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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**REQUEST FOR INVESTIGATIVE ACTION INTO EVENTS DESCRIBED DURING
THE TESTIMONY OF SÂM SITHY**

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I. INTRODUCTION

1. On 29 December 2014, the Co-Lawyers for Nuon Chea (“the Defence”) filed Nuon Chea’s appeal (“Appeal”)¹ against the trial judgment in Case 002/01 (“Judgment”).² The Defence argued, *inter alia*: that the Co-Investigating Judges (“CIJs”) placed unprecedented and unlawful limits on Nuon Chea’s ability to confront the evidence against him and advance his own case during the investigation³; that the Trial Chamber continually frustrated the efforts of Defence counsel to confront the evidence collected by the CIJs, *inter alia* by allowing witnesses to review their statements prior to testifying⁴; that the Trial Chamber subsequently relied extensively on civil party applications and other out-of-court statements without first giving due consideration to the evidence given live before the Trial Chamber and (secondarily) the CIJs⁵; that the direct evidence of CPK policy concerning Khmer Republic soldiers and officials was highly limited and on balance exculpatory⁶; and that the evidence that Khmer Republic soldiers and officials were targeted for execution was anecdotal, unreliable and comprised entirely of out-of-court statements and hearsay testimony.⁷ The Defence further argued that one of these out-of-court statements, the written record of interview (“WRI”) of witness Sâm Sithy, purports to convey eyewitness testimony otherwise absent from the record, of Khmer Republic soldiers arrested, removed and then killed by CPNLF forces during their evacuation from the cities. The Defence accordingly requested that this Chamber summons Sâm Sithy to appear for testimony.⁸ On 29 May 2015, this Chamber granted that request.⁹

2. On 3 July 2015, Sâm Sithy appeared before this Chamber. Sâm Sithy gave testimony which was internally inconsistent, deviated from the evidence in his WRI and contradicted other evidence on the case file. He failed to identify the name of a single victim other than his parents, even though he claims that numerous relatives, including aunts, uncles and cousins were killed. Although he is a senior police official in the very

¹ **F16**, ‘Nuon Chea’s Appeal against the Judgment in Case 002/01’, 29 Dec 2014 (“Appeal”).

² **E313**, ‘Case 002/01 Judgement’, 7 Aug 2014.

³ Appeal, paras 31-32, 133-134.

⁴ *Ibid.*, paras 135-147.

⁵ *Ibid.*, paras 154-171.

⁶ *Ibid.*, paras 551-580.

⁷ *Ibid.*, paras 581-596.

⁸ *Ibid.*, paras 595, 730(c).

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

province in which the killings allegedly occurred – no less than the Police Inspector of Kampong Chhnang District – he was not familiar with any efforts to exhume dead bodies at any time since 1979, including the mass grave (an easily identifiable B52 bomb crater) in which his family is supposedly buried. What remains on the record is an entirely uncorroborated account lacking numerous critical details and inconsistent in key respects with other evidence on the case file, including Sâm Sithy’s own prior statement.

3. Under these circumstances, further investigative action is critical as a means to test the credibility of Sâm Sithy’s testimony. The simple efforts to produce corroborating evidence urged in this request – to locate grave sites and other physical evidence, interview key witnesses and obtain the newspaper article in which Sâm Sithy’s interview is featured – are fundamental to an assessment of probative value and basic to any criminal proceeding. The failure of the CIJs and later of the Trial Chamber to adduce any such evidence is not attributable in any way to a lack of diligence on Nuon Chea’s part. Sâm Sithy’s status as the only eyewitness in this case file to a practice which the Trial Chamber found was widespread in the period following liberation, requires that his evidence be subject to the rigorous scrutiny lacking entirely in the Judgment.

II. SÂM SITHY’S TESTIMONY

4. Sâm Sithy’s WRI states that the witness was evacuated along with his family from his home in Ph’er Village in Kampong Chhnang District on 17 April 1975.¹⁰ His family travelled by foot for over two weeks until they reached Wat Chrak Sdech in Peam Commune in Samakki Mean Chey District. According to the WRI, at Wat Chrak Sdech CPNLA troops asked all Khmer Republic officials to register to receive rice. Sâm Sithy’s family was grouped with six other families and subsequently led through the forest “by a Khmer Rouge wearing a scarf around his neck”. Upon arrival at a stream at Prey Rong Khla, the twelve adult men in the group were ordered to go to the forest to cut trees. Sâm Sithy followed the men until he “saw five to six Khmer Rouge come out of the forest, pointing their weapons,” and lead the men away. Sâm Sithy ran back to his mother at the stream. About one hour later, they heard gunfire coming from the

¹⁰ E3/5201, ‘Written Record of Interview of Sâm Sithy’, 7 Aug 2008 (“WRI of Sâm Sithy”), ERN 00275139-140.

direction of the forest. The cadre who guided the seven families to Prey Rong Khla then returned and directed the women and children to the forest, where men with guns again emerged and led the group to a B-52 bomb crater. The remaining members of these seven families were killed, with the remarkable exception of not only Sâm Sithy himself, who survived by playing dead, but also his sister and two younger cousins.

