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

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APPLICATION OF AMNESTY INTERNATIONAL, THE INTERNATIONAL COMMISSION OF JURISTS AND THE REDRESS TRUST TO PRESENT AN AMICUS CURIAE SUBMISSION PURSUANT TO INTERNAL RULE 33

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The Applicants

1. The *amici curiae* (Applicants) have a wealth of experience in working on issues of international justice generally and the struggle against torture specifically.

1.1Amnesty International is a worldwide movement of people working for respect and protection of internationally-recognized human rights principles. The organization has over 2.2 million members and supporters in more than 150 countries and territories and is independent of any government, political ideology, economic interest or religion. It bases its work on the international human rights instruments adopted by the United Nations as well as those adopted by regional bodies such as the Organization of American States. It also has consultative status before the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organization and the Council of Europe, has working relations with the Inter-Parliamentary Union and the African Union, and is also properly registered as a civil society organization with the Organization of American States enabling it to participate in its activities.

1.2 The International Commission of Jurists is a non-governmental organization working to advance understanding and respect for the Rule of Law as well as the protection of human rights throughout the world. It was set up in 1952 and has its headquarters in Geneva (Switzerland). It is made up of 60 eminent jurists representing different justice systems throughout the world and has 90 national sections and affiliated justice organisations. The International Commission of Jurists has consultative status at the United Nations Economic and Social Council, the United Nations Organisation for Education, Science and Culture (UNESCO), the Council of Europe and the African Union. The organisation also cooperates with various bodies of the Organisation of American States and the Inter-Parliamentary Union. The International Commission Jurists regularly intervenes before national and international courts.

1.3 The Redress Trust (REDRESS) is an international non-governmental organisation with a mandate to seek justice and redress for victims of torture and related international crimes. It has a wide expertise on the rights of victims to gain both access to the courts and redress for their suffering, and has advocated on behalf of victims from all regions of the world. It regularly undertakes cases on behalf of individual torture survivors and assists those representing such individuals. REDRESS has extensive experience of interventions before national and international courts and tribunals.

The Application Under Rule 33 Of The Internal Rules

2. The Applicants present this application in accordance with Rule 33 of the Internal Rules and in response to the of the Co-Investigating Judges' Order of 28 July 2009,[1] which was appealed against on 11 September. The Applicants are well placed to assist the Pre-Trial Chambers in the proper determination of the issues on appeal. Both their experience in combating impunity for crimes under international law, including torture, and their struggle against torture throughout the world are decades-long, internationally-known and well-publicised.
3. A ruling by the Pre-Trial Chamber upholding the Co-Investing Judges' Order and admitting statements established to have been made as a result of torture (henceforth: obtained by torture) would have wider ramifications than simply the effect upon the present case or other cases within the ECCC, and it is therefore appropriate that the Chamber consider seeking amicus curiae submissions in respect of this issue to assist in reaching a decision that accords fully with international law.
4. In order to assist the Pre-Trial Chamber to consider their request expeditiously, the Applicants hereby include in the paragraphs which follow their submission. If granted leave to present an Amicus Curiae submission, the Applicants respectfully request the Chamber to consider the submission below. The Applicants will supplement this with any further information or appendixes requested by the Chamber.

The Applicants' Interest in the Issue of Admissibility of Statements Obtained by Torture

5. The admissibility of information including statements obtained by torture raises issues surrounding the scope of Article 15 of the UN *Convention on Torture and Other Cruel, Inhuman Or Degrading Treatment Or Punishment* (UNCAT), which all parties agree binds these Chambers, and which is the focus of this brief.

Specific Issues the Applicants Seek to Address

6. The Applicants' submission answers the following questions at issue in this appeal:

    6.1. Whether statements obtained by torture may be used (as evidence that the statements were made) only against the physical[2] torturers only;

[1] Office of the Co-Investigating Judges, Order on the use of statements which were or may have been obtained by torture, in the case of *Prosecutor v. Ieng Thirigh* (Case No. 002/19-09-2007/ECCC/OCIJ), filed 28 July 2009.
[2] This term is used here to denote the actual or direct perpetrator, bearing in mind that torture can be mental as well as physical.

6.2. Whether files and documents containing "confessions" obtained by torture may include material that is admissible; and

6.3. Whether statements obtained by torture may be used in the Chambers for purposes other than as evidence that the statements were made.

