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អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ:០០២/១៩កញ្ញា២០០៧/អវតក/អជសដ

Case File/Dossier No. 002/19-09-2007/ECCC/TC

Before:	**Judge NIL Nonn, President** **Judge Jean-Marc LAVERGNE** **Judge YA Sokhan** **Judge Claudia FENZ** **Judge YOU Ottara**
Date:	**5 February 2016**
Original language(s):	**Khmer/English/French**
Classification:	**PUBLIC**

DECISION ON EVIDENCE OBTAINED THROUGH TORTURE

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1. INTRODUCTION

1. The Trial Chamber is seised of requests by the parties made orally and in writing to clarify the permissible uses of evidence that may have been obtained through the use of torture. Though recognising its applicability to these proceedings, the parties contest the proper interpretation of Article 15 of the 1984 Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment ("CAT"), also known as "the exclusionary rule," which provides: "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."

2. In the Case 002/01 appeal proceedings, the Supreme Court Chamber ruled on objections to the use of several documents from the S-21 security centre proposed by parties for the questioning of witnesses. On 1 July 2015, the Supreme Court Chamber disposed of these objections with a decision with reasons to follow. On 31 December 2015, the Supreme Court

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Chamber issued the full reasons for its decision.[1] The SCC Decision examines Article 15 of the CAT and provides guidance on many of the issues raised by the parties before the Trial Chamber as to the permissible uses of evidence alleged to be tainted by torture.

3. The Chamber notes that the findings in the SCC Decision are largely limited to the evidence sought to be used during the July 2015 Supreme Court Chamber hearings, namely several S-21 documents.[2] Furthermore, because of the scope of Case 002/01, the Supreme Court Chamber did not interpret the exception contained in Article 15 of the CAT for statements "against a person accused of torture" nor did it examine the applicability of these principles to documents from Kraing Ta Chan and other security centres, apart from S-21.[3] This decision therefore examines the issue of torture-tainted evidence in a holistic fashion, addressing each of the issues presented in the case currently at trial.

2. SUBMISSIONS

2.1. The Co-Prosecutors' Submissions

4. The Co-Prosecutors submit that Article 15 of the CAT must be interpreted in light of the CAT's objective to abolish the use of torture as well as the obligation it creates to prosecute perpetrators of torture.[4] Article 15 of the CAT expressly provides for the admission of torture-tainted statements against the person accused of torture in order to prove that the statement was made.[5] It otherwise excludes torture-tainted statements from legal proceedings because such statements are unreliable.[6] However, this reasoning does not apply where such statements are used for purposes other than establishing the truth of their contents.[7] The exclusionary rule is intended to prevent the torturer from accruing any benefit from the illegally obtained statement.[8]

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1 Decision on Objections to Document Lists (Full Reasons), F26/12, 31 December 2015 ("SCC Decision"), paras 30, 67.

2 SCC Decision, disposition para. 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"); *See Also,* SCC Decision, para. 30, para. 65 ("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.")

3 SCC Decision, para. 27, 30, 67, FN 54.

4 Co-Prosecutors' Submission Regarding the Application of the Torture Convention to S-21 Confessions and Other Records Relating to Interrogations of Prisoners, E350/1, 21 May 2015 ("Co-Prosecutors' Submissions"), paras 2-3; T. 25 May 2015, pp. 4-5, 16.

5 Co-Prosecutors' Submissions, paras 3, 7.

6 Co-Prosecutors' Submissions, paras 4-5; T. 25 May 2015, p. 4.

7 Co-Prosecutors' Submissions, paras 3, 5, 7; T. 25 May 2015, pp. 7-8, 15-16.

8 Co-Prosecutors' Submissions, paras 4, 6; T. 25 May 2015, pp. 5-6.

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5. The Co-Prosecutors submit that interrogation records from S-21 and Kraing Ta Chan Security Centre are admissible for purposes other than to prove the truth of their contents.[9] The use of interrogation records to ascertain the identity and biographical data of the victims, as well as the dates of their arrests and interrogations either fall within the scope of the Article 15 exception or reflect information that was not obtained through torture.[10] Annotations made by the perpetrators or their superiors are to be distinguished from the victims' confessions and are not themselves statements obtained through torture.[11] They prove the commission of torture and other crimes, as well as the motives and knowledge of CPK leaders.[12] Any subsequent use of names identified in S-21 confessions or Kraing Ta Chan notebooks does not rely upon the torture-tainted confession being true.[13] Reports and notes can be used to prove a process by which arrest decisions were made.[14] Letters and statements made prior to interrogations and statements that are, due to their contents, unlikely to have been obtained through torture, are not established to be torture-tainted.[15]

6. The Co-Prosecutors submit that a clear and convincing standard of proof might be appropriate to show that a statement was not a result of torture.[16] They further submit that torture is not limited to physical maltreatment but may include mental mistreatment.[17]

7. Lastly, the Co-Prosecutors submit that the Chamber should not resolve these matters on an incremental basis. It should instead wait until the completion of evidence in Case 002/02 before it decides on the admissibility and weight of torture-tainted evidence.[18] This is said to follow the Chamber's approach in Case 001.[19] They reason that professional judges do not need restrictive evidentiary rules to be applied during the course of a trial.[20]

2.2. The Lead Co-Lawyers' Submissions

8. The Civil Party Lead Co-Lawyers submit that torture-tainted statements are inadmissible for the truth of their contents and can only be used in proceedings against the alleged

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9 Co-Prosecutors' Submissions, paras 7-18; T. 25 May 2015, pp. 7-8.
10 Co-Prosecutors' Submissions, paras 5, 9-10; T. 25 May 2015, pp. 11-12.
11 Co-Prosecutors' Submissions, paras 5, 11-15.
12 Co-Prosecutors' Submissions, paras 5, 14-15.
13 Co-Prosecutors' Submissions, para. 15.
14 Co-Prosecutors' Submissions, paras 5, 15; T. 25 May 2015, pp. 11-12.
15 Co-Prosecutors' Submissions, paras 16-18.
16 T. 25 May 2015, p. 13.
17 T. 25 May 2015, p. 14.
18 Co-Prosecutors' Submissions, paras 21-22.
19 Co-Prosecutors' Submissions, para. 22.
20 Co-Prosecutors' Submissions, para. 22; T. 25 May 2015, pp. 18-19.

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torturer.[21] They request the Chamber to rule that the parties may not put questions premised on the truthfulness of torture-tainted evidence.[22] They submit however that annotations or markings subsequently made to evidence obtained under torture are admissible.[23] Since the Accused are charged with torture, torture-tainted evidence may be used against them to prove that the statement was made.[24] Specifically, the existence and circumstances of confessions as well as the identity and biographical details of the confessing persons are said to fall within the exception set out in Article 15.[25]

9. Noting that S-21 confessions were treated as torture-tainted evidence in Case 001, the Lead Co-Lawyers submit that these confessions are presumed to be torture-tainted and cannot be relied upon for the truth of their contents, unless this presumption is rebutted by the party proposing to rely on the document by requesting a Chamber investigation pursuant to Internal Rule 93(1) into the circumstances under which a confession was made.[26] As to the standard of proof, the Lead Co-Lawyers suggest a standard of "substantial risk" that torture was used.[27]

2.3. The NUON Chea Defence's Submissions

10. The NUON Chea Defence submits that since the Supreme Court Chamber is seised with an appeal in Case 002/01 relating to the use of torture-tainted evidence, it is inappropriate for the Trial Chamber to issue a decision on the general use of such evidence.[28] Rather, the Trial Chamber should restrict itself to the specific question put to a witness on the basis of an S-21 confession.[29] In particular, the NUON Chea Defence requests permission to put questions to witnesses in a form similar to that put to Pech Chim[30] during proceedings on 24 April 2015[31] and Khoem Boeun alias Yeay Boeun on 5 May 2015.[32]

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[21] Civil Party Lead Co-Lawyers' Submissions Relating to the Admissibility and Permissible Uses of Evidence Obtained Through Torture, E350/3, 21 May 2015 ("Lead Co-Lawyers' Submissions"), paras 16, 18-19; T. 25 May 2015, p. 21.
[22] Lead Co-Lawyers' Submissions, para. 18; T. 25 May 2015, p. 21.
[23] Lead Co-Lawyers' Submissions, para. 17.
[24] Lead Co-Lawyers' Submissions, paras 16, 19.
[25] Lead Co-Lawyers' Submissions, para. 16.
[26] Lead Co-Lawyers' Submissions, para. 20; T. 25 May 2015, pp. 21-23, 25.
[27] T. 25 May 2015, pp. 24-26.
[28] NUON Chea's Submissions Regarding the Use of "Torture-Tainted Evidence" in the Case 002/02 Trial, E350, 21 May 2015 ("NUON Chea Defence's Submissions"), paras 9, 11.
[29] NUON Chea Defence's Submissions, para. 11; *cf.* T. 27 April 2015, p. 25 ("I would like the Chamber [...] to include in its written decision, how we should deal with reading from notes from Krang Ta Chan records.").
[30] T. 24 April, p. 30 ("Have you ever come to learn that Sae implicated you and your brother as belonging to his network?"); *see also,* T. 24 April 2015, pp. 31-33.
[31] NUON Chea Defence's Submissions, paras 4, 9; T. 25 May 2015, pp. 27, 37, 39.
[32] NUON Chea Defence's Submissions, para. 7; T. 5 May 2015, pp. 29-34.

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11. The NUON Chea Defence submits that although it should be permitted to adduce torture-tainted evidence, Article 15 of the CAT prevents the Co-Prosecutors from using it.[33] In particular, it asserts the exclusionary rule applies only to the use of torture-tainted statements by state authorities (in this case, the Co-Prosecutors) against individuals.[34] It contends that the historical development of the CAT and state practice endorse this interpretation.[35]

12. The NUON Chea Defence notes that the admissibility of evidence is within the Trial Chamber's discretion pursuant to Internal Rule 87(3).[36] It submits that a torture-tainted statement which may prove a defendant's innocence should be admissible,[37] with weight to be assessed at a later stage.[38] It contends that this forms part of the right to a fair trial.[39] It further argues that the domestic provisions in Canada, Denmark, Greece and Austria recognise the general admissibility of exculpatory evidence.[40] Evidence that is discovered through the use of torture-tainted evidence, i.e. the fruit of the poisonous tree, should not be categorically excluded.[41]

13. Lastly, it submits that the Co-Prosecutors used torture-tainted evidence on several occasions, while objecting to its use by the defence.[42] It is contended that this is a double standard.[43]

2.4. The KHIEU Samphan Defence's Submissions

14. The KHIEU Samphan Defence submits that torture-tainted evidence may be used solely to establish that a statement was made and that the party seeking to use such evidence bears the burden of proving that they only use it for this purpose.[44] It submits that the exclusionary rule in Article 15 of the CAT only applies to statements established to be obtained under torture.[45] The KHIEU Samphan Defence submits that not all persons interrogated at Kraing

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33 NUON Chea Defence's Submissions, paras 15-23, 30; T. 25 May 2015, p. 30.
34 NUON Chea Defence's Submissions, para. 17.
35 NUON Chea Defence's Submissions, paras 18-23.
36 NUON Chea Defence's Submissions, para. 24.
37 NUON Chea Defence's Submissions, paras 28, 30; T. 25 May 2015, p. 30.
38 NUON Chea Defence's Submissions, para. 28.
39 NUON Chea Defence's Submissions, paras 25-26.
40 NUON Chea Defence's Submissions, para. 27.
41 T. 25 May 2015, p. 29.
42 NUON Chea Defence's Submissions, paras 29-30; *see also* T. 25 May 2015, pp. 31-32.
43 NUON Chea Defence's Submissions, para. 30; T. 25 May 2015, p. 28.
44 Conclusion de la Défense de M. KHIEU Samphan concernant l'usage des informations obtenues sous la torture, E350/4, 21 May 2015 ("KHIEU Samphan Defence's Submissions"), para. 14; T. 25 May 2015, pp. 40-41, 45-46.
45 KHIEU Samphan Defence's Submissions, para. 6.

