D130/9/13

BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

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CO-PROSECUTORS' JOINT RESPONSE TO IENG THIRITH AND KHIEU SAMPHAN'S APPEALS AGAINST THE 'ORDER ON THE USE OF STATEMENTS WHICH WERE OR MAY HAVE BEEN OBTAINED BY TORTURE'

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I. INTRODUCTION

1. These appeals involve an attempt to apply the torture exclusionary rule, in a case against five persons accused of implementing a nationwide system of interrogation and torture, to exclude thousands of interrogation records inadvertently left behind by the torturers which document the systematic torture and other criminal conduct for which they are being prosecuted.

2. Between April 1975 and January 1979, more than 12,000 persons were arrested, detained, interrogated, tortured and executed at the S-21 security office in Phnom Penh. Hundreds of thousands of additional persons were interrogated and tortured at other security centres throughout Democratic Kampuchea. Before fleeing the scene of their crimes in early January 1979, the Khmer Rouge destroyed most of the documentary evidence recording their activities. Fortunately, the cadres at S-21 had to depart suddenly, and thousands of interrogation records were left behind. These documents constitute a veritable paper trail of the systematic interrogation and torture practiced at S-21 during the DK period. Indeed, Kaing Guek Eav, alias Duch, the head of S-21, was berated by CPK Deputy Secretary NUON Chea for failing to dispose of that evidence. Now, IENG Thirith and KHIEU Samphan seek to complete the task that DUCH failed 30 years ago, by expunging from the Case File the thousands of pages of incriminating records recovered at S-21 which provides evidence of their crimes.

3. The Co-Prosecutors ("CPs") request that these appeals be dismissed because:

   a. They are inadmissible as the impugned decision does not fall within the exhaustive list of decisions against which an appeal lies to the Pre-Trial Chamber;

   b. If the Appeals are deemed as requests for annulment then they are procedurally and substantively defective.

c. The Appeals are vague, premature and seek a declaratory ruling as no judicial authority of this Court has yet relied upon or ruled on the admissibility of any document allegedly obtained under torture.

d. Even if the Appeals were admissible, the exclusion of forensic use of evidence obtained under torture does not strictly apply here as the evidence is not being used for the prosecution of the tortured but that of the torturer.

e. Even if it was found that certain documents were produced with the use of torture, they contain information that can be permissively used given the specific nature of the "confessions" obtained at S-21 and the conditions under which they were obtained. Any other interpretation of the exclusionary rule in the Convention Against Torture ("CAT") would militate against its intent and purpose and would contribute to impunity for torture, the very purpose for which it was created.

II. RELEVANT PROCEDURAL BACKGROUND

4. The Defence for Ieng Thirith filed a Request entitled *Defence Request for Exclusion of Evidence Obtained by Torture* ("Defence Request") with the CIJs on 11 February 2009,[1] pursuant to Rule 55(10) of the Internal Rules ("IRs"). The CPs responded on 30 April 2009[2] ("Co-Prosecutors' Response") and the Defence replied on 18 May 2009,[3] before the CIJs issued their *Order on the Use of Statements Which Were or May Have Been Obtained by Torture* on 28 July 2009.[4] The Defence for Ieng Thirith filed a notice of appeal on 31 July 2009[5] while Khieu Samphan's Defence filed theirs on 7 August 2009.[6] Khieu Samphan's

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1 Defence Request for Exclusion of Evidence Obtained by Torture, 11 February 2009, D130, ERN 00281011-25 (ENG) and 00280991-1010 (KHM) (hereinafter "Defence Request").

2 Co-Prosecutors' Response to Ieng Thirith's Defence Request for Exclusion of Evidence Obtained by Torture dated 11 February 2009, 30 April 2009, D130/5, ERN 00324547-72 (KHM), 00324573-88 (ENG) (herinafter "Co-Prosecutors' Response").

3 Defence Reply to "Co-Prosecutors' Response to Ieng Thirith's Defence Request for Exclusion of Evidence Obtained by Torture", 18 May 2009, D130/6, ERN 00327264-83 (KHM), 00327284-98 (ENG) ("Defence Reply").

4 CIJ's Order on Use of Statements Which Were or May Have Been Obtained by Torture, 28 July 2009, D130/8, ERN 00355904-17(KHM), 00355926-33 (ENG), 00355918-25 (FRE) ("Torture Evidence Order")

5 Ieng Thirith Defence's Notice of Appeal against OCIJ Order on Statements Which Were or May Have Been Obtained by Torture, 31 July 2009, D 130/9.

Defence filed their appeal against the CIJs Order on 27 August 2009[7] ("Khieu Samphan's Appeal") and Ieng Thirith's Defence ("Appellant") filed their own appeal ("Appeal") on 10 September 2009.[8]

5. Apart from presenting extremely brief arguments in their appeal, Khieu Samphan's Defence merely adopted "in advance, in its entirety and unconditionally, the appeal brief of counsel for Ieng Thirith against the impugned order".[9] The CPs consider that responding to Ieng Thirith's appeal and Khieu Samphan's arguments at the same time in a joint response support judicial economy and good administration of justice. They request the PTC to make an order for the joinder of those appeals. The PTC decided on 17 September 2009[10] to grant the CPs' applications for extension of time to file their response to the appeals lodged by the Charged Persons Ieng Thirith and Khieu Samphan;[11] the PTC directed the CPs to file their response by 12 October 2009.

6. The Defence request the PTC to quash the CIJs' Torture Evidence Order and order the CIJs instead A) to treat as inadmissible any evidence or other material which was or may have been obtained by the use of torture, other than to show that a certain statement was made under torture and solely against the torturer; including but not limited to: Doc.No.D3/Annex

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(continued...)

6 Khieu Samphan's Notice of Appeal, 7 August 2009, D130/10.

7 The appeal was filed in French under the title *Appel de M. Khieu Samphan contre l'ordonnance sur l'utilisation des éléments obtenus ou susceptibles d'avoir été obtenus sous la torture*, 27 August 2009, D130/10/1, ERN 00367321-24 (FRE). It was translated and notified to the CPs in English on 11 September 2009, ERN 00374825-28 (ENG),. 00367763-67(KHM) (hereinafter "Khieu Samphan's Appeal").

8 Ieng Thirith's Defence Appeal against OCIJ 'Order on Use of Statements Which Were or May Have Been Obtained by Torture' of 28 July 2009, 10 September 2009, D130/9/6, ERN 00374841-72 (ENG), 00374873-917 (KHM) notified to the CPs on 11 September 2009. (hereinafter "Appeal").

9 Khieu Samphan's Appeal, para. 6.

10 *Case of Ieng Thirith*, PTC Decision on the Co-Prosecutor's Application for Extension of Time to File their Response to the Appeal against the Order on Use of Statements which were or may have been Obtained by Torture, 17 September 2009, D130/9/8 (PTC26); and *Case of Khieu Samphan,* PTC Decision on the Co-Prosecutor's Application for Extension of Time to File their Response to the Appeal against the Order on Use of Statements which were or may have been Obtained by Torture, 17 September 2009, D130/10/4 (PTC 27).

11 Co-Prosecutors' Urgent Applications for Extension of Time to File a Joint response to Charged Persons Ieng Thirith and Khieu Samphan's Appeals against Order on Use of Statements Which Were or May Have Been Obtained by Torture, 11 September 2009, D130/9/7 (PTC 26) and D130/10/2 (PTC 27), same ERN 00375588-91 (ENG).

C (5 – Confessions), Doc. No. D82 (Tuol Sleng documents), Doc. No. D43 (DC-Cam documents) and expert evidence relying upon confessions, such as Document No.D2/15 by Craig C. Etcheson; and B) refrain from using such statements in any other way than set out under A).[12] The Defence submit fourteen separate appeal grounds. To avoid repetition, the CPs will not respond to every individual ground of appeal as many overlap. Instead the CPs will address them comprehensively by discussing, in turn, preliminary issues, the CAT interpretation and the different types of evidence that they consider should be admissible before the CIJs.

