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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**CO-PROSECUTORS' SUBMISSION REGARDING THE APPLICATION OF THE
TORTURE CONVENTION TO S-21 CONFESSIONS AND OTHER RECORDS
RELATING TO INTERROGATIONS OF PRISONERS**

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I. Introduction

1. The Co-Prosecutors address in this submission the application of the torture exclusionary rule to surviving interrogation records evidencing the systematic torture and other criminal conduct for which the Accused are being prosecuted in this case.

II. The Convention Against Torture

2. The purpose of the Convention Against Torture (“CAT”) is to eradicate the use of torture by ensuring that torture is prohibited and prevented by State Parties and that those responsible for torture are prosecuted and punished.¹ The CAT was established to provide a system of enforcement under which “the torturer can find no safe haven” and does not gain from his or her acts.² Accordingly, the core provisions of the CAT concern the obligation of State Parties to prosecute torture offenders.³
3. Article 15 of the Convention states that “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 proceeding, except against a person accused of torture as evidence that the statement was made.”⁴ Article 15’s exclusionary rule and exception must be understood in the overall context of the CAT’s object and purpose,⁵ and should not be interpreted in a manner that would lead to an “unreasonable result.”⁶ The exception contained in Article 15 was introduced because courts should be permitted to “invoke the statement made under

¹ 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/RES/39/46, 1465 UNTS 113 (1984) [hereinafter “CAT”], Articles 4-9, 14.

² J. H. Burgers and H. Danelius, *The United Nations Convention against Torture – A Handbook on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 1988 [hereinafter “Burgers & Danelius”], p. 1; Nigel S. Rodley, *The Treatment of Prisoners under International Law*, 2nd ed. 1999, p. 100, cited in Lene Wendland, *A Handbook on State Obligations under the UN Convention on Torture*, Association for the Prevention of Torture [“APT Handbook”], p. 39, fn. 132.

³ CAT, Articles 4-9 [Article 7.1 provides that a State Party “shall submit the case to its competent authorities for the purpose of prosecution”]; *see also* APT Handbook, pp. 16, 35, 44 [“duty to take suspected persons into custody, to undertake inquiries into allegations of torture, and to submit suspected torturers to the prosecuting authorities”]; Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Chapter I.C.26 (Guidelines on the Role of Prosecutors), U.N. Doc. A/CONF.144/28/Rev.1, 1990 [hereinafter “UN Guidelines”], Guideline 16 [obligation to “take all necessary steps to ensure that those responsible for using such methods are brought to justice”]; N. Rodley, *Report of the Special Rapporteur on the Question of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, General Assembly, 56th session, 3 July 2001, A/56/156, paras. 26-33.

⁴ CAT, Art. 15. This exclusionary rule is limited to statements resulting from torture, and was not extended to “other acts of cruel, inhuman or degrading treatment or punishment.” *Id.*, Art. 16; Burgers & Danelius, p. 74.

⁵ Vienna Convention on the Law of Treaties, 155 U.N.T.S. 331, 23 May 1969, art. 31(1).

⁶ ICJ Advisory Opinion on Competence of the General Assembly for the Admission of a State to the United Nations, ICJ Reports (1950), p. 8.

torture as evidence against the torturer.”⁷ The very purpose of the CAT would be undermined were the treaty used to shield those responsible for torture from evidence that helps prove their crimes. It would certainly be an “unreasonable result” if a treaty dedicated to eradicate torture were interpreted so as to benefit torturers either by (a) precluding the admission of records documenting their crimes or (b) allowing an Accused to rely on statements obtained by torture to justify the arrest, detention and execution of their victims.

