BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

Case No: 002/19-09-2007-ECCC/TC

Filing Party: Nuon Chea Defence Team

Filed To: Trial Chamber

Original Language: English

Date of Document: 14 June 2016

CLASSIFICATION

Classification Suggested by the Filing Party: PUBLIC

Classification of the Trial Chamber: សាធារណៈ/Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

NUON CHEA'S REPLY TO CO-PROSECUTORS' RESPONSE TO NUON CHEA'S REQUEST TO RECALL PRAK KHAN

Filed By

Nuon Chea Defence Team:
SON Arun
Victor KOPPE
LIV Sovanna
Doreen CHEN
PRUM Phalla
Xiaoyang NIE
Marina HAKKOU
Léa KULINOWSKI
DY Socheata

Distribution

Co-Lawyers for Khieu Samphân:
KONG Sam Onn
Anta GUISSÉ

Co-Prosecutors:
CHEA Leang
Nicholas KOUMJIAN

Co-Lawyers for the Civil Parties:
PICH Ang
Marie GUIRAUD

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 the instant reply to the Co-Prosecutors' response to Mr. Nuon Chea's request to recall witness Prak Khan.

II. BACKGROUND

2. On 27 May 2016, the Defence filed a request to recall witness Prak Khan to finish its cross-examination of this witness (the "Request").[1]

3. On 1 June 2016, the Co-Prosecutors requested the Trial Chamber for leave to file their response to the Request on 6 June 2016 in English only, with Khmer translation to follow at the first opportunity.[2] The Chamber granted this request on 2 June 2016.[3]

4. On 6 June 2016, the Co-Prosecutors filed their response to the Request (the "Response").[4]

5. On 8 June 2016, the Defence requested the Trial Chamber for leave to reply to the Response by 14 June 2016 in English only, with Khmer translation to follow as soon as possible.[5] The Chamber granted this request on 8 June 2016.[6]

III. REPLY

A. The Co-Prosecutors' Contention that the Evidence Sought by the Defence Is Cumulative is without Merit

6. The Defence intends to elicit from Prak Khan evidence on the following subjects: (1) the alleged blood drawing; (2) the alleged rape incident; (3) the alleged killing of a Vietnamese baby; (4) interrogators' reports and annotations; (5) the detailed and specific circumstances of interrogation of three detainees personally interrogated by

[1] **E409**, 'Nuon Chea's Request to Recall Witness Prak Khan', 27 May 2016 (the "Request").
[2] Email from Assistant Co-Prosecutor to Trial Chamber Senior Legal Officer, 1 Jun 2016 (Attachment 1).
[3] Email from Trial Chamber Senior Legal Officer to the Parties, 2 Jun 2016 (Attachment 2).
[4] **E409/1**, 'Co-Prosecutors' Response to Nuon Chea's Request to Recall Witness Prak Khan', 6 Jun 2016 (the "Response").
[5] Email from Defence Legal Consultant to Trial Chamber Senior Legal Officer, 8 Jun 2016 (Attachment 3).
[6] Email from Trial Chamber Senior Legal Officer to the Parties, 8 Jun 2016 (Attachment 4).

Prak Khan; and (6) the "Khmer Rumdoh", "Khmer Sar" and "Khmer Serei" movements.[7]

7. The Co-Prosecutors contend that the evidence the Defence seeks to elicit from further cross-examination of Prak Khan in relation to blood drawing, rape, the killing of a Vietnamese baby and the system of interrogators' reports and annotation is cumulative. This is because, the Co-Prosecutors argue, Prak Khan has already provided "consistent" evidence on the issues in question during the interview by the Co-Investigating Judges, during the Case 001 trial proceedings under questioning from the Chamber, and during the Case 002/02 hearing when questioned by parties other than the Defence.[8] This contention is erroneous and highly problematic for the following reasons.

