

**BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**CIVIL PARTY LEAD CO-LAWYERS' SUBMISSIONS RELATING TO THE
ADMISSIBILITY AND PERMISSIBLE USES OF EVIDENCE OBTAINED
THROUGH TORTURE**

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Before:

Trial Chamber

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I. INTRODUCTION

1. The Lead Co-Lawyers for Civil Parties (“Lead Co-Lawyers”) hereby file their submissions with respect to the Trial Chamber’s request for written submissions on the admissibility and permissible uses of evidence that may have been obtained through the use of torture.¹

II. BACKGROUND

2. On 24 April 2015, the Nuon Chea Defence referred to the content of an S-21 confession while examining PECH Chim and withdrew the question.² About an hour and a half later, Counsel asked a question based upon a list of names contained at the end of the same confession, which listed PECH Chim as being implicated in a network of opponents to the DK regime.³ This information formed part of the content of an S-21 confession and was not a DK generated list of prisoners.⁴

3. The Defence for Nuon Chea again attempted to present the contents of torture-tainted evidence during the Key Documents hearing.⁵ The Prosecution requested oral and/or written submissions with respect to torture-tainted evidence on 7 May 2015.⁶

4. The Trial Chamber granted the Prosecutors’ request to make oral submissions on the admissibility and permissible uses of evidence that may have been obtained through the use of torture on 7 May 2015.⁷

III. Applicable Law

5. Internal Rule 87(1) states that “[u]nless provided otherwise in these IRs, all evidence is admissible...” Internal Rule 87(3)(d) provides that the Chamber may reject evidence that is not allowed under the law.

¹ Email from Senior Legal Officer to the Parties entitled “Submissions regarding the use of evidence obtained through torture,” 7 May 2015.

² Transcript, **E1/292.1**, 24 April 2015, pp. 6-7.

³ Transcript, **E1/292.1**, 24 April 2015, pp. 30-34.

⁴ Transcripts, **E1/99.1**, 31 July 2013, pp. 103-108.

⁵ Transcripts, **E1.294.1**, 28 April 2015, pp. 39-42.

⁶ Draft Transcripts, 7 May 2015, pp. 3-5.

⁷ Email from Senior Legal Officer to the Parties entitled “Submissions regarding the use of evidence obtained through torture,” 7 May 2015.

6. Cambodia acceded to the Convention Against Torture in 1992. Article 15 of the Convention provides 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 proceedings, *except against a person accused of torture as evidence that the statement was made.*⁸

7. Article 38 of the Constitution of Cambodia provides that “[c]onfessions obtained by physical or mental force shall not be admissible as evidence of guilt. Any case of doubt, it shall be resolved in favour of the accused.” Article 24(3) of the 1992 UNTAC Criminal Code reads, insofar relevant: “[a] confession obtained under duress, of whatever form, shall be considered null and void.” The Code of Criminal Procedure of the Kingdom of Cambodia in Article 321 specifies moreover that “[a] confession shall be considered by the court in the same manner as other evidence. Declaration given under the physical or mental duress shall have no evidentiary value”.

8. Internal Rule 21(3) provides, with respect to statements obtained by organs of the ECCC, that “[n]o form of inducement, physical coercion or threats thereof, whether directed against the interviewee or others, may be used in any interview. If such inducements, threats or coercion are used, the statements recorded shall not be admissible as evidence before the Chambers...”

9. The Internal Rules of the ECCC, unlike the Rules of Procedure at the ICTR and ICTY⁹ and the Rome Statute,¹⁰ does not contain a specific provision on the issue of evidence obtained through the use of torture by parties other than organs of the ECCC.

10. In granting the Co-Prosecutor’s request to put 60 S-21 confessions before the Chamber in Case 001, the Chamber held that “[t]he relevance of these documents is limited

⁸ Article 15, United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984 (*emphasis added*) (“CAT”).

⁹ See Rule 95 of the Rules of Procedure of both the International Criminal Tribunal for Rwanda and for the former Yugoslavia, providing that “No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.”

