BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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NUON CHEA'S SUBMISSIONS REGARDING THE USE OF "TORTURE-TAINTED EVIDENCE" IN THE CASE 002/02 TRIAL

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I. INTRODUCTION

1. Pursuant to Rule 92 and the Trial Chamber's request for written submissions,[1] the Co-Lawyers for Mr. Nuon Chea (the "Defence") make the following submissions regarding the use of "torture-tainted evidence" in the Case 002/02 trial (the "Submissions").

II. PROCEDURAL HISTORY

2. The Chamber held over the course of the Case 002/01 trial that, pursuant to Article 15 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), evidence produced by torture was inadmissible under all circumstances for the truth of its contents.[2] This decision was replicated in the Case 002/01 Judgement (the "Judgement").[3]

3. On 29 September 2014, the Defence filed its notice of appeal against the Judgement, noticing as appeal ground 36 that "[t]he Trial Chamber erred in law in holding that torture tainted evidence could not be used for the truth of its contents under any circumstances".[4] On 29 December 2014, the Defence submitted detailed arguments in support of this ground of appeal in its substantive appeal brief.[5]

4. During trial hearings on 24 April 2015, the Defence asked witness Pech Chim whether he was aware that "[Kang Chap *alias*] Sae implicated you and your brothers as belonging to his network".[6] After the witness answered the question, Judge Lavergne inquired as to the question's evidentiary basis. The Assistant Prosecutor subsequently suggested the basis was Kang Chap's S-21 confession, which the Defence denied. The Chamber and the parties nevertheless proceeded to have a more general discussion as to the use of the contents of "torture-tainted evidence" as a foundation for questions to a witness at trial. This discussion prompted the Defence to make an oral request for a clear, reasoned decision on the specific question of whether the Defence was permitted to ask the witness "whether he's aware of the fact that Sae has implicated him".[7] The Chamber indicated that it would rule on this question after the lunch break. However,

[1] Email from the Senior Legal Officer of the Trial Chamber, to the Parties, 7 May 2015 ("TC Email").
[2] **E74**, 'Trial Chamber Response to Motion E67, E57, E56, E58, E23, E59, E20, E33, E71 and E73 Following Trial Management Meeting of 5 April 2011', 8 Apr 2011 ("TC Procedural Decision"), p. 3.
[3] **E313**, 'Case 002/01 Judgement', 7 Aug 2014 ("Judgement"), para. 35.
[4] **E313/1/1**, 'Notice of Appeal Against the Judgment in Case 002/01', 29 Sep 2014, p. 7 (Ground 36).
[5] **F16**, 'Nuon Chea's Appeal Against the Judgment in Case 002/01', 29 Dec 2014 ("Appeal Brief"), pp. 261-267 (Section XXII).
[6] T. 24 Apr 2015 (Pech Chim, **E1/292.1**), p. 30, lns. 11-12.
[7] T. 24 Apr 2015 (Pech Chim, **E1/292.1**), p. 30, ln. 16 – p. 35, ln. 12.

the Chamber ultimately indicated that its decision would be delayed since it "need[ed] time to review the actual transcript and the relevant legal frameworks."[8]

5. It was also on 24 April 2015 that the Co-Prosecutors filed their response to the two defence Case 002/01 appeal briefs. In that brief, the Co-Prosecutors neglected to present substantive arguments in connection with the use of "torture-tainted evidence", other than to simply characterise the Defence's appeal ground as "legally specious and morally bankrupt".[9]

6. Throughout the Case 002/02 trial – and most memorably during their 27 April 2015 document presentation on the Tram Kok Cooperatives/Kraing Ta Chan Security Centre – the Co-Prosecutors have on numerous occasions sought to refer to the contents of interrogation records from Kraing Ta Chan Security Centre. This is discussed in more detail at paragraph 29 below.

