

**BEFORE THE TRIAL CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**FILING DETAIL**

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**URGENT REQUEST TO SUMMONS KEY WITNESSES IN RESPECT OF TUOL PO  
CHREY**

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The Co-Lawyers for Nuon Chea ('the Defence') hereby submit this request ('Request') that the Trial Chamber summons [REDACTED] to testify before the Chamber:

1. These submissions constitute the Defence's final request for live testimony as part of the trial in Case 002/01 (in its current form). The Defence makes this request now because the testimony of witnesses Ung Chhat and Lim Sat, heard before the Chamber during the week of 29 April 2013, revealed that their personal knowledge of the events at Tuol Po Chrey deviated substantially from the evidence proffered in their statements before the Co-Investigation Judges ('CIJs'). That testimony strongly supports the position of the Defence that Nuon Chea bears no criminal responsibility for the alleged events at Tuol Po Chrey. The Defence now has a concrete basis to doubt the reliability of other witness statements concerning Tuol Po Chrey and good reason to believe that more detailed scrutiny of the evidence would establish beyond any doubt that this Chamber cannot find Nuon Chea guilty for crimes allegedly committed there. Fundamental fairness and the right to present a defense require that additional witnesses relied upon by the CIJs be summonsed and subjected to cross examination.

#### I. PROCEDURAL HISTORY

2. On 17 August 2012, the Trial Chamber held a Trial Management Meeting at which it solicited requests from the parties to hear additional witnesses in Case 002/01. The Defence requested that the Chamber summons [REDACTED], primarily because he would testify that the alleged CPK policy to execute former officials of the Khmer Republic did not exist.<sup>1</sup> On 2 October 2012, the Trial Chamber denied that request without reasons.<sup>2</sup>
3. On 8 October 2012, the Trial Chamber responded to the Co-Prosecutors' second request to expand the scope of Case 002/01. The Chamber denied the bulk of the request but agreed to add allegations concerning executions of former Lon Nol officials and soldiers at Tuol Po Chrey shortly after 17 April 1975 to the scope of Case 002/01.<sup>3</sup>

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<sup>1</sup> Those submissions were communicated to the Senior Legal Officer via email but later filed in connection with a different motion. See Document No. **E-189/3/1/7.1.5**, Request for Additional Witnesses, 5 September 2012, paras 32-35.

<sup>2</sup> Document No. **E-236/1**, Memorandum from President Nil Nonn to All Parties, Case 002, 2 October 2012.

<sup>3</sup> Document No. **E-163/5**, Memorandum from President Nil Nonn to All parties, Case 002, 8 October 2012, para. 3.

4. On 22 February 2013, the Defence requested the Chamber to summons [REDACTED] as a character witness on behalf of Nuon Chea.<sup>4</sup>
5. On 26 April 2013, the Defence filed its objections to the Co-Prosecutors' request to admit witness statements into evidence. The Defence objected to any evidence concerning an alleged policy to target former soldiers and officials of the Khmer Republic and reserved its right to object to any crime base evidence concerning Tuol Po Chrey pending live testimony on that subject, which was scheduled for the following week.<sup>5</sup> During the week of 29 April 2013, Ung Chhat and Lim Sat – the only two witnesses summonsed by the Chamber to testify to events at Tuol Po Chrey – appeared before the Chamber.
6. On 31 May 2013, the Trial Chamber issued a memorandum for the purpose, *inter alia*, of scheduling a Trial Management Meeting on 13 June 2013. The Chamber noted that it would shortly issue a final decision on witnesses, experts and civil parties to be heard in Case 002/01, and that parties would be entitled to 'a last opportunity to raise any genuinely novel issue' regarding such witnesses at the TMM.<sup>6</sup> On 6 June 2013, the Senior Legal Officer circulated a list of the Chamber's final decisions concerning witnesses. That list noted the Defence's request to summons Heng Samrin, both in relation to population movement and as a character witness on behalf of Nuon Chea, and indicated that the Chamber 'was unable to reach agreement on whether or not he should be called.'<sup>7</sup>

## II. LAW

### A. Standard for Admitting Evidence

7. Pursuant to the jurisprudence of this Chamber, parties may seek to put new evidence before the Chamber during trial when that evidence satisfies the requirements of Rule 87(4). Parties are required to show that the evidence is admissible pursuant to Rule 87(3) and that it 'was not available before the opening of the trial.' The Chamber has adopted a flexible interpretation of Rule 87(4) and admitted evidence where it is of sufficient probative value.<sup>8</sup> Where the relevance of the evidence becomes apparent during the

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<sup>4</sup> Document No. E-236/5/1, 'Request to Summons TCW-223 as a Character Witness on Behalf of Nuon Chea', 22 February 2013.

