Washington and Lee Law Review

Volume 65 | Issue 1 Article 5

Winter 1-1-2008

Tainted Provenance: When, If Ever, Should Torture Evidence Be Admissible?

Michael P. Scharf

Tainted Provenance: When, If Ever, Should Torture Evidence Be Admissible?

Michael P. Scharf*

Abstract

This Article examines whether there should be exceptions to the international exclusionary rule for evidence obtained by torture, and if so, how those exceptions should be crafted to avoid abuse. Rather than explore the question in the hotly debated milieu of terrorist prosecutions, this Article analyzes and critiques three possible exceptions to the torture evidence exclusionary rule in the context of whether the newly established U.N. Cambodia Genocide Tribunal should admit evidence of the Khmer Rouge command structure that came from interrogation sessions at the infamous Tuol Sleng torture facility: (1) that the exclusionary rule should not apply to evidence resulting from preliminary questioning before the application of actual torture; (2) that the exclusionary rule should not apply to evidence obtained by third-party authorities; and (3) that the exclusionary rule should not apply to evidence used against the leaders of the regime who were ultimately responsible for the acts of torture.

---

* Professor of Law and Director of the Frederick K. Cox International Law Center, Case Western Reserve University School of Law; formerly Attorney-Adviser for U.N. Affairs at the U.S. Department of State during the Bush I and Clinton Administrations. Professor Scharf has led training sessions for the judges and prosecutors of the Extraordinary Chambers in the Courts of Cambodia, the International Criminal Tribunal for Rwanda, the International Criminal Court, and the Iraqi High Tribunal. In 2005, Professor Scharf and the Public International Law and Policy Group, an NGO dedicated to international justice which he co-founded, were nominated by six governments and an international criminal tribunal for the Nobel Peace Prize. The author thanks Kevin Hussey and Alexander Laytin, Senior Research Associates of the Public International Law and Policy Group, who assisted in the research of this Article, and the faculty of William and Mary College of Law who provided helpful feedback during a workshop at which the Article was presented on November 1, 2007.

Table of Contents

> It is one thing to condemn torture, as we all do. It is another to find a solution to the question that this case raises which occupies the moral high ground but at the same time serves the public interest and is practicable. Condemnation is easy. Finding a solution to the question is much more difficult.
>
> Lord Hope of Craighead,
> British House of Lords, 2005[1]

1. A & Others v. Sec'y of State for the Home Dep't [2005] UKHL 71, [2006] 2 A.C. 221, ¶ 100 (appeal taken from E.W.C.A.) (U.K.), *available at* http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd05 1208/aand.pdf (last visited Jan. 7, 2008).

I. Introduction

This Article examines whether there should be expanded exceptions to the torture evidence exclusionary rule, and if so, how those exceptions should be crafted to avoid abuse. Rather than explore the question in the hotly debated context of terrorist prosecutions, this Article uses a very different kind of case study which presents the issue in a fresh light that challenges the general assumptions about the morality, efficacy, and legality of admitting evidence obtained by torture.

In October 2006, the author of this Article was invited to help lead the first training session for the investigative judges and prosecutors of the United Nations' newly established Cambodia Genocide Tribunal, known as the Extraordinary Chambers in the Courts of Cambodia.[2] One of the most contentious issues that arose during the session was the question of whether the Cambodia Tribunal could admit evidence of the Khmer Rouge command structure that came from interrogation sessions at the infamous Toul Sleng torture facility. What makes the issue novel is that the evidence the Tribunal is interested in is not the substance of the victims' torture-induced confessions but the background biographical information provided by the victims at the start of, or just prior to their interrogation, such as the location and type of work they did for the regime, as well as the names and the responsibilities of their superiors and subordinates.

While in Phnom Penh, this author was given a tour of the Tuol Sleng facility, which has been maintained by the Cambodian government as a memorial exactly as it was the day the Khmer Rouge regime fell in January 1979. Each dank room at Tuol Sleng contains a rusty metal bed frame with large manacles and assorted implements of torment, under which can be seen the faded brownish stain from pools of blood, and above which hang large black and white photos of the anguished faces and broken bodies of the last occupants of that room the day the facility was liberated by the Vietnamese

2. After the genocidal Khmer Rouge regime was toppled by Vietnam in 1979, efforts to bring the Khmer Rouge to justice were largely dormant until the 1990s. From 1997 to 2004, the United Nations and the government of Cambodia undertook a series of negotiations, which ultimately resulted in the establishment of the Extraordinary Chambers in the Courts of Cambodia. This hybrid tribunal, with jurisdiction over the crimes of genocide, grave breaches of the Geneva Conventions, and crimes against humanity, was composed of a mix of Cambodian and internationally appointed judges, prosecutors, and staff. *See generally* Daniel Kemper Donovan, *Joint U.N.-Cambodia Efforts to Establish a Khmer Rouge Tribunal*, 44 HARV. INT'L L.J. 551 (2003); Daryl A. Mundis, *New Mechanisms for the Enforcement of International Humanitarian Law*, 95 AM. J. INT'L L. 934, 939–42 (2001). The Tribunal's constituent instruments, including its Statute, Agreement with the United Nations, and Internal Rules, are available at its website: http://www.eccc.gov.kh.

army. Over 17,000 people are documented to have entered Tuol Sleng for interrogation; only six are known to have survived.[3]

At first blush, the Tuol Sleng interrogation statements would seem plainly to be barred by the international exclusionary rule, contained in Article 15 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[4] Article 15 of the Torture Convention 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."[5]

The problem for the Cambodia Tribunal is that the Tuol Sleng evidence is believed to be critical to proving command responsibility[6] and/or joint criminal enterprise liability[7] of the half-dozen Khmer Rouge leaders being tried by the Tribunal. In addition, the evidence will be needed to prove that the defendants meet the Tribunal's jurisdictional requirement, which limits prosecution to "senior leaders" and "those who were most responsible."[8] Under these

---

3. Donovan, *supra* note 2, at 551 n.1.

4. *See generally* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 15, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 113 [hereinafter Torture Convention].

5. *Id.*

6. Under the doctrine of command responsibility, a military commander or civilian official, who has de jure or de facto control over subordinates, can be held responsible for the crimes committed by those subordinates if the commander/official "knew or had reason to know that [a crime] was about to be or had been committed" and did not take "reasonable measures to prevent [the crime] or punish the perpetrator[s]." Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶ 346 (Nov. 16, 1998), *available at* http://www.un.org/icty/celebici/trialc2/judgement (last visited Jan. 6, 2008); *see generally* Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)*, 25 YALE J. INT'L L. 89 (2000).

7. Somewhat similar to the American concepts of conspiracy and felony murder, under the international law doctrine of joint criminal enterprise, a defendant can be held criminally liable for the crimes of others acting pursuant to a common design or plan. For a thorough discussion and critique of the doctrine of joint criminal enterprise, see generally Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75 (2005).

8. Law on the Establishment of the Extraordinary Chambers art. 1, NS/RKM/1004/006 (2004) (Cambodia), *available at* http://www.eccc.gov.kh/english/cabinet/law/4/KR_law_as_amended_27_Oct_2004_eng.pdf (last visited Jan. 25, 2008). In reviewing its own statute, the Special Court for Sierra Leone interpreted the similar phrase "persons who bear the greatest responsibility" as not merely a guide for the exercise of the prosecutor's discretion, but rather as a jurisdictional hurdle that the prosecutor must prove to the satisfaction of the Tribunal. *See* Prosecutor v. Fofana, Case No. SCSL-04-14-PT, Decision on Defence Motion on the Lack of Personal Jurisdiction, ¶ 27 (Mar. 3, 2004).

circumstances, must the international rule excluding admission of torture evidence be mechanically applied, with the result that the prosecution of those responsible for mass torture in Cambodia will be frustrated, or does some principled argument exist under which the evidence can be admitted in harmony with international law?

In addressing this question, this Article begins by setting out the history and policies behind the international exclusionary rule for torture evidence and provides background about the importance of the Tuol Sleng evidence to the Cambodia Tribunal prosecutions. This is followed by an analysis and critique of three possible arguments for admission of the evidence: (1) that evidence resulting from preliminary questioning before the application of actual torture is not covered by the torture evidence exclusionary rule; (2) that the torture evidence exclusionary rule does not apply to evidence obtained by third-party authorities; and (3) that under canons of statutory construction and principles of treaty interpretation, the exception contained in Article 15 of the Torture Convention should be interpreted broadly to apply to evidence used against the superiors of the perpetrators as well as the perpetrators themselves, so as not to undermine the object, purpose, and spirit of the Convention. The concluding Part cautions that there are potentially significant negative long-term consequences that flow from judicial application of these arguments and, to minimize these, proposes specific criteria that a court should employ before admitting torture evidence in such a case.

II. Background

A. History of the Torture Evidence Exclusionary Rule

There was a time when evidence obtained by torture was not barred, but rather specifically authorized to be used in judicial proceedings. For example, 400 years ago, when Guy Fawkes was arrested as he was preparing to blow up the British Parliament building,[9] King James I sent orders authorizing torture to be used to persuade Fawkes to confess and reveal the names of his co-conspirators.[10] The King's order stated that "the gentlest tortures" were first to be employed and that his torturers were then to proceed to the worst until the

9. DONALD CARSWELL, TRIAL OF GUY FAWKES AND OTHERS (THE GUNPOWDER PLOT) 23–37 (1934).

10. 2 LUKE OWEN PIKE, A HISTORY OF CRIME IN ENGLAND 120 (1876); J.W. WILLIS-BUND, TRIALS FOR TREASON (1327–1660), at 373 (1879).

information was extracted from Fawkes.[11] Shortly thereafter, Fawkes signed a confession and provided the names of seven co-conspirators, all of whom were convicted on the basis of Fawkes' torture-induced confession.[12]

Although England banned the practice of relying on torture evidence in British trials in 1640 when the Star Chamber was abolished,[13] the admission of coerced confessions, including those elicited by violent means, was authorized for use in the special "Diplock Courts" employed by British authorities in terrorism trials in Northern Ireland as late as the 1980s.[14] In the United States, during the twentieth century, Supreme Court precedent gradually expanded the exclusionary rule to prohibit confessions elicited by means of torture.[15] However, like the British Diplock Courts, in 2006, the United States created an exception for evidence extracted under "cruel, inhuman, or degrading treatment" used in military commissions to prosecute members of the al Qaeda terrorist organization interned in the detention facilities at Guantanamo Bay.[16]

In an effort to eliminate world-wide use of torture, the members of the United Nations negotiated the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was adopted in 1984 and entered into force on June 26, 1987.[17] Today, this is one of the most

---

11. PIKE, *supra* note 10, at 120.

12. CARSWELL, *supra* note 9, at 39–42, 90–92.

13. 5 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 185–87, 194–95 (3d ed. 1945).

14. Michael P. Scharf, *Foreign Courts on Trial: Why U.S. Courts Should Avoid Applying the Inquiry Provision of the Supplementary U.S.-U.K. Extradition Treaty*, 25 STAN. J. INT'L L. 257, 264 n.34, 278–79 (1989).

15. Prior to the Supreme Court's decision in *Brown v. Mississippi*, 297 U.S. 278 (1936), confessions were admissible at trial without any restriction; even a statement obtained by torture was not excluded. In *Brown*, a confession obtained by brutally beating the suspect was struck down on the ground that interrogation is part of the process by which a state procures a conviction and thus is subject to the requirements of the Fourteenth Amendment Due Process Clause. *Id.* at 286.

16. Military Commissions Act of 2006, 10 U.S.C.S. § 948r (LexisNexis 2006 & Supp. 2007). While evidence from torture is prohibited, the statute permits evidence derived from "cruel, inhuman, or degrading" techniques, provided that the statement was obtained prior to December 30, 2005, that a military judge finds the statement to be "reliable," and that the statement's admission would serve "the interests of justice." *Id.* § 948r(b)–(d); *see also* Michael P. Scharf, Professor of Law, Case W. Reserve Univ. Sch. of Law, Prepared Statement Before the House Armed Services Committee Hearing on Standards of Military Commissions and Tribunals (July 26, 2006), http://www.publicinternationallaw.org/publications/testimony (last visited Jan. 7, 2008) (criticizing the testimony of Steven Bradbury, acting Assistant Attorney General and head of the Department of Justice, Office of Legal Counsel, who asserted that it was necessary to use evidence extracted using a variety of coercive techniques, including water boarding) (on file with the Washington and Lee Law Review).

