



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des tribunaux cambodgiens

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Preliminaire

D257/1/8

In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea

Case File N° 003/07-09-2009-ECCC/OCIJ (PTC34)

THE PRE-TRIAL CHAMBER

Before: Judge PRAK Kimsan, President
Judge Olivier BEAUVALLET
Judge NEY Thol
Judge Kang Jin BAIK
Judge HUOT Vuthy

Date: 24 July 2018

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DECISION ON [REDACTED] APPLICATION FOR THE ANNULMENT OF TORTURE-DERIVED WRITTEN RECORDS OF INTERVIEW

Co-Prosecutors

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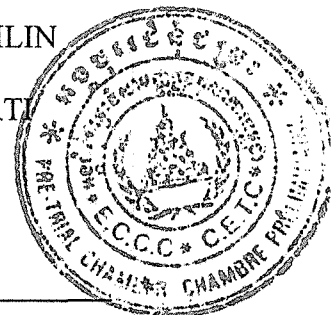
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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seised of “██████████ Application for Annulment of Torture-Derived Written Records of Interview”, filed by the Co-Lawyers for ██████████ (respectively “Co-Lawyers” and “Applicant”) on 10 August 2017 (“Application”).¹

I. PROCEDURAL HISTORY

1. On 7 September 2009, the Acting International Co-Prosecutor filed with the Office of the Co-Investigating Judges the Second Introductory Submission, alleging the involvement of the Applicant in criminal acts and proposing to press charges against him for, *inter alia*, torture as a crime against humanity.²
2. On 14 December 2015, the International Co-Investigating Judge charged the Applicant with the crime against humanity of torture at “[s]ecurity [c]entres, primarily S-21”, under the modes of liability of joint criminal enterprise or, in the alternative, through planning, ordering or superior responsibility.³
3. On 10 January 2017 and 24 May 2017, the International Co-Investigating Judge notified the conclusion of the judicial investigation⁴ and, on 25 July 2017, he forwarded the Case File to the Co-Prosecutors for the purpose of their final submissions pursuant to Internal Rule 66(4) (“Forwarding Order”).⁵
4. On 17 July 2017, the Applicant filed an application for annulment of four allegedly torture-derived written records of interview (“First Application to Annul Torture-Derived Evidence”),⁶ which was dismissed by the Pre-Trial Chamber on 13 December 2017.⁷

¹ Case No. 003/07-09-2009-ECCC-OCIJ (“Case 003”), ██████████ Application for the Annulment of Torture-Derived Written Records of Interview, 10 August 2017, D257/1/3 (“Application”), notified in English on 21 August 2017 and in Khmer on 19 October 2017.

² Case 003, Co-Prosecutors’ Second Introductory Submission Regarding the Revolutionary Army of Kampuchea, 20 November 2008, D1; Case 003, Acting International Co-Prosecutor’s Notice of Filing of the Second Introductory Submission, 7 September 2009, D1/1.

³ Case 003, Written Record of Initial Appearance of ██████████, 14 December 2015, D174, pp. 4-5.

⁴ Case 003, Notice of Conclusion of Judicial Investigation Against ██████████, 10 January 2017, D225; Case 003, Second Notice of Conclusion of Judicial Investigation Against ██████████, 24 May 2017, D252.

⁵ Case 003, Forwarding Order Pursuant to Internal Rule 66(4), 25 July 2017, D256 (“Forwarding Order”).

⁶ Case 003, ██████████ Application for Annulment of D114/164, D114/167, D114/170, and D114/171, 17 July 2017, D253/1/3 (“First Application to Annul Torture-Derived Evidence”), notified in English on 17 July 2017 and in Khmer on 28 August 2017.

