



ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

អង្គជំនុំជម្រះវិសេសវិសេសសាលាដំបូងក្រុងភ្នំពេញ

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Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des Tribunaux cambodgiens

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**CONSOLIDATED DECISION ON MEAS MUTH'S REQUESTS
FOR INVESTIGATIVE ACTION REGARDING POTENTIAL USE
OF TORTURE-TAINTED EVIDENCE**

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I. PROCEDURAL HISTORY

1. Disagreements between the Co-Investigating Judges (“CIJs”) in this case were registered on 7 February 2013, 22 February 2013, 17 July 2014, and 16 January 2017.
2. On 29 September 2015, I issued instructions to all investigators of the Office of the Co-Investigating Judges (“OCIJ”) on the procedure to be followed when making preliminary contacts with potential witnesses (screenings) and the conduct of formal interviews of witnesses (“29 September 2015 instructions”).¹
3. On 14 December 2015, I charged Meas Muth with, *inter alia*, the crime against humanity of torture at various security centres, primarily S-21.²
4. In January and February 2016, the OCIJ Investigator Stephen Owen Tedder (“Investigator”) met and interviewed witnesses Men Theory,³ Chhum Ya,⁴ Prum Mon,⁵ and Kev Sarourn⁶ (together, “Witnesses”). These investigative actions were recorded in written records of investigation action (“WRIAs”) dated 28 February 2016 (“D114/174”) and 10 March 2016 (“D114/184”).⁷
5. On 10 January 2017, I notified the parties that I considered that the judicial investigation against Meas Muth had concluded, granted the parties 30 days to file any further requests for investigative action, and reduced the scope of the judicial investigation pursuant to Internal Rule 66*bis*.⁸
6. On 25 January 2017, the Meas Muth Defence (“Defence”) filed a request for investigative action seeking further information regarding the potential use of torture-tainted evidence to identify, locate, and interview the Witnesses (“First Request”).⁹

¹ Case File No. 003-D157, *Memorandum from ICIJ to all OCIJ investigators concerning “Instructions on screenings of civil parties and other witnesses and on the format of the procès verbal”*, 29 September 2015.

² Case File No. 003-D174, *Written Record of Initial Appearance of Meas Muth*, 14 December 2015, pp. 4-5.

³ Case File No. 003-D114/164, *Written Record of Witness Interview Men Theory*, 1 February 2016 (“Men Theory WRI”).

⁴ Case File No. 003-D114/167, *Written Record of Witness Interview Chhum Ya*, 4 February 2016.

⁵ Case File No. 003-D114/170, *Written Record of Witness Interview Prum Mon*, 15 February 2016 (“Prum Mon WRI”).

⁶ Case File No. 003-D114/171, *Written Record of Witness Interview Kev Sarourn*, 16 February 2016 (“Kev Sarourn WRI”). The witness’s name is spelled Keo Saruon in the Written Record of Witness Interview.

⁷ Case File No. 003-D114/174, *Written Record of Investigative Action*, 28 February 2016 (“D114/174”), pp. 3-4; Case File No. 003-D114/184, *Written Record of Investigative Action*, 10 March 2016 (“D114/184”), pp. 2-3.

⁸ Case File No. 003-D225, *Notice of Conclusion of Judicial Investigation Against Meas Muth*, 10 January 2017; Case File No. 003-D226, *Decision to Reduce the Scope of Judicial Investigation Pursuant to Internal Rule 66 bis*, 10 January 2017.

⁹ Case File No. 003-D227, *Meas Muth’s Request for Investigative Action regarding D114/174, D114/184 and related Witness Interviews and the Potential use of Torture-Tainted Evidence*, 25 January 2017.



7. On 26 January 2017, the Defence filed a request for investigative action seeking information concerning an unrecorded interaction with witness Men Theory and to revise her written record of interview (“WRI”) (“Second Request”).¹⁰

II. SUBMISSIONS

A. First Request

8. The Defence request the CIJs to investigate the circumstances in which the OCIJ identified, located, and interviewed the Witnesses, basing their request on statements made in the WRIs that the Witnesses were identified as a result of the Investigator’s attempts to locate the immediate family members mentioned in the S-21 biographies of purged cadres from Kratie from November 1978.¹¹
9. The Defence submit that the requested investigative action is necessary in order to determine:
- a. whether the Investigator improperly relied upon evidence that is “*torture-tainted*”, such as S-21 confessions or biographies, to interview the Witnesses, which would render the Witnesses’ evidence inherently unreliable, and, if so, the appropriate remedy to be sought, potentially being annulment;¹² and
 - b. whether the Investigator only located the Witnesses as a result of information provided by purged cadres in their S-21 biographies, which may render the Witnesses’ evidence “*torture-derived*” which would prohibit the OCIJ from relying upon it, and, if so, the appropriate remedy to be sought, potentially being annulment.¹³
10. Specifically, the Defence seek the following information:
- a. details of the documents the Investigator used in order to identify the Witnesses and, if necessary, their placement on the Case File;
 - b. confirmation of whether information regarding the Witnesses stemmed solely from the S-21 biographies referred to in D114/174 and D114/184 or whether the OCIJ learned of those individuals from other documents, in which case the Defence request the details of those documents and, if necessary, their placement on the Case File; and
 - c. details of any documents related to the arrests of the Witnesses’ relatives which the Investigator showed to the Witnesses prior to or during his initial contacts and interviews.¹⁴
11. The Defence submit that, while the OCIJ has previously held that information in torture-tainted documents may be used as lead evidence, this position conflicts with later jurisprudence of the ECCC. The information in S-21 biographies used by the Investigator also do not appear to constitute annotations by interrogators or

