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**12 April 2013**

**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: 11 February 2009  
Party Filing: Defence for Madame Ieng Thirith  
Original Language: English and Khmer  
Type of Document: Public

<b>ឯកសារដើម</b>	
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL	
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Data de reception):	
11, FEB, 2009	
ម៉ោង (Time/Heure):	
14:30	
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier:	
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**DEFENCE REQUEST FOR  
EXCLUSION OF EVIDENCE OBTAINED BY TORTURE**

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ថ្ងៃ ខែ ឆ្នាំ ត្រឹមត្រូវ (Certified Date/Data de certification):	
12, FEB, 2009	
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier:	
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## I INTRODUCTION AND SUMMARY OF ARGUMENTS

1. It is submitted that any evidence contained within Case File 002 as presented by the Office of the Co-Prosecutors (“OCP”) and the Office of the Co-Investigating Judges (“OCIJ”), which has been obtained as a result of torture should be ruled inadmissible and not considered in the proceedings. It was recognised by Aristotle more than 2000 years ago that information which flows from torture often bears little relation to the truth. Evidence so obtained is properly described as tainted and inherently unreliable. We set out herein the legal framework, both national and international, which prohibits the use of torture as part of an interrogation process and further prohibits the use of information which has been obtained through torture. We request that the Co-Investigating Judges in recognition of the morally repugnant behaviour of the torturer and the legal prohibitions on the use of the resultant information exclude from consideration during their investigations any evidence which was or may have been obtained by torture.
2. The OCIJ is seized of material within the Case File which can be demonstrated to have been obtained as a result of interrogation by torture.<sup>1</sup> Duch, for example, in his many interviews, speaks of the methods by which confessions and information were extracted at the security centres. David Chandler in ‘Voices from S-21’ gives an authoritative assessment of the methodology used to obtain information.
3. These submissions are made pursuant to the provisions of Rule 55(10) of the Internal Rules (“IR”), which provides that at any time during an investigation a Charged Person may request the OCIJ to make such orders as they consider necessary for the conduct of the investigation.
4. Such evidence obtained by torture could at this stage of the proceedings be used as lead evidence to obtain information for further investigations, and also, the content thereof could be used in determining the final charges against Madame Ieng Thirith. The defence objects to both modalities.
5. The investigations against Duch have been completed, and the investigations against Madame Ieng have commenced. The defence contends that it is necessary and relevant to

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<sup>1</sup> See OCIJ interviews with Duch, mainly documents no. D86-D90 in Case File 002.

deal with this matter at this stage of the proceedings, so as to clarify the position of the ECCC on the use of such material, at a time when the investigations are ongoing.

## II RELEVANT FACTS

6. From 9 June 2008 onwards, Duch's interviews with the OCIJ in Case File No. 001 have been added to Case File No. 002.<sup>2</sup> The interviews set out Duch's position indicate that the confessions obtained in S-21 Security Centre have been extracted by the use of torture,<sup>3</sup> and that other security centres used similar torturous practices.<sup>4</sup>
7. The OCP in its Introductory Submission refers to numerous confessions and other documents potentially obtained by torture,<sup>5</sup> and also, relies on documents which themselves refer to evidence obtained by torture, such as Stephen Heder's "Seven Candidates for Prosecution",<sup>6</sup> and David Chandler, Ben Kiernan and Chanthou Boua's "Pol Pot Plans the Future".<sup>7</sup> In addition, other documents used by the OCP refer to those secondary sources.<sup>8</sup> The OCP thus uses several layers of evidence in its Introductory Submission, which all refer back to material potentially obtained by torture.
8. The defence submits that the use of such illegally obtained material is inadmissible in the current proceedings as it violates provisions of international and national law. Further it violates the Charged Person's right to a fair trial and the presumption of innocence. In the

<sup>2</sup> *Prosecutor v. Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC-PTC(02), Written Record of Adversarial Hearing, interview date 31 July 2007, Doc No. D86/1, document filed with greffiers on 9 June 2008 (ERN 00145454-00145457).

