



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

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 002/19-09-2007/ECCC/TC

Before: Judge NIL Nonn, President
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge YOU Ottara

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DECISION ON NUON CHEA REQUEST TO ADMIT NEW DOCUMENTS, TO INITIATE AN INVESTIGATION AND TO SUMMONS MR. ROB LEMKIN

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1. INTRODUCTION

1. On 10 July 2013, the NUON Chea Defence announced that it had received “extraordinary new information” in the closing minutes of the prior day’s hearing, information which had in their view “far reaching implications for this trial.”¹ The Defence indicated that it had received an e-mail from Mr. Rob LEMKIN, the Co-Producer of the films *Enemies of the People* and *One Day at Po Chrey*, which included exculpatory information (“E-mail”). It moved to postpone the testimony of Mr. Heder because he had interviewed cadres from the Northwest zone and would likely give testimony as to the same facts as Mr. LEMKIN.² The Chamber decided not to adjourn the testimony of Mr. Heder and requested the NUON Chea Defence to file written submissions regarding the remainder of its request.³ The Chamber is now seised of NUON Chea’s Request to Admit New Evidence, Summons Rob LEMKIN and Initiate an Investigation (“Request”).⁴ As ordered by the Chamber, the remaining parties responded to the request orally on 15 July 2013.

2. SUBMISSIONS

2. The Defence requests that the Trial Chamber admit the E-mail on the basis that it is exculpatory evidence relevant to the execution of Lon Nol officials after 17 April 1975.⁵ It indicates that the films co-produced by Mr. LEMKIN and appearing on the Case File are cut from ten years of video and audio taped interviews with NUON Chea,⁶ and that “none of the exculpatory facts described in the Email are found anywhere in the excerpt on the case file.”⁷ It also submits that Mr. LEMKIN was present for at least one of NUON Chea’s interviews.⁸ The Defence therefore submits that there is no question that Mr. LEMKIN is “intimately familiar with the interviews themselves and with the use to which they were put in crafting the narrative presented in *Enemies of the People* and subsequently placed before this

¹ T., 10 July 2013, p. 2. Because the matters to be raised were not clear, the Chamber entered into closed session. Once it became clear that the matter pertained to the e-mail in question, the Chamber re-entered open session and asked Mr. Koppe to repeat his submissions in open court. T., 10 July 2013, pp. 5, 10-11. The Chamber has since designated the entire hearing transcript as public.

² T., 10 July 2013, p. 4, 15.

³ T., 10 July 2013, p. 24.

⁴ Request to Admit New Evidence, Summons Rob LEMKIN and Initiate an Investigation, E294, 11 July 2013.

⁵ Request, para. 4.

⁶ Request, para. 5.

⁷ Request, para. 5.

⁸ Request, para. 6. *AS*

Chamber.”⁹ Further, it submits that challenges to the reliability of Mr. LEMKIN’s claims might be relevant to probative value but are irrelevant to admissibility.¹⁰

3. The NUON Chea Defence further requests that Mr. LEMKIN be summonsed to testify regarding statements concerning the treatment accorded to top members of the Lon Nol government and his exculpatory findings in relation to NUON Chea’s responsibility for the killings at Tuol Po Chrey.¹¹ It asserts he should testify either as an expert in relation to Tuol Po Chrey or as a fact witness to describe the evidence he collected and the witnesses he interviewed.¹²

4. Finally, the NUON Chea Defence requests the Chamber to initiate an investigation by contacting Mr. LEMKIN and inquiring into evidence that Tuol Po Chrey “was a massacre ordered by Ruos Nhim, not central command.”¹³ It asks the Chamber to obtain copies of any documentary evidence in Mr. LEMKIN’s possession, and suggests that the preliminary part of the investigation could be completed in a manner of days.¹⁴

5. The KHIEU Samphan Defence supports the NUON Chea Defence and requests that the director and the producer be summonsed to testify. It submits that the E-mail is new, exculpatory evidence pertaining to both Accused due to the fact that they are charged as part of a joint criminal enterprise. It asserts that the documentary evidence in question cannot be understood out of its proper context and therefore a fair trial necessitates an inquiry with Mr. LEMKIN.¹⁵

6. The Co-Prosecutors oppose the request to place the E-mail on the Case File and the request to summons Mr. LEMKIN, although they support a limited investigation. They assert that Mr. LEMKIN is a filmmaker and not an expert in the Khmer Rouge or CPK administrative structures, and that he is not credible as illustrated by his incorrect recollection of the contents of the DVD.¹⁶ Mr. LEMKIN’s motives are also suspect as he opposes the

⁹ Request, para. 7.

