



**អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា**  
Extraordinary Chambers in the Courts of Cambodia  
Chambres extraordinaires au sein des tribunaux cambodgiens

**ព្រះរាជាណាចក្រកម្ពុជា**  
**ជាតិ សាសនា ព្រះមហាក្សត្រ**

Kingdom of Cambodia  
Nation Religion King  
Royaume du Cambodge  
Nation Religion Roi

**អង្គបុរេជំនុំជម្រះ**  
Pre-Trial Chamber  
Chambre Preliminaire

**D253/1/8**

*In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*

Case File N° 003/07-09-2009-ECCC/OCIJ (PTC33)

**THE PRE-TRIAL CHAMBER**

**Before:** Judge PRAK Kimsan, President  
Judge Olivier BEAUVALLET  
Judge NEY Thol  
Judge Kang Jin BAIK  
Judge HUOT Vuthy

**Date:** 13 December 2017

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**DECISION ON [REDACTED] REQUEST FOR ANNULMENT OF  
D114/164, D114/167, D114/170, AND D114/171**

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**THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of “██████████ Application for Annulment of D114/164, D114/167, D114/170, and D114/171”, filed by the Co-Lawyers for ██████████ (respectively the “Co-Lawyers” and the “Applicant”) on 17 July 2017 (the “Application”).<sup>1</sup>

## I. INTRODUCTION

1. The Application was referred to the Pre-Trial Chamber by the International Co-Investigating Judge (the “ICIJ”) on 4 July 2017.<sup>2</sup>

## II. PROCEDURAL HISTORY

2. On 7 September 2009, the Acting International Co-Prosecutor filed with the Office of the Co-Investigating Judges (the “OCIJ”) the Second Introductory Submission, alleging the involvement of the Applicant in criminal acts and proposing to press charges against him for, *inter alia*, torture as a crime against humanity.<sup>3</sup>

3. On 2 September 2014, the ICIJ issued a Rogatory Letter delegating authority to perform investigative actions to OCIJ Investigators and instructing them to “identify, locate and interview witnesses [...] to specify facts [...] concerning the crimes under judicial investigation”.<sup>4</sup>

4. On 14 December 2015, the ICIJ charged the Applicant with, *inter alia*, the crime against humanity of torture at “[s]ecurity [c]entres, primarily S-21”,<sup>5</sup> under the modes of liability of “commission via JCE 1 [or] in the alternative through ordering or planning, and, in the further alternative through, superior responsibility”.<sup>6</sup>

<sup>1</sup> Case No. 003/07-09-2009-ECCC/OCIJ (“Case 003”), ██████████ Application for Annulment of D114/164, D114/167, D114/170, and D114/171, 17 July 2017, D253/1/3 (“Application”), notified in English on 17 July 2017 and in Khmer on 28 August 2017.

<sup>2</sup> Case 003, Decision on ██████████ Application to Seize the Pre-Trial Chamber with a Request for Annulment of D114/164, D114/167, D114/170, and D114/171, 4 July 2017, D253/1 (“Referral Decision”).

<sup>3</sup> Case 003, Co-Prosecutors’ Second Introductory Submission Regarding the Revolutionary Army of Kampuchea, 20 November 2008, D1 (“Introductory Submission”); Case 003, Acting International Co-Prosecutor’s Notice of Filing of the Second Introductory Submission, 7 September 2009, D1/1.

<sup>4</sup> Case 003, Rogatory Letter, 2 September 2014, D114, p. 2, para. C.

<sup>5</sup> Case 003, Written Record of Initial Appearance of ██████████, 14 December 2015, D174 (“Written Record of Initial Appearance”, p. 4, *referring to the Introductory Submission*, paras 43, 65-66.

<sup>6</sup> Written Record of Initial Appearance, p. 5.



5. In January and February 2016, an OCIJ investigator undertook a number of investigative actions, identifying and locating witnesses, and produced Written Records of Interview (“WRIs”) of witnesses ██████████ (“D114/164”),<sup>7</sup> ██████████ (“D114/167”),<sup>8</sup> ██████████ (“D114/170”),<sup>9</sup> and ██████████ (“D114/171”)<sup>10</sup> (together “the Witnesses” and “the WRIs”, respectively). The OCIJ investigator recorded the investigative actions in two Written Records of Investigative Action (“WRIAs”), one in February (“D114/174”)<sup>11</sup> and the other in March 2016 (“D114/184”)<sup>12</sup> (together “the WRIAs”).