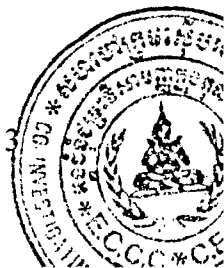
¹⁰ Case File No. 003-D229, *Meas Muth’s Request for Investigative Action concerning an Unrecorded Interaction with a Witness and Request to Revise Written Record of Witness Interview*, 26 January 2017.

¹¹ First Request, paras 4, 8, 12, 18; D114/174, p. 3; D114/184, p. 2.

¹² *Ibid.*, p. 1, paras 14, 18.

¹³ *Ibid.*, p.1, paras 19, 20.

¹⁴ First Request, para. 12.



superiors, or information about the detainees' identities or dates of arrest, incarceration, or execution recorded at registration or on the cover page of a confession, which is the type of information that the Trial Chamber has previously considered admissible.¹⁵ Further, torture-derived evidence, such as questions based on S-21 confessions, is inadmissible unless the party seeking to adduce the evidence rebuts the presumption that the responses were torture-tainted.¹⁶

B. Second Request

12. The Second Request relates to the witness Men Theory, the niece of allegedly purged cadre Roath Leang (alternative spelling, Roat Leang or Rath Leang), and the Investigator's preliminary screening with her on 31 January 2016 and interview on 1 February 2016.
13. The Defence highlight a section of the WRIA relating to the preliminary screening, an exchange in the WRI, and the corresponding audio recording of the interview¹⁷ and submit that:
 - a. the audio recording of the interview appears to show that Men Theory believed that the Investigator told her during the preliminary screening that Meas Muth was responsible for Roath Leang's death, but the WRI does not reflect this;¹⁸ and
 - b. it is likely that the Investigator influenced Men Theory's independent memory by telling her that Meas Muth was being investigated for sending people to S-21 and showing her a document indicating that Roath Leang was sent to S-21.¹⁹
14. The Defence also express concern that Men Theory may have been influenced by the comment of another individual, Long Lonh, who also spoke with the Investigator on 31 January 2016 and told the Investigator that he had heard that "*MEAS Muth has had [sic] RATH Leang arrested and sent to S21*".²⁰
15. Finally, the Defence highlight an apparent inconsistency regarding the witness's statement in the preliminary screening.²¹ According to D114/174, in the preliminary screening, Men Theory told the Investigator that "*her Mother once told her that MEAS Muth was responsible for the arrest and execution of her Uncle.*"²² In the WRI, the witness is recorded as saying that it was her *grandmother* who had told her about her uncle.²³
16. The Defence therefore request that the CIJs perform the following investigative action as it will prevent unreliable evidence remaining on the Case File, and assist the CIJs to properly evaluate the WRI and determine Meas Muth's alleged responsibility for the death of Roath Leang:²⁴

¹⁵ First Request, paras 15-18.

¹⁶ First Request, para. 19.

¹⁷ Men Theory WRI, ERN 01219840-01219841, A3-A6, A11-A12; D114/174, p.2; Second Request, paras 4-6.

¹⁸ Second Request, para. 6.

¹⁹ *Ibid.*, para. 9.

²⁰ Second Request, paras 4, 8(c); D114/174, p. 3.

²¹ Second Request, paras 5-6, 8(d).

²² D114/174, p. 3.

²³ Men Theory WRI, ERN 01219841, A11.

²⁴ Second Request, paras. 9-10.



- a. determine whether the Investigator went beyond the permissible scope of screening interviews in his interactions with Men Theory on 31 January 2016;
- b. determine which S-21 document was shown to the witness and what was said to the witness prior to her stating in the preliminary screening that “*her Mother once told her that Meas Muth was responsible for the arrest and execution of her Uncle*”;
- c. determine whether the witness made this statement before or after Long Lonh told the Investigator that he had heard that Meas Muth had Roath Leang arrested and sent to S-21;
- d. determine what other statements were made but not recorded that caused the Investigator to believe that it was the witness’s *grandmother* and not *mother* who had told her that Meas Muth had killed her uncle;
- e. determine whether the witness read and agreed with the final version of the WRI, or signed it after giving her comments but without reviewing the WRI to see whether her changes were incorporated into the final text; and
- f. revise the WRI to reflect the correction the witness made during the read back, i.e. that it was the Investigator who told the witness that Meas Muth arrested and killed people at S-21.²⁵

III. DISCUSSION

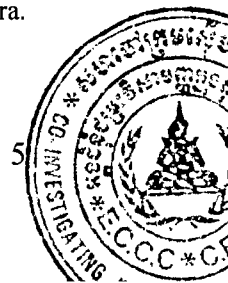
A. Standard for assessment of investigative requests

17. The Pre-Trial Chamber (“PTC”) has previously stated that a party requesting investigative action “*must satisfy two cumulative conditions [...] [n]amely, the request must:*
 - i. *identify the action to be taken or order to be made, as applicable, with sufficient precision (‘the precision requirement’), and*
 - ii. *demonstrate in detail the reasons why the requested investigative action [...] is prima facie ‘relevant to ascertaining the truth’ (‘the prima facie relevance requirement’). ”*²⁶
18. The precision requirement obliges the requesting party to be “*specific enough to give clear indications to the Co-Investigating Judges as to what they should search for*”.²⁷
19. The *prima facie* relevance requirement contains two sub-requirements. Firstly, the request must be “*relevant to the scope of the investigation pursuant to the limitations and parameters set by the Introductory and Supplementary*

²⁵ Second Request, para. 8.

