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NUON CHEA'S COMBINED REPLY TO CO-PROSECUTORS' AND CIVIL PARTY LEAD CO-LAWYERS' RESPONSES TO NUON CHEA'S RULE 92 MOTIONTO USE CERTAIN S-21 STATEMENTS

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I. INTRODUCTION

1. Pursuant to Internal Rule 92 and Article 8.4 of the Practice Direction on Filing of Documents Before the ECCC, the Co-Lawyers for Mr. Nuon Chea (the "Defence") submit this combined reply to the Co-Prosecutors' as well as the Civil Party Lead Co-Lawyers' responses to Mr. Nuon Chea's Rule 92 motion to use certain S-21 statements.

II. BACKGROUND

2. On 20 April 2016, the Defence filed a Rule 92 motion before the Trial Chamber seeking to use certain S-21 statements on the basis that there is evidence rebutting the presumption that there is a real risk that these particular statements were obtained through torture (the "Motion").[1]

3. On 2 May 2016, the Civil Party Lead Co-Lawyers (the "LCLs") and the Co-Prosecutors ("Prosecution") filed their respective responses ("LCLs' Response" and "Prosecution's Response") to the Motion.[2] The LCLs' Response was notified on the same day, while the Prosecution's Response was notified on 3 May 2016.

4. On 4 May 2016, the Defence requested leave from the Trial Chamber to file separate replies to the LCLs' Response and the Prosecution's Response "on 13 and 16 May 2016 respectively, and to do so only in English, with Khmer translations to follow as soon as possible".[3]

5. On 5 May 2016, the Trial Chamber partly granted the Defence's request, instructing the Defence to file a combined reply on 12 May 2016 in English, with Khmer translation to follow.[4] Following this decision, the Defence requested on the same day the Chamber's leave to extend the page limit from 15 pages to 30 pages.[5] The Trial Chamber partly granted this request, allowing the Defence to file the reply within 20 pages.[6]

[1] **E399**, 'Nuon Chea's Rule 92 Motion to Use Certain S-21 Statements', 20 Apr 2016 (the "Motion").
[2] **E399/1**, 'Lead Co-Lawyers' Response to Nuon Chea's Rule 92 Motion to Use Certain S-21 Statements', 2 May 2016 (the "LCLs' Response"); **E399/2**, 'Co-Prosecutors' Response to Nuon Chea's Motion to Use Certain S-21 Statements', 2 May 2016 (the "Prosecution's Response").
[3] Email from Defence Legal Consultant to the Trial Chamber Senior Legal Officer, 4 May 2016 (**Attachment 1**).
[4] Email from the Trial Chamber Senior Legal Officer to the Parties, 5 May 2016 (**Attachment 2**).
[5] Email from Defence Legal Consultant to the Trial Chamber Senior Legal Officer, 5 May 2016 (**Attachment 3**).
[6] Email from the Trial Chamber Senior Legal Officer to the Parties, 5 May 2016 (**Attachment 4**).

III. APPLICABLE LAW

6. As to the exclusionary rule stipulated in Article 15 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"),[7] the Trial Chamber held that there is no "universally-accepted international standard which would extend the exclusion of torture-tainted evidence to all evidence obtained through cruel, inhuman and degrading treatment". It further held that it "does not consider that Article 15 of the CAT extends to evidence obtained by ill-treatment" "falling short of torture".[8]

7. The distinction between torture and inhuman or degrading treatment:

> allow[s] the special stigma of "torture" to attach only to deliberate inhuman treatment causing very serious and cruel suffering [...] In addition to the severity of the treatment, there is a purposive element [...] which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating.[9]

8. The Defence rests on the Motion (paras. 8-14) for the remainder of the applicable law.

IV. REPLY

A. The Alleged Detention Conditions and Mental Coercion at S-21 Do Not Amount to Torture

9. The Prosecution argues that "even in the absence of" physical torture directly inflicted on detainees during interrogations, "the conditions of detention" and "the extreme mental coercion" during interrogations show that there is a real risk that "confessions of anyone interrogated at S-21 were obtained using mental and physical torture".[10]

10. The Defence submits, however, that in the absence of severe physical violence, neither the detention conditions at S-21 nor the mental coercion alone, or in combination, is sufficient to amount to torture or to demonstrate a real risk of torture.

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[7] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/39/51, 10 Dec 1984, entered into force on 26 Jun 1987.
[8] **E350/8**, 'Decision on Evidence Obtained through Torture', 5 Feb 2016 ("TC Decision"), para. 61, and fn. 126.
[9] *See*, e.g., *Case of El-Masri v. The Former Yugoslav Republic of Macedonia*, ECtHR, App. No. 39630/09, Judgement, 13 Dec 2012 ("*El-Masri* case", **Attachment 5**), para. 197.
[10] **E399/2**, Prosecution's Response, para. 14.

(i) Detention Conditions

11. At the outset, the Defence notes that the Trial Chamber in Case 001 found that the alleged detention conditions as summarised by the Prosecution[11] constituted "other inhumane acts" rather than torture.[12] Bearing in mind that whether the alleged conditions may be proven and if proven whether they could constitute inhumane acts are still live issues in Case 002/02, the Defence submits that such conditions may at the most amount to ill-treatment falling short of torture.

12. In relation to the detention conditions, the Prosecution emphasises the alleged "climate of fear" and argues that "[l]iving in a constant state of anxiety as a result of physical abuse and confinement constitutes mental suffering amounting to torture".[13] This is a misinterpretation of the law. In the *Hajrulahu* case cited by the Prosecution to support its argument, the European Court of Human Rights ("ECtHR") did not find the fear, anxiety, anguish and mental suffering of the applicant in itself sufficient to amount to torture. Rather, the finding of torture in that case was based on the "combination" of all the measures used including severe physical violence such as beatings causing bruises all over the applicant's body, holding the applicant under water with his legs and arms handcuffed, and threating the applicant with a dog.[14] In contrast, in the *El-Masri* case where "physical force" was absent, similar conditions which caused the applicant fear, anxiety, anguish and mental suffering were found by the ECtHR to constitute inhuman and degrading treatment rather than torture.[15] Indeed, the ECtHR has held that treatment