6. On 25 January 2017, the Co-Lawyers filed a request for investigative action regarding the WRIAs and the related WRIs because, in their view, they “indicate that [the Witnesses] became known to the OCIJ as the result of being listed in biographies allegedly completed at S-21 by cadres purged from Kratie [and t]his information raises concerns as to whether these S-21 biographies are torture-tainted evidence and, if so, the extent to which the documents may be used by OCIJ Investigators during the investigation and relied upon by the Co-Investigating Judges in drafting any Dismissal Order or Closing Order” (the “Investigative Request”).<sup>13</sup>

7. On 24 May 2017, the ICIJ issued a Consolidated Decision on investigative requests.<sup>14</sup> The ICIJ found as regards the WRIs, *inter alia*: i) that “[...] I am thus satisfied that there has been no tainting of ██████████ evidence [D114/164]”;<sup>15</sup> ii) that “[t]here is no indication in the WRI of ██████████ [D114/167] [...] that any torture-tainted information was put to the witness”;<sup>16</sup> iii) that “[t]here is no indication in [...] the WRI [...] of ██████████ [D114/170] that the Investigator shared any torture-tainted information with the witness”;<sup>17</sup> and lastly, iv) regarding D114/171, that “[i]n the interview, the Investigator references the S-21 biography

<sup>7</sup> Case 003, Written Record of Interview of witness ██████████, 1 February 2016, D114/164.

<sup>8</sup> Case 003, Written Record of Interview of witness ██████████, 4 February 2016, D114/167.

<sup>9</sup> Case 003, Written Record of Interview of witness ██████████, 15 February 2016, D114/170.

<sup>10</sup> Case 003, Written Record of Interview of witness ██████████, 16 February 2016, D114/171.

<sup>11</sup> Case 003, Written Record of Investigative Action, 28 February 2016, D114/174, pp. 3-4.

<sup>12</sup> Case 003, Written Record of Investigative Action, 10 March 2016, D114/184, pp. 2-3.

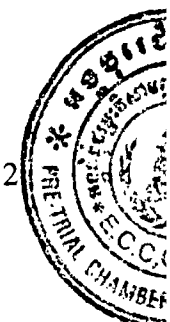
<sup>13</sup> Case 003, ██████████ Request for Investigative Action regarding D114/174, D114/184, and Related Witness Interviews and the Potential Use of Torture-Tainted Evidence, 25 January 2017, D227 (“Investigative Request”), p. 1.

<sup>14</sup> Case 003, Consolidated Decision on ██████████ Requests for Investigative Action Regarding Potential Use of Torture-Tainted Evidence, 24 May 2017, D251 (“Consolidated Decision”).

<sup>15</sup> Consolidated Decision, para. 48.

<sup>16</sup> Consolidated Decision, para. 51.

<sup>17</sup> Consolidated Decision, paras 54-55.



when questioning the witness on her husband's position on the Sector [...] I consider it as falling under the same presumption of torture [...] that attaches to S-21 Confessions. However, [...] the error is easily remedied by disregarding answers 46 to the end. I [...] will disregard Answers 46 to the end of D114/171 for the further course of the proceedings."<sup>18</sup>

8. On 23 June 2017, the Defence filed before the OCIJ an application seeking the annulment of the WRIs,<sup>19</sup> which was referred by the ICIJ to the Pre-Trial Chamber on 4 July 2017.<sup>20</sup>

9. On 5 July 2017, the Pre-Trial Chamber granted the Co-Lawyers ten days to file their Application before the Chamber.<sup>21</sup> On 17 July 2017 and 28 August 2017, the Defence filed the Application in English and Khmer, respectively.<sup>22</sup> The International Co-Prosecutor (the "ICP") filed his Response on 28 August 2017 (the "Response").<sup>23</sup> On 4 September 2017, the Co-Lawyers filed a Request for extension of time and to file their reply in English first with the Khmer translation to follow,<sup>24</sup> which was granted on 6 September 2017.<sup>25</sup> The Co-Lawyer's Reply was notified in English on 12 September 2017 and in Khmer on 30 October 2017 (the "Reply").<sup>26</sup>

### III. ADMISSIBILITY

10. The Co-Lawyers submit the Application pursuant to Internal Rule 76, contending that the WRIs are defective and that reliance on illegal evidence infringes upon the Applicant's right to a fair trial.

<sup>18</sup> Consolidated Decision, paras 58-59.

<sup>19</sup> Case 003, [REDACTED] Application to Seize the Pre-Trial Chamber with a Request for Annulment of D114/164, D114/167, D114/170, and D114/171, 23 June 2017, D253.

<sup>20</sup> See Referral Decision.

<sup>21</sup> Case File Officer Notification, Pre-Trial Chamber's Instructions to the Parties by Email in Case File No. 003/07-09-2009-ECCC/OCIJ (PTC33), 5 July 2017.

<sup>22</sup> See *supra* footnote 1.

<sup>23</sup> International Co-Prosecutor's Response to [REDACTED] Request for Annulment of Four Written Records of Interview, 28 August 2017, D253/1/4.