5. This account is both highly improbable on its face and contrary to the record. It was repeatedly contradicted by Sâm Sithy during his testimony before this Chamber.

A. Sâm Sithy was unable to state the most basic information concerning his interview with the CIJs

6. Although the WRI bearing Sâm Sithy's name is dated 26 May 2008, Sâm Sithy repeatedly testified that he was interviewed within the last one to two years prior to his appearance before the Chamber.¹¹ Even after reviewing his WRI and following numerous questions from the bench and counsel he denied having giving a statement in 2008.¹² Although Sâm Sithy was able to recall having been "interviewed only once,"¹³ he conveyed total certainty that this one interview took place no more than two years prior to his appearance for testimony, even rejecting counsel's repeated suggestions to the contrary: "First the interview was not conducted seven years ago, it was only conducted about two years ago and I don't agree with you that I was interviewed seven years ago."¹⁴
7. As the day progressed, Sâm Sithy gradually adjusted his recollection to reflect the facts put to him by counsel and in the documents before him. He first changed his testimony that he was interviewed only once, claiming that he was interviewed by "a few working groups".¹⁵ Although he was initially unable to recall any details about any of these "working groups", he subsequently indicated that "[s]ome of them were from media and some other were from other organisation."¹⁶ Nevertheless, he appeared at first to maintain that all of these working groups learned of his story through a newspaper

¹¹ **F1/2.1**, 'Transcript of Appeal Proceedings in Case 002' (Sâm Sithy), 3 Jul 2015 ("Transcript of Sâm Sithy's testimony"), pp. 6-8.

¹² *Ibid.*, p. 9.

¹³ *Ibid.*, p. 7.

¹⁴ *Ibid.*, p. 9. *See also* , p. 11.

¹⁵ *Ibid.*, p. 51.

¹⁶ *Ibid.*, p. 53.

article written approximately two years prior to his appearance before this Chamber.¹⁷ By the end of the day, however, Sâm Sithy came around: he concluded that in fact he had been “interviewed seven years ago and two years ago.”¹⁸

8. These contradictions as to a matter as simple as the date of Sâm Sithy’s interview with the CIJs proved to be a troubling microcosm of events to follow. Sâm Sithy not only contradicted both the WRI on the case file and his own testimony before the Supreme Court Chamber. He also proved himself susceptible to suggestion and willing to adopt whatever version of events was presented to him in court, even when directly inconsistent with prior statements given a mere few minutes earlier. This is a significant consideration in this Chamber’s assessment of the credibility of a witness claiming to describe events so widely reported to have occurred.

B. Sâm Sithy gave directly inconsistent accounts of events following his family’s arrival at Prey Rong Khla

9. Although counsel asked numerous open questions concerning the sequence of events between Sâm Sithy’s departure from Wat Chrak Sdech and his escape from Prey Rong Khla, the witness repeatedly refused to provide even the slightest corroborating detail. He made no mention of being separated from his father, crossing a river, following the adult men, seeing armed men appear from the forest, and running back to his mother to persuade her in vain of the imminent danger. Instead, he gave the vaguest possible account of an uninterrupted sequence of events beginning with his departure from Wat Chrak Sdech through to the execution of all seven families in one location at Prey Rong Khla. The following exchange, about the hour-long walk from Wat Chrak Sdech to Prey Rong Khla, is illustrative:

Q. Fine. So you and your family left Wat Chrak Sdech, tell me what happened?

A. After we left Chrak Sdech pagoda we crossed a stream or river and we were told to leave our belongings in another end of the river that is the southern part and -- the northern part rather, and we crossed the river or

¹⁷ *Ibid.*, pp. 49-51 (“I was interviewed at that time because there was a publication of an article in the news. There were a few working groups going to see me and interviewing me.”), 53 (“And as for the interviewers, they met me in the last two years. Two or three working groups came to see me and interview me. Some of them were from media and some other were from other organisation”).

¹⁸ *Ibid.*, p. 110.

stream southwards and after we crossed the stream or the river, the armed force took us away and killed.

[...]

