

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

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**APPLICATION OF THE CCHR TO PRESENT AN AMICUS CURIAE SUBMISSION
PURSUANT TO INTERNAL RULE 33
AMICUS CURIAE SUBMISSION OF THE CCHR**

Pre-Trial Chamber Judges:

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HOUT Vuty
Rowan Downing
NEY Thol
Katinka LAHUIS
PEN Pichsaly

Co-Prosecutors:

CHEA Leang
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Executive Summary

1. This *Amicus Curiae* brief (the “Brief”) is submitted by the Cambodian Center for Human Rights (the “CCHR”) pursuant to Rule 33 of the Internal Rules (the “IR”) of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”).¹ It is made to assist the Pre-Trial Chamber (the “PTC”) in determining whether or not to uphold the Office of the Co-Investigating Judges (the “OCIJ”) *Order on use of statements which were or may have been obtained by torture* dated 28th July 2009 (the “OCIJ Order”)² that dismissed a motion by IENG Thirith requesting a declaration of inadmissibility of all evidence obtained through torture (“Torture Tainted Evidence”) (the “IENG Thirith Motion”).³ The Brief contextualises the OCIJ Order with reference to the ECCC’s promised legacy and the domestic backdrop against which it has been made, and highlights the consequences that could occur as a result of a decision to permit the admission of Torture Tainted Evidence. It draws particular attention to the OCIJ Order’s potential implications for the judicial system and rule of law in Cambodia.

Applicants

2. The CCHR is a non-political, independent, non-governmental organisation (“NGO”) that works to promote and protect democracy and respect for human rights throughout Cambodia. The CCHR is concerned with the practical application of international human rights standards in Cambodia. It is led by Ou Virak: founder of the Alliance for Freedom of Expression in Cambodia, winner of the Reebok Human Rights Award and Vice-Chairman of the Cambodian NGO Working Group for establishing a National Human Rights Commission and Association of Southeast Asian Nations Human Rights Body. The CCHR’s staff consists predominantly of Cambodians with education, experience and/or expertise in law and human rights. Its Board of Directors includes Son Soubert, a Member of the Cambodian Constitutional Council and former Vice-Speaker of the Cambodian National Assembly; Kek Galabru, founder of the Cambodian League for the Promotion and Defence of Human Rights (“LICADHO”) and nominee for the 2005 Nobel Peace Prize; and Lao Mong Hay, a Researcher at the

¹ Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (Rev.3) as revised on 6th March 2009, <http://www.eccc.gov.kh/english/cabinet/fileUpload/121/IRv3-EN.pdf>.

² Order on use of statements which were or may have been obtained by torture, 28th July 2009, Doc No. D130/8.

³ Request by the Defence for IENG Thirith dated 11 February 2009, Doc. No. D130.

Asian Human Rights Commission (“AHRC”) and winner of the Human Rights Watch Award and United Nations (“UN”) High Commissioner for Refugees Nansen Medal.

3. The CCHR’s members of staff are grouped into four units - Freedom of Expression, Fair Trials, Democracy and Land Rights - and work through three programs. The Community Empowerment Program enables marginalised Cambodians to understand principles of democracy and human rights, giving them the voice and opportunities to advocate for change. Through the Monitoring Program, the CCHR monitors the human rights situation in Cambodia, conducts research and investigations and documents findings. This program includes the Trial Monitoring Project - the only such project in Cambodia - through which the CCHR monitors adherence by the Cambodian domestic courts to the right to a fair trial by an independent and impartial tribunal established by law.⁴ The CCHR’s Advocacy Program includes policy and legislation proposals, report writing, lobbying and campaigning. Many of the CCHR’s publications concern the application and implementation of international law standards in Cambodia.⁵ The CCHR has previously considered developments at the ECCC, issuing a number of opinions and press releases in this regard.⁶

Application under Rule 33 of the Internal Rules of the ECCC

4. The CCHR hereby requests that the PTC grants consideration to this Brief under Rule 33, IR.⁷ *Amici Curiae* may be accepted at “any stage of the proceedings” if consideration of the submissions therein is deemed to assist the “proper adjudication of the case.”⁸

⁴ International Covenant on Civil and Political Rights U.N. GA Res. 2200A [XXI], 16 December 1966, art. 14.

