

no/n: ① 190/6

**BEFORE THE OFFICE OF 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: 18 May 2009
Party Filing: Defence for Madame Ieng Thirith
Original Language: English and Khmer
Classification of the document
suggested by the filing party: Public

ឯកសារដើម
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception): 18 / 05 / 2009
ម៉ោង (Time/Heure) : 12:00
មន្ត្រីទទួលបន្ទុកសំណុំរឿង / Case File Officer/L'agent chargé du dossier: C.A. Juy



**DEFENCE REPLY TO "CO-PROSECUTORS' RESPONSE TO IENG THIRITH'S
DEFENCE REQUEST FOR EXCLUSION OF EVIDENCE OBTAINED BY TORTURE"**

Filed by:

Defence for Ieng Thirith:

PHAT Pouv Seang
Diana ELLIS, QC

Distribution to:

Co-Investigating Judges:

You Bun Leng
Marcel Lemonde

Co-Prosecutors:

CHEA Leang
Robert PETIT

Co-Lawyers for the Civil Parties

ឯកសារគ្រប់គ្រងតាមច្បាប់
CERTIFIED COPY/COPIE CERTIFIÉE CONFORME
ថ្ងៃ ខែ ឆ្នាំ នៃការបញ្ជាក់ (Certified Date/Date de certification): 19 / MAY / 2009
មន្ត្រីទទួលបន្ទុកសំណុំរឿង / Case File Officer/L'agent chargé du dossier: SANN RADA

I INTRODUCTION AND CHRONOLOGY

1. On 11 February 2009 defence for Madame Ieng Thirith filed its "Defence Request for Exclusion of Evidence Obtained by Torture" ("**Defence Request**").¹
2. 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 The defence herewith files its reply to the OCP Response ("**Reply**").

II PRELIMINARY ISSUE RELATING TO NEW INFORMATION

2.1 New Statements Made by Duch in Case File 001

3. Since the filing of the Defence Request for Exclusion of Evidence, there has been a new development in the Duch case (Case File 001). In the circumstances, the defence considers it relevant and of assistance to the arguments already advanced that it should be brought to the attention of the OCIJ at this stage.
4. On 7 April 2009, Duch made the following statement in court, in response to a question raised by Judge Lavergne:

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

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.³



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, D130/5.

³ Transcript 7 April 2009, Case File 001, Document No. E1/9.1, p. 22 (lines 4-6; 10-12; and 16-17).

5. The next day in court, Duch, after further reflection, reduced the percentage of truth contained in the confessions down to only twenty percent where he stated:

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.⁴

6. These statements made by Duch in court support the defence position that confessions and other material obtained by torture are inherently unreliable, and cannot in any manner be relied upon in a court except to show that torture was committed.

2.2 Press Statement by Amnesty International

7. On 30 April 2009, the day the OCP filed its Response, the Cambodia Daily featured an article on the content of the Defence Motion,⁵ which reflects a statement by Yuval Ginbar, Amnesty International's legal advisor for Asia-Pacific and author of the book *Why Not Torture Terrorists?*. He states, *inter alia*:

Trying to justify the use of statements obtained by torture as the only way to 'bring justice' is not dissimilar to the attempts to justify torture itself as the only way to, say, save innocent civilians from terrorist attacks.

[...]

It [torture-obtained evidence] must never see the light of day in a courtroom as part of legitimate criminal procedures.

8. This statement further underlines the defence position as outlined in the Defence Request and this Reply.



⁴ Transcript 8 April 2009, Case File 001, Document No. E1/10.1, p. 105 (lines 8-11), p. 106 (lines 20-21).

⁵ Douglas Gillison, 'Ieng Thirith: S-21 Confessions "Torture-Tainted"', Cambodia Daily, 30 April 2009, p. 1-2.

2.3 Conclusion

9. The statements made by Duch were made after the Defence Request was filed, as were the statements made by Yuval Ginbar of Amnesty International (together "Supplementary Material"), and therefore the defence could not have taken these into account in the Defence Request.
10. The defence submits, however, that this evidence assists in understanding the issue at hand, and should hence be taken into account by the OCIJ.
11. The relevant statements by Duch were made before the OCP filed its OCP Response, but the defence notes that the OCP did not take his statements into account. Yuval Ginbar made his statement in the Cambodia Daily on the day the OCP filed its motion, and therefore the OCP did not have the opportunity to respond to this particular point.
12. Should the OCP wish to respond to this Supplementary Material, the defence request that the OCIJ issues instructions to the OCP to file a short response, in order that this request may be dealt with within a reasonable period of time, especially as so much time has already elapsed since the Defence Request was first filed on 11 February 2009.