Q. Fine. I'll move on. You were walking with this group of seven families, then what happened?

A. Nothing happened because they were all killed and I surviving the killing. There were four of us survived the killing. Two of my relatives one male and one female survived the killing and my two siblings also survived the killing, one sister and one brother.

Q. Mr. Witness, your occupation is a police inspector; you know that I'm asking you about details so I'm telling you please try to recall what happened. You were walking there with a group of seven families, then what happened, what did you see, what did you hear, please give me some details?

A. When we were travelling, there were soldiers, armed soldiers and after we crossed the stream or the river we were escorted by these armed soldiers into the caves of Prey Rong Khla and we were all killed.

Q. At one point, you say you saw armed soldiers, what did they say, what did they do, please explain to the Court, the moment that this group saw these soldiers, what happened?

A. When we were walked at gun point by the group we were told to keep going straight and try not to escape otherwise we would be shot. Then at a certain location, we were all ordered to sit as one group, all the seven families.¹⁹

10. Importantly, Sâm Sithy adhered to this version of events even after he was asked specifically about the interaction between his father – who was supposedly already dead – and the CPNLF soldiers who escorted him away from the stream at Prey Rong Khla:

Q. What was the reaction of the people in the group, what happened, was there a discussion between your father and the soldiers, what happened?

¹⁹ *Ibid.*, pp. 22-24. Similarly vague descriptions permeate Sâm Sithy's testimony. See e.g.: *ibid.*, pp. 15-16 ("After we arrived at Prey Rong Khla, we travelled from one, we started leaving Prey Rong Khla at 1 o'clock and after we reached Prey Rong Khla we reached north of one place and we put our belonging at another end of a river when we reached that place, there were armed forces, we were asked to sit in one group and those soldiers shot their rifles at all of us.").

A. There was no discussion at all. We were not armed, we did not have an axe or a knife, we were ordered to place our belonging in a path on the north side of the stream and we were told to walk across the stream to the south side and then on the south side when we arrived we were ordered to walk at gun point to the killing site.²⁰

11. Only after he was reminded of the content of his WRI by defence counsel did Sâm Sithy suddenly remember to explain that his father was first separated from the rest of the group along with the other adult men.²¹ Not surprisingly, Sâm Sithy's account of this portion of his story shifted continuously throughout his testimony and deviated in important respects from his WRI. The WRI states that while he was following his father, the witness "saw five to six Khmer Rouge come out of the forest, pointing their weapons", causing him to run back to his mother. Nearly one hour later, he heard gunshots, leading him to conclude his father was dead.²² His account before this Chamber was completely different:

After I followed my father, I was chased back to the other side of the stream. At that time, my father and together with other man were ordered to go and cut trees so that we could make makeshift shelter. And after I saw the incident or the firing of bullets, I ran -- I was running back to my uncles and mother and told them that they were all killed.²³

One hour after that, the witness gave a third account:

Only the adult were taken away first. And I was small at that time, I follow my father, but I was chased away back to my mother. I was not allowed to go with my father. At that time, I did not come back. I was there to see the incident and to see that my father and other men were taken into the forest. And after a while, I could hear the sound of gunfire. I ran back to my mother and other people and I told them to escape but they did not believe me. [...] After the sounds of the gunfire, I ran back to them and I told them to escape but they did not believe me.²⁴

Sâm Sithy cannot remember if he was scared off by the sight of cadres with guns or his own father being brutally murdered. He cannot remember if he ran off of his own volition or if he was chased away. He cannot remember if he waited patiently with his mother and aunts for a full hour until he heard gunshots in the distance, if he hid in the

²⁰ *Ibid.*, p. 24.

²¹ *Ibid.*, p. 25.

²² WRI of Sâm Sithy, ERN 00275139.

²³ Transcript of Sâm Sithy's testimony, p. 35 (emphasis added).

²⁴ *Ibid.*, p. 61

forest and returned to his mother only after hearing those gunshots, or if he witnessed his father's bloody execution before racing back to his mother in, one would assume, a hysterical panic.

