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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**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**

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I. Introduction

1. The Co-Prosecutors hereby respond 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” (“Response”).¹ On 1 April 2015, following Nuon Chea’s first request to obtain and consider additional evidence in the appeal proceedings of Case 002/01,² the Supreme Court Chamber (“SCC” or “Chamber”) decided to initiate an Additional Investigation to determine whether footage in the possession of Robert Lemkin and Thet Sambath might be obtained within a reasonable time and, if so, procure it.³ As part of the Additional Investigation, the SCC interviewed Lemkin,⁴ who subsequently provided the SCC with notes he had prepared (“Notes”).⁵ On 15 June 2015, the SCC asked Nuon Chea to make written submissions on (1) whether the Notes should be admitted into evidence and (2) whether any further action should be undertaken by the Delegate Judges or the Chamber in relation to the information that emerged from the Additional Investigation.⁶ In his Response, Nuon Chea seeks the admission of the Notes into evidence and requests that the SCC re-interview Lemkin, interview Thet Sambath and summon both to testify before the Chamber.⁷ The Co-Prosecutors respectfully submit that the Chamber should reject these requests for the reasons discussed below.

II. Applicable Law

2. Under Rule 108(7), three requirements must be met when a party requests the admission of new evidence during the appellate phase of proceedings. The moving party must establish that the new evidence proposed for admission: (i) was unavailable

¹ F2/4/3/3/1 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 (“Response”).

² F2 Request to Obtain and Consider Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01, 1 September 2014, para. 17

³ F2/4/3 Interim Decision on Part of Nuon Chea’s First Request to Obtain and Consider Additional Evidence in Appeal Proceedings of Case 002/01, 1 April 2015, para. 26.

⁴ F2/4/3/1 Written Record of Interview Robert T. F. Lemkin, 18 May 2015 (“WRI Lemkin”).

⁵ F2/4/3/3.1 Annex - Robert T. F. Lemkin’s Unpublished Notes on Khmer Rouge Internal Conflict Investigation, 29 May 2015 (“Notes”).

⁶ F2/4/3/3 Decision Requesting Submissions on the Additional Investigation, 15 June 2015.

⁷ F2/4/3/3/1 Response, paras 8-9.

- at trial; (ii) could have been a decisive factor in reaching the decision under appeal; and (iii) pertains to specific findings of fact by the Trial Chamber.⁸
3. As to the first requirement, the SCC has emphasized that demonstrating that the evidence was not available at trial despite the exercise of due diligence “is vital to avoid disruptive and inefficient litigation strategies.”⁹ Perhaps most importantly to the issue at hand, the second requirement establishes a high standard for admitting new evidence on appeal. Rather than mere relevance, the evidence must be of such weight and significance that it could have been “a decisive factor in reaching the decision at trial.” Such a high standard is crucial to prevent the appeal from deteriorating into a second trial, unduly prolonging proceedings and/or promoting inefficient litigation.¹⁰ As for the third requirement, it is important to note that under the plain language of the Rule, the new evidence must be relevant to the findings of fact of the Trial Chamber, not to a party’s arguments.
 4. Rule 104(1) gives the SCC discretionary power to admit new evidence “where the interests of justice so require, taking into account the specific circumstances of the case.”¹¹ “In making this determination, the Chamber will consider whether the evidence is conducive to ascertaining the truth.”¹²
 5. Rule 21(1)(a) provides in relevant part that “ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties.”

III. Response

A. Admission of new evidence on appeal should only occur under extraordinary circumstances

6. The trial phase of Case 002/01 took place over 214 hearing days.¹³ The Trial Chamber heard the testimony of 92 individuals, including three experts.¹⁴ The combined transcripts of the proceedings totalled approximately 25,000 pages, and more than 5,800

⁸ Extraordinary Chambers of the Courts of Cambodia, Internal Rules (Rev. 9), as revised on 16 January 2015 (“Rules”), Rule 108(7).

⁹ **F2/5** Decision on Part of Nuon Chea’s Requests to Call Witnesses on Appeal, 29 May 2015 (“SCC Witness Decision”), para. 16.

¹⁰ *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94(B), 8 May 2001, para. 3.

¹¹ **F2/5** SCC Witness Decision, para. 17.

¹² *Ibid.*

¹³ **E313** Case 002/01 Judgement, 7 August 2014 (“Trial Judgment”), para. 8.