III. PRELIMINARY ISSUES

A. JURISDICTION TO HEAR APPEAL

7. Internal Rule 74(3) ("Rules") enumerates the types of documents against which a charged person can launch appeals to the Pre-Trial Chamber from the decisions of the Co-Investigating Judges. This list is exhaustive.[13] In addition, a joint reading of Rules 55(10) and 74(3) also manifests that only orders refusing requests for investigative actions may be appealed and not any other order issued by the Co-Investigating Judges under Rule 55(10). The Pre-Trial Chamber has held that any other orders are subject to control through the annulment procedure.[14] These Appeals do not arise out of a refusal of a request for investigative action by the Co-Investigating Judges and, as such, are inadmissible. In addition, assuming they were requests for annulment—having not been agitated through a very procedurally specific annulment mechanism—they are defective in form and substance and therefore should be dismissed.

8. The CPs also observe that the Khieu Samphan Appeal does not mention its legal basis -which is distinct from the relevant law- in breach of Article 4.1 of the revised Practice Direction on

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12 Appeal, para. 124.

13 *Case of KHIEU Samphan*, Decision on Khieu Samphan's Appeal Against the Order on the Translation Rights and Obligations of the Parties, A190/I/20, 20 February 2009, para. 33 [*hereinafter* Translation Appeal Decision].

14 Translation Appeal Decision, para. 33.

the Filing of Documents before the ECCC.[15] The reference to paragraphs (1) and (2) of Rule 75 in the notice of appeal[16] can not be considered as sufficient legal basis for the right to appeal: as those paragraphs solely concern the time limit, the persons entitled to file a notice of appeal and its format.

9. Although the Co-Lawyers of Khieu Samphan, mention that they "*adopt in advance, in its entirety and unconditionally the appeal brief of counsel for IENG Tirith* (sic) *against the impugned order*",[17] it does not exempt them from indicating the Rules on which the appeal is based. This is mandatory and failure to do so renders the appeal inadmissible. Furthermore, it is worth mentioning that Khieu Samphan's Co-Lawyers underline that "(...) *the Internal Rules do not expressly provide for the right to appeal against such an order (...)*".[18] By so doing, they contradict the arguments presented by Ieng Thirith's counsel at paragraphs 10-22 of their Appeal,[19] and they admit themselves not to have the right to appeal the impugned order. Consequently, the CPs request the PTC to declare the appeal of Khieu Samphan inadmissible for lack of a legal basis.

B. PUBLIC HEARING

10. The Appellant seeks a public oral hearing of this Appeal as, according to her, it is complex and of fundamental nature. The CPs are aware of the amount of public interest this Appeal has raised in the national and international community. That said, the CPs understand that the right to a hearing does not necessarily involve an oral hearing; it may include a reasoned and public determination on written pleadings alone.[20] It has been the practice of the PTC to place all the party filings concerning appeals and the decisions thereupon on the ECCC

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15 Article 4.1 reads "*Documents filed before the Co-Investigating Judges or a Chamber shall contain the following where appropriate: a. An introduction containing the legal basis and a petition for the action relief sought. (..) d. A summary of the relevant law, including extracts of relevant legal sources. e. The detailed legal argument*"

16 Khieu Samphan's Notice of Appeal, D130/10, ERN 00360007-10 (ENG) at 00360010, paragraph 1.

17 Khieu Samphan's Appeal, para.6.

18 Khieu Samphan's Appeal, para.3, emphasis added: "*If the Internal Rules do not expressly provide for the right to appeal against such an order, it is simply because it should never have been issued.*"

19 Appeal, paras. 10-22, where the Defence argue that Rule 55(10) provides for the right to interlocutory appeal against a general request and Rule 21 gives jurisdiction to hear appeals where, inter alias, the fair trial rights of the Charged Person have been infringed.

20 *Jussila v. Finland*, Judgement, Appeal No. 73053/01, Grand Chamber of the European Court of Human Rights, 23 November 2006, para. 41.

website. The PTC rarely departs from this practice unless the interests of the parties (particularly, the defendants) are affected.[21] International tribunals regularly decide motions and appeals on written pleadings alone.

11. A clear and consistent practice has emerged regarding the PTC decisions to hold oral hearings. The Chamber has orally heard all but one of the detention appeals[22] and such appeals that may lead to the termination of proceedings and the consequential release of a charged person.[23] In sum, the liberty of a charged person has been the paramount consideration in the Chamber's determination on whether or not to hold a public hearing.[24] The CPs leave it to the discretion of the PTC whether this Appeal should be determined solely on the basis of the written submissions or subsequent to a public hearing.

C. RELEVANT FACTS

12. The Appellant underlines at paragraph 4 of her appeal that the CPs referred in the Introductory Submission ("IS") to numerous confessions and other documents[25] falling into the category of material obtained by torture. The Defence construe that all confessions cited in those 69 footnotes –out of a total of 572 in the IS– would be used for their substantive content by the CPs or CIJs. Moreover, the Defence make it appear that these confessions are simply admissions of guilt by S-21 detainees and little more, when in fact these documents are extremely lengthy and complex and can be used to establish many different types of direct and circumstantial information. Before discussing the legal issues, it is necessary to clarify this matter.

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21 *Case of IENG Sary*, Ruling Pursuant to Article 3.12 of the Practice Direction on Filing of Documents: Ieng Sary's Appeal Regarding Appointment of an Expert, 24 July 2008, A189/1/6, para. 4.

22 The PTC orally heard five original detention appeals of all detainees of this Court. Thereafter, it concluded detention extension appeal hearings of IENG Thirith, IENG Sary and KHIEU Samphan. By agreement of the parties, the detention extension appeal of NUON Chea was determined on written pleadings alone.

23 *Case of KHIEU Samphan*, Decision on Khieu Samphan's Request for a Public Hearing, 4 November 2008, A190/1/8, para. 8. This reflects the purpose of IR 77(6) that public hearings may be held "*in particular, where the case may be brought to an end by the [Pre-Trial Chamber's] decision*".

24 *Case of KHIEU Samphan,* Decision on the Co-Prosecutors' Request to Determine the Appeal on the Basis of Written Submissions and Scheduling Order, 6 February 2009, C26/5/13.

25 These "other documents" are not further described nor identified in footnotes by the Appellant.

13. In the IS, the CPs never rely on the statements in the confession for which the torture exclusionary rule was primarily intended – the coerced confessions of traitorous activities by the victims. Instead, at least 38 confessions cited in the footnote 8 of the Appeal are used by the CPs to establish that the statements were made in a particular DK security centre by victims identified in those documents, which consequently proves their presence, prior arrest and detention and/or subsequent execution at that centre.[26] Multiple other confessions are used because they bear annotations by security centre officials or other CPK cadres.[27] These annotations are not obtained as a result of torture. Other confessions are used for small portions of their content only as corroborative of non-torture related evidence or as lead evidence in order for the CIJs to obtain further non-torture related evidence.[28] None of these confessions are used to establish "new" facts or links to traitorous networks. One confession is used to illustrate the fact that confessions were broadcast on radio and in public meetings[29] while two other IS footnotes cited by the Appellant do not contain any reference to confessions or other allegedly torture tainted documents.[30] This clarification, as such, will allow the PTC to narrow the issues raised in the Appeal.

D. PREMATURE NATURE OF APPEAL

14. The PTC should not hear appeals challenging the admissibility of particular items of evidence. Internal Rule 74(3)(b) only allow appeals of orders "refusing requests for investigative action," and does not authorize appeals of the admissibility of specific pieces of evidence contained in the Case File. The CPs thus submit that the admissibility and permissible evidentiary uses of the S-21 confessions should be decided on a case-by-case

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[26] See for example IS footnotes 82, 119, 178, 179, 180, 182, 183, 203, 216, 350, 355, 356, 392, 398, 420, 425, 427, 432, 433, 457, 459, 460, 461, 462, 463, 465, 466, 467, 519, 520, 530, 531, 532, 533, 537, 538, 539 and 541. For instance, footnote 520 cites nine confessions of K-2 staff to show that Ieng Thirith's staff members were arrested and forced to confess at S-21.