<sup>5</sup> See e.g., Document No. E-223/2/8/1.2, 'Annex 1 – NC Objections to Co-Prosecutors' Rule 80(3)(d) Document List – Annex 12', No. 247. See also Document No. E-223/2/8, 'Objections to Requests to Put Before the Chamber Written Statements and Transcripts', 26 April 2013; Document No. E-223/2/8/1, 'Supplementary Annexes in Connection with Objections to Statements and Transcripts', 29 April 2013.

<sup>6</sup> Document No. E-288, Memorandum from President Nil Nonn to Parties, 31 May 2013, para. 3.

<sup>7</sup> 'Annexes II – Individuals requested by the parties in relation to Case 002/01 but not ultimately heard before the Trial Chamber', 6 June 2013, p. 4.

<sup>8</sup> Document No. E-266/3, Memorandum from President Nil Nonn to Parties, 29 May 2013, para. 3.

course of trial, the Chamber should furthermore consider that it was previously 'not available' within the meaning of Rule 87(4).

### B. Admissibility of Witness Statements

8. The Defence has made extensive submissions concerning the legal standards applicable to the admission of witness statements, which it incorporates herein by reference.<sup>9</sup> As previously indicated by the Chamber, the admission of statements which do not concern the acts and conduct of the Accused is discretionary, subject to the Chamber's consideration of certain factors. These include whether the evidence is cumulative to other live testimony heard at trial and whether it is contested by the parties.<sup>10</sup> As the Defence has previously argued, at the *ad hoc* tribunals this second factor is relevant to *both* the decision to admit the statement into evidence *and* whether cross-examination is required.<sup>11</sup> The Co-Prosecutors concede that the list of factors relevant to the Chamber's exercise of its discretion whether to admit statements into evidence is not exhaustive.<sup>12</sup>

### III. THE TESTIMONY OF UNG CHHAT AND LIM SAT

9. As alleged in the Closing Order and currently within the scope of Case 002/01, Nuon Chea faces charges of crimes against humanity for events which allegedly occurred at the Tuol Po Chrey execution site in the days following the liberation of Pursat Province and the regional area of Tuol Po Chrey on 19 April 1975.<sup>13</sup> Nuon Chea's criminal responsibility is alleged to arise, *inter alia*, from his participation in the alleged CPK policy of targeting former officials of the Khmer Republic.<sup>14</sup>
10. On 29 April through 2 May 2013, witnesses Ung Chhat and Lim Sat were called before the Trial Chamber to give testimony in relation to these allegations. The importance of that testimony cannot be overstated; not only were these the only two witnesses summonsed by the Trial Chamber, it is their statements to the OCIJ which provide a

<sup>9</sup> Document No. E-96/8/1, 'Preliminary Response to Co-Prosecutors' Further Request to Put Before the Chamber Written Statements and Transcripts', 8 November 2012 ('Preliminary Response to Requests to Admit Statements'), paras 6-16; Document No. E-223/2/8, 'Objections to Requests to Put Before the Chamber Written Statements and Transcripts', 26 April 2013 ('Objections to Requests to Admit Statements'), paras 6-15.

<sup>10</sup> Preliminary Response to Requests to Admit Statements, paras 12-13; Objections to Requests to Admit Statements, paras 6-7, 14.

<sup>11</sup> Objections to Requests to Admit Statements, para. 14.

<sup>12</sup> Document No. E-277/1, 'Co-Prosecutors' Combined Response to Defence Objections to the Admission of Witness Statements, Complaints and Transcripts', 27 May 2013, fn. 78.

<sup>13</sup> Document No. D-427, 'Closing Order', 15 September 2010 ('Closing Order'), paras 698-711.

<sup>14</sup> Closing Order, paras 205-209.

majority of the support (and often the sole support) for many of the most important allegations in the Closing Order concerning Tuol Po Chrey.<sup>15</sup>