12. When confronted with these contradictions, Sãm Sithy was unable to reconcile them. Instead, his response was to switch his account back to the one reflected in the WRI – immediately after the relevant passage was read to him by defence counsel. This tactic was exactly the same one he employed in response to counsel's earlier reminder that the men were separated from the women before being killed.²⁵ Sãm Sithy accordingly testified that he followed his father until he saw armed forces emerge from the forest and draw their weapons (not when he heard gunshots or when he saw those shots fired), that he ran back to his mother (instead of being chased back), and that he heard gunshots an hour after reaching his mother (not that he ran back to his mother immediately upon hearing them). Any witness so willing to model his story after the version most directly within his field of vision is plainly not credible.
13. Sãm Sithy furthermore contradicted his own account of which members of his family were separated at the stream in Prey Rong Khla with the adult males. In his WRI, Sãm Sithy claims that after the men were led off at Prey Rong Khla, only "women and children" remained.²⁶ He similarly describes returning to "the group of thirty women including my mother and my siblings" after following the men into the forest.²⁷ Yet, during his appearance before this Chamber, Sãm Sithy repeatedly testified that his "uncles" remained with his mother and his aunts after his father was supposedly taken to be executed.²⁸ He claims to remember specifically being present at the "execution site" where his "mother and uncle, aunts and relative" were "hit by bullets".²⁹ Just over three hours later, Sãm Sithy contradicted himself again, reverting to his WRI in asserting that his uncles and their grown sons were taken together with the men.³⁰ He

²⁵ *Ibid.*, pp. 62-65.

²⁶ WRI of Sãm Sithy, ERN 00275139.

²⁷ *Ibid.*, ERN 00275139.

²⁸ Transcript of Sãm Sithy's testimony, p. 35. Although it is not absolutely clear throughout Sãm Sithy's testimony whether the "uncles" he is describing are his parents' brothers, other male relatives or otherwise, it is clear that they are adult males.

²⁹ *Ibid.*, p. 38.

³⁰ *Ibid.*, pp. 96, 117.

then “ran back to tell my mother and my aunts” – his uncles are apparently no longer present – “that my father and the men were taken away and killed.”³¹

C. Sâm Sithy gave directly inconsistent accounts of the members of his family who survived

14. Sâm Sithy also gave contradictory testimony concerning the number and identity of his family members who survived the alleged incident. Sâm Sithy testified that he was the eldest of five children, with two younger sisters and two younger brothers.³² He testified that as of 17 April 1975 he lived with his four siblings along with his parents in a single home.³³ Sâm Sithy claims that during the incident at Prey Rong Khla, “two of my younger siblings were killed”.³⁴ Yet Sâm Sithy also counts only one survivor among his four siblings.³⁵ Sâm Sithy accordingly failed to give consistent testimony even about how many of his own siblings were killed.

D. Sâm Sithy gave contradictory accounts of his return to Wat Chrak Sdech

15. Sâm Sithy testified that once he escaped the B-52 crater, he returned to Wat Chrak Sdech, the same location from which he and his family departed toward Prey Rong Khla. Sâm Sithy testified that the original journey from Wat Chrak Sdech to Prey Rong Khla took between one and two hours.³⁶ Yet Sâm Sithy also told the CIJs that in order to make this exact same trip in reverse – from Prey Rong Khla back to Wat Chrak Sdech – “[t]he four of us including my little sister and cousins ran for one night before arriving back at Watt Chrak Sdech.”³⁷
16. Sâm Sithy then gave directly contradictory accounts of how the “thousands” of people still gathered at Wat Chrek Sdaech were informed of the killings at Prey Rong Khla. Sâm Sithy first testified repeatedly that when he returned to Wat Chrak Sdech, those still gathered there already knew that his parents were dead. He explained:

We were walking towards Chrak Sdech pagoda. And when we arrived at that pagoda, there were relatives and neighbours who saw me and knew that I had been led to the pit to be killed and I was helped by them. These people

³¹ *Ibid.*, p. 26 (emphasis added).

³² *Ibid.*, pp. 12, 89.

³³ *Ibid.*, p. 89.

³⁴ *Ibid.*, p. 12.

³⁵ *Ibid.*, pp. 40, 43-44.

³⁶ *Ibid.*, pp. 58-59.

³⁷ WRI of Sâm Sithy, ERN 00275140.

knew that my parents had been killed already and during that time the guards tried to search for us, four of us who survived the killing.³⁸

He explained again:

After we left the pit, I held hand of my sibling, and we ran back into Wat Chrak pagoda and people who knew us gave us some food to eat. And then I walked around from one place to the other.³⁹

17. Yet, Sâm Sithy later said the opposite:

And then I was asked about the whereabouts of my parents, then I whispered to them that they had been killed; they had been shot dead. And of course, the word by mouth spread from one person to the next, and then it spread out through the entire premises of the pagoda, and we had to hide ourselves.⁴⁰

