

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

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SIXTH AND FINAL REQUEST TO SUMMONS TCW-223

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The international co-lawyer for Nuon Chea ('the Defence') hereby submits this sixth and final request ('Request') that the Trial Chamber summons TCW-223 to testify:

1. These submissions constitute the Defence's sixth and final request for the appearance of TCW-223 for testimony. The purpose of this Request is to consolidate the procedural history, restate the many reasons why the appearance of TCW-223 is of unparalleled importance to this case, and implore the Chamber one last time to reconsider its earlier decision.
2. This Request will also serve the secondary purpose of responding briefly to the oral submissions of the Co-Prosecutors on 17 July 2013 concerning the admissibility of statements on the case file made by TCW-223.

I. PROCEDURAL HISTORY

3. On 15 February 2011, the Defence filed its initial list of witnesses to the Trial Chamber.¹ That list described TCW-223's former role as [REDACTED] and sought his appearance in relation to the role of Vietnam, alternative command structures within the Khmer Rouge and political interference at the ECCC. The Defence elaborated on that request in the updated version of its witness list, which it filed on 21 June 2011.² This was the first request to summons TCW-223.
4. On 8 and 9 February 2012, the Defence requested the Chamber to summons up to 47 witnesses in relation to the question of pre-1975 context.³ Among them was TCW-223. This was the second request to summons TCW-223.
5. On 17 August 2012, the Defence sought the appearance of seven witnesses, including TCW-223, in connection with population movement phases I and II. The Defence argued that TCW-223 held a very senior position in the CPK hierarchy as '[REDACTED]' [REDACTED] [REDACTED]⁴ The Defence argued further that, due to his alleged presence at a meeting with Nuon Chea on 20 May 1975,

¹ Document No. **E-9/10.1**, 'Order to File Materials in Preparation for Trial: Annex D: Witness Summaries with Points of the Indictment – Nuon Chea Defence Team', 15 February 2011.

² Document No. **E-93/4.3**, 'Materials in Preparation for Trial Proceedings: Primary List: Witness Summaries – Nuon Chea Defence Team', 21 June 2011.

³ Document No. **E-1/40.1**, 'Transcript of Trial Proceedings', 8 February 2012, pp. 3:15-4:7, 32:23-33:9; Document No. **E-155/1**, 'List of Additional Witnesses Regarding Historical Context', 9 February 2012.

⁴ Document No. **E-189/3/1/7.1.5**, Submissions in Support of Request for Population Movement Witnesses, 5 September 2012 (submissions attached to a subsequent filing with the Supreme Court Chamber).

TCW-223 was one of only two to three witnesses with purportedly direct knowledge of Nuon Chea's intent with regard to the treatment of former soldiers and officials of the Khmer Republic. That knowledge was recorded by Ben Kiernan following an interview with TCW-223 as follows:

[TCW-223], then studying military affairs under Son Sen, was also at the meeting. He recalls the use of another term: 'They did not say kill, they said scatter the people of the old government. Scatter (*komchat*) them away, don't allow them to remain in the framework. It does not mean smash (*komtec*)...Smash means kill but they use a general word scatter. Nuon Chea used this phrase.'⁵

Relying on this excerpt, the Defence argued that TCW-223's evidence was both uniquely relevant and exculpatory and sought his appearance before the Chamber. This was the third request to summons TCW-223.

6. On 22 February 2013, the Defence sought the appearance of TCW-223 as the sole character witness to testify on behalf of Nuon Chea.⁶ That request described Nuon Chea's 60-year relationship with TCW-223, including the two decades in which they worked closely together toward the goal of socialist revolution in Cambodia:

Nuon Chea's relationship with TCW-223 dates to before the Geneva Conference, some 60 years ago. Beginning at that time, when he was already a member of the Indochinese Communist Party, Nuon Chea worked closely with TCW-223. According to Nuon Chea, TCW-223 acted as his messenger. The two men saw one another at least once per month. Among TCW-223's duties was that he accompany Nuon Chea to the border when Nuon Chea made such trips. Although multiple messengers or bodyguards participated in those trips, it was TCW-223 who travelled directly with Nuon Chea. Nuon Chea says that his 'life absolutely depended' on TCW-223. TCW-223 has told Ben Kiernan that, in the 1960s, he accompanied Nuon Chea to 'every Center meeting to the base.'