11. That testimony revealed that both witnesses were low-ranking cadre who lacked first-hand knowledge of crucial facts.<sup>16</sup> Neither witness was present at the provincial town hall meeting and had no first-hand knowledge of what was said.<sup>17</sup> Neither did either witness see the alleged killings at Tuol Po Chrey or its aftermath,<sup>18</sup> contrary to Ung Chhat's OCIJ statement, which indicated that he had personally seen the bodies of freshly executed officials.<sup>19</sup> Only during cross-examination did Ung Chhat recant, stating that he had never seen corpses<sup>20</sup> but only 'the site where a dead body could have been buried.'<sup>21</sup>
12. Neither were the witnesses able to verify the number of former Khmer Republic officials allegedly executed at Tuol Po Chrey. Lim Sat, whose statement constitutes the sole support in the Closing Order for the allegation that three thousand former Lon Nol officials were transported to Tuol Po Chrey for execution,<sup>22</sup> testified that he 'did not actually pay attention to counting the numbers of people because [his] duty was merely to guard the place.'<sup>23</sup> He had no reliable information concerning the number of trucks used to transport the alleged victims to Tuol Po Chrey, and was unable to perform the basic mathematical calculations necessary to have accurately assessed the number of former Lon Nol officials being transported.<sup>24</sup> Nor did he know how many people attended the town hall meeting.<sup>25</sup> Ung Chhat suggested that roughly two hundred people were present.<sup>26</sup>
13. Testimony given at trial also established that neither witness knew, or had the opportunity to observe, the rank or status of the alleged victims.<sup>27</sup> When confronted with his OCIJ statement that 'the people who were leaving the provincial house were the Generals of the

<sup>15</sup> Closing Order, paras. 698-711

<sup>16</sup> Document No. **E-1/186.1**, 'Transcript of Trial Proceedings', 30 April 2013, pp. 55:23-56:2.

<sup>17</sup> Document No. **E-1/186.1**, Testimony Ung Chhat, 30 April 2013, pp. 65:8-66:7; Document No. **E-1/187.1**, 'Transcript of Trial Proceedings', 2 May 2013, pp. 23:4-24.

<sup>18</sup> Document No. **E-1/186.1**, 'Transcript of Trial Proceedings', 30 April 2013, pp. 84:11-18, 85:20-24; Document No. **E-1/187.1**, 'Transcript of Trial Proceedings', 2 May 2013, pp. 73:22-74, 51:11-13.

<sup>19</sup> Document No. **D-125/176**, 1st Written Record of Interview of Witness UNG Chhat, p.5

<sup>20</sup> Document No. **E-1/186.1**, 'Transcript of Trial Proceedings', 30 April 2013, pp. 22:21-25, 25:21-25.

<sup>21</sup> Document No. **E-1/186.1**, 'Transcript of Trial Proceedings', 30 April 2013, p. 85:20-24.

<sup>22</sup> Closing order, para. 708, fn. 3049.

<sup>23</sup> Document No. **E-1/187.1**, 'Transcript of Trial Proceedings', 2 May 2013, p. 84:23-25

<sup>24</sup> Document No. **E-1/187.1**, 'Transcript of Trial Proceedings', 2 May 2013, pp.72:20-73:19, 84:18-85:4, 84:18-25.

<sup>25</sup> Document No. **E-1/187.1**, 'Transcript of Trial Proceedings', 2 May 2013, pp. 24:13-15; Document No. **E-1/188.1**, 'Transcript of Trial Proceedings', 3 May 2013, p.24:14-21.

<sup>26</sup> Document No. **E-1/186.1**, 'Transcript of Trial Proceedings', 30 April 2013, pp. 58:3-8, 73:1-3.

<sup>27</sup> Document No. **E-1/186.1**, 'Transcript of Trial Proceedings', 30 April 2013, p.78:6-17; Document No. **E-1/188.1**, 'Transcript of Trial Proceedings', 3 May 2013, pp. 12:21-13:4 (despite testifying that he observed former Lon Nol soldiers in uniform, Lim Sat very specifically identified their ranks).

Lon Nol Military,<sup>28</sup> Ung Chhat testified that the word ‘General’ was not chosen by him but by the OCIJ investigators,<sup>29</sup> that he ‘could not say whether these people were wearing any particular rank,<sup>30</sup> and that he ‘just didn’t know their exact rank or title.’<sup>31</sup> His opinion that senior military officials were present was based solely on having seen a single person whom he believed fit that description.<sup>32</sup> Both witnesses did, however, testify that everyone who attended the meeting was a local Pursat official.<sup>33</sup> According to Lim Sat, one hundred of those in attendance had previously been ordinary soldiers stationed at the Tuol Po Chrey fortress before its fall to Khmer Rouge forces.<sup>34</sup>

14. With no first-hand knowledge of what happened at Tuol Po Chrey, the identity or number of the alleged victims, or the existence of an alleged policy to execute Khmer Republic officials, the question of whether the alleged executions were part of a greater CPK policy was far beyond the scope of the knowledge of either witness.