¹⁰ Request, para. 8.

¹¹ Request, para. 13.

¹² Request, para. 13.

¹³ Request, para. 12.

¹⁴ Request, para. 12.

¹⁵ T., 15 July 2013, p. 108-110.

¹⁶ The E-mail states, "He [NUON Chea] did not agree that top Lon Nol officers had been killed. What he said was that half a dozen Lon Nol cabinet and top officials had been put through revolutionary due process and condemned to death by a military tribunal which from memory, Nuon Chea was not part of." On the DVD itself, the OCP submit NUON Chea stated, "They [the top four or five leaders of the previous regime] were to be liquidated, they deserved the severest penalty, they'd betrayed the nation to foreigners." T., 15 July 2013, p. 114.

adversarial process of this trial. Further, the Co-Prosecutors submit that as Mr. LEMKIN was not present during the most important interviews and that as it was THET Sambath who performed the research and interviewed the individuals in the Po Chrey video, Mr. LEMKIN does not have the expertise or knowledge to be called as a witness or expert. Furthermore, The Co-Prosecutors oppose the introduction of the E-mail because it is not suitable to prove the facts, being an interpretation of NUON Chea's words that is unreliable. They assert that it is improper to admit a hearsay email where the same individual is unwilling to provide the original material.¹⁷

7. The Co-Prosecutors, however, do not oppose a request for information being sent to Mr. LEMKIN and Mr. THET Sambath, so long as the request is strictly limited to providing material that is in their possession, including all audio and video footage and the manuscript that served as the basis for the book, "Behind the killing fields: a Khmer Rouge leader and one of his victims".¹⁸ The material could then be provided confidentially to the parties and the parties invited to make submissions as to the admissibility of the material. They observe that it is likely that the request for information will be met by silence or a refusal.¹⁹

8. The Civil Parties oppose the Request. They submit that Mr. LEMKIN is not an expert and that the majority of what he said cannot be admitted as evidence. They further submit that if the initial request regarding the E-mail is not admissible, neither are the requests to summons Mr. LEMKIN or the request for an investigation. The E-mail does not have relevance and does not prove what it purports to prove as illustrated by its vagueness. If NUON Chea himself believes that the video extracts do not represent what he actually said, it is surprising he has not made that point earlier.²⁰

9. The NUON Chea Defence replies that Mr. LEMKIN did not offer himself as an expert. He only wished to inform the Defence that what was reported in the local newspaper did not accord with his own knowledge. Excerpts of this film have been shown many times during key documents hearings and therefore are considered by the Co-Prosecutors to be crucial to ascertaining the truth. The Co-Producers are in possession of 160 hours of video and 1000 hours of audio footage not included in the films. In referring to exculpatory information in his possession, he is obviously referring to the hours of footage that he has. Although a prior

¹⁷ T., 15 July 2013, p. 111-119.

¹⁸ "Behind the killing fields: a Khmer Rouge leader and one of his victims", E152.2, 5 December 2011.

¹⁹ T., 15 July 2013, p. 119-120.