III ARGUMENTS

3.1 Incorrect Interpretation of the Law

13. The defence submits it has already fully addressed the applicable law in its Defence Request. However, the OCP Request misinterprets the law in several respects, which the defence wishes to draw to the attention of the OCIJ.



14. Firstly, in interpreting Article 38 of the Cambodian Constitution, paragraph 6 of the OCP Response sets out:

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.

15. The OCP incorrectly imposes its own interpretation on this Constitutional provision, without providing an explanation for such extensive reading. Article 38 is not only applicable to accused persons who are victims of torture, but to every accused person in a criminal trial. Nowhere in the Constitution, nor anywhere else, does it say that the accused needs to be the victim of the torture. Article 38 is clear and unambiguous where it reads:

Confessions obtained by physical or mental force shall not be admissible as evidence of guilt. Any case of doubt, it shall be resolved in favour of the accused.

16. The conclusion the OCP draws,⁶ that "[t]he 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" can thus be dismissed.

17. Secondly, paragraph 13 of the OCP Response refers to Article 16 CAT. This Article indicates that the term torture can in certain CAT provisions be understood to include "cruel, inhuman or degrading treatment or punishment [...]", but not in Article 15.⁷

18. The defence submits that Article 16 does not diminish the importance of Article 15, and unless the OCP intends to argue that the confessions are not the result of torture but "only" the result of cruel, inhuman or degrading treatment or punishment, the defence cannot see the relevance of this comment.



⁶ OCP Response, para. 6.

⁷ The 1990 UN Guidelines on Prosecutors para. 16, quoted in para. 13 of the OCP Response, does not make a distinction between torture on the one hand, and inhuman and degrading treatment and punishment on the other.

19. Thirdly, the OCP misconstrues para. 16 of the UN Guidelines for Prosecutors, where it states that the UN guidelines recognize “that prosecutors may use evidence obtained through torture against ‘those who used such methods’, without limitation.” The addition “without limitation” was added by the OCP.⁸

3.2 OCP Response Fails to Properly Reflect Article 15 CAT

20. On several occasions throughout the OCP Response, the OCP refers to the object and purpose of Article 15 CAT, which provision was extensively dealt with in the Defence Request. Initially, the OCP indicates it agrees with the interpretation as reflected in the Defence Request,⁹ but throughout the OCP Response the OCP conveniently focuses on one part of the interpretation only. The second part of the twofold rationale is heavily emphasised, namely the prevention of torture in the future and the first part of the rationale, the unreliability of such evidence, is largely ignored.
21. For instance, in paragraph 20 of the OCP Response, the OCP makes a far-reaching conclusion that

[E]xcluding 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.

The OCP thus overlooks the fact that Article 15 is unambiguous in its interpretation: torture-obtained evidence cannot be used in court with the exception that it can be used solely against the alleged torturer to show that torture has been committed.

⁸ The full text of paragraph 16 of the UN Guidelines on Prosecutors reads:

When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

⁹ OCP Response, para. 3.

22. The OCP circumvents the reliability argument when it refers to the ICTY and ICTR allowing illegally obtained evidence through violation of attorney-client privilege, warrantless searches and illegal wiretaps.¹⁰ Their approach to the admissibility of illegally obtained evidence of this nature reflects that of many courts within the common law system, where the circumstances under which it has been obtained do not cast doubt on its reliability and credibility. This is contrary to the inherently unreliable nature of evidence obtained through torture.
23. As set out in the Defence Request, the defence refutes the contention of the OCP that there is “minimal prejudice to the Charged Person(s)”. Besides the fact that prejudice to the accused is not required by Article 15 CAT, if inherently unreliable information is used in an attempt to prove criminal charges, such a process amounts to an infringement of the Charged Person’s right to a fair trial as guaranteed by Rule 21 of the Internal Rules and innumerable, previously cited international provisions.
24. The OCP sets out that one of the aspects of the rationale of Article 15 CAT is not applicable in the underlying case, namely the inherent unreliability of torture-tainted evidence, in saying that “it can be argued that the reliability concern [...] is minimized where the statements at issue are not confessions of ‘criminal’ acts at all, but peripheral or background statements.”¹¹ The OCP does not provide any explanation or arguments for such a far-reaching conclusion, and no authority is cited in support of its contention. Further the OCP denies without any basis that the torture victims were forced to provide incorrect information on issues other than ‘criminal acts’.
25. In any case, the onus to prove that certain information in confessions was not the result of torture is on the OCP, given the unambiguous provision of Article 38 of the Cambodian Constitution, which provides that in “case of doubt, it shall be resolved in favour of the accused.” Duch’s recent statements in courts may be judged as

¹⁰ OCP Response, para. 15.

