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Should The Extraordinary Chambers In The Courts Of Cambodia Be Allowed To Admit Evidence Of The Khmer Rouge's Command Structure That Was Obtained From The Torture Of Prisoners At Tuol Sleng

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MEMORANDUM FOR THE EXTRAORIDINARY CHAMBERS IN THE COURTS OF CAMBODIA

ISSUE:

SHOULD THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA BE ALLOWED TO ADMIT EVIDENCE OF THE KHMER ROUGE'S COMMAND STRUCTURE THAT WAS OBTAINED FROM THE TORTURE OF PRISONERS AT TUOL SLENG

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INDEX OF AUTHORITIES

Statutes and Rules

1. Agreement on the Establishment of a Special Court for Sierra Leone, UN-Sierra Leone, Jan. 16, 2002,UN Doc. S/2002/246, Annex, art. 14(1).

2. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, para. 1, G.A. Res. 46, at 197, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984).

3. Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, art. 3, *entered into force* Sept. 3, 1953, *as amended by* Protocols Nos 3, 5, 8, and 11 *which entered into force* on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 *respectively*.

4. Extraordinary Chambers in the Courts of Cambodia, Draft Internal Rules, Rule 26(3) (Nov. 3, 2006)

5. International Convention on Civil and Political Rights G.A. res. 2200A (XXI), art. 7, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

6. International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, Rule 95, U.N. Doc. ITR/3/Rev.1 (1995).

7. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, Rules of Procedure and Evidence Rule, Rule 95, U.N. Doc. IT/32/Rev. 38 (as amended) (2006).

8. On Transitional Rules of Criminal Procedure, UNTAET/Reg/2000/30 (Sept. 25, 2000).

9. Rome Statute of the International Criminal Court, united nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9 (1998).

10. Special Court for Sierra Leone, Rules of Procedure and Evidence, Rule 95 (Mar. 7, 2003).

11. U.N. Charter preamble.

12. Universal Declaration of Human Rights, G.A. Res. 21A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

13. Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 8 I.L.M. 679, 1155 U.N.T.S. 332.

CASES

14. A and Others v. Secretary of State for the Home Department, [2005] UKHL 71 (U.K.).

15. Aydin v. Turkey, App. No. 57/1996/676/866, Eur. Ct. H.R. (1997).

16. Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003).

17. Chevron U.S.A v. Echazabal, 536 U.S. 73, 81 (2002).

18. Doe v. United States, 487 U.S. 201, 210 (1988).

19. Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2nd Cir. 1980).

20. HCJ 5100/94 Pub. Comm. Against Torture in Isr. v. Israel [1999], *available at* http://elyon1.court.gov.il/eng/verdict/framesetSrch.html

21. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) (1978).

22. The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. para. 159 (July 9).

23. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

24. Pennsylvania v. Muniz, 496 U.S. 582, 601 (1990).

25. Prosecutor v. Delalic et al., Case No. IT-96-21-T, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence (Trial Chamber, Int'l Crim. Trib. Former Yugo., Sept. 2, 1997).

26. Prosector v. Furundzija, Case No. IT-95-17/1-T, Judgment (Trial Chamber, Int'l Crim. Trib. Former Yugo., Dec. 10, 1998).

27. R v Evans and Others, ex parte Pinochet Ugarte (No 3), 6 BHRC 24, 11 (March 24, 1999).

28. Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

29. Selmouni v. France, App. No. 25803/94, Eur. Comm'n H.R. (1999).

30. Siderman de Blake v. Republic of Argentina 965 F.2d 699 (9th Cir. 1992).

31. Soering v. United Kingdom, 11 Eur. H.R. Rep. 439 (1989).

32. United States v. Horton, 873 F.2d 180, 181, note 2 (8th Cir. 1989).

33. United States v. McLaughlin, 777 F.2d 388, 391 (8th Cir. 1985).

34. United States v. Sims, 719 F.2d 375, 378 (1983), *cert. denied*, 465 U.S. 1034, 79 L. Ed. 703, 104 S. Ct. 1304 (1984).

Law Reviews

35. Christoph Burchard, The Nuremburg Trial and its Impact on Germany, 4 J. Int'l Crim. L. 800 (2006).

36. Joanne Roman, U.S. Medical Research in the Developing World: Ignoring Nuremburg, 11 Cornell J. L. & Pub. Pol'y 441, 448 (2002).

Other Documents

37. Black's Law Dictionary (8th ed. 2004), *expressio unius est exclusio alterius.*

38. Herman Burges 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 148 (Martinus Nijhoff 1988).

39. John D. Clioreiari & Youk Chhang, *Documenting the Crimes of Democratic Kampuchea*, *in* Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence before the Cambodian Courts 227 (Jaya Ramji & Beth Van Schaack eds., 2005).

40. Baruch C. Cohen, The Ethics of Using Medical Data from Nazi Experiments, *available at* http://www.jewishvirtuallibrary.org/jsource/Judaism/naziexp.html.

41. Stephen Heder, Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge (2001) *available at* http://www.wcl.american.edu/warcrimes/khmerrouge.html.

42. Chris Ingelse, The UN Committee against Torture: An Assessment 380 (Kluwer Law 2001).

43. Seth Mydans, Khmer Rouge Executioner Found, Willing to Stand Trial, Chic. Trib., Apr. 30, 1999.

44. United States Military Commission Manual (Jan. 18, 2007) a*vailable at* http://www.fcnl.org/pdfs/Torture/Military_Commissions_Manual.pdf.

I. ISSUE AND SUMMARY OF CONCLUSION

A. Issue[*]

This memorandum addresses whether the Extraordinary Chambers in the Courts of Cambodia ("ECCC") should exclude evidence of the Khmer Rouge's command structure that was obtained from members of the Khmer Rouge that were denounced, tortured, and subsequently killed.

B. Summary of Conclusions

1. Interrogation prior to certain torture within the confines of Tuol Sleng rises to the level of suffering required to constitute torture.

The statements in question resulted from severe mental torture that took place immediately before obvious physical abuse was going to commence. The knowledge that actual physical torture was about to begin is of sufficient gravity to constitute the level of mental pain and suffering necessary to constitute torture.

2. The international prohibition against torture and the status of torture as *jus cogens* bars the admission of any evidence derived from torture regardless of its benefit.

The ban against torture and its products has gained the status of *jus cogens* and is a peremptory norm. This means that derogating from the norm is a violation of international law. The use of evidence gathered through torture would plainly violate international law.

[*] Should the Extraordinary Chambers in the Courts of Cambodia be allowed to admit evidence of the Khmer Rouge's command structure that was obtained from the torture of prisoners, that were subsequently killed, at Tuol Sleng?

3. All of the international and hybrid courts have rules of procedure banning evidence resulting from torture.

Each international tribunal and hybrid tribunal has rules prohibiting the admission of evidence gained from torture. Nothing in this case justifies deviating from these traditional rules.

4. The analogy to the Miranda exception does not support the contention that evidence of the Khmer Rouge command structure should be admissible.

Miranda rights do not protect individuals from basic processing questions police officers may ask in trying to identify the person. For example, an officer may ask a person to identify himself by name or provide his address. Presumably, a prisoner's rank and serial number would also fall under this exception. However, substantive evidence cannot be admitted into court if the suspect's Miranda rights were not read first. Procedurally, the Miranda rights must be read when the suspect is in custody and prior to formal interrogation.