¹⁴ *Ibid.*, para. 32.

evidentiary documents totalling over 222,000 pages across three languages were admitted following the opportunity for public, adversarial debate.¹⁵

7. After such a lengthy trial, any decision to admit new evidence proposed by a party on appeal must apply the high standards for admission set by Rule 108(7). Should such evidence be admitted, the SCC must then consider the new evidence in the context of the entire evidentiary record, avoiding the natural inclination to give greater weight to testimony it heard or admitted over evidence on the same topic that was heard or admitted by the Trial Chamber. Moreover, the Co-Prosecutors submit, if any new evidence *is* admitted, fundamental fairness and the adversarial process in place at the ECCC dictate that the other parties must be given a fair opportunity to rebut the new evidence.¹⁶ It would be detrimental to the search for truth and incompatible with the right to a fair trial, to admit a piece of new evidence proposed by one party but then deny the admission of new evidence from an adverse party, when it is directly relevant to the same factual finding and contradicts the other party's newly admitted evidence.
8. Rule 108(7) helps avoid situations in which litigation never ends and the appeal effectively turns into a trial *de novo*. It is critical that the SCC consistently apply this Rule's common sense requirements for all motions for admission of new evidence on appeal, even those requesting admission under the Chamber's Rule 104(1) discretionary power. Otherwise, the discretionary power runs the risk of obviating the gatekeeping purposes for which the high standard for admitting new evidence was set, and the exception would swallow the rule. Parties would endlessly barrage the Chamber with any statement or document they claim supports their position, despite the fact that the evidence could not have been a decisive factor in the Judgment, or was available but not proposed by the moving party at trial. This is of particular concern in mass atrocity cases involving tens of thousands of victims and potential witnesses, where there will always be numerous witnesses not discovered or heard during the trial stage.

B. The Notes are unreliable and have little to no probative value

9. Lemkin's unpublished Notes summarize anonymous interviews conducted with an unclear methodology. They are interspersed with opinion evidence and unsourced

¹⁵ *Ibid.*, para. 33.

¹⁶ The ICTY, ICTR and SCSL all directly provide in their respective Rules 115 that parties affected by the admission of new evidence during the appellate phase of proceedings may present rebuttal evidence.

- factual assertions by a person who is not an expert on the Khmer Rouge and whose personal and/or business relationship with the Accused is fraught with questions. For all of these reasons and as discussed below, the Notes have little to no probative value, could not have been a decisive factor in the Judgment, and should not be admitted.¹⁷
10. First, the Notes seem to primarily rely on information provided by four anonymous witnesses whose motivations for speaking to the filmmakers are unknown. As correctly pointed out by Nuon Chea, evidence admitted in Case 002/01 included secondary sources based on underlying evidence which was not made available to the Chamber.¹⁸ However, the Trial Chamber explicitly stated that less weight may be assigned to such evidence.¹⁹ Moreover, anonymous source evidence is generally admitted only when corroborated by other evidence or when it concerns an uncontested issue.²⁰ Neither circumstance exists in the instant case.
 11. Second, Nuon Chea's attempt to equate Lemkin's Notes with the works of Philip Short, François Ponchaud and Stephen Heder²¹ fails unequivocally when the work and experience of these individuals is compared to Lemkin. (Moreover, unlike Lemkin, Short, Ponchaud and Heder provided the Trial Chamber with the identity of their key sources on matters to which they testified.)
 12. The Trial Chamber called Philip Short as an expert and determined that "by virtue of [his] research and publication of books on the relevant period" he possessed "specialised knowledge in the proposed field of expertise."²² The Trial Chamber determined that Short could be questioned on facts within his personal knowledge which he acquired through his interviews with leaders or cadres from the Democratic Kampuchea ("DK") period.²³ Short testified that he spent 5-6 years writing *Pol Pot: The History of a Nightmare*.²⁴ In preparing to write this book, he conducted extensive interviews with senior leaders of the Communist Party of Kampuchea ("CPK"),

¹⁷ E313 Trial Judgment, para. 34; see also Rule 87(3); E96/7 Decision on Co-Prosecutors' Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents before the Trial Chamber, 20 June 2012, para. 24.

¹⁸ F2/4/3/3/1 Response, para. 8.

¹⁹ E313 Trial Judgment, para. 34.

²⁰ *Ibid.*

²¹ F2/4/3/3/1 Response, para. 8.

²² E215 Decision on Assignment of Experts, 5 July 2012, para. 18.

²³ *Ibid.*

²⁴ E1/189.1 Transcript, 6 May 2013, Philip Short, pp. 6-7 [09.15.42-09.20.30].