17. Torture Convention, *supra* note 4, at 113 n.1.

widely ratified of multilateral treaties, with 145 parties, including Cambodia.[18] Article 15 of the Torture Convention contains the first international codification of the exclusionary rule for evidence obtained by torture. No state party has made a reservation to Article 15.[19]

In 1992, the U.N. Special Rapporteur on Torture, Peter Koojimans, in his report to the U.N. Commission on Human Rights, explained the rationale for the exclusionary rule, observing that judicial acceptance of statements obtained under torture was "responsible for the flourishing of torture" and that the exclusion of such evidence would "make torture unrewarding and therefore unattractive."[20] In addition to the public policy objective of removing any incentive to undertake torture anywhere in the world, the exclusionary rule has been justified on the basis of the unreliability of evidence obtained as a result of torture and on the need to preserve the integrity of the judicial process.[21]

Unlike the rulings of other international and hybrid tribunals,[22] the Internal Rules of the Cambodia Tribunal do not contain an exclusionary rule mirroring Article 15 of the Torture Convention.[23] Even though Cambodia is a party to the Torture Convention, the hybrid Tribunal, as a separate legal personality, is not itself bound by the treaties to which Cambodia is a party.[24] However, both the

---

18. The Office of the U.N. High Commissioner for Human Rights maintains an up-to-date list of the countries that have ratified the Torture Convention and their reservations, if any, to the treaty, available at http://www2.ohchr.org/english/bodies/ratification/9.htm.

19. Office of the United Nations High Comm'r for Human Rights, Ratifications and Reservations, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, http://www2.ohchr.org/english/bodies/ratification/9.htm (last modified Oct. 2, 2007) (last visited Mar. 18, 2008) (on file with the Washington and Lee Law Review).

20. The Special Rapporteur, *Report of the Special Rapporteur on the Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 590–91, *delivered to the Commission on Human Rights*, U.N. DOC. E/CN.4/1993/26 (Dec. 15, 1992).

21. *See* J. HERMAN BURGERS & 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 (1988).

22. *See infra* notes 64–68 and accompanying text.

23. *See* EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA INTERNAL R. 87, *available at* http://www.eccc.gov.kh/english/cabinet/files/irs/ECCC_IRs_English_2007_06_12.pdf (last visited Jan. 6, 2008) ("The Chamber shall give the same consideration to confessions as to other forms of evidence.").

24. International and hybrid war crimes tribunals, like other international organizations, have international legal personality, which provides them "the capacity to enter into agreements with other international persons governed by international law; privileges and immunities; and an autonomous will distinct from that of [their] members." Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, ¶ 41(b) (May 31, 2004), *available at* http://www.sc-sl.org/documents/SCSL-03-01-I-059.pdf (last visited Jan. 6, 2008) (concluding that the Special Court for Sierra Leone has international legal personality). *See generally* JANNE ELISABETH NIJMAN, THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY: AN INQUIRY INTO THE HISTORY AND THEORY OF INTERNATIONAL LAW (2004);

Agreement between Cambodia and the United Nations, which authorizes the Tribunal, and the Cambodian domestic statute, which establishes it, contain provisions requiring the Chambers of the Cambodia Tribunal to "exercise their jurisdiction in accordance with international standards of justice."[25] These standards arguably include the rule prohibiting the admission of torture evidence. Moreover, Article 31(3)(c) of the Vienna Convention on the Law of Treaties provides 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,"[26] which would include the Torture Convention. At the very least, the Cambodia Tribunal would not want to be perceived as flouting the proscriptions of the Torture Convention, as this would erode its legitimacy and international support.

B. The Importance of the Tuol Sleng Evidence

To enable the reader to comprehend the significance of the Tuol Sleng evidence, which lies at the heart of this case study on whether there should be exceptions to the torture exclusionary rule, this subpart provides background about the atrocities committed by the Khmer Rouge in Cambodia in general, and at Tuol Sleng in particular.

In April 1975, after a protracted guerilla campaign, the Khmer Rouge, led by Pol Pot, captured Phnom Penh and consolidated its control over the whole of Cambodia.[27] Immediately after completing its takeover of Cambodia, the Khmer Rouge emptied the cities into the countryside in its quest to transform Cambodia into a completely agrarian communist state.[28] The Khmer Rouge then

---

Manuel Rama-Montaldo, *International Legal Personality and Implied Powers of International Organizations*, 1970 BRIT. Y.B. INT'L L. 111, 123, 139–40.

25. Agreement Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea art. 12(2), U.N.-Cambodia, June 6, 2003, http://www.eccc.gov.kh/english/cabinet/agreement/5/agreement_between_UN_and_RGC.pdf (last visited Jan. 6, 2008) (on file with the Washington and Lee Law Review); Law on the Establishment of Extraordinary Chambers art. 33, NS/RKM/1004/006 (2004) (Cambodia), *available at* http://www.eccc.gov.kh/english/cabinet/law/4/KR_law_as_amended_27_Oct_2004_Eng.pdf (last visited Jan. 6, 2008) (on file with the Washington and Lee Law Review).

26. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter Vienna Convention].

27. Andy Carvin, *The End of Cambodia; The Beginning of a Nightmare* (1999), http://www.edwebproject.org/sideshow/history/end.html (last visited Nov. 11, 2007) (on file with the Washington and Lee Law Review).

28. Ben Kiernan, *External and Indigenous Sources of Khmer Rouge Ideology*, *in* THE THIRD INDOCHINA WAR: CONFLICT BETWEEN CHINA, VIETNAM AND CAMBODIA, 1972–79, at 187, 190–91 (Odd Arne Westad & Sophie Quinn-Judge eds., 2006).

persecuted and murdered many of the deported townspeople (referred to as "the new people"), who tended to be more educated than the peasantry.[29] The Khmer Rouge also expelled 150,000 Vietnamese residents from Cambodia,[30] killed all 10,000 who remained and carried out a larger, if less systematic, genocidal campaign against the country's Chinese and Muslim minorities.[31]

During Pol Pot's four-year reign of terror, the Khmer Rouge regime caused the deaths of approximately 1.7 million people in Cambodia.[32] This number represents a full fifth of Cambodia's pre-1975 population.[33] At the same time as Cambodia's rice fields were being converted into the killing fields for hundreds of thousands of Cambodians, political prisoners and their families were meeting a terrible fate inside Khmer Rouge interrogation centers, where between 500,000 and 1 million Cambodians were tortured to death or executed.[34] The most infamous of the Khmer Rouge's interrogation centers "codenamed S-21, was located in the abandoned suburban Phnom Penh high school of Tuol Sleng ('hill of the poisoned tree')."[35]

Many of those executed within the Khmer Rouge's interrogation centers were members of the Khmer Rouge regime itself.[36] In 1976, Pol Pot and members of the Khmer Rouge Central Committee became convinced that a vast conspiracy against their leadership existed within the lower levels of Khmer leadership and rank and file.[37] The Central Committee subsequently adopted a policy of interrogating anyone not above suspicion, and executed all those

---

29. *Id.* at 190.

30. Sophie Quinn-Judge, *The Third Indochina War: Chronology of Events from 1972 to 1979*, *in* THE THIRD INDOCHINA WAR, *supra* note 28, app. 1, at 231.

31. Kiernan, *supra* note 28, at 189–90.

32. S21: THE KHMER ROUGE KILLING MACHINE (Institut National de l'Audiovisuel 2003); *see also* Sophie Quinn-Judge, *Victory on the Battlefield; Isolation in Asia: Vietnam's Cambodia Decade, 1979–1989*, *in* THE THIRD INDOCHINA WAR, *supra* note 28, at 207, 207–08.

33. S21, *supra* note 32.

34. STEPHEN HEDER WITH BRIAN D. TITTEMORE, SEVEN CANDIDATES FOR PROSECUTION: ACCOUNTABILITY FOR THE CRIMES OF THE KHMER ROUGE 7 (2001), *available at* http://www.wcl.american.edu/warcrimes/khmerrouge.pdf?rd=1 (last visited Jan. 6, 2008).

35. S21, *supra* note 32.

36. *See* HEDER WITH TITTEMORE, *supra* note 34, at 7 n.2 (noting that Khmer Rouge members who were convicted of treason were also subjected to the atrocities of torture).

37. *See id.* at 26 (explaining that the controlling officials of the Khmer Rouge ordered the execution of any person within the party who could be compelled to confess to serving as an enemy secret agent).

within the party "found" to have been involved in this conspiracy.[38] Tuol Sleng became the central location for implementation of this policy.[39]

Tuol Sleng quickly earned a dark reputation for stunning brutality. The sole purpose of Tuol Sleng was to extract confessions from political prisoners, who were then executed and buried in mass graves outside of the capital near the farming village of Choeung Ek.[40] Prisoners interrogated at Tuol Sleng were chained to iron beds, where they were tortured using electric shocks, water treatment, scorpions, beatings, and whippings.[41] During the Khmer Rouge rule, some 17,000 people were interrogated and killed at Tuol Sleng/Choeung Ek.[42]

The Khmer Rouge regime was peculiar among revolutionary governments in that, beyond its constitution, the regime issued no decrees and passed no laws.[43] This reticence to document its orders, decisions, and command hierarchy is emblematic of the fact that the Khmer Rouge leadership intentionally kept its members as well as their individual responsibilities veiled in a shroud of secrecy. As one Khmer Rouge leader reportedly proclaimed: "[T]hrough secrecy . . . we [can] be masters of the situation and win victory over the enemy, who cannot find out who is who."[44] Because of the Khmer Rouge's policy of intense secrecy, the identities of the Khmer Rouge leadership, as well as individual culpability for the regime's crimes, have been obscured.[45]

The little documentation that the Khmer Rouge produced, which would have tied individuals to the regime's crimes, the Khmer Rouge burned as they retreated from Phnom Penh in the face of Vietnam's 1979 invasion.[46] There was one exception: The extensive archives of Tuol Sleng were captured

38. *See id.* (noting that top officials took action to quell a widespread conspiracy against the leadership).

39. *Id.*

40. *See* John D. Ciorciari with Youk Chhang, *Documenting the Crimes of Democratic Kampuchea*, *in* BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS 221, 275 (Jaya Ramji & Beth Van Schaack eds., 2005) (describing the killing fields of Choeung Ek and the process used to effectuate the mass executions).

41. *See* Donovan, *supra* note 2, at 551 n.1 (describing the torture methods used at Tuol Sleng).

42. *See id.* (noting that the Khmer Rouge's own records indicate that 20,000 individuals were killed at Tuol Sleng).

43. Timothy Carney, *The Organization of Power*, *in* CAMBODIA 1975–1978: RENDEZVOUS WITH DEATH 79, 79 (Karl D. Jackson ed., 1989).

44. Ciorciari with Chhang, *supra* note 40, at 224–25.

45. *See id.* (describing the difficulty of collecting evidence from diverse locations and sources necessary to provide documentation of the Khmer Rouge's crimes).

46. *Id.*

intact.[47] In a 1999 interview, Kaing Guek Eav, also known as Duch (pronounced "Doik"), the Khmer Rouge's security chief who oversaw the operation of Tuol Sleng, explained that he had not been informed that the Vietnamese were on the verge of taking Phnom Penh, and thus had no time to destroy the records of the torture committed at Tuol Sleng.[48]

Among the documents that Duch failed to destroy were the testimonial biographies of each of the prisoners who were interrogated at Tuol Sleng.[49] These biographies are the primary source of information from which scholars have been able to construct a detailed understanding of the command structure of the Khmer Rouge.[50] Before being questioned about their loyalty, prisoners were asked preliminary questions about where they worked, who served as their superiors and subordinates, and what their job entailed.[51] In the absence of documentary evidence or witness testimony linking the Khmer Rouge defendants to particular atrocities, the Tuol Sleng evidence is critical for their successful prosecution before the Cambodia Tribunal, which is set to commence in 2008.[52]

III. An Analysis of Three Possible Grounds for Admitting the Tuol Sleng Evidence

A. An Exception for Preliminary Questions

At Tuol Sleng, Khmer Rouge members were forcibly brought to a place widely known as a torture facility. The biographical information the Cambodia Tribunal is interested in, however, was obtained from the victims immediately

---

47. *See id.* (noting the discovery in 1979 of documents from Tuol Sleng, including the confessions and biographies of members of the Communist Party of Kampuchea).

48. *Id.*

49. *See id.* at 228 (explaining that officials wrote down biographical information for each prisoner entering S-21).

50. *Id.*

51. Upon arrival at Tuol Sleng, prisoners were photographed and required to give detailed biographical information. These statements were tape recorded and then transcribed by the interrogators. After that, the prisoners were forced to strip to their underwear, and their possessions were confiscated. The prisoners were then taken to cells and shackled to the walls or concrete floor. Within two or three days, they were subject to interrogation accompanied by torture, sometimes committed over a period of weeks. Discussion with Craig Etcheson & Stephen Heder, Advisors, Office of the Prosecutor of the Extraordinary Chambers in the Courts of Cambodia, in Phnom Penh, Cambodia (Oct. 24, 2006).