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Ta Chan were physically tortured,[46] and that the Trial Chamber therefore cannot conclude that all statements were obtained through torture.[47] It further argues that, in the event of doubt about how a statement was obtained, such statement cannot be used.[48]

15. The KHIEU Samphan Defence also submits that, according to Cambodian Law, statements made under physical or mental coercion are inadmissible.[49] As both the Cambodian regulations and the CAT have the same objective, the same standards apply.[50]

3. BACKGROUND

3.1. OCIJ and PTC Decisions on Torture-Tainted Evidence

16. In 2009, the Co-Investigating Judges (CIJ) issued an order on the proper use of evidence which may have been obtained through torture.[51] In interpreting the CAT, the CIJ first ruled that there was a category of information contained within S-21 confessions which was not tainted by torture and therefore not subject to Article 15. This category included: handwritten annotations made by someone not subject to torture; preliminary biographical material (if established that it was obtained prior to the person's arrival at S-21); "any objective information [...] which exists independently of the interrogation, such as the date of the person's arrest"; and biographical information such as the name, age, position and work unit of the person subject to torture.[52]

17. The CIJ further held there was a "limited exception" to Article 15 allowing evidence obtained by torture to be used "against the person accused of torture as evidence that the statement was made". They held that this encompassed not only criminal proceedings against alleged direct perpetrators of torture, but also instances where accused are charged by superior responsibility or joint criminal enterprise because "it is equally, if not more important, to deter those who are higher in the chain of command" as those direct perpetrators implementing the policy of using torture.[53] The CIJ addressed in turn two rationales behind Article 15: to remove an important incentive for the use of torture and to prevent the use of unreliable

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[46] KHIEU Samphan Defence's Submissions, para. 7; T. 25 May 2015, pp. 43, 46.
[47] KHIEU Samphan Defence's Submissions, para. 8.
[48] KHIEU Samphan Defence's Submissions, para. 9; T. 25 May 2015, pp. 45-46.
[49] KHIEU Samphan Defence's Submissions, para. 10; T. 25 May 2015, pp. 43, 47.
[50] KHIEU Samphan Defence's Submissions, paras 11-13.
[51] Order on use of statements which were or may have been obtained by torture, D130/8, 28 July 2009 ("OCIJ Order").
[52] OCIJ Order, para. 19.
[53] OCIJ Order, paras 20, 22.

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information. The CIJ held the first rationale to be inapplicable, finding that the exclusion of information in Case 002 would not deter would-be torturers since the evidence was 30 years old and not obtained by the ECCC or its officials.[54]

18. The CIJ however considered the reliability of torture-tainted evidence to be a relevant consideration. They found that such evidence could be used in two ways which did not depend on the reliability of the evidence: (1) as investigative leads and (2) for purposes other than establishing the truth of the contents. The latter category included lists of alleged traitors, "if it can be demonstrated that the people listed were later arrested or executed" as proof of the Accused's reliance on this information.[55]

19. Finally, the CIJ ruled that "information obtained by torture, is, as a rule, unreliable." Nonetheless, they held that it was possible that such evidence could contain elements of truth and would consider whether to rely on such evidence at the conclusion of the investigation on a case-by-case basis.[56] The Pre-Trial Chamber addressed this last point when rejecting an appeal on admissibility grounds. It stated, "Notwithstanding any observations to the contrary by the Co-Investigating Judges in the Order, Article 15 of the CAT is to be strictly applied. There is no room for a determination of the truth or for use otherwise of any statement obtained through torture."[57]

3.2. ECCC Trial Chamber Decisions on Torture in Case 001 and Case 002/01

20. The Trial Chamber has consistently held that torture-tainted evidence cannot be used for the truth of its contents.[58] In Case 001, the Trial Chamber admitted a table compiling annotations made by the Accused Kaing Guek Eav *alias* Duch on 60 S-21 confessions, noting, "[t]he relevance of these documents is limited to the fact that they were made and,

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54 OCIJ Order, paras 23-24.
55 OCIJ Order, paras 25-27.
56 OCIJ Order, paras 28-29.
57 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, D130/7/3/5, 10 May 2010, para. 38.
58 T. 28 May 2009, p. 9 ("The Chamber wishes to emphasize the importance of the fact that this Court is bound by the provisions in Article 15 of the Torture Convention which the President has just read out. This provision is reflected in Article 38 of the Cambodian Constitution and also in Rule 21(3) of the Internal Rules [...] In practice, this means that the fact that a confession has been made, and that it was made under torture is an admissible fact; however, the contents of a confession made under torture cannot be accepted as a truthful statement. If any party wishes to refer to the truthfulness or otherwise of the contents of a confession, it will be necessary first to establish if the confession was made under torture or the threat of torture. For that reason, parties should consider whether an examination of the contents of a confession is sufficiently important to seek an inquiry concerning the circumstances under which the confession was made.")

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where appropriate, constitute evidence that they were made under torture. They are not admitted for the truth of their contents."[59] In further application of this ruling, in its Case 001 judgement, the Chamber made reference to a document produced by interrogators at S-21 which justified the arrest of detainees based upon their confessions and compiled information to investigate and eventually arrest others.[60] Moreover, in assessing the role of the Accused Kaing Guek Eav in arrests, the Chamber relied on several letters sent by SOU Met (the commander of Division 502) to the Accused, concerning the arrest of individuals identified as belonging to a network in S-21 confessions.[61] The Chamber made no reliance on the truth of the confessions.

21. In Case 002/01, the Chamber issued an oral ruling on 26 January 2012, reiterating its holding that evidence obtained through torture has limited uses and referring the parties to its prior decisions on the issue in Case 001.[62] The Chamber revisited the issue several times through the case, recalling that it was bound by the CAT and that it would not permit the parties to refer to the content of any confessions extracted by torture, although it would allow parties to refer to annotations or the dates on confessions.[63] The Chamber further clarified that: "confessions obtained contrary to the provisions of the Convention Against Torture cannot be used as evidence or for the basis for questioning. Therefore, the Chamber will remind the parties that it will permit no questions on the content of the confession nor will it use such information in its verdict."[64] During the questioning of Duch, who appeared as a witness, the Chamber disallowed a question as to whether Pang, a cadre who was later imprisoned at S-21, had been incriminated in other confessions because the question was based on confessions extracted by torture.[65] Finally, in the Case 002/01 Judgement, the

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[59] Decision on Parties Requests to Put Certain Materials before the Chamber Pursuant to Internal Rule 87(2), E176 (Case 001), 28 October 2009, para. 8.

[60] *KAING Guek Eav alias Duch*, Case 001/18-07-2007/ECCC/TC, Judgement, E188, 26 July 2010 ("Case 001 Trial Judgement"), para. 254 (*citing* Statistics list of Santebal S-21, E3/426).

[61] *KAING Guek Eav alias Duch*, Case 001/18-07-2007/ECCC/TC, Judgement, E188, 26 July 2010 ("Case 001 Trial Judgement"), para. 170 (*citing* Case 001 documents: "Sou Met's letter to Duch – 2 June 1977", E3/40; "Sou Met's letter to Duch – 1 April 1977", E3/210; "Sou Met's letter to Duch – 30 May 1977", E3/211; "Sou Met's letter to Duch – 1 June 1977", E3/212; "Sou Met's letter to Duch – 28 July 1977", E3/213; "Sou Met's letter to Duch – 10 August 1977", E3/214; "Sou Met's letter to Duch – 3 October 1977", E3/215; "Sou Met's letter to Duch – 4 October 1977", E3/216).

[62] T. 26 January 2012, p. 88; *see also*, Decision on Objections to Documents Proposed to be Put Before the Chamber on the Co-Prosecutors' Annexes A1-A5 and to Documents Cited in Paragraphs of the Closing Order Relevant to the First Two Trial Segments of Case 002/1, E185, 9 April 2012, para. 21(9).

[63] T. 31 July 2012, p. 108; *See also,* T. 27 April 2015, p. 27 (Judge Lavergne: "To the extent that the objective for which the notes on Kraing Ta Chan are used to establish the identity of persons detained at the security centre, the Chamber is of the view that there is no objection to such use.")

[64] T. 3 October 2012, p. 74 (emphasis added).

[65] T. 10 April 2012, p. 12.

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Chamber reaffirmed that "certain evidence admitted for a limited purpose, such as proof that a statement was obtained through torture, may be relied upon only for that limited purpose and not as to the truth of the statement."[66]

4. APPLICABLE LAW

22. Article 38 of the Cambodian Constitution provides that "Confessions obtained by physical or mental coercion shall not be admissible as evidence of guilt."[67] Further, Article 321 of the Cambodian Code of Criminal Procedure (CCCP) provides that a "Declaration given under physical or mental coercion shall have no evidentiary value."[68]

23. The Chamber notes that the Khmer word "**ការបង្ខិតបង្ខំ**" contained in Article 38 of the Constitution and Article 321 of the CCCP has been variously translated in unofficial English and French translations respectively as "force", "duress", "coercion" and "*pression*", "*coercition*", "*contrainte*".[69] Each of these words generally reflects the declarant's lack of free will in giving the statement. However, **ការបង្ខិតបង្ខំ**, which the Chamber considers is best translated in this context as "coercion", is neither defined nor criminalised as such in Cambodian law. While torture is criminalised under Cambodian law, the term is not defined and the Code of Criminal Procedure makes no specific reference to it.[70]

24. Pursuant to the ECCC legal framework, where Cambodian procedural law does not deal with a particular matter, or where there is a question regarding the consistency of such a rule with international standards, guidance may be sought in procedural rules established at the international level.[71] The Chamber therefore has reference to relevant international procedures

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[66] *NUON Chea and KHIEU Samphan*, Case 002/19-09-2007/ECCC/TC, Case 002/01 Judgement, E313, 7 August 2014 ("Case 002/01 Judgement"), para. 35.

[67] Constitution of the Kingdom of Cambodia, Article 38, internal translation; The Chamber notes that no provision of the Internal Rules expressly addresses evidence obtained by torture or coercion.

[68] Cambodian Code of Criminal Procedure, Article 321, internal translation; Article 321 provides generally that all evidence is admissible unless provided otherwise by law.

[69] *See* Constitution of the Kingdom of Cambodia, unofficial translation supervised by the Constitutional Council, March 2010, Article 38; Constitution of the Kingdom of Cambodia, unofficial translation available at: http://faolex.fao.org/docs/pdf/cam117198.pdf; Cambodian Code of Criminal Procedure, Khmer-English Translation, 1st ed. (2008).

[70] *See* Cambodian Criminal Code (2009), Article 188 (listing torture as a crime against humanity), Article 193 (listing torture as a war crime), Article 210 (criminalising torture as an offence and as an aggravating circumstance of other crimes e.g. murder, rape).

[71] Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law Of Crimes Committed during the Period of Democratic Kampuchea, 6 June 2003 ("ECCC Agreement"), Article 12(1); Law on the Establishment of Extraordinary Chambers in the Courts of

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in order to ascertain whether Cambodian law is consistent with relevant international standards, particularly those set forth in the CAT.[72]

25. The prohibition against torture contained in the CAT,[73] by nature of its widespread acceptance by the international community, is recognised as a peremptory norm of international law from which States cannot derogate (*jus cogens*).[74] By acceding to the Convention, Cambodia has indicated its intent to be bound by the provisions of the CAT, including Article 15. Human rights courts have held that Article 15, as part of the strictures of the CAT and a corpus of general and treaty rules proscribing torture, is itself a peremptory norm of international law.[75]

Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, 10 August 2001 with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) ("ECCC Law"), Article 23 new.

[72] The Supreme Court Chamber held that Article 15 of the CAT is directly applicable without the need for implementing legislation and is therefore part of Cambodian law. *See* SCC Decision, paras 34-35. Regardless of the route taken, both this decision and the SCC decision consider Article 15 as the basis for their respective decisions. *See* SCC Decision para. 38.

