

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

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NUON CHEA'S RULE 92 MOTION TO USE CERTAIN S-21 STATEMENTS

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I. INTRODUCTION

1. Pursuant to Rule 92, the Co-Lawyers for Mr. Nuon Chea (the “Defence”) move the Trial Chamber to allow the use of certain statements allegedly made by people detained in S-21 Security Centre (“S-21 Statements”) for which there is no real risk that they were obtained through torture.

II. BACKGROUND

2. On 29 December 2014, the Defence filed Mr. Nuon Chea’s Appeal against the Judgement in Case 002/01.¹ In the Appeal, the Defence argues that the Trial Chamber erred in law by finding that torture-tainted evidence is inadmissible in all circumstances for the truth of its contents. It argues that while international law prohibits the use of torture-tainted evidence against an accused, it does not forbid such use in the accused’s defence.²
3. On 27 April 2015, during the key document presentation in the trial of Case 002/02 in relation to Tram Kok Cooperatives and Kraing Ta Chan Security Centre, the Defence raised the issue of the Trial Chamber’s seemingly different attitudes towards the Co-Prosecutors and the Defence when it comes to the use of “confessions” which might have been obtained through torture.³ The Defence requested, therefore, that the Trial Chamber rule on the use of torture-tainted material and provide instructions on how the parties should approach this type of evidence.⁴
4. On 21 May 2015, pursuant to the request of the Trial Chamber, the Defence and the other parties filed respectively written submissions before the Trial Chamber on the use of torture-tainted evidence.⁵
5. On 25 May 2015, the parties made oral submissions before the Trial Chamber on the use of torture-tainted evidence.⁶

¹ **F16**, ‘Nuon Chea’s Appeal against the Judgement in Case 002/01’, 29 Dec 2014 (“Nuon Chea’s Appeal”).

² **F16**, Nuon Chea’s Appeal, paras. 706-722.

³ T. 27 Apr 2015 (Key Document Hearing, **E1/293.1**), p. 25, lns. 6-16, 21-24.

⁴ T. 27 Apr 2015 (Key Document Hearing, **E1/293.1**), p. 25, lns. 18-21.

⁵ **E350**, ‘Nuon Chea’s Submissions regarding the Use of “Torture-Tainted Evidence” in the Case 002/02 Trial’, 21 May 2015; **E350/1**, ‘Co-Prosecutors’ Submission regarding the Application of the Torture Convention to S-21 Confessions and other Records relating to Interrogations of Prisoners’, 21 May 2015; **E350/3**, ‘Civil Party Lead Co-Lawyers’ Submissions relating to the Admissibility and Permissible Uses of Evidence Obtained through Torture’, 21 May 2015; **E350/4**, ‘Conclusions de la Defense de M. KHIEU Samphan concernant l’usage des informations obtenues sous la torture’, 21 May 2015.

⁶ T. 25 May 2015 (Parties’ Submissions, **E1/304.1**), p. 3, ln. 4 – p. 48, ln. 4.

6. On 31 December 2015, the Supreme Court Chamber issued full reasons for its decision on the parties' objections to the documents proposed to be used during the hearing of three additional witnesses in relation to the appeal against the judgement in Case 002/01.⁷ In this decision, the Supreme Court Chamber dealt with Mr. Nuon Chea's appeal against the Trial Chamber's rulings with regard to torture-tainted evidence.⁸
7. On 5 February 2016, taking into consideration of the written and oral submissions made by the parties, the Trial Chamber issued its decision on the issue of torture-tainted evidence.⁹

III. APPLICABLE LAW

A. Torture-Tainted Evidence

8. Article 15 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment¹⁰ 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.

9. The Supreme Court Chamber noted that the applicable standard of proof and the allocation of the burden of proof to establish that a statement was made as a result of torture for the purpose of excluding this evidence "are not settled internationally, turn on the nature of the proceedings and circumstances of the case, and, in any event, are discussed in cases where the person concerned sought to *exclude* evidence against him or her, and not to use evidence in his or her defence".¹¹
10. Despite the unsettled international jurisprudence, the Supreme Court Chamber adopted "[t]he recent preference of human rights bodies [...] to exclude evidence upon the finding of a 'real risk' of torture".¹² Likewise, the Trial Chamber also considered "real risk" as the standard of proof applicable at the ECCC in deciding whether certain evidence needs to be excluded on the grounds of torture.¹³

⁷ F26/12, 'Decision on Objections to Document Lists: Full Reasons', 31 Dec 2015 ("SCC Decision"), para. 49.

