

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

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**REQUEST TO SUMMONS WITNESSES IN RESPECT OF ALLEGED POLICY OF
TARGETING KHMER REPUBLIC OFFICIALS**

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The Co-Lawyers for Nuon Chea ('the Defence') hereby submit the instant request ('Request') pursuant to Rules 92 and 87(4) of the Internal Rules (the 'Rules') that the Trial Chamber summons all witnesses relied upon by the Co-Investigating Judges or Co-Prosecutors for the purpose of proving the existence of an alleged policy of targeting former officials and soldiers of the Khmer Republic:

I. PROCEDURAL HISTORY

1. On 4 March 2013 and 9 April 2013, the civil parties and the Co-Prosecutors filed their final lists of witness statements and complaints for admission into evidence. On 26 April 2013, the Defence objected to most of those statements, including any evidence concerning an alleged policy to target former soldiers and officials of the Khmer Republic.¹
2. On 31 May 2013, the Trial Chamber issued a memorandum indicating 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 thereafter be entitled to 'a last opportunity to raise any genuinely novel issue' regarding such witnesses at the forthcoming trial management meeting.² On 6 June 2013, the Senior Legal Officer circulated a list of those witnesses who have already or will appear in Case 002/01 in advance of the Chamber's reasoned decision in that regard.
3. At the trial management meeting held on 13 June 2013 and in related written submissions, the Defence sought the appearance of six witnesses, all of which concerned the crimes charged at Tuol Po Chrey: five in relation to crime base evidence and a sixth, TCW-223, in relation to the alleged CPK policy to target former soldiers and officials of the Khmer Republic.³ On 19 June 2013, the Chamber issued its decision to summons one of those witnesses, along with two witnesses sought by the prosecution in relation to the existence of an alleged policy to execute former soldiers and officials of the Khmer Republic, and a third in relation to the role of Khieu Samphan.⁴

¹ 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.

² Document No. **E-288**, Memorandum from President Nil Nonn to Parties, 31 May 2013, para. 3.

³ Document No. **E-291**, 'Urgent Request to Summons Key Witnesses in Respect of Tuol Po Chrey', 17 June 2013.

⁴ Document No. **E-292**, Email from Susan Lamb to Parties, 19 June 2013.

4. At the TMM the President of the Trial Chamber also made incidental reference to the outstanding requests of the Co-Prosecutors and the civil parties to admit written statements into evidence. The President indicated that a decision would be issued within two to three weeks, adding that ‘approximately 1,500 written statements will shortly receive E3 classifications once this decision and its annexes are finalized.’⁵ The Defence notes that the civil parties and the Co-Prosecutors together have sought the admission of as many as 1,572 statements and complaints into evidence.⁶ The Defence infers that the Chamber has decided to admit a substantial majority of those documents into evidence.

II. THE ‘TARGETING WITNESSES’

5. Attached hereto as Annex A is a list of all witnesses identified by either the CIJs or the Co-Prosecutors in support of the allegation that a CPK policy existed to target former officials or soldiers of the Khmer Republic (‘Targeting Witnesses’). These witnesses were identified on the basis of the evidence cited in connection with selected allegations in the Closing Order and the prosecution’s requests to hear and admit evidence.
6. The Closing Order contains a variety of allegations concerning the alleged treatment by the CPK of former officials and soldiers of the Khmer Republic. Some of these are directed generally to the alleged targeting policy,⁷ while others arise throughout the Closing Order in relation to specific crime sites.⁸ The Defence considers that any witness statement cited in connection with any of these allegations is purported to be relevant to the alleged existence of a CPK policy of targeting former soldiers and/or officials of the Khmer Republic. Each witness is accordingly listed on Annex A. Other allegations in the Closing Order concern officials or soldiers of the Khmer Republic but do not allege that these persons were targeted as such.⁹ Witnesses cited in support of these allegations were not included on Annex A.

⁵ Document No. **E-1/207.1**, ‘Transcript of Trial Proceedings’, 13 June 2013, p. 26:11-12.

