

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

**FILING DETAILS**

**Case No:** 002/19-09-2007-ECCC/TC  
**Filing Party:** Nuon Chea Defence Team  
**Filed To:** Trial Chamber  
**Original Language:** English  
**Date of Document:** 2 May 2017



**CLASSIFICATION**

**Classification Suggested by the Filing Party:** CONFIDENTIAL  
**Classification of the Trial Chamber:** សម្ងាត់/Confidential  
**Classification Status:**  
**Review of Interim Classification:** សាធារណៈ/Public  
**Records Officer Name:**  
**Signature:**

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**NUON CHEA'S CLOSING BRIEF IN CASE 002/02**

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**Filed By**

**Nuon Chea Defence Team:**  
SON Arun  
Victor KOPPE  
LIV Sovanna  
Doreen CHEN  
PRUM Phalla  
Xiaoyang NIE  
Marina HAKKOU  
Léa KULINOWSKI  
DY Socheata

**Distribution**

**Co-Lawyers for Khieu Samphân:**  
KONG Sam Onn  
Anta GUISSÉ  
  
**Co-Prosecutors:**  
CHEA Leang  
Nicholas KOUMJIAN  
  
**Co-Lawyers for the Civil Parties:**  
PICH Ang  
Marie GUIRAUD

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The Co-Lawyers for Nuon Chea (the ‘Defence’) hereby submit Nuon Chea’s closing submissions in Case 002/02 (the ‘Brief’):<sup>1</sup>

## CHAPTER 1. INTRODUCTION

1. Nuon Chea’s case is best summarised and introduced in his own words. In June 2006, when the Tribunal was setting up and his arrest was imminent, he told a DC-Cam-sponsored researcher that:

I think the tribunal should be used wisely to serve the benefits of my people and my country. [...] As some people do not see that there was foreign involvement in the conflict, I have a role to tell them the truth about what happened. I admitted my mistake of being unable to control my lower comrades at that time.<sup>2</sup>

2. Nuon Chea reiterated these wishes and sense of moral responsibility over nine years later at the Supreme Court Chamber’s Case 002/01 appeal hearings on 17 November 2015:

I thought that this process, if done right, could allow Cambodia as an innocent, justice-loving nation to come together and meaningfully discuss what happened during the Democratic Kampuchea period. It could be our chance – our only chance to learn the truth from me and from all those who lived through the period, before we die and take our memories and experiences to the grave forever.

I have long recognized that some of my fellow Cambodians suffered during the Democratic Kampuchea period. As I have said repeatedly, **I am remorseful for their suffering and I accept moral responsibility for it. I have engaged with this tribunal because I believed that I have a responsibility to the Cambodian people to [help] them learn the truth about what really happened in Democratic Kampuchea [and] to explain to them as the surviving leader of the Communist Party of Kampuchea, the reasons our Party undertook certain actions and what the results were.** And I believe that this is what most Cambodians want from this [t]rial as well.

However, from day one, it was my strong impression that this tribunal was not at all interested in exploring the truth. Instead, it seems to operate as though its mission was simply to endorse the instructions of a handful of officials in power and tell a tale approved by the government before the tribunal was established. And I was right.<sup>3</sup>

3. Nuon Chea’s assessment is equally, if not more, applicable to Case 002/02. Throughout Case 002/02, the Trial Chamber has somehow managed to even deepen its already blatant disinterest in the truth. At every turn, its proceedings have blindly regurgitated the dominant narrative promoted by Vietnam, the Cambodian government and a handful of Anglo-French

<sup>1</sup> See E421, Deadlines for Case 002/02 Final Stages, para. 5; E449/1, Chamber’s Memo on Case 002/02 Closing Briefs/Statements, paras 8-10; E457/6, Chamber’s Memo on Request to Postpone Closing Briefs and Statements, para. 15.

<sup>2</sup> E3/108, Notes of Interview of Nuon Chea and Khieu Samphân, ERN 00000933.

<sup>3</sup> F1/4.1, Appeal Hearings, T. 17 Nov 2015, p. 9, ln. 21 to p. 10, ln. 18.

books, films, and exhibitions memorialising the Democratic Kampuchea ('DK') period. That historically inaccurate, often plainly false and oversimplified narrative presents DK as a monstrous regime sadistically intent on harming its people. The Defence refers to it in this Brief as the "Manichean narrative" – *i.e.*, a narrative that portrays everything in a simplistic black and white duality of "Good versus Evil". In reality, as explained in this Brief, the DK was led by a widely-recognised government that implemented inherently legitimate, lawful policies in response to the continual state of emergency in the DK period. This state of emergency was borne out of both a combination of the unparalleled existential threat posed by Vietnam and its internal collaborators within the Communist Party of Kampuchea ('CPK'), and the dire conditions Cambodia faced when the CPK assumed power owing to the devastating impact of relentless US bombings and years of bloody civil war.

4. The Chamber's disinterest in the truth is symptomatic of a Tribunal-wide pattern of conduct from the very start of Nuon Chea's case nearly 10 years ago. This pattern first emerged on 10 January 2008, when the Co-Investigating Judges shockingly notified Nuon Chea that unlike any other international tribunal or Cambodian court, his lawyers were forbidden from carrying out their own investigation and were simultaneously excluded from the Tribunal's investigation.<sup>4</sup> Since then, the pattern has been pervasive. It was evidenced most recently on the very last day of the evidentiary proceedings in Case 002/02, by the Trial Chamber's decision to prohibit the Defence from relaying important new information regarding the Chamber's decisions on the Defence's key witnesses,<sup>5</sup> a prohibition discussed further in Chapter 1-B.

5. This pattern of conduct has been addressed in extensive Defence filings and submissions over the past decade expounding at length on the Tribunal's deep institutional flaws and the most egregious ways in which it has disregarded the truth and violated Nuon Chea's right to a fair trial.<sup>6</sup> The Defence's general position is ultimately neatly encapsulated by the International

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<sup>4</sup> **A110/I**, CIJ Letter on Investigation Modalities, p. 2.

<sup>5</sup> See Initial Defence Email Request to Make Short Oral Submissions; Trial Chamber Email Response Requesting Clarification on Nature of Defence Submissions; Defence Email Providing Clarification on the Nature of Their Request; Email of Trial Chamber Decision on Defence Request for Oral Submissions.

<sup>6</sup> See *e.g.* **E54**, Application for Disqualification of Trial Chamber Judges; **E88**, First Consolidated Request for Additional Investigations; **E146.1**, Michiel Pestman, Response to OCP Opening Statement; **E234/2**, Joinder to Ieng Sary's Request for Clarification on Pre-Trial Irregularities; **E189/3/1/1**, Appeal Against Trial Chamber's Refusal to Investigate Evidence of Political Interference; **E295/6/3**, Nuon Chea's Case 002/01 Closing Brief, Parts I, II-B; **E1/232.1**, Case 002/01 Closing Arguments (Nuon Chea), T. 22 Oct 2013, p. 2, ln. 2 to p. 61, ln. 5; **E1/240.1**, Case 002/02 Initial Hearing (Nuon Chea), T. 30 Jul 2014, p. 28, ln. 28 to p. 30, ln. 15; **E314/6**, Nuon Chea's Second Trial Chamber Disqualification Motion; **E1/242.1**, Case 002/02 Opening Statements (Nuon Chea), T. 17 Oct 2014, p. 64, ln. 11 to p. 73, ln. 18; **F16**, Nuon Chea's Appeal Brief, Parts I-VI; **E336**, Nuon Chea's Request Regarding Trial Practices Concerning Civil Parties; **E319/16**, Nuon Chea's Grave CONCERN for Ongoing Disclosure of Case 003 and 004 Documents; **E366/2**, Nuon Chea's Response to OCP Request for Further

Co-Lawyer's remarks to the Supreme Court Chamber on 23 November 2015 – which the Defence maintains – that the Tribunal is a complete farce.<sup>7</sup>

6. Given its overall assessment that the Tribunal is a profoundly broken and close-minded institution, and the Defence's lengthy (and generally ignored) past submissions in this regard, the Defence considers it unnecessary to revisit in detail each specific aspect of that assessment. However, in this Introduction and more so in Chapter 2, the Defence reiterates two selected critiques it has levelled at this Tribunal: (1) that the Tribunal is blinded by the Manichean narrative; and (2) that this narrative has fundamentally impacted on the conduct of the Case 002/02 trial. The Defence undertakes this re-examination due to three key changes in circumstances that occurred during Case 002/02 which have rewritten the 'rules of the game'. Thus, before offering its critique, the Defence outlines these three new circumstances below.

## **I. NEW CIRCUMSTANCES REWRITING THE 'RULES OF THE GAME'**

### **A. INDEPENDENT SOURCES HAVE HEAVILY CRITICISED THE TRIAL CHAMBER**

7. The first change of circumstances occurred from early November 2015, two weeks before the substantive Case 002/01 appeal hearings, when Stanford University, together with two other academic institutions and a long-time Tribunal trial monitoring body,<sup>8</sup> issued a detailed assessment of the Case 002/01 Trial Judgement (the 'Stanford Report'). The report heavily criticised the Trial Chamber's approach<sup>9</sup> and concluded that:

Despite hopes that the five-year process of judicial investigation, trial, deliberation, and Judgment-drafting would produce a rigorous and insightful final product, in reality, as this report argues, the Case 002/01 Judgment fails to deliver the most fundamental output one expects from a criminal trial – systemic application of the elements of crime to a well-documented body of factual findings. [...]

[T]he Trial Chamber's poor handling of a number of novel and complex legal issues arising out of Case 002 created procedural confusion that permeated many aspects of the trial. [...] [The report finds] a great deal of cause for concern in the Court's analysis of the facts and application of the law, including the substantive legal analysis and factual findings underlying the Court's liability assessment. [...]

[W]e argue that the Case 002/01 Judgment is inadequate in its failure to meet expected standards for a final written reasoned decision. [...] **T]he Judgment in Case 002/01 offers a poorly-organized, ill-documented, and meandering narrative in lieu of**

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Witnesses on Cham Segment; F30/14/1, Victor Koppe Response to SCC Request for Explanation of Appeal Hearing Absence; E395/2, Nuon Chea's Rebellion Submissions, paras 43-50.

<sup>7</sup> F30/14/1, Victor Koppe Response to SCC Request for Explanation of Appeal Hearing Absence, para. 10.

<sup>8</sup> The East West Center, the Handa Center, and the Asian International Justice Initiative, respectively.

<sup>9</sup> F30/11.1.3, Cohen et al., Critical Analysis of Case 002/01.

**clearly structured legal writing, based upon a thorough and balanced analysis of the legal and factual issues in dispute.** What distinguishes this Judgment from the standard practices of other tribunals is the lack of a coherent structure for organizing the evidence and analysis in a series of factual findings, based upon the elements in regard to each charge against the Accused. Also missing is a systematic weighing of that evidence based upon clearly articulated legal standards and a discussion of relative credibility. **In the almost complete absence of such structured analysis, the basis of the factual findings scattered throughout the Judgment remains largely obscure. Narrative format operates to defeat the juristic analysis, which is the core of a well-reasoned opinion. The Judgment repeatedly draws inferences from a factual narrative that assumes rather than justifies the validity of those inferences.** [...] In addition to the lack of systematic and cogent analysis for the factual findings, the application of legal doctrines to the facts also provides cause for concern throughout the Judgment.<sup>10</sup>

8. The Stanford Report's relevance is twofold. First, it extensively critiques the Judgment itself, which was the work of (almost entirely) the same judges as those adjudicating Case 002/02<sup>11</sup> and who the Defence unsuccessfully sought to disqualify due to their appearance of a deep bias against both Accused.<sup>12</sup> Second, the Stanford Report was issued by an institution that is not only independent, reputable, and has monitored several international tribunals for many years, but has a public commitment to "support[ing] and improv[ing] the work of [...] international tribunals"<sup>13</sup> such as this one. The report cannot, therefore, be dismissed as a partisan, hostile effort merely intending to denigrate the Tribunal.

9. The Stanford Report's critiques were to a lesser extent echoed in a February 2016 report from the Open Society Justice Initiative ('OSJI') assessing the Tribunal's performance since its establishment ('OSJI Report').<sup>14</sup> The OSJI Report is more positive about the Tribunal, which is unsurprising since OSJI lobbied for the Tribunal's establishment.<sup>15</sup> Nevertheless, and in keeping with its long history of criticism in this regard,<sup>16</sup> OSJI sounded a warning note on political interference, noting that "it is a mistake to compromise on [...] judicial independence" and that "[i]n many ways, the history of the Khmer Rouge tribunal has been a series of concessions to Hun Sen, currently in his fifth term as Cambodia's prime minister".<sup>17</sup> It further concluded that:

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<sup>10</sup> **F30/11.1.3**, David Cohen *et al.*, *A Well-Reasoned Opinion? Critical Analysis of Case 002/01*, pp. vi, viii (emphases added).

<sup>11</sup> See **E314/6**, Nuon Chea's Second Trial Chamber Disqualification Motion, paras 3-4.

<sup>12</sup> **E314/6**, Nuon Chea's Second Trial Chamber Disqualification Motion.

<sup>13</sup> **F30/11.1.3**, David Cohen *et al.*, *A Well-Reasoned Opinion? Critical Analysis of Case 002/01*, p. 97.

<sup>14</sup> OSJI, *Performance and Perception*.

<sup>15</sup> OSJI, *More to be Done in Khmer Rouge Tribunal*.

<sup>16</sup> See e.g. **E5.1.7**, OSJI, *Political Interference at the ECCC*; see also **E295/6/3**, Nuon Chea's Case 002/01 Closing Brief, para. 86; **F16**, Nuon Chea's Appeal Brief, para. 23.

<sup>17</sup> OSJI, *Performance and Perception*, p. 13.

**the failure of government officials to appear as witnesses in Case 002, demonstrated vividly that those with political power and influence in Cambodia are immune from prosecution—an essential demonstration of impunity.** These factors contribute to a **negative legacy** for the court, in that they reinforce existing cynicism that those with power can easily escape judicial oversight.<sup>18</sup>

10. Taken together, the issuance of these two reports during the Case 002/02 trial constitute the first new circumstance redefining the trial’s ‘rules of the game’, for they put the judges on notice of the structure, factual and legal content which a proper judgement must address. This includes an acknowledgement of the “elephant in the room”: pervasive political interference, and the shadow it casts over Case 002/02.<sup>19</sup>

**B. THE CASE 002/01 APPEALS JUDGEMENT NECESSITATES A RADICALLY DIFFERENT APPROACH TO ADJUDICATING CASE 002/02**

11. The second new circumstance is the issuance of the Case 002/01 Appeals Judgement on 23 November 2016. It has to be acknowledged at the outset that this judgement contains a number of incomprehensible decisions that can only be understood as some form of compromise between the Supreme Court Chamber’s national and international judges, and as a reflection of the political interference against which OSJI has cautioned. Emblematic among these is its decision not to summons National Assembly president Heng Samrin to testify – a witness whose importance to Nuon Chea’s case<sup>20</sup> puts him in a completely different stratosphere to any other witness in Case 002 overall.<sup>21</sup>

12. The Supreme Court Chamber held that summoning Heng Samrin to testify “would have likely prolonged the appeal proceedings” and exceeded its powers given that “evidence should be heard by the Trial Chamber rather than the Supreme Court Chamber”.<sup>22</sup> However, since no available evidence suggests that proceedings would indeed have been prolonged,<sup>23</sup> and since the Supreme Court Chamber not only heard evidence from Defence witnesses but also initiated its own evidence investigation,<sup>24</sup> this justification cannot be taken seriously. Instead, it is simply

<sup>18</sup> OSJI, Performance and Perception, p. 32 (emphases added).

<sup>19</sup> E146.1, Pestman, Response to OCP Opening Statement, ERN 00756662.

<sup>20</sup> On Heng Samrin’s importance in Case 002/02, *see infra*, Chapter 3-VI-A.

<sup>21</sup> F2/10, Nuon Chea’s Request for SCC to Reconsider Summoning Heng Samrin and Robert Lemkin and Admit Lemkin Evidence, para. 40; *see also* E236/5/1/1, Sixth Request for Heng Samrin; E370, Nuon Chea’s East Zone Witnesses Request, paras 18-22, 24-25, 39; E392, Nuon Chea’s Rebellion Leadership Witnesses Request, paras 5, 7, 18-23, 25; E421/1/2, Nuon Chea’s Notice of Silence, paras 5-8.

<sup>22</sup> F36, Case 002/01 Appeals Judgement, para. 38.

<sup>23</sup> *See e.g.* E312, Decision on Case 002/01 Witnesses, Experts and Civil Parties, para. 107.

<sup>24</sup> F2/5, Decision on Appeal Witnesses; F2/4/3, SCC Decision to Open an Investigation.

a pathetic attempt to again ‘pass the buck’ between the chambers of the Tribunal<sup>25</sup> so that the Case 002/01 Appeals Judgement could avoid discussing political interference entirely. As OSJI astutely put it, however:

Given the importance, scope and length of the Case 002 trials, it is hard to understand why the single most requested witness, one that is said to have unique and relevant information, cannot be called. **The failure to do so leaves questions about whether the full and complex story of the inner workings of the Khmer Rouge is being adequately addressed.**<sup>26</sup>

13. OSJI’s comments dovetail neatly with those of ICC Judge Christine van den Wyngaert regarding a similar situation of missing evidence owing to the absence of key witnesses in the *Katanga* case. As she eloquently put it in her minority opinion:

The complete absence of evidence from those who were really at the centres of things at the time inevitably creates the impression that essential information is missing from the record. [...] It is important to consider the significance of so much missing evidence for the standard of proof. Indeed, **one may wonder whether it is at all possible to reach the required threshold when so many questions remain and where it is obvious that having more and better evidence might very well have led to significantly different answers. Conclusions reached on the basis of such incomplete evidence are inherently fragile and uncertain and cannot suffice for the standard of proof beyond reasonable doubt.**<sup>27</sup>

14. The Supreme Court Chamber’s attempt to justify its decision on Heng Samrin as being in the interests of “efficiency” is especially embarrassing given how belated their Judgement was. In fact, the Appeals Judgement was issued only 17 hearing days before the end of the trial hearings in Case 002/02. This was, in other words, after 94% of the Case 002/02 trial hearings. The Appeals Judgement highlighted several serious faults in the Trial Chamber’s general approach to evidence in Case 002/01,<sup>28</sup> which, taken together, demonstrated how flawed the trial proceedings were. Nevertheless, despite this important ruling, the delay in the judgement’s issuance rendered it too late to overhaul the Chamber’s evidentiary procedures. This puts the parties in the odd position of now having to make closing arguments based on the Trial Chamber’s Case 002/01 approach to the evidence – an approach that a superior chamber has revealed as considerably flawed.

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<sup>25</sup> **F2/10**, Nuon Chea’s Request for SCC to Reconsider Summoning Heng Samrin and Robert Lemkin and Admit Lemkin Evidence, para. 44.

<sup>26</sup> Cambodia Daily, Samrin’s Absence Leaves Holes at Tribunal (emphasis added).

<sup>27</sup> *Katanga* Trial Judgement; Dissenting Opinion of Judge Van den Wyngaert, para. 149.

<sup>28</sup> See e.g. **F36**, Case 002/01 Appeals Judgement, paras 263, 269, 349, 430, 447, 550, 879-81, 891; see also *infra* Chapter 2-III, on applicable evidentiary standards.

15. Nevertheless, setting aside its baffling decisions and complications from its belatedness, the Case 002/01 Appeals Judgement is incomparable to the Case 002/01 Trial Judgement, and not only in terms of its willingness to rightfully acquit Nuon Chea for charges in respect of former Khmer Republic soldiers and officials at Tuol Po Chrey. It comes far closer to the standard of proper international criminal judgement set out in the Stanford Report. In doing so, it rewrites wholesale the ‘rules of the game’ in Case 002/02, for it requires the Trial Chamber to adopt a radically different approach to preparing its judgement. It does so in two key ways. First, it recognises that there was “no statutory basis or compelling practical reasons” to shut the Defence out of investigations.<sup>29</sup> This is, as the Defence has said before, the ‘original sin’ – *i.e.*, the ‘root of all evil’ – that has forever limited its ability to marshal evidence that would have dismantled the Manichean narrative.<sup>30</sup> Thus, the Case 002/01 Appeals Judgement’s decision on investigations has a global impact on Nuon Chea’s case since the Manichean narrative is scrutinised in every aspect of that case. Second, and even more dramatically, the judgement completely redefines the evidentiary standards that the Trial Chamber must apply to reach findings beyond reasonable doubt.<sup>31</sup> This decision has a ripple effect that extends into each argument in Nuon Chea’s case, as is made clear throughout this Brief.

**C. THE CHAMBER HAS RULED THAT CASE 002/02 WILL BE NUON CHEA’S LAST TRIAL**

16. The final new circumstance that has redefined the ‘rules of the game’ in Case 002/02 is the Trial Chamber’s recent decision on 27 February 2017 that Case 002/02 will be the last trial against Nuon Chea.<sup>32</sup> This decision rewrites the ‘rules of the game’ as it serves as a wake-up call: this trial is now officially the final real opportunity the Tribunal has to search for the truth. There will be no more trials and no new judges appointed to adjudicate them (whether in Case 002 or, in all likelihood, Cases 003 and 004). Given Nuon Chea’s age; the Tribunal’s constant budgetary woes; and the snail’s pace at which the Supreme Court Chamber operates, it is not even certain that there will be a Case 002/02 appeal judgement. Thus, there are no more chambers to which to ‘pass the buck’ of discussing the broken institutional design of this Tribunal that has led each of its chambers to refuse to summons Heng Samrin and Nuon Chea’s other key witnesses. The trial judgement in Case 002/02 – the largest trial in history since

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<sup>29</sup> F36, Case 002/01 Appeals Judgement, para. 249.

<sup>30</sup> F2/10, Nuon Chea’s Request for SCC to Reconsider Summoning Heng Samrin and Robert Lemkin and Admit Lemkin Evidence, para. 21.

<sup>31</sup> F36, Case 002/01 Appeals Judgement, para. 418.

<sup>32</sup> E439/5, Decision on Reduction of the Scope of Case 002.

Nuremberg and Tokyo – is likely the last major corrective measure the Tribunal can take before its currently dismal legacy as nothing more than “victor’s justice” is set in stone.<sup>33</sup>

## II. NO OPTIMISM IN THE CHAMBER’S PERFORMANCE IN CASE 002/02

### A. THE CHAMBER HAS FREQUENTLY BOWED TO POLITICAL INTERFERENCE

17. However, the Trial Chamber’s performance in Case 002/02 gives no cause for optimism that it is correcting its course; quite the contrary. For instance, on many occasions in Case 002/02, the Chamber has confirmed the enduring power of political interference in Tribunal proceedings. Most notable among these is its last-minute, predictably-split decision not to summons Defence witnesses Heng Samrin, Ouk Bunchhoeun, and others who currently occupy top positions in the Cambodian government and military.<sup>34</sup> As this Brief shows, these witnesses could have offered unique insight into Nuon Chea’s case due to their ranking positions in the CPK and RAK and roles as leading collaborators of Vietnam.<sup>35</sup> Two further, flagrant examples of politically-motivated decisions are the Chamber’s unanimous decision not to summons Prime Minister Hun Sen to testify;<sup>36</sup> and to spuriously refuse to admit into evidence a Human Rights Watch report, *30 Years of Hun Sen*, describing Hun Sen’s role as RAK military commander and his dubious part in crushing the Cham rebellion in 1975, which directly relates to the allegations in Case 002/02 of a genocide against the Cham.<sup>37</sup>

### B. THE CHAMBER REMAINS AS DISINTERESTED IN THE TRUTH AND COMMITTED TO THE MANICHEAN NARRATIVE AS EVER

18. Moreover, the Chamber appears to remain entirely disinterested in the truth. The Defence had already predicted this in its February 2013 submissions on whether to sever Case 002 at all,<sup>38</sup> and in its 29 September 2014 motion to disqualify four judges from adjudicating Case 002/02.<sup>39</sup> The Defence’s motion cited reasons for disqualification that included the

<sup>33</sup> Nuon Chea himself referred to the Tribunal as such: *see* E3/108, Notes of Interview of Nuon Chea and Khieu Samphân, ERN 00000934; *see also* E1/232.1, Case 002/01 Closing Arguments (Nuon Chea), T. 22 Oct 2013, p. 55, ln. 3 to p. 58, ln. 4; E1/237.1, Case 002/01 Closing Arguments (Nuon Chea), T. 31 Oct 2013, p. 17, ln. 7.

<sup>34</sup> E443, Dispositive Decision on Nuon Chea’s Additional Witnesses; E454, Final Witnesses Decision.

<sup>35</sup> *See infra*, Chapter 3-III-C-2, Chapter 3-IV-A-1, on probative value of Heng Samrin’s evidence; Chapter 3-VI-B-1, on probative value of Ouk Bunchhoeun’s evidence.

<sup>36</sup> E370/4, Reasoned Decision on Nuon Chea’s East Zone Witnesses Request; E443, Dispositive Decision on Nuon Chea’s Additional Witnesses, para. 1.

<sup>37</sup> E347/1, First Decision on HRW Report; on the refusal to admit key evidence, *see infra*, Chapter 2-II-B-3-(c), Chapter 9, and Annex 1; on the Cham rebellions in 1975, *see infra*, Chapter 5-III, E347/2, Request to Admit HRW Report, paras 20-23, and E347.3, Human Rights Watch, *30 Years of Hun Sen*, ERN 01086022-28.

<sup>38</sup> E1/172.1, Severance Hearings, T. 20 Feb 2013, p. 7, ln. 21 to p. 8, ln. 6.

<sup>39</sup> The judges were Nil Nonn, Ya Sokhan, Jean-Marc Lavergne, and You Ottara: *see* E314/6, Nuon Chea’s Second Trial Chamber Disqualification Motion, paras 1-2, 5-6, 138.



judges' lack of judicial independence and impartiality and appearance of bias following the Case 002/01 Trial Judgement. In Judge Lavergne's case, the Defence also highlighted his lack of judicial integrity and his cowardly decision to dissent from the majority decision not to summons Heng Samrin and yet to obscure that dissent in a separate decision from the Case 002/01 Trial Judgement which left the determination of an appropriate remedy to be decided by the Supreme Court Chamber.<sup>40</sup> Although the Defence's disqualification motion was rejected, Judge Rowan Downing delivered a dissenting opinion just before he left the Tribunal agreeing that the four judges should indeed have been disqualified.<sup>41</sup>

19. Furthermore, the Defence's concerns as to the four judges' participation in Case 002/02 have been vindicated on every single day of the trial, not only through Judge Lavergne's predictable bias and closedmindedness, but also throughout that of international Judge Claudia Fenz. Indeed, with each passing day, it has become increasingly apparent that it is the entire Trial Chamber bench that is committed to the belief that the Accused are morally repugnant and deserving of the harshest punishment.<sup>42</sup> As a result, the Case 002/02 trial is littered with far too many incomprehensible Chamber decisions, in addition to the politically-motivated ones noted above, than can be named.

20. One prime example was the Chamber's September 2016 decision – for which it quietly issued reasons on 28 December 2016 – to refuse to admit interview transcripts produced by *Enemies of the People* filmmakers Robert Lemkin and Thet Sambath, a film on which it heavily relied as inculpatory evidence in its Case 002/01 Trial Judgement.<sup>43</sup> As discussed in Chapter 2 below, the Chamber's patently nonsensical refusal to admit this evidence and summons Robert Lemkin, despite the Defence's continual protestations that this evidence is pivotal to its case,<sup>44</sup> amounts to a deliberate and shameful attempt to withhold this evidence from public scrutiny,<sup>45</sup> not to mention to flagrantly deny Nuon Chea's right to obtain evidence for him on the same basis as evidence against him and to ultimately present a defence.<sup>46</sup> The Chamber also refused the Defence's request to admit three letters and a video and an audio file in which the late King Father Norodom Sihanouk had spoken emphatically about the existential threat that the 'Yuon' (*i.e.*, Vietnam) has historically posed to Cambodia. This decision was a clear bid not to upset

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<sup>40</sup> E314/6, Nuon Chea's Second Trial Chamber Disqualification Motion, paras 130-133.

<sup>41</sup> E314/12/1, Downing's Dissenting Opinion on Applications for Disqualification, *see particularly* para. 40.

<sup>42</sup> *See also* the Defence's assessment of the Chamber in Case 002/01: F16, Nuon Chea's Appeal Brief, para. 41.

<sup>43</sup> E313, Case 002/01 Trial Judgement, paras 313, 503, 667-68, 672, 673, 675-77, 680, 681, 824, 938.

<sup>44</sup> *See infra*, Chapter 2-II-B-3-(c) and Chapter 3-II-B-1.

<sup>45</sup> E1/478.1, Chhorn Vorn (2-TCW-1036), T. 21 Sep 2016, p. 99, lns 22-23, p. 100, lns 3-5.

<sup>46</sup> *See* ICCPR Art. 14(3)(c), ECCC Establishment Law Art. 35 *new* (e).

the new mythologies that have been carefully constructed in this country around the Late King Father, despite the fact that the contents of that evidence, and Sihanouk's views on Vietnam, are uncontroversial and common knowledge among ordinary Cambodians.

21. Finally, the Chamber's complete and utter disinterest in the truth, both legally and historically, was driven home yet again on the last day of trial hearings in Case 002/02, when a critical incident unfolded out of sight of the public. As briefly noted above, in a series of emails between the Defence and the Chamber, the Defence was prohibited from making what would have been only 10 minutes of oral submissions during that hearing. These submissions would have relayed important new information relevant to the Chamber's decisions on the Defence's key witnesses. However, the Defence request was shut down on the basis that "the parties will have the opportunity to present to the public any information that they consider relevant and/or important during closing statements".<sup>47</sup>

22. Had the Chamber been more interested in the truth than in stage-managing its hearings, it and the public would have learned that the new information in question was an audio file which the Defence is not at liberty at this stage to share and which it received confidentially shortly before the end of evidentiary proceedings. This file records an interview of Heng Samrin by Thet Sambath and Robert Lemkin on 17 October 2008, a year after Nuon Chea's arrest and less than a year before Heng Samrin was summonsed to appear as a witness by International Co-Investigating Judge Marcel Lemonde.

23. In the interview, Heng Samrin speaks, *inter alia*, of joining the revolution; of liberating Phnom Penh in 1975; of his time as commander of an East Zone Division; and of the East Zone rebellion he led with other collaborators of Vietnam. He also speaks sympathetically about Nuon Chea. Consistent with Nuon Chea's own account of his relationship with Heng Samrin,<sup>48</sup> Heng Samrin said that he was "close to Nuon Chea"<sup>49</sup> and that they "used to live, walk and sleep together".<sup>50</sup> He describes Nuon Chea as "good, fair, polite and loyal"<sup>51</sup> and said that "Khieu Samphân was also good [...] but he was powerless".<sup>52</sup> Finally, Heng Samrin nevertheless states that the fact "[t]hat the Khmer Rouge tribunal prosecuted him is correct, I

<sup>47</sup> Email of Trial Chamber Decision on Defence Request for Oral Submissions.

<sup>48</sup> **E1/36.1**, Nuon Chea, T. 31 Jan 2012, p. 46, lns 19-23; **E236/5/1/1**, Sixth Request for Heng Samrin, para. 6.

<sup>49</sup> "ប៉ុន្តែជិតស្និទ្ធមានតែ នួនជា" (internal Defence translation).

<sup>50</sup> "ព្រោះធ្លាប់រស់នៅ ដេកនៅ ដើរជាមួយគ្នា តែពីរនាក់ក៏មានដែរ" (internal Defence translation).

<sup>51</sup> "មនុស្សល្អ មនុស្សត្រឹមត្រូវ មនុស្សស្ងួតបូក មនុស្សស្មោះត្រង់" (internal Defence translation).

<sup>52</sup> "គាត់ល្អ ប៉ុន្តែគាត់គ្មានអំណាច បានន័យថា បើយើងនិយាយឱ្យច្បាស់គឺខ្សែវ សំផន អ្នកអត់អំណាច" (internal Defence translation).

support it”.<sup>53</sup> This interview’s importance and relevance is especially pronounced given that the national judges accused the Defence of requesting to hear Heng Samrin as a character witness “to generate controversy” and as mere “trial tactics”.<sup>54</sup> This was obviously never the case, as the interview clearly proves.

**C. THE DISCUSSION SHOULD FOCUS ON THE HEAD, BODY AND TAIL OF THE CROCODILE**

24. Although the Chamber’s blatant disinterest in the truth compelled Nuon Chea to exercise his right to remain silent in Case 002/02,<sup>55</sup> he has made every effort to propel the Chamber towards a genuine search for the truth. Most recently, he indicated on 1 August 2016 that he might waive his right to silence if the Chamber summonsed Heng Samrin to testify<sup>56</sup> – an offer the Chamber unsurprisingly refused. The reader of this Brief might therefore wonder why Nuon Chea has continued to engage with the proceedings at all, and why he submits this Brief to judges who are not only deeply biased and incompetent but will probably not even read it. The answer is that Nuon Chea remains engaged only for the Cambodian people.

25. Nuon Chea has always stressed that the Tribunal should examine DK comprehensively. As he puts it, this means that the Tribunal should assess not only the “body of the crocodile” but also its “head and tail”,<sup>57</sup> namely the DK’s “root cause and [...] consequence [...] pre-1975 and post-1979”.<sup>58</sup> From his first opportunity at trial, Nuon Chea has identified the Crocodile’s head as Vietnam’s imperialist (or hegemonist) ambitions to secure “long-term control”<sup>59</sup> of Cambodia, which he calls “the main factor that caused confusion in [DK] from 1975 through April 1979”.<sup>60</sup> As for the Crocodile’s tail, the main consequence of events in DK, according to Nuon Chea, was that Vietnam successfully invaded Cambodia, wresting control and influence over the country<sup>61</sup> that it maintains until today.

<sup>53</sup> “អាជ្ញាធរតុលាការខ្មែរក្រហមកាត់ទោសប្តឹងត្រឹមត្រូវហើយ គាំទ្រ” (internal Defence translation).

<sup>54</sup> E312, Decision on 002/01 Witnesses, Experts and Civil Parties, para. 117.

<sup>55</sup> E421/1/2.1.2, Email from Defence Senior Legal Consultant to Trial Chamber Senior Legal Officer, 30 Sep 2014; E1/242.1, Case 002/02 Opening Statements (Nuon Chea), T. 17 Oct 2014, p. 67, ln. 7 to p. 73, ln. 18.

<sup>56</sup> E421/1/2, Nuon Chea’s Notice of Silence.

<sup>57</sup> E1/14.1, Case 002/01 Opening Statements (Nuon Chea), T. 22 Nov 2011, p. 77, lns 18-20; E1/237.1, Case 002/01 Closing Arguments (Nuon Chea), T. 31 Oct 2013, p. 21, lns 6-7.

<sup>58</sup> E1/14.1, Case 002/01 Opening Statements (Nuon Chea), T. 22 Nov 2011, p. 77, lns 20-21.

<sup>59</sup> E1/14.1, Case 002/01 Opening Statements (Nuon Chea), T. 22 Nov 2011, p. 80, ln. 12.

<sup>60</sup> E1/14.1, Case 002/01 Opening Statements (Nuon Chea), T. 22 Nov 2011, p. 81, lns 5-6.

<sup>61</sup> E1/14.1, Case 002/01 Opening Statements (Nuon Chea), T. 22 Nov 2011, p. 101, lns 24-25, *see also* p. 100, ln. 16 to p. 102, ln. 20.

26. Nuon Chea may consider Vietnam's imperialist ambitions to be the "main factor" behind events in DK, but it was far from the only one. He has always highlighted the devastating US bombing of Cambodia as another root cause and existential threat which decimated Cambodian territory, terrorised its people and killed many thousands of them,<sup>62</sup> and left two million Cambodians homeless and the nation starving and on the brink of collapse.<sup>63</sup> However, since the Defence has attempted to discuss US bombings in Case 002/01 (despite the Chamber's obstruction) in the context of the evacuation of Phnom Penh,<sup>64</sup> it chooses to devote this Brief's limited pages to focusing instead on the comparatively-underexamined existential threat of Vietnam. It suffices to say that Nuon Chea maintains that the US bombings had a profound impact on DK. Indeed, their impact has even been downplayed in the Manichean narrative, for it is only in recent years that military data has been declassified revealing that the US dropped more than 2.7 million tonnes of munitions on Cambodia between October 1965 and May 1975, nearly five times the widely-accepted total figure of munitions dropped on Cambodia by the US.<sup>65</sup> For perspective, this is even more bombs than were dropped by the Allies in all theatres in all of WWII and makes Cambodia one of the most heavily-bombed states in history.<sup>66</sup> In light of demographic data, this suggests that hundreds of thousands more Cambodians died directly and indirectly due to US bombings than previously thought.

### III. THE CROCODILE'S RELEVANCE AND THE INADEQUACY OF THE EVIDENCE TO SUSTAIN ANY CRIMINAL CONVICTIONS

27. Despite the Tribunal and this Chamber's disinterest, therefore, the primary purpose of this Brief is to offer Nuon Chea's insight into the head, body, and tail of the Crocodile. It is meant not for the judges but for the Cambodian public, which is why the Defence sees it as in the public interest to distribute a copy of this Brief after it has been filed, despite the fact that the Chamber has directed the parties to file their closing briefs confidentially.

28. Chapter 2 of this Brief lays important groundwork for the Crocodile and wider case by analysing how the Manichean narrative has not only been constructed but has impacted on the Case 002/02 trial. In particular, it offers a detailed roadmap of the Case 002/01 Appeals Judgement's findings that have redefined the 'rules of the game' for the assessment of evidence

<sup>62</sup> E1/14.1, Case 002/01 Opening Statements (Nuon Chea), T. 22 Nov 2011, p. 87, ln. 16 to p. 88, ln. 1, p. 91, lns 15-21, p. 92, lns 1-4, 22-23, p. 94, lns 6-16.

<sup>63</sup> E1/14.1, Case 002/01 Opening Statements (Nuon Chea), T. 22 Nov 2011, p. 87, ln. 21 to p. 88, ln. 1, p. 91, lns 11-14, 19-25.

<sup>64</sup> See, in particular, E295/6/3, Nuon Chea's Case 002/01 Closing Brief, paras 22, 37, 52, 55, 142, 240-252, 462.

<sup>65</sup> See Owen and Kiernan, Bombs Over Cambodia, p. 2; see also *infra*, Chapter 6-II-A.

<sup>66</sup> Owen and Kiernan, Bombs Over Cambodia, p. 2.

in Case 002/02. The head, body, and tail of the Crocodile itself are detailed in Chapter 3. While it adopts a factual focus given its intent to advance public understanding and correct the historical record, the Crocodile is simultaneously of paramount legal importance to Nuon Chea's case. This is because it absolves Nuon Chea of individual criminal responsibility for the crimes charged, in particular by precluding a conviction of Nuon Chea under the main mode of liability with which he is charged, *i.e.*, the first form of Joint Criminal Enterprise ('JCE I').

29. The remainder of the Brief connects the Crocodile to the key contested issues in Case 002/02. It is important to emphasise, however, that the Crocodile is far from Nuon Chea's only defence. To the contrary, throughout this Brief, the Defence also dismantles the Manichean narrative by demonstrating that the evidence presented is wholly inadequate to convict Nuon Chea for any crime or other mode of liability with which he has been charged. As soon as the Defence removes the inescapably ideological<sup>67</sup> and emotionally-charged Manichean filter currently lying over Case 002/02, it becomes clear that Nuon Chea has no case to answer as the evidence is insufficient. This is most obvious in respect of the particularly emotional and high-profile but especially flimsy charges on the genocide of the Vietnamese and Cham; the regulation of marriage; and enslavement, which is encapsulated in the Closing Order and Co-Prosecutors' unsubstantiated but theatrical, and oft-repeated mantra that the DK was a "slave state"<sup>68</sup> or "prison without walls".<sup>69</sup>

30. Thus, this Brief not only contextualises the Crocodile within the contested issues, but explains in detail the inadequacy of evidence presented by the Co-Prosecutors in Case 002/02. This Brief mimics the Closing Order's structure and so focuses on the four major JCE policies contested in Case 002/02. Chapter 4 concerns the CPK's national defence and security policy (*i.e.*, the alleged 'enemies' policy) and its implementation at the four charged security centres and through 'internal purges'. Chapter 5 discusses the four alleged 'targeted groups', *i.e.*, the Cham, the Vietnamese, Buddhists, and former Khmer Republic soldiers and officials. Chapter 6 focuses on the CPK's cooperatives and worksites policy and its implementation at the four charged crime sites. Chapter 7 addresses the CPK's regulation of marriage nationwide. This Brief concludes with Chapter 8, which analyses the other modes of liability with which Nuon Chea is charged, and Chapter 9, which sets out the relief sought.

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<sup>67</sup> See also E314/6, Nuon Chea's Second Trial Chamber Disqualification Motion, para. 129.

<sup>68</sup> See *e.g.* E1/229.1, Co-Prosecutors' Case 002/01 Closing Statements, T. 17 Oct 2013, p. 6, ln. 24.

<sup>69</sup> See *e.g.* D427, Closing Order, para. 158; E1/242.1, Case 002/02 Opening Statements (Co-Prosecutors), T. 17 Oct 2014, p. 27, ln. 5.

## **CHAPTER 2. THE MANICHEAN NARRATIVE AND THE NEW ‘RULES OF THE GAME’**

### **I. INTRODUCTION**

31. As stated in Chapter 1, the Defence opts not to repeat wholesale its often-ignored but accurate critique of the Tribunal’s brokenness, closemindedness, and systematic violation of Nuon Chea’s fair trial rights. Instead, it devotes as many of this Brief’s limited pages as it can to Nuon Chea’s insight into the Crocodile. To that end, however, it is necessary to revisit limited aspects of the Defence’s critique so that the Crocodile and Nuon Chea’s wider case is put in proper context – a context that has transformed in Case 002/02 as a result of the following new circumstances outlined in Chapter 1:

- 1) The issuance of two independent reports criticising the Trial Chamber’s approach in its Case 002/01 Trial Judgement (the Stanford Report) and the entire Tribunal’s handling of political interference (the OSJI Report).
- 2) The delivery of the Case 002/01 Appeals Judgement, which clarifies the proper evidence standards applicable at this Tribunal and highlights the gulf between those standards and the approach the Trial Chamber instead adopted in Case 002/01.
- 3) The Trial Chamber’s recent decision that Case 002/02 is Nuon Chea’s final trial.

32. The Case 002/01 Appeals Judgement agrees that it was “illogical” to shut the Defence out of investigations. Coupled with the Stanford and OSJI reports and the fact that this trial is now Nuon Chea’s last, these circumstances turn the forthcoming trial judgement into Nuon Chea’s only real remaining remedy for being unable to gather exculpatory evidence *via* investigations. Such evidence would have dismantled the Manichean narrative, a feat nevertheless achieved in this Brief despite the gross inequality of arms. With this in mind, Section II puts Nuon Chea’s case in context by revealing the construction of the Manichean narrative and how it has impacted on Case 002/02.

33. Echoing the Stanford Report’s critical assessment, the Case 002/01 Appeals Judgement contrasts starkly with the Case 002/01 Trial Judgement in how it assesses evidence. As Section III notes, this is epitomised by the Supreme Court Chamber’s views on appeal witness Sâm Sithy and on how to establish a murder conviction. Thus, Section III contextualises Nuon Chea’s case by offering a roadmap of the new ‘rules of the game’: rules by which the Trial Chamber is now bound when assessing evidence and determining Nuon Chea’s liability for what is surely its – and the Tribunal’s – final ever judgement.

## II. THE MANICHEAN NARRATIVE

### A. THE MANICHEAN NARRATIVE BUILDS ON WIDE-RANGING FOUNDATIONS

34. The Manichean narrative offers a grossly-flawed vision of DK. Case 002/01 expert David Chandler – himself an occasional historical reductionist – calls it an “emotionally satisfying” but “poor history” which offers a “more comfortable” “Manichean framework” that “allows us not to ask too many questions”.<sup>70</sup> For the truth to emerge from beneath it, the Manichean narrative must be critically deconstructed. The Defence does this below by identifying and analysing the foundations through which it has been built.

#### 1. Propaganda Has Definitively Shaped the Manichean Narrative

35. Propaganda has definitively shaped the Manichean narrative by normalising hyperbolic depictions of the CPK and DK. The Vietnamese and their collaborators-turned People’s Republic of Kampuchea (‘PRK’) officials sought legitimacy *via* powerful and systematic efforts to reframe history by exaggerating DK’s supposed atrocities. This precursor to today’s “fake news”<sup>71</sup> was already recognised in an October 1978 report to US Congress by Vietnam expert and historian Douglas Pike, who explained that both states sought to influence “world public opinion, the Vietnamese far more skillfully than the Cambodians.”<sup>72</sup> Vietnam accused the CPK of “grisly atrocities” such as “dismembering children [...] extracting the livers of wounded to be eaten [...] butchering entire families, sacking pagodas, looting hospitals and schools”.<sup>73</sup> The PRK enthusiastically and diligently built on these foundations and other Soviet-style disinformation campaigns. For instance, a PRK report claimed that people in DK were killed by being “run over by tractors [or] thrown to crocodiles”.<sup>74</sup>

36. David Chandler concludes that this reconstruction of DK history not only intended to exaggerate atrocities and divert attention from the PRK’s leaders pasts as former ranking CPK members, but to undermine comparisons between supposed DK atrocities and those alleged to have been committed by Vietnamese communists. To achieve this, Vietnam’s “pitiful puppets” in the PRK – as the late King Father Norodom Sihanouk referred to Heng Samrin and his government in a speech to the UN Security Council<sup>75</sup> – had to act swiftly to suggest that

<sup>70</sup> E1/94.1, David Chandler, T. 23 Jul 2012, p. 33, ln. 14 to p. 34, ln. 16 (quoting from E3/1684, Chandler, Voices From S-21, ERN 00192688) (emphasis added).

<sup>71</sup> Allcott and Gentzkow, Social Media and Fake News in the 2016 Election, p. 4.

<sup>72</sup> E3/2370, Pike Congressional Report, ERN 00187389.

<sup>73</sup> E3/2370, Pike Congressional Report, ERN 00187389.

<sup>74</sup> E3/2618, Record on Crimes of China and their Servants During 1975-1978, ERN 00341010.

<sup>75</sup> E3/7335, UN Security Council Meeting Minutes, ERN 01001644.

Vietnam's communists had acted for humanitarian reasons, not selfish ones. They did this by attributing blame to a small group of CPK leaders. As Chandler put it:

[R]epresenting the Khmer Rouge as a homogenous group of indoctrinated fanatics, the incarnation of absolute evil [...] **the PRK regime worked hard to focus people's anger onto the 'genocidal clique' that had governed Cambodia between April 1975 and January 1979 [...] While the new government based its legitimacy on the fact that it had come to power by toppling the Khmer Rouge, it was in no position to condemn the entire Movement since so many prominent PRK figures had been Khmer Rouge themselves until they defected to Vietnam in 1977 and 1978.**<sup>76</sup>

37. Chandler cited the 1979 *in absentia* trial of Pol Pot and Ieng Sary, the annual Day of Hate, and the Museum of Genocidal Crimes as concrete efforts to focus the blame on a small group of CPK leaders.<sup>77</sup> As explored in Chapter 4-IV-B-2, the Museum of Genocidal Crimes in particular – today's Tuol Sleng Genocide Museum – was a powerful tool used to reframe the history of S-21 and thus further reimagine the DK narrative.

38. Moreover, Vietnam's propaganda was not merely the product of a struggle between belligerent neighbours, but part of a far-reaching Soviet disinformation campaign aided by its allies, including, in particular, East Germany. Academic Howard De Nike, who edited a collection of documents from the 1979 trial, documented this Soviet influence, interviewing a former leading East German public prosecutor named Carlos Foth who "provide[d] counsel" in the 1979 case.<sup>78</sup> De Nike stated that Foth's involvement reflected "the urgencies of the Cold War, as perceived in particular from the perspective of the Soviet Bloc" and that Foth assisted in "drawing parallels [...] between the Nazi and Khmer Rouge regimes".<sup>79</sup>

39. The Soviet influence, evidenced by an early 1978 meeting between Vietnam and a "Soviet propaganda department delegation",<sup>80</sup> is also apparent in propaganda produced about the DK, including the documentaries *Die Angkar* (The Angkar) and *Kampuchea: Sterben und Auferstehen* (Death and Rebirth), released in the first post-DK years.<sup>81</sup> Both were produced by East German filmmakers Walter Heynowski and Gerhard Scheumann – renowned for taking agitational propaganda films to new levels of sophistication – and consistently depict a fascist, barbarous, Pol Pot-Ieng Sary clique performing medical experiments on prisoners with the help

<sup>76</sup> E1/94.1, David Chandler, T. 23 Jul 2012, p. 33, ln. 14 to p. 34, ln. 16 (quoting from E3/1684, Chandler, Voices From S-21, ERN 00192688) (emphasis added).

<sup>77</sup> E1/94.1, David Chandler, T. 23 Jul 2012, p. 35, lns 1-8.

<sup>78</sup> De Nike, 1979 Trial East German Advisor, p. 39.

<sup>79</sup> De Nike, 1979 Trial East German Advisor, pp. 41, 43.

<sup>80</sup> E3/7338, Morris, Why Vietnam Invaded Cambodia, ERN 01001881, 01001955.

<sup>81</sup> E3/3095R, 'Die Angkar' and E3/535R, 'Kampuchea: Sterben und Auferstehen'.



of advisors from imperialist and hegemonist China, and killing innocent children in Nazi-style extermination camps.<sup>82</sup> The documentaries exemplify Soviet-style propaganda, a sophisticated policy art form that still remains “an important aspect of Russian military doctrine” today,<sup>83</sup> and have given vivid, visual form to the Manichean narrative.

## 2. Refugees Have Added Frequently Unreliable Manichean Accounts

40. As the Defence has noted in earlier filings<sup>84</sup> and political scientist and rejected Defence expert Roel Burgler has recounted in his book *The Eyes of the Pineapple*,<sup>85</sup> early accounts from Thai refugee camps after the liberation of Phnom Penh and then the Vietnamese invasion substantially develop the Manichean narrative as well. These accounts were of typically upper- and middle-class Cambodians who “had lost all or most of their wealth and who, therefore, had enough reason to hate and discredit the new regime.”<sup>86</sup> The truth of their accounts, Burgler said, was further obscured by “covert pressure from camp leaders, Thai officials and foreign agencies”<sup>87</sup> and “hearsay bec[oming] personal experience.”<sup>88</sup> As historian Michael Vickery noted in interviewing these refugees, often a limited probe was enough for their accounts to crumble in a heap of inconsistencies.<sup>89</sup> Nevertheless, these accounts helped establish the Manichean narrative as they were the first to emerge about life in DK. They directly shaped the Catholic priest François Ponchaud’s book, *Cambodia: Year Zero*, which painted a wholly Manichean portrait of DK nationwide based mostly on Northwest Zone refugee accounts.<sup>90</sup> Vickery critiqued this book – perhaps the most influential early depiction of DK – for misusing refugee testimony, a critique Ponchaud accepted when he appeared in Case 002/01.<sup>91</sup>

<sup>82</sup> The Defence sought, and the Trial Chamber attempted but failed to secure, Heynowski’s appearance in Case 002/02: see **E443/7**, Decision to not Hear Heynowski, para. 4. Scheumann is deceased.

<sup>83</sup> See New York Times, A Powerful Russian Weapon: The Spread of False Stories: “[T]he Soviet Union devoted considerable resources to that during the ideological battles of the Cold War. Now, though, disinformation is regarded as an important aspect of Russian military doctrine, and it is being directed at political debates in target countries with far greater sophistication and volume than in the past”.

<sup>84</sup> **F16**, Nuon Chea’s Appeal Brief, para. 120.

<sup>85</sup> **E3/7333**, Burgler, *Eyes of Pineapple*; see also *infra*, Chapter 2-II-B-3-(c) on the refusal to admit key witnesses/experts, Chapter 9 and **Annex 2**.

<sup>86</sup> **F16**, Nuon Chea’s Appeal Brief, para. 120.

<sup>87</sup> **E3/7333**, Burgler, *Eyes of Pineapple*, ERN 01002125.

<sup>88</sup> **E3/7333**, Burgler, *Eyes of Pineapple*, ERN 01002125.

<sup>89</sup> **E3/1757**, Vickery, *Cambodia*, ERN 00396944-83.

<sup>90</sup> **E3/1757**, Vickery, *Cambodia*, ERN 00396961-64; **E1/180.1**, François Ponchaud, T. 11 Apr 2013, p. 45, ln. 9 to p. 46, ln. 23.

<sup>91</sup> **E1/180.1**, François Ponchaud, T. 11 Apr 2013, p. 19, lns 13-17, p. 45, ln. 9 to p. 46, ln. 23.

### 3. The Media and Academia Have Bolstered the Manichean Narrative

41. Much like a Donald Trump tweet, material that feeds the Manichean narrative often not only escapes scrutiny but is bolstered courtesy of media attention. The media and the Manichean narrative enjoy a symbiotic relationship, feeding off and into each other. For example, Burgler notes how respectable Western media outlets early on reported on CPK atrocities that later proved fraudulent. While these stories were given an air of legitimacy by supporting photographs, Thai intelligence officers later admitted to staging the photos on Thai territory.<sup>92</sup> Nevertheless, the media circulated the story, even after the fraud was uncovered. Burgler cites this as “one example of a long list of distortions and manifest dishonesty by serious and supposedly responsible, non-partisan western journals.”<sup>93</sup>

42. Such blind acceptance is also apparent in Cambodian media today, as seen in the uncritical, star-struck reaction to Angelina Jolie and Rithy Panh’s new film *First They Killed My Father*.<sup>94</sup> The Defence does not comment on the veracity of then-five year old Loung Ung’s (also-upper-class Cambodian) account and its cinematic depiction. It simply signals an urgent need to remain critical; something that the Trial Chamber utterly failed to do in Case 002/01. The Supreme Court Chamber noted, for instance, that although he was a favourite source of the Trial Chamber, journalist and ‘expert’ Philip Short’s evidence needs to be “approach[ed] with caution”,<sup>95</sup> for his book *Pol Pot* relied heavily on hearsay<sup>96</sup> yet Short was unable to describe, identify, or recall the alleged conversations upon which he reached conclusions.<sup>97</sup>

43. Moreover, such lack of scrutiny is not limited to the media. It is also a common affliction of academics, many of whom have testified at, or worked for or in the margins of, this Tribunal. This is explored below *vis-à-vis* ‘expert’ evidence.<sup>98</sup>

### 4. Manichean Motifs Have Emerged Within Cambodians’ ‘Collective Memory’

44. The DK narrative has been further reframed by Manichean motifs that have emerged within Cambodians’ ‘collective memory’ of DK. According to academic Nancy Combs – a

<sup>92</sup> E3/7333, Burgler, Eyes of Pineapple, ERN 01002124-25.

<sup>93</sup> E3/7333, Burgler, Eyes of Pineapple, ERN 01002125.

<sup>94</sup> See e.g. Phnom Penh Post, First They Killed My Father; Cambodia Daily, Jolie’s Film Reopens Wounds.

<sup>95</sup> F36, Case 002/01 Appeals Judgement, para. 880.

<sup>96</sup> F36, Case 002/01 Appeals Judgement, para. 880.

<sup>97</sup> See F2/4/3/3/4, Nuon Chea’s Reply to Co-Prosecutors’ Response on Lemkin-Sambath Footage, para. 20.

<sup>98</sup> See *infra*, Chapter 2-III-B-1, on expert evidence.

Defence Case 002 expert who the Chamber refused to summons<sup>99</sup> – a witness’s evidence may be distorted by the “introduction of post[-]event information”. This is particularly so at international tribunals where significant time may pass between events and a trial; where events may be subject to post-event discussion; and where “the entire community has information to share about the crimes”.<sup>100</sup> As academic Alexander Zahar adds, “the controlling factor is not a deep (physical) memory imprint but the witness’s nurturing of the memory in self-reflection and social interaction. The memory does not preserve itself but rather is actively preserved”.<sup>101</sup>

45. At this Tribunal, civil party testimony is even more vulnerable. Civil parties do not testify under oath, amplifying the risk of lying or embellishment.<sup>102</sup> They participate collectively since they are mostly organised into large groups that share common lawyers and, in light of the testifying opportunities, nominate single civil parties to represent each group’s experiences in court. The Supreme Court Chamber highlighted the resultant weaknesses in civil party evidence, explaining that most civil party applications and victim complaint forms might in fact “represent ‘collective memory’ or ‘common narrative’ rather than personal experiences, [and] which, by itself, is inapt to establish relevant facts”.<sup>103</sup>

46. The Supreme Court Chamber’s observation has been vindicated many times throughout the Case 002/02 trial, as discussed throughout this Brief. To take just two examples, Chapter 4-IV-D-1 discusses how the ‘Sâm Sithys’ of Case 002/02, civil parties Say Sen and Meas Sokha offer several uncorroborated conclusions about Kraing Ta Chan Security Centre stretching well beyond their then-adolescent capabilities and clearly influenced by several external factors. Chapter 7-II-A, meanwhile, explains that on the regulation of marriage, many civil parties provided dramatically different live evidence to that contained in their civil party application.

## **B. THE MANICHEAN NARRATIVE HAS PROFOUNDLY IMPACTED THE CASE 002/02 TRIAL**

47. The Manichean narrative is critical to Nuon Chea’s case not simply because it is the antithesis to his core case (*i.e.*, the Crocodile) but also since it has profoundly impacted on his Case 002/02 trial. The Defence highlights a few emblematic examples of this below.

<sup>99</sup> The Chamber deemed Combs “repetitive” or “irrelevant”: See **E312.2**, Individuals Not Heard in Case 002/01, p. 9.

<sup>100</sup> Combs, Fact-Finding Without Facts, pp. 16-17; see also **F16**, Nuon Chea’s Appeal Brief, paras 118-124.

<sup>101</sup> Zahar, Witness Memory and the Manufacture of Evidence, p. 11.

<sup>102</sup> **F16**, Nuon Chea’s Appeal Brief, paras 201-206.

<sup>103</sup> **F36**, Case 002/01 Appeals Judgement, para. 457 (footnote omitted).

## 1. The Impact of the Manichean Narrative is Amplified by the Passage of Time

48. The Manichean narrative's influence on 'collective memory' has been further amplified in Case 002/02 by the significant time that has passed between the alleged crimes and their investigation and prosecution. This challenge is by no means unique to this Tribunal, as noted by Nancy Combs above. Judge Christine Van den Wyngaert of the ICC called a three-year passage of time between alleged crimes and their investigation "deficient",<sup>104</sup> while the ICTY Trial Chamber has said that "evidence about facts that occurred ten or more years prior to giving evidence, involves inherent uncertainties due to the vagaries of human memory and perception".<sup>105</sup> However, this Tribunal is located at the "continuum's extreme" end:<sup>106</sup> most testimony in Case 002/02 has been given at least 30 years after the alleged events, giving rise to distinctly more difficult challenges owing to the passage of time.

49. In the years between the events and their retelling here, the voluminous material produced about DK has had decades in which to interweave Manichean strands into 'collective memory'; to erode inconsistent factual nuances; and to entrench mythological 'accepted truths' about what happened in the DK. The most vivid 'accepted truths' featured in this trial were the use of loudspeakers to drown out the sound of executions; the smashing of babies against trees; the consumption of human organs; the use of the bodies of pregnant women to construct the sluice gate of Trapeang Thma Dam; and the use of *chhlop* (subdistrict militia) to monitor consummation of marriages.<sup>107</sup> However, as discussed in this Brief, at trial, such 'accepted truths' buckled under testing and revealed themselves at best as false memories and at worst, knowingly-baseless claims. More generally, and on a daily basis at trial, the existence of such Manichean 'accepted truths' appear to have emboldened witnesses, civil parties, and 'experts' to freely speculate about what must have happened in situations when they do not actually know. When probed, their conclusions frequently had no evidentiary basis, just what the Supreme Court Chamber called "widespread rumours" about pervasive events in the DK.<sup>108</sup>

## 2. Investigations in Case 002 Followed a Manichean Narrative Arc

50. The Manichean narrative has impacted on Nuon Chea's Case 002/02 trial in an even more dramatic way: the way it determined the fundamental arc which the investigation in Case

<sup>104</sup> ICC, *Katanga* Trial Judgement; Dissenting Opinion of Judge Van den Wyngaert, para. 138.

<sup>105</sup> ICTY, *Brđanin* Trial Judgement, para. 25.

<sup>106</sup> See e.g. Zahar, *Witness Memory and the Manufacture of Evidence*, p. 2.

<sup>107</sup> See e.g. Chapter 4-IV-B-1-(b) regarding music, baby smashing, and human organs; Chapter 6-V-E-4-(c) on pregnant women at Trapeang Thma Dam, and Chapter 7-III-A-1 and 7-IV-D on *chhlop* monitoring consummation.

<sup>108</sup> **F36**, Case 002/01 Appeals Judgement, para. 419.

002 followed. Defence participation in investigations would have propelled them down a different course by pushing the Co-Investigating Judges to genuinely and openly seek the truth. Instead, and as noted above and in past filings, the Defence was excluded from the judicial investigation and prohibited from conducting its own under the threat of disciplinary action and even criminal prosecution.<sup>109</sup> This has forced the Defence to operate at a distinct disadvantage – indeed, at a gross inequality of arms – from day one. In turn, this has made it nearly impossible for the Defence to locate potentially-exculpatory evidence and witnesses with which to push back the Manichean tide. What is more, this gave the Co-Investigating Judges free rein to investigate Case 002/02 as if a conviction based on the Manichean narrative was a *fait accompli*.

51. The Co-Investigating Judges revealed this Manichean attitude by failing to genuinely test the accuracy of the PRK’s presentation of the CPK as a strictly-hierarchical monolith that concentrated power in only a few individuals.<sup>110</sup> Despite 19 Defence requests for investigative action (‘RIAs’), the investigators failed to obtain whole categories of evidentiary material that would have overturned the Manichean framing of events in the DK, in particular material in the possession of foreign states.<sup>111</sup> It is for this reason that the Defence has attempted to obtain this material through the public domain or proxies such as historian Stephen Morris, who had short-lived access to the Soviet archives in the 1990s.<sup>112</sup>

52. Regarding witness evidence, the Defence argued in seven RIAs that not only did the Co-Investigating Judges collect WRIs in Case 002 that failed to satisfy even basic requirements of an impartial and effective investigation,<sup>113</sup> but they also revealed a clear witness selection bias. For instance, investigators often spoke to witnesses whose experiences reflected those of upper- and middle-class Cambodians at cooperatives and worksites. The Defence, in contrast, would have focused on peasants who were not only more accustomed to rural working conditions but reflected (and thus represented the experience of) the vast majority of the DK population. Indeed, the Supreme Court Chamber agreed, that at a minimum:

The Defence should be allowed to carry out the limited actions required to satisfy the first prong of the admissibility standard for requests for investigative actions before the Co-Investigating Judges – namely, that the action requested be “identif[ied] with sufficient precision” – such as identifying potential witnesses.<sup>114</sup>

<sup>109</sup> **A110/I**, CIJ Letter on Investigation Modalities, p. 2.

<sup>110</sup> For details of prior Defence arguments in this regard, see **F16**, Nuon Chea’s Appeal Brief, para. 35.

<sup>111</sup> These are summarised and overviewed in **F16**, Nuon Chea’s Appeal Brief, para. 36.

<sup>112</sup> See *infra*, Chapter 2-II-B-3, on material the Defence has sought to admit.

<sup>113</sup> These are summarised and overviewed in **F16**, Nuon Chea’s Appeal Brief, para. 33.

<sup>114</sup> **F36**, Case 002/01 Appeals Judgement, para. 249.

53. As the Defence noted in Case 002/01, former Tribunal investigator Wayne Bastin previously revealed that Judge Marcel Lemonde had instructed his staff in 2009 to only search for inculpatory evidence.<sup>115</sup> There was also a national investigator, Lim Sokuntha, who would conveniently obtain inculpatory evidence only whenever the batteries in his recording device would die.<sup>116</sup> Moreover, the Co-Investigating Judges' wholesale lack of commitment to the truth in Case 002 was underscored again very recently when the current International Co-Investigating Judge notified parties in July 2016 that he had "happened upon" a piece of evidence during a filing cabinet clear-out that had been sent to his predecessor Judge Siegfried Blunk by the Vietnamese Foreign Ministry in 2011 and was "still in its original envelope".<sup>117</sup>

### 3. The Co-Prosecutors and Trial Chamber Also Harbour a Manichean World View

54. At trial, Nuon Chea has likewise faced Co-Prosecutors and judges who eagerly share the Co-Investigating Judges' taste for "emotionally satisfying" Manichean tropes.<sup>118</sup> The Co-Prosecutors' attitude towards the Manichean narrative is exemplified in remarks of the International Senior Assistant Co-Prosecutor in court. He complained that the Defence "shouldn't be characterising it as if it is an established fact that there was [a] plan to overthrow [DK] when this is based on S-21 suspects' statements and gossip and propaganda from the regime itself [...] something that hasn't been established at all."<sup>119</sup> Tellingly, this comment was made in December 2015, when live witnesses had already begun testifying in detail about rebellion and attempted *coups d'état* and the Defence had already filed motions to the Supreme Court Chamber in this regard. For the Co-Prosecutors, however, this trial is a single-minded endeavour in which it is unthinkable to deviate one inch from the Manichean narrative that DK was a "prison without walls",<sup>120</sup> even in the face of live evidence. Thus, in response to the Defence being made to file a summary of its core case in June 2016 (a matter discussed below in Part B-3-(c)), the Co-Prosecutors, in true Manichean fashion, sweepingly dismissed the Defence case as being "remarkable in [its] callousness towards the extreme brutality of these crimes" and "casual [in its] embrace of the destruction of individuals and communities".<sup>121</sup> These broad, simplistic, and reductionist brushstrokes fall disconcertingly far from what their

<sup>115</sup> For a summary in this regard, see **E295/6/3**, Nuon Chea's Case 002/01 Closing Brief, para. 27.

<sup>116</sup> For a summary in this regard, see **F16**, Nuon Chea's Appeal Brief, para. 595.

<sup>117</sup> **E319/54**, Order to Disclose Document into Case 002, paras 2-3.

<sup>118</sup> **E3/1684**, Chandler, Voices From S-21, ERN 00192688; see *supra*, Chapter 2-II-A.

<sup>119</sup> **E1/361.1**, Pan Chhuong (2-TCW-918), T. 2 Dec 2015, p. 18, ln. 20 to p. 19, ln. 1.

<sup>120</sup> See e.g. **D427**, Closing Order, para. 158; **E1/242.1**, Case 002/02 Opening Statements (Co-Prosecutors), T. 17 Oct 2014, p. 27, ln. 5.

<sup>121</sup> **E395/3**, Co-Prosecutors' Response to Rebellion Submissions, para. 2.

mission should be. The Co-Prosecutors should not be partisan but ministers of justice. Their mission is not to secure a conviction at all costs but to represent the public interest of the international community, and to act with objectivity and fairness<sup>122</sup> in ascertaining the truth.<sup>123</sup>

55. Given the limited confines of this Brief, the Defence cannot discuss every manifestation of the Co-Prosecutors' tunnel vision at trial. Thus, it instead highlights only one example, in Chapter 5-II-B-3-(b): the extreme and improper lengths to which the International Co-Prosecutor apparently went to obtain evidence from Prak Yut (2-TCW-938) in his desperate quest to convict Nuon Chea for the genocide of the Cham. For the moment, however, the Defence focuses its limited pages on the Manichean commitment of the Trial Chamber judges, which is even more important, since it is they who are ultimately adjudicating Case 002/02. There are likewise far too many examples of the impact of the Manichean narrative on the Chamber's conduct of the Case 002/02 trial than can be discussed in this Brief. Accordingly, the Defence highlights only three examples below.

**(a) *The Manichean Shadow Cast Over Every Day of the Case 002/02 Trial***

56. While past Defence filings chronicle the key violations of Nuon Chea's fair trial rights in Case 002/02, what they do not mention are the daily ways the Manichean narrative has surfaced in the courtroom. Thus, the first example offered is one of countless such instances. Since the Defence has not only already chronicled Judge Lavergne's plentiful failings but sought his disqualification entirely,<sup>124</sup> it shifts focus instead to Judge Claudia Fenz. On the occasion in question, Judge Fenz doggedly questioned a witness for 15 minutes to establish the rate of worker deaths at the 1<sup>st</sup> January Dam. When the witness maintained that in two years, only three died in unfortunate landslide accidents and one or two others from illnesses, Judge Fenz sarcastically quipped that "that sounds like a healthy working environment", revealing her Manichean belief that conditions must have been abhorrent at the worksite. She then tried but failed to minimise the representativeness of the witness's testimony.<sup>125</sup>

<sup>122</sup> ICTY, *Blaškić Appeals Judgement*, paras 263-264, fn. 536; *S. Milošević*, Judge Shahabuddeen's Partial Dissenting Opinion on Admission of Prosecution Investigator's Evidence, para. 18; *Kordić & Čerkez*, Decision on Extension of Time to File Appeal Briefs, para. 14; ICTR, *Barayagwiza*, Judge Shahabuddeen's Separate Opinion on Prosecution's Request for Review, para. 68; *Ndindiliyimana*, Decision on Prosecutor's Alleged Violation of Disclosure Obligations, p. 12.

<sup>123</sup> See e.g. ECCC Internal Rule 53(4): "The Co-Prosecutors shall, as soon as practicable, disclose to the Co-Investigating Judges any material that in the actual knowledge of the Co-Prosecutors may suggest the innocence or mitigate the guilt of the Suspect or the Charged person or affect the credibility of the prosecution evidence".

<sup>124</sup> See **E314/6**, Nuon Chea's Second Trial Chamber Disqualification Motion, paras 115-122, 130-133.

<sup>125</sup> **E1/301.1**, Or Ho, T. 19 May 2015, p. 71, ln. 14 to p. 77, ln. 3.

57. Judge Fenz's fixation on worker deaths appeared to draw upon Manichean leanings she has long held. Indeed, in a January 2010 interview in Austrian newspaper *Wiener Zeitung*, Judge Fenz obviously parroted simplistic East German propaganda by drawing parallels between DK and Nazi Germany. As she put it, "[w]hen you have read the Nuremberg Laws, and think of the personalities chosen by the Khmer Rouge, then there are many similarities with the crimes of National Socialism".<sup>126</sup> She also referred to Duch as "the leader of an extermination camp".<sup>127</sup> Not only does her likening of S-21 to Auschwitz highlight the success of Vietnamese and PRK propaganda in falsely-equating S-21 with the Nazis' Auschwitz extermination camp,<sup>128</sup> but considering that Judge Fenz is Austrian and should be very familiar with the true nature of Nazi Germany, such a ridiculous and reductionist view is absolutely unforgivable. As the Defence has already argued at length in past filings and makes perfectly clear in the present Brief, DK was not at all Nazi Germany.<sup>129</sup>

58. Judge Fenz also told the *Wiener Zeitung* that "Khmers killed Khmers, very many" and queried why "1.8 million people ha[d] to die in Cambodia".<sup>130</sup> This reveals a different subset of the judge's Manichean preferences: her unquestioning acceptance of the 'accepted truth' of the DK death toll. Indeed, the Trial Chamber devoted two pages of the Case 002/01 Trial Judgement to unnecessarily weighing in on this subject and finding that "experts accept estimates falling between 1.5 and 2 million excess deaths as the most accurate".<sup>131</sup> However, as the Defence argued on appeal, this finding was flagrantly unreasonable. Not only was it based on highly-flawed and limited demographic data, it followed no adversarial debate, since every Defence attempt to discuss demographic factors – e.g., the PRK's post-1979 K-5 forced labour program and conditions created by US bombings and civil war – were systematically shut down in Case 002/01. Defence attempts to correct the false demographic record have been denied with equal fervour in Case 002/02, most notably with the Chamber rejecting its request

<sup>126</sup> See *Wiener Zeitung*, Claudia Fenz: Internationale Tribunale nicht überfrachten: "Wenn man die Nürnberger Akten gelesen hat, und an die Persönlichkeiten denkt, die sich die Roten Khmer ausgesucht haben, dann gibt es viele Ähnlichkeiten" (internal Defence translation).

<sup>127</sup> See *Wiener Zeitung*, Claudia Fenz: Internationale Tribunale nicht überfrachten: "des Leiter seines Vernichtungslagers zu überprüfen" (internal Defence translation).

<sup>128</sup> This framing process is described in detail *infra*, at Chapter 4-IV-B-3-(a).

<sup>129</sup> See e.g. **E295/6/3**, Nuon Chea's Case 002/01 Closing Brief, para. 5; **F16**, Nuon Chea's Appeal Brief, paras 128, 340, 345, 381, 416, 420.

<sup>130</sup> See *Wiener Zeitung*, Claudia Fenz: Internationale Tribunale nicht überfrachten: "Khmer haben damals Khmer getötet und zwar sehr viele" and "warum 1,8 Millionen Menschen in Kambodscha sterben mussten" (internal Defence translation).

<sup>131</sup> **E313**, Case 002/01 Trial Judgement, para. 174.



to summons demographer Patrick Heuveline as an expert<sup>132</sup> and refusing to admit the Human Rights Watch report *30 Years of Hun Sen* which discusses Hun Sen's lead role in K-5.<sup>133</sup> Clearly, the Chamber, and at least Judge Fenz, have long made up their minds in this regard.

59. Judge Fenz is far from the only judge who has had a Manichean world view of DK. While still a Trial Chamber judge, Silvia Cartwright relayed Manichean 'accepted truths' on camera at the Aspen Institute, calling the CPK a "dreadful, dreadful regime" and commenting on how "the Khmer Rouge wiped out the intelligentsia"; "they didn't care whether the people were guilty or innocent"; and how "thousands of people died for a useless project" (*i.e.*, the 1<sup>st</sup> January Dam).<sup>134</sup> Moreover, while the daily appearances of the Manichean narrative may seem minor in isolation, cumulatively they drive home that for the Chamber, like the Co-Investigating Judges, convicting Nuon Chea along Manichean lines is indeed a *fait accompli*. The Tribunal's judges are meant to be "professional" and possess "high moral character, a spirit of impartiality and integrity, and experience, particularly in criminal law or international law",<sup>135</sup> yet the international judges currently adjudicating Case 002/02 are what the International Co-Lawyer has once called the "ultimate combination of bias, incompetence and dumbness".<sup>136</sup> In the end, this gives rise to perhaps one of the most fundamental questions of all: namely, whether the UN could not have found anyone else in the world to adjudicate its trials.

**(b) Limiting Nuon Chea's Case Even When Witnesses and Evidence are Available**

60. The second example of how the Manichean narrative has severely impacted the Case 002/02 trial is how, even when there were witnesses testifying or evidence on the case file that could have advanced Nuon Chea's case, the Chamber unfairly limited the Defence's ability to do so. Again, there are too many examples to list and thus the Defence chooses only one: the Chamber's prohibition on the use of 'torture-tainted' evidence.<sup>137</sup>

<sup>132</sup> **E444**, Nuon Chea's Request to Summons Patrick Heuveline as a Demographics Expert; **E444/1**, Decision Not to Hear Patrick Heuveline; *see also infra*, Chapter 2-II-B-3-(c) on the refusal to call key witnesses/experts, Chapter 9 and **Annex 2**.

<sup>133</sup> *See supra*, Chapter 1-B-1, and *infra*, Chapter 2-II-B-3-(c), Chapter 9 and **Annex 1**; *see also* **E347/2**, Request to Admit HRW Report, paras 25-27, and **E347.3**, Human Rights Watch, *30 Years of Hun Sen*, ERN 01086029-33.

<sup>134</sup> *See* **F2/1**, Nuon Chea's Second Appeal Additional Evidence Request, pp. 2-4; *see also infra*, Chapter 6-V-B-2, for the Defence's discussion of the proper technical and scientific standards of the 1<sup>st</sup> January Dam.

<sup>135</sup> ECCC Establishment Law, Arts 9 *new*, 10 *new*.

<sup>136</sup> **E378/1.1**, Mekong Review, Victor's Justice, ERN 01205354, attached to **E378**, an application by the Trial Chamber to the Amsterdam Bar Association regarding alleged misconduct by the International Co-Lawyer.

<sup>137</sup> *See* **F26/12**, SCC Torture-Tainted Evidence Decision, paras 47, 58; **E350/8**, TC Torture-Tainted Evidence Decision, paras 33, 73-77; **E399/5**, TC Decision on Nuon Chea's S-21 Statement Request, para. 15.

61. The Chamber excluded the substantive use of all suspects' statements – or as they have incorrectly come to be known, “confessions” – from security centres on the sweeping basis that torture was a “generalised [practice] applied in all [DK] security centres”.<sup>138</sup> This of course blatantly violates Nuon Chea's presumption of innocence, since he is charged in Case 002/02 with alleged torture at these very security centres.<sup>139</sup> In addition, while David Chandler and Stephen Heder have even noted that such statements are underpinned by inherent truths falling on a spectrum between “facts, which may be taken fully at face value” and “fantastic fabrication[s]”,<sup>140</sup> the Chamber still unfairly refused to allow the Defence to use even a few statements<sup>141</sup> for which the Defence offered concrete and convincing evidence negating the “real risk” of torture.<sup>142</sup> The Chamber also unfairly refused to recall witness and S-21 interrogator Prak Khan<sup>143</sup> so that the Defence could question him, *inter alia*, on alleged torture practices at S-21.<sup>144</sup> With the Defence barred from investigations<sup>145</sup> and unable to refer to exculpatory substance in suspects' statements collected at security centres or to elicit evidence from a key witness, the Chamber has thus violated Nuon Chea's fair trial right to present a defence to the charges of torture.<sup>146</sup>

62. Although the Defence considers it valid to use ‘torture-tainted’ evidence more broadly, it will confine its use in this Brief to only Nuon Chea's core case (*i.e.*, the Crocodile), and within that, to only two limited uses. First, this evidence is set out in one paragraph in Chapter 3-IV to show how it corroborates other non-‘torture-tainted’ evidence and supports Chandler and Heder's contention that suspects' statements from security centres do contain underlying truths.

<sup>138</sup> **E399/5**, TC Decision on Nuon Chea's S-21 Statement Request, paras 21, 23; **E1/407.1**, Ysa Osman, T. 23 Mar 2016, p. 79, ln. 22 to p. 80, ln. 12.

<sup>139</sup> **E350/8**, TC Torture-Tainted Evidence Decision, para. 39.

<sup>140</sup> **E3/1684**, Chandler, Voices From S-21, ERN 00192726; **E434.1.11**, Heder, Khmer Rouge Opposition to Pol Pot, ERN 01323882-83; *see also*, **E434**, Nuon Chea's Request for Documents on Vietnamese Aggression and Rebellion, para 27; *see also infra*, Chapter 9 and **Annex 1**.

<sup>141</sup> **E399/5**, TC Decision on Nuon Chea's Request to Use Certain S-21 Statements, paras 21-24.

<sup>142</sup> **E399**, Nuon Chea's Motion to Use Certain S-21 Statements; **E399/3**, Nuon Chea's Reply on Use of Certain S-21 Statements.

<sup>143</sup> **E409/3**, Decision on Recall of Prak Khan.

<sup>144</sup> **E409**, Nuon Chea's Request to Recall Prak Khan, para. 10 (detailing how the Defence sought to question Prak Khan on alleged blood drawing, rape, killing of a Vietnamese baby, interrogators' reports and annotations, the detailed and specific circumstances of his interrogation of three detainees; and the “Khmer Rumdoh”, “Khmer Sar” and Khmer Serei” movements); *see also* **E409/2**, Nuon Chea's Reply on Recall of Prak Khan.

<sup>145</sup> *See supra*, Chapter 2-III-B-2.

<sup>146</sup> For further details of the Defence's position with regard to torture-tainted evidence, *see* **E350**, Nuon Chea's Submission on Torture-Tainted Evidence, paras 17, 25-28, and **F16**, Nuon Chea's Appeal Brief, Section XXII.

Second, Chapter 3 generally refers to the S-21 statements of Koy Thuon and Yim Sambath since these are demonstrably not ‘torture-tainted’ for reasons outlined in past filings.<sup>147</sup>

**(c) *Limiting the Defence’s Ability to Tender Witnesses and Evidence for its Case***

63. The third example of the Manichean narrative’s impact on the Case 002/02 trial is by far the most egregious and disturbing. Despite the nearly insurmountable inequality of arms the Defence has faced due to its exclusion from investigations, it has made every effort to locate exculpatory evidence from the biased case file and from the public domain (*inter alia*, from DC-Cam, the East German ‘Stasi’ archives, and Chinese secondary sources). In Case 002/02, the Defence has sought the appearance of numerous witnesses and the admission of a wide range of exculpatory documentary evidence, most notably transcripts produced by *Enemies of the People* filmmakers Robert Lemkin and Thet Sambath, as mentioned above. However, since this evidence demonstrably undermines the Manichean narrative, it is unsurprising – though nevertheless an incredibly flagrant violation of Nuon Chea’s fair trial rights – that the Chamber has largely hindered the Defence’s attempts to do so.

64. In response to the bulk of the Defence’s witness and investigation requests, the Chamber asked the Defence to first provide a further briefing before it rendered its decision. Specifically, the Chamber asked the Defence to answer “[h]ow would the assessment of NUON Chea’s criminal responsibility be affected by further evidence tending to prove the existence of conflicting factions or rebellions, whether supported by other countries or not”.<sup>148</sup> This answer to this question, as noted in Chapter 1 and substantiated in Chapter 3, is the heart of Nuon Chea’s case. In other words, what the Chamber required before it would determine the Defence’s requests was an explanation of Nuon Chea’s entire case.

65. As the Defence explained in its response to the Chamber, but must reiterate here, this was outrageously unfair. It imposed a far more stringent standard on the Defence than the Co-Prosecutors,<sup>149</sup> violating Nuon Chea’s right to obtain witnesses for him under the same conditions as those against him.<sup>150</sup> It also lent a further advantage to the Co-Prosecutors, who already benefit from the inequality of arms at this Tribunal since they have enjoyed far greater

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<sup>147</sup> See the Defence’s arguments *vis-à-vis* these statements in E399, Nuon Chea’s Motion to Use Certain S-21 Statements, and E399/3, Nuon Chea’s Reply on Use of Certain S-21 Statements; see also *infra*, Chapter 9 and Annex 3.

<sup>148</sup> E395/1, Request for Rebellion Submissions.

<sup>149</sup> See E395/2, Nuon Chea’s Rebellion Submissions, para. 44.

<sup>150</sup> See ICCPR Art. 14(3)(c), ECCC Establishment Law Art. 35 *new* (e).

access to investigations than the Defence. On top of this, the Co-Prosecutors' witnesses have mainly been summonsed on the basis of generalised single-sentence summaries of possible relevance in their witness list.<sup>151</sup> Indeed, one of their witnesses was even summonsed on the speculative basis that she might be someone else's neighbour (she was not) and might have relevant testimony to offer (she did not).<sup>152</sup>

66. The Defence cautioned that while "ascertaining the truth need not require the testimony of an unlimited number of witnesses",<sup>153</sup> its witnesses were key to its case. As the Defence was excluded from investigations, the trial is Nuon Chea's **only chance** to present his defence.<sup>154</sup> Accordingly, Defence witness, evidence, and investigation requests adopt a heightened significance as among the Defence's only tools to develop an evidentiary foundation for Nuon Chea's case.<sup>155</sup> It also argued that the admissibility standard should be that of the International Military Tribunal at Nuremberg, which even admitted evidence it considered "strictly irrelevant and [which] might well be regarded as the red herring drawn across the trial" on the basis that "the Tribunal's policy throughout this trial has been to admit everything which might conceivably elucidate the reasoning of the Defence".<sup>156</sup>

67. However, while the Chamber summonsed some of the Defence's witnesses,<sup>157</sup> it refused many of them, all Defence investigation requests,<sup>158</sup> and most additional exculpatory evidence.<sup>159</sup> The Chamber also delayed releasing its reasons for those decisions until 30 March 2017,<sup>160</sup> a little over a month before this Brief was due. Moreover, thus far, its only reason for refusing to summons Heng Samrin, Nuon Chea's number one witness and only character witness, is the cowardly statement that "it was unable to reach a consensus".<sup>161</sup> This was its same reason for refusing to summons other key Defence witnesses and top members of the Cambodian government and military, including Ouk Bunchhoeun and Pol Saroeun.<sup>162</sup>

<sup>151</sup> See the OCP Case 002/02 witness summaries at **E305/6.4**, **E305/6.5**, and **E307/3/2.4**.

<sup>152</sup> See **E1/387.1**, In Yoeung, T. 3 Feb 2016, p. 66, ln. 16 to p. 80, ln. 25.

<sup>153</sup> **E370/4**, Reasoned Decision on Nuon Chea's East Zone Witnesses Request, para. 15; **E395/2**, Nuon Chea's Rebellion Submissions, para. 49.

<sup>154</sup> **E395/2**, Nuon Chea's Rebellion Submissions, para. 49.

<sup>155</sup> See **F2/10**, Nuon Chea's Request for SCC to Reconsider Summoning Heng Samrin and Robert Lemkin and Admit Lemkin Evidence, paras 21-26; **E395/2**, Nuon Chea's Rebellion Submissions, para. 49.

<sup>156</sup> **F16.1.28**, Heller, Nuremberg Military Tribunals, p. 140; see also **F16**, Nuon Chea's Appeal Brief, para. 148.

<sup>157</sup> See the list *infra*, in **Annex 2**.

<sup>158</sup> See the list *infra*, in **Annex 3**.

<sup>159</sup> **E434/2**, Decision on Documents on Vietnamese Aggression; see also the list *infra*, in **Annex 1**.

<sup>160</sup> **E443/10**, Reasoned Decision on Key Defence Witnesses.

<sup>161</sup> **E454**, Final Witnesses Decision, para. 4.

<sup>162</sup> **E454**, Final Witnesses Decision, para. 4.

68. Even more outrageously than its cowardly decision *vis-à-vis* government witnesses was the Chamber's repugnant decision rejecting four transcripts produced by *Enemies of the People* filmmakers Robert Lemkin and Thet Sambath (the 'Lemkin-Sambath Transcripts'), for which it quietly released decisions on 28 December 2016 during the end-of-year recess.<sup>163</sup> With this decision, the Chamber achieved the unimaginable. While the Chamber had already reached the rock bottom of judicial ineptitude with its decisions not to admit the Defence's other key witnesses and evidence or to open investigations, through its decision not to admit the Lemkin-Sambath Transcripts and to refuse to summons Robert Lemkin, the Chamber actually managed to drill deeper into the bedrock and set a new standard of disingenuousness and hypocrisy.

69. In rejecting Robert Lemkin's appearance and the Lemkin-Sambath Transcripts, the Chamber gave weight to Lemkin's "general lack of cooperation" with the Tribunal; the hearsay nature of his evidence; his inability to speak Khmer; and a perceived inability to verify the interview transcripts he produced.<sup>164</sup> However, these decisions wilfully ignore the substantive content of the transcripts. This content is of patently-obvious relevance to Nuon Chea's case, and at a level of specificity rendering it extremely unlikely that it was fabricated in any respect. Moreover, while the Chamber rejected Lemkin's appearance and the Lemkin-Sambath Transcripts due in part to the perceived inability to verify the underlying source material, the Chamber in contrast refused the Defence's request to obtain and verify the source material of Alexander Laban Hinton, who in fact appeared in court as an 'expert' witness in Case 002/02.<sup>165</sup> This is a hypocritical and blatant double-standard demonstrative of the Chamber's blind commitment to the Manichean narrative. Its absurdity is further evidenced by the sources the Chamber has not only previously admitted but relied on in its own Case 002/01 Trial Judgement to convict Nuon Chea for murder. These included François Ponchaud and Philip Short's interviews of mysterious unnamed and unlocatable sources *e.g.*, the "man from *tambon* 13", unknown "villagers", or someone known only by the cryptic pseudonym "Mr. Worker" who had told Ponchaud about the murder of famous Cambodian actor Kong Sam Oeun during the evacuation.<sup>166</sup> Needless to say, the Supreme Court Chamber overturned that conviction.<sup>167</sup>

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<sup>163</sup> **E416/4**, Decision to Reject Lemkin Evidence and Investigations.

<sup>164</sup> **E443/10**, Reasoned Decision on Key Defence Witnesses, para. 41; **E416/4**, Decision to Reject Lemkin Evidence and Investigations, paras 19-21; *see also infra*, Chapter 9 and **Annex 2**.

<sup>165</sup> *See infra*, Part 5-III-2, for the Defence's detailed arguments in respect of Hinton and the Chamber's decision not to seek to obtain his source material.

<sup>166</sup> **F2/4/3/3/4**, Nuon Chea's Reply to Co-Prosecutors' Response on Lemkin-Sambath Footage, paras 19-20 (on the "man from *tambon* 13" and "villagers"), and **F16**, Nuon Chea's Appeal Brief, para. 317 (on "Mr. Worker").

<sup>167</sup> **F36**, Case 002/01 Appeals Judgement, para. 442.

70. This double standard was equally apparent in the Chamber’s spurious reasons refusing a Defence request to reconsider admitting the Human Rights Watch report *30 Years of Hun Sen* into evidence, widely known to have been written by “Mr. Khmer Rouge Tribunal” himself, Stephen Heder.<sup>168</sup> As is well-known considering the report’s prominent public profile, Human Rights Watch details Hun Sen’s involvement in the CPK, including in violently suppressing Cham rebellions in 1975. It also details his role in the PRK, *inter alia* in leading the K-5 forced labour program after 1979. Despite its clear relevance to Case 002/02 and the Defence’s case, the Chamber again refused to admit it, claiming that the report was “more a summary of [...] multiple and diverse sources [...] including] some references [that] are particularly vague” and took a “relatively narrow perspective, which is of limited use for the purpose of establishing factual findings”.<sup>169</sup> In a case file spanning some 11,000 pieces of evidence – including a good many on par with François Ponchaud’s mysterious source “Mr. Worker” – it is baffling that the Chamber would refuse to admit four transcripts, one Human Rights Watch report, and the handful of evidence listed in **Annex 1** of this Brief on such narrow and technical grounds.

71. A similar air of desperation and disregard for the interests of justice surrounds the Chamber’s reasons, finally released on 30 March 2017, for rejecting so many Defence witness and investigation requests. Apart from general “belatedness”, the Chamber said that the requests were “largely speculative”<sup>170</sup> and the witnesses were irrelevant, of “limited relevance”,<sup>171</sup> or would be repetitive.<sup>172</sup> These reasons wilfully ignore, however, the Defence’s extremely limited ability to locate evidence given it relies on a very biased case file and public domain evidence heavily-coloured by the Manichean narrative.

72. In the same decision, the Chamber explained that it could not find a key Defence witness featured in Robert Lemkin’s evidence – Northwest Zone medical doctor and rebellion participant Chan Savuth<sup>173</sup> – despite locating an almost identically-named person in the right village who denied being the witness sought. Its conclusion that the person was not the right one ignores the obvious possibility that this person lied to Tribunal staff about his identity out of fear of having to testify in public. In this regard, it is important to recall Thet Sambath’s remarks that those who can testify about rebellion “really want to speak” but have security

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<sup>168</sup> E347/2, Request to Admit HRW Report, para. 6.

<sup>169</sup> E347/1, First Decision on HRW Report, para. 4.

<sup>170</sup> E443/10, Reasoned Decision on Key Defence Witnesses, para. 36.

<sup>171</sup> E443/10, Reasoned Decision on Key Defence Witnesses, paras 37-38, 42.

<sup>172</sup> E443/10, Reasoned Decision on Key Defence Witnesses, paras 39, 42.

<sup>173</sup> See also E438, Nuon Chea’s Chan Savuth Investigation Request, and *infra*, Chapter 9 and **Annex 3**.

concerns and thus need “security assurance[s]” to testify.<sup>174</sup> There is no indication that the Tribunal staff provided the person they spoke to with any information in this regard.<sup>175</sup> Indeed, in a similar vein, one of the illogical decisions of the Case 002/01 Appeals Judgement was its failure to consider whether the disconnect between the live testimony and prior statements of Defence witness, *Enemies of the People* interview subject, Brigadier General and now-recently deceased Toat Thoeun owed to a similar fear,<sup>176</sup> which it very likely did.

73. Accordingly, and as detailed in Chapter 9, in the interests of justice and for the reasons set out in this entire Brief,<sup>177</sup> the Defence requests that the Chamber reconsider all rejected Defence requests for the admission of evidence stipulated in **Annex 1**. It also requests, in the alternative, that the Chamber reopen the Case 002/02 evidentiary hearings and also reconsider all rejected Defence witness requests stipulated in **Annex 2** and all rejected Defence investigation requests stipulated in **Annex 3**. Furthermore, the Defence freely references all such rejected evidence in this Brief, in particular where it assists in substantiating Nuon Chea’s core case – the Crocodile – in Chapter 3. The Defence realises that this is an unusual approach, but then, this is an unusual trial in an unusual Chamber within a decidedly unusual institution.

### **III. THE NEW ‘RULES OF THE GAME’**

#### **A. THE SUPREME COURT CHAMBER HAS REDEFINED THE APPLICABLE EVIDENCE STANDARDS**

74. As noted above, the Case 002/01 Appeals Judgement and Trial Judgement are (with some exceptions) like day and night in respect of their assessment of evidence. The Supreme Court Chamber’s approach is perfectly encapsulated by two striking examples, detailed below, in relation to Defence witness Sâm Sithy and to murder convictions.

##### **1. The ‘Sâm Sithy’ Threshold Confirms How to Properly Evaluate Witness Evidence**

75. On appeal, one of three Defence witnesses the Supreme Court Chamber summonsed to testify was Sâm Sithy.<sup>178</sup> Currently a police inspector in Kampong Chhnang, Sâm Sithy told the Co-Investigating Judges that he witnessed and barely escaped the brutal massacre of many

<sup>174</sup> **E335/1**, Nuon Chea’s Response to Co-Prosecutors’ Request for Thet Sambath.

<sup>175</sup> **E443/10**, Reasoned Decision on Key Defence Witnesses, para. 41.

<sup>176</sup> See **F36**, Case 002/01 Appeals Judgement, paras 54-56, for the decision on Toat Thoeun’s evidence.

<sup>177</sup> See *infra*, Chapter 9, setting out the relief sought.

<sup>178</sup> **F1/2.1**, Sâm Sithy, T. 3 Jul 2015.

of his family members who had previously been Khmer Republic officials.<sup>179</sup> The Trial Chamber relied on Sâm Sithy's WRI to convict Nuon Chea for the murder and extermination of former Khmer Republic soldiers and officials.<sup>180</sup> Indeed, his account was the only one on the case file in any form (including hearsay, civil party applications and anonymous out-of-court statements) describing the execution of families of Khmer Republic officials in any period remotely proximate to the liberation of the country.<sup>181</sup>

76. In court, Sâm Sithy cut a distinctly bombastic figure. He relished the spotlight, was quick to explain away inconsistencies in his account, yet could not recall key details – *e.g.*, the name of a single victim of the massacre other than his parents, despite claiming that numerous aunts, uncles and cousins, were killed that day. It was quickly apparent to the Defence that Sâm Sithy's testimony was completely unreliable, a pack of shameless lies, and an obvious attempt to “lie for justice”.<sup>182</sup> Accordingly, after his appearance, the Defence filed an RIA to the Supreme Court Chamber to gather evidence testing his account's veracity.<sup>183</sup> The Co-Prosecutors strenuously protested. They submitted theatrically that Sâm Sithy described “unforgettable events that changed his life”;<sup>184</sup> was “extremely consistent”, “powerful and very credible”;<sup>185</sup> and that the Defence's request was ultimately “desperate”, “ludicrous”, and making a “weak attempt to recover from this self-inflicted wound”.<sup>186</sup>

77. Unfortunately for the Co-Prosecutors, the Supreme Court Chamber sided squarely with the Defence. In its findings on Sâm Sithy in the Case 002/01 Appeals Judgement, the Chamber agreed that in light of Sâm Sithy's “demeanour and [...] particulars of his narration”, he was “neither credible nor reliable”.<sup>187</sup> The Chamber further highlighted the fact that Sâm Sithy “evaded answering questions regarding the details of the events preceding the execution” and kept “repeating the same general and vague version of the killing incident”.<sup>188</sup> The Chamber even went so far as to question Sâm Sithy's motives, noting that “the fact that there was past

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<sup>179</sup> **E3/5201**, ‘WRI of Sâm Sithy’.

<sup>180</sup> **E313**, Case 002/01 Trial Judgement, para. 511.

<sup>181</sup> See **F28**, Request for Investigative Action into Sâm Sithy, para. 26.

<sup>182</sup> See **F28**, Request for Investigative Action into Sâm Sithy, paras 2, 4-18, which summarise the multitude of flaws in Sâm Sithy's evidence.

<sup>183</sup> **F28**, Request for Investigative Action into Sâm Sithy.

<sup>184</sup> **F28/2**, OCP Response to Request for Investigative Action into Sâm Sithy, para. 18.

<sup>185</sup> **F28/2**, OCP Response to Request for Investigative Action into Sâm Sithy, paras 21, 38.

<sup>186</sup> **F28/2**, OCP Response to Request for Investigative Action into Sâm Sithy, paras 22, 38.

<sup>187</sup> **F36**, Case 002/01 Appeals Judgement, paras 478, 481.

<sup>188</sup> **F36**, Case 002/01 Appeals Judgement, para. 480.



press coverage of his experience may indicate an interest in repeating the account of that experience, regardless of its truthfulness”.<sup>189</sup>

78. Most strikingly of all, however, was the fact that the Supreme Court Chamber reached its finding *via* a point-by-point analysis of SâM Sithy’s testimony. This analysis so perfectly exemplifies dispassionate, rational and careful assessment of facts – *i.e.*, the polar opposite of the Case 002/01 Trial Judgement – that it is worthy of wholesale quotation, despite the page limitations of this Brief. As the superior chamber found:

Firstly, **it appears highly improbable** that a 13-year-old boy could skilfully and cool-headedly remain still and impassive after having been shot at, hit with a club and dragged into a pit, and after having witnessed his mother’s execution. **Nor is it credible** that both SÂM Sithy and his two younger cousins could survive relatively unharmed being shot at by indiscriminate, prolonged, short-range fire from six armed men surrounding them in a circle – followed by a round of hits with clubs to the children’s heads. Secondly, **chances are minimal** that, out of the seven families who, according to his testimony, were led away by the Khmer Rouge, only SÂM Sithy, his little sister and his two younger cousins survived; he could provide neither the name of any other victim of the execution (even though declaring that a number of other relatives were part of the group), nor the identities of other people who were present on the same occasion and are still alive, apart from that of his cousin. Thirdly, **it remains unclear** how he could have followed his father’s group despite having been chased back in the presence of three armed Khmer Rouge guards, could have seen that group being taken away to be shot at, at some point returned to his mother’s group only to be disbelieved and, finally, could have made an overnight journey back to the Wat Chrak Sdech.<sup>190</sup>

79. The Supreme Court Chamber’s SâM Sithy finding is of explosive importance to the Case 002/02 trial. Like Case 002/01, the Case 002/02 trial has been replete with SâM Sithy-style accounts, especially those offered by civil parties who have admitted to, or appear to be, ‘lying for justice’.<sup>191</sup> Thus, the Case 002/01 Appeals Judgement changes the ‘rules of the game’ in that it does exactly what the Stanford Report says was entirely lacking in the Case 002/01 Trial Judgement. In the process, it redefines the basic threshold that a witness or civil party’s account must reach to be considered reliable and credible at this Tribunal.

## 2. The Finding on Murder Convictions Clarifies the Proper Standard of Proof

80. Similarly ground-breaking – at least at this broken and close-minded institution – was the Supreme Court Chamber’s clarification of the applicable standard of proof. In particular, the

<sup>189</sup> F36, Case 002/01 Appeals Judgement, para. 480.

<sup>190</sup> F36, Case 002/01 Appeals Judgement, para. 479 (emphases added).

<sup>191</sup> See *e.g.* Nhem En on S-21 and Say Sen and Meas Sokha on Kraing Ta Chan, *infra*, Chapter 4-IV; No Sates (who even admitted to lying for justice) on the genocide of the Cham, *infra*, Chapter 5-II-D; and multiple civil parties testifying on the DK regulation of marriage, *infra*, Chapter 7-II-A.

superior chamber held that establishing a murder conviction required not only that “each and every fact must be proved beyond reasonable doubt, but [also] all facts underlying the elements of crime”.<sup>192</sup> As that Chamber explained, if any link in the evidentiary chain “is not proved beyond a reasonable doubt, the chain will not support a conviction”.<sup>193</sup>

## **B. NEW ‘RULES OF THE GAME’ APPLY TO EVIDENCE ASSESSMENT IN CASE 002/02**

81. The Supreme Court Chamber’s ‘Sâm Sithy’ threshold; clarification of the standard of proof; and general approach to evidence, underscores the Trial Chamber’s erroneous approach, blatant disinterest for the truth, and fealty to the Manichean narrative in Case 002/01. Case 002/02 is the final opportunity to correct course. Thus, below, the Defence offers a convenient roadmap of the applicable standards for evidence assessment in Case 002/02.

### **1. The Assessment of Evidence is Underscored by Key Principles of Fair Trial**

82. Although it defies belief considering the decade-long trial and the fact that this Tribunal was established by the UN which enshrines the right to a fair trial in its very own ICCPR, it appears necessary to reiterate that several basic principles are of overriding importance in determining how the Chamber must assess evidence in Case 002/02. First and foremost, Nuon Chea is presumed innocent until proven guilty.<sup>194</sup> As a result, the burden of proof is on the Co-Prosecutors alone to prove each constitutive element of each charged crime and mode of liability beyond reasonable doubt.<sup>195</sup>

83. The Trial Chamber must evaluate all evidence, both inculpatory and exculpatory, and decide the degree to which the evidence should be relied upon in accordance to its reliability and probative value. A conviction can only be entered if the evidence, which is reliable, corroborated and of high probative value, proves guilt beyond a reasonable doubt. Any doubt must be construed in favour of Nuon Chea, following the principle *in dubio pro reo* (*i.e.*, when in doubt, for the accused), which is expressly protected under the Cambodian Constitution.<sup>196</sup>

<sup>192</sup> **F36**, Case 002/01 Appeals Judgement, para. 418.

<sup>193</sup> **F36**, Case 002/01 Appeals Judgement, para. 418, citing ICTR, *Ntagerura et al.*, Appeals Judgement, para. 175.

<sup>194</sup> Constitution of the Kingdom of Cambodia, Art. 38 (“The accused shall be considered innocent until the court has judged finally on the case”); ICCPR, Art. 14(2); ECCC Establishment Law, Art. 35 *new*; Internal Rule 21(d).

<sup>195</sup> **F36**, Case 002/01 Appeals Judgement, para. 418.

<sup>196</sup> Constitution of the Kingdom of Cambodia, Art. 38 (“Any cases of doubt shall be resolved in favour of the accused”); *see also* **F36**, Case 002/01 Appeals Judgement, para. 379; ICTY, *Limaj et al.* Appeals Judgement, para. 21.

In other words – and as relevant to nearly every page of this Brief – where a reasonable doubt exists, an acquittal must follow.

84. Given the Defence’s resources and pages limits for this Brief, it is unable to undertake a ‘Sâm Sithy’-level analysis for each piece of evidence, or each witness or civil party who appeared. Nevertheless, no omitted discussion of an issue should be taken as an admission of guilt. Moreover, and in any case, this analysis is the Co-Prosecutors’ burden and, in the end, the Chamber’s. While the Case 002/01 Trial Judgement offered sparse evidentiary analysis, the Chamber must now deliver a judgement demonstrating ‘Sâm Sithy’-style (or ‘Stanford’-style, for that matter) the basis for each finding beyond reasonable doubt.<sup>197</sup>

85. In addition, and contrary to the Co-Prosecutors’ apparent understanding, the mere quantity of evidentiary items does not necessarily meet the requisite standard of proof, especially when such evidence is based on widespread rumours or is generally of low probative value.<sup>198</sup> In the case of circumstantial evidence or proof by inference – again, a matter which is relevant to nearly every page of this Brief – the guilt of the Accused or the fulfilment of a constitutive element of a crime or mode of liability must be the **only** reasonable conclusion available.<sup>199</sup> If any other conclusion can be inferred from the evidence consistent with Nuon Chea’s innocence, then he must be acquitted.<sup>200</sup>

86. It should be obvious that Nuon Chea must know the case he is to answer. This is part of his right to adequate facilities to prepare his defence, which includes access to all evidence, both exculpatory and inculpatory.<sup>201</sup> However, there have been severe obstacles to this access in Case 002/02. For instance, on a shockingly regular basis, the Co-Prosecutors have audaciously attempted to elicit evidence on issues or locations outside the scope of the trial. As noted throughout this Brief, this includes, *inter alia*, the issue of treatment of the Khmer Krom as a group or sites expressly excluded from the scope or never mentioned in the Closing Order.<sup>202</sup> Beginning a week before trial hearings were due to begin, the Co-Prosecutors also

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<sup>197</sup> ICTY, *Naletilić & Martinović*, Appeals Judgement, para. 603; SCSL, *RUF* Appeals Judgement, paras 710–712.

<sup>198</sup> **F36**, Case 002/01 Appeals Judgement, para. 419.

<sup>199</sup> ICTR, *Nahimana et al.* Appeals Judgement, para. 524; *see also*, generally, ICTY, *Krstić* Appeals Judgement, para. 41; *Brđanin* Trial Judgement, para. 970.

<sup>200</sup> ICTY, *Čelebići* Appeals Judgement, para. 458; ICTR, *Karera* Appeals Judgement, para. 34.

<sup>201</sup> HRC General Comment 32, para. 33; *see also* ICCPR Art. 14(3)(b); ECCC Establishment Law, Arts 33 *new*, 35 *new* (b); Constitution of the Kingdom of Cambodia, Art. 31.

<sup>202</sup> *See infra*, Chapter 4-IV-A-1, Chapter 4-IV-A-2, Chapter 5-II-B-1, Chapter 5-III-B, Chapter 5-IV-B-1, Chapter 6-IV-A.

started dumping what ultimately became a tsunami-sized wave of new evidence disclosed from Cases 003 and 004 into Case 002/02 as detailed in past Defence submissions.<sup>203</sup>

87. The over-300 trial transcripts pose a particular challenge. As discussed in previous filings,<sup>204</sup> in early 2016, *i.e.*, more than halfway through the Case 002/02 trial, the Translation Unit ('TU') suddenly introduced a 'quality control system' to revise all Case 002/02 transcripts. This system is in effect a post-event translation process aimed at correcting the mistakes of live interpretation during the hearings. Through this process, the TU staff use each speaker's original language as the basis to correct the record of what was interpreted live into the other two official languages.<sup>205</sup> Thus, the revised transcripts, though no longer reflecting verbatim the actual live interpretation heard in court, provide more reliable information in all three official languages of what the speakers actually said.

88. Although the transcript revisions are far from complete, it is already clear that the live interpretation – at least from Khmer to English – has often missed or misinterpreted key information. The quality control system, therefore, is of undoubted value. However, due to its extreme belatedness, the Defence could not have been aware of missed information during the hearings and thus could not follow up such information with the witnesses, civil parties, or 'experts' in question or with others who appeared. This also raises the obvious and highly-troubling concern that past transcripts in Cases 001 and 002/01 may be equally inaccurate. Furthermore, all of this infringes Nuon Chea's right to confront evidence and prepare his defence effectively, rights that are further prejudiced by the Chamber's decision for parties to submit closing briefs and present closing oral arguments before all transcripts are revised,<sup>206</sup> despite the Defence's concerns being shared by all parties.<sup>207</sup>

89. Moreover, and as the Defence has also noted in a previous filing, not only are the revisions to transcripts often substantive, it is also extremely difficult to identify when a transcript is final since there are multiple iterations on the case file and these have been sent to the parties throughout the period of drafting of this Brief. Not only does this mean that Nuon

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<sup>203</sup> See *e.g.* E366/2, Nuon Chea's Response to OCP Request for Further Witnesses on Cham Segment, paras 8-10.

<sup>204</sup> E449/3, Nuon Chea's Request on Finalisation of Transcripts; E457/3, Nuon Chea's Response to Co-Prosecutors' Request to Modify Closing Schedules.

<sup>205</sup> The TU's explanation note appearing on each revised transcript explains the quality control process. The note reads: "Corrected transcript: Text occurring between less than (<) and greater than (>) signs has been corrected to ensure consistency among the three language versions of the transcript. The corrections are based on the audio recordings in the source language and may differ from verbatim interpretation in the relay and target languages."

<sup>206</sup> E449/1, Chamber's Memo on Case 002/02 Closing Briefs/Statements, paras 10-11.

<sup>207</sup> E1/510/1.1, Trial Management Meeting, T. 8 Dec 2016, p. 7, lns 10-19.

Chea has had to prepare his case and submit this Brief without access to all the evidence, it also means that it has been impossible for the Defence to revise all of its citations in this Brief prior to filing, as multiple new versions of a transcript might have been issued after a part of the Brief was drafted. In any case, it is extremely difficult to identify when a transcript is final or not. As noted before, the only practical remedy is to wait until all revised transcripts are submitted – which is scheduled for 30 June 2017 in English and 31 July 2017 in Khmer and French – before the Defence can realistically and accurately review this Brief’s citations. Accordingly, the Defence intends to file a corrected version of this Brief and potentially request the reopening of the hearing after all transcript revisions are complete, depending on the nature of those revisions.<sup>208</sup> In addition, despite the Defence’s best efforts, the citations in this Brief may not be accurate due to transcript revision-related circumstances that are beyond its control and well-known to the Chamber.

90. Furthermore, and in the context of the new ‘rules of the game’, the multiple changes to a witness’s transcript and the sheer difficulty of even identifying which of the many iterations of a witness’s transcript is the final one, coupled with the more exacting evidence assessment required in Case 002/02, now puts exceptional pressure on the Chamber. It is now doubly important for the Chamber to carefully ensure that each of its findings is tethered to the correct piece of evidence (let alone is properly and adequately reasoned).

## **2. Different Standards Apply to Different Categories of Witness Evidence**

91. The new ‘rules of the game’ have also clarified the proper standards that must apply to the assessment of different categories of witness evidence. These standards depend on the evidence’s form (*i.e.*, live vs. written) and source (*i.e.*, witnesses vs. civil parties vs. out-of-court sources). In assessing live evidence, the Chamber must assess witnesses’ credibility and the reliability of their testimony.<sup>209</sup> When significant and material inconsistencies exist in their evidence, a witness’s testimony is thus unreliable and cannot form the basis of a conviction.<sup>210</sup>

92. It is also important to recall that in-court accounts of civil parties are subject to a different standard.<sup>211</sup> As civil parties are not required to take an oath, and may have an interest in

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<sup>208</sup> See also E457/6, Chamber’s Memo on Request to Postpone Closing Briefs and Statements, para. 12.

<sup>209</sup> See ICTY, *Milutinović et al.* Trial Judgement, paras 60–61.

<sup>210</sup> See ICTR, *Rutaganda* Trial Judgement, para. 195; *Rutaganda* Appeals Judgement, para. 190.

<sup>211</sup> F36, Case 002/01 Appeals Judgement, para. 314; E1/2.1, Trial Management Meeting, T. 5 Apr. 2011, p. 100; E74, Decision on Various Outstanding Procedural Requests, p. 1; E267/3, Decision on Civil Party Statements of Suffering and Related Issues, paras 21–22.

providing incriminating evidence as alleged victims, the probative value of their in-court statements is lower than for witnesses.<sup>212</sup> In any case, the same credibility analysis carried out for witnesses must be carried out for civil parties who appear in court.

93. Written evidence – *i.e.*, WRIs, civil party applications,<sup>213</sup> and out-of-court statements – has inherently low probative value.<sup>214</sup> At the same time, the Defence may fully rely on such written evidence. While they are insufficient, on their own, to establish anything beyond reasonable doubt, they are, on the contrary, sufficient to raise reasonable doubt.<sup>215</sup>

94. WRIs of people who did not testify in court have a lower probative value, as the Defence has not been able to test their veracity. Yet again, however, this appears to be something the Co-Prosecutors misunderstand, since, for instance, their documents presentation on worksites improperly focused wholly on WRIs rather than on contemporaneous DK documents, prompting the Defence and Co-Lawyers for Khieu Samphân to walk out of the hearing in protest.<sup>216</sup> To avoid any doubt, therefore, it must be reiterated that the Trial Chamber cannot convict based, solely or to a decisive degree, on WRIs of those who do not appear in court.<sup>217</sup> In addition, while witnesses and civil parties may be confronted with prior inconsistencies in their WRIs, unless specific circumstances are shown, their live testimony should be given more weight than their WRIs.

95. Civil party applications must also be afforded even lower probative value due to their possible interest in exaggerating their account and their exemption from testifying under oath.<sup>218</sup> Furthermore, these application forms are often completed by third parties, which means that they are riddled with inaccuracies,<sup>219</sup> as revealed at trial.

96. Other out-of-court statements *i.e.*, all material not collected by the Co-Investigating Judges for a judicial investigation (such as books, media articles, and DC-Cam interviews), have even lower probative value. This is because such material was collected outside a judicial process and without the protections of judicial formalities and guarantees.<sup>220</sup>

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<sup>212</sup> **F36**, Case 002/01 Appeals Judgement, para. 313.

<sup>213</sup> **F36**, Case 002/01 Appeals Judgement, para. 430.

<sup>214</sup> **F36**, Case 002/01 Appeals Judgement, paras 430, 440.

<sup>215</sup> *See supra*, Chapter 2-III-B-1; the basis for this is the presumption of innocence.

<sup>216</sup> **E1/337.1**, Key Documents Hearing, T. 26 Aug 2015, p. 35, lns 24-25, p. 38, ln. 21 to p. 39, ln. 1.

<sup>217</sup> **F36**, Case 002/01 Appeals Judgement, para. 296; ICCPR, Art. 14(3)(e).

<sup>218</sup> *See supra*, Chapter 2-II-A-4, on civil party accounts generally.

<sup>219</sup> **F36**, Case 002/01 Appeals Judgement, para. 296.

<sup>220</sup> **F36**, Case 002/01 Appeals Judgement, para. 296.

### 3. Particular Caution is Needed When Assessing Certain Categories of Evidence

97. Caution must be exercised when assessing hearsay evidence, particularly where the source of information is uncertain and thus unable to be tested in court. In such instances, hearsay must be afforded little, if any, probative value. Untested hearsay from an anonymous source and double hearsay cannot establish an element of crime or mode of liability beyond reasonable doubt.<sup>221</sup> While this is a challenge for any court, it is, as discussed in Section II-B-1, of particular significance here given the specific challenges created by victims and perpetrators continuing to live side-by-side and creating a new ‘collective memory’ under the tainted auspices of the prevailing Manichean narrative.

98. Caution must equally be exercised when examining witnesses who were or may have been involved in some capacity in the commission of the crimes,<sup>222</sup> such as former cadres. The reliability of their testimony must be considered in light of the obvious potential motives to implicate Nuon Chea and deflect their own responsibility.<sup>223</sup>

99. Finally, given the Chamber’s apparent deference to the ‘experts’ who appeared, it is important to revisit the applicable standards *vis-à-vis* experts. Expert status is confined to individuals with specialist knowledge, skills or training.<sup>224</sup> Despite clear jurisprudence and Defence objections in Case 002/01,<sup>225</sup> the Chamber in Case 002/02 nevertheless summonsed ‘experts’ who simply parroted the Manichean narrative; provided no methodological transparency; or were plainly unqualified. Accordingly, as discussed below in this Brief, of the eight ‘experts’ that appeared, the Defence refutes the credibility of five,<sup>226</sup> and partially accepts, to differing degrees, the credibility of the other three.<sup>227</sup>

100. An essential requirement of an expert is that they testify with utmost neutrality and objectivity.<sup>228</sup> During the proceedings, however, the Chamber neglected its duty to uphold

<sup>221</sup> **F36**, Case 002/01 Appeals Judgement, paras 441-42.

<sup>222</sup> SCSL, *CDF* Trial Judgement, para. 278.

<sup>223</sup> SCSL, *AFRC* Appeals Judgement, para. 128.

<sup>224</sup> See e.g. ICTY, *Strugar*, Decision on Admission of Expert, p. 4; ICTR, *Karemura et al.*, Trial Chamber Decision on Scope of Expert Testimony, para. 3; see also **E215**, Decision on Assignment of Experts, para. 15 (citing ICTY and ICTR case law); see also **E215**, Decision on Assignment of Experts, para. 16; **F36**, Case 002/01 Appeals Judgement, para. 328.

<sup>225</sup> See e.g. **E295/6/3**, Nuon Chea’s Case 002/01 Closing Brief, paras 24-25, 112, 117-18; **F16**, Nuon Chea’s Appeal Brief, paras 84, 207-211.

<sup>226</sup> Elizabeth Becker; Ysa Osman; Alexander Hinton; Vooun Vuthy; Henri Locard.

<sup>227</sup> Peggy Levine; Nakagawa Kasumi; Stephen Morris. For reasons detailed below, the Defence relies most on Levine (Chapter 7-II-B-2), then Nakagawa (Chapter 7-II-B-1), then Morris (Chapter 3-II-A).

<sup>228</sup> **E215**, Decision on Assignment of Experts, para. 15; ICTR, *Nahimana et al.* Appeals Judgement, para. 199.

Nuon Chea's right to a fair trial<sup>229</sup> by failing to censure the blatant partiality shown by Henri Locard<sup>230</sup> and Ysa Osman.<sup>231</sup> This lack of impartiality completely undermines these so-called experts' credibility and the probative value of their evidence.

101. The probative value of an expert's opinion also pivots on the quality of their sources.<sup>232</sup> There must be methodological transparency:<sup>233</sup> accordingly, where sources are not fully accessible and verifiable, diminished weight must be attributed to evidence derived from them.<sup>234</sup> In Case 002/02, the sources of 'experts' were often neither fully accessible nor fully tested,<sup>235</sup> or their methodology was deeply flawed.<sup>236</sup> In light of this, and the fact that the Chamber is not, in its own words, "bound by the evidence or conclusions given by an expert",<sup>237</sup> such evidence must be closely scrutinised and assigned limited weight, if any.

102. The underlying bias and incompetency of the Chamber is not only exemplified in their choice and treatment of 'experts', but also in their treatment of 'experts' that did not appear. These include those the Chamber ultimately refused to hear, such as Defence-requested expert Nayan Chanda,<sup>238</sup> as well as Roel Burgler, Patrick Heuveline, and Laura Summers.<sup>239</sup> It moreover also includes experts who the Chamber failed to compel to appear in Case 002/01 but who the Co-Prosecutors nevertheless seem intent on relying upon in Case 002/02, such as historian Ben Kiernan and DC-Cam-published author Ea Meng-Try, who avoided subjecting their opinions to scrutiny.

103. These failures to testify, as the Chamber noted in the context of Kiernan in Case 002/01, mean that their "conclusions can have little if any probative value in Case 002 given that their author cannot be adversarially challenged."<sup>240</sup> Despite this unequivocal assertion, however, the

<sup>229</sup> Art. 33 new, ECCC Establishment Law.

<sup>230</sup> See *infra*, Chapter 4-IV-E-2, on the partiality of Locard.

<sup>231</sup> See *infra*, Chapter 5-II-B-2-(a), on the partiality of Osman.

<sup>232</sup> **F36**, Case 002/01 Appeals Judgement, para. 880.

<sup>233</sup> *Galic*, Decision on Admission of Expert Professor, para. 9.

<sup>234</sup> **F36**, Case 002/01 Appeals Judgement, para. 329.

<sup>235</sup> See *infra*, Chapter 3-II-A, on Morris's poor DK sources; Chapter 4-IV-E-2, on Locard's lack of reliable sources; Chapter 5-II-B-2-(a), on Osman's poor sources; Chapter 5-II-B-2-(b), on Hinton's lack of reliable sources; Chapter 6-IV-B-2, on Becker's poor methodology; and Chapter 7-II-B-1, on Nakagawa's destroyed evidence.

<sup>236</sup> See *infra*, Chapter 4-IV-E-1, on Vooun Vuthy's poor methodology.

<sup>237</sup> **E367**, Decision on Osman, para. 11.

<sup>238</sup> See *infra*, Chapter 3-II-A, on the Chamber's treatment of Nayan Chanda; see also *supra*, Chapter 2-II-B-3-(c) on the refusal to admit key witnesses/experts, Chapter 9 and **Annex 2**.

<sup>239</sup> See *infra*, Chapter 2-II-B-3-(a) (Heuveline); see **E307/4.3**, Nuon Chea's Case 002/02 New Witness Summaries, p. 4 (Burgler), **E305/4.2**, Nuon Chea's Case 002/02 Updated Witness Summaries, pp. 20-21 (Summers), and **E454**, Final Witnesses Decision, para. 2 (declining to call either Burgler or Summers); see also *supra*, Chapter 2-II-B-3-(c) on the refusal to admit key witnesses/experts, and *infra*, Chapter 9 and **Annex 2**.

<sup>240</sup> **E166/1/4**, Proposed Testimony of Kiernan, p. 2.



Chamber nevertheless relied upon Kiernan an astounding 26 times in their Case 002/01 Trial Judgement and upon Ea Meng-Try seven times. It cannot adopt the same approach Case 002/02, given the Supreme Court Chamber's clarification of the extremely limited probative value to be assigned to untested out-of-court evidence such as the published works of these so-called 'experts'<sup>241</sup> who freely pontificate on the DK but are too fearful to subject their findings (and reputations) to the scrutiny of an international trial.

#### IV. CONCLUSION ON THE MANICHEAN NARRATIVE AND THE NEW 'RULES OF THE GAME'

104. The historian Richard Minear, who coined the term "victor's justice" in his seminal work on the International Military Tribunal for the Far East, assessed that tribunal as follows:

The Tokyo Tribunal failed miserably in its attempt to write the history of the prewar years. This failure was in part the result of the tribunal's bias, but it was also in large part the result of the fundamental misconceptions that lay behind the trial and dominated its course. [...] An unbiased look at the evidence would have forced drastic revision of both these misconceptions. But an unbiased approach to the evidence: this the tribunal was not prepared to undertake.<sup>242</sup>

105. The current Tribunal appears equally unprepared to adopt an unbiased approach to the evidence. This is driven home most of all in Section II above, which through only a few emblematic examples shows the Trial Chamber's closeminded commitment to simply rubber-stamping the prevailing Manichean narrative, which means that this trial could have cost international taxpayers a mere \$41 by purchasing the most popular books, instead of the hundreds of millions of dollars it has so far cost to conduct a disheartening sham of a trial.<sup>243</sup>

106. Ultimately, due to the overpowering impression that the Manichean narrative represents the 'accepted truth' of what happened in the DK, the presumption of innocence and the burden of proof are effectively reversed. Here, it is patently clear that the Chamber's judges presume Nuon Chea's guilt, and that to displace this presumption, the onus is on the Defence to disprove the Co-Prosecutors' case on the balance of probabilities, if not beyond reasonable doubt. However, all that a defence should actually need to do in a proper, openminded court, is to raise reasonable doubt. This is accordingly what the Defence does in the remaining Chapters of this Brief, most of all with its discussion of the head, body, and tail of the Crocodile in Chapter 3 immediately below.

<sup>241</sup> **F36**, Case 002/01 Appeals Judgement, para. 296 (emphasis added).

<sup>242</sup> Minear, *Victor's Justice: The Tokyo War Crimes Trial*, p. 158.

<sup>243</sup> **E1/232.1**, Case 002/01 Closing Arguments (Nuon Chea), T. 22 Oct 2013, p. 20, lns 10-16.

### **CHAPTER 3. THE CROCODILE: WHAT REALLY HAPPENED BEFORE, DURING, AND AFTER THE DK PERIOD**

#### **I. INTRODUCTION**

107. This Chapter expands on past filings and statements<sup>244</sup> by presenting in detail what Nuon Chea refers to as the head, body, and tail of the Crocodile. It is the heart of Nuon Chea’s case; it is addressed directly to the Cambodian people; and it dismantles the Manichean narrative and explains what really happened before, during, and after the DK period.

#### **A. THE DEFENCE HAS TRAVELLED A LONG ROAD TOWARDS REWRITING HISTORY**

108. Breaking down Manichean ‘accepted truths’ is no easy feat. As detailed in Chapter 2 above, it is almost insurmountable in a tribunal like this one. Not only does the Defence have virtually no investigative rights, but it also faces an inherently biased case file and national and international judges, prosecutors, and investigators who have all bought the Manichean narrative ‘hook, line and sinker’ and are committed to upholding it in the name of ‘justice’. Moreover, this trial takes place in a tribunal the establishment of which was requested by the Cambodian government – a government whose leaders are former ranking CPK members who rose to lead the PRK; have managed to cling on to power until today; and now seek to take advantage of the Tribunal’s judicial fact-finding process to whitewash their CPK pasts. Finally, and as also discussed in Chapter 2, this trial follows a 40-year process of reframing the truth of the DK as the Manichean narrative, a process expertly led by Vietnam, the Soviet Union and East Germany, and aided by the PRK, now in the guise of the current Cambodian government.

109. The Chamber and the Co-Prosecutors are fond of claiming that evidence for Nuon Chea’s case has long existed in the public domain. Both have in the past opposed the Crocodile on the basis that its discussion is “belated”<sup>245</sup> and could already have been uncovered through public information. This leads to the related claim that Nuon Chea’s attempts to discuss the Crocodile are mere “trial tactics”<sup>246</sup> aiming to mislead, disrupt, and delay proceedings.<sup>247</sup> However, these claims are entirely misplaced. First, and most obviously, Nuon Chea has said

<sup>244</sup> See e.g. **E1/14.1**, Case 002/01 Opening Statements (Nuon Chea), T. 22 Nov 2011, p. 78, ln. 25 to p. 81, ln. 7; **E395/2**, Nuon Chea’s Rebellion Submissions; **F2/8**, Nuon Chea’s Sixth Appeal Additional Evidence Request; **F2/4/3/3/6/1**, Nuon Chea’s “Rift” Submissions.

<sup>245</sup> See *supra*, Chapter 2-II-B-3-(c), regarding the Chamber’s decision to reject most of the Defence’s Case 002/02 witness, evidence and investigation requests.

<sup>246</sup> **E312**, Decision on 002/01 Witnesses, Experts and Civil Parties, para. 117; see also *supra*, Chapter 1-II-B.

<sup>247</sup> See e.g. **F2/8/5**, Co-Prosecutors’ Response to Nuon Chea’s Sixth Appeal Additional Evidence Request, as summarised and analysed in **F2/8/6**, Nuon Chea’s Reply to Co-Prosecutors’ Response to Sixth Appeal Additional Evidence Request, paras 3-7.

since even before it was established that this Tribunal ought to “tell [the Cambodian people] the truth about what happened” in DK.<sup>248</sup> Nuon Chea is nearly 91 years old. Opportunities to seek the truth are literally dying out: a steady stream of Nuon Chea’s witnesses have died or lost capacity during the decade-long proceedings. Thus, it is not in his interest whatsoever to delay the trial; it is very clearly the opposite.

110. Second, not only is information on the DK in the public domain limited and heavily coloured by the Manichean narrative, as noted in Chapter 2, but access to it is circumscribed. The Vietnamese and Soviet archives are hermetically sealed, and if they ever open, they will surely render the Tribunal’s factual findings absurd. Information can theoretically be obtained from DC-Cam, the US-founded self-appointed “custodians” of the DK record. However, the Defence may only obtain documents from DC-Cam when it can identify precisely which document it seeks, down to the document number. This leaves the Defence in the paradoxical situation of needing to know what it is looking for before looking for it, and unable to explore its document collections. In addition, DC-Cam statements are only translated into English when added to the Tribunal’s case file; Khmer is only now becoming digitally searchable; and most contemporaneous documents are too poor in quality to be accurately digitised in any case. All in all, this has meant for the Defence, identifying corroborative evidence on the Crocodile over the past decade has been more difficult than locating the proverbial needle in a haystack.

111. Thus, the Defence’s first Case 002 witness list in 2011 inevitably had to cast a wide net, seeking 527 witnesses, 13 experts, and five civil parties.<sup>249</sup> These included the Late King Father Norodom Sihanouk,<sup>250</sup> *Enemies of the People* filmmakers Robert Lemkin and Thet Sambath, from whom the Defence sought information in respect of “alternative command structures”;<sup>251</sup> international relations figures such as former US Secretary of State and National Security Advisor Henry Kissinger, US National Security Advisor Zbigniew Brzezinski, and Vietnamese Minister for Foreign Affairs Phan Hien,<sup>252</sup> and several former ranking CPK members who currently hold positions in the Cambodian government. The latter category not only included Heng Samrin, Hun Sen, Ouk Bunchhoeun, and the now-late Chea Sim, as mentioned throughout this Brief, but also Senate President Say Chhum, National Assembly member Keat Chhon, and

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<sup>248</sup> E3/108, Notes of Interview of Nuon Chea and Khieu Samphân, ERN 00000933; *see also supra*, Chapter 1.

<sup>249</sup> *See the summary in E312*, Decision on 002/01 Witnesses, Experts and Civil Parties, para. 5.

<sup>250</sup> E9/10.1, Nuon Chea’s Case 002 Witness Summaries, p. 38.

<sup>251</sup> E9/10.1, Nuon Chea’s Case 002 Witness Summaries, pp. 30 (Robert Lemkin) and 52 (Thet Sambath).

<sup>252</sup> E9/10.1, Nuon Chea’s Case 002 Witness Summaries, pp. 7 (Zbigniew Brzezinski), 27 (Henry Kissinger), 40 (Phan Hien).

former Minister for Foreign Affairs Hor Namhong.<sup>253</sup> Opposition politician and now-deceased first PRK head Pen Sovann was on the list as well.<sup>254</sup> However, in the Case 002/01 trial, the vast majority of Defence witnesses was rejected. Of the 75 substantive witnesses heard in that trial, only four were selected by all defence teams combined.<sup>255</sup> Furthermore, the Defence's attempts to question witnesses on issues related to its case – especially the head of the Crocodile pre-1975 and its tail post-1979 – were systematically shut down.<sup>256</sup>

112. In contrast, in the Case 002/01 appeal, the Supreme Court Chamber at times showed a somewhat greater interest in the Crocodile. In particular, following a Defence request, that Chamber opened an investigation into footage in the possession of Robert Lemkin and Thet Sambath. On 18 May 2015, this led to its judges interviewing Lemkin (albeit in the absence of the parties). In his interview, Lemkin explained that he and Sambath had “amassed a wealth of evidence about Ruos Nhim’s political agenda during the period 1975 to 1978”, including the accounts of four individuals who knew details of this agenda and of Ruos Nhim’s “view of the line of the Communist Party of Kampuchea; his view about what to do about that line; [and] his view and his activities in an attempt to take over control of the Party”.<sup>257</sup> Lemkin also provided the Supreme Court Chamber, on 15 September 2015, with the Lemkin-Sambath Transcripts recording the four people’s interviews,<sup>258</sup> transcripts that the Trial Chamber refused to admit despite their key importance to Nuon Chea’s case. As is detailed in this Chapter,<sup>259</sup> the evidence in the transcripts show, as Lemkin explained to the Cambodia Daily, that “[w]ithin a month of the takeover of power by the Khmer Rouge – Pol Pot, Nuon Chea and so on – senior leadership in the CPK were making separate plans for a separate military-backed administration and they were trying to work out how to achieve that.”<sup>260</sup>

113. Moreover, where there is a will – and the truth – there is often a way, and in Case 002/02, the Defence found it. As detailed in Chapter 2, in this trial, the Defence has searched more tenaciously and creatively for evidence and has thus obtained and sought the admission of

<sup>253</sup> **E9/10.1**, Nuon Chea’s Case 002 Witness Summaries, pp. 9 (Chea Sim), 18 (Heng Samrin), 20 (Hor Namhong and Hun Sen), 23 (Keat Chhon), 39 (Ouk Bunchhoeun), and 45 (Say Chhum).

<sup>254</sup> **E9/10.1**, Nuon Chea’s Case 002 Witness Summaries, pp. 39-40.

<sup>255</sup> See **E295/6/3**, Nuon Chea’s Case 002/01 Closing Brief, paras 40-56.

<sup>256</sup> See **E295/6/3**, Nuon Chea’s Case 002/01 Closing Brief, paras 55, 57-58.

<sup>257</sup> **E3/9620**, ‘WRI of Robert T.F. Lemkin’, A34.

<sup>258</sup> **F2/4/3/3/6.1**, WESU Report on Lemkin-Sambath Transcripts.

<sup>259</sup> See **E416**, Nuon Chea’s Request for Lemkin Documents, Chapter 1-II-B, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 3-II-B-1, Chapter 9 and **Annex 1**; see also *supra*, Chapter 3-IV-C and D, Chapter 3-V, Chapter 3-VI-A-2, Chapter 3-VI-B-1, and Chapter 3-VI-B-2.

<sup>260</sup> See **E416/3.1.2**, Cambodia Daily, *Factions or Fiction*, ERN 01298223, Chapter 1-II-B, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 3-II-B-1, Chapter 9 and **Annex 1**.

several unique pieces of evidence, cited throughout this Chapter, that corroborate the Crocodile. These include, *inter alia*, a speech given to the Chinese Communist Party politburo by its then-politburo member and Minister of Defence Geng Biao which was recorded and leaked by intelligence officials from Taiwan;<sup>261</sup> video and audio files of the Late King Father Norodom Sihanouk from the UN archives and YouTube;<sup>262</sup> documents provided to it by academics from the East German intelligence (*i.e.*, ‘Stasi’) archives;<sup>263</sup> and diplomatic cables from Wikileaks caches and from a cache donated by Sihanouk’s biographer to DC-Cam that DC-Cam showcased in an article in the Cambodia Daily.<sup>264</sup>

114. Yet another factor that has facilitated the Defence’s expanded account of the Crocodile in this Brief is the far more expansive scope of Case 002/02 as compared to Case 002/01. This scope has served as a double-edged sword, making it impossible for the Chamber to shut down discussions that threaten the Manichean narrative to the same extent as in Case 002/01. This is because, as explained through selected examples below, those discussions are often also relevant to the Co-Prosecutors for ostensibly-inculpatory purposes.

115. In June 2015, during hearings on the Kampong Chhnang Airfield Construction Site, the Co-Prosecutors attempted to prove their theory that RAK soldiers were transferred from Phnom Penh to the airfield as punishment<sup>265</sup> by asking witnesses about their activities in Phnom Penh and their subsequent transfers. However, this opened the door to witnesses offering credible accounts about their participation as part of North Zone-affiliated Centre Division 310 in attempted *coups d’état* led by Vietnam’s collaborators and seeking to overthrow the CPK and legitimate DK government. As detailed at length in Section VI below, these witnesses described personally being involved in preparing for a *coup d’état* by participating in meetings and stockpiling and transporting of weapons and other materiel. They also provide critical insight into the military objectives of the coups and the collaboration of multiple Zones and top CPK leaders in the furtherance of this traitorous cause.

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<sup>261</sup> **E3/7325**, Geng Biao, Report on the Indochina Situation, which the Defence discusses at length *infra*, in Chapter 3-III-A-2, Chapter 3-IV-B, Chapter 3-VIII-A, and Chapter 3-VIII-E.

<sup>262</sup> See **E396**, Nuon Chea’s Request for Sihanouk-Related Evidence; see also *supra*, Chapter 1-II-B, Chapter 2-II-B-3-(c) on the refusal to admit key evidence, and *infra*, Chapter 3-III, Chapter 9, and **Annex 1**.

<sup>263</sup> See **E305/17/2**, Nuon Chea’s Response to Chamber’s Request About Stasi Documents; **E305/18**, Decision on Stasi Documents.

<sup>264</sup> See **E383**, Nuon Chea’s Request to Admit Diplomatic Cables; **E383/2**, Decision on Diplomatic Cables.

<sup>265</sup> See **D390**, Co-Prosecutors’ Final Submission, paras 293, 295, 297.

116. Similarly, in the hearings on armed conflict – a segment the Defence sought to include in the scope of Case 002/02<sup>266</sup> – the Co-Prosecutors attempted through the hearings to advance their theory that it was DK that irrationally provoked and instigated armed conflict with Vietnam while magnanimous Vietnam tried to de-escalate the situation.<sup>267</sup> However, credible, high-ranking former RAK officers who appeared in court unanimously opposed the Co-Prosecutors' theory, rightfully considering it preposterous.<sup>268</sup> As Mak Chhoeun (2-TCW-823), commander of Battalion 560 in Division 164's Regiment 63, explained:

The policy of Kampuchea was not to invade another country. We were a small – Cambodia was a small country and had small population. We needed only to defend our country. Though Cambodia was a small country, when there was an invasion, we had to defend our country at all costs, even if it would cost us our lives.<sup>269</sup>

117. As set out in Section III below, Ieng Phan, a battalion commander of DK forces in the Southwest Zone, likewise stressed DK's small military and population<sup>270</sup> and explained that the RAK could only go as far as the border with Vietnam and could not attack into Vietnamese territory.<sup>271</sup> Similarly, Moeng Vet (2-TCW-1005), a former military officer from the division office of RAK Centre Division 117, explained that the RAK were tasked with countering Vietnamese advancement.<sup>272</sup> Deputy commander of West Zone Division 1 Meas Voeun, meanwhile, confirmed that the strategy was a defensive one that required the RAK not to fight back and to remain calm in the face of Vietnam's provocations.<sup>273</sup>

118. Such evidence, and the copious additional evidence chronicled throughout this Chapter, sets fire to the Manichean narrative. Far from being tethered in mere “gossip and propaganda” as the Co-Prosecutors suggest,<sup>274</sup> the Crocodile is unequivocally corroborated by multiple accounts of people who themselves saw and experienced events and lived to relay their tale to the Tribunal. Accordingly, while the countless issues in the Crocodile could easily fill several books, the Defence focuses in the limited confines of this Brief (and most particularly, in Section VI below) on the accounts of witnesses describing events that have until now been largely overlooked. These accounts would make it impossible, at least in a proper court of law,

<sup>266</sup> **E1/239.1**, Submissions on Case 002/02 Scope, T. 11 Feb 2014, p. 48, Ins 2-16.

<sup>267</sup> See **D390**, Co-Prosecutors' Final Submission, paras 815-833.

<sup>268</sup> They were also featured in the Trial and Supreme Court Chambers' judgements: *see infra*, Chapter 3-III.

<sup>269</sup> **E1/512.1**, Mak Chhoeun (2-TCW-823), T. 13 Dec 2016, p. 21, Ins 9-15.

<sup>270</sup> **E1/492.1**, Ieng Phan, T. 31 Oct 2016, p. 99, ln. 23 – p. 100, ln. 20.

<sup>271</sup> **E1/492.1**, Ieng Phan, T. 31 Oct 2016, p. 19, Ins 14-17.

<sup>272</sup> **E1/448.1**, Moeng Vet (2-TCW-1005), T. 26 Jul 2016, p. 91, Ins 6-8; **E1/449.1**, Moeng Vet (2-TCW-1005), T. 27 Jul 2016, p. 44, ln. 21 to p. 45, ln. 3.

<sup>273</sup> **E3/8752**, 'DC-Cam Interview of Meas Voeun', ERN 00849511.

<sup>274</sup> **E1/361.1**, Pan Chhuong (2-TCW-918), T. 2 Dec 2015, p. 18, ln. 20 to p. 19, ln. 1.

to simply cast the Crocodile – *i.e.*, the ultimate truth of what happened before, during and after the DK period – aside.

**B. THE CROCODILE EXPLAINS THE NATURE OF EVENTS PRE-, DURING AND POST-DK**

119. The issues discussed in the Crocodile are perhaps best encapsulated in a speech Nuon Chea gave on 18 January 1978 to welcome Deng Yingchao, a Chinese Communist Party Central Committee member and Chinese Premier Zhou Enlai’s wife, during her visit to the DK. As Nuon Chea declared then, and has maintained until today:

Our Cambodian people desire to live peacefully, independently and freely, in honour and as masters of their own territory, and to build a national society in accordance with their profound aspirations and chosen line. Our Cambodian people have a firm and most reasonable patriotism, have never provoked, and have no desire to provoke, anyone.<sup>275</sup>

Our Cambodian people always make efforts to have close, friendly relations with all countries, far and near, based firmly on the principles of respect for each other’s independence and territorial integrity, non-interference in each other’s internal affairs, non-aggression, equality and mutual benefit, and in line with the policies of independence, peace and non-alignment, as indicated in the Constitution of Democratic Cambodia. **However, our Cambodian people will struggle resolutely against the acts of sabotage and subversion from within aimed at staging a *coup d’état* to topple Democratic Cambodia; against the nibbling acts in the border area; and against all acts of aggression and expansion from without.**<sup>276</sup>

120. Before delving into Nuon Chea’s factual account of the DK, Section II addresses two preliminary issues: an analysis of expert evidence heard in relation to the Crocodile, and issues in respect of certain witnesses referred to in this Chapter. Thereafter, the Chapter adopts a factual focus. It is presented as chronologically as possible, although the variety of issues and facts discussed in this Chapter prevent a fully chronological approach.

121. Section III describes how (North) Vietnam has long threatened Cambodia’s survival as a nation-state.<sup>277</sup> It explains that Vietnam’s ultimate ambition was to establish and lead an Indochinese Federation in which Cambodia and Laos would serve as subjugated states. These efforts were complemented by what Nuon Chea calls constant “nibbling acts” and “acts of aggression” along Vietnam and DK’s border. These illegal incursions into DK territory culminated in November-December 1977 in Vietnam’s first large-scale invasion of DK. For

<sup>275</sup> E3/1407, ‘SWB: Far Eastern, 20 Jan 1978’, ERN 00008682.

<sup>276</sup> E3/1407, ‘SWB: Far Eastern, 20 Jan 1978’, ERN 00008683 (emphasis added).

<sup>277</sup> For ease of readability, the Defence refers only to Vietnam. However, all references to ‘Vietnam’ prior to the reunification of North and South Vietnam should be understood as references to North Vietnam.

these reasons, Vietnam represented to the DK an existential threat of the highest order. As a result, resisting that threat became the CPK's top policy concern.

122. During the DK period, Vietnam sought to realise its imperialist (or hegemonist) ambitions over Cambodia not only through its own actions but also, as detailed in Section IV and this Chapter generally, through collaborators it recruited from the highest offices within the CPK and DK government who offered Vietnam's imperialist efforts politically palatable cover. At the helm was CPK founding member,<sup>278</sup> Standing Committee member, First Deputy Chairman of the DK State Presidium,<sup>279</sup> and East Zone secretary Sao Phim.<sup>280</sup> Alongside him was fellow CPK founding member,<sup>281</sup> State Presidium Second Deputy Chairman,<sup>282</sup> Central<sup>283</sup> (and presumably Standing) Committee member<sup>284</sup> and Northwest Zone secretary Ruos Nhim,<sup>285</sup> together with Central or Standing committee members Koy Thuon, Vorn Vet,<sup>286</sup> Ney Sarann *alias* Ya, and Chou Chet. Other Central Committee members, RAK commanders and regional leaders spearheaded the treason as well, notably Chan Chakrei *alias* Mean, Suos Neou *alias* Chhouk, and Sbauv Him *alias* Oeun. Furthermore, after the first wave of collaborators were uncovered, they were replaced by rejected Defence witnesses Hun Sen, Heng Samrin, Ouk Bunchhoeun, the late Chea Sim, Pol Saroeun and Kun Kim,<sup>287</sup> among many others, who remain at the head of the Cambodian government and military today.

123. From the outset of the DK, Vietnam's collaborators began undermining the DK from within. They sought to thwart DK's efforts to construct a prosperous, independent state through *coups d'état* that would overthrow the CPK and legitimate DK government and replace them with new leadership loyal to Vietnam instead. Section V chronicles how, following the failure of early efforts in 1975 to assassinate Pol Pot, Vietnam's collaborators dramatically upped the

<sup>278</sup> **E3/131**, Nuon Chea, Struggle of Our Kampuchean Peasants, ERN 00716424.

<sup>279</sup> **E3/165**, People's Representative Assembly of Kampuchea, ERN 00184068.

<sup>280</sup> **E3/7340**, Duiker, China and Vietnam, ERN 01002004; **F2/8.1.24**, Chanda, Timetable for a Takeover, ERN 01141718 (with regard to this document, *see also* **E434**, Nuon Chea's Request for Documents on Vietnamese Aggression and Rebellion, paras 9, 28-33; **E434/2**, Decision on Documents on Vietnamese Aggression, para. 8; *see supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence; *see also infra*, Chapter 9 and **Annex 1**).

<sup>281</sup> **E3/131**, Nuon Chea, Struggle of Our Kampuchean Peasants, ERN 00716424.

<sup>282</sup> **E3/165**, People's Representative Assembly of Kampuchea, ERN 00184068.

<sup>283</sup> **E3/3989**, S-21 Statement of Nhim, ERN 00780876; *see also* **E3/16**, Khieu Samphân, History of Cambodia, ERN 00498235-36.

<sup>284</sup> **E3/10693**, SC Meeting, 11 Apr 1977 (Goscha Version), ERN 01324079 (listed as "Nhin"); *see also* **E3/7328**, SC Meeting, 11 Apr 1977 (PRT Version), ERN 01002086.

<sup>285</sup> **F2/4/3/3/6.2**, Lemkin-Sambath Transcripts (Witness 1), ERN 01151713; *see also infra*, Chapter 9 and **Annex 1**.

<sup>286</sup> Vorn Vet was also a CPK founding member: *see* **E3/131**, Nuon Chea, Struggle of Our Kampuchean Peasants, ERN 00716424.

<sup>287</sup> On Hun Sen, Heng Samrin, Ouk Bunchhoeun, Pol Saroeun, and Kun Kim, *see supra*, Chapter 2-II-3-(c), on the refusal of key witnesses, and *infra*, Chapter 9 and **Annex 2**.



ante. Between 1976 and 1978, Vietnam's collaborators escalated their efforts to unseat DK's leadership by staging at least three interlinked *coup d'état* attempts in 1976, 1977, and 1978. For the purposes of clarity and as explained in more detail below, the Defence describes these *coups d'état*, together, as Vietnam's 'Plan A'; *i.e.*, Vietnam's attempt to wrest control over the DK through internal means. Sections V, VI, and VII devote half of this Chapter to detailing the nature of, preparation for, and failure of the 1976, 1977, and 1978 coups, especially through eyewitness accounts offered by people who directly participated in those attempted coups.

124. Prudently, however, Vietnam never depended solely on its internal collaborators to establish the Indochinese Federation. Instead, it always simultaneously furthered its imperialist ambitions through its own parallel external efforts. The Defence refers to these external efforts – again, for the sake of clarity – as Vietnam's 'Plan B'. Picking up the thread from Section III which discusses 'Plan B's' early stages, Section VIII explains how when the 'Plan A' last *coup d'état* failed, Vietnam shifted gears to focus solely to 'Plan B'. In December 1978, Vietnam launched an even larger scale invasion of DK supported by the Soviet Union and its Warsaw Pact allies, this time followed by effective occupation akin to the Soviet Union's occupation of Afghanistan in 1979 and Czechoslovakia in 1968. Flagrantly violating DK's sovereignty and international law, this act was met with widespread international condemnation. Nevertheless, for Vietnam, it was a victory. It enabled Vietnam to effectively seize control Cambodia through a puppet government stacked with its internal collaborators who had defected, many of whom remain in power, and to maintain its influence within Cambodia until today.<sup>288</sup>

125. Finally, and by way of conclusion and transition to the remainder of this Brief, Section IX explains how the Crocodile also has profound legal significance for Nuon Chea's case. As detailed in that Section, the Crocodile absolves Nuon Chea of individual criminal responsibility for the crimes charged since the evidence demonstrates that key constitutive elements of the modes of liability charged against him – in particular, the primary mode of liability of JCE I – have not been proven beyond reasonable doubt.

## **II. PRELIMINARY ISSUES RELATED TO THE CROCODILE**

126. Ahead of the factual presentation of the Crocodile beginning in Section III, the Defence first discusses two preliminary issues. The first concerns the credibility of Stephen Morris, the

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<sup>288</sup> See *e.g.* Radio Free Asia, Cambodian PM to Visit Vietnam.

sole expert to testify on the existential threat of Vietnam, while the second involves matters relevant to certain witnesses cited within this Chapter.

## **A. EXPERTS HAVE MUCH TO SAY ON THE EXISTENTIAL THREAT OF VIETNAM**

### **1. All But One Defence Expert on the Existential Threat of Vietnam Did Not Appear**

127. In light of the significance of the existential threat of Vietnam to Nuon Chea's case, the Defence proposed six experts in Case 002/02 either primarily or partially because of the insights they could provide as to the nature of that threat.<sup>289</sup> Only two were initially selected to testify: Nayan Chanda and Michael Vickery. However, neither ultimately appeared. The Chamber abandoned its decision to hear Chanda – who had been cited in Case 001 as top evidence on the nature of the armed conflict between DK and Vietnam<sup>290</sup> – due to purportedly insurmountable scheduling difficulties.<sup>291</sup> Vickery, meanwhile, refused to comply with his summons, citing the advice of an anonymous “lawyer friend” not to.<sup>292</sup> In the end, only Stephen Morris testified, and only after the Defence reiterated its request for him to appear after the Chamber refused to reinstate its decision to summons Chanda.<sup>293</sup> As the sole expert to appear on this subject, Stephen Morris's testimony thus features prominently in the discussion in this Chapter.

### **2. Stephen Morris's Evidence is Partially Reliable**

128. The reliability of Stephen Morris's evidence is not uniform. On the one hand, Morris provides reliable evidence, based on extensive research,<sup>294</sup> on why Vietnam invaded DK. On the other, he concludes that DK was “paranoid” and “irrational” in its foreign policy and behaviour (especially *vis-à-vis* Vietnam), a conclusion deeply flawed in methodology and lacking reliable factual sources. As discussed below, the first arm of his evidence can assist in assessing the armed conflict between Vietnam and DK and the role of Vietnam in instigating

<sup>289</sup> These experts were Nayan Chanda, Stephen Morris, Michael Vickery, Laura J. Summers, David Chandler, and Roeland Burgler: *see* **E305/4.2**, Nuon Chea's Case 002/02 Updated Witness Summaries, pp. 17-20, 22-23; **E307/4.3**, Nuon Chea's Case 002/02 New Witness Summaries, p. 4.

<sup>290</sup> *See* Case 001, **E188**, Trial Judgement, paras 59-62, 66-81.

<sup>291</sup> **E1/458.1**, Document Hearing, T. 16 Aug 2016, p. 24, ln. 3 to p. 26, ln. 21; Email from Trial Chamber Legal Officer to the Parties, 13 Sep 2016; **E29/492**, WESU Report: Chanda Nayan, p. 1; *see also* Chapter 2-II-B-3, on experts not heard.

<sup>292</sup> **E408/5**, Outstanding Issues on Michael Vickery.

<sup>293</sup> **E1/458.1**, Document Hearing, T. 16 Aug 2016, p. 27, ln. 25 to p. 28, ln. 13, p. 31, lns 18-24; *see also* Email from Trial Chamber Legal Officer to the Parties, 13 Sep 2016; **E445**, Decision on Stephen Morris.

<sup>294</sup> **E3/10674**, CV of Stephen Morris; **E1/485.1**, Stephen Morris, T. 18 Oct 2016, p. 56, ln. 11 to p. 63, ln. 24; **E445**, Decision on Stephen Morris, para. 7.

and driving it. The latter, however, should be wholly disregarded when assessing the nature of the armed conflict between Vietnam and DK.<sup>295</sup>

**(a) Reliability of Morris's Evidence on Vietnam's Long-Term Imperialist Ambitions**

129. The Supreme Court Chamber held that “a key factor in the assessment of the reliability and probative value of expert evidence is the careful scrutiny of the sources from which experts infer their conclusions.”<sup>296</sup> Therefore, the reliability and probative value of experts' evidence depends on the quality of their sources.<sup>297</sup> In Stephen Morris's case, an essential source for his conclusions on Vietnam's long-term imperialist ambitions is his study of the archives of the former Communist Party of the Soviet Union.<sup>298</sup> These archives contain, *inter alia*, contemporaneous records of confidential communications between Soviet and Vietnamese officials; documents “written by the Vietnamese communists”; and records of interviews with Vietnamese communist leaders.<sup>299</sup>

130. As discussed above, governments' contemporaneous internal documents such as those in the Soviet archives are more reliable and probative than either uncorroborated public propaganda or secondary sources such as scholars' publications and media reports.<sup>300</sup> Moreover, the fact that the Russian government denied Morris further access to the archives and dismissed the archivist involved following Morris's disclosure of a sensitive file from the archives (regarding the fate of US POWs in Vietnam)<sup>301</sup> confirms the authenticity of the sources Morris obtained from the archives. The Defence further notes that given the scant internal Vietnamese documents in the case file,<sup>302</sup> Morris's reliable, probative evidence based on the Soviet archives provides highly valuable and unique perspectives on and insights into Vietnam's role in the armed conflict and political developments in Indochina at the time. Such

<sup>295</sup> The trier of fact may accept or reject the evidence of a witness in part or in whole, and may find a witness to be credible and reliable about certain aspects of their testimony and not credible or reliable with respect to others: *See e.g.* SCSL, *CDF* Trial Judgement, para. 258; ICTY, *Kupreškić et al.* Appeals Judgement, para. 332.

<sup>296</sup> **F36**, Case 002/01 Appeals Judgement, para. 329.

<sup>297</sup> **F36**, Case 002/01 Appeals Judgement, para. 880; *see supra*, Chapter 2-III-B-2.

<sup>298</sup> **E1/485.1**, Stephen Morris, T. 18 Oct 2016, p. 60, lns 14-23, p. 74, ln. 15 to p. 76, ln. 13.

<sup>299</sup> *E.g.* **E1/485.1**, Stephen Morris, T. 18 Oct 2016, p. 60, lns 14-23, p. 99, ln. 25 to p. 100, ln. 7. Morris clarified in court that his sources were “either reports of Soviet intelligence services on conversations that took place or reports of the Soviet ambassador of conversations that had taken place. So [he] ha[s] no reason to doubt the veracity of what was said. It was a function of Soviet diplomats to give the best possible information to Moscow in order to formulate policy.”

<sup>300</sup> *See supra*, Chapter 2-III-B, on the proper treatment of evidence.

<sup>301</sup> **E3/10702**, Washington Post, Researcher's Dream Find Turns into a Nightmare, ERN 01335285.

<sup>302</sup> *E.g.* **E327/4/8.1**, Statement of ICIJ. The ICIJ reported that Thailand and Vietnam failed to respond to three 11 Nov 2013 OCIJ requests (**E327/4/2/1.1**, **E327/4/2/1.2**, **E327/4/2/1.3**) for their assistance to obtain documents; *see also* **F16**, Nuon Chea's Appeal Brief, para. 36.

evidence is conducive to ascertaining the truth by casting light on the head and the tail of the Crocodile in addition to its body.<sup>303</sup>

**(b) Unreliability of Morris’s Conclusion that DK Was ‘Paranoid’ and ‘Irrational’**

131. As rightly noted by historian David Chandler, Stephen Morris’s definition of “political culture” and his theory of a “paranoid” culture “inherent” in all Marxist-Leninist regimes is oversimplified and Manichean. Moreover, Morris’s use of the human, psychological condition “Paranoid Personality Disorder” to describe the political situation of a state is ludicrous and unfounded, lacking any scientific proof, and stretching outside his expertise. It must therefore be disregarded. In addition to its problematic theoretical premise, Morris’s conclusion that the DK had “paranoid” and “irrational” foreign policy is based on unreliable sources and lacks any factual tether. Morris admitted that he did not have access to contemporaneous DK internal documents at the time of his research.<sup>304</sup> When confronted with several such documents for the first time in court, Morris conceded that these documents, at least *prima facie*, showed rational policy and behaviour.<sup>305</sup> However, he still refused to abandon his position, desperately arguing that “people who behave bizarrely or irrationally don’t necessarily behave bizarrely or irrationally all the time”.<sup>306</sup> Despite Morris’s efforts to defend his theory, however, the evidence clearly shows that it lacks any sound factual basis, or is, at least, perilously incomplete.

132. Stephen Morris’s conclusion that the DK acted “irrationally” in its foreign policy is partly based on his ill-founded belief that the DK “provoked” its neighbours – *i.e.* Thailand, Vietnam and Laos – simultaneously, for no reason, and apparently deliberately putting itself in harm’s way.<sup>307</sup> Morris formed this belief without reviewing any internal DK documents, such as military reports and minutes of meetings, that directly dealt with national defence and foreign policy, or interviewing any former RAK members.<sup>308</sup> Instead, he relied exclusively on media reports of alleged DK attacks on Thai villages.<sup>309</sup>

<sup>303</sup> See *supra*, Chapter 1-II-C.

<sup>304</sup> E1/485.1, Stephen Morris, T. 18 Oct 2016, p. 84, ln. 23 to p. 85, ln. 8; E1/486.1, Stephen Morris, T. 19 Oct 2016, p. 66, lns 10-19.

<sup>305</sup> E1/486.1, Stephen Morris, T. 19 Oct 2016, p. 46, ln. 11 to p. 53, ln. 24.

<sup>306</sup> E1/486.1, Stephen Morris, T. 19 Oct 2016, p. 46, ln. 11 to p. 53, ln. 24, *see particularly*, p. 49, lns 3-5.

<sup>307</sup> E1/487.1, Stephen Morris, T. 20 Oct 2016, p. 11, ln. 24 to p. 12, ln. 13; E3/7338, Morris, Why Vietnam Invaded Cambodia, ERN 01001736, 01001739, 01001745-46.

<sup>308</sup> E3/7338, Morris, Why Vietnam Invaded Cambodia, ERN 01001739, 01001745-46; E3/10703, Chandler’s Review of Morris’s Book, ERN 01335287.

<sup>309</sup> E3/7338, Morris, Why Vietnam Invaded Cambodia, ERN 01001745-46, 01001932.

133. Contrary to Morris' unreliable sources, the reliable, contemporaneous DK internal documents and evidence of individuals like the previously-mentioned Meas Vooun (who was the former deputy commander of the West Zone division deployed along the Thai-Cambodian border), demonstrate that the DK actively and genuinely sought to avoid conflict with Thailand and Laos as it was preoccupied with defending their territorial sovereignty in the face of constant Vietnamese aggression.<sup>310</sup> Unfortunately, the Defence was not able to put such evidence to Morris due to limited time granted to it.<sup>311</sup> It did, however, provide the Chamber and parties with references for these documents.<sup>312</sup> Despite this notice, the Co-Prosecutors carefully crafted their examination to evade this compelling evidence. Instead, they presented less reliable sources such as media reports, stripping their examination of objectivity and showing a clear effort to mislead both Morris and the public.<sup>313</sup> As a result, Morris was not forced to confront his wrongful belief that the erroneous factual basis for his conclusions – *i.e.*, DK's "provocation" of Thailand – was correct.<sup>314</sup> This misrepresentation of the evidence undermines the reliability and probative value of Morris' responses to the Co-Prosecutors.

134. Another basis for Morris's conclusion that the DK was "irrational" is his belief that the DK foolishly "provoked" its militarily stronger neighbour Vietnam, by launching "unprovoked" attacks on Vietnamese villages in April and September 1977.<sup>315</sup> This belief – based on hearsay evidence and secondary sources such as Chanda's book<sup>316</sup> – is also erroneous and unfounded because, as discussed further below,<sup>317</sup> it was Vietnam who carried out a series of premeditated provocations against the DK in early 1977, and particularly April and May 1977. When confronted about this in court, Morris admitted that in reaching this conclusion, he had not considered the background leading up to the alleged attacks on Vietnamese villages in April and September 1977.<sup>318</sup>

135. In sum, while Morris's evidence in respect of Vietnam's foreign policy ambitions is sound, his conclusion as to the DK's alleged "irrationality" and "paranoia" is devoid of a sound

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<sup>310</sup> E3/994, 'Telegram from Roth', 12 Mar 1978, ERN 00337918; E3/1004, 'Telegram to Brothers', 4 Apr 1978; E3/1007, 'Telegram from Rath to Brothers', 12 Apr 1978; E3/9741, 'WRI of Meas Vooun', A26.

<sup>311</sup> E1/486.1, Stephen Morris, T. 19 Oct 2016, p. 55, lns 5-6.

<sup>312</sup> E1/486.1, Stephen Morris, T. 19 Oct 2016, p. 40, ln. 20 to p. 41, ln. 22. The Defence also notified the Chamber and the parties via email on 11 Oct 2016 of its intention to use these documents.

<sup>313</sup> E1/487.1, Stephen Morris, T. 20 Oct 2016, p. 9, ln. 23 to p. 11, ln. 22.

<sup>314</sup> E1/487.1, Stephen Morris, T. 20 Oct 2016, p. 11, ln. 24 to p. 12, ln. 13.

<sup>315</sup> E1/486.1, Stephen Morris, T. 19 Oct 2016, p. 43, lns 3-19.

<sup>316</sup> E1/486.1, Stephen Morris, T. 19 Oct 2016, p. 43, lns 3-8; E3/7338, Morris, Why Vietnam Invaded Cambodia, ERN 01001765-66, 01001936-37.

<sup>317</sup> See *infra*, Chapter 3-III-D-1, on Vietnam's unprovoked acts of aggression.

<sup>318</sup> E1/486.1, Stephen Morris, T. 19 Oct 2016, p. 44, lns 4-6.

theoretical and factual basis. Thus, the Chamber should disregard this aspect of his testimony entirely. Far more compelling in this regard is the view of Vietnam expert and historian Douglas Pike, who told the US Congress that “Cambodian behaviour in the war is not as irrational as appears. There is logic both to Cambodian strategy and rhetoric, particularly when viewed in the light of Cambodian history”.<sup>319</sup> Having established Morris’s reliability *vis-à-vis* Vietnam’s policy towards DK, the Defence turns to discuss credibility and reliability issues in respect of certain witnesses whose evidence is discussed in the factual presentation of the Crocodile.

## **B. SOME WITNESSES’ CREDIBILITY AND RELIABILITY SHOULD BE ASSESSED UPFRONT**

136. As noted above, the discussion of Vietnam’s ‘Plan A’ in Sections V, VI, and VII below is substantiated largely through eyewitness accounts of individuals who directly participated in the treasonous activities in question. However, in light of the limited pages of this Brief; the complexity, length, and factual focus of this Chapter; and the fact that only few of these individuals appeared in court, the Defence only explicitly discusses certain individuals’ reliability and credibility. That discussion is included primarily wherever an individual’s evidence is first cited. However, this Part first addresses a small number of individuals where the Defence considers that the discussion of those issues would have been excessively disruptive to the flow of the factual presentation below.

### **1. Despite the Chamber’s Incredibly Disingenuous Efforts to Marginalise Them, the Lemkin-Sambath Witnesses are Cited Throughout the Crocodile**

137. The Lemkin-Sambath Transcripts that Robert Lemkin provided to the Tribunal address a multitude of events and details spanning 190 pages in English,<sup>320</sup> the audio files of which are also in the Defence’s possession and which the Defence has been able to verify as correctly reflected in the transcripts. Together, they offer dramatically powerful evidence substantiating Nuon Chea’s case regarding rebellion. They also fill in key lacunae in knowledge regarding events in the Northwest Zone, which was the heartland of top Vietnamese collaborator Ruos Nhim and, as this Chapter explains, of the 1977 rebellion. Until the Lemkin-Sambath Transcripts, information on rebellion in the Northwest Zone had been largely confined to so-called “torture-tainted” S-21 statements, otherwise remaining something of a mystery given the far more Manichean flavour of the Co-Investigating Judges’ investigation in Case 002. Additional information had only begun to appear in WRIs that the International Co-

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<sup>319</sup> E3/2370, Pike Congressional Report, ERN 00187396.

<sup>320</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts; *see also supra*, Chapter 3-I-A, for a discussion of the Supreme Court Chamber investigation that led to Robert Lemkin’s provision of the Lemkin-Sambath Transcripts.

Investigating Judge collected for Case 004 and which the Defence received as part of the tsunami of disclosures in 2015 and 2016.<sup>321</sup>

138. Accordingly, the Defence sought the admission of the Lemkin-Sambath Transcripts,<sup>322</sup> although, as noted above, this became the most flagrant example of an evidence request erroneously rejected by the Chamber.<sup>323</sup> The Defence also sought the appearance of three of the Lemkin-Sambath Witnesses. The Chamber was willing to seek out the person known by the pseudonym as W1 and the person named Chan Savuth (referred to in the Lemkin-Sambath Transcripts as ‘W3’). However, as this search was based on the flawed information contained in Thet Sambath’s follow-up book to *Enemies of the People*, and supplemented by the limited additional information Robert Lemkin could provide, the person summonsed as W1 was not the right person,<sup>324</sup> while the Chamber gave up the search for Chan Savuth after exerting only a minimal effort.<sup>325</sup> The fourth Lemkin-Sambath Witness – Toat Thoeun, who was the foster or biological son of Ruos Nhim and had testified on appeal in Case 002/01 – had already been scheduled to testify. However, although he had appeared as a healthy individual in July 2015, he suddenly died on 21 July 2016 just prior to his scheduled appearance in Case 002/02.<sup>326</sup>

139. It is important for the Defence to emphasise yet again Thet Sambath’s comments that the people he knows with evidence relating to rebellion are afraid to testify.<sup>327</sup> This remark must be borne in mind in connection with the reliability and credibility of the Lemkin-Sambath Witnesses, as must the fact that those witnesses surely regard the glaring lights and very public nature of the courtroom, and the senior government positions of many of the national side of the courtroom,<sup>328</sup> as standing in dramatic contrast with *Enemies of the People*, for which they could conceal their faces and identities.

<sup>321</sup> On that tsunami, see *supra*, Chapter 2-III-B-1.

<sup>322</sup> E416, Nuon Chea’s Request for Lemkin Documents.

<sup>323</sup> See E416/4, Decision to Reject Lemkin Evidence and Investigations; the Chamber admitted only the partial transcript of Toat Thoeun; see also *supra*, Chapter 1-II-B and Chapter 2-II-B-3-(c), for a discussion of the Chamber’s erroneous decision to reject the Lemkin-Sambath Transcripts.

<sup>324</sup> The Defence requested W1 to testify (E395, Nuon Chea’s Rebellion Evidence Witness Request, paras 24-25, 42) thinking that he was the person known as In Thoeun in Behind the Killing Fields (E3/4202, Chon and Sambath, Behind the Killing Fields, ERN 00757531). Robert Lemkin later advised the Chamber, upon its inquiry, that In Thoeun and W1 were not the same person (E29/489/1, Lemkin Email on W4 and W1, para. 2); see also *infra*, Chapter 9 and Annex 2.

<sup>325</sup> See *supra*, Chapter 2-II-B-3-(c).

<sup>326</sup> See E416/4, Decision to Reject Lemkin Evidence and Investigations, para. 18.

<sup>327</sup> See *supra*, Chapter 2-II-3-(c), on these comments.

<sup>328</sup> In this regard, see e.g. E314/6, Nuon Chea’s Second Trial Chamber Disqualification Motion, paras 41-51.

140. Concerning the now-late Toat Thoeun, it is highly likely that the contradictions between the testimony he provided to the Supreme Court Chamber and the muted demeanour he exhibited in court, and wide-ranging and confident testimony that he provided to both Lemkin and Sambath and the International Co-Investigating Judge may owe to such fear. This likelihood is heightened by the known political interference at this Tribunal<sup>329</sup> and the fact that before his untimely death, Toat Thoeun had held one of the top positions in the Royal Cambodian Armed Forces as a Brigadier-General. Similarly, the denial of the person that WESU spoke to who may have been Lemkin-Sambath Witness Chan Savuth ('W3') may equally be ascribed to such fear,<sup>330</sup> as may Lemkin's refusal to provide identifying particulars of the other two witnesses, who are referenced in the Lemkin-Sambath Transcripts and thus in this Brief only as 'W1' and 'W4'. Had the Chamber summonsed Robert Lemkin to testify rather than hide behind its flimsy allegation that Lemkin was not cooperating with the Tribunal, further specifics could have been provided in this regard, and regarding the interviews' methodology, surrounding circumstances, including reasons for the interview subjects' fears.

141. Denying the very admission of the Lemkin-Sambath Transcripts – as opposed to making a determination about their probative value in the Case 002/02 trial judgement – heavily curtails Nuon Chea's right to present a defence and is a disgraceful double-standard given the other kinds of evidence the Chamber is willing to admit. Therefore, despite the Chamber's refusal to admit the Lemkin-Sambath Transcripts, the Defence nevertheless refers to them throughout the Crocodile and requests in this Brief that the Chamber reconsider its decision not to admit them.<sup>331</sup> The Defence also requests that the Chamber renew its efforts to summons Chan Savuth, W1 and W4 to appear before it.<sup>332</sup>

## **2. Inconsistencies in Some Witnesses' Accounts May Owe to Improper Interference**

142. Two of the few Defence witnesses who the Chamber summonsed to provide evidence in respect of the Crocodile, Division 310 combatants Suoy Sao and Sem Am, had peculiar inconsistencies in their testimony. In Suoy Sao's case, while he freely provided details to DC-Cam and during his morning session of testimony on Division 310's rebellion plot, he apparently suffered a sudden onset of amnesia over lunch, since his afternoon testimony was instead characterised by a series of denials that he had known or participated in anything.<sup>333</sup>

<sup>329</sup> See *supra*, Chapter 1, generally, discussing political interference at this Tribunal.

<sup>330</sup> See *supra*, Chapter 2-II-3-(c).

<sup>331</sup> See *supra*, Chapter 2-II-3-(c), and *infra*, Chapter 9 and **Annex 1**.

<sup>332</sup> See *supra*, Chapter 2-II-3-(c), and *infra*, Chapter 9 and **Annex 2**.

<sup>333</sup> E.g. **E1/460.1**, Suoy Sao, T. 18 Aug 2016, p. 15, ln. 9 to p. 17, ln. 5, p. 52, ln. 22 to p. 54, ln. 10.



The Chamber noticed this shift as well, given that it went into closed session to ask the witness about it. Similarly, while witness Sem Am told DC-Cam that he read a secret document suggesting that the US would have helped Division 310 implement its treasonous plans, he insisted in court that he had never read such a document. He obstinately maintained this position even after the Defence twice played Sem Am audio of the portion of his DC-Cam interview in which he clearly told DC-Cam about reading this document, and despite confirming to the Defence that DC-Cam had already read him the transcript of his interview with them.<sup>334</sup>

143. The degree of change in Suoy Sao and Sem Am's testimony, and the surrounding circumstances in each case, suggest that it is highly likely that both witnesses may have been subjected to an attempted interference with the administration of justice. While the Internal Rules and the Cambodian Code of Criminal Procedure are silent on how to respond in such situation, the ICTY's Rules of Procedure and Evidence provide that a chamber may admit a witness's written statement in lieu of their live testimony where "the failure of the person [...] to give evidence has been materially influenced by improper interference, including threats, intimidation, injury, bribery, or coercion".<sup>335</sup> Accordingly, following the approach of the ICTY, only Suoy Sao's DC-Cam interview and the morning portion of his live testimony, and only Sem Am's DC-Cam testimony regarding seeing a document regarding US support for the Division 310-led rebellion efforts, should be admitted into evidence.

144. Having addressed the two preliminary issues, the Defence turns to the factual presentation of the Crocodile itself, which is the focus of the next six Sections of this Chapter.

### III. THE EXISTENTIAL THREAT OF VIETNAM

145. Vietnam posed a formidable, existential threat to the DK, endangering its national security, territorial integrity, and sovereignty.<sup>336</sup> Accordingly, surviving this imminent, objectively real, and ultimately-realised threat was naturally the paramount consideration in all CPK policy decisions. However, despite consistent efforts by the Defence to highlight the relevance of this threat to Nuon Chea's case, the Co-Prosecutors and the Chamber have scrupulously avoided substantively engaging on this topic.<sup>337</sup> Irrespective of these efforts by the Co-Prosecutors, appreciating the existential threat of Vietnam is critical to Nuon Chea's

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<sup>334</sup> See **E1/477.1**, Sem Am, T. 20 Sep 2016, p. 69, ln. 19 to p. 70, ln. 23, p. 29, lns 20-23.

<sup>335</sup> ICTY Rules of Procedure and Evidence, Art. 92 *quinquies* (A)(ii).

<sup>336</sup> **E395/2**, Nuon Chea's Rebellion Submissions, para. 11.

<sup>337</sup> See e.g. **F2/8/5**, Co-Prosecutors' Response to Sixth Appeal Additional Evidence Request; **E395/3**, Co-Prosecutors' Response to Rebellion Submissions.

case. It contextually frames the events that transpired, and exposes the CPK policies for what they were: logical, rational, proportionate, and lawful responses to the existential threat of treason from within and annihilation from without.<sup>338</sup>

146. As will be demonstrated below, this threat is founded upon a rich history of Vietnamese expansionist design. It manifested itself in the Vietnamese desire for an Indochinese Federation, and coloured the fickle diplomatic relations between the two states. The omnipresence of this threat throughout Cambodia's modern history is best encapsulated and introduced by the words of late King Father Norodom Sihanouk, whose various speeches and communications both before and after the DK constantly noted Vietnam's imperialist appetite for Cambodia. In January 1963, for instance, Sihanouk wrote that:

Whether he is called Gia Long, Ho Chi Minh, or Ngo Dinh Diem, no Annamite [*i.e.* Vietnamese person] will sleep peacefully until he has succeeded in **pushing Cambodia toward annihilation, having made it first go through the stages of slavery.**<sup>339</sup>

147. On 11 January 1979, at an extraordinary session of the UN Security Council convened to discuss Vietnam's illegal invasion of the DK, Sihanouk revisited this theme. In an astute comparison to Nazi Germany's invasion of Poland in 1939,<sup>340</sup> he vividly relayed the impact of Vietnam's endless appetite "to swallow up little Kampuchea just [like] a starving boa constrictor" over hundreds of years. As he put it:

From the fifteenth to the beginning of the twentieth century, Viet Nam, in spite of the bitter and indomitable resistance of the army and people of Kampuchea, succeeded in **swallowing up a good half of Kampuchea.** That half became what is known today as "South Viet Nam"; it used to be the south of Kampuchea [*i.e.* Kampuchea Krom].<sup>341</sup>

148. At a press conference in Beijing three days earlier, the late King Father also said that:

[a]fter swallowing Kampuchea, the appetite of the Russians, the Warsaw Pact and the Vietnamese will grow. They will threaten Thailand, and after swallowing Thailand, they will swallow Singapore and Malaysia as this is in the interests of Vietnamese imperialism and colonialism.<sup>342</sup>

<sup>338</sup> See *supra*, Chapter 3-IX-1-(b).

<sup>339</sup> E3/7338, Morris, Why Vietnam Invaded Cambodia, ERN 01001706 (emphasis added).

<sup>340</sup> E3/7335, UN Security Council Meeting Minutes, ERN 01001639.

<sup>341</sup> E3/7335, UN Security Council Meeting Minutes, ERN 01001643 (emphasis added); see also E3/7336R for a video recording of this speech obtained by the Defence.

<sup>342</sup> E3/10709, Sihanouk 8 January 1979 Beijing Conference Transcript, ERN 01323955; see also E3/2376, Chanda, Brother Enemy, ERN 00192555 ("When the Vietnamese army overran Phnom Penh and fanned out toward the Thai border in pursuit of the Khmer Rouge, there was consternation in Bangkok. Where would the Vietnamese stop? Would the "Prussians of Asia" [...] roll their tanks into Bangkok?").

149. Between October and November 1979, the late King Father also sent three letters to Vietnamese Prime Minister Phạm Văn Đồng requesting peace talks. In them, Sihanouk correctly described Vietnam's illegal invasion of the DK as "colonization, with the confiscation of land in favour of your compatriots, the annexation of the strategically important coastal islands, and the appropriation of the natural resources as well as the artistic and cultural wealth of my country", an act undertaken not "out of altruistic motives but in the spirit of domination and conquest".<sup>343</sup> In a speech given between 1980 and 1991, he said that the greatest danger to Cambodia was Vietnam, which "in the next 10 years, [...] will be very dangerous. They will be all over Cambodia. Like Laos, Cambodia will be Yeaknamised [*i.e.* 'Vietnamised']".<sup>344</sup> Given such strong views, it is unsurprising, that Vietnam at one point in the DK had a (failed) plan to have Sihanouk kidnapped.<sup>345</sup>

150. As Sihanouk suggests, and this Section in particular demonstrates, the threat of Vietnam has long been and remains a constant in Cambodian politics. This was not paranoid national mythology as the Manichean narrative claims. It was the result of Vietnam's relentless aggression towards Cambodia over centuries. Against this backdrop, DK's fears and subsequent policies were a perfectly rational and natural response.

## A. VIETNAM HELD DEEP-SEATED IMPERIALIST AMBITIONS FOR CAMBODIA

### 1. Modern Vietnamese Leaders Had Long Coveted an Indochinese Federation

151. During the years immediately prior to and during DK, Vietnam's express foreign policy intention *vis-à-vis* Cambodia was to absorb it into an Indochinese Federation with Vietnam at the helm. As Vietnam expert and historian Douglas Pike advised US Congress in 1978, the Indochinese Federation was, to Vietnam, the "proper ultimate configuration for the peninsula".<sup>346</sup> Indeed, its creation was a founding principle of the Indochinese Communist Party.<sup>347</sup> It was also a longstanding and deeply-felt wish of Hồ Chí Minh, the Indochinese

<sup>343</sup> **E396.1.1**, Letters from Sihanouk to Phạm Văn Đồng, ERN 01224296, 01224298; *see also* **E396**, Nuon Chea's Request for Sihanouk-Related Evidence, paras 7-17; **E396/3**, Nuon Chea's Reply on Sihanouk-Related Evidence, paras 6-7; **E396/4**, Decision on Sihanouk-Related Evidence, paras 9-10; **E445/1**, Nuon Chea's Request for Documents to Use in Questioning Morris, paras 29-35; **E445/2**, Decision on Documents to Use to Question Morris, para. 5, and *supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and **Annex 1**.

<sup>344</sup> **E396.1.2**, Sihanouk's Statement of Concern About Vietnamese Occupation, ERN 01331778; *see also* **E396**, Nuon Chea's Request for Sihanouk-Related Evidence, paras 7-17; **E396/3**, Nuon Chea's Reply on Sihanouk-Related Evidence, paras 6-7; **E396/4**, Decision on Sihanouk-Related Evidence, paras 9-10; *see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and **Annex 1**.

<sup>345</sup> **E3/2376**, Chanda, Brother Enemy, ERN 00192484 and 00192528, detailing how Chanda was relayed details of this plan by Vietnam's Minister for Foreign Affairs, Nguyen Co Thach, as well as by Sihanouk himself.

<sup>346</sup> **E3/2370**, Pike Congressional Report, ERN 00187396.

<sup>347</sup> **E3/7338**, Morris, Why Vietnam Invaded Cambodia, ERN 01001712, 01001732.

Communist Party's founding father and Vietnam's "father of the nation".<sup>348</sup> Indeed, it was a wish Hồ had explicitly discussed with Chinese Communist Party Chairman Mao Zedong; as Geng Biao reported to the Chinese Communist Party politburo, "in 1973 [...] Chairman Mao also told Sihanouk that Ho Chi Minh had talked with Chairman Mao about the establishment of an "Indochinese Federation"". <sup>349</sup>

152. In 1950, the Vietnamese military commander General Võ Nguyên Giáp shed light on one of Vietnam's motivations in seeking to establish the Indochinese Federation. Giáp, who was appointed in March 1950 as the head of the Indochinese Communist Party's Special Committee overseeing Laotian and Cambodian affairs,<sup>350</sup> described in a military strategy paper how he considered the Indochinese region as "a single strategic unit, a single battlefield". According to Giáp, the fates of Vietnam, Cambodia, and Laos were intertwined because, from a strategic perspective, controlling one of those states rendered the others vulnerable to being overrun. As he explained:

[E]specially because of the strategic terrain, we cannot consider Vietnam to be independent so long as Cambodia and Laos are under imperialist domination, just as we cannot consider Cambodia and Laos to be independent so long as Vietnam is under imperialist rule.

The colonialists used Cambodia to attack Vietnam. Laos and Cambodia temporarily have become the secure rear areas of the enemy and simultaneously their most vulnerable area in the entire Indochina theatre.<sup>351</sup>

153. This sentiment would be frequently reiterated that decade.<sup>352</sup> Similarly, sometime between 1969 and 1975, Lê Đức Thọ, the one-time head of the North Vietnamese Communist Party Central Committee, told US National Security Advisor and Secretary of State Henry Kissinger that "[Vietnam's] ambition was all of Indochina after which they would proceed to take over Southeast-Asia".<sup>353</sup> By 1971, according to a report that the Soviet ambassador to North Vietnam Ilia Scherbakov sent to Moscow, Scherbakov's North Vietnamese counterparts had "cautious[ly]" discussed the establishment of a "socialist federation of Indochina".<sup>354</sup> That caution was in any event limited, since Ambassador Scherbakov noted in the same report that

<sup>348</sup> **E3/10708**, 1981 US Congressional Debate, ERN 01141745.

<sup>349</sup> **E3/7325**, Geng Biao, Report on the Indochina Situation, ERN 01001622.

<sup>350</sup> **E3/9**, Short, History of a Nightmare, ERN 00396245.

<sup>351</sup> **E3/2376**, Chanda, Brother Enemy, ERN 00192305.

<sup>352</sup> **E3/7338**, Morris, Why Vietnam Invaded Cambodia, ERN 01001702.

<sup>353</sup> **E434.1.8**, Ford-Suharto-Kissinger Dec 1975 Meeting Cable, ERN 01323864; *see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and **Annex 1**.

<sup>354</sup> **E3/7338**, Morris, Why Vietnam Invaded Cambodia, ERN 01001718, citing Soviet archival material.

Vietnam had already irritated Cambodia and Laos through its “noticeable attempts [...] of **subordination of the problems of Laos and Cambodia to the interests of Vietnam**”.<sup>355</sup>

154. These attempts at subordination and ambitions to create an Indochinese Federation dovetail precisely with the dominant theme in Vietnam’s foreign policy towards Cambodia and the Southeast Asian region for nearly 1,000 years. This policy was characterised by its fixation upon *nam tiến* (“the march to the south”).<sup>356</sup> Over the last 500 years, it has increasingly encroached upon territory throughout Southeast Asia, an appetite that endangered Cambodia’s territorial integrity in Champa in the east and Kampuchea Krom in the south.<sup>357</sup> After 1834, Vietnam even designated Cambodia for a time as a “Vietnamese province”.<sup>358</sup> Vietnam’s “land swallowing, annexationist”<sup>359</sup> appetite continues to be insatiable today – both within the region, where Vietnam is notably contesting territory in the South China Sea, and in Cambodia, where there are frequent reports of suspected Vietnamese border encroachments.<sup>360</sup>

## 2. The Indochinese Federation Sought to Create a Political and Economic Bloc

155. Consistent with this historically proven desire for predominance, the ambition behind Vietnam’s Indochinese Federation was to secure overall regional dominance in Southeast Asia. As Nuon Chea explained to the Danish Communist Party in 1978, “Vietnam has enormous ambitions. It wants to force Kampuchea into an Indochinese Federation and will pursue expansionist aims in all of South-east Asia”.<sup>361</sup> Within this new federation, Vietnam would play the same role as that of the dominant Russia within the Soviet Union, facilitating political and economic integration.<sup>362</sup> Indeed, as Nayan Chanda stated, the Indochinese Federation was to achieve, “not only the security of a political bloc but the creation of an economically integrated

<sup>355</sup> **E3/7338**, Morris, Why Vietnam Invaded Cambodia, ERN 01001718, citing Soviet archival material (emphasis added).

<sup>356</sup> **E1/485.1**, Stephen Morris, T. 18 Oct 2016, p. 87, lns 11-14 (“the history of Vietnam is the history of a long march south from what is now northern Vietnam to conquer territories which were once occupied by other ethnic groups, including the Cham and Cambodians”); **E3/2370**, Pike Congressional Report, 1978, ERN 00187381; **E3/2376**, Chanda, Brother Enemy,

<sup>357</sup> See e.g. **E3/217**, SC Meeting, 11 Mar 1976, ERN 00182635. For a chronology of Vietnam’s persistent efforts to seize territory in Champa and Kampuchea Krom, see **E3/266**, Black Paper, ERN 00082514-15; regarding Kampuchea Krom, see also **E1/485.1**, Stephen Morris, T. 18 Oct 2016, p. 87, lns 15-18.

<sup>358</sup> **E3/7338**, Morris, Why Vietnam Invaded Cambodia, ERN 01001692-93; see also *infra*, Chapter 3-III-A-3, discussing a territorial map from 1838 published in Vietnamese Communist Party publication *Nhân Dân*.

<sup>359</sup> **E1/242.1**, Case 002/02 Opening Statements (Nuon Chea), T. 17 Oct 2014, p. 65, ln. 21.

<sup>360</sup> Vietnam’s current claims over islands in the South China Sea have been very widely reported in the context of the most recent round of disputes over the area. For a recent report of Vietnam’s possible encroachment on Cambodian territory, see e.g. **F2/8.1.26**, Cambodia Daily, PM Orders Senator’s Arrest.

<sup>361</sup> **E3/196**, Nuon Chea Speech to Danish Communist Party, Jul 1978, ERN 00762396.

<sup>362</sup> **E1/485.1**, Stephen Morris, T. 18 Oct 2016, p. 87, ln. 24 to p. 88, ln. 8 (“the idea of the Indochinese Federation was modelled on the Soviet Union itself”); see also **E3/7338**, Morris, Why Vietnam Invaded Cambodia, ERN 01001695.

unit in which to achieve gradual integration of labor distribution, ensuring an effective use of labor and land potentials of the three countries”.<sup>363</sup> Vietnam was to enjoy overall regional “pre-eminence”<sup>364</sup> in the Federation – *i.e.*, in other words, it would effectively enslave Cambodia and Laos. In 1973, the Soviet Ambassador Scherbakov predicted how Vietnam would realise its ambitions over its two neighbours. As he described it:

the program of the Vietnamese comrades for Indochina is to replace the reactionary regimes in Saigon, Vientiane, and Phnom Penh with progressive ones, and later when all Vietnam, and also Laos and Cambodia, start on the road to socialism, to move towards the establishment of a **Federation of the Indochinese countries**.<sup>365</sup>

156. Vietnam’s Indochinese Federation would also mirror Russia’s Soviet Union in terms of socio-political structure. According to Morris:

I think that the idea of the Indochinese Federation was modelled on the Soviet Union itself, that is, that there would be one major political ethnic entity which provided the “leadership” for the other ethnic groups which were federated with it. So as in the case of the Soviet Union, the Russian ethnic group was dominant over the other non-Russian peoples of the Soviet Union. So **the Vietnamese conceived Indochina as a place where the Vietnamese would be dominant over the Lao and Cambodian in terms of leadership, and they were – considered themselves more advanced than the people of Laos and Cambodia**.<sup>366</sup>

157. However, despite the parallels between the Soviet Union and Indochinese Federation and opinions from the likes of Nayan Chanda that the Federation was a concept superimposed by the Soviet Union,<sup>367</sup> Vietnam was far from being what US National Security Advisor Zbigniew Brzezinski described as a “Soviet proxy” or “surrogate”.<sup>368</sup> In reality, it was a savvy strategist that retained control over its foreign policy chessboard. Indeed, Thai foreign ministry officials and scholars concluded that the fact that Vietnam’s imperialist ambitions coincided with the Soviet Union’s hegemonic ones was simply a convenience that Vietnam exploited in order to secure the Soviet Union as a sponsor.<sup>369</sup> Stephen Morris also suggested that even if the

<sup>363</sup> E3/2376, Chanda, Brother Enemy, ERN 00192563; *see also* ERN 00192307.

<sup>364</sup> E3/2376, Chanda, Brother Enemy, ERN 00192274.

<sup>365</sup> E3/7338, Morris, Why Vietnam Invaded Cambodia, ERN 01001733 (emphasis added); *see also* E1/485.1, Stephen Morris, T. 18 Oct 2016, p. 98, ln. 25 to p. 100, ln. 7: Morris clarified that his sources were “either reports of Soviet intelligence services on conversations that took place or reports of the Soviet ambassador of conversations that had taken place. So I have no reason to doubt the veracity of what was said. It was a function of Soviet diplomats to give the best possible information to Moscow in order to formulate policy”.

<sup>366</sup> E1/485.1, Stephen Morris, T. 18 Oct 2016, p. 87, ln. 24 to p. 88, ln. 8 (emphasis added).

<sup>367</sup> E3/2376, Chanda, Brother Enemy, ERN 00192303.

<sup>368</sup> E3/2376, Chanda, Brother Enemy, ERN 00192472, 00192449.

<sup>369</sup> E435.1.9, Institute of Asian Studies, The Kampuchean Problem in Thai Perspective, ERN 01323978 (*see* E435, Nuon Chea’s Request for Chinese and Thai Documents on Vietnamese Aggression, paras 20-29; E434/2, Decision on Documents on Vietnamese Aggression, para. 22; *see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and Annex 1.

Indochinese Federation was modelled on the Soviet Union, this simply provided a “vener” of Marxist-Leninist ideological “legitimacy”.<sup>370</sup> Ultimately, the Indochinese Federation still represented Vietnam’s longstanding naked imperialist ambitions to colonise its neighbours; just “dressed up”, as Morris put it, “to be something consistent with Marxism/Leninism”.<sup>371</sup>

### 3. Post-Second Indochina War: Vietnam Escalated Their Imperialist Efforts

158. The superficiality of this ideological veneer became increasingly apparent in the wake of emboldened Vietnamese hostility following North Vietnam’s victory in the Second Indochina War on 30 April 1975. In a clear show of Vietnam’s expansionist designs for the region, in November 1975, *Nhân Dân*, the official newspaper of the Vietnamese Workers Party,<sup>372</sup> published a map of the territory claimed by Vietnam under the Nguyen Dynasty of the 1800s; a territory that at the time incorporated Cambodia and Laos.<sup>373</sup> By 16 November 1976, Lê Duẩn – the hardliner and Secretary-General of the Vietnamese Communist Party from 1960 and throughout the DK period – had informed Soviet Ambassador Scherbakov that:

I can promise that with Kampuchea all will be in order. **Sooner or later it will be with Vietnam; the Khmers do not have another way out.** We know how to work with them and where to display decisiveness and where to display flexibility.<sup>374</sup>

159. Two high-ranking Vietnamese communists confirm Lê Duẩn’s imperialist ambitions. Former Vietnamese Communist Party politburo member and Indochinese Communist Party founding member Hoàng Văn Hoan, recalled how from 1975, Lê Duẩn “schemed to make Viet Nam the [...] overlord of Indo-China and Southeast Asia” so as to realise “his counter-revolutionary objectives”.<sup>375</sup> Hoan further detailed how Lê Duẩn spent a decade (1967 to 1977) finding ways to sideline him and other political rivals. These rivals had opposed Lê Duẩn’s aggressive policies to, *inter alia*, establish an Indochinese Federation and pivot Vietnam away from China and towards the Soviet Union.<sup>376</sup>

<sup>370</sup> E3/7338, Morris, Why Vietnam Invaded Cambodia, ERN 01001732; *see also* E1/485.1, Stephen Morris, T. 18 Oct 2016, p. 88, ln. 10 to p. 89, ln. 7.

<sup>371</sup> E1/485.1, Stephen Morris, T. 18 Oct 2016, p. 88, ln. 20 to p. 89, ln. 7; *see also* E3/7338, Morris, Why Vietnam Invaded Cambodia, ERN 01001732.

<sup>372</sup> The party changed its name to the Communist Party of Vietnam at the December 1976 congress; thus, both names are used in this Brief: *see* E3/2376, Chanda, Brother Enemy, ERN 00192370.

<sup>373</sup> E435.1.1, Map of Vietnam’s Expansionist Ambition, ERN 01323943 (with regard to this document, *see* E435, Nuon Chea’s Request for Various Documents on Vietnamese Aggression, paras 6, 27-29; E434/2, Decision on Documents on Vietnamese Aggression, para. 19; *see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and Annex 1.

<sup>374</sup> E3/7338, Morris, Why Vietnam Invaded Cambodia, ERN 01001763 (emphasis added).

<sup>375</sup> E3/10707, Hoan, Drop in the Ocean, ERN 01141704.

<sup>376</sup> E3/10707, Hoan, Drop in the Ocean, ERN 01141704-11.

160. Similarly, Truong Nhu T ng told the US Congress in 1981 that the Vietnamese party leaders' school was instructing leaders about a "Union of the Socialist Republic of Southeast Asia [...] to be set up in the end of [the twentieth] century".<sup>377</sup> T ng further reported that under L  Du n's stewardship, Vietnam invaded DK and Laos in its capacity as the Soviet Union's proxy within the wider Cold War context.<sup>378</sup> At the same time, T ng saw Vietnam as more than just a proxy. According to his assessment, the result of these Vietnam's invasions of its neighbours would be that:

Laos and Cambodia are thus destined to be absorbed by Viet Nam in a kind of Indochina pact, a miniature model and tropical version of the Warsaw pact. In this context, Viet Nam is fulfilling a precise function: that of being at one and the same time the defender of the Soviet Union order and the regional soldier of [the Soviet Union,] becoming a new East Germany and a new Cuba in a way. But they are more active and fanatical because the Vietnamese Communists [*sic*] leaders are proud of themselves for having defeated the most powerful super power, the United States.<sup>379</sup>

**(a) Vietnam's Incursions into Cambodian Territory From 1975 Onwards**

161. As the movement towards the Indochinese Federation strengthened within Vietnam, so too did their efforts externally. Throughout 1975 and 1976, Vietnam committed numerous acts of aggression against DK, repeatedly drawing a reluctant Cambodia into conflict despite the CPK's patient and persistent attempts to calm the situation. The conflict began from the moment the CPK took power. The day after the liberation of Phnom Penh on 17 April 1975, Vietnamese communist forces attacked CPNLF forces in Kaam Samna, Kandal Province, leading to a month-long conflict.<sup>380</sup> Simultaneously, those forces committed numerous, illegal provocations along Cambodia's entire eastern border stretching from Kampot to Ratanakiri and over the seas to Cambodia's various islands.<sup>381</sup> Moreover, this aggression was exemplified by Vietnam's failure to fully respect the legitimate request of GRUNK to have North Vietnamese troops withdrawn from Cambodian territory by the end of May 1975.<sup>382</sup>

162. Following these initial clashes, a CPK delegation visited Hanoi in June 1975 to propose a treaty of friendship (to no avail).<sup>383</sup> Soon afterward – in July, October, and November that year – Vietnam invaded DK territory again, in Ratanakiri and in Sector 23 of the East Zone,

<sup>377</sup> E3/10708, 1981 US Congressional Debate, ERN 01141745.

<sup>378</sup> E3/10708, 1981 US Congressional Debate, ERN 01141745.

<sup>379</sup> E3/10708, 1981 US Congressional Debate, ERN 01141751.

<sup>380</sup> E3/266, Black Paper, ERN 00082550.

<sup>381</sup> E3/266, Black Paper, ERN 00082550.

<sup>382</sup> E3/266, Black Paper, ERN 00082549-50; E3/2376, Chanda, Brother Enemy, ERN 00192314-15; E3/227, SC Meeting, 2 Nov 1975, ERN 00183413; E3/1150, Telegram to Ya, 11 Nov 1975.

<sup>383</sup> E3/266, Black Paper, ERN 00082550.



refusing to withdraw despite repeated requests from the DK.<sup>384</sup> These repeated, unlawful, military incursions compelled the DK government to lodge a protest with the Vietnamese authorities and mobilise its forces to protect their territorial integrity and sovereignty.<sup>385</sup> Although this permitted a temporary respite from hostilities throughout January 1976,<sup>386</sup> by early February and into March 1976,<sup>387</sup> Vietnamese forces had once again invaded DK's eastern border at Ratanakiri, Svay Rieng and Kaam Smna, reaching deep into DK territory.<sup>388</sup>

**(b) *Complementation of Vietnam's Physical War With its Propaganda Efforts***

163. Despite these flagrant incursions into Cambodian territory, Vietnam intentionally crafted an alternative narrative of events, engineering a public perception of DK as the aggressor who had moved into Vietnamese territory since May 1975.<sup>389</sup> Indeed, Vietnam would frequently attempt to manipulate international opinion concerning its relations with DK, as discussed further below in Part B-3 of this Section and in Section VIII. However, these efforts, like other Vietnamese propaganda, must be approached with extreme caution.<sup>390</sup> Indeed, a New York Times article dated 22 June 1975 discredited Vietnam's efforts to distort the history of the conflict in early 1975. The article reported that Vietnamese and Cambodian forces had then been engaged in battle in Cambodian territory<sup>391</sup> and that "Hanoi's readiness to fight neighboring Communist-led armies on their home grounds [...] has spurred fears in Southeast Asia that North Vietnam may be planning to make an empire of the region."<sup>392</sup> These legitimate fears are a product of Vietnamese aggression, and discredit any suggestion that Vietnam was simply resisting incursions by Cambodia.