[27] For example, IS footnotes 177, 203, 216, 337, 345, 356, 357, 384, 392, 398, 400, 541, 555, 558 and 564. The footnote 216 refers to the confession of Ping, used to show that prisoners were tortured to death, via an annotation by Duch stating that the prisoner had died before completing confession.

[28] For example, IS footnotes 80, 82, 335, 340, 345, 350, 355, 375, 376, 391, 392, 393, 399, 400, 410, 416, 417, 419, 420, 490 and 552. The passage of the confession of Hu Nim, cited in footnote 80, states known facts as to the rank and position of upper brothers while footnote 375 provides detail and corroboration of the structure of the party and associated organs and departments.

[29] IS footnote 566.

[30] IS footnotes 181 and 458.

basis by the Trial Chamber, whose decisions will be subject to review by the Supreme Court Chamber. To decide these issues at the pre-trial stage would be premature, particularly given that the CIJs Order expressly states the reliability of the confessions "cannot be assessed until the end of the investigation."[31] The PTC does not have the requisite information to make an informed decision at this time, as the contested evidence has not yet been relied on for any purpose, let alone one non-compliant with Article 15. Many of the confessions are hundreds of pages long, which means they have an abundance of potential evidentiary uses, some permissible under CAT and some that are not. The Trial Chamber, if seized, would be a far better forum to adjudicate this matter, and the Defence will have the option of challenging specific uses of the S-21 confessions at that time.

15. Because no judicial authority has yet relied or ruled upon any of the evidence that the Defence alleges was obtained under torture, this Appeal in effect seeks a declaratory ruling on the meaning of Article 15 of CAT.[32] The PTC has previously held that it does not issue declaratory rulings or orders,[33] and it should not do so here.

E. INAPPLICABILITY OF LAW RELIED ON BY DEFENCE

16. The PTC should reject most of the Cambodian law,[34] international jurisprudence,[35] reports,[36]

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31 Torture Evidence Order, para. 28.

32 The Appeal is solely based on theoretical and philosophical arguments, which renders an *in concreto* review by the PTC impossible. No details are provided regarding the actual use of the documents that the Defence seek to be treated as inadmissible and excluded from Case File 002. The Appeal is also vague and fails to specify the particular evidence that was obtained through torture versus evidence that was not obtained through torture.

33 *Case of DUCH*, Ruling Concerning Co-Prosecutors' Notification of Delegation of Powers in Appeal by Charged Person against Provisional Detention Order, 20 November 2007, Case No.001/18-07-2007, C23, para. 4.

34 The Cambodian law cited by the Defence logically supports the notion that the ban on the use of this evidence focuses on its use against the torture victim (Article 38 of the Cambodian Constitution and Article 321 of the Code of Criminal Procedure of the Kingdom of Cambodia). The 1992 UNTAC Criminal Code is irrelevant.

35 *A and others v. Secretary of State for the Home Department* (2004), United Kingdom House of Lords 56, judgment of 16 December 2004: the admissibility of torture evidence obtained in a foreign country against a person accused of terrorism before British Courts is discussed. The evidence was not used against the torturer; *Case of Germany v. Mounir el Motassadeq*, Decision of the German Federal Court of Justice, 4 March 2004, 3 StR 218.03, where the sole issue discussed was the admissibility of evidence, against the accused, possibly obtained by torture (actually forced disappearance and lengthy detention in incommunicado amounting to torture) from 3 suspected Al-Qaida members detained by the United States. Here again, the evidence was used against a third party accused of terrorism, not against a torturer.

36 The 27 May 2003 Committee Against Torture Report only envisions the extent of the exclusionary rule, not the exception of Article 15. The Committee's recommendations to Cambodia to exclude torture evidence were

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and academic writing[37] cited by the Defence[38] as inapplicable to the determination of the issues raised in this Appeal. The precise issue before this Court --the extent to which interrogation records which include confessions obtained by torture can be used to prosecute the parties responsible for the torture-- has never before been addressed by an international or domestic court.[39] A basic tenet of law is that legal findings derived from factually distinguishable situations are inapplicable, because different facts lead to different legal outcomes. The legal authorities relied upon by the Defence in the Appeal involve completely different contextual paradigms from the present case.

17. Specifically, the Appellant cites law and legal material stemming from the following paradigm: State A tortures Defendant B and then seeks to use the material extracted from the

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based on the fact that the Cambodian police and judiciary have relied too heavily on *confessions to secure convictions against those who have been tortured* [emphasis added]*:* CAT, Conclusions and Recommendations of the Committee Against Torture, Cambodia, 27 May 2003, Doc. No. CAT/C/CR/30/2. paras. 6(h), 7(f); the same applies to the report the UN Human Rights Council cited by the Defence in para. 106, fn.75 and to J. Barber cited in Appeal, par.105, fn 73: "*Torturers (in Cambodia) know that they are unlikely to be punished.*" It is precisely why an end must be put to the impunity of people accused of torture in Cambodia, starting with the Khmer Rouge. The 2005 Redress Report was also concerned solely with the use of torture confessions against the tortured persons and consequently noted that the use of confessions "*only encourages interrogation techniques that result in torture*" and that *detainees* should be informed of the right against self-incrimination: Redress, *Bringing the International Prohibition of 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) p. 62- 63. ("hereinafter Redress Report")

37 T. Thienel does not focus in his article on the exception contained in Article 15 but only on the exclusionary rule, as he comments the A and Others case and describes 4 situations of the use of evidence obtained by torture in: A) the courts of the Torturer State against the tortured person (classic case); B) the courts of the Torturer State against a person other than the victim of torture (third party); C) in the courts of a state not involved in the act of torture (but again against the victim of torture or a third party) and D) the courts of a state implicated in the act of torture: T. Thienel, *The Admissibility of Evidence Obtained by Torture under International Law*, European Journal of International Law, 17, 349 (2006) [hereinafter "Thienel"]. Similarly, the Report of the Special *Rapporteur* on Torture dated 14 August 2006 (A/61/259) treats exclusively of the exclusionary rule of Article 15 (and mainly of the burden of proof that torture was applied) and not of the interpretation of its exception. Michael Scharf on the contrary discusses the admissibility of evidence against the torturer; M. Scharf, *Tainted Provenance: When, if Ever, Should Torture Evidence Be Admissible?*, in 65 Wash & Lee L. Rev. 129 (Winter 2008); Professor Pattenden's article, cited at Appeal, para. 61, fn.46, mostly discusses the admissibility of evidence obtained by torture of a third party.

38 Appeal, notably paras. 25, 26 and 37 to 40. Even Rule 95 of the Rules of Procedure of ICTY and ICTR cited by the Defence concerns the classic case of a State or Court officials using torture against a person in order to obtain evidence to be used against him/her or a third party.

39 This fact alone supports the conclusion that deciding this matter requires more interpretation and analysis than the Defence argue is required.

torture against Defendant B or another Defendant.[40] In this case, by contrast, an internationalized court with no relation to State A seeks to use the material to assist in establishing the criminal liability of the government officials from State A who were responsible for the torture. The legal authorities cited by the Defense involve fundamentally different facts than the present case, and should be given little weight by the PTC.

IV. THE LAW

A. ECCC INTERNAL RULES

18. IR 87(1) states that "[u]nless provided otherwise in these IRs, all evidence is admissible." Under IR 87(4), the Chamber may "summon or hear any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth."[41]

B. UNITED NATIONS CONVENTION AGAINST TORTURE

B.1 RATIONALE AND OBJECT AND PURPOSE OF THE CAT

19. The prohibition against torture is absolute; it is a *jus cogens* norm of international law crystallized in the CAT, to which Cambodia has acceded.[42] The exclusive purpose of the CAT is to eradicate the use of torture in the future, to ensure that torture be prohibited and prevented by State Parties and failing prevention, that its authors be prosecuted and punished.[43] As will be demonstrated hereinafter, the CAT is the classic suppression

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[40] According to Thienel, the "classic" situation is when the authorities use torture in order to obtain evidence for subsequent court proceedings against the tortured person, pp.351/356. The right against self-incrimination is applicable here. The second classic situation is the exertion from a person a witness statement for use in proceedings against another person; Thienel, p.357.