¹¹ OCP response para. 10.

providing the best evidence as to the unreliability of the information contained in the 'confessions'.

26. Furthermore, the content of Article 15 is clear. According to the OCP Response, the "Vienna Convention on the Law of Treaties commands that the CAT be interpreted 'in light of its object and purpose'."¹² This is a selective citation of Article 31(1) of this Convention, which provision reads in full:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

3.3 No Flexibility in the Exclusion of Torture-Tainted Evidence

27. The OCP in Section III.A of its Response suggests a flexible approach to admission of torture-obtained evidence. The OCP refers to "[e]very international *ad hoc* tribunal from the ICTY to the SCSL has crafted a flexible regime for the admission of evidence",¹³ therewith failing to acknowledge that none of the other *ad hoc* tribunals were faced with torture-tainted evidence.

28. The OCP fails to understand the unique nature of torture-tainted evidence and the underlying rationale for excluding its use within the trial process. It is irrelevant whether the evidence is judged by lay juries or professional judges, because neither of them is able to distinguish between the truth and incorrect information inherently contained in confessions obtained through torture, the exact point being that the truth of it is impossible to verify.

29. The OCP goes on to argue that Rule 28 of the Internal Rules is important in determining the flexibility of the ECCC's use of torture-tainted evidence. The OCP refers to this provision which implicitly indicates that the decision on whether to admit evidence may take into account whether or not this evidence could be replaced by evidence from another source. Again, this argument denies the inherent problem of

¹² OCP Response, para. 28

¹³ OCP Response, para. 15. See also OCP Response para. 18, where the OCP refers to a SCSL decision relating to admissibility of evidence.

torture-tainted evidence: its unreliability. With statements made by witnesses who incriminate themselves, there is no issue of reliability. Rather, the judicial organs of this court can assess the reliability of such witness by seeing him or her and asking questions. Such a test is impossible in the torture-tainted evidence contested by the defence.

30. Placing reliance upon torture-tainted evidence because there is no other source for such information would result in:

- (i) the use of inherently unreliable evidence becoming part of the adjudication process and
- (ii) such evidence cannot be challenged and tested by the accused person and the judges (or for experts, see para. 38 below).

31. In arguing that there “is no viable replacement for the interrogation documents”, the OCP relies on an academic article by Michael Scharf.¹⁴ The defence notes that, given the confidentiality of the Case File, Michael Scharf cannot have had access to the information contained therein. No analysis has been provided by the OCP in support of its assertion. Scharf, referring to discussions with Craig Etcheson and Stephen Heder, furthermore concludes in his article that “[t]he Tribunal is not interested in the substantive statements made by the detainees during actual physical torture.”¹⁵

32. The OCP furthermore refers to a decision by the SCSL Appeals Chamber in the case of *Prosecutor v. Moinina Fofana*.¹⁶ The OCP Response alleges that the SCSL have “rules of evidence similar to those of the ECCC”, which is incorrect. The SCSL is governed by common law based on the British legal system,¹⁷ whilst the ECCC is

¹⁴ See OCP Response, para. 17, footnote 22.

¹⁵ M.P. Scharf, “Tainted Provenance: When, If Ever, Should Torture Evidence Be Admissible?”, in: 65 Wash & Lee L. Rev. 129 (Winter 2008), at 140, referring to “Discussion with Craig Etcheson & Stephen Heder, Advisors, [OCP] of the [ECCC], in Phnom Penh, Cambodia (Oct. 24, 2006).”

¹⁶ See OCP Response, para. 18, referring to *Prosecutor v. Fofana et al.*, Fofana – Appeal against Decision Refusing Bail, Case No. SCLS-04-14-AR65, 11 March 2005, para. 24.

