ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

អង្គជំនុំជម្រះតុលាការកំពូល
Supreme Court Chamber
Chambre de la Cour suprême

សំណុំរឿងលេខ: ០០២/១៩-កញ្ញា-២០០៧-អ.វ.ត.ក/អ.ជ.ត.ក

Case File/Dossier N°. 002/19-09-2007-ECCC/SC

Before: **Judge KONG Srim, President**
Judge Chandra Nihal JAYASINGHE
Judge SOM Sereyvuth
Judge Agnieszka KLONOWIECKA-MILART
Judge MONG Monichariya
Judge Florence Ndepele MWACHANDE-MUMBA
Judge YA Narin

Date: **31 December 2015**
Language(s): **Khmer/English**
Classification: **PUBLIC**

DECISION ON OBJECTIONS TO DOCUMENT LISTS
FULL REASONS

Co-Prosecutors
CHEA Leang
Nicholas KOUMJIAN

Accused
KHIEU Samphân
NUON Chea

Civil Party Lead Co-Lawyers
PICH Ang
Marie GUIRAUD

Co-Lawyers for NUON Chea
SON Arun
Victor KOPPE

Co-Lawyers for KHIEU Samphân
KONG Sam Onn
Anta GUISSÉ
Arthur VERCKEN

1. **THE SUPREME COURT CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea between 17 April 1975 and 6 January 1979 ("Supreme Court Chamber" or "Chamber", and "ECCC", respectively) is seized of the Co-Prosecutors' Response to Witness Document Lists for SCW-3, SCW-4 and SCW-5,[1] NUON Chea's Objections to the Lists of Material to be Used by the Co-Prosecutors and Lead Co-Lawyers for the Civil Parties During Questioning of SCW-3, SCW-4 and SCW-5,[2] and the *Oppositions de la Défense de M. KHIEU Samphân à l'utilisation de certains documents pendant la déposition des témoins SCW-3, SCW-4 et SCW-5*[3] ("Co-Prosecutors' Objections", "NUON Chea's Objections" and "KHIEU Samphân's Objections", respectively).

I. BACKGROUND

2. Further to a request by NUON Chea,[4] the Supreme Court Chamber decided, on 29 May 2015, to hear witnesses SCW-3, SCW-4 and SCW-5 on appeal,[5] and scheduled the hearing of those witnesses to take place from 2 July to 7 July 2015 ("July 2015 Hearing"), as needed.[6]

3. On 17 June 2015, the Supreme Court Chamber issued the Directions on the Conduct of the Hearing[7] ("Directions"), *inter alia* directing the parties to submit, "no later than Wednesday, 24 June 2015, and via e-mail addressed to the Greffiers of the Supreme Court Chamber as well as to all other parties in Case 002/01, a list of the materials [they intend] to use during the witnesses' questioning".[8] For documents longer than 30 pages, the parties were instructed to provide the ERN numbers of the parts of those documents that they expect to use.[9] The Supreme Court Chamber directed further that any objections to the documents intended to be used must be submitted no later than Friday, 26 June 2015,[10] a time limit that was subsequently extended to Monday, 29 June 2015.[11] In response to a question by a member of the Defence for NUON Chea, one of the Greffiers of the Supreme Court Chamber confirmed in an e-mail that was copied to all parties that the "lists of material are to be

[1] 29 June 2015, F26/7.
[2] 29 June 2015, F26/8.
[3] 29 June 2015, F26/9.
[4] Third Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01, 25 November 2014, F2/4.
[5] Decision on Part of NUON Chea's Request to Call Witnesses on Appeal, F2/5 ("Decision to Call Witnesses").
[6] Order Scheduling a Hearing, 2 June 2015, F24.
[7] 17 June 2015, F26.
[8] Directions, operative paragraph 3 a), p. 4.
[9] Directions, operative paragraph 3 a), p. 4.
[10] Directions, operative paragraph 3 b), p. 5.
[11] Decision on KHIEU Samphân's Request for Extension of Time Limit for Objections, 23 June 2015, F26/1/1.

submitted in accordance with the usual provisions on the official filing hours, i.e. no later than 4:00 pm".[12]

4. On 24 June 2015, the Defence for KHIEU Samphân, the Defence for NUON Chea and the Civil Party Lead Co-Lawyers sent e-mails to the Greffiers of the Supreme Court Chamber,[13] which were copied to the other parties, attaching their respective lists of documents intended to be used during the questioning of the witnesses ("KHIEU Samphân's Document List", "NUON Chea's Document List" and "Civil Parties' Document List", respectively); these e-mails were sent at 15h56, 16h00 and 16h15, respectively. On the same day, a staff member of the Office of the Co-Prosecutors sent an e-mail at 16h42 to the Greffiers of the Supreme Court Chamber,[14] copying the other parties, attaching the Co-Prosecutors' document list ("Co-Prosecutors' Document List") and indicating that the "list was filed this afternoon [through the ECCC's e-filing system], but Khmer ERNs for several transcript references are not yet included in the table. An updated table containing all missing Khmer ERNs will be distributed shortly."

5. On 25 June 2015 at 10h50, a staff member of the Office of the Co-Prosecutors sent Supreme Court Chamber's Greffiers via e-mail,[15] which was copied to the parties, an updated list of documents ("Updated Co-Prosecutors' Document List"), detailing in the accompanying e-mail the changes to the Co-Prosecutors' Document List. Those changes include: a change to the title of a column of the list; the merger of documents that were listed twice; the re-classification of a number of documents in a different category; the provision of English ERN numbers for some documents; the provision of Khmer ERN numbers for

[12] E-mail by Greffier of the Supreme Court Chamber to Senior Legal Consultant for NUON Chea, "Re: inquiry regarding the lists of material for SCW-3, SCW-4 and SCW-5", 23 June 2015, 14h06, on file with the Supreme Court Chamber.
[13] E-mail by Legal Consultant for KHIEU Samphân to Greffiers of the Supreme Court Chamber, "Liste de documents en vue de la déposition de SCW-4, SCW-3 et SCW-5", on file with the Supreme Court Chamber; e-mail by Senior Legal Consultant for NUON Chea to Greffiers of the Supreme Court Chamber, "Lists of material for questioning of SCW-3, SCW-4 and SCW-5", on file with the Supreme Court Chamber; e-mail by Civil Party Lead Co-Lawyer to the Supreme Court Chamber Greffiers and the Parties, "List of documents / SCW-3, SCW-4, SCW-5", on file with the Supreme Court Chamber.
[14] E-mail by Assistant Co-Prosecutor to Greffier of the Supreme Court Chamber, "List of documents from the Office of the Co-Prosecutors to be used during questioning of SCW-3, SCW-4 and SCW-5", on file with the Supreme Court Chamber.
[15] E-mail by Assistant Co-Prosecutor to Greffier of the Supreme Court Chamber, "Corrected Co-Prosecutors' List of Documents", on file with the Supreme Court Chamber.

several documents; and the addition of one document, E3/1539, which, according to the e-mail "[d]ue to administrative error, [...] was not included in the first list".[16]

6. On 26 June 2015 at 15h21, and following a request by the Defence for KHIEU Samphân,[17] a staff member of the Office of the Prosecutor sent via e-mail[18] a further updated list of documents intended to be used by the Co-Prosecutors, which included the ERN numbers of the French versions of documents longer than 30 pages.

7. On 29 June 2015, the Co-Prosecutors, NUON Chea and KHIEU Samphân filed their objections to the documents lists.[19]

8. On 1 July 2015, the Supreme Court Chamber disposed of those objections with a summary of reasons, indicating that full reasons for the decision would be given in due course.[20] Herewith, the Chamber provides these reasons.

II. LATE FILING OF THE CIVIL PARTY CO-LAWYERS' AND THE CO-PROSECUTORS' DOCUMENT LISTS

9. NUON Chea submits that the Co-Prosecutors' Document List and Civil Party Lead Co-Lawyers' Document List were filed late and, for that reason, the Co-Prosecutors and the Civil Party Co-Lawyers should not be allowed to use any of the documents on their lists during the examination of the witnesses.[21] KHIEU Samphân also notes that the Co-Prosecutors' Document List was filed late.[22]

10. The Supreme Court Chamber notes that the Co-Prosecutors' Document List and the Civil Party Co-Lawyers' Document List were sent by e-mail to the Supreme Court Chamber's Greffiers on 24 June 2015 after 16h00 and therefore indeed after the time limit the Chamber had set. While the Co-Prosecutors also filed their list through the e-filing system

[16] Updated Co-Prosecutors' Document List.
[17] *See* E-mail by Legal Consultant for KHIEU Samphân to Assistant Co-Prosecutor, "Re: corrected Co-Prosecutors' list of documents", 26 June 2015, 9h54, on file with the Supreme Court Chamber.
[18] E-mail by Assistant Co-Prosecutor to Legal Consultant for KHIEU Samphân, "Re: corrected Co-Prosecutors' list of documents", on file with the Supreme Court Chamber.
[19] *See supra* para. 1 *and references to* Co-Prosecutors' Objections, NUON Chea's Objections *and* KHIEU Samphân's Objections. The Civil Party Lead Co-Lawyers also filed their objections, which, the Greffiers of the Supreme Court Chamber decided to reject because it was filed in English only. E-mail by Supreme Court Chamber Greffier to Singh Chitrangada, "Notice of deficient filing", 29 June 2015, 16h34. The Civil Party Lead Co-Lawyers filed the Civil Party Lead Co-Lawyers' Request Pursuant to Internal Rule 39(4)(b), 30 June 2015, F26/10. The Supreme Court Chamber addressed and rejected this request in the Decision on Civil Party Lead Co-Lawyers' Request Pursuant to Internal Rule 39(4)(b), 1 July 2015, F26/10/1.
[20] Decision on Objections to Document Lists Summary, 1 July 2015, F26/11.
[21] NUON Chea's Objections, para. 2.
[22] KHIEU Samphân's Objections, para. 7.

(potentially before 16h00), this did not dispense them from complying with the Supreme Court Chamber's clear instructions, which were aimed at ensuring that the other parties would be made aware of all document lists without the delay that inevitably would have been caused by the e-filing procedure. The Supreme Court Chamber also notes that neither the Co-Prosecutors nor the Civil Party Lead Co-Lawyers have presented any explanation for their late filing. Nevertheless, given that the transgression of the time limit was relatively limited (42 and 15 minutes, respectively) and has had no discernible effect on the proceedings or the preparation of the other parties, the Supreme Court Chamber has decided to accept the Co-Prosecutors' Document List and the Civil Party Lead Co-Lawyers' Document List on an exceptional basis.

III. ADDITIONAL DOCUMENT ON THE UPDATED CO-PROSECUTORS' DOCUMENT LIST

11. NUON Chea objects to the inclusion of document E3/1539 on the Updated Co-Prosecutors' Document List.[23]

12. The Supreme Court Chamber notes that document E3/1539 was not contained in the Co-Prosecutors' Document List and that the only explanation for its addition is an undefined "administrative error" on the part of the Co-Prosecutors. In these circumstances, the Supreme Court Chamber has decided that the Co-Prosecutors may not use document E3/1539 in the examination of the witnesses.

IV. DOCUMENTS LONGER THAN 30 PAGES WITH NO ERN NUMBERS PROVIDED

13. NUON Chea notes that the Co-Prosecutors' Document List refers to several documents that are longer than 30 pages, but does not provide the ERN number of the parts of the documents on which the Co-Prosecutors intend to rely. NUON Chea recalls that ERN numbers for the Khmer versions of the documents were provided with the Updated Co-Prosecutors' Document List in the morning of 25 June 2015 and that ERN numbers for the French versions of the documents were communicated by e-mail only in the afternoon of 26 June 2015.[24] He also notes that there are still 10 documents longer than 30 pages for which the Co-Prosecutors have not provided any ERN numbers.[25] As to the Civil Parties' Document

[23] NUON Chea's Objections, para. 9.
[24] NUON Chea's Objections, paras 1, 10.
[25] NUON Chea's Objections, para. 10.

List, NUON Chea notes that, instead of providing ERN numbers, the Civil Party Lead Co-Lawyers listed the approximate time stamp of the transcripts in question.[26]

14. KHIEU Samphân notes in this regard that it has been the standard practice of the Co-Prosecutors and all other parties to provide ERN numbers for all language versions of documents, including French.[27] He also submits that the Co-Prosecutors' Document List is very long and contains more documents than could possibly be used in the time allotted to the Co-Prosecutors for the examination of the three witnesses, and that many of the documents are seemingly irrelevant to the matters at hand and have been on the case file for many years, but have never been used in the context of Case 002/01.[28] He submits on that basis that the Co-Prosecutors should not be allowed to use any of the documents on the Co-Prosecutors' Document List because they are intended to prolong the proceedings (*see* Internal Rule 87(3)(e)), with the exception of prior statements of the three witnesses scheduled to testify before the Supreme Court Chamber.[29]

15. The Supreme Court Chamber recalls that it instructed the parties to provide, as part of their document lists, the ERN numbers of the portion expected to be used during questioning for all documents longer than 30 pages.[30] The purpose of this instruction was to enable the other parties, as well as the Chamber, to prepare properly for the upcoming hearing. Furthermore, the provision of ERN numbers would allow the parties to formulate objections to the other parties' document lists within the short time limits set by the Supreme Court Chamber. The Co-Prosecutors have not provided any explanation as to why the Co-Prosecutors' Document List did not include complete ERN numbers, why the ERN numbers for the Khmer version of documents could only be provided on the following day, and why the ERN numbers for the French version of documents were only provided two days after the time limit, and only upon request of KHIEU Samphân. The Supreme Court Chamber notes furthermore that the Co-Prosecutors' Document List was very long, containing more than 150 often lengthy documents. While the Supreme Court Chamber is aware that it was not the Co-Prosecutors who requested the testimony of the three witnesses, which may make it difficult for them to select relevant documents to be used in their examination, the high number of documents on the list aggravated the prejudice to the other parties caused by the missing

[26] NUON Chea's Objections, para. 10.
[27] KHIEU Samphân's Objections, para. 9.
[28] KHIEU Samphân's Objections, paras 8, 10.
[29] KHIEU Samphân's Objections, para. 11.
[30] Directions, operative paragraph 3 a).