18. Importantly, the significance of this contradiction extends well beyond the mere question of whether those assembled at the Wat knew about the events at Prey Rong Khla before Sâm Sithy returned. Sâm Sithy testified before both the CIJs and the Supreme Court Chamber that upon his return to the Wat, “the information about the killing of my parents and the others spread throughout the pagoda and caused confusion.”⁴¹ This confusion supposedly led to loudspeaker announcements from CPNLAF troops warning those gathered not to believe this propaganda, and ultimately to the departure of thousands of people toward their home villages. The timing of this entire sequence hinges on Sâm Sithy’s claim that he described the killings to uninformed relatives at Wat Chrek Sdech after his arrival, causing this story to “spread from one person to the next” and trigger the mass exodus from the pagoda. Yet, most of Sâm Sithy’s testimony before this Chamber was that the information which caused this panic was already known when he arrived at the Wat. It defies common sense to believe that Sâm Sithy is merely confused about this crucial detail which supposedly had such significant consequences and set the stage for the entire next stage of his journey.

³⁸ Transcript of Sâm Sithy’s testimony, p. 16.

³⁹ *Ibid.*, p. 40.

⁴⁰ *Ibid.*, p. 118.

⁴¹ WRI of Sâm Sithy, ERN 00275140.

E. No corroborating evidence exists

19. Paired with these considerable gaps and inconsistencies is a total absence of corroborating evidence. No witness, civil party, victim or academic makes any reference to a gathering of “thousands” of families at Wat Chrak Sdek, nor of any executions in the immediate vicinity of the Wat. No mass graves – indeed, not a single dead body – has ever been found. There is no other mention of Wat Chrak Sdech anywhere on the case file for any purpose. The only reference to Chrak Sdech of any significance comes from a refugee interviewed by Heder and Matsushita who moved to the village in December 1973 and “never heard of any capture of agents or LON NOL soldiers”.⁴²
20. The only evidence which does exist directly contradicts Sâm Sithy’s testimony. According to the DC-Cam mapping project, there was an execution site in Kampong Chhnang called Prey Rong Khla – but this site is nearly 70 kilometres from Wat Chrak Sdech in Boribour district,⁴³ a distance Sâm Sithy claims to have traversed in about one hour. Indeed, Prey Rong Khla is nowhere near the trajectory of Sâm Sithy’s journey in April 1975. Sâm Sithy described walking southwest from Ph’er Village (near Kampong Chhnang town) toward Khlong Popok and Phnom Chumrey before turning southeast toward Wat Chrak Sdech. Yet, Prey Rong Khla is a considerable distance northwest of Sâm Sithy’s point of departure in Ph’er Village; exactly the opposite of the direction in which he claims to have travelled. Either Prey Rong Khla was so far from Wat Chrak Sdech as to render Sâm Sithy’s account physically impossible, or nothing at all confirms its existence.

F. Sâm Sithy’s story is implausible

21. Only one common thread links these varied accounts of Sâm Sithy’s story, and that is Sâm Sithy: his courage, heroism and forethought at the tender age of fourteen – indeed, his general *importance* – among the thousands of people he insists were gathered at Wat Chrak Sdech. Sâm Sithy alone was brave enough to follow his father into the forest, then return to the stream in an effort to save his mother, siblings, aunts and (possibly) his uncles. Sâm Sithy alone was clever enough to play dead at Prey Rong Khla, and to survive, miraculously, along with no one other than his sister and two cousins. Sâm

⁴² E3/1714, ‘Interviews with Kampuchean Refugees at Thai-Cambodia Border’, Feb-Mar 1980, ERN 00170739.

⁴³ E3/2763, ‘List of burial sites’, 18 Feb 2008, ERN 00379099, No. 115.

Sithy alone knew to use “military tactics” to escape the B-52 crater and lead his sister and two cousins back to the Wat. It was precisely Sâm Sithy and his three younger relatives who were the four lone survivors – not just among the seven families he accompanied to Prey Rong Khla, but among the thousands of potential victims gathered at Wat Chrak Sdech. Indeed, it was Sâm Sithy’s return to Wat Chrak Sdech and his shrewd manoeuvrings amidst a manhunt by CPNLAF troops which singlehandedly triggered sufficient confusion to suddenly cause “thousands” of people to leave the Wat after (seemingly) days of waiting. Sâm Sithy is, according to Sâm Sithy, a most fearless hero.