[73] For purposes of determining whether the Chamber will permit the invocation of torture-tainted evidence in this trial, the Chamber applies the definition of torture as contained in the 1984 CAT as the Chamber seeks to preserve the integrity of the proceedings and not to determine whether the Accused were on notice of the definition of the crime of torture at the time of the alleged offences. *Cf. KAING Guek Eav alias Duch,* Case 001/18-07-2007/ECCC/SC, Appeal Judgement, F28, 3 February 2012, para. 205; Pursuant to Article 1 of the CAT, 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."

[74] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, ICJ, Judgement, 20 July 2012, (ICJ Reports 2012), para. 99; *Prosecutor v. Furundžija,* ICTY Trial Chamber, IT-95-17/1-T, Judgement, 10 December 1998 ("*Prosecutor v. Furundžija*"), paras 144-157, ("Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules"); *A and Others,* House of Lords, [2005] UKHL 71, Lord Bingham (quoting *Montgomery v. H M Advocate, Coulter v. H M Advocate* [2003] 1 AC 641), para. 33; Case 001 Trial Judgement, paras 352-353; *See also,* UN Doc. 18232, Vienna Convention on the Law of Treaties, entered into force Jan. 27, 1980 ("Vienna Convention"), Articles 53, 64 (defining *jus cogens*); SCC Decision, para. 40.

[75] *Othman (Abu Qatada) v. United Kingdom*, Judgment, ECtHR, Application No. 8139/09, 17 January 2012 ("*Othman (Abu Qatada) v. United Kingdom*"), para. 266 ("Few international norms relating to the right to a trial are more fundamental than the exclusion of evidence obtained by torture. [...] UNCAT reflects the clear will of the international community to further entrench the *ius cogens* prohibition on torture by taking a series of measures to eradicate torture and remove all incentive for its practice. Foremost among UNCAT's provisions is Article 15, which prohibits, in near absolute terms, the admission of torture evidence. It imposes a clear obligation on States."); *Cabrera García and Montiel Flores v. Mexico*, IACtHR, Judgement, 26 November 2010 ("*Cabrera García and Montiel Flores v. Mexico*"), para. 165 ("[T]he rule of excluding from judicial proceedings all evidence obtained under torture or through cruel or inhumane treatment (hereinafter "exclusionary rule") has been recognized by several international treaties and international bodies for the protection of human rights, which consider that the rule of exclusion is intrinsic to the prohibition of such acts."); UN Doc. A/HRC/25/60, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 10 April 2014 ("UN Special Rapporteur 2014 Report"), para. 22 ("As the prohibition against torture and other ill-

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26. In instances where statements made by an accused or third parties are obtained through torture, the European Court of Human Rights (ECtHR) has held that the use of the statement's content as evidence to support the charges is anathema to fair trial principles and the interests of justice. It has considered that such use automatically renders the proceedings unfair, except when it is against a person accused of torture as evidence that the statement was made.[76] It has countenanced the exclusion of such evidence where the victim of torture is the accused but also where third parties are the source of the torture-tainted evidence.[77]

27. In interpreting treaty provisions such as Article 15 of the CAT, the Vienna Convention on the Law of Treaties provides that reference is first made to the ordinary meaning to be given to the terms in light of the object and purpose of the treaty. Where this interpretation leaves ambiguity or leads to a manifestly absurd or unreasonable result, the preparatory work and other supplementary means of interpretation are to be consulted.[78]

5. FINDINGS

28. Before determining the scope of the exception to the exclusionary rule contained in the last phrase of Article 15 and whether this extends to evidence obtained through ill-treatment, coercion or that which is derived from torture-tainted evidence, the Chamber must first consider a number of related matters, including the burden and standard of proof to establish that torture was used to obtain the evidence and the fair trial rights implicated, particularly the right to the presumption of innocence and the right to present exculpatory evidence.

5.1. Preliminary Issues

29. As a preliminary matter, the Trial Chamber dismisses the NUON Chea Defence's argument that the Chamber should limit this decision to determining the permissibility of a form of question posed by the Defence based upon torture-tainted evidence. It is within the

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treatment is absolute and non-derogable under any circumstances, it follows that the exclusionary rule must also be non-derogable under any circumstances [...]"); *cf.* SCC Decision, paras 64-65 ("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.")

[76] *Othman (Abu Qatada) v. United Kingdom,* para. 264 ("More fundamentally, no 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.")

[77] *El Haski v. Belgium*, Judgement, ECtHR Application No. 649/08, 25 September 2012 ("*El Haski v. Belgium*"), para. 85.

[78] Vienna Convention, Articles 31, 32.

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purview of the Chamber to address any matter that is relevant to this trial, particularly where such matter has been presented on multiple occasions and will continue to confront these proceedings moving forward. Since the briefing of this issue, the Co-Prosecutors and the NUON Chea Defence have invoked, or attempted to invoke, evidence that may have been obtained through torture in a variety of circumstances, not limited to the specific scenario raised by the NUON Chea Defence and addressed in this decision.[79] It is therefore in the interests of judicial efficiency to address the issue fully, instead of in a piece-meal fashion. This remains the case following the SCC Decision which did not address torture-tainted evidence obtained from locations other than S-21 and left open several issues, including an in-depth analysis of the exception contained within Article 15.

30. The Chamber also notes that it has already admitted more than five hundred S-21 confessions, prison notebooks, and other evidence which may contain evidence obtained by torture. In assessing whether these documents have met the minimum standards of relevance and reliability (including authenticity) the Chamber has considered their permissible uses under the law.[80] In Case 001 and Case 002/01, such documents were considered relevant to facts such as the identity and number of persons who were arrested and placed in Security Centres. The question now presented is whether these documents may be invoked (i.e. used) for other evidentiary purposes in addition to those previously accepted, and if so, how this may be done. Therefore the Chamber will not reconsider the admissibility of such documents, but will instead clarify their permissible evidentiary uses as the admission of this evidence was necessarily subject to those uses allowed by law.[81]

31. The Chamber must first determine the applicable burden and standard or proof to establish that evidence is the result of torture. Once evidence is established, for evidentiary purposes, to have been obtained by torture, the question then arises as to its permissible uses with particular regard to the Accused's right to a fair trial.

5.2. Standard and Burden of Proof

32. Subject to the exception to be examined below, Article 15 of the CAT provides that evidence "which has been established" to be the result of torture shall not be invoked as evidence in any proceedings. It does not set out the relevant standard of proof or indicate who

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79 *See infra. Section* 5.5.2.

80 In admitting these documents, the Chamber made no reliance on these documents to establish facts.

81 Internal Rule 87(3)(d).

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bears the burden of establishing that the evidence is the result of torture. The Chamber considers these matters to be important in establishing a procedural framework to assess potentially torture-tainted documents in this case and therefore examines them below.[82]

5.2.1. Standard of Proof

33. The Chamber is persuaded that the "real risk" standard of proof adopted by the European Court of Human Rights gives meaningful effect to the prohibition against the use of torture-tainted evidence contained in Article 15. The ECtHR has held that it must be established that there is a *real risk* that such evidence was obtained through the use of torture for it to be excluded. It has held that it would be unfair to impose any higher burden of proof due "most importantly [...] to the special difficulties in proving allegations of torture," including the fact that it is practiced in secret, and that the government apparatus charged with preventing it is often complicit in concealing it.[83]

34. Many of the same considerations apply here. Although Democratic Kampuchea is no longer in a position to conceal evidence of torture,[84] there is ample evidence to suggest that torture was practiced in secret from 1975-1979. Further considering the many decades that have passed since the evidence in question was obtained, it becomes increasingly difficult to establish whether any particular piece of evidence was obtained through torture. Due to these difficulties, the Chamber considers that applying any higher standard to "establish" that statements are tainted by torture would substantially increase the danger that such evidence would be invoked at trial and damage the integrity of the proceedings.[85]

35. The Chamber will therefore consider evidence on a case-by-case basis to determine whether there is a real risk that such was obtained through torture.[86]

5.2.2. Burden of Proof

36. Pursuant to the ECCC legal framework, while any party may object to the use of evidence he or she alleges to have been improperly obtained, the initial assessment of whether

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[82] *Cf.* OCIJ Order, para. 16.

[83] *Othman (Abu Qatada) v. United Kingdom*, para. 276; *El Haski v. Belgium,* paras 86, 88; UN Special Rapporteur 2014 Report, para. 31.

[84] OCIJ Order, para. 17 (noting Internal Rule 21(1) involves statements obtained by the organs of the ECCC and not to those obtained by officials of the Communist Party of Kampuchea more than 30 years ago.)

[85] *R v. Oickle,* 2000 SCC 38, 66, Supreme Court of Canada (Case No. 26535); *A and Others,* House of Lords, [2005] UKHL 71 ("*A and Others*"), para. 39 (*quoting* Rome Statute, Article 69(7)).

[86] *See also,* SCC Decision, paras 56-57.

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evidence was obtained through torture must be made by the Chamber as part of its duty to ensure the fairness of the proceedings.[87] After the Chamber has made a preliminary determination that there is a real risk that torture was used to obtain a statement, any party seeking to rely upon such evidence may rebut this preliminary determination in particular upon a showing of specific circumstances negating this risk.[88] The Chamber considers this allocation of burden will effectively reduce the risk that tainted evidence will be impermissibly invoked at trial.

5.2.3. Standard and Burden on Rebuttal

37. The Supreme Court Chamber, while noting that the standard and burden of proof are not settled internationally, held that a preliminary assessment that there exists a real risk that evidence was obtained through torture may be rebutted by establishing, on a balance of probabilities, that torture was not used.[89] This finding is explicitly restricted to one specific situation, namely the introduction of S-21 statements into evidence at the appeal hearing under circumstances specific to Case 002/01.[90] The Trial Chamber therefore considers that the statement as to the standard of proof on rebuttal was *obiter dictum.*

38. The Trial Chamber does not find support in international jurisprudence to support a separate standard of proof on rebuttal.[91] Further, the Trial Chamber considers that applying a different standard of proof on rebuttal would unnecessarily complicate the assessment of evidence alleged to be tainted by torture, considering there are already separate standards at the stages of preliminary assessment of torture when a document is profferred and later in assessing the charges at the close of evidence. Accordingly, where the Chamber has found a real risk that torture was used to obtain evidence, and a party nonetheless seeks to use that evidence, the Chamber will give the parties an opportunity to present evidence or make submissions showing the evidence was not obtained by torture. Upon an assessment of all

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[87] Although placing an initial burden on an accused to produce evidence of torture in a case where charges were based on allegedly torture-tainted statements incriminating the accused, the ECtHR has held that a court must then satisfy itself that there was no real risk that torture was used to obtain the proffered evidence and that it is inherent to a court's responsibility to ensure that those appearing before it are guaranteed a fair hearing, and in particular to verify that the fairness of the proceedings is not undermined by the conditions in which the evidence on which it relies has been obtained. *See El Haski v. Belgium,* paras 88, 89; *Cf.* OCIJ Order, para. 16.

[88] Alternatively, such evidence may be invoked if it is shown to qualify under the exception contained in Article 15. *See infra.* Section 5.5.

[89] *See* SCC Decision, paras 49, 58.

[90] The Supreme Court Chamber did not, however, apply this standard of proof on rebuttal to the documents proposed for the appeal hearing. *See* SCC Decision, paras 58, 59, 68.

[91] Although *A and Others* considered an initial standard of a balance of probabilities was appropriate to establish torture was used, it did not apply that standard to rebuttal.

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relevant circumstances, the Chamber will determine whether there is a real risk that the evidence was obtained through torture.

5.2.4. Final Assessment of Evidence of Torture

39. Unlike other cases where the real-risk standard has been applied, the Accused in this case are charged with the crime of torture, and the Chamber must ultimately determine by a different, higher standard of proof whether torture occurred.[92] Therefore, the Chamber's preliminary determination of whether there is a real risk that evidence was obtained by torture, may differ from its final conclusion based on the standard for conviction on the allegations of torture, considering the totality of evidence available at the judgement phase. Where it is established that there is prejudice to any party as a result of this unique situation, it may be necessary to reopen the hearing of evidence to allow additional questions or evidence which had been initially prohibited.