¹⁰ Article 69(7) of the Rome statute similarly provides that “Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a) The violation casts substantial doubt on the reliability of the evidence; or (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.”

to the fact that they were made and, where appropriate, constitute evidence that they were made under torture. They are not admitted for the truth of their contents.”¹¹

11. During the course of hearings in Case 001, the Trial Chamber explained:

The Chamber wishes to emphasize the importance of the fact that this Court is bound by the provisions of Article 15 of the Torture Convention which the President has just read out. This provision is reflected in Article 38 of the Cambodian Constitution and also in Rule 21.3 of the Internal Rules which states: “No form of inducement, physical coercion or threats thereof, whether directed against the interviewee or others, may be used in any interview. If such inducements, coercion, or threats are used, the statements recorded shall not be admissible as evidence before the Chambers.” In practice, this means that *the fact that a confession has been made, and that it was made under torture is an admissible fact; however, the contents of a confession made under torture cannot be accepted as a truthful statement. If any party wishes to refer to the truthfulness or otherwise of the contents of a confession, it will be necessary first to establish if the confession was made under torture or the threat of torture.* For that reason, parties should consider whether an examination of the contents of a confession is sufficiently important to seek an inquiry concerning the circumstances under which the confession was made.¹²

12. In Case 002/01, the Trial Chamber explicitly adopted the approach taken in Case 001 with respect to the use of torture-tainted evidence at trial.¹³

13. In apply this approach in Case 002/01, the Chamber stated clearly and unambiguously:

The Trial Chamber has consistently and unanimously ruled that confessions obtained contrary to the provisions of the Convention Against Torture *cannot be used as evidence or for the basis for questioning.* Therefore, the Chamber will remind the parties that it will permit no questions on the content of the

¹¹ Decision on Parties Requests to Put Certain Materials Before the Chamber Pursuant to Internal Rule 87(2), **D288/6.176**, 28 October 2009, para. 8.

¹² Transcript, **E1/27.1**, 28 May 2009 at p. 9 (*emphasis added*). See also Transcript, **E1/22.1**, 20 May 2009 at p. 6.

¹³ Trial Chamber Memorandum entitled “Trial Chamber response to Motions E67, E57, E56, E58, E23, E59, E20, E33, E71 and E73 following Trial Management Meeting of 5 April 2011,” **E74**, 8 April 2011, p. 3. See also Trial Chamber Memorandum entitled “Trial Chamber response to portions of E114, E114/1, E131/1/9, E131/6, E136 and E158,” **E162**, 31 January 2012, para. 9. See also, Decision on Objections to Documents Proposed to be put before the Chamber on the Co-Prosecutors’ Annexes A1-A5 and to Documents cited in Paragraphs of the Closing Order Relevant to the First Two Trial Segments of Case 002/01, **E185**, 9 April 2012, para. 21.

confession and nor will it use such information in its verdict. This is simply reiterating what the Chamber has consistently ruled.¹⁴

14. In its Judgement, the Chamber stated “[a]dditionally, certain evidence admitted for a limited purpose, such as proof that a statement was obtained through torture, may be relied upon only for that limited purpose and not as to the truth of the statement.”¹⁵

15. In the present case, the Chamber has thus far taken no issue with Kraing Ta Chan notes that are used to establish the identities of persons detained there.¹⁶ The Chamber has further allowed only the annotations to confessions to be read. On 28 April 2015, the Chamber explained:

[T]he Chamber would like to advise you that the content of the records as a result of tortures will not be allowed to be read. When the Chamber allows the Prosecution to read that record, only the annotation part was allowed by the Chamber. So, there is a difference between allowing the annotation or the content of that record as a result of torture.¹⁷

III. SUBMISSIONS

16. The Lead Co-Lawyers submit that the law with respect to the admissibility of torture and its limited permissible uses is clear. Evidence obtained through the use of torture or cruel or inhuman treatment is inadmissible for the truth of their contents and must not be used in these proceedings except against a person accused of torture as evidence that the statement was made. As the accused persons in this case are accused of torture, this limited category of evidence obtained through the use of torture may be used against them.¹⁸ Thus, the Lead Co-Lawyers submit that the existence of the confessions, the circumstances of its making, the identity of the person confessing, other objective biographical information and the date(s) the confession was taken would all be permissible uses of torture-tainted evidence falling under the exception provided in Article 15.

