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**BEFORE THE TRIAL CHAMBER**

**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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# IENG SARY'S MOTION AGAINST THE USE OF TORTURE TAINTED EVIDENCE AT TRIAL

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Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby moves the Trial Chamber to declare that torture tainted evidence is under all its forms and in every circumstance inadmissible in judicial proceedings before the ECCC, except against a person accused of torture as evidence that the statement was made. The use of torture tainted evidence is antithetical to judicial proceedings. The Trial Chamber, following its practice in Case 001[1] and obliged to treat all those who appear before it equally,[2] must not admit or consider any torture tainted evidence except against a person accused of torture as evidence that the statement was made. The Trial Chamber must require any party wishing to tender such evidence to first demonstrate that it is being introduced only for this purpose. As the European Commissioner for Human Rights aptly stated, "*torture is torture whoever does it, judicial proceedings are judicial proceedings, whatever their purpose – the former can never be admissible in the latter.*"[3]

## I. PROCEDURAL HISTORY RELATED TO THE ADMISSION OF TORTURE TAINTED EVIDENCE IN CASE 002

1. On 28 July 2009, the OCIJ issued an Order on the Use of Statements which were or may have been Obtained by Torture.[4] In the Order, the OCIJ noted that the Rules do not specifically address the matter of the use that may be made of torture tainted evidence obtained by an authority other than the ECCC, and stated that it would seek guidance from relevant rules of procedure at the international level: in this case, Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

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[1] . In keeping with Article 15 of the Torture Convention, the Trial Chamber admitted into evidence documents made under torture only as evidence that the documents were made and not for the truth of their content. It stated, citing Article 15 of the Torture Convention, that "[t]he relevance of these documents is limited 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." *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/TC, Decision on Parties Requests to Put Certain Materials Before the Chamber Pursuant to Internal Rule 87(2), 28 October 2009, E176, ERN: 00398394-00398401, para. 8

[2] The right to equal treatment is guaranteed by Article 31 of the Cambodian Constitution, which provides in part that "[e]very Khmer citizen shall be equal before the law..." (emphasis added). This right is further set out in the Cambodian Code of Criminal Procedure which states in Article 3 that "Criminal actions apply to all natural persons or legal entities regardless of race, nationality, color, sex, language, creed, religion, political tendency, national origin, social status, resources or other status." This right is also enshrined in Article 7 of the Universal Declaration of Human Rights and Articles 14(1) and 26 of the International Covenant on Civil and Political Rights ("ICCPR"), which the ECCC must respect pursuant to Article 31 of the Cambodian Constitution.

[3] European Commissioner for Human Rights Report by Mr. Alvaro-Gil Robles, Commissioner for Human Rights, on his visit to the United Kingdom, 4–12 November 2004, Strasbourg, 8 June 2005, Comm DH (2005) 6, para. 27, *available at* https://wcd.coe.int/ViewDoc.jsp?id=865235&BackColorInternet=99B5AD&BackColor

[4] *Case of IENG Thirith*, 002/19-09-2007-ECCC/OCIJ, Order on Use of Statements which were or may have been Obtained by Torture, 28 July 2009, D130/8, ERN: 00355926-00355933 ("Order").

Punishment ("Torture Convention").[5] The OCIJ then stated that Article 15 only applies to evidence which has been established to have resulted from torture,[6] and that annotations which appear on confessions, preliminary biographical material and objective information included in a confession which exists independently of the interrogation were not obtained as a result of torture and would therefore not be excluded.[7] The OCIJ stated that the reliability of the statements is at issue only when using the statements for the truth of their contents, but that the reliability of the statements cannot be assessed until the end of the investigation, when the Case File is deemed complete.[8]

2. Shortly after this Order was issued, several notable human rights organizations expressed their distress and disappointment that the OCIJ's Order allowed the use of torture tainted evidence.[9] The Cambodian Center for Human Rights found the OCIJ's Order to be so antithetical to the international prohibition on the use of torture tainted evidence that it even sent an official complaint to the UN Special Rapporteur on Torture.[10]
3. On 27 August 2009, the KHIEU Samphan Defence filed an Appeal against the Order.[11] On 10 September 2009, the IENG Thirith Defence also appealed the Order.[12] On 19 November 2009, the Defence appealed[13] the constructive denial of two related requests[14]