²⁰ T., 15 July 2013, p. 121-124. *Am*

agreement between Mr. LEMKIN and NUON Chea may have discouraged Mr. LEMKIN from providing material to the ECCC, the Accused may now be willing to waive that agreement. The ascertainment of the truth requires that this information be sought by the Chamber.²¹

3. APPLICABLE LAW

10. According to Rule 87(4), the Trial Chamber may admit any new evidence that it deems conducive to ascertaining the truth, where that evidence also satisfies the *prima facie* standards of relevance, reliability and authenticity required under Rule 87(3). Pursuant to Internal Rule 87(3), the Trial Chamber may reject a request for evidence where it finds, *inter alia*, that it is irrelevant or repetitious, impossible to obtain within a reasonable time, or unsuitable to prove the facts it purports to prove. Ordinarily, the requesting party must also satisfy the Chamber that the proposed evidence was either not available before the opening of the trial or could not have been discovered with the exercise of due diligence. However, in certain cases, the Chamber has admitted documents which do not meet this criterion, including in instances where a document relates closely to material already on the Case File and where the interests of justice require the sources to be evaluated together, where the proposed documents are exculpatory and require evaluation to avoid a miscarriage of justice, or where the other parties do not object to the documents.²²

11. Pursuant to Internal Rule 93, the Trial Chamber has discretion to initiate a new investigation, which may include interviewing witnesses or conducting searches, where it considers it necessary.²³ This necessity must be justified by the interests of justice. Likewise, the Trial Chamber's discretion must be understood in the context of the ECCC Legal Framework which guarantees the Accused's right to a fair and expeditious trial and grants the President the discretion to exclude any proceedings that unnecessarily delay the trial.²⁴

²¹ T., 15 July 2013, p. 125-129.

²² Decision on the Co-Prosecutors' and KHIEU Samphan's Internal Rule 87(4) Request concerning US Diplomatic Cables[...], E282/2, 13 June 2013, para. 3; Response to Internal Rule 87(4) Request to Place New Documents on the Case File concerning the Testimony of Witnesses Francois Ponchaud [...], E260, 18 January 2013, para. 5; Decision Concerning New Documents and Other Related Issues, E190, 2 May 2012, para. 18.

²³ See also, Cambodian Code of Criminal Procedure, Article 339.

²⁴ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia ("ECCC Law"), Article 33 new; Internal Rule 85.

4. FINDINGS

12. The Chamber will address the Request in three parts: (1) the request to admit the E-mail; (2) the request to summons Mr. LEMKIN as a witness or expert and (3) the request to initiate an investigation.

4.1. Admissibility of the E-mail

13. The Defence seeks the placement of the E-mail onto the case file. The Chamber notes that the contents of the E-mail now appear on the Case File in their entirety in three separate locations. The E-mail has been read into the record by counsel for NUON Chea, both in closed session and open session, and also now appears quoted verbatim in the present submission to the Chamber. The request to place the E-mail on the case file and to put it before the Chamber is therefore moot. The probative value of the E-mail is a matter within the discretion of the Chamber.

4.2. Request to Summons Mr. LEMKIN

14. The Chamber notes that Mr. THET Sambath, who is a native Khmer speaker and the individual who conducted all of the interviews with the Accused NUON Chea, is best placed to provide details about additional film footage that did not appear in either of the films on the Case File. The *Enemies of the People* website indicates that the statements from the Accused NUON Chea were obtained, “through a decade of work by one of Cambodia’s best investigative journalists, THET Sambath.”²⁵ It also indicates that Mr. THET Sambath persuaded the Accused to speak, and on multiple occasions refers to *Mr. Sambath’s* remarkable work.²⁶ The Chamber however has been unsuccessful in its attempts to contact Mr. THET Sambath.²⁷

²⁵ About the Film, “Enemies of the People”, D344.2, 2 February 2010.

²⁶ About the Film, “Enemies of the People”, D344.2, 2 February 2010; *see also*, Ian Willoughby, Untiring journalist elicits groundbreaking testimonies from ex-Khmer Rouge men in One World film *Enemies of the People*, 17 March 2010 available at: <http://www.radio.cz/en/section/curaffrs/untiring-journalist-elicits-groundbreaking-testimonies-from-ex-khmer-rouge-men-in-one-world-film-enemies-of-the-people> (Mr. LEMKIN stating, “[T]he exclusive and extremely secret revelations that take place in the film are done by him [THET Sambath] alone. I filmed with him for the last three years. I was working out the interviews and the questions that we were going to put in the interviews. But for me the very secret things with Nuon Chea [...] this is the kind of thing that really only Sambath, a Cambodian that is trusted by these people – could do.”)