22. Sâm Sithy’s efforts to endow this story with a veneer of credibility only highlight its sheer improbability. Sâm Sithy claims that his remarkable escape from the B-52 crater was facilitated by CPNLAF troops, who hurried through the executions because “it was about to rain”.⁴⁴ According to Sâm Sithy, six CPNLAF troops armed with AK-47s and well-versed in the CPK’s supposed policy to “smash enemies” for even the slightest error, failed to carry out their orders to execute the most important enemies of the Party because they were scared that it was about to rain. Not surprisingly, Sâm Sithy himself did not remember this fantastical sequence for the first hour of his testimony, stating that “it was raining” already when the executions took place.⁴⁵ Only later did he decide that an imminent downpour caused the CPNLAF troops to depart.⁴⁶
23. Nor was Sâm Sithy’s explanation for how he survived this supposed massacre credible. Sâm Sithy testified that approximately thirty women and children⁴⁷ were in a B-52 crater surrounded by five or six CPNLAF troops carrying AK-47s. Sâm Sithy claims that although these five or six CPNLAF soldiers fired indiscriminately from short range at thirty people in a confined space, they managed to miss so many people that they were forced to try clubbing the survivors in the head in order to kill them. Sâm Sithy, a fourteen year old teenager, avoided this rainstorm of short-range fire simply by hiding behind his mother.⁴⁸

⁴⁴ Transcript of Sâm Sithy’s testimony, pp. 29, 42, 117.

⁴⁵ *Ibid.*, p. 16.

⁴⁶ *Ibid.*, pp. 29, 42, 117.

⁴⁷ The witness stated that there were seven families, each with five to twelve members, and that the twelve adult men among the seven families had been separated prior to the incident he survived at the B-52 crater. *See ibid.*, p. 23.

⁴⁸ *Ibid.*, p. 28.

24. Most extraordinary about Sâ m Sithy's testimony may be that, despite being held at Wat Chrak Sdech with "thousands" of people, including relatives and other acquaintances of his parents, and travelling from Wat Chrak Sdech to Prey ROUNG KHLA with seven families, including several uncles, cousins and other relatives, Sâ m Sithy was unable to produce the name of a single person killed by CPNLA forces, nor of anyone outside of these seven families detained at Wat Chrak Sdech. Indeed, Sâ m Sithy claims to recall the occupation of two of the men in this latter group even while he was unable to identify them by name.⁴⁹ The relevant exchange, in which both defence counsel and the President made several futile attempts to elicit this information, is worth quoting in full:

Q. Let me ask you about the survivors, because I did a quick check on my computer and nobody ever talks about the Chrak Sdech pagoda in describing the events that you relate, nobody in the case file. You said that there were thousands of people, that there were people you knew well, and that you went back to that place to join up again with the people who were close to you. And apart from your cousin, who you've told us about, can you tell us the names of anybody else who is still alive, or give us any kind of information that would help us to identify other people who might have been at that pagoda at that time, and who would still be alive today?

A. Yes, I can do that. However, I cannot force them to appear before the Chamber, and it would be better for you to go and meet them at their respective place of residence. And there are several of them who are related to my parents. After I met them they asked about the whereabouts of my parents

MR. PRESIDENT:

Mr. Witness, please answer briefly and precisely. And your long response leads to the waste of time. Just mention briefly who else is still alive today.

MR. SAM SITHY:

A. There are some of my relatives who are still alive.

BY MR. VERCKEN:

Q. Can you give us a few names?

MR. SAM SITHY:

A. I cannot do that now since I do not know their real names.⁵⁰

25. Rather than seek to rehabilitate Sâ m Sithy's testimony – perhaps by seeking to adduce some corroborating detail – the Co-Prosecutors barely made reference to these events

⁴⁹ *Ibid.*, pp. 22-24.

⁵⁰ *Ibid.*, pp. 118-120. *See also*, p. 22 (witness volunteering that he could not remember the names of the those among the seven families brought to Prey ROUNG KHLA).

during their examination of the witness. Instead, they focussed their questioning almost entirely on issues of no relevance to the Appeal or, in some cases, the entirety of Case 002.⁵¹ The Co-Prosecutors continued in this approach to examining the witness notwithstanding repeated objections from defence counsel.⁵² This strategy worked: for this brief period of his appearance before the Chamber, Sâm Sithy managed to avoid contradicting himself. For the Co-Prosecutors, the less attention paid to Sâm Sithy's tale, the better.

III. ARGUMENT

26. As the Appeal demonstrates, only the most limited eyewitness testimony of the fate of Khmer Republic officials on or around 17 April 1975 exists in any form on the case file. The only person to give any such testimony before the Trial Chamber was Kim Vanddy, whose evidence concerned the death of his uncle prior to the termination of hostilities,⁵³ as the Co-Prosecutors concede.⁵⁴ Numerous accounts on the case file – in fact, not merely on the case file, but among the arbitrary selection of roughly two dozen documents cited in the Judgment specifically for the purpose of proving that Khmer Republic soldiers were killed – establish that Khmer Republic soldiers and officials arrested in the days after 17 April 1975 were transferred to detention centres for brief periods of time before being released into cooperatives.⁵⁵ Sâm Sithy is accordingly an extreme outlier: he is the only person to ever give a first-hand account before the investigating judges or any Chamber of this Tribunal indicating that Khmer Republic soldiers who were arrested and removed during their evacuation from the cities were subsequently killed. Indeed, Sâm Sithy's account is the only one on the case file in any

⁵¹ See e.g., *ibid.*, pp. 76-79, 81-82.

