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SAMN RADA	

**CO-PROSECUTORS' RESPONSE TO NUON CHEA'S REQUEST FOR
INVESTIGATIVE ACTION INTO EVENTS DESCRIBED DURING THE
TESTIMONY OF SAM SITHY**

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 Request for Investigative Action into Events Described during the Testimony of Sam Sithy ("Investigative Request").¹
2. At Nuon Chea's request, the Supreme Court Chamber ("SCC") heard the testimony of Sam Sithy on 3 July 2015. Sam Sithy provided an extremely credible and detailed first-hand account of the execution of his father, a former Lon Nol soldier, and the massacre of several families, including his own. This testimony was highly damaging to Nuon Chea's appeal, as was apparent to all those present in the courtroom. His testimony wholly supports the Trial Chamber's reliance on Sam Sithy's evidence, and buttresses its findings of a Khmer Rouge policy to seek out and kill former Lon Nol soldiers and officials.²
3. The Investigative Request is nothing more than an attempt by Nuon Chea to undo this self-inflicted damage. Had Sam Sithy's testimony not been so obviously credible and damaging to Nuon Chea's appeal, this request would not have been made. The requested investigation is wholly unnecessary and impractical. If granted, it would unduly prolong proceedings and risk further devolving this appeal into a new trial. It would not produce evidence that could have been a "decisive factor" in reaching the Judgment in Case 002/01, and is patently not in the interests of justice.
4. For these reasons, the Co-Prosecutors respectfully request the Supreme Court Chamber to dismiss the Investigative Request.

II. PROCEDURAL HISTORY

5. On 7 August 2014, the Trial Chamber rendered the Judgment in Case 002/01, convicting Nuon Chea and Khieu Samphan of the crimes against humanity of murder, extermination, persecution on political grounds (against, *inter alios*, former Khmer Republic officials), and other inhumane acts of forced transfer, enforced disappearance and attacks against human dignity.³ Nuon Chea filed his notice of appeal on 29 September 2014,⁴ followed by his appeal brief on 29 December 2014.⁵ In his Appeal,

¹ F28 Request for Investigative Action into Events Described During the Testimony of Sãm Sithy, 7 September 2015 (filed in English and Khmer on 7 September 2015, notified on 8 September 2015).

² Further, when questioned by the Co-Prosecutors, Sam Sithy even recounted a further incident where he witnessed what appeared to be former Lon Nol soldiers being targeted. See F1/2.1 Sam Sithy, T. 3 July 2015, pp. 103-106.

³ E313 Case 002/01 Judgement, 7 August 2014 ("Judgment").

⁴ E313/1/1 Notice of Appeal against the Judgment in Case 002/01, 29 September 2014.

⁵ F16 Nuon Chea's Appeal against the Judgment in Case 002/01, 29 December 2014 ("NC Appeal").

Nuon Chea requested the SCC to call nine witnesses, including Sam Sithy.⁶ The Co-Prosecutors filed their response to the Case 002/01 appeals on 24 April 2015,⁷ objecting to Nuon Chea's request.⁸ On 29 May 2015, the SCC issued its decision to call Sam Sithy,⁹ and in accordance with the SCC's Scheduling Order,¹⁰ Sam Sithy testified on 3 July 2015.¹¹ On 7 September 2015, Nuon Chea filed the Investigative Request.

III. APPLICABLE LAW

6. Nuon Chea makes his Investigative Request pursuant to Internal Rule 104(1), arguing that this Rule confers on the SCC a "broad discretion to call any new evidence which it deems to be in the interests of justice."¹² He claims that "this includes an assessment of whether the evidence is 'conducive to ascertaining the truth'."¹³
7. Internal Rule 104(1) provides, in relevant part:

The Supreme Court Chamber shall decide an appeal against a judgment ... of the Trial Chamber on the following grounds:

...

b) an error of fact which has occasioned a miscarriage of justice.

...

For these purposes, the Supreme Court Chamber may itself examine evidence and call new evidence to determine the issue.
8. The SCC has found that it has discretionary power pursuant to Rule 104(1) to call new evidence "where the interests of justice so require, taking into account the specific circumstances of the case."¹⁴ "In making this determination, the Chamber will consider whether the evidence is conducive to ascertaining the truth."¹⁵ The SCC has further held that, pursuant to Internal Rule 93, read in conjunction with Internal Rule 104*bis*, it may decide to carry out additional investigations with a view to deciding whether to

⁶ F16 NC Appeal, paras 595, 730(c).

⁷ F17/1 Co-Prosecutors' Response to Case 002/01 Appeals, 24 April 2015 ("Co-Prosecutors' Appeal Response").

⁸ F17/1 Co-Prosecutors' Appeal Response, paras 62, 171 (fn. 656), 388.

⁹ F2/5 Decision on Part of Nuon Chea's Requests to Call Witnesses on Appeal, 29 May 2015 ("SCC Witness Decision"), paras 22-23, 26.

¹⁰ F24 Order Scheduling a Hearing, 2 June 2015.

¹¹ F1/2.1 Sam Sithy, T. 3 July 2015.

¹² F28 Investigative Request, paras 30, 31.

¹³ F28 Investigative Request, para. 30.

¹⁴ F2/5 SCC Witness Decision, para. 17.

¹⁵ F2/5 SCC Witness Decision, para. 17.

hear additional or other evidence on appeal.¹⁶ The SCC has invoked these Rules to engage in “limited additional investigation”.¹⁷

9. The Investigative Request is made with a view to the eventual calling and admission of new evidence on appeal, and as such, consideration of what the “interests of justice” and “specific circumstances of the case” require must necessarily include regard to the factors relevant to consideration of new evidence pursuant to Rule 108(7). Indeed, the SCC recently confirmed that Rule 108(7) “applies to both newly discovered facts and new means of evidence (*facta noviter producta* and *facta noviter reperta*).”¹⁸ Under Rule 108(7), three requirements must be met when a party requests the admission of new evidence during the appellate phase of proceedings. The moving party must establish that the new evidence proposed for admission: (i) was unavailable at trial; (ii) could have been a decisive factor in reaching the decision under appeal; and (iii) pertains to specific findings of fact by the Trial Chamber.¹⁹
10. As to the first requirement, the SCC has emphasised that demonstrating that the evidence was not available at trial despite the exercise of due diligence “is vital to avoid disruptive and inefficient litigation strategies.”²⁰ The second requirement establishes a high standard for admitting new evidence on appeal. Rather than mere relevance, the evidence must be of such weight and significance that it could have been “a decisive factor in reaching the decision at trial.” Such a high standard is crucial to prevent the appeal from deteriorating into a second trial, unduly prolonging proceedings and/or promoting inefficient litigation.²¹ As for the third requirement, under the plain language of the Rule, the new evidence must be relevant to the findings of fact of the Trial Chamber, not to a party’s arguments. The burden of proving that new evidence should be admitted on appeal rests squarely with the moving party.²²

¹⁶ 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. 19.

¹⁷ 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. 24.

¹⁸ 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. 15; F2/5 SCC Witness Decision, para. 15.

¹⁹ Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), as revised on 16 January 2015, Rule 108(7).

²⁰ F2/5 SCC Witness Decision, para. 16.

²¹ *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Appeals Chamber, Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94(B), 8 May 2001, para. 3.

