

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

FILING DETAILS

Case No: 002/19-09-2007-ECCC/SC

Party Filing: Co-Prosecutors

Filed to: Supreme Court Chamber

Original Language: English

Date of Document: 13 July 2015

CLASSIFICATION

**Classification of the document
suggested by the filing party:** CONFIDENTIAL



Classification by Supreme Court Chamber: សម្ងាត់/Confidential [PUBLIC REDACTED]

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

[REDACTED]

**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**

Filed by:

Co-Prosecutors
CHEA Leang
Nicholas KOUMJIAN

Distribute to:

Supreme Court Chamber
Judge KONG Srim, President
Judge A. KLONOWIECKA-MILART
Judge SOM Sereyvuth
Judge C. N. JAYASINGHE
Judge MONG Monichariya
Judge YA Narin
Judge Florence Ndepele MUMBA

Accused
NUON Chea
KHIEU Samphan

Lawyers for the Defence
SON Arun
Victor KOPPE
KONG Sam Onn
Anta GUISSÉ
Arthur VERCKEN

Copied to:

Civil Party Lead Co-Lawyers
PICH Ang
Marie GUIRAUD

I. Introduction

1. The Co-Prosecutors hereby respond to Nuon Chea's Fifth Request to Consider Additional Evidence ("Fifth Additional Evidence Request").¹ Nuon Chea seeks to admit six additional documents and summon five additional appeal witnesses. The Co-Prosecutors submit that Nuon Chea has failed to demonstrate that any of these five witnesses or additional documents could have been a decisive factor in the Judgment within the meaning of Rule 108(7), nor do the interests of justice require their admission pursuant to Rule 104(1). The Chamber should reject the application to call additional appeal witnesses and the application to admit additional documents, with the exception of two documents related to SCW-5², as those documents may assist the Chamber in evaluating the testimony already heard.

II. Applicable Law

2. Nuon Chea seeks to admit this new evidence pursuant to Rule 108(7) and/or Rule 104(1). In applying Internal Rule 108(7), the Supreme Court Chamber ("SCC") has established a three-pronged test, pursuant to which the moving party must establish that the new evidence proposed for admission on appeal: (i) was unavailable at trial despite the exercise of due diligence; (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.³ In relation to the third prong, it is important to note that, pursuant to the plain language, relevance must be to the findings of fact of the Trial Chamber, not of a party's arguments on appeal. The SCC has emphasized that the demonstration that the evidence was not available at trial despite the exercise of due diligence "is vital to avoid disruptive and inefficient litigation strategies."⁴
3. This rule 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

¹ F2/7 Nuon Chea's Fifth Request to Consider Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01, 25 June 2015 ("Fifth Additional Evidence Request").

² Although SCW-5 has already testified, and therefore could be identified by name, out of an abundance of caution and to mirror the references used in the Fifth Additional Evidence Request, the Co-Prosecutors continue to use the SCW-5 pseudonym in this filing.

³ F2/5 Decision on Part of Nuon Chea's Requests to Call Witnesses on Appeal, 29 May 2015 ("SCC Witness Decision"), at para. 16.

⁴ F2/5 SCC Witness Decision, at para. 16.

to avoid the appeal deteriorating into a second trial, unduly prolonging proceedings and promoting inefficient litigation.⁵

4. The SCC has also found that it has discretionary power pursuant to Rule 104(1) to admit new evidence “where the interests of justice so require, taking into account the specific circumstances of the case.”⁶ “In making this determination, the Chamber will consider whether the evidence is conducive to ascertaining the truth.”⁷ The Co-Prosecutors submit that the “interests of justice” and the “specific circumstances of the case” 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). Moreover, it stands to reason that it would be counterproductive to use this discretionary power to such an extent that it obviates the gatekeeping purposes for which such a high standard for admitting new evidence was set in Rule 108(7), *i.e.*, to have the exception swallow the rule.
5. The burden of proving that new evidence should be admitted on appeal rests squarely with the moving party.⁸ Nuon Chea provides no reasoned argument as to why it is “in the interests of justice” to admit on appeal the additional evidence he seeks.

III. Response

6. Nuon Chea seeks to admit Written Records of Interview (“WRIs”) of Witnesses 1-4,⁹ and to call Witnesses 1 and 2 to testify, pursuant to Rules 108(7) and 104(1).¹⁰ He also seeks to admit the WRI of SCW-5 and its related annex, and to hear the testimony of 2-TCW-959, 2-TCW-960, and 2-TCW-961 pursuant to Rule 104(1).¹¹ The Co-Prosecutors will address each of these documents and proposed witnesses individually below, but first will make some generally applicable observations.
7. None of the WRIs or proposed witness testimonies provide evidence that “could have been a decisive factor” in reaching the Judgment. Indeed, most, if not all, of the

⁵ *Prosecutor v. Kupreškić et al.*, 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, at para. 3.