<sup>384</sup> **E3/227**, SC Meeting, 2 Nov 1975, ERN 00183413; **E3/1150**, Telegram to Ya, 11 Nov 1975; **E3/879**, Telegram from Chhon to Pol, 11 Nov 1975, ERN 00182596.

<sup>385</sup> **E3/227**, SC Meeting, 2 Nov 1975, ERN 00183413; **E3/1150**, Telegram to Ya, 11 Nov 1975, ERN 00539054, paras 5-6; **E3/879**, Telegram from Chhon to Pol, 11 Nov 1975, ERN 00182596.

<sup>386</sup> **E3/228**, SC Meeting, 9 Jan 1976, ERN 00182615-16.

<sup>387</sup> **E3/217**, SC Meeting, 11 Mar 1976, ERN 00182636.

<sup>388</sup> **E3/229**, SC Meeting, 22 Feb 1976, ERN 00182625; *see also e.g.*, **E3/911**, Telegram from Ya to Brother, 17 Feb 1976; **E3/8373**, Telegram from Chhin to 89, 29 Feb 1976, ERN 00183693; **E3/923**, Telegram from Chhin to 89, 3 Mar 1976.

<sup>389</sup> *E.g.*, **E3/3515**, Vietnam's Official Allegations, ERN 00196229; **E3/2371**, SRV, Vietnam-Kampuchea Conflict, ERN 00187338.

<sup>390</sup> *See supra*, Chapter 2-III-B, on assessment of evidence. *See also* **E1/496.1**, Armed Conflict Document Hearing, T. 7 Nov 2016, p. 64, Ins 5-21, p. 60, Ins 17-22; and *infra*, Chapter 3-VIII-C, on Vietnam's propaganda and deceit.

<sup>391</sup> **E3/8230**, New York Times, Vietnamese Forces in Clash with Cambodians, ERN 00165962.

<sup>392</sup> **E3/8230**, New York Times, Vietnamese Forces in Clash with Cambodians, ERN 00165962 (emphasis added).

## **B. VIETNAM WORKED TO SUBJUGATE CAMBODIA POLITICALLY**

### **1. Vietnam's Diplomatic Relations with Cambodia were Governed by Their Self-Interest and Defined by Their Consistent Betrayal**

164. The true nature of Vietnam's imperialist ambitions was further evidenced by their diplomatic relations with Cambodia, a relationship that retained the semblance of an "allegiance" but in reality was governed by Vietnamese manipulation and deceit. A review of the CPK's history reveals that the prevailing theme in Vietnam's diplomatic relations was their preservation of self-interest at all costs. Most emblematically, in the 1973 Paris Peace Agreement negotiations, then-North Vietnam openly betrayed its ally the CPK: it rejected China's view that Cambodia-related issues should not be brought into the Agreement,<sup>393</sup> and instead sided with the US, ultimately facilitating a devastating US bombing campaign within Cambodian territory. As Nuon Chea explained the situation to Denmark's Communist Workers' Party in 1978:

At first, we did not notice our contradictions with Vietnam. To be frank, we thought the Vietnamese were our friends. But instead of helping us, Vietnam came to seize forces, to build up its own forces and to grasp our party as a whole. There were lots of difficulties. We had to fight the US-Thieu forces sent to help Lon Nol, while at the same time they tried to stab us in the back. Our party, of course, decided to resolve the first contradiction first, that is, to win victory over Lon Nol.

**The contradiction between us and Vietnam deepened towards 1973 when Vietnam united with the US at the negotiating table.** The US immediately imposed conditions, obliging Vietnam to pressure Kampuchea to come to the negotiating table. They tried but we refused. The Vietnamese then made every effort to undermine our revolution. Meanwhile, as Vietnam and Laos laid down their arms, the US mobilized all its forces to bomb Kampuchea – all its forces in South-East Asia! – for 200 days and 200 nights, to force us to the negotiating table.<sup>394</sup>

165. Witnesses also testified that in 1973, CPNLF forces and their then-supposed Vietcong allies clashed in Chhuk District, Kampong Province and in Kampong Cham Province in the East Zone near the border with Vietnam.<sup>395</sup> This was reportedly a reaction to the Vietcong siphoning off military supplies intended for Cambodia<sup>396</sup> and disputes over the border demarcation between the two states.<sup>397</sup> Key collaborator and current top government leader Heng Samrin

<sup>393</sup> **E435.1.6**, Zhou Enlai Speech, ERN 01323965; *see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and **Annex 1**.

<sup>394</sup> **E3/196**, Nuon Chea Speech to Danish Communist Party, Jul 1978, ERN 00762395.

<sup>395</sup> **E1/493.1**, Ieng Phan, T. 1 Nov 2016, p. 11, lns 8-12 (Chhuk District); **E1/493.1**, Long Sat (2-TCW-1065), T. 1 Nov 2016, p. 70, ln. 15 to p. 73, ln. 17 (Kampong Cham Province).

<sup>396</sup> **E1/493.1**, Long Sat (2-TCW-1065), T. 1 Nov 2016, p. 70, ln. 15 to p. 71, ln. 10.

<sup>397</sup> **E1/493.1**, Long Sat (2-TCW-1065), T. 1 Nov 2016, p. 71, lns 16-18.

could have offered relevant additional insights in this regard,<sup>398</sup> since he held a higher rank than any witness who described these clashes and had also described such clashes in 1973 and 1974 in the Southwest Zone and other zones.<sup>399</sup> Similar clashes had also reportedly broke out in late 1972 between the CPNLF and the Khmer Rumdo – a Vietnamese-trained guerrilla force aligned with the CPK in the FUNK – because the Khmer Rumdo refused the CPK’s request to stop cooperating with the Vietcong.<sup>400</sup>

166. Nuon Chea himself remarked on Vietnam’s preservation of self-interest. During his opening statement in Case 002/01, he said that in December 1969, Pol Pot and a CPK delegation walked the Hồ Chí Minh Trail to Hanoi where they held a “tense” meeting with senior members of the Vietnamese Communist Party. These members, who included Lê Duẩn, Lê Đức Thọ, and Võ Nguyên Giáp, sought to persuade the CPK “to cease its armed political struggle and return to only political struggle [as t]hat would benefit the Vietnamese Communist Party”.<sup>401</sup> Indeed, North Vietnam had made the strategic decision to remain aligned with Sihanouk, who offered them safe passage through Cambodia during the Second Indochina War<sup>402</sup> and who they calculated would likely triumph in the then-internal struggle between the CPK and Sihanouk.<sup>403</sup>

## 2. Acts of ‘Friendship’ Were in Fact Steps to Realising the Indochinese Federation

167. Moreover, the fact that Vietnam ultimately did invade and subsequently subjugate Cambodia recasts past acts of ostensible friendship in a different light – as calculated and patient moves in Vietnam’s very long game to establish the Indochinese Federation.

168. By establishing the Indochinese Communist Party (‘ICP’) with Vietnamese immigrant-dominated Cambodian and Laotian party cells,<sup>404</sup> Vietnam was in fact laying the groundwork for the fulfilment of its ambitions by pre-emptively imposing Vietnamese control over future Southeast Asian revolutionary movements. Vietnam added to these foundations when in 1951,

<sup>398</sup> See **E392**, Nuon Chea’s Rebellion Leadership Witnesses Request, paras 5, 7, 18-23, 25; see also **E454**, Final Witnesses Decision, para. 4; see also *supra*, Chapter 1, and *infra*, Chapter 9 and **Annex 2**.

<sup>399</sup> **E3/1568**, Kiernan Interview with Heng Samrin and Chea Sim, ERN 00651881-82.

<sup>400</sup> **E3/2376**, Chanda, Brother Enemy, ERN 00192251; **E3/1593**, Kiernan, Pol Pot Regime, ERN 00192257.

<sup>401</sup> **E1/14.1**, Case 002/01 Opening Statements (Nuon Chea), T. 22 Nov 2011, p. 88, lns 3-21.

<sup>402</sup> **E396.1.1**, Letters from Sihanouk to Pham Văn Đồng, ERN 01224295 (see also **E396**, Nuon Chea’s Request for Sihanouk-Related Evidence, paras 7-17; **E396/3**, Nuon Chea’s Reply on Sihanouk-Related Evidence, paras 6-7; **E396/4**, Decision on Sihanouk-Related Evidence, paras 9-10; **E445/1**, Nuon Chea’s Request for Documents to Use in Questioning Morris, paras 29-35; **E445/2**, Decision on Documents to Use to Question Morris, para. 5; *supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and **Annex 1**); see also **E3/2376**, Chanda, Brother Enemy, ERN 00192246-47; **E3/9**, Short, History of a Nightmare, ERN 00396357; **E3/7338**, Morris, Why Vietnam Invaded Cambodia, ERN 01001714-15.

<sup>403</sup> **E3/2376**, Chanda, Brother Enemy, ERN 00192246-47; **E3/2370**, Pike Congressional Report, ERN 00187384.

<sup>404</sup> **E3/2376**, Chanda, Brother Enemy, ERN 00192303, 00192242, 00192304.

it divided the ICP into three separate national parties, with the Cambodian one being the Kampuchean People's Revolutionary Party ('KPRP').<sup>405</sup> This "tactic", as characterised by Nuon Chea, was the product of Vietnam's awareness that "if it kept the name of the Indochinese Communist Party [...] it would not be able to mobilize Khmer and Laotian forces".<sup>406</sup> Despite this change in name, Nuon Chea explained that there was nothing new or independent about the KPRP.<sup>407</sup> Instead, "it remained under the complete control and leadership of the Vietnamese Communist Party"<sup>408</sup> from 1951 until at least 1960;<sup>409</sup> dependent upon Vietnam not only in decision-making<sup>410</sup> but also in the very physical infrastructure of the party, since the KPRP initially did not have its own headquarters or offices.<sup>411</sup> Indeed, even the party's name and statutes were reportedly translated into Khmer from Vietnamese.<sup>412</sup>

169. From 1954, many KPRP members became so-called "Khmer Viet Minh" who fled to Hanoi.<sup>413</sup> By providing safe-haven, training and mentoring to them, Vietnam groomed Cambodian leaders who would later help fulfil its imperial ambitions covertly from within DK. Indeed, as Nuon Chea put it, the "Khmer Viet Minh" "were influenced by the views, standpoints, political line, organizational line from the Vietnamese Communist Party and they were to disseminate and implement those in Cambodia"<sup>414</sup> in service of Vietnam's aim to "divide party members internally"<sup>415</sup> and ultimately "destroy the Party".<sup>416</sup>

170. From 1970 onwards, the so-called "Khmer Viet Minh" began returning to Cambodia where many were appointed as Cambodia-Vietnam liaisons in FUNK-liberated zones<sup>417</sup> reporting to Vietnamese rather than Cambodian minders<sup>418</sup> e.g., long-time Cambodian-

<sup>405</sup> E1/14.1, Case 002/01 Opening Statements (Nuon Chea), T. 22 Nov 2011, p. 78, Ins 12-19.

<sup>406</sup> E3/131, Nuon Chea, Struggle of Our Kampuchean Peasants, ERN 00716414.

<sup>407</sup> E1/14.1, Case 002/01 Opening Statements (Nuon Chea), T. 22 Nov 2011, p. 78, Ins 20-23. See also E3/131, Nuon Chea, Struggle of Our Kampuchean Peasants, ERN 00716414.

<sup>408</sup> E1/237.1, Case 002/01 Closing Arguments (Nuon Chea), T. 31 Oct 2013, p. 7, Ins 17-18.

<sup>409</sup> E1/22.1, Nuon Chea, T. 14 Dec 2011, p. 35, Ins 19-21.

<sup>410</sup> E1/16.1, Case 002/01 Opening Statements (Nuon Chea), T. 5 Dec 2011, p. 64, Ins 18-21.

<sup>411</sup> E1/237.1, Case 002/01 Closing Arguments (Nuon Chea), T. 31 Oct 2013, p. 7, Ins 16-17.

<sup>412</sup> E3/7338, Morris, Why Vietnam Invaded Cambodia, ERN 01001701-02. Short also reported that the KPRP's members had to be approved by a majority-Vietnamese committee and that the party was dominated by ethnic Vietnamese: E3/9, Short, History of a Nightmare, ERN 00396246-48.

<sup>413</sup> E3/2376, Chanda, Brother Enemy, ERN 00192435; E3/7338, Morris, Why Vietnam Invaded Cambodia, ERN 01001702-03.

<sup>414</sup> E1/14.1, Case 002/01 Opening Statements (Nuon Chea), T. 22 Nov 2011, p. 79, Ins 6-9.

<sup>415</sup> E1/16.1, Case 002/01 Opening Statements (Nuon Chea), T. 5 Dec 2011, p. 66, ln. 7 (emphasis added).

<sup>416</sup> E1/16.1, Case 002/01 Opening Statements (Nuon Chea), T. 5 Dec 2011, p. 66, ln. 17.

<sup>417</sup> E1/486.1, Stephen Morris, T. 19 Oct 2016, p. 23, Ins 1-9; E3/7338, Morris, Why Vietnam Invaded Cambodia, ERN 01001721-22.

<sup>418</sup> F2/8.1.28, Slocomb, The People's Republic of Kampuchea, ERN 01141780 (see also *supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and Annex 1); E3/9, Short, History of a Nightmare, ERN 00396405.

Vietnamese liaison committee member and friend of Sao Phim and Ruos Nhim, Hay Sau.<sup>419</sup> By doing so, Vietnam was not offering a gesture of friendship and mutual understanding but testing out its system of collaborators. This system laid the foundation for enduring Vietnamese influence within the CPK. This influence, in turn, directly shaped the subsequent struggle over the party's foundational narrative, as seen in the fundamental debate in the CPK over its founding date (*i.e.*, 1951 vs. 1960). This debate embodied the CPK's challenge over whether to acknowledge Vietnamese influence, and ultimately whether Cambodia should pursue an independent path or succumb to Vietnam's existential threat and thereafter live in service to and in the shadow of Vietnam.

171. Finally, and as discussed in detail above in Part B-1, by feigning cooperation and shifting the blame to DK during negotiations following Vietnamese relentless, territorial aggression during the DK period, Vietnam was underhandedly preparing to prevent international backlash once it ultimately illegally invaded the DK in 1977 and 1978.

172. Ultimately, and as Nuon Chea summarised in his opening statement in Case 002:

During the period from 1960 to 1979, Vietnam employed every trick available to destroy the revolution of the Kampuchean people and the development in Cambodia and its democracy including the organization of their members in the party members from the upper echelon downward secretly in order to prepare themselves for the overt opposition against CPK at the present time and they also organized their secret neighbour in the Communist Party of Kampuchea for the future. [...]

They also attacked on the Communist Party of Kampuchea. They instigated, break up, and persuaded Kampuchea and revolutionary army **to cause conflicts to become the enemies of the party in order to cause confusion and chaos to break up solidarity and to destroy the political line and the developing of the country** through the means of burn it to a crisp or leave it raw.<sup>420</sup>

### 3. Vietnam Used Deceptive Negotiation Tactics and Manipulated Public Opinion

173. Within the arsenal of “tricks” Nuon Chea notes,<sup>421</sup> Vietnam consistently attempted to manipulate and subjugate DK through diplomatic deceit and Soviet-style propaganda and disinformation aiming to engineer and mislead international public opinion. These efforts

<sup>419</sup> E3/387, Heder Interview with Ouk Bunchhoeun, ERN 00350217. Philip Short inaccurately identifies Hay Sau as an alias for senior Vietnamese Communist Party Leader (and later, its General Secretary) Nguyen Van Linh (*see* E3/9, Short, History of a Nightmare, ERN 00396369-70; *see also* the testimony of the witness Toat Thoeun who confirms knowing Hay Sau: F1/3.1, Toat Thoeun, T. 6 Jul 2015, p. 38, ln. 15 to p. 39, ln. 23, *see particularly* p. 39, lns 18-23; Lemkin-Sambath Transcripts (Toat Thoeun), ERN 01151762-63.

<sup>420</sup> E1/14.1, Case 002/01 Opening Statements (Nuon Chea), T. 22 Nov 2011, p. 79, ln. 12 to p. 80, ln. 1 (emphases added).

<sup>421</sup> Nuon Chea was not alone in noting Vietnamese tricks: *see also e.g.*, E3/2376, Chanda, Brother Enemy, ERN 00192588: “Americans were suspicious of the “tricky” Vietnamese”.

diametrically opposed those of DK, which, despite being forced to act in self-defence, did not abandon efforts to negotiate a peaceful solution to the conflict.<sup>422</sup> Despite Vietnam's ongoing small-scale provocations,<sup>423</sup> these negotiations largely secured calm for the rest of 1976.<sup>424</sup> Building on this, DK took additional steps to improve relations between the two states.<sup>425</sup>

174. Parallel to DK's magnanimous efforts, however, ran the inherently deceptive efforts of Vietnam. One emblematic example comes from their negotiations with DK about their shared border. In 1967, Vietnam made a declaration agreeing to the official demarcation between Vietnam and Cambodia, known as the "Brévié Line".<sup>426</sup> Despite this declaration and their public statement to the contrary,<sup>427</sup> Vietnam later failed to respond to the CPK's June 1975 proposal to sign a border treaty,<sup>428</sup> and ultimately blatantly reneged on its 1967 declaration during negotiations in May 1976.<sup>429</sup> Despite this display of bad faith, DK's leaders maintained hope that the two states would be able to resolve their border issues based on friendship and solidarity as they had in the past and thus continued to genuinely engage in negotiations with this in mind.<sup>430</sup> However, to the contrary, Vietnam refused to deviate from their position, even almost two years later in December 1977.<sup>431</sup>

175. Phan Hien, chief of the Vietnamese delegation during the border negotiations in May 1976,<sup>432</sup> confessed to Nayan Chanda in June 1977 that Vietnam did previously recognise the Brévié Line, but only because at the time Vietnam was unaware of certain "phenomena",<sup>433</sup> namely petroleum deposits in the relevant area of the sea. Vietnam was no longer willing to recognise the Brévié Line in May 1976 because these "'new phenomena' (the petroleum

<sup>422</sup> **E3/227**, SC Meeting, 2 Nov 1975, ERN 00183413; **E3/1150**, Telegram to Ya, 11 Nov 1975, ERN 00539054, paras 5-6; **E3/228**, SC Meeting, 9 Jan 1976, ERN 00182615; **E3/229**, SC Meeting, 22 Feb 1976, ERN 00182626; **E3/217**, SC Meeting, 11 Mar 1976, ERN 00182636; **E3/218**, SC Meeting, 26 Mar 1976; **E3/221**, SC Meeting, 14 May 1976.

<sup>423</sup> See e.g. **E3/799**, Division 920 Meeting, 7 Sep 1976, ERN 00184777, 00184779-80; **E3/9289**, Rep. on Situations 15 Jul to 31 Aug 1976, ERN 00233965-67; **E3/1132**, General Staff Rep. on Overall Situations 1 to 31 Dec 1976, ERN 00548772-74.

<sup>424</sup> **E3/794**, Ministers Meeting, 31 May 1976, 31 May 1976, ERN 00182675-76; **E3/814**, All Divisions Meeting, 1 Jun 1976, ERN 00143490; **E3/9289**, Rep. on Situations 15 Jul to 31 Aug 1976, ERN 00233965.

<sup>425</sup> See **E3/7338**, Morris, Why Vietnam Invaded Cambodia, ERN 01001761, describing a Radio Phnom Penh message of friendship with Vietnam, and the opening of a commercial air route between Phnom Penh and Hanoi. <sup>426</sup> **E3/266**, Black Paper, ERN 00082550.

<sup>427</sup> **E3/2371**, SRV, Vietnam-Kampuchea Conflict, ERN 00187338-39; **E3/3515**, Vietnam's Official Allegations, ERN 00196224.

<sup>428</sup> **E3/217**, SC Meeting, 11 Mar 1976, ERN 00182635-36; **E3/266**, Black Paper, ERN 00082550.

<sup>429</sup> **E3/221**, SC Meeting, 14 May 1976, ERN 00182694.

<sup>430</sup> **E3/221**, SC Meeting, 14 May 1976, ERN 00182703, 00182704.

<sup>431</sup> **E3/981**, Telegram to M-81, undated, ERN 00314585.

<sup>432</sup> **E3/221**, SC Meeting, 14 May 1976, ERN 00182693; see also *supra*, Chapter 3-I-A, noting that Phan Hien had been on the Defence's original Case 002 witness list.

<sup>433</sup> **E3/2376**, Chanda, Brother Enemy, ERN 00192218.

deposits) had overtaken [its] promises”.<sup>434</sup> Short testified that, by rejecting the Brévié Line, “the Vietnamese wanted to shift the sea border quite dramatically to give a much larger sea area to Vietnam”.<sup>435</sup> This failure to honour their earlier promise was clearly unacceptable to DK, not only because it was made in bad faith, but also because it would leave DK with little maritime territory, if any at all.<sup>436</sup> The unreasonable nature of Vietnam’s request was accentuated by the fact that the Brévié Line – which had always been the border between Vietnam and Cambodia<sup>437</sup> – had already favoured Vietnam including Phu Quoc in their territorial bounds.<sup>438</sup>

176. Moreover, such deceptive negotiation tactics by Vietnam were widespread. For instance, a Vietnamese official told Chanda that on 5 February 1978, Radio Hanoi aired Vietnam’s three-point proposal for resolution of their armed conflict with DK, despite knowing that “the Khmer Rouge would never accept that proposal”, simply to ensure that “the blame of rejection would be on [DK]”.<sup>439</sup> The insincerity of their peace proposal was evidenced by the accompanying daily Vietnamese attacks against DK between 4 and 12 February 1978.<sup>440</sup> The *Los Angeles Times* noted this hypocrisy, reporting on Vietnam’s bad faith in this regard. In particular, it reported that despite Vietnam announcing its ostensible willingness to negotiate, no ceasefire order had in fact been sent to its units on the ground. To the contrary, the invading Vietnamese forces were under orders to continue to combat any DK units in the battle area.<sup>441</sup>

177. This duplicitous behaviour was emblematic of the disconnect between Vietnam’s rhetoric about solidarity in its negotiations with DK and their constant violations of DK territorial integrity.<sup>442</sup> These violations, even when there was blatant evidence to the contrary, were consistently and deceitfully attributed to DK provocation.<sup>443</sup> In particular, one technique Vietnam often used was to make unfounded complaints about alleged DK’s incursions shortly before its troops intruded upon DK territory.<sup>444</sup> In addition, Vietnam carried out Soviet-style disinformation campaigns and spread blatant lies about atrocities “in order to slander” DK and

<sup>434</sup> E3/17, Chandler, Brother Number One, ERN 00393047.

<sup>435</sup> E1/192.1, Philip Short, T. 9 May 2013, p. 113, lns 4-5.

<sup>436</sup> E3/7333, Burgler, Eyes of Pineapple, ERN 01002251; E3/89, Heder Interview with Ieng Sary, ERN 00417637.

<sup>437</sup> E1/192.1, Philip Short, T. 9 May 2013, p. 112, ln. 24 to p. 113, ln. 2.

<sup>438</sup> E3/7333, Burgler, Eyes of Pineapple, p. 130, ERN 01002251.

<sup>439</sup> E3/2376, Chanda, Brother Enemy, p. 216, ERN 00192401.

<sup>440</sup> E3/1149, DK’s Message to Sweden-Kampuchea Friendship Association, ERN 00717587.

<sup>441</sup> E3/5882, Los Angeles Times, 50,000 Vietnam Troops Push Cambodian Invasion, ERN 00166173.

<sup>442</sup> See e.g. E3/218, SC Meeting, 26 Mar 1976, ERN 00182653, 00182654, 00182656.

<sup>443</sup> See e.g. E3/884, Telegram from Chhean to M-81, 30 Aug 1977, ERN 00182762-63.

<sup>444</sup> See e.g. E3/884, Telegram from Chhean to M-81, 30 Aug 1977, ERN 00182763 (DK representative said in response to Vietnam’s accusations, “When comrade [Vietnam] invaded us to a certain extent, comrade always alleged us first that we had invaded comrade to this and that degree. For example, I had remembered that comrade alleged us more and more heavily before an event in which mortar shells had been fired a thousand times.”).

“deceive the public”, while simultaneously “advancing its aggression into” DK territory.<sup>445</sup> The DK categorically denied Vietnam’s false accusations and dismissed them as ruses forming part of Vietnam’s efforts to pressure DK and to divert public attention from its own provocations.<sup>446</sup>

178. Vietnam’s ruses naturally did not fool DK’s diplomats in Hanoi.<sup>447</sup> Having witnessed what Vietnam had done to Laos, they did not believe Vietnam’s propaganda that DK was the aggressor in the conflict.<sup>448</sup> Even Vietnam’s ally and tutor in the art of disinformation, the Soviet Union, was constantly dismayed by what it described as “Vietnamese communist leaders’ distrustful and deceitful behavior”.<sup>449</sup>

### C. CAMBODIA’S FEAR OF VIETNAM’S EXISTENTIAL THREAT WAS LEGITIMATE

#### 1. CPK Policy Was Directly Shaped by the Existential Threat Posed by Vietnam

179. CPK policy was naturally directly shaped by, and often a reaction to, Vietnamese imperialist aggression. Even among the limited documents on the case file setting out the nature of policymaking within DK, the impact of the existential threat of Vietnam is undeniable. Vietnam’s intentions *vis-à-vis* Indochina were specifically mentioned during at least three Standing Committee meetings. For instance, at the 9 January 1976 meeting, the Standing Committee noted that Vietnam “**still maintain[s] their intention for Indochina**”.<sup>450</sup> During its 19-21 April 1976 meeting, the Standing Committee resolved that it wished to end the matter of Indochina.<sup>451</sup> Pol Pot further remarked, at the Standing Committee’s 14 May 1976 meeting analysing its ongoing negotiations with Vietnam concerning the border,<sup>452</sup> that Vietnam had “educated their youth for many years, from the time of Samdech Au and Hồ Chí Minh, educated them on this idea of Indochina constantly.”<sup>453</sup>

<sup>445</sup> See e.g. E3/882, Telegram from Chhean to M-81, 12 Aug 1977, ERN 01313132-33; E3/880, Telegram from Chhean to Brother, 20 Jul 1977, ERN 00182768; see also *supra*, Chapter 2-II-A-1.

<sup>446</sup> See e.g. E3/884, Telegram from Chhean to M-81, 30 Aug 1977, ERN 00182762-63, 00182764; E3/880, Telegram from Chhean to Brother, 20 Jul 1977, ERN 00182768; E3/221, SC Meeting, 14 May 1976, ERN 00182697 (“we denied their accusations”), 00182702 (“Negotiation tactics: Bring up other things to us as weapons to pressure us further [...] This is a ruse, a performance [...]”), 00182705 (“We deny all the events that they brought up. We explain that we have forbidden going within 500 meters of the border. We propose the same for their side, in order to not have any clashes.”).

<sup>447</sup> E3/882, Telegram from Chhean to M-81, 12 Aug 1977, ERN 01313135.

<sup>448</sup> E3/882, Telegram from Chhean to M-81, 12 Aug 1977, ERN 01313135.

<sup>449</sup> E3/10700, Morris, Soviet-Chinese-Vietnamese Triangle, ERN 01335256.

<sup>450</sup> E3/228, SC Meeting, 9 Jan 1976, ERN 00182617 (emphasis added).

<sup>451</sup> E3/235, SC Meeting, 19-21 Apr 1976, ERN 00183420.

<sup>452</sup> See *supra*, Chapter 3-III-B-3.

<sup>453</sup> E3/221, SC Meeting, 14 May 1976, ERN 00182702.



180. Following Vietnam's first major invasion of the DK in November 1977, its Indochinese Federation ambitions were expounded upon in greater detail in the January-February 1978 edition of Revolutionary Youth magazine, which stated that:

[T]he *Yuon* have had strategic plans for a long time. **They want to swallow Kampuchea and the Kampuchean people via the label of the Indochina Federation.** This plan, this stance, is the strategic line of the Indochinese Communist Party led by the *Yuon*. This strategic line of the Indochinese Communist Party has been and is now being actively and successively implemented by the present Vietnamese Communist Party and Vietnamese government. Therefore, **this is why the *Yuon* have always acted to cause turmoil and destruction and have attacked the Kampuchean revolution, the Kampuchean revolutionary state authority, and the Kampuchean army and people since the era of the imperialist American war of aggression, but particularly since 17 April 1975 [...].**<sup>454</sup>

**(a) *The CPK's Emphasis on Maintaining DK's Independence***

181. Indeed, even when the Indochinese Federation was not explicitly raised, the importance of DK maintaining its independence from Vietnam and other states was a recurring motif at CPK Standing Committee meetings,<sup>455</sup> DK Council of Ministers meetings,<sup>456</sup> and meetings of RAK leaders,<sup>457</sup> and in official DK publications.<sup>458</sup> For instance, the August 1975 issue of Revolutionary Youth emphasised that “[d]efending the independence, peace, neutrality, sovereignty, and territorial integrity of the new current and future Kampuchea [...] are the glorious missions of the Kampuchean people”,<sup>459</sup> while the November 1978 issue defined the “people’s war” as making DK “invulnerable and stable in independence, sovereignty and territorial integrity forever.”<sup>460</sup>

**(b) *The CPK's Recognition of the Parallel Internal Threat by Vietnam's Collaborators***

182. In addition, at the 14 May 1976 Standing Committee meeting on border negotiations with Vietnam held one month after DK survived its first major *coup d'état* attempt,<sup>461</sup> Pol Pot explained that any existential threat is strengthened by internal fractures:

<sup>454</sup> E3/726, Youth, Jan-Feb 1978, ERN 00278712.

<sup>455</sup> E3/217, SC Meeting, 11 Mar 1976, ERN 00182635; E3/221, SC Meeting, 14 May 1976, ERN 00182702; E3/223, SC Meeting, 17 May 1976, ERN 00182711.

<sup>456</sup> E3/818, Council of Ministers Meeting, 22 Apr 1976, ERN 00143465-67; E3/794, Council of Ministers Meeting, 31 May 1976, ERN 00182674.

<sup>457</sup> E3/799, Division 920 Meeting, 7 Sep 1976, ERN 00184780; E3/13, All Divisions Meeting, 9 Oct 1976, ERN 00940345.

<sup>458</sup> E3/768, ERN 00525949; E3/726, ERN 00278713-15, 00278718; E3/748, ERN 00495808, 00495814; E3/749, ERN 00532691, 00532693; E3/751, ERN 00583766; E3/756, ERN 00574381; E3/766, ERN 00524185.

<sup>459</sup> E3/749, Youth, Aug 1975, ERN 00532691.

<sup>460</sup> E3/766, Youth, Nov 1978, ERN 00524185.

<sup>461</sup> This 1976 attempted *coup d'état* is described in Chapter 3-V below.

In the international world today, countries, both socialist and non-socialist, have border conflicts, but that does not come to war because there are no internal forces rising up in opposition. To the contrary, if there are forces attacking within, that is another story. The problem of attacking from outside is not easy.

Therefore, when the international world is complicated, national conflicts are complicated. But inside the Revolution there are also national conflicts. **The situation now is not one in which a country uses force to seize another easily. Only after there are sufficient forces inside can the outside attack come. If there are no internal forces, the outside [attack] cannot come.**<sup>462</sup>

(c) *The Impact of the Existential Threat of Vietnam on CPK Policies Generally*

183. Moreover, what is significant for present purposes is not merely that the spectre of the threat of Vietnam was mentioned, but that it was also expressly identified as the underlying rationale for the CPK's policymaking. It goes without saying, of course, that neutralising the threat of Vietnam was the driver behind the CPK's defence policy.<sup>463</sup> However, the existential threat of Vietnam cast a far longer policy shadow than this, encompassing every arena. Following Vietnam's initial incursions into Cambodian territory in 1975,<sup>464</sup> the Standing Committee emphasised the cross-cutting policy impact of the need to resist danger, declaring at their 7 January 1976 meeting that:

The important thing is the factor of our acting on our own. If we can defend our borders, build a strong army [and simultaneously] build a prospering economy, the Party leads firmly and the people are comfortable and happy, then there are no problems. We can solve the external problems one after the other.<sup>465</sup>

184. Similarly, Pol Pot emphasised the direct connection between the work of every DK government ministry and DK's ability to resist its enemies at the second DK Council of Ministers meeting on 31 May 1976. Pol Pot advised each of the DK ministers to "storm attacks in each ministry to the maximum extent", and by so doing, "contribute, strengthen and extend our subjectivity more strongly. **Thus, from three to five years from now, we will be stronger. Enemies cannot do anything to us.**"<sup>466</sup>

185. The danger of Vietnam's existential threat manifested itself prominently in DK's foreign policy. Contrary to the enduring perception of DK as a hermetically-sealed state, its foreign

<sup>462</sup> E3/221, SC Meeting, 14 May 1976, ERN 00182701 (emphasis added).

<sup>463</sup> E3/228, SC Meeting, 7 Jan 1976, ERN 00182617; E3/223, SC Meeting, 17 May 1976, ERN 00182710-11; E3/795, All Divisions Meeting, 2 Aug 1976, ERN 00656578; E3/13, All Divisions Meeting, 9 Oct 1976, ERN 00940344-46.

<sup>464</sup> See *supra*, Chapter 3-III-A-3-(a).

<sup>465</sup> E3/228, SC Meeting, 7 Jan 1976, ERN 00182617.

<sup>466</sup> E3/794, Council of Ministers Meeting, 31 May 1976, ERN 00182691-92 (emphasis added).

policy was in fact far from isolationist. The DK specifically developed the widest possible array of diplomatic relationships so as to “strengthen [itself] internationally”<sup>467</sup> and thus hope to mitigate threats posed to it by Vietnam and others.<sup>468</sup> For instance, during a Standing Committee meeting, Pol Pot noted that, in light of Vietnam’s existential threat, “[the CPK had] to have friends in the world”.<sup>469</sup>

186. The impact of Vietnam’s existential threat was felt most strongly internally, drastically impacting the development of DK’s economy and DK living conditions. DK’s policy in this regard is best reflected in Pol Pot’s instructions at the inaugural meeting of the DK Council of Ministers on 22 April 1976, that to prevent Vietnam from “attack[ing] and open[ing] us up”, it was necessary for DK to develop rapidly. As Pol Pot put it, “[i]f we walk fast, they will follow on our tails. Therefore we can be independent.”<sup>470</sup> Economic development and independence were interdependent, as stated at the first national Party economic congress in November 1975:

The purposes of having such a rapid economy rebuilt especially in agriculture are to permanently defend the country, her territory, the Revolutionary achievements, independence, sovereignty and territorial integrity.<sup>471</sup>

187. Similarly, at a 2 August 1976 meeting of RAK leaders on the RAK’s rice production, Son Sen instructed the leaders to “understand clearly that **the leading role in farming is as important as the leading role in making war**. [...W]hile carrying out the country rebuilding task, [we] must constantly think about building up country defence forces simultaneously.”<sup>472</sup> Similarly, at a 19 September 1976 RAK leaders meeting, Son Sen identified “cultivation” as a key “protective measure” against “enemy attack[s]” from both outside and in.<sup>473</sup> Living conditions were also impacted by the existential threat. Several DK publications directly link the ability to defend DK independence and sovereignty to improved living conditions.<sup>474</sup>

<sup>467</sup> E3/217, SC Meeting, 11 Mar 1976, ERN 00182637.

<sup>468</sup> E3/223, SC Meeting, 17 May 1976, ERN 00182710; E3/799, Division 920 Meeting, 7 Sep 1976, ERN 00184780.

<sup>469</sup> E3/238, SC Meeting, 28 Feb 1976, ERN 00424113; *see also* E3/235, SC Meeting, 19-21 Apr 1976, ERN 00183420.

<sup>470</sup> E3/818, Council of Ministers Meeting, 22 Apr 1976, ERN 00143466 (emphasis added).

<sup>471</sup> E3/748, Flag, Oct-Nov 1975, ERN 00495808.

<sup>472</sup> E3/795, All Divisions Meeting, 2 Aug 1976, ERN 00656577-78 (emphasis added).

<sup>473</sup> E3/809, All Divisions Meeting, 19 Sep 1976, ERN 00183978-79.

<sup>474</sup> E3/4, Flag, Jul 1976, ERN 00268922; E3/759, Flag, Apr 1976, ERN 00517861, 00517866; E3/762, Flag, Aug 1976, ERN 00486758.

## 2. Other States Shared Cambodia's Fears of Vietnam's Existential Threat

### (a) China's Longstanding Doubts About Vietnam's Intentions

188. The existential threat of Vietnam not only manifested itself internally in CPK policy, but also often featured in the concerns of other states, including China. Chinese Premier Zhou Enlai had already expressed China's deep-seated concerns over Vietnam's intentions towards Cambodia as early as at the Paris Peace Agreement negotiations in 1973.<sup>475</sup> He had evidently relayed these concerns to the late King Father Sihanouk. Sihanouk once told the French Premier Pierre Mendès-France that he and Zhou Enlai had agreed that "after the [First Indochina] war Indochina should not be allowed to fall under one power – that is, Hanoi" but "should remain quite independent".<sup>476</sup> Indeed, China's concessions to France at the Geneva Conference to end the First Indochina War were made, according to French academic Paul Mus and historian François Joyaux, "in order to deny the Vietnamese full mastery over Indochina".<sup>477</sup>

189. China continued to voice its concerns over Vietnam's designs for Cambodia throughout the DK period. In addition to publishing numerous articles on the topic,<sup>478</sup> its leaders also made frequent mention of it. In September 1975, Deng Xiaoping – future Chinese Communist Party Chairman and then-Politburo member – denounced Soviet-style "hegemonism" during his opening remarks at the banquet welcoming Lê Duẩn to Beijing.<sup>479</sup> Chinese Foreign Minister Huang Hua echoed this sentiment in his July 1977 foreign policy address, in which he stressed that despite China's long-term stance of non-interference in the affairs of other states, it also "support[s] the stand of Cambodia and her people against Soviet revisionist social-imperialism and will not watch indifferently any intervention in Cambodian sovereignty or coveting of Cambodian territory by social-imperialism."<sup>480</sup> In February 1978, Huang reiterated that "[n]o country [...] should seek hegemony in any region or impose its will on another".<sup>481</sup> Three months later, in May 1978, Deng Xiaoping criticised Vietnam in a discussion with then-US National Security Advisor Zbigniew Brzezinski, labelling it "the Asian Cuba".<sup>482</sup> In November

<sup>475</sup> See *supra*, Chapter 3-III-B-1.

<sup>476</sup> E3/2376, Chanda, Brother Enemy, ERN 00192316.

<sup>477</sup> E3/2376, Chanda, Brother Enemy, ERN 00192311.

<sup>478</sup> E435, Nuon Chea's Request for Chinese and Thai Documents on Vietnamese Aggression, paras 6-12, 27-29; E434/2, Decision on Documents on Vietnamese Aggression, paras 5, 19-20; with regard to these documents, see also *supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence and *infra*, Chapter 9 and Annex 1.

<sup>479</sup> See e.g. E3/2376, Chanda, Brother Enemy, ERN 00192210-12.

<sup>480</sup> F2/8.1.31, Huang Hua, Problems with Indochina, Albania, and Yugoslavia, ERN 01141811 (emphasis added) with regard to this document, see also *supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and Annex 1.

<sup>481</sup> E3/7339, Richardson, China, Cambodia, and the Five Principles, ERN 01001995.

<sup>482</sup> E3/7339, Richardson, China, Cambodia, and the Five Principles, ERN 01001995.

1978, Deng astutely labelled Vietnam during a joint press conference with the Thai Premier as the “hooligans of the East”.<sup>483</sup> Then-Chinese Minister for Defence Geng Biao made similar comments after Vietnam invaded Cambodia in 1978, calling its leaders “war maniacs”.<sup>484</sup>

**(b) Concerns Expressed by Other States Over Vietnamese Ambitions**

190. Moreover, China’s deep concerns over Vietnamese ambitions for Cambodia were also shared by non-allies of the DK, including the US – as revealed for instance in a declassified White House Memorandum of Conversation and a US State Department cable.<sup>485</sup> These two documents minute meetings between US President Gerald Ford, Secretary of State Henry Kissinger, and Indonesian President Suharto on 5 July 1975 in Washington DC<sup>486</sup> and on 6 December 1975 in Jakarta.<sup>487</sup> In the second meeting, President Ford expressed his hope to “slow down the North Vietnamese influence” over Cambodia, and his concern over “the situation in Laos”, which he called “disturbing and appear[ing] to demonstrate an accelerated interest on the part of North Vietnam”.<sup>488</sup>

191. Similar sentiments were expressed in diplomatic cables sent from the First Secretary of the Australian Embassy in Hanoi to Canberra in 1975. A 20 August 1975 cable highlighted that “there are the suspected aspirations to form an “Indochinese Federation”.<sup>489</sup> Moreover, an earlier 8 May 1975 cable assessed the relationship between Vietnam and Cambodia after the Second Indochina War as follows:

It seems reasonable to suggest that the age-old Vietnamese-Khmer antagonism is likely to be continued with **the renewed verve of Vietnamese nationalism** following the “liberation” of the South. “Liberated” Indo-China is likely to be as complicated a mixture of national ambitions and conflicting alliances as in its recent neo-colonialist past.<sup>490</sup>

<sup>483</sup> E3/2376, Chanda, Brother Enemy, ERN 00192446. In this context, the Chinese term for “hooligan”, 流氓 or *liú máng*, would have been intended to mean someone who is dishonest, unreliable and dishonourable and cares little about what means they may use to get what they want (internal Defence translation).

<sup>484</sup> E3/7325, Geng Biao, Report on the Indochina Situation, ERN 01001621.

<sup>485</sup> E434, Nuon Chea’s Request for Documents on Vietnamese Aggression and Rebellion, paras 16, 29-30, 32-33; E434/2, Decision on Documents on Vietnamese Aggression, para. 10 (*see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and Annex 1).

<sup>486</sup> E434.1.7, White House Memorandum of Conversation July 5, 1975; *see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and Annex 1.

<sup>487</sup> E434.1.8, Ford-Suharto-Kissinger Dec 1975 Meeting Cable; *see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and Annex 1.

<sup>488</sup> E434.1.8, Ford-Suharto-Kissinger Dec 1975 Meeting Cable, ERN 01323863-64; *see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and Annex 1.

<sup>489</sup> E3/9723, Australian Embassy Hanoi Cable, 20 Aug 1975, ERN 01186945.

<sup>490</sup> E3/9722, Australian Embassy Hanoi Cable, 8 May 1975, ERN 01186941 (emphasis added).

192. Likewise, Cambodia's fellow Southeast Asian neighbours were also monitoring Vietnam's intentions. At the December 1975 meeting with President Ford and Secretary Kissinger noted above, it was Indonesian President Suharto who brought up the subject of whether Vietnam sought to "incorporate [...] [Cambodia and Laos] into one country" with it.<sup>491</sup> Thailand, similarly, took measures to try to contain Vietnamese influence in the region, including, *inter alia*, by supporting the Southern Vietnamese insurgency during the Second Indochina War.<sup>492</sup> In addition, Malaysia, Singapore, and Burma felt similarly, given Ieng Sary's account that representatives of all three countries were reassured that the DK disagreed with the notion of an Indochinese Federation.<sup>493</sup>

193. Finally, Vietnam's allies also monitored its intentions. As noted above, Soviet reports remark on Vietnamese designs on Cambodia and Laos from as early as 1971.<sup>494</sup> Similarly, a January 1978 letter from the Hanoi correspondent for East German state news agency Allgemeiner Deutscher Nachrichtendienst reported to the East German government that:

Confidential reports state that the [Socialist Republic of Vietnam] side is striving for a solution of the kind that would enable the remaining Patriotic Forces of Kampuchea to seize the initiative and wrest power from Pol Pot and his followers.<sup>495</sup>

### 3. Vietnamese Ambitions Were Eventually Realised in Laos

194. In addition to being corroborated by the perceptions of other states, DK's fears over Vietnam's ambitions were entirely justified in light of the fate of neighbouring Laos. At a Standing Committee meeting on 11 March 1976, Son Sen had already noted that DK's assessment of Vietnamese-Laotian relations was that "Vietnam controls the Lao revolution and take[s] Lao land".<sup>496</sup> In December 1976, Vietnam effectively confirmed this when it announced at its party congress that its priority was to "preserve and develop the **special relations** between the Vietnamese people and the **fraternal peoples** of Laos and Kampuchea",<sup>497</sup> and that the

<sup>491</sup> **E434.1.8**, Ford-Suharto-Kissinger Dec 1975 Meeting Cable, ERN 01323863; *see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and **Annex 1**.

<sup>492</sup> **E435.1.9**, Institute of Asian Studies, The Kampuchean Problem in Thai Perspective, ERN 01323985 (*see E435*, Nuon Chea's Request for Chinese and Thai Documents on Vietnamese Aggression, paras 20-29; **E434/2**, Decision on Documents on Vietnamese Aggression, para. 22; *see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and **Annex 1**); *see also E3/2376, Chanda, Brother Enemy, ERN 00192565.*

<sup>493</sup> **E3/2376**, Chanda, Brother Enemy, ERN 00192275.

<sup>494</sup> *See supra*, Chapter 3-III-A-1.

<sup>495</sup> **E3/540**, East German Reports on Cambodia-Vietnam Conflict, ERN 01246939 (emphases omitted).

<sup>496</sup> **E3/217**, SC Meeting, 11 Mar 1976, ERN 00182636.

<sup>497</sup> **E3/2376**, Chanda, Brother Enemy, ERN 00192270 (emphases added).

three countries would “**forever** be associated with one another in the building and defence of their respective countries”.<sup>498</sup>

195. Just seven months later, Vietnam secured its influence over Laos when on 17 July 1977, the two countries signed a 25-year “friendship treaty”. Although the terms of this treaty were secret,<sup>499</sup> its public preamble was announced on Vientiane Radio and declared that through the treaty, Vietnam and Laos sought to “closely combine genuine patriotism with proletarian internationalism and develop the Laos-Vietnam special relationship so that the two countries, already bound together in their national liberation struggle, will be forever bound in their national construction and national defence.”<sup>500</sup> Indeed, it was thought that it was the friendship treaty that enabled Vietnam to station some 50,000 troops and thousands of advisers<sup>501</sup> in Laos<sup>502</sup> and ultimately secure what Chinese ambassador to the UN, Chen Chu, described as “overall control” over Laos.<sup>503</sup>

196. Thus, by mid-1977, Vietnam had already solved half of its Indochinese Federation puzzle, fixing the Laotian piece in place. What remained was for it to secure the Cambodian piece of the puzzle. DK was acutely aware of this. On 12 August 1977, DK’s ambassador to Hanoi, Heng Sokh-Kheng *alias* Chhean, cabled the Standing Committee, assessing the significance of the friendship treaty, and other related actions by Vietnam, in these terms:

Due to Vietnam’s political stance and the above-mentioned events, it shows that Vietnam is taking the risk to advance its aggression into our country at its fullest strength compared to any previous acts [...] Obviously, **they do this in order to put pressure on us to reach a certain level of agreement in a form of a treaty or negotiation by following the pattern they had with Laos for the sake of supporting the political strategies of the Three Countries. All is for their power in the region and in general.**<sup>504</sup>

#### **D. VIETNAM LAUNCHED UNPROVOKED ACTS OF AGGRESSION AGAINST DK IN 1977**

197. In the wake of Vietnam’s increased domination over Laos, relations between Cambodia and Vietnam quickly unravelled towards a full-blown international armed conflict. The Manichean narrative absurdly blames Cambodia for this shift, portraying Vietnam as an

<sup>498</sup> E3/9, Short, History of a Nightmare, ERN 00396572-73 (emphasis added).

<sup>499</sup> Liow and Leifer, Modern Politics of Southeast Asia, pp. 377-78.

<sup>500</sup> Friendship Treaty Between Laos and Vietnam, p. 9.

<sup>501</sup> E3/7335, UN Security Council Meeting Minutes, ERN 01001646.

<sup>502</sup> See e.g. Liow and Leifer, Modern Politics of Southeast Asia, pp. 377-78; E3/9, Short, History of a Nightmare, ERN 00396582.

<sup>503</sup> E3/7335, UN Security Council Meeting Minutes, ERN 01001646.

<sup>504</sup> E3/882, ‘Telegram from Chhean to M-81’, 12 Aug 1977, ERN 01313134.

innocent victim of DK's "unprovoked" attacks in early 1977, particularly an alleged raid into Vietnamese territory on 30 April 1977 which is identified as the genesis for the armed conflict.<sup>505</sup> As discussed below however, contrary to this narrative, the culpability for this turning point in the relations between the two states clearly traces back to Vietnam.

### 1. Vietnam's Carefully Orchestrated Provocations in Early 1977 Led to War

198. DK internal military reports did not shy away from mentioning DK forces' incursions into Vietnamese territory when they happened.<sup>506</sup> However, no DK report during the first five months of 1977 even hinted at such incursions, whether on 30 April 1977 or otherwise. To the contrary, in late March 1977, the DK obtained intelligence that Vietnam had plans afoot to attack Cambodia in February, March, and April 1977.<sup>507</sup> This intelligence proved to be accurate. Moeng Vet (2-TCW-1005), a former military officer from the division office of RAK Centre Division 117, testified that he was transferred from Kirivong District in Takeo Province to Kratie Province in March 1977 as Vietnamese forces were attacking DK from "all directions". He stated that Division 117 was sent to Kratie to "counter the advancement" of the Vietnamese forces,<sup>508</sup> who had already seized Snuol District in Kratie by the time he arrived.<sup>509</sup> In April 1977, Vietnamese forces "provoked turmoil, opened fire and invade[d] [DK] territory every day" in Svay Rieng.<sup>510</sup> Several locations in this area were also shelled by the Vietnamese forces using heavy weapons between 7 and 11 April 1977.<sup>511</sup>

199. Similarly, the highly credible witness Ieng Phan, a then-battalion commander of DK forces in the Southwest Zone and current two-star general,<sup>512</sup> testified that clashes with Vietnam along Kampot and Takeo provinces started in early 1977.<sup>513</sup> According to Ieng Phan, DK forces could only push Vietnamese forces "back to the border", whereas Vietnamese forces pushed

<sup>505</sup> See e.g. **E1/495.1**, Document Hearing, T. 3 Nov 2016, p. 25, ln. 5 to p. 28, ln. 20. The Co-Prosecutors rely upon Kiernan, Chanda and Morris on the alleged events on 30 April 1977.

<sup>506</sup> E.g. **E3/897**, Telegram from Chhon to M-870, 7 Dec 1977.

<sup>507</sup> **E3/1061**, Telegram from Roeun to 89, 24 Mar 1977.

<sup>508</sup> **E1/448.1**, Moeng Vet (2-TCW-1005), T. 26 Jul 2016, p. 91, lns 6-8; **E1/449.1**, Moeng Vet (2-TCW-1005), T. 27 Jul 2016, p. 44, ln. 21 to p. 45, ln. 3.

<sup>509</sup> **E1/448.1**, Moeng Vet (2-TCW-1005), T. 26 Jul 2016, p. 91, lns 6-8; **E1/449.1**, Moeng Vet (2-TCW-1005), T. 27 Jul 2016, p. 44, ln. 21 to p. 45, ln. 3.

<sup>510</sup> **E3/852**, Telegram to M-870, undated, ERN 00183717.

<sup>511</sup> **E3/852**, Telegram to M-870, undated, ERN 00183715-16; **E3/143**, FBIS Reports, Sep 1977, ERN 00168725 (noting a *Bangkok Post* article reporting that "incidents – small arms and mortar exchanges – were occurring daily in early April" 1977 between Cambodia and Vietnam along all borders from the Southwest to Northeast).

<sup>512</sup> Ieng Phan was heavily relied on in **E313**, Case 002/01 Trial Judgement (see paras 218, 240, 244, 299, 300, 460, 485, 504, 506, 518, 577, 817) and in **F36**, Case 002/01 Appeals Judgement (see paras 152 (three times), 939, 969).

<sup>513</sup> **E1/492.1**, Ieng Phan, T. 31 Oct 2016, p. 18, ln. 22 to p. 19, ln. 3.



DK forces deep into DK territory.<sup>514</sup> Mak Chhoeun (2-TCW-823), Battalion 560 commander in Division 164's Regiment 63, echoed this, explaining that the policy was “not to invade another country” but to “defend our country at all costs”, if necessary through “counter-attack[s]”.<sup>515</sup> The probative value of Moeng Vet's (2-TCW-1005's), Ieng Phan's, and Mak Chhoeun's (2-TCW-823's) testimonies in this regard is bolstered by their military positions and proximity to the events on the ground.

200. Vietnam's carefully-orchestrated provocations continued into May 1977. A Bangkok Post article dated 1 September 1977 accurately reported that the “flare-up” in the Vietnam-DK conflict in April-May 1977 resulted from a “deliberate Vietnamese move”:

In a **carefully orchestrated** military escalation, the Vietnamese mounted what was **at first described as a training exercise** in [...] the border area between Ha Tien and [...] Chau Doc. This exercise was **well under way by about April 20** and continued into early May, when the manoeuvres were **suddenly converted into a “limited incursion”** into Cambodia. From **May 2 to 9, the Vietnamese air force struck** at Cambodian artillery emplacements and military barracks **up to 15 nautical miles inside the border** east of Kampong Trach and other Cambodian centres. [...]

**The first** major Cambodian **reaction** came on **May 13**. Elements of the Khmer Rouge 2<sup>nd</sup> Division moved up as **reinforcements, deploying** in border areas **west of** Ha Tien, Tinh Bien and Chau Doc. **The Vietnamese also reinforced, at the same time ordering the evacuation** from these centres, and especially Ha Tien [...].<sup>516</sup>

201. In other words, the evacuation of Vietnamese border towns such as Ha Tien and Chau Doc on 16 and 17 May 1977 was part of a calculated move by Vietnam.<sup>517</sup> Moreover, Ieng Phan explained that RAK forces did not initiate aggressive raids into Ha Tien and Chau Doc in early 1977 as Kiernan alleges, since his forces, which were stationed in the area at the time, “had no right to attack into An Giang, the territory of Vietnam [...] [They] could only attack close to [DK's] border”.<sup>518</sup> This further confirms that the DK's actions were taken as a defensive measure, rather than an aggressive or antagonistic one.

202. Furthermore, Vietnam's calculated measures during this period were not limited to areas bordering DK's Southwest Zone.<sup>519</sup> East Zone Sector 23 also reported a systematic operation by Vietnam to deploy forces and artillery along the border with Sector 23 in May 1977,

<sup>514</sup> E1/492.1, Ieng Phan, T. 31 Oct 2016, p. 19, lns 14-17.

<sup>515</sup> E1/512.1, Mak Chhoeun (2-TCW-823), T. 20 Apr 2016, p. 21, lns 9-18.

<sup>516</sup> E3/143, FBIS Reports, Sep 1977, ERN 00168725 (emphases added).

<sup>517</sup> E3/1593, Kiernan, Pol Pot Regime, ERN 01150186.

<sup>518</sup> E1/492.1, Ieng Phan, T. 31 Oct 2016, p. 29, ln. 2 to p. 30, ln. 4, p. 33, lns 1-10.

<sup>519</sup> E3/143, FBIS Reports, Sep 1977, ERN 00168725; E3/853, Southwest Zone Rep., 3 Jun 1977, ERN 00185243 (Vietnam evacuated its people from the border with Kampot and dug trenches at Wat Koh Chanloh).

followed by shelling of DK territory in this area later in the same month.<sup>520</sup> Indeed, a few days **before** the evacuation of Ha Tien and Chau Doc, Sector 23 had already observed an “unusual” situation in Svay Rieng between 14 and 16 May 1977 when Vietnam pre-emptively evacuated its people from the border to places deep inside its territory, dug trenches and trained all types of artillery on DK targets.<sup>521</sup> This evacuation, in preparation for their impending artillery offensive, provides further evidence of Vietnam’s systematic and coordinated aggression along its entire border with Cambodia.

203. As canvassed in more detail below,<sup>522</sup> Vietnam’s sudden and carefully premeditated provocations from February 1977 onwards coincided with an attempted *coup d’état* by RAK Central Division 310 forces in cooperation with former high-ranking North Zone cadres, other North Zone forces, and East Zone forces.<sup>523</sup> This attempted *coup d’état*, intended to occur probably on or around 17 April 1977,<sup>524</sup> is discussed in detail in Section V. This Chapter shows that the timing of this attempted *coup d’état* was anything but a coincidence. To the contrary, external acts of provocation by Vietnam and internal acts of treason and subversion by traitors in the CPK were coordinated and interrelated activities which sought to achieve a common aim: the takeover of the CPK and the legitimate DK government and the installation of a new leadership of “pitiful puppets” loyal to the interests of Vietnam.<sup>525</sup>

204. Thus, responsibility for the escalation of the conflict with Vietnam in early 1977 can be traced back directly and solely to Vietnam’s carefully-orchestrated provocations, which were implemented both internally and externally. These consistent, complementary acts of aggression understandably escalated the conflict, culminating in the first large-scale, unlawful

<sup>520</sup> **E3/850**, Sector 23 Rep. on Border Situation, May 1977, ERN 00654824 (on 19 May 1977, Vietnam transported 11 trucks of troops, 2 jeeps and one 105mm artillery to the east of Bavet; on 21 May 1977, another 25 trucks of Vietnamese troops were transported there), ERN 00654825 (on 18 May 1977, a group of fully armed Vietnamese troops installed one 12.8mm and one 30mm machine guns to the east of Prey Baraing; Vietnamese forces shelled the east of Prey Baraing with 82mm artillery on 18 May 1977, and shelled DK village Chrak Ampil with 60mm artillery on 21 May 1977), ERN 00654826.

<sup>521</sup> **E3/850**, Sector 23 Rep. on Border, May 1977, ERN 00654826.

<sup>522</sup> See *infra* Chapter 3-VI, on the 1977 *coup d’état*.

<sup>523</sup> **E1/319.1**, Sem Hoern, T. 22 Jun 2015, p. 76, ln. 14 to p. 85, ln. 6; **E1/320.1**, Sem Hoern, T. 23 Jun 2015, p. 4, ln. 13 to p. 21, ln. 22; **E1/316.1**, Keo Loeur, T. 15 Jun 2015, p. 33, ln. 8 to p. 38, ln. 15; **E1/317.1**, Keo Loeur, T. 16 Jun 2015, p. 10, ln. 2 to p. 12, ln. 7; **E1/460.1**, Suoy Sao, T. 18 Aug 2016, p. 13, lns 11-20, p. 14, ln. 21 to p. 15, ln. 24, p. 18, ln. 15 to p. 19, ln. 6, p. 19, lns 13-22, p. 21, lns 7-15, p. 27, lns 4-9; **E3/7535**, ‘DC-Cam Interview of Suoy Sao’, ERN 00324172; **E3/7540**, ‘DC-Cam Interview of Thach Siek’, ERN 00337712-13; **E3/509**, ‘WRI of Khorn Brak’, ERN 00282217; **E3/7584**, ‘DC-Cam Interview of Khorn Brak’, ERN 00183541-42, 00183549-50; **E3/5641**, ‘DC-Cam Interview of Nob Hat’, ERN 00881780-81, 00881784; **E3/7333**, Burgler, Eyes of Pineapple, ERN 01002239; see also *infra*, Chapter 3-IV, for information concerning other Centre Divisions potentially involved in the rebellion, in particular Divisions 450, 810 and 920.

<sup>524</sup> **E3/1593**, Kiernan, Pol Pot Regime, ERN 01150177; see also *infra*, Chapter 3-VI.

<sup>525</sup> **E3/7335**, UN Security Council Meeting Minutes, ERN 01001644.

invasion of DK in late 1977 and paving the way for its subsequent final invasion in December 1978. These events are discussed in greater detail in Section VIII below.

## 2. The CPK's Foreign and Defence Policies Were Rational, Reasonable, and Showed No Evidence of Provocation

205. Contrary to the factually unfounded opinions held by Stephen Morris and Elizabeth Becker,<sup>526</sup> evidence before the Chamber as a whole overwhelmingly shows that the CPK's foreign and defence policies were entirely rational and reasonable. Contrary to the Manichean narrative, they also showed no aggressive or provocative intentions. In particular, during a plenary meeting of Division 920 on 7 September 1976, Son Sen informed the Division that the CPK held the following stances towards Vietnam:

1. We won't be the ones who make trouble.
2. But we must defend our territory absolutely and absolutely not let anyone either take it or violate it.
3. If Vietnam invades, we will ask them to withdraw, and if they do not withdraw, we will attack. Our direction is to fight both politically and militarily.<sup>527</sup>

206. Unlike propaganda, a non-public statement like this has high probative value. Moreover, it is striking that whether in private (*i.e.*, during Standing Committee or military meetings)<sup>528</sup> or in public statements,<sup>529</sup> the CPK's foreign and defence policies were consistent: *i.e.*, DK would not initiate conflict with other states, but would resolutely defend itself if attacked. Mak Chhoeun's (2-TCW-823's) account, already cited in full above, fully corroborates this.<sup>530</sup> Moreover, this position is also perfectly in accordance with international law, not to mention a logical approach by any rational nation-state.

207. In reality, the CPK had no intention whatsoever of expanding DK territory. It very reasonably insisted on the previously-agreed Brévié Line (which already allocated a greater

<sup>526</sup> See *e.g.* E3/7338, Morris, Why Vietnam Invaded Cambodia, pp. 17-18; E1/260.1, Elizabeth Becker, T. 10 Feb 2015, p. 78, lns 1-7.

<sup>527</sup> E3/799, Division 920 Meeting, 7 Sep 1976, ERN 00184781; E1/492.1, Ieng Phan, T. 31 Oct 2016, p. 101, ln. 13 to p. 102, ln. 6 (confirming these instructions were part of the CPK's nationwide defence policy at the time).

<sup>528</sup> See *e.g.* E3/221, SC Meeting, 14 May 1976, ERN 00182696-98; E3/799, Division 920 Meeting, 7 Sep 1976, ERN 00184781.

<sup>529</sup> See *e.g.* E3/1407, SWB Far Eastern, 20 Jan 1978, ERN 00008683 (Nuon Chea speech); E3/749, Youth, Aug 1975, ERN 00532686.

<sup>530</sup> See *supra*, Chapter 3-I-A, citing and discussing E1/512.1, Mak Chhoeun (2-TCW-823), T. 13 Dec 2016, p. 21, lns 9-15 ("The policy of Kampuchea was not to invade another country. We were a small – Cambodia was a small country and had small population. We needed only to defend our country. Though Cambodia was a small country, when there was an invasion, we had to defend our country at all costs, even if it would cost us our lives").

proportion of territory to Vietnam) as its border with Vietnam with a view to “maintain[ing] the current situation, and mak[ing] no new demands”.<sup>531</sup> The Manichean ‘accepted truth’ of DK’s ambition to reclaim Kampuchea Krom territory from Vietnam<sup>532</sup> is clearly contradicted by the DK’s policy and actions in this regard. Indeed, witness Ieng Phan categorically dismissed the allegation of such a policy. He explained that it was simply a matter of military strategy that DK sought to attack Vietnamese forces from the rear once they entered DK territory in order to force them to withdraw; it was not at all for a far more expanded purpose of reclaiming Kampuchea Krom from Vietnam.<sup>533</sup> A news report from 1978 supports Ieng Phan’s account as it shows that this was exactly the military tactic adopted by Division-level commanders of the RAK.<sup>534</sup> Moreover, Stephen Heder’s interview with various people delegitimises the existence of an alleged CPK policy to reclaim Kampuchea Krom, as it demonstrates a clear lack of unanimity on the matter, with inconsistencies in the accounts as to the alleged policy.<sup>535</sup>

208. Both the former deputy commander of West Zone Division 1 Meas Voeun and Ieng Phan, confirmed that Son Sen and also Ta Mok gave consistent instructions to DK military forces, with Mak Chhoeun (2-TCW-823) confirming that he had the same understanding of what the policy was.<sup>536</sup> Meas Voeun recounted these instructions as follows:

We must defend our territory, and we must be patient; do not fight back when they fire off a few shots. Do not fight back. Remain calm. If they fire off a few shots and we fire back, it means we will create a very big problem.<sup>537</sup>

209. The evidence shows that CPK policies and instructions were respected at Division level on the military side and at Central Committee level for the civilian side.<sup>538</sup> For instance, Division 801 commander Saroeun – code named “05” – reported to Son Sen on 23 January 1976 that his forces exercised political maturity in the face of repeated attacks by Vietnamese

<sup>531</sup> **E3/221**, SC Meeting, 14 May 1976, ERN 00182702, 00182704-05; *see supra*, Chapter 3-III-B-3, for a discussion of the nature of the Brévié Line border demarcation between Cambodia and Vietnam.

<sup>532</sup> **E3/1593**, Kiernan, Pol Pot Regime, pp. 104-05, ERN 01150049.

<sup>533</sup> *E.g.* **E1/492.1**, Ieng Phan, T. 31 Oct 2016, p. 23, ln. 23 to p. 24, ln. 21.

<sup>534</sup> **E3/1014**, Foreign News Clips, 24 Dec 1978, ERN 00810104 (“some commanders at the division level [...] told us that, ‘These days, the Cambodian armies are fighting against *Yuon* by applying tactics as follows: only few men would be sent to launch attack at the front; then more men would be sent to launch attacks from the back and the sides”).

<sup>535</sup> **E3/1593**, Kiernan, Pol Pot Regime, p. 105, fn. 15, ERN 01150049 (“When questioned closely by Heder “on the issue of Kampuchea Krom and more particularly Phu Quoc,” these former 164<sup>th</sup> Division troops, then in Mai Rud camp in Thailand, told Heder: “Yes, these areas were considered Khmer territory and were to be brought under DK control.” Others he interviewed denied this claim”).

<sup>536</sup> **E1/512.1**, Mak Chhoeun (2-TCW-823), T. 13 Dec 2016, p. 27, lns 20-23.

<sup>537</sup> **E3/8752**, ‘DC-Cam Interview of Meas Voeun’, ERN 00849511; **E1/492.1**, Ieng Phan, T. 31 Oct 2016, p. 100, ln. 21 to p. 101, ln. 12.

<sup>538</sup> *E.g.* **E3/887**, Telegram from 05 to 89, 23 Jan 1976; **E3/221**, SC Meeting, 14 May 1976, ERN 00182696 (Son Sen), 00182697 (Nuon Chea).

forces by resolutely insisting to continue negotiating with the Vietnamese side and refusing to fire even a single bullet back.<sup>539</sup> Indeed, even when compelled to resort to military measures, the RAK was instructed only to “contain” and “counter-attack” Vietnamese forces to defend against violations of DK’s sovereignty.<sup>540</sup>

#### E. CONCLUSION ON THE EXISTENTIAL THREAT OF VIETNAM

210. The Manichean narrative that the DK somehow behaved in a paranoid and irrational way, whether *vis-à-vis* Vietnam, internal traitors, or its population generally, is simply unfounded. As clearly established above, Vietnam persistently worked, both pre- and during the DK era, to strip Cambodia of its autonomy and territorial sovereignty. These efforts most obviously manifested in Vietnam’s external efforts, culminating in its blatantly illegal invasion and subsequent occupation of DK in December 1978. This invasion, as shown above, built upon consistent Vietnamese incursions into DK territory throughout the DK period. Vietnam’s invasion of DK was no coming of the saviour, and certainly no humanitarian intervention.<sup>541</sup> It was a blatantly illegal act of aggression in flagrant violation of the United Nation’s most fundamental tenet: refraining from threatening the sovereignty of another state.<sup>542</sup> Achieving it enabled Vietnam not only to control Cambodia for the next decade but to fulfil its centuries-old ambition of creating an Indochinese Federation with Cambodia and Laos as Vietnam’s subjugated states.

211. It is of direct significance to Nuon Chea’s case to appreciate that Vietnam’s direct invasion of DK was only one of two plans Vietnam was pursuing. While “nibbling” and constantly provoking at the DK border to push DK into the Indochinese Federation, Vietnam simultaneously pursued an alternate path towards taking over DK. This path was the finale of

<sup>539</sup> **E3/887**, Telegram from 05 to 89, 23 Jan 1976.

<sup>540</sup> **E1/493.1**, Ieng Phan, T. 1 Nov 2016, p. 49, lns 11-22; **E1/492.1**, Ieng Phan, T. 31 Oct 2016, p. 24, lns 7-21, p. 35, lns 13-16, p. 50, lns 6-8; **E1/512.1**, Mak Chhoeun (2-TCW-823), T. 13 Dec 2016, p. 21, lns 12-18; **E1/489.1**, Chuon Thy (2-TCW-859), T. 25 Oct 2016, p. 74, lns 22-25, p. 84, lns 13-21, p. 87, ln. 16 to p. 88, ln. 4, p. 106, lns 9-16; **E1/490.1**, Chuon Thy (2-TCW-859), T. 26 Oct 2016, p. 29, lns 17-20, p. 51, lns 19-22, p. 56, lns 4-7; **E1/493.1**, Long Sat (2-TCW-1065), T. 1 Nov 2016, p. 76, lns 10-12; **E1/494.1**, Long Sat (2-TCW-1065), T. 2 Nov 2016, p. 42, lns 18-24.; **E1/454**, Chin Saroeun, T. 3 Aug 2016, p. 14, lns 5-7.

<sup>541</sup> **E396.1.1**, ‘Letters from Norodom Sihanouk to Phạm Văn Đồng’, 1979, ERN 01224296, 01224298 (*see also* **E396**, Nuon Chea’s Request for Sihanouk-Related Evidence, paras 7-17; **E396/3**, Nuon Chea’s Reply on Sihanouk-Related Evidence, paras 6-7; **E396/4**, Decision on Sihanouk-Related Evidence, paras 9-10; **E445/1**, Nuon Chea’s Request for Documents to Use in Questioning Morris, paras 29-35; **E445/2**, Decision on Documents to Use to Question Morris, para. 5; *supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence and *infra*, Chapter 9 and **Annex 1**); **E1/486.1**, Stephen Morris, T. 19 Oct 2016, p. 67, ln. 24 to p. 68, ln. 4; **E1/260.1**, Elizabeth Becker, T. 10 Feb 2015, p. 96, ln. 20 to p. 97, ln. 5; *see also* **F16**, Nuon Chea’s Appeal Brief, paras 125, 723.

<sup>542</sup> Charter of the United Nations, Art. 2(4): “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”.

its very long game towards establishing the Indochinese Federation,<sup>543</sup> and is the focus of the remainder of this Chapter. As demonstrated below, long before the CPK liberated Phnom Penh, Vietnamese collaborators at the highest ranks of the CPK had already begun undermining the CPK from within.<sup>544</sup> Their efforts intensified after DK was founded, featuring a series of at least three failed *coup d'état* attempts attempting to overthrow the CPK and the DK government in favour of leadership loyal to Vietnam.<sup>545</sup>

212. Vietnam's use of a system of internal collaborators within the CPK to help establish its Indochinese Federation alongside its parallel external efforts had a dual effect. On the one hand, it applied significant pressure to the DK and divided its attention, and thus, the strength of its response, to the concurrent internal and external threats it faced. On the other hand, this approach also offered Vietnam helpful international political cover,<sup>546</sup> disguising the imperialist desires of a foreign state as the internal resistance of independently-minded Cambodian "freedom fighters". However, the reality was that those collaborators were traitors; participants in acts of high treason and espionage who ultimately sought to fulfil the existential threat Vietnam posed to their very own state.<sup>547</sup>

213. It is for these reasons, and for ease of comprehension as noted before, that in this Brief and in its case generally, the Defence refers to the series of attempted *coups d'état* by Vietnam's collaborators within the CPK as, in effect, Vietnam's 'Plan A', and Vietnam's plan to carry out a direct military invasion of DK as 'Plan B'. Subsequent Chapters of this Brief consider the impact of these *coups d'état* on CPK policymaking, in particular Chapter 4 on the response to those suspected of treasonous activities as part of the CPK's nationwide defence and security policy, and Chapter 6 on policies in respect of living conditions. The present Chapter begins this discussion by focusing on explaining the nature of these plans, commencing immediately below with a description of Vietnam's network of internal collaborators within the CPK.

#### **IV. CRACKS WITHIN THE CPK: VIETNAM'S INTERNAL COLLABORATORS**

214. As noted above, Vietnam sought to realise its longstanding imperialist ambitions *vis-à-vis* Cambodia in part through internal collaborators it recruited from within the CPK. This is

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<sup>543</sup> See *supra*, Chapter 3-III-B-2.

<sup>544</sup> See *infra*, Chapter 3-IV.

<sup>545</sup> See *infra*, Chapter 3-V, 3-VI, and 3-VII.

<sup>546</sup> See *supra*, Chapter 3-III-A-3-(b), on Vietnam's efforts to shift blame for armed conflict to the DK; and *infra*, Chapter 3-VIII-C, on Vietnam's manipulation of international opinion in the lead-up to its 1978 invasion.

<sup>547</sup> See *supra*, Chapter 3-II; and *infra*, Chapter 3-V, Chapter 3-VI, Chapter 3-VII, and Chapter 4.

one key way in which the evidence presented in this Part undermines the Manichean narrative, for in the Manichean version of events, the CPK is typically presented as a monolithic, perfectly harmonious machine. In truth, however, the CPK was always cleaved with internal divisions. On the one hand were Pol Pot, Nuon Chea, Ta Mok, Son Sen, and Ke Pauk, among others.<sup>548</sup> On the other hand was a significant proportion of top leaders, who neither shared a criminal common purpose nor acted in concert with them. To the contrary, these traitorous leaders sought to overthrow the DK government and install a new regime loyal to Vietnam. This Section sets the scene by introducing the traitorous leaders and chronicling the longstanding cracks within the CPK.

#### A. CRACKS HAD APPEARED IN THE CPK EVEN BEFORE IT ASSUMED POWER

215. The available evidence indicates that cracks had formed within the CPK long before it had even assumed power. One witness suggested that those cracks dated back to 1967 or 1968 when a breakaway party within the CPK was formed, a matter discussed in further detail below.<sup>549</sup> Former North Zone secretary,<sup>550</sup> DK Commerce Minister,<sup>551</sup> and Central Committee member<sup>552</sup> Koy Thuon paints a vivid picture of a divided CPK in his S-21 statement, to which the Defence refers regardless of the Chamber's decision to the contrary<sup>553</sup> given the crystal clear, consistent evidence that Koy Thuon was not mistreated or tortured.<sup>554</sup> As Koy Thuon relayed, he learned in 1973 of secret plans afoot to create a breakaway party from within the CPK. He explained how Ney Sarann *alias* Ya (a Central Committee member<sup>555</sup> who would become the Northeast Zone secretary)<sup>556</sup> told him:

The Vietnamese now helps [*sic*] to organise a new party for us, and Keo Meas is the chairman. And you, comrade Thuch, like me, we understand what our tasks are. We must push on organizing this new party as soon as possible. **When there is a good opportunity, we will openly announce the plan to overthrow the old Communist**

<sup>548</sup> See *supra*, Chapter 3-IX-A-2-(c), concerning the non-existence of a JCE even in respect of loyal forces.

<sup>549</sup> See *infra*, Chapter 3-IV-A.

<sup>550</sup> E3/1604, S-21 Statement of Koy Thuon, ERN 00759697.

<sup>551</sup> E3/3856, S-21 Statement of Koy Thuon, ERN 00829627.

<sup>552</sup> E3/227, SC Meeting, 2 Nov 1975, ERN 00183409; E3/229, SC Meeting, 22 Feb 1976, ERN 00182625.

<sup>553</sup> E399/4, Dispositive Decision on Use of Certain S-21 Statements, para. 2(a).

<sup>554</sup> E1/441.1, Duch, T. 21 Jun 2016, p. 14, ln. 1 to p. 17, ln. 15; E3/10607, 'WRI of Duch', ERN 01213411; E3/65, 'WRI of Duch', ERN 00147519, 00147524; E3/5772, 'WRI of Duch', ERN 00209177; E3/15, 'Duch Written Responses to OCIJ', ERN 00251389; E3/5799, Testimony of Duch (Case 001), p. 47, lns 13-21; E3/5800, Testimony of Duch (Case 001), p. 18, lns 19-21, p. 36, lns 17-18; see also E399, Nuon Chea's Motion to Use Certain S-21 Statements, paras 15-18; E399/3, Nuon Chea's Reply on Use of Certain S-21 Statements, paras 24-41; see also *supra*, Chapter 2-II-B-3-(b), on 'torture-tainted' evidence.

<sup>555</sup> E3/1868, S-21 Statement of Ney Sarann, ERN 00290113; see also E3/405, 'WRI of Chhaom Se', A22.

<sup>556</sup> E3/1868, S-21 Statement of Ney Sarann, ERN 00290112.

**Party of Kampuchea throughout the country and replace it with this new party.  
But this must be kept very confidential because our life is on the line.**<sup>557</sup>

216. Had the Chamber summonsed Heng Samrin,<sup>558</sup> Heng Samrin could have corroborated Koy Thuon's account of dissension in the CPK ranks manifesting in the same period. As Heng Samrin told Ben Kiernan, from 1973 onwards he was actively involved in turf battles between CPNLAF forces from the East and Southwest Zones, particularly over Region 25, which ultimately became the no man's land between their respective zonal forces.<sup>559</sup> Similarly, there were also media reports suggesting that from as early as late 1972, the CPNLAF had been involved in armed clashes with the Khmer Rumdo, a guerrilla force which had been aligned with the CPK as part of the FUNK.<sup>560</sup>

#### **B. THE CRACKS IN THE CPK WERE WIDELY PERCEIVED**

217. CPK cadres at various levels offer consistent accounts of cracks they perceived within the Party, describing fault-lines on the basis of ideology, foreign allies, and DK Zones. According to witness Ban Seak, who served as the Central Zone Sector 42 commerce chief and deputy chief of Chamkar Leu District, the CPK was really divided into three parties: the "the Communist Party of Kampuchea following Mao Tse Tung's guideline; second, Sereikar Party (CIA); and third, the Worker's Party (KGB)".<sup>561</sup> At trial, Ban Seak clarified that the third of these, the "Workers Party of Indo-china", was led by Sao Phim<sup>562</sup> and composed mainly of Khmer cadres who had previously been trained in Vietnam.<sup>563</sup> Similarly, Division 310 combatant Nob Hat described to DC-Cam how according to information he obtained from Division 310 commander and eventual *coup d'état* leader Sbauv Him *alias* Oeun,<sup>564</sup> the Party was "divided into sections", or "three parties": the north, "affiliated with the United States";

<sup>557</sup> E3/1604, S-21 Statement of Koy Thuon, ERN 01381674 (ERN KH 00005879) (emphasis added). On Keo Meas, see also E3/3095R, 'Die Angkar', 15:24, describing Keo Meas as a "member of the central committee of the [breakaway] party" ("Mitglied des Zentralkomitees der Partei" (internal Defence translation)).

<sup>558</sup> E3/392, Nuon Chea's Rebellion Leadership Witnesses Request, paras 5, 7, 18-23, 25; see also E421/1/2, Nuon Chea's Notice of Silence, paras 5-8; see also E454, Final Witnesses Decision, para. 4, and *supra*, Chapter 1, on Heng Samrin specifically and Chapter-2-II-B-3-(c), on the refusal of key witnesses/experts, and *infra*, Chapter 9 and Annex 2.

<sup>559</sup> E3/1568, Kiernan Interview with Heng Samrin and Chea Sim, ERN 00651882-83.

<sup>560</sup> E3/2376, Chanda, Brother Enemy, ERN 00192257.

<sup>561</sup> E3/375, 'WRI of Ban Siek', ERN 00360757.

<sup>562</sup> E1/354.1, Ban Seak, T. 6 Oct 2015, p. 12, lns 1-2.

<sup>563</sup> E1/353.1, Ban Seak, T. 5 Oct 2015, p. 81, lns 14-18 ("To my knowledge, at my location there were Khmer cadres who had been trained in Vietnam, they were part of Labour Party and when the Vietnamese entered Cambodia, they were part of the force to build its own force on the ground and later on they had been purged").

<sup>564</sup> See *infra*, Chapter 3-V, for details of the *coup d'état* Oeun led.



the east, “associated with the *Yuon*”; and the Southwest “on the Khmer Rouge side”.<sup>565</sup> Northwest Zone transportation section worker Samey Saveng,<sup>566</sup> agreed, describing how:

[Northwest Zone cadres] had been accused of being affiliated with the Viet Minh Khmer Rouge and the East Zone Committee [Chief], SAO Phim. These two Zones had turned against POL Pot. According to my observations, the Khmer Rouge was apparently composed of three or four groups. **The first group was the Viet Minh. The second group was the nationalistic Khmer Rouge. The third was the Sihanouk Khmer Rouge, and the fourth group was the Khmer Rouge from China, including Pol Pot.**<sup>567</sup>

218. It is worth noting at this juncture that CPK references to “KGB” or “CIA” – such as Ban Seak’s comments above – were never literal references to those intelligence agencies. Rather, as Nob Hat indicated, as noted above, and Ban Seak confirmed in court,<sup>568</sup> they were shorthand labels assigned to those with Soviet bloc or Vietnamese (revisionist or hegemonist) leanings on one hand, or Western imperialist leanings on the other.<sup>569</sup>

219. CPK cadres’ accounts of a fractured CPK are corroborated by Geng Biao in a speech to his fellow Chinese Communist Party politburo members in January 1979. He said that six months after the liberation of Phnom Penh in 1975, three factions were formed:

The **first faction**, composed of Cambodian workers and peasants and under the direct control of Pol Pot and Khieu Samphan, was the majority and the main force of the Liberation Army. The **second faction** consisted of the royal forces faithful to Sihanouk and old patriotic officers and men from Lon Nol’s troops who turned against Lon Nol and joined the liberation war. Members of this faction were not many but all of them were well-trained allies of the Communist Party and sympathizers of the revolutionary cause. The **third faction** was the well-equipped pro-Vietnam group consisting of quite a few members.<sup>570</sup>

220. Chinese foreign minister Huang Hua described, in his 1977 foreign policy address, how the composition of the RAK was “extremely complex” and that “Vietnam[,] which was backed by Soviet revisionism [...] took advantage of this opportunity and infiltrated into certain units

<sup>565</sup> E3/5641, ‘DC-Cam Interview of Nob Hat’, ERN 00881777.

<sup>566</sup> E395, Nuon Chea’s Rebellion Evidence Witnesses Request, paras 26, 28, 42; *see also* E443/10, Reasoned Decision on Key Defence Witnesses, para. 38; *see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key witnesses/experts, and *infra*, Chapter 9 and Annex 2.

<sup>567</sup> E3/9579, ‘WRI of Samey Saveng’, ERN 00970467 (emphasis added).

<sup>568</sup> E1/354.1, Ban Seak, T. 6 Oct 2015, p. 5, ln. 24 to p. 7, ln. 5.

<sup>569</sup> *See also* E3/106, ‘WRI of Duch’, ERN 00177634 (“In fact, when the CIA or the KGB were mentioned, I immediately understood that it did not mean the persons cited were members of these organisations but rather that we were dealing with people considered by Pol Pot to be enemies of the Revolution”).

<sup>570</sup> E3/7325, Geng Biao, Report on the Indochina Situation, ERN 01001622 (emphasis added).

of the Cambodian forces”.<sup>571</sup> In addition, an unnamed Vietnamese diplomat told Chanda in March 1977 of a “serious fight” within the CPK, alluding to an ideological dispute between the “100 percent pro-Mao Pol Pot” and those with the “correct line”.<sup>572</sup> Likewise, a January 1978 letter from the Hanoi correspondent for the East German state news agency, Allgemeiner Deutscher Nachrichtendienst, already noted above,<sup>573</sup> referred in January 1978 to “Patriotic Forces of Kampuchea” supported by Vietnam that sought to “seize the initiative and wrest power from Pol Pot and his followers”.<sup>574</sup>

221. Finally, the CPK’s factionalisation is also one rare area where Cambodia-focused historians and analysts across the spectrum agree. Renowned Vietnam expert Douglas Pike testified to the US Congress in 1978 that between the liberation of Phnom Penh and early 1977, “the Vietnamese continued efforts to stage a *coup d’état* in Kampuchea, using a handful of traitorous forces which were Vietnamese agents [and which, a]s might be expected, [...] triggered a deadly but highly obscure power struggle among Cambodian Communists”.<sup>575</sup> Akin to the CPK cadres cited immediately above, Pike too described this struggle as a “personal and factional contest [which] also involved several doctrinal disputes”.<sup>576</sup> Even historian Ben Kiernan and also US State Department officer Kenneth Quinn described the CPK during the civil war respectively as a “factionalised insurgency”<sup>577</sup> and with “two [CPK] factions [...] at each other’s throats”,<sup>578</sup> while expert Stephen Morris described the CPK as containing “three distinct political tendencies”.<sup>579</sup>

### C. FROM 17 APRIL 1975, THOSE CRACKS EXPANDED AT LIGHTNING PACE

222. Whatever the precise nature of the divisions, what is clear is that the CPK that liberated Phnom Penh was not united, nor would it ever be. Its divisions were apparent even before the liberation of Phnom Penh, with reports of various CPNLF forces racing to reach and liberate Phnom Penh first and be the strongest of the forces stationed there, as Chan Savuth describes.<sup>580</sup>

<sup>571</sup> **E3/7325**, Geng Biao, Report on the Indochina Situation, ERN 01001622; **F2/8.1.31**, Huang Hua, Problems with Indochina, Albania, and Yugoslavia, ERN 01141809-10 (with regard to this document, *see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and **Annex 1**).

<sup>572</sup> **E3/2376**, Chanda, Brother Enemy, ERN 00192270.

<sup>573</sup> *See supra*, Chapter 3-III-C-2-(b).

<sup>574</sup> **E3/540**, East German Reports on Cambodia-Vietnam Conflict, ERN 01246939 (emphases omitted).

<sup>575</sup> **E3/2370**, Pike Congressional Report, ERN 00187385.

<sup>576</sup> **E3/2370**, Pike Congressional Report, ERN 00187386.

<sup>577</sup> **E3/1593**, Kiernan, Pol Pot Regime, ERN 00678504.

<sup>578</sup> **E3/1593**, Kiernan, Pol Pot Regime, ERN 00678527.

<sup>579</sup> **E3/7338**, Morris, Why Vietnam Invaded Cambodia, ERN 01001721; *see also* **E1/486.1**, Stephen Morris, T. 19 Oct 2016, p. 125, lns 13-14 (describing “rival communist factions”).

<sup>580</sup> **F2/4/3/3/6.2**, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151686.

As noted above, Chan Savuth is one of the four Lemkin-Sambath Witnesses, and his DK experience is chronicled at length later in this Chapter.<sup>581</sup>

223. The divisions in the CPK were cemented during the liberation of Phnom Penh itself. According to Heng Samrin,<sup>582</sup> shortly after liberation, Phnom Penh was strictly divided into four geographic regions, each controlled by competing forces reporting to zone leaders.<sup>583</sup> Sau Ren, who was a Division 310 soldier stationed in Phnom Penh during the liberation,<sup>584</sup> identified Phsar Thmei (*i.e.* the Central Market) as the convergence point of the East, North, and Southwest zones' respective regions. Phsar Thmei became to the liberating forces what Region 25 had been to the East and Southwest forces in 1973: a no man's land.<sup>585</sup> There, as Samey Saveng explained, all three zones' forces "did not dare to move forward into the zone of other forces", for if they did, "[t]he forces inside that zone would shoot them".<sup>586</sup> Far from being a united party, therefore, this arrangement more closely resembled that of a loose and fragile coalition of competing forces.

224. The evidence also shows that, from the liberation of Phnom Penh onwards, cracks in the CPK expanded at lightning pace. Cambodians in Thai refugee camps, including former CPK cadres, reported "widespread disorder in many Cambodian provinces" due to plots against the regime from late 1975.<sup>587</sup> An unnamed Northwest Zone official also told the Bangkok Post in September 1975 that "[t]here is no central government for another six months" and that there was "confusion as to who was the real power in Cambodia".<sup>588</sup>

## 1. The May 1975 Meeting Set the Wheels of Treason in Motion

225. The emblematic example of dissension within the CPK ranks in 1975 is a clandestine meeting Sao Phim hosted in Phnom Penh in May 1975. Held directly after the CPK's first congress in the city, the May 1975 meeting of 300 supporters from various zones and ministries<sup>589</sup> established 'Plan A' and is described by Lemkin-Sambath Witness W1 who

<sup>581</sup> See *infra*, Chapter 3-VI-A-2-(a); see also *supra*, Chapter 2-II-B-3-(c) and Chapter 3-II-B-1.

<sup>582</sup> E454, Final Witnesses Decision, para. 4; see also *supra*, Chapter 2-II-B-3-(c), on the refusal of key witnesses/experts, and *infra*, Chapter 9 and Annex 2.

<sup>583</sup> E3/1568, Kiernan Interview with Heng Samrin and Chea Sim, ERN 00651879, 00651882.

<sup>584</sup> E391, Nuon Chea's Division 310 Witnesses Request, paras 22-23, 25, 36(a); E443/10, Reasoned Decision on Key Defence Witnesses, para. 36; see also *supra*, Chapter 2-II-B-3-(c), on the refusal of key witnesses/experts, and *infra*, Chapter 9 and Annex 2.

<sup>585</sup> See *supra*, Chapter 3-IV-A.

<sup>586</sup> E3/2073, 'DC-Cam Interview of Sau Ren', ERN 00876405-06.

<sup>587</sup> F2/8.1.29, Paul, Plot Details Filter Through, ERN 01141796; with regard to this document, see also *supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and Annex 1.

<sup>588</sup> E3/1593, Kiernan, Pol Pot Regime, ERN 00678543.

<sup>589</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 1), ERN 01151713.

participated in the meeting and was evidently a high-ranking Northwest Zone cadre. According to W1, participants at the May 1975 meeting included two of Sao Phim's fellow CPK founding members,<sup>590</sup> namely Ruos Nhim,<sup>591</sup> the zone secretary, founding CPK member, and eventual State Presidium Second Deputy Chairman<sup>592</sup> and a Central<sup>593</sup> and also likely Standing Committee member,<sup>594</sup> and Kong Sophal *alias* Keu,<sup>595</sup> head of the Northwest Zone military and sectors 2, 6, and 7.<sup>596</sup> Another key Northwest Zone attendee was Lim Chhuom *alias* Kleng,<sup>597</sup> deputy head of Northwest military division 2.<sup>598</sup> East Zone attendees included Chan Chakrei *alias* Mean,<sup>599</sup> commander of then-East Zone (and later, Centre) Division 170<sup>600</sup> (and the direct supervisor of Heng Samrin<sup>601</sup>) who from mid-March 1976 would be part of the RAK general staff reporting to Son Sen;<sup>602</sup> as well as Suos Neou *alias* Chhouk,<sup>603</sup> the secretary of East Zone Sector 24.<sup>604</sup> Among ministerial attendees was the Deputy Minister for Propaganda, Tiv Ol.<sup>605</sup>

226. W1 describes how Sao Phim and Ruos Nhim introduced the broad aims of 'Plan A':

[Sao Phim] said that Pol Pot did not have a proper behaviour as a revolutionist. [...] Since] Pol Pot planned to betray so **we had to strengthen military force to fight back with Pol Pot** but he did not tell the exact date and we will take later when he begin his plan, we will inform to zones.<sup>606</sup> [...]

[Ruos Nhim and Sao Phim] spoke the same due to Ros Nhim's ideal was the same to Sao Phim [...] At the time the weapons had been transported to my zone and it was true. They transported from Siem Reap [in Autonomous Sector 106] [...] to northwest zone.<sup>607</sup>

<sup>590</sup> See E3/131, Nuon Chea, Struggle of Our Kampuchean Peasants, ERN 00716414.

<sup>591</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 1), ERN 01151713.

<sup>592</sup> E3/165, People's Representative Assembly of Kampuchea, ERN 00184068.

<sup>593</sup> E3/3989, S-21 Statement of Ruos Nhim, ERN 00780876; see also E3/16, Khieu Samphân, History of Cambodia, ERN 00498235-36.

<sup>594</sup> E3/10693, SC Meeting, 11 Apr 1977 (Goscha Version), ERN 01324079 (listed as "Nhin"); see also E3/7328, SC Meeting, 11 Apr 1977 (PRT Version), ERN 01002086.

<sup>595</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 1), ERN 01151713. For details of Ta Keu's name and position, see E3/3192, S-21 Statement of Kong Sophal *alias* Ta Keu.

<sup>596</sup> E3/9610, 'WRI of Toat Thoeun', ERN 00974023, 00974049.

<sup>597</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 1), ERN 01151713; E3/10665, Lemkin-Sambath Transcripts (Toat Thoeun), ERN 01156821. For details of Ta Kleng's name and position, see ERN 01355382-428, S-21 Statement of Lim Chhuom *alias* Ta Kleng.

<sup>598</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151686.

<sup>599</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 1), ERN 01151713.

<sup>600</sup> E3/2791, S-21 Statement of Chan Chakrei, ERN 00827763.

<sup>601</sup> E3/1568, Kiernan Interview with Heng Samrin and Chea Sim, ERN 00651878.

<sup>602</sup> E3/2791, S-21 Statement of Chan Chakrei, ERN 00183080.

<sup>603</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 1), ERN 01151713.

<sup>604</sup> E3/2792, S-21 Statement of Kang Chap, ERN 00789766.

<sup>605</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 1), ERN 01151709. On Tiv Ol's position, see E3/1832, S-21 Statement of Tiv Ol, ERN 00183810-11.

<sup>606</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 1), ERN 01151707 (emphasis added).

<sup>607</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 1), ERN 01151709.

227. Following those and other speeches, the podium was given to Chan Chakrei – who W1 described as “the top commander” with “absolute rights” – and Chakrei proceeded to close the meeting by outlining the military strategy by which the *coup d'état* would be achieved.<sup>608</sup> As W1 described:

Chakrei said if we could not do it secretly, we would do it openly. [...] It was the secret plan that we prepared strategy internally to arrest Pol Pot, but if it was known and we could not do that we would do it as an open movement. [...] It was likely they would ask for help from [*Yvon*] because they came in everywhere. I did not know about it.<sup>609</sup>

228. Indeed, the Co-Investigating Judges also interviewed an East Zone military messenger, Loek Sao, who appears to corroborate W1’s account by speaking about the same meeting and describing remarks made by Chan Chakrei there. As Loek Sao told the investigators:

As for Chakrei alias NEOU Mean who was the chief of Brigade 1, he was arrested approximately nearly a year after 17 April; so, it was approximately in early 1976. At Chbar Ampeou, I heard Chakrei saying that he wanted to have money used and he opposed the idea of POL Pot in the meeting held after 17 April; it was the meeting which was **held one month after 17 April** to prepare the cities after the victory. **At that time Chakrei also said that he would seize power back from POL Pot on 17 April 1976.**<sup>610</sup>

229. Summarising his account of the May 1975 meeting, W1 explained to Robert Lemkin and Thet Sambath that the plan was a “a big plan [... done] in the whole country. [...] It was not conducted in particular areas or regions, but in the nationwide.”<sup>611</sup>

#### **D. VIETNAM’S WEB OF COLLABORATORS STRETCHED NATIONWIDE AND TO ITS HIGHEST LEVEL**

230. W1’s summation proved to be accurate, for as detailed later in this Part, ‘Plan A’ was indeed a nationwide effort.<sup>612</sup> Prior to a discussion of the nature of ‘Plan A’, however, this Section first devotes some attention to identifying those key Vietnamese collaborators who led it and their proxies who implemented it. As detailed below, what is so striking about the leadership of ‘Plan A’ is that it demonstrates Vietnam’s extraordinary success in recruiting an extensive swathe of collaborators and proxies throughout the CPK leadership, stretching all the way to its highest level.

<sup>608</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 1), ERN 01151709.

<sup>609</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 1), ERN 01151737 (emphasis added).

<sup>610</sup> E3/517, ‘WRI of Loek Sao’, ERN 00375881; E295/6/3, Nuon Chea’s Case 002/01 Closing Brief, para. 186.

<sup>611</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 1), ERN 01151738.

<sup>612</sup> See *infra*, Chapter 3-V, 3-VI, 3-VII.

## 1. The CPK Leadership Nationwide Was Riddled with Vietnam's Collaborators

231. In the archives of the People's Revolutionary Tribunal in 1979, there is a document which appears to have been a CPK press release issued on 3 June 1978 following Sao Phim's death and Ruos Nhim's arrest and which identifies Vietnam's key collaborators and proxies.<sup>613</sup> Among the names listed were five Standing or Central Committee members and co-founders of the CPK, some of whom who also served as Zone secretaries, namely Sao Phim, Ruos Nhim, Koy Thuon, Ney Sarann *alias* Ya,<sup>614</sup> and Chou Chet. Together, they represented every single zone situated along Cambodia's borders with Vietnam and Thailand except for Ta Mok's Southwest Zone. Other top-ranking leaders implicated included party stalwarts Keo Meas and Son Ngoc Minh,<sup>615</sup> Hou Youn and fellow "ghost" Hu Nim, who served as the DK Minister for Propaganda;<sup>616</sup> Tiv Ol, Hu Nim's deputy<sup>617</sup> (who also attended the May 1975 meeting);<sup>618</sup> Non Suon, the Minister of Agriculture;<sup>619</sup> Touch Phoeun, the Minister of Public Affairs;<sup>620</sup> and Chhim Sam Aok *alias* Pang, chair of the Phnom Penh security office S-71,<sup>621</sup> who also attended the May 1975 meeting.<sup>622</sup>

232. In addition, the press release omitted a few top co-conspirators, including Minister of Industry Vorn Vet,<sup>623</sup> whose involvement may not yet have been known, since he was only arrested near the end of DK on 2 November 1978;<sup>624</sup> Pa Phal *alias* Soth, secretary of Autonomous Sector 106;<sup>625</sup> Oeun, commander of North Zone-affiliated Centre Division 310;<sup>626</sup> Seou Vasi *alias* Doeun, chair of Office 870;<sup>627</sup> and Chan Chakrei and Suos Neou *alias* Chhouk.<sup>628</sup> Other military leaders were implicated as well, in particular the leaders of Divisions

<sup>613</sup> E3/7327, CPK Kampuchean Workers' Party Press Release, 3 Jun 1978, ERN 00015679-80.

<sup>614</sup> Ney Sarann was listed by his revolutionary *alias* Ya.

<sup>615</sup> Keo Meas and Son Ngoc Minh have also been identified as founders of the breakaway party established by Vietnam's collaborators, together with Keo Moni. See E3/3095R, 'Die Angkar', 14:00 to 15:24.

<sup>616</sup> E3/1550, S-21 Statement of Hou Nim, ERN 00182805.

<sup>617</sup> E3/1604, S-21 Statement of Koy Thuon, ERN 00773106.

<sup>618</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 1), ERN 01151713.

<sup>619</sup> Non Suon was erroneously identified in this list, evidently retyped for the PRT, as Son Suon. On his position, see E3/182, SC Meeting, 9 Oct 1975, ERN 00183394; E3/1870, S-21 Statement of Nuon Suon, ERN 00096835. Non Suon was also a CPK founding member: see E3/131, Nuon Chea, Struggle of Our Kampuchean Peasants, ERN 00716414.

<sup>620</sup> E3/165, People's Representative Assembly of Kampuchea, ERN 00184069.

<sup>621</sup> E3/182, SC Meeting, 9 Oct 1975, ERN 00183394; E3/1596, S-21 Statement of Chhim Sam Aok, ERN 01365650.

<sup>622</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 1), ERN 01151713 (referring to someone by the alias "Pong" from a "general management" ministry).

<sup>623</sup> E3/182, SC Meeting, 9 Oct 1975, ERN 00183393; E3/1876, S-21 Statement of Vorn Vet, ERN 00767746.

<sup>624</sup> E3/1876, S-21 Statement of Vorn Vet, ERN 00767746.

<sup>625</sup> See *infra*, Chapter 3-VI-D-1.

<sup>626</sup> See *infra*, Chapter 3-VI-A, 3-VI-B.

<sup>627</sup> E3/182, SC Meeting, 9 Oct 1975, ERN 00183393.

<sup>628</sup> See *supra*, Chapter 3-IV-D-3; see *infra*, Chapter 3-V.

450 and 920, as illustrated by the account of Division 310 combatant Bin Sambok who described how the commanders of 450 and 920, which he called the other two North Zone-affiliated divisions, were “implicated in [Oeun’s] plot” and arrested as well.<sup>629</sup> However, while there is evidence corroborating this account,<sup>630</sup> in particular evidence that Division 450 and 920 chiefs Suong and Chhin had long been affiliated with Koy Thuon and Oeun<sup>631</sup> and that members of a related Division – 801 – had planned rebellion as well,<sup>632</sup> the evidence on the case file is incomplete in this regard. This is unsurprising, given that the Manichean focus of the Case 002 investigation and that evidence of Division 310’s involvement in rebellion only really began to be explored when Division 310 combatants began testifying in June 2015 in connection with the Kampong Chhnang Airfield Construction Site, as already discussed above.<sup>633</sup>

## 2. ‘Plan A’ Masterminds Sao Phim and Ruos Nhim Were Incredibly Close

233. Not only does the evidence described above substantiate interlinked treasonous efforts all around the country,<sup>634</sup> it also links the treasonous leaders to each other, evidencing their collaboration in ‘Plan A’. Most strikingly, Sao Phim and Ruos Nhim, the top two leaders of ‘Plan A’ and friends since the resistance,<sup>635</sup> even went so far as to arrange for their children to marry<sup>636</sup> in either August 1975<sup>637</sup> or 1976,<sup>638</sup> mere months after the May 1975 meeting. This familial connection not only emphasised their closeness and clearly signalled their desire to intensify and render permanent their political alliance, but it also provided Sao Phim and Ruos Nhim with the perfect cover story for the frequent visits they made to each other,<sup>639</sup> and for

<sup>629</sup> **E3/8989**, ‘DC-Cam Interview of Bin Sambok’, ERN 01208400-01.

<sup>630</sup> See e.g. **E3/9042**, ‘DC-Cam Interview of Kao Son’, ERN 01207757-59; **E1/411.1**, Sun Vuth, T. 30 Mar 2016, p. 65, lns 5-16, p. 91, lns 1-8, 18-24.

<sup>631</sup> **E1/416.1**, Phan Van, T. 7 Apr 2016, p. 68, ln. 15 to p. 69, ln. 20.

<sup>632</sup> **E3/1164**, Rep. from Roeun to 89, 25 Nov 1976, ERN 00516709-10 (see especially ERN 00516710: “The purposes of their plots were to mobilize as many forces and guns as possible and to launch an offensive on 15/1/77 with the support from outside forces and if they defeated us they will not move to anywhere but will retreat if they were defeated in the battle”).

<sup>633</sup> See *supra*, Chapter 3-IV-A.

<sup>634</sup> See *infra*, Chapter 3-V, 3-VI, 3-VII.

<sup>635</sup> **E3/10717**, ‘DC-Cam Interview of Nong Nim’, ERN 01355746.

<sup>636</sup> **E3/10717**, ‘DC-Cam Interview of Nong Nim’, ERN 01355746; see also **E1/505.1**, Sin Oeng, T. 1 Dec 2016, p. 73, ln. 23 to p. 74, ln. 9; **E3/10716**, ‘DC-Cam Interview of Sin Oeng’, ERN 01353334-35; **F1/3.1**, Toat Thoeun, T. 6 Jul 2015, p. 9, lns 12-21; **E3/10665**, Lemkin-Sambath Transcripts (Toat Thoeun), ERN 01156821-23; **E3/9564**, ‘WRI of Mun Mot (2-TCW-996)’, ERN 01044805; **E3/9579**, ‘WRI of Samey Saveng’, ERN 00970469.

<sup>637</sup> **E3/10665**, Lemkin-Sambath Transcripts (Toat Thoeun), ERN 01156803.

<sup>638</sup> **E1/511.1**, Nong Nim, T. 12 Dec 2016, p. 15, ln. 20 to p. 16, ln. 15, p. 17, lns 17-23.

<sup>639</sup> **E1/505.1**, Sin Oeng, T. 1 Dec 2016, p. 80, ln. 15 to p. 82, ln. 22; **E3/10716**, ‘DC-Cam Interview of Sin Oeng’, ERN 01353334-35; **E1/511.1**, Nong Nim, T. 12 Dec 2016, p. 17, ln. 25 to p. 20, ln. 18; **E3/10717**, ‘DC-Cam Interview of Nong Nim’, ERN 01355743-44; **E1/356.1**, Mun Mot (2-TCW-996), T. 26 Oct 2015, p. 55, ln. 25 to p. 57, ln. 14; **F1/3.1**, Toat Thoeun, T. 6 Jul 2015, p. 11, lns 10-24, **E3/10665**, Lemkin-Sambath Transcripts (Toat Thoeun), ERN 01156800.

sending their children to each other's zone to deliver messages.<sup>640</sup> It is also noteworthy that despite taking the trouble to create such a cover story, Sao Phim's relative and driver Nong Nim testified Sao Phim would nevertheless take a circuitous route from the East Zone up to Siem Reap in order reach Ruos Nhim in Battambang, apparently scrupulously avoiding taking the more convenient and faster route through Phnom Penh.<sup>641</sup> This underscores the fact that the two indeed had many things to hide in respect of their frequent meetings – a fact to which Lemkin-Sambath Witness Toat Thoeun, who was the foster or biological son of Ruos Nhim and a Brigadier General in the Cambodian military before his death in 2016, attested. As he explained, Ruos Nhim had personally told him that “he had held meetings [with Sao Phim] and contacted each other already, and split from the party – from the Pol Pot's party” and that “he had already met So Phim in order to organize forces to resist”.<sup>642</sup>

### 3. Extensive Evidence Connects the *Coup d'État* Leaders to Each Other

#### (a) *Links Between Coup Leaders Through Non-'Torture-Tainted' Evidence*

234. Apart from Sao Phim and Ruos Nhim, non-“torture-tainted” linkage evidence establishes that the other ‘Plan A’ masterminds included Koy Thuon and Vorn Vet, who the late Chhaom Se and his wife, the late An Sopheap *alias* Pheap, linked to Sao Phim.<sup>643</sup> There was also Ney Sarann *alias* Ya who met with Koy Thuon, as already noted above.<sup>644</sup> Koy Thuon, in turn, met with Ruos Nhim<sup>645</sup> – who he called “a CIA agent hiding in our Party a long time”.<sup>646</sup> Vorn Vet, likewise, visited Sao Phim in the East Zone to discuss ‘Plan A’,<sup>647</sup> and spoke at a meeting in the Northwest Zone alongside Ruos Nhim on how the traitors “could ask for help from [an]other [country] [...] in the form of food, weapons”.<sup>648</sup>

235. It is beyond the limitations of this Brief to detail the additional evidence implicating other leaders in ‘Plan A’. However, by way of summary, there is linkage evidence between

<sup>640</sup> **E3/9564**, ‘WRI of Mun Mot (2-TCW-996)’, ERN 01044804.

<sup>641</sup> **E1/511.1**, Nong Nim, T. 12 Dec 2016, p. 22, lns 18-21.

<sup>642</sup> *See e.g.* **E3/10665**, Lemkin-Sambath Transcripts (Toat Thoeun), ERN 01156796, 01156800.

<sup>643</sup> **E3/10569**, ‘DC-Cam Interview of An Sopheap and Chhaom Se’, ERN 01079523-24.

<sup>644</sup> **E3/1604**, S-21 Statement of Koy Thuon, ERN 01381673-674, 01381679, 01381681-84, 01381688-89, ERN KH 00005722-23, ERN KH 00005731-32, ERN KH 00005734-36, ERN KH 00005745-58, 00005776-77; *see also supra*, Chapter 3-IV-A-1.

<sup>645</sup> **E3/1593**, Kiernan, Pol Pot Regime, ERN 00678672 citing two defectors' accounts; **E3/1604**, S-21 Statement of Koy Thuon, ERN 01380814, 01380818-21, 01380823.

<sup>646</sup> **E3/1604**, S-21 Statement of Koy Thuon, ERN 00773089.

<sup>647</sup> **E3/10717**, ‘DC-Cam Interview of Nong Nim’, ERN 01355817; **E3/10716**, ‘DC-Cam Interview of Sin Oeng’, ERN 013533347.

<sup>648</sup> **F2/4/3/3/6.2**, Lemkin-Sambath Transcripts (Chan Savuth), ERN 01151687; *see also infra*, Chapter 3-VI-B-3.



most treasonous leaders, including Sao Phim, Hu Nim, and Hou Youn;<sup>649</sup> Ruos Nhim and Chhim Sam Aok *alias* Pang;<sup>650</sup> Sao Phim, Vorn Vet, Koy Thuon, and Non Suon;<sup>651</sup> Koy Thuon and Soth,<sup>652</sup> Oeun,<sup>653</sup> Seou Vasi *alias* Doeun,<sup>654</sup> Chan Chakrei,<sup>655</sup> Suos Neou *alias* Chhouk,<sup>656</sup> Hu Nim,<sup>657</sup> Keo Meas,<sup>658</sup> Non Suon,<sup>659</sup> and Touch Phoeun;<sup>660</sup> Ney Sarann *alias* Ya and Hu Nim and Hou Youn;<sup>661</sup> Keo Meas, Suos Neou *alias* Chhouk, and Chan Chakrei;<sup>662</sup> and Oeun and Chan Chakrei.<sup>663</sup> The way in which these various leaders cooperated with one another to advance attempted *coups d'état* in furtherance of 'Plan A' will be discussed in further detail below in Sections V, VI, and VII.

**(b) 'Torture-Tainted' Evidence Corroborating Links Between Coup Leaders**

236. So-called "torture-tainted" evidence, namely S-21 statements from suspects of treason, corroborates and consistently builds upon the non-"torture-tainted" evidence listed above.<sup>664</sup> Concerning the chief masterminds, this evidence shows that Ney Sarann *alias* Ya not only met with Koy Thuon, but also secretly met with Sao Phim;<sup>665</sup> that Koy Thuon not only met with Ruos Nhim and Ya, but also with Sao Phim<sup>666</sup> and Vorn Vet;<sup>667</sup> and that Vorn Vet met with Sao Phim in the sidelines of Party meetings<sup>668</sup> and kept in contact with him through intermediaries,<sup>669</sup> and also kept in regular contact with Ruos Nhim.<sup>670</sup> Indeed, in Vorn Vet's

<sup>649</sup> E3/7540, 'DC-Cam Interview of Thach Siek', ERN 00337713.

<sup>650</sup> E3/9610, 'WRI of Toat Thoeun', ERN 00974040, 00974045-46; F1/3.1, Toat Thoeun, T. 6 Jul 2015, p. 111, ln. 23 to p. 112, ln. 19.

<sup>651</sup> E3/10569, 'DC-Cam Interview of An Sopheap and Chhaom Se', ERN 01079524.

<sup>652</sup> E3/1604, S-21 Statement of Koy Thuon, ERN 01381690, 01381691, 01380824-26.

<sup>653</sup> E3/5686, 'DC-Cam Interview of Vung Ve', ERN 00874669; E3/1604, S-21 Statement of Koy Thuon, ERN 01381672, 01381685-87.

<sup>654</sup> E1/91.1, David Chandler, T. 18 Jul 2012, p. 106, lns 4-13; E3/1604, S-21 Statement of Koy Thuon, ERN KH 00005712-13, 00005731-32, 00005734-36, 00005745-52.

<sup>655</sup> E3/1604, S-21 Statement of Koy Thuon, ERN KH 00005745-48.

<sup>656</sup> E3/1604, S-21 Statement of Koy Thuon, ERN 01381681-84.

<sup>657</sup> E3/1604, S-21 Statement of Koy Thuon, ERN 01380656-58, ERN KH 00005753-58.

<sup>658</sup> E3/1604, S-21 Statement of Koy Thuon, ERN 01381673.

<sup>659</sup> E3/1604, S-21 Statement of Koy Thuon, ERN 01381681-84.

<sup>660</sup> E3/1604, S-21 Statement of Koy Thuon, ERN 01381681-84.

<sup>661</sup> IS19.160, Interview with S.M., Ratanakiri, ERN 00087595; *see also* E434, Nuon Chea's Request for Documents on Vietnamese Aggression and Rebellion, paras 25, 29-30, 32-33; E434/2, Decision on Documents on Vietnamese Aggression, para. 18; *see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and Annex 1.

<sup>662</sup> E1/367.1, Sin Chhem, T. 14 Dec 2015, p. 57, lns 16-23.

<sup>663</sup> E3/7535, 'DC-Cam Interview of Suoy Sao', ERN 00324172.

<sup>664</sup> *See supra*, Chapter 2-II-B-3-(b), on the Defence's position on "torture-tainted" evidence.

<sup>665</sup> E3/1868, S-21 Statement of Ney Sarann *alias* Ya, ERN 00009506.

<sup>666</sup> E3/2997, S-21 Statement of Kong Chea Sin *alias* Sun, ERN 00284076.

<sup>667</sup> E3/1876, S-21 Statement of Vorn Vet, ERN 00183178.

<sup>668</sup> E3/1876, S-21 Statement of Vorn Vet, ERN 00183180-81.

<sup>669</sup> E3/1876, S-21 Statement of Vorn Vet, ERN 00183195, 00183200.

<sup>670</sup> E3/1876, S-21 Statement of Vorn Vet, ERN 01183179, 00183205.

own S-21 statement, he explains that he met Ruos Nhim and Sao Phim in April 1978 at the Phnom Penh railway station to warn them of the impending wave of East Zone cadres' arrests,<sup>671</sup> and implicated Sao Phim, Ruos Nhim, and Ney Sarann *alias* Ya as among 'Plan A's' most important leaders.<sup>672</sup> The "torture-tainted" evidence also further links other leaders already implicated in the rebellion, including Vorn Vet to Seou Vasi *alias* Doeun<sup>673</sup> and Ney Sarann *alias* Ya to Chan Chakrei,<sup>674</sup> Suos Neou *alias* Chhouk<sup>675</sup> and Keo Meas.<sup>676</sup>

#### E. VIETNAM'S COLLABORATORS EVENTUALLY ESTABLISHED A BREAKAWAY PARTY

237. Evidence on the case file furthermore demonstrates that steps were taken by Vietnam's collaborators during the DK to establish a rival party known as the Kampuchean Workers' Party. As Koy Thuon had noted in his S-21 statement, this party may have been established as early as 1973, then with Keo Meas at the helm and Koy Thuon and Ney Sarann *alias* Ya involved in its set-up. In addition, the fact that the Vietnamese sponsored a congress to establish a new party from 5 January 1979,<sup>677</sup> even before the Vietnamese had finally captured Phnom Penh, and that a new party was established just one day after Phnom Penh fell,<sup>678</sup> suggests that the post-DK party that the Vietnamese installed built on the Kampuchean Workers' Party as a pre-existing structure. Finally, the post-DK party's first secretary, Pen Sovann,<sup>679</sup> reportedly also described the new party as "carrying forward the glorious tradition of the Ho Chi Minh-founded Indochinese Communist Party".<sup>680</sup> The Defence notes that while it had repeatedly requested Pen Sovann's appearance<sup>681</sup> the Chamber continually refused<sup>682</sup> until the request became moot with Pen Sovann's recent death in October 2016.<sup>683</sup>

<sup>671</sup> **E3/1876**, S-21 Statement of Vorn Vet, ERN 00183199; **E3/1593**, Kiernan, Pol Pot Regime, ERN 00678698.

<sup>672</sup> **E3/1876**, S-21 Statement of Vorn Vet, ERN 00183194.

<sup>673</sup> **E3/1876**, S-21 Statement of Vorn Vet, ERN 00183179.

<sup>674</sup> **E3/13**, All Divisions Meeting, 9 Oct 1976, ERN 00940343.

<sup>675</sup> **E3/1868**, S-21 Statement of Ney Sarann *alias* Ya, ERN 00009557, 00009566; **E3/13**, All Divisions Meeting, 9 Oct 1976, ERN 00940343.

<sup>676</sup> **E3/1868**, S-21 Statement of Ney Sarann *alias* Ya, ERN 00009557; **E3/13**, All Divisions Meeting, 9 Oct 1976, ERN 00940343.

<sup>677</sup> **E3/2376**, Chanda, Brother Enemy, ERN 00192558; *see also* **F2/8.1.28**, Slocomb, The People's Republic of Kampuchea, ERN 01141788 (with regard to this document, *see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and **Annex 1**).

<sup>678</sup> **F2/8.1.28**, Slocomb, The People's Republic of Kampuchea, ERN 01141788 (*see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, **Annex 1**).

<sup>679</sup> **E3/2376**, Chanda, Brother Enemy, ERN 00192559.

<sup>680</sup> **E3/2376**, Chanda, Brother Enemy, ERN 00192559.

<sup>681</sup> **E392**, Nuon Chea's Rebellion Leadership Witnesses Request, paras 5, 26-27, 37(a); Chapter 2-II-B-3-(c), on the refusal to admit key witnesses/experts.

<sup>682</sup> **E443**, Dispositive Decision on Nuon Chea's Additional Witnesses, para. 1.

<sup>683</sup> Cambodia Daily, Former Prime Minister Dead at 80.

## **F. CONCLUSION ON CRACKS WITHIN THE CPK: VIETNAM'S INTERNAL COLLABORATORS**

238. As noted above in Section III-B-2, from 1954, Vietnam had been carefully planting the seeds of dissension within the ranks of the CPK beginning with its mentorship of the “Khmer Viet Minh” from 1954 onwards. This Section has demonstrated how these seeds began to bear fruit long before the CPK had even liberated Phnom Penh. During the DK, Vietnam’s collaborators and proxies occupied a vast swathe of uppermost leadership positions within the CPK and included a significant proportion – if not, the majority – of alleged JCE members. Thus, the Manichean depiction of the CPK as a harmonious and strictly hierarchical structure is absurd in the extreme. The evidence supports instead that the CPK was riddled with divisions from even before the CPK liberated Phnom Penh. Upon liberation, those cracks expanded, with Vietnam’s expansive network of collaborators within the CPK eventually establishing a parallel structure that ultimately formalised in the creation of a breakaway party. Functional autonomy was enjoyed in the Zones and Autonomous Sectors (indeed, the majority of DK) in which Vietnam’s collaborators were in control. Their efforts coalesced at some point in a CPK breakaway party known as the Kampuchean Workers’ Party and grew from small instances of fighting with loyal CPK forces into an eventual trifecta of *coups d’état*, referred to in this Brief as the 1976, 1977 and 1978 *coups d’état* respectively.

239. This Brief focuses primarily on the 1977 *coup*, both because it is by far the least known of the three attempted coups, but also since it is the one which has been most vividly illustrated by the eyewitness evidence obtained in Case 002/02. Accordingly, Section VI devotes a significant portion of this Chapter to a description of that *coup*. It is prefaced with a more limited overview of the 1976 *coup* in Section V immediately below, and followed by a similarly brief review of ‘Plan A’s’ third and final *coup* in Section VII.

## **V. ‘PLAN A’S’ FIRST PHASE: THE 1976 COUP D’ÉTAT**

240. Vietnam’s collaborators wasted no time in trying to unseat the CPK and legitimate DK government. As set out in Part A, 1975 was marked with multiple assassination attempts against Pol Pot, an attack on Phnom Penh Radio, and border skirmishes. As these efforts floundered, ‘Plan A’ escalated by early 1976 to the first major attempt to overthrow the CPK and legitimate DK government: a series of attacks in Siem Reap and Phnom Penh. These attacks are discussed in Part B, and their aftermath in Part C.

**A. EARLY TREASONOUS EFFORTS INCLUDED ATTEMPTS TO ASSASSINATE POL POT**

241. As soon as the CPK assumed power in 1975, there were reports of immediate efforts to assassinate Pol Pot. Three witnesses describe one assassination attempt at the Olympic Stadium. Recently-deceased CPK cadres Chhaom Se and An Sopheap *alias* Pheap described to DC-Cam that Sao Phim had organised this plot, which was to be effected by a “skilled shooter”.<sup>684</sup> Chhaom Se said his source of knowledge was first-hand,<sup>685</sup> while An Sopheap’s response suggests that her account also could have been based on first-hand knowledge.<sup>686</sup> Pal Set, a Division 310 combatant, corroborates their account. He relayed how he had also attended a meeting at Olympic Stadium in 1975 at which Pol Pot narrowly avoided assassination by someone trained in “marksmanship”, in a plot later found to be masterminded by Sao Phim, when the assassin’s weapon was discovered.<sup>687</sup> Chhaom Se added that there had “been 2 or 3 explosions already [...] near Phnom Penh”, and that while these had injured Pol Pot’s messenger, Pol Pot himself was unharmed.<sup>688</sup>

242. In addition, there were at least three other attempts on Pol Pot’s life in 1975 and 1976, all of which can be traced back to Chan Chakrei, the commander of East Zone-affiliated Centre Division 170<sup>689</sup> and from mid-March 1976, member of the RAK general staff reporting to Son Sen<sup>690</sup> (who was also Heng Samrin’s direct supervisor).<sup>691</sup> First, Lemkin-Sambath Witness W1 described being involved in another assassination attempt planned by Chan Chakrei against Pol Pot at Phnom Penh’s Chenla theatre in 1975 or 1976. There, traitorous forces, in the guise of protecting Pol Pot, would assassinate him.<sup>692</sup> However, Pol Pot managed to detect the plot and therefore “did not hold a meeting there [and] changed the meeting to other place [...] for which he] prepared his own troops ready to guard”.<sup>693</sup> Second, W1 described how Sao Phim and Chan Chakrei had also planned to assassinate Pol Pot when one of his flights landed at Pochentong airport.<sup>694</sup> However, Pol Pot evidently uncovered this plot as well, since he diverted to land at

<sup>684</sup> E3/10569, ‘DC-Cam Interview of An Sopheap and Chhaom Se’, ERN 01079526-27.

<sup>685</sup> E3/10569, ‘DC-Cam Interview of An Sopheap and Chhaom Se’, ERN 01079526 (“I saw many events taking place in Phnom Penh”).

<sup>686</sup> E3/10569, ‘DC-Cam Interview of An Sopheap and Chhaom Se’, ERN 01079527 (“we interrogated those people we had arrested and they confessed”).

<sup>687</sup> E3/5671, ‘DC-Cam Interview of Pal Set’, ERN 00596167.

<sup>688</sup> E3/10569, ‘DC-Cam Interview of An Sopheap and Chhaom Se’, ERN 01079526.

<sup>689</sup> E3/2791, S-21 Statement of Chan Chakrei, ERN 00827763.

<sup>690</sup> E3/2791, S-21 Statement of Chan Chakrei, ERN 00183080.

<sup>691</sup> E3/1568, Kiernan Interview with Heng Samrin and Chea Sim, ERN 00651878.

<sup>692</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 1), ERN 01151717-18.

<sup>693</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 1), ERN 01151717.

<sup>694</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 1), ERN 01151718.

Kampong Chhnang instead.<sup>695</sup> Third, a CPK defector informed a US Embassy official in Thailand that there was an attempt in mid-1976 to poison Pol Pot's food. This attempt, as recounted by Nayan Chanda, was yet another effort planned by Chan Chakrei which was thwarted when one of Pol Pot's guards sampled the food and died instantly.<sup>696</sup> It is therefore unsurprising that there is a CPK report on the case file from September 1976 that indicates that the CPK remained concerned about attempts to "surreptitiously shoot Angkar".<sup>697</sup>

243. In addition to assassination attempts, in September 1975, Phnom Penh Radio fell silent for two days – an obvious target for any *coup d'état*.<sup>698</sup> Ieng Sary later explained that this was an East Zone-led *coup* attempt that failed when the soldiers could not find a target.<sup>699</sup> 1975 and 1976 also saw border skirmishes between CPNLAF/RAK forces and CPK defectors along the Thai border<sup>700</sup> at Koh Kong and Battambang, and in Kandal, Siem Reap,<sup>701</sup> and Oddar Meanchey.<sup>702</sup> In addition, there were reports of fighting along the Vietnamese border (in the Northeast or East zones) between the CPNLAF/RAK and the *Khmer Sar* (White Khmer) movement, a movement discussed throughout this Brief.<sup>703</sup>

## **B. THE 1976 COUP D'ÉTAT TARGETED SIEM REAP AND PHNOM PENH**

### **1. In Late February 1976, a Dramatic Explosion Took Place in Siem Reap**

244. On 25 February 1976, an explosion in Siem Reap (in Autonomous Sector 106) destroyed a munitions depot,<sup>704</sup> reportedly leaving "craters".<sup>705</sup> A company commander from Autonomous Sector 106 named Chek Win,<sup>706</sup> who defected to Thailand in 1977, told Asiaweek

<sup>695</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 1), ERN 01151718.

<sup>696</sup> E3/2376, Chanda, Brother Enemy, ERN 00192266.

<sup>697</sup> E3/811, Division 703 and S-21 Meeting, 9 Sep 1976, ERN 00933848.

<sup>698</sup> See *infra*, Chapter 3-VI-A-1-(a) discussing the nature of military objectives in insurgencies.

<sup>699</sup> E3/1593, Kiernan, Pol Pot Regime, ERN 00678543.

<sup>700</sup> E3/1593, Kiernan, Pol Pot Regime, ERN 00678567, citing In Tam as saying that there was "a conflict between two revolutionary groups among the Khmer Rouge with "one group of twenty-four Khmer Rouge were pursued across the border by seventy others who had been confronted by Thai border patrol police".

<sup>701</sup> F2/8.1.28, Slocomb, The People's Republic of Kampuchea, ERN 01141783, on fighting with a group of "free Khmer Rouge" and skirmishes in Koh Kong in 1975 and Koh Kong, Battambang, Kandal and Siem Riep in 1976; see also *supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and Annex 1; E3/1593, Kiernan, Pol Pot Regime, ERN 00678531-33, also describing a group of "free Khmer Rouge" fighting alongside Thais against the CPNLAF in Koh Kong.

<sup>702</sup> F2/8.1.29, Paul, Plot Details Filter Through, ERN 01141796; see also *supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and Annex 1).

<sup>703</sup> E3/1593, Kiernan, Pol Pot Regime, ERN 00678529; see also *infra*, Chapter 5-II-C-1-(c)-(i), on measures against the Cham being taken because of unlawful activity; Chapter 3-IV-B; and Chapter 3-VI-B-3.

<sup>704</sup> E3/9, Short, History of a Nightmare, ERN 00396562; E3/1684, Chandler, Voices From S-21, ERN 00192725-26; E3/7338, Morris, Why Vietnam Invaded Cambodia, ERN 01001760.

<sup>705</sup> E3/9730, US Embassy Bangkok Cable, 16 Mar 1976, ERN 01186983.

<sup>706</sup> This may be the same person as Anthony Paul's source Chek Pek in his article in the Far Eastern Economic Review: F2/8.1.29, Paul, Plot Details Filter Through, ERN 01141796 (about which, see also *supra*, Chapter 2-II-

that the day before the bombing, Autonomous Sector 106's secretary Pa Phal *alias* Soth<sup>707</sup> had held a meeting with at least 30 leaders from the region. At this meeting, according to the defector (and as recounted in Kiernan's Pol Pot Regime):

**All the soldiers in 106 wanted to create a rebellion** that would allow people to go back and work as they did before the capture of Phnom Penh ... the thought was to start a revolt and to bring back some acceptable practices of the old regime.<sup>708</sup>

245. It is worth noting that on 24 March 2016, the Defence requested the Chamber to investigate this defector's account of what was a clearly critical meeting, and further accounts of Autonomous Sector 106's possible involvement in *coup d'états*.<sup>709</sup> However, it was rebuffed. In the reasons the Chamber provided one year later on 30 March 2017, one month before this Brief was due, the Chamber explained that this was simply because the request for this critically-important evidence was "untimely" and that Ben Kiernan could be expected to offer "very little cooperation [...] if any" in the investigation.<sup>710</sup>

246. The Siem Reap explosion has never been claimed or explained by any group and its source remains unknown. Despite the CPK's official denouncement of it as an American aerial bombing,<sup>711</sup> the explosion's attribution and motive was the subject of much diplomatic and media speculation.<sup>712</sup> According to the US ambassador to Paris, theories circulating in the press included that it was a "bombing from Thailand by Cambodian dissidents, explosion of an ammunition dump either by insurgent attacks or accident or communist internal conflict, or bombing by South Vietnam or Lao-based Vietnamese aircraft perhaps masquerading as 'US planes'".<sup>713</sup> Swedish intelligence concluded – based on reports from Swedish visitors to Siem Reap – that "the damage could not definitely be established as either recent or caused by aerial attack [...] and was] probably caused by internal conflict".<sup>714</sup> Kiernan mused that it may have

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B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and **Annex 1**). Paul also wrote for Asiaweek. He described Chek Pek in that article as the chief of Choeung Tien village in Oddar Meanchey.

<sup>707</sup> See also *supra*, Chapter 3-IV-D, and *infra* at Chapter 3-V-B, 3-VI-A-1, 3-VI-A-2 for details of Soth's role in the attempted *coups d'état*.

<sup>708</sup> **E3/1593**, Kiernan, Pol Pot Regime, ERN 01150165. **E3/7333**, Burgler, Eyes of Pineapple, ERN 01002239 and 01002457.

<sup>709</sup> **E391**, Nuon Chea's Division 310 Witnesses Request, paras 27-30, 36(b).

<sup>710</sup> **E443/10**, Reasoned Decision on Key Defence Witnesses, para. 34; see also *supra*, Chapter 2-II-B-3-(c), on the refusal of key investigation requests, and *infra*, Chapter 9 and **Annex 3**.

<sup>711</sup> **E3/9**, Short, History of a Nightmare, ERN 00396562.

<sup>712</sup> See e.g. **E3/9729**, US Embassy Paris Cable, 8 Mar 1976, ERN 01186978-80; **E3/9730**, US Embassy Bangkok Cable, 16 Mar 1976, ERN 01186982-83; **E3/9731**, US Embassy Paris Cable, 16 Mar 1976, ERN 01186938-39.

<sup>713</sup> **E3/9729**, US Embassy Paris Cable, 8 Mar 1976, ERN 01186979.

<sup>714</sup> **E3/9731**, US Embassy Paris Cable, 16 Mar 1976, ERN 01186938-39.

been a “Centre” attempt to bombard and thwart saboteurs.<sup>715</sup> However, Nuon Chea categorically refutes this.

247. It is far more likely, in light of the evidence described above and below on the Vietnamese collaborators’ identities and attempted *coups d’état* – that the explosion was a dramatic effort by Pa Phal *alias* Soth to set the first phase of ‘Plan A’ in motion. Indeed, defectors from Autonomous Sector 106 revealed to the Far Eastern Economic Review that meetings were held throughout Oddar Meanchey in the autonomous sector to announce and develop rebellious plans. These meetings apparently stretched back to late 1975 – months before the Siem Reap explosion – with a meeting of senior leaders of the autonomous sector at Samraong where the intention to “draw up a [rebellious] plan” was first announced.<sup>716</sup> These efforts apparently continued after the explosion as well, with defectors telling the Far Eastern Economic Review of a follow-up meeting in May 1976 with instructions to “get men, weapons and ammunition ready” for combat, in conjunction with “like-minded officers in other provinces”; and a meeting at Chongkal district between 35 village, chiefs, communes and districts from Autonomous Sector 106 to disseminate the plan.<sup>717</sup> Another defector from the autonomous region explained that this plan involved “recruit[ing] as many soldiers and civilians as possible”, including “young men and women” who initially “were not to be told of their units’ purposes”.<sup>718</sup> Finally, and as is discussed further below, there is a tangible connection between the Siem Reap explosion and the events that followed just a few weeks later.

## **2. In Early April 1976, Grenades Were Thrown at the Royal Palace in Phnom Penh**

248. Less than six weeks after the Siem Reap explosion, a second attack took place, striking directly at major landmarks in Phnom Penh. In the early hours on 2 April 1976<sup>719</sup> – on the very day on which the late King Father Norodom Sihanouk had been due to announce his resignation<sup>720</sup> as DK’s head of state and just days before the first anniversary of Phnom Penh’s liberation – grenades were thrown outside the royal palace.<sup>721</sup> In this case, the culprit was

<sup>715</sup> E3/1593, Kiernan, Pol Pot Regime, ERN 01150165.

<sup>716</sup> F2/8.1.29, Paul, Plot Details Filter Through, ERN 01141796; *see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and Annex 1.

<sup>717</sup> F2/8.1.29, Paul, Plot Details Filter Through, ERN 01141796; *see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and Annex 1.

<sup>718</sup> F2/8.1.29, Paul, Plot Details Filter Through, ERN 01141796; *see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and Annex 1.

<sup>719</sup> E3/7397, S-21 Statement of Yim Sambath, ERN 00769665.

<sup>720</sup> E3/1684, Chandler, Voices From S-21, ERN 00192731.

<sup>721</sup> E3/7397, S-21 Statement of Yim Sambath, ERN 00769665.

caught and arrested. It was Yim Sambath, a deputy platoon chief in Division 170,<sup>722</sup> *i.e.*, Chan Chakrei's forces, as explained in more detail below.

249. The Defence notes that, as with Koy Thuon, it refers to Yim Sambath's S-21 statement despite the Chamber's decision to the contrary<sup>723</sup> in light of evidence that Yim Sambath was not mistreated or tortured.<sup>724</sup> In his (partial) S-21 statement, Yim Sambath said his network included members of Division 170 and its company stationed behind the royal palace;<sup>725</sup> the State Commerce Garage;<sup>726</sup> and Region 25<sup>727</sup> (the former site of a violent struggle for control between East Zone and Southwest Zone forces).<sup>728</sup> He also identified two individuals as being involved who had both held ranking positions in the Khmer Republic regime and were based at Suong<sup>729</sup> (Sao Phim's defence office)<sup>730</sup> and at Krouch Chhmar District<sup>731</sup> (over which Defence witness Ouk Bunchhoeun had been deputy sector secretary and Defence witness Hun Sen's subordinate had been security centre chief).<sup>732</sup> Moreover, Yim Sambath placed the grenade attack within the context of a longer-term series of events since at least 1968 furthering the aims of the *Khmer Sar* (White Khmer) movement – a movement involved both with unrest in the East Zone<sup>733</sup> and later with Division 310's activities in the second phase of 'Plan A'<sup>734</sup> (the subject of Section VI below). According to his account to interrogators, in 1971 the movement met to "formulate new plans to fight the Revolution"; made plans in December 1975 to fire at the School of Fine Arts, just behind the Royal Palace; and agreed on the plan for the April 1976 grenade attack one month before, in March 1976.<sup>735</sup>

250. Indeed, the evidence shows that the treasonous activities carried on after the Phnom Penh bombing. In August 1976, there were reports that Chan Chakrei's forces had also been fomenting unrest at Ang Prouch on the border between Kandal Steung district and Sector 33 in

<sup>722</sup> **E3/7397**, S-21 Statement of Yim Sambath, ERN 00799665, 00799673.

<sup>723</sup> **E399/4**, Dispositive Decision on Use of Certain S-21 Statements, para. 2(a).

<sup>724</sup> **E399**, Nuon Chea's Motion to Use Certain S-21 Statements, paras 19-21; **E399/3**, Nuon Chea's Reply on Use of Certain S-21 Statements, paras 49-51; *see also supra*, Chapter 2-II-B-3-(b).

<sup>725</sup> **E3/7397**, S-21 Statement of Yim Sambath, ERN 00769672.

<sup>726</sup> **E3/7397**, S-21 Statement of Yim Sambath, ERN 00769672.

<sup>727</sup> **E3/7397**, S-21 Statement of Yim Sambath, ERN 00769670.

<sup>728</sup> *See supra*, Chapter 3-IV-A, on clashes in Region 25.

<sup>729</sup> **E3/7397**, S-21 Statement of Yim Sambath, ERN 00769672.

<sup>730</sup> **E1/506.1**, Sin Ung, T. 5 Dec 2016, p. 65, lns 13-25; **E3/10716**, 'DC-Cam Interview of Sin Oeng', ERN 01353324-25, 01353347.

<sup>731</sup> **E3/7397**, S-21 Statement of Yim Sambath, ERN 00769672.

<sup>732</sup> *See infra*, Chapter 5-II-B-1-(a) concerning Kroch Chhmar District and the involvement of key Defence witnesses (and current government leaders) in the context of the alleged genocide of the Cham.

<sup>733</sup> *See infra*, Chapter 5-II-C-1-(c)-(i), on measures against the Cham being taken because of unlawful activity.

<sup>734</sup> *See infra*, Chapter 3-VI-B-3.

<sup>735</sup> **E3/7397**, S-21 Statement of Yim Sambath, ERN 00769670.



the Southwest Zone<sup>736</sup> – *i.e.*, even after Chan Chakrei had been arrested in connection with the Phnom Penh bombing, as is discussed shortly below. According to a report from Son Sen to RAK leaders, 100 members of Chakrei’s forces were arrested at that location for stirring up discontent by creating the impression of unrest, raising banners “with the slogans ‘Long Live Buddhism’, ‘Long Live the White Khmer Front of Liberation from Rice by the Can’”.<sup>737</sup> Following an investigation, the CPK discovered the following motives for the incident:

[T]here was a nexus with [...] our army, and **they said their leader was named Chakrei**. [...] They were getting ready for major unrest on 20 August [1976], and if that could not be done, then after a delay they would try again. [...] There is a nexus between this situation and our army. [...] For example, 170 combatants have deserted to Sector 20, where **they conducted agit-prop to the effect that there was unrest in Phnom Penh between the Khmer Rouge and the White Khmer**. [...] There is also agitation to steal, like in the artillery units.<sup>738</sup>

251. On 7 September 1976, only weeks later, there were reports of a tape playing on a loudspeaker in Phnom Penh with the message “that soldiers had to carry out the Party’s dictatorship”.<sup>739</sup> That same day, tracts were discovered near Wat Botum pagoda in Phnom Penh,<sup>740</sup> containing phrases like “[s]mall fry eats little, big shot eats a lot” and “Pure, New Revolutionary Organisation”. According to Son Sen, these tracts were identical to tracts thrown in June and July 1976 and were “made in legitimate working places, offices of Divisions, regiments or various ministries”.<sup>741</sup> Son Sen concluded that “the tracts have only one content, and involve only one leadership apparatus [...] more likely to involve Division 170”, and since they had distributed them, “they must have grasped the daily and hourly situation” and must be “in nearby areas” or had informants in guard units.<sup>742</sup>

252. Finally, it is worth noting that, as with the issue of Autonomous Sector 106’s possible involvement in the Siem Reap explosion, the Defence also requested the Chamber to investigate possible additional evidence of CPK defectors described in Kiernan’s Pol Pot regime regarding Chan Chakrei’s involvement in *coup d’états*.<sup>743</sup> However, this investigative request for further

<sup>736</sup> E3/798, All Divisions Meeting, 30 Aug 1976, ERN 00183966.

<sup>737</sup> E3/798, All Divisions Meeting, 30 Aug 1976, ERN 00183966.

<sup>738</sup> E3/798, All Divisions Meeting, 30 Aug 1976, ERN 00183966 (emphasis added).

<sup>739</sup> E3/811, Division 703 and S-21 Meeting, 9 Sep 1976, ERN 009333847.

<sup>740</sup> E3/811, Division 703 and S-21 Meeting, 9 Sep 1976, ERN 009333846.

<sup>741</sup> E3/811, Division 703 and S-21 Meeting, 9 Sep 1976, ERN 009333848.

<sup>742</sup> E3/811, Division 703 and S-21 Meeting, 9 Sep 1976, ERN 009333848.

<sup>743</sup> E391, Nuon Chea’s Division 310 Witnesses Request, paras 31-36.

information about a key Vietnamese collaborator and mastermind of ‘Plan A’ was equally rejected on the same basis that it was “untimely”.<sup>744</sup>

### C. FOLLOWING CAREFUL INVESTIGATIONS, THE MASTERMINDS WERE IDENTIFIED

#### 1. Koy Thuon and Soth Likely Orchestrated the Siem Reap Explosion

253. While the evidence is not definitive since no one has claimed responsibility for the Siem Reap explosion and the Defence’s requests for further investigations into this matter have been refused, the evidence implicates key Vietnamese collaborator, Central Committee member and one-time North Zone secretary Koy Thuon. This directly contradicts the Closing Order’s claim in the ‘internal purges’ section that Koy Thuon was merely “deemed to be a traitor”.<sup>745</sup> Far from it. As noted above, just one day before the explosion, Soth – secretary of Autonomous Sector 106 where the explosion took place and which bordered on the North Zone – held a meeting discussing plans to implement a rebellion in the Autonomous Sector.<sup>746</sup> In his S-21 statement, meanwhile, Koy Thuon explained that he had educated Soth, who was “a very active agent of the CIA”<sup>747</sup> – *i.e.*, a traitor.<sup>748</sup>

254. The situation that the CPK faced in light of the Siem Reap explosion, therefore, was one in which a top government member had colluded with the head of a major region to mastermind a high-profile and mysterious act of sabotage and treason. Nevertheless, Koy Thuon’s fellow CPK senior leaders treated him and Soth with considerable restraint and care. On 8 April 1976, days after the CPK had begun making arrests in connection with the second bombing in Phnom Penh, Koy Thuon was put under house arrest<sup>749</sup> though under relaxed conditions, *e.g.*, being allowed out in the afternoons.<sup>750</sup> A May 1976 Standing Committee meeting discussed what was referred to only vaguely as the “commerce situation”.<sup>751</sup> While no reference was made to the Siem Reap incident or to Koy Thuon’s absence, the “situation” was in all likelihood the reshuffling of Koy Thuon’s ministry following his house arrest – to which the Standing Committee responded by unknowingly appointing two other *coup* leaders, Seou Vasi *alias*

<sup>744</sup> **E443/10**, Reasoned Decision on Key Defence Witnesses, para. 34; *see also supra*, Chapter 2-II-B-3-(c), on the refusal of key investigation requests, and *infra*, Chapter 9 and **Annex 3**.

<sup>745</sup> **D427**, Closing Order, para. 196.

<sup>746</sup> *See supra*, Chapter 3-V-A.

<sup>747</sup> **E3/1604**, S-21 Statement of Koy Thuon, ERN 01381672 (ERN KH 00005865-66).

<sup>748</sup> On the meaning of the terms ‘CIA’, ‘KGB’, and ‘Yvon’, *see supra*, Chapter 3-IV.

<sup>749</sup> **E3/1604**, S-21 Statement of Koy Thuon, ERN 00096806; *see also* **E3/9**, Short, History of a Nightmare, ERN 00396562-63.

<sup>750</sup> **E3/1604**, S-21 Statement of Koy Thuon, ERN 00096807-08; *see also* **E3/1593**, Kiernan, Pol Pot Regime, ERN 01150169, on some Koy Thuon sightings.

<sup>751</sup> **E3/220**, SC Meeting, 7 May 1976, ERN 00182706.

Doeun and Non Suon, as replacements.<sup>752</sup> Koy Thuon and Soth were formally arrested and taken to S-21 in February 1977, one year after the Siem Reap explosion.<sup>753</sup> In a testament to Koy Thuon's power and threat to the CPK, his ultimate arrest required a special military operation and had the air of a climactic showdown. According to the eyewitness of two members of the 704<sup>th</sup> Special Forces Battalion assigned to the arrest:

**It took two days and a night before it was possible to arrest Koy [Thuon] because of the many soldiers guarding him.** The forces that were to make the arrest were mixed, some from the 704<sup>th</sup> Battalion and some from the General Staff, and were deployed from the front of the railroad station all the way to Watt Phnom. Meng explained that before they left to make the arrest, he did not know exactly who was to be arrested, and only after the arrest did comrade Pin, the division secretary, hold a meeting to tell the unit that, "Koy Thuon betrayed Angkar."<sup>754</sup>

## 2. Chan Chakrei Was Behind the Phnom Penh Bombing, and Links the Two Events

255. Unlike the Siem Reap explosion, the evidence clearly establishes that Chan Chakrei was behind the Phnom Penh bombing. Indeed, the evidence in fact points to Chan Chakrei as the epicentre of the entire 1976 *coup d'état*, for in fact, Chan Chakrei had initially been a member of Koy Thuon's North Zone and was also personally closely connected to Koy Thuon, who had introduced him into the CPK. As Son Sen reported, Chakrei "was originally in the North Zone, and when the struggle was in place and difficulties emerged, he fled and disappeared for a while, and then entered the East Zone's Sector 24".<sup>755</sup> The evidence also shows that the links between Chakrei and his former Zone remained strong. For instance, as discussed below, North Zone-affiliated Centre Division 310's plans for the 1977 *coup d'état* contemplated, according to Division 310 commander Sbauv Him *alias* Oeun, that "if we could not defeat Pol Pot we would appeal to Vietnam and call[...] for force at the east under [Chan] Chakrei to help".<sup>756</sup> Finally, Koy Thuon also identified Chan Chakrei in his S-21 statement as a core member of his group of collaborators with Vietnam, together with several others, including Central Committee member and Northwest Zone secretary Ney Sarann *alias* Ya; Sbauv Him *alias* Oeun just mentioned; and Suong, commander of North Zone-affiliated Centre Division 450.<sup>757</sup>

<sup>752</sup> E3/220, SC Meeting, 7 May 1976, ERN 00182706.

<sup>753</sup> E3/1754, S-21 Statement of Soth, ERN 00822357 (noting Soth was arrested on 21 February 1977).

<sup>754</sup> E3/2117, Vannak, Division 703, ERN 00081344 (emphasis added).

<sup>755</sup> E3/13, All Divisions Meeting, 9 Oct 1976, ERN 00940341.

<sup>756</sup> E3/7535, 'DC-Cam Interview of Suoy Sao', ERN 00324172; E1/460.1, Suoy Sao, T. 18 Aug 2016, p. 17, ln. 17 to p. 19, ln. 3; see the detailed discussion on this evidence and coup *infra*, at Chapter 3-VI-A-1.

<sup>757</sup> E3/1604, S-21 Statement of Koy Thuon, ERN 00769831 (KH ERN 00006159). On Ya, see *supra*, Chapter 3-IV-A, Chapter 3-IV-D, and Chapter 3-IV-E; on Oeun, see *infra*, Chapter 3-VI generally; and on Suong, see *supra*, Chapter 3-IV-D-1.

256. Indeed, Chan Chakrei's loyalties had long been a concern of the Standing Committee. Despite the fact that Nuon Chea had selected Chan Chakrei as an East Zone "role model" in 1974, East Zone Sector 21 deputy secretary, current Senator and rejected Defence witness Ouk Bunchhoeun<sup>758</sup> explained that Chan Chakrei "was [already] kept close tabs on" even then, with Nuon Chea "track[ing] down his background all along the way".<sup>759</sup> These concerns appeared to escalate six months prior to the Phnom Penh bombing, when, during a 9 October 1975 Standing Committee, Chan Chakrei's loyalties were debated at length. However, Pol Pot described Chan Chakrei as having "many good points" and said that despite suspicions as to his loyalties, the Standing Committee would not react but continue to "analyse the circumstances", investigate, monitor, and remain agile.<sup>760</sup>

257. The detailed nature of the Standing Committee's deliberations; their decision to wait and see; and the fact that Chan Chakrei remained in a senior position for six more months after their meeting before his arrest, once again shows the Standing Committee's considerable restraint in the face of possible treason, as well as its desire to act cautiously and on the basis of concrete evidence rather than rumour, intrigue, and paranoia. Indeed, by the time that Chan Chakrei was arrested, not only had he managed to make several dramatic assassination attempts on Pol Pot's life during 1976 and masterminded 'Plan A's' 1976 *coup d'état*, but he also had the opportunity to take significant steps towards the implementation of the 1977 *coup d'état* as well, as described below in Section VI.

258. Following Yim Sambath and Chan Chakrei's arrests, several others soon followed, including, *inter alia*, Suos Neou *alias* Chhouk,<sup>761</sup> Ney Sarann *alias* Ya,<sup>762</sup> Non Suon,<sup>763</sup> and Keo Meas,<sup>764</sup> followed by wider scale arrests within Division 310 and Autonomous Sector 106, as well as Divisions 450 and 920, in early 1977.<sup>765</sup> Contrary to what the Closing Order alleges, however, such arrests were not carried out lightly or merely on the basis of implications by others.<sup>766</sup> The CPK's caution, as seen in the case of the *coup* ringleaders Chan Chakrei and Koy

<sup>758</sup> **E370**, Nuon Chea's East Zone Witnesses Request, paras 19-20, 22-25, 39; **E392**, Nuon Chea's Rebellion Leadership Witnesses Request, paras 18-21, 24-25, 37(a); *see also supra*, Chapter 2-II-B-3-(c), on the refusal of key witnesses/experts, and *infra*, Chapter 9 and **Annex 2**.

<sup>759</sup> **E3/387**, Heder Interview with Ouk Bunchhoeun, ERN 00350212.

<sup>760</sup> **E3/182**, SC Meeting, 9 Oct 1975, ERN 00183403-04.

<sup>761</sup> 31 August 1976: *see* **E3/2494**, S-21 Statement of Suos Neou, ERN 00796081.

<sup>762</sup> 20 September 1976: *see* **E3/1868**, S-21 Statement of Ney Sarann, ERN KH 00009497.

<sup>763</sup> 1 November 1976: *see* **E3/4248**, S-21 Statement of Chey Suon, ERN KH 00021539.

<sup>764</sup> Approximately 20 September 1976: *see* **D288/6.5/2.19**, S-21 Statement of Keo Meas, ERN 00983407.

<sup>765</sup> *See infra*, Chapter 3-VI; *see also* **E3/1993**, List of Important Culprits, ERN 00064827 (Centre Divisions 170, 310 and 450), 00064828 (Centre Division 920), and 00064835-36 (Autonomous Sector 106). On the involvement of Divisions 450 and 920, *see also supra*, Chapter 3-IV-D-1.

<sup>766</sup> **D427**, Closing Order, paras 179-180, 192.

Thuon, was a guiding principle in its decisions to arrest or remove people suspected of crimes such as treason.<sup>767</sup> This overriding caution is further demonstrated in light of announcements Son Sen made at a 16 September 1976 RAK commanders and again at a 9 October 1976 RAK commanders meeting. At both meeting, Son Sen clearly referenced the 1976 *coup* led by Chakrei and the ensuing arrests and investigations.<sup>768</sup> In the latter meeting, he explained in more detail that the CPK had thwarted a plot of “the enemy of the East, the Vietnamese with the Soviets behind them” to attack Cambodia “in the Czechoslovakian and Angolan style” which had featured grenades and leaflets thrown near the Royal Palace.<sup>769</sup> Chhouk Rin, a longtime RAK combatant, corroborates that these messages were relayed to him, describing how he had learned that “in 1976, Divisions [...] under the command of Chăn Chăkrei tried to overthrow Pol Pot but were unsuccessful, and Chăn Chăkrei was arrested”.<sup>770</sup> Nevertheless, despite the fact that treasonous leaders in the RAK attended the September and October meetings, heard Son Sen’s announcement, and were thus put on notice that the CPK had gotten wind of their treason, it would still be several more months after Son Sen’s announcements before wider arrests within the RAK began to take place.

#### **D. CONCLUSION ON ‘PLAN A’S’ FIRST PHASE: THE 1976 COUP D’ÉTAT**

259. Following abortive early attempts – including multiple assassination attempts on Pol Pot – in 1975, the collaborators launched the first phase of ‘Plan A’ – the 1976 *coup d’état* featuring twin attacks in Siem Reap and Phnom Penh. At the heart of these events were top CPK members Koy Thuon and in particular, Chan Chakrei. These events triggered cautious investigations by the CPK and eventually a significant number of arrests. It is from this dramatic starting point that the far more existentially threatening but lesser-known second phase of ‘Plan A’, its 1977 *coup d’état*, must be considered. As will become clear, the internal threat posed by Vietnam’s collaborators to the CPK was far from neutralised; indeed, their treasonous efforts were about to ramp up substantially.

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<sup>767</sup> This formed part of the CPK’s legitimate and lawful national defence and security policy for the DK. This policy is discussed in detail *infra*, at Chapter 4-II.

<sup>768</sup> See e.g. E3/160, All Divisions Meeting, 16 Sep 1976, ERN 00143217: “Chak Krei is a main network who has a context with both Imperialists and revisionists. They enticed opponents, authoritarianists and those who are not satisfied with our revolution.”

<sup>769</sup> E3/13, All Divisions Meeting, 9 Oct 1976, ERN 00940341-43.

<sup>770</sup> E3/361, ‘WRI of Chhouk Rin’, ERN 00766455.

## VI. 'PLAN A'S' SECOND PHASE: THE 1977 *COUP D'ÉTAT*

260. The failure of the 1976 *coup d'état* did nothing to dissuade Vietnam's collaborators from their plans to overthrow the CPK and legitimate DK government. On the contrary, it not only prompted the traitors to double-down on their efforts, but to do so in a more coordinated, systematic and large-scale way. From late 1976 onwards, they dramatically intensified their activities in preparation for their second, ultimately-failed attempt to unseat the CPK and legitimate DK government. This second phase of 'Plan A' would have culminated in what the Defence refers to as the 1977 *coup d'état*.

261. The 1977 *coup d'état* was to follow the style of a classic direct-attack insurgency. Historically, these types of attack typically "capture a defender's values (a capital city, an industrial or communications center, or a bridge) or strategic assets (defensible terrain or a fort)".<sup>771</sup> In this instance, Vietnam's collaborators attempted both. As the available evidence demonstrates, they sought to carry out a dual-pronged, nationwide attack to capture the ultimate prize of Phnom Penh on the one hand, and attempt to simultaneously seize control over a vast swathe of strategically valuable territory on the other hand. In addition, while it was to be effected covertly by internal forces, this *coup d'état* also envisaged calling upon Vietnam to assist if this ultimately became necessary.

262. This Section – which is the primary focus of the Crocodile's analysis of 'Plan A' – begins in Part A with a discussion of the nature of the 1977 *coup's* twin prongs of seizing Phnom Penh and of taking control over much of DK territory. Part B describes the widespread preparations that Vietnam's collaborators undertook for the attack – notably through acts of sabotage and subversion; extensive stockpiling; and meeting and recruitment efforts. Finally, Part C explains how this *coup* was ultimately thwarted.

### A. THE 1977 *COUP D'ÉTAT* WAS TO INVOLVE A DUAL-PRONGED ATTACK

#### 1. Vietnam's Collaborators Planned to Attack and Capture Phnom Penh

263. The first way in which Vietnam's collaborators sought to undermine the CPK in its 1977 *coup d'état* was to strike at the CPK's heart by capturing the DK capital and epicentre of CPK operations: Phnom Penh. The Defence has identified at least nine witnesses who trace these

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<sup>771</sup> Arreguín-Toft, *How the Weak Win Wars*, p. 101.

plans back to North Zone-affiliated Centre Division 310.<sup>772</sup> It is also worth noting that these witness accounts were not identified by the Co-Investigating Judges, but by DC-Cam, which interviewed several former members of Division 310. In contrast, however, the Chamber denied the Defence's request to conduct a further investigation into the *coup d'état* that the witnesses describe,<sup>773</sup> again on the absurd basis that this was "untimely" and that Ben Kiernan, whose Pol Pot Regime book featured the defectors' accounts the Defence sought to investigate, would likely offer "very little cooperation [...] if any".<sup>774</sup> Given the inability to conduct further investigations into this topic, the Defence has been unable to confirm the nature of the involvement of the other North Zone-affiliated Centre Divisions, 450 and 920, in the *coup d'état*. However, the evidence suggests that they did indeed play a role alongside the former North Zone Division 310.<sup>775</sup> Thus, while this Section discusses only the role of Division 310, this is only a function of evidentiary limitations and not an indication that only Division 310 was involved.

264. Based on the nine witness accounts on the case file, it is clear that Division 310 head Sbauv Him *alias* Oeun was the military ringleader of the plans to seize Phnom Penh. All nine witnesses unanimously identify him as such.<sup>776</sup> Four of the witnesses further implicated Koy Thuon as playing a leading role,<sup>777</sup> while four connected the East Zone to this plot.<sup>778</sup> Two of

<sup>772</sup> **E1/319.1**, Sem Hoern, T. 22 Jun 2015, p. 68, ln. 6 to p. 85, ln. 6; **E1/320.1**, Sem Hoern, T. 22 Jun 2015, p. 4, ln. 24 to p. 21, ln. 6; **E3/7516**, 'DC-Cam Interview of Sem Hoern', ERN 00876519-21; **E1/316.1**, Keo Loeur, T. 15 Jun 2015, p. 33, ln. 8 to p. 55, ln. 9; **E3/5658**, 'DC-Cam Interview of Keo Loeur', ERN 00863305; **E3/7535**, 'DC-Cam Interview of Suoy Sao', ERN 00324168-75; **E1/460.1**, Suoy Sao, T. 18 Aug 2016, p. 14, ln. 15 to p. 17, ln. 5; **E1/477.1**, Sem Om, T. 20 Sep 2015, p. 46, ln. 16 to p. 50, ln. 12; **E3/7523**, 'DC-Cam Interview of Sem Om', ERN 00875574-76; **E3/509**, 'WRI of Khorn Brak', ERN 00282217; **E3/7584**, 'DC-Cam Interview of Khorn Brak', ERN 00183541-42, 00183549; **E3/7540**, 'DC-Cam Interview of Thach Siek', ERN 00337712-14; **E3/5686**, 'DC-Cam Interview of Vung Vei', ERN 00874668-70; **E3/7583**, 'DC-Cam Interview of Khoem Samhuon', ERN 00876558-59; **E3/5641**, 'DC-Cam Interview of Nob Hat', ERN 00881777-81.

<sup>773</sup> **E391**, Nuon Chea's Division 310 Witnesses Request, paras 29-30.

<sup>774</sup> **E443/10**, Reasoned Decision on Key Defence Witnesses, paras 34, 36; *see also supra*, Chapter 2-II-B-3-(c), on the refusal of key investigation requests, and *infra*, Chapter 9 and **Annex 3**.

<sup>775</sup> *See supra*, Chapter 3-IV-A-4-(a).

<sup>776</sup> **E1/319.1**, Sem Hoern, T. 22 Jun 2015, p. 76, ln. 14 to p. 79, ln. 5, p. 80, ln. 25 to p. 81, ln. 13; **E1/320.1**, Sem Hoern, T. 22 Jun 2015, p. 17, lns 19-24; **E3/7516**, 'DC-Cam Interview of Sem Hoern', ERN 00876520; **E1/316.1**, Keo Loeur, T. 15 Jun 2015, p. 33, ln. 8 to p. 37, ln. 20; **E3/5658**, 'DC-Cam Interview of Keo Loeur', ERN 00863305; **E1/460.1**, Suoy Sao, T. 18 Aug 2016, p. 13, ln. 5 to p. 16, ln. 1; **E3/7535**, 'DC-Cam Interview of Suoy Sao', ERN 00324168, 00324172; **E1/477.1**, Sem Om, T. 20 Sep 2015, p. 46, ln. 16 to p. 47, ln. 5; **E3/7523**, 'DC-Cam Interview of Sem Om', ERN 00875573-75; **E3/7584**, 'DC-Cam Interview of Khorn Brak', ERN 00183541-43; **E3/7540**, 'DC-Cam Interview of Thach Siek', ERN 00337712-13; **E3/5686**, 'DC-Cam Interview of Vung Vei', ERN 00874668-69; **E3/7583**, 'DC-Cam Interview of Khoem Samhuon', ERN 00876559; **E3/5641**, 'DC-Cam Interview of Nob Hat', ERN 00881778, 00881781.

<sup>777</sup> **E1/320.1**, Sem Hoern, T. 23 Jun 2015, p. 6, lns 16-22; **E3/7540**, 'DC-Cam Interview of Thach Siek', ERN 00337712; **E3/5686**, 'DC-Cam Interview of Vung Vei', ERN 00874668-69; **E3/7523**, 'DC-Cam Interview of Sem Om', ERN 00875573, 00875576; *see also supra*, Chapter 3-IV-D.

<sup>778</sup> **E3/7540**, 'DC-Cam Interview of Thach Siek', ERN 00337712, 00337714; *see also supra*, Chapter 3-IV-D.

the witnesses specifically implicated Sao Phim<sup>779</sup> and twice-rejected<sup>780</sup> Defence witness<sup>781</sup> and Prime Minister Hun Sen, who one witness described as being “in the same clique” as Oeun.<sup>782</sup> Witness Suoy Sao<sup>783</sup> implicated both the East Zone and Vietnam, explaining that, according to Oeun, “if we could not defeat Pol Pot we would appeal to Vietnam and call[...] for force at the east under [Chan] Chakrei to help”.<sup>784</sup> Witness Sem Am suggested that the US were also prepared to help if needed.<sup>785</sup> Finally, a CPK defector’s account indicated that “[Koy] Thuon and [Autonomous Sector 106 secretary] Soth had planned a *coup* in Phnom Penh” together, to commence in early 1977.<sup>786</sup> As already noted above, the Chamber also refused to investigate this account.<sup>787</sup>

265. The totality of the evidence on Division 310 is best encapsulated by the in-court testimony on 23 June 2015 of witness Sem Hoern, a former Division 310 commander:

A. Let me clarify the rebellion plan. There was **Ta So Phim in the East Zone** and **Ta Koy Thuon in the North Zone**. They already prepared their forces in the front line and at the rear; **the Army of the Centre was prepared for the front line** – a plan to attack Phnom Penh; **the Sector forces** were to attack behind at the Sector level. This is what I know. That’s all.<sup>788</sup> [...]

Q. As of 1975, did you hatch this plan with your division chief **Oeun**?

A. Yes, that is correct because he was the commander of the division [and he] had a plan and disseminated it to the battalions so that soldiers in battalions could rise up to overthrow and topple the Democratic Kampuchea.<sup>789</sup>

266. Division 310 was ideally situated to implement the *coup d’état*’s Phnom Penh-based attack. Its units were based in and around Phnom Penh since the city’s liberation on 17 April 1975, from Boeng Prayap in the northwest,<sup>790</sup> stretching southward to the northern

<sup>779</sup> **E1/320.1**, Sem Hoern, T. 23 Jun 2015, p. 6, lns 16-22; *see also supra*, Chapter 3-IV-D.

<sup>780</sup> **E370/3**, Dispositive Decision on Nuon Chea’s East Zone Witnesses Request, para. 2; **E370/4**, Reasoned Decision on Nuon Chea’s East Zone Witnesses Request, paras 25-27); **E454**, Final Witnesses Decision, para. 4; *see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key witnesses and *infra*, Chapter 9 and **Annex 2**.

<sup>781</sup> **E370**, Nuon Chea’s East Zone Witnesses Request, paras 26-30, 39; **E392**, Nuon Chea’s Rebellion Leadership Witnesses Request, paras 33-34, 37(a).

<sup>782</sup> **E3/7583**, ‘DC-Cam Interview of Khoem Samhuon’, ERN 00876559.

<sup>783</sup> *See supra*, Chapter 3-II-B-2, on his reliability, and *infra*, Chapter 3-VI-A-1-(c), for details of this account.

<sup>784</sup> **E3/7535**, ‘DC-Cam Interview of Suoy Sao’, ERN 00324172; **E1/460.1**, Suoy Sao, T. 18 Aug 2016, p. 17, ln. 17 to p. 19, ln. 3. Unbeknownst then, Chan Chakrei had already been arrested; *see supra*, Chapter 3-V-C-2.

<sup>785</sup> **E3/7523**, ‘DC-Cam Interview of Sem Om’, ERN 00875575; and *supra*, Chapter 3-II-B-2, on his reliability.

<sup>786</sup> **E3/1593**, Kiernan, Pol Pot Regime, ERN 01150177.

<sup>787</sup> *See supra*, Chapter 3-V-B, for details in relation to this request and *infra*, Chapter 9 and **Annex 3**.

<sup>788</sup> **E1/320.1**, Sem Hoern, T. 23 Jun 2015, p. 6, lns 16-22 (emphasis added).

<sup>789</sup> **E1/320.1**, Sem Hoern, T. 23 Jun 2015, p. 17, lns 19-24 (emphasis added).

<sup>790</sup> **E3/509**, ‘WRI of Khorn Brak’, ERN 00282217; **E3/7584**, ‘DC-Cam Interview of Khorn Brak’, ERN 00183549; **E3/7540**, ‘DC-Cam Interview of Thach Siek’, ERN 00337712; **E3/7583**, ‘DC-Cam Interview of Khoem Samhuon’, ERN 00876558.



areas of Phnom Penh encompassing Wat Phnom and the Central Market,<sup>791</sup> and westward to Tuol Kork<sup>792</sup> and Pochentong airport.<sup>793</sup> As former members of the Division detail immediately below, it planned to exploit its prime location in the capital to achieve three distinct military objectives: cutting off the CPK's access to the outside world; crippling the capital's defensive capacity; and finally, directly targeting Pol Pot.

**(a) Cutting Off Phnom Penh's Access to the Outside World**

267. In keeping with classic direct-attack insurgency strategy, Division 310 planned to cut off Phnom Penh's access to the outside world by seizing two high-value targets. As Sem Hoern explained, these were the Phnom Penh radio station and Pochentong airport:

We were ordered to stand by for further orders; when the time came, we were to transport these weapons on to Khieu's place in Pôchentong, **to attack and seize Pôchentong Airport** [...] [a]nother battalion was ordered to get ready **to attack the Radio Station**.<sup>794</sup>

268. During his live testimony, Sem Hoern elaborated that this plan was supposed to take place "in mid-1977".<sup>795</sup> He also remarked that "[a]t that time, the broadcast from [that] radio station was the official main broadcast of the [DK], and its broadcast extended to all provinces throughout the country."<sup>796</sup> As such, the strategic value of both targets was "to stop any further flood in or out of [DK]"<sup>797</sup> – *i.e.* effectively preventing the CPK leadership from either seeking assistance and reinforcements or escaping an attack. This would explain the traitors' persistence in attacking the radio station despite earlier failed attempt by East Zone forces (likely reporting to Chan Chakrei) in 1975.<sup>798</sup>

<sup>791</sup> **E1/318.1**, Sem Hoern, T. 17 Jun 2015, p. 94, lns 5-6; **E1/315.1**, Keo Loeur, T. 12 Jun 2015, p. 7, ln. 6 to p. 9, ln. 6; **E1/477.1**, Sem Om, T. 20 Sep 2015, p. 37, lns 19-23; **E3/7523**, 'DC-Cam Interview of Sem Om', ERN 00875574; **E3/509**, 'WRI of Khorn Brak', ERN 00232216; **E3/7535**, 'DC-Cam Interview of Suoy Sao', ERN 00324165; **E3/5686**, 'DC-Cam Interview of Vung Vei', ERN 00874661, 00874665; **E3/3962**, 'WRI of Khoem Samhuon', ERN 00293365; **E3/7583**, 'DC-Cam Interview of Khoem Samhuon', ERN 00876550; **E3/5641**, 'DC-Cam Interview of Nob Hat', ERN 00881776-77.

<sup>792</sup> **E1/460.1**, Suoy Sao, T. 18 Aug 2016, p. 8, lns 1-7; **E1/477.1**, Sem Om, T. 20 Sep 2015, p. 37, ln. 24 to p. 38, ln.2; **E3/7516**, 'DC-Cam Interview of Sem Hoern', ERN 00876491; **E3/5686**, 'DC-Cam Interview of Vung Vei', ERN 00874661, 00874663; **E3/7583**, 'DC-Cam Interview of Khoem Samhuon', ERN 00876550-51; **E3/5641**, 'DC-Cam Interview of Nob Hat', ERN 00881776; **E3/5671**, 'DC-Cam Interview of Pal Set', ERN 00596161, 00596163.

<sup>793</sup> **E1/316.1**, Keo Loeur, T. 15 Jun 2015, p. 33, lns 20-23.

<sup>794</sup> **E3/7516**, 'DC-Cam Interview of Sem Hoern', ERN 00876520-21 (Khmer phrases omitted, emphasis added); **E1/320.1**, Sem Hoern, T. 23 Jun 2015, p. 5, lns 8-9.

<sup>795</sup> **E1/320.1**, Sem Hoern, T. 23 Jun 2015, p. 79, ln. 25 to p. 80, ln. 2.

<sup>796</sup> **E1/320.1**, Sem Hoern, T. 23 Jun 2015, p. 5, lns 2-4.

<sup>797</sup> **E1/320.1**, Sem Hoern, T. 23 Jun 2015, p. 5, lns 9-10.

<sup>798</sup> *See supra*, Chapter 3-V-A.

269. Another Division 310 member, Khorn Brak, corroborates Sem Hoern's account. Concerning the attack on the Phnom Penh radio station, he said that:

In 1977, [...] one day I was called a meeting at Watt Phnom where Ta Yim made an announcement [...] regarding plans to carry out a *coup*; **he said that at 3a.m. we would open fire and attack and take the radio station near Watt Phnom** in order to make an announcement."<sup>799</sup>

270. Khorn Brak also explained how capturing Pochentong Airport would feature in the plot:

I forget the date, but know that there was a plan to open fire for another round. And we had already taken the troops to get ready. Hak from the marines and Brother Pin had distributed out the tanks [...] Brother Pin was responsible for aircraft at Pochentong, and Brother Hak for the tanks, the marines, those forces, had all been arranged to open fire about three o'clock. [...] Brother Oeun [...] set it up [...].<sup>800</sup>

**(b) Crippling Phnom Penh's Defensive Capacity**

271. In addition to cutting off the CPK leadership's access outside Phnom Penh, the 1977 *coup* also envisaged crippling the capital's and thus the leadership's defensive capacity. Khorn Brak's evidence, described immediately above, demonstrates how this military objective would have been fulfilled in part by having the traitorous forces commandeer CPK tank, marine, and aircraft capacity. Division 310 combatant Nob Hat added another layer to this plot, explaining that the traitors also intended to target the Defence Ministry:

We had planned to rebel. [...] Two or three days before we would rebel, they seized our weapons at DN [Defense Ministry]. [...] The Khmer Rouge leaders were staying there. **We were prepared to fire rockets at DN**, but our plan was disclosed because of Ta Oeun. Our plan was disclosed because of our top leader.<sup>801</sup>

272. Sem Hoern, meanwhile, described to DC-Cam and confirmed in court that they intended to target an "artillery and armoured vehicle warehouse".<sup>802</sup> This warehouse was to have been attacked alongside the attacks on the Phnom Penh radio station and Pochentong airport.<sup>803</sup> Division 310 company commander Thach Siek<sup>804</sup> explained that, more broadly,

<sup>799</sup> E3/509, 'WRI of Khorn Brak', ERN 00282217 (emphasis added).

<sup>800</sup> E3/7584, 'DC-Cam Interview of Khorn Brak', ERN 00183541-42.

<sup>801</sup> E3/5641, 'DC-Cam Interview of Nob Hat', ERN 00881781 (Khmer phrases omitted).

<sup>802</sup> E3/7516, 'DC-Cam Interview of Sem Hoern', ERN 00876520; E1/319.1, Sem Hoern, T. 22 Jun 2015, p. 76, ln. 21 to p. 77, ln. 25.

<sup>803</sup> E3/7516, 'DC-Cam Interview of Sem Hoern', ERN 00876520; E1/319.1, Sem Hoern, T. 22 Jun 2015, p. 80, lns 3-6.

<sup>804</sup> E391, Nuon Chea's Division 310 Witnesses Request, paras 12-14, 23-25, 36(a); E443/10, Reasoned Decision on Key Defence Witnesses, para. 36; *see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key witnesses/experts, and *infra*, Chapter 9 and Annex 2.

troops were to be readied for a general assault on the city, to be conducted jointly with East Zone Centre division forces. As she described to DC-Cam:

Yes, it erupted in 76, but I cannot recall the month; I have fo[r]gotten the month. In late 76, we were going to erupt, but it was exposed. **The two North Zone divisions were readied from Wat Phnom northward. The East Zone in charge to the south was ready to fight**, but it was exposed, and Khuon [*i.e.* Koy Thuon], the Chairman of the North Zone, was arrested.<sup>805</sup>

**(c) Targeting Pol Pot**

273. Finally, despite earlier failed attempts in 1975,<sup>806</sup> the third military objective was a renewed effort to assassinate Pol Pot and thus cripple the leadership of the CPK and DK government. Witness Khoem Samhuon, a Division 310 company commander,<sup>807</sup> confirms this, describing the plan to target Pol Pot as follows:

One day, during my work at Boeng Prayap [on the outskirts of Phnom Penh], [...] there was a CIA meeting at the house. [...] I overheard them saying, “Do not be too overwhelmed now. Wait until we have accomplished our plots. Then each of you can have 10 wives if you wish.” [...] It was a treasonous meeting because they were going to stage a rebellion. It was a CIA meeting. **At that time, they were planning to attack the POL Pot garrison**, but they failed because Ta Oeun, who was in the same clique with **HUN Sen**, was arrested.<sup>808</sup>

274. Khoem Samhuon recalled that the meeting took place in 1977.<sup>809</sup> When DC-Cam interviewed him a decade earlier, Division 310 combatant and witness Suoy Sao corroborated this date.<sup>810</sup> However, he was unable to recall this detail by the time of his live testimony.<sup>811</sup> Nevertheless, during his morning testimony, Suoy Sao confirmed that, as he told DC-Cam, Oeun had planned to “topple Pol Pot’s regime”,<sup>812</sup> and Suoy Sao was one of 100 combatants at a meeting at which Oeun relayed details of the plot.<sup>813</sup>

<sup>805</sup> **E3/7540**, ‘DC-Cam Interview of Thach Siek’, ERN 00337712 (emphasis added).

<sup>806</sup> *See supra*, Chapter 3-V-A.

<sup>807</sup> **E391**, Nuon Chea’s Division 310 Witnesses Request, paras 19-21, 23-25, 36(a); **E443/10**, Reasoned Decision on Key Defence Witnesses, para. 36; *see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key witnesses/experts, and *infra*, Chapter 9 and **Annex 2**.

<sup>808</sup> **E3/7583**, ‘DC-Cam Interview of Khoem Samhuon’, ERN 00876559 (emphasis added).

<sup>809</sup> **E3/7583**, ‘DC-Cam Interview of Khoem Samhuon’, ERN 00876558.

<sup>810</sup> **E3/7535**, ‘DC-Cam Interview of Suoy Sao’, ERN 00324168-69.

<sup>811</sup> **E1/460.1**, Suoy Sao, T. 18 Aug 2016, p. 13, ln. 15 to p. 14, ln. 1.

<sup>812</sup> **E1/460.1**, Suoy Sao, T. 18 Aug 2016, p. 13, ln. 14; *see also* **E3/7535**, ‘DC-Cam Interview of Suoy Sao’, ERN 00324168, 00324172. On the shift in Suoy Sao’s testimony and the impact this should have on his credibility, *see supra*, Chapter 3-II-B-2.

<sup>813</sup> **E1/460.1**, Suoy Sao, T. 18 Aug 2016, p. 15, ln. 9 to p. 17, ln. 5, p. 51, lns 1-20; *see also* **E3/7535**, ‘DC-Cam Interview of Suoy Sao’, ERN 00324168.

## 2. Vietnam's Collaborators Would Simultaneously Break the CPK's Spine Through a Nationwide Attack

275. As noted above, in addition to attacking Phnom Penh, Vietnam's collaborators planned as part of their 1977 *coup d'état* to simultaneously break the CPK's spine by seizing control of the country. The Defence has identified at least 10 witnesses – including the Lemkin-Sambath Witnesses<sup>814</sup> – who trace this aspect of the plot back to the Northwest Zone,<sup>815</sup> with nine implicating Zone secretary Ruos Nhim as a leader.<sup>816</sup> Extensive evidence, already detailed above, also aligns Ruos Nhim to Sao Phim, his in-law and a Standing Committee member and East Zone secretary,<sup>817</sup> while six witnesses implicate East Zone forces connected to the Northwest Zone's plot.<sup>818</sup> One witness names Chan Chakrei as a leader,<sup>819</sup> while another implicates Vorn Vet<sup>820</sup> and explained that Vorn Vet would call upon the assistance of an unnamed foreign power if necessary.<sup>821</sup> That foreign power was without a doubt Vietnam, given that another witness testified that Vietnam provided traitors in the Northwest Zone with supplies.<sup>822</sup> Finally, there is evidence to suggest that the Northwest Zone's neighbour,

<sup>814</sup> On the Lemkin-Sambath Witnesses, *see generally supra*, Chapter 3-II-B-1.

<sup>815</sup> **E3/4202**, Chon and Sambath, Behind the Killing Fields, ERN 00757532; **F2/4/3/3/6.2**, Lemkin-Sambath Transcripts (Witness 1), ERN 01151685-705, ERN 01151709-10, 01151714-15, 01151733 (Chan Savuth); **E3/4202**, Chon and Sambath, Behind the Killing Fields, ERN 00757531-32 (W1); **E1/478.1**, Chhorn Vorn (2-TCW-1036), T. 21 Sep 2016, p. 73, ln. 16 to p. 78, ln. 16; **E3/9581**, 'WRI of Chhorn Vorn (2-TCW-1036)', ERN 00970080; **E1/356.1**, Mun Mot (2-TCW-996), T. 26 Oct 2015, p. 44, ln. 10 to p. 53, ln. 10; **E3/9076**, 'DC-Cam Interview of Mun Mut (2-TCW-996)', ERN 00731170, 00731172; **F1/3.1**, Toat Thoeun, T. 6 Jul 2015, p. 30, lns 17-25; **E3/9610**, 'WRI of Toat Thoeun', ERN 00974038, 00974050; **E3/9579**, 'WRI of Samey Saveng', ERN 00970467; **E3/9580**, 'WRI of Huon Choeum', ERN 00978422; **E3/9060**, 'DC-Cam Interview of Lat Suoy', ERN 00728736-40; **E3/8991**, 'DC-Cam Interview of Bou Mao', ERN 00969893, 00969904; **E3/4202**, Chon and Sambath, Behind the Killing Fields, ERN 00757532 (Chiel Chhoeun).

<sup>816</sup> **E3/4202**, Chon and Sambath, Behind the Killing Fields, ERN 00757532, **F2/4/3/3/6.2**, Lemkin-Sambath Transcripts (Witness 1), ERN 01151786, 01151789, 01151790, 01151795, 01151797, 01151699 (Chan Savuth); **F2/4/3/3/6.2**, Lemkin-Sambath Transcripts (Witness 1), ERN 01151709, 01151714 (W1); **F2/4/3/3/6.2**, Lemkin-Sambath Transcripts (Witness 4), ERN 01156803, 01156810 (W4); **E3/9610**, 'WRI of Toat Thoeun', ERN 00974023; **E3/9581**, 'WRI of Chhorn Vorn (2-TCW-1036)', ERN 00970080; **E3/9076**, 'DC-Cam Interview of Mun Mut (2-TCW-996)', ERN 00731171-72; **E3/9579**, 'WRI of Samey Saveng', ERN 00970467; **E3/9060**, 'DC-Cam Interview of Lat Suoy', ERN 00728736-38; **E3/8991**, 'DC-Cam Interview of Bou Mao', ERN 00969893; **E3/4202**, Chon and Sambath, Behind the Killing Fields, ERN 00757532 (Chiel Chhoeun).

<sup>817</sup> *See supra*, Chapter 3-IV-D-2.

<sup>818</sup> **E3/4202**, Chon and Sambath, Behind the Killing Fields, ERN 00757532, **F2/4/3/3/6.2**, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151686 (Chan Savuth); **E3/4202**, Chon and Sambath, Behind the Killing Fields, ERN 00757531, **F2/4/3/3/6.2**, Lemkin-Sambath Transcripts (Witness 1), ERN 01151707-08, 01151712, 01151715, 01151717-18, 01151737; **F2/4/3/3/6.2**, Lemkin-Sambath Transcripts (Witness 4), 01156803; **E3/9610**, 'WRI of Toat Thoeun', ERN 00974022-23; **E1/356.1**, Mun Mot (2-TCW-996), T. 26 Oct 2015, p. 53, ln. 19 to p. 57, ln. 8, **E3/9076**, 'DC-Cam Interview of Mun Mut (2-TCW-996)', ERN 00731172; **E3/9060**, 'DC-Cam Interview of Lat Suoy', ERN 00728739, 00728748; **E3/8991**, 'DC-Cam Interview of Bou Mao', ERN 00969893, 00969904.

<sup>819</sup> **F2/4/3/3/6.2**, Lemkin-Sambath Transcripts (Witness 1), ERN 01151712, 01151737.

<sup>820</sup> *See supra*, Chapter 3-IV-D.

<sup>821</sup> **F2/4/3/3/6.2**, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151687-88.

<sup>822</sup> **E1/478.1**, Chhorn Vorn (2-TCW-1036), T. 21 Sep 2016, p. 73, ln. 14 to p. 74, ln. 8; **E3/9581**, 'WRI of Chhorn Vorn (2-TCW-1036)', ERN 00970080.

Autonomous Sector 106, was involved in both the nationwide attack<sup>823</sup> and the Phnom Penh attack through its secretary Pa Phal *alias* Soth.<sup>824</sup> This is bolstered by evidence that Ruos Nhim issued orders to Autonomous Sector forces at the Dangrek Mountains to carry out treason.<sup>825</sup>

276. Northwest Zone forces were ideally situated to implement the nationwide attack. That Zone was uniquely valuable to the CPK. The June 1976 issue of the Revolutionary Flag described the Zone as the “one good battlefield” in the country in terms of rice production, which had to be “attack[ed]”<sup>826</sup> (i.e., harvested) “strongly for the sake of the entire country”.<sup>827</sup> According to the CPK’s Four-Year Plan for economic development, the Zone was expected to produce around a third of the DK’s rice quota between 1977 and 1980.<sup>828</sup> In addition, the Northwest Zone, together with Autonomous Sector 106 and the East Zone, occupied great lengths of Cambodia’s borders with Thailand, Laos, and Vietnam. Combined, they not only surrounded loyal RAK forces, but also obstructed many routes through which the CPK could escape and reinforcements could enter.

277. As detailed immediately above, the evidence shows that Vietnam’s collaborators in at least the Northwest Zone, Autonomous Sector 106, and the East Zone, planned to exploit these advantages to achieve two military objectives: depleting the CPK’s nationwide capabilities, and seizing territory stretching from the northernmost parts of the country sweeping downward in an arc headed towards Phnom Penh. There, their efforts would marry up with those of the Division 310 and East Zone executing the Phnom Penh attack, and additional East Zone forces coming from that Zone.<sup>829</sup> United together, the traitorous forces led by Vietnam’s collaborators would thereafter crush the CPK leadership and legitimate DK government.

**(a) Depleting the CPK’s Capabilities**

278. As detailed above, classic direct-attack insurgency strategy contemplates capturing a defender’s “values”,<sup>830</sup> such as communications centres like the Phnom Penh radio station and Pochentong airport, which offer a concentrated military advantage. In keeping with this

<sup>823</sup> **F2/8.1.29**, Paul, Plot Details Filter Through, ERN 01141796 (*see also supra*, Chapter 2-II-B-3-(c), regarding the rejection of key evidence, and *infra*, Chapter 9 and **Annex 1**); **E3/7333**, Burgler, Eyes of Pineapple, ERN 01002239, 01002457; **E3/1593**, Kiernan, Pol Pot Regime, ERN 01150165.

<sup>824</sup> *See also supra*, Chapter 3-IV-D.

<sup>825</sup> **F2/4/3/3/6.2**, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151687.

<sup>826</sup> *See infra*, Chapter 4-II-B-1, for an analysis of the CPK’s use of “warlike” metaphors in its policy rhetoric.

<sup>827</sup> **E3/760**, Flag, Jun 1976, ERN 00509624.

<sup>828</sup> **E3/8**, 1976 CPK Four-Year Plan, ERN 00104063-64 (460,000 ha of 1.6m total ha in 1977; 500,000 ha of 1.7m total ha in 1978; 550,000 ha of 1.8m total ha in 1979; and 600,000 ha of 1.9m total ha in 1980).

<sup>829</sup> *See supra*, Chapter 3-VI-A-1.

<sup>830</sup> *See supra*, Chapter 3-VI.

strategy, Vietnam's collaborators' first objective was to capitalise on their control of the DK's most fertile territory – *i.e.*, a location offering a concentrated military advantage – by depleting the CPK's capabilities. The *coup* leaders would achieve this by siphoning off supplies necessary to the CPK's survival, such as military material and food; destroying these supplies if necessary, in a classic “scorched earth” strategy of decimating supplies to prevent them from being utilised by an opposing military force; and disrupting working productivity generally. In connection with this latter strategy, Vietnam's collaborators also sought to foment discontent to make the people resent the CPK and be more amenable to participating in treason.

279. The most detailed account in this regard is provided by Chan Savuth, a former Northwest Zone hospital director who was one of the Lemkin-Sambath Witnesses.<sup>831</sup> As detailed in his transcript, Chan Savuth, as a ranking cadre, was privy to meetings and arrangements within the Zone to prepare for the 1977 *coup d'état*. Chan Savuth described the siphoning off and destruction of supplies throughout 1977 as follows:

[Chan Savuth]: They did not inform us in advance whether when they did [the war], but **they ordered us to be in preparation of everything beforehand** – not wait until the time to cook, just try to look for pot and rice, but we had to find out rice and pot to keep in advance.<sup>832</sup> [...]

[Chan Savuth]: They ordered the lower rank to burn evidence in an attempt to destroy evidence [...T]hey did not want to leave it for the South Western zone. [...] If we could [not] defeat them at least we could destroy some before we died, as we were to resist.<sup>833</sup> [...]

SB: Thus, they collected rice to fill the warehouse.

[Chan Savuth]: **Yes.**

SB: To make war.

[Chan Savuth]: **Yes.**

SB: Against Pol Pot?

[Chan Savuth]: **Yes.**

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<sup>831</sup> The Defence requests to summons Chan Savuth are contained in **E307/4.3**, Nuon Chea's Case 002/02 New Witness Summaries, p. 9; **E395**, Nuon Chea's Rebellion Evidence Witnesses Request, paras 24-25, 42; *see also* **E29/490**, WESU Report: Chan Savuth; **E443/10**, Reasoned Decision on Key Defence Witnesses; *see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence and of key witnesses/experts and *infra*, Chapter 9 and **Annex 1** and **Annex 2**; and *supra*, Chapter 3-II-B-1, for a discussion of issues related to the Lemkin-Sambath Witnesses and the Lemkin Transcripts.

<sup>832</sup> **F2/4/3/3/6.2**, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151692 (emphases added).

<sup>833</sup> **F2/4/3/3/6.2**, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151696 (emphases added).

SB: So they had to collect rice from people in collective?

[Chan Savuth]: From collective! [...] **T]he preparation of rice was all trick to hide it.** [...] A]ll husk rice was under Bong Ham's<sup>834</sup> control and Bong Ham had trick to hide rice. He kept some and gave some to Angkar. He knew the trick to hide because economy was on him, and there was no one in charge of economy in Northwestern zone, only Bong Ham. He controlled everything including husk rice, rice, and petrol. [...] What did we call economy? **It controlled everything such as weapons, tanks and all things. They had already prepared to resist, so they had to collect and kept.** [...] W]e just collected and kept all because Ham [*i.e.*, Toat Thoeun] controlled everything and it depended on him to prepare.<sup>835</sup> [...]

[Chan Savuth]: [...] Ta Nhim told to prepare troops and choose in each district. [...] We had to gather our troops ready. [...] Y]ou had to be prepared with equipments, hammocks, and clothes. Weapons, he did not say, he just told to be alerted. Hammocks, clothes, cap, and east zone shoes. [...] **Rice and food supply, he said to be prepared for about 3 to 4 years.**<sup>836</sup> [...]

280. Chan Savuth also explained the plan to disrupt working productivity:

SB: So [Ruos Nhim's] purpose was to arrest and chaos ...?

[Chan Savuth]: To chaos, to chaos in the place. We, the Northwest Zone, make chaotic and did not let them know that we did not work on anything. [...] Arresting people to make it chaos. [...] He said to make ... unable to work. Maybe he wanted to destroy Pol Pot's plan to dig stream, or pond to make Ang [water storage] by people. **He said to make them unable to work. [... H]e just said not letting them do the work.**<sup>837</sup> [...]

281. Chan Savuth's information in this regard is corroborated by other evidence, detailed below,<sup>838</sup> proving that each aspect of this military objective was in fact implemented.

**(b) Seizure of Strategic Territory All the Way to the Capital**

282. The nationwide attack to be carried out as part of the 1977 *coup d'état* also featured a classic plot to seize strategic assets from the CPK; in this case, terrain. According to Chan Savuth, Ruos Nhim instructed his forces to “fight from Battambang to Moung, Pursat, Kampong Chhnang and Phnom Penh”.<sup>839</sup> Similarly, W1 described to Lemkin and Sambath that Northwest Zone forces were instructed to remain on permanent high-alert and to turn their artillery towards Phnom Penh,<sup>840</sup> in apparent anticipation for the plan's commencement. Chan

<sup>834</sup> Ham was the alias of the now-late Lemkin-Sambath Witness Toat Thoeun: *see* F1/3.1, Toat Thoeun, T. 6 Jul 2015, p. 7, ln. 8.

<sup>835</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151705-06 (emphases added).

<sup>836</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151793-94.

<sup>837</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151789-90 (emphasis added).

<sup>838</sup> *See infra*, Chapter 3-VI-B.

<sup>839</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151685 (emphasis added).

<sup>840</sup> *See also* F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 1), ERN 01151715, 01151719 (“at this time we had plan to fight [...] to] prepare[...] our military force to react in Phnom Penh to fight Pol Pot”; “we had to be

Savuth additionally revealed that, in the event that the traitors were unable to defeat the forces loyal to the CPK and capture territory, they were instructed to beat a retreat to their Battambang stronghold and defend it at all cost:

Bong Chhuon [head of Northwest Zone military division 1] [...] said **if we were not strong and could not roll out we had to protect and stay in Battambang** and if we continued to go forward we would lose economy and have no food to eat.<sup>841</sup> [...]

Ta Nhim said we fought to succeed, but we had to prepare, supposed if we could not defeat or resist them, **we had to cut off bridges** in Kampong Chhnang, Pursat, Moung and Battambang to prevent them moving troops here. After we made war we would prepare all DCR to shoot aircrafts along Battambang stream from Kampong Chamlong Kouy down and we limited our front line there. **No matter what we would never g[i]ve away this base line**, if we ran away we would completely lose.<sup>842</sup>

283. Evidence from Autonomous Sector 106 further corroborates the existence of a secret plan to mobilise forces with an ultimate view to attacking the capital. Chek Pek, a village chief from Autonomous Sector 106 who defected to Thailand, explained to the Far Eastern Economic Review that in the autonomous sector, “[t]he plan was to recruit as many soldiers and civilians as possible in the provinces of Siem Reap, Kompong Thom, and Kompong Cham”.<sup>843</sup> These recruits were to be formed into 300 member-strong mobile units which “would one day march on Phnom Penh”.<sup>844</sup>

## **B. EXTENSIVE PREPARATIONS WERE MADE FOR THE 1977 COUP D’ÉTAT**

284. The available evidence does not merely substantiate the existence of extensive planned attacks as part of the 1977 *coup d’état*; it furthermore demonstrates that widespread preparatory acts were undertaken around the country to give effect to the plot.

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alerted all-time and turn the arterially direction to Phnom Penh”); *see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence and of key witnesses/experts and *infra*, Chapter 9 and **Annex 1** and **Annex 2**; and *supra*, Chapter 3-II-B-1, for a discussion of issues related to the Lemkin-Sambath Witnesses and the Lemkin Transcripts.

<sup>841</sup> **F2/4/3/3/6.2**, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151686 (emphasis added).

<sup>842</sup> **F2/4/3/3/6.2**, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151686 (emphases added).

<sup>843</sup> **F2/8.1.29**, Paul, Plot Details Filter Through, ERN 01141796; with regard to this document, *see also supra*, Chapter 2-II-B-3-(c), and *infra*, Chapter 9 and **Annex 1**, on the refusal to admit key evidence.

<sup>844</sup> **F2/8.1.29**, Paul, Plot Details Filter Through, ERN 01141796; *see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence and *infra*, Chapter 9 and **Annex 1**.



## 1. Sabotage and Subversion Worsened Conditions and Stirre Up Discontent

### (a) *Attempts to Sabotage Living and Working Conditions*

285. Despite the dire and unstable conditions already facing Cambodia when the CPK assumed power,<sup>845</sup> the *coup* leaders attempted to effect their plans for high treason by exacerbating the severity of those conditions through acts of sabotage and subversion, most notably in the Northwest Zone.

#### (i) “Something Wrong” in the Northwest Zone

286. As the late Ieng Thirith explained to journalist Elizabeth Becker, while touring that zone in 1976 in her capacity as the DK Minister for Social Affairs she observed living and working conditions that were contrary to CPK directives:

IT: Yes, I was travelling in order to see the conditions of the people and at the time when I came back in Phnom Penh I reported to our leaders that there was something queer in some provinces, for example in Battambang, I saw something very clear, that they make people, all people going to the rice fields, very far from the village and they have no home; and I saw they have no home and they are all ill. I reported to my leaders that. [...]

EB: Who were your leaders? Who did you report to?

IT: To the Prime Minister. That's quite queer. It is not normal. There is something wrong in this. [...]

EB: So this is 1976. Then there was a purge in 1977. [...]

IT: At the time I told my leader there is something wrong in that province because I know the directives of the Prime Minister: not young, not old people, not pregnant women, not women feeding babies and not small children, but I saw everybody there in the rice fields in open air, nothing and with the sun, very hot sun. I saw many people ill of diarrhea and malaria so I reported it to him.<sup>846</sup>

#### (ii) Initiation of an Investigation into the Northwest Zone's Conditions

287. Following Ieng Thirith's report, Pol Pot initiated an investigation, which in 1978 concluded that Ruos Nhim, in collaboration with Sao Phim, had deliberately created these conditions to foment discontent among the people:

IT: [...] Ruos Nhim was in big collusion with So Phim in order to carry out the orders of XXX (*Yvon?*) [in original] **in order to sabotage our policy and to massacre our people. So in this way they can make people rise against us** because they don't know.

<sup>845</sup> See *supra*, Chapter 3-IX-A-1-(b).

<sup>846</sup> E3/659, Transcript of Becker's 1980 Interview with Ieng Thirith, ERN 00182322 (emphases added).

People know only Pol Pot and they don't know this, they don't know. They know that this is an order of Pol Pot. They don't know that Pol Pot don't order all of them to go to the rice fields. It's to cause dissatisfaction among people.<sup>847</sup>

288. Several witnesses corroborate Ieng Thirith's account and the nature of the investigative findings. Witness Long Vun (2-TCW-971), Tram Kok District deputy commerce chairman who was transferred to the Northwest Zone in January 1978,<sup>848</sup> testified to the Chamber that he was transferred under instructions from Ta Mok "to go see what happened at the various cooperatives".<sup>849</sup> Long Vun (2-TCW-971) detailed events upon his arrival in the Northwest Zone as follows:

When I arrived, [Ta Mok] organized us to go to see what happened at the various cooperatives; first, to go to Doun Teav for a few days. And I asked what the purpose was; **he said that people there did not have rice to eat and that some people were detained there and that we had to go and see it ourselves.** [...]

289. Long Vun (2-TCW-971) explained that he discovered that the Zone had kept rice and sugar in storage, including rice kept for so long that it spoiled.<sup>850</sup> He also noted that "in some areas the people did not have sufficient food to eat".<sup>851</sup> Witness Nop Ngim (2-TCW-1002), another Southwest Zone cadre transferred to the Northwest Zone, testified that certain cadres from the Northwest Zone's "lower echelons" withheld food from the people, despite rice and unhusked rice remaining.<sup>852</sup> Lemkin-Sambath Witness Chan Savuth provided further detail, describing how Ham of the Northwest Zone (*i.e.*, the now-late witness Toat Thoeun) implemented a scheme siphoning off the rice yield by under-reporting it, such that "we gave them half and we took half from this side".<sup>853</sup>

290. The Co-Prosecutors questioned both Long Vun (2-TCW-971) and Nop Ngim (2-TCW-1002) about the exportation of rice from the Northwest Zone. This appeared to be an attempt to suggest that rice had been kept in storage for this purpose and thus under the orders of the Standing Committee as opposed to the Northwest Zone leadership, such that any ensuing starvation was the fault of the Standing Committee. However, neither witness corroborated the Co-Prosecutors' suggestion. Long Vun (2-TCW-971) was categorical that he was not aware of any such activity while he was in the Northwest Zone, explaining that "[u]pon my arrival, I did

<sup>847</sup> E3/659, Transcript of Becker's 1980 Interview with Ieng Thirith, ERN 00182322 (emphases added).