⁵² *Ibid.*, pp. 79-80, 93, 99, 101, 105.

⁵³ **E1/148.1**, 'Transcript of Trial Proceedings in Case 002' (Kim Vanddy), 5 Dec 2012, p. 83:11-18; Appeal, para. 593.

⁵⁴ **F17/1**, 'Co-Prosecutors' Response to Case 002/01 Appeals', 24 Apr 2015 ('Co-Prosecutors' Response to the Appeal'), para. 165.

⁵⁵ See e.g., **E3/5397**, 'Civil Party Application of MEY Navy', 30 May 2008, ERN 00834021 (describing being evacuated to a "worksite for former government workers"); **E3/4822**, 'Civil Party Application of EAM Tres', 25 Dec 2008, ERN 00893354 (Khmer Republic soldiers sent for re-education along with 500 other soldiers); **E3/5232**, 'Written Record of Interview of Kung Samat', 22 Dec 2008, ERN 00279257 (Khmer Republic soldiers separated from a larger group were brought to live in different cooperatives); **E3/5211**, 'Written Record of Interview of CHUCH Punlork', 21 Jan 2009, ERN 00275399 (Khmer Republic soldiers gathered following an announcement by a CPNLF soldier were brought to work the rice fields); **E3/5598**, 'DC-CAM Statement of KHAT Khe', 15 Jan 2005, ERN 00874736 (soldiers who surrendered and removed their uniforms "were allowed to survive" and "were not sent out"); **E3/1593**, 'The Pol Pot Regime: Race Power and Genocide in Cambodia under the Khmer Rouge, 1975-79', ERN 00678599 (describing nearly a thousand soldiers and officials sent for re-education in April 1975 and released in the months which followed); see also, Appeal, paras 585, 596; **E295/6/3**, 'Nuon Chea's Closing Submissions in Case 002/01', 26 Sep 2013, para. 394.

form – hearsay, or otherwise, including civil party applications and anonymous out of court statements – purporting to describe the execution of the families of Khmer Republic officials in any period remotely proximate to the liberation of the country.

27. As the Appeal further demonstrates, international standards require that a Trial Chamber assess the facts established by live testimony first before subsequently considering whether out-of-court statements corroborate the testimony heard before the Chamber.⁵⁶ A Trial Chamber should be especially vigilant in assessing out-of-court statements on which the prosecution relies to establish a widespread pattern of conduct as a means to prove individual criminal responsibility.⁵⁷ A Trial Chamber should similarly consider excluding out-of-court statements which concern a “live issue” between the parties, and to afford reduced weight to any such statements admitted into evidence.⁵⁸ Even these standards are inadequate in these proceedings, because unlike the *ad hoc* tribunals from which they were derived, the Defence was excluded entirely from the investigative process even while an extensive role was accorded to both the Co-Prosecutors and the civil parties.⁵⁹ Special considerations furthermore apply to civil party applications and victim complaints, which are prepared for the purpose of litigation without any form of inquiry by any judicial authority or any party to the proceedings aside from the civil parties themselves.⁶⁰ These documents would have been excluded altogether from trials at the *ad hoc* tribunals and, given the absolute bar prohibiting Nuon Chea from gathering exculpatory evidence, the Trial Chamber’s extensive reliance on these documents for substantive purposes constituted a flagrant violation of the equality of arms. On the Trial Chamber’s own analysis, they are entitled to “little, if any weight”.⁶¹
28. In this case, the application of these standards requires that Sâm Sithy’s testimony be subject to the closest possible scrutiny. The Co-Prosecutors insist that the supposedly widespread nature of executions on or around 17 April 1975 is crucial to proving the existence of a JCE policy to target Khmer Republic soldiers and officials.⁶² Nuon Chea fiercely disputes the Trial Chamber’s finding that these executions occurred, a position

⁵⁶ Appeal, para. 161.

⁵⁷ Appeal, para. 162.

⁵⁸ Appeal, para. 162.

⁵⁹ Appeal, paras 31-32, 133-134.

⁶⁰ Appeal, paras 156, 165.

⁶¹ Appeal, para. 165.