8. Even though Prak Khan has provided evidence on the issues in question, he has never done so under cross-examination by the Defence. Neither the Co-Prosecutors, the civil party lawyers, the defence lawyers for other accused persons, the Chambers, nor the Co-Investigating Judges could replace the Defence in representing the case and the interest of Mr. Nuon Chea. Representing different interests and assuming different roles, the parties naturally have different strategies and focuses[9] when questioning the same witness, hence bringing distinctive perspectives to the same alleged facts and potentially eliciting different evidence. To argue that the evidence sought by the defence in cross-examination of a witness is cumulative simply because the witness has already been questioned on the same subjects by the prosecution and other parties equates to arguing that cross-examination is by definition unnecessary, and the defence by definition redundant in a criminal trial. This argument contradicts both the fundamental right of an accused person to a fair trial and the very essence of an adversarial trial that the ECCC vows to guarantee.[10]

9. Moreover, the Co-Prosecutors' suggestion that cross-examination by the Defence on the issues in question is unnecessary and dispensable because Prak Khan has provided

---

[7] **E409**, Request, para. 10.
[8] **E409/1**, Response, paras. 8-11.
[9] *See, e.g.*, ***Case 001***, **E72/3**, 'Decision on Civil Party Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character', Case No. 001/18-07-2007/ECCC/TC, 9 Oct 2009, paras. 19-25.
[10] Internal Rule 21 (1) (a): "ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties."

"consistent" evidence on those issues[11] is also disturbingly erroneous and without merit. The European Court of Human Rights ("ECtHR") has consistently held that "inculpatory evidence against an accused may well be 'designedly untruthful or simply erroneous'" and that "the reliability of evidence, including evidence which appears cogent and convincing, may look very different when subjected to a searching examination".[12] The ECtHR has emphasised, accordingly, that:

> assessment of whether a criminal trial has been fair cannot depend solely on whether the evidence against the accused appears *prima facie* to be reliable, if there are no means of challenging that evidence once it is admitted.[13] (emphasis added)

10. The ECtHR has also remarked that the dangers inherent in allowing untested evidence are all the greater if that evidence is the *sole or decisive* evidence against the accused.[14] This Defence will discuss this further in Section D.

B. In General, Where a Witness Is Available for Cross-Examination and the Evidence in Question Relates to a Critical Element of the Case or a Live and Important Issue between the Parties, Cross-Examination of this Witness Is Mandatory

11. The Co-Prosecutors acknowledge that further cross-examination of Prak Khan may be necessary in certain circumstances. However, the Co-Prosecutors erroneously limited such circumstances to situations where the evidence sought is "central to the defence case", and further narrowly interpreted "central to the defence case" as "relating to the act and conduct of the accused".[15] These erroneous interpretations of the law form the basis of the Co-Prosecutors' incorrect conclusion that cross-examination of Prak Khan by the Defence in relation to the issues in question is not required by law.

12. The *ad hoc* tribunals have consistently held that cross-examination is mandatory where the evidence in question "touches upon a critical element of the case, or goes to a live and important issue between the parties",[16] unless the absence of the witness for cross-

---

[11] **E409/1**, Response, paras. 8-11.
[12] *See, e.g.*, *Case of Al-Khawaja and Tahery v. The United Kingdom*, ECtHR, App. Nos. 26766/05 and 22228/06, 15 Dec 2011 ("*Al-Khawaja and Tahery* Case", Attachment 5), para. 142.
[13] *Al-Khawaja and Tahery* Case, para. 142.
[14] *Al-Khawaja and Tahery* Case, para. 142.
[15] **E409/1**, Response, para. 7.
[16] *E.g.*, *Prosecutor v. Nzabonimana*, 'Decision on Defence Motion for the Admission of A Written Statement and Accompanying Documents', Case No. ICTR-98-44D-T, 19 Oct 2011, para. 18: "Cross-examination *shall* be granted if the statement touches upon a critical element of the case, or goes to a live and important issue between the parties" (emphasis added); *Prosecutor v. Milošević*, 'Decision on Prosecution's Request to Have Written Statements Admitted under Rule 92 *bis*', Case No. IT-02-54-T, 21 Mar 2002 ("*Milošević* Decision"), paras. 24-25: "In these circumstances, [...] the requirements of a fair trial *demand* that the accused be given the right to cross-examine the witnesses in order to fully test the Prosecution's case" (emphasis added). The jurisprudence