ERN numbers. The tardy and piecemeal provision of ERN numbers with the Updated Co-Prosecutors' Document List and subsequent e-mails could not heal this prejudice.

16. In these circumstances, the Supreme Court Chamber has decided not to allow the Co-Prosecutors to use any of the documents listed on the Co-Prosecutors' Document List that are longer than 30 pages, as the Co-Prosecutors did not provide, or provided incomplete, ERN numbers by the time limit expired. In contrast, the Supreme Court Chamber is not persuaded by KHIEU Samphân's more general argument that that Co-Prosecutors should not be allowed to use any of the documents on the Co-Prosecutors' Document List because they are intended to prolong the proceedings.[31] While it is true that the number of documents on that list is high, there is no indication that the Co-Prosecutors seek to prolong the proceedings, in particular since the Supreme Court Chamber has already set a time frame for their examination of the witnesses.

17. As to the Civil Parties' Document List, which only consists of transcripts from the trial proceedings in Case 002/01, the Supreme Court Chamber notes that, instead of containing ERN numbers, it contains references to the time stamps in the transcript. While, as NUON Chea notes,[32] this is in breach of the Directions, providing the time stamps nevertheless allows all parties and the Chamber to identify with precision the relevant excepts of the transcripts in question, and this across all language versions of the transcripts. For that reason, the Supreme Court Chamber has decided to accept the Civil Parties' Document List despite its non-compliance with the Directions.

V. DOCUMENTS NOT PUT BEFORE THE TRIAL CHAMBER IN CASE 002/01

18. The Supreme Court Chamber notes that the document lists submitted by the parties contain several documents that were not put before the Trial Chamber and subjected to examination in terms of Internal Rule 87(2) in the context of Case 002/01. The Co-Prosecutors submit in this regard that such documents should not be used in the examination of the three witnesses, noting that the Supreme Court Chamber has held that a three-part test applies to the admission of additional evidence on appeal.[33] They submit that, as an exception

[31] KHIEU Samphân's Objections, para. 11.
[32] NUON Chea's Objections, para. 10.
[33] Co-Prosecutors' Objections, paras 2-3.

to this principle, only prior statements of the witnesses themselves may be used.[34] NUON Chea notes that many of the documents on the Co-Prosecutors' Document List stem from Case 002/02 and that the Co-Prosecutors have not requested their admission into evidence on appeal.[35] Accordingly, they should not be allowed to use those documents in the examination of the witnesses.[36] NUON Chea explains that there are four documents on NUON Chea's Document List stemming from Case 002/02, in relation to which no request for additional evidence has been submitted yet, but that the filing of such a request is imminent.[37] He also notes that there are three documents on the list that are not yet on the Case 002 case file at all; while he will submit an additional evidence request shortly, he is of the view that "in keeping with the usual practice in domestic courts, it should be unnecessary to make such a request for documents of this nature, i.e. those which are accessible in the public domain".[38] The three documents in question are articles published in periodicals in the 1970s. KHIEU Samphân, for his part, objects to the use of documents stemming from Cases 002/02, 003 and 004 in the absence of any explanation from the Co-Prosecutors as to why these documents should be admitted.[39] There should, however, be an exception for prior witness statements of the three witnesses who have been called to testify.[40]

19. The Supreme Court Chamber recalls that under the legal framework of the ECCC, the Trial Chamber may base its decision "only on evidence that has been put before the Chamber and subjected to examination".[41] Internal Rule 87(3) provides for the procedure as to how material that is on the case file of a given case is put before the Chamber, as well as for the criteria according to which the Chamber may reject requests for evidence. Internal Rule 87(4) sets out the procedure and criteria for the admission of "new evidence" during the trial. As to the appellate level, Internal Rule 108(7) provides for the procedure and criteria for requests by the parties for additional evidence on appeal. Importantly, Internal Rule 108(7) stipulates that such additional evidence must have been unavailable at trial and "could have been a decisive factor in reaching the decision at trial". Furthermore, the additional evidence must pertain to a specific finding of fact by the Trial Chamber.[42] In addition, the Supreme Court

[34] Co-Prosecutors' Objections, para. 3, fn. 7.
[35] NUON Chea's Objections, para. 4.
[36] NUON Chea's Objections, para. 6.
[37] NUON Chea's Objections, para. 7.
[38] NUON Chea's Objections, para. 8.
[39] KHIEU Samphân's Objections, paras 20-21.
[40] KHIEU Samphân's Objections, para. 20.
[41] Internal Rule 87(2).
[42] Decision to Call Witnesses, para. 16.

Chamber has the discretionary power recognised by Internal Rule 104(1) to call "new evidence" on appeal, which it may exercise in the interests of justice.[43]

20. In light of the above legal framework, the Supreme Court Chamber finds that, when considering alleged factual errors of the Trial Chamber in the context of an appeal, it is, as a rule, limited to the evidence that was "put before the [Trial] Chamber" in terms of Internal Rule 87(2). In this regard, the Supreme Court Chamber underlines that not every item that is placed on the case file of a given case is automatically "put before the [Trial] Chamber". Rather, as noted above, specific procedures in that regard have to be followed. For that reason, evidence that was not introduced into the trial in principle cannot be scrutinised in the context of an appeal.

21. An exception to this arises when the Supreme Court Chamber allows additional or new evidence on appeal, either under Internal Rule 108(7) or 104(1). This is indeed what has happened in relation to the three witnesses whom the Supreme Court Chamber decided to call in its Decision to Call Witnesses. Nevertheless, in principle and in keeping with the legal framework set out above, any documentary evidence that the parties wish to use in the course of their examination of the witnesses must either be part of the evidence that was put before the Trial Chamber in the course of the trial giving rise to the appeal or allowed on appeal under Internal Rules 108(7) or 104(1). Otherwise, the hearing of additional witnesses on appeal could be used as a springboard for the admission of additional items of evidence, even though such items may not meet the stringent criteria of Internal Rule 108(7) and 104(1). This is accepted by the Co-Prosecutors, NUON Chea and KHIEU Samphân;[44] however, it does not apply to prior statements of the witnesses the Supreme Court Chamber has decided to call. Such prior statements are so closely linked to the witnesses' expected live testimony that no separate decision under Internal Rule 108(7) and 104(1) is required; in addition, to the extent that the witness was unavailable at trial, so were his or her statements. Therefore, generally speaking, prior statements of a witness – obtained in the context of the ECCC investigation or trial, or otherwise – may be used in the examination of that witness.

22. The Supreme Court Chamber disagrees with NUON Chea's argument that, in addition, any material that is accessible in the public domain can be used in the examination of

[43] Decision to Call Witnesses, para. 17.
[44] Co-Prosecutors' Objections, para. 3; NUON Chea's Objections, paras 4-6; KHIEU Samphân's Objections, paras 20-21.

witnesses. There is no good reason why availability in the public domain should lift the requirement of novelty of evidence. Given that the case at hand deals with allegations of crimes on a massive scale, there are likely to be many such documents. Allowing such documents to be introduced into evidence at the appellate level without consideration of the criteria of Internal Rules 108(7) and 104(1) would belie the rationale of these Internal Rules, and could lead to significant challenges in the management of the proceedings. Accordingly, NUON Chea's argument in this regard is rejected.

23. Turning to the specific circumstances of the case at hand, the Supreme Court Chamber notes that some of the documents on the parties' document lists are the subject of requests for additional evidence by NUON Chea.[45] The Supreme Court Chamber has not ruled on these requests yet, and it has not even received responses in respect of all of them. Given the insufficiency of time to dispose of the entirety of these requests before hearing these witnesses, the Supreme Court Chamber has decided to allow the parties to use the documents that are subject to pending requests for additional evidence, to the extent that they feature on their respective document lists. This is without prejudice to the Supreme Court Chamber's eventual decision on these additional evidence requests.

24. The Supreme Court Chamber notes furthermore that NUON Chea submits that some documents on NUON Chea's Document List will be the subject of additional evidence requests that will be filed in the future.[46] In the Supreme Court Chamber's view, the mere intention of a party to request additional evidence in the future is an insufficient basis to allow the use of such documents in the examination of these witnesses. Accordingly, NUON Chea's submission in this regard is rejected.

25. The Supreme Court Chamber has therefore decided not to allow the parties to use in the examination of the three witnesses in the upcoming hearings any of the documents referred to on their respective document lists that are not already part of the evidentiary record of the trial of Case 002/01 or the subject of a pending request for additional evidence.

[45] NUON Chea's Fourth Request to Consider Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01, 15 June 2015, F2/6; NUON Chea's Fifth Request to Consider and Obtain Additional Evidence in Conncetion with the Appeal Against the Trial Judgement in Case 002/01, 25 June 2015, F2/7.
[46] NUON Chea's Objections, paras 7-8.

VI. TORTURE-TAINTED DOCUMENTS

A. Procedural context and submissions

26. KHIEU Samphân notes that NUON Chea's and the Co-Prosecutors' document lists include statements taken at S-21 prison ("S-21 Statements"), and, maintaining that such statements were presumably obtained by means of torture, objects to their use in the July 2015 Hearing entirely.[47] The Co-Prosecutors object to the use of S-21 Statements to establish the truth of the matters confessed, but posit that they may be used to prove other circumstances.[48]

27. The Supreme Court Chamber notes that the Trial Chamber held in Case 002/01 that evidence produced by torture is inadmissible in all circumstances for the truth of its contents based, principally, on Article 15 of the Convention Against Torture[49] ("CAT"), repeating an earlier finding to this effect in Case 001.[50] NUON Chea challenges this holding as part of his appeal against the Trial Judgment.[51] In Case 002/02, the use of torture-tainted evidence is a live issue again.[52]

28. In his submissions before the Supreme Court Chamber in the context of the July 2015 Hearing, NUON Chea does not explain how he wants to use the S-21 Statements. In his Appeal Brief, however, he argues that, while torture-tainted evidence may not be used *against* accused persons, they may use such evidence in their defence, which, in NUON

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[47] KHIEU Samphân's Objections, paras 12-14.
[48] Co-Prosecutors' Objections, para. 5, fn. 8; KHIEU Samphân's Objections, para. 14. The specific documents objected to are: D312.2.25, D366/7.1.1.8, E3/1682, E3/1855, E3/2792, E3/3857, E3/3989, E3/4202. The Supreme Court Chamber notes that E3/4202 is not in itself a confession, but a book quoting or paraphrasing confessions of S-21 prisoners, including the confession of RUOS Nhim. Given the provenance of the relevant portions of this document, the Supreme Court Chamber considers them equal to the other S-21 Statements.
[49] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/39/51, 10 December 1984, entered into force 26 June 1987 ("CAT").
[50] *See* Case 002/01 Judgement, 7 August 2014, E313 ("Trial Judgment"), para. 35; Trial Chamber Response to Motions E67, E57, E56, E58, E23, E59, E20, E33, E71, and E73 Following Trial Management Meeting of April 2011, 8 April 2011, E74, p. 3.
[51] NUON Chea's Appeal Against the Judgment in Case 002/01, 29 December 2014, F16 ("Appeal Brief"), paras 706-722; Notice of Appeal Against the Judgment in Case 002/01, 29 September 2014, E313/1/1, p. 7 (Ground 36).
[52] The Trial Chamber received written submissions and held an oral hearing on the matter on 21 and 25 May 2015, respectively. *See* NUON Chea's Submissions Regarding the Use of "Torture-Tainted Evidence" in the Case 002/02 Trial, 21 May 2015, E350 ("NUON Chea's Case 002/02 Submissions"); 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 ("Co-Prosecutors' Case 002/02 Submissions"); Civil Party Lead-Co-Lawyers' Submissions Relating to the Admissibility and Permissible Uses of Evidence Obtained through Torture, 21 May 2015, E350/3 ("Civil Party Lead Co-Lawyers' Case 002/02 Submissions"); *Conclusions de la Défense de M. KHIEU Samphân concernant l'usage des informations obtenues sous la torture*, 21 May 2015, E350/4 ("KHIEU Samphân's Case 002/02 Submissions"); T. (EN), 25 May 2015, E1/304.1, pp. 3-48.

Chea's case, would be to establish that an internal conflict existed within the Communist Party of Kampuchea in the period relevant to the charges.[53] The Supreme Court Chamber infers that NUON Chea intends to use the S-21 Statements when questioning the witnesses at the July 2015 Hearing based on the same justification. The Chamber will therefore consider his arguments contained in the Appeal Brief when ruling on the objections to the use of the S-21 Statements at that hearing.[54]

29. The Co-Prosecutors' position is that the S-21 Statements may not be used to prove the truth of matters extracted through torture.[55] They argue, however, that the S-21 Statements may be used to prove other relevant facts, such as that the prisoners were accused of and interrogated about hiding or failing to kill LON Nol officers, or that killing LON Nol officers was within the regime's policies.[56] The Co-Prosecutors incorporate their arguments submitted earlier before the Trial Chamber[57] which, in short, seek to demonstrate that the exception to the prohibition of the use of torture-tainted statements, which is contained in the second sentence of Article 15 of the CAT, must be read broadly, in order to facilitate proving crimes committed by the alleged torturers.[58] They add that a statement should only be excluded on the basis of Article 15 of the CAT if it has been found that it was, in fact, derived from torture.[59]

30. On the basis of these submissions, the Supreme Court Chamber frames the following three principal questions for consideration of the issue before it: (1) whether it has been established that the S-21 Statements were made as a result of torture; (2) whether NUON Chea may use the S-21 Statements to assist his defence; and (3) whether the Co-Prosecutors may be use the S-21 Statements to prove facts unrelated to the truth of the contents thereof. First, however, the Supreme Court Chamber shall set out the applicable law.