²⁶ Case File No. 002-D365/2/17, *Decision on Reconsideration of Co-Prosecutors’ Appeal Against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File which Assists in Proving the Charged Persons’ Knowledge of the Crimes*, 27 September 2010 (“Reconsideration Decision”), para. 47; *See also*, Case File No. 004/2-D320/1/1/4, [Redacted] *Decision on Appeal Against Decision on Ao An’s Twelfth Request for Investigative Action*, 16 March 2017, para. 13.

²⁷ Reconsideration Decision, para. 48.



*Submissions.*²⁸ Secondly, the request “*must detail why the requested information is conducive to ascertaining the truth*”.²⁹ This requires the requesting party to establish a *prima facie* nexus between the requested investigative action and a matter within the scope of the investigation.³⁰

20. I am satisfied that both the First and Second Requests set out the requested investigative action with sufficient precision. I am also satisfied that the requests meet the *prima facie* relevance requirement, given the investigative action relates to the credibility and reliability of evidence already on the Case File.

B. The use of information obtained under torture

i. Preliminary observations

21. I note that while the First Request does not seek the annulment of any evidence on the basis that the evidence is torture-tainted, it foreshadows potential applications to do so following my responses to the First Request.³¹ Therefore, for the purpose of addressing any concerns that may arise regarding potentially procedurally defective evidence, I will provide an overview of the rules governing the use of torture-tainted information in proceedings before the ECCC.

ii. Evidentiary use of torture-tainted statements as evidence

22. At the ECCC, all evidence is admissible by the Chambers unless provided otherwise in the Internal Rules.³² The Internal Rules specify five categories of evidence that may be rejected, one of which is evidence that is “*not allowed under the law*”.³³ ECCC jurisprudence has recognised that “*under the law*” includes international instruments such as the Convention against Torture (“CAT”).³⁴
23. Article 15 of the CAT, to which Cambodia is a party, sets out the internationally-recognised rule 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.*” The Committee against Torture emphasised the absolute nature of this exclusionary rule, stating:

“Article 15 of the Convention is one of the corollaries of the *absolute* prohibition of torture on which this Convention against Torture is based. The first part of the article is designed to deprive the practice of torture of any value when inflicted on a person for such purposes as obtaining from him or a third person information or a confession. In that context, *statements obtained as a result of torture must be declared absolutely null.*”³⁵ (emphasis added)

²⁸ *Ibid.*, 49.

²⁹ *Ibid.*, para. 50

³⁰ *Ibid.*, paras 50-51.

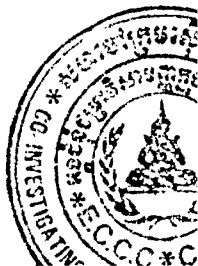
³¹ First Request, p. 1.

³² Internal Rule 87(1).

³³ Internal Rule 87(3)(d).

³⁴ Case File 002-D130/7/3/5, *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, para. 35; Case File 002-D130/10/12, *Decision on Admissibility of the Appeal Against Co-Investigating Judges' Order on Use of Statements Which Were or May Have Been Obtained by Torture*, 27 January 2010, para. 25.

³⁵ Committee against Torture, *PE v France*, UN Doc. CAT/C/29/D/193/2001, 19 December 2002 (“PE v France”), para. 3.2.



24. The prohibition set forth in Article 15 of the CAT has shaped international human rights standards and is now a fundamental principle enshrined in the jurisprudence of the European Court of Human Rights (“ECtHR”).³⁶
25. Article 15 of the CAT applies to proceedings before the ECCC.³⁷ The Trial Chamber held that the evidentiary value of statements obtained under torture is limited to the fact that such statements were made, and, where appropriate, constitute evidence that they were made under torture; they are otherwise inadmissible for the truth of their contents.³⁸ The prohibition against the use of torture-tainted statements as evidence extends to the use of such statements as a basis for questioning a witness.³⁹ The Trial Chamber’s position is in line with that of the PTC, which found the prohibition against the use of torture-tainted evidence to be absolute.⁴⁰
26. The Supreme Court Chamber (“SCC”) expressed the same view, stating that:
- “The exclusionary rule covers the direct tendering of the extorted information into evidence, the use of its recording, irrespective of its form, as well as reproducing its content through witness testimony. Furthermore, the effect of the exclusionary rule is that statements falling under it may not be used to prove the truth of its content or even to imply that it might be truthful, for instance by confronting a witness with it.”⁴¹
27. The most common examples of torture-tainted evidence at the ECCC are records of statements made by prisoners at the S-21 security centre (“S-21 Confessions”). The SCC and the Trial Chamber found that there is a rebuttable presumption that all S-21 Confessions were taken under torture and are thus inadmissible as evidence.⁴² There are, however, two types of information that do not fall within this category.
28. The first is represented by information contained in interrogation records but originating from persons other than the torture victim, such as handwritten annotations by S-21 personnel found on S-21 Confessions. According to the SCC, they may be used to prove questions posed, persons present, or the course of events and the application of torture in particular.⁴³
29. The second concerns so-called “objective information” recorded at S-21, which both the SCC and the Trial Chamber found not to be covered by the exclusionary