4. According to the Special Rapporteur on Torture, the twofold rationale behind the Article 15 exclusionary rule is that: (i) information extracted by torture is usually not reliable enough to be used as a source of evidence in legal proceedings; and (ii) prohibiting the use of such evidence removes an important incentive for the use of torture and therefore contributes to the prevention of the practice.⁸
5. The first rationale – that one cannot know whether a confession obtained through torture is reliable and reflects the truth, or was simply a statement made to please the interrogator in order to stop the torture – does not apply where the statements in issue are not being offered to prove that the “confession” extracted under torture is true, but rather for a purpose unrelated to the truth of the statement. For example, in a case such as this in which thousands of persons were unlawfully arrested, detained, interrogated and tortured, and detailed interrogation records were kept by the perpetrators, those records will reflect:
 - (a) the names and number of persons arrested and detained;
 - (b) the purported reasons for their detention (irrespective of the truth of the accusations, but proving for example that individuals were arrested for being related to another person under suspicion or because they held a position in the prior regime);
 - (c) the purpose of the use of torture during interrogations, the practices regularly employed by the torturers, and other facts indicative of a widespread and systematic pattern of criminal conduct.

Moreover, where confessions were reported to the superiors ultimately responsible for the crimes, either by written reports summarizing the interrogation or by forwarding a copy of

⁷ Burgers & Danelius, p. 69.

⁸ M. Nowak, *Report of the Special Rapporteur on Torture*, UN General Assembly, 14 August 2006, U.N. Doc. A/61/259 [hereinafter “Special Rapporteur Report”], at para. 45.

the confession, such evidence is relevant to prove the knowledge and intent of the persons who received those reports or confessions.

6. The second rationale for the Article 15 exclusionary rule is to deter future torture by not allowing torturers or the regimes they serve to benefit from the statements they forcibly extract. The rule only serves this purpose where the party seeking to use the confession is part of the perpetrator's regime. The reasoning is turned on its head if those behind torture can hide behind an exclusionary rule that prevents a court from considering such evidence for any purpose at all, even purposes unrelated to the truth of the statements derived through torture. A blanket rule excluding all evidence from torture-derived statements would only serve to reward the persons responsible for the torture by allowing them to use the very international laws that were designed to prevent and prosecute torture to avoid liability. By contrast, admitting the statements for use against the Accused would discourage torture by holding accountable the senior leaders of a criminal regime that regularly resorted to the use of torture against its citizens. For this reason, the UN Guidelines for Prosecutors adopted in 1990 recognized that evidence obtained through torture may be used without limitation against "those who used such methods."⁹
7. Article 15 expressly recognizes that evidence obtained by torture is admissible when it is being offered "against the person accused of torture as evidence the statement was made." Since obtaining a statement is not an element of the crime of torture, the only reasonable interpretation of the language "evidence a statement was made" is that it means a statement derived through torture may be used for purposes *other than* to prove the truth of the torture victim's statement. Because the exception allows statements obtained as a result of torture to be admitted in order to prove the commission of crimes by the torturers, there is no question that the surviving interrogation records from the S-21 and Kraing Ta Chan security centres are admissible. The issue for consideration by the Trial Chamber is not the admissibility of these documents, but rather the use that can be made of such evidence. Where the rationale underlying Article 15's exclusionary rule is not applicable, the

⁹ UN Guidelines, No. 16 ["When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture ..., they shall refuse to use such evidence against anyone *other than those who used such methods*, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice"].

exception to the rule allowing the use of such evidence against the torturers must be construed broadly in order to give effect to the purpose of CAT.

III. Permissible Evidentiary Uses of Interrogation Records

8. The Co-Prosecutors submit that the following constitute permissible uses for which S-21 confessions and other interrogation records may be admitted in this trial, in accordance with the principles of the Convention Against Torture described above.

Identity of Victims of Crimes

9. The surviving interrogation records from S-21 and Kraing Ta Chan establish the identity of thousands of victims who were unlawfully detained, interrogated, tortured and executed at those security centres. Evidence that statements were obtained from such persons at these crime sites is admissible under the exception to Article 15. Biographical data recorded in confessions or prison notebooks identifying the victims, such as their name, age, residence, former occupation and DK unit or position, is not information that was obtained by torture¹⁰ and, in any event, would fall within the exception of Article 15 as proof identifying the victims from whom statements were obtained at S-21 and Kraing Ta Chan or at a minimum, proving the intent of the regime to target individuals with those characteristics.
10. The same reasoning applies to information recorded in confessions establishing the dates of the arrest and interrogation of the victims, which was generally recorded by the prison cadres and under no circumstance could be considered to be a statement obtained “as a result of torture.” The Article 15 exception would be meaningless if it did not encompass proof of both the identity of the prisoner from whom the statement was obtained and the dates on which that prisoner was detained and interrogated.