- including Khieu Samphan, Ieng Sary, Son Sen and several other senior cadres.²⁵ Nuon Chea conceded that in light of his expertise, Short could offer general testimony regarding the CPK and the state of affairs in DK.²⁶
13. François Ponchaud is the author of numerous articles and three books, including *Cambodia Year Zero*, which provides a detailed account of life inside DK.²⁷ When he testified in April 2013, he had lived in Cambodia for more than 47 years.²⁸ He has gathered and analyzed extensive evidence regarding the organized killings of members of the Khmer Republic military in the immediate aftermath of 17 April 1975, and on the structure and ideology of the DK regime.²⁹ He interviewed hundreds of refugees about their experiences during the DK regime relatively close to the time the events occurred, and noted that many of the accounts corroborated other accounts and could thus be considered reliable.³⁰ Ponchaud also has considerable expertise in the Khmer language and studied Khmer Rouge broadcasts and terminology.³¹
14. Stephen Heder also has a wide range of expertise in matters relating to the DK era. For more than 30 years, Heder conducted extensive examinations of CPK and DK-related documents, collaborated with other Cambodia experts, and interviewed numerous CPK cadres and Cambodians affected by the DK regime, including Khieu Samphan,³² Ieng Sary³³ and Van Rith.³⁴ His findings have been compiled in numerous books, academic articles and working papers on the Khmer Rouge, CPK and DK, including: *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge*,³⁵ *Cambodian Communism and the Vietnamese Model: Imitation and Independence*,

²⁵ **E9/13.1** Witness, Civil Party and Expert Summaries with Points of the Indictment - OCP, 23 February 2011 (“Annex”), pp. 20-21.

²⁶ **E9/10** Summaries of Proposed Witnesses, Experts and Civil Parties, 23 February 2011; **E9/10.1** Annex D: Witness Summaries with Points of the Indictment – Nuon Chea Defence Team, 23 February 2011, p. 48; **E93/4** Updated Summaries of Proposed Witnesses, Experts and Civil Parties, 21 June 2011; **E93/4.3** Primary List/Witness Summaries – Nuon Chea Defence Team, 21 June 2011, p. 120.

²⁷ See, e.g., **E3/370** Written Record of Interview of François Ponchaud, 13 February 2009, pp. 2-7, ERN (En) 00333951-55 (explaining his numerous publications and articles).

²⁸ **E1/178.1** Transcript, 9 April 2013, François Ponchaud, pp. 6-7 [09.25.47-09.28.07].

²⁹ **E9/13.1** Annex, p. 6.

³⁰ **E1/178.1** Transcript, 9 April 2013, François Ponchaud, pp. 84 [15.11.46-15.14.54] (“we had to be careful because we wanted the truth and refugees could exaggerate their stories to defend themselves”), 85 [15.14.54-15.17.08] (“I had two sources of information. This information was collected scientifically. I put it together so that I could get a full picture, and the two sources corroborated each other.”)

³¹ **E9/13.1** Annex, p. 6.

³² **E3/203** Interview of Khieu Samphan by Stephen Heder, undated.

³³ **E3/543** Interview of Ieng Sary by Stephen Heder, 17 December 1996.

³⁴ **E9/13.1** Annex, p. 19.

³⁵ **E3/48** Stephen Heder and Brian D. Tittmore, *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge*, March 2004.

1930-1975, and *Pol Pot and Khieu Samphan*.³⁶ Heder was also employed as an analyst and investigator within the Office of the Co-Prosecutors and the Office of the Co-Investigating Judges (“OCIJ”) and was further engaged by the OCIJ in a consultative capacity.³⁷

15. In contrast, as determined by the Trial Chamber and acknowledged by the Defence, Lemkin cannot be considered such an expert.³⁸ His knowledge of the history of the Khmer Rouge and the DK regime is limited. Lemkin himself concedes he first visited Cambodia in September 2006 and has spent a total of approximately 22 weeks in the country.³⁹ Further, he states that he only became interested in the Khmer Rouge in 1998 and that he “worked on” the film project in the early 2000s from Europe, but it is unclear what such work entailed.⁴⁰ While he claims to have done “proper historical research” to make *Enemies of the People*, he provides no information as to its extent.⁴¹ He also maintains that he consulted several “leaders in the field” and met with many people who have worked at this Court, but he provides no further insight or detail on the identity or number of people he consulted, their positions, or the subject matter of the consultations.⁴²
16. It is therefore far-fetched to assert that Lemkin’s methodology on how evidence was gathered has been adequately explained before the SCC and can be relied upon.⁴³ Nuon Chea is correct that Lemkin was asked about his methodology to gather evidence,⁴⁴ but this does not even closely resemble the manner and intensity in which authors of secondary sources have been expected to explain their methodology during the trial phase of Case 002/01 so that the Trial Chamber could reliably assess the probative value of their work product.⁴⁵

³⁶ E9/13.1 Annex, pp. 18-19.

³⁷ *Ibid.*

³⁸ E294/1 Decision on Nuon Chea Request to Admit New Documents, to Initiate an Investigation and to Summons Mr. Rob Lemkin, 24 July 2013, para. 15.

³⁹ F2/4/3/1 WRI Lemkin, p. 4, A7-A9.

⁴⁰ *Ibid.*, p. 4, A10.

⁴¹ *Ibid.*, p. 5, A13.

⁴² *Ibid.* It is apparent that at least one of the Court workers he communicated with was a lawyer for Nuon Chea (see E1/221.1 Transcript, 10 July 2013, pp. 7-8 [09.19.10-09.23.09] where Lemkin’s email was discussed and read verbatim into the record).

