**BEFORE THE SUPREME COURT CHAMBER**

**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**FILING DETAILS**

ឯកសារដើម
ORIGINAL/ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ (Date): 07-Oct-2015, 13:30
CMS/CFO: Sann Rada

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

**Filing Party:** Nuon Chea Defence Team

**Filed To:** Supreme Court Chamber

**Original Language**: English

**Date of Document:** 07 October 2015

**CLASSIFICATION**

**Classification Suggested by the Filing Party:** PUBLIC

**Classification of the Supreme Court Chamber:**

**Classification Status:**

**Review of Interim Classification:**

**Records Officer Name:**

**Signature:**

---

# REPLY TO CO-PROSECUTORS' RESPONSE TO REQUEST FOR INVESTIGATIVE ACTION INTO EVENTS DESCRIBED DURING THE TESTIMONY OF SÂM SITHY

---

**Filed By**

**Nuon Chea Defence Team:**
SON Arun
Victor KOPPE
LIV Sovanna
PRUM Phalla
Doreen CHEN
Xiaoyang NIE
Marina HAKKOU

**Distribution**

**Co-Lawyers for Khieu Samphân:**
KONG Sam Onn
Anta GUISSÉ
Arthur VERCKEN

**Co-Prosecutors:**
CHEA Leang
Nicholas KOUMJIAN

**Co-Lawyers for the Civil Parties:**
PICH Ang
Marie GUIRAUD

## I. INTRODUCTION

1. On 7 September 2015, the Co-Lawyers for Nuon Chea ("the Defence") filed a request that this Chamber appoint an investigator for the purpose of assessing the credibility of Sâm Sithy's testimony before this Chamber on 3 July 2015 ("Request").[1] The Request reiterated key arguments set out in Nuon Chea's Appeal[2] against the Judgment in Case 002/01,[3] including that Nuon Chea's right to investigate the charges and confront the evidence against him was systematically infringed during the Case 002 proceedings[4] and that Sâm Sithy's evidence proved critical in the Judgment as the only eyewitness account anywhere on the case file purporting to describe the execution of Khmer Republic soldiers arrested during their evacuation from cities and towns in April 1975.[5] The Request further argued that Sâm Sithy's testimony before this Chamber was lacking in numerous critical details, marked by inaccuracies and inconsistencies, and not corroborated by a single other document or witness or, needless to say, any forensic evidence.[6] On 18 September 2015, both the Co-Prosecutors and the Civil Parties responded.[7] The Defence hereby files the instant Reply to the Co-Prosecutors' Response.

## II. ARGUMENT

### A. The Co-Prosecutors misrepresent the purpose of the Request and the importance of Sâm Sithy's testimony

2. The general thrust of the Co-Prosecutors' Response is that the Request is a belated and transparent effort to remedy the harm inflicted on Nuon Chea's case by Sâm Sithy's testimony. They argue that Sâm Sithy is only one among "scores" of other witnesses describing a pattern of targeting Khmer Republic soldiers and officials,[8] that his testimony was consistent and unimpeachably reliable, and that it is neither practical nor

[1] **F28**, 'Request for Investigative Action into Events Described During the Testimony of Sam Sithy' 7 September 2015 ("Request").
[2] **F16**, 'Nuon Chea's Appeal against the Judgement in Case 002/01', 29 December 2014 ("Appeal").
[3] **E313**, 'Case 002/01 Judgement', 7 August 2014 ("Judgement").
[4] **F28,** Request, para. 29; **F16,** Appeal, paras 31-32, 133-165.
[5] **F28,** Request, paras 26-28; **F16,** Appeal, paras 581-596.
[6] **F28,** Request, paras 6-25.
[7] **F28/1**, 'Civil Party Lead Co-Lawyers'Response to Nuon Chea's Investigatory Requests Relating to Sam Sithy', 18 September 2015 ("Civil Party Response"); **F28/2** , 'Co-Prosecutors' Response to Nuon Chea's Request for Investigative Action into Events Described During the Testimony of Sam Sithy', 18 September 2015 ("Co-Prosecutors' Response").
[8] **F28/2,** Co-Prosecutors' Response, para. 37.

necessary to obtain corroborating evidence for every one of the "hundreds" of witnesses heard in complex criminal cases.[9] The purpose of these submissions is not to address the significance of Sâm Sithy's testimony or the need to corroborate it. The purpose of these submissions is to create a false appearance of inevitability about the evidence on record and cow this Chamber into submission by the use of melodramatic fear-mongering.

