

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

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**LEAD CO-LAWYERS' RESPONSE TO NUON CHEA'S RULE 92 MOTION TO USE
CERTAIN S-21 STATEMENTS**

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Before:

Trial Chamber

Judge NIL Nonn, President
Judge YA Sokhan
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Judge Claudia FENZ

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I. INTRODUCTION

1. The Lead Co-Lawyers for the Civil Parties (“Lead Co-Lawyers”) hereby respond to *Nuon Chea’s Rule 92 Motion to Use Certain S-21 Statements* (“Request”), in which it is submitted that confessions and documents related to three individuals detained at S-21 carry no real risk that they were obtained through torture.¹

II. APPLICABLE LAW

2. Article 15 of the CAT provides that “any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”²

3. The Trial Chamber has held that the exclusionary rule applies to all parties, “including the NUON Chea Defence and torture-tainted evidence which it asserts to be exculpatory.”³ Both the Supreme Court Chamber and the Trial Chamber left open a narrow possibility for use if such exclusion would amount to a “flagrant denial of justice.”⁴

4. The procedure to be used with respect to potentially torture-tainted evidence was explained by the Trial Chamber. A statement is *established* to have been obtained as result of torture for the purposes of Article 15 where there is a real risk that torture was used in the taking of the statement.⁵ Once a preliminary determination has been made that there is a real risk that a statement is torture-tainted, “any party seeking to rely upon such evidence may rebut this preliminary determination upon a showing of specific circumstances negating this risk.”⁶

5. The Trial Chamber has already made the preliminary determination that a real risk exists that torture was used at S-21 to obtain confessions, and that it will not allow such statements

¹ Nuon Chea’s Rule 92 Motion to Use Certain S-21 Statements, **E399**, 20 April 2016 (“Request”).

² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984.

³ Decision on Evidence Obtained through Torture, **E350/8**, 5 February 2016, para. 47.

⁴ Decision on Evidence Obtained through Torture, **E350/8**, paras 48, 25; Decision on Objections to Document Lists, **F26/12**, 31 December 2015, paras 64-65.

⁵ Decision on Evidence Obtained through Torture, **E350/8**, para. 36; Decision on Objections to Document Lists, **F26/12**, para 55.

⁶ Decision on Evidence Obtained through Torture, **E350/8**, para. 36.

to be used “unless a party proposing to use such evidence establishes that a real risk does not exist that it was obtained through torture, or it falls within the exception to Article 15.”⁷

6. Finally, “[u]pon an assessment of all relevant circumstances, the Chamber will determine whether there is a real risk that the evidence was obtained through torture.”⁸ The Trial Chamber clarified that the real risk standard of proof is lower than that applied to its final determination as to whether torture occurred.⁹ As a result, the assessment errs on the side of exclusion of evidence.¹⁰

7. Internal Rule 93(1) states, “[w]here the Chamber considers that a new investigation is necessary it may, at any time, order additional investigations. Such order shall indicate which judge or judges shall conduct the new investigation.”¹¹ Pursuant to this rule, the Trial Chamber has the discretion to initiate a new investigation, which may include interviewing witnesses or conducting searches, where it considers necessary; this necessity must be justified by the interests of justice.¹² The Trial Chamber previously has held that this discretion must be understood “in the context of the ECCC Legal Framework which guarantees the Accused’s right to a fair and expeditious trial and grants the President the discretion to exclude any proceedings that unnecessarily delay the trial.”¹³

IV. RESPONSE

8. The Lead Co-Lawyers submit that it is uncontroversial that the statements requested for use by the Defence were taken at S-21 and that they have been established to have a real risk that they are torture-tainted. Thus, the onus is on the Defence to show specific circumstances negating that risk.

9. The Supreme Court Chamber “readily” accepted that there is a real risk that S-21 Statements are torture-tainted. The Supreme Court Chamber relied on its conclusions and

⁷ Decision on Evidence Obtained through Torture, **E350/8**, paras 79, 38.

⁸ Decision on Evidence Obtained through Torture, **E350/8**, para. 38.

⁹ Decision on Evidence Obtained through Torture, **E350/8**, para. 39.

¹⁰ Decision on Evidence Obtained through Torture, **E350/8**, para. 39.

¹¹ *See also* Article 339 of the Cambodian Code of Criminal Procedure authorizes the court of first instance to order additional investigations during the trial hearings.

¹² Decision on Nuon Chea Request to Admit New Documents, to Initiate an Investigation and to Summons Mr. Rob LEMKIN, **E294/1**, 24 July 2013, para. 11.