⁴³ F2/4/3/3/1 Response, para. 7.

⁴⁴ *Ibid.*, para. 8.

⁴⁵ See, e.g., E1/221.1 Transcript, 10 July 2013, Stephen Heder, pp. 25 [10.05.58-10.07.29] (“I’d like to start by revisiting, in a little more detail, the time in 2005 when you led a SOAS team, collecting evidence in Cambodia. Now, can you help us on how interviews were conducted? [...] was there a consistent instruction on question and answers, note taking, how the information was gathered, how the statements were produced?”), 33 [10.26.13-10.27.43] (“you’ve described your procedures for recording. Was it, for

17. Third, Lemkin's limited expertise and his explanations on the methodology adopted demonstrate the skewed perspective of the interviewers. For example, Lemkin states that [REDACTED].⁴⁶ He does not explain why any researchers seeking the objective truth would first show their interviewees information obtained by torture. He goes on to say that each of the interviewees [REDACTED] without explaining whose suggestion that was or why such a suggestion was put to the "witnesses."⁴⁷ Because of this serious error in methodology, it is impossible to ascertain in Lemkin's Notes which assertions of conspiracy derive from inadmissible S-21 confessions.
18. As demonstrated by this incident and as extensively detailed in the Co-Prosecutors' response to Nuon Chea's first and second requests for additional evidence,⁴⁸ Thet Sambath has a close personal relationship with Nuon Chea that undermines his ability to act as an impartial and neutral journalist when it comes to the project that is the subject of the Notes: Nuon Chea's responsibility for crimes committed during the DK era.⁴⁹ Thet Sambath has allegedly spent over 1,000 hours interviewing Nuon Chea over a period of six years⁵⁰ and they have formed an admittedly close bond. As described in *Behind the Killing Fields*, the book which Thet Sambath co-authored, Thet Sambath stated, "I have talked to Nuon Chea more than I talked to my brothers or sisters. We are

the others in the team, the same system of questions and answers being recorded down? Did they have prepared questions? Was it audio-recorded?"). 50 [11.28.29-11.29.45] ("Mr. Heder, again a question about the source in terms of this document."), 51-52 ("Mr. Heder, can I ask you about the first source, "Pol Pot Long Live"? Can you explain that document and how it helped you on this footnote?"); **E1/224.1** Transcript, 16 July 2013, Stephen Heder, pp. 30 [10.06.53-10.08.20] ("[W]ould you explain how in your research and the writing of your academic articles got into the possession of these original Revolutionary Flags?"), 34 [10.15.42] ("Would you be able to tell how you were able to determine whether these specific confessions with the signature on it, were in fact authentic and original versions?"). **E1/178.1** Transcript, 9 April 2013, François Ponchaud, p. 84 [15.10.10-15.11.46] ("And you said that you tried to inform yourself. So, among the sources of information that you used, a lot, for example radio, what can you tell us about this source of information? Why is this source of information interesting?"); **E1/179.1** Transcript, 10 April 2013, François Ponchaud, p. 115 [15.54.30] ("before you interviewed these refugees, some people would identify these refugees ahead of time or would – or would take notes of interviews with them before. Is that so?"); **E1/180.1** Transcript, 11 April 2013, François Ponchaud, p. 48 [11.02.55-11.06.11] ("Are you aware that Michael Vickery has not only criticized you on the differences in the execution of policy in the various areas of the country, also in your selection of refugees, which accounts you have used for your book?").

⁴⁶ **F2/4/3.1** Notes, p. 4 under the heading [REDACTED].

⁴⁷ One living person available to Lemkin who is likely to know if more confessions had been obtained from Ruos Nhim would of course be Nuon Chea, who supervised S-21 at the time of Ruos Nhim's 1978 arrest.

⁴⁸ **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, para. 10.

⁴⁹ *Ibid.*

⁵⁰ **E3/4202** Gina Chon and Thet Sambath, *Behind the Killing Fields: A Khmer Rouge Leader and One of His Victims*, p. 4, ERN (En) 00757478.

very close to each other.”⁵¹ Moreover, the book itself contains a disclaimer setting out that it is “not a historical textbook about the Khmer Rouge regime, nor is it a story based solely on facts, for much of it comes from the perspective of Nuon Chea.”⁵² It is likely that this relationship, intentionally or not, impacted Thet Sambath and thereby Lemkin in the decision-making process of whom to interview, what questions or materials to put to the witnesses, and which material to select for their film and book.