²² F2/5 SCC Witness Decision, para. 16; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Appeals Chamber, Decision on Appellants’ Motions to Admit Additional Evidence Pursuant to Rule 115, 16 February 2004

11. Internal Rule 108(7) is expressly subject to Internal Rule 87(3), which provides that the Chamber may reject a request for evidence where it finds that it is:
- a. irrelevant or repetitious;
 - b. impossible to obtain within a reasonable time;
 - c. unsuitable to prove the facts it purports to prove;
 - d. not allowed under the law; or
 - e. intended to prolong proceedings or is frivolous.

The SCC has confirmed that the rules governing the admissibility of evidence apply to the SCC's consideration of calling and administering evidence before it.²³

12. Internal Rule 108(4) provides that the SCC "shall issue its decision on any appeal against a judgement within a reasonable period", i.e. appeal proceedings must be concluded within a reasonable period.²⁴

IV. ARGUMENT

13. On 3 July 2015, at Nuon Chea's request, the SCC heard the testimony of Sam Sithy, who had previously provided the Co-Investigating Judges with a compelling, and credible, first-hand account of how seven families, including his own, were led into the forest and killed after they heeded a loudspeaker announcement to register as Lon Nol regime officials in order to receive rice.²⁵ Due to the batteries in the recorder depleting, a portion of the interview had no audio recording. Nuon Chea claimed in his Appeal that the relevant investigator had been involved in producing highly inculpatory statements without audio recordings, and had Sam Sithy been called to testify at trial, his evidence would have proved irrelevant.²⁶
14. When Sam Sithy testified before this Chamber, he confirmed the statements in the portion of the interview during the period when the recording had malfunctioned. Having therefore failed to demonstrate that Sam Sithy's evidence was "irrelevant," Nuon Chea now requests the SCC to "appoint an investigator for the purpose of

(noting that "Appellant Prcac has not established that [the evidence] could have been a decisive factor in reaching the decision at trial").

²³ 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. 16.

²⁴ 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.

²⁵ E3/5201 Written Record of Interview of Sam Sithy, 7 August 2008, pp. 3-4, ERN (En) 00275139-40.

²⁶ F16 NC Appeal, para. 595.

gathering evidence corroborating Sãm Sithy's testimony," or in the alternative, to allow the Defence to conduct its own investigations into these same facts.²⁷

15. Nuon Chea makes this request on the basis that "further investigative action is critical as a means to test the credibility of Sãm Sithy's testimony."²⁸ He asserts that the testimony given by Sam Sithy was "internally inconsistent, deviated from the evidence in his WRI and contradicted other evidence on the case file."²⁹

a. Sam Sithy's testimony was wholly credible and consistent

16. Contrary to Nuon Chea's numerous allegations in the Investigative Request, Sam Sithy's consistent, inculpatory testimony dispelled any notion Nuon Chea may have harboured that the tape recording of his interview had been deliberately sabotaged in order to introduce inculpatory evidence into his written record of interview. The issues now raised by Nuon Chea present no meaningful challenge to Sam Sithy's credibility.
17. Nuon Chea first alleges that "Sam Sithy was unable to state the most basic information concerning his interview with the CIJs"³⁰ and points to occasions during his testimony when Sam Sithy was unable to confirm with precision the date upon which the CIJs had interviewed him.³¹ However, Sam Sithy's confusion about the date of his interview by the Office of the Co-Investigating Judges ("OCIJ") does not undermine the credibility of his testimony. Sam Sithy testified that he had been interviewed by a number of different "working groups", including the OCIJ³² and was clearly struggling to distinguish between them. He had absolutely no reason to lie about the date of his interview, which in any event has no impact upon his memory of the key portions of the unforgettable events that changed his life in 1975. At no time did Sam Sithy seek to disavow his written record of interview. To the contrary, he "acknowledge[d] the document",³³ although at the express request of Nuon Chea, he was not given an opportunity to review the statement prior to his testimony. He further confirmed both

²⁷ F28 Investigative Request, para. 31.

²⁸ F28 Investigative Request, para. 3.

²⁹ F28 Investigative Request, para. 2.

³⁰ F28 Investigative Request, Heading A.

³¹ F28 Investigative Request, paras 6-7 citing F1/2.1 Sam Sithy, T. 3 July 2015, pp. 7, 9, 11, 49-51, 110.

³² See F1/2.1 Sam Sithy, T. 3 July 2015, pp. 51, 53, 55.

³³ F1/2.1 Sam Sithy, T. 3 July 2015, p. 9.

that “the signature on it was made when [he] was interviewed”³⁴ and that the written record of interview was consistent with the account he gave to the investigators.³⁵

18. Turning to the content of the testimony, Sam Sithy provided an extremely credible and detailed account. Sam Sithy testified that, on 17 April 1975, when he was 13 years old,³⁶ he and his family were forced by the Khmer Rouge to evacuate their home³⁷ and walk to Wat Chrak Sdech pagoda in Peam Commune.³⁸ Upon arrival, his father heeded a call for former Lon Nol officials to register there in order to receive rice,³⁹ whereupon the family was escorted from Wat Chrak Sdech towards Prey Rong Khla.⁴⁰ His father was first taken with a group of men and killed by Khmer Rouge militia.⁴¹ Sam Sithy

³⁴ F1/2.1 Sam Sithy, T. 3 July 2015, p. 9.

³⁵ F1/2.1 Sam Sithy, T. 3 July 2015, p. 10.

³⁶ F1/2.1 Sam Sithy, T. 3 July 2015, p. 2 (“A: I was born on 15th May 1961”); E3/5201 Written Record of Interview of Sam Sithy, 7 August 2008, p. 2, ERN (En) 00275138 (“age 47” on 7 August 2008).

³⁷ F1/2.1 Sam Sithy, T. 3 July 2015, pp. 11 (“A: I was forced to vacate my house to a mountainous area”); 12 (“A: I walked on foot at the time. People were evacuated and they were ordered to leave their house and they had to follow the direction as instructed”); E3/5201 Written Record of Interview of Sam Sithy, 7 August 2008, p. 2, ERN (En) 00275138 (“A: .. At approximately 6pm on 17 April 1975, I saw fully armed Khmer Rouge soldiers dressed in black come to compel the people in each house to leave their residences... They led the people, my family included, out toward the road to Romeas headed up to Teuk Phos District. My entire family was evacuated from my residence in Ph-e Village, Ph-e Subdistrict, Kampong Chhnang District, Kampong Chhnang Province, travelling on foot”).

³⁸ F1/2.1 Sam Sithy, T. 3 July 2015, pp. 13 (“A: I left Ph'er village and arrived at Wat Chrak Sdech pagoda”); 88 (“People were gathered, former civil servant officials were gathered in Chrak Sdech pagoda, Peam commune, Chrak Sdech village. This Chrak Sdech pagoda was in Chrak Sdech village, Peam commune”) E3/5201 Written Record of Interview of Sam Sithy, 7 August 2008, p. 3, ERN (En) 00275139 (“A: ... Ten days later, we arrived at Phnom Chumreay in Samakki Mean Chey District, and we walked together through the forest to meet at Watt Chrak Sdech in Peam Subdistrict, Samakki Mean Chey District.”)