<sup>848</sup> E1/510.1, Long Vun (2-TCW-971), T. 9 Dec 2016, p. 28, lns 6-14.

<sup>849</sup> E1/510.1, Long Vun (2-TCW-971), T. 9 Dec 2016, p. 30, lns 20-21.

<sup>850</sup> E1/510.1, Long Vun (2-TCW-971), T. 9 Dec 2016, p. 31, ln. 15 to p. 33, ln. 17.

<sup>851</sup> E1/510.1, Long Vun (2-TCW-971), T. 9 Dec 2016, p. 33, ln. 25 to p. 34 ln. 1.

<sup>852</sup> E1/469.1, Nop Ngim (2-TCW-1002), T. 5 Sep 2016, p. 95, ln. 13 to p. 97, ln. 21.

<sup>853</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151705.

not witness any transportation [of rice] to any other places”,<sup>854</sup> that he “did not see any activities of transports”,<sup>855</sup> and that the Zone’s commerce office “was not the trading office selling and buying stuff. It was a mere place where a few stuff was transported to and stored. It was not to store rice.”<sup>856</sup> Nop Ngim (2-TCW-1002) confirmed that they “produced rice and [...] kept some for ourself, and some was sent away”,<sup>857</sup> but had no knowledge of any rice being sent by train from Battambang to Phnom Penh,<sup>858</sup> explaining only that while some rice was sent to the “upper echelon”, she “did not know as to which level it was sent to.”<sup>859</sup>

(iii) Nuon Chea and Pol Pot’s Personal Direction of the Investigation

291. It is also noteworthy that two witnesses identified Nuon Chea and Pol Pot as having been personally involved in initiating investigations of conditions in the Northwest Zone. Southwest Zone messenger Khoem Vai told the International Co-Investigating Judge that Nuon Chea had instructed the Southwest transferees “to take control of the situation”.<sup>860</sup> As Khoem Vai said:

When they [the Northwest Zone cadres] received supplies such as clothes and rice from the warehouse, they did not distribute them to the people, they kept them until they were old and perished. The former cadres hid the rice and gave the people gruel to eat instead. The Northwest zone was full of rice, there was no reason why the people had to eat gruel.<sup>861</sup>

292. Lemkin-Sambath Witness W4 also described attending a course led by Pol Pot in which Pol Pot assigned attendees to go to the Northwest Zone “to control and inspect the death of the people [because p]eople were killed to death and starved to death”; since “people were suffering”, it was important to Pol Pot to identify “who committed this killing”.<sup>862</sup>

(iv) Veracity of the Investigation’s Findings

293. Although there is no official documentation among the incomplete documentation on the case file that sets out the investigation’s formal findings, the evidence (and in particular, the live evidence) paints a clear picture. All witnesses who speak of investigations in the Northwest

<sup>854</sup> E1/514.1, Long Vun (2-TCW-971), T. 15 Dec 2016, p. 58, lns 18-19.

<sup>855</sup> E1/514.1, Long Vun (2-TCW-971), T. 15 Dec 2016, p. 59, lns 15-16.

<sup>856</sup> E1/514.1, Long Vun (2-TCW-971), T. 15 Dec 2016, p. 62, lns 19-22.

<sup>857</sup> E1/469.1, Nop Ngim (2-TCW-1002), T. 5 Sep 2016, p. 48, lns 11-12.

<sup>858</sup> E1/469.1, Nop Ngim (2-TCW-1002), T. 5 Sep 2016, p. 48, ln. 7.

<sup>859</sup> E1/469.1, Nop Ngim (2-TCW-1002), T. 5 Sep 2016, p. 49, lns 10-12.

<sup>860</sup> E3/10750, ‘WRI of Khoem Vai’, ERN 01207675.

<sup>861</sup> E3/10750, ‘WRI of Khoem Vai’, ERN 01207677.

<sup>862</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 4), ERN 01151802; *see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence and of key witnesses/experts and *infra*, Chapter 9 and **Annex 1** and **Annex 2**; and *supra*, Chapter 3-II-B-1, on issues related to the Lemkin-Sambath Witnesses and the Lemkin Transcripts.

Zone consistently explain that they were transferred to the Zone in order to conduct an open investigation seeking to ascertain the nature of the conditions and the reasons for such. They also suggest that there was evidence of deliberate spoiling of supplies stockpiling (of which there is also additional evidence detailed immediately below and further addressed in Part B-2). The approach taken, and in particular widespread observation and data-gathering, is moreover consistent with the CPK's approach to the first *coup d'état* and in their national defence and security policy generally – *i.e.*, a cautious and genuine investigation to ascertain the truth.<sup>863</sup> Therefore, there is no reason to doubt the veracity of the investigation's conclusion, as Ieng Thirith relayed to Elizabeth Becker, that Ruos Nhim and Sao Phim had colluded in deliberate sabotage “[s]o in this way they can make people rise against us”.<sup>864</sup>

**(b) Destruction of Supplies and Strategic Locations**

294. Indeed, consistent with the evidence mentioned immediately above of supplies being left to spoil, the evidence indicates that supplies as well as strategic locations were actively destroyed in the Northwest Zone and also the Central Zone. Son Sen had predicted this when he reported at a meeting of RAK leaders' meeting in October 1976 that “the activities of one or two enemies on the inside can wreck the strength of the Revolution. For example, they could burn down storage depots, for a start”.<sup>865</sup> Chan Savuth personally destroyed medicine supplies prior to his arrest,<sup>866</sup> and detailed how after some Northwest Zone leaders were arrested, they had their forces burn down a rice storage warehouse “because they did not want to leave it for the South Western zone. They destroyed all the rice storage”.<sup>867</sup> Likewise, Lemkin-Sambath Witness W4 testified about seeing “one rice mill [...] on fire in Battambang, the one along the road to Svay on the left hand side”.<sup>868</sup> Finally, evidence from Ben Kiernan, Ke Pauk's son Ke Pich Vannak, and Alexander Hinton also indicates that in 1977, traitorous forces destroyed an ammunition and arms depot<sup>869</sup> and detonated mines at a prison<sup>870</sup> in Kampong Cham city in the Central Zone.

<sup>863</sup> See *supra*, Chapter 3-V-B concerning the CPK's approach to the Siem Reap explosion and Phnom Penh bombing; see also *infra*, Chapter 4-II-C-2, concerning the proper and genuine investigative methods employed as part of the CPK's nationwide defence and security policy.

<sup>864</sup> E3/659, Transcript of Becker's 1980 Interview with Ieng Thirith, ERN 00182322.

<sup>865</sup> E3/13, All Divisions Meeting, 9 Oct 1976, ERN 00940346.

<sup>866</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151696.

<sup>867</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151697.

<sup>868</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 4), ERN 01151818.

<sup>869</sup> E3/1593, Kiernan, Pol Pot Regime, ERN 01150166 (citing an intelligence debrief with a CPK defector); see also E3/35, 'WRI of Ke Pich Vannak', ERN 00346161; E3/3346, Hinton, Why Did They Kill?, ERN 00431483.

<sup>870</sup> E3/3346, Hinton, Why Did They Kill?, ERN 00431483.

**(c) Other Forms of Subversion Perpetrated**

295. Furthermore, according to Chan Savuth, Ruos Nhim capitalised on the conditions he created by waging “psychological war”, complaining to the people about conditions including the insufficiency of rice and water and the absence of money and markets in order to persuade them to “come to our side”.<sup>871</sup> Ruos Nhim eventually escalated the psychological warfare – as Northwest Zone guard Lat Suoy described it to DC-Cam and confirmed to the Chamber – when he printed and began using a new form of currency in the Northwest Zone, including to pay salaries.<sup>872</sup> Ruos Nhim also had forces stage fake clashes at the Dangrek Mountains in Autonomous Sector 106 along the Thai border, so as to create the impression that their troops were occupied in battles with defectors.<sup>873</sup> As Chan Savuth relayed, their forces fired cannon and threw bombs at that location, but “did not fire at anything ... just into the air”, before communicating reports of shots fired to the “higher level”.<sup>874</sup> This ploy was to avoid having the forces deployed to the eastern front to fight Vietnam and instead remain in place, ready to be deployed for Ruos Nhim’s plan to “fight here [...] to fight and demand [...] our land by Battambang and Moug”.<sup>875</sup> Indeed, according to Phin Sin, a deputy company commander from Autonomous Sector 106, traitorous leaders also issued orders there for forces to stop planting mines and sharp sticks along the Thai border, presumably in disregard of an RAK order.<sup>876</sup>

296. There is also evidence to suggest that CPK and RAK cadres were defying orders even while formally remaining part of those structures. For example, according to Heng Samrin, “we suspected their activities and [unclear Khmer words] resisted their [unclear Khmer words] measures starting from 1976 when we knew Pol Pot was a traitor.”<sup>877</sup> One such measure appears to have been the order to defend the country against Vietnam-initiated armed conflict: a biography of Hun Sen which Vietnamese intelligence forces produced and which originated from the East German “Stasi” archives suggests that in June 1977, he refused to carry out an order to engage in combat with Vietnam.<sup>878</sup> There are also extensive reports of deviations from correct party policy in a wide range of other locations within the sphere of influence of

<sup>871</sup> **F2/4/3/3/6.2**, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151786.

<sup>872</sup> **E3/9060**, ‘DC-Cam Interview of Lat Suoy’, ERN 00728739; **E1/329.1**, Lat Suoy, T. 12 Aug 2015, p. 66, ln. 9.

<sup>873</sup> **F2/4/3/3/6.2**, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151686.

<sup>874</sup> **F2/4/3/3/6.2**, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151686.

<sup>875</sup> **F2/4/3/3/6.2**, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151686.

<sup>876</sup> **F2/8.1.29**, Paul, Plot Details Filter Through, ERN 01141796; *see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and **Annex 1**.

<sup>877</sup> **E3/1568**, Kiernan Interview with Heng Samrin and Chea Sim, ERN 00651896.

<sup>878</sup> **E3/9720**, Stasi Biographies, ERN 01206275.

Vietnam's collaborators. including Phnom Penh (in Division 310's area of control);<sup>879</sup> Kampong Thom in the North Zone;<sup>880</sup> Preah Vihear in Autonomous Sector 106;<sup>881</sup> and, of course, the Northwest Zone.<sup>882</sup> Many such incidents are discussed at various junctures throughout this Brief.

## 2. Extensive Stockpiling Was Undertaken in Systematic Preparation for the Attacks

297. The available evidence reveals that from 1975 onwards, Vietnam's collaborators prepared to effect the 1977 *coup d'état* through widespread stockpiling of a wide range of supplies all throughout the country, including military materiel, rice, sugar, and fish.

### (a) Gathering of Wide-Ranging Military Materiel

298. A telling sign of the Vietnamese collaborators' intentions is the wide range of military materiel they stockpiled. Division 310 company commander Sem Hoeurn and combatant Suoy Sao both confirmed to the Chamber that they had personally transported weapons as part of the division's preparations for a *coup d'état*. Sem Hoeurn testified that one month prior to Oeun's arrest (likely early 1977), he acted under Oeun's orders and led a 36-member platoon<sup>883</sup> to transport six 10-wheel CMC trucks "full" of weapons including "M-79[s], AK rifles and Pekin"<sup>884</sup> from Division 310's Wat Phnom office "to the East Zone [...] to Kampong Cham [to be] kept in Sector 31 [...] by] Tol, the chief of the sector".<sup>885</sup> While Sem Hoeurn referred to Sector 31, it was clear that he meant the sector that was identified as "Sector 42" in the Closing Order, which indeed covered areas in Kampong Cham in the Central (old North) Zone that closely bordered the areas in Kampong Cham in the East Zone, and the chief of which was indeed named Tol.<sup>886</sup> There is evidence indicating that Sector 42's former code number was 31 and that Tol was its secretary both during the time when it was called Sector 31 and after its code number was changed to 42.<sup>887</sup> Given that Sem Hoeurn left the sector with his North zone

<sup>879</sup> E3/7523, 'DC-Cam Interview of Sem Om', ERN 00875555, 000875570-71; E3/2073, 'DC-Cam Interview of Sau Ren', ERN 00876429.

<sup>880</sup> E3/4202, Chon and Sambath, Behind the Killing Fields, ERN 00757529.

<sup>881</sup> E3/4202, Chon and Sambath, Behind the Killing Fields, ERN 00757528.

<sup>882</sup> E3/4202, Chon and Sambath, Behind the Killing Fields, ERN 00757528.

<sup>883</sup> E1/319.1, Sem Hoeurn, T. 22 Jun 2015, p. 77, lns 1-2, p. 79, lns 3-8, p. 85, lns 4-6.

<sup>884</sup> E1/319.1, Sem Hoeurn, T. 22 Jun 2015, p. 78, lns 15-23.

<sup>885</sup> E1/319.1, Sem Hoeurn, T. 22 Jun 2015, p. 85, lns 4-6 ; E1/320.1, Sem Hoeurn, T. 23 Jun 2015, p. 18, lns 9-21.

<sup>886</sup> E1/353.1, Ban Seak, 5 Oct 2015, p. 19, lns 2-14; E1/310.1, SOU Soeurn, 4 Jun 2015, p. 14, ln. 3 to p. 15, ln. 14; E3/35, 'WRI of Ke Pick Vannak', ERN 00346149-50.

<sup>887</sup> E3/3962, 'WRI of Khoem Samhuon', ERN 00293364; ; E3/2782, Ke Pauk's Autobiography, ERN 00089713 ("Region 42 comprising of Tang Kok, Baray, Stung Trang, Chamkar Leu and Prek Prasap Districts"); E3/8727, List of North Zone Appointments 1963-Early 1977, ERN 01236371-72 ("From 1973 to 1975 [...] Sector 31 [...] covered Batheay District, Chamkar Leu District, Tang Kouk District, Stung Trang District, and Preaek Prasab District. The sector committee members included [...] Comrade Tol, the sector secretary"), 01236376-77 ("From

forces before the liberation of Phnom Penh and was stationed in Phnom Penh after its liberation, it is understandable that he and Oeun would only have known the sector under its old cold number – 31 – which was changed to 42 after April 1975.<sup>888</sup>

299. Likewise, Suoy Sao confirmed that in 1977,<sup>889</sup> he transported a truck full of weapons included AK rifles<sup>890</sup> within Phnom Penh.<sup>891</sup> In addition, Division 310 company commander Keo Loeur testified to the Chamber that he saw a truck loaded with weapons “[come] from the north direction”<sup>892</sup> and stop “near the front of the Calmette hospital”,<sup>893</sup> which is located north of Wat Phnom. He also testified about attending a meeting “north of Wat Phnom”<sup>894</sup> where he heard Oeun and “senior cadres speaking among themselves that the weapons had been brought in to Phnom Penh”.<sup>895</sup> Division 310 company commander Thach Siek – who the Chamber refused to summons<sup>896</sup> as a Defence witness<sup>897</sup> – confirmed that troops had been ordered to “prepare artillery and small arms to attack”.<sup>898</sup> Combatant Khorn Brak confirmed that Division 310 had prepared to command tank, marine, and aircraft capacity, and that “we had each drawn and were holding our weapons [... a]nd we had already taken the troops to get ready”.<sup>899</sup> Finally, Division 310 combatant Vung Vei – yet another Defence witness<sup>900</sup> the Chamber refused to call<sup>901</sup> – advised DC-Cam, when asked about Oeun and Koy Thuon’s plans, that “[t]hey were planning a rebellion [and] I saw some people holding cannons and rifles”.<sup>902</sup>

300. Similar activities were underway in the Northwest Zone. Lemkin-Sambath Witness Toat Thoeun, Ruos Nhim’s foster or biological son,<sup>903</sup> testified to the Supreme Court Chamber, the International Co-Investigating Judge, and Lemkin and Sambath how, under Ruos Nhim’s

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April 1975 to February 1977 [...] Sector 42 [...] covered Preaek Prasab District, Stueng Trang District, Chamkar Leu District, Baray District, and Tang Kouk District. The sector committee members included: [...] Comrade Tol was the sector secretary”).

<sup>888</sup> **E3/8727**, List of North Zone Appointments 1963-Early 1977, ERN 01236371-72, 01236376-77.

<sup>889</sup> **E3/7535**, ‘DC-Cam Interview of Suoy Sao’, ERN 00324168-69.

<sup>890</sup> **E3/7535**, ‘DC-Cam Interview of Suoy Sao’, ERN 00324174.

<sup>891</sup> **E1/460.1**, Suoy Sao, T. 18 Aug 2016, p. 14, ln. 23 to p. 17, ln. 5.

<sup>892</sup> **E1/317.1**, Keo Loeur, T. 16 Jun 2015, p. 11, ln. 2.

<sup>893</sup> **E1/317.1**, Keo Loeur, T. 16 Jun 2015, p. 10, lns 10-13.

<sup>894</sup> **E1/316.1**, Keo Loeur, T. 15 Jun 2015, p. 35, ln. 5.

<sup>895</sup> **E1/316.1**, Keo Loeur, T. 15 Jun 2015, p. 35, ln. 24 to p. 36, ln. 1.

<sup>896</sup> **E443/10**, Reasoned Decision on Key Defence Witnesses, para. 36; *see also supra*, Chapter 2-II-B-3-(c), on the refusal to call key witnesses, and *infra*, Chapter 9 and **Annex 2**.

<sup>897</sup> **E391**, Nuon Chea’s Division 310 Witnesses Request, paras 12-14, 23-25, 36(a).

<sup>898</sup> **E3/7540**, ‘DC-Cam Interview of Thach Siek’, ERN 00337713.

<sup>899</sup> **E3/7584**, ‘DC-Cam Interview of Khorn Brak’, ERN 00183541-42; *see supra*, Chapter 3-VI-A-1-(a).

<sup>900</sup> **E391**, Nuon Chea’s Division 310 Witnesses Request, paras 17-18, 23-25, 36(a).

<sup>901</sup> **E443/10**, Reasoned Decision on Key Defence Witnesses, para. 36; *see also supra*, Chapter 2-II-B-3-(c), on the refusal to call key witnesses, and *infra*, Chapter 9 and **Annex 2**.

<sup>902</sup> **E3/5686**, ‘DC-Cam Interview of Vung Vei’, ERN 00874669.

<sup>903</sup> **F1/3.1**, Toat Thoeun, T. 6 Jul 2015, p. 7, ln. 11 to p. 8, ln. 8 (adoptive son); *cf.* **E3/10665**, Lemkin-Sambath Transcripts (Toat Thoeun), ERN 01156802 (biological son).

orders, he built a weapons cache concealed within a bamboo forest at Thmar Prus village near Veay Chap Mountain in Battambang.<sup>904</sup> In this cache, he secured 20,000 weapons of various kinds that Northwest Zone forces had seized from Khmer Republic soldiers in the civil war.<sup>905</sup> Similarly, Lat Suoy described how Northwest Zone forces had hidden weapons in the forest in anticipation of the arrival of Southwest forces.<sup>906</sup> Chan Savuth also described seeing convoys transporting guns, and the stockpiling of tanks, personnel carriers, trucks, artillery, small arms, ammunition, and petrol<sup>907</sup> at Thmar Pouk district in Banteay Meanchey and at the Dangrek Mountain in Autonomous Sector 106, including by burying them in trenches.<sup>908</sup> However, Chan Savuth added that as a doctor, he was not allowed to enter the ammunition caches.<sup>909</sup>

301. Two Northwest Zone cadres testified to the Chamber about new uniforms being distributed in the zone. Chhorn Vorn (2-TCW-1036) explained that he escorted Ruos Nhim to Phnom Den Mountain near the Vietnamese border (in the Southwest Zone) “probably [in] 1977 [...] in the later part of the year” to take delivery of “blueish” Vietnamese uniforms.<sup>910</sup> In his WRI, he added that he guarded Ruos Nhim while “transporting [those] military uniforms from Phnum Den Mountain to Ampil P rahaong and Sisophon”, which were Ruos Nhim’s “house and office” and “military base”.<sup>911</sup> Although Chhorn Vorn (2-TCW-1036) could not recall the uniforms’ destinations in court, given his explanation that he was nervous and “forgetting a lot these days”,<sup>912</sup> and his recall of other details, it is appropriate to rely on his WRI on this point.

302. Trapeang Thma Dam mobile unit chief Mun Mot (2-TCW-996) corroborates Chhorn Vorn’s (2-TCW-1036’s) testimony on uniforms. Mun Mot (2-TCW-996) testified to DC-Cam and the Chamber that he attended a meeting led by Ta Val of the Trapeang Thma Dam to discuss plans for rebellion, during which Ta Val distributed scarves, white shirts, and nice “Eastern Zone” sandals to the assembled mobile unit members.<sup>913</sup> Witness Khoem Vai confirmed the

<sup>904</sup> **E3/10665**, Lemkin-Sambath Transcripts (Toat Thoeun), ERN 01156802-03; **E3/9610**, ‘WRI of Toat Thoeun’, ERN 00974021; **F1/3.1**, Toat Thoeun, T. 6 Jul 2015, p. 24, ln. 2 to p. 26, ln. 2.

<sup>905</sup> **E3/10665**, Lemkin-Sambath Transcripts (Toat Thoeun), ERN 01156802-03; **E3/9610**, ‘WRI of Toat Thoeun’, ERN 00974021; **F1/3.1**, Toat Thoeun, T. 6 Jul 2015, p. 24, ln. 2 to p. 26, ln. 2.

<sup>906</sup> **E1/329.1**, Lat Suoy, T. 12 Aug 2015, p. 64, lns 6-7.

<sup>907</sup> **F2/4/3/3/6.2**, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01161689-90, 01151692, 01151703, 01151792.

<sup>908</sup> **F2/4/3/3/6.2**, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151703.

<sup>909</sup> **F2/4/3/3/6.2**, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151692.

<sup>910</sup> **E1/478.1**, Chhorn Vorn (2-TCW-1036), T. 21 Sep 2016, p. 73, ln. 8 to p. 78, ln. 15; **E3/9581**, ‘WRI of Chhorn Vorn (2-TCW-1036)’, ERN 00970079-80.

<sup>911</sup> **E3/9581**, ‘WRI of Chhorn Vorn [2-TCW-1036]’, ERN 00970080.

<sup>912</sup> **E1/478.1**, Chhorn Vorn (2-TCW-1036), T. 21 Sep 2016, p. 73, lns 15-21, p. 80, lns 12-16.

<sup>913</sup> **E1/356.1**, Mun Mot (2-TCW-996), T. 26 Oct 2015, p. 55, ln. 25 to p. 61, ln. 1; **E3/9076**, ‘DC-Cam Interview of Mun Mot (2-TCW-996)’, ERN 00731172.



stockpiling of clothes in the Northwest Zone,<sup>914</sup> while Chan Savuth also describes the stockpiling of clothes, caps, and hammocks,<sup>915</sup> and described how he – as a doctor – had a warehouse full of medical supplies in preparation for war,<sup>916</sup> with enough there for a regiment to wage war for a year.<sup>917</sup> Finally, witness Long Vun (2-TCW-971) also explained that he had discovered cloth stored in a warehouse<sup>918</sup> – along with foodstuffs, as set out immediately below.

**(b) Stockpiling of Rice, Sugar, and Fish**

303. Division 310 company commander Keo Loeur testified to the Chamber that his disabled soldiers unit participated in “packaging food in order for [Division 310 forces] to overthrow the DK regime”<sup>919</sup> and that this food was stored at his unit’s location “north of Pochentong Airport”.<sup>920</sup> Similarly, a 21 May 1977 report from Northwest Zone Sector 5 committee reported that food stockpiles were discovered in Phnom Srok, Preah Netr Preah, Thma Puok, and Sisophon districts<sup>921</sup> in what is present-day Banteay Meanchey – including at least one district in which it was reported that food supplies had run out a month earlier.<sup>922</sup> Witness Long Vun (2-TCW-971) also confirmed to the Chamber that the Northwest Zone had stockpiled rice, sugar, and dried fish;<sup>923</sup> witness Khoem Vai also reported rice stockpiling in the zone;<sup>924</sup> and Chan Savuth provided supplementary details in this regard, noting that rice was stored in warehouses in Moung, Salapar, Thmor Koul, Thmar Pouk, and throughout Battambang.<sup>925</sup> He also witnessed approximately 10 convoys a week travelling westward at Thmar Pouk district in northern Banteay Meanchey, transporting not only milled rice but also dried fish.<sup>926</sup>

**3. Meetings and Recruitment Drives Were Held to Build Up Forces for the Attacks**

304. Another step in the preparations for the 1977 *coup d'état* was the efforts of Vietnam’s collaborators to hold clandestine meetings and disseminate plans for the attacks, particularly

<sup>914</sup> E3/10750, ‘WRI of Khoem Vai’, ERN 01207677.

<sup>915</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151689-90, 01151699.

<sup>916</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151691.

<sup>917</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151698.

<sup>918</sup> E1/514.1, Long Vun (2-TCW-971), T. 15 Dec 2016, p. 38, ln. 15, p. 40, ln. 13.

<sup>919</sup> E1/316.1, Keo Loeur, T. 15 Jun 2015, p. 33, lns 15-17; *see also* E1/317.1, Keo Loeur, T. 16 Jun 2015, p. 12, lns 12-14.

<sup>920</sup> E1/317.1, Keo Loeur, T. 16 Jun 2015, p. 12, ln. 7.

<sup>921</sup> E3/178, Sector 5 Weekly Report, 21 May 1977, ERN 00342708.

<sup>922</sup> E3/178, Sector 5 Weekly Report, 21 May 1977, ERN 00342721 (describing that in Phnom Srok district, “the food was gone since mid April”).

<sup>923</sup> E1/510.1, Long Vun (2-TCW-971), T. 9 Dec 2016, p. 31, ln. 15 to p. 33, ln. 17; E1/514.1, Long Vun (2-TCW-971), T. 15 Dec 2016, p. 38, lns 1-19, p. 40, lns 12-13.

<sup>924</sup> E3/10750, ‘WRI of Khoem Vai’, ERN 01207677.

<sup>925</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151704-05.

<sup>926</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151792.

through the recruitment of traitorous forces. These efforts were associated with both the attack planned on Phnom Penh and one planned nationwide.

305. Without a doubt the most striking meeting is the May 1975 meeting held in Phnom Penh, already introduced above in Section IV, at which it is reported that key collaborators of Vietnam, including Sao Phim, Ruos Nhim, Chan Chakrei and Suos Neou *alias* Chhouk cemented the rebellion plans in general.<sup>927</sup> Four former members of Division 310 also describe attending clandestine meetings led by Oeun and other Division commanders to brief them on rebellious plans at various locations around Phnom Penh, including one attended by “the entire division [... to the] north of Wat Phnom”;<sup>928</sup> one attended by “around 500 people [...] to the south of Preah Keat Mealea Hospital”;<sup>929</sup> one at Wat Phnom attended by the combatants of an entire battalion;<sup>930</sup> one in Phnom Penh to discuss establishing an “assault force” of around 100 combatants to attack Pol Pot;<sup>931</sup> and one at Boeng Prayap discussing a planned attack on “the Pol Pot garrison”.<sup>932</sup> Sem Hoern also testified that he was aware “the commanders of North Zone and East Zone had the meetings but in locations I did not know.”<sup>933</sup> Furthermore, both Sem Hoern and rejected Defence witness Sau Ren indicate that not only did Division 310 chief Oeun actively recruit people to the traitorous cause, but that he organised these recruits into the *Khmer Sar* (or White Khmer) movement.<sup>934</sup> In addition to these accounts, Nob Hat explained that the plan was to be shrouded in the utmost secrecy, since “they said that if the plan was disclosed, they would kill us. They would kill the people who disclosed the plan.”<sup>935</sup>

306. There is also evidence of meetings in the Northwest Zone in late 1976. In particular, Chan Savuth described attending a secret meeting in the forest approximately one kilometre from Treng market in Battambang attended by Ruos Nhim, Vorn Vet, and approximately 100 high-ranking officials from regiments, battalions, and divisions, including both division heads Chhuon and Ren.<sup>936</sup> During the meeting, Ruos Nhim described the “secret plan” and advised participants to be “absolutely careful”.<sup>937</sup> Vorn Vet confirmed Ruos Nhim’s plan and said that

<sup>927</sup> See *supra*, Chapter 3-IV-D.

<sup>928</sup> E1/316.1, Keo Loeur, T. 15 Jun 2015, p. 34, ln. 20, p. 35, ln. 5.

<sup>929</sup> E1/319.1, Sem Hoern, T. 22 Jun 2015, p. 83, ln. 19, p. 84, lns 6-8.

<sup>930</sup> E3/509, ‘WRI of Khorn Brak’, ERN 00282217.

<sup>931</sup> E3/7535, ‘DC-Cam Interview of Suoy Sao’, ERN 00324171-73; E1/460.1, Suoy Sao, T. 18 Aug 2016, p. 14, ln. 10 to p. 17, ln. 5, p. 51, ln. 4.

<sup>932</sup> E3/7583, ‘DC-Cam Interview of Khoem Samhuon’, ERN 00876558-59.

<sup>933</sup> E1/319.1, Sem Hoern, T. 22 Jun 2015, p. 84, lns 23-25.

<sup>934</sup> This movement is discussed in more detail *infra*, in Chapter 5-II-C-1-(c), on measures being taken against the Cham because of unlawful activity, and Chapter 3-IV-D and Chapter 3-V-A.

<sup>935</sup> E3/5641, ‘DC-Cam Interview of Nob Hat’, ERN 00881784.

<sup>936</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151695, 01151689.

<sup>937</sup> F2/4/3/3/6.2, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151797.

they would be able to ask for help from a neighbouring country but would not divulge its identity as “we would all die if it were not in secret”.<sup>938</sup> Chan Savuth’s vivid recall of details of this meeting, including that participants parked between 500 metres and one kilometre away; that they were told that they were attending a study course; and that they were disarmed,<sup>939</sup> supports the veracity of his evidence in this regard. It is also corroborated by other witness evidence available to the Chamber. As Mun Mot (2-TCW-996) testified,<sup>940</sup> he attended a meeting at which Ta Val of the Trapeang Thma Dam announced to members of the dam’s mobile units that they were all captains, presumably within the traitorous forces.<sup>941</sup>

307. Finally, recruitment efforts were at the same time strenuously underway throughout the Northwest Zone. Lat Suoy told the Chamber how armed Northwest Zone forces fled to the forest to await the arrival of those from the Southwest Zone, although they were ultimately lured out.<sup>942</sup> Chan Savuth said that Northwest Zone division heads Ren and Chhuon were put in charge of recruitment, and that Chhuon did recruit up to 30,000 troops from among both locals and “new people” in mobile work brigades in Phnom Srok and Battambang.<sup>943</sup>

### **C. FOLLOWING CPK MONITORING AND INVESTIGATIONS, BOTH THE PHNOM PENH ATTACK AND THE NATIONWIDE ATTACK WERE ULTIMATELY FOILED**

308. However, despite meticulous and widespread planning and preparation, ‘Plan A’ Phase II was gradually thwarted. For Division 310 and the North Zone, one Division 310 member, Nob Hat, explained that “Oeun was tracked for two or three months [before finally, he was arrested”,<sup>944</sup> while the lengthy process of arresting Koy Thuon has already been described above.<sup>945</sup> There is also evidence that the CPK had already learned of treason afoot in Autonomous Region 106 from as early as September 1976, with arrests beginning from January 1977.<sup>946</sup> As for the Northwest Zone, it has already been detailed above how the

<sup>938</sup> **F2/4/3/3/6.2**, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151687.

<sup>939</sup> **F2/4/3/3/6.2**, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151689.

<sup>940</sup> *See supra*, Chapter 3-VI-B-2.

<sup>941</sup> **E1/356.1**, Mun Mot (2-TCW-996), T. 26 Oct 2015, p. 44, ln. 10 to p. 46, ln. 4; **E3/9076**, ‘DC-Cam Interview of Mun Mut (2-TCW-996)’, ERN 00731172.

<sup>942</sup> **E1/329.1**, Lat Suoy, T. 12 Aug 2015, p. 62, ln. 15 to p. 64, ln. 7.

<sup>943</sup> **F2/4/3/3/6.2**, Lemkin-Sambath Transcripts (Witness 3) [Chan Savuth], ERN 01151689, 01151695, 01151699, 01151793.

<sup>944</sup> **E3/5641**, ‘DC-Cam Interview of Nob Hat’, ERN 00881782.

<sup>945</sup> *See supra*, Chapter 3-V-B.

<sup>946</sup> **F2/8.1.29**, Paul, Plot Details Filter Through, ERN 01141796; *see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and **Annex 1**.

CPK learned of the treasonous plans in 1977 and in early 1978, following their investigation into the living and working conditions there.<sup>947</sup>

309. Numerous witnesses describe arrests of the *coup* leaders, including in Division 310,<sup>948</sup> Autonomous Region 106,<sup>949</sup> and the Northwest Zone.<sup>950</sup> Given the gravity of the planned 1977 *coup d'état*, which contemplated commission of high treason, the CPK was justified in arresting, detaining, and indeed also executing the *coup* leaders.<sup>951</sup> Nevertheless, even in the fact of this most existential of threats, the available evidence shows that the Standing Committee demonstrated considerable caution and restraint – most notably through carrying out extensive investigations as discussed above. Furthermore, despite various suspects' statements consistently implicating Sao Phim and Ruos Nhim in the plot, and evidence (described above) of East Zone involvement in the treasonous activities,<sup>952</sup> no significant arrests were undertaken in the East Zone in association with the 1977 *coup d'état*. In addition, several witnesses testify that after the discovery of the plot, they were simply transferred to perform alternate military duties, such as farming and working in mobile units<sup>953</sup> or assisting in the construction of the secret military airfield at Kampong Chhnang,<sup>954</sup> while three witnesses reported that they suffered no consequences at all.<sup>955</sup> Witnesses also report that there was a clear

<sup>947</sup> See *supra*, Chapter 3-VI-B-1.

<sup>948</sup> See e.g. **E1/319.1**, Sem Hoern, T. 22 Jun 2015, p. 76, ln. 21 to p. 77, ln. 25, p. 81, lns 11-22; **E3/7516**, 'DC-Cam Interview of Sem Hoern', ERN 00876506; **E1/316.1**, Keo Loeur, T. 15 Jun 2015, p. 36, ln. 22 to p. 37, ln. 2; **E1/477.1**, Sem Om, T. 20 Sep 2015, p. 43, ln. 25 to p. 44, ln. 22; **E3/7535**, 'DC-Cam Interview of Suoy Sao', ERN 00324175; **E3/7540**, 'DC-Cam Interview of Thach Siek', ERN 00337713-14; **E3/5686**, 'DC-Cam Interview of Vung Vei', ERN 00874669; **E3/7583**, 'DC-Cam Interview of Khoem Samhuon', ERN 00876557-58; **E3/5641**, 'DC-Cam Interview of Nob Hat', ERN 00881779, 00881781-83.

<sup>949</sup> **F2/8.1.29**, Paul, Plot Details Filter Through, ERN 01141796; see also *supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and **Annex 1**.

<sup>950</sup> **E1/478.1**, Chhorn Vorn (2-TCW-1036), T. 21 Sep 2016, p. 63, ln. 6 to p. 64, ln. 22; **E3/9581**, 'WRI of Chhorn Vorn (2-TCW-1036)', ERN 00970080-83; **E1/356.1**, Mun Mot (T-TCW-996), T. 26 Oct 2015, p. 43, ln. 7 to p. 46, ln. 4; **E3/9076**, 'DC-Cam Interview of Mun Mut (2-TCW-996)', ERN 00731172-73; **E1/484.1**, Huon Choeum (2-TCW-1037), T. 17 Oct 2016, p. 66, ln. 1 to p. 70, ln. 19; **E1/329.1**, Lat Suoy, T. 12 Aug 2015, p. 63, lns 21-25; **E3/9060**, 'DC-Cam Interview of Lat Suoy', ERN 00728736; **F2/4/3/3/6.2**, Lemkin-Sambath Transcripts (Witness 1), ERN 01151689-90, 01151694 (Chan Savuth); **E3/9579**, 'WRI of Samey Saveng', ERN 00970464, 00970468; **E3/8991**, 'DC-Cam Interview of Bou Mao', ERN 00969893.

<sup>951</sup> See *infra*, Chapter 4-II, on the CPK's legitimate and lawful nationwide defence and security policy.

<sup>952</sup> See e.g. **E3/9**, Short, History of a Nightmare, ERN 00396566.

<sup>953</sup> **E1/316.1**, Keo Loeur, T. 15 Jun 2015, p. 54, lns 9-11; **E1/477.1**, Sem Om, T. 20 Sep 2015, p. 85, ln. 24 to p. 86, ln. 6; **E3/7535**, 'DC-Cam Interview of Suoy Sao', ERN 00324168; **E3/7583**, 'DC-Cam Interview of Khoem Samhuon', ERN 00876560.

<sup>954</sup> **E1/318.1**, Sem Hoern, T. 17 Jun 2015, p. 32, lns 5-20; **E1/316.1**, Keo Loeur, T. 15 Jun 2015, p. 11, ln. 16 to p. 16, ln. 15; **E3/5641**, 'DC-Cam Interview of Nob Hat', ERN 00881785-86; see also *infra*, Chapter 6-V, for more detail about the Kampong Chhnang Airfield Construction Site.

<sup>955</sup> **E3/509**, 'WRI of Khorn Brak', ERN 00282217; **E3/5686**, 'DC-Cam Interview of Vung Vei', ERN 00874661; **E3/9076**, 'DC-Cam Interview of Mun Mut (2-TCW-996)', ERN 00731173.

distinction in treatment between the leaders of the *coup* and their subordinates: while the leaders were arrested, the subordinates were assured that they were not considered traitors.<sup>956</sup>

#### **D. CONCLUSION ON ‘PLAN A’S’ SECOND PHASE: THE 1977 *COUP D’ÉTAT***

310. Taken together, the evidence outlined in the present Part incontrovertibly substantiates that throughout 1977 (and slightly before and afterward), a *coup d’état* was being planned and concretely prepared for, if not attempted, nationwide. The evidence detailed in this Section paints a wholly different picture to the ‘accepted truth’, encapsulated by Philip Short in his testimony in Case 002/01, that “it would not have been possible for Zone commanders to act against or outside the broad policy consensus which had been laid down by the Centre”.<sup>957</sup> Quite the contrary; the evidence shows that Vietnam’s collaborators leading several Zones and an Autonomous Sector acted wholly independently of Nuon Chea and at diametrically-opposed purposes to the CPK, its legitimate and lawful policies, and the good of the people. They sought to violently overthrow the CPK and the legitimate DK government through dual-pronged attacks on Phnom Penh and nationwide – a plan that contemplated Vietnamese intervention if required. The Party’s reaction to these not only unlawful but treasonous activities was both proportionate and lawful.

#### **VII. ‘PLAN A’S’ THIRD AND FINAL PHASE: THE 1978 *COUP D’ÉTAT***

311. During the last months of 1977, as further investigations into the Northwest Zone commenced and the 1977 *coup d’état* finally began to falter, Vietnam’s collaborators decided to up the ante. As is very well-known, their efforts culminated in an attempted *coup d’état* beginning on 25 May 1978 in the East Zone and ending dramatically with Sao Phim’s suicide on 3 June 1978.

312. Of all aspects of ‘Plan A’, this 1978 *coup* is the most well-known and most reframed by the Manichean narrative. Thus, the focus of this Section is to recapitulate the events of the *coup* by simultaneously correcting three aspects of the historical record. Part A shows that unlike the

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<sup>956</sup> **E3/3960**, ‘DC-Cam Interview of Kung Kim’, ERN 00633883-84; **E3/3959**, ‘WRI of Kung Kim’, ERN 00278684, “Ta Phan (from the Southwest), held a meeting and told us that my commander Ta Ouen had betrayed Angkar and had prepared a coup that I learned about this. But he told us that we, the subordinates, had committed no offense, and we would be spared. Later, they sent us to construct the Kampong Chhnang Airfield.”; **E3/5641**, ‘DC-Cam Interview of Nob Hat’, ERN 00881790; **E3/7523**, ‘DC-Cam Interview of Sem Om’, ERN 00875576 (Division 310 commander Oeun was arrested but his couriers who were with him at the time of the arrest were released), 00875568 (Division 310 soldiers sent to work in the rice field at Kab Srov after Oeun’s arrest were told that they were considered good people).

<sup>957</sup> **E1/191.1**, Philip Short, T. 8 May 2013, p. 142, lns 11-13.

perception that the 1978 *coup* was the admirable but futile final stand of a band of freedom fighters against a monstrous regime, it was in fact a calculated plan by central collaborators of Vietnam that had overt sponsorship from Vietnam from the start. Part B explains that unlike the Manichean ‘accepted truth’ that *coup* leader Sao Phim was hapless and indecisive, he was in fact a fearsome warlord. Finally, Part C counters the perception that this was a spontaneous uprising and instead outlines the careful planning and preparation taken to effect the *coup*.

**A. THE 1978 COUP D’ÉTAT WAS SPONSORED BY VIETNAM AS PART OF ITS EFFORT TO ACHIEVE THE INDOCHINESE FEDERATION THROUGH INTERNAL MEANS**

313. In order to understand the nature of the 1978 *coup d’état*, it is important to put it in wider context. As noted in Section III above regarding the nature of the existential threat Vietnam posed to the DK, Vietnam sought to achieve its Indochinese Federation dream through both internal means (‘Plan A’) and its own simultaneous external efforts (‘Plan B’). In late 1977, while the 1977 *coup d’état* efforts were beginning to stumble, Vietnam launched its first full-scale invasion into the DK as part of its efforts in ‘Plan B’. It began its offensive in late October 1977,<sup>958</sup> ramped up in November 1977 and had 50,000 Vietnamese troops invade DK territory by mid-December 1977, cold-bloodedly executing many RAK soldiers.<sup>959</sup> This blatant violation of DK’s sovereignty and territorial integrity – not to mention international law – led the CPK to publicly announce its decision to sever diplomatic relations with Vietnam on 31 December 1977.<sup>960</sup>

314. Vietnam’s invasion, like past offensives, was a carefully-orchestrated provocation designed to manipulate public opinion and offer Vietnam strategic cover for its efforts to absorb DK into an Indochinese Federation. This is apparent in the fact that despite Vietnam publicly counter-claiming that it had “at all times respected the independence, sovereignty, territorial integrity and freedom of other countries” and sought to “solve the border issue [with DK] in a spirit of brotherly friendship”,<sup>961</sup> a confidential 3 January 1978 report from Vietnam’s ally East Germany revealed that Vietnam was at that very moment setting the wheels of ‘Plan A’ in motion. According to that report, Vietnam was then “striving for a solution of the kind that

<sup>958</sup> E3/1684, Chandler, Voices From S-21, ERN 00192750.

<sup>959</sup> E3/9, Short, Pol Pot, ERN 00396585.

<sup>960</sup> E3/8305, ‘Foreign Ministry Statement on Severing Ties with SRV’, 31 Dec 1977, ERN 00169517; *see also* E3/8182, Washington Post, Cambodia Cuts Diplomatic Ties with Vietnam, ERN 00166127.

<sup>961</sup> E3/10605, East Germany Report on Cambodia-Vietnam Relations 1977-1979, ERN 01184553, 01184557; *see also* E3/4604, Flag, Apr 1978, ERN 00519838-40; E3/8304, FBIS Report 3 Jan 1978, ERN 00166068.

would enable the remaining Patriotic Forces of Kampuchea to seize the initiative and wrest power from Pol Pot and his followers.”<sup>962</sup>

315. Nayan Chanda, a Defence expert witness who the Chamber unreasonably refused to make greater efforts to summons,<sup>963</sup> also reported that according to “Hanoi sources”, the Vietnamese Communist Party’s Central Committee had decided in a “momentous series of meetings in the outskirts of Ho Chi Minh City” held “at the police training school of the fallen Thieu regime”<sup>964</sup> in February 1978 that it would back a *coup d’état* led by Sao Phim,<sup>965</sup> the CPK founding member,<sup>966</sup> Standing Committee member, First Deputy Chairman of the DK State Presidium<sup>967</sup> and East Zone secretary,<sup>968</sup> to overthrow the CPK and legitimate DK government. As Chanda reported in the Far Eastern Economic Review:

Vietnam’s decision to back a rebel movement in Kampuchea with military might, which swept Pol Pot’s regime from power in early January, was taken at a secret Vietnamese Communist Party Central Committee meeting 10 months earlier, the REVIEW has learned. [...] Communist sources close to Vietnam told the Review that the announcement from Phnom Penh on December 31, 1977, accusing Vietnam of aggression and snapping official ties took Hanoi by surprise [...] **Sources would not disclose the details of the central committee resolution, but suggested that a decision was taken to back a political movement to topple Pol Pot and if necessary to use military power to that effect.**<sup>969</sup>

316. American academic and former Vietnam-based diplomat William Duiker likewise claimed in a 1986 monograph published by the University of California, Berkeley, that at the Vietnamese Communist Party Central Committee’s February 1978 Fourth Plenum, Vietnam’s leadership had formally approved the commencement of such a *coup*, to be led by Sao Phim.<sup>970</sup> This report is further boosted by information current Prime Minister Hun Sen had relayed to Kiernan in 1991. According to Hun Sen, already in December 1977 – before Vietnam had

<sup>962</sup> E3/540, East German Reports on Cambodia-Vietnam Conflict, various dates, ERN 01246939; *see supra*, Chapter 3-III-C-2-(b).

<sup>963</sup> *See supra*, Chapter 3-II-A-1.

<sup>964</sup> E3/2376, Chanda, Brother Enemy, ERN 00192402.

<sup>965</sup> Chanda, Cambodia’s Cry for Help, ERN 00011805.

<sup>966</sup> E3/131, Nuon Chea, Struggle of Our Kampuchean Peasants, ERN 00716414.

<sup>967</sup> E3/165, People’s Representative Assembly of Kampuchea, ERN 00184068.

<sup>968</sup> F2/8.1.24, Chanda, Timetable for a Takeover, ERN 01141718 (with regard to this document, *see also* E434, Nuon Chea’s Request for Documents on Vietnamese Aggression and Rebellion, paras 9, 28-33; E434/2, Decision on Documents on Vietnamese Aggression, para. 8; *supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and Annex 1).

<sup>969</sup> F2/8.1.24, Chanda, Timetable for a Takeover, ERN 01141718 (with regard to this document, *see also* E434, Nuon Chea’s Request for Documents on Vietnamese Aggression and Rebellion, paras 9, 28-33; E434/2, Decision on Documents on Vietnamese Aggression, para. 8; *supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and Annex 1).

<sup>970</sup> E3/7340, Duiker, China and Vietnam, ERN 01002003-04, 01002007; *see also* E3/10706, Duiker, China and Vietnam Selected Bibliography, ERN 01323835-40.

decided to give effect to ‘Plan A’ but after Hun Sen had already fled DK for Vietnam – he returned to DK inside a Vietnamese tank, accompanied by Hem Samin and Vietnamese troops, in search of Sao Phim.<sup>971</sup> Similarly, in September 1978, Lê Duẩn described Sao Phim to the Soviet ambassador in Hanoi as having been Vietnam’s “man” in Cambodia.<sup>972</sup> While there is also evidence, discussed below in Part C, that Sao Phim’s forces also recognised the need for Vietnamese support if the *coup* was to succeed, it is in any event clear, therefore, that the 1978 *coup d’état* was in no way an organic, internal initiative by Sao Phim and his forces, but one in which Vietnam had a significant – indeed, possibly even a decisive – hand.

## B. SAO PHIM WAS NOT HAPLESS AND WEAK BUT A FEARSOME WARLORD

317. The Manichean narrative presents Sao Phim as a hapless liberator, paralysed by inaction<sup>973</sup> and naively loyal to Pol Pot until it too late.<sup>974</sup> In reality, the evidence reveals that Sao Phim was, as Philip Short characterised him, the “quintessential warlord”.<sup>975</sup> Both Ieng Sary and Nuon Chea corroborate this. As Ieng Sary told Stephen Heder:

Even Pol Pot and Nuon Chea, when they were in Sao Phim’s Zone, the East Zone, they were afraid of Ta Phim. I went with them once, and I knew that and saw that. That is, **Pol Pot himself did not dare go down below: he was afraid of Ta Phim.** So, in that Zone, if SAO Phim wanted to kill and wanted to do something, it was not necessary for him to ask upper echelon. **The organization was like that; each Zone was independent, almost what could be called kill as you please, do as you please.**<sup>976</sup>

318. Nuon Chea described the situation *vis-à-vis* Sao Phim as follows:

The Eastern Zone was a crucial area for the Khmer Rouge. Nuon Chea said Pol Pot took great care of that Zone because So Phim had many troops and they were on the Vietnamese border. **“This was one of the center leader’s weak points,” Nuon Chea said. “The Center did not have troops and every region was very powerful because it controlled the soldiers.** So when we talked to the region leaders, we were very careful. **Pol Pot was also scared of the Eastern Zone and worried about So Phim because he was a former soldier and he was strong”.**<sup>977</sup>

<sup>971</sup> E3/1593, Kiernan, Pol Pot Regime, ERN 00678589.

<sup>972</sup> E3/7338, Morris, Why Vietnam Invaded Cambodia, ERN 01001776-77.

<sup>973</sup> See e.g. E3/1684, Chandler, Voices from S-21, ERN 00192751 (“Sao Phim seemed to know what was happening but was unable to raise the energy or gather the forces to resist”); E3/2376, Chanda, Brother Enemy, ERN 00192437 (summarising Kiernan’s position that Sao Phim “was caught by inertia powerless to stop” “arrests and killings”).

<sup>974</sup> E3/2376, Chanda, Brother Enemy, ERN 00192437 (summarising Kiernan’s view that “So Phim was hamstrung by a sense of party discipline and by his belief that these arrests and killings could not reflect the nature of the revolution”).

<sup>975</sup> E3/9, Short, History of a Nightmare, ERN 00396378.

<sup>976</sup> E3/89, Heder Interview with Ieng Sary, ERN 00417608.

<sup>977</sup> E3/4202, Chon and Sambath, Behind the Killing Fields, ERN 00757536.



319. Likewise, Ouk Bunchhoeun described to Heder that “Pol Pot was afraid of SAO Phim. He was afraid of SAO Phim because SAO Phim had strong influence on people in the Eastern Zone.”<sup>978</sup> Sao Phim’s formidable power and influence (assisted by his right hand military man Heng Samrin<sup>979</sup>), in combination with Nuon Chea and Pol Pot’s sentimental feelings for him – with Nuon Chea describing him as close as a “brother” – explains why, even in May 1978, Pol Pot and Nuon Chea continued to try to defuse the situation in the East Zone by appealing to Sao Phim.<sup>980</sup> They each wrote Sao Phim letters, with Nuon Chea’s advising Sao Phim to “be careful and alert and to have a high revolutionary spirit”, and Pol Pot’s urging Sao Phim to compromise.<sup>981</sup> However, neither received a response for by then it was too late; Sao Phim already had plans for the 1978 *coup* well underway.

### **C. THE 1978 COUP D’ÉTAT WAS EXTENSIVELY PLANNED AND PREPARED**

#### **1. The Seeds for the 1978 Coup d’État Had Long Been Sown**

320. As discussed earlier, Sao Phim had spearheaded the development of *coup d’état* plans from the start, hosting the May 1975 meeting,<sup>982</sup> cultivating alliances not only with Ruos Nhim but other leading traitors,<sup>983</sup> and allegedly being responsible for attempts to circumvent the gradual build-up of these plans by assassinating Pol Pot.<sup>984</sup> Nong Nim, a relative of Sao Phim, explained to DC-Cam and confirmed to the Chamber that he had seen Sao Phim speaking to Vietnamese guests through an interpreter at Ta Kuk Mountain, a meeting which was located outside of the framework of the DK’s official meetings with Vietnam. Although Nong Nim could not recall the precise date of this meeting – only that it was before or during a war with Vietnam<sup>985</sup> – given that Nong Nim had only begun working with Sao Phim from 1971,<sup>986</sup> it appears probable that Nong Nim was describing meetings sometime after sustained hostilities between Vietnam and Cambodia in 1977.<sup>987</sup>

321. Similarly, Heng Samrin explained to Ben Kiernan that by 1976 and 1977, the East Zone was already engaged in “a struggle but a secret one”, although “tight and cramped” conditions

<sup>978</sup> E3/387, Heder Interview with Ouk Bunchhoeun, ERN 00320215.

<sup>979</sup> E3/1568, Kiernan Interview with Heng Samrin and Chea Sim, ERN 00181898.

<sup>980</sup> E3/4202, Chon and Sambath, Behind the Killing Fields, ERN 00757536.

<sup>981</sup> E3/4202, Chon and Sambath, Behind the Killing Fields, ERN 00757536.

<sup>982</sup> See *supra*, Chapter 3-IV-D.

<sup>983</sup> See *supra*, Chapter 3-IV-D.

<sup>984</sup> See *supra*, Chapter 3-V-A.

<sup>985</sup> E1/551.1, Nong Nim, T. 12 Dec 2016, p. 13, ln. 21.

<sup>986</sup> E1/551.1, Nong Nim, T. 12 Dec 2016, p. 9, ln. 8.

<sup>987</sup> See *infra*, Chapter 3-III-D.

limited the opportunities for them “to rise up”.<sup>988</sup> He described how Sao Phim would placate him by promising that “[w]e will have further bloodshed”.<sup>989</sup> Likewise, Heng Samrin’s brother Heng Samkai, chief of the East Zone couriers, revealed to Nayan Chanda that the East Zone forces eventually “[came] to realise that it was impossible to overthrow Pol Pot on our own. We had to seek Vietnamese help.”<sup>990</sup>

## 2. Preparations Included Stockpiling, Recruitment, and Meetings

322. According to Nayan Chanda, preparations for the launch of the East Zone *coup d’état* were in full swing by November 1977. As Chanda describes:

A later, official Vietnamese account reveals that preparations for the most important *coup* attempt against the Pol Pot regime began in November 1977. Dissident Khmer Rouge cadres of the Eastern Zone had started building secret food reserves in the jungle. But no date was set for the uprising.<sup>991</sup>

323. Similarly, East Zone Sector 21 deputy secretary and rejected Defence witness Ouk Bunchhoeun explained to Stephen Heder that from early 1978, he personally began issuing instructions to make preparations for a *coup d’état* led by the East Zone.<sup>992</sup> He hid weapons in his sector by siphoning off part of all brand-new guns intended to be delivered to the front with Vietnam and instead “secretly [keeping] them in our sector”, “hidden in the forest nearby”;<sup>993</sup> stockpiled “not only rice, but medicines, fish paste, pigs, chickens and ducks” hidden in Dam Be forest;<sup>994</sup> and began recruiting forces, personally putting together a battalion of approximately 300 forces.<sup>995</sup> While the number of those forces are not definitively known – and likely will never be unless Heng Samrin, their overall commander, testifies – civil party and East Zone combatant Mey Savoeun estimated there to have been approximately 8,000 forces involved in the final conflict with the RAK.<sup>996</sup>

324. An RAK defector reported that Heng Samrin had attempted a *coup* against the CPK and legitimate DK government in April 1978 but the plot leaked and the *coup* was crushed.<sup>997</sup> Heng

<sup>988</sup> E3/1568, Kiernan Interview with Heng Samrin and Chea Sim, ERN 00651889.

<sup>989</sup> E3/1568, Kiernan Interview with Heng Samrin and Chea Sim, ERN 00651889.

<sup>990</sup> E3/2376, Chanda, Brother Enemy, ERN 00192440.

<sup>991</sup> E3/2376, Chanda, Brother Enemy, ERN 00192381 (citing “Kampuchea Dossier, Vol. 2, VC, Hanoi, 1979, 63-65”: ERN 00192617).

<sup>992</sup> E3/387, Heder Interview with Ouk Bunchhoeun, ERN 00350219.

<sup>993</sup> E3/387, Heder Interview with Ouk Bunchhoeun, ERN 00350219.

<sup>994</sup> E3/387, Heder Interview with Ouk Bunchhoeun, ERN 00350222.

<sup>995</sup> E3/387, Heder Interview with Ouk Bunchhoeun, ERN 00350219.

<sup>996</sup> E3/9467, ‘WRI of Mey Savoeun’, ERN 00978753; E1/459.1, Mey Savoeun, T. 17 Aug 2016, p. 48, Ins 6-18.

<sup>997</sup> See E3/10699, Morris’s PhD Thesis, citing a 5 December 1978 Hong Kong AFP report noted in a FBIS report.

Samrin himself identifies May 1978 as a key moment, for this was when he said that Sao Phim appointed him to organise the military forces for the *coup*:

Ta Phim withdrew me, in 1978, 18th May 1978, from the 4<sup>th</sup> Division. He had me come to Suong to meet him at the Zone command and gave me the task to go stay in Prey Veng to be responsible for the Zone military command. To look after the men in the Zone (HQ) office in Prey Veng. I got to Prey Veng that day. The *coup* occurred on the 25th.<sup>998</sup>

325. Two days later, Sao Phim convened approximately 20 top East Zone commanders,<sup>999</sup> including three rejected Defence witnesses: Heng Samrin, the now-late Chea Sim, and Pol Saroeun<sup>1000</sup> – deputy chief of the East Zone military, current Commander-in-Chief of the Royal Cambodian Armed Forces.<sup>1001</sup> At the meeting, Heng Samrin explained how the participants “drew up the plan to fight”.<sup>1002</sup> Heng Samrin also relayed Sao Phim’s advice to the meeting participants that:

**“If we resist, the resistance has to rely on support. This support is our old friends. There is only our old friends. We have to go seek out our old friends.”** He said this clearly. “We have to find our friends for support. If we don’t seek out our friends, we will not get any support.” **Because the friends were, frankly, Vietnam.**<sup>1003</sup>

#### **D. CONCLUSION ON ‘PLAN A’S’ THIRD AND FINAL PHASE: THE 1978 COUP D’ÉTAT**

326. The Closing Order portrays the situation in the East Zone as one in which the Standing Committee had to “convince [CPK] cadres” that “alleged traitors [...] supposedly implicated as CIA, KGB or Vietnamese agents” had infiltrated the Party.<sup>1004</sup> However, the evidence shows that the Closing Order’s scepticism is completely misplaced. Sao Phim and his forces in the East Zone were indeed traitors of the highest order. They attempted high treason in collusion with a foreign power, Vietnam, and they planned this treason systematically. In this situation, not only was the CPK astutely accurate in characterising its victory over Sao Phim as a “great victory” equal to that of the 17 April 1975 victory,<sup>1005</sup> but its response to the *coup* was entirely proportionate and lawful.<sup>1006</sup>

<sup>998</sup> E3/1568, Kiernan Interview with Heng Samrin and Chea Sim, ERN 00181898.

<sup>999</sup> E3/1568, Kiernan Interview with Heng Samrin and Chea Sim, ERN 00651899-900.

<sup>1000</sup> See e.g. E392, Nuon Chea’s Rebellion Leadership Witnesses Request, paras 26, 37(a).

<sup>1001</sup> E454, Final Witnesses Decision, para. 4; see also *supra*, Chapter 1 and Chapter 2-II-B-3-(c), on the refusal of key witnesses/experts, and *infra*, Chapter 9 and Annex 2.

<sup>1002</sup> E3/1568, Kiernan Interview with Heng Samrin and Chea Sim, ERN 00181900.

<sup>1003</sup> E3/1568, Kiernan Interview with Heng Samrin and Chea Sim, ERN 00181900 (emphasis added).

<sup>1004</sup> D427, Closing Order, paras 199, 202.

<sup>1005</sup> E3/834, ‘Pon-Tuy Notebook’, ERN 00184498.

<sup>1006</sup> See also *infra*, Chapter 3-IX-A-1-(b); Chapter 4.

### VIII. ‘PLAN B’ REALISED: VIETNAM’S INVASION AND OCCUPATION

327. In the face of ill-fated *coup* attempts by their internal collaborators, Vietnam shifted its focus to invading Cambodia directly. This effort, as shown above,<sup>1007</sup> was no afterthought, but rather the logical product of a gradual escalation of Vietnam’s nibbling acts of aggression – acts which ran parallel to ‘Plan A’. Vietnam laid the foundation for this large-scale, flagrantly-illegal invasion by opportunistically aligning with the Soviet Union. With this added security, Vietnam could focus on recruiting a Cambodian “Front”, in the misplaced hope that their involvement would legitimise Vietnam’s exploitative annexation. Vietnam’s efforts at legitimisation were further bolstered by their crafty manipulation of public perception. These calculated moves, as shown below, worked to position Vietnam favourably as they began their large-scale invasion of the DK in December 1978.

#### A. VIETNAM ENGINEERED INTERNATIONAL RELATIONS TO PREPARE FOR ITS INVASION

328. Vietnam’s first step in implementing their external efforts was to neutralise DK’s major ally and insurance policy against a Vietnamese invasion – China – by drawing the Soviet Union in even closer as a counterweight. On 19 April 1975, China had agreed to provide DK US \$1billion economic and military aid and trading opportunities,<sup>1008</sup> a promise formalised on 10 February 1976 in a non-refundable aid treaty.<sup>1009</sup> China’s support of DK strengthened in the wake of Vietnam’s friendship treaty with Laos in July 1977.<sup>1010</sup> When Vietnam then launched its late 1977 full-scale invasion of DK, this flagrant demonstration of imperialist ambition confirmed China’s fears and prompted an immediate response. In December 1977, as Geng Biao explained, China finally decided to wholeheartedly throw its weight behind Cambodia, “strengthening it so that it might cope with the possible new situation when negotiations fail to solve the problems”.<sup>1011</sup>

329. China’s gravitation towards Cambodia was further propelled by Vietnam’s cooling relationship with China owing to Vietnam’s imperialist taste for Chinese territory. Vietnam and China had already disputed ownership of territory in the South China Sea in 1974 and 1975,<sup>1012</sup> yet in spite of such aggression, Lê Duẩn still had the audacity in 1976 to request China to

<sup>1007</sup> See *supra*, Chapter 3-I, 3-III.

<sup>1008</sup> See e.g. E3/9, Short, History of a Nightmare, ERN 00396509-10.

<sup>1009</sup> See e.g. E3/2376, Chanda, Brother Enemy, ERN 00192202-03.

<sup>1010</sup> See *supra*, Chapter 3-III-C-3.

<sup>1011</sup> E3/7325, Geng Biao, Report on the Indochina Situation, ERN 01001625.

<sup>1012</sup> See e.g. E3/2376, Chanda, Brother Enemy, ERN 00192319-20; E3/1593, Kieman, Pol Pot Regime, ERN 00678546.

provide Vietnam aid – a request to which China naturally would not accede.<sup>1013</sup> Vietnam further set out to deliberately provoke China in 1978. At the same meeting at which the Vietnamese Communist Party Central Committee decided to initiate the 1978 *coup d'état* led by Sao Phim, Vietnam's leaders simultaneously determined to “resolve the overseas Chinese question”, since they apparently increasingly saw overseas Chinese as “an undigestible foreign body” within the country.<sup>1014</sup> That year, Vietnam began to subject its population of over one million overseas Chinese to a severely discriminatory policy. Vietnam nationalised overseas Chinese businesses, confiscated their property, forced mixed Chinese-Vietnamese couples to divorce, forcibly relegated the overseas Chinese to live in impoverished conditions in special economic zones, expelled 270,000 of them in a gruelling overland migration back to China, and put hundreds of thousands on boats out to sea<sup>1015</sup> where tens of thousands died.<sup>1016</sup> As Stephen Morris explained in court, ultimately “the Vietnamese provoked the Chinese into attacking them”.<sup>1017</sup>

330. While distancing from China, Vietnam also sought to bolster its position against any possible Chinese reaction to its eventual invasion of DK by turning more closely to the Soviet Union. Vietnam's relationship with the Soviet Union, China's main rival and threat, had already warmed while its relationship with China cooled. As Morris testified:

Vietnamese communists did not always maintain a neutrality between the communists, the rival communist powers, the Soviet Union, and China [... Instead, t]hey sometimes took sides between the Soviet Union and China and the most clear and decisive example of them taking sides was their decision to sign a treaty of friendship and cooperation with the Soviet Union at the end of 1978, just prior to their invasion of Cambodia.<sup>1018</sup>

331. In October 1975, immediately after China rebuffed Vietnam's request for aid, Vietnam turned around and secured a promise from the Soviet Union for long-term military aid, and the two signed a joint communiqué endorsing the Soviet Union's foreign policy.<sup>1019</sup> In mid-1977, Vietnam's then Prime Minister Pham Van Dong met the Soviet Union's State Presidium Chairman and Communist Party General Secretary Leonid Brezhnev for preliminary talks in preparation for the formalisation of a partnership.

<sup>1013</sup> See e.g. **E3/2376**, Chanda, Brother Enemy, ERN 00192212.

<sup>1014</sup> **E3/7340**, Duiker, China and Vietnam, ERN 01002003-04, 01002006.

<sup>1015</sup> **E3/10707**, Hoan, Drop in the Ocean, ERN 01141709-10; **E3/7340**, Duiker, China and Vietnam, ERN 01002004-05; **E3/9**, Short, History of a Nightmare, ERN 00396587.

<sup>1016</sup> **E3/9**, Short, History of a Nightmare, ERN 00396587.

<sup>1017</sup> **E1/485.1**, Stephen Morris, T. 18 Oct 2016, p. 63, lns 20-21.

<sup>1018</sup> **E1/485.1**, Stephen Morris, T. 18 Oct 2016, p. 59, lns 7-13.

<sup>1019</sup> **E3/2376**, Chanda, Brother Enemy, ERN 00192213.

332. More strikingly, in late January 1978, just before the Fourth Plenum, General Vo Nguyen Giap sought the counsel of the Soviet Union's commander-in-chief of ground forces, General Grigoriyevich Pavloskiy, on how to resolve the "Cambodian situation". Pavlovskiy advised the Vietnamese to "do a Czechoslovakia",<sup>1020</sup> referring to the Soviet Union's 1968 invasion of Czechoslovakia. This precisely echoed Son Sen's 1976 speech in which he explained how the CPK had triumphed over an enemy plot seeking to do exactly that.<sup>1021</sup> Vietnam clearly took Pavlovskiy's advice to heart, invading Cambodia less than a year later. Indeed, the Defence notes that as part of the "Brezhnev doctrine", the Soviet Union itself undertook a similar invasion on a much grander scale a year later, when it brutally invaded Afghanistan. Today, not only are aftershocks of that invasion still felt, but similar sentiments still form part of Russian foreign policy, as its 2014 military intervention in Ukraine suggests.

333. From mid-1978, the relationship between Vietnam and the Soviet Union rapidly solidified. On 28 June, Vietnam joined the Soviet bloc's economic group, Comecon.<sup>1022</sup> In August, the Soviet Union began airlifting and shipping arms to Vietnam, including long-range guns, missiles, radar, ammunition and MiG-21 fighter jets.<sup>1023</sup> Finally, on 3 November 1978, Vietnam and the Soviet Union signed a 25-year friendship treaty.<sup>1024</sup> The treaty pledged that:

When either side is attacked or is under the threat of attack, the two signatories shall immediately conduct meetings to work out ways of stamping out the threat and take appropriate, effective measures to guarantee the peace and security of the two countries.<sup>1025</sup>

334. As Geng Biao astutely described, the treaty "bolstered Vietnam up" and made it "swollen with arrogance",<sup>1026</sup> since it served as firm insurance for Vietnam's "Indochinese Federation" ambitions – particularly in light of China's characteristic commitment to the principle of non-interference in the affairs of other states.<sup>1027</sup>

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<sup>1020</sup> E3/2376, Chanda, Brother Enemy, ERN 00192401.

<sup>1021</sup> See *supra*, Chapter 3-V.

<sup>1022</sup> E3/2376, Chanda, Brother Enemy, ERN 00192431; E3/20, Becker, When the War was Over, ERN 00238138; see also E1/485.1, Stephen Morris, T. 18 Oct 2016, p. 59, lns 7-13.

<sup>1023</sup> E3/2376, Chanda, Brother Enemy, ERN 00192443.

<sup>1024</sup> E3/2376, Chanda, Brother Enemy, ERN 00192506.

<sup>1025</sup> E3/10707, Hoan, A Drop in the Ocean, ERN 01141710.

<sup>1026</sup> E3/7325, Geng Biao, Report on the Indochina Situation, ERN 01001623.

<sup>1027</sup> E3/7325, Geng Biao, Report on the Indochina Situation, ERN 01001623.

**B. VIETNAM RECRUITED CAMBODIAN FORCES THAT WOULD PAINT A THIN, LEGITIMISING VENEER OVER THE INVASION**

335. The next step Vietnam undertook in preparing to invade Cambodia was to build up a military front of former CPK cadres and civilians who had fled to Vietnam during the DK.<sup>1028</sup> This front was to serve a twofold purpose. First, it was to marginally participate in the invasion and thereby offer the invasion a propagandistic “cloak of legitimacy”<sup>1029</sup> or “political fig leaf”<sup>1030</sup> painting a thin veneer of “liberation” over an otherwise blatantly aggressive invasion. Second, upon the invasion’s success, the front’s leaders, who would already have been trained by Vietnam, would be able to double as “the basis of a puppet government which [Vietnam] intended to install in Phnom Penh.”<sup>1031</sup>

336. Steps had already been taken long before the Fourth Plenum to put the front together. As discussed earlier, East Zone commanders including Hun Sen had fled across the border to Vietnam in mid-1977,<sup>1032</sup> while the recruitment drive among Cambodian refugees in southern Vietnam reportedly began a few months later in October 1977.<sup>1033</sup> The fledgling front was bolstered in 1978 when East Zone troops including Heng Samrin fled across the border during the armed conflict.<sup>1034</sup> By at least mid-1978, more significant steps were taken to form the Kampuchean National United Front for National Salvation (“KNUFNS”)<sup>1035</sup> led by Heng Samrin.<sup>1036</sup> At least six Vietnamese, including long-time Cambodia liaisons Hay Sau and Ba Ha, had held several clandestine meetings with East Zone leaders in Kampong Cham between February and May 1978 to plan successive invasions of Cambodia.<sup>1037</sup> From April 1978, Vietnam set up guerrilla training camps for the front forces,<sup>1038</sup> while from June 1978, Radio Hanoi also began to broadcast calls for Cambodians to rise up against

<sup>1028</sup> **F2/8.1.25**, Alexiou, Foreign Policy of the PRC towards the SRV, ERN 0141729.

<sup>1029</sup> **E3/7340**, Duiker, China and Vietnam, ERN 01002008; **E3/7338**, Morris, Why Vietnam Invaded Cambodia, ERN 01001777-78.

<sup>1030</sup> **E3/7338**, Morris, Why Vietnam Invaded Cambodia, ERN 01001777-78.

<sup>1031</sup> **E3/7338**, Morris, Why Vietnam Invaded Cambodia, ERN 01001777-78.

<sup>1032</sup> **E3/7339**, Richardson, China, Cambodia, and the Five Principles, ERN 01001992; *see also* **E3/9720**, Stasi Biographies (Hun Sen), ERN 01206275.

<sup>1033</sup> **E3/7338**, Morris, Why Vietnam Invaded Cambodia, ERN 01001768.

<sup>1034</sup> **E3/9094**, ‘DC-Cam Interview of Pan Chhuong (2-TCW-918)’, ERN 00728699; *see also* **E3/1593**, Kiernan, Pol Pot Regime, ERN 00678702.

<sup>1035</sup> **F2/8.1.24**, Chanda, Timetable for a Takeover, ERN 01141718; *see also* **E434**, Nuon Chea’s Request for Documents on Vietnamese Aggression and Rebellion, paras 9, 28-33; **E434/2**, Decision on Documents on Vietnamese Aggression, para. 8; *see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and **Annex 1**.

<sup>1036</sup> **E3/7338**, Morris, Why Vietnam Invaded Cambodia, ERN 01001777-78; *see also* **E3/9720**, Stasi Biographies (Heng Samrin), ERN 01206272.

<sup>1037</sup> **E3/1262**, CPK Vietnam Coup D’État Press Release, 25 Jun 1978, ERN 00079722-24; *see also* **E3/387**, Heder Interview of Ouk Bunchhoeun, ERN 00350217.

<sup>1038</sup> *See e.g.* **E3/2376**, Chanda, Brother Enemy, ERN 00192403-04.

Pol Pot<sup>1039</sup> and Vietnam began to build up its border with Cambodia.<sup>1040</sup> There are also reports that refugees were recruited from camps along the Thai border in October 1978.<sup>1041</sup> However, the formation of KNUFNS was not formally announced until 3 December 1978, just three weeks before the invasion commenced.<sup>1042</sup> This late announcement was a calculated way to suggest that the invasion was a spontaneous uprising of the people rather than a deliberate, carefully-planned invasion by a powerful and ruthless military force. The notion was clearly ridiculous, as the late King Father Norodom Sihanouk suggested before the UN Security Council as follows:

Even school children at the primary level would be unable to believe that in the extremely short space of only 22 days, this tiny and insignificant so-called Kampuchean Front could recruit, equip, teach, train, and lick into shape such an Olympian armed force of so many components and furthermore equipped with machines and weapons requiring a perfect mastery of electronics and ballistics, not to mention the special skills that can be possessed only by units which have already taken part in large-scale operations.<sup>1043</sup>

**C. VIETNAM KICKED ITS PROPAGANDA MACHINE INTO HIGH GEAR, WORKING TO PRE-EMPT EVENTUAL CONDEMNATION OF THE INVASION**

337. This late announcement by Vietnam exemplified their third and final stage in readying for the invasion. As part of this final stage, Vietnam carefully laid a foundation that would enable them to control the post-invasion narrative. This pre-emptive safeguard was not a novel tactic of the Vietnamese. In fact, it was something they had already attempted in connection with their very first provocations towards DK after the liberation of Phnom Penh.<sup>1044</sup> Vietnam worked to propagandise their efforts, drawing the CPK into a ferocious propaganda war to seize the moral high ground in the eyes of the international community. Vietnam, as detailed in a 1978 US Congress Report, did this very skilfully and their “grisly atrocity charges” worked to manipulate international public perception.<sup>1045</sup>

<sup>1039</sup> **F2/8.1.24**, Chanda, Timetable for a Takeover, ERN 01141718; *see also* **E434**, Nuon Chea’s Request for Documents on Vietnamese Aggression and Rebellion, paras 9, 28-33; **E434/2**, Decision on Documents on Vietnamese Aggression, para. 8; *see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and **Annex 1**; **E3/7338**, Morris, Why Vietnam Invaded Cambodia, ERN 01001777.

<sup>1040</sup> **F2/8.1.24**, Chanda, Timetable for a Takeover, ERN 01141718; *see also* **E434**, Nuon Chea’s Request for Documents on Vietnamese Aggression and Rebellion, paras 9, 28-33; **E434/2**, Decision on Documents on Vietnamese Aggression, para. 8; *see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and **Annex 1**.

<sup>1041</sup> **E3/9726**, US Embassy Bangkok Cable, 15 Feb 1978, ERN 01186958; **E3/9727**, US Embassy Bangkok Cable, 9 Feb 1978, ERN 01186963.

<sup>1042</sup> **E3/7338**, Morris, Why Vietnam Invaded Cambodia, ERN 01001777-78.

<sup>1043</sup> **E3/7335**, UN Security Council Meeting Minutes, ERN 01001644.

<sup>1044</sup> *See supra*, Chapter 3-III-A-3-(b).

<sup>1045</sup> **E3/2370**, Pike Congressional Report, ERN 00187389; *see also supra*, Chapter 2-II-A-1, on Vietnamese propaganda.



338. Beyond these baseless accusations, there were reports that Vietnam issued regular radio broadcasts about Cambodian misdeeds,<sup>1046</sup> paving the way for Vietnam to later depict their invasion as a humanitarian intervention. Their campaign steadily narrowed the personification of the Cambodian enemy from the “Kampuchean authorities” to the “Phnom Penh authorities” and by June 1978, the dual-headed “Pol Pot-Ieng Sary clique”, the term which eventually stuck. It also made concerted efforts to develop a dichotomous divide between itself and Cambodia. Vietnam sought to paint itself as the magnanimous, reasonable party and Cambodians as the isolationist aggressor spoiling for a fight,<sup>1047</sup> when of course, it was in fact Vietnam which perpetrated countless acts of aggression.<sup>1048</sup> Although it is beyond the scope of this Brief to discuss, it is also important to note that despite reports of numerous border clashes with Thailand during the CPK’s reign,<sup>1049</sup> the CPK had long sought positive relations with Thailand<sup>1050</sup> and was ultimately able to avoid escalation to full-scale armed conflict and successfully normalise relations between the two countries by September 1978 instead.<sup>1051</sup> Moreover, as Nayan Chanda noted, Vietnam’s propaganda campaign only had a short-term impact at the time and that:

Some observers are convinced that had the Cambodian regime got a year’s reprieve, its internal and international image would have been improved enough to make any Vietnamese drive [to invade Cambodia] very difficult if not impossible. So the Vietnamese had to strike [quickly].<sup>1052</sup>

339. The Manichean portrayal of the DK as isolationist that this propaganda created is likewise inapt and simply ridiculous. As noted above in Section III-C-1, DK foreign policy was in fact the opposite and sought to develop the widest possible diplomatic relations as a core means of resisting the existential threat posed to it by Vietnam. To that end, the DK had formal relations with a wide range of European countries including the Netherlands, Denmark, Italy,

<sup>1046</sup> See e.g. **E3/2376**, Chanda, Brother Enemy, ERN 00192403-04.

<sup>1047</sup> **E3/2370**, Pike Congressional Report, ERN 00187389; see also *supra*, Chapter 3-I-A, detailing how the Co-Prosecutors have played right into Vietnam’s hand and adopted this as their theory of the armed conflict.

<sup>1048</sup> See *supra*, Part 3-III-A, 3-III-D, on Vietnam’s consistent acts of aggression.

<sup>1049</sup> **E3/1593**, Kiernan, Pol Pot Regime, ERN 00678680-81, 00678685; **E3/7338**, Morris, Why Vietnam Invaded Cambodia, ERN 01001745, 01001747.

<sup>1050</sup> **E3/9727**, US Embassy Bangkok Cable, 9 Feb 1978, ERN 01186963.

<sup>1051</sup> **E3/7338**, Morris, Why Vietnam Invaded Cambodia, ERN 01001749-50; see also **E295/6/3**, Nuon Chea’s Case 002/01 Closing Brief, para. 170.

<sup>1052</sup> **F2/8.1.32**, Chanda, Fifteen Days That Shook Asia; with regard to this document, see **E434**, Nuon Chea’s Request for Documents on Vietnamese Aggression and Rebellion, paras 10, 28-33; **E434/2**, Decision on Documents on Vietnamese Aggression, para. 8; *supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and **Annex 1**.

the United Kingdom, Belgium, Sweden, Greece, Finland, Austria, Switzerland and Norway,<sup>1053</sup> and approximately 100 states in total.<sup>1054</sup>

**D. WITH ALL THE PIECES IN PLACE, VIETNAM ‘DID A CZECHOSLOVAKIA’**

340. Having carefully undertaken all the necessary preparations, on 25 December 1978, Vietnam stormed Cambodia in what the late King Father Norodom Sihanouk described as a “blitzkrieg”, “Czechoslovakia”-style invasion carried out by over 150,000 Vietnamese and KNUFNS troops. By 7 January 1979, they had captured Phnom Penh. Heng Samrin was installed as the new head and Hun Sen as Minister for Foreign Affairs of the new PRK puppet state, while former “Khmer Viet Minh” and current CNRP Member of Parliament Pen Sovann<sup>1055</sup> was installed as the secretary of a new Kampuchean People’s Revolutionary Party, a party name strikingly similar to the 1951 Vietnam-controlled Khmer People’s Revolutionary Party which had been one of the precursors for the Kampuchean Workers’ Party.<sup>1056</sup> At last, Vietnam had put in place the final piece in its Indochinese Federation puzzle.

341. However, despite Vietnam’s meticulous efforts to pre-emptively legitimise their invasion, the initial international reaction was not as they had anticipated. On 11 January 1979, less than a week after the invasion, the UN Security Council convened an emergency session in response to a request sent by Ieng Sary on behalf of the DK government. There, to Vietnam’s surprise and humiliation, the majority of member states present (with the limited exception of Soviet bloc states) condemned Vietnam’s actions, characterising them precisely as an unprovoked invasion of a sovereign state in flagrant violation of international law. In particular, the Chinese ambassador to the UN, Chen Chu, described the Vietnamese invasion as:

a large-scale naked armed aggression against Democratic Kampuchea, seriously violating the independence, sovereignty and territorial integrity of Democratic Kampuchea and gravely violating and menacing peace and security in South-East Asia, the whole of Asia and the world at large.<sup>1057</sup>

<sup>1053</sup> **F2/8.1.21**, Tweede Kamer der Staten-Generaal [House of Representatives of the Netherlands], ERN 01141679-80; with regard to this document, *see* **E434**, Nuon Chea’s Request for Documents on Vietnamese Aggression and Rebellion, paras 23, 28-33; **E434/2**, Decision on Documents on Vietnamese Aggression, para. 14; *supra*, Chapter 2-III-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and **Annex 1**.

<sup>1054</sup> **F2/8.1.22**, Oesterheld, East German Socialism and the Khmer Rouge Revolution, ERN 01141686 (with regard to this document, *see* **E434**, Nuon Chea’s Request for Documents on Vietnamese Aggression and Rebellion, paras 23, 28-33; **E434/2**, Decision on Documents on Vietnamese Aggression, para. 14; *see also supra*, Chapter 2-II-B-3-(c), on the refusal to admit key evidence, and *infra*, Chapter 9 and **Annex 1**).

<sup>1055</sup> **E3/9720**, Stasi Biographies (Pen Sovann), ERN 01206281-83.

<sup>1056</sup> **E3/7338**, Morris, Why Vietnam Invaded Cambodia, ERN 01001778.

<sup>1057</sup> **E3/7335**, UN Security Council Meeting Minutes, ERN 01001638 (emphasis added).

342. Chen Chu further noted that by invading Cambodia, Vietnam “tramp[ed] upon the elementary principles guiding international relations and violating the Charter of the United Nations”.<sup>1058</sup> The representatives from France, Norway, and the UK echoed Chen Chu’s sentiments.<sup>1059</sup> In addition, the late King Father Sihanouk also read into the record the criticisms lodged against Vietnam’s invasion of Cambodia by the US, Japan, Kuwait, Sweden, Colombia, Australia, Romania and Yugoslavia.<sup>1060</sup> While the Security Council failed to pass a resolution due to the Soviet Union’s predictable veto, a majority of its members voted for the draft resolution emphatically condemning Vietnam’s actions.<sup>1061</sup>

343. Furthermore, the UN General Assembly passed annual resolutions on the matter for a decade between 1979 and 1989. Each resolution called for the “withdrawal of all foreign troops”, and affirmed the Kampuchean people’s right to self-determination and the right to non-interference.<sup>1062</sup> During plenary sessions, member states continued to condemn Vietnam’s ongoing occupation. For instance, the Australian representative stated that “Vietnam is acting contrary to international law, contrary to basic principles enshrined in the Charter and **in total disregard for world opinion** as expressed in the resolutions of the Assembly”.<sup>1063</sup> Additionally, the UN General Assembly verified that the DK government were the rightful representatives at the UN,<sup>1064</sup> delegitimising the Vietnamese-installed PRK’s self-proclaimed status as the new government.<sup>1065</sup>

344. Worldwide criticism and economic sanctions followed.<sup>1066</sup> Countries and international organisations imposed severe sanctions.<sup>1067</sup> Australia,<sup>1068</sup> the United Kingdom,<sup>1069</sup>

<sup>1058</sup> E3/7335, UN Security Council Meeting Minutes, ERN 01001646.

<sup>1059</sup> Minutes of 2109<sup>th</sup> UNSC Meeting, paras 17-18, 36; Minutes of 2110<sup>th</sup> UNSC Meeting, paras 65-66.

<sup>1060</sup> E3/7335, UN Security Council Meeting Minutes, ERN 01001644-45.

<sup>1061</sup> Minutes of 2112<sup>th</sup> UNSC Meeting, para. 4; *see also* UNSC Draft Resolution, 15 Jan 1979.

<sup>1062</sup> UNGA Res 34/22, Art. 7; UNGA Res 35/6, Art. 3(a); UNGA Res 36/5, Art. 2; UNGA Res 37/6, Art. 2; UNGA Res 38/3, Art. 2; UNGA Res 39/5, Art. 2; UNGA Res 40/7, Art. 2; UNGA Res 41/6, Art. 2; UNGA Res 42/3, Art. 2; UNGA Res 43/19, Art. 2; UNGA Res 44/22, Art. 2.

<sup>1063</sup> UNGA, Minutes of 39<sup>th</sup> Plenary Meeting, para. 167 (emphasis added); *see also* the statements of the Canadian delegation in paras 31-41, the statements of the Norwegian delegation in paras 157-164, the statements of the New Zealand delegation in paras 178-184.

<sup>1064</sup> UNGA Credential Committee, 20 Sep 1979, para. 26.

<sup>1065</sup> *See* Vietnamese statements to the Security Council stating that the United Front for the National Salvation of Kampuchea is the new government of Kampuchea in E3/7335, UN Security Council Meeting Minutes, ERN 01001649-50, paras 135, 138.

<sup>1066</sup> E3/2376, Chanda, Brother Enemy, ERN 00192561.

<sup>1067</sup> E3/20, Becker, When the War was Over, ERN 00238159-60.

<sup>1068</sup> Australian Financial Review, Fraser Stops aid to Vietnam; Frost, Engaging the Neighbours, p. 58; Shiraishi, Japanese Relations with Vietnam, fn. 243; Bell, Problems in Australian Foreign Policy, p. 12.

<sup>1069</sup> HC Deb 19 Mar 1979, cc397-8W; HC Deb 19 Mar 1979, cc1094-6; HC Deb 19 Mar 1979, cc1478-9. The attachment is from the UK Millbank System and is the official electronic historic archive for Commons Hansard pre-dating 1988.

Norway,<sup>1070</sup> and Japan suspended aid to Vietnam until the army withdrew from Cambodia,<sup>1071</sup> while the European Economic Community, World Bank, the International Monetary Fund also cut aid and relief programs.<sup>1072</sup> In short, Vietnam and the PRK became correctly viewed as the pariahs of the international community.

#### **E. CONCLUSION ON ‘PLAN B’ REALISED: VIETNAM’S INVASION AND OCCUPATION**

345. In 1979, Geng Biao had remarked that:

[n]o matter what kinds of mistakes the Cambodian Communist Party and the Government of Democratic Kampuchea have committed in the past, this should absolutely not be taken as a [pretext] by any regime to interfere in, subvert, and invade Cambodia, which is still a sovereign state.<sup>1073</sup>

346. In spite of Geng Biao’s warning, this is exactly what has happened. Vietnam’s relentless efforts to legitimise its illegal aggression towards Cambodia, revive its image and denigrate that of the CPK and the DK were eventually wildly successful. Today, it appears that Vietnam’s ruthless, calculating and aggressive designs for Cambodia are entirely forgotten. The prevailing narrative, instead, is a Manichean one that paints the actions of the CPK and the DK as entirely paranoid, irrational, offensive – and ultimately evil. It is this narrative that underpins the Closing Order’s factual and legal findings as to the existence of Nuon Chea’s liability under JCE I or, in the alternative, superior responsibility.

347. Nevertheless, as appealing as it may be for this Chamber to simply copy and paste that narrative into the Case 002/02 judgement, the evidence presented in this Chapter, together with the proper evidence standards clarified in Chapter 2-III-B above, precludes it from doing so. The evidence outlined in the Crocodile not only resoundingly dismantles the core tenets of the Manichean narrative but incontrovertibly demonstrates that Cambodia was threatened before, and during the DK period, by an existential threat of the highest order. This threat was pursued both through relentless internal efforts by Vietnam’s collaborators to overthrow the CPK and legitimate DK government, most notably through a trifecta of *coup d’états* (‘Plan A’), and through Vietnam’s own external acts of aggression (‘Plan B’) and constant deception and manipulation in its relations with the DK, its relations internationally, and in the public eye. This existential threat, coupled with the devastating conditions in the country when the CPK

<sup>1070</sup> Shiraishi, *Japanese Relations with Vietnam*, fn. 243.

<sup>1071</sup> Hirata, *Japan-Vietnam Relations*, p. 23.

<sup>1072</sup> E3/20, Becker, *When the War was Over*, ERN 00238159-60.

<sup>1073</sup> E3/7325, Geng Biao, *Report on the Indochina Situation*, ERN 01001630.

inherited it, rendered the DK in a state of constant emergency.<sup>1074</sup> Moreover, the Vietnamese threat was ultimately realised,<sup>1075</sup> with Cambodia left in a state of effective occupation in the post-DK period and with Vietnamese influence still felt in a multitude of ways today.

348. As noted above, however, the Crocodile's impact is not simply in rewriting the historical record. It also has a profound legal impact on Nuon Chea's case. Thus, prior to turning to an examination of the remainder of that case, this Chapter offers a brief analysis of the Crocodile's legal significance.

## IX. THE LEGAL SIGNIFICANCE OF THE CROCODILE

349. In its Appeals Judgement, the Supreme Court Chamber dismissed the relevance of an earlier iteration<sup>1076</sup> of the “full crocodile” to the findings in **Case 002/01**.<sup>1077</sup> That Chamber held that while “[t]he root cause and the consequences of certain actions may be suitable subjects for historical analysis, [they] have no bearing on an individual's *criminal*, as opposed to moral, responsibility” **unless** the Defence could demonstrate how such information “would impact on any findings that were instrumental to the conviction for specific crimes and modes of liability”.<sup>1078</sup> As explained in detail above in this Chapter, however, in Case 002/02, the Crocodile does not simply advance historical understanding for the sake of posterity. It also absolves Nuon Chea of individual criminal responsibility for the crimes charged not only by undermining the proof of those crimes but moreover since the evidence detailed in this Chapter demonstrates that key constitutive elements of the modes of liability charged against him have not been proven beyond reasonable doubt. These are:

- 1) The existence of the common purpose and the alleged action in concert, in relation to the basic form of JCE (‘JCE I’);
- 2) The question of Nuon Chea's authority and effective control over the alleged perpetrators of the crimes charged, regarding the additional mode of liability of ordering, as well as the alternative mode of liability of superior responsibility; and,
- 3) Nuon Chea's mens rea, i.e., his knowledge of the alleged crimes, which is relevant to all of the modes of liability charged.

<sup>1074</sup> See *supra*, Chapter 3-III.

<sup>1075</sup> See *supra*, Chapter 3-VIII.

<sup>1076</sup> **F2/8**, Nuon Chea's Sixth Appeal Additional Evidence Request, paras 23-69.

<sup>1077</sup> **F36**, Case 002/01 Appeals Judgement, para. 82.

<sup>1078</sup> **F36**, Case 002/01 Appeals Judgement, para. 82 (emphasis in original).

350. The Supreme Court Chamber held that all facts underlying the mode of liability alleged must be proven beyond reasonable doubt.<sup>1079</sup> If there is reasonable doubt, a conviction cannot be entered, following the principle of *in dubio pro reo* (i.e. when in doubt, for the accused).<sup>1080</sup> The full Crocodile renders it impossible to establish beyond reasonable doubt any of the key constitutive elements mentioned immediately above. This accordingly precludes a conviction of Nuon Chea for crimes under the primary mode of liability with which he is charged (JCE I),<sup>1081</sup> or under the additional and alternative modes of liability charged, particularly ordering<sup>1082</sup> and superior responsibility.<sup>1083</sup> Further, this Chapter also demonstrates that a finding that Nuon Chea had the requisite *mens rea* for any and all of the modes of liability charged cannot be sustained.

351. It is for this reason that, far from being “largely set aside” in Case 002/02 by the Appeals Judgement – as the Civil Party Lead Co-Lawyers once suggested in court<sup>1084</sup> – the issues in this Chapter are of far greater relevance and ultimately decisive importance to the outcome of the current trial, both factually and legally. It is also for this reason that the Defence has consistently identified the full crocodile as the heart of its case.<sup>1085</sup>

352. The Defence further notes that in this Brief, it relitigates several issues on which this Chamber and the Supreme Court Chamber made findings in Case 002/01. It does so because, despite this Chamber’s repeated characterisation of Case 002/01 as a “foundation” for future trials,<sup>1086</sup> the Supreme Court Chamber explicitly held that as a result of Case 002’s severance, “even though evidence remains formally common to the severed cases, this commonality does not extend to findings, and common factual elements in all cases resulting from Case 002 must be **established anew**.”<sup>1087</sup>

<sup>1079</sup> **F36**, Case 002/01 Appeals Judgement, para. 418; *see also*, ICTY, *Stakić* Appeals Judgement, para. 219; *Limaj et al.* Appeals Judgement, para. 21; *Vasiljević* Appeals Judgement, para. 120; *Brđanin* Appeals Judgement, paras 428, 431; *Haradinaj et al.* Trial Judgement, para. 475; ICTR, *Ntakirutimana & Ntakirutimana* Appeals Judgement, para. 171.

<sup>1080</sup> *See supra*, Chapter 2-III-B-1, on *in dubio pro reo*; *see also* ICTY, *Limaj et al.* Appeals Judgement, para. 21; *Čelebići* Trial Judgement, para. 601; *Naletilić & Martinović* Appeals Judgement, para. 120; *Stakić* Appeals Judgement, paras 102-103; *Kvočka et al.* Appeals Judgement, paras 623-624.

<sup>1081</sup> **D427**, Closing Order, paras 1318-1319.

<sup>1082</sup> **D427**, Closing Order, paras 1553-1554.

<sup>1083</sup> **D427**, Closing Order, paras 1557-1560.

<sup>1084</sup> **E1/505.1**, Sin Oeng, T. 1 Dec 2016, p. 55, ln. 2.

<sup>1085</sup> *See e.g.* **E395/2**, Nuon Chea’s Rebellion Submissions, para. 5.

<sup>1086</sup> *See e.g.* **E131**, Case 002 Scheduling Order, p. 2.

<sup>1087</sup> **E301/9/1/1/3**, SCC Decision on Second Severance of Case 002, para. 85 (emphasis added).

353. The discussion below focuses on the three modes of liability inextricably intertwined with the facts described in this Chapter, namely JCE I, ordering and superior responsibility. The fact that the evidence does not support a finding beyond reasonable doubt that all elements of the specific crimes charged are established<sup>1088</sup> is discussed in Chapters 4, 5, 6, and 7, which are structured following the four alleged CPK policies primarily at issue in this trial. Chapter 8 discusses how the evidence equally precludes Nuon Chea from being held individually criminally responsible under the other charged modes of liability<sup>1089</sup> of planning,<sup>1090</sup> instigating,<sup>1091</sup> aiding and abetting.<sup>1092</sup> That Chapter also briefly revisits the ordering and superior responsibility modes of liability addressed here.

#### A. IN LIGHT OF THE CROCODILE, NUON CHEA CANNOT BE HELD LIABLE UNDER JCE I

354. Although the ECCC Establishment Law prescribes only planning, instigation, ordering, aiding and abetting, commission, and superior responsibility as available modes of liability at this Tribunal,<sup>1093</sup> the Closing Order charges Nuon Chea under JCE I by treating JCE as a form of commission liability.<sup>1094</sup> In order for Nuon Chea to be convicted under JCE I, the Co-Prosecutors must establish the existence of all three of the following elements beyond reasonable doubt:<sup>1095</sup> (1) the existence of a common plan, design or purpose which amounts to or involves the commission of a crime; (2) the existence of a plurality of persons who act pursuant to a common purpose (also referred to as “action in concert”); and (3) the participation of the accused in furthering the common design or purpose.<sup>1096</sup> The first two are discussed here, and the last is discussed throughout the Brief when individual policies are discussed,<sup>1097</sup> as well as in Chapter 8 of this Brief.

<sup>1088</sup> See *infra*, the sections on crimes in Chapters 5, 6, 7 and 8 of this Brief.

<sup>1089</sup> See *infra*, Chapter 8.

<sup>1090</sup> **D427**, Closing Order, paras 1544-1545.

<sup>1091</sup> **D427**, Closing Order, paras 1547-1548.

<sup>1092</sup> **D427**, Closing Order, paras 1550-1551.

<sup>1093</sup> ECCC Establishment Law, Art. 29; see also **D427**, Closing Order, paras 1318-1319.

<sup>1094</sup> **D427**, Closing Order, paras 1541, 1318; relying on *Case 001*, **E188**, Case 001 Trial Judgement, paras 479 (“‘committing’ as a form of responsibility includes [...] commission through the participation in a joint criminal enterprise”), 509 (defining the elements of the three forms of JCE); see also **F36**, Case 002/01 Appeals Judgement, paras 791-807, for the Supreme Court Chamber’s views in this regard.

<sup>1095</sup> **F36**, Case 002/01 Appeals Judgement, para. 418; see also, ICTY, *Stakić* Appeals Judgement, para. 219; *Limaj et al.* Appeals Judgement, para. 21; *Vasiljević* Appeals Judgement, para. 120; *Brđanin* Appeals Judgement, paras 428, 431; *Haradinaj et al.* Trial Judgement, para. 475; ICTR, *Ntakirutimana & Ntakirutimana* Appeals Judgement, para. 171.

<sup>1096</sup> ICTY, *Karadžić* Trial Judgement, para. 561; *Stanišić & Simatović* Appeals Judgement, para. 77; *Tadić* Appeals Judgement, para. 227; *Stakić* Appeals Judgement, para. 65; *Krajišnik* Appeals Judgement, paras 200-208, 707 (emphases added).

<sup>1097</sup> See *infra*, Chapters 4-II, 5-I, 6-II and 7-II, for discussions concerning each of the four alleged policies.

## 1. There is No Criminal Common Purpose or One Involving Commission of Crimes

355. The common purpose is at the core of the JCE mode of liability, for as the Supreme Court Chamber held, it “ties the members of the JCE together and provides the justification for the mutual imputation of the members’ conduct that gives rise to criminal responsibility”.<sup>1098</sup> Establishing that a common purpose existed is therefore essential to proving the existence of a JCE in Case 002/02.

356. The Closing Order alleges that the common purpose in Case 002/02 is “to implement rapid socialist revolution in Cambodia through a ‘great leap forward’ and defend the Party against internal and external enemies, by whatever means necessary”.<sup>1099</sup> It alleges that the CPK sought to achieve the common purpose through five policies, the latter four of which are the principal focus in this case:

- The repeated movement of the population from towns and cities to rural areas, as well as from one rural area to another;
- The establishment and operation of cooperatives and worksites;
- The reeducation of “bad-elements” and killing of “enemies”, both inside and outside the Party ranks;
- The targeting of specific groups, in particular the Cham, Vietnamese, Buddhists and former officials of the Khmer Republic, including both civil servants and former military personnel and their families; and
- The regulation of marriage.<sup>1100</sup>

357. It is important to note that, according to the Supreme Court Chamber, JCE liability requires that the common purpose be “of a criminal character”. That is, it must either have as its **objective** the commission of one or several crimes,<sup>1101</sup> or its implementation (*i.e.*, its **means**) must involve the commission of one or several charged crimes.<sup>1102</sup> In addition, **all** JCE members must intend to achieve the defined common purpose.<sup>1103</sup>

358. However, here lies the Co-Prosecutors’ first major problem in establishing Nuon Chea’s JCE I liability in Case 002/02: no direct evidence of either a common objective or common means exists. As such, the Closing Order is forced to resort to circumstantial evidence alleging that there was a discernible systematic pattern in the events at the “crime base” level so as to

<sup>1098</sup> **F36**, Case 002/01 Appeals Judgement, para. 789.

<sup>1099</sup> **D427**, Closing Order, para. 156.

<sup>1100</sup> **D427**, Closing Order, para. 157.

<sup>1101</sup> **F36**, Case 002/01 Appeals Judgement, paras 789, 807-808 (emphasis added).

<sup>1102</sup> See *e.g.* ICTY, *Tadić* Appeals Judgement, para. 227 (emphasis added).

<sup>1103</sup> ICTY, *Karadžić* Trial Judgement, para. 569; *Stanišić & Simatović* Appeals Judgement, para. 77; *Tadić* Appeals Judgement, para. 228; *Brđanin* Appeals Judgement, para. 365; *Kvočka et al.* Appeals Judgement, para. 82; *Blaškić* Appeals Judgement, para. 33; *Vasiljević* Appeals Judgement, paras 97, 101 (emphasis added).



infer the existence of the common means in Case 002/02 – namely the JCE members’ agreement to implement the alleged CPK policies.<sup>1104</sup>

359. Since establishing a common purpose in Case 002/02 turns on discerning a systematic pattern within the evidence of cadres’ actions at the ‘crime base’, evidence that shows that those cadres may in fact have been taking orders from a sub-section of JCE members who were actively attempting to overthrow the legitimate DK government and further the interests of a foreign state (Vietnam) is of obvious relevance. This evidence raises fundamental questions concerning who was responsible for designing the systematic pattern the cadres were allegedly following, and what that allegedly systematic pattern was.<sup>1105</sup>

**(a) No Criminal Common Purpose**

360. Even if there were a common purpose as alleged in the Closing Order, establishing JCE liability requires more than just having a group of people who agreed to act in concert to pursue any common purpose. For JCE liability, the common purpose must be of a **criminal character**.<sup>1106</sup> As noted above, this means that the common purpose must either be criminal in itself (*i.e.* have the commission of a crime as its primary objective)<sup>1107</sup> or involve the commission of a crime (*i.e.* include the commission of a crime as a means to achieve the ulterior objective).<sup>1108</sup> In the latter case, the commission of a crime must be contemplated and intended as being necessary to achieve the ultimate purpose.<sup>1109</sup>

361. Even if it was found that there was an agreement to implement rapid socialist revolution in Cambodia through a ‘great leap forward’ and to defend the Party against internal and external enemies, between the alleged JCE members the Defence challenges both that the CPK’s common purpose was criminal – which the Closing Order already partially concedes<sup>1110</sup> – and

<sup>1104</sup> **D427**, Closing Order, paras 169-70, 172, 174-76, 302, 323, 351, 369, 383, 400, 1165-66, 1237, 1239 (cooperatives and worksites policy); paras 178-80, 182-86, 189-90, 192, 393, 415, 476, 485, 488, 506, 510, 514, 516, 521, 528, 530, 533, 535, 541, 545-46, 551, 559, 563, 565, 572, 576, 581, 584, 587, 589, 598, 605, 610, 616, 625, 634, 639, 641, 644, 653, 658-59, 667, 673, 680, 682, 686, 689, 698, 715, 917, 964, 968, 971-72, 1175, 1248, 1385 (national defence and security policy); paras 206, 207, 210-14, 321, 360, 709-711, 740, 743, 753, 751, 761-764, 795, 797, 801-02, 805, 819, 820, 826, 836, 977, 978, 980, 984, 1117, 1192-96, 1198, 1346-47, 1420, 1422 (so-called ‘targeted groups’ policy); paras 216-19, 316, 344, 833, 845, 855, 992, 1121 (regulation of marriage).

<sup>1105</sup> See *infra*, Chapter 3-IV, 3-V, 3-VI, and 3-VII.

<sup>1106</sup> **F36**, Case 002/01 Appeals Judgement, para. 789 (emphasis added).

<sup>1107</sup> **F36**, Case 002/01 Appeals Judgement, para. 807.

<sup>1108</sup> **F36**, Case 002/01 Appeals Judgement, para. 808.

<sup>1109</sup> **F36**, Case 002/01 Appeals Judgement, para. 808.

<sup>1110</sup> **D427**, Closing Order, para. 1524 (“[t]he purpose itself was not entirely criminal in nature”).

that its implementation involved the commission of crimes.<sup>1111</sup> The general goal of implementing a socialist revolution cannot be in any way interpreted as being inherently criminal. As discussed in detail in Chapter 6 of this Brief, the CPK's goals for DK were not unlawful. DK was not Nazi Germany as Judge Fenz apparently believes.<sup>1112</sup> The CPK was a communist movement<sup>1113</sup> which sought not to harm ordinary Cambodians, but to eliminate the injustices which affected a broad cross-section of the Cambodian population, especially the rural poor. Its fundamental objectives constitute an application of orthodox Marxism-Leninism. It is perhaps easy today to criticise them in historic isolation long after the Cold War, but in 1975, economic and social collectivisation was a widespread global phenomenon. In 1975, no reasonable person could have understood or expected that it was unlawful as such<sup>1114</sup> and the evidence in the present case fails to prove otherwise. As such, Nuon Chea cannot be held responsible for the crimes with which he is charged under JCE I.

**(b) No Common Purpose Involving the Commission of Crimes**

362. The Closing Order presents five alleged CPK policies as the means through which the common purpose was to be achieved.<sup>1115</sup> However, the evidence does not even establish that a “targeting policy” against specific groups existed at all, as discussed in Chapter 5 of this Brief. All the other alleged policies – movement of population, establishment of cooperatives and worksites, national defence and security, and the regulation of marriage – were never inherently criminal. Indeed, as discussed in this Brief, for instance, economic collectivisation and identification and arrest of people suspected of unlawful activities including high treason against the state were very common back in the 1970s, and are still implemented around the world today.<sup>1116</sup>

<sup>1111</sup> *Contra* **D427**, Closing Order, para. 1524 (“its implementation resulted in and/or involved the commission of crimes within the jurisdiction of the ECCC”).

<sup>1112</sup> Wiener Zeitung, Claudia Fenz: Internationale Tribunale nicht überfrachten. In this interview she said “If you read the Nuremberg Laws and think about the personalities who chose the Khmer Rouge, there are many similarities” (internal Defence translation); *see also supra*, Chapter 2-II-B-2.

<sup>1113</sup> Communism seeks to create a classless society, devoid of inequality or injustice. This was the goal of the CPK. However, in order to achieve this, society must first transition through the lower stage of communism, known as socialism. Throughout this Brief the Defence refers to the CPK's communist ideals and the socialist revolution through which they sought to achieve this. *See* Çam and Kayaoglu, *Marx's Distinction Between Socialism and Communism*, p. 387.

<sup>1114</sup> *See infra*, Chapter 6, generally.

<sup>1115</sup> **D427**, Closing Order, para. 1525.

<sup>1116</sup> *See infra*, Chapters 4-II, 5-I, 6-II and 7-II, for discussions concerning each of the four alleged policies.

363. Nuon Chea maintains that the CPK's actual policies<sup>1117</sup> – as opposed to those defined in the Closing Order<sup>1118</sup> – were correct and necessary given the circumstances the CPK faced,<sup>1119</sup> but never amounted to or involved the commission of crimes. Those circumstances, forgotten now, merit reiterating. The CPK inherited a country whose economy and infrastructure had been obliterated by war.<sup>1120</sup> Its land had been decimated by a relentless bombing campaign in which the US dropped more tonnage of bombs in total than the Allies did on all theatres in all of WWII<sup>1121</sup> and which incurred at least ten times the casualties of the evacuation of Phnom Penh, but likely many more.<sup>1122</sup> Compounding this was a bloody civil war between the CPK and what the late King Father Norodom Sihanouk described as the “fascist” Khmer Republic government.<sup>1123</sup> Moreover, and as this Chapter has detailed, throughout the DK period, the CPK and the legitimate DK government simultaneously faced acute existential threats not only from Vietnam itself<sup>1124</sup> but also from traitors within collaborating with Vietnam.<sup>1125</sup> These threats were to DK an infinitely more dangerous version, *e.g.*, of what Russia currently is to Ukraine (and are on a completely different stratosphere than the threat ISIS for instance poses to western liberal democracies) – and all of these threats to the DK ultimately materialised.

364. Further, the policies that the CPK implemented can only be properly considered in the context of these existential threats, for they left DK in a constant state of emergency. In turn, to the extent that the CPK's alleged policies existed, this constant state of emergency underscores both the policies' inherent lawfulness and the fact that they did not involve the commission of crimes at all. Again, this in turn means that Nuon Chea cannot be held responsible for any of the crimes with which he is charged under JCE I.

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<sup>1117</sup> See *infra*, Chapter 4-I, Chapter 5-I, Chapter 6-II and Chapter 7-II, for discussions concerning each of the four alleged policies.

<sup>1118</sup> See *supra*, Chapter 4-1, Chapter 5-II-A, Chapter 6-I, and Chapter 7-I, setting out the Closing Order definition of the alleged CPK policies.

<sup>1119</sup> **E3/108**, Notes of Interview of Nuon Chea and Khieu Samphân, ERN 00000932 (“In my time, the policy was good”).

<sup>1120</sup> See *e.g.* **E3/88**, Shawcross, Sideshow, ERN 00430077-78 (citing an April 1975 USAID report detailing how “Cambodia slipped in less than five years from a significant exporter of rice to large-scale imports, and when these ended in April 1975, to the brink of starvation. [...] up to 75 percent of draft animals had been destroyed by the war [...] If ever a country needed to beat its swords into plowshares in a race to save itself from hunger, it is Cambodia. [...] general deprivation and suffering will stretch over the next two or three years before Cambodia can get back to rice self-sufficiency.”).

<sup>1121</sup> Owen and Kiernan, *Bombs Over Cambodia*, p. 2; see also *infra*, Chapter 6-II.

<sup>1122</sup> The Trial Chamber relied upon a prediction of 40,000 deaths stemming from the American bombing campaign (**E313**, Case 002/01 Trial Judgement, para. 155 citing **E1/180.1**, Francois Ponchaud, T. 11 Apr 2013, p. 27, lns 3-14), which is 10 times the death toll of the evacuation (**F16**, Nuon Chea's Appeal Brief, para. 348).

<sup>1123</sup> **E3/7335**, UN Security Council Meeting Minutes, ERN 01001645.

<sup>1124</sup> See *infra*, Chapter 3-IV and 3-VI.

<sup>1125</sup> See *infra*, Chapter 3-III, 3-IV, and 3-V.

365. As detailed in Chapter 4 regarding the CPK's national defence and security policy, it was lawful for the CPK to identify, arrest, detain, and in most circumstances execute internal and external enemies due to legitimate suspicions and convictions of unlawful activities such as treason, subversion, collaborating with the enemy, and espionage.<sup>1126</sup> Further, and as discussed in Chapter 5 on the treatment of 'targeted groups', to the extent that members of the so-called 'targeted groups' were arrested, this owed not to their group identity but again, to legitimate suspicions of their participation in unlawful activities.<sup>1127</sup> The establishment of worksites and cooperatives and the involvement of people in work there – as discussed in Chapter 6 – was a necessary and lawful measure to bolster the DK's capacity to survive the existential threats it faced.<sup>1128</sup> Finally, and as set out in Chapter 7 of this Brief, the CPK's regulation of marriage was perfectly lawful (and there was no top-level nationwide policy to force people into marriages).<sup>1129</sup>

## 2. There is No Plurality of People Acting in Concert

### (a) *The Diametrically-Opposed Purposes Pursued by Most JCE Members*

366. The Closing Order alleges that the JCE membership included not only Nuon Chea, but also "[other] members of the Standing Committee [...]; members of the Central Committee [...]; heads of CPK Ministries, [...] zone and autonomous sector secretaries, and the heads of the Party Centre military divisions".<sup>1130</sup> In order to establish an action in concert between them beyond reasonable doubt, the role and contribution of the key alleged JCE members must be assessed in order to determine whether they in fact shared an intent to commit crimes in furtherance of the common purpose.<sup>1131</sup>

367. However, the abundant evidence detailed below in this Chapter demonstrates that in fact, the majority of JCE members did not act at all in unison with Nuon Chea to further an alleged common purpose. Quite the opposite. These leaders, including Sao Phim, Ruos Nhim, Koy Thuon, Vorn Vet, Ney Sarann *alias* Ya, Chou Chet, Chan Chakrei, Chhouk, Oeun and many others worked to pursue a diametrically-opposed goal: to overthrow the CPK and legitimate

<sup>1126</sup> See *infra*, Chapter 4 generally; see also E395/2, Nuon Chea's Rebellion Submissions, paras 17-30; E295/6/3, Nuon Chea's Case 002/01 Closing Brief, para. 464.

<sup>1127</sup> See *infra*, Chapter 6-I, discussing the so-called 'targeting policy' in respect of each 'targeted group'.

<sup>1128</sup> See *infra*, Chapter 7 generally; see also E295/6/3, Nuon Chea's Case 002/01 Closing Brief, para. 457.

<sup>1129</sup> See *infra*, Chapter 9, discussing the so-called policy to regulate marriage.

<sup>1130</sup> D427, Closing Order, para. 1529.

<sup>1131</sup> See e.g. ICTY, *Karadžić* Trial Judgement, paras 3448-3462, see particularly para. 3452; *Stanišić & Župljanin* Trial Judgement, paras 131-206.

DK government and to replace them with leadership which would instead further the interests of an imperialist foreign power, Vietnam.<sup>1132</sup>

368. The Co-Prosecutors argue that “there is nothing impossible, and indeed nothing unusual, about members of a criminal organization sharing a common criminal purpose while simultaneously disliking, mistrusting, and even plotting against each other”.<sup>1133</sup> This is theoretically possible. However, this does not save the Co-Prosecutors’ case, for two reasons. First, the attribution of criminal responsibility within a criminal organisation is very different from the context of JCE. Second, what matters is that it is illogical, if not impossible, to find that a JCE exists when the disagreement between the alleged JCE members is over the very issues that form the basis for the JCE, *i.e.*, the objectives and the means envisaged in the alleged criminal “purpose”, and the intent to cooperate to achieve the said “purpose”. For instance, in *Šešelj*, the ICTY Trial Chamber held that Šešelj was not in a JCE with Slobodan Milošević to achieve the alleged political goals for the Serbians in the region because they disagreed on this matter.<sup>1134</sup> It found that the mistrust and hostility between different Serbian entities, *e.g.*, the Milošević government’s armed forces and Šešelj’s volunteers incorporated into these forces, was incompatible with an alleged criminal conspiracy between them.<sup>1135</sup> As Presiding Judge Antonetti pointed out, it is unreasonable to find Šešelj to be in a JCE with Milošević since Šešelj was a political opponent of the Milošević government and that his volunteers caused serious concerns in the government by infiltrating into the government’s armed forces.<sup>1136</sup>

369. The situation in Case 002/02 is similar, only more serious. Instead of openly expressing political opposition, some alleged JCE members such as Sao Phim, Ruos Nhim, Koy Thuon and others plotted to overthrow the DK government. As discussed above and in Chapter 6-II below, while CPK policy was to maintain Cambodia’s independence from improper foreign influence, particularly Vietnam’s, Vietnam’s collaborators sought to rely on Vietnam to overthrow the DK government. In addition, the CPK’s core policy was to improve people’s lives so that they would support communism and the government, while the objective of Vietnam’s collaborators was to turn the people against DK and to generate justifications for

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<sup>1132</sup> See *infra*, Chapter 3-V, 3-VI, and 3-VII.

<sup>1133</sup> E395/3, Co-Prosecutors’ Response to Rebellion Submissions, para. 22.

<sup>1134</sup> See *e.g.* ICTY, *Šešelj* Trial Judgement, paras 260, 277.

<sup>1135</sup> ICTY, *Šešelj* Trial Judgement, paras 240, 253, 258.

<sup>1136</sup> ICTY, *Šešelj*, Judge Antonetti’s Concurring Opinion on Trial Judgement, pp. 407-08.

their subversion, *e.g.*, by spreading rumours, sabotaging government policies, and mistreating the people in the name of the CPK.

370. Such profound differences, as well as the mistrust and hostility between the opposing factions, make it impossible to find that they were in a JCE together to achieve a common political goal by acting in concert to commit the alleged crimes against the Cambodian people and operating within what the Closing Order called a strict hierarchy.<sup>1137</sup> Indeed, the evidence instead suggests that if there was a JCE, it was one of which Nuon Chea was not a member. This alternative JCE shared a common purpose of overthrowing the CPK and legitimate DK government through treason and other crimes, with the sponsorship of Vietnam, and as of 1978, the Soviet Union and its Warsaw Pact allies as well.

**(b) *No Action in Concert***

371. Returning to the alleged common purpose and the systematic evidence used to establish it, evidence of this diametrically-opposed purpose also precludes the Chamber from finding beyond reasonable doubt that the participation of all alleged JCE members into the common purpose could be inferred from their actions. This is because this is not the only reasonable inference that can be drawn from the evidence.<sup>1138</sup> Far from it. Even if the evidence suggested a systematic order to events, this does not lead to the sole conclusion that the events occurred pursuant to any systematic organisation. In many cases, alleged events could be attributed to any of the competing factions in the CPK, and some could have been deliberate acts of sabotage organised by the traitorous leaders in deviation from CPK policies. In addition, as illustrated in relevant portions in this Brief, the rebel leaders included DK officials from all levels and almost all departments of the government. They were highly organised and secretly cooperated with each other in their common efforts to overthrow DK government.

372. As detailed above and further substantiated throughout this Brief, the evidence shows that some events were the sole responsibility of local authorities. This is particularly true when one considers that most low-level cadres were not well-educated yet were nevertheless often zealous, if not radical about socialist revolution, and frequently eager to show that they were more revolutionary than others, perhaps to distinguish themselves. Such circumstances could

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<sup>1137</sup> **D427**, Closing Order, Part One-II (Administrative Structures (Centre)), Part One-III (Administrative Structures (National)), Part One-V (Military Structure).

<sup>1138</sup> *Cf.* **F36**, Case 002/01 Appeals Judgement, para. 46 (where the Supreme Court Chamber held the Trial Chamber's circular finding in regard to "pattern evidence" in that case was reasonable).

and did<sup>1139</sup> lead to these cadres misinterpreting and thus misapplying correct CPK policies, thus falling outside the common purpose and not being able to be imputed to the alleged JCE members. In sum, these considerations cast more than reasonable doubt on whether the events – even if they occurred – were in fact implementing policies agreed upon by all alleged members of the alleged JCE. As a result, a finding that there was a common purpose between all alleged JCE member is precluded.

373. Evidence detailed in this Chapter also shows that there were investigations into alleged sabotage and subversion.<sup>1140</sup> This not only supports Nuon Chea’s long-held contention that “bad cadres” abused correct CPK policies,<sup>1141</sup> but makes it even less likely that Vietnam’s collaborators acted in concert with Pol Pot, Nuon Chea and others. To put it another way, had they all been acting in concert in furtherance of the same common purpose, investigating and punishing some of the alleged JCE members for furthering this allegedly criminal common purpose would defeat the very essence of this purpose and thus be entirely illogical.

374. Indeed, evidence that Pol Pot and others initiated investigations into suspected sabotage would suggest that to the extent that the charged crimes were committed in areas under the control of Vietnam’s collaborators, they were committed under their direction and without the knowledge or approval of Pol Pot, Nuon Chea, and leaders loyal to DK.<sup>1142</sup> Consequently, coordinated government action is not the only reasonable inference from the widespread or systematic nature of any alleged crimes, as Vietnam’s collaborators can also be independently responsible for staging crimes of such a nature.<sup>1143</sup> This is particularly the case when the alleged crimes served the objective and the interest of those collaborators. Thus, not only were these acts outside of the alleged common purpose and in defiance of lawful orders, they may very well have been in furtherance of **an entirely different JCE**. Furthermore, since these acts

<sup>1139</sup> See in particular, Chapter 6 *supra*, discussing low-level deviation at all four cooperatives and worksites within the scope of Case 002/02; see also Chapter 8 generally.

<sup>1140</sup> See *infra*, Chapter 3-V-B.

<sup>1141</sup> E3/108, Notes of Interview of Nuon Chea and Khieu Samphân, ERN 00000932 (“In my time, the policy was good; but our comrades (officers) are bad. We did not have good bridge to take our good policy to the people. Therefore we fail to reach our goal”); E1/36.1, Nuon Chea, T. 31 Jan 2012, p. 25, ln. 22 to p. 26, ln. 4 (“The Party’s Standing Committee and the - even the commune district levelled educated the people not to discriminate the New People because we are all Khmer [...] Of course, there were bad elements who incite the hatred between the base and - the Base People and the New People. The situation was complicated.”).

<sup>1142</sup> See also, E395/2, Nuon Chea’s Rebellion Submissions, paras 39-41.

<sup>1143</sup> In this regard, the Defence notes that the Supreme Court Chamber erred in considering that the “rift” would not affect the reasonableness of the Trial Chamber’s findings which were based on “a pattern of events, which had occurred over a long time-span and in various parts of the country”: F36, Case 002/01 Appeals Judgement, para. 46.

occurred in areas in which crimes are charged in Case 002/02, they undermine the Co-Prosecutors' efforts to hold Nuon Chea responsible for crimes charged in those areas.<sup>1144</sup>

375. In short, in Case 002/02, to show that the action in concert, and thus the alleged common purpose, could be deduced on the basis of systematic evidence, it is for the Co-Prosecutors to establish beyond reasonable doubt that the alleged common purpose is the **only reasonable inference** permitted by the evidence.<sup>1145</sup> That is, they must show that none of the possible inferences mentioned above could possibly have been drawn from the evidence. However, the strength of the evidence detailed in this Chapter – as well as plain common sense – shows the contrary. To suggest that traitorous leaders and their subordinates shared the same goal as the DK regime they sought to overthrow, and that their actions in furtherance of such a goal could be attributed to Pol Pot, Nuon Chea and CPK leaders loyal to the DK, is patently absurd.

*(c) No JCE I In Respect of Loyal CPK Forces Either*

376. Similarly, it is equally impossible to establish JCE I liability beyond reasonable doubt in respect of the actions of loyal CPK forces, namely, forces reporting to Pol Pot, Ta Mok, Son Sen, Ke Pauk and others. Even if it could be established that Nuon Chea was acting in concert in a plurality with Pol Pot, Ta Mok, Son Sen, Ke Pauk and others they were not doing so in furtherance of a criminal common purpose, as stated above, but instead with the aim of achieving a more equitable communist society. To the extent that individual members of the CPK committed abuses, these abuses took place outside the lawful framework of CPK policies and instructions, and were committed by brutal lower-level leaders with whom Pol Pot, Nuon Chea, Ta Mok, Son Sen, and Ke Pauk did not share any criminal intent and did not act in concert. As noted throughout this Brief, evidence of low-level deviations is widespread and exists for all crime sites charged in Case 002/02. Such deviations were even reported in Ta Mok's Southwest Zone, as discussed in more detail below in Chapter 4-V (concerning Kraing Ta Chan Security Centre) and Chapter 6-V (on the Tram Kok Cooperatives).<sup>1146</sup> As also discussed in Chapter 5-II in connection with the alleged genocide of the Cham, Ke Pich Vannak,

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<sup>1144</sup> E395/2, Nuon Chea's Rebellion Submissions, para. 42.

<sup>1145</sup> Cf. F36, Case 002/01 Appeals Judgement, para. 46 ("there was no indication that the proposed evidence would have been capable of rendering the Trial Chamber's findings based on a pattern of events, which had occurred over a long time-span and in various parts of the country, unreasonable").

<sup>1146</sup> See *infra*, Chapter 4-V, on Kraing Ta Chan Security Centre, and Chapter 6-V on the Tram Kok Cooperatives.



Ke Pauk's son, also testified that Pol Pot was surprised to discover headless Cham corpses floating in the Mekong in front of his office, and immediately opened an inquiry.<sup>1147</sup>

**B. NUON CHEA CANNOT BE HELD RESPONSIBLE UNDER ORDERING OR SUPERIOR RESPONSIBILITY AS HE HAD INADEQUATE AUTHORITY AND/OR EFFECTIVE CONTROL**

377. In addition, the evidence detailed in this Chapter makes it impossible to convict Nuon Chea under the mode of liability of ordering, or under the alternative and indirect mode of liability of superior responsibility.<sup>1148</sup> The existence of *de jure* or *de facto* authority is insufficient in itself to establish superior responsibility.<sup>1149</sup> Proof of superior responsibility liability requires the Co-Prosecutors to also show that the *de jure* or *de facto* superior possesses “effective control”<sup>1150</sup> over the perpetrators, as measured through his possession of the material ability to prevent or punish their criminal conduct.<sup>1151</sup> In other words, the “[a]ssessment of the superior’s failure to fulfil [his] obligation [...] must be done on a case-by-case basis”.<sup>1152</sup> Such assessment “may lead to a determination that the said superior may have been in a situation such that he lacked the material ability to ensure that his subordinates acted in compliance with international humanitarian law.”<sup>1153</sup>

378. While the question of effective control is not a requirement to establish the mode of liability of ordering, the absence of such control tends to undermine the existence of a relationship of authority. The existence of such a relationship is a constitutive element of this mode of liability. Factors to be taken into account when determining the existence of effective control include the capacity to issue orders and whether those orders were in fact followed, the authority to issue disciplinary measures, as well as the power to promote personnel and terminate positions held.<sup>1154</sup> Importantly, even if a unit was receiving orders from and occasionally fighting alongside another unit, the former would not be considered under the latter’s effective control if, for example, it recklessly disregarded directives from the latter unit

<sup>1147</sup> E3/35, ‘WRI of Ke Pich Vannak’, ERN 00346155.

<sup>1148</sup> D427, Closing Order, paras 1557-1560.

<sup>1149</sup> ICTY, *Karadžić* Trial Judgement, para. 581; *Hadžihasanović & Kubura* Appeals Judgement, paras 20-21; *see also Šainović et al.* Appeals Judgement, para. 1368: “not every position of authority necessarily leads to superior responsibility”.

<sup>1150</sup> ECCC Establishment Law, Art. 29, which describes the requirement, in respect of civilian superiors, as “effective [...] authority and control”; *see also* D427, Closing Order, para. 1319.

<sup>1151</sup> ICTY, *Čelebići* Appeals Judgement, para. 256; *Karadžić* Trial Judgement, para. 580; *Kvočka et al.* Appeals Judgement, para. 144.

<sup>1152</sup> ICTY, *Prlić et al.* Trial Judgement, para. 235.

<sup>1153</sup> ICTY, *Prlić et al.* Trial Judgement, para. 235.

<sup>1154</sup> ICTY, *Karadžić* Trial Judgement, para. 581.

or the only way for the latter unit to control it was to attack the former unit as if it were an enemy unit.<sup>1155</sup> Also, while the Chamber need not establish that Nuon Chea knew the exact identity of his alleged subordinates, the fact that the individuals were his subordinates, and that they committed one of the crimes charged, must be established beyond reasonable doubt.<sup>1156</sup>

379. However, the evidence in fact shows that the relevant individuals were often acting autonomously, secretly, and independently of Nuon Chea. This undermines the proposition that Nuon Chea could possibly have exercised effective control over cadres belonging to most zonal, autonomous sector, and Centre and zonal military division forces, or that he would have been able to prevent or punish those cadres' actions.

**C. NUON CHEA LACKED THE REQUISITE *MENS REA* AS HE DID NOT HAVE KNOWLEDGE OF THE ALLEGED COMMISSION OF CRIMES**

380. Knowledge of the crimes about to be committed or committed by the subordinates must also be established beyond reasonable doubt for a conviction to be entered under superior responsibility. It is also directly relevant to all other modes of liability charged, as it goes to *mens rea*. However, as discussed above, the Co-Prosecutors have failed to demonstrate that either the alleged common purpose or the alleged CPK policies in fact involved the commission of crimes. Nor do contemporaneous reports or other forms of communication addressed to Nuon Chea discuss specific instance of crimes. To the contrary, the existing documents refer to the taking of justified and lawful military actions, or to actions concerning individuals who committed crimes or were suspected of treason.<sup>1157</sup> In the absence of evidence of any relevant crimes, Nuon Chea accordingly had no relevant obligation to prevent or punish the actions of CPK cadres at issue in Case 002/02.

381. In addition, even if the Trial Chamber were to find that crimes were committed, first, Nuon Chea's mistake of law would negate the *mens rea* for superior responsibility. Second, the evidence in this Chapter demonstrates that, in the areas in which Vietnam's collaborators operated, it was them and their subordinates who committed crimes and attempted to attribute those crimes to the DK regime in order to discredit it.

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<sup>1155</sup> ICTY, *Hadžihasanović & Kubura Appeals Judgement*, paras 227, 229-230; *see also* F16, Nuon Chea's Appeal Brief, para. 695, fn. 1871.

<sup>1156</sup> ICTY, *Blagojević & Jokić Appeals Judgement*, para. 287.

<sup>1157</sup> *See infra*, Chapters 4 and 5-III-B.

**D. CONCLUSION ON THE LEGAL SIGNIFICANCE OF THE CROCODILE**

382. In sum, it is impossible, on the evidence, to establish, beyond reasonable doubt, either of the principal modes of liability with which Nuon Chea is charged in Case 002/02. In the case of JCE I, the evidence does not establish beyond reasonable doubt an agreement between the alleged JCE members to a criminal common purpose. Nor does it show that the alleged JCE members agreed to implement the common purpose through the commission of crimes. Equally, the evidence fails to establish the modes of liability of ordering or superior responsibility. It cannot be demonstrated beyond reasonable doubt that Nuon Chea enjoyed effective control of authority over the perpetrators of the crimes to the extent that he would have been able to prevent or punish their actions. Even if he did, the evidence fails to conclusively establish that crimes were committed and that even if they were, that Nuon Chea had knowledge of them.

**X. CONCLUSION ON THE CROCODILE: WHAT REALLY HAPPENED BEFORE, DURING, AND AFTER THE DK PERIOD**

383. The evidence outlined in this Chapter demonstrates that Nuon Chea cannot be held responsible under the mode of liability of JCE I as there was no criminal common purpose. Moreover, even if the common purpose were found to have amounted to or involved the commission of crimes, the alleged JCE lacks both an action in concert<sup>1158</sup> and the necessary plurality of members.<sup>1159</sup> Throughout the DK, a majority of the Central Committee, Zone leaders and many RAK leaders were instead collaborating with Vietnam to further the interests of that foreign power and thus pursue diametrically-opposed purposes to the CPK and legitimate DK government,<sup>1160</sup> or were otherwise in defiance of lawful instructions.<sup>1161</sup> Similarly, the Chamber cannot alternatively find Nuon Chea responsible under superior responsibility. As the evidence proves, the idea that Nuon Chea could have exercised effective control over Vietnam's collaborators and forces loyal to them is utterly absurd.<sup>1162</sup> Even if he had, the evidence also shows that concerted efforts were taken to investigate and punish acts of sabotage and subversion.<sup>1163</sup> These also negate Nuon Chea's liability under the alternative mode of liability of superior responsibility.

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<sup>1158</sup> See *supra*, Chapter 3-V, 3-VI, 3-VII.

<sup>1159</sup> In particular, see *supra*, Chapter 3-IV-A.

<sup>1160</sup> See *supra*, Chapter 3-V, 3-VI, 3-VII.

<sup>1161</sup> See *supra*, Chapter 3-VI-B-1-(b).

<sup>1162</sup> See *supra*, Chapter 3-IV-A.

<sup>1163</sup> See *supra*, Chapter 3-VI-B-1-(a).

384. It is once again worth reiterating that the burden of proof lies with the Co-Prosecutors, and not the Defence. Bearing in mind the lack of direct evidence incriminating Nuon Chea, what the Co-Prosecutors are required to do is to demonstrate that each finding based on circumstantial evidence must be the only reasonable inference.<sup>1164</sup> However, the evidence detailed above in this Chapter and below throughout this Brief prevents them from doing so, for it dismantles the Manichean narrative and exposes the existence of more than one reasonable inference. Indeed, what is made clear throughout this Brief is that to the extent that the alleged CPK policies at issue in this trial existed at all, this state of emergency existing throughout the DK period owing to the existential threat of Vietnam and the decimated conditions of Cambodia at the time that the CPK took power renders them not only entirely rational and perfectly legitimate but absolutely lawful.<sup>1165</sup> This is discussed further in this Brief in respect of each of the four policies at issue, beginning with the CPK's nationwide defence and security policy in Chapter 4 immediately below.

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<sup>1164</sup> See *supra*, Chapter 2-III-B, discussing the applicable standard of proof.

<sup>1165</sup> See *supra*, Chapter 3-IX-A-1-(b), Chapter 3-III.

#### **CHAPTER 4. THE CPK'S NATIONAL DEFENCE AND SECURITY POLICY AND ITS IMPLEMENTATION VIA SECURITY CENTRES AND 'INTERNAL PURGES'**

##### **I. INTRODUCTION**

385. The Closing Order defines one of the alleged policies forming part of the JCE's common purpose as "to implement and defend the CPK socialist revolution through the reeducation of 'bad-elements' and the killing of 'enemies', both inside and outside the Party ranks."<sup>1166</sup> It alleges that the CPK replaced the former judicial system with, and implemented this policy through, "a network of security centres and execution sites"<sup>1167</sup> meant to "reeducate or kill those who were suspected of engaging in activities against the State."<sup>1168</sup> It is further alleged that this policy evolved to include an increasing series of 'internal purges': mass arrests and transfers to security centres, followed by mass executions.<sup>1169</sup> Ultimately, the Closing Order and the Co-Prosecutors rely on this policy to portray DK as a killing machine led by paranoid leaders who stifled all dissenting voices and bloodily repressed misconduct. This blind Manichean portrayal is epitomised by the Closing Order's reference to the policy as one of "smashing enemies".<sup>1170</sup>

386. However, as this Chapter demonstrates, the evidence simply does not support such portrayal. The CPK's national defence and security policy was akin to what most states, entangled in an armed conflict with a far more powerful opponent and recovering from a bloody civil war, would develop. The CPK's policy sought to investigate and detain those suspected of unlawful activities endangering state security or threatening the society as such and was both lawful and legitimate. Indeed, if the CPK was simply an evil entity bent on annihilating everything that stood in its way and sadistically searching for 'enemies' to exterminate, it would not need to expend time and resources on monitoring, interrogating and investigating people. People identified as 'enemies' would have been summarily executed without justification. The fact that, on the contrary, there was an elaborate process to monitor, investigate and interrogate people shows that, at the very least, one reasonable inference from the evidence is that the CPK was genuinely trying to identify individuals guilty of unlawful activities.

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<sup>1166</sup> **D427**, Closing Order, para. 178.

<sup>1167</sup> **D427**, Closing Order, para. 178.

<sup>1168</sup> **D427**, Closing Order, para. 178.

<sup>1169</sup> **D427**, Closing Order, paras 192-203; **D390**, Co-Prosecutors' Final Submission, paras 164, 327-28.

<sup>1170</sup> **D427**, Closing Order, para. 1375.

387. This Chapter also shows that Nuon Chea is not criminally responsible for events charged *vis-à-vis* ‘internal purges’<sup>1171</sup> or the four security centres in Case 002/02 through which the CPK’s national defence and security policy was implemented: Kraing Ta Chan, Au Kanseng, and Phnom Kraol (which have not been previously adjudicated at this Tribunal), and S-21 (which has).<sup>1172</sup> Since S-21 has been adjudicated before, this Chapter discusses the three new crimes sites first and S-21 last. S-21 was nonetheless included in Case 002/02<sup>1173</sup> at the Co-Prosecutors’ insistence<sup>1174</sup> and despite the Defence’s protestations that three judges in this Chamber who had previously adjudicated Case 001 could not possibly now adjudicate S-21 impartially given their textbook-Manichean and deeply-troubling Case 001 Trial Judgement.<sup>1175</sup> The Defence argued that there seems to be no possibility that it can persuade this Chamber that the conclusions some of its judges formed after 17 months of proceedings were incorrect.<sup>1176</sup> This prediction has so far proven accurate, with S-21 thus far appearing to be the epicentre of the Chamber’s closeminded Manichean commitment in Case 002/02, as discussed below. Separately, it is also important to highlight that while this Brief discusses Phnom Kraol, it transpired at trial that the evidence in relation to this site is woefully limited. Of the six witnesses who testified on Phnom Kraol, only two could actually provide evidence relevant to the crimes allegedly committed there. Thus, the discussion on Phnom Kraol is – as an inevitable function of the evidence itself – comparatively brief.

388. Section II of this Chapter lifts the Manichean shroud to present the true nature of the CPK’s national defence and security policy, demonstrating that it was legitimate and no different than the policies of states the world over. Due to the factual and legal overlaps between issues relating to security centres and ‘internal purges’, the Defence has adopted an integrated thematic, rather than crime site-based, approach to the bulk of this Chapter. Section III opens the Defence’s analysis of the crime sites by introducing the Defence’s position on each site. Section IV addresses a number of cross-cutting preliminary issues, such as questions of scope and credibility of key witnesses including Duch, and the key role that propaganda and

<sup>1171</sup> ‘Internal Purges’ in Case 002/02 are limited to the impact of the alleged events on the “relevant underlying offences” charged in connection with security centres: *see* **E301/9/1.1**, Scope of Case 002/02, p. 1.

<sup>1172</sup> **E301/9/1.1**, Scope of Case 002/02, p. 2.

<sup>1173</sup> **E301/9/1**, Additional Severance of Case 002/02, paras 17, 31.

<sup>1174</sup> **E124/2**, Co-Prosecutors’ Request for Reconsideration of Severance Order; **E163**, Co-Prosecutors’ Request to Include Additional Crimes in Case 002/01; **E163/5/1/1**, Co-Prosecutors’ Immediate Appeal of the Scope of Trial in Case 002/01; **E1/171.1**, Oral Submissions on Severance, T. 18 Feb 2013; **E284/2/1**, Co-Prosecutors’ Appeal of Second Decision on Severance; **E301/5/1**, Co-Prosecutors’ Submission on Case 002/02 Scope.

<sup>1175</sup> **E1/239.1**, Submissions on Case 002/02 Scope, T. 11 Feb 2014, p. 44, lns 14-17, and *see* generally, p. 44, ln. 9 to p. 49, ln. 2; *see also* **E314/6**, Nuon Chea’s Second Trial Chamber Disqualification Motion, paras 115-121.

<sup>1176</sup> **E1/239.1**, Submissions on Case 002/02 Scope, T. 11 Feb 2014, p. 44, lns 17-20.

disinformation has played in creating a Manichean narrative regarding all four crime sites in the scope of Case 002/02 and S-21 above all. As discussed in Section V, which analyses the evidence presented *vis-à-vis* the alleged facts at the four sites, such narrative has been dutifully repeated by the various witnesses and civil parties who came to give evidence. This Chapter concludes with an assessment of the alleged crimes in Section VI, and the mode of liability of JCE I in Section VII. The remaining modes of liability are discussed in Chapter 8 of this Brief.

## II. THE CPK'S NATIONAL DEFENCE AND SECURITY POLICY

389. Like all the CPK policies presented as criminal in the Closing Order, this Section shows that the CPK's national defence and security policy (at times pejoratively referred to as the 'enemies policy' by the parties), when seen objectively and in context, was perfectly legitimate and akin to many security-related policies worldwide. Part A underscores the importance of context in understanding the CPK's policy. Part B explains that the language used in CPK publications was not indicative of any hatred or criminal intention. Part C demonstrates that in fact, the CPK's policy was comparable to security and defence policies around the world. Finally, Part D shows generally that the implementation of this policy did not amount to or involve the commission of crimes – a contention that is further developed in Sections V-VII *vis-à-vis* the four security centres in Case 002/02.

### A. THE POLICY WAS LAWFUL AND LEGITIMATE IN LIGHT OF THE SPECIFIC CONTEXT

390. The CPK came to power in 1975, ending more than seven years of bloody civil war with the US-backed Khmer Republic which claimed the lives of hundreds of thousands of Cambodians.<sup>1177</sup> The Khmer Republic, led by Lon Nol and described by the late King Father Norodom Sihanouk astutely as “very feudal, oligarchical, **fascist**, antinational, **antipeople** and **ultracorrupt**”,<sup>1178</sup> was unable to alleviate the socio-economic impact of US bombing campaigns over Cambodia.<sup>1179</sup> As discussed in this Brief, these bombings decimated Cambodian territory and terrorised its people.<sup>1180</sup> By the time the CPK assumed power, all state

<sup>1177</sup> See *supra*, Chapter 3-IX and *infra*, Chapter 6-II; see also **E295/6/3**, Nuon Chea's Case 002/01 Closing Brief, para. 430; **F16**, Nuon Chea's Appeal Brief, paras 294, 368.

<sup>1178</sup> **E3/120**, FBIS Reports, Mar 1975, ERN 00166825 (emphases added); see also **E3/1683**, Chandler, The Tragedy of Cambodian History, ERN 00193333, on how the Khmer Republic was riddled with corruption.

<sup>1179</sup> See **E3/11**, Flag, Sep 1977, ERN 00486260; see *supra*, Chapter 1-II-C and *infra*, Chapter 6-II; see also **E295/6/3**, Nuon Chea's Case 002/01 Closing Brief, paras 241, 245; **F16**, Nuon Chea's Appeal Brief, para. 368.

<sup>1180</sup> See *supra*, Chapter 3-IX and *infra*, Chapter 6-II; see also **E1/14.1**, Case 002/01 Opening Statements (Nuon Chea), T. 22 Nov 2011, p. 87, ln. 16 to p. 88, ln. 1, p. 91, lns 15-21, p. 92, lns 1-4, 22-23, p. 94, lns 6-16; **D427**, Closing Order, paras 221-23.

institutions were dismantled and its economy devastated.<sup>1181</sup> Its judicial institutions were likewise shattered long before 1975. Indeed, under the Khmer Republic, “the majority of Cambodians had no contact with the judicial system; those who were accused of crimes were confronted with imprisonment or possible execution, without judicial review.”<sup>1182</sup> Hence, the Closing Order allegation that “[a]s it took power, the CPK destroyed the existing legal and judicial structures”<sup>1183</sup> is historically and factually incorrect, as thanks to the Khmer Republic, there were in fact no such structures to destroy.

391. Not only did the CPK inherit a Cambodia already on its knees,<sup>1184</sup> it also had to resist Vietnam’s longstanding imperialist ambitions *vis-à-vis* Cambodia. As discussed at length in Chapter 3, this was no paranoid delusion by the CPK, as Vietnam’s invasion of DK in December 1978 and subsequent effective occupation proves.<sup>1185</sup> Vietnam sought to fulfill its imperialist ambition through both *coups d’état* led by its internal collaborators (‘Plan A’),<sup>1186</sup> and at the same time, its own blatant external acts of aggression (‘Plan B’) which began the very next day after the liberation of Phnom Penh.<sup>1187</sup> These acts of aggression soon escalated to a full-blown armed conflict. Coupled with the decimated state of the country and the internal threats of Vietnam’s collaborators, these conditions left DK in a constant state of emergency.<sup>1188</sup> In such situation, it is logical that the CPK would implement a strong national defence and security policy that would rebuild DK and bolster its ability to resist an existential threat from inside and out. States naturally tighten defence and security policy during wars or periods of political instability to strengthen borders and contain internal political turmoil.<sup>1189</sup> In fact, this is the exact reaction of many states to terrorist threats today.

<sup>1181</sup> Cambodia’s Social Studies Textbook, pp. 2-3 (“The Republic regime of Field Marshal Lon Nol was unable to maintain political and economic stability [and] surviving only through massive assistance from the United States in all fields. [...] The city dwellers lived a hand-to-mouth existence. The price of basic commodities such as rice and oil skyrocketed. Rates of inflation, unemployment, and corruption multiplied. It was a society in crisis [...] Four-fifths of industrial factories were destroyed; two-thirds of the rubber plantations were damaged; about 70 to 80 percent of roads and railroads were out of operation; ports and ferry docks were ruined, and 80 to 90 percent of public buildings, populated areas, and educational institutions suffered major damage”); *see also infra*, Chapter 6-II, for details on conditions in Cambodia when the CPK assumed power.

<sup>1182</sup> Kheang Un and Sokbunthoeun So, Cambodia’s Judiciary, p. 4.

<sup>1183</sup> **D427**, Closing Order, para. 178.

<sup>1184</sup> **E295/6/3**, Nuon Chea’s Case 002/01 Closing Brief, para. 241.

<sup>1185</sup> *See supra*, Chapter 3-VIII, on the ultimate realisation of Vietnam’s existential threat.

<sup>1186</sup> *See supra*, Chapter 3-V, VI, and VII, which describe the nature of ‘Plan A’.

<sup>1187</sup> *See supra*, Chapter 3-III, for a short history of Vietnam’s systematic acts of aggression towards the DK.

<sup>1188</sup> *See supra*, Chapter 3-IX and *infra*, Chapter 6-II, on the state of emergency.

<sup>1189</sup> On the wide acceptance for states to take stricter national security measures in times of war, *see* ICRC 1958 Commentary to Geneva Convention IV, Art. 4 (1) (“The Convention thus remains faithful to a recognized principle of international law: it does not interfere in a State’s relations with its own nationals”).



## **B. THE CPK’S CHARGED POLICY LANGUAGE DOES NOT ILLUSTRATE CRIMINAL INTENT**

### **1. The CPK Commonly Used Warlike Metaphors in its Policy Language**

392. Discerning the intent behind the CPK’s policies requires an understanding of the meaning underlying the revolutionary terminology used in its official statements and publications.<sup>1190</sup> That language used warlike metaphors such as ‘enemies’, ‘purge’, ‘smash’, ‘fight’, ‘sweep clean’, ‘battlefield’, or ‘victory’ to describe ordinary tasks such as harvesting rice,<sup>1191</sup> dam construction,<sup>1192</sup> or medicine production.<sup>1193</sup> The same style of rhetoric was also used to describe the revolution’s main goals and achievements, such as improving people’s living conditions<sup>1194</sup> or increasing people’s ideological stance.<sup>1195</sup> The CPK, in short, generally used vivid and warlike metaphors to refer to a wide range of ordinary policy matters, including in respect of defence and security issues. This was mere policy language – and a form of policy expression that remains commonplace in states today, with one well-known example being the US’s ‘war on drugs’. Such language does not, however, prove that the CPK’s policies have any underlying criminal intent.

### **2. ‘Smashing’ ‘Enemies’ Does not Refer to Arbitrary Killings**

393. Honing in on two terms used by the CPK, the Closing Order alleges that people who opposed the state were deemed ‘enemies’ and faced ‘smashing’ – which it defines as “killing” – while people who committed lighter offences were considered “bad-elements” who would be reeducated.<sup>1196</sup> The true meaning of these terms is different, however, and is unpacked below.

#### **(a) ‘Enemies’**

394. The Closing Order confusingly presents the term ‘enemies’ as a catch-all category for a dozen different groups, yet at the same time identifies four of those groups as ‘targeted groups’.<sup>1197</sup> It is unclear therefore what the Co-Investigating Judges intended to be the difference between being an ‘enemy’ and being ‘targeted’. Moreover, the breadth of people

<sup>1190</sup> For more details see **E295/6/3**, Nuon Chea’s Case 002/01 Closing Brief, paras 149-154.

<sup>1191</sup> See e.g. **E3/213**, SC Meeting, 21 Jul - 2 Aug 1976, ERN 00104082; **E3/224**, SC Meeting, 30 May 1976, ERN 00182681; **E3/165**, People’s Representative Assembly of Kampuchea, ERN 00184070.

<sup>1192</sup> **E3/750**, Youth, Nov 1975, ERN 00522478.

<sup>1193</sup> **E3/758**, Youth, Dec 1976, ERN 00544886, **E3/226**, Meeting on Health and Social Affairs, 10 Jun 1976, ERN 00183371.

<sup>1194</sup> **E3/165**, People’s Representative Assembly of Kampuchea, ERN 00184070.

<sup>1195</sup> **E3/146**, Youth, 1974, ERN 00538738-39; **E3/748**, Flag, Oct-Nov 1975, ERN 00495806.

<sup>1196</sup> **D427**, Closing Order, para. 179.

<sup>1197</sup> **D427**, Closing Order, para. 181.

described as ‘enemies’ by the Co-Investigating Judges, the Co-Prosecutors, and the Trial Chamber in its Case 002/01 Trial Judgement is staggering.<sup>1198</sup> It includes, at the very least, imperialists; feudalists; capitalists; intellectuals; the petty bourgeoisie; former Khmer Republic soldiers and officials; every person living in a city as of 17 April 1975; Buddhists; the Khmer Krom; the Vietnamese; and the Cham.<sup>1199</sup>

395. In reality, however, the term ‘enemy’ was strictly and narrowly defined in the DK Constitution, by **activity** rather than group identity. It referred to people who conducted “dangerous activities in opposition to the people’s State”.<sup>1200</sup> ‘Enemy’ is therefore not a generic term referring to any pre-defined group targeted on the basis of their identity as such. In particular, none of the groups referred to as ‘enemies’ by the Co-Investigating Judges, the Co-Prosecutors, and the Chamber have ever been so targeted.<sup>1201</sup> On the contrary, members of those groups were regularly invited through CPK publications to take part in the collective effort to achieve the Cambodian revolution.<sup>1202</sup> Real ‘enemies’ were those who breached DK law by participating in unlawful activities that threatened national sovereignty and state security at the time. They were often labelled as “*i.e.*, people suspected of treason or espionage activities on behalf of Vietnam and its ally the Soviet Union, or the US and its allies such as Thailand.”<sup>1203</sup>

**(b) To ‘Smash’**

396. Similarly, the Closing Order alleges that, per definition, “to ‘smash’ means to kill’ [...] in the context of a security centre, it meant to secretly arrest, interrogate, torture, and execute”.<sup>1204</sup> This allegation relies exclusively on two witnesses’ statements: Duch<sup>1205</sup> and the

<sup>1198</sup> See also **F36**, Case 002/01 Appeals Judgement, paras 268-283.

<sup>1199</sup> See **D427**, Closing Order, paras 148, 212, 479, 545, 750, 765, 1424; **D390**, Co-Prosecutors’ Final Submission, paras 8, 86, 164, 226, 357, 440, 463, 482, 506, 524, 751, 774; **E313**, Case 002/01 Trial Judgement, paras 118, 169, 613, 616, 726.

<sup>1200</sup> **E3/259**, DK Constitution, Art. 10, ERN 00184836.

<sup>1201</sup> See *infra*, Chapter 5, analysing evidence on the treatment of the four so-called ‘targeted groups’.

<sup>1202</sup> On “petty bourgeoisie”, intellectuals, and students, see **E3/11**, Flag, Sep 1977, ERN 00486234; **E3/146**, Youth, Aug-Sep 1974, ERN 00538748; on former civil servants, students, elites and intellectuals, see **E3/99**, 1975 Party Political Line, ERN 00244274-77; on Vietnamese, see **E3/215**, Flag, 1978, ERN 00488625-26; **E3/1149**, ‘Telex Message, Sweden-Kampuchea Friendship Association’, 4 Mar 1978, ERN 00717588; **E3/1264**, ‘Press Communique of the Spokesman of the Ministry of Propaganda and Information of Democratic Kampuchea’, 1 Jul 1978, ERN 00078182; see also **E295/6/3**, Nuon Chea’s Case 002/01 Closing Brief, para. 154.

<sup>1203</sup> Nuon Chea describes how “[t]here was to be combined struggle from inside and outside. [...] The CIA, KGVB and Vietnamese agents [in the cities] left for the countryside and were unable to implement the plan. People who infiltrated the party could not react immediately, but we discovered them later when they planned coups d’état. Their activities were co-ordinated with aggression from outside”: **E3/196**, Nuon Chea Speech to Danish Communist Party, Jul 1978 ERN 00762402; see also *supra*, Chapter 3-IV-B, on the non-literal meaning of general CPK uses of the terms “KGB” and “CIA”.

<sup>1204</sup> **D427**, Closing Order, para. 179.

<sup>1205</sup> See *infra*, Chapter 4-IV-C-1, on Duch’s credibility.

late Iep Duch, an official working in Kraing Ta Chan.<sup>1206</sup> However, neither of these witnesses was in a position that enabled them to fully understand the rationale behind CPK policies and their content at the time. Nevertheless, the Co-Investigating Judges and the Chamber in its Case 002/01 Trial Judgement built upon these two witnesses' evidence to form the assumption that each use by the CPK of the words 'enemy' or 'smash' automatically signifies the CPK's underlying intent to commit criminal acts.<sup>1207</sup>

397. Close scrutiny of DK documents reveals this assumption to be erroneous. In fact, the Khmer term '*kâmtech*' – which translates to 'smash' in English – can have different meanings (much like it also has in English) and must therefore be considered in its specific context.<sup>1208</sup> As former Tram Kok District secretary Pech Chim testified:

[t]o 'smash' [...] doesn't mean to execute, but to eliminate. In other words, to **eliminate the sense of class, exploitation of other people, so we have to get rid of all of this mindset**. We have to get rid of all these bad mindsets.<sup>1209</sup>

398. Similarly, references in CPK's publications to 'smash', 'oppressive class',<sup>1210</sup> 'feudalism',<sup>1211</sup> 'CIA',<sup>1212</sup> 'KGB',<sup>1213</sup> or '*Yvon*'<sup>1214</sup> were obviously not calls to kill each and every individual perceived as a member of one of these groups. Instead, they are simply other examples of policy language employed by the CPK.<sup>1215</sup>

### 3. Charged Policy Language Remains in Widespread Use Today

399. Furthermore, the use of charged policy language remains commonplace in political discourse, whether in respect of non-defence related policy matters (such as in respect of the 'war on drugs' as noted above), or in reaction to internal or external aggression. For instance, following an attempted *coup d'état* on 15 July 2016, Turkish President Recep Tayyip Erdoğan stated that "[w]e will continue to **cleanse the virus from all state institutions, because this**

<sup>1206</sup> Iep Duch never came to testify, and as such, the probative value of his written evidence is therefore limited.

<sup>1207</sup> F16, Nuon Chea's Appeal Brief, para 271.

<sup>1208</sup> See also F36, Case 002/01 Appeals Judgement, paras 153-154. The Supreme Court Chamber held that Heng Samrin's live testimony "could have clarified" the content of his interview in which he described a meeting during which Nuon Chea used the word '*komchat*' as opposition to the word '*kâmtech*', in relation to the policy concerning former Khmer Republic officials. As the Defence has previously noted, '*komchat*' means 'scatter': see E295/6/3, Nuon Chea's Case 002/01 Closing Brief, para. 384.

<sup>1209</sup> E1/290.1, Pech Chim, T. 22 Apr 2015, p. 47, lns 19-24 (emphasis added).

<sup>1210</sup> E3/8368, S-21 Notes, ERN 00225400; E3/145, Speech of Party Representatives, 30 Sep 1977, ERN 00715051.

<sup>1211</sup> See E3/759, Flag, Apr 1976, ERN 00517860; E3/197, SC Meeting - the Front, 11 Mar 1976, ERN 00182641.

<sup>1212</sup> See E3/13, All Divisions Meeting, 9 Oct 1976, EN 00183985; see also *supra*, Chapter 3-IV-B, on CIA and KGB being indicators of Western or Soviet leanings.

<sup>1213</sup> See E3/925, Ministry of Foreign Affairs Notebook, ERN 00143500.

<sup>1214</sup> E3/741, Instructions of 870, 3 Jan 1978, ERN 00296006.

<sup>1215</sup> See also *infra*, Chapter 5-III-C-2-(iii), on the use of the term '*Yvon*'.

**virus has spread. Unfortunately like a cancer, this virus has enveloped the state**".<sup>1216</sup> In addition, and like the CPK, both French President François Hollande<sup>1217</sup> and former American President George W. Bush have commonly used warlike rhetoric in discussing terrorist attacks.<sup>1218</sup> It is also noteworthy that despite both politicians using warlike rhetoric in a similar way to the CPK, at no time before, during, or after these terrorist attacks against France or the US was there a threat to the very existence of either state, in contrast with the truly existential threat DK faced from Vietnam.

400. Finally, the Defence notes that the ICTY Appeals Chamber has held that the use of "charged language" towards an opponent is "commonplace amongst military personnel during war".<sup>1219</sup> The ICTY Trial Chamber has also held that discriminatory intent cannot be deduced merely from the use of "derogatory terms".<sup>1220</sup> Thus, the use of derogatory or charged terminology to refer to opponents is insufficient, alone, to establish criminal intent. Read in light of the CPK's wider body of charged policy language, CPK documents instructing cadres to 'attack' or 'smash' 'capitalism', 'feudalism' or 'imperialists' can only be seen as ordinary policy discourse. As such, the term 'enemy' cannot be used as the sole basis to prove any criminal intent towards any specific group.

### C. THE SYSTEM OF LAW ENFORCEMENT THAT THE CPK ESTABLISHED IS COMPARABLE TO THAT OF OTHER STATES

401. The main objective of the CPK was to improve the livelihood of the Cambodian people who had suffered from years of war and political turmoil.<sup>1221</sup> Safeguarding state security,

<sup>1216</sup> BBC News, Erdogan Roots Out 'Virus' (emphasis added); *see also*, E1/452.1, Henri Locard, T. 1 Aug 2016, p. 69, ln. 12 to p. 70, ln. 16, in which the Defence discussed Erdogan's statement with 'expert' Locard, and Cambodia Daily, Lawyer Compares Khmer Rouge and Turkish Rhetoric, in which Turkey's ambassador to Cambodia, responded, defending Erdogan's statement as referring to "the terrorist who tried to depose a democratically elected Government with a coup attempt".

<sup>1217</sup> *See e.g.* François Hollande, Voeux au Conseil Constitutionnel: "[i]t is from the Republic that French people are waiting, today, a relentless response against the enemy who targeted us"; François Hollande, Discours du lors de l'Inauguration du Monument des Fraternisations: "France [...] is attacked by an enemy whose sole aim is to lead us, through terror, to abandon our values and our freedoms"; François Hollande, NATO Summit Speech: "[t]here is a terrorist group which wants to occupy territories and to massacre populations which do not share its views. This is this **enemy** that we have to fight"; François Hollande, Discours lors de l'Anniversaire du Débarquement: "[t]his fight is different than 70 years ago but it is still the same enemy **that we have to crush**" (Defence internal translations; emphases added).

<sup>1218</sup> *See e.g.* New York Times, Terror in America: "we're going to smoke them out" of their holes, "I want justice [... t]here's an old poster out West that said, 'Wanted, dead or alive'"; Washington Post, Which Past War is Iraq: "[the enemy] is never tired, never sated, never content with yesterday's brutality"; Los Angeles Times, The Long War Quagmire: "Americans were engaged in the struggle of their generation [...] in a long war against a determined enemy".

<sup>1219</sup> ICTY, *Krstić* Appeals Judgement, para. 130.

<sup>1220</sup> ICTY, *Popović et al.* Trial Judgement, para. 2095; *see also infra*, Chapter 5-III-C-2-(iii).

<sup>1221</sup> *See infra*, Chapter 6-II, on the CPK's objective to improve people's living conditions.

controlling the DK's borders and containing internal instability in the context of an armed conflict and a state of emergency was the only way to achieve this goal, as several CPK statements affirmed.<sup>1222</sup> Such a policy is analogous to judicial policies adopted in other states – including so-called western liberal democracies – notwithstanding the revolutionary terminology in which it is couched. Defending its borders and ensuring peace and stability are inherent to the very idea of sovereignty and legitimate and common goals of states all around the world. Like those states, DK, as a sovereign state, was entitled to set its own laws to reach its political goals and ensure the security of the nation in accordance with the specific context in which it found itself and the specific threats it faced.

402. In any event, the CPK's security and defence policy was not unlawful in any way. The definition and sanction for offences were set out in Article 10 of the DK Constitution, which provided that “dangerous activities in opposition to the people's State must be condemned to the highest degree” while “other cases are subject to constructive reeducation in the framework of the state's or people's organization”.<sup>1223</sup> In other words, the CPK set out that the primary and first means of responding to offences was to be educational, which was consistent with its view that the real “enemy” was not the individual but anti-revolutionary activities.<sup>1224</sup> Much like many other states even today, only “dangerous activities” against “the people's State” were to be “condemned to the highest degree”.

### **1. The Policy's Implementation Did Not Amount to or Involve the Commission of Crimes**

403. As part of its national defence and security policy, the CPK implemented a form of judicial system and a specific form of proceeding for dealing with suspected offenders. After having defined the legal basis for arrest in the DK Constitution,<sup>1225</sup> the Central Committee published a “framework” identifying the competent authority to implement its policy depending on the suspected offender's workplace.<sup>1226</sup> An investigative process was to be implemented to verify the factual grounds for arrests and ensure that arrests and detention were lawful. This Section describes the general framework set up by the CPK to implement its defence and

<sup>1222</sup> See e.g. **E3/805**, Meeting of Division 920, 16 Dec 1976, ERN 00923162.

<sup>1223</sup> **E3/259**, DK Constitution, Art. 10, ERN 00184836.

<sup>1224</sup> **E3/729**, Youth, Oct 1975, ERN 00357910; **E3/1233**, DK Notebook on Social Class, ERN 00711716-17.

<sup>1225</sup> **E3/259**, DK Constitution, Article 10, ERN 00184836.

<sup>1226</sup> **E3/12**, Central Committee Decisions, 30 Mar 1976, ERN 00182809.

security policy, while the specific implementation of that framework in respect of each security centre and ‘internal purges’ within the scope of this trial is discussed in Section V below.

**(a) *Alleged Identification Methods as Part of Standard Processes***

404. The Closing Order alleges that methods such as biography-taking or holding of self-criticism meetings intended to identify those who had carried out “activities against the State”.<sup>1227</sup> However, as explained above, people’s backgrounds were irrelevant to their identification as suspected offenders. The only basis for arrest was the actual breach of the law. Registration of biographies was a standard administrative process which allowed the authorities to assess the number of inhabitants in each commune and arrange sufficient food and supplies accordingly. In any event, biographies were mandatory for everyone independent of their alleged membership of specific groups.<sup>1228</sup>

**(b) *Legitimate Factual Bases for Arrests***

405. Two main mechanisms were used to test the veracity of allegations of a suspect’s alleged unlawful activities: monitoring and interrogation.<sup>1229</sup> Monitoring was often conducted prior to arrests to verify people’s alleged involvement in unlawful activities, particularly in cases of suspected involvement in treasonous activities including *coups d’état*.<sup>1230</sup> Monitoring through a variety of surveillance methods remains a common means of investigation in modern law enforcement systems as well. Moreover, as in any other law enforcement process, interrogations, and suspects’ statements, or ‘confessions’ as they are known in these proceedings,<sup>1231</sup> were also at the core of the investigative process. They were conducted for individuals suspected of involvement in unlawful activities, be they ‘light’ or ‘serious’ offences.<sup>1232</sup> Contrary to the Closing Order’s allegations,<sup>1233</sup> the CPK defined clear rules regarding interrogation, with the use of physical violence being strictly limited<sup>1234</sup> and interrogators being warned to not to feed the suspect with information.<sup>1235</sup> The consistency and

<sup>1227</sup> **D427**, Closing Order, para. 180.

<sup>1228</sup> **E3/193**, Flag, Aug 1977, ERN 00399230.

<sup>1229</sup> *See infra*, Chapter 4-V-B and 4-V-C, on interrogations and monitoring.

<sup>1230</sup> *See infra*, Chapter 4-V-B-1-(d), on Division 310 commander Oeun’s arrest; Chapter 7-IV-D, on militia monitoring; and *see supra* Chapter 3-VI, on monitoring of Northwest Zone cadres by Southwest Zone cadres.

<sup>1231</sup> Interrogations and suspects’ statements are usually the first step in a typical law enforcement process. On guilty pleas in international criminal law *See e.g.* Rome Statute, Art. 64 (8) (a); ICTY RPE, Rule 62, ICTR RPE, Rule 62; SCSL RPE, Rule 61.

<sup>1232</sup> *See supra*, Chapter 4-II-C, on different categories of offenders.

<sup>1233</sup> **D427**, Closing Order, para. 180.

<sup>1234</sup> *See infra*, Chapter 4-V-C, on interrogations.

<sup>1235</sup> *See infra*, Chapter 4-V-C, on interrogations.

credibility of suspects' statements were to be carefully assessed and further investigations could be requested to corroborate the suspect's account and to limit the risk of false statements leading to unjustified arrests.<sup>1236</sup> When insufficient evidence was found, the suspects were in fact released.<sup>1237</sup> In short, standard means of investigation were employed in the DK, mirroring the means adopted in modern law enforcement systems. In any event, considering the context of an armed conflict and the state of emergency, any alleged lack of procedural safeguards did not render the arrests unlawful as such.<sup>1238</sup>

**(c) Legitimate Legal Bases for Arrests**

406. As noted above, Article 10 of the DK Constitution provided that "actions violating the laws of the people's State", which were defined as "dangerous activities in opposition to the people's State", "must be condemned to the highest degree."<sup>1239</sup> Likewise, under the 1956 Cambodian Penal Code, treason and espionage-like acts were identified as among the category of most serious crimes for which the applicable punishment was the death penalty.<sup>1240</sup> Accordingly, evidence that most detainees in security centres were accused of treason and espionage confirms the existence of a clear legal basis for their deprivation of liberty of those arrested.<sup>1241</sup> Indeed, treason was, and still is, in many countries, one of the most severely repressed crimes and, punishment by the death penalty was commonplace. Today, 70 states (*i.e.*, more than a third of UN member states) still retain the death penalty for crimes against the state, and in 1975-1979, it was a staggering 124 states, or 81% of states worldwide.<sup>1242</sup> Treason

<sup>1236</sup> See *e.g.* **E3/1085**, 'Division 310 Report', ERN 00143564.

<sup>1237</sup> See *e.g.* **E3/156**, 'Report from Sarun to Brother', 23 Apr 1978, ERN 00296220; **E3/384**, 'WRI of Sao Sarun', 13 Jun 2009, ERN 00348372-73; **E1/410.1**, Sao Sarun, T. 29 Mar 2016, p. 95, ln. 4 to p. 96, ln. 3; **E3/384**, 'WRI of Sao Sarun', ERN 00348373; **E3/965**, List of People Released from Company 44; and *infra*, Chapter 4-V-B.

<sup>1238</sup> The ICCPR permits derogations from Arts 9 (arbitrary arrest and detention) and 14 (procedural guarantees) "[i]n time of public emergency which threatens the life of the nation": ICCPR, Art. 4.

<sup>1239</sup> **E3/259**, Raoul M. Jennar, The Cambodian Constitutions 1953-1993, ERN 00184836.

<sup>1240</sup> **D288/6.91/6.1.1**, 1956 *Code Pénal et Lois Pénales*, Arts. 220 and 21, ERN FR 00366894-95, 00366801. The Defence's internal translation is: **Art. 220**: Will be found guilty of treason and will be punished by the third degree criminal punishment all Cambodians or equivalent: (a) Who will carry arms against Cambodia; (b) Who will pass intelligence with a foreign power [...]; (c) Who will hand over to a foreign power, its agents or rebels, either Cambodian troops, or territories, [...]; (d) Who, in times of war, will cause Cambodians to fight for a foreign power, facilitate them doing so, or carry out unauthorised recruitment on the foreign power's behalf on Cambodian territory; (e) Who, in times of war, will pass intelligence with a foreign power in view of facilitating its undertakings against Cambodia or its allies; (f) Who will hand over to a foreign power or its agents, or rebels, in any form and in any way, a secret, the possession of which could harm the national defence, or will make sure to possess such a secret with the aim of communicating it to a foreign power or its agents; (g) Who will, by any means harm the territorial integrity of Cambodia. [...]; **Art. 21**: The criminal penalties are: 1° - Death; 2° - Forced labour for life (or life forced labour); 3° - Forced labour for a prescribed period. The death penalty constitutes the criminal penalty of the third degree. Crimes punishable by the death penalty are qualified as third degree crimes.

<sup>1241</sup> See *infra*, Chapter 4-V-B; see also **E395/2**, Nuon Chea's Rebellion Submissions.

<sup>1242</sup> 124 out of 152 UN member states retained the death penalty as punishment for crimes against the state during the period 1975-1979. 70 states have retained the death penalty from the 1970s to the present day for crimes against

in particular – the definition of which, as a crime against the state, has always depended on each state’s political context<sup>1243</sup> – has always been at the gravest end of the crimes scale in times of war.<sup>1244</sup> The Defence further notes that the remaining minority of people who were not arrested for treason or espionage were likely detained for other offences deemed serious by the CPK, such as rape,<sup>1245</sup> or after multiple failed re-education attempts.<sup>1246</sup>

**(d) Justifiability of Sanctions Imposed for Offences**

407. Suspects’ fate following arrest depended on the results of investigations. The CPK identified three categories of offenders, depending on the offences which they were found to have committed. Son Sen, who was responsible for implementing the CPK’s national defence and security policy, instructed his subordinate commanders as follows:

Operational methods: 1. It is imperative to educate more. 2. It is absolutely imperative to screen out evil elements in the sense of class struggle. The screening is based on three principles: **Category 1: The destructive category: it is absolutely imperative to screen [them] out. Category 2: The normal liberal category: it is imperative to educate more in our education schools. Category 3: The category of those who have merely been incited by the enemy, merely believing in the enemy incitement. First of all, it is imperative to educate them so that they no longer believe the enemy.**<sup>1247</sup>

408. This demonstrates the CPK’s preference for re-education, given that two of the three categories of offenders were to face reeducation for their offences.<sup>1248</sup> At one point, re-education was preferred even for those suspected of involvement in treason or espionage and

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the state, although 38 are *de facto* abolitionist (for more details, see **Annex 4**). On the number of UN member states in 1975-1979, see UN, Growth in UN Membership 1945; on the number of states which retained the death penalty for crimes against the state in the period 1975-1979, see Amnesty International, Death Penalty; see also Cornell Center, Death Penalty Database.

<sup>1243</sup> On the scope of the crime of treason, see also Shvedsky, Michael Moore Calls for Trump’s Arrests, in relation to contacting Russian authorities during the 2016 electoral campaign.

<sup>1244</sup> See e.g. Lieber Code, 24 Apr 1863, Arts 91, 96, 98, 154, 157.

<sup>1245</sup> On DK’s policy regarding sexual offences, see **E3/765**, Youth, 10 Oct 1978, ERN 00539994; **E3/833**, ‘S-21 Notebook by Mam Nai *alias* Chan’, 17 Dec 1977, ERN 00184595; **E1/474.1**, Noem Kimsreang, T. 15 Sep 2016, p. 54, lns 9-11; **E1/427.1**, Him Huy, T. 4 May 2016, p. 84, lns 14-16; **E1/424.1**, Prak Khan, T. 28 Apr. 2016, p. 16, lns 16-18; **E1/422.1**, Lach Mean, 26 Apr 2016, p. 34, ln. 23; **E3/1044**, Recommended Arrest List from Ren, 30 Oct 1977; see also *infra*, Chapter 4-V-D-2, on alleged incidents of rape.

<sup>1246</sup> On DK’s policy regarding re-education, see **E3/1168**, Report from Roeun to 89, 30 Mar 1977, ERN 00916974; **E3/763**, Central Committee’s Guidance on Mised Persons, 20 Jun 1978, ERN 00275218-19; **E3/13**, All Divisions Meeting, 9 Oct 1976, EN 00940354-55.

<sup>1247</sup> **E3/13**, All Divisions Meeting, 9 Oct 1976, ERN 00940354-55 (emphasis added).

<sup>1248</sup> **E3/13**, All Divisions Meeting, 9 Oct 1976, ERN 00940354-55; on the three categories of offenders see also **E3/11**, Flag, Sep 1977, ERN 00486235; on the treatment of “light offenders”; see e.g. **E3/805**, Minutes of Division 920, 16 Dec 1976, ERN 00923161 (“Comrade Kdei” who complained as a form of reeducation); **E1/177.1**, Chhaom Se, T. 8 Apr 2013, p. 42, ln. 23 to p. 43, ln. 2. See also *infra*, Chapter 4-V-B-1, describing people being sent to the security centres in Case 002/02 after multiple re-education attempts.



collaborating with Vietnam or the US and their allies – *i.e.*, those “who had joined the “CIA”, “Yuon” or “KGB” between 1975 and 1978” – if they had stopped those activities by July 1978:

[F]or any individual who stops to carry out the traitorous activity from this July 1978 onwards, and who tries to re-educate himself/herself, who makes his/her efforts in fulfilling the revolutionary duty, such individual shall not be punished. [...] **The policy of the Party is to re-educate all the forces who can be reformed, and the Party and the people are making efforts in re-educating those who have been misled to turn them back as their own good flesh and blood**, and to be good forever, in order to join forces in the defense and rebuilding of the country, and heightening the living standards of the people so that they will rapidly progress and step up towards prosperity in all fields.<sup>1249</sup>

409. The CPK also directed that even those who continued such activities should be reeducated “[b]y all possible means as feasible so that they will get rid of the misleading thoughts, be awakened and turn to take side with our Party’s, Revolutions, Kampuchean People”.<sup>1250</sup> Such explicit Central Committee guidance, intended for wide distribution,<sup>1251</sup> unequivocally shows that there was no general policy to kill ‘enemies’.

## 2. The Implementation of the Policy Varied Due to Local Authorities’ Deviations

410. While the CPK’s national defence and security policy was strictly defined and lawful, local implementation varied as a result of local authorities’ failure to enforce the law. Indeed, evidence throughout this Brief shows that local cadres sometimes acted autonomously and overzealously in deviation from CPK policy and despite repeated warnings. The October-November 1975 special edition of the Revolutionary Flag cautioned that “having a robust Revolutionary vigilant stance means having a robust stance to correctly enforce any Party’s lines which are not extreme left or extreme right”.<sup>1252</sup> Similarly, the July 1976 Revolutionary Flag noted that it was “imperative to be vigilant” towards members being “leftists – meaning not believing in masses”, or “[r]ightists – meaning just continuing to instruct them carelessly, not based on the foundation of the Party Statutes”.<sup>1253</sup>

<sup>1249</sup> **E3/763**, Central Committee’s Guidance on Misled Persons, 20 Jun 1978, ERN 00275218 (emphasis added); *see also infra*, Chapter 5-II-C-2-(c), for a further discussion of these guidelines.

<sup>1250</sup> **E3/763**, Central Committee’s Guidance on Misled Persons, 20 Jun 1978, ERN 00275218.

<sup>1251</sup> **E3/763**, Central Committee’s Guidance on Misled Persons, 20 Jun 1978, ERN 00265220; *see also* **E3/404**, ‘WRI of Sao Sarun’, ERN 00403025-26 (Sao Sarun, District 106 secretary, confirmed that people were amnestied as stated in this guidance); **E3/35**, ‘WRI of Ke Pich Vannak’, ERN 00346156 (son of the Central Zone Secretary Ke Pauk recalls this guidance and confirmed its implementation); **E3/15**, ‘Duch Written Responses to OCIJ’, ERN 00251388 (Duch stated that this guidance was a “trick”); on the lack of reliability of Duch, *see infra*, Chapter 4-IV-D-1; *see also* **E3/725**, Flag, Dec 1977-Jan 1978, ERN 00184321.

<sup>1252</sup> **E3/748**, Flag, Oct-Nov 1975, ERN 00495802.

<sup>1253</sup> **E3/4**, Flag, Jul 1976, ERN 00268924, 00268939.

411. Frequent misunderstanding and misuse of the meaning of word ‘*Angkar*’ also led to confused evidence regarding the content and the source of instructions. In particular, low-ranking cadres commonly conflated the concept of ‘*Angkar*’ as the CPK with ‘*Angkar*’ as their immediate superior,<sup>1254</sup> hence this directive was to be broadly disseminated among the people in order to “make them fully absorb and successfully implement it”.<sup>1255</sup>

#### **D. CONCLUSION ON THE CPK’S NATIONAL DEFENCE AND SECURITY POLICY**

412. Once Manichean tropes are stripped away, it becomes immediately clear that the CPK’s national defence and security policy, as a form of law enforcement process, was a legitimate and lawful one designed to deal with offenders who broke the law and endangered state security in a context of armed conflict and a state of emergency, and which was implemented mainly through re-education. Each security centre in this trial offers specific examples of DK’s thorough process to investigate, reeducate, and when necessary reprimand, offenders representing a serious threat for both the state and the society, as detailed in Section V below.

### **III. THE DEFENCE’S GENERAL POSITION *VIS-À-VIS* THE FOUR SECURITY CENTRES AND ‘INTERNAL PURGES’ IN CASE 002/02**

413. By way of introduction to the Defence’s analysis of relevant evidence heard in this trial, this Section offers a brief overview of the Defence’s position in respect of the four security centres included in the scope of the trial at which the CPK’s national defence and security policy was implemented. These security centres, as noted above, are Kraing Ta Chan, Au Kanseng, Phnom Kraol, and S-21 (encompassing Choeung Ek). The Closing Order charges Nuon Chea with nine crimes against humanity at Kraing Ta Chan,<sup>1256</sup> seven at Au Kanseng<sup>1257</sup> and Phnom

<sup>1254</sup> *E.g.* E3/445, ‘WRI of Sao Phen’, A3 (“At that time, Angkar was referred to upper echelons of the Khmer Rouge. I observed that the district level and higher ones were Angkar of Khmer Rouge. The district level was also referred to as Angkar. Opposing Angkar means anyone who did not obey the disciplines and regulations of Angkar”); *see also* E3/1194, Telegram from Chhan, 19 Oct 1976, E3/1102, ‘Telegram from Chhan to Dor’, 20 Oct 1976 (in both telegrams, the term ‘party’ refers to CPK sector/cooperative branches, rather than top leadership).

<sup>1255</sup> E3/740, Directive on the Use of Terms “Angkar” and “Party”, 24 Jul 1977, ERN 00305412.

<sup>1256</sup> D427, Closing Order, paras 1373 (murder), 1381 (extermination), 1391 (enslavement), 1402 (imprisonment), 1408 (torture), 1416 (political persecution), 1422 (racial persecution), 1434 (other inhumane act of “attacks against human dignity”) and 1470 (other inhumane act of enforced disappearances). Despite the Closing Order identifying Kraing Ta Chan as an underlying crime site for the charge of rape (para. 1426), the Trial Chamber has confirmed that rape is not charged in respect of Kraing Ta Chan: *see* E346/3, Reasoned Decision on Nuon Chea’s Tram Kok and Kraing Ta Chan Witnesses Request, para. 45; *see also* Chapter 5-IV-A.

<sup>1257</sup> D427, Closing Order, paras 1373 (murder), 1381 (extermination), 1391 (enslavement), 1402 (imprisonment), 1416 (political persecution), 1422 (racial persecution), 1434 (other inhumane act of “attacks against human dignity”).

Kraol,<sup>1258</sup> and eight at S-21.<sup>1259</sup> It also charges him with two grave breaches of the Geneva Conventions at Au Kanseng<sup>1260</sup> and six at S-21.<sup>1261</sup>

414. As detailed below, a proper analysis of the relevant evidence paints a picture that flies directly in the face of the Manichean narrative of security entres and ‘internal purges’ as symptomatic of irrationality, paranoia, and evil. For instance, turning to Kraing Ta Chan specifically, the Closing Order alleges that at least 15,000 people were detained and executed at Kraing Ta Chan, which was situated in Tram Kok District (District 105) in Takeo Province (Sector 13) of the Southwest Zone.<sup>1262</sup> Both the Closing Order and the Co-Prosecutors’ Final Submission present Kraing Ta Chan as a blunt instrument that meted out “death for 99% of the prisoners sent there”.<sup>1263</sup> In reality, however, Kraing Ta Chan served an entirely legitimate and lawful purpose as Tram Kok District’s detention facility and re-education office for serious offenders. Its detainees were accused of crimes including treason, espionage, rape, and persistent theft; were arrested following systematic monitoring and investigation and sometimes after multiple re-education attempts; and were interrogated as part of a genuine criminal investigation that neither involved the systematic use of torture nor resulted in certain death. To the contrary, several witnesses testified that prisoners could be, and were, released. Finally, there is no evidence that Nuon Chea was in any way involved in Kraing Ta Chan’s daily operations or the alleged crimes, if any, committed there.

415. The Closing Order identifies Au Kanseng as a security centre located in Ratanakiri Province, and established as part of the Centre Division 801.<sup>1264</sup> As discussed below, Au Kanseng was a legitimate investigative and correctional institution used to interrogate and, where necessary, re-educate soldiers who were accused of breaking military discipline and civilians suspected of crimes. Detention conditions varied depending on the nature of the crime. Based on the results of interrogation or re-education, some detainees were released, and some

<sup>1258</sup> **D427**, Closing Order, paras 1373 (murder), 1381 (extermination), 1391 (enslavement), 1402 (imprisonment), 1408 (torture), 1434 (other inhumane act of “attacks against human dignity”) and 1470 (other inhumane act of enforced disappearances).

<sup>1259</sup> **D427**, Closing Order, paras 1373 (murder), 1381 (extermination), 1391 (enslavement), 1402 (imprisonment), 1408 (torture), 1416 (political persecution), 1422 (racial persecution), 1434 (other inhumane act of “attacks against human dignity”).

<sup>1260</sup> **D427**, Closing Order, paras 1494-95 (wilful killing), 1511-14 (wilfully depriving a citizen of the right to fair and regular trial).

<sup>1261</sup> **D427**, Closing Order, paras 1491-1493 (wilful killing), 1498-1500 (torture), 1501-1503 (inhumane treatment), 1507-1510 (wilfully depriving a prisoner of war or a civilian of the rights of a fair and regular trial), 1515-1517 (unlawful deportation), 1518-1520 (unlawful confinement of civilians).

<sup>1262</sup> **D427**, Closing Order, paras 500, 514, 1385; *see also* **D390**, Co-Prosecutors’ Final Submission, para. 493.

<sup>1263</sup> **E1/295.1**, Objections to Document Presentations, T. 30 Apr 2015, p. 5, ln. 25 to p. 6, ln. 1.

<sup>1264</sup> **D427**, Closing Order, para 589.

had their detention conditions altered to reflect the nature and gravity of their crimes. There was no systematic mistreatment of detainees, and the labour performed by some detainees was of the kind that was and still is normally required of a person under lawful detention. The evidence is also insufficient to prove the alleged killings beyond reasonable doubt. In any event, there is no evidence that Nuon Chea had knowledge of, or was in any way involved in, the operation of Au Kanseng or the alleged crimes, if any, committed there.

416. The Closing Order alleges that Phnom Kraol was a “security office” located in Koh Nhek District, in Autonomous Sector 105.<sup>1265</sup> It was under the leadership of the Autonomous Sector’s military,<sup>1266</sup> assisted by Division 920,<sup>1267</sup> a Centre-affiliated division sent as reinforcement in Sector 105 to handle the chaotic situation at the Vietnamese border.<sup>1268</sup> As already noted above and detailed further below, the evidence related to this crime site is extremely minimal since only two witnesses provided first-hand testimony in relation to their alleged short detention at Phnom Kraol. Their testimonies are patently insufficient to support any of the crimes charged. Other live evidence provided on this site is in fact primarily unrelated to the site or consists of vague, unsubstantiated hearsay that is even more unsuitable to support any findings of crime.<sup>1269</sup> In addition, while there is evidence of communications between Sector 105 and the so-called “Centre”, there is no evidence that Nuon Chea was in any way involved in Phnom Kraol’s daily operations or the alleged crimes, if any, committed there.

417. Finally, the Closing Order alleges that at least 12,273 persons were held at Phnom Penh’s S-21 facility, mostly former RAK members and CPK cadres.<sup>1270</sup> However, contrary to the overwhelmingly-influential Manichean narrative, the Defence shows that thorough investigations took place prior to arrests and detention, and that rather than being arbitrarily arrested and detained, most people were in fact at S-21 for legitimate security reasons. There was no systematic torture or execution, and people were often released. In any event, S-21 was

<sup>1265</sup> **D427**, Closing Order, para. 625.

<sup>1266</sup> **E1/410.1**, Bun Loeng Chauy, T. 29 Mar 2016, p. 29, Ins 20-21.

<sup>1267</sup> See **D427**, Closing Order, paras 629, 635.

<sup>1268</sup> See **D427**, Closing Order, para. 629, **E3/1664**, Colm and Sim, Purges in Mondulhiri, ERN 00397577; on the situation at the Vietnamese border See e.g. **E1/410.1**, Sao Sarun, T. 29 Mar 2016, p. 84, Ins 23-25 (“[the Vietnamese] were continuously attacking us”); **E1/411.1**, Sao Sarun, T. 30 Mar 2016, p. 11, Ins 19-23; **E1/411.1**, Sao Sarun, T. 30 Mar 2016, p. 14, Ins 13-15 (“At the Sector level, they did not have many soldiers. There were only 100 or 200 soldiers”); **E1/416.1**, Phan Van, T. 7 Apr 2016, p. 60, Ins 23-24; **E3/7960**, DC Cam Interview – Northeast Minorities; see also, Chapter 3-IV-D-1, on Division 920’s connection to internal rebellion.

<sup>1269</sup> See also *infra*, Chapter 4-V-A-2, on the lack of evidence regarding Phnom Kraol.

<sup>1270</sup> **D427**, Closing Order, para. 423.

never under Nuon Chea's direct authority, as it was an RAK regiment under the direct control of the General Staff,<sup>1271</sup> which was led by Son Sen.

#### **IV. PRELIMINARY ISSUES RELATED TO SECURITY CENTRES AND 'INTERNAL PURGES'**

418. Before discussing the allegations related to the four security centres in detail, the Defence first a number of preliminary issues that relate to the totality of the evidence. These include questions related to the scope of the charges (Part A), the impact of propaganda campaigns on the formation of 'accepted truths' *vis-à-vis* the CPK's national defence and security policy (Part B), and the lack of credibility of former security centre staff (Part C), 'survivors' (Part D), and so-called 'experts' (Part E) respectively. Finally, this Section discusses the lack of minimum indicia of authenticity and reliability of widely-used out-of-court evidence, in particular in respect of Kraing Ta Chan and S-21 (Part F).

##### **A. THE RANGE OF RELEVANT ISSUES TO BE DISCUSSED REGARDING EACH CRIME SITE IS LIMITED**

###### **1. Several Issues Are Excluded From the Scope of Case 002/02 and Thus This Brief**

419. In light of the Closing Order's convoluted structure and issues arising from Case 002/02's severance, it is useful to clarify the scope of issues to be addressed in the discussion of facts in Section V below. On a general note, with the exception of a brief discussion on Vietnamese detainees at the crime sites, the discussion below generally excludes the treatment of 'targeted groups' in Case 002/02 on the basis of group identity as this is addressed below in Chapter 5 on 'targeted groups'. Similarly, evidence on the regulation of marriage is addressed exclusively in Chapter 7. Finally, where crime-site related evidence is more closely related to the question of the nature of the CPK's defence and security policy, it is discussed primarily in Section II above rather than Section V below.

420. In addition, while evidence on Kraing Ta Chan was heard in a consolidated trial segment that also focused on the Tram Kok Cooperatives and the treatment of two 'targeted groups', namely former Khmer Republic soldiers and officials, and Buddhists. However, this Brief follows the Closing Order's structure by addressing these crime sites and issues separately.<sup>1272</sup> Furthermore, insofar as the Kraing Ta Chan-related evidence concerns the treatment of 'new

<sup>1271</sup> See *infra*, Section V-A-4, on structure and personnel at S-21.

<sup>1272</sup> See *infra*, Chapter 6-III to VII, on the Tram Kok Cooperatives, Chapter 5-IV on former Khmer Republic soldiers and officials, and Chapter 5-V on Buddhists.

people’, the discussion of ‘new people’ is limited in this Chapter, as it is a key focus of the analysis of facts related to the Tram Kok Cooperatives in Chapter 6 of this Brief. Finally, despite the Co-Prosecutors’ and Judge Lavergne’s persistent focus in the Kraing Ta Chan-related trial segment on the treatment of the Khmer Krom, the Khmer Krom are not a ‘targeted group’ in Case 002/02. Neither can they be subsumed within the Vietnamese group. Thus, although the presentation of evidence on the Khmer Krom in court has focused on their discrimination as a group, the Defence disregards this in relation to the charge *vis-à-vis* Kraing Ta Chan for which there is a required discriminatory intent against an allegedly ‘targeted group’ (*i.e.*, racial persecution), and considers it only in relation to other charges.<sup>1273</sup>

## **2. Most of the Evidence Presented at Trial in Relation to Phnom Kraol Security Centre was In Fact Unrelated to This Crime Site**

### **(a) *The Questionable Relevance of Most of the Witnesses***

421. According to the Closing Order, Phnom Kraol was a security office “containing Phnom Kraol Prison and related to the nearby Sector 105 Office K-11 and to the Sector 105 Secretary, headquartered Office K-17”.<sup>1274</sup> Of the six witnesses who testified during the trial segment on Phnom Kraol, only two of them, Chan Toi and Neth Savat, were actually detained (for a month) in one of the facilities alleged to be part of the “Phnom Kraol security office”.<sup>1275</sup> Therefore, they are the only ones able to provide credible first-hand testimony relevant to the scope of this crime site. The other witnesses, when their evidence relates to a security facility at all, were either unable to provide precise evidence as to which location they were discussing, or testified about facilities clearly not part of the Phnom Kraol complex as described by the Closing Order as detailed immediately below.

422. Notably, Bun Loeng Chauy, the guard of Khaev Seima District secretary Kasy, was detained for a month at office K-16, the commerce office of Autonomous Sector 105.<sup>1276</sup> This office is not included in what is described as the “Phnom Kraol security office” by the Closing Order, and Bun Loeng Chauy himself claimed that K-16 was “not a security centre”.<sup>1277</sup> Civil party Sun Vuth also provided unsworn and dubious evidence about his alleged three month-

<sup>1273</sup> See *infra*, Chapter 5-II-B-1-(b), for a further discussion on the Khmer Krom.

<sup>1274</sup> **D427**, Closing Order, para. 625.

<sup>1275</sup> **E1/399.1**, Chan Toi, T. 10 Mar 2016, p. 17, lns 23-24, p. 67, lns 4-6; **E1/400.1**, Neth Savat, T. 11 Mar 2016, p. 19, lns 16-20, p. 25, lns 1-4; see also *infra*, Chapter V-A-3 on the structure and personnel of Phnom Kraol.

<sup>1276</sup> **E1/410.1**, Bun Loeng Chauy, T. 29 Mar 2016 p. 27, lns 9-19, p. 32, lns 10-20; **E1/409.1**, Bun Loeng Chauy, T. 28 Mar 2016 p. 7, lns 8-12.

<sup>1277</sup> **E1/410.1**, Bun Loeng Chauy, T. 28 Mar 2016, p. 27, lns 16-17.

long detention<sup>1278</sup> in a prison “near Ou Chbar stream”,<sup>1279</sup> close to a “land in the shape of a turtle shell,”<sup>1280</sup> which was “organized” by Division 801.<sup>1281</sup> Sun Vuth in particular added that this prison “was not near Phnom Kraol”.<sup>1282</sup> In addition to the unclear location of his alleged detention, therefore, Sun Vuth was also inconsistent regarding his exact position,<sup>1283</sup> the date of his arrest,<sup>1284</sup> the duration of his detention,<sup>1285</sup> and his alleged detention (in respect of which he provided a fanciful account).<sup>1286</sup> In any event, nothing in his outlandish testimony allows a confirmation that the detention facility he discussed was part of the Phnom Kraol complex. Therefore, both Bun Loeng Chauy and Sun Vuth’s evidence regarding their alleged detention fall out of the scope of the trial and must simply be disregarded.

**(b) The Unrelated Live Evidence Elicited**

423. The live evidence elicited from the four other witnesses who came to testify focused primarily on issues that are not directly related and sometimes totally irrelevant to the Phnom Kraol crime site, such as general ‘internal purges’ of Autonomous Sector 105 and Division 920 staff, armed conflict with Vietnam; the experience of ethnic groups in Mondulkiri; marriages; or the general reporting system. Strikingly, a large part of the witnesses’ evidence was related to alleged mass arrests that occurred in Autonomous Sector 105 following two sets of events: the discovery of a plot to overthrow DK led by the Sector 105 commerce office (K-16) Secretary Kham Phoun in 1977, and an internal leadership struggle between Ta Laing *alias* Ta Ham *alias* Chhan (referred to throughout this Part as Ta Ham), secretary of Sector 105, and this same Kham Phoun, secretary of K-16.<sup>1287</sup> On 30 July 1977, 17 subordinates of Kham Phoun, led by K-16 deputy secretary Nhun, attempted to flee to Vietnam.<sup>1288</sup> Evidence further suggests that Kham Phoun had close relationships with Vietnam.<sup>1289</sup> In October 1977, Ta Ham and Kham

<sup>1278</sup> E1/411.1, Sun Vuth, T. 30 Mar 2016, p. 95, lns 23-24.

<sup>1279</sup> E1/411.1, Sun Vuth, T. 30 Mar 2016, p. 78, lns 20-21.

<sup>1280</sup> E1/411.1, Sun Vuth, T. 30 Mar 2016, p. 87, lns 16-17.

<sup>1281</sup> E1/411.1, Sun Vuth, T. 30 Mar 2016, p. 86, ln. 25.

<sup>1282</sup> E1/411.1, Sun Vuth, T. 30 Mar 2016, p. 99, ln. 11.

<sup>1283</sup> E1/411.1, Sun Vuth, T. 30 Mar 2016, p. 64, lns 1-3.

<sup>1284</sup> E1/411.1, Sun Vuth, T. 30 Mar 2016, p. 64, ln. 21 to p. 66, ln. 17.

<sup>1285</sup> E1/411.1, Sun Vuth, T. 30 Mar 2016, p. 50, lns 1-17.

<sup>1286</sup> E1/411.1, Sun Vuth, T. 30 Mar 2016, p. 68, ln. 1 to p. 69, ln. 7.

<sup>1287</sup> On this issue, *see* E1/410.1, Bun Loeng Chauy, T. 29 Mar 2016, p. 23, lns 15-23, p. 25, ln. 9; E1/410.1, Bun Loeng Chauy, T. 29 Mar 2016, p. 25, lns 9-18; E1/399.1, Chan Toi, T. 10 Mar 2016, p. 12, lns 10-12, p. 13, ln. 24 to p. 14, ln. 1; E1/400.1, Neth Savat, T. 11 Mar 2016, p. 20, lns 15-20.

<sup>1288</sup> E3/1664, Colm and Sim, Purges in Mondulkiri, ERN 00397647.

<sup>1289</sup> *E.g.*: E1/409.1, Bun Loeng Chauy, p. 58, lns 8-14; E3/7960, DC Cam Interview – Northeast Minorities, ERN 00450295 (“Kham Phoun brought Vietnamese in through Svay. Kham Vieng told me that the leaders would arm the Fulro. They had already prepared themselves in gourps. [...] The Vietnamese were secretly kept near the village. They had the so called struggle. The villages and sub-districts saw Vietnamese were behind Svay's house”); *see also* E3/44, ‘WRI of Phan Sovannhan’, ERN 00295163.

Phoun were found dead in the same room in Phnom Penh.<sup>1290</sup> While the exact causes of their deaths remain unresolved, evidence suggests that Kham Phoun may have killed Ta Ham with an iron bar.<sup>1291</sup> In September 1978, according to the Closing Order<sup>1292</sup> (but in reality possibly before),<sup>1293</sup> Sao Sarun, former secretary of Pen Chenda district, was appointed by Pol Pot as Autonomous Sector 105 secretary to replace Ta Ham.

424. In any event, the alleged arrests that followed these events – discussed at length at trial – are relevant only to the extent that the persons allegedly arrested were subsequently detained at Phnom Kraol or S-21. Alleged arrests of Autonomous Sector 105 staff or Division 920 soldiers and their detention in facilities in the Autonomous Sector that are not part of the Phnom Kraol complex are out of the scope and are therefore irrelevant and excluded from discussion below. Given the limited actual relevance of witnesses summonsed on Phnom Kraol to Phnom Kraol, the live evidence on allegations concerning living and working conditions, torture, or executions at the security centre, discussed both in the Closing Order and in the Co-Prosecutors' Final Submission, is therefore minimal and patently insufficient to prove the crimes charged.

**(c) *The Unrelated Documentary Evidence Available***

425. Not only is the live evidence regarding the crimes charged in relation to Phnom Kraol sparse, but the remaining evidence available consists of merely out-of-court accounts and unrelated documentary evidence. As a matter of fact, the only two documents directly related to Phnom Kraol presented by the Co-Prosecutors during the key documents hearing are WRIs containing the unsworn accounts of two deceased civil parties<sup>1294</sup> whose evidence obviously could not be tested at trial. All other documents highlighted by the Co-Prosecutors in relation to Phnom Kraol are simply unrelated to that crime site. They consist of the list of alleged S-21 detainees prepared by the Co-Investigating Judges (the 'OCIJ List'),<sup>1295</sup> and internal communications that concern the relationships between Autonomous Sector 105 and Office 870, but which do not refer to Phnom Kraol in particular. As should have been obvious to the

<sup>1290</sup> See **E1/410.1**, Bun Loeng Chauy, T. 29 Mar 2016, p.23, lns 15-18; **E1/410.1**, Sao Sarun, T. 29 Mar 2016, p.73, lns 2-14; **E3/1664**, Colm and Sim, Purges in Mondulkiri, ERN 00397653-62.