⁶ F2/5 SCC Witness Decision, at para. 17.

⁷ F2/5 SCC Witness Decision, at para. 17.

⁸ F2/5 SCC Witness Decision, at para. 16; *Prosecutor v. Kvocka et al.*, IT-98-30/1-A, Decision on Appellants’ Motions to Admit Additional Evidence Pursuant to Rule 115, 16 February 2004 (noting that “Appellant Prcac has not established that [the evidence] could have been a decisive factor in reaching the decision at trial”).

⁹ For clarity, the Co-Prosecutors use the same pseudonyms as Nuon Chea did in his filing.

¹⁰ F2/7 Fifth Additional Evidence Request, at paras. 59, 61.

¹¹ F2/7 Fifth Additional Evidence Request, at para. 66.

evidence that Nuon Chea highlights in his Fifth Additional Evidence Request has only the most attenuated relationship to the events addressed in the Case 002/01 Judgment, and relies on speculation built on conjecture. Nuon Chea proposes this evidence in relation to his conviction for the killings of Lon Nol soldiers and civil servants at Tuol Po Chrey in April 1975. In relation to that crime, he alleges that this evidence is relevant to the policy to target former Lon Nol officials and soldiers, orders given by Ruos Nhim and others at a meeting shortly following the capture of Pursat Province, and the hierarchical authority structure within the CPK.¹²

8. Temporally, none of the evidence proposed by Nuon Chea correlates to the period of the Tuol Po Chrey executions for which Nuon Chea has been convicted, and thus none of it could have been a decisive factor in reaching the Judgment.
9. Topically, Nuon Chea points to no evidence in any of the statements regarding Tuol Po Chrey; no exculpatory evidence regarding the policy to target former Lon Nol officials and soldiers; and no evidence rebutting the finding that the hierarchical power structure was firmly in place during the events at Tuol Po Chrey for which Nuon Chea and Khieu Samphan have been convicted in Case 002/01. Indeed, the SCC will look in vain for any indication in the proposed evidence that the policy to target Khmer Republic soldiers and officials did not emanate from the Centre and was not followed by the Zones until the Khmer Rouge was overthrown.
10. Indeed, on the basis of the excerpts emphasized by Nuon Chea from the submitted documents and witnesses, he appears to be proposing that any evidence, from any time, that Ruos Nhim was arrested and killed; that the Southwest Zone troops were used to purge the Northwest Zone; or concerning the administrative structure of the Northwest Zone, is of sufficient importance to be admitted as new evidence on appeal. But no amount of additional information on any of these irrelevant topics would change the Judgment.
11. Nuon Chea also argues that the five WRIs and one annex should be admitted, at least in part, because they relate to “critical aspects of SCW-5’s testimony”.¹³ Elsewhere, Nuon Chea refers to the WRIs as being relevant to SCW-5’s “expected testimony”,¹⁴ and SCW-5’s “likely testimony”,¹⁵ and that the WRI’s are submitted “in part to corroborate

¹² F2/7 Fifth Additional Evidence Request, at paras. 52-54.

¹³ F2/7 Fifth Additional Evidence Request, at para. 4.

¹⁴ F2/7 Fifth Additional Evidence Request, at para. 6.

¹⁵ F2/7 Fifth Additional Evidence Request, at para. 6.

and verify SCW-5's testimony".¹⁶ Nuon Chea is therefore now submitting requests for new evidence on appeal on the basis of their putative relevance not solely to the Judgment, but to other new evidence admitted on appeal, and, as regards SCW-5's testimony at the time the Fifth Additional Evidence Request was made, on speculation about what new evidence would be forthcoming. This goes far beyond the highly stringent standards for new evidence on appeal that this Chamber has rightly imposed.

12. Moreover, given that Nuon Chea relies to a large extent on the relationship between what he anticipated SCW-5's testimony would be and the relevancy of the evidence requested to be admitted in the Fifth Additional Evidence Request, it is proper to assess the claims in the Fifth Additional Evidence Request against the testimony actually given by SCW-5.

13. Here is how Nuon Chea described SCW-5 in the initial request to call him as a witness:

[SCW-5] is the best placed witness to test Nuon Chea's key overarching defence in both segments of Case 002: that the CPK was a deeply fragmented Party at its highest levels because some of its leaders – chief among them, [SCW-5]'s adoptive father – were set against the Party's putative leadership in a bitter power struggle.¹⁷

14. Here is how Nuon Chea described SCW-5's expected testimony in his Fifth Additional Evidence Request in order to buttress his request for "corroborating" witnesses:

SCW-5 is also a critical witness with regard to CPK structure and the origin, scope and nature of the armed conflict within the CPK. His testimony corroborates Defence submissions that leading figures within the Northwest and East zones formed a united opposition faction against the CPK and, as of early 1976, also against the legitimate and widely-recognised government of Democratic Kampuchea in which Sao Phim and Ruos Nhim served as top-ranking officials. SCW-5 describes personally planting the seeds of this open armed conflict as early as 1975.¹⁸

15. However, the actual testimony of SCW-5 clearly contradicted the basic premise of this new evidence request, as his testimony completely dispelled any conjecture that Ruos Nhim was in rebellion against the party centre in 1975. SCW-5 first explained that he, SCW-5, did not decide to "defect the Angkar" until 1978, after attempts were made to arrest him.¹⁹ He was then asked:

¹⁶ F2/7 Fifth Additional Evidence Request, at para. 62.

