IN THE PRE-TRIAL CHAMBER OF
THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

In the Matter of the appeal by Ieng Thirith
against the order on use of statements which were or may have been obtained by torture
by the Office of the Co-Investigating Judges dated 28 July 2009

Case No. 002/19-09-2007-ECCC-OCIJ

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I. SUMMARY

This brief is submitted pursuant to Rule 33 of the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia ("ECCC"), allowing submission by *amicus curiae*. It addresses the order issued by the Co-Investigating Judges on July 28, 2009, which was appealed by the Defence for Ieng Thirith on September 11, 2009. In the July 28 order, the Co-Investigating Judges found that the exclusionary rule in Article 15 of the Convention Against Torture ("CAT") prohibiting the admission into evidence of statements established to have been the result of torture applies not only to the direct perpetrator of torture, but also to those officials "higher in the chain of command and [who] are responsible for the policies of torture implemented by the direct perpetrators." The Co-Investigating Judges further found that certain information contained in the confessions at issue, such as handwritten annotations, preliminary biographical material, and "objective information included in the confession"—e.g., "the date of the person's arrest, the date of the beginning, end and any interruptions to the confession…"—were outside the scope of the exclusionary rule contained in CAT Article 15. The order further stated that "regardless of the circumstances in which the information within the confessions was obtained, it is not possible at this stage to affirm that no element of truth can ever be found in the confessions." Therefore, "the reliability of the confessions will be assessed on a case-by-case basis, with the understanding that the Co-Investigating Judges will proceed with utmost caution given the nature of the evidence and the manner in which it was obtained."

It is respectfully submitted that a full evaluation of the potential evidence at issue has not yet been undertaken, a task that is essential to "the proper adjudication of the case." After examining the factual background of each category of potential evidence challenged by Ieng Thirith, it is clear that some categories may be admissible because they fall outside the scope of

CAT Article 15's exclusionary rule. Likewise, other categories should be deemed inadmissible in the case at bar, as the information contained therein can most likely be established as having been made as a result of torture. As such, the Applicant hereby offers this submission in an attempt to assist all parties in coming to a more complete understanding of the potential documentation at hand. The Applicant stands ready to supplement this submission with any further information as requested by the Chamber.

Interest of *Amicus Curiae*

Andrew F. Diamond is currently a legal associate at the Documentation Center of Cambodia ("DC-Cam") for the Fall 2009. He is a graduate of Brooklyn Law School. His admission to the Bar Association of the State of New York, United States, is pending. Toni Holness assisted with the research and writing of the submission. The views expressed in this submission are his own and do not reflect the opinions or policies of DC-Cam.

II. PROCEDURAL CONSIDERATIONS

1. The ECCC Internal Rules do not specifically address the issue at hand. Therefore, pursuant to Article 12(1) of the Agreement Between the United Nations and the Royal Government of Cambodia,[1] dated June 6, 2003, and Article 23 (new) of the ECCC Law,[2] it is appropriate to look to relevant international law for procedural guidance, namely Article 15 of the United

[1] Article 12(1): "The procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level."

[2] Article 23 (new): "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." *Also*: Article 33 (new): "If these existing procedure[s] 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 standard[s]. guidance may be sought in procedural rules established at the international level."

Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[3]

III. BRIEF STATEMENT ON THE FACTUAL BACKGROUND

2. There is a substantial amount of documentary evidence available from the Khmer Rouge era.[4] Of particular interest are documents that come from Tuol Sleng Prison ("Office S-21" or "S-21")[5] and the other 195 district-level detention facilities located throughout Democratic Kampuchea ("DK").[6] Many of these documents contain statements or other information that were potentially made under torture. Most relevant to the issue of the admissibility of statements potentially made under torture are: (1) prisoners' biographical information taken at registration to a Khmer Rouge detention facility; (2) prisoners' biographies written as part of a confession; (3) the confession itself; and (4) annotations made by Khmer Rouge ("KR") officials on these confessions.[7] Of this potential evidence, there is much confusion as to which types of information were obtained by torture and which were not. Some of this confusion comes from the use of general or imprecise terminology to describe these documents. Still more confusion results from questions surrounding the circumstances of the creation of the documents themselves, and perhaps their current physical location as well.

[3] Office of the Co-Investigating Judges, "Order on use of statements which were or may have been obtained by torture," ¶ 17, July 28, 2009, Document No. D130/8 [hereinafter "OCIJ Order"].
[4] *See* John D. Ciorciari & Youk Chhang, "Documenting the Crimes of Democratic Kampuchea," in JAYA RAMJI & BETH VAN SCHAACK, Eds., BRINGING THE KHMER ROUGE TO JUSTICE 226-30 (2005) (describing seven potential types of documentary evidence from the DK period: Communist Party of Kampuchea ("CPK") Correspondence, Confession Transcripts, Committee Minutes and Reports, CPK Biographies, Foreign Documents, Media Materials, and Diaries and Notebooks).
[5] Ciorciari & Chhang at 226-27.
[6] For example, the DK Prison Files from Kraing Ta Chan Prison, Takeo Province, have survived. While the deputy chief of Kraing Ta Chan Prison, Eap Duch, died on October 23, 2009, several chiefs, deputy chiefs and guards of other prisons are still alive today.
[7] The annotations implicate two levels of KR officials: (1) Kaing Guek Eav ("Duch") and his staff at Office S-21; and (2) senior KR leaders such as Ta Mok, Son Sen, and Ke Pauk. The later group is mostly implicated through annotations on cover letters to confession reports.