52. *See* HEDER WITH TITTEMORE, *supra* note 34, at 5 (suggesting that the archival evidence establishes a prima facie case against seven of the Khmer Rouge officials).

before, rather than during, the actual torture sessions.[53] As indicated above, these statements consisted of background information such as the name and age of the person questioned, location and type of work they did for the regime, as well as the names and the responsibilities of their superiors and subordinates. The Tribunal is not interested in the substantive statements made by the detainees during actual physical torture.[54] Because many of the 17,000 people interrogated at Tuol Sleng ended up "admitting" that they were a traitor or a CIA/Vietnamese/Soviet spy, those confessional statements are obviously unreliable.[55] The preliminary biographical statements made as to the command structure of the Khmer Rouge, on the other hand, are in no way self-incriminatory and tend to corroborate one another to a high degree, suggesting that this information is highly reliable and probative.

That the preliminary biographical information might be reliable, however, does not mean that that the statements were not the product of offenses under the Torture Convention. As victims were led into the blood-stained rooms of Tuol Sleng and asked these preliminary questions, they knew that certain pain, suffering, and likely death would follow. Anyone who visits Tuol Sleng, as this author did in 2006, can attest to the overpoweringly coercive and oppressive atmosphere of the setting. On the other hand, the Torture Convention recognizes a spectrum of abusive interrogation, ranging from cruel, inhuman, and degrading treatment on one side to outright torture on the other. While the Convention prohibits both types of abuses, the distinction between the two is important, as the Convention's exclusionary rule by its terms only applies to the latter, a point recently highlighted by England's highest court in *A & Others v. Secretary of State for the Home Department*.[56]

---

53. *See supra* note 51 (discussing the interrogation of prisoners at Tuol Sleng).

54. *Id.*

55. *See* HEDER WITH TITTEMORE, *supra* note 34, at 27–29 (noting the unreliable nature of these tortured confessions).

56. A & Others v. Sec'y of State for the Home Dep't [2005] UKHL 71, [2006] 2 A.C. 221 (appeal taken from E.W.C.A.) (U.K.), *available at* http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd051208/aand.pdf (last visited Jan. 7, 2008). In this case, the House of Lords unanimously overturned a two-to-one ruling of the court of appeal that had held that information obtained by agents of another country through torture where there was no British government involvement was admissible in detention proceedings before the Special Immigration Appeals Commission involving Algerians suspected of involvement in terrorism. *Id.* ¶ 1 (opinion of Lord Bingham). The Law Lords held that once the petitioner advances a plausible reason to suspect that the evidence in question was obtained by torture, the Commission must exclude the evidence "if it is established, by means of diligent enquiries into the sources that it is practicable to carry out and on a balance of probabilities, that the information . . . was obtained by torture." *Id.* ¶ 121 (opinion of Lord Hope).

1. Torture Versus Cruel, Inhuman, and Degrading Treatment

The preliminary biographical information from the Tuol Sleng interrogations resulted from psychological pressure 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 is of sufficient gravity to constitute the level of mental pain and suffering that constitutes torture, thus triggering the Torture Convention's exclusionary rule. The Torture Convention 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.[57]

The leading case focusing on the distinction between torture and cruel, inhuman, or degrading treatment is *Ireland v. United Kingdom*,[58] decided by the European Court of Human Rights in 1978. In that case, the European Court found that the five techniques in question (wall standing, hooding, subjection to noise, deprivation of sleep, and reduced diet) constituted cruel, inhuman, and degrading treatment, but did not rise to the level of torture under the European Convention.[59] In subsequent cases, the European Court for Human Rights has been extremely reluctant to attach what it calls the "special stigma to deliberate inhuman treatments causing very serious and cruel suffering"[60] which accompanies a finding of torture.[61] In *Soering v.*

---

57. Torture Convention, *supra* note 4, art. 1. The Torture Convention's full definition follows:

> [T]orture 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.

Id.

58. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 162 (1978) (drawing the distinction between inhumane interrogation techniques and torture, noting that actions characterized as torture must meet "a minimum level of severity").

59. *See id.* at 67 (concluding that, although the five techniques extracted confessions and other information, they did not induce suffering or cruelty rising to the level of torture).

60. *Id.* at 66.

61. *See, e.g.*, Selmouni v. France, 1999-V Eur. Ct. H.R. 149, 183 (finding the requisite stigma in a case in which French police had severely beaten and raped a criminal suspect, concluding that this treatment was "particularly serious and cruel"); *see also* Aydin v. Turkey (No. 50), 1997-VI Eur. Ct. H.R. 1866, 1891–92 (noting that a finding of torture is reserved for

United Kingdom,[62] for example, the court determined that waiting on death row with the ever-present specter of death hanging over one's head created "mounting anguish" constituting cruel, inhuman, and degrading treatment, but did not amount to torture.[63] If the fear of impending death at issue in *Soering* is viewed as analogous to that with which the Tuol Sleng detainees were faced during their preliminary questioning, then the biographical information obtained from the Tuol Sleng detainees would not be barred by the Torture Convention's exclusionary rule.

In more recent cases, however, the European Court of Human Rights appears to have lowered its very high threshold for finding "torture." Thus, in the 1996 case of *Aksoy v. Turkey*,[64] the European Court determined that subjecting the accused to prolonged hanging by the arms, which resulted in temporary paralysis of both arms, constituted torture;[65] in the 1997 case of *Aydin v. Turkey*,[66] the European Court found that rape by an official during incarceration constituted torture;[67] and in the 1999 case of *Selmouni v. France*,[68] the European Court found that blows to the body, sexual humiliation, and threats of bodily harm with a blowtorch constituted torture.[69] In making these determinations, the European Court stated that the European Convention (which contains the same definition of torture as the Torture Convention) was a "living instrument" and that the *Ireland v. United Kingdom* severity test must be adapted to reflect contemporary understanding and evolution of the law.[70]

Also relevant is the case law of the Inter-American Court of Human Rights, which has applied a lower threshold for finding torture than the

---

"deliberate inhuman treatment causing very serious and cruel suffering").

62. Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) ¶ 92 (1989) (holding that the undue delay a death row inmate experiences while awaiting execution amounts to cruel and inhuman punishment).

63. *Id.*

64. *See* Aksoy v. Turkey (No. 26), 1996-VI Eur. Ct. H.R. 2260, 2282–83 (concluding that treatment that is deliberately inflicted with the aim of obtaining information and that results in severe pain amounts to torture).

65. *Id.*

66. *Aydin*, 1997-VI Eur. Ct. H.R. at 1892 (concluding that rape, in certain circumstances, can amount to torture).

67. *See id.* at 1891–92 (noting that the act of rape leaves psychological scars on a victim that do not fade as quickly as scars from other physical and mental violence).

68. *See* Selmouni v. France, 1999-V Eur. Ct. H.R. 149, 182–83 (finding that the sustained beating of a criminal suspect over a period of days constituted torture under the European Convention on Human Rights).

69. *Id.*

70. *Id.* at 183.

European Court of Human Rights did in *Ireland v. United Kingdom*. It has found the following measures to constitute torture:

> [P]rolonged *incommunicado* detention; keeping detainees hooded and naked in cells; interrogating them under the drug pentothal; . . . holding a person's head in water until the point of drowning; standing or walking on top of individuals; cutting with pieces of broken glass; putting a hood over a person's head and burning him or her with lighted cigarettes; rape; mock burials, mock executions, beatings, deprivation of food and water; . . . threats of removal of body parts; and death threats.[71]

The U.N. Human Rights Committee has found similar acts or conduct to constitute torture, including "electric shocks, and mock executions, forcing prisoners to remain standing for extremely long periods of time, and holding persons *incommunicado* for more than three months while keeping that person blindfolded with hands tied together, resulting in limb paralysis, leg injuries, substantial weight loss, and eye infection."[72] The U.N. Special Rapporteur on Torture has listed several acts determined to be torture, including beating; extraction of nails or teeth; burns; electric shocks; suspension; suffocation; exposure to excessive light or noise; sexual aggression; prolonged denial of rest or sleep, food, sufficient hygiene, or medical assistance; total isolation and sensory deprivation; and simulated executions.[73]

While the trend in the case law of human rights bodies reflects a lowering of the threshold for finding torture, it remains unclear whether preliminary questions asked prior to the commencement of a torture session would meet even the reduced standard, unless death was explicitly or implicitly threatened during the preliminary questioning.

2. *An Analogy to the Booking Questions Exception Under the* Miranda *Rule*

The Torture Convention's exclusionary rule was designed to prevent torture-induced confessions or other substantive information from being used in judicial proceedings. In distinguishing the biographical information elicited from the Tuol Sleng detainees from their subsequent torture-induced statements, an analogy might be made to the "booking questions" exception under the American *Miranda* Rule.

---

71. Robert K. Goldman, *Trivializing Torture: The Office of Legal Counsel's 2002 Opinion Letter and International Law Against Torture*, 12 HUM. RTS. BRIEF 1, 2–3 (2004).

72. *Id.* at 3.

73. *See id.* (noting the U.N. Special Rapporteur's findings).

The Supreme Court's opinion in *Miranda v. Arizona*[74] established the basic guidelines for protecting a suspect's rights by requiring certain procedural safeguards during a custodial interrogation.[75] Similar to the exclusionary rule of the Torture Convention, in the United States, statements made in violation of the *Miranda* safeguards are deemed inadmissible in court.[76] The *Miranda* rule applies when a person in custody is subjected to either "express questioning or its functional equivalent."[77] 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."[78]

Notably, courts in the United States have determined that the *Miranda* rule does not apply to information gained from "routine" booking questions.[79] Such questions involve requesting information for basic identification purposes to secure the "biographical data necessary to complete booking"[80] of the accused regardless of whether it occurred during custodial interrogation.[81] U.S. courts have distinguished questions intended to elicit mere biographical data from lines of questioning intended to yield substantive evidence.[82]

Similarly, the Tuol Sleng statements which the Cambodia Tribunal is interested in using were elicited at an early stage of the interrogations and are biographical in nature. The interrogators' preliminary questions were not intended to establish the guilt or innocence of those being interrogated, but

---

74. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (holding that criminal suspects must be informed of certain constitutional rights, including the right to counsel and the right against self-incrimination, prior to police interrogation).

75. *Id.*

76. *Id.* at 476; *see also* Pennsylvania v. Muniz, 496 U.S. 582, 590 (1990) (suppressing a criminal defendant's statements on grounds that he was not informed of his *Miranda* rights until after the police interrogation ended).

77. Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980).

78. *Id.* at 301.

79. *See* United States v. Sims, 719 F.2d 375, 378 (11th Cir. 1983) ("We have held that requesting 'routing' information for booking purposes is not an interrogation under *Miranda*, even though that information turns out to be incriminating.").

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

81. *See* United States v. McLaughlin, 777 F.2d 388, 391 (8th Cir. 1985) ("[N]ot all government inquiries to a suspect in custody constitute interrogation and therefore need be preceded by *Miranda* warnings.").

82. *See, e.g.*, Pennsylvania v. Muniz, 496 U.S. 582, 602 n.14 (1990) ("[R]ecognizing a 'booking exception' to *Miranda* does not mean, of course, that any question asked during the booking process falls within that exception. Without obtaining a waiver of the suspect's *Miranda* rights, the police may not ask questions, even during booking, that are designed to elicit incriminatory admissions.").

rather were merely an attempt to gain basic background information. The analogy is not perfect, however, because evidence about the command structure of the Khmer Rouge may cross the line from processing information used to identify the detainee, to substantive testimonial evidence because it discloses the names of the detainee's superiors and colleagues.

3. *Should the Exclusionary Rule Apply to Cruel, Inhuman, and Degrading Treatment As Well As Torture?*

The original draft of the Torture Convention provided that "[e]ach 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 persons in any proceedings."[83] However, at the suggestion of the United Kingdom, Austria, and the United States, the final text of what would become Article 15 of the Convention was substantially narrowed, by deleting the phrase "or other cruel, inhuman or degrading treatment," and inserting the phrase "except against a person accused of obtaining that statement by torture."[84]

Although the final wording of Article 15 mentions only evidence obtained by torture, and not evidence procured by cruel, inhuman, or degrading treatment, the United Nations subsequently expanded the scope of the exclusionary rule through *The Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, which was approved by the U.N. General Assembly and adopted by the Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders in September 1990.[85] Principle 16 requires prosecutors to refuse to use as evidence statements obtained by torture or other ill treatment except in proceedings against those who are accused of using such means.[86]

---

83. Comm'n on Human Rights, *Report on the Thirty-Fifth Session*, ¶ 12, U.N. Doc. E/1979/36 (Feb. 12–Mar. 16, 1979); *see also* BURGERS & DANELIUS, *supra* note 21, at 205–06 (discussing the original draft of the Torture Convention).

84. *Revised Draft Convention submitted by Sweden* U.N. Doc. E/CN.4/WG.1/WP.1 (1979); *see also* BURGERS & DANELIUS, *supra* note 21, at 212 (noting Sweden's support for the amended language).

85. Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27–Sept. 7, 1990, ¶ 3.C.26, U.N. Doc. A/CONF.144/28/Rev.1 (1991).

86. *Id.* ¶ 3.C.26 annex ¶ 16. The *Guidelines on the Role of Prosecutors* are also available at http://www2.ohchr.org/english/law/prosecutors.htm (last visited Jan. 25, 2008) (on file with the Washington and Lee Law Review).

