



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ
Royaume du Cambodge
Nation Religion Roi

Kingdom of Cambodia
Nation Religion King

ការិយាល័យសហចៅក្រមនៃអង្គជំនុំជម្រះ

Office of the Co-Investigating Judges
Bureau des Co-juges d'instruction

Case File No: 002/19-09-2007-ECCC-OCIJ

Before: **Judge YOU Bunleng**
Judge Marcel LEMONDE
Date: **28 July 2009**
Original Language: **Khmer/French**
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Order on use of statements which were or may have been obtained by torture

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We, You Bunleng (ឃុំ ប៊ុនលេង) and Marcel Lemonde, Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”),

Noting the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, dated 27 October 2004 (the “ECCC Law”),

Noting Rule 55(10) of the ECCC Internal Rules (the “Internal Rules”),

Noting the ongoing judicial investigation against IENG Thirith (អៀង ធីរិទ្ធ) relating to charges of Crimes against humanity, and against other Charged Persons relating to charges of Crimes against humanity and Grave breaches of the Geneva Conventions dated 12 August 1949, offences defined and punishable under Articles 5, 6, 29 (new) and 39 (new) of the ECCC Law,

CONSIDERING the request by the Defence for IENG Thirith dated 11 February 2009 (D130),

CONSIDERING the response by the Co-Prosecutors dated 30 April 2009 (D130/5),

CONSIDERING the reply by the Defence for IENG Thirith dated 18 May 2009 (D130/6),

ARGUMENTS OF THE PARTIES

Defence Request

1. The Defence requests the Co-Investigating Judges to:

- a) treat as inadmissible any evidence or other material which was or may have been obtained by use of torture, other than to show that a certain statement was made under torture and solely against the torturer;
- b) refrain from using such statements in any other way than set out above, including their use as “lead evidence” or the use of any secondary sources/experts opinions based thereon.

2. The request is primarily grounded on Article 15 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”).¹ According to the Defence, the text of this provision should be interpreted as strictly limiting the use of torture-induced evidence to the circumstances described above.

3. The Defence argues that a broad interpretation would be “inconsistent with the ordinary meaning of that provision in the light of its object and purpose”,² which is twofold: “first information extracted by torture is unreliable and secondly, prohibiting the use of torture-induced evidence shall contribute to the prevention of that practice”.³

¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85.

² D130, para. 51.

³ D130, para. 48, citing Committee Against Torture, Conclusions and Recommendations of the Committee Against Torture, Cambodia, 27 May 2003, UN Doc. No. CAT/C/CR/30/2 (Concluding Observations/Comments), para. 45.

4. The Defence further recalls that the use of unreliable information would be a clear violation of the Charged Person's right to a fair trial and that to make a specific exception for the ECCC, because such evidence is "*necessary in showing the accused persons' guilt*",⁴ would violate the presumption of innocence.

Co-Prosecutors' Response

5. The Co-Prosecutors request the Co-investigating Judges to:

- a) Reject the Defence request in its entirety;
- b) Maintain any contested torture related evidence on Case File 002, and
- c) Admit onto Case File 002 any similar evidence meeting the criteria described above.

6. First, the Co-Prosecutors invoke the "Flexibility Principle", according to which international tribunals have more flexible rules of evidence than domestic jurisdictions. In particular, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") have allowed the admission of illegally or improperly obtained evidence "*so long as those collecting the evidence were not employees or agents of the tribunals*".⁵

7. Second, the Co-Prosecutors call for a broad interpretation of Article 15 of the CAT, arguing that a strict interpretation would be adverse to the deterrent purpose of the CAT, since "*barring the contested evidence would reward those who participated in bringing about torture by allowing them to use the very international laws that were design to prevent and prosecute torture to escape liability*".⁶

8. Third, the Co-Prosecutors contend that portions of the contested evidence are admissible since certain statements possess high indicia of reliability favouring admission.⁷ They also argue that these statements are admissible against the Charged Persons regardless of whether they directly perpetrated the torture.⁸

9. The Co-Prosecutors also consider that even if such statements were not deemed admissible, this would not preclude the admissibility of expert opinions based thereon since the ICTY has held that concerns about the reliability of sources used by the expert do not affect the admissibility of their reports but may affect the weight given to the evidence relied upon by them.⁹

10. The Co-Prosecutors claim that at the very least, such statements are admissible as "lead evidence".¹⁰

11. Finally, the Co-Prosecutors affirm that annotations and biographies were not obtained by torture and are admissible evidence not subject to the scrutiny of Article 15 of the CAT.¹¹

⁴ D130, para. 37 referring to Michael P. Scharf, "Tainted Provenance: When, If Ever, Should Torture Evidence Be Admissible" (2008) 65 Washington and Lee Law Review 129, p. 139.