[41] Only IR 21(3) even touches on the issue of evidence potentially tainted by coercion, and that rule only applies to coercion by the ECCC's own agents.

[42] See also Article 3 of the European Convention on Human Rights (ECHR), Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and Article 5 of the Universal Declaration of Human Rights (UDHR); *The Prosecutor v. Anto Furundžija*, ICTY Trial Chamber II, Case No.: IT-95-17/1-T, 38 ILM (1999), 317, at 349-350 (para.153-156) ["hereinafter Furundžija"]: there is universal criminal jurisdiction to try suspected torturers following the jus cogens-rank of the prohibition of torture. Regarding the principle of legality, the Redress Report at p.79 mentions that "*In accordance with Article 15, the principle of legality does not operate as a bar to torture prosecutions, which relate to acts which occurred prior to a state party's ratification of the Convention or prior to the incorporation of a definition of torture within a criminal code*".

[43] United Nations Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984), arts. 4-9, 14 [hereinafter "CAT"].

convention that binds State Parties not to use torture itself and to prosecute its commission within its jurisdiction.

20. Torture constitutes a grave violation of human rights, a specific crime of the utmost gravity. To use the words of the Defence, torture is an "inhumane, barbaric and grotesque method",[44] is "abhorrent"[45] and the behaviour of the torturer is "morally repugnant".[46] Consequently, the CAT was established to provide a system of enforcement under which "the torturer can find no safe haven"[47] and the torturer does not gain from his/her acts.[48] In other words, "the rationale of the Convention is (...) that any suspect of torture must fear prosecution always and everywhere".[49] In paragraph 55, the Appellant erroneously confuses the object and purpose of the CAT itself and the twofold rationale behind its Article 15 exclusionary rule.

B.2 OBLIGATION TO PROSECUTE TORTURE OFFENDERS

21. The obligation for a State Party to prosecute torture offenders is the corollary of the absolute prohibition of the torture. The core provisions of the CAT concern criminal enforcement and prosecution: Article 4 provides that State Parties must ensure that all forms of torture are punishable offenses under their criminal law.[50] Articles 5 to 9 concern the prosecution of the persons suspected of torture. Article 5 obliges States Parties to establish universal jurisdiction in cases of torture where the alleged offenders are not extradited to face prosecution in another State. The States' obligation to bring alleged torturers to justice extends to the highest government officials. Articles 6-8 govern the exercise of universal jurisdiction as established in Article 5.[51] Article 9 provides that State Parties assist one another in criminal

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44 Appeal, paras. 103 and 8.
45 Appeal, para. 109.
46 Defence Request, para. 1.
47 J. H. Burgers and H. Danelius, *The United Nations Convention against Torture –A Handbook on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Martinus Nijhoff Publishers, 1988, p. 1. [hereinafter Burgers & Danelius].
48 According to the principle of law that "*no one should be allowed to profit from his/her own unlawful acts*".
49 Nigel S. Rodley, *The Treatment of Prisoners under International Law*, 2nd ed., Oxford, 1999, p.100, cited in Lene Wendland, *A Handbook on State Obligations under the UN Convention on Torture*, published by APT (Association for the Prevention of Torture), p.39, fn 132. [hereinafter *APT Handbook*]
50 See APT Handbook, p.35
51 "*This includes the duty to take suspected persons into custody, to undertake inquiries into allegations of torture, and to submit suspected torturers to the prosecuting authorities*", APT Handbook, pp. 16 and 44. Unless the

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proceedings concerning torture while Article 12 directs that a State Party conduct prompt and impartial investigation into allegations of torture. Article 14 mandates that torture victims have a right to seek civil justice against those who tortured them.[52] In brief, it is manifest that the CAT's overriding purpose is to prosecute the commission of torture and the failure for a State Party, like Cambodia, to prosecute torturers constitutes a violation of international law.

22. In 1990, a few years after the CAT, the UN Guidelines for Prosecutors ("UN Guidelines") were adopted, requiring prosecutors not only to "give due attention to the prosecution of crimes committed by public officials particularly (...) grave violations of human rights and other crimes recognized by international law"[53] but more importantly to "take all necessary steps to ensure that those responsible for using such methods [unlawful methods, including torture] are brought to justice."[54]

23. In his report dated 3 July 2001, Sir Nigel Rodley, Special *Rapporteur* of the Commission on Human Rights on the question of torture, discussed the relation between torture and impunity.[55] He states that "the single most important factor in the proliferation and continuation of torture is the persistence of impunity, be it of a *de jure* or *de facto* nature"[56] and stresses "the duty of States to bring to justice perpetrators of torture as an integral part of the victim's right to reparation".[57] He also refers to the Vienna Declaration and Programme

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(continued...)

suspected torturers are to be extradited, the States Parties are obliged to prosecute suspected torturers. "This is called the principle of *aut dedere aut judicare*, meaning "either extradite or prosecute".

52 Article 5: "*Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offenses referred to in article 4* (...); Article 6: 1. If "*the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offense referred to in article 4 is present shall take him in custody or take other legal measures to ensure his presence*"; 2. "*Such State shall immediately make a preliminary inquiry into the facts*"; Article 7: 1. "*The state Party,* (...) *shall submit the case to its competent authorities for the purpose of prosecution.*"

53 Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders: Guidelines on the Role of Prosecutors, U.N. Doc. A/CONF.144/28/Rev.1, Havana, Cuba, Aug. 27-Sept. 7, 1990, Guideline 15. [hereinafter "UN Guidelines"].

54 UN Guidelines, Guideline 16

55 N. Rodley, *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment*, General Assembly, 56th session, 3 July 2001, A/56/156, paras. 26-33. [hereinafter "Rodley Report"]

56 Rodley Report, para. 26. Emphasis added.

57 Rodley Report , para. 28.

of Action, which stipulates that "states should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law".[58] A restrictive or literal interpretation of Article 15 would not only lead to an absurd or unreasonable result (see below) but would amount to a violation of the obligation to prosecute persons accused of torture.

B.3 EXCLUSIONARY RULE OF CAT ARTICLE 15 AND ITS EXCEPTION

24. Article 15 exclusionary rule and exception must be understood in the overall context of the CAT's object and purpose. Article 15 states 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 proceeding, except against a person accused of torture as evidence that the statement was made."

25. The preparatory works of the CAT show that, contrary to the text of the U.N. General Assembly Declaration of 9 December 1975[59] and the initial proposal made by Sweden similar to the Declaration,[60] an exception was added to the exclusionary rule of Article 15, at the initiative of the United Kingdom, Austria and the United States.[61] This shows that the international law evolved from an absolute exclusionary rule without any distinction between the persons against whom the torture evidence was applied to the consideration that the particular situation of the person accused of torture justified an exception.[62] Noteworthy, Article 15, one of the least discussed articles of the CAT, applies exclusively to situations of

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58 Rodley Report, para. 27; UN Document A.CONF.157/23 (25 July 1993), para. 60.

59 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or degrading Treatment or Punishment, adopted by General Assembly Resolution 3452 on 9 December 1975,: Article 12 states that "*Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceedings.*"

60 Article 13 of the original Swedish draft read "*Each State Party shall ensure that any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment shall not be invoked as evidence against the person concerned or against any other persons in any proceedings.*"

61 Burgers & Danielus, p. 69; Nowak & McArthur, *The United Nations Convention Against Torture: A Commentary*, Oxford 2008, 18.

62 Burgers & Danielus, p. 69: This exception was introduced because "*courts should be permitted to invoke a statement made under torture as evidence against the torturer*".

torture, and not other cruel, degrading and inhumane treatment.[63]

26. The preparatory works do not indicate that the CAT drafters envisioned how Article 15 should be applied in a case in which hundreds of thousands of persons were unlawfully arrested, detained, interrogated and tortured, and detailed interrogation records were kept which can be used to establish the identity of the victims, the purpose of the unlawful torture, the practices regularly employed by the torturers and other facts indicative of a widespread and systematic pattern of criminal conduct.