5.3. Fair Trial Considerations

5.3.1. Presumption of Innocence

40. The Chamber emphasises that the right of the Accused to be presumed innocent precludes a final determination on the Accused's culpability for torture until all evidence is adduced and the Chamber delivers its judgement. The Chamber considers that a preliminary finding that a real risk exists that torture was used, based on a *prima facie* assessment of the evidence at the time of the decision, does not impinge upon this right as it does not pronounce on either the guilt of the Accused or the role they may have played in obtaining the statement at issue. It is a preliminary evidentiary ruling necessary to effectuate the obligatory provisions of the CAT.

41. Even if more practical or efficient, the Chamber cannot defer until a determination of the merits its assessment of which documents were obtained by torture, as proposed by the Co-

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[92] *See* Case 002/01 Judgement, para. 22 ("The Accused are presumed innocent until proven guilty. The Co-Prosecutors bear the burden of proof. In order to convict, the Chamber must be convinced of an accused's guilt "beyond reasonable doubt". In order to resolve any discrepancy between the different language versions of Internal Rule 87(1) that reflect the common law "beyond reasonable doubt" standard and the civil law concept of "*intime conviction*", the Chamber has adopted a common approach that evaluates the sufficiency of the evidence. Upon a reasoned assessment of the evidence, the Chamber interprets any doubt as to guilt in the Accused's favour.")

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Prosecutors.[93] Such a proposal runs contrary to the plain language of Article 15, which provides that torture-tainted evidence "shall not be invoked as evidence in any proceedings." The language of the Article is not limited to the judgement phase but applies with equal force to the presentation of evidence and the questioning of witnesses during the trial. Furthermore, if the Chamber were to allow the parties to invoke possibly torture-tainted evidence throughout this trial, the damage to the integrity of the proceedings will have been done. Removing from consideration, torture-tainted evidence at the judgement phase cannot remedy that damage. For the parties and the public will have seen the product of torture relied on for its truth, normalising the acquisition and invocation of that evidence at trial and diverting the Chamber's inquiry into the ascertainment of the truth.

5.3.2. Right to Present Exculpatory Evidence

42. The Chamber next considers the NUON Chea Defence submission that the exclusionary rule applies only to state authorities (the Co-Prosecutors in this case) and cannot therefore be interpreted to apply to the Defence, particularly where it seeks to invoke torture-tainted evidence it asserts is exculpatory.[94]

43. Contrary to the Defence submission, the Chamber considers that the CAT is not limited in application to state authorities. The ordinary meaning of Article 15 suggests that it has general application and provides no indication that it should be read to be limited in this way. The drafters of the Convention have made an explicit exception for a narrow personal and substantive scope to the exclusionary rule. This very narrow exception concerns proceedings against persons accused of torture. It is meant to avoid a reading of the exclusionary rule that would have the effect of preventing the prosecution of those liable for acts of torture. The language of the rule is not limited to the prosecutor, and reading such a limitation into the Article is unjustified.

44. In addition, the exclusionary rule must be seen as complementary to a corpus of general and treaty rules proscribing torture. Because of the importance of the values it protects, the prohibition of torture in international law constitutes a clear peremptory norm.[95] International

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[93] Co-Prosecutors' Submissions, para. 22 ("The Co-Prosecutors submit that the only practical and efficient manner to deal with this evidence is for the Chamber to wait to the completion of all evidence in the case [...]").

[94] NUON Chea Defence's Submissions, para. 17.

[95] *Othman (Abu Qatada) v. United Kingdom*, para. 266 ("Few international norms relating to the right to a trial are more fundamental than the exclusion of evidence obtained by torture."); *Cabrera García and Montiel Flores v. Mexico*, para. 165.

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courts, aware of the importance of outlawing this heinous phenomenon, have recognised that the prohibition against torture operates at the level of states as well as individuals.[96]

45. Furthermore, the ECtHR has held that "the admission of torture evidence is manifestly contrary, not just to the provisions of Article 6 [of the European Convention on Human Rights], but to the most basic international standards of a fair trial" and that "[i]t would make the whole trial not only immoral and illegal, but also entirely unreliable in its outcome."[97] In this regard, the Chamber notes that the intrinsic unreliability of torture tainted evidence does not vary based on the party invoking it, nor by the fact that it is allegedly exculpatory in nature. The purpose of the exclusionary rule at guaranteeing a reliable outcome in the interest of a fair trial would therefore be thwarted if it were invoked by any party, including the Accused.

46. In this case, NUON Chea is alleged to be responsible for the torture which has tainted the evidence in question and now seeks to rely on that same evidence as he asserts it to be exculpatory. This is not the primary situation which was envisaged when the CAT was adopted. The drafters of Article 15 were instead focused on the abuse of state authorities of those in their custody for the purposes of attaining information, and later invoking that evidence to obtain a conviction.[98] The Chamber nonetheless considers that the exclusionary rule, as an essential measure contained within the CAT, is inextricably linked with the prohibition against torture and must apply to individuals (including the Accused in this case) as well as to state authorities.

47. Although the NUON Chea Defence notes legal provisions and jurisprudence of various countries (including Cambodia) relevant to confessions, the Chamber has not identified any case where an Accused has been permitted to invoke torture-tainted evidence on the basis of his fair trial rights or for any other reason.[99] Moreover, the Chamber considers that it is not in

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[96] *Prosecutor v. Furundžija,* paras 145-146 ("[T]he international community, aware of the importance of outlawing this heinous phenomenon, has decided to suppress any manifestation of torture *by operating both at the interstate level and at the level of individuals.* No legal loopholes have been left."); *See also,* Trial of the Major War Criminals Before the International Military Tribunal, 14 November 1945-1 October 1946, Vol. XXII, p. 466 ("[C]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.").

[97] *Othman (Abu Qatada) v. United Kingdom*, para. 267.

[98] UN Doc. E/CN.4/1314, UN Economic and Social Council, 35th session, 19 December 1978, paras 13, 21, 29, 43-45. There was comparatively little discussion concerning the exclusionary rule contained in then Article 13. *See* paras 85-86.

[99] *See* NUON Chea Defence's Submissions, paras 21-22, 27; The NUON Chea Defence also relies upon a New Zealand High Court case to support its position. This case does not involve torture-tainted evidence and the

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the interests of a fair trial to permit as a rule the use of unreliable evidence obtained through illegal means. The Accused should be permitted to adduce evidence that he asserts is exculpatory, but not at the expense of the integrity of the proceedings.[100] Therefore, the Chamber considers that the exclusionary rule in Article 15 applies to all parties to this case, including the NUON Chea Defence and torture-tainted evidence which it asserts to be exculpatory.

48. The Supreme Court Chamber, while not reaching a final conclusion on the issue, leaves open the possibility that "[a]n exception could potentially arise in situations of extreme necessity, based on the combined factors of the provenience of evidence, its reliability, its overwhelming exonerating value and its uniqueness [...]". In this regard, the Supreme Court Chamber sets an extraordinarily high standard to permit the Accused to use evidence obtained through torture. The Trial Chamber has concluded, consistent with the European Court for Human Rights, the Inter-American Court for Human Rights and the UN Special Rapporteur for torture, that the exclusionary rule is a non-derogable obligation. As such, it applies to all parties in these proceedings, including the Accused. In any event, the Chamber is not satisfied that based on all of the circumstances here, the Accused has established that precluding his proposed uses of torture-tainted evidence, such as those summarised in section 5.5.2, would create a "flagrant denial of justice."[101]

5.4. Application and Breadth of the Exclusionary Rule

49. As a preliminary point, the Supreme Court Chamber has held that "Article 15 of the CAT does not [...] mandate the sweeping exclusion of the whole documentation surrounding the interrogation of the torture victim" and that "information originating from persons other than the torture victim" may be used.[102] The Trial Chamber considers that certain objective information contained on confessions is not part of the statement obtained through torture and therefore not covered by the exclusionary rule in Article 15 of the CAT. These may include information concerning the recorded identity of the detainee subject to interrogation, his or her date of arrest, incarceration, and/or execution which were recorded either during

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statement in question had already been admitted into evidence. *See R v. Vagaia,* HC AK CRI 2006-092-16228 [2008] NZHC 306, 11 March 2008, para. 15 (available at: F16.1.6).

[100] *A and Others,* paras 39, 52 ("The principles of the common law, standing alone, in my opinion compel the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice.").

[101] SCC Decision, paras 64-65. TC Decision, *supra.* para. 25.

[102] SCC Decision, para. 68.

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registration at the security centre, or at the beginning of a document containing a confession (notably on its cover page), but not in the confession itself.[103] Further, the Chamber reaffirms its consistent practice of allowing reference to annotations made on statements containing confessions by the interrogators or any other superiors, notably when indicating an action to take or already taken as they do not form part of the "statement" as it appears in Article 15.[104]

50. Apart from this type of information, the Defence teams raise two ways in which the exclusionary rule could be interpreted to encompass evidence that is not inherently torture tainted, namely evidence obtained through either cruel, inhuman or degrading treatment ("ill-treatment") or coercion not reaching the threshold of torture and evidence derived from torture-tainted evidence. The Chamber addresses each of these points below.

5.4.1. Evidence Obtained through Coercion or Ill-treatment

51. Although Article 38 of the Cambodian Constitution and Article 321 of the CCCP both address evidence obtained through coercion – which may be considered conduct not meeting the threshold of torture – Cambodian law does not specifically address whether evidence obtained by coercion is subject to the exclusionary rule.

52. By its plain terms, Article 38 of the Cambodian Constitution categorically prohibits reliance on confessions obtained under coercion as evidence of guilt, but is limited in application to statements made by the accused, thereby protecting his or her fundamental right against self-incrimination.[105] The statements at issue here are not those of the Accused. The more relevant provision is therefore Article 321 of the CCCP which provides that any "Declaration given under physical or mental coercion shall have no evidentiary value."

53. According to the Supreme Court Chamber, Article 321 of the CCCP implements Article 15 of the CAT in the area of criminal procedure in Cambodia and creates an exclusionary rule for evidence obtained through coercion (falling short of torture).[106] It considers that although the plain language of Article 321 contains no exception for statements "against a person accused of torture" as in Article 15 of the CAT, the exception in Article 15 "is not tacitly

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[103] The Supreme Court Chamber notes that whether these facts were obtained by torture is a matter of proof. *See* SCC Decision, para. 68.
[104] SCC Decision, para. 68.
[105] International Covenant on Civil and Political Rights, Article 14(g); Constitution of the Kingdom of Cambodia, Articles 31, 33, 38.
[106] SCC Decision, paras. 31, 35-37.

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obliterated."[107] In practice, the Supreme Court Chamber does not apply Article 321 to the documents proposed for its hearing but examines the issues primarily through the lens of Article 15 of the CAT as the parties' arguments are centred on that provision.[108]

54. The Trial Chamber notes that Article 321 of the CCCP must be read as a whole and in its context which encompasses both rules on admissibility and the evaluation of evidence. Article 321(1) provides that "Unless it is provided otherwise by law, all evidence is admissible". The same article explictly provides only one exception from this general rule (i.e. Article 321(4) communications between accused and lawyer). The third paragraph of Article 321 doesn't prohibit the admission of declarations made under physical and mental coercion but deals with evaluation of evidence and clarifies that such statements have no evidentiary value, thereby implying that this part of the provision comes into effect at the evidence assessment phase. Since Cambodian procural law does not deal with the issue of admissibility of evidence obtained through coercion and/or ill treatment, the Chamber seeks guidance in procedural rules established at the international level.[109]

55. The Chamber notes that Article 15 of the CAT does not require by its plain terms the exclusion of evidence obtained through ill-treatment.[110] Statements made as a result of ill-treatment were encompassed by an exclusionary rule in the 1975 General Assembly Declaration that preceded the CAT,[111] but reference to ill-treatment was omitted from Article 15 during the negotiation of the 1984 treaty.[112] The notions of cruel, inhuman and degrading treatment are not defined in the CAT.