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[5] *Id.*, para. 17. Although the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is sometimes referred to as the "CAT", certain commentators use this designation to refer to the Committee Against Torture. To avoid confusion, the term "Torture Convention" will be used throughout.
[6] *Id.*, para. 19.
[7] *Id.*
[8] *Id.*, para. 28.
[9] *See, e.g.*, Application of Amnesty International, the International Commission of Jurists and the Redress Trust to Present an Amicus Curiae Submission Pursuant to Internal Rule 33, 25 September 2009, *available at* http://www.icj.org/IMG/ECCC_Torture_Evidence_Amicus_Application_AI_ICJ_REDRESS_25_Sept_09.pdf. ("Amnesty International Application"); Application of the CCHR to Present an Amicus Curiae Submission Pursuant to Internal Rule 33 Amicus Curiae Submission of the CCHR, 7 September 2009, ("CCHR Application"), *available at* http://www.cchrcambodia.org/English/add_report/reports/cchr%20acb%20sept.%207(090709_1252307364).pdf
[10] Pre-Trial Chamber Rejection of Amicus Curiae Brief – Opaque Filing Procedures and the Disregard of Legacy at the ECCC, Press Release, Cambodian Center for Human Rights, 15 October 2009 , available at: http://www.cchrcambodia.org/English/add_press_release/press_release/cchr%20press%20release%20-%20opaque%20filing%20procedures%20and%20the%20disregard%20of%20legacy%20at%20the%20eccc(101509_1255603015).pdf.
[11] *Case of IENG Thirith*, 002/19-09-2007-ECCC/OCIJ(PTC27), Mr. KHIEU Samphan's Appeal Against the Order on Use of Statements which were or may have been Obtained by Torture, 27 August 2009, D130/10/1, ERN: 00374825-00374828.
[12] *Case of IENG Thirith*, 002/19-09-2007-ECCC/OCIJ(PTC26), Defence Appeal Against OCIJ 'Order on Use of Statements which were of may have been Obtained by Torture' of 28 July 2009, 10 September 2009, D130/9/6, ERN: 00374841-00374872.
[13] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC 31), 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, 19 November 2009, D130/7/3/1, ERN:00399297-00399327.
[14] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Request Concerning the OCIJ's Identification of, and Reliance on, Evidence Obtained through Torture, 17 July 2009, D130/7, ERN: 00352184-00352185; *Case of*

it made to the OCIJ concerning the definition of and identification of torture tainted evidence as well as what guidelines the OCIJ employed in making use of such evidence.

4. On 18 December 2009, the Pre-Trial Chamber found IENG Thirith's appeal inadmissible.[15] On 27 January 2010, the Pre-Trial Chamber found KHIEU Samphan's appeal to be inadmissible.[16] On 10 May 2010, the Pre-Trial Chamber found the Defence appeal inadmissible,[17] but stated:

> Notwithstanding any observations to the contrary by the Co-Investigating Judges in the Order, Article 15 of the [Torture Convention] is to be strictly applied. There is no room for a determination of the truth or for use otherwise of any statement obtained through torture.[18]

5. On 16 August 2010, the OCP filed its Final Submission,[19] which impermissibly relied extensively upon a number of confessions.[20]

6. On 16 September 2010, the OCIJ issued the Closing Order.[21] While the Closing Order did not rely upon torture tainted evidence to the extent the OCP did in its Final Submission, it does appear that the OCIJ relied upon confessions for an impermissible purpose.[22] The OCIJ furthermore relied upon several secondary sources such as books by David Chandler and Steve Heder which rely on confessions for the truth of their contents.[23]

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*IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Letter Concerning the OCIJ's Identification of, and Reliance on, Evidence Obtained through Torture, 7 August 2009, D/130/7/21, ERN: 00360855-00360856.

[15] *Case of IENG Thirith*, 002/19-09-2007-ECCC/OCIJ(PTC26), Decision on Admissibility of the Appeal on Co-Investigating Judges' Order on Use of Statements which were or may have been Obtained by Torture, 18 December 2009, D130/9/21, ERN: 00416830-00416838.

[16] *Case of IENG Thirith*, 002/19-09-2007-ECCC/OCIJ(PTC27), Decision on Admissibility of the Appeal on Co-Investigating Judges' Order on Use of Statements which were or may have been Obtained by Torture, 27 January 2010, D130/10/12, ERN: 00432775-00432784.

[17] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC31), 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, ERN: 00512912-00512924 ("Pre-Trial Chamber Torture Decision").

[18] *Id.*, para. 38 (emphasis added).

[19] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Co-Prosecutors' Rule 66 Final Submission, 16 August 2010, D390, ERN: 00591062-00591992.

[20] *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, 1 September 2010, D390/1/2/1.3, ERN: 00599293-00599359, Annex, which lists the footnotes in the Final Submission which rely upon confessions.

[21] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Closing Order, 15 September 2010, D427, ERN: 00604508-00605246.

[22] For instance, paragraph 1188 of the Closing Order cites a confession by Penh Thuok, alias Von Vet, to support an assertion that it "appears that Khieu Samphan witnessed the arrest of Vorn Vet on 2 November 1978."

[23] Footnotes 37-39 of the Closing Order, for example, rely upon DAVID P. CHANDLER, BROTHER NUMBER ONE: A POLITICAL BIOGRAPHY OF POL POT 63-64, 67-69, 191, 201-02 (1999). These pages of BROTHER NUMBER ONE: A POLITICAL BIOGRAPHY OF POL POT rely upon confessions from Siet Chhae, Chou Chet, Chhim Samauk, Kheang Sim Hon, Im Naen, Som Chea, Vorn Vet, Keo Moni, Kol Thai, and Keo Meas. As another example,

## II. APPLICABLE LAW

7. Article 15 of the Torture Convention, to which Cambodia is a party,[24] states: "[e]ach 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."