After the 1970 coup, Nuon Chea continued to interact with TCW-223, who was then a rising figure within the Khmer Rouge hierarchy. The notes of his interview with Ben Kiernan demonstrate that in the period TCW-223 had a familiar and even informal relationship with Nuon Chea: as TCW-223 explained, he and others in his 'group [...] called Nuon Chea "Ta Prahoc";

⁵ Document No. E-3/1593, '[REDACTED]'.

⁶ Document No. E-236/5/1, 'Request to Summons TCW-223 as a Character Witness on Behalf of Nuon Chea', 22 February 2013.

we'd say "Eh, I met Ta Prahoc", and so on. And they'd know, because the old man was someone who ate a lot of Prahoc.⁷

This was the fourth request to summons TCW-223.

7. On 17 June 2013, the Defence repeated its request to summons TCW-223 for the purpose of giving testimony relevant to Nuon Chea's intent in relation to the treatment of former soldiers and officials of the Khmer Republic.⁸ The factual basis underlying the request was the same as in August 2012. The request sought reconsideration of the Trial Chamber's denial of the August 2012 request in light of its subsequent decision to add the allegations concerning the executions at Tuol Po Chrey to the scope of the trial in Case 002/01. This was the fifth request to summons TCW-223.
8. Each of these requests was either denied or not specifically ruled upon by the Trial Chamber. Most recently, on 6 June 2013, the Trial Chamber's Senior Legal Officer indicated by email that the Chamber was unable to reach agreement with regard to the appearance of TCW-223.⁹

II. ARGUMENT

9. The importance of TCW-223's testimony to the Case 002 proceedings was never in question. Former international co-investigating Judge Lemonde admits that in 2009 he conveyed to a colleague 'qu'il nous fallait absolument interroger' TCW-223.¹⁰ That need has only grown at the trial stage. Indeed, the trial in Case 002/01 has two major components: the first two phases of the alleged forced movement and the executions at Tuol Po Chrey. TCW-223 is possibly the single most important witness in relation to *both* components.
10. In relation to forced movement, Nuon Chea does not deny that cities in Cambodia were evacuated in April 1975. Nor does he deny that the evacuation was done pursuant to an order of the Party center. Nuon Chea does, however, deny that the evacuation was unlawful under the circumstances.¹¹ He also denies that any criminal acts which may have been committed during the evacuation were committed pursuant to any plan or order

⁷ Document No. **E-236/5/1**, 'Request to Summons TCW-223 as a Character Witness on Behalf of Nuon Chea', 22 February 2013, paras 3-4.

⁸ Document No. **E-291**, 'Urgent Request to Summons Key Witnesses in Respect of Tuol Po Chrey', 17 June 2013, paras 31-33, 39(a).

⁹ Email from Susan Lamb, 6 June 2013.

¹⁰ Document No. **E-189/3/1/7.1.3**, 'Un Juge Face Aux Khmer Rouges', p. 172.

¹¹ Document No. **E-163/5/11**, 'Preliminary Submissions Concerning the Applicable Law', 18 January 2013, paras 6-27.

emanating from the Party center. He maintains that the formal hierarchy of the Communist Party of Kampuchea did not reflect the reality of the command structures in place, and that most troops were acting under the effective control of zone leaders. The key questions of fact in connection with Nuon Chea's defence to forced movement therefore concern living conditions in Phnom Penh and elsewhere in Cambodia just prior to April 1975, the nature of the command relationship which linked (or did not link) Nuon Chea to the troops on the ground, and the substance of the interaction between the Party center and zone-based military officials.