19. Moreover, it is clear from Lemkin’s film and interview with the Delegate Judges that Nuon Chea was his primary source in defining what happened during the DK period, as translated (and most likely summarised) by Thet Sambath. Nuon Chea chose not to testify and subject himself to questioning about the very issue which is at the heart of these Notes: the fantastical Defence claim that he bears no criminal responsibility for the crimes that flowed from the Centre’s policy on enemies because the crimes at issue were committed by other individuals as part of a secret war within the CPK. Nuon Chea’s involvement with and influence over the process in creating the film, book and Notes essentially gives him a way to testify without having his assertions tested in the meaningful way that cross-examination would have allowed.
20. For all of these reasons, the Notes have little to no probative value and should not be admitted.

C. The Notes would not have been a “decisive factor” in the Judgment

21. The Notes should not be admitted into evidence because they would not have been a “decisive factor” in reaching the Judgment. The information in the Notes that potentially falls within the temporal scope of the Tuol Po Chrey executions does not provide any basis to conclude that the killings at Tuol Po Chrey were not in accordance with the Party Centre’s policy, nor does it rebut the finding of an effective hierarchical authority structure at that time. Moreover, the Notes contain inaccurate information which Lemkin has failed to recognize due to his lack of expertise. Failure to test credibility on obvious matters further calls into question the credibility of the other “evidence” contained in the Notes.
22. Lemkin’s lack of expertise, and the unreliability of the analysis contained in his Notes, is demonstrated in his assertion that in July 1975, [REDACTED]

⁵¹ *Ibid.*, p. 152, ERN (En) 00757555.

⁵² *Ibid.*, ERN (En) 00757472.

[REDACTED]

[REDACTED]

[REDACTED].⁵³ Lemkin appears unaware that each Zone was allowed to retain military forces, and that the Northwest Zone was allowed by the Centre to retain two military divisions, each of which had 5,000 soldiers.⁵⁴ There was thus no reason for [REDACTED] as with the full knowledge and approval of the Centre, a Zone army of 10,000 soldiers remained in the Northwest and reported to Nhim as Zone Secretary.

23. Another example can be seen in the great credence Lemkin seems to give to a suggestion that Ruos Nhim personally added the directive to [REDACTED].⁵⁵ Though unnamed, it is not hard to imagine who one source of such a claim might be, as holding Ruos Nhim responsible for the order to [REDACTED] would absolve Nuon Chea of liability. Lemkin's limited knowledge of the DK era allows him to be easily led to believe in a distinction that effectively did not exist at the time. He fails to fully appreciate that the Khmer Rouge [REDACTED].⁵⁶ In reality, it would have been a radical departure from CPK policy to [REDACTED]

⁵³ F2/4/3/3.1 Notes, p. 2 under the heading [REDACTED].
⁵⁴ See, e.g., E3/1170 DC-Cam Khmer Rouge Black Journal, ERN (En) 00602544; ERN (Kh) 00443016; ERN (Fr) 00544895 (S-21 notebook containing an organization chart showing two Northwest Zone military divisions. (It is clear from the original Khmer and French translation that the reference to the "Northeast Zone Army" in the English translation is a typographical error and should read "Northwest Zone Army".)); E319.1.27 Written Record of Interview of SCW-5, 10 September 2013, at A92 and A97-102 (describing the structure of the zone military forces in the Northwest Zone); E3/20 Book by E. Becker: *When The War Was Over*, 1986, p. 180, ERN (En) 00237885 ("although [Phim] had to give up two of his three army divisions to the Center, he was allowed to create one replacement division"); E3/494 Written Record of Analysis by Craig Etcheson, 18 July 2007, p. 28, ERN (En) 00142853 ("The Constitution of Democratic Kampuchea describes the Revolutionary Army as being divided into three echelons, 'regular, regional and guerilla.' The 'regular' army consisted of divisions loyal to the center, as well as divisions whose primary loyalties were vested with 'regional' or Zone leaders."); and E3/130 CPK Statute, p. 7, Art. 1, ERN (En) 00184028 (distinguishing between the "Regular Army of the Center" and the "Regular Army of the Zone"); E3/424 Written Record of Interview of Meas Voeun, 16 December 2009, A6-A7 and E1/130.1 Transcript, 4 October 2012, Meas Voeun, pp. 19-20, 09.56.33-10.01.05 (Deputy Commander of Division 1 describing how a division of 2,700 soldiers remained under the Southwest Zone, and was later transferred to the West Zone, from 1975-78); E3/745 Revolutionary Flag, March 1978, ERN (En) 00504069 (Pol Pot speech referencing "West Zone military forces").

⁵⁵ F2/4/3/3.1 Notes, pp. 3-4.