I. Statements Obtained By Torture May be Used (As Evidence that the Statements were Made) Against Any Person Accused of Torture

7. According to rules of general international law pertaining to the interpretation of international treaties, a treaty provision should be understood in accordance with "the natural meaning of the words"[3] therein or their "ordinary meaning".[4]
8. Article 15 of the UNCAT provides: "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."
9. In view of this Article's plain and clear language, the only pertinent questions are, first, whether or not the person in question has been accused of torture (this will be dealt with in Part I); and second, whether the statement is presented only for the purpose of demonstrating that it was made (as part of the proof of the act of torture through which it was procured) and not in any way for the truth of its contents (see Part III below).
10. As a preliminary point, it is a fundamental and undisputed principle of criminal law in general, and international criminal law in particular, that responsibility for crimes is not limited to those who have physically committed the criminal act; rather, it extends, among others, to those who have ordered, solicited or induced the commission of a crime, or aided, abetted or otherwise assisted in its commission, as the case may be.[5]
11. According to the doctrine of "command responsibility", senior officials can be held criminally responsible for the acts of their subordinates, where they were in a position to prevent or punish the subordinates' crimes and failed to do so, irrespective of whether the senior official himself gave an order to the commit the crime in question.[6] Equally, low-

[3] This phrase was used by the Permanent Court of International Justice regarding the term '*établis'* in the Lausanne Agreement in *Exchange of Greek and Turkish Populations Case*, Advisory Opinion of 21 February 1925, PCIJ, Series B-10, p. 19.
[4] Vienna Convention on the Law of Treaties (1969), Art. 31(1).
[5] See e.g., Arts. 6(1), 6(2) of the Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES 955, adopted by Security Council on 8 Nov. 1994; Arts. 7(1), 7(2) of the Statute of the International Tribunal for the Former Yugoslavia, adopted by Security Council on 25 May 1993, UN Doc. S/RES/827 (1993); Art. 25(3) of the Rome Statue of the International Criminal Court, adopted on 17 July 1998 (A/CONF.183/9), entered into force 1 July 2002.
[6] For example, the UN Committee against Torture stated that it "considers it essential that the responsibility of any superior officials, whether for direct instigation or encouragement of torture or ill-treatment or for consent or acquiescence therein,

ranking officials cannot evade criminal liability by relying on "superior orders" – as the UNCAT (which Cambodia acceded to in October 1992) clearly states "[a]n order from a superior officer or a public authority may not be invoked as a justification of torture".[7]

12. Specifically, individuals have been accused and convicted of crimes, indeed of torture, without the accusation involving any physical participation in the commission of the acts, in both national[8] and international courts. For instance, as early as the aftermath of World War II, "[a]ll the defendants" at the Trials of the Major war Criminals at Nuremburg were accused, and most convicted, of having "participated as leaders, organizers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy to commit, or which involved the commission of, Crimes against Peace, War Crimes, and Crimes against Humanity," (under Article 6 of the Nuremburg Charter) rather than being accused of physically, or directly, engaging in such crimes. The crimes included "ill-treatment" (which includes torture as now defined).[9]
13. Therefore, under Article 15 of the UNCAT, a statement which is established to have been made as a result of torture may be invoked against any person accused of torture as evidence that the statement was made, and this includes all levels of participation, from those accused of physically committing the act of torture to those otherwise bearing individual criminal responsibility for that act.

II. Files Containing 'Confessions' Obtained by Torture May Include Admissible Material

14. In view of Article 15's plain language and the requirement, under general international law, to interpret it in accordance with the natural, or ordinary, meaning of its words, as explained above, the inadmissibility rule is limited to the statement obtained by torture and does not extend automatically to all material contained in files within which the statement is found, to documents such as registration forms, or even to annotations written

be fully investigated through competent, independent and impartial prosecutorial and judicial authorities." Committee against Torture, Gen. Comm. No. 2: Implementation of art. 2 by States parties UN Doc. CAT/C/GC/2, 24 Jan. 08, para. 26.

[7] Article 2(3) of the UNCAT.

[8] See e.g., *R. v. Bow Street Metropolitan Stipendiary Magistrate And Others, Ex Parte Pinochet Ugarte* (No. 3) [2000] 1 AC 147 (former military commander and president accused of torture inflicted by subordinates); *Vargas Aignasse Guillermo S/Secuestro y Decaparición"*.- Expte. V - 03/08, Cámara del Tribunal Oral en lo Criminal Federal de Tucumán (Argentina), decision of 28 Aug. 2008 (former army generals convicted *inter alia* of torture by their troops).

