00324573

D130/5

BEFORE THE CO-INVESTIGATING JUDGES
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

Case No.	:	002/19-09-2007-ECCC/OCIJ
Filed to	:	Co-Investigating Judges
Date of Document	:	30 April 2009
Party Filing	:	Office of the Co-Prosecutors
Original Language	:	English
Classification of the Document Suggested by the Filing Party	:	PUBLIC

សម្ងាត់
CONFIDENTIAL
CONFIDENTIEL

Public 18/05/2009

CO-PROSECUTORS' RESPONSE TO IENG THIRITH'S DEFENCE REQUEST FOR EXCLUSION OF EVIDENCE OBTAINED BY TORTURE DATED 11 FEBRUARY 2009

Filed by:

Office of the Co-Prosecutors
Ms. CHEA Leang
Mr. Robert PETIT
Mr. YET Chakriya
Mr. William SMITH
Mr. SENG Bunkheang
Mr. Vincent de WILDE d'ESTMAEL

Distributed to:

Co-Investigating Judges
Mr. YOU Bunleng
Mr. Marcel LEMONDE

Defence Counsel for IENG Thirith
Mr. PHAT Pouv Seang
Ms. Diana ELLIS

Co-Lawyers for the Civil Parties
HONG Kim Suon
LOR Chunthy
NY Chandy
KONG Pisey
Silke STUDZINSKY
YONG Phanith
KIM Mengkhy
Martine JACQUIN
MOCH Sovannary
Philippe CANNONE
Pierre-Olivier SUR
E. RABESANDRATANA
Olivier BAHOUGNE
David BLACKMAN

ឯកសារដើម
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception): 30/04/2009
ម៉ោង (Time/Heure): 15:30
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: [signature]

ឯកសារបានថតចម្លងត្រឹមត្រូវតាមច្បាប់ដើម
CERTIFIED COPY/COPIE CERTIFIÉE CONFORME
ថ្ងៃ ខែ ឆ្នាំ នៃការបញ្ជាក់ (Certified Date/Date de certification): 07/05/2009
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: UCH ARUN

I. INTRODUCTION AND SUMMARY OF ARGUMENTS

1. The Defence for Ieng Thirith ("Defence") filed an Investigatory Request entitled *Defence Request for Exclusion of Evidence Obtained by Torture* ("Defence Request") with the Co-Investigating Judges ("CIJs") on 11 February 2009[1] pursuant to Rule 55(10) of the Internal Rules ("IRs"). The Co-Prosecutors hereby request that the CIJs reject the Defence Request in its entirety.

2. The Defence requests the exclusion from Case File 002 and from CIJs consideration all torture related evidence pursuant to the exclusionary rule of Article 15 of the United Nations Convention Against Torture ("CAT"), which bars the use of evidence obtained through torture in criminal prosecutions. The rationale for the CAT exclusionary rule was to (i) discourage the use of torture by prohibiting States from using evidence of guilt gathered through torture against criminal suspects and to (ii) minimize the chance that an unreliable confession will be used against a criminal suspect.[2]

3. The Co-Prosecutors agree with this rationale. The Defence, however, misconstrues the application of this rationale by failing to take into consideration the particularity of the facts at hand. Furthermore the Defence Request errs when it groups all torture related evidence together, and fails to consider each category of evidence and the purpose for which each is offered. Additionally, the Defence misuses and distorts the purpose and rationale behind CAT and its exclusionary rule.

4. Case File 002 contains confessions and statements made by S-21 prisoners as documented by Democratic Kampuchea ("DK") officials who interrogated and tortured them. The Communist Party of Kampuchea ("CPK") used S-21 to implement a CPK policy to arrest, interrogate, torture, and execute those believed to be traitors within the Party or subversive

---

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

2 UN General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. No. A/61/259, 14 August 2006 para. 45, *available at* http://www.icj.org/IMG/NowakGAReport2006.pdf. [hereinafter "Special Rapporteur Torture Report"]

secret agents that threatened the Party's plans and existence. More specifically, the evidence on Case File 002 includes: (i) relevant statements made by tortured detainees related to the hierarchy and policies of the CPK, and S-21 expert opinions based on these statements, (ii) annotations on confessions by S-21 personnel and (iii) biographical information obtained at S-21 registration. As explained below, these types of evidence should be admitted and are reliable.