⁵⁶

Nuon Chea's Response attempts to gloss over the number discrepancy by asserting that Ruos Nhim was also a member of the Standing Committee, but acknowledges in a footnote that this was "not entirely clear" and was based on excerpted minutes from one Standing Committee meeting that reported that "Nhim" was present in April 1977, almost two full years after the killings at Tuol Po Chrey.⁶⁴

25. Similarly, the allegation that [REDACTED] were opposed to Pol Pot and his group⁶⁵ comes from an unknown source, the names of those who opposed Pol Pot are unspecified, and the information is patently incorrect. Based on the evidence adduced during trial, which included OCIJ's interview of Khieu Samphan (a member of the Central Committee), even at its peak in the 1970s, the Central Committee comprised between 20 and 30 members,⁶⁶ [REDACTED]. Lemkin does not explain [REDACTED]. The only member of the Central Committee Lemkin claims to have spoken to is Nuon Chea. Perhaps he also referred to names that appeared on S-21 execution lists or who confessed to being traitors while being tortured and interrogated at S-21. In either case, not knowing the basis of the assertion further diminishes the probative value of the Notes. Finally, even if, *arguendo*, both allegations about [REDACTED] were true, such allegations fall far short of proof that the individuals opposing Pol Pot were not adhering to Party policy one week after the triumphant capture of Phnom Penh when the Tuol Po Chrey massacre has been found to have taken place.⁶⁷

Refugees at Thai-Cambodia Border, February-March 1980, p. 58 [stating that in August 1978, the Standing Committee remained the same, 7 members: Pol Pot, Nuon Chea, Ta Mok, Ieng Sary, Vorn Vet, Son Sen and Keu (Deputy Secretary of the Northwest Region, starting in the period of political study)].

⁶⁴ F2/4/3/3/1 Response, para. 3 and fn. 6. Note that the document on which Nuon Chea refers is an excerpt which appears in a book and, even if it is deemed to be a legitimate excerpt from the actual 11 April 1977 Standing Committee minutes, it merely shows that Nhim attended the meeting, not that he was a member. Virtually every Standing Committee meeting was attended by someone who was not a member, usually to report on what was going on in their part of the organization.

⁶⁵ F2/4/3/3.1 Notes, p. 1 under the heading [REDACTED].

⁶⁶ E313 Trial Judgment, para. 202, citing E1/95.1 Transcript, 24 July 2012, David Chandler, p. 138 ["The Central Committee, I think, numbered about 20 people."]; E3/27 Khieu Samphan Interview Record, 13 December 2007, p. 11, ERN (En) 00156751 ["The central committee consisted of more than 30 members"]; E3/1714 Report by S. Heder and M. Matsushita: Interviews with Kampuchean Refugees at Thai-Cambodia Border, February-March 1980, p. 59, ERN (En) 00170750 ["The Central Committee had around 30 members including full and candidate members"]; E1/69.1 Transcript, 26 April 2012, Saloth Ban, p. 2 [confirming that he stood by the estimate he gave the OCIJ that there were about 20 members of the Central Committee (see also page 1 demonstrating that this estimate relates to the 1975-1976 timeframe)].

⁶⁷ E313 Trial Judgment, paras 681, 684.

26. Although the Notes allege that [REDACTED],⁶⁸ this does not constitute evidence that East Zone leaders acted contrary to the Party leadership's directives. The same can be said about [REDACTED]⁶⁹—the Notes point to no specific conduct demonstrating that the Northwest and East Zone leaders did not comply with the Party directives at the relevant time.
27. All other information in the Notes has little to no temporal relevance to the April 1975 killings of former Lon Nol soldiers and officials at Tuol Po Chrey and the first and second forced transfers of population. Nuon Chea's reasoning of the relevance of the Notes demonstrates the expansive conception of what he believes is relevant to admit as new evidence on appeal.
28. For example, Nuon Chea suggests that the Notes should be admitted because they confirm that a plot to overthrow the regime was cemented "since at least" a secret meeting that was held in May 1975.⁷⁰ Not only does May 1975 postdate the April 1975 events at Tuol Po Chrey, but the Notes are unclear as to [REDACTED], stating only that it [REDACTED].⁷¹ Based on the timing of the meeting [REDACTED], the purported treasonous activities that flowed as a result of the meeting postdate the events at Tuol Po Chrey⁷² and provide no evidence that Ruos Nhim was not complying with Party Centre orders in April 1975. Nor do they rebut the finding of an effective hierarchical authority structure at the time of the killings.
29. The burden of proving that new evidence should be admitted on appeal rests squarely with the moving party.⁷³ Nuon Chea has failed to demonstrate how the Notes are of

⁶⁸ F2/4/3/3.1 Notes, p. 1 under the heading [REDACTED].

⁶⁹ *Ibid.*

⁷⁰ F2/4/3/3/1 Response, para. 6.

⁷¹ F2/4/3/3.1 Notes, p. 2 under the heading [REDACTED].

⁷² *Ibid.*, p. 2.

⁷³ F2/5 SCC Witness Decision, para. 16; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Decision on Appellants' Motions to Admit Additional Evidence Pursuant to Rule 115, 16 February 2004, p. 3 (noting that

such weight and significance to have been a decisive factor in reaching the Judgment, or to even establish that they prove the facts he purports that they prove.