⁷ Case 003 (PTC33), Decision on ██████████ Request for Annulment of D114/164, D114/167, D114/170, and D114/171, 13 December 2017, D253/1/8 (“PTC Decision on First Application to Annul Torture-Tainted



5. On 27 July 2017, the Co-Lawyers filed before the Office of the Co-Investigating Judges a request⁸ seeking the annulment of alleged torture-derived sections of 22 written records of interview (“Impugned Interviews”),⁹ which was referred to the Pre-Trial Chamber on 1 August 2017.¹⁰

6. On 10 August 2017, pursuant to the Pre-Trial Chamber’s instructions,¹¹ the Co-Lawyers filed the Application before the Pre-Trial Chamber.¹² On 12 October 2017, the International Co-Prosecutor filed his response to the Application (“Response”)¹³ and, on 24 October 2017, the Co-Lawyers filed a reply (“Reply”).¹⁴

II. ADMISSIBILITY

7. The Co-Lawyers submit that the Application is admissible pursuant to Internal Rule 76(2), since the impugned investigative actions constitute procedural defects and violate the Applicant’s right to a fair trial.¹⁵ They argue that Internal Rule 76(2) permits annulment applications at any time during the judicial investigation, which is formally concluded upon the issuance of a closing order.¹⁶ In their view, the time limits set in Internal Rule 66(1) concern only the filing of requests for further investigative action after the notice of conclusion of the judicial investigation and not of applications to annul investigative action.¹⁷

Evidence”).

⁸ Case 003, [REDACTED] Application to Seize the Pre-Trial Chamber with an Application for the Annulment of Torture-Derived Sections of Written Records of Interview, 27 July 2017, D257, notified in English on 28 July 2017 and in Khmer on 12 September 2017.

⁹ See Case 003, Annex: Excerpts of Written Records on Interview Tainted by S-21 Confessions, 10 August 2017, D257/1/3.2 (“Annex”).

¹⁰ Case 003, Decision on [REDACTED] Application to Annul Torture-Tainted Written Records of Interview, 1 August 2017, D257/1. See also Letter from OCIJ Greffier to Case File Officer Regarding Forwarding Copy of Case File 003 to the Pre-Trial Chamber Pursuant to Case File 003-D257/1, 2 August 2017, D257/1/1, notified in English on 3 August 2017.

¹¹ Case 003, Case File Officer Notification, Pre-Trial Chamber’s Instructions to the Parties by Email in Case File No. 003/07-09-2009-ECCC-OCIJ (PTC34), 4 August 2017.

¹² See *supra* footnote 1.

¹³ Case 003, International Co-Prosecutor’s Response to Application for Annulment of Alleged Torture-Derived Written Records of Interview, 11 October 2017, D257/1/4 (“Response”), notified on 12 October 2017.

¹⁴ Case 003, [REDACTED] Reply to International Co-Prosecutor’s Response to Application for Annulment of Alleged Torture-Derived Written Records of Interview, 24 October 2017, D257/1/7 (“Reply”), notified in English on 24 October 2017 and in Khmer on 21 November 2017. See also Case 003, Decision on [REDACTED] Request for Extension of Time to Reply to International Co-Prosecutor’s Response to Application for Annulment of Alleged Torture-Derived Written Records of Interview and Request to File his Reply in English with the Khmer Translation to Follow, 17 October 2017, D257/1/6.

¹⁵ Application, p. 1.

¹⁶ *Ibid.*

¹⁷ *Ibid.*



8. The International Co-Prosecutor responds that the Application is “grossly untimely, and should be ruled inadmissible”.¹⁸ He relies on a combined reading of Internal Rules 66 and 76 and submits that any request that would change the content of the Case File, either by adding or removing materials, must be filed before the forwarding of the Case File to the Co-Prosecutors for the purpose of their final submissions.¹⁹ He underlines that the annulment request was filed two months after the notice of conclusion of the judicial investigation and that the International Co-Investigating Judge already observed in the Forwarding Order that an earlier annulment request was untimely.²⁰ Finally, even if the Pre-Trial Chamber has discretion to consider untimely applications, there is no good cause to do so in the present case, since the vast majority of the Impugned Interviews were conducted years earlier.²¹

9. The Co-Lawyers reiterate in their Reply that Internal Rule 76(2) allows applications for annulment at any time during the investigation and that, under Internal Rule 67(1), the judicial investigation concludes only when a closing order is issued.²² The Pre-Trial Chamber can change the content of the Case File whenever a procedural defect has occurred that violates fair trial rights, up to the point a closing order is issued.²³ Any doubt in Internal Rules 66 and 67 as to when the judicial investigation officially concludes must be resolved in the favor of the Applicant, in accordance with the *in dubio pro reo* principle.²⁴ Alternatively, the Co-Lawyers request that the Pre-Trial Chamber exercises its discretion under Rule 39(4)(b) to admit the Application, given the importance of fair trial rights and lack of prejudice.²⁵

10. Internal Rule 76(4) vests the Pre-Trial Chamber with jurisdiction to determine the admissibility of an application for annulment, which it may declare inadmissible where the application relates to an order that is open to appeal; is manifestly unfounded; or does not set out sufficient reasons.²⁶ The Pre-Trial Chamber is satisfied that these conditions are met, as the Application does not concern any order that is open to appeal, set forth logically

¹⁸ Response, para. 8.