¹³ *Ibid*, para. 11 *citing* Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia, Article 33 new; Internal Rule 85.

those of the Trial Chamber in Case 001, specifically: that torture techniques “were applied in an environment of extreme fear where threats were routinely put into practice and caused detainees severe pain and suffering, both physical and mental”;¹⁴ that “officials carried out acts constituting torture ‘for the purpose of obtaining a confession or of punishment’”;¹⁵ that S-21 detainees were subjected to the routine use of violence during interrogations;¹⁶ that “S-21 detainees lived in a ‘permanent climate of fear’”;¹⁷ and that S-21 detainees “could ‘hear screaming and crying’, and would see ‘that other detainees returning from interrogations showed signs of severe beating, mutilation, bruises and cuts.’”¹⁸

10. The Trial Chamber relied on its findings in Case 001 to find that there is “a real risk that any confessions obtained at S-21 were the result of torture”,¹⁹ specifically “that torture was used to obtain confessions at S-21, that where prisoners did not give satisfactory confessions more torture was ordered, and that much of the information contained in the confessions was fabricated.”²⁰

11. The Lead Co-Lawyers submit that these circumstances have not been negated by the submissions contained in the Request as follows.

(a) The Request has not demonstrated that there is no real risk that the S-21 Statements of KOY Thuon were obtained through torture

12. The Request argues that “there is convincing evidence showing that in the particular case of Koy Thuon, his S-21 Statements were not obtained through torture”²¹ on the basis of Duch’s admission of personally interrogating Koy Thuon, his denial that he used torture during the course of interrogation, and the Case 001 Trial Judgement finding that Duch was not responsible for committing “torture or other inhumane acts through physical perpetration or culpable omission.”²²

¹⁴ Decision on Objections to Document Lists, **F26/12**, para. 56 (citing Appeal Judgement, F28, 3 February 2012, para. 209).

¹⁵ Decision on Objections to Document Lists, **F26/12**, para. 56 (citing Appeal Judgement, F28, 3 February 2012, para. 209).

¹⁶ Decision on Objections to Document Lists, **F26/12**, para. 57.

¹⁷ Decision on Objections to Document Lists, **F26/12**, para. 57.

¹⁸ Decision on Objections to Document Lists, **F26/12**, para. 57.

¹⁹ Decision on Evidence Obtained through Torture, **E350/8**, para. 79.

²⁰ Decision on Evidence Obtained through Torture, **E350/8**, para. 79.

²¹ Request, **E399**, para. 18.

²² Request, **E399**, paras 16-17.

13. First, the Lead Co-Lawyers submit that the unchallenged fact that the statement was taken in S-21 itself, under the circumstances described by both the Trial Chamber and the Supreme Court Chamber in finding that S-21 Statements are established to have been made as a result of torture, demonstrates that there is a real risk that the statement is torture-tainted.²³

14. Second, Duch was convicted of having acted together with other JCE members and through his subordinates “to operate the S-21 complex, a facility dedicated to the unlawful detention, interrogation and execution of perceived enemies of the CPK, both domestic and foreign. A concerted system of ill-treatment and torture was purposefully implemented in order to subjugate detainees and obtain their confessions during interrogations.”²⁴ Therefore, a statement by him to the effect that torture was not used cannot raise circumstances to negate the real risk that torture was used to obtain the S-21 Statements of Koy Thuon. Further, Duch’s use of the word “torture” cannot be presumed to apply the legal definition of torture, and therefore does not negate the real risk that the statements were obtained through torture. The Lead Co-Lawyers note that the Case 001 judgement paragraphs cited by the Defence refer to Duch’s individual criminal responsibility for having physically committed torture or other inhumane acts, or through culpable omission.²⁵ It does not make findings as to whether Koy Thuon was tortured during the course of his detention at S-21 or that his confessions were obtained as a result of torture.

15. Third, the Lead Co-Lawyers note that on the four corners of one of Koy Thuon’s confessions, there is an annotation that reads “[o]nly after [we] had made a hole in one side did he answer”.²⁶ Other annotations cast doubt on the reliability of the contents of Koy Thuon’s statements, at various points referring to his statements as inaccurate or fabricated.²⁷

²³ *Infra.* paras 9-10.

²⁴ Case 001 Trial Judgement, **E188**, para. 514.

²⁵ Request, **E399**, para. 17 (citing Case 001 Trial Judgement, **E188**, paras 483-486).

²⁶ **E3/1604** at 00769831 (English); 00006159 (Khmer).

²⁷ *See, e.g.*, **E3/1604** at 00773088, 00773089, 00773113, 00773115 (English). Other annotations note that Koy Thuon’s statements change. *See* **E3/1604** at 00773116, 00773119, 00773121 (English).