The Miranda exception analogy does not support the idea that the Khmer Rouge command structure evidence should be admissible because the evidence is substantive and the victims were detained and interrogated. Questioning relating to the command structure of the Khmer Rouge crosses the line from processing information – such as identifying the prisoner - to substantive evidence because the purpose of such questions is to uncover the names of the prisoner's superiors, which does not help to identify the actual prisoner. Furthermore, once a prisoner is detained for interrogation, he is entitled to be read his Miranda rights without exception. This would apply to each of the prisoners at Tuol Sleng if U.S. law controlled.

5. Even if the use of medical information obtained from Nazi medical experiments suggests that the evidence in question can be admitted (which it does not) the evidence in question should still be barred because there is no immediate benefit to the public.

The general consensus is that it is unethical to use information gained from Nazi medical experiments. Although, some have argued that this information should be utilized if an immediate benefit to the public exists, no such benefit exists here. The prosecution of the Khmer Rouge leadership may help heal Cambodia as a nation, but it will not provide an immediate public benefit. For example, polls the Allied forces conducted in Germany during Nuremburg showed that the trial had no immediate soothing effect on the German people.[1]

6. The statutory canon of construction of *expressio unius est exclusio alterius* supports the contention that Article 15 of the Convention against Torture is meant to exclude evidence gained from torture, except as to prove the existence of torture.

There are two principle reasons to exclude evidence gained from torture. First, evidence gained from torture is considered unreliable. Even though the statements the prosecution wants to use were not made under actual physical torture, they were made under intense mental pain and suffering, which is considered torture. Even if some of the statements made under torture corroborate one another, they were still made under torture and are inherently unreliable.

Second, torture has often been used to ensure evidence in judicial proceedings. If statements made under torture cannot be invoked, then an important reason for using torture is removed. Even if preventing the admission of torture evidence would hinder the prosecution of those who are responsible for facilitating the crimes of the Khmer Rouge, torture is banned

[1] Christoph Burchard, The Nuremburg Trial and its Impact on Germany, 4 J. Int'l Crim. L. 800, 812-13 (2006) [reproduced in the accompanying notebook at Tab 35].

because as a peremptory norm it is fundamentally wrong. Allowing torture evidence in some situations, but not others, leaves open the possibility that more evidence from torture can be used in future cases, thus encouraging an increase in torture in the future. In other words, creating an exception in this case could lead to future exceptions that would risk swallowing the rule. This is a slippery slop indeed.

II. **FACTUAL BACKGROUND**

The Khmer Rouge was one of the most brutal regimes in modern history. Between 1975 and 1979 as many as two million people– nearly one-third of the Cambodian population - died under the Khmer Rouge.[2] Anywhere, from 500,000 to one million of these deaths were the result of executions, many of which occurred when the Khmer Rouge turned on its own party members.[3] In 1976, Pol Pot, Nuon Chea, and Son Sen, members of the Khmer Rouge Central Committee, believed a conspiracy against their leadership existed within their party. They subsequently adopted a policy to execute all those within the party who could be compelled to confess to this conspiracy.[4] The policy was implemented at Tuol Sleng prison, also known as S-21. Kang Kech Eav, more commonly known as Duch, ran Tuol Sleng where at least 14,000 people were executed, many of whom were killed only after being tortured.[5]

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[2] Stephen Heder, Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge, at 7 (2001) *available at* http://www.wcl.american.edu/warcrimes/khmerrouge.html [reproduced in the accompanying notebook at Tab 41].

[3] *Id.*

[4] *Id.* at 26.

[5] *Id.* at 12.

The Khmer Rouge leadership was an extremely secretive body that determined "through secrecy […] we can be masters of the situation and win victory over the enemy, who cannot find out who is who."[6] As a result of the leadership's paranoia, uncovering the command structure of the Khmer Rouge, as well as individual culpability, has proven difficult. When Vietnam invaded Cambodia in 1979, the Khmer Rouge leadership burned most of their own documents that could have tied them to their crimes.[7] Consequently, much of the evidence about the Khmer Rouge and its command structure that exists today comes from the torture confessions of prisoners at Tuol Sleng because Duch claims that he was never told to burn his files.[8] In addition to these torture confessions, Duch has since admitted on more than one occasion to being personally responsible for torturing and murdering prisoners at Tuol Sleng.[9] In fact, he said that he received orders from the central committee and was willing to stand trial for his actions.[10]

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[6] John D. Clioreiari & Youk Chhang, *Documenting the Crimes of Democratic Kampuchea*, *in* Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence before the Cambodian Courts 225 (Jaya Ramji & Beth Van Schaack eds., 2005) [reproduced in the accompanying notebook at Tab 39].

[7] *Id.* at 26-27.

[8] *Id.* at 27. In an interview with Duch after Vietnam toppled the Khmer Rouge, Duch recalled a conversation he had with Nuon Chea where Nuon Chea told Duch that "all the papers from the party were burned except yours. You are stupid."

[9] Seth Mydans, Khmer Rouge Executioner Found, Willing to Stand Trial, Chic. Trib., Apr. 30, 1999, at 22 [reproduced in the accompanying notebook at Tab 43].

[10] *Id.*

III. **LEGAL ANALYSIS**

A. Interrogation prior to certain torture within the confines of Tuol Sleng rises to the level of "severity" as is required to constitute torture.

The statements in question resulted from severe mental torture made immediately before obvious physical abuse was going to commence. The principle question here is whether the knowledge that actual physical torture was about to begin, which would lead to death, is of sufficient gravity to constitute the level of mental pain and suffering that constitutes torture. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") defines torture as an act that is intentionally inflicted on a person by which *severe* pain or suffering, either physical or mental, is used to obtain information from that person.[11]

In determining the severity of a case, a court often look to the duration of the treatment, its physical or mental effects, and in some cases the sex, age, and state of health of the victim.[12] In the United States' Military Commissions Manuel, the U.S. military defines *severe* mental pain or suffering as the prolonged mental harm caused by or resulting from:

> "(a) the intentional infliction or threatened infliction of severe physical pain or suffering; (b) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (c) the threat of imminent death; or (d) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering

[11] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, para. 1, G.A. Res. 46, at 197, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) [*hereinafter* 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 from 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) [reproduced in the accompanying notebook at Tab 2].

[12] Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A), ¶ 162 (1978) [reproduced in the accompanying notebook at Tab 21].

substances or other procedures calculated to disrupt profoundly the senses or personality."[13]

The European Court of Human Rights, referring to Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), stated in *Soering v. United Kingdom* that the "Convention is a living instrument which … must be interpreted in the light of present-day conditions,"[14] implying that what did not rise to the level of torture in the past could rise to the level of torture today.[15] In other words, acts that were once considered cruel, degrading, or inhuman in the late 1970's could be considered torture today.[16] The court in *Selmouni v. France* found that acts, which would arouse in the victim feelings of fear, anguish, humiliation, and inferiority, which could possibly break the plaintiff's physical and moral resistance could reach the level of torture.[17] In *Soering v. United Kingdom*, the court determined that waiting on death row with the ever present specter

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[13] United States Military Commission Manual, at Sec. IV-9 (Jan. 18, 2007) a*vailable at* http://www.fcnl.org/pdfs/Torture/Military_Commissions_Manual.pdf [reproduced in the accompanying notebook at Tab 44].