¹⁹ Response, para. 6.

²⁰ Response, para. 7 referring to Forwarding Order, para. 12.

²¹ Response, para. 8.

²² Reply, para. 6.

²³ Reply, paras 6-8.

²⁴ Reply, para. 9.

²⁵ Reply, para. 12.

²⁶ Case 004/07-09-2009-ECCC/OCIJ (PTC40), Decision on [REDACTED] Application to Annul the Investigative Material Produced by Paolo STOCCHI, 25 August 2017, D351/1/4 (“Decision on [REDACTED] Application”), para. 7.



consistent submissions, and contains nothing suggesting that it is evidently unfounded in fact or in law to deprive it of any prospect of success.

11. The Pre-Trial Chamber also considers the Application timely. The Internal Rules do not set any explicit time limit for the filing of annulment applications after the notification of conclusion of judicial investigation. In contrast with Internal Rule 66(1), which provides that requests for investigative action shall be filed within 15 days from the notification of conclusion of investigation, Internal Rule 76(2) set forth that annulment applications can be submitted “at any time during the judicial investigation” and shall be resolved “before the Closing Order”. The Pre-Trial Chamber interprets Internal Rules 66(1), 67(1) and 76(2) in light of Internal Rule 21(1) and considers that the “judicial investigation” is officially concluded by the issuance of the Closing Order, and not at the time the Co-Investigating Judges notify the parties of their intent to conclude it.

12. Therefore, limiting the filing of annulment applications between the forwarding of the Case File to the Co-Prosecutors pursuant to Internal Rule 66(4) and the issuance of the Closing Order would deprive the Charged Person of a remedy for procedural defects that may occur during this period. Furthermore, while the Cambodian Code of Criminal Procedure does not prescribe any time limit for annulment applications, Article 175 of the French Code of Criminal Procedure expressly authorises the filing of annulment applications within three months from the forwarding order, when the suspect is not in detention. The French Court of Cassation has also held that a final submission itself could be annulled if found defective.²⁷

13. Accordingly, the Pre-Trial Chamber finds the Application admissible.

III. APPLICABLE LAW

14. Internal Rule 73(b) establishes the Pre-Trial Chamber’s sole jurisdiction over applications for annulment. In accordance with Internal Rule 48, consideration of an application for annulment requires two steps: 1) determining whether a procedural irregularity exists; and 2) where such a defect is found to exist, determining whether it is prejudicial to the applicant. Accordingly, a procedural irregularity which is not prejudicial to

²⁷ See French Cass. Crim., 5 May 1998, Case No. 98-80138; French Cass. Crim., 11 December 1984, Cases No. 84-90238 and 84-90560; French Cass. Crim., 6 October 2015, Case No. 15-82765.



the applicant does not entail annulment.²⁸

IV. MERITS

A. Submissions

15. The Co-Lawyers request the annulment of torture-derived sections of the Impugned Interviews.²⁹ They submit that the Co-Investigating Judges and investigators violated Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) by using the contents of torture-tainted S-21 confessions when conducting the Impugned Interviews and by placing torture-derived evidence on the Case File.³⁰ They contend that torture-tainted confessions cannot be relied upon for the truth of their contents, and therefore that using them to question witnesses constitutes a procedural defect and a violation of the Applicant’s fair trial rights.³¹

16. The Co-Lawyers stress the need to prohibit the use of torture-tainted evidence in judicial proceedings³² and recall that the primary object and purpose of Article 15 of the CAT is to prevent torture by “removing an important incentive for its use, namely the possibility of introducing into any formal proceedings information that was extracted through torture”.³³ In their view, the use of S-21 confessions or of their summaries during witness interviews damages the ECCC’s credibility.³⁴ They also challenge the placement of unreliable torture-derived evidence on the Case File for use during the investigation, in the closing order, and possibly at the trial stage, while such evidence can only be used against an accused torturer to establish that the relevant statement was made under torture.³⁵

17. The Co-Lawyers further incorporate, by reference, the legal arguments contained in

²⁸ See Decision on [REDACTED] Application, para. 12; Case 003 (PTC20), Decision on [REDACTED] Appeal against Co-Investigating Judge HARMON’s Decision on [REDACTED] Applications to Seize the Pre-Trial Chamber with Two Applications for Annulment of Investigative Action, 23 December 2015, D134/1/10, para. 26.