<sup>1291</sup> On Ta Ham and Kham Phoun's death, See e.g. **E1/399.1**, Chan Toi, T. 10 Mar 2016, p. 11, lns 18-2; **E1/410.1**, Bun Loeng Chauy, T. 29 Mar 2016, p. 23, lns 15-18; **E1/410.1**, Sao Sarun, T. 29 Mar 2016, p.73, lns 2-14; **E1/400.1**, Neth Savat, T.11 Mar 2016, p. 21, lns 5-6; **E3/7960**, DC Cam Interview – Northeast Minorities, ERN 00450296; **E3/1664**, Colm and Sim, Purges in Mondulkiri, ERN 00397653.

<sup>1292</sup> **D427**, Closing Order, para. 628.

<sup>1293</sup> Several telegrams signed by Sao Sarun suggest that he may have been appointed Sector 105 secretary before Sep 1978, e.g. E3/937, E3/249, E3/1072, E3/1078.

<sup>1294</sup> **E1/456.1**, Key Documents Hearings, T. 12 Aug 2016, p. 22, ln. 15 to p. 25, ln. 25.

<sup>1295</sup> **E1/456.1**, Key Documents Hearings, T. 12 Aug 2016, p. 22, lns 2-5.



Co-Prosecutors, those communications are therefore irrelevant to prove the crimes allegedly committed at Phnom Kraol and are thus irrelevant.

426. In sum, the overall evidence presented during the trial segment on Phnom Kraol is, ridiculously, in fact primarily unrelated to the crime site and a sheer waste of the Tribunal's time. The evidence directly related to the Phnom Kraol security centre is highly circumscribed and patently insufficient to prove the crimes charged beyond reasonable doubt.

### 3. Several Aspects of the Scope *Vis-à-Vis* S-21 Must Be Clarified

427. As the Defence cautioned in the past,<sup>1296</sup> Case 002/02 is a new and entirely separate trial. Findings made in Case 001 in respect of S-21 should be simply irrelevant here were this Tribunal a proper court of law. A conviction in Case 002/02 must be based on evidence heard and arguments made in this trial, and not on what was found in Case 001, particularly since in Case 001, Duch effectively admitted guilt and thus did not challenge most of the evidence. Any other approach would blatantly violate Nuon Chea's right to confront and test evidence.

428. The Closing Order charged the related worksite of Prey Sar as a separate crime site to S-21 which was specifically **excluded** from the crime base for Case 002/02.<sup>1297</sup> However, during the hearings, the Co-Prosecutors attempted to expand the scope to include Prey Sar as well – likely since the Co-Prosecutors were simply using the same trial preparation as in Case 001 which had encompassed Prey Sar. Ultimately, the Chamber was forced to clarify that the “Prey Sar S-24 worksite does not form part of the charges in Case 002/02”, although it would allow questions regarding this location since it is “interrelated with the creation and functioning of S-21 and therefore relevant.”<sup>1298</sup> Accordingly, the Defence does not address this crime site substantially, but only in relation to the initial processing of part of the detainees registered at S-21.<sup>1299</sup> The Defence further recalls that S-21 Security Centre was comprised of the former Ponhea Yat *lycée* premises and a complex of surroundings houses.<sup>1300</sup> Therefore, mentions of “S-21” in this Brief should be understood to refer to the complex as a whole. Finally, it should also be borne in mind that S-21 was primarily an independent military regiment consisting of more than 2,000 soldiers<sup>1301</sup> tasked with many different activities apart from being stationed at

<sup>1296</sup> E314/6, Nuon Chea's Second Trial Chamber Disqualification Motion, paras 115-121.

<sup>1297</sup> E301/9/1, Additional Severance of Case 002/02; E301/9/1.1, Scope of Case 002/02.

<sup>1298</sup> E1/430.1, Suos Thy, T. 2 Jun 2016, p. 48, lns 19-22.

<sup>1299</sup> See *infra*, Chapter 4-V, on the destination of the detainees.

<sup>1300</sup> E3/10603, OCIJ Organigram of S-21 Layout on Satellite Map.

<sup>1301</sup> E3/849, Joint Statistics of Armed Forces, ERN 00183956 or E3/1136, Rice Consumption Plan, ERN 00543743.

S-21 Security Centre. Thus, references to S-21 in the evidence can and do refer to matters beyond the security centre itself.

429. Finally, it should be noted that the relevant temporal scope for S-21 differs from the general temporal scope of the trial. The Closing Order alleges that S-21 Security Centre was “fully in operation” from October 1975 until 7 January 1979.<sup>1302</sup> However, it was moved from different locations during its first year of existence.<sup>1303</sup> Little evidence exists regarding the period before it was settled at its Tuol Sleng location and before the arrest of Chan Chakrei *alias* Mean – one of its first prisoners – on 19 May 1976,<sup>1304</sup> and none at all exists regarding detention conditions prior to this date. Therefore, any conviction deriving from the detention conditions at S-21 must be limited to the period April/May 1976 to 7 January 1979.

## **B. MANICHEAN PROPAGANDA HAS HEAVILY COLOURED THE LIVE EVIDENCE**

430. In the contest to frame the narrative of the DK, security centres and ‘internal purges’, and particularly Kraing Ta Chan and S-21, have always served as key battlegrounds that have been the subject of decades of relentless propaganda by Vietnam, the PRK and the current government. As discussed below, they play a foundational role in the establishment of the Manichean narrative of the DK, and in turn, on the emergence of ‘collective memory’ among Cambodians as to the events of the DK.<sup>1305</sup> Witness and civil party evidence must therefore always be approached highly cautiously with the spectre of propaganda firmly in mind.

### **1. Propaganda Paints Kraing Ta Chan as Having a Higher Death Toll Than S-21**

431. Kraing Ta Chan’s often-repeated alleged death toll of 15,000 is the highest of all security centres in Case 002,<sup>1306</sup> and a stupa and exhibition at the site permanently memorialises the ‘accepted truth’ of what happened there. Like at S-21, the propaganda over Kraing Ta Chan began early. For instance, in 1985, the PRK’s Ministry of Propaganda and Culture issued a “Genocidal Report of Kraing Ta Chan Prison” alleging that “[a]ll of the male, female, young and old people in Trăm Kàk district were murdered in this prison”.<sup>1307</sup> A 1996 “Brief History of Kraing Ta Chan Genocide Centre of Pol Pot-Ieng Sary Clique” from the Tram Kok governor

<sup>1302</sup> **D427**, Closing Order, para. 416.

<sup>1303</sup> **D427**, Closing Order, para. 417.

<sup>1304</sup> See **E3/10085**, ‘Name List of Prisoners of Division 170’, KH ERN 01013478 (listing “Chan Chakrei *alias* Mean, secretary of Division 170”: Defence internal translation); **E3/8463**, ‘Name List of Pol Pot’s Senior Cadres’, ERN 01302442; **E3/1993**, List of Important Culprits, ERN 00064827; see also *infra*, Chapter 4-IV-C-1.

<sup>1305</sup> See *supra*, Chapter 2-II-A-1 and 2-II-A-4.

<sup>1306</sup> See **D427**, Closing Order, paras 500, 514, 1385; **D390**, Co-Prosecutors’ Final Submission, para. 493.

<sup>1307</sup> **E3/5838**, ‘Genocidal Report of POL Pot in Trăm Kàk District’, 1985, ERN 00713114.

Sou Phirin – a rejected Defence witness and now-Council of Ministers Secretary of State<sup>1308</sup> – reads like a sensational version of the Closing Order or Final Submission.<sup>1309</sup>

432. In addition, many of Kraing Ta Chan’s alleged victims and perpetrators still live side-by-side in the same area today, as was frequently noted at trial. Together, these factors inevitably affect the ‘collective memory’ of what happened at Kraing Ta Chan and therefore the reliability of all witness evidence in respect of the site.<sup>1310</sup>

433. The shifting sands of the Kraing Ta Chan narrative manifested in Case 002/02 in the failure of three archetypical DK ‘accepted truths’ to withstand the scrutiny of trial following contradictory testimony. The first was that music was broadcast over loudspeakers to mask the sound of executions;<sup>1311</sup> the second, that children and babies were smashed to death against a tree;<sup>1312</sup> and the third, that Kraing Ta Chan staff extracted and consumed detainees’ gallbladders and livers.<sup>1313</sup> Kraing Ta Chan guards Saut Saing and Van Soeun provided the only accounts beyond a purely anecdotal level concerning the role of loudspeakers and music. Both testified that there were no loudspeakers, only a 40 to 50-centimetre-long radio used to listen to radio broadcasts and songs, which could be heard up to 15-40 metres away<sup>1314</sup> and patently could not have masked the sound of executions. Similarly, the only relevant allegations of children and babies being smashed against trees and human organs being consumed was provided by two civil parties, Say Sen and Meas Sokha, whose wholesale unreliability is discussed at length in Part D below. The former allegation on smashing against trees was contradicted by the alleged executioner, Saut Saing,<sup>1315</sup> and the latter allegation on the consumption of human organs, by both Saut Saing and Van Soeun.<sup>1316</sup>

<sup>1308</sup> See the witness request **E346**, Nuon Chea’s Tram Kok and Kraing Ta Chan Witnesses Request, paras 27, 29(f); **E346/3**, Reasoned Decision on Nuon Chea’s Tram Kok and Kraing Ta Chan Witnesses Request, paras 55-63; see also *infra*, Chapter 9 and **Annex 2**.

<sup>1309</sup> **E3/2062**, Brief History of Kraing Ta Chan Centre; see e.g. “They [...] kill[ed] anyone who revealed their heinous and filthy acts” (ERN 00301365-66).

<sup>1310</sup> See *supra*, Chapter 2-II-A-4, on the development of ‘collective memory’.

<sup>1311</sup> **D427**, Closing Order, para. 511; **D390**, Co-Prosecutors’ Final Submission, para. 490.

<sup>1312</sup> **D427**, Closing Order, para. 513; **D390**, Co-Prosecutors’ Final Submission, para. 490.

<sup>1313</sup> **D390**, Co-Prosecutors’ Final Submission, para. 487.

<sup>1314</sup> **E1/281.1**, Saut Saing, T. 24 Mar 2015, p. 55, ln. 21, p. 63, ln. 3 to p. 63, ln. 17, p. 84, ln. 25 to p. 86, ln. 3; **E1/271.1**, Van Soeun, T. 4 Mar 2015, p. 91, ln. 25 to p. 94, ln. 8; see also **E1/267.1**, Srei Than, T. 23 Feb 2015, p. 39, ln. 2.

<sup>1315</sup> **E1/281.1**, Saut Saing, T. 24 Mar 2015, p. 11, ln. 25 to p. 12, ln. 9.

<sup>1316</sup> **E1/271.1**, Van Soeun, T. 4 Mar 2015, p. 34, ln. 23, p. 87, lns 3-4; **E1/281.1**, Saut Saing, T. 24 Mar 2015, p. 87, lns 3-4; **E1/282.1**, Saut Saing, T. 25 Mar 2015, p. 29, ln. 21.

## 2. Propaganda Situates S-21 at the Very Heart of the Entire Manichean Narrative

434. The notorious S-21 is arguably the single biggest contributor to the Manichean narrative of the DK altogether. Thanks to the steady stream of tourists who visit it and speak with the likes of Chum Mey, it is also likely the most widely-known but fundamentally-misunderstood site of all of DK. David Chandler described how the Vietnamese authorities seized on S-21 “sensing the historical importance and the propaganda value of their discovery”.<sup>1317</sup> Building on the discussion in Chapter 2-II-A-1 as a contested site for propaganda, from the moment Vietnam took control of the site on 7 January 1979,<sup>1318</sup> it went to work organising the premises to be the nucleus for their propagandist efforts to discredit the DK regime, and simultaneously legitimise their unlawful invasion and subsequent military occupation of Cambodia.<sup>1319</sup>

435. One aspect of the Vietnamese efforts was to open S-21 to foreigners as early as March 1979, a mere two months after their invasion, in a bid to generate communication material which would showcase “the cruel torture committed by the traitors to the Khmer people”.<sup>1320</sup> This was – and remains – overwhelmingly successful. Among those invited to discover the site and to spread the word about the ‘barbarism and cruelty of the bloodthirsty Pol Pot-Ieng Sary clique’, were two East German filmmakers, Walter Heynowski and Gerhard Scheumann. In 1979-1980, they produced the documentary, *Die Angkar*, filmed on the S-21 premises,<sup>1321</sup> which perfectly encapsulated Soviet-style propaganda the sole purpose of which was to equate DK to Nazi Germany.<sup>1322</sup> In the meantime, Mai Lam, a Vietnamese colonel with previous experience in staging propagandistic post-war museums,<sup>1323</sup> transformed S-21 into a museum.<sup>1324</sup> The “Tuol Sleng Extermination Camp of Pol Pot-Ieng Sary’s Clique”,<sup>1325</sup> now known as the Tuol Sleng Genocide Museum, opened in 1980, offering a historically inaccurate, Manichean portrayal of DK, built on incorrect, unverified, and completely artificially-manufactured yet wholly-deliberate parallels between S-21 and Nazi extermination camps such

<sup>1317</sup> E3/1684, David Chandler, Voices from S-21, ERN 00192683.

<sup>1318</sup> E3/1684, David Chandler, Voices from S-21, ERN 00192681-82.

<sup>1319</sup> See *supra*, Chapter 2-II-A-1; see also Chapter 3-VIII on Vietnam’s efforts to legitimise its invasion.

<sup>1320</sup> E3/1684, David Chandler, Voices from S-21, ERN 00192687 citing “a PRK Ministry of Culture, Information and Propaganda document from 1980”.

<sup>1321</sup> E3/3095R, ‘Die Angkar’, 10 Dec 1981; see also F16, Nuon Chea’s Appeal Brief, para. 129.

<sup>1322</sup> See *supra*, Chapter 2-II-A-1; see also F16, Nuon Chea’s Appeal Brief, para. 128.

<sup>1323</sup> Such as the ‘Exhibition House for US and Puppet Crimes’ to expose war crimes and crimes of aggression by the US against Vietnam, later changed into the ‘Exhibition House for Crimes of War and Aggression in Ho Chi Minh City’ and today known as the ‘War Remnants Museum’.

<sup>1324</sup> E3/1684, Chandler, Voices From S-21, ERN 00192683-84.

<sup>1325</sup> E3/3095R, ‘Die Angkar’, 10 Dec 1981, at 11:12:34:02.

as Auschwitz or Treblinka.<sup>1326</sup> Mai Lam and Gerhard Scheumann are deceased, while Walter Heynowski never appeared as a witness, as a result of the Chamber's conclusion that the technicalities required to hear his testimony *via* videolink would take too long, ostensibly in light of the closure of evidentiary hearing and the closing brief drafting schedule. Given that the Defence had initially requested to hear Heynowski as early as May 2014; had always asked for his testimony to be expedited due to his age; and reiterated its request to expedite his testimony in June 2016, such reasoning shows at best, a disturbing lack of organisation by the Chamber, and, at worse, a clear attempt to avoid hearing what Heynowski had to say.<sup>1327</sup>

436. The overwhelming propaganda surrounding S-21, coupled with the precedent of the trial and appeals judgements in Case 001,<sup>1328</sup> ultimately predetermined the would-be contested issues in the S-21 trial segment in Case 002/02,<sup>1329</sup> just as the Defence had predicted when it protested the fairness of including S-21 in the proposed scope of Case 002/02.<sup>1330</sup> The Manichean narrative dictated to the Cambodian people and to the world for 37 years inevitably coloured Case 002/02 and impacted how evidence was presented at trial. Accordingly, the present trial has always appeared as a foregone conclusion insofar as S-21 is concerned. Indeed, the Defence has to address the charges related to S-21 in front of many of the same judges who have already rendered a 246-page judgement on this security centre in Case 001. This *de facto* requires the Defence to persuade them that they were in error, a standard normally only applicable to appellate proceedings, instead of having to simply create doubt in the mind of the Judges. This amounts to an unacceptable reversal of the burden of proof.<sup>1331</sup>

### C. FORMER SECURITY CENTRE STAFF HAVE MIXED AND LIMITED CREDIBILITY

437. In this Chapter, the Defence discusses witness, 'expert' and civil party credibility issues as and where they are most relevant to the discussion of a particular allegation. However, it highlights the credibility of certain individuals as a preliminary issue where their evidence is particularly important to proof of the contested issues and/or where their credibility is most

<sup>1326</sup> E3/1684, Chandler, Voices From S-21, ERN 00192684; *see also* F16, Nuon Chea's Appeal Brief, para. 126; *see also supra*, Chapter 2-II-B-3-(a), describing Judge Fenz's apparent belief in such comparison.

<sup>1327</sup> The Defence sought Heynowski's appearance as a witness in Case 002/02 as early as May 2014. He did not appear due to technical difficulties: *see* E443/7, Decision not to Hear Heynowski.

<sup>1328</sup> *See* E54, Urgent Application for Disqualification of the Trial Chamber Judges.

<sup>1329</sup> *See* E314/6, Nuon Chea's Second Trial Chamber Disqualification Motion, paras 115-121.

<sup>1330</sup> E1/239.1, Submissions on Case 002/02 Scope, T. 11 Feb 2014, p. 44, lns 14-17; *see also supra*, Chapter 4-I.

<sup>1331</sup> E314/6, Nuon Chea's Second Trial Chamber Disqualification Motion, paras 122-133; *see also supra*, Chapter 2-III-B-1 and Chapter 2-IV, on the burden of proof in fact being on the Co-Prosecutors.

glaringly absent. It begins this discussion with security centre staff, followed by ‘survivors’, and finally the ‘experts’.

## 1. Former S-21 Chairman and Case 001 Defendant Duch has Limited Credibility

### (a) *Duch’s Knowledge of the Case File*

438. The most cited witness of the Closing Order on S-21 is, of course, S-21 chairman Kaing Guek Eav *alias* Duch.<sup>1332</sup> However, the Co-Investigating judges themselves acknowledged his evidence’s limited value, stating that “[i]t is not always clear to what extent his knowledge and understanding of the hierarchical structure above him developed with his access to the Case File”.<sup>1333</sup> Duch’s testimony, already flawed in Case 001 and Case 002/01,<sup>1334</sup> is more biased than ever in Case 002/02. Indeed, Duch has conveniently continued to enhance his ‘knowledge’ of events at S-21 and in the DK generally through thorough reviews of the evidence from both previous trials and ongoing investigations into Cases 003 and 004.

439. Duch has long acknowledged having a poor memory on which he “cannot rely any more [*sic*]”.<sup>1335</sup> He even went further, admitting that he “only understood the organization gradually, **after becoming aware of the case file**”.<sup>1336</sup> As he told the OCIJ’s in Case 001 answering a particular question: “As I went through the case file, I understood better the organisation of the regime”.<sup>1337</sup> In addition, Duch admitted that his knowledge derived exclusively from the case file for issues as crucial as “the organisation of the Regime”,<sup>1338</sup> and the system of annotations on S-21 suspects’ statements between Son Sen and “his superiors”.<sup>1339</sup>

440. In fact, Duch has systematically adjusted his testimony to align with information made available in the case file and other secondary sources. For instance, Duch first said that he “was transferred to Nuon Chea” in July 1978.<sup>1340</sup> However, he later changed his testimony to say that he started reporting to Nuon Chea in 1977, after reviewing the evidence on the case file which indicated that Son Sen was no longer in charge of reviewing S-21 suspects’ statements

<sup>1332</sup> In the Closing Order, Duch was cited 121 times *see* **D427**, Closing Order, paras 415-474. Similarly, in the Final Submission, he was cited 552 times: *see* **D390**, Co-Prosecutors’ Final Submission, paras 325-518.

<sup>1333</sup> **D427**, Closing Order, para. 878.

<sup>1334</sup> **E313**, Case 002/01 Trial Judgement, para. 396.

<sup>1335</sup> **E3/106**, ‘WRI of Duch’, ERN 00177633.

<sup>1336</sup> **E3/355**, ‘WRI of Duch’, ERN 00242874 (emphasis added).

<sup>1337</sup> **E3/456**, ‘WRI of Duch’, ERN 00198882.

<sup>1338</sup> **E3/456**, ‘WRI of Duch’, ERN 00198882.

<sup>1339</sup> **E3/83**, ‘WRI of Duch’, ERN 00398164.

<sup>1340</sup> **E3/1567**, Thayer, I am in danger - Duch, 1999, ERN 00002622.

after 15 August 1977.<sup>1341</sup> Additionally, he attempted to give evidence on how many detainees had ever been held at S-21. He said, “it never reached the 1000”,<sup>1342</sup> yet also that he “never counted the lists and the upper echelon also did not demand the lists”<sup>1343</sup> and that he likewise never “totalled up” the number of detainees.<sup>1344</sup> Duch has also referred to secondary sources, contradictorily stating that he saw “foreign newspapers publish from 14,000-16,000 prisoners, but I do not know”.<sup>1345</sup> In the end, he admitted that he had no knowledge of how many detainees were held at S-21, saying, “let me tell you straight, I do not remember”.<sup>1346</sup> Instead, Duch has freely explained having carefully read David Chandler’s book, *Voices From S-21*, and admitted that it “influenced” him, again demonstrating his reliance on secondary sources for his testimony rather than his contemporaneous knowledge.<sup>1347</sup>

441. Duch was frequently irritated during his testimony in court in Case 002/02, systematically demanding parties refer to the Co-Prosecutor’s revised Excel spreadsheet logging details of S-21 detainees (the ‘OCP List’) because that was the list he knew.<sup>1348</sup> In February 2016, Duch also grew enraged and chastised the International Co-Investigating Judge who questioned him on the basis of documents with which he was not familiar:

I don’t understand why are we not using all the same uncontested documents that we have already agreed to use?<sup>1349</sup>[...] you have to show me the document so that it can remind me of the events and the words used at the time [...] I no longer want to work with. If you want to work with me, please show me the documents first.<sup>1350</sup> [...] All of these documents are new, so I never saw them. **Why are you not showing me the old documents that we worked on together? [...] Do not take something I have never seen and order me to explain it to you.**<sup>1351</sup>

442. More concerningly, Duch expressed doubt in court about documents which do not bear a “TSL” (Tuol Sleng Museum) reference and about people not recorded in the OCP List.<sup>1352</sup> He was openly hostile to several new documents presented to him at trial. In the words of Judge

<sup>1341</sup> E3/1579, ‘WRI of Duch’, ERN 00398205.

<sup>1342</sup> E3/347, OHCHR Suspect Statement of Duch, ERN 00002538.

<sup>1343</sup> E3/10583, ‘WRI of Duch’, ERN 00326781.

<sup>1344</sup> E3/528, ‘WRI of Duch’, ERN 00327319; *see also* E1/430.1, Duch, T. 2 Jun 2016, p. 74, lns 11-16.

<sup>1345</sup> E3/528, ‘WRI of Duch’, ERN 00327319.

<sup>1346</sup> E3/65, ‘WRI of Duch’, ERN 00147525.

<sup>1347</sup> E3/355, ‘WRI of Duch’, ERN 00242874, *see also* F16, Nuon Chea’s Appeal Brief, paras 176-177.

<sup>1348</sup> E1/436.1, Duch, T. 13 Jun 2016, p.74, ln. 15 to p. 49, ln. 3; E3/342, OCP List; *see infra*, Chapter 4-IV-F-2.

<sup>1349</sup> E3/9836, ‘WRI of Duch’, A24.

<sup>1350</sup> E3/9836, ‘WRI of Duch’, A29.

<sup>1351</sup> E3/9836, ‘WRI of Duch’, A30 (emphasis added).

<sup>1352</sup> E1/434.1, Duch, T. 8 Jun 2016, p.37, ln. 16 to p. 38, ln. 3 (emphasis added). “TSL” stands for “Tuol Sleng Museum”. It is a Tuol Sleng Museum reference added post 1979 on alleged contemporaneous documents; E3/9836, ‘WRI of Duch’, ERN 0123434-37.

Fenz, he “[did not] like [them] because [they] were not presented to [him] in [his] own case”.<sup>1353</sup> He clearly became anxious and confused when confronted with any document not part of his case, as one example of an outburst of Duch’s aptly illustrates:

[...] Can you tell me whether these lists were extracted from the lists of prisoners at S-21 that were used to question to me or these two are separate lists?<sup>1354</sup> [...] I am presented with a new list and it is rather strange to me. So I do not know how to respond to your question, and I actually need time to read these documents fully before I can respond to your question.<sup>1355</sup>

443. As a fact witness, Duch should have limited his evidence to things he had directly seen, heard, knew of, or experienced.<sup>1356</sup> Instead, he often testified on what he had later learnt from the case file and other secondary sources such as David Chandler’s book. As he said in Case 001, “if you really want me to only talk about what I knew back then, I am afraid I may not have anything to tell the world about this because I was confined to S-21 in particular”.<sup>1357</sup> As a result, Duch provided merely speculative evidence, which should be afforded low probative value, on issues such as the release of detainees;<sup>1358</sup> food;<sup>1359</sup> the alleged policy of ‘smashing’;<sup>1360</sup> the fate of detainees’ relatives;<sup>1361</sup> alleged knowledge of Standing and Central Committee members;<sup>1362</sup> and the number of detainees sent to S-21.<sup>1363</sup>

**(b) Duch’s Limited Role at S-21**

444. As noted by the Supreme Court Chamber, “there is some paucity in the Trial Chamber’s discussion of Duch’s testimony, which should be approached with caution given the determination in Case 001 that he lacked credibility due to his motive of seeking to “shift responsibility away from himself”.<sup>1364</sup> However, while often downplaying his role, what is

<sup>1353</sup> E1/436.1, Duch, T. 13 Jun 2016, p. 78, Ins 9-10.

<sup>1354</sup> E1/436.1, Duch, T. 13 Jun 2016, p.69, Ins 9-12.

<sup>1355</sup> E1/436.1, Duch, T. 13 Jun 2016, pp. 69-70, *see also* E1/436.1, Duch, T. 13 Jun 2016, p.77 (“the second part of my comment is that it is strange that I was confronted with this new list of people who were sick and who were sent to S-21”).

<sup>1356</sup> *See* E215, Decision on Assignment of Experts, para. 16; *see also* ICTR, *Ndindiliyimana et al*, Decision on Prosecutor’s Opposition to Witness DE4-30 as a Factual Witness, para. 9; *Karemera et al.*, Decision on Defence Request for the Withdrawal of GFJ Witness Statement, para. 4.

<sup>1357</sup> E1/440.1, Duch, T. 20 Jun 2016, p. 34, Ins 1-2

<sup>1358</sup> *See e.g.* E3/5796, Testimony of Duch (Case 001), p. 13, ln. 21 to p. 15, ln. 4, p. 60, Ins 19-20.

<sup>1359</sup> *See e.g.* E3/5799, Testimony of Duch (Case 001), p. 63, Ins 12-8.

<sup>1360</sup> *See e.g.* E1/433.1, Duch, T. 7 Jun 2016, p. 49, Ins 4-5; E1/437.1, Duch, T. 14 Jun 2016, p. 27, Ins 4-5; E1/441.1, Duch, T. 21 Jun 2016, p. 36, Ins 16-7; E1/442.1, Duch, T. 22 Jun 2016, p. 76, Ins 13-5; E3/5795, Testimony of Duch (Case 001), p. 76, Ins 23-5.

<sup>1361</sup> E1/434.1, Duch, T. 8 Jun 2016, p. 75, Ins 1-11; E3/5793, Testimony of Duch (Case 001), p. 85, Ins 14-5.

<sup>1362</sup> E3/61, ‘WRI of Duch’, ERN 00195575.

<sup>1363</sup> E1/435.1, Duch, T. 9 Jun 2016, p. 6, ln. 22 – p. 7, ln. 5.

<sup>1364</sup> F36, Case 002/01 Appeals Judgement, para. 349.



much more serious and strikes more directly at the heart of his credibility are Duch's efforts to provide evidence on things in respect of which he clearly had no contemporaneous knowledge.

445. After ten years of proceedings and thousands of pages of testimony,<sup>1365</sup> Duch's precise role at S-21 is finally reasonably well-defined. Duch's official function since November 1976<sup>1366</sup> was that of general chairman of S-21. However he correctly considered himself a lower to mid-level cadre at the "same level [in the CPK] as the position of the current Prime-Minister"<sup>1367</sup> (Hun Sen) before the latter left for Vietnam in June 1977.<sup>1368</sup> S-21 was the equivalent to a District committee<sup>1369</sup> and Duch said that "[i]n terms of hierarchical orders there were many cadres above me".<sup>1370</sup> However, during study sessions, he would study with cadres "at the battalion and regimental level".<sup>1371</sup>

446. S-21 was an independent military regiment that consisted of more than 2,000 combatants, with around 95 percent of members from Division 703.<sup>1372</sup> According to Duch, "as an independent regiment, S-21 is under the subordinate of the General Staff and "followed the instructions of the General Staff".<sup>1373</sup> As a consequence, for logistics, weaponry, and medical supplies – such as clothing or uniforms, for instance – they subordinated to the General Staff.<sup>1374</sup> Therefore, S-21 was under the ultimate command of Son Sen from its establishment until the very end of the DK regime. Additionally, Ta Nath, the S-21 regiment commander, most likely kept playing an important role after he had left S-21, since Duch still referred to Nath as the "leader" in November 1976, when Nath had already transferred to the General Staff.<sup>1375</sup>

447. Duch testified that "regarding the management of staff of forces, I was not directly involved".<sup>1376</sup> His day-to-day responsibilities were instead limited to reading S-21 suspects' statements of important detainees, "locked in [his] office" for 18 hours a day.<sup>1377</sup> Thus, Duch

<sup>1365</sup> **D3**, Co-Prosecutors' Introductory Submission, 18 Jul 2007.

<sup>1366</sup> See **E3/1038**, Duch Report on Weapon Stealing Incident, ERN 00008147. This report suggests that Nath was still in charge of S-21 in Nov 1976.

<sup>1367</sup> **E1/440.1**, Duch, T. 20 Jun 2016, p. 40, Ins 1-4 (correction symbols omitted).

<sup>1368</sup> **E3/9720**, Stasi Biographies, ERN 01206275.

<sup>1369</sup> **E3/1578**, 'WRI of Duch', ERN 00194551.

<sup>1370</sup> **E1/440.1**, Duch, T. 20 Jun 2016, p. 38, Ins 13-14 (correction symbols omitted).

<sup>1371</sup> **E3/347**, OHCHR Suspect Statement of Duch, ERN 00002523.

<sup>1372</sup> **E3/849**, Joint Statistics of Armed Forces, ERN 00183956, indicating a number of 2,327 combatants; **E3/1136**, Rice Consumption Plan, 4 Jan 1976, ERN 00543743, indicating 2,048 combatants.

<sup>1373</sup> **E3/5724**, 'WRI of Duch', ERN 00680798.

<sup>1374</sup> **E1/62.1**, Duch, T. 10 Apr 2012, p. 87, Ins 15-18.

<sup>1375</sup> **E3/1038**, Duch Report on Weapon Stealing Incident, ERN 00008146-47; see also *infra*, Chapter 4-V-A-4, for details on Ta Nath.

<sup>1376</sup> **E1/440.1**, Duch, T. 20 Jun 2016, p. 45, Ins 22-23.

<sup>1377</sup> **E3/1578**, 'WRI of Duch', ERN 00194552.

admitted that he was “not aware of 90% of the tasks at S-21.”<sup>1378</sup> In reality, Khim Vat *alias* Hor, Duch’s deputy, was the one in charge of all the daily activities of S-21 and of the whole S-21 regiment.<sup>1379</sup> Hor “took care of the Phnom Penh sector in every field, interrogation as well as document reading”.<sup>1380</sup> The interrogators supplied daily reports to Hor and not to Duch.<sup>1381</sup> In fact, Hor worked autonomously in supervising the vast majority of unimportant detainees. As Duch said: “For simple combatants, Hor controlled everything and could order ‘*tearunakamm*’”.<sup>1382</sup> Duch also testified that Hor was the one who had authority in ordering executions.<sup>1383</sup> Thus, Hor – who most likely answered directly to Nath and Son Sen regarding the arrest, registration, detention, interrogation and punishment of detainees – was effectively in charge of the whole S-21 operation.

448. As for the arrest of detainees, Duch confirmed that “[he, himself] never issued any decisions to make any arrest.”<sup>1384</sup> He also stressed that he had no role in field investigation,<sup>1385</sup> stating that “it is beyond my knowledge to conclude the criteria for identifying an enemy or friend”.<sup>1386</sup> Indeed, Him Kheng, a former S-21 guard, explained that the “interrogation unit was separated from the arrest unit. [...]”<sup>1387</sup> Additionally, Duch did not participate in the meetings with Son Sen and the RAK commanders where “strategy relating to the arrest was discussed”.<sup>1388</sup> In fact Huy, who was in charge of Baku and Prey Sar,<sup>1389</sup> attended these meetings.<sup>1390</sup> Thus, Duch had no knowledge regarding the transfer of prisoners to Prey Sar and Choeng Ek. In respect of Prey Sar in particular, Duch acknowledged that “in real practice and the details, I could not grasp everything.”<sup>1391</sup> Prey Sar “for me was other people’s work, meaning Hor and Huy”.<sup>1392</sup> In respect of Choeng Ek, Duch likewise said that he had “no idea how the departure of detained persons to Choeng Ek was organised”.<sup>1393</sup> He also said that he was “in no position

<sup>1378</sup> E1/441.1, Duch, T. 21 Jun 2016, p. 51, lns 7-10.

<sup>1379</sup> D427, Closing Order, para. 419; E1/441.1, Duch, T. 21 Jun 2016, p. 32, lns 5-10.

<sup>1380</sup> E1/441.1, Duch, T. 21 Jun 2016, p. 31, lns 18-19; E3/1570, ‘WRI of Duch’, ERN 00154193.

<sup>1381</sup> E1/441.1, Duch, T. 21 Jun 2016, p. 32, lns 14-16; E3/5772, ‘WRI of Duch’, ERN 00209169.

<sup>1382</sup> E1/441.1, Duch, T. 21 Jun 2016, p. 28, ln. 25 to p. 29, ln. 1; *see also infra*, Chapter 4-V-C-1-(b), on the proper meaning of ‘*tearunakamm*’.

<sup>1383</sup> E1/441.1, Duch, T. 21 Jun 2016, p. 36, lns 2-4; E3/5770, ‘WRI of Duch’, ERN 00177609.

<sup>1384</sup> E1/441.1, Duch, T. 21 Jun 2016, p. 6, lns 4-5.

<sup>1385</sup> E1/435.1, Duch, T. 9 Jun 2016, p. 63, ln. 3 to p. 64, ln. 21.

<sup>1386</sup> E3/15, ‘Duch Written Responses to OCIJ’, ERN 00251387.

<sup>1387</sup> E3/7632, ‘DC-Cam Interview of Him Kheng’, ERN 00351428.

<sup>1388</sup> E3/5762, ‘WRI of Duch’, ERN 00164330.

<sup>1389</sup> E3/5792, Testimony of Duch (Case 001), p. 32, ln. 17-21; E1/424.1, Prak Khan, T. 28 Apr 2016, p. 44, lns 14-15; E3/1578, ‘WRI of Duch’, ERN 00194547, 00194553.

<sup>1390</sup> E3/5762, ‘WRI of Duch’, ERN 00164330.

<sup>1391</sup> E1/441.1, Duch, T. 21 Jun 2016, p. 55, ln. 25 to p. 56, ln. 1.

<sup>1392</sup> E3/1578, ‘WRI of Duch’, ERN 00194553.

<sup>1393</sup> E3/5748, ‘WRI of Duch’, ERN 00153568.

to tell whether people were transferred directly from Prey Sar to Choeng Ek.”<sup>1394</sup> Furthermore, Duch, who had no connection with the documentation unit, had no knowledge of the administrative process of list making and photograph-taking at S-21.<sup>1395</sup> Therefore, Duch could not have had any knowledge regarding the flow of detainees going in and out each day either.

449. Duch was in short and to put it simply, completely clueless in respect of almost the entire S-21 operation. Duch had no idea what regiment S-21 was doing on a day to day basis. He had no idea which detainees – other than important ones – were brought in; how they had been selected; what the reasons for their arrests had been; or on the basis of which criteria they were subsequently sent to Prey Sar, the Tuol Sleng premises, or elsewhere. Even in the matters in which Duch was involved, he showed an astonishing lack of memory, reinforcing the notion that almost everything to which he has testified was based upon his knowledge of the case file. When asked for instance why Division 310 commander Oeun, Division 170 commander Chan Chakrei or Koy Thuon were arrested, he could not offer any explanation,<sup>1396</sup> which is bizarre considering the fact that Duch questioned Koy Thuon himself. Therefore, despite his official function, Duch’s role was extremely limited and the scope of his daily tasks very narrow. His contemporaneous understanding of the functioning of S-21 was confined accordingly.

**(c) Conclusion on Former S-21 Chairman and Case 001 Defendant Duch’s Limited Credibility**

450. There is no available evidence from Son Sen, Hor, Huy Sre, Nath, Pang and many others of the people who played a key role in respect of the entire S-21 operation. Instead, there is Duch. However, even leaving aside Duch’s overall lack of credibility; his bias due to his study of the case file; and his high propensity for speculation, the weight of his evidence is nevertheless limited. Indeed, considering how much evidence is missing, his sole evidence fails to reach the standard of proof required to make any finding beyond reasonable doubt.<sup>1397</sup> At best, Duch’s evidence reflects one story among hundreds missing, which is clearly insufficient to reach any conclusion.<sup>1398</sup>

451. In this Chapter, the Defence argues that there is a complete absence of evidence as to what happened during the interrogation of the vast majority of detainees in S-21. Only a very

<sup>1394</sup> E3/1578, ‘WRI of Duch’, ERN 00194549.

<sup>1395</sup> E1/432.1, Duch, T. 6 Jun 2016, p. 97, lns 6-9.

<sup>1396</sup> E1/441.1, Duch, T. 21 Jun 2016, p. 45, ln. 12.

<sup>1397</sup> See *supra*, Chapter 2-III-A-2, on the standard of proof.

<sup>1398</sup> On the impossibility to reach the standard of proof beyond reasonable doubt without comprehensive evidence explained by Judge van den Wyngaert, see *supra*, Chapter 1-I-B.

limited number of people were considered important detainees and even during these interrogations Duch was mostly absent. There is also clearly insufficient evidence to refute the Defence's position – set out in this Brief – that most detainees registered at the S-21 complex were in fact sent to re-education sites such as Prey Sar and were not killed. The number of detainees who eventually entered S-21 likely lies around 6,000 and there is no evidence to prove beyond reasonable doubt that all those people were killed.<sup>1399</sup> Indeed, this number is roughly the same as the number of Indonesian Communist Party ('PKI') members that US government officials in Jakarta had presented to the Indonesian military in 1965 and who were subsequently killed along with at least 500,000 more victims, all under applause from Western media<sup>1400</sup> – a forgotten chapter of US history and a stark reminder that history is written by the victors.

## 2. Former S-21 'Photography Unit Staffer' Nhem En is a Professional Charlatan

452. Nhem En is without a doubt an impostor and a greedy charlatan<sup>1401</sup> who attempted to claim the work of others in order to earn money and fame, fooling all Western media, including the New York Times, who naïvely accepted, featured and ultimately emboldened his account.<sup>1402</sup> In court, Nhem En cut a figure so bombastic and spotlight-loving that even Case 002/01's Sâm Sithy pales in comparison. His evidence was likewise wholly lacking in credibility. While the Defence could fill several pages discussing Nhem En, within the limited pages of this Brief, the Defence reduces this to only the briefest assessment of key issues in respect of which he clearly lied: his arrival at S-21, his training, and his role. These lies were exposed by other witnesses: Duch; Suos Thy, who was in charge of lists of detainees at S-21; and Noem Kimsreang,<sup>1403</sup> who was the chief of the S-21 photography unit.

453. First, Nhem En lied about the date of his arrival at S-21. In 2007, he told the OCIJ that he arrived in S-21 in 1977;<sup>1404</sup> in court, he testified that it was in July 1976;<sup>1405</sup> but Noem Kimsreang, the S-21 photography unit head, testified that Nhem En joined the unit in mid-1978.<sup>1406</sup> Second, Nhem En also provided false evidence about being sent to China to study

<sup>1399</sup> On the death toll at S-21, *see infra*, Chapter 4-V-E-4.

<sup>1400</sup> ABC News, Indonesia's Coup Remains a Mystery; Time Magazine, Indonesia's Quest for Truth.

<sup>1401</sup> *See e.g.* Nhem En asked Nic Dunlop for 300 US dollars/hour to be interviewed (E3/2817, Dunlop, The Last Executioner, ERN 00370098). Nhem En also tried to sell a pair of Pol Pot's shoes as well as other alleged DK period's items for US \$1 million: E1/420.1, Nhem En, T. 21 Apr 2016, p. 45, lns 5-11.

<sup>1402</sup> *See supra*, Chapter 2-II-A-3, on the role of the media in perpetuating false accounts of DK experiences.

<sup>1403</sup> His name is also spelt Noem Oem and Nim Kimsreang.

<sup>1404</sup> E3/68, 'WRI of Nhem En', ERN 00401822.

<sup>1405</sup> E1/418.1, Nhem En, T. 19 Apr 2016, p. 113, lns 12-19.

<sup>1406</sup> E1/471.1, Noem Kimsreang, 15 Sep 2016, p. 19, lns 4-10; E3/7618, 'WRI of Nim Kimsreang', ERN 00164441.

photography.<sup>1407</sup> Third, and most importantly, he lied about his role as S-21, presenting himself as the “Chief Photographer of S-21” to the various newspapers to which he spoke.<sup>1408</sup> In court, however, he testified that he was in charge of a squad<sup>1409</sup> but “considered” himself the chief as he “had more knowledge in this area than the others.”<sup>1410</sup> Both Duch<sup>1411</sup> and Noem Kimsreang denied Nhem En’s claims.<sup>1412</sup> They make it clear that Nhem En was only at S-21 to study photography and certainly did not play any leading role in the unit.<sup>1413</sup> Indeed, it is highly disturbing that a claimed ‘chief’ photographer such as Nhem En appeared not to even know how to properly take a film roll out of a camera.<sup>1414</sup> Moreover, while Nhem En testified that he knew Suos Thy “very well”<sup>1415</sup> and that he would give him the detainees’ photos on a regular basis,<sup>1416</sup> Suos Thy said that he never heard of Nhem En.<sup>1417</sup> While Nhem En bragged about having photographed various DK members across the six Zones in DK,<sup>1418</sup> Duch denied this was so,<sup>1419</sup> and Noem Kimsreang testified that only Sry, who was a CPK member, could take photos outside of the S-21 compound.<sup>1420</sup>

454. The totality of Nhem En’s evidence is based on his role in S-21, *i.e.*, on false premises. It also significantly and materially differs from the evidence of others. Furthermore, Nhem En also appears to have an even more vested interest in maintaining his account than Sâm Sithy, who the Supreme Court Chamber said might have “an interest in repeating the account of that experience [publicised in one newspaper] regardless of its truthfulness”.<sup>1421</sup> Not only has Nhem En been more widely featured in more media outlets, but he also freely admitted that he came to testify in the hope that the tribunal would help publicise his book.<sup>1422</sup> In short, Nhem En’s evidence is an offence to the search for the truth and must be simply disregarded in totality.<sup>1423</sup>

<sup>1407</sup> **E1/418.1**, Nhem En, T. 19 Apr 2016, p. 99, lns 2-18, p. 100, lns 14-23; *contra* **E1/474.1**, Noem Kimsreang, 15 Sep 2016, p. 20, lns 9-14, p. 20, lns 16-23; **E3/7468**, Testimony of Duch (Case 001), p. 128, lns 16-22.

<sup>1408</sup> *See e.g.* **E3/7495**, ‘Interview Nhem En by Niven and Maguire’, 12 Mar 1997, ERN 00078256; **E3/8867**, Associated Press, Photographer Recalls Victims of KR Regime; **E3/9012**, New York Times, Out from Behind a Camera at a Khmer Torture House.

<sup>1409</sup> **E1/418.1**, Nhem En, T. 19 Apr 2016, p. 113, ln. 22 to p. 114, ln. 1.

<sup>1410</sup> **E1/420.1**, Nhem En, 21 Apr 2016, p. 21, lns 7-15.

<sup>1411</sup> **E3/7468**, Testimony of Duch (Case 001), p. 128, ln. 24 to p. 129, ln. 10.

<sup>1412</sup> **E1/474.1**, Noem Kimsreang, 15 Sep 2016, p. 22, lns 12-17.

<sup>1413</sup> **E1/474.1**, Noem Kimsreang, 15 Sep 2016, p. 24, lns 6-13.

<sup>1414</sup> *See* **E1/419.1**, Nhem En, T. 20 Apr 2016, p. 13, ln. 21 to p. 14, ln. 7.

<sup>1415</sup> **E1/419.1**, Nhem En, T. 20 Apr 2016, p. 6, lns 22-24.

<sup>1416</sup> **E1/419.1**, Nhem En, T. 20 Apr 2016, p. 53, lns 7-11.

<sup>1417</sup> **E3/7643**, ‘WRI of Suos Thy’, ERN 00162615; **E1/432.1**, Suos Thy, T. 6 Jun 2016, p. 87, lns 10-12.

<sup>1418</sup> **E1/419.1**, Nhem En, T. 20 Apr 2016, p. 6, ln. 25 to p. 7, ln. 5.

<sup>1419</sup> **E3/7468**, Testimony of Duch (Case 001), p. 128, lns 24-25.

<sup>1420</sup> **E1/474.1**, Noem Kimsreang, 15 Sep 2016, p. 106, lns 3-7.

<sup>1421</sup> **F36**, Case 002/01 Appeals Judgement, para. 480; *see also supra*, Chapter 2-III-A-1, for a detailed discussion.

<sup>1422</sup> **E1/420.1**, Nhem En, T. 21 Apr 2016, p. 47, ln. 19 to p. 48, ln. 4.

<sup>1423</sup> *See supra*, Chapter 2-III-B-2-(a) on inconsistencies.

## D. MOST ‘SURVIVORS’ SIGNIFICANTLY LACKED CREDIBILITY

### 1. Kraing Ta Chan: Say Sen and Meas Sokha are the ‘Sâm Sithys’ of Case 002/02

455. Notwithstanding the caution with which civil party evidence must be approached,<sup>1424</sup> the allegations *vis-à-vis* Kraing Ta Chan in the Closing Order and Final Submission turn on the account of two civil parties, Say Sen and Meas Sokha, both young teenage “detainees” at Kraing Ta Chan who, as several witnesses explained, worked and had certain privileges there.<sup>1425</sup> Say Sen is the top reference for Kraing Ta Chan in the Closing Order and Co-Prosecutors’ Final Submission.<sup>1426</sup> He is referenced twice as often in the Closing Order as the next most-referenced person (who is Meas Sokha),<sup>1427</sup> and is – incredibly – the **sole** source for 11 Closing Order allegations on all aspects of Kraing Ta Chan’s operations.<sup>1428</sup> Say Sen is also the near-exclusive source for the Co-Investigating Judges’ Site Identification Report.<sup>1429</sup> His importance is further underscored by the concerted and apparently coordinated effort by the francophone trio of the Senior Assistant Co-Prosecutor, International Civil Party Lead Co-Lawyer, and Judge Lavergne, who took it in turns to systematically disrupt the Defence’s cross-examination with constant objections and interruptions wasting 22% of the Defence’s time.<sup>1430</sup>

456. Say Sen, and to a lesser extent Meas Sokha, are emblematic examples of the rampant overreliance at this Tribunal on civil parties as “quasi-fact witnesses” who are relied upon to substantiate key contested issues yet do not have to testify under oath. As discussed in Chapter 2 above, it was for this reason that, after Meas Sokha’s appearance and prior to Say Sen’s, the

<sup>1424</sup> On the special status of civil parties, *see supra*, Chapter 2-II-A-4, III-A, III-B-2-(a).

<sup>1425</sup> **E1/256.1**, Say Sen, T. 4 Feb 2015, p. 43, ln. 11 to p. 44, ln. 4, p. 44, ln. 21 to p. 46, ln. 5, p. 57, lns 14-25, p. 66, lns 6-7, p. 69, ln. 21 to p. 70, ln. 1, p. 72, lns 13-15, p. 73, lns 3-6, p. 75, lns 4-7, p. 84, ln. 22 to p. 85, ln. 1, p. 88, lns 17-21, p. 89, lns 2-6, p. 89, lns 12-25, p. 93, ln. 20 to p. 94, ln. 3, p. 94, ln. 20 to p. 95, ln. 6; **E1/257.1**, Say Sen, T. 5 Feb 2015, p. 9, lns 14-20, p. 26, lns 10-14, p. 69, lns 5-13, p. 74, ln. 4, p. 76, ln. 17; **E1/249.1**, Meas Sokha, T. 21 Jan 2015, p. 13, ln. 19 to p. 14, ln. 6, p. 15, lns 21-23, p. 45, ln. 10 to p. 46, p. 3, p. 57, lns 6-9, p. 72, lns 7-22, p. 73, lns 6-19, p. 79, lns 11-16, p. 87, lns 19-25, p. 88, lns 14-22; **E1/266.1**, Srei Than, T. 19 Feb 2015, p. 22, lns 15-20; **E1/268.1**, Phann Chhen, T. 24 Feb 2015, p. 74, lns 8-18; **E1/271.1**, Van Soeun, T. 4 Mar 2015, p. 75, lns 12-17; **E1/300.1**, Vong Sarun, T. 18 May 2015, p. 55, ln. 13 to p. 56, ln. 15.

<sup>1426</sup> Say Sen is referenced 32 times in the Closing Order (**D427**, Closing Order, paras 2121, 2143-44, 2147, 2149, 2161, 2164, 2166-7, 2176-7, 2179, 2182, 2189-90, 2196, 2203, 2209-12, 2216, 2219-25, 2227-8 and 2230) and 36 times in the Co-Prosecutors’ Final Submission (**D390**, Co-Prosecutors’ Final Submission, paras 2361, 2363-5, 2372-3, 2375, 2377-8, 2399, 2401-3, 2405-6, 2409, 2410, 2412-7, 2423, 2429-30, 2435, 2437-9, 2441-2, 2444, 2446, 2449 and 2452).

<sup>1427</sup> Meas Sokha is referenced 16 times in the Closing Order (**D427**, Closing Order, paras 2161, 2166, 2176, 2178, 2183, 2186-8, 2193, 2200, 2210-11, 2214, 2220, 2222 and 2225).

<sup>1428</sup> **D427**, Closing Order, paras 2121, 2144, 2164, 2179, 2190, 2203, 2212, 2220-1, 2224 and 2230.

<sup>1429</sup> **E3/5828**, ‘Site Identification Report: Kraing Ta Chan Security Centre’, 17 Mar 2009.

<sup>1430</sup> **E1/258.1**, Say Sen, T. 6 Feb 2015, p. 3, ln. 22 to p. 4, lns 1-16, p. 6, lns 1-18, p. 7, lns 6-25, p. 10, ln. 6 to p. 11, ln. 15, p. 18, ln. 14 to p. 20, ln. 12, p. 22, ln. 8 to p. 23, ln. 10, p. 28, lns 1-10, p. 32, ln. 11 to p. 33, ln. 17, p. 34, ln. 21 to p. 35, ln. 15, p. 37, lns 13-23, p. 39, ln. 7 to p. 42, ln. 13, p. 44, ln. 12 to p. 45, ln. 9, p. 48, lns 4-22, p. 53, ln. 1 to p. 54, ln. 15; **E1/282.1**, Say Sen, T. 25 Mar 2015, p. 88, lns 7-25.

Defence filed a (rejected) request to change practices *vis-à-vis* civil parties in the trial, in particular to require them to testify under oath.<sup>1431</sup>

**(a) Credibility of ‘Star’ Civil Party and Former ‘Privileged’ Detainee Say Sen**

457. The Defence’s reservations about civil parties were wholly justified at trial, when Say Sen attempted to substantiate his alleged knowledge of what happened at Kraing Ta Chan by claiming that – despite having been approximately 15 years old when arriving at Kraing Ta Chan<sup>1432</sup> and, he claimed, the youngest person to perform work duties<sup>1433</sup> – he had carried out a dizzying array of tasks at Kraing Ta Chan. These included:

- 1) **execution-related duties**, *i.e.*, playing music or chopping firewood to mask the sound of executions; grave-digging; unshackling, carrying, and burying corpses; and collecting and storing clothes of deceased detainees;
- 2) **detention-related duties**, *i.e.*, counting and reporting the number of detainees; distributing food to detainees; carrying water for detainees to clean themselves; and removing and disposing of detainees’ faeces and urine;
- 3) **interrogation-related duties**, *i.e.*, pulling detainees out from an underground “dungeon”; and sweeping the interrogation room; and
- 4) **general work duties**, *i.e.*, monitoring prisoners working in the rice fields; tending buffaloes, horses, and other cattle; assisting staff when they went bird-shooting at night; planting coconut and cassava trees; farming vegetables; making sour palm juice; clearing grass; digging a reservoir; washing the typist’s desk; and cleaning.<sup>1434</sup>

458. Despite Say Sen’s seemingly-extensive workload, youth, and lack of rank or CPK membership, Say Sen additionally claimed to have learned information by chatting with the prison chief and staff who would confide in him what they had done.<sup>1435</sup> He further claimed to have learned the background of prisoners by conversing with them.<sup>1436</sup> Moreover, although he was an apparent bystander if not participant in seemingly every activity at the relatively small

<sup>1431</sup> See also E336, Nuon Chea’s Request Regarding Trial Practices Concerning Civil Parties; E336/3, Decision on Trial Practices Concerning Civil Parties.

<sup>1432</sup> E1/257.1, Say Sen, T. 5 Feb 2015, p. 69, lns 1-2, 12-13.

<sup>1433</sup> E1/256.1, Say Sen, T. 4 Feb 2015, p. 43, ln. 23.

<sup>1434</sup> E1/256.1, Say Sen, T. 4 Feb 2015, p. 43, ln. 24 to p. 44, ln. 3, p. 44, lns 11-14, 24 to p. 45, ln. 4, p. 45, lns 14-15, p. 46, lns 3-5, p. 47, lns 10-13, p. 57, lns 21-24, p. 58, lns 13-14, p. 61, lns 23-24, p. 70, ln. 1, p. 73, lns 4-9, p. 77, lns 10-12, p. 80, lns 7-8, p. 83, lns 1-5, p. 84, ln. 24 to p. 85, lns 1, 23-24, p. 89, lns 2-6, 15-17, p. 92, lns 19-21, p. 93, ln. 34 to p. 94, lns 2, 13-18, p. 95, lns 1-6; E1/257.1, Say Sen, T. 5 Feb 2015, p. 10, ln. 24 to p. 11, ln. 1, p. 26, lns 12-14, p. 61, lns 10-11, 25, p. 63, lns 17, 25 to p. 64, ln. 1.

<sup>1435</sup> E1/256.1, Say Sen, T. 4 Feb 2015, p. 66, lns 8-9, p. 72, lns 16-21, p. 90, lns 8, 20 to p. 91, lns 1, 19-21.

<sup>1436</sup> E1/256.1, Say Sen, T. 4 Feb 2015, p. 65, ln. 24 to p. 66, lns 1, 6-8, p. 72, lns 13-15.

site of Kraing Ta Chan, Say Sen failed to substantiate his account beyond the anecdotal level when asked by the Defence to provide particulars, including sufficient details that would enable the identification of even a single detainee.<sup>1437</sup>

459. As noted in Chapter 2 above, the Supreme Court Chamber found in the Case 002/01 Appeals Judgement that appeal witness Sâm Sithy lacked credibility and reliability since, *inter alia*, his account was “inherently implausible”, “highly improbable”, and “general and vague”.<sup>1438</sup> Similarly, academic Nancy Combs has noted that at international tribunals, “[s]ometimes, the witness’s account, although not patently ridiculous, proves so implausible that it gives rise to the highest possible suspicion of lying”.<sup>1439</sup> Say Sen’s account far exceeds either level. It is not only highly improbable but preposterously implausible, in defiance of all common sense, and in the end, its own undoing.

460. However, Say Sen’s preposterous account is not alone in eviscerating his credibility. His credibility is further undermined by the contradictory accounts of Kraing Ta Chan staff. Notably, former Kraing Ta Chan chief Phan Chhen said that Say Sen was only at Kraing Ta Chan because he had asked Say Sen to come to tend buffalo out of pity;<sup>1440</sup> guard and typist Srei Than described Say Sen as a “former prisoner” involved in cooking;<sup>1441</sup> and guard Saut Saing denied seeing Say Sen perform any of the work duties Saut Saing was asked about and which Say Sen had claimed to have performed.<sup>1442</sup> Yet that is still not all. Six months before his appearance in court, a feature article in the Cambodia Daily newspaper entitled “Prisoner Recounts Horrors of Kraing Ta Chan Prison” profiled Say Sen and his alleged DK experiences.<sup>1443</sup> This could indicate, as the Supreme Court Chamber observed regarding Sâm Sithy, that Say Sen had “an interest in repeating the account of that experience, regardless of its truthfulness”.<sup>1444</sup> Say Sen also declared in court that he was “here to assist the victims and the survivor[s] of the period”,<sup>1445</sup> and was following the Kraing Ta Chan hearings on Radio Free Asia,<sup>1446</sup> while witness and former Kraing Ta Chan detainee Vong Sarun testified that after

<sup>1437</sup> E1/258.1, Say Sen, T. 6 Feb 2015, p. 15, ln. 23 to p. 17, ln. 3.

<sup>1438</sup> F36, Case 002/01 Appeals Judgement, paras 478-480; *see also supra*, Chapter 2-III-A-1.

<sup>1439</sup> Combs, Fact-Finding Without Facts, p. 151.

<sup>1440</sup> E1/268.1, Phann Chhen, T. 24 Feb 2015, p. 74, lns 8-13.

<sup>1441</sup> E1/266.1, Srei Than, T. 19 Feb 2015, p. 21, lns 18-20, p. 22, lns 18-20.

<sup>1442</sup> E1/282.1, Saut Saing, T. 25 Mar 2015, p. 23, ln. 18 to p. 25, ln. 24.

<sup>1443</sup> E3/9301, Cambodia Daily, Prisoner Recounts Horrors at Kraing Ta Chan; *see also* E3/8944, Agence France Press, KR Victims and Executioners Seek Reconciliation, 21 Dec 2005, ERN 00236830.

<sup>1444</sup> F36, Case 002/01 Appeals Judgement, para. 480 (footnote omitted).

<sup>1445</sup> E1/282.1, Say Sen, T. 25 Mar 2015, p. 65, ln. 11, p. 93, lns 7-8.

<sup>1446</sup> E1/282.1, Say Sen, T. 25 Mar 2015, p. 93, lns 14-19 (“A few days ago, I listened to a Radio Free Asia concerning Ta [Phan] Chhen, who testified before this Court, and Ta Chhen said that please the Court do not



visiting the Kraing Ta Chan memorial, Say Sen called her to speak about and verify details of her experience.<sup>1447</sup> These comments clearly show that Say Sen sees himself as Kraing Ta Chan's spokesperson and had both the motive and means to embellish his predetermined account of what happened there in the name of what he – and the present (local and national) government – see as 'justice'. This is consistent with Nancy Combs' observation that international tribunals often feature people "who have reason to be biased because these witnesses are members of the group that was targeted" and thus have reason to "want revenge"<sup>1448</sup> – *i.e.*, people who 'lie for justice'. Taking into account his special status as a civil party (which, *inter alia*, exempted Say Sen from taking an oath and thus perjuring himself), all of these factors preclude the assigning of any probative value whatsoever to Say Sen's evidence.

**(b) Credibility of Civil Party and Former 'Privileged' Detainee Meas Sokha**

461. Similarly, Meas Sokha's unsworn statement far exceeded the Supreme Court Chamber's "Sâm Sithy" threshold of being inherently implausible, highly improbable, and ultimately unreliable. Meas Sokha's account was more striking than Sâm Sithy's in its frequently "general and vague",<sup>1449</sup> Manichean nature.<sup>1450</sup> His testimony appeared to be a clear product of 'collective memory', as discussed in Chapter 2-II-A-4. Meas Sokha's demeanour clearly showed what Nancy Combs calls an "unwillingness to provide clear, accurate testimony" that she says may – and in Meas Sokha's case, clearly does – reflect a desire to "evade, obfuscate, or downright lie."<sup>1451</sup> Given the flagrant deficiencies in his evidence, the Defence sought more time to examine Meas Sokha in order to elicit particulars from him on specific incidents he claimed to have witnessed and thus test their foundations.<sup>1452</sup> However, due to the absurdly rigorous time limitations imposed on its cross-examination,<sup>1453</sup> the Defence was able to focus on only three incidents: the mistreatment of a detainee with a plastic bag; a guard smashing a

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believe in Soy Sen testimony. He was too young at that time, and he told lies. And whatever the witnesses talk here, I also knew through radio.").

<sup>1447</sup> E1/300.1, Vong Sarun, T. 18 May 2015, p. 57, ln. 17 to p. 60, ln. 4.

<sup>1448</sup> Combs, Fact-Finding Without Facts, p. 136; *see e.g.* No Sates, who admitted lying for justice; *see* E1/351.1, No Sates, T. 29 Sep 2015, p. 24, lns 9-18; *see also supra*, Chapter 2-III-B-2, describing the relevant legal principles.

<sup>1449</sup> F36, Case 002/01 Appeals Judgement, para 478.

<sup>1450</sup> *E.g.* E1/249.1, Meas Sokha, T. 21 Jan 2015, p. 86, lns 2-12; E1/249.1, Meas Sokha, T. 21 Jan 2015, p. 92, lns 9-14; E1/249.1, Meas Sokha, T. 21 Jan 2015, p. 92, ln. 17 to p. 93, ln. 3; E1/249.1, Meas Sokha, T. 21 Jan 2015, p. 96, lns 15-20; E1/247.1, Meas Sokha, T. 8 Jan 2015, p.50, ln. 20 to p. 51, ln. 14; E1/247.1, Meas Sokha, T. 8 Jan 2015, p. 51, lns 18-24; E1/247.1, Meas Sokha, T. 8 Jan 2015, p. 57, ln. 23 to p. 58, ln. 2.

<sup>1451</sup> Combs, Fact-Finding Without Facts, p. 303.

<sup>1452</sup> E1/250.1, Meas Sokha, T. 22 Jan 2015, p. 4, lns 11-9.

<sup>1453</sup> E1/250.1, Meas Sokha, T. 22 Jan 2015, p. 9, lns 2-4; *see*, more generally, on the unfair limitations regarding cross-examinations: E295/6/3, Nuon Chea's Case 002/01 Closing Brief, paras 60-67, 73-79; F16, Nuon Chea's Appeal Brief, paras 148-153.

baby against a tree (discussed briefly above); and the mass execution of 100 people, for which the Chamber cut short the Defence's questions. Accordingly, a significant part of his vague evidence has not been subject to any scrutiny.

462. Regarding the plastic bag incident, Meas Sokha shifted suddenly from the initial fact that he “could not remember anything besides that [the detainee] was fat”,<sup>1454</sup> to a torrent of minute specificities, *e.g.*, that the detainee was a quite tall, fat man who the interrogator kicked with his right foot and then left foot.<sup>1455</sup> Meas Sokha also offered contradictory details of the incident. His initial position was that the victim told the interrogator his position and rank.<sup>1456</sup> When later pressed for details, Meas Sokha changed tack entirely, asserting that the detainee was incapable of responding as he was unconscious.<sup>1457</sup> Eventually, he shifted again, stating that the detainee did in fact respond to the interrogator, answering that he was a tricycle driver, but that the interrogator did not believe him.<sup>1458</sup> As for the execution of 100 people, Meas Sokha initially claimed that he had seen this and again offered particulars; later changed tack and said he did not observe the killings; and finally said that he saw only one killing.<sup>1459</sup>

463. The President twice warned Meas Sokha that “if you are trying to overstate, there will be consequences”,<sup>1460</sup> apparently signalling his own doubts as to whether Meas Sokha is credible. These concerns were entirely valid. The Co-Prosecutors' argument that Meas Sokha's failure to remember details of these key incidents was acceptable given the passage of time and that such detailed questions were unproductive<sup>1461</sup> is both desperate and plainly ridiculous, particularly when noting that the standard of proof required is beyond reasonable doubt. The Defence further recalls that the Co-Prosecutors had taken the same defensive approach when the Defence challenged Sâm Sithy's evidence, referring to his evidence as “extremely consistent”, “powerful” and “very credible”.<sup>1462</sup> Yet, as the Supreme Court Chamber held, Sâm Sithy was “neither credible nor reliable”.<sup>1463</sup> Clearly, the Co-Prosecutors have a tendency to forget their objective truth-seeking duties, as ministers of justice,<sup>1464</sup> at the profit of

<sup>1454</sup> E1/249.1, Meas Sokha, T. 21 Jan 2015, p. 86, ln. 24.

<sup>1455</sup> E1/249.1, Meas Sokha, T. 21 Jan 2015, p. 87, ln. 1, p. 96, ln. 25 to p. 97, ln. 1.

<sup>1456</sup> E1/249.1, Meas Sokha, T. 21 Jan 2015, p. 93, lns 2-3.

<sup>1457</sup> E1/249.1, Meas Sokha, T. 21 Jan 2015, p. 93, lns 12-15.

<sup>1458</sup> E1/249.1, Meas Sokha, T. 21 Jan 2015, p. 97, ln. 19 to p. 98, ln. 1.

<sup>1459</sup> E1/250.1, Meas Sokha, T. 22 Jan 2015, p. 17, ln. 5 to p. 22, ln. 12.

<sup>1460</sup> E1/250.1, Meas Sokha, T. 22 Jan 2015, p. 18, lns 21-22; *see also* p. 9, ln. 13.

<sup>1461</sup> E1/250.1, Meas Sokha, T. 22 Jan 2015, p. 7, lns 9-16.

<sup>1462</sup> F28/2, OCP Response to Request for Investigative Action into Sâm Sithy, paras 21, 38; *see also supra*, Chapter 2-III-A-1, detailing the Supreme Court Chamber's blanket dismissal of the Co-Prosecutors' arguments.

<sup>1463</sup> F36, Case 002/01 Appeals Judgement, paras 478, 481.

<sup>1464</sup> *See supra*, Chapter 2-II-B-2, detailing the Co-Prosecutors' role in this regard.

vindicativeness and in the name of the Manichean narrative. Meas Sokha's demonstrated tendency to invent details of key incidents and the notable inconsistency of his account undermine his credibility as a whole. Again, therefore, considering Meas Sokha's special status as a civil party, and his consequent exemption from testifying under oath, it is, in sum, equally unacceptable to assign any probative value to Meas Sokha's unsworn statement either.

## 2. S-21: High-Profile 'Survivor' Chum Mey Parrots the Manichean Narrative

464. Beyond Duch's testimony (whose credibility is discussed above),<sup>1465</sup> significant reliance has been placed during Tribunal proceedings over the years on evidence from several 'survivors' of S-21, especially Chum Mey and the late Vann Nath, whose paintings, on display at the Tuol Sleng Genocide Museum, bring the Manichean horrors to vivid life. These 'survivors' present accounts heavily-coloured by the Manichean narrative; are tethered in only minimal contemporaneous knowledge; and are ultimately undermined by contrary evidence.

465. One so-called 'survivor', civil party and Tuol Sleng tour guide Chum Mey, appeared in court both in Case 001 and in this trial. However, his testimony is riddled with inconsistencies, and is premised on his alleged incarceration which cannot be objectively established. Accordingly, his evidence bears no probative value. Indeed, despite his purported two-month incarceration from late 1978 until the fall of Phnom Penh,<sup>1466</sup> no-one could corroborate Chum Mey's imprisonment. Chum Mey testified that he fled S-21 with another prisoner Ung Pech.<sup>1467</sup> He testified that they knew each other quite well,<sup>1468</sup> and that they walked together from S-21 all the way to Angk Snoul.<sup>1469</sup> Despite this, when Ung Pech testified in the 1979 trial *in absentia* against Pol Pot and Ieng Sary, he stated that he fled with four other "survivors", none of whom were Chum Mey.<sup>1470</sup> Despite his alleged status as a survivor, Chum Mey was also never called to testify at the 1979 trial.<sup>1471</sup> The only other evidence linking Chum Mey to S-21 is an alleged

<sup>1465</sup> See *infra*, Chapter 2-IV-C-1.

<sup>1466</sup> E1/417.1, Chum Mey, T. 18 Apr 2016 p. 72, Ins 12-4.

<sup>1467</sup> E1/417.1, Chum Mey, T. 18 Apr 2016 p. 72, Ins 12-24.

<sup>1468</sup> E1/417.1, Chum Mey, T. 18 Apr 2016 p. 71, Ins 14-7.

<sup>1469</sup> E1/417.1, Chum Mey, T. 18 Apr 2016 p. 72, Ins 7-15.

<sup>1470</sup> E1/417.1, Chum Mey, T. 18 Apr 2016 p. 75, ln 15 – p. 76, ln. 17, see also E1/417.1, Chum Mey, T. 18 Apr 2016, p. 78, ln. 12 – p. 79, ln. 2 (Chum Mey suggested that he was not mentioned because "what Ung Pech counted as survivors" was based not on those who purportedly fled S-21 with him, but just those who continued with him after Chum Mey and Ung Pech allegedly got separated kilometres away from S-21 in Angk Snoul.)

<sup>1471</sup> E1/417.1, Chum Mey, T. 18 Apr 2016, p. 80, Ins 10-4; see also E1/417.1, Chum Mey, T. 18 Apr 2016 p. 91, ln. 3 to p. 92, ln. 6 (No S-21 photo of Chum Mey was ever found); E1/417.1, Chum Mey, T. 18 Apr 2016 p. 89, ln. 24 to p. 90, ln. 16; E3/3095R, 'Die Angkar' (Chum Mey is the only alleged survivor not featured in *Die Angkar*).

suspect's statement<sup>1472</sup> whose authenticity cannot be tested and is questionable.<sup>1473</sup> While Chum Mey's mere presence at S-21 is in and of itself highly questionable, his factual evidence is moreover inconsistent, fanciful and driven by the Manichean narrative.<sup>1474</sup>

466. As the tour guide and 'face' of S-21 'survivors', Chum Mey may also, like Sâm Sithy, be interested in maintaining his account whether or not it is true.<sup>1475</sup> Indeed, it has happened before; less than a year ago, a man named Joseph Hirt was exposed for having fabricated the story that he was at Auschwitz. For years, Hirt had given speeches about his experiences as an Auschwitz 'survivor', claiming to have met with the infamous Nazi doctor Josef Mengele and to have ultimately escaped – all invented, he said, out of a fear that Auschwitz would otherwise be forgotten. Hirt is by no means the first documented Holocaust impostor, and historian Ken Walzer has noted in this context that it is alarming how quickly people accept such a story.<sup>1476</sup> For all these reasons, Chum Mey's evidence is unreliable and must be simply disregarded.

**E. LACK OF EXPERTISE AND RELIABILITY SEEM TO BE THE BASIS UPON WHICH THE CHAMBER SELECTED 'EXPERTS' ON SECURITY CENTRES AND 'INTERNAL PURGES'**

467. Two 'expert' witnesses appeared in respect of the security centres and 'internal purges' segment: Voeun Vuthy, who testified in relation to S-21 Security Centre and Kraing Ta Chan Security Centre; and Henri Locard, who testified in relation to security centres generally. The lack of credibility of their testimonies is discussed below.<sup>1477</sup>

**1. Voeun Vuthy's Conclusions Diligently Follow the Manichean Narrative, and are Based on Speculation Rather than Scientific Objective Analysis**

468. While Voeun Vuthy has undeniable expertise in archaeology and bone conservation,<sup>1478</sup> he does not possess the proper background to reach conclusions regarding causes of death of individuals whose bones, especially crania, were exhumed from Choeng Ek or Kraing Ta

<sup>1472</sup> E3/9253, 'S-21 Statement of Chum Manh alias Mei', 8 Nov 1978.

<sup>1473</sup> Chum Mey's S-21 statement has no S-21 label and nothing in the content indicates clearly that it is from S-21; see also E1/417.1, Chum Mey, T. 18 Apr 2016 p. 67, lns 5-17 (the person interrogated stated that he was 47 on 8 Nov 1978, while Chum Mey stated he was born in Nov 1933 and thus should have been 45.)

<sup>1474</sup> See e.g. Chum Mey testified that he was interrogated in Building A (E1/418.1, Chum Mey, T. 19 Apr 2016, p. 27, lns 12-5) but Duch suggests that this building was reserved for important detainees (E3/5765, Report of Tuol Sleng Crime Scene Re-Enactment, para. 6.8) and Duch had never heard of Chum Mey during his time at S-21 (E3/5770, 'WRI of Duch', ERN 00177608); Chum Mey's account of his own torture is directly refuted by Duch (E1/436.1, Duch T. 13 Jun 2016, p. 25, lns 20-4).

<sup>1475</sup> F36, Case 002/01 Appeals Judgement, para. 480; see also *supra*, Chapter 2-III-A-1.

<sup>1476</sup> See Guardian, Man Who Claims to Have Escaped Auschwitz Admits He Lied for Years.

<sup>1477</sup> See also *supra*, Chapter 2-III-B-2-(c), discussing the proper requirements for experts.

<sup>1478</sup> E404/7, Nuon Chea's Submissions on Voeun Vuthy's Expert Status, para. 18.

Chan.<sup>1479</sup> Indeed, Vuthy does not have any training or experience in identifying of trauma or causes of death for legal purposes (*i.e.*, ‘forensic pathology’).<sup>1480</sup> He is therefore not qualified to reach scientific conclusions on this topic. Instead, his evidence in this respect is largely based on hearsay, which according to the Supreme Court Chamber has an “inherently low probative value”.<sup>1481</sup> Vuthy’s evidence must therefore be approached with the utmost caution,<sup>1482</sup> particularly where it is uncorroborated.<sup>1483</sup>

**(a) Origin and Dating of the Bones**

469. There has never been a proper, comprehensive, and scientific exhumation of the bones, especially crania, at Choeung Ek,<sup>1484</sup> or at Kraing Ta Chan.<sup>1485</sup> Even if there were, Vuthy himself recognised that he and his team did not review any record of previous exhumations or of their results.<sup>1486</sup> Similarly, there is no evidence about the origin and chain of custody of the bones. The existing information on previous exhumation is vague and sometimes exaggerated. For instance, according to the Manichean narrative, 8,985 bodies were found at Choeung Ek in 1980, stored in a zinc house for eight years, and then only washed and conserved by the Vietnamese in 1988.<sup>1487</sup> How such a large number of bodies could be stored, unwashed, in a single zinc house for several years in the Cambodian tropical heat is, to say the least, hardly believable. As a result, any information regarding this topic must be approached with caution.

470. Vuthy and his team did not scientifically determine that the bones analysed, especially crania, came from Choeung Ek and dated from the DK period; they merely assumed so.<sup>1488</sup>

<sup>1479</sup> **E404/5.1**, CV of Voeun Vuthy, ERN 01321159-1160; **E1/512.1**, Voeun Vuthy, T. 13 Dec 2016, p. 48, ln. 3 to p. 49, ln. 2; *see also* **E404/7**, ‘Nuon Chea’s Submissions on the Possible Expert Status of Voeun Vuthy [E404/5]’, 1 Sep 2016, paras 19-20.

<sup>1480</sup> *Cf. e.g.* the background of Michael Sven Pollanen, who was hired as a forensic pathology consultant by the Coalition for International Justice to conduct a forensic survey of three memorial sites in Cambodia. He holds a Ph.D. in pathology and a specialist certification in forensic pathology, and is a qualified legal practitioner working as a consultant in forensic pathology in the Forensic Pathology Unit of the Office of the Chief Coroner for Ontario, Canada. He also worked as an expert for the UN in East Timor, wherein he conducted medicolegal investigations. *See* **E3/8767**, Pollanen, Forensic Survey of Three Memorial Sites Containing Bones in Cambodia, ERN 00078217.

<sup>1481</sup> *See* **F36**, Case 002/01 Appeals Judgement, paras 90, 880.

<sup>1482</sup> *See* **F36**, Case 002/01 Appeals Judgement, paras 90, 880.

<sup>1483</sup> *See supra*, Chapter 2-III-A-2 and 2-II-B-2, for a description of the relevant legal standards.

<sup>1484</sup> **E3/10643**, Choeung Ek Bone Study Evaluation Report, ERN 01235396-5402.

<sup>1485</sup> **E3/10769**, Excerpts from Choeung Ek Bone Study, ERN 01362851: “[i]n the 1980s, some migrated Cambodians dug up the mass graves in order to find fortunes, but their greed was not satiated by that unfruitful search. During the State of Cambodia regime, mass graves in Kraing Ta Chan were exhumed. A stupa to preserve the human remains was also constructed at that time to preserve the remains as historical evidence of this dark regime”. This section focuses on Vuthy’s analysis of Choeung Ek, but the arguments detailed here apply equally to Kraing Ta Chan (*mutatis mutandis*).

<sup>1486</sup> **E1/518.1**, Voeun Vuthy, T. 10 Jan 2017, p. 11, lns 18-23.

<sup>1487</sup> **E3/10645**, Preface to Choeung Ek Bone Study Evaluation Report, ERN 01240557.

<sup>1488</sup> **E1/518.1**, Voeun Vuthy, T. 10 Jan 2017, p. 13, lns 18-24.

When asked about the origin of the bones, Vuthy testified that the analysis of the mud contained in some of the bones confirmed that they were indeed buried at Choeng Ek.<sup>1489</sup> However, when confronted with the hypothesis that bones of people killed in other locations could have been transported to and buried at Choeng Ek after 1979, Vuthy responded “how would I know.”<sup>1490</sup> In any event, the mere fact that the bones were buried at Choeng Ek does not establish that they had been there since the DK period, or that they belonged to victims of S-21. Similarly, Vuthy was unable to provide a scientific justification for his assertion that the bones examined, especially crania, were from people who died during the DK. While skilfully dodging the question for a while,<sup>1491</sup> he later admitted that they could not use existing scientific methods to date bones in light of “budget constraints”.<sup>1492</sup> His evidence on this aspect is thus solely based on presumptions and preconceived ideas, not upon objective, scientific findings. Accordingly, it does not qualify as expert’s evidence and must be disregarded.<sup>1493</sup>

**(b) Causes of Death**

**(i) Purpose of the Study was the Conservation of Bones**

471. The purpose of the Choeng Ek Conservation of Victims at Killing Field Project (the ‘Choeng Ek Bone Study’), which Vuthy led, was never the determination of causes of death, but the conservation of the skeletal remains.<sup>1494</sup> The identification of causes of death, or of the reasons for trauma marks, is also not listed as part of scope of the study in the External Evaluation Report of the Study.<sup>1495</sup> Thus, the Report does not address any of the conclusions reached by Vuthy and his team on this topic. The reality is that neither Vuthy nor his team have any training or experience in forensic pathology, which would have provided them with the required credentials to identify causes of death. As a result, Vuthy’s findings on this matter are simply outside of the scope of his expertise and must be disregarded altogether.<sup>1496</sup>

<sup>1489</sup> E1/513.1, Voeun Vuthy, T. 14 Dec 2016, p. 30, lns 6-18.

<sup>1490</sup> E1/513.1, Voeun Vuthy, T. 14 Dec 2016, p. 32, lns 5-7.

<sup>1491</sup> E1/513.1, Voeun Vuthy, T. 14 Dec 2016, p. 40, ln. 15 to p.41, ln. 13, p. 41, ln. 21 to p. 42, ln. 1, p. 42, ln. 17 to p. 45, ln. 12.

<sup>1492</sup> E1/518.1, Voeun Vuthy, T. 10 Jan 2017, p. 13, ln. 21 to p. 14, ln. 7.

<sup>1493</sup> See *supra*, Chapter 2-III-B-3-(c).

<sup>1494</sup> E3/10645, Preface to Choeng Ek Bone Study Evaluation Report, ERN 01240558-59. Further, Ms. Fleischman, a Ph.D. student who assisted Vuthy during the study, indicated that it was not a forensic report as it was not completed for the purpose of legal proceedings. She qualified it as an osteological study with an emphasis on skeletal trauma, see E404, ‘Notice on Choeng Ek Bone Study and Warning Regarding Belated Internal Rule 87(4) Requests’, 2 May 2016, para. 2.

<sup>1495</sup> E3/10643, Choeng Ek Bone Study Evaluation Report, ERN 01235401, objectives 2a and 2b.

<sup>1496</sup> ICTR, *Ndindiliyimana et al*, Decision on Prosecution’s Objections to Expert Witnesses, para. 15.

(ii) Findings were Based on Interviews

472. Instead of grounding his conclusions on an objective, scientific examination of the bones, Vuthy relied on his general knowledge, as well as on information he obtained from Him Huy and other individuals he interviewed.<sup>1497</sup> In the same vein, although information on the Kraing Ta Chan study is more limited, it is highly troubling that Vuthy's source of information on that site was none other than civil party Say Sen, who the Defence has already noted above as having no credibility whatsoever.<sup>1498</sup> Returning to the Choeung Ek Study, the whole process of the study is flawed and open to the risk of 'confirmation bias', as the interviews of Him Huy and others were conducted **prior to** the analysis of the bones.<sup>1499</sup> In addition, Vuthy or his team would further contact various individuals during or after their scientific examination of the bones, especially the crania, asking for clarification or confirmation of their findings.<sup>1500</sup> Vuthy admitted in court that he and his team could not have reached certain conclusions regarding causes of death without the information obtained through these individuals.<sup>1501</sup>

473. Vuthy also made a number of findings regarding the tools which allegedly caused the various trauma marks on the bones analysed from Choeung Ek, especially on crania, and which allegedly caused torture or death.<sup>1502</sup> However, the tools listed in the Study had not been found on the site; instead, they were only identified by Vuthy's team following their interviews with various individuals related to Choeung Ek.<sup>1503</sup> As Vuthy testified, "these tools were reconstructed in order to see whether they match the cracked [*sic*] on the skull."<sup>1504</sup> There is no evidence that Vuthy or his team attempted to determine whether the marks could have been made through objects other than those referred to by the individuals with whom they spoke. This simply cannot qualify as proper scientific work whatsoever.

474. At other times, Vuthy and his team went the opposite way, ignoring information provided by Him Huy and reaching diametrically-opposed conclusions, while failing to justify

<sup>1497</sup> **E1/512.1**, Voeun Vuthy, T. 13 Dec 2016, p. 55, lns 5-9; **E1/513.1**, Voeun Vuthy, T. 14 Dec 2016, p. 61, ln. 21 to p. 62, ln. 11.

<sup>1498</sup> **E3/10769**, Excerpts from Choeung Ek Bone Study, ERN 01362851; *see also supra*, Chapter 4-IV-D-1-(a).

<sup>1499</sup> **E1/512.1**, Voeun Vuthy, T. 13 Dec 2016, p. 55, lns 5-9 (emphasis added).

<sup>1500</sup> *See e.g.* **E1/513.1**, Voeun Vuthy, T. 14 Dec 2016, p. 32, ln. 21 to p. 33, ln. 1; *see also* **E1/513.1**, Voeun Vuthy, T. 14 Dec 2016, p. 56, lns 12-25.

<sup>1501</sup> **E1/513.1**, Voeun Vuthy, T. 14 Dec 2016, p. 61, ln. 21 to p. 62, ln. 3; *See e.g.* **E1/513.1**, Voeun Vuthy, T. 14 Dec 2016, p. 32, ln. 21 to p. 33, ln. 1; *see also* **E1/513.1**, Voeun Vuthy, T. 14 Dec 2016, p. 56, lns 7-25.

<sup>1502</sup> *See also* **E3/10647**, Photos of Tools and Marks Found via Autopsy; *see also* **E3/10646**, Excerpt from Choeung Ek Bone Study: Inventory of Victims' Remains, ERN 01240562-63.

<sup>1503</sup> **E1/513.1**, Voeun Vuthy, T. 14 Dec 2016, p. 61, lns 8-20; *see also* **E1/512.1**, Voeun Vuthy, T. 13 Dec 2016, p. 55, ln. 5 to p. 56, ln. 11.

<sup>1504</sup> **E1/513.1**, Voeun Vuthy, T. 14 Dec 2016, p. 60, ln. 24 to p. 61, ln. 6 *see also* p. 60, lns 9-14.

the inconsistencies. While Vuthy asserted that they found 1,686 bullet marks and cleaning rods on crania,<sup>1505</sup> both Him Huy and Tay Teng – two contemporaneous witnesses who were eager to provide as much gruesome and incriminating evidence as possible to this Tribunal – testified that rifles were not used to execute people at S-21 or Choeng Ek.<sup>1506</sup> This casts considerable doubt on whether the bones examined were in fact from S-21.

(iii) Absence of Scientific Equipment

475. Finally, Vuthy testified that the equipment available in Cambodia did not allow him or his team to check whether the marks on the skulls were *ante-*, *peri-*, or *post-mortem*.<sup>1507</sup> Therefore, three equally-plausible inferences that could be drawn are that the marks of trauma identified were due to trauma occurring in the person's life prior to his or her death; were the cause of his or her death; or were caused *post-mortem*. Similarly, Vuthy's justifications for the conclusions that some individuals were tortured show that these conclusions are in fact mere speculation. For instance, the main basis for their conclusion that torture occurred is that the bones, especially crania, showed that the person had wounds which did not result in his or her immediate death.<sup>1508</sup> However, Vuthy later recognised that he and his team did not have access to the technical material to determine how long, prior to death, the wound was sustained.<sup>1509</sup>

(iv) Findings Related to Torture

476. Similarly, on the basis of Him Huy's evidence, Vuthy and his team determined that if a person fell down while in detention, it was considered torture in the Study.<sup>1510</sup> Vuthy provided the following unconvincing justification for this finding: “[i]f the person had freedom, the person would not fall down; that would be fall down [*sic*] elsewhere or in the rice field and

<sup>1505</sup> E1/513.1, Voeun Vuthy, T. 14 Dec 2016, p. 33, ln 12, p. 46, lns 7-17, p. 47, lns 15-21, p. 48, lns 12-17, p. 61, ln. 21 to p. 62, ln. 11. Vuthy explained that the two types of marks were put in the same category as “[t]he reason we do not make the distinction -- and as I had responded earlier -- is that some bones had overlapping marks; for example, there was a bullet fired from one side and then [*sic*] the marks overlapped with the cleaning rod from the other side, so we had to decide whether we counted it as one or as two.” E1/518.1, Voeun Vuthy, T. 10 Jan 2017, p. 29, lns 21-25.

<sup>1506</sup> E1/427.1, Him Huy, T. 4 May 2016, p. 45, ln. 22 to p. 46, ln. 14; E1/420.1, Tay Teng, T. 21 Apr 2016, p. 107, lns 5-21.

<sup>1507</sup> E1/513.1, Voeun Vuthy, T. 14 Dec 2016, p. 58, lns 10-22; *see also* E1/512.1, Voeun Vuthy, T. 13 Dec 2016, p. 56, lns 1-23.

<sup>1508</sup> E1/513.1, Voeun Vuthy, T. 14 Dec 2016, p. 53, lns 5-21.

<sup>1509</sup> E1/531.1, Voeun Vuthy, T. 14 Dec 2016, p. 58, ln. 6 to p. 59, ln. 22; *see also* E1/518.1, Voeun Vuthy, T. 10 Jan 2017, p. 13, ln. 18 to p. 14, ln. 1: “A. Thank you. And when -- how a person died, I have already told you we did not have the budgets to conduct the C-14 carbon analysis or DNA analysis. These were the -- these are the method that we could establish how old a person is. In our preservation projects we were not able to conduct such analysis because of the budget constraints”.

<sup>1510</sup> E1/513.1, Voeun Vuthy, T. 14 Dec 2016, p. 56, lns 22-23.



would not have this crack in the skull.”<sup>1511</sup> When asked to clarify and explain why the wounds seen on the crania could not be due to regular military fighting, Vuthy avoided the question and simply referred to the review and approval of their work by an external committee.<sup>1512</sup> However, as mentioned above, the External Evaluation Report did not evaluate the assessment of the origin of the marks of trauma, for it was never part of the scope of the Study.<sup>1513</sup>

**(c) Conclusion on Vuthy’s Lack of Credibility**

477. In sum, the Study’s entire analysis of the bones and traces of trauma – and therefore, Vuthy’s conclusions – were premised on presumptions and pre-conceived ideas about what allegedly happened. This process inverts the usual scientific process, where the objective analysis – here, the analysis of marks on the bones, especially crania – should be undertaken first. Only then, *i.e.*, based on objective evidence, would subjective conclusions on possible reasons for trauma ordinarily be reached. Moreover, Vuthy and his team have no scientific credentials to reach conclusions on the cause of death or any training in proper interview techniques. In any event, such an inverted method to determine cause of death is not scientifically valid, as it is based on double hearsay which has limited probative value.<sup>1514</sup> As a result, Vuthy’s evidence regarding causes of death of remains exhumed at Choeung Ek cannot be given any probative value. Similarly, while the information on the Kraing Ta Chan study is more limited – and given its last-minute provision by the Chamber, parties’ questions on it were similarly limited – it appears that the methodology Vuthy adopted there was even less scientific than for Choeung Ek.<sup>1515</sup> Thus, his evidence *vis-à-vis* cause of death of remains exhumed at Kraing Ta Chan must equally be assigned zero probative value.

**2. Henri Locard is an Expert Charlatan Who Lacks Total Credibility**

478. The Trial Chamber appointed Henri Locard as an ‘expert’ on security centres and ‘internal purges’.<sup>1516</sup> He testified between 28 July and 2 August 2016 on the topic, yet what the parties and the public will remember is not his evidence, which lacks any basis and reliability, but his contemptible behaviour towards the Tribunal and the Defence in particular. His claim that the Defence – simply exercising its right to cross-examine witnesses – subjected him to

<sup>1511</sup> E1/513.1, Voeun Vuthy, T. 14 Dec 2016, p. 56, lns 12-25.

<sup>1512</sup> E1/513.1, Voeun Vuthy, T. 14 Dec 2016, p. 57, ln. 8 to p. 58, ln. 3.

<sup>1513</sup> See *supra*, Chapter 4-IV-E-1-(a)-(i), describing how the purpose of the study was the conservation of bones.

<sup>1514</sup> See F36, Case 002/01 Appeals Judgement, paras 90, 880.

<sup>1515</sup> E1/513.1, Voeun Vuthy, T. 14 Dec 2016, p. 64, ln. 6 to p. 69, ln. 20.

<sup>1516</sup> E415, Decision on Locard.

“cold torture and moral torture”<sup>1517</sup> made the headlines of the Cambodia Daily.<sup>1518</sup> As is set out below, Locard is not an expert but, like Nhem En, a charlatan of the highest order. To describe himself as “the voice of ordinary Cambodians”<sup>1519</sup> is an outrage to the intelligence and honesty of Cambodian people. The Chamber cannot legitimately rely on any aspect of his evidence, which must simply be disregarded altogether.

**(a) Lack of Historical Background**

479. Locard has been an English teacher for most of his life.<sup>1520</sup> When he started undertaking his “research” in Cambodia in 1992, he had no expertise in Cambodian history,<sup>1521</sup> linguistics, CPK propaganda, or investigative techniques.<sup>1522</sup> His only link with Cambodia was having written the memoirs of cultural preservationist Moeung Sonn’s life during the DK.<sup>1523</sup> Locard himself recognised he was an “average academic”.<sup>1524</sup> While he incredibly holds a PhD in History – obtained eight years after his ‘research’ – it is in fact a “*soutenance sur travaux*”<sup>1525</sup> wherein he presented the result of his ‘research’ on DK before a jury of five people, including one of his friends.<sup>1526</sup> None of the jurors had written anything about DK,<sup>1527</sup> and it does not appear that any step was undertaken to verify whether his findings were academically valid and reliable. In other words, there was not any serious peer review of his research at all. When asked about the issue in court, Locard refused to answer, dismissing it as “irrelevant”.<sup>1528</sup>

**(b) Lack of Methodology**

480. Locard’s ‘expertise’ results from the ‘research’ he has allegedly done on DK security centres, and his compilation of alleged DK slogans. However, he admitted he had not followed

<sup>1517</sup> E1/453.1, Henri Locard, T. 2 Aug 2016, p. 4, lns 7-10, p. 5, ln. 2; E3/10649, Cambodia Daily, French Historian Accuses Tribunal Lawyers of ‘Cold Torture’.

<sup>1518</sup> E3/10649, Cambodia Daily, ‘French Historian Accuses Tribunal Lawyers of ‘Cold Torture’.

<sup>1519</sup> E1/450.1, Henri Locard, T. 28 Jul 2016, p. 53, lns 13-15.

<sup>1520</sup> E3/10610, CV of Henri Locard, ERN 01299039.

<sup>1521</sup> E1/450.1, Henri Locard, T. 28 Jul 2016, p. 39, ln. 14 to p. 40, ln. 20; E1/452.1, Henri Locard, T. 1 Aug 2016, p. 18, ln. 14-25, p. 20, ln. 9-20; E3/10610, ‘Curriculum Vitae, Henri Locard’, ERN 01299039.

<sup>1522</sup> E1/450.1, Henri Locard, T. 28 Jul 2016, p. 39, lns 14 to p. 40, ln. 20; E3/10610, ‘Curriculum Vitae, Henri Locard’.

<sup>1523</sup> E1/450.1, Henri Locard, T. 28 Jul 2016, p. 41, ln. 20 to p. 42, ln. 8.

<sup>1524</sup> E1/452.1, Henri Locard, T. 1 Aug 2016, p. 18, lns 7-8.

<sup>1525</sup> E1/450.1, Henri Locard, T. 28 Jul 2016, p. 43, lns 1-6.

<sup>1526</sup> E1/450.1, Henri Locard, T. 28 Jul 2016, p. 48, lns 2-4.

<sup>1527</sup> The names of the examiners of Henri Locard’s “*soutenance sur travaux*” are listed in E3/10610, ‘Curriculum Vitae, Henri Locard’, ERN 01299039. Christian Henriot and Jean-Luc Domenach are historians, specialised in China, see CV of Christian Henriot; CV of Jean-Luc Domenach; Stéphane Courtois is an historian, specialised in communism, see CV of Stéphane Courtois; Alain Forest, is an historian and anthropologist, specialised in Indochina, see CV of Alain Forest; Dr Mak Phoeun, a CNRS researcher, is the only one who appear to have done some work regarding Cambodia, see CV of Mak Phoeun. However, none appear to have published works on DK.

<sup>1528</sup> E1/452.1, Henri Locard, T. 1 Aug 2016, p. 22, lns 4-22.

any research protocol when starting his research on security centres.<sup>1529</sup> His evidence is based on accounts of victims,<sup>1530</sup> which he appears to have selected randomly, without following any system to ensure representativeness or objectivity<sup>1531</sup> or any protocols to avoid falling into the trap of ‘confirmation bias’, a term of which Locard was not even aware.<sup>1532</sup> He studied only one quarter of the security centre system,<sup>1533</sup> and recognised in court that his investigation was “incomplete”.<sup>1534</sup> Locard himself recognises that his work was done at a grassroots level,<sup>1535</sup> and that he did not study DK’s internal documents.<sup>1536</sup> However, this does not stop him from making sweeping comments on the alleged CPK policies.<sup>1537</sup> Similarly, the slogans used for his book had been collected “as a side [*sic*]”,<sup>1538</sup> “just for fun”,<sup>1539</sup> and were obtained from anonymous sources.<sup>1540</sup> At the time, he had not taken notes of the context and the meaning of these slogans, “which was often ambiguous or ambivalent”.<sup>1541</sup> Later, however, like a magician, he somehow “reconstructed” these “snippets”.<sup>1542</sup>

**(c) Lack of Access to Locard’s Sources, and Various Misrepresentations He Made**

481. In sum, in addition to being devoid of any scientific rigour, Locard’s ‘research’ is incomplete and unverifiable. The Defence does not have access to his sources.<sup>1543</sup> An example which typically represents the unreliability of his work is that when the parties were given access to some transcripts of his interviews, used to prepare his last book *Why the Khmer Rouge?*, it appeared that Locard had misrepresented the information provided to him by his informants.<sup>1544</sup> His evidence was also full of contradictions: he testified that the result of his research on security centres was representative of what happened in the whole country, even

<sup>1529</sup> E1/450.1, Henri Locard, T. 28 Jul 2016, p. 42, lns 9-16.

<sup>1530</sup> E1/450.1, Henri Locard, T. 28 Jul 2016, p. 83, lns 2-6; E1/452.1, Henri Locard, T. 1 Aug 2016, p. 64, lns 19-23; E1/453.1, Henri Locard, T. 2 Aug 2016, p. 13, lns 11-18.

<sup>1531</sup> E1/452.1, Henri Locard, T. 1 Aug 2016, p. 36, ln. 22, to p. 37, ln. 13.

<sup>1532</sup> E1/452.1, Henri Locard, T. 1 Aug 2016, p. 27, ln. 10.

<sup>1533</sup> E3/2811, Locard, The Khmer Rouge Gulag, ERN 00394583; *see also* E1/452.1, Henri Locard, T. 1 Aug 2016, p. 39, ln. 24 to p. 40, ln. 13.

<sup>1534</sup> E1/450.1, Henri Locard, T. 28 Jul 2016, p. 66, lns 11-13, p. 69, lns 2-5.

<sup>1535</sup> E3/2812, Locard, Little Red Book, ERN 00394652; E1/450.1, Henri Locard, T. 28 Jul 2016, p. 83, lns 2-6; E1/452.1, Henri Locard, T. 1 Aug 2016, p. 64, lns 19-23.

<sup>1536</sup> E1/452.1, Henri Locard, T. 1 Aug 2016, p. 42, ln. 7 to p. 43, ln. 23; E1/453.1, Henri Locard, T. 2 Aug 2016, p. 13, lns 11-18.

<sup>1537</sup> E3/2812, Locard, Little Red Book, ERN 00394647; *see also* E1/451.1, Henri Locard, T. 29 Jul 2016, p. 108 to p. 109; E1/452.1, Henri Locard, T. 1 Aug 2016, p. 61, ln. 23 to p. 62, ln. 17.

<sup>1538</sup> E3/2812, Locard, Little Red Book, ERN 00394626.

<sup>1539</sup> E1/450.1, Henri Locard, T. 28 Jul 2016, p. 42, lns 19-23, p. 67, lns 14-22, p. 67, ln. 23 to p. 68, ln. 6.

<sup>1540</sup> E3/2812, Locard, Little Red Book, ERN 00394626.

<sup>1541</sup> E3/2812, Locard, Little Red Book, ERN 00394626.

<sup>1542</sup> E3/2812, Locard, Little Red Book, ERN 00394626.

<sup>1543</sup> *See supra*, Chapter 2-III-B-3, on the requirements for proper experts.

<sup>1544</sup> *See* E447/1, ‘Demande de la Défense de Khieu Samphan d’admission en preuve d’extraits de documents fournis par Henri Locard’, 21 Nov 2016, paras 7-22.

though he only investigated one quarter of the alleged security centres.<sup>1545</sup> He also testified that under the DK, everything was in “chaos”,<sup>1546</sup> yet, at the same time, that it was very centralised.<sup>1547</sup> When asked about a statement that had in fact been uttered by Turkish president Erdogan following the attempted 2016 *coup* but without first being given the source of the statement, Henri Locard was quick to assume that the statement had been made by the CPK and confidently testified that it reflected CPK policies at the time.<sup>1548</sup>

**(d) Locard’s Contemptible Behaviour in Court**

482. Finally, Locard’s evidence and attitude was in complete opposition to the fundamental principle according to which experts must testify in a neutral, objective, and impartial manner.<sup>1549</sup> He showed his contempt for the Defence from the beginning, refusing to salute the side of the Defence when entering the courtroom. He refused to answer questions from the Defence, calling them “irrelevant”,<sup>1550</sup> or responding by stating “you should ask your client”.<sup>1551</sup> He called Nuon Chea and Khieu Samphân “schizophrenic”,<sup>1552</sup> and qualified Defence counsels as “completely perverse people” who are “deniers” and “negationists”.<sup>1553</sup> To him, defence work is a “waste” of the Tribunal’s time.<sup>1554</sup> The Defence regrets – but of course, is unsurprised by – the lack of reaction on the part of the Chamber, whose duties include upholding the rights of the Accused.<sup>1555</sup> Nonetheless, it is not too late. In view of the above, the obvious and indeed only available option to protect the integrity of the proceedings and the reputation of the Tribunal is to ignore the totality of Locard’s evidence.

<sup>1545</sup> E1/450.1, Henri Locard, T. 28 Jul 2016, p. 85, Ins 12-14; E1/451.1, Henri Locard, T. 29 Jul 2016, p. 79, Ins 12-21, p. 94, Ins 22-24, p. 122, Ins 8-9, 17-18.

<sup>1546</sup> E1/451.1, Henri Locard, T. 29 Jul 2016, p. 16, Ins 9-10: “[T]here was no clear rule”; E1/451.1, Henri Locard, T. 29 Jul 2016, p. 103, Ins 5-7: “they were improvising. So such and such’s role was not clearly defined”; E1/451.1, Henri Locard, T. 29 Jul 2016, p. 13, Ins 20-25: “it’s almost impossible to speak in generalities for the regime because it was completely chaotic. It was total chaos. So there could be one thing that happened in one people’s commune in one place, and the one next door was completely different. So it’s very, very difficult, and we must be very cautious in generalizing”.

<sup>1547</sup> E1/450.1, Henri Locard, T. 28 Jul 2016, p. 83, Ins 12-14: “So of course if the same question is asked everywhere it means that central directives or guidelines must be given to the Santebal throughout the country”, p. 84, Ins 10-12: “[s]o this was the general pattern throughout the country. Therefore, the system cannot having [been] anything but been [sic] highly centralized”, p. 85, In. 11: “it was highly centralized”, p. 100, Ins 15-16: “[the slogans] were collected nationwide and this is proof that the regime was highly centralized”; E1/451.1, Henri Locard, T. 29 Jul 2016, p. 79, Ins 12-14: “Orders were followed everywhere”.

<sup>1548</sup> E1/452.1, Henri Locard, T. 1 Aug 2016, p. 70, In. 19 to p. 71, In. 17. This statement is also discussed *supra*, at Chapter 4-II-B-3, describing the widespread use of charged policy language today.

<sup>1549</sup> See *supra*, Chapter 2-III-B-3, on the requirements for proper experts.

<sup>1550</sup> E1/452.1, Henri Locard, T. 1 Aug 2016, p. 22, Ins 9-13, In. 22.

<sup>1551</sup> E1/452.1, Henri Locard, T. 1 Aug 2016, p. 26, Ins 20-21, p. 54, Ins 5-6.

<sup>1552</sup> E1/451.1, Henri Locard, T. 29 Jul 2016, p. 124, Ins 1-6.

<sup>1553</sup> E3/10649, Cambodia Daily, French Historian Accuses Tribunal Lawyers of ‘Cold Torture’, ERN 01311297.

<sup>1554</sup> E3/10649, Cambodia Daily, French Historian Accuses Tribunal Lawyers of ‘Cold Torture’, ERN 01311297.

<sup>1555</sup> Art. 33 new, ECCC Establishment Law.

**F. EXISTING OUT-OF-COURT DOCUMENTARY EVIDENCE LACKS THE MINIMUM INDICIA OF AUTHENTICITY AND RELIABILITY**

483. Throughout the Case 002/02 trial and as they have done in the Case 002/01 trial, the Co-Prosecutors have relied heavily on out-of-court evidence, and in particular copies (or copies of copies) documents, in order to substantiate allegations *vis-à-vis* security centres and ‘internal purges’.<sup>1556</sup> In some instances, such as with respect to Kraing Ta Chan and S-21, they appear to do so to a decisive degree, extensively relying on the so-called ‘Tram Kok District Records’ or the ‘OCP List’, ‘OCIJ List’, or other S-21 documents. However, as discussed below, these particular sets of documents lack even the bare minimum indicia of reliability in substantial respects. Moreover, the Co-Prosecutors’ attempted uses of out-of-court documentary evidence have routinely failed to satisfy the evidentiary requirements clarified by the Supreme Court Chamber, as discussed above in Chapter 2.<sup>1557</sup> Therefore, regardless of the leeway given in court during Case 002/02 regarding the use of such type of evidence, heightened caution must be exercised when determining the weight to be given to untested and unauthenticated documentary evidence in the Case 002/02 trial judgement.

**1. Kraing Ta Chan: The ‘Tram Kok District Records’ Lack the Minimum Indicia of Authenticity and Reliability to be Given any Weight**

484. As with S-21, which is discussed below, allegedly contemporaneous DK documents play an instrumental role in respect of Kraing Ta Chan. The selection of Kraing Ta Chan and the Tram Kok Cooperatives as crime sites in Case 002/02 clearly pivoted on the existence of a cache of hundreds of allegedly DK-era documents from Tram Kok District which the Co-Prosecutors described not only as “a unique example of written communications exchanged at the local level within one single district”<sup>1558</sup> but as “the only [...] surviving records from any district in [DK]”.<sup>1559</sup> These documents – the so-called ‘Tram Kok District Records’ – include communications between the district office, its communes, and the sector, as well as, *inter alia*, lists and interrogators’ notebooks.

485. During the Case 002/02 trial, the Co-Prosecutors relied heavily on the ‘Tram Kok District Records’ to substantiate allegations of what occurred at Kraing Ta Chan and in the Tram Kok Cooperatives. They did so deliberately, explaining that they hoped to find

<sup>1556</sup> See also E295/6/3, Nuon Chea’s Case 002/01 Closing Brief, paras 102-110, 119-120; E1/233.1, Case 001/01 Closing Arguments, p. 21, ln. 23 to p. 22, ln. 15; F16, Nuon Chea’s Appeal Brief, paras 154-165.

<sup>1557</sup> See *supra*, Chapter 2-III-B, detailing the new ‘rules of the game’.

<sup>1558</sup> E1/48.1, Objections to Document Presentations (Communications), T. 14 Mar 2012, p. 13, lns 13-19.

<sup>1559</sup> E1/295.1, Objections to Document Presentations, T. 30 Apr 2015, p. 20, lns 17-18.

“interconnections between the documents” that they suggested would demonstrate the documents’ authenticity.<sup>1560</sup> However, regardless of whether the documents are authentic (which they are not, as discussed below), the overriding and first principle to recall in respect of each and every ‘Tram Kok District Record’ is that such non-court evidence has, according to the Supreme Court Chamber, an “**inherently low probative value**”.<sup>1561</sup> The Supreme Court Chamber adopted the ECtHR’s approach *vis-à-vis* the treatment of untested or out-of-court evidence of witnesses and civil parties at this Tribunal, *i.e.*, that:

A conviction may not be based solely or to a decisive degree on evidence by a witness whom the defence has not had an opportunity to examine, unless there are sufficient counterbalancing factors in place, so that an accused is given an effective opportunity to challenge the evidence against him.<sup>1562</sup>

486. This reasoning also applies to non-witness-related evidence, such as documentary evidence. According to the ECtHR, those counterbalancing factors include “the existence of strong procedural safeguards” and “measures that permit a fair and proper assessment of the reliability of that evidence to take place”.<sup>1563</sup> As discussed above in Chapter 2, such counterbalancing factors are conspicuously absent here.<sup>1564</sup> In other words, given their unreliability and the inability for the Defence to meaningfully test this, the vast majority of ‘Tram Kok District Records’ can only be assigned minimal probative value.<sup>1565</sup> In addition, even in the very few instances in which the reliability of certain ‘Tram Kok District Records’ was bolstered by the appearance in court of the person who wrote the document and could confirm such authorship, these records may even then only occupy a subsidiary place. Whether or not they are authentic, they can never be the **sole**, or even **decisive**, factor in finding that an alleged event occurred beyond reasonable doubt.<sup>1566</sup>

<sup>1560</sup> E1/295.1, Objections to Document Presentations, T. 30 Apr 2015, p. 20, lns 17-18.

<sup>1561</sup> F36, Case 002/01 Appeals Judgement, para. 440; *see also* para. 430 and *supra*, Chapter 2-III-B-2.

<sup>1562</sup> F36, Case 002/01 Appeals Judgement, para. 296.

<sup>1563</sup> ECtHR, *Al-Khawaja and Tahery v. The United Kingdom*, para. 147.

<sup>1564</sup> *See supra*, Chapter 2-III, on the new ‘rules of the game’.

<sup>1565</sup> *See*, ICTY, *Boškoski & Tarčulovski* 2008 Bar Table Decision, para. 4 (holding that a document has probative value if found “to be of sufficient reliability and of sufficient relevance to the issues in the case”) and paras 6, 13, 19, 23 and 30 (holding that reliability is synonymous with authenticity).

<sup>1566</sup> *See e.g.* the Supreme Court Chamber’s reasoning in F36, Case 002/01 Appeals Judgement, paras 423, 430, 440, 446; more generally, *see supra*, Chapter 2-III, on the new ‘Rules of the Game’.

**(a) Concerns Regarding the Authenticity of the ‘Tram Kok District Records’****(i) The Near-Total Absence of Originals**

487. Furthermore, on the subject of the authenticity and reliability of the ‘Tram Kok District Records’, the Defence has previously highlighted that among the hundreds of documents within the cache, a mere **three** documents have an original (held at Tuol Sleng)<sup>1567</sup> and accordingly requested that these originals be added to the case file.<sup>1568</sup> Originals for the rest have been lost in a complex chain of custody implicating various government officials as well as historian Ben Kiernan.<sup>1569</sup> This problem is compounded by the fact that many of the documents are not only copies but poor quality copies or copies of copies,<sup>1570</sup> leading to significant data loss. In addition, while the case file presents the ‘Tram Kok District Records’ as 138 separate documents, 65 of them are in fact compilations of multiple separate documents.<sup>1571</sup> The Defence has no information on who created these compilations, or when, how, or why this was done.<sup>1572</sup> As this Chamber noted, the existence of copies rather than originals creates serious obstacles to a proper forensic examination.<sup>1573</sup> The Chamber apparently recognises the importance of authenticating documents given that it summonsed witness Suos Thy, S-21’s list-maker to testify for nearly 3.5 days primarily to authenticate purported S-21 lists.<sup>1574</sup>

488. It is clear, therefore, that unless the ‘Tram Kok District Records’ are authenticated – which they cannot be in the case of 98% of the documents<sup>1575</sup> and have not been in the case of the three originals – then this is another reason militating against assigning any probative value to them whatsoever. Moreover and yet again, even if the ‘Tram Kok District Records’ were

<sup>1567</sup> **E1/294.1**, Document Presentation, T. 28 Apr 2015, p. 3, lns 14-17; *see also* **E1/249.1**, Meas Sokha, T. 21 Jan 2015, p. 20, ln. 24 to p. 21, ln. 12; *see also* Email from DC-Cam Deputy Director to the International Co-Counsel for Nuon Chea, 30 Oct 2014.

<sup>1568</sup> **E1/265.1**, Objections to Document Presentations, T. 30 Apr 2015, p. 31, lns 18-25.

<sup>1569</sup> **E3/188**, ‘WRI of Chhang Youk’, ERN 00342450-5; *see also* **E346**, Nuon Chea’s Tram Kok and Kraing Ta Chan Witnesses Request, paras 25-8; **E346/3**, Reasoned Decision on Nuon Chea’s Tram Kok and Kraing Ta Chan Witnesses Request, paras 60-1, 63.

<sup>1570</sup> E3/2012, E3/2044, E2/2048-E3/2050, E3/2052-E3/2053, E3/2057, E3/2107, E3/2420-E3/2422, E3/2424-E3/2425, E3/2427, E3/2433-E3/2436, E3/2439-E3/2444, E3/2446-E3/2450, E3/2452-E3/2453, E3/2455, E3/2457, E3/2785, E3/4083-E3/4085, E3/4088, E3/4092, E3/4094-E3/4096, E3/4098, E3/4100-E3/4104, E3/4106-E3/4109, E3/4111, E3/4113-E3/4117, E3/4119, E3/4123-E3/4125, E3/4143, E3/4164, E3/5856, E3/5858, E3/5860, E3/8413, E3/8418-E3/8420, E3/8423, E3/8425, E3/8427, E3/8428-E3/8429.

<sup>1571</sup> E3/2012, E3/2044-E3/2045, E3/2048, E3/2050, E3/2052-E3/2053, E3/2057, E3/2107, E3/2420, E3/2423-E3/2424, E3/2433, E3/2435, E3/2440-E3/2457, E3/2785, E3/2924, E3/4083-E3/4085, E3/4092-E3/4094, E3/4098, E3/4101-E3/4103, E3/4106, E3/4109-E3/4111, E3/4113, E3/4115-E3/4118, E3/4120, E3/4123-E3/4124, E3/4126-E3/4127, E3/4145, E3/5856, E3/5860, E3/8407, E3/8417, E3/8426, E3/8428.

<sup>1572</sup> *See also* the Defence’s remarks in **E1/267.1**, Srei Than, T. 23 Feb 2015, p. 26, ln. 16 to p. 27, ln. 1.

<sup>1573</sup> **E349/1**, Decision on Forensic Analysis Request for E3/2107, para. 5.

<sup>1574</sup> **E1/430.1**, Suos Thy, T. 2 Jun 2016; **E1/431.1**, Suos Thy, T. 3 Jun 2016; **E1/432.1**, Suos Thy, T. 6 Jun 2016; **E1/433.1**, Suos Thy, T. 7 Jun 2016.

<sup>1575</sup> *See* **E349/1**, Decision on Forensic Analysis Request for E3/2107, para. 5.

authenticated, they still could never serve as the sole or decisive factor substantiating a conviction of Nuon Chea. It is also important to note that particular ‘Tram Kok District Records’ give rise to even greater authenticity concerns, as discussed below. The Co-Prosecutors disingenuously sought to dismiss these concerns on the basis that “[the] documents have been admitted, and we are well past the point in time to be following down these conspiracy theories”.<sup>1576</sup> However, as the Co-Prosecutors should know, authenticity is synonymous with reliability, and this goes to the probative value to be assigned to evidence.<sup>1577</sup> a determination only made when a judgement is being written.

(ii) The Document Allegedly Substantiating the ‘15,000’ Death Toll

489. The prime example of a forged ‘Tram Kok District Record’ is the purported Kraing Ta Chan notebook,<sup>1578</sup> E3/2107, which contains a scribbled annotation as to the killing of 15,000 people<sup>1579</sup> and which is outrageously the basis for the Closing Order’s allegation of a death toll of 15,000.<sup>1580</sup> Even without the support of expert opinion, it is obvious that the annotation is carelessly scribbled, and out of context. Its handwriting appears only in this one instance in the document cache; differs greatly from any other handwriting in the cache; and differs from the other handwriting appearing on the same page, as confirmed by witnesses Pech Chim and Srei Than (who the Chamber described as having “relevant, contemporaneous knowledge” of such documents).<sup>1581</sup> In addition, its statistical nature sharply detours from the rest of the notebook, which concerns interrogations.<sup>1582</sup> Indeed, the Chamber acknowledged that since the document did not have an available original, it would not be possible to forensically analyse it.<sup>1583</sup> It must also be recalled that both local and national governments have carried out a concerted propaganda campaign *vis-à-vis* Kraing Ta Chan post-DK.<sup>1584</sup> Together, these factors raise legitimate, serious concerns that the document is a forgery designed to create a false record of events at, and most importantly inflate the death toll of, Kraing Ta Chan. Indeed, even Vooun Vuthy’s deeply-scientifically flawed study of bones exhumed at Kraing Ta Chan indicates that

<sup>1576</sup> E1/295.1, Objections to Document Presentations, T. 30 Apr 2015, p. 18, lns 10-11.

<sup>1577</sup> See, ICTY, *Bošković & Tarčulovski* 2008 Bar Table Decision, paras 4, 6, 13, 19, 23 and 30.

<sup>1578</sup> Whether the notebook is even a Kraing Ta Chan notebook is unclear: see the Defence’s remarks in this regard at E1/295.1, Objections to Document Presentations, T. 30 Apr 2015, p. 28, ln. 20 to p. 29, ln. 2.

<sup>1579</sup> E3/2107, ERN 00068049 (KH) (and see ERN 00290205 (EN)).

<sup>1580</sup> See D427, Closing Order, paras 500, 514, 1385; D390, Co-Prosecutors’ Final Submission, para. 493.

<sup>1581</sup> E349/1, Decision on Forensic Analysis Request for E3/2107, para. 5.

<sup>1582</sup> See E1/294.1, Document Presentation, T. 28 Apr 2015, p. 27, lns 13-19.

<sup>1583</sup> E349/1, Decision on Forensic Analysis Request for E3/2107, para. 5.

<sup>1584</sup> See *supra*, Chapter 4-IV-B-1, on longstanding propaganda campaigns *vis-à-vis* Kraing Ta Chan.



there was a total of just over 3,000 bones of any kind exhumed – which, needless to say, is an incredibly far cry from the 15,000 alleged in this forged document.<sup>1585</sup>

490. The Co-Prosecutors’ only specific response on this document was that two sets of handwriting “means that two people were involved in preparing that document” and “in no way, means it’s a forgery.”<sup>1586</sup> They failed to address any of the very serious and legitimate concerns the Defence raised on the authenticity of this annotation during the document hearing and that the Co-Lawyers for Khieu Samphân raised in a subsequent request to have the document authenticated (to which the Co-Prosecutors did not respond).<sup>1587</sup> In other words, they failed to fulfill their burden of eliminating the more than reasonable doubt to which these concerns give rise. For these reasons, the annotation on document E3/2107 as to “15,000” people should be simply ignored and assigned no probative value whatsoever.

(iii) Other Possible Forgeries

491. The Defence further maintains that two documents in the ‘Tram Kok District Records’ may be forgeries, at least in part. The first is part of E3/4145, which appears to be a compilation of Kraing Ta Chan detainee lists. Among its constituent documents is a scrawled handwritten list<sup>1588</sup> which is the only document among all of the ‘Tram Kok District Records’ to identify Say Sen as having been a detainee at Kraing Ta Chan.<sup>1589</sup> Moreover, this document is also the only one among all of the ‘Tram Kok District Records’ to identify Kraing Ta Chan as “M-105”. The Co-Prosecutors’ response is that M refers to *munti* (*i.e.* office).<sup>1590</sup> However, this fails to explain why this is the only document that refers to Kraing Ta Chan in this way or in this format.

492. In addition to indicating that Say Sen was a long-term detainee at Kraing Ta Chan, the handwritten list also lists other detainees who were frequently discussed in court, namely Hun Kimseng *alias* Yeay Nha and Meas Sarat *alias* Rat. However, the handwritten document only lists these two detainees by their aliases (“Hun Nha” and “Meas Rat”) rather than their full names, and only offers limited other details about these women. In contrast, another list in the same collection, which is typed onto what appears to be a list template document, lists the

<sup>1585</sup> **E3/10769**, Excerpts from Choeung Ek Bone Study, ERN 01362857 and **E1/513.1**, Voeun Vuthy, T. 14 Dec 2016, p. 65, lns 2-10.

<sup>1586</sup> **E1/295.1**, Objections to Document Presentations, T. 30 Apr 2015, p. 14, lns 14-15, 17-19.

<sup>1587</sup> **E349**, Request for Forensic Analysis of E3/2107.

<sup>1588</sup> **E3/4145**, ERN 00068736 (KH) (*see* ERN 00762844 (EN)).

<sup>1589</sup> Say Sen is listed here as Khuth Sen, which he confirms was an alias he used: **E1/257.1**, Say Sen, T. 5 Feb 2015, p. 13, ln. 18 to p. 14, ln. 7.

<sup>1590</sup> **E1/295.1**, Objections to Document Presentations, T. 30 Apr 2015, p. 15, lns 9-15.

women's names in full and includes further particulars of them. However, this typed list, which bears stronger indicia of reliability<sup>1591</sup> and appears to reflect similar content as the handwritten list, does not list Say Sen as a long-term Kraing Ta Chan detainee.<sup>1592</sup> Given that the handwritten list is the only document that refers to Say Sen's presence at Kraing Ta Chan and that he has long associated himself with Kraing Ta Chan and effectively become its self-appointed spokesperson,<sup>1593</sup> the Defence considers it likely that the handwritten list has been created by Say Sen or others in order to create a documentary record that would indicate that he was detained at Kraing Ta Chan, rather than its errand boy who tended buffaloes. For these reasons, the peculiarities of the handwritten list require it to be treated with the utmost caution.

493. The other likely forgery is document E3/4083, which is purported to be an execution list of former Khmer Republic soldiers and officials within Tram Kok District. The Defence has already highlighted this document's peculiarities in previous submissions, namely its particularly poor quality and most strikingly, the fact that the list indicates one soldier's execution date as 8 January 1979.<sup>1594</sup> The Co-Prosecutors suggest that the reason for this was likely that the staff at Kraing Ta Chan did not learn about the need to evacuate until late.<sup>1595</sup> This feeble justification is unconvincing, especially in light of testimony from Tram Kok District chief at that time, Neang Ouch *alias* Ta San, that although the Vietnamese arrived in Phnom Penh on 7 January 1979, they had already passed through Takeo Province on their way to the capital earlier – likely by December 1978, which was when the Tram Kok District forces withdrew themselves.<sup>1596</sup> Thus, the Defence's concerns regarding E3/4083 remain. Accordingly, it too must be approached with great caution.

(iv) Documents Not Recognised by the Relevant Cadres

494. Four witnesses alleged to have written, annotated or transcribed some of the documents within the 'Tram Kok District Records' testified that they did not recognise the handwriting or signatures that several documents bore: Tram Kok District chief Neang Ouch *alias* Ta San,<sup>1597</sup>

<sup>1591</sup> The prisoners' names are written in full, more particulars are provided for each prisoner, and the document's format appears similar to other documents among the so-called 'Tram Kok District Records'.

<sup>1592</sup> **E3/4145**, ERN 00068730 (KH) (*see* ERN 00762837 (EN)).

<sup>1593</sup> Say Sen features in the 1996 "Brief History of Kraing Ta Chan Genocide Centre of Pol Pot-Ieng Sary Clique": **E3/5838**, 'Genocidal Report of POL Pot in Trăm Kàk District', 1985, ERN 00301369.

<sup>1594</sup> **E1/294.1**, Document Presentation, T. 28 Apr 2015, p. 33, ln. 2 to p. 34, ln. 4.

<sup>1595</sup> **E1/295.1**, Objections to Document Presentations, T. 30 Apr 2015, p. 18, lns 19-25.

<sup>1596</sup> **E1/276.1**, Neang Ouch, T. 12 Mar 2015, p. 7, lns 3-11.

<sup>1597</sup> **E1/273.1**, Neang Ouch, T. 9 Mar 2015, p. 89, lns 3-8 (on **E3/2785**), p. 90, ln. 25 to p. 91, ln. 1 (on **E3/2423**); *see also* **E1/294.1**, Document Presentation, T. 28 Apr 2015, p. 31, ln. 22 to p. 32, lns 4, 6-13.

commune chiefs Nut Nov<sup>1598</sup> and Khoem Boeun *alias* Yeay Boeun;<sup>1599</sup> and Kraing Ta Chan guard and typist Srei Than.<sup>1600</sup> Again, the Co-Prosecutors' dismissive, knee-jerk response that it was a conspiracy theory that such documents could be forgeries and that it would be a lot of trouble to create a forgery<sup>1601</sup> fails to resolve the doubt created by the documents' deficiencies. Accordingly, these documents must also be treated with the utmost caution.

**(b) Permitted Uses by the Co-Prosecutors of 'Torture-Tainted' Evidence**

495. The Defence further notes that the Co-Prosecutors' position is that "Kraing Ta Chan prisoners underwent severe interrogation and torture [... as] a regular occurrence".<sup>1602</sup> Accordingly, in light of the – in themselves highly-questionable – rulings of both this Chamber and the Supreme Court Chamber prohibiting the use of 'torture-tainted' evidence except in very limited respects,<sup>1603</sup> the Co-Prosecutors cannot rely on the content of certain 'Tram Kok District Records', namely interrogators' notebooks and other communications, to establish the truth of information divulged in the course of the interrogation. However, the Co-Prosecutors have previously done so. For instance, during their key documents presentation, they referred to a purported Kraing Ta Chan interrogator's notebook in order to show the truth of information the detainee had presented to the interrogator during the course of the interrogation.<sup>1604</sup>

496. Given the Co-Prosecutors' argument (unsupported by the evidence)<sup>1605</sup> that torture regularly occurred at Kraing Ta Chan, even if the document upon which the Co-Prosecutors rely is not a suspect's statement itself but an interrogator's account of such statement, this type of document is considered 'derivative evidence' of torture. As per this Chamber's decision on permissible use of 'torture-tainted' evidence, it cannot be relied upon to establish the truth of the document's contents,<sup>1606</sup> and in any event, the probative value of such evidence is to be "assessed on a case by case basis".<sup>1607</sup> That is, the Co-Prosecutors cannot simultaneously allege

<sup>1598</sup> E1/276.1, Nut Nov, T. 12 Mar 2015, p. 47, lns 23-4, p. 48, lns 3-4 (on E3/2452); see also E1/294.1, Document Presentation, T. 28 Apr 2015, p. 32, lns 14-25.

<sup>1599</sup> E1/296.1, Khoem Boeun, T. 4 May 2015, p. 66, ln. 17 to p. 67, ln. 2 (on E3/2012); see also E3/9480, 'WRI of Khoem Boeun', A212.

<sup>1600</sup> E1/267.1, Srei Than, T. 23 Feb 2015, p. 16, ln. 15 (on E3/4092), and p. 24, lns 18-19, 24, p. 26, ln. 2 (on E3/4083).

<sup>1601</sup> E1/295.1, Objections to Document Presentations, T. 30 Apr 2015, p. 17, ln. 23 to p. 18, ln. 11, p. 19, ln. 5-8.

<sup>1602</sup> D390, Co-Prosecutors' Final Submission, paras 487-8.

<sup>1603</sup> E350/8, TC Torture-Tainted Evidence Decision, paras 33-34, 36, 38, 49, 61-62, 69-70, 73-77, 79, 88; F26/12, SCC Torture-Tainted Evidence Decision, paras 30, 47, 56-57, 58, 64-65, 67; see also *supra*, Chapter 2-II-B-3-(b).

<sup>1604</sup> E1/293.1, Document Presentation, T. 27 Apr 2015, p. 9, lns 7-20; see also E1/395.1, Objections to Document Presentation, T. 30 Apr 2015, p. 27, ln. 7 to p. 28, ln. 4, p. 40, ln. 8 to p. 41, ln. 17.

<sup>1605</sup> See *infra*, Chapter 4-V, detailing alleged torture at Kraing Ta Chan.

<sup>1606</sup> E350/8, TC Torture-Tainted Evidence Decision, para. 70.

<sup>1607</sup> E350/8, TC Torture-Tainted Evidence Decision, para. 70.

systematic torture at Kraing Ta Chan – and by extension, characterise the relevant ‘Tram Kok District Records’ as ‘torture-tainted’ – yet still rely on their so-called ‘torture-tainted’ contents in a prohibited way.<sup>1608</sup> To put it plainly, they cannot have their cake and eat it too.

***(c) Implications Regarding the Weight to be Given to the ‘Tram Kok District Records’***

497. Ultimately, it follows that the probative value, if any, to be assigned to a ‘Tram Kok District Record’ must be evaluated on a document-by-document basis, with the Co-Prosecutors bearing the burden to establish beyond reasonable doubt the authenticity and thus reliability of each document upon which they seek to rely.<sup>1609</sup> Moreover, the Defence recapitulates that in evaluating what probative value to assign to each document, the Supreme Court Chamber’s jurisprudence requires the following approach to be adopted.

498. First, as out-of-court documentary evidence, any so-called ‘Tram Kok District Record’ can only ever be assigned limited probative value, and can never be the sole or decisive factor underpinning a finding beyond reasonable doubt unless there are sufficient counterbalancing factors in place (which there are not here).<sup>1610</sup> The probative value to be assigned to most ‘Tram Kok District Records’ should be further reduced because they cannot be authenticated and are thus unreliable,<sup>1611</sup> and in certain cases also because there are particular authenticity concerns over those documents.<sup>1612</sup> Even if a document were assigned any probative value at all, if the document were a suspect’s statement or ‘derivative evidence’ of such, given the Co-Prosecutors’ arguments about the prevalence of torture at Kraing Ta Chan, they cannot use it to establish the contents of that evidence due to the jurisprudence on permissible uses of ‘torture-tainted’ evidence at this Tribunal. Finally, and most importantly, such out-of court evidence must be treated with particular caution absent any corroborating in-court evidence from a witness testifying under oath. Thus, the Defence refers only sparingly to any ‘Tram Kok District Records’ in this Brief, and only in the alternative to show that even if such document has any probative value, it substantiates the Defence’s case rather than the Co-Prosecutors’.

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<sup>1608</sup> The Defence’s position on the use of ‘torture-tainted’ evidence is set out *supra* in Chapter 2-II-B-3-(b).

<sup>1609</sup> See, ICTY, *Boškoski & Tarčulovski* 2008 Bar Table Decision, paras 6, 13, 19, 23 and 30 (holding that reliability is synonymous with authenticity).

<sup>1610</sup> See *supra*, Chapter 4-IV-F-1-(a).

<sup>1611</sup> See *supra*, Chapter 4-IV-F-1-(a)-(i).

<sup>1612</sup> See *supra*, Chapter 4-IV-F-1-(a)-(ii) and Chapter 4-IV-F-1-(a)-(iii).

## 2. S-21: The OCP and OCIJ Lists Are Unreliable, and the Case File Dangerously Incomplete

### (a) *The Incompleteness of the Case File*

499. As illustrated above, the charges *vis-à-vis* S-21 are tethered to a piecemeal case file containing documents for which the authenticity and provenance are extremely dubious. Moreover, while all former S-21 cadres who testified confirmed that they were not instructed to destroy any S-21 documents,<sup>1613</sup> it appears that a substantial number of documents have nevertheless “disappeared” since 7 January 1979. Rumours have long since circulated at this Tribunal that documents were removed from S-21 by Vietnam and the PRK while the Vietnamese and Mai Lam were transforming S-21 into the centrepiece and physical embodiment of the Manichean narrative.<sup>1614</sup> There are also rumours of further DK document caches in the Cambodian government’s custody – an issue that could have been clarified had the Chamber summonsed Defence-requested witnesses to testify on political interference.<sup>1615</sup>

500. Specific documents are known to be missing. For instance, the S-21 photograph of former Northwest Zone secretary and Standing Committee member Ruos Nhim,<sup>1616</sup> and substantial parts of his S-21 statement,<sup>1617</sup> have never been recovered. However, his foster (or biological) son Toat Thoeun<sup>1618</sup> testified before the Supreme Court Chamber that he saw his father’s photograph together with those of Hu Nim and Hou Youn at Tuol Sleng in room number 3 when he visited it in 1979.<sup>1619</sup> On the other hand, there also continue to be documents surfacing that had been in others’ custody. For instance, the Chamber recently admitted an orange detainee logbook that appears in the film *Die Angkar* and was provided by the filmmaker Walter Heynowski. The reason as to why it was never sought during investigations before

<sup>1613</sup> E1/438.1, Duch, T. 15 Jun 2016, p. 33, ln. 20 – p. 34, ln. 2; E1/422.1, Lach Mean, T. 26 Apr 2016, p. 73, ln. 24 to p. 74, ln. 7; E1/425.1, Prak Khan, T. 2 May 2016, p.49, ln. 19 to p. 51, ln. 1; E1/425.1, Suos Thy, T. 2 May 2016, p. 14, lns 9-12.

<sup>1614</sup> David Chandler also observes obvious lacunae in available S-21 statements: *see* E3/1684, Chandler, Voices From S-21, ERN 00192736-37, noting that “The full-blown reign of terror that ensued from September onward was probably linked in some way to what Keo Meas, Ney Saran, and other prisoners were being forced to “confess” at S-21. It is impossible to determine whether these prisoners had been involved in genuine plots, although documents that survive from S-21 about them are suspiciously skimpy and may have been culled after 1979 to conceal evidence of connivance with the Vietnamese.”

<sup>1615</sup> *See e.g.* E9/10.1, Nuon Chea’s Case 002 Witness Summaries, pp. 2 (Ang Vong Vathana, the Minister of Justice), 25 (Khieu Kanharith, the Minister of Information), and 49 (the now-late Sok An, Deputy Prime Minister).

<sup>1616</sup> For further details on Ruos Nhim’s position, *See e.g. supra*, Chapter 3-I-B, 3-IV-C-1.

<sup>1617</sup> E1/39.1, Chhang Youk, T. 6 Feb 2012, p. 44, lns 1- p. 45, ln. 19; E3/1684, Chandler, Voices from S-21, ERN 00192876.

<sup>1618</sup> For further details on Toat Thoeun, *see supra*, Chapter 2-II-B-3-(c) and 3-II-1.

<sup>1619</sup> F1/3.1, Toat Thoeun, T. 6 Jul 2015, p. 13, ln. 8-17.

remains unknown,<sup>1620</sup> and the fact that it was in Heynowski's custody at all raises the troubling question of where other documents might be and the extent to which the picture that the Tribunal is putting together is incomplete. Heynowski and another individual, Mrs. Nuon Maly, also provided the Tribunal with series of photos purportedly of S-21 detainees, which had never been requested earlier.<sup>1621</sup> Finally, no expert was ever called in order to testify specifically about the authenticity of the various records related to S-21,<sup>1622</sup> although the Defence had requested the long-time head of the Tuol Sleng Genocide Museum and the director of the National Archives of Cambodia to do so precisely for this purpose,<sup>1623</sup> while the DC-Cam director and deputy who appeared in Case 002/01 could only offer limited insight into the provenance of documents at Tuol Sleng.<sup>1624</sup> In short, a true understanding of the case cannot be reached while the case file is incomplete. This must be kept in mind when assessing the evidence.

**(b) *The Inexistent Chain of Custody and the Unreliability of the OCP and OCIJ Lists***

501. Most of the documents admitted before the Chamber as contemporaneous and from S-21 are not originals; are unauthenticated; and have an inexistent chain of custody. Nevertheless, neither the Co-Investigating Judges nor the Chamber ever deemed it necessary to conduct further scientific analysis to test their authenticity. The Chamber instead admitted into evidence two combined lists of detainees prepared by the Co-Prosecutors (*i.e.*, the 'OCP List') and by the Co-Investigating Judges (*i.e.*, the 'OCIJ List') that are based on this untested evidence.<sup>1625</sup> The OCP List contains 12,273 names of alleged S-21 detainees. It was heavily relied on in both Cases 001 and 002,<sup>1626</sup> and used as a benchmark by the Co-Prosecutors throughout the evidentiary hearings in both Case 002/01 and Case 002/02.<sup>1627</sup> However, the Chamber and the

<sup>1620</sup> **E443/2**, Documents Obtained From Professor Heynowski, para. 1.

<sup>1621</sup> **E443/2/1**, Further Documents Obtained From Professor Heynowski, para. 2; **E3/9837**, 'S-21 Photographs'; **E3/10785-E3/10789**, 'Photographs Obtained from Pr. Heynowski'.

<sup>1622</sup> See *supra*, Chapter 2-II-B-2 and Chapter 4-IV-F-2-(a).

<sup>1623</sup> See **E305/4.2**, Nuon Chea's Case 002/02 Update Witness Summaries, pp. 2-4 (Chey Sopheara and Chhem Neang); regarding Chey Sopheara, see also **E412**, Nuon Chea's Fourth Witness Request for Security Centres and 'Internal Purges' Segment, paras 1-2, 37; **E443/10**, Reasoned Decision on Key Defence Witnesses, para. 32; *supra*, Chapter 2-II-B-3-(c), on the refusal to call key witnesses, and *infra*, Chapter 9 and **Annex 2**.

<sup>1624</sup> **E1/37.1**, Chhang Youk, p. 69, ln. 8 to p. 70, ln. 10, p. 82, lns 20-24, p. 105, lns 2-8 (and see also *supra*, Chapter 2-II-B-3-(c) and *infra*, Chapter 9 and **Annex 2**); **E1/31.1**, Vanthan Peou Dara, T. 23 Jan 2012, p. 43, ln 18 to p. 44, ln 3.

<sup>1625</sup> **E3/342**, OCP List; **E3/10604**, OCIJ List.

<sup>1626</sup> **E188**, Case 001 Judgement (7 times); **D427**, Closing Order (64 times); **D390**, Co-Prosecutors' Final Submission (162 times).

<sup>1627</sup> See e.g. **E1/73.1**, Pean Khean, T. 15 May 2012, p. 5, lns 11-15; **E1/88.1**, Yun Kim, T. 19 Jun 2012, p. 84, lns 13-16; **E1/112.1**, Kim Vun, T. 22 Aug 2012, p. 41, ln. 12; **E1/127.1**, Khiev En, T. 1 Oct 2012, p. 75, lns 4-9; **E1/140.1**, Sum Chea, T. 5 Nov 2012, p. 43, lns 16-19; **E1/156.1**, Sa Vi, T. 8 Jan 2013, p. 49, lns 17-19; **E1/177.1**, Chhaom Se, T. 8 Apr 2013, p. 30, lns 20-23; **E1/285.1**, Richard Dudman, T. 31 Mar 2015, p. 26, ln. 14 to p. 27, ln. 6; **E1/316.1**, Keo Loeur, T. 15 Jun 2015, p. 38, lns 14-20; **E1/319.1**, Sem Hoeurn, T. 22 Jun 2015, p. 20, lns 9-16; **E1/328.1**, Lat Suoy, T. 11 Aug 2015, p. 90, ln. 16 to p. 91, ln. 1; **E1/341.1**, Documents Hearing, T.

parties have never been provided with the underlying documents used for each entry and thus cannot test the overall accuracy of the list. The OCP List therefore cannot properly form the basis for any finding beyond reasonable doubt in Case 002/02, despite its starring and decisive role in the Case 001 Judgement.

502. On 30 March 2016, the International Co-Investigating Judge informed the Chamber of another S-21 list combined by one of his analysts, Hin Sotheany who went through 13,383 contemporaneous documents,<sup>1628</sup> conducting a “thorough and lengthy analysis based on a robust and rigorous methodology”.<sup>1629</sup> This new OCIJ List contains 15,101 names of people who allegedly entered S-21. At the Defence’s request, the Chamber heard Hin Sotheany.<sup>1630</sup> Her testimony confirmed serious methodological flaws in compiling the list and was anything but robust or rigorous. Firstly, Hin Sotheany did not question the provenance of any of the documents she analysed, simply noting that some originated from the Tuol Sleng Genocide Museum having been collected by its staff “after 1979”) and that others – presumably those not discovered by Tuol Sleng staff – “remained from the [DK] regime” and were classified as originating from S-21 directly.<sup>1631</sup> She acknowledged that she “do[es] not know about the chain of custody.”<sup>1632</sup> Moreover, most of the documents she examined are not originals; many of them do not bear any S-21 label;<sup>1633</sup> others seem to originate from other security centres,<sup>1634</sup> and some bear mention of the previous regime of the Khmer Republic.<sup>1635</sup>

503. Secondly, it also appears that a number of documents have been misrepresented in the OCIJ List. For instance, while some entries in the OCIJ List mentioned an execution date, the

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3 Sep 2015, p. 89, ln. 25 to p. 90, ln. 2; **E1/366.1**, Ung Sam Ean, T. 11 Dec 2015, p. 79, lns 16-24; **E1/367.1**, Sin Chhem, T. 14 Dec 2015, p. 20, ln. 20 to p. 21, ln. 7; **E1/390.1**, Documents Hearing, T. 23 Feb 2016, p. 57, ln. 21 to p. 58, ln. 3; **E1/411.1**, Sun Vuth, T. 30 Mar 2016, p. 89, lns 7-16; **E1/416.1**, Phan Van, T. 7 Apr 2016, p. 32, lns 15-25; **E1/455.1**, Che Heap, T. 11 Aug 2016, p. 32, lns 2-24, Phuong Yat, p. 63, ln. 23 to p. 64, ln. 13, p. 65, lns 11-20.

<sup>1628</sup> **E393.1**, Explanation of OCIJ List Methodology, ERN 01221294.

<sup>1629</sup> **E443/1.2**, Decision on International Co-Prosecutor’s Investigative Request Regarding S-21 Prisoners List, ERN 01328269.

<sup>1630</sup> **E412**, Nuon Chea Fourth Witness Request for Security Centres and ‘Internal Purges’ Segment.

<sup>1631</sup> **E1/517.1**, Hin Sotheany, T. 9 Jan 2017, p. 14, lns 6-12.

<sup>1632</sup> **E1/517.1**, Hin Sotheany, T. 9 Jan 2017, p. 13, ln. 25 to p. 14, ln. 1.

<sup>1633</sup> See e.g. **E3/1700**, General List of Prisoners From Early 1977; **E3/2000**, Commercial and Energy Ministry Prisoner List From Early 1977; **E3/3185**, List of Prisoners Killed From 15 to 31 Jan 1977; **E3/1996**, Interrogators and Prisoners in Group Six of Comrade Run; **E3/10285**, List of Prisoners of Division 450; **E3/8598**, Prisoner Illness Report.

<sup>1634</sup> See e.g. **E3/8810**, List of Prisoners from Units 502 and 521; **E3/9850**, List of Prisoners Entered on 16 Jan 1977; **E3/9858**, List of Prisoners yet to be Interrogated; **E3/2243**, Prisoners from Ministry S-71 Jul 1978; **E3/1738**, Prisoners from Ministry S71 Jun 1978.

<sup>1635</sup> See e.g. **E3/10398**, 1977 Annual List of Prisoners.

underlying documents specify that the listed persons in fact died from diseases.<sup>1636</sup> Some of the source documents also mention names that have been crossed out, suggesting that they were mistakenly recorded at the time. However, those names are still entered on the OCIJ List.<sup>1637</sup> Finally, other underlying documents mention that the person was “removed”. Without further explanation or objective basis, this statement was interpreted by Hin Sotheany as signifying that these people were killed, and they are recorded as such in the OCIJ List, when a perfectly reasonable alternative inference is, for instance, that they were transferred elsewhere.<sup>1638</sup>

504. Hin Sotheany testified that her analysis was based solely on lists of incoming detainees,<sup>1639</sup> not other types of lists, such as the lists of released detainees. It also appears that information such as the release of S-21 detainees or their transfer to another location has not been recorded comprehensively in the OCIJ List.<sup>1640</sup> Therefore, the information recorded in the OCIJ List is only partial and reflects only and exclusively the detainees who were registered at S-21. In light of the significant issues which the Defence was able to identify by comparing the underlying documents with the list itself through even just a cursory analysis, the OCIJ List cannot be used by the Chamber to draw any conclusion than one related to the number of persons who were registered at S-21.

## V. FACTS RELATED TO SECURITY CENTRES AND ‘INTERNAL PURGES’

505. A dispassionate, rational and careful assessment of the evidence on the four security centres and associated ‘internal purges’ in Case 002/02 convincingly dismantles the prevailing Manichean narrative in respect of each of them. Out of pragmatism, this Section adopts a similar taxonomy to the Closing Order’s discussion of the issues, as do all other subsequent factual analyses set out in this Brief. The Closing Order adopted a uniform taxonomy of issues in its discussion of each of the security centres within the scope of Case 002/02, and one which was fairly similar to that adopted by the Co-Prosecutors in their Final Submission. That is of course logical in the light of the fact that it was Stephen Heder, author of *Seven Candidates for*

<sup>1636</sup> See e.g. **E3/3181**, ‘List of prisoners died on 3, 4, 7 and 12/10/77’, ERN 00784611 (mentions that “Thao Nhip” died from disease while his date of death is recorded in the ‘date of execution’ column of the OCIJ List (see entry 3476)); same issue for Ky Hor (see entry 4567).

<sup>1637</sup> See e.g. **E3/9869**, ‘Important prisoners’, ERN 01299717 (This document has been used as entry 53 in the OCIJ List “Aun Srass” while this person’s name is crossed on the list; the same occurs for entry 4700: “Ma Meng Kheang”).

<sup>1638</sup> See e.g. **E3/2272**, List of Names from Foreign Affairs Ministry, ERN 00181644 (“Lach Vary”, entry 4243 in the OCIJ list).

<sup>1639</sup> **E1/517.1**, Hin Sotheany, T. 9 Jan 2017, p. 12, ln. 17, p. 14, lns 22-23, p. 15, lns 24-25, p. 28, lns 8-9.

<sup>1640</sup> See e.g. **E393/3**, Co-Prosecutors’ Request to Admit S-21 Lists (The Co-Prosecutors submitted that the OCIJ List is not comprehensive).



*Prosecution*, who the Co-Prosecutors hired to help write the Introductory Submissions. After the Introductory Submissions were filed, Heder was then retained by the Co-Investigating Judges for the purpose of investigating the allegations he himself had made, first in his book, and then in the Introductory Submissions. He then helped write the Closing Order, which copied the Co-Prosecutors' Final Submissions to a considerable extent, and in which the Defence was unsurprised to discover he agreed with his own allegations.<sup>1641</sup>

506. The Closing Order's discussion of the location and establishment of the security centres, as well as their functioning, is set out in Part A. The questions of arrest and detention, including through 'internal purges' is addressed in Part B, while the intrinsically interrelated issue of interrogation is discussed in Part C. Part D covers the working and living conditions, and Part E, the allegations of murders, exterminations and disappearances.

#### **A. ORGANISATION AND PERSONNEL OF SECURITY CENTRES**

507. This Part addresses the allegations in the Closing Order sections for each Security Centre entitled "Location and Establishment" and the "Functioning" sub-section entitled "Structure and Personnel". Within this Part, the Defence chooses to focus primarily on evidence in respect of the authority structure at each of the four crime sites. It considers this to be the most important question in this regard as it impacts fundamentally on the Co-Prosecutors' (in)ability to establish beyond reasonable doubt the modes of liability with which Nuon Chea is charged, in particular JCE I<sup>1642</sup> and the alternative mode of liability of superior responsibility.<sup>1643</sup>

#### **1. Kraing Ta Chan Security Centre Was Under the Control of Sector 13**

##### **(a) The Role of Sector 13**

508. At trial, the highest administrative level that could be shown to be integrally involved in decision-making *vis-à-vis* Kraing Ta Chan was the sector (and specifically, Sector 13). Both Tram Kok District chiefs who appeared as witnesses in Case 002/02 – Pech Chim and his successor Neang Ouch *alias* Ta San – testified that they received orders on Kraing Ta Chan from the sector and issued their instructions pursuant to those orders. Pech Chim, who the Defence considers to be a forthcoming and credible witness and who offers detailed evidence of generally-high probative value, explained that although he at the district could request

<sup>1641</sup> See further E1/232.1, Case 002/01 Closing Arguments (Nuon Chea), T. 22 Oct 2013, p. 46, ln. 20 to p. 49, ln. 20.

<sup>1642</sup> See *infra*, Chapter 4-VII.

<sup>1643</sup> See *infra*, Chapter 8.

releases from Kraing Ta Chan, the sector had “exclusive control” on deciding whether to authorise such releases.<sup>1644</sup> He also confirmed that the district had to consult the sector about individuals who had been re-educated several times but who still committed offences and that it was the sector that would issue the final decision about how to respond to that case.<sup>1645</sup>

509. Neang Ouch *alias* Ta San reported that he had to seek approval from Sector 13 secretary Ta Ran before sending offenders to Kraing Ta Chan;<sup>1646</sup> that Ta Ran dictated the annotated instructions that he then wrote on documents;<sup>1647</sup> and that this system remained in place until the end of DK.<sup>1648</sup> He further noted that within Tram Kok, authority for decisions to arrest alleged offenders was generally vested at the **lower**, district level, and that Tram Kok was anomalous in relying upon higher sector level-instructions because it was geographically far closer to the sector office at the Takeo provincial town than the sector’s other districts.<sup>1649</sup>

**(b) The Role of the Southwest Zone and Ta Mok**

510. Although the Closing Order claims that in respect of Kraing Ta Chan, Sector 13 reported to the Southwest Zone,<sup>1650</sup> the evidentiary basis for this allegation is highly limited and clearly insufficient to establish the knowledge or involvement of the Southwest Zone in the affairs of Kraing Ta Chan beyond reasonable doubt. The key example cited in the Closing Order and Co-Prosecutors’ Final Submission<sup>1651</sup> as evidence of zonal knowledge of and authority over Kraing Ta Chan is Pech Chim’s recollection that he once overheard Southwest Zone secretary and Ta Mok order Sector 13 chief Ta Saom to monitor and examine 60 people.<sup>1652</sup> At trial, however, Pech Chim clarified that the 60 people had been arrested following suspects’ statements collected from Chou Chet’s West Zone<sup>1653</sup> which implicated the 60 people as being “involved in the secret struggle” and being among “the members of the Democratic Kampuchea [who] were [...] fighting with one another”.<sup>1654</sup> Moreover, Pech Chim explained that “after an investigation, those 60 persons were rehabilitated and they are **still alive** today.”<sup>1655</sup>

<sup>1644</sup> E1/290.1, Pech Chim, T. 22 Apr 2015, p. 51, lns 8-21.

<sup>1645</sup> E1/290.1, Pech Chim, T. 22 Apr 2015, p. 53, lns 3-24.

<sup>1646</sup> E1/274.1, Neang Ouch, T. 10 Mar 2015, p. 4, lns 3-8.

<sup>1647</sup> E1/274.1, Neang Ouch, T.10 Mar 2015, p.61, lns 16-20; E1/276.1, Neang Ouch, T.12 Mar 2015, p.6, lns 1-19.

<sup>1648</sup> E1/276.1, Neang Ouch, T. 10 Mar 2015, p. 6, lns 23-24.

<sup>1649</sup> E1/276.1, Neang Ouch, T. 12 Mar 2015, p. 5, lns 8-9; *see also* lns 2-10.

<sup>1650</sup> D427, Closing Order, para. 490.

<sup>1651</sup> D390, Co-Prosecutors’ Final Submission, para. 476, fn. 2384.

<sup>1652</sup> D427, Closing Order, para. 492.

<sup>1653</sup> E1/290.1, Pech Chim, T. 22 Apr 2015, p. 57, lns 13-14; *see* Chapter 3-IV-A-3, on Chou Chet’s role in fomenting *coup d’état* in DK.

<sup>1654</sup> E1/290.1, Pech Chim, T. 22 Apr 2015, p. 57, ln. 16 to p. 58, ln. 7.

<sup>1655</sup> E1/290.1, Pech Chim, T. 22 Apr 2015, p. 57, lns 23-24 (emphasis added).

511. In any event, it is unclear if the 60 people were at Kraing Ta Chan, since Pech Chim told the Co-Investigating Judges that “[t]hat group [of 60 people] **might** mean the prisoners at the Kraing Ta Chan”.<sup>1656</sup> It is equally unclear whether Ta Saom was reporting to Ta Mok about the matter formally and in order to obtain instructions, since, as Pech Chim told the Co-Investigating Judges, he overheard Ta Saom tell Ta Mok about the 60 people, and when asked if Ta Mok gave any instructions in return, Pech Chim said that instead, “Ta Mok talked about the work plans for doing rice farming, and instructed Ta [Saom] to lead this or that work.”<sup>1657</sup> In any event, even if Ta Saom was indeed formally reporting to Ta Mok about a group of 60 detainees at Kraing Ta Chan, the evidence shows that these particular 60 people were accused of involvement in treason. This gives rise to the possibility that Ta Mok was consulted because of the exceptionally-serious nature of the alleged offence, which naturally would also be a legitimate basis to arrest and detain the 60 people.<sup>1658</sup> Further, the evidence shows as argued before that the 60 people were released. This could indicate both that Ta Mok ordered this to occur (which would be consistent with other evidence that Ta Mok showed great concern for the welfare of the people in Tram Kok District)<sup>1659</sup> and that there were procedural safeguards in place at Kraing Ta Chan.<sup>1660</sup>

512. In addition, the evidence that Ta Mok visited Kraing Ta Chan, as the Closing Order and Co-Prosecutors’ Final Submission allege,<sup>1661</sup> is insufficient. Civil party Say Sen said Ta Mok visited Kraing Ta Chan two or three times but could not detail what Ta Mok saw or discussed.<sup>1662</sup> In any case, as already discussed, his evidence is unreliable.<sup>1663</sup> Witness and released Kraing Ta Chan detainee Kev Chandara claimed to have known Ta Mok well as Ta Mok would frequently lunch at the witness’s mother’s home prior to DK.<sup>1664</sup> He also testified that he saw Ta Mok visit Kraing Ta Chan, and that when Ta Mok saw that Kev Chandara was detained, he had him released.<sup>1665</sup> However, despite this alleged familiarity with Ta Mok and Ta Mok’s allegedly pivotal role in his release, Kev Chandara was unable to identify anyone in a photographic array the Defence showed him containing DK-era photographs of CPK leaders

<sup>1656</sup> **E3/4626**, ‘WRI of Pech Chim’, ERN 00380137 (emphasis added).

<sup>1657</sup> **E3/4626**, ‘WRI of Pech Chim’, ERN 00380137-8.

<sup>1658</sup> *See also supra*, Chapter 4-II-C-1-(c), on legitimate legal bases for arrests.

<sup>1659</sup> *See infra*, Chapter 6-V, on the Tram Kok Cooperatives.

<sup>1660</sup> *See also infra*, Chapter 4-V-B-1, on monitoring.

<sup>1661</sup> **D427**, Closing Order, para. 495; **D390**, Co-Prosecutors’ Final Submission, para. 474.

<sup>1662</sup> *See E1/257.1*, Say Sen, T. 5 Feb 2015, p. 63, ln. 13 to p. 64, ln. 2; **E1/258.1**, Say Sen, T. 6 Feb 2015, p. 71, ln. 7 to p. 76, ln. 2.

<sup>1663</sup> *See supra*, Chapter 4-IV-C-1-(a), on Say Sen’s credibility.

<sup>1664</sup> **E1/255.1**, Kev Chandara, T. 2 Feb 2015, p. 29, ln. 23 to p. 30, ln. 3.

<sup>1665</sup> **E1/255.1**, Kev Chandara, T. 2 Feb 2015, p. 47, ln. 4 to p. 48, ln. 7.

and which included Ta Mok's distinctive face.<sup>1666</sup> In any event, it is unclear whether Kev Chandara was detained at Kraing Ta Chan during the DK at all, or whether he was detained and released prior to the DK period, as Kev Chandara's testimony varied on this point and he ultimately said that he stood by his initial answer to the Co-Investigating Judges that he was arrested "during 73-74, before the whole country fell" and was released from Kraing Ta Chan "when it was nearly fallen, in 1975".<sup>1667</sup> Finally, even if Ta Mok did visit, this does not establish beyond reasonable doubt that he had any knowledge of the daily operations of Kraing Ta Chan. On the contrary, Standing Committee member (as well as Southwest Zone secretary) Ta Mok had wide-ranging responsibilities and activities, particularly after the early 1977 arrests and the sending of his forces over to the Northwest Zone. It is highly unlikely that he was aware, much less involved in the detailed functioning of Kraing Ta Chan.

513. Furthermore, there is no other detailed evidence that shows that the Southwest Zone had specific knowledge of, and a role in, any alleged criminal conduct at Kraing Ta Chan. While Pech Chim said that the sector had to consult the zone "in principle", whether they actually did so "in every matter" was beyond his knowledge.<sup>1668</sup> Neang Ouch *alias* Ta San said that "the sector reported to the zone, from what I knew",<sup>1669</sup> but provided no further specifics as to how this manifested. In addition, while the Sre Ronoung commune chief (in Tram Kok) Nut Nov claimed that "only the sector or the zone had the authority to authorize for the arrest and subsequently the smashing", when asked about alleged 'purge' orders, he was only able to implicate sector level-leaders as having issued them.<sup>1670</sup>

***(c) Nuon Chea's Alleged Visit to and Knowledge of Kraing Ta Chan Security Centre***

514. The Closing Order and Co-Prosecutors' Final Submission allege that Nuon Chea once visited Kraing Ta Chan.<sup>1671</sup> Notwithstanding the Defence's view that evidence of such visits by any Central Committee or Standing Committee member, or government functionary is in any case of limited relevance unless it can be shown that such person gained relevant knowledge in the process, the Defence nevertheless addresses this allegation given it has been made.

<sup>1666</sup> E3/5847, Photographic Array, ERN 01068466.

<sup>1667</sup> E1/255.1, Kev Chandara, T. 2 Feb 2015, p.68, ln. 23 to p.69, ln. 18, p.70, ln. 23 to p.71, ln. 19, p.100, lns 6-18.

<sup>1668</sup> E1/290.1, Pech Chim, T. 22 Apr 2015, p. 54, lns 4-5.

<sup>1669</sup> E1/273.1, Neang Ouch, T. 9 Mar 2015, p. 30, ln. 7, p. 48, lns 15-20, p. 56, lns 6-17.

<sup>1670</sup> E1/276.1, Nut Nov, T. 12 Mar 2015, p. 59, ln. 9 to p. 60, ln. 25.

<sup>1671</sup> D427, Closing Order, para. 496; D390, Co-Prosecutors' Final Submission, para. 474.

515. Both the Closing Order and Co-Prosecutors' Final Submission cite only to Kev Chandara to substantiate the claim that Nuon Chea visited Kraing Ta Chan. In court, however, Kev Chandara's testimony on this matter was vague and weak. He clarified that "prior to the liberation",<sup>1672</sup> *i.e.*, prior to the DK period and outside the temporal scope of this trial, he saw, from a distance of 70-80 metres away, a man visiting Kraing Ta Chan, who another detainee told him was "Ta Chea".<sup>1673</sup> He added that he did not know who Ta Chea was; that many men in the DK were named Ta Chea; and (correctly) that at the time, "Ta" designated someone "with senior or high position".<sup>1674</sup> Moreover, when Judge Lavergne asked him if he thought that Ta Chea and Nuon Chea were the same person – which is a peculiarly-ignorant question given the abundance of evidence that Nuon Chea was never addressed as Chea but always as Nuon – Kev Chandara answered that "I did not know Ta Chea nor do I know Ta Chea now. I don't know who Ta Chea was or is."<sup>1675</sup> In addition, when the Defence asked Kev Chandara to identify Nuon Chea from a photographic array containing a DK-era photograph of him,<sup>1676</sup> Kev Chandara was unsurprisingly unable to do so.<sup>1677</sup> The only other witness alleged to have seen Nuon Chea at Kraing Ta Chan, its first chief Phan Chhen,<sup>1678</sup> testified that the first time he saw Nuon Chea's face was after 1979.<sup>1679</sup> In short, therefore, there is no probative evidence that Nuon Chea visited Kraing Ta Chan whatsoever.

516. In sum, the Co-Prosecutors have been unable to demonstrate beyond reasonable doubt that Nuon Chea or anyone else from the Standing or Central Committee level, or even from the zone level, had knowledge of let alone decision-making authority over alleged criminal conduct at Kraing Ta Chan. As discussed in Section VII and Chapter 8 of this Brief, this precludes a finding beyond reasonable doubt that Nuon Chea is liable for crimes charged in respect of Kraing Ta Chan under JCE I and every other mode of liability with which he has been charged.

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<sup>1672</sup> **E1/256.1**, Kev Chandara, T. 4 Feb 2015, p. 5, ln. 25 ("Ta Chea's visit was prior to the liberation").

<sup>1673</sup> **E1/255.1**, Kev Chandara, T. 2 Feb 2015, p. 48, lns 11-15, p. 49, lns 8-9; **E1/256.1**, Kev Chandara, T. 4 Feb 2015, p. 6, lns 15-16.

<sup>1674</sup> **E1/255.1**, Kev Chandara, T. 2 Feb 2015, p. 48, lns 15-21.

<sup>1675</sup> **E1/256.1**, Kev Chandara, T. 4 Feb 2015, p.

<sup>1676</sup> **E3/5847**, Photographic Array, ERN 01068466.

<sup>1677</sup> **E1/256.1**, Kev Chandara, T. 4 Feb 2015, p. 17, lns 4-16.

<sup>1678</sup> **D427**, Closing Order, para. 496.

<sup>1679</sup> **E1/269.1**, Phann Chhen, T. 25 Feb 2015, p. 56, lns 4-6.

## 2. Au Kanseng Security Centre Was a Military Institution Subordinated to Unit 806

### (a) *Au Kanseng as a Military Institution Within Division 801 But Not Under the Direct Supervision of the Division*

517. Towards late April 1977, the three-member leadership of Au Kanseng was appointed, with Chhaom Se as the chief in charge of overall supervision, Tim as the deputy in charge of security guards, and Chin Kimthong *alias* Chhang<sup>1680</sup> as the the third member in the leadership, in charge of interrogation.<sup>1681</sup> As a military institution established within Division 801, Au Kanseng only reported to and received orders from the military side of the authorities, not the civilian side. Although it did at one point receive some civilian detainees, this reportedly occurred pursuant to Division 801 commander Sau Saroeun's instructions.<sup>1682</sup> Indeed, as of January 1976, Division 801 had 5,423 combatants, the number of which was supposed to reach 6,000; in short, it was a large division, and it is normal that it had its own detention facilities.<sup>1683</sup>

518. The exclusively military nature of Au Kanseng clearly indicates that it was not under the authority of Nuon Chea who was a civilian official.<sup>1684</sup> Further, the highest authority from which Au Kanseng allegedly received instructions was the division: it never received instructions from Son Sen or any other authority higher than Sau Saroeun.<sup>1685</sup> In addition, Au Kanseng was never mentioned in any of the telegrams or minutes of meetings, including those between Son Sen and Division 801, that are available on the case file. The evidence thus does not show that any DK authorities, military or civilian, higher than Sau Saroeun had any knowledge of or involvement in the operation of Au Kanseng.

### (b) *The Supervision of Au Kanseng*

519. Despite the evidence that it had the jurisdiction to detain any Division 801 soldiers,<sup>1686</sup> Au Kanseng was not even directly supervised by the division. Instead, it was subordinated to Unit 806, a battalion-level unit within Division 801.<sup>1687</sup> Unit 806 had the authority to appoint

<sup>1680</sup> E3/5512, 'WRI of Chin Kimthong (2-TCW-900)', ERN 00403578.

<sup>1681</sup> E1/405.1, Chin Kimthong (2-TCW-900), T. 21 Mar 2016, p. 38, ln. 3 to p. 39, ln. 17, p. 40, lns 7-12, p. 41, lns 18-23; E3/405, 'WRI of Chhaom Se', A7.

<sup>1682</sup> E1/159.1, Chhaom Se, T. 11 Jan 2013, p. 84, lns 10-25.

<sup>1683</sup> E3/1136, 'Rice Consumption Plan for the Military in 1976', 4 Jan 1976, ERN 00543743, Entry 8.

<sup>1684</sup> See E1/232.1, Case 002/01 Closing Arguments (Nuon Chea), T. 22 Oct 2013, p. 92, ln. 11 to p. 98, ln. 14; *see also*, E313, Case 002/01 Trial Judgement, para. 204.

<sup>1685</sup> E1/177.1, Chhaom Se, T. 8 Apr 2013, p. 59, lns 6-13; E3/9459, 'WRI of Chhaom Se', A36.

<sup>1686</sup> E1/405.1, Chin Kimthong (2-TCW-900), T. 21 Mar 2016, p. 63, lns 13-18; E3/5512, 'WRI of Chin Kimthong (2-TCW-900)', A9; E3/405, 'WRI of Chhaom Se', A6.

<sup>1687</sup> E1/405.1, Chin Kimthong (2-TCW-900), T. 21 Mar 2016, p. 42, lns 4-5; E3/5512, 'WRI of Chin Kimthong (2-TCW-900)', A3.

the three-member leadership of Au Kanseng,<sup>1688</sup> and to remove Au Kanseng's staff from their positions.<sup>1689</sup> In addition, Unit 806 leaders frequently visited Au Kanseng and gave instructions to its staff on the centre's daily operations such as how to prevent detainees from escaping.<sup>1690</sup> In contrast, Division 801 commander Sau Saroeun never visited Au Kanseng.<sup>1691</sup> Moreover, communications between Au Kanseng and Division 801 had to go through Unit 806.<sup>1692</sup>

520. It is worth noting that Chhaom Se and Chin Kimthong (2-TCW-900) – the first and the third in the Au Kanseng leadership – gave contradictory evidence on whether Au Kanseng could directly report to Division 801. Chhaom Se claimed that certain matters, such as the suspects' statements obtained from detainees, had to be reported directly to Division 801, and that in 1978 he was instructed to stop reporting through Unit 806 and to report all matters directly to the division.<sup>1693</sup> Chin Kimthong (2-TCW-900), on the other hand, maintained that all matters – including reports on interrogation – had to go through Unit 806 before reaching the division.<sup>1694</sup> He never mentioned any change to the reporting system in 1978.

521. In any event, there is no evidence on how messages between Au Kanseng and Division 801 were conveyed, be it indirectly through Unit 806 or directly (if that ever even occurred). It is unknown, therefore, whether messages were communicated in writing or verbally, and whether the original content of the messages was summarised in the process or passed on verbatim. In the absence of such essential details, it is impossible to make any findings beyond reasonable doubt on whether the division had comprehensive and accurate knowledge of the situation at Au Kanseng and whether the division's instructions were accurately conveyed to Au Kanseng. The Defence further notes that, except for in one instance,<sup>1695</sup> the evidence does not specify whether the instructions allegedly 'from' Sau Saroeun were passed on through Unit

<sup>1688</sup> E1/405.1, Chin Kimthong (2-TCW-900), T. 21 Mar 2016, p. 42, lns 4-5, p. 55, lns 23-25.

<sup>1689</sup> E1/406.1, Chin Kimthong (2-TCW-900), T. 22 Mar 2016, p. 89, lns 5-21.

<sup>1690</sup> E1/405.1, Chin Kimthong (2-TCW-900), T. 21 Mar 2016, p. 55, ln. 23 to p. 56, ln. 7; E1/406.1, Chin Kimthong (2-TCW-900), T. 22 Mar 2016, p. 8, ln. 23 to p. 9, ln. 6.

<sup>1691</sup> E1/405.1, Chin Kimthong (2-TCW-900), T. 21 Mar 2016, p. 55, lns 16-17; E1/406.1, Chin Kimthong (2-TCW-900), T. 22 Mar 2016, p. 9, ln. 1.

<sup>1692</sup> E1/405.1, Chin Kimthong (2-TCW-900), T. 21 Mar 2016, p. 41, ln. 19 to p. 42, ln. 12; E1/406.1, Chin Kimthong (2-TCW-900), T. 22 Mar 2016, p. 8, lns 11-21; E3/5512, 'WRI of Chin Kimthong (2-TCW-900)', A7; E1/159.1, Chhaom Se, T. 11 Jan 2013, p. 94, ln. 12 to p. 95, ln. 3; E3/3985, 'WRI of Chhaom Se', A1.

<sup>1693</sup> E1/159.1, Chhaom Se, T. 11 Jan 2013, p. 94, ln. 12 to p. 95, ln. 3; E3/3985, 'WRI of Chhaom Se', A1.

<sup>1694</sup> E1/405.1, Chin Kimthong (2-TCW-900), T. 21 Mar 2016, p. 41, ln. 19 to p. 42, ln. 12; E1/406.1, Chin Kimthong (2-TCW-900), T. 22 Mar 2016, p. 8, lns 11-21; E3/5512, 'WRI of Chin Kimthong (2-TCW-900)', A7.

<sup>1695</sup> This is Chin Kimthong's (2-TCW-900's) uncorroborated and unreliable allegation that he and Chhaom Se received the order to "solve" the Jarai detainees from Sau Saroeun in person, *see infra*, Chapter 4-V-E-2, for detailed discussion on this evidence.

806; imparted by the division commanders directly; or given by Sau Saroeun personally.<sup>1696</sup> It is thus imperative to be mindful that when a witness claims that the orders were ‘from’ Sau Saroeun, it does not necessarily mean the witness received those orders first-hand.

### 3. Phnom Kraol Security Centre Was Under the Control of Autonomous Sector 105

#### (a) *Independent Actions of Autonomous Sector 105 on Security Matters*

522. According to the Closing Order, Phnom Kraol was a security office “containing Phnom Kraol Prison and related to the nearby [Autonomous] Sector 105 Office K-11 and to the [Autonomous] Sector 105 Secretary, headquartered Office K-17”.<sup>1697</sup> However, the live evidence does not support this allegation and fails to shed any light on the precise structure of the Phnom Kraol complex. Indeed, the number of facilities, their names and their localisation remain unclear. The term “Phnom Kraol” is used in this section to refer to the complex including those three facilities, while each facility’s name is mentioned to refer to it specifically.

523. When questioned about a security centre in the Autonomous Sector, Bun Loeng Chauy, the guard of Khaev Seima District secretary Kasy, appeared confused himself. He testified both that there was “only one security centre [...] known as K-11”<sup>1698</sup> and that this facility was the “prison known as Phnom Kraol prison” which was close to K-11.<sup>1699</sup> Phan Van, the son of Autonomous Sector 105 secretary Ta Ham, who worked in Autonomous Sector 105 until his father’s death in October 1977, testified that he never heard of an office called ‘K-11’. Thus, it is unclear whether K-11 and Phnom Kraol were one and the same facility or different facilities.

524. Two witnesses, Chan Toi and Neth Savat, testified that they were “detained” in K-17 for a month.<sup>1700</sup> However, Sao Sarun, who became the secretary of Autonomous Sector 105 in 1978, testified that K-17 has never been use as a detention facility.<sup>1701</sup> Likewise, Phan Van, who worked at K-17, in 1975 and 1976 confirmed that “K-17 was not a security office”<sup>1702</sup> and that “there was not any detention at Office K-17”.<sup>1703</sup> Therefore, the evidence also challenges the nature of K-17 as a detention facility forming part of the Phnom Kraol complex. In sum, the

<sup>1696</sup> See e.g. **E1/159.1**, Chhaom Se, T. 11 Jan 2013, p. 104, lns 14-15; **E3/405**, ‘WRI of Chhaom Se’, A12, A16; **E3/406**, ‘WRI of Chin Kimthong (2-TCW-900)’, ERN 00404077.

<sup>1697</sup> **D427**, Closing Order, para. 625.

<sup>1698</sup> **E1/409.1**, Bun Loeng Chauy, T. 28 Mar 2016, p. 22, lns 15-19.

<sup>1699</sup> **E1/410.1**, Bun Loeng Chauy, T. 28 Mar 2016, p. 29, lns 5-17.

<sup>1700</sup> **E1/399.1**, Chan Toi, T. 10 Mar 2016, p. 17, lns 23-24, p. 67, lns 4-6.

<sup>1701</sup> **E1/411.1**, Sao Sarun, T. 30 Mar 2016, p. 42, lns 13-15.

<sup>1702</sup> **E1/416.1**, Kham Phan, T. 7 Apr 2016, p. 20, lns 7-8.

<sup>1703</sup> **E1/416.1**, Kham Phan, T. 7 Apr 2016, p. 24, lns 15-16.



evidence is not clear on the precise structure of Phnom Kraol Security Centre. In any event, the alleged crimes discussed by the witnesses are relevant only to the extent that they took place in a location that is part of the Phnom Kraol complex. When the location discussed cannot be ascertained, the evidence falls out of the scope of this crime site.

**(b) *Communications Between Autonomous Sector 105 and Office 870***

525. The minimal live evidence elicited regarding the security facilities in Autonomous Sector 105 is deeply confusing and, in any event, does not even offer a clear picture of the organisation of the Phnom Kraol complex and of the facilities it comprised, let alone permits any findings beyond reasonable doubt in this regard. What minimal live evidence there is, however, confirms that Autonomous Sector 105 enjoyed a broad discretion over security matters. Indeed, Sao Sarun, who replaced Ta Ham as Autonomous Sector 105 secretary in 1978, confirmed that he did not need to request any authorisation when he chose to release people.<sup>1704</sup>

526. While there is evidence of communications between Autonomous Sector 105 and Office 870 on general matters, communications related to security matters are rare and never report orders of arrest sent by the Standing or Central Committees. During the key documents hearing, the Co-Prosecutors presented several telegrams feebly claiming that they “show the knowledge, control and responsibility of the Party Centre for the Autonomous Sector 105, including decisions on the fate of arrested prisoners”.<sup>1705</sup> Three of these telegrams were sent in 1976 by Sector 105 secretary Ta Ham to Nuon Chea. None are related in any way to security matters. In the first telegram, Ta Ham merely informs Nuon Chea about the construction of houses by the Vietnamese at the border, in an area which “has not been demarcated yet”, and asks for specific supplies such as water pumps and iron pots.<sup>1706</sup> In the second telegram, Ta Ham acknowledges the reception of a telegram and informs that the “broken communication radio [...] has now been repaired”.<sup>1707</sup> In the last telegram, Ta Ham acknowledges the reception of the CPK Four-Year Plan, and informs Nuon Chea about the agricultural situation in the area.<sup>1708</sup>

527. Other telegrams presented by the Co-Prosecutors were sent to “Office 870”, and report specific actions already taken locally by Autonomous Sector 105 to resolve some security matters. None of these telegrams seek any opinion or advice from Office 870 on those matters,

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<sup>1704</sup> E1/411.1, Sao Sarun, T. 30 Mar 2016, p. 49, lns 8-24.

<sup>1705</sup> E1/456.1, Key Documents Hearings, T. 12 Aug 2016, p. 27, lns 2-5.

<sup>1706</sup> E3/1118, Telegram from Chhan to Brother Nuon, 2 Nov 1976, ERN 00436997.

<sup>1707</sup> E3/1192, Telegram from Laing to Brother Nuon, 12 Oct 1976, ERN 00508560.

<sup>1708</sup> E3/1194, Telegram from Chhan to Brother, 19 Oct 1976, ERN 00548893.

or indicate that Nuon Chea was a specific recipient.<sup>1709</sup> The last group of documents presented by the Co-Prosecutors is related to the “relationship and conflict between Democratic Kampuchea and Vietnam on the border in Mondolkiri”<sup>1710</sup> and has nothing to do with the specific crime site of Phnom Kraol whatsoever. Therefore, at best, communications between Office 870 and Autonomous Sector 105 constitute merely informative reports on actions already taken by the Autonomous Sector to deal with some security issues.<sup>1711</sup> In no way do those communications reflect the authority of the Standing or Central Committees over Autonomous Sector 105 on security matters. In contrast, they confirmed that Autonomous Sector 105 operated autonomously, with a wide discretion on those issues.

#### 4. S-21 Was Under the Control of the RAK General Staff

528. As already repeatedly noted above, S-21 was first and foremost a military regiment of the RAK under the direct control of the General Staff and its commander, Son Sen.<sup>1712</sup> S-21 personnel were almost exclusively drawn from ranks of the military, either from Division 703 or directly from the General Staff.<sup>1713</sup> Likewise, the majority of its detainees were also from the RAK.<sup>1714</sup> In early 1976, the S-21 military regiment consisted of 2,048 combatants and it was envisaged that it would grow to 3,048.<sup>1715</sup> In early 1976, its commander was Ta Nath, who subsequently moved to the General Staff.<sup>1716</sup>

529. The General Staff was at all relevant times in overall charge of the logistical, administrative, and security matters at S-21. Contrary to Duch’s allegation that S-21 was “under the control of the Standing Committee for its duties in regard to security”,<sup>1717</sup> the General Staff regularly sent specific instructions,<sup>1718</sup> and General Staff Deputy Chief Ren made recommendations regarding security-related matters and S-21.<sup>1719</sup> Furthermore, evidence

<sup>1709</sup> **E3/1196**, Telegram from Chhan to M870, 26 Nov 1976, ERN 00506647; **E3/160**, DC-Cam Collection of DK Internal Communications, ERN 00143134; **E3/877**, Telegram from Chhan to M870, 20 May 1977, ERN 00185226 (“The problem of these contemptible ‘*Yvon*’ has already been decided”).

<sup>1710</sup> **E1/456.1**, Key Documents Hearing, T. 12 Aug 2016, p. 30, Ins 24-25.

<sup>1711</sup> **E3/1196**, Telegram from Chhan to M870, 26 Nov 1976; **E3/160**, DC-Cam Collection of DK Internal Communications, ERN 00143134; **E3/877**, Telegram from Chhan to M870, 20 May 1977.

<sup>1712</sup> **D427**, Closing Order, para. 421; **E3/849**, Joint Statistics of Armed Forces; **E3/453**, ‘WRI of Duch’, ERN 00147583; **E3/347**, OHCHR Suspect Statement of Duch, ERN 00160885.

<sup>1713</sup> **E1/441.1**, Duch, T. 21 Jun 2016, p. 35, Ins 10-13.

<sup>1714</sup> **D427**, Closing Order, para. 424 (“5,609 entries in the revised prisoners list”); *see also* **E3/10604**, OCIJ List (8953 people from the military); *see also infra*, Chapter 4-VI-G, on protected persons.

<sup>1715</sup> **E3/1136**, ‘Rice Consumption Plan for the Military in 1976’, 4 Jan 1976, ERN 00543743.

<sup>1716</sup> **E3/65**, ‘WRI of Duch’, ERN 00147519-20.

<sup>1717</sup> **D427**, Closing Order, para. 421.

<sup>1718</sup> **E3/1047**, ‘Instructions from Son Sen to Duch’ 5 Oct 1977.

<sup>1719</sup> **E3/1044**, Recommended Arrest List from Ren, 30 Oct 1977.

shows that S-21 also functioned as an independent military regiment security-wise. Indeed, Duch communicated with various units across the country on security matters, such as the reception of arrested people, the conduct of interrogations or the necessity of additional investigations.<sup>1720</sup> In contrast, there is no evidence, other than Duch's unreliable testimony, that any member of the Standing Committee other than Son Sen was directly or indirectly involved in the daily security matters or the operation of S-21. As explained above and as recognised by the Supreme Court Chamber, Duch has a tendency to incriminate others in order to "shift the responsibility from himself".<sup>1721</sup> The reality is that S-21 was a military institution subjected to strict military hierarchy from start to finish, something which Duch himself confirmed.<sup>1722</sup> Daily operational matters were under the General Staff led by Son Sen, who happened to also be a member of the Standing Committee. However, this does not constitute proof beyond reasonable doubt that the Standing Committee was involved in S-21. Since Nuon Chea was unrelated to the military,<sup>1723</sup> this precludes a finding beyond reasonable doubt that Nuon Chea could individually be criminally liable for alleged crimes, if any, there, as discussed below.<sup>1724</sup>

## **B. DETENTION AT THE FOUR SECURITY CENTRES WAS NOT ARBITRARY**

### **1. Legitimate Factual Bases for Detention Existed**

530. As introduced in Chapter 3 and Section II of this Chapter and elaborated on here, a central contention of the Defence's case is that arrest and detention in the charged security centres in Case 002/02 and through 'internal purges' were not arbitrary as they had a legitimate factual and legal basis, and were justified under international law at the time.<sup>1725</sup> The Section immediately below addresses the former issue, outlining how according to the evidence, arrests and detention at each of the four security centres took place after a process of careful monitoring and where possible, first attempting to re-educate offenders.

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<sup>1720</sup> See **E3/1140**, Letter from Met to Duch, 1 Apr 1977, ERN 00178065; *see also* **E3/970**, Letter from Met to Duch, 30 May 1977, ERN 00335202, **E3/8391**, Letter from An to Duch, 6 Jan 1977; **E3/1042**, Letter from San to Duch, 5 May 1977, **E3/1042**, Letter from San to Duch, 5 May 1977, ERN 00178184; **E3/1087**, Letter from Met to Duch, 3 Oct 1977; **E3/1051**, Letter to Chief of S-21, undated; **E3/1141**, Letter from Met to Duch, 28 Jul 1977.

<sup>1721</sup> *See supra*, Chapter 4-IV-D-1, on Duch's credibility.

<sup>1722</sup> **E1/440.1**, Duch, T. 20 Jun 2016, p. 42, Ins 9-19.

<sup>1723</sup> *See* **F36**, Case 002/01 Appeals Judgement, para. 996.

<sup>1724</sup> *See infra*, Chapter 4-VII and Chapter 8.

<sup>1725</sup> *See infra*, Chapter 4-VI-A-1 and 4 on arbitrary imprisonment.

**(a) Legitimate Factual Basis for Detention in Kraing Ta Chan Security Centre**

531. Both the Closing Order and Co-Prosecutors' Final Submission describe the alleged process of arrest and detention at Kraing Ta Chan technically, relying on the questionable 'Tram Kok District Records' to track the paperwork that would be sent between subdistricts, the district, and the sector.<sup>1726</sup> What they ignore, however, is the more relevant issue of the underlying events leading to an arrest, which is described in far more probative evidence: that of live witness testimony describing events they witnessed first-hand. The secretary of Cheang Tong commune in Tram Kok District, Khoem Boeun *alias* Yeay Boeun, explained that Tram Kok group, village, commune, and district cadres and militia undertook "monitoring activities" to protect people against enemies inside and outside.<sup>1727</sup> Moreover, Tram Kok District secretary Neang Ouch *alias* Ta San explained that a person would be re-educated repeatedly, for a day, to two weeks, to a month,<sup>1728</sup> and would only then be arrested if re-education proved ineffective.

532. Moreover, even if the 'Tram Kok District Records' could be relied upon,<sup>1729</sup> these documents would corroborate the witnesses' description of the process by which information about a person was verified prior to them being arrested and detained at Kraing Ta Chan. As the Defence has previously highlighted, several documents within the 'Tram Kok District Records' show that multiple attempts were made to re-educate people before matters were escalated, if at all.<sup>1730</sup> One alleged Kraing Ta Chan notebook described two former Khmer Republic soldiers who had repeatedly stolen food and been subject to attempted re-education many times.<sup>1731</sup> An alleged report from Kraing Ta Chan to the district office reported that a youth unit worker in Sre Ronoung commune stole frequently and had been re-educated several times but continued to steal.<sup>1732</sup> Alleged reports from 1978 between subdistricts, the district, and Kraing Ta Chan also detailed several instances of people being re-educated multiple times, including a frequent thief who had been re-educated over a three year-period.<sup>1733</sup> An alleged report to Kraing Ta Chan from an unknown subdistrict reported two men of officer rank who had been re-educated several times, while another alleged Kraing Ta Chan notebook listed a similar series of cases where multiple attempts at re-education had been made, without

<sup>1726</sup> **D427**, Closing Order, para. 497; **D390**, Co-Prosecutors' Final Submission, para. 483.

<sup>1727</sup> **E1/296.1**, Khoem Boeun, T. 4 May 2015, p. 86, ln. 19 to p. 87, lns 17, p. 88, lns 3-5, 8-12, 16-18, p. 89, ln. 9.

<sup>1728</sup> **E1/275.1**, Neang Ouch, T. 11 Mar 2015, p. 71, ln. 25 to p. 72, ln. 12.

<sup>1729</sup> This is questionable, *see supra*, Chapter 4-IV-F-1, on the reliability of the 'Tram Kok District Records'.

<sup>1730</sup> *See* **E1/294.1**, Document Presentation, T. 28 Apr 2015, p. 8, ln. 1 to p. 14, ln. 3.

<sup>1731</sup> **E3/4092**, ERN 00834826-8.

<sup>1732</sup> **E3/4101**, ERN 00322124.

<sup>1733</sup> **E3/2424**, ERN 00322217, 00322220, 00322222, 00322225.

success.<sup>1734</sup> Finally, the so-called ‘Tram Kok District Records’ also offer several examples of local officials seeking guidance from the district with regard to the approach to problematic cases.<sup>1735</sup> Thus, consistent with Yeay Boeun and Ta San’s testimony, these documents demonstrate that the eventual arrest and detention of people was not done arbitrarily.

533. The Co-Prosecutors responded to these arguments in two ways. First, they circularly argued, in light of the Manichean narrative they blindly follow, that there was “only death for 99% of the prisoners” at Kraing Ta Chan,<sup>1736</sup> and therefore that it was irrelevant that the alleged victims were first re-educated multiple times. Second, they repeatedly attempted to minimise the relevance of such evidence on the basis that in any case, the alleged wrongdoing was merely stealing food.<sup>1737</sup> This mischaracterises the evidence, which detailed cases of persistent thefts by the same offenders, despite re-education. Moreover, it wholly disregards the context of the DK, namely that it operated in a state of emergency and suffered food shortages thanks in significant part to the devastating impact of US bombings and the civil war with the Khmer Republic regime.<sup>1738</sup> Finally, it fails to consider the collective, which is the base unit in any Marxist-Leninist society and the legitimate socio-economic framework that the CPK sought to introduce in the DK. Persistent theft of a common good such as food during a time of shortage harms the overall welfare of the collective and is an acceptable basis for arrest and detention, even more so after multiple re-education attempts were made. Indeed, such actions continue to be criminalised today in societies that are far from Marxist-Leninist. For instance, most Australian states’ governments have laws criminalising theft and excessive use of water during times of drought.<sup>1739</sup> As elaborated on below,<sup>1740</sup> the DK, in light of the particular circumstances at the time, did not violate the international prohibition against arbitrary arrests.

<sup>1734</sup> **E3/2107**, ERN 00290205, 00290222, 00290245-46, 00290256.

<sup>1735</sup> See e.g. **E3/2453**, ERN 00388580, 00388577, 00388584, 00388586, **E3/4105**, ERN 00322135; see also **E1/294.1**, Document Presentation, T. 28 Apr 2015, p. 14, ln. 11 to p. 15, ln. 12, p. 16, lns 7-14.

<sup>1736</sup> **E1/295.1**, Objections to Document Presentations, T. 30 Apr 2015, p. 5, ln. 25 to p. 6, ln. 1.

<sup>1737</sup> **E1/295.1**, Objections to Document Presentations, T. 30 Apr 2015, p. 6, lns 6-23.

<sup>1738</sup> See *supra*, Chapter 3-I-A and II-B.

<sup>1739</sup> See e.g. *Water Management Act 2000* (NSW) s 60A which sanctions the taking of water ‘without, or otherwise than authorised by, an access licence’ with a maximum penalty of a \$1m and/or 7 years imprisonment for a natural person or a \$5m for a body corporate; see also provisions in various Australian jurisdictions with criminal sanctions for the misuse of water resources *Water Management Act 2000* (NSW) ss 60C, 60D, 91D; *Water Act 1989* (Vic) ss 33E, 289(1); *Water Act 2000* (Qld) s 808; *National Resources Management Act 2004* (SA) s 127; *Water Resources Act 2007* (ACT) ss 77A-77J; *Water Act* (NT) ss 15(1), 48.

<sup>1740</sup> See *infra*, Chapter 4-VI-A, on crimes related to arrests and detention.

**(b) Legitimate Factual Basis for Detention in Au Kanseng Security Centre**

534. None of the witnesses who testified participated in decision-making regarding alleged arrests, and there is no contemporaneous evidence describing the factual basis for any alleged arrest. In other words, no direct evidence on the specific factual basis for each alleged arrest exists. There is, however, circumstantial evidence that the detainees were arrested and sent to Au Kanseng by their respective units, together with reports from their units explaining the reasons for their arrest.<sup>1741</sup> In some cases, the unit chiefs' observation of the arrested individuals' acts may have formed (part of) the reasons for their arrest.<sup>1742</sup> In addition, the accompanying reports sometimes mentioned that the arrested individuals were repeat offenders that had been unsuccessfully re-educated multiple times.<sup>1743</sup> However, in general, it is unclear whether the "reasons" as noted in those reports included both factual and legal bases for their arrest. Any doubt in this regard must be resolved in favour of the accused (following *in dubio pro reo*, i.e., when in doubt, for the accused). The evidence also shows that individuals were often sent to Au Kanseng for further interrogation to either confirm or dispel the suspicion they were under.<sup>1744</sup> After their interrogation at Au Kanseng, those for whom suspicions were dispelled, or those whose offences were minor, were released or re-educated.<sup>1745</sup>

535. There were also alleged occasions where the arrested individuals were said to have been implicated in "confessions from Phnom Penh".<sup>1746</sup> There is no evidence, however, on whether these implications were the sole basis for their arrest. In any event, in the absence of any evidence on the specific circumstances in which these 'confessions' were obtained, there is no reason to consider that these suspects' statements could not provide the factual basis for a lawful arrest. In conclusion, the absence of direct evidence, the lack of available details of the factual circumstances, and the nature of the circumstantial evidence, as demonstrated above, prevent any finding beyond reasonable doubt that the alleged arrest or detention in relation to Au Kanseng lacked a legitimate factual basis.

<sup>1741</sup> See e.g. **E1/405.1**, Chin Kimthong (2-TCW-900), T. 21 Mar 2016, p. 64, lns 1-3, p. 71, lns 15-25; **E1/406.1**, Chin Kimthong (2-TCW-900), T. 22 Mar 2016, p. 83, ln. 22 to p. 84, ln. 4; **E3/405**, 'WRI of Chhaom Se', A9.

<sup>1742</sup> **E1/405.1**, Chin Kimthong (2-TCW-900), T. 21 Mar 2016, p. 71, lns 15-25.

<sup>1743</sup> **E1/406.1**, Chin Kimthong (2-TCW-900), T. 22 Mar 2016, p. 49, lns 10-14.

<sup>1744</sup> See e.g., **E1/405.1**, Chin Kimthong (2-TCW-900), T. 21 Mar 2016, p. 71, lns 24-25.

<sup>1745</sup> **E1/406.1**, Chin Kimthong (2-TCW-900), T. 22 Mar 2016, p. 59, ln. 24 to p. 60, ln. 6; **E1/405.1**, Chin Kimthong (2-TCW-900), T. 21 Mar 2016, p. 43, lns 21-24, p. 75, lns 16-23; **E3/407**, 'WRI of Chhaom Se', A6; **E3/405**, 'WRI of Chhaom Se', A9.

<sup>1746</sup> **E1/405.1**, Chin Kimthong (2-TCW-900), T. 21 Mar 2016, p. 64, lns 8-11, p. 85, ln. 25 to p. 86, ln. 6.

**(c) *Legitimate Factual Basis for Detention in Phnom Kraol Security Centre***

536. Sao Sarun, Autonomous Sector 105 secretary from 1978, confirmed that CPK’s policy required there to be a factual basis for an arrest. He testified that “the policy of the regime [was] not to arrest people arbitrarily. Unless there was a clear analysis and judgement, then people could be arrested.”<sup>1747</sup> Only two people testified about their arrest and detention at Phnom Kraol security centre: Chan Toi and Neth Savat.

537. Neth Savat was a subordinate and relative of Kham Phoun, secretary of office K-16.<sup>1748</sup> Chan Toi, likewise, was Kham Phoun’s relative.<sup>1749</sup> Both were arrested following the attempted escape to Vietnam of 17 people from Kham Phoun’s Office K-16.<sup>1750</sup> Neth Savat testified that, on the day of his arrest, Phan Khon *alias* Chuon, younger brother of Ta Ham<sup>1751</sup> and member of Office K-16,<sup>1752</sup> announced to the people that Kham Phoun had committed treason. Phan Khon also told Neth Savat and his colleagues that they were going to be detained “temporarily”<sup>1753</sup> and “encourage[d] [them] not to feel terrified or scared”.<sup>1754</sup> As a result, following the mysterious death of Kham Phoun and Ta Ham,<sup>1755</sup> preventive measures were apparently taken within the Autonomous Sector to calm the chaotic situation.<sup>1756</sup> Individuals who were alleged to be part of Kham Phoun and Ta Ham’s ‘network’, *i.e.*, their relatives or subordinates, were gathered and kept at K-17, the Autonomous Sector 105 office, for a short period of time while the authorities investigated the situation further. In other words, Chan Toi and Neth Savat were not detained in a prison but kept under surveillance at the Sector secretary office K-17, which was not a detention facility.<sup>1757</sup> They were then released a month later, together with their relatives.<sup>1758</sup> Given that subordinates and relatives of Kham Phoun had attempted to flee to Vietnam after being suspected of involvement in treasonous activities, Chan Toi and Neth Savat, who were both closely-related to Kham Phoun, were subjected to a

<sup>1747</sup> E1/411.1, Sao Sarun, T. 30 Mar 2016, p. 27, ln. 19 to p. 28, ln. 1.

<sup>1748</sup> E1/400.1, Neth Savat, T. 11 Mar 2016, p. 20, lns 15-20, p. 22, lns 10-11.

<sup>1749</sup> E1/399.1, Chan Toi, T. 10 Mar 1976, p. 15, lns 1-19.

<sup>1750</sup> E1/409.1, Bun Loeng Chauy, 28 Mar 2016, p. 37, ln. 16 to p. 38, ln. 1; E1/399.1, Chan Toi, T. 10 Mar 1976, p. 13 ln. 20 to p. 14, ln. 1.

<sup>1751</sup> E1/399.1, Chan Toi, T. 10 Mar 1976, p. 14, ln. 15.

<sup>1752</sup> E1/400.1, Neth Savat, T. 11 Mar 2016, p. 40, lns 21-24.

<sup>1753</sup> E1/400.1, Neth Savat, T. 11 Mar 2016, p. 39, ln. 10.

<sup>1754</sup> E1/400.1, Neth Savat, T. 11 Mar 2016, p. 27, lns 13-19.

<sup>1755</sup> *See supra*, Chapter 4-IV-A-2, on the unrelated evidence elicited in relation to the Phnom Kraol.

<sup>1756</sup> *See supra*, Chapter 4-I-C and D, on the CPK policy on defence and security and investigations.

<sup>1757</sup> *See supra*, Chapter 4-V-A-1-(a), on the organization of Phnom Kraol and K-17 not being a detention facility; *see also* E1/411.1, Sao Sarun, T. 30 Mar 2016, p. 42, lns 13-15; E1/416.1, Kham Phan, T. 7 Apr 2016, p. 20, lns 7-8; E1/416.1, Kham Phan, T. 7 Apr 2016, p. 24, lns 15-16.

<sup>1758</sup> E1/400.1, Neth Savat, T. 11 Mar 2016, p. 54, lns 8-9; E1/399.1, Chan Toi, T. 10 Mar 2016, p. 61, lns 21-24.

legitimate short-term preventive detention aimed to allow further investigations. Their arrest and limited detention, based on legitimate suspicions following the events involving Kham Phoun's subordinates and relatives, were therefore not arbitrary.<sup>1759</sup>

**(d) *Legitimate Factual Basis for Detention in S-21 Security Centre***

538. In most cases at S-21, reasonable grounds for arrest existed. Thorough investigations, and notably monitoring, were carried out prior to arrests to ensure that people were rightfully suspected of participation in unlawful activities. Examples of close monitoring include the cases of Chan Chakrei *alias* Mean, Division 170 commander;<sup>1760</sup> Suos Neou *alias* Chhouk, Secretary of Sector 24;<sup>1761</sup> and Sbauv Him *alias* Oeun, Division 310 commander. In a Standing Committee meeting dated 9 October 1975, the committee discussed Chan Chakrei's political stance, acknowledging his many strengths ("good points") and cautioned against referring to him as a "traitor". Instead, the Standing Committee emphasised the need for close monitoring.<sup>1762</sup> Similarly, the case of Oeun, who was monitored and arrested two to three months after Duch reported his suspected implication, is a particularly telling example.<sup>1763</sup> Duch confirmed this monitoring process<sup>1764</sup> and further evidence shows that, in fact, a subunit of Division 703 was especially tasked with monitoring activities of suspected traitors.<sup>1765</sup>

539. On many occasions, decisions to arrest people were made on the basis of the information gathered through monitoring.<sup>1766</sup> On other occasions, such decisions were made "according to actual observations and examination of the confession".<sup>1767</sup> Indeed, besides monitoring, thorough analyses of S-21 suspects' statements were carried out.<sup>1768</sup> Moreover, contrary to what

<sup>1759</sup> See *supra*, Chapter 4-I-C-1-(b) and (c), on the legitimate factual and legal basis for arrest according to the CPK policy on defence and security.

<sup>1760</sup> See *supra*, Chapter 3-V-B.

<sup>1761</sup> E3/65, 'WRI of Duch', ERN 00147523; see also *supra* Chapter 3-V-B.

<sup>1762</sup> E3/182, SC Meeting, 9 Oct 1975, ERN 00183403-04; see also *supra*, Chapter 3-IV-C-2.

<sup>1763</sup> See E3/5641, 'DC-Cam Interview of Nob Hat', ERN 00881781; E3/1197, 'Report from Duch to Brother', 23 Dec 1976, ERN 00506641; E3/1891, S-21 Statement of Sbauv Him *alias* Oeun, ERN 00096830; E3/3673, S-21 Statement of Khek Bin *alias* Sou, KH ERN 00174487, ERN 00224129 (Annotation: 17 Feb 1977, *Ah* Oeun was arrested).