<sup>24</sup> Case 003, [REDACTED] Request for an Extension of Time to Reply to the International Co-Prosecutor's Response to [REDACTED] Request for Annulment of Four Written Records of Interview and Request to File His Reply in English with the Khmer Translation to Follow, 4 September 2017, D253/1/5.

<sup>25</sup> Case 003, Decision on [REDACTED] Request for an Extension of Time to Reply to the International Co-Prosecutor's Response to [REDACTED] Request for Annulment of Four Written Records of Interview & Request to File His Reply in English with the Khmer Translation to Follow, 6 September 2017, D253/1/6.

<sup>26</sup> Case 003, [REDACTED] Reply to International Co-Prosecutor's Response to [REDACTED] Application for Annulment of Four WRIs, 11 September 2017, D253/1/7, notified in English on 12 September, 2017 and in Khmer on 30 October 2017.



11. Internal Rule 76(4) directs that the Pre-Trial Chamber may declare an application for annulment inadmissible where the application: (i) does not set out sufficient reasons; (ii) relates to an order that is open to appeal; or (iii) is manifestly unfounded. Accordingly, the Pre-Trial Chamber shall ascertain whether the application for annulment: (i) specified the parts of the proceedings which are prejudicial to the rights and interests of the applicant; (ii) clearly articulated the prejudice; and (iii) where necessary, adduced sufficient evidence to sustain the allegations.<sup>27</sup>

12. The Pre-Trial Chamber is satisfied that the conditions of Internal Rule 76(4) are met. The Application does not concern any order that is open to appeal. Nothing in the Application suggests that it is evidently unfounded in fact or in law such as to deprive it of any prospect of success. The Chamber is of the further view that the reasoning set forth in the Application is sufficient since it contains logically consistent submissions, underpinned by legal reasoning, whose grounds are set forth, or by factual material pinpointed in the case file. The Pre-Trial Chamber therefore finds the application admissible.

#### IV. APPLICABLE LAW

13. Annulment is foreseen under Internal Rule 48, which provides that “[i]nvestigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application”.

14. Accordingly, examination of an application for annulment requires: (1) consideration, in the first place, of procedural defect; and (2) subsequently, where such defect is established, the existence of prejudice to the applicant.<sup>28</sup> A procedural irregularity which is not prejudicial to an applicant does not result in annulment.<sup>29</sup>

<sup>27</sup> Case No. 004/07-09-2009-ECCC/OCIJ (PTC39), Considerations on ██████████ Application to Annul Investigative Action and Orders Relating to Kang Hort Dam, 11 August 2017, D345/1/6, para. 7.

<sup>28</sup> Case 003 (PTC20), Decision on ██████████ Appeal against Co-Investigating Judge HARMON’s Decision on ██████████ Applications to Seize the Pre-Trial Chamber with Two Applications for Annulment of Investigative Action, 23 December 2015, D134/1/10 (“██████████ Decision on Two Applications”), para. 25 referring to Case No. 002/19-09-2007-ECCC/OCIJ (“Case 002”) (PTC06), Decision on NUON Chea’s Appeal Against Order Refusing Request for Annulment, 26 August 2008, D55/1/8, , para. 34.

<sup>29</sup> ██████████ Decision on Two Applications, para. 26 referring to Case 002 (PTC41), Decision on IENG Thirith’s Appeal Against the Co-Investigating Judges’ Order Rejecting the Request to Seize the Pre-Trial Chamber with a View to Annulment of All Investigations, 25 June 2010, D263/2/6, para. 21.



## V. MERITS

### A. Submissions

#### 1. The Application

15. The Co-Lawyers request that the Pre-Trial Chamber annul the WRIs D114/164, D114/167, D114/170 and D114/171,<sup>30</sup> and allege procedural defect on two grounds. They contend that the OCIJ has violated the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (the “CAT”),<sup>31</sup> and thus applicable Cambodian law, by (i) relying on torture-tainted S-21 biographies (the “First Ground”)<sup>32</sup> and (ii) by placing torture-derived WRIs on the Case File (the “Second Ground”).<sup>33</sup> They further submit that “[t]hese defects violate [the Applicant’s] right to a fair trial”.<sup>34</sup>

16. In support of the First Ground, the Co-Lawyers present two main arguments, including that information used as an investigative lead constitutes evidence (the “Argument A”)<sup>35</sup> and that relying on torture-tainted evidence as lead evidence is contrary to the policy rationales behind the exclusionary rule (the “Argument B”).<sup>36</sup> In Argument A, the Co-Lawyers submit that information used as an investigative lead constitutes evidence because it is a link in a chain of evidence tending to prove or disprove a fact<sup>37</sup> and that information establishing the quality and reliability of the evidence is also itself necessary evidence.<sup>38</sup> They contend that a definition of evidence that excludes investigative leads is overly narrow and cannot be used to circumvent the exclusionary rule set out in the CAT.<sup>39</sup> The Co-Lawyers aver, further in Argument B, that the “[u]se of torture-tainted evidence, for whatever reason, legitimizes the use of torture and promotes [it]”<sup>40</sup> and that “[t]he point of the exclusionary rule is to render

<sup>30</sup> Application, para. 32.