## III. ARGUMENT

### A. Torture tainted evidence is generally prohibited in judicial proceedings

8. The prohibition of torture is considered a *jus cogens* norm of international law[25] and can be found in a multitude of international human rights instruments.[26] This condemnation of torture extends to the official use of evidence obtained by torture, as this use indicates acceptance of the practice of using torture to obtain evidence.[27] The Council of Europe, for example, has stated that "European Governments should not condone torture in other parts of the world. Information obtained under torture must never, under any circumstances, be accepted as evidence in judicial proceedings, regardless of where or by whom [the information was] obtained."[28]

9. The fact that the international community takes the issue of torture and torture tainted evidence seriously can be seen from a recent report by Martin Scheinin, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. In his report, the Special Rappoteur discusses his concerns regarding the role of intelligence agencies in the fight against terrorism:

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footnotes 41 and 42 of the Closing Order cite STEVE HEDER, CAMBODIAN COMMUNISM AND THE VIETNAMESE MODEL 88, 92, 109-10 (White Lotus Press 2004). These pages of Heder's book rely on confessions by Saom Chea, Bou Phat, Suo Keum An, Tauch Chaem, Meah Chhuon, Kae San, and Kung Sophal.

[24] *See* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en. The Pre-Trial Chamber has confirmed that the "'law' applicable in Cambodia includes international instruments such as the Convention Against Torture...." Pre-Trial Chamber Torture Decision, para. 35.

[25] James Thuo Gathii, *Torture, Extraterritoriality, Terrorism, and International Law*, 67 ALB. L. REV. 335, 341 (2003).

[26] *See, e.g.*, ICCPR, Art. 7; Convention on the Rights of the Child, Art. 37(a); Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3; Charter of Fundamental Rights of the European Union, Art. 4; American Convention on Human Rights, Art. 5(2); African Charter on Human and Peoples' Rights, Art. 5; Inter-American Convention to Prevent and Punish Torture.

[27] *For example, see United States v. Abu Ali*, 395 F.Supp. 2d 338, 379 (E.D.Va. 2005). "Due to the serious nature of the allegations of torture and mistreatment being made by the defendant, the Court would like to make a very clear statement that torture of any kind is legally and morally unacceptable, and that the judicial system of the United States will not permit the taint of torture in its judiciary proceedings."

[28] Council of Europe Press Release, "There are no Excuses for Torture", 526, 11 October 2005, *available at* https://wcd.coe.int/ViewDoc.jsp?id=925717&Site=COE (emphasis added). In *Jalloh v. Germany*, the European Court of Human Rights ruled that "incriminating evidence- whether in the form of a confession or real evidence- obtained as a result of acts of violence or brutality or other forms of treatment which can be characterized as torture- should never be relied on as proof of the victim's guilt, irrespective of its probative value." *Jalloh v. Germany*, ECtHR [Grand Chamber], No. 5481/00, 2006, para. 105.

> The Special Rapporteur remains deeply troubled that the United States has created a comprehensive system of extraordinary renditions, prolonged and secret detention, and practices that violate the prohibition against torture and other forms of ill-treatment. This system required an international web of exchange of information and has created a corrupted body of information which was shared systematically with partners in the war on terror through intelligence cooperation, thereby corrupting the institutional culture of the legal and institutional systems of recipient States.
> [...]
> The Special Rapporteur reminds States that they are responsible where they knowingly engage in, render aid to or assist in the commission of internationally wrongful acts, including violations of human rights. Accordingly, grave human rights violations by States such as torture, enforced disappearances or arbitrary detention should therefore place serious constraints on policies of cooperation by States, including by their intelligence agencies, with States that are known to violate human rights. The prohibition against torture is an absolute and peremptory norm of international law. States must not aid or assist in the commission of acts of torture, or recognize such practices as lawful, including by relying on intelligence information obtained through torture. States must introduce safeguards preventing intelligence agencies from making use of such intelligence.[29]

10. The universal condemnation of torture led to the United Nations General Assembly's 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Declaration Against Torture").[30] Article 12 of the Declaration Against Torture prohibits the use of evidence obtained by torture:

> Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceedings.

11. The Torture Convention was drafted to strengthen the Declaration Against Torture.[31] It was adopted and opened for signature, ratification and accession on 10 December 1984 and it entered into force on 26 June 1987. Currently, 147 States are parties to the Convention,[32] making it "one of the most widely ratified of multilateral treaties."[33]

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[29] Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, A/HRC/10/3, 4 February 2009, paras. 51, 53, *available at* http://www2.ohchr.org/english/issues/terrorism/rapporteur/docs/A.HRC.10.3.pdf (emphasis added).

[30] Available at: http://www2.ohchr.org/english/law/declarationcat.htm.