<sup>1764</sup> E3/5800, Testimony of Duch (Case 001), p. 48, lns 13-23.

<sup>1765</sup> Also called "Division 704" (E3/2117, Vannak, Division 703, ERN 00081343); see also E426, Nuon Chea Fifth Witness Request for Security Centres and 'Internal Purges' Segment, paras 29-30.

<sup>1766</sup> E3/1050, Letter from Met to Duch, 2 Jun 1977, ERN 00316309 ("So far, not a single enemy has ever implicated this person through their confessions. However, according my personal observation on his actions, he is an enemy because he used to stay in the Division Office for a period of time."); E3/1087, Letter from met to Duch, 3 Oct 1977, ERN 00195320 ("No enemies have yet confessed to clarify this person, but after coming from this outside [the country], his activities have not been good. Therefore, we request to send this one too."); E3/822, Meeting with Division 290 and Division 170, 16 Sep 1976, ERN 00937116 ("Based on the reasoning made by S-21 and the Division, which have seen concrete and continuous activities [...]").

<sup>1767</sup> E3/1051, Letter to Chief of S-21, undated, ERN 00283114.

<sup>1768</sup> See *infra*, Chapter 4-V-C-3, on the interrogation stage being a genuine investigative process.



the Closing Order alleged,<sup>1769</sup> S-21 suspects' statements were hardly ever the sole basis for the arrest of those individuals and Duch confirmed that there was "never" an arrest immediately after a person was implicated.<sup>1770</sup> The arrests were therefore legitimately grounded in fact.

## 2. Legitimate Legal Bases for Detention Existed

540. In addition to there being a legitimate factual basis for arresting and detaining individuals at the four security centres charged, there was a legitimate legal basis as well: suspicion of participation in unlawful activities. As detailed below, this included attempted treason, sabotage or espionage in connection with a series of *coup d'état* attempts designed to overthrow the CPK and legitimate DK government and replace them with leadership loyal to Vietnam, which is (quite obviously) recognised as constituting a "legitimate and serious" reason for the internment of individuals, including civilians.<sup>1771</sup> It also included conduct such as persistent theft which had a heightened impact in light of the state of emergency DK faced at the time.<sup>1772</sup> In addition, there is also evidence of procedural safeguards being in place which would also demonstrate that the arrests and detention were not legally arbitrary under the specific circumstances DK faced at the time.

### (a) *Legitimate Legal Basis for Detention in Kraing Ta Chan Security Centre*

#### (i) Treason and Espionage

541. Although the Closing Order did not address the nature of the alleged offences that would lead a person to be detained at Kraing Ta Chan, the Co-Prosecutors' Final Submission suggested that Kraing Ta Chan sought to detain "those arrested for being enemy spies".<sup>1773</sup> In this narrow regard, the Defence is in rare agreement with the Co-Prosecutors. There is substantial evidence that a number of detainees were arrested and detained at Kraing Ta Chan due to their suspected participation in treasonous activities. For example, as discussed above, Tram Kok District Pech Chim testified that during the DK period, there was a "secret struggle" within the DK – the exact term both Heng Samrin and the late Chea Sim also used<sup>1774</sup> – and

<sup>1769</sup> D427, Closing Order, para. 455.

<sup>1770</sup> E1/440.1, Duch, T. 20 Jun 2016, p. 99, lns 15-6; *see also infra*, Chapter 4-V-C-3, on the interrogation stage being a genuine investigative process.

<sup>1771</sup> *See supra*, Chapter 4-II-C-1-(c), on the legitimate legal bases for arrest under the CPK defence and security policy, and *infra*, Chapter 4-VI-A, on crimes related to arrests and detention.

<sup>1772</sup> *See supra*, Chapter 3-III to V, on the state of emergency.

<sup>1773</sup> D390, Co-Prosecutors' Final Submission, para. 482.

<sup>1774</sup> E3/1568, Kieman Interview with Heng Samrin and Chea Sim, ERN 00651876, 00651889 (Heng Samrin), 00651862 (Chea Sim).

thus many conflicts ensued between members of DK fighting each other.<sup>1775</sup> Again, even if the ‘Tram Kok District Records’ were reliable, they would corroborate this testimony, detailing, for instance, arrests for inciting conflict with the regime<sup>1776</sup> and planning to destroy DK’s social structures.<sup>1777</sup> Furthermore, not only was suspected involvement in treason a legitimate, lawful, and understandable reason for arrest and detention in the DK, it remains so today.<sup>1778</sup>

(ii) Other Unlawful Activities

542. The Co-Prosecutors’ Final Submission alleges that Kraing Ta Chan was created to detain those who “violated CPK’s rules”.<sup>1779</sup> While this is literally true, what the Co-Prosecutors fail to mention (or, perhaps, comprehend) is that the CPK was the legitimate government of DK and therefore its “rules” therefore constituted domestic law. Thus, violating CPK rules would be more accurately – and less pejoratively – described as breaking the law.

543. Detailed testimony was heard at trial on the type of violations, apart from treason and espionage, that would lead to detention at Kraing Ta Chan. Kraing Ta Chan messenger and guard Van Soeun *alias* Vann Soan said that Kraing Ta Chan was used to detain serious as opposed to light offenders.<sup>1780</sup> The secretary of Cheang Tong Commune in Tram Kok District, Khoem Boeun *alias* Yeay Boeun, said that an “instruction from the upper echelon” dictated that people would not be arrested because they stole food and that this was unaffected by whether the person was a so-called “new” or “base” person.<sup>1781</sup> A resident of Samraong Commune in Tram Kok District, Phneu Yav, agreed, explaining that people would not be sent away, for example, for just stealing a coconut.<sup>1782</sup>

544. In addition, both Van Soeun *alias* Vann Soan and his fellow guard Saut Saing specified that accusations of “moral misconduct” would be cause for arrest and detention at Kraing Ta Chan.<sup>1783</sup> Cheang Tong Commune secretary Khoem Boeun *alias* Yeay Boeun and Kraing Ta

<sup>1775</sup> See *supra*, Chapter 4-V-A-1-(b), on the role of the Southwest Zone and Ta Mok in Kraing Ta Chan; Chapter 3-V to VII.

<sup>1776</sup> See e.g. **E3/2424**, ERN 00322225 and **E3/2107**, ERN 00290245; see also **E1/294.1**, Key Documents Hearing, T. 28 Apr 2015, p. 11, lns 2-11, p. 13, lns 7-11.

<sup>1777</sup> See e.g. **E3/2453**, ERN 00388586 and **E3/2053**, ERN 00276578; see also **E1/294.1**, Key Documents Hearing, T. 28 Apr 2015, p. 15, lns 6-12, p. 20, ln. 19 to p. 21, ln. 6.

<sup>1778</sup> See *supra*, Chapter 4-II; see also *infra* Chapter 4-VI-A, on Crimes related to arrest and detention.

<sup>1779</sup> **D390**, Co-Prosecutors’ Final Submission, para. 481.

<sup>1780</sup> **E1/271.1**, Van Soeun, T. 4 Mar 2015, p. 70, ln. 22 to p. 71, ln. 13.

<sup>1781</sup> **E1/297.1**, Khoem Boeun, T. 5 May 2015, p. 18, lns 15-20.

<sup>1782</sup> **E1/264.1**, Phneu Yav, T. 17 Feb 2015, p. 61, lns 20-25.

<sup>1783</sup> **E1/270.1**, Van Soeun, T. 3 Mar 2015, p. 30, lns 8-9; **E1/281.1**, Saut Saing, T. 24 Mar 2015, p. 64, lns 19-21.

Chan guard and typist Srei Than *alias* Iep Duch both identified rape as cause for punishment,<sup>1784</sup> with Khoem Boeun *alias* Yeay Boeun qualifying that naturally it was the rapist who would be punished, not the victim.<sup>1785</sup> Thus, the evidence shows that detention at Kraing Ta Chan was not arbitrary but instead based on legal grounds, *i.e.*, suspected commission of a serious offence.

(iii) Procedural Safeguards

545. The Co-Prosecutors portray Kraing Ta Chan in effect as an execution site at which “99%” of detainees were executed<sup>1786</sup> and at which “the killing of enemies of the DK regime was encouraged”.<sup>1787</sup> The Closing Order is somewhat more restrained, noting that detainee release was possible, although exceedingly rare.<sup>1788</sup> In contrast, the live evidence heard at trial suggests that release was much more common. As discussed above, Pech Chim testified about the release of 60 people who had been accused of no less than treason.<sup>1789</sup> Pech Chim also recalled personally requesting 10 people to be released and confirmed that they were.<sup>1790</sup> In combination with testifying witnesses who were themselves released (Meas Sokha and Kev Chandara)<sup>1791</sup> and the other released detainees they named (Hun Kimseng, Meas Sarat. and their respective children),<sup>1792</sup> the available evidence substantiates that around 80 people were released from Kraing Ta Chan during the DK, and likely many more.

546. Furthermore, Tram Kok District secretary Pech Chim testified that the district had a process in place with respect to the consideration and authorisation of detainee releases. While Pech Chim did not have the authority to decide on releases, he said that he did have the authority to request the sector to release detainees based on information that local level authorities would provide to him regarding detainees.<sup>1793</sup> As he described:

if it was reasonable that the person shall be released, and if the person who came to seek the release was reasonable, then we would decide to release them. We listened to their reasons for the release, and we considered them. And upon the release, the release of

<sup>1784</sup> **E1/297.1**, Khoem Boeun, T. 5 May 2015, p. 45, lns 5-24; **E1/267.1**, Srei Than, T. 23 Feb 2015, p. 94, lns 13-16.

<sup>1785</sup> **E1/297.1**, Khoem Boeun, T. 5 May 2015, p. 44, ln. 12 to p. 45, ln. 24.

<sup>1786</sup> **E1/295.1**, Objections to Document Presentations, T. 30 Apr 2015, p. 5, ln. 25 to p. 6, ln. 1.

<sup>1787</sup> **D390**, Co-Prosecutors’ Final Submission, para. 489.

<sup>1788</sup> **D427**, Closing Order, para. 505.

<sup>1789</sup> *See supra*, Chapter 4-V-A-1-(b), on the role of the Southwest Zone and Ta Mok in Kraing Ta Chan

<sup>1790</sup> **E1/290.1**, Pech Chim, T. 22 Apr 2015, p. 51, lns 10-21.

<sup>1791</sup> **E1/249.1**, Meas Sokha, T. 21 Jan 2015, p. 41, lns 15-17; **E1/255.1**, Kev Chandara, T. 2 Feb 2015, p. 49, ln. 17 to p. 50, ln. 3, p. 71, lns 14-19, p. 74, ln. 12 to p. 75, ln. 4, p. 90, lns 14-24, p. 90, ln. 25 to p. 91, ln. 7.

<sup>1792</sup> **E1/249.1**, Meas Sokha, T. 21 Jan 2015, p. 41, ln. 25 to p. 42, ln. 8; **E1/270.1**, Van Soeun, T. 3 Mar 2015, p. 24, ln. 19 to p. 25, ln. 14; **E1/271.1**, Van Soeun, T. 4 Mar 2015, p. 33, lns 8-17.

<sup>1793</sup> **E1/290.1**, Pech Chim, T. 22 Apr 2015, p. 51, lns 10-21.

their relatives, we would advise them to engage in a productive manner. So usually we – I was approached **a lot** on this matter.<sup>1794</sup>

547. First Kraing Ta Chan chief Phan Chhen corroborated this aspect of Pech Chim’s evidence. He testified that from what he knew of Kraing Ta Chan pre-DK, upon re-education, released detainees would then be reintegrated into the ‘base’.<sup>1795</sup> Pech Chim testified that those accused of “serious political matters [...] would be arrested.”<sup>1796</sup> This, however, is consistent with evidence described above that Tram Kok District differentiated between serious and light offences and that Kraing Ta Chan was a re-education centre for serious offenders.<sup>1797</sup> Moreover, even if accusations of serious offences resulted in arrest – as would be normal in any criminal justice system today – this did not mean that they also inevitably resulted in execution. Tellingly indeed, in the example Pech Chim gave of people alleged of serious offences – the 60 people said to be involved in a “secret struggle” – these alleged offenders were ultimately released.

**(b) *Legitimate Legal Basis for Detention in Au Kanseng Security Centre***

**(i) Legal Basis**

548. The evidence shows that the detainees at Au Kanseng were generally arrested and detained under accusations of violating military discipline;<sup>1798</sup> being involved in treason, such as by contacting enemies from Vietnam or being Vietnam’s “puppet”;<sup>1799</sup> stealing;<sup>1800</sup> violating work rules;<sup>1801</sup> moral misconduct (*i.e.*, illegal sexual conduct);<sup>1802</sup> and “not respecting their leaders”.<sup>1803</sup> As noted above, treason is among the most serious crimes in any domestic legal system, and remains frequently punishable by death.<sup>1804</sup> Breaching military discipline is also punishable by law in any country and amounts to a serious crime, particularly in wartime. Similarly, stealing, destroying public property, and illegal sexual conduct are commonly criminalised in domestic legal systems.

<sup>1794</sup> **E1/292.1**, Pech Chim, T. 24 Apr 2015, p. 83, ln. 23 to p. 84, ln. 5 (emphasis added).

<sup>1795</sup> **E1/269.1**, Phann Chhen, T. 25 Feb 2015, p. 66, lns 2-3.

<sup>1796</sup> **E1/290.1**, Pech Chim, T. 22 Apr 2015, p. 52, lns 2-5.

<sup>1797</sup> *See supra*, Chapter 4-V-B-1-(a), on the legitimate factual basis for detention at Kraing Ta Chan.

<sup>1798</sup> **E3/405** ‘WRI of Chhaom Se’, A6; *see also*, **E1/405.1**, Chin Kimthong (2-TCW-900), T. 21 Mar 2016, p. 65, lns 16-24; **E1/159.1**, Chhaom Se, T. 11 Jan 2013, p. 86, lns 11-17; **E3/407**, ‘WRI of Chhaom Se’, A1.

<sup>1799</sup> **E1/396.1**, Moeurng Chandy, T. 3 Mar 2016, p. 42, lns 8-9; **E3/9326**, ‘WRI of Mao Phat’, ERN 00272580; **E3/407**, ‘WRI of Chhaom Se’, A6; **E1/405.1**, Chin Kimthong (2-TCW-900), T. 21 Mar 2016, p. 64, lns 4-11.

<sup>1800</sup> **E1/405.1**, Chin Kimthong (2-TCW-900), T. 21 Mar 2016, p. 64, lns 1-3; **E3/405** ‘WRI of Chhaom Se’, A9; **E1/158.1**, Ung Ren, T. 10 Jan 2013, p. 47, lns 13-23, p. 85, lns 4-18.

<sup>1801</sup> **E3/405** ‘WRI of Chhaom Se’, A9; *see also*, **E1/395.1**, Phon Thol, T. 2 Mar 2016, p. 39, lns 6-20.

<sup>1802</sup> **E3/405** ‘WRI of Chhaom Se’, A9.

<sup>1803</sup> **E1/405.1**, Chin Kimthong (2-TCW-900), T. 21 Mar 2016, p. 64, lns 19-20; **E1/406.1**, Chin Kimthong (2-TCW-900), T. 22 Mar 2016, p. 11, ln. 23 to p. 12, ln. 2.

<sup>1804</sup> *See supra*, Chapter 4-II-C.

549. As to disrespecting leaders, there is insufficient evidence to establish the factual circumstances that gave rise to such an accusation. Regarding disobeying military commanders, this constitutes a serious violation of military discipline. During WWI, in the British army, for instance, serious disciplinary breaches could be punished by death,<sup>1805</sup> while even today, in China and the US, serious cases of military misconduct are punishable by the death penalty.<sup>1806</sup> Finally, for civilians, disrespecting their chiefs – for instance, by disobeying their orders – can also amount to a crime, given the specific circumstances of the order given. In any event, the absence of factual details renders it impossible to find beyond reasonable doubt that disrespecting leaders could not have, in the circumstances, been a legitimate legal basis for arrest or detention.

(ii) Procedural Safeguards

550. The evidence shows that there was a review system in place at Au Kanseng. Division 801 commander Sau Saroeun reportedly made decisions to release or re-categorise the detainees according to the nature and gravity of their conduct, based mainly on Au Kanseng's reports on the interrogation or performance of detainees.<sup>1807</sup>

(c) *Legitimate Legal Basis for Detention in Phnom Kraol Security Centre*

551. As stated above, based on legitimate suspicions following the events involving Kham Phoun's subordinates and relatives, Chan Toi and Neth Savat, both closely-related to Kham Phoun, were subjected to a month of preventive detention at K-17, the Autonomous Sector 105 office, which appears reasonable.<sup>1808</sup> Given that treason was the most serious offence according to the CPK's national defence and security policy, suspicion of treason justified such preventive detention measures (measures which remain common today).<sup>1809</sup> In any event, both Chan Toi and Neth Savat were released after a month, together with "20 or 30" people.<sup>1810</sup>

552. Neth Savat also testified about a circular sent to his unit in Autonomous Sector 105 describing three categories of offenders: the first category had to be "smashed"; the second,

<sup>1805</sup> Welch, *Military Justice*, pp. 7-8.

<sup>1806</sup> Roderamel, *Military law in Communist China*, pp. 61-64; *Uniform Code of Military Justice*, pp. 119-157.

<sup>1807</sup> E3/407, 'WRI of Chhaom Se', A6; E3/405, 'WRI of Chhaom Se', A9; E1/406.1, Chin Kimthong (2-TCW-900), T. 22 Mar 2016, p. 59, ln. 24 to p. 60, ln. 6; E1/405.1, Chin Kimthong (2-TCW-900), T. 21 Mar 2016, p. 43, lns 21-24, p. 75, lns 16-23; *see also*, E1/158.1, Ung Ren, T. 10 Jan 2013, p. 47, lns 13-23, p. 85, lns 4-18.

<sup>1808</sup> *See supra* Chapter 4-V-C-1, on the legitimate factual basis for Chan Toi and Neth Savat's arrests.

<sup>1809</sup> *See supra* Chapter 4-II, on DK's defence and security policy.

<sup>1810</sup> E1/400.1, Neth Savat, T. 11 Mar 2016, p. 54, lns 8-9; E1/399.1, Chan Toi, T. 10 Mar 2016, p. 61, lns 21-24.

“detained”; and the third, “sent to the cooperatives”.<sup>1811</sup> The content of the document described by Neth Savat is similar to the guidance issued by Son Sen in October 1976.<sup>1812</sup> It further confirms that the CPK widely disseminated its nationwide security and defence policy and notably, the fact that different sanctions had to be applied depending on the gravity of the offence.<sup>1813</sup> Indeed, in light of the fact that the circular was sent to Autonomous Sector 105, which was frequently engaged in combat owing to Vietnamese incursions onto its territory, a reasonable alternative inference of the circular’s reference to “smashing” a category of offender is that it was a non-literal example of ‘charged policy language’ intended to signify an instruction to militarily defeat the Vietnamese soldiers through a counter-attack.<sup>1814</sup> Finally, the fact that Chan Toi and Neth Savat – the only two witnesses to be detained at Phnom Kraol – were released after a month, powerfully confirms that suspects’ fate following preventive arrest at Phnom Kraol was not predefined but depended on the results of the investigation.

**(d) *Legitimate Legal Basis for Detention in S-21 Security Centre***

553. S-21 implemented the lawful policy to defend DK’s national sovereignty and safeguard the territorial integrity of the nation.<sup>1815</sup> Its major task, according to Duch, was to “search for traitors, [and] finding poison, arms and Vietnamese agents”.<sup>1816</sup> Besides a few people suspected of moral offences,<sup>1817</sup> the vast majority of detainees were suspected of being part of an enemy network and of having carried out treason, espionage, collaborating with Vietnamese armed forces, or other subversive activities that could seriously jeopardise the integrity and safety of the country.<sup>1818</sup> Duch confirmed on several occasions that “[t]he task of S-21 defined by Office 870 was to counterspy”, *i.e.*, to “counter any espionage”.<sup>1819</sup> Mâm Nai *alias* Chan, one of the interrogators, described the role of interrogators as to obtain from Vietnamese detainees “information regarding the battlefields” and “about their functions and in which battlefields

<sup>1811</sup> E1/400.1, Neth Savat, T. 11 Mar 2016, p. 29, lns 1-7, p. 67, lns 1-7.

<sup>1812</sup> See E3/13, All Divisions Meeting, 9 Oct 1976, ERN 00183993.

<sup>1813</sup> See *supra*, Chapter 4-II, on DK’s defence and security policy.

<sup>1814</sup> See *e.g.* F36, Appeal Judgement, para. 88, on reasonable inferences; see also *supra*, Chapter 4-II-B, on the CPK’s use of ‘charged policy language’.

<sup>1815</sup> See *supra* Chapter 4-II, on DK’s defence and security policy.

<sup>1816</sup> E3/451, ‘WRI of Duch’, ERN 00204341.

<sup>1817</sup> *E.g.* E3/1044, Recommended Arrest List from Ren, 30 Oct 1977.

<sup>1818</sup> *E.g.* E3/1042, Letter from San to Duch, 5 May 1977; E3/811, Meeting of Unit 703 and S-21, 9 Sep 1976; E3/1051, Letter to Chief of S-21, undated; E3/1044, Recommended Arrest List from Ren, 30 Oct 1977 (clandestine meetings; encouraging others to pretend to be sick or to steal); E3/1043, Letter from Met to Duch, 10 Aug 1977, ERN 00224319.

<sup>1819</sup> E1/441.1, Duch, T. 21 Jun 2016, p. 84, lns 24-25.

they fought”.<sup>1820</sup> Any spies had to be monitored and report to the Angkar [*sic*].<sup>1821</sup> This, as discussed below in the part on Crimes, does not constitute an international crime. The question of procedural safeguards for S-21 is also discussed below in Section E-4 on the alleged killings and disappearances at S-21, as it close relates to the question of S-21’s death toll and releases.

### 3. The Arrest of Certain Highlighted Categories of Detainees Was Lawful

554. Both the Closing Order and the Co-Prosecutors’ Final Submission focus on describing certain groups of detainees allegedly held at the four security centres within the scope of Case 002/02. Moreover, while implicit in the Closing Order, the Co-Prosecutors explicitly argue that people were detained **“for being” members of those groups**.<sup>1822</sup> Although the Defence has already argued above that detention based on their suspected participation in treason or other unlawful activities is lawful,<sup>1823</sup> the Defence nevertheless addresses the presence of certain categories of detainees where significant evidence was heard in respect of such issues, or where the group identity is relevant for the crimes with which Nuon Chea is charged that require a discriminatory intent (*i.e.*, racial and political persecution). In light of the latter consideration, the Defence organises this discussion first by category of detainees and then by crime site.

#### (a) *The ‘Targeted Group’ of Vietnamese*

##### (i) Vietnamese at Kraing Ta Chan Security Centre

555. The only evidence, apart from the so-called ‘Tram Kok District Records’, and beyond the purely anecdotal level, was that of Tram Kok District hospital director Riel Son. He said that when visiting Kraing Ta Chan, he recognised a detainee, who was a “man from Hanoi” named Ta Chea.<sup>1824</sup> However, it eventually transpired that rather than being Vietnamese, Ta Chea (a typical Khmer name) was a Khmer CPK cadre who had lived in Hanoi for three years,<sup>1825</sup> perhaps as one of the so-called “Khmer Viet Minh”.<sup>1826</sup> Civil party Say Sen, whose evidence lacks any credibility and should be wholly disregarded for reasons discussed above,<sup>1827</sup> alleged that there was a “privileged” detainee at Kraing Ta Chan named Ta Norn

<sup>1820</sup> E3/7459, Testimony of Mam Nai (Case 001), p. 28, lns 8-13, p. 51, ln. 25 to p. 52, ln. 3.

<sup>1821</sup> E1/441.1, Duch, T. 21 Jun 2016, p. 84, ln. 24 to p. 86, ln. 1; *see also* E1/57.1, Duch, T. 2 Apr 2012, p. 92, lns 1-4; E3/5794, Testimony of Duch (Case 001), p. 31, lns 10-2; E3/451, ‘WRI of Duch’, ERN 00204341.

<sup>1822</sup> D390, Co-Prosecutors’ Final Submission, paras 358, 482, 551, 591 (emphasis added).

<sup>1823</sup> *See supra*, Chapter 4-V-B-1-(a).

<sup>1824</sup> E1/279.1, Riel Son, T. 18 Mar 2015, p. 59, lns 22-25; E1/278.1, Riel Son, T. 17 Mar 2015, p. 70, lns 8-21.

<sup>1825</sup> E1/278.1, Riel Son, T. 17 Mar 2015, p. 70, lns 14-21.

<sup>1826</sup> *See supra*, Chapter 3-III-C-2-(b), on Vietnam grooming the “Khmer Viet Minh”.

<sup>1827</sup> *See supra*, Chapter 4-IV-C-1.

who likewise “came from Hanoi”.<sup>1828</sup> However, he also stated that he “did not know about where the people came from or what ethnicities were in that prison”.<sup>1829</sup> Neither piece of evidence is sufficiently probative, even cumulatively, to find beyond reasonable doubt that Vietnamese were even detained at Kraing Ta Chan, let alone there as a result of their nationality.

(ii) Vietnamese at Au Kanseng Security Centre

556. In relation to Au Kanseng, the Closing Order specified two incidents of ‘targeting’ of alleged Vietnamese nationals, namely the alleged arrest and execution of 209 Vietnamese nationals of Jarai ethnicity, and the capture of six Vietnamese nationals from Au Ya Dav.<sup>1830</sup> The Closing Order charges Nuon Chea with racial persecution against Vietnamese for these two alleged incidents.<sup>1831</sup> It also relies on them to infer the existence of an alleged nationwide ‘targeting’ policy against Vietnamese.<sup>1832</sup> Setting aside whether the alleged incidents can be proven,<sup>1833</sup> evidence shows that the reasons for the alleged arrests were these individuals’ suspected espionage activities,<sup>1834</sup> not their purported Vietnamese nationality as such.<sup>1835</sup>

557. In addition, ethnic Jarai, even if holding Vietnamese nationality (which is not proved beyond reasonable doubt in this case), are neither of Vietnamese race nor ethnicity. Their physical features differ from that of Vietnamese, and they live in both Cambodia and Vietnam as an ethnic minority with a distinctive language and culture.<sup>1836</sup> Moreover, there is no evidence that the DK or the CPK considered Jarai as part of the racial or ethnic Vietnamese group.<sup>1837</sup> In any event, there is also significant evidence that the CPK trusted people of Jarai ethnicity<sup>1838</sup> and that many Jarai held senior positions in the CPK and RAK,<sup>1839</sup> including a member of

<sup>1828</sup> E1/257.1, Say Sen, T. 5 Feb 2015, p. 8, ln. 17 to p. 9, ln. 13.

<sup>1829</sup> E1/257.1, Say Sen, T. 5 Feb 2015, p. 18, lns 4-5.

<sup>1830</sup> D427, Closing Order, paras 618-22.

<sup>1831</sup> D427, Closing Order, para. 1422.

<sup>1832</sup> D427, Closing Order, para. 804.

<sup>1833</sup> The Defence maintains that they cannot be proven beyond reasonable doubt, *see infra*, for detailed discussion.

<sup>1834</sup> E3/240, ‘Telegram from Vy’, 15 Jun 1977, ERN 00897667; E3/405, ‘WRI of Chhaom Se’, A12.

<sup>1835</sup> *See also*, Part 5, ‘Targeted’ Groups: Vietnamese.

<sup>1836</sup> *See e.g.* E1/405.1, Chin Kimthong (2-TCW-900), T. 21 Mar 2016, p. 99, lns 4-6; E1/454.1, Chin Saroeun, T. 3 Aug 2016, p. 43, ln. 24 to p. 44, ln. 5; E3/7960, Northeast Minorities in the DK, ERN 00450296, 00450329.

<sup>1837</sup> *See supra*, reasoning in Chapter 5-III-B-2 (Scope Khmer Krom), which applies *mutatis mutandis*.

<sup>1838</sup> *See e.g.* E3/17, Chandler, Brother Number One, ERN 00392990; E1/192.1, Philip Short, T. 9 May 2013, p. 130, ln. 22 to p. 131, ln. 3; E3/9, Short, History of a Nightmare, ERN 00396373.

<sup>1839</sup> *See e.g.* E1/410.1, Chan Bun Leath, T. 29 Mar 2016, p. 19, lns 7-18; E1/488.1, Kul Nem, T. 24 Oct 2016, p. 99, lns 14-21; E3/7960, Northeast Minorities in the DK, ERN 00450270; E3/7867, ‘Soas Interview of Ha Sinan’, ERN 00351997.



Division 801 command, Leu.<sup>1840</sup> It is clear, therefore, that Jarai in the DK were not discriminated against or ‘targeted’ because of their Jarai identity.

(iii) Vietnamese at S-21 Security Centre

558. There is no objective evidence that Vietnamese civilians were detained at S-21, and even if there was, there is no information available as to the reasons for their arrests, let alone any evidence that they were arrested on the sole basis of their nationality. In the absence of such evidence, it is impossible to enter a finding beyond reasonable doubt that Vietnamese civilians were detained at S-21. The mere fact that a detainee list refers to a person as “Vietnamese” does not suffice to establish beyond reasonable doubt that this individual was in fact Vietnamese, or that he or she was arrested as a result of being Vietnamese. Prak Khan’s and Suos Thy’s reports of having seen Vietnamese “civilians” without providing any details as to the reason they identified these people as such is similarly insufficient.<sup>1841</sup>

559. In any event, only 56 out of 516 persons listed as Vietnamese in the OCIJ List have a date of entry prior to February 1977,<sup>1842</sup> the turning point marking the intensification of the armed conflict between Vietnam and DK.<sup>1843</sup> The vast majority of alleged Vietnamese detainees entered S-21 in 1978, a time where the conflict between DK and Vietnam was at its highest. In such situation, it is legitimate for a government to detain captured foreign troops of the state with which it is at war. Duch stated that only a few ‘*Yuon*’ people were arrested and the rest were all soldiers.<sup>1844</sup> He further explained that people listed as “*Yuons* who were spies” were actually soldiers who “disguised themselves as civilians”.<sup>1845</sup> Suos Thy confirmed that the categorisation of the Vietnamese detainees as “spy” or “fisherman” in S-21 lists was not necessarily their status as soldier or civilian. He explained that this categorisation reflected that “soldiers, they would be labeled as spies and if they were civilians from Kampong Som they would be labeled as fishermen.”<sup>1846</sup>

560. No witness provided specific evidence regarding the basis or circumstances of Vietnamese detainees’ arrests or conditions of detention at S-21. The Co-Prosecutors stated that

<sup>1840</sup> E3/10569, ‘DC-Cam Interview of An Sopheap and Chhaom Se’, ERN 01079493.

<sup>1841</sup> E1/423.1, Prak Khan, T. 27 Apr 2016, p. 105, Ins 6-11, E1/431.1, Suos Thy, T. 3 Jun 2016, p. 18, Ins 22-23, p. 30, ln. 3 to p. 36, ln. 18.

<sup>1842</sup> See E3/10604, OCIJ List. This counting is based on a word search in the “position” column of the OCIJ List using the terms ‘Vietnamese’, ‘*Yuon*’, and ‘Thiv Ky’.

<sup>1843</sup> See *supra*, Chapter 3-III-D.

<sup>1844</sup> E1/436.1, Duch, T. 13 Jun 2016, p. 86, Ins 10-11.

<sup>1845</sup> E1/439.1, Duch, T. 16 Jun 2016, p. 12, Ins 5-15.

<sup>1846</sup> E1/431.1, Suos Thy, T. 3 Jun 2016, p. 82, Ins 4-10.

the Vietnamese detainees were interrogated “under torture” at S-21, yet, failed to provide any evidence to support their statement.<sup>1847</sup> On the contrary, Duch testified that Vietnamese soldiers were “not seriously mistreated”.<sup>1848</sup> Further evidence shows that Vietnamese people were segregated from other detainees and kept in the ‘special prison’,<sup>1849</sup> in which detainees enjoyed relatively better conditions than the ones staying in the main compound.<sup>1850</sup>

561. There is no credible evidence as to the destination of the Vietnamese detainees after they entered S-21. Prak Khan testified having seen a group of Vietnamese individuals brought in S-21 in “1977-78”.<sup>1851</sup> Those people “were not sent straight to the prison but they were ordered to sit down in front of Building A and B”.<sup>1852</sup> There is no evidence as to whether those people eventually ended up in the prison building or were alternatively released. While Him Huy testified that Vietnamese people were executed “behind the Tuol Sleng prison”, he was not in any way involved in this matter, Peng’s team being the only one in charge.<sup>1853</sup> Him Huy’s evidence therefore constitutes mere hearsay. Duch averred that, “in principle, both civilians and soldiers had to be smashed”.<sup>1854</sup> As stated above, Duch’s theory of a general “smashing policy” is unsupported,<sup>1855</sup> and his limited role at S-21 did not enable him to be aware of the fate of the Vietnamese detainees.<sup>1856</sup> Tay Teng, Lach Mean, and Him Huy testified having seen a film featuring Vietnamese soldiers interrogated.<sup>1857</sup> Of them, Him Huy is the only one who stated that the film also showed execution of the Vietnamese detainees. Duch, who confirmed having seen this film, firmly denied that such a scene was ever screened.<sup>1858</sup>

562. In an interview with Rithy Panh, Pha Than Chan, a detainee in charge of the interrogations of Vietnamese people at S-21, stated that the “Khmer Rouge” distorted the reality, arresting Vietnamese civilians, having them wear uniforms, and using ‘*tearunakamm*’ to compel them to confess that they were involved in the “Vietnam incursion”. Pha Than Chan

<sup>1847</sup> E1/390.1, Document Hearing, T. 23 Feb 2016, p. 58, lns 4-19.

<sup>1848</sup> E1/439.1, Duch, T. 16 Jun 2016, p. 19, lns 11-12. Duch used the word ‘*Tearunakamm*’ which does not automatically translate as torture, *see supra*, Chapter 4-II.

<sup>1849</sup> E3/5795, Testimony of Duch (Case 001), p. 85, ln. 20 to p. 86, ln. 5; E3/7601, ‘WRI of Kong Phai’, ERN 00146783; E3/5691, ‘WRI of Prak Khan’, ERN 00142181; E3/1684, Chandler, Voices from S-21, ERN 00182375.

<sup>1850</sup> E3/5799, Testimony of Duch (Case 001), p. 45, ln. 22 to p. 46, ln. 6, p. 54, lns 13-18; E3/7665, ‘WRI of Chhun Phal’, ERN 00163814.

<sup>1851</sup> E1/423.1, Prak Khan, T. 27 Apr 2016, p. 105, lns 6-7.

<sup>1852</sup> E1/423.1, Prak Khan, T. 27 Apr 2016, p. 105, lns 9-11.

<sup>1853</sup> E1/427.1, Him Huy, T. 4 May 2016, p. 26, ln. 8 – p. 27, ln. 2.

<sup>1854</sup> E1/436.1, Duch, T. 13 Jun 2016, p. 91, ln. 9.

<sup>1855</sup> *See supra*, Chapter 4-II.

<sup>1856</sup> *See supra*, Chapter 4-IV-C-1.

<sup>1857</sup> E1/422.1, Tay Teng, T. 26 Apr 2016, p. 32, lns 1-25, E1/427.1, Him Huy, T. 4 May 2016, p. 83, ln. 2 to p. 84, ln. 3; E1/422.1, Lach Mean, T. 26 Apr 2016, p. 32, lns 8-25.

<sup>1858</sup> E1/439.1, Duch, T. 16 Jun 2016, p. 42, lns 12-17.

eventually speculated, “Vietnamese may have been killed at that location Choeung Ek”.<sup>1859</sup> Pha Than Chan testified before the Chamber. Confronted with this statement, Suos Thy testified, to the contrary, that Vietnamese people were photographed wearing the clothes they wore when they were brought in,<sup>1860</sup> while Duch stated that Pha Than Chan was trying to fit the Vietnamese “political line” and to “alleviate what had been done by their people”.<sup>1861</sup> In sum, the evidence available does not permit to identify the legal status of the Vietnamese people who entered S-21. Nor does it allow a conclusion to be drawn in relation to the basis of arrest, the detention conditions, or the final fate of these alleged Vietnamese detainees. In any event, even if all the underlying facts were established beyond reasonable doubt, the evidence does not support a finding that this was done pursuant to a policy targeting Vietnamese as a group, as discussed in Chapter 5-II-C-2 of this Brief.

**(b) *Spouses of Detainees***

**(i) Spouses of Detainees at Kraing Ta Chan Security Centre**

563. One witness and Kraing Ta Chan detainee, Vong Sarun, was the wife of another alleged Kraing Ta Chan detainee and a medic at the Southwest Zone military hospital (Hospital 22) who was detained at Kraing Ta Chan after her husband had also been.<sup>1862</sup> However, Vong Sarun testified that during her interrogation at Kraing Ta Chan, the interrogators focused on questioning her about unlawful activities she was suspected to have participated in with her husband, namely concealing a pistol, and participating in spy networks.<sup>1863</sup> This shows that, consistent with the Defence’s case, the reason for her arrest was not her identity as a wife but her suspected participation in unlawful activities.

**(ii) Spouses of Detainees at Au Kanseng Security Centre**

564. In cases where spouses of the detainees were also held at Au Kanseng, they were not detained because of their marital relationship, but on the basis of their individual actions. For instance, Phon Thol testified that he was arrested because of the method he used to treat rubber trees,<sup>1864</sup> while his then-wife, Moeurng Chandy, testified that she was detained due to her suspected contact with the ‘*Yuon*’.<sup>1865</sup> Similarly, Sam Soem and her husband Khoem Peou told

<sup>1859</sup> E3/2352, ‘Interview of Pha Than Chan by Rithy Panh’, ERN 01245230-31.

<sup>1860</sup> E1/431.1, Suos Thy, T. 3 Jun 2016, p. 21, lns 9-11.

<sup>1861</sup> E1/439.1, Duch, T. 16 Jun 2016, p. 37, lns 21-23, p. 38, ln. 4 to p. 39, ln. 3.

<sup>1862</sup> E1/300.1, Vong Sarun, T. 18 May 2015, p. 9, ln. 19 to p. 10, ln. 8.

<sup>1863</sup> E1/300.1, Vong Sarun, T. 18 May 2015, p. 30, ln. 19 to p. 31, ln. 5.

<sup>1864</sup> E1/395.1, Phon Thol, T. 2 Mar 2016, p. 38, lns 19-24.

<sup>1865</sup> E1/396.1, Moeurng Chandy, T. 3 Mar 2016, p. 42, lns 8-9.

the Co-Investigating Judges that they were arrested on suspicion of stealing<sup>1866</sup> and having “disdained the party”,<sup>1867</sup> respectively.

(iii) Spouses of Detainees at S-21 Security Centre

565. Based on a list prepared by the Office of the Co-Prosecutors, the Closing Order alleges that some people were “detained **because of family ties**”.<sup>1868</sup> This list allegedly compiles the detainees whose names have been registered together with a notation mentioning their familial link with another detainee. However, evidence shows that mentions of family relationships were never the basis of arrests. Rather, such mentions appear to be an administrative method of additional identification. A telegram sent by Division 502 secretary Sou Met to Duch in which names of the detainees’ wives are mentioned besides their name, together with the name of the head of their alleged network, clearly illustrates this process.<sup>1869</sup> Further, the large majority of the entries mentioning family ties in the OCIJ List also mention the former position of the person: out of 700 entries bearing the mention “wife of”, 498 also bear the mention of the person’s position.<sup>1870</sup> This confirms that the family relationship was simply recorded as additional information to facilitate the identification of detainees. This practice is still common nowadays, with people often having to provide their parents’, spouses’ or children’s names for administrative processes such as visa or marriage applications.

566. In any case, in contrast with Duch’s testimony<sup>1871</sup> and the Closing Order’s allegations,<sup>1872</sup> evidence shows that no policy existed regarding the arrest of family members. Prak Khan confirmed that there was no “rule” concerning the arrests of family members and that the basis for arresting someone was exclusively his or her unlawful activities and link with the “enemy”.<sup>1873</sup> Suos Thy testified that cases where a family was brought in together “did not happen often”.<sup>1874</sup> Other examples show that spouses of cadres were not systematically arrested following their husbands’ or wives’ arrest. Indeed, Prak Yut (2-TCW-938) was not arrested despite the arrest of her husband,<sup>1875</sup> neither, for instance, was Chhouk’s wife;<sup>1876</sup> Krauch

<sup>1866</sup> E3/9327, ‘WRI of Sam Soem’, ERN 00272620.

<sup>1867</sup> E3/7684, ‘WRI of Khoem Peou’, ERN 00250072.

<sup>1868</sup> D427, Closing Order, para. 432 (emphasis added).

<sup>1869</sup> E3/1140, ‘Telegram from Met to brother Duch’, 1 Apr 1977.

<sup>1870</sup> See E3/10604, OCIJ List.

<sup>1871</sup> E1/437.1, Duch, T. 14 Jun 2016, p. 22, Ins 5-8.

<sup>1872</sup> D427, Closing Order, para 432.

<sup>1873</sup> E1/423.1, Prak Khan, T. 27 Apr 2016, p. 57, Ins 1-3.

<sup>1874</sup> E1/431.1, Suos Thy, T. 3 Jun 2016, p. 31, ln. 16 (correction signs omitted).

<sup>1875</sup> See E1/378.1, Prak Yut (2-TCW-938), T. 19 Jan 2016, p. 56, Ins 4-12.

<sup>1876</sup> See E3/7564, ‘DC-Cam Interview of Dok Sean’, 28 Jun 2005, ERN 00353600.

Chhmar District Secretary Ta Pha's wife;<sup>1877</sup> or Northwest Zone cadre Ta Val's wife.<sup>1878</sup> There is clear evidence that some cadres' spouses were themselves implicated in traitorous activities. For instance, the wife of Oeun, commander of Division 310, who was one of the leaders of an attempted a *coup d'état* in 1977 to overthrow the legitimate DK government, was also arrested since she held a senior position in the division which was involved in the rebellion.<sup>1879</sup> In Vorn Vet's S-21 statement, some people are referred to as "wife of [name]" instead of by their own name,<sup>1880</sup> meaning once again that when arrested, the wives were implicated because of their own subversive activities rather than because of their husbands' behaviour.

**(c) Children**

**(i) Children at Au Kanseng Security Centre**

567. The Closing Order alleges that some children were held at Au Kanseng.<sup>1881</sup> The evidence shows that some detainees gave birth to their children in detention, and the detainees took turns to take care of the children.<sup>1882</sup> Au Kanseng chief Chhaom Se said the children were not prisoners, but were there to live with their parents.<sup>1883</sup> The Defence notes that it is a common practice in domestic systems around the world to allow small children of the detainees to stay with them in detention facilities.<sup>1884</sup>

**(ii) Children at S-21 Security Centre**

568. The detention of children at S-21 is a particularly misunderstood aspect of S-21 thanks to Manichean 'accepted truths' in this regard, in particular, as seen in the black and white photographs long on display at the Tuol Sleng Genocide Museum. The reality is that the majority of "children" who were registered at S-21 were young cadres. Indeed, out of the total of 67 children listed in the OCIJ List, nearly half (33) are listed under their position as

<sup>1877</sup> See **E3/2653**, Osman, Cham Rebellion, ERN 00219110.

<sup>1878</sup> **E3/9300**, 'Media Report about Cheam Kin', 15 Aug 2011; see *infra* Chapter 6-V-D-1, on Ta Val.

<sup>1879</sup> See **E3/10604**, OCIJ List, entry 6961 "wife of Oeun, Chief of the children's team Division 310"; see also **E1/507.1**, Tres Tech, T. 6 Dec 2016, p. 90, ln. 22 to p. 91, ln. 9; see also Chapter 3-IV-D-1 and 3-VI generally.

<sup>1880</sup> **E3/1876**, S-21 Statement of Penh Thuok alias Sok or Vorn Vet, ERN 00767783, 00767796, 00767798, 00767801, 00767859.

<sup>1881</sup> **D427**, Closing Order, para. 605.

<sup>1882</sup> See e.g. **E1/396.1**, Moeurng Chandy, T. 3 Mar 2016, p. 67, lns 3-7; **E3/9327**, 'WRI of Sam Soem', ERN 00272620.

<sup>1883</sup> **E3/405**, 'WRI of Chhaom Se', A9.

<sup>1884</sup> See US Congress Library's overview of laws regarding children residing in prisons with their parents.

combatant,<sup>1885</sup> medical staff,<sup>1886</sup> soldier,<sup>1887</sup> division member,<sup>1888</sup> or unit chief.<sup>1889</sup> It is uncertain whether these “children” were actually arrested, given the true nature of the S-21 registration process as discussed in Part E-4-A below. Even if they were, this likely owed to their suspected participation in unlawful activities, consistent with CPK policy. Moreover, no evidence has been offered substantiating beyond reasonable doubt either the reasons for arrest of any of the “children” or of their actual ages.

569. Evidence further shows that 1,685 “children” worked at S-21<sup>1890</sup> as guard, interrogator,<sup>1891</sup> photographer or medic<sup>1892</sup> and that some were subsequently arrested because of their suspected involvement in unlawful activities.<sup>1893</sup> Noem Kimsreang, the chief of the photography unit who was in charge of developing negatives at S-21 and would have been in a position to see photographs of almost all staff and detainees, testified that he saw “between 5 and 10 children” without specifying that they were prisoners.<sup>1894</sup> He further explained that women and children were not detained at S-21, but rather sent to Prey Sar.<sup>1895</sup> Suos Thy confirmed that he did not see “often” children entering S-21.<sup>1896</sup>

570. Other children who happened to enter S-21 might have been accompanying their parents. Those children were naturally not considered detainees, which explains why they were not registered<sup>1897</sup> and rarely photographed.<sup>1898</sup>

571. Duch stated that children at S-21 “would also be smashed since there was no sign of any existence of an orphanage centre during the regime.”<sup>1899</sup> Making “a general statement in [his] capacity as a person who was overall in charge” Duch further testified that children “were sent

<sup>1885</sup> E3/10604, OCIJ List, entry 6316.

<sup>1886</sup> E3/10604, OCIJ List, entry 11433.

<sup>1887</sup> E3/10604, OCIJ List, entry 9902.

<sup>1888</sup> E3/10604, OCIJ List, entries 2448, 3676, 4120, 5765, 4120, 6770, 11969, 12138, 12182.

<sup>1889</sup> E3/10604, OCIJ List, entry 4991, 4998.

<sup>1890</sup> See E3/8722a, Meng-Try, The Child Cadres of S-21, ERN 00002211.

<sup>1891</sup> E3/8722a, Meng-Try, The Child Cadres of S-21, ERN 00002212.

<sup>1892</sup> E1/474.1, Noem Kimsreang, T.15 Sep 2016, p. 17, ln. 19 to p. 18, ln. 5, p. 109, lns 12-19; E1/430.1, Suos Thy, T. 2 Jun 2016, p. 44, lns 14-17, p. 49, lns 19-25; E1/431.1, Suos Thy, T. 6 Jun 2016, p. 32, ln. 14 to p. 33, ln. 11.

<sup>1893</sup> E3/8722b, Meng-Try, The Child Cadres of S-21, ERN 00047476.

<sup>1894</sup> E1/474.1, Noem Kimsreang, T. 15 Sep 2016, p. 56, lns 21-22.

<sup>1895</sup> E1/428.1, Him Huy, T. 5 May 2016, p. 35, lns 5-15.

<sup>1896</sup> E1/431.1, Suos Thy, T. 3 Jun 2016, p. 31, ln. 16.

<sup>1897</sup> E1/431.1, Suos Thy, T. 3 Jun 2016, p. 31, lns 1-3.

<sup>1898</sup> “They were brought in with their parents, but I did not see their numbers in hundreds nor thousands. They were in the numbers between 4, 5 or 10 children only. Some children did not have their photographs taken.” E1/474.1, Noem Kimsreang, T.15 Sep 2016, p. 56, lns 20-23, p. 56, lns 22-23; “for some children, their photos were not taken.” E1/419.1, Nhem En, T. 20 Apr 2016, p. 64, lns 15-16.

<sup>1899</sup> E1/434.1, Duch, T. 8 Jun 2016, p. 75, lns 9-11.

to be killed at Choeng Ek.”<sup>1900</sup> Conversely, Him Huy, Meas Peng Kry, Tay Teng and Chhum Phal, who all testified having been involved in the executions at Choeng Ek, unanimously denied having ever seen any children (being killed) at that location.<sup>1901</sup> Besides Duch’s speculation, the only evidence available regarding the alleged executions of children is hearsay. Him Huy testified that he “heard Peng say that those children were killed and executed behind the prison”.<sup>1902</sup> However, no forensic exhumation was put into place, reaching scientific results objectively confirming such statement. In fact, no remains of children were found around S-21. Similarly, Vann Nath who painted children taken away from their mothers confirmed that the information he portrayed in fact came from second-hand testimony.<sup>1903</sup>

572. A photocopy of a document listing 18 names bearing a written annotation translated as “[t]otal Detainees, including 160 children, **smashed** by Brother Srè are 178 persons”,<sup>1904</sup> has been used by the Case 001 Trial Chamber to support its finding regarding the execution of children.<sup>1905</sup> It appeared later that this annotation was mistranslated, the corrected translation reading “[t]otal number of persons **in the rice-production** section: 178, including 160 children.” Duch testified on multiple occasions that he did not know anything about the functioning of Prey Sar.<sup>1906</sup> Yet, when confronted with this document, which he had never seen before Case 001, Duch took the lead and repeated what he had stated in Case 001, namely that it was Hor’s handwriting and that the annotation means that 178 people, including the 160 children, have been smashed.<sup>1907</sup> Duch’s testimony on this point is once again mere speculation and became senseless in light of the new translation. It is now obvious that the annotation refers to the number of people remaining at Prey Sar and not to the number of people killed. Vuthy gave evidence about the remains of 13 children ages 3 to 8, and 241 aged from 8 to 19. Yet, there is nothing permitting to reach a finding beyond reasonable doubt that these “children” were previously detained at S-21, were executed, or even died during DK.<sup>1908</sup> The overall

<sup>1900</sup> E1/434.1, Duch, T. 8 Jun 2016, p. 85, lns 10-11.

<sup>1901</sup> E3/5766, ‘Written Record of Confrontation of Duch’, ERN 00165438, *see also* E3/7617, ‘WRI of Tay Teng’, ERN 00401878; Voeun Vuthy stated that he found 13 crania of children, *see* E1/512.1, Voeun Vuthy, T. 13 Dec 2016, p. 69, ln. 19; on the reliability of Voeun Vuthy’s study *see supra*, Chapter 4-IV-E-1.

<sup>1902</sup> E1/428.1, Him Huy, T. 5 May 2016, p. 46, lns 4-5, 11-13.

<sup>1903</sup> “**I did not see the incident by myself** heard the screaming and the beating the sounds of the beating out the crying of both adult and young people and the children were taken away [...] The guards took them out from Building walking passing my workplace to go outside. **But because could not see further** did not know where they were taken out [*sic*]” (E3/7450, Testimony of Vann Nath (Case 001), p. 83, ln. 15 to p. 84, ln. 6, (emphasis added).

<sup>1904</sup> E3/2133, Prisoners under Sre’s Authority, 23 Jul 1977 (emphasis added).

<sup>1905</sup> E188, Case 001 Judgement, para. 215.

<sup>1906</sup> E1/434.1, Duch, T. 8 Jun 2016, p. 83, lns 5-6.

<sup>1907</sup> E1/434.1, Duch, T. 8 Jun 2016, p. 82, lns 24-25.

<sup>1908</sup> *See supra*, Chapter 4-IV-E-1, on Vuthy’s lack of credibility.

evidence available is insufficient to prove beyond reasonable doubt the existence of both a policy of arrest and a policy of execution of children.

**(d) ‘New People’ at Kraing Ta Chan Security Centre**

573. While the Closing Order alleges that ‘new people’ were detained at Kraing Ta Chan,<sup>1909</sup> at trial, the only relevant information offered in this regard was from Say Sen, whose evidence on this point was contradictory.<sup>1910</sup> While he claimed that “Phnom Penh people were considered 17 April people, and they were taken there”,<sup>1911</sup> and that “most of the prisoners were the New People”,<sup>1912</sup> he also said that at least from “1977 they were categorised the same, and anyone who commit[ted] any mistake [was] sent to Kraing Ta Chan at that time when war was happening at the border”.<sup>1913</sup> This unspecific, inconsistent, unsworn statement from a wholly unreliable civil party is insufficient even to establish that “new people” were detained at Kraing Ta Chan whatsoever.

**(e) ‘Intellectuals’ at S-21 Security Centre**

574. According to the Manichean narrative, intellectuals were often targeted throughout the DK,<sup>1914</sup> thus, for instance, one false ‘accepted truth’ that circulates widely is that if you wore glasses in the DK, you would be doomed. Indeed, as Judge Cartwright remarked at the Aspen Institute while she was adjudicating Case 002/01, “the Khmer Rouge wiped out the intelligentsia”.<sup>1915</sup> While the ‘targeting’ of intellectuals was a focus in both Case 001 and Case 002/01, the discussion in this regard was extremely limited – likely as a function of the wholesale lack of evidence in this regard. Therefore, it is only dealt with briefly here.

575. Contemporaneous documents consistently show that intellectuals and students were considered “allies” of the peasant-workers and “love[d the] revolution”.<sup>1916</sup> Furthermore, most members of the CPK highest bodies were intellectuals themselves; it would be illogical for them to target their fellows.<sup>1917</sup> In a report from Duch to Brother 03,<sup>1918</sup> Duch sought Nath’s

<sup>1909</sup> **D427**, Closing Order, para. 500.

<sup>1910</sup> See also *supra*, Chapter 4-IV-D-1, on Say Sen’s general credibility.

<sup>1911</sup> **E1/256.1**, Say Sen, T. 4 Feb 2015, p. 71, ln. 24 to p. 72, ln. 2.

<sup>1912</sup> **E1/256.1**, Say Sen, T. 4 Feb 2015, p. 59, lns 24-25.

<sup>1913</sup> **E1/256.1**, Say Sen, T. 4 Feb 2015, p. 59, ln. 25 to p. 60, ln. 3.

<sup>1914</sup> See *Case 001 E188*, Trial Judgement, para. 169; **D427**, Closing Order, para. 432.

<sup>1915</sup> See **F2/1**, Nuon Chea’s Second Appeal Additional Evidence Request, pp. 2-4; see also *infra*, Chapter 6-V-B-2, for the Defence’s discussion of the proper technical and scientific standards of the 1<sup>st</sup> January Dam.

<sup>1916</sup> **E3/11**, Flag, Sep 1977, ERN 00486234; **E3/146**, Youth, Aug-Sep 1974, ERN 00538748.

<sup>1917</sup> See also the Defence arguments in Case 002/01, which apply *mutatis mutandis* here, in **E295/6/3**, Nuon Chea’s Case 002/01 Closing Brief, paras 163, 264-266; **F16**, Nuon Chea’s Appeal Brief, paras 365-387, 395-396.

<sup>1918</sup> *I.e.* In Lorn *alias* Nat, former chief of S-21.



decision on whether to arrest several people who were professors or students.<sup>1919</sup> The basis for considering their arrest was their involvement in unlawful activities such as membership of an organisation opposing the revolution, or participating in a petition during the Sihanouk regime to have revolutionary cadres eliminated.<sup>1920</sup> These people were not sent to S-21 on the basis of their status as intellectuals but because of suspected activities against the regime. Contrary to the archetypical DK myth, no policy to specifically target intellectuals ever existed.

*(f) Subordinates and ‘Close Relations’*

*(i) Subordinates and ‘Close Relations’ at Phnom Kraol Security Centre*

576. As stated above, based on legitimate suspicions following the events involving Kham Phoun’s subordinates and relatives, Chan Toi and Neth Savat, both closely-related to Kham Phoun, were subjected to a month of temporary preventive detention at K-17, the Autonomous Sector 105 office.<sup>1921</sup> Given that secretary of Office K-16 Kham Phoun and some of his subordinates were implicated in activities of treason, suspicion of his other subordinates was legitimate.<sup>1922</sup> In any event, and as noted repeatedly above, both Chan Toi and Neth Savat were released after a month, together with their relatives,<sup>1923</sup> showing once again that suspects’ fate following preventive arrest was not predefined and depended on the results of the investigation.

*(ii) Subordinates and ‘Close Relations’ at S-21 Security Centre*

577. The Closing Order seems to suggest that subordinates or “close relations” of detainees were also targeted on a systematic basis and sent to S-21.<sup>1924</sup> The existing evidence wholly undermines this contention. In this regard, Division 310 commander Oeun’s arrest is a telling example. After his arrest, a meeting was held to inform Division 310 soldiers that their commander betrayed the Party but that they themselves, “[as] subordinates, had committed no offenses”,<sup>1925</sup> and therefore did not have to worry.<sup>1926</sup> Indeed, it seems that more than 90% of

<sup>1919</sup> E3/1052, Report from Duch to Brother 03, 27 Nov 1975.

<sup>1920</sup> E3/1052, Report from Duch to Brother 03, 27 Nov 1975, ERN 00289848.

<sup>1921</sup> See *supra*, Chapter 4-V-B-1-(c), on the legitimate factual basis for Chan Toi and Neth Savat’s arrests.

<sup>1922</sup> See *supra*, Chapter 4-IV-A-2-(b), on Kham Phoun’s relationships with Vietnam and his subordinates’ activities.

<sup>1923</sup> E1/400.1, Neth Savat, T. 11 Mar 2016, p. 54, lns 8-9; E1/399.1, Chan Toi, T. 10 Mar 2016, p. 61, lns 21-24.

<sup>1924</sup> D427, Closing Order, para 196 (“Around the same time, S-21 cadre arrested the first major Commerce Ministry cadre **closely associated with** Koy Thuon: Tit Son alias Nhem [...]”); para. 936 (“The arrest of Koy Thuon lead to the arrest of numerous CPK cadres and RAK members, in particular those **from or associated with** the Central (Old North) Zone”); para 1424, (“individuals that the Party Centre saw as political opponents and who were sent to S-21, often with their **family members or close relations** [...]”) (emphases added).

<sup>1925</sup> E3/3959, ‘WRI of Kung Kim’, ERN 00278684.

<sup>1926</sup> E3/3960, ‘DC-Cam Interview of Kung Kim’, ERN 00633883-84; E3/3959, ‘WRI of Kung Kim’, ERN 00278684; E3/5641, ‘DC-Cam Interview of Nob Hat’, ERN 00881790.

the 310 soldiers were not arrested following Oeun's arrest,<sup>1927</sup> but were sent to work in different locations instead where they performed ordinary military duties.<sup>1928</sup> Similarly, the majority of soldiers from related North Zone-affiliated Centre Divisions 450 and 920 were not arrested.<sup>1929</sup> This counter-example confirms that there was no automatic policy of arresting subordinates following their superior's arrest.

578. In sum, the evidence fails to demonstrate beyond reasonable doubt either that certain groups of people were detained in large numbers at the four security centres or through associated 'intrnal purges' within the scope of Case 002/02 at all. Even if they were, the evidence fails to undermine the Defence's contention that their detention was due to suspected participation in unlawful activities, which is clearly a legitimate and lawful basis for arrest.

### C. INTERROGATIONS WERE GENUINE SEARCHES FOR THE TRUTH AND WERE LAWFUL

579. According to the Closing Order, persons arrested and interrogated at security centres were "required to name other members of their alleged "network", routinely under torture, which was practiced in security centres nationwide".<sup>1930</sup> It further alleges that methods of interrogations, "cold", "chewing" or "hot" "appear to have been taught to security centre cadres by the sector and district cadres",<sup>1931</sup> and that the order to interrogate and ask questions originated from the "Centre and Zone levels".<sup>1932</sup> As demonstrated in Section II above, the national defence and security policy was perfectly legitimate and justified, and interrogating suspects forms part of any judicial system in the world.<sup>1933</sup>

580. No matter how loudly the Co-Prosecutors may denounce the "callousness" of the Defence's arguments in this regard, a dispassionate and rational analysis of the facts and the law as opposed to a mindless regurgitation of the Manichean narrative is a cornerstone of the

<sup>1927</sup> Oeun's couriers who were with him at the time of his arrest were not arrested, *see* E3/7523, 'DC-Cam Interview of Sem Am', ERN 00875576; *see* E3/849, Joint Statistics of Armed Forces, ERN 00183956: in March 1977, shortly after the first waves of arrest of Division 310, 450, and 920 people, there were still 6,096 in Division 310, 5,259 in Division 450, and 3,528 in Division 920.

<sup>1928</sup> Some Division 310 soldiers were sent to Kampong Chhnang Airfield, *see* E3/7592, 'DC-Cam Interview of Lay Ean', ERN 00686100; Some Division 310 soldiers were sent to farm at Kab Srov, *see* E3/7523, 'DC-Cam Interview of Sem Am', ERN 0087556, Division 310 soldiers sent to farm at Kab Srov were considered "good people" *see* E3/7523, 'DC-Cam Interview of Sem Am', ERN 00875568; *see also* E1/474.1, Noem Kimsreang, T. 15 Sep 2016, p. 50, lns 23-24 (subordinates were usually sent to farm at Prey Sar).

<sup>1929</sup> *See* E3/849, Joint Statistics of Armed Forces, ERN 00183956: in March 1977, shortly after the first waves of arrest of Division 310, 450, and 920 people, there were still 6,096 in Division 310, 5,259 in Division 450, and 3,528 in Division 920.

<sup>1930</sup> D427, Closing Order, para. 180.

<sup>1931</sup> D427, Closing Order, para. 180.

<sup>1932</sup> D427, Closing Order, para. 180.

<sup>1933</sup> *See supra*, Chapter 4-II-C-1-(b), on the legitimate purpose of interrogation and arrest.

Defence's duty – not to mention, of courts of law.<sup>1934</sup> Such an analysis requires a consideration of the particular circumstances which DK faced at the time, and particularly the Khmer Republic's dismantling of judicial institutions; thus, the system the CPK had to build upon cannot be compared with that of today's Cambodia.<sup>1935</sup> Rather, it should be viewed in light of the situation prior to DK and immediately after DK. This applies equally to the interrogation process. Contrary to what the Closing Order alleges,<sup>1936</sup> the purpose of interrogation was to investigate, rather than to force detainees to confess to pre-determined facts, as described below. Moreover, the Defence's position that interrogations were part of a genuine investigative process to ascertain the truth is clearly supported by the evidence adduced at trial.<sup>1937</sup> While the Defence does not deny that mistreatments which may have, at times, reached the level of torture, may have occurred at S-21, this was the exception, conducted by people who were deviating from the official policy, rather than the implementation of a nationwide state policy. In any case, these incidents have not been established beyond reasonable doubt.

581. The present Part starts with a discussion of the Khmer terms '*chamloay*' and '*tearunakamm*', demonstrating that their mistaken standard translation at the Tribunal as respectively 'confessions' and 'torture' has led to a fundamental misrepresentation of the actual evidence from the very start, which must be corrected.<sup>1938</sup> The absence of an official policy on the use of torture is discussed next, followed by an explanation of the legitimate truth seeking purpose of interrogations and finally, the allegations of torture themselves.

## 1. The Misinterpretation of Khmer Terms Has Led to Misconceptions

### (a) '*Chamloay*'

582. In respect of the term '*chamloay*', the language used in the proceedings is revealing. Indeed, the original Khmer word used to describe the document produced after an interrogation – *i.e.*, a suspect's statement – is '*chamlaoy*' (ចម្លើយ) which literally means 'statement of'. However, this word has been wrongly translated as the word 'confession', which carries with it the implication of the author's admission of guilt. As a result, instead of being viewed through the blinding, one-sided lens of the Manichean narrative that 'confessions' had to be produced

<sup>1934</sup> See *supra*, Chapter 2-II-B-3-(a).

<sup>1935</sup> See *supra*, Chapter 4-II-A.

<sup>1936</sup> D427, Closing Order, para. 455.

<sup>1937</sup> See also *supra*, Chapter 4-II-C-1-(b) and (c), on the legitimate factual basis for arrests.

<sup>1938</sup> See also *supra*, Chapter 2-III-B-1, on the severe impact of misinterpretations and mistranslations in Case 002/02.

to feed an evil, paranoid urge to eradicate all opponents, the circumstances surrounding the taking of each suspect's statement must be carefully and dispassionately examined, in order to determine whether it did, in fact, contain a confession of guilt. As demonstrated below, the paucity of details contained in the evidence, however, actually precludes such analysis.

**(b) 'Tearunakamm'**

583. The Khmer word which has been translated and interpreted as 'torture' during the trial, '*tearunakamm*' (ទារុណកម្ម), has several meanings. The Trial Chamber President himself noted that the term might even be used to describe discipline of children by parents, which "could not be legally defined as torture".<sup>1939</sup> Duch, perhaps losing sight of his crusade to incriminate Nuon Chea as much as possible for a moment, confirmed the word's dual meaning:

So in ordinary term, "tearunakam[m]", it can be like a mother hitting a child or a teacher hitting a pupil or even a monk hitting his student like my case, I was hit by my professor who was a monk. So it was referred to as well as "tearunakamm", as torture, but in the intention to improve or to correct a person, so that's all.<sup>1940</sup>

584. Prak Khan, an S-21 interrogator, also testified that he had used the word '*tearunakamm*' to refer to beatings with a small tree branch of the size of a pen, which only left some marks on the detainees that would disappear "within a day or two".<sup>1941</sup>

585. In contrast, it must be recalled that the term "torture" is a legal characterisation of a crime, the constitutive elements of which must be established beyond reasonable doubt before a finding can be reached. The mere fact that a witness or civil party used the term "torture" does not establish beyond reasonable doubt that facts reaching the requisite level of gravity to qualify as torture, or meeting the other constitutive elements of the crime, have taken place, given the variance in the possible meanings of "torture". It follows that when an ordinary fact witness claims that there is "torture", no definite conclusion can be drawn as to whether torture in the legal sense has occurred. The same applies to documentary evidence where the term appears, such as suspects' statements, detainee lists, or interrogators' notebooks. Specific and detailed evidence if needed, and, as explained below, except for general and unspecified statements that this person or that person has been tortured, or a few photos of injured and bloodstained bodies for whom it is impossible to determine the causes of death or wounds, the evidence does not

<sup>1939</sup> E1/423.1, Prak Khan, T. 27 Apr 2016, p. 66, ln. 19 to p. 67, ln. 5.

<sup>1940</sup> E1/441.1, Duch, T. 21 Jun 2016, p. 25, lns 10-25.

<sup>1941</sup> E1/425.1, Prak Khan, T. 2 May 2016, p. 3, lns 20-24, p. 6, ln. 23 to p. 8, ln. 5, p. 23, ln. 23 to p. 24, ln. 3.

permit the reaching of a finding that torture occurred on a mass scale pursuant to a nationwide policy beyond reasonable doubt.

## 2. There Was No Policy on Torture

586. The Closing Order alleges that there was a “torture system” in place under DK, “dictated from above”.<sup>1942</sup> However, there is no reference to the use of torture in official DK documents such as minutes of meetings, Revolutionary Flags or Revolutionary Youths. There is also no evidence of any order issued by any government representative, any JCE member, and even less so Nuon Chea, on the use of torture. There was therefore no official policy promoting, encouraging, or instructing the use of torture. On the contrary, statements obtained under torture were considered unreliable by Son Sen, and hence the other Standing Committee members. Indeed, Son Sen gave very specific instructions to Duch regarding the pivotal interrogation of Koy Thuon.<sup>1943</sup> Various annotations from both Son Sen and Duch on S-21 suspects’ statements also show that they were highly critical of the information recorded.<sup>1944</sup>

587. While the existence of a policy can in theory be deduced from circumstantial evidences, it must be the only reasonable conclusion from the existence of a systematic and widespread use of torture existed throughout DK. As discussed below, such finding is precluded beyond reasonable doubt. The only evidence on the alleged CPK policy or principles on ‘*tearunakamm*’ is from Duch and a few unauthenticated S-21 interrogators’ notes which appear to have recorded what Duch taught them during study sessions.<sup>1945</sup> Given Duch’s problematic credibility and the fact that there is no independent evidence corroborating his words, it cannot be established beyond reasonable doubt that there was any CPK policy on *tearunakamm*.

588. In fact, there is no evidence of torture or mistreatment during interrogation in three out of the four charged security centres: Kraing Ta Chan, Au Kanseng and Phnom Kraol. As for S-21, what the evidence shows is that, when acts which could amount to torture or inhumane and degrading treatments occurred, crimes were committed outside of any policy by individuals

<sup>1942</sup> **D427**, Closing Order, para. 1360.

<sup>1943</sup> **E1/54.1**, Duch, T. 27 Mar 2012, p. 14, lns 14-19; **E1/435.1**, Duch, T. 9 Jun 2016, p. 22, lns 8-13; **E1/437.1**, Duch, T. 14 Jun 2016, p. 60, lns 17-24, p. 73, lns 3-9; **E1/441.1**, Duch, T. 21 Jun 2016, p. 12, lns 3-7, p. 19, lns 19-24.

<sup>1944</sup> See e.g. **E3/3652**, ‘The summary of the responses of Lang Pring *alias* Lang Phat’, Sep 1975, ERN 00780840; **E3/1604**, S-21 Statement of Koy Thuon, ERN 00773088, 00773089, 00773114, 00773116 (Some of the annotations are not signed but there is a striking resemblance to Son Sen’s handwriting For comparison, See e.g. **E3/1562**, KH 00174764; **E3/1127**, KH 00162487; **E3/1047**, KH 00002455).

<sup>1945</sup> **E3/833**, **E3/834**, and **E3/8368**.

acting autonomously in violation of the policy.<sup>1946</sup> In any event, even if crimes did occur at S-21, S-21 was a specific high security prison. Therefore, the absence of such crimes at the other security centres shows the absence of a nationwide system of torture in DK.

### **3. Rather than Being There to ‘Produce Confessions’, the Interrogation Stage was Part of a Genuine Investigative Process to Ascertain the Truth**

589. Much like how someone suspected of a criminal action in any nation-state would be interrogated by the police, individuals suspected of criminal activities during DK were interrogated. Rather than being part of a circular process aiming to ‘produce confessions’ in order to feed the CPK’s allegedly evil and paranoid plan to destroy all opposition, the interrogation process had the same purpose as any state’s: to investigate allegations and determine further actions. Furthermore, while a period of detention may have followed the interrogation, it would have been an appropriate time to review the information given during the interrogation. In addition, there is unequivocal evidence that, subject to the answers given, there could be a relaxation of detention conditions or an eventual release.<sup>1947</sup>

#### **(a) The Interrogation Process at Kraing Ta Chan Security Centre**

590. At trial, the only former Kraing Ta Chan detainee to offer credible live testimony as to their personal experience of being interrogated at Kraing Ta Chan was zone hospital medic Vong Sarun. As discussed above, she was questioned about unlawful activity she was alleged to have undertaken, including concealing a pistol, and being introduced by her husband to a spy network or participating in those spy networks.<sup>1948</sup> Vong Sarun added that she was asked about her educational background and instructed to write her biography, detailing what she, her parents, and her husband had done prior to the DK.<sup>1949</sup> Moreover, after writing that biography, Vong Sarun said that she was never interrogated again.<sup>1950</sup> Instead, a week later, Vong Sarun was assigned as a detainee who could work outside the centre, alongside, *inter alia*, detainee Hun Kimseng’s children.<sup>1951</sup> Vong Sarun further recalled that another detainee she had been

<sup>1946</sup> See *supra*, Chapter 4-II-C-2, on local authorities’ deviations from the official policy.

<sup>1947</sup> See *infra*, Chapter 4-V-E-4-(c).

<sup>1948</sup> See *supra*, Chapter 4-III-B-3-(c), on alleged arbitrariness of detention of spouses of detainees.

<sup>1949</sup> E1/300.1, Vong Sarun, T. 18 May 2015, p. 31, lns 1-14.

<sup>1950</sup> E1/300.1, Vong Sarun, T. 18 May 2015, p. 34, ln. 15.

<sup>1951</sup> E1/300.1, Vong Sarun, T. 18 May 2015, p. 34, lns 15-18.

detained with – Han, a Hospital 22 medic who the Defence requested as a witness<sup>1952</sup> – had recounted having a similar interrogation experience.<sup>1953</sup> Neither mentioned being mistreated.

**(b) *The Interrogation Process at Au Kanseng Security Centre***

591. Au Kanseng’s chief interrogator Chin Kimthong (2-TCW-900) testified that the interrogation method in place there was to have detainees write suspects’ statements before questioning them further,<sup>1954</sup> and to record their answers without alteration.<sup>1955</sup> Former detainees concurred that they were each interrogated only once, during which time they were neither forced to provide certain answers nor mistreated in any way.<sup>1956</sup> There was no instruction on what to do if a person refused to cooperate with the interrogation,<sup>1957</sup> and certainly no orders on using torture in the legal sense of the word. Moreover, as discussed above,<sup>1958</sup> subject to the assessment of each case after interrogation, a relaxation of detention conditions or eventual release could result, as also discussed above at Part B-2-(b)-(ii).

**(c) *The Interrogation Process at Phnom Kraol Security Centre***

592. The Closing Order alleges that “[i]nterrogations included questioning the prisoners about their alleged links to the CIA and/or Vietnamese networks”.<sup>1959</sup> Neth Savat, who was detained for a month at the Autonomous Sector 105 office, said that he was questioned only once about the person who “inducted [him] into the Party.”<sup>1960</sup> He, fellow detainee Chan Toi, and some of their relatives, were released one month later. This is further proof that investigations conducted within that month of detention clearly confirmed that they were not guilty and prompted their immediate release. There also is no evidence of torture or mistreatment or either witness or at Phnom Kraol more generally.

<sup>1952</sup> See **E346**, Nuon Chea’s Tram Kok and Kraing Ta Chan Witnesses Request, paras 13-14; see also **E346/3**, Reasoned Decision on Nuon Chea’s Tram Kok and Kraing Ta Chan Witnesses Request, para. 39.

<sup>1953</sup> **E1/300.1**, Vong Sarun, T. 18 May 2015, p. 73, lns 20-22, p. 74, lns 6-8.

<sup>1954</sup> **E1/405.1**, Chin Kimthong (2-TCW-900), T. 21 Mar 2016, p. 87, lns 14-17; **E1/406.1**, Chin Kimthong (2-TCW-900), T. 22 Mar 2016, p. 52, lns 10-11.

<sup>1955</sup> **E1/405.1**, Chin Kimthong (2-TCW-900), T. 21 Mar 2016, p. 67, lns 19-25.

<sup>1956</sup> **E1/395.1**, Phon Thol, T. 2 Mar 2016, p. 39, lns 1-20, p. 58, ln. 16, p. 60, lns 13-24, p. 80, ln. 4; **E1/396.1**, Moeurng Chandy, T. 3 Mar 2016, p. 42, lns 1-25; **E3/9326**, ‘WRI of Mao Phat’, ERN 00272580; **E3/9327**, ‘WRI of Sam Soem’, ERN 00272620.

<sup>1957</sup> **E1/405.1**, Chin Kimthong (2-TCW-900), T. 21 Mar 2016, p. 87, ln. 25 to p. 88, ln. 1.

<sup>1958</sup> See *supra*, Chapter 4-V-B-2-(b), on releases at Au Kanseng.

<sup>1959</sup> **D427**, Closing Order, para. 640.

<sup>1960</sup> **E1/400.1**, Neth Savat, T. 11 Mar 2016, p. 37, ln. 12.

**(d) *The Interrogation Process at S-21 Security Centre***

593. Former S-21 interrogator Prak Khan testified that before each interrogation, he was only given a short note – by Suos Thy – with the detainee’s name, origin, and cell number on it.<sup>1961</sup> He asked the detainees questions but did not feed them answers.<sup>1962</sup> Former S-21 interrogator Lach Mean also testified that the content of suspects’ statements was completely up to the detainees,<sup>1963</sup> and that Duch and Hor instructed the interrogators to carefully examine the answers to find the truth.<sup>1964</sup> This corroborates a handwritten document which appears to be the note of an S-21 staff member. The note states, “[t]he important thing is that we do not press on names, do not lead them to talk, or beat them to say what we want.”<sup>1965</sup> Suspects’ statements at S-21 were always very detailed, beginning with the story of the detainees from the time before the revolution to his or her date of arrest. Logically, such a detailed account could not have been shaped by interrogators or completely made up by the detainee himself or herself.

594. Nevertheless, contemporaneous documents show that both Son Sen and the S-21 chiefs Duch and his predecessor and superior Ta Nath were particularly cautious and critical of the information recorded in S-21 suspects’ statements and were analysing and verifying the information in a genuine attempt to ascertain the truth.<sup>1966</sup> Indeed, inconsistencies were often highlighted, and further investigations were requested when the statements were not consistent, just like the police would request in any country in the world following a suspect’s statement. For instance, annotations on a summary of the S-21 suspect’s statement of Lang Pring *alias* Lang Phat signed by *Ta Nat* indicate that some people implicated in the statement were already “arrested” while others were either “requested to be arrested”, or labelled as “must be tracked”.<sup>1967</sup> In response, Son Sen instructed further investigation by annotating the S-21 suspect’s statement as follows: “1. Examine and monitor the factories; 2. Advise contacting the Industry bases and rural bases. Agree [illegible] 3. Examine further”.<sup>1968</sup> Similarly, following

<sup>1961</sup> E1/423.1, Prak Khan, T. 27 Apr 2016, p. 63, lns 9-12.

<sup>1962</sup> E1/423.1, Prak Khan, T. 27 Apr 2016, p. 80, lns 17-18; E1/424.1, Prak Khan, T. 28 Apr 2016, p. 18, lns 13-17.

<sup>1963</sup> E1/422.1, Lach Mean, T. 26 Apr 2016, p. 20, lns 6-9, p. 20, ln. 22 to p. 21, ln. 2.

<sup>1964</sup> E1/421.1, Lach Mean, T. 25 Apr 2016, p. 94, lns 4-10; E1/422.1, Lach Mean, T. 26 Apr 2016, p. 70, ln. 20 to p. 71, ln. 10.

<sup>1965</sup> E3/8368, S-21 Notes, ERN 00225397; *see also*, ERN 00225393.

<sup>1966</sup> *See e.g.* E3/1047, ‘Instructions from Son Sen to Duch’, 5 Oct 1977; E3/3652, ‘The summary of the responses of Lang Pring *alias* Lang Phat’, Sep 1975, ERN 00780840; E3/1604, S-21 Statement of Koy Thuon, ERN 00773088, 00773089, 00773114, 00773116 (Some of the annotations are not signed but there is a striking resemblance to Son Sen’s handwriting. For comparison of Son Sen’s handwriting, *See e.g.* E3/1562, KH 00174764; E3/1127, KH 00162487; E3/1047, KH 00002455).

<sup>1967</sup> E3/3652, Summary of responses of Lang Pring *alias* Lang Phat, ERN 00780840.

<sup>1968</sup> E3/3652, Summary of responses of Lang Pring *alias* Lang Phat, ERN 00780840.



the grenade incident near the royal palace in 1976, the culprit Yim Sambath's S-21 suspect's statement was meticulously analysed against other evidence and additional investigations were carried out to find corroborative evidence.<sup>1969</sup> A significant number of S-21 lists bear annotations such as "suspended",<sup>1970</sup> "in progress"<sup>1971</sup>, or "postponed",<sup>1972</sup> which confirms that additional investigations were conducted alongside interrogations in order to verify the information and to gather corroborative evidence. Evidence also shows that authorities that had sent people to S-21 often contacted Duch subsequently to follow up on the interrogation, with a view to determining whether the suspects were actually responsible for alleged crimes.<sup>1973</sup> All of the above, when viewed dispassionately rather than through the lens of Manichean 'accepted truths', clearly shows that S-21 suspects' statements were a real means of investigation and not just a pre-determined written statement of guilt.

#### **4. There Are No Reliable, Detailed, or Specific Accounts of Torture**

595. Consistent with the recurring theme of the trial in Case 002/02, the Co-Investigating Judges' and the Co-Prosecutors' grand statements about the existence of systematic and widespread torture are simply unsupported by the evidence.<sup>1974</sup> There is no evidence of acts which could amount to torture at Kraing Ta Chan, Au Kanseng and Phnom Kraol. Regarding S-21, evidence shows that even if torture took place, it was as a result of individual acting autonomously rather than pursuant to orders or policy.

##### ***(a) Alleged Acts of Torture at Kraing Ta Chan Security Centre***

###### ***(i) Alleged Methods of Torture Debunked at Trial***

596. Key aspects of the evidence related to allegations of torture at Kraing Ta Chan collapsed in court. As discussed above, one method of torture highlighted in the Co-Prosecutors' Final Submission and which is regarded as an 'accepted truth' of what happened at Kraing Ta Chan and other security centres like it – *i.e.*, the removal and consumption of detainees' livers – was undermined through the live evidence at trial of two guards who testified that this did not occur (as opposed to the unsworn statements of two unreliable civil parties who suggested that it

<sup>1969</sup> **E3/7397**, S-21 Statement of Yim Sambath, ERN 00284005; *see also* **E3/822**, Meeting with Division 290 and Division 170, 16 Sep 1976, ERN 00937116; *see also supra*, Chapter 3-V-B-2 and Chapter 3-V-C-2.

<sup>1970</sup> **E3/2010**, East Zone Commerce and Staff Officer Prison List, ERN 00887845, 00887851, 00887857-58.

<sup>1971</sup> **E3/1707**, Prisoner List from Social Work and Foreign Affairs Ministry, ERN 00183866; **E3/2177**, Prisoner List From Ministry of Foreign Affairs and Ministry of Education, ERN 00181699.

<sup>1972</sup> **E3/1707**, Prisoner List from Social Work and Foreign Affairs Ministry, ERN 00183866.

<sup>1973</sup> **E3/8391**, Letter from An to Duch, 6 Jan 1977; **E3/1043**, Letter from Met to Duch, 10 Aug 1977.

<sup>1974</sup> *See supra*, Chapter 1-III.

did).<sup>1975</sup> Another alleged method that failed to withstand the scrutiny of trial was that plastic bags were used to hood and/or suffocate detainees during interrogation.<sup>1976</sup> Civil party Meas Sokha's account in this regard fails to carry any probative value whatsoever, in light of his absolute lack of credibility, as already discussed above.<sup>1977</sup> In addition, two Kraing Ta Chan guards who initially testified that plastic bag-torture was systematically used in interrogations – Van Soeun and Saut Saing – subsequently diminished this testimony under cross-examination, with Van Soeun explaining that in fact, he never witnessed any interrogations at all,<sup>1978</sup> and Saut Saing qualifying that he could only guess that a plastic sheet was used in one interrogation he witnessed from afar.<sup>1979</sup> Thus, the use of plastic bags in interrogations has not been established beyond reasonable doubt. There is therefore not reliable live evidence at trial that events which could legally qualify as torture occurred at Kraing Ta Chan.

(ii) Evidence on the Nature of Interrogations at Kraing Ta Chan

597. Both the Closing Order and Final Submission detail the gruesome interrogation methods purportedly adopted at Kraing Ta Chan, alleging that torture routinely took place.<sup>1980</sup> The evidence upon which the Closing Order relies is eyewitness evidence from detainees and guards who saw interrogations from a distance<sup>1981</sup> – as opposed to interrogated prisoners or alleged interrogators. None of Kraing Ta Chan's interrogators testified at trial, and its former guards were unable to offer eyewitness evidence of what occurred during interrogations. Indeed, there was a cassava plantation between the interrogation room and detention buildings,<sup>1982</sup> and a banana plantation surrounding Kraing Ta Chan's inner perimeter.<sup>1983</sup> In fact, witness and former detainee Kev Chandara described Kraing Ta Chan as having been a plantation prior to becoming a re-education centre.<sup>1984</sup>

<sup>1975</sup> See *supra*, Chapter 2-II-A and Chapter 4-IV-B-1, on propaganda and 'accepted truths'.

<sup>1976</sup> **D427**, Closing Order, para. 508; **D390**, Co-Prosecutors' Final Submission, para. 487.

<sup>1977</sup> See *supra*, Chapter 4-IV-D-1-(b), on the credibility of Meas Sokha.

<sup>1978</sup> **E1/271.1**, Van Soeun, T. 4 Mar 2015, p. 90, lns 15-25.

<sup>1979</sup> **E1/282.1**, Saut Saing, T. 25 Mar 2015, p. 17, ln. 12- p. 18, ln. 1.

<sup>1980</sup> **D427**, Closing Order, paras 507-9; **D390**, Co-Prosecutors' Final Submission, para. 487.

<sup>1981</sup> **D427**, Closing Order, para. 508: "[f]ormer Kraing Ta Chan prisoners and guards witnessed a variety of methods being used to mistreat prisoners during interrogation".

<sup>1982</sup> **E1/300.1**, Vong Sarun, T. 18 May 2015, p. 49, ln. 21 to p. 50, ln. 3; **E1/256.1**, Say Sen, T. 4 Feb 2015, p. 76, lns 14-19; **E1/257.1**, Say Sen, T. 5 Feb 2015, p. 35, ln. 23; see also **E1/281.1**, Saut Saing, T. 24 Mar 2015, p. 45, lns 10-13.

<sup>1983</sup> **E1/271.1**, Van Soeun, T. 4 Mar 2015, p. 82, lns 4-5; **E1/267.1**, Srei Than, T. 23 Feb 2015, p. 7, lns 21-24.

<sup>1984</sup> **E1/255.1**, Kev Chandara, T. 2 Feb 2015, p. 85, lns 2-4.

598. The significance of these plantations is that their existence completely obstructed a proper view of interrogations.<sup>1985</sup> Even Say Sen, who likely had an interest in exaggerating the events at Kraing Ta Chan,<sup>1986</sup> said that they could “only see the roof, not the [interrogation] building itself due to the thickness of the plantation”.<sup>1987</sup> The obstruction of the cassava plantation casts more than reasonable doubt on any evidence from detainees and guards who claim to have witnessed the use of torture from a distance. In any event, the only evidence offered in this regard going beyond an anecdotal level relates to ‘plastic bag’ torture, and as just discussed, the evidence in this regard was inconclusive.

599. Only one witness offered an eyewitness account about an interrogation at Kraing Ta Chan which showed that torture was not used whatsoever. As briefly noted above, witness Vong Sarun testified that she was not physically mistreated at all while being interrogated,<sup>1988</sup> and that another detainee she knew, Han (who the Chamber declined to summons<sup>1989</sup>), also suffered no physical mistreatment.<sup>1990</sup> In short, Vong Sarun’s evidence precludes a conclusion beyond reasonable doubt that torture was employed during interrogations at Kraing Ta Chan. Beyond this, the only other evidence is Vong Sarun’s claim that she heard – not saw – the sound of whipping during an interrogation on one occasion,<sup>1991</sup> and that of Saut Saing who described only in generalities that people would be beaten by clubs and rattan whips<sup>1992</sup> but said he did not himself witness any beatings or physical acts.<sup>1993</sup> None of this evidence is sufficient to substantiate a finding beyond reasonable doubt that torture was used at Kraing Ta Chan.

(iii) Information in the ‘Tram Kok District Records’

600. Even if the ‘Tram Kok District Records’ could be considered reliable,<sup>1994</sup> these documents suggest that the use of ‘hot methods’ during interrogations at Kraing Ta Chan were the exception rather than the rule. For example, two lengthy, purported Kraing Ta Chan

<sup>1985</sup> E1/256.1, Say Sen, T. 4 Feb 2015, p. 76, lns 18-19; E1/257.1, Say Sen, T. 5 Feb 2015, p. 35, lns 22-24; E1/267.1, Srei Than, T. 23 Feb 2015, p. 7, lns 21-24; *see also* E1/300.1, Vong Sarun, T. 18 May 2015, p. 38, lns 21-24.

<sup>1986</sup> *See supra*, Chapter 4-IV-D-1-(a), on the credibility of Say Sen.

<sup>1987</sup> E1/256.1, Say Sen, T. 4 Feb 2015, p. 76, lns 18-19; E1/257.1, Say Sen, T. 5 Feb 2015, p. 35, lns 22-24.

<sup>1988</sup> E1/300.1, Vong Sarun, 18 May 2015, p. 31, ln. 14, p. 34, lns 4-11.

<sup>1989</sup> *See* E346, Nuon Chea’s Tram Kok and Kraing Ta Chan Witnesses Request, paras 13-14; *see also* E346/3, Reasoned Decision on Nuon Chea’s Tram Kok and Kraing Ta Chan Witnesses Request, para. 39.

<sup>1990</sup> E1/300.1, Vong Sarun, 18 May 2015, p. 74, ln. 4; *see also supra*, Chapter 4-V-C-3-(a).

<sup>1991</sup> E1/300.1, Vong Sarun, T. 18 May 2015, p. 38, ln. 22 to p. 39, ln. 6.

<sup>1992</sup> E1/271.1, Saut Saing, T. 4 Mar 2015, p. 29, lns 15-22.

<sup>1993</sup> E1/282.1, Saut Saing, T. 25 Mar 2015, p. 21, ln. 16 to p. 22, ln. 5.

<sup>1994</sup> This is questionable, as the Defence has explained, *supra*, at Chapter 4-IV-F-1, on the reliability of the ‘Tram Kok District Records’.

interrogators' notebooks record the use of 'hot methods' against 2 of 105 detainees listed<sup>1995</sup> and 4 of 107 detainees respectively.<sup>1996</sup> Only one of these notebook entries indicates what 'hot method' was employed, explaining that the detainee was "beaten".<sup>1997</sup> Without any further information on the nature of such beating, this reference is insufficient to substantiate beyond reasonable doubt that the beating rose to the threshold of torture.

601. There is also no evidence to suggest what the alleged 'hot methods' at Kraing Ta Chan were. First Kraing Ta Chan chief Phan Chhen discussed this concept in court, and only testified that he was "told by someone" that "hot methods" meant "to use other resorts, other means, to force the prisoner to confess", including '*tearunakamm*'.<sup>1998</sup> However, as mentioned above, '*tearunakamm*' does not automatically describe acts of severe gravity such as those which could qualify as torture.<sup>1999</sup> This is, again, insufficient to substantiate beyond reasonable doubt that even if 'hot methods' were used at Kraing Ta Chan, something which is not established on the basis of the live evidence, they were of such nature and degree so as to be constitute the crime against humanity of torture. Finally, it should be noted that these notebook entries further suggest that whatever the "hot methods" were, they were used, on average, in between 2-4% of cases, which precludes a finding that their use was widespread and systematic. Further, there is no evidence, even taking the interrogators' notebooks at face value, that the use of such methods was implemented pursuant to an order or policy from the Standing or Central Committees.

602. The Co-Prosecutors attempted to dismiss this argument by suggesting that there was no basis to assert that the use of torture would have been recorded on every occasion and thus it was not probative to rely upon the evidence in this way.<sup>2000</sup> In doing so, however, the Co-Prosecutors have apparently forgotten that it is they, and not the Defence, who bear the burden of proof in Case 002/02. It is entirely appropriate for the Defence to highlight these aspects of the evidence and the doubt to which they clearly give rise. It is incumbent upon the Co-Prosecutors to substantiate, beyond reasonable doubt, their claim that torture was used at Kraing Ta Chan, and **not** for the Defence to disprove this claim beyond reasonable doubt.<sup>2001</sup>

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<sup>1995</sup> **E3/4095**, Kraing Ta Chan Notebook, ERN 00747279, 00747287; *see also* **E1/294.1**, Documents Presentation, T. 28 Apr 2015, p. 16, ln. 15 to p. 17, ln. 16.

<sup>1996</sup> **E3/4092**, Kraing Ta Chan Notebook, ERN 00834805, 00834816, 00834822; *see also* **E1/294.1**, Documents Presentation, T. 28 Apr 2015, p. 17, ln. 17 to p. 18, ln. 7.

<sup>1997</sup> **E3/4095**, Kraing Ta Chan Notebook, ERN 00747279, 00747287.

<sup>1998</sup> **E1/269.1**, Phan Chhen, 25 Feb 2015, p. 17, ln. 25 to p. 18, ln. 4.

<sup>1999</sup> *See supra*, Chapter 4-V-C-1, on the misinterpretation of '*tearunakamm*'.

<sup>2000</sup> **E1/295.1**, Objections to Document Presentations, T. 30 Apr 2015, p. 11, lns 20-25.

<sup>2001</sup> *See also supra*, Chapter 2-III-B, on the new 'rules of the game' and the proper assessment of evidence.

**(b) *Alleged Acts of Torture at Au Kanseng Security Centre***

603. There was no systematic mistreatment of detainees during interrogations at Au Kanseng. As to the alleged isolated instances of mistreatment, the evidence is insufficient to prove beyond reasonable doubt that they took place as alleged. In any event, the evidence does not substantiate that any alleged mistreatment was authorised by Au Kanseng’s leadership. Moreover, the lack of evidence on the circumstances of the alleged mistreatment renders it impossible to assess whether such treatment was of a gravity and nature comparable to crimes against humanity.<sup>2002</sup>

**(c) *Alleged Acts of Torture at Phnom Kraol Security Centre***

604. The Closing Order, relying purely on untested out-of-court statements, alleges that “[s]everal witnesses state that detainees were seriously mistreated during interrogations at Phnom Kraol.”<sup>2003</sup> As stated above, however, such statements have very limited inherent probative value and cannot constitute the sole basis for a conviction.<sup>2004</sup> Moreover, the limited live evidence heard contradicts this allegation. Chan Toi and Neth Savat, who were preventively detained for a month at Autonomous Sector 105 office K-17, did not mention any acts of torture.<sup>2005</sup> There is thus no reliable evidence at all that acts of torture occurred at Phnom Kraol.

**(d) *Alleged Acts of Torture at S-21 Security Centre***

605. According to Duch, he taught interrogators that “S-21 had to adhere to the principles set by the Party”, and that “[t]orture had to be conducted if it was necessary.”<sup>2006</sup> He testified that the use of ‘*tearunakamm*’ was in general “inevitable” in any police office at that time: not only S-21, but also police offices in the Issarak era in the 1940s and 1950s.<sup>2007</sup> However, this does not mean that ‘*tearunakamm*’ was inevitable in each case. At S-21, ‘*tearunakamm*’ was the “last resort” and a supplementary means of interrogation only used when it was “unavoidable” in a specific case.<sup>2008</sup> Duch further alleged, however, that in most cases at S-21, ‘*tearunakamm*’ was unavoidable,<sup>2009</sup> but this allegation is completely unreliable. Firstly, as mentioned above, Duch was “locked in his office” for “up to 18 hours a day”, and was “not aware of 90% of the

<sup>2002</sup> See *infra*, Chapter 4-VI, on the crimes charged.

<sup>2003</sup> **D427**, Closing Order, para. 639.

<sup>2004</sup> See *supra*, Chapter 2-III-B, on the new ‘rules of the game’ and the proper assessment of evidence.

<sup>2005</sup> **E1/400.1**, Neth Savat, T. 11 Mar 2016, p. 36, ln. 20.

<sup>2006</sup> **E1/441.1**, Duch, T. 21 Jun 2016, p. 14, lns 11-13, p. 17, lns 10-13.

<sup>2007</sup> **E3/62**, Testimony of Duch (Case 001), p. 61, lns 21-23, p. 64, lns 5-9; **E3/5791**, Testimony of Duch (Case 001), p. 15, lns 1-4.

<sup>2008</sup> **E1/441.1**, Duch, T. 21 Jun 2016, p. 26, ln. 18 to p. 27, ln. 11; **E1/54.1**, Duch, T. 27 Mar 2012, p. 12, lns 4-7; **E3/525**, Testimony of Duch (Case 001), p. 19, lns 21-23; **E3/8368**, S-21 Notes, ERN 00225392.

<sup>2009</sup> **E1/441.1**, Duch, T. 21 Jun 2016, p. 17, lns 11-13.

tasks at S-21”.<sup>2010</sup> He could not have been aware of the circumstances of each interrogation. Secondly, Duch said the interrogators had to note down on their summary of each S-21 suspect’s statement whether they had used ‘*tearunakamm*’ in extracting the said statement.<sup>2011</sup> However, among the hundreds of alleged S-21 statements in evidence, only a few bear annotations indicating the use of *tearunakamm*. This clearly shows, therefore, that ‘*tearunakamm*’ was not used in “most” cases as alleged by Duch.

606. As to interrogation methods, there is evidence that Duch taught the S-21 interrogators three different methods: the “cold” (no ‘*tearunakamm*’), the “hot” (‘*tearunakamm*’), and the “chewing” (rarely ‘*tearunakamm*’) methods.<sup>2012</sup> Regarding ‘*tearunakamm*’ techniques, Duch testified that he, purportedly with the agreement of Son Sen, only permitted four techniques to be used at S-21: beating, electric shock, suffocation by plastic bags, and “waterboarding”.<sup>2013</sup> He said he learned these techniques from the police of the Khmer Republic regime, the French regime, and the ‘*Yvon*’.<sup>2014</sup> He also testified that “[*tearunakamm*] which was beyond beating was however not the core or fundamental means employed by S-21.”<sup>2015</sup> Regarding the alleged incidents of pulling off the toenails of detainees, Prak Khan claimed that Duch taught the interrogators this technique during study sessions.<sup>2016</sup> Yet, Duch was adamant that he disapproved of such practice.<sup>2017</sup> Second, another S-21 interrogator who attended study sessions held by Duch was oblivious of such practice.<sup>2018</sup> Furthermore, the interrogators’ notes of the study sessions did not contain any information on such practice.<sup>2019</sup> Prak Khan’s evidence on this subject is therefore widely unreliable. Duch was also adamant that he was only made aware of one such incident by Hor, and that he strictly prohibited this practice afterwards because it was “criminal” and against CPK policy.<sup>2020</sup> Duch also testified that after hearing his report on

<sup>2010</sup> E3/1578, ‘WRI of Duch’, ERN 00194552; E1/441.1, Duch, T. 21 Jun 2016, p. 51, lns 7-10; *see also supra*, Chapter 4-V-C-1-(b).

<sup>2011</sup> E1/435.1, Duch, T. 9 Jun 2016, p. 16, lns 11-13, p. 18, lns 2-4.

<sup>2012</sup> E1/424.1, Prak Khan, T. 28 Apr 2016, p. 65, lns 4-10; E3/1570, ‘WRI of Duch’, ERN 00154194-95.

<sup>2013</sup> E1/435.1, Duch, T. 9 Jun 2016, p. 10, ln. 18 to p. 12, ln. 3.

<sup>2014</sup> E3/5794, Testimony of Duch (Case 001), p. 71, lns 10-25; E1/435.1, Duch, T. 9 Jun 2016, p. 11, lns 13-25.

<sup>2015</sup> E1/54.1, Duch, T. 27 Mar 2012, p. 12, lns 4-6.

<sup>2016</sup> E1/425.1, Prak Khan, T. 2 May 2016, p. 41, lns 20-25.

<sup>2017</sup> E1/436.1, Duch, T. 13 Jun 2016, p. 25, lns 13-19, p. 26, lns 9-13; E3/5800, Testimony of Duch (Case 001), p. 77, ln. 22 to p. 78, ln. 7; E3/5802, Testimony of Duch (Case 001), p. 86, ln. 22 to p. 87, ln. 19, p. 88, lns 9-11.

<sup>2018</sup> E1/421.1, Lach Mean, T. 25 Apr 2016, p. 93, ln. 23 to p. 94, ln. 2; E1/422.1, Lach Mean, T. 26 Apr 2016, p. 10, lns 2-6, p. 13, ln. 16 to p. 14, ln. 4.

<sup>2019</sup> E3/833, E3/834, and E3/8368.

<sup>2020</sup> E1/436.1, Duch, T. 13 Jun 2016, p. 25, lns 13-19, p. 26, lns 9-13; E3/5800, Testimony of Duch (Case 001), p. 77, ln. 22 to p. 78, ln. 7; E3/5802, Testimony of Duch (Case 001), p. 86, ln. 22 to p. 87, ln. 19, p. 88, lns 9-11.

the use of ‘*tearunakamm*’ at S-21, Son Sen instructed him “not [to] inflict too severe physical torture on the prisoners” and “not [to] rely too much on physical torture”.<sup>2021</sup>

607. Moreover, the above alleged facts, even taken as proven beyond reasonable doubt, do not show any criminal intent on the part of Nuon Chea or other senior leaders alleged to be members of the JCE. Even nowadays, there is no international rule prohibiting the use of coercions falling short of torture, or inhumane and degrading treatment, in investigations. ‘*Tearunakamm*’, as discussed above, has a broad meaning and can refer to minor discipline falling far short of inhumane or degrading treatment, let alone torture.<sup>2022</sup> The CPK’s alleged policy on the use of ‘*tearunakamm*’ clearly did not envisage any ‘*tearunakamm*’ reaching the level of torture, or inhumane or degrading treatment. This is evidenced by the fact that the said policy strictly prohibited any severe ‘*tearunakamm*’, that none of the four party-permitted ‘*tearunakamm*’ techniques was by nature severe enough to *per se* amount to torture;<sup>2023</sup> and that ‘*tearunakamm*’ techniques beyond beating was not the policy’s core. Therefore, the alleged CPK policy on ‘*tearunakamm*’ does not show any criminal intent by Nuon Chea or others.

608. In addition to being insufficient to prove intent, the evidence is also inadequate to prove beyond reasonable doubt any specific incident of torture at S-21. To determine whether torture took place, all the circumstances of a specific case must be considered. The circumstances include both the objective factors such as the duration of the treatment and its physical and mental impact on the alleged victim, and the subjective factors such as the age, gender, and health conditions of the said victim.<sup>2024</sup> It is imperative to bear in mind that the law requires scrutiny of all the circumstances of each specific case, not all the circumstances of the whole facility in general. In other words, the Chamber must not arbitrarily consider together all the ‘*tearunakamm*’ techniques allegedly used at S-21 in general – both the ‘permitted’ ones and the prohibited ones – as if they were all simultaneously used on each alleged victim in each specific case.<sup>2025</sup> In reality, despite the use of certain techniques at a facility in general, each individual’s experience at the said facility naturally varies. At S-21, some detainees were not subjected to

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<sup>2021</sup> E1/435.1, Duch, T. 9 Jun 2016, p. 22, lns 15-19.

<sup>2022</sup> See *supra*, Chapter 4-V-C-1-(b).

<sup>2023</sup> See, *Case 001*, E188, Trial Judgement, para. 355. The Chamber held that in principle whether certain conduct may amount to torture, all circumstances of each case must be considered. However, some exceptional acts such as rape and mutilation of body parts are by nature severe enough to reach the level required by torture.

<sup>2024</sup> See *infra*, Chapter 4-VI-B, for a discussion of the crime of torture.

<sup>2025</sup> The Trial Chamber in *Case 001* erred in this regard by entering convictions on a technique-level, rather than on an incident-level; see, *Case 001*, E188, Trial Judgement, para. 360.

any *tearunakamm*,<sup>2026</sup> and some only experienced one of the '*tearunakamm*' techniques.<sup>2027</sup> In the absence of sufficient evidence on the circumstances of each case, it is impossible to establish beyond reasonable doubt that any incident of torture occurred.

609. In the present case, most evidence on the alleged torture arise from vague and sweeping allegations from Duch or others that certain techniques were used at S-21. Such general evidence not only lacks specific details, but also is often hearsay or second-hand hearsay. For instance, as discussed above, Duch did not personally participate in any interrogation apart from a few, and he did not have sufficient knowledge of the circumstances of other interrogations. Such general and hearsay evidence is insufficient to prove any torture beyond reasonable doubt.

610. The only incidents where evidence on the specific circumstances exists are the alleged experience of civil party Chum Mey; that of Chhon who was interrogated by Prak Khan; and that of Koy Thuon who was interrogated by Duch. Chum Mey, as discussed above, has zero credibility.<sup>2028</sup> In the cases of Chhon and Koy Thuon, the circumstances described by Prak Khan and Duch show that torture did not occur.<sup>2029</sup>

611. Regarding alleged psychological torture and torture as a result of detention conditions, the Defence rests on its previous analysis of and submissions on the relevant facts and law,<sup>2030</sup> given the page limits of this Brief.

#### **D. DETENTION CONDITIONS RESPECTED INTERNATIONAL STANDARDS AT THE TIME OR WERE INSUFFICIENTLY GRAVE**

##### **1. Living and Working Conditions Were Consistent with Norms in DK in 1975-1979**

612. For all four security centres charged in Case 002/02, the Closing Order and Co-Prosecutors' Final Submission highlight what the Co-Prosecutors describe as "gruesome" conditions of detention and "hard physical labour". However, as discussed further below in Section V, the evidence offered in this regard shows that the conditions in place respected international standards at the time. Alternatively, the evidence presented showed that the facts

<sup>2026</sup> E399, Nuon Chea's Motion to Use Certain S-21 Statements; E399/3, Nuon Chea's Reply on Use of Certain S-21 Statements.

<sup>2027</sup> Prak Khan testified that when interrogating Chhon, he only lightly beat Chhon with a small tree branch. *See*, E1/425.1, Prak Khan, T. 2 May 2016, p. 3, lns 20-24, p. 6, ln. 23 to p. 8, ln. 5, p. 23, ln. 23 to p. 24, ln. 3.

<sup>2028</sup> *See supra*, Chapter 4-IV-D-2.

<sup>2029</sup> Prak Khan testified that when interrogating Chhon, he only lightly beat Chhon with a small tree branch of the size of a pen, leaving marks that would disappear in one or two days; *see*, E1/425.1, Prak Khan, T. 2 May 2016, p. 3, lns 20-24, p. 6, ln. 23 to p. 8, ln. 5, p. 23, ln. 23 to p. 24, ln. 3. For Koy Thuon, *see*, E399, Nuon Chea's Motion to Use Certain S-21 Statements; E399/3, Nuon Chea's Reply on Use of Certain S-21 Statements.

<sup>2030</sup> E399/3, Nuon Chea's Reply on Use of Certain S-21 Statements.



were of insufficient gravity as to reach the level required for the relevant crimes against humanity charged (*i.e.*, torture, enslavement, or other inhumane acts).

**(a) *Living and Working Conditions at Kraing Ta Chan Security Centre***

613. Limited evidence was heard at trial on conditions of detention apart from those that the Defence argues were consistent with conditions in prisons in the DK at the time, and which fail to reach the level required to constitute a crime against humanity or a war crime.<sup>2031</sup> Indeed, Tram Kok District hospital director Riel Son testified that pursuant to a request from Tram Kok District secretary Pech Chim, he visited Kraing Ta Chan to spray the centre and its surrounds with anti-mosquito chemical DDT in a bid to prevent the spread of malaria.<sup>2032</sup> Not only is this inconsistent with the description of Kraing Ta Chan in the Closing Order and by the Co-Prosecutors as a blunt instrument of death, it also precludes the Co-Prosecutors from suggesting that the conditions of detention might have been deliberately imposed with the intention to cause severe harm. Regarding working conditions, only one witness testified about the hardship of physical labour at Kraing Ta Chan – Vong Sarun – who said that she became physically ill from carrying earth.<sup>2033</sup> However, this testimony is too general to substantiate a finding beyond reasonable doubt that the hardship could be considered torture or enslavement.

**(b) *Living and Working Conditions at Au Kanseng Security Centre***

614. The alleged detention conditions at Au Kanseng,<sup>2034</sup> including guarding and locking-up systems, were not beyond what is common in a detention facility. Moreover, the evidence shows that the staff and the detainees were given the same amount of food and the same medical treatment.<sup>2035</sup> Notably, former detainee Phon Thol testified that the medics visited his wife every day when she was about to give birth in detention.<sup>2036</sup> Although some detainees died of malaria, this was because malaria was (and remains) rampant in Ratanakiri, not because of the particular conditions at Au Kanseng.<sup>2037</sup> It is also imperative to be mindful that there are

<sup>2031</sup> On this matter, *see infra*, Chapter 4-VI, on crimes charged and relevant human rights standards.

<sup>2032</sup> E1/279.1, Riel Son, T. 18 Mar 2015, p. 53, ln. 23 to p. 55, ln. 25, p. 35, lns 3-12 ; E1/278.1, Riel Son, T. 17 Mar 2015, p. 68, ln. 19 to p. 70, ln. 3.

<sup>2033</sup> E1/300.1, Vong Sarun, T. 18 May 2015, p. 34, lns 18-21.

<sup>2034</sup> D427, Closing Order, paras 605-06.

<sup>2035</sup> E1/406.1, Chin Kimthong (2-TCW-900), T. 22 Mar 2016, p. 67, ln. 23 to p. 68, ln. 13, p. 72, lns 18-22.

<sup>2036</sup> E1/395.1, Phon Thol, T. 2 Mar 2016, p. 64, lns 23-24.

<sup>2037</sup> E1/406.1, Chin Kimthong (2-TCW-900), T. 22 Mar 2016, p. 66, lns 16-18, p. 68, ln. 19 to p. 69, ln. 3.

insurmountable material barriers limiting a state's ability to provide the desired living conditions and it cannot be required to do the impossible such as eradicating malaria.<sup>2038</sup>

615. Regarding working conditions, the evidence suggests that some detainees at Au Kanseng were assigned to work, mainly to plant potatoes and vegetables. Both Chin Kimthong (2-TCW-900) and Phon Thol testified that the crops which the detainees grew were meant for their own consumption.<sup>2039</sup> In general, the work that the detainees were required to did not exceed what is normally required of a person who is under lawful detention.

**(c) *Living and Working Conditions at Phnom Kraol Security Centre***

616. The only accounts regarding living and working conditions at Phnom Kraol were provided by Chan Toi and Neth Savat, who were kept for one month at Autonomous Sector 105 office K-17. They stated that they were tied up in a row.<sup>2040</sup> Detainees had one meal per day,<sup>2041</sup> which consisted of a bowl of rice and pumpkin,<sup>2042</sup> “with merely one piece of meat or two piece[s] of meat”.<sup>2043</sup> Neth Savat testified that “at the beginning” they were allowed to bathe once a week.<sup>2044</sup> While Chan Toi stated that detainees had skin diseases, he confirmed that no one died from illness or starvation.<sup>2045</sup> Chan Toi further testified that he had to beat jute seeds for “one hour or two hours”.<sup>2046</sup> In any event, these conditions of detention were consistent with conditions in prisons in the DK at the time, and fail to reach the level of gravity required to constitute a crime against humanity.

**(d) *Living and Working Conditions at S-21 Security Centre***

617. Conditions described in the Closing Order such as armed guards watching over detainees, detainees being locked up and warned against escape, or separation between male and female detainees and between adults and children,<sup>2047</sup> are normal conditions which also apply nowadays in prisons all around the world.

<sup>2038</sup> See *infra*, Chapter 6-II; see also *supra*, Chapter 4-II, on the CPK's national defence and security policy.

<sup>2039</sup> E1/406.1, Chin Kimthong (2-TCW-900), T. 22 Mar 2016, p. 70, lns 10-19; E1/396.1, Phon Thol, T. 3 Mar 2016, p. 25, lns 3-7.

<sup>2040</sup> E1/400.1, Neth Savat, 11 Mar 2016, p. 32, lns 20-21; E1/399.1, Chan Toi, T. 10 Mar 2016, p. 60, lns 22-24.

<sup>2041</sup> E1/399.1, Chan Toi, T. 10 Mar 2016, p. 58, ln. 9.

<sup>2042</sup> E1/399.1, Chan Toi, T. 10 Mar 2016, p. 19, ln. 1.

<sup>2043</sup> E1/400.1, Neth Savat, 11 Mar 2016, p. 46, ln. 25 to p. 47, lns 1-2.

<sup>2044</sup> E1/400.1, Neth Savat, 11 Mar 2016, p. 47, ln. 5.

<sup>2045</sup> E1/399.1, Chan Toi, T. 10 Mar 2016, p. 19, ln. 19 to p. 20, ln. 2.

<sup>2046</sup> E1/399.1, Chan Toi, T. 10 Mar 2016, p. 21, lns 19 to p. 22, ln 2.

<sup>2047</sup> See D427, Closing Order, paras 442-443.

618. The Closing Order further describes that S-21 detainees were not allowed to “wash themselves under adequate conditions of hygiene”, had no beds, were not provided with mosquito nets, and were malnourished.<sup>2048</sup> However, Duch stated that food rations for detainees were “better than at the base” and that food was never reduced as a punishment.<sup>2049</sup> Even if unfortunate, these conditions were not abnormal considering the general living standards in the country at the time and were certainly not worse than the conditions pre-1975 during the Khmer Republic regime or post-1979 under the PRK.<sup>2050</sup> In any case, these conditions were not willingly and sadistically inflicted upon the detainees and, as stated by Duch himself, were certainly not implemented as punishment.

619. Regarding working conditions, the Closing Order alleges that “[a] small number of detainees were forced to work within the S-21 premises”.<sup>2051</sup> Chum Mey is the only former alleged former detainee who worked at S-21 who gave evidence in Case 002/02. As stated above, however, his unsworn evidence must be disregarded altogether since even his mere presence at S-21 is dubious, whatever Manichean ‘accepted truths’ may suggest.<sup>2052</sup> Two other witnesses provided testimony in Case 001 explaining that their conditions improved when they started working. They were provided better food,<sup>2053</sup> did not have to sleep with other detainees, and were not shackled.<sup>2054</sup> Therefore, evidence confirms that detainees who were working were not treated as detainees anymore but were offered the same conditions as other S-21 staff.

620. Citing Duch, the Closing Order alleges that blood drawing was used as a method of killing at S-21.<sup>2055</sup> However, it appears that detainees were brought outside the main compound when their blood was taken.<sup>2056</sup> Since Duch stated several times that he usually did not leave his office where he was busy annotating suspects’ statements,<sup>2057</sup> his evidence is, again, purely speculative. Besides Duch, former S-21 interrogator Prak Khan<sup>2058</sup> is the only witness who

<sup>2048</sup> **D427**, Closing Order, paras 443-444.

<sup>2049</sup> **E1/436.1**, Duch, T. 13 Jun 2016, p. 35, lns 1-3.

<sup>2050</sup> *See infra*, Chapter 4-VI-C, on enslavement; *see further*, Chapter 6, on cooperatives and worksites

<sup>2051</sup> **D427**, Closing Order, para. 443.

<sup>2052</sup> *See supra*, Chapter 4-IV, Unreliability of Chum Mey’s testimony.

<sup>2053</sup> *Case 001*, **E1/39.1**, Vann Nath, T. 29 Jun 2009, p. 34, ln. 23 to p. 35, ln. 1; *Case 001*, **E1/41.1**, Bou Meng, T. 1 Jul 2009, p. 35, lns 14-17.

<sup>2054</sup> *Case 001*, **E1/39.1**, Vann Nath, T. 29 Jun 2009, p. 34, ln. 24; *Case 001*, **E1/41.1**, Bou Meng, T. 1 Jul 2009, p. 36, lns 2-7.

<sup>2055</sup> **D427**, Closing Order, para. 473.

<sup>2056</sup> **E1/423.1**, Prak Khan, T. 27 Apr 2016, p. 101, ln. 11 to p. 102, ln. 3; **E1/426.1**, Mak Thim, T. 3 May 2016, p. 14, ln. 22 to p. 16, ln. 2.

<sup>2057</sup> *See supra*, Chapter 4-IV-C-1-(b), on Duch’s limited role.

<sup>2058</sup> *See supra*, Chapter 2-II-3-(b), on the rejection of the Defence’s request for further time to question Prak Khan.

claimed having once witnessed the process of blood drawing.<sup>2059</sup> Yet, his evidence is riddled with inconsistencies. At first, he claimed that he witnessed, from his house, blood drawing incidents taking place at the medical site next door to his house.<sup>2060</sup> However, he later changed the details, saying he could witness such incidents when he visited the medical site, and such visits did not take place often.<sup>2061</sup> It also transpired later that his residence at the time was near the current Beehive Radio Station (on Street 360, to the south of Tuol Sleng),<sup>2062</sup> while the medical site was near the main entrance of Tuol Sleng (at the corner of Streets 113 and 330).<sup>2063</sup> There are a few blocks between the two locations and he could not have lived next door to the medical site, much less witnessed its activities from his residence. In any event, Prak Khan further testified that he did not know who authorised this practice.<sup>2064</sup> Former S-21 medic Mak Sithim said he saw bags of blood but did not witness the process itself, nor did he hear of anyone who had their blood drawn to death.<sup>2065</sup> In contrast, Mak Sithim testified that detainees whose blood was drawn were later treated and provided with medicine to regain their strength.<sup>2066</sup>

621. In June 1976, minutes of meeting from the Ministry of Social Affairs reported that blood donations were needed to treat wounded soldiers at the battlefield and that blood had been collected from people living in Phnom Penh.<sup>2067</sup> This shows that blood drawing may have been authorised at S-21 exceptionally in order to meet an urgent need of blood to treat wounded combatants. In any case, there is no evidence, besides Duch's testimony, substantiating beyond reasonable doubt that blood drawing was used as a killing method at S-21.

## 2. Alleged Incidents of Rape at Kraing Ta Chan and S-21 Security Centres

622. The Chamber has held that “the occurrence of rape may be relevant, among others, to the conditions in Kraing Ta Chan” – and by analogy, S-21 – but rape cannot be considered a crime used “to implement the common purpose” of the alleged JCE and had not been separately charged (except in the context of forced marriage).<sup>2068</sup> Yet again disregarding how the Co-Prosecutors might try to denigrate and dismiss the Defence's argument, the fact is simply that

<sup>2059</sup> E1/423.1, Prak Khan, T. 27 Apr 2016, p. 101, ln. 8 to p.102, ln. 25, p. 103, lns 1-25; E1/424.1, Prak Khan, T. 28 Apr 2016, p. 12, ln. 13 to p. 13, ln. 25, p. 14, lns 10-17, p. 40, ln. 25 to p. 41, ln. 18.

<sup>2060</sup> E3/79, ‘WRI of Prak Khan’, ERN 00161559-60.

<sup>2061</sup> E3/7463, Testimony of Prak Khan (Case 001), p. 36, lns 16-20.

<sup>2062</sup> E1/423.1, Prak Khan, T. 27 Apr 2016, p. 13, lns 14-16.

<sup>2063</sup> E3/5765, Report of Tuol Sleng Crime Scene Re-Enactment, para. 10.1, ERN 00198006.

<sup>2064</sup> E1/424.1, Prak Khan, T. 28 Apr 2016, p. 12, lns 23-25.

<sup>2065</sup> E1/426.1, Makk Thim, T. 3 May 2016, p. 14, ln. 22 – p.20, ln. 4.

<sup>2066</sup> E1/426.1, Makk Thim, T. 3 May 2016, p. 46, ln. 24 – p. 50, ln. 5.

<sup>2067</sup> E3/226, ‘Minutes of a Meeting on Health and Social Affairs, Jun 1976, ERN 00183372.

<sup>2068</sup> E348/4, Decision on Requested Confrontation Regarding Kraing Ta Chan, para. 11; E346/3, Decision on Kraing Ta Chan Witnesses Request, para. 45; *see also infra*, Chapter 4-VI-F.

the evidence heard at trial on alleged rape at Kraing Ta Chan or S-21 fails to substantiate whatsoever that rape in fact occurred at either centre.

**(a) Allegations of Rape at Kraing Ta Chan Security Centre**

623. Two guards – Saut Saing and Van Soeun – were confronted with the allegation that guards had been said to have raped detainees at Kraing Ta Chan, and both denied ever knowing of such an incident.<sup>2069</sup> In particular, civil party Saut Saing, who civil party Say Sen had named as one of the alleged rapists, repeatedly and categorically denied doing so.<sup>2070</sup> The only other account of rape occurring at Kraing Ta Chan was provided by civil party Say Sen. However, as discussed earlier, his unsworn account is highly unreliable and should be disregarded entirely.<sup>2071</sup> Moreover, even if it were not disregarded wholesale, Say Sen’s account would be an insufficient basis to find beyond reasonable doubt that rape occurred at Kraing Ta Chan. Say Sen clarified that for one rape incident he had discussed – which is cited in the Closing Order – his knowledge was in fact based only on hearsay.<sup>2072</sup> Finally, Say Sen also confirmed that he also did not witness a second alleged incident of rape he had mentioned, but had only heard about this from the mother of the alleged victim.<sup>2073</sup>

**(b) Allegations of Rape at S-21 Security Centre**

624. Three incidents of rape are discussed in the Closing Order in relation to S-21. The Case 001 Trial Chamber discussed two of them and found that evidence was insufficient to substantiate beyond reasonable doubt that they had occurred.<sup>2074</sup> The same applies equally to the third incident. The CPK policy was very strict in terms of moral offences. This policy is illustrated for instance by the 12<sup>th</sup> Revolutionary Precept stated in, *inter alia*, the October 1978 Revolutionary Youth: “Do not behave in any way that violates females”.<sup>2075</sup> The same principle is also noted in one of the interrogator’s notebooks: “Another thing must be vigilant in morals. Summarizing, be vigilant. Be vigilant: 1) Rough word or careless word, conflict with the collective. 2) Morality with females.”<sup>2076</sup> This principle was widely taught and most of the

<sup>2069</sup> E1/281.1, Saut Saing, T. 24 Mar 2015, p. 65, lns 17-18, p. 66, lns 2-4; E1/272.1, Van Soeun, 5 Mar 2015, p. 1, lns 7-12.

<sup>2070</sup> E1/282.1, Saut Saing, T. 25 Mar 2015, p. 20, lns 13-15, p. 51, ln. 23 to p. 52, ln. 1,

<sup>2071</sup> See *supra*, Chapter 4-IV-D-1, on the credibility of Say Sen.

<sup>2072</sup> E1/282.1, Say Sen, T. 25 Mar 2015, p. 105, ln. 25 to p. 106, ln. 7.

<sup>2073</sup> E1/258.1, Say Sen, T. 6 Feb 2015, p. 12, lns 2-6; E1/282.1, Say Sen, T. 25 Mar 2015, p. 98, ln. 9 to p. 99, ln. 25.

<sup>2074</sup> E188, Case 001 Judgement, paras 246-247; D427, Closing Order, paras 457-459, fns 1992, 1997.

<sup>2075</sup> E3/765, Youth, Oct 1978, ERN 00539994.

<sup>2076</sup> E3/833, ‘S-21 Notebook by Mam Nai *alias* Chan’, 17 Dec 1977, ERN 00184595.

former S-21 staff confirmed that they knew it.<sup>2077</sup> Any person breaching the rule was always severely punished. Former S-21 guard Lach Mean stated that “moral discipline was the strictest discipline applied to everyone”.<sup>2078</sup> Other witnesses testified that, in such cases, the offender was arrested and executed<sup>2079</sup> or disappeared.<sup>2080</sup> If rape incidents occurred at S-21, they were definitely committed in violation of CPK policy and perpetrators were systematically punished.

**E. ALLEGATIONS OF MASS MURDER, EXTERMINATION, AND ‘DISAPPEARANCES’ HAVE NOT BEEN ESTABLISHED**

**1. Alleged Killings, Extermination and ‘Disappearances’ at Kraing Ta Chan Security Centre Are Not Proven**

**(a) Forensic and Demographic Evidence**

625. Both the Closing Order and Final Submission refer to exhumations of mass graves near Kraing Ta Chan post-DK, in an apparent effort to bolster the famed death toll of 15,000.<sup>2081</sup> Setting aside the Defence’s view that the sources for these exhumations – civil party Say Sen and witness Kev Chandara – are unreliable on this point, the Defence notes that in any event, the numbers of bones allegedly uncovered in these exhumations appears to be three to five times greater than the number of bones studied in Voeun Vuthy’s forensic study of bones associated with Kraing Ta Chan, namely a little over 3,000 bones.<sup>2082</sup> Moreover, that study itself has questionable probative value, as explained above.<sup>2083</sup> In addition, two demographic-related facts before the Chamber necessitate the use of extreme caution with respect to evidence regarding post-DK exhumations. The first is the evidence that prior to the DK period, Kraing Ta Chan had been a **gravesite**, which appears in two government-issued documents.<sup>2084</sup> The second is Tram Kok District hospital director Riel Son’s evidence that the Tram Kok District hospital was located six kilometres away and that the hospital buried its dead one kilometre away from the hospital,<sup>2085</sup> which is within the 10 kilometre-radius demographers set as the

<sup>2077</sup> **E1/422.1**, Lach Mean, 26 Apr 2016, p. 41, lns 5-11; **E1/428.1**, Him Huy, T. 5 May 2016, p. 68, ln 7to p. 69, ln. 18.

<sup>2078</sup> **E1/422.1**, Lach Mean, T. 26 Apr 2016, p. 35, ln. 25 to p. 36, ln. 1.

<sup>2079</sup> **E1/474.1**, Noem Kimsreang, T. 15 Sep 2016, p. 54, lns 9-11; **E1/427.1**, Him Huy, T. 4 May 2016, p. 84, lns 14-16; **E1/424.1**, Prak Khan, T. 28 Apr. 2016, p. 16, lns 16-18.

<sup>2080</sup> **E1/422.1**, Lach Mean, 26 Apr 2016, p. 34, ln. 23.

<sup>2081</sup> **D427**, Closing Order, para. 514; **D390**, Co-Prosecutors’ Final Submission, para. 493.

<sup>2082</sup> Voeun Vuthy is not even clear on the number of bones himself; see **E1/513.1**, Voeun Vuthy, T. 14 Dec 2016, p. 65, lns 2-10 and **E3/10769**, Excerpts from Choeung Ek Bone Study, ERN 01362857.

<sup>2083</sup> See *supra*, Chapter 4-IV-E-1, on Voeun Vuthy’s credibility.

<sup>2084</sup> **E3/5838**, 1985 Report of Pol Pot’s Genocide: Tram Kok, ERN 00713113; **E3/2062**, Brief History of Kraing Ta Chan Centre, ERN 00301363.

<sup>2085</sup> **E1/279.1**, Riel Son, T. 18 Mar 2015, p. 52, lns 9-25.

typical locus of mass graves from the point of origin of death.<sup>2086</sup> Even if the exhumed bones were properly forensically analysed to determine date and cause of death, both of these demographic facts cast more than reasonable doubt on whether bones recovered from the immediate vicinity of Kraing Ta Chan could ever be attributed to alleged criminal conduct there during the DK. At least two reasonable alternative inferences are that the bones were from those buried there before the DK or that they were people who died of potential natural causes at the Tram Kok District hospital.

**(b) Alleged ‘Eyewitness’ Accounts**

626. The Closing Order alleges that many witnesses “remember either witnessing executions carried out at Kraing Ta Chan or seeing the bodies of the victims”.<sup>2087</sup> However, the live evidence does not support this claim. The only individuals who maintained in court their account of seeing any executions or corpses were civil parties Say Sen and Meas Sokha, whose testimony lacks credibility entirely, as already discussed.<sup>2088</sup> On the other hand, witness Sao Han explained that he did not know for sure that his brother ended up at Kraing Ta Chan.<sup>2089</sup> Civil party Oem Saroeurn said she learned of her husband’s death at Kraing Ta Chan from her brother, and the death of her father, brother, and uncle at Kraing Ta Chan from a Kraing Ta Chan report.<sup>2090</sup> However, this alleged report does not appear in the so-called ‘Tram Kok District Records’ (even if they could be relied upon), and it is unclear from the civil party’s Victim Information Form that her relatives were actually detained at Kraing Ta Chan.<sup>2091</sup> Even if they had been, the Supreme Court Chamber requires every allegation of murder to be established beyond reasonable doubt,<sup>2092</sup> which is impossible here. Neither can a finding beyond reasonable doubt be based on the testimony of witness Phneu Yav, who testified that he only **heard** that someone from his unit may have been sent to Kraing Ta Chan,<sup>2093</sup> or of civil party Ry Pov, who stumbled upon a dying friend in a pit in the vicinity of Kraing Ta Chan but did not provide definitive evidence connecting that friend’s condition to something that happened to him at Kraing Ta Chan.<sup>2094</sup>

<sup>2086</sup> See *supra*, Chapter 4-V-E-1, on forensic and demographic evidence at Kraing Ta Chan.

<sup>2087</sup> **D427**, Closing Order, para. 512.

<sup>2088</sup> See *supra*, Chapter 4-IV-D-1, on the credibility of Say Sen and Meas Sokha.

<sup>2089</sup> **E1/265.1**, Sao Han, T. 18 Feb 2015, p. 44, ln. 20 to p. 46, ln. 1.

<sup>2090</sup> **E1/283.1**, Oem Saroeurn, T. 26 Mar 2015, p. 17, lns 9-22, p. 23, ln. 25 to p. 24, ln. 2.

<sup>2091</sup> **E3/5869**, ‘Victim Information Form of Ung Saroeurn’, 8 Jan 2010, ERN 01069307 (referring, twice, to “Kreang Chan prison in Kampot Province”).

<sup>2092</sup> **F36**, Case 002/01 Appeals Judgement, para. 420.

<sup>2093</sup> **E1/264.1**, Phneu Yav, T. 17 Feb 2015, p. 21, lns 22-25.

<sup>2094</sup> **E1/262.1**, Ry Pov, T. 12 Feb 2015, p. 23, lns 17-24, p. 25, lns 17-22.

627. Most importantly, Kraing Ta Chan guards Srei Than and Van Soeun denied ever seeing executions or corpses whatsoever,<sup>2095</sup> while guard Saut Saing said that he had not seen an execution, just that a prisoner he knew disappeared from the centre one day while he was outside working – which could have been for several reasons aside from execution or disappearance.<sup>2096</sup> Finally, former detainee Vong Sarun, who initially testified that she had seen a pile of skeletons at Kraing Ta Chan during the DK, later explained that in fact, what she had seen was bones in the memorial stupa erected at Kraing Ta Chan just a few years ago.<sup>2097</sup> In short, no credible eyewitness evidence of executions at Kraing Ta Chan exists whatsoever.

## 2. Alleged Killings, Extermination and ‘Disappearances’ at Au Kanseng Security Centre Are Not Proven

628. The evidence is insufficient to support the Closing Order’s allegations that murder and extermination took place at Au Kanseng. To begin with, there is zero forensic analysis of the remains – if any – of the alleged victims of killing at Au Kanseng.<sup>2098</sup> Meanwhile, the available evidence on the alleged killings is inadequate to establish the alleged facts.

### (a) *The Alleged Mass Killing of Ethnic Jarai Vietnamese Nationals*

629. The Closing Order relies on one unauthenticated telegram and some witness interviews to conclude and charge that hundreds of Jarai Vietnamese were killed *en masse* at Au Kanseng, and that Nuon Chea had knowledge of their arrest.<sup>2099</sup> Three witnesses testified about this alleged incident. However, their testimonies are substantially inconsistent with each other and with the telegram, leaving it impossible to establish the alleged facts.

#### (i) The Lack of Credible Witness Evidence and the Absence of any Link between the Witness Evidence and the Telegram

630. The telegram in question, from Northeast Zone secretary Vy and dated 15 June 1977, was purportedly copied to Nuon Chea and some others.<sup>2100</sup> It reported that “209 Vietnamese **soldiers**, including 9 females”, most of whom were Jarai, were arrested by “Production Unit 801” in Sector 107 (in Ratanakiri). It also reported that despite carrying AKs, AR-15 guns, pistols, grenades, bayonets, US-made backpacks, and a Vietnamese map, they claimed to be

<sup>2095</sup> E1/267.1, Srei Than, T. 23 Feb 2015, p. 37, lns 13-14; E1/271.1, Van Soeun, T. 4 Mar 2015, p. 80, lns 6-9, p. 81, ln. 24 to p. 82, ln. 5.

<sup>2096</sup> E1/282.1, Saut Saing, T. 25 Mar 2015, p. 20, ln. 12 to p. 22, ln. 11.

<sup>2097</sup> E1/300.1, Vong Sarun, T. 18 May 2015, p. 47, ln. 3 to p. 48, ln. 6, p. 66, lns 2-19.

<sup>2098</sup> E3/8024, Site Identification Report: Au Kanseng.

<sup>2099</sup> D427, Closing Order, paras 618-21, 804, 990.

<sup>2100</sup> E3/240, ‘Telegram from Vy’, 15 Jun 1977.



“ordinary people” who used to serve as soldiers and who had now come to defect to Cambodia. However, the telegram further reported that the local authorities assessed the circumstances and suspected that these people were not being truthful; accordingly, measures were taken to confiscate all their belongings before questioning them further. The above information depicts legitimate responses (capture, confiscation, and interrogation) to reasonably-suspected espionage by soldiers of an enemy state. Nothing in this report could have reasonably alerted Nuon Chea, if he read the telegram, of any crimes being or to be committed by any DK officials. Moreover, nothing in this telegram proves that the arrested soldiers were sent to Au Kanseng.

631. Separately, witnesses Chin Kimthong (2-TCW-900), Phon Thol, and Moeurng Chandy each claimed that they saw a group of Jarai arrive at Au Kanseng who was later taken away, presumably to be killed. However, the time when they allegedly saw those Jarai was several months after 15 June 1977 when the telegram was purportedly sent. Chin Kimthong (2-TCW-900) said those Jarai came in around “late 1977”,<sup>2101</sup> while both Phon Thol and Moeurng Chandy placed the event in February or March 1978.<sup>2102</sup> The significant gap in time between the telegram reporting the arrest of 209 Jarai soldiers and the alleged arrival of some Jarai at Au Kanseng makes it highly uncertain – thus not beyond reasonable doubt – that there was a connection between the two. Moreover, none of these witnesses personally witnessed the alleged killing. They presumed that the Jarai were killed and buried in B-52 craters near Au Kanseng because the craters smelled bad shortly after the Jarai were taken away.<sup>2103</sup> Notably, to bolster his testimony that the buried must have been those Jarai, Phon Thol added he saw Jarai traditional clothes marked with blood near the crater.<sup>2104</sup> However, this was obviously untruthful given that only a few minutes earlier he said that the Jarai detainees wore usual clothes rather than their traditional onwa.<sup>2105</sup>

<sup>2101</sup> E1/405.1, Chin Kimthong (2-TCW-900), T. 21 Mar 2016, p. 93, lns 2-6.

<sup>2102</sup> Phon Thol said it was when the jackfruit ripened, which was normally February or March. Since he was arrested on 16 June 1977, it could only have been February or March 1978. *See*, E1/395.1, Phon Thol, T. 2 Mar 2016, p. 88, ln. 3, p. 91, ln. 22 to p. 92, ln. 13; E1/395.1, Phon Thol, T. 2 Mar 2016, p. 36, lns 14-18. Corroborating this, Moeurng Chandy said she saw the Jarai about two or three months after she gave birth in prison, and she gave birth about six months after her arrest in mid-June 1977; *see*, E1/396.1, Moeurng Chandy, T. 3 Mar 2016, p. 78, ln. 21 to p. 79, ln. 4; E3/9357, ‘WRI of Moeurng Chandy’, A6

<sup>2103</sup> E1/405.1, Chin Kimthong (2-TCW-900), T. 21 Mar 2016, p. 91, lns 6-12; E1/395.1, Phon Thol, T. 2 Mar 2016, p. 51, lns 4-5 & lns 16-19; E1/396.1, Moeurng Chandy, T. 3 Mar 2016, p. 60, lns 4-13.

<sup>2104</sup> E1/395.1, Phon Thol, T. 2 Mar 2016, p. 49, lns 2-6.

<sup>2105</sup> E1/395.1, Phon Thol, T. 2 Mar 2016, p. 46, lns 12-17.

(ii) Unreliability of Chin Kimthong's (2-TCW-900's) Testimony about Sau Saroeun's Order to Kill the Jarai

632. Chin Kimthong (2-TCW-900) claimed that he and the late Chhaom Se were called to meet Division 801 commander Sau Saroeun and was asked by Sau Saroeun to “solve” those Jarai, which Chin Kimthong (2-TCW-900) and Chhaom Se understood as meaning to kill.<sup>2106</sup> However, this dramatically contradicts Chhaom Se's statements<sup>2107</sup> that neither he nor other Au Kanseng staff were involved in the killing.<sup>2108</sup> Moreover, according to Chin Kimthong (2-TCW-900), Sau Saroeun said “please solve it” after hearing Chhaom Se's report that there were too many Jarai and not enough detention space.<sup>2109</sup> Given this context, it is unreasonable to infer that by saying “solve”, Sau Saroeun clearly intended to order killing rather than other, usual measures to address prison overcrowding. This is particularly so given the evidence that other measures such as building new shelters or transferring detainees to other facilities were taken to solve overcrowding problems at Au Kanseng.<sup>2110</sup> Further, it is unlikely that Sau Saroeun would call the chief (Chhaom Se) and the third committee member (Chin Kimthong (2-TCW-900)) to meet him but leave out the deputy chief (Tim) who was in charge of security guards, if he had really intended to kill the Jarai. In sum, Chin Kimthong's (2-TCW-900's) testimony about the alleged order from Sau Saroeun is implausible and unreliable.

**(b) *The Alleged Killing of Six Vietnamese Nationals***

633. The Defence notes that the Closing Order does not charge Nuon Chea of war crimes for the alleged killing of six individuals alleged to be Vietnamese nationals at Au Kanseng.<sup>2111</sup> Further, the Closing Order's allegation about the killing of a group of six Vietnamese captured from Au Ya Dav in 1978 is based on Chhaom Se and Chin Kimthong's (2-TCW-900's) WRIs. However, this incident was not discussed during either witness's testimony in Case 002/01 and Case 002/02. Such untested out-of-court evidence is unsuitable for any findings beyond reasonable doubt.

<sup>2106</sup> E1/405.1, Chin Kimthong (2-TCW-900), T. 21 Mar 2016, p. 99, ln. 25 to p. 100, ln. 10, p. 101, lns 3-11.

<sup>2107</sup> Chhaom Se passed away before appearing in court in Case 002/02. Although he testified in Case 002/01, crimes at Au Kanseng were outside the scope at the time and thus were not discussed.

<sup>2108</sup> E3/407, 'WRI of Chhaom Se', A21; E3/405, 'WRI of Chhaom Se', A12; E3/9459, 'WRI of Chhaom Se', A24-28.

<sup>2109</sup> E1/405.1, Chin Kimthong (2-TCW-900), T. 21 Mar 2016, p. 99, ln. 25 to p. 100, ln. 10, p. 101, lns 3-5.

<sup>2110</sup> E3/405, 'WRI of Chhaom Se', A11; E3/9459, 'WRI of Chhaom Se', A6-A7.

<sup>2111</sup> D427, Closing Order, paras 1494, 1511-12, only the Jarai incident is specifically charged for grave breaches.

**(c) Other Alleged Killings**

634. Phon Thol and Moeurng Chandy testified about a few instances of alleged killing at Au Kanseng that are not specified in the Closing Order. Their testimony, without credible corroborating evidence, is insufficient to meet the standard of proof. Moreover, the evidence cannot establish whether the isolated killings were following orders of the Au Kanseng leaders or that they had knowledge of these incidents.

**3. Alleged Killings, Extermination and ‘Disappearances’ at Phnom Kraol Security Centre Are Not Proven**

635. Based on the written statements of Bun Loeng Chauy, the Closing Order alleges that “[e]xecutions were usually carried out at Trapeang Pring, [...] On other occasions, prisoners would be killed within the prison vicinity.”<sup>2112</sup> However, Bun Loeng Chauy testified differently at trial. He explained that he saw pits at Trapeang Pring but never saw executions or corpses.<sup>2113</sup> He was simply told that killings happened at that site by a Sector soldier called Bun.<sup>2114</sup> None of the other witnesses testified about any executions in or in the vicinity of Phnom Kraol security centre.<sup>2115</sup> Furthermore, while Bun Loeng Chauy claimed that the majority of the detainees died at Phnom Kraol security centre, he never visited that location and admitted that his knowledge amounted to mere hearsay.<sup>2116</sup> Chan Toi, who was detained for a month at K-17, provided inconsistent and vague testimony, stating that according to his “personal conclusion [...] when those people were taken out, it means that they were taken out and killed”.<sup>2117</sup> This is pure speculation, particularly since he confirmed that he never saw any corpses or pits but only learnt about it after the regime.<sup>2118</sup> In sum, there is no evidence about even a single death at Phnom Kraol security centre, and there is therefore no basis at all to prove the crimes of murder and extermination beyond reasonable doubt.

**4. Alleged Killings, Extermination and ‘Disappearances’ at S-21 Security Centre Are Not Proven, and Even if They Were, They Were Dramatically Fewer in Number Than Always Claimed**

636. Relying solely on Duch’s evidence and the findings of the Case 001 Judgement, the Closing Order alleges that “[m]ore than 12,273 S-21 detainees were executed at Choeng Ek,

<sup>2112</sup> D427, Closing Order, para. 642.

<sup>2113</sup> E1/409.1, Bun Loeng Chauy, T. 28 Mar 2016, p. 30, ln. 25 to p. 31, ln. 7.

<sup>2114</sup> E1/409.1, Bun Loeng Chauy, T. 28 Mar 2016, p. 31, lns 19-20.

<sup>2115</sup> E1/416.1, Kham Phan, T. 7 Apr 2016, p. 22, ln. 20.

<sup>2116</sup> E1/409.1, Bun Loeng Chauy, T. 28 Mar 2016, p.11, lns 1-3, p. 28, lns 5-8.

<sup>2117</sup> E1/399.1, Chan Toi, T. 10 Mar 2016, p. 27, lns 20-24.

<sup>2118</sup> E1/399.1, Chan Toi, T. 10 Mar 2016, p. 44, lns 14-18.

within the S-21 complex or nearby, or died as a result of the detention conditions at S-21.”<sup>2119</sup> This specific number itself comes from the OCP List on which Duch and the Trial Chamber heavily relied in Case 001.<sup>2120</sup> However, as stated above, this list is unreliable since it had been built on untested evidence and was based on a flawed methodology.<sup>2121</sup> The OCIJ List, compiled more recently, mentions 15,101 names of alleged S-21 detainees, out of which **5,512** have a date of execution. Based on the exact same untested evidence and flawed methodology, the OCIJ List is no more reliable than the OCP List.<sup>2122</sup> Further, and in any event, both of those lists – as with any of the so-called detainee lists on the case file – are clearly insufficient to establish killings since they are unsuitable to establish any deaths.<sup>2123</sup> They are even more unsuitable to establish that those alleged killings were unlawful. At most, those lists provide an average number of people who were registered in the outside premises of the S-21 complex. Evidence clearly shows, however, that roughly only a third of those people was subsequently detained at the S-21 security premises at Tuol Sleng at all.

**(a) Registration Process**

637. The evidence clearly establishes the existence of a specific registration process implemented in Phnom Penh after people’s arrest and subsequent arrival from all parts of DK. Following this process, arrested people were first registered in an office located outside the premises of the S-21 complex, in a location which is now known as the Beehive Radio Station.<sup>2124</sup> They were then sent to different locations, including the S-21 security centre itself and Prey Sar, among others, depending on the charges against them. A report from General Staff Deputy Chief Ren reflects the categorisation of detainees upon their arrival at the S-21 registration office. It describes three categories of people. The first category comprises people suspected of unlawful activities to be sent to “Duch”, the second category, people deemed too “liberal” or “dishonest” to be sent to “Brother Huy”; and the third category, people whose “offenses have not yet been categorized yet”, also to be sent to “the rice fields”.<sup>2125</sup>

638. Witnesses also testified about this specific dispatch process at the S-21 complex to which the Beehive Radio Station belonged. It appears that most people were sent to Prey Sar right

<sup>2119</sup> **D427**, Closing Order, para. 460; *see also* Chapter 4-IV-C-1, on the probative value of Duch’s evidence.

<sup>2120</sup> **E3/342**, OCP List; *see also supra*, Chapter 4-IV-F-2, on the reliability of the OCP List.

<sup>2121</sup> *See supra*, Chapter 4-IV-F-2, on the reliability of the OCP List.

<sup>2122</sup> *See supra*, Chapter 4-IV-F-2, on the reliability of the OCIJ List.

<sup>2123</sup> *See also E1/239.1*, Submissions on Case 002/02 Scope, T. 11 Feb 2014, p. 45, ln. 1 to p. 46, ln. 9.

<sup>2124</sup> **E1/427.1**, Him Huy, T. 4 May 2016, p. 64, lns 11-18; *supra*, Chapter 4-I.

<sup>2125</sup> **E3/1044**, Recommended Arrest List from Ren, 30 Oct 1977.

after their registration. Him Huy testified that “when the prisoners were sent to Tuol Sleng, the important prisoners would be detained in the prisons and, for the less important prisoners, they would be sent to Prey Sar to Huy Sre’s section”.<sup>2126</sup> He further specified that “the children and the mothers” were part of the latter group.<sup>2127</sup> Noem Kimsreang, chief of the S-21 photography unit, testified that Duch asked him to go to the “rice fields” (*i.e.*, Prey Sar), on occasion to retake photographs of “minor people” (*i.e.*, light offenders) who had been initially registered at the S-21 premises, when their original photos had been damaged:

A. Yes, the photos were damaged; then I asked permission from Ta Duch and he said that I should go to the rice fields and that's what I did. [...] People who did not have implications were sent to work in the rice fields. [...] What I mean is that when I took the photos at the premise and the photos were damaged, then I would go to the rice field to retake those photos and there were many people; thousands of them, working in the rice fields. That's where they farmed the rice and they also raise livestock [...]

Q. What did you mean when you said, “The prisoners sent to farm rice were mostly minor people”; what does that mean, minor people?

A. It means that those who were subordinate and who did not have any major role to play.<sup>2128</sup>

639. As a result, only a relatively small percentage of people who were “registered” at S-21 finally ended up in the S-21 facility at Tuol Sleng. Keeping in mind the need to approach it with utmost caution,<sup>2129</sup> the Defence still notes that the OCIJ List, which is not comprehensive,<sup>2130</sup> references 70 people as sent from S-21 to either S-21D,<sup>2131</sup> Prey Sar or “the rice fields”. This is a further confirmation that most people arrested and registered at the S-21 complex were not ultimately detained in the S-21 security centre. Instead, the majority was sent to different locations such as Prey Sar,<sup>2132</sup> for re-education purposes.

**(b) Number of S-21 Detainees**

640. As noted above, Duch provided deeply-inconsistent evidence as to the number of detainees at S-21 itself, saying first that “it never totalled 1000”,<sup>2133</sup> before confirming any numbers he learnt from the case file or secondary sources. As discussed above, Duch’s evidence

<sup>2126</sup> E3/7461, Testimony of Him Huy (Case 001), p. 34, lns 11-4.

<sup>2127</sup> E3/7461, Testimony of Him Huy (Case 001), p. 35, lns 23-5.

<sup>2128</sup> E1/474.1, Noem Oem, T. 15 Sep 2016, p. 48, lns 14-15, p. 50, lns 14-24.

<sup>2129</sup> See *supra*, Chapter 4-IV-F-2, on the reliability of the OCIJ List.

<sup>2130</sup> See *supra*, Chapter 4-IV-F-2, on the reliability of the OCIJ List.

<sup>2131</sup> “S-21D” was used to refer to Prey Sar, see E1/432.1, Suos Thy, T. 6 Jun 2016, p. 85, lns 22-23; E1/430.1, Duch, 2 Jun 2016, p. 44, lns 22-23.

<sup>2132</sup> E.g. E3/7592, ‘DC-Cam Interview of Lay Ean’, ERN 00686100.

<sup>2133</sup> E3/347, OHCHR Suspect Statement of Duch, ERN 00002538.

in this regard is highly unreliable, since he was not in a position to know such detailed information, which he finally acknowledged himself.<sup>2134</sup> Contemporaneous evidence allows a rough conclusion to be drawn as to the overall number of people who, in principle, eventually entered the S-21 premises after registration. Indeed, 4,300 to 5,000 suspects' statements recorded at S-21 have been found so far.<sup>2135</sup> Given that former S-21 cadres all testified that no document was destroyed before the Vietnamese arrived,<sup>2136</sup> and even considering that part of the S-21 contemporary documents are missing,<sup>2137</sup> this evidence allows a conclusion that 6,000 to 7,000 people at most were detained and interrogated at the S-21 security centre itself. In any case, moreover, concluding that all those people died from systematic killing – as did the Chamber in Case 001 – is a misleading shortcut and affront to the role of a proper court of law undoubtedly motivated by the Manichean narrative. Evidence clearly disproves this ill-founded and reductionist theory and shows instead that many S-21 detainees were released.

**(c) Releases from S-21**

641. Exclusively based on Duch's testimony that "none [of the] prisoners held within the S-21 complex were to be released as they were all due to be executed", the Closing Order concludes that "a general policy of "eliminating enemies", or "the CPK's policy of 'smashing enemies'" was implemented at S-21.<sup>2138</sup> Duch, who said that there was no "theoretic plan for smashing enemies",<sup>2139</sup> stated that a general "smashing policy" was implemented at S-21.<sup>2140</sup> When asked about the source of his knowledge, Duch never managed to provide any evidence beyond mere speculation.<sup>2141</sup> Duch's evidence in this regard is inconsistent and, in any event, unreliable since he was not in position at the time to know any information regarding CPK's policies nor was he in charge of executions.<sup>2142</sup>

<sup>2134</sup> E.g. **E3/65**, 'WRI of Duch', ERN 00147525; *see also* Chapter 4-IV-C-1, on the probative value of Duch's evidence.

<sup>2135</sup> **E3/1684**, Chandler, Voices From S-21, ERN 00192685; *see also* **E1/420.1**, Nhem En, T. 21 Apr 2016, p. 55, ln. 7 to p. 57, ln. 4.

<sup>2136</sup> *See* **E1/438.1**, Duch, T. 15 Jun 2016, p. 33, ln. 20 to p. 34, ln. 2; **E1/420.1**, Nhem En, T. 21 Apr 2016, p. 52, ln. 24 to p. 53, ln. 19; **E1/422.1**, Lach Mean, T. 26 Apr 2016, p. 73, ln. 24 to p. 74, ln. 7; **E1/425.1**, Prak Khan, T. 2 May 2016, p.49, ln. 19 to p. 51, ln. 1; **E1/425.1**, Suos Thy, T. 2 May 2016, p. 14, lns 9-12.

<sup>2137</sup> *See supra* Chapter 4-V-F-2-(b), on the incompleteness of the case file.

<sup>2138</sup> **D427**, Closing Order, para. 1375, 1390.

<sup>2139</sup> **E3/5798**, Testimony of Duch (Case 001), p.14, lns 18-25.

<sup>2140</sup> *See* **D427**, Closing Order, para. 461; **E3/5798**, Testimony of Duch (Case 001), p. 15, lns 2-5; **E1/437.1**, Duch, T. 14 Jun 2016, p. 27, lns 2-5.

<sup>2141</sup> **E3/5795**, Testimony of Duch (Case 001), p. 77, lns 4-7 ("It is hard to say who told us about the rule because the rule had been in place since M-13 -- from M-13 office Therefore it is the Party principle and line regarding -- in relation to the enemies") (emphasis added).

<sup>2142</sup> On the probative value of Duch's evidence, *see supra*, Chapter 4-IV-C-1.

642. In fact, and as noted before, not all the S-21 detainees were executed. Evidence shows that many were eventually released from S-21. Several witnesses testified that they were detained in S-21 for a short period of time before being released or sent to work to a different location for re-education purposes. Sokh Sophat, a Division 703 soldier, for example, stated that he was arrested and detained at S-21 for one and a half months in late 1977. He was then released and sent to work at Prey Sar for one month.<sup>2143</sup> Sreng Thi,<sup>2144</sup> a Division 502 soldier who was accused of committing a light offence, testified that he was released from S-21 together with “about 50” other people.<sup>2145</sup>

643. Contemporaneous DK documents also confirm the release of S-21 detainees throughout the regime. Evidence further confirms that this practice existed since the establishment of S-21 in late 1975, and was implemented until the end. A list dated 12 December 1975 records the names of 49 soldiers of Company 44 of Division 703 who have been released, indicating a practice of release before S-21 moved to the Tuol Sleng premises.<sup>2146</sup> Further, the S-21 statement of Division 703 combatant Try Cheab Ngorn dated 25 December 1975, bears the interrogator’s annotations who requested “Angkar” to release him “[b]ecause three of his siblings joined the revolution; one of them was in Unit 260, while two others were in a Sector 25; [b]ecause he just promised to incite a combatant to escape to Vietnam and he failed to do it.”<sup>2147</sup> In 2008, while investigating 28 cadres who were released from S-21 in 1976,<sup>2148</sup> DC-Cam found that Try Cheab Ngorn, was still alive. Another S-21 list from November 1977 shows that 100 detainees from Division 920 were released on 26 November 1977, three days after their arrests.<sup>2149</sup> Youk Chhang, director of DC-Cam, confirmed that this list and other “records of releases at S-21 have long been known to exist.” He further noted that those records were “available all the time, but somehow it didn’t get the interest,”<sup>2150</sup> confirming the strength of the Manichean ‘accepted truth’ that no one could ever be released from S-21.

<sup>2143</sup> E3/7664, ‘WRI of Sokh Sophat’, ERN 00163803-05.

<sup>2144</sup> See E426, Nuon Chea Fifth Witness Request for Security Centres and ‘Internal Purges’ Segment.

<sup>2145</sup> E3/7532, ‘DC-Cam Interview of Sreng Thi’, ERN 00329481.

<sup>2146</sup> E3/965, List of People Released from Company 44.

<sup>2147</sup> E3/2461, Summary of responses and information of Try Cheab Ngorn, 25 Dec 1975, ERN 00821866.

<sup>2148</sup> E3/8778, ‘DC-Cam PA Fields Report’, undated.

<sup>2149</sup> E3/8648, Division 920 Members Released on 26 November 1977.

<sup>2150</sup> E3/3992, Cambodia Daily, 177 Released from S-21; see also *supra*, Chapter 2-II-B-3-(c), on the refusal to call key witnesses, and *infra*, Chapter 9 and Annex 2.

644. Finally, even if it could be relied upon, the OCIJ List – which is not comprehensive<sup>2151</sup> – mentions that 103 people were released from S-21.<sup>2152</sup> While some of them are mentioned as having been rearrested later on, it appears that they were in fact sent to the “rice fields” at that point. In any event, given that these people were released from S-21 at one point, a reasonable alternative inference is that their alleged new arrest might have been the result of new unlawful activities. Either way, this does not contradict the fact that people were regularly released from S-21 throughout the DK period.

**(d) Average Death Toll at S-21**

645. It follows from the evidence detailed above that the 15,101 people referenced in the OCIJ List are people who were registered at the S-21 complex and who, for the vast majority, were transferred to work in different locations afterwards. Moreover, and as also explained, out of those 15,101 people around 6,000 to 7,000 at most eventually ended up at S-21. Some of these people were released from S-21 later on.

646. While documentary evidence may be of help to establish the average number of people who entered the framework of the S-21 security centre, there is no evidence available to support any finding regarding the exact number of people allegedly killed by members of the S-21 regiment. In any event, this number is obviously below 7,000, which is the maximum number of people who entered the S-21 security centre. In this regard, the OCIJ List references 5,512 people with a date of execution and expert Voeun Vuthy, testified about a total of 6,426 skulls of alleged former S-21 detainees found at Choeung Ek. The reliability of both of these findings has been challenged above.<sup>2153</sup>

647. Furthermore, as stated above, the killing of S-21 detainees has never been proven beyond reasonable doubt and there is no evidence – apart from Duch’s testimony – permitting a finding that all of them were eventually executed. As discussed previously, Duch’s evidence in that regard is purely speculative since he admitted having a limited knowledge of the daily operations at S-21.<sup>2154</sup> While the Defence does not deny that a substantial number of people were executed by members of the S-21 regiment, the lack of comprehensive and reliable

<sup>2151</sup> See *supra*, Chapter 4-IV-F-2, on the reliability of the OCIJ List.

<sup>2152</sup> See **E3/10604**, OCIJ List, e.g. entries 1220, 1188, 7390, 7396, 7397, 7399, 7405, 7406, 7409, 7412, 7421, 7443, 7445, 7450, 7453, 7460, 7469, 7475, 7479.

<sup>2153</sup> See *supra*, Chapter 4-IV-E-1, on the reliability of expert Voeun Vuthy’s study; Chapter 4-IV-F-2 on the reliability of the OCIJ List.

<sup>2154</sup> See *supra*, Chapter 4-IV-C-1.



evidence and notably the lack of forensic evidence,<sup>2155</sup> precludes any finding of killing beyond reasonable doubt. Indeed, as discussed below in Section VI on the crimes charged, in order to reach a finding that murder or extermination took place, each constitutive element for each individual murder must be established beyond reasonable doubt on the basis of the evidence. In the present case, such specific evidence is in fact lacking, preventing any finding in that regard. As the Chamber has demonstrated its longstanding willingness to disregard the most basic standards of evidence, it is nevertheless likely that it will make a numbered finding regarding the S-21 death toll. In such an unacceptable and disappointing scenario, the evidence strictly precludes a death toll finding of any higher than approximately 7,000, the substantiation beyond reasonable doubt of which the Defence contests.

648. Ultimately, and in any event, the overall evidence fails to establish beyond reasonable doubt that any of these prisoners were unlawfully killed. Indeed, as previously stated, the evidence shows quite the opposite, *i.e.*, that the fate of most detainees was decided after thorough investigation and the subsequent conclusion that they had committed the most serious crimes of treason, espionage, collaborating with the enemy during wartime, or sabotage.<sup>2156</sup> Evidence further shows that people who ended up at S-21 were indeed the most serious offenders. It follows that alleged killings at S-21 were the result of a lawful process and grounded on both legal and factual bases.

#### **F. SECURITY CENTRES SERVED LEGITIMATE RE-EDUCATIVE FUNCTIONS**

649. The final issue discussed in the analysis of relevant facts before turning to an examination of the crimes charged is how, after thorough investigation, people were classified into categories. Light offenders were sent to re-education while people wrongly suspected were released, in accordance with the CPK's national defence and security policy.<sup>2157</sup> The Defence notes that in light of the absence of any evidence on this subject regarding Phnom Kraol, it is not discussed below. S-21 is also excluded from the below discussion since its re-educative functions have been discussed above in Part E-4 on alleged killings and 'disappearances'.

##### **(a) *Re-Education at Kraing Ta Chan Security Centre***

650. Vong Sarun's testimony that following her interrogation, she was eventually assigned to work alongside "former inmates" outside the centre is consistent with the status of Kraing

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<sup>2155</sup> See *supra*, Chapter 4-IV, on the absence of forensic evidence, and Chapter 2-II-B-3-(a), on demographics.

<sup>2156</sup> See *supra*, Chapter 4-II, on the CPK's policy on national defence and security.

<sup>2157</sup> See *supra*, Chapter 4-III.

Ta Chan as a re-education centre. It also tallies with the testimony of Tram Kok District secretary Pech Chim and first Kraing Ta Chan chief Phan Chhen on what re-education entailed. When asked what his role to “eliminate traitors” involved from a practical point of view, Pech Chim explained that the idea was to “compromise and mediate the conflict” and “rebuild our solidarity”.<sup>2158</sup> Phan Chhen elaborated that the purpose of re-education was “to understand the offences that [the offenders] made individually and that [were] against the leadership line”.<sup>2159</sup>

**(b) Re-Education at Au Kanseng Security Centre**

651. Au Kanseng was known as the “re-education and correction office” or “re-education school”.<sup>2160</sup> Every ten days or every fortnight, Chhaom Se held education sessions at Au Kanseng to raise the detainees’ awareness of the national situation; to advise them on how to correct their mistakes, behaviour, and work perspectives; and to ease their fears and worries.<sup>2161</sup> This re-educative function is consistent with the CPK’s principle to make every attempt to win everyone over to the side of the revolution.<sup>2162</sup>

**VI. CRIMES CHARGED FOR SECURITY CENTRES AND ‘INTERNAL PURGES’**

652. This Section demonstrates that, even if the facts discussed above were established – which they are not – a conviction cannot be sustained, as the evidence does not reach the requisite standard of proof for each element of the alleged crimes. This is particularly true in light of the specific historical, economic and social situation of the state at the time. First, as discussed above, the CPK inherited a physically and economically-destroyed state, which lacked even the most public institutions and infrastructures, and had no judicial system.<sup>2163</sup> Second, there was an international armed conflict ongoing at the same time, which adversely impacted the regular functioning of the state’s security system.<sup>2164</sup> The measures and restrictions taken were legitimate and necessary to protect national security, a reality which even international human rights and humanitarian law acknowledges, as discussed below.

<sup>2158</sup> E1/292.1, Pech Chim, T. 24 Apr 2015, p. 75, lns 9-17.

<sup>2159</sup> E1/269.1, Phann Chhen, T. 25 Feb 2015, p. 65, lns 23-24.

<sup>2160</sup> E.g. E3/405, ‘WRI of Chhaom Se’, A4; E3/5172, ‘WRI of Phan Thol’, ERN 00272585.

<sup>2161</sup> E1/177.1, Chhaom Se, T. 8 Apr 2013, p. 41, lns 12-20; E3/3984, ‘WRI of Chhaom Se’, ERN 00403575; E1/405.1, Chin Kimthong (2-TCW-900), T. 21 Mar 2016, p. 48, ln. 23 to p. 49, ln. 10.

<sup>2162</sup> See e.g. E3/763, Central Committee’s Guidance on Mised Persons, 20 Jun 1978; E3/13, All Divisions Meeting, 9 Oct 1976, ERN 00940355; E3/11, Flag, Sep 1977, ERN 00486235; and E3/1164, ‘Telegram from Rooun to 89’, 25 Nov 1976, ERN 00516711; see also *infra*, Chapter 6-II-D, on the CPK policy to make every attempt to make the people welcome the communist state governance.

<sup>2163</sup> See *supra*, Chapter 3 and Chapter 4-II; see *infra*, Chapter 6-II.

<sup>2164</sup> See *supra*, Chapter 3 and Chapter 4-II; see *infra*, Chapter 6-II.

## A. ARRESTS AND DETENTION WERE LAWFUL

653. The constitutive elements of the crimes of arbitrary imprisonment as a crime against humanity and unlawful confinement as a war crime are comparable. The key corresponding element is the absence of a legal basis to justify the deprivation of liberty for arbitrary imprisonment, while unlawful confinement requires that the civilian was detained without reasonable grounds to believe that the security of the detaining power made the confinement absolutely necessary. In both cases, the perpetrator must intend to arbitrarily deprive the person of his/her liberty, or be in the reasonable knowledge that his act or omission was likely to cause an arbitrary deprivation of liberty.<sup>2165</sup>

### 1. Arrests and Detention Were Permissible and Not Crimes Against Humanity

654. International jurisprudence indicates that the reasonableness of the arresting officer's suspicion that the factual circumstances warrant an arrest is essential to assessing whether an arrest was arbitrary.<sup>2166</sup> What may be regarded as reasonable depends on the circumstances of.<sup>2167</sup> Observations, implications in statements from other suspects, and confidential or anonymous intelligence are all commonly accepted forms of factual basis for a reasonable suspicion sufficient for arrest or preventive detention in domestic legal systems.<sup>2168</sup> Moreover, the factual basis for a reasonable suspicion does not need to reach the level for bringing formal charges, since the purpose of the arrest or detention was to further the investigation with a view to either confirming or dispelling the suspicion.<sup>2169</sup>

655. In light of the circumstances of DK at the time, arrests in most security centres were tethered to facts, in accordance with the law protecting national security, and following investigations.<sup>2170</sup> Similarly, the fact that persons were released shows that imprisonment was

<sup>2165</sup> ICTY, *Simić et al.* Trial Judgement, para. 64; *Krnojelac* Trial Judgement, para. 115; *Kordić & Čerkez* Appeals Judgement, paras 114-115.

<sup>2166</sup> HRC General Comment 35, para. 12; ICTY, *Simić et al.* Trial Judgement, para 680; ICTR, *Kajelijeli* Appeals Judgement, para. 224; ECtHR, *O'Hara v. UK*, para. 34.

<sup>2167</sup> ICTY, *Simić et al.* Trial Judgement, paras 657-660; ECtHR, *O'Hara v. UK*, para. 34; ECtHR, *Fox, Campbell & Hartley v. UK*, para. 32

<sup>2168</sup> See e.g. ICC, Al Bashir Decision on Appeal Regarding Prosecution's Application for Arrest Warrant, paras 32-33; ECtHR, *O'Hara v. UK*, paras 21-22, 40-41; see also Coster Van Voorhout, Intelligence as Legal Evidence.

<sup>2169</sup> ICTR, *Kajelijeli* Appeals Judgement, para. 32; ECtHR, *O'Hara v. UK*, paras 36, 44.

<sup>2170</sup> See *supra*, Chapter 4-II and Chapter 4-V, demonstrating that there was no arbitrariness in arrest, investigation and detention.

not arbitrary.<sup>2171</sup> In any event, international humanitarian law recognises that sabotage and espionage constitute “legitimate and serious” reasons to intern civilians.<sup>2172</sup>

656. Standards in security centres must not be compared with today’s high – and western-oriented – standards, but considered in light of the situation pre- and post-DK, and of the situation in similarly-developed countries at the time. When looked at it objectively and away from any Manichean narrative, it is clear that the arrest processes in place were permissible under the circumstances, and do not constitute a crime against humanity. Indeed, under international human rights law, states can in certain circumstances derogate from some of their obligations related to arrests of individuals in times of public emergency threatening the life of a nation.<sup>2173</sup> As discussed above, this was precisely the situation DK faced.<sup>2174</sup> Obligations that could be derogated from influence the requirement to make arrests “in such grounds and in accordance with such procedures as are established by law”; to promptly notify a detained person of the reasons for arrest and charges; the appearance before a judge; and provisional release or the existence of proceedings for review of detention.<sup>2175</sup>

657. Similarly, the fair trial guarantees as listed in Article 14 of the ICCPR can also be derogated upon in times of emergency.<sup>2176</sup> These rights were not included in the list of non-derogable rights as a result of pressure from UN member states;<sup>2177</sup> it therefore can be said that derogations from such rights constituted customary international law in terms of emergency. Accordingly, it cannot be said that derogating from the rights against arbitrary detention constituted an international crime at the time. Finally, in 1975, the ECtHR recognised that in times of emergency, certain limitations or derogations of certain aspects of due process were

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<sup>2171</sup> See *supra*, Chapter 4-V, on Kraing Ta Chan and S-21.

<sup>2172</sup> Geneva Convention IV, Art. 5, 52; ICRC 1987 Commentary to Geneva Convention IV, p. 258; see also ICTY, *Čelebići Trial Judgement*, paras 565-566, 576.

<sup>2173</sup> ICCPR, Art. 4 (1) & (2); ACHPR, Art. 27 (1); ECHR, Art. 15 (1); ECtHR, *Ireland v. UK*, paras 205-224; ECtHR, *Brannigan v. McBride*, para. 66; HRC general Comment 29 recognised that armed conflict could be regarded as an emergency for the purpose of derogation to the rights listed in article 4 of the ICCPR, para. 3; see also UN HRC general comment 32, para. 5.

<sup>2174</sup> See *supra*, Chapter 3.

<sup>2175</sup> ICCPR, Art. 9, not contained in the list of non-derogable rights listed in Art. 4(2).

<sup>2176</sup> ICCPR, Art. 14, not contained in the list of non-derogable rights listed in Art. 4(2).

<sup>2177</sup> Only the US, France and Israel initially supported the inclusion of Article 14 in the list of non-derogable rights, see US Amendment to Article 4 of Draft International Covenant on Human Rights, para. 3; Pati, *Due Process and International Terrorism*, p. 247.

permitted, such as informing people of the reasons for their arrest, and providing them with chances to have the arrest and detention reviewed by an independent judicial body.<sup>2178</sup>

658. In any event, secrecy before arrest is understandable and still used far and wide nowadays to ensure successful arrest. During the DK, however, the local authorities always informed the public of the reason for the arrest afterwards: meetings were held in the units where people had been arrested to inform them that the arrested were traitors who colluded with foreign enemies, mistreated the people, *etc.*<sup>2179</sup> In the August 1977 Revolutionary Flag, the Party Organisation Representative is quoted as saying that:

Everyone must know, must understand and be in unity, and no deception can be permitted. If we do this quietly, if we go do this covertly at this and that location, the masses will not know and they will ask why this is not being done at other locations. Therefore, everyone must know the policy of the Party.<sup>2180</sup>

659. With regards to the use of suspects' statements, as stated above in Section II, the taking of a statement from a suspect is generally the first step in any police investigation, and its use to further the investigations are standard in law enforcement systems throughout the world.

## 2. Unlawful Confinement as a War Crime Has Not Been Proven

660. Unlawful confinement is charged as a war crime only with regards to the Vietnamese civilians at S-21.<sup>2181</sup> In order to find unlawful confinement as a war crime, the victims must be protected under the Geneva Conventions (as discussed further below). However, as stated above in Section V, regarding S-21, there is no evidence that the individuals were Vietnamese; or that they were either civilians or belonged to the Vietnamese armed forces.<sup>2182</sup> As a result, they were not protected under Geneva Convention IV. In any event, the evidence shows that there was a legitimate basis for their arrest and detention.<sup>2183</sup> Finally, limiting certain fair trial rights is indeed permitted under international law, as discussed immediately above.<sup>2184</sup>

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<sup>2178</sup> *E.g.* ECtHR, *Ireland v. UK*, paras 81-87, 212; *Fox, Campbell & Hartley v. UK*, para. 41; *Murray v UK*, para. 77; Greer, Margin of Appreciation, p. 30, *citing X v. The Netherlands*, Application No. 2894/66, 6 Oct 1966, (1966) Yearbook 564, 568; HRC General Comment 35, para 65.

<sup>2179</sup> *See e.g.* E3/193, E3/193, Flag, Aug 1977, ERN 00399228.

<sup>2180</sup> E3/193, Flag, Aug 1977, ERN 00399229.

<sup>2181</sup> D427, Closing Order, paras 1518, 1519.

<sup>2182</sup> *See supra*, Chapter 4-V-B-3-(a), on, Vietnamese detainees.

<sup>2183</sup> *See supra*, Chapter 4-V-B-1 and Chapter 4-V-B-2 on alleged arbitrariness of arrest and detention.

<sup>2184</sup> *See supra*, Chapter 4-VI-A, on the crime of imprisonment.

### **3. Fair Trial Violations as a War Crime Has Not Been Proven**

661. The Closing Order also charges fair trial violations as a war crime for S-21 and Au Kanseng. This requires that the victim is a person protected as a prisoner of war, or a civilian under the Geneva Conventions.<sup>2185</sup> However, as expanded upon below, the Co-Prosecutors have failed to meet their burden of proving so.<sup>2186</sup> In any event, there is no direct or indirect evidence showing that the physical perpetrators intended the victims to be arbitrarily detained or that their fair trial rights were violated, for there is no reasonable reason to believe that they were aware of the requisite fair trial standards. The fact that no witness mentioned the absence of grounds for arrest or judicial process shows that this was not considered as being the applicable standard at the time.

### **4. There is no Evidence Establishing the Requisite *Mens Rea***

662. Finally, there is no evidence that Nuon Chea was aware of the alleged arbitrariness of the detention, and even less so that he intended to arbitrarily deprive the victims of their physical liberty. What is more, this should be seen in context of the fact that there is a general consensus that international law accepts that fair trial rights and the right to liberty and security are not absolute and that derogations to both are permissible.<sup>2187</sup>

## **B. TORTURE HAS NOT BEEN ESTABLISHED**

### **1. Evidence on Alleged Acts of Torture is Entirely Insufficient**

663. As stated above, the evidence related to the alleged acts of torture is vague and unspecific; it is insufficient to reach a finding beyond reasonable doubt that torture occurred in any of the security centres beyond any reasonable doubt. Mere statements that “people were tortured”, or “I heard screams” or “he came back with bruises” are – in the absence of direct and eyewitness evidence – mere rumours. As stated by the Supreme Court Chamber finding that “a multiplicity of evidentiary items [...] add[ing] up to meet the burden of proof beyond reasonable doubt by virtue of their sheer number, irrespective of their probative value [...] would mean that an accused could be convicted merely on the basis of widespread rumours.”<sup>2188</sup>

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<sup>2185</sup> See Geneva Convention III, Art. 130; Geneva Convention IV, Art. 147; Common Art. 3; see also the ICC, Elements of Crimes, Art. 8 (2) (a) (vi), element 2.

<sup>2186</sup> See *infra*, Chapter 4-VI-G-2, on the status of alleged victims.

<sup>2187</sup> See HRC General Comment 32, para. 5; UNHRC, Annual Report 1984, p. 15; HRC, *Vivanco v. Peru*, para. 10; ECtHR, *Ireland v. UK*, para. 204; *Lawless v. Ireland*, para. 55.

<sup>2188</sup> **F36**, Case 002/01 Appeals Judgement, para. 419.

Regarding Kraing Ta Chan, there is simply no reliable evidence of severe harm and physical or mental suffering being deliberately inflicted upon the detainees.<sup>2189</sup>

664. In S-21, the remaining credible evidence regarding alleged acts of mistreatment does not reach the requisite level of gravity for torture. As stated by the ICTY, “the seriousness of the pain or suffering sets torture apart from other forms of mistreatment.”<sup>2190</sup> To assess the seriousness, the objective severity of the act must be considered, including the nature, purpose and consistency of the acts committed.<sup>2191</sup> In addition, subjective criteria such as the physical or mental condition of the victim, the effect of the treatment and, in some cases, factors such as the victim’s age, sex, state of health and position of inferiority, will also be relevant in assessing the gravity of the harm.<sup>2192</sup> Notably, treatment such as disciplining, according to the findings of the Trial Chamber in Case 001, does not reach the minimum level of severity to amount to torture.<sup>2193</sup> In the present trial, only hearsay information has been provided by the live witnesses or civil parties regarding the allegations of torture. This is insufficient to establish this core element of the crime of torture beyond reasonable doubt. The same applies for Au Kanseng, even if torture is not charged in relation to Au Kanseng. Regarding Phnom Kraol, there is no mention of torture whatsoever.

665. In addition to the above-mentioned elements, in order to establish the crime of torture, the Co-Prosecutors must establish beyond reasonable doubt the link between the alleged act, and a specific purpose.<sup>2194</sup> In the present case, no specific information is provided.<sup>2195</sup> A general statement that “torture was used to extract confessions” simply does not meet the requisite standard of proof. There is no reliable evidence linking Nuon Chea to acts of torture at S-21, Kraing Ta Chan, Phnom Kraol or Au Kanseng, or indicating that he was aware that acts of torture took place. Even if crimes were committed, there is no evidence that such acts were ever reported to Nuon Chea, and therefore no evidence that it was ever within his knowledge. In the absence of a common plan involving torture, and of any link between Nuon Chea and alleged acts of torture, no conviction can be sustained. If acts of torture occurred in any of the security centres, it was under the instructions of the operational head of the security centre, and such

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<sup>2189</sup> See *supra*, Chapter 4-III and Chapter 4-V, discussing the factual allegations at Kraing Ta Chan.

<sup>2190</sup> ICTY, *Brđanin* Trial Judgement, paras 483-484.

<sup>2191</sup> ICTY, *Brđanin* Trial Judgement, para. 484.

<sup>2192</sup> *Case 001, E188*, Trial Judgement, para. 355; see also ICTY, *Kvočka et al.* Trial Judgement, paras 142-143.

<sup>2193</sup> See *Case 001 E188*, Trial Judgement, para. 241; see also *E399/3*, Nuon Chea’s Reply on Use of Certain S-21 Statements, para. 44.

<sup>2194</sup> See e.g. ICTY, *Brđanin* Trial Judgement, paras 486-487.

<sup>2195</sup> See *supra*, Chapter 4-V-C, on interrogation.

cases were concealed from the Standing Committee.<sup>2196</sup> Furthermore, S-21 and Au Kanseng were operating under the military, to which Nuon Chea was unrelated. As a result, and in the absence of linkage evidence, even if acts of torture were found to have been committed at S-21 or Au Kanseng, Nuon Chea's individual criminal responsibility cannot be established.

## 2. Detention Conditions at the Time Do Not Amount to Torture

666. Regarding the Co-Prosecutors' argument that the general living conditions in the security centres constituted, in and of themselves, torture, the Defence recalls that the more egregious evidence as to detention conditions is provided by unsworn civil parties, whose credibility is inexistent.<sup>2197</sup> Regarding the other alleged harsh detention conditions, such as shackling, lack of hygiene, lack of mosquito nets, overcrowded cells, limited food, lack of freedom of movement inside the detention facilities, or inmate's labour, these did not amount to a crime under customary international law at the time, and certainly not as torture. This is clear from the definition of torture under the 1975 Declaration on Torture, which the Supreme Court Chamber has held constituted customary international law at the time,<sup>2198</sup> and which unequivocally distinguishes "acts of torture" and possible "cruel, inhumane or degrading treatment".<sup>2199</sup> Second, even if these facts were established beyond reasonable doubt, such conditions do not reach the requisite level of gravity and seriousness to amount to torture.

667. As with most of the allegations relating to the DK period, it is important to put things into their context in order to gain perspective: in 1975, Cambodia had just emerged out of five or seven years of civil war, and a large part of its territory – including its judicial institutions and detention centres – had been destroyed as a result of the civil war and U.S. bombings.<sup>2200</sup> Furthermore, the fact that such detention conditions were an international crime amounting to torture at the time does not find support in state practice or *opinio juris*,<sup>2201</sup> third, such detention conditions are the same as those in today's Cambodia, 32 years later. Indeed, as late as 2004, the UN Committee against Torture ('CAT') expressed concerns about the "numerous, ongoing

<sup>2196</sup> See *supra*, Chapter 4-V-C, on the prohibited use of torture.

<sup>2197</sup> See *supra*, Chapter 4-IV-D, on the credibility of 'survivors'.

<sup>2198</sup> *Case 001, F28*, Appeals Judgement, para. 195.

<sup>2199</sup> UN Declaration on Protection against Torture and Other Cruel, Inhuman or Degrading Treatment, 9 Dec 1975. In accordance with Art. 31 of the VCLT, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

<sup>2200</sup> See *supra*, Chapter 3; Chapter 4-II, on the CPK's national defence and security policy; see *infra*, Chapter 6-II, on the dire situation of Cambodia before 1975.

<sup>2201</sup> Amnesty International, 'Annual Report 1974/75', 1975, pp. 82, 85, 87-89, 91, 93, 99; Amnesty International, 'Annual Report 1975/1976', 1976, pp. 122, 130-31, 134-137, 146, 147; Amnesty International 'Report 1977', 1977, pp. 172, 178, 183, 187, 193, 196-197, 208, 228; Amnesty International, 'Report 1978', 1979, pp. 164, 175, 184; Amnesty International 'Report 1979', 1979, pp. 85, 101, 109-110, 117



and consistent allegations of acts of torture and other cruel, inhuman or degrading treatment or punishment committed by law enforcement personnel in police stations and prisons' in Cambodia,<sup>2202</sup> the fact that torture was not prohibited in its domestic penal law,<sup>2203</sup> the “unwarranted protraction of the pre-trial detention period”, the lack of access to counsel or a medical doctor of their choice, and, last but not least, the “overcrowding and poor conditions in prisons”.<sup>2204</sup> A 2015 report from the Cambodian League for the Promotion and Defense of Human Rights (‘Licadho’), one of Cambodia’s most reputed human rights organisations, qualified the current prison conditions as “squalid”,<sup>2205</sup> highlighting issues such as unlawful detention, lack of access to basic needs such as food, water, daylight and fresh air.<sup>2206</sup> However, these concerns were never qualified as torture or a crime against humanity.

668. The possible existence of such detention conditions more than 30 years ago, in a country emerging from a civil war and entrenched in an international armed conflict with Vietnam cannot be said to reach the requisite level of gravity to amount to torture as a crime against humanity. In any event, there is no evidence that the detention conditions in 1975-1979 were put into place to deliberately inflict severe harm and suffering,<sup>2207</sup> rather than merely resulting from Cambodia’s lack of resources at the time. The Defence relies on its previous analysis of and submissions on the relevant facts and law on this issue,<sup>2208</sup> given the page limit of the Brief.

### **C. THE CONSTITUTIVE ELEMENTS OF ENSLAVEMENT HAVE NOT BEEN ESTABLISHED**

669. The charges of enslavement insofar as the security centres are concerned are limited to forced labour,<sup>2209</sup> stating that “victims were forced to perform work without their consent, unpaid and without the opportunity to reap the direct benefits thereof.”<sup>2210</sup> In the context of establishing lack of consent beyond reasonable doubt, the mere subjective opinion of the victims that they were forced to work is insufficient; instead, it must be proved with objective evidence.<sup>2211</sup> However, in order to constitute enslavement, forced labour must be illegal, and of a certain gravity. Indeed, the use of “forced” labour is not always unlawful,<sup>2212</sup> and “the work

<sup>2202</sup> CAT 2004 Recommendations for Cambodia, p. 2, point 6 (a).

<sup>2203</sup> CAT 2004 Recommendations for Cambodia, p. 2, point 6 (c).

<sup>2204</sup> CAT 2004 Recommendations for Cambodia, p. 3, points 6 (i), (k) and (l).

<sup>2205</sup> LICADHO Report, Life Inside Cambodia’s Prisons, p. 2.

<sup>2206</sup> LICADHO Report, Life Inside Cambodia’s Prisons, pp. 2 & 4.

<sup>2207</sup> **D427**, Closing Order, para. 1409; *see also supra*, Chapter 4-V-D, on detention conditions.

<sup>2208</sup> **E399/3**, Nuon Chea’s Reply on Use of Certain S-21 Statements.

<sup>2209</sup> Paragraph 1393 of the Closing Order clearly related to facts which took place outside of the security centres. Paragraph 1394 deals with security centres specifically.

<sup>2210</sup> **D427**, Closing Order, para. 1394.

<sup>2211</sup> ICTY, *Krnjelac* Appeals Judgement, para. 195.

<sup>2212</sup> ICTY, *Blaškić* Appeals Judgement, para. 597.

required of a person in the ordinary course of lawful detention is not regarded as forced or compulsory labour.”<sup>2213</sup> To the contrary, the 1957 Standard Minimum Rules for the Treatment of Prisoners states that “all prisoners under sentence shall be required to work”, subject to certain conditions,<sup>2214</sup> and that “sufficient work of a useful nature shall be provided to keep prisoners actively employed”.<sup>2215</sup> During DK, requiring inmates to work in the various security centres was justified and lawful under both international human rights law and international humanitarian law.

670. International human rights law clearly distinguishes between forced or compulsory labour, on the one hand, and “any work or service normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention”.<sup>2216</sup> In addition, “any service exacted in cases of emergency or calamity threatening the life or well-being of the community” is not considered as a human rights violation.<sup>2217</sup> As discussed above, the very existence of Cambodia as a country was under threat at the time.<sup>2218</sup> Further, the protection against forced labour is not part of the non-derogable rights under international human rights law.<sup>2219</sup> The United Nations and the plenary of the European Commission on Human Rights have also held at the relevant time that “normally prisoners have no legal right to remuneration”.<sup>2220</sup> International humanitarian law also permits the use of labour of prisoners of war, and of non-combatants, provided that, for the latter, their labour is not related to war operations or of a military character.<sup>2221</sup> Finally, the imposition of forced labour was lawful, as the 1956 Penal Code, applicable during the DK, prescribed forced labour as a sentence for a wide range of offences.<sup>2222</sup>

671. Regarding the gravity of the alleged acts of forced labour, which is relevant to assess whether or not it can qualify as a crime against humanity, it is crucial to put things into perspective. At the time, Cambodia was coming out of a decade of civil war, with its territory decimated as a result of US bombings and destroying farming areas. Farmers and other workers in the country were living and working under dire conditions. Even nowadays, the work of

<sup>2213</sup> ICTY, *Krnjelac* Appeals Judgement, para. 200; *see also* ECHR, Art. 4 (3).

<sup>2214</sup> UN Standard Minimum Rules for the Treatment of Prisoners, Art. 71 (2).

<sup>2215</sup> UN Standard Minimum Rules for the Treatment of Prisoners, Art. 71 (3).

<sup>2216</sup> ICCPR, Art. 8 (3) (c) (i).

<sup>2217</sup> ICCPR, Art. 8 (3) (c) (iii); *see also* ECHR, Art. 4(3); ILO *Convention Concerning Forced or Compulsory Labour*, 39 UNTS 55, entered into force on 1 May 1932, Art. 2(2).

<sup>2218</sup> *See supra*, Chapter 3-I-A and Chapter 3-IX; *see infra*, Chapter 6-I and Chapter 6-II.

<sup>2219</sup> *See* ICCPR, Art. 4(2), which only refers to paras 1 & 2 of Art. 8.

<sup>2220</sup> ECtHR, *Twenty-One Detained Persons v. Germany*.

<sup>2221</sup> Geneva Convention III, Art. 49, 51; ICTY, *Blaškić* Appeals Judgement, para. 597.

<sup>2222</sup> **D288/6.91/6/1.1**, *1956 Code Pénal et Lois Pénales*, Art. 21, ERN 00366801.

farmers throughout Cambodia necessarily involves physical hardship, as they do not benefit from the various agricultural tools available in western countries. Further, regarding the work of prisoners in particular, nowadays there are still reports of detainees in Cambodia being forced to work for private companies without being given the choice, who see their detention conditions negatively impacted should they refuse or be unable to work, or who actually have to pay to be able to work outside of their cells.<sup>2223</sup> As a result, while such working conditions can appear unduly burdensome, they are no different than that of most of Cambodia's population prior to 1975-1979, at the time, or even nowadays.

#### **D. THERE WAS NO RACIAL OR POLITICAL PERSECUTION**

672. The Defence refers to Chapter 5 for a discussion of the legal elements of persecution. In particular, a prerequisite to a finding that the crime of persecution took place is that it must be discriminatory in fact, but also that the perpetrator (or the person responsible for him or her) intended to discriminate.<sup>2224</sup> As stated above, there is no credible specific evidence permitting a finding beyond reasonable doubt that people who were arrested and detained in security centres were targeted due to their race, or their political beliefs. Instead, they were arrested as a result of their own individual activities, be it unlawful actions and/or actions threatening national security.<sup>2225</sup> There is no evidence supporting that measures taken against the detainees at S-21 or Kraing Ta Chan were grounded or related to their political belief and on their membership of a particular group *per se*.

673. Instead, evidence shows that detainees were arrested and detained exclusively on the basis of their suspected engagement in unlawful activities such as treason and espionage.<sup>2226</sup> Being suspected or involved in unlawful activities, or activities threatening national security, such as treason or espionage, does not qualify as holding a particular political belief. It is simply a criminal act, notwithstanding the mental state of the person who commits it. There was therefore no discrimination in fact. Further, there is no evidence supporting that measures taken against the Vietnamese detainees at S-21 or Kraing Ta Chan were motivated by their race *per se* grounded on their political belief and on their membership of a particular group *per se*. Instead, evidence, where available, shows that Vietnamese detainees were arrested and detained

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<sup>2223</sup> See e.g. Licadho, 'Rights at a Price: Life Inside Cambodia's Prisons', Jan 2015, pp. 8-9.

<sup>2224</sup> **F36**, Case 002/01 Appeals Judgement, para. 667; *Case 001*, **F28**, Appeals Judgement, 3 Feb 2012, para. 267; see also ICTR, *Nahimana et al.* Appeals Judgement, para. 985; ICTY, *Deronjić* Appeals Judgement, para. 109; *Kvočka et al.* Appeals Judgement, para 320.

<sup>2225</sup> See *supra*, Chapter 4-V-B-3, on the alleged arrests of specific categories of detainees.

<sup>2226</sup> See *supra*, Chapter 4-V-B-3, on the alleged arrests of specific categories of detainees.

exclusively on the basis of their suspected engagement in unlawful activities such as treasons and espionage.<sup>2227</sup> Further, in the context of an international armed conflict, it cannot logically be concluded that targeting official members of the opposing armed forces amounted to persecution, for their status of combatant renders them legitimate targets.<sup>2228</sup> There is also no evidence that the physical perpetrators held any discriminatory intent. Even if there were, there is no evidence that such intent was shared by Nuon Chea, or that he was even aware of it. In the absence of such mens rea, a conviction is precluded.

#### **E. MURDER, WILFUL KILLING AND EXTERMINATION HAVE NOT BEEN ESTABLISHED**

674. The crimes of unlawful killings and murder share the same elements: the death of a person must occur; it must be the result of the perpetrator's acts or omission; and the perpetrator must have acted with the intention to kill, or knowing that his/her actions could lead to death.<sup>2229</sup> Regarding wilful killing, the victim must have been a protected person under international humanitarian law.<sup>2230</sup> Extermination requires the same, plus that deaths occur on a large scale, and with the specific intent to kill on a mass scale or to knowingly create conditions of life that lead to the death of a large number of people.<sup>2231</sup> As held by the ICTY, extermination must not be "collective in nature, rather than directed towards singled out individuals".<sup>2232</sup> All facts establishing the constitutive elements of the crimes must be established beyond reasonable doubt,<sup>2233</sup> and, in the case of extermination, "the overall conclusion that murder occurred cannot be said to have been established beyond a reasonable doubt if none of the specific instances that underpin that conclusion have been established to this standard."<sup>2234</sup>

675. The Defence recalls the lack of evidence establishing the existence of murders beyond reasonable doubt at S-21, Kraing Ta Chan, Au Kanseng or Phnom Kraol. At Kraing Ta Chan,

<sup>2227</sup> See *supra* Chapter 4-V-B-3-(a), on the alleged arrests of Vietnamese detainees; see also Chapter 5-II, on the alleged 'targeting' of Vietnamese.

<sup>2228</sup> Additional Protocol I enshrines this principle at Article. 48 "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." See Also ICRC 1958 Commentary to Protocol I on Art. 51(3), which provides: "direct" participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces. It is only during such participation that a civilian loses his immunity and becomes a legitimate target. Once he ceases to participate, the civilian regains his right to the protection under this Section, i.e., against the effects of hostilities, and he may no longer be attacked.

<sup>2229</sup> Case 001, E188, Trial Judgement, para 331-338 and 431; F36, Case 002/01 Appeals Judgement, para. 410

<sup>2230</sup> ICTY, *Kordić & Čerkez* Appeals Judgement, para. 38.

<sup>2231</sup> F36, Case 002/01 Appeals Judgement, para. 510; Case 001, F28, Appeals Judgement, paras 322-323.

<sup>2232</sup> ICTY, *Brđanin* Trial Judgement, para. 390.

<sup>2233</sup> F36, Case 002/01 Appeals Judgement, para. 418.

<sup>2234</sup> F36, Case 002/01 Appeals Judgement, para. 420.

only two civil parties – who were not under oath – provided evidence related to murders which as stated above, is unreliable for lack of credibility.<sup>2235</sup> Regarding S-21, the Defence’s view, based on the circumstantial evidence, is that at most, 7,000 people may have been sent to S-21, some of whom were later executed.<sup>2236</sup> However, the Co-Prosecutors have failed to establish even this – let alone the higher alleged death toll – beyond reasonable doubt. On the contrary, there is evidence that at least some of the deaths which occurred at S-21 were the result of lawful executions.<sup>2237</sup>

676. For the other security centres, vague and unspecific evidence, which is often hearsay, are insufficient to establish beyond reasonable doubt that death occurred.<sup>2238</sup> In any event, the Co-Prosecutors failed to present evidence that Nuon Chea knew about any alleged murders, let alone that he intended them. In the absence of proof beyond reasonable doubt regarding such a constitutive element of the crimes of murder or unlawful killings, the Chamber cannot enter a finding of guilt.

677. Regarding extermination in particular, no credible evidence established beyond reasonable doubt that killings occurred on a mass scale.<sup>2239</sup> Mere statements that “many people died”, without specific, eyewitness or credible hearsay evidence, constitute mere rumours that are insufficient for a finding beyond reasonable doubt.<sup>2240</sup> Even if the live witnesses’ evidence were found to be credible, the number of deaths proved beyond reasonable doubt would not constitute mass killings. Other evidence about the number of deaths come from documentary evidence, such as WRIs, or out-of-court statements, the S-21 prisoners or execution lists and the ‘Tram Kok District Records’, have not been tested by the Defence, have serious reliability issues, and, generally, a very low probative value.<sup>2241</sup> They are insufficient to establish beyond reasonable doubt that a massive number of people were killed. There is also no evidence that the physical perpetrators held any intent to kill on a mass scale. Even if there were, there is no evidence that such intent was shared by Nuon Chea, or that he was even aware of it. In the absence of such mens rea, a conviction is precluded.

<sup>2235</sup> See *supra*, Chapter 4-IV-D-1, on credibility of Meas Sokha and Say Sen.

<sup>2236</sup> See *supra*, Chapter 4-V-E-4, on alleged killings and ‘disappearances’ at S-21.

<sup>2237</sup> See *supra*, Chapter 4-V-E-4, on alleged killings and ‘disappearances’ at S-21.

<sup>2238</sup> **F36**, Case 002/01 Appeals Judgement, paras 428 & 430.

<sup>2239</sup> See *supra*, Chapter 4-V-E, on alleged killings and ‘disappearances’; see also *supra*, Chapter 4-IV-D-1, on credibility of Meas Sokha and Say Sen.

<sup>2240</sup> **F36**, Case 002/01 Appeals Judgement, para. 419.

<sup>2241</sup> **F36**, Case 002/01 Appeals Judgement, paras 296, 440. See *supra*, Chapter 4-IV-F-2, on the reliability of the OCP List and OCIJ List; see also *supra*, Chapter 2-II-B-3-(a).

## **F. OTHER CRIMES EQUALLY HAVE NOT BEEN ESTABLISHED**

678. As a result of the space limitations, the Defence is unable to extensively discuss all of the other charged crimes. However, the arguments made above apply *mutatis mutandis* to all the crimes not explicitly discussed in their own section. Regarding the allegation of rape as an “other inhumane act”, there is no credible evidence that it took place at any of the security centres, and that it was perpetrated under the order of senior cadres.<sup>2242</sup> To the contrary, DK’s official documents show that rape was considered a serious offense<sup>2243</sup> Regarding allegations of enforced disappearance, the mere statements that “people were taken away” or “were never seen again” is far from being sufficient to establish beyond reasonable doubt the core elements of the crime, but instead constitute mere rumours.

## **G. CHAPEAU ELEMENTS HAVE NOT BEEN ESTABLISHED**

### **1. The Discriminatory Nature of the ‘Attack’ Is Not Established**

679. The Closing Order alleges that there existed an ‘attack’ directed against the “entire population of Cambodia”, while at the same time alleges that this ‘attack’ was of discriminatory nature, “principally on political grounds but also, in some contexts, on national, ethnic, racial or religious grounds”.<sup>2244</sup> This self-contradictory allegation is unsubstantiated. Regardless of whether legitimate state policies and its implementation can be qualified as an ‘attack’, none of the five distinct components – the five alleged CPK policies and their implementation – of the alleged ‘attack’ was of discriminatory nature.

680. The state’s regulation of marriage, which was equally applicable to every citizen, was not a discriminatory campaign targeting any political, national, ethnic, racial, or religious groups. Similarly, the establishment of cooperatives and worksites mobilised and engaged Cambodian citizens of any origins equally in the country reconstruction efforts.

681. The DK security centres were the country’s police stations and correction facilities, serving to maintain public security and order by pursuing crimes ranging from minor crimes to high treason. Citizens of any origin were equally under the jurisdiction of the security system, if they were suspected of crimes. Irrespective of the terminology used by DK, be it ‘enemy’ or ‘bad element’, the target of the security centres was essentially criminals or criminal suspects,

<sup>2242</sup> D427, Closing Order, para. 1429.

<sup>2243</sup> See *infra*, Chapter 7, on the CPK regulation of marriage nationwide.

<sup>2244</sup> D427, Closing Order, para. 1350.

which cannot be considered a political group. Otherwise, the operation of any police or judicial systems in the world would by nature amount to a discriminatory process on political grounds.

682. Lastly, the alleged ‘targeting’ against certain groups such as Vietnamese and Cham is a misinterpretation of the facts. These groups were not targeted on grounds of their political, racial, or religious identity, but on grounds of their (suspected) criminal activities, or their being the enemy belligerents in an international armed conflict. Even if the alleged ‘targeting’ policy existed and was of discriminatory nature, the discriminatory nature of one component of the alleged ‘attack’ cannot define the nature of the entire ‘attack’. This follows the same logic that the (non-) discriminatory nature of each underlying crime forming part of an ‘attack’ would not affect the nature of the ‘attack’ *per se*. Therefore, based on the above, the chapeau element of discriminatory nature of the ‘attack’<sup>2245</sup> is not established. Accordingly, Nuon Chea cannot be held responsible for any charges of crimes against humanity.