³⁶ ECtHR, *Jalloh v Germany*, Judgement, Grand Chamber (Application No. 54810/00), 11 July 2006, para. 105; ECtHR, *Gäfgen v Germany*, Judgment, Grand Chamber (Application No. 22978/05), 1 June 2010 (“Gäfgen Judgement”), para. 167.

³⁷ Case File 001-E1/27.1, *Transcript of Trial Proceedings – Kaing Guek Eav “Duch”*, 28 May 2009, pp. 8-9.

³⁸ Case File 001-E176, *Decision on Parties Requests to Put Certain Documents before the Chamber Pursuant to Rule 87(2)*, 28 October 2009, para. 8; Case File No. 002-E350/8, *Decision on Evidence Obtained Through Torture*, 5 February 2016 (“Evidence Decision”), paras 20-21.

³⁹ Case File 002-E1/129.1, *Transcript of Trial Proceedings*, 3 October 2012, p. 74; Evidence Decision, para. 21.

⁴⁰ Case File No. 002-D130/7/3/5, *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”), para. 38; Case File 002-D130/9/21, *Decision on Admissibility of the Appeal Against the Co-Investigating Judges' Order on Use of Statements Which Were or May Have Been Obtained by Torture*, 18 December 2009, para. 30.

⁴¹ Case File No. 002-F26/12, *Decision on Objections to Document Lists – Full Reasons*, 31 December 2015, para. 47. See also paras 66-68.

⁴² See Case File No. 002-F26/12, *Decision on Objections to Document Lists – Full Reasons*, 31 December 2015, paras 58-59.

⁴³ *Ibid.*, para. 68; Evidence Decision, para. 49.



rule.⁴⁴ The SCC stated that whether this information was provided under torture is a matter of proof,⁴⁵ thus implying that objective information falls outside of the general presumption of torture attaching to S-21 Confessions. The Trial Chamber considered that objective information may include the identity of the detainee and the date of arrest, incarceration, or execution.⁴⁶

30. The SCC, however, went further and included among the category of “objective information” details such as the prisoner’s former occupation and the position held in the Khmer Rouge ranks.⁴⁷ For the reasons that follow, I find that such information must fall under the presumption of torture – and hence of unreliability - generally applicable to S-21 Confessions.
31. The type of objective information referred to by the Chambers is primarily found in “detainee biographies”, which are typically single-page documents setting out the detainee’s name, alias, date of birth, gender, nationality, position and department in “*the revolution*”, place of birth, parents’ names and occupations, spouse’s name and place of birth, number of children, and the date and place of arrest.⁴⁸ In his Case 003 interview, Duch explained that “*there was no torture while biographies were obtained*”.⁴⁹ However, when asked a follow up question, “*do we understand correctly that, as you claimed, generally there was no torture during biography-making, except when there were offences committed by the interrogators who did not comply with the principles?*” (emphasis added), he answered “*yes*”,⁵⁰ and did not dispute the “*generally*” qualification in the question. In addition, threats of torture were used,⁵¹ and whether there was any threat or fear of torture during the biography-making stage “*would have depended on the skills of the interrogators*”.⁵² The extraction of biographies and confessions was conducted in the same room and by the same interrogator.⁵³ It is not clear whether detainees would have seen evidence of torturing at the time their biographies were drafted,⁵⁴ however, according to Duch “*some people would have understood that they could not avoid being tortured*”.⁵⁵ It is thus not unlikely that some S-21 detainees provided biographical information under torture, duress, or fear of the same.
32. Details such as the sex of the arrested person and the date and place of arrest may be considered *objective*, because it is data which is known to the incarcerating authorities irrespective of the detainee’s provision of it.

⁴⁴ Case File No. 002-F26/12, *Decision on Objections to Document Lists – Full Reasons*, 31 December 2015, para. 68; Evidence Decision, para. 49.

⁴⁵ Case File No. 002-F26/12, *Decision on Objections to Document Lists – Full Reasons*, 31 December 2015, para. 68.

⁴⁶ Case File No. 002-F26/12, *Decision on Objections to Document Lists – Full Reasons*, 31 December 2015, para. 68; Evidence Decision, para. 49.

⁴⁷ Case File No. 002-F26/12, *Decision on Objections to Document Lists – Full Reasons*, 31 December 2015, para. 68.

⁴⁸ See e.g. Case File No. 003-D59/1/3.51b, *Biography of Huon Yeng*.

⁴⁹ Case File No. 003-D114/158, *Written Record of Interview Witness Kaing Guek Eav alias Duch*, 1 February 2016, ERN 01213411, A14.

⁵⁰ *Ibid.*, ERN 01213411, A16.

