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DEFENCE APPEAL AGAINST OCIJ 'ORDER ON USE OF STATEMENTS WHICH WERE OR MAY HAVE BEEN OBTAINED BY TORTURE' OF 28 JULY 2009

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I INTRODUCTION AND CHRONOLOGY

1. On 11 February 2009, the defence for Madame Ieng Thirith (**Charged Person**) filed its 'Defence Request for Exclusion of Evidence Obtained by Torture' (**Defence Request**).¹ On 30 April 2009, the OCP filed its 'Co-Prosecutors' Response to Ieng Thirith's Defence Request for Exclusion of Evidence Obtained by Torture dated 11 February 2009' (**OCP Response**), which was notified to the parties one week later, on 7 May 2009.² On 18 May 2009, the defence filed its 'Defence Reply to "Co-Prosecutors' Response to Ieng Thirith's Defence Request for Exclusion of Evidence Obtained by Torture"' (**Reply**).³ On 28 July 2009, the Office of the Co-Investigating Judges (**OCIJ**) issued its 'Order on Use of Statements Which Were or May Have Been Obtained by Torture' (**Order**).⁴
2. On 30 July 2009, the defence for the Charged Person filed the 'Ieng Thirith Defence Notice of Appeal against OCIJ Order on Statements Which Were or May Have Been Obtained by Torture of 28 July 2009'⁵ with the OCIJ, notifying the Chamber and the parties of the defence intention to appeal against the Order. On 31 July 2009, the defence filed an 'Urgent Defence Request for Extension of Time Limit for Appeal against "Order on Use of Statements Which Were or May Have Been Obtained by Torture"'⁶; none of the other parties responded to this request. On 18 August 2009, the Pre-Trial Chamber (**PTC**) allowed the request for extension.⁷
3. The defence herewith files its appeal, requesting the Pre-Trial Chamber to quash the said Order.

¹ Defence Request for Exclusion of Evidence Obtained by Torture, 11 February 2009, Document No. D130.

² Co-Prosecutors' Response to Ieng Thirith's Defence Request for Exclusion of Evidence Obtained by Torture dated 11 February 2009, 30 April 2009, Document No. D130/5.

³ Defence Reply to "Co-Prosecutors' Response to Ieng Thirith's Defence Request for Exclusion of Evidence Obtained by Torture", 18 May 2009, Document No. D130/6.

⁴ OCIJ, Order on Use of Statements Which Were or May Have Been Obtained by Torture, 28 July 2009 (notification 29 July 2009), Document No. D130/8.

⁵ Ieng Thirith Defence Notice of Appeal against OCIJ Order on Statements Which Were or May Have Been Obtained by Torture of 28 July 2009, 30 July 2009, Document No. D130/9.

⁶ Urgent Defence Request for Extension of Time Limit for Appeal against 'Order on Use of Statements Which Were or May Have Been Obtained by Torture', 31 July 2009, Document No. D130/9/1.

⁷ Decision on the Defence Application for Extension of Time Limit for Appeal against Order on Use of Statements Which Were or May Have Been Obtained by Torture, 18 August 2009, Document No. D130/9/2.

II RELEVANT FACTS AND PROCEDURE

2.1 Relevant Facts

4. The OCP in its Introductory Submission refers to numerous confessions and other documents which fall into the category of material obtained by torture.⁸ It also relies on documents which themselves refer to evidence obtained by torture.⁹ In addition, other documents used by the OCP refer to those secondary sources.¹⁰ The OCP thus uses several layers of evidence in its Introductory Submission, which all refer back to and rely upon material obtained by torture.
5. Since 9 June 2008, the interviews conducted with Duch by the OCIJ which are contained in Case File No. 001 have been added to Case File No. 002.¹¹ These interviews set out Duch's opinion, based on his direct knowledge, that the confessions obtained in S-21 Security Centre were extracted by the use of torture,¹² and that other security centres used similar torturous practices.¹³ On 7 April 2009, in the course of the proceedings before the Trial Chamber, Duch confirmed this opinion. In response to a question raised by Judge Lavergne, he stated:

[...] I never believed the confessions I received tallied to the truth. The most was probably 40 percent true. [...]

⁸ See for instance Introductory Submission, footnotes 80, 82, 119, 177-180, 182, 183, 203, 216, 327, 335, 337, 340, 342, 344, 345, 350, 355-357, 375, 376, 384, 391-394, 398-400, 410, 416, 417, 419, 420, 425, 427, 429, 432, 433, 457-463, 465-467, 490, 519, 520, 528, 530-533, 537-539, 541, 552, 555, 558, 564 and 566.

⁹ See Stephen Heder and Brian D. Tittmore, "Seven Candidates for Prosecution. Accountability for the Crimes of the Khmer Rouge", Phnom Penh: DC-Cam 2004, p. 29-31. See also David Chandler, Ben Kiernan and Chanthou Boua, "Pol Pot Plans the Future. Confidential Documents from Democratic Kampuchea", see Introductory Submission, p. 106, footnote 80.

¹⁰ See for instance, just by way of example: Phnom Penh Post (16/1), "The Amnesia of Brother Number 2", 12-25 January 2007, (ERN 00081516-00081520).

¹¹ *Prosecutor v. Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC-PTC(02), Written Record of Adversarial Hearing, interview date 31 July 2007, Doc No. D86/1, document filed with greffiers on 9 June 2008 (ERN 00145454-00145457).

¹² See for instance: Written Record of Interview of Charged Person, interview date 7 August 2007, Doc. No. D86/3 (ERN 000147517-000147527), p. 8, Written Record of Interview of Charged Person, interview date 2 October 2007, Doc. No. D86/6 (ERN 000147600-000147608), p. 6, etc.

¹³ See for instance Written Record of Interview of Charged Person, interview date 2 June 2008, Doc. No. D87 (ERN 00195571-00195579), p. 4, where Duch states that "the entire Standing Committee knew that torture was practiced in all security centres."

So the confessions I received, the truth in it was probably 40 percent. [...] But about those, they implicated only 20 percent is true. [...] but it is very hard for me to compare and give you an actual percentage.¹⁴

6. The next day in court, Duch, after further reflection, reduced the percentage of truth contained in the confessions to twenty percent when he said:

I still maintain that all the confessions we obtained did not reflect the truth, maybe 20 percent only that reflects, 20 percent maybe the most. Twenty percent of those confessions reflected the truth. [...] So the reason that I said that the confessions were not true because it is consistent with that situation.¹⁵

7. The relevant facts are set out in the Defence Request and the Defence Reply. On the basis of those documents, and the OCP Response, the OCIJ issued its Order, which held, *inter alia*:

- That it is the OCIJ who is responsible for finding out whether or not material was obtained by torture;
- That the exception of Article 15 Convention Against Torture (CAT) is limited to where the issue of self-incrimination arises, namely a prohibition on the use of torture-tainted statements against a torture victim or against anyone implicated by a torture victim;
- That Article 15 CAT applies equally to persons who are accused of torture through indirect forms of responsibility;
- That the spirit of the law must not be overshadowed by the letter of the law. To use the exception of Article 15 in this case would not deter future would-be torturers. Further, the OCIJ held that the reliability of the material is not at issue here;
- That there are two instances where torture tainted evidence can be relied upon (1) as lead evidence, and (2) to prove that the CPK relied on information set out in the confessions;
- That it cannot be said at this stage that the confessions do not contain elements of truth; hence, the OCIJ will determine the reliability of each confession on the Case File at the end of the investigation on a case-by-case basis;
- That the Defence Request be dismissed.

¹⁴ Transcript 7 April 2009, Case File 001, Document No. E1/9.1, p. 22 (lines 4-6; 10-12; and 16-17).