⁵ D130/5, paras. 15 and 16.

⁶ D 130/5, para. 22.

⁷ D 130/5, para. 24.

⁸ D 130/5, paras. 29-32.

⁹ D 130/5, paras. 33-34.

¹⁰ D 130/5, paras. 35-37.

¹¹ D 130/5, paras. 38-40.

Defence Reply

12. The Defence reiterates the arguments developed in its initial request and affirms that the Co-Prosecutors:

- a) incorrectly interpreted the law,¹²
- b) circumvented the issue of the unreliability of torture-tainted evidence,¹³ and
- c) wrongly attempted to rely on the Flexibility Principle, which it says does not apply given the unique nature of torture-tainted evidence.¹⁴

13. The Defence also argues that should the question of whether the information was obtained by the use of torture or not be disputed, the burden of proof falls upon the Co-Prosecutors.¹⁵

14. Finally, the Defence re-affirms that Article 15 of the CAT excludes any use of torture-tainted information, including expert opinions based thereon.¹⁶

REASONS FOR THE DECISION

15. At the outset, the following two observations should be made:

16. First, the question raised by both the Defence¹⁷ and the Co-Prosecutors¹⁸ about who bears the burden of proof of establishing whether a statement was made as the result of torture and its reliability is not as important at the ECCC as it is in other international tribunals operating according to common law procedure, given the active role of the Co-Investigating Judges in the search for and assessment of evidence.¹⁹

17. Second, the Internal Rules do not contain specific provisions on the issue raised in the Request as to the use that may be made of torture-tainted evidence obtained by an authority other than the ECCC. While Rule 21(1) of the Internal Rules provides “[n]o form of inducement, physical coercion or threats thereof, whether directed against the interviewee or others, may be used in any interview”, this provision concerns statements obtained by the organs of the ECCC, rather than statements obtained by officials of the Communist Party of Kampuchea (“CPK”) whose actions occurred more than 30 years ago. In light of the foregoing and the ambiguities in the interpretation of the relevant provisions of Cambodian law,²⁰ it is appropriate, pursuant to Article 12(1) of the Agreement Between the United

¹² D 130/6, paras. 13-19.

¹³ D 130/6, paras. 22-25.

¹⁴ D 130/6, paras. 27-33.

¹⁵ D 130/6, para. 24.

¹⁶ D 130/6, paras. 36-42.

¹⁷ Relying on authorities such as *A and Others v. Secretary of State for the Home Department*, [2005] UKHL 71 (*A and Others*) and the criticism of the Special Rapporteur on Torture in the German case against *Mounir el Motassadeq (Beschluss IV-1/04 des Hanseatischen Oberlandesgericht Hamburg, Neue Juristische Wochenschrift 2005 Heft 32, 14 June 2005)* – referred to in UN General Assembly, *Torture and other cruel, inhuman or degrading treatment or punishment*, 14 August 2006, U.N. Doc. No. A/61/259, p. 17.

¹⁸ D130/5, para. 27.

¹⁹ As Tobias Thienel notes “any provision of Article 15 UNCAT on the burden would be impossible to implement in the inquisitorial system of criminal trials. An onus on the accused is alien to this system, in which the court itself must ascertain the facts and in which no burden of proof therefore exists, be it on the accused or the prosecution”. Tobias Thienel, “The Admissibility of Evidence Obtained by Torture Under International Law” (2006) 17 EJIL 329, p. 354.

²⁰ The Co-Prosecutors submit that Article 38 of the Cambodian Constitution (“Confessions obtained by physical or mental force shall not be admissible as evidence of guilt”) and Article 321 of the Code of

Nations and the Royal Government of Cambodia, dated 6 June 2003²¹ and Article 23 (new) of the ECCC Law²² to seek guidance from the relevant rules of procedure at the international level, in this instance, Article 15 of the CAT.