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[53] NUON Chea Appeal Brief, paras 706-722. *See also* NUON Chea's Case 002/02 Submissions, paras 13-28.
[54] NUON Chea specifies that the Trial Chamber's alleged error in holding that evidence produced by torture is inadmissible under all circumstances for the truth of its contents does not invalidate the Trial Judgment, but that the issue is of general importance to the jurisprudence of the ECCC. *See* NUON Chea Appeal Brief, para. 707. In light of these submissions, the admissibilty of these arguments on appeal is open to debate. The Supreme Court Chamber's consideration of NUON Chea's arguments on appeal in respect of torture-tainted evidence should not be interpreted as predeteriming its decision on the admissibility thereof on appeal.
[55] Co-Prosecutors' Objections, para. 5.
[56] Co-Prosecutors' Objections, paras 5, 6, fn. 11.
[57] Co-Prosecutors' Objections, fn. 9-10.
[58] Co-Prosecutors' Case 002/02 Submissions, para. 7.
[59] Co-Prosecutors' Objections, para. 7.

B. Applicable Law

31. Both the Constitution of the Kingdom of Cambodia[60] ("Cambodian Constitution") and the Cambodian Code of Criminal Procedure[61] ("CPC") contain prohibitions related to the use of evidence obtained through physical or mental compulsion. Article 38 of the Cambodian Constitution mandates that "[c]onfessions obtained by physical torture or mental pressure shall not be admissible as evidence of guilt". Article 321 of the CPC establishes that "[u]nless it is provided otherwise by law, in criminal cases all evidence is admissible" and adds that "[a] confession shall be considered by the court in the same manner as other evidence". By way of an exclusionary rule, Article 321 of the CPC provides that "[a] declaration given under the physical or mental duress shall have no evidentiary value". Both the placement of the exclusionary rule in a provision that deals generally with the admissibility of evidence and the term "declaration", as opposed to "confession" (the term used in Article 38 of the Cambodian Constitution), indicate that the prohibition in Article 321 of the CPC covers any information obtained under duress, and not only statements by the accused.

32. The ECCC's Internal Rules mirror Article 321 of the CPC in providing that, as a rule, "all evidence is admissible", except where it is, *inter alia*, "not allowed under the law".[62] Specifically on point, Internal Rule 21(3), incorporated under the heading "Fundamental Principles", provides that:

> 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, and the person responsible shall be appropriately disciplined in accordance with Rules 35 to 38.

As such, pursuant to Internal Rule 21(3) information obtained under duress is inadmissible irrespective of whether it stems from the accused or another person. The purview of the provision, however, appears limited to statements collected by the organs of the ECCC. The Internal Rules thus do not contain a broad exclusionary rule akin to those of other international criminal tribunals, which generally bar the admission of evidence that could compromise the integrity of the proceedings.[63]

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[60] Constitution of the Kingdom of Cambodia (1993), adopted by the Constitutional Assembly on 21 September 1993.
[61] Code of Criminal Procedure of the Kingdom of Cambodia, promulgated by the King on 10 August 2007.
[62] Internal Rule 87(3)(d).
[63] *See* Rome Statute of the International Criminal Court, A/CONF.183/9, adopted on 17 July 1998, Article 69(7) ("Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not

33. Article 15 of the CAT stipulates an exclusionary rule relating to statements extracted through torture:

> 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.

34. The Supreme Court Chamber considers that the normative content of Article 15 of the CAT is sufficiently precise not to depend on implementing legislation for it becoming operative.[64] Further, in accordance with the Cambodian Constitution, it is directly applicable in Cambodia, given that Cambodia ratified the CAT on 15 October 1992 and that Article 31(1) of the Cambodian Constitution provides that "[t]he Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights".[65] This finding confirms conclusions expressed in the

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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"); International Criminal Tribunal for the former Yugoslavia (ICTY), Rules of Procedure and Evidence, IT/32/Rev. 50, adopted on 11 February 1994, amended on 8 July 2015 ("ICTY RPE"), Rule 95 *and* International Criminal Tribunal for Rwanda (ICTR) Rules of Procedure and Evidence, adopted on 29 June 1995, amended on 13 May 2015 ("ICTR RPE"), Rule 95 ("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"); Special Court for Sierra Leone (SCSL), Rules of Procedure and Evidence, adopted on 16 January 2002, amended on 31 May 2012, Rule 95 ("No evidence shall be admitted if its admission would bring the administration of justice into serious disrepute"); United Nations Transitional Administration in East Timor (UNTAET), Regulation No. 2000/30 On Transitional Rules of Criminal Procedure, UNTAET/REG/2000/30, adopted on 25 September 2000, amended on 14 September 2001, Rule 34(2) ("The Court may exclude any evidence if its probative value is substantially outweighed by its prejudicial effect, or is unnecessarily cumulative with other evidence. No evidence shall be admitted if obtained by methods that cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings, including without limitation evidence obtained through torture, coercion or threats to moral or physical integrity"); Special Tribunal for Lebanon (STL), Rules of Procedure and Evidence, adopted on 20 March 2009, amended on 12 February 2015, Rule 162 (Exclusion of Certain Evidence: ("(A) 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, (B) In particular, evidence shall be excluded if it has been obtained in violation of international standards on human rights, including the prohibition of torture").

[64] The SCC notes the that the opening words of Article 15 of the CAT do not imply that implementing legislation is necessary; rather, they signal deference to new or existing legislation that States Parties' legal systems may enact for the implementation of the obligations arising from the provision (*see* Committee Against Torture ("CAT Committee"), Guidelines on the Form and Content of Initial Reports Under Article 19 to be Submitted by States Parties to the Convention Against Torture, CAT/C/4/Rev.318, July 2005, para 24). In this regard, it is of note that, upon ratifying the CAT in 1987, Austria declared that it "regards article 15 as the legal basis for the inadmissibility provided for therein of the use of statements which are established to have been made as a result of torture", conversely, the United States of America declared, upon ratifying the CAT, that it considered that "articles 1 through 16 of the Convention are not self-executing" (Multilateral Treaties Deposited with the Secretary-General, Status as at 1 April 2009,Vol. I Part I, ST/LEG/SER.E/26, United Nations Publication 2009, pp. 360, 363-4).

[65] On the domestic applicability of international human rights treaties in Cambodia, *see* the decision of the Cambodian Constitutional Council, Case No. 131/003/2007, Decision No. 092/003/2007, 10 July 2007. This decision was noted with approval by the CAT Committee, which understood it to mean "that international

jurisprudence of the Pre-Trial Chamber, which has ruled that Article 15 of the CAT is part of the "law" as referred to in the CPC and Internal Rule 87(3)(d).[66] The Trial Chamber appears to have taken the same position when finding that it was "bound by Article 15 [of the CAT]", which was "reflected" in Internal Rule 21(3) and Article 38 of the Cambodian Constitution.[67]

35. On the relation between the exclusionary rule enshrined in Article 15 of the CAT and that in Article 321 of the CPC, both of which are applicable in Cambodia, it falls to be noted that the two norms are not conterminous. The exclusionary rule of Article 15 of the CAT encompasses "any proceedings", thus covering more than criminal procedure. At the same time, it covers only information extorted by means of torture, which is narrowly defined as follows:

> For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[68]

36. The exclusionary rule in Article 321 of the CPC, on the other hand, speaks more broadly of "physical or mental duress". Moreover, unlike Article 15 of the CAT, it does not foresee any exception.

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treaties are part of the national law and that courts should take treaty norms into account when interpreting laws and deciding cases", (Concluding Observations of the Committee Against Torture (Cambodia), CAT/C/KHM/CO/2, 20 January 2011, para.10).

[66] Decision on Admissibility of the Appeal Against Co-Investigating Judges' Order on Use of Statements Which Were or May Have Been Obtained by Torture, 18 December 2009, D130/9/21 ("PTC Admissibility Decision on Torture-Derived Statements"), para. 27; 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 ("Second PTC Admissibility Decision on Torture-Derived Statements"), para. 35.

[67] Trial Judgment, para. 35, *citing* T. (EN), 5 April 2011, E1/2.1, pp. 96, 97; Trial Chamber Response to Motions E67, E57, E56, E58, E23, E59, E20, E33, E71 and E73 Following Trial Management Meeting of 5 April 2011 (TC), 8 April 2011, E74, p. 3; Trial Chamber Memorandum entitled "Trial Chamber response to portions of E114, E114/1, E131/1/9, E131/6, E136 and EI58", 31 January 2012, E162, para. 9; Decision on Objections to Documents Proposed to be Put Before the Chamber on the Co-Prosecutors Annexes AI-A5 and to Documents Cited in Paragraphs of the Closing Order Relevant to the First Two Trial Segments of Case 002/01, 9 April 2012, E185, para. 21; T. (EN), 3 October 2012, E1/129.1, p. 74 ("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 of or for the basis for questioning"). *See also* T. (EN), 28 May 2009, E1/27.1, p. 45; Case 001, Decision on Parties Requests to Put Certain Materials before the Chamber pursuant to Internal Rule 87(2), 28 October 2009, E176, para. 8.

[68] Article 1 of the CAT.

37. The Supreme Court Chamber considers that Article 321 of the CPC has a dual function. First, it implements Article 15 of the CAT in the area of criminal procedure and, as such, needs to be interpreted in line with the normative content of Article 15 of the CAT.[69] Accordingly, the exception allowing the use of information resulting from torture under the conditions defined in the second sentence of Article 15 of the CAT is not tacitly obliterated in Cambodian criminal procedure by the fact that this exception is not articulated in Article 321 of the CPC. Second, it extends the exclusionary rule beyond the strict terms of the CAT, covering information "given under physical or mental duress", even if not amounting to torture in terms of Article 1 of the CAT. It follows that, where a statement is inadmissible under Article 15 of the CAT, it is necessarily also inadmissible under Article 321 of the CPC. Conversely, information not excluded under Article 15 of the CAT may still be inadmissible under Article 321 of the CPC.

38. The Supreme Court Chamber notes that NUON Chea and the Co-Prosecutors do not dispute the applicability of the exclusionary rule contained in Article 15 of the CAT to the ECCC proceedings. Rather, they essentially seek to limit the extent of the prohibition on the use of information obtained through torture for reasons of utility or necessity in scenarios, which, in their view, fall outside the scope of Article 15 of the CAT. The parties' arguments are centred on that provision and therefore it remains the principal plane of reference for the Supreme Court Chamber's analysis.

39. According to Article 31 of the Vienna Convention on the Law of Treaties[70] ("VCLT"), an international treaty must be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". Furthermore, any subsequent agreement between the parties regarding the interpretation of the treaty, subsequent practice, which establishes the agreement of the parties regarding its interpretation, and any relevant rules of international law applicable in the relations between the parties may be taken into account.[71] As such, the Supreme Court Chamber considers that, in interpreting Article 15 of the CAT, particular weight should be given to the practice of the

[69] CAT Committee, Initial Report of State Parties due in 1990 (United Kingdom), CAT/C/9/Add.6, 10 May 1991, paras 121-123; Initial Reports of States Parties due in 1995 (United States of America), CAT/C/28/Add.5, 9 February 2000, paras 11, 49, 58; Sixth Periodic Reports of States Parties due in 2008 (Canada), CAT/C/CAN/6, 22 June 2011, para. 3; Fifth Periodic Report of States Parties due in 2008 (United Kingdom of Great Britain and Northern Ireland), CAT/C/GBR/5, 21 May 2012, paras 4, 110, 504.
[70] Vienna Convention on the Law of Treaties, adopted on 23 May 1969 and entered into force on 27 January 1980, United Nations, Treaty Series, Vol. 1155, p. 340.
[71] *See* Article 31(3) of the VCLT.

CAT Committee, whose interpretation of the treaty has been described as being "authoritative".[72] Moreover, the interpretation of the CAT is facilitated by comparative analysis of similar international or regional human rights treaties and the case law and practice of human rights monitoring bodies.[73] In this respect, the relevant case law of the UN Human Rights Committee ("HR Committee") and the European Court of Human Rights ("ECtHR") is instructive, particularly in the area of the right to a fair trial, given the procedural focus of Article 15 of the CAT. Moreover, Article 32 of the VCLT permits recourse to supplementary means of interpretation, including the *travaux préparatoires*, in order to confirm the meaning resulting from the application of Article 31 of the VCLT, or to determine the meaning when the interpretation according to Article 31 of the VCLT leaves the meaning ambiguous or obscure, or leads to a result, which is manifestly absurd or unreasonable.