[31] CHRIS INGELSE, THE UN COMMITTEE AGAINST TORTURE: AN ASSESSMENT 2-3 (Kluwer Law International 2001).

[32] *See* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en.

Article 15 mandates that "[e]ach 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."[34] No State party has made a reservation to this Article. This clearly indicates that the prohibition on the use of statements which are the result of torture is universally accepted as a necessary deterrent to the use of torture to obtain evidence.

12. The Torture Convention is not the only source which may be considered in regard to the exclusion of torture tainted evidence.[35] Other international conventions and procedural rules[36] similarly prohibit the use of torture tainted evidence. One example is Article 7 of

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[33] Michael P. Scharf, *Tainted Provenance: When, if Ever, Should Torture Evidence Be Admissible?*, 65 WASH. & LEE L. REV. 129, 134-35 (2008) ("Scharf").

[34] Emphasis added.

[35] The OCIJ found that because Cambodian law was not clear on the issue of what use may be made of torture tainted evidence, it must seek guidance from relevant rules of procedure at the international level. *See* Order, para. 17. It then examined only the Torture Convention, although several other relevant sources exist.

[36] Rule 95 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR") and the Special Court for Sierra Leone ("SCSL") and Article 69(7) of the Rome Statute of the International Criminal Court ("ICC") all prohibit the admission of evidence which has been obtained by means antithetical to the integrity of the proceedings. The identical ICTY and ICTR Rule 95 states, "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." Rule 95 of the SCSL states, "No evidence shall be admitted if its admission would bring the administration of justice into serious disrepute." Article 69(7) of the ICC states that "[e]vidence 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." According to one scholar, "[a] statement procured directly by torture is *par excellence* evidence the admissibility of which is antithetical to, or damages, the integrity of the tribunal." Rosemary Pattenden, *Admissibility in Criminal Proceedings of Third Party and Real Evidence Obtained by Methods Prohibited by UNCAT*, 10 INT'L J. EVIDENCE & PROOF 1, 15 (2006) ("Pattenden"). These Rules from international or internationalized tribunals require that torture tainted evidence be totally excluded. This is an exception to the general rule in international tribunals to admit evidence freely and consider its weight at the end of trial, in the context of the entire trial record. *See Prosecutor v. Orić*, IT-03-68-T, Judgement, 30 June 2006, para. 14. *See also* JUDGE RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE 93 (Transnational Publishers, Inc. 2002) ("MAY & WIERDA"): "In this respect, international criminal trials resemble criminal trials held under the civil law systems, operating under a 'free evaluation of evidence.'"; J. HERMAN BURGERS & HANS DANELIUS, THE UN CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 148 (Martinus Nijhoff Publishers 1988) ("BURGERS & DANELIUS"): "Even in countries whose court procedures are based on a free evaluation of all evidence, it is hardly acceptable that a statement made under torture should be allowed to play any part in court proceedings." "Rule 95 of the Rules provides for the exclusion of improperly obtained evidence. It declares 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. Accordingly, the Trial Chamber makes it clear at the very outset that statements which are not voluntary, but rather are obtained by means including oppressive conduct, cannot be admitted." *Prosecutor v. Perišić*, IT-04-81-T, Order for Guidelines on the Admission and Presentation of Evidence, and Conduct of Counsel in Court, 29 October 2008, para. 38 (emphasis added). *See also Prosecutor v. Delić*, IT-04-83-T, Decision Adopting Guidelines on the Admission and Presentation of Evidence and Conduct of Counsel in Court, 24 July 2007, para. 33. In accordance with this exception, some Chambers have held that statements obtained "by means including oppressive conduct" cannot be admitted. None of these international or internationalized tribunals – which have been either established or supported by United Nations' funding and

the ICCPR.[37] Although Article 7 does not specifically prohibit the use of torture tainted evidence, the UN Human Rights Committee[38] has stated that "[i]t is important for the discouragement of violations under article 7 that the law must prohibit the use or admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment."[39]

13. According to the UN Special Rapporteur on Torture,[40] the rationale behind the exclusion of torture tainted evidence is that:

    A. Prohibiting the use of such evidence in legal proceedings removes an important incentive for the use of torture and, therefore, contributes to the prevention of the practice;[41] and

    B. Information obtained by torture is usually not reliable enough to be used as a source of evidence in any legal proceedings.

14. The concern under the first rationale is that allowing torture tainted evidence to be used in judicial proceedings will create an incentive to use torture. At issue is not an incentive created for one particular torturer, but for anyone who might consider using torture in the future as a means of obtaining evidence for judicial proceedings. As explained by the Cambodian Center for Human Rights, "Cambodia's transition from conflict and

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assistance – make any exceptions or qualifications as to what parts of evidence derived from torture can be used during judicial proceedings, including the investigative stage, especially when, as in this instance, the investigation is conducted solely by a judicial organ. The ECCC – a national court, but assisted in part by the United Nations – should not be the exception.