²⁷ Memorandum from Witness and Expert Support Unit to Trial Chamber Senior Legal Officer entitled, “Potential Witnesses – Unable to Locate”, E292/1/2, 4 July 2013. 

15. In contrast, Mr. LEMKIN met Mr. THET Sambath in 2006 and only became involved in these films thereafter.²⁸ He speaks little Khmer and was not present during the majority of interviews with the Accused.²⁹ Likewise, Mr. LEMKIN does not possess the credentials required for qualification as an expert. The Defence readily concedes that this is not Mr. LEMKIN's purpose. While the Trial Chamber had signalled its intent to the parties not to call Mr. LEMKIN, the NUON Chea Defence failed to raise an objection at any time, and at this very late stage of proceedings it fails to provide a substantial basis to revive its request.³⁰

16. Mr LEMKIN's behaviour during the pre-trial phase clearly demonstrates a lack of cooperation. Both he and Mr. THET Sambath have expressed at that time as well as since, to the judicial authorities and in various press articles, a number of reasons justifying their refusal to handover relevant material to the ECCC.³¹ At this very late stage of the trial and

²⁸ Public Broadcasting Service, Interview: Enemies of the People, 12 July 2011, available at: <http://www.pbs.org/pov/enemies/interview.php>

²⁹ Cambodian Alliance for the Arts, Enemies of the People – a film by Rob LEMKIN, 4 February 2011, available at: <http://www.cambodianallianceforthearts.com/enemies-of-the-people-a-film-by-rob-lemkin/>

³⁰ The NUON Chea Defence proposed to summons Mr. LEMKIN in July 2011. See Request for additional Witnesses and continuation of initial hearing, E93/9, 5 July 2011 and Annex: List of Proposed Witnesses, E93/9.1, 6 July 2011. Rob LEMKIN was not included on the list of individuals to be called in support of the first trial segments. See Annex A: Partial list of witnesses, experts and civil parties for first trial in Case 002, E131/1.1, 25 October 2011. NUON Chea did not object to Mr. LEMKIN's exclusion at that time although parties were invited to make objections. See Scheduling of Trial Management Meeting to enable planning of the remaining trial phases in Case 002/01 [...], E218, 3 August 2012, paras 3, 11-12. Finally in advance of the final Trial Management Meeting held on 13 June 2013, the Trial Chamber provided the parties with an indication of the remaining witnesses to be summonsed at which time the summons of Rob LEMKIN was clearly denied. This approach was adopted in order to enable the parties to raise any remaining concern regarding the final witnesses to be summonsed. See Announcement of remaining hearings prior to the close of evidentiary proceedings in case 002/01 and scheduling of final Trial Management Meeting for 13 June 2013, E288, 5 June 2013. NUON Chea did not react to the exclusion of Rob LEMKIN.

³¹ On 3 February 2010, the OCIJ contacted Mr. LEMKIN, requesting a copy of the film *Enemies of the People* before 12 February 2010. See Letter from Office of Co-Investigating Judges to Mr. Rob LEMKIN, D344/1.1, 3 February 2010. Mr. LEMKIN responded on 9 February 2010 indicating that he would not provide the film to the Chamber but would be willing to arrange a public screening of the film in Phnom Penh. See E-mail from Mr. Robert LEMKIN to Co-Investigating Judge, D344/1.2, 9 February 2010. The Co-Investigating Judges replied to Mr. LEMKIN that in order to ascertain the potential evidentiary value of the film, the Chamber would need to preview the film and have the option to place it on the Case File, not merely view the film in a public setting. See Reply letter of Co-Investigating Judges to Mr. Rob LEMKIN, D344/1.3, 15 February 2010. The Co-Investigating Judges also noted that Mr. LEMKIN had told Agence France Presse on 28 January 2010 that, "[t]he film is going to be used by the court and given to the court. We are very proud of it." The Co-Investigating Judges emphasized that any delay in providing evidence to the court would result in that evidence not being considered by the ECCC. See D344/1.3. Mr. LEMKIN did not respond to this request and the OCIJ initiated a telephone call in March 2010 in which Mr. LEMKIN reiterated that he was not prepared to provide a copy of the film to the court prior to the film's general release date. See Order on Investigative Request Regarding the Film *Enemies of the People*, D344/1, 9 April 2010. It was not until 17 April 2012, more than two years later, that the films *Enemies of the People* and *One Day at Po Chrey* were placed on the Case File, after the Office of the Co-Prosecutors purchased the film on the open market and submitted them to the Chamber. See Video Record: *Enemies of the People*, E186.1R, 17 April 2012; Video Record: *One Day at Po Chrey*, E186.1R, 17 April 2012. Mr. LEMKIN did not provide either film to the Court as he had promised. Although he had full knowledge for the last three years that the ECCC was considering the responsibility of NUON Chea and would view *Enemies of the State* (which includes on the same DVD-set the film *One day at Po Chrey*), he chose not to alert the Chamber