¹⁵ Transcript 8 April 2009, Case File 001, Document No. E1/10.1, p. 105 (lines 8-11), p. 106 (lines 20-21).

2.2 The Appeal

8. The defence submits that the Co-Investigating Judges have failed to give proper consideration to the statutory framework of national and international law and have adopted the wrong approach and applied the wrong test to determine whether material which was, or may have been, obtained by use of methods of torture can be considered at the pre-trial stage and admitted in the proceedings. It is a fundamental rule of international law that evidence obtained by torture is inadmissible in criminal proceedings. The use of evidence obtained in this way is excluded regardless of its potential, truthfulness, accuracy and reliability, to reflect the repugnance of civilised nations to the use of barbaric methods. The defence submits that use of such illegally obtained material is inadmissible in the current proceedings as is clearly established by statute and jurisprudence.
9. Further, its use violates the Charged Person's right to a fair trial and the presumption of innocence. Under these circumstances the defence contends that the OCIJ should not be permitted to use any material identified individually or by reference to its category as having been obtained through the use of torture.

III JURISDICTION TO HEAR THE APPEAL

10. The defence files this appeal pursuant to Rule 55(10) and Rule 74(3)(b) of the Internal Rules and with regard to the fundamental principles set out in Rule 21.
11. Rule 55(10) of the Internal Rules provides for an interlocutory appeal in certain circumstances. It states:

At any time during an investigation, the Co-Prosecutors, a Charged Person or a Civil Party may request the Co-Investigating Judges to make such orders or undertake such investigative action as they consider necessary for the conduct of the investigation. If the Co-Investigating Judges do not agree with the request, they shall issue a rejection order as soon as possible and, in any event, before the end of the judicial investigation. The order, which shall set out the reasons for the rejection, shall be notified to the parties and shall be subject to appeal.¹⁶

12. This Rule thus provides a basis for two kinds of requests:

¹⁶ Emphasis added.

- (i) Orders necessary for the conduct of the investigation (general request),
and
 - (ii) Investigative action necessary for the conduct of the investigation (request
for investigative action).
13. If the OCIJ disagrees with a request, it should issue a rejection order, which, according to the last sentence, shall be subject to appeal. Both categories of requests are subject to appeal; no distinction is made between an order denying a general request and an order denying a request for investigative action. As such, Internal Rule 55(10) provides for the right to interlocutory appeal against rejection of both general requests and requests for investigative action.
14. Internal Rule 74(3)(b) limits the Charged Person's right to an interlocutory appeal to orders 'refusing requests for investigative action allowed under these IRs'.
15. The defence submits that in order to avoid any inconsistency between these two Rules, should any be perceived, Rule 55(10) should prevail. This interpretation would be in accordance with the principle of *in dubio pro reo*, which provides that where a statute or rule may be fairly interpreted in two or more ways, the version most favourable to the accused should be selected.¹⁷
16. The Pre-Trial Chamber has jurisdiction to hear the appeal where, *inter alia*, the fair trial rights of the Charged Person have been infringed.
17. There is authoritative support from the Pre-Trial Chamber of the ECCC in the Khieu Samphan Translation Decision for the proposition that a Charged Person may appeal to the PTC where there is a perceived infringement of a fair trial right. There it was held that the PTC would examine:

whether Internal Rule 21 requires that [the Pre-Trial Chamber] adopts a broader interpretation of the Charged Person's rights to appeal in order to ensure that proceedings during the investigation are fair and adversarial and that a balance is preserved between the rights of the Parties.¹⁸

¹⁷ See K. Khan & R. Dixon, *Archbold International Criminal Courts* (2005), p. 165.

¹⁸ Khieu Samphan Translation Decision, para. 36.

18. In that decision, the Pre-Trial Chamber held that ‘the Charged Person’s rights safeguarded in Internal Rule 21 are not violated’.¹⁹ It concluded by stating:
- The Pre-Trial Chamber therefore finds that Internal Rule 21 does not force it to interpret the Internal Rules in such a way that the Appeal against the Translation Order should be declared admissible.²⁰
19. Further, the appeal is essential to ensure that there is not a future violation of the Charged Person’s fair trial rights in two ways:
- (i) The OCIJ’s investigations and hence the Closing Order will be based on and tainted by inherently unreliable evidence, and
 - (ii) The defence could only raise this again before the Trial Chamber whereas it is an issue that should essentially be settled at the investigative stage. If the OCIJ rely on the torture-tainted evidence, the defence will challenge its use at the trial stage. If the Trial Chamber rules against the OCIJ decision, and does not admit torture-tainted evidence to be adduced in the ECCC proceedings, the Closing Order and the underlying investigations which are tainted by torture evidence would be fundamentally compromised.
20. This approach accords with that taken by all other international and internationalized tribunals (the ICTY, the ICTR, the ICC, the Special Court for Sierra Leone and the Special Tribunal for Lebanon) which provide for interlocutory appeals where issues are raised that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and where an immediate resolution by the appellate chamber may materially advance the proceedings.²¹
21. Both situations occur in the case at hand, where the Charged Person’s fair trial rights are being violated, and where a decision by the Pre-Trial Chamber would materially advance the proceedings.
22. Given the Pre-Trial Chamber’s acknowledgement of fair trial issues constituting a separate basis for interlocutory appeal in the Khieu Samphan Translation Decision, and

¹⁹ Khieu Samphan Translation Decision, para. 50.

²⁰ Khieu Samphan Translation Decision, para. 50.

²¹ See Rule 72(B)(ii) of the ICTY Rules of Procedure and Evidence, Rule 72(B)(ii) of the ICTR Rules of Procedure and Evidence, Article 82(1)(d) of the Rome Statute for the ICC, Rule 72(F) of the SCSL Rules of Procedure and Evidence, and Rule 90(B)(ii) of the STL Rules of Procedure and Evidence.

the fact that the other international and internationalized tribunals all allow interlocutory appeals on the basis of fair trial infringement and the desire for expeditious conduct of the proceedings, the defence respectfully submits that the PTC has jurisdiction to hear this appeal.

IV REQUEST FOR ORAL HEARING

23. Given the complexity of the underlying issues, as well as the importance and fundamental nature thereof in both Cambodian and the international legal society, the defence seeks an oral hearing. Any questions which arise regarding this complex area may then be addressed orally.
24. In the ‘Decision on “Request for an Oral Hearing” on the Appeals PTC 24 and 25’²² the Pre-Trial Chamber has held that as a general rule it would not hold public hearings relating to investigative requests because of their confidential nature. The defence submits that this consideration is irrelevant in relation to the issues raised in this appeal which by their very nature should be dealt with in a transparent manner; no reference need be made to matters which are under investigation. As such, the defence submits that the nature of the argument is appropriate for a public hearing, and it would assist the judges in dealing with any issues which may arise.

V RELEVANT LEGAL STANDARDS

5.1 Cambodian Law

25. Article 38 of the Cambodian Constitution provides that ‘[c]onfessions obtained by physical or mental force shall not be admissible as evidence of guilt. Any case of doubt, [...] shall be resolved in favour of the accused.’
26. Similarly, Article 24(3) of the 1992 UNTAC Criminal Code reads, insofar relevant: ‘A confession obtained under duress, of whatever form, shall be considered null and void.’ The Code of Criminal Procedure of the Kingdom of Cambodia in Article 321 specifies

²² Pre-Trial Chamber, Decision on “Request for an Oral Hearing” on the Appeals PTC 24 and 25, 20 August 2009, Document No. D164/4/3.

moreover that '[a] confession shall be considered by the court in the same manner as other evidence. [A d]eclaration given under the physical or mental duress shall have no evidentiary value'. Cambodia's obligations under international law require these provisions to be interpreted in light of Article 15 of the Convention against Torture (CAT).