⁵¹ *Ibid.*, ERN 01213412, A19.

⁵² *Ibid.*, ERN 01213411, A17.

⁵³ *Ibid.*, ERN 01213414, A25, A28.

⁵⁴ *Ibid.*, ERN 01213414, A29.

⁵⁵ *Ibid.*, ERN 01213415, A30.



33. However, information such as the prisoner's former occupation, his parents' occupation, and his relatives' names may not have been known to the authorities. Even the positions held by the prisoner since the beginning of the revolution may not have been fully or accurately known to the interrogating authorities. Considering the procedure for taking biographies as explained by Duch, and the fact that this type of information was relevant to the Communist Party of Kampuchea's assessment of alleged "bad elements", prisoners may have lied in providing information on their own background.
34. Finally, I consider that the detainee's name, as reported in the biography or in a confession, is also not subject to the exclusionary rule under Article 15 of the CAT. It is not objective information like the detainee's sex and date of arrest or execution. However, Article 15 of the CAT allows for the use of a statement taken under torture against the person accused of torture "*as evidence that the statement was made*". To prove that the statement was made under torture, and to prosecute the torturer, the victim's name is a necessary piece of information. The reliability of that information will be assessed through the traditional interpretive canons.
35. I therefore consider that information contained in the biographies other than a) a prisoner's name, b) a prisoner's sex, and c) a prisoner's date of arrest or execution must be treated the same way as the information contained in the confessions proper, and must therefore not be used as evidence or put to a witness during questioning. However, it stands to reason that the use of such information, albeit tainted, typically has a lesser impact on the material quality of a witness statement if used in an interview, and does not belong to the core area meant to be protected by the policy objectives outlined above.
- iii. Use of information found in torture-tainted statements as investigative leads
36. The absolute prohibition against the use of torture-tainted statements as evidence does not prevent the CIJs, under the conditions further specified in this section, from using the content of S-21 Confessions as investigative leads. Two reasons support this conclusion.
37. First, the prohibition contained in Article 15 of the CAT and adopted by the ECCC Chambers and human rights bodies only concerns the use of torture-tainted information as *evidence*.⁵⁶
38. Second, the use of information contained in S-21 Confessions as leads does not run contrary to any of the policy rationales underlying the exclusionary rule, namely (i) preventing reliance on inherently unreliable evidence; (ii) removing any incentive for authorities to engage in torture; and (iii) preserving the integrity of judicial proceedings.⁵⁷
39. With regard to policy rationale (i), the unreliability of an S-21 Confession where an investigative lead is found does not affect the reliability of the evidence of a witness found through that lead. The tainted S-21 Confession has simply no bearing on the reliability of the new interview, unless the contents of the S-21 Confession are put to the witness found through the lead.

⁵⁶ See *supra* Section III(B)(ii).

⁵⁷ Michael P. Scharf, 'Tainted Provenance: When, if ever, should torture evidence be admissible?' (1998) 65 *Washington & Lee Law Review* 129, p. 171.



40. The use of torture-tainted information as leads may, in certain cases, frustrate policy rationale (ii). This would be the case, for instance, if information obtained under torture were used by the torturing authorities to locate a witness or documents to be then used as evidence in judicial proceedings. In this scenario, allowing the use of evidence located through torture could incentivise the authorities to resort to torture as an investigative tool.
41. The use by the OCIJ of information found in S-21 Confessions or biographies as leads, however, is not comparable to the scenario just described. The OCIJ has at its disposal archive materials, mainly in the form of S-21 Confessions, which were likely elicited under torture by authorities of a state whose alleged former officials the OCIJ is investigating. The OCIJ is neither directly nor indirectly connected to the torturing authorities, and would use possible leads to locate evidence relevant to investigations into the conduct of persons who were allegedly former officials of the torturing authorities. In such a scenario, allowing the use of evidence found through S-21 leads does not incentive the use of torture (in fact, if anything, it may produce the opposite effect and disincentive torture through special prevention, if convictions are secured thanks to this evidence).
42. Finally, with regard to policy rationale (iii), in the absence of any explicit prohibition or risk of frustrating the purpose of Article 15 of the CAT, the use of S-21 Confessions or biographies as leads does not undermine the integrity of the proceedings.
43. In Case 002, the Trial Chamber stated that the exclusionary rule set out in Article 15 does not apply to 'derivative evidence' ("*evidence which was not itself the product of torture, but was nonetheless discovered through torture-tainted evidence*").⁵⁸ The Trial Chamber could not find evidence of the establishment of an international standard regarding the use of derivative torture⁵⁹ and found that neither the preparatory work of the CAT nor consistent international jurisprudence supported broadening the exclusionary rule to encompass derivative evidence. It therefore concluded that the "*free admissibility of evidence militates in favour of accepting derivative evidence so long as the proposed use does not circumvent the prohibition against invoking the contents of torture-tainted confessions to establish their truth.*" Logically, the Trial Chamber stated that the probative value of such evidence is to be assessed on a case by case basis.⁶⁰
44. There is thus no prohibition at the ECCC to pursue investigative leads contained in S-21 Confessions and to rely on the evidence that may be found through such leads. To conclude otherwise would hinder the prosecution of torture as a crime and be fundamentally against the interests of justice. Obviously, once a witness is identified in this fashion, OCIJ investigators must refrain from putting to the witness information contained in the S-21 Confession or biographies (other than the confession's author's name, sex, and date of his or her arrest and/or execution, which as I have found above, fall within the permissible use of statements made under torture pursuant to Article 15 of the CAT, or are objective information).