²⁹ Application, p. 1.

³⁰ Application, para. 10.

³¹ Application, para. 11; *see also* paras 12-18.

³² Application, para. 19.

³³ Application, para. 20 *referring to* Case 002/19-09-2007-ECCC-TC/SCC (“Case 002”), Decision on Objections to Documents Lists – Full Reasons, 31 December 2015, F26/12 (“SCC Decision on Evidence Obtained through Torture”), para. 40.

³⁴ Application, para. 21.

³⁵ Application, paras 23-25.



their First Application to Annul Torture-Derived Evidence.³⁶

18. The International Co-Prosecutor responds that the Application should be dismissed,³⁷ since it ignores the numerous permissible uses of S-21 confessions³⁸ and since Article 15 of the CAT does not bar derivative evidence or the use of S-21 confessions as investigative leads.³⁹ He submits that the drafters of the CAT did not intend to encompass derivative evidence within the exclusionary rule,⁴⁰ and that investigators are not precluded from asking witnesses whether they knew persons or organisation units, provided they do not use any substantive statements contained in the confessions to establish the truth of such statements.⁴¹

19. Referring to the ECCC case law, the International Co-Prosecutor avers that objective biographical information contained in confessions was obtained before interrogations using torture and is admissible.⁴² It was thus proper to show witnesses the cover page of S-21 confessions or registration biographies and ask questions seeking to identify prisoners.⁴³ Article 15 of the CAT also does not preclude using the information that exists independent of the use of torture,⁴⁴ such as statements that originated from the torturer⁴⁵ or information in written records of interview based on the independent knowledge of a witness.⁴⁶ S-21 confessions may further be used to prove that the crime of torture occurred and how torturers and their superiors used the information contained therein.⁴⁷

20. The International Co-Prosecutor submits that the annulment of written records of interview is not a proper remedy, and that the Trial and Supreme Court Chambers will have the opportunity to evaluate their weight and admissibility.⁴⁸ In his view, the use of S-21

³⁶ Application, p. 1 *referring to* First Application to Annul Torture-Derived Evidence, paras 4, 12-30.

³⁷ Response, para. 30.

³⁸ Response, paras 1, 9-22.

³⁹ Response, paras 23-24.

⁴⁰ Response, para. 23.

⁴¹ Response, para. 24.

⁴² Response, paras 9-11 *referring to* Case 002, Decision on Evidence Obtained Through Torture, 5 February 2016, E350/8 (“TC Decision on Evidence Obtained through Torture”), paras 49, 81; SCC Decision on Evidence Obtained through Torture, para. 68; Case 002, Order on Use of Statements Which Were or May Have Been Obtained by Torture, 28 July 2009, D130/8, para. 19; Case 003, Consolidated Decision on ████████ Requests for Investigative Action Regarding Potential Use of Torture-Tainted Evidence, 24 May 2017, D251 (“Consolidated Decision on ████████ Requests”), para. 32.

⁴³ Response, paras 12-15.

⁴⁴ Response, para. 16.

⁴⁵ Response, para. 17.

⁴⁶ Response, paras 18-19.

⁴⁷ Response, paras 20-22.

⁴⁸ Response, para. 26.



confessions or biographies “must be viewed within the broader mandate and function of the ECCC” and “it would be utterly inappropriate to exclude relevant evidence due to procedural considerations, as long as the fairness of the trial is guaranteed.”⁴⁹

21. In their Reply, the Co-Lawyers challenge that the objective biographical information contained in confessions were used as investigative leads or to prove that torture occurred and to establish the victims’ identity.⁵⁰ They submit that the S-21 confessions were rather used for the truth of their contents or in ways that implied the truth of the contents, which is prohibited by the CAT, in order to obtain information about Democratic Kampuchea operations, structures and events.⁵¹ They submit that the references to the Trial and Supreme Court Chambers’ jurisprudence are inapposite, since the investigators did not limit themselves to using biographical information from cover pages of confessions.⁵² The International Co-Prosecutor improperly circumvents the rules by seeking to appeal a previous decision regarding the written record of interview D114/171.⁵³