27. Rule 87(1) of the Internal Rules of the ECCC provides that '[u]nless provided otherwise in these IRs, all evidence is admissible'. Rule 87(2)(d) provides that a Chamber may reject a request for evidence where it finds that it is 'not allowed under the law'.
28. Rule 87(1) can be seen as providing a *lex generalis*. Article 15 of CAT, provides for the exclusion of torture-tainted evidence, and can be considered a *lex specialis*, providing for a more specific situation than the Internal Rules. The *lex specialis* prevails over the *lex generalis* and Article 15 CAT must be taken into account by the ECCC. Also, Article 15 CAT falls within the category of evidence not allowed under the law pursuant to Rule 87(2)(d) of the Internal Rules.
29. Significantly, the ECCC procedural rules do not prevail over Cambodia's obligations under international law. The ECCC and other courts of Cambodia are bound by the treaties signed by the Government of Cambodia.
30. Finally, Internal Rule 21 provides for the Charged Person's right to a fair and expeditious trial, in accordance with Article 14 of the International Covenant on Civil and Political Rights (ICCPR).

5.2 International Law

31. Article 14(1) of the ICCPR provides that '[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.' The second limb of Article 14 provides for the presumption of innocence, and Article 14(3)(c) provides for the right to be tried without undue delay.

32. Article 15 of the CAT states:²³

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.

33. Article 2(2) of the CAT states that the nature of this provision is non-derogable.

34. The defence submits that the text of this provision is self-explanatory in that the use of torture-induced evidence is strictly limited to the use "against a person accused of torture as evidence that the statement was made".²⁴35. As a party to CAT, Cambodia is bound by its provisions according to Article 26 of the 1969 Vienna Convention on the Law of Treaties (**Vienna Convention**), as are the judges of the ECCC, including the OCIJ. Scharf argues that the ECCC judges are not bound by this Vienna Convention, given that the ECCC is a separate legal personality not bound by Cambodia's international legal obligations. However, he acknowledges that the Agreement between Cambodia and the UN requires the ECCC to 'exercise their jurisdiction in accordance with international standards of justice' and he reluctantly concludes that '[a]t the very least, the Cambodia Tribunal would not want to be perceived as flouting the proscriptions of the CAT, as this would erode its legitimacy and international support'.²⁵ Thienel argues that apart from treaty law it may be said that 'the obligation of Article 15 [CAT] has achieved customary status'.²⁶

36. General Comment No. 20 to Article 7 of the ICCPR as articulated by the UN Office of the High Commissioner for Human Rights, specifies that:

It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.²⁷

²³ To which Cambodia acceded on 15 October 1992, see URL: <http://www2.ohchr.org/english/bodies/ratification/9.htm>.

²⁴ Emphasis added.

²⁵ M.P. Scharf, "Tainted Provenance: When, If Ever, Should Torture Evidence Be Admissible?", in: 65 Wash & Lee L. Rev. 129 (Winter 2008), at 135-136.

²⁶ T. Thienel, "The Admissibility of Evidence Obtained by Torture under International Law", in: European Journal of International Law 17 (2006) 349, at 365.

²⁷ Office of the High Commissioner for Human Rights, General Comment No. 20, Torture or cruel, inhuman or degrading treatment or punishment (Art. 7): 30/05/82, CCPR General Comment No. 20 (General Comments), URL address: <http://www.unhchr.ch/tbs/doc.nsf/0/6924291970754969c12563ed004c8ae5?Opendocument>, para. 12.

37. In a report of 27 May 2003 the Committee against Torture (the UN monitoring body of the CAT) made certain recommendations to Cambodia.²⁸ It set out its concern about '[t]he importance given to confessions in criminal proceedings and the reliance of the police and the judiciary on confessions to secure convictions'.²⁹ It specifically advises Cambodia to '[t]ake measures to ensure that evidence obtained under torture is not invoked in court'.³⁰
38. In 2006, Redress published a report on the national implementation of international obligations concerning the prohibition of torture. It outlines the prohibition of Article 15 CAT, and specifies some aspects of that prohibition. It reads, insofar as is relevant: 'The prohibition must be unconditional, without exception and must not allow for judges and other decision makers to exercise discretion over whether to accept, or what weight to accord to, such evidence.'³¹
39. The Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment submitted a report to the UN General Assembly on 14 August 2006.³² This report has a section on 'The principle of the non-admissibility of evidence extracted by torture', elaborating on the specifics of Article 15 CAT. The report first of all refers to the German case against *Mounir el Motassadeq*,³³ where the German Supreme Court on 4 March 2004 quashed the decision of a lower court using evidence obtained through

²⁸ Committee against Torture, Conclusions and Recommendations of the Committee against Torture: Cambodia, 27 May 2003, Doc. No. CAT/C/CR/30/2 (Concluding Observations/Comments), URL address: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.CR.30.2.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.30.2.En?OpenDocument).

²⁹ Committee against Torture, Conclusions and Recommendations of the Committee against Torture: Cambodia, 27 May 2003, Doc. No. CAT/C/CR/30/2 (Concluding Observations/Comments), URL address: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.CR.30.2.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.30.2.En?OpenDocument), para. 6 under (h).

³⁰ Committee against Torture, Conclusions and Recommendations of the Committee against Torture: Cambodia, 27 May 2003, Doc. No. CAT/C/CR/30/2 (Concluding Observations/Comments), URL address: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.CR.30.2.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.30.2.En?OpenDocument), para. 7 under (f).

³¹ 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*, January 2006, p. 62.

³² UN General Assembly, *Torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. No. A/61/259, 14 August 2006.

³³ *Beschluss IV – 1/04 des Hanseatischen Oberlandesgericht Hamburg*, *Neue Juristische Wochenschrift* 2005 Heft 32 of 14 June 2005, referred to in UN General Assembly, *Torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. No. A/61/259, 14 August 2006, para. 46.

- torture. The case was sent to the Hamburg Court for a retrial, in which the court excluded the torture-tainted evidence.³⁴
40. The report furthermore refers to the judgment of the House of Lords in *A and Others v. SSHD (No. 2)* of 8 December 2005.³⁵ The court was unanimous in its condemnation of torture. It recognised that Article 15 had acquired the status of jus cogens and prohibited the use in judicial proceedings of torture-tainted statements.
41. Article 23 *new* of the ECCC Establishment Law reads:
- 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, the Co-Investigating Judges may seek guidance in procedural rules established at the international level.
42. Guidance is provided for by Rules 95 of the Rules of Procedure of both the International Criminal Tribunals for the former Yugoslavia and Rwanda which provide:
- No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.
43. The ICTY interpreted the extent of Rule 95, and noted that '[t]here is no doubt statements obtained from suspects which are not voluntary, or which seem to be voluntary but are obtained by oppressive conduct, cannot pass the test under Rule 95.'³⁶
44. Article 69(7) of the Rome Statute contains the same provision worded slightly differently.
45. The defence is not aware of any case in which any of the international criminal tribunals has had to rule on the admissibility of evidence obtained by torture. Domestic and international courts and academics have accepted that information obtained by torture is inherently unreliable and tainted and cannot not as a matter of principle be used in a criminal court. Significantly, the aforementioned Rule 95 ICTY RPE and Article 69(7)

³⁴ UN General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. No. A/61/259, 14 August 2006, p. 11-14.

³⁵ UN General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. No. A/61/259, 14 August 2006, p. 14-16. See for a discussion of this case: T. Thienel, "Foreign Acts of Torture and the Admissibility of Evidence. The Judgment of the House of Lords in *A and Others v. Secretary of State for the Home Department (No. 2)*," in: *Journal of International Criminal Justice* 4 (2006) 410.