3. The Co-Prosecutors seem to assume that the only purpose of hearing Sâm Sithy on appeal was to verify a gap in the audio recording of his interview. Yet the Appeal was based on a far broader allegation that the Trial Chamber made repeated errors of law in its assessment of the evidence in the Judgment, including *inter alia* the standards it applied to the admission of out of court statements into evidence,[10] its treatment of the probative value of those statements in the Judgment,[11] and its assessment of the credibility and reliability of witnesses at trial.[12] The Trial Chamber's use of Sâm Sithy's WRI was an acute manifestation of this pattern in light of the importance of his testimony in the larger context of the evidence. It was indeed extraordinary that the one single eyewitness account of killings amidst a sea of rumours and suppositions vanished from the audio recording. But the question of the reliability of Sâm Sithy's evidence did not begin and end with the possibility that it was the product of a fraudulent conspiracy of the investigating judges. This would be a low bar indeed. Defence filings during the course of the trial demonstrated that the audio recordings of numerous WRIs contained significant irregularities,[13] yet the Appeal contains no submissions about any of these witnesses. The Defence sought to hear Sâm Sithy *specifically* based on the totality of the circumstances, including his status as the only eyewitness to a supposed pattern of killing, the absence of any corroborating evidence and the striking gap in the audio recording. Far from an effort to "recharacterise" Sâm Sithy's testimony or "recover" from a wound or "self-inflected damage", the Request follows directly from the fundamental complaint about the Trial Chamber's assessment of the evidence in the Judgment: that instead of subjecting the evidence to the genuine scrutiny reflected in

[9] **F28/2**, Co-Prosecutors' Response, para. 35.
[10] **F16,** Appeal, paras 154-162.
[11] **F16,** Appeal, paras 163-165.
[12] **F16,** Appeal, paras 172-211.
[13] **E142**, 'Request for Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews', 17 November 2011.

and required by the case law,[14] the Trial Chamber "swallowed whole" [15] every morsel of inculpatory evidence while reflexively discarding anything exculpatory.

4. As is generally their approach in their response to the Appeal,[16] the Co-Prosecutors respond to our specific arguments about the importance of Sâm Sithy's evidence with generalities. They cite boilerplate jurisprudence to the effect that corroboration is not a prerequisite to reliability *in general*, but they fail to make reference to any of our arguments that corroboration is essential to substantiate the account of this witness in particular. The civil parties nominally assert that the Trial Chamber's use of Sâm Sithy's evidence in relation to the existence of the relevant JCE policy was "limited" and "meagre", but satisfy themselves with a generalized reference to the number of paragraphs discussing the issue in the Judgment.[17] Neither party contests that Sâm Sithy is the only known eyewitness to a practice which the Judgment finds was widespread across the country, and without which the convictions entered for the crimes committed at Tuol Po Chrey clearly could not stand.[18]

5. Ultimately, the credibility of Sâm Sithy's testimony is a matter within the discretion of this Chamber. But the Co-Prosecutors' assertion that Sâm Sithy's testimony is "extremely credible" is nothing short of ridiculous. The Trial Chamber relied on Sâm Sithy's evidence as the sole basis of a finding that dozens of soldiers and their families were murdered. Not a single other reference to any part of this story appears in any form anywhere on the case file. The prosecution has failed to produce a single dead body. Neither Sâm Sithy nor the Co-Prosecutors nor the Civil Parties can name a single one of the supposed victims, aside from Sâm Sithy's claim that his parents were among them. Yet it is this same body of evidence purporting to substantiate the alleged massacre at Prey Roung Khla which stands as the *most* compelling on the case file.[19] No honest and experienced practitioner would fail to recognize these significant gaps in the evidence as a substantial constraint on the ability of the prosecution to prove its case.

---

[14] *See* paras 8 - 9, *infra*.
[15] **F16,** Appeal, para. 555.
[16] This attitude toward the Appeal permeates the Co-Prosecutors' response brief. While this is not easily demonstrated in this brief Reply, it will be reflected throughout our submissions in reply.
[17] **F28/1,** Civil Party Response, paras 34-35.
[18] *See* **F17/1**, 'Co-Prosecutors' Response to Case 002/01 Appeals', 24 April 2015, para. 51 (acknowledging the importance of this supposed pattern evidence to the Trial Chamber's findings concerning the JCE targeting policy).
[19] Insofar as any supposed policy of targeting Khmer Republic soldiers and officials for execution in the aftermath of liberation is concerned.