[14] Soering v. United Kingdom, 11 Eur. H.R. Rep. 439, ¶ 102 (1989) [reproduced in the accompanying notebook at Tab 31].

[15] Selmouni v. France, App. No. 25803/94, Eur. Comm'n H.R. ¶ 101 (1999) [reproduced in the accompanying notebook at Tab 29].

[16] *See Ireland*, 25 Eur. Ct. H.R. ¶ 96 (five actions which were not considered torture because they were not intense enough were (a) wall standing: forcing the detainees to remain for periods of some hours in a "stress position' ... ; (b) hooding: putting a black or navy colored bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation; (c) subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise; (d) deprivation of sleep: pending their interrogations, depriving the detainees of sleep; (e) deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations); *See also* HCJ 5100/94 Pub. Comm. Against Torture in Isr. v. Israel [1999], ¶. 24-32, *available at* http://elyon1.court.gov.il/eng/verdict/framesetSrch.html (search "Parties" for "Public Committee Against Torture in Israel," then click on search) (methods such as covering one's head with a burlap bag that causes suffocation, playing loud music, intentional sleep deprivation, and uncomfortable detention were inhuman, but not torture) [reproduced in the accompanying notebook at Tabs 21, 20 respectively].

[17] *Selmouni*, App. No. 25803/94, Eur. Comm'n H.R. ¶¶ 99, 105; *See also*, Aydin v. Turkey, App. No. 57/1996/676/866, Eur. Ct. H.R. ¶ 84 (1997) [reproduced in the accompanying notebook at Tabs 29, 15 respectively].

of death hanging over one's head created "mounting anguish" in violation of Article 3 of the European Convention.[18]

At Tuol Sleng, Khmer Rouge members were brought to a prison that was known for its brutality. The fact that Khmer Rouge members were shackled to beds in blood stained rooms at Tuol Sleng and asked questions with knowledge that certain pain, suffering, and death was imminent, rises to the level of *severe* mental pain or suffering. Therefore, any information gained through interrogation before physical torture began should still be deemed inadmissible.

B. The international prohibition against torture and the status of torture as *jus cogens* bars the admission of any evidence derived from torture regardless of its benefit.

The international revulsion towards torture is captured in numerous international conventions and the prohibition against torture is considered an international peremptory norm. In *A and others v. Secretary of State for the Home Department* the court thoroughly analyzed the status of torture under international law and the court's reasoning supports the proposition that torture evidence is inadmissible.[19]

1. International prohibition against torture and torture's status as *jus cogens*

After the end of World War II, the community of nations, shocked by the horrors and atrocities of the holocaust, attempted "to reaffirm faith in fundamental human rights" through the

[18] *Soering* 11 Eur. H.R. Rep. ¶ 111 [reproduced in the accompanying notebook at Tab 31].

[19] A and others v. Secretary of State for the Home Department (No 2), [2005] UKHL 71, ¶¶ 27-39 (U.K) [reproduced in the accompanying notebook at Tab 14].

United Nations Charter.[20] This reaffirmation was expanded in the Universal Declaration of Human Rights, which stated with no ambiguity that "no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment."[21] This precept was also incorporated into the European Convention and the International Covenant on Civil and Political Rights ("ICCPR"), which also forbade the use of torture or cruel, inhuman or degrading treatment.[22] These international instruments laid the groundwork for the adoption of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1987.[23] Not only did the CAT define torture,[24] and expressly forbid it,[25] but Article 15 also clearly states that evidence gained from torture may not be used in any proceedings, except to prove the existence

[20] U.N. Charter preamble [reproduced in the accompanying notebook at Tab 11].

[21] Universal Declaration of Human Rights, G.A. Res. 21A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) [reproduced in the accompanying notebook at Tab 12].

[22] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, art. 3, *entered into force* Sept. 3, 1953, *as amended by* Protocols Nos 3, 5, 8, and 11 *which entered into force* on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 *respectively*; International Covenant on Civil and Political Rights G.A. res. 2200A (XXI), art. 7, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 [*hereinafter* ICCPR] [reproduced in the accompanying notebook at Tabs 3, 5 respectively].

[23] CAT, *supra*, note 11 [reproduced in the accompanying notebook at Tab 2].

[24] *Id.* at art. 1. (For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions) [reproduced in the accompanying notebook at Tab 2].

[25] *Id.* art. 2 [reproduced in the accompanying notebook at Tab 2].

of torture.[26] In *A and Others v. Secretary of State for the Home Department,* the court interpreted Article 15 as an absolute bar to the use of torture evidence in judicial proceedings.[27]

Two international conventions,[28] case law,[29] various national legal systems,[30] and six international criminal tribunals[31] all condemn torture and prohibit the use of evidence gained therefrom in any legal proceedings. This raises the use of evidence gained from torture and the ban on torture itself to the level of *jus cogens,* and creates a peremptory norm of international law, which makes derogation from those norms forbidden.[32] Furthermore, the prohibition of torture as a *jus cogens* was recognized in several cases. In *R v Evans ex p Pinochet Ugarte* the

[26] *Id.* 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) [reproduced in the accompanying notebook at Tab 2].

[27] *A and Others*, [2005] UKHL 71, ¶35 [reproduced in the accompanying notebook at Tab 14].

[28] *Infra* notes 36-40 and accompanying text.

[29] *A and Others*, [2005] UKHL 71; *See also infra* notes 33, 35 and accompanying text [reproduced in the accompanying notebook at Tab 14].

[30] *Infra* notes 53-70 and accompanying text.

[31] *Infra* notes 63-77 and accompanying text.

[32] Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 8 I.L.M. 679, 1155 U.N.T.S. 332. ([A] norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character) [*hereinafter* Vienna Convention]; The court in *Siderman de Blake v. Republic of Argentina* stated that "*Jus cogens* embraces customary laws considered binding on all nations and is derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested choices of nations. Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent. These norms, which include principles and rules concerning the basic rights of the human person, are the concern of all states; they are obligations *erga omnes…"* and "[B]ecause *jus cogens* norms do not depend solely on the consent of states for their binding force, they enjoy the highest status within international law. The supremacy of *jus cogens* extends over all rules of international law; norms that have attained the status of *jus cogens* prevail over and invalidate international agreements and other rules of international law in conflict with them. A *jus cogens* norm is subject to modification or derogation only by a subsequent *jus cogens* norm." Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992)*; See also, A and Others*, [2005] UKHL 71 [reproduced in the accompanying notebook at Tabs 13, 30, 14 respectively].

court explicitly recognized that torture had reached the level of *jus cogens*.[33] In fact, the court stated that the express purpose of the CAT was to create an international system to prosecute acts of torture.[34] The International Criminal Tribunal for the Former Yugoslavia ("ICTY") also explicitly stated in *Prosecutor v. Furundzija* that torture "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."[35] As a signatory to the ICCPR and the CAT, Cambodia is bound to prevent torture in all its forms, as well as prohibit the submission of evidence gained from torture into legal proceedings.