Four years later, when the International Criminal Tribunal for the Former Yugoslavia was established, the judges adopted a rule rendering inadmissible evidence "obtained directly or indirectly by means which constitute a serious violation of internationally protected human rights"[87]—a phrase broad enough to apply to both torture and cruel, inhuman, or degrading treatment. The rule was amended in 1995, and currently reads: "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."[88] According to the Tribunal's Second Annual Report,

> The amendment to rule 95, which was made on the basis of proposals from the Governments of the United Kingdom and the United States, puts parties on notice that although a Trial Chamber is not bound by national rules of evidence, it will refuse to admit evidence—no matter how probative—if it was obtained by improper means.[89]

Subsequently, similar provisions were included in the rules governing the proceedings of the Rwanda Tribunal,[90] the Special Court for Sierra Leone,[91] the East Timor Tribunal,[92] and the International Criminal Court.[93]

---

87. INT'L CRIM. TRIBUNAL FOR THE FORMER YUGO. R. P. & EVID. 95, U.N. Doc. IT/32/Rev.1 (1994).

88. INT'L CRIM. TRIBUNAL FOR THE FORMER YUGO. R. P. & EVID. 95, U.N. Doc. IT/32/Rev.40 (2007).

89. *The Secretary-General, Note of the Secretary-General Transmitting the Report of the 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*, ¶ 26 n.9, *delivered to the Security Council and the General Assembly*, U.N. Doc. S/1995/728, A/50/365 (Aug. 23, 1995).

90. INT'L CRIM. TRIBUNAL FOR RWANDA R. P. & EVID. 95, U.N. Doc. ITR/3/Rev.1 (June 29, 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.").

91. SPECIAL CT. OF SIERRA LEONE R. P. & EVID. 95 ("No evidence shall be admitted if its admission would bring the administration of justice into serious disrepute.").

92. TRANSITIONAL R. CRIM. P. 34.2, U.N. Doc. UNTAET/REG/2000/30 (Sept. 25, 2000). Rule 34.2 states:

> 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.

Id.

93. The statute of the International Criminal Court provides:

It is noteworthy that the Cambodia Tribunal adopted a much narrower exclusionary rule than is present in the rules of the other war crimes tribunals.[94] Even if it had adopted the approach of the other international war crimes tribunals, however, it is significant that the rules of the various Tribunals do not automatically require exclusion of evidence obtained by techniques deemed to fall short of torture but to constitute cruel, inhuman, or degrading treatment. Rather, under what one noted commentator calls "the flexibility principle,"[95] the way the exclusionary rules of the other tribunals are written suggests that the Cambodia Tribunal should examine all of the circumstances of the case within the context of the purposes behind the exclusionary rule, including the fact that the Tuol Sleng biographical statements are corroborative (suggesting reliability) and are being used against the regime that committed the torture.

4. Application of the Doctrine of Necessity

Even if the Torture Convention's exclusionary rule were interpreted in light of subsequent developments to apply not only to torture but also to cruel, inhuman, and degrading treatment, the Tuol Sleng evidence might nonetheless be admissible under the international law doctrine of "necessity." The doctrine

---

> Evidence obtained by means of a violation of the Statute or internationally recognized human rights shall not be admissible if: (a) The violation casts substantial doubt on the reliability of evidence; or (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

United Nations Diplomatic Conference on Plenipotentiaries on the Establishment of an International Criminal Court, June 15–July 17, 1998, *Rome Statute of the International Criminal Court*, ¶ 69(7), U.N. Doc. A/CONF.183/9 (1998).

94. The only exclusionary rule contained in the Cambodia Tribunal's Internal Rules provides that:

> 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 35 to 38.

EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA INTERNAL R. 21(3), *available at* http://www.eccc.gov.kh/english/cabinet/fileUpload/27/Internal_Rules_Revision1_01-02-08_eng.pdf (last visited Feb. 19, 2008). This rule applies only to witness statements taken by the personnel of the Cambodia Tribunal, and therefore is not relevant to the Tuol Sleng statements.

95. Gideon Boas, *Admissibility of Evidence Under the Rules of Procedure and Evidence of the ICTY: Development of the 'Flexibility Principle,' in* ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK MCDONALD 263, 264 (Richard May et al. eds., 2001).

is set forth in Article 33 of the International Law Commission's Draft Articles on State Responsibility, which provides:

> 1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless: (a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and (b) the act did not seriously impair an essential interest of the State toward which the obligation existed.
>
> 2. In any case, a state of necessity may not be invoked by a State for precluding wrongfulness: (a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or (b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or (c) if the State in question has contributed to the occurrence of the state of necessity.[96]

The International Court of Justice affirmed that the doctrine of necessity, as reflected in Article 33, constitutes customary international law in the *Gabcikovo-Nagymaros* case of 1997 and again in its *Advisory Opinion on Construction of a Wall* in 2004.[97]

In the instant case, the threshold question would be whether the use of the Tuol Sleng evidence is necessary to safeguard an essential interest. The successful prosecution of the former Khmer Rouge leaders is seen as essential to transitioning Cambodia to a country that respects the rule of law, to avoiding

---

96. *Report of the International Law Commission on the Work of Its Fifty-Third Session*, U.N. GAOR, 56th Sess., Supp. No. 10, at 49, U.N. Doc. A/56/10 (2001), *available at* http://untreaty.un.org/ilc/documentation/english/A_56_10.pdf (last visited Jan. 25, 2008) [hereinafter *ILC Report on 53d Session*] (providing the text of the draft articles on Responsibility of States for Intentionally Wrongful Acts, including the draft version of Article 25 on Necessity) (on file with the Washington and Lee Law Review). The final articles, commentaries, prior drafts, and tables showing the derivation of each provision, all appear in JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2002).

97. *See* Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 40 (Sept. 25) ("[T]he state of necessity is a ground recognized by customary international law . . . ."); Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 140–42 (July 9), *available at* http://www.icj-cij.org/docket/files/131/1671.pdf (same).

outbreaks of vigilantism, and to deterring the commission of future atrocities in the country.[98] These are unquestionably significant interests.

The next step is to determine whether the threat to the state's interest rises to the level of grave and imminent peril. If the Cambodia Tribunal cannot successfully prosecute the former Khmer Rouge leaders without the Tuol Sleng evidence, then the entire project of establishing accountability for the Khmer Rouge atrocities may be in imminent jeopardy.

Third, even if exclusion of the Tuol Sleng evidence threatens an essential interest, a necessity claim will nonetheless fail unless the state had no lawful alternative available to protect the essential interest. In other words, "the peril must not have been escapable by any other means, even a more costly one, that could be adopted in compliance with international obligations."[99] Investigators have opined that there are no available witnesses or documents that can paint a complete picture of the Khmer Rouge command hierarchy in the way the Tuol Sleng biographies do.[100] Moreover, it is unlikely that any of the principal defendants can be induced to provide such information through the promise of a reduced sentence. Thus, there are no feasible alternatives to using the Tuol Sleng evidence.

Fourth, the doctrine of necessity requires a balancing of the interests in successfully prosecuting the Khmer Rouge leaders against the interest in generally deterring the use of torture to obtain evidence for use in judicial proceedings. An argument based on necessity will only succeed if the Tribunal decides that the former outweighs the latter. As one of the members of the British House of Lords (Britain's High Court) observed in *A & Others v.*

---

98. *See* G.A. Res. 57/228, U.N. Doc. A/Res/57/228 (Feb. 27, 2003) ("recognizing" that the successful prosecution of Khmer Rouge leaders by the Cambodia Tribunal "is one of the central elements of any effective remedy for victims of human rights violations and a key factor in ensuring a fair and equitable justice system and, ultimately, reconciliation and stability within" Cambodia).

99. *Report of the International Law Commission on the Work of Its Thirty-Second Session*, U.N. GAOR, 35th Sess., Supp. No. 10, at 49, U.N. Doc. A/35/10 (1980), *reprinted in* [1980] 2 Y.B. Int'l L. Comm'n pt. 2, U.N. Doc. A/CN.4/SER.A/1980/Add.1 [hereinafter *ILC Report on 32d Session*]; *see also* Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 42–46 (Sept. 25) (explaining that Hungary could not invoke the doctrine of necessity because other means were available for responding to its perceived perils).

100. *See* HEDER WITH TITTEMORE, *supra* note 34, at 9–10 (noting the value of this evidence); George Chigas, *The Trial of the Khmer Rouge: The Role of the Tuol Sleng and Santebal Archives*, 4 HARV. ASIA Q., Winter 2000, at 44, 47, *available at* http://www.asiaquarterly.com/ content/view/61/40 (last visited Feb. 9, 2008) ("[T]he Santebal documents record the regime's military and security activities throughout the country and may well connect individual top leaders to specific crimes.") (on file with the Washington and Lee Law Review).

Secretary of State for the Home Department,[101] sometimes "the greater public good . . . lies in making some use at least of the information obtained [by ill-treatment], whether to avert public danger or to bring the guilty to justice."[102]

Even if all the preconditions for the necessity doctrine set forth in Article 33(1) are satisfied, the doctrine cannot be used if one of the three exceptions set forth in Article 33(2) applies. First, the doctrine may not be invoked if doing so would violate a *jus cogens* norm, an issue that will be dealt with in detail below.[103] Second, the doctrine is not available "if the issue of the competing values has been previously foreclosed by a deliberate legislative choice."[104] The Torture Convention provides in Article 2: "No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[105] This nonderogation clause, however, applies only to torture. While state parties must "undertake to prevent" cruel, inhuman, or degrading treatment, the "no exceptional circumstances" provision does not explicitly apply to such conduct.[106] Thus, if the preliminary questioning at Tuol Sleng is deemed to be "inhuman or degrading treatment" but not "torture," then the language of the Convention does not foreclose reliance on the doctrine of necessity to justify admission of the evidence.

Finally, the doctrine is inapplicable in a "case in which the State invoking the state of necessity has, in one way or another, intentionally or by negligence, contributed to creating the situation it wishes to invoke as justification of its non-fulfillment of an international obligation."[107] The situation does not arise out of any negligence of the Cambodia Tribunal's prosecutors or investigative judges, but because the Khmer Rouge regime made it a policy not to document its command structure, and with the exception of the Tuol Sleng biographies,

---

101. A & Others v. Sec'y of State for the Home Dep't [2005] UKHL 71, [2006] 2. A.C. 221 (appeal taken from E.W.C.A.) (U.K.), *available at* http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd05 1208/aand.pdf (last visited Jan. 7, 2008).

102. *Id.* ¶ 160 (opinion of Lord Brown).

103. *Infra* notes 126–36 and accompanying text.

104. THE INTERNATIONAL LAW COMMISSION'S DRAFT ARTICLES ON STATE RESPONSIBILITY: PART 1, ARTICLES 1–35, at 350 (Shabtai Rosenne ed., 1991) (providing the text of draft Article 33). *Cf.* United States v. Oakland Cannabis Buyer's Coop., 532 U.S. 483, 491 (2001) (assuming necessity is an available defense to federal criminal charges but holding that Congress made a determination that marijuana has no medical benefits worthy of an exception and thus necessity was not available as a defense to distributing a controlled substance).

105. Torture Convention, *supra* note 4, art. 2, ¶ 2.

106. *Id.*

107. *ILC Report on 32d Session*, *supra* note 99, at 52.

the Khmer Rouge regime destroyed all of the evidence that could be used to prove command responsibility or joint criminal enterprise liability.[108]

States have cited the necessity doctrine to justify departures from various human rights obligations in cases involving essential interests. For example, in 1995, when 50,000 Rwandan refugees and local Burundis fled to the border of Tanzania seeking safety after gunmen attacked a refugee camp in northern Burundi, Tanzania invoked the necessity doctrine as justification for deploying its army to keep the refugees from crossing into Tanzania in violation of its obligations under the Refugee Convention.[109] Citing the necessity doctrine, both Israel and the United States have used the "ticking bomb" scenario to justify subjecting suspected terrorists to harsh interrogation techniques that fall short of actual torture but may constitute cruel, inhuman, or degrading treatment.[110] If the doctrine can be used to justify the use of cruel, inhuman, or degrading interrogation techniques in compelling circumstances, then it should follow that it can be used to permit the admission of evidence derived from such interrogation techniques where reliability is not in question, the evidence is being used against the leaders of the regime that committed the brutal acts, and there are no other means available to establish guilt.

B. An Exception for Evidence Obtained by Third Parties

Even assuming that the Tuol Sleng biographical statements were the product of actual torture, or that the torture evidence exclusionary rule should be read to apply to evidence obtained through cruel, inhuman, or degrading techniques that fall short of torture, this subpart analyzes whether the evidence should nevertheless be admitted on the grounds that the Tribunal's personnel were not involved in the unlawful interrogations.

---

108. *See* Chigas, *supra* note 100, at 45 (describing the destruction of documentary evidence by members of the Khmer Rouge).