7. On 5 May 2015, the Defence sought to confront witness Khoem Boeun with a passage from DK West Zone Secretary Chou Chet's S-21 confession that Southwest Zone Sector 13 Secretary Saom had been an oppressive and radical person. The Defence explained that it sought to do so in order to ask if the witness agreed with this statement.[10] However, the Chamber prohibited the Defence from asking this question on the basis that "any questions based on the interview or record or statement as a result of torture may be prohibited in the Chamber".[11] The Defence emphasised that its preliminary investigation indicated that there was no "*prima facie* evidence that Chou Chet was tortured".[12] Nevertheless, when the Defence sought to revisit the passage from Chou Chet's testimony later that same day, the Chamber again prohibited this on the basis that the content of "a record or statement as a result of torture" cannot be used before the Chamber.[13] The Chamber indicated that a "full decision" – presumably in relation to the Defence's 24 April 2015 request concerning the question it posed to Pech Chim – was to be delivered the following week.[14]

[8] T. 24 Apr 2015 (Pech Chim, **E1/292.1**), p. 47, lns. 23-24.
[9] **F17/1**, 'Co-Prosecutors' Response to Case 002/01 Appeals', 24 Apr 2015, para. 6.
[10] T. 5 May 2015 (Khoem Boeun, **E1/297.1**), p. 32, lns. 17-19.
[11] T. 5 May 2015 (Khoem Boeun, **E1/297.1**), p. 33, lns. 10-12.
[12] T. 5 May 2015 (Khoem Boeun, **E1/297.1**), p. 33, lns. 19-21.
[13] T. 5 May 2015 (Khoem Boeun, **E1/297.1**), p. 56, lns. 19-20: "The Chamber does not allow you to do that or to read an extract from a record or statement as a result of the torture, and that's the end of it".
[14] T. 5 May 2015 (Khoem Boeun, **E1/297.1**), p.55, ln. 16.

8. Two days later, on 7 May 2015, International Co-Prosecutor Nicholas Koumjian raised the question of the use of "torture-tainted evidence". He suggested that the Chamber was due to release a decision "on the use of evidence that was obtained by torture in this Trial".[15] The International Co-Prosecutor said that in light of the importance of this issue to the trial and international jurisprudence, the Chamber should "have an oral hearing for a half hour or an hour where Parties could be heard", or alternatively, invite parties to submit written submissions.[16] He based this request in part on the erroneous assertion[17] that Defence "never indicated" its arguments concerning "torture-tainted evidence" as a ground of appeal in its appeal notice, noting that this was the reason the Co-Prosecutors did not respond to it.[18] On 7 May 2015, the Chamber granted the International Co-Prosecutor's request, requesting written submissions from the parties regarding evidence obtained through use of torture to be filed by 21 May 2015, with one hour of oral submissions to follow on 25 May 2015.[19]

III. ARGUMENT

A. Scope of the Trial Chamber's Forthcoming Reasoned Decision

9. The Defence understands that the Trial Chamber's forthcoming reasoned decision will address only the admissibility of the specific form of question the Defence put to witness Pech Chim on 24 April 2015.[20] As stated during that hearing, the Defence is of the view that a question formulated in that manner should be and is permissible.[21] The Defence notes, however, that the International Co-Prosecutor has characterised the forthcoming decision as one that will address "the use of evidence that was obtained by torture in this Trial."[22] This question is far broader in scope than the one put to the Chamber by the Defence on 24 April 2015. It is also significantly different in nature, being a question of general importance to the jurisprudence of this Tribunal and to Nuon Chea's defence in Case 002/02;[23] in short, it is the very question that is presently before the Supreme Court Chamber in the Case 002/01 appeal.