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[11] **E399/2**, Prosecution's Response, paras. 15-17 (excluding fns. 39, 61, 62, 64, 66, 67), citing, *inter alia*, *Case 001*, **E188**, Trial Judgement, Case File No. 001/18-07-2007/ECCC/TC, 26 Jul 2010 ("Case 001 Trial Judgement"), paras. 258-60, 262-65, 268-70, 272.
[12] Case 001 Trial Judgement, paras. 258-78, and 372-73.
[13] **E399/2**, Prosecution's Response, paras. 15, 17, and para. 12, citing *Case of Hajrulahu v. The Former Yugoslav Republic of Macedonia*, ECtHR, App No. 37537/07, Judgement, 29 Jan 2016 ("*Hajrulahu* case", **Attachment 6**).
[14] *Hajrulahu* case, paras. 100-101.
[15] *El-Masri* case, paras. 200, 202-204. "As to the applicant's treatment in the hotel, the Court observes that he was under constant guard by agents of the Macedonian security forces, interrogated in a foreign language of which he had a limited command, threatened with a gun and consistently refused access to anyone other than his interrogators. Such treatment led the applicant to protest by way of a hunger strike for ten days. […] It is true that while he was kept in the hotel, no physical force was used against the applicant. However, the Court reiterates that Article 3 does not refer exclusively to the infliction of physical pain but also of mental suffering, which is caused by creating a state of anguish and stress by means other than bodily assault. There is no doubt that the applicant's solitary incarceration in the hotel intimidated him on account of his apprehension as to what would happen to him next and must have caused him emotional and psychological distress. The applicant's prolonged confinement in the hotel left him entirely vulnerable. He undeniably lived in a permanent state of anxiety owing to his uncertainty about his fate during the interrogation sessions to which he was subjected. The Court notes that such treatment was intentionally meted out to the applicant with the aim of extracting a confession or information about his alleged ties with terrorist organisations. Furthermore, the threat that he would be shot if he left the hotel room was sufficiently real and immediate […] Lastly, the applicant's suffering was further increased by the secret nature of the operation and the fact that he was kept incommunicado for twenty-three days in a hotel, an extraordinary place of detention outside any judicial framework. […] In view of the foregoing, the Court considers that the treatment to which the applicant was subjected while in the hotel amounted on various counts to inhuman and degrading treatment"

which is "such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance" is typically degrading treatment,[16] which is to be distinguished from torture.

13. Moreover, some of the conditions listed by the Prosecution – such as detainees being held under armed guard, being handcuffed while being moved, and being kept in collective cells with barred windows[17] – hardly amount to "distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention" and "the practical demands of imprisonment".[18] Hence, these conditions are insufficient to constitute inhuman or degrading treatment.[19]

14. The most appalling condition alleged by the Prosecution – that detainees were forced to lick urine and faeces from the cell floor – is solely based on the recent testimony of one civil party, Chum Mey, who also testified in Case 001 but apparently omitted such details back then.[20] As illustrated above, the Defence submits that such condition, if proven, may at the most amount to ill-treatment falling short of torture. Moreover, there is no evidence whatsoever showing that such abuses were used with a view to obtaining statements from the detainees.[21] The Prosecution's assertion that "[t]he S-21 detention conditions [...] weakened prisoners *in preparation for interrogation*"[22] is groundless. Indeed, the Prosecution fails to refer to any evidence to support the asserted purposive element.[23] In addition, the Defence notes that "the statement given by [...] the alleged victim in this case with a possible direct interest" must be treated with caution and "should be evaluated in the context of the evidence as a whole".[24] In light of this, apart from lacking corroborative evidence, Chum Mey's allegation seems highly questionable given that one of the pieces of contemporaneous and documentary evidence before the Trial Chamber shows that the S-21 guards were instructed "absolutely" not to "threaten

[16] *See*, e.g., *Hajrulahu* case, para. 97.
[17] **E399/2**, Prosecution's Response, para. 16.
[18] *Case of Gelfmann v. France*, ECtHR, App. No. 25875/03, Judgement, 14 Dec 2004 (**Attachment 7**), para. 50.
[19] ibid.
[20] **E399/2**, Prosecution's Response, para. 16, fn. 51. Although fn. 51 also refers to paragraph 272 of the Case 001 Trial Judgement, the referenced paragraph only found that detainees had to defecate and urinate in the cells.
[21] Article 15 of CAT only applies to statement obtained through torture.
[22] **E399/2**, Prosecution's Response, para. 16 (emphasis added).
[23] *See*, *supra*, para. 7.
[24] *Case of Loayza-Tamayo v. Peru*, IACtHR, Series C No. 33, Judgment, 17 Sep 1997 (**Attachment 8**), para. 43. The Defence submits that such caution must be applied to the evidence of all the civil parties, including Chum Mey, Vann Nath and Bou Meng whose evidence is either directly or indirectly relied on by the Prosecution in its Response.

or beat the prisoners" and just to report "[i]f the prisoners disobey the rules or ignore warnings".[25]

15. Moreover, the civil parties, Chum Mey, Vann Nath and Bou Meng – whose evidence the Prosecution heavily relies on in order to demonstrate the conditions at S-21 – were only detained at S-21 in 1978 towards the end of the regime. The detention conditions to which they were allegedly subjected are irrelevant to the determination of the detention conditions in 1976 and 1977, which is the relevant period for Koy Thuon, Yim Sambath and Chea Non.

16. Further, the Defence notes that in determining whether certain treatment may reach the minimum level of severity to constitute either torture, or inhuman and degrading treatment, all circumstances must be considered, including the *general situation* in which the alleged victims find themselves. For instance, even though the lack of mosquito nets[26] may sound inhuman or degrading to European people living in 2016, it did not necessarily arouse similar negative feelings in Cambodian people living in the 1970s. Duch once said that "at that time at S-21, frankly speaking of the real situation, I myself did not even sleep in the mosquito nets".[27] Given such a general situation, the lack of mosquito nets can neither be considered a treatment deliberately inflicted on the detainees at S-21, nor reaching the minimum level of severity to constitute torture, or inhuman and degrading treatment.