#### IV. ARGUMENT

##### A. The Chamber Must Summons All Witnesses Relied Upon by the CIJs with regard to Tuol Po Chrey

15. The Defense requests that the Chamber now summons the remaining witnesses relied upon in the Closing Order to support the factual allegations concerning Tuol Po Chrey: [REDACTED] (‘TPC Witnesses’). Live examination of these five witnesses at trial will further establish that evidence concerning crucial facts is both unreliable and conflicted and that the Chamber is incapable of making findings of fact beyond a reasonable doubt.

##### i – The TPC Witnesses

16. All five TPC Witnesses gave evidence before the CIJs.
17. The written record of interview (‘WRI’) of [REDACTED] indicates that the witness saw 100 trucks transporting former Khmer Republic army officers, the provincial Governor

<sup>28</sup> Document No. **D-125/176**, Written Record of Interview of Witness Ung Chhat, p. 3.

<sup>29</sup> Document No. **E-1/186.1**, ‘Transcript of Trial Proceedings’, 30 April 2013, pp. 77:24-78-17.

<sup>30</sup> Document No. **E-1/186.1**, ‘Transcript of Trial Proceedings’, 30 April 2013, p. 78:2-5

<sup>31</sup> *Id.*

<sup>32</sup> Document No. **E-1/186.1**, ‘Transcript of Trial Proceedings’, 30 April 2013, p.3:16-19.

<sup>33</sup> Document No. **E-1/188.1**, ‘Transcript of Trial Proceedings’, 3 May 2013, p. 28:1-16; Document No. **E-1/186.1**, ‘Transcript of Trial Proceedings’, 30 April 2013, p.74:21-25.

<sup>34</sup> Document No. **E-1/188.1**, ‘Transcript of Trial Proceedings’, pp. 29:22-30:3 (Lon Nol soldiers from the fortress at TPC were brought to the meeting at Pursat Provincial Hall and then allegedly executed by the Khmer Rouge).

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and civil servants towards Tuol Po Chrey.<sup>35</sup> He estimated that 3,000 people were killed at Tuol Po Chrey, based on the number of trucks he observed and information he heard from others. The WRI indicates that the witness returned to Tuol Po Chrey in 1986 and saw corpses and burial pits.

18. The WRI of [REDACTED] purports to describe the meeting at the Pursat provincial town hall, at which 500 people attended.<sup>36</sup> Attendees were placed on between 13 and 15 white trucks, which may have made more than one trip to Tuol Po Chrey. He learned three days later that those brought to Tuol Po Chrey were killed.
19. The WRI of [REDACTED] indicates that the witness saw Khmer Rouge soldiers 'gather up' people to meet at the Pursat provincial headquarters and that the provincial governor attended the meeting.<sup>37</sup> The witness did not attend the meeting, know who ran it or what it was about, or see attendees taken away. The witness heard later that they were killed.
20. The WRI of [REDACTED] describes an announcement that officers of the Khmer Republic of rank from Second Lieutenant through to Colonel would gather to study at Angkor Wat and then be promoted to higher ranks.<sup>38</sup> The witness indicates that soldiers were transported in trucks which held approximately 40 people to Tuol Po Chrey, where they were killed. He learned about killings the following day and later saw the corpses.
21. The WRI of [REDACTED] describes trucks transporting Khmer Republic soldiers wearing military uniforms and rank insignia.<sup>39</sup> Each truck held approximately 30 people but the witness did not stop to watch them. The following day he observed bulldozer tracks at Tuol Po Chrey from a distance, but he did not see corpses or witness killings.

#### ii – Cross-Examination of the TPC Witnesses Would Exonerate Nuon Chea

22. Like Lim Sat and Ung Chhat, none of these witnesses saw the alleged killings at Tuol Po Chrey. The WRIs suggest that [REDACTED] and [REDACTED] later saw corpses at the Tuol Po Chrey execution site – as did Ung Chhat's, before he corrected the record in court.<sup>40</sup> The CIJs never conducted any forensic investigation or endeavored to exhume

<sup>35</sup> Document No. **D-125/49**, Written Record of Interview of Witness [REDACTED], 11 June 2008.

<sup>36</sup> Document No. **D-125/48**, Written Record of Interview of Witness [REDACTED], 10 June 2008.

<sup>37</sup> Document No. **D-232/13**, Written Record of Interview of Witness [REDACTED], 22 August 2009.

<sup>38</sup> Document No. **D-125/175**, Written Record of Interview of Witness [REDACTED], 15 January 2009.

<sup>39</sup> Document No. **D-125/174**, Written Record of Interview of Witness [REDACTED], 13 January 2009.