22. The Co-Lawyers further contend that the answers given in the Impugned Interviews were triggered by questions or prodding based upon torture-tainted confessions and biographies, rather than on the witnesses’ independent knowledge.⁵⁴ There is no indication that the torture-tainted confessions and biographies were used to question witnesses for the purposes to prove that torture occurred or how the information contained therein was used by torturers.⁵⁵ They reiterate that the purpose of the CAT is to deter any use of torture-tainted or torture-derived evidence and that the issues raised must be decided now, in order to avoid a violation of fair trial rights and preclude such evidence to be used in the final submissions and closing order.⁵⁶

⁴⁹ Response, para. 28 referring to International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Brđanin*, Case No. IT-99-36, Decision on Defence ‘Objection to Intercept Evidence’, Trial Chamber, 3 October 2003, para. 63(7).

⁵⁰ Reply, paras 13-31.

⁵¹ Reply, paras 14, 31.

⁵² Reply, paras 15-20.

⁵³ Reply, paras 21-29, referring to Consolidated Decision on [REDACTED] Requests.

⁵⁴ Reply, para. 32-39; see also para. 42.

⁵⁵ Reply, paras 43-48.

⁵⁶ Reply, paras 40-42, 49-50, 52-55, 57-59.



B. Discussion

1. Scope of the Exclusionary Rule

23. The Pre-Trial Chamber recalls that Article 15 of the CAT, which 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”, applies strictly to proceedings before the ECCC.⁵⁷

24. With regards to the use of torture-tainted statements, the Pre-Trial Chamber concurs with the Supreme Court Chamber’s finding that the exclusionary rule covers the reproduction of extorted information through witness testimony, for instance by confronting a witness with it, to prove the truth of its content or imply that it might be truthful.⁵⁸ The Trial Chamber equally prohibited direct reading from a torture-tainted statement and confronting a witness with accusations laid forth in a torture-tainted confession, whenever it leads to the impression that reliance is being place on the truth of the confession.⁵⁹

25. Nonetheless, Article 15 of the CAT does not “mandate the sweeping exclusion of the whole documentation surrounding the interrogation of the torture victim”.⁶⁰ References to torture-tainted statements in questioning witnesses must be assessed on a case-by-case basis to determine whether they were made in violation of Article 15 of the CAT.

26. The Supreme Court Chamber permitted the use of information originating from persons other than the torture victim, insofar as it could prove questions posed or the application of torture.⁶¹ The Trial Chamber also held that certain objective information contained on confessions which were not obtained through torture are not covered by the exclusionary rule; this includes information recorded during registration at the security center or on the cover page of a confession, such as the identity of the detainee and dates of arrest, incarceration

⁵⁷ See PTC Decision on First Application to Annul Torture-Tainted Evidence, paras 26-27; Case 002 (PTC31) Decision on Admissibility of IENG Sary’s Appeal against the OCIJ’s Constructive Denial of IENG Sary’s Requests Concerning the OCIJ’s Identification of and Reliance on Evidence Obtained through Torture, 10 May 2010, D130/7/3/5, paras 35, 38; SCC Decision on Evidence Obtained through Torture, para. 40, footnote 65. See also Cambodian Constitutional Council, Case No. 131/003/2007, Decision No. 092/003/2007, 10 July 2007; Committee Against Torture, General Comment No. 2, Implementation of Article 2 by States Parties, CAT/C/GC/2, 24 January 2008, para. 6; Committee Against Torture, Concluding Observations of the Committee Against Torture (Cambodia), CAT/C/KHM/CO/2, 20 January 2011, para. 10.

⁵⁸ SCC Decision on Evidence Obtained through Torture, para. 47.

⁵⁹ TC Decision on Evidence Obtained through Torture, para. 88.

⁶⁰ SCC Decision on Evidence Obtained through Torture, para. 68.