109. *See* Roman Boed, *State of Necessity as a Justification for Internationally Wrongful Conduct*, 3 YALE HUM. RTS. & DEV. L.J. 1, 2 (2000) ("In effect, Tanzania had invoked the concept of 'state of necessity' as an excuse for a border-closure that may have violated its duties under international law.").

110. *See Supreme Court of Israel: Judgment Concerning the Legality of the General Security Service's Interrogation Methods*, 38 I.L.M. 1471, 1485–86 (1999) (discussing the availability of a "ticking bomb" necessity defense for investigators facing criminal charges stemming from their use of controversial interrogation techniques); Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), *reprinted in The White House Torture Memoranda*, 37 CASE W. RES. J. INT'L L. 615 app. lxx, at 39–41 (2006). For a critique of the use of the necessity doctrine in these cases, see Robert Goldman, *supra* note 71.

1. The Silver Platter Doctrine

Because the exclusionary rule is based largely on the principle of deterring the misconduct of the state's authorities, the rule has generally been applied only when the state's authorities are themselves involved in the breach. As the U.S. Supreme Court has said, "[i]t is well established, of course, that the exclusionary rule, as a deterrent sanction, is not applicable where a private party or a foreign government commits the offending act."[111] This has become known in the United States as the "international silver platter doctrine,"[112] which applies to evidence supplied by foreign authorities unless "the United States agents' participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials."[113]

There is a compelling argument for applying the silver platter doctrine to the Cambodia Tribunal. Because the authorities seeking to use the Tuol Sleng evidence (the international co-prosecutors) are part of a separate legal system than the authorities that procured the statements by torture (the Khmer Rouge regime), there is no deterrent value to excluding the evidence from proceedings before the Cambodia Tribunal. The regime that employed torture is in no way benefiting from its misconduct; rather, the evidence is being used against the regime's former leaders in their prosecution by a war crimes Tribunal established by the United Nations.[114]

Moreover, application of the silver platter doctrine by the Cambodia Tribunal would be consistent with the case law of other U.N.-established war crimes tribunals. Although they have not dealt squarely with the question of the admissibility of torture evidence, both the International

---

111. United States v. Janis, 428 U.S. 433, 455 n.31 (1976).

112. *See generally* Warren J. Argue, Note, *The New International "Silver Platter Doctrine": Admissibility in Federal Courts of Evidence Illegally Obtained by Foreign Officers in a Foreign Country*, 2 N.Y.U. J. INT'L L. & POL. 280 (1969); Stephen M. Kaplan, Comment, *The Applicability of the Exclusionary Rule in Federal Court to Evidence Seized and Confessions Obtained in Foreign Countries*, 16 COLUM. J. TRANSNAT'L L. 495 (1977).

113. United States v. Barona, 56 F.3d 1087, 1091 (9th Cir. 1995).

114. Although the Extraordinary Chambers in the Courts of Cambodia (ECCC) is a hybrid tribunal rather than a purely "international tribunal," and although its name ("in the Courts of Cambodia") might suggest that it is part of the Cambodia judicial system, like the Special Court for Sierra Leone, it has enough international attributes to render it a distinct international juridical institution. *See* Introduction to the ECCC, http://www.eccc.gov.kh/english/about_eccc.htm.aspx (last visited Jan. 25, 2008) (noting that the ECCC is "a Cambodian court with international participation that will apply international standards") (on file with the Washington and Lee Law Review); *see also* Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, Appeals Chamber, ¶¶ 37–42 (May 31, 2004), *available at* http://www.sc-sl.org/documents/scsl-03-01-I-059.pdf (last visited Jan. 25, 2008) (noting that the Special Court for Sierra Leone was an international criminal tribunal).

Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda have applied a version of the silver platter doctrine to admit evidence obtained in violation of attorney-client privilege, through warrantless searches, or through illegal wiretaps where the tribunals' personnel or agents were not involved in the breaches.[115] Thus, in refusing to exclude unlawful wiretap evidence obtained by Bosnian authorities, the Yugoslavia Tribunal stated: "The function of this Tribunal is not to deter and punish illegal conduct by domestic law enforcement authorities by excluding illegally obtained evidence."[116]

---

115. *See, e.g.*, Prosecutor v. Nyiramasuhuko, Case No. ICTR 97-21-AR15bis, Decision on the Defence Motion for Exclusion of Evidence and Restitution of Property Seized, ¶ 26 (Oct. 12, 2000) (rejecting a defendant's motion to exclude evidence obtained through an unlawful search of his home by Kenyan authorities); Prosecutor v. Kajelijeli, Case No. ICTR 98-44A-T, Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing, ¶¶ 34–36 (May 8, 2000) (rejecting a defendant's motion, before the Rwanda Tribunal, to dismiss charges based on the failure of Benin authorities to present an arrest warrant or apprise the defendant of the charges at the time of arrest); Prosecutor v. Barayagwiza, Case No. ICTR 97-19-AR72, Prosecutor's Request for Review or Reconsideration, ¶ 74 (Mar. 31, 2000) (reversing a dismissal of charges against a defendant because Cameroon, rather than the prosecutor, was responsible for the defendant's lengthy pre-trial detention and for failing to inform him of the charges or afford him a right to challenge the legality of his detention); Prosecutor v. Ngirumpatse, Case No. ICTR 98-44-I, Decision on the Defence Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Items, ¶ 56, (Dec. 10, 1999) (rejecting a defendant's motion for review of the Trial Chamber's decision absent newly discovered facts); Prosecutor v. Karemera, Case No. ICTR 98-44-AR73, Decision on the Defence Motion for the Restitution of Documents and Other Personal or Family Belongings Seized (Rule 40(C) of the Rules of Procedure and Evidence), and the Exclusion of Such Evidence Which May Be Used by the Prosecutor in Preparing an Indictment Against the Applicant, ¶ 4.2 (Dec. 10, 1999) (rejecting a motion to dismiss, before the Rwanda Tribunal, where Togo held the defendant for an excessive amount of time before turning him over to the Tribunal); *see also* Prosecutor v. Brdjanin, Case No. IT-99-36-T, Decision on the Defence Objection to Intercept Evidence, ¶¶ 61–68 (Oct. 3, 2003) (rejecting defendant's motion, before the Yugoslavia Tribunal, to exclude evidence obtained through the illegal interception of telephone conversations by Bosnian authorities). *But see* Prosecutor v. Delalić, Case No. IT-96-21-T, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, ¶¶ 46–55 (Sept. 2, 1997) (holding, by the Yugoslavia Tribunal, that a defendant's confession was inadmissible where his right to counsel was violated during an Austrian police interrogation); *accord* Goran Sluiter, *International Criminal Proceedings and the Protection of Human Rights*, 37 NEW ENG. L. REV. 935, 942 (2003) (criticizing application of the silver-platter doctrine and arguing that international war crimes tribunals "must take account of every human rights violation that occurs in the framework of the criminal proceedings").

116. Prosecutor v. Brdjanin, Case No. IT-99-36-T, Decision on the Defence Objection to Intercept Evidence, ¶ 65(9) (Oct. 3, 2003), *available at* http://www.un.org/icty/brdjanin/trialc/decision-e/031003.htm (last visited Jan. 7, 2008) (on file with the Washington and Lee Law Review).

Some courts, however, apply an exception to the international silver platter doctrine where the acts of the foreign authorities shock the judicial conscience. A leading case is *United States v. Fernandez-Caro*,[117] in which a U.S. federal court found that the conduct of Mexican police "shocked the conscience"[118] and, therefore, excluded statements that the Mexican police had obtained by severely beating the defendant, pouring water through his nostrils while he was bound and gagged, and applying electrical shocks to his wet body.[119] The reason for this exception is that in addition to serving a deterrent function, the torture evidence exclusionary rule serves an important secondary function: to preserve the integrity of the judicial process and the honor of the judicial system.

In deciding not to apply the silver platter doctrine to torture evidence procured by foreign authorities in the case of *A & Others v. Secretary of State for the Home Department*, the British House of Lords stressed that "the rule must exclude statements obtained by torture anywhere, since the stain attaching to such evidence will defile [the] court whatever the nationality of the torturer."[120] As two of the Law Lords in that case put it, "torture is torture whoever does it."[121] Yet, that is not exactly true, because the Torture Convention does not apply to the conduct of private parties. Therefore, the exclusionary rule cannot really be justified on the grounds that a court can never admit torture evidence without degrading the administration of justice, because evidence obtained from private acts of torture would not be excluded by the Torture Convention, though using such evidence would seem to be equally defiling.

It is also noteworthy that the defendant in *Fernandez-Caro* was merely charged with immigration fraud in a domestic court[122] and the petitioners in *A & Others* were alleged to have been part of a terrorist organization by an immigration court.[123] In contrast, international war crimes tribunals have

117. United States v. Fernandez-Caro, 677 F. Supp. 893, 895 (S.D. Tex. 1987) (granting the defendant's motion to suppress evidence of his confession).

118. *Id.*

119. *See id.* at 894–95 (refusing to admit evidence obtained from an interrogation conducted by foreign authorities because "the methods employed . . . were too close to the rack and screw to be acceptable").

120. A & Others v. Sec'y of State for the Home Dep't [2005] UKHL 71, [2006] 2 A.C. 221, ¶ 91 (opinion of Lord Bingham) (appeal taken from E.W.C.A.) (U.K.), *available at* http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd051208/aand.pdf (last visited Jan. 25, 2008).

121. *Id.* ¶ 35 (opinion of Lord Bingham).

122. *Fernandez-Caro*, 677 F. Supp. at 894.

123. *A & Others*, ¶¶ 8–9 (opinion of Lord Bingham).

balanced the gravity of the alleged crimes against the severity of the mistreatment of the defendant in fashioning an appropriate remedy. Thus, in *Prosecutor v. Nikolic*,[124] the Appeals Chamber of the Yugoslavia Tribunal, departing from the approach of the European Court of Human Rights and numerous national courts, declined to dismiss a case when it was established that individuals in collusion with the NATO-led Stabilization Force in Bosnia had abducted and mistreated the defendant in violation of human rights law.[125] Although the *Nikolic* case did not deal specifically with the admission of evidence gained by torture, by analogy, it suggests that the Cambodia Tribunal could follow a more flexible approach in light of the fact that the defendants have been charged with the gravest crimes known to mankind by an international war crimes tribunal. The Tribunal could, for example, deal with the problem of using third-party torture evidence by expressly discounting the weight to be accorded it, rather than excluding it altogether.

2. *Jus Cogens and the Torture Exclusionary Rule*

The British Appeals Court found discounting the weight to be the appropriate approach to torture evidence procured by foreign officials in *A & Others v. Secretary of State for the Home Department*.[126] In overturning the appeals court decision, at least one of the Law Lords concluded that treating torture evidence as a matter of weight rather than admissibility was foreclosed by the *jus cogens* nature of the prohibition on torture.[127] Citing the International Court of Justice's *Advisory Decision on the Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, Lord Bingham opined that the *jus cogens* nature of the prohibition on torture implied that states were under an obligation to refuse to accept any results arising from its violation by another state.[128]

---

124. Prosecutor v. Nikolic, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, ¶ 26 (June 5, 2003).

125. *See id.* ¶ 32 ("[T]he evidence does not satisfy the Appeals Chamber that the rights of the accused were egregiously violated in the process of his arrest. Therefore, the procedure adopted for his arrest did not disable the Trial Chamber from exercising its jurisdiction.").

126. A & Others v. Sec'y of State for the Home Dep't [2005] UKHL 71, [2006] 2 A.C. 221 (appeal taken from E.W.C.A.) (U.K.), *available at* http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd051208/aand.pdf (last visited Jan. 25, 2008).

127. *Id.* ¶ 50 (opinion of Lord Bingham).

128. *Id.* ¶ 33–34 (opinion of Lord Bingham). Lord Bingham states:

> [The opinion] explained the consequences of the breach found in that case: "Given the character and the importance of the rights and obligations involved, the court is of the view that all States are under an obligation not to recognize the illegal

Closer scrutiny, however, suggests that Lord Bingham's deduction represents a leap in logic that is not supported by the international precedent. To be clear, this Article fully accepts Lord Bingham's initial conclusion that the prohibition on torture itself rises to the level of *jus cogens* (a preemptory norm that prevails over international agreements and other rules of international law that conflict with it).[129] Though the term *jus cogens* had not yet been coined, the concept was first applied by the U.S. Military Tribunal at Nuremberg, which declared that the treaty between Germany and Vichy France approving the use of French prisoners of war in the German armaments industry was void under international law as *contra bonus mores* (contrary to fundamental morals).[130] The debates within the U.N. International Law Commission, which codified the *jus cogens* concept for the first time in the 1969 Vienna Convention on the Law of Treaties,[131] reflect the view that the phenomenon of Nazi Germany rendered the purely contractual conception of international law insufficient for the modern era.[132] Consequently, the International Law

---

> situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction."