[9] See Indictment, Trial of The Major War Criminals before the International Military Tribunal, 14 Nov. 1945 -1 October 1946, Nuremberg, Germany, 1947, Vol. 1, p. 29. See also *Prosecutor v. Jean-Paul Akayesu,* Case No. ICTR-96-4-T**,** judgment of 2 Sept. 1998 (mayor accused and convicted *inter alia* of rape, including as torture, committed by militias); *Prosecutor v. Anto Furundzija,* ICTY Case No. IT-95-17/1-T, ICTY Trial Chamber II, Judgement of 10 Dec. 1998 (military police commander convicted *inter alia* of torture/rape of a woman inflicted by his subordinates).

by torturers or other staff on the margins of the document containing the statement obtained by torture.

15. The Applicants would emphasise that, the above principle notwithstanding, the admissibility of any specific material produced as evidence in court is open to challenge, on the grounds that such material is actually part of the statement obtained by torture, that such material too was otherwise obtained by torture, or that it is inadmissible on other grounds provided in international law or, in the case of the ECCC, in Cambodian law.

III. Statements Obtained By Torture May Not Be Admitted Except As Evidence That the Statements were Made

16. According to various authorities, the rationale behind the exclusionary rule includes: (i) the public policy objective of removing any incentive to undertake torture anywhere in the world (i.e. the prevention of torture);[10] (ii) the outrage and opprobrium aroused by the unconscionable and inhumane character of torture;[11] (iii) protecting the fundamental rights of the party against whose interest the evidence is sought to be used;[12] (iv) preserving the integrity of the judicial process;[13] and (v) the unreliability of evidence obtained as a result of torture.[14]

17. Article 15 of the UNCAT, and the exclusionary rule in international law more generally, restrict the use of statements obtained by torture to evidence that the statements were made. Six elements will be elaborated here: i) the ordinary meaning of the language in the Article 15 exclusionary rule prohibits the use of statements obtained by torture under any circumstances whatsoever except as evidence that the statements were made; ii) the drafters of Article 15 rejected all attempts to create a narrower exclusionary rule (*ratione personae*), so as to prohibit the use of statements obtained by torture only against the torture victim; iii) the drafters of Article 15 rejected all attempts to create a narrower exclusionary rule (*ratione materiae*), so as to allow unlimited use of statements obtained by torture, so long as it is against the person accused of torture; iv) article 15 in its entirety is echoed in international jurisprudence; v) admitting statements obtained by torture violates the right to a fair trial; vi) admitting the content of torture "confessions" would be

[10] M.Nowak & E.McArthur, *The United Nations Convention against Torture: A Commentary* (Oxford Univ. Press 2008) Ch.15, para. 2; J.H.Burgers & H.Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff, 1988) 148.
[11] See, for example, Lord Hope in *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*, [2005] UKHL 71 (hereinafter: *A and Others*), para. 112.
[12] *Ibid*.
[13] Burgers and Danelius, p. 148, Lord Bingham in *A and Others*, para. 39 .
[14] M. Nowak and E. McArthur, Ch. 15 para. 2 and Burgers and Danelius, p. 148.

wholly inconsistent not only with the express terms, but also the object and purpose, of the UNCAT.

A. The Ordinary Meaning of the Language in the Article 15 Exclusionary Rule Prohibits the Use of Statements Obtained by Torture Under Any Circumstances Whatsoever Except as Evidence That The Statements Were Made

18. Article 15 is structured simply and clearly, providing for: a) A general exclusionary rule; b) An *ad hominem* exception to that rule; and c) A restriction on the scope that exception.
19. To elaborate, Article 15 provides: a) That states parties "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"; b) hat this general rule notwithstanding, such statements may be invoked in proceedings as evidence "against a person accused of torture"; and c) That such invocation be restricted to one type of use only, namely "as evidence that the statement was made".
20. The formulation "except against a person accused of torture as evidence that the statement was made" is unequivocally cumulative, namely, providing for only one, specified category of persons for whom the exception to the exclusionary rule applies and for only one, specified use of statements obtained by torture against such persons.
21. The drafting history of Article 15, discussed immediately below, has seen both attempts to create an exclusionary rule with a narrower remit *ratione personae*, that would prohibit the use of statements obtained by torture only against the torture victim, and attempts to create a narrower exclusionary rule *ratione materiae*, so as to allow unlimited use of statements obtained by torture, so long as it is against the person accused of torture. All such attempts have failed. The result is that all three elements listed above are essential to this Article, none can be overlooked without breaching it.