[37] Article 7 states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

[38] The Human Rights Committee is the principal actor at the international level mandated to enforce the rights enunciated in the ICCPR. CHRISTIAN TOMUSCHAT, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 3, available at http://untreaty.un.org/cod/avl/pdf/ha/iccpr/iccpr_e.pdf.

[39] General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7), 10 March 1992, (emphasis added) *available at* http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/6924291970754969c12563ed004c8ae5?Opendocument. *See also* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. No. HRI/GEN/1/Rev.3, 15 August 1997, p. 8, para. 1; Report of the Human Rights Committee, UN Doc. No. A/47/40, Annex VI, para. 12.

[40] United Nations General Assembly, Torture and other cruel, inhuman or degrading treatment, UN Doc. No. A/61/259, 14 August 2006, para. 45. This rationale was cited approvingly by the OCIJ. *See* Order, para. 23.

[41] "That torture continues to flourish in some parts of the world today is attributed (at least in part) to the fact that some courts have been willing to ignore that torture was used to obtain incriminating evidence." Pattenden, at 7, *citing* Report of the Special Rapporteur on Torture, Doc E/CN.4/1993/26, 15 December 1992 para. 590; UN Doc. No. A/54/44 (1999) para. 45; CAT/C/SR.289, para. 34. "The Committee against Torture established a direct link between the admissibility in court of statements made as a result of torture and the meagre success of efforts against torture practices... Evidence obtained by torture is of absolutely no value and therefore has no place in the court file." CHRIS INGELSE, THE UN COMMITTEE AGAINST TORTURE: AN ASSESSMENT 379 (Kluwer Law International 2001).

instability to democracy is reliant on the ECCC not only for its search for justice and reconciliation, but also for its promise to act as a role model for the Cambodian judicial system."[42] The Cambodian Center for Human Rights goes on to explain its fear that the Cambodian judiciary could permit the admission of torture tainted evidence in other cases if torture tainted evidence is found admissible at the ECCC, or could even view such admission as precedent to ignore or apply broad discretion whenever interpreting domestic and international law, in order to achieve a desired result.[43]

15. Regarding the second rationale, "the unreliability of torture evidence was the main reason, apart from humanitarian considerations, for its abolition in the post-revolutionary, enlightened reformed criminal procedure codes of the European continent. The infliction of torture is more likely to test a suspect's capacity to endure pain than his loyalty to the truth."[44]

16. Although concerns about reliability are considered one reason that torture tainted evidence must be excluded, there is no exception under Article 15 of the Torture Convention or other similar international standards for information that is demonstrated to be reliable. A determination that evidence is likely to be reliable does not affect whether it must be excluded pursuant to Article 15 of the Torture Convention. As stated by Lord Hope in *A and Others v. Secretary of State for the Home Department*:

> [t]he use of such evidence [obtained by torture] is excluded not on grounds of its unreliability – if that was the only objection to it, it would go to its weight, not to its admissibility – but on grounds of its barbarism, its illegality and its inhumanity. The law will not lend its support to the use of torture for any purpose whatever.[45]

### B. Torture tainted evidence includes preliminary biographical evidence, derivative evidence, and secondary sources

#### i. Preliminary biographical information

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[42] CCHR Application, para. 16.

[43] *Id.*, para. 20. The Cambodian Center for Human Rights' concern regarding Cambodia's judiciary appears justified. In 2004, the Committee Against Torture expressed its concern about "[t]he allegations of widespread corruption amongst public officials in the criminal justice system..." It also expressed concern over "[t]he numerous, ongoing and consistent allegations of acts of torture and other cruel, inhuman or degrading treatment or punishment committed by law enforcement personnel in police stations and prisons..." Conclusions and recommendations of the Committee against Torture: Cambodia, UN Doc. No. CAT/C/CR/31/7, 5 February 2004, para. 6(a), (e), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.31.7.En?OpenDocument.

[44] Kai Ambos, *The Transitional Use of Torture Evidence*, 42 ISR. L. REV. 362, 369 (2009).

[45] *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*, [2005] UKHL 71, para. 112.

17. Preliminary biographical information must be considered torture tainted and inadmissible. Such information may have been given under circumstances which do not rise to the level of torture, but may suggest that the information was not given freely.[46] It is certainly true that information can hardly be considered to have been given freely when it was given while facing imminent torture. Moreover, it is difficult to determine when torture actually begins, and this information should be excluded from consideration even if it is obtained in a situation that does not rise to the level of actual torture.
18. There is no international consensus as to the definition of torture.[47] "What constitutes torture is dependent on individual perceptions, and the scope of prohibited behavior differs depending on the culture."[48] Preliminary questioning in itself could constitute a form of torture. Asking a person to provide background information when that person knows that torture awaits may rise to the level of unlawful ill-treatment, if it does not reach the level of actual torture. Although the Torture Convention's Article 15 prohibition only states that it applies to evidence which is established to have been made as a result of torture, the Committee Against Torture has also consistently indicated that statements obtained by other prohibited ill-treatment may not be used as evidence in any proceedings: "[t]he Committee considers that articles 3-15 [of the Torture Convention] are likewise obligatory as applied to both torture and ill-treatment."[49] Article 15 has therefore been interpreted to also apply to ill-treatment which does not rise to the level of actual torture.
19. Similarly, the UN Human Rights Committee has declared, in relation to ICCPR Article 7, that "the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment."[50] Article 12 of the Declaration Against Torture also prohibits the use of statements "established to have been made as a result of torture or other cruel, inhuman or degrading treatment or