⁶ Document No. **E-278.3**, ‘Revised Annex 12 – Witness Statements’, 9 April 2013; Document No. **E-278.4**, ‘Revised Annex 13 -- Complaints’, 9 April 2013; Document No. **E-223/2/7.2**, ‘Annex 1: Written Statements of Civil Parties who Have not Given Oral Evidence’, 4 March 2013. The three lists combined include 1,572 statements, prior to accounting for any overlap.

⁷ See Document **D-427**, ‘Closing Order’, 15 September 2010 (‘Closing Order’), fns 698, 709-714, 3004-3005, 3014.

⁸ See Closing Order, fns 447-449, 860-867, 921-923, 964-965, 2068, 2156-2160, 2263, 2992.

⁹ See *e.g.*, Closing Order, fns 1577, 2067, 2168.

7. The Co-Prosecutors filed witness summaries in connection with their requests for live testimony in early 2011¹⁰ and a revised request to admit witness statements and complaints into evidence in April 2013.¹¹ Both filings describe the relevance of each witness concerned to the allegations in Case 002. Any witness explicitly alleged therein to be in possession of evidence concerning former officials or soldiers of the Khmer Republic, and who gave evidence before the CIJs, has also been added to Annex A.
8. The Defence notes that some of the Targeting Witnesses have already appeared before the Chamber. As the purpose of the instant request is to seek the appearance of witnesses for testimony, those who have already appeared are identified in a separate listing in the attached Annex. Witnesses known to be deceased are omitted from the Annex altogether. Also omitted are witnesses already sought in related requests.¹²

III. ARGUMENT

A. No Reliable Direct Evidence of a Policy to Execute Khmer Republic Soldiers and Officials Exists

9. As the Defence has previously argued,¹³ the direct evidence that a CPK policy to execute former soldiers and officials of the Khmer Republic was in place is almost non-existent. The most precise evidence of the intention of the party center is given by a witness who had direct contact with Nuon Chea, claims to recall his exact words on a definite occasion, and specifically denies that the policy existed.¹⁴ Ieng Sary claims the policy existed, but insists in the same breath that he knew nothing about it.¹⁵ Not a single piece of physical evidence that soldiers and officials of the Khmer Republic were executed exists. There are no mass graves and no dead bodies. There is no forensic analysis.
10. Numerous well-placed witnesses have furthermore testified that defeated Lon Nol soldiers were *not* executed but rather arrested and taken prisoner. Phy Phuon – upon

¹⁰ Document No. **E-13.1**, ‘Witness, Civil Party and Expert Summaries with Points of the Indictment – OCP’, 23 February 2011.

¹¹ Document No. **E-278.3**, ‘Revised Annex 12 – Witness Statements’, 9 April 2013; Document No. **E-278.4**, ‘Revised Annex13 -- Complaints’, 9 April 2013.

¹² See para. 3, *supra*. The Annex also identifies statements taken from and/or complaints filed by each witness. Those listings are for identification purposes and are not intended to be comprehensive under circumstances in which the witness has given multiple statements.

¹³ Document **E-1/219.1**, ‘Transcript of Trial Proceedings’, 8 July 2013 (‘Document Presentation Response Hearing’), pp. 45:15-47:7.

¹⁴ See Document **E-291**, ‘Urgent Request to Summons Key Witnesses in Respect of Tuol Po Chrey’, 17 June 2013, paras 31-33.

¹⁵ Document No. **IS20.6**, ‘Steve Heder Interview of Ieng Sary’, 17 December 1996, pp. 5-6.

whom Philip Short relied repeatedly as his only direct source in relation to the existence of a policy to execute former Lon Nol soldiers – has testified as follows:

No, because they have raised white flags already. There were clear instructions not to touch them. During war, on the battlefield, that was different. Now they had surrendered to us, and we need not touch them, just welcome them and greet them, and respond to the questions which they asked us. He said that [they were] “Cambodians, like us”; Don’t touch them at all. Those were the words of Pol Pot.¹⁶ (emphasis added)