<sup>40</sup> See para. 11, *supra*.

any of the corpses allegedly buried there.<sup>41</sup> No physical evidence exists of a single murder at Tuol Po Chrey.

23. Facts of which the witnesses do claim to have first-hand knowledge are conflicted and unreliable. [REDACTED] estimate that 3,000 people were killed is based on the same flawed methodology – a rough count of passing trucks – that collapsed under Defence counsel’s cross-examination of Lim Sat. [REDACTED] testified that 500 people attended the meeting at the provincial town hall yet the CIJs concluded that the maximum capacity of the hall was 200 people.<sup>42</sup> Nor is it clear that [REDACTED] in fact attended the meeting and if so, how he (a Khmer Republic soldier) managed to survive [REDACTED] claims that 100 trucks made a single trip whereas [REDACTED] recalls that 13 trucks made multiple trips. Aside from [REDACTED], no other witness suggests that trucks might have travelled from the town hall to the alleged execution site and back.
24. [REDACTED] and [REDACTED] suggest that the alleged victims were soldiers whereas [REDACTED] recalls a mix of soldiers and civil servants. [REDACTED] and Lim Sat recall that the soldiers wore military uniforms, but Ung Chhat insisted that ‘all of them were wearing plain civilian clothes.’<sup>43</sup> [REDACTED] claims that Khmer Rouge soldiers ‘gathered up’ the alleged victims for transport to the provincial town hall, yet Ung Chhat testified that they arrived at the town hall voluntarily.<sup>44</sup>
25. All of these ambiguities concern facts critical to the (highly circumstantial) case that Nuon Chea is criminally responsible for the alleged executions at Tuol Po Chrey. Absent any direct evidence that a CPK policy to execute Khmer Republic soldiers and officials existed or that any executions at Tuol Po Chrey took place, the number, rank and origin of the alleged victims are all key to an assessment of Nuon Chea’s responsibility. So too is the method by which the alleged victims arrived at the town hall. The prosecution’s own experts conclude – wrongly and with no basis – that only senior military officers and the highest-ranking civil servants were executed.<sup>45</sup> Yet the evidence shows that if any executions did take place at Tuol Po Chrey in the days after 19 April 1975, victims were a collection of ordinary soldiers and low-level officials summoned haphazardly to a

<sup>41</sup> Document No. **D-125/217**, Tuol Po Chrey Site Identification Report, p. 3.

<sup>42</sup> Document No. **D-125/217**, Tuol Po Chrey Site Identification Report, p. 10.

<sup>43</sup> Document No. **E-1/186.1**, ‘Transcript of Trial Proceedings’, 30 April 2013, p. 13:6-9.

<sup>44</sup> Document No. **E-1/186.1**, ‘Transcript of Trial Proceedings’, 30 April 2013, p. 56:17-57:2; Document No. **E-1/185.1**, ‘Transcript of Trial Proceedings’, 29 April 2013, p. 81:1-4.

<sup>45</sup> Document No. **IS20.6**, Steve Heder Interview with Ieng Sary, 17 December 1996, p. 6 (according to Heder, ‘the documentation does make it clear that those to be executed included military officers, senior officials, “secret agents” and a number of other categories, but not ordinary soldiers and low-ranking civil servants like school teachers.’); Document No. **E-1/191.1**, ‘Transcript of Trial Proceedings’, 8 May 2013, p. 94:24-95:3 (according to Philip Short, officials of ‘high rank’ were targeted).



provincial town hall by local authorities. The only logical conclusion is that those local authorities acted alone to exact vengeance from their erstwhile rivals.

26. The Defence notes that a comparison between the allegations in the Closing Order and the evidence provided to support them in the WRIs is so incongruous as to raise grave doubts about the methodology of the investigating judges. The CIJs heard estimates of the number of alleged victims ranging from 200 up to 3,000,<sup>46</sup> then concluded without qualification that between 2,000 and 3,000 people were killed.<sup>47</sup> They ignored the conclusions of their own investigators that no more than 200 people could have been present in the provincial town hall<sup>48</sup> and accepted without question Lim Sat's analysis that because there were 30 to 40 people on each of 30 trucks there must have been 3,000 people in total.<sup>49</sup> They arbitrarily concluded from amongst a wide range of estimates<sup>50</sup> that between 30 and 40 trucks transported individuals between the town hall and the alleged execution site<sup>51</sup> and concluded with certainty, on the basis of an ambiguous reference in a single interview, that the trucks made multiple trips.<sup>52</sup> Indeed, they combined the testimony of one witness that 13 trucks made multiple trips with the testimony of another witness that there were 30-40 trucks to conclude that 30-40 trucks made multiple trips.<sup>53</sup> Investigators fed to Ung Chhat the conclusion that 'generals' were amongst the victims,<sup>54</sup> then relied exclusively on his testimony to find that 'witness testimony supports' their view that 'all' former officers were summoned to the meeting.<sup>55</sup>