17. The Defences also notes that the Prosecution cited ICTR jurisprudence to argue that "a person may suffer serious mental harm by witnessing acts against others",[28] yet did so without referencing evidence to show that the detainees at S-21 were made to witness violent acts against others. In this regard, the Defence wants to point out, first, that when making the cited finding in *Kayishema et al.* case, the ICTR Trial Chamber was referring to "other inhumane acts" rather than torture.[29] Second, the Defence submits that hearing screams or seeing injuries on others[30] are not to be equated with what the ICTR Trial Chamber described as "witnessing acts committed against others".[31] In any event, if witnessing families being brutally killed was only considered by the ICTR as inhumane

[25] **E3/8386**, S-21 Circular, EN 00521631.
[26] **D427**, 'Closing Order', 15 Sep 2010, para. 443.
[27] T. 15 Jun 2009 (Kaing Guek Eav *alias* Duch, **E3/5799**), p. 47, lns. 16-21.
[28] **E399/2**, Prosecution's Response, para. 12, fn. 33, citing *Prosecutor v. Kayishema et al.*, Case No. ICTR-95-1-T, Judgement, 21 May 1999 ("*Kayishema et al.* case", **Attachment 9**), para. 153.
[29] *Kayishema et al.* case, para. 153, which falls in the section entitled "Other Inhumane Acts" that covers paras. 148-154.
[30] **E399/2**, Prosecution's Response, para. 17.
[31] *Kayishema et al.* case, para. 153.

acts, it would be too much of a stretch to argue that hearing screams and seeing injuries on others who most likely were strangers to the detainees could amount to torture.

(ii) Mental Coercion

18. The Prosecution argues that mental coercion such as threats to use torture – either by display of torture instruments or by explicit threats – as well as threats against the detainees' families, amounts to mental torture even where direct physical torture was absent.[32]

19. The Inter-American Court of Human Rights (the "IACtHR") has indeed held that "threats and real danger of physical harm causes, *in certain circumstances*, *such a degree* of moral anguish that it *may* be considered psychological torture".[33] However, it is clear from this holding that whether threat or danger of torture may in itself constitute torture depends completely on the circumstances. According to the ECtHR, the relevant circumstances include "the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim".[34]

20. The display of torture instruments hardly reaches the minimum of level of severity to constitute psychological torture. This is especially so in the current case given that the three people in question – Koy Thuon, Yim Sambath and Chea Non – were adult males who were either battle-hardened combatants or high-ranking (former) military commanders. Moreover, there is no evidence supporting the existence of a systematic use of the display of torture instruments as a way to threaten detainees at S-21. In a recent statement, Duch categorically dismissed Prak Khan's evidence in relation to the display of torture instruments and speculated that perhaps "those materials were put there after 7 January [1979]".[35] Prak Khan himself revealed recently that sometimes he just randomly picked up a small branch of the size of a pen from a nearby tree to beat the detainees,[36] which does not seem to be consistent with the alleged premeditated display of torture instruments as deterrence or as a way to threaten detainees.

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[32] **E399/2**, Prosecution's Response, para. 18.
[33] *Case of Baldeon-Garcia v. Peru*, IACtHR, Series C No. 147, Judgment, 6 Apr 2006 (**Attachment 10**), para. 119 (emphasis added).
[34] *See*, e.g., *El-Masri* case, para. 196.
[35] **E319/42.3.1**, 'Written Record of Interview of Kaing Guek Eav *alias* Duch', 1 Feb 2016 ("Duch WRI"), EN 01213414, A29.
[36] T. 28 Apr 2016 (Prak Khan, Draft Transcript), p. 66, lns. 15-16; T. 2 May 2016 (Prak Khan, Draft Transcript), p. 23, lns. 9-10.

21. As to the alleged explicit threats to use torture made by the interrogators at S-21, there is no evidence supporting the existence of a systematic use of *severe* threats which could reach the degree of psychological torture. Considering that whether such threats may amount to torture depends completely on the degree and circumstances,[37] the lack of evidence on the severity of the threats means that there is only a mere *possibility* of psychological torture, and a possibility is not sufficient to be considered a "real risk".

22. With regard to the threats against detainees' families, the Defence notes at the outset that whether the mere threat to torture or kill one's families may as such amount to psychological torture is still in question. The aforementioned jurisprudence of the IACtHR does not appear to extend threats or danger of torture to include the threats or danger of torture of one's families.[38] Moreover, in the *Maritza* case relied on by the Prosecution, the IACtHR's finding of psychological torture was not based merely on threats against families. Rather, it was based on a combination of threats against the lives of Maritza's family members and various other factors such as sleep deprivation, exposure to constant noise and light, sensory deprivation by constant hooding, continuous threats of being tortured or raped, etc.[39]

23. In any event, the alleged threats against the detainees' families – such as informing the detainees that their families were detained or asking them to think of their families[40] – simply do not reach the minimum level of severity for them to be considered psychological torture. Moreover, there is evidence that detainees at S-21 were told that once they confessed they would be able to reunite with their wives and children who were waiting for them at home.[41] Whether or not just a deception as alleged by Prak Khan – which is still a live issue and something which the detainees would not have known at that time – this method is in any event drastically different from threatening to torture or kill one's families in terms of the mental effect which they may have on a detainee.

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[37] *See*, *supra*, para. 19.
[38] *See*, *supra*, para. 19, fn. 33, citing the *Baldeon-Garcia* case.
[39] *Case of Maritza Urrutia v. Guatemala*, IACtHR, Series C No. 103, Judgment, 27 Nov 2003 ("*Maritza* case", **Attachment 11**), paras. 85, and 78 (b), citing arguments made by the Commission to the Court.
[40] **E399/2**, Prosecution's Response, para. 18, fn. 64. The Defence notes that **E3/834** (cited by the Prosecution) does not provide any explanation as to the meaning of "strive to think about the family environment". Another document seems to suggest that "think about family environment" means to ask the detainees to think about their families, *see*, **E3/8368**, 'Statistics of the Special Branch S-21: Politics, Ideology and Organisation', undated, KH 00007466, 00007469. The English translation (EN 00225393-94) is incorrect. In Khmer it says to think about their families and their own lives, while the English translation says to think about the lives of their families. According to the Khmer document, there was not threat on the lives of the families. The relevant portions in Khmer are: "(ឃ) អ្នសទាញ្ញសញ្ចោតនាឱ្យវាវិលរុលក្នុងរុំវង់គ្រសារប្រពន្ធកូន អាយុជីវិតវារ" (KH 00007466) "ឱ្យវានឹកឃើញគ្រួសារ ឪពុកម្តាយ ប្រពន្ធកូនវា អាយុជីវិតវា (ល)" (KH 00007469)
[41] T. 2 May 2016 (Prak Khan, Draft Transcript), p. 23, lns. 18-23.