6. During trial, the Defence expressed the concern that the usual standards applicable to the assessment of the evidence appear at this Tribunal to be slipping from our grasp. The Defence argued as follows:

> As defence lawyers, we have only one anxiety about the evidence that has been presented about the supposed policy to execute Lon Nol soldiers and officials. It is not that the evidence is strong; it is that the evidence is so weak, so weak that we have become accustomed to it in this courtroom. We fear that, to use an English expression, the Prosecution is "moving the goalposts". In other words, they are changing the standards by which these kinds of charges are usually judged.[20]

7. Nowhere is this "moving of the goalposts" more apparent than in the Co-Prosecutors' Response, in which they claim that in "cases such as these", locating dead bodies and weighing corroborating evidence is not "common practice".[21] The patent falsity of this claim arises from their own submissions, which urge this Chamber to take note of testimony at the ICTY which, they claim, is comparable to Sâm Sithy's. Yet a close review of the authority they rely on (*see infra*) merely serves to illustrate the caution with which this testimony was treated and the sheer volume of the corroborating evidence supporting it. This is perhaps the apex of the Co-Prosecutors' inability to understand the greater significance of the Request and ultimately the issues on appeal. Undoubtedly, no shortage exists of extraordinary witnesses who have testified in criminal trials, international or otherwise. The issue is not what witnesses have said on the stand but how that evidence has been treated in the judgment.

8. As the Co-Prosecutors observe, witness "Q" testified in the *Krstić* case to having survived a mass killing at the "Pilica School Detention Site".[22] In the *Krstić* Trial Judgment, the Pilica School Detention Site was the seventh successive crime site considered as part of the Trial Chamber's analysis of the role of the Drina Corps in the execution of Bosnian Muslim men from Srebenica. The Chamber's assessment of each of the first six crime sites includes a detailed analysis of eyewitness testimony given live before the Chamber and forensic analysis based on bodies exhumed from mass graves. The Chamber made an individualized assessment of the Drina Corps' responsibility for each massacre, concluding multiple times that such responsibility

[20] T. 08 July 2013 (Case 002/01 Transcript **E1/219.1**), p..46, lns. 20 – p. 47, lns. 3
[21] **F28/2,** Co-Prosecutors' Response, para. 35.
[22] **F28/2,** Co-Prosecutors' Response, fn. 64.

could not be established beyond a reasonable doubt on the basis of the evidence.[23] When the *Krstić* Trial Chamber finally turned to its analysis of the Pilica School Detention Site, it relied first on the eyewitness testimony of Drazen Erdemović, a soldier who "participated in the mass execution", pled guilty to crimes against humanity in connection with those crimes, and described his personal role in the killings.[24] After describing the testimony of Mr. Erdemović, Witness Q and a second eyewitness survivor, the *Krstić* Trial Chamber then found that the "testimony of survivors has other support in the Trial Record". This "other support" included, *inter alia*, contemporaneous aerial photographs showing large numbers of dead bodies, forensic examinations conducted on exhumed corpses showing that "where cause of death could be determined it was gunshot wounds", eighty-three ligatures and two cloth blindfolds and, "in this grave, positive identification[s…] for 13 individuals who were missing following the takeover of Srebrenica: all of them Bosnian Muslim men."[25] While the evidence considered by the *Krstić* Trial Chamber in connection with the Pilica School Detention Site was so extensive that a full account would occupy the entire space of this Reply, suffice to say that the Chamber's analysis continued for an additional six paragraphs. All told, the Chamber analyzed more than ten crime sites, subjecting each one to a similarly exacting analysis. In this case, the Trial Chamber found Nuon Chea criminally responsible for the supposed executions at Prey Roung Khla based on the uncorroborated out of court statement of a witness whose name does not appear in the body of the Judgment. *The name of the crime site* does not appear *anywhere* in the Judgment.

9. The analysis is similar in *Krajišnik*, the second example proffered by the Co-Prosecutors.[26] In *Krajišnik*, the ICTY Trial Chamber individually analysed the evidence of crimes charges at each of thirty-three municipalities throughout Bosnia-Herzegovina.[27] As in *Krstić*, the *Krajišnik* Trial Chamber relied on extensive eyewitness

[23] *See e.g.*, *Prosecutor v. Krstić,* Case No. IT-98-33-T, Trial Judgment, 02 Aug 2001 ("*Krstić* Trial Judgement"), paras 200, 204.
[24] *Krstić* Trial Judgment, para. 234.
[25] *Krstić* Trial Judgment, para. 237.
[26] As the Appeal demonstrates, the *Krajišnik* Trial Judgment expressed its prudence explicitly, stating that it "has not generally relied" on anonymous hearsay evidence. This was quite unlike the Trial Chamber in Case 002/01, which cited to anonymous hearsay and out of court evidence freely and without a word of explanation, discussion or analysis. *See* Appeal, paras 164, 170.
[27] *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Trial Judgment, 27 Sep 2006 ("*Krajišnik* Trial Judgment"), paras 113-701.

