

**ECCC Must Prosecute Those Responsible for Torture**

**Christopher Hale**

**January 31, 2012**

Every weekday at around eight o'clock in the morning in the far outskirts of Phnom Penh, a procession of UN busses pass through the security gates at the Extraordinary Chambers in the Courts of Cambodia (ECCC) or better known as the UN-backed Khmer Rouge Tribunal. The ECCC and its staff will soon be launching the latest salvo in the ongoing war about torture obtained evidence. From Guantanamo Bay to rendition flights all over the world, this controversial legal feud will now make a stop in the rice fields of Cambodia.

By way of background, the long-anticipated and long overdue trial of the remaining senior leaders of the brutal Khmer Rouge regime began on November 21, 2011 with opening statements. While a fourth defendant, former Minister of Social Affairs Ieng Thirith, remains in hospital care for her recent diagnosis of dementia and will not be tried at present, the remaining three defendants are the most senior members of the Khmer Rouge's inner circle still alive: Nuon Chea, the Khmer Rouge chief ideologue and second in command to the deceased Khmer Rouge leader, Saloth Sar, better known as "Pol Pot;" Ieng Sary, the Minister of Foreign Affairs and public face of the regime, and Khieu Samphan, the political head of state of the Khmer Rouge government. All of these defendants are charged with war crimes, crimes against humanity (including torture), and genocide.

After opening statements, the ECCC Trial Chamber has begun to hear evidence about one of the most horrific episodes of human cruelty and mass atrocities in modern human history. Widespread killings, routine torture and interrogations, massive forced labor camps, and systemic starvations are just a few of the crimes that the defendants are alleged to have masterminded, ordered and supervised. These alleged crimes occurred from border to border of Cambodia for close to four years from April 17, 1975 to January 6, 1979, and resulted in the loss of 25 percent of Cambodia's population. It is no surprise then that the lead international co-prosecutor, Andrew Cayley, and many others believe that this case is the largest and most complex in international criminal history since Nuremberg.

This often criticized and underfunded (and under-resourced) tribunal is charged with the difficult task of bringing justice to crimes that occurred over 30 years ago and to a population in which, it is said statistically, every citizen suffered at least one death in their immediate family. Lost in the mix of news coverage about alleged corruption and political interference at the ECCC is that this court will soon make a landmark decision

on an issue that is highly contentious, both among the trial parties and among policymakers, counterterrorism experts and human rights commentators the world over: the use of torture evidence. However, unlike the standard paradigm where a government tortures a detainee to force a confession or produce evidence, and subsequently uses that confession or evidence in court against that detainee or one of his alleged co-defendants, the ECCC Trial Chamber faces a far different scenario. The prosecution intends to use as evidence extracts from thousands of pages of prisoner files, including statements and "confessions" that were produced before, during, and after interrogation sessions where Khmer Rouge prisoners were brutally tortured at hundreds of government prison sites throughout Cambodia, most notably at the infamous S-21/Tuol Sleng prison in central Phnom Penh. Hence, factually, the ECCC prosecutors plan to submit this evidence not against a victim(s) of torture, but against those alleged to have tortured, or in this case, ran the regime that allegedly tortured hundreds of thousands of people.

In an innovative piece of fancy legal footwork, ECCC defense teams have argued that a provision of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) [PDF] — which forms part of the legal basis of the ECCC itself and relevant international law at large — prohibits the prosecution from using this "torture tainted" evidence. Their argument stems from Article 15 of CAT, which states, "any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." The defense argues that any and all evidence obtained through torture is by definition inadmissible with the small exception of evidence used against the actual perpetrator of torture (and only then, merely as proof that the statement is the byproduct of torture inflicted by the actual torturer(s)), who in this instance are the Khmer Rouge soldiers and interrogators who whipped, electrocuted, water boarded, and pulled out the nails of prisoners, among other techniques [PDF]. As their argument concludes, senior government officials who allegedly instructed or otherwise brought about this torture are immune from such evidence, because they do not fit this limited exception. Whereas Article 15 serves as a shield to protect torture victims from torture evidence being used against them, the defenses' argument turns Article 15 into a sword to impale the prosecution's case. The final twist that makes this legal argument and factual situation so fascinating is that it is an unprecedented issue. No international criminal court has answered, let alone faced, the question of whether CAT Article 15 precludes from the prosecution [PDF] of alleged torturers, or those responsible for such torture, the admission of documentary evidence from the torture at issue. Consequently, the final ruling from the ECCC judges will likely be one of the ECCC's most significant judicial legacies. Notwithstanding the question's exceptional nature, the answer is clear: international justice, standards of treaty interpretation and the integrity of universally accepted legal principles will take a significant step backwards if the ECCC Trial Chamber endorses the defense teams' argument.