¹⁷ F2/4 Third Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01, 25 November 2014 ("Third Additional Evidence Request"), at para. 26(emphasis in original).

¹⁸ F2/7 Fifth Additional Evidence Request, at para. 9.

¹⁹ Draft Transcript, 6 July 2015, at 10.58.29.

[Counsel for Nuon Chea]: ...[D]o you know when plans were made for the first time to rebel? And who was behind these plans?

[SCW-5]: The rebellion plan was not behind anyone else. We had this kind of idea because we were thinking that we could no longer live in that regime. Many of our comrades disappeared. They were called into a study session in Phnom Penh and disappeared. And after I learnt that they wanted to arrest me, and with God's help, I was not arrested. I started to think that I had to use that 2,000 weapons to start the rebellion. I implore[d] Ta Phat, Ta Nhim and other Tas to start the rebellion against Angkar at that time.²⁰

16. SCW-5 had previously explained Ruos Nhim's reaction when he "implore[d]" him to rebel: "My foster father explained to me that I should not do anything in a rush, and he told me to be patient."²¹

17. Unsatisfied, Counsel for Nuon Chea tried again:

[Counsel for Nuon Chea]: Mr. Witness, it's all very interesting, what you are saying. But isn't it true, and I put that to you, that sometime in the summer of Seventy-five, August, Seventy-five, your foster father, together with S[a]o Phim, On Vet, possibl[y] Koi Tung, and others, started talking – started having plans to openly rebel against the government, or the soon-to-be government? Is that correct?

[SCW-5]: ... In fact, there was no plan to rebel.²²

18. Counsel for Nuon Chea persisted:

[Counsel for Nuon Chea]: Were plans – do you know if plans, at one point in time, to assassinate Pol Pot, to sabotage the revolution by spreading chaos, both internally and externally – for instance by conducting a phony war with Thailand – ultimately to stage a coup d'état, do you know anything about such plans? Whether they existed in the second half of 1975?

[SCW-5]: No, I was not aware of that.

[Counsel for Nuon Chea]: Have you ever heard of plans to combine forces from the East Zone and the former North Zone, to attack Ponchentong airport, to attack the radio station, Radio Phnom Penh, at some time in early Seventy-seven?

[SCW-5]: No, I didn't know that.²³

19. When SCW-5 was asked again about supposed "plans to combine forces from the East Zone", he explained that he did have contact with other forces, but not until after the Khmer Rouge had been overthrown:

[Counsel for Nuon Chea]: And at one point in time, did you contact the East Zone forces, led by Heng Samrin? And that you, together with his forces, attacked former South West Zone forces? Is that correct?

²⁰ Draft Transcript, 6 July 2015, at 11.00.28-11.01.05; see also at 11.39.53.

²¹ Draft Transcript, 6 July 2015, at 10.58.29.

²² Draft Transcript, 6 July 2015, at 11.01.15

²³ Draft Transcript, 6 July 2015, at 11.05.26.

[SCW-5]: Regarding the contact with Lokta Heng Samrin, who was a part of the United Front of Cambodia, it happened after the troops of the United Front arrived in Battambang. ... I contacted these forces in Battambang, not in the East Zone.

20. Nuon Chea had also told the SCC that SCW-5's testimony was critical as he "describes personally planting the seeds of this open armed conflict as early as 1975" by building a warehouse and storing weapons there.²⁴ That proposition was put to SCW-5 in court in the following exchange:

[Counsel for Nuon Chea]: Was that the original intention? To hide these weapons, so that Nhim, you and others could start an armed rebellion against Pol Pot?

[SCW-5]: There was no such rationale behind.²⁵

...

[SCW-5]: The weapons were not stored secretly to start a rebellion against Pol Pot at the outset.²⁶

21. Later, SCW-5 further clarified that Ruos Nhim gave no instructions to hide the weapons:

[Counsel for Khieu Samphan]: Did Ros Nhim instruct you how to hide those weapons?