testimony,[28] entering findings about the number and identity of people killed or otherwise mistreated at precise locations in each municipality.[29] The specific survivor testimony identified by the Co-Prosecutors concerned events in Kalinovik municipality, the twenty-ninth successive location under consideration in the judgment.[30] The particular incident described by the witness was corroborated by an out of court statement of another witness,[31] supplemented further by adjudicated facts previously established beyond a reasonable doubt in relation to similar incidents in the same municipality.[32]

10. While these tangible differences between the Judgment in this case and those relied upon by the Co-Prosecutors are considerable, a full appreciation of the Trial Chamber's failure to genuinely assess the evidence is best appreciated through a full perusal of the relevant documents. Any reader with even a passing familiarity with the Judgment in this case could not help but be struck by the quality of the evidence and the specificity of the analysis in *Krstić* and *Krajišnik*, the very precedents which the Co-Prosecutors argue should put this Chamber at ease about Sâm Sithy's testimony. The bare fact that witness Q testified in one trial and Sâm Sithy in the other – like the fact that Sâm Sithy's WRI appears not to have been the product of deliberate fraud – does not resolve the task presently before this Chamber.

11. Lurking in the shadows of the Co-Prosecutors' Response is a pair of unstated assumptions that no attorney would dare make explicit: that the experience described in Sâm Sithy's testimony was so awful that he could not possibly have made it up, and that Nuon Chea is so obviously guilty that he must surely have intended it. No other explanation exists for the Co-Prosecutors' brazen claim that the uncorroborated account of the one and only eyewitness to a supposedly nationwide pattern of conduct is so "extremely credible" that no further confirmation of his evidence is necessary. The Co-Prosecutors quietly urge this Chamber to conclude that Sâm Sithy told a bad story about a bad man and must therefore be telling the truth.

---

[28] *See e.g.*, *Krajišnik* Trial Judgment, fns 686-695, 711-719, 739-745.
[29] *See e.g.*, *Krajišnik* Trial Judgment, paras 309, 320, 337.
[30] *Krajišnik* Trial Judgment, paras 660-667.
[31] *Krajišnik* Trial Judgment, fns 1519-1523.
[32] *Krajišnik* Trial Judgment, fns 1526-1528.

12. Reality at international criminal trials is rather different. It is precisely because the thrust of the Co-Prosecutors' Response is equally apparent in the Judgment that our Appeal devotes considerable attention to the dangers of relying on uncorroborated testimony, including the real possibility that supposed victims have simply fabricated their testimony. Nancy Combs demonstrates that inconsistencies in testimony are systematic in international criminal trials and affect a "large proportion" of witnesses.[33] Roel Burgler and Michael Vickery show that refugees at the Thai border were pressured to exaggerate their accounts, that they regularly adopted stories circulating in the public domain as their own, and that they even invented atrocity stories out of whole cloth.[34] Sâm Sithy's testimony is not "extremely credible" just because he told a sad story.

13. Unlike the Co-Prosecutors, the Civil Parties at least seek to engage with the arguments in the Request concerning the importance of Sâm Sithy's evidence. The Civil Parties argue that the Trial Chamber merely described Sâm Sithy's WRI but did not hold beyond a reasonable doubt that the executions he describes occurred.[35] Yet the Civil Parties misunderstand the structure of and findings in the Judgment. Contrary to their analysis, the Trial Chamber held Nuon Chea criminally responsible for the specific executions described in Sâm Sithy's testimony.[36]

14. The first half of the Civil Parties' analysis – that the Trial Chamber failed to analyse Sâm Sithy's WRI and merely asserted that some witnesses described killings – is certainly correct. Indeed, the Trial Chamber's findings of fact concerning the treatment of Khmer Republic soldiers and officials during the evacuation of Phnom Penh – in paragraphs 501 through 515 of the Judgment – studiously avoids any clear finding beyond a reasonable doubt that soldiers were killed. With the exception of a single sentence in paragraph 507, every reference to killing is framed as a description of the evidence instead of a finding made beyond a reasonable doubt.[37] This manner of proceeding allowed the Trial Chamber to describe evidence in the vaguest possible