⁵ See *Preah Vihear, Kingdom of Cambodia – Legal Analysis of the Events of 3 April that Result in the Destruction of a Village and Damage to the Preah Vihear Temple*, CCHR, 6 May 2009, available at http://www.cchrcambodia.org/English/add_report/reports/PREAH_VIHEAR_REPORT.pdf; Joint Submission on Freedom of Expression and Assembly for the Universal Periodic Review of Cambodia’s Fulfillment of its Human Rights Obligations and Commitments, CCHR, 22 April 2009, available at http://www.cchrcambodia.org/English/add_report/reports/Joint_UPR_Submission_Cambodia_ENG.pdf.

⁶ See: *Conflicts of Interest, Serious Concerns arising from the appointment of H.E. Dr. Helen Jarvis as the new head of the Victims Unit at the ECCC*, CCHR, 10 June 2009, available at [http://www.cchrcambodia.org/English/add_press_release/press_release/cchr%20press%20release-%2010-06-09\(060909_1244605910\).pdf](http://www.cchrcambodia.org/English/add_press_release/press_release/cchr%20press%20release-%2010-06-09(060909_1244605910).pdf); *Tolerance of corruption at the Khmer Rouge Tribunal is unacceptable*, Joint Statement by the CCHR and the AHRC, 17 April 2009, available at http://www.cchrcambodia.org/English/add_press_release/press_release/CCHR_AHRC_JointStatement_Corruption_ECCC_210409.pdf.

⁷ IR 33, *supra* note 1.

⁸ *Id.*

5. On 30 July 2009 IENG Thirith gave notice of appeal of the OCIJ Order.⁹ This Brief is made to assist the PTC in its determination of the issue by contextualising the OCIJ Order with reference to the ECCC's promised legacy and the domestic backdrop, highlighting the consequences that could occur as a result of a decision to permit the admission of Torture Tainted Evidence.

6. Applications to file *Amicus Curiae* briefs under Rule 33 have been rejected because the PTC Judges considered themselves to be sufficiently informed of the matter under consideration.¹⁰ The CCHR respectfully submits that inadequate consideration has been given to the domestic implications and ramifications for the ECCC's legacy that could follow a wider interpretation of Article 15 of the Convention Against Torture (the "CAT").¹¹ Decisions at the ECCC do not take place in a vacuum, and it is therefore necessary for the PTC to consider a wide range of factors in order to properly adjudicate the case. Moreover, the ECCC has yet to hear from a Cambodian organisation in connection with this question; a question that could have lasting implications for Cambodia long after the conclusion of proceedings at the ECCC. Accordingly, this Brief contains information that has yet to be considered in the course of the current discussion and that will contribute to the "proper adjudication of the case."

7. The PTC has previously held that *Amicus Curiae* Briefs must be focused and should not go beyond the issue under consideration.¹² This Brief is limited to the domestic implications that are likely to follow a PTC decision concurring with the OCIJ's broad

⁹ IENG Thirith Defence Notice of Appeal Against OCIJ Order on Use of Statements Which Were or May Have been Obtained by Torture of 28 July 2009, dated 30 July 2009, Doc. No. D130/9.

¹⁰ See *Prosecutor v. NUON Chea et al.*, Case File No. 002/19-09-2009-ECCC/OCIJ (PTC19), Decision on Request for Leave to File *Amicus Curiae* Brief, Doc. No. D158/5/4/13, ERN 00355847-49, PTC, 4 August 2009, para. 3; *Prosecutor v. KAINING Guek Eav*, Criminal Case File No. 001/18-07-2007-ECCC/OCIJ (PTC02), Decision on Request for Leave to File *Amicus Curiae* Brief, Doc. No. D99/3/17, ERN 00225287-89, PTC, 2 October 2008, para. 3.

¹¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85, Art. 15: "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."

¹² *Prosecutor v. NUON Chea*, Case File No. 002/19-09-2007-ECCC/OCIJ, Order on the Filing of Submissions on the Issue of Civil Party Participation in Appeals Against Provisional Detention Order and an Invitation to *Amicus Curiae*, Doc. No. C11/36, ERN 00162546-48, PTC, 12 February 2008, para. 6.

interpretation of Article 15 of the CAT, whilst avoiding a repetition of the legal arguments made already by the Office of the Co-Prosecutors (the “OCP”) and IENG Thirith.