II. Relevant Legal Provisions

A. The ECCC Internal Rules

5. IR 87(1) states that "[u]nless provided otherwise in these IRs, all evidence is admissible." Under IR 87(4), the Chamber may "summon or hear any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth."[3]

B. Cambodian Law

6. The Cambodian law cited by the Defence supports the notion that the ban on the use of this evidence focuses on its use against the torture victim. Article 38 of the Cambodian Constitution excludes confessions that are "evidence of guilt" and notes that any doubts are to be resolved in favor of "the accused," *i.e.* the torture victim. The article further states that "[t]he law guarantees there shall be no physical abuse against any individual; Coercion, physical ill-treatment or any other mistreatment that imposes additional punishment on a detainee or prisoner shall be prohibited."[4] Article 321 of the Code of Criminal Procedure of the Kingdom of Cambodia similarly focuses on confessions of guilt made by detainees obtained under physical or mental duress.

---

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

[4] The Constitution of the Kingdom of Cambodia (1993), Art. 38, *available at* http://www.embassy.org/cambodia/government/constitution.htm.

C. CONVENTION AGAINST TORTURE,

7. The prohibition against torture is a *jus cogens* norm of international law and is crystallized in the CAT. The overriding purpose of the CAT, to which Cambodia has acceded, is to eradicate the use of torture, to ensure that torture be prevented, and failing prevention, that it be punished.[5] CAT Article 6 provides that wherever a torturer is present in a State Party, it "take him into custody"; Article 12 directs that a State Party investigate allegations of torture; Article 14 mandates that torture victims have a right to seek civil justice against those who tortured them.

8. Article 15's exclusionary rule must be understood in the overall context of the CAT's purpose. Article 15 states that "each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceeding, except against a person accused of torture as evidence that the statement was made."[6]

9. According to the Special Rapporteur on Torture, the twofold rationale behind Article 15 is that (i) prohibiting the use of this evidence removes an incentive for the use of torture and (ii) the information obtained through torture is generally not considered to be reliable enough to be used in legal proceedings.[7]

10. Without the ability to introduce forced confessions of guilt against individuals obtained through torture, torture becomes less useful to a State considering its use. Tobias Thienel, upon whom the Defence relies heavily, identifies the "classic case" where the forum state is the perpetrator and the victim of torture is the party against whom the evidence is brought as "*the one abuse of state power that Article 15 UNCAT was primarily intended to outlaw.*"[8] Similarly, it can be argued that the reliability concern—that one cannot know if a confession

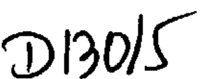
---

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

6 CAT, art. 15.

7 Special Rapporteur Torture Report, at para. 45.

8 Tobias Thienel, *The Admissibility of Evidence Obtained Under Torture under International Law,* 17 E.J.I.L. 349 (2006), at 356 [emphasis added] [hereinafter "Thienel"].



obtained through torture reflects the truth, or simply a statement made in order to stop the torture—is minimized where the statements at issue are not confessions of "criminal" acts at all, but peripheral or background statements..

11. The 27 May 2003 Committee Against Torture report, cited by the Defence, reflects this understanding of the exclusionary rule. Recommendations made to Cambodia that it excludes torture evidence were based on the fact that the Cambodian police and judiciary have relied too heavily on *confessions to secure convictions against those who have been tortured.*[9]

12. Similarly, the 2005 Redress report was concerned with the use of torture confessions against the same individual who has been tortured. The report notes that the use of confessions "only encourages interrogation techniques that result in torture" and recommends that States should take measures to reduce the likelihood of the use of torture "to coerce confessions or statements, such as requiring that confessions can only be made to an officer above a certain rank" and recognizing that *detainees* are informed of the right against self-incrimination.[10]

13. It must be highlighted that CAT Article 16 states that each State Party "shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1" and specifically notes that "the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment." This notably leaves out Article 15's evidentiary rule.[11]

D. THE UN GUIDELINES ON THE ROLE OF PROSECUTORS

---

[9] 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), *available at* http://193.194.138.190/tbs/doc.nsf/(Symbol)/CAT.C.CR.30.2.En?OpenDocument, paras. 6(h), 7(f) [emphasis added].

