

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

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**NUON CHEA'S REPLY TO THE CO-PROSECUTORS' RESPONSE TO HIS
SIXTH REQUEST TO CONSIDER AND OBTAIN ADDITIONAL EVIDENCE IN
CONNECTION WITH THE APPEAL AGAINST THE TRIAL JUDGEMENT
IN CASE 002/01**

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I. INTRODUCTION

1. On 11 September 2015, the Co-Lawyers for Nuon Chea (the “Defence”) filed their sixth request to consider and obtain additional evidence in connection with the appeal against the Trial Judgement in Case 002/01 (the “Sixth Additional Evidence Request”) in English only,¹ and a Khmer-language translation on 25 September 2015. On 14 October 2015, the Co-Prosecutors filed their response (the “Co-Prosecutors’ Response” or the “Response”).² On 5 October 2015, the Defence requested to file a reply to the Co-Prosecutors’ Response in English only,³ a request which the Supreme Court Chamber rejected on 6 October 2015.⁴ Pursuant to Article 8.4 of the Practice Direction on the Filing of Documents Before the ECCC, the Defence hereby submits the instant reply to the Co-Prosecutors’ Response (the “Reply”).
2. As a preliminary matter, the Defence submits that this Reply should be classified as public. The information presented within it is either drawn from the public record or, where it originates in the Defence’s confidential filings, is neither inherently confidential in nature nor the reason that the Defence sought a confidential classification to be assigned to those filings.⁵ In addition, considering the fundamental nature of the Defence’s arguments which are at issue, it is in the public’s interest to assign a public classification to the instant Reply.

II. ARGUMENT

3. To put it bluntly, the Co-Prosecutors’ Response is a monumental disappointment. The Defence had hoped that it would serve as an opportunity to engage in meaningful debate over the key substantive arguments the Defence consolidated and advanced in its Sixth

¹ F2/8, ‘Nuon Chea’s Sixth Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgement in Case 002/01’, 11 Sep 2015 (“Sixth Additional Evidence Request”).

² F2/8/5, ‘Co-Prosecutors’ Response to Nuon Chea’s Sixth Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01’, 14 Oct 2015 (“Co-Prosecutors’ Response”).

³ Email from the Defence Senior Legal Consultant to the Supreme Court Chamber Senior Legal Officer, 5 Oct 2015.

⁴ Email from the Supreme Court Chamber Senior Legal Officer to the Defence Senior Legal Consultant, 6 Oct 2015.

⁵ In this regard, the Defence notes that paras. 13 and 14, *infra*, are respectively drawn from the following confidential Defence filings: F2/4/3/3/4, ‘Nuon Chea’s Reply to the Co-Prosecutors’ Response to Nuon Chea’s Questions on the Supreme Court Chamber’s Additional Investigation into Footage in the Possession of Filmmakers Rob Lemkin and Thet Sambath’, 29 Jul 2015 (“Reply to Co-Prosecutors on Lemkin’s Notes”) (para. 3) and F28/3, ‘Reply to Co-Prosecutors’ Response to Request for Investigative Action into Events Described During the Testimony of Sâm Sithy’, 7 Oct 2015 (“Reply to Co-Prosecutors on Sâm Sithy”) (para. 27), while para. 10 offers a limited general discussion of F2/4/3/3/6/1, ‘Nuon Chea’s Submissions on Robert Lemkin’s Transcripts and the Significance of the “Rift” Within the CPK’, 8 Oct 2015 (“Submissions on Lemkin Transcripts and the CPK “Rift””).

Additional Evidence Request. However, the Co-Prosecutors have resoundingly failed to do so. Instead, they focus single-mindedly on escalating their smear campaign against the Defence (which they appear to have launched not long after International Co-Prosecutor Nicholas Koumjian's arrival⁶) by casting offensive aspersions as to the Defence's motives, conduct, and overall case.

4. Accordingly, the Defence is largely content to rest on the substantive arguments it has already advanced in its Sixth Additional Evidence Request. The Defence limits the instant Reply to two issues: one on which it believes that the Co-Prosecutors have significantly misrepresented the Defence, and another on which it believes that the Co-Prosecutors have significantly misrepresented the applicable law. All of the comments herein reiterate Defence arguments already made before the Supreme Court Chamber. However, they bear repeating, not only for the Chamber's convenience, but also since the Co-Prosecutors evidently failed to read or comprehend the arguments when the Defence initially made them.