11. Testimony concerning military structures during the evacuation of Phnom Penh has been given almost exclusively by low-ranking soldiers who deny having had any knowledge of the 'upper echelon' or even of events outside their narrow physical space.¹² TCW-223 is the senior-most Khmer Rouge military officer still living to have participated in the evacuation of Phnom Penh. He arrived in that capacity at Independence Monument at 9 a.m. on 17 April 1975.¹³ He has specifically described interacting with party leaders at around the same time as the evacuation.¹⁴ No witness of comparable stature has been called to testify before the Chamber. TCW-223's testimony is therefore essential to elucidating the nature of the Party center's relationship to the alleged direct perpetrators of the crimes charged and the content of the orders conveyed to them, if any.
12. In relation to the second component of the trial, concerning the incidents at Tuol Po Chrey, the Defence advances two main positions: that no policy to execute former soldiers or officials of the Khmer Republic existed, and that if there were any executions

¹² See e.g., Document No. **E-1/139.1**, 'Transcript of Trial Proceedings', 25 October 2012, pp. 51:23-52:8 (Phnom Penh divided into zones), 53:11-18 (witness Kung Kim not allowed to leave the small area he was guarding), 54:21-55:16 (commander of witness' division was able to travel outside of the Zone), 55:19-56:12 (no knowledge outside his area), 71:10-25 (similar), 73:24-76:2 (similar); Document No. **E-1/140.1**, 'Transcript of Trial Proceedings', 5 November 2012, p. 88:2-89:1 (witness Sum Chea), 91:14-25, 92:13-19. Meas Voeun was a mid-ranking officer below the rank of TCW-223 at the time of the evacuation of Phnom Penh. He indicated in his testimony that he was ordered to withdraw from Phnom Penh shortly after entering and witnessed relatively little of the evacuation. See Document No. **E-1/129.1**, 'Transcript of Trial Proceedings', 3 October 2012, p. 98:9-25; Document No. **E-1/130.1**, 'Transcript of Trial Proceedings', 4 October 2012, pp. 14:4-17:21. He also testified that he received orders only from the Commander of the Division to which he belonged and 'what I know was only up to the Zone level'. See Document No. **E-1/129.1**, 'Transcript of Trial Proceedings', 3 October 2012, pp. 90:10-14, 91:5-11. See also *id.*, pp. 93:4-16, 101:4-8. Ieng Phan, whose rank was similar to Meas Voeun's, gave similar testimony. See Document No. **E-1/193.1**, 'Transcript of Trial Proceedings', 20 May 2013, pp. 13:19-14:17, 16:16-23. The same is true of Chhaom Se. See Document No. **E-1/159.1**, 'Transcript of Trial Proceedings', pp. 64:25-65:15; Document No. **E-1/177.1**, 'Transcript of Trial Proceedings', p. 11:17-24. Ung Ren testified that he was injured during the approach on Phnom Penh and was not involved in any part of the evacuation. See Document No. **E-1/157.1**, 'Transcript of Trial Proceedings', 9 January 2013, pp. 42:19-43:3, 46:7-25.

¹³ Document No. **E-3/1568**, Ben Kiernan Interview Notes with Chea Sim and Heng Samrin, 3 December 1991, p. 18.

¹⁴ See para. 5, *supra*.

at Tuol Po Chrey, the circumstances which surround them indicate that they were ordered by local officials and not the Party center. TCW-223 is one of two witnesses purportedly in possession of direct evidence of any kind of the intentions of the Party center in that regard. His evidence specifies Nuon Chea's exact words at a specific date, time and place and is therefore extremely reliable. The importance of his appearance in court is therefore unrivalled also in relation to the second component of the Case 002/01 trial.

13. TCW-223 is not only the single most important fact witness in this case. He is also Nuon Chea's only character witness in Case 002/01. Few people still alive in Cambodia today had as long and close a relationship with Nuon Chea during the formative years of the socialist revolution. Certainly, none have appeared before this Tribunal. The Defence is unaware of any instance at any international tribunal in which the appearance of an Accused's sole character witness was denied on grounds of relevance.
14. Many of the facts upon which this request is based were recently confirmed by witness Stephen Heder during his testimony before the Chamber. Mr. Heder agreed that TCW-223 had contact with Pol Pot at least as early as 1962 and later volunteered for the 'burgeoning' Revolutionary Army of Kampuchea. Mr. Heder confirmed that TCW-223 rose to become a company commander in the RAK, and by April 1975, regiment commander and [REDACTED]
[REDACTED]¹⁵ Mr. Heder confirmed that in that capacity, TCW-223 had a prominent role in the capture of both Neak Loeung and Phnom Penh, and that he was at that time already opposed to forces aligned with the Party center.¹⁶
15. The Defence notes that the Trial Chamber has heard at least 96 witnesses in Case 002/01. TCW-223's testimony would be more conducive to ascertaining the truth in relation to truly contentious questions of fact than any single one of them.
16. In light of these facts, the Defence seeks reconsideration of the Trial Chamber's decision not to summons TCW-223 on two grounds. First, the Chamber's decision not to summons TCW-223 notwithstanding the importance of his testimony to this case was a 'clear error of reasoning'.¹⁷ Second, the Chamber's decision not to summons TCW-223