D. The Notes rely on S-21 Confessions for the truth of the matters asserted

30. Nuon Chea’s request to admit the Notes should also be rejected because it constitutes a backdoor attempt to rely on S-21 confessions for the truth of the matters asserted. As mentioned above, the Notes state that [REDACTED].⁷⁴ It is impossible to determine to what degree the witnesses were influenced by the information contained in the confession and to what extent the contents of the Notes reflect such influence or are simply reiterating inadmissible conspiracies from S-21 confessions.
31. The Notes also cite [REDACTED].⁷⁵ The quickness to use the content of a confession for corroborative purposes further belies the reliability and probative value of Lemkin and Thet Sambath’s entire body of work as well as the claim that they used a “strict and careful method to assess the reliability of the individuals they interviewed”.⁷⁶
32. As repeatedly emphasized by the Co-Prosecutors, “Cambodian and international law unambiguously prevent any party from using evidence derived from torture to prove the truth of the matters ‘confessed’.”⁷⁷ Furthermore,
- [u]nder 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.⁷⁸
33. Under Rule 87(3)(d) and the Exclusionary Rule of Article 15 of the Convention Against Torture, the Notes are inadmissible to the extent they rely on “confession” evidence through torture for the truth of the matters asserted therein.

“Appellant Preać has not established that [the evidence] could have been a decisive factor in reaching the decision at trial”).

⁷⁴ F2/4/3/3.1 Notes, p. 4 under the heading [REDACTED].

⁷⁵ *Ibid.*, p. 2 under the heading [REDACTED].

⁷⁶ F2/4/3/3/1 Response, para. 7.

⁷⁷ F26/7 Co-Prosecutors’ Response to Witness Document Lists for SCW-3, SCW-4 and SCW-5, 29 June 2015, para. 5.

⁷⁸ *Ibid.*, at para. 6.

E. Further action by the Chamber on the Additional Investigation is unwarranted

34. Nuon Chea asks this Chamber to carry out further investigative actions at his request. One of the fundamental principles of the ECCC is that proceedings should be fair and adversarial.⁷⁹ *Ex parte* judicial investigations during the appellate stage are not adversarial. Unlike judicial investigations conducted before a closing order is issued, the Parties do not have the opportunity to challenge the evidence at trial.
35. Moreover, admitting additional evidence or calling witnesses on appeal suggested by only one party is not fundamentally fair. If the Chamber wishes to exercise its discretion to re-open a factual finding of the Trial Chamber for additional examination *de novo*, all parties should be invited to submit additional evidence on the issue. It is the SCC's obligation to ensure that all parties, including the Co-Prosecutors, have a fair opportunity to present their evidence.⁸⁰
36. Nothing in Nuon Chea's submissions establishes that further investigations by the Supreme Court Chamber would lead to evidence that could have been a decisive factor in the Judgment in Case 002/01. The original motive for the SCC's attempts to contact Lemkin and Thet Sambath was to obtain video footage. This was in response to the assertion in Nuon Chea's Appeal that Lemkin had sent an unsolicited email to the

⁷⁹ Rule 21(a).

⁸⁰ *Prosecutor v. Tadić*, IT-94-1, Decision on Prosecutor's Motion requesting Protective Measures for Witnesses and Victims (Trial Chamber), 10 August 1995, para. 55 ("a fair trial means not only fair treatment of the defendant but also the Prosecution and witnesses."); *Prosecutor v. Aleksovski*, IT-95-14/1, Decision on Prosecutors Appeal on Admissibility of Evidence (Appeals Chamber), 16 February 1999, para. 25 ("Seen in this way, it is difficult to see how a trial could ever be considered to be fair where the accused is favoured at the expense of the Prosecution beyond a strict compliance with those fundamental protections."); *Prosecutor v. Haradinaj et al.*, IT-04-84-A, Appeal Judgment, 19 July 2010, para. 46 ("this decision again inappropriately prioritized logistical considerations over the Prosecution's right to a fair trial."); *Prosecutor v. Karemera et al.*, ICTR-98-44-PT, Decision on Severance of André Rwamakuba and Amendments to the Indictment (Pre-Trial Chamber), 7 December 2004, para. 26 ("The Chamber recalls that the right to a fair trial applies both to the Defence and the Prosecution."); *Prosecutor v. Zigiranyirazo* ICTR-2001-73-T, Decision on the Prosecution Joint Motion (Trial Chamber III), 16 November 2006, para. 18 ("Protecting the integrity of the proceedings means ensuring fairness in the conduct of the case as far as both Parties are concerned. While the Chamber must be diligent in ensuring that the Accused is not deprived of his rights, the Prosecution must also not be unduly hampered in the presentation of its case."); *Situation in Uganda*, ICC-02/04-112, Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06m (Pre-Trial Chamber II), 19 December 2007, para. 27 ("It is commonly understood that the right to a fair trial in criminal proceedings mainly ensues to the benefit of the defendant or the defence. Yet, fairness also extends to other parties in proceedings such as the Prosecution."); *Situation in the Democratic Republic of the Congo*, ICC-01/04-135-tEN, Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for the Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 AND VPRS 6 (Pre-Trial Chamber I), 31 March 2006, para. 38 ("fairness of proceedings includes respect for the procedural rights of the Prosecutor, the Defence and the Victims.")