A. The Co-Prosecutors Misrepresent the Defence's Motives, Conduct, and Case

5. The Defence devoted twenty-five pages of its Sixth Additional Evidence Request to presenting carefully substantiated arguments supporting Nuon Chea's account of what truly occurred in Cambodia during the ECCC's temporal period, bolstered by another twenty-five pages analysing the relevant evidence sought for admission in the request. Furthermore, the Defence has attempted to present this case throughout the Case 002/01 trial and appeal. During the current appeal proceedings, it has explored these arguments in detail in its appeal brief⁷ (the "Appeal") and other filings,⁸ including through what will soon be a total of seven requests for the admission of additional evidence.⁹

⁶ See, e.g., F2/6/2, 'Co-Prosecutors' Response to Nuon Chea's Fourth Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01', 30 Jun 2015 ("Co-Prosecutors' Response to Fourth Request"), para. 5; F2/7/1, 'Co-Prosecutors' Response to Nuon Chea's Fifth Request to Consider and Obtain additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01', 13 Jul 2015 ("Co-Prosecutors' Response to Fifth Request"), para. 3; see, also, F2/8, Sixth Additional Evidence Request, para. 16.

⁷ F16, 'Nuon Chea's Appeal Against the Judgment in Case 002/01', 29 Dec 2014 ("Appeal").

⁸ See, e.g., F2/4/3/3/6/1, Submissions on Lemkin Transcripts and the CPK "Rift"; 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 Jul 2015; F2/4/3/3/4, Reply to Co-Prosecutors on Lemkin's Notes.

⁹ (1) F2, 'Request to Obtain and Consider Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01', 1 Sep 2014 ("First Additional Evidence Request") (relating to evidence in the possession of filmmakers Thet Sambath and Rob Lemkin); (2) F2/1, 'Second Request to Consider Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01', 2 Sep 2014 (relating to the

6. In their Response, however, the Co-Prosecutors accuse the Defence *nineteen times* of deliberately misleading the Supreme Court Chamber as to the nature and significance of the evidence sought for admission in the Sixth Additional Evidence Request.¹⁰ They suggest a further *seven times* that this is all part of a devious plot by the Defence to disrupt and delay the proceedings.¹¹ In doing so, the Co-Prosecutors have evidently failed to take into account, for example, the Supreme Court Chamber's recognition, in the 30 September 2015 iteration of the ECCC's Completion Plan, that filing requests for additional evidence amounts to the Defence "*extensively exercis[ing] procedural rights available*" to Nuon Chea¹² and are therefore an entirely legitimate course of action.
7. The Co-Prosecutors then fixate in their Response on simply insulting the Defence's case, which they do nearly *sixty times*,¹³ employing the widest possible variety of indignant language in the apparent belief that the thesaurus is mightier than reason and evidence, and in a clear effort to taint the Defence's case with the spectre of

video of an interview of Silvia Cartwright and excerpts of a book by Marcel Lemonde); (3) F2/4, 'Third Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01', 25 Nov 2014 ("Third Additional Evidence Request") (relating to evidence by appeal witness Toat Thoeun); (4) F2/6, 'Nuon Chea's Fourth Request to Consider Additional Evidence in Connection with the Appeal Against the Trial Judgement in Case 002/01', 15 Jun 2015 ("Fourth Additional Evidence Request") (relating to evidence by Case 002/01 and 002/02 trial witness Pech Chim); (5) F2/7, 'Nuon Chea's Fifth Request to Consider Additional Evidence in Connection with the Appeal Against the Trial Judgement in Case 002/01', 25 Jun 2015 ("Fifth Additional Evidence Request") (relating to evidence of rebellion and/or treason in the Northwest Zone); (6) F2/8, Sixth Additional Evidence Request; and (7) *see*, F2/4/3/3/6/1, Submissions on Lemkin Transcripts and the CPK "Rift", para. 41.

¹⁰ *See*, F2/8/5, Co-Prosecutors' Response, accusing the Defence of "misleading" the Chamber (paras. 3, 50, 56, 59, 82, 83, 90, 92, and 105 (twice)), and "misrepresenting" (paras. 21, 26, 27 (twice) and 50) and "distorting" (paras. 18 (twice), 35, and 39) the evidence.