B.3.1 Principle of the Exclusionary Rule

27. According to the Special *Rapporteur* on Torture, the twofold rationale behind Article 15 exclusionary rule is that (i) confessions or other information extracted by torture is usually not reliable enough to be used as a source of evidence in any legal proceeding; (ii) prohibiting the use of such evidence removes an important incentive for the use of torture and, therefore, shall contribute to the prevention of the practice.[64] As mentioned above, this rationale only applies to the first part of Article 15, concerning the two classic cases: the persons against whom the torture evidence is used are the victims of torture or a person accused by that victim – a third party –, who are "*the one abuse(s) of state power that Article 15 UNCAT was primarily intended to outlaw.*"[65] Similarly, the reliability concern –that one cannot know if a confession obtained through torture reflects the truth, or simply a statement made in order to stop the torture– is minimized where the statements at issue are not relied upon for their truth but for non-hearsay purposes, such as to establish the knowledge, state of mind and intent of persons who received and reviewed the confessions.

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63 Burgers & Danielus, p. 69; Nowak & McArthur, 507. A reference was proposed to be included in Article 16, thus extending the exclusionary rule to situations of CIDTP but that reference was dropped during the 1981 Working Group.

64 M. Nowak, *Report of the Special Rapporteur on Torture*, UN General Assembly, 14 August 2006, A/61/259, at para. 45. [Emphasis added], [hereinafter "Special *Rapporteur* Report"]. It must be noted that the Special *Rapporteur* does not explicitly exclude that information or portions of evidence extracted by torture may be reliable enough to be used as a source of evidence; In their Appeal, the Defence state that the information is unreliable (as opposed to "usually not reliable enough") and in Appeal, para. 55, they manifestly confuse the twofold rationale of the exclusionary rule of CAT Article 15 with the object and purpose of the CAT itself.

65 Thienel, at 356 [emphasis added].

B.3.2 Interpretation of Article 15 Exception

28. Article 15 explicitly recognizes that evidence obtained under torture is admissible when it is being offered "against the person accused of torture as evidence the statement was made." This exception allows all evidence collected under torture to be admitted in order to show that the statements were made under torture. If admitted, this indicates that the issue at stake is not the admissibility of that evidence but the weight it should ultimately be given by the CIJs or the Chambers.[66] The UN Guidelines legally broaden this exception and allow the use of such evidence against those responsible of torture for broader purposes, particularly if that evidence was allegedly created by the defendants. The obligation of prosecuting those responsible for using such methods is however recalled: "When prosecutors come into possession of evidence obtained against suspects that they know or believe on reasonable was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or CIDTP, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who use such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice".[67]

29. The Appellant consistently argues that the ordinary meaning of the Article 15 exception – which permits evidence from torture when used "against a person accused of torture as evidence that the statement was made" – prevails and other modes of interpretation are irrelevant.[68] Yet, the Defence have failed to cite any legal source that supports the contention that the ordinary meaning of a single provision can eviscerate the object and purpose of a convention. Moreover, the Defence are not correct that the plain meaning of Article 15

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66 Although the Defence repeat in the Appeal the unique argument that no torture evidence is admissible because of its inherent unreliability, it must be noted that in para. 5, they paradoxically refer to Duch's testimony regarding the relative reliability or weight to be given to S-21 confessions extracted by the use of torture. It is contradictory to their own arguments. The fact that they discuss the percentage of reliability of the confessions' content (hearsay purpose) which, according to Duch, may be 20% to 40% true, amply demonstrate that, as the CIJs stated, "*it is not possible at this stage to affirm that no element of truth can ever be found in the confessions*" and "*the reliability of the statements cannot be assessed until the end of the investigation*" (Torture Evidence Order para.28).

67 UN Guidelines, 16.

68 Appeal, Ground 3 'Interpretation against Ordinary Meaning", paras. 59-63.

suffices to determine how the exception will apply to the unique facts of this case. For example, the phrase "against a person" does not inform the reader if this means the direct perpetrator only, as indicated by the Defence,[69] or someone indirectly responsible for torture. The phrase "as evidence the statement was made" also requires interpretation when one attempts to apply it to the complex, multifaceted series of interrogation records at issue in this case.[70]

30. The Defence's own citation shows that a deeper analysis is needed. The Defence quote an International Court of Justice ("ICJ") advisory opinion about treaty provisions that states "if (...) the words in their natural and ordinary meaning (do not make sense and) are ambiguous or lead to an unreasonable result", then, other methods of interpretation can be used by the Court "to ascertain what the parties really did mean when they used these words".[71]

31. The CIJs are correct that the CAT, in principle, should not be used to shield those responsible for torture from evidence that helps prove their crimes.[72] It would certainly be an "unreasonable result" if a provision in a treaty dedicated to eradicate torture were interpreted so as to allow torturers to bar admission of interrogation records that document their crimes. It simply is a position that defies logic and common sense. The general principle that no one shall be allowed to profit from his own unlawful actions makes the Defence's argument all the more untenable. The PTC should not allow CAT to be manipulated to ensure that torturers do eventually gain from their acts in proceedings against them. The ICJ opinion, in the CPs' view, supports the position that additional interpretive analysis of Article 15's exception is required.

32. In the case of the DK documents obtained through torture, the exception in Article 15's exclusionary rule for use against persons accused of torture should be broadly construed in

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69 Defence Request, paras. 45/55.

70 For example, the CPs contend that allowing the use of an S-21 confession " as evidence the statement was made" would include establishing that the "made" statement was sent to, reviewed and relied upon by the Charged Persons for purposes of identifying and arresting other persons named in the confession.

71 ICJ Advisory Opinion on Competence of the General Assembly for the Admission of a State to the United Nations, ICJ Reports (12950), p.8, as referred to in *Prosecutor v. Akayezu*, Judgment, Appeals Chamber, Case No.ICTR-96-4-A, 1 June 2001, Dissenting Opinion by Judge Nieto-Navia, para.5; cited in Appeal, para.59.

72 Torture Evidence Order, paras. 23 and 24.

order to honor the object and purpose of the CAT[73]—not merely to allow the admission of statements to prove their existence and that torture and other crimes occurred, but to admit non-hearsay evidence against the torturers. As the former UN Special *Rapporteur* on Torture P. Koojimans explained, the rationale for the inclusion of Article 15 is that judicial acceptance of statements obtained under torture was "responsible for the flourishing of torture" and that the exclusion of such evidence would "make torture unrewarding and therefore unattractive."[74] Here, where the rationale underlying Article 15's exclusionary rule does not apply, the exception to that rule allowing the use of this evidence against the torturers must be construed broadly in order to effectuate the CAT's purpose.[75]

33. Under customary international law, the interpretation of the definition of torture is broader than the letter of the CAT Article 1: the participation of a state official is not necessary[76] and rape may amount to torture[77] as well as acts aiming at humiliating the victim.[78] This broad interpretation, which reflects the present-day conditions, is consistent with the object and purpose of the CAT. The same principles should apply in determining how the exception set forth in CAT Article 15 should apply to a series of interrogation records that were reviewed and relied upon by the persons who commissioned the torture and that document a systematic pattern of criminal conduct carried out over a four year period.

34. The CPs observe that in the particular context of the DK security centres, the admission of a statement made under torture "as evidence the statement was made" will assist in proving other crimes in addition to torture. This is not based on any expansion of the Article 15 exception, but merely a reasonable inference based on the evidence that a person was interrogated and made a confession statement in S-21. For example, the fact a person was

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73 Vienna Convention on the Law of Treaties, 155 U.N.T.S. 331, 23 May 1969, art. 31(1).

74 Scharf, at 135.

75 *See* UN Guidelines, 16.

76 *Kunarac, Kovac and Vokovic*, Appeal Chamber, ICTY, 12 June 2002, para. 148 ; *Brdjanin*, Trial Chamber, ICTY, 1 September 2004, paras. 488-89; *Simic, Tadic and Zaric*, Trial Chamber, ICTY, 17 October 2003, para. 80; *Kvocka et al.*, Trial Chamber, ICTY, 2 November 2001 para. 139.

77 *Akayesu, ICTR*, 2 September 1998, para. 597; *Furindžija*, Trial Chamber, ICTY, Case No.IT-95-17/1, 10 December 1998, para 163.