[SCW-5]: No, he did not give any instructions. He told me that these weapons should be kept properly in the warehouse and should be cleaned.²⁷

22. Although SCW-5 firmly rebutted, multiple times, "Nuon Chea's key overarching defence in both segments of Case 002"²⁸ of a fractured Khmer Rouge in conflict with no hierarchy following orders, he did provide "material information concerning the alleged CPK policy against Khmer Republic soldiers and officials."²⁹ In response to a question from the Bench as to whether he was aware of "any policy whatsoever of what to do with Lon Nol soldiers", SCW-5 replied that he had overheard the policy being discussed at a meeting: "I have heard of Khmer Rouge policy but I do not understand the policy fully. The policy was to smash all former imperialists and was to smash all former feudalists."³⁰ When asked about the origin of this policy, he responded "It was the policy from the upper echelon – the policies ordered by the upper echelon"³¹, and

²⁴ F2/4 Third Additional Evidence Request, at para. 19.

²⁵ Draft Transcript, 6 July 2015, at 10.47.25-10.49.10.

²⁶ Draft Transcript, 6 July 2015, at 10.55.17.

²⁷ Draft Transcript, 6 July 2015, at 14.55.41-14.58.52.

²⁸ F2/4 Third Additional Evidence Request, at para. 26.

²⁹ F2/5 SCC Witness Decision, at para. 20.

³⁰ Draft Transcript, 6 July 2015, at 16.45.52.

³¹ Draft Transcript, 6 July 2015, at 16.50.08.

clarified that “because it was discussed by people at the zone level, upper echelon here refers to those who were in the centre.”³²

23. Finally, the Co-Prosecutors reiterate the point made in their response to Nuon Chea’s Fourth Additional Evidence Request³³ that it is not in the interests of justice nor conducive to ascertaining the truth to admit selective new evidence proposed by one party only in regards to these issues, because the new evidence admitted as a result of such a process will provide an inherently skewed perspective of reality. Should the Chamber decide that it is in the interests of justice to reopen factual findings of the Trial Chamber, all parties should be invited to submit additional evidence relevant to the point under dispute.

A. WRI and Testimony Request for Witness 1

24. Nuon Chea seeks the admission of a WRI³⁴ from Witness 1 and to have him called to testify.³⁵ The Co-Prosecutors oppose both requests.
25. The evidence provided by Witness 1 would not have been a decisive factor in the Judgment, and would not be conducive to ascertaining the truth. He does not discuss Tuol Po Chrey, and provides no evidence rebutting either the finding of an effective hierarchical authority structure at the relevant time, or the policy to target former Lon Nol soldiers and officials. As Nuon Chea notes, Witness 1 did not become [REDACTED] until 1976,³⁶ well after the events at Tuol Po Chrey.
26. Nuon Chea emphasizes statements from Witness 1’s WRI to the effect that in 1977 he escorted Ruos Nhim in transporting military uniforms that Ruos Nhim told him came from Vietnam, from close to the border with Vietnam to Ruos Nhim’s office.³⁷ Nuon Chea also emphasizes Witness 1’s claims that when he was detained and interrogated, he was questioned about trips to Vietnam with Ruos Nhim.³⁸ In fact, as the Chamber will recall, these exact portions of this WRI were read to SCW-5 during his testimony. Nuon Chea’s Counsel then asked SCW-5: “Do you know anything about that?”³⁹ He replied:

³² Draft Transcript, 6 July 2015, at 16.52.19.

³³ **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 June 2015.

³⁴ **E319/19.3.107** Written Record of Interview of [Witness 1], 31 October 2013.

³⁵ **F2/7** Fifth Additional Evidence Request, at para. 14.

³⁶ **F2/7** Fifth Additional Evidence Request, at para. 16.

³⁷ **F2/7** Fifth Additional Evidence Request, at para. 16.

³⁸ **F2/7** Fifth Additional Evidence Request, at para. 18.

³⁹ Draft Transcript, 6 July 2015, at 11.13.19.

No, I neither knew nor saw anything regarding this matter, and the uniforms. In fact, the clothes were produced from a textile factory in Battambang. And we decided with the natural tree resource in Cambodia. We used different tree barks to dye the clothes, but I never hear about those imported from overseas.⁴⁰

27. The other excerpts Nuon Chea selects from Witness 1's WRI demonstrate the expansive conception of what he believes is relevant to admit as new evidence on appeal. He suggests the admission of Witness 1's WRI and calling him as a witness by highlighting information he provided about: the arrest and execution of Ruos Nhim at the end of 1978;⁴¹ the arrival of Southwest Zone forces in the Northwest Zone in 1977 and the subsequent purge of the Northwest Zone in late 1978;⁴² information relating to Ruos Nhim's family;⁴³ and information relating to the "Northwest Zone's operations".⁴⁴ Nuon Chea applies a similarly broad approach in relation to the other WRIs, as the Chamber can well see for itself on review of the selected information from the WRIs that Nuon Chea highlights in the Fifth Additional Evidence Request, but in order to avoid unnecessary repetition the Co-Prosecutors will not make similar observations regarding the other WRIs proposed.
28. Nuon Chea makes no attempt to demonstrate how the specific pieces of information he quotes and summarizes in relation to this document would have been a decisive factor in the Judgment. Instead, in the course of three paragraphs replete with broad phrases he addresses how, purportedly, all four WRIs and the three witnesses proposed on the basis of *Behind the Killing Fields* are relevant to the Trial Chamber's findings. In this welter of summarized information, Witness 1's WRI is specifically identified first for the following evidentiary value: that he "emphatically corroborates the account of SCW-5 and several other witnesses – including [REDACTED] – that leading figures within the Northwest Zone and East Zones formed a united opposition faction against the CPK".⁴⁵ But, as demonstrated, SCW-5 did not provide such an account. Furthermore, Nuon Chea does not cite to evidence on the case file by [REDACTED] to which he is referring (nor have these individuals testified), and, most importantly, Witness 1's WRI provides no evidence of "a united opposition faction against the CPK."