³⁹ F1/2.1 Sam Sithy, T. 3 July 2015, p. 11 (“A:...upon reaching Wat Chrak Sdech pagoda, I heard an announcement that former public servants, soldiers or students could go and get rice distribution and that they could return to their previous work place”); 12 (“A: We were told to register names so that we could get some rice”); 19 (“ On that day, there was a loud speaker, an announcement was made over the loud speaker to search for former soldiers and civil servants and the announcement was aimed to search for former officials and officers so they could get rice...names of people were registered in the list”); E3/5201 Written Record of Interview of Sam Sithy, 7 August 2008, p. 3, ERN (En) 00275139 (“A: At Watt Chrak Sdech ... I saw the Khmer Rouge make loudspeaker announcements looking for Lon Nol regime officials, saying, “We invite the brothers and sisters who did any work in the past to return to their former work. Request that the brothers and sisters register their names to receive rice distribution so they can then go back to work.””)

⁴⁰ F1/2.1 Sam Sithy, T. 3 July 2015, p. 58 (“A. The militiamen who led us away from Chrak Sdech pagoda, they each had a long knife. They told us that we had to go into the forest to cut trees so that we can make a makeshift shelter. And when we reach Rong Khla forest, armed force came out.”); E3/5201 Written Record of Interview of Sam Sithy, 7 August 2008, p. 3, ERN (En) 00275139 (“My group of seven families was led south of Watt Chrak Sdech, walking through the forest and crossing streams, headed for Prey Rong Khla. We travelled on foot for more than an hour, guided by a Khmer Rouge wearing a red scarf around his neck and carrying a knife on his shoulder.”)

⁴¹ F1/2.1 Sam Sithy, T. 3 July 2015, pp. 25-26 (“A: ...first they ordered us to divide into groups mainly men would be put into one group and then they had to cross the stream first...they told my father to cross the stream in order to cut trees to make our makeshift shelter...Then I saw those armed soldiers came with their weapon drawn and pointed at my father... When I saw that I ran back to tell my mother”); E3/5201 Written Record of Interview of Sam Sithy, 7 August 2008, p. 3, ERN (En) 00275139 (“A. ... He told the able bodied men to go into the forest to cut trees to make temporary shelters. ... That person then led the twelve

was then himself taken, along with his mother, siblings and other family members, to a former B-52 crater where the group was killed and buried in the pit.⁴² Sam Sithy survived, along with a number of other young family members, by hiding behind his mother and playing dead.⁴³ Having escaped the pit, the small group of survivors returned to seek refuge in Wat Chrak Sdech pagoda, where the large group of civilians were still gathered. Panic ensued among them as word of the massacre spread.⁴⁴

19. Contrary to Nuon Chea's contention,⁴⁵ there is no contradiction between Sam Sithy's repeated confirmation that it took between one and two hours⁴⁶ to travel from Wat Chrak Sdech to Prey Rong Khla, and his statement to the CIJs that the return journey took one night.⁴⁷ The outward journey took place during the daytime⁴⁸ and the group was being led by a Khmer Rouge cadre.⁴⁹ It is unsurprising that a small group of

men in my group, including my father, across the rice fields and into the forest. I followed. Then I saw five to six Khmer Rouge come out of the forest, pointing their weapons. Then they led the men into the forest. I ran back to tell what I had seen to the group of thirty women including my mother and my siblings who were waiting. Nearly an hour later, I heard gunfire in the forest from the direction they had walked the men's group.")

⁴² **F1/2.1** Sam Sithy, T. 3 July 2015, pp. 26 ("A: ... after they had killed the men's group that militia came back to get the female group including myself"); 27- 28 ("A: they fired the shots at us, not only to myself but to many people and I pretended to be dead then we were dragged to the pit - - that is, other corpses and myself"); 30 ("A. In fact, the pit was an existing B-52 crater"); **E3/5201** Written Record of Interview of Sam Sithy, 7 August 2008, pp. 3-4, ERN (En) 00275139-00275140 ("A ... Then the man who wore the red scarf came to lead the women's group, in which I and my mother were included, in the same direction. While we walked through the forest, they came out and pointed their weapons and walked us deep into the forest. When we reached a B52 bomb crater about four meters across and three meters deep, they had us sit in a group, and they shot at us."); **E3/5201** Written Record of Interview of Sam Sithy, 7 August 2008, p. 3, ERN (En) 00275139 ("A: ...I was in the group which they fired at...After the people stopped screaming, they stopped firing...Then they dragged us into the pit").

⁴³ **F1/2.1** Sam Sithy, T. 3 July 2015, pp. 27 ("A: After they fired the shots at us...I pretended to be dead"); 28 ("A: My mother was sitting in front of me and when they shot at us, one bullet hit her chest so she fell onto the ground and I pretended to fall on to the ground as well behind her"); **E3/5201** Written Record of Interview of Sam Sithy, 7 August 2008, p. 3, ERN (En) 00275139 ("A: While they were shooting, I was sitting behind my mother. I saw my mother shot in the chest. She fell over and I pretended to fall with her...I played dead");

⁴⁴ **F1/2.1** Sam Sithy, T. 3 July 2015, pp. 40 ("A: After we left the pit, ... we ran back into Wat Chrak pagoda"); 118 ("A: ...I was asked about the whereabouts of my parents...and of course, the word by mouth spread from one person to the next...And amid the chaos, there was an announcement on the loudspeaker...The situation was rather confusing"); **E3/5201** Written Record of Interview of Sam Sithy, 7 August 2008, p. 4, ERN (En) 00275140 ("A: After we returned to Watt Chrak Sdech, I saw thousands of families still gathered together, and the information about the killing of my parents and the others spread throughout the pagoda and caused confusion").

⁴⁵ **F28** Investigative Request, para. 15.

⁴⁶ **E3/5201** Written Record of Interview of Sam Sithy, 7 August 2008, p. 3, ERN (En) 00275139 ("We travelled on foot for more than one hour"); **F1/2.1** Sam Sithy, T. 3 July 2015, pp. 58 ("it was about an hour to travel from Chrak Sdech pagoda to Roun Kla (phonetic) forest. So it was about two hours to travel"); 59 ("So it was two hours, about two hours from Chrak Sdech to that forest.")

⁴⁷ **E3/5201** Written Record of Interview of Sam Sithy, 7 August 2008, p. 4, ERN (En) 00275140 ("[We] ran for one night before arriving back at Wat Chrak Sdech").

⁴⁸ **F1/2.1** Sam Sithy, T. 3 July 2015, p. 15.

⁴⁹ **F1/2.1** Sam Sithy, T. 3 July 2015, p. 58 ("A. The militiamen who led us away from Chrak Sdech pagoda..."); **E3/5201** Written Record of Interview of Sam Sithy, 7 August 2008, p. 3, ERN (En) 00275139.

children, travelling at night in unfamiliar terrain, would need longer to find their way back.

20. Nuon Chea criticises Sam Sithy for providing “the vaguest possible account” of the events occurring between his departure from Wat Chrak Sdech pagoda and “the executions of all seven families in one location at Prey Rong Khla.”⁵⁰ However, this criticism does not stand up to scrutiny. First, it overlooks the numerous attempts by Nuon Chea’s defence counsel at this stage of Sam Sithy’s testimony to limit the scope of his responses and discourage elaboration.⁵¹ Secondly, nothing in the supposedly “vague” passage quoted by Nuon Chea contradicts any aspect of the more detailed testimony that followed. Finally and most importantly, elements of his account which Nuon Chea claims were not mentioned until prompted⁵² appear, *unprompted*, in the very transcript excerpt cited by Nuon Chea to support the erroneous allegation. For example, far from making “no mention” of “crossing a river”, Sam Sithy testified to that effect four times *in that passage alone*.⁵³ The same extract also reveals several references to the armed men that Nuon Chea alleges were overlooked by Sam Sithy.⁵⁴
21. Contrary to Nuon Chea’s assertions,⁵⁵ Sam Sithy provided an extremely consistent account of the circumstances surrounding his father’s death, in terms of both the detail provided and the chronology of the events. The material facts of his testimony are unwavering. Sam Sithy explained that he was present when his father and other able bodied men were taken away on the pretext of chopping wood for temporary or makeshift shelters,⁵⁶ how he followed them but was chased back,⁵⁷ that he saw five or

⁵⁰ F28 Investigative Request, paras 9-10 *quoting* F1/2.1 Sam Sithy, T. 3 July 2015, pp. 15-16, 22-24.