18. This article provides that *“Each State Party shall ensure 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”*.

19. In interpreting this article, the Co-Investigating Judges first observe that it applies only to evidence which has been established to have been *“made as a result of torture”*. However, the confessions at issue in the present case contain certain information that was not obtained as a result of torture. This includes, *inter alia*, some handwritten annotations which appear on the confessions, where it has been established that they were not obtained through the use of torture, but were made by the torturers themselves, by other members of the S-21 personnel or by the Charged Persons, but not by those who were subjected to torture.²³ This category also includes preliminary biographical material, provided that it is established that it was obtained upon the person’s arrival at S-21 during registration, and not biographical information contained in the confession, as recognized by the Defence.²⁴ This category also includes any objective information included in the confession which exists independently of the interrogation, such as the date of the person’s arrest, the date of the beginning, end and any interruptions to the confession, as well as basic biographical information such as the name, age, position and/or work unit of the person subject to torture. As the material referred to above was not obtained as a result of torture, the exclusionary rule contained within Article 15 of the CAT does not apply. However, such information may have been obtained in circumstances which, while they may not rise to the level of torture, may suggest that it was not obtained freely (e.g. people knew that they were about to be subjected to torture) or there may have been reasons for people not to tell the truth (e.g. to give false information about their status as a member of an ethnic or religious minority). While the use of such information would not be prohibited by Article 15 of the CAT, the Co-Investigating Judges will take such considerations into account when assessing its reliability and the use that will be made of such information.

Criminal Procedure of the Kingdom of Cambodia (*“A confession shall be considered by the court in the same manner as other evidence. Declaration given under the physical or mental duress shall have no evidentiary value.”*) prohibit the use of evidence obtained through torture only against an accused person who was the victim of torture (D130/5, para. 6), while the Defence submits that these provisions are applicable not only to accused persons who were the victims of torture, but to every accused person in a criminal trial (D130/6, paras. 14-15).

²¹ Article 12(1): *“The procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level”*.

²² Article 23 (new): *“If these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, Judges may seek guidance in procedural rules established at the international level.”*

²³ The question of the authenticity of the annotations (see D130/6, para. 42) is a distinct issue.

²⁴ In its Request, the Defence is not opposed to taking account of biographical information obtained prior to torture (see D130, para. 42). However, in its Reply, the Defence seems to contest the proposition that such information was not obtained by torture, and argues that the burden of proof lies with the Co-Prosecutors to demonstrate this (see D 130/6, para. 40).

20. Article 15 of the CAT recognizes a limited exception to the prohibition on the use of statements obtained under torture – namely, that evidence obtained by torture can be used only “*against the person accused of torture as evidence that the statement was made*”.

21. It is clear that this exception prohibits the use of statements obtained under torture against a torture victim or against anyone implicated by a victim of torture. In the present case, the statements will not be used against the person subjected to torture, and the legitimate concerns of certain authorities regarding the right against self-incrimination²⁵ are therefore not applicable in this context. The same reasoning applies to the decision of the House of Lords in *A and Others* which concerns statements obtained by torture by third parties, and their use against persons implicated in those statements.

22. It is equally clear that Article 15 of the CAT permits the use of such statements only against persons “*accused of torture*”. The Defence argues that in its wording, Article 15 of the CAT precludes the use of statements obtained under torture against anyone other than the direct perpetrator of the torture, and therefore against those who are charged with torture via other modes of liability, such as superior responsibility or as part of a joint criminal enterprise.²⁶ Such an interpretation is untenable. There is no basis to limit the language of the exception to the direct perpetrator alone, as a person can be “*accused of torture*” on the basis of any number of forms of liability. Given that one of the purposes of Article 15 of the CAT is to deter would-be torturers, it would be absurd to hold that evidence obtained by torture can only be used against the direct perpetrator, as it is equally, if not more important, to deter those who are higher in the chain of command and are responsible for the policies of torture implemented by the direct perpetrators.

23. More generally, the spirit of the law must not be overshadowed by the letter of the law. The Vienna Convention on the Law of Treaties recalls: “*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*”.²⁷ The purpose of the CAT is to eradicate the use of torture, to ensure that the use of torture is prevented and failing that, to ensure that torture is punished.²⁸ According to the Special Rapporteur on Torture, the twofold rationale behind Article 15 of the CAT is that:

- a) prohibiting the use of such evidence in legal proceedings removes an important incentive for the use of torture and, therefore, contributes to the prevention of the practice;
- b) information obtained by torture is usually not reliable enough to be used as a source of evidence in any legal proceeding.²⁹

24. With respect to the first rationale underlying Article 15 of the CAT, barring the use of such information in the context of this case would not deter the would-be torturer³⁰ but would instead allow those who are accused of torture to use the laws designed to prevent torture to

²⁵ Committee against Torture, Conclusions and Recommendations of the Committee against Torture, Cambodia, 27 May 2003, UN Doc. No. CAT/C/CR/30/2 (Concluding Observations/Comments); Redress, “*Bringing the International Prohibition against Torture Home: National Implementation Guide for the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*”, The Redress Trust: London (January 2006), pp. 62-63.