examination is legally justified.[17] "Critical element of the case" and "live and important issue" clearly go far beyond issues "relating to the act and conduct of the accused", contrary to what the Co-Prosecutors have argued. The ICTY considers an issue "live and important" and critical to a party's case when the opposing party "has put this evidence into issue and vigorously put forward a contrary case".[18] The fact that the Defence has vigorously sought to cross-examine Prak Khan to contest the Prosecution case in relation to the issues in question shows that the evidence the Defence seeks to elicit from Prak Khan relates to live and important issues critical for both the Prosecution case and the Defence case. These issues include mainly the following:

(a) The alleged blood drawing practice, its purpose, the manner in which it was done, its nature, its consequence, and its impact on the alleged victims.

(b) Whether the rape incident and the killing of a Vietnamese baby actually took place and, if so, the attribution of criminal responsibility for those incidents.

(c) The system of interrogators' reports and annotations and Mr. Nuon Chea's alleged knowledge of crimes at S-21 through this system.

(d) Whether torture in legal terms took place in relation to the three detainees personally interrogated by Prak Khan.

(e) Whether it was "paranoia" or rather legitimate and substantiated suspicion that motivated the so-called "purges", and accordingly whether actions during the alleged "purges" may qualify as political persecution or amount to crimes such as arbitrary arrest and detention.

13. Based on the above and the lack of legal justification for Prak Khan's absence from live testimony (*infra*, paras. 14-16), it is demanded by law and by the requirements of a fair

---

demonstrates that although it is in general a chamber's discretion to decide whether to order cross-examination of a witness whose written statement has been admitted, in certain circumstances such cross-examination is *in effect mandatory* rather than discretionary because the chamber will not be able to deny a cross-examination in those circumstances without violating the principle of a fair trial.

[17] The cited jurisprudence of the *ad hoc* tribunals that cross-examination is mandatory in certain circumstances relates to Rule 92 *bis* of the tribunals' rules. Rule 92 *bis* only applies when the witness in question is available for cross-examination if a chamber so decides (*see*, ICTY Rule 92 *bis* (C) and ICTR Rule 92 *bis* (E)). Therefore, the said jurisprudence applies where the witness in question is available, that is, there is no legal justification for the absence of the witness for cross-examination. The Defence will discuss the legal justifications in Section C of the instant reply.

[18] *E.g.*, *Milošević* Decision, para. 24.

trial that the Defence be allowed to cross-examine Prak Khan regarding the said issues in order to fully test the Co-Prosecutors' case and to properly mount the Defence case.[19]

C. Legally Permissible Limitations to the Accused's Right to Confront Witnesses Do Not Apply to the Present Case

14. The Co-Prosecutors argue that the accused's right to confront witnesses is not absolute yet the Defence, by requesting to recall Prak Khan, is wrongfully seeking an unfettered right to question witnesses.[20] This assertion is erroneous for the following reasons.

15. While the right to confront witnesses may be limited in some circumstances, such limitation is confined to the few specific circumstances envisaged by law in order to balance between the fair trial rights of the accused and other equally important values. The exceptional circumstances include, for example, the unavailability of the witnesses to testify in person due to death, bodily or mental condition, or other justifiable reasons; the right to silence; the right against self-incrimination; and privileged information.[21] None of the exceptional circumstances permissible by law exists in the case of Prak Khan.