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

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

<sup>5</sup> See for instance Introductory Submission, footnotes 80, 82, 119, 177-180, 182, 183, 203, 216, 327, 335, 337, 340, 342, 344, 345, 350, 355-357, 375, 376, 384, 391-394, 398-400, 410, 416, 417, 419, 420, 425, 427, 429, 432, 433, 457-463, 465-467, 490, 519, 520, 528, 530-533, 537-539, 541, 552, 555, 558, 564 and 566.

<sup>6</sup> Stephen Heder and Brian D. Tittmore, "Seven Candidates for Prosecution. Accountability for the Crimes of the Khmer Rouge", Phnom Penh: DC-Cam 2004, p. 29-31.

<sup>7</sup> David Chandler, Ben Kiernan and Chanthou Boua, "Pol Pot Plans the Future. Confidential Documents from Democratic Kampuchea", see Introductory Submission, p. 106, footnote 80.

<sup>8</sup> See for instance, just by way of example: Phnom Penh Post (16/1), "The Amnesia of Brother Number 2", 12-25 January 2007, (ERN 00081516-00081520).

circumstances the defence contends that the OCIJ should refrain from using such material.

### III RELEVANT LEGAL STANDARDS AND INTERPRETATION THEREOF

#### 3.1 Cambodian Law

9. Article 38 of the Cambodian Constitution provides that “[c]onfessions obtained by physical or mental force shall not be admissible as evidence of guilt. Any case of doubt, it shall be resolved in favour of the accused.” Similarly, Article 24(3) of the 1992 UNTAC Criminal Code reads, insofar relevant: “A confession obtained under duress, of whatever form, shall be considered null and void.” The Code of Criminal Procedure of the Kingdom of Cambodia in Article 321 specifies moreover that “[a] confession shall be considered by the court in the same manner as other evidence. Declaration given under the physical or mental duress shall have no evidentiary value”.
10. Cambodian law is therefore unequivocal in its exclusion from evidence obtained by torture, and in case of doubt, it shall be resolved in favour of the accused person.
11. In 1992, Cambodia acceded to the Convention against Torture.

#### 3.2 ECCC Internal Rules

12. Rule 87(1) of the Internal Rules provides that “[u]nless provided otherwise in these IRs, all evidence is admissible”. Rule 87(2)(d) provides that a Chamber may reject a request for evidence where it finds that it is “not allowed under the law”.
13. Rule 87(1) can be seen as providing a *lex generalis*. The provision of Article 15 of the Convention against Torture (“CAT”), providing for the exclusion of torture-tainted evidence, can be considered a *lex specialis*, providing for a more specific situation than the IR. The *lex specialis* prevails over the *lex generalis* and Article 15 CAT should be taken into account by the ECCC. Also, Article 15 CAT is in line with Rule 87(2)(d) IR.
14. Significantly, the ECCC procedural rules do not prevail over Cambodia’s obligations under international law. The courts of Cambodia, and thus also the ECCC, are bound by the treaties signed by the Government of Cambodia. As such, the ECCC judges are bound by Article 15 CAT.

### 3.3 Other International Criminal Tribunals

15. Article 23 new of the ECCC Establishment Law reads:

“If these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, the Co-Investigating Judges may seek guidance in procedural rules established at the international level.”

16. Accordingly further guidance is sought by consideration of the procedural rules of the other international criminal instruments, Rules 95 of the Rules of Procedure of both the International Criminal Tribunals for the former Yugoslavia and Rwanda provide:

“No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.”

17. Article 69(7) of the Rome Statute provides in a slightly different wording:

“Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

- (a) The violation casts substantial doubt on the reliability of the evidence; or
- (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.”