⁸ F26/12, SCC Decision, paras. 26-69.

⁹ E350/8, 'Decision on Evidence Obtained through Torture', 5 Feb 2016 ("TC Decision").

¹⁰ 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.

¹¹ F26/12, SCC Decision, para. 49.

¹² F26/12, SCC Decision, para. 55.

¹³ E350/8, TC Decision, para. 33.

11. However, mindful that “relying ultimately on the presumption” that all statements made in certain facilities were tainted because of a “real risk” that they were the result of torture “would not sit well with the obligation of the Chambers of the ECCC to establish the truth”, and also mindful that excluding a statement “as soon as there is a real risk that it was obtained through torture would, in the circumstances of the present case, be potentially prejudicial to NUON Chea, who seeks to rely on” such statements, the Supreme Court Chamber accordingly held that any party seeking to rely on statements so presumed to have been obtained from torture “should be allowed to rebut the presumption by offering proof that the information in question was not the result of torture”.¹⁴
12. Concurring with the Supreme Court Chamber, the Trial Chamber held that after a preliminary determination has been made that there is a real risk that torture was used to obtain a statement, “any party seeking to rely upon such evidence may rebut this preliminary determination in particular upon a showing of specific circumstances negating this risk”.¹⁵ The Trial Chamber also emphasised that it will “consider evidence on a case-by-case basis to determine whether there is a real risk”.¹⁶

B. Additional Investigation

13. According to Rule 93, the Trial Chamber may “at any time, order additional investigations” as long as it deems it “necessary”.

C. Reconsideration

14. Reconsideration by a chamber of its decisions is not stipulated in the Internal Rules. However, the Trial Chamber has held that it will entertain requests for reconsiderations “where a fresh application justified by new evidence or new circumstances is made”.¹⁷ The Pre-Trial Chamber, following established ICTY jurisprudence, has adopted a broader test, ruling that a chamber’s power to reconsider its decisions applies not only where there is a “change of circumstances” (which could result from “new facts or

¹⁴ F26/12, SCC Decision, para. 58.

¹⁵ E350/8, TC Decision, para. 36.

¹⁶ E350/8, TC Decision, para. 35.

¹⁷ E238/11/1, ‘Decision on IENG Sary’s Request for Reconsideration of the Trial Chamber Decision on the Accused’s Fitness to Stand Trial and Supplemental Request’, 19 Dec 2012, para. 7.

arguments”¹⁸), but also where the Chamber “finds that the previous decision was erroneous or [...] caused an injustice”.¹⁹

IV. ARGUMENT

A. S-21 Statements of Koy Thuon

15. Koy Thuon was the Communist Party of Kampuchea (“CPK”)’s secretary of the North Zone (then Zone 304) until he became the Minister of Commerce of Democratic Kampuchea (“DK”) after April 1975.²⁰ Koy Thuon was later detained in S-21 Security Centre (“S-21”) and several compilations of his S-21 Statements allegedly made while he was detained there have been admitted into evidence by the Trial Chamber for specific and limited purposes.²¹
16. Kaing Guek Eav *alias* Duch (“Duch”), the head of S-21, told the ECCC investigators and the Trial Chamber on several occasions that the “upper echelon” – in that particular case Son Sen – ordered him to interrogate Koy Thuon personally and not to use torture and that as a result Koy Thuon was not tortured, either by him or by others.²²
17. In Case 001, after presumably considering all the evidence available including Duch’s statements that he personally interrogated Koy Thuon and two others and that he did not use torture, the Trial Chamber found that Duch was “not responsible for having committed torture or other inhumane acts through physical perpetration or culpable omission”.²³

¹⁸ *Case 001*, **D99/3/41**, ‘Decision on IENG Sary’s Motion for Reconsideration of Ruling on the Filing of a Motion in the Duch Case File’, Case 001/18-07-2007-ECCC/OCIJ, 3 Dec 2008, para. 6; *Prosecutor v. Galić*, Case No. IT-98-29, ‘Decision on Defence Request for Reconsideration’, 16 Jun 2004 (“*Galić* Decision on Reconsideration”), 9th recital.

¹⁹ **D164/4/9**, ‘Decision on Request to Reconsider the Decision for an Oral Hearing on the Appeals PTC 24 and PTC 25’, 20 Oct 2009, para. 12; **C22/I/68**, ‘Decision on Application for Reconsideration of Civil Party’s Right to Address Pre-Trial Chamber in Person’, 28 Aug 2008, para. 25; *Galić* Decision on Reconsideration, 8th recital.