16. The Defence notes that it is important to bear in mind that, contrary to the Co-Prosecutors' suggestion, the existence in law of a few specific limitations to the accused's right to confront witnesses does not open the door to any general and unspecified limitations to the accused's right to confront witnesses. Any other interpretation of the law would undermine the fundamental principle of a fair trial and render the protection of the rights of the accused ineffective.[22] In this regard, as the Defence has demonstrated in its Request, neither the expediency of trial nor the rigid application of equal time for the parties constitutes a valid justification for unreasonably limiting the fundamental fair trial rights of the accused.[23]

---

[19] *Milošević* Decision, para. 25.
[20] **E409/1**, Response, para. 24.
[21] *See, e.g.*, ICTY, Rules 92 *quater* and 92 *quinquies*; *see also*, *Al-Khawaja and Tahery* Case, para. 120. The Defence notes that some of the circumstances prevent live testimony as such, while the others – such as privileged information and the right against self-incrimination – only limit the scope of the information available to the parties.
[22] The ECtHR has consistently remarked that the "rights in the Convention, must be interpreted so as to make it practical and effective, not theoretical or illusory". *See, e.g.*, *Case of Cudak v. Lithuania*, ECtHR, App. No. 15869/02, 23 Mar 2010 ("*Cudak* Case", Attachment 6), paras. 36, 58.
[23] **E409**, Request, paras. 23-32.

D. Fair Trial Rights Demand that a Conviction Must Not Be Based Solely or to a Decisive Extent on Evidence that the Accused Was Unable to Test during the Trial

17. In terms of the relevance of cross-examination to the fair trial rights of the accused, both the ICTY and the ECtHR have emphasised that it is important to distinguish between two stages of the trial: the admission of evidence and the final judgement. While the mere *admission* of untested evidence is not automatically a violation of the fair trial rights of the accused, the subsequent *conviction* of the accused based "solely or to a decisive extent" on such evidence will amount to an unacceptable violation of the accused's fair trial rights.[24]

18. The ECtHR remarks that the rationale behind the "sole and decisive" rule is twofold. The first aspect relates to the fact that, as noted above, "inculpatory evidence against an accused may well be 'designedly untruthful or simply erroneous'" and that "the reliability of evidence, including evidence which appears cogent and convincing, may look very different when subjected to a searching examination".[25] The dangers inherent in allowing untested evidence are all the greater if that evidence is the sole or decisive evidence against the accused.[26]

19. As to the second aspect, the ECtHR observes that:

> the defendant must not be placed in the position where he is effectively deprived of a real chance of defending himself by being unable to challenge the case against him. Trial proceedings must ensure that a defendant's Article 6 rights are not unacceptably restricted and that he or she remains able to participate effectively in the proceedings.[27]

20. Although it is not yet the stage of judgement, the Defence wishes to make the following remarks. In the *Al-Khawaja and Tahery* Case, the ECtHR found that the evidence of a witness who is the only purported eyewitness of a crime with which the accused is charged constitutes, if not sole, at least decisive evidence against the accused in relation to that charge.[28] Accordingly, Prak Khan's evidence on some of the subjects that the Defence seeks to explore with him – such as blood drawing, the killing of a Vietnamese baby, the specific circumstances of the interrogation of the three detainees personally interrogated by Prak Khan – is by nature the sole or decisive evidence for part of the

[24] *E.g.*, *Al-Khawaja and Tahery* Case, paras. 128, 147; *Prosecutor v. Šešelj*, 'Decision on Prosecution's Motion to Add One Exhibit to its Rule 65 *ter* List and for Admission of Evidence of Witness Matija Bošković pursuant to Rule 92 *quarter*', Case No. IT-03-67-T, 9 Mar 2009, paras. 19, 20.
[25] *Al-Khawaja and Tahery* Case, para. 142.
[26] *Al-Khawaja and Tahery* Case, para. 142.
[27] *Al-Khawaja and Tahery* Case, para. 142.
[28] *Al-Khawaja and Tahery* Case, para. 160.

Co-Prosecutors' case. In the event that the Trial Chamber decides not to allow the Defence to cross-examine Prak Khan on those subjects, unless the circumstances change due to new evidence as yet unknown to the parties, the Trial Chamber cannot convict Mr. Nuon Chea of crimes derived from those incidents without simultaneously violating his right to a fair trial.