⁴⁰ Draft Transcript, 6 July 2015, at 11.13.19.

⁴¹ F2/7 Fifth Additional Evidence Request, at para. 17.

⁴² F2/7 Fifth Additional Evidence Request, at paras. 19, 20.

⁴³ F2/7 Fifth Additional Evidence Request, at para. 21.

⁴⁴ F2/7 Fifth Additional Evidence Request, at para. 22.

⁴⁵ F2/7 Fifth Additional Evidence Request, at para. 55.

29. Nuon Chea also argues that Witness 1 is able “to offer concrete examples of active steps taken towards rebellion and/or treason in the Northwest Zone. Witness 1 gave an eyewitness account of accompanying Ruos Nhim to the border with Vietnam to collect military uniforms from the Vietnamese.”⁴⁶ Nuon Chea states that this example “lend[s] additional weight to SCW-5’s account of not only having created a weapons cache in the forest as early as 1975 but also allegedly creating and participating in the ‘White Khmer Movement’.”⁴⁷ Even if one were to make the leap that collecting uniforms that Ruos Nhim supposedly told Witness 1 “had come from Vietnam”⁴⁸ was a “step towards a rebellion”⁴⁹, this occurred in 1977,⁵⁰ long after the incident at Tuol Po Chrey. Moreover, as quoted above, SCW-5’s testimony is not that he created a “weapons cache” associated with any rebellion, but that: 1) the weapons were not stored to start a rebellion; and 2) there was no plan for a rebellion with which Ruos Nhim was involved.
30. The only remaining grounds on which Nuon Chea claims Witness 1’s evidence is relevant (as he claims for all four of the Case 004 witnesses), let alone a decisive factor in the Judgment, is on the vague and immaterial claims of “lifting the veil shrouding events in the Northwest Zone until now”, “detail[ing] how Southwest Zone cadres arrived in the Northwest and, after some time, commenced arresting Northwest Zone Cadres”, and “provid[ing] insight into the Northwest Zone structure, identifying members of its leadership and detailing the fate of various leaders.”⁵¹ Such vague and tangential justifications clearly do not merit admitting new evidence on appeal under this Chamber’s jurisprudence.

B. WRI and Testimony Request for Witness 2

31. Nuon Chea seeks the admission of a WRI⁵² from Witness 2 and to have him called to testify.⁵³ The Co-Prosecutors oppose both requests.
32. The evidence provided by Witness 2 would not have been a decisive factor in the Judgment, and would not be conducive to ascertaining the truth. Witness 2 does not discuss Tuol Po Chrey or the forcible transfers of populations that are the subject of

⁴⁶ F2/7 Fifth Additional Evidence Request, at para. 56.

⁴⁷ F2/7 Fifth Additional Evidence Request, at para. 56.

⁴⁸ F2/7 Fifth Additional Evidence Request, at para. 16.

⁴⁹ The Co-Prosecutors note that Witness 1 stated that he “did not know for whom those uniforms were transported ...” E319/19.3.107 Written Record of Interview of [Witness 1], 31 October 2013, at A6.

⁵⁰ F2/7 Fifth Additional Evidence Request, at para. 16.

⁵¹ F2/7 Fifth Additional Evidence Request, at para. 57.

⁵² E319/13.3.17 Written Record of Interview of [Witness 2], 22 September 2013.

⁵³ F2/7 Fifth Additional Evidence Request, at para. 23.

Case 002/01. He provides no evidence rebutting either the finding of an effective hierarchical authority structure at the relevant time, or the policy to target Lon Nol soldiers and officials. He is put forward for events beginning “at the end of 1976”,⁵⁴ in mid-1977,⁵⁵ and in 1978,⁵⁶ long after the events from Case 002/01 at Tuol Po Chrey.