[10] Redress, "Bringing the International Prohibition of Torture Home: National Implementation Guide for the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", The Redress Trust: London (January 2006), *available at* http://www.redress.org/publications/CAT%20Implementation%20paper%2013%20Feb%202006.pdf, p. 62- 63.

[11] In 1981, the CAT Working Group met and agreed not to include references to article 15 with respect to Article 16. *See* H. Burgers and H. Danielus, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Martinus Nijhoff Publishers: Dordrecht (1988), p. 74.

14. In 1990, the UN Guidelines for Prosecutors ("UN Guidelines") were adopted, requiring prosecutors to "take all necessary steps to ensure that those responsible for using such methods [including torture] are brought to justice."[12] Importantly, the UN recognized that prosecutors may use evidence obtained through torture against "*those who used such methods*", without limitation.[13]

III. ARGUMENT

A. THE FLEXIBILITY PRINCIPLE ALLOWS FOR THE ECCC TO ADMIT THIS EVIDENCE AND THEN ASSIGN THE EVIDENCE ITS DUE WEIGHT

15. The ECCC should allow the evidence outlined above to be admitted, and after review, assign the evidence its due weight. Every international *ad hoc* tribunal from the ICTY to the SCSL has crafted a flexible regime for the admission of evidence—including the ECCC.[14] International criminal tribunals have laid down the flexibility principal in order to avoid the intricate and complicated national rules of evidence[15] that predominate in jurisdictions where lay juries, instead of professional judges, serve as trier of fact.[16] As the ICTY notes, "[t]he function of this Tribunal is not to deter and punish illegal conduct by domestic law

---

[12] Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders: Guidelines on the Role of Prosecutors, U.N. Doc. A/CONF.144/28/Rev.1, Havana, Cuba, Aug. 27-Sept. 7, 1990, Guideline 16 [hereinafter "UN Guidelines"].

[13] UN Guidelines, 16.

[14] *See, e.g.*, IR 87(4), permitting all evidence "conducive to ascertaining the truth".

[15] Even common law jurisdictions with strict rules of evidence unlike the flexible ones applied in international tribunals still make exceptions based on uniqueness and importance. In the U.S., the "residual exception" to the hearsay bar allows evidence to be admitted where (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. *See* U.S. Federal Rules of Evidence Rule 807, "Residual Exception." Here the evidence is obviously relevant, cannot be procured by other means, and will serve the interests of justice.

[16] Gideon Boas, *Admissibility of Evidence Under the Rules of Procedure and Evidence of the ICTY: Development of the Flexibility Principle*, in Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald, 3 Int'l Humanitarian Law Series 263 (2001), at 265; *See* Judge Richard May and Marieke Wierda, *Trends in International Criminal Evidence: Nuremburg, Tokyo, The Hague, and Arusha*, 37 Columb. J. Transnat'l L. 725 (1998-1999), at 745: "A significant practice of all the international tribunals is their refusal to be hindered by a technical approach to the admission of evidence in their search for the truth... This is best illustrated by their approach to hearsay evidence, but is also reflected in the admission of documents and affidavits. In all these matters the tribunals have adopted a liberal approach, not fettered by common law rules."

enforcement authorities by excluding illegally obtained evidence."[17] Tellingly, the ICTY and ICTR have allowed evidence obtained through violation of attorney-client privilege, warrantless searches, and illegal wiretaps, so long as those collecting the evidence were not employees or agents of the tribunals.[18]

16. Notably, the IRs are more flexible than those of the other tribunals.[19] While the ICTY and ICTR are limited to considering evidence that is both relevant *and* probative—with a weighing of the evidence's reliability incorporated into the determination of whether or not it is probative[20] —the ECCC may consider "any evidence ...useful in ascertaining the truth" *i.e.*, any relevant evidence.[21]