78 *Furindžija*, Trial Chamber, Case No.IT-95-17/1, 10 December 1998, p.64, para 162.

interrogated in S-21 necessarily meant, pursuant to DK practices and policies, that the person had previously been arrested and detained at S-21, and would most likely be executed after completing their confession.[79] The argument raised in paragraph 1 of Khieu Samphan's Appeal to this effect must, therefore, be rejected.[80]

35. Admitting this quasi-historical evidence, obtained by a criminal State before the CAT was even passed, and not by ECCC investigators or officials, would not promote torture or reward torturers. The concern that if the ECCC were to allow this evidence to be used, then it would encourage Cambodian police to continue to use torture to gain evidence, and courts to accept it, is misplaced. It is difficult to understand how permitting evidence from torture to be used against the senior leaders and those most responsible of one of the most criminal regimes in modern history – evidence that their alleged criminal behavior created – would encourage a similar practice among Cambodian police and judicial officials. More importantly, the greater message that the ECCC gives to the Cambodian police and judiciary is that torture does not go un-investigated, un-prosecuted, and unpunished. Such interpretation of Article 15 exception only strengthens the Cambodian rule of law and fight against impunity.

36. Moreover, there are no "slippery slope" concerns: should the leaders of another regime that tortures its own citizens stand trial in the future, the rule that those who torture cannot hide behind anti-torture rules will help prosecute such leaders. As the intended use of the contested evidence does not apply to torture victims or to third parties accused by the torture victim, there is no danger of encouraging torture or the use of torture-induced evidence.

37. The CIJs rightly held that the charged persons can be considered as "Persons Accused of Torture" regardless of their actual presence at torture or direct participation, as "there is no basis to limit the language of the exception to the perpetrator alone, as a person can be

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[79] S-21 cadres have testified to the regular practices followed at that security office, including the fact that virtually all persons detained at S-21 were executed after their confessions.

[80] Khieu Samphan's Appeal, para 1.: "*by interpreting the exception (...) not as the means to establish a specific fact but to prove and engage a person's criminal responsibility for all the crimes with which he or she is charged (...), the CIJ violated the law, exceeded their authority and seriously jeopardized the spirit of Justice*".

accused of torture on the basis of any number of forms of liability".[81] The definition is much broader, especially in light of the object and purpose of the CAT, and extends to the individuals who disseminate torturous policies and demand their underlings to commit torturous acts.[82] "It is important, in particular, that different forms of complicity or participation are punishable, since the torturer who inflicts pain or suffering often does not act alone, but his act is made possible by support or encouragement which he receives from other persons of high authority. In many cases the torturer is merely a tool in the hands of someone else (...) the person or persons who instructed him should also be punished."[83]

38. Similarly, the UN Guideline 16 allows such evidence to be admitted against "those who used such methods." Moreover, the very definition of torture in CAT Article 1.1 includes the participation of government officials, making any limitation of liability to an individual interrogator or perpetrator illogical.[84]

39. In the *Furundžija* Trial judgment, the ICTY considered that "the nature of the crime and the forms that it takes, as well as the intensity of international condemnation of torture, suggest that in the case of torture all those who in some degree participate in the crime and in particular take part in the pursuance of one of its underlying purposes are equally liable" and that "the rules of construction emphasizing the importance of the object and purpose of

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81 Torture Evidence Order, para.22; The Defence argue the opposite in para. 45. The CPs consider that it should also encompass the persons "suspected" of torture before the indictment is passed. Moreover, the Charged Persons are alleged to have been part of a criminal conspiracy or joint criminal enterprise with the interrogators who served under them. The language of the CAT indicates that this type of complicity is intended to be encompassed in the definition of torturer. CAT Article 4 states that "*[e]ach State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.*"

82 The well-established doctrine of Command Responsibility holds that individuals can be held responsible for international crimes, even when those individuals were not present during the commission of the crimes. *See Rome Statute of the International Criminal Court,* UN Doc. A/CONF. 183/9, 17 July 1998, art. 28 and ECCC Law Article 29 which provides that suspects are responsible for their subordinates' actions when they "*knew or had reason to know that the subordinate was about to*" commit a crime, yet neither prevent nor punish the act.

83 Burgers & Danelius, p. 130; See Human Rights Committee, General Comment No. 20: *The Prohibition of torture and cruel treatment or punishment (article 7),* 10 March 1992, UN Doc. HRI/GEN/1/Rev. 7 at para. 13.

84 It is worth mentioning that the Committee Against Torture also expressed the view that the States' obligations to bring alleged torturers to justice extend to the highest officials, not only the perpetrators; see C. Ingelse, *The UN Committee Against Torture – An Assessment,* Kluwer Law International, 2001, p.318, cited in APT Handbook, p.39 *in fine.*

international norms lead to the conclusion that international law renders the persons equally accountable".[85]

V. PERMISSABLE USES OF CONTESTED EVIDENCE

40. The purpose of the current judicial investigation is – in part – to determine whether torture was in fact committed during the DK regime as alleged in the IS. As such, it is still subject to determination whether the contested evidence is the product of torture, and consequently, if relevant torture law applies. However, assuming this evidence is intertwined with torture, the CPs argue that there are permissible uses for the contested evidence outside of the incriminating or hearsay "truths" contained therein.

A. BIOGRAPHIES, ANNOTATIONS AND OBJECTIVE INFORMATION

41. Biographies are admissible as they were established upon the detainees' admission into S-21 (or other security centres), and therefore before they were tortured. The CPs and Defence agree, in principle, that the CIJs rightly decided that annotations and biographical information contained in the confessions are admissible[86] because they were not obtained as a result of torture. As stated by the CIJs, the handwritten annotations by officials, "any objective information in the confession[s], which exists independently of the interrogation" of the victim and "preliminary biographical material"[87] are admissible as they fall outside the scope of Article 15 exclusionary rule.[88] DK interrogators, officials and Charged Persons made these annotations free of torture. The CIJs also correctly determined that although some evidence may have been recorded while the detainees were mistreated to a "level" less than torture, this does not affect its admissibility, but rather its weight.[89]

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85 *Furindžija*, Trial Chamber, ICTY Case No.IT-95-17/1-T, 10 December 1998, p.96, para 254.

86 Appeal, para. 96; Torture Evidence Order, para. 19.

87 Numerous detainees were interrogated multiple times and earlier confessions concentrated on biographical information. See, *e.g.*, Confession of KOY Thuon aka KHUON, 5 Feb-Mar 4 1977, D83, ERN 00026253-318 (KHM); Former S-21 personnel interviewed by the CIJs have testified that in these cases, torture was not applied until later interrogations. *See, e.g.*, OCIJ Written Record of Interview of PRAK Khan, 21 Sep 2007, D108/2/7, ERN 00161568-86 (ENG) and 00146613-34 (KHM), p.8. Until proven otherwise with credible evidence, the PTC should find the reliance on these portions of biographical information is permissible.

88 Torture Evidence Order, para. 19.

89 Torture Evidence Order, para. 19.

42. However, the Defence's argument that reference to annotations and biographical information is permitted only if "it does not require or rely on any reference back to the contents of the 'confession'" is unsustainable.[90] Annotations often critique or comment on the confession itself, and only make sense if the underlying material is read as well. Annotations in isolation are incomprehensible. Certain biographical information might also require context in order to be understood.[91] The Defence's position would only allow meaningless information of no evidentiary value into evidence. Accordingly, the PTC should dismiss this contention.[92]

43. In sum, the CPs believe any annotations made by DK officials are admissible, and include, but are not limited to, comments and instructions[93] as well as information such as "the date of the person's arrest, the date of the beginning, end and any interruptions to the confession".[94] Also, any basic biographical data of the person interrogated is admissible, and includes, but is not limited to, name, age, residence, position and work unit before and after the 17th of April 1975, and time and place of arrest. Naturally, annotations and biographical information are only admissible if they were not obtained through the use of torture. Nevertheless, the CPs are not aware of any evidence that this information was gained through torture.