¹¹ *See*, F2/8/5, Co-Prosecutors' Response, accusing the Defence of attempting to pursue "disruptive and ineffective litigation strategies" (para. 97), "delay" proceedings (paras. 4 and 7), "prolong" and "unduly prolonging" the appeal proceedings (paras. 61 and 13), and "forestall the issuance of a final judgment in Case 002/01 as long as possible" (para. 41), and describing the request as "dilatory" (para. 7).

¹² Extraordinary Chambers in the Courts of Cambodia, *Completion Plan (Revision 6)*, 30 Sep 2015 ("*Completion Plan (Rev. 6)*"), para. 40 (emphasis added), available at: http://www.eccc.gov.kh/sites/default/files/ECCC_Completion_Plan_Rev_6.pdf.

¹³ *See*, F2/8/5, Co-Prosecutors' Response, describing the Defence's arguments as "conspiracy" (paras. 5 and 21 and fn. 28), "misguided" (paras. 33), a desperate attempt to "insinuate" (para. 68), "misguided" (para. 33), "misplaced" (para. 57), "speculation" (paras. 3, 23, 44, 45, 71, 99, and 106), "irrelevant" (paras. 29, 49, 55, and 106), "unsupported" (paras. 18 and 20), "unclear" (para. 107), "implausible" or "lacking plausibility" (paras. 2, 28 and 61), "dubious" (paras. 18 and 95), "unremarkable" (para. 68), "frivolous" (paras. 4 and 107 (twice)), "unrelated" (para. 107), "untethered" (para. 2), "unsuitable" (paras. 50, 58, 98 (twice) and 107), "vacuous" (para. 6), "little to do with" the request (para. 18), "selective" (para. 18), "free of any factual anchor" (para. 22), a "preferred version of events" (para. 22), "story-telling" (para. 23), an attempt to "surreptitiously remedy" a failure to make earlier, timely requests (para. 25), based on "increasing degrees of attenuation" (para. 28), "exploit[ative]" (para. 29), a "disparaging[] characteri[sation]" (para. 35), an attempt to "add and buttress appellate arguments" (para. 35), failing to "demonstrate a precise or viable connection" (para. 36), "disingenuous[]" (para. 50), "patently insufficient" (para. 52), "clearly ambiguous" (para. 60), "indiscriminately dumping evidence" (para. 62), "simply not credible" (para. 105), "baseless" (para. 108), and fns. 15-21, *infra*.

conspiratorial “Holocaust denial”¹⁴ so as to prevent it from being considered at all. Most memorably, they characterise the Defence’s case as “paranoid assertions”,¹⁵ “feverish ruminations”,¹⁶ “innuendo”,¹⁷ “conjecture”,¹⁸ an “inherently skewed perspective of reality”,¹⁹ and a “fanciful”²⁰ and “revisionist Khmer Rouge history”.²¹ It is a technique the Co-Prosecutors have employed in the past, most notably in an attempt to sideline the highly relevant evidence collected by the filmmaker Robert Lemkin.²²

¹⁴ The International Co-Prosecutor, Nicholas Koumjian, has previously insinuated that the Defence is pursuing precisely such a strategy: at a 12 June 2015 talk at the ECCC hosted by the Raoul Wallenberg Institute for an audience of Cambodian students and ECCC staff, and featuring Mr. Koumjian and International Co-Lawyer for Nuon Chea Victor Koppe as speakers, Mr. Koumjian said words to the effect that while Holocaust denial was a crime in France, the Defence here was free to discuss whatever conspiracy theories it liked.

¹⁵ F2/8/5, Co-Prosecutors’ Response, para. 19.

¹⁶ F2/8/5, Co-Prosecutors’ Response, para. 32.

¹⁷ F2/8/5, Co-Prosecutors’ Response, para. 3.

¹⁸ F2/8/5, Co-Prosecutors’ Response, paras. 3 and 21.

¹⁹ F2/8/5, Co-Prosecutors’ Response, para. 38.

²⁰ F2/8/5, Co-Prosecutors’ Response, para. 32.

²¹ F2/8/5, Co-Prosecutors’ Response, para. 24.