<sup>31</sup> Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984 and entered into force on 26 June 1987, United Nations Treaty Series, Vol. 1465 (“CAT”).

<sup>32</sup> Application, paras 5-17.

<sup>33</sup> Application, paras 18-31.

<sup>34</sup> Application, para. 31. *See also* Application, paras 4 and 32.

<sup>35</sup> Application, paras 5-9.

<sup>36</sup> Application, Section “B” and paras 10-17.

<sup>37</sup> Application, para. 5.

<sup>38</sup> Application, para. 6.

<sup>39</sup> Application, para. 7.

<sup>40</sup> Application, para. 12.



torture worthless, not to ensure that convictions are based on reliable evidence.”<sup>41</sup> The Co-Lawyers contend that while “[t]he *only* permissible use of torture-tainted evidence under Article 15 of the CAT is that it may be invoked as evidence against a person accused of torture as evidence that the statement was made under torture”,<sup>42</sup> “[t]he biographies are not being used to show they were made under torture”.<sup>43</sup> The Co-Lawyers then make reference to international jurisprudence and academic articles and state that “[r]emoving any incentive to use torture is particularly important in Cambodia”.<sup>44</sup> The Co-Lawyers conclude that “[t]he policy rationales behind Article 15 of the CAT of disincentivizing torture and protecting the integrity of the proceedings demonstrate that the OCIJ must not rely on torture-tainted S-21 biographies as investigative leads and that no use can be made of the resulting WRIs.”<sup>45</sup>

17. The Co-Lawyers then articulate their arguments, in support of the Second Ground for the procedural defect allegations, under the heading “C” of the Application, where they argue that Article 15 of the CAT applies to derivative evidence (the “Argument C”).<sup>46</sup> The Co-Lawyers submit, first, that a review of the preparatory work of the CAT does not support a conclusion that derivative evidence was intended to be excluded from the CAT<sup>47</sup> and, second, the fact that civil law systems favor the free admissibility of evidence does not mean that such systems universally permit the admission of evidence derived from torture-tainted evidence.<sup>48</sup> The Co-Lawyers add that a review of international sources also shows that the exclusionary rule applies to derivative evidence.<sup>49</sup>

18. Regarding the alleged prejudice caused, the Co-Lawyers submit that the right to a fair trial as protected under the ECCC Agreement, Establishment Law and Rule 21 has been violated.<sup>50</sup>

<sup>41</sup> *Ibid.*

<sup>42</sup> Application, para. 13.

<sup>43</sup> *Ibid.* See also Application, para. 3(a): OCIJ is relying on “torture-tainted S-21 biographies for their evidential value”, para. 3(b): “as lead evidence”, and para. 8: “to discover the existence of relatives of people who were tortured at S-21 and [...] [the] addresses in the biographies to locate [and interview] these people.”

<sup>44</sup> Application, paras 13-16.

<sup>45</sup> Application, para. 17.

<sup>46</sup> Application, paras 18-31.

<sup>47</sup> Application, paras 18, 21.

<sup>48</sup> Application, paras 18, 22.

<sup>49</sup> Application, paras 24-25, 27-29.

<sup>50</sup> Application, paras 4, 9, 17, 31-32.



## 2. The Response

19. In his Response, the ICP requests the Pre-Trial Chamber to dismiss the Annulment Request, contending that “[n]either the law, nor the policies underlying the CAT’s exclusionary rule, support a prohibition on the use of S-21 biographies as investigative leads”.<sup>51</sup>

20. Responding to the First Ground, the ICP submits that relying on torture-tainted documents for investigative leads does not constitute being “invoked as evidence” for purposes of the CAT.<sup>52</sup> In the ICP’s view, the use of S-21 biographies to identify witnesses is not equal to tendering them into evidence or relying on them for their truth.<sup>53</sup> The ICP also contends that the Co-Lawyers make an “overly broad definition of ‘evidence’”.<sup>54</sup> Moreover, the ICP submits that “[i]f there is any remaining question that investigative leads are not encompassed by Article 15 of the CAT, the Article itself makes it clear by not just prohibiting the existence of evidence but the invocation as evidence”.<sup>55</sup>

21. To address the Co-Lawyers’ Second Ground, the ICP puts forward two main arguments, including: (i) that the Applicant has not shown that derivative evidence is prohibited by Article 15 of the CAT or by other controlling law,<sup>56</sup> and (ii) that allowing this derivative evidence in the unique context of the ECCC does not violate any of the policy rationales behind the exclusionary rule.<sup>57</sup> In the first argument, the ICP notes that the Applicant admits that Article 15 of the CAT is silent as to derivative evidence,<sup>58</sup> and then submits that neither the ECCC Internal Rules, nor Cambodian law address the use of derivative evidence.<sup>59</sup> The ICP avers that “the derivative WRIs have not been made as a result of torture, and therefore are not covered by Article 15’s plain language”<sup>60</sup> and that “under the ‘ordinary meaning’ of its terms, Article 15 applies only to statements themselves made as a result of torture.”<sup>61</sup> He

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<sup>51</sup> Response, para. 71.