⁵¹ F1/2.1 Sam Sithy, T. 3 July 2015, p. 13 (“Mr. Witness, please bear with me. I’m asking you questions about you and your siblings and you father and mother leaving; I will get back to whatever happened at Wat Chrak Sdech later”); 14 (“Listen to my questions and give brief answers”); 16 (“Mr. Witness, please, I’m still – in the chronology when you and your family arrived at Wat Chrak Sdech, what did you see...”) 22 (“Again, please do not go too fast”).

⁵² F28 Investigative Request, para. 9.

⁵³ See F28 Investigative Request, para. 9, *citing* F1/2.1 Sam Sithy, T. 3 July 2015, pp. 22-24 (“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 stream southwards* and after *we crossed the stream or the river*, the armed force took us away and killed.... 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”) (emphasis added).

⁵⁴ See *supra* fn. 53. As noted by Nuon Chea at F28 Investigative Request, fn. 19, Sam Sithy had already described these men at F1/2.1 Sam Sithy, T. 3 July 2015, pp. 15-16 (“when we reached that place, there were armed forces.”)

⁵⁵ F28 Investigative Request, paras 11-13.

⁵⁶ F1/2.1 Sam Sithy, T. 3 July 2015, pp. 25 (“At that point in time I was a young boy and I followed my father as I was told that they told my father to cross the stream in order to cut trees to make our makeshift

six armed men with their weapons trained on his father’s group,⁵⁸ that he later heard the sound of gunshots,⁵⁹ and that having returned to his mother’s group, he tried in vain to persuade them to flee.⁶⁰ Despite Nuon Chea’s claims to the contrary,⁶¹ at no time did Sam Sithy testify to having witnessed his father’s execution.⁶² Given the trauma of the event and the passage of 40 years since it occurred, minor discrepancies as to exactly when Sam Sithy heard the gunshots—whether it was before or after he ran back to his mother’s group—and as to the exact composition of the group that remained with his mother in no way undermines his credibility. Indeed, it is well established that minor inconsistencies commonly occur in witness testimony without rendering it unreliable.⁶³ In any event, on all accounts, it was after his father was led away, and before he and the rest of his family were taken for execution.

shelter”); 35 (“At that time, my father and together with other man were ordered to go and cut trees so that we could make makeshift shelter.”); 113 (“militiamen took away the men to cut trees to make makeshift shelters.”)

⁵⁷ F1/2.1 Sam Sithy, T. 3 July 2015, pp. 26 (“Then I saw those armed soldiers came with their weapon drawn and pointed at my father and other men and took them away and since I was young, they chased me away to return.”); 35 (“After I followed my father, I was chased back to the other side of the stream.”); 62 (“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”); 114 (“so I ran after him and he chased me to go back”.)

⁵⁸ F1/2.1 Sam Sithy, T. 3 July 2015, pp. 26 (“Then I saw those armed soldiers came with their weapon drawn and pointed at my father and other men and took them away”); 63 (“I followed, then I saw five to six Khmer Rouge come out of the forest pointing their weapons. Then they led the men into the forest”); 114 (“I saw six armed men on the other side of the stream pointed their guns at my father and the men and took them away”). See also E3/5201 Written Record of Interview of Sam Sithy, 7 August 2008, p. 3, ERN (En) 00275139 (“Then I saw five to six Khmer Rouge come out of the forest, pointing their weapons”).

⁵⁹ F1/2.1 Sam Sithy, T. 3 July 2015, p. 62 (“I followed 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.”)

⁶⁰ F1/2.1 Sam Sithy, T. 3 July 2015, p. 26 (“So I returned to tell my mother and my uncles and aunts that my father and the men were taken away to be shot dead. They did not believe me after they had killed the men’s group they returned for the female group and the children and they were taken to be executed at the same spot.”); 61 (“I told my mother to run away, and I told other also to run away, but they did not believe me.”); 62 (“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. And my mother told me that it might have been the sound of gunfire hitting the wild animals. I told them to run away but they did not.”); 65 (“After I saw those armed men pointed the rifle at my father, I ran back to my mother and told my mother and her group to run away, but they did not believe me.”)

⁶¹ F28 Investigative Request, para. 11 (“Sam Sithy cannot remember if he was scared off by the sight of cadres with guns or his own father being brutally murdered” and “He cannot remember ... if he witnessed his father’s bloody execution before racing back to his mother in, one would assume, a hysterical panic.”) See also F28 Investigative Request, para. 12 (“when he saw those shots [being] fired”).

⁶² Nuon Chea appears to have drawn the conclusion that Sam Sithy saw his father being executed from F1/2.1 Sam Sithy, T. 3 July 2015, p. 35 (“after I saw the incident or the firing of bullets, I ran”). The Khmer transcript clarifies that Sam Sithy is not claiming to have actually witnessed his father’s execution. Sam Sithy testified as follows: ហើយដល់ពេលខ្ញុំឈរមើលគេ ខ្ញុំសបលរមើលគេ ក្រោយពេលគេយកឪពុកខ្ញុំ ចូលទៅដល់ព្រៃរុំខ្លាហ្នឹងហើយ គេបាញ់សម្លាប់ហើយ ខ្ញុំរត់មកក្រោយវិញ។ (F1/2.1 Sam Sithy, T. 3 July 2015 (Khmer), p. 29, ERN (Kh) 01115521, lns 21-23) (“I stood and watched them. I sneaked to see them. After they had taken my father away to Prey Rong Khla, they shot [him] dead. I ran back.”)

⁶³ *Prosecutor v. Lukić and Lukić*, IT-98-32/1-A, Judgement, Appeals Chamber, 4 December 2012, para. 135; *Prosecutor v. Haradinaj et al.*, IT-04-84-A, Judgement, Appeals Chamber, 19 July 2010, para. 134.