⁶¹ SCC Decision on Evidence Obtained through Torture, para. 68.



and/or execution.⁶² Whether they were obtained by torture is a matter of proof.⁶³

27. The Pre-Trial Chamber also concurs with the Trial Chamber that questions using S-21 biographies or confessions are permissible insofar as torture-tainted statements are not put as assertions of fact and focus instead on the knowledge of the witness.⁶⁴ Information contained in a torture-tainted statement may be used for the purpose of determining resulting actions, for example as evidence of the cause of an action taken following a confession, such as proof of further arrests triggered by the disclosure of names.⁶⁵ Strictly speaking, this form of use does not provide an exception to Article 15 of the CAT as it does not affect the validity of the principle expressed in the rule.⁶⁶

28. The Pre-Trial Chamber further previously held that the use of information contained in S-21 biographies as investigative leads does not amount to invocation as “evidence” within the ordinary meaning of Article 15 of the CAT.⁶⁷ Whether statements were made “as a result of torture” shall be addressed on a case-by-case basis, in the light of the object and purpose of Article 15 of the CAT, and requires a certain degree of causation.⁶⁸

2. Examination of the Impugned Interviews

a. *Use of Torture-Tainted Evidence as Investigative Leads and to Seek the Independent Knowledge of Witnesses*

29. The Pre-Trial Chamber observes that, in 16 of the 22 Impugned Interviews, the investigators did not use S-21 confessions or biographies to prove the truth of their content or to imply that they might be truthful, but instead used them as investigative leads and/or to seek independent knowledge of the interviewee.

30. In most of the Impugned Interviews, the investigators referred to names contained in confessions or biographies as investigative leads and/or to seek the witnesses’ independent

⁶² TC Decision on Evidence Obtained through Torture, para. 49.

⁶³ SCC Decision on Evidence Obtained through Torture, para. 68.

⁶⁴ TC Decision on Evidence Obtained through Torture, para. 84.

⁶⁵ TC Decision on Evidence Obtained through Torture, para. 75.

⁶⁶ Manfred NOWAK and Elizabeth McARTHUR, *The United Nations Convention Against Torture: A Commentary*, Oxford University Press, 2008, p. 537.

⁶⁷ PTC Decision on First Application to Annul Torture-Tainted Evidence, para. 32.

⁶⁸ PTC Decision on First Application to Annul Torture-Tainted Evidence, paras 35-37.



knowledge of persons and events. In D4.1.430⁶⁹ and D55/6,⁷⁰ the witnesses were asked whether they knew anyone in the documents shown to them. In D2/16, the investigator questioned the witness whether he knew a person named Dim and heard about Regiment 152.⁷¹ In D114/20, the witness identified his acquaintances in the S-21 documents, including [REDACTED] and [REDACTED], and stated his knowledge about them.⁷² In D114/85, the witness also identified in a document from S-21 the name of [REDACTED], after having stated his knowledge about his arrest and accusations of being a traitor.⁷³ In D114/116, faced with similar questions, the witness identified [REDACTED] but failed to identify [REDACTED].⁷⁴ In D4.1.794, the witness was also asked whether he knew names on a confession shown to him, and sought to clarify the events he remembered.⁷⁵ In D114/233, the investigator showed the witness a photo on the cover page of a confession and sought whether he knew that person.⁷⁶

31. In two Impugned Interviews, the questions presented by the investigators were based on the biographies or confessions of the witnesses' relatives, not to establish the truth of those statements, but rather to seek their personal knowledge of the circumstances of their relatives' disappearances. In D114/171, the witness remembered that her husband, who ended up as a prisoner of S-21, was on District 505 committee and recalled the circumstances surrounding his disappearance.⁷⁷ In D114/36.1.62, the witness was shown her husband's confession and offered her own opinion regarding its contents.⁷⁸ Similarly, in D114/241, the witness was presented a summary of the confession of the person formerly in charge of his unit, in which he identified the names of individuals who disappeared during the Khmer Rouge regime,

⁶⁹ See Annex, No. 3 referring to Case 003, Written Record of Interview of [REDACTED], 23 October 2008, D4.1.430, at ERN (EN) 00239483-00239484.

⁷⁰ See Annex, No. 13 referring to Case 003, Written Record of Interview of [REDACTED], 9 May 2013, D55/6, at ERN (EN) 00943564 (A35).

⁷¹ See Annex, No. 1 referring to Case 003, Written Record of Interview of [REDACTED], 11 November 2010, D2/16, at ERN (EN) 00629463 (A15-A16).