24. The Prosecution also argues that Duch's concern over the possibility that Koy Thuon might commit suicide shows the "extreme mental anguish" Koy Thuon suffered.[42] The Defence submits that there is no evidence showing that Duch's concern was based on Koy Thuon's actual suicidal tendency. Rather, Duch said that he introduced precautionary measures after Koy Thuon lost his temper, threw away a table, and broke many other things in his cell.[43] According to the evidence, therefore, precautions were introduced in reaction to Koy Thuon's violent behaviour, rather than his suicidal tendency. The Prosecution's argument in this regard is therefore baseless.

25. In summary, contrary to the Prosecution's contention, neither the alleged detention conditions or mental coercion alone, nor the combination of the two, is sufficient to amount to torture in the absence of any severe physical violence. Therefore, once the real risk of severe physical violence is negated in a particular case, there is no longer a real risk of torture. The risk, if any, of inhuman or degrading treatment falling short of torture is not sufficient for the application of the exclusionary rule provided in Article 15 of CAT.[44] Moreover, there is no evidence supporting a purposive element that links the alleged detention conditions to the obtaining of the detainee's statements.[45] Therefore, the alleged detention conditions and mental coercion as such do not demonstrate a real risk that any statements at S-21 were obtained through torture. Accordingly, they cannot block the use of S-21 statements as requested by the Defence.

B. The Case of Koy Thuon

(i) Detention Conditions

26. The Prosecution argues that even in the absence of physical torture, the circumstances in which Koy Thuon found himself constitute mental torture.[46] However, as demonstrated below, this argument is groundless.

- Detention Conditions

27. As illustrated above, in particular through the *El-Masri* case,[47] the conditions to which Koy Thuon was allegedly subject – such as house arrest, being shackled to the bed, being

[42] **E399/2**, Prosecution's Response, para. 21, fn. 79.
[43] **E3/347**, 'UNHCHR Suspect Statement of Kaing Guek Eav *alias* Duch', 3 Jul 1999 ("Duch's UNHCHR Statement"), EN 00185009.
[44] *See*, *supra*, para. 6.
[45] *See*, *supra*, para. 7.
[46] **E399/2**, Prosecution's Response, para. 21.
[47] *See*, *supra*, para. 12, fn. 15.

denied an opportunity to appeal his case, and being punched once for "acting up"[48] – could hardly amount to torture.

28. Moreover, evidence shows that Koy Thuon was held in the "special prison"[49] which was located outside the Tuol Sleng compound,[50] and the conditions there, especially with regards to comfort, medical assistance and the treatment of prisoners, were much better than ordinary cells in S-21.[51] Koy Thuon had a bed in his room and had the same food as Duch – the chief of S-21.[52] Duch talked to Koy Thuon politely[53] and was polite even in his written annotations addressed to Koy Thuon on the latter's statements, at one point "happily thank[ing]" Koy Thuon for the information he provided which appeared to Duch to be truthful.[54] Duch also instructed Pon and other staff to be polite to Koy Thuon.[55]

29. As to the conditions of Koy Thuon's house arrest (before he was transferred to S-21) which the Prosecution argues contributed to Koy Thuon's mental suffering,[56] there is evidence that Koy Thuon was kept in a three-storey building, where he could move around in the house inside the locked fence and chat with the guards. Later, he was also allowed to go outside to relax a little in the evening.[57]

- Mental Coercion

30. Duch's statement which the Prosecution described as showing "chilling" and "intimidating" circumstances in which Koy Thuon was interrogated with the "cold method" and in which he – according to the Prosecution – suffered "extreme mental coercion" was in fact the following:

> *Cold method*: no torture, no insults, but use of propaganda. For example, when I interrogated KOY Thuon I started off by waiting 2 or 3 hours before I went to see him. I

[48] **E399/2**, Prosecution's Response, para. 21, fn. 78.
[49] **E3/347**, Duch's UNHCHR Statement, EN 00185008; T. 15 Jun 2009 (Kaing Guek Eav *alias* Duch, **E3/5799**), p. 45, lns. 22-25; p. 89, lns. 11-12; **E3/5765**, 'Report on Reconstruction', 27 Feb 2008, EN 00198003.
[50] T. 19 Apr 2009 (Kaing Guek Eav *alias* Duch, **E3/5795**), p. 85, ln. 25 – p. 86, ln. 1; **E3/5692**, 'Record of Interview with Prak Khan', 12 Oct 2006, EN 00146792; **E3/5158**, 'Written Record of Interview with Him Huy', 18 Jan 2008, EN 00164451.
[51] T. 15 Jun 2009 (Kaing Guek Eav *alias* Duch, **E3/5799**), p. 45, ln. 22 – p. 46, ln. 6.
[52] T. 15 Jun 2009 (Kaing Guek Eav *alias* Duch, **E3/5799**), p. 88, lns. 8-10; **E3/7665**, 'Written Record of Interview with CHHUN Phal', 15 Jan 2008, EN 00163814.
[53] T. 27 Mar 2012 (Kaing Guek Eav *alias* Duch, **E1/54.1**), KH 00794030 (p. 8, lns. 11-15), the English interpretation missed a lot of details, *see*, EN 00795577 (p. 10, lns. 10-14).
[54] **E3/3856**, Compilation of Some of Koy Thuon's S-21 Statements ("Koy Thuon S-21 Statements"), EN 00829638, KH 00026280.
[55] **E3/347**, Duch's UNHCHR Statement, EN 00185009; *see also*, T. 15 Jun 2009 (Kaing Guek Eav *alias* Duch, **E3/5799**),p. 46, lns. 4-5.
[56] **E399/2**, Prosecution's Response, para. 21.
[57] **E3/1604**, Compilation of Some of Koy Thuon's S-21 Statements ("Koy Thuon S-21 Statements"), KH 00006913-30.

> called him "Brother". I asked him to draft his statement for Angkar. I left him some time to write, and had him guarded by two persons to avoid any risk of suicide. After having written half a page, he lost his temper, tore out the sheet and broke his glasses. I allowed him to calm down and after discussion, he agreed to keep on writing.[58]

The Defence submits that if such conditions could be considered torture – be it physical or psychological – most police officers around the world would have to quit their jobs as it would be barely possible to fulfil them without regularly committing the crime of torture.