## 2. The Alleged Victims Were Not Protected Persons

683. For a crime to qualify as a crime against humanity or a war crime, the victims need to fall under a specific category: civilians for the former, protected persons under international humanitarian law, for the latter. The Co-Prosecutors must establish the protected status of a victim beyond reasonable doubt.<sup>2246</sup> International humanitarian law does provide guidance as to how to determine the protected character of individuals or of a population, which is also relevant for crimes against humanity.<sup>2247</sup> Therefore, if an individual does not qualify as a civilian or protected person under the Geneva Conventions, this person cannot be considered as a civilian for the purposes of fulfilling the chapeau elements of crimes against humanity.

684. Individuals were arrested and detained in the security centres as a result of legitimate suspicions of activities detrimental to the national security of the state;<sup>2248</sup> they do not qualify as protected persons under international law. Indeed, civilians lose their protection when they take a direct part in the hostilities, which includes acts of espionage and sabotage.<sup>2249</sup> Furthermore, such actions constitute “legitimate and serious” reasons for the internment of

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<sup>2245</sup> ECCC Establishment Law, Art. 5.

<sup>2246</sup> **F36**, Case 002/01 Appeals Judgement, para. 418; ICC, *Bemba* Trial Judgement, para 94; ICTY, *Blaškić* Appeals Judgement, para. 111; *Strugar* Appeals Judgement, para. 178, fn. 457.

<sup>2247</sup> See e.g. ICTY, *Tadić* Appeals Judgement, paras 578 & following, where the ICTY used the Geneva Convention to define the term “civilian population”.

<sup>2248</sup> See *supra*, Chapter 4-V-B, on alleged arbitrary arrests.

<sup>2249</sup> ICTY, *Čelebići* Trial Judgement, para. 567; ICRC Interpretative Guidance on the Notion of Direct Participation in Hostilities, p. 48; see also, more generally, Geneva Convention IV, Art. 5; see also Additional Protocol I, Art. 51(3); ICRC Interpretative Guidance on the Notion of Direct Participation in Hostilities.

civilians.<sup>2250</sup> There is no requirement that the particular activity be judged as a crime under national law for a state to derogate from the rights of protected civilians under Article 5 of Geneva Convention IV.<sup>2251</sup> In addition, the decision as to whether a civilian constitutes a threat to the security of the state is “largely left to [the State’s] discretion”.<sup>2252</sup> Consequently, arresting and detaining civilians in such circumstances is not a war crime or a crime against humanity.

685. Regarding members of foreign armed forces who may have been arrested and detained at the security centres, they do not qualify as civilians for the purpose of crimes against humanity; while for war crimes, only crimes specifically directed towards prisoners of war can be charged, which is only the case for S-21. In any event, the First Additional Protocol to the Geneva Conventions states unequivocally that any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.<sup>2253</sup> As stated above in Section V-B-3-(a), the Co-Prosecutors failed to show beyond reasonable doubt that the detainees were members of the Vietnamese armed forces or were Vietnamese nationals.<sup>2254</sup> Further, and as also stated above, there is reliable evidence that such individuals were captured for their suspected participation in espionage or other unlawful activities. They therefore fall outside the scope of protected persons.

686. Finally, members of the RAK were arrested and detained in relation to activities against the state. According to the OCIJ, in 1975-1979, where members of a state’s own armed forces were allied with or providing militarily relevant support to an opposing side during an armed conflict, they did not fall within the definition of a civilian population in the context of crimes against humanity.<sup>2255</sup> This is precisely the case here; S-21 and Au Kanseng were military institutions and the vast majority of the detainees were from the RAK. As a result, no crime against humanity or war crime can be found against them.

## VII. JCE I IN RESPECT OF SECURITY CENTRES AND ‘INTERNAL PURGES’

687. As discussed extensively in Section II above, the CPK’s policy on security was a regulatory one, like any other country in the world. If anything, the alleged JCE members

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<sup>2250</sup> ICRC 1958 Commentary to Geneva Convention IV, p. 258, *see also* ICTY, *Čelebići* Trial Judgement, paras 565-567; Geneva Convention IV, Art. 42.

<sup>2251</sup> ICTY, *Čelebići* Trial Judgement, para. 568.

<sup>2252</sup> ICTY, *Čelebići* Trial Judgement, para. 583.

<sup>2253</sup> Additional Protocol I, Art. 46(1); 1907 Hague Convention, Art. 29, 30; ICRC Customary IHL, Rule 107.

<sup>2254</sup> Geneva Convention III, Art. 4; Additional Protocol I, Art. 43(2) and 44.

<sup>2255</sup> *Case 003, D191/18*, CIJ’s Interpretation of Attack Against Civilian Population, para. 69.



intended to install a lawful security system in the country to investigate, detain, and punish criminal offenders.<sup>2256</sup> This intent is not criminal and does not involve the commission of crimes. Furthermore, the majority of the crimes charged in relation to security centres require a specific intent: torture requires the intent to extract information, or to intimidate; extermination to kill on a mass scale, and persecution, to discriminate. In such cases, each member of the JCE must individually share the specific intent, which must also be possessed by the person who actually committed the crime.<sup>2257</sup> The evidence does not establish such specific intent in the present case.

688. In addition, there is no link between the alleged crimes on the ground, as discussed in Part IV, and any JCE member, or Nuon Chea. This is particularly true for S-21, which was a military institution, with which Nuon Chea had no relation.<sup>2258</sup> As a result, none of the alleged crimes, even if established beyond reasonable doubt, could be attributed to a JCE member or to Nuon Chea. A JCE I finding is therefore precluded. The remainders of the modes of liability are discussed in Chapter 8 of this Brief.

### **VIII. CONCLUSION ON THE CPK'S NATIONAL DEFENCE AND SECURITY POLICY AND ITS IMPLEMENTATION VIA SECURITY CENTRES AND 'INTERNAL PURGES'**

689. The majority of the evidence heard in relation to the security centres and 'internal purges' constitutes mere repetitions of the prevailing Manichean narrative presenting the DK as a blood-thirsty killing machine and unashamedly embraced by the Judges, the Co-Prosecutors and the Civil Party Lead Co-Lawyers. However, the proper role of a criminal trial – which may come as a surprise to the Chamber – is to look at evidence in a dispassionate and rational way, and assess whether the burden of proof is met. Most importantly, facts in the present case must be considered anew, independently of Case 001. One must determine that the crimes charged are established beyond reasonable doubt, and also analyse the evidence to see whether no doubt exists as to the guilt of Nuon Chea. This is simply impossible.

690. As described throughout Chapter 4, the CPK followed a legitimate national defence and security policy. Individuals who were suspected or involved in actions threatening national security were monitored, arrested, questioned and, if necessary, detained in the security centres.

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<sup>2256</sup> On the existence of a common purpose, *see supra*, Chapter 3-IX, and Chapter 4-II.

<sup>2257</sup> ICTY, *Brđanin* Trial Judgement, para. 708.

<sup>2258</sup> *See E1/232.1*, Case 002/01 Closing Arguments (Nuon Chea), T. 22 Oct 2013, p. 92, ln. 11 to p. 98, ln. 14; *see also, E313*, Case 002/01 Trial Judgement, para. 204.

Such policy is in existence in most states of the world. While certain differences exist, those owed to the particular circumstances DK faced: a country devastated by bombings, war and corruption, an inexistent judicial system, and facing relentless attacks from Vietnam. Even if certain crimes were committed, those were not the result of the policy but rather actions of individuals acting autonomously. Absent any link, Nuon Chea cannot be held criminally responsible for them.

## CHAPTER 5. THE CPK'S ALLEGED 'TARGETING' OF FOUR SPECIFIC GROUPS, INCLUDING THROUGH GENOCIDE

### I. INTRODUCTION

691. The Closing Order alleges that the CPK aimed to implement and defend the CPK socialist revolution through the 'targeting' of four specific groups "by whatever means necessary" between April 1975 and 6 January 1979,<sup>2259</sup> with the objective of "establish[ing] an atheistic and homogenous society without class divisions, abolishing all ethnic, national, religious, racial, class and cultural differences".<sup>2260</sup> The 'targeted' groups are the Cham, the Vietnamese, the Buddhists, and the former Khmer Republic soldiers and officials. It charges Nuon Chea with a range of crimes as a result, including the so-called "crime of crimes" – genocide – *vis-à-vis* the Cham and the Vietnamese groups. It further charged Nuon Chea with the crimes against humanity of murder, extermination, racial, religious and political persecution, imprisonment, torture, and other inhumane acts for the alleged crimes against the Cham and Vietnamese; the crimes against humanity of murder, religious persecution and forced marriage as other inhumane act against Buddhists; and the crimes against humanity of murder and political persecution in respect of former Khmer Republic soldiers and officials.

692. However, this Chapter demonstrates that there is no evidence directly or indirectly showing that the CPK had any policy aiming to target individuals from the four 'targeted' groups as a result of their group membership. The totality of the evidence in fact reveals an entirely different common thread: a lack of detailed, credible testimony that the charged crimes were actually committed against Cham, Vietnamese, Buddhists, and former Khmer Republic soldiers and officials due to their race, ethnicity, religion or political views. *Vis-à-vis* the Cham and Vietnamese in particular, there is not a shred of reliable evidence that the CPK had a policy to destroy them as a group.

693. On the contrary, the evidence clearly establishes that members of all four groups were treated like any other DK citizen. When they were arrested, detained, or executed, this owed to serious violations of DK law in accordance with the CPK's national defence and security policy,<sup>2261</sup> not to their group membership or to discrimination. In addition, not only is there no evidence of crimes, but there is nothing linking alleged JCE members including Nuon Chea to any of the events which allegedly took place. There is no evidence justifying a finding that

<sup>2259</sup> D427, Closing Order, para. 205.

<sup>2260</sup> D427, Closing Order, para. 207.

<sup>2261</sup> The CPK nationwide defence and security policy is discussed, *supra*, in Chapter 4-II.

Nuon Chea hated, discriminated against, or otherwise intended to persecute Cham, Vietnamese, Buddhists, or former Khmer Republic soldiers and officials.

694. At trial, only the Cham and Vietnamese were addressed in standalone trial segments. Buddhists and former Khmer Republic soldiers and officials were addressed as cross-cutting themes within other trial segments. However, given the Closing Order's efforts to highlight these four groups and the common themes underpinning the allegations of their particular 'targeting', the Defence focuses its discussion of the 'targeting' of all four groups in the present Chapter. This Chapter integrates and discusses together the alleged 'targeting' of Cham and Vietnamese, in Section II, since they relate to charges of genocide. Section III addresses the alleged 'targeting' of Buddhists. Finally, Section IV focuses on the alleged 'targeting' of former Khmer Republic soldiers and officials.

## **II. THE ALLEGED 'TARGETING' OF CHAM AND VIETNAMESE, INCLUDING THROUGH GENOCIDE**

### **A. INTRODUCTION**

#### **1. It is Alleged that the CPK Pursued Genocidal Policies Against Both Groups**

695. Regarding the Cham, the Closing Order alleges that prior to 1975, the CPK adopted a policy to target the Cham people as a group in order to defend the socialist revolution,<sup>2262</sup> a policy that allegedly escalated during DK.<sup>2263</sup> The policy's implementation purportedly included the suppression of Cham culture,<sup>2264</sup> forcible transfer of Cham population, and mass killings of Cham people that escalated to genocide in the Central (old North) Zone and East Zone in 1977 and 1978.<sup>2265</sup> Cham are classified as an ethnic or religious group for the purpose of the genocide charge.<sup>2266</sup> For the purposes of clarity, references to the "Cham group" should be interpreted as referring to both the ethnic and religious group.

696. Turning to the Vietnamese, the Closing Order alleges first that the CPK expelled Vietnamese people from DK territory and sent them back to Vietnam in 1975 and 1976,<sup>2267</sup> and second, that from April 1977, the CPK intended to further the "targeting policy" by "destroying

<sup>2262</sup> D427, Closing Order, para. 205.

<sup>2263</sup> D427, Closing Order, para. 211.

<sup>2264</sup> D427, Closing Order, para. 1420.

<sup>2265</sup> D427, Closing Order, paras 211-12.

<sup>2266</sup> D427, Closing Order, para. 1336.

<sup>2267</sup> D427, Closing Order, para. 213.

in whole or in part the Vietnamese group as such”.<sup>2268</sup> As a result, from 1977 onwards, alleged “mass targeted killings” occurred throughout Prey Veng and Svay Rieng while Vietnamese civilians were allegedly targeted and killed throughout DK, particularly in the Northeast and North Zones, culminating in genocide.<sup>2269</sup> The Closing Order presents the Vietnamese as an ethnic, national or racial group.<sup>2270</sup> Again for the purposes of clarity, references to the “Vietnamese group” should be interpreted as encompassing the ethnic, national and racial group.

## **2. The Evidence Does Not Substantiate Any of the Allegations of ‘Targeting’**

697. The Closing Order’s wide-ranging allegations as to both the Cham and the Vietnamese were wholly unsupported at trial. There is no credible evidence that Cham or Vietnamese people were targeted as such in DK.<sup>2271</sup> In particular, the evidence is insufficient to substantiate the charge of genocide *vis-à-vis* either group.

698. Regarding the ‘targeting’ of the Cham, there is no direct or indirect evidence pointing to the fact that the CPK policies had the will to exterminate, discriminate, or otherwise target Cham people. To the contrary, the evidence shows that any security measures taken against some members of the Cham population were a legitimate response to their unlawful individual activities, rather than on the grounds of their ethnic or religious identity or their political beliefs.<sup>2272</sup> Similarly, the alleged suppression of Cham culture was in fact a result of measures justified under international law, and which were generally applied to all DK citizens irrespective of their ethnic or religious identity. As to the alleged ‘targeting’ of Vietnamese, while statements that “all the Vietnamese disappeared”, “Vietnamese people were arrested” or “Vietnamese people were killed” were heard, this is insufficient in a court of law to substantiate a legal finding beyond reasonable doubt. In reality, the evidence does not support a finding that Vietnamese individuals were targeted as a result of their ethnicity, nationality or race, nor that the CPK intended to destroy the Vietnamese group as such, or otherwise intended to target its members. There is an acute absence of evidence establishing a link between the alleged ‘targeting’ and the ethnicity, nationality, or race of the alleged victims. Equally, evidence as to what actually happened to the persons concerned is nowhere to be found. Finally, the large

<sup>2268</sup> D427, Closing Order, para. 214.

<sup>2269</sup> D427, Closing Order, para. 214.

<sup>2270</sup> D427, Closing Order, para. 1343.

<sup>2271</sup> D427, Closing Order, paras 1337-39, 1419.

<sup>2272</sup> D427, Closing Order, paras 1337-39, 1417, 1419.

majority of the evidence heard constitutes mere rumours, which cannot serve as the basis of a finding of guilt beyond reasonable doubt.<sup>2273</sup>

699. In fact, what the trial showed is that elements such as ethnicity, nationality, religion or race were irrelevant in the DK. The evidence further shows that, when individuals who happened to belong to the Cham or Vietnamese group were arrested or otherwise ‘targeted’, it was as a result of them being soldiers, civilians taking an active part in hostilities, or them being involved in unlawful activities such as espionage, treason, destruction of property or theft. Those all constitute legitimate, non-discriminatory justifications. Regarding Nuon Chea, there is not even an indication that he held any discriminatory or genocidal intent towards Cham and Vietnamese people, or that he intended them to be specifically targeted. Likewise, there is nothing supporting a finding that he intended or even had knowledge of any crimes allegedly committed by some local authorities. In sum, the evidence is far from permitting a finding beyond reasonable doubt that Nuon Chea is criminally responsible for the alleged crimes against the Cham or Vietnamese group as charged in the Closing Order. Part B in this Section addresses several preliminary issues related to the charges applicable to the Cham and Vietnamese. The Section then considers the alleged policy aiming to destroy, exterminate or otherwise persecute the Cham and the Vietnamese in Part C. The underlying factual allegations of crimes are discussed in Part D for the Cham, and Part E for the Vietnamese. Part F contains the Defence’s position regarding the charge of genocide, while Part G discusses the other crimes charged. The primary mode of liability, JCE I, is addressed in Part H.

#### **B. PRELIMINARY ISSUES RELATED TO THE ‘TARGETING’ OF CHAM AND VIETNAMESE**

700. This Part sets out several issues that must be discussed at the outset as they relate to the totality of the evidence. The Defence first addresses questions related to the scope of the charges related to the Cham and Vietnamese. The credibility of ‘experts’ Ysa Osman and Alexander Laban Hinton, and of certain fact witnesses, is discussed next. Finally, the Defence briefly details the propaganda which has been issued *vis-à-vis* Wat Au Trakuon and has heavily coloured witnesses’ and civil parties’ accounts in this regard.

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<sup>2273</sup> F36, Case 002/01 Appeals Judgement, para. 419.

## 1. Several Issues Are Excluded from the Scope of Case 002/02

### (a) *The Kroch Chhmar Security Centre Has Been Excluded from Case 002/02*

701. The Closing Order charges Nuon Chea with alleged crimes against the Cham people at three sites: Kroch Chhmar Security Centre in Kroch Chhmar District in Sector 21 of the East Zone; Wat Au Trakuon Security Centre in Kang Meas District in Sector 41 of the Central (Old North) Zone; and Trea Village Security Centre in Kroch Chhmar District in Sector 21 of the East Zone.<sup>2274</sup> However, the Chamber excluded Kroch Chhmar Security Centre from the scope of Case 002/02 following the suggestion of the Co-Prosecutors. As the Defence has previously submitted,<sup>2275</sup> the Co-Prosecutors' reason for this exclusion was vague, self-contradictory, and unconvincing.<sup>2276</sup>

702. The exclusion of Kroch Chhmar Security Centre was clearly just another attempt to pivot away from any possible incrimination of current government officials including Prime Minister Hun Sen, Senator Ouk Bunchhoeun, and National Assembly President Heng Samrin.<sup>2277</sup> Ample and mutually-corroborating evidence, including the Human Rights Watch Report *30 Years of Hun Sen* (unjustifiably rejected by the Chamber in yet another illustration of its total disregard for its truth-seeking mission)<sup>2278</sup> shows that the East Zone forces – in particular Battalion 55 under Hun Sen's command and in turn under Heng Samrin's command – participated in the crackdown of two Cham rebellions in late 1975 in Kroch Chhmar District.<sup>2279</sup> Moreover, Hun Sen's immediate subordinate Yun Sophi, chief of staff of Battalion 55,<sup>2280</sup> also supervised Kroch Chhmar Security Centre.<sup>2281</sup> Ouk Bunchhoeun, who was then deputy secretary of Sector 21 where Kroch Chhmar Security Centre was located,<sup>2282</sup> was also likely involved in or at least had knowledge of the suppression of the Cham rebellions and the operation of Kroch Chhmar Security Centre. In fact, even 'expert' Osman publicly stated in a 27 March 2017 letter to the Cambodia Daily's editor – though not to the Chamber – that “evidence shows that some senior

<sup>2274</sup> **D427**, Closing Order, paras 771-789.

<sup>2275</sup> **E439/2**, 'Nuon Chea's Response re Kroch Chhmar Security Centre, paras 14-17.

<sup>2276</sup> **E301/2**, OCP Submission on Severance, para. 11 (emphasis added).

<sup>2277</sup> See **E439/2**, Nuon Chea's Response re Kroch Chhmar Security Centre; see also **E439**, Request for Clarification about Remaining Charges, which contains no mention of Kroch Chhmar.

<sup>2278</sup> **E347/1**, First Decision on HRW Report; see also *supra*, Chapter 1-II-A.

<sup>2279</sup> See **E439/2**, Nuon Chea's Response re Kroch Chhmar Security Centre, paras 7-9.

<sup>2280</sup> See **E439/2**, Nuon Chea's Response re Kroch Chhmar Security Centre, para. 8.

<sup>2281</sup> **D427**, Closing Order, para. 772.

<sup>2282</sup> **E3/387**, Heder Interview of Ouk Bunchhoeun, ERN 00350203.

CPP leaders had connections with the regime and possibly the deadly suppression in 1975 of Cham rebellions in Kroch Chhmar District”.<sup>2283</sup>

703. Indeed, based on the limited information Ouk Bunchhoeun provided in the 1990s to Stephen Heder, from around early 1976, local authorities in the East Zone were investigating and suppressing two organised rebellion movements in which Cham people were heavily involved and which were fighting against the DK government.<sup>2284</sup> One movement intended to create a Cham state seceding from DK, while the other was under instructions from Vietnam to topple the DK government.<sup>2285</sup> Part of Ouk Bunchhoeun’s information appeared to have come from interrogations of arrested rebels likely detained at Kroch Chhmar Security Centre.<sup>2286</sup> Such information related to Kroch Chhmar Security Centre is crucial to, *inter alia*, the *mens rea* of the alleged crimes against the Cham in Case 002/02, particularly political and religious persecution and genocide. The Closing Order confirms this importance since it alleges that most prisoners at Kroch Chhmar Security Centre were Cham individuals considered to be affiliated with the 1975 Cham rebellions.<sup>2287</sup> It also alleges that the 1975 Cham rebellions profoundly impacted the subsequent treatment of the Cham, including the escalation of arrests and the transfer of Cham population living along the Mekong River.<sup>2288</sup>

704. Detailed evidence on Kroch Chhmar Security Centre, therefore, could have shed light on the nature, scale, and impact of the Cham rebellions and the DK national and local authorities’ interpretation of them. Such information is obviously crucial to determining whether measures against certain Cham individuals were taken with discriminatory or genocidal intent towards the Cham people as such, or whether they were instead legitimate responses to menaces to national security and public order. However, due to the exclusion of Kroch Chhmar Security Centre and the Chamber’s erroneous decisions not to hear Ouk Bunchhoeun, Heng Samrin, and Hun Sen, key evidence in this regard is missing. The unjustified exclusion of Kroch Chhmar Security Centre from Case 002/02 is, therefore, profoundly detrimental to the ascertaining of the truth. It is also another example of the long shadow cast by political interference over this Tribunal.<sup>2289</sup> As ICC Judge Wyngaert explained in a minority opinion to the Katanga trial judgement: “the complete absence of evidence from those who

<sup>2283</sup> Cambodia Daily, Cham Have Been Betrayed Long Enough.

<sup>2284</sup> E3/387, Heder Interview of Ouk Bunchhoeun, ERN 00350206.

<sup>2285</sup> E3/387, Heder Interview of Ouk Bunchhoeun, ERN 00350206.

<sup>2286</sup> E1/372.1, Sos Romly, T. 8 Jan 2016, p. 69, ln. 1 to p. 71, ln. 21.

<sup>2287</sup> D427, Closing Order, para. 773.

<sup>2288</sup> D427, Closing Order, paras 281, 773.

<sup>2289</sup> See also *supra*, Chapter 1-I-A, Chapter 1-I-B, and Chapter 1-II-A on political interference.



were really at the centre of things at the time inevitably creates the impression that essential information is missing from the record.”<sup>2290</sup> The question as to whether the standard of proof, beyond reasonable doubt, can be reached “where it is obvious that having more and better evidence might well have led to significantly different answers”<sup>2291</sup> must be asked here too. The answer is no, the crimes could not be proven beyond reasonable doubt.

**(b) *The Khmer Krom Cannot Be Considered a Subset of the Vietnamese Group***

705. A basic tenet of the right to a fair trial is the right to be promptly informed of the charges,<sup>2292</sup> including both the legal description of the offence (“nature”) and the alleged underlying facts (“cause”) on which the allegations rest.<sup>2293</sup> The issue of who belonged to the Vietnamese group is a constitutive element of the crimes of genocide and persecution. Thus, any allegation that the Khmer Krom were part of the protected Vietnamese group needed to be included in the Closing Order in order to be legally proper. This is something which the International Co-Prosecutor has clearly grasped, since it now explicitly forms part of the charges against Yim Tith in Case 004.

706. However, this has never been the case in Case 002. Nuon Chea has never been charged with crimes related to the targeting of the Khmer Krom as a group or as part of the Vietnamese group. The Co-Prosecutors’ Introductory Submission contains no reference to the Khmer Krom, and only talks about “ethnic Vietnamese”.<sup>2294</sup> Nevertheless, the Co-Prosecutors and Civil Party Lead Co-Lawyers have attempted on several occasions to present the Khmer Krom as forming part of the Vietnamese ethnic, national, or racial group, based on the allegation that they were ‘targeted’ as a result of their “association with Vietnam”. In January 2010, the Co-Investigating Judge rejected those requests, stating that the question of whether the Khmer Krom may have been subjectively perceived to be Vietnamese by alleged perpetrators constituted a legal characterisation which needed to be set out in the Closing Order.<sup>2295</sup> The Co-Prosecutors attempted again to include the Khmer Krom within the scope of the trial in its Final Submissions.<sup>2296</sup> Despite this persistence, the Closing Order still contains no reference to the

<sup>2290</sup> ICC, *Katanga* Trial Judgement; Dissenting Opinion of Judge Van den Wyngaert, para. 148.

<sup>2291</sup> ICC, *Katanga* Trial Judgement; Dissenting Opinion of Judge Van den Wyngaert, para. 149.

<sup>2292</sup> ECCC Establishment Law, Art. 35 New; ICCPR, Art. 14(3)(a).

<sup>2293</sup> CCPR General Comment 13, para. 8; *see also* ICTR, *Ndindiliyimana et al.* Trial Judgement, para. 120; ICTY, *Kvočka et al.* Appeals Judgement, para. 31; ECCC Establishment Law, Art. 35 New; ICCPR, Art. 14(3)(a); ICTY, *Kvočka et al.* Appeals Judgement, paras 28, 31; *Naletilić & Martinović* Appeals Judgement, paras 23-24, 26; *Blaškić* Appeals Judgement, paras 209-220; *Kupreškić et al.* Appeals Judgement, paras 88-90.

<sup>2294</sup> **D3**, Co-Prosecutors Introductory Submission, para. 12.

<sup>2295</sup> **D247/2**, Order on Co-Prosecutors’ Request for Investigative Action Regarding the Khmer Krom, para. 10.

<sup>2296</sup> **D390**, Co-Prosecutors’ Final Submission, paras 13, 14, 795.

Khmer Krom being part of the “Vietnamese group”. Thus, the Khmer Krom were *de facto* excluded from the scope of the case.<sup>2297</sup> Consistent with this, in November 2016, the Chamber held that evidence pertaining to the alleged persecution of the Khmer Krom as a targeted group fell outside the scope of Case 002/02.<sup>2298</sup>

707. However, violating basic fair trial rights is not enough to deter the international Co-Prosecutors or the Civil Party Lead Co-Lawyers, who have repeatedly attempted to elicit evidence concerning the Khmer Krom.<sup>2299</sup> Judge Lavergne himself asked a witness who was born in Cambodia and never described himself as such, whether he “considered himself” a Khmer Krom.<sup>2300</sup> This most likely occurred since the international Co-Prosecutor realised that his case against Yim Tith may never go to trial due to political interference into Case 004, but this is irrelevant to the trial against Nuon Chea in Case 002/02. Ignoring the Closing Order and basic legal principles, and overlooking his duty of reserve and impartiality, Judge Lavergne stated that the Chamber could take into account the evidence regarding the treatment of Khmer Krom when “determining who belonged to the Vietnamese group”.<sup>2301</sup> This is plainly legally incorrect, as any competent judge should well know. Considering evidence heard in relation to Khmer Krom in the context of charges related to the treatment of Vietnamese would grossly violate Nuon Chea fair trial rights.

708. Regrettably, given the Chamber’s apparent readiness to disregard Nuon Chea’s basic fair trial rights, the Defence feels compelled to address the question of whether the Khmer Krom could be considered as belonging to the Vietnamese group. However, it recalls that the Co-Prosecutors bear the burden of proving either that the victim belonged to the targeted group, or that the perpetrator of the crime believed that the victim belonged to the group.<sup>2302</sup> Further, the question of how the individual is perceived and whether he is perceived as being a member of a protected group by the perpetrator (the “subjective” element), is insufficient, alone to establish membership of a group.<sup>2303</sup> There must be objectively verifiable elements related to the

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<sup>2297</sup> **D427**, Closing Order, paras 791-841.

<sup>2298</sup> **E319/52/4**, Decision on Two Requests by the International Co-Prosecutor to Admit Documents, para. 18.

<sup>2299</sup> **E1/262.1**, Ry Pov, T. 12 Feb 2015, p. 19, Ins 7-24; **E319/52**, International Co-Prosecutor’s Request to Admit Documents, para. 4.

<sup>2300</sup> **E1/262.1**, T. Ry Pov, T. 12 Feb 2015, p. 54, Ins 10-12.

<sup>2301</sup> **E1/262.1**, Ry Pov, T. 12 Feb 2015, p. 20, ln. 14 to p. 21, ln. 1.

<sup>2302</sup> ICTR, *Muhimana* Trial Judgement, para. 500.

<sup>2303</sup> ICTY, *Stakić* Appeals Judgement, para. 25; *Stakić* Appeals Judgement, para. 25; ICTR, *Nahimana et al.* Appeals Judgement, para. 496; *Nchamihigo* Trial Judgement, para. 338; *Rutaganda* Trial Judgement, paras 56-57; *Musema* Trial Judgement, para. 162; *Semanza* Trial Judgement, para. 317.

membership in a group.<sup>2304</sup> In the present case, no evidence has been heard to the effect that individuals referred to as Khmer Krom were identified or assimilated to the Vietnamese group.

709. The Khmer Krom is an ethnic group with its own common culture and language entirely separate from that of the Vietnamese.<sup>2305</sup> The Co-Prosecutors themselves accept this, previously describing the Khmer Krom as “ethnic Khmer inhabitants” of Southern Vietnam.<sup>2306</sup> The Khmer Krom cannot therefore fall under the Vietnamese ethnic group. Similarly, they cannot be said to belong to the Vietnamese national group, as they share no common citizenship with Vietnamese nor do they share the same territory, as they can be of Khmer or Vietnamese nationality and live in either country.<sup>2307</sup> Finally, being “racially” Khmer, they do not share any physical characteristics with the Vietnamese people and cannot therefore be considered as part of the Vietnamese racial group.<sup>2308</sup>

710. In addition, being perceived as being “associated” with Vietnam is different to being treated as being part of the Vietnamese ethnic, national or racial group. The former link is about political association; the latter is about intrinsic identity, *i.e.*, perceived membership in a protected group.<sup>2309</sup> Here, following the Co-Prosecutors’ reasoning would mean that any person suspected of having links with Vietnam – including the DK cadres, region leaders, or foreign nationals – could be considered part of the Vietnamese ethnic, national or racial group. This would violate the definition of protected groups under the Genocide Convention which deliberately excluded political groups. As a result, all allegations regarding crimes following the alleged policy of ‘targeting’ Vietnamese cannot be substantiated through evidence pertaining to the treatment of the Khmer Krom, as it falls outside of the scope of Case 002/02.

711. In any event, the evidence on the “treatment” of the Khmer Krom is vague, unreliable and incomplete. Heng Samrin himself was a Khmer Krom; attempting to destroy his own ethnic group is simply nonsensical. There is no evidence of Khmer Krom people being ‘targeted’ because of their group, or as a result of being associated with Vietnam, but rather because they were suspected of being involved in combat operations or illegal activities. The Defence recalls that most of the evidence concerning the “treatment” of Khmer Krom relates to Tram Kok

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<sup>2304</sup> ICTY, *Brđanin* Trial Judgement, para. 684; ICTR, *Semanza* Trial Judgement, para. 317; *Kajelijeli* Trial Judgement, para. 811.

<sup>2305</sup> For the definition of an ethnic group *see* ICTR, *Akayesu* Trial Judgement, para. 513.

<sup>2306</sup> **D390**, Co-Prosecutors’ Final Submission, para. 782.

<sup>2307</sup> ICTR, *Akayesu* Trial Judgement, para. 512.

<sup>2308</sup> ICTR, *Akayesu* Trial Judgement, para. 514

<sup>2309</sup> *See e.g.* ICTR, *Nahimana et al.* Appeals Judgement, para. 496; *Nchamihigo* Trial Judgement, paras 337-338.

District, and is based on the so-called ‘Tram Kok District Records’, the unreliability of which has been explained in Chapter 5 above.<sup>2310</sup>

## 2. ‘Experts’ Ysa Osman and Alexander Laban Hinton Completely Lack the Requisite Qualifications, and Provided Biased, Unverifiable Evidence

### (a) *Osman’s Evidence on the Cham is Unreliable and Lacks Probative Value*

712. Ysa Osman was heard as an expert in relation to the treatment of the Cham.<sup>2311</sup> However, but for being a Cham himself, Osman has no formal training in Cham culture or religion, social science, history, demographics, or investigative techniques.<sup>2312</sup> While the Defence does not intend to denigrate his work, interviewing people and summarising interviews into a book do not provide one with specialised knowledge or skills beyond the realm of that of a trier of fact.<sup>2313</sup> If Osman has any skills, it is perhaps the ability to summarise unverified information selected specifically to support his prejudgement.<sup>2314</sup> Osman also lacked the requisite impartiality and independence to testify as an expert, which undermines his evidence’s reliability and probative value.<sup>2315</sup> In particular, he prejudged key issues in Case 002/02, *e.g.*, the existence of a genocide against the Cham and the CPK’s responsibility for it,<sup>2316</sup> before starting his research. In fact, all of Osman’s research was driven by a desire to confirm his preconceived belief that the Cham were victims of persecution and genocide.<sup>2317</sup> As a result, he misrepresented evidence, whether intentionally or not. His inaccurate report of Sales Ahmat’s evidence, discussed below, and his misrepresentation of Ke Pauk’s 1976 telegram,<sup>2318</sup> are just some cases in point.

713. In addition, Osman’s evidence is unreliable as it derives almost exclusively from information obtained through interviews of people whose accounts cannot be tested. This is particularly important since, when individuals interviewed by Osman testified in court, it emerged that there were substantial discrepancies between Osman’s account of their interview

<sup>2310</sup> See *supra*, Chapter 4-IV-F-1.

<sup>2311</sup> E367, Decision on Osman.

<sup>2312</sup> E1/407.1, Ysa Osman, T. 23 Mar 2016, p. 16, ln. 17 to p. 17, ln. 14.

<sup>2313</sup> See *e.g.* E9/4/9.1.12, SCSL Taylor Decision on Expert Dufka, paras 15-16; ICTR, *Nyiramasuhuko et al*, Decision on the Qualification of Defence Expert Witness’, paras 6-8, 10.

<sup>2314</sup> See *also supra*, Chapter 2-III-B-3.

<sup>2315</sup> E367, Decision on Osman, para. 11; see *also supra*, Chapter 2-III-B-2, on the proper requirements for experts.

<sup>2316</sup> See *e.g.* E3/9678, Transcripts of Osman Interview, ERN 01199554; E3/1822, Ysa Osman, ‘Oukoubah’, 2002, ERN 00078536; E3/9680, Phnom Penh Post, How Many Cham Killed, ERN 01199557.

<sup>2317</sup> E3/1822, Ysa Osman, Oukoubah, ERN 00078598; E3/9678, Transcripts of Osman Interview, ERN 01199554: Ysa Osman did “[r]esearch on the genocide, why the Khmer Rouge killed the Cham people.”

<sup>2318</sup> E3/952, ‘Telegram from Pauk to Pol’, 2 Apr 1976, ERN 00182658; E3/2653, Osman, Cham Rebellion, ERN 00219176; see *infra*, Chapter 5-II-C-1-(a).

and their actual recollection. For instance, No Sates – who had told Osman that she witnessed the execution of Cham girls in Trea Village – later admitted in court that she lied about being an eyewitness because she wanted “justice”.<sup>2319</sup> Similarly, Sales Ahmat, who according to Osman had heard Ke Pauk say that all Cham in the mobile forces must be destroyed since they were all traitors,<sup>2320</sup> later testified he had only heard that there was a plan to “purge” the mobile unit forces “who betrayed the *Angkar*, regardless of their ethnicity, whether Cham or Khmer”.<sup>2321</sup> In addition, Him Man, who according to Osman saw CPK cadres smash Cham children against tree trunks,<sup>2322</sup> told the Co-Investigating Judges that he did not witness such things but heard from others that it happened.<sup>2323</sup>

714. Furthermore, the lack of sound sources for Osman’s opinion evidence is further reflected in the fact that he “could not find any documents” to support his conclusion that the CPK had a nationwide policy to destroy the Cham.<sup>2324</sup> Similarly, his sweeping conclusion that “Cham people were gathered and brought for execution” was not supported by any representative research of all Cham nationwide.<sup>2325</sup> Finally, Osman’s conclusions on Cham demographics also lack any legitimate basis. He claimed that the Cham were specifically targeted as a group because allegedly more than 500,000 Cham died during the DK.<sup>2326</sup> However, this death toll is based on “interviews” of individuals who said they had “seen statistics”, “heard an announcement by Les Kosem”, a Khmer Republic military official who acted as a Cham community representative,<sup>2327</sup> or relied on “memories of Cham elders”.<sup>2328</sup> None of this is scientifically valid evidence. Moreover, several scholars challenged Osman’s conclusions. Even anti-CPK historian Ben Kiernan states that Osman “more than triples the true proportion”,<sup>2329</sup> and concludes – though also wrongfully – that 90,000 Cham died in DK.<sup>2330</sup>

<sup>2319</sup> **E1/351.1**, No Sates, T. 29 Sep 2015, p. 24, lns 9-18; *See infra*, Chapter 5-II-D-3.

<sup>2320</sup> **E3/2653**, Osman, Cham Rebellion, ERN 00219179.

<sup>2321</sup> **E1/398.1**, Sales Ahmat, T. 9 Mar 2016, p. 32, lns 9-11, *see also*, p. 102, ln. 22 to p. 103, ln. 20, p. 56, ln. 24 to p. 57, ln. 11, p. 58, lns 5-16; *see infra*, Chapter 5-II-D-3.

<sup>2322</sup> **E3/2653**, Osman, Cham Rebellion, ERN 00219216.

<sup>2323</sup> **E3/5203**, ‘WRI of Him Man’, ERN 00242091.

<sup>2324</sup> **E1/388.1**, Ysa Osman, T. 9 Feb 2016, p. 17, ln. 23 to p. 18, ln. 5.

<sup>2325</sup> **E1/388.1**, Ysa Osman, T. 9 Feb 2016, p. 18, lns 3-4; **E1/407.1**, Ysa Osman, T. 23 Mar 2016, p. 32, ln. 2 to p. 33, ln. 10.

<sup>2326</sup> **E3/1822**, Ysa Osman, Oukoubah, ERN 00078450.

<sup>2327</sup> At the time, Les Kosem sought to obtain support from Muslim countries around the world and therefore had a clear interest in inflating the number of Cham people, *see e.g.* **E3/9691**, US Diplomatic Cable: Conversation with Lon Nol, 20 Apr 1974; **E367/5.1.5**, Phnom Penh Post, ‘Leaks Tell Cham General’s Tale; *see also infra*, Chapter 9 and **Annex 1**.

<sup>2327</sup> **E3/9686**, Kiernan, Genocide and Resistance in Southeast Asia, ERN 01199613.

<sup>2328</sup> **E3/1822**, Ysa Osman, Oukoubah, ERN 00078450, fn. 5.

<sup>2329</sup> **E3/9686**, Kiernan, Genocide and Resistance in Southeast Asia, ERN 01199613.

<sup>2330</sup> **E3/9681**, Kiernan, Cham Muslims of Kampuchea Under Pol Po, ERN 01199580.

Vickery challenges both Osman's and Kiernan's methodologies, and provides an also inaccurately high estimate of 10,000 deaths.<sup>2331</sup> In light of the lack of any objective data on Cambodia's population between 1962 and 1998,<sup>2332</sup> any conclusion on the Cham death toll is at best speculative and at worst, unfounded. Thus, Osman's conclusion in this regard – like all of his evidence – should not be given any weight.

**(b) Hinton's Evidence on the Vietnamese is Unreliable and Lacks Probative Value**

715. Alexander Laban Hinton, an anthropology professor and the director of the Centre for the Study of Genocide and Human Rights at Rutgers University, was called to testify as an expert on the treatment of Vietnamese and of Buddhists.<sup>2333</sup> However, his research never focused on the question of the treatment of Vietnamese. He testified that he was “doing research in general” to “understand the experience in [one specific] village” and “represent the experience of the people in this district”.<sup>2334</sup> He only spoke to “half a dozen people” regarding the treatment of Vietnamese,<sup>2335</sup> he never spoke to any CPK cadre or CPK member during his research;<sup>2336</sup> and most of his research took place in one village – which he called “Banyan” – in Kampong Siem District in Region 41.<sup>2337</sup>

716. In addition, most of Hinton's sources are inaccessible and therefore, unreliable. He used three types of sources: interviews and “casual conversations” with individuals; other scholars' publications; and documents such as security centre statements of prisoners, and CPK publications and documents.<sup>2338</sup> He identified the individuals as his primary sources, testifying that he had formal interviews with about 10 of them, and spoke with about 150-200 people overall. Thus, his evidence generally constitutes second-hand hearsay;<sup>2339</sup> must be approached with utmost caution; and ultimately should be given very limited weight.<sup>2340</sup>

717. The fact that Hinton never researched the treatment of Vietnamese and only spoke to people in one village in one of DK's some-120 Districts<sup>2341</sup> did not deter him from making

<sup>2331</sup> E3/9682, Vickery, Cham Population Figures, ERN 01199597.

<sup>2332</sup> See *infra*, Chapter 5-II-E-3.

<sup>2333</sup> E388, Decision on Hinton.

<sup>2334</sup> E1/402.1, Alexander Hinton, T. 15 Mar 2016, p. 27, ln. 6, p. 116, lns 13-20, p. 124, lns 6-7.

<sup>2335</sup> E1/403.1, Alexander Hinton, T. 16 Mar 2016, p. 12, lns 21-24.

<sup>2336</sup> E1/402.1, Alexander Hinton, T. 15 Mar 2016, p. 128, lns 2-18.

<sup>2337</sup> E1/401.1, Alexander Hinton, T. 14 Mar 2016, p. 12, lns 4-8, 17-19.

<sup>2338</sup> E1/402.1, Alexander Hinton, T. 15 Mar 2016, p. 105, ln. 25 to p. 106, ln. 5, p. 115, ln. 18.

<sup>2339</sup> The Defence uses the term “second-hand hearsay” to refer to the situation where a witness or a civil party testifies about a fact which he or she did not eyewitness but only learned about from another person who did not eyewitness the fact themselves either. This is also known as “double hearsay”.

<sup>2340</sup> F36, Case 002/01 Appeals Judgement, paras 90, 329, 550, 880, 881.

<sup>2341</sup> E3/1398, Political Geography of DK, ERN 00814510-11.

sweeping and highly unacademic statements about how all Vietnamese people were killed in a genocide. When asked for sources for his statement, Hinton referred to Kiernan; to demographic data; and to “information [he has] from secondary sources **from the village** where [he] worked”.<sup>2342</sup> He also pointed to the use of the term ‘*Yuon*’, and the fact that many scholars agreed with him, and concluded that “I think there’s a lot of evidence that supports [the] claim” that there had been a genocide.<sup>2343</sup> The truth is that Hinton’s evidence is the product of a deep confirmation bias. It constitutes mere repetition of what other scholars, and mainly Kiernan, said about the treatment of Vietnamese, together with his own interpretation of the term ‘*Yuon*’<sup>2344</sup> and information he received in an interview with a certain Teap.<sup>2345</sup> The issues of demographics and the term ‘*Yuon*’ are addressed later in this Section.<sup>2346</sup> However, since the “magical Teap” is at the core of Hinton’s allegation of a genocide against the Vietnamese, he is discussed immediately below.

718. According to Hinton, a Southwest cadre whose pseudonym is Teap told him about a letter he received from “Grandmother Yut” – whom all the parties agree is Prak Yut (2-TCW-938) and whose credibility is discussed immediately below – in mid-1977, which called for the “smashing of internal enemies, including Vietnamese”.<sup>2347</sup> Hinton admitted in court that he “didn’t dwell” upon the subject.<sup>2348</sup> The only other information Hinton volunteered in this regard was that, as stated in his book, “several former cadres who worked in Region 41 described how Vietnamese were singled out for execution in the area”.<sup>2349</sup> In court, however, he said that one person who worked at the district office and a couple of village heads **may** have told him about the singling out of Vietnamese, but “he would need to check [his] records”.<sup>2350</sup> In any event, Teap’s evidence is contradicted by that of Prak Yut (2-TCW-938) herself, who testified that such orders were never given.<sup>2351</sup> Furthermore, Hinton never saw the letter that Teap allegedly referred to.<sup>2352</sup> His evidence therefore constitutes vague and

<sup>2342</sup> E1/402.1, Alexander Hinton, T. 15 Mar 2016, p. 118, ln. 23, to p. 119, ln. 7 (emphasis added).

<sup>2343</sup> E1/402.1, Alexander Hinton, T. 15 Mar 2016, p. 132, ln. 1 to p. 133, ln. 24.

<sup>2344</sup> E1/402.1, Alexander Hinton, T. 15 Mar 2016, p. 132, lns 10-12.

<sup>2345</sup> E1/402.1, Alexander Hinton, T. 15 Mar 2016, p. 26, ln. 12 to p. 27, ln. 7.

<sup>2346</sup> See *infra*, Chapter 5-II-E-3, Chapter 5-II-C-2-(a)-(iii).

<sup>2347</sup> E1/401.1, Alexander Hinton, T. 14 Mar 2016, p. 69, ln. 15 to p. 70, ln. 21; E1/402.1, Alexander Hinton, T. 15 Mar 2016, p. 20, ln. 12 to p. 22, ln. 13.

<sup>2348</sup> E1/402.1, Alexander Hinton, T. 15 Mar 2016, p. 27, lns 2-4.

<sup>2349</sup> E3/3346, Alexander Hinton, ‘Why did they Kill’, 2005, ERN 00431661.

<sup>2350</sup> E1/402.1, Alexander Hinton, T. 15 Mar 2016, p. 30, lns 2-4.

<sup>2351</sup> E1/380.1, Prak Yut (2-TCW-938), T. 21 Jan 2016, p. 12, ln. 4-10.

<sup>2352</sup> E1/402.1, Alexander Hinton, T. 15 Mar 2016, p. 21, lns 8-15.

unsubstantiated second-hand hearsay.<sup>2353</sup> The Defence is also unable to challenge it, as it neither has information confirming Teap's true identity<sup>2354</sup> nor access to any of Hinton's interview recordings. In light of all of these considerations, and of the contradictory evidence provided by Prak Yut (2-TCW-938), Hinton's evidence in this regard must therefore be given no weight whatsoever.

719. The Defence requested access to Hinton's sources, specifically the survey he used as a basis for his research; his interview audio records and notes; and the code sheet containing the names of people he interviewed.<sup>2355</sup> After waiting more than seven months to issue a decision, the Chamber rejected the request, dismissing it as "untimely".<sup>2356</sup> Curiously, the Chamber has at other times recognised that access to sources is of crucial importance.<sup>2357</sup> As noted in Chapter 2, for instance, its ostensible basis not to hear key Defence witness Robert Lemkin or admit the four highly exculpatory Lemkin-Sambath Transcripts that are central to the Defence's case was a presumed inability to test the source material.<sup>2358</sup> However, in the case of Hinton – an 'expert' central to the Co-Prosecutors' case – the Chamber dramatically changed tune. No longer were sources critical; instead, the Chamber found the Defence's request for Hinton's sources to be "overly broad" and "a fishing expedition"<sup>2359</sup> which would "unduly delay the fair and expeditious conduct of the proceedings" and undermine the interests of justice.<sup>2360</sup> Only a few days after the Chamber's decision, however, the Supreme Court Chamber issued its Case 002/01 Appeals Judgement, in which it unequivocally held that "careful scrutiny of the sources from which experts infer their conclusions" was a "key factor in the assessment" of the reliability and probative value of their evidence.<sup>2361</sup> Abiding by these new 'rules of the game' accordingly necessitates disregarding the totality of Hinton's evidence.

<sup>2353</sup> **F36**, Case 002/01 Appeals Judgement, paras 90, 329, 550, 880, 881; *see also supra*, Chapter 2-III-B-3, on the caution required when assessing hearsay evidence.

<sup>2354</sup> **E1/402.1**, Alexander Hinton, T. 15 Mar 2016, p. 24, lns 10-21, p. 25, ln. 11 to p. 26, ln. 1.

<sup>2355</sup> **E405**, Nuon Chea's Hinton Rule 93 Request.

<sup>2356</sup> **E405/2**, Decision on Nuon Chea's Hinton Rule 93 Request, paras 17-18.

<sup>2357</sup> **E347/1**, First Decision on HRW Report, para. 4.

<sup>2358</sup> *See supra*, Chapter 2-II-B-3-(c) and Chapter 3-II-B-1.

<sup>2359</sup> **E405/2**, Decision on Nuon Chea's Hinton Rule 93 Request, paras 17-18.

<sup>2360</sup> **E405/2**, Decision on Nuon Chea's Hinton Rule 93 Request, paras 17-18.

<sup>2361</sup> **F36**, Case 002/01 Appeals Judgement, para. 329; for further details, *see supra*, Chapter 2-III-B-3, on the assessment of 'experts'.



### 3. Credibility Issues *Vis-à-Vis* Certain Witnesses on the ‘Targeting’ of the Cham

#### (a) *Soh Kamrei’s Behaviour Illustrates his Total Lack of Credibility*

720. Soh Kamrei, General Director of the Cambodia Islamic Centre, is the source the Closing Order relies on to establish an alleged DK plan to destroy all the Cham by 1980.<sup>2362</sup> However, while a clearly devoted Muslim, Soh Kamrei refused to take a religious oath before giving an interview to the Co-Investigating Judges in 2008.<sup>2363</sup> When the Chamber summonsed him to testify in September 2015, he refused the summons.<sup>2364</sup> He rejected all of the Chamber’s subsequent efforts to facilitate his testimony.<sup>2365</sup> His apparent efforts to avoid testifying were also aided by a certain “assistant to [His Excellency] Osman Hasann who is an advisor to Prime Minister Hun Sen”, who directly contacted WESU and asked if Soh Kamrei could be replaced by other witnesses.<sup>2366</sup> After the Chamber eventually resorted to enforcing the summons it issued,<sup>2367</sup> the Council for Islamic Religious Affairs intervened to convince Soh Kamrei to testify voluntarily.<sup>2368</sup> He eventually agreed,<sup>2369</sup> but again, only on the condition that he would not take a religious oath.<sup>2370</sup> The Chamber incomprehensibly permitted him to do so, and he made a non-religious affirmation to tell the truth.<sup>2371</sup>

721. Soh Kamrei’s persistent refusal to testify; Prime Minister Hun Sen’s intervention in facilitating his desired exemption from court duty; and his refusal to take an oath on the Quran, despite being an apparently devout Muslim, casts significant doubts over the veracity of his evidence. As a result, his evidence is inherently unreliable and must be excluded entirely. As a result, the Defence does not address his evidence here.

#### (b) *Prak Yut’s (2-TCW-938’s) Sixth WRI Should Be Disregarded*

722. As flagged in Chapter 2 above,<sup>2372</sup> the second witness credibility issue that must be addressed *vis-à-vis* the ‘targeting’ of the Cham relates to Prak Yut (2-TCW-938). The former secretary of Kampong Siem District in Sector 41 of the Central (old North) Zone, Prak Yut (2-

<sup>2362</sup> D427, Closing Order, para. 765.

<sup>2363</sup> E3/5216, ‘WRI of Soh Kamrei’, ERN 00225495.

<sup>2364</sup> E202/208/1, WESU Report: Soh Kamrei.

<sup>2365</sup> E202/208/1, WESU Report: Soh Kamrei; E29/477, TC Request for Medical Assessment of 2-TCW-827.

<sup>2366</sup> E202/208/1, WESU Report: Soh Kamrei.

<sup>2367</sup> E202/208/2, ‘Order to Bring a Witness Refusing to Appear’, 4 Apr 2016.

<sup>2368</sup> E202/208/3/1, ECCC National Security Section Report on Soh Kamrei.

<sup>2369</sup> E202/208/3/1, ECCC National Security Section Report on Soh Kamrei.

<sup>2370</sup> E1/415.1, Soh Kamrei, T. 6 Apr 2016, p. 15, lns 4-9.

<sup>2371</sup> E1/415.1, Soh Kamrei, T. 6 Apr 2016, p. 15, lns 5-12.

<sup>2372</sup> See *supra*, Chapter 2-II-B-2.

TCW-938) testified for three days as the key fact witness on the alleged nationwide policy on the Cham.<sup>2373</sup> The Co-Prosecutors first proposed Prak Yut (2-TCW-938) for the Cham segment in their May 2014 Case 002/02 witness list.<sup>2374</sup> Among the 127 individuals on their list, she was one of only four Case 002/01 witnesses proposed to be recalled, alongside Duch and Pech Chim. What is incredibly odd, however, is that when the Co-Prosecutors proposed Prak Yut's (2-TCW-938)'s appearance in May 2014, they officially had no evidence in their possession demonstrating that she in fact had any relevant evidence *vis-à-vis* the Cham. At that stage, the Co-Investigating Judges had interviewed Prak Yut's (2-TCW-938)'s four times in 2009 for Case 002,<sup>2375</sup> and DC-Cam once in 2013.<sup>2376</sup> She had also testified for several days in Case 002/01.<sup>2377</sup> Nowhere in any of that evidence had Prak Yut (2-TCW-938) even once mentioned the Cham.

723. Prak Yut (2-TCW-938) only began to discuss the Cham during a series of interviews by the International Co-Investigating Judge in Case 004. By the time the Co-Prosecutors put her on their Case 002/02 witness list in May 2014, she had been interviewed in Case 004 four times, with a fifth interview taking place in September 2014.<sup>2378</sup> However, according to submissions to the Chamber signed only by the International Co-Prosecutor without his national counterpart, the Co-Prosecutors only received Prak Yut (2-TCW-938)'s five Case 004 WRIs on 12 December 2014 when they were placed on the Case 004 case file.<sup>2379</sup> Indeed, this is corroborated by the time stamp on both the Khmer and English WRIs. Thus, the Co-Prosecutors only had access to the WRIs **seven months after** they had already put Prak Yut (2-TCW-938) on their Case 002/02 witness list for the Cham.

724. On 17 July 2015, the Trial Chamber admitted all of Prak Yut's (2-TCW-938)'s five WRIs.<sup>2380</sup> However, on 7 August 2015, it declined to hear her for the Cham segment.<sup>2381</sup> Within two weeks of the Chamber's decision not to call Prak Yut (2-TCW-938), the International Co-Investigating Judge interviewed her a sixth time.<sup>2382</sup> This time, her account differed

<sup>2373</sup> See e.g. **E366**, International Co-Prosecutor's Request to Call Witnesses in Cham Segment, paras 6, 8.

<sup>2374</sup> **E305/6**, Co-Prosecutors' Case 002/02 Updated Witness, Civil Party and Expert List and Summaries; see also, **E305/6.1**, Co-Prosecutors' Case 002/02 Updated Witness Summaries, ERN 00986546.

<sup>2375</sup> **E3/162**, 'WRI of Prak Yut (2-TCW-938)'; **E3/163**, 'WRI of Prak Yut (2-TCW-938)'; **E3/164**, 'WRI of Prak Yut (2-TCW-938)'; **E3/165**, 'WRI of Prak Yut (2-TCW-938)'.

<sup>2376</sup> **E3/9310**, 'DC-Cam Interview of Prak Yut (2-TCW-938)'.

<sup>2377</sup> **E1/33.1**, Prak Yut (2-TCW-938), T. 25 Jan 2012; **E1/34.1**, Prak Yut (2-TCW-938), T. 26 Jan 2012; **E1/35.1**, Prak Yut (2-TCW-938), T. 30 Jan 2012.

<sup>2378</sup> **E3/9499**, 'WRI of Prak Yut (2-TCW-938)', 30 Sep 2014

<sup>2379</sup> **E366**, International Co-Prosecutor's Request to Call Witnesses in Cham Segment, fn. 3.

<sup>2380</sup> **E319/22/1**, Decision on International Co-Prosecutors' Request to Admit Statements, paras 6-7.

<sup>2381</sup> Email from Trial Chamber Senior Legal Officer to the Parties, 7 Aug 2015.

<sup>2382</sup> **E3/9677**, 'WRI of Prak Yut (2-TCW-938)'.

dramatically from her five previous ones.<sup>2383</sup> In her five first Case 004 WRIs, Prak Yut (2-TCW-938) stated that the only orders she had received were to identify individuals, including Cham, “who took some action such as opposing communal eating and creating other problems” or “who opposed the revolution [...] wanted to topple the revolution [...]”. She said in those five WRIs that separate orders to collect, arrest, or, in some cases, execute some of these individuals depending on the assessment of the nature and gravity of their suspected activities, arrived later.<sup>2384</sup> She had also said that even among arrested Cham, there were systems of distinction, as only “some of them” were sent to District security centre Tuol Beng<sup>2385</sup> where light offenders would be released after re-education,<sup>2386</sup> and that she did not know whether the others were to be executed.<sup>2387</sup> However, in her sixth Case 004 WRI, Prak Yut (2-TCW-938) suddenly reportedly twice said that she wanted to “clarify” and “clarify once again” that the orders she received were “very clear about killing those Cham” and “very clear [...] that we must **kill all the Cham**”.<sup>2388</sup>

725. In addition, Prak Yut (2-TCW-938) had repeatedly stated in her five first Case 004 WRIs that she did not know if Ta An had initiated orders to kill some Cham, or if he had received such orders from others.<sup>2389</sup> In her sixth Case 004 WRI, however, Prak Yut (2-TCW-938) dramatically reversed position and suddenly “confirmed” that the orders to kill the Cham originated from a level higher than Sector 41 secretary Ta An, “for instance [the] zone level”.<sup>2390</sup> Her attitude seems eager and even impatient in providing these “clarifications” and contrasted markedly with her apparent attitude during the five Case 004 interviews.

726. Prak Yut’s (2-TCW-938’s) sixth Case 004 WRI is also odd in another sense. It appears to have lasted five hours (from 10.30am to 3.30pm), with no rest breaks,<sup>2391</sup> and yet is only 8 pages long and records only 15 questions and answers. To take just one comparative example, within five hours, witness Toat Thoeun gave an interview in Case 004 spanning 39 pages and covering 181 questions and answers.<sup>2392</sup> Furthermore, Prak Yut’s (2-TCW-938’s) sixth WRI

<sup>2383</sup> E3/9677, ‘WRI of Prak Yut (2-TCW-938)’.

<sup>2384</sup> E3/9522, ‘WRI of Prak Yut (2-TCW-938)’, A44; E3/9496, ‘WRI of Prak Yut (2-TCW-938)’, A48-49; E3/9539, ‘WRI of Prak Yut (2-TCW-938)’, A6-7; E3/9525, ‘WRI of Prak Yut (2-TCW-938)’, A12; E3/9499, ‘WRI of Prak Yut (2-TCW-938)’, A12-13, A19, A28-29, A94.

<sup>2385</sup> E3/9499, ‘WRI of Prak Yut (2-TCW-938)’, A13.

<sup>2386</sup> E3/9499, ‘WRI of Prak Yut (2-TCW-938)’, A92.

<sup>2387</sup> E3/9499, ‘WRI of Prak Yut (2-TCW-938)’, A13.

<sup>2388</sup> E3/9677, ‘WRI of Prak Yut (2-TCW-938)’, A8-9 (emphasis added).

<sup>2389</sup> E3/9525, ‘WRI of Prak Yut (2-TCW-938)’, A15; E3/9499, ‘WRI of Prak Yut (2-TCW-938)’, A24.

<sup>2390</sup> E3/9677, ‘WRI of Prak Yut (2-TCW-938)’, A1, A11.

<sup>2391</sup> See E3/9677, ‘WRI of Prak Yut (2-TCW-938)’, generally, and ERN 01151266 and 01151272.

<sup>2392</sup> See E3/9612, ‘WRI of Toat Thoeun’, ERN 00974011, 00974021, 00974049. The first day of interview was from 10.10am-5.40pm, with a break at 12.30pm-1.07pm. Thus, Toat was interviewed for 5 hours and 3 minutes.

was not recorded.<sup>2393</sup> It therefore cannot be confirmed that her responses were transcribed verbatim.<sup>2394</sup> Indeed, this appears to be unlikely. The pittance of data recorded over five hours suggests that there were interactions with Prak Yut (2-TCW-938) deliberately or erroneously omitted from the WRI, rendering it unreliable. Finally, the Defence notes that biased ‘expert’ witness on the Cham, Ysa Osman – who, as noted above, appears to be on a quest to judicially establish that a genocide was perpetrated against the Cham<sup>2395</sup> and who by then, knew he would be appearing as an ‘expert’ on the ‘targeting’ of the Cham – attended Prak Yut’s (2-TCW-938’s) sixth Case 004 interview.<sup>2396</sup>

727. The suspicious character of Prak Yut’s (2-TCW-938’s) sixth WRI was confirmed in court. Prak Yut’s (2-TCW-938’s) evidence over three days was consistent with her first five Case 004 WRIs on the two key issues discussed above.<sup>2397</sup> Thus, she *de facto* recanted her evidence in her sixth Case 004 WRI on this matter. Furthermore, the Defence has deep concerns over how Prak Yut’s (2-TCW-938’s) sixth Case 004 WRI was obtained. Given the uncanny timing of the interview taking place right after the Chamber had rejected the Co-Prosecutors’ request for her appearance, it appears that it may have been intended as an attempt to obtain more incriminating evidence from her to demonstrate her value in Case 002/02 and thus have the Chamber reconsider summoning her. For all of these reasons, Prak Yut’s (2-TCW-938’s) sixth WRI must be given no weight at all.

728. It is also worth noting that unless the Co-Prosecutors were clairvoyant in proposing Prak Yut (2-TCW-938) as a witness on the Cham despite not yet having access to any relevant evidence from her, the circumstances give rise to more grave concerns about what transpired. Two potential explanations come to mind. The first is that the Co-Prosecutors included her as a witness speculatively and then the International Co-Prosecutor improperly influenced the nature of the investigation in Case 004 in order to ‘fish’ for evidence that would substantiate this decision. Indeed, this is actually the less bad scenario. The second, worse possibility is that the International Co-Prosecutor misled the Chamber. While his office only formally received Prak Yut’s (2-TCW-938’s) Case 004 WRIs on 12 December 2014, he must have informally

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<sup>2393</sup> E3/9677, ‘WRI of Prak Yut (2-TCW-938)’, ERN 01151268.

<sup>2394</sup> E3/9677, ‘WRI of Prak Yut (2-TCW-938)’, ERN 01151268.

<sup>2395</sup> See *supra*, Chapter 5-II-2-(a), for more details on Osman’s prejudgement *vis-à-vis* the alleged genocide.

<sup>2396</sup> E3/9677, ‘WRI of Prak Yut (2-TCW-938)’, ERN 01151266.

<sup>2397</sup> E1/378.1, Prak Yut (2-TCW-938), T. 19 Jan 2016, p. 11, lns 15-20, p. 12, lns 17-24; E1/379.1, Prak Yut (2-TCW-938), T. 20 Jan 2016, p. 4, ln. 15 to p. 5, ln. 4, p. 35, lns 18-21; E1/380.1, Prak Yut (2-TCW-938), T. 21 Jan 2016, p. 11, lns 14-21. On the origin of the orders and the knowledge of upper level, see e.g. E1/378.1, Prak Yut (2-TCW-938), T. 19 Jan 2016, p. 19, lns 10-12, p. 22, lns 4-8, p. 22, ln. 13 to p. 23, ln. 16.

received knowledge of her evidence long before then that led him to suggest her as a witness. If this were so, it would suggest that highly improper *ex parte* communications took place between the International Co-Prosecutor and his friend and then-International Co-Investigating Judge Mark Harmon, or with Harmon's staff.

729. Either way, the events surrounding Prak Yut's (2-TCW-938's) testimony in Case 002/02 clearly show that the International Co-Prosecutor has at least once used Case 002/02 as a means of salvaging Case 004 investigative work product since that case will never reach trial in light of political interference. This is in, itself, improper. However, even more improperly, it also shows that the International Co-Prosecutor has used Case 004 as a way of reinvestigating and bolstering Case 002/02. This further deepens the blatant inequality of arms between the Co-Prosecutors and the Defence and the violation of Nuon Chea's right to a fair trial as discussed in Chapter 2. At a minimum, the Chamber should redress this by, again, giving zero weight to Prak Yut's (2-TCW-938's) sixth Case 004 WRI.

#### **4. Witnesses and Civil Parties Disseminated Propaganda on Wat Au Trakuon**

730. PRK propaganda, as in many other areas of Case 002/02, has been instrumental in entrenching in the minds of witnesses and civil parties Manichean 'accepted truths' of what occurred in the DK.<sup>2398</sup> In 1981 or 1982, the Kang Meas District chief held a meeting at Wat Au Trakuon, where local villagers were "informed of the killings committed by Khmer Rouge".<sup>2399</sup> In addition, instead of carrying out an official exhumation, local authorities "invited villagers to exhume the bones and skulls" themselves which were then "collected and put in a stupa".<sup>2400</sup> This stupa was funded by Prime Minister Hun Sen – who himself was involved in responding to Cham rebellions in 1975<sup>2401</sup> – and Mao Pirun, a member of the Central Committee of the Cambodian People's Party.<sup>2402</sup> These events significantly crafted the 'collective memory' of past events. As discussed below, this led to a large part of evidence heard being speculative and groundless conclusions tethered in this Manichean propaganda, and not on actual witnessing of the events.

<sup>2398</sup> See also *supra*, Chapter 2-II-A-1.

<sup>2399</sup> E1/344.1, Seng Kuy, T. 9 Sep 2015, p. 105, lns 16-20; E1/345.1, Seng Kuy, T. 10 Sep 2015, p. 16, lns 9-18, p. 17, lns 8-12.

<sup>2400</sup> E1/345.1, Seng Kuy, T. 10 Sep 2015, p. 18, lns 15-17.

<sup>2401</sup> See *supra*, Chapter 5-II-B-1-(a), on the exclusion of Kroch Chhmar Security Centre from Case 002/02.

<sup>2402</sup> E1/348.1, Tay Koemhun, T. 16 Sep 2015, p. 27, lns 9-12.

**C. NO BASIS FOR GENOCIDE: ABSENCE OF POLICIES AIMING TO DESTROY, EXTERMINATE OR PERSECUTE THE CHAM OR VIETNAMESE GROUPS**

731. The Closing Order alleges the existence of a ‘targeting’ policy having an objective to “establish an atheistic and homogenous society without class divisions, abolishing all ethnic, national, religious, racial, class and cultural differences.”<sup>2403</sup> This policy also allegedly aimed to “eliminate enemies and to destroy certain groups, as such, in whole or in part”, as the ‘targeting’ of specific groups was a “key means by which the CPK did ‘whatever can be done that is a gain for the revolution’”.<sup>2404</sup> On this basis, Nuon Chea is charged with a number of crimes, based on the premise that the victims were ‘targeted’ as a result of their ethnicity, race,<sup>2405</sup> nationality,<sup>2406</sup> or religion.<sup>2407</sup>

732. These allegations culminate in the charge of genocide, popularly seen as one of the most serious crimes in international law, if not the very “crime of crimes” itself. The temptation to convict for genocide is high, particularly since this is likely to be the sole genocide trial at this Tribunal and a genocide conviction would double as a claim to fame for the judges, Co-Prosecutors and the institution generally. However, it must be recalled that genocide’s perception as one of the most serious crimes is mirrored in the “stringent requirements which must be satisfied before this conviction is imposed”.<sup>2408</sup> As reiterated throughout this Brief, each constitutive element of a crime and of the applicable mode(s) of liability must be established beyond reasonable doubt. In case of indirect or circumstantial evidence, it is insufficient for guilt to be one reasonable conclusion inferred from the evidence; it must be the only reasonable conclusion.<sup>2409</sup> If any other reasonable conclusion can be inferred from the evidence consistent with the Accused’s innocence, then he must be acquitted.<sup>2410</sup> In the present case, the evidence is far from establishing even the most basic element of the crimes charged, let alone the modes of liability.

733. In particular, one requirement for genocide is the demonstration of a specific intent to destroy the Cham or Vietnamese group (known as ‘genocidal intent’, ‘specific intent’ or ‘*dolus*

<sup>2403</sup> **D427**, Closing Order, para. 207.

<sup>2404</sup> **D427**, Closing Order, para. 207.

<sup>2405</sup> For the Vietnamese only.

<sup>2406</sup> For the Vietnamese only.

<sup>2407</sup> For the Cham only.

<sup>2408</sup> ICTY, *Krstić* Appeals Judgement, para. 37.

<sup>2409</sup> **F36**, Case 002/01 Appeals Judgement, para. 418; ICTY, *Halilović* Appeals Judgement, para. 109; SCSL, *Taylor* Trial Judgement, para 159; ICTR, *Bagosora et al.* Appeals Judgement, para. 278; *Rukundo* Appeals Judgement, para. 235.

<sup>2410</sup> ICTY, *Čelebići* Appeals Judgement, para. 458; ICTR, *Karera* Appeals Judgement, para. 34.

*specialis*'). The crime of genocide is the "denial of the right of existence of entire human groups".<sup>2411</sup> It must be a specific group, as such, targeted for destruction, not the individual.<sup>2412</sup> As the ICTY held, "the intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it."<sup>2413</sup> Thus, in addition to establishing beyond reasonable doubt that individuals were targeted for being Cham or Vietnamese, the Co-Prosecutors must show that in doing so, Nuon Chea intended to eradicate members of either the Cham and Vietnamese groups.<sup>2414</sup> As explained in this Part, this allegation is completely unsubstantiated. On the contrary, the evidence shows that Cham people were treated like any other DK citizen. *Vis-à-vis* Vietnamese, the CPK unequivocally distinguished between the "enemy" – *i.e.*, the state and government of Vietnam with which it was at war – and the Vietnamese **people**, with whom it wanted to "hold hand[s] in peace".<sup>2415</sup> When any member of these two groups was investigated, arrested or, in certain cases, executed, this owed to the implementation of the CPK's legitimate national defence and security policy, described above in Chapter 4-II.

734. This Part shows that the CPK held no discriminatory intent towards Cham or Vietnamese people and even less so the intent to destroy them as a group. There is no reliable live evidence about the existence of the alleged policies, and no discriminatory reference towards Cham or Vietnamese people in contemporaneous DK documents. The evidence fails to establish the existence of any direct call for the discrimination or extermination of the Cham or Vietnamese on the part of the CPK in general, and Nuon Chea specifically. To the contrary, the DK Constitution held that "[t]here must be complete equality among all Kampuchean people".<sup>2416</sup> "Kampuchean people", as the Revolutionary Flag explained shortly after the promulgation of the Constitution, included "both ethnic Khmer and other nationalities" living in DK.<sup>2417</sup> Sub-Part 1 discusses the alleged 'targeting' policy towards the Cham. The alleged policy regarding the Vietnamese follows in Sub-Part 2.

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<sup>2411</sup> UNGA Res 96 (I).

<sup>2412</sup> ILC 1996 Draft Code of Crimes against Peace and Security with Commentaries, p. 45, point (6), fn 118.

<sup>2413</sup> ICTY, *Krstić* Trial Judgement, para. 590; *Brđanin* Trial Judgement, para. 700; *see also* ICTR, *Bagilishema* Trial Judgement, para. 64.

<sup>2414</sup> As defined above in Chapter 5-II-A-1.

<sup>2415</sup> *See supra*, Chapter 5-II-G.

<sup>2416</sup> E3/259, DK Constitution, 5 Jan 1976, ERN 00184836.

<sup>2417</sup> E3/759, Flag, Apr 1976, ERN 00517854.

## 1. There is no Evidence of a Policy ‘Targeting’ Members of the Cham Group

735. As discussed below, the evidence does not support a finding beyond reasonable doubt that the CPK as a whole, and Nuon Chea in particular, pursued a policy aiming to exterminate, discriminate, or otherwise ‘target’ the Cham people. To the contrary, it shows that during the DK, Chams lived and worked under the same conditions as ethnic Khmers.<sup>2418</sup> Measures that the Closing Order alleges to be demonstrative of a “CPK Centre”-directed “suppression of Cham culture”<sup>2419</sup> were in fact (when they did exist and form part of a policy) measures generally and equally applied to all DK citizens without discriminatory intent.<sup>2420</sup> First, there is nothing in the official CPK documents calling for the destruction, extermination or persecution of Cham people. Second, live evidence confirmed that the CPK never had a policy calling for such actions. Third, and instead, the evidence shows that where measures were taken against individuals who happened to be Cham, they were legitimate and unrelated to their ethnicity, religion or political views.

### (a) *CPK Official Documents Never Called for the Destruction, Extermination, or Persecution of Cham People*

736. The DK Constitution explicitly guaranteed the right to worship any religion not deemed reactionary.<sup>2421</sup> In addition, during his 17 April 1976 speech in Phnom Penh, Pol Pot referred to “Kampuchean people” which included “both ethnic Khmer and other nationalities living [...] throughout the country”.<sup>2422</sup> In June 1975, the Phnom Penh Radio referred to Cham as “Islamic brothers” who are helping in building the country.<sup>2423</sup> Further, there is nothing in Revolutionary Flags, Revolutionary Youth, or other DK publications or media containing a call or incitation to destroy, discriminate, or otherwise persecute Cham people.

737. During the key documents hearing on the treatment of Cham, the Co-Prosecutors alleged that a CPK document from 1973 revealed CPK’s “racism” by announcing that “[a]ll nationalities have labourers, like our Kampuchean nationality, except for Islamic Khmers, whose lives are not so difficult.”<sup>2424</sup> The excerpt read out was extracted from anti CPK historian

<sup>2418</sup> See e.g. **E1/301.1**, Or Ho, T. 19 May 2015, p. 11, ln. 15, pp. 13-15, p. 17, ln. 25; **E1/302.1**, Or Ho, T. 20 May 2015, p. 17, lns 19-21; **E3/9351**, ‘WRI of Meas Laihuo’, ERN 00244165.

<sup>2419</sup> **D427**, Closing Order, paras 756, 1341, 1420.

<sup>2420</sup> See *infra*, Chapter 5-II-D-5.

<sup>2421</sup> **E3/259**, DK Constitution, Art. 20; see also **E3/550**, Newsweek, Interview with Ieng Sary, ERN 00087604.

<sup>2422</sup> **E3/759**, Flag, Apr 1976, ERN 00517854.

<sup>2423</sup> **E3/1366**, FBIS Report, 29 Jun 1975, ERN 00167259, para. 4.

<sup>2424</sup> **E1/390.1**, Key Documents Hearing, T. 23 Feb 2016, p. 11, ln. 16 to p. 12, ln. 2, citing **E3/1593**, Kiernan, Pol Pot Regime, ERN 01150137.



Ben Kiernan's book, who himself was quoting Stephen Heder's translation of the said document. However, the underlying document itself is in fact on the case file and has an official translation, which reveals fundamentally different information.<sup>2425</sup> The document in fact reads: "[g]enerally speaking, various ethnic people are in the peasant class. However, **like Khmer, Champa** ethnic group and Thai are divided into many classes according to economic status."<sup>2426</sup> Rather than revealing any discriminatory intent, this document unequivocally shows that Cham and Khmer were considered the same. This is perfectly consistent with the principles announced in the DK Constitution.

738. A key "document" the Closing Order relies on is a 16-page booklet allegedly stating that the Cham were the biggest enemy and must all be destroyed by 1980,<sup>2427</sup> allegedly read by Soh Kamrei, in a commune office in Chamkar Leu District of Sector 42 in late 1978.<sup>2428</sup> Soh Kamrei is the only person to ever mention this booklet, which is nowhere to be found. He is also the only one to testify about an alleged meeting where it was said that all Cham must be "smashed". As noted above, however, Soh Kamrei is also the religious leader who refused to testify under a religious oath, in blatant disregard for the judicial process. In light of his lack of credibility and the fact that his evidence is not only uncorroborated but contradicted by more credible witnesses *e.g.*, former Kroch Chhmar District secretary Ban Seak,<sup>2429</sup> the existence of such booklet is not established beyond reasonable doubt.

739. The Closing Order also refers to a 2 April 1976 telegram from North Zone Secretary Ke Pauk as proof of Nuon Chea's knowledge of a policy targeting the Cham as such.<sup>2430</sup> 'Expert' Ysa Osman refers to this telegram as evidence that "the entire Cham race" was considered the enemy.<sup>2431</sup> However, it is unclear how such sweeping conclusions could be tethered in the actual document, whose plain wording contains no reference to destroying, exterminating, or discriminating against Cham. The telegram reads:

Specifically, some activity has appeared in Chamkar Leu District. The enemies are former soldiers in combination with the Cham and former cooperative team chairmen. They used copies of a photo of Lon Nol and Nol's announcement of 18 March 70 to post on tree trunks [...] in Chamkar Leu District, and conducted other activities like **burning forests**, and **destroying crops** like bananas, papaya, etc.

<sup>2425</sup> E3/1233, DK Notebook on Social Class.

<sup>2426</sup> E3/1233, DK Notebook on Social Class, ERN 00711618.

<sup>2427</sup> D427, Closing Order, para. 765.

<sup>2428</sup> D427, Closing Order, para. 765.

<sup>2429</sup> See *e.g.* E1/353.1, Ban Seak, T. 5 Oct 2015, p. 42, ln. 6 to p. 43, ln. 14; see also *infra*, Chapter 5-II-C-1-(b).

<sup>2430</sup> D427, Closing Order, para. 981.

<sup>2431</sup> E3/2653, Osman, Cham Rebellion, ERN 00219176.

Regarding the above enemy activity, the Zone has taken measures and instructed the Sectors to concentrate on tracking down these activities. In so tracking that activity, we captured some elements who were former cooperative team chairmen.<sup>2432</sup>

740. Once the Closing Order's and 'expert' Osman's bombastic characterisations are set aside, it is clear that the telegram is a mere police report describing unlawful activities such as burning forests or destroying crops and identifying potential suspects, *e.g.*, former soldiers, former cooperative team chairmen and Cham.<sup>2433</sup> Moreover, instead of referring to a blanket order to arrest, kill or otherwise "target" all Cham people, the report stated that such activities were "tracked down" and that certain individuals were arrested. In any event, there is no evidence that Nuon Chea received or was even aware of this telegram.

741. Finally, another mysterious document is the so-called "Document No. 163" discussed by Ben Kiernan. Kiernan claims that he heard about this alleged 1978 "Centre" document from someone he interviewed,<sup>2434</sup> who relayed the following description of the document:

[The document] said we will not spare the Chams, because if spared they will resist, [and produce] revisionism .... It said that the Cham race is not to be spared because it has a history of resisting the socialist revolution [...] They were hand in hand with the Vietnamese, so they must all be killed off.<sup>2435</sup>

742. However, Kiernan's evidence is unverifiable second-hand hearsay. In addition, Kiernan was unable to locate a copy of the document or in any way confirm its authenticity.<sup>2436</sup> Thus, there is no proof beyond reasonable doubt that this document ever existed. Equally, and as discussed below, the absence of any policy to kill, arrest, persecute or otherwise discriminate against Cham is supported by the live evidence, where a multitude of witnesses testified that there was never an order to 'smash' the Cham.

**(b) *No Live Evidence Can Establish the Existence of a Policy to 'Target' Cham***

**(i) Live Testimony of Cadres That There was Never a Policy to 'Target' Cham**

743. Former cadres who appeared in court testified that they never heard of a policy to exterminate, discriminate or otherwise "target" the Cham. For example, S-21 chief Duch testified that there was no policy to exterminate the Cham people. He never saw any documents

<sup>2432</sup> E3/952, 'Telegram from Pauk to Pol', 2 Apr 1976, ERN 00182658 (emphasis added).

<sup>2433</sup> E3/952, 'Telegram from Pauk to Pol', 2 Apr 1976, ERN 00182658.

<sup>2434</sup> E3/1593, Kiernan, Pol Pot Regime, fn. 106, ERN 01150147.

<sup>2435</sup> E3/1593, Kiernan, Pol Pot Regime, ERN 01150147.

<sup>2436</sup> E3/1593, Kiernan, Pol Pot Regime, fn. 106, ERN 01150147.

at the time mention a policy to target the Cham because they were Cham,<sup>2437</sup> and never received any instruction on the issue of the Cham.<sup>2438</sup> Similarly, Prak Yut (2-TCW-938), secretary of Kampong Siem District in Sector 41 of the Central Zone,<sup>2439</sup> testified that there were no discriminatory measures against the Cham or any other group; on the contrary, there were clear instructions of non-discrimination.<sup>2440</sup> Other cadres confirmed that there was never a policy to exterminate, discriminate, or otherwise target Cham people due to their ethnicity or religion. Seng Soeun, the deputy chief of the handicapped youth office of Sector 13 in the Southwest Zone, stated that he “never heard” of a policy regarding ethnic Cham.<sup>2441</sup> Likewise, Kroch Chhmar District Secretary Ban Seak testified that there were never instructions or plans to “purge the Cham people”.<sup>2442</sup>

(ii) Unreliability of Incriminating Evidence

744. Heng Samrin and Chea Sim both claimed, during their interview with Ben Kiernan, that the Cham people were persecuted and killed during the DK.<sup>2443</sup> However, the Defence was prevented from testing the veracity of their reported evidence in court: all its requests to call them as witnesses were unjustifiably rejected by the Chamber,<sup>2444</sup> and Chea Sim has now died. Such second-hand untested hearsay – which is directly contradicted by most live evidence – cannot be given any weight without violating one of the most fundamental fair trial rights of Nuon Chea.<sup>2445</sup> It most certainly cannot be used to establish a key constitutive element of the crimes of genocide (intent to destroy), extermination (intent to kill on a mass scale), or persecution (intent to discriminate).

745. Two live witnesses claimed to have heard from commune cadres of a plan to kill all the Cham. On his second day of testimony, Seng Kuy, an Angkor Ban Commune farmer, suddenly mentioned that he had heard an Angkor Ban cadre called Run saying that they would kill all the Cham.<sup>2446</sup> His earlier testimony differed markedly, however. His evidence was that he reached

<sup>2437</sup> E1/443.1, Duch, T. 23 Jun 2016, p. 105, lns 3-21, p. 109, ln. 19 to p. 110, ln. 4.

<sup>2438</sup> E1/438.1, Duch, T. 15 Jun 2016, p. 28, ln. 15 to p. 29, ln. 1.

<sup>2439</sup> Prak Yut (2-TCW-938) is cited 12 times in the Case 002/01 Judgement (*see* fns 315, 686, 733, 734, 735, 822, 889, 898, 987, 1718, 1916, 1917); on Prak Yut’s (2-TCW-938’s) general credibility, *see supra*, Chapter 5-II-B-3-(b).

<sup>2440</sup> E1/380.1, Prak Yut (2-TCW-938), T. 21 Jan 2016, p. 48, lns 1-20, p. 51, lns 5-13; *see also*, E3/163, ‘WRI of Prak Yut (2-TCW-938)’, ERN 00364085.

<sup>2441</sup> E1/465.1, Seng Soeun, T. 29 Aug 2016, p. 76, lns 6-12.

<sup>2442</sup> E1/354.1, Ban Seak, T. 6 Oct 2015, p. 34, ln. 2 to p. 35, ln. 8, p. 76, lns 1-8, p. 77, lns 6-9; *see also* E1/353.1, Ban Seak, T. 5 Oct 2015, p. 72, lns 8-10.

<sup>2443</sup> E3/1568, Kiernan Interview with Heng Samrin and Chea Sim, ERN 00651868, 00651885.

<sup>2444</sup> *See supra*, Chapter 2-II-B-3.

<sup>2445</sup> F36, Case 002/01 Appeals Judgement, para. 296.

<sup>2446</sup> E1/345.1, Seng Kuy, T. 10 Sep 2015, p. 27, ln. 24 to p. 28, ln. 4.

the “**personal conclusion** that a plan was put in place for the elimination of the Cham”,<sup>2447</sup> and asserted that the “Khmer Rouge [...] would not spare any other ethnicity, including the Cham”.<sup>2448</sup> He reached such conclusion because “[t]hey even killed their own Khmer people”.<sup>2449</sup> The witness Say Doeun, the chairman of the Long Sword Group, when asked about arrests of Cham people in Andoung Sar village, testified that he “forg[o]t about it all” and that they were just ordered to arrest the people, without any particular reasons being given for it.<sup>2450</sup> However, after the Co-Prosecutors read out Seng Kuy’s sudden change in testimony,<sup>2451</sup> Say Doeun likewise suddenly testified that he heard Pheap, the commune chief of Peam Chikang say no Cham shall be spared.<sup>2452</sup>

746. Both witnesses’ testimonies must therefore be approached with the utmost caution. In any event, both accounts are uncorroborated, and constitute unverifiable hearsay, which is insufficient to establish any element of crimes or mode of liability beyond reasonable doubt. Further, even if they were true, it does not illustrate the existence of a nationwide policy to destroy, exterminate or otherwise persecute Cham: even if a commune chief said that “they would kill all the Cham”, there is no evidence that this was pursuant to any order or policy. Rather, another reasonable conclusion from the evidence could be that the commune cadre was acting autonomously, overzealously, did not understand the legitimate national defence and security policy, or was just a rogue element. This is particularly the case given that local cadres’ deviation from orders was a frequent occurrence during the DK.<sup>2453</sup> To take just one example, in Svay Khleang (in Kroch Chhmar District), a local cadre decided on his own to “gather up” all the local Cham including the original inhabitants, despite the clear instruction from the sector to gather only the Cham who had come to the area from other locations<sup>2454</sup> so as to move them further to a new residence.<sup>2455</sup>

747. Finally, witness Seng Srun initially told the Co-Investigating Judges that he had heard a commune security cadre called Tay Koemhun say that the Cham were a different race and must be smashed because they would otherwise rebel.<sup>2456</sup> However, when he testified in Court, he

<sup>2447</sup> E1/345.1, Seng Kuy, T. 10 Sep 2015, p. 30, lns 7-20 (emphasis added).

<sup>2448</sup> E1/344.1, Seng Kuy, T. 9 Sep 2015, p. 89, lns 17-22.

<sup>2449</sup> E1/344.1, Seng Kuy, T. 9 Sep 2015, p. 89, lns 17-22.

<sup>2450</sup> E1/374.1, Say Doeun, T. 12 Jan 2016, p. 62, ln. 25, p. 63, lns 12-13, p. 67, lns 14-15.

<sup>2451</sup> E1/374.1, Say Doeun, T. 12 Jan 2016, p. 64, ln. 23 to p. 68, ln. 1.

<sup>2452</sup> E1/374.1, Say Doeun, T. 12 Jan 2016, p. 67, ln. 25 to p. 68, ln. 7.

<sup>2453</sup> See *supra*, Chapter 4-II-C-2; see also, F16, Nuon Chea’s Appeal Brief, paras 246-49.

<sup>2454</sup> E3/5208, ‘WRI of Sauv Nhit’, ERN 00235139.

<sup>2455</sup> E3/2653, Osman, Cham Rebellion, ERN 00219178, referring to Sauv Nhit’s account.

<sup>2456</sup> E3/5302, ‘WRI of Seng Srun’, ERN 00210488.

retracted his evidence, denying having ever said that and testifying that he never personally heard this statement.<sup>2457</sup> Tay Koemhun himself also testified, and categorically rejected ever making such statement.<sup>2458</sup> All remaining evidence that “there was a policy to kill all Cham” or “all Cham had to be ‘smashed’” are unsubstantiated and constitute mere rumours, which cannot sustain a finding beyond reasonable doubt.<sup>2459</sup>

**(c) *Measures Taken Against Certain Cham People Were Unrelated to Their Ethnicity, and Were Legitimate and Consistent With the CPK’s National Defence and Security Policy***

748. As will be explained in more detail below in Part D, it cannot be established beyond reasonable doubt what the reasons were for each alleged security measure taken against certain Cham individuals.<sup>2460</sup> However, given the widespread involvement of Cham in rebellion movements and other illegal activities, and given that in the DK, security measures were only intended for those who were involved in wrongful activities,<sup>2461</sup> it is reasonable to infer that any alleged security measures against certain Cham individuals were taken because of their actions, not their Cham identity.

**(i) Involvement in Illegal Activities**

749. Abundant evidence shows that a large number of individuals who happened to be Cham were involved in either organised rebellion movements against the DK government or in other illegal activities. Based on interviews of refugees from East Zone Sector 21, a Washington Post article in late 1974 reported that a group called the *Khmer Sar* (White Khmer) had broken away from the “Khmer Rouge”, sided with the Vietnamese communists, and clashed with CPK units.<sup>2462</sup> *Khmer Sar* comprised “mostly Cham Moslems”.<sup>2463</sup> CPP Senator Ouk Bunchhoeun, former Sector 21 Deputy Secretary, confirmed the Cham people’s involvement in rebellion movements including *Khmer Sar*.<sup>2464</sup> The *Khmer Sar* was an organised movement involving both civilians and RAK soldiers, with both Cham and Khmer members. Some RAK members were involved in an unrest where people raised banners saying “Long Live the White Khmer Front of Liberation”.<sup>2465</sup> Evidence also shows that Division 310 commander Oeun, who was

<sup>2457</sup> E3/8736, ‘WRI of Seng Srun’, A29; E1/346.1, Sen Srun, T. 14 Sep 2015, p. 44, lns 1-11, p. 89, lns 18-19.

<sup>2458</sup> E1/348.1, Tay Koemhun, T. 16 Sep 2015, p. 42, ln. 22 to p. 43, ln. 2.

<sup>2459</sup> F36, Case 002/01 Appeals Judgement, para. 419.

<sup>2460</sup> See *infra*, Chapter 5-II-D.

<sup>2461</sup> In accordance with the legitimate CPK’s national defence and security policy, see *supra*, Chapter 4-II.

<sup>2462</sup> E3/1593, Kiernan, Pol Pot Regime, ERN 01150031.

<sup>2463</sup> E3/1593, Kiernan, Pol Pot Regime, ERN 01150031.

<sup>2464</sup> See *supra*, Chapter 5-II-B-1-(a).

<sup>2465</sup> E3/798, All Divisions Meeting, 30 Aug 1976, ERN 00183966; see also *supra*, Chapter 3-VI.

one of the leaders of the failed *coup d'état* in early 1977, had gathered forces to form *Khmer Sar* whose aim was to overthrow the DK government.<sup>2466</sup>

750. There were two other movements in which some Cham individuals were involved that were fighting the DK government in early 1976. One was called “FULRO *Champa*” and was largely composed of individuals who happened to be Cham, living along the Mekong River; another was called “*Kbal Sar*”, which had both Khmer and Cham members. According to Ouk Bunchhoeun, the first movement was secessionist in nature, seeking to “occupy Cambodia[n] territory on the eastern bank of the Mekong River to Central Anam [i.e., Vietnam] to create a state”, while the second sought to “topple the Pol Pot regime”.<sup>2467</sup> He added that members of both movements were eventually arrested,<sup>2468</sup> which is corroborated by evidence from Cham villagers from Kroch Chhmar District.<sup>2469</sup> More specifically, there is evidence that in October 1975, a group of Cham people from every village in Kroch Chhmar District met secretly to organise a rebellion set to take place on the Islamic holy day *Raya*.<sup>2470</sup> However, villagers in Koh Phal started the rebellion prematurely, and villagers in Svay Khleang rebelled shortly afterwards to support Koh Phal.<sup>2471</sup> Battalion 55 of the Sector 21 military forces – i.e., part of Hun Sen’s forces – together with Kroch Chhmar district forces, fought the rebels for a few days and finally suppressed the rebellions with heavy artillery weapons and naval boats.<sup>2472</sup> An organised and premeditated rebellion affecting a large area like this naturally requires responsive and preventive measures.

(ii) Security Measures Imposed Only on Those Involved in Unlawful Activities

751. The CPK’s legitimate national defence and security policy, as discussed extensively in Chapter 4-II above – involving investigating and, if necessary, arresting people suspected of being involved in activities threatening public order or state security – forms part of regular state police activities. In the absence of evidence that the individuals were arrested based solely on their ethnicity or religion, no crime can be established. Many witnesses confirmed this,

<sup>2466</sup> E1/320.1, Sem Hourn, T. 23 Jun 2015, p. 8, lns 12-20, p. 9, lns 13-15; *see also*, E3/2073, ‘DC-Cam Interview of Sau Ren’, ERN 00876409.

<sup>2467</sup> E3/387, Heder Interview of Ouk Bunchhoeun, ERN 00350206.

<sup>2468</sup> E3/387, Heder Interview of Ouk Bunchhoeun, ERN 00350206.

<sup>2469</sup> E1/350.1, No Sates, T. 28 Sep 2015, p. 54, lns 4-6; E1/351.1, No Sates, T. 29 Sep 2015, p. 5, lns 10-13, p. 16, lns 16-24; E3/2653, Osman, Cham Rebellion, ERN 00219145; *see also supra*, Chapter 5-II-B-1-(a), on the exclusion of Kroch Chhmar Security Centre from the scope of Case 002/02 for political reasons.

<sup>2470</sup> *See e.g.* E3/2653, Osman, Cham Rebellion, ERN 00219148.

<sup>2471</sup> *See e.g.* E3/2653, Osman, Cham Rebellion, ERN 00219148.

<sup>2472</sup> *E.g.* E1/343.1, It Sen, T. 8 Sep 2015, p. 17, lns 9-11; E1/343.1, Sos Ponyamin, T. 9 Sep 2015, p. 22, lns 13-15; E3/2653, Osman, Cham Rebellion, ERN 00219145-46, 00219149.

testifying that irrespective of ethnicity, only those suspected of unlawful activities were subjected to corresponding measures during the DK. Prak Yut (2-TCW-938) testified that as District secretary she had to see to it that only “bad elements” who opposed the revolution or otherwise caused problems were subjected to corresponding measures *e.g.*, arrest. “Good people” among the Cham – *i.e.*, those not involved in illegal activities – were untouched.<sup>2473</sup> You Vann (2-TCW-894) corroborates Prak Yut’s (2-TCW-938’s) evidence. She testified that Sector 41 secretary *Ta An* instructed her to verify the list by finding out who was “good” and who was “bad”.<sup>2474</sup> After the list was drawn, she said that some “elements” disappeared but the “good people”, Cham or otherwise, remained.<sup>2475</sup> There is no evidence that the alleged “disappearances” meant death.

752. Former Kroch Chhmar District secretary Ban Seak also testified that the Cham were not deemed the enemy of the revolution, nor did he ever receive orders from either the Zone secretary Ke Pauk or others to target the Cham.<sup>2476</sup> The instruction Ban Seak received from Ke Pauk was to target all the rebels, regardless of ethnicity, specifically those who had participated in a mobile unit rebellion in 1978.<sup>2477</sup> This is corroborated by Sales Ahmat who was a Cham mobile unit member in Kroch Chhmar District. Sales Ahmat claimed to have overheard an East Zone meeting held by Ke Pauk in 1978 where a plan to “purge” the mobile unit forces was announced; the target was “the ones who betrayed the *Angkar*, regardless of their ethnicity, whether Cham or Khmer”.<sup>2478</sup> Similarly, Duch testified that “there was no policy to exterminate the Cham people, but if a Cham committed a mistake, he or she would be arrested. This was the case in respect of Sim Mel alias Man”, a former S-21 interrogator who was later detained in S-21 himself.<sup>2479</sup>

<sup>2473</sup> **E1/378.1**, Prak Yut (2-TCW-938), T. 19 Jan 2016, p. 11, lns 15-20, p. 12, lns 17-24; **E1/379.1**, Prak Yut (2-TCW-938), T. 20 Jan 2016, p. 4, ln. 15 to p. 5, ln. 4, p. 35, lns 18-21; **E1/380.1**, Prak Yut (2-TCW-938), T. 21 Jan 2016, p. 11, lns 14-21; *see also*, **E3/9496**, ‘WRI of Prak Yut (2-TCW-938)’, 19 Jun 2013, A49; **E3/9499**, ‘WRI of Prak Yut (2-TCW-938)’, 30 Sep 2014, A12, A19.

<sup>2474</sup> **E1/376.1**, You Vann (2-TCW-894), T. 14 Jan 2016, p. 66, lns 8-18.

<sup>2475</sup> **E1/376.1**, You Vann (2-TCW-894), T. 14 Jan 2016, p. 79, lns 4-18; **E1/377.1**, You Vann (2-TCW-894), T. 18 Jan 2016, p. 33, ln. 18 to p. 34, ln. 16.

<sup>2476</sup> **E1/354.1**, Ban Seak, T. 6 Oct 2015, p. 33, ln. 25 to p. 35, ln. 8, p. 76, lns 1-8, p. 77, lns 6-9; **E1/353.1**, Ban Seak, T. 5 Oct 2015, p. 72, lns 8-10.

<sup>2477</sup> **E1/354.1**, Ban Seak, T. 6 Oct 2015, p. 33, ln. 25 to p. 35, ln. 8, p. 76, lns 1-8; p. 77, lns 6-9; **E1/353.1**, Ban Seak, T. 5 Oct 2015, p. 43, lns 10-14.

<sup>2478</sup> **E1/398.1**, Sales Ahmat, T. 9 Mar 2016, p. 32, lns 9-11, *see also*, p. 102, ln. 22 to p. 103, ln. 20, p. 56, ln. 24 to p. 57, ln. 11, p. 58, lns 5-16.

<sup>2479</sup> **E1/443.1**, Duch, T. 23 Jun 2016, p. 105, lns 3-21.

**(d) Conclusion on the Alleged Policy ‘Targeting’ Members of the Cham Group**

753. There was never an official CPK policy aiming to exterminate, discriminate, or otherwise “target” members of the Cham group as a result of their ethnicity or religion. Similarly, the totality of credible evidence – be it live or documentary – does not permit to reach the conclusion that the CPK intended to “target” Cham as a result of their religion or ethnicity. The evidence overwhelmingly shows that Cham were never targeted as such. This is not changed by the fact that, like any other DK citizens, Cham individuals would face legitimate security measures in response to their involvement in unlawful activities, in accordance with the legitimate CPK national defence and security policy described in Chapter 4-II above. The same applies to the Vietnamese group, as discussed below.

**2. There is no Evidence of a Policy ‘Targeting’ Members of the Vietnamese Group**

754. There is also no credible evidence about the existence of a policy targeting the Vietnamese people. As noted earlier, general sweeping statements that “Vietnamese were targeted”, that “all the Vietnamese families were “taken away” or that “they killed the Vietnamese people” are insufficient.<sup>2480</sup> As held by the Supreme Court Chamber, an Accused should not be convicted merely on the basis of rumours, even if widespread,<sup>2481</sup> and evidence of disappearance does not constitute a proof of killing beyond reasonable doubt.<sup>2482</sup> Similarly, references to various written reports taken out of context do not establish such policy. Instead, there is direct, clear and credible evidence that there was never any policy intending to target, arrest or destroy Vietnamese people. First, there is nothing in the official CPK contemporaneous documents calling for the destruction, extermination or persecution of the Vietnamese people. Second, live evidence confirmed that the CPK never had a policy encouraging for such actions. Instead, in 1978, at the height of what was supposed to be a plan to eradicate Vietnamese people, the CPK called for friendship, peace and forgiveness in relation to the Vietnamese people.

**(a) CPK Official Documents Never Called for the Destruction, Extermination, or Persecution of Vietnamese People**

755. The Closing Order alleges that calls for the destruction of “the enemy” constitute a direct genocidal call against the Vietnamese group.<sup>2483</sup> The Co-Prosecutors also urges the Chamber to draw the overstretched inference that any reference to ‘enemies’ in DK documents is a

<sup>2480</sup> See *infra*, Chapter 5-II-E.

<sup>2481</sup> F36, Case 002/01 Appeals Judgement, para. 419.

<sup>2482</sup> F36, Case 002/01 Appeals Judgement, paras 471, 472, 482.

<sup>2483</sup> D427, Closing Order, para. 214.



reference to all Vietnamese, including civilians. However, this does not withstand scrutiny, particularly when seen in context.<sup>2484</sup> The CPK has never been shy or equivocal about the nature of its policies. Yet, one finds no reference whatsoever to questions of race, purity or ethnicity in official CPK documents, such as the 1976 Four-Year Plan, or the Revolutionary Flags.<sup>2485</sup>

(i) Distinction Between Military and Civilians

756. Meas Voeun, who was the deputy commander of West Zone Division 1,<sup>2486</sup> testified that there was a clear distinction at the policy level between Vietnam as a state trying to invade Cambodia, and the Vietnamese people. He explained that only “military *Yuon*” were considered enemies.<sup>2487</sup> As stated above, it was war. Vietnam, as a state, was the unlawful aggressor. Its forces – be they formal soldiers, civilians taking an active part in hostilities through spying or sabotaging, or individuals acting as agents of Vietnam – could all legitimately be considered as enemies.<sup>2488</sup>

757. The April 1977 Revolutionary Flag has been used in both the Closing Order and the Co-Prosecutors as evidence of the start of the genocide against the Vietnamese.<sup>2489</sup> However, that document, like all other CPK documents, clearly relates to the Vietnamese forces and agents, and not civilians: it refers to “the ‘CIA’ and their agents, the ‘KGB’ and their agents, the territory-swallowing ‘Y[uo]n’ and their running dogs throughout the whole Party”.<sup>2490</sup> Other CPK documents show a clear distinction between Vietnamese soldiers or agents, and civilians.<sup>2491</sup> Pol Pot’s April 1978 speech about the 1-30 combatants ratio, which was absurdly used as evidence of genocidal intent in a blind following of the Manichean narrative, clearly refers only to Vietnamese armed forces since it only discusses military activities, as evidenced by the terms “troops” and “soldiers”.<sup>2492</sup> Prum Sarat, who was a military commander in naval

<sup>2484</sup> On this point, *see also supra*, Chapter 4-II, on the CPK’s national defence and security policy.

<sup>2485</sup> **E3/8**, 1976 CPK Four-Year Plan.

<sup>2486</sup> *See also supra*, Chapter 3-III-D-2, for a discussion of his evidence regarding the conflict with Vietnam; Meas Voeun was also relied upon by the Trial Chamber in Case 002/01, **E313**, Case 002/01 Trial Judgement, *see e.g.* paras 150, 389, 502; *see also* **F36**, Case 002/01 Appeals Judgement, para. 152.

<sup>2487</sup> **E1/386.1**, Meas Voeun, T. 2 Feb 2016, p. 64, lns 5-19; **E1/387.1**, Meas Voeun, T. 3 Feb 2016, p. 4, ln. 24 to p. 5, ln. 19, p. 29, ln. 23 to p. 30, ln. 1.

<sup>2488</sup> *See also* **E3/743**, Flag, Jul 1977, ERN 00476163, on the definition of ‘enemies’.

<sup>2489</sup> **D427**, Closing Order, paras 1346-1348; **D390**, Co-Prosecutors’ Final Submission, para. 798; *referring to* **E3/742**, Flag, Apr 1977, ERN 00478502.

<sup>2490</sup> **E3/742**, Flag, Apr 1977, ERN 00478502.

<sup>2491</sup> *See e.g.* **E3/725** (ERN 00184299), **E3/741** (ERN 00296003), **E3/726** (ERN 00278708), **E3/791** (ERN 00721422), **E3/727** (ERN 00185322), **E3/808** (ERN 00197591), **E3/829** (ERN 00756519).

<sup>2492</sup> **E3/4604**, Flag, Apr 1978, ERN 00519834-36; *see* French: “*Si on était un million de soldats cambodgiens, on combattrait trente millions de soldats vietnamiens*”, ERN 00520344.

Regiment 140 in Division 164<sup>2493</sup> and stationed in Kampong Saom at the time,<sup>2494</sup> confirmed that this speech was a comparison of military forces.<sup>2495</sup> He testified that “there was a key policy for cadres to understand, but I would like to make a clear point that one soldiers of our army had to smash 30 Vietnamese soldiers.”<sup>2496</sup> Thus, Pol Pot’s speech was not in any way a call for racial hatred, but, as Prum Sarat put it, “used to stir up the fighting spirits of cadres and combatants to be ready in battlefields, whenever the clash erupted between Kampuchea and Vietnam.”<sup>2497</sup>

758. Indeed, much of the evidence relied upon to establish the existence of a policy targeting the Vietnamese minority consists of military reports or orders, referring to Vietnamese soldiers in the context of military operations, at the Vietnamese border. The Defence recalls that the burden of proof to establish a policy to target Vietnamese civilians is upon the Co-Prosecutors. In any event, mere reference to a dozen reports, even if they related to the killing of Vietnamese civilians, does not establish the existence of a criminal policy towards the Vietnamese.

(ii) Late King Father Norodom Sihanouk’s Letter

759. The Closing Order also relies on a letter allegedly written by Late King Father Norodom Sihanouk nearly 30 years after the events in an attempt to establish that the CPK intended to destroy the Vietnamese people as a group. It refers to a meeting requested by Pol Pot to ask Sihanouk to “be the advocate” of DK before the UN Security Council. In this meeting, Pol Pot allegedly stated that “the evil *Yvon* race will be wiped off the face of the earth” and called for the killing of all Vietnamese.<sup>2498</sup> While documents authored by Late King Father Norodom Sihanouk may have probative value insofar as his own intent and actions are concerned, in this particular case, it amounts to second-hand hearsay and must therefore not be given any weight. This is particularly true in light of the fact that the late King Father refused to attend an interview with the then-International Co-Investigating Judge Marcel Lemonde in this regard.<sup>2499</sup> The Closing Order itself also notes that this document has low probative value,<sup>2500</sup> and the Co-

<sup>2493</sup> E1/381.1, Prum Sarat, T. 25 Jan 2016, p. 89, ln. 9 to p. 90, ln. 6.

<sup>2494</sup> E1/381.1, Prum Sarat, T. 25 Jan 2016, p. 81, lns 6-7.

<sup>2495</sup> E1/382.1, Prum Sarat, T. 26 Jan 2016, p. 68, lns 19-23.

<sup>2496</sup> E1/382.1, Prum Sarat, T. 26 Jan 2016, p. 65, ln. 25 to p. 66, ln. 3.

<sup>2497</sup> E1/382.1, Prum Sarat, T. 26 Jan 2016, p. 70, lns 8-13.

<sup>2498</sup> E3/7478, Dying Day of the Pol Pot Regime and Me, ERN 00224394, cited in D427, Closing Order, para. 818, fns 3489 & 3490.

<sup>2499</sup> The Co-Investigating Judge approached the Government on 15 July 2009, asking for an interview. The Government refused to acknowledge receipt and returned the request, see D122/4/3, PTC Decision on Appeal Against Refusal of Investigative Action.

<sup>2500</sup> D427, Closing Order, para. 818.

Prosecutors did not dare use it during the key documents hearing.<sup>2501</sup> It must therefore not be given any weight.

(iii) Use of the Term ‘Yuon’

760. Finally, the use of the term ‘Yuon’ in official CPK documents must be read in its context. The term generally referred to Vietnam as an aggressor, as well as to individuals acting on behalf of Vietnam during the war, be they formal soldiers or civilians spying or infiltrating. It does not refer to ordinary Vietnamese civilians. In no way does the term ‘Yuon’ equate to ‘Vietnamese race’. Further, it is not derogatory; even Later King Father Norodom Sihanouk referred to Vietnamese authorities as ‘Yuon’ in a public speech.<sup>2502</sup> In any event, even if the Chamber found that such term had a negative connotation, the use of derogatory terms, without more, is insufficient to establish genocidal intent. There is a chasm between derogatory terms, racism, and the intent to destroy a group as a whole and eradicate it from the face of the earth.

761. In international criminal law, it has been consistently held that the use of derogatory terms when referring to certain groups is insufficient for a finding of a genocidal intent. The ICTY and ICTR have found that the use of certain derogatory terms, such as referring to Croats as “Ustaša” (‘Croatian fascists’),<sup>2503</sup> to Muslims being “hated enemies”,<sup>2504</sup> or to Tutsis as “Inyenzi” (‘cockroaches’),<sup>2505</sup> was not, alone, sufficient to demonstrate genocidal or persecutory intent.<sup>2506</sup> The same reasoning applied to the use of certain “inflammatory expressions” such as “asking people to “take up arms” against a certain group,<sup>2507</sup> and talking about “struggles against past injustices”<sup>2508</sup> or of “historic enemies”.<sup>2509</sup> Similarly, speeches and statements demonstrating “an intent to create an ethnically homogeneous Serb state in BiH, to separate from Bosnian Muslims and Bosnian Croats, and remove them from Bosnian Serb controlled territory” were not found to be demonstrative of an intent to physically destroy a part of either group by the ICTY.<sup>2510</sup> The ICTY Appeals Chamber also unambiguously held that the

<sup>2501</sup> See E1/390.1, E1/391.1; E1/392.1.

<sup>2502</sup> E396.1.2, ‘Sihanouk’s Concern over Vietnamese Occupation’, undated, ERN 01249195.

<sup>2503</sup> ICTY, *Krstić* Trial Judgement, paras 336, 592; discussed in *Krstić* Appeals Judgement, para. 130.

<sup>2504</sup> ICTY, *Krstić* Trial Judgement, para. 336, discussed in *Krstić* Appeals Judgement, para. 130; *Stakić* Appeals Judgement, fn. 84.

<sup>2505</sup> ICTR, *Ntagerura et al.* Trial Judgement, paras 96-102, 156, 234, 310, 342, 349, 683, 693, 732, 786.

<sup>2506</sup> ICTY, *Krstić* Appeals Judgement, para. 130; *Karadžić* Trial Judgement, paras 2596, 2599; *Brđanin* Trial Judgement, para. 987; *Šešelj* Trial Judgement, para. 283; *Stakić* Appeals Judgement, para. 52; ICTR, *Ntagerura et al.* Trial Judgement, paras 96-103.

<sup>2507</sup> ICTR, *Ntagerura et al.* Trial Judgement, paras 96-102.

<sup>2508</sup> ICTY, *Krstić* Trial Judgement, para. 336, discussed in *Krstić* Appeals Judgement, para. 130.

<sup>2509</sup> ICTY, *Karadžić* Trial Judgement, paras 2596, 2655, 2670, 2895, 3435, 3483, 3485.

<sup>2510</sup> ICTY, *Karadžić* Trial Judgement, para 2596; *Šešelj* Trial Judgement, para. 283.

use of “charged language” towards the opponent was “commonplace amongst military personnel during war”, and that no weight should be placed on it in establishing the Accused’s alleged genocidal intent.<sup>2511</sup> To put it simply, evidence demonstrating ethnic bias does not necessarily prove genocidal<sup>2512</sup> or persecutory intent.<sup>2513</sup> The same reasoning applies here.<sup>2514</sup>

**(b) *Cadres Testified of the Absence of a CPK Policy ‘Targeting’ Vietnamese People***

762. The majority of witnesses and civil parties do not mention the existence of any propaganda, order, instruction, plan or policy about the Vietnamese.<sup>2515</sup> Y Vun testified that he never heard anything about Vietnamese being enemies,<sup>2516</sup> and Sao Sak, Ung Sam Ean, Sin Chhem and Thang Phal all said that they had never heard of a plan or order to kill the Vietnamese or those connected to them.<sup>2517</sup> None of the three witnesses and civil parties who testified about Prey Veng provided evidence about steps being taken to identify those of Vietnamese ethnicity in his village,<sup>2518</sup> the reasons for arrests,<sup>2519</sup> or actual evidence that they were in fact executed.<sup>2520</sup> Not one of the people were eyewitnesses of the alleged “arrests”, except Lach Kry, whose evidence is unreliable for the reasons described below.<sup>2521</sup> All the evidence Thang Phal gave regarding any order or policy was that of a rumour that Vietnamese people were gathered together and executed”.<sup>2522</sup> He never heard anyone make an announcement about the Vietnamese, nor did he attend any meeting.<sup>2523</sup> Similarly, Lach Kry never heard the village “authorities” talk about Vietnamese people.<sup>2524</sup>

<sup>2511</sup> ICTY, *Krstić Appeals Judgement*, para. 130.

<sup>2512</sup> ICTY, *Stakić Appeals Judgement*, para. 52.

<sup>2513</sup> ICTY, *Šešelj Trial Judgement*, para. 283.

<sup>2514</sup> See also *supra*, Chapter 4-II-B.

<sup>2515</sup> Sean Song; Choeung Yang Chat; Um Suonn; Lach Kry; Doung Oeurn; Sao Van; Khouy Muoy, Sieng Chanthuy; Uch Sunlay.

<sup>2516</sup> **E1/368.1**, Y Vun, T. 15 Dec 2015, p. 18, ln. 17, p. 23, ln. 5.

<sup>2517</sup> **E1/363.1**, Sao Sak, T. 7 Dec 2015, p. 23, lns 4-7; **E1/371.1**, Thang Phal, T. 6 Jan 2016, p. 60, lns 11-15; **E1/366.1**, Ung Sam Ean, T. 11 Dec 2015, p. 50, lns 9-19; **E1/367.1**, Sin Chhem, T. 14 Dec 2015, p. 27, lns 9-17.

<sup>2518</sup> **E1/371.1**, Thang Phal, T. 6 Jan 2016, p. 37, ln. 19 to p. 38, ln. 2, p. 39, lns 5-8, p. 43, ln. 6-8; **E1/379.1**, Lach Kry, T. 20 Jan 2016, p. 72, lns 19-23, p. 73, ln. 25 to p. 74, ln. 6; **E1/381.1**, Doung Oeurn, T. 25 Jan 2016, p. 11, ln. 23 to p. 12, ln. 21, p. 13, lns 13-16, p. 14, lns 4-6, p. 24, ln. 24 to p. 25, ln. 7.

<sup>2519</sup> **E1/371.1**, Thang Phal, T. 6 Jan 2016, p. 13, lns 9-10, p. 15, lns 18-23, p. 43, ln. 6-8, p. 48, lns 5-24, p. 50, lns 16-25, p. 51, lns 2-7; **E1/379.1**, Lach Kry, T. 20 Jan 2016, p. 13, lns 9-10, p. 15, lns 18-23, p. 72, lns 19-23, p. 73, ln. 25 to p. 74, ln. 6; **E1/381.1**, Doung Oeurn, T. 25 Jan 2016, p. 11, ln. 23 to p. 12, ln. 21, p. 13, lns 13-16, p. 14, lns 4-6.

<sup>2520</sup> **E1/371.1**, Thang Phal, T. 6 Jan 2016, p. 43, ln. 6-8, p. 46, lns 10-12, 16-19, p. 48, lns 2-4; **E1/379.1**, Lach Kry, T. 20 Jan 2016, p. 13, lns 9-10, p. 15, lns 18-23, p. 72, lns 19-23, p. 73, ln. 25 to p. 74, ln. 6; **E1/381.1**, Doung Oeurn, T. 25 Jan 2016, p. 14, lns 4-6.

<sup>2521</sup> See *infra*, Chapter 5-II-E-4-(a).

<sup>2522</sup> **E1/371.1**, Thang Phal, T. 6 Jan 2016, p. 76, lns 7-17.

<sup>2523</sup> **E1/371.1**, Thang Phal, T. 6 Jan 2016, p. 55, lns 4-21, p. 60, lns 11-15, p. 61, lns 12-16.

<sup>2524</sup> **E1/379.1**, Lach Kry, T. 20 Jan 2016, p. 87, lns 5-11.

763. Pak Sok (2-TCW-1000), after having his memory thoroughly “refreshed” by the Co-Prosecutors and Civil Party Lead Co-Lawyers, testified that as Division 164 soldier, he participated in a mandatory training for all soldiers in the division in early 1977.<sup>2525</sup> During this training, “the Vietnamese” were referred to as the “hereditary enemies”, and orders to kill them – even babies – were given.<sup>2526</sup> Pak Sok (2-TCW-1000) testified that the battalion commander said this and had received that order from the upper level.<sup>2527</sup> At the same time, Pak Sok (2-TCW-1000) also stated that “my teacher before the training, I did not know about what he did. So I knew only that he came to teach me at Ou Chheu Teal training school”.<sup>2528</sup> This prompted the Civil Party Lead Co-Lawyers to again “refresh” his memory by reading him part of his WRI where he had said that the commanders of battalions and regiments had trained with the division prior to training the soldiers.<sup>2529</sup> Obediently, Pak Sok (2-TCW-1000) changed his account, stating that “[a]t the level of the battalion and regiment, who went to study at the division level, they came back and instructed -- gave instruction at all battalions of the division.”<sup>2530</sup> However, a few minutes later he forgot this new position, saying that he “did not know about the affairs of the upper level”.<sup>2531</sup> He added later that “I was aware only [of] what happened in my unit”.<sup>2532</sup> This does not constitute evidence of a policy or of the implementation of such, since other evidence demonstrates that there was never such orders at the higher levels.

764. Moreover, three military commanders gave evidence directly contradicting Pak Sok’s (2-TCW-1000’s) account. Prum Sarat, commander of Company 2 in Division 164’s Regiment 140, testified that he never received precise instructions about the treatment of Vietnamese refugees.<sup>2533</sup> He explained that in practice, there was a clear distinction to be made between Vietnamese soldiers and civilians: only the soldiers were “external enemies”<sup>2534</sup>, not refugees.<sup>2535</sup> Likewise, Meas Voeun, the deputy commander of West Zone Division 1, testified that there was never a plan to destroy the Vietnamese.<sup>2536</sup> To the contrary, he testified that the Minister of Defence Son Sen had explicitly ordered not to arrest Vietnamese refugees and to

<sup>2525</sup> E1/370.1, Pak Sok (2-TCW-1000), T. 5 Jan 2016, p. 63, lns 8-9.

<sup>2526</sup> E1/369.1, Pak Sok (2-TCW-1000), T. 16 Dec 2015, p. 47, ln. 1 to p. 48, lns 7.

<sup>2527</sup> E1/369.1, Pak Sok (2-TCW-1000), T. 16 Dec 2015, p. 47, lns 7-12.

<sup>2528</sup> E1/369.1, Pak Sok (2-TCW-1000), T. 16 Dec 2015, p. 50, lns 14-20.

<sup>2529</sup> E1/369.1, Pak Sok (2-TCW-1000), T. 16 Dec 2015, p. 50, ln. 21 to p. 51, ln. 9.

<sup>2530</sup> E1/369.1, Pak Sok (2-TCW-1000), T. 16 Dec 2015, p. 51, lns 11-13.

<sup>2531</sup> E1/369.1, Pak Sok (2-TCW-1000), T. 16 Dec 2015, p. 51, lns 19-20.

<sup>2532</sup> E1/370.1, Pak Sok (2-TCW-1000), T. 5 Jan 2016, p. 29, lns 12-13.

<sup>2533</sup> E1/382.1, Prum Sarat, T. 26 Jan 2016, p. 8, lns 10-18.

<sup>2534</sup> E1/382.1, Prum Sarat, T. 26 Jan 2016, p. 12, ln. 7 to p. 13, ln. 8, p. 15, lns 2-8.

<sup>2535</sup> E1/382.1, Prum Sarat, T. 26 Jan 2016, p. 12, ln. 24 to p. 13, ln. 1.

<sup>2536</sup> E1/387.1, Meas Voeun, T. 3 Feb 2016, p. 9, ln. 23 to p. 10, ln. 4.

let them travel.<sup>2537</sup> If it was established that the Vietnamese people were refugees, they were released and would be sent “wherever they wished to go.”<sup>2538</sup> As importantly, he denied having ever received instructions to kill all Vietnamese, including babies.<sup>2539</sup> To the contrary, he explained that:

I sent them to the upper level, and whatever measures the upper level did, that was their authority. Those “*Yuon*” that we captured, they were not soldiers. They did not bear arms, so they were not considered the enemy, and they were considered ordinary people who tries [sic] to find a better place to live.<sup>2540</sup>

765. Mak Chhoeun (2-TCW-823), commander of Battalion 560 in Division 164’s Regiment 63, corroborated these accounts. He testified that with regard to Vietnamese refugees, “the instruction from the upper echelon was that they were not considered enemy. If they fled, they would be allowed to flee off the areas. This was the common instruction from the Division that I could grasp.”<sup>2541</sup> He also said that “[t]o my understanding, the refugees were not perceived as enemies since they fled from Vietnam to other countries, and they were not armed, so how could we fire at them because they were unarmed?”<sup>2542</sup>

766. In any event, all these witnesses were in the military and amidst combat operations between DK and Vietnam. As Prum Sarat put it, it was “a hot battlefield”.<sup>2543</sup> As a result, it must be kept in mind that any evidence of crimes located in this region cannot be said to be representative of the situation elsewhere in the DK. Similarly, it cannot be illustrative of a nationwide civilian policy, as this was limited to military operations.

767. Other witnesses also testified that there was never a policy to destroy Vietnamese people under the DK. Sao Sarun, Autonomous Sector 105 committee member from 1975, and who became its secretary in 1978, testified that there was no policy to “target” Vietnamese civilians, and that people were only arrested if they committed errors.<sup>2544</sup> This was corroborated by Duch,

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<sup>2537</sup> E1/386.1, Meas Voeun, T. 2 Feb 2016, p. 62, lns 5-23.

<sup>2538</sup> E1/386.1, Meas Voeun, T. 2 Feb 2016, p. 63, lns 4-6.

<sup>2539</sup> E1/387.1, Meas Voeun, T. 3 Feb 2016, p. 29, ln. 4 to p. 30, ln. 1.

<sup>2540</sup> E1/387.1, Meas Voeun, T. 3 Feb 2016, p. 29, ln. 21 to p. 30, ln. 1.

<sup>2541</sup> E1/512.1, Mak Chhoeun (2-TCW-823), T. 13 Dec 2016, p. 18, lns 17-20.

<sup>2542</sup> E1/512.1, Mak Chhoeun (2-TCW-823), T. 13 Dec 2016, p. 17, lns 20-23.

<sup>2543</sup> E1/383.1, Prum Sarat, T. 27 Jan 2016, p. 46, lns 8-13.

<sup>2544</sup> E1/410.1, Sao Sarun, T. 29 Mar 2016, p. 90, lns 14-16; E1/411.1, Sao Sar, T. 30 March 2016, p. 17, lns 3-25, p. 27, lns 14-23.

who testified that there was no policy about targeting the Vietnamese, and that they were only arrested if they committed “errors”.<sup>2545</sup>

**(c) In 1978, the DK Called for Friendship, Peace and Forgiveness with Vietnam**

768. In sharp contrast with the absence of any statements calling for the eradication of the Vietnamese race, several CPK publications explicitly referred to Vietnamese civilians in peaceful and friendly terms right at the time when the Closing Order argues they were attempting to destroy the Vietnamese group (April 1977 until January 1979). In March and July 1978, the CPK stated that “friendship between the two countries will germinate, take root and grow”<sup>2546</sup> and still emphasised the possibility of reverting to a “wonderful friendship”, if Vietnam stopped its acts of aggression.<sup>2547</sup> In September 1978, the Revolutionary Flag states that Cambodia “holds out its hand in peace to the Vietnamese people.”<sup>2548</sup> In contrast, it is difficult to imagine *Radio des Milles Collines* talking about a “wonderful friendship” with the Tutsis in 1994 in Rwanda, or *Der Stürmer*, the Nazi newspaper, quoting Hitler using such terms when referring to Jews.<sup>2549</sup>

769. Likewise, in June 1978 – *i.e.*, right in the middle of the period in which the CPK allegedly wanted to destroy the Vietnamese civilians as a group – the Central Committee also issued a “Guidance” towards “Misled Persons who have joined the CIA, served as *Yuon* Agents or joined the KGB and opposed the Party, Revolution, People and Democratic Kampuchea”.<sup>2550</sup> The Guidance clearly refers to the “*Yuon* aggressor who swallows up the territory”, *i.e.*, to Vietnam as a state and a war opponent, and not to civilians. The Central Committee underlines the need to forgive the people whom it considers have been misled, and not to punish them.<sup>2551</sup> Several witnesses confirmed hearing this guidance.<sup>2552</sup>

<sup>2545</sup> E1/443.1, Duch, T. 23 Jun 2016, p. 104, lns 22-23, p. 109, ln. 19 to p. 110, ln. 4; *see also* E3/429, ‘WRI of Duch’, ERN 00403926.

<sup>2546</sup> E3/1149, ‘Telex Message, Sweden-Kampuchea Friendship Association’, 4 Mar 1978, ERN 00717588.

<sup>2547</sup> E3/1264, ‘Press Communique of the Spokesman of the Ministry of Propaganda and Information of Democratic Kampuchea’, 1 Jul 1978, ERN 00078182.

<sup>2548</sup> E3/215, Flag, Sep 1978, ERN 00488625-26.

<sup>2549</sup> *See* F16, Nuon Chea’s Appeal Brief, para. 381, for further comparative discussion of *Der Stürmer*.

<sup>2550</sup> E3/763, Central Committee’s Guidance on Misled Persons, 20 Jun 1978.

<sup>2551</sup> E3/763, Central Committee’s Guidance on Misled Persons, 20 Jun 1978, ERN 00265217-18.

<sup>2552</sup> E1/406.1, Chin Kimthong (2-TCW-900), T. 22 Mar 2016, p. 58, lns 11-19; E1/326.1, Om Chy, T. 30 Jul 2015, p. 67, ln. 10 to p. 71, ln. 10.

**(d) Conclusion the Alleged Policy ‘Targeting’ Members of the Vietnamese Group**

770. Not only is there no direct evidence of the DK government having established and followed a policy to exterminate, discriminate or otherwise target members of the Vietnamese ethnic, national or racial group, there is actual credible evidence that such policy never existed and that there was no discrimination towards Vietnamese people, who were treated like everyone else under DK.

771. While the existence of a “targeting policy” could be deduced from circumstantial evidence, it must be the only reasonable conclusion. In light of the limited character of the evidence – both in terms of systematic and widespread nature of the alleged crimes – another reasonable conclusion is that the crimes were committed outside of any policy by individuals acting autonomously. Part D below discusses the factual allegations regarding the Cham, and Part E for the Vietnamese. When examining the case file as a whole, the absence of specific and reliable evidence that Cham and Vietnamese were specifically ‘targeted’ as result of their ethnicity, race, religion or nationality is striking. Very few witnesses or civil parties provided actual evidence about the reasons the people were allegedly ‘targeted’. Where such evidence does exist, it shows that in most cases, there was a legitimate reason for it, unrelated to their membership in the Cham or Vietnamese group.

772. Similarly, while the Closing Order contains allegations of killings and mistreatments allegedly occurring systematically and throughout the whole of DK, the evidence is geographically sparse, overly vague, and, more times than not, constitutes hearsay, uncorroborated, or unsubstantiated statements. Only a handful of individuals provided detailed, first-hands accounts on incidents against Cham or Vietnamese in geographically limited locations. As importantly, there is no direct evidence – whether live or documentary – that the DK intended to target the Cham or Vietnamese.

**D. FACTS RELATED TO THE ALLEGED ‘TARGETING’ OF CHAM**

773. The evidence does not support a finding that Cham people were specifically targeted as a result of their ethnicity or their religion. To the contrary, it shows that when an individual who happened to be Cham was arrested or otherwise ‘targeted’, it was as a result of their individual actions rather than their membership to the Cham group. While a number of witnesses and civil parties testified about the alleged discrimination against Cham, particularly in the context of



religious activities, the evidence shows that such events, when they are actually established, cannot be linked to an intention to destroy, discriminate or to persecute Cham people.

774. During the evidentiary hearings, the Defence objected to the Co-Prosecutors' attempt to introduce evidence on alleged crimes taking place outside the two crime sites specifically charged in the Closing Order and included in the scope of Case 002/02, namely Wat Au Trakuon Security Centre and Trea Village Security Centre.<sup>2553</sup> In blatant disregard for basic fair trial principles regarding the notification of the charges, the Chamber allowed such evidence while specifying that it related only to a nationwide policy, not to the crime base.<sup>2554</sup> It is important to keep in mind that the alleged existence of a policy is not a crime *per se*, but rather relates to the mode of liability of JCE I. Therefore, even if the existence of a policy to "target" Cham could be established, if it is found on the basis of evidence from a location which is not charged in the Closing Order in relation to the treatment of Cham (*i.e.*, any evidence outside of Wat Au Trakuon or Trea Village), no conviction for any of the crimes charged can be entered. Finding otherwise would violate Nuon Chea's right to be promptly informed of the charges.<sup>2555</sup> This includes, in particular, evidence on alleged crimes in Kampong Siem District in Sector 41 of the Central (old North) Zone.

775. The present Part demonstrates that Cham along the Mekong were never forcibly displaced as a result of their religion or political beliefs. It addresses the allegations that Cham were arrested, detained, and summarily executed as a result of their membership in the Cham group in Wat Au Trakuon and Trea Village security centres. It also discusses the lack of evidence that Cham political or religious leaders were arrested, or that any measures were taken in order to discriminate against Cham.

### **1. The Transfer of Cham on the Mekong River Does Not Constitute Persecution**

776. The Closing Order charges Nuon Chea with political and religious persecution against the Cham by transferring them to different locations.<sup>2556</sup> It alleges that Cham had to be "eliminated", because they were viewed as potential opponents of the regime, and considered "beyond redemption".<sup>2557</sup> In addition, the Closing Order states that Cham were 'targeted' as a

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<sup>2553</sup> See **E1/353.1**, Ban Seak, T. 5 Oct 2015, p. 40, ln. 8-p. 41, ln. 17.

<sup>2554</sup> See **E1/353.1**, Ban Seak, T. 5 Oct 2015, p. 42, lns 1-4.

<sup>2555</sup> ECCC Establishment Law, Art. 35 New; ICCPR, Art. 14(3)(a); ICTY, *Prlić et al.* Decision on Purpose of Evidence, paras 27, 29.

<sup>2556</sup> **D427**, Closing Order, paras 1367-68, 1416-20.

<sup>2557</sup> **D427**, Closing Order, paras 1367-68.

result of their ethnicity or religious identity,<sup>2558</sup> on “discriminatory grounds, due to their membership of the group”.<sup>2559</sup> Among the various transfers of the Cham during the Phase 2 population movement, the Closing Order only charges the transfer of the Cham population in late 1975 from Kampong Cham Province.<sup>2560</sup> The Closing Order mostly relies on a November 1975 telegram #15 from “Chhon” (an alias for Sao Phim) to Pol Pot, allegedly copied to Nuon Chea and others.<sup>2561</sup> The Closing Order alleges that the telegram illustrated a decision of “the CPK Centre” to move part of the Cham population from the East Zone to the North and Northwest Zones, to “break up” the Cham through displacement.<sup>2562</sup> In reality, what the telegram and other evidence unequivocally show is that the Cham population was not the “target” of the transfer; that there is no evidence that the transfer was aimed to “break up” the Cham community; and that there is evidence that the reasons for the transfer were legitimate.

**(a) *The Transfer Did Not ‘Target’ the Cham and Thus Was Not Discriminatory***

777. In Case 002/01, the Supreme Court Chamber held that, since the transfer of people was a “widespread practice that affected all parts of the population”, the movement of the population during Phase Two was not discriminatory or “an emanation of [a] persecutory intent”.<sup>2563</sup> The same reasoning applies here. Only by the extreme overstretching of a biased imagination could telegram #15 be considered as evidence of a policy to target and discriminate against Cham people. It talks about the movement of “people from the East Zone”, not about movement of Cham; it refers to “Cambodians of Cham origin”; and it presents the fact that certain villages would not accept them while accepting “pure Khmer” as a “problem”. Instead of illustrating a policy to discriminate against Cham by forcibly displacing them, the document shows that the displacement concerned all residents, and not solely members of the Cham population. It was therefore not discriminatory in practice. In fact, the discriminatory treatment of Cham people in both Preah Prasap and Steung Trang was seen as a problem to be addressed by authorities, rather than an illustration of a policy.

778. The “other evidence” referred to in the Closing Order is in fact only one document, a statement from Amnesty International to the UN Sub-Commission on Prevention of

<sup>2558</sup> **D427**, Closing Order, para. 1369.

<sup>2559</sup> **D427**, Closing Order, para. 1419.

<sup>2560</sup> **D427**, Closing Order, para. 266.

<sup>2561</sup> **E3/154**, ‘Telegram from Chhon to Pol’, 30 Nov 1975.

<sup>2562</sup> **D427**, Closing Order, paras 165, 211, 266, 281.

<sup>2563</sup> **F36**, Case 002/01 Appeals Judgement, para. 705.

Discrimination and Protection of Minorities.<sup>2564</sup> It refers to multiple layers of hearsay from unnamed individuals regarding the treatment of Cham: an article from the Malaysian review Islamic Herald which presented interviews of three unnamed Muslim refugees who alleged that Cham were “systematically dispersed”.<sup>2565</sup> The Defence expresses its surprise that such a document was admitted into evidence, while the Chamber had refused to accept a more detailed and referenced Human Rights Watch report (*30 Years of Hun Sen*) closely related to the question of the Cham rebellion. This decision clearly illustrates the lack of logic in the Chamber’s reasoning, with the Chamber stating that the Human Rights Watch report was somehow “more of a summary of the multiple and diverse sources [rather] than an assessment of the said sources”, which were often “particularly vague” and was therefore “not conducive to ascertaining the truth”.<sup>2566</sup> In actuality, the statement by the advocacy group Amnesty International amounts to vague, unsubstantiated multiple hearsay which cannot be tested by the Defence and uncorroborated by any other evidence. Notably, the document itself recognises that “many allegations [...] remain uncorroborated”.<sup>2567</sup> Thus, it must be entirely disregarded.

779. Finally, there is no evidence that the transfer violated any fundamental rights. There is scant evidence on the conditions of the specific transfer from Kampong Cham Province. Evidence shows in general that various means of transportation were provided;<sup>2568</sup> people were asked to bring personal belongings;<sup>2569</sup> and families were not separated during the transfer.<sup>2570</sup> There is no credible evidence that people suffered or died due to conditions during the transfer. Moreover, many families returned after January 1979.<sup>2571</sup> This further shows that there was no discrimination or violation of a fundamental right in fact.

**(b) *There is no Evidence that the Transfer was to Punitively ‘Break Up’ the Cham***

780. Not only is there no evidence that Cham were the “target” of the transfer, there is also no evidence that the reason underlying the population transfer was to punitively “break up” the

<sup>2564</sup> **D427**, Closing Order, fn. 1034, *citing to E3/4198, Amnesty International, Allegations of Human Rights Violations in DK.*

<sup>2565</sup> **E3/4198**, ‘Allegations of Human Rights Violations in Democratic Kampuchea’, Amnesty International, Aug 1978, ERN 00271509.

<sup>2566</sup> **E347/1**, First Decision on HRW Report, para. 4.

<sup>2567</sup> **E3/4198**, ‘Allegations of Human Rights Violations in Democratic Kampuchea’, Amnesty International, Aug 1978, ERN 00271510.

<sup>2568</sup> **E1/342.1**, It Sen, T. 7 Sep 2015, p. 65, lns 17-18, 20, p. 66, lns 11-13; **E3/5207**, ‘WRI of Mat Ysa’, ERN 00242078; **E3/5206**, ‘WRI of Teh Sren’, ERN 00275380.

<sup>2569</sup> **E3/9342**, ‘WRI of Leav Loas’, ERN 00339936; **E3/8741**, ‘WRI of Bao Troab’, A12.

<sup>2570</sup> **E1/342.1**, It Sen, T. 7 Sep 2015, p. 65, lns 2-6; **E1/344.1**, Seng Kuy, T. 9 Sep 2015, p. 72, lns 8-11; **E3/5206**, ‘WRI of Teh Sren’, ERN 00275380.

<sup>2571</sup> **E1/372.1**, Sos Romly, T. 8 Jan 2016, p. 43, lns 16-19, p. 45, lns 1-2; **E1/344.1**, Seng Kuy, T. 9 Sep 2015, p. 98, lns 18-22; **E3/5207**, ‘WRI of Mat Ysa’, ERN 00242078.

Cham population from Kampong Cham Province. The “tensions” that telegram #15 refers to are those created by the fact that certain officials did not want to welcome the Cham people in Preah Prasap and in Steung Trang for unstated reasons. Indeed, Sao Phim notes that since the officials “categorically” refused to receive Cham people, “a state of utter agitation” was created among those who had been slated to be transferred.<sup>2572</sup> The rest of the document is too vague to establish beyond reasonable doubt that the telegram’s reference to a plan to “disperse” the Cham amounted to a punitive or discriminatory intention to “break up” the Cham.<sup>2573</sup> Indeed, at one point, Sao Phim notes that the East Zone was required to transfer 50,000 people to the North Zone, but that there was more than double this number of Cham in the East Zone.<sup>2574</sup> Thus, one reasonable interpretation of the reference to “dispersing” the Cham is that it related to practical transfer constraints: *i.e.*, the requirement to transfer a limit of 50,000 people to the North Zone would mean that not all Cham people could be transferred to the same place.

781. In addition, the Closing Order’s allegation that the “tensions” in the telegram refer to security concerns arising from the two Cham rebellions shortly predating the 1975 telegram is unsubstantiated. The evidence does not establish such a causal link beyond reasonable doubt. On the contrary, telegram #15 refers to people – both Cham and Khmer – coming from three districts (Kroch Chhmar, Chhloung and Peam Chileang)<sup>2575</sup> while the two Cham rebellions took place only in Kroch Chhmar District. Moreover, and again, the reference to “Cambodians of Cham origin” (in comparison with “those of Cambodian origin”) show that Cham were considered inclusively like any ethnic Khmer person, rather than being considered political opponents or as a group whose religion is not permissible.<sup>2576</sup>

782. Instead of being grounded in a discriminatory intent to persecute Cham people, the evidence shows that the reason behind the transfer of the general population was to move people to less populated areas, with sufficient food and arable land. In fact, the Closing Order itself,<sup>2577</sup> and the Supreme Court Chamber, recognised that the second phase of the population movement was “primarily for economic goals”.<sup>2578</sup> Consistent with this, the population itself was told that they were moving to less populated areas with sufficient food and good land to farm on.<sup>2579</sup> The

<sup>2572</sup> E3/154, ‘Telegram from Chhon to Pol’, 30 Nov 1975, ERN 00185064.

<sup>2573</sup> E3/154, ‘Telegram from Chhon to Pol’, 30 Nov 1975, ERN 00185065.

<sup>2574</sup> E3/154, ‘Telegram from Chhon to Pol’, 30 Nov 1975, ERN 00185064-65.

<sup>2575</sup> E3/154, ‘Telegram from Chhon to Pol’, 30 Nov 1975, ERN 00185064.

<sup>2576</sup> E3/154, ‘Telegram from Chhon to Pol’, 30 Nov 1975, ERN 00185064.

<sup>2577</sup> D427, Closing Order, paras 165, 276-77.

<sup>2578</sup> F36, Case 002/01 Appeals Judgement, para. 705.

<sup>2579</sup> E1/372.1, Sos Romly, T. 8 Jan 2016, p. 17, Ins 1-9; E1/342.1, It Sen, T. 7 Sep 2015, p. 67, Ins 2-5.

transfer must also be viewed in light of an August 1975 report of the CPK Standing Committee's visit to the Northwest Zone, which states that the North and the Northwest Zones had surplus good land and must receive more people.<sup>2580</sup> Rather than being a discriminatory act or punishment, the transfer accorded with the CPK's policy to improving people's living standards.<sup>2581</sup> There was no persecution on political or religious ground specifically targeting Cham people.

**2. The Evidence Does Not Establish that all Cham in Kang Meas District were Taken to and Executed at Wat Au Trakuon Due to Ethnicity, Religion, or Political Beliefs**

783. The Closing Order alleges that around 1977, "all the Cham" in Kang Meas District were arrested and sent to be killed at Wat Au Trakuon, the District Security Centre, in Sector 41 of the Central (old North) Zone.<sup>2582</sup> It also alleges that the Cham were targeted for no reason other than their membership of the Cham group,<sup>2583</sup> and that they were executed upon arrest, without detention or interrogation.<sup>2584</sup> However, none of the allegations are substantiated beyond reasonable doubt. First, the evidence does not demonstrate that all Cham were indiscriminately targeted and arrested as a result of their ethnicity, religion or political views. Rather, the testimonies heard were based on pure speculation and rumours and no objective evidence was provided for the reasons for arrests. Second, there is no evidence that the Cham people who were in Wat Au Trakuon were executed. Finally, in any event, the evidence only relates to two of the 10 communes in Kang Meas District. Thus, it is not established even that "all the Cham" in the District were arrested and taken to Wat Au Trakuon, let alone that there was a parallel nationwide, systematic pattern of such conduct.

**(a) There Is No Credible Evidence that all the Cham in Peam Chikang and Angkor Ban Communes Were Arrested and Taken to Wat Au Trakuon**

784. Four witnesses<sup>2585</sup> and one civil party<sup>2586</sup> testified on Peam Chikang commune, and one witness on Angkor Ban commune.<sup>2587</sup> None provided detailed and credible evidence.

<sup>2580</sup> E3/216, Record of Standing Committee's Visit to Northwest Zone, ERN 00850977; see also E3/1765, 'Examination of Control and Implementation of the Policy Line on Restoring the Economy and Preparations to Build the Country in Every Sector', Sep 1975, ERN 00523590-91.

<sup>2581</sup> See *infra*, Chapter 6-II, setting out in detail the CPK policy on cooperatives and worksites.

<sup>2582</sup> D427, Closing Order, paras 779-782.

<sup>2583</sup> D427, Closing Order, para. 1337.

<sup>2584</sup> D427, Closing Order, para. 783.

<sup>2585</sup> Sen Srun, Samrit Muy, Tay Koemhun, and Say Doeun.

<sup>2586</sup> Him Man.

<sup>2587</sup> Seng Kuy.

(i) Arrests in Peam Chikang

785. Sen Srun, a villager, testified to being assigned one day in 1977,<sup>2588</sup> to help the “Long Sword Group” guard a group of people at Wat Au Trakuon.<sup>2589</sup> He testified that all the Cham within Peam Chikang Commune were arrested;<sup>2590</sup> “hundreds” of them.<sup>2591</sup> However, he acknowledged that at the time, it was too dark to recognise anyone.<sup>2592</sup> Nevertheless, when confronted about it, he testified that he had recognised a Cham neighbour, Rin, and his family, in the group he escorted.<sup>2593</sup> Sen Srun was in no position to determine the ethnicity of any of them, let alone confirm that the group comprised all the Cham from the entire Peam Chikang commune.<sup>2594</sup> Sen Srun’s account was riddled with inconsistencies, exaggerations and lack of details. Like most witnesses, his perspective of the events was heavily influenced by rumours; his awareness of Him Man’s story; and post-DK propaganda of the alleged crimes against the Cham.<sup>2595</sup> In any event, his evidence that “all the Cham” were arrested is pure speculation: he provides no legitimate reason as to why the people he allegedly saw were Cham.

786. Samrit Muy, a villager from Peam Chikang, claimed that he saw on one occasion in 1977 that all the Cham from Sach Sau were walked to Wat Au Trakuon.<sup>2596</sup> It is unclear how he could possibly determine that those people were exclusively Cham, and all the Cham from Sach Sau, as he watched from afar and thus could not even see who was escorting the group.<sup>2597</sup> Most importantly, his assumption is prefaced on the belief that no Cham remained in Sach Sau village,<sup>2598</sup> even though he had not returned to the village after.<sup>2599</sup> This amounts to pure speculation. In any event, even if there was no Cham in the village, this does not constitute proof beyond reasonable doubt that they were arrested. Former militiaman Say Doeun alleged that there was a raid on seven villages in Peam Chikang in late 1978 to arrest Cham villagers. However, he was only involved in the arrest of two individuals from one village and had no

<sup>2588</sup> E1/346.1, Sen Srun, T. 14 Sep 2015, p. 31, lns 1-8.

<sup>2589</sup> E1/346.1, Sen Srun, T. 14 Sep 2015, p. 31, ln. 19, to p. 32, ln. 5.

<sup>2590</sup> E1/346.1, Sen Srun, T. 14 Sep 2015, p. 32, lns 17-23.

<sup>2591</sup> E1/346.1, Sen Srun, T. 14 Sep 2015, p. 35, lns 6-11.

<sup>2592</sup> E1/346.1, Sen Srun, T. 14 Sep 2015, p. 85, ln. 25 to p. 86, ln. 1; E1/347.1, Sen Srun, T. 15 Sep 2015, p. 4, lns 8-12, p. 5, lns 4-7.

<sup>2593</sup> E1/346.1, Sen Srun, T. 14 Sep 2015, p. 87, lns 7-14.

<sup>2594</sup> E1/346.1, Sen Srun, T. 14 Sep 2015, p. 32, lns 17-19.

<sup>2595</sup> E3/5302, ‘Notes of Interview of Seng Srun’, ERN 00210489; E1/346.1, Sen Srun, T. 14 Sep 2015, p. 42, lns 9-24, p. 57, ln. 11 to p. 58, ln. 11, p. 61, ln. 3 to p. 62, ln. 3, p. 75, lns 6-11.

<sup>2596</sup> E1/347.1, Samrit Muy, T. 15 Sep 2015, p. 25, ln. 17 to p. 26, ln. 10, p. 27, lns 1-3.

<sup>2597</sup> E1/347.1, Samrit Muy, T. 15 Sep 2015, p. 27, lns 12-16, p. 30, lns 18-20, p. 46, lns 7-10.

<sup>2598</sup> E1/347.1, Samrit Muy, T. 15 Sep 2015, p. 99, lns 2-9.

<sup>2599</sup> E1/347.1, Samrit Muy, T. 15 Sep 2015, p. 99, lns 10-13.

knowledge of the situation in the other six villages.<sup>2600</sup> He also testified that he did not remember hundreds of Cham being gathered in Peam Chikang Commune and being taken to Wat Au Trakuon.<sup>2601</sup> His evidence is vague and unsubstantiated. It does not constitute proof beyond reasonable doubt that all Cham in Peam Chikang Commune were arrested.

787. The only specific evidence about arrests of Cham in Sach Sau village is that of Him Man, a civil party, in relation to events in April 1978. However, his unsworn statement is nothing but exaggeration and speculation, if not an outright lie. Him Man claimed that he and his wife were escorted, together with all Cham from Sau Sach village, to Wat Au Trakuon to be killed. He alleged that the two of them were the only survivors of this arrest.<sup>2602</sup> Indeed, after sneaking away from the line of people allegedly being walked to a killing pit in Wat Au Trakuon, he and his wife hid in a bush that was only 100 metres from the pit and 50 metres from armed guards, unnoticed.<sup>2603</sup> Evading the attention of the nearby guards once more, he and his wife then decided to move to a pond 200 metres away, and hid in the water and in nearby bushes for “three months and 29 days”.<sup>2604</sup> Not only does staying in a pool of water for any extended period of water seem physically impossible, but doing so only a few metres away from armed guards without being noticed is highly implausible. There is also no reason why Him Man and his wife would not elect to hide in one of the few empty houses in his village.<sup>2605</sup> As implausibly, at some point, guards did see them and fired heavy weapons, such as M79 grenade-launchers and B40 rocket launchers at them in the pond.<sup>2606</sup> While it is unclear how large the pond was or how far the guards were, it appears nearly impossible to escape the fire of such weapons while being in water stuck in between water hyacinths.

788. Him Man’s statement that all the Cham from Sach Sau were taken away together in one group that day is based on the fact that he did not see any Cham in his village.<sup>2607</sup> This is nothing but speculation. Even if it was established that they did disappear, this does not suffice to establish arrest or death beyond reasonable doubt.<sup>2608</sup> In any event, Him Man contradicted himself, as he also said that after having left the pond and gone back to Sach Sau, he sought the

<sup>2600</sup> E1/374.1, Say Doeun, T. 12 Jan 2016, p. 83, ln. 7 to p. 84, ln. 11.

<sup>2601</sup> E1/374.1, Say Doeun, T. 12 Jan 2016, p. 67, lns 2-8.

<sup>2602</sup> E3/4706, ‘Victim Information Form of Him Man’, ERN 00417863-64.

<sup>2603</sup> E1/349.1, Him Man, T. 17 Sep 2015, p. 44, ln. 9 to p. 45, ln. 8, p. 46, lns 20-22.

<sup>2604</sup> E1/349.1, Him Man, T. 17 Sep 2015, p. 51, lns 18-20, p. 52, lns 19-20, p. 54, ln. 2, p. 56, lns 20-25.

<sup>2605</sup> E1/349.1, Him Man, T. 17 Sep 2015, p. 51, lns 12-14.

<sup>2606</sup> E1/349.1, Him Man, T. 17 Sep 2015, p. 51, lns 18-21.

<sup>2607</sup> E1/349.1, Him Man, T. 17 Sep 2015, p. 51, lns 12-17.

<sup>2608</sup> F36, Case 002/01 Appeals Judgement, paras 471, 472, 482-483.

help of Cham neighbours.<sup>2609</sup> Indeed, there is evidence suggesting that Cham families in Kang Meas District were often asked by local cadres to change residence.<sup>2610</sup> Therefore, another reasonable interpretation from the fact that Him Man's neighbours were gone when he checked their houses is that they had been relocated.

789. No witness or civil party provided credible evidence on key constitutive elements of the crimes: very few witnesses provided objective justifications for their statement that the people they saw being arrested were actually Cham. Mat Toulouh, a Cham individual whose Cham identity was known to his colleagues in the Kang Meas District office, was entrusted with transporting people by boat to Wat Au Trakuon.<sup>2611</sup> He testified that it was impossible to tell if the transported people were Cham or Khmer.<sup>2612</sup> Furthermore, no one provided evidence as to why people, including Cham, were arrested.<sup>2613</sup> On the contrary, for instance, Sen Srun testified that he had nothing to do with "arrest of the Cham people".<sup>2614</sup> Him Man said that after an initial investigation, he and his wife were released by Kang Meas District chief Kan (who knew they were Cham) once other villagers assured Kan that Him Man was not involved in "any accused activities".<sup>2615</sup> This shows that rather than intending to eliminate all Cham arbitrarily and indiscriminately, Kang Meas cadres sought those suspected of illegal activities. It also shows that the alleged gathering and killing of villagers in Sach Sau could reasonably have been an effort to arrest suspected offenders who happened to be Cham. There is simply no credible evidence that people were arrested for the mere reason of being Cham. This amounts to mere speculation based on the Manichean narrative, activism and propaganda.

(ii) Arrests in Angkor Ban

790. Evidence of alleged arrests of Cham in Angkor Ban are equally vague, speculative and insufficient. Seng Kuy was the only witness to talk about Angkor Ban. He was also allegedly called once in 1977 to escort a group of people to Wat Au Trakuon. Although he claimed to have witnessed all the Cham villagers (about 10 people) from his village (Angkor Ban Two village) be called out from the dining hall at 8pm,<sup>2616</sup> it was not until an hour later, at 9pm, that

<sup>2609</sup> E1/349.1, Him Man, T. 17 Sep 2015, p. 50, ln. 20 to p. 51, ln. 14.

<sup>2610</sup> See e.g. E1/344.1, Seng Kuy, T. 9 Sep 2015, p. 71, lns 10-19; E3/8741, 'WRI of Bao Troab', A12; see also E3/2653, Osman, Cham Rebellion, ERN 00219212.

<sup>2611</sup> E3/9360, 'WRI of Mat Toulouh', A20, A16.

<sup>2612</sup> E3/9360, 'WRI of Mat Toulouh', A17, A21.

<sup>2613</sup> E1/374.1, Say Doeun, T. 12 Jan 2016, p. 81, ln. 24 to p. 82, ln. 2; E1/373.1, Mui Vanny, T. 11 Jan 2016, p. 43, lns 17-19; E1/348.1, Tay Koemhun, T. 16 Sep 2015, p. 57, ln. 17, p. 74, ln. 25 to p. 75, ln. 1.

<sup>2614</sup> E1/346.1, Sen Srun, T. 14 Sep 2015, p. 28, lns 13-14.

<sup>2615</sup> E1/349.1, Him Man, T. 17 Sep 2015, p. 58, lns 2-11.

<sup>2616</sup> E1/344.1, Seng Kuy, T. 9 Sep 2015, p. 77, lns 2-10.



he was ordered by his village chief to escort a group of people to Wat Au Trakuon.<sup>2617</sup> There is no evidence that the people he was asked to transport were the Cham villagers from the dining hall. By then, it was too dark for him to see exactly how many ox carts were used to transport people. He only knew that there were three people on his ox cart who sat “quietly” during the trip.<sup>2618</sup> Therefore, Seng Kuy’s evidence that all the Cham were taken to Wat Au Trakuon constitutes mere speculation. Without more, it is insufficient to establish beyond reasonable doubt that all or some of the Cham were arrested. In any event, his evidence contains no reference to possible reasons as to why people were being escorted to the Wat.

**(b) *There is No Credible Evidence of Executions of the Cham at Wat Au Trakuon***

791. A number of people were arrested and taken to Wat Au Trakuon, irrespective of their nationality or religion. Its detainees would arrive through Peam Chikang, by boat, and then be walked into Wat Au Trakuon.<sup>2619</sup> Wat Au Trakuon was a regular security centre for the whole of Kang Meas District functioning in accordance with the CPK’s national defence and security policy. The Closing Order, however, alleges that “when arrested, Cham people were not detained at all, but killed immediately”.<sup>2620</sup> Once again, this is not supported by the evidence.

792. The only live witness who had ever entered the compound of Wat Au Trakuon was Muy Vanny, former bodyguard of the chief of security of Kang Meas District. However, his testimony is implausible and unreliable. First of all, he was not in a position to provide specific, comprehensive and representative evidence: he was only around 12 years old at the time; only came to Wat Au Trakuon once a month, for one or two nights, for about five or six months;<sup>2621</sup> and, while there, was never involved in any aspect of Wat Au Trakuon’s daily functioning, *e.g.*, receiving detainees, taking statistics, interrogations, or alleged executions.<sup>2622</sup> His evidence must therefore be viewed in this limiting context. Regarding the treatment of Cham, while Muy Vanny testified that some of the detainees were Cham, he justified his answer by referring to the fact that he had heard about a plan to gather the Cham.<sup>2623</sup> However, he also testified that he did not know whether such plan was ever carried out.<sup>2624</sup> There is also no basis for his

<sup>2617</sup> E1/344.1, Seng Kuy, T. 9 Sep 2015, p. 81, lns 19-20.

<sup>2618</sup> E1/344.1, Seng Kuy, T. 9 Sep 2015, p. 82, lns 15-19, p. 84, lns 6-7.

<sup>2619</sup> E3/9360, ‘WRI of Mat Toulouh’, A16, A18; E1/373.1, Muy Vanny, T. 11 Jan 2016, p. 45, ln. 16 to p. 46, ln. 3.

<sup>2620</sup> D427, Closing Order, para. 783.

<sup>2621</sup> E1/373.1, Muy Vanny, T. 11 Jan 2016, p. 12, lns 18-19, p. 78, lns 17-22, p. 79, lns 19-25.

<sup>2622</sup> E1/373.1, Muy Vanny, T. 11 Jan 2016, p. 25, lns 18-20, p. 45, lns 1-4, p. 47, ln. 21 to p. 48, ln. 1, p. 48, lns 24-25, p. 57, lns 23-24, p. 67, lns 21-23; E1/374.1, Muy Vanny, T. 12 Jan 2016, p. 17, ln. 24 to p. 18, ln. 4.

<sup>2623</sup> E1/373.1, Muy Vanny, T. 11 Jan 2016, p. 46, lns 10-16, p. 62, lns 7-13.

<sup>2624</sup> E1/373.1, Muy Vanny, T. 11 Jan 2016, p. 46, lns 10-16, p. 62, lns 7-13.

statement that none of the Cham detainees were interrogated, or that they were executed.<sup>2625</sup> In fact, the totality of Mui Vanny's testimony was in fact largely based on his personal conclusions based on rumours and post-DK propaganda rather than actual factual knowledge.<sup>2626</sup> It must therefore be disregarded entirely. When specifics are given in relation to the arrests of Cham, the evidence shows that such arrests took place for legitimate reasons, and that people were released after being detained. For instance, a Cham from Sach Sau told Osman<sup>2627</sup> that she was arrested and sent to Wat Au Trakuon once, perhaps because she left her mobile unit without permission, and was released after one night.<sup>2628</sup>

793. Regarding alleged executions of Cham in Wat Au Trakuon, as stated above, only Mui Vanny entered the location, and his evidence on executions is unfounded. While Tay Koemhun allegedly saw a pit with skeletons shortly after DK, he also admitted that there was no indication as to the ethnicity of the alleged victims.<sup>2629</sup> Further, he never witnessed any killings<sup>2630</sup> and never entered Wat Au Trakuon.<sup>2631</sup> Him Man's allegation that the Cham from Sach Sau were killed in a pit near Wat Au Trakuon is similarly unreliable. Not only is he generally not credible as noted above, but he was 200 metres away from the pit, too far away to eyewitness anything. No other witness or civil party personally witnessed any killing at Wat Au Trakuon; instead, they either heard or speculated that killings occurred. This is insufficient for findings beyond reasonable doubt. Finally, no official exhumation of the remains of alleged victims killed at Wat Au Trakuon and allegedly buried in nearby pits has been carried out, or any forensic examination on the remains to determine cause of death, time of death or identity of the victims.<sup>2632</sup> A finding that Cham were summarily executed at Wat Au Trakuon on the sole basis of their religion, ethnicity or political views cannot be established beyond reasonable doubt.

**(c) The Evidence Does Not Illustrate a Systematic Pattern**

794. The sweeping and wide-ranging allegations that all Cham within Kang Meas District were killed fell flat at trial. The majority of the evidence produced by the Co-Prosecutors were

<sup>2625</sup> E1/373.1, Mui Vanny, T. 11 Jan 2016, p. 47, ln. 21 to p. 48, ln. 1, p. 48, lns 24-25, p. 67, lns 21-23; E1/374.1, Mui Vanny, T. 12 Jan 2016, p. 17, ln. 24 to p. 18, ln. 4.

<sup>2626</sup> See e.g. E1/373.1, Mui Vanny, T. 11 Jan 2016, p. 22, lns 17-18, p. 24, lns 11, 14-15, p. 25, ln. 24 to p. 26, ln. 1, p. 26, ln. 23 to p. 27, ln. 1, p. 46, lns 10-16, p. 62, lns 7-13, p. 29, lns 20-23, p. 57, ln. 24 to p. 58, ln. 2, p. 72, ln. 22 to p. 73, ln. 10, p. 83, lns 1-14.

<sup>2627</sup> See *supra*, Chapter 5-II-B-2-(a), on Osman's credibility.

<sup>2628</sup> E3/2653, Osman, Cham Rebellion, ERN 00219209.

<sup>2629</sup> E1/348.1, Tay Koemhun, T. 16 Sep 2015, p. 21, lns 15-19; E3/2654, 'OCP Mission Report', ERN 00211169.

<sup>2630</sup> E1/348.1, Tay Koemhun, T. 16 Sep 2015, p. 20, lns 15-17; E3/5257, 'WRI of Tay Koemhun', ERN 00251021.

<sup>2631</sup> E3/5257, 'WRI of Tay Koemhun', ERN 00251018.

<sup>2632</sup> E3/8038, 'Site Identification Report of Wat Au Trakuon', ERN 00364806.

limited to a small number of villages in two communes: Peam Chikang and Angkor Ban, whereas Kang Meas District was constituted of 10 communes.<sup>2633</sup> Even if all the incidents which allegedly took place there were established beyond reasonable doubt – which they are not – it would still be insufficient to constitute a systematic pattern of conduct from which genocide, extermination or a policy of persecution could be deduced, be it in the District or nationwide. In fact, evidence related to other communes in the District contradict the allegation that Cham were arrested *en masse*. For instance, a former mobile unit chief in Roka Koy commune said that she never received any specific orders regarding the Cham; that none of the 20 Cham girls in her unit were arrested; and that the few who were assigned to work in other locations later returned.<sup>2634</sup> Similarly, a Cham villager from Roka Koy stated that, apart from one family member who was probably arrested for stealing food, no one in her family was “punished” during the DK.<sup>2635</sup>

795. In sum, all individuals who testified either were not in a position to know the situation throughout the entire communes, or made assumptions as to the alleged arrests despite not witnessing the entire process. These assumptions were a product of the witness and civil party’s own conclusions about the charged events, based on the pieces of the puzzle they put together with the hearsay they had learned. Such speculative conclusions must be disregarded. Even if they were considered credible, the circumstantial evidence given by each of them, even taken together, does not form an unbroken chain leading to an inference beyond reasonable doubt that all the Cham in the two communes, or any Cham at all, were taken to Wat Au Trakuon.<sup>2636</sup> As demonstrated above, these varying accounts are riddled with inconsistencies. In fact, the only apparent common characteristic between these accounts is their speculative character.

### **3. There is No Credible Evidence that Cham Were Taken to and Executed at Trea Village Security Centre Due to Ethnicity, Religion, or Political Beliefs**

796. The Closing Order alleges that in mid-1978, many Cham were taken from around Kroch Chhmar and from the mobile units, to the Trea Village Security Centre. They were individually asked to identify if they were Cham or Khmer, and those identifying themselves as Cham were allegedly killed.<sup>2637</sup> The Closing Order relies on witnesses Ahmad Sofiyah and It Sen, as well

<sup>2633</sup> E3/1398, Political Geography of DK, ERN 00814542.

<sup>2634</sup> E3/5528, ‘WRI of Yim Kimsan’, A12-A16.

<sup>2635</sup> E3/5192, ‘WRI of Ismael Maisam’, ERN 00242111; E3/2653, Osman, Cham Rebellion, ERN 00219211-14.

<sup>2636</sup> Regarding the chain of evidence, *see supra*, Chapter 2-III-A-2.

<sup>2637</sup> D427, Closing Order, paras 784-87.

as on civil party No Sates. None provided credible evidence on the alleged screening and killing of Cham.

797. Both Ahmad Sofiyah and No Sates, who were both allegedly detained in Trea Village Security Centre, stated that detainees were each questioned by district chief “Hor” about their ethnicity.<sup>2638</sup> Their evidence is directly contradicted by that of Ban Seak, who was the district chief at the time and whose alias was “Hor”. He categorically denied ever having been inside the detention house or having questioned anyone.<sup>2639</sup> Further, No Sates’ evidence that “Hor” questioned her about whether she was in fact Vietnamese<sup>2640</sup> contradicts her allegation that the screening was aimed at singling out the Cham to be killed. Given the fierce war with Vietnam at the time, it is likely that the district cadres were trying to find Vietnamese soldiers or agents hiding among the DK citizens, rather than screening people to identify ethnic Cham. On the other hand, the mutually corroborating testimonies of Ban Seak and Sales Ahmat show that the arrests and detention related to Trea Village in 1978 were legitimate measures against the “rebels”, irrespective of their ethnicity, who had participated in a mobile unit rebellion in 1978.<sup>2641</sup>

798. Ahmad Sofiyah and No Sates were allegedly detained together with other young Cham females in Trea Village Security Centre in 1978. However, despite having been detained in the same room,<sup>2642</sup> their evidence significantly differs. Ahmad Sofiyah claimed to have seen the execution of girls who admitted to being Cham through a crack in the wooden wall, and to have heard their screams.<sup>2643</sup> While No Sates initially told Osman that she also witnessed the alleged execution, she subsequently admitted that she had lied about being an eyewitness because she wanted “justice”.<sup>2644</sup> She explained in court that did not see or hear the alleged execution outside the house.<sup>2645</sup> This also gives rise to the suspicion that Ahmad Sofiyah’s evidence may be motivated by the same “quest for justice”. Her evidence must therefore be approached with the utmost caution, and is insufficiently credible to support a finding beyond reasonable doubt that executions took place at Trea Village security centre. Finally, It Sen claimed having seen

<sup>2638</sup> E1/351.1, No Sates, T. 29 Sep 2015, p. 44, lns 13-20; E1/375.1, Ahmad Sofiyah, 13 Jan 2016, p. 28, lns 2-17.

<sup>2639</sup> E1/353.1, Ban Seak, T. 5 Oct 2015, p. 97, lns 3-4; E1/354.1, Ban Seak, T. 6 Oct 2015, p. 71, lns 18-21.

<sup>2640</sup> E1/350.1, No Sates, T. 28 Sep 2015, p. 66, lns 21-25; E1/351.1, No Sates, T. 29 Sep 2015, p. 41, lns 1-4.

<sup>2641</sup> E1/354.1, Ban Seak, T. 6 Oct 2015, p. 33, ln. 25 to p. 35, ln. 8, p. 76, lns 1-8; p. 77, lns 6-9; E1/353.1, Ban Seak, T. 5 Oct 2015, p. 43, lns 10-14; E1/398.1, Sales Ahmat, T. 9 Mar 2016, p. 32, lns 9-11; *see also*, p. 102, ln. 22 to p. 103, ln. 20; p. 56, ln. 24 to p. 57, ln. 11, p. 58, lns 5-16.

<sup>2642</sup> E1/351.1, No Sates, T. 29 Sep 2015, p. 47, lns 8-16; E1/375.1, Ahmad Sofiyah, 13 Jan 2016, p. 50, lns 1-2.

<sup>2643</sup> E1/375.1, Ahmad Sofiyah, 13 Jan 2016, p. 49, lns 22-24, p. 37, lns 8-10.

<sup>2644</sup> E1/351.1, No Sates, T. 29 Sep 2015, p. 24, lns 1-10.

<sup>2645</sup> E1/351.1, No Sates, T. 29 Sep 2015, p. 24, lns 10-18.

Cham people being drowned in the river when he was hiding in the bush after escaping detention in the Centre.<sup>2646</sup> However, according to him, it was dark and there was pouring rain which was what permitted him to escape.<sup>2647</sup> It is unclear how, in those circumstances, It Sen could see people being drowned in the river, even less so how he could identify such people as Cham. His evidence is also uncorroborated. In conclusion, there is no reliable evidence that at Trea Village Security Centre, Cham people were arrested, singled out and executed. Similarly, as seen in the following Sub-Part, there is no evidence that Cham people were discriminated against throughout DK.

#### **4. Cham Leaders Were Not Arrested or Killed as a Result of their Ethnicity, Religion or Political Beliefs**

799. The Closing Order alleges that as part of the persecution of the Cham people, Cham religious leaders were arrested or killed.<sup>2648</sup> The evidence in this regard is vague and speculative. In any event, there is no evidence that Cham religious leaders were arrested or ousted because they were Cham. Given the lack of credible evidence on the reasons for their alleged arrest, and given the specific involvement of Cham individuals in rebellions and other illegal activities,<sup>2649</sup> one reasonable alternative inference is that the alleged arrests of those Cham leaders were because of their roles in illegal activities. The evidence, therefore, does not prove beyond reasonable doubt that the alleged arrests of religious leaders were carried out with discriminatory intent on religious grounds.

#### **5. Measures Which May Have Inadvertently Impacted Cham Culture Were Not the Result of a Genocidal, Exterminatory, or Discriminatory Policy**

800. In support of the allegation that Cham were persecuted as a reason of their political views or religion, the Closing Order states that Islam was banned, Cham were prohibited from praying, that Qurans were burned, and that mosques were destroyed or used for other purposes. In addition, it alleges that Cham were forced to eat pork, women had to cut their hair, that Cham people could not practice their language and that the traditional dress was prohibited.<sup>2650</sup> However, this is not supported by the evidence. The measures that the Closing Order alleges to be a “CPK Centre” directed “suppression of Cham culture”<sup>2651</sup> were in fact measures generally

<sup>2646</sup> E1/342.1, It Sen, T. 7 Sep 2015, p. 83, Ins 8-10.

<sup>2647</sup> E1/342.1, It Sen, T. 7 Sep 2015, p. 87, Ins 14-16.

<sup>2648</sup> D427, Closing Order, paras 756, 1420.

<sup>2649</sup> See *supra*, Chapter 5-II-C-1-(c)-(i).

<sup>2650</sup> D427, Closing Order, para. 756.

<sup>2651</sup> D427, Closing Order, paras 756, 1341, 1420.

and equally applied to all DK citizens without discriminatory intent. Any measure which adversely impacted Cham culture was in fact an indiscriminate measure equally applicable to all ethnicity and religions within DK; it thus does not constitute evidence of a genocidal policy aiming to destroy the Cham as a group, nor does it illustrate of an intent to exterminate or to discriminate. Further, even if it did, this does not constitute religious or political persecution. As explained below in the discussion on the charged crimes, even taken together, those measures do not reach the level of gravity required to constitute a crime against humanity,<sup>2652</sup> as limitations to one's right to manifest his or her religion were permitted under customary international law.

**(a) Cham People Were Not Forced to Eat Pork**

801. The Closing Order's allegation that the Cham were forced to eat pork as a means of persecution<sup>2653</sup> is not supported by the evidence. It also disregards the historical context. Struggling to recover from the destructive impact of a prolonged war, DK faced food shortages.<sup>2654</sup> The CPK endeavoured to provide all citizens with nutritious food.<sup>2655</sup> However, due to shortages, having specific menus to satisfy the dietary needs of each individual was just not always an option. Therefore, when food supply enabled pork to be provided, it was not out of any discriminatory or persecutory intent against Cham. Rather, it owed to food shortages and the CPK's belief in equality: since Cham and Khmer were the same, they were given the same food.<sup>2656</sup> Moreover, there is a significant difference between providing and forcing. A lot of witnesses and civil parties stated that Cham did not have to eat pork in their locations; instead, they could choose to eat something else when pork was provided to both Cham and Khmer.<sup>2657</sup> Moreover, the shortage meant that scarce food like pork was saved for special occasions only, such as festivals, weddings, or official rest days.<sup>2658</sup> It is unlikely and illogical that scarce food would have been used for a persecutory purpose at a time of severe food shortages.

<sup>2652</sup> See *infra*, Chapter 5-II-G-3.

<sup>2653</sup> **D427**, Closing Order, paras 756, 1420.

<sup>2654</sup> See e.g. **E3/88**, Shawcross, Sideshow, ERN 00430077-78, *citing* to an April 1975 USAID report.

<sup>2655</sup> Such food included fish, vegetables, and meat (no official specification of the type of meat), see e.g. **E3/8**, 1976 CPK Four-Year Plan, ERN 00104051, 00104053-54.

<sup>2656</sup> **E1/344.1**, Seng Kuy, T. 9 Sep 2015, p. 99, lns 9-17; **E3/5528**, 'WRI of Yim Kimsan', A13.

<sup>2657</sup> **E1/308.1**, Seang Sovida, T. 2 Jun 2015, p. 39, lns 4-11; **E1/334.1**, Tak Boy, T. 20 Aug 2015, p. 16, ln. 21 to p. 17, ln. 3; **E1/398.1**, Sales Ahmat, T. 9 Mar 2016, p. 50, lns 14-15; **E1/350.1**, No Sates, T. 28 Sep 2015, p. 52, lns 16-19; **E1/301.1**, Or Ho, T. 19 May 2015, p. 20, lns 8-10, p. 56, lns 23-24; **E1/302.1**, Or Ho, T. 20 May 2015, p. 56, lns 2-14; **E1/326.1**, Om Chy, T. 30 Jul 2015, p. 60, lns 16-19; **E3/5528**, 'WRI of Yim Kimsan', A13; **E3/7812**, 'WRI of Khiev Sokh', ERN 00282328; **E3/7818**, 'WRI of Saing Nham', ERN 00290385; **E3/4519**, So, Oral History of Cham Women, ERN 00554483, 00554548.

<sup>2658</sup> See e.g. **E1/302.1**, Or Ho, T. 20 May 2015, p. 56, ln. 16 to p. 57, ln. 2; **E1/304.1**, Meas Laihour, T. 25 May 2015, p. 106, lns 11-15; **E1/306.1**, Hun Sethany, T. 27 May 2015, p. 49, lns 15-17; **E3/2144**, Documents

**(b) *Clothing Requirements Were an Effort to Ensure Equality and Non-Discrimination***

802. The fact that the Closing Order had to go as far as looking into Cham's hairstyles and clothing to support the allegations of genocide, extermination, and persecution highlights the weakness of the case on the 'targeting' of Cham. Short hairstyles for women at the time was partly a symbol of gender equality<sup>2659</sup> and partly a symbol of the revolution against old oppressive regimes.<sup>2660</sup> It was a historical phenomenon affecting women in general, not limited to any religions. In any event, there was no such thing as forced hair cutting for Cham women.<sup>2661</sup> The clothing requirements applied to all DK citizens, irrespective of ethnicity, religion or political views. The DK government endeavoured to improve people's lives by providing sufficient cloth for each person in the country to have two sets of clothes every year.<sup>2662</sup> Rather than being discriminatory, it was an effort to ensure non-discrimination and equality amongst all people. Even today, most school children in Cambodia have to wear a uniform, and government workers are subject to a certain dress code; yet, this would never be perceived as persecution or discrimination. Similarly, in early 2017, the European Court of Justice ruled that employers could prevent certain employees from wearing certain religious attires, such as the *hijab* (headscarf), in pursuance of a policy of political, philosophical, and religious neutrality.<sup>2663</sup> The DK was no different. Any attempt to qualify its legitimate and egalitarian agnostic policies as criminal is yet another illustration of the indoctrination caused by the prevailing Manichean narrative.

**(c) *There Was No Destruction of Religious Buildings or Prohibition of Ceremonies***

803. The Closing Order also alleges that mosques were destroyed or used for other purposes and religious ceremonies and practices abolished.<sup>2664</sup> While the evidence on this is extremely limited, the Defence submits that in the limited cases this occurred, it was based on legitimate, practical reasons, rather than being an act of discrimination or persecution. As mentioned above,

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from the Trial of Pol Pot, ERN 00190288; **E3/8**, 1976 CPK Four-Year Plan, ERN 00104054; **D22/2682B**, 'Victim Supplementary Information of Ung Phat', ERN 00866045; **E3/6035A**, 'Victim Supplementary Information of Mat Mousa', ERN 00858208.

<sup>2659</sup> See e.g. **D108/27.17**, 'DC-Cam Interview of Nam Sokha', ERN 00351471-72; **E3/6000A**, 'Victim Supplementary Information of Hoeng Neng', ERN 01066669; **E1/402.1**, Alexander Hinton, T. 15 Mar 2016, p. 83, lns 5-19.

<sup>2660</sup> See e.g. **E3/6555B**, 'Victim Supplementary Information of Dy Sokly', ERN 01190934; **D22/2682B**, 'Victim Supplementary Information of Ung Phat', ERN 00866045; **E3/4528**, 'Revolutionary Female Medical Staff in Tram Kok', ERN 00549326; **E3/7333**, Burgler, Eyes of Pineapple, ERN 01002195.

<sup>2661</sup> **E1/344.1**, Seng Kuy, T. 9 Sep 2015, p. 75, lns 17-19.

<sup>2662</sup> **E3/8**, Explanation of the 1976 CPK Four-Year Plan, ERN 00104072; **E3/8**, 1976 CPK Four-Year Plan, ERN 00104046.

<sup>2663</sup> ECJ, *Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* Judgement.

<sup>2664</sup> **D427**, Closing Order, paras 756, 1420.

struggling to recover from the destructive war, the DK faced serious shortage of material and difficulties in industry. As the CPK Four-Year Plan analysed in 1976, “industries of all types, heavy or light, there are hardly any, especially in the field of heavy industry.”<sup>2665</sup> Although the CPK planned to develop heavy industries including those that could produce bricks, sand, gravel, stone, *etc.*,<sup>2666</sup> it was not the priority at the time. To avoid investing the limited capital to the heavy industry at the expense of the people’s livelihood, the CPK decided to primarily develop the light industry with the heavy industry to follow.<sup>2667</sup> This policy was legitimate and reasonable. However, understandably, the lack of heavy industries and material would make it extremely difficult to rebuild the country from the devastating impact of the war. Against this backdrop, old temples and mosques were dismantled in some places and their materials were reused to solve the problem of the shortage of material such as bricks and stones needed for the construction of roads or dams.<sup>2668</sup>

804. There is also evidence that in some places old mosques or temples were transformed into storehouses, hospitals or given other uses.<sup>2669</sup> Non-religious constructions were subjected to the same measures: they were similarly used to build new residential houses, livestock stables, storehouses, schools, roads, bridges, *etc.* as part of the country reconstruction efforts, which precludes any finding of discrimination or religious persecution.<sup>2670</sup> Regarding allegations that religious ceremonies were prohibited, the Defence refers to the arguments made below with regards to the ‘targeting’ of Buddhist,<sup>2671</sup> which apply *mutatis mutandis* here.

**(d) There is No Evidence That Cham Were Prohibited From Speaking Their Language**

805. Despite various statements that Cham people were prohibited from speaking their own language, there is conflicting evidence on this issue. For instance, Prak Yut (2-TCW-938)

<sup>2665</sup> E3/8, 1976 CPK Four-Year Plan, ERN 00104021.

<sup>2666</sup> E3/8, 1976 CPK Four-Year Plan, ERN 00104048.

<sup>2667</sup> E3/8, Explanation of the 1976 CPK Four-Year Plan, ERN 00104072.

<sup>2668</sup> *E.g.* E3/6670, ‘Victim Information of Phoeur Sophat’, ERN 01148006; E3/8298, ‘Report on Crimes in Takeo’, ERN 00721335; E3/2621, ‘Report on Crimes in Bati Distirct’, ERN 00721530.

<sup>2669</sup> *See e.g.* E3/7490, ‘Social Science Research Council Interview of Muhamad Ali’, ERN 00667215; E3/10756, ‘WRI of Hin Non’, ERN 01213400; E3/9038, ‘DC-Cam Interview of Kaet An’, ERN 01207824; E3/2632, ‘DC-Cam Mapping: Kampong Cham’, ERN 00208351; E3/5776, Compilation of Refugee Accounts, ERN 00875067.

<sup>2670</sup> *See e.g.* E1/149.1, Hun Chhunly, T. 6 Dec 2012, p. 105, Ins 12-14; E1/136.1, Chum Sokha, T. 22 Oct 2012, p. 102, Ins 11-15; E3/9169, ‘DC-Cam Interview of UL Hoeun’, ERN 01050197; E3/8666, ‘Interview of Sau Tit’, ERN 01173790-91; E3/5776, Compilation of Refugee Accounts, ERN 00875067; E3/8619, SWB, ‘Cambodian Refugees Describe Hardship in Cambodia’, 10 Mar 1978, ERN S00009931; E3/287, FBIS Report, 5 May 1977, ERN 00168127; E3/9, Short, History of a Nightmare, ERN 00396553; E3/7320, Jackson, Rendez-vous with Death, ERN 00394076; E3/3351, Chhunly, Life of a Physician, ERN 00369721, 00369698.

<sup>2671</sup> *See infra*, Chapter 5-III-D-3.



testified that the Cham language was not banned.<sup>2672</sup> In any event, there is no evidence that there was an official policy on this issue.

## 6. Conclusion on Facts Related to the Alleged ‘Targeting’ of Cham

806. Putting aside the Manichean trope that “all Cham were killed during DK”, and looking at the evidence objectively in an effort to determine whether the applicable standard of proof beyond reasonable doubt was achieved, only one conclusion can be reached: it is not. Instead of showing a nationwide genocidal policy, or one aimed at exterminating or persecuting Cham people, the evidence, even if fully reliable (which the Defence vehemently contests), shows that only a few Cham individuals might have been killed at Wat Au Trakuon and Trea Village security centres, for unknown reasons. The totality of the evidence also shows that instead of being persecuted as a result of their ethnicity, religion or political beliefs, Cham people were treated just like other DK citizens. The DK did not attempt to eradicate the Cham religious or ethnic group; they were not killed *en masse* simply for being Cham; and they were not persecuted as a result of their religion or political beliefs. As seen in the Part below, the same applies to the Vietnamese group.

## E. FACTS RELATED TO THE ALLEGED ‘TARGETING’ OF VIETNAMESE

807. Vietnamese people were not victims of genocide or extermination, nor were they persecuted. Instead of a large amount of incriminating evidence about the existence of a plan to target Vietnamese and of its implementation, the Chamber is faced with vague, inconsistent and/or exaggerated evidence. This, as discussed in detail below, is insufficient to sustain a conviction under any of the crimes or modes of liability charged. Realising the paucity of the evidence, the Co-Prosecutors and the Civil Party Lead Co-Lawyers repeatedly attempted to “refresh the memory” of the individuals to ensure that they would fit the Manichean narrative. However, these attempts failed, as most witnesses and civil parties either did not recall what they had said, or significantly changed their evidence.<sup>2673</sup> Undeterred, the Co-Prosecutors ramped up their efforts, trying to incorporate information contained in WRIs, civil party applications, or DC-Cam interviews of other individuals into the testimony of the witnesses and civil parties who appeared. On this subject, the Defence recalls that the contents of WRIs, civil

<sup>2672</sup> E1/377.1, Prak Yut (2-TCW-938), T. 18 Jan 2016, p. 88, lns 20-22; *see also*, E1/344.1, Seng Kuy, T. 9 Sep 2015, p. 76, lns 7-15; E1/373.1, Muy Vanny, T. 11 Jan 2016, p. 20, lns 1-4.

<sup>2673</sup> *See e.g.* E1/371.1, Thang Phal, T. 6 Jan 2016, p. 48, lns 5-24, p. 50, lns 16-25, p. 51, lns 2-7; E1/367.1, Sin Chhem, T. 14 Dec 2015, p. 27, lns 19 to p. 28, ln. 8; E1/369.1, Pak Sok (2-TCW-1000), T. 16 Dec 2015, p. 24, lns 18-25, p. 50, ln. 21 to p. 51, ln. 9.

party applications or DC-Cam statements of individuals who have not been cross-examined by the Defence all have “an inherently low probative value”, as discussed in Chapter 2-III-B-2-(b) above. None is sufficient to establish a constitutive element of the crimes or modes of liability beyond any reasonable doubt.

808. Not only is there no evidence of a policy to target Vietnamese, there is reliable evidence that Vietnamese civilians were never targeted as a result of their ethnicity, nationality or race. When Vietnamese people were arrested, it was because they were legitimate military targets or because they had undertaken unlawful activities; their ethnicity, nationality or race was simply irrelevant as also recognised by several historians and scholars.<sup>2674</sup> Further, neither Nuon Chea the CPK or DK government had any intent to destroy or exterminate the Vietnamese as an ethnic, national, or racial group. By mid-1978, at the time where Nuon Chea and the DK were supposedly attempting to eradicate the Vietnamese group from the face of the earth, the DK’s official publications referred to peace, friendship and to “hold[ing] out its hand in peace to the Vietnamese people”.<sup>2675</sup> Living together in peace and true friendship with Vietnam were qualified as the “sacred objective of the Kampuchean people and Democratic Kampuchea”.<sup>2676</sup> In June 1978, the Central Committee issued a guidance calling for forgiveness of the ‘enemies’ – including those who fought or otherwise acted on behalf of the Vietnamese – who had been “misled”.<sup>2677</sup> This directly contradicts any suggestion that the DK had any genocidal or extermination policy against Vietnamese people.

809. In light of the sheer amount of evidence and complexity of facts, the present Part starts with an overview highlighting the paucity of evidence supporting the alleged genocide, extermination or persecution charges. The question of the alleged mass killings in Prey Veng and Svay Rieng Provinces, East Zone, and in other areas of DK confirm the absence of credible, specific and reliable evidence. Finally, the Defence demonstrates that the alleged theory of matrilineal descent was based on nothing but hearsay and speculation.

<sup>2674</sup> E1/192.1, Philip Short, T. 9 May 2013, p. 18, ln. 23 to p. 19, ln. 16; E1/180.1, François Ponchaud, T. 11 Apr 2013, p. 36, lns 16-17; E3/3995, Heder’s Critique of Kiernan’s ‘The Pol Pot Regime; E3/7333, Burgler, Eyes of Pineapple, ERN 01002202; *see supra*, Chapter 4-II, on the CPK nationwide defence and security policy.

<sup>2675</sup> E3/215, Flag, Sep 1978, ERN 00488625-26; E3/1149, ‘Telex Message, Sweden-Kampuchea Friendship Association’, 4 Mar 1978, ERN 00717588; E3/1264, ‘Press Communiqué of the Spokesman of the Ministry of Propaganda and Information of Democratic Kampuchea’, 1 Jul 1978, ERN 00078182; *see supra*, Chapter 5-II-C-1-(a).

<sup>2676</sup> E3/215, Flag, Sep 1978, ERN 00488626.

<sup>2677</sup> E3/763, Central Committee’s Guidance on Misled Persons, 20 Jun 1978; *see* Chapter 4-II.

## 1. There Was No Systematic Pattern of Conduct Aiming to Destroy, Exterminate or Persecute Vietnamese People

810. According to the Closing Order,<sup>2678</sup> and the Co-Prosecutors,<sup>2679</sup> there were virtually no Vietnamese left in Cambodia in January 1979. Events of such magnitude would certainly have been witnessed by many individuals who would have been identified during the three-year judicial investigations<sup>2680</sup> and called to testify during the two-year trial. Nonetheless, credible evidence regarding the “treatment of Vietnamese” is sparse, to say the least. During the segment on the treatment of ‘targeted groups’, 20 individuals provided some form of evidence on the ‘targeting’ of the Vietnamese: 12 witnesses,<sup>2681</sup> five civil parties,<sup>2682</sup> and three victims who spoke at the impact assessment hearing.<sup>2683</sup> All of their evidence is summarised below.

811. Despite allegations of mass killings throughout the whole of DK, half of the ten people heard in court on these allegations talked about the same events in three locations: alleged executions at Khsach Pagoda in Siem Reap Province, Sector 106;<sup>2684</sup> the alleged disappearance of three Vietnamese families from Pochendam Village, Prey Veng District in Prey Veng Province, East Zone,<sup>2685</sup> and the treatment of Vietnamese soldiers and refugees in DK territorial waters near Kampong Saom.<sup>2686</sup> Despite the limited number of persons and information, the evidence is impermissibly vague, contains significant contradictions, fails to establish that the individuals allegedly targeted were executed as a result of being Vietnamese or that the individuals actually disappeared or were executed.

812. While the Closing Order alleges that most of the ‘targeting’, particularly the killings and deportation, occurred in Svay Rieng,<sup>2687</sup> only two civil parties gave unsworn statements regarding this location.<sup>2688</sup> Neither contained sufficient particulars. Two individuals testified about alleged “deportation”, one of whom stated that there were orders not to harm or hate the Vietnamese and that the return to Vietnam was voluntary.<sup>2689</sup> Out of the remaining six

<sup>2678</sup> **D427**, Closing Order, para. 1349.

<sup>2679</sup> **D390**, Co-Prosecutors’ Final Submission, paras 14, 166, 790, 798.

<sup>2680</sup> **E313**, Case 002/01 Trial Judgement, para. 3.

<sup>2681</sup> Sean Song; Sao Sak; Prum Sarun; Ung Sam Ean; Y Vun; Pak Sok (2-TCW-1000); Thang Phal; Prum Sarat; In Yoeung; Sann Lorn; Sao Van; Meas Voeun.

<sup>2682</sup> Choeung Yaing Chaet; Um Suonn; Sin Chhem; Lach Kry; Doung Oeurn.

<sup>2683</sup> Sieng Chanthy; Uch Sunlay; Khoy Muoy.

<sup>2684</sup> Sean Song; Um Suonn; Y Vun.

<sup>2685</sup> Thang Phal; Lach Kry; Doung Oeurn.

<sup>2686</sup> Prum Sarun; Pak Sok (2-TCW-1000); Prum Sarat; Meas Voeun.

<sup>2687</sup> Ung Sam Ean; Sin Chhem.

<sup>2688</sup> **D427**, Closing Order, paras 214, 797-801.

<sup>2689</sup> Sann Lorn; Sao Van.

individuals from the segment, five provided vague evidence, none of which related to the fact that the victims were targeted as a result of their ethnicity, nationality or race.<sup>2690</sup> Last but not least, one person was a “surprise” witness: In Yoeung, who was called to testify on the basis of a DC-Cam statement which was in evidence and believed to be hers and which was relevant to the “treatment of Vietnamese”. In fact, it was her husband who had given the interview, to which “a neighbour” actively participated as well.<sup>2691</sup> The Chamber, against all odds, still decided to hear her – in plain violation of the rights of the Defence to have adequate time to prepare. However, In Yoeung “did not know anything” about the treatment of Vietnamese.<sup>2692</sup>

## 2. The Evidence Does Not Establish the Crime of Deportation

813. As the crime of deportation contains very specific elements, and the Defence’s factual discussion of this issue is framed around the elements of crime, the Defence sets out the elements first. The *actus reus* of the crime of deportation is “the forced displacement of persons by expulsion or other forms of coercion from the area in which they are lawfully present, across a *de jure* state border or, in certain circumstances, a *de facto* border, without grounds permitted under international law.”<sup>2693</sup> Displacement of civilians during an armed conflict is allowed if it is carried out for the security of the individuals involved or for imperative military reasons.<sup>2694</sup> The *mens rea* is the intent to transfer persons on a non-provisional basis.<sup>2695</sup> Each of these constitutive elements must be established beyond reasonable doubt.<sup>2696</sup> However, as discussed below, none are. Not only is the evidence impermissibly vague and unfounded, there is also no evidence that the displacement was made under coercion or in coercive circumstances. There is also no evidence that the other elements of the crime of deportation are met, such as the lawful presence of the alleged victim on the territory, or that the lack of justification for the displacement. Finally, there is no evidence of a plan or policy regarding the deportation of Vietnamese civilians.

<sup>2690</sup> Sao Sak; Choeung Yaing Chaet; Sieng Chanthy; Uch Sunlay; Khouy Muoy.

<sup>2691</sup> E1/387.1, In Yoeung, T. 3 Feb 2016, p. 66, ln. 16 to p. 73, ln. 10, p. 78, ln. 15, to p. 81, ln. 5.

<sup>2692</sup> E1/387.1, In Yoeung, T. 3 Feb 2016, p. 81, lns 8-16; *see also infra*, Chapter 5-II-E-2.

<sup>2693</sup> ICTY, *Stakić* Appeals Judgement, para. 278.

<sup>2694</sup> Geneva Convention IV, Art. 49; Additional Protocol II, Art. 17(1); ICTY, *Stakić* Appeals Judgement, paras 284-285; *Blagojević & Jokić* Trial Judgement, paras 597-598; *Krajišnik* Appeals Judgement, para. 308; *Popović et al.*, Trial Judgmt, para. 920.

<sup>2695</sup> ICTY, *Stakić* Appeals Judgement, para. 319. The ICTY Appeals Chamber held that an intent to displace the individual across the border on a permanent basis was not required, *see* para. 278.

<sup>2696</sup> F36, Case 002/01 Appeals Judgement, para. 418.

**(a) The Evidence on Deportation is Vague and Unsubstantiated**

814. Most evidence heard in relation to the alleged deportation of Vietnamese consists of vague and unsubstantiated statements such as “[the Vietnamese] had all been evacuated”,<sup>2697</sup> that the other Vietnamese were being gathered and “being evacuated”; or that mixed families were “taken away by boat”<sup>2698</sup> or were being “chased away to return to their country”.<sup>2699</sup> Lach Kry, a civil party from Pochendam Village, in Prey Veng District of Prey Veng Province, was the only person to state that from 1970 onwards, the Vietnamese returned to Vietnam and only three families remained.<sup>2700</sup> Ung Sam Ean, a civil party from Kraham Ka Village in Svay Rieng Province, did not know whether the families she allegedly saw being “chased away”<sup>2701</sup> were arrested, relocated, or sent to work in a mobile unit.<sup>2702</sup> Three civil parties who provided impact statements provided equally vague and unsubstantiated accounts, *e.g.*, that “the Khmer Rouge evacuated Vietnamese to their home town”, suggesting that their lawful residence was Vietnam, and not DK.<sup>2703</sup> Khouy Muoy said that she was told her parents were “sent back to Vietnam” and that they had been killed instead.<sup>2704</sup> Uch Sunlay “heard” that “Vietnamese people were invited to board a truck [...] to the road leading to Vietnam”.<sup>2705</sup>

815. Ultimately, most evidence on deportation is based on speculation and/or hearsay. Sao Sak, for instance, testified that she and the other villagers did not have official information about where the Vietnamese people were sent and only speculated that they were sent back to Vietnam.<sup>2706</sup> Prum Sarat, commander of Company 2, Regiment 140, in naval Division 164<sup>2707</sup> and then stationed in Kampong Saom,<sup>2708</sup> gave generic evidence that “another deportation took place in 1975 or 1976”, but he did not know if they were subject to “repressive measures”.<sup>2709</sup> Prum Sarat was not personally involved in the events and only received information that the “upper echelon” had to return Vietnamese prisoners to Vietnam.<sup>2710</sup> He did not know about an

<sup>2697</sup> E1/362.1, Sao Sak, 3 Dec 2015, p. 73, lns 11-13.

<sup>2698</sup> E1/362.1, Sao Sak, 3 Dec 2015, p. 83, lns 17-21; E1/367.1, Sin Chhem, 14 Dec 2014, p. 76, lns 4-6.

<sup>2699</sup> E1/366.1, Ung Sam Ean. T. 11 Dec 2015, p. 38, lns 24-25.

<sup>2700</sup> E1/380.1, Lach Kry. T. 21 Jan 2016, p. 11, lns 4-8.

<sup>2701</sup> E1/366.1, Ung Sam Ean. T. 11 Dec 2015, p. 38, ln. 24 to p. 39, ln. 2.

<sup>2702</sup> E1/366.1, Ung Sam Ean. T. 11 Dec 2015, p. 39, lns 5-7, p. 40, lns 23-24.

<sup>2703</sup> E1/393.1, Sieng Chanthly, T. 29 Feb 2016, p. 86, lns 11-15.

<sup>2704</sup> E1/394.1, Khouy Muoy, T. 1 Mar 2016, p. 56, lns 19-25 to p. 58, lns 1-10.

<sup>2705</sup> E1/394.1, Uch Sunlay, T. 2 Mar 2016, p. p. 9, lns 17-19.

<sup>2706</sup> E1/362.1, Sao Sak, T. 3 Dec 2015, p. 83, lns 23-25 to p. 84, lns 1-9; E1/363.1, Sao Sak, T. 7 Dec 2015, p. 19, lns 16-24.

<sup>2707</sup> E1/381.1, Prum Sarat, T. 25 Jan 2016, p. 89, ln. 11 to p. 90, ln. 6.

<sup>2708</sup> E1/381.1, Prum Sarat, T. 25 Jan 2016, p. 81, lns 6-7.

<sup>2709</sup> E1/382.1, Prum Sarat, T. 26 Jan 2016, p. 71, ln. 20 to p. 72, ln. 11.

<sup>2710</sup> E1/383.1, Prum Sarat, T. 27 Jan 2016, p. 53, lns 13-17.

alleged “program” consisting of “exchanging people of Vietnamese origin against Cambodians from Kampuchea Krom”.<sup>2711</sup>

816. Regarding Tram Kok, Cheang Sreimom testified that people who were Vietnamese or presented themselves as such were recorded and that while they were being told they would be sent to Vietnam, they were in fact sent to be killed in Kraing Ta Chan.<sup>2712</sup> Yet, this was mere speculation on her part on the basis that the people were sent in the direction of the mountains, “that is also Krang Ta Chan area”.<sup>2713</sup> In any event, her evidence shows that the people voluntarily asked to join Vietnam.<sup>2714</sup> Civil party Ry Pov talked about an alleged exchange programme between Cambodia and Vietnam about their respective refugees, in April 1975, and his evidence shows clearly that the movement was voluntary and not forced.<sup>2715</sup> The rest of the evidence consists of the so-called ‘Tram Kok District Records’,<sup>2716</sup> the lack of authenticity of which has already been discussed earlier, and prisoner records, which the Chamber said were obtained through torture (in the absence of any concrete evidence) and cannot be used here.<sup>2717</sup>

**(b) *There is No Evidence of Coercion***

817. As stated above, the key constitutive element of the crime of deportation is the forced character of the movement. Only two individuals provided specific evidence on this question: Choeng Yaing Chaet, a civil party who was based in Ruessei Dangkuoch village, Kampong Chhnang Province and who travelled back to Vietnam, and Sann Lorn, who allegedly transported a number of Vietnamese to Tram Kok. Choeng Yaing Chaet stated that “someone” told him that the Vietnamese had to leave for Vietnam by boat. He did not know whether this was pursuant to an official policy.<sup>2718</sup> He provided no evidence about the reasons for his departure to Vietnam other than he was able to leave for Vietnam “when there was an exchange of rice with Vietnam”.<sup>2719</sup> He did not mention any immediate threat or coercion for people to leave coming from the authorities. To the contrary, he stated that the “Khmer Rouge” on the

<sup>2711</sup> E1/383.1, Prum Sarat, T. 27 Jan 2016, p. 53, lns 18-20.

<sup>2712</sup> E1/254.1, Cheang Sreimom, T. 29 Jan 2015, p. 36, lns 14-18.

<sup>2713</sup> E1/254.1, Cheang Sreimom, T. 29 Jan 2015, p. 80, ln. 20 to p. 81, ln. 3.

<sup>2714</sup> E1/254.1, Cheang Sreimom, T. 29 Jan 2015, p. 80, ln. 20 to p. 81, ln. 3.