33. Nuon Chea makes no attempt to demonstrate how the specific pieces of information he quotes and summarizes in relation to this document would have been a decisive factor in the Judgment. In the more general justifications, he makes similar claims about the value of Witness 2’s evidence as he did for Witness 1’s evidence, *i.e.*, stating that Witness 2 “emphatically corroborates the account of SCW-5” and would “lift the veil shrouding the events of the Northwest Zone”. Such claims are untrue. Moreover, having heard SCW-5’s testimony, it is clear it could not have been a decisive factor in the Judgment. SCW-5 contradicted Nuon Chea’s claims that the party was at war with itself in 1975 and added additional evidence confirming Tuol Po Chrey was part of the policy of the CPK upper echelon to smash Lon Nol officers.
34. Nuon Chea makes specific reference to only one part of Witness 2’s WRI when attempting to justify its relevance, stating that Witness 2 “explained that a plan for both Northwest Zone military divisions to ‘fight back against Pol Pot’ was leaked ‘through some agents of the Centre’, and that the Northwest Zone cadre [SCW-5] had been arrested as he was accused of having transported military equipment to Phnum Veay Chab Mountain.”⁵⁷ But Nuon Chea’s Counsel read this very passage from Witness 2’s WRI to SCW-5 during SCW-5’s testimony and he refuted it. When Counsel for Nuon Chea asked SCW-5 to confirm the veracity that 1) he had been arrested; and 2) he was accused of having transported military equipment, SCW-5 answered:

The attempt to arrest me failed. And as for the weapons, the weapons, as I said, were not stored to start the rebellion against Pol Pot. And the attempt to arrest me, once again, failed. And for this reason, I decided to use the weapons to start the rebellion against them.⁵⁸

C. WRI Request for Witness 3

⁵⁴ F2/7 Fifth Additional Evidence Request, at para. 27.

⁵⁵ F2/7 Fifth Additional Evidence Request, at para. 27.

⁵⁶ F2/7 Fifth Additional Evidence Request, at para. 25.

⁵⁷ F2/7 Fifth Additional Evidence Request, at para. 56.

⁵⁸ Draft Transcript, 6 July 2015, at 11.39.53.

35. Nuon Chea seeks the admission of a WRI⁵⁹ from Witness 3.⁶⁰ The Co-Prosecutors oppose this request.
36. The evidence provided by Witness 3 would not have been a decisive factor in the Judgment, and would not be conducive to ascertaining the truth. He does not discuss Tuol Po Chrey, and provides no evidence either rebutting the finding of an effective hierarchical authority structure at the relevant time, or rebutting the existence of the policy to target Lon Nol officials and soldiers. He is put forward for events beginning in mid-1977 or late 1977,⁶¹ long after the events at Tuol Po Chrey addressed in the Judgment.
37. Nuon Chea makes no attempt to demonstrate how the specific pieces of information he quotes and summarizes in relation to this document would have been a decisive factor in the Judgment. In the more general justifications, he makes similar claims about the value of Witness 3's evidence as he did for Witness 1's evidence, *i.e.*, that he "emphatically corroborates the account of SCW-5" and would "lift the veil shrouding the events of the Northwest Zone". As stated above, those claims are untrue and/or irrelevant.
38. Nuon Chea makes specific reference to only one part of Witness 3's WRI in attempting to justify its relevance, stating that Witness 3 "provided further insight into the factions themselves, explaining that Ruos Nhim was accused of affiliation 'with the Viet Minh Khmer Rouge'".⁶² Counsel for Nuon Chea read this passage to SCW-5 when he appeared to testify. In response, SCW-5 first described his own experience with false allegations of connections to the Vietnamese: "I myself was alleged of being a slave to the Vietnamese. In fact, I did not have anything at all to do with the Vietnamese during the period..."⁶³ Counsel for Nuon Chea then followed by asking specifically about Ruos Nhim and others Nuon Chea alleges were part of an organized rebellion:

[Counsel for Nuon Chea]: "But did Sou Phim or Ros Nhim, your foster father, or Chek Rai or Kol Thun, or Tif Oul have any contacts with the Vietnamese in this rebellion?"

[SCW-5]: I was not aware of that.⁶⁴

⁵⁹ E319/13.3.58 Written Record of Interview of [Witness 3], 3 September 2013 ("WRI of Witness 3").

⁶⁰ F2/7 Fifth Additional Evidence Request, at paras. 31-36.

⁶¹ F2/7 Fifth Additional Evidence Request, at para. 33; WRI of Witness 3, at A2 ("the Southwest people arrived in Battambang around mid-1977 or late 1977").

⁶² F2/7 Fifth Additional Evidence Request, at para. 55.

⁶³ Draft Transcript, 6 July 2015, at 11.28.46.

⁶⁴ Draft Transcript, 6 July 2015, at 11.30.47.