⁶² Co-Prosecutors’ Response to the Appeal, para. 51.

supported by much of the evidence cited by the Trial Chamber itself in the Judgment.⁶³ Civil Party applications, victim complaints and other unauthenticated out-of-court statements constitute the bulk of the evidence cited in the Judgment. Under these circumstances, a careful assessment of Sâm Sithy's testimony – including the quality of the corroborating evidence – is an essential foundation upon which this Chamber's assessment of the probative value of the (often exculpatory) evidence cited in the Judgment must be based.⁶⁴

29. As a consequence of the total exclusion of defence counsel from all stages of the investigation no prior effort to contest or corroborate the substance of Sâm Sithy's testimony was possible. Even so, the Defence filed repeated requests for investigative action with the CIJs seeking more robust efforts to test the reliability of witness testimony and to obtain corroborating evidence.⁶⁵ During trial, the Defence sought Sâm Sithy's appearance for testimony but was rebuffed by the Trial Chamber.⁶⁶ No other avenues for relief were available.
30. As this Chamber has recently held, Rule 104(1) confers on it a broad discretion to call any new evidence which it deems to be in the interests of justice.⁶⁷ This determination includes an assessment of whether the evidence is conducive to ascertaining the truth. In light of the importance of Sâm Sithy's testimony in the context of the evidence cited in the Judgment, the numerous contradictions in his testimony and the absence of any corroborating evidence on the record, the investigative acts set out in paragraph 31 below, patently meet this standard.

⁶³ See para. 26, above.

⁶⁴ As the Appeal argues, there are multiple reasons why a *de novo* review of this evidence is appropriate. First, it is within this Chamber's jurisdiction as an appellate court within the Cambodian judicial system. See Appeal, paras 2-11. Second, the Trial Chamber made considerable errors throughout its analysis of the JCE targeting policy. These errors were particularly serious in its assessment of the treatment of Khmer Republic soldiers and officials prior to 1975 and Party Center instructions in that regard following liberation, including its continual misrepresentation of the evidence and its systematic failure to acknowledge exculpatory evidence from sources it repeatedly deemed reliable. See Appeal, paras 529-573 (demonstrating the errors in the Judgment). These errors justify a *de novo* review on Appeal. See Appeal, para. 573 (citing the relevant authority). The factors outlined here are, in any event, central to this Chamber's assessment of the findings in the Judgment on any standard of review.

⁶⁵ **D318**, 'Nineteenth Request for Investigative Action', 13 Jan 2010; **D319**, 'Twentieth Request for Investigative Action', 13 Jan 2010; **D320**, 'Twenty-First Request for Investigative Action', 15 Jan 2010; **D336**, 'Twenty-Second Request for Investigative Action', 26 Jan 2010; **D338**, 'Twenty-Third Request for Investigative Action', 27 Jan 2010; **D339**, 'Twenty-Fourth Request for Investigative Action', 2 Feb 2010; **D340**, 'Twenty-Fifth Request for Investigative Action', 3 Feb 2010.

⁶⁶ **E291/2**, 'Request to Summons Witnesses in Respect of Alleged Policy of Targeting Khmer Republic Officials', 25 Jul 2013; Appeal, para. 85.

⁶⁷ Decision on Nuon Chea's Requests to Call Witnesses, para. 17.

IV. RELIEF SOUGHT

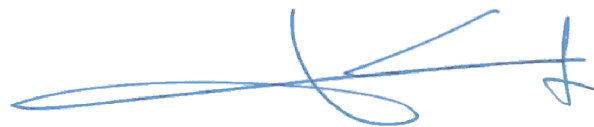
31. The Defence accordingly requests that the Supreme Court Chamber, acting pursuant to Rule 104(1), appoint an investigator for the purpose of gathering evidence corroborating Sâm Sithy's testimony, including, at a minimum, the following investigative steps:
- (a) interview Sâm Sithy's female cousin, Som Kim Sok, residing in Trea Cheung village, Srae Thmei commune, Rolea B'ier district, Kampong Chhnang province;
 - (b) determine whether a location named Prey ROUNG Khla exists within approximately two kilometres of Wat Chrak Sdech, and if so, attempt to locate a grave site through physical evidence and/or interviews with local residents;
 - (c) interview local residents in Chrak Sdech in an effort to confirm the content of Sâm Sithy's testimony; and
 - (d) obtain the *Koh Santepheap* newspaper article in which Sâm Sithy's interview is featured.

In the alternative, the Defence hereby requests permission to conduct its own investigation into these same facts.

CO-LAWYERS FOR NUON CHEA



SON Arun



Victor KOPPE