B. Drafters Rejected Attempts to Create a Narrower Exclusionary Rule (*Ratione Personae*) so as to Prohibit the Use of Statements Obtained by Torture only Against the Torture Victim

22. As will be seen below, Article 15 of the UNCAT is based upon Article 12 of the UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1975. The drafting of that Declaration took place earlier that year, during the Fifth United Nations Congress On the

Prevention of Crime and the Treatment of Offenders, which had been assigned that task by a UN General Assembly resolution.[15]

23. During the deliberations of the Congress,[16] Article 12 of the Draft Declaration that was presented to the Congress by an informal intersessional working group authorised by its Steering Committee,[17] as follows: 'Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence *against the person concerned* in any proceedings'.[18] [emphasis added]. However, reservations were expressed to the narrowness of this rule during the deliberations of the Congress. According to the Congress' Secretariat report:

> "With respect to Article 12, some participants suggested that it be amended to reflect the fact that statements made as a result of torture or other cruel, inhuman or degrading treatment or punishment should not be used as evidence against a victim of torture "or any other person."[19]

24. The text of the Draft Declaration recommended to the UN General Assembly, and adopted by it *verbatim* later that year, reflected these concerns, and made the requested addition to its Article 12, which now reads: 'Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned *or against any other person* in any proceedings'.[20]

25. No attempts were made to re-introduce a version of the exclusionary rule which would narrow it to use against torture victims during the drafting of the UNCAT.

C. The Drafters Rejected All Attempts to Create a Narrower Exclusionary Rule (*Ratione Materiae*), so as to Allow Unlimited Use of Statements Obtained by Torture, so long as it is Against the Person Accused of Torture

26. Article 13 of the original Draft Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment presented by Sweden, read as follows, its substantive part being in perfect concurrence with that of Article 12 of the Declaration:

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[15] UNGA Res. 3218 (XXIX), 6 November 1974, para. 4.
[16] UN, Dep't of Economic and Social Affairs, 5th UN Congress On the Prevention of Crime and the Treatment of Offenders, A/CONF.56/10, Geneva, 1-12 Sept. 1975, Report prepared by Secretariat (NY: UN, 1976), paras. 290-301, pp. 36-40.
[17] See *ibid*., paras. 290-2, pp. 36-7. For the full text of that draft see *ibid*., para. 292, pp. 37-8.
[18] *Ibid*., para. 292, p. 38.
[19] *Ibid*., para. 295, p. 38.
[20] Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975.

27. Each State Party shall ensure that any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment shall not be invoked as evidence against the person concerned or against any other person in any proceedings.[21]
28. Several states, including the United Kingdom, Austria and the USA, suggested amending this provision so as to make an exception to the exclusionary rule, in the case of persons accused of torture. For instance, the USA suggested the following version of the exclusionary role: 'Each State party shall take such measures as may be necessary to assure that any statement which is established to have been made as a result of torture shall not be invoked as evidence against any person in any proceedings except that it may be invoked in evidence against a person accused of having obtained such statement by torture'.[22]
29. Responding to these concerns, Article 15 of the revised Swedish Draft Convention read as follows: 'Each State party shall take such measures as may be necessary to assure that any statement which is established to have been made as a result of torture shall not be invoked as evidence against any person in any proceedings except that it may be invoked in evidence against a person accused of having obtained such statement by torture.'[23]
30. It should be noted that Article VII of the Draft Convention for the Prevention and Suppression of Torture, submitted by the International Association of Penal Law in January 1978, similarly provided: 'Any oral or written statement or confession obtained by means of torture or any other evidence derived therefrom shall have no legal effect whatever and shall not be invoked in any judicial or administrative proceedings, except against a person accused of obtaining it by torture'.[24]
31. The open-ended Working Group established by the Commission on Human Rights in 1980[25] to draft the Convention had before it the revised Swedish draft quoted above, and its report relates:'With respect to Article 15, one delegate drew the attention of the Working Group to Article 12 of the Declaration on the Protection of all Persons from being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or

[21] UN Doc E/CN.4/1285, 18 January 1978.
[22] Summary Prepared by UN SG in Accordance with Commission Res'n 18 (XXXIV), UN Doc. E/CN.4/1314, 19 Dec. 1978, 22.
[23] UN Doc. E/CN.4/WG/1/WP.1, 16 February 1979.
[24] UN Doc. E/CN.4/NGO/213, 15 Jan. 1978.
[25] Commission on Human Rights, decision 1 (XXXVI) at its 1526th meeting on 5 February 1980.