D. WRI Request for Witness 4

39. Nuon Chea seeks the admission of a WRI⁶⁵ from Witness 4.⁶⁶ The Co-Prosecutors oppose this request.
40. The evidence provided by Witness 4 would not have been a decisive factor in the Judgment, and would not be conducive to ascertaining the truth. He does not discuss Tuol Po Chrey, and provides no evidence rebutting either the finding of an effective hierarchical authority structure at the relevant time, or the policy to target Lon Nol officials and soldiers. He is put forward for events beginning in “late 1977 or early 1978”,⁶⁷ long after the events at Tuol Po Chrey relevant to the Case 002/01 Judgment.
41. Nuon Chea makes no attempt to demonstrate how the specific pieces of information he quotes and summarizes in relation to this document would have been a decisive factor in the Judgment.⁶⁸ In the more general justifications he makes no specific mention of Witness 4’s evidence, and addresses it only by reference to “all four Case 004 witnesses” for the general points previously addressed and rebutted above as untrue and/or irrelevant.
42. Nevertheless, it bears noting that evidence from Witness 4’s WRI was put to SCW-5 during his testimony. In his submission, Nuon Chea quotes a passage from the WRI of Witness 4 regarding the alleged arrest of Ruos Nhim in 1978 involving a helicopter as “describ[ing] the circumstances which heralded a change in the Northwest Zone leadership”.⁶⁹ Counsel for Nuon Chea took this information regarding Witness 4 seeing a helicopter and being told by “people” that Ruos Nhim had been arrested, embellished it with information from the WRI of Witness 1 regarding Ruos Nhim escaping to Sisophon, presented it as the evidence provided by a single witness (without providing citation to this Chamber or the parties), and sought SCW-5’s reaction:

[Counsel for Nuon Chea]: There is a witness who testified before the investigators that your foster father learned about his pending arrest, escaped to Sisophon, and was arrested in Sisophon by armed units using a helicopter. Is that correct?

[SCW-5]: I do not know about that. At that time, there was no helicopter, none of them.⁷⁰

⁶⁵ E319/19.3.198 Written Record of Interview of [Witness 4], 15 October 2014.

⁶⁶ F2/7 Fifth Additional Evidence Request, at paras. 37-41.

⁶⁷ F2/7 Fifth Additional Evidence Request, at paras. 39, 41.

⁶⁸ F2/7 Fifth Additional Evidence Request, at paras. 37-41.

⁶⁹ F2/7 Fifth Additional Evidence Request, at para. 39.

⁷⁰ Draft Transcript, 6 July 2015, at 11.44.05.

E. Three Witnesses from Behind the Killing Fields

43. Nuon Chea requests that the Chamber call as witnesses three individuals described in the book *Behind the Killing Fields*.⁷¹ The Co-Prosecutors oppose these requests.
44. Not only would their evidence not be conducive to ascertaining the truth nor have been a decisive factor in the Judgment, but these requests do not evidence the due diligence that this Chamber has found “is vital to avoid disruptive and inefficient litigation strategies.”⁷²
45. Nuon Chea’s request to call these individuals as witnesses is entirely premised on information contained in the book *Behind the Killing Fields*. That book has been on the Case File since the beginning of evidentiary proceedings in Case 002/01.⁷³ As Nuon Chea admitted: “This is a book that was published in 2010, has been distributed widely, is well-known, is on the case file, and is currently in stock at Monument Books stores in Cambodia.”⁷⁴ However Nuon Chea did not seek to call these witnesses during trial in Case 002/01.
46. In relation to 2-TCW-960,⁷⁵ Nuon Chea also relies on two other documents,⁷⁶ E3/1894 and E3/3849, to support his request to call this witness. First, the Co-Prosecutors note that both of these documents were also on the Case File during Case 002/1, yet Nuon Chea did not seek to call this witness. Second, the Co-Prosecutors note that both of these documents are S-21 Confessions, which, in Nuon Chea’s assertion that they are corroborative of the information ostensibly provided by 2-TCW-960 to Gina Chon and Thet Sambath (including the quotations in the footnotes⁷⁷), are clearly being used for the truth of the matters asserted. As the Co-Prosecutors have previously noted, “Cambodian and international law unambiguously prevent any party from using

⁷¹ F2/7 Fifth Additional Evidence Request, at paras. 43-46.

⁷² F2/5 SCC Witness Decision, para. 16.

⁷³ E152.2 Behind the Killing Fields (annexed to E152 Co-Prosecutors’ Disclosure of a Khieu Samphan Video Interview and Book Entitled ‘Behind the Killing Fields: A Khmer Rouge Leader and One of His Victims’ by Gina Chon and Thet Sambath, 5 December 2011); see also E3/4202 Behind the Killing Fields.

⁷⁴ F2/7 Fifth Additional Evidence Request, at para. 64.

⁷⁵ Nuon Chea refers in both the body of the paragraph and in the relevant footnote to these documents “referenc[ing] a person who appears likely to be 2-TCW-961” (F2/7 at para. 45), however reference to those documents, as well as the placement of this paragraph within the section addressing 2-TCW-960 makes clear that he is referring to 2-TCW-960.

⁷⁶ F2/7 Fifth Additional Evidence Request, at para. 45.

