

BEFORE THE TRIAL CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC/TC**Party Filing:** The Defence for a Named Suspect in Case 004**Filed to:** The Trial Chamber**Original language:** ENGLISH**Date of document:** 4 June 2015**CLASSIFICATION****Classification of the document suggested by the filing party:****PUBLIC****Classification by OCIJ or Chamber:****សាធារណៈ/Public****Classification Status:****Review of Interim Classification:****Records Officer Name:****Signature:**

**REQUEST TO SUBMIT *AMICUS CURIAE* BRIEF ON
ADMISSIBILITY OF "TORTURE-TAINTED EVIDENCE"**

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Suzana TOMANOVIĆ**Distribution to:****The Judges of the Trial Chamber:**Judge NIL Nonn, Presiding
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge YOU Ottara
Judge Claudia FENZ**Co-Prosecutors:**CHEA Leang
Nicholas KOUMJIAN**All Defence Teams in Cases 002, 003
and 004****All Civil Parties in Cases 002, 003
and 004**

A named Suspect in Case 004 (“the Suspect”), through his Co-Lawyers (“the Defence”), pursuant to Rules 21 and 33 of the ECCC Internal Rules (“Rules”), hereby seeks leave to submit an *amicus curiae* brief in order to assist the Trial Chamber in reaching its decision on the admissible use of evidence obtained through torture. The *amicus curiae* brief is made necessary because the Trial Chamber is seised of requests from both the Co-Prosecutors (“OCP”) and the NUON Chea Defence to admit evidence suspected or presumed to have been obtained through torture for the truth of its content.¹ To allow either of these requests would violate the Convention Against Torture (“the CAT”), and therefore violate the principle of legal certainty enshrined in the ECCC Rules as well as Cambodia’s international obligations, and jeopardise the ECCC’s credibility as a model court and the international standards it upholds.

I. Issue Raised before the Trial Chamber

1. During the trial proceedings on 24 April 2015, the NUON Chea Defence asked PECH Chim whether he was aware that he had been implicated by “SAE” (KANG Chap) as belonging to his network.² The OCP suggested that the evidential basis for this question was KANG Chap’s S-21 confession. The NUON Chea Defence subsequently requested a reasoned decision as to whether it was permitted to ask the witness “whether he’s aware of the fact that Sae has implicated him.”³
2. On 7 May 2015, via email, the Trial Chamber directed the Parties to submit written submissions regarding the use of evidence obtained through torture by 21 May 2015, in advance of oral hearings to be held on 25 May 2015.⁴
3. On 21 May 2015, pursuant to the Trial Chamber’s Order, the parties submitted their written submissions regarding the use of evidence obtained through the use of torture:

¹ *Case 002*, Nuon Chea’s Submissions Regarding the Use of “Torture-Tainted Evidence” in the Case 002/02 Trial, 21 May 2015, E350; Co-Prosecutors’ Submissions Regarding the Application of the Torture Convention to S-21 Confessions and Other Records Relating to Interrogations of Prisoners, 21 May 2015, E350/1.

² Transcript of the proceedings, E1/292.1, 24 April 2015, p. 30.

³ Transcript of the proceedings, E1/292.1, 24 April 2015, p. 30.

⁴ *Case 002*, Conclusions de la Defense de M. KHIEU Samphan concernant l’usage des informations obtenues sous la torture, 21 May 2015, Annex: The email from Trial Chamber concerning “Submissions regarding evidence obtained through use of torture” dated May 07, 2015, E350/4.2.