Confession Annotations & Reports from Interrogators

11. Many S-21 confessions contain handwritten annotations, including comments written by the interrogators, notes written by Duch to his superiors (Son Sen and Nuon Chea), and annotations from Son Sen or Nuon Chea recording that copies of the confession were sent to the heads of the DK organisations whose cadres were implicated. For example, the S-21 Confession of Division 164 Battalion Secretary Kung Kien contains a 21 May 1977 note

¹⁰ At S-21, for example, biographical records were created when prisoners first arrived, before any interrogations were conducted. Accordingly, where biographical information was also subsequently included in confession records, it cannot be considered to have been obtained as a result of torture.

from Duch, a 23 May 1977 note identified by Duch as Son Sen's handwriting stating "Sent to Brother Nuon" and a further note in different handwriting (identified by Duch as Nuon Chea's) stating "Excerpts presented to Comrade Mok."¹¹ A confession of another Division 164 cadre contains a lengthy note from Son Sen alias Khieu forwarding the confession to "Brother Nuon" and stating that Comrade Mut should be contacted "so that he can take measures."¹² Another confession contains a note from Duch to interrogator Pon stating that "Brother Number II" had requested the removal of certain names from the confession.¹³

12. Many of the documents that for simplicity are identified on the Case File as S-21 Confessions also include reports written by S-21 cadres for the leadership summarizing the results of prisoner interrogations. For example, the S-21 confession file for Ke Kim Huot contains a detailed report describing the escalating use of torture on that prisoner over the course of a three-day period, including the use of electric shocks and the forced feeding of excrement. It describes how the prisoner had initially maintained his innocence, but was now beginning to "break" and had "confessed a bit." The S-21 interrogator concludes the report stating that his "operative line is to continue to torture with mastery," and requesting "opinion and guidance from Angkar."¹⁴
13. The surviving records from the Kraing Ta Chan security centre, in addition to a few examples of prisoner confessions,¹⁵ contain seven lengthy notebooks relating to prisoner interrogations,¹⁶ as well as reports on confessions sent by the prison chief to the District and Sector leaders. These notebooks do not contain actual prisoner confessions, but instead are summaries of detained prisoners and their interrogations that were used to prepare the reports sent from Kraing Ta Chan chief An to the District Office.¹⁷

¹¹ **E3/1565** S-21 Confession of Kung Kien *alias* Ing Vet, 16 May 1977, at KHM 00017305, ENG 00822048 & 00182773, FRE 00825431; **E3/83** Kaing Guek Eav OCIJ Statement, at ENG 00398164, KHM 00398157.

¹² **E3/3697** S-21 Confession of Kun Dim, at KHM 00175293, FRE 00289872, ENG 00822359.

¹³ **E3/1688** S-21 Confession of Chap Mit, at KHM 00226401, ENG 00284069, FRE 00294523.

¹⁴ **E3/1705** S-21 Confession of Ke Kim Huot *alias* Sot, 22 July 1977, at ENG 00183286-90, KHM 00014091-96, FRE 00373117-20 & FRE 00951214-15.

¹⁵ *See, e.g.*, **E3/4091** Confession of Nop Neang; **D157.81** Confession of Nop Neang, 1 April 1977, at KHM 00271052, ENG 00322167, FRE 00631483.

¹⁶ E3/4095; E3/2107; D157.7; D157.13; E3/2427; E3/4092; E3/4122.