3. Precise classification of each particular type of document is vital to properly determine its admissibility before the ECCC. Only through separating out each category of potential evidence and applying the appropriate legal analysis to that specific category can one come to a conclusion that is in accord with both the factual realities of the case at bar and the relevant legal standards. For this reason, this submission will use the term "Khmer Rouge Security File"[8] to refer to the whole package of documents implicated herein. Conversely, when referring to a certain type of document, this submission will specifically reference one of the four categories of potential evidence at issue.
4. The first category is prisoners' biographical information taken down by Khmer Rouge officials upon registration at a Khmer Rouge prison or detention facility.[9] These "prisoners were photographed and required to give detailed biographies, beginning with their childhood and ending with their date of arrest,"[10] also including a physical description, family history, date of birth, place of birth, nationality, and occupation or position within the Communist Party of Kampuchea ("CPK"). Generally, this biographical information was provided prior to the infliction of torture.[11]

[8] For completeness sake, this term would also necessarily include other categories of evidence not discussed here, such as: lists of prisoners, execution lists, individual and group communications by KR leadership, personal correspondence by victims, cover letters of confession reports addressed to senior KR leaders, biographies of Khmer Rouge cadre taken when joining the party, telegrams, and daily and weekly reports by Khmer Rouge prison staff. Interview with Youk Chhang, Director, Documentation Center of Cambodia (DC-Cam), October 27, 2009. The term "Khmer Rouge Security File" is not to be confused with the terms "S-21 confessions" or "S-21 Prison Files." *See* Ciorciari & Chhang at 227-28 (describing the difference between the Tuol Sleng Archive and the *Santebal* ("Security") documents).
[9] KHAMBOLY DY, A HISTORY OF DEMOCRATIC KAMPUCHEA (1975-1979) 50 (2007). *See also* Ciorciari & Chhang at 228 ("DK officials recorded biographical information about each of the prisoners entering S-21 and certain other detention facilities.").
[10] DY at 50.
[11] *See* DY at 50.

5. The second distinct category of potential evidence at issue is the detailed biographies provided by the prisoners themselves.[12] "[T]he prisoners were asked to describe their personal background. If they were party members, they had to say when they joined the revolution and describe their work assignments in DK."[13] These biographies generally were contained within the confession itself.[14] For purposes of this submission, however, these biographies will be treated separately from the confessions themselves.
6. The third category is prisoners' confessions, almost always made under torture.[15] These confessions extracted from prisoners during the Khmer Rouge era generally were comprised of four sections. The first section of the confession was the detailed personal biography, described immediately above, which will be discussed separately. In the second section, "the prisoners would relate their supposed treasonous activities in chronological order. The third section of the confession text described prisoners' thwarted conspiracies or supposed treasonous conversations."[16] The fourth section, often included as an appendix to the confession itself, would be a list "of traitors who were the prisoners' friends, colleagues, or acquaintances."[17]
7. The fourth and final category of potential evidence at issue is the annotations made by Khmer Rouge officials on the confessions.[18] "Certain confession reports…include notes

[12] DY at 52. These biographies are to be distinguished from those biographies provided by Khmer Rouge cadres when applying to join the Communist Party of Kampuchea. *See* Ciorciari & Chhang at 228 ("CPK officials also took down biographical information when individuals joined the party. DC-Cam holds…over 19,763 biographies of CPK cadres and soldiers, many of which contain photographs as well. The information from employee and prisoner biographies can be valuable in determining the identities of particular victims or perpetrators and establishing relevant chains of command. The biographies come from both the [Tuol Sleng Archive] and *Santebal* collections.").
[13] DY at 52.
[14] DY at 52.
[15] Ciorciari & Chhang at 237 ("[I]nterrogation reports and other evidence show beyond a doubt that torture was routinely used to extract confessions during the DK era.").
[16] DY at 52.
[17] DY at 52.
[18] Ciorciari & Chhang at 226. There are also annotations on the cover letters of confession reports made both by Office S-21 staff and senior DK leaders. *See* File K082LIS- List and translation of the cover pages of the "at risk"

written in the margins by high-ranking officials, most notably Security Chief Kaing Guek Eav *alias* Duch, head of the CPK's state security organization, the *Santebal*."[19]

8. There is also dispute about two proposed uses of statements established to have been the result of torture. It has been argued that even if the above documentary evidence is ruled inadmissible in the case at bar, it should still be allowed for use (1) as "lead" or "investigative" evidence, potentially leading investigators to other, admissible evidence;[20] and (2) as the basis of expert opinion testimony.[21]

IV. LEGAL ANALYSIS

9. Under well-defined international law, statements established to have been made as a result of torture are inadmissible in judicial proceedings.[22] Article 15 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT" or "the Convention"),[23] to which Cambodia is a party,[24] established this evidentiary rule by excluding the admission into evidence "in any proceedings" of any

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documents, bearing signatures and notes by Khmer Rouge leaders, prepared by Youk Chhang in 1997 and submitted to the UN Commission of Experts August-September 1998. The entire collection of files was provided to the Office of Co-Investigating Judges on February 15, 2008.