B. NON-HEARSAY PURPOSES

44. Article 15 prevents the incriminating content of torture-induced evidence from being admitted as evidence. In other words, the hearsay – or alleged "truth" – asserted in the torture-induced confession is inadmissible.[95] However, the Article 15 exception allowing the admission of confessions "as evidence that the statement was made" explicitly permits such torture-induced evidence to be admitted to prove the non-hearsay purpose that the statement

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90 Appeal, para. 96.

91 For instance, a person's residence being clarified by something said in the confession.

92 While the underlying confessions are admissible as argued herein – making the need for the confession to provide context moot –, the CPs believe that if the confessions were deemed inadmissible, these annotations and biographical data should be read with relevant portions of the confessions in order to make them understandable.

93 These statements made by security centre personnel (like S-21) conducting the torture that often reflect the names of individuals to whom confessions were communicated to and/or that an individual named in a confession had been arrested or executed.

94 Torture Evidence Order, para. 19.

95 For example, a confession that says "*I am a CIA spy*" would be the hearsay asserted truth that Article 15 was devised to bar as evidence.

was made, as conceded in the Appeal.[96] The CPs submit that inferential and circumstantial facts that stem from admitting the contested material to prove "that the statement was made" are also admissible.[97]

45. The CPs further submit that other non-hearsay purposes for the contested evidence are also permissible. A non-hearsay purpose is "a purpose other than proof of an asserted fact."[98] The Defence do not dispute in their Appeal that this would be a proper use of the S-21 confessions, and even cite the conclusion of a torture-evidence expert, Professor Pattenden, that evidence obtained from torture could be used against the torturer offender for a "non-hearsay" purpose.[99]

46. In this case, the S-21 confessions were sent to the Charged Persons, who reviewed the documents and relied on them to arrest additional persons named in the confessions.[100] Because the confessions were reviewed by the Charged Persons, they are relevant to establish their knowledge of the fact that persons were being detained and subject to coercive interrogation at the S-21 security office in order to identify purported enemies of the DK regime. This use of the confessions would be a non-hearsay purpose, because it would not rely on the truth of the coerced statements – i.e., that the persons named and implicated in the confessions were in fact CIA or KGB spies. Rather, the statements would be used to establish other relevant facts, specifically the knowledge, state of mind, motive and intent of both the interrogators who prepared the documents and the senior CPK leaders who received and read

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96 Appeal, para. 61.

97 See above, para. 33. For instance, admitting an S-21 confession of a particular torture victim places them at S-21, which in turn infers that the victim was illegally arrested, detained in inhumane conditions, and eventually executed. The family of such a victim was likely also brought to S-21 and suffered similar fates. These and other inferences can be made in light of independent, non-torture induced evidence that is not subject to CAT, such as witness statements and expert analysis.

98 *Evidence Act 2008* (Australia Federal Law) sec. 60(1).

99 Appeal, para. 61.

100 For example, an S-21 confession that implicated cadres from the Ministry of Foreign Affairs would be sent to IENG Sary, while a confession that named cadres from the Ministry of Social Affairs would be sent to IENG Thirith. They were then responsible to advise the CPK Standing Committee what action should be taken in relation to the implicated cadres. In some cases, those cadres were just monitored by the Party and required to write personal biographies. In other cases, they were arrested, taken to S-21, interrogated and tortured until they confessed and named other persons who were also "enemies" of Angkar.

them.[101] In this circumstance, as the CIJs concluded, "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)."[102]

47. Another relevant non-hearsay fact that can be established from the confessions themselves is the purpose of the torture and the categories of persons that were considered "enemies" by the CPK leaders responsible for such torture. Specifically, the fact that thousands of persons were interrogated as to whether they were CIA, KGB, Vietnamese spies, former Lon Nol loyalists or members of other groups establishes the purpose of the systematic interrogation and torture implemented by the Charged Persons. Once again, such evidence is not offered to establish the truth of the statements – i.e., that the person tortured was in fact a CIA spy – but rather to establish the state of mind and intent of the persons responsible for the torture.[103]

C. INVESTIGATIVE LEADS

48. These statements in confessions should be admissible to the case file as investigative leads to other sources of information. Article 23 new of the ECCC Law, which is mirrored in IR 55(5), states that the CIJs: "shall conduct investigations on the basis of information obtained from any institution, including the Government, United Nations organs, or non-governmental organizations". It further provides that the CIJs "shall have the power to question suspects and victims, to hear witnesses, and to collect evidence, in accordance with existing procedures in force."

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101 *See U.S. v. Horton*, 847 F.2d 313, United States 6th Circuit Court of Appeals (1988) at 324; Colin Ying, *Australian Essential Evidence* 3/e (2005) p. 47-9.

102 Torture Evidence Order, para. 27.

103 As a further example, the confessions reflect that detainees were interrogated as to whether or not they complied with certain CPK directives and policies. While the confession would not be admissible to establish the truth of the coerced statement (e.g., that the detainee betrayed Angkar by failing to comply with the directive that all former Lon Nol soliders be smashed), the fact interrogators were questioning detainees on these subjects is relevant and assists in establishing the CPK directives that cadres were expected to follow.

49. IR 55(5) provides that "in the conduct of judicial investigations, the Co-Investigating Judges may take any investigative action conducive to ascertaining the truth." To this end, the CIJs may, *inter alia,* "[s]ummon and question Suspects and Charged Persons, interview Victims and witnesses and record their statements, seize exhibits, seek expert opinions and conduct on-site investigations". With the express caveat that the CIJs must be impartial when collecting evidence, whether inculpatory or exculpatory, there is no provision in the IRs or ECCC Law that prevents them from relying on any information at their disposal in regard to S-21 or other security centres and places where torture was applied, for purposes of investigating different leads in their attempt to establish the truth.

50. At this stage, this evidence may be used as a basis for further investigation and whether it is sufficient as judicial evidence can be determined upon the merits of a particular case. A prohibition on using this evidence at this premature stage would interfere with the State's ability–here Cambodia and the ECCC–to investigate and prosecute acts of torture as required by CAT Article 12.[104]

51. The Defence argue that the "fruit of the poisonous tree" doctrine should bar the use of the contested evidence as lead evidence.[105] By citing this doctrine, the Defence has confused lead evidence with illegally seized material, which in turn indicates a misunderstanding of the definition of lead evidence. The "fruits" doctrine deals with procedural illegalities that immediately lead to the seizure of incriminating evidence, such as entering a home without a warrant and finding illicit drugs or obtaining a confession inside. The United State Supreme Court, in defining the doctrine, explicitly stated that: "[w]e need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light *but for* the illegal actions of the police."[106]

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[104] CAT Article 12 provides: *"[Each Party] shall ensure...prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."*

[105] Appeal, Appeal Ground 7; Fruit of the Poisonous Tree Doctrine, paras. 77-86.

[106] Wong Sun v. U.S., 71 U.S. 471, United States Supreme Court (1963) p. 487-88 [emphasis added].

52. Lead evidence, in contrast, is using written or oral material to identify further investigative activities, such as whom to interview, where to collect documents or what questions to ask to witnesses. Moreover, the subsequent investigative activity is distinct in time and place from the lead itself, unlike illegally seized evidence where the evidence at issue comes immediately or soon thereafter and at the scene of the illegality. Applying this principle, the CIJs could use material in the contested evidence to lead to other distinct pieces of evidence, "even if the information within the confession is ultimately deemed unreliable".[107]

D. USE BY EXPERTS

53. Expert reports and opinions that rely on the contested evidence are naturally also admissible if the underlying evidence is deemed admissible. Yet, in the alternative, if the contested evidence is not admissible, this does not automatically preclude the expert evidence. The Defence fail to provide a basis in ECCC law for preventing expert evidence that is based, in part, on the contested evidence. In addition, the Defence fail to explain why cross examination or the calling of another expert, both under IR 84, is not a sufficient basis to call into question these types of reports and opinions. The Trial Chamber is more than able to judge the creditability and reliance to be placed on experts in such a context.