<sup>2715</sup> E1/262.1, Ry Pov, T. 12 Feb 2015, p. 4, lns 1-4, p. 7, lns 11-16, p. 8, lns 19-24, p. 30, lns 7-10, p. 31, lns 9-12, p. 56, lns 7-9.

<sup>2716</sup> See E1/293.1, Key Documents Hearing, T. 27 Apr 2015, p. 9, lns 13-20 (discussion of E3/2107), p. 9, ln. 22 to p. 10, ln. 8 (discussion of E3/5827).

<sup>2717</sup> See E1/295.1, Key Documents Hearing, T. 30 Apr 2015, p. 27, ln. 7 to p. 29, ln. 2 (discussion of E3/2107), p. 29, lns 4-17 (discussion of E3/5827). More generally, see *supra*, Chapter 4-IV-F-1.

<sup>2718</sup> E1/363.1, Choeng Yaing Chaet, T. 7 Dec 2015, p. p. 55, ln. 20 to p. 56, ln. 10.

<sup>2719</sup> E1/363.1, Choeng Yaing Chaet, T. 7 Dec 2015, p. p. 56, lns 1-10.

boat did not carry any weapons.<sup>2720</sup> He described his trip back to Vietnam by boat. Finally, he gave evidence that the Vietnamese authorities received the boat and provided salt and rice to the Cambodian authorities.<sup>2721</sup> He was told by someone he identified as being with the Vietnamese authorities that he had been bartered for rice and salt<sup>2722</sup> but provided no other evidence for this.

818. Sann Lorn was the Tram Kok District messenger for Yeay Khom, Ta Mok's daughter; he was also Ta Mok's brother-in-law.<sup>2723</sup> He testified that he saw "a huge number of Vietnamese people [who] were gathered and deported back to Vietnam".<sup>2724</sup> During his examination in chief by the Defence, he testified that he was not involved in the transport of Vietnamese people.<sup>2725</sup> He only heard that the persons went to Vietnam from "what people said at the district level".<sup>2726</sup> Notwithstanding his evidence, he later testified under cross-examination by the Co-Prosecutors that he was instructed to transport the Vietnamese people in 1975.<sup>2727</sup> He testified that he transported some people whom he was told were being sent back to Vietnam and that he did not witness any incident or resistance during the transportation.<sup>2728</sup> He also stated that there was a CPK policy to "round up the Vietnamese" in 1975, but did not provide more details.<sup>2729</sup> It is unknown how he reached this conclusion, as he testified that he never attended any meetings in the commune, district or village level.<sup>2730</sup> Further, he did not provide evidence as to whether the individuals who were allegedly gathered were lawfully residing in DK. The Defence submits that the substantial inconsistency in his evidence renders it unreliable<sup>2731</sup> and that in any event, it does not support a finding that people were forced to go back to Vietnam. Finally, Doung Oeurn,<sup>2732</sup> a civil party from Prey Veng, stated her Vietnamese husband refused to go back to Vietnam, with no consequence. None of her evidence contained reference to force or threat being used towards the Vietnamese people when discussions of their return to Vietnam took place.<sup>2733</sup>

<sup>2720</sup> E1/363.1, Choeng Yaing Chaet, T. 7 Dec 2015, p. 62, lns 10-13.

<sup>2721</sup> E1/363.1, Choeng Yaing Chaet, T. 7 Dec 2015, pp. 62, lns 21-25 to p. 63, ln. 1.

<sup>2722</sup> E1/364.1, Choeng Yaing Chaet, T. 8 Dec 2015, p. 16, lns 2-19.

<sup>2723</sup> E1/384.1, Sann Lorn, T. 28 Jan 2016, p. 8, lns 16-17, p. 9, lns 19-24.

<sup>2724</sup> E1/384.1, Sann Lorn, T. 28 Jan 2016, p. 16, lns 17-25.

<sup>2725</sup> E1/384.1, Sann Lorn, T. 28 Jan 2016, p. 17, lns 10-14.

<sup>2726</sup> E1/384.1, Sann Lorn, T. 28 Jan 2016, p. 17, lns 18-19.

<sup>2727</sup> E1/384.1, Sann Lorn, T. 28 Jan 2016, p. 62, lns 2-18.

<sup>2728</sup> E1/384.1, Sann Lorn, T. 28 Jan 2016, p. 65, ln. 10 to p. 66, ln. 23.

<sup>2729</sup> E1/384.1, Sann Lorn, T. 28 Jan 2016, p. 62, lns 20-22.

<sup>2730</sup> E1/384.1, Sann Lorn, T. 28 Jan 2016, p. 80, lns 1-23, p. 81, lns 3-6, lns 22-25.

<sup>2731</sup> See *supra*, Chapter 2-III-B-2, on the assessment of inconsistencies.

<sup>2732</sup> Also known as Din Ouen.

<sup>2733</sup> E1/381.1, Doung Oeurn, T. 25 Jan 2016, p. 10, ln. 20-25.

819. In short, there is no evidence of a policy, nor that the return to Vietnam, when it is established that it took place, was directly or indirectly coerced. To the contrary, Sao Van, Kean Svay Commune chief in Kandal Province of Sector 25<sup>2734</sup> testified that in 1976, while there were instructions to “gather up” Vietnamese people in Ang Roka Pagoda, Cheng Torng Commune in Tram Kok to send them back to Vietnam, there was an instruction from the District that they should not be harmed and that their properties should not be touched.<sup>2735</sup> He testified that at a meeting, people were told not to hate the Vietnamese.<sup>2736</sup> If the people carried weapons, those should however be confiscated.<sup>2737</sup>

**(c) No Evidence Exists Regarding the Other Elements of the Crime**

820. No evidence was heard about the other constitutive elements of the crime of deportation, namely that people were lawfully present on the territory or that the movement occurred in violation of international law, despite the burden of proof being on the Co-Prosecutors. No witness or civil party gave evidence that the persons who were repatriated were “lawfully present” on Cambodian territory. Similarly, there is no evidence about any order to force Vietnamese people to return to Vietnam, or any reference to reasons why people returned to Vietnam. There is nothing to establish that the movement of the persons was not legitimate under international law. In any event, the fact that a conflict was taking place between Vietnam and Cambodia does provide a legitimate reason to suggest the return of Vietnamese nationals to Vietnam. The fact that the Cambodian and Vietnamese authorities cooperated together lends significant weight to this argument.<sup>2738</sup>

**(d) There is No Evidence of a Policy to Expel the Vietnamese**

821. Last but not least, none of the witnesses or civil parties who provided evidence before the Tribunal gave evidence of a policy to expel the Vietnamese from Cambodia between 1975 and 1976. While the Closing Order suggests that Nuon Chea’s intent can be deduced from the number of victims and organised nature of the displacements,<sup>2739</sup> the evidence does not support such deduction. First, there is no tangible evidence regarding the number of people who

<sup>2734</sup> **E1/385.1**, Sao Van, T. 1 Feb 2016, p. 10, lns 1-6. His credibility is discussed *infra*, at Chapter 5-IV-C-1-(a).

<sup>2735</sup> **E1/385.1**, Sao Van, T. 1 Feb 2016, p. 48, ln. 22 to p. 49, ln. 16.

<sup>2736</sup> **E1/385.1**, Sao Van, T. 1 Feb 2016, p. 49, lns 6-16.

<sup>2737</sup> **E1/385.1**, Sao Van, T. 1 Feb 2016, p. 49, lns 14-16.

<sup>2738</sup> See e.g. **E1/363.1**, Choeng Yaing Chaet, T. 7 Dec 2015, p. 63, lns 9-13; **E1/262.1**, Ry Pov, T. 12 Feb 2015, p. 5, ln. 25 to p. 6, ln. 2, p. 6, ln. 6 to p. 8, ln. 3; see also **E3/9**, Short, Pol Pot, ERN 00396506; **E3/4589**, Ponchaud, Special Report on Liberated Cambodia, ERN 00323699.

<sup>2739</sup> **D427**, Closing Order, para. 1400.



travelled back to Vietnam in 1975.<sup>2740</sup> Second, only three individuals gave specific evidence about the displacement of Vietnamese, and their evidence referred to less than ten persons in only three locations. None provided any evidence about the existence of an order to expel, or about the use of force or coercion. The April 1976 Revolutionary Flag which refers to the “sweeping clean” of “thousands” of foreigners and their being “expelled” from DK,<sup>2741</sup> does not, alone, prove beyond reasonable doubt the existence of a policy to deport Vietnamese. As stated throughout this Brief, documents cannot form the sole basis of a finding beyond reasonable doubt on a key constitutive element of a crime. This document is the sole evidence that refers to the “expelling” of “foreigners”, while live evidence shows that there was never such a policy. Moreover, the document must be read as a whole. It refers to “foreigners to whom Cambodian land had been sold”, and to “imperialists”.<sup>2742</sup> There is no evidence permitting a finding that these references relate to Vietnamese people.<sup>2743</sup>

822. In sum, it is impossible to find that the crime of deportation was established beyond reasonable doubt with regard to the Vietnamese. Even if there was evidence to support such a finding, the evidence does not permit a finding that such actions took place pursuant to a CPK policy. Mere repetition by people that the “Vietnamese had to leave and go back to Vietnam”, without any link to an order, plan or policy is insufficient to permit a deduction that there was in fact a policy as it would not be the only reasonable inference<sup>2744</sup> and would instead amount to speculation.

### 3. Demographic Data on Vietnamese Deaths is Unverifiable and Speculative

823. Statistics and demographic calculations have drawn the attention of academics, scientists and of investigators to the alleged discriminatory treatment against the Vietnamese during DK. Manichean statements such as “nearly all Vietnamese who were living in Cambodia in April 1975 had died by January 1979”, or that “[the Vietnamese] died in proportionally more numbers” than the Khmer have been extensively reproduced and relied upon, without anyone ever attempting to verify whether they were actually based in objective facts.<sup>2745</sup> The Closing

<sup>2740</sup> See also *infra*, Chapter 5-II-E-3.

<sup>2741</sup> E3/759, Flag, Apr 1976, ERN 00517853-54.

<sup>2742</sup> E3/759, Flag, Apr 1976, ERN 00517853-54.

<sup>2743</sup> See *supra*, Chapter 3-III and Chapter 4-II.

<sup>2744</sup> F36, Case 002/01 Appeals Judgement, para. 418.

<sup>2745</sup> D427, Closing Order, paras 792-793; E1/402.1, Alexander Hinton, T. 15 Mar 2016, p. 100, lns 1-9; E3/1593, Kiernan, Pol Pot Regime, ERN 01150236-37; E367/4.1.5, Cambodia Daily, ‘Khmer Rouge Genocide Debate Moves to Trial’, 8 Sep 2015 (see also *infra*, Chapter 9 and Annex 1); E367/4.1.8, Phnom Penh Post, There Should Be No KR Trial (see also *infra*, Chapter 9 and Annex 1).

Order refers to the question of “demographics” as the first evidence that a genocide took place against the Vietnamese.<sup>2746</sup> ‘Expert’ Hinton also relied on such numbers to reach his conclusion that a genocide took place against the Vietnamese during DK.<sup>2747</sup> When asked about his position on the treatment of the Vietnamese during DK, Hinton stated that “[t]he demographic data is very revealing in this regard”,<sup>2748</sup> and referred to the “mass elimination of members of both [Cham and Vietnamese] groups in disproportionately high numbers in terms of the demographics”.<sup>2749</sup> However, when one looks closely, there is no evidence to support such a conclusion: there was only a population census in 1962 and then, 36 years later, in 1998.<sup>2750</sup> As the demographic expert appointed by the Co-Investigating Judges, Ewa Tabeau, explains, “[s]tatistical sources on the population of Cambodia during or around the period from April 1975 to January 1979 are non-existent”.<sup>2751</sup> This Chamber itself noted the “level of uncertainty underlying the Report’s specific data” on the topic of Vietnamese.<sup>2752</sup> From this follows mathematical gymnastics and speculation by various scholars based on less-than-reliable information.

824. The question of demographics can be reduced to three figures: the number of Vietnamese before 1975; the number of Vietnamese repatriated during DK in 1975; and the number of Vietnamese remaining in DK on or after January 1979. Regarding the period pre-1975, Tabeau states that there was “no consensus” regarding the size of ethnic minorities in Cambodia by the 1970s.<sup>2753</sup> The only population census taken during that period was dated 1962. At the time, it was found that there were 218,000 Vietnamese nationals in Cambodia, based on the criteria of nationality/citizenship.<sup>2754</sup> Somehow, in 1965, Late King Father Norodom Sihanouk “corrected the 1962 census statistics on Vietnamese and stated that there were 400,000 Vietnamese at that time”.<sup>2755</sup> The basis for such “correction” is unknown, and Late King Father Norodom Sihanouk was never called to testify, thereby preventing the

<sup>2746</sup> **D427**, Closing Order, para. 792.

<sup>2747</sup> **E1/402.1**, Alexander Hinton, T. 15 Mar 2016, p. 9, lns 15-21; **E3/3346**, Alexander Hinton, ‘Why Did They Kill’, 2005, ERN 00431659, 00431661.

<sup>2748</sup> **E1/402.1**, Alexander Hinton, T. 15 Mar 2016, p. 11, lns 23-24; *see also* **E1/402.1**, Alexander Hinton, T. 15 Mar 2016, p. 117, lns 10-11; *see also* **E1/402.1**, Alexander Hinton, T. 15 Mar 2016, p. 118, ln. 25 to p. 119, ln. 1.

<sup>2749</sup> **E1/402.1**, Alexander Hinton, T. 15 Mar 2016, p. 100, lns 4-7.

<sup>2750</sup> **E3/2413**, Tabeau’s Report, ERN 00385246.

<sup>2751</sup> **E3/2413**, Tabeau’s Report, ERN 00385246.

<sup>2752</sup> **E371/2**, Chamber’s Request for Submission on Requests to Hear Ewa Tabeau, paras 5, 8.

<sup>2753</sup> **E3/2413**, Tabeau’s Report, ERN 00385309.

<sup>2754</sup> **E3/2413**, Tabeau’s Report, ERN 00385309.

<sup>2755</sup> **E3/2413**, Tabeau’s Report, ERN 00385309.

Defence from asking him for further explanation on this decision.<sup>2756</sup> Yet, both Kiernan and Tabeau relied on this 400,000 figure.<sup>2757</sup>

825. Second, the magical number of 150,000 Vietnamese who were repatriated to Vietnam in 1975, relied upon by Ben Kiernan<sup>2758</sup> and Ewa Tabeau,<sup>2759</sup> is based on the book by journalist and academic Nayan Chanda,<sup>2760</sup> who learnt this “during a trip to the border provinces of Vietnam in March 1978”.<sup>2761</sup> No source is provided in Chanda’s book; it is simply unverifiable. Finally, the number of 20,000 is – according to Ben Kiernan and Hinton – the number of Vietnamese left in the country at the end of 1975, all of whom allegedly perished.<sup>2762</sup> This is based on nothing but numerical speculation. No census was conducted until 1998 and it is impossible to know how many Vietnamese nationals remained in Cambodia by January 1979.<sup>2763</sup> The 1980 administrative count of the Cambodian population was based on “approximate basic figures” provided to the central statistical office in Phnom Penh by village chiefs, commune leaders, district and provincial authorities.<sup>2764</sup> This does not constitute reliable scientific evidence. In sum, there is simply no verifiable information regarding how many Vietnamese were repatriated in 1975, how many died or how many were left after January 1979. Any statement about the number or “proportionality” of Vietnamese deaths is therefore devoid of any basis and must not be given any weight.

#### 4. There is no Credible Evidence of Mass Killings in Prey Veng and Svay Rieng

826. Vague, unsubstantiated and limited are adjectives which perfectly characterise the evidence heard in court regarding the provinces of Prey Veng and Svay Rieng Provinces, East Zone, where Vietnamese were allegedly murdered *en masse*. No one who testified on these areas gave any evidence regarding the existence of a policy ‘targeting’ Vietnamese people, or of a large number of killings. To the contrary, the evidence on Prey Veng concerns the disappearance of three persons who were allegedly Vietnamese nationals in Pochendam Village

<sup>2756</sup> **D122/4/3**, PTC Decision on Appeal Against Refusal of Investigative Action; **D301**, International Co-Investigating Judge’s Note; **D314**, CIJ Order on Nuon Chea & Ieng Sary’s Request to Summon Witnesses; **D314/2/7**, PTC Decision on Appeal Against CIJ Order on Requests to Summons Witnesses.

<sup>2757</sup> **E3/2413**, Tabeau’s Report, ERN 00385311; **E3/1593**, Kiernan, Pol Pot Regime, Fn 147, ERN 00678650.

<sup>2758</sup> **E3/1593**, Kiernan, Pol Pot Regime, Fn 147, ERN 00678650.

<sup>2759</sup> **E3/2413**, Tabeau’s Report, ERN 00385262, 00385282, 00385310, 00385324, 00385371.

<sup>2760</sup> *See also supra*, Chapter 3-II-A.

<sup>2761</sup> **E3/2376**, Chanda, Brother Enemy, ERN 00192201.

<sup>2762</sup> **E3/1593**, Kiernan, Pol Pot Regime, ERN 01150236; **E1/402.1**, Alexander Hinton, T. 15 Mar 2016, p. 11, lns 4-8.

<sup>2763</sup> **E3/2413**, Tabeau’s Report, ERN 00385246; *see also* **E3/7338**, Morris, Why Vietnam Invaded Cambodia, ERN 01001898.

<sup>2764</sup> **E3/2413**, Tabeau’s Report, ERN 00385246.

in Prey Veng District, Prey Veng Province and nothing indicates that the persons were targeted as a result of their ethnicity, nationality or race, nor is there evidence that they actually died. Insofar as Svay Rieng is concerned, the evidence is no more specific: the three individuals who talked about this province made general allegations, having heard (and not witnessed) that people were “taken away” with no indications as to the reasons or link with their nationality. The evidence is completely insufficient to satisfy the most basic elements of the crimes charged, namely that the persons actually died, or that they were targeted as a result of their ethnicity, nationality or race. If some individuals were arrested or died, it is not established whether they were killed, or whether their arrests or death was due to other reasons such as, for instance, the armed conflict in Svay Rieng and Prey Veng.

**(a) *There Was No Mass Killing in Prey Veng***

827. Two civil parties and one witness testified about the arrest and alleged killing of one of the spouses in three Vietnamese couples in the village of Pochendam village, between late 1976 and early 1977. The couples were Nhang and Tech,<sup>2765</sup> Chhuy and Oeung,<sup>2766</sup> and Lach Ny and Ngang.<sup>2767</sup> However, the evidence only refers to their alleged disappearance, and the Defence, again, recalls the Supreme Court Chamber’s finding that even if a piece of evidence established disappearance, it did not establish killing beyond reasonable doubt.<sup>2768</sup> Regarding the first couple Nhang and Tech, Thang Phal, Lach Kry, and Doung Oeurn gave evidence that Nhang disappeared.<sup>2769</sup> None provided more detail, and the ‘targeting’ and/or death of Nhang is therefore not established.

828. Regarding the second couple Chhuy and Oeun, Thang Phal testified hearing villagers saying that Chhuy was taken away on a horse cart and that he was taken to a study session,<sup>2770</sup> but he later admitted that Chhuy and Oeun lived far away from him, and that he only met Oeun after the war.<sup>2771</sup> Lach Kry provided the unsworn statement that Chhuy was called to cut *rumpeak* vine and then disappeared.<sup>2772</sup> Oeun herself – *i.e.*, civil party Doung Oeurn – gave an

<sup>2765</sup> Sometimes spelled as “Ngoy” in the transcripts.

<sup>2766</sup> Also spelt “Chuy”.

<sup>2767</sup> E1/370.1, Thang Phal, T. 5 Jan 2016, p. 89, lns 15-18.

<sup>2768</sup> F36, Case 002/01 Appeals Judgement, paras 471-472, 482.

<sup>2769</sup> E1/371.1, Thang Phal, T. 6 Jan 2016, p. 43, ln. 6-8 (referring to Ngoy as the husband of Tech, E1/370.1, p. 89, lns 15-18); E1/379.1, Lach Kry, T. 20 Jan 2016, p. 72, lns 19-23; E1/381.1, Doung Oeurn, T. 25 Jan 2016, p. 14, lns 4-6.

<sup>2770</sup> E1/371.1, Thang Phal, T. 6 Jan 2016, p. 42, lns 15-20, p. 58, lns 12-21, p. 59, lns 17-21.

<sup>2771</sup> E1/371.1, Thang Phal, T. 6 Jan 2016, p. 78, lns 11-18, p. 79, lns 8-11.

<sup>2772</sup> E1/379.1, Lach Kry, T. 20 Jan 2016, p. 73, ln. 25 to p. 74, ln. 6.

unsworn statement stating the same.<sup>2773</sup> She was not there when it happened, and was told about it by her mother who allegedly eyewitnessed it; she did not provide any information as to the reasons for his alleged “arrest”.<sup>2774</sup> Further, she testified that her husband had been a Vietnamese soldier before he settled in her village.<sup>2775</sup> Doung Ourn also previously told DC-Cam that he may have been involved in selling opium and/or smuggling medicine across the border, something confirmed by her sister, even though Doung Ourn later denied this in court.<sup>2776</sup> The evidence therefore does not establish that Chhuy was killed or even arrested, and does not show that he was ‘targeted’ as a result of him being Vietnamese. Rather, it shows that there are reasons to believe that if he was arrested, it was due to involvement in unlawful activities.

829. Finally, regarding the third couple, Lach Ny and Ngang, Thang Phal testified that the wife of Lach Ny disappeared, and that she had heard that she had been taken away for re-education but was in fact killed.<sup>2777</sup> Her children were also taken.<sup>2778</sup> However, he testified that he did not know the reasons for which Lach Ny’s wife was taken away, even when faced with Lach Ny nephew’s WRI to “refresh his memory”.<sup>2779</sup> Lach Kry, Lach Ny’s brother and a civil party, said he witnessed his sister-in-law (whom he called Son San) being arrested in November 1977, together with her children.<sup>2780</sup> He did not know the reasons for their arrest, nor did he know where they were taken to.<sup>2781</sup> While he is the only alleged eyewitness, his evidence is unreliable, as he “forgot” having allegedly been present at a meeting (which most likely never took place) where her arrest was allegedly announced.<sup>2782</sup> Thang Phal testified that he never heard about such a meeting, and added that such meetings were usually closed to villagers anyway.<sup>2783</sup> Doung Ourn stated that Lach Ny’s wife and children had been taken away, but did not provide any evidence regarding the context or the reasons.<sup>2784</sup> The evidence therefore does not establish that Lach Ny’s wife was targeted as a result of his being Vietnamese, nor that

<sup>2773</sup> E1/381.1, Doung Ourn, T. 25 Jan 2016, p. 5, lns 12-14, p. 11, lns 18-19.

<sup>2774</sup> E1/381.1, Doung Ourn, T. 25 Jan 2016, p. 11, ln. 23 to p. 12, ln. 21.

<sup>2775</sup> E1/381.1, Doung Ourn, T. 25 Jan 2016, p. 52, lns 11-25; *see also* E3/6941, ‘DC-Cam Interview with Din Ay’, ERN 01165890.

<sup>2776</sup> E3/7562, ‘DC-Cam Interview of Doung Ourn’, ERN 01157781; E3/6941, ‘DC-Cam Interview with Din Ay’, ERN 01165890; *see also* E1/381.1, Doung Ourn, T. 25 Jan 2016, p. 50, ln. 16 to p. 51, ln. 8.

<sup>2777</sup> E1/371.1, Thang Phal, T. 6 Jan 2016, p. 46, lns 10-12, 16-19, p. 48, lns 2-4.

<sup>2778</sup> E1/371.1, Thang Phal, T. 6 Jan 2016, p. 46, lns 22-23.

<sup>2779</sup> E1/371.1, Thang Phal, T. 6 Jan 2016, p. 48, lns 5-24, p. 50, lns 16-25, p. 51, lns 2-7.

<sup>2780</sup> E1/379.1, Lach Kry, T. 20 Jan 2016, p. 11, ln. 4 to p. 12, ln. 7.

<sup>2781</sup> E1/379.1, Lach Kry, T. 20 Jan 2016, p. 13, lns 9-10, p. 15, lns 18-23.

<sup>2782</sup> E1/379.1, Lach Kry, T. 20 Jan 2016, p. 13, lns 12-17, p. 14, lns 11-15, p. 15, lns 9-10; *see also* E3/5630, ‘Supplementary Statement of Lach Kry’, ERN 0678289.

<sup>2783</sup> E1/371.1, Thang Phal, T. 6 Jan 2016, p. 55, lns 4-21.

<sup>2784</sup> E1/381.1, Doung Ourn, T. 25 Jan 2016, p. 13, lns 13-16.

she was killed. In sum, the evidence of “mass killing” in Prey Veng is in fact evidence of a small handful of people allegedly disappearing, without any link being established between their alleged disappearance and the fact that they may have belonged to the Vietnamese group.

**(b) *There Was No Mass Killing in Svay Rieng***

830. Only one person gave evidence under oath regarding Svay Rieng province: Ung Sam Ean, who was working on a dam in Kraham Ka Village, Chantrei Commune, Romeas Haek District, Svay Rieng Province.<sup>2785</sup> She testified that she witnessed the “arrest” of four or five Vietnamese children aged 10-15 years and that they were taken to a mobile unit by unarmed people wearing “the same black clothes as other[s] did”.<sup>2786</sup> Nothing happened to their parents.<sup>2787</sup> She also gave general evidence about seeing the “arrest” of three mixed couples (Vietnamese-Khmer) sent to mobile units to work on rice fields.<sup>2788</sup> However, she provided no evidence regarding any link between their ethnicity and their “arrest” to be brought to the mobile units,<sup>2789</sup> and she admitted not knowing what happened to them.<sup>2790</sup> She also never attended any meetings where the question of Vietnamese was discussed.<sup>2791</sup> Finally, she stated that “every ethnicity were [*sic*] instructed to join the mobile [units] and work in the rice fields [...] the Khmer, the Chinese and the Vietnamese.”<sup>2792</sup> Her evidence cannot serve to establish the ‘targeting’ of Vietnamese or any of the crimes charged.

831. Two other civil parties spoke of events in Svay Rieng Province: Sin Chhem, the wife of a commune chief in Svay Yea Village, Svay Yea Commune, Svay Chrum District in Svay Rieng Province<sup>2793</sup> and Sieng Chanthy, who lived in Russey Prey Village, Chorm Long Rieng Commune in Svay Rieng Province.<sup>2794</sup> Sin Chhem said that there were three or four Vietnamese families in her District<sup>2795</sup> and that those who had Vietnamese wives and children would see their wives and children “taken away to be killed”.<sup>2796</sup> She claimed that in all, four Vietnamese families were “taken away”.<sup>2797</sup> However, her evidence is hearsay, as “this was just what other

<sup>2785</sup> E1/366.1, Ung Sam Ean, T. 11 Dec 2015, p. 36, lns 10-13, p. 87, lns 6-14.

<sup>2786</sup> E1/366.1, Ung Sam Ean, T. 11 Dec 2015, p. 39, ln. 8 to p. 40, ln. 15.

<sup>2787</sup> E1/366.1, Ung Sam Ean, T. 11 Dec 2015, p. 42, lns 5-8.

<sup>2788</sup> E1/366.1, Ung Sam Ean, T. 11 Dec 2015, p. p. 52, lns 10-22.

<sup>2789</sup> E1/366.1, Ung Sam Ean, T. 11 Dec 2015, p. 41, ln. 3 to p. 42, ln. 8.

<sup>2790</sup> E1/366.1, Ung Sam Ean, T. 11 Dec 2015, p. 55, lns 19-20.

<sup>2791</sup> E1/366.1, Ung Sam Ean, T. 11 Dec 2015, p. 50, lns 9-19.

<sup>2792</sup> E1/366.1, Ung Sam Ean, T. 11 Dec 2015, p. 42, lns 5-8.

<sup>2793</sup> E1/367.1, Sin Chhem, T. 14 Dec 2015, p. 16, ln. 23 to p. 17, ln. 4.

<sup>2794</sup> E1/394.1, Sieng Chanthy, T. 1 Mar 2016, p. 12, lns 13-17.

<sup>2795</sup> E1/367.1, Sin Chhem, T. 14 Dec 2015, p. 9, lns 13-15.

<sup>2796</sup> E1/367.1, Sin Chhem, T. 14 Dec 2015, p. 25, lns 16-18.

<sup>2797</sup> E1/367.1, Sin Chhem, T. 14 Dec 2015, p. 25, ln. 24 to p. 26, ln. 1.

people had told her”.<sup>2798</sup> The source of her knowledge is not identified and Sin Chhem did not witness any arrest or killing herself.<sup>2799</sup>

832. While Sin Chhem claimed she saw dead bodies,<sup>2800</sup> this is insufficient to establish that the people were executed, or that they were ‘targeted’ as a result of being Vietnamese. She also did not know how or if Vietnamese people were identified.<sup>2801</sup> When asked if there was a meeting “where they made an announcement about what to do with mixed Khmer-Vietnamese families”, she said that she never attended such meeting. She even added that she “never cared about attending those meetings”, that she “did not know anything about what was happening”,<sup>2802</sup> and she never heard of a meeting where “Vietnamese people” were discussed.<sup>2803</sup> Despite this clear answer, the Co-Prosecutors “refreshed her memory”, reading back her WRI – after which she changed her evidence, testifying that “people talked about” “Khmer Rouge cadres” announcing that if a Khmer husband was married to a Vietnamese woman, the woman and child would be “taken away”.<sup>2804</sup> However, she added that “as a woman, she stayed at home and did not get involved in affairs”.<sup>2805</sup>

833. Sieng Chanthy, whose father was Vietnamese,<sup>2806</sup> offered similarly general, vague and unsubstantiated unsworn evidence at the hearing on harm. She stated that when the “Khmer Rouge” took power, they were treated like “17 April people” and “had to go back to their hometown”.<sup>2807</sup> She said that her father killed himself due to the treatment of the Vietnamese and his fear,<sup>2808</sup> and that both of her brothers were killed.<sup>2809</sup> However, she later explained that one of her brothers was a Khmer Republic soldier, and the other, a policeman, and were “taken away” as a result.<sup>2810</sup> She provided no evidence that the alleged killings of her brothers were in any way related to them being Vietnamese, or even to them being Khmer Republic soldiers, and in fact, provides no evidence that they were killed.<sup>2811</sup> The rest of her evidence was very

<sup>2798</sup> E1/367.1, Sin Chhem, T. 14 Dec 2015, p. 30, lns 1-2, p. 75, lns 19-25.

<sup>2799</sup> E1/367.1, Sin Chhem, T. 14 Dec 2015, p. 75, lns 19-25, p. 85, lns 2-7.

<sup>2800</sup> E1/367.1, Sin Chhem, T. 14 Dec 2015, p. 75, lns 19-25.

<sup>2801</sup> E1/367.1, Sin Chhem, T. 14 Dec 2015, p. 30, lns 10-19,

<sup>2802</sup> E1/367.1, Sin Chhem, T. 14 Dec 2015, p. 27, lns 9-12.

<sup>2803</sup> E1/367.1, Sin Chhem, T. 14 Dec 2015, p. 27, lns 16-17.

<sup>2804</sup> E1/367.1, Sin Chhem, T. 14 Dec 2015, p. 27, lns 19 to p. 28, ln. 8.

<sup>2805</sup> E1/367.1, Sin Chhem, T. 14 Dec 2015, p. 41, lns 9-12. She also stated that she had a “poor memory”, *see* E1/367.1, Sin Chhem, T. 14 Dec 2015, p. 67, ln. 18.

<sup>2806</sup> E1/393.1, Sieng Chanthy, T. 29 Feb 2016, p. 86, lns 11-13.

<sup>2807</sup> E1/393.1, Sieng Chanthy, T. 29 Feb 2016, p. 86, lns 13-15.

<sup>2808</sup> E1/393.1, Sieng Chanthy, T. 1 Mar 2016, p. 86, ln. 11 to p. 89, ln. 1.

<sup>2809</sup> E1/394.1, Sieng Chanthy, T. 1 Mar 2016, p. 7, ln. 3, to p. 11, ln. 10.

<sup>2810</sup> E1/393.1, Sieng Chanthy, T. 29 Feb 2016, p. 25, lns 8-16.

<sup>2811</sup> E1/394.1, Sieng Chanthy, T. 1 Mar 2016, p. 18, ln. 25.

general: she was told about two Vietnamese girls who had been “taken away”, raped and killed.<sup>2812</sup> She also made the general, hearsay and unsubstantiated assertion that two other Vietnamese families in her village were killed.<sup>2813</sup> In short, the evidence of “mass killing” in Prey Veng in fact consists of a handful of people’s alleged disappearances or killing, without any link being established between such allegation and the fact that they may have belonged to the Vietnamese group.

##### **5. There is No Evidence of Mass Killings Outside of Prey Veng and Svay Rieng**

834. The evidence outside of Prey Veng and Svay Rieng Provinces only amount to general statements related to isolated incidents, and do not, contrary to what the Closing Order alleges, illustrate the existence of a policy to target Vietnamese people throughout DK.<sup>2814</sup>

###### **(a) Evidence Regarding Khsach Pagoda in Autonomous Sector 106 is Unreliable**

835. Three of the 20 people who testified on the ‘targeting’ of Vietnamese spoke of the same event: the alleged killing of Vietnamese people, including a young Vietnamese woman called Chantha, at Khsach Pagoda. Sean Song, a witness, and Um Suonn, a civil party, were allegedly together<sup>2815</sup> when they witnessed the execution of Chantha and another individual at the Khsach Pagoda in 1975, 1976 or 1978, near Toul Sar Village, Kampong Khleang Commune, Sotr Nikum District, Autonomous Sector 106. Y Vun testified that he witnessed the same event, from a different location, but only gave very generic evidence that Chantha was killed at the pagoda.<sup>2816</sup> Moreover, their evidence is inconsistent on the number of people present at the pagoda; the reasons for the alleged executions; Chantha’s killing, and the number of people being executed. Such inconsistencies prevent finding beyond reasonable doubt that murder(s) in fact took place.

836. Sean Song testified that, on his way back from work in the field with his mobile unit, around 7pm, he heard cries inside the pagoda, and went to see what happened.<sup>2817</sup> His friend

<sup>2812</sup> E1/393.1, Sieng Chanthly, T. 29 Feb 2016, p. 89, lns 1-3; E1/394.1, Sieng Chanthly, T.1 Mar 2016, p. 5, lns 8-17.

<sup>2813</sup> E1/394.1, Sieng Chanthly, T. 1 Mar 2016, p. 17, ln. 25 to p. 18, ln. 9.

<sup>2814</sup> D427, Closing Order, paras 214, 797-801.

<sup>2815</sup> E1/357.1, Sean Song, T. 27 Oct 2015, p. 14, lns 5-7; E1/358.1, Sean Song, T. 28 Oct 2015, p. 39, lns 1-2, p. 46, lns 4-5; E1/365.1, Um Suonn, T. 9 Dec 2015, p. 41, lns 9-10, p. 58, lns 5-7, p. 61, lns 6-17, p. 76, lns 9-10; E1/366.1, Um Suonn, T. 11 Dec 2015, p. 11, lns 7-8, p. 22, lns 15-16.

<sup>2816</sup> E1/368.1, Y Vun, T. 15 Dec 2015, p. 20, lns 7-8.

<sup>2817</sup> E1/357.1, Sean Song, T. 27 Oct 2015, p.12, ln. 15 to p. 13, ln. 14.



Um Suonn was with him,<sup>2818</sup> and they hid in a pit about 30 metres away from the pagoda.<sup>2819</sup> Sean Song first testified that he “estimated” seeing 300 to 400 people in the pagoda,<sup>2820</sup> yet, he later explained that he had heard this number from “old villagers”.<sup>2821</sup> Um Suonn stated that there were only 25 people present at the pagoda, not 300-400,<sup>2822</sup> and Y Vun, who was also allegedly there, estimated there were 10 or 20 people.<sup>2823</sup> Sean Song further testified that he saw the killing of a Vietnamese woman he knew, Chantha, whose gallbladder was taken away and eaten.<sup>2824</sup> He also testified of the killing of children.<sup>2825</sup> While Um Suonn initially corroborated Sean Song’s evidence regarding the killing of Chantha,<sup>2826</sup> he later admitted that he “could not identify clearly who were the persons” and confirmed that he was not sure that Chantha was executed that day.<sup>2827</sup> He also said that when Chantha was killed, Sean Song was not with him.<sup>2828</sup> In addition, Sean Song testified that he saw about 60-80 persons being killed in the hour or so where he secretly watched the executions.<sup>2829</sup> Um Suonn had stated that around 25 persons were killed.<sup>2830</sup> According to Y Vun between 10 and 20 persons were executed.<sup>2831</sup>

837. None of the individuals provided credible evidence about the reasons for the killings, nor did they testify about any order regarding the ‘targeting’ of Vietnamese. While Sean Song testified hearing executioners at the pagoda ask detainees if they were Vietnamese, and sparing the non-Vietnamese,<sup>2832</sup> he later testified that he “could not hear very clearly what they [the soldiers and those to be killed] were talking about”.<sup>2833</sup> Further, Um Suonn and Y Vun, who were both allegedly there at the same time and at the same distance from the pagoda, did not hear such questions,<sup>2834</sup> Um Suonn added that he did not see anyone being spared.<sup>2835</sup> Sean Song also denied hearing any statement made on the treatment of Vietnamese from the cadres

<sup>2818</sup> E1/357.1, Sean Song, T. 27 Oct 2015, p. 14, lns 5-7; E1/358.1, Sean Song, T. 28 Oct 2015, p. 39, lns 1-2, p. 46, lns 4-5.

<sup>2819</sup> E1/357.1, Sean Song, T. 27 Oct 2015, p. 13, lns 17-19.

<sup>2820</sup> E1/358.1, Sean Song, T. 28 Oct 2015, p.10, lns 18-20, p. 11, lns 8-9.

<sup>2821</sup> E1/358.1, Sean Song, T. 28 Oct 2015, p. 66, ln. 23 top, 67, ln. 4.

<sup>2822</sup> E1/365.1, Um Suonn, T. 9 Dec 2015, p. 74, ln. 11 to p. 75, ln. 2.

<sup>2823</sup> E1/368.1, Y Vun, T. 15 Dec 2015, p. 29, lns 11-12.

<sup>2824</sup> E1/358.1, Sean Song, T. 28 Oct 2015, p. 3, lns 12-25.

<sup>2825</sup> E1/358.1, Sean Song, T. 28 Oct 2015, p. 17, ln. 22 to p. 18, ln. 14.

<sup>2826</sup> E1/365.1, Um Suonn, T. 9 Dec 2015, p. 42, lns 18-21, p. 53, ln. 2 to p. 56, ln. 6.

<sup>2827</sup> E1/366.1, Um Suonn, T. 11 Dec 2015, p. 13, lns 3-9.

<sup>2828</sup> E1/366.1, Um Suonn, T. 11 Dec 2015, p. 19, lns 18-24.

<sup>2829</sup> E1/358.1, Sean Song, T. 28 Oct 2015, p. 9, lns 13-16; *see also* E3/7890, ‘WRI of Sean Sung’, ERN 00422313.

<sup>2830</sup> E1/365.1, Um Suonn, T. 9 Dec 2015, p. 74, ln. 11 to p. 75, ln. 2.

<sup>2831</sup> E1/368.1, Y Vun, T. 15 Dec 2015, p. 29, lns 11-12.

<sup>2832</sup> E1/357.1, Sean Song, T. 27 Oct 2015, p. 15, ln. 21 to p. 16, ln. 16.

<sup>2833</sup> E1/358.1, Sean Song, T. 28 Oct 2015, p. 65, ln. 23 to p. 66, ln. 2.

<sup>2834</sup> E1/365.1, Um Suonn, T. 9 Dec 2015, p. 66, lns 11-24, p. 67, lns 9-20, p. 68, lns 5-9; E1/368.1, Y Vun, T. 15 Dec 2015, p. 31, lns 5-9.

<sup>2835</sup> E1/365.1, Um Suonn, T. 9 Dec 2015, lns 11-24, p. 67, lns 9-20, p. 68, lns 5-9.

in his village,<sup>2836</sup> or knowing why they were executed.<sup>2837</sup> Finally, no official exhumation of the remains of alleged victims and allegedly buried in nearby pits has been carried out, or any forensic examination on the remains to determine cause of death, time of death or identity of the victims. A finding that Vietnamese were summarily executed at Khsach Pagoda on the sole basis of their ethnicity or nationality cannot be established beyond reasonable doubt

**(b) *There is Only Vague Evidence on Events in Tuol Ta Trang in Battambang***

838. Prum Sarun, who was the chief of a platoon in Sector 3, Northwest Zone, under Company 1 of Krapeu Cheung Village, Phnum Sampov Commune, Banan District, Battambang Province,<sup>2838</sup> provided vague, unsubstantiated hearsay evidence regarding the ‘targeting’ of Vietnamese, which cannot be given any weight. He said that two Vietnamese persons were arrested in Battalion 2.<sup>2839</sup> In court, he first testified that he did not know where they were sent.<sup>2840</sup> Later, he said that they were sent to Tuol Ta Trang,<sup>2841</sup> as “[he] saw the skulls remaining at Tuol Ta Trang” and therefore “[he] think[s] they may have been brought to that place”.<sup>2842</sup> He believed the two persons were Vietnamese because “they spoke with accents”.<sup>2843</sup> Prum Sarun also testified that he saw the members of the “three or four” Vietnamese families in his village being “tied up and walked away”<sup>2844</sup> and that he later saw their skeletal remains at Tuol Ta Trang.<sup>2845</sup> He later clarified that he only saw the arrest of four people, and confirmed he did not see the killing.<sup>2846</sup> Further, he said that he did not approach the corpses as the smell was too strong.<sup>2847</sup> His evidence therefore does not establish that the corpses he allegedly saw were that of the people whose arrest he witnessed. On the next day of his testimony however, Prum Sarun said that he never saw any arrest and that “[he] did not know about that”.<sup>2848</sup> When pressed as to whether he stood by his 2008 WRI in which he stated that he saw the Vietnamese people being tied up and executed, Prum Sarun gave an inconclusive answer and ultimately said that “of course, when they arrested people, they killed them”.<sup>2849</sup>

<sup>2836</sup> E1/358.1, Sean Song, T. 28 Oct 2015, p. 24, lns 16-24.

<sup>2837</sup> E1/358.1, Sean Song, T. 28 Oct 2015, p. 37, lns 1-6.

<sup>2838</sup> E1/364.1, Prum Sarun, T. 8 Dec 2015, p. 52, ln. 14 to p. 53, ln. 14.

<sup>2839</sup> E1/364.1, Prum Sarun, T. 8 Dec 2015, p. 59, lns 1-7.

<sup>2840</sup> E1/364.1, Prum Sarun, T. 8 Dec 2015, p. 59, lns 1-7.

<sup>2841</sup> E1/364.1, Prum Sarun, T. 8 Dec 2015, p. 60, lns 3-10.

<sup>2842</sup> E1/364.1, Prum Sarun, T. 8 Dec 2015, p. 61, lns 15-16.

<sup>2843</sup> E1/364.1, Prum Sarun, T. 8 Dec 2015, p. 62, lns 23-25.

<sup>2844</sup> E1/364.1, Prum Sarun, T. 8 Dec 2015, p. 63, lns 10-22.

<sup>2845</sup> E1/364.1, Prum Sarun, T. 8 Dec 2015, p. 64, lns 4-5, p. 65, lns 1-2.

<sup>2846</sup> E1/364.1, Prum Sarun, T. 8 Dec 2015, p. 66, lns 9-11.

<sup>2847</sup> E1/364.1, Prum Sarun, T. 8 Dec 2015, p. 68, lns 1-2.

<sup>2848</sup> E1/365.1, Prum Sarun, T. 9 Dec 2015, p. 4, lns 21-25.

<sup>2849</sup> E1/365.1, Prum Sarun, T. 9 Dec 2015, p. 5, ln. 9 to p. 7, ln. 17.

Nonetheless, he never witnessed any killing.<sup>2850</sup> His account is riddled with contradictions, is vague and inconclusive; and does not establish any crime beyond reasonable doubt.

839. Like the evidence heard regarding Prey Veng and Svay Rieng, the evidence heard regarding the ‘targeting’ of the Vietnamese in other locations in Cambodia does not contain any detail about the fate of the persons, the reasons for their alleged ‘targeting’, nor does it hint at the existence of a policy aiming to destroy the Vietnamese group.

**(c) *The Treatment of Vietnamese in Conflict Zones, While Arguably Not Part of the Case, Likewise Fails to Show a Policy to ‘Target’ Vietnamese Civilians***

840. The Closing Order makes no reference to the alleged “treatment” of Vietnamese refugees or Vietnamese at sea. As a result, the question of Vietnamese individuals which were located in the DK’s territorial waters was never part of the case against Nuon Chea.<sup>2851</sup> The Co-Prosecutors however attempted to use information the International Co-Prosecutor obtained in the context of the investigations in Case 003 against Meas Muth in an attempt to reinforce their case regarding the “treatment” of the Vietnamese. The Defence therefore feels compelled to briefly address it. Four witnesses testified about the treatment of Vietnamese people found on boats in DK’s territorial waters: Pak Sok (2-TCW-1000), who was a battalion soldier in naval Division 164 under Meas Muth in Kampong Saom;<sup>2852</sup> Prum Sarat, who was a military commander of company 2, in regiment 140, within the navy division 164<sup>2853</sup> in Kampong Saom at the time;<sup>2854</sup> Meas Voeun, who was the deputy commander of West Zone Division 1 stationed near the coast of Koh Kong;<sup>2855</sup> and Mak Chhoeun (2-TCW-823), commander of Battalion 560 in Division 164’s Regiment 63.

841. Pak Sok (2-TCW-1000) was based on Tang Island in 1975, and in Poulo Wai Island from 1976 until 1977, with Regiment 622.<sup>2856</sup> From 1977, he worked in the navy and was stationed at Ou Chheu Teal port, with Division 164.<sup>2857</sup> He testified to having seen the killing of a Vietnamese couple and their one-year-old infant who had been captured from a boat off the coast of Poulo Wai island, while he was with the Regiment 622 at Poulo Wai island, in

<sup>2850</sup> E1/364.1, Prum Sarun, T. 8 Dec 2015, p. 66, lns 9-11.

<sup>2851</sup> See D427, Closing Order, which make no reference to Vietnamese refugees or Vietnamese at sea.

<sup>2852</sup> E1/369.1, Pak Sok (2-TCW-1000), T. 16 Dec 2015, p. 14, ln. 18 to p. 15, ln. 15.

<sup>2853</sup> E1/381.1, Prum Sarat, T. 25 Jan 2016, p. 88, lns 13-18, p. 89, lns 11-15.

<sup>2854</sup> E1/381.1, Prum Sarat, T. 25 Jan 2016, p. 81, lns 6-10.

<sup>2855</sup> E1/386.1, Meas Voeun, T. 2 Feb 2016, p. 55, ln. 22 to p. 56, ln. 17.

<sup>2856</sup> E1/369.1, Pak Sok (2-TCW-1000), T. 16 Dec 2015, p. 18, lns 7-13.

<sup>2857</sup> E1/369.1, Pak Sok (2-TCW-1000), T. 16 Dec 2015, p. 18, lns 14-17.

1976.<sup>2858</sup> According to him, they were “perhaps ordinary citizens” as they had no military uniforms.<sup>2859</sup> No further information was provided.<sup>2860</sup> Pak Sok (2-TCW-1000) further testified that he was never involved in the arrest or capture of Vietnamese refugees<sup>2861</sup> and that he just saw an “incident” where a man had a hand amputated at Ou Chheu Teal port, when that person was sent ashore.<sup>2862</sup> The International Co-Prosecutor kindly “refreshed” his memory again,<sup>2863</sup> after which, Pak Sok (2-TCW-1000) said that the man with an amputation was a soldier and that there were other “ethnic Vietnamese people” with him on the boat heading to Thailand who had been arrested between Tang and Poulo Wai islands, and brought to Ou Chheu Teal port.<sup>2864</sup> He testified that the soldiers had thrown a baby into the sea as it was crying.<sup>2865</sup> He did not provide further details. During cross-examination, he confirmed that he witnessed the killing of an alleged Vietnamese person twice: once on Poulo Wai island, and the baby incident.<sup>2866</sup>

842. Regarding the treatment of Vietnamese people in Ou Chheu Teal port, Pak Sok (2-TCW-1000) testified that Vietnamese people were brought to the port from the sea only once or twice in 1977.<sup>2867</sup> When people were “taken out”, he did not know where, as it was not his responsibility.<sup>2868</sup> Again, the International Co-Prosecutor “refreshed” his memory, for the fourth time already, reminding him that he previously said that there were thousands of captured persons going through the port.<sup>2869</sup> Pak Sok (2-TCW-1000) got the hint and agreed, adding that ethnic Vietnamese who were travelling to Thailand were arrested and killed.<sup>2870</sup> On his last day of testimony, he went back to his first statement in court, testifying that when he was stationed at Ou Chheu Teal port, the arrest and transportation of people happened “two or three times” and that they were transported to Kampong Saom.<sup>2871</sup> Finally, Pak Sok (2-TCW-1000) also testified that he and his group sank a Vietnamese boat which contained armed Vietnamese people, after they fired shots at them.<sup>2872</sup> Pak Sok (2-TCW-1000) also testified about orders

<sup>2858</sup> E1/369.1, Pak Sok (2-TCW-1000), T. 16 Dec 2015, p. 35, lns 7-25.

<sup>2859</sup> E1/369.1, Pak Sok (2-TCW-1000), T. 16 Dec 2015, p. 35, lns 24-25.

<sup>2860</sup> E1/370.1, Pak Sok (2-TCW-1000), T. 5 Jan 2016, p. 33, ln. 2 to p. 34, ln. 18.

<sup>2861</sup> E1/369.1, Pak Sok (2-TCW-1000), T. 16 Dec 2015, p. 23, lns 2-12.

<sup>2862</sup> E1/369.1, Pak Sok (2-TCW-1000), T. 16 Dec 2015, p. 23, lns 13-17.

<sup>2863</sup> E1/369.1, Pak Sok (2-TCW-1000), T. 16 Dec 2015, p. 24, lns 18-25.

<sup>2864</sup> E1/369.1, Pak Sok (2-TCW-1000), T. 16 Dec 2015, p. 25, lns 7-12.

<sup>2865</sup> E1/369.1, Pak Sok (2-TCW-1000), T. 16 Dec 2015, p. 25, lns 19-22.

<sup>2866</sup> E1/370.1, Pak Sok (2-TCW-1000), T. 5 Jan 2016, p. 68, lns 1-24.

<sup>2867</sup> E1/369.1, Pak Sok (2-TCW-1000), T. 16 Dec 2015, p. 25, ln. 23 to p. 26, ln. 3.

<sup>2868</sup> E1/369.1, Pak Sok (2-TCW-1000), T. 16 Dec 2015, p. 26, lns 5-6.

<sup>2869</sup> E1/369.1, Pak Sok (2-TCW-1000), T. 16 Dec 2015, p. 26, lns 8-24.

<sup>2870</sup> E1/369.1, Pak Sok (2-TCW-1000), T. 16 Dec 2015, p.27, lns 1-6.

<sup>2871</sup> E1/370.1, Pak Sok (2-TCW-1000), T. 5 Jan 2016, p. 52, lns 8-13.

<sup>2872</sup> E1/369.1, Pak Sok (2-TCW-1000), T. 16 Dec 2015, p. 30, lns 7-12.

given to him regarding the treatment of Vietnamese – which also should not be given any weight for the reasons addressed below in the section on policy.<sup>2873</sup>

843. Pak Sok’s (2-TCW-1000) evidence, despite the International Co-Prosecutor’s and Civil Party Lead Co-Lawyers’ attempts to feed him answers – or maybe as a result of it – is inconsistent and contradictory. It must also be viewed in context: he was in the navy, in an area where open conflict was happening between DK and Vietnam regarding the islands.<sup>2874</sup> Further, there were instructions from Son Sen to let Vietnamese refugees continue on their way.<sup>2875</sup> Even in the unlikely event that his evidence could be considered credible, it illustrates deviations from the official CPK’s national defence and security policy. In no way can it be taken as evidence of a policy targeting Vietnamese civilians.

**(d) *Evidence Related to Other Locations Mentioned at Trial is Similarly Vague and Unreliable***

844. The remaining three witnesses and three civil parties provided unsubstantiated evidence, none of which could be used alone or cumulatively to find that any of the elements of the crimes charged is met beyond reasonable doubt. Sao Sak testified that her mother, who was Vietnamese, disappeared, but did not provide any detail, and certainly no evidence that this was in any way related to her ethnicity.<sup>2876</sup> Her mere statement that “Anyone who was related to Vietnamese origin would be taken away and killed that is what I learnt”<sup>2877</sup> constitutes an unsubstantiated rumour. Further, she never heard of any Vietnamese person being killed in her village, Anlong Trea,<sup>2878</sup> and never witnessed anyone being killed.<sup>2879</sup>

845. Choeung Yaing Chaet, a civil party whose parents were ethnically Vietnamese, gave an unsworn statement that his whole family was killed in Dar village, near Kandal Village in Kampong Chhnang, in early 1975. He said that he was tied up and brought close to a pit where he saw the dead bodies of his parents and siblings, and that members of another Vietnamese family were also brought there. He was then hit several times on the head with an axe, and left dead in the pit.<sup>2880</sup> Upon regaining consciousness, he apparently walked “day and night” to

<sup>2873</sup> See also *supra*, Chapter 5-II-C-2.

<sup>2874</sup> See e.g. **E1/370.1**, Pak Sok (2-TCW-1000), T. 5 Jan 2016, p. 45, lns 17-20, p. 49, lns 16-18.

<sup>2875</sup> **E1/386.1**, Meas Voeun, T. 2 Feb 2016, p. 62, lns 5-23.

<sup>2876</sup> **E1/362.1**, Sao Sak, T. 3 Dec 2015; **E1/363.1**, Sao Sak, T. 7 Dec 2015.

<sup>2877</sup> **E1/362.1**, Sao Sak, T. 3 Dec 2015, p.77, lns 17-18.

<sup>2878</sup> **E1/362.1**, Sao Sak, T. 3 Dec 2015, p. 76, lns 8 to p. 77, ln. 18.

<sup>2879</sup> **E1/363.1**, Sao Sak, T. 7 Dec 2015, p. 25, lns 6-11.

<sup>2880</sup> **E1/363.1**, Choeung Yaing Chaet, T. 7 Dec 2015, p. 41, ln. 9 to p. 45, ln. 9.

another village, where he met Ta Ly who eventually accompanied him to Vietnam.<sup>2881</sup> Even if the event occurred, in any event, it is unclear whether the event occurred within the temporal scope of the Tribunal or if in fact took place before then.<sup>2882</sup> Civil parties Khouy Muoy and Uch Sunlay likewise provided only hearsay evidence about alleged killings of members of their family. None of these three civil parties provided evidence linking the alleged killings with the fact that the victims were Vietnamese. In any event, such isolated incidents do not amount to a systematic ‘targeting’, and cannot establish that a policy to “target” Vietnamese was in place.

## 6. The ‘Theory of Matrilineal Descent’ is Mere Speculation

846. The Closing Order also alleges that the policy to destroy was based on the “theory of matrilineal descent”,<sup>2883</sup> in which the children of a Vietnamese family would be taken if the mother was Vietnamese, but not if the father was Vietnamese. However, the only existing evidence supporting this assertion is mere statements along the lines of “if the woman was Vietnamese, the children would be taken away too”. All are based on hearsay, and are unsupported by evidence that such a “theory” existed and was put into practice.

847. For instance, Sin Chhem initially stated in court that she never attended any meetings where the “new cadres who took over announced what was to be done with the Vietnamese people”, she testified that she “never cared about attending those meetings, so I did not know anything about what was happening.”<sup>2884</sup> She added that “I did not ever heard [*sic*] of it because I did not get close to those meetings. I did not want to attend those meetings”.<sup>2885</sup> Unsatisfied by her unequivocal answer, the International Co-Prosecutor nonetheless and as usual, decided that it was time to “refresh her memory”, and read her 2008 WRI. Obediently, Sin Chhem then changed her evidence, stating she was told about a meeting where the newly arrived cadres had announced that if the father was Vietnamese, only he would be killed, while if it was the mother, her and the children would be killed.<sup>2886</sup> Her evidence was that “[y]es, people talked about that. They said that those children who fed by the breast-feeding from the mothers would not be kept alive; they must be killed; only the father was kept alive”, something she had heard from

<sup>2881</sup> E1/363.1, Choeung Yaing Chaet, T. 7 Dec 2015, p. 46, lns 7-10; for evidence regarding his departure to Vietnam, *see supra*, Chapter 5-II-E-2.

<sup>2882</sup> E1/363.1, Choeung Yaing Chaet, T. 7 Dec 2015, p. 34, ln. 23 to p. 35, ln. 17, p. 49, ln. 22 to p. 55, ln. 4; E1/364.1, Choeung Yaing Chaet, T. 8 Dec 2015, p. 11, ln. 12 to p. 12, ln. 2; E3/5631, ‘WRI of Choeung Yaing Chaet’, ERN 00678292.

<sup>2883</sup> D427, Closing Order, para. 215.

<sup>2884</sup> E1/367.1, Sin Chhem, T. 14 Dec 2015, p. 27, lns 4-12.

<sup>2885</sup> E1/367.1, Sin Chhem, T. 14 Dec 2015, p. 27, lns 9-17.

<sup>2886</sup> E1/367.1, Sin Chhem, T. 14 Dec 2015, p. 27, ln. 19 to p. 28, ln. 23.

someone called Savorn, from Svay Yea village.<sup>2887</sup> Thang Phal testified that he had heard people talking about the question of theory of matrilineal descent,<sup>2888</sup> but did not know the reason for that.<sup>2889</sup> Lach Kry stated the same, arguing that it was “widely known to the villagers”,<sup>2890</sup> and Doung Oeurn gave similar information.<sup>2891</sup> Mere unsworn hearsay statements by three persons cannot legitimately be said to constitute proof beyond reasonable doubt that the DK had a policy to target and exterminate the Vietnamese group in Cambodia between 1975 and 1979.

## 7. Conclusion on Facts Related to the Alleged ‘Targeting’ of Vietnamese

848. Instead of showing a nationwide genocidal policy, or a policy aiming to exterminate or persecute Vietnamese people, the live evidence, even if entirely reliable (which the Defence vehemently contests), only shows that only a number of Vietnamese civilians were arrested or killed. In the absence of reliable evidence regarding the reasons for their arrests or killing, it cannot be said that the only reasonable conclusion is that they were killed as a result of their ethnicity, nationality or race. On the contrary, the evidence shows the absence of any systematic pattern of crimes permitting the inference of the existence of a nationwide policy. Even taking the evidence as a whole, the allegation that Nuon Chea intended to discriminate, destroy, or otherwise target Cham and Vietnamese people is not only directly established, it is far from being the only reasonable inference.<sup>2892</sup> A conviction simply cannot be sustained on this flimsy body of evidence.

## F. THE CRIME OF GENOCIDE

849. As discussed extensively above, there is no evidence that the Cham or the Vietnamese were targeted as a result of their mere membership in the ethnic and religious Cham group or the ethnic, national, or racial Vietnamese group respectively. Again, the gravity of the crime of genocide is reflected in the “stringent requirements which must be satisfied before this conviction is imposed”.<sup>2893</sup> None are met here. Despite allegations of widespread and systematic killings, there is only sparse specific evidence of murders of Cham or Vietnamese

<sup>2887</sup> E1/367.1, Sin Chhem, T. 14 Dec 2015, p. 28, lns 6-16; *see also supra*, Chapter 5-II-E-4-(b).

<sup>2888</sup> E1/371.1, Thang Phal, T. 6 Jan 2016, p. 51, lns 13-19.

<sup>2889</sup> E1/371.1, Thang Phal, T. 6 Jan 2016, p. 51, lns 13-23.

<sup>2890</sup> E1/379.1, Lach Kry, T. 20 Jan 2016, p. 75, lns 3-10.

<sup>2891</sup> E1/381.1, Doung Oeurn, T. 25 Jan 2016, p. 61, lns 14-24.

<sup>2892</sup> F36, Case 002/01 Appeals Judgement, para. 418; ICTY, *Halilović* Appeals Judgement, para. 109; *Čelebići* Appeals Judgement, para. 458; ICTR, *Bagosora et al.* Appeals Judgement, para. 278; *Rukundo* Appeals Judgement, para. 235; *Karera* Appeals Judgement, para. 34; SCSL, *Taylor* Trial Judgement, para 159.

<sup>2893</sup> ICTY, *Krstić* Appeals Judgement, para. 37.

individuals, none of which is credible.<sup>2894</sup> The allegation of the ‘disappearance’ of some Cham or Vietnamese people, even if proven, is insufficient to prove killings took place.<sup>2895</sup> The *actus reus* of genocide by killing is therefore not met. Even if it were, as held by the ICTY:

the killings, in different places spread over a broad geographical area, of a finite number of members of a protected group might not thus qualify as genocide, despite the high total number of casualties, because it would not show an intent by the perpetrators to target the very existence of the group as such.<sup>2896</sup>

850. Regarding the *mens rea*, genocide is a specific intent (*dolus specialis*) crime: in addition to intending the commission of the underlying crime, the perpetrator must also have the clear intention to destroy a protected group “as a separate and distinct entity”.<sup>2897</sup> In other words, a conviction for genocide can only be entered when it is established beyond reasonable doubt that the Accused intended the “physical or biological destruction of all or part of the group” to which the victim belonged.<sup>2898</sup>

851. The key element that distinguishes genocide from other crimes is that its underlying actions – in the present case, killing – must be undertaken with not only the intent to commit the crime, but also with the intent to destroy the specific targeted group. In other words, an “act must be committed [...] as an incremental step in the overall objective of destroying the group”.<sup>2899</sup> The Co-Prosecutors recognised that there is a “requirement that a prohibited act will only amount to genocide if it was committed against a victim ‘specifically because’ of his/her membership in a protected group.”<sup>2900</sup> Finally, genocidal intent must be unequivocally established.<sup>2901</sup> While both the ICTY and the ICTR held that it could be inferred from relevant facts and circumstances,<sup>2902</sup> it is only possible where it is the **only reasonable inference** from the indirect evidence,<sup>2903</sup> or else the Accused must be acquitted.<sup>2904</sup> This applies equally to the

<sup>2894</sup> See *supra*, Chapter 5-II-D-2, Chapter 5-II-D-3, Chapter 5-II-E-4, Chapter 5-II-E-5.

<sup>2895</sup> F36, Case 002/01 Appeals Judgement, paras 472, 482-83.

<sup>2896</sup> ICTY, *Krstić* Trial Judgement, para. 590.

<sup>2897</sup> ICTY, *Brđanin* Trial Judgement, para. 698; see also ICTR, *Rutaganda* Appeals Judgement, para. 524; *Akayesu* Trial Judgement, paras 520-521.

<sup>2898</sup> ILC Report of its 48<sup>th</sup> Session, pp. 45–46, para. 12; ICTY, *Krstić* Appeals Judgement, para. 25; see also, *Brđanin* Trial Judgement, paras 694-695; ICTR, *Seromba* Trial Judgement, para. 319; ICJ, *Croatia v. Serbia* Judgement, para. 136.

<sup>2899</sup> ILC 1996 Draft Code of Crimes against Peace and Security with Commentaries, p. 45, point (6).

<sup>2900</sup> D390, Co-Prosecutors’ Final Submission, para. 1227.

<sup>2901</sup> ICTY, *Krstić* Appeals Judgement, para. 134; see also ICTR, *Akayesu* Trial Judgement, para. 520.

<sup>2902</sup> ICTR, *Kayishema and Ruzindana* Appeals Judgement, para. 159; *Rutaganda* Appeals Judgement, para. 525; ICTY, *Jelisić* Appeals Judgement, para. 47.

<sup>2903</sup> ICTR, *Nahimana et al.* Appeals Judgement, para. 524 (emphasis added); ICJ, *Croatia v. Serbia* Judgement, para. 148; *Bosnia and Herzegovina v. Serbia* Judgement, para. 373; see also, generally, *Krstić* Appeals Judgement, para. 41; *Brđanin* Trial Judgement, para. 970.

<sup>2904</sup> ICTY, *Čelebići* Appeals Judgement, para. 458; ICTR, *Karera* Appeals Judgement, para. 34.



specific intent crimes of extermination and persecution; where the *mens rea* is inferred from circumstances, it must be the only reasonable inference available on the evidence adduced.<sup>2905</sup> In addition, when inferring the Accused's intent from the context, this must be done in reference to the actual conduct of the Accused;<sup>2906</sup> *i.e.*, the intent of the Accused should be inferred, primarily, from his words and deeds and be evident from a pattern of purposeful conduct.<sup>2907</sup> It must also be kept in mind that mere knowledge does not amount to genocidal intent.<sup>2908</sup> Further, in the case of JCE, it must be established that the physical perpetrator held the specific intent, but also that each member of the JCE possessed and shared the specific intent.<sup>2909</sup> As demonstrated below, this is not the case.

852. In the present case, there is no direct evidence that there was a policy in place aiming to destroy the Cham or Vietnamese group, nor that the physical perpetrators had any intention to destroy the Cham or Vietnamese groups as such. Similarly, there is nothing linking Nuon Chea with any intent to destroy the Cham or Vietnamese group as such, nor any indication that he had knowledge of the physical perpetrators' intent to do so. The existence of specific genocidal intent also cannot be deduced from the evidence, as neither the witnesses nor civil parties who appeared in court knew the precise reasons behind any of the alleged arrests, detention, or execution of Cham or Vietnamese people. To the contrary: one of the pillars of the Co-Prosecutors' case is that the CPK had a policy in place promoting marriage and population growth. The evidence unequivocally showed that such policies – which were perfectly legitimate and applied in most countries in the world even today<sup>2910</sup> – were applied to members of the Cham and Vietnamese groups, as discussed in Chapter 7-IV-A of the present Brief. This logically contradicts the notion that the CPK intended to eradicate either group.

853. Several other reasonable inferences can be drawn from the evidence other than the existence of an intent to destroy the Cham or Vietnamese groups. One that is supported by credible evidence, is that when people who happened to be Cham or Vietnamese were arrested or otherwise 'targeted', it was a result of their own individual actions, irrespective of their ethnicity or religion and pursuant to the CPK's legitimate and lawful nationwide defence and

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<sup>2905</sup> ICTY, *Vašiljević* Appeals Judgement, paras 120, 131; *Krstić* Appeals Judgement, para. 41.

<sup>2906</sup> ICTR, *Bagilishema* Trial Judgement, para. 63.

<sup>2907</sup> ICTR, *Bagilishema* Trial Judgement, para. 63.

<sup>2908</sup> See discussion of evidence in ICTY, *Krstić* Appeals Judgement, paras 83, 98, 100, 104, 129, 130, 134 (emphasis added).

<sup>2909</sup> ICTY, *Kvočka et al.* Appeals Judgement, para. 110; *Brđanin* Trial Judgement, para. 708; *Milutinović* Trial Judgement, para. 109.

<sup>2910</sup> See *infra*, Chapter 7-III, CPK Policy on Marriage.

security policy. A finding that the CPK had a policy to destroy the Cham or the Vietnamese group simply cannot be made on the basis of the evidence.

### 1. There is no Evidence that the Physical Perpetrators Held any Specific Intent

854. As discussed above, there is nothing in the evidence permitting a conclusion to be drawn beyond reasonable doubt as to the reasons were for the alleged ‘targeting’. The mere fact that someone who happened to be Cham or Vietnamese was arrested or killed – if it were established beyond reasonable doubt – does not automatically mean that this person was arrested or killed because he or she was Cham or Vietnamese. As a result, it cannot be established beyond reasonable doubt that the alleged victims were ‘targeted’ as a result of being Cham or Vietnamese. Furthermore, in the majority of cases, the alleged physical perpetrator is not identified, often being merely referred to as “Angkar” or “the Khmer Rouge”. Therefore, a finding that the physical perpetrator held a genocidal or discriminatory intent, which is a prerequisite for a finding of guilt for the crimes of genocide, extermination or persecution, is impossible. Finally, as the physical perpetrators were non-JCE members,<sup>2911</sup> there needs to be “evidence that the JCE member explicitly or implicitly **requested** the non-JCE member to commit such a crime **or instigated, ordered, encouraged, or otherwise availed himself of the non-JCE member** to commit the crime”.<sup>2912</sup> This is nowhere to be found.

855. Finally, there is substantial evidence showing that throughout the DK, local authorities everywhere were promoting and arranging marriages between Chams who chose each other as spouses, with full knowledge of their ethnicity.<sup>2913</sup> In particular, witness You Vann (2-TCW-894) testified that, though she did not know if the arrangement of marriages between the Cham was meant to increase Cham population, she did hear from her superior Prak Yut (2-TCW-938) that “it was for the purpose of building the country”.<sup>2914</sup> This explicit and deliberate encouragement of reproduction within the Cham group by DK authorities throughout the country cannot be reconciled with any genocidal intent on their part.

<sup>2911</sup> **D427**, Closing Order, para. 1529: Alleged JCE members are “members of the Standing Committee, including Nuon Chea and Ieng Sary; members of the Central Committee including Khieu Samphan; heads of CPK Ministries, including Ieng Thirith, zone and autonomous sector secretaries, and the heads of the Party Centre military divisions”.

<sup>2912</sup> ICTY, *Krajišnik Appeals Judgement*, para. 226; *Brđanin Appeals Judgement*, para. 410.

<sup>2913</sup> *E.g.* **E1/380.1**, Prak Yut (2-TCW-938), T. 21 Jan 2016, p. 61, lns 9-25; **E1/377.1**, You Vann (2-TCW-894), T. 18 Jan 2016, p. 33, ln. 18 to p. 34, ln. 16, p. 39, lns 4-5, p. 56, ln. 16 to p. 57, ln. 11; **E1/375.1**, Ahmad Sofiyah, T. 13 Jan 2016, p. 74, ln. 14 to p. 75, ln. 3, p. 100, lns 4-10; **E1/350.1**, Him Man, T. 28 Sep 2015, p. 16, lns 4-8, 17-22; **E3/6035A**, ‘Victim Supplementary Information of Mat Mousa’, ERN 00858208; **E3/5255**, ‘WRI of Au Hau’, ERN 00250047.

<sup>2914</sup> **E1/377.1**, You Vann (2-TCW-894), T. 18 Jan 2016, p. 37, ln. 22 to p. 38, ln. 7.

**2. There is No Evidence that Nuon Chea Intended to Destroy, Exterminate or Persecute Members of the Cham or Vietnamese Groups**

856. In any event, there is nothing in the evidence pointing to Nuon Chea having and sharing the intent to destroy, discriminate, exterminate or otherwise target the Cham or Vietnamese people, as discussed below. A finding of guilt is therefore precluded.

**(a) Nuon Chea Never Held any Criminal Intent Towards the Cham**

857. When discussing Nuon Chea's participation in the common purpose and in particular his intent regarding the Cham, the Closing Order refers to Nuon Chea's position as Deputy Secretary and full-rights member of the Standing Committee. It particularly affirms that he was one of the superiors of Ke Pauk, who supposedly "implemented the CPK policy against the Cham community in the Central (Old North) Zone between 1977 and 1979".<sup>2915</sup> Nonetheless, there is no evidence that such policy existed or that Ke Pauk was involved in it. There is nothing in the live evidence linking Ke Pauk to the alleged crimes on the ground, nor is there any evidence linking him to Nuon Chea.<sup>2916</sup> The mere fact that Nuon Chea may have been, in theory, his superior, does not establish beyond reasonable doubt that Nuon Chea had effective control over him or knowledge about his actions.

858. The Closing Order also refers to a May 1975 conference where Pol Pot and Nuon Chea allegedly presented policies which included the abolition of all religions deemed reactionary.<sup>2917</sup> However, no evidence supports the allegation that Islam was considered reactionary – in fact, such a statement is a far-reaching extrapolation of the existing evidence at the time as none of the sources cited in the Closing Order, taken alone or together, support such allegation. In his WRI, Sao Sarun talked about a three-day meeting at the Cambodian-Soviet friendship school "about four-ten days after the 17<sup>th</sup> April 1975", where Nuon Chea and Pol pot made the opening sessions. He makes no mention of the abolition of religion; instead, he stated that Nuon Chea and Pol Pot "talked about political matters, cooperative organization, currency prohibition, market and monastery closings and stated that they would be reopened in the future."<sup>2918</sup> In his testimony in Case 002/01, he said that he did not hear anything about the Cham during this meeting.<sup>2919</sup> Sao Sarun said nothing about religion or Cham when he testified

<sup>2915</sup> D427, Closing Order, para. 979.

<sup>2916</sup> See *supra*, Chapter 5-II-C-1-(a) and Chapter 5-II-C-1-(c)-(ii).

<sup>2917</sup> D427, Closing Order, para. 980, citing to E3/367, 'WRI of Sao Sarun', E3/7821, 'DC-Cam Statement of Math Ly', 27 Mar 2000, & E3/1822, Ysa Osman, 'Oukoubah'.

<sup>2918</sup> E3/367, 'WRI of Sao Sarun', 17 Dec 2008, ERN 00278694.

<sup>2919</sup> E1/82.1, Sao Sarun, T.6 Jun 2012, p. 66, lns 18-23.

on 29 and 30 March 2016. The Closing Order also refers to Matt Ly's DC-Cam interview, however he spoke about a May 1976 meeting to which he did not attend but was just told about, he made no mention of Nuon Chea, and merely said, after having made an extensive list of topics allegedly discussed, that "I've forgotten. Religion was also eliminated".<sup>2920</sup> One wonders how a Cham leader could forget this. In any event, this statement has minimal probative value as it constitutes out-of-court evidence of hearsay. Finally, the Closing Order refers to Osman's book, "Oukoubah", which is unreliable for the reasons stated above,<sup>2921</sup> and which in any event relies on Mat Ly's interview, which contains no mention of Nuon Chea.

859. The Closing Order refers to a 30 November 1975 telegram from Sao Phim regarding a policy to "break up" the Cham and forcibly transfer them from the East to the North Zone, and which was allegedly copied to Nuon Chea.<sup>2922</sup> As stated above, this does not constitute evidence of a discriminatory intent or of forcible transfer and in fact refers to the need to transfer the East Zone population more generally.<sup>2923</sup> Finally, the Closing Order refers to a telegram from Ke Pauk dated 2 April 1976 allegedly referring to the Cham in the North Zone and particularly in the Chamkar Leu District, as enemies.<sup>2924</sup> The document reads "[t]he enemies are former soldiers in combination with the Cham and former cooperative team chairmen".<sup>2925</sup> This does not show any discriminatory intent towards the Cham, who are not singled out. Further, the document refers to concrete actions which led to the group of individuals being called 'enemies': burning forests, destroying crops, calling for uprising. Finally, the telegram also states that the resultant measures taken were "tracking down" the problematic activities, and to arrest the individuals. What the document shows is regular and reasonable police activities, which are far from evidence of a policy to specifically kill, arrest, or otherwise discriminate against Cham as a result of their religion. In any event, the fact that Nuon Chea may have been copied on a document does not mean that he actually received it or that he agreed with its contents.<sup>2926</sup> There is simply no evidence establishing beyond reasonable doubt that Nuon Chea held any intent to destroy the Cham as a religious or ethnic group; that he intended to exterminate or persecute them; or that he in any way intended to single them out for 'targeting'.

<sup>2920</sup> **E3/7821**, 'DC-Cam Statement of Math Ly', 27 Mar 2000, ERN 00441580.

<sup>2921</sup> *See supra*, Chapter 5-II-B-2-(a).

<sup>2922</sup> **D427**, Closing Order, para. 980, *citing to* **E3/154**, 'Telegram from Chhon to Pol', 30 Nov 1975; **E3/64**, 'WRI of Shophang Norng aka Norng Sengchim'.

<sup>2923</sup> *See supra*, Chapter 5-II-D-1, on the alleged transfer of Cham.

<sup>2924</sup> **D427**, Closing Order, para. 98, referring to **E3/511**, 'Telegram from Ta Pok to Brother Pol', 2 Apr 1976.

<sup>2925</sup> **E3/952**, 'Telegram from Ta Pok to Brother Pol', 2 Apr 1976, ERN 00182658.

<sup>2926</sup> *See supra*, Chapter 5-II-C-1-(c), on certain Cham's involvement in rebellion and other illegal activities.

**(b) *Nuon Chea Never Held any Criminal Intent towards the Vietnamese***

860. The Closing Order refers to Nuon Chea's position, to his contribution to the Revolutionary Flag, Revolutionary Youth and Black Paper magazines and to speeches he allegedly made, as well as to reports he allegedly received to state that Nuon Chea had the intent to target Vietnamese as a group. Each allegation is discussed in turn below.

**(i) Nuon Chea's Alleged Contribution to Magazines and Speeches**

861. The Closing Order contains no direct or specific evidence to support the allegation that Nuon Chea intended to "target" the Vietnamese group. It refers to its alleged position,<sup>2927</sup> states that Nuon Chea "endorsed and disseminated the CPK policy to expel all the Vietnamese people in Cambodian territory" through meetings and his role in the production of the Revolutionary Flag and Revolutionary Youth magazines.<sup>2928</sup> Regarding the period of 1977 and 1978, the Closing Order alleged that Nuon Chea "provided information intended to engender fear and hatred of the Vietnamese or to otherwise win support for the targeting of this group, through his continued involvement in the production of CPK propaganda magazines and radio broadcasts."<sup>2929</sup> It also referred to the Black Paper, which Nuon Chea allegedly co-wrote, and which "also contained extracts denouncing the strategy of Vietnam to annex and swallow Cambodia together with references inciting hatred towards the Vietnamese."<sup>2930</sup> Finally, it discussed various speeches allegedly made by Nuon Chea in July and September 1978 referring to Vietnam trying to undermine the CPK, and to "crush[ing]" the Vietnamese strategy of "Indochina Federation aiming at swallowing the Kampuchea's territory and exterminating the Kampuchea's race".<sup>2931</sup> The Defence further refers to Chapter 3-III and 3-VIII in particular for a full discussion of the complex relations between DK and Vietnam. In any event, and as discussed above, however, even if such language could be considered inflammatory, in the specific historical context, it is insufficient to establish genocidal intent.<sup>2932</sup>

862. There is no credible evidence of Nuon Chea making any comment, speech or publication expressing any intention to destroy the Vietnamese group. To the contrary, the CPK documents to which he allegedly contributed called for peace with the Vietnamese people and forgiveness

<sup>2927</sup> D427, Closing Order, para. 982.

<sup>2928</sup> D427, Closing Order, para. 984.

<sup>2929</sup> D427, Closing Order, para. 984.

<sup>2930</sup> D427, Closing Order, para. 984.

<sup>2931</sup> D427, Closing Order, para. 985.

<sup>2932</sup> See *supra*, Chapter 5-II-C-2-(a)-(iii), on the use of the term 'Yvon'.

of enemies.<sup>2933</sup> All the Co-Prosecutors could find during the key documents hearing was his statement in Gina Chon and Thet Sambath's book, *Behind the Killing Fields* referring to traitors and internal enemies.<sup>2934</sup> Nonetheless in the same excerpt, Nuon Chea is quoted as having told “[i]f we had a policy to kill all the people then why did we struggle to liberate the country? Why did we try to make rice for the people and reconstruct the nation? It is impossible that we would build a house and then destroy our own home.”<sup>2935</sup> There is nothing which comes close to a genocidal statement.

(ii) Alleged Reporting to Nuon Chea

863. The Closing Order further alleges that “Nuon Chea was kept apprised by the zones and military commanders of the implementation of the CPK policy to kill members of the Vietnamese community”<sup>2936</sup> As briefly discussed above, all reporting allegedly made to Nuon Chea referred to Vietnamese soldiers and not civilians. There is, in any event, no evidence that Nuon Chea actually received, reviewed or approved the reports. Similarly, there is no evidence that Nuon Chea ever issued any response or order following these alleged reports, and in an case, documentary evidence alone is insufficient to establish beyond reasonable doubt a key element of the crime of genocide, namely the genocidal intent. The same applies for alleged reports regarding the arrest of Vietnamese soldiers and civilians arrested in or near the conflict zone on the border with Vietnam.<sup>2937</sup>

**G. OTHER CRIMES FOR THE ALLEGED ‘TARGETING’ OF CHAM AND VIETNAMESE**

864. As set out in Chapter 4-VI-G-1, the Co-Prosecutors have failed to established the necessary chapeau element for crimes against humanity, namely that there was a ‘discriminatory’ attack. Therefore, no crime against humanity can be established – including rape and other inhumane acts – at all. Even if they could, as explained above in Parts D and E, the evidence regarding the “treatment” of Cham and Vietnamese is limited to small locations and is vague, incomplete, unsubstantiated, or amounts to hearsay. As held by the Supreme Court Chamber, an Accused should not be convicted merely on the basis of widespread rumours;<sup>2938</sup> rather, each constitutive element of each crime must be established beyond reasonable

<sup>2933</sup> See *infra*, Chapter 5-II-C-2-(c), on the DK calling for friendship with Vietnam in 1978.

<sup>2934</sup> E3/4202, Chon and Sambath, *Behind the Killing Fields*, ERN 00757520.

<sup>2935</sup> E3/4202, Chon and Sambath, *Behind the Killing Fields*, ERN 00757520; see also *supra*, Chapter 3.

<sup>2936</sup> D427, Closing Order, para. 986.

<sup>2937</sup> D427, Closing Order, paras 988-990.

<sup>2938</sup> F36, Case 002/01 Appeals Judgement, para. 419.

doubt.<sup>2939</sup> For crimes allegedly to affect a large number of persons, such as extermination, it must be kept in mind that “the overall conclusion that murder occurred cannot be said to have been established beyond a reasonable doubt if none of the specific instances that underpin that conclusion has been established to this standard.”<sup>2940</sup> This Part discusses the crimes of murder, torture, arbitrary imprisonment, and extermination, and the allegations of political, racial and religious persecution. Finally, the residual crime of ‘other inhumane acts’ is briefly mentioned.

## **1. The Crimes of Murder, Torture and Arbitrary Imprisonment Are Not Established**

### **(a) *There is No Proof of Murder, Torture or Arbitrary Imprisonment of the Cham***

865. Regarding the charge of murder, there is no evidence beyond reasonable doubt that any Cham individuals were killed at Wat Au Trakuon or Trea Village Security Centres.<sup>2941</sup> A conviction cannot therefore be sustained. As to the charge of torture, there is no evidence beyond reasonable doubt that any Cham detainees at these two Security Centres were subjected to treatment or conditions intended to bring about and resulted in severe physical and/or mental harm. In respect of the charge of imprisonment, firstly, the reasons for the arrest or detention of any Cham individuals at the two Security Centres cannot be established beyond reasonable doubt and the benefit of the doubt as to whether the deprivation of liberty had legal basis lies with Nuon Chea in accordance with the principle of *in dubio pro reo* (i.e., when in doubt, for the accused). Given the evidence that many Cham individuals were involved in rebellion movements or other illegal activities, and given the overwhelming evidence<sup>2942</sup> that only those who were involved in wrongful activities were subjected to security measures depending on the nature and gravity of their activities, the evidence as a whole favours the inference that the alleged arrests and detentions in fact had a legal basis. At the very least, this is a perfectly reasonable conclusion from the totality of the evidence, and it therefore prevents a finding beyond reasonable doubt that Cham were arrested on the basis of their ethnicity.

866. Secondly, as to the due process aspect of the “arbitrary” element of the crime of imprisonment, international law allows far-reaching derogations from it in times of public emergency threatening the life of a nation.<sup>2943</sup> As discussed above in Chapter 3 of this Brief,

<sup>2939</sup> F36, Case 002/01 Appeals Judgement, para. 418.

<sup>2940</sup> F36, Case 002/01 Appeals Judgement, para. 420.

<sup>2941</sup> See *supra*, Chapter 5-II-D.

<sup>2942</sup> Including that of Prak Yut (2-TCW-938), You Vann (2-TCW-894), Ban Seak, Sales Ahmat, and Him Man.

<sup>2943</sup> See *supra*, Chapter 4-VI-A-1.

the DK was facing serious internal and external threats to the life of the nation. For instance, organised rebellion movements were carrying out relentless acts of sabotage and subversive activities throughout the country. Given such circumstances, derogations from certain due process measures such as informing people of the reasons for their arrest and providing them with the chance to have the arrest and detention reviewed by an independent judicial body, *etc.*, are justified.

**(b) *There is No Proof of Murder, Torture or Arbitrary Imprisonment of the Vietnamese***

867. Regarding the crime of murder, the Defence submits that there is very little direct evidence that people were actually killed. Most witnesses testified that people were “taken away” and they assumed that they were killed, as discussed in the factual part of the present section.<sup>2944</sup> This does not constitute proof beyond reasonable doubt, as stated by the Supreme Court’s Chamber, which held that each specific instance of killing must be proved beyond reasonable doubt.<sup>2945</sup> This is not the case here. Regarding torture and imprisonment, no detailed evidence was heard, but only general, vague and unsubstantiated statements which do not establish any of the constitutive elements of the crimes beyond reasonable doubt.<sup>2946</sup>

**2. Nothing in the Evidence Fulfils the Constitutive Elements of Extermination**

868. The existence of killings on a massive scale is an element of the crime of extermination.<sup>2947</sup> As held by the Supreme Court Chamber:

in order to sustain an overall finding that killings occurred beyond reasonable doubt, specific instances of killing must be proved beyond reasonable doubt, irrespective of whether a specific conviction for murder for each instance has been entered.<sup>2948</sup>

869. Extermination is also a specific intent crime, as the perpetrator must intend to kill on a massive scale<sup>2949</sup> and *dolus eventualis* is specifically excluded as insufficient.<sup>2950</sup> As a preliminary note, the Defence submits that most arguments related to the crime of genocide contained in Part F apply *mutatis mutandis* to the crime of extermination.

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<sup>2944</sup> See *supra*, Chapter 5-II-E-4.

<sup>2945</sup> F36, Case 002/01 Appeals Judgement, para. 420.

<sup>2946</sup> See also *supra*, Chapter 5-II-D and Chapter 5-II-E.

<sup>2947</sup> F36, Case 002/01 Appeals Judgement, para. 510.

<sup>2948</sup> F36, Case 002/01 Appeals Judgement, para. 420.

<sup>2949</sup> F36, Case 002/01 Appeals Judgement, para. 510.

<sup>2950</sup> F36, Case 002/01 Appeals Judgement, para. 522.



**(a) *There is No Evidence of the Crime of Extermination Regarding the Cham***

870. There is no evidence beyond reasonable doubt that any Cham were killed at Wat Au Trakuon or Trea Village Security Centres. In addition, there is little evidence on the detention conditions in the two centres, and no evidence at all that any Cham individual died of the conditions. Further, there is no evidence linking the remains allegedly discovered from the vicinity of the centres to the DK period, or any evidence that any of those buried there were Cham. As to the transfer of Cham population in late 1975, there is no evidence that death occurred on a large scale during the transfer. Based on the scarce evidence on the conditions during the transfer, means of transportation were provided, and the people were asked to bring their personal belongings. There is no evidence beyond reasonable doubt that any Cham died during the transfer due to the conditions.

871. As to the *mens rea*, firstly, there is no evidence beyond reasonable doubt that Nuon Chea or any of the physical perpetrators held the specific intent to kill the Cham on a large scale at Wat Au Trakuon or Trea Village Security Centres, especially given the evidence that release of prisoners took place at both centres. There is similarly no evidence beyond reasonable doubt that the specific intent to kill on a large scale existed in the case of the transfer of the Cham in late 1975. As clearly demonstrated in the 1975 telegram about the transfer of the Cham residents along the Mekong River, the aim of the transfer was to ease the tension by dispersing the population, not by killing them.<sup>2951</sup> Whether death on a large scale during the transfer can be reasonably foreseen is irrelevant because *dolus eventualis* is insufficient for specific intent crimes.<sup>2952</sup> In any event, there is no evidence that the physical perpetrators held any intent to kill on a large scale. Even if there were, there is no evidence that such intent was shared by Nuon Chea, or that he was aware of it. On the contrary, the evidence shows that Nuon Chea wanted to “hold hands in peace” with the Vietnamese people.<sup>2953</sup> Absence such *mens rea*, a conviction is precluded.

**(b) *There is No Evidence of the Crime of Extermination Regarding the Vietnamese***

872. In the absence of proof beyond reasonable doubt that more than a couple of murders took place against members of the Vietnamese group, one of the most essential elements of the crime of extermination is not met. In any event, there is no evidence that the physical

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<sup>2951</sup> E3/154, Telegram from Chhon to Pol, 30 Nov 1975.

<sup>2952</sup> F36, Case 002/01 Appeals Judgement, para. 522.

<sup>2953</sup> See *supra*, Chapter 5-II-F, on Nuon Chea’s lack of intent.

perpetrators held any intent to kill on a large scale. Even if there were, there is no evidence that such intent was shared by Nuon Chea, or that he was aware of it. On the contrary, what the evidence shows is that Nuon Chea wanted to “hold hands in peace” with the Vietnamese people.<sup>2954</sup> In the absence of such *mens rea*, a conviction is precluded.

### 3. The Evidence Does Not Establish the Crime of Persecution

873. In order to establish the crime of persecution beyond reasonable doubt, an act or omission took place, which denies or infringes upon a fundamental right laid down in international customary or treaty law, and which was carried out deliberately with the intention to discriminate.<sup>2955</sup> The victim must have been targeted because of his or her membership in a group on a political, religious or racial basis.<sup>2956</sup> The acts or omissions of the perpetrator must discriminate in fact: a demonstration of actual discriminatory consequences is required.<sup>2957</sup> In order to satisfy the requisite *mens rea*, the perpetrator must have intended to discriminate.<sup>2958</sup> *Dolus eventualis* is insufficient: there must be a specific intent to “cause injury to a human being because he belongs to a particular community or group”.<sup>2959</sup> Further, the existence of this specific discriminatory intent cannot be inferred “simply by looking to the general discriminatory nature of a broader attack”.<sup>2960</sup> Therefore, whether the alleged acts may have unintended discriminatory impact on the Cham is irrelevant for the charge of persecution; what matters is that this impact was not directly desired by the physical perpetrator(s) and Nuon Chea. None of the constitutive elements of the crimes of political, racial, and religious persecution is met, as discussed below.

#### (a) Cham Were Not Persecuted as a Result of Their Political Beliefs

874. As demonstrated above, the evidence cannot prove beyond reasonable doubt that the Cham people transferred in late 1975 were targeted because of their political affiliation.<sup>2961</sup> On the contrary, the transfer was likely aimed at easing tensions caused by inadequate resources – part of a general measure imposed on all parts of the DK population indiscriminately – or at

<sup>2954</sup> See *supra*, Chapter 5-II-F, on Nuon Chea’s lack of intent.

<sup>2955</sup> F36, Case 002/01 Appeals Judgement, para. 667; Case 001, F28, Appeals Judgement, para. 226.

<sup>2956</sup> F36, Case 002/01 Appeals Judgement, para. 667.

<sup>2957</sup> Case 001, F28, Appeals Judgement, para. 267.

<sup>2958</sup> F36, Case 002/01 Appeals Judgement, para. 667; Case 001, F28, Appeals Judgement, 3 Feb 2012, para. 267; see also ICTR, *Nahimana et al.* Appeals Judgement, para. 985; ICTY, *Deronjić* Appeals Judgement, para. 109; *Kvočka et al.* Appeals Judgement, para 320.

<sup>2959</sup> Case 001, F28, Appeals Judgement, paras 229, 240; see also ICTY, *Stakić* Appeals Judgement, para. 329.

<sup>2960</sup> Case 001, F28, Appeals Judgement, paras 229, 240.

<sup>2961</sup> See *supra*, Chapter 5-II-D.

preventing further public disorder. Even if the transfer was aimed at protecting public order, there is no evidence that the Cham population transferred because of their political beliefs. There is no evidence that they were considered political opponents by the DK government, nor that the transfer was imposed on those Cham because they were perceived as opponents.

875. There is no evidence supporting that any measures which may have been taken against Cham people were grounded or related to their political beliefs. There was also no such thing as a suppression of Cham culture, as mentioned above. Any measure which may have adversely affected members of the Cham group was part of general measures equally applied to all DK citizens, without any discriminatory intent. Similarly, there is no evidence that any alleged security measures were applied differently between Cham and Khmer individuals when they were involved in comparable activities. In addition, evidence shows that where members of the Cham group were investigated, arrested and detained, it was exclusively on the basis of their suspected engagement in unlawful activities such as treason and espionage.<sup>2962</sup> Being suspected or involved in unlawful activities, or activities threatening national security, such as treason or espionage, does not qualify as holding a particular political belief. It is simply a criminal act, irrespective of the political views of the person who commits it. Investigating, arresting or detaining individuals suspected of having committed such actions does not constitute discrimination in fact, but regular police operations. Finally, there is also no evidence that the alleged physical perpetrators held any discriminatory intent. Even if there were, there is no evidence that such intent was shared by Nuon Chea, or that he was even aware of it. In the absence of such *mens rea*, a conviction is precluded.

**(b) Vietnamese Were Not Persecuted as a Result of Their Race**

876. None of the witnesses or civil parties gave credible evidence that any of the crimes which they witnessed or heard about were linked to the fact that the alleged victim(s) belonged to the Vietnamese race.<sup>2963</sup> In fact, there is no evidence that certain measures targeting only members of the Vietnamese group were put into place. If individuals who happened to belong to the Vietnamese group were investigated or arrested, it was on an individual basis and as a result of their individual actions, just like every DK citizen.<sup>2964</sup>

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<sup>2962</sup> See *supra*, Chapter 5-II-C-1-(c).

<sup>2963</sup> See *supra*, Chapter 5-II-E; see also *supra*, Chapter 4-II.

<sup>2964</sup> See *supra*, Chapter 5-II-E; see also *supra*, Chapter 4-II.

877. Further, in order to fulfil the *mens rea* of persecution, the alleged perpetrator must intend to racially discriminate.<sup>2965</sup> There is no evidence supporting that measures taken against members of the Vietnamese group were grounded or related to their race. Instead, evidence shows that members of the Vietnamese group were arrested and detained exclusively on the basis of their suspected engagement in unlawful activities such as treason and espionage.<sup>2966</sup> There is no evidence that the physical perpetrators held any discriminatory intent. Even if there were, there is no evidence that such intent was shared by Nuon Chea, or that he was aware of it. On the contrary, what the evidence shows is that Nuon Chea wanted to “hold hands in peace” with the Vietnamese people.<sup>2967</sup> In the absence of such *mens rea*, a conviction is precluded.

**(c) Cham Were Not Persecuted as a Result of their Religious Beliefs**

878. In order to establish the crime of religious persecution, a demonstration of actual discriminatory consequences is required.<sup>2968</sup> These do not exist here: Cham were treated like every citizen under DK, no more, no less. Furthermore, there must be a violation of a fundamental right under customary international law which must reach the same level of gravity as other crimes against humanity. However, there was no such thing as an absolute right to manifest one’s religion in 1975-1979. There was therefore no violation of a fundamental right. Even if there were, the facts – if the evidence was considered credible (which the Defence vehemently contests) – do not reach the requisite level of gravity to qualify as a crime against humanity. Finally, if it was found that a fundamental right was infringed upon with sufficient gravity, a conviction is still precluded as nothing in the evidence permits a finding beyond reasonable doubt that the physical perpetrators and Nuon Chea held the requisite specific *mens rea* to discriminate against Cham people.

**(i) No Discrimination in Fact**

879. Even if the Chamber were to find that the transfer was primarily directed at the Cham population along the Mekong River, the responsive and preventive measure of transfer were not discriminatory in fact, because the different treatment properly corresponded to the different extent of the involvement of the people in unlawful activities.<sup>2969</sup> Evidence also shows that members of the Cham group were arrested and detained exclusively on the basis of their

<sup>2965</sup> F36, Case 002/01 Appeals Judgement, para. 667; *see supra*, Chapter 5-II-E.

<sup>2966</sup> *See supra*, Chapter 5-II-E.

<sup>2967</sup> *See supra*, Chapter 5-II-F.

<sup>2968</sup> Case 001, F28, Appeals Judgement, para. 267.

<sup>2969</sup> ECtHR, *Ireland v. UK*, paras 228-232; ECtHR, *Kafkaris v. Cyprus*, para. 161; *see also supra*, Chapter 5-II-D and Chapter 5-VI-A-1.

suspected engagement in unlawful activities such as treason and espionage.<sup>2970</sup> As to the alleged suppression of the Cham culture by forcing the Cham to eat pork and to cut their hair short, prohibiting traditional clothes and language, *etc.*, those measures were generally applied to all DK citizens regardless of their religious identity, and for reasons unrelated to religion. There was simply no discrimination in fact.

(ii) No Violation of Fundamental Rights under Customary International Law

880. There is a clear distinction in international human rights law between the freedom of religion as such, which can never be curtailed, and the freedom to manifest religion, which can be derogated from.<sup>2971</sup> Ritual ceremonies, the building of places of worship or the display of religious symbols are part of the freedom to manifest one's religion.<sup>2972</sup>

881. Secularism is at the cornerstone of Marxist-Leninism. At the time of the alleged crimes against Cham, there were about 23 communist countries<sup>2973</sup> comprising a significant part of the world's population. In all, the exercise of religion was restricted one way or another. This included, for example, countries as diverse as Afghanistan,<sup>2974</sup> Angola,<sup>2975</sup> Laos,<sup>2976</sup> Mongolia,<sup>2977</sup> Romania,<sup>2978</sup> the Soviet Union,<sup>2979</sup> Vietnam<sup>2980</sup> and Yugoslavia.<sup>2981</sup> At the stage the world was in 1975-1979, there was no state practice ("*usus*") or belief that the practice to limit certain manifestations of religion ("*opinio juris sive necessitates*") constituted a crime, let alone an international crime or a crime against humanity. As a result, the right to manifest one's religion did not form part of customary international law and any restriction of it under DK cannot be considered to amount to religious persecution as a crime against humanity.

882. Restrictions on the manifestations of the right to religion are not limited to communist countries or to the 1970s either. France, which is well known for its secularism, has recently enforced a number of measures which directly 'targeted' Muslims' rights to exercise their

<sup>2970</sup> See *supra*, Chapter 5-II-C-1-(c).

<sup>2971</sup> ICCPR, Art. 18(3); HRC General Comment 22, para. 3.

<sup>2972</sup> HRC General Comment 22, para. 4.

<sup>2973</sup> Mirilovic, Regime Type, Security and the Politics of Migration, *citing to* Janos Kornai, The Socialist System: The Political Economy of Communism, p. 60.

<sup>2974</sup> Yahya, Communism in Ambush, p. 78.

<sup>2975</sup> Haynes, Religious Transnational Actors and Soft Power, p. 46.

<sup>2976</sup> Worldmark Encyclopedia of Nations, Laos, Religion.

<sup>2977</sup> New World Encyclopedia, Mongolia, Religion.

<sup>2978</sup> Leustean, Constructing Communism in the Romanian People's Republic, pp. 303-329.

<sup>2979</sup> Ramet Religious Policy in the Soviet Union, pp. 20-21.

<sup>2980</sup> Worldmark Encyclopedia of Nations, Vietnam, Religion.

<sup>2981</sup> Keys, A Time of Transition for Religion in Yugoslavia, p. 3.

religion from the prohibition of wearing certain religious outfits,<sup>2982</sup> to exercising their right to pray<sup>2983</sup> and the closure of certain mosques.<sup>2984</sup> France has been alleged to be guilty of religious persecution but the European Court of Human Rights has ruled that while there were indeed restrictions on the right to practice one's religion, they were justified by the need for public order and security as well as by the protection of the rights and freedoms of others.<sup>2985</sup> As recently as January 2017, it held that the interests of a successful social integration could take precedence over certain expressions of the right to manifest one's religion.<sup>2986</sup> In March 2017, the European Court of Justice held that the prohibition on wearing any political, philosophical or religious sign in the workplace, including the hijab, may be objectively justified by a legitimate aim, such as the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious neutrality.<sup>2987</sup> Even human rights law permits derogations to the right to manifest one's religion in times of emergency.<sup>2988</sup>

883. On the basis of the above, it is impossible to consider that restricting certain religious activities constituted a crime against humanity back in 1975-1979 in light of customary international law. On the contrary, it is clear that in respect of human rights law, derogations were justified as a result of the emergency situation DK was under at the time.<sup>2989</sup> Therefore, any action which may have been taken and which restricted the religious freedoms of Cham people did not constitute a crime under customary international law. Therefore, Nuon Chea cannot be convicted for it without violating the principle of non-retroactivity. Even if they were established beyond reasonable doubt, there is no evidence that the acts allegedly impacting Cham's religious freedom reached the requisite level of gravity to constitute a crime against humanity, as discussed below.

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<sup>2982</sup> Independent, *Why France Thinks the Burkini is an Attack on Secularism*.

<sup>2983</sup> Le Figaro, *L'Interdiction des Prières de Rue Globalement Respectée*; Al Jazeera, *Is France Still a Secular State?*.

<sup>2984</sup> Le Monde, *Fermeture de Quatre Mosquées Considérées comme Lieux de Référence pour la Mouance Salafiste*.

<sup>2985</sup> ECtHR, *S.A.S v. France*, paras 140-142; *see also Leyla Sahin v. Turkey*, paras 157-158; *Osmanoğlu et Kocabaş c. Suisse; Dahlab v. Switzerland*; *see also ICCPR*, Art. 18(3); HRC Comment 22, para. 8; ECHR, Art. 9.2; *see further*, more generally on derogations, *Aksoy v. Turkey*.

<sup>2986</sup> ECtHR, *Osmanoğlu et Kocabaş c. Suisse*, paras 94-99, 105.

<sup>2987</sup> ECJ, *Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* Judgement.

<sup>2988</sup> ICCPR, Art. 18 (3); HRC General Comment 22, para. 3.

<sup>2989</sup> *See supra*, Chapter 3, Chapter 4-VI-A.

(iii) Insufficient Level of Gravity for a Crime Against Humanity

884. Acts or omissions, to be found to constitute the crime of persecution, must reach the same level of gravity as other crimes against humanity.<sup>2990</sup> As held by the ICTY, “not every denial of a fundamental human right is serious enough to constitute a crime against humanity”.<sup>2991</sup> As demonstrated above, there is no evidence that Cham were killed or otherwise mistreated as a result of their religious beliefs, nor is there any credible evidence that they were arbitrarily arrested. Having to eat pork, to cut one’s hair or to wear a certain type of clothes, or being unable to undertake a religious ceremony, while perhaps regrettable, whether taken alone or together does not reach the same level of gravity as extermination, imprisonment, torture or rape. The crime against humanity of religious persecution cannot therefore be established.

(iv) No Evidence of the Requisite *Mens Rea*

885. Regarding the charges of religious persecution in relation to the movement of population (Phase 2), there is no evidence that any physical perpetrators or Nuon Chea had the specific intent to discriminate on religious grounds. Rather, it was simply a police operation. Likewise, with regards to the other alleged underlying acts to the crime of religious persecution, there is no evidence that the physical perpetrators held any discriminatory intent. Even if the physical perpetrator did have the requisite specific discriminatory intent, there is no evidence that such intent was shared by Nuon Chea, or that he was even aware of it. In the absence of such *mens rea*, a conviction is precluded.

#### **4. No Conviction is Possible Under ‘Other Inhumane Acts’**

886. The Supreme Court Chamber held that at the relevant time enforced disappearance, forced transfer, and attacks on human dignity had not yet crystallised as separate and discrete crimes against humanity, unlike within the category of other inhumane acts.<sup>2992</sup> The Chamber, therefore, needs to consider the circumstances as a whole in determining whether crimes against humanity of other inhumane acts were committed, instead of looking into each of the conduct separately.<sup>2993</sup> In particular, specific attention must be drawn as to whether the established facts

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<sup>2990</sup> *Case 001*, **F28**, Appeals Judgement, 3 Feb 2012, paras 257, 261; **F36**, Case 002/01 Appeals Judgement, para. 586; ICTY, *Kordić & Čerkez* Appeals Judgement, para. 102, 671; *Kvočka et al.* Appeals Judgement, para. 321; ICTR, *Nahimana et al.* Appeals Judgement, para. 987.

<sup>2991</sup> ICTY, *Kordić & Čerkez* Appeals Judgement, para. 102.

<sup>2992</sup> **F36**, Case 002/01 Appeals Judgement, para. 589.

<sup>2993</sup> **F36**, Case 002/01 Appeals Judgement, para. 590.

reach the level of gravity of other crimes against humanity.<sup>2994</sup> As it clear from the above, this is not the case here.

#### H. JCE I IN RESPECT OF THE ALLEGED ‘TARGETING’ OF CHAM AND VIETNAMESE

887. The Defence now esdiscuss the primary alleged mode of liability regarding the alleged ‘targeting’ policies against the Cham and Vietnamese. As for other sections of this brief, the other modes of liability are discussed in Chapter 8. The present Section focuses on the “specific intent crimes”, namely genocide, persecution and extermination, but the arguments equally apply to the additionally charged crimes, *i.e.*, murder, torture, imprisonment, and other inhumane acts. As stated above in Part C, there is no evidence that a policy existed aiming to target the Vietnamese group, as a result of their ethnicity, nationality or race. As a result, a key constitutive element of the mode of liability of JCE cannot be established, for there is no common purpose. A conviction cannot be sustained. Further, there is no evidence that any of the alleged crimes can be attributed to any of the alleged JCE members, for no evidence was heard about it.

888. In any event, where JCE is charged, it must be demonstrated that all of its alleged members shared the specific genocidal intent (for genocide), discriminatory intent (for persecution) or the intent to kill on a mass scale (for extermination).<sup>2995</sup> as stated above in Chapter 3-IX, it is impossible to find that the alleged JCE members acted in concert, even more so when the question of Vietnamese is concerned, as many were actually part of an internal rebellion, to which Vietnam was closely associated.<sup>2996</sup> In any event, the applicable law is unequivocal: in the case of specific intent crimes such as genocide (specific intent to destroy), extermination (specific intent to kill on a large scale) and racial persecution (specific discriminatory intent on the basis of race), each member of the JCE must individually share the specific intent, which must also be possessed by the person who actually committed the crime.<sup>2997</sup> None of the requirements are satisfied here.

889. Regarding the crime of genocide in particular, the Closing Order alleges that the genocide against the Vietnamese became part of the JCE in April 1977 and the one against the Cham in 1977, and that Nuon Chea’s acceptance of this greater range of criminal means,

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<sup>2994</sup> F36, Case 002/01 Appeals Judgement, para. 586.

<sup>2995</sup> ICTY, *Krstić* Trial Judgement, para. 549; *Krstić* Appeals Judgement, paras 83, 98, 100, 104, 129, 130, 134; *Kordić & Čerkez* Trial Judgement, para. 220.

<sup>2996</sup> See *supra*, Chapter 3-IX.

<sup>2997</sup> ICTY, *Brđanin* Trial Judgement, para. 708.



coupled with persistence in implementation, amounted to an intent to pursue the common purpose through genocide.<sup>2998</sup> In such a situation, a key element is that all JCE members agree to the expansion of means to achieve the JCE. The Chamber is required to make findings on: (i) whether leading members of the JCE were informed of the crimes; (ii) whether they did nothing to prevent their recurrence and persisted in the implementation of this expansion of the common objective; and, (iii) when the expanded crimes became incorporated into the common objective.<sup>2999</sup> This was not established here.

890. As stated above, there is no evidence that the leading JCE members knew about the crimes on the ground – assuming they took place – as the reporting which was made related to the death of legitimate military targets, namely soldiers and civilians taking an active part in hostilities, or who were otherwise committing crimes. Similarly, the persistence of the implementation of the expanded common objective is not established, as it was never there to start with. When examining the evidence objectively, a finding that all JCE members shared a genocidal intent cannot be established beyond reasonable doubt, as a significant portion of these said members were actually collaborating with Vietnam.<sup>3000</sup> In the absence of these two key elements, it is impossible to find that the existing JCE expanded to include the crime of genocide. In any event, the Chamber must also find beyond any reasonable doubt that all JCE members shared the same specific intent to destroy the Cham as an ethnic and religious group, and the Vietnamese as an ethnic, national or racial group. As mentioned earlier, the evidence precludes such a finding.

#### **I. CONCLUSION ON THE ALLEGED ‘TARGETING’ OF CHAM AND VIETNAMESE, INCLUDING THROUGH GENOCIDE**

891. Since the end of the 1970s, the term genocide has been closely associated with the history of Cambodia. For many Cambodians, the actions undertaken by the DK towards the Khmer people is referred to as “*prolai pouch-sas*”: genocide.<sup>3001</sup> Scholars have extensively debated whether or not what happened to the Khmer people in Cambodia was or could be qualified as a genocide.<sup>3002</sup> Genocide is often seen as “the crime of crimes”, and its gravity “is reflected in the stringent requirements which must be satisfied before this conviction is

<sup>2998</sup> **D427**, Closing Order, para. 1527.

<sup>2999</sup> ICTY, *Krajišnik* Appeals Judgement, para. 171.

<sup>3000</sup> See *supra*, Chapter 3-IX and Chapter 3 generally.

<sup>3001</sup> **E367/4.1.13**, New York Review of Books, The Genocide That Wasn’t, ERN 01199619 (*see also infra*, Chapter 9 and **Annex 1**).

<sup>3002</sup> See **E367/4.1.13**, New York Review of Books, The Genocide that Wasn’t.

imposed”.<sup>3003</sup> No matter how tempting it is to create a legacy as the “Chamber who established the Cambodian genocide”, one must be cautious and resist the urge to convict Nuon Chea of genocide without proper legal basis. The Chamber must instead fulfil its judicial role, making legal determinations based on evidence, not politics.

892. The evidence on the facts but also at the policy level does not support a finding that the Cham or the Vietnamese were targeted as a group, nor does it support a finding that Nuon Chea ever had the goal to destroy the Cham or Vietnamese ethnicity, nationality or race nor to otherwise exterminate, discriminate or mistreat them. The evidence does not merely create a doubt as to whether there was in fact a policy to target and later exterminate the Cham or Vietnamese group; it shows unequivocally that there was never such policy. As demonstrated in the below, the same applies to the ‘targeting’ of Buddhists (Section IV) and of former Khmer Republic soldiers and officials (Section V).

### III. THE ALLEGED ‘TARGETING’ OF BUDDHISTS

#### A. INTRODUCTION

893. According to the Closing Order, the DK had a policy of ‘targeting’ specific groups, including “Buddhists”, between 17 April 1975 and until at least 6 January 1979.<sup>3004</sup> It alleges that the policy included the prohibition of Buddhism and of the practice of Buddhism, that “many pagodas and sanctuaries were destroyed or converted for other purposes such as security centres, pig pens, dining halls, hospitals or warehouses” that images of Buddha were destroyed and that “even lighting incense was prohibited”.<sup>3005</sup> The Closing Order also affirms that the CPK “incited hatred of monks and nuns”, and “disseminated propaganda about monks being parasites, blood-sucking parasitic worms, tapeworms and leeches”.<sup>3006</sup> Finally, it referred to the fact that “[v]irtually all Buddhist monks and nuns were disrobed”, some under threat and forced to do manual labour or farming.<sup>3007</sup> It also refers to one monk being “forced” to marry under alleged threat of death.<sup>3008</sup> Nuon Chea is therefore charged with, *inter alia*, murder, religious persecution and forced marriage as other inhumane act against Buddhists.<sup>3009</sup>

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<sup>3003</sup> ICTY, *Krstić* Appeals Judgement, para. 37.

<sup>3004</sup> D427, Closing Order, paras 157-158, 210; *see also supra*, Chapter 5-I.

<sup>3005</sup> D427, Closing Order, para. 740.

<sup>3006</sup> D427, Closing Order, para. 740.

<sup>3007</sup> D427, Closing Order, para. 741, *see also* paras 210, 1421.

<sup>3008</sup> D427, Closing Order, para. 741.

<sup>3009</sup> D427, Closing Order, paras 1373, 1421.

894. As discussed below in Part B, there is nothing in the evidence to directly or indirectly support the existence of such allegations. In particular, there is no credible evidence of monks being killed as a result of being Buddhist, nor is there any reliable evidence of propaganda calling for hatred of monks. General statements such as “all monks were disrobed” and “religion was prohibited”, without further specific details, do not suffice to establish beyond reasonable doubt that this was actually the case, let alone that the DK had a policy doing so, as discussed in Part C. As held by the Supreme Court Chamber, and reiterated many times in the present Brief, a finding that “a multiplicity of evidentiary items [...] add[ing] up to meet the burden of proof beyond reasonable doubt by virtue of their sheer number, irrespective of their probative value [...] would mean that an accused could be convicted merely on the basis of widespread rumours.”<sup>3010</sup> Part D shows that there is no evidence permitting a finding that acts of murder, religious persecution, or forced marriage took place against Buddhist monks.<sup>3011</sup> Any actions that Buddhist monks and other Buddhists were subjected to, such as the requirement to work, were applied to all DK citizens indiscriminately and therefore preclude a finding of persecution on religious grounds. Part E demonstrates that the alleged ‘mistreatment’ of the Buddhist ‘targeted group’, such as requiring them to work, preventing them from using pagodas or holding religious ceremonies, even if established beyond reasonable doubt – which they are not – do not meet the level of gravity threshold to be considered crimes against humanity. Finally, JCE I is discussed in Part F.

## **B. PRELIMINARY ISSUES RELATED TO THE ‘TARGETING’ OF BUDDHISTS**

895. In Case 002/02, the crime base for the alleged ‘targeting’ of Buddhists is limited to the Tram Kok Cooperatives, located in District 105, Sector 13, in the Southwest Zone.<sup>3012</sup> As a result, Nuon Chea can only be convicted for alleged crimes which took place within this location. However, as explained below, the evidence in Tram Kok District does not support any of the allegations. In blatant disregard with basic fair trial principles regarding the notification of the charges, the Chamber permitted the Co-Prosecutors and the Civil Party Lead Co-Lawyers to elicit evidence outside of this crime base, on the grounds that it could serve to establish a nationwide policy.<sup>3013</sup> However, it is important to recall that the alleged existence of a policy is

<sup>3010</sup> **F36**, Case 002/01 Appeals Judgement, para. 419.

<sup>3011</sup> The Defence notes that the allegations which do not relate to the ‘targeting’ of Buddhists as a result of their religion are discussed *infra*, in Chapter 6, within the discussion on the Tram Kok Cooperatives.

<sup>3012</sup> **E301/9/1.1**, Scope of Case 002/02, p. 2, ERN 00981688.

<sup>3013</sup> See e.g. **E1/301.1**, Or Ho, T. 19 May 2015, p. 87, ln. 11 to p. 15; see also **E1/366.1**, Ung Sam Ean, T. 11 Dec 2015, p. 92, lns 5-13.; **E1/318.1**, Sem Hoern, T. 17 Jun 2015, p. 89, ln. 25 to p. 90, ln. 11; **E1/353.1**, Ban Seak (2-TCW-950), T. 5 Oct 2015, p. 36, lns 9-14; **E1/366.1**, Ung Sam Ean, T. 11 Dec 2015, p. 67, lns 13-20.

not a crime *per se*, but relates to the mode of liability of JCE I. Therefore, even if the existence of a policy to “target” Buddhists could be established, if it is found on the basis of evidence from a location not charged in the Closing Order in relation to the treatment of Buddhists (*i.e.*, any evidence outside the Tram Kok Cooperatives) no conviction for any crime charged can be entered. Finding otherwise would violate Nuon Chea’s right to be promptly informed of the charges.<sup>3014</sup> Accordingly, only the evidence related to Tram Kok District is discussed under the “facts” section. All other evidence is discussed in the context of the alleged ‘targeting’ policy.

### C. THE CPK NEVER HAD A POLICY AIMING TO PERSECUTE BUDDHISTS

896. The evidence regarding an alleged policy to persecute Buddhists is purely inexistent. What it shows, however, is that there was no policy ordering the disrobing of monks, no actual and explicit prohibition of religion and certainly no policy to persecute Buddhists. Even if all the facts discussed above were established beyond reasonable doubt, it would still be insufficient to infer the existence of a nationwide policy discriminating against Buddhists. To the contrary, what the evidence shows is the clear absence of discrimination: Buddhists, including monks, were just treated like everyone else. Not only was there never a policy prohibiting religion, but there was never any call or incitation to hatred, discrimination or persecution of Buddhists by the CPK. Nuon Chea himself was, and still is, a Buddhist.<sup>3015</sup> A finding that the CPK had a policy aiming to persecute Buddhists is simply unfounded.

#### 1. There was Never a Policy Prohibiting Religion

897. The DK Constitution enshrined the right to worship any religion not deemed reactionary,<sup>3016</sup> which, of course, included Buddhism.<sup>3017</sup> Pech Chim testified that people could practice their religion freely.<sup>3018</sup> Em Phoeung provided no evidence that monthly meetings he attended included discriminatory language towards monks, the Buddhist religion or any incitation to hatred, persecution or discrimination.<sup>3019</sup> Only after his memory was conveniently “refreshed” by the Co-Prosecutors did he testify that he had been told by his monk teacher that

<sup>3014</sup>ECCC Establishment Law, Art. 35 New; ICCPR, Art. 14(3)(a); ICTY, *Kvočka et al.* Appeals Judgement, paras 28, 31; *Naletilić & Martinović* Appeals Judgement, paras 23-24, 26; *Blaškić* Appeals Judgement, paras 209-220; *Kupreškić* Appeals Judgement, paras 88-90.

<sup>3015</sup> See *supra*, Chapter 3; see also E3/108, Notes of Interview of Nuon Chea and Khieu Samphân, ERN 00000932-33.

<sup>3016</sup> E3/259, DK Constitution, Art. 20; see also E3/550, Newsweek, Interview with Ieng Sary, ERN 00087604.

<sup>3017</sup> See e.g. E1/58.1, Duch, T. 3 Apr 2012, p. 22, lns 16-18.

<sup>3018</sup> E1/291.1, Pech Chim, T. 23 Apr 2015, p. 92, ln. 7 to p. 93, ln. 2.

<sup>3019</sup> E1/263.1, Em Phoeung, T. 16 Feb 2015, p. 22, lns 5-6, 16-23.

monks had been referred to as “leeches and worms”.<sup>3020</sup> This is devoid of any probative value as, in addition to constituting unverifiable and vague second-hand hearsay, there is no indication as to who referred to the monks in such terms. Sao Han, a rice farmer in Tram Kok District, testified that “all kinds of religion were prohibited.”<sup>3021</sup> Not only does his evidence fail to link this to an official policy, but it also fails to show any discriminatory character. The same applies to Cheang Sreimom, a rice farmer in Tram Kok who gave unsworn evidence as a civil party that she was told “in various meetings” that “religion and pagodas would no longer exist” and instructed not to believe in Buddhism.<sup>3022</sup> The evidence of individuals outside of Tram Kok Cooperatives was very vague and limited to statements that “all monks were defrocked”<sup>3023</sup> or that “Buddhist monks were considered enemies of the party”<sup>3024</sup> and must therefore be disregarded.

## **2. There is No Call for Hatred or any Discriminatory Statement Against Buddhists in Official CPK Documents**

898. According to the Closing Order, the CPK “incited hatred of monks and nuns”, and “disseminated propaganda about monks being parasites, blood-sucking parasitic worms, tapeworms and leeches”.<sup>3025</sup> As mentioned immediately above, this is solely based on the evidence of Em Phoeung, which lacks any specificity and fails to link the statement to any JCE member. In any event, as discussed above *vis-à-vis* the ‘targeting’ of Cham and Vietnamese, the mere use of derogatory language does not establish discriminatory intent.<sup>3026</sup> The fact that this is the sole incriminating piece of evidence says a lot: had the CPK, and in particular JCE members and Nuon Chea, called for hatred, discrimination and persecution of Buddhists, and of Buddhist monks in particular, there would have been a large amount of evidence. However, none of the Revolutionary Flags or other CPKK official documents contains discriminating statements against Buddhists.<sup>3027</sup> More generally, CPK documents contain no reference to disrobing monks, destroying religious artefacts or buildings, or to hateful language towards Buddhists or Buddhist monks. On the other hand, and as noted earlier, the DK Constitution

<sup>3020</sup> E1/263.1, Em Phoeung, T. 16 Feb 2015, p. 34, lns 19-21.

<sup>3021</sup> E1/265.1, Sao Han, T. 18 Feb 2015, p. 25, ln. 25 to p. 26, ln. 11.

<sup>3022</sup> E1/254.1, Cheang Sreimom, T. 29 Jan 2015, p. 34, ln. 5 to p. 35, ln. 7.

<sup>3023</sup> E1/318.1, Sem Hoeurn, T. 17 Jun 2015, p. 89, ln. 25 to p. 90, ln. 11; E1/353.1, Ban Seak, T. 5 Oct 2015, p. 36, lns 9-14; E1/366.1, Ung Sam Ean, T. 11 Dec 2015, p. 67, lns 13-20.

<sup>3024</sup> E1/353.1, Ban Seak, T. 5 Oct 2015, p. 84, lns 14-23.

<sup>3025</sup> D427, Closing Order, para. 740.

<sup>3026</sup> See *supra*, Chapter 5-II.

<sup>3027</sup> See e.g. E3/4, E3/5, E3/10, E3/11, E3/25, E3/135, E3/139, E3/146, E3/166, E3/170, E3/193, E3/215, E3/724 to E3/734, E3/742 to E3/760, E3/762, E3/765 to E3/774, E3/778, E3/784, E3/785, E3/4604; see also E1/291.1, Pech Chim, T. 23 Apr 2015, p. 91, lns 6-13.

enshrined the right to worship any religion not deemed reactionary,<sup>3028</sup> which included Buddhism.<sup>3029</sup> Indeed, not only were nearly all CPK cadres Buddhist themselves, many had been monks prior to DK.

899. In June 1975, the Phnom Penh Radio referred to Buddhists as “brothers”.<sup>3030</sup> The DK notebook on Division of Class Status and Social Struggle in Cambodian Society contains no derogatory or hateful terms against monks. It is very matter-of-fact, stating that monks are a particular class as follows: “[t]hey neither work nor produce anything themselves. They live their lives as dependants of others from all classes, especially the peasant class. So their social class depends on the others’ economic situation.”<sup>3031</sup> In fact, these characteristics are described as “like those of other classes”, which goes against any suggestion of discrimination. Similarly, the fact that monks are nationalistic and “love democracy” were considered as “good point[s]”.<sup>3032</sup> Even the “weak points” which are listed are devoid of any emotionally tainted language: “Firstly, they do not have clear political characteristics because they do not work hard. Secondly, their understanding is unrealistic and the class boundary is still complicated; they are indifferent to exploitation.”<sup>3033</sup> The part on the “monk class” further concludes on a positive note: “[h]owever, the good point is that most monks support the politics against imperialists and their stooges.”<sup>3034</sup> Moreover, as this document shows and as confirmed by Duch,<sup>3035</sup> monks were considered to be of a “good background”, as they were closely associated with the peasant class, the “gods” of any Marxist-Leninist revolution.<sup>3036</sup>

900. Further, there is no evidence that any of the public statements regarding the disrobing of monks, or religion, referred to by witnesses were done on the orders of or encouraged or supported by Nuon Chea or alleged JCE members. The present Brief is riddled with examples of local cadres acting autonomously and at times overzealously, in deviation of the DK’s official and non-criminal policy.<sup>3037</sup> Regarding Tram Kok District in particular, Pech Chim testified that it was frequent that local cadres deviated from the existing policies regarding living

<sup>3028</sup> E3/259, DK Constitution, Art. 20.

<sup>3029</sup> See e.g. E1/58.1, Duch, T. 3 Apr 2012, p. 22, lns 16-18; see *supra*, Chapter 4-IV-C-1, on Duch’s credibility.

<sup>3030</sup> E3/1366, FBIS Report, 29 Jun 1975, ERN 00167259, para. 4.

<sup>3031</sup> E3/1233, DK Notebook on Social Class, ERN 00711617.

<sup>3032</sup> E3/1233, DK Notebook on Social Class, ERN 00711617.

<sup>3033</sup> E3/1233, DK Notebook on Social Class, ERN 00711617.

<sup>3034</sup> E3/1233, DK Notebook on Social Class, ERN 00711617.

<sup>3035</sup> E1/433.1, Duch, T. 7 Jun 2016, p. 75, ln. 3 to p. 76, ln. 2.

<sup>3036</sup> E3/259, DK Constitution, Art. 1: “The State of Kampuchea is a State of the people, workers, peasants, and all other Kampuchean labourers.” See also *infra*, Chapter 6-II, on the reverence of the people under communism.

<sup>3037</sup> See *supra*, Chapter 4-II, regarding the CPK nationwide defence and security policy.

and working conditions.<sup>3038</sup> The evidence fails to show that the CPK had any policy aiming to persecute Buddhists, in particular Buddhist monks. While the existence of a “targeting policy” could be deduced from circumstantial evidence, it must be the only reasonable conclusion. As is clear from the following Part, it is far from being the only available conclusion from the totality of the evidence.

#### **D. FACTS RELATED TO THE ALLEGED ‘TARGETING’ OF BUDDHISTS**

901. The absence of any detailed, credible or consistent evidence establishing that Buddhists, and especially Buddhist monks, were disrobed, forced to work, killed, or otherwise mistreated as a result of their religion, is striking. Taken together with the lack of evidence linking Nuon Chea, or other JCE members to the alleged facts, a finding of guilt beyond reasonable doubt is simply impossible. In view of the paucity of live evidence regarding the alleged mistreatment of Buddhists, it may be tempting to rely upon Ian Harris’ book on “Buddhism Under Pol Pot”. However, it is largely based on out-of-court interviews, none of which were obtained for the purpose of judicial proceedings, and none of which was tested by the Defence.<sup>3039</sup> Notwithstanding the historical value of this research, for the present purposes, it has an inherently low probative value.<sup>3040</sup> As a consequence, it cannot be used to establish any or all of the elements of the charged crimes beyond reasonable doubt in the absence of existing live evidence on the subject.<sup>3041</sup>

902. First, the evidence shows that rather than being forced to disrobe, Monks elected to do so for practical reasons. Second, there is no evidence that Buddhists, in particular monks, were killed as a result of their religious beliefs. Third, the very limited evidence regarding the destruction of pagoda fails to establish a systematic pattern, but it is clear that such destruction was, most of the times, justified by legitimate purposes. Finally, contrary to the allegations contained in the Closing Order, the evidence does not permit to reach a finding that Buddhists, in particular monks, were mistreated.

##### **1. Monks Elected to Disrobe for Practical Reasons**

903. As stated above, most the evidence heard in court was limited to the claim that “all the monks were disrobed”,<sup>3042</sup> without indication of the source for such a statement. This

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<sup>3038</sup> See *infra*, Chapter 6-V, on the Tram Kok Cooperatives.

<sup>3039</sup> F36, Case 002/01 Appeals Judgement, para. 296.

<sup>3040</sup> F36, Case 002/01 Appeals Judgement, paras 296, 430, 440.

<sup>3041</sup> F36, Case 002/01 Appeals Judgement, para. 440.

<sup>3042</sup> See e.g. E1/254.1, Cheang Sreimom, T. 29 Jan 2015, p. 35, ln. 25 to p. 26, ln. 5; E1/263.1, Em Phoeung, T.

constitutes mere unverifiable and vague rumours and cannot be considered when deciding whether the “Buddhists” were persecuted as a religious group or otherwise ‘targeted’. No witnesses or civil parties provided detailed accounts regarding events where monks were disrobed, noticeably not even Venerable Em Phoeung, who was a monk in charge of all the monks at Ang Roka Pagoda in Tram Kok<sup>3043</sup> from around May 1975 to early 1976, or Pech Chim, who was a member of the District committee at the time in 1975 and who became Tram Kok District chief in mid-1976 until early 1977.

904. Both Em Phoeung and Pech Chim testified about a meeting which allegedly took place in 1975 at Angk Roka Pagoda where monks were allegedly asked to disrobe. Neither Em Phoeung or Pech Chim mentioned the use of threats or force,<sup>3044</sup> and their testimonies contained nothing indicating that the disrobing was undertaken in an effort to discriminate or otherwise persecute Buddhist monks. Ek Hoeun, who also worked in the Tram Kok District office, testified that monks were gradually disrobed in Tram Kok Cooperative, one or two at the time, but provided no additional detail.<sup>3045</sup> Regarding areas outside of Tram Kok District, while Em Phoeung made a number of sweeping statements to the effect that all monks had been disrobed,<sup>3046</sup> he also testified that he “had no idea” about what happened in other parts of the District.<sup>3047</sup> He finally admitted that these statements were just an “assumption” based on the fact that he could not see any monks.<sup>3048</sup>

905. There is no evidence linking the alleged instructions to disrobe Nuon Chea or to any CPK policy. Em Phoeung simply described how “*they* will not let anyone to be in monkhood” or referring generically to “Angkar”, or “the Khmer Rouge”; he further admitted that not knowing who “Angkar” was at the time, although he was told it meant “the upper echelon”, whoever or whatever that may be.<sup>3049</sup> Pech Chim did not know whether Yeay Khom, who presided over the meeting as the district chief, had received the orders about the disrobing of monks from the sector or from Ta Mok.<sup>3050</sup> In any event, Em Phoeung’s evidence does not

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16 Feb 2015, p.14, ln. 15 to p. 15, ln. 6, p. 19, lns 9-21; **E1/264.1**, Phneou Yav, T. 17 Feb 2015, p. 37, lns 3-12; **E1/265.1**, Sao Han, T. 18 Feb 2015, p. 25, lns 11-18; **E1/247.1**, Meas Sokha, T. 8 Jan 2015, p. 50, lns 15-19.

<sup>3043</sup> **E1/263.1**, Em Phoeung, T. 16 Feb 2015, p. 20, ln. 20.

<sup>3044</sup> **E1/263.1**, Em Phoeung, T. 16 Feb 2015, p. 17, lns 9-10, 20-21, p. 20, ln. 20 to p. 21, ln 21, p. 40, lns 2-8, 11-13, p. 70, lns 5-9, p. 77, lns 2-25, p. 80, lns 5-10; **E1/290.1**, Pech Chim, T. 22 Apr 2015, p. 14, lns 11-12.

<sup>3045</sup> **E1/298.1**, Ek Hoeun, T. 7 May 2015, p. 96, lns 3-16.

<sup>3046</sup> **E1/263.1**, Em Phoeung, T. 16 Feb 2015, p. 19, lns 15-16, p. 43, lns 17-19.

<sup>3047</sup> **E1/263.1**, Em Phoeung, T. 16 Feb 2015, p. 32, lns 19-21.

<sup>3048</sup> **E1/263.1**, Em Phoeung, T. 16 Feb 2015, p. 49, lns 17-25.

<sup>3049</sup> **E1/263.1**, Em Phoeung, T. 16 Feb 2015, p. 15, lns 1-4, p. 19, lns 18-20, p. 20, lns 5-8, p. 81, ln. 24, to p. 82, ln. 3, p. 83, ln. 2.

<sup>3050</sup> **E1/290.1**, Pech Chim, T. 22 Apr 2015, p. 14, ln. 6 to p. 17, ln. 8.



support the allegation that the disrobing took place in an effort to discriminate against monks.<sup>3051</sup> Pech Chim also did not know why monks were disrobed.<sup>3052</sup> Finally, nothing in the evidence even points to Nuon Chea or the CPK intending to prohibit religion, or hating, persecuting, or otherwise intending to discriminate against Buddhist monks. Conversely, Em Phoeung's account clearly shows that monks disrobed so that they could work.<sup>3053</sup> In short, even if disrobing took place, it was unrelated to any prohibition of religion or any discrimination against Buddhist monks. Rather, it was an illustration of the DK's intent to ensure equality amongst all its citizens by requiring everyone to work and contribute to the country's development.<sup>3054</sup>

## 2. No Evidence Shows That Buddhist Monks Were Killed Due to Their Religion

906. Venerable Em Phoeung was the only witness who provided some sort of specific evidence on the alleged killing of monks. Regarding Tram Kok District, he testified that he “noticed some disappearance”,<sup>3055</sup> but he did not know or identify the people who “disappeared”,<sup>3056</sup> and certainly did not testify about them being monks. He further testified not knowing what happened to them, other than being told they were sent for re-education by “the Angkar”.<sup>3057</sup> As repeated multiple times throughout this brief, even if “disappearance” was established up to the requisite level of proof – which is not the case here – it obviously does not constitute proof beyond reasonable doubt of a killing.<sup>3058</sup>

907. Em Phoeung further testified that one of his monk friends, who has passed away, had told him that three monks had been tortured and killed in Takeo Province, because “they opposed Angkar's instructions”.<sup>3059</sup> He also testified that he was told by another monk, who allegedly witnessed it, that a monk had been killed “by Angkar” and buried near the Ang Prey pagoda, in Samraong Commune, Takeo province.<sup>3060</sup> First, apart from being unverifiable and vague hearsay evidence for which no source is identified, this statement is also uncorroborated; Second, there is no evidence establishing that the alleged killings, if they in fact happened, were

<sup>3051</sup> E1/263.1, Em Phoeung, T. 16 Feb 2015, p. 19, lns 1-8, p. 20, ln. 20 to p. 21, ln 21, p. 40, lns 6-9.

<sup>3052</sup> E1/290.1, Pech Chim, T. 22 Apr 2015, p. 14, lns 11-12.

<sup>3053</sup> E1/263.1, Em Phoeung, T. 16 Feb 2015, p. 16, lns 12-14, p. 17, ln. 14, p. 19, lns 18-21, p. 20, lns 22-24, p. 22, ln. 24, p. 44, lns 5-11, p. 50, lns 1-5, p. 74, ln. 24 to p. 75, ln. 9, p. 78, lns 22-24.

<sup>3054</sup> E3/259, DK Constitution, Arts 4, 12; *see, more generally, infra*, Chapter 6-II, on the CPK policy to establish cooperatives and worksites.

<sup>3055</sup> E1/263.1, Em Phoeung, T. 16 Feb 2015, p. 29, lns 2-4.

<sup>3056</sup> E1/263.1, Em Phoeung, T. 16 Feb 2015, p. 29, ln. 15.

<sup>3057</sup> E1/263.1, Em Phoeung, T. 16 Feb 2015, p. 29, lns 2-4.

<sup>3058</sup> F36, Case 002/01 Appeals Judgement, paras 471-472, 482.

<sup>3059</sup> E1/263.1, Em Phoeung, T. 16 Feb 2015, p. 23, lns 11-14, p. 43, lns 10-12.

<sup>3060</sup> E1/263.1, Em Phoeung, T. 16 Feb 2015, p. 43, lns 1-12.

grounded on the fact that the victims were Buddhist monks; it is insufficient to establish any mistreatment, torture and even less any murder beyond reasonable doubt. Finally, it is also unclear whether this took place in the Tram Kok Cooperatives, as the precise location is not provided. Consequently, it is far from sufficient to establish beyond reasonable doubt that the killings actually took place, and that if they did, the victims were killed as a result of their religion, as opposed to their own individual activities. The rest of Em Phoeung's evidence is outside of the geographical scope of the charges and must therefore be disregarded.<sup>3061</sup>

908. In sum, there is no direct, specific and reliable live evidence that Buddhists and in particular monks, were killed as a result of their religion. Notably, the late Ian Harris, who had conducted extensive field research on Buddhism under DK,<sup>3062</sup> concluded that the systematic killing of monks was never part of a policy under DK.<sup>3063</sup>

### **3. The Destruction of Pagodas and Other Religious Artefacts was not the Result of DK's Actions and does not Illustrate a Policy of Religious Persecution**

909. No witness or civil party provided detailed evidence about the destruction of pagodas in Tram Kok. To the contrary, the evidence shows that many pagodas had already been destroyed or damaged during the civil war or by US bombings.<sup>3064</sup> While there is evidence that some pagodas had been used as food storage or security centres the Defence recalls that the taking over of certain civilian buildings for military use is a common occurrence in times of war. Other public buildings, such as schools, were also, sometimes, put to a different use during DK. It does not support a finding beyond reasonable doubt that this was done pursuant to a discriminatory intention to persecute and target the "Buddhists". Rather, it was legitimate under the circumstances at the time, in a country that had just come out of a civil war during which many public buildings had been destroyed and that immediately faced an armed conflict with Vietnam,<sup>3065</sup> there were limited public spaces available to store rice, grains or to use as a police station. In sum, the use of pagodas was based on practical considerations, rather than being done with the intent to discriminate or otherwise mistreat Buddhists or Buddhist monks.

<sup>3061</sup> E1/263.1, Em Phoeung, T. 16 Feb 2015, p. 23, lns 2-7, p. 49, lns 14-15.

<sup>3062</sup> Ian Harris was not called to testify as he passed away. Nonetheless, the Defence submits that he would not have qualified as an expert, *see supra* Chapter 2-III-B-3, on experts.

<sup>3063</sup> E3/2818, Harris, Buddhism Under Pol Pot, ERN 00704083-84; *see also* E305/6.4, Co-Prosecutors' Case 002/02 Updated Witness Summaries, ERN 00986616.

<sup>3064</sup> E1/263.1, Em Phoeung, T. 16 Feb 2015, p. 64, ln. 15 to p. 65, ln. 18; E3/2818, Harris, Buddhism Under Pol Pot, ERN 00704015.

<sup>3065</sup> *See supra*, Chapter 3-III; *see also infra*, Chapter 6-II.

910. Regarding alleged destruction of religious artefacts, only two persons gave specific evidence on Buddha statues in Tram Kok District. Phneou Yav testified that statues of Buddha at Tuek Chrum Pagoda were thrown into ponds by villagers.<sup>3066</sup> He stated that they were instructed to do so by the village chief.<sup>3067</sup> However, he did not witness the incident himself, but heard it from his cousin who claimed to have been an eyewitness to the event.<sup>3068</sup> According to Phneou Yav, the instructions came from the “upper level”, and “probably from the commune chief”.<sup>3069</sup> This is all he knew about the destruction of the statues.<sup>3070</sup> Unlike the rest of his evidence, Pech Chim’s statement that statues in pagodas had to be demolished upon orders of “the upper echelon” lacks specificity.<sup>3071</sup> The remaining evidence is outside the scope of the charges and merely anecdotal.<sup>3072</sup> Further, there is evidence that in Phnom Penh, pagodas were kept intact, and that a number of official events were held at pagodas or involved participation by Buddhist monks. For instance, in September 1975, when Late King Father Norodom Sihanouk came back from Beijing, a ceremony was held in Phnom Penh, which included Buddhist monk representatives and prayers.<sup>3073</sup> Similarly, in July 1975 a delegation of top Vietnamese leaders on a visit to DK was taken to see the Silver Pagoda at the Royal Palace, with the CPK key leadership including Nuon Chea in attendance.<sup>3074</sup>

#### 4. Buddhist Monks Were Not Mistreated

911. Finally, there is no evidence that Buddhist monks were mistreated. Venerable Em Phoeung’s evidence, as discussed above in the section on killings, is insufficient to even establish mistreatment, as it constitutes unverifiable and vague hearsay.<sup>3075</sup> On the fact that monks had to work, this did not related to monks’ status as Buddhist monks but as DK citizens.<sup>3076</sup> As discussed in Chapter 6-II, the fact that the CPK required people to work was as a means through which to eliminate injustices which affected a broad cross-section of the population, especially in rural areas. Far from constituting evidence of religious persecution, the fact that Buddhist monks, just like everyone else, were required to work illustrates the

<sup>3066</sup> E1/264.1, Phneou Yav, T. 17 Feb 2015, p. 37, lns 8-12, p. 62, lns 7-24.

<sup>3067</sup> E1/264.1, Phneou Yav, T. 17 Feb 2015, p. 62, lns 7-11.

<sup>3068</sup> E1/264.1, Phneou Yav, T. 17 Feb 2015, p. 63, lns 1-6.

<sup>3069</sup> E1/264.1, Phneou Yav, T. 17 Feb 2015, p. 62, lns 17-24.

<sup>3070</sup> E1/264.1, Phneou Yav, T. 17 Feb 2015, p. 63, lns 7-12.

<sup>3071</sup> E1/291.1, Pech Chim, T. 23 Apr 2015, p. 93, ln. 4 to p. 94, ln. 16.

<sup>3072</sup> See e.g. E1/366.1, Ung Sam Ean, T. 11 Dec 2015, p. 92, lns 5-13.

<sup>3073</sup> E3/271, FBIS Report, 9 Sep 1975, ERN 00167433.

<sup>3074</sup> E3/3201R, ‘Vietnamese delegation to visit DK 1975’, at minutes 06:30 to 08:55.

<sup>3075</sup> See *supra*, Chapter 5-II-D-2.

<sup>3076</sup> See *infra*, Chapter 6-V, on the Tram Kok Cooperatives; see also *supra*, Chapter 4-V, on Kraing Ta Chan.

CPK's intent to treat everyone equally.<sup>3077</sup> Evidence regarding the existence or non-existence of Buddhist religious rituals is mixed. While it appears that certain religious rituals did not take place in certain areas, the witnesses and civil parties failed to provide any further explanation for the imposition of such restriction, including by whom such practices were prohibited. Further, in other places, including Tram Kok, people could still freely practice their religion.<sup>3078</sup> Pech Chim testified that people could freely practice Buddhist rituals.<sup>3079</sup> Em Phoeung also testified that he supervised a Buddhist burial ritual in his village in Tram Kok; that he was asked to preside over a marriage; and that he would still preach at night.<sup>3080</sup> At the very least, these significant differences on the ground preclude a finding of a nationwide policy to prohibit religion and persecute Buddhists.

912. Regarding marriage, there was never a policy to force people to marry, as discussed in detail in Chapter 7-II below. Even if there was some form of regulation of marriage, this applied to everyone, irrespective of race, ethnicity or religion.<sup>3081</sup> In any event, Venerable Em Phoeung said he declined a suggestion of getting married without any negative consequences.<sup>3082</sup> The rest of his evidence constitutes unverifiable and vague hearsay: a friend of his was "forced" to marry, and Em Phoeung had also heard of others who "had to" marry.<sup>3083</sup> Even if it were established beyond reasonable doubt that Buddhist monks were required to work; that religious rituals did not take place; or that Buddhist monks were arranged (and not forced) to get married, none of this can be said to constitute a crime against humanity as there is no discriminatory aspect to it. Instead, the restrictions applied to the whole population of DK.

## 5. Conclusion on Facts Related to the Alleged 'Targeting' of Buddhists

913. There is no evidence that Buddhists monks were specifically 'targeted' as a result of their religion. In fact, they were treated like everyone else in DK. In any event, the only time when Buddhist monks were subjected to specific measures was when, on certain occasions, they were requested to disrobe. It is unequivocal that this was done as a result of the requirement – applicable to everyone in DK<sup>3084</sup> – to work in the fields or at worksites, which is non-

<sup>3077</sup> See also *supra*, Part 5-III-C.

<sup>3078</sup> E3/2818, Harris, Buddhism Under Pol Pot, ERN 00704011, 00704033.

<sup>3079</sup> E1/291.1, Pech Chim, T. 23 Apr 2015, p. 92, ln. 7 to p. 93, ln. 2.

<sup>3080</sup> E1/263.1, Em Phoeung, T. 16 Feb 2015, p. 51, lns 17-18, p. 55, lns 2-14, p. 57, ln. 5 to p. 58, ln. 24, p. 60, lns 17-24.

<sup>3081</sup> See *infra*, Chapter 7-III, on the CPK's legitimate marriage policy.

<sup>3082</sup> E1/263.1, Em Phoeung, T. 16 Feb 2015, p. 54, lns 5-14.

<sup>3083</sup> E1/263.1, Em Phoeung, T. 16 Feb 2015, p. 53, ln. 23 to p. 54, ln. 4.

<sup>3084</sup> E3/259, DK Constitution, Art. 12, 19; see also *infra*, Chapter 6-II.

discriminatory.<sup>3085</sup> Finally, no evidence was heard to the effect that Buddhist monks or Buddhists felt discriminated against due to their religion.<sup>3086</sup>

## **E. CRIMES CHARGED FOR THE ALLEGED ‘TARGETING’ OF BUDDHISTS**

914. As set out in Chapter 4-VI-G-1, the Co-Prosecutors have failed to established the necessary chapeau element for crimes against humanity, namely that there was a ‘discriminatory’ attack. Therefore, no crime against humanity can be established – including rape and other inhumane acts – at all. Even if the chapeau element could be proven, whether taken individually or as a whole, the evidence related to the “treatment” of Buddhists fails to fulfil even one of the constitutive elements of any crime against humanity, be it murder or religious persecution. Nuon Chea must therefore be acquitted.

### **1. There is No Evidence of Murder**

915. As stated above, there is no evidence of killings in the Tram Kok Cooperatives. Any evidence outside of Tram Kok Cooperatives is irrelevant to establishing the charge of murder as it is outside the scope of Case 002/02.<sup>3087</sup>

### **2. There Was No Religious Persecution Against Buddhists**

#### **(a) *The Actus Reus For Religious Persecution is Not Established***

916. The elements of the crime of religious persecution are listed above in Section III-G-2 of this Chapter. As explained above, in order to establish the crime of persecution, there must be a violation of a fundamental right under customary international law, which must reach the same level of gravity as other crimes against humanity.<sup>3088</sup> However, there was no such thing as an absolute right to practice one’s religion in 1975-1979,<sup>3089</sup> there was therefore no violation of a fundamental right. As detailed above, none of the allegations have been established beyond reasonable doubt. Even if they were, there is no evidence that the actions were taken in an effort to discriminate against Buddhists, including monks. It rather shows that it was part of a nationwide policy to ensure equal treatment of all DK citizens; monks had to work, like everyone else. Once they were working, they were treated no different to anyone else.

<sup>3085</sup> See e.g. **E1/263.1**, Em Phoeung, T. 16 Feb 2015, p. 16, lns 12-14, p. 17, ln. 14, p. 19, lns 18-21, p. 20, lns 22-24, p. 22, ln. 24, p. 44, lns 5-11, p. 50, lns 1-5, p. 74, ln. 24 to p. 75, ln. 9, p. 78, lns 22-24.

<sup>3086</sup> See e.g. **E1/263.1**, Em Phoeung, T. 16 Feb 2015, 51, lns 10-18.

<sup>3087</sup> **F36**, Case 002/01 Appeals Judgement, para. 418, 428, 434.

<sup>3088</sup> See *supra*, Chapter 5-II-G-3-(c).

<sup>3089</sup> See *supra*, Chapter 5-II-G-3-(c).

917. Further, even if the underlying acts were established beyond reasonable doubt, having to remove a religious outfit and work in the field, not being able to go to a religious building or not being able to undertake a religious ceremony, while perhaps regrettable, whether taken alone or together does not reach the level of gravity as extermination, imprisonment, torture or rape. The crime against humanity of religious persecution cannot therefore be established.

**(b) The Mens Rea For Religious Persecution is Not Established**

918. In addition, there is no evidence that the physical perpetrator(s) held any discriminatory intent. Even if there were, there is no evidence that such intent was shared by Nuon Chea, or that he was even aware of it. Absent such *mens rea*, a conviction is precluded.

919. Two individuals gave evidence about Nuon Chea's acts and conduct regarding Buddhists, including Buddhist monks, none of which have any indicia of credibility. Son Em (2-TCCP-223), a civil party from Battambang, first said that he did not know whether "any of the leaders from the Centre" were "involved or had issued any orders relating to the closing of pagodas in the country".<sup>3090</sup> After his memory was "refreshed" by the Co-Prosecutors, he stated having been told by the zone leader, "Korn aka Keu", that Nuon Chea had said that the "Khmer Rouge" would "get rid of religion and monks" and had issued an order to demolish pagodas in Moug Ruessei.<sup>3091</sup> His evidence – even if it were reliable – constitutes second-hand hearsay which has very limited probative value. Further, even if it were true, this does not illustrate intent to discriminate; another reasonable interpretation for instance, is that it expressed a will to ensure equality of all people in a secular society. While Ek Hoeun, Pech Chim's cousin who also worked at the District office, testified having heard from Pech Chim that Nuon Chea and Khieu Samphân had decided to abolish Buddhism at a meeting with Hou Youn and Hu Nim,<sup>3092</sup> it is not corroborated by Pech Chim's testimony who did not mention the presence of Nuon Chea at this meeting and did not make any reference to religion being discussed.<sup>3093</sup>

920. On the contrary, Nuon Chea explained to Thet Sambath – in a, for once, accurately reproduced citation – that he had nothing against Buddhism, since he was himself a Buddhist, and that the CPK "did not look down on religion and pagodas".<sup>3094</sup> He explained the DK's

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<sup>3090</sup> E1/500.1, Son Em (2-TCCP-223), T. 21 Nov 2016, p. 29, lns 12-15.

<sup>3091</sup> E1/500.1, Son Em (2-TCCP-223), T. 21 Nov 2016, p. 27, lns 1-4, p. 29, ln. 16 to p. 30, ln. 7; p. 30, lns 5-6.

<sup>3092</sup> E1/298.1, Ek Hoeun, T. 7 May 2015, p. 96, lns 3-16.

<sup>3093</sup> E1/291.1, Pech Chim, T. 23 Apr 2015, p. 23, ln. 13 to p. 24, ln. 4.

<sup>3094</sup> E3/4202, Chon and Sambath, Behind the Killing Fields, ERN 00757497; see also E3/108, Notes of Interview of Nuon Chea and Khieu Samphân, ERN 00000933.

position on religion in the following terms: “[i]f we pray for a candle, how will it come? We have to make it by ourselves. If we have no water, we must make a dam. So communist [*sic*] educated people to believe in people power”.<sup>3095</sup> Nuon Chea’s position regarding monks working re-joins that of Venerable Em Phoeung: “[a]ll the people were at the rice fields so the monk automatically worked too”.<sup>3096</sup> Further, in July 1978, Nuon Chea’s official statement to a delegation of the Danish Communist Party does not contain any negative statement about religion or Buddhists or monks, but instead refers to the CPK’s past collaboration with Buddhist monks.<sup>3097</sup> Finally, even if Nuon Chea was found to have a leading role in DK propaganda, none of it contained any discriminatory or hateful comments against monks, as discussed above.

#### **F. JCE I IN RESPECT OF THE ALLEGED ‘TARGETING’ OF BUDDHISTS**

921. As extensively described above, there is not an ounce of evidence that the CPK had an explicit policy to target Buddhists as a result of their religion or for any other reason. There is also nothing permitting to deduce the existence of such policy from events on the ground, as, as discussed in Part D above, there is no systematic pattern of actions. On the contrary: Buddhists were not discriminated in fact. Even if the alleged crimes were established beyond reasonable doubt – which is legally impossible, as discussed above in Part E – no evidence links them to a JCE member or Nuon Chea. Lastly, even if there was such link, there is no evidence that the physical perpetrator(s) acted with the requisite specific intent to discriminate against Buddhists as a result of their religion. In addition, in order to enter a finding on the crime of religious persecution under JCE I, it must be demonstrated beyond reasonable doubt that each JCE member individually shared the specific intent to discriminate.<sup>3098</sup> The evidence does not establish such specific intent in the present case, and logically so, as all the CPK members were themselves Buddhists. In fact, some were even former monks. A JCE I finding is therefore precluded. The remaining the modes of liability are discussed in Chapter 8 of this Brief.

#### **G. CONCLUSION ON THE ALLEGED ‘TARGETING’ OF BUDDHISTS**

922. There is no evidence that Buddhists, including monks, were discriminated against in or outside of Tram Kok Cooperatives, nor that there was a policy aiming to discriminate against them or otherwise ‘target’ them. The bulk of the evidence heard was that monks were asked to disrobe and had to work; that pagodas were used for non-religious purposes; and that religious

<sup>3095</sup> E3/4202, Chon and Sambath, Behind the Killing Fields, ERN 00757497.

<sup>3096</sup> E3/4202, Chon and Sambath, Behind the Killing Fields, ERN 00757497.

<sup>3097</sup> E3/196, Nuon Chea Speech to Danish Communist Party, Jul 1978, ERN 00762394-98.

<sup>3098</sup> ICTY, *Brđanin* Trial Judgement, para. 708.

rituals were not held. This does not illustrate a policy aimed at persecuting Buddhists. There is a significant difference between preventing people from exercising certain activities related to their religion – which is permitted under international law – and discriminating against those individuals because of their religion. The legal requirements of the crime of religious persecution cannot be met and as such, Nuon Chea must be acquitted of all charges related to the alleged ‘treatment’ of Buddhists, including monks. The same applies to the alleged ‘targeting’ of former Khmer Republic soldiers and officials, as the next Section demonstrates.

#### IV. THE ALLEGED ‘TARGETING’ OF FORMER KHMER REPUBLIC SOLDIERS AND OFFICIALS

##### A. INTRODUCTION

923. The Closing Order alleges that the CPK aimed to “establish an atheistic and homogenous society.”<sup>3099</sup> For this purpose, it allegedly implemented a policy of ‘targeting’ specific groups, including “former officials of the Khmer Republic (including both civil servants and former military personnel and their families)”,<sup>3100</sup> from “before 1975” and “until at least 6 January 1979”.<sup>3101</sup> According to the Closing Order, this policy included “public declarations of intent in February 1975 to execute the most senior Khmer Republic figures”,<sup>3102</sup> arrests and killings of officials of the Khmer Republic during the evacuation of the population throughout DK,<sup>3103</sup> “this last incident constitut[ing] only one of several occurrences of a pattern of targeting former officials of the Khmer Republic.”<sup>3104</sup> The Co-Prosecutors argued that “numerous [...] people were arrested and executed on the basis of their actual or perceived association with the former Khmer Republic regime.”<sup>3105</sup>

924. The Defence recalls that the question of the ‘targeting’ of former Khmer Republic soldiers and officials has been extensively discussed in Case 002/01, and that the arguments it made in its Closing and Appeal Briefs apply *mutatis mutandis* here.<sup>3106</sup> However, the evidence presented at trial does not permit to directly or indirectly support such allegations. Instead, it

<sup>3099</sup> **D427**, Closing Order, para. 207.

<sup>3100</sup> **D427**, Closing Order, para. 205.

<sup>3101</sup> **D427**, Closing Order, para. 208.

<sup>3102</sup> **D427**, Closing Order, para. 208.

<sup>3103</sup> **D427**, Closing Order, para. 209.

<sup>3104</sup> **D427**, Closing Order, para. 206.

<sup>3105</sup> **D390**, Co-Prosecutors’ Final Submission, para. 164.

<sup>3106</sup> See especially **E295/6/3**, Nuon Chea’s Case 002/01 Closing Brief, paras 36, 42, 284-285, 295, 298-304, 335, 336, 339, 383, 384, 386-390, 392, 395, 397-402, 405, 407, 410, 412-413, 416, 418; **F16**, Nuon Chea’s Appeal Brief, paras 111, 150, 163-164, 170, 177-178, 184, 209, 269, 274, 283, 321, 388, 397, 438, 451, 462, 465, 478, 482, 527, 530, 532-536, 542, 545-546, 552, 555, 561, 565, 571, 578, 583, 585, 590, 593, 594, 596-597, 601-603, 606, 608, 610, 624, 650, 705.



mostly consists of anonymous and uncorroborated hearsay. Furthermore, the documentary evidence comprises lists of detainees and contemporaneous DK reports which are insufficient to establish beyond reasonable doubt that the alleged victims were arrested or otherwise targeted as a result of their position in the former regime. The present Section first presents a number of preliminary issues related to the “treatment” of the former Khmer Republic soldiers and officials. Then, the Defence demonstrates that the CPK never had a policy aiming to exterminate or otherwise persecute this specific group as a result of their political beliefs. The third Part shows that the evidence on events on the ground does not permit to infer the existence of a nationwide policy. Finally, the alleged crimes and the JCE are discussed.

**B. PRELIMINARY ISSUES RELATED TO THE ‘TARGETING’ OF FORMER KHMER REPUBLIC SOLDIERS AND OFFICIALS**

925. The discussion of the allegations related to the ‘targeting’ of former Khmer Republic soldiers and officials must remain within the scope of the Closing Order, namely Tram Kok Cooperatives, the 1<sup>st</sup> January Dam Worksite, S-21 Security Centre and Kraing Ta Chan Security Centre. Notwithstanding this fact, the lack of clarity insofar as the alleged specific group of former Khmer Republic soldiers and officials is concerned needs to be highlighted, as it has significantly impacted the Defence’s ability understand the charges and therefore, to adequately prepare and defend against them. Finally, the extensive use of out-of-court statements to support the Co-Prosecutors’ case is discussed.

**1. The Alleged Policy of ‘Targeting’ former Khmer Republic Soldiers and Officials is Strictly Limited to the Defined Crime Base**

926. The scope of the charges related to the alleged ‘targeting’ policy against the former Khmer Republic soldiers and officials in Case 002/02 is limited to four crime sites insofar as implementation is concerned: the Tram Kok Cooperatives, the 1<sup>st</sup> January Dam Worksite, S-21 Security Centre and Kraing Ta Chan Security Centre. Disregarding basic fair trial principles and Nuon Chea’s right to be informed of the charges against him, the Co-Prosecutors and the Civil Party Lead Co-Lawyers were permitted to elicit evidence outside of this crime base on the grounds that it could serve to establish the existence of a policy nationwide. However, the alleged policy is not a crime *per se*. Therefore, if its alleged existence could be established on the basis of crimes committed outside of the geographic scope defined by the Chamber, no conviction for any of those crimes can be entered without violating Nuon Chea’s right to be

promptly notified of the charges against him.<sup>3107</sup> Accordingly, only the evidence related to the four implementation crime sites will be discussed below, whereas the evidence outside of this scope will be discussed in relation to the alleged ‘targeting’ policy generally.

927. The alleged policy of ‘targeting’ former Khmer Republic soldiers and officials was part of Case 002/01. The scope of Case 002/01 in relation to this policy was limited to the factual allegations and the crimes against humanity allegedly committed during Phase One and Phase Two of the Movement of Population and at Tuol Po Chrey.<sup>3108</sup> Reversing the Case 002/01 Trial Judgement, the Supreme Court Chamber found that it cannot be established beyond reasonable doubt that a “policy contemplating the execution of Khmer Republic soldiers and officials existed at the time of the events at Tuol Po Chrey,”<sup>3109</sup> since nationwide evidence had not been established<sup>3110</sup> and evidence of killings was insufficient.<sup>3111</sup> Thus, the Appeals Judgement *de facto* limited the scope of the Case 002/02 findings in relation to this policy. Indeed, pursuant to the principle of *ne bis in idem*, an Accused cannot be tried twice for the same set of facts.<sup>3112</sup> The Supreme Court Chamber’s ruling has therefore two consequences for the present case. First, the Chamber cannot make any factual or legal findings in relation to the existence of a targeting policy against former Khmer Republic soldiers and officials in April-May 1975 without relying on new evidence, *i.e.*, evidence not presented in Case 002/01 to support the existence of this policy relying on the same set of facts. Second, it follows that the evidence presented by the Co-Prosecutors over the course of Case 002/02, which had also been presented in Case 002/01 to support the existence of a policy of targeting former Khmer Republic soldiers and officials in April-May 1975 must be ignored as non-probative.

## 2. The Charges Related to the Alleged Policy are Nebulous

928. One of the most basic tenets of a fair trial is the right to be promptly informed of the charges.<sup>3113</sup> They must include both the legal description of the offence (“nature”) and the alleged underlying facts (“cause”) on which the allegations are based.<sup>3114</sup> However, in plain

<sup>3107</sup> ECCC Establishment Law, Art. 35 New; ICCPR, Art. 14(3)(a); ICTY, *Prlić et al.*, Decision on Purpose of Evidence, paras 27, 29.

<sup>3108</sup> E124/7.3, Scope of Case 002/01.

<sup>3109</sup> F36, Case 002/01 Appeals Judgement, para. 972.

<sup>3110</sup> F36, Case 002/01 Appeals Judgement, para. 963.

<sup>3111</sup> F36, Case 002/01 Appeals Judgement, para. 922.

<sup>3112</sup> Also referred to as “double jeopardy” in common law systems; *see* ICCPR, Art. 14(7); ECHR, Protocol 7, Art. 4 (refers to same “offences”); Cambodia, Code of Criminal Procedure, Art. 12; EU Charter of Fundamental Rights, Art. 50; Rome Statute, Art. 20.

<sup>3113</sup> ECCC Establishment Law, Art. 35 New; ICCPR, Art. 14(3)(a).

<sup>3114</sup> HRC General Comment 13, para. 8; *see also* ICTR, *Ndindiliyimana et al.* Trial Judgement, para. 120; ICTY, *Kvočka et al.* Appeals Judgement, para. 31; ECCC Establishment Law, Art. 35 New; ICCPR, Art. 14(3)(a); ICTY,

disregard for this right, neither the Closing Order nor the scope decision for Case 002/02 contain clearly defined charges regarding the crimes allegedly committed against the former Khmer Republic soldiers and officials nor the policy pursuant to which they were allegedly targeted – which is required for a finding under JCE I. While the facts underpinning the alleged ‘targeting’ policy against the Vietnamese, Cham and Buddhists are all discussed in the Closing Order under section VIII-D “Factual Findings of Crimes” – “Treatment of Specific Groups”,<sup>3115</sup> no reference is made to the former Khmer Republic soldiers and officials in this same section. Further, while section VI-A of the Closing Order entitled “Findings of Responsibility under the Joint Criminal Enterprise” lists all the crimes underpinning the alleged ‘targeting’ policy towards specific groups, it fails to include political persecution, which however appears to be the most relevant charge to the treatment of former Khmer Republic soldiers and officials.<sup>3116</sup>

929. For its part, the Case 002/02 scope decision specifies that:

The scope of Case 002/02 includes, *inter alia*, the Tram Kok Cooperatives, 1<sup>st</sup> January Dam Worksite, S-21 Security Centre, and Kraing Ta Chan Security Centre. Factual allegations relevant to each of these crime sites are relevant to the policy of targeting former Khmer Republic officials. Political persecution against former Khmer Republic officials is also charged in relation to each of these four crime sites. The Chamber has therefore included within the scope of Case 002/02 the policy concerning targeting of former Khmer Republic officials, limited to implementation at the Tram Kok Cooperatives, 1<sup>st</sup> January Dam Worksite, S-21 Security Centre, and Kraing Ta Chan Security Centre.<sup>3117</sup>

930. There is no clarity as to which specific factual allegations are relevant to the treatment of former Khmer Republic soldiers and officials, nor an indication of their legal qualification. Contrary to what they did regarding the other three ‘targeted groups’, both the Co-Investigating Judges and the Chamber failed to define the alleged policy of ‘targeting’ former Khmer Republic soldiers and officials or the specific charges underpinning this policy.<sup>3118</sup> Indeed, while the Chamber stated that “factual allegations relevant to each of these crime sites are relevant to the policy of targeting of former Khmer Republic officials”, the Chamber is silent on to the relevant legal characterisation of such facts. In doing so, the Chamber appears to imply that the legal findings related to the four crime sites are therefore underlying the policy towards

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*Kvočka et al.* Appeals Judgement, paras 28, 31; *Naletilić & Martinović* Appeals Judgement, paras 23-24, 26; *Blaškić* Appeals Judgement, paras 209-220; *Kupreškić* Appeals Judgement, paras 88-90.

<sup>3115</sup> **D427**, Closing Order, paras 740-841.

<sup>3116</sup> **D427**, Closing Order, para. 1525.

<sup>3117</sup> **E301/9/1**, Decision of Additional Severance of Case 002 and Scope of Case 002/02, 4 Apr 2014, para. 44.

<sup>3118</sup> For the definition of the alleged policy against Cham *see* **D427**, Closing Order, paras 205, 211-212, 1336,1420; alleged policy against the Vietnamese *see* paras 213, 214, 1343; alleged policy against the Buddhists *see* paras 157-158, 210, 740, 741, 1373, 1421.

the former Khmer Republic soldiers and officials. However, some of the crimes charged in relation to these crime sites are simply irrelevant to this policy, *i.e.*, religious or racial persecution, rape, and all grave breaches of the Geneva Conventions.

931. The Defence should not have to guess what crimes Nuon Chea is charged with insofar as this ‘targeted group’ is concerned or whether this is a targeted group at all. By failing to precisely identify the crimes underlying the policy of ‘targeting’ former Khmer Republic soldiers and officials, the Closing Order and the Chamber violated Nuon Chea’s right to know the charges against him. As things stand, in the absence of a precise description of this policy and of a clear identification of the charges underpinning it, the Defence has nothing to respond to and no conviction can be entered on the basis of this policy. Nevertheless, as the Chamber has demonstrated its willingness to disregard the most basic fair trial rights of Nuon Chea on numerous occasions, the Defence feels compelled to address below the crimes it deems are attached in nature to the alleged targeting policy and which are charged generally in relation to the four crime sites, *i.e.*, murder, extermination and persecution on political grounds.<sup>3119</sup>

### **3. Sar Sarin’s Evidence Cannot be Relied Upon Without Violating the Rights of the Nuon Chea**

932. Sar Sarin, a civil party who worked in a K-12 office transport unit and allegedly transported important DK delegates, gave an unsworn statement in Case 002/01 on 29 April 2013. He spoke on a few subjects, including an alleged meeting chaired by Nuon Chea, and the existence of a CPK policy to kill Khmer Republic soldiers and officials.<sup>3120</sup> However, he eventually refused to continue testifying absent certain protective measures being accorded to him, and therefore concluded his evidence without the Defence being able to cross-examine him. On 8 November 2016, he appeared in Case 002/02.<sup>3121</sup> However, once again, this time for alleged health reasons, he ceased testifying before he was cross-examined by the Defence. His live evidence must therefore be entirely disregarded. Similarly, his DC-Cam interview<sup>3122</sup> cannot be used insofar as it relates to the acts and conduct of Nuon Chea, as it would violate Nuon Chea’s fundamental right to test evidence, something which the Chamber recognised in its decision on the use of statements in lieu of in-court testimony.<sup>3123</sup>

<sup>3119</sup> The Defence will make additional arguments on this subject during the oral arguments, on the basis of the OCP’s final submissions, as it is them who bear the burden of proof.

<sup>3120</sup> E1/185.1, Sar Sarin, T. 29 Apr 2013.

<sup>3121</sup> E1/497.1, Sar Sarin, T. 8 Nov 2016.

<sup>3122</sup> E3/9129, ‘DC-Cam Interview of So Sarin’, 16 Aug 2005.

<sup>3123</sup> E96/7, Decision on the Co-Prosecutors’ Submission on the Admission of Evidence, para. 22.

#### 4. The Use of Out-of-Court Evidence to Prove this Policy is Abusive

933. As will be demonstrated below, live evidence in relation to the treatment of former Khmer Republic soldiers and officials is insufficient to establish the alleged crimes beyond reasonable doubt. As a result, the evidence supporting the Co-Prosecutors' case in relation to the treatment of former Khmer Republic soldiers and officials in the four implementation crime sites is overwhelmingly limited to out-of-court statements and unauthenticated documentary evidence. Evidence from the Tram Kok Cooperatives and Kraing Ta Chan Security Centre consists mainly of the 'Tram Kok District Records' which are not substantiated by any live evidence and whose reliability is dubious at best.<sup>3124</sup> Similarly, evidence from S-21 Security Centre consists of lists of people who allegedly held a rank in the former regime but which have not been authenticated by any testifying witnesses.<sup>3125</sup> In any event, mere lists of names or brief reports alone are insufficient to explain the reasons for arrest and therefore unsuitable to prove the link between somebody's arrest and his or her alleged background. The relevant standard of proof has been recalled by the Supreme Court Chamber which held that "in order to sustain an overall finding that killings occurred beyond reasonable doubt, specific instances of killing must be proved beyond reasonable doubt"<sup>3126</sup> and that "a multiplicity of evidentiary items [...] add[ing] up to meet the burden of proof beyond reasonable doubt by virtue of their sheer number" is insufficient to enter a conviction.<sup>3127</sup>

#### C. THE CPK NEVER HAD A POLICY AIMING TO PERSECUTE OR OTHERWISE DISCRIMINATE AGAINST FORMER KHMER REPUBLIC SOLDIERS AND OFFICIALS

934. Contrary to what the Closing Order alleged, the CPK did not have an official policy aiming to persecute former Khmer Republic soldiers and officials as a result of their political beliefs. Rather, any measure taken, which related to an individual who also happened to fall in this specific group was the result of the legitimate CPK's national defence and security policy described in Chapter 4-II above. Indeed, not only did nearly all witnesses deny the existence of such policy, the documentary evidence relied upon in the Closing Order and by the Co-Prosecutors does not establish the existence of such policy beyond reasonable doubt.

<sup>3124</sup> See *supra*, Chapter 4-IV-F-1, on the unreliability of the 'Tram Kok District Records'.

<sup>3125</sup> See *infra*, Chapter 5-IV-C-2-(a), on Duch and Suos Thy's testimonies regarding those lists.

<sup>3126</sup> F36, Case 002/01 Appeals Judgement, para. 420.

<sup>3127</sup> F36, Case 002/01 Appeals Judgement, para. 419; see also F36, Case 002/01 Appeals Judgement, paras 430, 440; see also *supra*, Chapter 2-III-B-1.

## 1. The Live Evidence Demonstrates the Absence of a ‘Targeting’ Policy Towards Former Khmer Republic Soldiers and Officials

### (a) All Higher-Ranking Cadres Denied the Existence of a Policy

935. Four former DK cadres from three different zones provided live testimony in relation to the alleged policy of ‘targeting’ former Khmer Republic soldiers and officials. All of them categorically denied the existence of such a policy. These witnesses attended meetings where policies were disseminated, and received CPK publications containing those policies. Their evidence is therefore highly probative.

936. Pech Chim, former Tram Kok District chief,<sup>3128</sup> is clearly regarded by both the Trial Chamber and the Co-Prosecutors as a credible and important witness: not only has he been recalled to testify in Case 002/02, he was cited a striking 35 times by the Co-Prosecutors in their Case 002/01 Closing Brief and 13 times by the Chamber in the Case 002/01 judgement. Pech Chim provided detailed evidence about a meeting held in Takeo provincial town “after May 1975”<sup>3129</sup> during which Ta Mok announced that soldiers with the ranks from second lieutenant to colonel were not to be harmed.<sup>3130</sup> He further confirmed that, logically, “those who had lower ranks would be spared [...] [they] would not be touched.”<sup>3131</sup> Pech Chim himself never witnessed any execution of former Khmer Republic soldiers or officials<sup>3132</sup> and only heard unsubstantiated “rumour from one person to another”<sup>3133</sup> in this regard. Finally, questioned about his own understanding of the word “*komchat*”<sup>3134</sup> which was used in District 105 in relation to the treatment of former Khmer Republic officials and military,<sup>3135</sup> Pech Chim confirmed that it had a dual meaning and does not systematically equate to ‘purge’:

That word was used in the party lines and it stands to get rid of personal feeling, to get rid of personal ambition, and to build a good positive stance in place of the negative ones. [...] [former Lon Nol soldiers] had to refashion themselves in order to conform

<sup>3128</sup> See **E313**, Case 002/01 Judgement, fns 682, 683, 691, 699, 706, 960, 962, 1533, 1539, 1546, 2436, 2580, 2583; **E295/6/1**, Co-Prosecutors’ Case 002/01 Closing Brief, fns. 391, 644, 662, 717 (twice), 773, 786, 881, 1442, 1451, 1455, 1640 (twice), 1643 (three times), 1645 (three times), 1646 (three times), 1647 (twice), 1665, 1739 (twice), 1740 (twice), 1743, 1744, 1749, 1750, 1751, 1944.

<sup>3129</sup> **E1/292.1**, Pech Chim, T.24 Apr 2015, p. 17, lns 12-18.

<sup>3130</sup> **E1/292.1**, Pech Chim, T.24 Apr 2015, p. 18, lns 2- 9.

<sup>3131</sup> **E1/292.1**, Pech Chim, T.24 Apr 2015, p. 24, lns 8-11.

<sup>3132</sup> **E1/291.1**, Pech Chim, T. 23 Apr 2015, p. 75, lns 3-6.

<sup>3133</sup> **E1/215.1**, Pech Chim, T. 1 Jul 2013, p. 57, lns 9-12.

<sup>3134</sup> At the Tribunal, the Khmer word ‘*komchat*’ is typically translated into English as ‘purge’. However, as the Defence has previously argued, it in fact means to ‘scatter’: see *supra*, Chapter 4-II-B-2-(a).

<sup>3135</sup> **E1/291.1**, Pech Chim, T. 23 Apr 2015, p.71, lns 25 - p. 73, ln. 5.

themselves to the society and to get rid of their personal negatives [...] That was another meaning of that word.<sup>3136</sup>

937. Sao Van is also a crucial witness in Case 002/02, deemed credible by the Supreme Court Chamber.<sup>3137</sup> In April 1975, he was appointed Kampong Svay Commune committee member in Kien Svay District, Sector 25, Southwest Zone, and he became deputy secretary of Beoung Ksha Commune in Kandal Stung District, Sector 25, Southwest Zone, in 1977. Sao Van, whose brother was a former “Lon Nol official”<sup>3138</sup> who survived the regime, never witnessed any “mistreatments” of former Khmer Republic soldiers or officials.<sup>3139</sup> In his area, former soldiers and officials were “invited [...] to be re-educated or to join in the study sessions”<sup>3140</sup> and this is what happened to his brother who was sent to an “education area in Sector 24”.<sup>3141</sup> As with Pech Chim, Sao Van provided detailed evidence about a meeting held a few months after the liberation in Phnum Trael, District 106, Sector 13, Southwest Zone and chaired by Ta Saom,<sup>3142</sup> secretary of Sector 13, who confirmed that low ranking soldiers should not be harmed:

[S]oldiers ranking from the 2<sup>nd</sup> lieutenant to colonel should not be mistreated, should not be touched. And he actually emphasized the point that those ranked soldiers also had their relatives living amongst us and that those people involved in the movement to liberate the country, and for that reason we had to maintain this force and for us cadres, we had to remember that and had to implement this instruction effectively at our respective bases.<sup>3143</sup>

938. Prak Yut (2-TCW-938), former secretary of Kampong Siem District in Sector 41 of the Central Zone,<sup>3144</sup> also provided detailed evidence, fully consistent with that of both Pech Chim and Sao Van. She confirmed that, in both Sector 41 and Sector 25 where she used to work, former Khmer Republic soldiers and officials were invited to attend re-education meetings held at the commune level.<sup>3145</sup> In 1977, she attended a meeting held by Sector secretary Ta An, during which he provided orders in relation to the treatment of former Khmer Republic soldiers officials in Kampong Siem District. Ta An, clearly reaffirmed that the policy in this regard did not differ from the general DK defence and security policy, discussed above in Chapter 4-II,

<sup>3136</sup> E1/291.1, Pech Chim, T. 23 Apr 2015, p. 72, lns 4-25.

<sup>3137</sup> See e.g. F36, Case 002/01 Appeals Judgement, paras 949, 969.

<sup>3138</sup> E1/385.1, Sao Van, T. 1 Feb 2016, p. 36, ln. 22 to p. 37, ln. 5.

<sup>3139</sup> E1/385.1, Sao Van, T. 1 Feb 2016, p. 25, ln. 21.

<sup>3140</sup> E1/385.1, Sao Van, T. 1 Feb 2016, p. 76, lns 12-13.

<sup>3141</sup> E1/385.1, Sao Van, T. 1 Feb 2016, p. 37, lns 18-22.

<sup>3142</sup> E1/385.1, Sao Van, T. 1 Feb 2016, p. 18, lns 5-23.

<sup>3143</sup> E1/385.1, Sao Van, T. 1 Feb 2016, p. 19, lns 14-25 to p. 20, lns 1-3.

<sup>3144</sup> Prak Yut (2-TCW-938) is cited 12 times in the Case 002/01 Judgement (see fns 315, 686, 733, 734, 735, 822, 889, 898, 987, 1718, 1916, 1917); on Prak Yut (2-TCW-938)’s general credibility see *supra*, Chapter 5-II-B-3-(b).

<sup>3145</sup> E1/378.1, Prak Yut (2-TCW-938), T. 19 Jan 2016, p. 33, lns 16-17; E1/379.1, Prak Yut (2-TCW-938), T. 20 Jan 2016, p. 16, lns 6-21, p. 18, lns 16-19, p. 19, lns 12-16.

which applied to everyone: *i.e.*, only people who conducted unlawful activities had to be reprimanded. As she explained:

He instructed to identify former Lon Nol soldiers who were considered not good and for those who were good, they were spared. And I was told to identify a certain group of former soldiers; those who opposed the Angkar, I had to identify and told him and for those who were good, they were spared.<sup>3146</sup> [...]

[T]hose who were good could live peacefully because they adhered to the instruction from the communes and villages, so there were -- there were no contradiction among them.<sup>3147</sup>

939. Former Northwest Zone cadre Ly Nhoek (2-TCW-920) likewise confirmed that no specific policy applied to former Khmer Republic soldiers and officials. Indeed, he explained that, following Ruos Nhim's instructions,<sup>3148</sup> soldiers and officials from the previous regime "could live peacefully"<sup>3149</sup> in his area, even if "they were Colonels or had five strokes on their shoulders", "as long as they adapted themselves."<sup>3150</sup> Former DK cadres from the Southwest, Central and Northwest Zones – provided specific and fully consistent evidence confirming that no policy was ever designed by the CPK to "target" former Khmer Republic soldiers and officials. Quite the contrary: their testimonies confirm that, in accordance with the DK general policy towards defence and security,<sup>3151</sup> people who conducted unlawful activities and refused to "adapt themselves" were 'targeted', irrespective of their specific background.

**(b) Other Witnesses Confirmed the Absence of a Nationwide 'Targeting' Policy**

940. Several witnesses made allegations outside of the implementation scope which also corroborate DK cadres' evidence that no 'targeting' policy in relation to former Khmer Republic soldiers and officials ever existed. In particular, witness Prum Sarun, platoon chief in Sector 3 in the Northwest Zone, was a former Khmer Republic soldier who stated that local cadres at his location were well aware of his background and that he was "kept" because he was "hardworking".<sup>3152</sup> Prum Sarun further provided vague and selective evidence about the killing

<sup>3146</sup> E1/378.1, Prak Yut (2-TCW-938), T. 19 Jan 2016, p. 32, ln. 24 to p. 33, ln. 4.

<sup>3147</sup> E1/379.1, Prak Yut (2-TCW-938), T. 19 Jan 2016, p. 20, lns 19-22.

<sup>3148</sup> E1/507.1, Nhoek Ly (2-TCW-920), T. 6 Dec 2016, p. 22, lns 19-21.

<sup>3149</sup> E1/507.1, Nhoek Ly (2-TCW-920), T. 6 Dec 2016, p. 19, lns 4-5.

<sup>3150</sup> E1/507.1, Nhoek Ly (2-TCW-920), T. 6 Dec 2016, p. 18, lns 15-22.

<sup>3151</sup> See *supra*, Chapter 4-II, on the CPK's nationwide defence and security policy.

<sup>3152</sup> E1/365.1, Prum Sarun, T. 9 Dec 2015, p. 15, ln. 25 to p. 16, ln. 12; see also F36, Case 002/01 Appeals Judgement, para. 922.



of one individual who was “perhaps” a former Khmer Republic soldier or official on 17 April 1975 at Ou Pong Moan.<sup>3153</sup>

941. While he never took parts in any arrests,<sup>3154</sup> witness Say Doeun, member of the Long Sword unit in Kang Meas District in the East Zone, stated that his unit allegedly received orders to arrest former Khmer Republic soldiers and officials.<sup>3155</sup> Say Doeun’s evidence is general and unsubstantiated; he did not provide details as to who issued those alleged orders, nor did he explain whether these instructions have been implemented. In addition, civil party Sieng Chanthy provided unsworn testimony about the alleged “killing” of two of her brothers who were former lieutenants during the Khmer Republic, in Svay Rieng province. However, she stated that both of them had been accused of specific mistakes unrelated to their background.<sup>3156</sup> While her evidence lacks details and amounts to mere hearsay, it also suggests that her brothers’ arrests were due to their misconduct and have nothing to do with their former links with the Khmer Republic regime.

942. Evidence provided by witnesses outside of the charged crime base is anecdotal, vague and unspecific. No testifying witness managed to provide reliable evidence that the reason for arrest, killing or treatment was based on his or her background as former Khmer Republic soldier or official for even one single individual. In any event, evidence elicited outside of the scope of the case cannot form the basis of any findings in relation to the existence of a policy.<sup>3157</sup> In contrast, and as discussed above, former DK cadres gave extensive and consistent testimonies showing that people linked with the former regime were not ‘targeted’ because of their background. DK documentary evidence further confirms that no such policy ever existed.

## **2. The Documentary Evidence Likewise Fails to Support the Existence of a ‘Targeting’ Policy Based on the Alleged Membership of this Specific Group**

### **(a) *Detainee Lists, DK Publications, and Communications Alike Fail to Establish the Existence of a Policy***

943. The three categories of evidence presented by the Co-Investigating Judges, the Co-Prosecutors and the Chamber (in its Case 002/01 Judgement) in support of the existence of an alleged policy of ‘targeting’ former Khmer Republic soldiers and officials are out-of-court

<sup>3153</sup> E1/364.1, Prum Sarun, T. 8 Dec 2015, p.81, lns 10-14.

<sup>3154</sup> E1/374.1, Say Doeun, 12 Jan 2016, p.44, lns 3-5, p. 81, ln. 24, to p. 82, ln. 1.

<sup>3155</sup> E1/374.1, Say Doeun, 12 Jan 2016, p. 43, ln. 25.

<sup>3156</sup> E1/394.1, Sieng Chanthy, T. 1 Mar 2016, p. 24, ln. 21 to p. 25, ln. 6.

<sup>3157</sup> See *supra*, Chapter 5-IV-B-1, on the scope of Case 002/02 regarding the alleged ‘targeting’ policy against former Khmer Republic soldiers and officials.

documents. Apart from their inherently limited probative value, especially in the absence of sufficient corroborating live evidence, these documents are in any event, insufficient to prove beyond reasonable doubt the Co-Prosecutors' contention that a 'targeting' policy against former Khmer Republic soldiers and officials existed.<sup>3158</sup>

944. The first category of documents presented is lists of people identified as former Khmer Republic soldiers or officials in the so-called 'Tram Kok District Records' or allegedly being associated with S-21.<sup>3159</sup> As stated above, those lists are unreliable, since they have never been authenticated.<sup>3160</sup> Further, they are silent on the reason(s) that led to the people's arrests. Thus, they cannot be used to establish that the individuals' links with the former regime were the basis for their arrest. The second category of documents referred to are DK publications, which refer to actions taken against "enemy"<sup>3161</sup> in general, "concealed enemies boring from within",<sup>3162</sup> or "imperialist ringleaders".<sup>3163</sup> The sole use of such vague and generic terminology is insufficient to prove criminal intent.<sup>3164</sup> It cannot serve as a basis to find that the CPK designed a 'targeting' policy against former Khmer Republic soldiers and officials.<sup>3165</sup> The last category is DK communications, either telegrams or local reports.<sup>3166</sup> These documents likewise use general "charged" language and "ranking enemy officers"<sup>3167</sup> that is not specific enough to conclude that it is directed against former Khmer Republic soldiers or officials in particular.

945. Other CPK documentary evidence is consistent with the testimonies provided by DK cadres, namely that former Khmer Republic soldiers or officials were arrested when found guilty of serious misconducts or unlawful activities. For instance, several telegrams report treasonous activities conducted by people linked with the former regime in worksites such as

<sup>3158</sup> See *supra*, Chapter 2-III-B-2-(b).

<sup>3159</sup> See e.g. **E3/832**, Decision on Named Traitors; on the probative value of this document regarding the existence of a targeting policy see **F36**, Case 002/01 Appeals Judgement, para. 945; **E3/1539**, S-21 List of Prisoners; **E3/3973**, S-21 List of Prisoners; **E3/2048**, Tram Kok Reports, Mar-May 1977.

<sup>3160</sup> See *supra*, Chapter 2-III-B-2-(b); see also *supra*, Chapter 4-II-F-1; see also **F36**, Case 002/01 Appeals Judgement, para. 419 ("a multiplicity of evidentiary items [...] add[ing] up to meet the burden of proof beyond reasonable doubt by virtue of their sheer number, irrespective of their probative value [...] would mean that an accused could be convicted merely on the basis of widespread rumours").

<sup>3161</sup> See **E3/5**, Flag, Aug 1975, ERN 00401497.

<sup>3162</sup> See **E3/746**, Flag, Jul 1978, ERN 00428303.

<sup>3163</sup> See **E3/759**, Flag, Apr 1976, ERN 00517853.

<sup>3164</sup> See also *supra*, Chapter 4-II, on the legitimate CPK nationwide defence and security policy.

<sup>3165</sup> See *supra*, Chapter 4-II.

<sup>3166</sup> See e.g. **E3/4141**, Report from Moeun to Tram Kok District; **E3/2048**, Tram Kok Reports, Mar-May 1977; **E3/996**, Telegram from Se to 870, 19 Mar 1978.

<sup>3167</sup> **E3/2048**, Tram Kok Reports, Mar-May 1977, ERN 01454945.

propaganda and display of photos of Lon Nol on trees,<sup>3168</sup> or attempts to “disguise [...] themselves” as “new people”.<sup>3169</sup>

**(b) Evidence Shows That Former Khmer Republic Soldiers and Officials Were Also Involved the CPK**

946. Last but not least, former Khmer Republic soldiers or officials would hold leadership positions during DK, notably in cooperatives such as Kampong Leng or Ponhea Leu,<sup>3170</sup> and even in the military.<sup>3171</sup> Allowing its until very recently-bitter foes to enter the military and defend the DK in times of war is the ultimate proof of the CPK’s willingness to involve everyone’s good will in the new order. As long as they were not found guilty of activities threatening state security, people were trusted and assimilated, regardless of their background.

947. In sum, the documentary evidence either refers to generic terms and is thus irrelevant to former Khmer Republic soldiers and officials, or confirms that people’s background was never the basis for their arrest at all. The incriminating evidence is generally vague, unsubstantiated and inconsistent, while strong and reliable exculpatory evidence such as testimonies of former DK cadres, unanimously shows that DK treated former Khmer Republic soldiers and officials the same way as other DK citizens. The alleged policy of ‘targeting’ former Khmer Republic soldiers and officials is nothing more than another myth cultivated by the Manichean narrative.

**3. Conclusion on the Alleged Policy ‘Targeting’ Former Khmer Republic Soldiers and Officials**

948. Not only is there no direct evidence of the CPK having established and followed a policy to persecute former Khmer Republic soldiers and officials, an overwhelming number of witnesses testified that such policy never existed. While the existence of a ‘targeting policy’ could be deduced from circumstantial evidence, it must be the only reasonable conclusion. This is not so here; there is no systematic pattern permitting the inference of the existence of a nationwide policy due to the political beliefs of former Khmer Republic soldiers and officials.

<sup>3168</sup> E3/511, Telegram from Pok to Pol, 2 Apr 1976, ERN 00182658.

<sup>3169</sup> E3/995, Telegram from Sae to 870, 19 Mar 1978, ERN 00185583.

<sup>3170</sup> E3/193, Flag, Aug 1977, ERN 00399232.

<sup>3171</sup> See E3/2073, ‘DC-Cam Statement of Sau Ren’, ERN 00876433 (on Oeun, Division 310 commander, who was a captain during the Khmer Republic regime).

**D. FACTS RELATED TO THE ALLEGED ‘TARGETING’ OF FORMER KHMER REPUBLIC SOLDIERS AND OFFICIALS**

949. Not only is there no credible evidence that former Khmer Republic soldiers and officials were systematically identified in an effort to later “target” them, there is also no evidence that they were systematically killed, even less so as a result of their political beliefs.

**1. There is No Reliable Evidence of Identification of Former Khmer Republic Soldiers and Officials**

950. Evidence of the so-called ‘targeting’ policy includes testimonies discussing the alleged identification of former Khmer Republic soldiers and officials through the gathering and reviewing of documentation from the Khmer Republic<sup>3172</sup> and the compilation of lists of names.<sup>3173</sup> In any case, assuming that an identification process was implemented, the evidence shows that it applied to every DK citizen and not only to former Khmer Republic soldiers or officials. Further, such identification took place in a specific context after a civil war in which the CPK had fought the Khmer Republic regime.<sup>3174</sup> The fact that a person was linked to the previous regime may have been legitimately relevant for military or security reasons, and in no way illustrates a policy of targeting former soldiers or public officials as a group. Mere registration of people does not constitute evidence that such people were targeted in a discriminatory manner as a result of their membership in a group. It is a common practice to register individuals for administrative reasons, as well as being a routine practice in times of emergency or war, for security and intelligence-gathering purposes. Thus, at the very least, a perfectly reasonable alternative conclusion as to the purpose for which lists were made is that it was a regular and non-discriminatory registration process. The probability of this being the case is increased by the fact that there is no evidence that these lists were created or used to illegitimately target former Khmer Republic soldiers or officials upon orders or with the knowledge of Nuon Chea. As a result, the existence of possible lists is not indicative of the existence of a policy targeting former Khmer Republic soldiers and officials.

951. There is no direct and reliable evidence of killings or ‘targeting’ of soldiers or officials from the previous regime in the four charged sites. To the contrary, evidence from different areas as well as CPK documents confirm that the CPK never implemented a ‘targeting’ policy

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<sup>3172</sup> E1/433.1, Duch, T. 7 Jun 2016, p. 64, lns 9-12, p. 71, lns 12-18; E1/419.1, Nhem En, T. 20 Apr 2016, p. 104, lns 2-11, on Duch and Nhem En’s credibility, *see supra*, Chapter 4-IV-D-1.

<sup>3173</sup> *See e.g.* E1/263.1, Em Phoeung, T. 16 Feb 2015, p. 32, lns 7-14; E1/298.1, Ek Hoeun, T. 7 May 2015, p. 52, lns 16-23; E1/299.1, Ek Hoeun, T. 8 May 2015, p. 33, lns 2-23.

<sup>3174</sup> *See supra*, Chapter 3-III.

against former Khmer Republic soldiers and officials, who were subjected to the same conditions as every other Cambodian person at the time.

## **2. There is No Reliable Evidence of Killings of Former Khmer Republic Soldiers and Officials**

952. Even if evidence established disappearance, it does not establish killing beyond reasonable doubt.<sup>3175</sup> Similarly, evidence relating to arrests and disappearances may only be indicative of executions when seen in light of other evidence.<sup>3176</sup> Therefore, absent any specific and reliable evidence of killings, no finding of crime can be established beyond reasonable doubt. The live evidence presented over the course of Case 002/02 in relation to alleged killings of former Khmer Republic soldiers and officials is anecdotal, unsubstantiated and hence constitutes an inadequate basis for the Co-Prosecutors to prove the killings of these people due to their specific background beyond reasonable doubt.

### **(a) Evidence Relating to the 1<sup>st</sup> January Dam Worksite is Insufficient**

953. Relying solely on the WRI of Ut Seng, the Closing Order alleged that at the 1<sup>st</sup> January Dam, “[m]any of the people who disappeared had perceived links to the former Khmer Republic regime.”<sup>3177</sup> Ut Seng testified that he worked in the same unit as workers who “were the 17 April people and who had connection with the former Lon Nol soldiers.”<sup>3178</sup> He claimed that at night, he saw “two to three workers walk[ed] away”<sup>3179</sup> and the next day overheard the chief of the youth unit telling a militiaman that “those few workers had been put in a well”.<sup>3180</sup> Ut Seng neither explained what he meant by “people who had connection with former Lon Nol soldiers” nor how he knew that those people had such connections. Further, Ut Seng also provided no evidence as to the reason for the alleged arrest of those persons. Ut Seng’s testimony amounts to mere “rumours”, which is insufficient to support any finding beyond reasonable doubt.<sup>3181</sup>

954. Additional live evidence presented in relation to the 1<sup>st</sup> January Dam consisted of the testimony of one witness and one civil party. Witness Au Hau, village chief in Baray District of the Northwest Zone, testified that people whose background as former Khmer Republic

<sup>3175</sup> **F36**, Case 002/01 Appeals Judgement, paras 471, 472.

<sup>3176</sup> **F36**, Case 002/01 Appeals Judgement, para. 874.

<sup>3177</sup> **D427**, Closing Order, para. 366.

<sup>3178</sup> **E1/309.1**, Ut Seng, T. 3 Jun 2015, p. 8, lns 13-14.

<sup>3179</sup> **E1/309.1**, Ut Seng, T. 3 Jun 2015, p. 9, lns 8-9.

<sup>3180</sup> **E1/309.1**, Ut Seng, T. 3 Jun 2015, p. 8, ln. 25.

<sup>3181</sup> See **F36**, Case 002/01 Appeals Judgement, paras 300, 419, 428, 441.

soldiers or officials when uncovered were arrested, sent to the security office<sup>3182</sup> and would disappear.<sup>3183</sup> Au Hau did not provide any specifics as to the source of his knowledge. Au Hau also testified about seven families, “some of them were in civil service and some were in the army”<sup>3184</sup> which were “taken away” from his village. Since he recognised one of those individual’s set of clothes that had been sent back to the village, he deduced that those families must have been killed.<sup>3185</sup> However, Au Hau did not witness any killings and only noticed people’s transfer to another location. His conclusion is a mere assumption and is insufficiently substantiated for the Co-Prosecutors to satisfy their burden of proving beyond reasonable doubt that an alleged policy of ‘targeting’ former Khmer Republic soldiers or officials existed.

955. Civil party Seang Sovida gave unsworn evidence about the disappearance of her father who was a former “Lon Nol soldier” and of her brother-in-law’s who was a “former pilot”. Seang Sovida stated that her father’s background was unknown to the local cadres.<sup>3186</sup> Hence, her father’s background could not have been the reason for his arrest. In any event, Seang Sovida only learnt of her relatives’ arrests from others and acknowledged not having “a full account of the event”.<sup>3187</sup> She provided no details about the circumstances surrounding those arrests and no evidence at all linking their alleged arrests to their background. Therefore, as with the two other testimonies detailed above, Seang Sovida’s account is an inadequate basis for the Co-Prosecutors to prove beyond reasonable doubt the killings of former Khmer Republic soldiers and officials at the 1<sup>st</sup> January Dam as a result of their specific background.<sup>3188</sup>

**(b) Evidence Relating to the Tram Kok Cooperatives is Insufficient**

956. No witness or civil party who appeared in relation to the treatment of former Khmer Republic soldiers and officials in Tram Kok District provided first-hand testimony of killings. The overall live evidence presented amounts to hearsay and the documentation available is, in any event, insufficient to prove either killings or connections between the arrests and the specific background of arrested people. Ek Hoeun,<sup>3189</sup> Pech Chim’s brother-in-law, offered inconsistent evidence that does not support the existence of an alleged ‘targeting’ policy. On

<sup>3182</sup> E1/301.1, Au Hau, T. 19 May 2015, p. 16, lns 1-6.

<sup>3183</sup> E1/301.1, Au Hau, T. 19 May 2015, p. 26, lns 13-14.

<sup>3184</sup> E1/301.1, Au Hau, T. 19 May 2015, p. 25, lns 22-23.

<sup>3185</sup> E1/301.1, Au Hau, T. 19 May 2015, p. 27, lns 9-11.

<sup>3186</sup> E1/308.1, Seang Sovida, T. 2 Jun 2015, p. 61, lns 13-15.

<sup>3187</sup> E1/308.1, Seang Sovida, T. 2 Jun 2015, p. 62, lns 17-18.

<sup>3188</sup> On the probative value of anonymous hearsay provided by a civil party, see F36, Case 002/01 Appeals Judgement, paras 434, 442.

<sup>3189</sup> Also known as UI Hoeun.

the contrary, he confirmed that former Khmer Republic soldiers and officials were subjected to the same conditions as all other Cambodians at the time. Ek Hoeun testified about identification of “former Lon Nol soldiers” who were sent to work “24 hours round the clock.”<sup>3190</sup> He further testified about the gathering of former Khmer Republic soldiers and officials in 1977 at Champa Leu Pagoda and their scattering between “different villages”.<sup>3191</sup> He did not know what happened to these people afterwards.<sup>3192</sup> In any event, Ek Hoeun confirmed that “former Lon Nol soldiers” and “new people” in general “were treated the same way [...] they enjoyed the same rights; they had to respect one another and so on and so forth”,<sup>3193</sup> and that “[...] the policy was applicable to both the New People and the Base People.”<sup>3194</sup>

957. Civil party Chou Koemlan provided unsworn testimony about the arrest of her husband, who was a former major during the Khmer Republic.<sup>3195</sup> She explained that, one night in August 1975, three people came to her place and took her husband away, saying that he had been called to study.<sup>3196</sup> Chou Koemlan also stated that she heard three shots of gunfire after her husband’s arrest and inferred that her husband was killed.<sup>3197</sup> Several years later, in “1984 or 1990”,<sup>3198</sup> a “person who learnt of that event from [that person’s] husband” told Chou Koemlan that her husband had been killed.<sup>3199</sup> She also recalled that the three men who came to pick her husband up found his ID card, which mentioned his former rank.<sup>3200</sup> Chou Koemlan deduced that her husband had been killed as he was a former “Lon Nol soldier”.<sup>3201</sup> In addition to not being under oath, Chou Koemlan only provided anonymous third-hand<sup>3202</sup> hearsay, reported to her more than ten years after the alleged event. Therefore, her evidence is of very low probative value and cannot “reasonably serve as a basis for a finding of murder or corroboration thereof”.<sup>3203</sup>

<sup>3190</sup> E1/298.1, Ek Hoeun, T. 7 May 2015, p. 51, lns 16-20.