⁷² See Annex, No. 15 referring to Case 003, Written Record of Interview of [REDACTED], 23 October 2014, D114/20, at ERN (EN) 01040453-01040455 (A29-A38).

⁷³ See Annex, No. 17 referring to Case 003, Written Record of Interview of [REDACTED], 15 June 2015, D114/85, at ERN (EN) 01119971-01119972 (A10-A11).

⁷⁴ See Annex, No. 18 referring to Case 003, Written Record of Interview of [REDACTED], 4 September 2015, D114/116, at ERN (EN) 01172474 (A38-A43).

⁷⁵ See Annex, No. 4 referring to Case 003, Written Record of Interview of [REDACTED], 23 October 2009, D4.1.794, at ERN (EN) 00408397.

⁷⁶ See Annex, No. 20 referring to Case 003, Written Record of Interview of [REDACTED], 11 July 2016, D114/233, at ERN (EN) 01475952 (A42-A44).

⁷⁷ See Annex, No. 19 referring to Case 003, Written Record of Interview of [REDACTED], 16 February 2016, D114/171, at ERN (EN) 01223474-01223476 (A46-A68).

⁷⁸ See Annex, No. 16 referring to Case 003, Written Record of Interview of [REDACTED], 10 June 2009, D114/36.1.62, at ERN (EN) 00345542.



recalled their positions, as well as the circumstances surrounding their disappearance.⁷⁹

32. In some Impugned Interviews, the independent knowledge of witnesses was further sought to prove the actions taken following confessions. In D54/74.1.11, the witness was asked whether he knew that a S-21 prisoner implicated him as a spy in confession,⁸⁰ as part of a questioning seeking his independent knowledge regarding the author of the confession⁸¹ and actions taken by the Charged Person IENG Sary following his implication.⁸²

33. In other Impugned Interviews, torture-tainted statements were also not put as assertions of facts; the questioning focus instead on the general knowledge of the witness, in relation, for instance, to re-education policies in D98/3.1.283⁸³ and to the Congress of the West Zone held at coconut plantation in 1977 in D4.1.1057.⁸⁴ In the latter case, the questions focused on the own memory of the witness, who himself attended the Congress, rather than verifying the contents of the author of the confession – who was not present.

34. Likewise, in D234/2.1.73, the investigator did not use the S-21 confession to establish the truth of its content but instead referred to basic identifying information to seek the independent knowledge of the witness regarding a person named [REDACTED], who was mentioned in a previous interview.⁸⁵ In D37, the Civil Party confirmed that the confession from [REDACTED] was a source of the information in his Civil Party Application.⁸⁶

35. In sum, the above-mentioned torture-tainted statements were not used by the investigators to establish the truth of their content, or to imply that reliance was being placed on the truth of the confession when confronting the witnesses. Rather, they focused on the knowledge of the witnesses. The Pre-Trial Chamber thus find their use permissible.

⁷⁹ See Annex, No. 21 referring to Case 003, Written Record of Interview of [REDACTED], 6 August 2016, D114/241, at ERN (EN) 01479324 (A71-A80).

⁸⁰ See Annex, No. 12 referring to Case 003, Written Record of Interview of [REDACTED], 18 November 2009, D54/74.1.11, at ERN (EN) 00412151 (A81).

⁸¹ Case 003, Written Record of Interview of [REDACTED], 18 November 2009, D54/74.1.11, at ERN (EN) 00412151 (A77).

⁸² Case 003, Written Record of Interview of [REDACTED], 18 November 2009, D54/74.1.11, at ERN (EN) 00412153 (A107-A108).

⁸³ See Annex, No. 14 referring to Case 003, Written Record of Interview of [REDACTED], 7 May 2009, D98/3.1.283, at ERN (EN) 00327245.

⁸⁴ See Annex, No. 5 referring to Case 003, Written Record of Interview of [REDACTED], 3 March 2010, D4.1.1057, at ERN (EN) 00491656-00491657 (A14-A19).

⁸⁵ See Annex, No. 22 referring to Case 003, Written Record of Interview of [REDACTED], 19 June 2014, D234/2.1.73, at ERN (EN) 01000697 (A259-A260).