- (i) The NUON Chea Defence filed its Submissions Regarding the Use of ‘Torture-Tainted Evidence’ in the Case 002/02 Trial, in which it argued that Article 15 of the CAT does not apply to those accused of torture because “a rule prohibiting the use of certain evidence ‘against’ a person does not prohibit a person to use that evidence ‘for’ him/herself.”⁵
- (ii) The OCP filed the Co-Prosecutors’ Submission Regarding the Application of the Torture Convention to S-21 Confessions and Other Records Relating to Interrogations of Prisoners, in which they argued that the exception to the rule in Article 15 of the CAT “must be construed broadly in order to give effect to the purpose of CAT.”⁶ The OCP also argued that certain passages within statements believed to have been obtained through torture should be admitted for the truth of their content where “[t]here is a good faith basis to conclude that statements such as these were accurate and reliable,” and “the Chamber [is] free to evaluate its reliability and assign the appropriate weight to the evidence.”⁷
- (iii) The Civil Parties filed the Civil Party Lead Co-Lawyers’ Submissions Relating to the Admissibility and Permissible Uses of Evidence Obtained through Torture, in which they advocate the strict application of Article 15 of the CAT.⁸ Noting the “extensive findings relating to the use of torture as a systematic means of extracting confessions in Case 001,” the Lead Co-Lawyers submitted that S-21 confessions are “presumed to be torture-tainted” and that “any party wishing to rely on a confession for the truth of its statement bears the burden of rebutting that presumption and that the proper procedure must be more than a claim to that effect.”⁹

⁵ *Case 002*, Nuon Chea’s Submissions Regarding the Use of “Torture-Tainted Evidence” in the Case 002/02 Trial, 21 May 2015, E350, para. 20.

⁶ *Case 002*, Co-Prosecutors’ Submission Regarding the Application of the Torture Convention to S-21 Confessions and other Records Relating to Interrogations of Prisoners, 21 May 2015, E350/1, para. 7.

⁷ *Case 002*, Co-Prosecutors’ Submission Regarding the Application of the Torture Convention to S-21 Confessions and other Records Relating to Interrogations of Prisoners, 21 May 2015, E350/1, para. 18.

⁸ *Case 002*, Civil Party Lead Co-Lawyers’ Submissions Relating to the Admissibility and Permissible Uses of Evidence Obtained through Torture, 21 May 2015, E350/3.

⁹ *Case 002*, Civil Party Lead Co-Lawyers’ Submissions Relating to the Admissibility and Permissible Uses of Evidence Obtained through Torture, 21 May 2015, E350/3, para. 20.

(iv) The KHIEU Samphan Defence filed its ‘Conclusions de la Defense de M. KHIEU Samphan concernant l’usage des informations obtenues sous la torture,’ in which it argued that the use of evidence obtained through the use of torture should be limited to proving that the statement was made, and that any party wishing to rely on such evidence must first demonstrate that its use is legally admissible.¹⁰

4. On 25 May 2015, the Trial Chamber heard oral submissions on this matter from the parties in Case 002/02, during which the parties repeated the substance of their written submissions.¹¹

II. Admissibility

5. The Defence submits that this *amicus curiae* brief is filed with all due expedition. The Defence was not alerted to the Trial Chamber’s request for written submissions from the parties to Case 002 regarding evidence obtained through the use of torture to be filed by 21 May 2015 until it received the notification of the filing of KHIEU Samphan’s *Conclusions de la Defense de M. KHIEU Samphan concernant l’usage des informations obtenues sous la torture*, which contained the Trial Chamber’s request in an annex, on Friday 22 May 2015.¹² The Defence has acted as expeditiously as possible to provide this *amicus curiae* brief to the Trial Chamber in order to prevent unnecessary delay.

6. This Request is made pursuant to Rule 33(1), which provides:

At any stage of the proceedings, the Co-Investigating Judges or the Chambers may, if they consider it desirable for the proper adjudication of the case, invite or grant leave to an organization or person to submit a written *amicus curiae* brief concerning any issue. The Co-Investigating Judges and the Chambers concerned shall determine what time limits, if any, shall apply to the filing of such briefs.

¹⁰ *Case 002*, Conclusions de la Defense de M. KHIEU Samphan concernant l’usage des informations obtenues sous la torture, 21 May 2015, E350/4. The Defence relies on the Khmer translation of this document as French is not a working language of the team.