21. For clarity, the law discussed so far can be summarised as follows. First, when a witness is available for live testimony, cross-examination is in effect mandatory where the evidence of the witness bears on a critical element of the case or a live and important issue between the parties. Second, when the unavailability of the live testimony of a witness is justified by exceptional circumstances specified by law, written statement of the witness may be admitted into evidence even if it relates to critical and important issues. However, at the stage of judgement, a conviction must not be based solely or to a decisive extent on such untested evidence.

22. The Defence submits that given the lack of legal justifications for excusing Prak Khan from live testimony, and given that the evidence the Defence seeks to elicit from him relates to live and important issues critical to the case, the denial of the Defence's request to cross-examine Prak Khan on these issues will as such amount to a violation of Mr. Nuon Chea's fair trial rights. In addition, Mr. Nuon Chea's right to a fair trial might once again be flagrantly violated at a later stage if the Trial Chamber subsequently relies solely or to a decisive extent on Prak Khan's evidence – which the Defence has not been allowed to test – in convicting Mr. Nuon Chea of any crime.

E. The Relevance of Evidence on Conflicting Internal Factions within the CPK

23. The Co-Prosecutors contend that the Defence fails to demonstrate the relevance of the evidence it seeks to elicit from Prak Khan in relation to "Khmer Rumdoh", "Khmer Sar" and "Khmer Serei" movements.[29] They argue that the Defence's Request to recall Prak Khan in this respect is yet another "attempt to articulate an argument that relies on the DK regime's paranoid perception of enemies among its own cadres".[30] The Co-Prosecutors further assert that evidence on conflicting internal factions within the CPK or the DK is not relevant because:

[29] **E409/1**, Response, para. 15.
[30] **E409/1**, Response, para. 16.

> Even if there existed conflicting factions within the CPK, the evidence on the case file shows that the CPK Party Centre was never deprived of the ability to impose its will. Similarly, reporting procedures ensured that the higher CPK echelons had full knowledge of the events taking place in the regions. [...] Even if Nuon Chea's assertions of secret plans within the party to replace the leadership were true, it would not absolve the Centre leaders of crimes implemented by Zone and autonomous region leaders that were part of the joint criminal enterprise.[31] (emphasis added)

24. The Defence submits that this argument is erroneous and has no merit for the following reasons. First of all, the Co-Prosecutors' argument concerning the relevance is completely based on their own case and their own interpretation of the evidence available on the record so far. What the Co-Prosecutors are arguing – just as they have always been – is essentially that any evidence that does not support the Prosecution case or the Co-Prosecutors' interpretation of the evidence on the record is irrelevant as such. The absurdity of this argument is obvious. If this logic stands, it will render the defence in a criminal trial completely redundant and dispensable, which cannot be compatible with the fair and adversarial trial system that the ECCC is obliged by law to guarantee.[32]

25. Second, as has been repeatedly demonstrated on various occasions,[33] the Defence strongly disagrees with the Co-Prosecutors on both the interpretation of the evidence and the nature of the case in this regard. The Co-Prosecutors' case appears to be that the so-called "purges" amount to political persecution in connection with other crimes such as arbitrary arrest and detention because, *inter alia*, the "purges" were based on "paranoid perception". The Defence, on the other hand, has been trying to put forward a contrary case that the so-called "purges" were based on legitimate and substantiated suspicion of treason and other crimes, which undermines the key elements of the crimes charged including political persecution and imprisonment (notably the element of arbitrary arrest and detention).[34] Additionally, the Co-Prosecutors argue that the evidence shows that "the CPK Party Centre was never deprived of the ability to impose its will" and that "reporting procedures ensured that the higher CPK echelons had full knowledge of the events taking place in the regions". The Defence argues, however, that the evidence – both already on the record and evidence yet to be obtained – supports conclusions to the contrary.