[19] Ciorciari & Chhang at 226.

[20] Office of the Co-Prosecutors, "Co-Prosecutors' Response to Ieng Thirith's Defence Request for Exclusion of Evidence Obtained by Torture Dated 11 February 2009," ¶¶ 35-37, April 30, 2009, Document No. D130/5 [hereinafter "Co-Prosecutors' Response"]. *But see*: Defence for Ieng Thirith, "Defence Reply to 'Co-Prosecutors' Response to Ieng Thirith's Defence Request for Exclusion of Evidence obtained by torture,'" ¶ 41, May 18, 2009, Document No. D130/6 [hereinafter "Defence Reply"].

[21] Co-Prosecutors' Response at ¶¶ 33-34. *But see*: Defence Reply at ¶¶ 36-37.

[22] *See* Inter-American Convention to Prevent and Punish Torture, art. 10, O.A.S. Treaty Series No. 67, *entered into force* 28 February 1987; International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, Rule 95, U.N. Doc. IT/32/Rev.18 (June 2000); International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, Rule 95, U.N. Doc. ITR/3/Rev.8 (June 2000); Rome Statute of the International Criminal Court, art. 69(7), U.N. Doc. A/CONF.183/9 (17 July 1998).

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

[24] Cambodia acceded to the CAT on October 15, 1992. *See* United Nations Treaty Collection, Status of Treaties, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *available at*: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en.

statement that has been established to be the result of torture.[25] This exclusionary rule is subject by its own terms to one exception: a statement established to result from torture may be admissible "against a person accused of torture as evidence that the statement was made."[26] For this exception to apply, a two-part test must be satisfied: (1) an individual must qualify as "a person accused of torture" and (2) the statement must only be used for the limited purpose of proving that the statement itself was made under torture.[27]

A. A Public Official Who Allegedly Instigated, Consented to or Acquiesced in the Infliction of Torture Qualifies As "A Person Accused of Torture" Under Articles 1 and 15 of the Convention Against Torture.

10. When interpreting the meaning of a treaty term—such as "a person accused of torture" as in this threshold inquiry—the Vienna Convention on the Law of Treaties dictates that "[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 light of its object and purpose."[28] CAT Article 1 contains the treaty's definition of "torture," which states:

> For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official

[25] "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." CAT, art. 15.
[26] CAT, art. 15.
[27] LENE WENDLAND, A HANDBOOK ON STATE OBLIGATIONS UNDER THE UN CONVENTION AGAINST TORTURE 56 (2002), *available at*: http://www.apt.ch/component/option,com_docman/task,cat_view/gid,92/Itemid,59/lang,en/; J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 148 (1988).
[28] Vienna Convention on the Law of Treaties, 155 U.N.T.S. 331, 23 May 1969, art. 31(1).

> or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[29]

11. Here, the definition of torture explicitly encompasses torture "inflicted by or at the instigation of or with the consent or acquiescence of a public official."[30] Therefore, these public officials need not be physically present at the time the torture is inflicted nor directly inflict the torture themselves to fall within the scope of CAT Articles 1 and 15. CAT Article 4 buttresses this interpretation by obligating state parties to criminalize all acts of torture, applicable "to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture."[31] It is therefore clear that, according to "the ordinary meaning to be given to the terms of the treaty in their context,"[32] "a person accused of torture" is not limited to only those persons who are accused of directly inflicting torture upon another person, but also includes public officials who instigate, consent to or acquiesce in the infliction of torture.[33]

12. This interpretation is further supported by the drafting history of the Convention itself. During the *travaux preparatoires*, there was a question among states as to "whether or not an act of the kind referred to in Article 1 should be regarded as torture *irrespective of who committed the act*."[34] In their authoritative treatise on the drafting of the Convention Against Torture, J. Herman Burgers and Hans Danelius state:

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[29] CAT, art. 1.
[30] CAT, art. 1.
[31] CAT, art. 4(1).
[32] Vienna Convention, art. 31(1).
[33] It appears from their briefs that the Defence for Ieng Thirith concedes that Ieng Thirith qualifies under CAT Article 15 as "a person accused of torture." However, *see* Defence for Ieng Thirith, "Defence Request for Exclusion of Evidence Obtained by Torture," ¶¶ 20, 55, February 11, 2009, Document No. D130 [hereinafter "Defence Request"]. *See also* OCIJ Order at ¶ 22 ("The Defence argues that in its wording, Article 15 of the CAT precludes the use of statements obtained under torture against anyone other than the direct perpetrator of the torture, such as superior responsibility or as part of a joint criminal enterprise."); *see also* Co-Prosecutors' Response at ¶¶ 29-32.
[34] BURGERS & DANELIUS at 119 (emphasis in original).