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[15] T. 7 May 2015 (AEK Hoeun, Draft Transcript), p. 3, lns. 6-9.
[16] T. 7 May 2015 (AEK Hoeun, Draft Transcript), p. 3, lns. 9-19.
[17] *See* para. 3.
[18] T. 7 May 2015 (AEK Hoeun, Draft Transcript), p. 3, ln. 4 – p. 5, ln. 4.
[19] TC Email.
[20] T. 24 Apr 2015 (Pech Chim, **E1/292.1**), p. 33, lns. 3-4.
[21] T. 24 Apr 2015 (Pech Chim, **E1/292.1**), p. 33, ln. 6; p. 34, lns. 19-20 and p. 46, lns. 20-25 – p.47, lns. 1-5.
[22] T. 7 May 2015 (AEK Hoeun, Draft Transcript), p. 3, lns. 8-9.
[23] *See* **F16**, Nuon Chea Appeal Brief, para. 707.

10. Indeed, given the Co-Prosecutors' failure to address the Defence's arguments on the use of "torture-tainted evidence" in its appeal response brief and the Supreme Court Chamber's refusal to grant the Co-Prosecutors time and page extensions for that brief, it would appear that the introduction of the broader question as to the use of "torture-tainted evidence" is a means by which the Co-Prosecutors can nevertheless secure additional time, additional pages and a forum in which to respond to those arguments anyway. This is a patent abuse of process and cannot and should not be permitted.

11. The Defence believes that the issue as to the proper use of "torture-tainted evidence" will be one for which the Supreme Court Chamber will seek detailed oral submissions during the imminent appeal hearings. It follows that the Trial Chamber is not the proper forum in which to litigate in detail the broad question as to the use of "torture-tainted evidence" at this stage of the proceedings. Accordingly, the forthcoming reasoned decision by the Trial Chamber should be limited to the specific question put to the Chamber by the Defence on 24 April 2015.

12. In the event that the Chamber nevertheless considers it appropriate to issue a decision on the use of torture-tainted evidence in general, the Defence:

    (a) submits that such decision should only be interlocutory in nature and subject to revision pending a decision by the Supreme Court Chamber;

    (b) reserves the right to file an additional motion to the Chamber with variations or extensions to its arguments detailed below in light of developments during the appeal hearings; and

    (c) incorporates into these Submissions, *mutatis mutandis*, the detailed arguments at paragraphs 706 to 722 of its Appeal against these practices, which it summarises in Parts B and C below.

B. Article 15 of the CAT Does Not Apply to the Defence

13. Article 15 of the CAT states:

> 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.

14. Article 31 of the Vienna Convention on the Law of Treaties (the "VCLT") requires that a treaty to be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

(i) Object and Purpose of CAT

15. CAT's preamble provides a clear description of its object and purpose, in particular paragraph 6, which expresses the States Parties' desire "to make more effective the struggle against torture and other inhuman or degrading treatment or punishment throughout the world". Article 15 serves this object and purpose by removing a major incentive for law enforcement to use torture, with a view to contributing to its prevention.

16. Nothing in the preamble suggests that rules of evidence and the right to a fair trial form part of CAT's concern. On the contrary, the fact that the preamble refers only to Article 5 of the UDHR and Article 7 of the ICCPR (both of which concern the principle that no one shall be subjected to ill-treatment) while refraining from referring to any other provisions, including those relating to fair trial rights, clearly evidences that such issues do not constitute CAT's object and purpose.

(ii) Interpretation of Article 15 in Light of the Object and Purpose of CAT

17. In light of the object and purpose of CAT, the only reasonable interpretation of Article 15's exclusionary rule is that it applies only to the use of the content of torture-tainted statements by state authorities *against* individuals, rather than *by* individuals *for* their defence. This interpretation is consistent with the language of Article 15.

18. The preparatory work and drafting history of CAT[24] shows that Article 15 originated from Article 12 of the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

19. This provision reads:

> Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment may not be invoked as evidence *against* the person concerned or *against* any other person in any proceedings. (emphasis added)

[24] UN Economic and Social Council, Commission of Human Rights, 'Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in particular Torture and Other Cruel Inhuman or Degrading Treatment or Punishment', 35th Session, UN Doc. No. E/CN.4/1314, 19 Dec 1978, p. 18; Nowak & McArthur, 'The United Nations Convention Against Torture: A Commentary' (2008), pp. 506-507.