40. The Supreme Court Chamber notes that the terms of the first sentence of Article 15 of the CAT are, as such, unambiguous when read together with Article 1 of the CAT, which defines torture as aimed, among other things, at extorting confessions *or* information. Article 15 of the CAT prohibits the use of information that was provided as a result of torture without any qualification whatsoever, other than the exception to the prohibition contained in its second sentence. The parties' propositions that the prohibition is more limited and principally does not extend over information favourable for the defence cannot be defended on the language of the provision alone and would, therefore, have to be vetted against the object and purpose of the exclusionary rule. In this regard, the Supreme Court Chamber recalls that the CAT defines its object and purpose in recognition of a person's inalienable human rights and inherent dignity, expresses the desire to render "more effective" the struggle against torture throughout the world,[74] and reiterates the absolute and non-derogable nature of the prohibition against torture.[75] Any interpretation of the CAT, or of its integral parts, which includes Article 15, that would weaken the prohibition and prevention of torture must therefore be rejected. Moreover, in furtherance of the preventive objective and purpose, the CAT Committee has stressed that the state obligation to take effective preventive

[72] Manfred Nowak & Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary*, p. 12.
[73] Manfred Nowak & Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary*, p. 12.
[74] *See* Preamble of the CAT.
[75] *See* Preamble *and* Article 2(2) of the CAT.

measures transcends the items enumerated specifically in the CAT.[76] In this light, the object and purpose of Article 15 of the CAT is primarily to prevent the practice of torture by removing an important incentive for its use, namely the possibility of introducing into any formal proceedings information that was extracted through torture.[77]

41. Another rationale for the exclusionary rule is the duty to protect the right of an accused to a fair trial. Here, the most fundamental application of the exclusionary rule disqualifies a confession resulting from torture from being used as evidence against the person who was the victim of torture, as admission of such evidence would manifestly violate the right to silence and to not incriminate oneself, recognised expressly under Article 14(3)(g) of the International Covenant on Civil and Political Rights[78] and derived from Article 6(3) of the European Convention of Human Rights.[79] The ECtHR has declared that "[t]he right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.[80] The right to remain silent and the right against self-incrimination are indeed most vulnerable to violation through torture. For that reason, many municipal systems have adopted express exclusionary rules to cover such situations – such as the one in the Cambodian Constitution. Despite such rules, violations of the prohibition of torture appear to remain widespread, as is evidenced by the large body of human rights jurisprudence in this regard,[81] including the jurisprudence of

[76] CAT Committee, General Comment No. 2, CAT/C/GC/2, 24 January 2008 ("General Comment No. 2"), para. 25.
[77] *See* Human Rights Committee, General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), HRI/GEN/1/Rev.9 (Vol. I), 27 May 2008, para 12,"it is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture [...]"; *See also* CAT Committee, Second periodic report of Paraguay, Third periodic report of Mexico, CAT/C/SR.289, 26 August 1997, para. 34. At its 289th meeting the Committee Against Torture deplored "the ineffectiveness of efforts to put an end to the practice of torture is the result, inter alia, of the continuing impunity of torturers and the fact that the authorities responsible for the administration of justice continue to admit confessions and statements made under torture as evidence during trials, despite legal provisions explicitly declaring them inadmissible"; *and* Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/61/259, 14 August 2006 ("Special Rapporteur Report A/61/259"), para. 45; Manfred Nowak & Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary*, pp. 504, 530.
[78] International Covenant on Civil and Political Rights, adopted on 16 December 1966 and entered into force on 23 March 1976, United Nations Treaty Series, vol. 999, p. 171. *See also*, Human Rights Committee, General Comment No. 13: Article 14 (Administration of Justice), HRI/GEN/1/Rev.9 (Vol. I), 27 May 2008, para. 14.
[79] (European) Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950 and entered into force on 3 September 1953, United Nations Treaty Series, vol. 213 I, No. 2889 (as amended by Protocols Nos. 11 and 14).
[80] *See Gäfgen v. Germany*, ECtHR, "Grand Chamber Judgment", App. No. 22978/05, 1 June 2010 ("*Gäfgen v. Germany*"), para. 168.
[81] CAT Committee, Concluding Observations of the Committee Against Torture (Cambodia), CAT/C/KHM/CO/2, 20 January 2011, para. 28, where the Committee expressed its concern at reports that the

ECtHR, which has considered allegations of ill-treatment in deciding fairness of proceedings even in the absence of a formal complaint of torture.[82]

42. A purely pragmatic justification for the exclusionary rule is that confessions or other information extracted through torture are intrinsically unreliable, as victims of torture are likely to say anything (whether true or not) in order to put an end to their torment. The intrinsic unreliability of such information was originally advanced in connection with arguments related to the right to a fair trial, as any conviction based on forced confessions would be unsafe.[83] Logically, however, the argument that evidence obtained through torture is unreliable is relevant not only to forced confessions but, more generally, to any information derived from a person subjected to torture, even if that person is not party to proceedings in which the information is to be used.[84] Of note is that a recent empirical study discredits the utility of the United States Central Intelligence Agency's "enhanced interrogation techniques" even for operative purposes, as it was found that they were not an effective means of acquiring intelligence, which lends further support to the argument that information obtained through torture is inherently unreliable.[85]

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use of forced confessions as evidence in courts is widespread in Cambodia; Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Report of Spain, CAT/C/SR.145, 23 August 1993, para. 8, "Paragraph 27 of the report [CAT/C/17/Add.10] reproduced a judgement of the Constitutional Court of 15 April 1991, stating that '... each of the defendants was questioned on the specific and detailed contents of his statements to the police; the defendants used this opportunity to deny their original statements and allege that the statements in question were made under pressure and torture. This allegation of torture, which had not been made before, either by the defendant or the defence counsel present at the police proceedings, cannot be taken into account by this Court in order to invalidate the statements'. That judgement was completely at variance with the provisions of article 15 of the Convention, which stipulated that any statement which was established to have been made as a result of torture could not be invoked as evidence in any proceedings. If the provisions of the Convention were directly applicable in Spanish law, article 15 could, on the contrary, be used to invalidate evidence given during the proceedings".

[82] *Saunders v. United Kingdom*, ECtHR, "Chamber Judgment", App. No. 19187/91, 17 December 1996, para. 71; *Jalloh v. Germany*, ECtHR, "Grand Chamber Judgment", App. No. 54810/00, 11 July 2006 ("*Jalloh v. Germany*"), para. 100; *Huseyn and Others v. Azerbaijan*, ECtHR, "Chamber Judgment", App. Nos. 35485/05, 45553/05, 35680/05 and 36085/05, 26 July 2011 ("*Huseyn and Others v. Azerbaijan*"), para. 202; citing *mutatis mutandis Örs and Others v. Turkey*, ECtHR, "Chamber Judgment", App. No. 46213/99, 20 June 2006 ("*Örs and Others v. Turkey*"), para. 58, and *Kolu v. Turkey*, ECtHR, "Chamber Judgment", App. No. 35811/97, 2 August 2005 ("*Kolu v. Turkey*"), para. 54.

[83] *See* Manfred Nowak & Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary*, p. 530; *Söylemez v. Turkey*, ECtHR, "Chamber Judgment", App. No. 46661/99, 21 September 2006, para. 122; *Örs and Others v. Turkey,* para. 60; *Kolu v. Turkey,* paras 51-54.

[84] *Huseyn and Others v. Azerbaijan,* para. 202; *El Haski v. Belgium*, ECtHR, "Chamber Judgment", App. No. 649/08, 25 September 2012 ("*El Haski v. Belgium*"), para. 85.

[85] United States Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, 3 December 2014 (Declassification Revisions), p. 2, where the report finds that individuals subjected to such treatment either produced "no intelligence" or they "fabricated information, resulting in faulty intelligence".

43. Against this background, a fairly recent development in the jurisprudence favours the broad exclusion of information obtained through torture, based on fundamental precepts of rights-based ethics. The ECtHR, which usually focuses on assessing the overall fairness of proceedings and refrains from making determinations regarding particular types of evidence,[86] made an exception in respect of the use of evidence obtained in breach of the prohibition of torture. The Grand Chamber of the ECtHR held that the use of evidence that was "secured as a result of a violation of one of the core and absolute rights guaranteed by the Convention" to establish the relevant facts rendered the proceedings as a whole unfair, irrespective of the probative value of the evidence and whether it was decisive for securing the accused person's conviction.[87] In another case, the Grand Chamber found that accepting the use in criminal proceedings of incriminating evidence that was obtained "as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture [...] would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the [European Convention on Human Rights] sought to proscribe" or "to afford brutality the cloak of law".[88]

44. In relation to non-criminal cases, the British case *A. and Others v. Secretary of State (no. 2)*[89] is of seminal importance. In that case, the House of Lords considered whether an administrative body deciding on deportation could lawfully admit evidence which was, or may have been, obtained through the torture of persons other than those who were the subject of the deportation proceedings, in another state and without the complicity of British officials. On the basis of the Common Law, the jurisprudence of ECtHR, and public international law, including Article 15 of the CAT, the House of Lords concluded that it could not, as torture evidence is "offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice".[90] This holding and the reasons underpinning it were upheld by the ECtHR in the case

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[86] *Khan v. The United Kingdom*, ECtHR, "Chamber Judgment", App. No. 35394/97, 12 May 2000 ("*Khan v. The United Kingdom*"), para. 34.
[87] *See Gäfgen v. Germany*, paras 165-166. *See also Desde v. Turkey*, ECtHR, "Chamber Judgment", App. No. 23909/03, 1 February 2011, paras 125-126, 132; *Othman (Aby Qatada) v. The United Kingdom*, ECtHR, "Chamber Judgment", App. No. 8139/09, 17 January 2012 ("*Othman v. The United Kingdom*"), paras 263-267.
[88] *Jalloh v. Germany,* para. 105, citing to the US Supreme Court judgment in *Rochin v. California*, 342 U.S. 165 (1952), paras 10-12.; *Harutyunyan v. Armenia*, ECtHR, "Chamber Judgment", App. No. 36549/03, 28 June 2007, para. 63.
[89] *A. and Others v. Secretary of State for the Home Department (no. 2),* [2005] UKHL 71 ("*A. and Others v. Secretary of State (no. 2)*"), paras 116-118.
[90] Lord Bingham in *A. and Others v. Secretary of State (no. 2)*, paras 35-52.

of *Othman v. The United Kingdom.* [91] The ECtHR recalled the House of Lords' finding that "the prohibition on receiving evidence obtained by torture is not primarily because such evidence is unreliable or because the reception of the evidence will make the trial unfair. Rather it is because 'the state must stand firm against the conduct that produced the evidence'".[92] The ECtHR further held that:

> [N]o legal system based upon the rule of law can countenance the admission of evidence – however reliable – which has been obtained by such a barbaric practice as torture. The trial process is a cornerstone of the rule of law. Torture evidence damages irreparably that process; it substitutes force for the rule of law and taints the reputation of any court that admits it. Torture evidence is excluded to protect the integrity of the trial process and, ultimately, the rule of law itself.[93]

45. The ECtHR concluded that relying on such evidence renders the trial as a whole immoral, illegal, and entirely flawed in its outcome.[94] The principles articulated in *Othman v. The United Kingdom* were confirmed in *El Haski v. Belgium*[95] and *Al Nashiri v. Poland.*[96] The ECtHR's jurisprudence stresses systemic coherence with Article 15 of the CAT.[97] Of note is also the reference to "integrity of the process" and "reputation of the court", echoing the terms employed by exclusionary rules of international criminal courts and tribunals.[98]

46. In sum, human rights bodies have found that the prohibition of the use of information derived through torture concerns any formal proceedings, whether judicial or administrative.[99] It further indicates that it is immaterial whether the act of torture was committed by the forum state or another state,[100] and whether the victim of torture is a party,

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[91] *Othman v. The United Kingdom,* para. 264.
[92] *Othman v. The United Kingdom*, para. 264, citing Lord Philips in *A. and Others v. Secretary of State (no. 2).*
[93] *Othman v. The United Kingdom*, para. 264.
[94] *Othman v. The United Kingdom*, para. 267.
[95] *El Haski v. Belgium,* para. 85.
[96] *Al Nashiri v. Poland,* ECtHR, "Chamber Judgment", App. No. 28761/11, 24 July 2014 ("*Al Nashiri v. Poland*"), para. 564.
[97] *Othman v. The United Kingdom,* paras 253, 266; *Jalloh v. Germany*, para. 105.
[98] *See supra* footnote 63; *Gäfgen v. Germany,* para. 175; *Othman v. The United Kingdom,* paras 253, 264, 266. *See also*, *Olmstead v. US,* 277 US 438 (1928), para. 484 (Brandeis J, diss), *Elkins v. US*, 364 US 206 (1960), paras 222-3, *Herring v. US,* 172 L Ed 2d 496 (2009), para. 512 (Ginsburg J, diss).
[99] *See also* CAT Committee, *G. K. v. Switzerland*, Communication No. 219/2002, CAT/C/30/D/219/2002, 7 May 2003 ("*G. K. v. Switzerland*"), para. 6.10, declaring that the "broad scope" of the prohibition in Article 15 of the CAT implies "an obligation for each State party to ascertain whether or not statements admitted as evidence in *any proceedings for which it has jurisdiction*, including extradition proceedings, have been made as a result of torture" (emphasis added); Conclusions and recommendations of the Committee against Torture: 4th Periodic Report (United Kingdom of Great Britain and Northern Ireland), CAT/C/CR/33/3, 10 December 2004, paras 4(a)(i), 5(d); Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/59/324, 1 September 2004, para. 23. *See also* Manfred Nowak & Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary*, p. 530; Lord Bingham before the House of Lords in *A. and Others v. Secretary of State (no. 2),* paras 42-44.
[100] *Othman v. The United Kingdom,* paras 263, 267; *El Haski v. Belgium,* paras 85, 86, 88, 89.

or otherwise participant, to the proceedings.[101] Whereas the ECtHR goes only so far as to stress the fundamental nature of the prohibition against the use of evidence obtained by torture,[102] the position of the CAT Committee is that the exclusionary rule, which is a function of the absolute nature of the prohibition of torture, is absolute and non-derogable.[103]

47. In light of the object and purpose so understood, the Supreme Court Chamber considers that the terms of Article 15 of the CAT are to be read so as to give full effect to the exclusionary rule. Accordingly, subject only to the exception set out in the second sentence of Article 15 of the CAT, information obtained as a result of torture is inadmissible as evidence, even if it is relevant to the subject of the proceedings and may have some probative value. The exclusionary rule covers the direct tendering of the extorted information into evidence, the use of its recording, irrespective of its form, as well as reproducing its content through witness testimony. Furthermore, the effect of the exclusionary rule is that statements falling under it may not be used to prove the truth of its content or even to imply that it might be truthful, for instance by confronting a witness with it.