17. Rule 28, "Right Against Self-Incrimination of Witnesses," already expressly incorporates into the ECCC's governing law the concept of weighing the uniqueness and importance of the anticipated evidence against the ECCC's' stated principle of protecting witnesses from self-incrimination and the acuteness of its need for the evidence. As IR 28 implicitly commands, the decision as to whether to admit evidence must sometimes take into account whether or not the CIJs or another ECCC organ could replace the evidence in question with that from another source. The evidence provided by the documents from S-21 offer a unique and important source of information to assist the CIJs and the ECCC in uncovering the

---

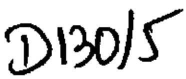
[17] *Prosecutor v. Brdjanin*, Case No. IT-99-36-T, Decision on the Defence Objection to Intercept Evidence, 3 Oct. 2003, (Trial Chamber), para. 63(9), *available at* http://www.un.org/icty/brdjanin/trialc/decision-e/031003.htm *cited* in Michael P. Scharf, *Tainted Provenance: When, If Ever, Should Torture Evidence Be Admissible?*, 65 Wash. & Lee L. Rev. 129 (Winter 2008), at n. 116. [hereinafter "Scharf"]

[18] *See* Scharf, at n.115 (collecting cases)(including *Prosecutor v. Brdjanin*, Case No. IT-99-36-T, 3 October 2003, Decision on the Defence Objection to Intercept Evidence, (Trial Chamber), para. 61–68, rejecting defendant's motion to exclude evidence obtained through the illegal interception of telephone conversations by Bosnian authorities, noting that "in situations of armed conflict, intelligence which may be the result of illegal activity may prove to be essential in uncovering the truth; all the more so when this information is not available from other sources.").

[19] Scharf, at p. 147.

[20] The absence of a requirement that evidence be probative to be admitted is important. In the Tadic case the ICTY held that its Rules implicitly required evidence to be reliable—non-reliable evidence could not be probative, and would have to be excluded under ICTY Rule 89(c): "In evaluating the probative value of hearsay evidence, the Trial Chamber is compelled to pay special attention to indicia of its reliability. In reaching this determination, the Trial Chamber may consider whether the statement is voluntary, truthful, and trustworthy, as appropriate". *Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision on Defence Motion on Hearsay, 5 Aug 1996 (Trial Chamber), para. 16.

[21] IR 87(4).



truth,—DK officials destroyed most inculpatory written records and documents and there is no viable replacement for the interrogation documents.[22]

18. Along with its great importance, S-21 evidence carries minimal prejudice to the Charged Person(s); with no jury to be led astray, there can be no harm in admitting records that hold even apparently slight evidentiary value and then subsequently evaluating their proper weight. In the *Fofana* Appeals Chamber decision, the SCSL, with rules of evidence similar to those of the ECCC,[23] explained that "evidence is admissible once it is shown to be relevant: the question of its reliability is determined thereafter, and is not a condition for its admission".[24]

19. The Defence contends that admission of this evidence would violate the Charged Person's right to a fair trial and the presumption of innocence.[25] However, as Tobial Thienel notes, the principle of a fair trial is related to the right against self-incrimination.[26] Here, there is no fear of self-incrimination since the statements were not made by the Charged Person while being tortured but instead made by prisoners who were tortured by DK officials who were subordinates to, or acting in concert with, the Charged Person and her co-Accused.

B. THE EXCEPTION IN ARTICLE 15'S EXCLUSIONARY RULE FOR USE AGAINST TORTURERS SHOULD BE BROADLY CONSTRUED IN ORDER TO HONOR THE PURPOSE OF THE CAT

20. Clearly, excluding the contested evidence would defeat the object and purpose of CAT to prevent torture. Article 15 exists in service to the CAT and its goal of preventing torture; therefore, Article 15 cannot be used to eviscerate the CAT. As the former UN Special Rapporteur on Torture P. Koojimans explained, the rationale for the inclusion of Article 15 is that judicial acceptance of statements obtained under torture was "responsible for the flourishing of torture" and that the exclusion of such evidence would "make torture

---

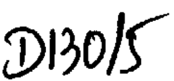
22 Scharf, at p. 137-39.

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

24 *Prosecutor v. Norman et al*, Case No. SCSL-04-14-AR65, Fofana – Appeal against Decision Refusing Bail, 11 March 2005 (Appeal Chamber), para. 24, available at http://www.sc-sl.org/LinkClick.aspx?fileticket=gcYjozQ1q9U%3d&tabid=193.