Similar testimony was repeated by this witness, and by numerous others, during their appearances before this Chamber.¹⁷ Indeed, the former RAK soldiers who participated in the evacuation of Phnom Penh have consistently testified that Khmer Republic soldiers were unharmed once they surrendered on or around 17 April 1975.¹⁸

11. The CIJs and the Co-Prosecutors have identified a small selection of documentary evidence in support of their claim that a policy to execute former soldiers and officials of the Lon Nol regime existed. Several of these documents were described by the Co-Prosecutors during their document presentation hearing and subsequently debunked by the Defence.¹⁹ Other documents cited by the CIJs similarly fail to withstand scrutiny. The CIJs cite a series of newspaper articles describing US intelligence which in turn purport to describe orders intercepted from the Khmer Rouge concerning former soldiers and officials of the Khmer Republic.²⁰ The authors of the second-hand hearsay (the newspaper articles) have not testified, neither the first-hand hearsay (the intelligence report) nor the original source (the Khmer-language ‘order’) is before the Chamber, and there is no evidence at all of who gave that ‘order’ or who received it. A telegram copied to Nuon Chea dated 2 April 1976 – almost a year after the alleged events at Tuol Po Chrey – makes a single oblique reference to ‘former soldiers’ as enemies without any

¹⁶ Document No. **E-3/24**, Written Record of Interview of Rochoem Ton alias Phy Phuon, 5 December 2007, p. 5.

¹⁷ See e.g., Document No. **E-1/98.1**, ‘Transcript of Trial Proceedings’, 30 July 2012 (‘Phy Phuon Testimony’), p. 88:2-10; Document No. **E-1/193.1**, ‘Transcript of Trial Proceedings’, 20 May 2013 (‘Ieng Phan Testimony’), pp. 36:9-43:9, 65:20-71:20; Document No. **E-1/129.1**, ‘Transcript of Trial Proceedings’, 3 October 2012 (‘Meas Voeun Testimony’), p. 97:1-12; Document No. **E-1/139.1**, ‘Transcript of Trial Proceedings’, 25 October 2012 (‘Kung Kim Testimony’), pp. 50:18-5:13; Document No. **E-1/177.1**, ‘Transcript of Trial Proceedings’, 8 April 2013 (‘Chhaom Se Testimony’), pp. 64:14-65:1.

¹⁸ See fn 17, *supra*.

¹⁹ Document Presentation Response Hearing, pp. 53:22-75:5.

²⁰ Closing Order, fn. 712 (citing relevant sources).

indication, explicit or otherwise, that they had been or might be executed.²¹ No other direct evidence is put forward by either the CIJs or the Co-Prosecutors.

B. Witness Statements Purporting to Describe the Execution of Khmer Republic Officials are Systematically Unreliable

12. In light of the near-total absence of any direct evidence, the notion that a policy to execute former Lon Nol soldiers and officials existed seems to be based primarily on the proposition that executions were so widespread across Cambodia that they must have followed from a policy devised by the party center.²² Testimony purporting to describe individual instances of such executions – in particular, from the Targeting Witnesses – is consequently of central importance. Careful scrutiny of those statements reveals, however, that they are systematically unreliable and fail to support the Co-Prosecutors' position.
13. First, the CIJs and the Co-Prosecutors were unable to identify more than four witnesses who even claim to have observed any executions of any former soldiers or officials. That failure is remarkable in light of the conclusion urged upon this Chamber: that executions were so widespread and universal as to establish without any direct evidence that they must have been intended by the party center. The CIJs and the Co-Prosecutors, together with their many proxies, conducted thousands of interviews of people at all levels of Democratic Kampuchea across the entirety of Cambodia. The fact that almost none of those people witnessed any actual executions should be a significant consideration in the Chamber's evaluation of the evidence.
14. Nor can a pattern of executions be inferred from the limited and tentative testimony the Targeting Witnesses have given before this Tribunal. Some witnesses testify that Lon Nol soldiers or officials were separated by CPK cadres from a larger group and then taken away. Yet none of these witnesses has any first-hand knowledge of what transpired next. Any number of possible outcomes might have followed, including transfer to a worksite or cooperative, reeducation or detention at a security center. Indeed, this evidence is consistent with Heng Samrin's claim that officials of the Lon Nol regime were to be

²¹ Document No. E-3/511, CPK Telegram by Pok entitled 'Telegram 94 - Radio Band 1100 - With Respect to Beloved Brother Pol', 2 April 1976.