¹¹ *Case 002*, Transcript of the proceedings, E1/304.1, 25 May 2015.

¹² *Case 002*, Conclusions de la Defense de M. KHIEU Samphan concernant l’usage des informations obtenues sous la torture, 21 May 2015, E350/4.2.

7. Rule 21 requires, in pertinent part that the laws of the ECCC “be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of the proceedings.”¹³ It demands, further, that “[p]ersons who find themselves in a similar situation and prosecuted for the same offences shall be treated according to the same rules.”¹⁴ Legal certainty has been found by the European Court of Human Rights (“ECtHR”) to be “one of the fundamental aspects of the rule of law.”¹⁵ The ECtHR requires that the law be: (a) adequately accessible – “the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case;” and (b) formulated with sufficient precision “to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”¹⁶ In a civil law system, legal certainty is defined in terms of a maximum predictability of officials’ behavior.¹⁷ Legal certainty applied to procedural rules as well as substantive law.¹⁸
8. For the reasons set out herein, the Defence submits that it is desirable for the proper adjudication of this matter, Case 002/02 as a whole, and, ultimately, Cases 003 and 004, that the Trial Chamber grants it leave to submit the written *amicus curiae* brief (attached hereto at Annex A). This is especially important in view of the ECCC’s role as a model court.¹⁹
9. The Supreme Court Chamber has recently noted that “the primary role of an *amicus curiae* in international criminal law matters is to provide assistance to the court in the determination of a case; primarily this concerns matters of law relevant to the current proceedings, with content that will sufficiently add to the arguments already received

¹³ Rule 21(1).

¹⁴ Rule 21(1)(b).

¹⁵ ECtHR, *Şahin & Şahin v. Turkey*, App. No. 13279/05, Judgement (Gr. Ch.), 20 October 2011, para. 56.

¹⁶ ECtHR, *Sunday Times v. United Kingdom*, App. No. 6538/74, Judgement, 26 April 1979, para. 49.

¹⁷ Erik Claes et al., *Facing the Limits of the Law 92* (Springer Publishing Co. 2009), A157/2/1/1.1.4.

¹⁸ In *Cañete de Goñi v. Spain*, the ECtHR held that “the rules governing the formal steps to be taken and the time-limits to be complied with in lodging an appeal or an application for judicial review are aimed at ensuring a proper administration of justice and compliance, in particular, with the principle of legal certainty. Litigants must be entitled to expect those rules to be applied.” *Cañete de Goñi v. Spain*, Eur. Ct. H.R., App. No. 55782/00, Judgement, 15 October 2002, para. 36.

¹⁹ *Case 002*, Trial Chamber, Decision on IENG Sary’s Application to Disqualify Judge Nil Nonn and Related Requests, 28 January 2011, E5/3, para. 14.

from the parties to that case.”²⁰ The Defence submits that the Trial Chamber will be assisted in the determination of a case by its additional submissions, which will consider, in particular, the standard to be applied in excluding potentially torture-tainted evidence. This matter was raised by both Judge Fenz and Judge Lavergne at the oral hearings held on 25 May 2015, but not substantively argued by the parties.²¹ The content of the Defence’s *amicus curiae* brief will, therefore, sufficiently add to the arguments already received from the parties to Case 002/02. As far as the Defence is able to tell, this matter has not been litigated. Nor will the content of the Defence’s *amicus curiae* brief merely rehearse those submissions already before the Chamber.

10. The Supreme Court Chamber has also commented that it is “*preferable* that [a] person’s or entity’s motives in making submissions lie rather in an abstract interest in a particular question than in promoting or producing any particular outcome in relation to the criminal case.”²² The Defence is indeed motivated by an abstract and objective interest in ensuring legal certainty and that the ECCC upholds its obligations under the CAT. Indeed, since the Defence does not have access to the Case File and therefore cannot know the evidence contained therein, the Defence cannot foresee whether any particular outcome will benefit its case and thus makes these submissions objectively.