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[46] Order, para. 19.
[47] Pattenden, at 18. Although the Torture Convention gives a definition of torture, most international conventions which prohibit torture do not define what constitutes torture. *See also* Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1695-96 (2005), discussing the disparate views of conduct in Abu Ghraib and the general difficulty in pinning down objective criteria defining torture.
[48] Omer Ze'ev Bekerman, *Torture - The Absolute Prohibition of a Relative Term: Does Everyone Know What is in Room 101?*, 53 AM. J. COMP. L. 743, 745 (2005).
[49] Committee Against Torture, General Comment No. 2 on Implementation of Article 2 by States parties, UN Doc. No. CAT/C/GC/2, 24 Jan. 2008, para 6. (emphasis added).
[50] Report of the Human Rights Committee, UN Doc. No. A/47/40, Annex VI, para. 12 (emphasis added).

punishment..."[51] Thus, preliminary biographical information must be excluded if it was obtained in such circumstances.

**ii. Derivative material**

20. Derivative evidence, i.e. evidence found as result of a statement made under torture (*the fruit of the poisonous tree*, as it were[52]), should also be excluded, as urged by Amnesty International, the International Commission of Jurists and the Redress Trust.[53] Article 15 of the Torture Convention says nothing about derivative evidence. Professor Rosemary Pattenden notes that under an ordinary meaning of "any statement ... established to have been made as a result of torture," derivative evidence would not be included in the Article 15 prohibition. She argues, however, that "if the purpose behind [the Torture Convention] is to remove the incentive for states to engage in torture, it is just as important to deprive a state of evidence that would have laid hidden but for the use of torture as it is to deprive the state of evidence elicited under torture."[54] The Committee Against Torture follows this line of reasoning and has criticized States that permit the use of evidence that can be traced back to torture.[55] "The Committee does not distinguish ... between derivative evidence that has probative value independently of the evidence obtained under torture and derivative evidence that does not."[56]
21. Following the second rationale for prohibiting torture tainted evidence would also lead to the exclusion of derivative evidence: if evidence obtained by torture is inherently

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[51] Emphasis added.

[52] This doctrine is defined as: "The rule that evidence derived from an illegal search, arrest, or interrogation is inadmissible because the evidence ('the fruit') was tainted by the illegality ('the poisonous tree')." BLACK'S LAW DICTIONARY 679 (7th ed. 1999).

[53] "The Applicants urge the Chamber to apply this prohibition to both direct and derivative information." Amnesty International Application, para. 57.

[54] Pattenden, at 8-9 (emphasis added).

[55] *See, e.g.*, Summary Record of the Public Part of the 250th Meeting: Finland, UN Doc. No. CAT/C/SR.250, 8 May 1996, Recommendations D, para. 18 (emphasis added): "The Committee recommends that a special provision be incorporated into the State party's criminal procedure concerning the exclusion from judicial proceedings of evidence which has been obtained, directly or indirectly, as a result of torture, as provided for by article 15 of the Convention."; Summary Record of the Public Part of the 279th Meeting: Georgia, Poland, UN Doc. No. CAT/C/SR.279, 21 March 1997, Recommendations E, para. 15 (emphasis added): "The Committee recommends that statements obtained directly or indirectly under torture be not produced as evidence in the courts."; Summary Record of the Public Part of the 329th Meeting: Germany, UN Doc. No. CAT/C/SR.329, 14 May 1998, Recommendations E, para. 15: "The Committee recommends that further legislative attention be paid to the strict enforcement of article 15 of the Convention and that all evidence obtained directly or indirectly by torture be strictly prevented from reaching the cognizance of the deciding judges in all judicial proceedings." It has also been argued that the ICTY's Rule 95, and by analogy Article 69(7) of the ICC Statute, also extend to derivative evidence. This is because the original wording of Rule 95 (before a 1995 revision) covered derivative evidence and "[s]ince the purpose of the 1995 revision was to widen the accused's rights, it is submitted that it still extends to derivative evidence." Pattenden, at 15.

