

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

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**REQUEST THAT THE CHAMBER NOT PROVIDE PRIOR STATEMENTS TO
TUOL PO CHREY WITNESSES BEFORE TESTIFYING**

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The Co-Lawyers for Nuon Chea ('the Defence') hereby submit the instant request ('Request') pursuant to Rule 92 of the Internal Rules ('the Rules') that the Trial Chamber decide not to provide Sum Alat, Pech Chim, Lev Lam or 'the driver in the video E186.R'¹ a copy of their prior statements, whether given to the Co-Investigating Judges ('CIJs') or otherwise, prior to testifying:

I. PROCEDURAL HISTORY

1. On 1 November 2011, the Co-Prosecutors proposed to the Trial Chamber by interoffice memorandum that each witness called to testify before the Chamber be furnished with a copy of their prior statements in order to 'refresh their memory'.² The Nuon Chea defence objected both orally³ and in writing.⁴ On 17 November 2011, the Trial Chamber indicated its intention to accede to that request,⁵ and on 24 November 2011 provided detailed modalities for that procedure.⁶
2. During the course of the trial, the Trial Chamber continued to set rules concerning the use of documents and the methods of examination. One such rule established a general prohibition on leading questions.⁷ Notwithstanding that general rule, the Chamber also held that parties are permitted to quote from a witness's prior statement, and seek confirmation of the truth of its contents, without first seeking to elicit that testimony through open questions.⁸
3. During the week of 29 April 2013, the Chamber heard the testimony of Ung Chhat and Lim Sat, at that time the only two witnesses scheduled to testify with regard to the alleged crimes committed at Tuol Po Chrey. In the course of the Co-Prosecutors' examination of Ung Chhat, the Defence objected to the specific use to which the witness's prior statements was being put by the prosecution:

I know the practice of reading out passages from the OCIJ statement, but we have now reached a moment in his statement that I feel it is very necessary to ask open questions. It doesn't come as a surprise to the Chamber that there's

¹ Document No. E-292, Email from Susan Lamb to the Parties, 19 June 2013.

² Document No. E-142, 'Request for Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Interviews', 17 November 2011 ('Request Concerning Inconsistencies in WRIs'), para. 22.

³ Document No. E-1/16.1, 'Transcript of Trial Proceedings', 5 December 2011, pp. 30:15-31:9.

⁴ Request Concerning Inconsistencies in WRIs, paras 22-24.

⁵ Document No. E-141, Memorandum from Susan Lamb to Parties, 17 November 2011, p. 4.

⁶ Document No. E-141/1, Memorandum from Susan Lamb to Wendy Lobwein, 24 November 2011.

⁷ See e.g., Document No. E-1/9.1, 'Transcript of Trial Proceedings', 30 August 2011, p. 4:10-13.

⁸ See e.g., Document No. E-1/186.1, 'Transcript of Trial Proceedings', 30 April 2013, pp. 7:15-11:1.

very little evidence of what happened exactly, and so, to the potential evidence of this witness, could be very important. So I think we have reached a moment that my learned friend on the other side should just ask, please Mr. Witness what happened, and not have him read the things – the specific things that he has said earlier to the OCII.⁹

4. Judge Cartwright gave the ruling of the Chamber as follows:

The Chamber wishes to emphasize that the fundamental rule as summarized by the prosecutor remains valid and that this ruling is not in any way a variation of it. However the Chamber sees the concerns that the defence for Nuon Chea has raised, that the questioning has reached a delicate point and invites the prosecutor to ask more open questions from this point on.¹⁰

5. Shortly after the conclusion of Ung Chhat and Lim Sat's testimony, the Trial Chamber released its final list of witnesses who have or will testify in Case 002/01.¹¹ The Chamber then afforded to the parties one final opportunity to seek additional witnesses in respect of 'genuinely novel' issues.¹² Both the Co-Prosecutors and the Nuon Chea Defence sought further witnesses in connection with the crimes allegedly committed at Tuol Po Chrey. The Defence argued that the testimony of Ung Chhat and Lim Sat 'deviated substantially from the evidence proffered in their statements before the Co-Investigation Judges ('CIJs') [and] strongly supports the position of the Defence that Nuon Chea bears no criminal responsibility for the alleged events at Tuol Po Chrey.'¹³ The Co-Prosecutors agreed that the both witnesses gave testimony inconsistent with their statements before the CIJs.¹⁴ Accordingly, the Defence requested an opportunity to examine all of the witnesses relied upon by the CIJs in connection with Tuol Po Chrey so as to establish, clearly and in open court, that Nuon Chea is not criminally responsible for crimes allegedly committed there.¹⁵ The Co-Prosecutors sought, *inter alia*, three additional witnesses with respect to Tuol Po Chrey and three witnesses relevant to the alleged CPK policy to execute former Khmer Republic soldiers and officials.¹⁶

⁹ Document No. E-1/186.1, 'Transcript of Trial Proceedings', 30 April 2013, p. 7:16-25.