⁵⁸ Evidence Decision, paras 63, 70.

⁵⁹ *Ibid.*, 69.

⁶⁰ *Ibid.*, 70.



C. The First Request

45. Investigator Stephen Tedder is no longer in the employ of the OCIJ. My responses to the queries raised by the Defence are thus only based on my review of the documentation filed by the Investigator on the Case File following his missions and my consultation with OCIJ staff and analysts involved in the Case 003 investigation.

iv. Men Theory

46. As indicated in D114/174, which reports on the OCIJ investigative mission that took place between 28 January and 4 February 2016, the Investigator “*made the operational decision to...attempt to locate the immediate family members mentioned in the S21 Biographies of the Kratie Purged cadre’s [sic] from November/December 1978*”.⁶¹ During this mission, the Investigator relied on the S-21 biography of Roath Leang, which had been copied from the Tuol Sleng Genocide Museum and unofficially translated into English by an OCIJ analyst. Copies of the S-21 biography and its unofficial English translation will be placed on the Case File as set out in the Annex to this Decision.

47. The S-21 biography records Roath Leang’s place of birth as Trapeang Kul village, Por Peal commune, Tram Kak district. Based on that information, the OCIJ investigation team travelled to that village where they met Men Theory, who identified herself as the niece of Roath Leang.⁶²

48. It appears likely that the Investigator showed Men Theory the S-21 biography of Roath Leang during the preliminary screening.⁶³ However, upon review of the WRI and the transcript of the audio recording of the interview (annexed to this Decision), it is clear that at no point in the interview did the Investigator refer to the contents of the S-21 biography or confession and question the witness based on that information. I am thus satisfied that there has been no tainting of Men Theory’s evidence.

v. Chhum Ya

49. In the same mission recorded in D114/174, the Investigator relied upon the S-21 biography of Chhum Chen which had been copied from the Tuol Sleng Genocide Museum and unofficially translated into English by an OCIJ analyst. A copy of the S-21 biography and its unofficial English translation will be placed on the Case File as set out in the Annex to this Decision . The S-21 biography is undated and lists biographical data of Chhum Chen.

50. The S-21 biography records Chhum Chen’s place of birth as Kbal Au village, Cheang Tang commune, Tramkak district. Relying on this information, the OCIJ investigation team travelled to neighbouring village, Srekrou, in the same

⁶¹ D114/174, p. 3.

⁶² *Ibid.*

⁶³ Men Theory WRI, ERN 01219840, A2: “*Yesterday, we showed you a document about the arrest of your uncle from Tuol Sleng, didn’t we?*”; Case File No. 003-D251.2, *Transcript of Interview of Men Theory*, 1 February 2016 (“Men Theory Transcript”), p. 11: Interpreter [Khmer]: “*Is it correct that yesterday we showed a document about Uncle Roth Leang’s arrest at Tuol Sleng?*”, Men Theory [Khmer]: “*Yes*”.



commune where they met Chhum Ya, who identified herself as the sister of Chhum Chen.⁶⁴

51. There is no indication in the WRI of Chhum Ya that the Investigator showed her the S-21 biography of Chhum Chen or that any torture-tainted information was put to the witness.

vi. Prum Mon

52. In D114/184, which reports on the OCIJ investigative mission that took place from 14 to 17 February 2016, the Investigator referenced “*an attempt to locate the immediate family members mentioned in the S21 Biographies of the Kratie Purged cadre’s [sic] from November/December 1978*”.⁶⁵ On this mission, the Investigator relied on the S-21 biography of Khun Sarom, which had been copied from the Tuol Sleng Genocide Museum and unofficially translated into English by an OCIJ analyst. Copies of the S-21 biography and its unofficial English translation will be placed on the Case File as set out in the Annex to this Decision.
53. The S-21 biography names Prum Mon as Khun Sarom’s wife, and lists her place of birth as Anlong Kanh Chos village, Pralay Meas commune, Kampong Leung district, Kampong Chhnang. Relying on this information, the OCIJ investigation team travelled to that village where they met the village chief who immediately took them to the home of Prum Mon.⁶⁶

54. In the interview, the Investigator references the S-21 biography when seeking to establish the witness’s timeline regarding her husband’s arrest, as follows:

Q: “Based on the biography found at Tuol Sleng, your husband was arrested on December 8, 1978. Do you recall if the event corresponds with the age of your child?”

A45: “No, I don’t.”⁶⁷

55. As I explained above, I consider the date of arrest to be objective information and, therefore, not to be covered by the exclusionary rule. There is no indication in either the WRI or audio recording⁶⁸ of the interview of Prum Mon that the Investigator shared any torture-tainted information with the witness.

vii. Kev Saroun

56. In the same mission recorded in D114/184, the Investigator relied on the S-21 biography of Huon Yeng, which had been copied from the Tuol Sleng Genocide Museum and unofficially translated into English by an OCIJ analyst. The S-21 biography of Huon Yeng is already on the Case File.⁶⁹ A copy of the unofficial English translation will be placed on the Case File as set out in the Annex to this Decision.
57. The biography names ‘Keo Ruon’ as the wife of Huon Yeng and records her place of birth as Neang Meas village, Meanchey commune, Roleah Phaeir district, Kampong Chhnang. After an extensive search of the Chreybak Commune, the

⁶⁴ D114/174, p. 4.