[33] **F16,** Appeal, para. 118.
[34] **F16,** Appeal, paras 120-122.
[35] **F28/1,** Civil Party Response, paras 28-29. This argument concerns specifically Sâm Sithy's claim that soldiers were executed after they were gathered, the only relevant proposition in his testimony.
[36] **F28/1,** Civil Party Response, paras 28-29.
[37] *See e.g.*, **E313**, Judgment, paras 508 ("some accounts reported that the soldiers were taken to be killed elsewhere"), 511 ("According to Sum Chea, Chea, former regiment commander KOEUN told SUM Chea's division to make such announcement in order to lure in former LON Nol soldiers after which they would be killed"), 513 ("one account describes how those identified as LON Nol soldiers were executed on the spot by young Khmer Rouge soldiers").

terms, assembling citations to the evidence in footnotes without any real assessment of its content, credibility or reliability. It allowed the Trial Chamber to avoid the rigorous analysis which would have been required of findings beyond a reasonable doubt.

15. The Civil Parties are however mistaken that the Trial Chamber did not then parlay this careless summary of the evidence into a conviction for extermination and a finding of criminal responsibility for murder. The Civil Parties' argument appears to assume that every finding in the Judgment which appears under the heading of "legal findings" necessarily concerns only the intent, or *mens rea*, of the perpetrators.[38] Nothing in the meaning of the term "legal findings" nor in the language employed in the Judgment supports this interpretation. It is clear that the "legal findings" concerning crimes charged in connection with the evacuation of Phnom Penh – set out in paragraphs 546 through 574 of the Judgment – includes findings that both the *actus reus* and the *mens rea* of each crime charged was satisfied. These legal findings included the conclusion in paragraph 553 that the *actus reus* for murder was satisfied because "victims who were identified as soldiers or civilian officials of the Khmer Republic during the course of the evacuation were taken aside for execution elsewhere." This finding was based, *inter alia*, on the analysis in paragraph 511, which includes a citation to Sâm Sithy's WRI. The Civil Parties are accordingly mistaken that the Trial Chamber did not hold Nuon Chea criminally responsible for the supposed executions described in Sâm Sithy's testimony.[39]

16. The importance of the Civil Parties' argument is accordingly that it highlights just how deficient the Trial Chamber's analysis of the evidence was in the Judgment. The Trial Chamber said so little about the executions at Prey Roung Khla that a party seeking to secure a conviction chose to construct an elaborate and fundamentally illogical

[38] **F28/1,** Civil Party Response, para. 28.

[39] The Defence notes further that the Co-Prosecutors advance similar arguments in their response to the Appeal, alleging that the Judgment did enter a convictions for murder for each individual killing but rather one single conviction for extermination based on the totality of the evidence. *See* F17/1, para. 144. For reasons to be elaborated in reply to the Co-Prosecutors' response, this argument equally misunderstands the Judgment, which unambiguously found that Nuon Chea was criminally responsible for murder in connection with each killing described in the factual findings of the Judgment.

Equally puzzling is the Civil Parties' claim that our Appeal "does not challenge the reference or reliance to Sâm Sithy's WRI in relation to the legal findings." *See* Civil Party Response, para. 35. The Appeal plainly disputes all of the relevant legal findings. *See e.g.*, Appeal, Section XIB, para. 321 (alleging that the "Trial Chamber erred in law and fact in finding that murder was committed during the Phase I movement through killings of Khmer Republic soldiers" and citing to paras 588-596 of the Appeal, which includes the analysis of Sâm Sithy's WRI in paragraph 595).

argument that the Trial Chamber did not find that the executions took place instead of trying to establish that it would have been appropriate to do so. The Trial Chamber's analysis of the evidence was so limited and so uncritical that a party could read the Judgment and conclude in good faith that the Chamber *did not even rely on it*. The contrast with *Krstić* and *Krajišnik* is extraordinary.

17. Ironically, if the Civil Parties' interpretation of the Judgment were correct, the Trial Chamber's analysis of criminal responsibility would be even more incoherent than even the Defence previously believed (no mean feat). If the Trial Chamber did not in fact find beyond a reasonable doubt that the executions at Prey Roung Khla took place, it could not have relied on these executions for any purpose indispensable to entering a conviction – certainly not to prove the intent of the immediate perpetrators, as the Civil Parties claim the Trial Chamber did in the Judgment (intent to do *what*, if no one was murdered?). Indeed, as demonstrated in paragraph 14, *supra*, the Trial Chamber's approach to Sâm Sithy's WRI was no exception – the Chamber made almost no clear findings beyond a reasonable doubt at all in its "findings of fact" as to the treatment of Khmer Republic soldiers and officials during the evacuation of Phnom Penh. On the Civil Parties' analysis, the Trial Chamber entered a conviction for extermination and found Nuon Chea criminally responsible for murder while finding that almost no particular murders took place. The only plausible explanation would be that the Trial Chamber decided that there were enough out of court, uncorroborated, hearsay accounts of murder that at least some of them must be true. Possibly, some version of this thought process entered the minds of the judges of the Trial Chamber. Needless to say, this analysis would have constituted a gross and flagrant violation of the presumption of innocence.