¹⁷ For example, the handwritten notes for 7 prisoners contained in Kraing Ta Chan notebook **E3/4092** at KHM 00271156-57, ENG 00834818-19, FRE 00721298-99 were used almost verbatim for a typed report sent from prison chief An to the Party dated 5 July 1978 (**E3/2421** at KHM 00271176-77, ENG 00322201-02, FRE 00623832-33), and the notes for prisoners Om Chantha and Pok Bunly (**E3/4092** at KHM 00271162-63, ENG

14. All of the above categories of documents are not barred by Article 15, and have been regularly used throughout the Case 002/01 and 002/02 trials. These reports or annotations written by CPK cadres were not obtained by torture and do not constitute statements of prisoners that are subject to exclusion under Article 15. While the annotations, notebooks and reports discuss or relate to prisoner confessions, they constitute separate documentary evidence that has a relevance and import not dependent upon the content or truth of the underlying confessions. Specifically, the annotations and reports prove the use that was made of prisoner confessions, the commission of torture and other crimes, and the identity of the CPK leaders who had knowledge of and responsibility for decisions relating to arrests, detention, torture and executions at these security offices. They assist in proving the intent, motives and knowledge of the cadres who conducted and reported on the interrogations and the CPK leaders who received such documents.
15. The reports and notes also concern other persons who were implicated in the underlying confessions, in some cases recording recommendations or instructions as to the arrest of such implicated persons.¹⁸ It is submitted that in addition to the reports and annotations themselves, the lists of implicated cadres contained in the S-21 confessions and Kraing Ta Chan notebooks can be relied upon to prove the process by which arrest decisions were made, and the identity of victims who were targeted and/or arrested because they were named in the confessions.¹⁹ This evidentiary use of the confessions does not rely upon the truth of the content of the confessions - i.e., that the implicated cadres were in fact part of traitorous CIA networks. Rather, the purpose of such evidence is simply to prove that lists of suspect persons were communicated by DK security offices to Party leaders, and decisions on further arrests were then made based on such lists. Under these circumstances, “the information contained in the confession is not being used for the truth of its contents (i.e. to establish that the persons concerned were actually foreign agents or planning to

00834826-27, FRE 00721306) were used for report **E3/2425** from An to the Party.

¹⁸ See, e.g., **E3/2012** Report from Kraing Ta Chan Chairman An, 11 July 1977, at KHM 00082726, ENG 00276595, FRE 00797685 [annotation “To be arrested” next to the names of 2 former Lon Nol officers identified in the prisoner’s statement].

¹⁹ See, e.g., **E3/1764** S-21 Confession of An Kan alias Kol, at KHM 00005123-25, ENG 00759678-79, FRE 00761751-53 [confession sent to “Bang Nuon” containing lists of implicated cadres with notes identifying those already arrested]; **E3/1670** S-21 Confession of Sector 505 Secretary Born Nan alias Yi, at KHM 00297066-74, ENG 00766957-66, FRE 00763408-17 [list of 192 persons titled “List of CIA names involved with me,” with notes identifying those already “arrested by Angkar”].

oppose the regime) but rather, to show how the confession was used (i.e. to commit crimes against the persons named in the confession).”²⁰

Other Statements Not Obtained as a Result of Torture

16. In some cases, S-21 detainees wrote letters or made statements on the day of their arrest, before any interrogations using torture, in which they expressed their innocence and loyalty to the Party. A number of such statements were used during the Case 002/01 trial, including a letter written by Minister of Propaganda Hu Nim on the day of his arrest addressed to Brothers Pol, Nuon, Van, Vorn, Khieu and Hem (Khieu Samphan),²¹ and a statement of Sector 103 Secretary Bou Phat alias Hâng requesting the Party leaders to release him.²² The S-21 records also include prisoner statements that expressly note they were obtained without the use of torture.²³
17. In such cases, the Trial Chamber has a proper basis on which to make a preliminary determination that such statements were not obtained as a result of torture, and therefore are not barred by Article 15 of CAT. The same principle could also be applied to statements that on their face are unlikely to have been the result of torture, such as statements reflecting CPK administrative structure, the identity of Party leaders, official meetings of the Central Committee or Zone Congresses, and policies or decisions of the Party Centre,²⁴ particularly where such statements are corroborative of other witness testimony or CPK documents.
18. For example, the S-21 confession of North Zone Deputy Secretary Chor Chhan alias Sreng

²⁰ **D130/8** Order on Use of Statements Which Were or May Have Been Obtained by Torture, 28 July 2009, para. 27.

