



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

**ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ**

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះតុលាការកំពូល

Supreme Court Chamber
Chambre de la Cour suprême

ឯកសារដើម
ORIGINAL/ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ (Date): 20-Aug-2015, 15:58
CMS/CFO: Sann Rada

សំណុំរឿងលេខ: ០០២/១៩-កញ្ញា-២០០៧-អ.វ.ត.ក/អ.ជ.ត.ក

Case File/Dossier N°. 002/19-09-2007-ECCC/SC

**Before: Judge MONG Monichariya, Delegate Judge
Judge Chandra Nihal JAYASINGHE, Delegate Judge**

Date: 20 August 2015
Language(s): Khmer/English
Classification: PUBLIC

THIRD INTERIM DECISION ON THE ADDITIONAL INVESTIGATION

Co-Prosecutors
CHEA Leang
Nicholas KOUMJIAN

Co-Lawyers for NUON Chea
SON Arun
Victor KOPPE

Accused
KHIEU Samphân
NUON Chea

Co-Lawyers for KHIEU Samphân
KONG Sam Onn
Anta GUISSÉ
Arthur VERCKEN

Civil Party Lead Co-Lawyers
PICH Ang
Marie GUIRAUD

WE, Judge MONG Monichariya and Judge Chandra Nihal JAYASINGHE, Delegate Judges of the Supreme Court Chamber of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea between 17 April 1975 and 6 January 1979 (“Supreme Court Chamber” and “ECCC”, respectively);

BEING APPOINTED pursuant to the “Interim Decision on Part of NUON Chea’s First Request to Obtain and Consider Additional Evidence in Appeal Proceedings of Case 002/01” (“Appointment Decision”),¹ in which the Supreme Court Chamber decided to initiate an additional investigation pursuant to Internal Rule 93 (“Additional Investigation”);²

RECALLING that the main purpose of the Additional Investigation is to establish direct contact with Robert Thomas Fitzgibbon LEMKIN (“Robert LEMKIN”) and THET Sambath in order to assess whether the footage allegedly in their possession may be obtained within a reasonable period of time and to ascertain what specific information could be derived from it;³

RECALLING the procedural history of the Additional Investigation as set out in the “Decision Requesting Submissions on the Additional Investigation” (“Decision Requesting Submissions”),⁴ and, in particular, that THET Sambath declined consent, due *inter alia* to perceived safety risks to himself, his relatives and former staff, to the release of any footage or transcript resulting from interviews conducted by him, whereas Robert LEMKIN submitted his notes concerning the interviews with four individuals (“Notes” and “Four Individuals”, respectively),⁵ “regarding the general political position and agenda of Ruos Nhim”;⁶

RECALLING that the Supreme Court Chamber afforded the parties an opportunity to make representations 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 emerged from the Additional Investigation”;⁷

¹ 1 April 2015, F2/4/3, paras 25-26.

² ECCC Internal Rules (Rev. 9), 16 January 2015 (“Internal Rules”).

³ Appointment Decision, paras 21-26.

⁴ 15 June 2015, F2/4/3/3, pp. 2-3.

⁵ Annex - Robert Lemkin’s Notes on Ruos Nhim’s Political Agenda (confidential), 15 June 2015, F2/4/3/3.1.

⁶ Written Record of Witness Interview – Robert T.F. Lemkin, 18 May 2015, F2/4/3/1, para. A34.

⁷ Decision Requesting Submissions, p. 3.

NOTING the parties' observations made in response to the Supreme Court Chamber's Decision Requesting Submissions,⁸ and, in particular, that NUON Chea and KHIEU Samphân submit that the Chamber or the Delegate Judges should *inter alia*: (i) admit the Notes into evidence;⁹ (ii) call Robert LEMKIN and THET Sambath to give testimony;¹⁰ (iii) seek further information in respect of the Four Individuals, such as their interviews' logbooks and transcripts or Robert LEMKIN's announced 10,000-word article from which the Notes were presumably excerpted;¹¹ and, (iv) in order to address any safety concerns, provide adequate information to all interested persons about, and make appropriate use of, the wide range of protective measures available at the ECCC;¹² whereas the Co-Prosecutors maintain that no further action is warranted and the request to admit the Notes into evidence should be rejected;¹³

NOTING that the identities of two of the Four Individuals as well as excerpts of their interviews with THET Sambath appear in Gina CHON and THET Sambath's book *Behind the Killing Fields*,¹⁴ while one of the Four Individuals testified before the Supreme Court Chamber in open session;¹⁵ and that, therefore, their identities and roles in the Khmer Rouge era are already in the public domain;

⁸ 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 ("NUON Chea Submissions"); *Observations de la Défense de M. KHIEU Samphân concernant le supplément d'information ordonné*, 23 July 2015, F2/4/3/3/2 ("KHIEU Samphân Submissions"); 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 Rob Lemkin and Thet Sambath, 23 July 2015, F2/4/3/3/3 ("Co-Prosecutors Submissions"); NUON Chea's Reply to 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 Rob Lemkin and Thet Sambath, 29 July 2015, F2/4/3/3/4.