¹⁷ Already in 1980, the British common law system “has refused to accept that oppression or inducement should go to the weight rather than the admissibility of the confession. The common law has insisted on an

governed by civil law based on the Cambodian and French legal systems. Moreover, the Fofana decision referred to by the OCP relates to the admission of unsigned statements of witnesses in court, statements which can be verified by the Trial Chamber in court whilst examining the witness in question. Once again the OCP fails to take account of the unique position that is taken in respect of torture-tainted evidence and which sets it apart from the categories of evidence they seek to rely upon.

33. The OCP in paragraph 19 of its Response misinterprets Tobias Thienel's argument, where the latter states that the principle of fair trial is related to the right against self-incrimination.¹⁸ The OCP neglects to point out that this remark was made by Thienel under the heading "A – Use of Tainted Evidence in the Courts of the Torture *against the Tortured Person*".¹⁹ The issue here is not the use of tainted evidence against the tortured person. The fair trial issue is thus misconstrued by the OCP, where it relates to the infringement of the right to a fair trial being solely to a breach of the right against self-incrimination. The Charged Person's fair trial is breached by the use of torture-tainted evidence in the proceedings against her, which amounts to a violation of Rule 21 of the Internal Rules.

3.4 Categories of Evidence

(i) CPK Policies

34. In Section C of its Response, the OCP attempts to analyse the substance of the contested confessions. The defence submits that this attempt to analyse already violates Article 15 CAT. On that basis alone, this OCP argument should be rejected.

exclusionary rule." See *A v Secretary of State of the Home Department* (No. 2), 8 December 2005, para. 15.

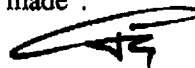
¹⁸ OCP Response, para. 19.

¹⁹ T. Thienel, "The Admissibility of Evidence Obtained by Torture under International Law", in: *European Journal of International Law* 17 (2006) 349, at 356 (emphasis added).

35. The OCP suggests the use of torture-tainted information should be permitted to explain the hierarchy, communication and CPK policies.²⁰ The information would, it is argued, through the concepts of command responsibility and joint criminal enterprise, be attributed to the Charged Person. Article 15 CAT is unequivocal in this matter. Torture-tainted evidence shall not be used, "except against a person accused of torture as evidence that the statement was made."²¹ Any wider application of confessions is prohibited by the CAT. Whether this is used in the theory of command responsibility or joint criminal enterprise is irrelevant; the statements may only be used against the accused of torture to show that the statements were made.

(ii) *Expert Statements*

36. Article 15 CAT similarly excludes expert opinions based on torture-tainted evidence. The information relied upon by the OCP experts who rely on torture-tainted evidence is in turn unreliable, and should thus not be used against the Charged Person in the legal proceedings against her. Whilst the expert's opinion itself can be tested through cross-examination, the source of his 'expert opinion' cannot be tested and is deemed unreliable. The OCP does not explain why an 'expert' would be able to distinguish between reliable and unreliable information in such statements, whilst professional judges are deemed unable to do so by Article 15 CAT. The ICTR and ICTY jurisprudence the OCP relies on in this respect does not relate to the use of information resulting from torture.²² No single court in a jurisdiction which is subject to the Convention against Torture, will allow the results of torture to be admitted in the courtroom, except, as formulated by Article 15 "against a person accused of torture as evidence that the statement was made".



²⁰ OCP Response, para. 24.

²¹ Emphasis added.

²² OCP Response, para. 34. The mentioned decision by the ICTY Trial Chamber in Prosecutor v. Perisic, Decision on Expert Report by Richard Phillips, Case No. IT-04-81-T, 10 March 2009, para. 6 mentions explicitly that one of the requirements for admissibility of an expert report is "the expert statements or reports meet the minimum standard of reliability". Moreover, para. 10 of this decision reads: "The evidence sought to be admitted into evidence pursuant to Rule 94bis of the Rules must also fulfil the general requirements of admissibility. The proposed evidence must therefore be relevant and have probative value, and the probative value must not be substantially outweighed by the need to ensure a fair trial."