²² The Co-Prosecutors conspicuously omit to mention that they had previously sought to rely heavily on the film Robert Lemkin and Thet Sambath made, relying upon them repeatedly at trial (*see*, F2/4/3/3/4, Reply to Co-Prosecutors on Lemkin’s Notes, paras. 13-15), submitting to the Supreme Court Chamber in September 2014 that “[t]he investigative skills of Thet Sambath cannot be questioned” (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 Judgement in Case 002/01’, 16 Sep 2014, para. 10), and attempting to guard against this obvious contradiction by absurdly attempting to distinguish Robert Lemkin from Thet Sambath (*see*, F2/4/3/3/4, Reply to Co-Prosecutors on Lemkin’s Notes, para. 14). However, when it was the *Defence* which attempted to rely on Lemkin’s evidence, the Co-Prosecutors strenuously objected, attempting to disparage Robert Lemkin’s:

- (1) impartiality: The Co-Prosecutors described the evidence gathered as being part of “a determined but unsuccessful effort by Nuon Chea’s chosen biographers to validate at least part of his claims to have led a political movement filled with spies and agents of foreign governments” (F2/4/3/3/6/3, ‘Co-Prosecutors’ Submissions on Transcripts of Interviews Received From Robert Lemkin’, 9 Oct 2015 (“Co-Prosecutors’ Submissions on Lemkin’s Transcripts”)) and suggested that Lemkin’s 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 would have been impacted by the “admittedly close bond” formed between his collaborator Thet Sambath and Nuon Chea (F2/4/3/3/3, ‘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 Jul 2015 (“Co-Prosecutors’ Response on Lemkin’s Notes”), para. 18);
- (2) expertise: The Co-Prosecutors described Lemkin as someone who “cannot be considered [] an expert”, possesses “limited” knowledge of the CPK and DK, and has a “lack of expertise” (F2/4/3/3/3, Co-Prosecutors’ Response on Lemkin’s Notes, paras. 15, 39, 21 and 23);
- (3) motives: The Co-Prosecutors attempted to generate doubt over Robert Lemkin’s motives in interviewing witnesses by noting that Lemkin has withheld witnesses’ identities, the “positions they held at the relevant time, as well as their age and educational level” “for reasons which remain unclear”; noting that the “circumstances of [Lemkin’s] interviews remain unclear. In particular, there is nothing to indicate what, if any, promises were made to the interviewees”, “who translated the words of [Lemkin’s] interviewees to English [and] whether that person had any particular interest in the issues”; and implying that Lemkin has withheld various other evidence from the Chamber for unknown reasons (F2/4/3/3/6/3, Co-Prosecutors’ Submissions on Lemkin’s Transcripts, para. 13); and
- (4) methodology: The Co-Prosecutors levelled a wide range of critiques at Lemkin’s methodology, referring to the noting the “unreliability of his analysis” and “unclear methodology” (F2/4/3/3/3, Co-Prosecutors’ Response on Lemkin’s Notes, paras. 22 and 9); *see, also*, F2/4/3/3/6/3, Co-Prosecutors’ Submissions on Lemkin’s Transcripts, para. 13.

8. Aside from hurling insults across the schoolyard, and despite the Defence's efforts to present a consolidated discussion of its case and the relevant supporting evidence, the Co-Prosecutors' only substantive reaction in the Response is to put forward an assortment of myopic complaints over each piece of evidence which the Defence has sought for admission.²³ The Defence declines to respond to this list, trusting that the Sixth Additional Evidence Request has already made the importance of each piece of evidence abundantly clear. Moreover, the Defence suggests that by considering the requested evidence in only a piecemeal fashion and failing to address the substance of the Defence's case on the whole, the Co-Prosecutors fail to refute the central contention of the Sixth Additional Evidence Request altogether: that the evidence, taken together, clearly substantiates Nuon Chea's argument that a faction within the Communist Party of Kampuchea ("CPK") – led by Sao Phim and Ruos Nhim – was sponsored by Vietnam to foment rebellion and attempt a coup d'état against Pol Pot, Nuon Chea and the legitimate Democratic Kampuchea government ("Plan A"), failing which Vietnam, backed by the Soviet Union, would (and did) directly invade Cambodia itself ("Plan B").²⁴
9. The closest that the Co-Prosecutors come to substantively engaging with this contention is when they echo the simplistic and prevalent Manichean narrative by suggesting that even if internal rebellion did occur, it would have been unsurprising given that the CPK brought only "misery and terror". Thus, it seems that the Co-Prosecutors would portray the rebellion leaders as noble freedom fighters whose treasonous actions were justified by their cause – rebellion leaders including the ruthless and opportunistic Northwest Zone secretary Ruos Nhim, who the Defence argues to have been solely responsible for the crimes at Tuol Po Chrey at issue in Case 002/01.²⁵ Indeed, the most emblematic example of the Co-Prosecutors' total failure to meaningfully engage with the Sixth Additional Evidence Request's central argument is that despite the Defence's suggestion that Vietnam played a pivotal role in the events which transpired, the Co-Prosecutors' Response do not attempt to meaningfully address the substance of this claim, except to simply dismiss without further explanation the fact that "[Nuon Chea]

²³ **F2/8/5**, Co-Prosecutors' Response, paras. 43-108.