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[107] SCC Decision, para. 37.
[108] SCC Decision, para. 38.
[109] ECCC Agreement, Article 12(1); ECCC Law, Article 23 new.
[110] The Chamber notes that "ill-treatment" is accepted shorthand for "cruel, inhuman and degrading treatment." *See* UN Special Rapporteur 2014 Report, para. 17; *See also,* UN Doc. CAT/C/GC/2, Committee Against Torture, General Comment No. 2, 24 January 2008 ("General Comment 2"), para. 3; There are two differences between torture and other ill-treatment. It is generally considered that there is a difference in the intensity of the suffering inflicted with torture at the highest end of the spectrum and degrading treatment at the lowest. *See Ireland v. United Kingdom,* Judgement, ECtHR Plenary, Application no. 5310/71, 18 January 1978, para. 167; *Gäfgen v. Germany*, Judgement, ECtHR Grand Chamber, Application no. 22978/05, 1 June 2010 ("*Gäfgen v. Germany*"), paras 88-90. Torture is also unique in that it requires that the mistreatment be inflicted for a particular purpose (i.e. to obtain information, to punish, to coerce or for any other reason based on discrimination). *See İlhan v. Turkey*, Judgement, ECtHR, Application no. 22277/93, 27 June 2000, para. 85; UNCAT, Article 1(1).
[111] UN Doc. 3452 (XXX), UN General Assembly Resolution - Declaration on the protection of all persons from being subjected to torture and other cruel inhuman or degrading treatment, 9 December 1975, Article 12 ("Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceedings." (emphasis added)).
[112] UN Doc. E/CN.4/1285, UN Economic and Social Council, 34th session, 23 January 1978 ("Swedish Draft"); Herman Burgers and Hans Danelius, *The United Nations Convention against Torture – A Handbook on the*

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56. Many other provisions of the CAT apply to cruel, inhuman or degrading treatment, including the obligation to prevent such practices. Article 16, in identifying the means to prevent ill-treatment, emphasises "*in particular*" the measures outlined in Articles 10 to 13 of CAT, but does not explicitly limit its application to these articles.[113]

57. Furthermore, the obligation to prevent ill-treatment in practice overlaps with and is largely congruent with the obligation to prevent torture. As noted by the Committee Against Torture in 2007, "in practice, the definitional threshold between ill-treatment and torture is often not clear. Experience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment." Accordingly, the Committee Against Torture considered not only that the use of evidence obtained through ill-treatment is impermissible but that such prohibition to be likewise non-derogable under the Convention.[114] Later, in 2008, the Committee considered that Articles 3 to 15, inclusive, are obligatory with regard to both torture and ill-treatment.[115] A UN General Assembly Resolution adopted in 2013 moves in this same direction by encouraging States to extend the prohibition against invoking torture-tainted evidence to evidence obtained through ill-treatment.[116]

58. Relevant provisions of both the American and European Conventions on Human Rights prohibit the use of torture and ill-treatment.[117] Article 8(3) of the American Convention goes

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Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dordrecht: Martinus Nijhoff, 1988)("Burgers and Danelius"), p. 147-148 ("Unlike the provision of the Declaration [on the protection of all persons from being subjected to torture and other cruel inhuman or degrading treatment], article 15 of the present Convention applies exclusively to torture."); United Nations Convention Against Torture – Oxford Commentaries, pp. 534-535 (noting Article 15 only refers to torture and not ill-treatment, because states could not reach consensus on which state obligations should apply to all forms of ill-treatment and which to torture only.); The Chamber further notes that Article 16 of the CAT incorporates cruel, inhuman and degrading conduct into four additional Articles (10, 11, 12, 13), but fails to include it in Article 15.

[113] UNCAT, Article 16 ("Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in Articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment" (emphasis added)).

[114] General Comment 2, paras 3, 6; UN Special Rapporteur 2014 Report, paras 20-22 (*addressing* torture and other ill-treatment without distinction with respect to Article 15).

[115] General Comment No. 2para. 6.

[116] UN Doc. A/RES/67/161, UN General Assembly Resolution 67/161 - Torture and other cruel, inhuman or degrading treatment or punishment, 7 March 2013, para. 16 ("Strongly urges States to ensure that no statement that is established to have been made as a result of torture is invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made, encourages States to extend that prohibition to statements made as a result of cruel, inhuman or degrading treatment or punishment [...]").

[117] *See* Article 5(2) of the American Convention on Human Rights ("ACHR") and Article 3 of the European Convention for the Protection of Human Rights and Fundamental freedom which both foresee that no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.

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further still and specifically provides that: "A confession of guilt by the accused shall be valid only if it is made without coercion of any kind."[118]

59. Nonetheless, jurisprudence from human rights courts is not unanimous as to whether evidence obtained through ill-treatment should be, as a general rule, excluded from all proceedings. The IACtHR has held that whenever it is proven that any form of coercion has interfered with the spontaneous expression of a person's will, this necessarily requires the exclusion of that evidence from the judicial proceeding. The Court stressed that statements obtained under coercion are seldom truthful, because the person tries to say whatever is necessary to make the cruel treatment or torture stop.[119] Whereas the ECtHR has held that the admission of evidence obtained through ill-treatment but falling short of torture, violates fair trial rights only if it has been shown that the admission of evidence obtained through ill-treatment had an impact on the Accused's conviction or sentence.[120]

60. In a related body of jurisprudence, international criminal tribunals since Nuremberg have recognised that evidence obtained through illegal means should be excluded.[121] The ICC and *ad hoc* Tribunals have specific rules which prohibit the admission of evidence obtained by methods which cast doubt on its reliability or where its admission would seriously damage the integrity of the proceedings.[122] These rules may apply to evidence obtained through torture and ill-treatment[123] but have also been applied as a procedural safeguard to protect the fair

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[118] ACHR, Article 8(3).

[119] *Cf. Cabrera Garcia and Montiel Flores v. Mexico,* paras 165-167; *See also, Garcia Cruz and Sanchez Silvestre v. Mexico,* Judgement, 26 November 2013, para 58.

[120] *Gäfgen v. Germany,* para. 178 ("[T]he Court considers that both a criminal trial's fairness and the effective protection of the absolute prohibition under Article 3 [torture and ill-treatment] in that context are only at stake if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings against the defendant, that is, had an impact on his or her conviction or sentence."); *El Haski v. Belgium,* para. 85 ("the admission of such evidence obtained as a result of an act qualified as inhuman treatment in breach of Article 3, but falling short of torture, will only breach Article 6 [fair trial], however, if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings against the defendant, that is, had an impact on his or her conviction or sentence.")

[121] *USA v. Greifelt et al.* (RuSHA Case), Judgement of 10 March 1948, reprinted in Trials of War Criminal Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Vol. V, p. 88 ("During the course of the trial several witnesses, including some defendants who made affidavits that were offered as evidence by the prosecution, testified that they were threatened, and that duress of a very improper nature was practiced by an interrogator. The affidavits referred to were excluded from the evidence and have not been considered by the Tribunal.")

[122] ICC Statute, Article 69(7) ("Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a) The violation casts substantial doubt on the reliability of the evidence; or (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings"); ICTY RPE 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"); ICTR RPE 95 (same).

[123] *Prosecutor v. Lubanga,* ICC Pre-Trial Chamber (ICC-01-04-01/06), Decision on the Confirmation of Charges, 29 January 2007 ("*Prosecutor v. Lubanga*"), para. 85, *quoting* H-J Behrens, "The Trial Proceedings" in

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trial rights of the Accused.[124] However, these rules do not automatically require the exclusion of evidence obtained by illegal means and several international tribunals have ruled that in deciding on the admission of such evidence, the correct balance must be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law.[125]

61. This review of relevant international instruments and jurisprudence does not demonstrate the existence of a universally-accepted international standard which would extend the exclusion of torture-tainted evidence to all evidence obtained through cruel, inhuman and degrading treatment.[126] Thus, the Chamber does not consider that Article 15 of the CAT extends to evidence obtained by ill-treatment.

62. The Chamber nonetheless considers that Article 321 of the CCCP is complementary to Article 15 of the CAT. While the former only has application at the judgement phase, preventing any reliance on coerced statements, the latter prohibits the invocation of torture-tainted evidence at all stages of the proceedings.

The International Criminal Court, The Making of the Rome Statute, The Hague, Kluwer Law international, 1999, p. 914, para. 76 ("some forms of illegality or violations of human rights create the danger that the evidence, such as confession [sic] obtained from a person during interrogation, may not be truthful or reliable as it may have been proffered as a result of the duress arising from the circumstances of the violation.")

[124] The *ad hoc* tribunals have applied the limitations in Rule 95 where it is alleged that the accused's right to counsel was denied, where the accused was not properly advised of his rights, and where a witness was contacted in violation of a protective order. *See e.g., Prosecutor v. Delalic et. al.*, ICTY Trial Chamber (IT-96-21-T), Decision on Zdravko Mucic's Motion for the Exclusion of Evidence, 2 September 1997; *Prosecutor v Mrskic et al*, ICTY Trial Chamber (IT-95-13/1-T), Decision Concerning the Use of Statements Given by the Accused, 9 October 2006; *Prosecutor v Karemera et al.*, ICTR Trial Chamber (ICTR-98-44-T), Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse, 2 November 2007, para. 32; *Prosecutor v Bagosora et al.*, (ICTR-98-41-T), Decision on the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89(C), 14 October 2004, para. 21; *Prosecutor v Zigiranyirazo*, (ICTR-2001-73-T), Decision on the Voir Dire Hearing of the Accused's Curriculum Vitae, 29 November 2006, para. 13; *Prosecutor v Prlic et al.*, ICTY Trial Chamber (IT-04-74-T), Decision on the Admission into Evidence of Slobodan Praljak's Evidence in the Case of Natelic and Martinovic, 5 September 2007, paras 22-23; *Prosecutor v Nyiramasuhuko et al.*, ICTR Trial Chamber (ICTR-98-42-T), Decision on Kanyabashi's Oral Motion to Cross Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997, 15 May 2006, paras 80-82; *Prosecutor v Kajelijeli*, ICTR Trial Chamber (ICTR-98-44A-T), Decision on Kajelijeli's Motion to Hold Members of the Office of the Prosecutor in Contempt of the Tribunal (Rule 77(C)), 15 November 2002, para. 14.

[125] *Prosecutor v. Lubanga*, paras 69, 84, 86, 89-90; *See also, Prosecutor v. Brdjanin,* ICTY Trial Chamber (IT-99-36), Decision on the Defence "Objection to Intercept Evidence", 3 October 2003, paras 61-62 (In determining whether the admission of evidence will seriously damage the integrity of the proceedings, "the correct balance must, therefore, be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law.").

[126] The Chamber notes that the practical effect of this ruling may not be significant in this case due to the relevant standard of proof. If there is a real risk of torture, there is also likely a real risk of ill-treatment. In addition, most, if not all, of the evidence in question here was obtained at security centres. The parties have not identified any evidence which may have been obtained by ill-treatment falling short of torture.

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5.4.2. Derivative Evidence

63. In addition to evidence established to have been obtained by torture, parties may seek to use other evidence derived from tainted evidence, that is evidence which was not itself the product of torture, but was nonetheless discovered through torture-tainted evidence.[127] Cambodian law is silent on the use of derivative evidence and Article 15 refers exclusively to the exclusion of "any statement which is established to have been made as a result of torture" without further precision. For these reasons, the Chamber considers the preparatory work of the CAT and other international jurisprudence.