22. Nuon Chea's attempts to discredit Sam Sithy's testimony regarding the massacre that he himself survived are similarly unfounded. Beyond mere assertion, Nuon Chea fails to explain why Sam Sithy's testimony that he survived the massacre by hiding behind his mother and playing dead is "implausible". Indeed, a number of witnesses before international criminal tribunals have testified to having either been, or witnessed, survivors to mass shootings like the one experienced by Sam Sithy.⁶⁴ Nor does he explain why it is implausible that the teenage son of a military father would know sufficient military tactics to escape a bomb crater and have the ability to lead his young relatives back to the Wat.⁶⁵ Moreover, Sam Sithy never testified that the "five or six CPNLAF soldiers [missed] so many people that they were forced to try clubbing the survivors in the head in order to kill them".⁶⁶ As the transcript references relied upon by Nuon Chea himself show, Sam Sithy consistently explained that some young children, who had not been hit by bullets, were subsequently clubbed to death by the Khmer Rouge soldiers.⁶⁷ Indeed, this is entirely consistent with the fate of his younger sister who was also hit on the head, but survived.⁶⁸ Nuon Chea's portrayal of Sam Sithy as a self-aggrandising "fearless hero"⁶⁹ is no more than a misplaced, desperate attempt to discredit and insult the survivor of an incredibly horrific event whose testimony contradicted the Defence theory that he was called to support.
23. Similarly, Nuon Chea's assertion that the credibility of Sam Sithy's testimony is undermined simply by an alleged inconsistency about whether it began to rain during or

⁶⁴ See, e.g. *Prosecutor v Krajišnik*, IT-00-39, Fejzija Hadžić, T. 24 September 2004, pp. 5952, 5982-5983 (Fejzija Hadžić survived the massacre in Jalašaćko Polje, Kalinovik. He was taken with a number of other prisoners on trucks before being lined up and shot at. He was injured, but feigned death and survived the massacre – managing to escape after the bodies, including his, had been thrown in a stable and set on fire); *Prosecutor v Krstić*, IT-98-33-T, Trial Chamber, Judgment, 2 August 2001, paras 233-236 (Witness Q survived a massacre at Branjevo Military Farm where around 1,000 – 1,200 men were lined up in groups of 10 and executed over the course of a day. Witness Q threw himself on the ground when the firing started and then crawled to safety and hid nearby).

⁶⁵ F28 Investigative Request, para. 21.

⁶⁶ F28 Investigative Request, para. 23.

⁶⁷ F1/2.1 Sam Sithy, T. 3 July 2015, pp. 25 ("...they all fired upon us and for the young children who were not hit by bullets, they would go around, pick them up and smash them"); 28 ("they would go around and smash the heads of young infants to make sure they [were] dead"); 39 (And as I told you, young babies and infants were not shot with the bullet, only the adult were. And there was screaming and crying at that time after the shooting. And then clubs were used to hit the baby and infants who were crawling to their mother so that they could have their breast milk. But after that time, the baby were hit and thrown into the pit."); 123-124 ("And they shot us, and as for the young babies and children, they were crying, they were crying, after the bullets were shot at all of us. And after the shooting, these men went around to hit the babies, and they -- after that they threw the babies' bodies into the pit."); 128 ("After the shooting stopped, no screaming, no moaning; only the sounds of young babies and infants could be heard. And they went around and smashed the babies and children.")

⁶⁸ See F1/2.1 Sam Sithy, T. 3 July 2015, pp. 28, 37, 38, 40, 44, 96, 120, 121.

⁶⁹ F28 Investigative Request, para. 21.

after the massacre⁷⁰ is not only ludicrous, but suffers from a lack of due diligence or wilful blindness to the *actual* testimony provided by the witness. Had Nuon Chea referred himself to the Khmer transcript, the language in which Sam Sithy testified, it would have been clear to him that Sam Sithy was, in fact, entirely consistent in his recollection, using the same Khmer word to convey the fact that it was *about to rain* on each occasion that he testified about the massacre of the seven families.⁷¹

24. With regard to events after Sam Sithy returned to the pagoda following the massacre, Nuon Chea alleges a contradiction between the witness's "repeated" testimony that, when the children returned, those gathered there already knew that his parents were dead⁷² and a later account that the news spread only after Sam Sithy had conveyed the news himself upon their return.⁷³ According to Nuon Chea, the significance of this supposed contradiction is far reaching, with the timing of the ensuing panic wholly determined by this issue.⁷⁴ Dramatically, he suggests that "[i]t defies common sense to believe that Sam 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."⁷⁵ Yet, a closer inspection of the Khmer transcript would again have revealed that each of these accounts is entirely consistent.⁷⁶

⁷⁰ F28 Investigative Request, para. 22 comparing F1/2.1 Sam Sithy, T. 3 July 2015, p. 16 ("during that time it was raining") with F1/2.1 Sam Sithy, T. 3 July 2015, pp. 29, 42, 117 ("it was about to rain").

⁷¹ F1/2.1 Sam Sithy, T. 3 July 2015 (Khmer), p. 13, ERN (Kh) 01115505, ln 24 (មេឃវែកភ្លៀងផង) ("it was also about to rain"); F1/2.1 Sam Sithy, T. 3 July 2015 (Khmer), p. 24, ERN (Kh) 01115516, lns 20-21 (ហើយមេឃវែកភ្លៀងទៀត) ("and it was about to rain"); F1/2.1 Sam Sithy, T. 3 July 2015 (Khmer), p. 97, ERN (Kh) 01115589, ln 6 (ហើយមេឃងងឹតវែកភ្លៀងផង) ("and the sky was dark and it was about to rain"). When referring to the *later* period, when he was in the pit for two hours, Sam Sithy testified that "it was raining". See F1/2.1 Sam Sithy, T. 3 July 2015 (Khmer), p. 35, ERN (Kh) 01115527, ln 24 (មេឃភ្លៀង).

⁷² F28 Investigative Request, para. 16 *citing* F1/2.1 Sam Sithy, T. 3 July 2015, pp. 16 ("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 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"); 40 ("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").

⁷³ F28 Investigative Request, para. 17 *citing* F1/2.1 Sam Sithy, T. 3 July 2015, p. 118 ("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.")

⁷⁴ F28 Investigative Request, para. 18.

⁷⁵ F28 Investigative Request, para. 18.

⁷⁶ Where the English translation of F1/2.1 Sam Sithy, T. 3 July 2015, p. 16 referred to by Nuon Chea reads, "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 knew that my parents had been killed already...", the Khmer testimony demonstrates that Sam Sithy never testified that those at the pagoda already knew that his parents were dead. See Sam Sithy, T. 3 July 2015 (Khmer), p. 14, ERN (Kh)

- 25. As to the allegation that “no corroborating evidence exists”⁷⁷ for Sam Sithy’s testimony, Nuon Chea fails to cite any authority in ECCC law or jurisprudence to support a requirement for corroboration. It is well established that a Chamber has full discretion to assess the appropriate credibility and weight to be accorded to the testimony of a witness;⁷⁸ and that corroboration is only one of many considerations relevant to this assessment.⁷⁹ A chamber retains discretion to decide, in the circumstances of each case, whether corroboration of evidence is necessary and to rely on uncorroborated, but otherwise credible, witness testimony.⁸⁰ In view of the detail and consistency with which Sam Sithy testified, his evidence is credible and requires no corroboration.
- 26. Nuon Chea’s attempt to discredit Sam Sithy by reference to his failure to name any of the survivors from Wat Chrak Sdech⁸¹ is wholly unpersuasive. There is nothing incredible about not knowing the full names of individuals from an incident that occurred 40 years prior. Nuon Chea also overlooks the fact that Sam Sithy openly offered to assist in their identification, and to disclose their place of residence,⁸² and that he had already identified his living cousin.⁸³

[01115506], lns 6-9 (ទៅដល់វត្តច្រកស្តេចនោះហើយ មានអ្នកស្គាល់ខ្ញុំ ដែលជាបងប្អូនសាច់ញាតិ។ មានអ្នកស្គាល់គេឃើញខ្ញុំត្រូវគេបណ្តើរទៅចែកអង្ករហើយ... គេសួរកឪពុកម្តាយ។ ... ខ្ញុំខ្សឹបប្រាប់គេថា ឪពុកម្តាយត្រូវគេយកទៅបាញ់ចោលអស់ហើយ។) (“Upon arrival at Chrak Sdach Pagoda, there were relatives there; we recognised each other. Someone I know saw me while I was walking to the rice distribution place.... He/she asked me about my parents... I whispered to him/her that my parents had been taken away and shot dead.”)