8. Requests to file *Amicus Curiae* briefs have also been denied by the PTC on the grounds of judicial economy; the judges reasoning that to receive them and to respond thereto would risk delaying the proceedings at hand.¹³ This Brief is made in a timely manner and before any other *Amicus Curiae* brief on this issue has been filed with the PTC. Moreover, the CCHR respectfully submits that the “proper adjudication of the case” should not be subordinated to the exigencies of judicial economy, and that consideration of the consequences that this decision could hold for the ECCC’s legacy in Cambodia should not be disregarded in the interests of expediency.
9. Finally, *Amici Curiae* briefs can be rejected on the grounds that they are procedurally defective. This Brief is drafted and filed in accordance with the IR¹⁴ and Practice Direction ECCC/01/2007/Rev.4 on the Filing of Documents before the ECCC,¹⁵ and is therefore in compliance with procedural requirements.

Summary of Proceedings

10. On 11th February 2009, the IENG Thirith Motion requested that the OCIJ “treat as inadmissible any evidence or other material which was or may have been obtained by the use of torture, other than to show that a statement was made under torture and solely against the torturer” and to “[r]efrain from using such statements in any other way.”¹⁶
11. In their response on 30th April 2009, the OCP suggested various methods of examining Torture Tainted Evidence that, it contended, removed any concerns regarding its inherent unreliability. It was proposed also that the doctrines of necessity and command responsibility, the principle of flexibility concerning the admission of evidence to

¹³ See *supra* note 10.

¹⁴ IR, *supra* note 1.

¹⁵ Practice Direction ECCC/01/2007/Rev.4 on the Filing of Documents before the ECCC.

¹⁶ Request by the Defence for IENG Thirith dated 11 February 2009, *supra* note 3.

international tribunals, and a purposive interpretation to honour the spirit of the CAT should all be considered by the OCIJ as grounds for admitting Torture Tainted Evidence.¹⁷

12. On 18th May 2009, IENG Thirith replied to the OCP response, reiterating that all Torture Tainted Evidence is inadmissible save for one specific and narrow caveat. IENG Thirith submitted that the methods proposed by the OCP for assessing Torture Tainted Evidence breached Article 15 of the CAT, as they did not fall within the stated caveat.¹⁸
13. On 28th July 2009, the OCIJ rejected the IENG Thirith request.¹⁹ It did not consider the promises made regarding the ECCC's legacy or the long-term implications of its Order for Cambodia. On 30 July 2009, IENG Thirith gave notice to appeal the OCIJ Order.

Specific issues to be addressed

14. This Brief addresses the following issues to assist the PTC in its determination of the matter:
- a. The promised legacy of the ECCC;
 - b. The OCIJ's failure to consider the ECCC's legacy when making its order;
 - c. The impact of the OCIJ Order on the Cambodian judicial system; and
 - d. The impact of the OCIJ Order on rule of law in Cambodia.

Promised legacy of the ECCC

15. The CCHR respectfully submits that promises made regarding the ECCC's legacy – what the Court will leave behind for Cambodia – are fundamental to its existence. As set out below, these promises include contributing to the development of the Cambodian judicial system and strengthening rule of law in Cambodia.
16. Cambodia's transition from conflict and instability to democracy is reliant on the ECCC not only for its search for justice and reconciliation, but also for its promise to act as role

¹⁷ Co-Prosecutors' Response to IENG Thirith's Defence Request for Exclusion of Evidence Obtained By Torture Dated 30 April 2009, Case No. D130/5.

¹⁸ Defence Reply to "Co-Prosecutors Response to IENG Thirith's Defence Request for Exclusion of Evidence Obtained By Torture" dated 18 May 2009, Case No. D130/6.