²¹ **E3/1550** Letter of Hu Nim to Pol Pot, Nuon Chea, Ieng Sary, Vorn Vet, Son Sen and Khieu Samphan in S-21 Confession of Hu Nim *alias* Phoas, 10 April 1977, at KHM 00008923, ENG 00249844-45, FRE 00766902 & 00766888.

²² **E3/2470** Personal Biography of Bou Phat *alias* Hâng, 5 January 1978, at KHM 00296585-95, ENG 00768217-28, FRE 00842838-48 [initial document in prisoner’s S-21 confession file].

²³ *See, e.g.*, **E3/3857** S-21 Confession of North Zone Deputy Secretary Chor Chhan *alias* Sreng, 20 February 1977, at ENG 00825261, KHM 00070438, FRE 00850216 [“Confessed without Torture”]. S-21 detainees were typically interrogated multiple times, and former S-21 cadres have testified that hot methods of interrogation were usually not used until later interrogations. *See, e.g.*, **E3/5156** Prak Khan OCIJ Statement, 21 September 2007, at ENG 00161575, KHM 00146621, FRE 00705393 .

²⁴ Interrogations often focused on the failure of alleged traitors to implement and follow established CPK policies. *See* **E3/48** S. Heder and B. Tittmore, *Seven Candidates for Prosecution*, at ENG 00393516-17, KHM 00742607-08, FRE 00729653-54 [stating that the S-21 confessions “cumulatively provide important insights into the criminal policies” and “consistently accepted as uncontroversial the very existence and nature of those policies”].

contains the following description of the Party policy on execution of former Lon Nol personnel, which he is accused of not implementing by hiding, rather than smashing, high-ranking Lon Nol officers:

“After the whole country was liberated, Angkar has continuously imposed the *policy to smash high-ranking military officers from generals down to lieutenants*, as well as spies, police officers, gendarmerie officers and reactionary public servants. So far, at the various bases, the Party’s guidelines have been continuously implemented. ... The measures related to the *high-ranking military officers* have been applied since liberation day until now. But in 1975 and mid-1976, many were swept clean.”²⁵

The following statement appears in the confession of West Zone Secretary Chou Chet:

“As for the fate of the latter two types of enemy, Deputy Party Secretary Nuon Chea advised: ‘The old soldiers, don’t keep them for anything, since they cannot easily abandon their old ideas. So smash and destroy them all.’”²⁶

There is a good faith basis to conclude that statements such as these were accurate and reliable statements of the Party leaders’ policy. It would not make sense for a person being tortured for alleged disloyalty to the CPK to make up Party policies. The Party would know its own policies and there would be no logical reason for a victim to misstate policies in the hope of ending the torture. Excluding such evidence would frustrate, rather than advance, the purposes behind the CAT. As such, when offered against the person accused of torture, the statement should be admissible and the Chamber free to evaluate its reliability and assign the appropriate weight to the evidence.

IV. Reliance by the Accused on the Content of S-21 Confessions

19. Nuon Chea in his appeal of the judgment in Case 002/01 has asked the Supreme Court Chamber to rule that “torture-tainted evidence” may be used in this case by the Accused, but not by the Prosecution. In contrast to the permissible uses set forth above, the Nuon Chea Defence seeks to rely on S-21 confessions for a purpose squarely prohibited by CAT – to show that victims detained at S-21 or other DK security centres were in fact CIA spies, Yuon agents or disloyal cadres plotting against the CPK leadership, and therefore that their torture and execution were justified. The only circumstance in which statements would be

²⁵ E3/3857 S-21 Confession of Chor Chhan alias Sreng, 18 March 1977, at ENG 00825290-91. Later, Sreng confesses to hiding 21 “high-ranking military officers” in contravention of this Party policy. *Id.* at ENG 00825295-303.