¹⁰ Document No. E-1/186.1, 'Transcript of Trial Proceedings', 30 April 2013, p. 10:14-19.

¹¹ Email from Susan Lamb to Parties, 6 June 2013.

¹² Document No. E-288, Memorandum from President Nil Nonn to All Parties, 31 May 2013, para. 3.

¹³ Document No. E-291, 'Urgent Request to Summons Key Witnesses in Respect of Tuol Po Chrey', 17 June 2013, para. 1.

¹⁴ Document No. E-1/207.1, 'Transcript of Trial Proceedings', 13 June 2013, pp. 70:15-71:14.

¹⁵ Document No. E-291, 'Urgent Request to Summons Key Witnesses in Respect of Tuol Po Chrey', 17 June 2013, para. 28.

¹⁶ Document No. E-288/3, 'Co-Prosecutors' Notification in Response to the Senior Legal Officer's Request to Provide Information Prior to the Trial Management Meeting', 10 June 2013, para. 5.

6. On 19 June 2013, the Chamber provided advance notice that it would summons (or endeavor to find, and then summons) Sum Alat, Pech Chim, Lev Lam and ‘the driver in the video E186.R’. It also indicated that other witnesses sought by the Defence and the Co-Prosecutors might be under consideration as reserve witnesses.¹⁷

II. ARGUMENT

7. For the record, the Defence restates its continuing objection to the practice of providing witnesses access to their statements prior to appearing for testimony. As the Defence has previously argued, that practice risks systematically tainting the testimony heard by the Chamber. One of the goals of cross-examination is to determine whether the witness’s recollections are consistent across time. The events in question took place more than thirty years before the interviews were conducted, raising real concerns about the quality of the witnesses’ recollections. Those concerns are aggravated considerably by the fact that, contrary to standard practice in civil law jurisdictions, defence counsel was excluded entirely from those interviews.¹⁸ Permitting witnesses to read their prior statements just prior to testifying is more likely ‘to supplant their memory [...] than refresh it’ and defeats the purpose of cross-examination.¹⁹
8. Pursuant to standard practice before the *ad hoc* tribunals, inconsistencies in the statements of a witness over time are relevant to determinations of both reliability and probative value. While such inconsistencies may not require exclusion of that evidence ‘per se’, they are relevant to the question of whether it ought to be accorded any weight at all, and if so, how much:

The presence of inconsistencies in the evidence does not, per se, require a reasonable Trial Chamber to reject it as being unreliable. Similarly, factors such as the passage of time between the events and the testimony of the witness, the possible influence of third persons, discrepancies, or the existence of stressful conditions at the time the events took place do not automatically exclude the Trial Chamber from relying on the

¹⁷ Document No. E-292, Email from Susan Lamb to the Parties, 19 June 2013.

¹⁸ Document No. A-110/1, Memorandum from Co-Investigating Judges, 10 January 2008, ERN 00157729-00157730; French Code de Procédure Pénale, Art. 120 (‘Le juge d’instruction dirige les interrogatoires, confrontations et auditions. Le procureur de la République et les avocats des parties et du témoin assisté peuvent poser des questions ou présenter de brèves observations.’), Art. 82.1 (‘Les parties peuvent, au cours de l’information, saisir le juge d’instruction d’une demande écrite et motivée tendant à ce qu’il soit procédé à leur audition ou à leur interrogatoire, à l’audition d’un témoin, à une confrontation ou à un transport sur les lieux, à ce qu’il soit ordonné la production par l’une d’entre elles d’une pièce utile à l’information, ou à ce qu’il soit procédé à tous autres actes qui leur paraissent nécessaires à la manifestation de la vérité.’).

¹⁹ Request Concerning Inconsistencies in WRIs, para. 24.

evidence. However, the Trial Chamber should consider such factors as it assesses and weighs the evidence.²⁰

Where witnesses are permitted to review their earlier statements just prior to testifying, a meaningful assessment of the evidence along these lines becomes impossible. Indeed, live testimony may nominally corroborate prior statements – and therefore appear more reliable – when in reality the opposite is true. Not surprisingly, no other international tribunal or civil law jurisdiction provides witnesses with systematic access to their earlier statements prior to testifying.

