2 September 2014 (‘Second Request’).

selected excerpts of Judge Lemonde's book into evidence.⁶ On 8 September 2014, the defence for Khieu Samphan joined both Requests.⁷

2. On 16 September 2014, the Co-Prosecutors filed a response ('Response').⁸ The Co-Prosecutors argued, *inter alia*, that prior efforts to summons Thet and Lemkin and obtain evidence in their possession have been unsuccessful⁹ and that the Defence failed to disclose the personal relationship between Thet and Nuon Chea – even while they admit that Thet openly called for Nuon Chea's conviction for crimes other than those allegedly committed at Tuol Po Chrey.¹⁰ The Co-Prosecutors reassured the Chamber that both Thet and Lemkin have misapprehended the evidence that the Co-Prosecutors have never seen, which they are 'certain' will be 'highly inculpatory'.¹¹ According to the Co-Prosecutors, there is no need for this Chamber to obtain evidence relevant to charges with which it is now seized, because a different Chamber adjudicating different charges in a different trial might at some point in the hopefully near future do so on its behalf.¹² The Co-Prosecutors similarly object to the admission of Judge Cartwright's interview and the excerpts from Judge Lemonde's book into evidence.¹³
3. The Co-Prosecutors' characterization of both the content of Thet's interview and the Tribunal's prior efforts to obtain his evidence are inaccurate. The Co-Prosecutors claim that the First Request 'falsely suggest[s] [...] that the Trial Chamber made no effort to obtain Thet Sambath's evidence', yet fail to identify a single instance in which the Trial Chamber sought to obtain Thet Sambath's testimony or the footage in his possession.¹⁴ Nor do they mention Lemkin's apparent willingness to discuss or disclose the footage

⁶ Second Request, paras 13-19.

⁷ Document No. **F2/1/1**, 'Soutien de la Défense de M. KHIEU Samphan aux deux premières requêtes de la Défense de M. NUON Chea aux fins d'admission et d'examen de moyens de preuve supplémentaires en appel (F2 et F2/1)', 8 September 2014.

⁸ Document No. **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 Judgment in Case 002/01', 16 September 2014 ('Response').

⁹ Response, paras 7-8.

¹⁰ Response, paras 10-11, 13.

¹¹ Response, para. 14.

¹² Response, para. 15.

¹³ Response, paras 17-24.

¹⁴ Response, paras 7-9. The Co-Prosecutors identify a single effort to contact Thet during the trial stage, as part of an effort to obtain contact information of *other* potential witnesses. See Response, fn 14; Document No. **E292/1/2**, WESU Memorandum, 3 July 2013. Even in that instance, WESU was apparently 'unable to obtain an email address or other contact details', even though news outlets across Phnom Penh seem to have no difficulty doing so and Lemkin's contact information is available.

during trial.¹⁵ The Co-Prosecutors furthermore mischaracterize the nature of Thet's interview. At issue is not Thet's 'personal opinions'¹⁶ but his description of the evidence he obtained from well-placed sources.¹⁷ The Case 002/01 judgment relies extensively not only on third-party descriptions of vague testimonials from anonymous sources,¹⁸ but also on broad assessments of primary research given by fact witnesses.¹⁹ Descriptions of relevant evidence provided by either Thet or Lemkin on a narrowly defined subject which they both spent 'many years'²⁰ investigating is, at a minimum, equally reliable. The Defence agrees strongly with the Co-Prosecutors that admission of the footage itself is ideal,²¹ and is accordingly perplexed by the Co-Prosecutors' objection to the Defence's request that this Chamber seek to obtain it.²² At a minimum, no cogent reason exists not to explore modalities through which Thet and/or Lemkin can elaborate on their descriptions of the evidence before this Chamber.²³

4. Most striking about the Response is the Co-Prosecutors' failure to respond to or even mention Thet Sambath's description of the effects of government intimidation and interference on proceedings before this Tribunal.²⁴ The interview is highly probative of the failure of the Case 002/01 trial to respect Nuon Chea's right to an independent tribunal, which will form part of the Defence's appeal against the trial judgment. Thet has furthermore proven himself willing to discuss the nature of that interference, even in a public forum. The Co-Prosecutors similarly seek to minimize the incontrovertible proof of political interference in Case 002 contained in Judge Lemonde's book by

¹⁵ Document No. **E294**, 'Request to Admit New Evidence, Summons Rob Lemkin and Initiate an Investigation', 11 July 2013, para. 11.