31. Likewise, the Prosecution's allegation that Koy Thuon was threatened with physical abuse[59] is a misrepresentation of the evidence. What Duch told Koy Thuon was that Koy Thuon's trick of trying to get the interrogators to beat him would not work.[60] In other words, rather than threatening to use physical violence, Duch's communicated intent was clearly to ensure that Koy Thuon would not be beaten whatever tricks he might try.

32. Except for having Pon administer one punch, Duch kept his word. Duch "absolutely forbade Pon from doing anything at all" to Koy Thuon even after Koy Thuon threw away the table, broke pens and glasses and tore paper apart several times; instead, Duch instructed Pon simply to attack Koy Thuon "with words to win and to gain advantage over him".[61] The first statements from Koy Thuon were extracted without having to resort to beating at all.[62] The subsequent interrogations were conducted in the same manner, except that Duch asked Pon to punch Koy Thuon once to stop him from acting up.[63] As aforementioned, a single punch normally does not amount to torture.[64] Moreover, recourse to physical force which was necessitated by the alleged victim's own conduct is not in principle considered an infringement of the law against torture, and inhuman or degrading treatment.[65]

33. Further, the Defence notes that the Prosecution referred to Duch's statement that they used "hot method" and "tortured" Koy Thuon when he reacted.[66] In this regard the Defence first notes that, as will be discussed in detail below (para. 44), the use of the word "torture" by a witness cannot be taken as a strict reference to the legal definition of

[58] **E3/1570**, 'Written Record of Interview of Kaing Guek Eav *alias* Duch', EN 00154194-95, cited in **E399/2**, Prosecution's Response, para. 21, fn. 75.
[59] **E399/2**, Prosecution's Response, para. 21, fn. 76.
[60] **E3/347**, Duch's UNHCHR Statement, EN 00185009.
[61] **E3/347**, Duch's UNHCHR Statement, EN 00185009.
[62] **E3/347**, Duch's UNHCHR Statement, EN 00185009.
[63] **E3/347**, Duch's UNHCHR Statement, EN 00185009.
[64] In Koy Thuon's case, he was punched shortly after he entered S-21 and he was apparently able to keep writing his statements afterwards. There is no evidence that he was severely injured as a result of the punch.
[65] *El-Masri* case, para. 207.
[66] **E399/2**, Prosecution's Response, para. 24, fn. 89.

torture. The everyday usage of the word "torture" is much broader and embraces less severe treatment falling short of torture. Second, as discussed above, Duch said in the same statement that he sent Pon to attack Koy Thuon with words and on one occasion to punch him once for his angry reactions. To attack him with words and to punch him seem to be consistent with Duch's interpretation of "hot method", i.e. "insults, beatings and other torture".[67] Taking the evidence and the context of Duch's statement as a whole, it is clear that what Duch meant by "hot method" and "torture" in the current case of Koy Thuon refers to verbal attacks and one punch, which, as has been argued, does not amount to torture.

34. As to the alleged threat against families,[68] there is no evidence that Duch threatened to torture or kill Koy Thuon's wife, nor evidence that Duch even informed Koy Thuon of the detention of his wife. In any event, as aforementioned, the law is unclear on whether the mere threat to harm the alleged victim's family is sufficient to amount to torture.

35. The Prosecution asserts that Koy Thuon, "[a]s one of the highest ranking CPK officials", "cannot have failed to know that S-21 was a centre for excruciating torture and certain death for himself and most likely his family".[69] The Defence has several responses in this regard. First of all, this sweeping allegation – in particular the alleged certain knowledge on the part of high-ranking CPK officials as well as the alleged inevitability of death for the detainees and their families – is not at all supported by the evidence.[70]

36. Moreover, Koy Thuon's first reactions when transferred to S-21 – such as requesting to speak only to "Angkar" rather than to Duch, as well as throwing tables and destroying things in his room – suggest that he did not know how S-21 functioned. In addition, these reactions certainly do not evidence feelings of hopelessness or desperation due to his alleged knowledge of his certain torture and death.

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[67] **E399/2**, Prosecution's Response, para. 24, fn. 88.
[68] **E399/2**, Prosecution's Response, para. 21, fn. 72.
[69] **E399/2**, Prosecution's Response, para. 21, fn. 72.
[70] There is evidence that many detainees were released from S-21, and some of those released were still alive after 1979 (*See*, e.g. **E3/8778**, Report of DC-Cam Field Trips, 12 Sep 2008; **E3/8648**, 'Names of People Released on 26 Nov 1977, Division 920', 2 Dec 1977; **E3/7326**, DC-Cam, *Fact Sheet: Pol Pot and His Prisoners at Secret Prison S-21* (2011)). The evidence also shows that only limited people were involved in the operation of S-21. For instance, *Ta* Mok, CPK Standing Committee member and the Southwest Zone secretary, stated that what happened at S-21 "was between Pol Pot and the director of the prison, only the two of them. The director interrogated the prisoner and Pol Pot decided. We did not know anything about that in the Committee. The Committee does not have a say in anything related to the security." (unofficial transcription and translation by the Defence of **E3/3907R**, Video Clip of Interview with *Ta* Mok) Duch also said that Son Sen told him "time after time never to report the facts of the interrogations of the enemies to anyone other than [Son Sen] himself" (**E3/347**, Duch's UNHCHR Statement, EN 00184996). Moreover, the Defence notes that the Prosecution failed to refer to any evidence to support its bold assertions in this regard.

37. Furthermore, the Defence emphasises that to presume the real risk of torture is one thing, while it is quite another to presume the knowledge and even the intention of the alleged crimes on the part of high-ranking CPK officials. The latter presumption appears to be a flimsy cover for pointing the figure at the accused in this case. The Trial Chamber has held that the presumption of a real risk of torture at this stage is not a violation of the presumption of innocence because, although it presumes a real risk of the crimes having been committed, it does not presume "either the guilt of the Accused or the role they may have played in obtaining the statement at issue".[71] The Prosecution's assertion, however, effectively invites the Trial Chamber to presume the guilt of the accused, or at least the role they played in the alleged crimes, before any of this has been proven at the end of the case. The Defence submits that this is a blatant disregard and gross violation of the fundamental right of the accused to be presumed innocent until proven guilty.