<sup>52</sup> Response, paras 26-33.

<sup>53</sup> Response, paras 28-30.

<sup>54</sup> Response, para. 31.

<sup>55</sup> Response, para. 33.

<sup>56</sup> Response, paras 34-53.

<sup>57</sup> Response, para. 54-66.

<sup>58</sup> Response, para. 35, *referring to Application*, para. 21.

<sup>59</sup> Response, para. 36.

<sup>60</sup> Response, para. 39.

<sup>61</sup> Response, para. 41.





further submits that none of the rules of the international criminal tribunals currently prohibit derivative evidence<sup>62</sup> and that the Co-Lawyers fail to show any international consensus, let alone customary international law or *jus cogens*, regarding the applicability of Article 15 of the CAT to derivative evidence.<sup>63</sup> In his second argument, the ICP acknowledges that it is “appropriate to consider the policy rationales behind Article 15’s exclusionary rule in order to determine whether derivative evidence should be prohibited”<sup>64</sup> and adopts the view that “there is no deterrent value to excluding the evidence from proceedings before the [ECCC]”.<sup>65</sup> He adds that “the integrity of the proceedings will only be buttressed by using all available evidence that is not explicitly prohibited to determine the truth of the facts in Case 003”.<sup>66</sup>

22. The ICP lastly submits that “annulment is not a proper remedy”,<sup>67</sup> as “[n]one of [Accused’s] rights under the ICCPR have been violated by the presence of the WRIs on the Case File, as all parties agree that the evidence contained in [the] WRIs is untainted”<sup>68</sup>, therefore not “affecting the fairness of the proceedings”<sup>69</sup> and the “[usage] of S-21 Biographies [...] must be viewed within the broader mandate and function of the ECCC.”<sup>70</sup>

### 3. The Reply

23. In their Reply, the Co-Lawyers reiterate that information used as investigative leads constitutes evidence because, without “the S-21 Biographies, the witnesses would not have been found”, thereby evincing the existence of a “link [...] tending to prove or disprove a fact.”<sup>71</sup> They assert that “Article 15 does not limit the word *proceeding* only to trials, nor does it limit the word *invoke* only in so far as it applies to trials”.<sup>72</sup> Therefore the reliance on S-21 Biographies at a pre-trial investigation stage by the investigator when carrying out

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<sup>62</sup> Response, para. 52.

<sup>63</sup> Response, para. 53.

<sup>64</sup> Response, para. 54.

<sup>65</sup> Response, para. 59, *referring to* Michael P. SCHARG, *Tainted Provenance: When, if Ever, Should Torture Evidence Be Admissible*, 2008, p. 152.

<sup>66</sup> Response, para. 65.

<sup>67</sup> Response, paras 67-70.

<sup>68</sup> Response, para. 67.

<sup>69</sup> Response, para. 70.

<sup>70</sup> Response, para. 68.

<sup>71</sup> Reply, para. 9.

<sup>72</sup> Reply, para. 15.



investigative duties, typically recorded in a WRI, could constitute the “invocation” of such evidence for the purposes of conducting a judicial investigation.<sup>73</sup>

24. The Co-Lawyers contend that because the four WRIs would not exist but for the S-21 biographies, they constitute evidence “made as a result of” torture.<sup>74</sup> They reiterate that the CAT’s prohibition of torture is a *jus cogens* norm of international law, encompassing a prohibition on the use of derivative evidence<sup>75</sup> with which the OCIJ and Chambers must comply<sup>76</sup> since Cambodia is a party to the treaty.<sup>77</sup> They argue that the “plain language of Article 15, object and purpose of the CAT, and national and international standards prohibit the use of derivative evidence in judicial proceedings, except against an accused torturer as evidence that the statement was made under torture.”<sup>78</sup> They also submit that the use of torture-tainted evidence to obtain torture-derived evidence impermissibly expands Article 15’s narrow exception and frustrates its deterrent purpose,<sup>79</sup> and that reliance on torture-tainted evidence in a legal proceeding legitimizes torture and damages the integrity of those proceedings.<sup>80</sup>

25. The Co-Lawyers finally argue that annulment is a proper remedy as the Applicant’s fair trial rights were violated by the unlawful use of torture-tainted evidence and as the proceedings are not fair “when they are not conducted in accordance with the Cambodian Constitution and Article 15 of the CAT”.<sup>81</sup> They add that adopting a flexible approach to the use of torture-tainted and derivative evidence “negatively impacts [...] the individual right to a fair trial [...], damages the integrity of the proceedings and the administration of international justice at the ECCC.”<sup>82</sup>

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<sup>73</sup> Reply, paras 13, 15-16.