¹⁹ D130/8, *supra* note 2.

model for the Cambodian judicial system. The UN Group of Experts responsible for investigating the need for a tribunal concluded that “the Cambodian judiciary presently lacks three key criteria for a fair and effective judiciary: a trained cadre of judges, lawyers and investigators; adequate infrastructure; and a culture of respect for the process.”²⁰ As former UN Secretary-General Kofi Annan stated, the ECCC is “expected to have considerable legacy value, inasmuch as it will result in the transfer of skills and know-how to Cambodian court personnel.”²¹ This objective has been affirmed repeatedly: “each step of the legal process must be followed carefully, and conducted in line with the highest standards of justice [to] ensure the most enduring legacy for the Cambodian Courts.”²² The legacy aims are reiterated in the ECCC’s outreach publication: the trials provide “an excellent opportunity to bolster the understanding of the criminal trial process within Cambodia and, in particular, the right to a fair trial....”²³ In light of the foregoing, the Cambodian judiciary is encouraged to look to the ECCC judges for guidance, particularly on matters relating to international law. Indeed, in adjudication of their domestic cases, courts in other countries have relied on decisions made by international tribunals that have tried international crimes committed in those countries.²⁴

17. Associated with these promises to develop the judicial system are those to strengthen rule of law in Cambodia. The ECCC website provides: “the trials will strengthen rule of law and set an example to people who disobey the law....”²⁵ It has been said that if the ECCC implements its mandate, “it may make an essential contribution toward combating a persisting culture of impunity by demonstrating an effective, fair, judicial response”²⁶ and that “accountability can play an important preventive role in Cambodia - demonstrating to

²⁰ Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135, 18 February 1999, UN Doc. A/53/850-S/1999/23, Para 126.

²¹ Report of Secretary General on Khmer Rouge Trials, 12 October 2004, U.N. Doc A/59/432, at Para 27.

²² Cambodia Tribunal Monitor Media Alert: ECCC Trial Progress, 8 October 2008, *available at* http://www.cambodiatribunal.org/CTM/Media_Alert_final_8_Oct_2008.pdf?phpMyAdmin=8319ad34ce0db941ff04d8c788f6365e&phpMyAdmin=ou7lpwtyV9avP1XmRZP6FzDQzg3.

²³ Defence Support Section Building Capacity, *available at* http://www.eccc.gov.kh/english/dss_legacy.aspx.

²⁴ Domestic courts in Germany, Italy, and Israel continue, fifty years after the Nuremberg trials, to prosecute former Nazis. *See* cases of *John Demjanjuk* and *Josef Scheungraber*. The Court of Bosnia Herzegovina (BiH) and domestic courts in Rwanda rely heavily on the case law already decided from the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, when prosecuting war crimes.

²⁵ ECCC website FAQ section: http://www.eccc.gov.kh/english/faq.view.aspx?doc_id=40.

²⁶ CAMBODIA Submission to the Universal Periodic Review of the UN Human Rights Council Sixth Session: 30 November – 11 December, 2009 International Center for Transitional Justice, 14 April 2009.

those contemplating offences that punishment is at least possible, and promoting an awareness among the people about the meaning of justice and the rule of law.”²⁷ As the Royal Government of Cambodia (“RGC”) has itself said: “we seek justice that contributes to the reconstruction and democratisation of our society as a whole.”²⁸ The CCHR reiterates the appeal made by former UN Under Secretary-General Nicolas Michel: “Let us work together to make the Extraordinary Chambers a success. Such success will stand as a beacon in the region signalling that the sinister culture of impunity is, indeed, being replaced by a culture of accountability. It would also leave Cambodia with a positive legacy for its efforts in strengthening the rule of law.”²⁹ At the very least then, decisions made at the ECCC must endeavour to assist, rather than thwart, Cambodia’s difficult transition towards a functional democracy free from violence and abuse of power.

18. The Agreement between the UN and RGC to establish the ECCC³⁰ (the “Agreement”) was made in the foregoing context; in the spirit and with the intention of developing the judicial system and strengthening the rule of law in Cambodia. According to the Vienna Convention of the Law of Treaties, the judges at the ECCC must uphold this spirit and intention when interpreting the Agreement.³¹ The “Extraordinary Chambers” are part of the “Courts of Cambodia.” The Agreement itself applies as law within Cambodia³² and all Judges at the ECCC are required to act in accordance with Cambodian Law.³³ ECCC Judges must therefore take into account the implications of their rulings for the ECCC’s legacy in Cambodia.

OCIJ’s failure to consider the ECCC’s legacy when making its order

²⁷ Group of Experts, Cambodia, *supra* note 20.

²⁸ The Rule of Law and the Legacy of Conflict, Presentation by Sok An, Senior Minister in Charge of the Office of the Council of Ministers, Cambodia, and President of the Task Force for Cooperation with Foreign Legal Experts and Preparation of the Proceedings for the Trial of Senior Khmer Rouge Leaders, 16-19 Jan. 2003.