³⁶ *Prosecutor v. Delalic et al.*, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence, Case No. IT-96-21-T, 2 September 1997, para. 41.

Rome Statute are formulated in mandatory terms. Consequently, any prosecutor seeking to adduce such evidence would face an insurmountable burden.

VI APPEAL GROUND 1: INFRINGEMENT OF FAIR TRIAL

46. In 1992, Cambodia acceded to the Convention against Torture; Cambodia is thus bound by its provisions, and consequently, so is the ECCC. Cambodia is a Party to the ICCPR, Article 14 of which guarantees the Charged Person broad fair trial rights. Guarantees which form the fundamental principles set out in Rule 21 of the Internal Rules of the ECCC. The use of torture-tainted evidence would be a violation of the Charged Person's right to a fair trial, as guaranteed by both the ICCPR and the ECCC instruments.
47. Evidence obtained by torture is universally acknowledged to be inherently unreliable. Moreover, its use as lead evidence infects the proceedings based upon this material. For instance, if a witness is confronted with parts of a confession, the witness may be influenced by material which is inherently unreliable. It is impossible for the Charged Person to verify the extent of the use of such tainted material because the process is insufficiently transparent to verify such procedures.
48. As confirmed in paragraph 23 of the Order on Use of Torture Evidence, the rationale behind the Article 15 CAT exclusion is twofold: firstly, information extracted by torture is unreliable, and secondly, prohibiting the use of torture-induced evidence shall contribute to the prevention of that practice.³⁷
49. Taking into account the Article 15 exception, the Committee on Civil and Political Rights, the monitoring body of the ICCPR, states that '[d]eviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times'
50. The defence respectfully submits that the OCIJ Order violates the Charged Person's right to a fair trial, and hence, should be quashed on this basis.

³⁷ Committee against Torture, Conclusions and Recommendations of the Committee against Torture: Cambodia, 27 May 2003, Doc. No. CAT/C/CR/30/2 (Concluding Observations/Comments), URL address: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.CR.30.2.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.30.2.En?OpenDocument), para. 45.



VII APPEAL GROUND 2: ARTICLE 15-EXCEPTION IS NOT RESTRICTED TO SELF-INCRIMINATION

51. Paragraph 21 of the Order sets out the OCIJ's interpretation of the exception in Article 15 CAT, noting that the statements will not be used against the person subjected to torture, and concerns regarding the right against self-incrimination are therefore not applicable. The defence submits the rationale of Article 15 CAT is not limited to the issue of self-incrimination by torture victims.
52. Thobias Thienel argues in this respect that whether or not self-incrimination is an aspect of the assessment of the Article 15 exception is not relevant, given that 'a person may be much more inclined to incriminate someone else under torture than him/herself.'³⁸ This again goes to the unreliability of the content of the statement in question. Thienel concludes that 'because Article 15 UNCAT applies to the production of evidence against one person of statements coerced from someone else, the same conclusion on Article 6(1) ECHR [the right to a fair trial] is further reinforced.'³⁹
53. The Committee against Torture itself stated that Article 15 applies also to statements that are not self-incriminating and that torture evidence should be excluded from all proceedings.⁴⁰
54. The defence submits the OCIJ has wrongly interpreted the application of Article 15 CAT to situations where the issue of self-incrimination arises. For this reason, the Order must be quashed.

³⁸ T. Thienel, "The Admissibility of Evidence Obtained by Torture under International Law", in: *European Journal of International Law* 17 (2006) 349, at 358.

³⁹ T. Thienel, "The Admissibility of Evidence Obtained by Torture under International Law", in: *European Journal of International Law* 17 (2006) 349, at 359 (footnote omitted).

⁴⁰ See A/54/44, para. 45, where the Committee against Torture states that torture-tainted evidence and confessions 'should never be permitted to reach the cognizance of the judges deciding the case, in any legal procedure'.

VIII APPEAL GROUND 3: INTERPRETATION AGAINST 'ORDINARY MEANING'

8.1 Spirit of the Law versus Letter of the Law

55. The OCIJ in paragraph 23 of the Order invokes what it calls the 'spirit of the law', and holds that the spirit of the law must not be overshadowed by the letter of the law. The OCIJ fails to define this 'spirit of the law' and how, when and most importantly why it would be different from the letter of that law. Given the subsequent sentence in paragraph 23, which quotes from the Vienna Convention on the Law of Treaties, the OCIJ may be seeking to equate the 'spirit of the law' with the 'object and purpose' of the Convention. The object and purpose of said Convention is unambiguous, and indeed agreed upon by the parties and the OCIJ, namely:

Firstly, confessions or other information extracted by torture is usually not reliable enough to be used as a source of evidence in any legal proceeding. Secondly, prohibiting the use of such evidence in legal proceedings removes an important incentive for the use of torture and, therefore, shall contribute to the prevention of the practice.⁴¹

56. The decision of the OCIJ—although lacking analysis—is that the ordinary meaning of Article 15 is not in line with the Convention's 'object and purpose', and hence it substitutes its alternative interpretation.
57. The explanation the OCIJ provides for its alternative interpretation is that it is not contrary to the CAT's object and purpose. This method of treaty interpretation is erroneous and impermissible under international law. If it were correct that the ordinary meaning of Article 15 is *contradictory* to the CAT's 'object and purpose', then it could be argued that the ordinary meaning of a provision may be changed specifically to achieve a law's object and purpose.
58. However, that is not the position here. Article 15 CAT is unambiguous in its interpretation, and the ordinary meaning thereof is not in contradiction to the CAT's object and purpose. Hence, the OCIJ has failed to pay proper regard to the wording of the provision and has erred in its interpretation.⁴²

⁴¹ UN General Assembly, Torture and Other Cruel, Inhuman or Degrading Treatment, 14 August 2006, UN Doc. No. A/61/259, para. 45. The OCIJ in its Order changes the order of the elements of the object and purpose of the Convention, thus implying that the second element is more important than the first element.

⁴² See OCIJ, Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD, 19 June 2009, Document No. D164/2, para. 6, where the OCIJ states: 'an investigating judge may close a

59. The International Court of Justice ruled that:

[I]f the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words.⁴³

60. The International Court of Justice has moreover emphasized that ‘interpretation must be based above all upon the text of the treaty’.⁴⁴ One commentator states that ‘[w]hen the meaning of a treaty provision is clear, there will rarely be a need, and certainly little judicial desire, to introduce extraneous material’.⁴⁵
61. Professor Pattenden, in explaining the meaning of Article 15 CAT, explains that this provision should be interpreted strictly, in accordance with its ordinary meaning, no matter which method of interpretation is employed. She notes:

Whether a literal or theological construction is applied, this Article [15 CAT] obliges the Convention’s signatories to ‘ensure’ that no statement however reliable made under torture is admitted in any trial other than one in which the torturer is prosecuted, and even then it is to be used only to prove that the statement was made, that is to say, for a non-hearsay purpose.⁴⁶

62. The defence submits the choice of an interpretation which is favourable to the OCIJ amounts to judicial cherry-picking, and is not a correct interpretation under public international law.⁴⁷ The ordinary meaning is clear and unequivocal, is in accordance with the CAT’s object and purpose, and no alternative interpretation should be read into the CAT’s Article 15 by the OCIJ.
63. The OCIJ has erred in its interpretation of Article 15 which is contrary to the internationally accepted interpretation, and based on a method that is not in accordance

judicial investigation once he has determined that there is sufficient evidence to indict a Charged Person.’ This Order has also been appealed by the defence.