C. Has it been established that the S-21 Statements were extracted by torture?

48. As recalled above, Article 15 of the CAT requires excluding from evidence "any statement which is *established* to have been made as a result of torture".[104] In this vein, the Co-Prosecutors submit that a fact-finder must first determine that the evidence in question was actually derived from torture before it may be excluded on that basis.[105] They contend that the evidence in Case 002/02 is "overwhelming" that all S-21 prisoners were tortured, but note that such evidence is very limited in Case 002/01.[106] Accordingly they request, for the purpose of deciding whether the S-21 Statements may be used during the July 2015 Hearing, that the Supreme Court Chamber "determine if this is a fact in dispute among the parties or can be resolved by a stipulation".[107] KHIEU Samphân, in turn, argues that evidence must be

[101] *Othman v. The United Kingdom,* para. 262; *El Haski v. Belgium,* para. 85.
[102] *Othman v. The United Kingdom,* paras 253-255; *El Haski v. Belgium,* para. 70.
[103] *See* General Comment No. 2, para. 6, on the implementation of Article 2 of the CAT by States parties, specifying that "no exceptional circumstances whatsoever…may be invoked as a justification of torture", the exclusionary rule contained in Article 15 of the CAT and the prohibition of cruel, inhuman or degrading treatment or punishment in Article 16 are "three provisions of the Convention that must be observed in all circumstances". *Similarly*, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez, U.N. Doc. A/HRC/25/60, 10 April 2014 ("Special Rapporteur Report A/HRC/25/60"), para. 17.
[104] Emphasis added.
[105] Co-Prosecutors' Objections, para. 7.
[106] Co-Prosecutors' Objections, para. 7.
[107] Co-Prosecutors' Objections, para. 7.

excluded where there exists a real risk that it was obtained by torture or coercion, and on that basis objects to the use of the S-21 Statements in the July 2015 Hearing.[108] By contrast, NUON Chea in his Appeal Brief emphasises that "the evidence has not established that any particular confession was produced by torture and intends to litigate this question of fact in Case 002/02".[109] The Supreme Court Chamber notes that the question of whether all S-21 prisoners were tortured and whether, consequently, all statements were made as a result of torture was the subject of a dispute among the parties before the Trial Chamber in Case 002/02.[110]

49. Article 321 of the CPC is silent both as to the applicable standard of proof and the allocation of the burden of proof to establish torture or duress for the purpose of the exclusionary rule. Upon seeking guidance at the international level,[111] the Supreme Court Chamber notes that the standard and burden of proof are not settled internationally, turn on the nature of the proceedings and circumstances of the case, and, in any event, are discussed in cases where the person concerned sought to *exclude* evidence against him or her, and not to use evidence in his or her defence. Nevertheless, a few general principles can be extracted from this international jurisprudence, as discussed below.

50. The CAT Committee generally ruled that, as a corollary to the absolute prohibition of torture, where a petitioner makes allegations that evidence – whether his or her own confession or other witnesses' statements – was obtained as a result of torture, the State concerned is under a duty to promptly and impartially investigate the veracity of the claim.[112] The CAT Committee's pronouncements on the requisite standard of proof, however, were not consistent.[113] In some cases, the CAT Committee deferred to the assessments undertaken by

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[108] KHIEU Samphân's Objections, paras 13-14.
[109] NUON Chea Appeal Brief, fn. 1902.
[110] T. (EN), 24 April 2015, E1/292.1, p. 30; T. (EN), 25 May 2015, E1/304.1, pp. 3-47; T. (EN), 26 June 2015, E1/319.1, pp. 21, 22; *See also* NUON Chea's Case 002/02 Submissions; Co-Prosecutors' Case 002/02 Submissions; Civil Party Lead Co-Lawyers' Case 002/02 Submissions; KHIEU Samphân's Case 002/02 Submissions; *Conclusions de la Defense de M. KHIEU Samphân concernant l'usage des informations obtenues sous la torture*, 21 May 2015, E350/4.2.
[111] As envisaged under Article 12 of the ECCC Agreement and Article 33 new of the ECCC Law.
[112] CAT Committee, *P. E. v. France*, Communication No. 193/2001, CAT/C/29/D/193/2001, 21 November 2002 ("*P. E. v. France*"), para. 6.3.
[113] *P. E. v. France*, para. 6.6 (holding that, for the prohibition in Article 15 of the CAT to apply, the allegations must be shown to be "well-founded"; the use of this standard has been criticised). *See,* Manfred Nowak & Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary*, p. 517; *G. K. v. Switzerland*, para. 6.11 (requiring that allegations be "well-founded"). *See also,* CAT Committee, *Ali v. Tunisia*, Communication No. 291/2006, CAT/C/41/D/291/2006, 21 November 2008, para. 15.4 (finding that torture has been established in the light of the applicant's allegations *vis-à-vis* failure of the State party to provide "sufficiently substantiated" counter arguments); *Aarrass v. Morocco*, Communication No. 477/2011,

domestic authorities, insofar as they did not disclose arbitrariness or partiality,[114] whereas in cases where the petitioners' allegations were not given serious consideration by domestic authorities or the State failed to convincingly refute them, the CAT Committee found, as a rule, a violation of Article 15 of the CAT. This was particularly the case when torture was alleged to have occurred in countries in relation to which periodic reports confirmed a widespread practice of torture by law enforcement officers or use of torture-derived confessions to secure convictions.[115]

51. Similarly, the HR Committee held that where allegations of torture are made in the context of the proceedings before it, "the burden of proof cannot rest on the author of the communication alone, especially since the author and the State party do not always have equal access to the evidence and it is frequently the case that the State party alone has the relevant information".[116] Accordingly, "where the allegations are corroborated by credible evidence submitted by the author and where further clarification depends on information that is solely in the hands of the State party", which failed to rebut the allegations, such allegations must be given due weight and may be considered substantiated.[117]

52. At the ECtHR, the standard and the allocation of the burden of proof was found to depend on the specificities of the facts of the case, the nature of the allegation made and the human rights at stake.[118] According to that jurisprudence, "proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact".[119] Regarding allegations of torture in particular, the ECtHR has also found that the "proceedings do not lend themselves to a strict application of the principle *affirmanti incumbit probation*", notably where "the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, for instance as in the case of persons under their control in custody".[120] Allegations of torture were deemed more credible if supported by

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CAT/C/52/D/477/2011, 19 May 2014 ("*Aarrass v. Morocco*"), paras. 10.5, 10.6, 10.8, (finding that the duty to investigate allegations of torture arises "wherever there is reasonable ground to believe that an act of torture has been committed").

[114] *P. E. v. France*, paras 6.4, 6.5; *G. K. v. Switzerland*, paras 6.11, 6.12.

[115] *Aarrass v. Morocco*, paras 10.8, 11; *Yousri Ktiti v. Morocco*, Communication No. 419/2010, CAT/C/46/D/419/2010, 5 July 2011, paras 8.6-8.8.

[116] HR Committee, *Maharjan v. Nepal*, Communication No. 1863/2009, CCPR/C/105/D/1863/2009, 19 July 2012 ("*Maharjan v. Nepal*"), para. 8.3 and references cited therein; *Womah Mukong v. Cameroon*, Communication No. 458/1991, CCPR/C/51/D/458/1991, 21 July 1994, para. 9.2.

[117] *Maharjan v. Nepal*, para. 8.3; HR Committee, *Shukurova v. Tajikistan*, Communication No. 1044/2002, CCPR/C/86/D/1044/2002, 17 March 2006, para. 8.2.

[118] *Al Nashiri v. Poland*, para. 394 and references cited therein.

[119] *Al Nashiri v. Poland*, para. 394.

[120] *Al Nashiri v. Poland,* para. 396.

evidence of a pattern of similar human rights abuses, for example, by a large number of complaints of similar conduct supported by corroborating evidence.[121] On the other hand, where the judicial system is independent and impartial, and "allegations of torture [are] conscientiously investigated", it is conceivable to require a higher standard of proof.[122] In *El Haski v. Belgium* as well as in *Othman v. The United Kingdom*, the exclusionary rule was held to apply where there is a "real risk" that a statement was obtained through torture or inhuman or degrading treatment, in light of the "special difficulties in proving allegations of torture [...] in a criminal system which was complicit in the very practices which it existed to prevent".[123]

53. Turning to international criminal proceedings, the ICTY Trial Chamber in the case of *Prosecutor v. Martić* adopted guidelines on the standards governing the admission of evidence,[124] which elaborated on the terms of the ICTY RPE barring evidence "obtained by methods which cast substantial doubt on its reliability" and evidence the admission of which is "antithetical to, and would seriously damage, the integrity of the proceedings".[125] The guidelines notably stipulate that, if there are "*prima facie* indicia" that statements were not voluntarily given, the burden shifts to the party seeking to admit the evidence to prove that the statements were not obtained through oppressive conduct.[126] In other instances where the defence submitted that an accused's confession was obtained by means of oppressive conduct, the ICTY clarified that, in the context of deciding whether to apply a procedure akin to a *voir dire* as known in Common Law jurisdictions, the defence is first required to "satisfy" the court by showing that the confession *may* have been obtained by means that render it unreliable before the court; once this threshold is met, the prosecution has to prove beyond reasonable doubt that it was obtained voluntarily.[127]

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[121] *Denmark v. Greece*, App. No. 3321/67; *Norway v. Greece*, App. No. 3322/67; *Sweden v. Greece*, App. No. 3323/67; *Netherlands v. Greece*, App. No. 3344/67, in *Yearbook of the European Convention on Human Rights*, Vol. 12, 1969, p. 502, para. 14.
[122] *El Haski v. Belgium*, paras 86, 88; *Othman v. The United Kingdom*, paras 272-280, 282.
[123] *El Haski v. Belgium*, paras 86, 88; *Othman v. The United Kingdom*, paras 263, 272, 276, 285.
[124] *Prosecutor v. Milan Martić,* IT-95-11-T, "Decision Adopting Guidelines on the Standards Governing the Admission of Evidence", Trial Chamber, 19 January 2006 ("*Prosecutor v. Martić*"), Annex A, para. 9.
[125] ICTY RPE, Rule 95.
[126] *Prosecutor v. Martić*, para. 9, confirmed in *Prosecutor v. Radovan Karadžić*, IT-95-5/18-T, "Decision on Guidelines for the Admission of Evidence through Witnesses", Trial Chamber, 19 May 2010, para. 11 referring, *inter alia*, to *Prosecutor v. Perišić,* IT-04-81-T, "Order on Guidelines on the Admission and Presentation of Evidence and Conduct of Counsel in Court", Trial Chamber, 29 October 2008, para. 38.
[127] *Prosecutor v. Zejnil Delalić et al.*, IT-96-21, "Decision on the Motions for the Exclusion of Evidence by the Accused, Zejnil Delalić", Trial Chamber, 25 September 1997, paras 31-33, 40; *Prosecutor v. Zejnil Delalić et al.*, (IT-96-21), "Decision on Zdravko Mucić's Motion for the Exclusion of Evidence", Trial Chamber, 2 September 1997, paras 42, 48 (finding that it was incumbent on the Prosecutor to establish beyond reasonable

54. The standard of proof was a key issue in domestic jurisdictions, several of which favoured more exacting approach to the burden and standard of proof.[128] Of particular prominence are the cases of *Mounir El-Motassadeq* before the Hanseatisches Oberlandesgericht (Higher Regional Court) in Hamburg, Germany[129] ("*El-Motassadeq*") and *A. and Others v. Secretary of State (no. 2)* before the British House of Lords.[130] In the former case, the Hamburg court found that, in a situation where there are only some indications that evidence was obtained through torture, this does not suffice to exclude it from use in criminal proceedings.[131] In the second case, the majority of the House of Lords conceded that petitioners cannot be realistically expected to prove anything, given their usual limited access to information; they may merely "raise the issue" before the competent authority.[132] Nevertheless, echoing the *El-Motassadeq* case, the majority found that evidence must be excluded only if it is established, "by means of [...] diligent inquiries into the sources that it is practicable to carry out and on balance of probabilities", to have been extracted through torture.[133] In case of doubt, evidence is admissible, though this factor is to be borne in mind in the evaluation of such evidence.[134] While this standard has been criticised on human rights grounds as being too exigent and failing to effectively shift the burden of proof on the

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doubt that a statement of the accused or suspect person had not been obtained through oppressive conduct); *Prosecutor v. Sefer Halilović*, IT-01-48-T, "Decision on Admission into Evidence of Interview of the Accused", Trial Chamber I Section A, 20 June 2005, paras 11, 17 (rejecting a defence's request for a *voir dire* hearing, owing to the dearth of evidence in support of the defence's allegation that the accused's interview was not voluntarily given; *Prosecutor v. Sefer Halilović*, IT-01-48-AR73.2, "Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table", Appeals Chamber, 19 August 2005, para. 46 (criticising the *Halilović* Trial Chamber for having failed to consider that a break in the accused's interview constituted a sufficient element to prompt the Trial Chamber "to explore more fully the voluntariness of the interview", without necessarily holding a *voir dire*).

[128] *See, India v. Singh* (1996), 108 C.C.C. (3d) 274 (B.C.S.C., Canada), paras 21, 33 (extradition proceedings adopting the balance of probabilities test, finding that the allegations of torture were established to the required threshold in a case in which their "persuasive nature" was coupled with the absence of any denial by the alleged torturers); *Li v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 (Canada), paras 21-28; *Suresh v. Canada* [2000] 2 FCR 592, paras 151-152 (both adopting the balance of probabilities standard in cases of *refoulement* of a refugee to a country which exposed the individual to a risk of torture); *Harkat (Re)*, 2005 FC 393 (Canada), para. 116 (immigration proceedings adopting the balance of probabilities test). *See* conversely, *Mohammad Zeki Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1503, (Canada), paras 30, 33 (whether the applicant had a realistic opportunity under the circumstances to provide detailed information corroborating the allegations of torture was significant to the findings). *See also Re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005), p. 474 (the petitioning detainees were required to make "sufficient allegations").