¹⁴ Transcript, **E1/129.1**, 3 October 2012 at p. 74 (*emphasis added*).

¹⁵ Judgement, Case 002/01, **E313**, para. 35 (citing T. 5 April 2011, E74 and E176).

¹⁶ Transcript, **E1/293.1**, 27 April 2015 at p. 27.

¹⁷ Transcript, **E1/294.1**, April 2015 at p. 42.

¹⁸ Closing Order, **D427**, 15 September 2010, paras. 1408-1414, 1498-1500.

17. It is similarly uncontroversial that any subsequent annotations or markings are admissible as evidence, as they are markings by interrogators and DK officials and not induced by torture.¹⁹ Additionally, evidence relating to the motivations behind interrogations²⁰ and the *subsequent use* of confessions by interrogators and/or DK officials would similarly be permissible to establish the DK hierarchy, communication, policies, and their implementation and not in contravention of the principles underlying Article 15 of the CAT.²¹

18. However, with respect to the recent defence questioning in Case 002/02, the Lead Co-Lawyers recall that torture-tainted evidence is inadmissible for the truth of its contents.²² The Lead Co-Lawyers therefore submit that any lines of questioning formulated for the

¹⁹ Transcript, **E1/294.1**, April 2015 at p. 42. *See also* Order on use of statements which were or may have been obtained by torture, **D130/8**, 28 July 2009, para. 19. For an example of this use, *see* Judgement, Case 001, **E188**, para. 177 (“The Accused annotations on confessions put before the Chamber are illustrative of his instructions to interrogators. On the confession of detainee DANH Siyan, the Accused wrote ‘interrogate meticulously, serious but moderate torture to find the network. Hit until she stops saying she went to Vietnam with her grandfather to cure his cancer and the problem of menstruation.’ His annotation on the confession of detainee UM Soeun reads, ‘Not yet confessed. To be tortured’, while his annotation on the confession of detainee PRUM Samneang states, ‘[t]his female spoke quite little! No need to summarize! I do not want you to explain to me, beat her 40 times with a rattan stick and force her to keep writing. This afternoon, should I be dissatisfied with the confession, I will request Bong that more interrogations be made and to force her to write again. She was ill at the moment.’ Interrogators also used annotations to keep the Accused apprised of the progress of their interrogations and of the state of the detainees.”).

²⁰ *See, e.g.*, Judgement, Case 001, **E188**, para. 159 (“Given that detainees were considered guilty by reason of their presence at S-21, the role of interrogators was simply to ‘validate the Party’s verdict by extracting full confessions.’ Thus, the contents of confessions were in many respects pre-ordained as interrogators, who were instructed by the Accused to establish links between the detainees and the CIA, KGB, and/or the Vietnamese, forced detainees into providing scripted answers...”).

²¹ *See, e.g.*, Judgement, Case 001, **E188**, paras 178-179, 254:

178. Following his review, the Accused was solely responsible for communicating the detainees’ confessions and the list of those they had implicated to his superiors. To facilitate his superiors’ work, the Accused included his annotations and summaries with these documents...

179. The Accused was aware that much of the information in the confessions he passed along to his supervisors was fabricated. S-21 confessions were nevertheless used to decide upon the arrest of those denounced as enemy agents and often led to the arrest of many others implicated as traitors. The confessions served the political interest of those in control of the CPK by justifying arrests, and implicating the networks of those sent to S-21.

254. The use of these various interrogation techniques, whether resulting in physical pain or mental suffering, were designed to obtain confessions, which detailed the detainees biography, the nature of the crimes and ‘traitorous’ activities, his or her personal involvement in them, as well as network of ‘traitors.’ The interrogation would end only when the confession was deemed adequate and complete. The confessions were then examined by the upper echelon and used for two main purposes: first to justify the decision to arrest the particular detainee who wrote the confession, and second to obtain information to investigate and eventually arrest the people implicated in the confessions.