20. The use of the term 'against' has the effect of limiting the scope of the application of this article. However, as rightly observed by the New Zealand High Court in *R v. Vagaia*, when a defendant uses a statement in support of his or her defence, the use was 'for' that person and 'by' that person, rather than 'against' anyone.[25] Thus, the High Court concluded that a rule prohibiting the use of certain evidence 'against' a person does not prohibit a person to use that evidence 'for' him/herself.[26] Similarly, the term 'against' in Article 12 of the 1975 Declaration clearly indicates that the article was not intended to be applied to the use of torture-tainted statements *by* and *for* a person.[27]

(iii) Subsequent State Practice

21. Article 31(3) of the VCLT permits reference to subsequent agreement between or practice among state parties in the interpretation of a treaty. State practice confirms that Article 15 of CAT is intended only to exclude the use of evidence by the prosecution against a defendant. Most significantly, the Constitution of the Kingdom of Cambodia prohibits the use of confessions obtained by physical or mental force "as evidence of guilt".[28] In New Zealand, the only exclusionary rules relevant to CAT Article 15 are those formulated in Sections 28-30 of the 2006 Act, which regulate the exclusion of a defendant's out-of-court statements on the grounds of being unreliable, influenced by oppression (including ill-treatment), or improperly obtained. All three sections explicitly limit their application to situations where it is the prosecution who offers or proposes to offer the evidence (against an accused). In its 2013 Review of the 2006 Act, the New Zealand Law Commission expressly explained that '[t]he applicable rules that determine whether a defendant's statement is admissible depend on who is seeking to adduce the statement: the defendant, the prosecution, or a co-defendant',[29] and that when it is a co-defendant, rather than the prosecution, who proposes to use the confession of a defendant as evidence, the admissibility of the statement will be governed by the 'general admissibility rules' such as hearsay, rather than by the

[25] *R v. Vagaia*, HC AK CRI 2006-092-16228 [2008] NZHC 306, 11 Mar 2008, para. 9. The issue in question was whether a co-defendant was allowed to use of the confession of another defendant in the same case. The NZ law stipulates that the confession of one defendant may not be used "against" another defendant (co-defendant) tried in the same case.
[26] *R v. Vagaia*, HC AK CRI 2006-092-16228 [2008] NZHC 306, 11 Mar 2008, para. 9.
[27] While the final language of Article 15 removed the word 'against', the reason for this decision was *not* to prohibit the use of torture-tainted evidence by or for the accused, but to ensure that such evidence *could* be used against the torturer. *See*, Nowak & McArthur, 'The United Nations Convention Against Torture: A Commentary' (2008), pp. 505-507. Accordingly, the purpose was not to expand Article 15, but to restrict it.
[28] Constitution of the Kingdom of Cambodia, Art. 38.
[29] 'The 2013 Review of the Evidence Act 2006', New Zealand Law Commission, 11 Mar 2013, para. 3.38.

exclusionary rules set out in Sections 28-30.[30] In the German Code of Criminal Procedure, exclusionary rules relevant to CAT Article 15 can be found in Sections 136a and 69a, which provide for the exclusion of statements obtained in a manner that impairs the accused's or a witness's "freedom to make up his mind and to manifest his will". Both sections are specifically designed to govern the admission of statements obtained through the "examination" (similar to interview) process, during which the accused and witnesses are examined by the state authorities for the purpose of a particular trial. Therefore, these rules do not apply to statements that are not produced by the state authorities' "examination" for the need of the present trial, for example, contemporaneous statements produced before the state even started to pursue the case. Accordingly, both New Zealand and Germany continue to follow the original intent interpretation of CAT Article 15: that it is limited to the use of the statement by the prosecution as evidence *against* an individual.

