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

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**MR KHIEU SAMPHAN'S APPEAL AGAINST THE ORDER ON USE OF
STATEMENTS WHICH WERE OR MAY HAVE BEEN OBTAINED BY TORTURE**

Filed by:

**Lawyers for the Defence of Mr KHIEU
Samphan
SA Sovan
Jacques VERGÈS**

Before:

**The Pre-Trial Chamber
Judge PRAK Kimsan
Judge NEY Thol
Judge HUOT Vuthy
Judge Katinka LAHUIS
Judge Rowan DOWNING**

Assisted by:

**SENG Socheata
Charlotte MOREAU
Uldis KRASTINS**

The Co-Prosecutors

**CHEA Leang
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**Civil Party Lawyers and Unrepresented
Civil Parties**

Original FR: 00367321-00367324

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MAY IT PLEASE THE PRE-TRIAL CHAMBER**CONSIDERING, on the one hand:**

- the prohibition against the use of evidence obtained by torture, as prescribed by the applicable law, including:
 - ❖ **Article 38 of the CONSTITUTION of the Kingdom of Cambodia:** “Confessions obtained by physical or mental force *shall not be admissible* as evidence of guilt.”
 - ❖ **Article 15 of the CONVENTION AGAINST TORTURE and other cruel, inhuman or degrading treatment or punishment:** “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.”
- the unambiguity of these provisions, their rank within the hierarchy of norms and their significance in the legal system;
- the absolute prohibition against torture, a *jus cogens* norm, the protection of which is at issue;
- the principle that criminal laws are to be construed strictly, the principle of the separation of powers and the need to safeguard justice, public order and the public good;

CONSIDERING, on the other hand:

- the Co-Investigating Judges’ *Order on use of statements which were or may have been obtained by torture*,¹ which acknowledges, legitimises and authorises – at the highest level of the legal system –, the use of evidence covered by the prohibition for purposes expressly and clearly prohibited by the laws;

¹ Co-Investigating Judges’ *Order on use of statements which were or may have been obtained by torture*, 28 July 2009, *Court Document D130/8*.

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The Co-Lawyers submit:

1. that by interpreting the exception under the written provisions, not as the means to establish a specific fact (“the statement was made”), but to prove and engage a person’s criminal responsibility for all the crimes with which he or she is charged, ostensibly because he or she might be “a would-be torturer”,² the Co-Investigating Judges violated the law, exceeded their authority and seriously jeopardised the spirit of Justice;
2. that by encouraging, justifying and supporting such action, the Co-Prosecutors, far from safeguarding the interests that they claimed to be defending, failed in their duty to protect public order and safeguard the general interest;
3. finally, that if the Internal Rules do not expressly provide for the right to appeal against such an order, it is simply because it should never have been issued; that the said decision is a discredit to Cambodian and international Justice; and that the judges of the Pre-Trial Chamber have an absolute duty to enter upon this appeal;
4. that, in fact, the dangers and perverse effects of such a decision for Justice and the reputation of the judges are indisputable; as evidence of this, the Defence points to:

➤ *the Co-Investigating Judges’ Order on use of statements which were or may have been obtained by torture:*

“(…) it is not possible at this stage to affirm that no element of truth can ever be found in the confessions. The reliability of the statements cannot be assessed until the end of the investigation, when the case file is deemed complete. (…) the reliability of the confessions will be assessed on a case-by-case basis, with the understanding that the Co-Investigating Judges will proceed with utmost caution given the nature of the evidence and the manner in which it was obtained.”³

➤ *Statement of Mr KAINING GUEK EAV, alias Duch, concerning the use confessions obtained by torture during the Democratic Kampuchea regime:*

“Question: Did the party take prisoners’ confessions seriously? Answer: The Party does not consider that each

² Co-Investigating Judges’ *Order on use of statements which were or may have been obtained by torture*, 28 July 2009, *Court Document D130/8*, para. 24

³ Co-Investigating Judges’ *Order on use of statements which were or may have been obtained by torture*, 28 July 2009, *Court Document D130/8*, para. 28

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and every confession may be 100% useable. It reads the confession from beginning to end and determines what, if any, is true in it and makes its assessment: this or that point is true, this or that point is not, this or that other point is an exaggeration. Question: So, why did you make prisoners confess? Answer: I know that confessions were often grotesque. Few were good and could be used. (...) What is important is to extract the confessions – whether they were true or false, that's not what was required of me.”⁴

5. accordingly, that it matters little that the documents in question are still covered with the blood of which they are both the outcome and the cause, inasmuch as without them, the guilt of the traitors of yesterday, would-be torturers today, may be finally and categorically established.

Accordingly, the Co-Lawyers adopt:

6. in advance, in its entirety and unconditionally, the appeal brief of counsel for Ms IENG Tirth against the impugned order.

Finally, and for these reasons,

7. the Co-Lawyers for the Defence solemnly request the judges of the Pre-Trial Chamber to fully enter upon their appeal and, without further prevarication, to:
- REVERSE the Co-Investigating Judges' Order
 - ORDER that all the prohibited evidence be definitively withdrawn from the proceedings.

**WITHOUT PREJUDICE,
AND JUSTICE WILL BE DONE**

	SA Sovan Jacques VERGÈS	Phnom Penh Paris	
Date	Name	Place	Signature

⁴ Record of Duch's interview by the United Nations High Commissioner for Refugees, 04 May 1999, *Court Document D9/16, ERN 147873* - This quote is in no way an acknowledgement by the Charged Person of the statement in question; moreover, the Defence reserves the right to challenge at any time the admissibility and/or the merits of this document as evidence and at all stages of the proceedings.

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Mr KHIEU Samphan's Appeal against the Order on use of statements which were or may have been obtained by torture