25 Defence Request, at para. 8.

26 Thienel, at p. 356.



unrewarding and therefore unattractive."[27] Here, where the rationale underlying Article 15's exclusionary rule does not apply, the exception to that rule allowing the use of this evidence against the torturers must be construed broadly in order to effectuate the CAT's purpose.[28]

21. The Defence requests that "in recognition of the morally repugnant behavior of the torturer" this evidence must be excluded.[29] To grant this request would turn the CAT on its head. In fact, the Co-Prosecutors filed an Introductory Submission alleging in part that the Charged Person participated in torture precisely to respect and uphold the law prohibiting torture. In these circumstances, it makes no sense to apply a policy in a situation where neither of the concerns underpinning it are present: *i.e.*, there is no concern that admitting this quasi-historical evidence would promote torture or reward torturers.

22. No torturer stands to prevail in any way if this evidence is admitted—not the ones who carried out the interrogations, and not their leaders on trial. In fact, the reverse is true. Barring the contested evidence would reward those who participated in bringing about torture by allowing them to use the very international laws that were designed to prevent and prosecute torture to escape liability. Moreover, there are no "slippery slope" concerns: should the leaders of another regime that tortures its own citizens stand trial in the future, the rule that those who torture cannot hide behind anti-torture rules will help prosecute such leaders.

C. Portions of Contested Evidence Contained in Confessions Are Admissible

23. The Defence Request lacks specificity as to particular types of evidence that was obtained through torture, and thus, must be excluded versus evidence that was not obtained through torture and therefore unobjectionable. To clarify, the Co-Prosecutors believe the evidence at issue is statements made by interrogated prisoners in written confessions. Other types of evidence, notably annotations on confessions and biographical information obtained at registration, are not at issue. Accordingly, the Co-Prosecutors wish to discuss each in turn.

---

[27] Scharf, at 135.
[28] *See* UN Guidelines, 16.
[29] Defence Request, para.1.

i. Certain Statements in Confessions Possess Indicia of Reliability Favouring Admission

24. On a case by case basis, there are categories of statements contained within S-21 confessions that possess a degree of reliability that favours admission.[30] Statements regarding DK hierarchy, communication, and policies/policy implementation[31] were made by victim after victim, allowing corroboration across sources as well as in combination with other non-torture evidence on the case file. No single individual was the sole repository of knowledge about the inner workings of the DK regime. Additionally, interrogations were instituted to prove that alleged traitors or spies were responsible for "the failures of the CPK policies",[32] so S-21 personnel had every incentive to make sure CPK policies were stated correctly. Most significant, none of the S-21 victims were tortured, for instance, to "confess" to DK policies; this type of information was contextual against which false confessions were forced, *i.e.* for *violating* DK policies.[33] The concern that a torture victim will say anything to stop his or her torture does not undercut statements made by victims when they are neither the focus of the interrogation nor where the victim has no incentive to lie because the interrogator knew, for example, the requirements of DK policies.[34] However, self-incriminations or incriminations of others found in confessions are statements that may be considered unreliable and excluded by CAT Article 15.

25. Biographical information contained in confessions–which included, *inter alia*, names of superiors and subordinates and past locations of the detainee–is also admissible and reliable.

---

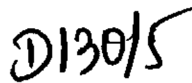
30 *See* Stephen Heder and Brian D. Tittemore, "Seven Candidates for Prosecution, Accountability for the Crimes of Khmer Rouge", War Crimes Research Office, American University: (2001), available at http://www.wcl.american.edu/warcrimes/khmerrouge.pdf?rd=1, p. 26-29 [hereinafter "Heder"].

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

32 Heder, at p. 29.

33 Heder, at p. 29 ("Notably, however, the confessions consistently accepted as uncontroversial the very existence and nature of those policies. These facts formed the essential scaffolding on which the coerced "admissions"...were secured.")

34 This applies equally to hierarchy and communication as the interrogators or S-21 personnel collectively knew prior to any interrogation what the CPK hierarchy was and how DK communication was conducted.



Numerous detainees were interrogated multiple times and earlier confessions concentrated on biographical information.[35] Former S-21 personnel interviewed by the CIJs have testified that in these cases, torture was not applied until later interrogations..[36] Hence, biographical information found in earlier interrogations was arguably not the product of torture, and reliable as a consequence.