2. Exclusionary principle of the Convention against Torture: Article 15

In the seminal work on understanding the United Nations Convention against Torture, Herman Burges and Hans Danelius explained that the exclusionary rule of Article 15 was based on two principles.[36] First, the authors noted that a statement made under torture is contrary to the fundamental principle of a "fair trial" and is often unreliable. Indeed, the authors suggested that Article 15 was meant to be a check on legal systems where court procedures are based on the free evaluation of evidence so as to bar any statements or evidence gained from torture from

[33] R v Evans and Others, ex parte Pinochet Ugarte (No 3), 6 BHRC 24, 11 (March 24, 1999); *See also Siderman de Blake*, 965 F. 2d at 717 ("the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*") [reproduced in the accompanying notebook at Tabs 27, 30 respectively].

[34] R v Evans and Others, ex parte Pinochet Ugarte (No 3), 6 BHRC 24, 12 (March 24, 1999) [reproduced in the accompanying notebook at Tab 27].

[35] Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment (Trial Chamber, Int'l Crim. Trib. Former Yugo., Dec. 10, 1998) ¶ 153 [reproduced in the accompanying notebook at Tab 26].

[36] Herman Burges 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 148 (Martinus Nijhoff 1988) [reproduced in the accompanying notebook at Tab 38].

being heard in court, preventing judges and jurors from even having the opportunity to weigh its inclusion or exclusion.[37] Second, the authors reasoned that excluding evidence gained from torture from judicial proceedings would indirectly prevent torture in the first place because if the evidence gained through torture cannot be utilized an important reason for using torture is nullified.[38]

Additionally, while Article 7 of the ICCPR does not contain the same exclusionary provisions as Article 15 of the CAT, it has nonetheless been interpreted to bar torture evidence.[39] The Human Rights Committee of the ICCPR has specifically stated that "it is important for the discouragement of violations under Article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment."[40]

Lastly, the interpretation of the Convention against Torture under Article 31, Article 31(3)(c) and Article 53 of the Vienna Convention supports the exclusionary principle of CAT Article 15 and forbids the ECCC from reading a new exception into the Convention against Torture.

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[37] *Id; See also* Chris Ingelse, The UN Committee against Torture: An Assessment 380 (Kluwer Law 2001) [reproduced in the accompanying notebook at Tabs 38, 42 respectively].

[38] Burges and Danelius, *supra* note 36, at 148 [reproduced in the accompanying notebook at Tab 38].

[39] Ingelse, *supra* note 37, at 382 [reproduced in the accompanying notebook at Tab 42].

[40] *Id. citing* General Comment 20 on Article 7, HRI/GEN/1/Rev.1 (1994), p.30, §12 [reproduced in the accompanying notebook at Tab 42].

a) Interpreting the Convention Against Torture Under Article 31 of the Vienna Convention

Article 31 of the Vienna Convention requires that "a treaty shall be interpreted…in accordance with the ordinary meaning to be given to the terms of the treaty and…in the light of its object and purpose."[41] The "ordinary" meaning of Article 15 is to ban the submission of any statement gathered from torture, *except* to prove that the statement was made under torture.[42] The 1975 Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("1975 Declaration"), the precursor to the CAT, had no exception to the rule.[43] It was not until the CAT negotiations that the contracting parties decided to add one exception,[44] which shows that the "ordinary" meaning of Article 15 was to bar all torture evidence except to prove torture's existence.

The leading authorities on the CAT, Mr. Burges and Mr. Danelius, stated that the "purpose" of Article 15 is "not to prove that the statement is a true statement," but to prove that a statement was said under torture.[45] It is clear from these leading authorities that interpreting the CAT under Article 31 of the Vienna Convention would lead to the same conclusion that Article 15's "ordinary" meaning and "purpose" is to prevent the submission of any torture evidence except to prove that torture existed. Article 31 of the Vienna Convention can not to be invoked to

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[41] Vienna Convention, *supra* note 32, art. 31 [reproduced in the accompanying notebook at Tab 13].

[42] CAT, *supra* note 11, art. 15 [reproduced in the accompanying notebook at Tab 2].

[43] Burges and Danelius, *supra* note 36, at 148 [reproduced in the accompanying notebook at Tab 38].

[44] *Id.*

[45] *Id.*

justify reading another exception into Article 15 that would allow the submission of a torture statement's substance because that is explicitly not the "object" or "purpose" of Article 15. Therefore, the submission of the Khmer Rouge command structure into the ECCC would be in violation of Article 31 of the Vienna Convention.

b) Interpreting the Convention Against Torture Under Article 31(3)(c) of the Vienna Convention

Article 31(3)(c) of the Vienna Convention states that when "interpreting a treaty a party shall take into consideration, together with the context, any relevant rules of international law applicable in the relations between the parties."[46] The European Court of Human Rights in *Al-Adsani v. UK* stated that the European Convention could not be interpreted in a vacuum and that courts need to be aware of the convention's "special character as a human rights treaty."[47] Additionally, the European Convention must take into account relevant rules of international law and "be interpreted in harmony with other rules of international law of which it forms a part."[48] The analysis in *Al-Adsani* is theoretically interchangeable with any human rights treaty and since the CAT is a human rights treaty the CAT must be interpreted in harmony with international law. International law clearly states that the use of evidence gathered through torture is inadmissible in criminal proceedings.[49] Therefore, any use of evidence gathered through torture other than to prove that torture existed would violate international law.

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[46] Vienna Convention, *supra* note 32, art. 31(3)(c) [reproduced in the accompanying notebook at Tab 13].

[47] Al-Adsani v. UK, Eur. Ct. H.R. App. No. 35763⁄97 para. 55 (2001) *cited in* A and Others v. Secretary of State for the Home Department, [2005] UKHL 71, ¶ 29 (U.K.) [reproduced in the accompanying notebook at Tab 14].

[48] *Id.*

[49] *See supra*, notes 29, 36-40 and accompanying text; *See infra* notes 53-77 and accompanying text.

c) Interpreting the Convention Against Torture Under Article 53 of the Vienna Convention

Article 53 of the Vienna Convention defined an international peremptory norm as a "norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[50] Under well-established principles of international law the only way to allow evidence gained from torture into proceedings is to use the evidence to prove that the evidence was gained through torture. If the ECCC wanted to use the substantive information gathered through torture there would first have to be another preemptory norm allowing the use of substantive information gained through torture to be admissible in court in order to go after not just the torturer, but others. However, no such norm exists and if the ECCC did submit the substance as evidence they would violate fundamental principles of international and human rights law,[51] which in turn would make the proceedings of the ECCC questionable and the results laughable.

The international community has placed torture on the same plane as genocide and slavery because of its abhorrence. Regardless of whether or not evidence gathered through torture would help prosecute vile suspects, the use of torture evidence is a "moral defilement"[52] and degradation that would help to justify and condone torture, not condemn it, and this would violate fundamental human rights and international law.

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[50] Vienna Convention, *supra* note 32 , art. 53 [reproduced in the accompanying notebook at Tab 13].

[51] *Id.*

[52] People v. (at the suit of the A-G) v. O'Brien, IR 142 (1965) *cited in* A and Others v. Secretary of State for the Home Department, [2005] UKHL 71, ¶ 39 (U.K.) [reproduced in the accompanying notebook at Tab 14].