22. In the United Kingdon, the 1984 Police & Criminal Evidence Act similarly provided only for the exclusion of confessions of the accused proposed for admission by the prosecution (s76). The 2003 Criminal Justice Act subsequently extended the exclusionary rule to the use of a torture-tainted confession by a co-accused person charged in the *same trial*. The limited nature of this extension reflects the same underlying rationale as the prohibition on the use of such evidence by the prosecution: it is concerned with the potential prejudice to one defendant which may be caused by the use of such evidence by another defendant in the same trial. This rule, which does not apply to separate trials, establishes that the UK legislature consciously chose to continue to permit the use of torture-tainted evidence by an accused in all other scenarios.

23. These considerations establish that CAT Article 15 was not and is not intended to cover the use of a statement by an accused in defence of his innocence, rather than against him (let alone a scenario where the person who made the statement is not charged in the same proceeding as the person who proposes to use the statement).

C. Torture-Tainted Evidence Adduced by the Accused May be Admitted

24. Admission of evidence is a discretionary decision of the Chamber. At the ECCC, this discretion is reflected in Rule 87(3). Exercising that discretion involves striking a balance between conflicting values. It is crucial to determine first and foremost what

[30] 'The 2013 Review of the Evidence Act 2006', New Zealand Law Commission, 11 Mar 2013, para. 3.44.

values are at stake, so that a chamber would be able to avoid abusing its discretionary power by "[giving] weight to 'extraneous or irrelevant considerations" or "fail[ing] to give weight or sufficient weight to relevant considerations".

25. When the prosecution seeks to use a torture-tainted statement against an individual (the scenario covered by CAT Article 15), the value of crime control (the public interest in convicting the guilty) conflicts with the need to ensure proper behaviour by the authorities, the struggle against torture, and the moral concerns over the brutality of torture. Judicial decisions and academic work on the topic of the exclusion of evidence under CAT Article 15 accordingly focus their analysis on these values. This is exemplified by A & Ors and the extensive sources referred to therein, in which the court emphasized that the core concern is ensuring that "conviction" may not be obtained at "too high a price"; that is to say, in prosecuting crimes, the state is not allowed to disregard "certain decencies of civilised conduct" or act in such a manner that "shocks the community", as such conduct "would compromise the integrity of the judicial process, dishonour the administration of justice".

26. By contrast, when a defendant seeks to use torture-tainted evidence in support of his or her defence, the value of crime control is replaced by the value of ensuring that the innocent must not be convicted. Ensuring that the innocent is not convicted is the overriding concern of a criminal proceeding. As Judge Van den Wyngaert stated in her dissenting opinion in Katanga, "the trial must be first and foremost fair towards the accused. […] After all, when all is said and done, it is the accused - and only the accused – who stands trial and risks losing his freedom and property". ICTY jurisprudence has also repeatedly emphasised that "an over-riding principle in matters of admissibility of evidence" is that "[t]he Trial Chamber is […] the guardian and guarantor of the procedural and substantive rights of the accused".

27. In line with this common understanding, many domestic legal systems give leeway to the accused in terms of admission of evidence when innocence is at stake. The NMTs adopted a largely liberal approach towards evidence admission, in particular when it comes to defence evidence. In the Einsatzgruppen case, the Tribunal II considered some of the defendants' evidence "strictly irrelevant and might well be regarded as the red herring drawn across the trial", but it nevertheless admitted all of them on the ground that "the Tribunal's policy throughout the trial has been to admit everything which

might conceivably elucidate the reasoning of the defence". In Canada, the rule of confidentiality of the identity of police informants, which is based on public policy, is subject to only one exception, i.e. "innocence at stake" exception. The rationale is that when these two public policies are conflicting, "that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail". In Denmark's national law, one of the general positions towards illegally obtained evidence is that if the unlawfully obtained evidence is favourable to the defendant, the evidence "must as a main rule be admitted". In Greece, the jurisprudence is that the Constitution does not preclude the use of illegally obtained information as evidence for the purpose of establishing the innocence of the accused. Austrian courts also indicate that illegally obtained evidence is not automatically excluded, especially when the admission of evidence by the Accused appears to be imperative in the interest of fair proceedings.