> [t]he problem with which the *Convention* was meant to deal was that of torture in which the authorities of a country were themselves involved and in respect of which the machinery of investigation and prosecution might therefore not function normally…All such situations where the responsibility of the authorities is somehow engaged are supposed to be covered by the rather wide phrase appearing in article 1: 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'[35]

13. This view on the scope of the Convention is also endorsed by the U.N. Committee Against Torture, the oversight body charged with monitoring states parties' implementation of and compliance with the CAT.[36] The Committee went so far as to say that it "considers it essential that the responsibility of any superior officials, whether for direct instigation or encouragement of torture or ill-treatment or for consent or acquiescence therein, be fully investigated through competent, independent and impartial prosecutorial and judicial authorities."[37] Therefore, a public official charged with complicity in acts of torture would qualify as "a person accused of torture."[38] For example, in the case at bar, Ieng Thirith has

[35] BURGERS & DANELIUS at 119-20.
[36] UN Committee Against Torture (CAT), General Comment No. 2: *Implementation of Article 2 by States Parties*, ¶ 26, CAT/C/GC/2, 24 January 2008, *available at*: http://www.unhcr.org/refworld/docid/47ac78ce2.html [accessed 9 October 2009] ("At the same time, those exercising superior authority - including public officials - cannot avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measures.").
[37] *Id*.; *see also* WENDLAND at 29 ("The element of official sanction is stated in very broad terms and extends to officials who take a passive attitude, or who turn a blind eye to torture committed against opponents of the government in power, be it by unofficial groups or by the authorities. Failure to act in such cases could well be interpreted at least as acquiescence.").
[38] BURGERS & DANELIUS at 120 ("If torture is performed by a public agency, such as the security police, the government of the country has no defence under the *Convention* in saying that it was unaware of the act…"); *Id*. at 119 ("Moreover, it can often be assumed that where a public official performs such an act [of torture], there is also to some extent a public policy to tolerate or to acquiesce in such acts.").

been charged with crimes against humanity, including complicity in torture.[39] This is sufficient to qualify as "a person accused of torture" under the CAT.

i. The Object and Purpose of the Convention Against Torture Supports A Broad Interpretation of the Term "A Person Accused of Torture."

14. The Vienna Convention on the Law of Treaties also dictates that a treaty must be interpreted "in light of its object and purpose."[40] The self-stated goal of the Convention Against Torture is "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world."[41] Article 15[42] supports this goal by excluding from judicial proceedings evidence established to have been the result of torture.[43] This exclusionary rule thereby seeks "to discourage torture by devaluing its product."[44]

15. An interpretation of this exclusionary rule to apply it only to those persons who personally inflicted the torture would run counter to the object and purpose of the rule itself. Such an argument would require interpreting the term "a person accused of torture" to exclude those public officials who instigated, consented to or acquiesced in the infliction of torture as defined in CAT Article 1. This interpretation would have the perverse effect of allowing senior government officials who order torture to escape liability under the very international treaty designed to criminalize such behavior, possibility resulting in an increased use of government-sanctioned torture.

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[39] Co-Prosecutors' Response at ¶ 21; *see also* Pre-Trial Chamber, "Report of Examination," May 20, 2008, Document No. C20/I/22.
[40] Vienna Convention, art. 31(1).
[41] CAT, pmbl.
[42] For a more in-depth analysis of the object and purpose of Article 15, *see* Section IV(B)(iv).
[43] *See* Tobias Thienel, "The Admissibility of Evidence Obtained by Torture Under International Law," 17 EUR. J. INT'L L. 349, 367 (2006) ("It may therefore be said that international law provides a comprehensive set of rules to combat torture and that the inadmissibility of evidence found to have been obtained by coercion is an important tool designed to eradicate torture once and for all.").
[44] *A (FC) and others (FC) v. Secretary of State for the Home Department*, [2005] U.K.H.L. 71, ¶ 39 (Opinion of Lord Bingham).

16. Instead, by interpreting the CAT in accord with its object and purpose—to strengthen measures against the use of torture by, under Article 15, prohibiting the use of information resulting from torture in judicial proceedings—it is clear that the exclusionary rule cannot apply to those public officials who instigate, consent to or acquiesce in the infliction of torture. Only a reasonable interpretation such as this comports with the Convention's goal of deterring future acts of torture.

B. Statements Within the Scope of Article 15 Must Be Excluded from Evidence Unless They Are Used Only as Evidence that Torture Occurred.