64. The preparatory work of Article 15 suggests that the drafters did not intend to encompass derivative evidence within the exclusionary rule. An early draft of Article 15 submitted by the International Association of Penal Law supported the exclusion of "[a]ny oral or written statement or confession obtained by means of torture or any other evidence derived therefrom."[128] The underlined language was excluded from the final version of Article 15, suggesting the drafters intentionally omitted derivative evidence.

65. The Chamber further notes that in Cambodia, as in most civil law countries, the general rule is that all evidence is admissible.[129] This weighs in favour of permitting the invocation of derivative evidence. However, there is no consensus among the international sources as to whether the exclusionary rule should apply to derivative evidence and, if so, under what circumstances.[130]

66. The European Court of Human Rights addressed the issue in a case in which it found that during police investigations an accused was subjected to a method of interrogation amounting to inhuman treatment not reaching the threshold of torture. The Court declined to categorically extend the exclusionary rule to derivative evidence obtained under these circumstances, instead finding that the invocation of such evidence will render a proceeding unfair only if it has an impact on an Accused's conviction or sentence.[131] Where evidence

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[127] A typical example of such evidence would be the body of the victim found after the authorities had tortured the suspect to confess as to its location. *See Gäfgen v. Germany,* paras 15-16, 73-74, 171..

[128] UN Doc. E/CN.4/NGO/213, Draft Convention for the Prevention and Suppression of Torture, Submitted by the International Association of Penal Law, 15 January 1978 (emphasis added).

[129] Cambodian Code of Criminal Procedure, Article 321; Internal Rule 87(1).

[130] *Gäfgen v. Germany*, paras 69-74, 174 ("The Court notes that there is no clear consensus among the Contracting States to the Convention, the courts of other States and other human rights monitoring institutions about the exact scope of application of the exclusionary rule.")

[131] *Gäfgen v. Germany*, para. 178; *See also, Jalloh v. Germany* (Application no. 54810/00), ECtHR Grand Chamber, Judgment, 11 July 2006, paras 104-108.

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derived from ill-treatment was ultimately obtained from another, untainted source, the ECtHR considered the proceedings to be fair.[132]

67. The Inter-American Court for Human Rights (IACtHR) has reached a different conclusion, stating that "excluding evidence gathered or derived from information obtained by coercion adequately guarantees the exclusionary rule."[133] In that case, the IACtHR did not find occasion to apply the exclusionary rule to derivative evidence since the evidence in question consisted of confessions made by the victims directly subject to torture or ill-treatment.[134] Considering that the IACtHR did not cite any supporting authority for the proposition that the exclusionary rule encompassed derivative evidence, and that since the issue did not arise on the facts it was addressed only in *obiter dictum*, the Trial Chamber does not consider the IACtHR's ruling to be persuasive in this case.

68. The Supreme Court of Appeal of South Africa has also held that the exclusionary rule encompasses evidence that is derived from torture, concluding that "[i]n the long term, the admission of torture-induced evidence can only have a corrosive effect on the criminal justice system. The public interest, in my view, demands its exclusion, irrespective of whether such evidence has an impact on the fairness of the trial."[135] Nonetheless, the judge in that case acknowledged that derivative evidence is not categorically excluded and that such evidence may be admissible if it could have been obtained from a source independent of the torture or where it would have been discovered inevitably.[136] The Trial Chamber likewise considers that a categorical rule excluding evidence derived from evidence obtained by torture or ill-treatment would be over-expansive.

69. In the absence of consistent international jurisprudence, the Trial Chamber finds that an international standard concerning the use of evidence derived from torture has not yet been established.

70. For these reasons, the Chamber finds that a broadening of the scope of the exclusionary rule is not supported by the preparatory work of the CAT or consistent jurisprudence at the

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[132] *Gäfgen v. Germany*, paras 178-187.
[133] *Cabrera Garcia and Montiel Flores v. Mexico,* para. 167.
[134] *Cabrera Garcia and Montiel Flores v. Mexico,* paras 134, 170.
[135] *Mthembu v. the State,* (379/2007)[2008] ZASCA 51 (10 April 2008)("*Mthembu v. the State*"), para. 36; A United States District Court likewise held that evidence derived from a suspect of a terrorist bombing in Tanzania which was obtained by "extremely harsh interrogation methods" and in the absence of counsel must be excluded from the proceedings. *See U.S. v. Ghailani,* 743 F. Supp. 2d 242 (S.D.N.Y. 2010) *conviction aff'd U.S. v. Ghailani et al.,* 733 F.3d 29 (2nd Cir. 2013).
[136] *Mthembu v. the State,* paras 33, 35..

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international level. The free admissibility of evidence militates in favour of accepting derivative evidence so long as the proposed use does not circumvent the prohibition against invoking the contents of torture-tainted confessions to establish their truth. However the probative value of such evidence will be assessed on a case by case basis. The Chamber now turns to the issue of when evidence established to have been obtained by torture may nonetheless be invoked during these proceedings.

5.5. The Exception to the Exclusionary Rule Contained in Article 15

71. In addition, Article 15 states that such evidence may be used "against a person accused of torture as evidence that the statement was made."[137] The SCC Decision states 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 [...] does not apply." The charges in Case 002/02 include torture, thereby necessitating an assessment of which evidence may fall within the exception.[138]

72. The plain language of the exception suggests that it should be interpreted narrowly.[139] It provides a singular instance of what may be proven, namely "that a statement was made." The language of Article 15 does not clarify how a statement may be used and for what purpose(s). Due to ambiguities within the language of the exception to Article 15, the Chamber makes reference to the purpose of Article 15 as a whole and its drafting history.[140]

73. The Chamber notes that the Working Group's first draft of Article 15 did not provide for *any* permissible uses of torture-tainted evidence. During the drafting of the Convention, language was added to maximize the deterrent effect of the article by allowing statements to be used to prosecute the alleged torturer.[141] If this language is read too broadly, however, it risks undermining the general rule which is to exclude such evidence. Therefore, the permissible scope of invoking torture-tainted evidence must be determined in line with the general purpose of Article 15 as a whole. These include, (1) a public policy of disincentivising torture; (2) preventing the use of unreliable evidence as it is not conducive to ascertaining the

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[137] *Othman (Abu Qatada) v. United Kingdom*, para. 266 ("Indeed, the only exception to the prohibition that Article 15 allows is in proceedings against a person accused of torture.").
[138] SCC Decision, para. 67; *See also,* SCC Decision, para 27; FN 54.
[139] SCC Decision, para. 67.
[140] Judge Fenz dissents from this Section 5.5 of the decision, with reasons to follow.
[141] An early draft of Article 15 proposed by Sweden did not include any exception. *See* Swedish Draft.

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truth; (3) preserving the integrity of the proceedings; and (4) protecting the Accused's right to a fair trial, including due process.[142]

74. First, Article 15 is meant to discourage the use of torture by state authorities for the purpose of obtaining information. As explained by one commentator involved in the drafting of the Convention, "if a statement made under torture cannot be invoked as evidence, an important reason for using torture is removed, and the prohibition against the use of such statements as evidence before a court can therefore have the indirect effect of preventing torture".[143] However, the underlying reason for excluding torture-tainted evidence is to prevent reliance on such evidence to gain a benefit with a view to preventing torture. This purpose would be defeated if in prosecuting those responsible for torture, all uses of such evidence were prohibited, thereby favouring individuals accused of this crime. Such a situation would not serve as a disincentive to the use torture in future. As noted by the Co-Investigating Judges in their order in this case, "barring [any] use of such information in the context of this case would not deter the would-be torturer but would instead allow those who are accused of torture to use the laws designed to prevent torture to shield themselves from liability."[144] The Chamber considers therefore that allowing certain information to be used against an alleged torturer does not run counter to the general purpose of Article 15.

75. Second, the exclusionary rule is meant to protect the right to a fair trial by, *inter alia,* preventing the invocation of unreliable evidence. More precisely, it is a mechanism to prevent the use of statements made by an accused or by others under torture as evidence of the truthfulness of admissions or other matters asserted in the statement, because in such circumstances this evidence is intrinsically unreliable.[145] The Chamber considers that information contained within a torture-tainted statement may be used to establish facts other than the truth of the statement, but only for the purpose of determining what action resulted

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[142] UN Special Rapporteur 2014 Report, para. 21; Burgers and Danelius, p. 148 ("The rule laid down in article 15 would seem to be based on two different considerations. First of all, it is clear that a statement made under torture is often an unreliable statement; and it could therefore be contrary to the principle of 'fair trial' to invoke such a statement as evidence before a court.").

[143] Burgers and Danelius, p. 148.

[144] OCIJ Order, para. 24.

[145] T. 28 May 2009, pp. 7-9; E74, p. 3; E185, para. 21; *See also,* Burgers and Danelius, p. 148 (when such evidence is invoked against an accused, "the intention is not to prove that the statement is a true statement. The purpose is rather to prove that a specific statement was made under torture [...]"); UN Doc. A/61/259, UN General Assembly, Torture and other cruel, inhuman or degrading treatment, 14 August 2006, para. 45; *See also,* Rome Statute, Article 69(7) which prohibits the admission of evidence obtained by means of a violation of the Rome Statute or internationally recognized human rights 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."

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based on the fact that a statement was made. The reliability of the information contained in the tainted evidence is not implicated if its use is limited in this way.[146] For example, when information is disclosed to interrogators because a statement has been made by an individual subject to torture, the disclosure of the information in itself is a fact which exists independently of the truth of the statement. Such facts can be used as evidence of the cause of an action taken following a confession, such as proof of further arrests triggered by the disclosure of names or of a purge policy or process. By limiting the permissible uses of such evidence in this way, concerns about the unreliability of torture-tainted evidence are attenuated.

76. Third, the exclusionary rule is also meant to preserve the integrity of the proceedings by preventing the Chamber from according any judicial legitimacy to the abhorrent conduct which procured the evidence.[147] This concern however must be considered in tandem with the need to ensure the availability of evidence to prosecute those accused of torture. The Chamber considers that the limited use of torture-tainted evidence as envisaged would not legitimise torture, but would permit a full assessment of the alleged conduct in this case. Given the restrictions on its use, the evidence will assist the Chamber in ascertaining the truth and shed light on reprehensible and inhuman practices where such occurred, in accordance with the obligations imposed by the CAT.[148] Therefore, the need to ensure the integrity of the proceedings does not militate against a complete prohibition on the use of torture-tainted evidence in this case where the Chamber must make determinations of responsibility for acts of torture.

77. Fourth, most, if not all, of the international jurisprudence cited by the parties and considered by the Chamber in this decision have arisen where the accused are defending against allegations contained in torture-derived confessions. Where the accused themselves have been coerced into confessing, there are manifold fair trial and due process concerns.

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[146] T. 31 July 2012, p. 108 (President: "[T]he Chamber has maintained its position firmly that it shall always follow [the CAT]. [...] And during these proceedings, the Chamber shall not allow parties to refer to the content of any of the confessions that were extracted by torture because the contents of the confessions were somehow the result of tortures. And if parties wish to refer to other annotations or the dates on the confessions, parties are allowed to do so.").

[147] *A and Others,* para. 39 (*noting* appellant's contention that permitting use of torture-tainted statement would infringe the party's rights and the fairness of the proceedings, shock the judicial conscience, abuse or degrade the proceedings and involve the state in moral defilement."); Rome Statute, Article 69(7)(prohibiting the use of evidence obtained in violation of internationally recognized human rights where the violation casts substantial doubt on the reliability of the evidence or the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.)

[148] *See e.g.,* UNCAT, Articles 5, 12.

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Likewise, where the torture-tainted statements of third parties implicating the Accused are put forward as evidence of guilt, the accused have few avenues to challenge that evidence. The unreliability of these statements precludes judicial consideration of the statements for their truth. As noted above, however, the Chamber considers that in the circumstances presented here, the use of torture-tainted statements for the limited purpose of determining what action resulted based on the fact that a statement was made, does not violate the due process or fair trial rights of the Accused.[149]

78. The Chamber considers that the above reading of Article 15 adequately protects the object and purpose of the exclusionary rule while at that same time permitting the prosecution of those charged with torture. The Chamber now considers the practical application of these principles to the evidence in this case.