Punishment of 9 December 1975 and stressed that there should be conformity between the meaning of the Declaration and Article 15 of the Draft Convention.'[26]

32. As a result, the Working Group adopted "by consensus" the following text: '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.'[27]
33. Throughout the rest of the drafting process the text of this Article remained unchanged, and was adopted with the rest of the Convention by the UN General Assembly.
34. In conclusion, the drafting history of Article 15 shows that its current wording is the result of careful deliberation. The drafters considered allowing the unlimited use of evidence obtained by torture against suspected torturers, just as the drafters of Article 15's predecessor, Article 12 of the Declaration against Torture, had considered limiting the exclusionary rule to evidence produced against the victim of torture. Both these approaches were, upon reflection, rejected. The exclusionary rule as it now stands therefore unequivocally prohibits the use of statements obtained by torture save against suspected torturers, and prohibits such use save for the purpose of proving that the statement has been obtained.
35. This point was succinctly made by Lord Bingham in *A and Others*:

> 'The additional qualification [provided for in article 15] makes plain the blanket nature of this exclusionary rule. It cannot possibly be read … as intended to apply only in criminal proceedings. Nor can it be understood to differentiate between confessions and accusatory statements, or to apply only where the state in whose jurisdiction the proceedings are held has inflicted or been complicit in the torture. It would indeed be remarkable if national courts, exercising universal jurisdiction, could try a foreign torturer for acts of torture committed abroad, but could nonetheless receive evidence obtained by such torture.'

36. The matter was succinctly put in the Report by Mr Alvaro Gil-Robles, the Council of Europe Commissioner for Human Rights, in his Report on his visit to the United Kingdom in November 2004 (8 June 2005, Comm DH (2005)6):"torture is torture whoever does it,

[26] Comm. on HR, Report of Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman Or Degrading Treatment Or Punishment, E/CN.4/1367, 5 Mar. 1980, para. 82. Reproduced in Comm. on HR, Report on the Thirty-Sixth Session (4 Feb.-14 March 1980), UN Doc. E/1980/13, E/CN.4/1408, para. 205, pp. 52-73, para. 83.
[27] *Ibid*., para. 84.

judicial proceedings are judicial proceedings, whatever their purpose — the former can never be admissible in the latter."[28]

D. Article 15 in its Entirety is Echoed in International Jurisprudence

37. None of the 146 states party to the UNCAT have entered reservations to Article 15, or any understandings to the effect that statements obtained by torture may be used in any way other than as evidence that the statements were made.[29]
38. As will be seen from the brief and non-exhaustive review immediately below, resolutions by UN and other international bodies, regional instruments, and international and regional jurisprudence all uphold the Article 15 rule in its entirety.
39. Both the UN General Assembly and the Human Rights Council have urged states to ensure that no statements "established to have been made as a result of torture" are "invoked as evidence in any proceedings, except against a person accused of torture *as evidence that the statement was made*.[30] [emphasis added]
40. In its authoritative General Comment on the right to equality before courts and tribunals and to a fair trial under the International Covenant on Civil and Political Rights (ICCPR), to which Cambodia is a state party, the Human Rights Committee, using a slightly different formula but to an identical effect, stated the following:

    '… as article 7 is also non-derogable in its entirety, no statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by article 14, including during a state of emergency, except if a statement or confession obtained in violation of article 7 is used *as evidence that torture or other treatment prohibited by this provision occurred*.'[31] [emphasis added]

41. Article 10 of the Inter-American Convention to Prevent and Punish Torture similarly provides: 'No statement that is verified as having been obtained through torture shall be admissible as evidence in a legal proceeding, except in a legal action taken against a person or persons accused of having elicited it through acts of torture, and only *as evidence that the accused obtained such statement by such means*.'[32] [emphasis added]

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[28] *A and Others*, para. 35
[29] Only Austria made a declaration on that Article, to the effect that it "regards article 15 as the legal basis for the inadmissibility provided for therein of the use of statements which are established to have been made as a result of torture."
[30] UN GA Res'n 62/148: Torture and other cruel, inhuman or degrading treatment or punishment, 4 March 2008, para. 10. See also UN GA Res'n 61/153: 14 Feb. 2007, para. 7; UN GA Res'n 59/182, 20 Dec. 2004, para. 6; HR Council, Res'n 8/8. Torture and other cruel, inhuman or degrading treatment or punishment, 28th meeting, 18 June 2008, para. 6(c).
[31] HR Committee, Gen. Comm. No. 32, Art. 14, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 6 (footnotes omitted).
[32] Inter-American Convention to Prevent and Punish Torture, 9 December 1985, OAS Treaty Series, No. 67.