⁷⁷ F28 Investigative Request, Heading E. Specifically, at para. 19, Nuon Chea asserts that “[n]o witness, civil party, victim or academic makes any reference to a gathering of “thousands” of families at Wat Chrak Sdech, 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 mention of Wat Chrak Sdech anywhere on the case file for any purpose.”

⁷⁸ *Ntawukulilyayo v. The Prosecutor*, ICTR-05-82-A, Appeals Chamber, Judgement, 14 December 2011, para. 21; *Nchamihigo v. The Prosecutor*, ICTR-01-63-A, Appeals Chamber, Judgement, 18 March 2010, para. 47; *Muvunyi v. The Prosecutor*, ICTR-00-55, Appeals Chamber, Judgement, 1 April 2011, para. 56; *Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Appeals Chamber, Judgement, 28 November 2007, para. 194.

⁷⁹ *Nchamihigo v. The Prosecutor*, ICTR-01-63-A, Appeals Chamber, Judgement, 18 March 2010, para. 47; *Simba v. The Prosecutor*, ICTR-01-76-A, Appeals Chamber, Judgement, 27 November 2007, para. 24, quoting *Ntakirutimana et al. v. The Prosecutor*, ICTR-96-17, Appeals Chamber, Judgement, 13 December 2004, para. 132.

⁸⁰ *Karera v The Prosecutor*, ICTR-01-74-A, Appeals Chamber, Judgement, 2 February 2009, para. 45. See also *Renzaho v. The Prosecutor*, ICTR-97-31-A, Appeals Chamber, Judgement, 1 April 2011, para. 556; *Nchamihigo v. The Prosecutor*, ICTR-01-63-A, Appeals Chamber, Judgement, 18 March 2010, para. 42; *Muvunyi v The Prosecutor*, ICTR-00-55, Appeals Chamber, Judgement, 29 August 2008, para. 128.

⁸¹ F28 Investigative Request, para. 24.

⁸² F1/2.1 Sam Sithy, T. 3 July 2015, p. 119 (“Q: ... 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

27. In support of his contention that “the only evidence which does exist directly contradicts Sam Sithy’s testimony,⁸⁴ Nuon Chea points to evidence of a killing site with the name Prey Rong Khla located in Boribour District,⁸⁵ which he claims directly contradicts Sam Sithy’s testimony because it lies 70 kilometres to the north of Wat Chrak Sdech, a distance that could not have been traversed in the timescales described by the witness. First, the Co-Prosecutors note that Nuon Chea has provided no evidence of this alleged distance.⁸⁶ Secondly, Nuon Chea ignores the fact that when confronted with this assertion by Defence Counsel, Sam Sithy clearly and confidently confirmed that the relevant Prey Rong Khla he was referring to was located around two kilometres south of Wat Chrak Sdech.⁸⁷ Moreover, the fact that a killing site of the same name existed in Boribour District does not preclude there being a second site of the same name proximate to Wat Chrak Sdech.
28. In any event, contrary to Nuon Chea’s assertion, the case file does in fact contain evidence that corroborates Sam Sithy’s testimony about this location. Civil Party Sorng Savat described being evacuated in 1977 to Changkran Daek Village, *Peam Stueng Commune*, Kampong Tralach District, Kampong Chhnang Province.⁸⁸ He explained that, while he did not see any security centre or execution site, he knew that most of the people arrested were sent to the village of *Roung Khla* located in Kampong Tralach District,⁸⁹ 15 kilometres away.⁹⁰ This places a contemporaneous location, which was

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.”)

⁸³ F1/2.1 Sam Sithy, T. 3 July 2015, p. 44 (“Q. What’s the name of your female cousin? A. Her name is Kim Sok (phonetic). And the surname is Som (phonetic). So the full name is Som Kim Sok (phonetic).”)

⁸⁴ F28 Investigative Request, para. 20.

⁸⁵ F28 Investigative Request, para. 20 citing E3/2763 “List of burial sites”, 18 February 2008, ERN 00379099, No. 115 (“Prey Rong Khla”).

⁸⁶ When asked for such evidence during the hearing, Counsel for Nuon Chea refused to produce any documentary evidence, stating “I’m not relying on any document, I’m relying, it’s 2015, on google maps which clearly says that Prey Rong Khla is 65 to 70 kilometres north of Wat Chrak Sdech. So let me withdraw the question.” (F1/2.1 Sam Sithy, T. 3 July 2015, pp. 32-33.)

⁸⁷ F1/2.1 Sam Sithy, T. 3 July 2015, p. 21 (“it was about two kilometres away from the pagoda, it was to the south, not to the north.”) See also F1/2.1 Sam Sithy, T. 3 July 2015, p. 58 (“It was about two kilometres away from Chrak Sdech pagoda to the killing site.”)

⁸⁸ E3/6808a Supplementary Information of Civil Party Applicant Sorng Savat, 22 June 2010, ERN (En) 00858577.

⁸⁹ Sam Sithy confirmed that Wat Chrak Sdech was located in Sameakki Mean Chey District (E3/5201 Written Record of Interview of Sam Sithy, 7 August 2008, p. 3, ERN (En) 00275139). As he explained during his testimony, there were formerly two Kampong Tralach Districts: Kampong Tralach Krom and Kampong Tralach Leu. Sameakki Mean Chey District is the modern name for part of these areas formerly known collectively as Kampong Tralach. See F1/2.1 Sam Sithy, T. 3 July 2015, pp. 88-89.

likely a killing site, with the name ROUNG KHLA⁹¹ in precisely the area described by Sam Sithy. Other indicia of the veracity of Sam Sithy's evidence include the existence of a stream or river – STUENG KRANG PONLEY⁹² – to the immediate south of Peam Commune, just as Sam Sithy testified.⁹³

b. The Investigative Request should not be granted

29. This extremely broad and impractical investigative request during the appeal proceedings is an unmistakable attempt to try to undo some of the self-inflicted damage from Nuon Chea's successful petition to the SCC to hear Sam Sithy's testimony as new evidence on appeal. Sam Sithy's detailed, consistent and credible testimony only further buttressed the Trial Chamber's findings of a policy to seek out and kill former Lon Nol officers and officials. This Investigative Request is nothing more than a thinly veiled attempt to recharacterise damaging evidence that Nuon Chea himself requested to hear, and to supplement his appeal brief with yet further appellate argument. The Investigative Request is untimely, would unduly lengthen the appeals proceedings, and seeks investigation into evidence that could not have been a "decisive factor" in reaching the Judgment in Case 002/01.
30. By this Investigative Request, Nuon Chea is once again seeking to circumvent the permissible page limit for appeal briefs. In addition to this Investigative Request, Nuon Chea has submitted six additional evidence requests,⁹⁴ which have all devoted a

⁹⁰ **E3/6808a** Supplementary Information of Civil Party Applicant Sorng Savat, 22 June 2010, ERN (En) 00858578.

⁹¹ Prey ROUNG KHLA means the forest of ROUNG KHLA. Sam Sithy testified that the events he described there took place in a forest.