Id. ¶ 34 (quoting Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 200 (July 9)).

129. *See* Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 153 (Dec. 10, 1998) ("Because of the importance of the values it protects, [the prohibition against 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."). *See generally* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (1987).

130. *See* 9 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1395 (1950) ("[W]e have no hesitancy in reaching the conclusion that if Laval or the Vichy ambassador to Berlin made any agreement such as that claimed with respect to the use of French prisoners of war in German armament production, it was manifestly contra bonus mores and hence void.").

131. Article 53 of the Vienna Convention provides:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is 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.

Vienna Convention, *supra* note 26, art. 53.

132. The U.N. International Law Commission noted:

> The international society of [the nineteenth century] had been able to accept the idea of the unlimited will of the State because it had been relatively stable. But when a phenomenon such as Naziism appeared, the theory became questionable.

Commission opined that a treaty designed to promote slavery or genocide, or to prepare for aggression, "ought to be declared void."[133]

Thus, pursuant to the *jus cogens* concept, even states that are not party to the Torture Convention are prohibited from committing acts of torture, and an international agreement between states to facilitate commission of such acts would be void *ab initio*. Moreover, there is growing recognition that universal jurisdiction exists such that all states have a right to prosecute or entertain civil suits against the perpetrators of *jus cogens* crimes such as torture, even if they are not party to the Torture Convention.[134] Yet, this does not mean, as Lord Bingham asserted, that the Torture Convention's exclusionary rule has itself risen to the level of *jus cogens* or that the exclusion of torture evidence is required as an essential corollary to the *jus cogens* prohibition of torture.

To understand the flaw in Lord Bingham's reasoning, consider that courts have found that other procedural requirements of the Torture Convention, such as the obligation to prosecute under Article 5 and the obligation to provide a remedy under Article 14, have not in themselves attained *jus cogens* status despite the fact that torture is a *jus cogens* offense. Not only have there been numerous instances of states providing amnesty and asylum to leaders accused of committing acts of torture when it is in the interests of peace and ending abuses to do so, but even more telling, there have been no protests from states when such amnesty or asylum has been offered.[135] Moreover, there has been

---

> The contractual conception of international law, which did not recognize *jus cogens*, belonged to the time when international law had been only a law for the Great Powers. But modern international law had been universalized and socialized.

Summary Records of the 684th Meeting, [1963] 1 Y.B. Int'l L. Comm'n 72, ¶¶ 61–62, U.N. Doc. A/CN.4/156 & Addenda.

133. *Summary Records of the 683rd Meeting*, [1963] 1 Y.B. Int'l L. Comm'n 63, ¶ 40, U.N. Doc. A/CN.4/156 & Addenda.

134. *See* Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985) (observing that "[i]nternational law recognizes a 'universal jurisdiction' over certain offenses," including crimes against humanity and genocide); Michael P. Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS. 67, 88–90 (2001) ("It is now widely accepted that crimes against humanity are subject to universal jurisdiction.").

135. *See* Michael P. Scharf, *From the eXile Files: An Essay on Trading Justice for Peace*, 63 WASH. & LEE L. REV. 339, 340–47 (2006) (noting examples in recent international conflicts where amnesty and/or exile has been traded for peace). In the years since the negotiation of the Torture Convention, sixteen states—Angola, Argentina, Brazil, Cambodia, Chile, El Salvador, Guatemala, Haiti, Honduras, Ivory Coast, Nicaragua, Peru, Sierra Leone, South Africa, Togo, and Uruguay—have each, as part of a peace arrangement, granted amnesty to members of the former regime that committed acts of torture within their respective borders. *Id.* at 342. In five of these countries—Cambodia, El Salvador, Haiti, Sierra Leone, and South Africa—the United Nations itself pushed for, helped negotiate, or endorsed the granting of amnesty as a means of restoring peace and democratic government. *Id.* at 343. In addition to amnesty (which

widespread judicial recognition that the *jus cogens* nature of the crime of torture does not prevent accused perpetrators from successfully asserting head of state immunity or sovereign immunity to avoid criminal or civil liability in foreign courts.[136] Because *jus cogens*, as a peremptory norm, would by definition supersede the customary international law doctrine of head of state immunity where the two come into conflict, the only way to reconcile these rulings is to conclude that the duty to prosecute has not attained *jus cogens* status and is not required as an incidence of the *jus cogens* prohibition of torture.

Because the duty to prosecute torture has not attained *jus cogens* status, logic would suggest that the exclusionary rule has not done so either. This would be especially true when the use of the torture evidence would not condone the torture but be used against the leaders of the regime that committed the torture. Using the evidence in the trials of the Khmer Rouge before the Cambodia Tribunal would not have the effect of rendering aid or assistance to an unlawful situation, and thus would not contravene the principle laid down by the International Court of Justice in the *Advisory Decision on the Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*.[137]

---

immunizes the perpetrator from domestic prosecution), exile and asylum in a foreign country (which puts the perpetrator out of the jurisdictional reach of domestic prosecution) is often used to induce regime change, with the blessing and involvement of significant states and the United Nations. *Id.* at 343. Since the advent of the Torture Convention, Ferdinand Marcos fled the Philippines for Hawaii; Baby Doc Duvalier fled Haiti for France; Mengisthu Haile Miriam fled Ethiopia for Zimbabwe; Idi Amin fled Uganda for Saudi Arabia; General Raoul Cedras fled Haiti for Panama; and Charles Taylor fled Liberia for exile in Nigeria under a deal negotiated by the United States and U.N. envoy Jacques Klein. *Id.*

136. *See* Ye v. Zemin, 383 F.3d 620, 627 (7th Cir. 2004) (concluding that a violation of *jus cogens* is not an implied waiver of head of state immunity); Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 244 (2d Cir. 1996) ("Congress can legislate to open United States courts to some victims of international terrorism in their suits against foreign states without inevitably withdrawing entirely the defense of sovereign immunity for all *jus cogens* violations."); Princz v. Fed. Republic of Germany, 26 F.3d 1166, 1173 (D.C. Cir. 1994) (finding no statutory exceptions to the general grant of sovereign immunity under the Federal Sovereign Immunities Act for *jus cogens* violations occurring during the Holocaust); Siderman de Blake v. Republic of Arg., 965 F.2d 699, 717–19 (9th Cir. 1992) (concluding that a violation of *jus cogens* does not waive sovereign immunity under U.S. law); Regina v. Bow St. Metro. Stipendiary Magistrate, *ex parte* Pinochet Ugarte (No. 3), [2000] 1 A.C. 147 (H.L. 1999) (U.K.) (allowing a head of state immunity defense for crimes committed prior to the ratification of the Torture Convention); Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 23–25 (Feb. 14), *available at* http://www.icj-cij.org/docket/files/121/8126.pdf (last visited Jan. 25, 2008) (denying an exception to head of state immunity for war crimes or crimes against humanity); Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 79, 100–02 (affirming state immunity from international civil suits).

137. *See* A & Others v. Sec'y of State for the Home Dep't [2005] UKHL 71, [2006] 2 A.C.

C. An Expanded Exception for Cases Against the Torturer

1. Canons of Statutory Construction and Principles of Treaty Interpretation

Article 15 of the Torture Convention contains a specific exception to the general prohibition of admitting evidence obtained from torture. The exception permits evidence gained from torture to be used "only against a person accused of torture as evidence that the statement was made."[138] This exception was inserted during the final stages of the negotiation of the Convention at the urging of the United Kingdom, Austria, and the United States.[139] According to Burges and Danelius, the leading authorities on the negotiating history of the Convention, the purpose of the exception to the exclusionary rule was "not to prove that the statement is a true statement," but to prove that a statement was said under torture.[140]

The inclusion of this single specific exception would ordinarily trigger the canon of statutory construction known as *expressio unius est exclusio alterius*, meaning the inclusion of one thing implies the exclusion of another.[141] In the case of the Torture Convention, the maxim would mean that a court should presume that because the drafters decided to include a single, specific exception to the exclusionary rule, they must have intended to exclude all other possible exceptions.

On its face, *expressio unius* supports the contention that there can be but one narrow exception to the Torture Convention's exclusionary rule, namely that evidence gained from torture can be used to prove the existence of torture in a case against the torturer. The Tuol Sleng evidence would not be admissible under this narrow exception for two reasons: First, it would be used against high-ranking members of the Khmer Rouge regime rather than the actual Tuol Sleng torturers; and second, it would be used to provide details about the command structure of the Khmer Rouge regime rather than to prove that the victims were tortured at Tuol Sleng.

However, *expressio unius* is limited by context, as when strict adherence to the text in a given case will lead to an absurd or unreasonable result.

221, ¶ 34 (opinion of Lord Bingham) (appeal taken from E.W.C.A.) (U.K.), *available at* http://www. publications.parliament.uk/pa/ld200506/ldjudgmt/jd051208/aand.pdf (last visited Jan. 25, 2008) (describing this principle as the duty to "reject the fruits of torture inflicted in breach of international law").

138. Torture Convention, *supra* note 4, art. XV.

139. BURGERS & DANELIUS, *supra* note 21, at 208.

140. *Id.*

141. BLACK'S LAW DICTIONARY 620 (8th ed. 2004) (citing as an example "each citizen is entitled to vote" implies that noncitizens cannot vote).

According to the Vienna Convention on the Law of Treaties,[142] treaties "shall be interpreted in good faith . . . in the light of [their] object and purpose."[143] In the instant case, strict adherence to a literal construction of Article 15 could convert the Torture Convention into a shield to protect high-ranking members of the Khmer Rouge from successful prosecution for committing acts of torture—a result that would frustrate the object and purpose of the Convention. To avoid this unreasonable result, the limitation to the *expressio unius* maxim could be used to support a broader interpretation of the exception in Article 15, one that would permit the use of evidence of the command hierarchy obtained by torture to be used in a case against the regime superiors who were responsible for the policy of torture and other atrocities.

The leading case that illustrates application of the limitation to the *expressio unius* maxim is *Church of the Holy Trinity v. United States*.[144] In *Holy Trinity*, an Episcopal Church in New York City petitioned the Supreme Court to overturn its conviction for hiring an English citizen as rector, in violation of the Alien Contract Labor Act.[145] Under the Alien Contract Labor Act, it was "unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States" for the purposes of labor.[146] Despite its broad language, the actual purpose of the Alien Contract Labor Act was only to prevent an influx of unskilled labor into the United States.[147] In overruling the petitioner's conviction, the Supreme Court made several important points. First, the Court noted: "[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers."[148] Next, the Court observed: "If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity."[149]

---

142. *See generally* Vienna Convention, *supra* note 26.

143. *Id.* art. XXXI.

144. *See* Church of the Holy Trinity v. United States, 143 U.S. 457, 465 (1892) (finding that Congress enacted the Alien Contract Labor Act merely to avoid "the influx of . . . cheap, unskilled labor" into the country).

145. *Id.* at 457–58. For an in-depth discussion of the case, see generally Carol Chomsky, *Unlocking the Mysteries of Holy Trinity: Spirit, Letter and History in Statutory Interpretation*, 100 COLUM. L. REV. 901 (2000).

146. *Holy Trinity*, 143 U.S. at 458.

147. *Id.* at 464–65.

148. *Id.* at 459.

149. *Id.* at 460.

Applying these principles—first, that a statute or treaty may contain language that is specific and yet undermines its purpose; second, that a treaty is to be interpreted in light of its object and purpose; and third, that literal construction that leads to an unreasonable conclusion is to be avoided—the exception contained in Article 15 of the Torture Convention could be interpreted to permit admission of the Tuol Sleng evidence in order to establish the command structure of the Khmer Rouge. If it is permissible under Article 15 to use evidence obtained through the use of torture against those that committed the torture to prove the torture occurred, then it should also be permissible to use the same evidence against those higher in the chain of command who were responsible for the policies resulting in the torture, especially where there is no other evidence available for this purpose. Rather than undercut the deterrent function of the torture evidence exclusionary rule, this interpretation will provide an added incentive for regimes to forego torture. If the members of the leadership of a regime know that evidence derived through the use of torture can be used against them, it will be a more difficult decision for them to sanction the use of torture.

Support for this expanded interpretation of Article 15 may be found in the subsequent practice of the members of the United Nations, consistent with Article 31(3)(b) of the Vienna Convention on the Law of Treaties.[150] As mentioned above, three years after the Torture Convention entered into force, the U.N. General Assembly approved *The Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, Principle 16 of which requires prosecutors to refuse to use as evidence statements obtained by torture or other ill treatment except in proceedings against those who are accused of using such means.[151] This subsequent reformulation of the exception to the torture evidence exclusionary rule drops the strict requirement that the statements can only be used "as evidence that the statement was made,"

---

150. Vienna Convention, *supra* note 26, art. XXI ("There shall be taken into account, together with the context . . . [a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."). Observing that Article 31 reflects customary international law, the International Court of Justice has stated:

> The importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty. Recourse to it as a means of interpretation is well-established in the jurisprudence of international tribunals.