## B. The Co-Prosecutors employ scare tactics to avoid a critical assessment of the evidence

18. The Co-Prosecutors warn of a parade of horribles which would follow from the relief sought in the Request, and claim these consequences would be consistent with Nuon Chea's "attempts to prolong proceedings" and ensure that this Chamber never reaches a verdict.[40] The Co-Prosecutors warn that should this Chamber interview further witnesses, it would "[u]ndoubtedly" lead to yet further requests to investigate the

[40] **F28/2,** Co-Prosecutors' Response, para. 33.

supposed events described in Sâm Sithy's testimony.[41] Their fear-mongering reaches a fever pitch with the claim that, "[e]xtrapolating Nuon Chea's approach here across every, or even a portion of witnesses whose testimony, written record of interview or civil party application is cited in the Judgment, would involve the SCC in an iterative and interminable process lasting years."[42]

19. These dire and frenzied warnings are grounded in nothing but the Co-Prosecutors' very active imagination. The simple fact is that the Defence has sought to hear exactly one witness on appeal whose testimony was cited in the Judgment: Sâm Sithy. The reasoning in support of that request was detailed and, as already demonstrated, extended well beyond the deficient audio recording of Sâm Sithy's interview.[43] Other requests to hear witnesses before this Chamber, both in the Appeal brief itself and in subsequent requests to admit and obtain evidence – each of which has been equally reasoned – have all concerned evidence which the Trial Chamber chose *not* to consider in the Judgment. Those requests were grounded in Nuon Chea's right to present a defence and the systematic failure to consider exculpatory evidence in the Judgment, an entirely different rationale from the arguments set forth in the Request. In any event, a rather simple safeguard exists against the onslaught predicted by the Co-Prosecutors: if the requests they envisage materialize and this Chamber finds them to be without merit, it can decide to reject them.

20. The Co-Prosecutors' submissions concerning the alleged complexity of locating physical evidence is equally misplaced.[44] The Co-Prosecutors observe that there are "thousands" of mass graves in Cambodia, begging the question as to why not one single body was ever exhumed to substantiate the allegation in the Closing Order that nearly two million people died in Democratic Kampuchea. The Request does not seek to identify the location of thousands of graves, it seeks to identify the location of the one grave which would substantiate the account of the only eyewitness to a supposedly nationwide pattern of conduct. Had the Co-Investigating Judges endeavoured to conduct a forensic examination in connection with even a tiny cross-section of the vast array of crimes with which they charged Nuon Chea, our submissions would have followed from

[41] **F28/2,** Co-Prosecutors' Response, para. 34.
[42] **F28/2,** Co-Prosecutors' Response, para. 34.
[43] *See* para. 3, *supra*.
[44] **F28/2,** Co-Prosecutors' Response, para. 35.

the parameters and the results of that hypothetical investigation. Possibly the Request would not have sought this particular relief. But this alternate universe is not the one this Chamber presently inhabits. Once again, the Co-Prosecutors partake in fanciful abstractions about *every* grave and *every* witness when reality is such that in evidence are *no* graves and a *single* eyewitness. The *Krstić* and *Krajišnik* Trial Chambers would not remotely recognize the trial record in this case.

21. While the Co-Prosecutors claim that Sâm Sithy's testimony is "extremely credible", their conduct suggests something quite a bit different. The Co-Prosecutors' conduct suggests that they want as little discussion about Sâm Sithy's testimony as possible. Despite repeated objections from Defence counsel, they asked the witness almost no questions about the alleged massacre during his appearance before the Chamber. As the hearing reached a close, Defence counsel pleaded with this Chamber to instruct the Co-Prosecutors to engaged substantively with the witness in relation to the purpose of his appearance before the Chamber:

> Mr. President, the Prosecution is making a mockery of this Appeal. It is disgraceful what is happening. Please, intervene.[45]

And then again:

> We are really not interested in this incident. Please, use your last few minutes asking this witness questions about the massacre, Mr. Prosecution.[46]

The Co-Prosecutors' Response is a continuation of this effort to divert as much attention as possible away from the substance of Sâm Sithy's testimony. If indeed the Co-Prosecutors believe that Sâm Sithy's testimony is "extremely credible", they should have no objection to the relief sought in the Request in furtherance of their duty to ascertain the truth. The fig leaf of efficiency they use to disguise their effort to avoid scrutiny of Sâm Sithy's testimony is revealed for what it is by their refusal to even respond to the alternative relief sought in the Request: that this Chamber grant permission to the Nuon Chea Defence to carry out the proposed investigation on its own.