<sup>74</sup> Reply, para. 25.

<sup>75</sup> Reply, para. 28.

<sup>76</sup> Reply, paras 28, 37.

<sup>77</sup> Reply, para. 37.

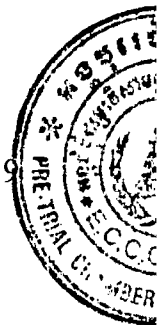
<sup>78</sup> Reply, para. 46.

<sup>79</sup> Reply, para. 50.

<sup>80</sup> Reply, paras 57, 59.

<sup>81</sup> Reply, para. 62 [references omitted].

<sup>82</sup> Reply, para. 63.



**B. Discussion**

26. The Pre-Trial Chamber makes reference to Article 15 of the CAT, which provides:

“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.”

27. The Pre-Trial Chamber has found that Article 15 of the CAT applies to proceedings before the ECCC<sup>83</sup> and that its application has to be strict.<sup>84</sup> It shall read Article 15 in accordance with the ordinary meaning of the terms of the CAT in their context and in the light of its object and purpose.<sup>85</sup> The Pre-Trial Chamber concurs that “the CAT defines its object and purpose in recognition of a person’s inalienable human rights and inherent dignity.”<sup>86</sup>

28. In this light, the Pre-Trial Chamber concurs that the rationales behind Article 15’s exclusionary rule “[include] the public policy objective of removing any incentive to undertake torture anywhere in the world by discouraging law enforcement agencies from resorting to the use of torture. Furthermore, confessions and other information extracted under torture or ill-treatment are not considered reliable enough as a source of evidence in any legal proceeding. Finally, their admission violates the rights of due process and a fair trial.”<sup>87</sup>

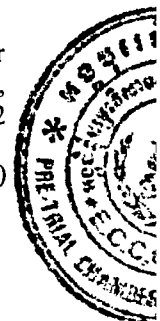
<sup>83</sup> Case 002 (PTC31), Decision on Admissibility of IENG Sary’s Appeal against the OCIJ’s Constructive Denial of IENG Sary’s Requests Concerning the OCIJ’s Identification of and Reliance on Evidence Obtained through Torture, 10 May 2010, D130/7/3/5 (“PTC Case 002 Decision”), para. 35. *See also* Case No. 002/19-09-2007-ECCC/SCC, Decision on Objections to Document Lists (Full Reasons), 31 December 2015, F26/12 (“Supreme Court Case 002 Decision”), footnote 65, *referring to* Cambodian Constitutional Council, Case No 131/003/2007, Decision No 092/003/2007, 10 July 2007 *and to* Concluding Observations of the Committee Against Torture (Cambodia), CAT/C/KHM/CO/2, 20 January 2011, para. 10.

<sup>84</sup> PTC Case 002 Decision, para. 38. *See also* Committee Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, CAT/C/GC/2, 24 January 2008, para. 6: “the Committee specified that the obligations in articles [...] 15 (prohibiting confessions extorted by torture being admitted in evidence, except against the torturer) [...] ‘must be observed in all circumstances’.” *See also* Supreme Court Case 002 Decision, para. 40: “[a]ny interpretation of [...] Article 15, that would weaken the prohibition and prevention of torture must [...] be rejected”.

<sup>85</sup> Vienna Convention on the Law of Treaties, adopted on 23 May 1969 and entered into force on 27 January 1980, United Nations Treaty Series, Vol. 1155 (“VCLT”), Article 31.

<sup>86</sup> Supreme Court Case 002 Decision, para. 40.

<sup>87</sup> Report of the Special Rapporteur on Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, Juan E. MÉNDEZ, U.N.G.A., Human Rights Council, 25th Session, UN Doc. No. A/HRC/25/60, 10 April 2014 (“Report of the Special Rapporteur on Torture”), para. 21. *See also* Supreme Court Case 002



### 1. Torture-Tainted Evidence

29. The Co-Lawyers argue that information, used as an investigative lead, constitutes evidence because it is a link in a chain of evidence tending to prove or disprove a fact. In their view, a definition of evidence that excludes investigative leads is overly narrow and cannot be used to avoid the exclusionary rule set out in the CAT. More concretely, “[t]he names and addresses in the S-21 biographies are the link in the chain that led the investigators to interview the witnesses. But for the torture-tainted biographies, the investigators would not have learned of these potential witnesses or collected their WRIs.”<sup>88</sup>

30. The Pre-Trial Chamber considers that, generally, the term “investigative lead” is not encompassed within the ordinary meaning of evidence.<sup>89</sup> An investigative lead does not prove or disprove any alleged fact concerning the crimes under judicial investigation. The Co-Lawyers’ argument that it is “a link”, or their use of the connective phrase “but for”, also indicates that the lead is not itself evidence.