(ii) The Alleged Two Phases of Interrogation

38. The Prosecution argues that only the first two interrogations of Koy Thuon were conducted by Duch while the remainder were conducted by Pon, and that whether Duch personally tortured Koy Thuon has little relevance to statements obtained by Pon.[72]

39. In response, the Defence notes first of all that it did not rely solely on Duch's not personally torturing anyone. Instead, the Defence relied also on evidence that there was an order from Son Sen not to torture Koy Thuon and that as a result, Koy Thuon was not tortured, either by Duch or by others.[73] As aforementioned, the evidence shows that Duch strictly forbade Pon from physically abusing Koy Thuon, except for administering one punch. Duch also told the Trial Chamber that because of the order of his superior, no one could even touch Koy Thuon.[74] Moreover, the annotations on Koy Thuon's S-21 statements show that even matters as small as whether to handcuff Koy Thuon or to let him keep writing had to be reported to and decided by Son Sen[75] – the very person who gave the order not to torture Koy Thuon. This shows that whether or not Duch was personally involved in each and every interrogation of Koy Thuon, there is no real risk that Koy Thuon was tortured.

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[71] **E350/8**, 'Decision on Evidence Obtained through Torture', 5 Feb 2016 ("TC Decision"), para. 40.
[72] **E399/2**, Prosecution's Response, para. 22.
[73] **E399**, Motion, para. 16.
[74] T. 27 Mar 2012 (Kaing Guek Eav *alias* Duch, **E1/54.1**), KH 00794030 (p. 8, lns. 11-15). The English interpretation missed a lot of details: *see*, EN 00795577 (p. 10, lns. 10-14).
[75] **E3/1604**, Koy Thuon S-21 Statements, EN 00773088, KH 00006757. The annotation was dated "8 March 1977" and was not signed. However, the handwriting clearly belongs to Son Sen. For comparison, *see*, e.g., **E3/1562**, KH 00174764; **E3/1127**, KH 00162487; **E3/1047**, KH 00002455.

40. Second, Duch's testimony that he no longer wanted to be involved in the interrogation of Koy Thuon after the first two interrogations and assigned Pon to continue with the interrogation does not seem to be corroborated by the contemporaneous evidence.[76] On the statements of Koy Thuon available in the case file, there is only one annotation from Pon dated 20 February 1977.[77] In contrast, Duch's annotations appear throughout the statements, suggesting that he was still personally involved in the interrogation after February 1977.[78] For instance, in an annotation that was written on a page of Koy Thuon's statement dated 3 April 1977, Duch wrote, evidently sometime after 3 April 1977: "[…] I am not convinced with this part […]. When I went to reconfirm these with him [Koy Thuon], he said that […]".[79] The fact that Duch was personally seeking confirmation from Koy Thuon shows that Duch was still actively and personally involved in the interrogation of Koy Thuon in April 1977.

41. Based on the above, the Defence submits that there is no real risk that any of the statements of Koy Thuon in question were obtained through torture.

(iii) The Credibility of Duch and the Use of the Word "Torture"

42. The LCLs argue that because Duch was convicted of having committed torture through a JCE, Duch's evidence that torture was not used cannot negate the real risk of torture.[80]

43. The Defence notes firstly that Duch was neither charged with nor convicted of committing torture through physical perpetration.[81] Therefore, there is no convincing reason to doubt his evidence in relation to whether he physically committed torture. Moreover, in relation to the JCE, Duch never denies that "torture (ទារុណកម្ម)" was committed at S-21 – with a few definite exceptions[82] including the case of Koy Thuon. Neither does Duch refute his alleged responsibility for the crimes committed by his subordinates. It does not make sense for him to lie about one incident when he willingly accepts that "torture (ទារុណកម្ម)" was used in most other cases. Duch's personal

[76] *See*, **E399/2**, Prosecution's Response, para. 22, fn. 82.
[77] **E3/1604**, Koy Thuon S-21 Statements, EN 00776989, KH 00005794.
[78] **E3/3856**, Koy Thuon S-21 Statements, KH 00026279; **E3/1604**, Koy Thuon S-21 Statements, KH 00006772, 00006858, 00006869, 00006874, 00006876, 00006878, 00006906.
[79] **E3/1604**, Koy Thuon S-21 Statements, EN 00773114, KH 00006869. The annotation was not signed. However, the handwriting clearly belongs to Duch. For comparison, *see*, e.g., **E3/3856**, KH 00026279.
[80] **E399/1**, LCLs' Response, para. 14.
[81] Case 001 Trial Judgement, paras. 482 (fn. 847), 486.
[82] The Defence argues that there were more than just the few "exceptions" mentioned by Duch because, while Duch is familiar with these few cases, he does not have a comprehensive knowledge of each and every other case at S-21. However, this does not affect the Defence's argument here, which relates to Duch's *attitude* and his knowledge of the specific case of Koy Thuon rather than the accuracy of his knowledge regarding any other case.

involvement in Koy Thuon's interrogation is not a convincing reason to dismiss his evidence either, for two reasons. First, Duch was not charged with physical perpetration. Second, even if it was a question of his reputation rather than criminal responsibility, there is no motivation for Duch to lie to protect the reputation of the other staff who were also involved in Koy Thuon's interrogation, such as Pon. Therefore, the LCLs' argument does not undermine the evidence that Koy Thuon was not tortured, either by Duch or by others.

44. The LCLs also argue that Duch's use of the word "torture" could not be presumed to apply the legal definition of torture, hence does not negate the real risk.[83] The Defence agrees in principle that the use of the word "torture" by a witness is not to be equated to the use of "torture" in its legal sense. This is particularly so as it transpires from the testimony of Prak Khan that he sometimes used the word "torture" to refer to beatings with a small tree branch equal to the size of a pen which only left on the detainee some beating marks that would disappear "within a day or two".[84] This type of treatment, according to the findings of the Trial Chamber in Case 001, does not reach the minimum level of severity to amount to torture.[85] The President of the Trial Chamber also remarked that in Khmer the word for "torture" (ទារុណកម្ម) might even be used to describe discipline of children by the parents, and that this "could not be legally defined as torture".[86] The ordinary meaning of the Khmer word for "torture" (ទារុណកម្ម) thus appears to be broader than that of the legal term and may refer to treatment falling short of torture. It follows that when an ordinary fact witness claims that there is "torture", no definite conclusion can be drawn as to whether torture in the legal sense has occurred, However, when such a witness says that there is *no* "torture", it is safe to conclude that this means that torture in the legal sense has not occurred, since the ordinary word for "torture" is broad enough to include its legal counterpart. Therefore, the Defence submits that the Trial Chamber could take Duch's statement that "torture" was not used on Koy Thuon as evidence that torture in the legal sense was not used.