3. States have adopted domestic laws similar to Article 15 of the Convention against Torture

Many nations have adopted domestic laws similar to Article 15. Canada embodied Article 15 in its criminal code,[53] while France[54] and Germany[55] gave Article 15 legal affect through court decisions. Spain[56] and The Netherlands[57] also determined that witness statements obtained through torture could not be used as evidence. The High Court of Australia stated that "convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price."[58] The courts in the U.S. have also adopted prohibitions against the use of torture. In *Filartiga v. Pena-Irala*, the court decried that the "torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind."[59] Likewise, the court in *LaFrance v. Bohlinger* foreshadowed Article15 when it stated that it would be "unthinkable that a statement obtained by torture or by other conduct belonging only in a police state should be admitted at the government's behest in order to bolster its case."[60]

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[53] India v. Singh, 108 CCC (3d) 274, ¶ 20 (1996) *citied in A and Others*, [2005] UKHL 71, para. 27 [reproduced in the accompanying notebook at Tab 14].

[54] French Republic v. Haramboure, No de pourvoi 94-81254, (Jan 24, 1995) *cited in A and Others*, [2005] UKHL 71, ¶ 37 [reproduced in the accompanying notebook at Tab 14].

[55] El Motassadeq, 2005 NJW 2326, para. 2 (June 14, 2005) *cited in A and Others*, [2005] UKHL 71, ¶ 37 [reproduced in the accompanying notebook at Tab 14].

[56] Le Ministere Public v. Irastorza Dorronsoro, No 238/2003 (May 16, 2003) *cited in A and Others*, [2005] UKHL 71, ¶ 39 [reproduced in the accompanying notebook at Tab 14]. [reproduced in the accompanying notebook at Tab 14].

[57] Pereira, nr 103.094, para. 6.2 (Oct 1, 1996) *cited in A and Others*, [2005] UKHL 71, ¶ 37 [reproduced in the accompanying notebook at Tab 14]. [reproduced in the accompanying notebook at Tab 14].

[58] *A and Others*, [2005] UKHL 71, ¶ 17 [reproduced in the accompanying notebook at Tab 14].

[59] Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2nd Cir. 1980) [reproduced in the accompanying notebook at Tab 19].

[60] LaFrance v. Bohlinger, 499 F.2d 29, 34 (1st Cir. 1974) *cited in A and Others*, [2005] UKHL 71, ¶ 38 [reproduced in the accompanying notebook at Tab 14].

The International Court of Justice ("ICJ") explained in its advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, that the world has an obligation not to recognize the outcome of an illegal situation, nor should the world offer aid or assistance in maintaining such a situation.[61] Since the ban of evidence gained from torture has reached *jus cogens* status, any derogation from this fundamental rule would seem to be a violation of international law.[62]

The international community's placement of torture on the same high level as its prohibition against genocide, slavery, racial discrimination, aggression, and acquisition of territory by force demonstrates the world's revulsion to torture in all its forms. Allowing the use of evidence gained through torture in an international criminal trial would be utterly unacceptable.

C. All of the international and hybrid courts have rules of procedure banning evidence resulting from torture.

Each international tribunal and hybrid tribunal has rules prohibiting the admission of evidence gained from torture.

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[61] The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. ¶ 159 (July 9) (the court's opinion was in respect to Israel's construction of a wall on Occupied Palestinian Territory) [reproduced in the accompanying notebook at Tab 22].

[62] Therefore, under the ICJ opinion the world would have a duty to not recognize the outcome of an ECCC case nor provide further aid or assistance to the ECCC if it were to admit into the proceedings evidence gained from torture.

1. International Criminal Tribunal for the former Yugoslavia

Rule 95 of the ICTY Rules of Procedure forbids the use of evidence "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."[63] Even if evidence had probative value it would still be excluded under Rule 95 if its inclusion would affect the integrity of the proceedings, especially if it were "obtained by means contrary to internationally protected human rights."[64] Additionally, even evidence gained from oppressive conduct, not constituting torture, would be inadmissible under Rule 95.[65] The Trial Chamber in *Prosecutor v. Delalic* stated that oppressive conduct is conduct that can drain the concentration and free will of a person under interrogation through acts that can weaken one's resistance causing one to be unable to think clearly.[66] The act of torturing someone is not only contrary to human rights, but is also an oppressive act and would negatively affect the integrity of the proceedings.

2. International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda's ("ICTR") Rules of Procedure and Evidence are almost identical to those of the ICTY. ICTR Rule 95 states that evidence shall be

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[63] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, Rules of Procedure and Evidence Rule, Rule 95, U.N. Doc. IT/32/Rev. 38 (as amended) (2006) ("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 proceedings.") [reproduced in the accompanying notebook at Tab 7].

[64] Prosecutor v. Delalic et al., Case No. IT-96-21-T, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence (Trial Chamber, Int'l Crim. Trib. Former Yugo., Sept. 2, 1997) ¶ 35 [reproduced in the accompanying notebook at Tab 25].

[65] *Id.* ¶ 41.

[66] *Id.* ¶ 66.

inadmissible if it is "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.[67] Aside from the fact that evidence gained through torture is inherently unreliable, admitting such evidence is antithetical to international criminal rules of procedure, which are beholden to international norms, one of which is the ban on torture.

3. International Criminal Court

The International Criminal Court ("ICC"), which was created with the adoption of the Rome Statute in 1998, has an even more comprehensive exclusionary rule.[68] Article 69(7) of the Rome Statute forbids the use of any "evidence obtained by means of a violation of … 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."[69] While similar to the rules in the ICTY and ICTR, the ICC explicitly states that evidence gained at the expense of human rights is

[67] International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, Rule 95, U.N. Doc. ITR/3/Rev.1 (1995) ("Exclusion of Evidence on the Grounds of the Means by which it was Obtained 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") [reproduced in the accompanying notebook at Tab 6].

[68] Rome Statute of the International Criminal Court, united nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9 (1998) [reproduced in the accompanying notebook at Tab 9].

[69] *Id*. art. 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").

inadmissible, whereas the Trial Chamber in *Prosecutor v. Delalic* had to imply that Rule 95 of the ICTY banned evidence gained from violations of human rights.[70]

4. United Nations Transitional Administration for East Timor

The United Nations Transitional Administration for East Timor ("UNTAET") created the most detailed exclusionary rule to date.[71] Section 34.2 of the UNTAET's Transitional Rules of Criminal Procedure forbids the use of evidence if it was obtained through methods that call into question the reliability of the evidence, or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings. Specifically enumerated in this section is that, without limitation, no evidence obtained through torture, coercion or threats to moral or physical integrity" can be admitted.[72] These rules clearly forbid the use of evidence gained from torture.

5. Special Court for Sierra Leone

The Special Court for Sierra Leone ("SCSL") has a broader exclusionary rule to the effect that evidence shall be excluded "if its admission would bring the administration of justice into serious disrepute."[73] However, the SCSL also adopted the Rules of Procedure of the ICTR

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[70] Prosecutor v. Delalic et al., Case No. IT-96-21-T, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence (Trial Chamber, Int'l Crim. Trib. Former Yugo., Sept. 2, 1997) ¶ 35 [reproduced in the accompanying notebook at Tab 25].

[71] On Transitional Rules of Criminal Procedure, UNTAET/Reg/2000/30 (Sept. 25, 2000) ¶ 34 [reproduced in the accompanying notebook at Tab 8].