37. The OCP submission that “any facts or data may be used as a basis for expert testimony”²³ amounts to a circumvention of Article 15, and should thus be rejected. No distinction is made between an expert and judges or lay juries adjudicating the facts of a case, nor is there any reason to make such distinction.
38. The document by Craig Etcheson, submitted as an Annex to the Introductory Submission, contains more than seventy references to confessions from S-21.²⁴ Throughout the document, S-21 confessions are being used as evidence of the Democratic Kampuchea hierarchy and Khmer Rouge policies. However, Etcheson never refers to more than one or two confessions when using them as sources for the broad conclusions he draws.²⁵ Thus, to say that statements regarding DK hierarchy, communication, and policies/policy implementation “were made by victim after victim”²⁶ is unsubstantiated, at least in the document drafted by Craig Etcheson, and should be rejected.
39. In any case, the use of an expert should be reserved to deal with facts which are outside the knowledge of the judges.²⁷
40. The OCP argues that the first few statements of victims in S-21 were not subject to torture where it states that “biographical information found in earlier interrogations was arguably not the product of torture, and reliable as a consequence.”²⁸ The OCP raises the issue of the burden of proof and argues that “[i]n this case, it is the persons accused of torture who are most capable of proving whether torture occurred or not

²³ OCP Response, para. 34.

[REDACTED]

[REDACTED]

²⁶ OCP Response, para. 24.

[REDACTED]

²⁷ See May & Wierda, *International Criminal Evidence* (2002), p. 199.

²⁸ OCP Request, para. 25.

since almost all the torture victims have been killed.”²⁹ The defence wishes to reiterate Article 38 of the Cambodian Constitution, which states that “[c]onfessions obtained by physical or mental force shall not be admissible as evidence of guilt. Any case of doubt, it shall be resolved in favour of the accused.” It is the case for the OCP that confessions were routinely extracted from persons as a result of methods of torture. This is supported by the evidence of Duch and numerous academic writers. The burden of proof to show that confessions were not the result of torture lies on the OCP.

41. The OCP suggests that the torture charges against the Charged Person cannot be investigated and tried without relying upon torture-tainted evidence, and would thus breach Cambodia’s obligations to investigate and prosecute acts of torture as required by Article 12 CAT.³⁰ The defence reminds the OCP that the torture-tainted evidence can be used “against a person accused of torture as evidence that the statement was made.” To use it against other charges of the Introductory Submission than torture is explicitly prohibited by the CAT.

42. The OCP indicates that the annotations on confessions are admissible.³¹ The OCP still has to prove the authenticity of those annotations, but that is a different matter. Again, the confessions cannot be used to show the reliability and authenticity of the annotations, which would be barred by Article 15.

IV CONCLUSION

43. The overall argument in the OCP Response seems to be that, given that these proceedings are instituted against war criminals, it should be allowed to use torture-tainted evidence. As Scharf puts it “the Tuol Sleng evidence is critical for their successful prosecution before the Cambodia Tribunal”.³² The defence respectfully

²⁹ OCP Request, para. 27.

³⁰ OCP Request, para. 37.

³¹ OCP Response, paras. 38-39.

³² M.P. Scharf, “Tainted Provenance: When, If Ever, Should Torture Evidence Be Admissible?”, in: 65 Wash & Lee L. Rev. 129 (Winter 2008), at 139.

submits the Charged Person has the right to be considered innocent until proven guilty. It is not in accordance with international law standards by which Cambodia and the ECCC are bound to admit evidence obtained by torture, regardless of the consequences of not admitting the evidence.

44. The OCP in its Response violates the presumption of innocence, where it states that

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.³³

The OCP fails to observe that these same international laws were designed to protect the rights of individuals who are to be considered innocent until proven guilty.

45. In its Response, the OCP does not cite a single case where a national or international court has (knowingly) admitted evidence obtained through torture.³⁴ It is submitted that extending the Article 15 exception would diminish the effect of the CAT and its role in the fight against torture in courtrooms around the world and the arguments advanced by the OCP would result in a dilution of the provisions and should be rejected.

V PRAYER

46. For the reasons set out above, the defence respectfully requests the OCIJ to:

- (i) 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:

(a) [REDACTED] 35

(b) [REDACTED] 36

³³ OCP Response, para. 22.

³⁴ Rather, the use of such tainted evidence has been dismissed in countries such as France, the Netherlands, the United States and the United Kingdom. These cases are referred to in: A v Secretary of State of the Home Department (No. 2), 8 December 2005, paras. 37-38.


[REDACTED]


(c) [REDACTED] 37

(d) Expert evidence relying upon confessions, such as [REDACTED]
[REDACTED]

(ii) Refrain from using such statements in any other way than set out under (i) and (ii) above.

Done in Phnom Penh, this 18th day of May 2009,




 M. RENT Pouy Seang
 Ms. Diana ELLIS, QC
 Co-Lawyers for Madame Ieng

36 [REDACTED] [REDACTED]

37 [REDACTED] [REDACTED]