without making any assessment of these alleged justifications, the Chamber is not persuaded of the value of calling a witness who *de facto* has constantly shown reluctance to assist the court. For these reasons, the Chamber considers that Mr. LEMKIN's testimony would not assist it in ascertaining the truth. The source material that may be in the possession of Messrs' LEMKIN and THET Sambath would be more helpful than their testimony.

4.3. Request for Investigation

17. The E-mail makes two major claims. The Chamber is not concerned by the contention that NUON Chea's statements in the film were not properly interpreted. NUON Chea's statements in the film speak for themselves and in the event of ambiguity they will be closely examined in their first language by native Khmer speakers. Therefore, Mr. LEMKIN's assistance in interpreting these statements would not be helpful to the Chamber.

18. The E-mail's second claim is much broader although lacking any detail. It asserts that Mr. LEMKIN has in his possession a vast trove of evidence that is exculpatory of the Accused NUON Chea, in particular for the events at Tuol Po Chrey. The NUON Chea Defence concedes that the films themselves do not contain the exculpatory evidence alluded to in the E-mail, but it claims that there may be exculpatory information in the footage shot by Messrs' LEMKIN and THET Sambath that has not been made available to the public.

19. As a preliminary matter in this regard, the Chamber is conscious of its obligation to balance the fairness of proceedings with an expeditious trial.³² In order to achieve this balance, the potential value of admitting evidence must be weighed against concerns regarding the undue delay of trial. With this overarching obligation in mind, the Trial

to the existence of allegedly exculpatory information that he decided to exclude from his film until the eve of the closure of evidence.

³² Article 33 new of the ECCC Law ("The [ECCC] trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force"); Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, E163/5/1/13, 8 February 2013, para. 51 ("Given the advanced age and declining health of the Co-Accused, as well the gravity of the alleged crimes remaining in the Indictment, it is imperative that the ECCC utilize every available day to ensure a final determination of the remaining charges as expeditiously as possible."); *Prosecutor v. Delalic et. al.*, Judgement, ICTY Appeals Chamber (IT-96-21-A), 20 February 2001, para. 290 ("The stage in the trial at which the evidence is sought to be adduced and the potential delay that will be caused to the trial are matters highly relevant to the fairness to the accused of admission of fresh evidence[...]); *Prosecutor v. Aleksovski*, Decision on Prosecutor's Appeal on Admissibility of Evidence, ICTY Appeals Chamber (IT-95-14/1-AR73), 16 February 1999, para. 19 ("The purpose of the Rules is to promote a fair and expeditious trial, and Trial Chambers must have the flexibility to achieve this goal"). 

Chamber has identified several concerns with launching an investigation into the existence of the alleged material.

20. First, based on the information provided by the NUON Chea Defence, it would appear that the material in Mr. LEMKIN's possession is not in fact new as the main part of the interview footage of Mr. NUON Chea was filmed prior to May 2009.³³ There is a question therefore as to whether such material would be admissible pursuant to Internal Rule 87(4).