26. The Defence acknowledges that "[i]f it is indeed established that such evidence is not obtained by torture, it does not fall under Article 15 CAT."[37] The Defence further acknowledges that with "regard to preliminary questions not obtained by torture... the Defence submitted it does not object."[38] The Co-Prosecutors agree, and evidence on the case file does include biographical information taken from prisoners prior to being tortured.

27. As Tobias Thienel notes, Article 15 does not state which party bears the burden of proof with respect to showing that the statement was made under torture.[39] The Special Rapporteur on Torture's report notes that the approach taken in *A and Others v. Secretary of State for the Home Department* and *Mounir el Montassadeq* only bars evidence *established* to have been taken under torture and "does not seem really to shift the burden of proof to the Government authorities."[40] The Special Rapporteur's concern with this approach was based on the concept of fairness to the victim who was tortured. Here, where the person accused of torture is the one seeking to exclude the evidence, this fairness concern is turned on its head. In this case, it is the persons accused of torture who are most capable of proving whether torture occurred or not since almost all the torture victims have been killed. Thus, Article 15 cannot bar the admission of this evidence.

35

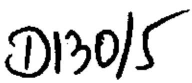
36

37 Defence Request, at para. 39.

38 Defence Request, at para. 42.

39 Thienel, at p. 354.

40 Special Rapporteur Torture Report, at para. 65.



28. The Vienna Convention on the Law of Treaties commands that the CAT be interpreted "in light of its object and purpose."[41] Accordingly, the exception in Article 15 must be applied broadly in this case—not merely to allow the admission of statements like these one described to prove that torture occurred, but to admit all evidence against torturers that possesses indicia of reliability and can be afforded any weight at all by the trier of fact.

ii. <u>Certain Statements are Admissible Against the Charged Persons Regardless of Their Actual Presence at Torture</u>

29. Article 15 explicitly recognizes that evidence obtained under torture is admissible when it is being offered "against the person accused of torture as evidence the statement was made." This exception unequivocally allows all evidence collected under torture to be admitted in order to show that the statements were made under torture. The UN Guidelines broaden this exception and allow the use of evidence against torturers regardless of the purpose for which it is used.

30. These exceptions apply to the Charged Person for several reasons. First, the language of the exception to the exclusionary rule in Article 15, encompassing any "person accused of torture," plainly describes anyone accused of torture. Similarly, the UN Guidelines allow such evidence to be admitted against "those who used such methods." Moreover, the very definition of torture in CAT Article 1 includes the participation of government officials, making any limitation of liability to an individual interrogator or perpetrator illogical.[42]

31. Second, the Charged Persons are alleged to have been part of a criminal conspiracy or joint criminal enterprise with the interrogators who served under them. The language of the CAT indicates that this type of complicity is intended to be encompassed in the definition of torturer. CAT Article 4 states that "[e]ach State Party shall ensure that all acts of torture are

---

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

offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture."[43]

32. Third, the well-established doctrine of Command Responsibility holds that individuals can be held responsible for international crimes, even when those individuals were not present during the commission of the crimes.[44] Command responsibility requires three elements: 1) a superior-subordinate relationship; 2) the superior's knowledge, or *mens rea*; and 3) that the superior failed either to prevent or to punish the action taken by the subordinate.[45] Under ECCC Law Article 29, Suspects are responsible for their subordinates' actions when they "knew or had reason to know that the subordinate was about to" commit a crime, yet neither prevent nor punish the act. By the same logic, the S-21 interrogators' superiors are "accused of torture" under Article 15.

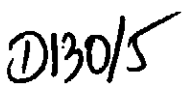
iii. Certain Statements are Admissible as Relied upon by Experts, or in the Alternative, Not Subject to Exclusion

33. Logically, if these types of statements discussed thus far are admissible, then related expert opinions on S-21 are also admissible. However, in the alternative, even if such statements are deemed inadmissible on their own, it does not preclude related expert opinion. There is no basis in any law governing the ECCC for preventing expert witnesses from basing opinions upon torture related evidence, and with good reason. Expert testimony can be tested through cross-examination under IR 84, and the CIJs and other ECCC judicial organs can assign expert testimony its proper weight based on that testing.