---

[31] **E409/1**, Response, para. 16.
[32] In addition to other applicable international law in all its forms, Internal Rule 21 (1) (a) specifies that "ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties."
[33] Most recently, *see*, **E395/2**, 'Nuon Chea's Submissions on the Relevance of Evidence of Treasonous Rebellion to His Individual Criminal Responsibility in Case 002/02' ('Nuon Chea Submissions on His Defence Case'), 10 June 2016.
[34] *See also*, **E395/2**, Nuon Chea Submissions on His Defence Case.

26. The very fact that the Co-Prosecutors and the Defence have been intensely disputing the aforementioned issues – which relate to both the elements of the crimes charged and the elements of modes of liability – indicates that these issues are "live and important", and critical to the case.[35] It is a corollary of the principle of a fair trial that in such a circumstance, both parties be entitled to bring evidence that supports their case and to fully test the case of the other.[36]

27. Third, it is premature and legally wrong for a trial chamber to take sides between the conflicting cases advanced respectively by the two opposing parties at the stage of admission of evidence. The Co-Prosecutors' request that the Trial Chamber reject any evidence on conflicting internal factions on the basis that it does not fit in with the Co-Prosecutors' case or their interpretation of the evidence is in effect inviting the Chamber to disregard fundamental principles of impartiality, fair trial and even the presumption of innocence.

F. Elements of the Crime against Humanity of Imprisonment and the Relevance of Evidence on Conflicting Internal Factions

28. In an effort to dismiss the relevance of potential evidence from Prak Khan on conflicting internal factions within the CPK, the Co-Prosecutors submit that as one element of the crime against humanity of imprisonment, arbitrary deprivation of liberty refers to deprivation of liberty that is "without a justifiable legal basis and without due process of law".[37] The Co-Prosecutors contend that, therefore, Mr. Nuon Chea cannot reply on the existence of a legal basis to justify imprisonment without due process.[38] They further argue that:

> The evidence overwhelmingly establishes that the charge of the CAH of imprisonment, i.e. detention without due process, for those detained at S-21 is fulfilled. No evidence that Prak Khan could provide regarding "conflicting factions" within the CPK could affect this conclusion.[39] (emphasis added)

29. This argument is problematic for the following reasons. As reflected in the Request,[40] the Defence does not contend that the lack of legal basis is the only element of the crime of imprisonment. Nevertheless, the lack of legal basis is undisputedly one of the

[35] *See*, *supra*, para. 12, citing *Milošević* Decision, para. 24.
[36] *See*, *supra*, paras. 12-13.
[37] **E409/1**, Response, para. 17.
[38] **E409/1**, Response, para. 17.
[39] **E409/1**, Response, para. 20.
[40] **E409**, Request, para. 14. "Arbitrariness in this regard refers, *inter alia*, to the lack of legal basis."

elements of the crime explicitly charged in the Closing Order.[41] Accordingly, any evidence relevant to this element is relevant to the current case. It would be unfair, impractical and illogical to require that each and every piece of evidence a party introduces is in itself relevant to all the elements of the crimes charged. Whether or not Prak Khan's evidence may cover all the elements of the crime of imprisonment is completely irrelevant to the assessment of the relevance of Prak Khan's evidence to one aspect of the crime.

30. In addition, whether the evidence on the record so far is "overwhelming" in respect of one element of the crime in question is similarly irrelevant to the assessment of the relevance and admissibility of evidence relating to other elements of the crime. Moreover, it is premature for the Co-Prosecutors to suggest at this stage of the trial that one of the charges is "fulfilled".[42]

G. Issues Related to Rebutting the Presumption of a "Real Risk" of Torture

31. With regard to the Defence's Request to question Prak Khan in order to elicit evidence to rebut the presumption of a "real risk" of torture in relation to three specific detainees, the Co-Prosecutors argue that: (1) the Defence's argument is speculative as it offers no grounds for the Chamber to believe that Prak Khan's evidence will rebut the presumption; and (2) both the Trial Chamber and the Supreme Court Chamber have "determined that there was a 'real risk' that all confessions at S-21 were made as a result of torture". Moreover, "the evidence overwhelmingly shows that *all* confessions given at S-21 were obtained by torture". Therefore, "[n]o evidence elicited from Prak Khan […] would negate this conclusion or rebut the presumption that the statements of the three individuals were obtained through torture".[43]

32. As will be demonstrated below, these arguments are very problematic. First, both the Trial Chamber and the Supreme Court Chamber have specifically emphasised that the presumption of a "real risk" is rebuttable. Using the presumption as the basis to argue that the same presumption cannot be rebutted is a circular argument.