¹⁵ Draft Transcript (EN), 16 July 2013, p. 97:15-101:1.

¹⁶ Draft Transcript (EN), 16 July 2013, p. 97:15-101:1.

¹⁷ 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 ICTY Appeals Chamber standard for reconsideration).

notwithstanding the exculpatory nature of his testimony would 'cause an injustice'.¹⁸ Each of these constitutes an independent ground for reconsideration under the circumstances of this case.

III. ADMISSIBILITY OF WRITTEN TESTIMONY

17. On 17 July 2013, the Co-Prosecutors noted that the Defence had relied on document number E3/1568, a witness statement given by TCW-223 to which the Defence has previously objected, in the course of its' examination of Stephen Heder. The Co-Prosecutors argued:

Now, Mr. President, impliedly, by the defence teams referring to these statements, it seems that the Defence are withdrawing their objections to the admission of such statements absent cross-examination.

So my application at this state is twofold: firstly, for the Defence to confirm its position, and if it is not sufficiently clarified, secondly, for the Trial Chamber to note my application today as a factor to be considered when the Trial Chamber ultimately decides whether to admit such statements in lieu of cross-examination.¹⁹

18. In response to the Co-Prosecutors' first question, the Nuon Chea defence confirms unequivocally that it continues to maintain all of the objections it has previously lodged against the witness statements, complaints and transcripts tendered for admission by the Co-Prosecutors and civil parties.²⁰

19. The Defence submits that this position is (and was) amply clear and infers that the Co-Prosecutors' second submission is therefore moot. The Defence nevertheless submits that its' use of document E3/1568 has no bearing at all on the Chamber's consideration of its objections against the documents tendered into evidence. As the instant Request makes clear, the Defence continues actively to seek the appearance of TCW-223. Were he to appear for testimony, his statements in E3/1568 would be admissible into evidence. The Defence furthermore notes that, although the ongoing trial has been in progress for twenty months, no ruling is yet forthcoming on any of the Defence's objections to written

¹⁸ *Id.*

¹⁹ Draft Transcript (EN), 17 July 2013, p. 62:13-22.

²⁰ 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; 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.

testimony. For both of these reasons, the question of whether document E3/1568 will ultimately be admitted into evidence is presently unknown.

20. The Defence is not required to choose between objecting to documents it believes are inadmissible and relying on them during their examinations pending final rulings from the Chamber. Should the Chamber ultimately decide to summons TCW-223 or to admit E3/1568 without cross-examination, the Defence would otherwise have squandered its' opportunity to make use of critical exculpatory evidence.
21. The Defence notes, finally and for the record, that its' objection to document E3/1568, like its' objections to all other written statements, is not to admission as such but to admission without cross-examination. In light of the Defence's persistent requests to summons TCW-223, the Co-Prosecutors' assertion that the Defence objects to the admission of document E3/1568 is not correct as such. The Defence strongly supports the appearance of TCW-223 and the admission of document E3/1568. If the Chamber chooses not to summons TCW-223 – with the ancillary effect of rendering E3/1568 inadmissible – it would, for all of the reasons provided herein, cause a grave violation of Nuon Chea's right to a fair trial.

IV. CONCLUSION AND RELIEF SOUGHT

22. The Defence respectfully requests that the Chamber SUMMONS TCW-223 to testify before the Chamber and REJECT the Co-Prosecutors' oral submissions on 17 July 2013 concerning the admissibility of witness statements, complaints and transcripts.

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