²² See e.g., Document No. E-1/191.1, 'Transcript of Trial Proceedings', 8 May 2013, pp. 130:23-133:3.

‘removed from the framework’ rather than killed.²³ As the Defence argued in its’ response to the Co-Prosecutors’ document presentation in relation to this alleged policy, there is good reason to be skeptical of the Co-Prosecutors’ effort to equate mere removal or disappearance with execution.²⁴

15. Other evidence is even weaker. Numerous statements relay distant hearsay, often from unspecified sources, that certain people known to the witness who previously held a position in the former regime were arrested, ‘disappeared’, or killed. None of these witnesses has first-hand knowledge of any treatment of former soldiers or officials, let alone their execution. In many of these statements, there is furthermore no basis at all upon which to conclude that the alleged victims, if indeed they were killed, were targeted on the basis of having previously been a member of the former regime. Other witnesses merely describe hearing others characterize officials of the former regime as ‘enemies’ or assert in general terms that such people should be killed. Others claim to have seen dead bodies, but have no information about how they were killed. Indeed, in some cases, it is unclear how they know the alleged victims were former Lon Nol soldiers or officials; in other cases, it is apparent they were soldiers only because they had almost certainly just been killed in battle. In other cases, the basis of the witness’s claim that Lon Nol soldiers or officials were killed is not clear at all. In still other cases, there is no reference of any kind to Lon Nol soldiers or officials, or, if there is such a reference, there is no assertion that they were executed.

16. The tentative nature of these statements renders them unreliable on their face. But the risks involved in relying on these statements without cross-examination only became fully apparent during cross-examination. In a recent example, two witnesses sought by the Co-Prosecutors specifically for the purpose of describing executions of former soldiers and officials of the Khmer Republic appeared for testimony over the week of 1 July 2013. Both witnesses contradicted the evidence given in their statements to the investigating judges, testified that they had no first-hand knowledge of the relevant facts, and conceded that the facts of which they did claim to be aware amounted to rumor and speculation.

²³ See Document E-291, ‘Urgent Request to Summons Key Witnesses in Respect of Tuol Po Chrey’, 17 June 2013, paras 31-33.

²⁴ Document Presentation Response Hearing, p. 47:14-51:6. See also Draft Transcript (EN), 19 July 2013, pp. 4:21-5:17 (according to Stephen Heder, ‘removal’ could mean any number of concrete acts, including arrest or removal from a post).

17. The first witness, Pech Chim, appeared on 1 July 2013. Pech Chim indicated in his statement to the Co-Investigating Judges that former Lon Nol soldiers and officials had been removed from the crowd by Khmer Rouge cadre during the evacuation of Phnom Penh and killed.²⁵ But during cross-examination, he explained that he ‘did not witness the event personally’ and ‘regarding the fate of those soldiers, I did not know’.²⁶ Mr. Chim acknowledged that his only source for this information were the wives of the soldiers who were allegedly killed.²⁷ Those sources, in turn, knew only that they had been separated from their husbands during the evacuation of Phnom Penh.²⁸ He explained:

I did not witness it personally and I did not participate in that action, I only heard about it. It was a rumour from one person to another who whispered from one person to next.²⁹

Mr. Chim concluded this portion of his testimony by confirming that he never witnessed any killings of former Lon Nol soldiers or officials,³⁰ that he had never been told by anybody that they had executed enemies of the CPK,³¹ and that the information he had regarding the disappearance of the former Lon Nol soldiers was based on rumor and speculation.³²

18. The second witness, Lev Lam, appeared on 2 July 2013. When questioned by the Co-Prosecutors about whether former members of the Khmer Republic were sorted and separated from the rest of the population when they arrived in his commune after having been evacuated from Phnom Penh, Mr. Lam stated: ‘during the sorting of the people I was not aware of it.’³³ Nor was Lev Lam aware of how these former Lon Nol soldiers and officials were allegedly identified from other evacuees, where they were assembled or what ultimately became of them.³⁴ When asked if he knew what a Lon Nol official was, Lev Lam responded, ‘No, I don’t’.³⁵

19. Similarly, when cross-examined on the account provided in his statement to the CIJs of the execution of a group of 20 family members and affiliates of the former Lon Nol

²⁵ Document No. E-1/215.1, ‘Transcript of Trial Proceedings’, 1 July 2013, p. 32:17-25.