[129] Higher Regional Court, Hamburg, Germany, decision of 14 June 2005, case numbers 2 BJs 85/01 – 2 StE 4/02 - 5 IV – 1/04, (available in German at: http://openjur.de/u/86173.html [accessed on 26 October 2015]).

[130] *A. and Others v. Secretary of State (no. 2),* paras. 116-118 (deportation proceedings adopting the balance of probabilities test).

[131] *El-Motassadeq,* paras 12, 24.

[132] *A. and Others v. Secretary of State (no. 2)* , para. 116.

[133] *A. and Others v. Secretary of State (no. 2)*, para. 121, 125. Lord Hope cited with approval *El-Motassadeq*.

[134] *A. and Others v. Secretary of State (no. 2)*, para. 118.

State,[135] it must not be overlooked that in cases were the evidence was not collected by the State pursuing prosecution, as the State is in no better position than the accused person to show whether or not information was obtained through torture.[136]

55. In conclusion, in addressing the question of proof applicable to the exclusionary rule, there seems to be agreement that, due to the unequal and often limited access to information possessed by public authorities, individuals cannot be expected to carry the full burden of establishing that a statement was procured through torture. The solution often rests on requiring the individual, in the first place, to advance a *prima facie* credible allegation that evidence was improperly obtained, in order to shift the burden of proof and trigger an inquiry by the court or the prosecution. The standard of proof applied at the next step, namely to "establish" that a statement falls under an exclusionary rule, is not well-articulated. The recent preference of human rights bodies is to exclude evidence upon the finding of a "real risk" of torture applied in relation to judicial systems that do "not offer meaningful guarantees of an independent, impartial and serious examination" of allegations of torture.[137] In that regard, as previously discussed,[138] the ECtHR, the CAT Committee and the HR Committee are prepared to find that a statement was the result of torture, where the complainant alleged that he or she had been tortured and that torture was widespread, when this allegation was not rebutted by the State in question.

56. The Supreme Court Chamber considers that, in the context of the case before it, it can readily accept that there is a "real risk" that the S-21 Statements were obtained through torture. In this regard, the Supreme Court Chamber recalls that in Case 001 it sanctioned the conclusions reached at trial by finding that:

> [A]t S-21, '[a] variety of torture techniques' for interrogation purposes 'were applied in an environment of extreme fear where threats were routinely put into practice and caused detainees severe pain and suffering, both physical and mental'. These interrogation methods included 'one proven instance of rape'. Furthermore, the Trial Chamber found that 'the S-21 interrogators […] who perpetrated acts of torture acted in

[135] Special Rapporteur Report A/61/259, para. 64; ECtHR in *El Haski v. Belgium*, para. 86 and *Othman v. The United Kingdom*, paras 274, 276; minority opinion by Lord Bingham in *A. and Others v. Secretary of State (no. 2)*, para. 60.
[136] *See A. and Others v. Secretary of State (no. 2)*, paras 119, 125; Manfred Nowak & Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary*, p. 533.
[137] *El Haski v. Belgium*, para. 88.
[138] *Supra* paras 50-52.

official capacity'. These officials carried out acts constituting torture 'for the purpose of obtaining a confession or of punishment'.[139]

57. Further, KAING Guek Eav (alias *Duch,* accused and convicted in Case 001) himself admitted that S-21 detainees were subjected to systemic interrogation with the routine use of violence,[140] aimed at extracting confessions through torture, which was prescribed by him in detailed annotations; such annotations were also examined by the Trial Chamber.[141] As a result, S-21 detainees lived in a "permanent climate of fear".[142] It was established that inmates could "hear screaming and crying",[143] and would see "that other detainees returning from interrogations showed signs of severe beating, mutilation, bruises and cuts." [144] In light of the Case 001 findings of torture, physical mistreatment and psychological suffering, in the absence of substantiated indications to the contrary, the Supreme Court Chamber is satisfied that there is a real risk that the S-21 Statements were obtained through torture and each statement may thus be presumed to be so obtained.

58. As to the level of proof required for the purpose of introducing the S-21 Statements into evidence for the truth of facts narrated therein, the Supreme Court Chamber considers that relying ultimately on the presumption that all the S-21 Statements were the result of torture would not sit well with the obligation of the Chambers of the ECCC to establish the truth, as relevant to the charges. The torture at S-21 was not alleged to have taken place at the behest or with the knowledge of the prosecution authorities; accordingly, the prosecution authorities are in no better position than any of the other parties to confirm or refute a claim that information was extracted through torture. Moreover, excluding it as soon as there is a real risk that it was obtained through torture would, in the circumstances of the present case, be potentially prejudicial to NUON Chea, who seeks to rely on the S-21 Statements. Accordingly, any party that seeks to rely on a statement taken at S-21 should be allowed to rebut the presumption by offering proof that the information in question was not the result of torture. For that reason, when deciding on this issue, the Chambers need to take into account, in addition to the submissions of the parties, any relevant information of which they are aware; eventually, a statement taken at S-21 may only be admitted into evidence if it has been established, on a balance of probabilities, that it was *not* the result of torture.

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[139] Appeal Judgement, 3 February 2012, F28 ("Case 001 Appeal Judgment"), para. 209, *quoting* Case 001 Judgement, 26 July 2010, E188 ("Case 001 Trial Judgment"), paras 241, 359-360 (emphasis added).
[140] Case 001 Trial Judgment, paras 153 et seq. and references thereto.
[141] Case 001 Trial Judgment, paras 176-177.
[142] Case 001 Trial Judgment, para. 258.
[143] Case 001 Trial Judgment, para. 262.
[144] Case 001 Trial Judgment, para. 264.

59. For the limited purposes of the July 2015 Hearing, however, the Supreme Court Chamber considers that the S-21 Statements are established to have been derived from torture. As such, they fall under the exclusionary rule of Article 15 of the CAT. The Supreme Court Chamber emphasises that it makes this assessment in the circumstances where the parties intend to use the S-21 Statements to examine witnesses in the July 2015 Hearing; as such, the importance of the S-21 Statements to the proceedings is lower than if they were to be admitted into evidence. Moreover, none of the parties seeking to use the S-21 Statements has asserted that they were not extorted through torture. It follows that the Supreme Court Chamber is not required to carry out a more thorough inquiry into how the S-21 Statements were obtained.

D. Whether Article 15 may be derogated to enable the use of the S-21 Statements to assist in defence of NUON CHEA?

60. NUON Chea argues that Article 15 of the CAT only prohibits the use of torture-tainted evidence *against* an accused and therefore has the effect of permitting its use *by* an accused, as confirmed by subsequent State practice, the examples of which limit exclusionary rules to evidence offered by the prosecution.[145] He contends that the object and purpose of Article 15 of the CAT are only aimed at preventing the prosecution from benefiting from the use of information obtained through torture, but do not cover any other scenarios, particularly where a defendant wishes to use such evidence to prove his or her innocence.[146]

61. At the outset, the Supreme Court Chamber observes that the fact that certain municipal systems have express exclusionary rules only in relation to evidence adduced by the agency investigating or prosecuting the case demonstrates only that legislative decisions were limited to addressing the most frequent pattern of abuse; it does not demonstrate that in those municipal systems torture-tainted evidence is legally admissible in other situations.[147] In this

[145] NUON Chea Appeal Brief, paras 712-716.
[146] NUON Chea Appeal Brief, paras 717-722.
[147] Concerning the examples given by the NUON Chea (*see* NUON Chea Appeal Brief, paras 714-715, 721-722), the Supreme Court Chamber notes that the source cited, (E.U. Network of Independent Experts on Fundamental Rights, "Opinion on the status of illegally obtained evidence in criminal procedures in the Member States of the European Union", CFR-CDF, 30 November 2003 ("E.U. Opinion"), p. 7), focuses on illegality in breaching the right to private life, plainly leaving the application of Article 15 of the CAT as a proscription *not* considered for derogation. *See* "The Legal Framework", E.U. Opinion, p. 6 fn. 7 and p. 7. The specific examples cited in the NUON Chea Appeal Brief of waiving exclusionary rules in favour of the defence derived from the E.U. Opinion and the example of New Zealand legislation ("2006 Act"), which has been interpreted to allow the use in support of the defence of out of court confession of a co-defendant, do not seem relevant as, on the facts cited, they do not concern statements obtained through torture. Regarding the specific legal systems invoked as examples: For the United Kingdom, *see A and Others v Secretary of State (no. 2),* paras 91-97. In Germany, while sections 136a and 69 of the German Code of Criminal Procedure apply *inter alia* to torture in the context

regard, it is noteworthy that the CAT Committee has frequently called upon States Parties to the CAT to fully align their domestic legislation with the precise wording of Article 15 of the CAT.[148] The CAT Committee has also expressed concern about the use of torture-tainted evidence in jurisdictions where broad exclusionary rules in full conformity with Article 15 of the CAT were in place.[149] However, NUON Chea's argument that State practice would

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of the investigation of the case at hand, the inadmissibility of evidence in criminal proceedings may also result from other norms, including the Basic Law (*see*, for example, German Federal Consitutional Court, Second Senate, decision of 14 September 1989, case no. 2 BvR 1062/87, regarding the exclusion of evidence relating to the protected core sphere of privacy) and Article 15 of the CAT (*see El Motassadeq*, paras 9 et seq.). In Denmark, the same E.U. Opinion that states that unlawfully obtained evidence favourable to the defence must be admitted as a general rule also comments that "the courts increasingly tend to disregard unlawfully obtained evidence in criminal cases" (E.U. Opinion, p. 12). There is no caselaw cited in the E.U. Opinion on Denmark to specify how the unlawful evidence was obtained, the majority of examples cited in the document involve violations to the right to privacy. The CAT Committee has been critical of Denmark's incorporation of the Convention into domestic law under its dualist system, "[t]he Committee regrets that the State party has not changed its position with regard to the incorporation of the Convention into Danish law (Conclusions and Recommendations of the Committee Against Torture (Denmark), CAT/C/DNK/CO/5, 16 July 2007, para. 9). The CAT Committee makes no mention of Article 15, nor the use of unlawfully obtained evidence when reviewing Greece's country reports, but it considered "[Greece's compliance with the Convention] satisfactory, but some of its members also considered it to be one of the most advanced legislations in Europe" (CAT Committee, Second Periodic Reports of States Parties due in 1993 (Addendum Greece), CAT/C/20/Add.2, 16 December 1993, para. 3). Neither of the Canadian cases cited by the Defence involves torture tainted evidence. In the first, *R v. Mills* [1999] 3 SCR 668 (Canada) the Supreme Court upheld as constitutional Sections 278.1 to 278.91 of the Canadian Criminal Code, which balance the right of the accused to make a full defence with the right to privacy of a victim's records in cases of sexual assault. The second case, *Basaillon v. Keable*, [1983] 2 SCR 60 (Canada), balanced the secrecy rule regarding police informers' identity with the singular exception to demonstrate the innocence of an accused person in a criminal trial. The Supreme Court of Canada had previously recognised in *R v. Seaboyer*, [1991] 2 S.C.R. 577, p. 611 the difference between excluded evidence tendered by the prosecution and similar evidence tendered by the defence. Cautious guidance on the admissibility of evidence by the defence that is typically ruled out due to an exclusionary rule, favours the fair trial right of the accused to be presumed innocent. "[T]he prejudice must substantially outweight the value of the evidence" before disallowing evidence raised by the defendant.

[148] *For example,* "The Committee recommends that [Finland] enact legislation specifically prohibiting the use of statements obtained under torture as evidence and elements of proof in conformity with Article 15 of the Convention", (CAT Committee, Concluding Observations of the Committee Against Torture (Finland), CAT/C/FIN/CO/5-6, 29 June 2011, para. 21); "[Israel] should prohibit by law that any statement which is established to have been made as a result of torture cannot be invoked as evidence in any proceedings against the victim, in line with Article 15", (Concluding Observations of the Committee Against Torture (Israel), CAT/C/ISR/CO/4, 23 June 2009, para. 25); "[Morocco should] incorporate a provision prohibiting any statement obtained under torture from being invoked as evidence in any proceedings, in conformity with Article 15 of the Convention", (Conclusions and Recommendations of the Committee Against Torture (Morocco), CAT/C/CR/31/2, 5 February 2004, para. 6(h)); "[the United Kingdom's] law has been interpreted to exclude the use of evidence extracted by torture only where the State party's officials where complicit" in contravention of the precise meaning of Article 15; (Conclusions and Recommendations of the Committee Against Torture (United Kingdom of Great Britain and Northern Ireland), CAT/C/CR/33/3, 10 December 2004, para. 4); "[Sweden must] ensure that the prohibition on the use of statements obtained by torture as evidence in proceedings is clearly formulated in domestic law", (Conclusions and Recommendations of the Committee Against Torture (Sweden), CAT/C/CR/28/6, 6 June 2002, para. 7(h)).

[149] For example, Article 21 of the Russian Constitution offers a broad, non-derogable prohibition against torture and Article 50(2) prohibits the use of evidence in violation of federal law whereas in accordance with Article 75 of the Code of Criminal Procedure, evidence obtained in breach of the Code is inadmissible, has no legal force and cannot be used as the basis of an indictment or to substantiate the material facts of a case, However, "[t]he Committee is concerned about numerous allegations that persons deprived of their liberty were subjected to torture or ill-treatment for the purpose of compelling a forced confession, and that such confessions were subsequently admitted as evidence in court in the absence of a thorough investigation into the torture

demonstrate, in the sense of Article 31 of the VCLT, an agreed interpretation on restricting Article 15 of the CAT to evidence adduced in support of prosecution, is without merit.

62. The real issue before the Supreme Court Chamber is whether the exclusionary rule of Article 15 of the CAT covers information obtained through torture when used for the purpose of defence, *i.e.* where the right against self-incrimination and the risk of a conviction based upon unreliable evidence are not in question. Further, even if such use came into the exclusionary rule's purview, the question is whether the reasons underlying the prohibition may be balanced against the right to present a defence in individual instances.