²⁰ See, e.g. **E3/9042**, ‘Documentation Centre of Cambodia’s Interview with KAO Son’, 19 Mar 2011, ERN 01207737; **E3/183**, Minutes of Standing Committee, 9 Oct 1975, ERN 00183393; **E3/3856**, S-21 Statements of Koy Thuon, ERN 00829627.

²¹ **E3/1604**, S-21 Statements of Koy Thuon; **E3/1753**, S-21 Statements of Koy Thuon; **E3/3856**, S-21 Statements of Koy Thuon. In its decision on torture-tainted evidence, the Trial Chamber clarified the specific purposes for which it had admitted hundreds of confessions: see, **E350/8**, TC Decision, para. 30.

²² See, e.g., **E319/42.3.1**, ‘Written Record of Interview of Kaing Guek Eav *alias* Duch’, 1 Feb 2016 (“Duch WRI”), A 13, ERN 01213411; **E3/65**, ‘Written Record of Interview of Kaing Guek Eav *alias* Duch’, 7 Aug 2007, ERNs 00147519 and 00147524; **E3/5772**, ‘Written Record of Interview of Kaing Guek Eav *alias* Duch’, 6 May 2008, ERN 00209177; **E3/15**, ‘Kaing Guek Eav’s Response to the Co-Investigation Judges’ Written Questions’, 21 Oct 2008, ERN 00251389; T. 15 Jun 2009 (Kaing Guek Eav *alias* Duch, **E3/5799**) ERNs 00341732-00341733; T. 16 Jun 2009 (Kaing Guek Eav *alias* Duch, **E3/5800**), ERNs 00341975 and 00341991.

²³ *Case 001*, **E188**, Trial Judgement, Case File No. 001/18-07-2007/ECCC/TC, 26 Jul 2010, paras. 483-486.

18. The Defence submits, therefore, that there is convincing evidence showing that in the particular case of Koy Thuon, his S-21 Statements were not obtained through torture.

B. S-21 Statements of Yim Sambath

19. Yim Sambath was a combatant of Division 170 of the Revolutionary Army of Kampuchea (“RAK”) and was detained in S-21 for his suspected involvement in the grenade-throwing incident near the Royal Palace in April 1976.²⁴
20. Duch told the ECCC investigators that, as with the case of Koy Thuon, there was an order from Son Sen not to torture Yim Sambath while conducting 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”.²⁵ Duch’s deputy Hor was designated by Son Sen to carry out the interrogation of Yim Sambath, and Duch confirmed to the ECCC investigators that “[t]he interrogation was thus conducted without torture and pictures were taken to prove it”.²⁶
21. The Defence submits, therefore, that there is convincing evidence showing that in the particular case of Yim Sambath, S-21 Statements were not obtained through torture.

C. S-21 Statements of Chea Non *alias* Suong

22. Chea Non *alias* Suong was the commander of Division 450 of the RAK.²⁷ He was allegedly detained at S-21 and statements were made during the detention.²⁸
23. On 17 June 2016, the Defence attempted to use Suong’s S-21 Statements to confront a civil party who used to serve in Division 450 and it justified this use of the S-21 Statements by referring to an annotation on the statements, reading “written before he was tortured”.²⁹

²⁴ E3/7397, S-21 Statements of Yim Sambath, ERN 00769665.

²⁵ 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.

²⁶ E3/356, 2008 Duch WRI, ERN 00242900, emphasis added; *see also*, E319/42.3.1, Duch WRI, A 13, ERN 01213411.

²⁷ E3/1892, S-21 Statements of Chea Non *alias* Suong, ERN 00096949; E3/1585, ‘Statistical List of Participants: 1st General Staff Training’, 20 Oct 1976, ERN 00897652.

²⁸ E3/1892, S-21 Statements of Chea Non *alias* Suong.

²⁹ T. 17 Jun 2015 (Kong Siek, E1/318.1), p. 79, ln. 21 – p. 80, ln. 6. The Defence referred to the English translation of E3/1892, at ERN 00096949.