[45] T. 3 July 2015 (Transcript of Appeal Proceedings, **F1/2.1**), p. 101, lns. 21-22.
[46] T. 3 July 2015 (Transcript of Appeal Proceedings, **F1/2.1**),, p. 105, lns. 14-16.

### C. The Co-Prosecutors wrongly diminish the considerable inconsistencies in Sâm Sithy's testimony

22. As the Request demonstrates, Sâm Sithy repeatedly testified for nearly forty minutes that all seven families were marched together from Wat Chrak Sdech to Prey Roung Khla, escorted across a river and executed all at the same time.[47] This testimony was dramatically different from the account Sâm Sithy gave to the Co-Investigating Judges, in which the adult men were first separated from the rest of the group, after which he surreptitiously followed his father into the forest, witnessed the emergence of several armed soldiers, ran back to his mother to tell her what happened, and was subsequently escorted back across the river together with only the women and children, brought to a killing site and fired upon.[48] Only after Sâm Sithy was prompted with the information in his WRI did he change his story to adopt this account before this Chamber.[49]

23. The Co-Prosecutors "most important" response to this alarming contradiction in Sâm Sithy's testimony is that the witness made "several" references to having crossed the river and seeing the armed men prior to having been prompted with this information by Defence counsel. These submissions are nothing short of an effort to confuse the record and mislead this Chamber. The testimony the Co-Prosecutors rely on all concerns Sâm Sithy's supposed trip across the river together with the rest of his family toward the B-52 crater just prior to having been shot at – in his later telling, the second time he crossed the river. Thus, Sâm Sithy testified that "we crossed the river or stream southwards and after we crossed the stream or the river, the armed force took us away and killed."[50] Sâm Sithy testified that "after we crossed the stream or the river we were escorted by these armed soldiers into the caves of Prey Roung Khla and we were all killed."[51] In each case, Sâm Sithy makes no reference to being separated from the adult men, to crossing the river *to follow his father*, to discovering his father was killed, to running back to his mother, or to having witnessed the execution of only the women and children. In each case, Sâm Sithy testified that "all" of the seven families were killed together on one single occasion.[52] The fact Sâm Sithy *did* mention crossing the river but failed to state that he did so *twice* merely highlights the inconsistency. This

[47] **F28,** Request, paras 9-10.
[48] **F28,** Request, paras 4, 9-10.
[49] **F28,** Request, paras 11-12.
[50] T. 3 July 2015 (Transcript of Appeal Proceedings, **F1/2.1**), p. 22, lns. 8-10.
[51] T. 3 July 2015 (Transcript of Appeal Proceedings, **F1/2.1**), p. 23, lns 22-23.
[52] **F28,** Request, para. 9.

"unprompted" testimony which the Co-Prosecutors claim rehabilitates Sâm Sithy's testimony proves exactly the opposite.

24. The Co-Prosecutors also claim that nothing in Sâm Sithy's first forty minutes of testimony contradicts his "more detailed" testimony later on. This is simply not true. Sâm Sithy testified three times that "all" of the seven families were shot at together in his presence. Thus, he testified that after crossing the river escorted by armed soldiers "we were all killed".[53] He testified that "we were all ordered to sit as one group, all the seven families."[54] He testified that after reaching the B-52 crater, "we were asked to sit in one group and those soldiers shot their rifles at all of us."[55] Furthermore, when asked for any detail about what happened after the walk from Wat Chrak Sdech, Sâm Sithy was blunt: "Nothing happened because they were all killed".[56] This "nothing" which happened is, in the Co-Prosecutors' view, apparently consistent with the complex and dramatic sequence of events he later claims took place over a period of at least two hours in the forest. When asked by Defence counsel whether there was a discussion between his father and the CPNLAF troops, Sâm Sithy declined to state that his father was already dead.[57] If ever there was an error by omission, this was it.