18. The defence is not aware of any case in which one of the international criminal tribunals has had to rule on the admissibility of evidence obtained by torture. However, given the general acceptance that information obtained by torture is inherently unreliable and tainted, and the mandatory terms in which both Rule 95 and Article 69(7), any prosecutor seeking to adduce such evidence would face an insurmountable burden.

### 3.4 International Law: CAT

19. Article 15 CAT provides:<sup>9</sup>

“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.”

20. The defence submits that the text of this provision is self-explanatory in that the use of torture-induced evidence is strictly limited to the use “against a person accused of torture as evidence that the statement was made”.<sup>10</sup>

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

<sup>10</sup> Emphasis added.

21. As a party to the treaty, Cambodia is bound by its provisions according to Article 26 of the 1969 Vienna Convention on the Law of Treaties, and so are the judges of the ECCC, including the Co-Investigating Judges. Scharf argues that the ECCC judges are not bound by this Convention, given that the ECCC is a separate legal personality not bound by Cambodia's international legal obligations. However, he acknowledges that the Agreement between Cambodia and the UN requires the ECCC to "exercise their jurisdiction in accordance with international standards of justice" and he reluctantly concludes that "[a]t the very least, the Cambodia Tribunal would not want to be perceived as flouting the proscriptions of the Torture Convention, as this would erode its legitimacy and international support".<sup>11</sup> Thienel argues that apart from treaty law it may be said that "the obligation of Article 15 [CAT] has achieved customary status".<sup>12</sup>
22. General Comment No. 20 to Article 7 of the International Covenant on Civil and Political Rights ("ICCPR") as articulated by the UN Office of the High Commissioner for Human Rights, specifies that:
- "It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment."<sup>13</sup>
23. In a report of 27 May 2003 the Committee against Torture (the UN monitoring body of the CAT) made certain recommendations to Cambodia.<sup>14</sup> In this document, the Committee against Torture outlines its concern about "[t]he importance given to confessions in criminal proceedings and the reliance of the police and the judiciary on

<sup>11</sup> M.P. Scharf, "Tainted Provenance: When, If Ever, Should Torture Evidence Be Admissible?", in: 65 Wash & Lee L. Rev. 129 (Winter 2008), at 135-136.

<sup>12</sup> T. Thienel, "The Admissibility of Evidence Obtained by Torture under International Law", in: European Journal of International Law 17 (2006) 349, at 365.

<sup>13</sup> Office of the High Commissioner for Human Rights, General Comment No. 20, Torture or cruel, inhuman or degrading treatment or punishment (Art. 7): 30/05/82, CCPR General Comment No. 20 (General Comments), URL address:

<http://www.unhchr.ch/tbs/doc.nsf/0/6924291970754969c12563ed004c8ae5?Opendocument>, para. 12.

<sup>14</sup> Committee against Torture, Conclusions and Recommendations of the Committee against Torture: Cambodia, 27 May 2003, Doc. No. CAT/C/CR/30/2 (Concluding Observations/Comments), URL address: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.CR.30.2.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.30.2.En?OpenDocument).

confessions to secure convictions”.<sup>15</sup> It specifically advises Cambodia to “[t]ake measures to ensure that evidence obtained under torture is not invoked in court”.<sup>16</sup>

24. In 2006, Redress published a report on the national implementation of international obligations concerning the prohibition of torture. It outlines the prohibition of Article 15 CAT, and specifies some aspects of that prohibition. It reads, insofar relevant: “The prohibition must be unconditional, without exception and must not allow for judges and other decision makers to exercise discretion over whether to accept, or what weight to accord to, such evidence.”<sup>17</sup>
25. The Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment submitted a report to the UN General Assembly on 14 August 2006.<sup>18</sup> This report has a section on “The principle of the non-admissibility of evidence extracted by torture”, elaborating on the specifics of Article 15 CAT.
26. The report first of all refers to the German case against *Mounir el Motassadeq*,<sup>19</sup> where the German Supreme Court on 4 March 2004 quashed the decision of a lower court using evidence obtained through torture. The case was sent to the Hamburg Court for retrial, which court excluded the torture-tainted evidence.<sup>20</sup> A problem in this case manifested itself in the definition of the burden of proof; the Hamburg Court held that certain testimonies were admissible given that the veracity of the torture allegations could not be fully established. The Special Rapporteur criticised that aspect of the judgment,