Kasikili/Sududu Island (Botswana v. Namibia), 1999 I.C.J. 1045, 1076 (Dec. 13).

151. Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *supra* note 85, ¶ 16.

thus permitting the use of evidence obtained by torture for any purpose in a case against those responsible for the torture.

2. *An Analogy to the Use of Unethically Obtained Medical Data*

The main argument against broadening the interpretation of Article 15 of the Torture Convention to permit the use of torture evidence to establish command responsibility or joint criminal enterprise liability in a case against the leaders responsible for torture is that, as a matter of morality, a court should never use such tainted evidence, regardless of its reliability or the public need.[152] During the discussions at the judicial training sessions in Phnom Penh, an analogy was drawn to the controversy over whether the data from the infamous Nazi medical experiments during World War II could subsequently be used to help save lives or benefit society.[153]

Following World War II, twenty-three leading Nazi doctors were tried for participating in crimes against humanity by the American Military Tribunal at Nuremberg.[154] The Nuremberg "Doctors Trial" revealed evidence of sadistic human experiments conducted without the consent of the victims at the Dachau, Auschwitz, Buchenwald, and Sachsenhausen concentration camps.[155] These included freezing experiments, where subjects were forced to remain in a tank of ice water for periods of up to three hours and then re-warmed; phosgene gas experiments, where subjects were exposed to various concentrations of the poison gas and then autopsied; malaria experiments, where subjects were deliberately infected with malaria to investigate immunization procedures; sulfanilamide experiments, where subjects were deliberately wounded, infected with bacteria such as streptococcus, tetanus, and gangrene, and then treated with sulfanilamide to determine its effectiveness; and typhus experiments,

---

152. Discussion with Investigative Judges & Prosecutors of the ECCC, Training Session, in Phnom Penh, Cambodia (Oct. 25, 2006).

153. *Id.* The two situations are obviously distinct. In the Cambodian Tribunal context, the use of the information is contrary to the intention of the torturers, whereas in the Nazi medical context, subsequent scholarly citation and use by medical researchers is consistent with the original purpose (the intention of the Nazis was not to inflict as much pain as possible, but rather to obtain technically robust data not otherwise available to benefit third parties with both military and civilian applications).

154. *See* JAY KATZ, EXPERIMENTATION WITH HUMAN BEINGS: THE AUTHORITY OF THE INVESTIGATOR, SUBJECT, PROFESSIONS, AND STATE IN THE HUMAN EXPERIMENTATION PROCESS 294 (1972) (reprinting *United States v. Karl Brandt*, 2 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBURG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1948), which stated that the crimes against humanity violated international treaties and norms of war).

155. *See id.* at 291 (describing the medical acts performed without consent).

where subjects were deliberately infected with spotted fever virus.[156] The Nazi doctors defended their actions by arguing that human experimental research was necessary during war and that prisoners were frequently used as research subjects around the world.[157] At the conclusion of the eight-month-long trial, the Nuremberg Tribunal rejected these defenses and convicted sixteen of the Nazi doctors, sentencing seven to death.[158]

In addition to documenting these atrocities, the primary legacy of the Doctors Trial has come to be known as the "Nuremberg Code"—a judicial codification of ten prerequisites for the moral and legal use of human beings in medical experiments.[159] The most important of these is the requirement of informed and voluntary consent, which was subsequently codified in the International Covenant on Civil and Political Rights.[160] It is noteworthy, however, that the Nuremberg Tribunal did not consider the possible future use of Nazi medical data, and neither the Nuremberg Code nor the Covenant on Civil and Political Rights stipulate that the data from the Nazi experiments must never be used or cited in the future. Moreover, although the prosecutor and prosecution witnesses at Nuremberg convincingly argued that the Nazi methods were inefficient, unscientific, and unsystematic, and that "the experiments performed added nothing of significance to medical knowledge,"[161] in subsequent decades, researchers who have examined the Nazi data have opined that "at least some data might provide [useful] information unobtainable from ethical research."[162] Since the Doctors Trial, at least forty-

156. *See id.* at 293–96 (explaining the various medical experiments that the Nazi doctors carried out on the Jews and other prisoners of war).

157. *Id.* at 303–04.

158. *Id.* at 306.

159. *See* Benjamin Mason Meier, *International Protection of Persons Undergoing Medical Experimentation: Protecting the Right of Informed Consent*, 20 BERKELEY J. INT'L L. 513, 523 (2002) (describing the "Nuremberg Code").

160. Article 7 of the Covenant on Civil and Political Rights provides: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation." International Covenant on Civil and Political Rights art. 7, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, 16 I.L.M. 368. The International Covenant currently has 154 parties, including Cambodia. Office of the United Nations High Comm'r for Human Rights, *Ratifications and Reservations: International Covenant on Civil and Political Rights*, http://www2.ohchr.org/english/bodies/ratification/4.htm (last visited Jan. 7, 2008) (on file with the Washington and Lee Law Review).

161. Meier, *supra* note 159, at 522.

162. *See* Terra Ziporyn, *What the Nazis Called "Medical Research" Haunts the Scientific Community to This Day*, 263 J. AM. MED. ASS'N. 791, 791 (1990) (discussing whether the Nazi doctors' research is worth examining); *see also* Peter Mostow, *"Like Building on Top of Auschwitz": On the Symbolic Meaning of Using Data from the Nazi Experiments, and on Non-*

five articles in reputable medical journals have included data from the Nazi medical experiments.[163] According to Arthur Caplan, Director of the Department of Medical Ethics at University of Pennsylvania, over the years the data from the Nazi medical experiments have been "studied, cited, and absorbed into mainstream science with little comment."[164]

The debate made front-page news, however, in 1988 when Robert Pozos, Director of the Hypothermia Laboratory at the University of Minnesota School of Medicine, sought to analyze for publication the Nazi doctor Sigmund Rascher's freezing and re-warming data, which Pozos felt filled an important void in modern hypothermia research, saying "it could advance my work in that it takes human subjects farther than we're willing."[165] In these experiments, the Nazi doctors, who were trying to increase the survival rates of Luftwaffe pilots shot down over the North Sea, immersed Dachau concentration camp subjects into vats of ice water at sub-zero temperatures.[166] As the prisoners excreted mucus, fainted and slipped into unconsciousness, Rascher's assistants meticulously recorded the changes in their body temperature, heart rate, muscle response, and urine.[167] In experimenting with re-warming techniques on these victims, Rascher documented that re-warming in hot liquids was, contrary to the popularly accepted method of slow passive re-warming, the most efficient means of revival.[168] When Dr. Pozos sought to republish the Nazi data in the

---

Use as a Form of Memorial, 10 J. L. & RELIGION 403, 417 (1993–1994) (observing that "while it is correct to believe that the Nazi scientists were not acting ethically, to believe that therefore they were not acting scientifically is a category mistake"). Mostow further adds: "[W]hile there is certainly much to criticize in their scientific method . . . their errors are not so fundamental as to put them entirely outside the realm of 'science.'" *Id.* at 417 n.53.

163. *See* Stephen G. Post, *The Echo of Nuremberg: Nazi Data and Ethics*, J. MED. ETHICS 42, 42 (1991) (noting the abundance of literature relying on the data); *see also* Kristine Moe, *Should the Nazi Research Data Be Cited?*, 14 HASTINGS CENTER REP. 5, 6 (1984) (reporting that Nazi data are included in several citations in articles appearing in the *Journal of the American Medical Association* and the *Annual Review of Physiology*).

164. Arthur Caplan, *The Meaning of the Holocaust for Bioethics*, 19 HASTINGS CENTER REP. 2, 3 (1989).

165. *See* Barry Siegel, *Can Evil Beget Good? Nazi Data: A Dilemma for Science*, L.A. TIMES, Oct. 30, 1988, at 1 (relaying the scientist's view that the data collected from Nazi experiments could benefit people today).

166. *See* David Bogod, *The Nazi Hypothermia Experiments: Forbidden Data?*, 59 ANAESTHESIA 1155, 1155 (2004) (describing the research conducted by the Nazi doctors).

167. *See* Baruch C. Cohen, *The Ethics of Using Medical Data from Nazi Experiments*, JEWISH LAW ARTICLES, http://www.jlaw.com/Articles/NaziMedEx.html (last visited Oct. 15, 2007) (illustrating the pain the prisoners experienced during the experimentation) (on file with the Washington and Lee Law Review).

168. *See id.* (describing the results of Nazi research in this area).

New England Journal of Medicine, however, the *Journal*'s Editor-in-Chief, Arnold Relman, publicly refused to publish Pozos's article.[169]

The issue made national headlines again a year later when the Environmental Protection Agency (EPA) was promulgating air quality regulations for "phosgene," a toxic gas used in the manufacture of pesticides and plastic across the United States.[170] The gas was also believed to be in the arsenal of Iraqi leader Saddam Hussein.[171] The EPA scientists used animal experiments to predict the effect of the gas on humans, because there was no human data available to them.[172] Todd Thorslund, Vice President of ICF-Clement, an environmental consulting firm that was assisting the EPA, suggested using the Nazi data from their experiments on fifty-two French prisoners who were subjected to the toxic gas in an effort to develop a means of protecting the German soldiers against chemical weapons.[173] However, after receiving a letter signed by twenty-two EPA scientists protesting the use of Nazi data, the EPA Chief Administrator, Lee Thomas, decided that the agency should not even review the records from the Nazi experiment—even if the Nazi phosgene data could potentially have saved lives of residents living near manufacturing plants or American troops stationed in the Persian Gulf.[174]

On one hand, there are those like Arnold Relman and Lee Thomas who believe that "[w]hen the medical profession uses Nazi data, [as] when a court of law uses tainted evidence, legitimacy is indirectly conferred upon the manner by which the data/evidence was acquired."[175] Analogizing the use of Nazi data to the inadmissibility of unconstitutionally obtained evidence, Harvard Medical School ethicist Henry Beecher stated, "this loss it seems, would be less important than the far reaching moral loss to medicine if the data . . . were to be published."[176]

Yet, there are numerous exceptions to the American exclusionary rule,[177] and other medical researchers say they would like to use the Nazi data, partly to

---

169. *See id.* (noting Arnold Relman's opposition).

170. *See* Marjorie Sun, *EPA Bars Use of Nazi Data*, SCI. MAG., Apr. 1, 1988, at 21, 21 (describing the EPA regulations).

171. JUDITH MILLER & LAURIE MYLROIE, SADDAM HUSSEIN AND THE CRISIS IN THE GULF 163 (1990) (noting reports that Iraq produced phosgene as part of its chemical weapons program).

172. *See* Sun, *supra* note 170, at 21 (describing the EPA's reliance on animal-testing data).

173. *See id.* (noting the potential relevance of the Nazi data to the EPA's testing).

174. *See id.* (describing the ethical dilemma facing the EPA).

175. Cohen, *supra* note 167.

176. Henry K. Beecher, *Ethics & Clinical Research*, 274 NEW ENG. J. MED. 1354, 1360 (1966).

177. The U.S. Supreme Court has "carved out exceptions to the exclusionary rule . . . where the introduction of reliable and probative evidence would significantly further the

"salvage some good from the ashes."[178] Lawyer and medical ethicist Baruch Cohen explains:

> Although the data is morally tainted and soaked with the blood of its victims, one cannot escape confronting the dreaded possibility that perhaps the [Nazi] doctors . . . actually learned something that today could help save lives or benefit society . . . . Absolute censorship of the Nazi data does not seem proper, especially when the secrets of saving lives may lie solely in its contents . . . . When the value of the Nazi data is of great value to humanity, then the morally appropriate policy would be to utilize the data, while explicitly condemning the atrocities.[179]

In considering Cohen's proposition, one should view the issue of Nazi medical research within the broader context of other uses of unethically obtained medical data for the public good. For example, even as the Nuremberg Tribunal was passing judgment on the Nazi doctors, a number of their colleagues were being recruited by the U.S. military via "Project Paperclip," through which the United States exploited the knowledge obtained through Nazi medical experiments by bringing these scientists to the United States to continue their work for government and private science facilities.[180] The Nazis were not the only ones conducting unethical medical experiments during the war.[181] The Japanese conducted biological warfare experiments on Allied prisoners at a site called Unit 731.[182] Rather than prosecute these

---

truth-seeking function of a criminal trial and the likelihood that admissibility of such evidence would encourage police misconduct is but a 'speculative possibility.'" James v. Illinois, 493 U.S. 307, 311 (1990). These include the impeachment exception, which allows the prosecution to introduce illegally obtained evidence to impeach a defendant's own testimony; the independent source doctrine, which allows the introduction of material seized in two different ways, one of which is illegal and one of which is legal; the inevitable discovery doctrine, which allows illegally obtained information into evidence when the prosecution can show that the information would have been discovered legally had it not first been obtained illegally; and the good faith exception, which allows the introduction of evidence that was seized based on a good faith belief that proper authority was granted for the search and seizure. *See* WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY KING, CRIMINAL PROCEDURE 107–13, 511–15, 531–35 (4th ed. 2004).