9. Although the Chamber has chosen not to heed these warnings in general, they are uniquely important in relation to Sum Alat, Pech Chim, Lev Lam and ‘the driver in the video E186.R’. There is presently no evidence before the Chamber of any of the key facts upon which Nuon Chea’s criminal responsibility in respect of Tuol Po Chrey turns, including any first-hand knowledge of a CPK policy to execute Lon Nol soldiers or officials or of the alleged executions at Tuol Po Chrey, nor is there any reliable evidence of any kind of the number or composition of the alleged victims or how they arrived at Tuol Po Chrey.²¹ It was due to the paucity of this evidence (and the consequent importance of the small number of witnesses heard live in Case 002) that the Chamber instructed the Co-Prosecutors not to use OCIJ statements as a primary tool to establish facts in relation to ‘delicate points’ of the examination.
10. At this stage, the examination of any evidence concerning Tuol Po Chrey is ‘delicate’. The Co-Prosecutors have indicated their intention to examine all four witnesses selected by the Chamber narrowly on questions of fact directly relevant to the charges concerning Tuol Po Chrey.²² The new witnesses called by the Chamber were furthermore sought by the Defence and the Co-Prosecutors precisely because the testimony given by Ung Chhat and Lim Sat failed in so many ways to reflect the evidence they (presumably) gave to the investigating judges.²³ The importance of proceeding with caution is even greater now than it was when the Chamber instructed the Co-Prosecutors not to place evidence from Ung Chhat’s statement before him prior to eliciting his testimony. By showing Sum Alat, Pech Chim, Lev Lam and the driver in E186.R their statements prior to testifying, the

²⁰ *Prosecutor v. Kupreskic et al.*, IT-95-16, ‘Appeal Judgement’, 23 October 2001, para. 31.

²¹ Document No. **E-291**, ‘Urgent Request to Summons Key Witnesses in Respect of Tuol Po Chrey’, 17 June 2013, paras 9-14, 32.

²² Document No. **E-1/2017.1**, ‘Transcript of Trial Proceedings’, 13 June 2013, pp. 60:25-61:9.

²³ See para. 5, *supra*.

Chamber would be allowing WESU to do out of court that which it has ruled the Co-Prosecutors may not do in court.

11. In light of these considerations, the rationale for the usual practice – which the Trial Chamber formulated at the beginning of trial for the purpose of facilitating the testimony of all witnesses in general – does not apply in this case. The Chamber previously held that the purpose of the rule was ‘to avoid a waste of valuable in-court time should witnesses [...] need to reacquaint themselves with their prior statements or attest that they made these statements’.²⁴ Yet the time savings to be gained by ensuring that four witnesses recall having given a prior statement is negligible – and possibly non-existent. By contrast, the risk to the integrity of the proceedings is significant. Indeed, the only real ‘efficiency’ might be realized in the event the witnesses’ recollections deviate from their statements as they are summarized in the WRIs or presented in E186.R. In that case, a fresh examination of their knowledge untainted by their highly suggestive prior statements is only more important.

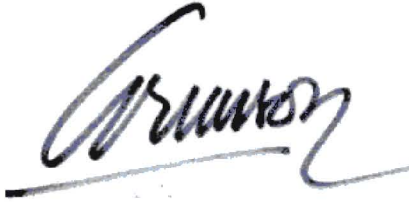
III. CONCLUSION AND RELIEF SOUGHT

12. Nuon Chea makes this Request now for the same and simple reason that he sought the appearance of all witnesses relied upon by the CIJs in relation to Tuol Po Chrey: he wants a full and fair opportunity to confront the evidence against him in open court. Under these circumstances, permitting witnesses to read or see their previous statements prior to testifying can only place that hearing at risk. There is no real, let alone significant, benefit in doing so – and no conceivable reason to deny this Request.
13. The Defence notes that, during the examination of Nou Mouk on the morning of 20 June 2013, the Chamber revealed to the parties that WESU had previously provided to the witness a picture of Ben Kiernan, ostensibly for the purposes of confirming his identity, as well as the translated, Khmer-language version of (supposedly) Professor Kiernan’s notes of his interview with the witness. Although especially egregious (in light of the unsworn, unauthenticated nature of Kiernan’s notes), this is an example of precisely the practice which the Chamber should take care to avoid. The Defence considers that identification of the witness would have required, at most, a brief review of Professor Kiernan’s photo, and certainly did not require his possession of Kiernan’s notes.

²⁴ Document No. E-141/1, Memorandum from Susan Lamb to Wendy Lobwein, 24 November 2011, p. 1.

14. For these reasons, the Defence respectfully requests that the Chamber ORDER that Sum Alat, Pech Chim, Lev Lam and 'the driver in video E186.R' (or any other person summonsed in their stead) shall not for any purpose be given or shown any information, including their prior statements concerning the events at issue in Case 002/01 or any part of the video E186.R, in advance of their testimony before the Trial Chamber.

CO-LAWYERS FOR NUON CHEA

A handwritten signature in blue ink, appearing to read 'Arun' with a stylized flourish at the end.

SON Arun

A handwritten signature in blue ink, consisting of a series of loops and a final vertical stroke.

Victor KOPPE