⁶⁵ D114/184, p. 2.

⁶⁶ *Ibid.*

⁶⁷ Prum Mon WRI, ERN 01212903, A45.

⁶⁸ Case File No. 003-D114/170R, *CD Recording of Interview of Witness Prum Mon*, 15 February 2016.

⁶⁹ Case File No. 003-D59/1/3.51b, *Biography of Huon Yeng*, filed 10 June 2013.



OCIJ investigation team travelled to another village, O Kamnop, in Kampong Chhang where they met Kev Sarourn (alternative spelling, Keo Saruon) who identified herself as Huon Yeng's wife and confirmed her alias 'Keo Ruon'.⁷⁰

58. In the interview, the Investigator references the S-21 biography when questioning the witness on her husband's position on the Sector 505 committee, as follows:

Q: "I have received your husband's biography; he was on District 505 committee; is that correct?"

A46: "Yes, it is."

Q: "You answer "yes". Are you certain that it was Sector 505 or is this just a memory?"

A47: "I remember it. It happened many years ago, so it's hard to remember."⁷¹

59. I have explained above that I do not consider this type of information to be "objective". Rather, I consider it as falling under the same presumption of torture – and hence of unreliability – that attaches to S-21 Confessions. However, I do not consider Kev Sarourn's interview to be null and void on that basis alone. As I explained at para. 35 above, the effect of the tainted material as emanating from a biography is of a lesser degree than if the substance of an interview had been used, and it is on the periphery of the protective policy underlying the use of torture-tainted material. I also note that the relative impact on the substance of the witness' statement is minor and the error is easily remedied by disregarding answers 46 to the end. I consider a *proprio motu* annulment application under Internal Rule 76(1) disproportionate and will disregard Answers 46 to the end of D114/171 for the further course of the proceedings. .

D. Second Request

i. The document shown to the witness

60. As established above,⁷² the document shown to the witness at the preliminary screening was the S-21 biography of Roath Leang. This was noted and acknowledged by the Investigator and witness in the following day's interview.⁷³

ii. Whether the investigator went beyond the permissible scope of screening interviews

61. I consider that, ideally, the Investigator should not have showed the witness the S-21 biography of Roath Leang. There was no need to do so. However, a review of the audio-recording of the interview and the WRI showed that the contents of the S-21 biography were not discussed with the witness. There is thus no reason to believe that, by showing the biography to the witness, the investigator tainted the witness' interview.

iii. The timing of the Investigator's discussions with Men Theary and Long Lonh

62. The Investigator spoke with Long Lonh, the step brother of Roath Leang, on the same day that he spoke with Men Theary.⁷⁴ Long Lonh told the Investigator that

⁷⁰ D114/184, pp. 2, 3.

⁷¹ Kev Sarourn WRI, ERN 01223474, A46-A47.

⁷² See *supra*, para. 48.

⁷³ Men Theary WRI, ERN 01219840, A3; Men Theary Transcript, p. 11.

⁷⁴ D114/174, p. 3.



they had been visited by former senior cadres who told them that Meas Muth had had Roath Leang arrested and sent to S-21.⁷⁵

63. The Defence seek to know whether Long Lonh had made this statement before or after Men Theory told the Investigator, during the preliminary screening, that “*her Mother once told her that Meas Muth was responsible for the arrest and execution of her Uncle*”.⁷⁶
64. On review of D114/174, it is not possible to definitively establish the timing of the statement made by Long Lonh, let alone whether he made the statement in front of Men Theory. However, the fact that the Investigator reports in D114/174 on Long Lonh’s statement after he reports on his interaction with Men Theory suggests, as the contents of D114/174 are otherwise in chronological order, that Long Lonh made this statement after the Investigator had spoken with Men Theory.

iv. Statements made about the witness’s grandmother and mother

65. The WRIA D114/174 records that Men Theory heard of her uncle’s fate from her *mother*,⁷⁷ whereas the WRI of Men Theory records that she heard it from her *grandmother*.⁷⁸ This is not a discrepancy; the transcript of the audio-recording of the interview confirms that the witness heard the information from her grandmother,⁷⁹ whom she also refers to, in the same interview, with the term “mother” or “mum”.⁸⁰ The evidence given in the interview is therefore accurately recorded in the WRI. The witness likely used the term “mother” when recounting her knowledge of her uncle’s fate to the Investigator in the preliminary screening, which is why the WRIA records the witness’s information as coming from her mother.

v. The witness’s reading and signing of the final WRI

66. The Defence submit that the audio recording of the interview indicates that the witness claims that the Investigator told her that Meas Muth was responsible for her uncle’s death, and allege that this is not accurately reflected in the WRI.⁸¹
67. The transcript of the interview records the following exchange at the start of the interview:

Mr Tedder [English]: “*And yesterday, I informed you and your relatives that we had indicted a person named Meas Muth; we had indicted [...] for allegedly being responsible for many crimes, including the arrests and transfer of senior military personnel to S-21.*”

Interpreter [Khmer]: “*Yesterday we also told your family members that Meas Muth was responsible for the arrest, transfer **and killing** of cadres and their transfer to Tuol Sleng Security Office. Is it correct?*” (emphasis added)

Men Theory [Khmer]: “*It is correct.*”⁸²

68. In the WRI, the exchange is recorded as follows:

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*; Second Request, para. 8.