<sup>46</sup> Document No. **D-125/176**, Written Record of Interview of Witness Ung Chhat, p. 3; Document No. **E-3/364**, 1<sup>st</sup> Written Record of Interview of Witness Lim Sat, 23 November 2008, p. 2; Document No. **D-232/65**, 2<sup>nd</sup> Written Record of Interview of Witness Lim Sat, 18 November 2009, p. 4; Document No. **D-125/49**, Written Record of Interview of Witness ██████████, 11 June 2008; Document No. **D-125/48**, Written Record of Interview of Witness ██████████, 10 June 2008.

<sup>47</sup> Closing Order, para. 711.

<sup>48</sup> See para. 23, *supra*.

<sup>49</sup> Document No. **E-3/364**, 1<sup>st</sup> Written Record of Interview of Witness Lim Sat, 23 November 2008, p. 2; Document No. **D-232/65**, 2<sup>nd</sup> Written Record of Interview of Witness Lim Sat, 18 November 2009, p. 4; Closing Order, para. 708.

<sup>50</sup> Document No. **D-125/49**, Written Record of Interview of Witness ██████████, 11 June 2008; Document No. **D-125/48**, Written Record of Interview of Witness ██████████, 10 June 2008; Document No. **D-125/176**, Written Record of Interview of Witness Ung Chhat, p. 3; Document No. **E-3/364**, 1<sup>st</sup> Written Record of Interview of Witness Lim Sat, 23 November 2008, p. 2.

<sup>51</sup> Closing Order, para. 709.

<sup>52</sup> Closing Order para. 709, fn 3055. The Closing Order cites the WRIs of Ung Chhat and ██████████ for this proposition, but Ung Chhat's statement does not support it. The WRI of his interview merely states that trucks carrying Lon Nol soldiers passed from the Po Village fort to Tuol Po Chrey one at a time, and that each truck would wait for the prior truck to return before continuing on. There is no indication that the returning trucks then transported more soldiers to Tuol Po Chrey. See Document No. **D-125/176**, 1st Written Record of Interview of Witness UNG Chhat, pp. 4-5.

<sup>53</sup> Document No. **E-3/364**, 1<sup>st</sup> Written Record of Interview of Witness Lim Sat, 23 November 2008, p. 2; Document No. **D-125/48**, Written Record of Interview of Witness ██████████, 10 June 2008.

<sup>54</sup> See para. 13, *supra*.

<sup>55</sup> Closing Order, para. 706. As noted above, Ung Chhat testified in court that he could not distinguish who among those taken to Tuol Po Chrey were soldiers or civilians because they were all wearing civilian clothes

27. The ease with which these claims vanished on cross-examination demonstrates that the CIJs made no effort to ascertain truth or investigate impartially. Instead, they doggedly pursued inculpatory evidence during their investigation, then quoted selectively from that biased pool of evidence to formulate an overall narrative that bears no resemblance to the facts. Legal ‘presumptions’ of impartiality and reliability carry no weight where they are so thoroughly refuted by reality.
28. Nuon Chea does not wish to rest on the mere absence of evidence and argue – as this Chamber would in any case now be required to hold – that no reasonable trier of fact could convict him on the basis of the evidence presently before the Chamber. He does not wish to hide behind the prosecution’s burden of proof. Nor should this Chamber hide behind the CIJs’ veil of secrecy. Nuon Chea wants (and hereby seeks) a full and public hearing, on the basis of which both the Chamber and the gallery would be able to formulate their own conclusions about whether Nuon Chea is criminally responsible for crimes allegedly committed at Tuol Po Chrey. That hearing will establish beyond any shadow of a doubt that he is not.

iii – This Request is Genuinely Novel and Satisfies Rule 87(4)

29. None of the TPC Witnesses was included on the Defence’s witness lists in 2011.<sup>56</sup> Pursuant to the jurisprudence of the Chamber, the Defence is therefore required to satisfy Rule 87(4). It is also required to show that the request is ‘genuinely novel’ pursuant to the Chamber’s 31 May 2013 memorandum.
30. The Defence considers that these standards appear roughly similar and submits that they are both satisfied for all of the foregoing reasons. The Defence requested the appearance of Lim Sat in 2011 because of the apparent shortcomings in the methodology of his interview with the CIJs and in order to challenge potentially inculpatory testimony.<sup>57</sup> Both reasons proved amply justified during cross-examination. It was only during that examination that the unreliability of the evidence concerning Tuol Po Chrey – and hence the need for further cross-examination – became fully apparent.