⁹ NUON Chea Submissions, paras 3-8; KHIEU Samphân Submissions, para. 6.

¹⁰ NUON Chea Submissions, para. 9; KHIEU Samphân Submissions, paras 7, 13.

¹¹ NUON Chea Submissions, para. 9; KHIEU Samphân Submissions, para. 12.

¹² NUON Chea Submissions, para. 9; KHIEU Samphân Submissions, paras 7-11.

¹³ Co-Prosecutors Submissions, para. 41.

¹⁴ Gina Chon and Sambath Thet, *Behind the Killing Fields*, University of Pennsylvania Press, 2010, E3/4202, pp. 106-107;

¹⁵ Electronic mail sent from Witnesses and Experts Support Unit ("WESU") to Greffiers of the Supreme Court Chamber, entitled "Fw: update on confidential Notes", on 11 August 2015 at 01:52PM, on file with the Supreme Court Chamber ("E-mail of 11 August 2015") (forwarding an e-mail of 10 August 2015 from Robert Lemkin, in which he observes that the person referred to as "W2" in the Notes gave evidence before the Supreme Court Chamber, while the persons identified as "W1" and "W3" in the Notes are named in the book *Behind the Killing Fields*).

CONSIDERING that 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;¹⁶

RECALLING that the ECCC legal framework provides for protective measures to protect the security of victims, witnesses, their family members and close relatives, thereby enabling the Chamber to effectively address any concern of this nature and ensure anonymity as appropriate, by way of, for example, assigning pseudonyms, recording statements without disclosing the declarant's identity, distorting a person's voice and physical features, holding *in camera* hearings, ordering the physical protection of a person, providing a safe residence in Cambodia or abroad and redacting from the record all information that could potentially identify the protected person or his or her location;¹⁷

CONSIDERING, therefore, that the Supreme Court Chamber may order any such measure, which, in consultation with the WESU, it deems necessary and apposite to address any safety and security issues raised by potential witnesses; and that the assessment of security hazards, proportionality of protective measures to the risk and modalities to ensure the respect of fair trial rights of the accused is, in the context of a criminal trial, a complex and procedurally well-regulated operation that falls under the duties and responsibilities of the judges;¹⁸

CONSIDERING that further information is required to properly evaluate, *inter alia*, the relevance, credibility and reliability of the Notes and the potential testimony of any of the Four Individuals, and that it is in the interests of justice for the Chamber and the parties to have access to the primary sources on which the Notes are based;

EMPHASISING that any security concern shall be carefully considered and the Chamber, with the assistance of the WESU, shall seek the consent of the persons in respect of whom protective measures are envisaged;¹⁹ and that, as always, classification of the received materials will take into account security risks;

¹⁶ NUON Chea's Fifth Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgement in Case 002/01 (strictly confidential), 25 June 2015, F2/7, paras 42-46.

¹⁷ Internal Rule 29(4); Practice Direction on Protective Measures, 29 April 2008, ECCC/03/2007/Rev.1 ("Practice Direction on Protective Measures"), Article 3.

¹⁸ See e.g. Internal Rule 29; Practice Direction on Protective Measures, Article 1.3-1.4.

¹⁹ Practice Direction on Protective Measures, Article 1.5.

CONSIDERING that Robert LEMKIN complied with the requests made by the Delegate Judges in the course of the Additional Investigation and recently reiterated his willingness to provide the Court with further information relating to the Four Individuals;²⁰

HEREBY:

REQUEST Robert LEMKIN to provide the WESU, on a strictly confidential basis, all transcripts and logbooks relating to the interviews with the Four Individuals no later than Sunday, 30 August 2015;

INSTRUCT the WESU to liaise with Robert LEMKIN as appropriate, identify, in consultation with the Greffiers of the Supreme Court Chamber, the technical precautions necessary to protect the confidentiality of the materials, and report the outcome to the Delegate Judges no later than Monday, 31 August 2015, submitting any materials it has received;

INSTRUCT the WESU, upon receipt of material containing identifying information relating to the person referred to in the Notes as “W4”, to contact him and assess the risk that the disclosure of his identity would pose to his life or health or that of his family members or close relatives or any other persons involved in the making of the interview, and report the outcome of such assessment to the Delegate Judges as soon as practicable.

Phnom Penh, 20 August 2015

The Delegate Judges of the Supreme Court Chamber



Chandra Nihal JAYASINGHE

MONG Monichariya

²⁰ E-mail of 11 August 2015 (“I would now be happy to supply the court with my account (written or verbal) of these three named persons’ [W1, W2 and W3] accounts as recorded by me in 2008-9. [...] [T]he identity of W4 from my Notes would have remain [*sic*] anonymous and any detail in his evidence that could lead to his being identified would need to remain confidential”).