17. Generally, statements established to have been the result of torture are never admissible in judicial proceedings.[45] This is the rule established in CAT Article 15 and, based on state practice and *opinio juris*, it is possible that this evidentiary prohibition has achieved the status of customary international law.[46] As applied to the case at bar, the exclusion of "any statement which is established to have been made as a result of torture" necessarily includes a number of different types of statements obtained from prisoners that may have been the result of torture. A single Khmer Rouge Security File could include annotations made by interrogators, biographical information obtained from a prisoner during registration to a prison, biographies provided by prisoners prior to the infliction of torture, and the "confession" itself.[47] It is therefore necessary to clearly differentiate among these categories of potential evidence and the use to which they will be put when applying relevant international law.

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[45] *See supra* note 22.
[46] Thienel at 363 ("Apart from treaty law, the rule on the inadmissibility of evidence obtained by torture may also exist as part of customary international law."); *Id*. at 365 ("Considering also the similarly widespread practice relating to the right to a fair trial, it may therefore be said that the obligation of Article 15 UNCAT has achieved customary status.").
[47] DY at 52.

i. Annotations Made by Interrogators on Confessions Are Outside the Scope of Article 15.

18. CAT Article 15 by its own terms applies to "any statement which is established to have been made as a result of torture." It is therefore clear that the writings of persons who were not tortured—i.e., the torturer—are outside the scope of Article 15. With regard to Khmer Rouge Security Files compiled from prisoners of various detention centers during the DK period, "[c]ertain confession reports…include notes written in the margins by high-ranking officials, most notably Security Chief Kaing Guek Eav *alias* Duch, head of the CPK's state security organization, the *Santebal*."[48] Such annotations can therefore be admitted into evidence against the accused for a permissible purpose, provided proper authentication.[49] They are facially outside the scope of Article 15's exclusionary rule.

ii. Biographical Information Provided During Registration to a Khmer Rouge Prison Should Be Generally Admissible As Not Resulting from Torture.

19. A second category of potential evidence contained in the Khmer Rouge Security Files concerns the biographies of prisoners taken at registration to a Khmer Rouge detention facility.[50] These "prisoners were photographed and required to give detailed biographies, beginning with their childhood and ending with their date of arrest,"[51] also including a physical description, family history, date of birth, place of birth, nationality, and occupation or position within the CPK.

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[48] Ciorciari & Chhang at 226; *see also* STEPHEN HEDER & BRIAN D. TITTEMORE, SEVEN CANDIDATES FOR PROSECUTION 29 n.98 (2004) (referencing an October 1977 "confession" by Nheum Sim *alias* Saut that "included a note from Saut's interrogator explaining that 'it was only after I tortured (*tearunakam*) him that he confessed to the story of having been a police informer and a CIA systematically right up to the time of his arrest.'").

[49] The same analysis would allow, consistent with CAT Article 15, the introduction into evidence of interrogator reports and interrogators' notebooks. *See* Ciorciari & Chhang at 230, 271-72. *See id.* at 226 ("The confession reports usually contain transcripts of confessions and attached reports by CPK interrogators, some of which indicate criminal conduct.").

[50] Ciorciari & Chhang at 228 ("DK officials recorded biographical information about each of the prisoners entering S-21 and certain other detention facilities.").

[51] DY at 50.

20. Generally, prisoners provided these biographies to DK officials at registration to a detention facility, prior to being tortured.[52] However, it is very likely that these biographies were taken in situations that could be found to constitute cruel, inhuman or degrading treatment, even if not rising to the level of "torture." The Convention makes clear that in these situations—where a biographical statement is not the result of torture but of cruel, inhuman or degrading ("CID") treatment or punishment—Article 15's exclusionary rule does not apply.[53] The drafting history of Article 16 indicates that this was purposeful. As Burgers and Danelius state, "[d]uring the *travaux preparatoires*, there were for some time different views on whether or not the obligations in article[…]15 should also apply to [CID] treatment and punishment. In the end it was decided not to include any reference to these articles."[54]
21. The drafting history of Article 15 specifically confirms that interpretation. The precursor to CAT Article 15—Article 12 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment—specifically barred the admissibility of statements established to have been the result of either torture or cruel, inhuman or degrading treatment or punishment.[55] However, Article 15 contains no mention of cruel, inhuman or degrading treatment or punishment. Accordingly, by its terms, Article 15's exclusionary rule has been interpreted to apply only to statements

[52] *See* DY at 50 (It was generally after providing this information that prisoners "had to strip to their underwear and their possessions were confiscated. They were then taken to cells where they were shackled with chains fixed to walls or the concrete floor, while those kept in the large cells had their legs shackled to pieces of iron bar.").
[53] The first sentence of CAT Article 16(1) contains the Convention's definition of cruel, inhuman or degrading treatment or punishment. The second sentence states: "In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment." Notably, this sentence does not include the obligations contained in Article 15.
[54] BURGERS & DANELIUS at 150.
[55] "Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceedings." Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 12, GA res. 3452 9 Dec. 1975, *available at*: http://textus.diplomacy.edu/Thina/txGetXDoc.asp?IDconv=1277.

established to have been the result of torture.[56] Therefore, while the Court should certainly review each piece of such evidence to determine its own weight, the Convention Against Torture does not act as a bar *per se* to the admissibility of such evidence.