²⁴ See, e.g., **F2/8**, Sixth Additional Evidence Request, paras. 10-12 and 23-69.

²⁵ See, e.g., **F16**, Appeal, para. 613; **F2/4/3/3/6/1**, Submissions on Lemkin Transcripts and the CPK "Rift", para. 65.

makes no showing that Vietnam [...] played any role in the crimes for which he was convicted in Case 002/01”.²⁶

10. Otherwise, the Co-Prosecutors simply make the false claim that the Defence has failed to demonstrate how the arguments and evidence presented in the Sixth Additional Evidence Request would have any impact on findings of the Trial Chamber in the Case 002/01 trial judgement (the “Judgement”).²⁷ The Co-Prosecutors have apparently ignored the fact that the Defence made a consistent and careful effort to do so throughout the Sixth Additional Evidence Request. Specifically, it chose to repeat past filings by setting out yet again, in detail, the relevant Judgement findings;²⁸ it offered twenty-five pages of explanation as to how the relevant evidence relates to those findings;²⁹ and it presented specific arguments as to the importance of the evidence in so tilting the evidentiary scale as to lead a reasonable trier of fact to reach a different verdict.³⁰ The Defence is baffled as to how the Co-Prosecutors could have failed to properly consider these arguments, particularly given that several days before the Co-Prosecutors filed their Response, the Defence filed submissions to the Supreme Court Chamber, at the Chamber’s request, further clarifying the significance of its arguments that a “rift” existed within the CPK, in which they referenced at length the arguments presented in the Sixth Additional Evidence Request.³¹
11. In the Sixth Additional Evidence Request, the Defence made a conscious effort to draw attention to the prevalence of the Manichean “standard total view”³² and clarify its good faith intentions and role in the proceedings,³³ all in an attempt to propel the discussion to a more substantive level and ultimately move closer to ascertaining the truth. However, the Co-Prosecutors have chosen in their Response not only to remain doggedly fixated on their simple tale of Good Versus Evil to the exclusion of all else, but moreover to use it as yet another opportunity to level a thinly-veiled accusation of

²⁶ F2/8/5, Co-Prosecutors’ Response, para. 5.

²⁷ F2/8/5, Co-Prosecutors’ Response, para. 4 (“none [of the pieces of evidence requested] would have any impact whatsoever on the findings of the Trial Chamber in Case 002/01”), 19 (“this would have no impact on the criminal charges at issue in this case”), 45 (“none provide evidence that “could have been a decisive factor” in reaching the Judgment), 47 (“it would not be significant enough to overcome the extensive evidence available to the Trial Chamber of the effective hierarchical structure of the CPK”).

²⁸ F2/8, Sixth Additional Evidence Request, paras. 2-8 and 151.

²⁹ F2/8, Sixth Additional Evidence Request, paras. 23-69.

³⁰ F2/8, Sixth Additional Evidence Request, paras. 152-155.

³¹ See, F2/4/3/3/6/1, Submissions on Lemkin Transcripts and the CPK “Rift”, paras. 16-66.

³² F2/8, Sixth Additional Evidence Request, paras. 21-22.

³³ F2/8, Sixth Additional Evidence Request, paras. 17-18.

misconduct against the Defence.³⁴ Such serious accusations should not be lightly made, and yet the Response offers constant, unsubstantiated suggestions that the Defence's motives, conduct, and case are in bad faith. Not only should the Chamber therefore disregard the Response in its entirety, it should also censure the Co-Prosecutors for such (mis)conduct.