---

[41] The Closing Order charges that "[t]ens of thousands of people detained in security centres were intentionally and arbitrarily held without any legal basis." *See*, **D427**, 'Closing Order', 15 Sep 2010, para. 1404 (emphasis added). *See also*, **E409**, Request, para. 14, fn. 23.
[42] **E409/1**, Response, para. 20.
[43] **E409/1**, Response, para. 13.

33. Second, contrary to the stage of initial assessment of a "real risk" where *general* evidence is sufficient, at the stage of rebutting the presumption, the determinative factor is the *specific* evidence related to a *particular* case. For instance, evidence that Interrogator A *usually* tortures people he interrogated may be sufficient to establish a "real risk" that people interrogated by A was tortured. However, such general evidence is irrelevant to whether torture was actually imposed on a specific individual. This is particularly so, if there is specific evidence that A treated Individual B differently from the others and did not resort to torture when interrogating him. Therefore, contrary to what the Co-Prosecutors are suggesting, it is plainly incorrect and illogical to rely solely on the general evidence to argue that whatever the specific evidence may be – before the specific evidence is even introduced – it cannot rebut the general presumption.

34. Moreover, the Co-Prosecutors' assertion in this regard that "the evidence overwhelmingly shows that *all* confessions given at S-21 were obtained by torture" (emphasis added) is both premature and without evidentiary basis. The Defence notes that in addition to general evidence (such as former S-21 staff's testimony that resorting to torture was what they *would usually* do), the Co-Prosecutors, during recent trial proceedings, have been invoking examples of specific S-21 detainees' statements where the use of torture was explicitly mentioned in relation to those particular individuals.[44] However, plenty of other similar S-21 detainees' statements on the record do not contain any explicit indication of the use of torture. Some statements even contain explicit information that the specific individuals in question were not tortured.[45] Given that the specific evidence varies in such a way, the evidence on the record cannot – contrary to what the Co-Prosecutors has argued – support a sweeping conclusion that *all* S-21 statements were obtained through torture. It is one thing to presume a "real risk", whereas it is quite another to conclude on the actual situation based on such evidence.

35. The Defence also notes that it is wildly ironic, inconsistent, and hypocritical for the Co-Prosecutors to argue in their Response that *all* S-21 statements were obtained through torture, while on the other hand claim in court that certain parts of such statements where the detainees claimed their innocence were not a product of torture.[46]

---

[44] T. 9 Jun 2016 (Kaing Guek Eav *alias* Duch, **Draft Transcript**), p. 14, ln. 1-24 (09.35.29-09.39.00).
[45] *E.g.*, **E3/2497**, KH 00318408, EN 00818856; **E3/3839**, KH 00173799-80, EN 00823052-53; **E3/3857**, KH 00070438, 00070448, EN 00825261-62.
[46] T. 13 Jun 2016 (Kaing Guek Eav *alias* Duch, **Draft Transcript**), p. 60, ln. 19-p. 61, ln. 6 and p. 62, ln. 14-p. 63, ln. 11 (13.55.39-14.00.18).