²⁶ Document No. E-1/215.1, ‘Transcript of Trial Proceedings’, 1 July 2013, pp. 57:25, 58:13-18.

²⁷ Document No. E-1/215.1, ‘Transcript of Trial Proceedings’, 1 July 2013, p. 57:1-16.

²⁸ Document No. E-1/215.1, ‘Transcript of Trial Proceedings’, 1 July 2013, p. 32:17-25.

²⁹ Document No. E-1/215.1, ‘Transcript of Trial Proceedings’, 1 July 2013, p. 57:9-12.

³⁰ Document No. E-1/215.1, ‘Transcript of Trial Proceedings’, 1 July 2013, p. 60:1-7.

³¹ Document No. E-1/215.1, ‘Transcript of Trial Proceedings’, 1 July 2013, p. 60:9-12.

³² Document No. E-1/215.1, ‘Transcript of Trial Proceedings’, 1 July 2013, pp. 58:19-59:6.

³³ Document No. E-1/216.1, ‘Transcript of Trial Proceedings’, 2 July 2013, pp. 22:18-23:1.

³⁴ Document No. E-1/216.1, ‘Transcript of Trial Proceedings’, 2 July 2013, pp. 68:8-12, 72:22-73:7.

³⁵ Document No. E-1/216.1, ‘Transcript of Trial Proceedings’, 2 July 2013, p. 65:12-15.

regime, he explained: ‘No, I didn’t see this. These people were taken away only to be received by other people and then I would be allowed to return home.’³⁶ When confronted with his prior statement that he had witnessed the execution of 100 evacuee families of former Lon Nol officials and soldiers, he revealed that he had not seen the executions and did not know whether they had occurred.³⁷ The extent of his first-hand knowledge that they had occurred was that he heard someone counting ‘one, two, three’.³⁸

20. The other witnesses listed on Annex A who have appeared before the Chamber have repeatedly made similar concessions on cross-examination. Hun Chhunly explained that although he heard that military officers were transported away and later killed he saw neither part of that sequence.³⁹ Pechuy Chipse testified that Lon Nol soldiers were taken to Kampong Kdei and then executed, but that he witnessed neither the evacuation to Kampong Kdei nor the alleged executions.⁴⁰ Kim Vanndy stated that he saw the dead bodies of Lon Nol soldiers which ‘could be the casualty of the fighting because the bodies were already swollen and there were flies.’⁴¹ Sum Chea testified that he had no direct evidence of any killings.⁴² Kung Kim, Meas Voeun and Ieng Phan all directly contradicted the Co-Prosecutors’ allegation, explaining that Lon Nol soldiers who surrendered in battle were left unharmed.⁴³ The Co-Prosecutors concede that Ung Chhat and Lim Sat contradicted numerous elements of their prior statements during cross-examination, and indeed neither one witnessed any executions.⁴⁴ Every other witness listed on Annex A who has appeared before the Chamber has similarly testified only that they heard or presumed that Lon Nol soldiers or officials had been killed. None witnessed any executions first-hand.

C. The Targeting Witnesses Must be Cross-Examined

21. In light of the foregoing, the Defence requests the Chamber to summons all of the Targeting Witnesses to appear before the Chamber. The evidence given by these witnesses is of central importance to the allegation that a policy of executed Lon Nol

³⁶ Document No. E-1/216.1, ‘Transcript of Trial Proceedings’, 2 July 2013, p. 77:14-21.

³⁷ Document No. E-1/216.1, ‘Transcript of Trial Proceedings’, 2 July 2013, pp. 82:12-83:18.