⁴³ ICJ Advisory Opinion on *Competence of the General Assembly for the Admission of a State to the United Nations*, ICJ Reports (1950), p. 8, as referred to in *Prosecutor v. Akayesu*, Judgement, Appeals Chamber, Case No. ICTR-96-4-A, 1 June 2001, Dissenting Opinion by Judge Nieto-Navia, para. 5.

⁴⁴ International Court of Justice, the *Libya / Chad* case, ICJ Reports (1994), p. 6, 22, quoted in M. Shaw, *Public International Law* (2003), p. 842.

⁴⁵ D. French, ‘Treaty Interpretation and the Incorporation of Extraneous Legal Rules’, in: *International & Comparative Law Quarterly* 281 (2006), p. 303.

⁴⁶ R. Pattenden, ‘Admissibility of Evidence Obtained by Torture of a Third Party’, in: *The International Journal of Evidence & Proof* (2006), p. 6.

⁴⁷ D. French, ‘Treaty Interpretation and the Incorporation of Extraneous Legal Rules’, in: *International & Comparative Law Quarterly* 281 (2006), p. 306.

with international law. Consequently, the OCIJ's alternative interpretation should be dismissed, and the Order quashed.

8.2 Author of the Confession Is Irrelevant

64. In interpreting the limited exception contained in Article 15 of the CAT, the OCIJ specifies in paragraph 21 of the Order that '[i]t is clear that this exception prohibits the use of statements under torture against a torture victim or against anyone implicated by a victim of torture'. In fact the exception contained in Article 15 is solely related to the use to which statements obtained under torture may be put in proceedings, namely, against a person accused of torture as evidence that the statement was made.
65. The Committee against Torture has held that all torture-tainted evidence must be excluded from criminal proceedings, whether the statement obtained was made by the defendant, a co-defendant, or a third party.⁴⁸ In the UK case of *A and Others v SSHD (No. 2)* the House of Lords held that the admissibility exclusion is very broad. Lord Bingham states that "[t]he additional qualification makes plain the blanket nature of this exclusionary rule."⁴⁹
66. The wording of Article 15 is clear and unambiguous: the author of the confession extracted under torture is irrelevant; likewise it is irrelevant who is implicated by the statement. The interpretation the OCIJ relies upon is not in accordance with the methods of treaty interpretation permitted under international law, as explained under paragraph 57 above.

⁴⁸ CAT/C/SR.111, para. 44, which is only available in Spanish, but referred to in R. Pattenden, 'Admissibility of Evidence Obtained by Torture of a Third Party', in: *The International Journal of Evidence & Proof* (2006), p. 7.

⁴⁹ *A and Others v. Secretary of State for the Home Department (No. 2)* [2005] UKHL 71, [2005] 3 WLR 1249, para. 35. See for a discussion of the use of tainted evidence in the courts of a state not itself involved in the torture, T. Thienel, "The Admissibility of Evidence Obtained by Torture under International Law", in: *European Journal of International Law* 17 (2006) 349, at 359.

IX APPEAL GROUND 4: EXCEPTION OF ARTICLE 15 APPLIES

67. The OCIJ holds that '[t]here is no basis to limit the language of the exception to the direct perpetrator alone'.⁵⁰ It continues to state that it can be used against anyone who is charged with torture, whether through direct or indirect forms of liability. Paragraph 22 then fails to specify that the statement obtained under torture shall be used *only* against a person accused of torture to show that a statement has been made under torture.
68. The OCIJ formulates its finding in a manner which indicates that the statements may be used against anyone charged with torture, whether directly or indirectly, and also in relation to other charges the Charged Person faces. In other words, the OCIJ's interpretation suggests that so long as there is a torture charge on the indictment, the torture evidence can be used as evidence against all those charges. Paragraph 28 of the Order shows that the OCIJ has formulated this wide interpretation.
69. The restrictive language of Article 15 prohibits the use of torture-tainted evidence outside the scope of Article 15 and renders its use unlawful. Hence, the Order should be quashed on this ground and the correct interpretation applied.

X APPEAL GROUND 5: PROHIBITION ON TORTURE EVIDENCE IS ABSOLUTE

70. The Order specifies in paragraph 25 that evidence obtained as a result of torture may be used outside of the Article 15 exception where the issue of reliability does not arise. Besides the fact that the defence contests that reliability is not at issue for the two categories the OCIJ mentions in paragraphs 27 and 28, the defence submits that the application of Article 15 CAT is not merely concerned with the reliability of evidence and the OCIJ has again erred in its interpretation.
71. As expressed by Lord Hope in *A and Others v SSHD (No. 2)*:

The use of such evidence is excluded not on grounds of its unreliability – if that was the only objection to it, it would go to its weight, not to its admissibility – but on grounds of its barbarism, its illegality and its inhumanity. The law will not lend its support to the use of torture for any purpose whatever. It has no place in the defence of freedom and

⁵⁰ Order, para. 22.

democracy, whose very existence depends on the denial of the use of such methods to the executive.⁵¹

72. Further the said case states that the admission of evidence obtained by torture would shock the judicial conscience, abuse or degrade the proceedings and involve the state in moral defilement, and would fail to protect the fundamental rights of the accused person.⁵² Lord Bingham, delivering the Lords' leading opinion, added further that in addition to the unreliability of torture evidence and the need to discourage the use of such material, the rationale for the exclusionary rule is also to protect the integrity of the proceedings, referring to Article 69(7) of the Rome Statute which states that:

Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: [...] (b) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

73. The defence submits that the OCIJ has erred in holding that reliability is the only factor underlying the rationale of Article 15 CAT and has failed to take account of the international law and jurisprudence which makes clear the rationale for the prohibition on the use of torture tainted evidence. Consequently, the Order should be quashed on this basis.

XI APPEAL GROUND 6: ILLEGAL TREATY INTERPRETATION

74. The OCIJ has for the aforementioned reasons erred in its interpretation of Article 15 in a manner which causes it to violate the CAT's object and purpose.
75. The exception formulated in Article 15 is that torture-tainted evidence can be used 'against the person accused of torture as evidence that the statement was made'. The OCIJ holds that '[i]t 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.'⁵³ However, the OCIJ in paragraph 28 further notes that '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

⁵¹ *A and Others v. Secretary of State for the Home Department (No. 2)* [2005] UKHL 71, [2005], para. 112.

⁵² House of Lords, *Opinion of the Lords of Appeal for judgment in the cause A (FC) and others (FC) v. Secretary of State for the Home Department*, [2005] UKHL 71, para. 39.

⁵³ Order, para. 21.

confessions'. In other words, the OCIJ does not exclude the possibility that it will indeed rely on torture-tainted material. The OCIJ errs in applying a test of 'truthfulness' as to the issue of admissibility of torture-tainted evidence.

76. This approach is not only in direct violation of the terms of Article 15 of the CAT, but also violates its object and purpose. Torture-tainted evidence is unreliable, and the OCIJ cannot, under any circumstances, make use of the content of such material, except to use a torture statement against someone accused of torture, solely to show that the statement was made under torture. Any other reliance on torture-tainted evidence is in violation of the Article 15's object and purpose, and hence erroneous. The Order should be quashed on this basis.

XII APPEAL GROUND 7: FRUIT OF THE POISONOUS TREE DOCTRINE

77. The OCIJ mentions two examples of evidence that it finds fall outside of the scope of Article 15 CAT in paragraph 27 of the Order. Appeal Grounds 7 and 8 will deal with these two exceptions.
78. The first exception is the use of torture evidence as so-called 'lead evidence', i.e. evidence upon which it bases further investigations. The justification is that '[a] great deal of "lead evidence" used in investigations is inherently unreliable'.⁵⁴ In other words, because a lot of the evidence used by the OCIJ in its investigations is unreliable anyway, no exception should be made for the inherently unreliable torture-obtained materials.
79. The defence submits that the OCIJ unlawfully relies upon evidence which has been obtained by torturous methods not only because it is inherently unreliable but also because it has the potential for others to continue to use barbaric and inhumane practices. The defence recognizes that the reliability of the material the OCIJ works with has not yet fully been established, and that this is generally not required at this stage of the proceedings. However, the position is unique and entirely different where the OCIJ has knowledge that a specific document has been obtained by torture; then the OCIJ is prohibited from using such a document.