31. In the instant case, investigators were tasked by the ICIJ to identify, locate and interview witnesses. An investigator used the S-21 biographies to identify information such as the place of birth and/or name of family member of persons whose biographies were recorded at the S-21. The investigator then travelled to those birth places and/or to neighbouring village(s) and met either village chiefs or relatives in order to possibly locate the family members who could testify and, if found, to then interview the latter. The investigator clearly did not use the information, such as birth place or name of family member, to prove any alleged fact. The information merely served as a starting point to search for potential witnesses, absent any verification of quality or reliability of the witnesses, and in fact did not directly lead to the WRIs in question. In this regard, the Pre-Trial Chamber concurs that “during the course of the investigation, the Co-Investigating Judges need not rule out any hypothesis and it is not necessary for them to believe the

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Decision, paras 40-46. *See also* Case No. 002/19-09-2007/ECCC/TC Decision on Evidence Obtained Through Torture, 5 February 2016, E350/8 (“Trial Chamber Case 002 Decision”), para. 73.

<sup>88</sup> Application, para. 8.

<sup>89</sup> Black’s Law Dictionary, Evidence: “1. Something (including testimony, documents and tangible objects) that tends to prove or disprove the existence of an alleged fact”.



assertions in the confessions to be true in order to use them to develop new avenues for searching out the truth, without this affecting the integrity of the proceedings.”<sup>90</sup>

32. Therefore, Pre-Trial Chamber finds that such use of the Information from the S-21 biographies does not amount to “invocation as *evidence*” within the ordinary meaning of the phrase, as in Article 15 of the CAT read in accordance with the internationally accepted standard for interpretation.<sup>91</sup> In this regard, the Chamber finds that the Co-Lawyers’ definition of evidence that includes investigative leads is overly broad.

33. The Pre-Trial Chamber notes that the instant case does involve charges of torture. The information was used as a lead to identify and locate new witnesses because they were likely to have independent knowledge of events relevant to the charges of torture, which in turn may contribute to finding the truth of torture allegations. Therefore, the exclusion of the investigative lead by encompassing it as “evidence” in the present case runs contrary to the object and purpose of Article 15 of the CAT as it would compromise the very rationale behind it.

## 2. Torture-Derived Evidence

34. The Co-Lawyers argue that a review of the preparatory work of the CAT does not support a conclusion that derivative evidence was intended to be excluded from the Convention; that the fact that civil law systems favor the free admissibility of evidence does not mean that such systems universally permit the admission of evidence derived from torture-tainted evidence; and that a review of international sources shows that the exclusionary rule applies to derivative evidence.<sup>92</sup> They add that the policy rationales behind the CAT demonstrate that the intent was to include derivative evidence within the scope of Article 15.<sup>93</sup>

35. The Pre-Trial Chamber first notes that the Co-Lawyers acknowledge that Article 15 of the CAT is silent as to derivative evidence.<sup>94</sup> It only refers to “any *statement* which is

<sup>90</sup> Case 002, Order on Use of Statements which Were or May Have Been Obtained by Torture, 28 July 2009, D130/8, para. 26.

<sup>91</sup> VCLT, Article 31.

<sup>92</sup> Application, para. 18.

<sup>93</sup> Application, para. 21, referring to “Argument B”.

<sup>94</sup> Application, para. 21 and Response, para. 35.



established to have been made as a *result of torture*” [emphasis added] without making any further precision. A reading of Article 15 of the CAT and a review of the several drafts<sup>95</sup> of the CAT, discussed in the process before its unanimous adoption by the United Nations General Assembly on 10 December 1984,<sup>96</sup> reveal that the term “derivative” appeared only once in the first draft submitted by the International Association of Penal Law, which read “obtained by means of torture or *any other evidence derived therefrom*” [emphasis added]. It was not later or finally included, which, in the Pre-Trial Chamber’s view, indicates that the final settlement of any issue whether specific statements are “made as a result of torture” was left for the scrutiny of the judicial authorities whenever faced with concrete allegations. Therefore, any specific allegations that statements may fall within the ambit of the exclusionary rule of Article 15 of the CAT have to be addressed on a case by case basis through interpretation of the term “made as a result of torture” in its context and in the light of its object and purpose, rather than by deciding whether Article 15 of the CAT applies to the “derivative evidence” in general.