<sup>15</sup> Committee against Torture, Conclusions and Recommendations of the Committee against Torture: Cambodia, 27 May 2003, Doc. No. CAT/C/CR/30/2 (Concluding Observations/Comments), URL address: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.CR.30.2.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.30.2.En?OpenDocument), para. 6 under (h).

<sup>16</sup> Committee against Torture, Conclusions and Recommendations of the Committee against Torture: Cambodia, 27 May 2003, Doc. No. CAT/C/CR/30/2 (Concluding Observations/Comments), URL address: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.CR.30.2.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.30.2.En?OpenDocument), para. 7 under (f).

<sup>17</sup> Redress, Bringing the International Prohibition of Torture Home. National Implementation Guide for the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, January 2006, p. 62.

<sup>18</sup> UN General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. No. A/61/259, 14 August 2006.

<sup>19</sup> *Beschluss IV – 1/04 des Hanseatischen Oberlandesgericht Hamburg*, Neue Juristische Wochenschrift 2005 Heft 32 of 14 June 2005, referred to in UN General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. No. A/61/259, 14 August 2006, para. 46.

<sup>20</sup> UN General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. No. A/61/259, 14 August 2006, p. 11-14.

indicating that the burden of proof should have shifted to the government authorities who invoked the contested evidence.<sup>21</sup>

27. The report furthermore refers to the judgment of *A and Others v. Secretary of State for the Home Department* of the British House of Lords of 8 December 2005.<sup>22</sup> The House of Lords was unanimous in its condemnation of torture and the use of torture-obtained statements in judicial proceedings. Again, they applied the same test regarding the burden of proof as the German court mentioned above, stating that evidence should only be excluded if on a balance of probabilities, the evidence invoked was in fact obtained by torture.<sup>23</sup>

### 3.5 Heder's Interpretation

28. Stephen Heder and Brian D. Tittmore in their book "Seven Candidates for Prosecution" indicate that:

"To rely upon statements extracted [under torture] raises acute ethical and methodological issues. The very notion of using a confession that is known to be the result of torture would, in most circumstances, be so morally repelled as to preclude its use."<sup>24</sup>

29. Nonetheless they propose a more extensive use of confessions obtained through torture than allowed by the CAT. They propose to extend its use (i) to prove the existence of crimes committed other than torture; (ii) to prove the wider CPK policy, and (iii) as lead evidence for further investigations.

30. Obviously such interpretation was only used for writing the book "Seven Candidates for Prosecution", but since that book has been relied upon by the Prosecution in its

<sup>21</sup> UN General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. No. A/61/259, 14 August 2006, p. 17.

<sup>22</sup> UN General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. No. A/61/259, 14 August 2006, p. 14-16. See for a discussion of this case: T. Thienel, "Foreign Acts of Torture and the Admissibility of Evidence. The Judgment of the House of Lords in *A and Others v. Secretary of State for the Home Department (No. 2)*," in: *Journal of International Criminal Justice* 4 (2006) 410.

<sup>23</sup> UN General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. No. A/61/259, 14 August 2006, p. 17.

<sup>24</sup> Stephen Heder and Brian D. Tittmore, "Seven Candidates for Prosecution. Accountability for the Crimes of the Khmer Rouge", Phnom Penh: DC-Cam 2004, p. 28.



Introductory Submission,<sup>25</sup> and given Mr. Stephen Heder's involvement with the OCIJ and OCP, the defence wishes to object explicitly to the interpretation methods suggested by him.