⁵⁴ Order, para. 27.

80. The deliberations of the Committee against Torture, in interpreting Article 15 CAT, mention that '[A]rticle 15 require[s] that the judge be effectively precluded from learning of the evidence in the first place'.⁵⁵ Thus, if the OCIJ has knowledge that a document is tainted with torture, it should not use it, unless to prove that a specific statement was made, and then only in relation to a person accused of torture to show that that statement was made.
81. The doctrine of the 'fruit of the poisonous tree' provides that evidence which is based on earlier inadmissible evidence is also inadmissible in legal proceedings. It is considered that the tree, the original illegal evidence, is poisoned and everything that grows from it is tainted. Hence, the evidence based on the original illegal evidence is similarly inadmissible. For instance, if the OCIJ uses confessions in interviews it conducts with witnesses and confronts them with the illegal material, it thus taints the witness, and the evidence of the witness based on the content of such confession can no longer be deemed reliable.
82. This doctrine is also embedded in French criminal law, where the *Cour de Cassation* has held that all acts which are derived from an illegal seizure must similarly be annulled.⁵⁶ For example, the annulment should extend to a witness statement regarding items seized in the course of the illegal seizure.⁵⁷ Thus, annulment of the seizure leads to annulment of the evidence seized and of the investigative actions based on such evidence. Also related to this doctrine in French law is the annulment of the interview of a suspect who was interviewed under hypnosis. The expert report and the related profiling report based on that interview were similarly annulled because they were both based on the interview.⁵⁸ Just like torture, hypnosis is an illegal form of interrogation, though obviously much less intrusive.
83. The Committee against Torture noted that the 'fruit of torture' also falls under the prohibition of Article 15 CAT, and has heavily criticized states that permit the admission

⁵⁵ CAT/C/SR.307, 28 November 1997, para. 54.

⁵⁶ Crim, 10 décembre 1968, *Bull.* 333; Crim, 4 juin 1969, *Bull.* 186.

⁵⁷ Crim, 4 juin 1997, *Bull.* 221.

⁵⁸ Crim, 28 novembre 2001, *Bull.* 248.

of evidence that can be traced back to torture.⁵⁹ One commentator explains that the Committee against Torture does not distinguish ‘between derivative evidence that has probative value independently of the evidence obtained under torture and derivative evidence that has not’.⁶⁰

84. The exception in Article 15 CAT is limited, and does not form an exception to the fruit of the poisonous tree doctrine. One commentator noted in this regard in discussing the exception provided for in the provision itself:

The rule of Article 15 means that the fruits of the poisonous tree should not be used as evidence, i.e. the substance of a confession or other statement extracted by torture.⁶¹

85. The rule that confessions or statements extracted under torture should not be used as evidence has also been accepted in international jurisprudence and domestic jurisdictions.⁶²
86. Using torture-tainted evidence for purposes of lead evidence thus leads to a violation of the doctrine of the fruit of the poisonous tree in violation of Article 15 CAT. The evidence which is based on the torture evidence is thus also tainted, and cannot be admissible in the proceedings. The confessions may thus not be used as lead evidence for the investigations of the OCIJ.

⁵⁹ See for instance CAT/C/SR.250, Section D, para. 18, where the Committee against Torture ‘recommends that a special provision be incorporated into the State party’s criminal procedure concerning the exclusion from judicial proceedings of evidence which has been obtained, *directly or indirectly*, as a result of torture, as provided for by article 15 of the Convention’ (emphasis added); CAT/C/SR.279, Recommendations, para. 15, where the Committee recommends ‘that statements obtained directly or indirectly under torture be not produced as evidence in the courts’.

⁶⁰ R. Pattenden, ‘Admissibility of Evidence Obtained by Torture of a Third Party’, in: *The International Journal of Evidence & Proof* (2006), p. 9.

⁶¹ M. Nowak & E. McArthur, *The United Nations Convention against Torture. A Commentary* (2008), p. 536.

⁶² See for instance the various CAT jurisprudence cited throughout this appeal, and *A and Others v Secretary of State for the Home Department (No. 2)* [2005] UKHL 71, [2005] 3 WLR 1249 as the most obvious example of the application of this doctrine in a domestic jurisdiction. This case in turn refers to other cases from domestic jurisdictions.

XIII APPEAL GROUND 8: NOT ALLOWED TO RELY ON CONTENT OF CONFESSIONS**13.1 Invalid Argumentation**

87. The second exception the OCIJ formulates in contravention to Article 15 CAT is where the OCIJ holds that it does not itself use 'the information obtained [...] for the truth of its contents, but rather as evidence that the CPK relied on the contents of the confessions'.⁶³
88. It is respectfully submitted that this distinction is invalid because reliance has to be placed on the content of the confessions in order to ascertain the manner in which the information contained therein was used by the Charged Persons in the form of the CPK. This approach exceeds the limited exception contained in Article 15 of the CAT. Thus the Order should be quashed.

13.2 Inherent Unreliability Prevents OCIJ from Relying on Content

89. In paragraph 28 of the Order, the OCIJ indicates more generally that it intends to rely on the content of confessions and states that:

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.

90. The OCIJ thus defies the rationale behind the prohibition of Article 15: the inherent unreliability of torture-obtained evidence and the revulsion of civilized nations that material should ever be obtained by torturous methods. Many of the documents date back 30 years, were forcibly obtained by torture, and were in some cases, it has been stated in the Trial Chamber, compiled by the interrogators.⁶⁴ The Party leadership themselves are reported to have doubted the credibility of some of the material obtained.⁶⁵

⁶³ Order, para. 27.

⁶⁴ Duch explains: 'I still remember how the confessions are sharpened. So I would like to give you an example of how the confessions were framed because when they wanted to arrest anyone, then they would like confessions to be aimed into that direction.' See Case 001, Transcript 18 May 2009, Document No. E1/20.1/TR001, p. 53 (lines 4-7). See also, Case 001, Transcript 18 May 2009, Document No. E1/20.1/TR001, p. 56 (line 19)-p. 57 (line 2).

⁶⁵ Duch stated in court: 'However, Pol Pot at one point did not even believe that the confessions were of true information.' See Case 001, Transcript, 16 June 2009, Document No. E1/33.1/TR001, p. 29 (lines 15-17); and he stated moreover: 'Duch said he believed that even the Standing Committee itself did not believe

91. The defence submits it is impossible for the OCIJ to verify the ‘truth’ of these confessions—Duch admits such verification process is even impossible for him⁶⁶—and moreover, such verification process is against the specific prohibition of Article 15.
92. The decision of the OCIJ is a direct violation of Article 15 CAT, and hence the Order should be quashed.

13.3 Reliability Is Not a Consideration

93. Paragraph 28 of the Order implies that the OCIJ deems itself capable of assessing the reliability of the contents when it states that “it is not possible at this stage to affirm that no element of truth can ever be found in the confessions’. It is submitted that it is irrelevant whether or not this is possible, because the OCIJ is prohibited from engaging in the exercise where the statements are obtained by torture. Pattenden notes that Article 15 CAT ‘obliges the Convention’s signatories to “ensure” that no statement however reliable made under torture is admitted [...]’.⁶⁷
94. Therefore, reliability is not an aspect that may be taken into account in evaluating torture-tainted evidence. The OCIJ cannot search for reliable elements within the confessions. The Order should be quashed as a result of this.