[72] *Id.* para. 34.2. ("The Court may exclude any evidence if its probative value is substantially outweighed by its prejudicial effect, or is unnecessarily cumulative with other evidence No evidence shall be admitted if obtained by methods that cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings, including without limitation evidence obtained through torture, coercion or threats to moral or physical integrity").

[73] Special Court for Sierra Leone, Rules of Procedure and Evidence, Rule 95 (Mar. 7, 2003) ("No evidence shall be admitted if its admission would bring the administration of justice into serious disrepute") [reproduced in the accompanying notebook at Tab 10].

mutatis mutandis,[74] which means that the ICTR Rules of Procedure apply along with any changes required for the running of the SCSL. Because, the SCSL adopted the evidentiary rules of the ICTR it is understood that Rule 95 of the SCSL will have the same meaning as Rule 95 of the ICTR.

6. Extraordinary Chambers in the Courts of Cambodia

To date, the Extraordinary Chambers in the Courts of Cambodia ("ECCC") has not adopted final rules relating to evidence and procedure. Nevertheless, Rule 26(3) of the draft internal rules does mention an aversion to the use of coercive techniques towards interviewees.[75] The internal rules state that any information gained through coercion or threat will be considered inadmissible as evidence in the ECCC.[76] While the draft internal rules govern information gained from an interviewee, they provide no criteria for selecting who qualifies as an interviewee.[77] It is likely, based on the other international criminal tribunals' rules for evidence exclusion that similar rules prohibiting the admission of evidence gained from torture would apply in the ECCC as well.

Based on the myriad of international criminal tribunals and their rules of procedure it is clear that the overwhelming theme of their exclusionary rules is to protect the integrity of the

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[74] Agreement on the Establishment of a Special Court for Sierra Leone, UN-Sierra Leone, Jan. 16, 2002,UN Doc. S/2002/246, Annex, art. 14(1) [reproduced in the accompanying notebook at Tab 1].

[75] Extraordinary Chambers in the Courts of Cambodia, Draft Internal Rules, Rule 26(3) (Nov. 3, 2006) ("No form of inducement, physical coercion or threats thereof, whether directed against the interviewee or others, may be used in any interview. If such inducements, coercion or threats are used, the statements recorded shall not be admissible as evidence before the Chambers, and the person responsible shall be appropriately disciplined in accordance with Rules [39 to 42]") [reproduced in the accompanying notebook at Tab 4].

[76] *Id.*

[77] *Id.*

judicial proceedings. The primary means of doing this is to bar any evidence that was gained from the violation of a person's human rights and one such fundamental human right is the right to be free from torture. Therefore, the international tribunals understand that evidence gained from torture must be excluded lest the tribunals themselves become tarnished with the taint of torture.

D. The analogy to the Miranda exception does not support the contention that evidence of the Khmer Rouge command structure should be admissible.

The *Miranda* rule is a procedure that provides safeguards in order to protect information that would be considered testimonial, which means information that implicitly or explicitly relates to a factual assertion or disclosure of information.[78] This particularly relates to the privilege of being spared from revealing one's thoughts or views with the government.[79]

1. The *Miranda* rule

The Supreme Court's opinion in *Miranda v. Arizona* established the basic guidelines for protecting a suspect's rights by requiring certain procedural safeguards during a custodial interrogation.[80] Custodial interrogation is defined as questioning initiated after security officers take a person into custody or otherwise deprive a person of his freedom of action in any significant way.[81] "The *Miranda* safeguards come into play when a person in custody is

[78] Doe v. United States, 487 U.S. 201, 210 (1988) [reproduced in the accompanying notebook at Tab 18].

[79] *Id.* at 213.

[80] Miranda v. Arizona, 384 U.S. 436, 444 (1966) [reproduced in the accompanying notebook at Tab 23].

[81] *Id.*

subjected to either express questioning or its functional equivalent."[82] The functional equivalent to express questioning refers to "any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect." [83] The functional equivalent portion of this "definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police."[84] Additionally, courts have determined that custodial interrogation for the purposes of *Miranda* includes a security officer using his knowledge of any special susceptibilities of the suspect as leverage against the accused.[85] The result of a Miranda violation is that any testimonial evidence gained from interrogation is suppressed at trial.[86]

However, courts in the U.S have determined that the *Miranda* shield does not suppress information that is gained from "routine" booking questions.[87] Such questions involve requesting information for basic identification purposes to secure the "biographical data necessary to complete booking"[88] of the accused regardless of whether it occurred during custodial interrogation.[89] In *Miranda*, the Court stated that information gathered from

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[82] Rhode Island v. Innis, 446 U.S. 291, 301 (1980) [reproduced in the accompanying notebook at Tab 28].

[83] *Id.*

[84] *Id.*

[85] Pennsylvania v. Muniz, 496 U.S. 582, 601 (1990) [reproduced in the accompanying notebook at Tab 24].

[86] Miranda v. Arizona, 384 U.S. 436, 476 (1966); *See also Muniz*, 496 U.S. at 590 [reproduced in the accompanying notebook at Tabs 23, 24 respectively].

[87] United States v. Sims, 719 F.2d 375, 378 (1983), *cert. denied*, 465 U.S. 1034, 79 L. Ed. 703, 104 S. Ct. 1304 (1984) [reproduced in the accompanying notebook at Tab 34].

[88] United States v. Horton, 873 F.2d 180, 181, note 2 (8th Cir. 1989) [reproduced in the accompanying notebook at Tab 32].

[89] United States v. McLaughlin, 777 F.2d 388, 391 (8th Cir. 1985); *See also Sims*, 719 F.2d [reproduced in the accompanying notebook at Tabs 33, 34 respectively].

fingerprinting, photographing, measuring, writings, and speech were all allowable means of ascertaining the identification of the accused without requiring the reading of the accused' Miranda rights.[90]

2. The command structure evidence is not included within the scope of the Miranda exception for basic questions.

Even if the ECCC adopted an evidentiary rule similar to the U.S. Miranda rights exception, the information about the Khmer Rouge's command structure obtained at Tuol Sleng should still be excluded for two reasons. First, the information about the Khmer Rouge's command structure is not "routine" booking information necessary for identification, but testimonial, and would be suppressed at trial unless the prisoner was read his Miranda rights before being interrogated.[91] Secondly, the information was gathered during a custodial interrogation because the Khmer Rouge detained the victims at a government run prison camp[92] and the guards used their knowledge of the victims' fears of imminent torture and death as leverage against the victims to gain information.[93] Since the Miranda safeguards come into play when a person undergoes custodial interrogation, the victims at Tuol Sleng would require protection under the Miranda rules.[94] Any information gathered from the victims at Tuol Sleng

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[90] *Miranda*, 384 U.S. at 764; *See also Muniz*, 496 U.S. at 601-02 (1990) (stating that the seven questions regarding the defendant's name, address, height, weight, eye color, date of birth, and current age do not qualify as custodial interrogation afforded protection under the defendant's Miranda rights) [reproduced in the accompanying notebook at Tabs 23, 24 respectively].

[91] Doe v. United States, 487 U.S. 201, 210 (1988) [reproduced in the accompanying notebook at Tab 18].

[92] *Miranda*, 384 U.S. at 444 [reproduced in the accompanying notebook at Tab 23].