63. In this regard, it falls to be considered that, unlike the right to a trial fair as a whole and the right to an independent and impartial tribunal, the right to present evidence as a component of the right to a fair trial is not absolute. Given that the accused is protected mainly by the presumption of innocence, the right to remain silent and the right to test evidence against him or her, the right to present evidence may become subject to limitations aimed at protecting other values and interests, such as expeditiousness and integrity of proceedings. Recalling that rules of evidence and exclusionary rules are usually not established by international human rights standards, but at the municipal level, it is noteworthy that they do not only have the purpose of protecting the accused from prejudice, but also, by eliminating certain means of proof or certain facts from proving, they protect, among other things, the reliability of evidence,[150] the confidentiality of judicial

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allegations", (Concluding Observations on the Fifth Periodic Report of the Russian Federation, CAT/C/RUS/CO/5, 11 December 2012, para. 10). In Poland, pursuant to Article 171 the Code of Criminal Procedure it is prohibited to influence the statement of the examined person through coercion or unlawful threat, or through the application of "hypnosis or chemical or technical means affecting the psychological processes of the examined person or aimed at influencing unconscious reactions of his organism in connection with the examination" (Code of Criminal Procedure Act, 6 June 1997, amended 1 July 2015, Art. 171(4)(2)) and explanations, testimony and declarations obtained in conditions excluding free deposition do not constitute evidence (Art. 171(6)). In this regard, however, the CAT Committee stated that it "regrets that, despite its previous recommendations [...] the State party still maintains its position on not incorporating the provisions of the Convention [...] into domestic law", (CAT Committee, Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Poland, CAT/C/POL/CO/5-6, 23 December 2013, para. 7).

[150] An example for this is the prohibition of hearsay evidence that exists in several jurisdictions. *See* Rule 802 of the United States Federal Rules of Evidence, which provides that "[h]earsay is not admissible unless any of the following provides otherwise: a federal statute; these rules; or other rules prescribed by the Supreme Court" (Fed. R. Evid. 403); Section 114(1) of the Criminal Justice Act 2003 (Chapter 44) in the United Kingdom provides that "[i]n criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if— a) any provision of this Chapter or any other statutory provision makes it admissible, [...] d) the court is satisfied that it is in the interests of justice for it to be admissible"; In Hong Kong the hearsay rule was imported from the British common law and was reaffirmed in *Wong Wai-man & Others v. HKSAR,* (2000) 3 HKCFAR 322, para. 327 (*Report*: *Hearsay in Criminal Proceedings,* The Law Reform Commission of Hong Kong (November 2009), paras 1.9, 3.3). There is no statutory provision excluding hearsay evidence in Canada but the exclusionary rule is well-established in case law, "exceptions to the exclusionary rule were largely crafted around those circumstances where the dangers of receiving the evidence

deliberations,[151] third persons' right against self-incrimination,[152] family relations,[153] the right to privacy,[154] State secrets,[155] and professional ethics.[156] Depending on the purpose of the

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were sufficiently alleviated", *R. v. Khelawon*, 2006 SCC 57, para. 3. Article 75 of the Russian Code of Criminal Procedure bans the admissibility of "evidence of the victim and of the witness, based on a surmise, a supposition or hearsay, as well as the testimony of the witness, who cannot indicate the source of his knowledge" (Criminal Procedure Code of the Russian Federation No. 174-FZ, 18 December 2001, Amended 1 March 2012, Art. 75(2)(2)). *See also, ibid.*, Article 193, establishing the inadmissibility of "a repeated identification of a person or of an object by the same identifying person and by the same features".

[151] At common law, the general principle is that anything said in the course of judicial proceedings is absolutely privileged (Irish Law Reform Commission, Civil Law of Defamation, Consultation Paper on the (LRC CP 3-1991) [1991] IELRC 2 (March 1991), p. 77). In the U.S. both tradition and the doctrine of separation of powers support the legitimacy of judicial privilege. *See United States v. Morgan*, 313 U.S. 409 (1941), para. 422 (the mental processes of a judge cannot be subjected to scrutiny, "[s]uch an examination of a judge would be destructive of judicial responsibility"); *Soucie v. David*, 448 F.2d 1067, (D.C. Cir. 1971), pp. 1080-81. *See also Nixon v. Sirica*, 487 F.2d 700, (D.C.Cir.1973) (MacKinnon, J., concurring), paras 740-742 (the source of judicial privilege is "rooted in history and gains added force from the constitutional separation of powers"); *Grant v. Shalala*, 989 F.2d 1332 (3d Cir.1993), p. 1344 ("[i]t has long been recognized that attempts to probe the thought and decision making processes of judges and administrators are generally improper"). *See also*, *Canada (Privacy Commissioner) v. Canada (Labour Relatinos Board)* (T.D.) [1996] 3 F.C. 609, p. 612 (Complete liberty of individual judges to decide the cases that come before them is the very essence of the principle of judicial independence. Complete liberty to decide can only exist if the judge is entirely free from interference in fact or attempted interference by any "outsider" with the way in which the judge conducts the case and makes his or her decision). In France, judges take an oath to "religiously" preserve the confidentiality of deliberations among other duties (Article 6 de l'ordonnance n°58.1270 of 22 December 1958 contains the oath formula : "*je jure de bien fidèlement remplir mes fonctions, de garder religieusement le secret des délibérations et de me conduire en tout comme un digne et loyal magistrat*"). In Russia, Article 56(3) of the Code of Criminal Procedure (footnote 149, above) exempts from testifying judges and jurors "about circumstances of the case, which have become known to them in connection with their participation in the procedure on the given criminal case". At the ICTY, the Appeals Chamber held in *Delalic et al.,* AC, ICTY, 7 December 1999 at para 5: "[J]udicial deliberations and observations in relation to matters on which judges are required to adjudicate should not be the subject of compelled evidence before the International Tribunal or exposure in any forum other than the proper forum of published reasons for decision in a particular matter".

[152] The right against self-incrimination has long been a principle at common law and was recognised in Section 3 of the UK Evidence Act 1851 c. 99, "[n]othing [...] shall render any person compellable to answer any question tending to criminate himself or herself". *See Blunt v. Park Lane Hotel,* [1942] 2KB 253, p. 257, where the Plaintiff's claim that the investigation "would expose her to the risk of ecclesiastical penalties" as an adulterer were dismissed and "the rule [...] that no one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the deponent to any criminal charge, penalty [...]" was upheld. Section 13 of the Canadian Charter of Rights and Freedoms grants constitutional protection against self-incriminatory witness testimony, "[a] witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings [...]" (The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11). In the ECHR system, even where not explicit in the national law, the privilege against self-incrimination has been affirmed by the European Court, *see Serves v. France*, ECtHR, "Chamber Judgment", App. No. 20225/92, 20 October 1997, para. 47, where the Court held regarding a person summoned as witness "It is understandable that the applicant should fear that some of the evidence he might have been called upon to give before the investigating judge would have been self-incriminating. It would thus have been admissible for him to have refused to answer any questions from the judge that were likely to steer him in that direction."; *K. v. Austria*, ECtHR, "Chamber Judgment (struck out of the list)", App. No. 16002/90, 2 June 1993, which prompted reform of the Austrian criminal procedure to the effect that "[a] witness, against whom on account of the same facts criminal proceedings are pending and who may incriminate himself through his own statements given as a witness, will therefore have an unconditional right to refuse to give evidence. This ensures that breaches of the Convention of this type can no longer arise" (at para. 14). *See also* Charter of Fundamental Rights and Freedoms of the Czech Republic, 16 December 1992, Article 37(1), "[e]veryone has the right to refuse to give testimony if she would thereby incriminate herself or a person close to her" (Constitutional act No. 2/1993 Coll., as amended by Constitutional Act No. 162/1998 Coll.).

exclusionary rule in question, the right to waive the prohibition – if at all possible – may belong to the accused, other persons protected by the rule, or may be remitted to a judicial or administrative decision. In any event, there is no support in human rights doctrine for construing the right to present a defence to either automatically trump exclusionary rules, or to find that the interest of accused must always be decisive in waiving them. Rather, the accused is entitled to waive the prohibition stipulated by an exclusionary rule only where the

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[153] In the U.K. "nothing [...] shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband" (Section 3 of the Evidence Act 1851 c. 99). In Canada spousal privilege is legislated under section 4(3) of the Canada Evidence Act, RSC 1985, c. C-5, which was affirmed in *R. v. Zylstra*, (1995) 99 CCC (3d) (ONCA Canada). Similar provisions exist in most European codifications, *see, e.g.*, Article 416.1 of the Spanish Code of Criminal Procedure of 1882 (Ley de Enjuiciamiento Criminal) exempts a spouse and other relatives from the obligation to testify as witnesses (Núm. 260, de 17 de septiembre de 1882, last modified 29 July 2015); Article 56 (4) of the Russian Code of Criminal Procedure (fn 149 above)

[154] In the U.S. the *Federal Wiretap Statute* prohibits the interception and use of illegally intercepted communications (18 U.S.C. §§2510 et seq). "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter." (18 U.S.C. §2515). *See Gelbard v. U.S.*, 408 U.S. 41, 51-52 (1972) [witness could not be forced to disclose testimony from illegal wiretap to grand jury] *and Lee v. Florida* 392 U.S. 378 (1968) where the Supreme Court extended its interpretation of section 605 of the Federal Communications Act to render conversations intercepted and divulged in violation of the Act inadmissible as evidence in a state court. *See also R v Tse* 2012 SCC 16 where the Supreme Court of Canada regarded warrant-less wiretaps in emergency situations as unconstitutional due to a lack of oversight and accountability measures. The German Code of Criminal Procedure specifically prohibits the use of information concening the core area of private life. Section 100c(5) (5) provides: "The interception and recording is to be interrupted without delay if during the surveillance indications arise that statements concerning the core area of the private conduct of life are being recorded. Recordings of such statements are to be deleted without delay. Information acquired by means of such statements may not be used" (Code of Criminal Procedure, 7 April 1987. Amended by Article 3 of the Act of 23 April 2014). Regarding exclusion based in the nature of the facts, at the *ad hoc* international criminal tribunals and at the ICC, prior or subsequent sexual conduct of a victim cannot be admitted into evidence regardless of its probative value, (ICTY RPE, ICTR RPE, Rule 96(iv); International Criminal Court (ICC), Rules of Procedure and Evidence, ICC-ASP/1/3 (Part.II-A), adopted on 9 September 2002, Rule 71).

[155] According to the Italian Constitutional Court, Judgment No. 40 (2012), paras 5, 6.4 (considerando in diritto), the right to present a defence is outweighed by the "essential and irrepressible interest" to protect national security, which prevails over other tenets. Therefore, information or documents if classified as State secrets by the Prime Minister, the dissemination of which could pose a threat to national security, cannot be disclosed or used in criminal proceedings, regardless of whether they are alleged to constitute inculpatory or exculpatory evidence.

[156] On lawyer-client privilege *see* American Bar Association Model Rules of Professional Conduct, Rule 1.6 Confidentiality of Information [2015]). *See also State v. Macumber*, 544 P.2d 1084 (Ariz. 1976), p. 1086 describing how the Arizona Supreme Court affirmed the trial court, which asserted the attorney-client privilege after the death of the client and *State v. Hunt*, 659 S.E.2d 6 (N.C. 2008) where two men, Hunt and Cashwell, were convicted of a murder only to have Cashwell subsequently confess to his public defender of being the sole perpetrator, which the attorney did not reveal until after Cashwell's death (Colin Miller, "Ordeal by Innocence: Why There Should be a Wrongful Incarceration/Execution Exception to Attorney-Client Confidentiality", *Northwestern University Law Review Colloquy*, Vol. 102 (July 14, 2008), pp. 391-392) . For privileges in civil law jurisdictions, *see e.g.*, Article 178 of the Polish Code of Criminal Procedure (Code of Criminal Procedure Act, 6 June 1997, as amended on 1 July 2015) and Art. 56 (3) of the Russian Code of Criminal Procedure (fn 149 above), asserting priviledge against testyfying for legal counsel and religious confessors as to information acquired in the course of their duties.

rights and interests that it protects are at the accused person's autonomous disposal.[157] In other instances the question of waiving an exclusionary rule must be resolved by balancing the competing interests based on considerations of necessity and proportionality.[158]

64. In the opinion of this Chamber, the fact that Article 15 of the CAT does not list the right to a fair trial as its concern does not demonstrate that this right was left outside consideration as a relevant interest when adopting the provision. To the contrary, the choice not to limit its prohibitive language to evidence *against* a person[159] and its drafting history[160] indicate that the exclusionary rule was not meant to be mitigated, generally, on account of the right to present a defence. In testing this proposition against the object and purpose of Article 15 of the CAT, as elucidated above, it has to be noted that the overarching goal of preventing torture would not be served by authorising the use of information obtained through torture in any other circumstances than those set out in the second sentence of the provision - because any act of legitimisation of such information as evidence weakens the prohibition and could develop a constituency with a vested interest in circulating statements obtained through torture. This said, the Supreme Court Chamber concedes that concerns of general deterrence are not persuasive in dismissing rights-based claims in individual cases, unless they would have been calculated into, and expressed through, categorical legislative decisions. Accordingly, the preventive rationale of Article 15 of the CAT would be valid for the present discussion only upon reading of its proscription as non-derogable. In any event, even if one assumed, for the sake of argument, that the preventive function of exclusionary rule stipulated by Article 15 of the CAT could be ceded in favour of the right to present a defence based on information obtained through torture, the right to defence would still compete with the imperative to not use evidence that is inherently unreliable, moreover, originates from an act not only denigrating human dignity, but also cruel and *juris cogentis* criminal. Moreover,

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[157] Such as statements taken in violation of the right to silence, or statements taken in the absence of the counsel where the accused was not advised of his rights.