36. In this vein, the Pre-Trial Chamber agrees with the finding of the Trial Chamber that an international standard concerning the “torture-derived evidence” has not yet been established.<sup>97</sup> The authorities cited by the Co-Lawyers in support to their argument<sup>98</sup> are only “recommendations” for countries to incorporate Article 15 of the CAT in their national legislations and cannot contradict the plain letter of Article 15 without any consideration of specific circumstances in each case. The Report of the Special Rapporteur on torture,<sup>99</sup> which speaks about extensions of the exclusionary rule to evidence originating in an act of torture and subsequently obtained through legal means, is also a general recommendation to the judicial branch of the States requesting “to go beyond the literal remit of article 15 of the

<sup>95</sup> Draft submitted by the International Association of Penal Law, 15 January 1978, UN Doc. No. E/CN.4/NGO/213; Original draft submitted by Sweden, 18 January 1978, UN Doc. No. E/CN.4/1285; Draft submitted by the United States, 19 December 1978, UN Doc. No. E/CN.4/1314; Revised draft submitted by Sweden, 19 February 1979, UN Doc. No. E/CN.4/WG.1/WP.1.

<sup>96</sup> U.N.G.A., Resolution 39/46 of 10 December 1984.

<sup>97</sup> Trial Chamber Case 002 Decision, para. 69.

<sup>98</sup> Application, para. 24, referring to Summary Record of the Public Part of the 250th Meeting: Finland, UN Doc. No. CAT/C/SR.250, 8 May 1996, Recommendations, para. 18, p. 7 and to Summary Record of the Public Part of the 279th Meeting: Georgia, Poland, UN Doc. No. CAT/C/SR.279, 21 March 1997, Recommendations, para. 15, p. 3 and to Summary Record of the Public Part of the 329th Meeting: Germany, UN Doc. No. CAT/C/SR.329, 14 May 1998, Recommendations, para. 15, p. 8.

<sup>99</sup> Application, para. 25, referring to Report of the Special Rapporteur on Torture, para. 29.



Convention and provide procedures in domestic legislation for the exclusion of any and all evidence obtained in violation of safeguards designed to protect against torture”.<sup>100</sup>

37. The Pre-Trial Chamber considers that, in its ordinary meaning, the term “made as a result of” requires a certain degree of causation. It does not include every event that follows. In the instant case, the link between torture and the WRIs in question is tenuous. Although the search for witnesses was initiated from the information, such as the birth place of the S-21 detainee or their relatives’ names, the witnesses were eventually found through extensive search attempts by the investigator at various places. The interviews were conducted depending on the availability and willingness of the witnesses. The information was only extracted from the cover page of an S-21 biography<sup>101</sup> that is not related to the contents of the S-21 confession, which is presumed to have been made under torture.<sup>102</sup> In these circumstances, the degree of causation is not sufficient to conclude that the WRIs were “made as a result of a torture” in accordance with the ordinary meaning of this phrase as used in Article 15 of the CAT.

38. The Pre-Trial Chamber also finds that the Co-Lawyers’ argument that the use of torture-tainted evidence to obtain torture-derived evidence impermissibly expands Article 15’s narrow exception and frustrates its deterrent purpose fails in the instant case. First, the interpretation of the phrase “statement [...] made as a result of a torture” in Article 15 of the CAT is not related to the exception of the Article. Secondly, the Co-Lawyers’ broad interpretation beyond the ordinary meaning of the phrase goes against the rationale behind Article 15 of the CAT if the investigation of the torture allegation is hindered and those who are accused of torture are protected by the interpretation.<sup>103</sup>

39. In conclusion, the Pre-Trial Chamber does not find the WRIs defective.

<sup>100</sup> Report of the Special Rapporteur on Torture, para. 68 [emphasis added].

<sup>101</sup> Supreme Court Case 002 Decision, para. 68: “whether information such as biographical data recorded in S-21 confessions or prison notebooks identifying the victims, such as their name, age, residence, former occupation and DK unit or position [...] were obtained by torture is a matter of proof.”

<sup>102</sup> Supreme Court Case 002 Decision, para. 57: “there is a real risk that the S-21 Statements were obtained through torture and each statement may thus be presumed to be so obtained.”

<sup>103</sup> *Supra*, para. 33.



**VI. DISPOSITION**

**THEREFORE, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:**

**FINDS** the Application admissible;

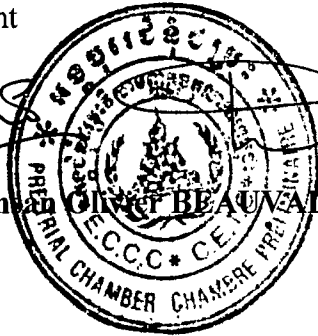
**DISMISSES** the Application in its entirety.





In accordance with Internal Rule 77(13), the present decision is not subject to appeal.

**Phnom Penh, 13 December 2017**

President

Pre-Trial Chamber



**PRAK Kim CHENG BEAUVALLLET NEY Thol Kang Jin BAIK HUOT Vuthy**