11. The Trial Chamber’s consistent position with regard to the admissible use of evidence presumed to have been obtained by torture complies with the CAT;²³ any deviation from this would breach the principle of legal certainty, leading to unpredictability regarding the conduct of future cases before the ECCC. As a Cambodian court supported by the United Nations, it is imperative that the ECCC complies with the important provisions of the CAT. The adjudication of this matter will potentially impact the future interpretation of Article 15 of the CAT, and therefore affects the Kingdom of Cambodia and the entire international community. This is all the more important in view of

²⁰ *Case 002/01*, Supreme Court Chamber, Decision on Requests to Intervene or Submit *Amici Curiae* Briefs in Case 002/01 Appeal Proceedings, 8 April 2015, F20/1, para. 9.

²¹ *Case 002*, Transcript of the proceedings, E1/304.1, 25 May 2015.

²² *Case 002/01*, Supreme Court Chamber, Decision on Requests to Intervene or Submit *Amici Curiae* Briefs in Case 002/01 Appeal Proceedings, 8 April 2015, F20/1, para. 10 (emphasis added).

²³ *See, for example*: Case 002/01 Judgment, 7 August 2014, E313, para. 35; Transcript of the proceedings, E1/27.1, 28 May 2009, p. 9; Transcript of the proceedings, E1/129.1, 3 October 2012, p. 74; Transcript of the proceedings, E1/294.1, 28 April 2015, p. 42.

concerns regarding the practices of the Cambodian police and courts with regard to the use of torture and torture-tainted evidence.²⁴

12. Rule 33 allows the Chamber to grant leave for the submissions of *amicus curiae* brief where it considers it “desirable for the proper adjudication of the case.” Further, the Supreme Court Chamber has ruled that interested-party applications for admission as *amicus curiae* are to be granted “where the interests of justice so dictate.”²⁵ It has been stated publicly that the investigations in Cases 003 and 004 focus on a number of “security centres,” “execution sites” and “prisons.”²⁶ The Defence also notes the Prosecution’s comment that “very considerable evidence is already on the record establishing the widespread use of torture by DK authorities around the country, particularly in security centres [... and] much further evidence is expected to be heard on security centres and methods of interrogation later in Case 002/02.”²⁷ It is highly likely, therefore, that evidence that is presumed to be torture-tainted will similarly be at issue in all cases before the ECCC. It is therefore in the interests of justice that the Defence be granted leave to submit its *amicus curiae* brief in order to assist the Chamber with the proper adjudication of the matter before it.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to grant the request to submit this *amicus curiae* brief, attached hereto at Annex A.

²⁴ UN Human Rights Committee, Concluding observations on the second periodic report of Cambodia (Advance unedited version), adopted by the Committee at its 113th session (16 March - 2 April 2015), CCPR/C/KHM/CO/2, para. 13: *The Committee is concerned at reports of torture and ill-treatment of detainees by law enforcement personnel, especially in the context of police custody and for the purpose of obtaining confessions. [...] The Committee is concerned that confessions obtained under coercion or torture cannot be ruled out without evidence and that judges use such confessions until evidence is determined in court proceedings.*

²⁵ *Case 002/01*, Supreme Court Chamber, Decision on Requests to Intervene or Submit *Amici Curiae* Briefs in Case 002/01 Appeal Proceedings, 8 April 2015, F20/1, para. 12.

²⁶ See: information on Case 003 published on the ECCC website at <http://www.eccc.gov.kh/en/articles/statement-co-investigating-judges-regarding-case-003> and information on Case 004 published on the ECCC website at <http://www.eccc.gov.kh/en/case/topic/98?page=1>. Accessed on 25 May 2015.

²⁷ *Case 002*, Co-Prosecutors’ Submission Regarding the Application of the Torture Convention to S-21 Confessions and other Records Relating to Interrogations of Prisoners, 21 May 2015, E350/1, para. 20.

Respectfully submitted,



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Signed in Phnom Penh, Kingdom of Cambodia on this 4st day of **June**, 2015