¹⁶ Response, para. 6

¹⁷ First Request, para. 6 (interviewees 'confessed to committed acts against Pol Pot and Nuon Chea'; prison chiefs, supervisors and spies 'told me about all the plans' including for example orders for 'killings of the military pilots').

¹⁸ See e.g., Document **E313**, 'Judgement', 7 August 2014, para. 124.

¹⁹ See e.g., Document **E313**, 'Judgement', 7 August 2014, fns 318, 335, 344, 2653, 2657.

²⁰ First Request, para. 3.

²¹ First Request, para. 17 (seeking an investigation into Thet's footage).

²² Response, paras 14-16.

²³ In regards to the Co-Prosecutors' slanderously false description of Lemkin's unfamiliarity with the relevant footage (see Response, para. 16), the Defence refers the Chamber to its original submissions before the Trial Chamber. See Document No. **E294**, 'Request to Admit New Evidence, Summons Rob Lemkin and Initiate an Investigation', 11 July 2013, paras 7-8; Document **E1/223.1**, 'Transcript of Trial Proceedings', 15 July 2013, pp. 125:22-126:7. Among other things, the Co-Prosecutors persistently fail to explain the significance of Lemkin's lack of Khmer language skills, in light of the fact that all of the interviews have been translated into English, and the Trial Chamber's extensive reliance on evidence from non-Khmer speakers such as Philip Short to describe their interviews, and even to interpret the meaning of Khmer language evidence. See fn 18, *supra*; Document **E313**, 'Judgement', 7 August 2014, para. 120.

²⁴ See First Request, para. 16.

characterizing the absence of judicial independence as a ‘procedural defect’, which in the Co-Prosecutors’ view is unrelated to the fairness of Nuon Chea’s trial.²⁵

5. The Defence remains troubled by the willingness of the Co-Prosecutors – both of whom are officers of the court – to actively participate in obfuscating the effects of government interference on the integrity of the proceedings and Nuon Chea’s fundamental fair trial rights. It is apparent that perspective at this Tribunal has been lost: a highly reliable source on whom the Co-Prosecutors and the Trial Chamber have repeatedly relied has described his personal knowledge of a pattern of witnesses refusing to give evidence precisely because that evidence would attribute blame for crimes with which Nuon Chea is charged to former subordinates, currently in positions of power, *acting contrary to* Nuon Chea’s instructions.²⁶ In the face of this evidence, the Co-Prosecutors counsel an unspecified period of delay while an entirely separate trial unfolds in Case 002/02, and actively seek to exclude proof of the government’s interference from evidence. The Defence submits that under any other circumstances, the need for immediate and urgent action would be obvious. If Case 002/01 *was* a genuine trial and Nuon Chea *is* presumed innocent then the same sense of urgency ought to animate all of the participants in this process, prosecutors and judges included. At issue is more than a fair trial abstraction (although that ought to be enough); at issue is actual innocence.
6. The Defence hereby submits that the instant reply is admissible pursuant to Article 8.4 of the Practice Direction on Filing, requests the Supreme Court Chamber to reject the arguments presented in the Co-Prosecutors’ Response, and reiterates the requests for relief presented in the First Request and Second Request to consider and obtain additional evidence.

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²⁵ Response, para. 24

²⁶ See First Request, para. 6 (Thet Sambath repeatedly describing lower level cadres ‘betray[ing]’, ‘oppos[ing]’ and ‘committing acts against’ Nuon Chea and that Nuon Chea ‘did not initiate’ the alleged killings at Tuol Po Chrey); cf. Response, para. 12 (Nuon Chea participated in a Joint Criminal Enterprise with Ruos Nhim).