⁸⁶ See Annex, No. 11 referring to Case 003, Written Record of Interview of [REDACTED], 20 March 2012, D37, at ERN (EN) 00791865.



b. Use of Torture-Tainted Evidence to Prove the Cause of an Action by the Charged Person Following Confession

36. In the five Impugned Interviews with Duch, the questions focused on the action or knowledge of the Charged Person, as the chief of the prison, following confessions at S-21. The Pre-Trial Chamber considers that none of the confessions were used to prove the truth of its content or to imply that it might be truthful.

37. In particular, in D4.1.403, the Co-Investigating Judges asked Duch whether KHIEU Samphan was aware of ██████████ confession, as well as of the fact that he was implicated in it.⁸⁷ They also questioned, in D4.1.1110, the reasons why ██████████ was not executed after having confessed being a spy and instead sent to work in a workshop.⁸⁸ In D4.1.1111, they put questions regarding the instructions which Duch gave to remove his name from the list of “traitors”, after a confession suggested that he was himself a suspect.⁸⁹ In D4.1.1156, Duch was questioned about the arrest and detention of twenty persons implicated by the confession of ██████████.⁹⁰ In D4.1.1119, Duch was asked whether he remembered the confession of ██████████, according to which ██████████ replaced ██████████ as Minister of Commerce in 1976; while he did not remember the confession, he provided his own knowledge that ██████████ was arrested because he was implicated by ██████████.⁹¹

38. The Pre-Trial Chamber finds, in light of the object and purpose of Article 15 of the CAT, that the use of these statements is not covered by the exclusionary rule.

c. Use of S-21 Confession as Evidence of the Statement Made Under Torture

39. Finally, regarding the Impugned Interview D10.1.23, the Pre-Trial Chamber considers that the confession of the Civil Party ██████████ at S-21 was used “against a person accused of torture as evidence that the statement was made”, which is permitted by the limited

⁸⁷ See Annex, No. 2 referring to Case 003, Written Record of Interview of KAING Guek Eav *alias* Duch, 25 November 2008, D4.1.403, at ERN (EN) 00242898-00242899.

⁸⁸ See Annex, No. 6 referring to Case 003, Written Record of Interview of KAING Guek Eav *alias* Duch, 31 March 2008, D4.1.1110, at ERN (EN) 00177608-00177609.

⁸⁹ See Annex, No. 7 referring to Case 003, Written Record of Interview of KAING Guek Eav *alias* Duch, 1 April 2008, D4.1.1111, at ERN (EN) 00177634.

⁹⁰ See Annex, No. 9 referring to Case 003, Written Record of Interview of KAING Guek Eav *alias* Duch, 15 July 2008, D4.1.1156, at ERN (EN) 00205160.

⁹¹ See Annex, No. 8 referring to Case 003, Written Record of Interview of KAING Guek Eav *alias* Duch, 25 June 2008, D4.1.1119, at ERN (EN) 00198885.

exception clause of Article 15 of the CAT.

40. The Co-Investigating Judges indeed questioned [REDACTED] on whether the content of his confession was true, on whether he knew the fate of the superiors arrested, and on how he was not killed after having confessed being a CIA spy. He acknowledged that, after over twelve days and twelve nights' interrogation, he made up answers to escape torture.⁹² In the present case, the Applicant is charged with the crime against humanity of torture at S-21⁹³ and the interviewee was a torture victim in S-21. The questions regarding the accuracy of his confession were mainly posed to demonstrate that the statement was made under torture.

41. In conclusion, the Pre-Trial Chamber does not find the Impugned Interviews defective.

V. DISPOSITION

FOR THESE REASONS, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:

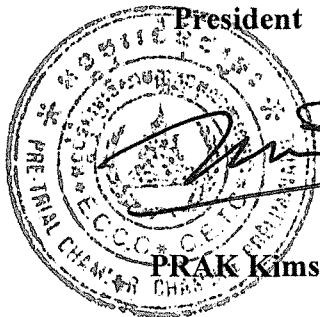
- **FINDS** the Application admissible;
- **DISMISSES** the Application.

In accordance with Internal Rule 77(13), the present decision is not subject to appeal.

Phnom Penh, 24 July 2018

President

Pre-Trial Chamber



PRAK Kimsan

Olivier BEAUVALLET

NEY Thol

Kang Jin BAIK HUOT Vuthy

⁹² See Annex, No. 10 referring to Case 003, Written Record of Interview of [REDACTED], 25 March 2008, D10.1.23, at ERN (EN) 00176405-00176406.

⁹³ See *supra* para. 2.