31. In the first place, Heder and Tittmore suggest that "[t]he policy considerations underlying the UN Torture Convention's approach may support similar uses of confessions as evidence that crimes other than torture, including extermination, were committed."<sup>26</sup> They suggest that such confessions can be used as evidence against the defendants to whom these confessions were circulated, to show the likely state of knowledge they might have had of the mass executions. They consider such use "consistent with the approach of the UN torture Convention".<sup>27</sup>
32. This interpretation would extend the scope of applicability of Article 15 CAT. Not only would it be used to prove the fact that torture was committed, but also to prove that knowledge of torture and other crimes existed with certain persons in the CPK hierarchy. The defence submits that there is no legal basis for such extensive interpretation and that such use is inadmissible.
33. The second mode Heder and Tittmore propose is to prove the wider CPK policy. They write:
 

"[W]hile much of the material to which S-21 'confessions' attest is indeed manifestly false, the confessions cumulatively provide important insights into the criminal policies that are the subject of this report. Significantly, the confessions themselves played a key role in implementing those policies – a point that can be appreciated only by examining their content."<sup>28</sup>
34. This suggested interpretation goes even further than the aforementioned method, and goes directly against the text of Article 15 CAT. This issue will be dealt with below.
35. The third and last method suggested by Heder and Tittmore is to use evidence obtained through torture as lead evidence for further investigations. They write: "it may provide

<sup>25</sup> See Annex B to the Introductory Submission, p. 5 (ERN 00146888-000147014). But also, other sources mentioned by the Prosecution again rely on this source; see for instance, just by way of example: Phnom Penh Post (16/1), "The Amnesia of Brother Number 2", 12-25 January 2007, (ERN 00081516-00081520).

<sup>26</sup> Stephen Heder and Brian D. Tittmore, "Seven Candidates for Prosecution. Accountability for the Crimes of the Khmer Rouge", Phnom Penh: DC-Cam 2004, p. 30.

<sup>27</sup> Stephen Heder and Brian D. Tittmore, "Seven Candidates for Prosecution. Accountability for the Crimes of the Khmer Rouge", Phnom Penh: DC-Cam 2004, p. 30.

<sup>28</sup> Stephen Heder and Brian D. Tittmore, "Seven Candidates for Prosecution. Accountability for the Crimes of the Khmer Rouge", Phnom Penh: DC-Cam 2004, p. 30.

investigators with reliable leads to other sources of evidence”.<sup>29</sup> Why the content thereof would be ‘reliable’ is not explained. The defence, again, submits that also the use of such evidence as lead evidence should be inadmissible precisely because the content thereof is by definition unreliable.

### 3.6 Scharf: Violation of the Presumption of Innocence

36. Michael Scharf, in his recent article discusses whether there should be expanded exceptions to the torture evidence exclusionary rule. He argues:

“The problem for the Cambodia Tribunal is that the Tuol Sleng evidence is believed to be critical to proving command responsibility and/or joint criminal enterprise liability of the half-dozen Khmer Rouge leaders being tried by the Tribunal. In addition, the evidence will be needed to prove that the defendants meet the Tribunal’s jurisdictional requirement, which limits prosecution to ‘senior leaders’ and ‘those who were most responsible’.”<sup>30</sup>

He also adds:

“In the absence of documentary evidence or witness testimony linking the Khmer Rouge defendants to particular atrocities, the Tuol Sleng evidence is critical for their successful prosecution before the Cambodia Tribunal”.<sup>31</sup>

37. In other words, Scharf proposes a specific exception for the ECCC, because such evidence is necessary in showing the accused persons’ guilt. In this particular case it is deemed necessary to make an exception to the international legal obligation, given the impossibility to prove their guilt otherwise. This is in clear violation of the Charged Person’s right to be presumed innocent until proven guilty.

38. After setting out the necessity of using such evidence in ascertaining convictions for the accused persons, Scharf explains possible grounds to admit such evidence. He proposes three modalities for exceptions.