36. Third, as the Defence has demonstrated in its Request, the parties are entitled to bring evidence to rebut the presumption of a "real risk".[47] The fact that Prak Khan personally interrogated those three individuals is a sufficient basis for the Defence to request an opportunity to elicit from him evidence on the specific circumstances in which they were interrogated, which may or may not be sufficient to rebut the presumption that the three individuals were tortured. Any requirement higher than that will render the right of the Defence to rebut the presumption illusory, impractical and ineffective.[48]

37. Also in regard to rebutting the presumption of a "real risk" of torture, the Co-Prosecutors argue that the Defence failed to manage its time efficiently when Prak Khan previously testified because, *inter alia*, it spent a large portion its time on questioning Prak Khan about the circumstances of his interrogation of one specific individual. The Co-Prosecutors assert that "[t]his line of questioning illegitimately sought to rely on the content of confessions obtained through torture".[49]

38. Contrary to this allegation, the Defence was simply exercising its right – which has been recognised by both the Trial Chamber and the Supreme Court Chamber – to rebut the presumption of a "real risk" of torture in order to legally rely on the content of statements that were not obtained through torture.

39. The Defence notes with great concern that, despite the warning from the Supreme Court Chamber,[50] the Co-Prosecutors are still misrepresenting the Defence's normal conduct as an indispensable party to the trial and keep making false, unjust and disrespectful comments on the Defence's legitimate representation of the rights and interest of Mr. Nuon Chea.

H. The Co-Prosecutors' Alternative Request to Further Question Prak Khan and to Do So After the Defence Finishes Its Questioning Is Unjustified

40. The Co-Prosecutors request that, in the event that Prak Khan is recalled, they should be given an opportunity to put further questions to Prak Khan on topics that they did not have time to cover during Prak Khan's previous testimony, and to do so after the

[47] **E409**, Request, para. 13.
[48] As a principle, the law "must be interpreted so as to make it practical and effective, not theoretical or illusory". *See*, *supra*, fn. 22, citing the *Cudak* case, paras. 36, 58.
[49] **E409/1**, Response, para. 26.
[50] **F28/4**, 'Decision on Nuon Chea's Request for Investigative Actions Aimed at Assessing the Credibility of Witness Sam Sithy', 29 Oct 2015, pp. 3-4.

Defence has finished its questioning.[51] This request is unjustified for the following reasons.

41. First, the Co-Prosecutors' request to put further questions to Prak Khan on topics that they did not cover previously is in effect a request to recall a witness. Hence, the Co-Prosecutors must demonstrate by a formal and reasoned request that the conditions to recall Prak Khan to elicit evidence on those topics are fulfilled. The Defence submits that at first glance, Prak Khan's potential evidence on the topics proposed by the Co-Prosecutors is cumulative and not significant enough to warrant a recall. That said, the Defence is open to discuss this in further detail once a reasoned request to recall Prak Khan for those topics is made by the Co-Prosecutors. Until then, the Co-Prosecutors' request to put further questions to Prak Khan is unjustified.

42. Second, in the event that the Chamber nevertheless decides to let the Co-Prosecutors put further questions to Prak Khan, the Co-Prosecutors should do so before the Defence starts its questioning. The Defence's Request to recall Prak Khan is essentially a request for the Trial Chamber to reconsider its decision not to grant the Defence additional time to cross-examine Prak Khan. In other words, the Defence's Request to recall Prak Khan is for the purpose of continuing and finishing its cross-examination, rather than introducing new issues *stricto sensu* in the form of examination-in-chief. Given that the reappearance of Prak Khan, if granted, is in effect a continuation of Prak Khan's previous testimony, there is no reason to depart from the normal order of questioning.

43. Moreover, if the Chamber allows the Co-Prosecutors to question Prak Khan on issues that have not been addressed previously, the Defence should be given extra time on top of what it has specified in the Request in order to respond to the Co-Prosecutors' additional examination-in-chief.

IV. RELIEF

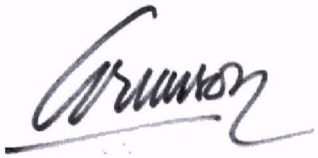
44. For the above reasons, the Defence requests that the Trial Chamber:

a) dismiss the arguments made by the Co-Prosecutors in the Response; and

b) grant the Defence's Request.

[51] **E409/1**, Response, para. 30.

CO-LAWYERS FOR NUON CHEA



SON Arun

Victor KOPPE