⁷⁷ F2/7 Fifth Additional Evidence Request, at fn. 68.

evidence derived from torture to prove the truth of the matters ‘confessed’.”⁷⁸
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.⁷⁹

47. One of the two S-21 confessions relied on by Nuon Chea exemplifies the logic behind this prohibition clearly. E3/1894 is the S-21 “confession” of Sieng Pauly *alias* Sean, a cadre from the Northwest Zone who was accused of being connected with “CIA strings”. His interrogator at S-21 notes for his superiors: “I noticed that he did not confess...When we started torturing, he agreed to confess by telling about his connection, activities, and plan in the network from the beginning until his arrest by Angkar.”⁸⁰ He thus provided his “traitorous plan” including the information quoted by Nuon Chea in footnote 68 of the Fifth Additional Evidence Request. When the confession was complete, a notation on the first page informs that someone then “Sent to Brother Nuon 2 copies”.⁸¹ Brother Nuon has now used them with this Chamber for the truth of the matters asserted therein.
48. Moreover, Nuon Chea has not made any specific showing that the information by these witnesses would have been a decisive factor in the Judgment or conducive to ascertaining the truth. It first must be noted that the information Nuon Chea seeks to rely on here in order to support his request to call these witnesses is not from WRIs taken by an investigative judge, but from a book, written by two individuals who have not testified before the ECCC.
49. Furthermore, none of these individuals discuss Tuol Po Chrey, nor provide any evidence rebutting either the finding of an effective hierarchical authority structure at the relevant time, or the policy of targeting Lon Nol officials and soldiers. The earliest date mentioned by any of them is 1976,⁸² well after the events at Tuol Po Chrey for which Nuon Chea was convicted in Case 002/01.

⁷⁸ **F26/7** Co-Prosecutors’ Response to Witness Document Lists for SCW-3, SCW-4 and SCW-5, 29 June 2015 (“Response to Document Lists”), at para. 5.

⁷⁹ **F26/7** Response to Document Lists, at para. 5.

⁸⁰ **E3/1894** S-21 Confession of Sieng Pauly *alias* Sean, 9 November 1977, at ENG 00702085.

⁸¹ **E3/1894** S-21 Confession of Sieng Pauly *alias* Sean, 9 November 1977, at ENG 00702082; *see also* **E3/1579** Written Record of Interview of Kaing Guek Eav *alias* Duch, 21 October 2009, at ENG ERN 00398207 (Duch identified the annotation as having been written by Son Sen).

⁸² **F2/7** Fifth Additional Evidence Request, at para. 46.

50. Nuon Chea references the purported statements of these individuals saying that they “spoke of secret stockpiling ... in preparation for attacks” and “plans including blowing up bridges”, which “lend additional weight to SCW-5’s account”.⁸³ But SCW-5 testified that there was no plan to rebel, and certainly not one including Ruos Nhim, or for that matter, Vorn Vet and Sao Phim as the passage attributed to 2-TCW-959 claims.⁸⁴
51. The passage attributed to 2-TCW-959 asserts that preparations for a plot “to overthrow Pol Pot” were disguised by saying they were “preparing to make war with Thailand.”⁸⁵ However SCW-5 was asked about this possibility, and denied knowledge of it.

[Counsel for Nuon Chea]: [D]o you know if plans, at one point in time, to assassinate Pol Pot, to sabotage the revolution by spreading chaos, both internally and externally – for instance by conducting a phony war with Thailand – ultimately to stage a coup-d’etat, do you know anything about such plans? Whether they existed in the second half of 1975?

[SCW-5]: No, I was not aware of that.

F. Second WRI of SCW-5 and its Annex

52. Nuon Chea seeks to admit a second WRI of SCW-5 and its annex.⁸⁶ Because SCW-5 has already testified on appeal, the Co-Prosecutors do not oppose the request to admit his second WRI and related annex as new evidence on appeal.

⁸³ F2/7 Fifth Additional Evidence Request, at para. 56.

⁸⁴ Compare F2/7 Fifth Additional Evidence Request, at para. 43, with Draft Transcript, 6 July 2015, at 11.01.05.

⁸⁵ F2/7 Fifth Additional Evidence Request, at para. 43.


⁸⁶ F2/7 Fifth Additional Evidence Request, at paras. 47-48; E319.1.28 Written Record of Interview of SCW-5, 27 November 2013; E319.1.28.1 Annex to [SCW-5’s] Statement, 27 November 2013.

IV. Conclusion

53. For the reasons set forth above, the Co-Prosecutors respectfully request that the Supreme Court Chamber:

- 1) Deny the request to admit the WRIs of Witnesses 1-4;
- 2) Deny the request to hear testimony from Witnesses 1, 2, 2-TCW-959, 2-TCW-960, and 2-TCW-961; and
- 3) Grant the request to admit the additional WRI of SCW-5 and the related annex.

Respectfully submitted,

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