39. In the first place, he suggests an exception for preliminary questions, i.e. evidence obtained prior to the testimony obtained under torture. If it is indeed established that such evidence is not obtained by torture, it does not fall under Article 15 CAT. Scharf adds

<sup>29</sup> Stephen Heder and Brian D. Tittmore, “Seven Candidates for Prosecution. Accountability for the Crimes of the Khmer Rouge”, Phnom Penh: DC-Cam 2004, p. 31.

<sup>30</sup> M.P. Scharf, “Tainted Provenance: When, If Ever, Should Torture Evidence Be Admissible?”, in: 65 Wash & Lee L. Rev. 129 (Winter 2008), at 132.

<sup>31</sup> M.P. Scharf, “Tainted Provenance: When, If Ever, Should Torture Evidence Be Admissible?”, in: 65 Wash & Lee L. Rev. 129 (Winter 2008), at 139.

that “[t]he Tribunal is not interested in the substantive statements made by the detainees during actual physical torture”.<sup>32</sup>

40. Scharf then goes into a detailed discussion of the level of torture or cruel, inhuman or degrading treatment or punishment required to fall under Article 15.<sup>33</sup> The defence disputes the validity of this distinction and, in any event, such a debate is merely academic, since it will be impossible to establish the nature of the torture inflicted on the security centre detainees in respect of confessions made some thirty years ago.

41. He finally discusses the doctrine of necessity as laid down in Article 25 of the International Law Commission’s Draft Articles on State Responsibility, which provides:

“1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity.”<sup>34</sup>

42. Scharf discusses this option only with regard to preliminary questions not obtained by torture, to which the defence submitted it does not object. However, the defence submits this interpretation of the doctrine of necessity is a device to circumvent the terms of Article 15 CAT and is contrary to the principle enshrined therein. The ILC Draft Articles in its Commentary to Article 25 indicate that “[t]he term “necessity” (*état de nécessité*) is used to denote those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency.” Scharf defines such “grave and imminent peril” as “[t]he successful prosecution of the former Khmer Rouge leaders”.<sup>35</sup> This interpretation of the law breaches the presumption of innocence afforded as of right to the Charged Person and deprives her of the protection of Article 15 CAT.

<sup>32</sup> M.P. Scharf, “Tainted Provenance: When, If Ever, Should Torture Evidence Be Admissible?”, in: 65 Wash & Lee L. Rev. 129 (Winter 2008), at 140.

<sup>33</sup> M.P. Scharf, “Tainted Provenance: When, If Ever, Should Torture Evidence Be Admissible?”, in: 65 Wash & Lee L. Rev. 129 (Winter 2008), at 141-147.

<sup>34</sup> ILC Draft Articles on State Responsibility, UN Doc.

<sup>35</sup> M.P. Scharf, “Tainted Provenance: When, If Ever, Should Torture Evidence Be Admissible?”, in: 65 Wash & Lee L. Rev. 129 (Winter 2008), at 148-149.

43. The second exception to Article 15 CAT proposed by Scharf relates to evidence obtained by third parties. This proposal has been explicitly rejected in cases in the United Kingdom<sup>36</sup> and Germany,<sup>37</sup> and would indeed be a breach of Article 15, which does not require that the authorities prosecuting have committed the torture themselves. The fact that the torture was committed by another entity does not affect the unreliability of the information obtained.
44. In the UK case of *A and Others* the House of Lords held that the admissibility exclusion is very broad. Lord Bingham states that “[t]he additional qualification makes plain the blanket nature of this exclusionary rule.”<sup>38</sup> Thienel holds that the interpretation excluding evidence tainted by torture committed by third parties is based on the historical background and *travaux préparatoires* of Article 15 CAT.<sup>39</sup>
45. In his third and final argument for the expansive interpretation of Article 15 CAT, Scharf proposes to expand the interpretation so as to be able to use such evidence not only against the alleged torturer, but also against his or her alleged superiors. Again, he proposes to use the content of such statements, which is prohibited under Article 15 CAT.<sup>40</sup>
46. Scharf indicates that exclusion of such evidence would lead to an absurd or unreasonable result,<sup>41</sup> but he fails to mention how one can justify the use of content of evidence presumed to be unreliable. It was exactly one of the two underlying reasons for the strict formulation of Article 15 CAT, so as to preclude reliance on the unreliable content of statements obtained by torture.