22. Applying this principle to the case at bar, where a prisoner's biography was produced before the infliction of torture, such evidence may be admitted as evidence. This is true even if the biography was produced in circumstances that could constitute cruel, inhuman or degrading treatment or punishment. The Court should be wary of such evidence and turn a careful eye to the reliability of its contents; but the biography's dark background should not act as an absolute bar to its admission into evidence. In this situation, because the statement was not the result of torture, the biography and the information contained therein are not within the scope of CAT Article 15.

iii. Biographies Within Confessions Should Be Admissible As Outside the Scope of Article 15 Unless It Can Be Shown That They Were the Result of Torture.

23. As mentioned above, generally, each confession contained, as its first section, the prisoner's biography. "[T]he prisoners were asked to describe their personal background. If they were party members, they had to say when they joined the revolution and describe their work assignments in DK."[57] This biographical information was generally obtained prior to the

[56] *A and others* at ¶ 53 (Opinion of Lord Bingham) ("Ill-treatment falling short of torture may invite exclusion of evidence as adversely affecting the fairness of a proceeding under [British law]. But I do not think the authorities on the Torture Convention justify the assimilation of these two kinds of abusive conduct. Special rules have always been thought to apply to torture."); *A and others* at ¶ 126 (Opinion of Lord Hope) ("The exclusionary rule that article 15 of the Torture Convention lays down extends to statements obtained by the use of torture, not to those obtained by the use of cruel, inhuman or degrading treatment or punishment. That is made clear by article 16.1 of the convention."). *See also* WENDLAND at 56-57 ("Article 15 applies only to statements made under torture and not to statements made under cruel, inhuman, or degrading treatment. However, the [Committee Against Torture] has suggested that statements made under cruel, inhuman, or degrading treatment, nor statements made under threat of torture or under duress, may not be put forward as evidence in any proceedings.").

[57] DY at 52.

infliction of torture.[58] As with the biographical information taken at registration to a Khmer Rouge detention facility, it is quite possible that the circumstances surrounding these biographies constituted cruel, inhuman or degrading treatment or punishment. As discussed above however, the obligations contained in Article 15 apply only to treatment that rises to the level of torture.[59]

24. Additionally, the fundamental purpose of the biography differs markedly from that of the torture-induced confession. The biography was designed to "identify additional suspected 'traitors' within the Party for arrest and interrogation…"[60] In contrast,

> the confessions were produced for a larger purpose: to convince some skeptical individuals in the CPK leadership, and to confirm the suspicions of others, that the 'conspiracies' alleged by the Party existed, that these conspiracies explained the regime's failures, and that further arrests were required in order to give proper effect to the regime's policies…[61]

25. Therefore, there was built into the confessions themselves an incentive to include "fabricated claims, aimed at justifying CPK policy failures."[62] This incentive is notably absent from the production of prisoners' biographies. Given the over-arching desire of the Khmer Rouge to identify additional "traitors" for arrest, interrogation and ultimately murder, the Khmer Rouge sought to ensure the accuracy of many biographies.[63] As such, the biographies contained in the confessions should be admissible into evidence in the case at bar.

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[58] Interview with Youk Chhang, October 27, 2009. In rare instances, some people who were arrested in the villages may have been beaten by the arresting prison staff before arriving at a Khmer Rouge prison. *Id.*
[59] *See* Section IV(B)(ii).
[60] HEDER & TITTEMORE at 30, 38.
[61] HEDER & TITTEMORE at 30-31.
[62] HEDER & TITTEMORE at 31.
[63] HEDER & TITTEMORE at 38-9 (quoting a Son Sen statement that it was "'imperative further to evaluate our cadre' and purge their ranks 'by getting a clear grasp of biographies and by keeping track of [their] implementation of the line.'").

iv. Confessions Established to Have Been the Result of Torture May Only Be Used as Evidence that the Confession Was Made Under Torture.

26. International law is abundantly clear: statements established to have been made as the result of torture are inadmissible in any judicial proceedings.[64] CAT Article 15 embodies this international rule of evidence. It does contain one exception: such statements may be admissible against a person accused of torture as evidence that the statement was made.[65] In such a situation, the statement cannot be introduced into evidence for the truth of the information contained therein.[66] It is therefore important to note that the exception "does not affect the validity of the principle that the facts appearing from a statement made under torture should not be invoked in court proceedings as if they were true facts."[67]

27. Instead, "[t]he purpose is rather to prove that a specific statement was made under torture and presumably that the tortured person would not otherwise have made the same statement, because it was untrue or because it disclosed certain information which he would not otherwise have been prepared to disclose."[68] Here, the confessions contained in the Khmer Rouge Security Files may be introduced into evidence solely for the purpose of proving that the confession was made under torture. This is the sole exception under international law. Other interpretations, expansive or otherwise, should be rejected as setting a dangerous precedent and, as discussed below, in the case at bar, are wholly unnecessary.