[93] *Muniz*, 496 U.S. at 601 [reproduced in the accompanying notebook at Tab 24].

[94] Rhode Island v. Innis, 446 U.S. 291, 301 (1980) [reproduced in the accompanying notebook at Tab 28].

would be suppressed under the Miranda rule if such a rule existed at the ECCC because of the testimonial nature of the information and the process in which the information was gained.

However, as noted above, Miranda protections are inapplicable when security officers ask suspects basic processing questions in order to identify the suspect, like name and address without informing the suspect of her Miranda rights. Evidence about the command structure of the Khmer Rouge crosses the line from processing information, identifying the prisoner, to substantive testimonial evidence because it is uncovering the names of the prisoner's superiors, which does not help to identify the actual prisoner. Since the information is not for suspect identification, but testimonial information, *Miranda v. Arizona* forbids the submission of that information into court as evidence if the suspect's Miranda rights were not read first.[95] Therefore, even if the ECCC adopted a Miranda analogy, the analogy does not support the notion that the Khmer Rouge command structure evidence should be admissible because the information was gained through custodial interrogation and the information gathered was not for prisoner identification.

E. Even if the use of medical information obtained from Nazi medical experiments suggests that the evidence in question can be admitted (which it does not) the evidence in question should still be barred because there is no immediate benefit to the public.

During the horrific years of Nazi rule, barbarous Nazi doctors used live humans to conduct scientific experiments. At the Nuremburg trial, 20 of these doctors were tried for war crimes and crimes against humanity. The debate over whether to use material gained from these

[95] *Miranda*, 384 U.S. at 476 [reproduced in the accompanying notebook at Tab 23].

"scientific" experiments has parallels to whether evidence gained through torture should be admitted before the ECCC.

1. Medical information obtained from Nazi human medical experiments violates international medical ethics and is generally barred from use

At Nuremburg, the foundation of the international norms dealing with human experimentation was established with the creation of the Nuremburg Code.[96] The Nuremburg Code includes two basic rules; (1) informed consent of the human is required before experimentation; and (2) research is not justified solely because the subject gave consent.[97] The requirement of informed consent was later codified in Article 7 of the ICCPR,[98] which now means that informed consent is a requirement under international law.[99]

Researchers have tried to use information gained from Nazi medical experiments in the past, but they have been harshly criticized and much of their research was never published.[100] For instance, Doctor Robert Pozos, Director of the Hypothermia Laboratory at the University of Minnesota, attempted to use information that Nazi doctors got from freezing concentration camp prisoners to death. When he tried to publish his research with this information included, the New England Journal of Medicine rejected the work.[101]

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[96] Joanne Roman, U.S. Medical Research in the Developing World: Ignoring Nuremburg, 11 Cornell J. L. & Pub. Pol'y 441, 448 (2002) [reproduced in the accompanying notebook at Tab 36].

[97] *Id.* at 449.

[98] ICCPR, *supra* note 22, art. 7 [reproduced in the accompanying notebook at Tab 5].

[99] Roman, *supra* note 96, at 450 [reproduced in the accompanying notebook at Tab 36].

[100] Baruch C. Cohen, The Ethics of Using Medical Data from Nazi Experiments, *available at* http://www.jewishvirtuallibrary.org/jsource/Judaism/naziexp.html [reproduced in the accompanying notebook at Tab 40].

[101] *Id.*

General Telford Taylor, Chief Counsel for the prosecution at Nuremberg argued that the Nazi experiments were insufficient and unscientific, "a ghostly failure as well as a hideous crime … those experiments revealed nothing which civilized medicine can use."[102] All of the subjects in these cases were malnourished, dehydrated, starving, skeletons of men and women who resemble nothing of today's masses, which such information is only arguably capable of helping. The editor of the New England Journal of Medicine stated that the experiments were such a "gross violation of human standards that they are not to be trusted at all."[103] Additionally, famed Harvard Medical School Doctor, Henry Beecher, said that Nazi information should be treated like unconstitutionally obtained evidence, that is, it should be inadmissible in any form in today's society.[104]

2. The analogy to evidence gained through torture is that both violate ethical, moral, and international norms and cannot be used

Both the Nazi information and the evidence at issue here were gathered using torture. The use of such information would be to bring justification to the horrific acts because its use legitimizes the means by which they were achieved. Regardless of the good that using this evidence might bring, the ends do not justify the means, especially when the means violate fundamental principles of human rights and decency.

With regard to the Nazi medical data, some have argued that ends justify the means if the greater good is served. Putting aside all the moral, ethical, and legal condemnations of using the

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[102] *Id.*

[103] *Id.*

[104] *Id.*

Nazi medical information and assuming that the Nazi information *should* be allowed into the scientific arena *if* it could save lives, this situation just does not exist in relation to the facts we are concerned with in Cambodia. While the prosecutions of the Khmer Rouge leadership will go a long way to help heal Cambodia as a nation,[105] they will not save lives or bring back those who were killed. Moreover, the exclusion of evidence gained from torture in cases before the ECCC will not prohibit justice from being done because other evidence exists that can be used to prosecute the leadership.[106] It is vitally important that the ECCC takes the moral high ground on this issue.

F. The statutory canon of construction of *expressio unius est exclusio alterius* supports the contention that Article 15 of the Convention against Torture is meant to exclude evidence gained from torture, except as to prove the existence of torture.

The principle of *expressio unius est exclusio alterius* is a canon of construction that means the inclusion of one thing implies the exclusion of the other, or the alternative.[107] The United States Supreme Court has determined that this canon depends on "identifying a series of two or more terms…which are abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded."[108] In other words, this construction applies

[105] Yet, even the soothing effect a nation may get from prosecuting its war criminals in an international tribunal could be doubtful. In post-war Germany 59% of West Germans disapproved of the Nuremburg trials and Germany never politically or morally endorsed the trials until much later. Burchard, *supra* note 1, at 812-13 [reproduced in the accompanying notebook at Tab 35].

[106] *See* Heder, *supra* note 2, at 29 [reproduced in the accompanying notebook at Tab 41].

[107] Black's Law Dictionary (8th ed. 2004), *expressio unius est exclusio alterius* (for example "each citizen can vote" implies that non-citizens cannot vote) [reproduced in the accompanying notebook at Tab 37].

[108] Chevron U.S.A v. Echazabal, 536 U.S. 73, 81 (2002); Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003) [reproduced in the accompanying notebook at Tabs 17, 16 respectively].

only when the ideas are of the same associated group or subject matter so that one can justifiably infer that an idea not mentioned was intentionally excluded.[109]

1. Application of *expressio unius est exclusio alterius* to Article 15 of the Convention against Torture

Article 15 explicitly forbids the admission of any evidence gained from torture; "each state party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings."[110] This statement is followed by a second, an exception to the first, that would allow the admission of information gained from torture to be used "only against a person accused of torture as evidence that the statement was made."[111] Since there are two statements of the same subject matter, banning the evidence gathered from torture, one of which is a narrowly tailored exception to the rule, one can infer that all other exceptions were intentionally excluded. The 1975 Declaration provided no exceptions to the admissibility of evidence gained from torture.[112] It was only during the drafting of the CAT that an exception was included, which shows that the intention of the signatories was to leave out all other exceptions.