[158] *See Al Nashiri v. Poland,* para. 494, "It is to be recalled that even if there is a strong public interest in maintaining the secrecy of sources of information or material, in particular in cases involving the fight against terrorism, it is essential that as much information as possible about allegations and evidence should be disclosed to the parties in the proceedings without compromising national security. Where full disclosure is not possible, the difficulties that this causes should be counterbalanced in such a way that a party can effectively defend its interests". *See also*, *A. and Others v. the United Kingdom*, ECtHR, "Grand Chamber Judgment", App. No. 3455/05, 19 February 2009, paras 216-218.

[159] U.N. Economic and Social Council, Commission of Human Rights, 'Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in particular Torture and Other Cruel Inhuman or Degrading Treatment or Punishment', 35th Session, UN Doc. No. E/CN.4/1314, 10 December 1978, p. 18. *See also*, Special Rapporteur Report A/61/259, paras 45-48, Special Rapporteur Report A/HRC/25/60, para. 30.

[160] Manfred Nowak & Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary*, p. 506-507.

it must be noted that the use of such evidence would once again inflict prejudice upon the torture victim's human dignity. These all are valid legal interests, which beg the question of reconcilability of such evidence with the operation of a court of law, not just regarding statements extorted from third parties but even if the accused wished to use, or conceded to the use of, his own statements extorted through torture. As such, the proportionality test used to balance the interests at stake will usually result in rejecting evidence obtained through torture, even if it may assist the defence. An exception could potentially arise in situations of extreme necessity, based on the combined factors of the provenience of evidence,[161] its reliability,[162] its overwhelming exonerating value and its uniqueness, *i.e.*, where, despite the considerations set out above, the exclusion of information obtained through torture would prejudice the right to present a defence to such an extent that proceeding with the prosecution without admitting the evidence in question would amount to a flagrant denial of justice.

65. The Supreme Court Chamber cannot categorically exclude that there may be rare and extreme cases where departing from the exclusionary rule is thinkable, the case at hand is certainly not one of them. At issue here is whether the S-21 Statements may be used during the July 2015 Hearing for the limited purpose of examining three witnesses on appeal. Thus, at most, the S-21 Statements would be used to confront a witness and elucidate further information. There is no indication whatsoever that not allowing the use of the S-21 Statements for this purpose would significantly prejudice the defence or come even close to a flagrant denial of justice.

E. Can the Co-Prosecutors use the S-21 Statements to prove facts unrelated to the truth of the contents thereof?

66. The Co-Prosecutors similarly seek to restrict the application of Article 15 of the CAT, albeit in a different direction. They incorporate, by reference, their submissions before the Trial Chamber in Case 002/02,[163] and contend that the exclusionary rule does not apply when the statements extracted under torture are being used to prove facts unrelated to the truth of the matter "confessed", for instance, that S-21 prisoners were interrogated about hiding or

[161] Whether evidence has been produced by the prosecuting state or a third entity is, in this aspect, immaterial. It must be stressed that torturing for collection of evidence may never be condoned. Rather, the issue concerns information readily put before an organ of criminal procedure deciding on its use even without it having had a part in the collection of evidence, and whether exonerating information could be ignored.
[162] Reliability of torture-extracted statements remains a central question. It usually does not, however, arise in relation to real evidence obtained from the victim, either directly (*cf. Jalloh v. Germany*) or on the basis of an extorted statement (*cf. Gäfgen v. Germany*).
[163] Co-Prosecutors' Objections, para. 5.

failing to kill LON Nol officers, or further evidence that killing LON Nol officers was within the enemy's policy of the regime.[164] In other words, they argue that the exception stipulated in the second sentence of Article 15 of the CAT, which permits use of statements derived from torture "as evidence that the statement was made", implies that such statements may be used for any purpose other than to prove the truth of its contents.[165] The Co-Prosecutors add that the exclusionary rule only serves its deterrent purpose where the party seeking to use the torture-derived statement is part of the perpetrator's regime, and that preventing a court or prosecutors from using such statements for purposes unrelated to the truth of their contents would have the unreasonable and unintended effect of rewarding torturers by shielding them from liability.[166]

67. The Supreme Court Chamber recalls that Case 002/01 does not involve charges of torture. Accordingly, the sole exception in Article 15 of the CAT permitting use of a statement derived from torture "against a person accused of torture as evidence that the statement was made" does not apply. Transferring their arguments raised in Case 002/02 to the present case, the Co-Prosecutors essentially argue the doctrine of necessity – notably, the exigencies of effective prosecution – in order to broaden the use of statements obtained through torture beyond the plain language of Article 15 of the CAT. For the reasons indicated above at paragraphs at 40-47, the exclusionary rule does not lend itself to accommodating the Co-Prosecutors' interpretation. The object and purpose of Article 15 of the CAT requires broad exclusion of any information obtained through torture, and the exception to this rule, by its nature, is to be interpreted narrowly. Specifically, the Supreme Court Chamber concurs with the jurisprudence cited above,[167] which holds that necessities of prosecution do not justify the use of statements obtained through torture, even where the party moving to use the statements is not responsible for the torture.

68. In accordance with the notion of "statements" as interpreted above, Article 15 of the CAT excludes the admission of any information resulting from the torture of the victim, no matter whether adduced directly, through a witness, or in recorded form. Article 15 of the CAT does not, however, mandate the sweeping exclusion of the whole documentation surrounding the interrogation of the torture victim. When an interrogation record contains information originating from persons other than the torture victim, for instance from the

[164] Co-Prosecutors' Objections, para. 5.
[165] Co-Prosecutors' Case 002/02 Submissions, para. 7.
[166] Co-Prosecutors' Case 002/02 Submissions, para. 6.
[167] *Supra* paras 42-46.

torturer, this information may be used, insofar as it could prove questions posed, persons present, or the course of events and the application of torture in particular.[168] On the other hand, whether information such as biographical data recorded in S-21 confessions or prison notebooks identifying the victims, such as their name, age, residence, former occupation and DK unit or position, and other information that the Co-Prosecutors wish to use, were obtained by torture is a matter of proof.[169] For the purpose of the issue at hand, a review of the S-21 Statements included in NUON Chea's and the Co-Prosecutors' Document Lists shows *prima facie* that the contents thereof emanate entirely from the victims alone and it has been established, for the purpose of the present proceedings, that the victims were subjected to torture; any "other relevant facts" would have to be extracted by inference. The Co-Prosecutors do not demonstrate which elements of the S-21 Statements did not emanate from the victim or were not the result of torture. In the context of the July 2015 Hearing, the Supreme Court Chamber therefore refuses to permit the use of the S-21 Statements or making any inferences therefrom.

F. Conclusion

69. A party requesting the use of evidence derived from torture or wishing to tender such evidence must first demonstrate that it is being introduced only for the reason permitted by Article 15 of the CAT. For the reasons stated above, the Supreme Court Chamber considers that both NUON Chea and the Co-Prosecutors fail to so demonstrate, and has accordingly decided that none of the S-21 Statements may be used during the hearing of SCW-3, SCW-4, and SCW-5.

VII. STATEMENTS OF CIVIL PARTIES

70. KHIEU Samphân notes that documents E1/197.1, E1/198.1, E1/199.1 and E1/200.1, which feature on the Civil Parties' Document List, and documents E1/287.1 and E3/4719, which feature on the Co-Prosecutors' Document List, are declarations that individual Civil Parties have made in relation to crimes.[170] He notes that the use by the Trial Chamber of such declarations is the subject of one of his grounds of appeal and recalls that the Supreme Court Chamber, in the Directions, held that "[t]he parties' questions must relate to NUON Chea's

[168] Co-Prosecutors' Case 002/02 Submissions, paras 11-15. *See also* Novak Manfred Nowak & Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary*, pp. 536-537.
[169] Co-Prosecutors' Case 002/02 Submissions, para. 9.
[170] KHIEU Samphân's Objections, paras 15, 18.

and KHIEU Samphân's criminal responsibility, including reliability and credibility of evidence".[171]

71. The Supreme Court Chamber notes that the use of statements and declarations of Civil Parties by the Trial Chamber are indeed grounds of appeal raised by KHIEU Samphân and NUON Chea.[172] However, it is the manner in which the Trial Chamber relied on such statements that is alleged to have been in error, and not the decision to allow their use or admission into evidence *per se*. As such, and without prejudice to the eventual decision of the Supreme Court Chamber on those grounds of appeal, the Supreme Court Chamber has decided to allow the use of documents E1/197.1, E1/198.1, E1/199.1, E1/200.1, E1/287.1 and E3/4719 in the examination of the three witnesses.

VIII. FILING OF THE DOCUMENT LISTS INTO THE CASE RECORD

72. In keeping with the Directions, NUON Chea, KHIEU Samphân, and the Civil Party Lead Co-Lawyers submitted their respective document lists as attachments to e-mails addressed to the Supreme Court Chamber's Greffiers. To ensure the completeness of the record, the Supreme Court Chamber has decided that these document lists be filed into the Case 002 Case File.[173]

IX. DISPOSITION

For the foregoing reasons, **THE SUPREME COURT CHAMBER HEREBY** decides that:

1) The request of NUON Chea and KHIEU Samphân to reject the Civil Parties' Document List and the Co-Prosecutors' Document List because of their late filing is rejected;

2) The Co-Prosecutors may not use document E3/1539 in the examination of the witnesses as it was not included in the Co-Prosecutors' Document List and no compelling reason for its subsequent inclusion was presented;

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[171] KHIEU Samphân's Objections, para. 17, referring to Directions, operative paragraph 1 b).
[172] *Mémoire d'appel de la Défense de M. KHIEU Samphân contre le jugement rendu dans le procès 002/01*, 29 December 2014, F17, para. 30; Appeal Brief, paras 185-206.
[173] NUON Chea's List of Materials for Use in Questioning SCW-3, SCW-4 and SCW-5, 24 June 2015, F26/4; *Liste des documents de M. KHIEU Samphân pour la déposition de SCW-3, SCW-4 et SCW-5*, 24 June 2015, F26/5; List of Materials to Be Used by the Lead Co-Lawyers for the Hearings Before the Supreme Court Chamber, 24 June 2015, F26/6.

3) The Co-Prosecutors may not use any of the following documents in the examination of the witnesses because they are longer than 30 pages long and the Co-Prosecutors failed to comply with the Directions to provide ERN numbers for those documents in the Co-Prosecutors' Document List:

D313.2.25/D366/7.1.108, E3/3989, E3/531, E3/342, E305/13.23.375, E319.1.27, E3/1805, E3/4590, E3/62, E1/14.1, E1/216.1, E1/140.1, E1/144.1, E1/138.1, E1/218.1, E1/191.1, E305/13.23.405, E3/89, E3/387, E319/19.3.125, E3/5649, E319.1.21, E1/278.1, E1/279.1, E3/4627, E1/298.1, E1/299.1, E1/290.1, E1/291.1, E1/215.1, E1/256.1, E1/258.1, E1/255.1, E1/269.1, E3/3232, E3/5637, E1/296.1, E3/2120. D313/1.2.16, E3/1682, E3/2792, E3/3857, E3/3973, E1/249.1, E1/252.1, E1/253.1, E1/263.1, E1/264.1, E1/265.1, E1/281.1, E1/283.1, E1/287.1, E1/289.1, E1/257.1, E1/300.1, E1/222.1, E305/13.23.451;

4) NUON Chea, KHIEU Samphân and the Co-Prosecutors may not use any of the following documents contained in their respective document lists because they are not part of the evidentiary record of Case 002/01 nor the subject of a pending request for additional evidence on appeal:

E319.1.18 (CF004 D118/259), E3/9118 (E305/13.23.405), E3/5838, Draft-Transcript of the Hearing of Sem Hoeun, 22 June 2015, Draft-Transcript of the Hearing of Sem Hoeun, 23 June 2015, Nayan Chanda, "The Timetable for a Takeover: Hanoi's Decision to Take Kampuchea was Reached After Months of Careful Planning", *Far Eastern Economic Review*, Unknown Author, "That Was No F-111; That Was a MiG!", *Asiaweek*, Anthony Paul, "Plot Details Filter Through", *Far Eastern Economic Review*, D312.1.59-E3/8707, E319/12.3.10, E319/12.3.10/Corr-1, E319/19.3.125, E319/12.3.2, E319.1.21, E1/278.1, E1/279.1, E319.1.2, E319/23.3.42, E319/21.3.51, E1/298.1, E1/299.1, E1/290.1, E1/291.1, E1/256.1, E1/258.1, E1/255.1, E1/269.1, E1/296.1, E1/249.1, E1/252.1, E1/253.1, E1/263.1, E1/264.1, E1/265.1, E1/281.1, E1/283.1, E1/287.1, E1/289.1, E1/257.1, E1/300.1, E319.1.8, E319.1.23, E319/8.2.4, E319/12.3.8, IS 19.161, D312.2.25, D366/7.1.108, E305/13.23.375, D288/6.68.50, D166/173, D25/17, D25/19,

D166/174, E319.1.32, D224.90, D313/1.2.16, E305/13.23.451, D40/20, D22/88, D25/24, D40/21;

5) The parties may not use D312.2.25-D366/7.1.1.8, E3/1682, E3/1855, E3/2792, E3/3857, E3/3989, E3/4202 because they are likely statements obtained through the use of torture;

6) KHIEU Samphân's request that the Co-Prosecutors and the Civil Party Lead Co-Lawyers shall not be allowed to use documents E1/197.1, E1/198.1, E1/199.1, E1/200.1, E1/287.1 and E3/4719 in the examination of the witnesses because the issue of whether statements of Civil Parties may be relied upon for determining the guilt of the Accused is a live issue in the appeal against the trial judgment in Case 002/01 is rejected.[174]

Phnom Penh, 31 December 2015

President of the Supreme Court Chamber

KONG Srim

[174] Summary Decision pp. 3-5.