28. Where a torture-tainted statement is sought as evidence by a defendant and may prove his innocence or materially assist in so proving, a court should admit the evidence and assess its weight later. This is particularly so in regard to the very serious charges at issue in Case 002. As rightly remarked by the European Court of Human Rights, "the seriousness of what is at stake for the applicant will be of relevance to assessing the adequacy and fairness of the procedures". Nuon Chea's interest in adducing evidence critical to his defence against crimes against humanity, war crimes and genocide implicating millions of alleged victims is the overriding consideration.

D. Torture-Tainted Evidence Adduced by the Co-Prosecutors, in Contrast, Cannot be Admitted

29. In the Case 002/02 trial, questions as to permissible uses of "torture-tainted evidence" first arose during hearings on alleged events at Kraing Ta Chan Security Centre. The Defence recalls that it is the Co-Prosecutors who have alleged that "Kraing Ta Chan prisoners underwent severe interrogation and *torture*".[31] However, despite this allegation, the Co-Prosecutors have often referred to the *contents* of Kraing Ta Chan interrogation records (i.e. allegedly "torture-tainted evidence") themselves. For instance, during their document presentation on 27 April 2015, the Co-Prosecutors offered numerous, detailed analyses of Kraing Ta Chan interrogation record *contents*.

[31] **D390**, 'Co-Prosecutors' Rule 66 Final Submission', 16 Aug 2010, para. 487 (emphasis added).

Inter alia, they presented statistics on the number and precise rank of former Lon Nol soldiers and officials interrogated;[32] excerpts from confessions intended to illustrate maltreatment of Vietnamese;[33] and excerpts from confessions intended to illustrate apparently trivial reasons for prisoners' arrests.[34]

30. The Co-Prosecutors are quick to level cheap accusations of moral bankruptcy at the Defence when it has sought to refer to the contents of allegedly "torture-tainted evidence" in Nuon Chea's favour, while at the same time seeking to rely on the same type of evidence to establish Nuon Chea's guilt. The Defence noted that this appeared to be a double standard,[35] which the Chamber itself appears to have recognised on at least one occasion.[36] However, while the form of evidence may be identical, its permissible use differs. As argued in Parts B and C above, while Article 15 of CAT should properly operate so as to prevent the Co-Prosecutors from using allegedly "torture-tainted evidence" against Nuon Chea, where the Defence conversely seeks to adduce allegedly "torture-tainted evidence" in order to assist in proving Nuon Chea's innocence, this latter form of usage should be permitted by the Chamber.

IV. RELIEF

31. For the above reasons, the Defence requests that the Trial Chamber issue an interlocutory decision permitting the Defence to put questions to witness in similar form to that which it put to witness Pech Chim on 24 April 2015.

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[32] T. 27 Apr 2015 (Document Hearing, **E1/293.1**), p. 22, ln. 11 – p. 23, ln. 4 (E3/4095).
[33] T. 27 Apr 2015 (Document Hearing, **E1/293.1**), p. 9, lns. 7-20 (E3/2107), p. 9, ln. 22 – p. 10, ln. 8 (D157.7).
[34] *See, e.g.*, T. 27 Apr 2015 (Document Hearing, **E1/293.1**), p. 27, ln. 20 – p. 28, ln. 9 (E3/2107), p. 45, lns. 3-25 (E3/4095).
[35] T. 27 Apr 2015 (Document Hearing, **E1/293.1**), p. 25, lns. 22-24 ("I do not see any difference between reading from these [Kraing Ta Chan interrogation] notes and asking questions to [a] witness possibly basing myself upon S-21 records").
[36] *See, e.g.*, T. 18 May 2015 (Vorng Sarun, Draft Transcript), p. 36, lns. 2-8, lns. 19-22.