Furthermore, the exception allows only that proof of the *statement*, not the substance of the statement, can be admitted into evidence to prove that the statement was made under torture

[109] *Barnhart*, 537 U.S. at 168 [reproduced in the accompanying notebook at Tab 16].

[110] CAT, *supra* note 11, art. 15 [reproduced in the accompanying notebook at Tab 2].

[111] CAT, *supra* note 11, art. 15 [reproduced in the accompanying notebook at Tab 2].

[112] Burges and Danelius, *supra* note 36, at 148 [reproduced in the accompanying notebook at Tab 38].

in order to prove the guilt of the alleged torturer.[113] Allowing evidence gained from torture into the ECCC's proceedings would be to use the substance of the statements and that is not permitted under Article 15. Additionally, some of the evidence that would be used from these interrogations would be used to go after leaders of the Khmer Rouge, some of who had no direct involvement in the actual torture of the victims and whose crimes are unrelated to the torture of the victim that produced the information. This is expressly prohibited because Article 15 states that no evidence could be submitted in "*any proceedings* except *against a person accused of torture* as evidence that the statement was made."[114] Additionally, the 1975 Declaration proposed that no information gained from torture could be used as evidence against "the person concerned or *against any other person in any proceedings.*"[115] Leading authorities on this seem to suggest that this meaning is still implied in Article 15, [116] which would intimate that not only could information about the Khmer Rouge command structure be excluded in proceedings against the torturer, but also in proceedings against others who were not the torturer.

Even if Article 15 did not preclude the use of statements made as a result of torture to prosecute suspects other than the actual torturer, such as those who ordered the torture, the evidence at issue here is still barred. The evidence in question would be submitted in order to establish the actual command structure of the Khmer Rouge, not to prove the torture was the

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[113] CAT, *supra* note 11, art. 15; Burges and Danelius, *supra* note 11, at 148 [reproduced in the accompanying notebook at Tabs 2, 38 respectively].

[114] CAT, *supra* note 11, art. 15; Burges and Danelius, *supra* note 36, at 148 [reproduced in the accompanying notebook at Tabs 2, 38 respectively].

[115] Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. 3452(XXX) Dec. 9, 1975 *cited in* Burges and Danelius, *supra* note 36, at 193 [reproduced in the accompanying notebook at Tab 38].

[116] Burges and Danelius, *supra* note 36, at 148 [reproduced in the accompanying notebook at Tab 38].

result of the leadership's order. Article 15 prohibits the substantive use of this evidence to establish the command structure of the Khmer Rouge because the only exception in Article 15 provides for using the statements as proof that torture occurred.[117] Since torture evidence is unreliable its use here could establish a false command structure.[118]

Allowing the information about the command structure of the Khmer Rouge into the proceedings at the ECCC not only violates the statutory construction of *expressio unius*, but it would unjustifiably create new law. This new law would allow the admission of substantive information gained from torture into proceedings against not only those directly responsible for the torture of the victim, but also against others in different proceedings who were not responsible for the torture of the victim nor any other crime against that particular victim. Such an infusion of new law and application into Article 15 not only violates the plain meaning of the article, but to do so would create a unilateral approach to the application of an international treaty, and a peremptory norm, which will erode the strength of CAT and the international condemnation of torture.

2. Two Additional Policy Reasons to Exclude Torture Evidence

Two other policy reasons exist for excluding torture evidence. First, evidence gained from torture is considered inherently unreliable.[119] A member of the Committee against Torture

[117] CAT, *supra* note 11, art. 15; Burges and Danelius, *supra* note 36, at 148 [reproduced in the accompanying notebook at Tabs 2, 38 respectively].

[118] *Infra* notes 119 – 124 and accompanying text.

[119] Burges and Danelius, *supra* note 36, at 148 [reproduced in the accompanying notebook at Tab 38].

stated that torture evidence "must not be invoked under any circumstances"[120] because evidence obtained through torture is of "absolutely no value and therefore has no place in the court file."[121] Regardless of whether some of the statements made under torture corroborate one another, they were still made under torture and are inherently unreliable.

Second, torture has often been used to ensure evidence in judicial proceedings. If statements made under torture cannot be invoked, then an important reason for using torture is removed. Even if preventing the admission of torture evidence would hinder the prosecution of those who are responsible for facilitating the crimes of the Khmer Rouge, torture is banned because as a peremptory norm it is fundamentally wrong. Allowing torture evidence to be admitted into legal proceedings undermines the theory that banning evidence gained from torture removes an important reason for using torture. [122]

Ultimately, the argument that this information is necessary to prosecute the Khmer Rouge leadership is questionable. One of the leading researchers on the atrocities committed under the Khmer Rouge, Stephen Heder from American University, has stated that most of the confessions obtained at Tuol Sleng are unreliable because many fabricated claims were included in them to reinforce the party's fear that a conspiracy actually existed.[123] Additionally, Mr. Heder suggests

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[120] Ingelse, *supra* note 37, at 379 [reproduced in the accompanying notebook at Tab 42].

[121] *Id.* at 382.

[122] One likely outcome of this proposed exception would be if *A* determined that he would sacrifice himself so he could bring to justice a person responsible for murdering a handful of people. In order to do this *A* would torture *B* who would hopefully name the killer. *B* is subsequently tortured and gives up *C* (assuming that this information is reliable). Now both *A* and *C* will be prosecuted and this proposed exception accepts that one can be tortured in order to uncover who was responsible for another's killing. This example creates an incentive for a person who is willing to sacrifice himself to torture another because he knows the information he gets will be admissible in a court of law.

[123] Heder, *supra* note 2, at 29 [reproduced in the accompanying notebook at Tab 41].

that he has found evidence that would be able to be used in the ECCC that would not violate legal proceedings or diminish the basic principles of human rights.[124] Duch's confession and willingness to testify, coupled with the fact that one of the leading researchers on this subject believes most of the information gained was unreliable, demonstrates that prosecutors have available other forms of evidence to utilize in prosecuting the former leading members of the Khmer Rouge. Because the need for this evidence is questionable, it is not worth the risk of establishing a questionable precedent.

IV. **CONCLUSION**

Crafting exceptions to or analogizing around the fundamental human right to be free from torture only creates opportunities for others to do the same, which would needlessly weaken the CAT. The world has not determined that an exception to Article 15 of the CAT is necessary. Creating an exception to Article 15 would set a dangerous precedent indeed. And, if an exception is to be created, it is up to the international community to create it, not the ECCC. It would be tragic if the ECCC proceeded without the support of the international community and created an exception that could undermine its legitimacy from the start.

To achieve real justice, there must be an impression of a fair trial. If the ECCC admits evidence obtained from torture, the fairness of any trial using such evidence will be questioned. As the Council of Europe Commissioner for Human Rights succinctly stated: "torture is torture whoever does it, judicial proceedings are judicial proceedings, whatever their purpose- the

[124] *Id.*

former can never be admissible in the latter."[125] Allowing evidence gained from torture into a trial undermines the fundamental notion of fairness, which the ECCC is striving to uphold. The risk of admitting this evidence is simply too great.

[125] A and Others v. Secretary for the Home Department (No 2), [2005] UKHL 71, ¶ 35, (U.K.) citing Mr. Alvaro Gil-Robles, (June 8, 2005, Comm DH (2005)6) [reproduced in the accompanying notebook at Tab 14].