²² Decision on Parties Requests to Put Certain Materials Before the Chamber Pursuant to Internal Rule 87(2), **D288/6.176**, 28 October 2009, para. 8; Transcript, **E1/27.1**, 28 May 2009 at p. 9. *See also* Transcript, **E1/22.1**, 20 May 2009 at p. 6 (*emphasis added*).

purpose of examining a witness, expert or civil party should not imply, suggest, seek to confirm or assume that the content of the torture-tainted evidence could be true.

19. The Lead Co-Lawyers submit that the plain language of Article 15 of the CAT is unambiguous and leaves no room for interpretation as to *who* may or may not use the torture-tainted evidence – such evidence may only be used *against* a person accused of torture as evidence that the statement was made. The Article binds the ECCC, the Trial Chamber and the parties. Such exclusion is not prejudicial to the accused, rather, this limitation ensures that those accused of torture do not stand to gain from their use of torture or legitimise it any way.

20. With respect to the admissibility and permitted use of S-21 confessions in particular, the Chamber had already treated them as torture-tainted in Case 001 when considering that those documents were not admitted for the truth of their contents and that their relevance “is limited to the fact that they were made and, where appropriate, constitute evidence that they were made under torture.”²³ Furthermore, the Lead Co-Lawyers note the extensive findings relating to the use of torture as a systematic means of extracting confessions in Case 001.²⁴ Therefore, the Lead Co-Lawyers submit that S-21 confessions, at this stage, are presumed to be torture-tainted.²⁵ The Lead Co-Lawyers further argue that any party wishing to rely on a confession for the truth of its contents bears the burden of rebutting that presumption and that the proper procedure must be more than a claim to that effect. Rather, a party should submit a request for additional investigative action by the Trial Chamber, pursuant to IR 93(1). As recalled by the Chamber in Case 001, “parties should consider whether an examination of the contents of a confession is sufficiently important to seek an inquiry concerning the circumstances under which the confession was made.”²⁶

²³ Decision on Parties Requests to Put Certain Materials Before the Chamber Pursuant to Internal Rule 87(2), **D288/6.176**, 28 October 2009, para. 8.

²⁴ See for example, Judgement, Case 001, **E188**, paras 359-360, 150-155, 241-248.

²⁵ See, the Chamber’s oral rulings in Case 002/01: **E1/46.1** at pp. 73-74; **E1/62.1** at p. 12; **E1/93.1** at pp. 49-50; **E1/99.1** at pp. 107-108; **E1/129.1** at p. 74; **E1/130.1** at pp. 45-46. See also, Case 002/02 transcripts: **E1/292.1** at pp. 30-34; **E1.294.1** at pp. 39-42.

²⁶ Transcript, **E1/27.1** 28 May 2009 at p. 9. See also Internal Rule 93(1) (“Where the Chamber considers that a new investigation is necessary it may, at any time, order additional investigations. Such order shall indicate which judge or judges shall conduct the new investigation.”)

21. Finally, the Lead Co-Lawyers wish to express that the above submissions reflect the interests of the civil parties in preventing future instances of torture, holding those responsible for torture accountable and maintaining the integrity of the proceedings.²⁷

IV. REQUEST

WHEREFORE, the Civil Party Lead Co-Lawyers respectfully request that the Trial Chamber:

- (1) **CONFIRM** that torture-tainted evidence is not admissible except as against a person accused of torture as evidence that the statement was made;
- (2) **CONFIRM** that parties may not base questions on torture-tainted evidence which imply or seek to confirm that its contents may be true;
- (3) **CONFIRM** that any subsequent annotations or markings on torture-tainted evidence by interrogators or members of the DK regime are permissible.

Respectfully submitted,

Date	Name	Place	Signature
21 May 2015	Marie GUIRAUD International Lead Co-Lawyer	Phnom Penh	

²⁷ For example, four civil parties were admitted by the OCIJ as suffering immediate harm relating to crimes at S-21; One-hundred and twenty-five civil parties were admitted by the OCIJ as suffering indirect harm relating to crimes at S-21; one civil party was admitted by the Pre-Trial Chamber for harm suffered as a result of crimes at S-21. Additionally, another fifteen civil parties admitted on other grounds knew people who were sent to S-21 or had a family member killed there.