28. This interpretation of the scope of the exclusionary rule is directly in line with the object and purpose of the Convention itself and Article 15 specifically. "The principal aim of the *Convention* is to *strengthen* the existing prohibition of [torture and other cruel, inhuman or

[64] *See supra* note 22.
[65] CAT art. 15. *See also* WENDLAND at 56.
[66] BURGERS & DANELIUS at 148 ("The rule that evidence of this kind cannot be accepted does not apply if the statement is invoked against the alleged torturer in order to prove that the statement was made. However, when the statement is invoked in such a manner, the intention is not to prove that the statement is a true statement.").
[67] BURGERS & DANELIUS at 148.
[68] BURGERS & DANELIUS at 148.

degrading treatment or punishment] by a number of supportive measures."[69] Article 15's exclusionary rule "is an important tool designed to eradicate torture once and for all."[70] Article 15 seeks to strengthen the CAT in its fight against torture in two principal ways. First, statements resulting from torture are "usually not reliable enough to be used as a source of evidence in any legal proceeding."[71] Keeping these statements out of legal proceedings works to uphold the principles of a fair trial, preserving the integrity of the judicial process.[72] Secondly, declaring torture-induced statements inadmissible in legal proceedings has a strong deterrent value, rendering them "worthless[,] remov[ing] an important motive for the use of torture."[73]

29. In the case at bar, "interrogation reports and other evidence show beyond doubt that torture was routinely used to extract confessions during the DK era."[74] As such, there must be a presumption that any confession produced during this period was made under torture.[75] These confessions extracted from prisoners during the Khmer Rouge era generally were

[69] BURGERS & DANELIUS at 1 (emphasis in original).
[70] Thienel at 367.
[71] "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment," UN Doc. A/61/259, ¶ 45, 14 Aug. 2006 [hereinafter "Special Rapporteur Report"].
[72] BURGERS AND DANELIUS at 148. *See also A and others* at ¶ 91 (Opinion of Lord Hoffman) (stating that "[he] ha[s] no doubt that the purpose of the [exclusionary] rule is not to discipline the executive, although this may be an incidental consequence. It is to uphold the integrity of the administration of justice.").
[73] WENDLAND at 56; *see also* BURGERS & DANELIUS at 148 ("[I]f a statement made under torture cannot be invoked as evidence, an important reason for using torture is removed, and the prohibition against the use of such statements as evidence before a court can therefore have the indirect effect of preventing torture."); *A and others* at ¶ 39 (Opinion of Lord Bingham) ("It seems indeed very likely that the unreliability of a statement or confession procured by torture and a desire to discourage torture by devaluing its product are two strong reasons why the rule was adopted."); Special Rapporteur Report at ¶ 45 ("Secondly, prohibiting the use of such evidence in legal proceedings removes an important incentive for the use of torture and, therefore, shall contribute to the prevention of the practice.").
[74] Ciorciari & Chhang at 237; *see also* HEDER & TITTEMORE at 28 ("Most individuals arrested by the CPK were interrogated and tortured or otherwise coerced into signing a written confession."); DY at 49 ("Most of the confessions at S-21 were probably untrue because the prisoners were innocent and confessed because of severe torture.").
[75] Indeed, the absence of such a presumption would raise complicated and potentially counter-intuitive burden of proof issues. *See* Thienel at 354 ("[A]ny provision of Article 15 UNCAT on the burden of proof would be impossible to implement in the inquisitorial system of criminal trials. An onus on the accused is alien to this system, in which the court itself must ascertain the facts and in which no burden of proof therefore exists, be it on the accused or on the prosecution. Article 15 UNCAT therefore does not prescribe in detail who should be the burden of proof.").

comprised of four sections. First, there was the personal biography discussed above in Section IV(B)(iii) and treated separately from the confession itself for purposes of this submission. In the second section, "the prisoners would relate their supposed treasonous activities in chronological order. The third section of the confession text described prisoners' thwarted conspiracies or supposed treasonous conversations."[76] The fourth section, often included as an appendix to the confession itself, would be a list "of traitors who were the prisoners' friends, colleagues, or acquaintances. Some lists contained over a hundred names."[77]

30. It has been argued that the substance of these confessions constitute "a unique" and vital source of evidence to prove or disprove the Khmer Rouge hierarchy, certain Khmer Rouge policies, and chain of command liability.[78] This is not wholly accurate. While these confessions would most likely be relevant to those issues of contention, in fact, much other potential evidence exists on these issues, evidence that does not implicate the issues of unreliability or morality inherent in these confessions.[79] As stated by Ciorciari and Chhang,

> CPK documents, including communiqués, reports, minutes of meetings, and proclamations, can provide some of the most compelling evidence against leading defendants. They come from official sources that are normally presumed to be reliable, and they are the most important sources of evidence for providing the high-level chain of command and establishing the all-important states of mind of key DK officials.[80]