24. The Trial Chamber forbade the Defence from using Suong's S-21 Statements on the basis that "[a]pparently, the Khmer version does not include that – does not state that this confession was made before torture".³⁰
25. In its decision on the use of torture-tainted evidence, the Trial Chamber reiterated its previous ruling on Suong's S-21 Statements, holding that "a note of questionable provenance at the top of only the English version of this document, rather than the original Khmer, does not rebut the presumption of a real risk that the confession was obtained under torture".³¹
26. However, contrary to the Trial Chamber's observation, there is indeed an annotation on the first page of the original Khmer version of Suong's S-21 Statements stating that the statements were written before torture.³² The handwriting of this annotation appears to be the same as that of Pon, an interrogator at S-21.³³
27. Moreover, there is another annotation in Suong's S-21 Statements explaining that the statements were written by Suong on his own accord after the interrogation had ceased for a while.³⁴
28. Considering that these annotations appear to be contemporaneous notes written by interrogators, and considering that similar notes allegedly made by the interrogators at S-21 do not seem to shy away from the use of torture,³⁵ the said annotations on Suong's S-21 Statements are convincing evidence that the statements were not obtained through torture.
29. The Defence, therefore, requests the Trial Chamber to exercise its inherent authority to reconsider its previous decision on the use of Suong's S-21 Statements.
30. In the event that the Trial Chamber is not satisfied with the provenance or authenticity of the annotations, the Defence requests that the Trial Chamber exercise its power under Rule 93 to order investigations into the issue before making any decisions on the permissible use of Suong's S-21 Statements. Possible investigative measures may

³⁰ T. 17 Jun 2015 (Kong Siek, **E1/318.1**), p. 80, ln. 24 – p. 81, ln. 1.

³¹ **E350/8**, TC Decision, para. 86, emphasis added.

³² **E3/1892**, S-21 Statements of Chea Non *alias* Suong, ERN 00012693 (in Khmer).

³³ For comparison, *see*, e.g., **E3/2492**, S-21 Statements of Sao Kang *alias* Nhoek, ERN 00311444 (in Khmer), ERN 00819772 (in English).

³⁴ **E3/1892**, S-21 Statements of Chea Non *alias* Suong, ERN 00012945 (in Khmer).

³⁵ *See*, e.g., **E3/2492**, S-21 Statements of Sao Kang *alias* Nhoek, ERN 00311444 (in Khmer), ERN 00819772 (in English).

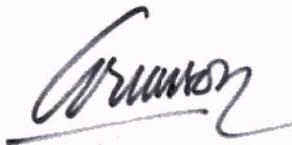
include consulting experts in the relevant fields about whether the annotations in question were contemporaneous and whether the anonymous hand writing came from Pon or any of the other interrogators at S-21. Investigations in this particular case are necessary for the purpose of ascertaining the truth, avoiding a miscarriage of justice, and ensuring the fairness of the trial.³⁶ Indeed, once triggered by the request of a party, it becomes a chamber's onus to make inquiries or to investigate, as long as it is practicable, in order to determine whether a particular piece of evidence needs to be excluded on the grounds of torture.³⁷ The Trial Chamber itself has also envisaged resorting to additional investigation or "inquiry" into the circumstances in which certain statements were made, with a view to determining if these statements may be used as ordinary and untainted evidence.³⁸

31. Based on the foregoing, the Defence submits that the evidence clearly shows that there is no "real risk" of torture in the cases of Koy Thuon, Yim Sambath and Chea Non.

V. RELIEF

32. For the above reasons, the Defence requests that the Trial Chamber:
- (a) allow the use of the S-21 Statements of Koy Thuon, Yim Sambath and Chea Non as evidence not tainted by torture; or,
 - (b) conduct additional investigations into the circumstances in which the said S-21 Statements were obtained before making its decision on the permissible use of these statements.

CO-LAWYERS FOR NUON CHEA



SON Arun



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³⁶ See, *supra*, para. 9, citing **F26/12**, SCC Decision, para. 58, SCC's holdings in relation to the Chambers' obligation to establish the truth and the potential prejudice to Nuon Chea.

³⁷ *A and Others v. Secretary of State for the Home Department*, House of Lords, [2005] UKHL 71, paras. 145, 155, 172.

³⁸ T. 28 May 2009 (Case 001, Craig Etcheson, **E1/27.1**), p. 9, Ins. 16-22, Judge Cartwright spoke on behalf of the Trial Chamber: "If any party wishes to refer to the truthfulness or otherwise of the contents of a confession, it will be necessary first to establish if the confession was made under torture or the threat of torture. For that reason, parties should consider whether an examination of the contents of a confession is sufficiently important to seek an inquiry concerning the circumstances under which the confession was made."