54. International law of evidence is instructive on this topic. The a*d hoc* tribunals favor allowing experts to use their own discretion as to what sources to consult, permitting the expert evidence to be admitted, and subsequently testing that discretion at trial through cross-examination. In *Bagosora*, the Defence contested the admission of an expert witness statement, challenging the reliability of documents upon which the statement was based. The ICTR Trial Chamber held that "[t]he Defence may, of course, question the evidential basis of the opinion during the witness's testimony. The Chamber considers cross-examination to be the appropriate mechanism for addressing the concerns of the Defence. The Chamber prefers

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[107] Torture Evidence Order, para. 26. In normal domestic investigations, the same applies when judicial investigators or investigating judges use unverified and potentially unreliable information as investigative leads, such as informants' tips. Not to follow such leads would prevent the investigators to discover offences and offenders on due time.

to deal with the contested issues of reliability when considering the merits of the case, after having heard the totality of the evidence".[108]

55. Similarly, the ICTY recently held that "[t]hese concerns [about the reliability of sources used by the expert], however, do not affect the admissibility of the Report but may affect the weight to be given to [the expert's] evidence."[109] Other jurisdictions, such as the United States and Canada, allow for the admission of expert testimony that can be cross-examined by an opposing party and weighed by the trier of fact.[110] As such, any facts or data may be used as a basis for expert testimony. The Co-Prosecutors see no reason for the ECCC to derogate from this mechanism established at the international level by other international(ized) criminal tribunals handling cases of similar complexity and gravity.

E. CORROBORATIVE EVIDENCE

56. The logical converse to lead evidence is corroboration, and the CIJs should be able to use the contested evidence as a secondary source to corroborate evidence that the judicial investigation has already independently uncovered (primary source). As already stated, the CIJs possess broad investigatory powers in order to ascertain the truth. With this in mind, if the CIJs have discovered certain facts – particularly from interviews or other documents – and test such facts with contemporaneous material, the use of contested evidence for such a purpose should be permitted.

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[108] *Prosecutor v. Bagosora*, Case No. ICTR-98-41-T, Decision on Motion for Exclusion of Expert Witness Statement of Filip Reyntjens, 28 Sept. 2004 (Trial Chamber), at para. 9.

[109] *See Prosecutor v. Perišić*, Case No. IT-04-81-IT, Decision on Expert Report By Richard Phillips, 10 Mar. 2009 (Trial Chamber), at para. 18.

[110] U.S. Federal Rules of Evidence, Rule 703 provides: "*[t]he facts or data [that the opinion is based on] need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury...unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.*" Canada takes a similar approach. The case of *R v. Zundel, (1987) 35 DLR (4th) 338, paras. 132/141*,allows experts to rely upon those contemporary documents that historians would traditionally rely upon in order to prove the existence of the Holocaust. Under Canadian law, that an expert bases part or all of his opinion on statements not admitted into evidence goes to the proper weight to be accorded his opinion, not its admissibility. *See, e.g. City of St. John v. Irving Oil. Ltd.* (1966), 58 DLR (2d) 404, p. 12.

57. By testing non-contested material against the contested material -particularly on areas like CPK policies that are discussed in numerous confessions- the CIJs will be able to judge the veracity of the source where they uncovered such material, and come closer to the truth. Additionally, using the contested evidence in such a manner does not promote torture or unfairly prejudice any party, but rather determines whether or not such uncovered evidence is in conformity with contemporaneous material and more reliable as a consequence.

58. Potential areas where the contested evidence can be used for corroborative purposes, without violating the spirit of CAT and Article 15, are numerous. Statements regarding DK hierarchy, communication, and policies/policy implementation[111] were made by numerous victims, allowing corroboration across sources as well as in combination with other non-torture evidence on the case file. These areas of corroboration are not areas of incrimination, but rather ancillary material not the subject of the interrogation. In the eyes of the CPK, the core purpose of the interrogation was to prove that alleged traitors or spies were responsible for "the failures of the CPK policies",[112] which logically indicates that CPK policies were stated correctly in the contested evidence to prove what the "traitors" violated. Accordingly, the material in the contested evidence that could be used for corroborative purposes is not the hearsay truth asserted.

F. ADMISSIBLE UNDER THE FLEXIBILITY PRINCPLE

59. The CPs believe that the contested evidence is admissible, as described above, because Article 15 must be interpreted in line with the overall object and purpose of CAT and because permissible purposes for this evidence exist that do not violate Article 15 or its exception. Nevertheless, the CPs argue in the alternative – and in direct relation to its

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[111] A good example is statements from confessions that go to establish the "purge cycle" policy implemented at S-21 and that the Charged Person acted upon the statements. For example, if in a confession torture victim "A" identified "B" as a traitor who was then brought to S-21, and then "B" similarly identified "C" as a traitor who was subsequently brought to S-21, and so on, then these confessions should be admitted as evidence demonstrating the DK purge policy that was being carried out at S-21.

[112] S. Heder and B. Tittemore, *Seven Candidates for Prosecution.* Accountability for the Crimes of the Khmer Rouge, Phnom Penh, DC-Cam 2004, p. 29.

previous argument that the Appeal is vague and premature–[113] that the ECCC should follow the flexibility principle established at the international level.

60. The evidence regimes at other international(ized) criminal tribunals are inherently flexible as these courts are comprised of professional judges who do not have to be shackled by restrictive rules of evidence appropriate for jury trials.[114] Accordingly, under Rule 87(1), "all evidence is admissible" unless specifically excluded. Common Rule 89 of the Rules of Procedure and Evidence of the ICTY, ICTR and SCSL are noticeably similar as well. The SCSL Appeals Chamber, which is governed by evidence rules similar to the ECCC,[115] aptly stated that "evidence is admissible once it is shown to be relevant: the question of its reliability is determined thereafter, and is not a condition for its admission".

61. As a consequence, the conclusion of the judicial investigation[116] and/or subsequent trial hearings are forums where evidence reliability is rightly debated. Meanwhile, the contested evidence remains on the Case File as admissible for present purposes due to it containing *prima facie* relevance and probative value. If a party's objection to evidence is found convincing, then the CIJs or the Trial Chamber may give it the appropriate weight when each organ deliberates evidence,[117] or –as practiced by the Trial Chamber in Case File 001[118] – strike the evidence from consideration altogether once it is shown to be unjustly relied upon pursuant to IR 87. In addition, the admission of the documents and their placement on the Case File does not necessarily mean that the CIJs, the PTC or Trial Chamber accept them as true.

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113 See above, paras 14-15.

114 Annual Report of the ICTY, A/49/342, 29 August 1994, p. 24. The CPs note that the ECCC IRs are even more flexible than those of the other tribunals: while the ICTY and ICTR are limited to considering evidence that is both relevant *and* probative, the ECCC may consider "any evidence ...useful in ascertaining the truth" *i.e.*, any relevant evidence (IR 87(4)).

115 *See* Rules of Procedure and Evidence of the Special Court for Sierra Leone, 27 May 2008, Rule 89(c),

116 IRs 66-67.

117 *Prosecutor v. Brdjanin*, Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown, ICTY, Case No. IT-99-36-T, 3 June 2003, p. 3.

118 *Case of Duch*, Decision on the Admissibility of Material on the Case File as Evidence, ECCC Trial Chamber, 26 May 2009, No.001/18-07-2007, E43/4, ERN 00332849-57 (ENG), paras.18-20

62. Finally, no judicial authority of this Court has ruled that it has relied on the contested evidence for a purpose that would violate Article 15. In fact, the Defence request before the CIJs was so general and sweeping –without identifying its grounds of challenge and the factual assertions regarding the credibility of every individual document– that the PTC should reject it for being vague and lacking a factual foundation. In the CPs' submission, at this stage, there should be no hindrance to the continued retention of these documents on the Case File. The parties can make their submissions regarding the weight any ECCC organ should assign to them at the appropriate procedural times, or whether the CIJs at the conclusion of the judicial investigation or Trial Chamber at trial should consider them at all.

VI. CONCLUSION

63. The Co-Prosecutors request that the Pre-Trial Chamber dismiss the Appeals.

YET Chan[illegible] William SMITH
Deputy Co-Prosecutor [illegible] Co-Prosecutor

Signed in Phnom Penh, Kingdom of Cambodia, on 12 October 2009