

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

FILING DETAILS

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**CO-PROSECUTORS' RESPONSE TO WITNESS DOCUMENT LISTS FOR SCW-3,
SCW-4 AND SCW-5**

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RESPONSE

I. Procedural History

1. On 2 June 2015, the Supreme Court Chamber (“SCC”) scheduled a hearing of three witnesses requested by Nuon Chea in relation to the Case 002/01 appeals from Judgment.¹ On 17 June 2015, the SCC ordered the Case 002 parties to submit by 24 June 2015, via email, “a list of the materials the party intends to use during the witnesses’ questioning.”² It also instructed the parties to file by 26 June 2015 any objections to the documents submitted by other parties.³ At the request of Khieu Samphan, that filing deadline was extended to 29 June 2015.⁴ The SCC further stated that, barring exceptional circumstances, it would “not entertain any objections to documents that are used during the questioning of witnesses that are raised at a later stage, including during the Scheduled Hearing.”⁵

II. Documents Not Before the Trial Chamber in Case 002/01

2. Both Nuon Chea and Khieu Samphan have submitted documents that were not before the Trial Chamber in Case 002/01. These include documents added to the Case 002 Case File after the Trial Judgment was issued, as well as documents not on the Case 002 Case File. The Co-Prosecutors submit that these documents should be excluded.
3. The SCC has ruled that no new evidence will be admitted on appeal unless it meets a three part test, *i.e.*, “that the proffered evidence: (i) was unavailable at trial; (ii) could have been a decisive factor in reaching the trial decision under appeal; and (iii) pertains to specific findings of fact by the Trial Chamber.”⁶ Unless a party has filed a Rule 108(7) application and the Chamber has admitted the evidence, the Co-Prosecutors submit that no document not on the case file by the time of the Case 002/01 Judgment should be used in the examination of these witnesses.⁷
4. It should be noted that because the Supreme Court has not explicitly addressed the policy on the use of documents outside what was on the case file as of the Case 002/01 Judgment, and in order to preserve their right to equal treatment, the Co-Prosecutors have also included in

¹ F24 Order Scheduling a Hearing, 2 June 2015.

² F26 Directions on the Conduct of the Hearing, 17 June 2015, para. 3(a).

³ F26 Directions on the Conduct of the Hearing, 17 June 2015, para. 3(b).

⁴ F26/1/1 Decision on Khieu Samphan’s Request for Extension of Time Limit for Objections, at p. 3.

⁵ F26 Directions on the Conduct of the Hearing, 17 June 2015, para. 3(b).

⁶ F2/5 Decision on Part of Nuon Chea’s Requests to Call Witnesses on Appeal, para. 16.

⁷ The exception would be any of the witnesses’ own statements.

their list documents that were added to the Case 002 Case File after the Trial Judgment was rendered. Should the SCC apply its previous jurisprudence regarding the admission of new evidence as submitted, the Co-Prosecutors understand that this would also apply to their own use of such documents.

III. S-21 “Confessions”

5. Nuon Chea’s document list includes statements or “confessions” taken at S-21 prison.⁸ As yet, it is unknown how Nuon Chea intends to use those documents. The Co-Prosecutors have previously addressed the issue of the use of evidence derived by torture in a filing before the Trial Chamber⁹ and in a brief oral argument.¹⁰ To briefly summarize that argument, the Co-Prosecutors’ position is that Cambodian and international law unambiguously prevent any party from using evidence derived from torture to prove the truth of the matters “confessed.” However, statements could be used to prove other relevant facts that do not rely on the truth of the “confession”, such as the fact that prisoners are accused of and interrogated about hiding or failing to kill Lon Nol officers, or further evidence that killing Lon Nol officers was within the enemies policy of the regime.¹¹
6. Under the particular facts of this case, this prohibition would clearly apply to prevent Nuon Chea, who the evidence in Case 002/02 will show supervised the S-21 prison where prisoners were regularly and horrifically tortured, to use confessions to prove the truth of the matters “confessed”, as this would reward the very purpose for which the torture was inflicted—to justify the crimes of the regime.
7. However, the Co-Prosecutors recognized in their arguments that in order to exclude evidence that is ostensibly relevant on the basis of the torture prohibition, the fact-finder would need to make a finding that torture was in fact inflicted and that the particular statement in question was derived from torture. That evidence is expected to appear in abundance in Case 002/02

⁸ Document 8 in relation to SCW-4 (E3/1682 (Partial) S-21 Confession of Chou Chet); Document 21 in relation to SCW-5 (E3/3989 S-21 Confession of Moul Sambath alias Ruos Nhim); and Document 31 in relation to SCW-5 (E3/4202 Gina Chon and Thet Sambath, “Behind the Killing Fields”), also includes evidence from the S-21 confession of Ruos Nhim at ENG ERN 00757532.



⁹ **E350/1** Co-Prosecutors’ Submission Regarding the Application of the Torture Convention to S-21 Confessions and other Records Relating to Interrogations of Prisoners, 21 May 2015.

¹⁰ **E1/304.1** Transcript 09.13.48-09.34.31.

¹¹ The Co-Prosecutors’ document list also includes statements taken from S-21, which the Co-Prosecutors may use during the hearing of these witnesses but only within the confines of the position expressed above—none will be offered to prove the truth of matters confessed through torture.

which will examine the crimes at S-21 but there is very limited evidence of this torture now before the SCC in Case 002/01. The Co-Prosecutors' submit that while largely outside the record of Case 002/01, the available evidence is overwhelming that all of the men, women and children incarcerated at S-21 were the victims of torture within the meaning of the Convention Against Torture.¹² For the purpose of the SCC hearings, the Co-Prosecutors are willing to stipulate to this fact and suggest that the Supreme Court Chamber determine if this is a fact in dispute among the parties or can be resolved by a stipulation.

Respectfully submitted,

| Date | Name | Place | Signature |
|--------------|------------------------------------|------------|--|
| 29 June 2015 | CHEA Leang Co-Prosecutor | Phnom Penh |  |
| | Nicholas KOUMJIAN Co-Prosecutor | |  |

¹² Article One of the Convention defines torture as “any act by which severe pain or suffering, whether **physical or mental**, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” (Emphasis added.)