⁹² See **Annex 1: E305/13.23.47.1** Cambodia Index Map Tiles for Index Image 00992847-00992848; Tile 5932, ERN 01045029 (annotated by the Office of the Co-Prosecutors) and **Annex 1A: E305/13.23.47.1** Cambodia Index Map Tiles for Index Image 00992847-00992848; Tile 5932, ERN 01045029 (zoomed portion showing Peam and Stuong Krang Ponley, annotated by the Office of the Co-Prosecutors).

⁹³ With regard to Wat Chrak Sdech's location in Peam Commune, see *supra* fn. 38. **F1/2.1** Sam Sithy, T. 3 July 2015, pp. 19-21 ("A. After the registration and names of members of family were called and we [were] led southward of the pagoda and we were told that we go to find house to live in. ... A. After we obtained the rice and after the registration, we were led southwards of the pagoda.... Q. You said you went southwards and in your statement you said you went southward to Prey ROUNG KHLA is that correct? A. Yes, that is correct. ... A. I told you already that after people got the rice, they were led southwards."); 22 (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 stream southwards.") **E3/5201** Written Record of Interview of Sam Sithy, 7 August 2008, p. 3, ERN (En) 00275139 ("My group of seven families was led south of Watt Chrak Sdech, walking through the forest and crossing streams, headed for Prey ROUNG KHLA.")

⁹⁴ **F2** Request to Obtain and Consider Additional Evidence in Connection with the Appeal against the Trial Judgment in Case 002/01, 1 September 2014; **F2/1** Second Request to Consider Additional Evidence in Connection with the Appeal against the Trial Judgment in Case 002/01, 2 September 2014; **F2/4** Third Request to Consider and Obtain Additional Evidence in Connection with the Appeal against the Trial

substantial amount of text to arguing how the additional evidence advances his position on appeal.⁹⁵ The majority of this Investigative Request is now devoted to analysing the credibility of one witness. Setting this in context, this Chamber originally allowed Nuon Chea 210 pages for his entire appeal from Judgment,⁹⁶ later extended at Nuon Chea's request to 270 pages.⁹⁷ Indeed, this Investigative Request, together with the additional evidence requests filed to date comprise approximately 150 pages of additional argument, almost three-quarters of the pages originally allowed for the appeal itself.

31. Nuon Chea contends that the "total exclusion of defence counsel from all stages of the investigation" meant that "no prior effort to contest or corroborate the substance of Sam Sithy's testimony was possible".⁹⁸ This argument is entirely erroneous and contradicted by Nuon Chea's own submissions. Nuon Chea has been fully involved in the investigation and trial throughout the entirety of the proceedings against him. By his own admission, he made scores of requests for investigative action in the pre-trial stage of Case 002,⁹⁹ which were assessed on their merits, and Nuon Chea's complaints about

Judgment in Case 002/01, 25 November 2014; **F2/6** Nuon Chea's Fourth Request to Consider Additional Evidence in Connection with the Appeal against the Trial Judgment in Case 002/01, 15 June 2015; **F2/7** Nuon Chea's Fifth Request to Consider and Obtain Additional Evidence in Connection with the Appeal against the Trial Judgment in Case 002/01, 25 June 2015; **F2/8** Nuon Chea's Sixth Request to Consider and Obtain Additional Evidence in Connection with the Appeal against the Trial Judgment in Case 002/01, 11 September 2015.

⁹⁵ See **F2** Request to Obtain and Consider Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01, 1 September 2014; **F2/1** Second Request to Consider Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01, 2 September 2014; **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; **F2/6** Nuon Chea's Fourth Request to Consider Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01, 15 June 2015; **F2/7** Nuon Chea's Fifth Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01, 25 June 2015; **F2/8** Nuon Chea's Sixth Request to Consider and Obtain Additional Evidence in Connection with the Appeal against the Trial Judgment in Case 002/01, 11 September 2015.

⁹⁶ **F9** Decision on Motions for Extension of Time and Page Limits for Appeal Briefs and Responses, 31 October 2014.

⁹⁷ **F13/2** Decision on Defence Motions for Extension of Pages to Appeal and Time to Respond, 11 December 2014.

⁹⁸ **F28** Investigative Request, para. 29.

⁹⁹ See **F28** Investigative Request, para. 29 and fn. 65. See also **D80** Request for Investigative Action, 11 March 2008; **D100** Second Request for Investigative Action, 11 August 2008; **D101** Third Request for Investigative Action, 18 August 2008; **D102** Fourth Request for Investigative Action, 27 August 2008; **D105** Fifth Request for Investigative Action, 26 September 2008; **D113** Sixth Request for Investigative Action, 30 October 2008; **D122** Seventh Request for Investigative Action, 28 November 2008; **D126** Eighth Request for Investigative Action, 21 January 2009; **D128** Ninth Request for Investigative Action, 27 January 2009; **D136** Tenth Request for Investigative Action, 24 February 2009; **D158** Eleventh Request for Investigative Action, 27 March 2009; **D173** Twelfth Request for Investigative Action, 3 June 2009; **D179** Thirteenth Request for Investigative Action, 15 June 2009; **D194** Fourteenth Request for Investigative Action, 14 August 2009; **D130/11** Fifteenth Request for Investigative Action, 1 September 2009; **D253**

the CIJ's decisions rejecting his requests for further investigations were heard by the PTC.¹⁰⁰ With regard to the trial proceedings, the Co-Prosecutors have already shown that Nuon Chea has failed to demonstrate that the Trial Chamber illegitimately limited his opportunities for investigation at the trial stage,¹⁰¹ and that the Trial Chamber correctly admitted and relied upon out-of-court statements and transcripts in its Judgment.¹⁰² Throughout the trial, the Chamber provided sufficient safeguards to ensure that Nuon Chea would be able to adduce evidence necessary to ascertain the truth, to examine witnesses and to rebut the evidence and allegations against him.¹⁰³

32. Pursuant to Internal Rule 87(3), a Chamber may reject, and perforce need not investigate, evidence that is "intended to prolong proceedings." Indeed, the SCC has held that "concerns of expeditiousness circumscribe the right of the accused to obtain evidence where the motion for evidence would *de facto* not serve the defence, such as per Internal Rule 87(3), according to which evidence may be rejected if it is irrelevant, repetitious or the motion is meant to prolong proceedings."¹⁰⁴ This fully accords with the requirement in Internal Rule 108(4) that appeal proceedings must be concluded within a reasonable period,¹⁰⁵ and is further reflected in the rationale behind the high standard required by Internal Rule 108(7): namely that is crucial to prevent the appeal from deteriorating into a second trial, unduly prolonging proceedings and/or promoting inefficient litigation.¹⁰⁶

Sixteenth Request for Investigative Action, 30 November 2009; **D254** Request for Investigation, 30 November 2009; **D265** Seventeenth Request for Investigative Action, 8 December 2009; **D273** Eighteenth Request for Investigative Action, 10 December 2009; **D356** Twenty-Sixth Request for Investigative Action, 12 February 2010.

¹⁰⁰ See e.g. **D100/9/2** Decision on Appeal against the Co-Investigating Judges Order on Nuon Chea's Second Request for Investigative Action, 5 May 2010; **D300/1/5** Decision on Appeal against OCIJ Order on Requests D153, D172, D173, D174, D178 and D284 (Nuon Chea's Twelfth Request for Investigative Action), 14 July 2010; **D253/3/5** Decision on Appeal against OCIJ Order on Nuon Chea's Sixteenth (D253) and Seventeenth (D265) Requests for Investigative Action, 6 April 2010; **D273/3/5** Decision on Appeal against OCIJ Order on Nuon Chea's Eighteenth Request for Investigative Action, 10 June 2010.