42. Similarly, Article 29 of the African Commission on Human and Peoples' Rights' "Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa" (the Robben Island Guidelines) provide that states should: 'Ensure that any statement obtained through the use of torture, cruel, inhuman or degrading treatment or punishment shall not be admissible as evidence in any proceedings except against persons accused of torture *as evidence that the statement was made*.'[33] [emphasis added]

43. The Council of Europe (COE) has also endorsed the Article 15 exclusionary rule in its entirety. In 2005, the COE Parliamentary Assembly adopted a resolution on the Lawfulness of detentions by the United States in Guantanamo Bay. Among other things, the Assembly called on the US Government: **'**…to respect its obligations under international law and the Constitution of the United States to exclude any statement established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment, except against a person accused of such ill-treatment *as evidence that the statement was made*. '[34] [emphasis added]

E. Admitting Statements Obtained by Torture Violates the Right to Fair Trial

44. The strict link between the prohibition of torture and the right to a fair trial has been established in the jurisprudence of regional human rights courts and UN treaty bodies.

45. In *Singarasa v. Sri Lanka,* the Human Rights Committee found a violation of Article 14 of the ICCPR, read in conjunction with Article 7, as the complainant had been "forced to sign a confession and subsequently had to assume the burden of proof that it was extracted under duress and was not voluntary."[35]

46. The Inter-American Court and Commission on Human Rights have found that the use of evidence obtained by torture violates the right to a fair trial under Article 8 of the American Convention on Human Rights.[36] For example, in *Manríquez v. Mexico*, the Inter-American Commission found that,

> '…the confession obtained through torture was in effect the only evidence relied upon in the judgment of the court of first instance to convict Manuel Manríquez as direct perpetrator of the homicide of which he was accused. The Commission also concludes

[33] Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines), African Commission on Human and Peoples' Rights, 32nd Sess. (2002).
[34] Res'n 1433(2005*)* of Parliamentary Assembly on the legality of the detention of persons by the United States in Guantanamo Bay, 26 Apr. 2005, para. 8(vi). See also para. 10(iv) (addressing a similar call to Member States of the COE).
[35] HR Committee, *Nallaratnam Singarasa v. Sri Lanka*, No. 1033/2001, CCPR/C/81/D/1033/2001, 23 Aug. 2004, para. 7.4.
[36] Inter-Am. Ct of HR, *Cantoral Benavides v. Peru,* Series C No. 69, 18 Aug. 2000, paras. 132-133.

that the right to the presumption of innocence set forth at Article 8(2) of the [American] Convention was violated, as Manuel Manríquez was forced to give testimony against himself under torture, to declare his guilt, and for having accepted his confession obtained by coercion as valid'.[37]

47. The European Court of Human Rights held, In *Harutyunyan v. Armenia,* that:

'…different considerations apply to evidence recovered by a measure found to violate Article 3[prohibiting torture and other ill-treatment]. An issue may arise under Article 6 § 1 [right to a fair and public hearing] in respect of evidence obtained in violation of Article 3 of the Convention, even if the admission of such evidence was not decisive in securing the conviction. The use of evidence obtained in violation of Article 3 in criminal proceedings raises serious issues as to the fairness of such proceedings. '[38]

48. In *A and Others*, Lord Bingham remarked on the rationale of the exclusionary rule (having cited Burgers and Danelius' commentary on Article 15):

'It seems indeed very likely that the unreliability of a statement or confession procured by torture and a desire to discourage torture by devaluing its product are two strong reasons why the rule was adopted. But it also seems likely that the article reflects the wider principle expressed in article 69(7) of the Rome Statute of the International Criminal Court, which has its counterpart in the Rules of Procedure and Evidence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda: "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*.' [39] [emphasis added]

F. Admitting the Content of Torture "Confessions" Would Be Wholly Inconsistent not only with the Express Terms, but also the Object and Purpose, of the Convention

49. The prohibition in Article 15 on using the content of torture "confessions" is irrespective of their probative value. Instead, it rests on the international community's fundamental rejection of torture and refusal to provide it any legitimacy. It goes to the heart of the integrity of the court itself.