<sup>36</sup> *A and Others v. Secretary of State for the Home Department (No. 2)* [2005] UKHL 71, [2005] 3 WLR 1249, URL address: [www.parliament.the-stationery-office.co.uk/pa/ld200506/ldjudgmt/jd051208/aand.pdf](http://www.parliament.the-stationery-office.co.uk/pa/ld200506/ldjudgmt/jd051208/aand.pdf).

<sup>37</sup> *Beschluss IV – 1/04 des Hanseatischen Oberlandesgericht Hamburg*, Neue Juristische Wochenschrift 2005 Heft 32 of 14 June 2005, referred to in UN General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. No. A/61/259, 14 August 2006, para. 46.

<sup>38</sup> *A and Others v. Secretary of State for the Home Department (No. 2)* [2005] UKHL 71, [2005] 3 WLR 1249, URL address: [www.parliament.the-stationery-office.co.uk/pa/ld200506/ldjudgmt/jd051208/aand.pdf](http://www.parliament.the-stationery-office.co.uk/pa/ld200506/ldjudgmt/jd051208/aand.pdf), para. 35. See for a discussion of the use of tainted evidence in the courts of a state not itself involved in the torture, T. Thienel, “The Admissibility of Evidence Obtained by Torture under International Law”, in: *European Journal of International Law* 17 (2006) 349, at 359.

<sup>39</sup> T. Thienel, “The Admissibility of Evidence Obtained by Torture under International Law”, in: *European Journal of International Law* 17 (2006) 349, at 357.

<sup>40</sup> M.P. Scharf, “Tainted Provenance: When, If Ever, Should Torture Evidence Be Admissible?”, in: 65 *Wash & Lee L. Rev.* 129 (Winter 2008), at 159.

<sup>41</sup> M.P. Scharf, “Tainted Provenance: When, If Ever, Should Torture Evidence Be Admissible?”, in: 65 *Wash & Lee L. Rev.* 129 (Winter 2008), at 159.

47. Restricting the use of confessions to show that torture has been committed is permitted by the CAT; any wider application of such confessions not only infringes the Convention, but also breaches the Charged Person's right to be presumed innocent until proven guilty. If exception to international obligations is permitted pragmatically in order to facilitate the prosecution and punishment of a certain category of persons this would be in contravention of recognised standards of fairness established over many years.

### 3.7 Right to a Fair Trial

48. By admitting into the procedure evidence obtained by torture, the Charged Person's right to a fair trial is also infringed. The aforementioned UN report mentions that the rationale behind the Article 15 CAT exclusion is twofold: first, information extracted by torture is unreliable, and secondly, prohibiting the use of torture-induced evidence shall contribute to the prevention of that practice.<sup>42</sup>

49. The analogy Scharf draws between medical data illegally obtained by Nazi doctors and the underlying situation is different and irrelevant, given that the medical data he refers to are deemed reliable.<sup>43</sup> Scharf fails to address the crucial issue of the lack of reliability of the documents obtained by torture. On page 169 of his article he mentions that evidence obtained by torture is "often unreliable" but that these specific documents from Tuol Sleng suggest "a high degree of reliability". He fails to explain why that specific evidence is reliable as opposed to other evidence obtained by torture.