Both in terms of law and fact, the argument that Article 15 of CAT bars torture evidence from being used against the senior leaders of the Khmer Rouge regime has little merit. While the applicable law does not support the contention by the defense, the facts are even more damaging to their argument. In detention centers throughout the Khmer

Rouge's Cambodia, a large segment of the population was mercilessly and routinely tortured for days, weeks or even months in the most gruesome of ways, including being forced to eat human feces. Before, during and/or after such torture, and either by themselves or by an interrogator, the confessions of these torture victims were recorded on paper. Numerous victims had multiple documents drafted at various times throughout this process. Their confessions were seldom a short admission of guilt to a single crime, but rather lengthy biographies — often hundreds of pages — that detailed their lives to date, the identity of their family members, friends and colleagues, their full knowledge of and interaction with the regime and its officials, and gave intricate descriptions of their "criminal" activities. Most alarming, these victims did not "admit" to murders or rapes, but confessed to participating in the most farfetched conspiracies against the Khmer Rouge imaginable, all to "prove" the Khmer Rouge's paranoia that their problems were caused by outside infiltrators. These fictional crimes were, for instance, being a CIA or KGB agent teaching others how to spark internal instability, a capitalist spreading imperialist propaganda, or a Vietnamese sympathizer purposefully not working hard in the rice fields as a way to disrupt the government's agenda. It was regular practice of supervising Khmer Rouge interrogators to send these confessions back with instructions to torture more if the supervisor was not pleased with what he read or felt there were more hidden crimes to uncover. Their instructions were written right on the confessions in red ink, with orders to "beat" more if they refuse to admit to a particular "crime."

In the case at hand, the ECCC prosecutors are not, for example, using these confessions to prove that the victims were in fact CIA agents attempting to overthrow the regime. Considering the absurdity of these Khmer Rouge era "crimes," the confessions have zero incriminating value. Instead, these confessions are treasure troves of other important information. For the purposes of prosecutorial work at the ECCC, the confessions contain crucial information about the Khmer Rouge hierarchy and policies, actual evidence that torture de facto occurred, contemporaneous annotations by interrogators, lead evidence for ECCC investigators and lawyers, and corroborating evidence of known, but potentially disputed facts. More importantly, the confessions have significant non-hearsay value. In other words, value not for the incriminating truths the evidence asserts (i.e. "I'm a CIA agent who the US sent to sabotage the government"), but for inferences imbedded in the evidence.

The non-hearsay value in portions of these confessions is directly rooted in the Article 15 exception "as evidence that the statement was made," in that there is inferential value to take away from the mere fact that a "statement was made." For instance, some non-hearsay purposes to pull from these "statement[s]" are knowledge, notice, and effect on the reader. This last purpose is particularly relevant and important for this trial, because Khmer Rouge detainees were tortured in part to divulge the identity of other collaborators, and subsequently, these individuals named in written confessions were arrested and tortured themselves, as the cycle goes. Additionally, some victims divulged their familial, social, and work relationships prior to torture, and the Khmer Rouge subsequently rounded these individuals up and tortured them just for being associated with a known "enemy" to the regime. Thus, the confessions show that the "effect" of naming someone on the Khmer Rouge "reader" led to further unlawful arrests, tortures

and murders. These confessions help prove this pattern and make it harder for the Khmer Rouge senior leaders on trial to plead ignorance.