²⁹ Speech of Nicolas Michel, UN Under Secretary General and Special Representative of HE Kofi Annan, delivered 3 July 2006, available at http://www.cambodia.gov.kh/krt/pdfs/Nicolas%20Michel%20Opening_Remarks%203%20July%202006.pdf.

³⁰ 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.

³¹ Agreement, *supra* note 30, at art. 2, Para 2; Vienna Convention for the Law of Treaties, UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969), arts. 26, 27; *see argument made in Crimen sine lege: judicial lawmaking at the intersection of law and morals*, by Beth Van Shaack, 97 *Georgetown Law Journal* 119 (2008) at 64-65.

³² Agreement, *supra* note 30, at art. 31.

³³ Agreement, *supra* note 30, at art. 21, para 3.

19. The OCIJ Order³⁴ failed to afford sufficient attention to the legacy promises set out above and to address the implications for legacy of a decision to admit Torture Tainted Evidence. The CCHR respectfully submits that had the OCIJ taken into account these legacy promises, it would not have made the same decision; and that in light of these promises and the implications for Cambodia set out below, the OCIJ Order is irresponsible.

Impact of the OCIJ Order on the Cambodian Judicial System

20. In accepting the OCIJ's broad and misguided interpretation of Article 15 of the CAT, the PTC would run the risk of setting an example that could have untold consequences for the fairness of legal proceedings in Cambodia. The CCHR respectfully implores the PTC to give due consideration to the promises to develop the Cambodian judicial system, and the domestic backdrop against which it will make its decision - the political interference, corruption and limited capacity that makes it difficult to ensure that the Cambodian judiciary can discharge its constitutional function to "guarantee and uphold impartiality and protect the rights and freedoms of the citizens."³⁵ At the very least, the judiciary could exploit a decision concurring with the OCIJ Order in order to permit the admission of Torture Tainted Evidence. At worst, Cambodian judges could view such a decision as enabling them to ignore or apply broad discretion in their interpretation of all domestic and international law in order to achieve a desired result.

21. The PTC should proceed with utmost caution before it delivers a decision that could reverberate around Cambodian halls of justice. Recent reports by the UN have determined that the Cambodian courts are suffering from interference from the RGC, corruption and lack of competence.³⁶ The CCHR respectfully submits that such serious blights should be

³⁴ OCIJ Order, *supra* note 2.

³⁵ Constitution of the Kingdom of Cambodia, at art. 109.

³⁶ Report of the Special Representative of the Secretary-General for human rights in Cambodia. by *Yash Ghai*, 29 February 2008, para. 33, Human Rights Council Doc. No. A/HRC/7/42, available at <http://daccessdds.un.org/doc/UNDOC/GEN/G08/115/04/PDF/G0811504.pdf>; Report of the Special Rapporteur on the Independence of Judges and Lawyers, Cambodia: United Nations Expert concerned at restrictions on freedom of lawyers to represent their clients; United Nations Office of the United Nations High Commissioner for Human Rights; 1 July 2009; http://cambodia.ohchr.org/WebDOCs/DocStatements/2009/072009/SRIJ%20Statement_01072009E.pdf; and United Nations Press Release: The United Nations Special representative of the Secretary General for human

at the forefront of the PTC judges' minds when making a decision that could extend the scope of the Cambodian judiciary's discretion on fundamental human rights issues.

22. The independence of the Cambodian judiciary is currently under a great deal of scrutiny. The RGC has recently used the domestic courts to conduct a harsh clampdown on freedom of expression and democracy, with a proliferation of criminal charges of defamation, disinformation and incitement being initiated against the pillars of democracy - politicians, lawyers, journalists and civil society.³⁷ The RGC has used the courts to silence criticism, signifying the absence of impartiality in the Cambodian judiciary. The US Department of State observed recently that whilst the Constitution of Cambodia provides for an independent judiciary, in practice the RGC does not respect judicial independence.³⁸ The PTC must proceed carefully before delivering a verdict that could expand the scope of discretion that is open to a judiciary that is allegedly subject to influence by the RGC.
23. The US Department of State has found corruption to be widespread amongst judges, prosecutors and court officials in Cambodia.³⁹ Indeed the courts are viewed as amongst the most corrupt institutions in the Kingdom.⁴⁰ As the CCHR has stated previously, "corruption introduces an element of external control that affects ... independence and fairness of the trials."⁴¹ The CCHR therefore respectfully asks the PTC to be mindful of the fact that broad discretion in the hands of a corrupt judiciary is unlikely to be discharged solely in the interests of justice.