²⁶ E3/2120 Meng Try-Ea, *The Chain of Terror: The Khmer Rouge Southwest Zone Security System*, at ENG 00416322.

admissible for that purpose is if the Defence could establish that they were not made as a result of torture. The use of S-21 confessions proposed by Nuon Chea would be contrary to both underlying principles of Article 15, as such statements are patently unreliable and their use as purported justification for arrests would encourage and reward the use of torture. Moreover, even were the “confessions” true, they could not legally justify the torture or extra-judicial executions of the victims, and Nuon Chea has failed to show how they would have any legal relevance.

V. Procedure for Deciding Admission & Use of Interrogation Records



20. Both Nuon Chea and Khieu Samphan are charged with torture, and this charge is the subject of the Case 002/02 trial.²⁷ While to date, only the Tram Kak Cooperative and Kraing Ta Chan security centre have been the subject of evidence in this trial, very considerable evidence is already on the record establishing the widespread use of torture by DK authorities around the country, particularly in security centres, including the testimony of perpetrators and survivors from S-21 and Kraing Ta Chan. However, much further evidence is expected to be heard on security centres and methods of interrogation later in Case 002/02.
21. While each of the Accused has indicated they are unwilling to subject themselves to questioning and will not testify, nothing prevents them from changing that decision. The procedural question arises, when evidence is offered by a party which may have been the result of torture, when will the court make a determination as to whether the evidence should be excluded and based on what evidence? The Co-Prosecutors submit that it would be impractical to hold separate hearings relating to the admission of each individual statement alleged to have been derived from torture. There are simply too many such statements, torture is too central to this case, and holding such a hearing for each statement would bring the trial to a halt.
22. The evidence regimes at international tribunals are inherently flexible, as these courts are also comprised of professional judges who do not have to be limited by restrictive rules of evidence appropriate for jury trials.²⁸ Under ECCC Internal Rule 87(1), “all evidence is

²⁷ Each is charged with torture committed in Tram Kak Cooperative and five security centers. See paras. 1408-1414 of the Closing Order.

²⁸ Annual Report of the ICTY, U.N. Doc. A/49/342, 29 August 1994, p. 24; Gideon Boas, *Admissibility of*

admissible” unless specifically excluded. Statements derived from torture, where offered for their truth, are subject to exclusion under Rule 87(3), which provides that a Chamber “may reject a request for evidence where it finds that it is... c) unsuitable to prove the facts it purports to prove; d) not allowed under the law.” The Co-Prosecutors submit that the only practical and efficient manner to deal with this evidence is for the Chamber to wait for the completion of all evidence in the case, and then in its deliberations determine whether a statement is derived from torture, and if so, whether it is admissible for a purpose other than proving the truth of the statement and if admissible, determine the appropriate weight to give to that evidence.²⁹ As this Chamber did in Case 001, it may strike the evidence from consideration altogether if it is later determined to be unreliable or inadmissible.³⁰

Respectfully submitted,

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Evidence Under the Rules of Procedure and Evidence of the ICTY: Development of the Flexibility Principle, in Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald, 3 Int'l Humanitarian Law Series 263 (2001), at 265; Judge Richard May and Marieke Wierda, *Trends in International Criminal Evidence: Nuremburg, Tokyo, The Hague, and Arusha*, 37 Colum. J. Transnat'l L. 725 (1998-1999), at 745 [“A significant practice of all the international tribunals is their refusal to be hindered by a technical approach to the admission of evidence in their search for the truth... This is best illustrated by their approach to hearsay evidence, but is also reflected in the admission of documents and affidavits. In all these matters the tribunals have adopted a liberal approach, not fettered by common law rules”].

²⁹ *Prosecutor v. Brdjanin*, Trial Chamber, Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown, ICTY, Case No. IT-99-36-T, 3 June 2003, p. 3.

³⁰ *Case 001: E43/4* Decision on the Admissibility of Material on the Case File as Evidence, 26 May 2009, paras. 18-20.