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and for the same reason could not know their rank. *See* para. 13, *supra*; Document No **E-1/186.1**, ‘Transcript of Trial Proceedings’, 30 April 2013, pp. 32:15-33:25.

<sup>56</sup> *See* Document No. **E-9/10.1**, ‘Annex D: Witness Summaries with Points of the Indictment’, 23 February 2011.

<sup>57</sup> Document No. **E-93/4.3**, ‘Primary List: Witness Summaries’, 21 June 2011, No. 255.

**B. The Chamber Must Summons**

31. As the Defence has previously argued,<sup>58</sup> [REDACTED] has specifically denied that Nuon Chea ordered the execution of former officials of the Khmer Republic. According to the notes of his interview with Ben Kiernan, [REDACTED] described his participation in a meeting on 20 May 1975 in which various questions of CPK policy were allegedly discussed. With regard to the policy concerning former officials of the Khmer Republic, Kiernan's notes indicate as follows:

They did not say 'kill' (the Lon Nol leaders). They said (unclear Khmer words). Don't allow them to remain in the framework, it doesn't mean 'smash'. Nuon Chea used this phrase. Komtec means 'kill' but they use a general word 'komchat'.<sup>59</sup>

32. With the exception of one other statement from a 'witness' who has not appeared before this Tribunal,<sup>60</sup> no other direct evidence concerning the existence of a policy to execute former officials and soldiers of the Khmer Republic exists. Following extensive cross-examination, expert witness Philip Short was unable to produce a single example.<sup>61</sup> [REDACTED]'s first-hand knowledge of Nuon Chea's exact words with regard to that specific question is of unparalleled relevance. It is also exculpatory. The Trial Chamber must summons him and then act to compel his appearance. Its failure to do so would by itself render the trial unfair in respect of the charges concerning Tuol Po Chrey.
33. Those members of the Chamber who currently oppose [REDACTED]'s appearance must reconsider that decision in order to avoid 'causing an injustice'.<sup>62</sup> Although it appears moot in light of the Chamber's recent indication that some of its members now support calling [REDACTED] to testify,<sup>63</sup> the Defence notes that reconsideration of the Chamber's

<sup>58</sup> See para. 2, *supra*.

<sup>59</sup> Document No. **E-3/1568**, Ben Kiernan Notes of Interview, p. 23. See also Document No. **E-3/1593**, 'The Pol Pot Regime: Race, Power and Genocide in Cambodia under the Khmer Rouge, 1975-1979', p. 57 ([REDACTED] explained that members of the previous regime were to be 'komchat', or 'scattered', 'don't allow them to remain in the framework' – not 'komtec' or 'smashed').

<sup>60</sup> Document No. **E3/387**, DC-Cam statement of [REDACTED], p. 6. Ieng Sary has also told Stephen Heder that such a policy existed but that, too, was not based on his personal knowledge. See Document No. **IS-20.6**, Suspect Statement of IENG Sary alias Van, p.5-6 (Ieng Sary's purported knowledge of such a policy is qualified by his further statement that he "did not participate in and knew nothing about the decision stipulating that soldiers and major civil servants [of the former Lon Nol regime] were to be killed.).

<sup>61</sup> Short implied at one point that Phy Phuon had told him of such a policy but then clarified: 'Unless I'm mistaken, I didn't say there was a policy that had been laid down from the top. I – I may be mistaken. What I said was it happened.' See Document No. **E-1/191.1**, 'Transcript of Trial Proceedings', 8 May 2013, pp. 96:11-97:5, 98:15-99:7. Phy Phuon has furthermore denied the existence of such a policy before this Chamber. See Document No. **E-1/98.1**, 'Transcript of Trial Proceedings', 30 July 2012, p. 88:2-10.

<sup>62</sup> Document No. **C-22/I/68**, 'Decision on Application for Reconsideration of Civil Party's Right to Address Pre-Trial Chamber in Person', 28 August 2008, ERN 00221475-00221475, para. 25 (adopting the reconsideration standard of the ICTY Appeals Chamber).