XIV APPEAL GROUND 9: LIMITED USE OF ANNOTATIONS AND BIOGRAPHIES

95. In paragraph 19 of the Order, the OCIJ holds that ‘handwritten annotations which appear on the confessions’ and ‘preliminary biographical material’ does not fall under Article 15 CAT, because it was not established as a result of torture.
96. Where it is apparent that the annotations and preliminary biographical information were not added or compiled as a result of torture, the defence submits that the information can only be relied upon to a limited extent where it does not require or rely on any reference

the whole truth of the confessions. Agree.’ See Case 001, Transcript, 18 May 2009, Document No. E1/20.1/TR001, p. 50 (lines 10-12).

⁶⁶ Duch states: ‘I can say in short that I did not have anything to measure whether the confessions were truth or not.’ See, Case 001, Transcript 18 May 2009, Document No. E1/20.1/TR001, p. 51 (lines 1-3).

⁶⁷ R. Pattenden, ‘Admissibility of Evidence Obtained by Torture of a Third Party’, in: *The International Journal of Evidence & Proof* (2006), p. 6 (emphasis added).

back to the content of the ‘confession’. Any use by reference to their content is prohibited by Article 15.

XV APPEAL GROUND 10: WHEN / BY WHOM TORTURE OCCURRED IS IRRELEVANT

97. In footnote 30 of the Order, the OCIJ indicates that the ‘impugned evidence, dating back 30 years, was not obtained by the ECCC or any officials acting pursuant to the authority of the ECCC’. The defence submits that it is irrelevant which authority was in charge at the relevant periods, and that the evidence is not admissible no matter when the torture was committed and by whom.
98. In the House of Lords decision in *A and Others v SSHD (No. 2)*, cites Lord Justice Neuberger comments in the Court of Appeal that Article 15 applies no matter where the torture took place.⁶⁸ The Committee against Torture in explaining Article 15 CAT emphasized that evidence obtained under torture is automatically inadmissible and judges should not be given discretionary powers to verify torture-tainted evidence.⁶⁹
99. The European Human Rights Commissioner said in a report on the United Kingdom that ‘torture is torture whoever does it, judicial proceedings are judicial proceedings, whatever their purpose—the former can never be admissible in the latter’.⁷⁰
100. Whilst the OCIJ noted that the evidence is thirty years old and was not obtained by ECCC authorities is thus irrelevant and does not negate the fact that the evidence is strictly inadmissible. Hence, the order must be quashed.

⁶⁸ Lord Neuberger in *A and Others v Secretary of State for the Home Department (No. 2)* [2004] WECA Civ 1123, [2005] 1 WLR 414 at [448], *per* Neuberger LJ, referred to in: R. Pattenden, ‘Admissibility of Evidence Obtained by Torture of a Third Party’, in: *The International Journal of Evidence & Proof* (2006), p. 10. See for an analysis of the case of *A and Others v Secretary of State for the Home Department*, T. Thienel, ‘Foreign Acts of Torture and the Admissibility of Evidence’, in: *Journal of International Criminal Justice* 4 (2006), p. 401-409.

⁶⁹ CAT/C/CR/30/6 (2003), under C-Subjects of Concern, para. 5 under (o). See also: CAT/C/SR.494, para. 33; and A/48/44, para. 148.

⁷⁰ Mr. Alvaro Gil-Robles, the Council of European Commissioner for Human Rights, quoted in R. Pattenden, ‘Admissibility of Evidence Obtained by Torture of a Third Party’, in: *The International Journal of Evidence & Proof* (2006), p. 12.

XVI APPEAL GROUND 11: MISINTERPRETATION OF RATIONALE OF ARTICLE 15

101. The OCIJ states in interpreting the rationale underlying Article 15 CAT:

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 torturer but would instead allow those who are accused of torture to use the laws designed to prevent torture to 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.⁷¹

102. The defence submits this argument represents a fundamental misunderstanding of Article 15 CAT. It is contrary to the interpretation of this provision as explained by the Committee against Torture and many domestic courts.

103. The OCIJ states that a literal interpretation of Article 15 would ultimately lead to shielding the would-be torturers from liability. The opposite is true. Civilised societies have tried through their national laws and by means of the development of international laws and treaties to criminalize the use of torture for whatever purpose and to ensure that where such inhumane, barbaric and grotesque methods do prevail the information obtained shall not be used. The OCIJ err in failing to recognize this.

104. It is hoped that the ECCC will set an example and leave a legacy to the legal profession in Cambodia and its wider population. Cambodia is a country where the practice of torture has not yet been eradicated. The Committee against Torture even specifically advised Cambodia a few years ago that it should not use evidence tainted by torture practices in its criminal proceedings.⁷²

105. One report on the situation in Cambodia states that: 'Torture continues to exist in Cambodia because it is allowed to. Torturers know that they are unlikely to be punished. Laws are poorly enforced; opportunities to avoid them are rampant.'⁷³ This report furthermore states:

The government and judiciary are prime accomplices to torture in Cambodia. By failing to adequately investigate and prosecute torture cases, they condone the use of torture.

⁷¹ Order, para. 24 (footnote omitted).

⁷² Committee against Torture, Conclusions and Recommendations of the Committee against Torture: Cambodia, 27 May 2003, Doc. No. CAT/C/CR/30/2 (Concluding Observations/Comments), para. 6 under (h) and para. 7 under (f).

⁷³ J. Barber, 'Less than Human. Torture in Cambodia', June 2000, p. 144 (of the Word version).

There appear to be no independent institutions willing or capable of holding powerful groups of torturers, such as police, soldiers and other government agents, accountable to the law. A lack of political willpower, to strengthen the independence and professionalism of the judiciary, among other necessary reforms, is the biggest barrier to changing this situation.

Torture is also perpetuated by an attitude of acceptance of the status quo: the belief that torture – and other violence and exploitation, and related crimes such as corruption and extortion – are ‘normal’ and to be expected.⁷⁴

106. A report by the UN Human Rights Council of 2008 specifically refers to the practice of the use of coerced confessions in Cambodian criminal courts:

Previously, a confession could not be a basis for conviction unless corroborated by other evidence. This safeguard is removed, giving confessions the same weight as other evidence (art. 321), although PPC reiterates the prohibition on the use of coerced confessions. There is a heavy reliance on confessions, many obtained through coercion or torture. The new rule could undermine the prohibition of evidence obtained by forced confessions by the Constitution and the Convention against Torture.⁷⁵

107. These reports and others⁷⁶ indicate that torture is still rampant in Cambodia, and that coerced confessions are still being used in criminal proceedings contrary to law. If the ECCC were now seen to rely on evidence that is tainted by torture, whether directly or indirectly, the Court will set the wrong example, which can only have an adverse influence on the Cambodian system in the future.
108. It is of the utmost importance that the ECCC upholds the highest standards of international law and human rights protection. Future criminal cases will rely upon the examples set by this Court. If the Court will rely on torture-tainted evidence, chances are that the Cambodian legal system will follow and allow further reliance on such evidence resulting from torturous practices nowadays.
109. The defence submits that the exclusion of evidence obtained through torture is excluded regardless of reliability (which goes to the weight of the evidence), but because its use is too abhorrent to justify and would set the wrong example to a country where the practice of torture has not yet been eradicated. For these reasons, the Order must be quashed.

⁷⁴ J. Barber, ‘Less than Human. Torture in Cambodia’, June 2000, p. 145 (of the Word version).

⁷⁵ UN Human Rights Council, 29 February 2008, Document No. A/HRC/7/42, para. 24.