[83] **E399/1**, LCLs' Response, para. 14.
[84] T. 2 May 2016 (Prak Khan, Draft Transcript), p. 3, lns. 20-25; p. 6, ln. 24 – p. 8, ln. 3; p. 23, lns. 9-10.
[85] Case 001 Trial Judgement, para. 241.
[86] T. 27 Apr 2016 (Prak Khan, Draft Transcript), p. 66, ln. 19 – p. 67, ln. 5.

(iv) The Annotations

45. The Prosecution refers to two annotations on Koy Thuon's statements which state that Koy Thuon only answered after [we] "made a hole" on one side[87] and later on another side.[88] The Prosecution argues that these comments show that physical torture was employed against Koy Thuon.[89] However, the Prosecution fails to acknowledge that in the second annotation, the whole sentence reads as follows:

> He did not agree to confess until we [made a whole on] the other side *with the statement*: "maintaining secrecy is like protecting the eyeball forever?" [and] "How many persons have you slandered by your response?"[90] (emphasis added)

"Making a hole" *with two statements* apparently does not mean literally making a hole on one's body. The Defence also notes that "eyeball (ប្រស្រីភ្នែក)" in Khmer is often used as a metaphor for important or treasured things. Therefore, the context of the language in the two annotations – both dated 9 April 1977 and apparently both written by one person – clearly shows that the word "making a hole (ចោះ)" refers to a verbal attack on perceived weaknesses in Koy Thuon's statements rather than physical torture.

46. Moreover, the Defence notes that the handwriting of these two annotations appears to belong to Son Sen *alias* Khieu,[91] the very person who gave a strict order not to torture Koy Thuon.[92] It is thus even less likely that the two annotations evidence any physical torture.

47. As to a third annotation referred to by the Prosecution – the one regarding handcuffs[93] – the Defence makes three submissions. First, the use of handcuffs as described in this annotation clearly does not amount to torture. Second, the annotation appears to be from Son Sen who personally gave the order not to "torture" Koy Thuon. Third, the fact that Koy Thuon was able to negotiate conditions such as the use of handcuffs – whether or not he was successful – shows that he was not under extreme physical or mental coercion or suffering.

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[87] **E3/1604**, Koy Thuon S-21 Statements, EN 00769831, KH 00006159.
[88] **E3/1604**, Koy Thuon S-21 Statements, EN 00773153, KH 00006930.
[89] **E399/2**, Prosecution's Response, para. 23, fns. 84, 85.
[90] **E3/1604**, Koy Thuon S-21 Statements, EN 00773153, KH 00006930. The Defence notes that the English translation used the word "mention", while in Khmer it is the same word (ចោះ) as the one used in the annotation on KH 00006159, meaning "making a hole".
[91] For comparison, *see*, e.g., **E3/1562**, KH 00174764; **E3/1127**, KH 00162487; **E3/1047**, KH 00002455.
[92] *See*, **E399**, Motion, para. 16.
[93] **E3/1604**, Koy Thuon S-21 Statements, EN 00773088, KH 00006757; E399/2, Prosecution's Response, para. 23, fn. 86.

(v) The Reliability of the Statements

48. The LCLs raise the issue of the reliability of Koy Thuon's statements.[94] The Defence submits that reliability is an issue that the Trial Chamber has to commonly consider for every piece of evidence before it. It does not as such bar the parties from using evidence at this stage of the trial. Indeed, as the House of Lords remarked in the *A and Others* case, involuntary statements are not always unreliable, especially when they could be corroborated by real evidence, and the concern over reliability is not the sole or determinant reason for their exclusion by Article 15 of CAT.[95]

C. The Case of Yim Sambath

49. The LCLs try to undermine the Defence's argument by referring to Duch's testimony that despite the order from his superior not to "torture" Yim Sambath, Yim Sambath was later "tortured".[96] The Defence notes that while the English interpretation of Duch's testimony uses the word "torture", the corresponding Khmer word used by Duch was "beat" (វាយ).[97] As held by the Trial Chamber in Case 001, beatings do not as such amount to torture unless the severity reaches the required minimum level.[98] According to Duch, there was an order from Son Sen not to torture Yim Sambath during the interrogation because "Son Sen did not want to find himself in an inferior position with respect to CHAN Chak Krey, who would have been able to hold against him that the confession had been made under torture".[99] Duch said that "[t]he interrogation was thus conducted without torture and pictures were taken to prove it".[100] Taking the evidence as a whole, the Defence submits that even if Yim Sambath was indeed beaten, the beating could not have been sufficiently severe to constitute torture since Duch was confident enough to take pictures as proof to show Chan Chakrei.

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[94] **E399/1**, LCLs' Response, para. 15.
[95] *A and Others v. Secretary of State for the Home Department*, House of Lords, [2005] UKHL 71 (**Attachment 12**), paras. 16-17, 112. "[T]here can ordinarily be no surer proof of the reliability of an involuntary statement than the finding of real evidence as a direct result of it" (para. 16). "[T]he rejection of an improperly obtained confession is not dependent only upon possible unreliability" (para. 17) "The use of such evidence is excluded not on grounds of its unreliability – if that was the only objection to it, it would go to its weight, not to its admissibility – but on grounds of its barbarism, its illegality and its inhumanity." (para. 112)
[96] **E399/1**, LCLs' Response, para. 18.
[97] T. 27 Mar 2012 (Kaing Guek Eav *alias* Duch, **E1/54.1**), KH 00794030 (p. 8, lns. 16-19); EN 00795577 (p. 10, lns. 15-19).
[98] Case 001 Trial Judgement, para. 241.
[99] **E319/42.3.1**, Duch WRI, A 13, ERN 01213411; **E3/356**, 'Written Record of Interview of Kaing Guek Eav *alias* Duch', 25 Nov 2008 ("2008 Duch WRI"), ERN 00242900.
[100] **E3/356**, 2008 Duch WRI, ERN 00242900, emphasis added; *see also*, **E319/42.3.1**, Duch WRI, A 13, ERN 01213411.