rights in Cambodia and the Rapporteur on the Independence of Judges and Lawyers express concern over judicial independence in Cambodia in the light of recent judicial appointments; 23 August 2007, <http://www.unhcr.ch/hurricane/hurricane.nsf/0/591808C8E3CEF14CC12573400043FE82?opendocument>.

³⁷ See *Bar Council to receive results of Kong Sam Onn Probe this week*, PHNOM PENH POST, 10 June 2009; *Court upholds jailed publisher's conviction*, PHNOM PENH POST, 12 August, 2009; *Justice is on trial, says opposition*, THE NATIONAL, 07 September, 2009 UAE; *Cambodia Court Cases Mount against Opposition*, THE NEW YORK TIMES, 20 July 2009; *Rash of lawsuits sees Cambodia crack down on dissenters*, 27 July 2009, THE FINANCIAL TIMES ASIA-PACIFIC.

³⁸ US Department of State, Country Report on Cambodia 2008, released February 2009; available at: <http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119036.htm>.

³⁹ *Id.*

⁴⁰ Corruption and Cambodian Households, Household Survey on Perceptions, Attitudes and Impact of Everyday Forms of Corrupt Practices in Cambodia: Center for Social Development, 2005, available at <http://www.csdcambodia.org/pdf/Pub/Corruption%20and%20Cambodian%20Households.pdf>.

⁴¹ *Tolerance of corruption at the Khmer Rouge Tribunal is unacceptable*, *supra* note 6.

24. Lawyers and judges in Cambodia generally do not have the formal training of the Judges at the ECCC.⁴² As noted above, the UN Group of Experts responsible for investigating the need for a tribunal identified the lack of a “trained cadre of judges, lawyers and investigators” as one of the “three key criteria for a fair and effective judiciary.”⁴³ In the absence of capacity the expansion of judicial discretion necessarily gives rise to concern.
25. The CCHR envisages potentially grave consequences for Cambodia if the legacy of the ECCC allows for indeterminate judicial discretion and legal flexibility.⁴⁴ The OCIJ Order effectively states that whether or not law is relevant to a particular case can be determined at the end of an investigation and will depend on the exigencies of the case.⁴⁵ This blanket acceptance of Torture Tainted Evidence is in breach of the CAT and is therefore illegal. The OCIJ Order follows recent promises made by the OCP and others that the subordinates of Kaing Guek Eav, who allegedly carried out gross acts of torture and cruelty, would not face justice. These promises in effect amount to an amnesty that - according to *Prosecutor v. Furundzija*⁴⁶ - is itself in breach of the CAT.⁴⁷ As the ECCC is

⁴² Legal and Judicial Reform In Cambodia: A LICADHO Briefing Paper, February 2006, available at <http://www.licadho.org/reports/files/79LICADHOLegalJudicialReformPaper06.pdf>.

⁴³ Group of Experts, Cambodia, *supra* note 20.

⁴⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, 2 March 2004, U.N. Doc. CAT/C/CR/31/7, *see* Recommendations.

⁴⁵ OCIJ Order, *supra* note 2, at para. 28.

⁴⁶ *Prosecutor v Furundzija* [1998] ICTY 3,10 December 1998, para 155: “The fact that torture is prohibited by a peremptory norm of international law has other effects at the interstate and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the jus cogens value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had locus standi before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked inter alia to disregard the legal value of the national authorising act. What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle.

⁴⁷ CAT, *supra* note 11, art. 2.

part of the Cambodian court system, and therefore a limb of the State, Cambodia is in breach of the CAT. The CCHR respectfully asks, what sort of legacy is this? Aside from putting a post conflict country in breach of international law, the CCHR is concerned that the precedential value of the OCIJ Order will enable the Cambodian judiciary to deviate from international human rights laws and jurisprudence for pragmatic purposes where adherence to the law would not produce the desired outcome. The CCHR respectfully submits then, that within the current milieu outlined above, the OCIJ order threatens the fairness of legal proceedings in Cambodia for years to come.