50. The problem of the unreliability of the evidence, and its inherent effect on the right to a fair trial, is also highlighted by Tobias Thienel in his article on the interpretation of Article 15 CAT.<sup>44</sup>

<sup>42</sup> Committee against Torture, Conclusions and Recommendations of the Committee against Torture: Cambodia, 27 May 2003, Doc. No. CAT/C/CR/30/2 (Concluding Observations/Comments), URL address: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.CR.30.2.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.30.2.En?OpenDocument), para. 45.

<sup>43</sup> M.P. Scharf, "Tainted Provenance: When, If Ever, Should Torture Evidence Be Admissible?", in: 65 Wash & Lee L. Rev. 129 (Winter 2008), at 162-168.

<sup>44</sup> T. Thienel, "The Admissibility of Evidence Obtained by Torture under International Law", in: European Journal of International Law 17 (2006) 349, at 358-359.

#### IV CONCLUSION

51. The defence submits that such extensive interpretation of Article 15 CAT as suggested by Heder and the other authors is inconsistent with the ordinary meaning of that provision in the light of its object and purpose, as provided by Article 31 of the 1969 Vienna Convention on the Law of Treaties.
52. The proposed extensive interpretations of Article 15 also suggest, contrary to the facts, that there has been no debate on the exact wording of that provision, as indicated by Thienel who states that the interpretation of the exclusionary rule extending to persons other than the victim of torture is based on the historical background and *travaux préparatoires* of Article 15 CAT.<sup>45</sup>
53. It may be concluded on the basis of Cambodian and international legal obligations that the exclusionary rule of Article 15 CAT ought to apply to the current proceedings and evidence obtained by torture be declared inadmissible in the current proceedings.
54. There should be no difference in its use as actual evidence at trial or as lead evidence in the investigative stage, given that the objection to its use relates to its unreliability, which is relevant at all stages of the proceedings.
55. The rationale behind the restriction on the use of statements made under torture is logical: the substance of such statements cannot be used as if they were true. And it is exactly this point which opposes wider use of such statements as suggested by Heder and Tittlemore. The only manner in which such evidence should be allowed to be used is to show that torture has been committed and solely against the torturer, as expressly provided for in Article 15 CAT.

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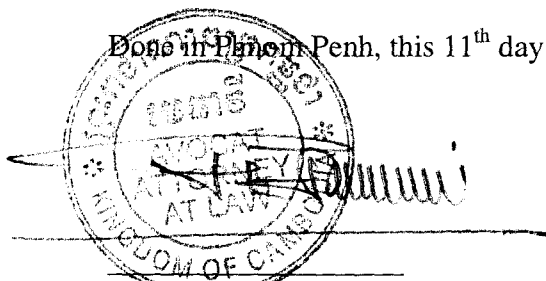
<sup>45</sup> T. Thienel, "The Admissibility of Evidence Obtained by Torture under International Law", in: *European Journal of International Law* 17 (2006) 349, at 357.

## V PRAYER

56. 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) Doc. No. D3/Annex C (5 – Confessions)<sup>46</sup>
  - (b) Doc. No. D82 (Tuol Sleng documents)<sup>47</sup>
  - (c) Doc. No. D43 (DC-Cam documents)<sup>48</sup>
- (ii) Refrain from using such statements in any other way than set out under (i) and (ii) above.

Done in Phnom Penh, this 11<sup>th</sup> day of February 2009,



Mr. **PHAT** Pouy Seang  
 Ms. Diana **ELLIS**, QC  
 Co-Lawyers for Madame Ieng

<sup>46</sup> Doc. No. D3, Annex C – Other Evidentiary Material, Document Index, ERN 00141524-00141652, relevant pages 13-28.

<sup>47</sup> Doc. No. D82, Rogatory Letter, 29 January 2008, ERN 00173193-00173194, and all Annexes and Reports of Rogatory Letters related to D82.

<sup>48</sup> Doc. No. D43, Rogatory Letter, 7 December 2007, ERN 00156491-00156492, and all Annexes and Reports of Rogatory Letters related to D43.