50. As to the Prosecution's argument that summaries of other people's statements contained in Yim Sambath's statements should not be used in the absence of evidence negating the real risk of torture in their cases,[101] the Defence agrees that this is fair and in compliance with the decisions of the Supreme Court Chamber and the Trial Chamber. However, the Defence reserves its right to revisit to this issue if it later finds evidence negating the real risk of torture in the particular cases of these other people.

51. The Defence also notes that there is evidence suggesting that Yim Sambath was taken into custody from "Kbal Thnal Phnom Penh" to an unknown location on 4 April 1976.[102] One of the Agreed Facts in Case 001 was that "in April 1976, upon [Duch's] decision, S-21 detainees were moved to the premises of the Pohnea Yat Lycée [...] which is now the site of the Tuol Sleng Genocide Museum".[103] Based on the evidence, whether Yim Sambath was detained in Tuol Sleng or in other locations is still in question. The conditions at Tuol Sleng, therefore, may well be irrelevant to the determination of the detention conditions to which Yim Sambath was subjected.

D. The Case of Chea Non

52. The Prosecution argues that the annotation on Chea Non's statement reading "written before tortured" only covers the first few pages of Chea Non's statements and thus does not negate the real risk of torture in relation to the remainder of his statements.[104]

53. To the contrary, the Defence notes that there is evidence that the interrogators would compile the statements written by a detainee once his or her interrogation was complete, make several copies, and send the compilation to their superiors.[105] The Defence notes that the annotation in question is put immediately after the general cover page of the compiled statements of Chea Non and is written in a completely different format compared to that of the cover page of each section.[106] The Defence therefore submits that it is clear that the annotation in question was intended to apply to the whole compilation of Chea Non's statements in general rather than just the first few pages.

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[101] **E399/2**, Prosecution's Response, para. 26.
[102] DC-Cam No. **D06865**, 'List of Prisoners', undated, p. 6, KH 01012815.
[103] *See*, Case 001 Trial Judgement, para. 135.
[104] **E399/2**, Prosecution's Response, para. 28.
[105] T. 2 May 2016 (Prak Khan, Draft Transcript), p. 47, ln. 4 – p. 48, ln. 4.
[106] **E3/1892**, S-21 Statements of Chea Non *alias* Suong, *see*, e.g., KH 00012699, 00012762-63, 00012795, 00012826, 00012832, 00012843, 00012889, 00012911, 00012924, 00012944. The cover page for each section always includes headings such as "Statement of Chea Non *alias* Suong, Division 450" on the top of the page and the date on the bottom of the page. The annotation page in question, however, bears no such heading or date.

54. The LCLs argues at the outset that the Defence's request for the Trial Chamber's reconsideration of its decision in relation to Chea Non's statements is untimely and that the fact that the annotation appears in the Khmer document is hardly a "new circumstance" since the decision of the Trial Chamber was issued almost a year ago.[107] The Defence wishes simply to point out that the reason for its request for the Chamber's reconsideration is the obvious error in the decision which would cause an injustice.[108] Moreover, the Defence's Motion was directly triggered by recent decisions from the Trial Chamber and the Supreme Court Chamber on "torture-tainted evidence". The request is therefore not untimely.

55. The LCLs then argues that the statements of Chea Non as a whole appear consistent with the Trial Chamber's finding that instructions were given to re-interrogate detainees until their statement was complete.[109] The Defence fails to see how "re-interrogation" in itself could be considered to give rise of a real risk of torture. Duch said that he was the one who ordered the interrogators to use "torture" during further interrogations and that he would do so by annotating on the detainee's statement to recommend the use of "torture".[110] However, this is not the case in relation to Chea Non. Only two annotations from Duch appear on Chea Non's statements, one of which recommended further interrogation.[111] There is no mention of the use of "torture" in either of the two annotations. In addition, as discussed above (para. 44), the word "torture" used by a witness cannot be taken as strictly referring to the legal meaning of torture because the Khmer word for "torture" has a much broader meaning and could refer to less severe treatment falling short of torture.

56. The LCLs also argue that the quality of photocopies prevents any genuine comparison of handwriting.[112] The Defence notes that in the decision referenced by the LCLs, the Trial Chamber did not deny the request for forensic analysis on the basis that the quality of the copies was not good enough. Rather, the Chamber rejected the request because expert assistance was not required in that specific case in assessing whether the annotations in

[107] **E399/1**, LCLs' Response, para. 21.
[108] **E399**, Motion, para. 14.
[109] **E399/1**, LCLs' Response, para. 22, referring to Case 001 Trial Judgement, para. 176.
[110] T. 16 Jun 2009 (Kaing Guek Eav *alias* Duch, **E3/5800**), p. 85, ln. 22 – p. 86, ln. 1.
[111] **E3/1892**, S-21 Statements of Chea Non *alias* Suong, KH 00012762, 00012843 (EN 00769598). The second annotation reads: "Comrade Pon, Ask *Ah* Suong to clarify some names of people, their positions and units which were written in his confession."
[112] **E399/1**, LCLs' Response, para. 23, citing **E349/1**, 'Decision on Khieu Samphan Request for a Forensic Analysis of Document E3/2107', 17 Nov 2015 ("TC Decision on Forensic Analysis").

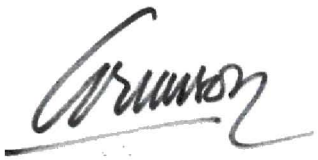
question had been written by different authors.[113] The Chamber could always conduct investigations to locate the original copies of the documents and to order forensic analysis when it deems it necessary to have expert assistance.

57. As a general remark, the Defence is surprised by the reluctance of the LCLs to let the Chamber carry out forensic analysis which could be fundamental to the ascertainment of the truth. A miscarriage of justice is not in the interest of any party, including the civil party represented by the LCLs.

V. RELIEF

58. For the above reasons, the Defence requests that the Trial Chamber dismiss the arguments raised by the Co-Prosecutors and the Civil Party Lead Co-Lawyers in their responses and permit the Defence's requested use of the S-21 statements of Koy Thuon, Yim Sambath and Chea Non.

CO-LAWYERS FOR NUON CHEA



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Victor KOPPE

[113] **E349/1**, TC Decision on Forensic Analysis, para. 5-6.