¹⁰¹ **F17/1** Co-Prosecutors' Appeal Response, para. 79.

¹⁰² **F17/1** Co-Prosecutors' Appeal Response, paras 86-90.

¹⁰³ See e.g. **F17/1** Co-Prosecutors' Appeal Response, para. 67.

¹⁰⁴ **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. 22, citing *Prosecutor v Kanyabashi*, ICTR-96-15-T, Trial Chamber, Decision on Kanyabashi's Motion to Re-open his Case and to Recall Prosecution Witness QA, 2 July 2008, paras 23 *et seq.*

¹⁰⁵ **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.

¹⁰⁶ *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94(B), 8 May 2001, para. 3.

33. Nuon Chea's attempts to prolong proceedings by devolving this appeal into a new trial are abundantly clear from the timing and nature of the stream of requests Nuon Chea has made since the Trial Chamber rendered its Judgment. He would clearly rather have the SCC's time and resources spent on these superfluous errands than on reaching a final verdict. The timing of this Investigative Request exhibits an astonishing lack of diligence on Nuon Chea's part. Though not directly applicable in this instance, it is instructive to look at the Practice Direction on the Filing of Documents before the ECCC, which requires that "[a]ny response to an application or pleadings shall be filed ... within 10 calendar days of notification of the document to which the participant is responding."¹⁰⁷ Sam Sithy testified on 3 July 2015. It therefore took Nuon Chea over six times as long to file this Request, which he eventually did on 7 September 2015, more than nine weeks later.
34. This Chamber is now squarely facing the prospect of never-ending requests from the Appellants to hear, investigate or admit new irrelevant evidence that threaten to prolong these proceedings for years. Having doubted the veracity of Sam Sithy's written record of interview, Nuon Chea sought his live testimony. Having found Sam Sithy's testimony compatible with his written record of interview, and damaging to Nuon Chea's case on appeal, Nuon Chea now seeks an investigation into the details of the witness's testimony. Undoubtedly, should this request be granted and further witnesses discovered corroborating Sam Sithy, Nuon Chea would then ask for further investigation of these witnesses. Extrapolating 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.
35. Moreover, far from being a "simple effort[...]"¹⁰⁸ locating the mass graves and other physical evidence sought by Nuon Chea would, contrary to Internal Rule 87(3), be "impossible to obtain within a reasonable time", and would prevent appeal proceedings being concluded within a reasonable time, as required by Internal Rule 108(4). There are thousands of mass graves in Cambodia. Nuon Chea seeks interviews with an untold number of "local residents" in an "attempt to locate a grave site" near Wat Chrak Sdech

¹⁰⁷ Practice Direction on the Filing of Documents before the ECCC, ECCC/01/2007/Rev.8, Article 8.3.

¹⁰⁸ F28 Investigative Request, para. 3.

and “in an effort to confirm the content of Sam Sithy’s testimony”.¹⁰⁹ These are not, as Nuon Chea characterises them, “fundamental to an assessment of probative value and basic to any criminal proceeding”¹¹⁰ in every instance that a party alleges minor inconsistencies in witness testimony. Complex cases such as these, in which hundreds of witnesses are heard by the chambers, would never be completed, contrary to the interests of justice if this were common practice.

36. Nuon Chea has not made any specific showing that the information gleaned from the investigation would have been a “decisive factor” in the Judgment, or even that it pertains to specific findings by the Trial Chamber. Nor does he provide any reasoned argument as to why it is “in the interests of justice” for the SCC to conduct the investigations he seeks. Nuon Chea fails to establish that, were the SCC to spend time and resources on the expansive investigations Nuon Chea seeks, it would have had *any* impact upon *any* finding in the Judgment.
37. The Trial Chamber relied on Sam Sithy’s evidence in support of two factual findings: (i) that the Khmer Rouge announced by loudspeaker and radio in several areas around Phnom Penh that “Khmer Republic officials should turn themselves in, reveal their former ranks and either return to Phnom Penh to collaborate or join the Khmer Rouge army,”¹¹¹ and (ii) that there is evidence that Khmer Republic soldiers who heeded the calls were executed at various locations in and around Phnom Penh.¹¹² In each case, the Trial Chamber’s finding was supported by scores of witnesses, civil parties and documents in addition to Sam Sithy.¹¹³ Thus there is no reason to believe that Sam Sithy’s evidence alone would have been a “decisive factor” in the Judgment. This further emphasises that the use of this Chamber’s limited resources to conduct an

¹⁰⁹ F28 Investigative Request, para. 31.

¹¹⁰ F28 Investigative Request, para. 3.

¹¹¹ See E313 Judgment, para. 511, fn 1528.

¹¹² See E313 Judgment, para. 511, fn 1530.

¹¹³ Moreover, these factual findings formed only a small aspect of the Chamber’s findings pertaining to Nuon Chea’s criminal responsibility, including the existence of a policy to target Lon Nol officials on or after 17 April 1975. These findings additionally relied on a wealth of other evidence. The Trial Chamber’s finding that murder was committed during the Phase I movement through the killing of Khmer Republic soldiers is a case in point. In addition to the finding that Khmer Republic soldiers who heeded the calls were executed in and around Phnom Penh, the Trial Chamber made the finding that murder had been committed based upon an abundance of evidence, including eyewitness accounts, demonstrating that (i) soldiers *hors de combat* were executed (E313 Judgment, para. 507. See also F17/1 Co-Prosecutors’ Appeal Response, paras 160-165); (ii) there were reports that soldiers were killed elsewhere (E313 Judgment, para. 508. See also F17/1 Co-Prosecutors’ Appeal Response, para. 166); (iii) individuals subsequently learned that former Khmer Republic soldiers had been killed (E313 Judgment, para. 513. See also F17/1 Co-Prosecutors’ Appeal Response, para. 167); and (iv) those who registered at Kien Svay were rounded up and killed (E313 Judgment, para. 514. See also F17/1 Co-Prosecutors’ Appeal Response, para. 174).

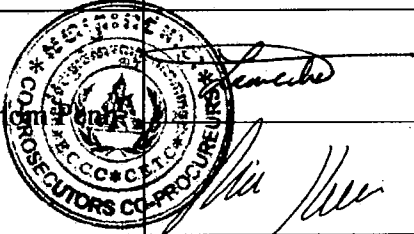
extensive investigation in search of evidence to corroborate his testimony is not warranted.

38. Nuon Chea's request to call Sam Sithy to testify before the Supreme Court Chamber backfired. His powerful and very credible testimony only bolstered the evidence of a deliberate and calculated policy by the Khmer Rouge leadership to target Lon Nol officers and officials. This request for a protracted and impractical investigation is simply a weak attempt to recover from this self-inflicted wound.

V. RELIEF REQUESTED

39. For the reasons set forth above, the Co-Prosecutors respectfully request that the Supreme Court Chamber dismiss the Investigative Request.

Respectfully submitted,

Date	Name	Place	Signature
18 September 2015	CHEA Leang Co-Prosecutor	Phnom Penh	
	Nicholas KOUMJIAN Co-Prosecutor		