⁷⁶ See also, *inter alia*, Cambodian League for Promotion and Defense of Human Rights, ‘Torture in Police Custody’, April 2003; US Department of State Report Cambodia 2007; and Freedom House, ‘Freedom in the World 2009’.

110. Moreover, besides having an adverse effect on Cambodian society, interpreting Article 15 CAT in a manner contrary to the Committee against Torture and other domestic jurisdictions' interpretation would lead to a fragmentation in the interpretation of this CAT. This would leave the option open for Cambodian and other courts around the world to interpret this Article favourably to their particular position, just like the OCIJ proposes to do in this particular case. This would ultimately adversely affect the rationale behind Article 15 CAT. Also for this reason, the OCIJ Order has to be quashed.
111. Since the drafting of this appeal, the Cambodian Center for Human Rights published an amicus brief to the Pre-Trial Chamber dealing with this particular issue of the legacy of the ECCC in Cambodia.⁷⁷ The defence exhibits this amicus brief to this appeal.

XVII APPEAL GROUND 12: APPLICABILITY OF *IN DUBIO PRO REO*

112. It is a principle of international criminal law, and indeed in many domestic jurisdictions, that in criminal proceedings where there is any doubt in the correct interpretation of a legal provision, it should be resolved in favour of the accused person. This is the so-called principle of *in dubio pro reo*, as enunciated in the *Tadic* case, where the ICTY Appeals Chamber held that 'in applying these criteria, any doubt should be resolved in favour of the Defence, in accordance with the principle *in dubio pro reo*'.⁷⁸
113. In interpreting the Convention against Torture, and more specifically Article 15 thereof, the interpretation most favourable to the Charged Person must be employed. If, which is not accepted, the Pre-Trial Chamber views the interpretation relied upon by the OCIJ as capable of being correct, it should not be followed as to do so would violate the principle. Also on this basis, the Order must be quashed.

⁷⁷ CCHR, 'Application of the CCHR to Present an Amicus Curiae Submission Pursuant to Internal Rule 33 – Amicus Curiae Submission of the CCHR', 7 September 2009, available at: [http://www.cchrcambodia.org/English/add_report/reports/cchr%20acb%20sept.%207\(090709_1252307364\).pdf](http://www.cchrcambodia.org/English/add_report/reports/cchr%20acb%20sept.%207(090709_1252307364).pdf).

⁷⁸ *Prosecutor v Tadic*, IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998, para. 73.

XVIII APPEAL GROUND 13: OCIJ DOES NOT HAVE RIGHT TO LEGISLATE

114. The OCIJ thus redefines the CAT's object and purpose. Relying on a self-defined object and purpose of the Convention against Torture and the rationale of Article 15 thereof has the effect of providing the court with too much discretion, and leads to the court engaging in judicial law-making.⁷⁹
115. The Committee against Torture has been unequivocal in its rejection of allowing the judiciary too much discretion in determining the scope of Article 15 CAT.⁸⁰ The International Arbitral Tribunal specified that the process of interpretation is 'a judicial function, whose purpose is to determine the precise meaning of a provision, but which cannot change it'.⁸¹
116. The doctrine of *non liquet* (literally 'it is not clear') allows a judge to fill judicial gaps where the law is incomplete.⁸² However, in the case of Article 15, the law is not incomplete. It is clear and unambiguous in its statement and any interpretation in contradiction to the ordinary meaning of the law is unlawful.
117. The interpretation of the CAT and Article 15 set out in paragraphs 21, 23-25 and 28 of the Order does not accord with the internationally accepted interpretation, as provided by the Committee against Torture and other domestic jurisdictions. By creating a new object and purpose for the CAT and a new rationale for Article 15 thereof, the OCIJ engages in judicial law-making, an act which is prohibited under international law. Hence, the OCIJ decision must be quashed.

⁷⁹ M. Shaw, *Public International Law* (2003), p. 839.

⁸⁰ CAT/C/CR/30/6 (2003), under C-Subjects of Concern, para. 5 under (o). See also: CAT/C/SR.494, para. 33; and A/48/44, para. 148.

⁸¹ International Arbitral Tribunal, Case of Argentina v. Chile, Laguna del Desierto, Judgment, 21 October 1994, referred to in M. Shaw, *Public International Law* (2003), p. 841.

⁸² M. Swart, *Judges and Lawmaking at the International Tribunals for the former Yugoslavia and Rwanda* (2006), p. 67.

XIX APPEAL GROUND 14: INSUFFICIENTLY REASONED ORDER

118. The Order '[d]ismisses the Defence Request', however, in doing so it fails to specify why one of the basic arguments raised by the Defence in the Defence Request and Reply was dismissed. This is a breach of the OCIJ's obligation to issue reasoned decisions.
119. In Section 3.7 of the Defence Request (Right to a Fair Trial), the defence specified that the OCIJ's failure to exclude torture-tainted evidence from the Case File leads to an infringement of the Charged Person's right to a fair trial. The OCIJ in its Order dismissed the entire Defence Request, but the Order fails to provide reasons for dismissing the Defence argument.
120. Each judicial decision should provide reasons for the conclusions it reaches. The European Court of Human Rights held that this is a general principle of law, as noted in *Hadjianastassiou v. Greece*:
- The national courts must [...] indicate with sufficient clarity the grounds on which they based their decision. It is this, inter alia, which makes it possible for the accused to exercise usefully the rights of appeal available to him.⁸³
121. This requirement similarly applies to the underlying Order, which needs to provide adequate reasoning for its decision. As said, it fails to explain why it dismissed the fair trial argument. Also, it fails to explain why it dismisses the generally accepted interpretation of Article 15, as provided for by the CAT and international and domestic jurisprudence. The defence respectfully submits that the Order on several issues fails to reach this threshold.
122. For this reason, the Order must be quashed and substituted by a decision by the Pre-Trial Chamber.

XX CONCLUSION

123. In the premises, the defence submits the OCIJ Order should to be quashed.

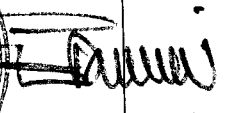
⁸³ *Hadjianastassiou v. Greece*, Judgment, European Court, Appl. No. 12945/87, 16 December 1992, para. 33.

- The PTC has jurisdiction to hear the appeal on the basis of violation of the Charged Person's fair trial rights, and pursuant to the Internal Rules 74(3)(b) and 55(10);
- The defence submits there are fourteen appeal grounds, each individually provides a sufficient basis for the quashing of the Order;
- The defence requests the Pre-Trial Chamber to rule that the Order should be quashed and replaced with its own ruling.

XXI PRAYER

124. For the above reasons, the defence respectfully requests the Pre-Trial Chamber to quash the OCIJ Order, and order the OCIJ instead to:

- A. 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 C (5 – Confessions), Doc. No. D82 (Tuol Sleng documents), Doc. No. D43 (DC-Cam documents)⁸⁴ and expert evidence relying upon confessions, such as Document No. D2/15 by Craig C. Etcheson.
- B. Refrain from using such statements in any other way than set out under A above.

Party	Date	Lawyers	Place	Signature
Co-Lawyers for Ieng Thirith	10 September 2009	PHAT Pouy Seang	Phnom Penh	

⁸⁴ Doc. No. D3, Annex C – Other Evidentiary Material, Document Index, ERN 00141524-00141652, relevant pages 13-28; Doc. No. D82, Rogatory Letter, 29 January 2008, ERN 00173193-00173194, and all Annexes and Reports of Rogatory Letters related to D82; and Doc. No. D43, Rogatory Letter, 7 December 2007, ERN 00156491-00156492, and all Annexes and Reports of Rogatory Letters related to D43.