5.5.1. Evidence in Case 002/02 for which there exists a real risk that it was obtained under torture

79. The Chamber recalls its findings in the Case 001 Judgement, confirmed on appeal, that torture was used to obtain confessions at S-21, that where prisoners did not give satisfactory confessions more torture was ordered, and that much of the information contained in the confessions was fabricated.[150] While *res judicata* is not applicable to the Case 001 Judgement findings with regard to the Accused in this case because they were not parties to the Case 001 proceedings, the Chamber considers that these findings demonstrate a real risk that any confessions obtained at S-21 were the result of torture. In further relation to security centres, the Co-Investigating Judges have considered, in their assessment of the existence of sufficient evidence to remit Case 002 to the Trial Chamber that torture was used at other security centres to obtain confessions and "to identify members of their 'network' for arrest".[151] Consequently, the Chamber is satisfied that a real risk exists that torture was used at S-21 and other security centres to obtain confessions. The Chamber will not permit the invocation of

[149] The Supreme Court Chamber states that it concurs with the judicial authorities that hold that the necessities of prosecution do not justify the use of statements obtained through torture. *See* SCC Decision para. 67. It appears to have limited its analysis to the general exclusionary rule in Article 15 and not to have interpreted the exception contained in Article 15. In addition, none of the authorities cited by the Supreme Court Chamber involved a prosecution of the Accused on charges of torture to which the exception to Article 15 explicitly applies.

[150] Case 001 Judgement, paras 176, 177, 179.

[151] Closing Order, paras 1408, 1411.

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such evidence, unless a party proposing to use such evidence establishes that a real risk does not exist that it was obtained through torture, or it falls within the exception to Article 15.[152]

5.5.2. Use of Torture-Tainted Evidence in Case 002/02

80. In order to provide the parties with guidance as to the application of these principles, the Chamber now considers instances in this case where the parties have invoked, or sought to invoke, evidence that may have been obtained through torture.

81. Both the NUON Chea Defence and the Co-Prosecutors have attempted to invoke S-21 confessions either to question witnesses in the case or at the key document presentation hearings.[153] Where such questions refer to annotations or inquire as to basic identifying information, they are permissible; otherwise, they will not be permitted.

82. The NUON Chea Defence has also made reference to statements contained within S-21 confessions without identifying a specific confession or confirming whether such confessions were the basis for such questions.[154] Where the foundation for a question is not properly laid, such questions will not be permitted.[155]

83. As to the NUON Chea Defence request for clarification about its question to Witness PECH Chim ("Have you ever come to learn that Sae implicated you and your brother as belonging to his network?"), the Chamber notes that it is moot as the witness in fact answered the question. Nonetheless, because similar questions continue to be asked,[156] and the Chamber must determine if it may rely on the answer to this question as evidence, the Chamber provides the following guidance.

84. The question put to PECH Chim inquires as to the witness' knowledge. It seeks information from the witness as to his awareness of being accused of acts that may have been considered to be disloyal to the CPK. How he came to know of this would be of particular

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[152] Judge Fenz generally agrees with the Majority decision on this Section 5.5.1, however maintains her dissent with regard to the interpretation of the exception in Article 15.

[153] T. 28 April 2015, pp. 39-42 (Counsel for NUON Chea referencing S-21 Confession of Chou Chet E3/746 at key document presentation hearing); T. 5 May 2015, p. 32-33, 55-57.

[154] T. 24 April 2015, pp. 30-35 (during the questioning of Pech Chim, Counsel for NUON Chea inquired whether the witness knew "that Sae implicated you and your brother as belonging to his network." The Assistant Co-Prosecutor suggested that this information was contained in the S-21 confession of Kang Chap (E3/2792); T. 16 June 2015, p. 4 (Counsel for NUON Chea inquiring whether witness had "ever heard of the storage of more than 1000 tonnes of food at Anlong Kngan used for soldiers involved in the rebellion.").

[155] T. 16 June 2015, pp. 5-6.

[156] T. 5 May 2015, pp. 32-33, 55-57.

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interest as it may be relevant to the communication structure within the regime. This much is conceded by the Co-Prosecutors.[157] Insofar as the torture-tainted statement is not put to the witness as an assertion of fact and the question focuses instead on the knowledge of the witness, the Chamber considers that this form of question is permissible.[158]

85. This is to be contrasted with the question the Chamber did not permit counsel for NUON Chea to put to Witness Khoem Boeun. Counsel sought to confront the witness with the confession of CHOU Chet to confirm or deny facts contained within his S-21 confession (i.e. whether Saom was in fact a very oppressive and radical person).[159] This question does not touch on the knowledge of the witness. The question seeks to confront the witness where she has previously stated that she had no particular recollection of Saom.[160] It therefore invokes torture-tainted evidence for the truth of the matter asserted and is impermissible.[161]

86. The Co-Prosecutors and the NUON Chea Defence both attempted to ask questions based on the S-21 Confession of SUONG (E3/1892). The NUON Chea Defence stated that a note at the top of the confession in the English version indicates that the confession was written before he was tortured. The Chamber ruled that the contents of the confession should not be read out as it was not clear under exactly what conditions this confession was obtained.[162] The Chamber considers that a note of questionable provenance at the top of only the English version of this document, rather than the original Khmer, does not rebut the presumption of a real risk that the confession was obtained under torture. As a torture-tainted document, its uses must be limited to those described above.[163]

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[157] T. 24 April 2015, p. 32 ("[...] I think there is a legitimate question that can be made -- certainly not for the truth of the matter. [...] What would be relevant would be to know whether the fact he had been implicated was communicated to him by Ke Pauk or someone else. So, to the extent, that is the question -- whether the -- this confession was then used in the regime and communicated to people I think would be appropriate. To use it for the truth of the matter is entirely barred.")

[158] If the line of questioning were to turn to an assertion that the witness was in fact part of a network with a plan to rebel against the CPK leadership, the question would then rely upon the truth of the torture-tainted confession. Such a use is not permissible.

[159] T. 5 May 2015, p. 32 ("I would like to confront her with the statement of Chou Chet that Saom was a very oppressive and radical person, and my question would be whether she would agree with this, yes or no?")

[160] T. 5 May 2015, pp. 29-30.

[161] *See* SCC Decision, para. 47 ("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.")

[162] T. 17 June 2015, pp. 80-81.

[163] Judge Fenz maintains her dissent as to the interpretation of the exception in Article 15.

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87. Furthermore, the Co-Prosecutors have on several occasions presented questions to witnesses based on notebooks or prisoner logbooks from security centres.[164] The Chamber considers that such documents containing the thoughts and perceptions of torturers are permissible, so long as they are not invoked to establish the truth of statements made by those subject to torture. For example, if it can be demonstrated that the people listed were later arrested or executed, it may serve as proof of reliance on this information by the Accused or others within the CPK structure.[165]

5.5.3. Future Application of these principles

88. The Chamber recognises that in balancing the interests sought to be protected by Article 15, each proffered use of torture-tainted evidence must be evaluated on a case-by-case basis. Nonetheless, certain guidelines may create further certainty about the application of these principles. First, reading directly from a torture-tainted statement in court, regardless of the intent of doing so, leads to the impression that it is being used to establish the truth of the statement. Such use is therefore unlikely to be accepted by the Chamber. Second, confronting a witness with accusations laid forth in a torture-tainted confession is unfair to the witness and suggests that reliance is being place on the truth of the confession.[166] This use will not be permitted by the Chamber.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

FINDS that the exclusionary rule contained in Article 15 of the CAT is binding on all parties to these proceedings;

FURTHER FINDS that the Cambodian Code of Criminal Procedure prohibits any weight being given to coerced statements in the Chamber's factual findings at the judgement phase;

DETERMINES that Article 15 of the CAT does not extend to evidence obtained through cruel, inhuman, and degrading conduct or to evidence derived from torture-tainted evidence;

RULES that statements from security centres that the Co-Investigating Judges determined used torture fall within the scope of Article 15 of the CAT and may not therefore be invoked in these proceedings unless it is established, on a case-by-case basis, that an individual

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[164] T. 27 April 2015, pp. 9-10, 25-26 (Assistant Co-Prosecutor reference to D157.7); T. 4 May 2015, pp. 47-48 (questioning of Khoem Boeun Assistant Co-Prosecutor reference to E3/2048); T. 18 May 2015, pp. 19-21 (OCP reference to Krang Ta Chan notebook (D157.13, E3/5860), noting biographical information of one man and naming individuals being identified as traitors, though not asking whether they were in fact traitors.)

[165] OCIJ Order, para. 27.

[166] Judge Fenz agrees with this result, however, maintains her dissent with regard to the interpretation of the exception in Article 15.

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statement was not obtained through torture or that it is adduced pursuant to the exception contained in Article 15; and

REAFFIRMS, Judge Fenz dissenting, with reasons to follow, that the exception to the exclusionary rule in Article 15 of the CAT permits the use of torture-tainted evidence against a person accused of torture for purposes other than proving the truth of the matter asserted in the statement.

Phnom Penh, 5 February 2016
President of the Trial Chamber

Nil Nonn

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1. REASONS FOR PARTIALLY DISSENTING OPINION OF JUDGE FENZ

1. Although I join with my colleagues in Sections 1 through 5.4 of the Decision, I respectfully disagree with the Majority on their interpretation of the nature and scope of the exception contained in Article 15 of the Convention Against Torture as explained in Section 5.5 of the Majority opinion.

2. I first examine where, in my view, the reasoning of the Majority is not convincing. I then put forward my own interpretation of Article 15 based on the ordinary meaning of the terms of the provision in their context and in the light of the objective and purpose of the Convention. Additionally I discuss how permissible subsidiary means of interpretation referenced by the Vienna Convention on the Law of Treaties support my interpretation.

1.1. Reasoning of the Majority Opinion

3. Article 15 of the CAT provides 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.** In the Majority Opinion, this provision morphs via interpretation into the following rule: Any statement that has been established to have been made as a result of torture shall not be invoked as evidence in any proceedings except against the person accused of torture **for purposes other than proving the truth of the matter asserted in the statement.**

4. In its reasoning, though not the disposition of the Decision, the Majority appears to foresee further qualification of this purpose in individual cases (*e.g.* when it finds that "The Chamber considers that information contained within tortured tainted statements may be used to establish facts other than the truth of the statement, but only for the purposes of determining what action resulted based on the fact that a statement was made.")[1] I will come to this later.

5. A comparison of the original language of Article 15 and the relevant language used in the disposition of the Decision shows that, simply put, the exception has been changed from allowing the use of a statement obtained by torture **for one purpose** to allowing the use of

[1] Majority Opinion, para. 75.

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such statement for **all purposes but one** (i.e. to establish its truth). This is a significant difference and, in itself, a first indication that the interpretation is problematic. It is also surprising because the Majority concedes that the plain language of the exception indicates that it should be read narrowly.[2]

6. The Majority arrives at this interpretation by identifying an ambiguity in the language of the exception to Article 15 by alleging that it does not clarify "how a statement may be used and for what purpose(s)."[3] It then claims to solve this alleged ambiguity by teleological interpretation of the whole of Article 15 (i.e. by reference to the "purposes of Article 15") and reference to the drafting history.[4] The Majority then states that generally "the permissible scope of invoking torture-tainted evidence must be determined in line with the general purpose of Article 15."[5] This language indicates legislating not interpreting.

7. Consequently, paragraphs 73-77 of the Majority appear less concerned with the interpretation of the original exception, but with establishing that the Majority's "interpretation" of it does not run counter to (some of) the major purposes of Article 15. Even if this were considered proved, the only thing established is exactly that – the Majority's exception to Article 15 does not violate the purposes of the Convention. What it does not prove is that this exception was the one intended by the drafters of the Convention. Legislators always have a variety of options when it comes to regulating a certain matter legally. In the end, after balancing relevant concerns, principles and issues, the legislative body decides on one of these options (thereby ruling out the others). And the drafting history shows that the drafters of the Convention have done exactly that.