<sup>63</sup> See para. 6, *supra*.

first decision that his testimony was not material to Case 002/01 is also now appropriate in light of its intervening decision to include the allegations concerning Tuol Po Chrey within the scope of Case 002/01.<sup>64</sup> That decision constitutes a ‘change of circumstances’ justifying reconsideration.<sup>65</sup>

**C. Witness Statements Concerning Tuol Po Chrey are Inadmissible Absent Cross-Examination**

34. On 26 April 2013, the Defence filed its’ objections to the Co-Prosecutors’ request to admit witness statements into evidence.<sup>66</sup> At that time, no witnesses had yet testified concerning Tuol Po Chrey. This Chamber has recognized that prior to admitting statements into evidence, it is required to consider whether and to what extent those statements are cumulative to live testimony heard before the Chamber.<sup>67</sup> The Defence was therefore unable to formulate informed objections with regard to statements concerning Tuol Po Chrey prior to 26 April 2013. The Defence instead reserved its right to object at a later date, and also objected to the admission of any statement concerning the alleged policy of targeting former soldiers and officials of the Khmer Republic.<sup>68</sup>
35. Having now heard the only two witnesses currently scheduled to testify to the allegations concerning Tuol Po Chrey, it is apparent that the Chamber is unable to admit the statement of any witness who does not appear for cross-examination. There is presently no first-hand testimony before the Chamber that any killings at Tuol Po Chrey took place,<sup>69</sup> and no reliable evidence at all of the number of alleged victims,<sup>70</sup> of their identity or rank,<sup>71</sup> or of any connection between the alleged events at Tuol Po Chrey and any person or administrative entity close to the party center.
36. Evidence proffered in witness statements concerning any of these alleged facts is not cumulative to live testimony and would constitute the only ‘evidence’ before the

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<sup>64</sup> Document No. **E-124/7.3**, ‘Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/01, amended further to the Trial Chamber’s decision on Ieng Thirith’s Fitness to Stand Trial (E138) and the Trial Chamber’s Decision on Co-Prosecutors’ Request to Include Additional Crimes Sites within the Scope of Trial in Case 002/01 (E163)’, 8 October 2012, point 1(vii). *Cf.* Document No. **E-124/7.2**, ‘Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/01, amended further to the Trial Chamber’s decision on Ieng Thirith’s Fitness to Stand Trial (E138)’, 30 November 2011, point 1(vii).

<sup>65</sup> *See* fn. 62, *supra*.

<sup>66</sup> *See* para. 5, *supra*.

<sup>67</sup> *See* para. 8, *supra*.

<sup>68</sup> *See* para. 5, *supra*.

<sup>69</sup> *See* paras 11, 22, *supra*.

<sup>70</sup> *See* para. 12, *supra*.

<sup>71</sup> *See* para. 13, *supra*.

Chamber.<sup>72</sup> Those facts are furthermore pivotal to the prosecution's case and the defence advanced by Nuon Chea.<sup>73</sup> For all of these reasons, they are inadmissible absent cross-examination.

37. Cross-examination with regard to these particular questions of fact is especially important because the testimony heard by the Chamber does not merely fail to explore the allegations in the Closing Order – it directly contradicts them. Both Lim Sat and Ung Chhat were questioned extensively and either denied the claims in the Closing Order or showed themselves incapable of having known them.<sup>74</sup> Both witnesses acknowledged under cross-examination that facts described in their witness statements were little more than vague and distant hearsay.
38. Under these circumstances, to admit witness statements into evidence without cross-examination would be to attempt to prove without scrutiny that which has already shown its inability to withstand it. The admission of such evidence would constitute a serious miscarriage of justice and a gross violation of the rights of the Accused.

#### V. CONCLUSION AND RELIEF SOUGHT

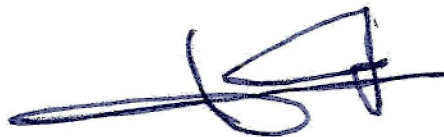
39. For these reasons, the Defence respectfully requests that the Chamber:

- a. SUMMONS [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED] and [REDACTED] to testify before the Chamber; and
- b. EXCLUDE any evidence concerning Tuol Po Chrey contained in any witness statement or victim complaint of any person not called to testify before the Chamber.

CO-LAWYERS FOR NUON CHEA



SON Arun



Victor KOPPE

<sup>72</sup> Document No. E-96, 'Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Witness Statements Before the Trial Chamber', 15 June 2011, paras 9-10 (statements are inadmissible without cross-examination where they would be decisive with respect to the criminal responsibility of the Accused). The Defence notes that the Co-Prosecutors endorse this standard but continues to maintain that the Chamber is required to enforce, at a minimum, the rules governing the admission of written statements in place at the ad hoc tribunals. See para. 8, *supra*.

<sup>73</sup> See para. 8, *supra*.

<sup>74</sup> See paras 11-13, *supra*.