34. UN tribunals favour permitting experts to use their own judgment as to what sources to consult, testing that judgment and their testimony through cross-examination, and then admitting the expert's testimony subject to the tribunal's determination as to the proper weight to accord it. In the case of *Prosecutor v. Bagosora*, the Defence contested the admission of an expert witness statement, challenging the reliability of documents upon

---

43 CAT, art. 4(1).
44 *See* Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9, 17 July 1998, art. 28.
45 ECCC Law, Article 29; ICTY Statute, Sep 2008, art. 7(3).



which the statement was based. The ICTR Trial Chamber held that "[t]he Defence may, of course, question the evidential basis of the opinion during the witness's testimony. The Chamber considers cross-examination to be the appropriate mechanism for addressing the concerns of the Defence. The Chamber prefers to deal with the contested issues of reliability when considering the merits of the case, after having heard the totality of the evidence".[46] Similarly, the ICTY recently held that "[t]hese concerns [about the reliability of sources used by the expert], however, do not affect the admissibility of the Report but may affect the weight to be given to [the expert's] evidence."[47] Other jurisdictions, such as the United States and Canada, allow for the admission of expert testimony that can be cross-examined by an opposing party and weighed by the trier of fact.[48] As such, any facts or data may be used as a basis for expert testimony.

iv. <u>Certain Statements are Admissible as Lead Evidence</u>

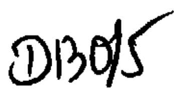
35. These statements in confessions should be, at the very least, admissible to the case file for the limited purpose as lead evidence for further investigation. Article 23 new of the ECCC Law, which is mirrored in IR 55(5), states that the CIJs "shall conduct investigations on the basis of information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

---

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

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

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



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

37. At this stage, this evidence may be used as a basis for further investigation and whether it is sufficient as judicial evidence can be determined upon the merits of a particular case. A prohibition on using this evidence at this stage would interfere with the State's ability–here Cambodia and the ECCC–to investigate and prosecute acts of torture as required by CAT Article 12.[49]

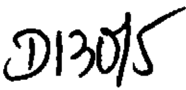
D. Annotations on Confessions and Biographies are Admissible Evidence Not Subject to CAT Article 15's Scrutiny.

i. Annotations on Confessions

38. The annotations on the confessions are admissible statements and also reliable because they are not statements obtained through torture. Rather, these are statements made by S-21 personnel conducting the torture that often reflect the names of individuals to whom confessions were communicated to and/or that an individual named in a confession had been arrested or executed. Since these are not statements made by individuals who were tortured, there is no basis under Article 15 or any other provision for excluding them.

39. The annotations are admissible along with the underlying confessions since the confessions are admissible, at the very least, to show that the torture occurred as permitted by CAT Article 15. Most important, the confessions should be admitted in order to provide context to

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



the annotations, which in turn reflects the perpetrators and the Charged Persons' knowledge and state of mind with respect to the information contained within the confessions that have been annotated. Otherwise, annotations in isolation are incomprehensible.

ii. <u>Biographies</u>

40. Admissible and reliable biographical information of detainees was located in registration documentation created upon their arrival to S-21. The registration documents–that included information such as name, age, residence, employment before and after the revolution, and time and place of arrest–are unaffected by CAT Article 15 as this information was not gathered through torture,[50] but simply upon admittance to S-21.

IV. CONCLUSION

41. To give meaning to the principles embodied in the CAT and to ensure that those responsible for the torture of the victims at S-21 are held accountable even after over 30 years, the victims own words must be allowed to be heard.

42. To ensure that and for the reasons stated above, the Co-Prosecutors respectfully request the Co-Investigating Judges to reject the Defence Request in its entirety, maintain any contested torture related evidence on Case File 002, and admit onto Case File 002 any similar evidence meeting the criteria described above.

Respectfully submitted,

CHEA Leang   Robert PETIT
Co-Prosecutor   Co-Prosecutor

Signed in Phnom Penh, Kingdom of Cambodia on this thirtieth day of April 2009

[50] Nor have these registration documents been allegedly collected through torture.