³⁸ Document No. E-1/216.1, ‘Transcript of Trial Proceedings’, 2 July 2013, pp. 87:11-88:15.

³⁹ Document No. E-1/150.1, ‘Transcript of Trial Proceedings’, 7 December 2012, pp.56:19-57:18.

⁴⁰ Document No. E-1/144.1, ‘Transcript of Trial Proceedings’, 14 November 2013, pp. 25:22-27:11, 30:8-16.

⁴¹ Document No. E-1/148.1, ‘Transcript of Trial Proceedings’, 5 December 2012, pp. 101:23-102:8.

⁴² Document No. E-1/140.1, ‘Transcript of Trial Proceedings’, 5 November 2012, p. 113:11-22.

⁴³ See fn 17, *supra*.

⁴⁴ Document E-291, ‘Urgent Request to Summons Key Witnesses in Respect of Tuol Po Chrey’, 17 June 2013, paras 9-14; Document No. E-1/207.1, ‘Transcript of Trial Proceedings’, 13 June 2013, pp. 70:15-71:14.

soldiers and officials existed. That evidence is unreliable on its face and has consistently proven yet more unreliable following cross-examination. Accordingly, the Defence seeks the opportunity to contest all of their evidence in open court.

D. This Request is ‘Genuinely Novel’ and Satisfies Rule 87(4)

22. Most of the witnesses listed on Annex A were never previously proposed for testimony. The instant request must therefore satisfy the requirement of Rule 87(4) that new evidence sought following the commencement of trial was previously ‘not available’. The Chamber may also choose to require that the request is ‘genuinely novel’ pursuant to its memorandum of 31 May 2013. The Defence submits that this request is made at the earliest possible opportunity and therefore satisfies both standards.
23. When the Defence originally formulated its witness lists in February 2011, there was no indication that the rules concerning the admission of witness statements at the *ad hoc* tribunals would apply before the Trial Chamber. Indeed, the position of the Defence was that no witness statement could be admitted without an opportunity for cross-examination at trial,⁴⁵ a view encouraged by the CIJs’ explicit assurance in that regard and the clarity of the Internal Rules.⁴⁶ There was no obligation at that time for Nuon Chea to seek additional witnesses in connection with allegations against him.
24. Subsequent opportunities to seek the appearance of witnesses were granted while the Defence’s objections to the requests to admit witness statements into evidence were still outstanding. Indeed, the Chamber hinted for the first time that witness statements concerning the alleged CPK policy to target former officials and soldiers of the Khmer Republic might be admitted on 13 June 2013. It also indicated at that time that a formal decision in that regard was forthcoming within two to three weeks.
25. For reasons already stated, it is only if the statements given by the Targeting Witnesses are admissible that the need to cross-examine those witnesses arises. Prior to 13 June 2013, no indication of any kind existed that the statements in question would be admitted. In the weeks since 13 June 2013, the Defence has been awaiting the Trial Chamber’s final decision prior to filing the instant request. In light of the most recent indications from the

⁴⁵ Document No. E-96/1, ‘Response to OCP Submission Regarding the Admission of Written Witness Statements’, 21 July 2011, para. 1.

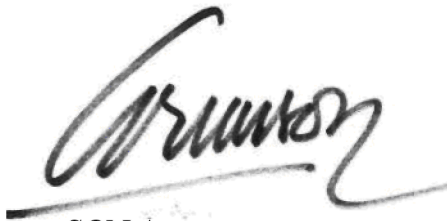
⁴⁶ See Rule 84(1); Document No. A-110/I, Memorandum from Co-Investigating Judges to Co-Lawyers for Nuon Chea, 10 January 2008, p. 2.

Chamber that the closing of the hearing of the evidence is imminent, the Defence has elected to file this request in advance of the Chamber's decision. It is, for these same reasons, filed at the earliest possible opportunity. It is therefore timely.

IV. CONCLUSION AND RELIEF SOUGHT

26. For these reasons, the Defence respectfully requests that the Chamber SUMMONS all of the witnesses listed on Annex A who have not already appeared before the Chamber.

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