25. Most disingenuous, however, is the Co-Prosecutors' claim that Sâm Sithy's testimony was restricted by "numerous attempts by Nuon Chea's defence counsel at this stage of Sâm Sithy's testimony to limit the scope of his responses and discourage elaboration."[58] As the record clearly shows, Defence counsel repeatedly encouraged Sâm Sithy to elaborate on the details of his testimony.[59] Counsel was met not merely by silence but by an express assurance that "nothing" had happened.[60]

26. Finally, the Co-Prosecutors seek to diminish as "minor" numerous inconsistencies in Sâm Sithy's testimony which are so apparent from the record that even they are unable to deny them.[61] These contradictions are clear on the record and the Defence will rest on the Request in that regard. It is however noteworthy that the Co-Prosecutors' do not

[53] **F28,** Request, para. 9.
[54] **F28,** Request, para. 9.
[55] **F28,** Request, para. 9.
[56] **F28,** Request, para. 9.
[57] **F28,** Request, para. 10.
[58] **F28/2,** Co-Prosecutors' Response, para. 20.
[59] T. 3 July 2015 (Transcript of Appeal Proceedings, **F1/2.1**), pp. 18, lns.22, - pp. 19, lns. 2, pp. 19, lns. 20-23, pp. 23, lns. 15-19, pp. 23, lns. 24 - pp. 24, lns. 1, pp. 24, lns. 6-8, pp. 27, lns. 16-20.
[60] **F28,** Request, para. 9.
[61] **F28,** Request, paras 11, 13; **F28/2,** Co-Prosecutors' Response, para. 21.

even make reference to one error so glaring they obviously prefer not to discuss it at all: that Sâm Sithy cannot even remember how many of his siblings were killed.[62]

## D. The Co-Prosecutors misstate the applicable legal standards

27. The Co-Prosecutors have made repeated failed attempts to persuade this Chamber that its discretion to admit new evidence on appeal is constrained by Rule 108(7).[63] Contrary to the Co-Prosecutors' assertion that this Chamber's assessment of the interests of justice under Rule 104(1) "must necessarily" include regard to the test in Rule 108(7),[64] this Chamber has repeatedly held that the two provisions are distinct[65] 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." [66] The requirements of both Rule 104(1) and Rule 108(7) are in any event both satisfied. Contrary to the Co-Prosecutors' frivolous assertions,[67] both the Request and the Appeal include extensive argument demonstrating the significance of the probative value of Sâm Sithy's testimony to the existence of the relevant JCE policy, and accordingly to Nuon Chea's criminal responsibility.[68]

28. Perhaps the most bizarre argument in the Co-Prosecutors' Response is that the Request is not timely.[69] Rather than refer to this Chamber's express holding that "parties must generally submit applications for new evidence before the close of the appeal hearing," [70] the Co-Prosecutors refer to the Practice Direction on the Filing of Documents, which fixes a ten day time limit for filing a response to a motion.[71] The Co-Prosecutors note that it "took Nuon Chea over six times as long to file this Request".[72] It

---

[62] **F28,** Request, para. 14.
[63] **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 July 2015, para 7; **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 Judgement in Case 002/01', 13 July 2015, para 4.
[64] **F28/2,** Co-Prosecutors' Response, para. 9.
[65] **F2/5**, 'Decision on Part of Nuon Chea's Request to Call Witnesses on Appeal', 29 May 2015, paras 15-17 (characterizing 104(1) and 108(7) as "two avenues" for the admission of evidence on appeal).
[66] **F2/5**, 'Decision on Part of Nuon Chea's Request to Call Witnesses on Appeal', 29 May 2015, fn. 51 (citing *Lubanga* Appeal Judgment, para. 62).
[67] **F28/2,** Co-Prosecutors' Response, para. 36.
[68] **F28,** Request, paras 26-30.
[69] **F28/2,** Co-Prosecutors' Response, paras 29, 33.
[70] **F2/4/3**, 'Interim Decision on Part of Nuon Chea's First Request to Obtain and Consider Additional Evidence in Appeal Proceedings of Case 002/01', 1 April 2015, para. 18.
[71] **F28/2,** Co-Prosecutors' Response, para. 33.
[72] **F28/2,** Co-Prosecutors' Response, para. 33.

also took around twelve times the length of a test match in cricket. The relevance is comparable.

## E. Conclusion

29. For these reasons, the Defence hereby requests that the Supreme Court Chamber reject the arguments in both Responses and grant the relief sought in the Request.

CO-LAWYERS FOR NUON CHEA

SON Arun

Victor KOPPE