21. Second, the NUON Chea Defence have previously indicated that Mr. LEMKIN claimed journalistic privilege in refusing to provide material in his possession to the ECCC.³⁴ The E-mail does not provide positive indication that Mr. LEMKIN has changed his position in this regard. In view of Mr. LEMKIN's established failure to cooperate with the investigation of the charges here at issue,³⁵ the Chamber does not find that there is sufficient basis to reopen lines of inquiry that have been exhaustively pursued in the past.

22. Third, the Accused NUON Chea states that he is now prepared to absolve the co-producers of their promise to maintain the confidentiality of his interviews. Although the NUON Chea defence has been aware of the assertion of journalistic privilege since at least June 2011 when it informed the Chamber of this information, NUON Chea has delayed nearly two years before waiving the promise of confidentiality. Therefore, his own decision has impeded the court from potentially obtaining the material in question in a timely fashion.

23. Fourth, this is the first the Chamber has heard from the NUON Chea defence that exculpatory information may have been recorded by Mr. LEMKIN. If such exculpatory information were to originate from interviews with NUON Chea, the Chamber would have expected this to have been brought before the Chamber before this late juncture. In view of this, as well as the complete absence of detail regarding the alleged exculpatory information in the possession of Mr. LEMKIN, the request for investigation appears to amount to little

³³ Real Screen, Q&A: 'Enemies of the People' director Rob LEMKIN, 5 January 2011, available at: <http://realscreen.com/2011/01/05/enemies-20110105/>

³⁴ Annex 3: Materials in preparation for Trial proceedings – Primary list: Witness summaries – NUON Chea Defence Team, E93/4.3, 21 June 2011, p. 74; Annex: List of proposed witnesses (NUON Chea), E93/9.1, 6 July 2011, A-24, A-25.

³⁵ See *supra*, footnote 31. 

more than a ‘fishing expedition’, which directly conflicts with the Chamber’s obligation to conduct an expeditious trial.³⁶

24. Finally, considering the frail health of the Accused and other uncertainties that may preclude a timely delivery of the judgement in Case 002/01, there is a concern that if the Chamber were to launch an investigation it might not be completed within a reasonable period of time. Even if Mr. LEMKIN were to respond favourably to an investigative request, such information could not be put on the Case File and put before the Chamber in a reasonable period of time. Based on press interviews with Mr. LEMKIN, it appears there are 160 hours of video-recordings and 1000 hours of audio-recordings within his and Mr. THET Sambath’s archive. The parties would therefore require a substantial period of time to review the recordings to identify any potentially relevant information. Next, prior to any document being put before this Chamber, it would have to be translated into all three official languages of the court. As Mr. THET Sambath conducted the interviews, they are likely to be exclusively in Khmer and translating these interviews would also take a considerable amount of time.

FOR THE FOREGOING REASONS, THE CHAMBER:

FINDS the request to put before the Chamber the E-mail is moot;

DENIES the request to summons Mr. Rob LEMKIN as a Witness or Expert; and

DENIES the request to initiate an investigation pursuant to Internal Rule 93. *SR*

Phnom Penh, 24 July 2013

President of the Trial Chamber



SR
Nil Non

³⁶ *Prosecutor v. Galic*, Decision on Defence Motion Regarding New Evidence, ICTY Appeals Chamber (IT-98-29-A), 14 July 2006 (*finding* motions filed at an advanced stage of the proceedings must be supported by good cause and in the absence of particularization amount to a fishing expedition); *See also*, *Prosecutor v. Delalic*, Decision on the Prosecution’s Alternative Request to Reopen the Prosecution’s Case, ICTY Trial Chamber, 19 August 1998, para. 34 (to admit circumstantial evidence filed at very late stages of the trial proceedings that existed at the initial stages, “the injustice of rejecting it should be irresistible”); *Prosecutor v. Kanyabashi*, Decision on Kanyabashi’s Motion to Re-Open his Case and to Recall Prosecution Witness QA, ICTR Trial Chamber (ICTR-96-15-T), 2 July 2008, paras 23-25 (*holding* the probative value of new evidence needs to outweigh the prejudice caused by delaying the fair and expeditious conduct of the proceedings and that relevant factors to be considered include the advanced stage of the trial and the potential for delay).