8. In my view, the Majority, has effectively created their own alternative exception which might, standing on its own, be defensible when measured against the purposes of the Convention but is simply not the one chosen by the legislator.[6]

9. A major concern is obviously that if the Majority were to adopt a more restrictive view, the exception contained in Article 15 would benefit the alleged torturer (and thus go against

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2 Majority Opinion, para. 72.
3 Majority Opinion, para. 72.
4 Majority Opinion, para. 72.
5 Majority Opinion, para. 73.
6 I doubt that the Majority's interpretation of Article 15 adequately safeguards the integrity of the proceedings since permitting the use of the statement to establish facts (*e.g.* a pattern) effectively results in torture tainted evidence permeating proceedings. Potentially lengthy discussions of torture tainted statements in public trial to determine if they are eventually permissible according to the majority decision add to this problem.

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the deterrent objective of the Convention)[7] and would prevent a full assessment of the alleged conduct.[8] But this is not unusual. In some instances (evidentiary) rules are created that effectively risk "benefiting the Accused" by making prosecution more difficult.[9] This result is accepted as an unavoidable (though not necessarily intended) consequence after balancing various issues, values and principles at stake.

10. I note that the Majority when applying the exclusionary rule to at least one individual case sees the need to further qualify it.[10] They deal with this issue in the fair trial section of the reasoning. The rationale behind this further qualification remains unexplained. It is not immediately obvious why in the example discussed in this context, the evidence should only be allowed to prove this specific pattern as opposed to other issues unrelated to the truthfulness of the statement.

11. I take from this example that the Majority generally foresees case-related adaptations of the general principle, as stated by them in the dispositive, taking the form of further qualifications of the purpose. This approach is problematic.[11] Such case-related further qualifications of the purpose are bound to lead to a highly-fragmented and potentially inconsistent body of jurisprudence – an outcome which is not conducive to the deterrent purpose of the Convention because the general message sent becomes ambiguous.

1.2. Reasoning of the dissenting opinion:

12. I now set forth how I consider Article 15 should be interpreted based on the ordinary meaning of the terms of the provision in their context and in the light of its objective and purpose. I will further reference subsidiary means that support this interpretation.[12]

13. In my opinion, Article 15 aims to prevent that torture-tainted statements are used as sources of information – that is as evidence – for the courts. This prohibition is absolute.

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7 Majority Opinion, para. 74.

8 Majority Opinion, para. 76.

9 For example, the exclusionary rule in common law jurisdictions may prevent the prosecutor from adducing evidence supporting the charges because the evidence was obtained through an illegal search. *See e.g., Mapp v. Ohio*, U.S. Supreme Court, 367 U.S. 643 (1961). This exclusionary rule has the effect of making the prosecution more difficult.

10 *See* Majority Opinion, para. 75, "[...] but only for the purposes of determining what action resulted based on the fact that a statement was made."

11 The problem of fragmented jurisprudence is already inherent in the general interpretation of Article 15 as described in the dispositive ("[...] for purposes other than proving the truth of the matter asserted in the statement."

12 Vienna Convention on the Law of Treaties, Articles 31 & 32.

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14. Article 15 covers any reference to, and any use of, torture-tainted statements when it chooses the word "invoke" to describe the prohibited action. The lack of any qualification of the term clarifies that "invoking the statement as evidence" is generally prohibited regardless of the purpose for which it is put forward. Article 15 appears to allow for one "exception" when it states that evidence obtained as a result of torture may be used "against a person accused of torture as evidence that the statement was made".[13] I agree with the Majority that the plain language of this provision suggests that it should be interpreted narrowly. In my opinion, however, it is limited to one specific category of persons and one specific use.

15. The language is clear on both: the category of persons – those accused of torture – and the use (purpose) – as evidence that the statement was made. Simply put, the only permissible use is to prove the existence of such statement (and arguably that it was made under torture). The statement can be important evidence to prove that torture occurred. The exception goes to the existence not in any way to the substance of the statement. I believe that the interpretation of the ordinary meaning to be given to the terms of the provision in their context and in the light of their purpose leads to this clear result which is neither ambiguous nor manifestly absurd or unreasonable.[14]

16. Reference to subsidiary means supports this reading. It is in this context instructive and relevant that the Inter-American Convention to Prevent and Punish Torture, adopted one year after the CAT, interpreted the exclusionary rule to be limited in this same fashion.[15] Article 10 of that Inter-American Convention provides: "No statement that is verified as having been obtained through torture shall be admissible as evidence in a legal proceeding, except in a legal action taken against a person or persons accused of having elicited it through acts of torture, and only as evidence that the accused obtained such statement by such means."[16]

17. Furthermore, the UN Human Rights Committee states in its authoritative General Comment on the right to equality before courts and tribunals and to a fair trial under the ICCPR (to which Cambodia is party), "[...] as Article 7 (ICCPR) is also non-derogable in its entirety, no statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by Article 14,

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[13] *Case of Othman (Abu Qatada) v. The United Kingdom* (Application No. 8139/09), 17 January 2012, para. 266 ("Indeed, the only exception to the prohibition that Article 15 allows is in proceedings against a person accused of torture.").

[14] Vienna Convention on the Law of Treaties, Arts. 31 & 32.

[15] Vienna Convention on the Law of Treaties, Art. 31(3).

[16] Inter-American Convention To Prevent and Punish Torture, Article 10, 1986 (emphasis added).

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including during a state of emergency, except if a statement or confession obtained in violation of Article 7 is used as evidence that torture or treatment prohibited by this provision occurred."

18. Equally compelling is the drafting history of Article 15. The Working Group's first draft of Article 15 did not provide for *any* permissible uses of torture-tainted evidence. During the drafting of the Convention, language was added to maximize the deterrent effect of the Article by allowing statements to be used in a narrow fashion to prosecute the alleged torturer.[17] To the contrary, an attempt to allow the unlimited use of statements obtained by torture against the alleged torturer was eventually rejected.[18] In summary, the drafting history shows that the current text is the result of careful deliberations.[19]

19. The resulting language and the purpose of the exception to Article 15 has been explained by one author involved in the drafting of the Convention as follows: "However, when the statement is invoked in such a manner, the intention is not to prove that the statement is a true statement. The purpose is rather to prove that a specific statement was made under torture and presumably that the tortured person would not otherwise have made the same statement, because it was untrue or because it disclosed certain information which he would not otherwise have been prepared to disclose. Consequently, the exception is more apparent than real."[20]

20. In my opinion, it is clear that the purpose of the "exception" is not to establish a substantive exception to the rule but to prevent – by way of this clarification – an overly extensive interpretation of Article 15 which would indeed have bordered on absurd.[21]

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[17] An early draft of Article 15 proposed by Sweden did not include any exception; *See* UN Economic and Social Council, 34th session, 23 January 1978, UN Doc. E/CN.4/1285.

[18] *See* Draft Convention for the Prevention and Suppression of Torture, Submitted by the International Association of Penal Law, UN Doc. E/CN.4/NGO/213, 15 January 1978 ("An oral or written statement or confession obtained by means of torture or any other evidence derived therefrom shall have no legal effect whatever and shall not be invoked in any judicial or administrative proceedings, except against a person accused of obtaining it by torture.")

[19] UN Doc. E/CN.4/1314, UN Economic and Social Council, 35th session, 19 December 1978; UN Doc. 3452 (XXX), UN General Assembly Resolution - Declaration on the protection of all persons from being subjected to torture and other cruel inhuman or degrading treatment, 9 December 1975.

[20] Herman Burgers and Hans Danelius, *The United Nations Convention against Torture – A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht: Martinus Nijhoff, 1988), p. 148 (emphasis added). Read in context, it is clear that the author's remark did not aim to identify the only forbidden use but mentioned one and arguably the most frequently occurring one to make the principled point as evidenced by the bold section.

[21] Vienna Convention, Article 32.

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21. This interpretation of the exception contained in Article 15 is in accordance with the purposes of Article 15 and the Convention which it aims to implement. Only the most important will be discussed subsequently. These were: (1) a public policy of disincentivising torture; (2) preventing the use of unreliable evidence as it is not conducive to ascertaining the truth; (3) preserving the integrity of the proceedings; and (4) protecting the Accused's right to a fair trial, including due process.[22] There is no hierarchy between these purposes.

22. First, Article 15 is meant to discourage the use of torture by state authorities for the purpose of obtaining information. I am aware that this argument might be considered weakened in certain cases where the alleged torturer would appear to benefit from a narrow interpretation of the rule. And this possible benefit appears to be a major concern of the Majority opinion. As the drafting history shows, the drafters of the CAT were equally concerned about this possibility. They nevertheless chose the language of Article 15 with the "exception" as the only concession to ease prosecution in cases against the alleged torturer. General deterrence is best achieved where the message is unambiguous and jurisprudence as consistent as possible.[23]

23. Second, the exclusionary rule is meant to protect the right to a fair trial by, *inter alia,* preventing the invocation of unreliable evidence. More precisely, it is a mechanism to prevent the use of statements made by an accused or by others under torture as evidence of the truthfulness of admissions or other matters asserted in the statement, because in such circumstances this evidence is intrinsically unreliable.[24] The interpretation of the exception chosen by the dissenter provides maximum protection against unreliable evidence in this regard.

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[22] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/25/60, 10 April 2014, para. 21; Herman Burgers and Hans Danelius, *The United Nations Convention against Torture – A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht: Martinus Nijhoff, 1988), p. 148 ("The rule laid down in article 15 would seem to be based on two different considerations. First of all, it is clear that a statement made under torture is often an unreliable statement; and it could therefore be contrary to the principle of "fair trial" to invoke such a statement as evidence before a court. [...]").

[23] *See* para. 11.

[24] T. 28 May 2009, pp. 7-9; E74, p. 3; E185, para. 21; *See also,* Herman Burgers and Hans Danelius, *The United Nations Convention against Torture – A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht: Martinus Nijhoff, 1988), p. 148 (when such evidence is invoked against an accused, "the intention is not to prove that the statement is a true statement. The purpose is rather to prove that a specific statement was made under torture [...]"); United Nations General Assembly, Torture and other cruel, inhuman or degrading treatment 14 August 2006, U.N. Doc. A/61/259, para. 45; *See also,* Rome Statute, Article 69(7) which prohibits the admission of evidence obtained by means of a violation of the Rome Statute or internationally recognized human rights 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."

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24. Third, the exclusionary rule is also meant to preserve the integrity of the proceedings by preventing the Chamber from according any judicial legitimacy to the abhorrent conduct which procured the evidence.[25] The preservation of the integrity of proceedings is another strong argument for a narrow reading of Article 15. Permitting the parties to refer to the statement as proof that it was made under torture allows the Chamber to evaluate allegations of torture, without according any legitimacy to the practice of torture.[26]

25. In sum, Article 15 is meant to ensure that no information from a statement obtained by torture is used as evidence in proceedings. This prohibition is absolute. The "exception" does not take away from this. Its only objective is to allow the establishment of the existence of such a statement as proof that torture occurred.

26. Any interpretation that reads Article 15 too broadly risks undermining the purpose of the general rule. Given that this rule gives effect to one of the most important protections in international law, any attempt to narrow its applicability, or create ambiguity about its application, needs to be viewed with the utmost caution. The risk of creating a slippery slope and eventually weakening the protection is ever present.

Phnom Penh, 11 March 2016

Claudia Fenz

[25] *A and Others,* House of Lords, [2005] UKHL 71, Lord Bingham, para. 39 (*noting* appellant's contention that permitting use of torture-tainted statement would infringe the party's rights and the fairness of the proceedings, shock the judicial conscience, abuse or degrade the proceedings and involve the state in moral defilement."); Rome Statute, Article 69(7)(prohibiting the use of evidence obtained in violation of internationally recognized human rights where the violation cases substantial doubt on the reliability of the evidence or the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.)

[26] *See* para. 8.

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