Using the confessions in this way comports legally with the ECCC Internal Rules and Article 15 of CAT, contrary to the assertions made by the defense teams and others. The ECCC has a very liberal admissibility standard for evidence, and leaves it to the Court's judges — who are best placed — to evaluate the weight, credibility and probative value of the evidence before them. For instance, it is within the responsibilities and capacity of these professional judges to allow in "evidence that the statement was made," attribute only non-hearsay value to the contested evidence (i.e. the torture victim gave the name of a "co-conspirator" who was immediately arrested and tortured by the Khmer Rouge), and not be influenced by the other impermissible uses of this evidence (i.e. the identified co-conspirator is a "criminal"). Judges at international criminal tribunals are regularly asked to carry out such evidentiary analysis. As such, the extracts from confessions should be admitted and judged by the Court as to its value and persuasiveness.

In terms of CAT, a plain reading of Article 15 exhibits that the CAT drafters wanted to permit non-hearsay uses of torture evidence, because Article 15's exception — "except against a person accused of torture as evidence that the statement was made" — is itself a non-hearsay exception. Of note, the exception is unclear as to what portion of a "statement," if not all, can be admitted. Put together, the inclusion of a non-hearsay exception with the ambiguity as to the scope of this exception strongly indicates that the CAT's drafters wanted to leave room for judicial interpretation, and thus allow judges to determine how this exception may apply to the myriad of potential fact patterns. The drafters likely anticipated that to effectuate CAT's strong policy towards prosecuting any and all who are responsible for torture so to prevent future torture, an injection of ambiguity in Article 15's exception was necessary.

Further adding to the exception's ambiguity, "against a person accused of torture" does not cement that the drafters only meant the physical perpetrators of torture. The more logical explanation in keeping with the object and purpose of CAT is that the drafters intended this exception to include anyone accused of being responsible for torture, including senior government officials that set torture-producing policies and/or gave orders to torture. The firmly established legal principles of command and joint criminal responsibility by definition include using such "on the ground" evidence against far removed government superiors and policy makers. Reading the exception in this manner also adheres to one of the main rationales and *raison d'être* behind Article 15, which is to remove the incentive to torture in the first place. If senior government officials know such torture evidence cannot be used against the torture victim and can also later be used against them in a prosecution, then their incentive to resort to torture is further diminished. The defenses' reading of the Article 15 exception, on the other hand, would not only remove this additional deterrent value, but would signal to senior government officials that they are shielded from torture evidence as long as they do not personally torture themselves — a manifestly unreasonable result that can hardly be justified under the CAT regime.

The biggest concern with allowing the Khmer Rouge defendants to misapply Article 15 in this way is that it will eviscerate CAT itself. It befalls the cautionary proverb "the exception that swallows the rule." It bears stressing that the object and purpose of CAT is to eradicate both torture itself and impunity for those responsible for torture, an odious crime of universal prohibition and abhorrence. To this end, State Parties to CAT — Cambodia being one of them — are obligated to investigate, prosecute and punish commissions of torture on their territory. This explains why the majority of provisions in CAT's operative Part I deal squarely with the investigation and prosecution of torture, even authorizing State Parties to exercise universal jurisdiction to do so. Therefore, permitting Khmer Rouge senior leaders to limit the evidence that can be used to prove their responsibility for torture — especially when it is evidence their regime created — takes away a substantial tool in prosecuting them, not to mention undermining of the CAT regime itself. It is logically dishonest and incomprehensible to argue that CAT mandates for universal prosecution of all those accused of torture, yet permits torturers to prevent the admission into evidence of interrogation reports that record their crimes. Every defendant should have the 'fruits of their actions' used against them at trial, and the Khmer Rouge senior leaders are no different.