B. The Co-Prosecutors Apply the Wrong Standard for the Admission of New Evidence on Appeal

12. The Co-Prosecutors argue that none of the documents in the Sixth Additional Evidence Request “meet the standard for admission of new evidence on appeal, as none provide evidence that “could have been a decisive factor” in reaching the Judgment, nor would it be in the interests of justice to admit them at this stage.”³⁵ The Co-Prosecutors stress that while Rule 104(1) endows the Supreme Court Chamber with the discretionary power to admit new evidence in the interests of justice, this “would perforce include consideration of the three factors the SCC has identified to be relevant to consideration of new evidence pursuant to Rule 108(7)”.³⁶
13. As the Defence has highlighted, in a past reply to the Co-Prosecutors,³⁷ however, its Appeal has demonstrated that the Supreme Court Chamber has broad authority to admit new evidence. Rule 104(1) expressly authorises the Chamber to “examine evidence and call new evidence” to determine the issues on appeal. This broad authority is consistent with proceedings before Cambodian courts and in civil law jurisdictions generally, which clearly contemplate a *de novo* assessment of the evidence on appeal³⁸ – regardless of the Co-Prosecutors' repeated, indignant and misguided protestations that the Chamber is somehow obligated to prevent the appeal from deteriorating into a second trial, unduly prolonging proceedings and/or promoting inefficient litigation”.³⁹
14. The Defence has also already discussed, in another past reply to the Co-Prosecutors,⁴⁰ how the Co-Prosecutors have made repeated failed attempts to persuade this Chamber

³⁴ See the discussion at F2/8, Sixth Additional Evidence Request, para. 16.

³⁵ F2/8/5, Co-Prosecutors' Response, para. 45.

³⁶ F2/8/5, Co-Prosecutors' Response, para. 14.

³⁷ F2/4/3/3/4, Reply to Co-Prosecutors on Lemkin's Notes, para. 3.

³⁸ F16, Appeal, paras. 2-14.

³⁹ F2/6/2, Co-Prosecutors' Response to Fourth Request, para. 5; F2/7/1, Co-Prosecutors' Response to Fifth Request, para. 3; F2/4/3/3/3, '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 Jul 2015 (“Co-Prosecutors' Response on Lemkin's Notes”), para. 3.

⁴⁰ F28/3, Reply to Co-Prosecutors on Sâm Sithy, para. 27.

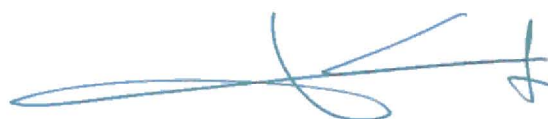
that its discretion to admit new evidence on appeal is constrained by Rule 108(7).⁴¹ Contrary to the Co-Prosecutors' assertion that this Chamber's assessment of the interests of justice under Rule 104(1) "would perforce" include regard to the test in Rule 108(7),⁴² this Chamber has repeatedly held that the two provisions are distinct⁴³ and that it "retains discretion to admit evidence on appeal despite a negative finding on one or more of the criteria governing the admissibility of evidence on appeal."⁴⁴ The requirements of both Rule 104(1) and Rule 108(7) are in any event both satisfied. In contrast with the Co-Prosecutors' assertions,⁴⁵ the Sixth Additional Evidence Request in fact includes extensive argument demonstrating the significance of the evidence requested for admission to the Judgement and its findings as to Nuon Chea's criminal responsibility.

15. The proceedings before the ECCC have been a long time in the making. They are in all likelihood the only ever legal avenue through which to ascertain the truth about what happened during the DK period. Accordingly, it is the Defence's hope that the Co-Prosecutors will be able to move past the "smoke and mirrors" approach of simply hurling insults at the Defence, and instead engage with the Defence in a substantive debate about what that truth may be. The Cambodian public and the international community deserve nothing less.

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⁴¹ F2/4/3/3/3, Co-Prosecutors' Response on Lemkin's Notes, para. 7, F2/7/1, Co-Prosecutors' Response to Fifth Request, para. 4.

⁴² F2/8/5, Co-Prosecutors' Response, para. 14.

⁴³ F2/5, 'Decision on Part of Nuon Chea's Request to Call Witnesses on Appeal', 29 May 2015, paras. 15-17 (characterising 104(1) and 108(7) as "two avenues" for the admission of evidence on appeal).

⁴⁴ F2/5, 'Decision on Part of Nuon Chea's Request to Call Witnesses on Appeal', 29 May 2015, fn. 51 (citing *Lubanga* Appeal Judgement, para. 62).

⁴⁵ F2/8/5, Co-Prosecutors' Response, para. 45; *see, also, supra*, para. 7.