26. Further, and more specifically, there remains the very real concern that the Cambodian judiciary will exploit the discretion to admit Torture Tainted Evidence. The OCIJ Order sets a dangerous and persuasive example for Cambodia. What is likely to happen in a politically sensitive case when the investigation returns only Torture Tainted Evidence?
27. As noted above, the ECCC has promised to develop the Cambodian judiciary. The CCHR respectfully submits that it is clear from the foregoing that a decision that could be viewed as a green light for breach of international law and the expansion of judicial discretion could only serve to usurp the legacy envisaged. Rather than contributing to “a culture of respect for the process.”⁴⁸ such a decision would likely foster further political interference, corruption and incompetence in the Cambodian judiciary and ensure that the judicial legacy of the ECCC is a negative one.

Impact of the OCIJ Order on the rule of law in Cambodia

28. The CCHR reminds the PTC that its decisions are not made in a vacuum. Any decision to widen the exception in Article 15 could serve to legitimise and perpetuate endemic torture practices in Cambodia. The CCHR respectfully submits that the OCIJ Order failed to take into account these implications. In rejecting the relevance of the deterrent value of Article 15⁴⁹ the OCIJ evinced a complete lack of consideration and understanding of the current domestic context. In Cambodia, as with other transitional or post-conflict societies, police

⁴⁸ Group of Experts, Cambodia, *supra* note 20.

⁴⁹ CAT Art. 15, *supra* note 11.

use of torture to obtain confessions from detainees⁵⁰ is such that the deterrent rationale underlying the ban on Torture Tainted Evidence holds particular significance. The CCHR respectfully calls upon the PTC to overturn the OCIJ Order and uphold the exclusionary rule.

29. The Committee Against Torture in its most recent report on Cambodia noted “numerous, ongoing and consistent allegations of acts of torture and other cruel, inhuman or degrading treatment or punishment committed by law enforcement personnel.”⁵¹ The Committee found that the existence of torture practices in Cambodia was exacerbated by a culture of impunity surrounding law enforcement officials. Moreover, the Committee expressed its concern at the reliance on confessions in Cambodian criminal proceedings. The Center for Social Development (“CSD”) found that in 2006 17% of all defendants at the Municipal Court of Phnom Penh claimed to have been tortured to give a confession: 91% of these defendants were convicted.⁵² As recently as mid-2009, the AHRC - considering torture practices in Cambodia - noted that they are “still being used, mainly to extract confessions.”⁵³ Similarly, a recent report by LICADHO noted that “[i]n addition to obtaining confessions, torture is used by police to arbitrarily punish perceived wrongdoers, or to extort money from detainees for their release. Torture is also committed by other agents of the state, including the military and prison guards.”⁵⁴ Furthermore, the US Department of State affirms that beatings and other forms of physical mistreatment of police detainees and prison inmates continues to be a serious problem.⁵⁵

30. The rationale behind the blanket ban on admissibility of Torture Tainted Evidence is twofold. The first goes towards reliability of such evidence and is beyond the scope of this

⁵⁰ See generally: Human Rights Watch World Report 2008, <http://www.hrw.org/en/node/792981>; LICADHO submission to the United Nations Universal Periodic Review, Cambodia, 10 April 2009, <http://www.licadho-cambodia.org/reports/files/133LICADHOUPRSsubmissionCambodia.pdf>.

⁵¹ CAT, Consideration of Reports, *supra* note 44, see Recommendations and Conclusions.

⁵² The Center for Social Development Annual Report, October 2005-September 2006, February 2007, at pgs. 18-19.

⁵³ Cambodia: The Government Must Combat Torture, Press Release by AHRC, 24 June 2009, available at <http://www.scoop.co.nz/stories/WO0906/S00381.htm>.

⁵⁴ Project Against Torture vital support for victims of violence, available at <http://www.licadho-cambodia.org/programs/project.php>.

⁵⁵ US Department of State, Country Report on Cambodia 2008, *supra* note 38. The report noted several unresolved cases: the 2006 tortured death of a suspect by military police, the beating of a 13-year-old boy who was detained without a warrant and the beating of a motorist by Battambang police. No arrests have been made.