⁷⁷ D114/174, p. 3.

⁷⁸ Men Theory WRI, ERN 01219841, A11.

⁷⁹ Men Theory Transcript, pp. 12, 22, 24.

⁸⁰ *Ibid.*, pp. 22, 42.

⁸¹ Second Request, para. 6.

⁸² Men Theory Transcript, pp. 11-12.



Q: “Do you agree that yesterday we told you that Meas Muth has been charged with many crimes, including the arrests and transfers of many cadres to Office S-21?”

A4: “Yes, I do.”⁸³

69. The reference to Meas Muth’s responsibility for “killings” is excluded from Question 4 in the WRI. Towards the end of the interview, after the read-back has concluded, the transcript of the audio-recording of the interview records the witness telling the interpreter that she remembered being told during the preliminary screening that Meas Muth was responsible for the arrest and execution or killing of people at S-21.⁸⁴ Despite this clarification from the witness, the WRI is not amended to include reference to “killing” in Question 4.

70. Notwithstanding the failure to amend the WRI to reflect the witness’s recollection of what she was told in the preliminary screening, I see no material prejudice to Meas Muth as a result of this discrepancy as I consider that the witness was capable of giving consistent and independent evidence of her recollection of being told that her uncle was killed by an individual named “Muth”. Specifically, the witness repeatedly stated that she had been told by her grandmother that her uncle had been killed by a person named “Muth”.⁸⁵ The witness gave evidence of the circumstances surrounding that disclosure by her grandmother and the reason why she remembered this disclosure.⁸⁶ The witness also appears frank in acknowledging what she does not know.⁸⁷ These matters indicate that Men Theory had an independent recollection of what her grandmother had told her about her uncle’s fate, and therefore her evidence would not have been influenced by a reference to “killing”.

vi. Request to revise the WRI

71. I have repeatedly stated that it is inappropriate to alter the Khmer WRI in light of the fact that it constitutes the official record of the statements made by the witness under an oath during a judicial interview, and the WRI has been signed on every page by the witness and all persons present at the interview.⁸⁸ In any event, as stated in preceding paragraph, I consider Meas Muth to have suffered no material prejudice as a result of the discrepancy between the way the witness was told about Meas Muth’s alleged responsibility in the preliminary screening, and the

⁸³ Men Theory WRI, ERN 01219841, A4.

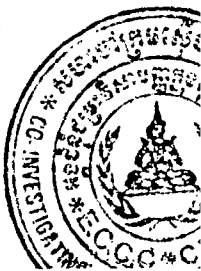
⁸⁴ Men Theory Transcript, pp. 49-51.

⁸⁵ Men Theory Transcript, p. 12 (Interpreter [Khmer]: “When we told you of the name “Meas Muth”, you were interested in it and said that you heard this name from your grandmother.” Men Theory [Khmer]: “Yes, my grandmother told me about that.”; p. 14 (“I don’t know what his surname was, but I just know he is Muth. I simply know he is Muth [...] I did not know his surname at the time. She said only one word.”); p. 22 (Interpreter [Khmer]: “How did you first hear the name “Meas Muth?” Men Theory [Khmer]: “I heard my mother say that “Your uncle, Leang, was killed. The person named Muth was the killer.”)

⁸⁶ *Ibid.*, p. 24 (regarding her grandmother being seen crying), p. 26 (i.e. that she remembered because she had seen her grandmother crying only on that occasion).

⁸⁷ *Ibid.*, p. 14 (i.e. that she did not know Meas Muth’s full name, only that she had heard of “Muth” from her grandmother), pp. 24-25 (i.e. that she did not know how her grandmother learned of her uncle’s death).

⁸⁸ Case File No. 003-D203/1, *Decision on Request to Rectify Defects in Written Records of Interviews*, 10 January 2017, paras 11-12; Case File No. 003-D228/1, *Decision on Meas Muth’s Requests for Correction of Certain Case File Documents*, 17 April 2017, para. 5.



way that statement is recorded in the WRI. I therefore deny this part of the Second Request.⁸⁹

FOR THE FOREGOING REASONS, I:

- 72. **INFORM** the Defence of my responses above to the questions raised in the First and Second Requests;
- 73. **DENY** the request to revise the WRI of Men Theary as set out in paragraph 8(f) of the Second Request;
- 74. **NOTIFY** the parties that I will disregard Answers 46 ff of the interview of Kev Saroun (D114/171); and
- 75. **INSTRUCT** the OCIJ Greffier to place the documents listed in the Annex to this Decision on Case File 003.

This decision is filed in English with a Khmer translation to follow.



Dated 24 May 2017, Phnom Penh

Judge Michael Bohlander

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International Co-Investigating Judge
Co-juge d'instruction international

⁸⁹ Second Request, para. 8(f).