The odd aspect of this debate is that international human rights groups have lined up in support of the ECCC Defense teams' argument that such "torture tainted" evidence should be barred, period. In echoing the defense teams' arguments discussed earlier, these groups lend their support largely because of their unsaid belief that to allow such evidence into trial would lead to a "slippery slope" erosion of the universal protection against incriminating torture evidence being used against torture victims. However, the slippery slope argument is as unconvincing as it is simplistic. If ECCC prosecutors are allowed to use this evidence against these senior Khmer Rouge defendants — people accused of orchestrating torture on a mass scale — it is unclear how this limited exception will descend into a universal decline of CAT Article 15 protections for victims of torture. If anything, as argued above, such a development would create an evidentiary rule that subjects more torturers and their superiors — Khmer Rouge or otherwise — to a legitimate evidentiary use of their acts of torture, hence generating a deterrent effect.

In line with the defense teams' case, the international human rights groups lodge other policy arguments that miss the mark. For instance, they argue that the integrity of the judicial process and the fair trial rights of the defendants are violated if such unreliable evidence obtained through such repulsive means as torture is allowed. This argument, however, only carries persuasive value when the evidence admitted is incriminating evidence against the victims of torture (which is not the case here where the ECCC Prosecution is pursuing those responsible for the widespread commission of torture). Khmer Rouge victims were not tortured to admit to their biographical data and history, to confess the policies and hierarchy of the regime, or even to their associations in some cases. The torture was employed to force confessions to imaginary or blameless "crimes;" indeed, many, if not all, admitted to these crimes just to make the torture stop. No one wants admitted — nor will the Court admit — the incriminating evidence the Khmer Rouge tortured to get, so the judicial process is not abused. Relatedly, admitting the non-incriminating evidence and non-hearsay inferences from the confession extracts is not a

violation of the defendants' fair trial rights, because as already established, this is the fruits of their alleged criminal activity. It is well within the right of a prosecutor to confront them with this evidence. Not to be overlooked is the backdrop to this debate: defendants at the ECCC benefit from robust substantive and procedural due process and fair trial safeguards.

Within their brief, these groups also assert that the confessions cannot be admitted because the law cannot support or appear to support the fruits of such barbarous and inhuman behavior. However, let us not forget the context of this argument. The ECCC prosecutors are charging senior Khmer Rouge leaders for international crimes, including torture directly, and the use of torture to gain "incriminating" evidence indirectly. They intend to use these confessions not to support the use of torture to obtain confessions, but to punish those that institutionalized torture, and did so in part to force confessions. The product of their alleged torture is, above all else, the most fitting evidence to use to secure their convictions. It follows then that it is a higher legal recognition of the horror of torture to admit such evidence in order to prosecute and imprison those willing to inflict torture or empower others to perpetrate it.

The most disconcerting aspect of these groups' support is that it makes the perfect the enemy of the good. The main thrust of CAT is about preventing torture in part by prosecuting those responsible for it. To respect the overall object and purpose of CAT to deter and prosecute commissions of torture, the ECCC judges must interpret Article 15 to incorporate the admission of such confessions against government leaders responsible for bringing about the torture in the first place, a mode of interpreting CAT that Amnesty International itself promotes. While it may be difficult to delineate the contours of when torture evidence is admissible and when it is not, this difficulty has no bearing on whether such a judicial exercise should be done. On the contrary, it is the very importance of prosecuting torture perpetrators and their instigating superiors that demands that the ECCC Trial Chamber and other judiciaries undertake the difficult task of determining, within the object and purpose of CAT, when and in what ways the use of torture evidence is permissible.

Many have said that due to the serious considerations at stake, reasonable minds can disagree on this issue. The more accurate comment is that reasonable minds should not disagree about an issue that goes to the very core of CAT itself — effective prosecution of those who orchestrate and use torture. One must believe that it is morally and legally more repugnant to bypass the full prosecution of those allegedly responsible for torture — including confronting them with the byproducts of their alleged torture — than it is to construe liberally an evidentiary rule found in the very law that calls for their prosecution. The disgust and revulsion that lead us to loathe the commission of torture should also lead us to recognize that Article 15 of CAT must never be interpreted to benefit those that perpetrate or employ torture. To find otherwise would send the wrong message to would-be perpetrators of torture and significantly weaken the CAT.