Brief. The second is the preventative effect of such a ban, whereby prohibiting the use of Torture Tainted Evidence in legal proceedings removes an important incentive for the use of torture as a method of interrogation.⁵⁶ The former UN Special Rapporteur on Torture explained this rationale to the effect that it is judicial acceptance of statements under torture that has been “responsible for the flourishing of torture;” and by ensuring the inadmissibility and illegality of such evidence, Article 15 of the CAT operates so as to “make torture unrewarding and therefore unattractive.”⁵⁷ In its Order the OCIJ rejected the applicability of the second rationale of Article 15, reasoning that barring the use of such information in the current case would not deter the would-be torturer. The OCIJ reasoned that the deterrent effect of Article 15 is no longer relevant as the Khmer Rouge are no longer in power. As is clear from the foregoing however, torture practices in Cambodia were not unique to the Democratic Kampuchea period; rather, they are ongoing and endemic in Cambodia today. The CCHR respectfully submits that, in light of the context in which the OCIJ Order was made, the interpretation of the CAT advocated by the OCIJ is thoroughly irresponsible and injudicious.

31. Viewed in light of the ECCC’s legacy aspiration to strengthen rule of law the OCIJ Order is all the more imprudent. It has been recognised that the prevalence of violence within police and prison systems is significantly higher in post-conflict societies than in other contexts: “A major problem in many countries has been police impunity where the police literally got away with murder, torture, rape and extortion.”⁵⁸ International bodies, including the UN, have increasingly referred to the need to implement extra measures to ensure that police, judicial and prison reforms in these societies reflect international human rights standards.⁵⁹ The CCHR respectfully submits that the OCIJ Order, rather than serving to strengthen the rule of law, threatens to perpetuate and legitimise torture practices in Cambodia.

⁵⁶ UN General Assembly, Torture and other cruel, inhuman or degrading treatment, 14 August 2006, U.N. Doc. No. A/61/259, para. 45.

⁵⁷ *Tainted Provenance: When, If Ever, Should Torture Evidence Be Admissible*, by Michael P. Scharf, 65 WASHINGTON AND LEE LAW REVIEW 129, 135 (2008), quoting Report of the Special Rapporteur on the Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 15 Dec. 1992, U.N. Doc. E/CN.4/1993/26, at 590-91.

⁵⁸ *Police Reform and Human Rights*, a Hurist Document, by William G. O’Neill, 20 July 2004, at pg. 13.

⁵⁹ *Id.*; quoting *Democratizing the Police Abroad: What To Do and How To Do It*, by David Bayley, National Institute of Justice, at pg. 40 (2001).

Concluding remarks

32. The Cambodian people have been promised much by the ECCC. This Brief and the submissions herein reflect fear: fear that these promises have been forgotten, fear that judicial reform and the strengthening of rule of law in Cambodia will be replaced by a legacy of terror. The CCHR refers to a recent article by Mr. Michael P. Scharf in which he paraphrases Justice Robert Jackson's dissent in *Korematsu v. United States*: once judicial approval is given to an exception to a fundamental principle of human rights, it "lies about like a loaded weapon ready for the hand of any authority" that can show an urgent need to use it.⁶⁰ As in the OCIJ Order, the domestic implications of admitting Torture Tainted Evidence are not addressed in Mr. Scharf's article. We respectfully submit that the backdrop against which the OCIJ Order has been made leaves no doubt that there is a serious risk that the "loaded weapon" will be used long after the mandate of the ECCC has been completed: by an incompetent, corrupt and non-independent Cambodian judiciary as and when is required; and by law enforcement agents to justify their sustained use of torture and the stifling of rule of law in Cambodia. The CCHR strongly urges the PTC to overrule the OCIJ Order, to safeguard the legacy of the ECCC and - most importantly - the fundamental rights of the people of Cambodia.

All of which is respectfully submitted.

Signing on behalf of the Applicants, the CCHR:



Ou Virak, President of the CCHR

Dated this 7th September 2009.

At Phnom Penh, Kingdom of Cambodia.

To be made available on the CCHR website www.cchrcambodia.org. To be sent to the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment – and copied to the UN Special Rapporteur on the Situation of Human Right in Cambodia – under cover of a complaint letter and request for urgent action.

⁶⁰ Scharf, *supra* note 57, at 169-70.