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[76] DY at 52.
[77] DY at 52. Additionally, use of these lists as proof that the statement was made—but not as proof that these persons were in fact "traitors" of "CIA"—would be a permissible way, under applicable international law, to attempt to demonstrate the existence of "purge cycles."
[78] Co-Prosecutors' Response at ¶¶ 17, *citing*: Michael P. Scharf, "Tainted Provenance: When, if Ever, Should Torture Evidence be Admissible?," 65 WASH. & LEE L. REV. 129, 137-38 (Winter 2008). This statement is factually incorrect. *See* Ciorciari & Chhang at 240.
[79] *See* Ciorciari & Chhang at 240.
[80] *Id.*

31. It is clear then that in order to fully litigate the case at bar, including various theories of liability and DK command structure, it is not, in fact, necessary to admit evidence that has been established to be the result of torture. A decision to do so, even provisionally,[81] would be the first such ruling from an international tribunal, potentially creating a dangerous precedent that would undermine the prohibition on the use of evidence obtained as a result of torture. This is a result the ECCC should avoid at all costs.

C. Evidence Deemed Inadmissible Can Be Used As "Lead Evidence" or Form the Basis of Expert Opinion Testimony.

32. Even if the confession-portion of the KR Security File discussed above is established by the Pre-Trial Chamber to be the result of torture and thereby inadmissible, this information may still have other, permissible uses. Two possible uses that have been raised are: the use of excluded evidence (1) as "lead" or "derivative" evidence[82] and (2) as forming the basis for expert opinion testimony.[83] Both uses should be permitted by the ECCC, as they do not implicate the same issues inherent in the potential admission of evidence established to have been the result of torture.

33. "Lead" evidence here means using information contained in torture-induced confessions as investigative leads to find other sources of evidence, sources that may produce evidence admissible to the case at bar. In the Committee Against Torture's Guidelines to states parties on the submission of reports, the Committee states, in its guidelines for Article 15, that each state party should provide, among others, "information on whether derivative evidence is admissible, if applicable in the State party's legal system."[84] These reporting guidelines make

[81] OCIJ Order at 28.
[82] *Supra* note 20.
[83] *Supra* note 21.
[84] Committee Against Torture, "Guidelines on the Form and Content of Initial Reports Under Article 19 to be Submitted by States Parties to the Convention Against Torture," ¶ 24, July 18, 2005, CAT/C/4/Rev.3.

clear that there is no absolute bar to the use of excluded evidence as lead evidence and it is up to the rules of each State party. Here, Internal Rule 55(5) states that "in the conduct of judicial investigations, the Co-Investigating Judges may take any investigative action conducive to ascertaining the truth." In so doing, "the Co-Investigating Judges may…[s]summon and question Suspects and Charged Persons, interview Victims and witnesses and record their statements, seise exhibits, seek expert opinions and conduct on-site investigations; [and may] [s]eek information and assistance from any State, the United Nations or any other intergovernmental or non-governmental organization, or other sources that they deem appropriate."[85] Furthermore, the use of excluded information as lead evidence does not run counter to the purposes of Article 15's exclusionary rule: to deter torture by making torture-induced confessions inadmissible and to promote judicial integrity by excluding notoriously unreliable confessions resulting from torture.[86] Therefore, under the rules applicable to the Chamber, otherwise excluded evidence may be utilized as lead evidence.

34. Likewise, otherwise excluded evidence may form a proper basis for expert opinion testimony. Under the Internal Rules, the Co-Investigating Judges may seek expert opinions,[87] and these experts are subject to cross-examination.[88] Cross-examination will allow the reliability of the sources upon which expert opinion is based to be determined on a case-by-case basis, in accord with the dual purposes of CAT Article 15. This determination should affect the weight, not the admissibility, of such expert opinions.[89]

[85] IR 55(5)(a), (c). *See also* Code of Civil Procedure of the Kingdom of Cambodia (Khmer-English Translation, 1st Publication), art. 127, (September 2008).
[86] *See supra* notes 71-73.
[87] IR 55(5)(a).
[88] IR 84.
[89] OCIJ Order at ¶ 29.

V. CONCLUSION

35. The ECCC will be the first internationalized criminal tribunal to rule on the admissibility against a person accused of torture of statements or other information that was potentially produced as a result of torture. This decision will no doubt be looked upon by other internationalized tribunals, as well as Cambodia's own domestic courts. Therefore, it behooves the ECCC to proceed with the utmost caution when addressing this issue of first impression, one which also implicates issues of morality and evidentiary reliability. In so doing, the ECCC should carefully examine and appropriately classify each category of potential evidence before applying the appropriate international law. This step-by-step analysis is the best way of ensuring a just decision, one that not only adheres to the overall object and purpose of the Convention Against Torture, but also takes into active consideration the factual realities of the potential available documentation.

Submitted by

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