- Defence which indicated he had “important” and “exculpatory” evidence which would show that Nuon Chea’s conviction for Tuol Po Chrey was “completely wrong.”⁸¹
37. However, Lemkin’s interview with the Delegate Judges and the “Notes” he has provided make it clear that the four witness interviews he has conducted do not directly mention Tuol Po Chrey, are not relevant to Tuol Po Chrey, and what footage he does have will not be provided. Further investigative actions would only delay the already remarkably lengthy proceedings in this case, without any reasonable expectation that it would significantly contribute to the ascertainment of the truth or evidence that could have been a decisive factor in the Case 002/01 Judgment, particularly in light of Lemkin and Thet Sambath’s refusal to provide the requested video footage.
38. It is clear Thet Sambath has highly relevant and highly incriminatory evidence of issues in contention in Case 002/02—evidence which comes directly from the words of Nuon Chea. For this reason, the Co-Prosecutors have previously urged the Trial Chamber to call Thet Sambath as a priority witness in Case 002/02, but he has refused to cooperate.⁸² The Co-Prosecutors assure Thet Sambath that all efforts will be made to meet his legitimate security concerns and those of his sources, and hope he will reconsider his refusal to contribute to the establishment of the truth about the Pol Pot regime by testifying at the ECCC. However, for all of the reasons discussed above, there is no reason to believe that Thet Sambath has evidence which could have been a decisive factor in the Judgment in Case 002/01, and further attempts to seek his testimony in appeal proceedings are unwarranted.
39. As discussed above, Robert Lemkin is not an expert in the Khmer Rouge and what information he learned about the period came largely through the interpretations or summaries provided by Thet Sambath. Thus, there is even less reason to believe that

⁸¹ **F16** Nuon Chea’s Appeal Against the Judgment in Case 002/01, 29 December 2014, para. 83.

⁸² Thet Sambath’s unwillingness to cooperate with the Court can also be seen in relation to the Co-Prosecutors’ request to call him as a priority witness in Case 002/02. The Co-Prosecutors consider his evidence highly relevant to the issues being adjudicated in Case 002/02, especially in regard to the internal purges of CPK cadres, the treatment of former officials and soldiers of the Lon Nol regime, and the role of the Accused. On 7 May 2015, the Trial Chamber granted the Co-Prosecutors’ request and directed WESU to contact Thet Sambath and to report to the Chamber by 21 May 2015 on his availability to testify (*see E335/3 Decision on Co-Prosecutors’ Request to Call Thet Sambath as a Priority Witness*, 7 May 2015, p. 4). WESU then initiated a series of email and telephone exchanges with Thet Sambath. At the conclusion of these discussions, Thet Sambath declared he was unavailable to testify because (a) that “would place him, his family, and an unspecified number of other people with whom he has worked, at such a level of security risk that the protection mechanisms of the ECCC could not ensure their continued safety, not even for those persons residing in countries outside Cambodia”; and “(b) he would be unable to answer certain questions because he has obtained information from other persons who have not agreed that their material be used in any other form or for any other purpose than for the production of his films.” (*See E335/3/2 WESU – Updated Report in response to Trial Chamber Decision E335/3*, 28 May 2015.)



Lemkin could provide evidence that could have been a decisive factor in the Judgment in Case 002/01.

40. For all of these reasons, delaying the proceedings to interview Thet Sambath, re-interview Lemkin, or to call either to testify is unwarranted.⁸³ Nuon Chea has failed to make a specific showing that information given by Lemkin or Thet Sambath would have been a decisive factor in the Judgment or even conducive to ascertaining the truth.

IV. Conclusion

41. For the reasons set forth above, the Co-Prosecutors respectfully request that the Supreme Court Chamber:
- 1) Reject the request to admit the Notes into evidence;
 - 2) Reject the request to summon Robert Lemkin and Thet Sambath to testify before this Chamber; and
 - 3) Reject the requests that the Delegate Judges re-interview Robert Lemkin and interview Thet Sambath.

Respectfully submitted,

Date	Name	Place	Signature
23 July 2015	CHEA Leang Co-Prosecutor	Phnom Penh	
	Nicholas KOUMJIAN Co-Prosecutor		

⁸³ See Nuon Chea's reiteration of this request in **F2/4/3/3/1** Response, para. 9.