²⁶ D130, para. 45.

²⁷ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, Article 31.

²⁸ CAT, Articles 4-9, 14.

²⁹ United Nations General Assembly, Torture and other cruel, inhuman or degrading treatment, 14 August 2006, U.N. Doc. No. A/61/259, para. 45.

³⁰ The Co-Investigating Judges recall that the impugned evidence, dating back 30 years, was not obtained by the ECCC or any officials acting pursuant to authority of the ECCC.

shield themselves from liability. A literal interpretation of Article 15 of the CAT could potentially protect would-be torturers and would therefore encourage, rather than prevent, the implementation of policies of torture, and thereby defeat the underlying purpose of Article 15 of the CAT, and of the CAT as a whole.

25. With respect to the second rationale underlying Article 15 of the CAT, the issue of reliability does not arise if the confessions are used in the following two ways:

26. First, there is nothing objectionable in using the information contained in confessions as investigative leads to other sources of information, even if the information within the confession is ultimately deemed unreliable. A great deal of “lead evidence” used in investigations is inherently unreliable and as such, would not be relied on in the Closing Order. However, during the course of the investigation, the Co-Investigating Judges need not rule out any hypothesis and it is not necessary for them to believe the assertions in the confessions to be true in order to use them to develop new avenues for searching out the truth, without this affecting the integrity of the proceedings.

27. Second, the question of the reliability of the information contained in the confessions does not arise if the information obtained is not being used for the truth of its contents, but rather as evidence that the CPK relied on the contents of the confessions to carry out systematic crimes falling within the jurisdiction of the ECCC. For example, a confession may contain lists of names of other people that the torture victim has identified as “traitors”, and if it can be demonstrated that the people listed were later arrested or executed, this may assist in proving that the Charged Persons relied on these confessions in order to commit systematic arrests and/or executions. As such, the information contained in the confession is not being used for the truth of its contents (i.e. to establish that the persons concerned were actual traitors) but rather, to show how the confession was used (i.e. to commit crimes against the persons named in the confession). The reliability of the statements is therefore not at issue.

28. However, the reliability of the statements is at issue when it comes to using them for the truth of their contents. The Co-Investigating Judges are fully cognisant of the fact that information obtained by torture, is, as a rule, unreliable. However, regardless of the circumstances in which the information within the confessions was obtained, it is not possible at this stage to affirm that no element of truth can ever be found in the confessions. The reliability of the statements cannot be assessed until the end of the investigation, when the case file is deemed complete. At that point, as with all of the evidence in the case file, the reliability of the confessions will be assessed on a case-by-case basis, with the understanding that the Co-Investigating Judges will proceed with utmost caution given the nature of the evidence and the manner in which it was obtained.

29. Similarly, the Co-Investigating Judges will assess reports and secondary materials on the Case file whose sources are, in whole or in part, material obtained by torture, for their reliability on a case-by-case basis.³¹ If, after such an analysis, the Co-Investigating Judges

³¹ In particular, the information contained in the following materials: S-21 Analytical Report by TAN Senarong, SENG Bungkheap and SOUR Bonsou entitled “*Prisoner Confessions with Torture Annotations*”; Analytical Report by David HAWK entitled “*Khmer Rouge Prison Documents from the S-21 (Tuol Sleng) Extermination Centre in Phnom Penh*”; Book by David CHANDLER entitled “*Voices from S-21: Terror and History in Pol Pot's Secret Prison*”; Book by Ben KIERNAN entitled “*The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-79*”; book by Stephen HEDER and Brian TITTEMORE entitled “*Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge*”; Book by David CHANDLER, Ben KIERNAN and CHANTHOU Boua entitled “*Pol Pot Plans the Future: Confidential Documents from Democratic Kampuchea*”; Written Record of Analysis by Craig C. ETCHESON, Investigator of the Office of Co-Prosecutors.

finds that the confessions on which the reports/secondary materials are based are not reliable, they will assess the secondary materials in light of this determination, which will affect the weight that the Co-Investigating Judges will accord to such secondary material in their analysis.

30. In light of the above reasoning, the arguments of the Defence about the use of statements which were, or which may have been obtained by torture, cannot be sustained.

FOR THESE REASONS,

DISMISS THE DEFENCE REQUEST.

Done in Phnom Penh, on 28 July 2009

Co- Investigating Judges

YOU Bunleng

Marcel LEMONDE