[37] Inter-Amm Comm. of HR, *Manuel Manríquez v. México*, Case 11.509, Report No. 2/99, OEA/Ser.L/V/II.95 Doc. 7 rev. at 663 (1998), (23 Feb. 1999), para. 85.
[38] *Harutyunyan v. Armenia*, App. No. 36549/03, 28 June 2007, para. 63. See also *Jalloh v. Germany* (applic. no. 54810/00), Grand Chamber Judgment of 11 July 2006, para. 105.
[39] *A and Others*, para. 39.

50. The UN Committee Against Torture has explicitly founded the Article 15 exclusionary rule on the general prohibition on torture. In *P.E.* v. *France*, the Committee observed that:

> …the generality of the provisions of Article 15 derive from the absolute nature of the prohibition of torture and imply, consequently, an obligation for each State party to ascertain whether or not statements constituting part of the evidence of a procedure for which is it is competent have been made as a result of torture.[40]

51. In *Harutyunyan v. Armenia*, the European Court of Human Rights similarly stated:

> 'Incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture should never be relied on as proof of the victim's guilt, *irrespective of its probative value*. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, in other words, to "afford brutality the cloak of law."[41] [emphasis added]

52. While the European Court was referring to reliance on "evidence" obtained by torture against the torture victim, this concern about "affording brutality the cloak of law" no doubt applies in respect of any purpose for which reliance upon information obtained by torture is sought in judicial or other proceedings. Unlike the use of a statement as evidence that it was made, such reliance is never justified.

53. In *A and Others*, Lord Bingham (for the minority) clarified:

> 'It trivialises the issue before the House to treat it as an argument about the law of evidence. The issue is one of constitutional principle, whether evidence obtained by torturing another human being may lawfully be admitted against a party to proceedings in a British court, irrespective of where, or by whom, or on whose authority the torture was inflicted. To that question I would give a very clear negative answer'.[42]

54. In the same case, Lord Hope (for the majority) forcefully made the same point:

> 'The use of such evidence [obtained by torture] is excluded not on grounds of its unreliability – if that was the only objection to it, it would go to its weight, not to its

[40] UN Comm. Against Torture, 193/2001, *P.E. v. France*, Views adopted 21 Nov. 2002, CAT/C/29/D/193/2001, 19 Dec. 2002, para. 6.3.
[41] *Harutyunyan v. Armenia*, App. No. 36549/03, Judgement of 28 June 2007, para. 63. See similarly *Jalloh v. Germany* (application no. 54810/00), Grand Chamber Judgment of 11 July 2006, para. 105.
[42] *A and Others*, para. 51.

admissibility – but on grounds of its barbarism, its illegality and its inhumanity. The law will not lend its support to the use of torture for any purpose whatever'.[43]

CONCLUSIONS

55. The prohibition on the use of the contents of a statement obtained by torture as a source of information for courts to consider is absolute, reflecting as well as supporting the absolute prohibition on torture itself. This prohibition applies both to direct and to derivative information. This exclusionary rule rests on a variety of grounds, not least fair trial considerations and the moral repugnance at the prospect of adopting torturers' 'end-justifies-the-means' approach by using the torturer's creation – the "confession" – to achieve what is otherwise the legitimate aim of prosecuting suspected offenders.
56. The unequivocal rejection of any use of the contents of a statement obtained by torture is reflected in the drafting of the UN Convention against Torture, in the jurisprudence of national and international courts and human rights treaty-monitoring bodies and in academic writings.
57. The Applicants urge the Pre-Trial Chamber to reject any attempts to admit statements obtained by torture as evidence in any proceedings, except against any person accused of torture, including commanders and other superiors accused of bearing responsibility, as evidence that the statement was made. The Applicants urge the Chamber to apply this prohibition to both direct and derivative information. Inadmissibility is limited to statements obtained by torture and does not extend automatically to all related material which does not form part of these statements. The admissibility of such material could nevertheless be challenged, either on grounds that it does form part of statements obtained by torture, that it was itself obtained by torture or on other independent grounds.

Respectfully submitted,

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[43] *Ibid*., para. 112.