(b) The Request has not demonstrated that there is no real risk that the S-21 Statements of YIM Sambath were obtained through torture

16. It is uncontroversial that Yim Sambath's statements were obtained at S-21. The Defence at paragraphs 20 and 21 argue that because two of Duch's OCIJ written records of interview stated that there was order from Son Sen to not torture Yim Sambath and that Hor conducted the interrogation without torture, there is "convincing evidence" that his S-21 Statements were not obtained through torture. The Lead Co-Lawyers submit that the unchallenged fact that the statement was taken at S-21 itself demonstrates that there is a real risk that the statement is torture-tainted based on the coercive environment of S-21, as described by both the Trial Chamber and the Supreme Court Chamber above.²⁸

17. The Lead Co-Lawyers submit that Duch's OCIJ testimony that Yim Sambath was not tortured does not negate the real risk that his S-21 Statements were obtained as a result of torture for the same reasons that they do not negate the real risk that Koy Thuon's S-21 Statements were obtained as a result of torture.²⁹

18. Significantly, Duch testified in Case 002/01 that "as for Yim Sambath -- was accused of plotting the bomb attack and then he was arrested and detained at S-21, but my superior actually asked me not to torture this person and I was not even allowed to interrogate him myself, but later on, I learned that he was also tortured."³⁰

19. Further, Khim Vak Hor alias Hor, Duch's Deputy, conducted the interrogation, not Duch himself.³¹ The Lead Co-Lawyers note that Hor was a JCE member together with Duch, and was "entrusted with managing the daily operations of S-21, and overseeing the work of the

²⁸ *Infra.* paras 9-10.

²⁹ *Infra.* para. 14.

³⁰ Transcripts Case 002/01, 27 March 2012, E1/54.1, p. 10, lines 15-19, ERN 00795577. At the same excerpt, the Khmer transcript clarifies that Pon and Duch were not allowed to interrogate Yim Sambath, but that Duch instructed Hor to conduct the interrogation: "ដោយឡែក យីម សម្បត្តិ គឺជាអ្នកបោកគ្រាប់បែក ហើយបន្ទាប់មក គាត់ក៏ត្រូវបាន គេចាប់ខ្លួន និងឃុំនៅ ស២១។ មេហាមមិនឱ្យវីរ៉ែមន ប៉ុន្តែមិនឱ្យខ្ញុំសួរ មិនឱ្យ មិត្តប៉ុន សួរទេ គឺឱ្យអ្នកផ្សេងទៀតសួរ ខ្ញុំឱ្យ មិត្តហ៊ី សួរ។ ក៏ ប៉ុន្តែដល់ក្រោយមក វីរ៉ែ មានវីរ៉ែ" (E1/54.1, p. 8, lines 16-19, ERN 00794030).

³¹ Request, E399, para. 20 (citing E3/356 at ERN 00096949, E319/42.3.1 at ERN 01213411).

guards and the interrogators within S-21.”³² Hor, with Duch’s agreement, “would manage the execution of the S-21 detainees with the help of his subordinates.”³³

(c) The Request does not demonstrate that there is no real risk that the S-21 Statements of CHEA Non alias Suong were obtained through torture

20. The Defence requests reconsideration of the Chamber’s previous decision finding that Chea Non’s S-21 Statements can be presumed to be torture-tainted.³⁴

21. The Lead Co-Lawyers note that the Request is untimely. The Defence sought to use Chea Non’s S-21 Statements on the 17th of June 2015 in court when the issue was raised about the absence of the annotation in question in the Khmer version.³⁵ It is unclear why, nearly a year later, the Defence seeks to rely on the annotation in the Khmer version, appearing at the beginning of the document, as a new circumstance warranting reconsideration.

22. The Lead Co-Lawyers first submit that regardless of the presence of annotations to the effect that the statements were freely given, they were still obtained at S-21 under the circumstances described by the Trial Chamber and Supreme Court Chamber when finding S-21 Statements carry a real risk of being obtained through torture.³⁶ This risk is not negated by the presence of annotations. The Lead Co-Lawyers note that the entire document appears consistent with the Trial Chamber’s finding in Case 001 at paragraph 176 that instructions would be given to re-interrogate detainees until their confessions were complete.³⁷

23. At paragraph 30, the Defence requests that, “[i]n the event that the Trial Chamber is not satisfied with the provenance or authenticity of the annotations”, additional Rule 93 investigations be ordered. The Lead Co-Lawyers note that this document originates from DC-Cam and appears to be a photocopy. The Lead Co-Lawyers recall the jurisprudence of the Chamber that the provenance of such documents “prevents any genuine handwriting

³² Case 001 Trial Judgement, **E188**, para. 133 (*see also* para. 514).

³³ Case 001 Trial Judgement, **E188**, para. 181.

³⁴ Request, **E399**, paras 25, 29; **E350/8**, para. 86.

³⁵ Request, **E399**, paras 23-24.

³⁶ *Infra.* paras 9-10.

³⁷ Case 001 Trial Judgement, **E188**, para. 176.


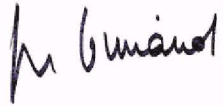
comparisons and creates serious obstacles to a proper forensic examination which, in such circumstances, could only be considered unsuitable to prove the facts it purports to prove.”³⁸

IV. REQUEST

24. The Lead Co-Lawyers respectfully request that the Trial Chamber:

- (i) **DISMISS** the Request;

Respectfully submitted,

Date	Name	Place	Signature
2 May 2016	PICH ANG Lead Co-Lawyer	Phnom Penh	
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³⁸ Trial Chamber Memorandum entitled Decision on KHIEU Samphan request for a forensic analysis of document E3/2107”, E349/1, 17 November 2015, para. 5.