[56] Pattenden, at 9.

unreliable, then derivative evidence based on this unreliable information will also not be reliable. Moreover, to suggest that any information obtained through the proverbial *silver platter* (new evidence obtained from tainted evidence) is somehow *laundered* and thus *free of taint*, ignores the fundamental bases militating against the use of torture to obtain evidence in the first place.[57]

**iii. Secondary sources**

22. Related to derivative evidence are portions of secondary sources such as books and articles which rely upon torture tainted evidence as their primary sources. This material must also be excluded, for the same reason as derivative evidence. Torture tainted evidence does not become cleansed when it is first relied upon by a scholar. Scholars are not prohibited from relying upon such material for their work because their reliance upon such material does not raise the same concerns as when government officials rely upon it. Courts may not attempt to "go around" the prohibition on the use of torture tainted evidence by relying on material which directly relies on prohibited material – this would undermine the very rationale for the prohibition.

23. Secondary sources may also be based on material which scholars have derived from evidence obtained by torture. This would be quite difficult to verify and for this reason, among others, secondary sources, if admitted, must be given little weight.

**C. There is only one exception to the prohibition on the use of torture tainted evidence**

24. Although Article 12 of the Declaration Against Torture does not provide for any exception to the prohibition on the use of evidence obtained by torture,[58] Article 15 of the Torture Convention requires 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."[59] Torture tainted evidence may not be used to prove that the statement is a true statement, but may only be

[57] As Justice Neuberger states in *A and Others*,: "even by adopting the fruits of torture, a democratic State is weakening its case against terrorists, by adopting their methods, thereby losing the moral high ground an open democratic society enjoys." Lord Justice Neuberger (dissenting) in *A and Others v. Secretary of State for the Home Department*, [2004] EWCA Civ 1123 (11 August 2004), para. 497.

[58] Article 12 states, "[a]ny statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceedings."

[59] "Whether a literal or teleological construction is applied, this Article obliges the Convention's signatories to 'ensure' that no statement however reliable made under torture is admitted in any trial other than one in which the torturer is prosecuted, and even then it is to be used only to prove that the statement was made..." Pattenden, at 6 ("emphasis added").

used against a person accused of torture to prove that the statement was said under torture.[60] As stated in the Amnesty International Application, "[t]he formulation 'except against a person accused of torture as evidence that the statement was made' is unequivocally cumulative, namely providing for only one, specified category of persons for whom the exclusionary rule applies and for only one, specified use of statements obtained by torture against such persons."[61] The drafting history of Article 15 shows that States considered whether to allow such statements for their content. The States, having duly considered the matter, rejected the use of statements obtained by torture.[62] Any argument implying the existence of a lacuna or an oversight on the part of the States parties has no value.

25. Other international sources which prohibit the use of torture tainted evidence follow a consistent approach as to when such evidence may be admissible. Article 10 of the Inter-American Convention to Prevent and Punish Torture, for example, states that "[n]o statement that is verified as having been obtained through torture shall be admissible as evidence in a legal proceeding, except in a legal action taken against a person or persons accused of having elicited it through acts of torture, and only as evidence that the accused obtained such statement by such means."[63] Another example is found in the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, which provide that States should: "[e]nsure that any statement obtained through the use of torture, cruel, inhuman or degrading treatment or punishment shall not be admissible as evidence in any proceedings except against persons accused of torture as evidence that the statement was made."[64]

26. The OCP has previously argued that the UN Guidelines on the Role of Prosecutors "legally broaden [the] exception and allow the use of such evidence against those

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[60] *See* BURGERS & DANELIUS, at 208.

[61] Amnesty International Application, para. 20.

[62] The United States, for example, proposed the wording: "Each State party shall take such measures as may be necessary to assure that any statement which is established to have been made as a result of torture shall not be invoked as evidence against any person in any proceedings except that it may be invoked in evidence against a person accused of having obtained such statement by torture." Summary prepared by Secretary-General in accordance with Commission Resolution 18 (XXXIV), UN Doc. No. E/CN.4/1314, 19 December 1978, para. 86 (emphasis added.) This proposed wording was not accepted and the final wording specified that such statements may be invoked against a person accused of torture only as evidence that the statement was made. For a more extensive discussion of the drafting history behind Article 15, *see* Amnesty International Application, paras. 26-36.

[63] Emphasis added.

[64] Emphasis added.

responsible of torture for broader purposes...."[65] Its argument is based on the fact that the UN Guidelines on the Role of Prosecutors do not use the same wording as Article 15 of the Torture Convention, but instead state in paragraph 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 or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, 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.[66]

However, nothing in the wording of this guideline legally broadens the prohibition on using a statement obtained by torture against an accused only as proof that the statement was made. The Guidelines assume that prosecutors will work within the bounds of the law. Other sources remind prosecutors that they must not use such evidence for impermissible purposes:

> When prosecutors come into possession of evidence against suspects that they know, or believe on reasonable grounds, was obtained through recourse to unlawful methods, notably torture, they should reject such evidence, inform the court accordingly, and take all necessary steps to ensure that those responsible are brought to justice. Any evidence obtained through the use of torture or similar ill-treatment can only be used as evidence against the perpetrators of these abuses.[67]

27. There is no "doctrine of necessity" which would allow torture tainted evidence to be admitted in this Case. Former OCP consultant Michael Scharf has previously made the argument that because torture tainted evidence is necessary to prove the case against the Accused, it could be admitted under a "doctrine of necessity."[68] There is no exception in the international standards of justice discussed above which would allow for evidence to be admitted because it is necessary for prosecution. This would completely contradict the

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[65] *Case of IENG Thirith*, 002/19-09-2007-ECCC/OCIJ(PTC26), Co-Prosecutors' Joint Response to IENG Thirith and KHIEU Samphan's Appeals Against the 'Order on the Use of Statements which were or may have been Obtained by Torture', 12 October 2009, D130/9/13, ERN: 00388394-00388423, para. 28.