178. Ziporyn, *supra* note 162, at 791.

179. Cohen, *supra* note 167.

180. *See* LINDA HUNT, SECRET AGENDA: THE UNITED STATES GOVERNMENT, NAZI SCIENTISTS, AND PROJECT PAPERCLIP, 1945 TO 1990, at 78–93 (1991) (noting how the U.S. military valued these scientists' research); *see also* TOM BOWER, THE PAPERCLIP CONSPIRACY: THE HUNT FOR NAZI SCIENTISTS 124–32 (1987) (noting the U.S. military's criteria for admitting German scientists into the country).

181. *See* April A. Oliver, *Human Experimentation at the Brink of Life*, 9 GEO. MASON L. REV. 1177, 1185 (2001) (noting that Germany was not alone in conducting human experiments during World War II).

182. *Id.*

medical researchers at the post-war Military Commissions in Tokyo, the U.S. government granted them immunity in return for the data derived from their experiments.[183] At the same time, the Australian Armed Forces Command conducted mustard gas and phosgene experiments on Australian soldiers to develop effective protective gear for gas warfare.[184] Meanwhile, British physicians deliberately infected Jewish refugees with malaria while interned in refugee camps in Australia in an effort to create a vaccine to protect British soldiers fighting on the Pacific front.[185]

Nor has the use of unethically obtained medical data been confined solely to wartime. For example, from 1932 through 1972, physicians of the U.S. Public Health Service conducted the so-called "Tuskegee Syphilis Study," in Macon County, Alabama, involving 399 African Americans afflicted with syphilis.[186] Though the subjects thought they were under the medical care of the U.S. Public Health Service, they were not informed of the nature of their illness, that they were participating in an experiment to study the natural history of untreated syphilis, or that a potent treatment—penicillin—was available.[187] Similarly, in the late 1940s and early 1950s, the United States tested new polio vaccines on institutionalized mentally retarded children.[188] And in 1994, the U.S. government acknowledged that during the Cold War, over 23,000 Americans, including prisoners and mental patients, had been involved in at least 1,400 different studies involving nonconsensual radiation experimentation.[189] The objective of these experiments was to measure the biological effects of radioactive materials, including plutonium, whether injected, ingested, or inhaled, in order to develop ways to survive nuclear war.[190] In the present decade, U.S. physicians have tested experimental AIDS

183. *See id.* (describing how some Japanese doctors received immunity in exchange for their research data).

184. *See id.* (noting the Allies' experimentation on human soldiers).

185. *See* Elli Wohlgelernter, *Report: Australian Army Experimented on Jews in WWII*, JERUSALEM POST, Apr. 20, 1999, at 1 (reporting that Jewish refugees were infected with malaria by Allied soldiers).

186. *See* Jay Katz, *Human Experimentation and Human Rights*, 38 ST. LOUIS U. L.J. 7, 8 n.3 (1993) (describing the study).

187. *Id.*

188. Clifton R. Gray, *"The Greater Good" . . . At What Cost?: How Nontherapeutic Scientific Studies Can Now Create Viable Negligence Claims in Maryland After* Grimes v. Kennedy Krieger Institute, Inc., 32 U. BALT. L. REV. 73, 78 (2002).

189. Leonard W. Schroeter, *Human Experimentation, the Hanford Nuclear Site, and Judgment at Nuremberg*, 31 GONZ. L. REV. 147, 151 (1995).

190. *Id.* at 157.

vaccines on "unwilling and uninformed patients" in Africa.[191] Despite criticism that these trials violate the Nuremberg Code, the general scientific community views AIDS vaccine research as the most likely hope for stemming the global epidemic.[192]

All of these cases are deplorable, and in using the data from these unethical medical studies, the scientific community should provide more than a simple disclaimer. Medical ethicists propose that such tainted data should only be used "in circumstances where the scientific validity is clear and where there is no alternative source of information."[193] Further, "the capacity to save lives must be evident," and "citations to the data must be accompanied with the author's condemnation of the data as a lesson in horror and as a moral aberration in medical science."[194] These criteria would seem to be equally useful in the context of the admission of torture evidence in cases against leaders accused of crimes against humanity under an expanded interpretation of Article 15 of the Torture Convention.

IV. Conclusion

Using the evidentiary challenge facing the Cambodia Tribunal as a case study, this Article has established that there are several compelling arguments that could be made to justify the admission of statements obtained by torture or cruel, inhuman, and degrading treatment under certain circumstances that go beyond the literal text of the narrow exception to the exclusionary rule contained in Article 15 of the Torture Convention. The aim of this Article, however, was not to weaken the strong protections provided by the Torture Convention and its exclusionary rule, but instead to strengthen the Torture Convention itself. If Article 15 of the Convention is used as a bar to the successful prosecution of senior Khmer Rouge leaders, the purpose of the Torture Convention will not be served, and respect for the Convention and the Cambodia Tribunal will be eroded.

The argument against judicial recognition of a broader reading of the exception to the Torture Convention's exclusionary rule rests on three

191. Benjamin Mason Meier, *International Criminal Prosecution of Physicians: A Critique of Professors Annas and Grodin's Proposed International Medical Tribunal*, 30 AM J.L. & MED. 419, 439 n.79 (2004).

192. *See* Joanne Roman, Note, *U.S. Medical Research in the Developing World: Ignoring Nuremberg*, 11 CORNELL J.L. & PUB. POL'Y 441, 443 (2002) (noting support for this research in the scientific community).

193. Moe, *supra* note 163, at 7.

194. Cohen, *supra* note 167.

assumptions: First, exclusion of evidence obtained by torture is at all times necessary to render torture unrewarding; second, exclusion is always warranted because evidence procured through torture is inherently unreliable; and third, absolute exclusion is essential to protect the integrity of the judicial proceedings. The Tuol Sleng evidence at issue in this case study provides a severe test of those assumptions. Rather than undermine the deterrent function of the torture evidence exclusionary rule, admission of the Tuol Sleng biographical statements in cases against the leaders of the Khmer Rouge regime would provide an incentive for regimes to forego torture because regime leaders will know that evidence derived through the use of torture can be used against them. While confessions and other incriminating evidence obtained by torture are often unreliable, the thousands of biographical statements from the Tuol Sleng interrogations provided a great deal of corroboration with respect to information about the Khmer Rouge command structure and hierarchy, suggesting a high degree of reliability for that specific use. Finally, while some have argued that "the admission of evidence obtained through the violation of human rights should be *per se* considered damaging to the integrity of the proceedings,"[195] this case study demonstrates why it is more appropriate to adopt a more flexible approach, taking into account such factors as the noninvolvement of the Tribunal's personnel in the acts of ill-treatment, the fact that the evidence would be used against the regime leaders responsible for torture, the fact that the evidence is seen as crucial to successful prosecution, and the fact that the case involves charges of the gravest crimes known to humankind being tried by a tribunal established by the United Nations.

On the other hand, this Article recognizes the wisdom in the adage "great cases, like hard cases, make bad law."[196] There is clearly danger inherent in judicial recognition of any of the three exceptions to the torture evidence exclusionary rule that are examined in this Article—the exception for preliminary biographical information, the exception for evidence obtained by third-parties, and the exception for evidence to be used against the leaders responsible for the torture. To paraphrase Justice Robert Jackson's dissent in *Korematsu v. United States*, once judicial approval is given to an exception to a fundamental principle of human rights, it "lies about like a loaded weapon

195. SALVATORE ZAPPALÁ, HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS 81 (2003).

196. U.S. Supreme Court Justice Oliver Wendell Holmes, Jr. wrote: "Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment." N. Sec. Co. v. United States, 193 U.S. 197, 400–01 (1904) (Holmes, J., dissenting).

ready for the hand of any authority" that can show an urgent need and bring forward a plausible claim.[197] In particular, it is likely that if the Cambodia Tribunal applies one or more of these exceptions in justifying admission of the Tuol Sleng evidence, the precedent will subsequently be cited with respect to the admissibility of torture evidence in terrorism cases before military commissions and national courts across the globe.

To avoid pernicious use of these exceptions and to ensure that they are not applied in a manner that will undermine the purposes of the Torture Convention in future cases, four criteria should be satisfied before a court can consider evidence that was obtained by torture or cruel, inhuman, or degrading methods of interrogation. First, evidence obtained by torture or cruel, inhuman, and degrading means must never be used in a trial where the victim of such abuse is the defendant. Second, such evidence must never be used where the prosecuting authorities were directly or indirectly involved in the acts of ill-treatment. Third, evidence obtained through the use of such ill-treatment must not be considered unless it meets a high level of corroboration. Fourth, evidence derived from torture or cruel, inhuman, or degrading treatment should not be admitted if, with reasonable efforts, the prosecution could obtain untainted evidence that would be effective in establishing criminal liability.

The first criterion, reflecting concerns about improper compulsion, recognizes that use of a defendant's confession which is extracted by torture or cruel, inhuman, or degrading treatment, would violate the defendant's right to a fair trial.[198] In contrast, the Tuol Sleng evidence is sought for use not against the victims of the torture but rather against the leaders of the regime that committed the torture.

The second criterion is based on the international silver platter doctrine—a doctrine which may be appropriate in cases involving the gravest crimes known to mankind before international war crimes tribunals such as the Cambodia Tribunal. This criterion recognizes that the exclusion of torture evidence will

197. Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting). Two years later, Justice Jackson served as Chief Prosecutor at the Nuremberg Tribunal. WILLIAM H. REHNQUIST, THE SUPREME COURT 179–81 (2001).

198. *See, e.g.*, Magee v. United Kingdom, 2000-IV Eur. Ct. H.R. 159, 175–76 (finding that the defendant who confessed during a forty-eight hour interrogation "should have been given access to a solicitor at the initial stages of the interrogation as a counter weight to the intimidating atmosphere specifically devised to sap his will and make him confess to his interrogators"); Montgomery v. H.M. Advocate, [2003] 1 A.C. 641 (P.C.) (appeal taken from High Court of Justiciary) (noting, in an opinion by Lord Hoffman, that "an accused who is convicted on evidence obtained from him by torture has not had a fair trial"); *see also* Brown v. Mississippi, 297 U.S. 278, 286 (1936) (holding that confessions procured by means "revolting to the sense of justice" could not be used to secure a conviction).

not have a deterrent effect when the prosecuting authorities, themselves, were in no way involved in the acts of torture. Conversely, it recognizes that when there is involvement of the prosecuting authorities, admission of the evidence would render the court an accomplice in the torture and defile the judicial process.

The third criterion addresses one of the central concerns about the use of evidence derived from torture, namely the inherent unreliability of such evidence. In general, evidence obtained through torture is disdained, not only because of the immorality of using torture, but also because of the fact that an individual undergoing torture will answer in whatever manner the torturer wants.[199] Thus, evidence obtained from the use of torture is often factually suspect. For this reason, evidence derived from torture must never be used unless there are strong indicia of its reliability, such as the extensive corroboration that exists in the case of the Tuol Sleng biographical statements. Even then, the court should explicitly give less weight to torture-induced statements than other types of evidence.

The fourth criterion recognizes that for moral reasons evidence obtained from torture must be used only as a last resort, when it is critical to proving criminal liability and there is no untainted evidence reasonably available that would serve the same purpose. Since there is no international version of the "fruit of the poisonous tree" doctrine,[200] however, the investigative judges and prosecutors may use the torture evidence to lead to other evidence that will establish the same facts, which, if available, should be used instead of the torture evidence.

Finally, drawing from the debate concerning citations to unethically obtained medical data, if a tribunal or court were to admit evidence in a case that meets these criteria, it should specifically acknowledge that the evidence was obtained through torture or cruel, inhuman, or degrading treatment, and would ordinarily have been excluded because of concerns about reliability, deterrence, and defiling the administration of justice. The Cambodia Tribunal is poised at the cutting edge of international criminal law. By applying this

---

199. *See* A & Others v. Sec'y of State for the Home Dep't [2005] UKHL 71, [2006] 2 A.C. 221, ¶ 147 (opinion of Lord Carswell) (appeal taken from E.W.C.A.) (U.K.), *available at* http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd051208/aand.pdf (last visited Jan. 25, 2008) (relating the story of Senator John McCain's experience as a POW in Vietnam). When McCain was asked during torture to provide the names of the members of his flight squadron, he instead listed the offensive line of the Green Bay Packers football team, "knowing that providing them false information was sufficient to suspend the abuse." *Id.* (citing NEWSWEEK, Nov. 21, 2005, at 50).

200. *Id.* ¶ 162 (opinion of Lord Brown) (noting that the exclusionary rule of the Torture Convention "says nothing whatever about the fruits of the poisoned tree").

four-part test, and by acknowledging the tainted provenance of the evidence, the Cambodia Tribunal can simultaneously provide justice for the people of Cambodia and fulfill the promise of the Torture Convention.