[66] Guidelines on the Role of Prosecutors, *available at* http://www2.ohchr.org/english/law/prosecutors.htm.

[67] CONOR FOLEY, COMBATING TORTURE: A MANUAL FOR JUDGES AND PROSECUTORS (2003) *available at* http://www.essex.ac.uk/combatingtorturehandbook/manual/3_content.htm, para. 3.8 (*citing the UN Guidelines for Prosecutors*). *See also* The Berlin Declaration: The ICJ Declaration on Upholding Human Rights and the Rule of Law in combating Terrorism, 6 September 2004, *available at* http://www.icj.org/news.php3?id_article=3503?=en. "In addition to working to bring to justice those responsible for terrorist acts, prosecutors should also uphold human rights and the rule of law in the performance of their professional duties, in accordance with the principles set out above. They should refuse to use evidence obtained by methods involving a serious violation of a suspect's human rights and should take all necessary steps to ensure that those responsible for using such methods are brought to justice." (Emphasis added).

[68] Scharf, at 147-52.

purpose of the prohibition on the use of such evidence – it would not deter would-be torturers, but encourage them to use torture when no other evidence is available. This is a classic situation where the end cannot justify the means.

> Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means – to declare that the government may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.[69]

28. The purpose of this Tribunal is not to find any way possible to convict the Accused, even if it means ignoring international standards of justice. The purpose of this Tribunal is to strictly adhere to fair trial principles and uphold international human rights principles in its pursuit of justice for the Cambodian people, and thus be a role model for the Cambodian courts.

## IV. CONCLUSION

29. Torture tainted evidence – including preliminary biographical information, derivative evidence, and secondary sources relying directly on torture tainted evidence – is prohibited in judicial proceedings except against a person accused of torture as evidence that the statement was made. This is the only exception to the prohibition. The Trial Chamber, continuing its practice from Case 001,[70] and in order to respect Mr. IENG Sary's right to equal treatment,[71] must not consider this evidence for any other purpose and must require any party wishing to tender such evidence to first demonstrate that it is being introduced only against a person accused of torture as evidence that the statement was made. "[T]he use of evidence obtained by torture must be anathema to any court of law properly so called,"[72] precisely "[b]ecause torture can coerce truth, break a human

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[69] *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

[70] *See Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/TC, Decision on Parties Requests to Put Certain Materials Before the Chamber Pursuant to Internal Rule 87(2), 28 October 2009, E176, ERN: 00398394-00398401, para. 8.

[71] This right is guaranteed by Article 31 of the Cambodian Constitution, which provides in part that "[e]very Khmer citizen shall be equal before the law..." (emphasis added). This right is further set out in the Cambodian Code of Criminal Procedure which states in Article 3 that "Criminal actions apply to all natural persons or legal entities regardless of race, nationality, color, sex, language, creed, religion, political tendency, national origin, social status, resources or other status." This right is also enshrined in Article 7 of the Universal Declaration of Human Rights and Articles 14(1) and 26 of the ICCPR, which the ECCC must respect pursuant to Article 31 of the Cambodian Constitution.

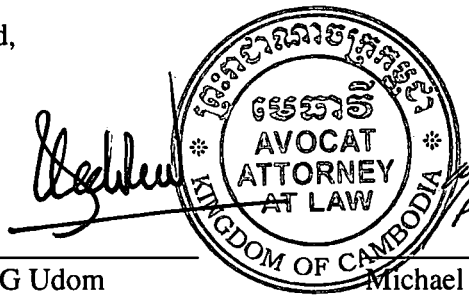
[72] Tobias Thienel, *Foreign Acts of Torture and the Admissibility of Evidence*, 4 INT'L CRIM. JUST. 401, 409 (2006).

being's dignity, treat him as an expendable means rather than as a fragile end, it has a terrible power to corrupt."[73]

## V. RELIEF REQUESTED

**WHEREFORE**, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber not to consider torture tainted evidence except against a person accused of torture as evidence that the statement was made and to ORDER the parties not to tender any such evidence unless they demonstrate that it is being introduced for this sole purpose.

Respectfully submitted,




ANG Udom Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 4th day of **February, 2011**

[73] Andrew Sullivan, *Dear President Bush*, THE ATLANTIC, October 2009, at 78, 87 (emphasis added).