<sup>3191</sup> E1/299.1, Ek Hoeun, T. 8 May 2015, p. 32, ln. 16.

<sup>3192</sup> E1/299.1, Ek Hoeun, T. 8 May 2015, p. 32, lns 16-17.

<sup>3193</sup> E1/298.1, Ek Hoeun, T. 7 May 2015, p. 55, lns 16-19; *see also infra*, Chapter 6-V-B-1-(b), on the equality between “new” and “base” people in the Tram Kok Cooperatives.

<sup>3194</sup> E1/298.1, Ek Hoeun, T. 7 May 2015, p. 57, lns 21-25; *see also infra*, Chapter 6-V-B-1-(b), on the equality between “new” and “base” people in the Tram Kok Cooperatives.

<sup>3195</sup> E1/253.1, Chou Koemlan, T. 27 Jan 2015, p. 35, lns 7-8.

<sup>3196</sup> E1/253.1, Chou Koemlan, T. 27 Jan 2015, p. 35, ln. 21, p. 38, lns 11-12.

<sup>3197</sup> E1/253.1, Chou Koemlan, T. 27 Jan 2015, p. 38, lns 10-11.

<sup>3198</sup> E1/253.1, Chou Koemlan, T. 27 Jan 2015, p. 38, ln. 1.

<sup>3199</sup> E1/253.1, Chou Koemlan, T. 27 Jan 2015, p. 37, ln. 11.

<sup>3200</sup> E1/252.1, Chou Koemlan, T. 26 Jan 2015, p. 49, ln. 22 to p. 50, ln. 1.

<sup>3201</sup> E1/252.1, Chou Koemlan, T. 26 Jan 2015, p. 49, lns 22-23.

<sup>3202</sup> The Supreme Court Chamber refers to “triple hearsay”, *see* F36, Case 002/01 Appeals Judgement, para. 886.

<sup>3203</sup> F36, Case 002/01 Appeals Judgement, para. 434; on the probative value of double hearsay from an anonymous source *see also* F36, Case 002/01 Appeals Judgement, para. 442.

958. The remaining evidence the Co-Prosecutors offered at trial on the treatment of former Khmer Republic soldiers and officials in Tram Kok District consists of reports or lists of arrested people registered as members of the previous regime. In addition to being part of the so-called ‘Tram Kok District Records’ and being inherently unreliable as such,<sup>3204</sup> these documents do not demonstrate the link between those people’s former positions and their arrest.<sup>3205</sup> On the contrary, it is often clear that those persons, who happened to be former soldiers or officials, had been arrested for specific unlawful activities they conducted during the regime.<sup>3206</sup> These documents are therefore insufficient for the Co-Prosecutors to satisfy their burden of proving beyond reasonable doubt that an alleged policy of ‘targeting’ former Khmer Republic soldiers or officials existed.

***(c) Evidence Relating to S-21 Security Centre is Insufficient***

959. The live evidence on the treatment of former Khmer Republic soldiers and officials at S-21 solely consists of the testimonies of Nhem En and Duch, two of the most unreliable witnesses heard in Case 002/02. Nhem En, a charlatan lacking any credibility,<sup>3207</sup> provided only unsourced and uncorroborated hearsay evidence, which is an unsuitable basis for the Co-Prosecutors to prove in accordance with the proper standard that any killings of former Khmer Republic soldiers or officials occurred.<sup>3208</sup> At trial, Duch provided hearsay evidence he learnt from Khoem Pin, former secretary of Division 703 on two former Khmer Republic generals who were allegedly “taken away secretly” during the regime.<sup>3209</sup> Duch did not provide further details on circumstances surrounding their arrest or their subsequent fate. His evidence on that point is thus insufficiently detailed and amounts to hearsay. As such, its probative value is inherently low and, in any event, it cannot support any finding of killings beyond reasonable doubt.<sup>3210</sup> In any event, Duch confirmed his previous statement that “[a]t S-21, there was not a

<sup>3204</sup> See Chapter 4-IV-F-1, on reliability of the ‘Tram Kok District Records’.

<sup>3205</sup> See e.g. E3/4083, Kraing Ta Chan Notebook; E3/2615, List of Kampuchea Krom People; E3/2281, List of People from Trâpaing Thom Cheung Commune, on the reliability of the ‘Tram Kok District Records’, see *supra* Chapter 4-IV-F-1.

<sup>3206</sup> See e.g. E3/2048, Tram Kok Reports, Mar-May 1977, ERN 01454945. (Following “Angkar” request on “vigilance against enemies and purges of ranking enemy soldiers” and after close monitoring, Cheang Torng commune provided the names of only two former Khmer Republic soldiers considered as “enemy”, meaning that the vast majority who did not conduct any unlawful activities considered “enemy” and not were not targeted as such.); see also E1/294.1, Key Documents Hearing, T. 28 Apr 2015, p. 12, lns 3-13.

<sup>3207</sup> See *supra*, Chapter 4-IV-D-1, on the reliability of Nhem En.

<sup>3208</sup> E1/419.1, Nhem En, T. 20 Apr 2016, p. 103, ln. 9 to p. 106, ln. 18.

<sup>3209</sup> E1/433.1, Duch, T. 7 Jun 2016, p. 68, lns 22.

<sup>3210</sup> F36, Case 002/01 Appeals Judgement, para. 441.



single general of Lon Nol [and t]here was not a single minister of Lon Nol”,<sup>3211</sup> and clearly stated there was no policy to “target” former Lon Nol soldiers and officials.<sup>3212</sup>

960. Additional evidence presented by the Co-Prosecutors consists of S-21 lists of detainees registered as being former Khmer Republic soldiers or officials. As stated above, however, the reliability of S-21 documentary evidence remains generally questionable.<sup>3213</sup> In addition, none of the witnesses who testified confirmed the authenticity of the lists of detainees allegedly linked to the previous regime.<sup>3214</sup> There is no live evidence regarding the treatment of former Khmer Republic soldiers or officials at S-21 and the documentary evidence available, is unauthenticated, and, in any event, cannot serve as the sole basis to establish a crime beyond reasonable doubt.<sup>3215</sup>

***(d) Evidence Relating to Kraing Ta Chan Security Centre is Insufficient***

961. The only live testimony concerning the arrest and detention of former Khmer Republic soldiers and officials at Kraing Ta Chan was offered by witness Sao Han. He claimed having heard that his former Khmer Republic soldier brother had been arrested and taken to Kraing Ta Chan. However, he later said he was not sure that he was taken there,<sup>3216</sup> and, in any case he did not explain the link between his brother’s arrest and his brother’s position in the previous regime. Sao Han’s testimony is therefore clearly insufficient to substantiate a finding beyond reasonable doubt as to his brother’s fate.

962. The remaining witnesses who testified on this subject failed to offer sufficient details to substantiate the Co-Prosecutors’ assertions to a degree even close to “beyond reasonable doubt”. When guard and typist Srei Than was asked about one of his cousins who the Co-Prosecutors had identified in a purported Kraing Ta Chan interrogator’s notebook from the ‘Tram Kok District Records’, he was unable to confirm either that the cousin in question was a former Khmer Republic soldier or official at all or that he was arrested and sent to Kraing Ta Chan.<sup>3217</sup> Srei Than also testified that he “did not know for sure” whether there were many

<sup>3211</sup> E1/443.1, Duch, T. 23 Jun 2016, p. 107, lns 16- 23.

<sup>3212</sup> E1/443.1, Duch, T. 23 Jun 2016, p. 109, ln. 19 to p. 110, lns 1-4.

<sup>3213</sup> See *supra*, Part 4, on the unreliability of the documentary evidence in connection with S-21.

<sup>3214</sup> See E1/433.1, Duch, T. 7 Jun 2016, p. 70, lns 17-18; E1/436.1, Duch, T. 13 Jun 2016, p. 53, lns 20-22; E1/430.1, Suos Thy, T. 2 Jun 2016, p. 24, lns 14-15.

<sup>3215</sup> F36, Case 002/01 Appeals Judgement, para. 296.

<sup>3216</sup> E1/265.1, Sao Han, T. 18 Feb 2015, p. 4, lns 6-24, p. 44, ln. 20 to p. 46, ln. 1; see also *supra*, Chapter 4-V-E-1, on the alleged death toll at Kraing Ta Chan.

<sup>3217</sup> E1/267.1, Srei Than, T. 23 Feb 2015, p. 32, ln. 13 to p. 34, ln. 1.

former “Lon Nol soldiers and officials” detained at Kraing Ta Chan.<sup>3218</sup> Similarly, witness Keo Chandara, who, as noted above, may have been detained in Kraing Ta Chan pre-DK,<sup>3219</sup> only offered contradictory, general evidence that he did see “Lon Nol officers or soldiers” at Kraing Ta Chan, but also that he did not see any of them arriving in Kraing Ta Chan during his short period of detention.<sup>3220</sup> In any event his testimony does not permit a conclusion that those persons were detained because of their links with the former regime.

963. The only remaining evidence is, beyond unreliable, the so-called ‘Tram Kok District Records’ and of course<sup>3221</sup> the unsworn statements of civil parties. Oem Saroeurn, whose father, uncle and brother had been associated with the Khmer Republic, was ultimately unable to confirm that they had been taken to or killed at Kraing Ta Chan, as discussed further above.<sup>3222</sup> Guard and civil party Saut Saing could only vaguely relay learning after the DK about someone named “Bong Chea” who he heard was a “former soldier in Lon Nol period” killed at Kraing Ta Chan.<sup>3223</sup> Finally, wholly-unreliable civil party Say Sen detailed how “former Lon Nol soldiers were regarded as prisoners of war [...] and they were taken there”.<sup>3224</sup> However, when pressed by the Defence, he could only provide the name Ta Het Pann or Ta Sokreach Pann justifying this answer – in a departure from his usual all-seeing, all-doing and all-knowing position – that he was “too young at that time” and “a prisoner as well. I did not have right to go to ask [...] that person”.<sup>3225</sup>

964. Once again, no witness who testified on the treatment of former Khmer Republic soldiers at Kraing Ta Chan Security Centre provided reliable direct evidence on one single killing as a result of the victim’s background. Subsequently, none of these testimonies is sufficient to prove that killings of former Khmer Republic soldiers and officials were conducted at Kraing Ta Chan Security Centre on the basis of their former positions.

<sup>3218</sup> E1/267.1, Srei Than, T. 23 Feb 2015, p. 30, ln. 22 to p. 31, ln. 1.

<sup>3219</sup> See *supra*, Chapter 4-V-A-1, on the role of the Southwest Zone at Kraing Ta Chan.

<sup>3220</sup> E1/256.1, Keo Chandara, T. 4 Feb 2015, p. 5, ln. 25 to p. 6, ln. 3 (“I did not see people who left the Lon Nol regime arrived, or rather who were the former Lon Nol regime’s servants arrived at Kraing Ta Chan”); *contra* E1/255.1, Keo Chandara, T. 2 Feb 2015, p. 41, lns 6-8 (“When I was detained at the Centre, I cannot make assumption. There was not less than 50 victims executed a day. It’s not only for the former Lon Nol officers or soldiers”).

<sup>3221</sup> See *supra*, Chapter 4-IV-F-1, on the reliability of the ‘Tram Kok District Records’.

<sup>3222</sup> See *supra*, Chapter 4-V-E-1, on the alleged death toll at Kraing Ta Chan.

<sup>3223</sup> E1/282.1, Saut Saing, T. 25 Mar 2015, p. 56, lns 2-15.

<sup>3224</sup> E1/256.1, Say Sen, T. 4 Feb 2015, p. 71, ln. 24 to p. 72, ln. 2.

<sup>3225</sup> E1/258.1, Say Sen, T. 6 Feb 2015, p. 16, lns 12-13, 24-25.

### **3. Conclusion on Facts Related to the Alleged ‘Targeting’ of Former Khmer Republic Soldiers and Officials**

965. The Closing Order’s allegations that former Khmer Republic soldiers and officials were identified and killed due to their political beliefs were, once again, not supported by the evidence heard at trial. The evidence, even taken as a whole, does not demonstrate that former Khmer Republic soldiers and officials were systematically targeted, arrested and killed in an effort to discriminate against them as a result of their political beliefs. Rather, it shows that when individuals who happened to also have been former Khmer Republic soldiers and officials were arrested, it was for legitimate reasons, unrelated to their political convictions.

#### **E. CRIMES CHARGED FOR THE ALLEGED ‘TARGETING’ OF FORMER KHMER REPUBLIC SOLDIERS AND OFFICIALS**

966. As set out in Chapter 4-VI-G-1, the Co-Prosecutors have failed to establish the necessary chapeau element for crimes against humanity, namely that there was a ‘discriminatory’ attack. Therefore, no crime against humanity can be established – including rape and other inhumane acts – at all. Even if the chapeau element could be proven, the evidence related to the “treatment” of former Khmer Republic soldiers and officials fails to fulfil even one of the constitutive elements of any crime against humanity, be it murder, or political persecution. Nuon Chea must therefore be acquitted.

##### **1. There is No Evidence of Murder**

967. As stated above, the only live evidence on ‘killings’ is general hearsay or vague accounts of ‘disappearances’. No details are given as to the specifics of the alleged events. The Supreme Court Chamber held that each constitutive element of a crime must be established beyond reasonable doubt<sup>3226</sup> and refused to hold that even a single killing took place beyond reasonable doubt when the supporting evidence only amounted to anonymous or unsubstantiated hearsay or when the sources of the witness’ knowledge was uncertain.<sup>3227</sup> The same reasoning should apply here, as none of the evidence presented reaches the standard of proof required.

##### **2. There is No Evidence of Political Persecution**

968. The elements of the crime of political persecution are listed above in Section II-H-2 of the present Chapter. The evidence discussed above shows that former Khmer Republic soldiers

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<sup>3226</sup> F36, Case 002/01 Appeals Judgement, para. 418.

<sup>3227</sup> F36, Case 002/01 Appeals Judgement, paras 428, 434.

and officials were not discriminated against on the basis of their political beliefs. They were required to work and live under the same conditions as any other person under DK. Some of them even held leadership positions, which clearly precludes any discriminatory intent against them as a group. There is no evidence supporting that any measures which may have been taken against former Khmer Republic soldiers and officials were grounded or related to their political beliefs. Instead, evidence shows that they were investigated, arrested and detained exclusively on the basis of their suspected engagement in unlawful activities such as treason and espionage. Being suspected or involved in unlawful activities, or activities threatening national security, such as treason or espionage, does not qualify as holding a particular political belief. It is simply a criminal act, irrespective of the political views of the person who commits it. Investigating, arresting or detaining individuals suspected of having committed such actions does not constitute discrimination in fact, but mere police operations. Finally, there is also no evidence that the alleged physical perpetrators held any discriminatory intent. Even if there were, there is no evidence that such intent was shared by Nuon Chea, or that he was even aware of it. In the absence of such *mens rea*, a conviction is precluded.

**F. JCE I IN RESPECT OF THE ALLEGED ‘TARGETING’ OF FORMER KHMER REPUBLIC SOLDIERS AND OFFICIALS**

969. As described above in Part C, there is not an ounce of evidence that the CPK had an explicit policy to target former Khmer Republic soldiers and officials due to their political beliefs. There is also nothing permitting the deduction of the existence of such policy from events on the ground, since, as discussed in Part D, there is no systematic pattern of actions. Even if the alleged crimes were established beyond reasonable doubt – which is legally impossible, as discussed in Part E – no evidence links them to a JCE member or Nuon Chea. Lastly, even if there was such link, there is no evidence that the physical perpetrator(s) acted with the requisite specific intent to discriminate against former Khmer Republic soldiers and officials on political grounds. In addition, to establish the crime of political persecution under JCE I, it must be shown beyond reasonable doubt that each JCE member individually shared the specific intent to discriminate.<sup>3228</sup> The evidence does not establish such intent here. A JCE I finding is therefore precluded. The remaining modes of liability charged are discussed in Chapter 8 of this Brief.

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<sup>3228</sup> ICTY, *Brđanin* Trial Judgement, para. 708.

**G. CONCLUSION ON THE ALLEGED ‘TARGETING’ OF FORMER KHMER REPUBLIC SOLDIERS AND OFFICIALS**

970. As demonstrated in this Section, the evidence at factual and policy levels does not support a finding that former Khmer Republic soldiers and officials were discriminated against due to their political beliefs or that Nuon Chea ever had the goal to persecute former Khmer Republic soldiers and officials. Indeed, the evidence does not merely create a doubt as to whether there was in fact a policy to persecute former Khmer Republic soldiers and officials; it shows unequivocally that there was never such policy.

**V. CONCLUSION ON THE ALLEGED ‘TARGETING’ OF FOUR SPECIFIC GROUPS, INCLUDING THROUGH GENOCIDE**

971. In its decision on severance and scope, the Trial Chamber implicitly recognised that in order to establish a nationwide policy, at the minimum, one witness or civil party should be heard for each zone, as well as one expert.<sup>3229</sup> The Defence disagrees with this approach: even if an individual would testify with regards to each Zone, it is insufficient to establish that a crime occurred systematically in this Zone. Notwithstanding this fact, in the case of the allegations regarding the ‘targeting’ of specific groups, this low standard was not even reached. Not only was there limited evidence, even with regards to the charges of genocide against the Cham and Vietnamese, what characterised the evidence on ‘targeted groups’ was its vagueness and unreliability. There is no evidence that crimes within the jurisdiction of the Tribunal were actually committed against Cham, Vietnamese, Buddhists, and former Khmer Republic soldiers and officials, as a result of their race, ethnicity, religion or political views.

972. On the contrary, unequivocal evidence was heard that there was never a policy to destroy, exterminate or otherwise persecute the Cham and Vietnamese; never a policy to persecute Buddhists, in particular monks, as a result of their religion; and never a policy to persecute former Khmer Republic soldiers and officials. The Closing Order that the CPK aimed to “establish an atheistic and homogenous society without class divisions, abolishing all ethnic, national, religious, racial, class and cultural differences”<sup>3230</sup> simply fell flat after trial. Rather, if anything, it showed the CPK’s egalitarian policy aiming to improve people’s living standards, which is further discussed immediately below in Chapter 6.

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<sup>3229</sup> E301/9/1, Additional Severance of Case 002, para. 33.

<sup>3230</sup> D427, Closing Order, para. 207.

## CHAPTER 6. THE CPK'S POLICY TO ESTABLISH COOPERATIVES AND WORKSITES AND ITS IMPLEMENTATION AT FOUR CRIME SITES

### I. INTRODUCTION

973. The Closing Order claims that one of the CPK policies adopted to implement the alleged JCE's common purpose was "to implement and defend the socialist revolution through the establishment and operation of cooperatives and worksites by whatever means necessary".<sup>3231</sup> Cooperatives and worksites<sup>3232</sup> allegedly had three objectives: to engage people in production and construction work regardless of its impact on them; to further another so-called CPK policy of 'smashing' enemies;<sup>3233</sup> and to replace the existing social structure with collectivism which allegedly turned the entire country into a "prison without walls".<sup>3234</sup> The Closing Order further asserts that the DK isolated itself through a self-reliance policy and failed to put in place adequate systems to redress the "serious health and food problems [that] arose following the establishment of the CPK regime".<sup>3235</sup> This policy was allegedly implemented in four crime sites included in Case 002/02: the Tram Kok Cooperatives, the 1<sup>st</sup> January Dam Worksite, the Kampong Chhnang Airfield Construction Site,<sup>3236</sup> and the Trapeang Thma Dam Worksite.

974. These allegations reveal an ignorance of socialism at best, and at worst, a deep bias against it.<sup>3237</sup> Communism, Marxism-Leninism, and more broadly, socialism, are ideologies driven entirely by the people's interests and standards of living. Before DK, and arguably even today, Cambodia was a country rich in natural resources, but whose wealth was concentrated in the hands of a limited few. People who were not part of the elite, most of whom were poor peasants, had to work extremely hard to just ensure their day-to-day survival. The Marxist-Leninist CPK intended to create a more equal society, where wealth would be shared for the benefit of all. It established cooperatives and worksites to improve agricultural production, and thus provide sufficient food for all DK citizens, irrespective of their social origin or wealth.

<sup>3231</sup> **D427**, Closing Order, paras 157, 168.

<sup>3232</sup> Unlike "cooperatives" – the definition of which will be discussed below – "worksites" are not a special product of socialism or communism. The Closing Order uses "worksites" in the ordinary sense of the word, namely a location where people work on construction projects.

<sup>3233</sup> See *supra*, Chapter 4-II, for an analysis of this so-called policy and the legitimate and lawful nationwide defence and security policy the CPK in fact put in place during the DK.

<sup>3234</sup> **D427**, Closing Order, paras 169, 158; see also **E1/14.1**, Case 002/01 Opening Statements (Co-Prosecutors), T. 22 Nov 2011, p. 24, Ins 5-8; **E1/242.1**, Case 002/02 Opening Statements (Co-Prosecutors), T. 17 Oct 2014, p. 27, Ins 4-5.

<sup>3235</sup> **D427**, Closing Order, para. 177.

<sup>3236</sup> Despite the Closing Order's use of "airport", the Defence will use "airfield" instead as it considers this description more factually accurate in light of the military nature of the site.

<sup>3237</sup> See *supra*, Chapter 3-II-A, for an explanation of the relationship between socialism and communism.

975. It is true that the system of governance in a socialist or communist state is undoubtedly different from that of a western liberal democracy, but western liberal democracies do not define the universal standard of right and wrong. The differences between ideologies and their approaches to state governance are legally irrelevant. What is relevant, instead, is whether the intent behind the DK's approach to state governance and in the creation and operation of cooperatives and worksites was criminal in nature, which it clearly was not.

976. It is for this reason that the trial segments on cooperatives and worksites were perhaps the most disappointing and infuriating of all, for it was here that the Co-Prosecutors, the Civil Party Lead Co-Lawyers, and the Chamber revealed that they share a bias that runs even deeper than their penchant for the reductionist Manichean narrative: **ideology**. The cooperatives and worksites segments vindicated the Defence's belief that this Tribunal is indeed inescapably ideological<sup>3238</sup> for through it, the Tribunal demonstrated its inability to evaluate the CPK cooperatives and worksites policy neutrally. Instead, it has shamelessly put communism on trial. The Co-Prosecutors and Civil Party Lead Co-Lawyers have also, either through ignorance or disingenuity, addressed cooperatives and worksites in a cultural, historical and ideological vacuum, questioning witnesses and civil parties on living and working conditions using current conditions in western liberal democracies as their baseline rather than taking proper consideration of conditions prevailing in Cambodia either during the DK or even today.

977. As clearly demonstrated below, cooperatives and worksites were not established to abstractly collectivise Cambodia at any cost with full disregard of human life. Rather, they were designed to rebuild, and, for Kampong Chhnang Airfield, defend, a Cambodia ravaged by civil war and decimated by US bombings. The ultimate aim was to improve the people's living conditions through the improvement of agriculture and the sharing of resources. The Manichean narrative, as dutifully parroted by the Co-Prosecutors, also suggests that DK was not only a "prison without walls" but even what the Co-Prosecutors refer to as a "slave state".<sup>3239</sup> However, this is undermined by the very nature of the ideological socio-economic goals the CPK sought to achieve. The idea the CPK would have put into place any form of policy aiming to enslave and punish its citizens would quite self-evidently defeat the very purpose of the revolution the CPK fought for many years, at a very high human cost, to achieve.<sup>3240</sup> The notion

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<sup>3238</sup> See also E314/6, Nuon Chea's Second Trial Chamber Disqualification Motion, para. 129.

<sup>3239</sup> See e.g. E1/229.1, Co-Prosecutors' Case 002/01 Closing Statements, T. 17 Oct 2013, p. 6, ln. 24.

<sup>3240</sup> See also, E295/6/3, Nuon Chea's Case 002/01 Closing Brief, para. 5.

that the CPK sought to build a “slave state” is also richly ironic considering that this, in fact, is what Vietnam sought to transform DK into by subsuming it into the Indochinese Federation.<sup>3241</sup>

978. Rather than showing the existence of a policy to enslave people or the existence of a nationwide system of enslavement as the Co-Prosecutors melodramatically suggest, a proper and dispassionate evaluation of the evidence – considered in proper context – shows that the CPK policy indeed sought to improve people’s livelihoods, but that that significant variations existed in working and living conditions within one individual cooperative or worksite. This owes, like in any state, to the significant autonomy local authorities exercised, which was not always used in accordance with the official policy or in pursuance of the greater good. However, despite such variations, the evidence also shows that the economic situation had considerably improved by the end of the DK regime. Far from being what Judge Cartwright referred to at the Aspen Institute as “useless project[s]”, the DK’s worksites were critical infrastructure projects some of which kept functioning until the 1990s<sup>3242</sup> and whose beneficial effects are still acknowledged nowadays.<sup>3243</sup> Even if conditions in the DK were not yet perfect, international law recognises that the social, economic, and cultural development of a state is by nature progressive, subject to the limitations linked to the material resources available to a state.

979. This Chapter shows not only that CPK’s cooperatives and worksites policy was legitimate and lawful, but that Nuon Chea is not criminally responsible for alleged crimes, if any, in the four sites in Case 002/02 in which the alleged policy was implemented. Section II sets out the policy in detail. Section III overviews the Defence’s position for each crime site. Preliminary issues relating to the crime sites are discussed in Section IV, and the facts in Section V. The alleged crimes are discussed in Section VI and the mode of liability of JCE I in Section VII. Finally, other modes of liability are discussed separately in Chapter 8 of this Brief below.

## **II. THE CPK’S POLICY TO ESTABLISH COOPERATIVES AND WORKSITES**

### **A. HISTORICAL CONTEXT IS KEY TO A PROPER UNDERSTANDING OF THE POLICY**

980. The Closing Order’s allegation that DK’s serious health and food problems arose after the DK was established is plainly false.<sup>3244</sup> As academic Michael Vickery put it, “the hysteria attendant on DK efforts to remodel Cambodia have caused most people to forget what

<sup>3241</sup> See *supra*, Chapter 3-III-A-2, on Vietnam’s longstanding aim to subjugate Cambodia and Laos.

<sup>3242</sup> See *infra*, Section II.

<sup>3243</sup> F2/1, Nuon Chea’s Second Appeal Additional Evidence Request, para. 4, p. 4; see also *infra* Chapter 6-V-B-2-a.

<sup>3244</sup> D427, Closing Order, para. 177.



conditions prevailed there shortly before the end of the war".<sup>3245</sup> The CPK took over a country in ruins. It had been bombed relentlessly by the US, which dropped over 2.7 million tons of bombs on Cambodia between October 1965 and May 1975, nearly five times the widely-accepted figure.<sup>3246</sup> This is even more bombs than were dropped by the Allies in all theatres during WWII and makes Cambodia one of the most heavily-bombed states ever.<sup>3247</sup> By the end of the civil war between the CPK and Lon Nol's Khmer Republic and heavily supported by the US, the country's bridges, roads, railways, paddy lands, and nearly half its hospitals had been destroyed; most draft animals had been killed.<sup>3248</sup> The remaining hospitals were overcrowded, undermanned, and acutely short on medicine, with patients were left unattended or in poor hygiene.<sup>3249</sup> Moreover, the war had made Cambodia slip from a significant exporter of rice to a large-scale importer, and by April 1975, Cambodia was on the brink of starvation.<sup>3250</sup> The US Agency for International Development noted in its April 1975 report that:

If ever a country needed to beat its swords into ploughshares in a race to save itself from hunger, it is Cambodia. [...] Slave labor and starvation rations for half the nation's people [...] will be a cruel **necessity** for this year, and general deprivation and suffering will stretch over the next two or three years before Cambodia can get back to rice self-sufficiency.<sup>3251</sup>

981. It was this context that the CPK faced when it took over the country, and these dire circumstances it had to address.<sup>3252</sup> The necessity, reasonableness, and effect of the CPK's policy response in this regard can only be properly assessed against this backdrop. Similarly, the fact that DK was at a state of war with Vietnam cannot be ignored.<sup>3253</sup> Lastly, it is important to recall the regional context as well. According the UN Food and Agriculture Organization, 32.1% of the Cambodian population was undernourished as late as 1990-1992.<sup>3254</sup> Indeed, in 2016, it is still 14.2% of the whole population.<sup>3255</sup>

<sup>3245</sup> **E3/1757**, Vickery, Cambodia, ERN 00396996.

<sup>3246</sup> See Owen and Kiernan, *Bombs Over Cambodia*, p. 2.

<sup>3247</sup> See Owen and Kiernan, *Bombs Over Cambodia*, p. 2; see also *supra*, Chapter 1-II-C.

<sup>3248</sup> See e.g. **E3/7333**, Burgler, *Eyes of Pineapple*, ERN 01002178; **E3/88**, Shawcross, *Sideshow*, ERN 00430078; **E3/1757**, Vickery, Cambodia, ERN 00396996; **E3/1370**, DK Press Release on the 1st Anniversary, ERN 00771772-74.

<sup>3249</sup> **E3/1757**, Vickery, Cambodia, ERN 00396996-97.

<sup>3250</sup> See e.g. **E3/88**, Shawcross, *Sideshow*, ERN 00430077, **E3/7333**, Burgler, *Eyes of Pineapple*, ERN 01002178; see also 2015 FAO Report, pp. 13, 38.

<sup>3251</sup> See, **E3/88**, Shawcross, *Sideshow*, ERN 00430078 (emphasis added).

<sup>3252</sup> See also **D173**, Nuon Chea's Request for Investigative Action on Living Conditions in 1975, paras 240-245.

<sup>3253</sup> See *supra*, Chapter 3.

<sup>3254</sup> 2015 FAO Report, p. 13, Table 1, p. 38.

<sup>3255</sup> 2015 FAO Report, p. 13, Table 1, p. 38.

## B. THE CPK'S POST-WAR MISSION WAS TO REBUILD AND DEFEND THE COUNTRY

982. After 17 April 1975, the CPK's revolutionary mission shifted from liberating the country to rebuilding it and defending it against foreign powers such as Vietnam that sought to annihilate Cambodia's independence and sovereignty.<sup>3256</sup> This new mission aimed to improve the people's living standards and overcome the hardship and difficulties the war had caused.<sup>3257</sup> It was reflected in most CPK documents, in particular the August 1976 Four-Year Plan for the period of 1977-1980, which detailed the guiding principles and goals for all aspects of the country's economic, social, and cultural development.<sup>3258</sup>

### 1. The Ultimate Policy Rationale was to Improve People's Standard of Living

983. The CPK considered improving the people's standard of living a "fundamental and continuous dut[y]",<sup>3259</sup> which was "not a separate duty but [...] strictly related with [*sic*] all Party's political lines".<sup>3260</sup> In other words, it was a cornerstone for all CPK policies. Improving the standard of living was deemed "one of the most important keys to national defence and reconstruction",<sup>3261</sup> the two intertwining aspects of the CPK's post-war mission.<sup>3262</sup> The CPK believed that building DK's economic strength through agricultural and industrial advancements would both improve people's quality of life and provide material support for national defence.<sup>3263</sup> Furthermore, once the continuous improvement of living conditions was ensured, the CPK believed that the people would welcome and support its policies rather than be lured into serving the interests of a foreign power, thus further strengthening national defence.<sup>3264</sup> In turn, a strong national defence could safeguard the country's independence, development, and prosperity,<sup>3265</sup> which, coming full circle, would ultimately benefit the people.

<sup>3256</sup> **E3/166**, Flag, Feb-Mar 1976, ERN 00517828-29; *see also supra*, Chapter 3-III-C-1, on the impact of the existential threat of Vietnam on CPK policymaking.

<sup>3257</sup> **E3/166**, Flag, Feb-Mar 1976, ERN 00517828-29.

<sup>3258</sup> **E3/8**, 1976 CPK Four-Year Plan, ERN 00104020-56.

<sup>3259</sup> **E3/748**, Flag, Oct-Nov 1975, ERN 00495818.

<sup>3260</sup> **E3/748**, Flag, Oct-Nov 1975, ERN 00495819.

<sup>3261</sup> **E3/748**, Flag, Oct-Nov 1975, ERN 00495819.

<sup>3262</sup> **E3/166**, Flag, Feb-Mar 1976, ERN 00517828-29.

<sup>3263</sup> **E3/8**, 1976 CPK Four-Year Plan, ERN 00104060; **E3/748**, Flag, Oct-Nov 1975, ERN 00495808.

<sup>3264</sup> **E3/8**, 1976 CPK Four-Year Plan, ERN 00104060; **E3/748**, Flag, Oct-Nov 1975, ERN 00495819.

<sup>3265</sup> **E3/8**, 1976 CPK Four-Year Plan, ERN 00104060; **E3/748**, Flag, Oct-Nov 1975, ERN 00495808.

984. The CPK endeavoured to develop the country as rapidly as possible in order to achieve its ultimate goal.<sup>3266</sup> However, the official policy did not seek to do so at any cost to the people, refuting any allegations of a policy of enslavement. As Pol Pot put it:

This speed does not use the forces to the point it damages them: we use them by implementing the correct line of operations and our forces remain as strong as they were and the [*sic*] remain in the same good health.<sup>3267</sup>

985. The centrality of the people's standard of living to the CPK's system of governance was encapsulated in the CPK's guiding principles for the country's development set out in its Four-Year Plan. In the economic sphere, the CPK gave agriculture and especially rice production<sup>3268</sup> top priority,<sup>3269</sup> for three reasons. First, Cambodia was traditionally an agrarian country, with resources and conditions favourable for agriculture and with about 85% of the population already having traditionally lived off farming.<sup>3270</sup> Second, in times of famine, agriculture was essential to guaranteeing people's basic living standards.<sup>3271</sup> Third, the capital generated by agriculture could be exchanged for materials necessary for building and defending the country and for further improving people's conditions.<sup>3272</sup>

986. Similarly, in light of the limited capital available and in order to immediately improve the people's standards of living, the CPK decided to first focus on developing light industries.<sup>3273</sup> Those have a more immediate and direct impact on the quality of people's lives, by helping provide basic daily necessities such as clothing, mosquito nets, blankets, soap, pots, *etc.*<sup>3274</sup> The CPK planned for the development of heavy industries (*e.g.*, large factories for steel, chemicals, heavy machinery, coal, *etc.*) to follow, with the key objective being to gradually increase mechanisation in order to reduce the need for manual labour.<sup>3275</sup> As with the rest of

<sup>3266</sup> **E3/8**, Explanation of 1976 CPK Four-Year Plan, ERN 00104060; **E3/748**, Flag, Oct-Nov 1975, ERN 00495808.

<sup>3267</sup> **E3/4604**, Flag, Apr 1978, ERN 00519847.

<sup>3268</sup> **E3/8**, 1976 CPK Four-Year Plan, ERN 00104023.

<sup>3269</sup> **E3/8**, 1976 CPK Four-Year Plan, ERN 00104022; *see also*, **E3/11**, Flag, Sep 1977, ERN 00486260.

<sup>3270</sup> **E3/8**, 1976 CPK Four-Year Plan, ERN 00104022; **E3/8**, Explanation of 1976 CPK Four-Year Plan, ERN 00104062.

<sup>3271</sup> **E3/8**, 1976 CPK Four-Year Plan, ERN 00104023, first objective of both the development of agriculture and the production of rice was to raise the people's standard of living.

<sup>3272</sup> **E3/8**, 1976 CPK Four-Year Plan, ERN 00104022-23, 00104060; *see also* **E3/11**, Flag, Sep 1977, ERN 00486260. Moreover, the agricultural production was primarily for domestic consumption; only the surplus was to be exported in exchange for capital. *See e.g.* **E3/8**, 1976 Study Session, ERN 00104084; **E3/8**, 1976 CPK Four-Year Plan, ERN 00104026, Table 5; **E3/760**, Flag, Jun 1976, ERN 00509619; **E3/845**, Meeting with Commerce Ministry, ERN 00681171.

<sup>3273</sup> **E3/8**, 1976 CPK Four-Year Plan, ERN 00104046, 00104072.

<sup>3274</sup> **E3/8**, 1976 CPK Four-Year Plan, ERN 00104046, 00104072.

<sup>3275</sup> **E3/8**, 1976 CPK Four-Year Plan, ERN 00104046, 00104051.

the CPK's cooperatives and worksites policy, the pivot towards heavy industry aimed to improve people's working and living conditions, a perfectly legitimate goal.

## 2. The Principle of Independence and Self-Reliance Was Legitimate

987. The CPK's sought to build and defend the country independently and self-reliantly.<sup>3276</sup> Self-reliance was seen as essential to guaranteeing state independence and sovereignty, which are inherent rights and features of a state that cannot be compromised.<sup>3277</sup> The CPK was aware that only through economic independence could DK be assured of genuine political independence.<sup>3278</sup> Therefore, it refused to seek certain states' help in order to avoid the imposition of political conditions on aid provided.<sup>3279</sup> Similarly, and naturally, it was unthinkable for the DK to accept aid from the US – a state that backed the Khmer Republic regime during the civil war and heavily destroyed Cambodia through its bombings – or from other states sharing the same political interests. Nuon Chea reasserted at trial that independence of Cambodia and emancipation of the people was the CPK's ultimate objective:

[the] exploitation and the poorness of [the] people was one of the many causes that the CPK determined to resolve by liberating the nation and people from slavery, from human exploitation and invasion by other countries, by building a country where people could live equally and own the country with independence, self-mastery, self-reliance, and decide own destiny and nation.<sup>3280</sup>

988. Contrary to the naïve, judgemental, and western liberal democratic view implicit in the Closing Order,<sup>3281</sup> self-reliance does not amount inevitably to isolationism. As Pol Pot said, “[a]id, we will take it, but in the stance of independence and mastery as well. If accepting [aid] would impact this stance, then that cannot be.”<sup>3282</sup> Nuon Chea further explained:

[w]e try to teach our people the principle of self-reliance in order to avoid making ourselves a burden for friendly countries [...] Thus, we try as much as possible to avoid

<sup>3276</sup> See e.g. **E3/8**, 1976 CPK Four-Year Plan, ERN 00104021-22; **E3/1370**, DK Press Release on the 1st Anniversary, ERN 00771776.

<sup>3277</sup> See e.g. Charter of the United Nations, Art. 1(2) and Art. 2; see also, ILC Draft Declarations on Rights and Duties of States.

<sup>3278</sup> **E3/8**, 1976 CPK Four-Year Plan, ERN 00104022 (the unofficial English translation by Chanthou Boua contains a typo; for the Khmer original, see ERN 00075822); see also **E1/237.1**, Case 002/01 Closing Arguments (Nuon Chea), T. 31 Oct 2013, p. 23, lns 12-23.

<sup>3279</sup> **E3/8**, 1976 CPK Four-Year Plan, ERN 00104021; see also UNGA Res. 3201 (S-VI), para. 4 (k): “Extension of active assistance to developing countries by the whole international community, free of any political or military conditions” (‘UNGA Res 3201 (S-VI)’).

<sup>3280</sup> **E1/237.1**, Case 002/01 Closing Arguments (Nuon Chea), T. 31 Oct 2013, p. 26, ln. 21 to p. 27, ln. 1.

<sup>3281</sup> **D427**, Closing Order, para. 177.

<sup>3282</sup> **E3/182**, SC Meeting, 9 Oct 1975, ERN 00183405.

outside aid, to overcome all forms of suffering without seeking aid unless it is absolutely necessary.<sup>3283</sup>

989. As Deng Xiaoping, widely praised for his economic policies in China, put it before the United Nations General Assembly in 1974:

by self-reliance, we mean that a country should mainly rely on the strength and wisdom of its own people, control its own economic lifelines, make full use of its own resources, strive hard to increase food production, and develop its national economy step by step and in a planned way.<sup>3284</sup>

990. In fact, in May 1974, the UN General Assembly emphasised “[t]he right of every country to adopt the economic and social system that it deems the most appropriate for its own development”. It emphasised that every state has “full permanent sovereignty” over its natural resources and economic activities, including the right to nationalisation, which cannot be subjected to any type of foreign coercion.<sup>3285</sup> In any event, the DK did accept aid provided unconditionally, not only from China but from states including Sweden and Yugoslavia.<sup>3286</sup> Further, the CPK endeavoured to generate capital for international trade through agriculture. The DK was not isolating itself; rather, it was trying to stand on its own feet economically instead of being reliant on others’ help. As discussed above in Chapter 3-III and Chapter 3-VIII, the DK also maintained a deliberately open foreign policy and established diplomatic relations with around 100 states. This is hardly illustrative of an isolationist policy.

### **3. Water and Defence Projects were Necessary to Rebuild, and Defend the Country**

991. In May 1974, the UN General Assembly recognised “the need for developing countries to concentrate all their resources for the cause of development”,<sup>3287</sup> and that “owing to lack of means some developing countries have vast potentialities of unexploited or underexploited land which, if reclaimed and put into practical use, would contribute considerably to the solution of the food crisis”.<sup>3288</sup> What the CPK did accorded with those principles. To increase rice production and to make more land amenable to having two successful harvests a year, the CPK focused primarily on increasing the efficiency of water use by building a network of dams and canals.<sup>3289</sup> The location of its water projects was carefully chosen based on an analysis of the

<sup>3283</sup> **E3/196**, Nuon Chea Speech to Danish Communist Party, Jul 1978, ERN 00762397.

<sup>3284</sup> **F2/8.1.31**, Teng Hsiao-Ping’s Speech before UNGA, p. 94, para. 2.

<sup>3285</sup> UNGA Res. 3201 (S-VI), 1 May 1974, paras 4 (d), (e), (i), (k).

<sup>3286</sup> See e.g. **E3/238**, SC Meeting, 28 Feb 1976, see, in particular, ERN 00424113-14.

<sup>3287</sup> UNGA Res. 3201 (S-VI), para. 4 (r).

<sup>3288</sup> UNGA Res. 3202 (S-VI), sec. I (2) (b).

<sup>3289</sup> See e.g. **E3/8**, 1976 CPK Four-Year Plan, ERN 00104042; **E3/8**, Explanation of the 1976 CPK Four-Year Plan, ERN 00104063; **E3/11**, Flag, Sep 1977, ERN 00486260-61.

geographic features of the soil and water resources in each area of the DK.<sup>3290</sup> Authorities of the zones and autonomous sectors were consulted about the accuracy of the analysis before a final plan was set out.<sup>3291</sup>

992. Similarly, regarding defensive structures such as airfield runways and fortifications,<sup>3292</sup> the CPK's decisions to have the RAK build them resulted from careful consideration.<sup>3293</sup> Further, nearly all countries in the world have defence related infrastructures. The conflict between Cambodia and Vietnam only increased the urgency of the need to improve or create such national defence constructions.

### C. IT WAS A DUTY AND RIGHT OF ALL TO BUILD AND DEFEND THE COUNTRY

#### 1. It was Both a Duty and a Right of DK Citizens to Build and Defend the Country

993. As mentioned above, the aftermath of the civil war was a transitional period during which it was necessary for the Cambodian people to temporarily endure and overcome hardship in order to rebuild the country rapidly and attain a higher collective standard of living.<sup>3294</sup> Therefore, the DK Constitution defined it as “the duty of all to defend and build the country together in accordance with individual ability and potential”.<sup>3295</sup> The CPK stressed the temporary nature of the challenge<sup>3296</sup> and that it would be gradually improved with everyone's contribution.<sup>3297</sup> While rebuilding the country was a pressing necessity, people's well-being remained the CPK's core priority. In addition, taking into consideration the demanding nature of the work, the CPK assigned people to work at construction sites on a rotative basis, generally for a few months only.<sup>3298</sup> Again, this is hardly illustrative of a criminal policy aiming to enslave the entire population and work it to death on unrealistic projects.

994. Further, it was not only a duty but also a general right of all DK citizens to work and to be guaranteed a living.<sup>3299</sup> Work assigned to all able-bodied citizens was not to enslave

<sup>3290</sup> See e.g. **E3/8**, Explanation of the 1976 CPK Four-Year Plan, ERN 00104063-68.

<sup>3291</sup> See e.g. **E3/8**, Explanation of the 1976 CPK Four-Year Plan, ERN 00104063.

<sup>3292</sup> **E3/8**, 1976 CPK Four-Year Plan, ERN 00104068.

<sup>3293</sup> See e.g. **E3/182**, SC Meeting, 9 Oct 1975, ERN 00183401, 00183405, 00183407; **E3/229**, SC Meeting, 22 Feb 1976, ERN 00182625, 00182627.

<sup>3294</sup> See *supra*, Chapter 6-II-B; see also e.g. **E3/166**, Flag, Feb-Mar 1976, ERN 00517828-29.

<sup>3295</sup> **E3/259**, DK Constitution, Article 14. Evidence is abundant that people were assigned different work according to their physical strength. See e.g. Chapter 6-V-B-4-(b), the Tram Kok Cooperatives. Mass mobilisation was necessary due to the shortage of manpower, See e.g. **E3/135**, Flag, Jun 1977, ERN 00446866-67.

<sup>3296</sup> **E3/166**, Flag, Feb-Mar 1976, ERN 00517828-29.

<sup>3297</sup> See e.g. **E3/760**, Flag, Jun 1976, ERN 00509629.

<sup>3298</sup> See *infra* Chapter 6-V-A-4; Chapter 6-V-C.

<sup>3299</sup> **E3/259**, DK Constitution, Art. 12, “Every citizen of Democratic Kampuchea is guaranteed a living. [...] There is absolutely no unemployment in Democratic Kampuchea.”

them,<sup>3300</sup> but to implement a communist system of organising the workforce to create the most value to be equally distributed to all people in the form of food and other materials.<sup>3301</sup> In contrast to employment in a non-communist regime, the communist work-assignment system was (and is) designed to eliminate exploitation of the working people by their employer.<sup>3302</sup>

## 2. The CPK Would Build and Defend the Country Through Four Groups

995. The mission of building and defending the country was to be accomplished by the coordinated efforts of four groups: the party itself, the worker-peasant alliance, the armed forces, and states which maintained friendly relations with the DK.<sup>3303</sup> The role of the CPK is discussed in detail below in Part D, while that of the friendly states was addressed above in Part B-2. This discussion immediately below will therefore focus on the contribution of the worker-peasant alliance, and that of the armed forces.

### (a) *The Worker-Peasant Alliance*

996. DK's peasants and workers were organised into cooperatives, for the former, and unions for the latter,<sup>3304</sup> to form the biggest workforces for the state reconstruction.<sup>3305</sup> Cooperatives were put in place to bring together the agricultural workforce, and to facilitate the construction of related facilities such as irrigation projects. A cooperative pools together means of production, including land, draft animals, tools, and seeds, for all members to use together; in turn, the collective work output is to be shared by all the members equally, without oppression or exploitation.<sup>3306</sup> Many people voluntarily resorted to a cooperative organisation to share the

<sup>3300</sup> **D427**, Closing Order, para. 1394.

<sup>3301</sup> See e.g. *infra*, Chapter 6-II-C-2-(a), the function of DK cooperatives. This is contrary to the Closing Order's allegation (**D427**, para. 1394) that people were deprived of the opportunity to reap the benefits of their work.

<sup>3302</sup> See e.g. *infra*, Chapter 6-II-C-2-(a), the function of DK cooperatives; see also **E1/14.1**, Case 002/01 Opening Statements (Nuon Chea), T. 22 Nov 2011, p. 82, ln. 21 to p. 83, ln. 9; **E1/237.1**, Case 002/01 Closing Arguments (Nuon Chea), T. 31 Oct 2013, p. 23 lns 12-23.

<sup>3303</sup> **E3/8**, 1976 CPK Four-Year Plan, ERN 00104056.

<sup>3304</sup> The Defence will not discuss unions as they are not related to the charges in Case 002/02, as the Closing Order does not include the establishment of unions as part of the alleged JCE, nor is any charged crimes specifically related to unions.

<sup>3305</sup> **E3/1398**, Political Geography of DK, ERN 00814564-66.

<sup>3306</sup> **E3/1398**, Political Geography of DK, ERN 00814564-65; **E3/1398**, Political Geography of DK, ERN 00814564-65, "The essence of the Cooperatives reflects the true Revolutionary spirit, absolutely countering and **destroying the prior oppressive regime** [...] **protect and reinforce the collective equality** of the Worker-Peasant class [...] The Cooperative distributes **equal** benefits collectively, and members assist one another **without discrimination**. In addition, the Cooperatives **demolish** many types of views, perceptions and the **attitudes of the oppressing classes**" (emphasis added).

limited means of production.<sup>3307</sup> Rather than illustrating enslavement, the creation of cooperatives is a further illustration of the CPK's legitimate egalitarian policy.

997. So-called "new people" were of course also members of cooperatives. They were therefore to be treated equally in accordance with the nature of cooperatives.<sup>3308</sup> Further, one of the roles of cooperatives was to "absorb" or integrate "new people" into the new egalitarian society.<sup>3309</sup> It is important to recall that, under DK, "the people" were seen as sacred and almighty – akin to "god[s]" – as in any communist regime.<sup>3310</sup> From this perspective, whether "new" or "old", the people cannot logically be considered at the same time as the "enemy".<sup>3311</sup> Consistent with this, Pol Pot and other leaders criticised certain cadres' treatment of "new people" as enemies as a major misinterpretation.<sup>3312</sup> The CPK publicly reasserted this position throughout the regime:

for the people, whether old or new, there is no problem with them. The new people are patriotic, too, and they have pride in the feeder canals and the dams the making of which they have participated in. Only the enemy digs out the people. And there is only a small handful of such enemies.<sup>3313</sup>

**(b) The Armed Forces**

998. In response to the extreme hardship the country faced after the liberation, the RAK was entrusted with the dual mission of defending as well as simultaneously rebuilding the country.<sup>3314</sup> Therefore, in addition to performing regular military duties including building defensive structures such as fortifications, piers, and runways (such as at Kampong Chhnang Airfield), it was equally important for the RAK to contribute to rice production.<sup>3315</sup>

<sup>3307</sup> See e.g. E3/1757, Vickery, Cambodia, and ERN 00397142, 00397149.

<sup>3308</sup> Evidence is abundant that in most places "new people" were treated the same as "base people" and assisted by "base people"; see e.g. F16, Nuon Chea's Appeal Brief, paras 399, 370-83, 662; see also *infra*, Chapter 6-V.

<sup>3309</sup> E3/216, Record of SC's visit to Northwest Zone, ERN 00850975-76.

<sup>3310</sup> E3/1783, Report of Chen Yung-Kuei's Visit, ERN 00498181.

<sup>3311</sup> See e.g. E3/743, Flag, Jul 1977, ERN 00476163; see also E3/725, Flag, Dec 1977-Jan 1978, ERN 00184320-21; see also *supra*, Chapter 4-II.

<sup>3312</sup> E3/8, 1976 Party Work Report, ERN 00104100; see also *infra*, Chapter 6-V-A-1, regarding Ta Mok's critiques *vis-à-vis* the Tram Kok Cooperatives in this regard.

<sup>3313</sup> E3/725, Flag, Dec 1977-Jan 1978, ERN 00184320-21.

<sup>3314</sup> E3/259, DK Constitution, Arts 14 & 19; E3/224, SC Meeting, 30 May 1976, ERN 00182667; E3/5, Flag, Aug 1975, ERN 00401500; E3/8, 1976 CPK Four-Year Plan, ERN 00104068; see also F16, Nuon Chea's Appeal Brief, paras 365-382.

<sup>3315</sup> E3/8, 1976 CPK Four-Year Plan, ERN 00104068; E3/224, SC Meeting, 30 May 1976; E3/5, Flag, Aug 1975, ERN 00401500-03; see also E3/795, All Divisions Meeting, 2 Aug 1976, ERN 00656577; see also *supra*, Chapter 3-III, the impact of Vietnam on CPK policymaking.



#### D. THE CPK MADE WIDE-RANGING EFFORTS TO IMPROVE THE STANDARD OF LIVING

999. The Closing Order alleges that the CPK had a policy to push production and construction “by whatever means necessary”, “regardless of their impact on the population”.<sup>3316</sup> It also alleges that “inhumane” conditions were imposed on the people to achieve the alleged common purpose of the JCE by “contributing to the creation of a climate of terror and constraint”.<sup>3317</sup> Once again, the closing Order demonstrates a blind following of the Manichean narrative rather than a neutral and objective assessment of the evidence. Late King Father Norodom Sihanouk, who visited DK’s countryside on several occasions between 1975 and 1978, described the situation in positive terms: “[t]hey are well fed. The life there is good, really good.”<sup>3318</sup> Similarly, journalist Richard Dudman, who visited DK in 1979, stated: “[t]he new Communist Cambodia became one huge work camp, but its people clearly were not being worked to death and starved to death as foreign critics often charged.”<sup>3319</sup> Rather, the CPK’s explicit policy was to make all possible efforts to have the people genuinely welcome the communist system governance by improving the quality of every aspect of their lives.<sup>3320</sup>

1000. As illustrated above, the amelioration of people’s standard of living through the fulfilment of their basic needs and through participation in a more equitable and just society, was seen as its most important, fundamental, and continuous duty of the CPK. It was intrinsically related to all party policies,<sup>3321</sup> and as a result, the CPK set out guiding principles and standards to ensure a proper implementation of the policy, none of which even came close to enslavement. For instance, the CPK repeatedly emphasised that the people should not work without sufficient rest, or work at night, as this would harm their health.<sup>3322</sup> Accordingly, the CPK’s policy was that work had to be carried out in cooperatives and at worksites from 6am to

<sup>3316</sup> **D427**, Closing Order, paras 168, 169.

<sup>3317</sup> **D427**, Closing Order, para. 1140.

<sup>3318</sup> **E3/10709**, Sihanouk Denounces Vietnam’s Aggression, ERN 01323955.

<sup>3319</sup> **E3/3290**, Dudman 1979 Report on DK Visit, ERN 00419208.

<sup>3320</sup> See e.g. **E3/8**, 1976 Study Session, ERN 00104084 (“Do whatever is necessary to make the people warm to our system.”); **E3/8**, 1976 Party Work Report, ERN 00104090 (“Do what you can to make people welcome this policy”); **E3/166**, Flag, Feb-Mar 1976, ERN 00517833 (“In terms of housing, [...] do whatever necessary so that our people have proper shelters to live in and protect them from the rain, the wind, the heat of the day”); see also, **E3/748**, Flag, Oct-Nov 1975, ERN 00495819 (“if the people’s living standard is promoted, [...] The people will be happy to support the Revolutionary power and the Party”; “when collectivism is obviously efficient and serving the people’s interests then the people, workers and peasants will voluntarily support the cooperatives and unions. On the contrary, if the cooperatives and unions were established but if the people’s living standard has not been improved, as a result, the people will lose their belief and trust in the cooperatives and unions”).

<sup>3321</sup> **E3/748**, Flag, Oct-Nov 1975, ERN 00495818, 00495819; see also *supra*, Chapter 6-II-B.

<sup>3322</sup> **E3/8**, Explanation of 1976 CPK Four-Year Plan, ERN 00104076; **E3/4604**, Flag, Apr 1978, ERN 00519847; **E3/170**, Flag, Oct-Nov 1977, ERN 00182578-79.

10.30am, then from 3.30pm to 6pm.<sup>3323</sup> CPK directives also clearly stated that old people, pregnant women and children must not work.<sup>3324</sup> In addition, the CPK mandated a rest day every ten days; ten to fifteen days of annual leave; two months of maternal leave; and with rest days for hospitalised people depending on each case.<sup>3325</sup> As for food, each person was to receive 13 *thang* (312 kg) rice every year from 1977 onwards, with vegetables, meat, and fish to be provided regularly, and dessert served at least once every ten days.<sup>3326</sup> Given shortages, setting food rations was not a way to enslave the people,<sup>3327</sup> but a necessity at the time to guarantee that everyone would get a fair share of the limited food and no one would starve.<sup>3328</sup> In addition, shelter and necessities such as clothing, blankets, mosquito nets, *etc.*, were to be provided to the people whenever possible,<sup>3329</sup> while both imported medicines and traditional medicines developed domestically were to be used to address medicinal shortages.<sup>3330</sup>

1001. Further, the CPK required all of its members to be responsible for improving people's living standard in every field and in a timely manner, and considered this duty the "highest morality of each Communist".<sup>3331</sup> It measured the situation by the yardstick that "wherever the livelihood of the people was better he, who was in charge of that place, was doing a good job."<sup>3332</sup> In reality, however, and as discussed in Section V below, while many cadres implemented the policy correctly, some did not. For instance, measures were taken to reduce working hours to align with the standards set by the party,<sup>3333</sup> and to work during cooler hours and rest during hot hours.<sup>3334</sup> People were encouraged to drink hot water to avoid getting sick.<sup>3335</sup> Shelters were built, and supplies distributed to the people.<sup>3336</sup> The necessary food

<sup>3323</sup> **E3/4604**, Flag, Apr 1978, ERN 00519847; *see also* **E1/237.1**, Case 002/01 Closing Arguments (Nuon Chea), T. 31 Oct 2013, p. 26, ln. 21 to p. 27, lns 15-21.

<sup>3324</sup> *See* **E3/659**, 1980 Becker Interview with Ieng Thirith, ERN 00182322.

<sup>3325</sup> **E3/8**, 1976 CPK Four-Year Plan, ERN 00104054; **E3/8**, Explanation of 1976 CPK Four-Year Plan, ERN 00104076.

<sup>3326</sup> **E3/8**, 1976 CPK Four-Year Plan, ERN 00104023, 00104054.

<sup>3327</sup> **D427**, Closing Order, para. 1393.

<sup>3328</sup> *See e.g.* **E3/166**, Flag, Feb-Mar 1976, ERN 00517832.

<sup>3329</sup> **E3/8**, 1976 CPK Four-Year Plan, ERN 00104053; **E3/1765**, Examination of the Implementation of Policy Line, ERN 00523581, 00523583; *see also*, **E3/5278**, 'WRI of Chan Morn', ERN 00292821.

<sup>3330</sup> **E3/8**, 1976 CPK Four-Year Plan, ERN 00104052-53, 00104044; **E3/1765**, Examination of the Implementation of Policy Line, ERN 00523591, 00523581.

<sup>3331</sup> **E3/748**, Flag, Oct-Nov 1975, ERN 00495818; **E3/166**, Flag, Feb-Mar 1976, ERN 00517832-34.

<sup>3332</sup> **E1/461.1**, Tep Poch (2-TCW-850), T. 22 Aug 2016, p. 69, ln. 6 to p. 71, ln. 18; **E3/9149**, 'DC-Cam Interview of Tep Poch (2-TCW-850)', ERN 01116151.

<sup>3333</sup> **E3/952**, 'Telegram from Pauk to Pol', 2 Apr 1976, ERN 00182658-59.

<sup>3334</sup> **E3/1073**, 'Telegram from Se to M-870', 10 Apr 1978, ERN 00293360.

<sup>3335</sup> **E3/952**, 'Telegram from Pauk to Pol', 2 Apr 1976, ERN 00182658-59.

<sup>3336</sup> **E3/179**, 'Report from M-560', 29 May 1977, ERN 00183013; **E3/1144**, 'Telegram from Se to M-870', 5 Sep 1977, ERN 00517924.

ration was implemented,<sup>3337</sup> and the rice production goal of 3-ton per hectare was achieved.<sup>3338</sup> When the policy was not followed, this owed to poor judgement and misinterpretation, or sometimes to an express intent to serve the interests of Vietnam's collaborators within the CPK and make the people resent the CPK.<sup>3339</sup> However, to the knowledge of senior leaders like Nuon Chea at the time, most cadres were doing their best to improve the national standard of living.

1002. If the CPK's intention was to enslave people, having them work with no food and until exhaustion, spending time and energy creating and disseminating detailed guidelines would be useless and unnecessary. No matter how much the followers of the Manichean narrative would like it to be so that they could be comforted in their self-righteous, and biased anti-communist opinions, there was never a policy to enslave or punish people through cooperatives and worksites. Rather, there is unequivocal evidence that those were created to ensure commonality of agricultural work and the sharing of its products for the greater good of all. No more, no less. In fact, this policy did reach part of its goal, as there is objective evidence that the economical situation improved during DK.

#### E. THE SITUATION DID IMPROVE, DESPITE MATERIAL LIMITATIONS

1003. The Closing Order alleges that the CPK failed to put in place adequate systems to respond to the serious health and food problems the country faced.<sup>3340</sup> This not only ignores the general situation of the country at the time that the CPK assumed power, it also disregards evidence pointing to the improvement of the situation in the DK. Indeed, by early 1979, the economic situation had notably improved, and food production was sufficient to support the population's basic subsistence needs.<sup>3341</sup> Thanks to water projects such as dams and canals, many places could have two harvests a year.<sup>3342</sup> Citizens from the Northwest and Central (old North) Zones reported that the water projects permitted year-round cultivation; provided abundant fish as supplementary food; protected their regions from severe flooding in 1978; and

<sup>3337</sup> E3/862, 'Report on the Twin Region in May 1978', ERN 00185212.

<sup>3338</sup> E.g. E3/1073, 'Telegram from Se to M-870', 10 Apr 1978, ERN 00293361.

<sup>3339</sup> See *supra*, Chapter 3-VI, for a discussion on sabotage; see also *infra*, Chapter 6-V, generally.

<sup>3340</sup> D427, Closing Order, para. 177.

<sup>3341</sup> The foreign journalists and delegations that visited Cambodia concurred on this. See e.g. E3/2307, Yugoslav Journalist's Report, 1978, ERN S00046703, S00046707; E3/7333, Burgler, Eyes of Pineapple, ERN 01002275-78; E3/4604, Flag, Apr 1978, ERN 00519845-46. The Defence notes evidence that in some places, local authorities gave most produced rice to the state, without reserving sufficient rice for the people. This practice, however, deviated from official policy which mandated that only surplus be exported in exchange for materials. In any event, Nuon Chea and other senior leaders had no knowledge of such situation at the time.

<sup>3342</sup> See e.g. E3/765, Youth, Oct 1978, ERN 00539979-80; see also *infra*, Chapter 6-V-B-2-(b), regarding the effects of DK dams.

continued to operate after DK.<sup>3343</sup> Further, the malaria situation was also largely contained and the International Red Cross medical staff confirmed the effectiveness of some Cambodian traditional medicine in easing malaria symptoms.<sup>3344</sup> The late King Father Norodom Sihanouk stated that “[t]he rich are not so rich and the poor not so poor as before. This is unfirritation of the society and social justice, and the majority of the people of Kampuchea like it.”<sup>3345</sup> Likewise, in 1978, journalist Richard Dudman witnessed children playing, and people in generally good health, nurturing mothers, and no sign of malnutrition.<sup>3346</sup>

1004. Given the dire situation in Cambodia before April 1975, even if the situation in the DK could not be compared to that of modern western countries, it was not because of any policy to deliberately mistreat, enslave or exterminate the population, nor was it because the CPK failed to do enough. As mentioned above in Section II-A, in 1992, 32.1 % of the Cambodia population was still undernourished.<sup>3347</sup> The reality is that the full realisation of the economic rights is of a **progressive** nature, and largely depending on a state’s **available resources**, as the International Covenant on Economic, Social and Cultural Rights recognises.<sup>3348</sup> As demonstrated above, the CPK did its best to improve the lives of DK’s citizens. Nuon Chea should not be held criminally responsible for a situation that was beyond his control.

#### F. CONCLUSION ON THE CPK POLICY TO ESTABLISH COOPERATIVES AND WORKSITES

1005. Despite the Closing Order and Co-Prosecutors’ efforts to portray DK as “a prison without walls”<sup>3349</sup> and as a “slave state”,<sup>3350</sup> there was only one legitimate and well-intentioned CPK’s policy regarding cooperatives and worksites: to rebuild, and defend the country in order to share wealth and create an egalitarian society. This policy was legitimate and lawful. In fact, if the Co-Prosecutors, Civil Party Lead Co-Lawyers, and Chamber were able to step outside of their ideological and historiographical tunnel-vision, they would recognise it was similar to that of western liberal democracies post-WWII, which resorted to nationalisation of key industries,

<sup>3343</sup> See e.g. **E3/1757**, Vickery, Cambodia, ERN 00397026; **E3/7333**, Burgler, Eyes of Pineapple, ERN 01002197, 01002278; see also *infra*, Chapter 6-V-B-2-(b), regarding the effects of DK dams.

<sup>3344</sup> **E3/7333**, Burgler, Eyes of Pineapple, ERN 01002199; see also **E3/9648**, Statistics on Medicines Imported From China, 1-14 Aug 1976, ERN 00233530, noting the distribution of Chinese traditional anti-malarial medicine; see also **E1/356.1**, Mun Mot (2-TCW-996), T. 16 Oct 2015, p. 81, ln. 14 to p. 82, ln. 8, noting that traditional medicine can be highly effective: indeed, in 2015, China received its first Nobel Prize for the development of traditional medicine which is used to treat none other than malaria.

<sup>3345</sup> **E3/10709**, Sihanouk Denounces Vietnam’s Aggression, ERN 01323955.

<sup>3346</sup> **E3/3290**, Dudman 1979 Report on DK Visit, ERN 00419209.

<sup>3347</sup> 2015 FAO Report, p. 13, Table 1, p. 38.

<sup>3348</sup> ICESCR, Art. 2(1).

<sup>3349</sup> **D427**, Closing Order, para. 158; **E1/242.1**, Case 002/01 Opening Statements (Co-Prosecutors), T. 17 Oct 2014, p. 27, ln. 5.

<sup>3350</sup> **E1/229.1**, Case 002/01 Closing Arguments (Co-Prosecutors), T. 17 Oct 2013, p. 6, lns 23-24.

central planning, mass mobilisation of the population, as well as rationing of food and clothing to redress acute material shortages and achieve rapid national reconstruction. Likewise, the CPK made every effort to improve the standard of living after years of struggles, destruction and exploitation. Although the situation was not yet perfect given material limitations, this was beyond the CPK leaders' control and not intentionally imposed on the people. Accordingly, and as demonstrated throughout this Chapter, the alleged events at cooperatives and worksites either do not amount to crimes, or are not manifestations of CPK policy but rather deviations from such policy.

### III. THE DEFENCE'S GENERAL POSITION *VIS-À-VIS* THE FOUR COOPERATIVES AND WORKSITES IN CASE 002/02

1006. The Closing Order charges 11 crimes against humanity at the Tram Kok Cooperatives,<sup>3351</sup> eight at the 1<sup>st</sup> January Dam Worksite,<sup>3352</sup> six at the Kampong Chhnang Airfield Construction Site,<sup>3353</sup> and seven at the Trapeang Thma Dam Worksite.<sup>3354</sup> However, the evidence for all four crime sites clearly demonstrates that to the extent that living and working conditions may have been difficult, they were not deliberately imposed on the people, but a regrettable reality of the general situation of the country (as explained in Section II above) despite the undertaking of all feasible efforts to ensure reasonable conditions.

1007. The evidence heard at trial clearly debunks the 'accepted truths' surrounding life in DK's cooperatives and worksites. The conditions in all four crime sites included within the scope of Case 002/02 were in fact not only reasonable under the circumstances but comparable with those in Cambodia broadly prior to 1975. However, this is a fact that has been completely obscured in the Manichean reframing of DK, which in turn defined the investigation of Case 002 and the available evidence at trial. As discussed in Chapter 2 above, both have been deconstructed by the accounts of upper- and middle-class Cambodian refugees unused to life outside of the

<sup>3351</sup> **D427**, Closing Order, paras 1381 (extermination), 1391 (enslavement), 1397 (deportation), 1402 (imprisonment), 1408 (torture), 1416 (political persecution), 1421 (religious persecution), 1422 (racial persecution), 1434 (other inhumane acts through attacks against human dignity), 1442 (other inhumane acts through forced marriage) and 1470 (other inhumane acts through enforced 'disappearances').

<sup>3352</sup> **D427**, Closing Order, paras 1373 (murder), 1381 (extermination), 1391 (enslavement), 1416 (political persecution), 1420 (religious persecution), 1434 (other inhumane acts through attacks against human dignity), 1442 (other inhumane acts through forced marriage) and 1470 (other inhumane acts through enforced 'disappearances').

<sup>3353</sup> **D427**, Closing Order, paras 1373 (murder), 1381 (extermination), 1391 (enslavement), 1416 (political persecution), 1434 (other inhumane acts through attacks against human dignity), and 1470 (other inhumane acts through enforced 'disappearances').

<sup>3354</sup> **D427**, Closing Order, paras 1373 (murder), 1381 (extermination), 1391 (enslavement), 1416 (political persecution), 1434 (other inhumane acts through attacks against human dignity), 1442 (other inhumane acts through forced marriage) and 1470 (other inhumane acts through enforced 'disappearances').

cities, instead of the experience of the overwhelming majority of the Cambodian population, which during the DK was 85% rural.<sup>3355</sup> Indeed, the fact that the Tribunal is based in Cambodia's Lexus-filled, bustling modern capital of Phnom Penh has clearly misled its international staff and perhaps even some of the longtime-urban-based national staff as well. In reality, Cambodia's population still remains **79%** rural, which is one of the highest proportions of rural population of any state in the world today.<sup>3356</sup> The growth of one third of children under the age of five is stunted; 79% of the population do not have access to piped water supply; and 13.5% live under the poverty line.<sup>3357</sup>

1008. Importantly, the evidence also clearly shows that far from being a strictly hierarchical monolith as the Manichean narrative suggests, there was in fact significant autonomy at the CPK's the local levels, in particular in determining conditions on the ground, with significant variance even within the constituent units of an individual cooperative or worksite. Thus, individual accounts of conditions cannot be treated as reflective of general practice even within a cooperative or worksite, let alone of CPK policy nationwide. Instead, any deviations that may have occurred from the CPK's legitimate and lawful policy were the clear result of deviations.

1009. Turning to the Tram Kok Cooperatives more specifically, the Defence notes that the Co-Prosecutors have frequently referred to Tram Kok's recognition by DK as a "model district".<sup>3358</sup> They argue that experiences there "allow us to examine all aspects of life in [DK] and the crimes to which the Cambodian people were subjected on a day to day basis".<sup>3359</sup> In other words, they preposterously hope that generalised conclusions will be drawn from Tram Kok about experiences in all of DK's some-120 districts<sup>3360</sup> and their constituent cooperatives. Not only does this defy basic principles of law, it also amounts to an attempt to convict Nuon Chea for what happened in cooperatives nationwide by mere analogy and to fill all voids created by sparse evidence with sentiment and the Manichean narrative. As noted above, however, these voids are too great to be filled. In particular, there is in fact no evidence of any policy to deliberately subject "new people" to particularly harsh treatment.

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<sup>3355</sup> See *supra*, Chapter 2-II-A-2 on the role of upper- and middle-class Cambodian refugee accounts in forming the Manichean narrative.

<sup>3356</sup> World Bank Statistics on Rural Population Percentage.

<sup>3357</sup> World Bank Cambodia Country Overview.

<sup>3358</sup> **E1/242.1**, Case 002/02 Opening Statements (Co-Prosecutors), T. 17 Oct 2014, p. 13, lns 13, 21, p. 14, lns 2, 22-24, p. 15, lns 9, 14, 19, p. 16, lns 17-19, p. 19, lns 8, 14-15, p. 20, ln. 4; **E1/293.1**, Document Presentation, T. 27 Apr 2015, p. 6, lns 8-9, 25, p. 16, ln. 9; **E1/295.1**, Objections to Document Presentations, T. 30 Apr 2015, p. 4, ln. 24 to p. 5, ln. 8.

<sup>3359</sup> **E1/242.1**, Case 002/02 Opening Statements (Co-Prosecutors), T. 17 Oct 2014, p. 14, lns 19-21.

<sup>3360</sup> **E3/1398**, Political Geography of DK, ERN 00814510-11.

1010. The 1<sup>st</sup> January Dam, rather than being a project that imposed harsh working conditions to construct a dam devoid of technical or scientific foundation,<sup>3361</sup> was a legitimate and fully functioning project. Local residents from villages and cooperatives were mobilised to participate in its construction, as part of every DK citizen's duty to participate in building the country, particularly in a state of emergency. At this worksite, like the others, living and working conditions were much like those in Cambodia prior to 1975.

1011. As for the Kampong Chhnang Airfield, while the Co-Prosecutors argue that it was a "tempering site" where "bad elements" from various Centre military divisions were sent to do forced labour as punishment,<sup>3362</sup> the evidence demonstrates that such allegations are baseless and based on nothing more than Manichean 'accepted truths'. Kampong Chhnang Airfield was not a "tempering site"; it was a normal and legitimate construction site for a military facility, where RAK soldiers were assigned to work as part of their ordinary military duties.

1012. Finally, as with the 1<sup>st</sup> January Dam, the Trapeang Thma Dam was similarly a legitimate project necessary for national reconstruction. Thousands of workers were involved in its construction and evidence shows that the living and working conditions at the Trapeang Thma Dam greatly varied from one unit to another, the local cadres enjoying wide discretion in this regard. Moreover, a unique feature of the Trapeang Thma Dam is that it provides concrete evidence of how some of its cadres were ordered by top Vietnam collaborator, Northwest Zone secretary (and CPK founding member and Standing and possibly Central Committee member) Ruos Nhim, to deliberately contradict CPK policies in order to foment discontent and turn people against the CPK. This phenomenon, which is discussed above in Chapter 3-VI-B-1, was part of preparations for the second phase of Vietnam's 'Plan A': the 1977 *coup d'état*. These acts of sabotage and subversion resulted in serious violations of the CPK's official policy.

1013. Ultimately, therefore, the Defence's overall position in respect of all four crime sites is that the Co-Prosecutors have failed to establish beyond reasonable doubt through the available evidence that the charged crimes, if any, occurred at each crime site, and even if they did, that Nuon Chea is criminally responsible for them. Due to the limited pages in this Brief, the factual analysis below focuses on only the most contentious issues that arose in the evidentiary hearings *vis-à-vis* each crime site. Therefore, while certain issues may be omitted from the discussion of a crime site in this Brief, this does not imply that the Defence has made any concession with

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<sup>3361</sup> For the charges of religious persecution against the Cham and the charges of other inhumane acts through forced marriage, *see supra*, Chapter 5, and *infra*, Chapter 7 respectively.

<sup>3362</sup> **D427**, Closing Order, paras 387, 389.

regard to these issues. Given that it does not bear the burden of proof, it will await the Co-Prosecutors' closing brief on these issues prior to engaging on any remaining issues, if at all.

#### **IV. PRELIMINARY ISSUES RELATED TO COOPERATIVES AND WORKSITES**

1014. A number of preliminary issues, namely the exclusion of several issues from the scope (Part A), the lack of credibility of 'expert' Elizabeth Becker (Part B), and the use of the unreliable so-called 'Tram Kok District Records' (Part C), affect the discussion of the facts in relation to some or all of the cooperatives and worksites charged. Hence, these preliminary issues are outlined before and are to be borne in mind when assessing the relevant evidence.

##### **A. SEVERAL ISSUES ARE EXCLUDED FROM THE SCOPE OF CASE 002/02**

1015. In light of the Closing Order's convoluted structure and issues arising from Case 002/02's severance, it is useful to clarify the scope of issues to be addressed in the discussion of facts in Section V. On a general note, the discussion below generally excludes the treatment of 'targeted groups' in Case 002/02 on the basis of group identity as this is addressed above in Chapter 5 on 'targeted groups'. Similarly, evidence on the regulation of marriage is addressed exclusively in Chapter 7. This Chapter focuses instead on evidence related to the general conditions in the cooperatives and worksites. Additional clarifications on the scope of discussion for each crime site are detailed below.

##### **1. The Alleged 'Targeting' of the Khmer Krom and the Prey Kduoch Security Centre or Office 204 are Outside the Scope *Vis-à-Vis* the Tram Kok Cooperatives**

1016. The Closing Order refers to the Khmer Krom being transferred from Tram Kok to Vietnam.<sup>3363</sup> However, as noted in Chapters 4 and 5 above, the Khmer Krom are neither a 'targeted group' in Case 002/02 nor part of the Vietnamese group. Accordingly, their alleged targeting as a group – evidence of which is in any case insufficient for a finding beyond reasonable doubt – is outside the scope of Case 002/02. Evidence in connection with the Khmer Krom is therefore only discussed in Section V insofar as it relates to charges of general alleged conditions within the cooperatives and worksites.

1017. At trial, the Co-Prosecutors either ignorantly or deliberately tried to expand the scope of the trial *vis-à-vis* Tram Kok by frequently posing questions regarding a security centre in Tram

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<sup>3363</sup> D427, Closing Order, para. 320.



Kok District known as Prey Kduoch or Office 204.<sup>3364</sup> However, neither the Closing Order nor the Co-Prosecutors' own Final Submission mention this location at all. Both focus only on re-education, arrest, and detention in the subdistricts and district, alleging that arrested people would be sent to Kraing Ta Chan (*i.e.*, the district re-education office).<sup>3365</sup> Prey Kduoch, on the other hand, was allegedly the **sector** re-education office.<sup>3366</sup> Since the Closing Order makes no reference to it or to sector-level security-related events, it is patently clear that Prey Kduoch is excluded from the scope of Case 002/02. Accordingly, evidence in its regard must be ignored.

## 2. Events Unrelated to the Construction of the 1<sup>st</sup> January Dam are Outside the Scope *Vis-à-Vis* the 1<sup>st</sup> January Dam Worksite

1018. The Closing Order describes the 1<sup>st</sup> January Dam as a project started in late 1976 or early 1977 and completed in early 1978, before the construction of a connected project – the 6<sup>th</sup> January Dam – commenced.<sup>3367</sup> Accordingly, the scope of the charge clearly excludes events related to the 6<sup>th</sup> January Dam or any other projects such as canals which, despite being physically connected to the 1<sup>st</sup> January Dam, were built after the completion of the 1<sup>st</sup> January Dam in early 1978. Despite this, during the testimony of Om Chy, the Chamber ruled against a Defence objection in relation to the scope, holding that the construction of a canal in February 1978 after the completion of the construction of the 1<sup>st</sup> January Dam<sup>3368</sup> was nevertheless within the scope.<sup>3369</sup> This is a shockingly elementary misinterpretation of the Closing Order and a blatant violation of Nuon Chea's fair trial rights. As any proper court of law should know, the Chamber may never exceed the factual basis set by the indictment.<sup>3370</sup> Accordingly, evidence in relation to these connected projects must also be ignored.

1019. In addition, any alleged events in local villages, communes, or other locations unrelated to the construction of the 1<sup>st</sup> January Dam are similarly excluded from the charges.<sup>3371</sup> For

<sup>3364</sup> See *e.g.* **E1/269.1**, Phann Chhen, T. 25 Feb 2015, p. 14, ln. 8 to p. 16, ln. 8; **E1/278.1**, Riel Son, T. 17 Mar 2015, p. 55, ln. 8 to p. 57, ln. 12; **E1/298.1**, Ek Hoeun, T. 7 May 2015, p. 50, ln. 21 to p. 51, ln. 10.

<sup>3365</sup> See *supra*, Chapter 4-IV, for a discussion of Kraing Ta Chan as the **district** reeducation office.

<sup>3366</sup> **E1/269.1**, Phann Chhen, T. 25 Feb 2015, p. 11, ln. 10.

<sup>3367</sup> **D427**, Closing Order, para. 352.

<sup>3368</sup> **E1/326.1**, Om Chy, T. 30 Jul 2015, p. 34, ln. 23 to p. 35, ln. 16.

<sup>3369</sup> **E1/326.1**, Om Chy, T. 30 Jul 2015, p. 36, ln. 18 to p. 38, ln. 11.

<sup>3370</sup> Internal Rule 98 (2).

<sup>3371</sup> *E.g.*, **E1/317.1**, Yean Lon, T. 16 Jun 2015, p. 60, lns 9-21, p. 81, ln. 13 to p. 82, ln. 9 (These events allegedly took place while Yean Lon was a militiaman in charge of the protection of his village, which was after he stopped working at the 1<sup>st</sup> January Dam worksite: see, p. 59, lns 9-17, p. 79, ln. 23 to p. 80, ln. 3, p. 83, lns 3-8. Although Yean Lon alleged that he also arrested people from "worksites", it is unclear whether it was the 1<sup>st</sup> January Dam or other worksites.); **E1/302.1**, Pech Sokha, T. 20 May 2015, p. 79, lns 1-25 (Ruessei Keo School in Phnom Penh); **E1/308.1**, Seang Sovida, T. 2 Jun 2015, p. 52, ln. 20 to p. 53, ln. 2, p. 65, lns 1-11 (Rumlum Pnov worksite); **E1/326.1**, Om Chy, T. 30 Jul 2015, p. 105, ln. 22 to p. 106, ln. 8 (village); **E1/301.1**, Or Ho, T. 19 May 2015, p. 16, ln. 7 to p. 18, ln. 21 (village).

instance, the evidence shows that the Baray Choan Dek Pagoda, which is mentioned in the Closing Order in connection with the 1<sup>st</sup> January Dam, is in fact completely unrelated to the worksite. The Closing Order alleges that this pagoda, which was located near the 1<sup>st</sup> January Dam Worksite, was “known as a place where people were taken to be killed”.<sup>3372</sup> However, there is no credible evidence capable of establishing beyond reasonable doubt a link between this site and the 1<sup>st</sup> January Dam Worksite.<sup>3373</sup> Neither a former detainee nor former prison guard of the pagoda knew if any 1<sup>st</sup> January Dam worker was ever brought there,<sup>3374</sup> and in any event, neither person was summonsed to testify. Therefore, evidence in relation to Baray Choan Dek Pagoda should also be ignored, as it is outside of the scope of Case 002/02.

### 3. The Alleged Post-6 January 1979 Killings of Soldiers Who Used to Work on the Construction of Kampong Chhnang Airfield is Outside the Temporal Jurisdiction

1020. The Closing Order alleges that when fleeing the Kampong Chhnang Airfield Construction Site due to Vietnam’s illegal invasion of Cambodia, soldiers from the East Zone were separated from the rest of the soldiers who had worked at the site and killed *en masse* after 6 January 1979 at a location about 20 kilometres away from the construction site.<sup>3375</sup> However, these alleged killings are quite obviously outside the temporal jurisdiction of the Tribunal, namely 17 April 1975 to 6 January 1979.<sup>3376</sup> They are therefore outside the scope of Case 002/02. Nevertheless, the Co-Prosecutors contend that these alleged killings can evidence the persecutory manner in which East Zone soldiers were treated while working on the construction of the airfield.<sup>3377</sup> However, there is no detailed or credible evidence on the specific circumstances of the alleged killings, particularly on the reasons and the origin of the alleged orders. In any event, the Defence maintains that these alleged killings are irrelevant to how East Zone soldiers were **previously** treated at the construction site. Thus, any evidence with respect to these alleged killings must equally be ignored.

<sup>3372</sup> D427, Closing Order, para. 367.

<sup>3373</sup> The live testimony in this regard is either hearsay, or speculations partly based on rumours and partly based on post-DK knowledge. *See e.g.* E1/304.1, Meas Laihour, T. 25 May 2015, p. 104, ln. 2 to p. 105, ln. 7 (Meas Laihour alleged that, after she started working on the 6<sup>th</sup> January Dam, she heard from her village chief that people were transported to Baray Choan Dek pagoda by oxcarts and they never returned. These events were clearly unrelated to the 1<sup>st</sup> January Dam both because it had been completed before the 6<sup>th</sup> January Dam started, and because these people appeared to have been taken from villages rather than from any worksites.); E1/305.1, Meas Laihour, T. 26 May 2015, p. 55, lns 10-20; E1/306.1, Hun Sethany, T. 27 May 2015, p. 29, lns 7-11, p. 30, lns 13-17; E1/309.1, Uth Seng, T. 3 Jun 2015, p. 17, ln. 1 to p. 18, ln. 10.

<sup>3374</sup> E3/5287, ‘WRI of Men Le’, ERN 00330776; E3/7765, ‘WRI of Yin Daut’, ERN 00333353.

<sup>3375</sup> D427, Closing Order, para. 398.

<sup>3376</sup> ECCC Establishment Law, Art. 1.

<sup>3377</sup> E1/341.1, Key Documents Hearing, T. 3 Sep 2015, p. 64, lns 1-15.

**B. ‘EXPERT’ ELIZABETH BECKER LACKS CREDIBILITY, IN PARTICULAR WHEN COMPARED WITH FACT WITNESS AND FELLOW JOURNALIST RICHARD DUDMAN**

**1. At Best, Becker Should Have Been Heard as a Simple Fact Witness**

1021. The only ‘expert’ witness to appear in connection with cooperatives and worksites at trial was journalist Elizabeth Becker. As one of only two American journalists invited into DK in 1978,<sup>3378</sup> Becker could provide insight into general conditions at the time of her visit. Her potential relevance should be limited to this scope, *i.e.*, testifying as a fact witness on what she saw, heard or experienced during her visit.<sup>3379</sup> However, parts of her testimony drew instead on secondary sources or interviews conducted after the fact,<sup>3380</sup> despite Becker herself noting that she is “a journalist...not an academic”<sup>3381</sup> and had only started her career as a journalist on her first trip to Cambodia in 1972.<sup>3382</sup> This precludes her from drawing general, expert conclusions based on research conducted outside the scope of her visit to DK.<sup>3383</sup>

**2. Much of Becker’s Evidence Drew Upon Her Unreliable, Highly-Manichean Book**

1022. Furthermore, much of Becker’s testimony relied on her book *When the War was Over*,<sup>3384</sup> which is not only one of the prime examples of blind regurgitation of the Manichean narrative but which has no probative value owing to its poor methodology. As the Supreme Court Chamber noted, the probative value of an expert’s opinion depends significantly on the quality of their sources.<sup>3385</sup> However, assessing Becker’s book’s sources is often impossible as it frequently fails to cite any.<sup>3386</sup> It also relies unduly on “English-language materials, many of them overtaken or qualified by recently published work”.<sup>3387</sup> David Chandler<sup>3388</sup> further critiques her book as “overdrawn”,<sup>3389</sup> “counter to evidence”<sup>3390</sup> and lacking “wide reading or

<sup>3378</sup> **E215.3**, CV of Elizabeth Becker.

<sup>3379</sup> **E215**, Decision on Assignment of Experts, para. 16.

<sup>3380</sup> *See e.g.* **E1/259.1**, Elizabeth Becker, T. 9 Feb 2015, p. 13, lns 4-10; **E1/260.1**, Elizabeth Becker, T. 10 Feb 2015, p. 17, ln. 25 to p. 18, ln. 22, p. 40, lns 9-17, p. 51, ln. 19 to p. 52, ln. 2, p. 75, ln. 5 to p. 76, ln. 1; **E1/261.1**, Elizabeth Becker, T. 11 Feb 2015, p. 17, ln. 19 to p. 18, ln. 1.

<sup>3381</sup> **E1/261.1**, Elizabeth Becker, T. 11 Feb 2015, p. 82, ln. 7.

<sup>3382</sup> **E1/261.1**, Elizabeth Becker, T. 11 Feb 2015, p. 36, lns 2-7.

<sup>3383</sup> **E1/261.1**, Elizabeth Becker, T. 11 Feb 2015, p. 84, ln. 23 to p. 85, ln. 2.

<sup>3384</sup> **E3/20**, Becker, *When the War was Over*.

<sup>3385</sup> **F36**, Case 002/01 Appeals Judgement, para. 880.

<sup>3386</sup> *See e.g.* **E1/261.1**, Elizabeth Becker, T. 11 Feb 2015, p. 37, ln. 13 to p. 38, ln. 4 (on ERN 00237722 of E3/20), p. 58, lns 10-22 (on ERN 00237875 of E3/20), p. 72, lns 1-2 (on ERN 00237968 of E3/20), p. 93, lns 6-18 (on ERN 00237775 of E3/20); *see also* **E232/1.1.5**, Chandler’s Review of Becker’s Book, ERN 00850336.

<sup>3387</sup> **E232/1.1.5**, Chandler’s Review of Becker’s Book, ERN 00850334.

<sup>3388</sup> **E215**, Decision on Assignment of Experts, para. 17.

<sup>3389</sup> **E232/1.1.5**, Chandler’s Review of Becker’s Book, ERN 00850333.

<sup>3390</sup> **E232/1.1.5**, Chandler’s Review of Becker’s Book, ERN 00850333.

research”.<sup>3391</sup> Thus, even if Becker were treated as an ‘expert’, the probative value of her ‘expert’ evidence is nonexistent, for where an expert’s “sources are not fully accessible and verifiable”, “a diminished weight must be attributed to expert evidence derived from them”.<sup>3392</sup>

### 3. Richard Dudman’s Account Has Comparatively Greater Credibility Than Becker

1023. Even as a simple fact witness, Becker lacks credibility, as demonstrated by the disparity between her opinion and that of the fellow journalist on the DK visit, Richard Dudman. Despite being on the same guided tour of DK, they reached drastically different conclusions. Becker painted a Manichean portrait based on nebulous sources. Dudman’s account drew on what “he [saw] and [could] learn” and was sceptical of hearsay.<sup>3393</sup> He asserted that “people clearly were not being worked to death and starved to death”, but lived a “regimented life of hard work [...] leavened, however, by much improved housing, regular issuance of clothing, and an assurance of apparently adequate food.”<sup>3394</sup>

1024. Dudman’s report was written less than six weeks after his visit while fresh in his mind,<sup>3395</sup> rather than seven years later in the case of Becker’s book.<sup>3396</sup> In addition, Becker herself acknowledges that at the time of their visit, Dudman was a “very experienced journalist”<sup>3397</sup> whereas she had only begun her career six years earlier.<sup>3398</sup> Despite this, Becker nevertheless attempted to sideline Dudman’s account on the basis that unlike her, Dudman “did not know Cambodia before [the DK]”.<sup>3399</sup> However, this is immaterial to his capacity for direct observation and does not undermine his contrary evidence;<sup>3400</sup> if anything, it would suggest that Dudman would have been likely to write a more sensational account of DK than Becker, who had seen Cambodia during its civil war.

1025. Dudman maintained his position on the DK at least 11 years after the visit in a feature article in the New York Times,<sup>3401</sup> although he ultimately – and very unconvincingly – repudiated it when testifying in Case 002/02 36 years after the visit.<sup>3402</sup> Setting aside the

<sup>3391</sup> E232/1.1.5, Chandler’s Review of Becker’s Book, ERN 00850333.

<sup>3392</sup> F36, Case 002/01 Appeals Judgement, para. 329. This is further discussed *supra*, at Chapter 2-III-B-3-(c).

<sup>3393</sup> E1/284.1, Richard Dudman, T. 30 Mar 2015, p. 13, lns 15-17.

<sup>3394</sup> E3/3290, Dudman 1979 Report on DK Visit, ERN 00419208.

<sup>3395</sup> E3/3290, Dudman 1979 Report on DK Visit.

<sup>3396</sup> E3/20, Becker, When the War was Over.

<sup>3397</sup> E1/260.1, Elizabeth Becker, T. 10 Feb 2015, p. 61, ln. 21.

<sup>3398</sup> E1/259.1, Elizabeth Becker, T. 9 Feb 2015, p. 5, lns 21-25.

<sup>3399</sup> E1/260.1, Elizabeth Becker, T. 10 Feb 2015, p. 68, lns 21-25.

<sup>3400</sup> E1/260.1, Elizabeth Becker, T. 10 Feb 2015, p. 68, lns 24-25

<sup>3401</sup> E3/7332, Dudman, Pol Pot No Mass Murderer, ERN 01002091.

<sup>3402</sup> E1/284.1, Richard Dudman, T. 30 Mar 2015 p. 13 ln. 20 to p. 14, ln. 2, p. 20, ln. 25 to p. 21, ln. 3.

questions this raises as to Dudman’s motive for repudiating his views, Dudman explains that he changed position after “read[ing ...] about what went on under the Pol Pot regime” and talking to unnamed “sources”.<sup>3403</sup> Thus, he admits that his new position is based on multiple hearsay evidence, which the Supreme Court Chamber warns “must [be] approach[ed] with caution.”<sup>3404</sup> Despite his change in position, the fact remains that he and Becker wrote drastically different accounts of their visit at a time when Dudman was the more experienced journalist. This undermines Becker’s credibility even as a fact witness.

### C. THE ‘TRAM KOK DISTRICT RECORDS’ ARE WHOLLY UNRELIABLE

1026. As noted in Chapter 4 above, the inclusion of the Tram Kok Cooperatives in Case 002 pivoted on the existence of the so-called ‘Tram Kok District Records’. However, due to their evidentiary limitations and authenticity concerns, the Co-Prosecutors must prove beyond reasonable doubt the authenticity and reliability of each ‘Tram Kok District Record’ they seek to use.<sup>3405</sup> This is impossible. In any event, as out-of-court evidence, any ‘Tram Kok District Record’ can only ever have limited probative value, especially absent any credible corroborating in-court witness evidence. Thus, the Defence refers only sparingly to them below, and only in the alternative to show that they would support its case, not the Co-Prosecutors’.<sup>3406</sup>

### V. FACTS RELATED TO COOPERATIVES AND WORKSITES

1027. The facts related to the four charged cooperatives and worksites thoroughly undermine the Co-Prosecutors’ sensationalist contention that there was an official policy seeking to create a “slave state”.<sup>3407</sup> No systematic pattern can be deduced whatsoever that would permit the deduction of the existence of such policy. Moreover, even if crimes were committed, none can be attributed to Nuon Chea, who simply had nothing to do with the day-to-day operation of any of the sites. The structure of the cooperatives and worksites, as well as the personnel responsible for overseeing them is discussed in Part A. Part B describes the function and purpose of each cooperatives and worksites. The working and living conditions at each of the sites are discussed in Part C, and finally, the question of the security conditions is set out in Part D.

<sup>3403</sup> E1/284.1, Richard Dudman, T. 30 Mar 2015, p. 13, lns 22-23.

<sup>3404</sup> F36, Case 002/01 Appeals Judgement, para. 880.

<sup>3405</sup> See, ICTY, *Bošković & Tarčulovski*, 2008 Bar Table Decision, paras 6, 13, 19, 23, 30 (holding that reliability is synonymous with authenticity).

<sup>3406</sup> On the validity of the Defence’s use of out-of-court evidence in this way, *see supra*, Chapter 2-III-B-2-(b).

<sup>3407</sup> E1/229.1, Co-Prosecutors’ Closing Arguments in Case 002/01, T. 17 Oct 2013, p. 6, lns 23-24.

## A. STRUCTURE AND PERSONNEL: NUON CHEA HAD NO INVOLVEMENT

1028. The evidence shows that the four sites' operations were squarely outside Nuon Chea's domain of responsibility. There is not even any credible evidence that Nuon Chea ever visited them. Even if he did, these visits are of little relevance, and the evidence shows that senior leaders did not see the full extent of conditions during their short visits anyway.<sup>3408</sup> Finally, the evidence shows that operations were instead controlled by local authorities who had wide discretion in determining conditions for their individual units. Thus, while the cooperatives and worksites policy was clearly defined, its implementation varied due to local authorities' failure to strictly enforce it. These variations were not always sinister, but there is evidence – especially at Trapeang Thma Dam – that certain conditions were indeed deliberate attempts to further a treasonous plot against the CPK. Therefore, where such variations amount to crimes, there is no evidence that this was pursuant to official CPK policy. This Part outlines the general supervising structure of each site; the significant degree of autonomy of local authorities; and, despite the general irrelevance of this evidence, allegations of visits by CPK leaders to the sites.

### 1. The Hierarchical Structure of the Cooperatives and Worksites is Unrelated to Nuon Chea

#### (a) Structure of the Tram Kok Cooperatives

1029. The Tram Kok Cooperatives, which were comprised of individual units within several Communes, were situated in Tram Kok District. Above the units and District, the Defence accepts that Standing Committee member, Southwest Zone chief and alleged JCE member Ta Mok, together with the Sector 13 chief, had high-level involvement in the Tram Kok Cooperatives. As Tram Kok District chief Pech Chim testified,<sup>3409</sup> Ta Mok instructed him to establish the cooperative, and he and “the sector” advised Pech Chim of the three tonnes per hectare rice yield goal.<sup>3410</sup> Witness Sao Van also testified hearing Ta Mok or Sector 13 chief Saom instruct communes on a common work policy for all cooperative members.<sup>3411</sup> Four other testifying Southwest Zone cadres also described Ta Mok making *ad hoc* inquiries about living and working conditions when he happened to visit.<sup>3412</sup> Even by the furthest stretch of the

<sup>3408</sup> See also *supra*, Chapter 4-V-A-1-(c), on the irrelevance of these visits despite the Co-Prosecutors' fixation.

<sup>3409</sup> On Pech Chim's credibility, see *supra*, Chapter 5-IV-C-1-(a).

<sup>3410</sup> E1/291.1, Pech Chim, T. 23 Apr 2015, p. 12, ln. 25 to p. 13, ln. 2.

<sup>3411</sup> E1/385.1, Sao Van, T. 1 Feb 2016, p. 31, ln 15 to p. 32, ln 11; see *supra*, Chapter 5, for details on Sao Van.

<sup>3412</sup> On asking about whether people had enough food and if supplies were properly distributed, see E1/297.1, Khoem Boeun, T. 5 May 2015, p. 16, lns 9-22; E1/299.1, Ek Hoeun, T. 8 May 2015, p. 13, lns 8-11; E1/275.1, Neang Ouch, T. 11 Mar 2015, p. 38, lns 11-16; E1/269.1, Nop Ngim (2-TCW-1002), T. 5 Sep 2016, p. 39, lns 17-22; on directing the sick not to work, see E1/269.1, Nop Ngim (2-TCW-1002), T. 5 Sep 2016, p. 87, lns 18-25.

imagination, this could not be associated with the commission of crimes. Rather, what it shows is a perfectly legitimate implementation of a communitarian policy.

1030. Importantly, these accounts are the limit of live evidence heard on the Tram Kok Cooperatives' authority structure. Documentary evidence is even more sparse. There is a sum total of one report on the case file from the "Southwest Zone" to "respected and beloved Angkar" on Zone conditions. It contains only two fleeting references to Tram Kok in four pages,<sup>3413</sup> does not refer to the commission of crimes, and does not indicate that Nuon Chea received it. Contrary to what is claimed in the Closing Order, it does not illustrate a regular "vertical chain of reporting" on operations at Tram Kok, and even if it were sent to the Central or Standing Committee, there is no evidence that it was nothing more than a one-off occurrence. In addition, even if the so-called 'Tram Kok District Records' could be relied upon,<sup>3414</sup> they show only communications up to the level of Sector 13, as discussed in Chapter 4.<sup>3415</sup>

1031. Ultimately, no evidence establishes beyond reasonable doubt that Ta Mok had a role in operational decision-making in the Tram Kok Cooperatives, including over daily living and working conditions (let alone Nuon Chea, for whom the Tram Kok Cooperatives were well outside his sphere of authority). The evidence merely shows that Ta Mok had cooperatives established; instructed their target rice yield, which was to bear "no [negative] consequence whatsoever" if not achieved;<sup>3416</sup> and sometimes visited them, asking about conditions and telling sick people not to work.<sup>3417</sup> He also gave high-level instructions that everyone should be treated equally and equally contribute to national reconstruction and defence.<sup>3418</sup> As discussed in Section II, this was not illegal but was part of DK's legitimate cooperatives and worksites policy. There is no evidence linking Ta Mok with any of the crimes allegedly committed.

**(b) Structure of the 1<sup>st</sup> January Dam Worksite**

1032. The 1<sup>st</sup> January Dam was an irrigation project. Like other infrastructure-related projects, irrigation projects were under the joint authority of the Ministries of Public Works and

<sup>3413</sup> E3/853, Southwest Zone Rep., 3 Jun 1977, ERN 00185244 ("At Tram Kak, the seedlings are ready to be transplanted into the irrigated paddy-field of 2,500 hectares at somewhere near O Chambak in Leap Bo Sub-district"), 00185246 ("At Tram Kak district, the plan for channels digging have been completed").

<sup>3414</sup> See *supra*, Chapter 4-III-C, regarding the inherently low probative value of the Tram Kok District Records.

<sup>3415</sup> See also *supra*, Chapter 4-IV, concerning the role of Sector 13 at Kraing Ta Chan.

<sup>3416</sup> E1/291.1, Pech Chim, T. 23 Apr 2015, p. 63, ln. 18 to p. 64, ln. 10.

<sup>3417</sup> On asking about whether people had enough food and if supplies were properly distributed, see E1/297.1, Khoem Boeun, T. 5 May 2015, p. 16, lns 9-22; E1/299.1, Ek Hoeun, T. 8 May 2015, p. 13, lns 8-11; E1/275.1, Neang Ouch, T. 11 Mar 2015, p. 38, lns 11-16; E1/269.1, Nop Ngim (2-TCW-1002), T. 5 Sep 2016, p. 39, lns 17-22; on directing the sick not to work, see E1/269.1, Nop Ngim (2-TCW-1002), T. 5 Sep 2016, p. 87, lns 18-25.

<sup>3418</sup> E1/385.1, Sao Van, T. 1 Feb 2016, p. 31, ln 15 to p. 32, ln 11.

Industry.<sup>3419</sup> The national committee of public works was headed by Touch Phoeun *alias* Phin,<sup>3420</sup> and the national committee of industry was headed by Cheng An, both reporting to Vorn Vet.<sup>3421</sup> Accordingly, the 1<sup>st</sup> January Dam was not under the authority of Nuon Chea who was not in charge of these matters. This also explains why when the Chinese Vice Premier Chen Yonggui visited several major construction projects throughout Cambodia – including the 1<sup>st</sup> January Dam – in December 1977, Pol Pot only took two ministers with him to accompany the Chinese delegation: Vorn Vet and Thiounn Thioeun (the Minister of Public Health), whose portfolios were particularly relevant to the visit.<sup>3422</sup>

1033. Within the Central (old North) Zone, the Zone committee headed by Ke Pauk had overall responsibility for the 1<sup>st</sup> January Dam Worksite, a huge project which mobilised people from all three Zone sectors for its construction.<sup>3423</sup> However, Ke Pauk was not directly in charge of its daily operation. Despite some witnesses' testimony that he visited the site frequently,<sup>3424</sup> it was impossible for Ke Pauk to see conditions throughout the worksite, given its size (at 32 km in length<sup>3425</sup>) and the mobile nature of the workforces.<sup>3426</sup> However, to the extent that he was made aware of any problematic conditions, Ke Pauk always took available measures to remedy such problems. For instance, the evidence shows that Ke Pauk gave instructions to reduce working hours, and to encourage workers to drink hot water instead of cold water to avoid getting sick.<sup>3427</sup> In order to deal with food shortages, he further ordered the organisation of specific groups in charge of cooking and gathering food. Ke Pauk also succeeded in improving the health situation at the dam, and instructed the sectors to assign medics to help treating patients in each shelter.<sup>3428</sup> Finally, evidence also shows that Ke Pauk sent construction material

<sup>3419</sup> **E3/237**, Meeting on Public Works, 10 Mar 1976, ERN 00543730; **E3/427**, 'WRI of Nam Che', ERN 00365652; **E3/36**, 'WRI of Nam Che', A3, A7.

<sup>3420</sup> Touch Phoeun was one of Vietnam's key collaborators and was eventually arrested. *See supra*, Chapter 3-IV-D and **E3/7327**, CPK Kampuchean Workers' Party Press Release, 3 Jun 1978, ERN 00015680.

<sup>3421</sup> **E3/237**, Meeting on Public Works, 10 Mar 1976, ERN 00543730; **E3/235**, SC Meeting, 19-21 Apr 1976, ERN 00183416-17; **E3/165**, People's Representative Assembly of Kampuchea, ERN 00184069; **E3/36**, 'WRI of Nam Che', A3, A7; *see also supra*, Chapter 3-IV-D, regarding these leaders.

<sup>3422</sup> **E3/1339**, FBIS, Dec 1977, ERN 00168335, the DK authorities that accompanied the Chinese delegation to the 1<sup>st</sup> January Dam consisted of three national leaders (Pol Pot, Vorn Vet, and Thiounn Thioeun) as well as leaders of the Central (old North) Zone (zone secretary Ke Pauk and his deputy An) where the dam was located.

<sup>3423</sup> *See e.g.* **E3/35**, 'WRI of Ke Pick Vannak', ERN 00346149-50; **E1/302.1**, Pech Sokha, T. 20 May 2015, p. 76, lns 10-21.

<sup>3424</sup> *See e.g.* **E1/302.1**, Pech Sokha, T. 20 May 2015, p. 75, lns 17-21.

<sup>3425</sup> **E1/309.1**, Uth Seng, T. 3 Jun 2015, p. 70, ln. 24 to p. 71, ln. 4.

<sup>3426</sup> *See e.g.* former technician Pech Sokha who was stationed on the worksite indicated that he did not always see Ke Pauk when Ke Pauk visited, **E1/302.1**, Pech Sokha, T. 20 May 2015, p. 75, lns 17-21, p. 76, ln. 22 to p. 77, ln. 1.

<sup>3427</sup> **E3/952**, 'Telegram from Pauk to Pol', 2 Apr 1976, ERN 00182658-59.

<sup>3428</sup> **E3/35**, 'WRI of Ke Pick Vannak', ERN 00346150.



at the worksite when he learnt about shortages.<sup>3429</sup> Rather than illustrating the implementation of a criminal policy of enslavement and punishment, this evidence further demonstrates the CPK's benevolent intentions towards its population.

1034. Similarly, below the zone, leaders from sectors, districts, communes, and cooperatives also occasionally visited people under their jurisdiction working on the dam. However, these leaders were also not directly in charge of the site's operation, nor were they permanently stationed there. Accordingly, they could not possibly see or know all aspects of conditions or any alleged crimes just through visits or reports.<sup>3430</sup> Nevertheless, the evidence shows that at least some of them, when informed of problems such as lack of tools, material, or food, took measures within their authority and ability to resolve them.<sup>3431</sup>

**(c) Structure of the Military Construction Site of Kampong Chhnang Airfield**

1035. Kampong Chhnang Airfield was a military airfield,<sup>3432</sup> and was built exclusively by RAK soldiers from various units including Centre Divisions 502, 310, 450, and 170. Centre Division 502 was the air force division of the RAK which controlled all airfields in the DK, including Kampong Chhnang Airfield.<sup>3433</sup> Sou Met was its commander, San his deputy, and Lvey third in rank in Division 502's command committee.<sup>3434</sup>

1036. The Airfield's construction was under exclusive military control; no civilians were involved in its construction.<sup>3435</sup> Nuon Chea, who was a civilian official, and was not a member of the Military Committee as ruled in the Case 002/01 Judgement, had no authority over the operation of the construction site. The fact that the initial decision to build the airfield was made by the Standing Committee<sup>3436</sup> does not change the military nature of the supervising authority,

<sup>3429</sup> **E3/5513**, 'WRI of Ieng Chham', A93.

<sup>3430</sup> See e.g. **E1/310.1**, Sou Soeurn, T. 4 Jun 2015, p. 54, ln. 18 to p. 55, ln. 21, p. 92, lns 4-17; **E1/317.1**, Yean Lon, T. 16 Jun 2015, p. 84, lns 8-16.

<sup>3431</sup> See e.g. **E1/301.1**, Or Ho, T. 19 May 2015, p. 82, ln. 23 to p. 83, ln. 3 ("I sought Angkar's help, I asked Angkar to give dyke metal or dyke (inaudible) and shovel to help in our work so Angkar provided with the materials as requested and we could finish -- could finish our work before the New Year."); **E1/310.1**, Sou Soeurn, T. 4 Jun 2015, p. 54, ln. 18 to p. 55, ln. 2 ("if I were [sic] to receive such a report directly, I would instruct the relevant commune chief to deal with those issues or to give them what they needed in terms of tools or food.").

<sup>3432</sup> **E3/235**, SC Meeting, 19-21 Apr 1976, ERN 00183419; **E1/312.1**, Chan Morn, T. 9 Jun 2015, p. 59, lns 16-21.

<sup>3433</sup> **E3/8366**, Air Force Recruitment Meeting, 3 Mar 1976, ERN 00234008; **E3/5536**, 'WRI of Seng Mon', ERN 00359932.

<sup>3434</sup> **E3/1136**, 'Rice Consumption Plan for the Military in 1976', 4 Jan 1976, ERN 00543743; **E3/1585**, 'List of Participants of the 1<sup>st</sup> General Staff Study Session', 20 Oct 1976, ERN 00897660.

<sup>3435</sup> **E1/312.1**, Chan Morn, T. 9 Jun 2015, p.18, lns 18-21, p. 64, ln. 24; **E1/508.1**, Nuon Trech, T. 7 Dec 2016, p. 21, lns 21-24; **E1/313.1**, Keo Kin, T. 10 Jun 2015, p. 92, lns 17-22; **E1/314.1**, Keo Kin, T. 11 Jun 2015, p. 25, lns 4-7, p. 67, lns 1-13; **E1/320.1**, Sem Hoern, T. 23 Jun 2015, p. 35, lns 2-8.

<sup>3436</sup> See *infra*, Chapter 6-V-B-3-(a), regarding the nature of the airfield.

as it is normal for the general state leadership to make decisions on the initiation of national military projects. In any event, there is nothing inherently criminal in the creation of a military Airfield, which constituted a legitimate and regular national defence operation. Notwithstanding this fact, once initiated, the operation of the military project was under the exclusive authority of the military commanders, on which Nuon Chea had no influence.

**(d) Structure of the Trapeang Thma Dam Worksite**

1037. The Trapeang Thma Dam was, like the 1<sup>st</sup> January Dam, an irrigation project. Like other infrastructures, irrigation projects were under the joint authority of the ministries of public works and of industry,<sup>3437</sup> both supervised by Vorn Vet, Deputy Prime Minister in charge of economics.<sup>3438</sup> Accordingly, the Trapeang Thma Dam was not under the authority of Nuon Chea. It was located in Sector 5 of the Northwest Zone, under the direct supervision of Ruos Nhim, Northwest Zone Secretary and key Vietnamese collaborator in plans to overthrow the CPK and legitimate DK government through subversion, sabotage, rebellion and *coups d'état*,<sup>3439</sup> and of Sector 5 committee members including Ruos Nhim's son and Sao Phim's son-in-law Ta Cheal.<sup>3440</sup> Ruos Nhim visited the site regularly, and notably chaired the conference held during the inauguration of the Trapeang Thma Dam.<sup>3441</sup> Ta Val, Sector 5 mobile unit chief, was in overall charge of the Trapeang Thma Dam,<sup>3442</sup> so much so that the dam was sometimes called "Ta Val's dam".<sup>3443</sup> Ta Val supervised all unit chiefs on the worksite.<sup>3444</sup>

**2. Local Authorities Benefited from Significant Autonomy**

**(a) Autonomy of Lower-Level Authorities in the Tram Kok Cooperatives**

1038. At the cooperative level, unit chiefs were responsible for the day-to-day operations of their unit. Thus, where there were deviations of policy, this was due to local authorities' failure to enforce CPK policy. In addition, Tram Kok District chief Pech Chim explained that unit

<sup>3437</sup> E3/237, Meeting on Public Works, 10 Mar 1976, ERN 00543730; E3/427, 'WRI of Nam Che', ERN 00365652; E3/36, 'WRI of Nam Che', A3, A7.

<sup>3438</sup> See E3/1339, FBIS, Dec 1977, ERN 00168341; see also Chapter 6-V-A-1-(b), on the structure and personnel at the 1<sup>st</sup> January Dam.

<sup>3439</sup> On Ruos Nhim's role, see in particular, *supra*, Chapter 3-IV and Chapter 3-VI.

<sup>3440</sup> E1/330.1, Chhit Yoeuk, T. 13 Aug 2015, p. 56, ln. 19 to p. 57, ln. 2.

<sup>3441</sup> E1/327.1, Kan Thorl, T. 10 Aug 2015, p. 46, lns 8-21, p. 67, lns 14-20, p. 68, lns 11-24; E1/324.1, Mam Soeum, T. 28 Jul 2016, p. 82, lns 14-16; E1/332.1, Chhum Seng, T. 18 Aug 2015, p. 37, ln. 15.

<sup>3442</sup> See e.g. E1/327.1, Kan Thorl, T. 10 Aug 2015, p. 57, lns 23-24; E1/329.1, Lat Suoy, T. 12 Aug 2015, p. 50, lns 7-10; E1/330.1, Chhit Yoeuk, T. 13 Aug 2015, p. 76, lns 17-18; E1/334.1, Yi Laisauv, T. 20 Aug 2015, p. 34, lns 13-14.

<sup>3443</sup> E1/329.1, Lat Suoy, T. 12 Aug 2015, p. 50, lns 7-10.

<sup>3444</sup> See e.g. E1/329.1, Lat Suoy, T. 12 Aug 2015, p. 36, lns 19-22, p. 49, lns 7-10; E1/330.1, Chhit Yoeuk, T. 13 Aug 2015, p. 38, lns 6-7.

chiefs sometimes inflated reports and hid the nature of conditions in their units, to seek praise from the district.<sup>3445</sup> He clarified that while he was not trying to divert blame, such conditions thereby amounted to “shortcomings in the management” of cooperative units<sup>3446</sup> which the District, which had overall oversight of the cooperatives, tried to avoid and address.<sup>3447</sup> Even if violations of the policy occurred, there is no evidence that such violations were ever brought to the attention of Nuon Chea.

**(b) *Autonomy of Lower-Level Authorities at the 1<sup>st</sup> January Dam Worksite***

1039. The people working on the construction of the 1<sup>st</sup> January Dam were divided into small units. Unit chiefs oversaw the daily operation on the site and exerted wide discretion in terms of allowing additional breaks and rest, taking care of the sick, discipline or punishment, and organising food, *etc.*<sup>3448</sup> Moreover, the variation of evidence from different witnesses shows that the conditions of the people working on the construction of the dam largely depended on each unit chief.<sup>3449</sup> In other words, what a witness allegedly experienced in his or her unit does not necessarily reflect the general situation on the worksite or the party policy. Therefore, in the absence of a systematic and consistent pattern at the 1<sup>st</sup> January Dam Worksite, the conclusion that a criminal policy can be inferred is impossible. Finally, the evidence also shows that unit chiefs did not always report all the problems they faced to their superiors,<sup>3450</sup> and as a result, those superiors did not always have knowledge of the actual situation.<sup>3451</sup>

**(c) *Autonomy of Lower-Level Authorities at the Kampong Chhnang Airfield Construction Site***

1040. Although Division 502 had overall responsibility for the construction of Kampong Chhnang Airfield, the division commanders were not directly in charge of its daily operation. The evidence shows that Lvey and the chief of division office Yeng only convened weekly meetings of unit commanders working there to discuss the construction plan; ordinary soldiers

<sup>3445</sup> E1/291.1, Pech Chim, T. 23 Apr 2015, p. 21, lns 8, 12-13.

<sup>3446</sup> E1/291.1, Pech Chim, T. 23 Apr 2015, p. 21, lns 8, 12-13.

<sup>3447</sup> E1/291.1, Pech Chim, T. 23 Apr 2015, p. 21, lns 13-25.

<sup>3448</sup> See *infra*, Chapter 6-V-C-2 and Chapter 6-V-D-2-(a)

<sup>3449</sup> See *infra*, Chapter 6-V-C-2 and Chapter 6-V-D-2-(a).

<sup>3450</sup> See e.g. E1/301.1, Or Ho, T. 19 May 2015, p. 38, ln. 22 to p. 39, ln. 2, p. 45, lns 15-20; E1/302.1, Or Ho, T. 20 May 2015, p. 18, lns 8-17; E1/326.1, Om Chy, T. 30 Jul 2015, p. 46, ln. 18 to p. 47, ln. 13; E3/5255, ‘WRI of Or Ho’, ERN 00250045.

<sup>3451</sup> For instance, they would not necessarily have known that the amount of work was too much for some to finish in time. See e.g. E1/326.1, Om Chy, T. 30 Jul 2015, p. 46, ln. 18 to p. 47, ln. 13; E1/301.1, Or Ho, T. 19 May 2015, p. 38, ln. 22 to p. 39, ln. 2; E1/302.1, Or Ho, T. 20 May 2015, p. 18, lns 8-17; E3/5255, ‘WRI of Or Ho’, ERN 00250045.

were not allowed to attend these meetings.<sup>3452</sup> Each unit commander was then in charge of holding meetings with the soldiers in their unit,<sup>3453</sup> and assigning out work.<sup>3454</sup> The unit commanders were the ones that directly supervised the soldiers and oversaw the daily work on the site, making decisions on working and living conditions. There is also no evidence that alleged crimes were reported to the military hierarchy, or to any civilian authority. In any event, there is no evidence linking them to Nuon Chea.

**(d) *Autonomy of Lower-Level Authorities at the Trapeang Thma Dam Worksite***

1041. The Trapeang Thma Dam was a very large project of about 7 to 10 kilometres long.<sup>3455</sup> Its base was “seven to eight” metres wide, while its crest was “10 to 15” metres wide.<sup>3456</sup> Around 15,000 to 20,000 workers were involved in the construction.<sup>3457</sup> They were either members of the Sector 5 mobile unit, or members of districts and cooperatives mobile units.<sup>3458</sup> The later were appointed by district and cooperative chiefs on an *ad hoc* basis and usually only spent a few months working at the Trapeang Thma Dam before being reassigned to another location.<sup>3459</sup> As detailed further below, in light of its size and the number of workers, the working and living conditions greatly varied, with local cadres and unit chiefs being granted wide discretion in that regard.<sup>3460</sup> As a result, if crimes were committed, they were the result of the local authorities acting in deviation of the official policy.

**3. Mere Visits Do Not Establish Involvement in Daily Operations or Knowledge of Crimes**

1042. As noted above in Chapter 4-V-A-1-(c), the Defence’s view is that the generally-fleeting visits of high-ranking leaders to crime sites are completely irrelevant unless it can be shown that during the visit, the leaders learned specific knowledge of charged crimes allegedly committed there. As described below in Part B, however, the working and living conditions in the cooperatives and worksites did not constitute enslavement nor were they inhumane or

<sup>3452</sup> E1/313.1, Keo Kin, T. 10 Jun 2015, p. 97, ln. 13 to p. 98, ln. 3; E3/5278, ‘WRI of Chan Morn’, ERN 00292825; *see also*, E1/316.1, Keo Loeur, T. 15 Jun 2015, p. 13, lns 11-13.

<sup>3453</sup> *See e.g.* E3/5278, ‘WRI of Chan Morn’, ERN 00292825; E1/318.1, Kong Siek, T. 17 Jun 2015, p. 42, lns 7-9; E3/5284, ‘WRI of Khin Vat’, ERN 00315915.

<sup>3454</sup> *See infra*, Chapter 6-V-C-3-(b), work assignment system.

<sup>3455</sup> E1/325.1, Mam Soeurm, 29 Jul 2015, p. 36, lns 12-13.

<sup>3456</sup> E1/327.1, Kan Thorl, 10 Aug 2015, p. 48, lns 5-7.

<sup>3457</sup> E1/328.1, Kan Thorl, T.11 Aug 2015, p. 19, lns 20-22; E1/330.1, Chhit Yoeuk, T.13 Aug 2015, p. 49, lns 22-23.

<sup>3458</sup> E1/359.1, Pan Chhuong (2-TCW-918), T. 30 Nov 2015, p. 35, lns 18-19.

<sup>3459</sup> E1/333.1, Tak Boy, T. 19 Aug 2015, p. 38, lns 23-25; E1/340.1, Mean Loeuy, T. 2 Sep 2015, p. 60, lns 5-6; E1/323.1, Sen Sophon, T. 27 Jul 2015, p. 43, lns 11-13; E1/329.1, Lat Suoy, T. 12 Aug 2015, p. 44, lns 6-8

<sup>3460</sup> *See infra*, Chapter 6-V-C-4 and Chapter 6-V-D-4 on the failure of local cadres to uphold CPK policies.

degrading in light of the specific circumstances at the time. As a result, any proof of a visit to any of the cooperatives and worksites charged in Case 002/02 is insufficient to establish knowledge of crimes beyond reasonable doubt. This is particularly true since, on certain occasions, there is evidence that the local authorities “staged” the visits. Since there is no evidence on visits at Trapeang Thma Dam, it is not included in the discussion below.

**(a) Alleged Visits to the Tram Kok Cooperatives**

1043. At trial, only civil party Chou Koemlan offered an unsworn statement that during the 1977 dry season,<sup>3461</sup> she saw leaders including Nuon Chea, Pol Pot, Ta Mok, and Khieu Samphân visit the Ou Chambak canal worksite for 15 minutes and meet with local chiefs.<sup>3462</sup> However, while Chou Koemlan insisted that the village/unit chiefs told her who had visited,<sup>3463</sup> it is very likely that she was told only that “senior leaders” visited but that she later merged this with post-DK information she learned about the identities of “senior leaders”.<sup>3464</sup> In any event, what the leaders could have materially learned about conditions at the Tram Kok Cooperatives in a 15 minutes meeting and a meeting with local leaders is questionable. The Defence returns to a discussion of this visit in Section VII below.

**(b) Alleged Visits to the 1<sup>st</sup> January Dam Worksite**

1044. As to the visits by senior DK leaders,<sup>3465</sup> film crews, and foreign delegations, the evidence shows that when such visits took place, some unit chiefs instructed their unit to work harder, faster, and act more actively in front of the visitors.<sup>3466</sup> Visitors were also warmly welcomed by the people working there.<sup>3467</sup> Therefore, what the DK leaders saw during these visits – either on their own or with foreign delegations – was that workers were in high morale

<sup>3461</sup> So presumably before 30 September 1977, when Nuon Chea and Pol Pot revealed themselves to the world.

<sup>3462</sup> E1/252.1, Chou Koemlan, T. 26 Jan 2015, p. 60, lns 10-14, p. 61, lns 7-12, p. 63, lns 20-23, p. 82, ln. 12 to p. 83, ln. 3; E1/253.1, Chou Koemlan, T. 27 Jan 2015, p. 3, ln. 23.

<sup>3463</sup> E1/253.1, Chou Koemlan, T. 27 Jan 2015, p. 40, ln. 2 to p. 42, ln. 9.

<sup>3464</sup> E1/253.1, Chou Koemlan, T. 27 Jan 2015, p. 8, ln. 19 to p. 9, ln. 10, p. 39, ln. 24 to p. 40, ln. 12, p. 41, ln. 5 to p. 42, ln. 9.

<sup>3465</sup> For an alleged visit by Nuon Chea, *see infra*, Chapter 6-VII: Mode of Liability of JCE I.

<sup>3466</sup> E1/304.1, Meas Laihour, T. 25 May 2015, p. 78, ln. 12 to p. 79, ln. 9 (The witness appears to be confused about the time of the visit. She said it was during the 6<sup>th</sup> January Dam construction. However, Chen Yonggui visited the zone in December 1977, which was at the end of the 1<sup>st</sup> January Dam construction and before the start of the the 6<sup>th</sup> January Dam project); E1/305.1, Meas Laihour, T. 26 May 2015, p. 9, lns 20-24; E1/308.1, Seang Sovida, T. 2 Jun 2015, p. 30, ln. 12 to p. 31, ln. 2; E1/306.1, Hun Sethany, T. 27 May 2015, p. 14, ln. 23 to p. 15, ln. 14; E1/301.1, Or Ho, T. 19 May 2015, p. 44, lns 11-19. In contrast, one civil party said that her unit was not required to act differently when the visitors came; *see*, E1/307.1, Un Rann, T. 28 May 2015, p. 35, lns 3-9.

<sup>3467</sup> *E.g.*, E3/1339, FBIS, Dec 1977, ERN 00168335-36; E1/311.1, Sou Soeurn, T. 5 Jun 2015, p. 49, lns 13-19; E1/305.1, Meas Laihour, T. 26 May 2015, p. 51, ln. 23 to p. 52, ln. 3; E1/301.1, Or Ho, T. 19 May 2015, p. 66, ln. 23 to p. 67, ln. 4; E3/35, ‘WRI of Ke Pick Vannak’, ERN 00346151.

and good physical condition. They could not have known from such visits that some workers – for instance, a handful of the witnesses and civil parties – were resentful of the work and dissatisfied with conditions. Moreover, when made aware of any problems, the evidence shows that they took reasonable measures available to tackle them,<sup>3468</sup> in an effort to implement their goal of improving the daily lives of DK citizens and rebuilding the country. It is also worth noting that during Chen Yonggui’s visit to several zones in DK in December 1977, Pol Pot and Chen Yonggui constantly joined the cooperative members in their work,<sup>3469</sup> including by carrying soil and consolidating the dam at the 1<sup>st</sup> January Dam Worksite.<sup>3470</sup> Pol Pot was proud to be considered a member of the cooperatives and to join their labour.<sup>3471</sup> This cannot logically reconcile with any intent by DK senior leaders to enslave people by having them work at cooperatives or worksites.

**(c) *Alleged Visits to the Kampong Chhnang Airfield Construction Site***

1045. The Closing Order’s allegation<sup>3472</sup> that senior military or civilian officials such as Ta Mok and Khieu Samphân visited the site has not been established beyond reasonable doubt. One witness said he never saw Ta Mok there,<sup>3473</sup> and another said Ta Mok was not involved in the airfield construction.<sup>3474</sup> Three witnesses said they were told Khieu Samphân inspected the site but they either did not see him or could not recognise him.<sup>3475</sup> Moreover, and again, even if any of them visited the site, this does not necessarily imply that they would have gained sufficient knowledge of the living and working conditions of the soldiers, or of any of the alleged crimes committed there. Indeed, the evidence shows that when important visitors came, they only stayed at Division 502’s headquarters, while soldiers were working far away and were not permitted to approach the visitors.<sup>3476</sup>

<sup>3468</sup> For instance, Ieng Thirith sent equipment and medicines to local hospitals in the Central (old North) Zone after her visit, and ordered the development of traditional medicines to deal with the lack of modern medicines. *See*, **E3/5294**, ‘WRI of Sou Soeur’, ERN 00360117; **E3/35**, ‘WRI of Ke Pick Vannak’, ERN 00346150.

<sup>3469</sup> **E3/1339**, FBIS, Dec 1977, ERN 00168343, 00168356; **D199/26.2.41**, Hsinhua News, Chen Yung-Kuei Tours East Zone, ERN 00390985.

<sup>3470</sup> **E3/35**, ‘WRI of Ke Pick Vannak’, ERN 00346150-51; **D199/26.2.42**, SWB: Far Eastern, Dec 1977, ERN 00390987.

<sup>3471</sup> **D199/26.2.41**, Hsinhua News, Chen Yung-Kuei Tours East Zone, ERN 00390985; *see also*, **E3/1339**, FBIS, Dec 1977, ERN 00168356.

<sup>3472</sup> **D427**, Closing Order, para. 388. For the alleged visit of Nuon Chea, *see infra*, Chapter 6-VII, JCE I.

<sup>3473</sup> **E1/316.1**, Keo Loeur, T. 15 Jun 2015, p. 20, lns 13-19.

<sup>3474</sup> **E1/312.1**, Chan Morn, T. 9 Jun 2015, p. 94, lns 7-19.

<sup>3475</sup> **E1/312.1**, Chan Morn, T. 9 Jun 2015, p. 47, ln. 4 to p. 48, ln. 22; **E1/320.1**, Sem Hoeurn, T. 23 Jun 2015, p. 13, ln. 20 to p. 14, ln. 17; **E1/326.1**, Khin Vat, T. 30 Jul 2015, p. 26, ln. 13 to p. 27, ln. 9.

<sup>3476</sup> **E1/313.1**, Chan Morn, T. 10 Jun 2015, p. 63, lns 8-13, p. 64, lns 1-7.

**B. THE COOPERATIVES AND WORKSITES WERE LEGITIMATE PROJECTS ESTABLISHED FOR THE PURPOSE OF BUILDING, AND DEFENDING THE COUNTRY**

1046. Contrary to the allegations in the Closing Order of cooperatives and worksites being blind to the needs of the people and vehicles for enslavement, punishment and ‘smashing’ of ‘enemies’, all four cooperatives and worksites implemented the CPK’s lawful and well-intentioned policy to improve the economic situation of DK and the livelihood of its people, just like any leadership in the world should so aim. The Tram Kok Cooperatives aimed to share resources and wealth without any discrimination, while the 1<sup>st</sup> January Dam and Trapeang Thma Dam projects aimed to create an irrigation system in order to improve agricultural production and reduce droughts. Kampong Chhnang Airfield Construction Site was a legitimate military project aiming to build a military airport.

**1. The Tram Kok Cooperatives Collectivised Limited Means of Production and Integrated All of its Members into the New Society**

**(a) *Collectivisation of Production Means at the Tram Kok Cooperatives***

1047. As noted in Section II, cooperatives are a means to pool limited resources for all members to use for agricultural production with the collective output shared equally.<sup>3477</sup> The Tram Kok Cooperatives were assigned a three-tonnes per hectare rice yield goal,<sup>3478</sup> but there were no consequences for not meeting it. Far from illustrating a system of slavery, the assignment of production goals occurs in any farm or factory in the world. Furthermore, contrary to the Closing Order’s allegation that “[t]he rice harvested by the cooperatives was not automatically distributed to members of the subdistricts” and that cooperatives’ workers worked “without the opportunity to reap the direct benefits” of their labour,<sup>3479</sup> the cooperatives’ produce was retained by them for direct consumption, with only surplus being sent to other cooperatives in Tram Kok District or the so-called ‘upper echelon’.<sup>3480</sup>

**(b) *Categorisation and Treatment of the Tram Kok Cooperatives’ Residents***

1048. The Tram Kok Cooperatives did not aim to punish and discriminate against “new people”. On the contrary, as explained in Section II, the role of cooperatives was, in part, to integrate “new people” into the new egalitarian society. At Tram Kok, and throughout the DK,

<sup>3477</sup> See *supra*, Chapter 6-II-C-2.

<sup>3478</sup> See *supra*, Chapter 6-V-A-1.

<sup>3479</sup> **D427**, Closing Order, paras 312 and 1394.

<sup>3480</sup> **E1/274.1**, Neang Ouch, T. 10 Mar 2015, p. 10, lns 13-17, p. 12, lns 20-23, p. 13, lns 7-10; **E1/264.1**, Phneou Yav, T. 17 Feb 2015, p. 18, lns 18-21.

the ‘people’ as a unit were seen by the CPK as sacred, as in any communist regime.<sup>3481</sup> However, the key contention of the Closing Order and the Co-Prosecutors *vis-à-vis* the Tram Kok Cooperatives was that its residents were separated into categories that were then subject to deliberately differential treatment. This is untrue. While the CPK formally set official categorisations for cooperative residents, the evidence is not even conclusive that such categorisation ever existed on the ground. In any event, the overall evidence clearly shows that there was never any discrimination between the different groups of cooperative residents.

1049. For administrative purposes, but also in order to address more accurately everyone’s needs, the CPK introduced temporary formal categories for cooperative residents, depending on their background and provenance: “full-rights members”, “candidate members” (both “base people” groups), and “depositee members” (“new people” or city evacuees group).<sup>3482</sup> Once cooperatives reached their objective to integrate people from all groups into the new society,<sup>3483</sup> categorisations became irrelevant and were officially abandoned.<sup>3484</sup> However, the live evidence paints a confusing picture on whether such categorisations ever existed on the ground in Tram Kok and whether they were experienced by the cooperatives’ residents. One witness and one civil party said there were **no categories** at all.<sup>3485</sup> Three people said there were **two categories**: “old” or “base” people and “new” or “17 April” people;<sup>3486</sup> “17 April” and “18 April” people;<sup>3487</sup> or “full rights” or “base” people, and “candidate” or “new” people.<sup>3488</sup> One civil party said there were **three categories**: “17 April people”; “the people from Vietnam [...] called “A Yuon””; and “base people”.<sup>3489</sup> Only two witnesses and one civil party said there were “full-rights”, “candidate” and “depositee” people.<sup>3490</sup> Among them, the person most likely to know – commune chief Nut Nov – said that “candidate” people were not those with “enemy”

<sup>3481</sup> E3/1783, Report of Chen Yung-Kuei’s Visit, ERN 00498181.

<sup>3482</sup> E3/742, Flag, Apr 1977, ERN 00478505.

<sup>3483</sup> See *supra*, Chapter 6-II-C-2-a.

<sup>3484</sup> E3/746, Flag, Jul 1978, ERN 00428304.

<sup>3485</sup> E1/275.1, Neang Ouch, T. 11 Mar 2015, p. 40, lns 16-17; E1/251.1, Oum Suphany, T. 23 Jan 2015, p. 83, lns 17-18.

<sup>3486</sup> E1/299.1, Ek Hoeun, T. 8 May 2015, p. 9, lns 19-23.

<sup>3487</sup> E1/271.1, Van Soeun, T. 4 Mar 2015, p. 20, lns 8-16.

<sup>3488</sup> E1/255.1, Chang Srey Mom, T. 2 Feb 2015, p. 20, ln. 25 to p. 21, ln. 4.

<sup>3489</sup> E1/262.1, Ry Pov, T. 12 Feb 2015, p. 13, ln. 25 to p. 14, ln. 5.

<sup>3490</sup> E1/276.1, Nut Nov, T. 12 Mar 2015, p. 43, lns 2-8; E1/264.1, Sao Han, T. 17 Feb 2015, p. 89, ln. 22 to p. 90, ln. 21. E1/289.1, Thann Thim, T. 21 Apr 2015, p. 24, lns 5-7.



links, but those whose “children [were] study[ing] or [...] living in the enemy zone”.<sup>3491</sup> He also confirmed that categories were abolished in late 1978,<sup>3492</sup> as *per* the CPK’s instructions.<sup>3493</sup>

1050. In any event, even if the categories were imposed in Tram Kok, the evidence resoundingly fails to establish either that any discrimination flowed from such categorisation, or to even identify with certainty ways in which categorisation was practically experienced by those in the different categories. Some accounts (primarily of civil parties) described how people lived,<sup>3494</sup> worked,<sup>3495</sup> and ate<sup>3496</sup> only within their category; however, most of them also said that in some places or at some points in time, people lived,<sup>3497</sup> worked,<sup>3498</sup> and ate with those from different categories.<sup>3499</sup> It also remains unclear how individuals’ categories were even discernible, given they all dressed uniformly and at times ate, lived and worked together. When confronted with this ambiguity, civil party and alleged “new person” Chou Koemlan claimed that “everyone knew” her status by virtue of her family connections.<sup>3500</sup> Nut Nov said there were “lists” of “new” and “base” people, but offered no detail as to who compiled them or what details they contained.<sup>3501</sup> In any case, these so-called lists have never been found.

1051. In short, the Tram Kok Cooperatives shows that categorisation of people was at best varied. As will be elaborated upon in Part C, resultant deliberate differentiation in treatment is also similarly varied, at best, and at worst, entirely unfounded. The question of ‘new people’ and ‘intellectuals’ is one of the roots of the Manichean narrative; perhaps because most Western observers can relate more to them than to the rural population. However, as the evidence from the Tram Kok Cooperatives makes clear, it is likely that this notion of differential treatment is another popular but unfounded Manichean ‘accepted truth’ propelled by the distinctly important role that the accounts of upper- and middle-class Cambodian refugees played in the construction

<sup>3491</sup> E1/276.1, Nut Nov, T. 12 Mar 2015, p. 43, lns 2-8.

<sup>3492</sup> E1/277.1, Nut Nov, T. 16 Mar 2015, p. 55, lns 8-12.

<sup>3493</sup> E3/746, Flag, Jul 1978, ERN 00428304.

<sup>3494</sup> E1/251.1, Oum Suphany, T. 23 Jan 2015, p. 64, lns 4-23; E1/252.1, Chou Koemlan, T. 26 Jan 2015, p. 46, ln. 23 to p. 47, ln. 3, p. 77, lns 18-23; E1/255.1, Chang Srey Mom, T. 2 Feb 2015, p. 21, lns 12-23; E1/287.1, Beng Boeun, T. 2 Apr 2015, p. 80, lns 1-6.

<sup>3495</sup> E1/276.1, Nut Nov, T. 12 Mar 2015, p. 73, ln. 14 to p. 74, ln. 20; E1/255.1, Chang Srey Mom, T. 2 Feb 2015, p. 20, ln. 25 to p. 21, ln. 5; E1/283.1, Oem Saroeurn, T. 26 Mar 2015, p. 8, lns 5-8.

<sup>3496</sup> E1/251.1, Oum Suphany, T. 23 Jan 2015, p. 83, lns 11-18; E1/255.1, Chang Srey Mom, T. 2 Feb 2015, p. 21, lns 12-23.

<sup>3497</sup> E1/277.1, Nut Nov, T. 16 Mar 2015, p. 39, lns 7-9, p. 54, lns 19-22; E1/252.1, Chou Koemlan, T. 26 Jan 2015, p. 75, lns 3-14; E1/253.1, Chou Koemlan, T. 27 Jan 2015, p. 16, lns 19-25.

<sup>3498</sup> E1/265.1, Sao Han, T. 18 Feb 2015, p. 33, lns 8-12; E1/253.1, Chou Koemlan, T. 27 Jan 2015, p. 18, lns 8-13.

<sup>3499</sup> E1/277.1, Nut Nov, T. 16 Mar 2015, p. 39, lns 7-9, p. 52, lns 18-19; E1/251.1, Oum Suphany, T. 23 Jan 2015, p. 64, lns 4-23; E1/252.1, Chou Koemlan, T. 26 Jan 2015, p. 59, lns 9-15; E1/255.1, Chang Srey Mom, T. 2 Feb 2015, p. 21, lns 12-23.

<sup>3500</sup> E1/253.1, Chou Koemlan, T. 27 Jan 2015, p. 30, ln. 11 to p. 32, ln. 12.

<sup>3501</sup> E1/276.1, Nut Nov, T. 12 Mar 2015, p. 39, lns 10-13.

of the Manichean narrative, as discussed above.<sup>3502</sup> As Dudman put it, he “did not find the grim picture painted by the thousands of refugees”; rather, he found that “those who remain appeared to be reasonably relaxed at the height of the busy harvest season. They sometimes leaned on their hoes like farm workers everywhere. And they often stared and then smiled and waved at the rare sight of Western faces.”<sup>3503</sup>

## 2. The 1<sup>st</sup> January Dam Served the Legitimate Purpose of Increasing Rice Production through Efficient use of Water Resources

1052. As mentioned in Section II, the construction of irrigation facilities such as the 1<sup>st</sup> January Dam was key to improving rice production and thus eliminating famine.<sup>3504</sup> Prior to discussing how the 1<sup>st</sup> January Dam’s construction reached its goal, the issue of the technical aspects of the dam’s construction is addressed. This is because one particularly contentious issue that emerged during the trial was whether the construction of the 1<sup>st</sup> January Dam was in accordance with proper technical and scientific standards<sup>3505</sup> or whether it was, as Judge Cartwright believed, a “useless project”.<sup>3506</sup> This line of questioning was clearly intended to feed the Manichean portrayal of the CPK as an evil and megalomaniac death machine, but also as a profoundly ignorant one. However, nothing could be further from the truth.

1053. The Co-Prosecutors rely on Elizabeth Becker’s book and some anonymous refugees’ accounts in François Ponchaud’s book to argue that the construction of irrigation facilities in the DK was “chaotic”, “without any feasibility studies”, and that the 1<sup>st</sup> January Dam in particular was a “disastrous” result of the disregard of scientific standards.<sup>3507</sup> Not only do Becker or the refugees lack the requisite expertise to make such comments, but the factual basis for their conclusions is untested, and unclear. More importantly, tangible evidence actually shows the contrary; indeed, the dam remained in operation until 1990. The technical details of the plans were to be handled by specially-recruited international specialists from the Technical Department, a think-tank established by the CPK to guarantee the scientific standards of the project.<sup>3508</sup> Technicians working on the 1<sup>st</sup> January Dam, such as Ieng Chham, Pech Sokha, and

<sup>3502</sup> See *supra*, Chapter 2-II-A-2 and Chapter 2-II-B-1.

<sup>3503</sup> E3/3290, Dudman 1979 Report on DK Visit, ERN 00419208.

<sup>3504</sup> The CPK set a goal for the rice production to be increased to three tons per hectare because only when this goal was achieved, would the DK have enough food for the entire population. See, E3/226, Meeting on Health and Social Affairs, 10 Jun 1976, ERN 00183369, 00183371.

<sup>3505</sup> See, e.g. E/337.1, Key Documents Hearing, T. 26 Aug 2015, p. 17, ln. 15 to p. 18, ln. 3, p. 19, ln. 3 to p. 21, ln. 19, p. 32, lns 2-20; E1/342.1, Key Documents Hearing, T. 7 Sep 2015, p. 18, ln. 21 to p. 20, ln. 3.

<sup>3506</sup> See *supra*, Chapter 2-II-B-3-(a).

<sup>3507</sup> E1/337.1, Key Documents Hearing, T. 26 Aug 2015, p. 17, ln. 15 to p. 18, ln. 3, p. 19, lns 3-22.

<sup>3508</sup> See, E3/237, Meeting on Public Works, 10 Mar 1976, ERN 00543730-31.

others, were sent to Phnom Penh to be trained in irrigation and hydro-electricity techniques,<sup>3509</sup> which were considered “modern for that time”.<sup>3510</sup> Moreover, during the construction of the 1<sup>st</sup> January Dam, there were inspections to check the dam’s quality.<sup>3511</sup>

1054. During the DK, the nationwide irrigation systems had already resulted in some areas being able to harvest rice twice or three times a year.<sup>3512</sup> Both Cambodians and foreign journalists who visited Cambodia in 1978 saw that paddy fields were green even during the dry season.<sup>3513</sup> In addition, the reservoir forming part of the 1<sup>st</sup> January Dam produced fish to supplement the population’s diet,<sup>3514</sup> as did other DK water projects.<sup>3515</sup> Moreover, thanks to the irrigation facilities, the DK did not suffer much from the acutely severe droughts and floods in 1978 – the worst flood in 70 years – which caused serious food shortages and other problems in neighbouring Laos and Vietnam.<sup>3516</sup> Accordingly, many DK citizens were rightfully happy with and proud of the result of their work.<sup>3517</sup>

1055. Rather than being “useless”, the Dam kept functioning until 1990. Uth Seng – currently a provincial water resources and meteorology officer<sup>3518</sup> governing the Chinit River irrigation project, which was based on the former 1<sup>st</sup> January Dam<sup>3519</sup> – confirmed the positive effects of the dam. He testified that the 1<sup>st</sup> January Dam built during the DK continued to function properly between 1979 and 1990. He described it as “very beneficial”, as it irrigated the fields in both Baray and Santuk districts, resulting in rice production of about three tonnes per hectare.<sup>3520</sup> His evidence was corroborated by local village chief Or Ho, who testified that the dam produced “huge harvests”.<sup>3521</sup>

<sup>3509</sup> E3/5513, ‘WRI of Ieng Chham’, A38.

<sup>3510</sup> E3/5513, ‘WRI of Ieng Chham’, A45.

<sup>3511</sup> E3/5513, ‘WRI of Ieng Chham’, A85.

<sup>3512</sup> E3/2307, Yugoslav Journalist’s Report, 1978, ERN S00046703, S00046707; E3/765, Youth, Oct 1978, ERN 00539979.

<sup>3513</sup> E3/403, ‘WRI of Pech Sokha’, ERN 00403008; E3/765, Youth, Oct 1978, ERN 00539979; E3/2307, Yugoslav Journalist’s Report, 1978, ERN S00046703.

<sup>3514</sup> E3/403, ‘WRI of Pech Sokha’, ERN 00403008.

<sup>3515</sup> E3/2307, Yugoslav Journalist’s Report, 1978, ERN S00046707; E3/4604, Flag, Apr 1978, ERN 00519851.

<sup>3516</sup> E3/7333, Burgler, Eyes of Pineapple, ERN 01002278, 01002197.

<sup>3517</sup> See e.g. E1/302.1, Or Ho, T. 20 May 2015, p. 22, ln. 9 to p. 23, ln. 7, p. 33, ln. 24 to p. 34, ln. 7; E1/301.1, Or Ho, T. 19 May 2015, p. 78, ln. 9; E3/135, Flag, Jun 1977, ERN 00446862; E3/725, Flag, Dec 1977-Jan 1978, ERN 00184320-21.

<sup>3518</sup> E1/308.1, Uth Seng, T. 2 Jun 2015, p. 81, lns 20-23.

<sup>3519</sup> E3/8026, Site Identification Report: 1<sup>st</sup> Jan and 6<sup>th</sup> Jan Dams, ERN 00290636.

<sup>3520</sup> E1/309.1, Uth Seng, T. 3 Jun 2015, p. 34, ln. 13 to p. 36, ln. 6. How the dam was damaged after 1990 is unclear. However, witness Or Ho testified that “the work on the dam was kind of great work, but later on it was damaged by people who used grenade to kill the fish living in the dam”; see, E1/301.1, Or Ho, T. 19 May 2015, p. 77, lns 18-22, p. 78, lns 3-11.

<sup>3521</sup> E1/302.1, Or Ho, T. 20 May 2015, p. 33, ln. 10 to p. 34, ln. 10.

### 3. The Kampong Chhnang Airfield was a Legitimate Military Defensive Project

1056. Although acknowledging that it was a military construction site used to build a military airfield, the Closing Order alleges that the Kampong Chhnang Airfield “functioned as one of the means of implementation of the purge process of RAK members as it was used as a tempering site for RAK members considered as ‘bad elements’”.<sup>3522</sup> Once again, however, the blind following of the Manichean narrative is exposed by the lack of supporting evidence.

#### (a) *The Military Need for the Airfield and the Status of the Soldiers Constructing It*

1057. Compared to its neighbouring countries, Cambodia did not have a strong air force when it was liberated in April 1975, putting it at an obvious disadvantage in its border clashes with Thailand and Vietnam.<sup>3523</sup> After careful deliberation, the Standing Committee decided to build a military airfield at Kampong Chhnang to better defend the country.<sup>3524</sup> Nothing in the Standing Committee’s discussions about Kampong Chhnang Airfield suggested that it was a site for “tempering” “bad elements”. There was similarly no instruction from the Standing Committee about which part of the RAK forces was to be sent to work on its construction.

1058. As illustrated below, the mission of constructing the airfield was eventually assigned to soldiers from various Centre Divisions. Contrary to the Closing Order’s allegation that these soldiers were “workers” who “had been” RAK members,<sup>3525</sup> they were still regular RAK members while constructing the airfield.<sup>3526</sup> A military table dated 7 April 1977 entitled the “joint statistics of armed forces” of the RAK<sup>3527</sup> unequivocally shows that Divisions 310 and 450 each had more than 1,000 troops working in Kampong Chhnang at the time. In contrast, the “components” (“elements”) under S-21’s authority were excluded from the count of RAK forces. This further shows that the speculation of in-court witnesses and civil parties (discussed immediately below) that they were sent to construct the airfield as punishment are unsubstantiated and merely a conclusion to which they have jumped thanks to the assistance of the existing Manichean ‘accepted truths’. In any event, it would be illogical and unreasonable for the Standing Committee to trust one of its most strategically important and incredibly

<sup>3522</sup> **D427**, Closing Order, paras 387, 389.

<sup>3523</sup> See e.g. **E3/813**, Division 164 Meeting, 9 Sep 1976, ERN 00657355-56; **E3/999**, ‘Telegram from Peam to Angkar’, 24 Mar 1978; **E3/9289**, Rep. on Situations 15 Jul to 31 Aug 1976, ERN 00233963-64; **E3/1164**, Rep. from Roeun to 89, 25 Nov 1976, ERN 00516708; **E3/8251**, Los Angeles Times, China Sending Jets to Cambodia, ERN 00166281.

<sup>3524</sup> **E3/182**, SC Meeting, 9 Oct 1975, ERN 00183407; **E3/235**, SC Meeting, 19-21 Apr 1976, ERN 00183419.

<sup>3525</sup> **D427**, Closing Order, para. 389.

<sup>3526</sup> See e.g. **E1/312.1**, Chan Morn, T. 9 Jun 2015, p. 64, ln. 24; **E1/326.1**, Khin Vat, T. 30 Jul 2015, p. 22, lns 1-6.

<sup>3527</sup> **E3/849**, Joint Statistics of Armed Forces.

secretive national defence projects<sup>3528</sup> to people they considered traitors or “bad elements”. In addition, at the time that the Kampong Chhnang Airfield Construction Site project had begun, the full extent of Vietnam’s web of collaborators throughout the DK and their plans to effect *coups d’état* were not yet known. Thus, the idea that the site was inherently established as a “tempering site” is plainly false.

**(b) Speculative and Unfounded Evidence that the Airfield was a ‘Tempering Site’**

1059. Seven witnesses and two civil parties appeared in court to provide evidence on Kampong Chhnang Airfield. Four were former Division 502 soldiers,<sup>3529</sup> four were former Division 310 soldiers,<sup>3530</sup> and one was from Division 450.<sup>3531</sup> Three of the four former Division 310 soldiers claimed that they were sent to the airfield to be “tempered” because their commanders had been arrested for trying to stage a *coup d’état*.<sup>3532</sup> In addition, the former Division 450 soldier – though admitting repeatedly that she did not know the real reason for her unit to be temporarily assigned to work on the airfield construction<sup>3533</sup> – also claimed that the work was a form of punishment for their relation to Division 450, which was also involved in the said *coup*.<sup>3534</sup>

1060. However, none of the four provided any objective sources for that assertion. They failed to identify any DK authority or document explicitly stating that their transfer to the airfield was punishment. The only ones who specifically asserted that they were sent to the airfield as punishment said so on the basis of mere rumours and speculation. This does not constitute proof beyond reasonable doubt. Indeed, their assertions appear to have been personal conclusions on what they allegedly were told at their unit meetings before or after their transfer to the airfield, namely that they were connected to the traitors and thus they had to work hard to try to avoid arrest or punishment.<sup>3535</sup> This, however, insufficient to establish beyond reasonable doubt that

<sup>3528</sup> The airfield was kept a secret from the international community, and the DK intentionally selected a location deep inside the country to build it. See, **E3/8251**, Los Angeles Times, China Sending Jets to Cambodia, ERN 00166282; **E3/2739**, AFP, Chinese Mig-19 in Cambodian Air Force, ERN 00517805; see also, **E3/229**, SC Meeting, 22 Feb 1976, ERN 00182627; **E3/235**, SC Meeting, 19-21 Apr 1976, ERN 00183419.

<sup>3529</sup> Three witnesses (Chan Morn, Keo Kin, and Khin Vat) and one civil party (Chum Samoeurn).

<sup>3530</sup> Four witnesses (Sem Hoeurn, Keo Loeur, Him Han, and Nuon Trech).

<sup>3531</sup> One civil party (Kong Siek).

<sup>3532</sup> **E1/315.1**, Keo Loeur, T. 12 Jun 2015, p. 14, ln. 19 to p. 15, ln. 14; **E1/319.1**, Sem Hoeurn, T. 22 Jun 2015, p. 28, ln. 22 to p. 29, ln. 6; **E1/506.1**, Nuon Trech, T. 5 Dec 2016, p. 106, lns 18-22; **E1/507.1**, Nuon Trech, T. 6 Dec 2016, p. 67, lns 7-11. For detailed discussion on the failed *coup d’état* in which Division 310 and Division 450 were involved, see *supra*, Chapter 3.

<sup>3533</sup> **E1/318.1**, Kong Siek, T. 17 Jun 2015, p. 33, lns 3-6, p. 72, lns 1-8.

<sup>3534</sup> **E1/318.1**, Kong Siek, T. 17 Jun 2015, p. 50, lns 16-19. For detailed discussion on the failed *coup d’état* in which Division 310 and Division 450 were involved, see *supra*, Chapter 3.

<sup>3535</sup> **E1/316.1**, Keo Loeur, T. 15 Jun 2015, p. 13, ln. 19 to p. 14, ln. 2; **E1/508.1**, Nuon Trech, T. 7 Dec 2016, p. 9, lns 15-20; **E1/318.1**, Kong Siek, T. 17 Jun 2015, p. 33, lns 19-23, p. 57, lns 23-25 (at a regiment meeting before being transferred to Kampong Chhnang Airfield).

they were indeed sent to the airfield to be “tempered”. It is normal for the military to be reminded of their general duty to serve the nation, and of the legal consequences of failing to do so. It is also legitimate that soldiers whose commanders had been arrested for their involvement in a *coup d'état* would have been subjected to more such instructions and reminders than usual.<sup>3536</sup> Such instructions and reminders were not exclusive to Kampong Chhnang Airfield. Indeed, the evidence shows that similar instructions were given to soldiers while they performed duties at other locations.<sup>3537</sup> Therefore, the evidence of these four former soldiers does not show any causal link between their being assigned to the airfield and their connection to the *coup*.

1061. By contrast, the majority of former soldiers (one from Division 310 and four from Division 502) who appeared in court either said their assignment to the airfield was not a form of re-education but a different yet normal military duty,<sup>3538</sup> or testified that they simply did not know the reason for their transfer.<sup>3539</sup> Some of them speculated that they were sent to the airfield because of their “bad backgrounds” such as association with the former regime.<sup>3540</sup> Such speculations, however, are inadmissible opinion evidence and appear to have stemmed from rumours among the soldiers working at the airfield.<sup>3541</sup>

1062. Further, the Defence notes that when asked why they considered a certain site a “tempering” place, witnesses and civil parties largely concurred that it was because the working conditions there were harsh or harsher than in other places.<sup>3542</sup> However, as mentioned in Section II, difficult working or living conditions were often inevitable given the general

<sup>3536</sup> The alleged waves of ‘purges’ within RAK ranks were part of the legitimate investigation of a military coup and the consequent punishment for treason. In contrast to the commanders that played a leading role in the coup, ordinary soldiers subordinated to these commanders were not automatically considered traitors. *See*, Chapter 3 and Chapter 4.

<sup>3537</sup> **E1/318.1**, Kong Siek, T. 17 Jun 2015, p. 33, lns 19-23, p. 57, lns 23-25; **E1/316.1**, Keo Loeur, T. 15 Jun 2015, p. 24, lns 11-15.

<sup>3538</sup> **E1/325.1**, Khin Vat, T. 29 Jul 2015, p. 56, lns 16-21; **E1/313.1**, Chan Morn, T. 10 Jun 2015, p. 29, ln. 3 to p. 30, ln. 4; **E1/321.1**, Chum Samoeurn, T. 24 Jun 2015, p. 78, lns 5-14, p. 59, lns 7-16, p. 81, lns 1-4; **E1/320.1**, Him Han, T. 23 Jun 2015, p. 71, lns 22-24, p. 83, lns 11-13; **E1/321.1**, Him Han, T. 24 Jun 2015, p. 37, lns 4-7; **E1/314.1**, Keo Kin, T. 11 Jun 2015, p. 51, ln. 15 to p. 52, ln. 13, p. 61, lns 6-25 (Keo Kin indicated that though he was sent there as part of his military duty, some other soldiers may have been sent there for “refashioning”). In addition to these five individuals, Sem Hoern also admitted that the construction of the airfield was part of soldiers’ military duty to defend the country: *see*, **E1/320.1**, Sem Hoern, T. 23 Jun 2015, p. 35, lns 16-24.

<sup>3539</sup> **E1/321.1**, Chum Samoeurn, T. 24 Jun 2015, p. 50, ln. 23 to p. 51, ln. 3, p. 52, lns 10-14, p. 74, lns 3-10.

<sup>3540</sup> **E1/314.1**, Keo Kin, T. 11 Jun 2015, p. 50, lns 10-16; **E1/325.1**, Khin Vat, T. 29 Jul 2015, p. 50, lns 12-19.

<sup>3541</sup> **E1/313.1**, Chan Morn, T. 10 Jun 2015, p. 29, lns 12-16; **E1/312.1**, Chan Morn, T. 9 Jun 2015, p. 33, lns 3-6, p. 34, lns 4-18, p. 39, lns 2-10; **E3/5278**, ‘WRI of Chan Morn’, ERN 00292825; **E3/5532**, ‘WRI of Him Han’, ERN 00425235.

<sup>3542</sup> *See e.g.* **E1/314.1**, Keo Kin, T. 11 Jun 2015, p. 51, lns 2-11; **E1/325.1**, Khin Vat, T. 29 Jul 2015, p. 56, lns 9-15; **E1/315.1**, Keo Loeur, T. 12 Jun 2015, p. 11, lns 4-12; **E1/320.1**, Sem Hoern, T. 23 Jun 2015, p. 32, lns 3-4; **E1/318.1**, Kong Siek, T. 17 Jun 2015, p. 66, lns 6-19; **E1/321.1**, Him Han, T. 24 Jun 2015, p. 20, lns 2-25.

situation the country was in after the civil war. Further, it is the role of the army to work and perform in difficult conditions – after all, they are here to defend the country in case of war, and therefore often find themselves in conflict and life or death situations. Therefore, the difficult conditions of certain work do not as such make the said work a punishment. Additionally, the Defence recalls that the RAK's Centre Divisions, in contrast to local military forces, were supposed to be mobile and stay ready to be deployed anywhere at any time to respond to the most challenging situations.<sup>3543</sup> The evidence further shows soldiers from different Centre Divisions were mobilised to construct the airfield because Division 502 itself was unable to build the airfield alone.<sup>3544</sup> Naturally, therefore, the soldiers in Centre Divisions were the ones most likely to be transferred and often to the most difficult locations due to the trust the country had in them, rather than any intention to persecute them.

1063. Finally, among the nine individuals who appeared in court, one (Keo Loeur from Division 310) was sent to Phnom Penh to receive three months of training on land surveying techniques.<sup>3545</sup> Three others were either assigned to assist the Chinese experts on site with technical and engineering tasks (Keo Kin and Chan Morn from Division 502),<sup>3546</sup> or worked closely with the Chinese experts in their daily tasks (Sem Hoeurn from Division 310).<sup>3547</sup> This type of treatment is directly contradictory to an intention to punish “bad elements”. On the contrary, it is clear from the evidence that soldiers were sent to the airfield as part of their regular military duty and continued to be trusted to carry out important tasks. In conclusion, the Kampong Chhnang Airfield construction was a legitimate military project necessary for national defence. Soldiers from various Centre Divisions were mobilised to build it as part of their military duty, not as a form of punishment.

#### **4. The Trapeang Thma Dam Served the Legitimate Purpose of Increasing Rice Production through Efficient use of Water Resources**

1064. As explained above,<sup>3548</sup> the improvement of the people's standard of living was the cornerstone of all CPK policies. One way to achieve this overarching goal was to resolve the drought problem that regularly affected Cambodia's harvest. In 1977, when the Trapeang Thma

<sup>3543</sup> *E.g.* E1/319.1, Sem Hoeurn, T. 22 Jun 2015, p.60, ln. 16 to p. 61, ln. 8; E3/3962, ‘WRI of Khoem Samhuon’, ERN 00293365.

<sup>3544</sup> E1/325.1, Khin Vat, T. 29 Jul 2015, p. 57, ln. 21 to p. 58, ln. 3; E3/3962, ‘WRI of Khoem Samhuon’, ERN 00293367.

<sup>3545</sup> E1/315.1, Keo Loeur, T. 12 Jun 2015, p. 12, lns 12-21, p. 22, ln. 23 to p. 23, ln. 4.

<sup>3546</sup> E1/314.1, Keo Kin, T. 11 Jun 2015, p. 50, ln. 20 to p. 51, ln. 3; E1/312.1, Chan Morn, T. 9 Jun 2015, p. 14, lns 17-19.

<sup>3547</sup> E1/320.1, Sem Hoeurn, T. 23 Jun 2015, p. 25, ln. 22 to p. 26, ln. 15.

<sup>3548</sup> *See supra*, Chapter 6-II-B-1, on the CPK policy on cooperatives and worksites.

Dam construction had just started, Pol Pot remarked that “[i]n the Northwest, [...] the soil is good; there’s only the problem of water”.<sup>3549</sup> A local report from Sector 5 dated May 1977 also stated that the area faced a severe drought which had damaged all kinds of crops in the Sector.<sup>3550</sup> As stated by the authorities at the time, the Trapeang Thma Dam had “two important roles”: (1) to “receive and keep the rain water” and “distribute it to tens of thousands hectares of rice paddies in the entire sector where rice will be farmed twice a year”; and (2) to “weaken and deter the direction of the water current, preventing the rice plants and paddies of the people from being flooded.”<sup>3551</sup> Given the situation, the Trapeang Thma Dam was more than a legitimate project; it was an absolute and urgent necessity.

1065. As with the Tram Kok Cooperatives, the Closing Order alleges that ‘new people’ were subjected to harsher working conditions” at the Trapeang Thma Dam.”<sup>3552</sup> However, the live evidence heard at trial clearly shows that this was not the case. Most witnesses acknowledged hearing about the categorisation of workers between ‘old’ and ‘new people’<sup>3553</sup> but did not notice any discrimination between the two groups. Indeed, most witnesses testified that both groups lived and worked under the same conditions, as discussed below in Part C-1-(d) and Part C-2-(d). Again, this is consistent with the CPK principles, discussed in Section II, that ‘new people’ were to be integrated into the new society and that the ‘people’ were seen as a sacred, indivisible unit as in any communist regime.<sup>3554</sup>

### C. WORKING AND LIVING CONDITIONS: PEOPLE WERE NOT ENSLAVED

1066. The heart of the charges in connection with the cooperatives and worksites are the issue of living and working conditions, because these go most directly to the emblematic charge *vis-à-vis* these sites: enslavement. However, on this issue, the Co-Prosecutors have yet again failed to meet their burden of proof that conditions were as harsh as originally alleged in the Closing Order. The evidence instead clearly shows that poor conditions were not a result of CPK policy, but of rogue autonomous cadres acting in contravention of the CPK’s correct policy, or of traitors such as Ta Val who created poor conditions deliberately in furtherance of a plan to

<sup>3549</sup> E3/8, Explanation of 1976 CPK Four-Year Plan, ERN 00104064.

<sup>3550</sup> E3/178, Weekly Report of Sector 5 Committee, 21 May 1977, ERN 00342719-20.

<sup>3551</sup> E3/771, Youth, Jul-Aug 1977, ERN 00509685-86.

<sup>3552</sup> D427, Closing Order, para. 343.

<sup>3553</sup> E1/329.1, Lat Suoy, T. 12 Aug 2015, p.24, ln. 21 to p. 25, ln. 1; E1/334.1, Yi Laisauv, T. 20 Aug 2015, p. 46, ln. 1; E1/323.1, Sen Sophon, T. 27 Jul 2015, p.73, ln. 16; E1/358.1, Pan Chhuong (2-TCW-918), T. 30 Nov 2015, p. 58, lns 11-22; E1/340.1, Sam Sak, T. 2 Sep 2015, p. 22, lns 21-22.

<sup>3554</sup> E3/1783, Report of Chen Yung-Kuei’s Visit, ERN 00498181.



overthrow the CPK and legitimate DK government.<sup>3555</sup> As noted above, this Part focuses on those issues that were most contested for each of the four sites at trial and thus addresses each site slightly differently. However, this cannot be interpreted as a concession regarding other conditions charged and discussed at trial *vis-à-vis* those crime sites.

## 1. Working Conditions Were Not Unduly Harsh

### (a) Working Conditions in the Tram Kok Cooperatives

1067. The Closing Order's allegations of differential working conditions in the Tram Kok Cooperatives are fully undermined by the live evidence. Six people<sup>3556</sup> confirmed at trial that people in the Tram Kok Cooperatives worked on an **equal footing**. This is consistent with the DK Constitution, which, lawfully and in accordance with international law, provided that "[i]t is the **duty of all** to defend and **build the country together**" and that "[e]very citizen of Democratic Kampuchea is guaranteed a living" and has "the right to work".<sup>3557</sup> The most detailed account of differential working conditions was of one witness who said that those with onerous work were actually "full rights" or "base people" who would be put in "unit 1".<sup>3558</sup> This is not only logical given that "base people" usually had more agricultural experience, but it also contradicts allegations of harsher working conditions for 'new people' or other 'enemies'. Only one witness and one civil party suggested that "base people" had better working conditions than "new people".<sup>3559</sup> However, both spoke not of "base people" generally, but of their unit chiefs, who were "base people" who apparently supervised only "new people" labourers. Finally, while 'expert' Elizabeth Becker spoke of differentiation in treatment of "new" and "base" people,<sup>3560</sup> her opinion is wholly unreliable as she herself admitted that she only "presumed" that this alleged categorisation disadvantaged 'new people'.<sup>3561</sup>

1068. Furthermore, the live evidence suggested that to the extent that there were differential working conditions, this was not based on whether someone was a 'new' or 'base' person but on their individual working capacity. Several witnesses and civil parties explained that lighter

<sup>3555</sup> See *infra*, Chapter 6-D-1, on Ta Val.

<sup>3556</sup> E1/263.1, Em Phoeung, T. 16 Feb 2015, p. 17, ln. 14; E1/298.1, Ek Hoeun, T. 7 May 2015, p. 55, ln. 24 to p. 56, ln. 1; E1/264.1, Phneou Yav, T. 17 Feb 2015, p. 17, ln. 11; E1/255.1, Keo Chandara, T. 2 Feb 2015, p. 70, lns 20-21; E1/289.1, Thann Thim, T. 21 Apr 2015, p. 24, ln. 13; E1/252.1, Chou Koemlan, T. 26 Jan 2015, p. 79, ln. 1.

<sup>3557</sup> E3/259, DK Constitution, ERN 00184836-37 (emphases added); see also *supra*, Chapter 6-II, on the dual right and duty of DK citizens to work.

<sup>3558</sup> E1/264.1, Phneou Yav, T. 17 Feb 2015, p. 20, lns 4-5, p. 17, lns 18-22.

<sup>3559</sup> E1/264.1, Sao Han, T. 17 Feb 2015, p. 92, lns 4-9; E1/262.1, Ry Pov, T. 12 Feb 2015, p. 62, lns 1-5.

<sup>3560</sup> E1/260.1, Elizabeth Becker, T. 10 Feb 2015, p. 15, lns 18-21.

<sup>3561</sup> E1/259.1, Elizabeth Becker, T. 9 Feb 2015, p. 74, lns 3-7.

work was assigned to those with “moderate energy” including women (especially new mothers) and children.<sup>3562</sup> Moreover, even if work duties were based on alleged status, which the Defence contests, there is nothing inherently discriminatory in this. Differentiation of work duties is normal, and given the relative experience and skills of ‘base people’, it makes sense that they would supervise the work of the more agriculturally-inexperienced among the ‘new people’.

1069. The live evidence equally undermined the Closing Order’s allegation of generally harsh working conditions. Witnesses and civil parties described work tasks as rice farming,<sup>3563</sup> canal digging,<sup>3564</sup> dam building,<sup>3565</sup> earth carrying,<sup>3566</sup> tree planting,<sup>3567</sup> banana and coconut picking,<sup>3568</sup> hut building,<sup>3569</sup> cooking,<sup>3570</sup> light work,<sup>3571</sup> and fishing.<sup>3572</sup> The working hours reported by witnesses ranged from starting at 6am to 8am, working until 11am or 11:30am. This was followed by a two-hour break, then work resumed from 1pm to 6pm.<sup>3573</sup> While some complained that the work was difficult,<sup>3574</sup> people also described having four weeks’ or more maternity leave;<sup>3575</sup> resting when they or their children were sick,<sup>3576</sup> and only occasional night work.<sup>3577</sup> In fact, a civil party explained that cooperative residents were allowed a rest day once a month and could seek permission to leave to visit family.<sup>3578</sup> While the maternity leave and rest days granted at Tram Kok Cooperatives deviated slightly from the official rest system, this

<sup>3562</sup> **E1/296.1**, Khoem Boeun, T. 4 May 2015, p. 90, lns 18-24; **E1/291.1**, Pech Chim, T. 23 Apr 2015, p. 20, lns 8-12, p. 21, lns 18-21; **E1/265.1**, Sao Han, T. 18 Feb 2015, p. 33, lns 21-22; **E1/251.1**, Oum Suphany, T. 23 Jan 2015, p. 85, lns 8-17; **E1/253.1**, Chou Koemlan, T. 27 Jan 2015, p. 19, lns 13-15; **E1/287.1**, Beng Boeun, T. 2 Apr 2015, p. 64, lns 24-25.

<sup>3563</sup> **E1/263.1**, Em Phoeung, T. 16 Feb 2015, p. 24, ln. 22; **E1/265.1**, Sao Han, T. 18 Feb 2015, p. 33, lns 16-20.

<sup>3564</sup> **E1/263.1**, Em Phoeung, T. 16 Feb 2015, p. 24, lns 10, 21-22; **E1/298.1**, Ek Hoeun, T. 7 May 2015, p. 92, lns 18-20.

<sup>3565</sup> **E1/263.1**, Em Phoeung, T. 16 Feb 2015, p. 24, lns 11, 22; **E1/264.1**, Phneou Yav, T. 17 Feb 2015, p. 8, lns 18-19.

<sup>3566</sup> **E1/298.1**, Ek Hoeun, T. 7 May 2015, p. 55, ln. 25.

<sup>3567</sup> **E1/298.1**, Ek Hoeun, T. 7 May 2015, p. 55, ln. 25.

<sup>3568</sup> **E1/287.1**, Beng Boeun, T. 2 Apr 2015, p. 64, lns 4-5.

<sup>3569</sup> **E1/252.1**, Chou Koemlan, T. 26 Jan 2015, p. 46, lns-23-25; **E1/251.1**, Oum Suphany, T. 23 Jan 2015, p. 64, lns 5-12.

<sup>3570</sup> **E1/291.1**, Pech Chim, T. 23 Apr 2015, p. 90, lns 23-24.

<sup>3571</sup> **E1/291.1**, Pech Chim, T. 23 Apr 2015, p. 90, ln. 23.

<sup>3572</sup> **E1/264.1**, Phneou Yav, T. 17 Feb 2015, p. 19, ln. 14; **E1/262.1**, Ry Pov, T. 12 Feb 2015, p. 14, lns 22-23.

<sup>3573</sup> **E1/263.1**, Em Phoeung, T. 16 Feb 2015, p. 17, lns 11-16; **E1/274.1**, Neang Ouch, T. 10 Mar 2015, p. 9, lns 12-18; **E1/288.1**, Im Vannak, T. 3 Apr 2015, p. 53, lns 16-23, p. 64, lns 7-10; **E1/253.1**, Chou Koemlan, T. 27 Jan 2015, p. 18, ln. 22; **E1/287.1**, Beng Boeun, T. 2 Apr 2015, p. 64, lns 3-4 *see also* **E3/4604**, Flag, Apr 1978, ERN 00519847.

<sup>3574</sup> **E1/263.1**, Em Phoeung, T. 16 Feb 2015, p. 26, ln. 11; **E1/252.1**, Chou Koemlan, T. 26 Jan 2015, p. 57, lns 6-10; **E1/288.1**, Im Vannak, T. 3 Apr 2015, p. 53, lns 12-23; **E1/254.1**, Chang Srey Mom, T. 29 Jan 2015, p. 39, lns 1-2.

<sup>3575</sup> **E1/253.1**, Chou Koemlan, T. 27 Jan 2015, p. 19, lns 6-7, 20-22.

<sup>3576</sup> **E1/274.1**, Neang Ouch, T.10 Mar 2015, p.10, lns 7-8; **E1/253.1**, Chou Koemlan, T.27 Jan 2015, p. 19, lns 2-3.

<sup>3577</sup> **E1/287.1**, Beng Boeun, T. 2 Apr 2015, p. 64, lns 4-5.

<sup>3578</sup> **E1/288.1**, Oum Vannak, T. 3 Apr 2015, p. 55, lns 1-5.

owes clearly to local authorities' failure to implement the Party standard strictly.<sup>3579</sup> Furthermore, no witnesses asserted that people were overworked to death. Only one vaguely speculated that overwork could "maybe" have been a potential cause, amongst several others, of death in the cooperatives.<sup>3580</sup> Thus, the evidence does not depict unduly onerous or harsh working conditions, especially in light of the DK's state of emergency at the time.<sup>3581</sup>

**(b) Working Conditions at the 1<sup>st</sup> January Dam Worksite**

1070. While some unit chiefs made all feasible efforts to provide the working people with decent conditions, but there was a material limit to their ability,<sup>3582</sup> especially given the overall difficulties the country faced.<sup>3583</sup> In addition, the evidence as a whole shows that everyone was treated equally, regardless of their status as 'new' or 'base' people.<sup>3584</sup>

1071. Evidence regarding the alleged imposition of production quotas varies greatly, as a result of the fact that unit chiefs had the discretion to set daily quotas.<sup>3585</sup> Some of the evidence refers to a daily quota for each person,<sup>3586</sup> while others said the work quota was set for each three-member group.<sup>3587</sup> The unit chiefs' discretion also extended to how to address unmet quotas. While in some units, workers who could not complete the daily quota had to complete it at night,<sup>3588</sup> in other units, members would help each other meet the quota.<sup>3589</sup> Some unit chiefs never threatened their members and only encouraged them to work,<sup>3590</sup> and all had discretion

<sup>3579</sup> See *infra*, Chapter 6-V-C-1-(d).

<sup>3580</sup> E1/277.1, Nut Nov, T. 16 Mar 2015, p. 42, lns 18-20, p. 43, lns 2-5.

<sup>3581</sup> See *supra*, Chapter 3 and Chapter 6-II, discussing the state of emergency.

<sup>3582</sup> See e.g. E1/318.1, Yean Lon, T. 17 Jun 2015, p. 7, lns 1-24, p. 8, lns 4-11; E1/302.1, Or Ho, T. 20 May 2015, p. 28, ln. 23 to p. 29, ln. 3. For other levels of authority, See e.g. E1/310.1, Sou Soeurn, T. 4 Jun 2015, p. 28, ln. 9 to p. 29, ln. 16, p. 74, lns 4-10.

<sup>3583</sup> See *supra*, Chapter 6-II.

<sup>3584</sup> E1/311.1, Sou Soeurn, T. 5 Jun 2015, p. 75, ln. 20 to p. 77, ln. 25; E1/301.1, Or Ho, T. 19 May 2015, p. 12, ln. 16 to p. 13, ln. 15, p. 59, ln. 20 to p. 60, ln. 2, p. 84, lns 2-5; E1/302.1, Or Ho, T. 20 May 2015, p. 17, ln. 22 to p. 18, ln. 2; E1/326.1, Om Chy, T. 30 Jul 2015, p. 93, lns 19-24; E1/322.1, Kong Uth, T. 25 Jun 2015, p. 23, lns 7-12; E1/304.1, Meas Laihour, T. 25 May 2015, p. 81, lns 17-21; E1/305.1, Meas Laihour, T. 26 May 2015, p. 32, lns 23-25; E1/308.1, Seang Sovida, T. 2 Jun 2015, p. 45, lns 1-10, p. 61, lns 3-7; E1/309.1, Uth Seng, T. 3 Jun 2015, p. 41, ln. 18 to p. 43, ln. 2, p. 67, ln. 1 to p. 68, ln. 20; see also *supra*, Chapter 6-II.

<sup>3585</sup> See e.g. E1/304.1, Meas Laihour, T. 25 May 2015, p. 62, lns 10-14; E1/306.1, Un Rann, T. 27 May 2015, p. 85, lns 21-23.

<sup>3586</sup> E1/301.1, Or Ho, T. 19 May 2015, p. 63, ln. 6; E1/302.1, Pech Sokha, T. 20 May 2015, p. 88, lns 5-6; E1/304.1, Meas Laihour, T. 25 May 2015, p. 55, lns 19-22; E1/306.1, Un Rann, T. 27 May 2015, p. 85, lns 21-24; E1/307.1, Un Rann, T. 28 May 2015, p. 21, lns 17-18.

<sup>3587</sup> E1/306.1, Hun Sethany, T. 27 May 2015, p. 24, lns 4-9, p. 37, lns 1-5, p. 63, lns 20-21; E1/309.1, Uth Seng, T. 3 Jun 2015, p. 22, lns 18-20, p. 62, lns 18-20.

<sup>3588</sup> E1/306.1, Un Rann, T. 27 May 2015, p. 85, ln. 25 to p. 86, ln. 1; E1/305.1, Meas Laihour, T. 26 May 2015, p. 32, lns 7-8.

<sup>3589</sup> E1/301.1, Or Ho, T. 19 May 2015, p. 64, lns 3-5, p. 76, ln. 25 to p. 77, ln. 3; E1/309.1, Uth Seng, T. 3 Jun 2015, p. 22, lns 23-25.

<sup>3590</sup> E1/308.1, Seang Sovida, T. 2 Jun 2015, p. 58, lns 4-9.

as to whether to grant their members additional, exceptional rest outside official rest schedules. Despite some witnesses and civil parties' claims that they were not allowed breaks even when exhausted or sick, others testified that some unit chiefs did allow their members to take short breaks or to rest when sick.<sup>3591</sup> In any event, as described above, the CPK had clear guidelines on working hours, none of which came even close to enslavement or mistreatment.<sup>3592</sup> The variations in practice were thus the result of local authorities failing to follow the policy.

1072. Workers' freedom of movement was not unduly restricted. Even nowadays, people must seek permission to leave their designated working location during working hours. Moreover, the evidence shows that on official rest days (every tenth day),<sup>3593</sup> people could visit their family.<sup>3594</sup> Additionally, the patrolling guards on the worksite were not a control measure, but rather they were there to provide security to the working people, and to protect the construction from external menace such as potential sabotage by the rebel movement *Khmer Sar* (White Khmer), or against any attack by Vietnam.<sup>3595</sup> These guards stayed far away from the site's workers and did not disturb their activities.<sup>3596</sup>

1073. Finally, precautions were put in place in a bid to prevent onsite accidents. For instance, whenever explosives were used to break rocks, workers were warned by loudspeaker to steer clear of the area.<sup>3597</sup> The security guards on site also prevented people from approaching such dangerous areas for fear of injuries.<sup>3598</sup> Rotation of work, between heavy and light work,<sup>3599</sup>

<sup>3591</sup> **E1/302.1**, Or Ho, T. 20 May 2015, p. 9, lns 2-18, p. 7, lns 14-18; **E1/318.1**, Yean Lon, T. 17 Jun 2015, p. 25, lns 15-20; **E1/322.1**, Kong Uth, T. 25 Jun 2015, p. 18, lns 20-25.

<sup>3592</sup> See *supra*, Chapter 6-II-D.

<sup>3593</sup> See *supra*, Chapter 6-II.

<sup>3594</sup> See e.g. **E1/304.1**, Meas Laihour, T. 25 May 2015, p. 83, lns 7-14, p. 94, lns 20-21; **E1/305.1**, Meas Laihour, T. 26 May 2015, p. 61, lns 2-13; **E1/322.1**, Kong Uth, T. 25 Jun 2015, p. 47, lns 9-14; **E1/301.1**, Or Ho, T. 19 May 2015, p. 34, lns 12-13, p. 75, lns 10-14; **E1/326.1**, Om Chy, T. 30 Jul 2015, p. 98, lns 5-8 & 20-24.

<sup>3595</sup> **E1/302.1**, Or Ho, T. 20 May 2015, p. 18, ln. 19 to p. 19, ln. 4; **E1/305.1**, Meas Laihour, T. 26 May 2015, p. 68, lns 3-6; **E1/303.1**, Pech Sokha, T. 21 May 2015, p. 26, ln. 5 to p. 28, ln. 1; **E3/9349**, 'WRI of Chuop Non', ERN 00244158.

<sup>3596</sup> **E1/302.1**, Or Ho, T. 20 May 2015, p. 19, lns 3-4; **E1/303.1**, Pech Sokha, T. 21 May 2015, p. 26, lns 5-23; **E1/322.1**, Kong Uth, T. 25 Jun 2015, p. 30, lns 22-24, p. 51, lns 9-14; **E1/305.1**, Meas Laihour, T. 26 May 2015, p. 15, lns 6-13, p. 41, lns 4-17.

<sup>3597</sup> **E1/303.1**, Pech Sokha, T. 21 May 2015, p. 47, lns 11-17.

<sup>3598</sup> **E1/305.1**, Meas Laihour, T. 26 May 2015, p. 68, lns 3-6.

<sup>3599</sup> See e.g. **E1/310.1**, Sou Soeur, T. 4 Jun 2015, p. 63, lns 14-24, p. 67, lns 18-21, p. 80, ln. 24, to p. 81, ln. 17; **E1/302.1**, Or Ho, T. 20 May 2015, p. 30, lns 3-4, p. 30, ln. 17 to p. 31, ln. 7, p. 51, ln. 21 to p. 52, ln. 3; **E1/317.1**, Yean Lon, T. 16 Jun 2015, p. 85, lns 22-25; **E1/318.1**, Yean Lon, T. 17 Jun 2015, p. 19, ln. 21 to p. 20, ln. 2; **E1/309.1**, Uth Seng, T. 3 Jun 2015, p. 36, ln. 21 to p. 37, ln. 2.

and between the construction site and other locations within the village,<sup>3600</sup> was another precautionary measure to conserve workers' strength.<sup>3601</sup>

**(c) Working Conditions at the Kampong Chhnang Airfield Construction Site**

1074. Evidence of working conditions at Kampong Chhnang Airfield Construction Site demonstrates that overall, the conditions were not unduly harsh at the time, particularly in light of the fact that it was a military institution. Given the size of the site, the large number of soldiers, and the fact that different units did not have close contact,<sup>3602</sup> no one could give credible evidence about the situation beyond their own units. In addition, as is the case for the other three sites, the evidence from different individuals shows that the lowest level authorities – unit or group chiefs – had a lot of discretion on the living and working conditions, which varied widely from unit to unit.

1075. Insofar as the working conditions are concerned, the evidence shows that it was the unit chiefs' discretion to give soldiers small breaks between official meal breaks.<sup>3603</sup> Not all units worked after 6pm.<sup>3604</sup> In some units, working after 6pm was occasional and only when it was necessary to finish a specific assignment.<sup>3605</sup> Sometimes it was organised in order to avoid the heat during the day.<sup>3606</sup> There is also evidence that soldiers in some units took shifts to work at night.<sup>3607</sup> In addition, working soldiers were assisted by machinery wherever feasible.<sup>3608</sup> For those assigned to break rocks with explosives, a wall was built to protect them from flying fragments.<sup>3609</sup> There were mobile medic units on site,<sup>3610</sup> and ambulances always stood by to take the sick or wounded to hospital.<sup>3611</sup> The majority of them recovered and returned to

<sup>3600</sup> See also *supra* Chapter 6-II-C-1.

<sup>3601</sup> See e.g. **E1/310.1**, Sou Soeur, T. 4 Jun 2015, p. 80, ln. 24, to p. 81, ln. 17; **E1/302.1**, Or Ho, T. 20 May 2015, p. 30, lns 17-20, p. 51, lns 21-23.

<sup>3602</sup> E.g. **E1/316.1**, Keo Loeur, T. 15 Jun 2015, p. 22, lns 5-7; **E1/321.1**, Him Han, T. 24 Jun 2015, p. 16, lns 12-14 & 17-19; **E1/314.1**, Keo Kin, T. 11 Jun 2015, p. 15, lns 10-13, p. 30, lns 18-24, p. 90, lns 14-15; **E1/508.1**, Nuon Trech, T. 7 Dec 2016, p. 26, lns 15-21; **E1/325.1**, Khin Vat, T. 29 Jul 2015, p. 58, lns 4-12.

<sup>3603</sup> **E1/312.1**, Chan Morn, T. 9 Jun 2015, p. 86, lns 8-16.

<sup>3604</sup> **E1/314.1**, Keo Kin, T. 11 Jun 2015, p. 89, ln. 25 to p. 90, ln. 5.

<sup>3605</sup> **E1/321.1**, Him Han, T. 24 Jun 2015, p. 21, lns 7-15.

<sup>3606</sup> **E1/318.1**, Kong Siek, T. 17 Jun 2015, p. 76, lns 18-19.

<sup>3607</sup> **E3/5526**, 'WRI of Srun Chey', ERN 00426309; **E3/5278**, 'WRI of Chan Morn', ERN 00292823.

<sup>3608</sup> **E1/312.1**, Chan Morn, T. 9 Jun 2015, p. 13, lns 9-15; **E1/508.1**, Nuon Trech, T. 7 Dec 2016, p. 6, lns 4-6.

<sup>3609</sup> **E1/313.1**, Chan Morn, T. 10 Jun 2015, p. 57, lns 17-20; **E1/507.1**, Nuon Trech, T. 6 Dec 2016, p. 106, lns 17-23; **E3/8041**, 'Site Identification Report: Kampong Chhnang Airfield', ERN 00378444.

<sup>3610</sup> **E1/316.1**, Keo Loeur, T. 15 Jun 2015, p. 17, lns 8-12; **E1/319.1**, Sem Hoeurn, T. 22 Jun 2015, p. 50, lns 16-19.

<sup>3611</sup> **E1/312.1**, Chan Morn, T. 9 Jun 2015, p. 70, ln. 18 to p. 71, ln. 5; **E1/314.1**, Keo Kin, T. 11 Jun 2015, p. 28, lns 20-24; **E1/316.1**, Keo Loeur, T. 15 Jun 2015, p. 17, lns 22-24.

work.<sup>3612</sup> Contrary to the Closing Order's allegation that the guards were posted on site to control the soldiers, the evidence suggests that the guards were there to patrol and provide protection to the soldiers and the Chinese experts,<sup>3613</sup> and to protect the top secret military construction site<sup>3614</sup> from potential trespassing or sabotage by external enemies.<sup>3615</sup> Such security exists in all major infrastructures throughout the world; no one would imagine an airport – in construction or in function – to be without any security guards.

1076. Individuals gave evidence that they were not allowed to “wander freely” or to go to other units without permission,<sup>3616</sup> and that if they wanted to leave the premises of the airfield, they had to seek authorisation first.<sup>3617</sup> Absence without leave amounts to desertion, a serious violation of military discipline in any country in the world. It is completely legitimate to request soldiers not to move to other units freely, and to request prior authorisation before leaving their duty station. This is particularly true here, given the top-secret nature of the airfield.

1077. Finally, there was no discrimination amongst the soldiers. In general it was the duty of division office chief Yeng to assign work to each unit chief.<sup>3618</sup> The unit chiefs were in turn in charge of assigning the work within their unit.<sup>3619</sup> There is no evidence that any of these officials intentionally assigned work on a discriminatory basis, differentiating between soldiers depending on “how much of a ‘traitor’” they were perceived to be.<sup>3620</sup> On the contrary, the evidence shows that soldiers often rotated between different types of work – ranging from high-risk tasks such as blasting the rocks to less intense tasks such as digging earth – based on the assignment decided by their unit chiefs.<sup>3621</sup> The evidence also shows that soldiers from different divisions were often assigned to work together on the same task. For instance, witness Chan Morn, a Division 502 soldier who had a close personal relationship with Division 502

<sup>3612</sup> **E1/314.1**, Keo Kin, T. 11 Jun 2015, p. 29, Ins 1-5; **E1/316.1**, Keo Loeur, T. 15 Jun 2015, p. 18, Ins 2-3; **E1/312.1**, Chan Morn, T. 9 Jun 2015, p. 71, Ins 11-14.

<sup>3613</sup> **E1/313.1**, Chan Morn, T. 10 Jun 2015, p. 61, Ins 10-14; **E1/314.1**, Keo Kin, T. 11 Jun 2015, p. 74, Ins 21-23; **E1/320.1**, Him Han, T. 23 Jun 2015, p. 74, Ins 1-8; **E1/315.1**, Keo Loeur, T. 12 Jun 2015, p. 25, Ins 13 to 23.

<sup>3614</sup> **E3/8251**, ‘China Reported Sending Jets to Cambodia’, ERN 00166282; **E3/2739**, ‘Chinese Mig-19 in Cambodian Air Force’, ERN 00517805.

<sup>3615</sup> **E1/320.1**, Sem Hoern, T. 23 Jun 2015, p. 34, Ins 23-25.

<sup>3616</sup> **E1/314.1**, Keo Kin, T. 11 Jun 2015, p. 62, ln. 24 to p. 63, ln. 3; **E1/320.1**, Him Han, T. 23 Jun 2015, p. 72, Ins 4-9; **E1/321.1**, Him Han, T. 24 Jun 2015, p. 43, Ins 6-10;

<sup>3617</sup> **E1/314.1**, Keo Kin, T. 11 Jun 2015, p. 76, Ins 10-15.

<sup>3618</sup> **E1/312.1**, Chan Morn, T. 9 Jun 2015, p. 27, Ins 9-15, p. 49, Ins 22-25, p. 80, Ins 7-8; **E1/313.1**, Chan Morn, T. 10 Jun 2015, p. 45, Ins 1-11.

<sup>3619</sup> *See e.g.* **E1/319.1**, Sem Hoern, T. 22 Jun 2015, p. 32, Ins 1-12, p. 41, Ins 14-18; **E1/312.1**, Chan Morn, T. 9 Jun 2015, p. 49, Ins 14-25, p. 62, Ins 3-9; **E1/507.1**, Nuon Trech, T. 6 Dec 2016, p. 103, Ins 4-8.

<sup>3620</sup> **D427**, Closing Order, para. 390.

<sup>3621</sup> **E1/507.1**, Nuon Trech, T. 6 Dec 2016, p. 102, ln. 25 to p. 103, ln. 8; **E1/319.1**, Sem Hoern, T. 22 Jun 2015, p. 41, Ins 10-18.

commanders Sou Met and Lvey,<sup>3622</sup> was assigned to cut wood in the forest with some East Zone soldiers, and they were working in the same conditions.<sup>3623</sup> Additionally, as discussed above, Division 310 soldiers were also assigned to work closely with the Chinese experts on technical tasks, same as Division 502 soldiers.<sup>3624</sup>

**(d) Working Conditions at the Trapeang Thma Dam Worksite**

1078. Evidence shows that *Ta Val*, overall in charge of the Trapeang Thma Dam, granted the units chiefs a wide discretion in setting the living and working conditions of their respective group members. As a result, witnesses' evidence on working conditions at the Trapeang Thma Dam only reflects their own individual experience in their unit and may have been the result of deliberate contravention of policy. It is distinctly unsuitable to rely on as a basis to establish a general CPK policy.

1079. Workers were organised within units. Male and female workers did not work in the same units,<sup>3625</sup> but generally received the same work quota *i.e.*, a certain volume of earth to dig and carry.<sup>3626</sup> Some witnesses stated that the quota was set per unit,<sup>3627</sup> while the majority testified that quota were rather set per worker. Testimonies regarding quota greatly varied between one,<sup>3628</sup> two<sup>3629</sup> or three cubic meters of earth to carry per day.<sup>3630</sup> The majority of workers could complete the quota assigned.<sup>3631</sup> Finally, evidence shows that there were trucks on the worksite to assist workers carrying rocks and earth.<sup>3632</sup>

1080. Following *Ta Val*'s directives, local cadres and unit chiefs enjoyed wide discretion to set working and living conditions of their respective teams. For instance, *Chhuy Huy*, chief of a 55 members squad at the Trapeang Thma Dam,<sup>3633</sup> testified that the working hours were set

<sup>3622</sup> See e.g. **E1/312.1**, Chan Morn, T. 9 Jun 2015, p. 25, ln. 19 to p. 26, ln. 9; **E1/313.1**, Chan Morn, T. 10 Jun 2015, p. 68, ln. 22 to p. 69, ln. 7.

<sup>3623</sup> **E1/313.1**, Chan Morn, T. 10 Jun 2015, p. 30, lns 6-19.

<sup>3624</sup> **E1/315.1**, Keo Loeur, T. 12 Jun 2015, p. 12, lns 12-21, p. 22, ln. 23 to p. 23, ln. 4; **E1/320.1**, Sem Hoern, T. 23 Jun 2015, p. 25, ln. 22 to p. 26, ln. 15; **E1/314.1**, Keo Kin, T. 11 Jun 2015, p. 50, ln. 20 to p. 51, ln. 3; **E1/312.1**, Chan Morn, T. 9 Jun 2015, p. 14, lns 17-19.

<sup>3625</sup> **E1/329.1**, Lat Suoy, T. 12 Aug 2015, p. 22, lns 18-21.

<sup>3626</sup> **E1/330.1**, Chhit Yoeuk, T. 13 Aug 2015, p. 85, ln. 4 to p. 86, ln. 23.

<sup>3627</sup> **E1/329.1**, Lat Suoy, T. 12 Aug 2015, p. 22, ln. 14 to p. 23, lns 1-3.

<sup>3628</sup> **E1/351.1**, Sot Sophal, T. 29 Sep 2015, p. 85, lns 15-17.

<sup>3629</sup> **E1/330.1**, Chhit Yoeuk, T. 13 Aug 2015, p. 78, ln. 25.

<sup>3630</sup> **E1/323.1**, Sen Sophon, T. 27 Jul 2015, p. 41, ln. 14; **E1/327.1**, Kan Thorl, T. 10 Aug 2015, p. 51, ln. 13; **E1/331.1**, Chhum Seng, T. 17 Aug 2015, p. 49, ln. 24 to p. 50, ln. 1; **E1/340.1**, Sam Sak, T. 2 Sep 2015, p. 23, lns 15-16.

<sup>3631</sup> **E1/340.1**, Sam Sak, T. 2 Sep 2015, p. 24, ln. 1.

<sup>3632</sup> **E1/332.1**, Chhum Seng, T. 18 Aug 2015, p. 38, lns 2-7.

<sup>3633</sup> **E1/335.1**, Chhuy Huy, T. 24 Aug 2015, p. 11, ln. 19.

by unit chiefs. He notably explained that he would decide by himself whether his workers could have breaks.<sup>3634</sup> As a result, CPK directives on working hours and rest time were not equally implemented at the Trapeang Thma Dam,<sup>3635</sup> which explains the discrepancies of conditions from one unit to another. The majority of witnesses testified about morning shifts from 4am,<sup>3636</sup> 6am or 7 am<sup>3637</sup> until 11 am or 11.30am and afternoon shifts starting at 1pm to 5pm<sup>3638</sup> Workers were allowed to take a two-hour break between the morning and afternoon shifts.<sup>3639</sup> When “the situation was demanding”,<sup>3640</sup> workers were sometimes required to do night shifts.<sup>3641</sup> In any event, they were usually allowed to rest if they finish their work earlier.<sup>3642</sup>

1081. Regarding freedom of movement, evidence shows that workers could walk freely on the worksite.<sup>3643</sup> Workers were allowed to visit their family from time to time,<sup>3644</sup> but needed to request a *laissez passer* from their unit chiefs in order to travel.<sup>3645</sup> Seen in context, however, this is not at all unusual as a means of controlling people’s movements. After all, Cambodia faced an armed conflict with Vietnam and was under a state of emergency at the time. Thus, requesting people to seek permission to leave their working location and to travel outside of the usual rest schedule was legitimate. Finally, some witnesses testified about children working in specific mobile units.<sup>3646</sup> However, this was a grave breach of the CPK directives, which clearly stated that old people, pregnant women and children must not work.<sup>3647</sup> Ieng Thirith, who visited the Northwest Zone at the time, precisely reported that young children were working in contravention of CPK rules.<sup>3648</sup> She further stated that, as a result of such breaches of the CPK policy, Northwest Zone leaders were later arrested and replaced by Southwest Zone cadres.<sup>3649</sup>

<sup>3634</sup> **E1/335.1**, Chhuy Huy, T. 24 Aug 2015, p. 61, ln. 9 to p. 63, ln. 22; *see also* **E1/351.1**, Sot Sophal, T. 29 Aug 2015, p. 80, ln. 15 to p. 86, ln. 25.

<sup>3635</sup> *See supra* Chapter 6-II-D, on the CPK standards regarding working hours and leaving conditions,

<sup>3636</sup> **E1/323.1**, Sen Sophon, T. 27 Jul 2015, p. 41, lns 16-18.

<sup>3637</sup> **E1/327.1**, Kan Thorl, T.10 Aug 2015, p. 54, lns 4-6; **E1/330.1**, Chhit Yoeuk, T. 13 Aug 2015, p. 78, lns 20-21.

<sup>3638</sup> **E1/327.1**, Kan Thorl, T.10 Aug 2015, p. 54, lns 4-6; **E1/330.1**, Chhit Yoeuk, T. 13 Aug 2015, p. 78, lns 20-21.

<sup>3639</sup> **E1/331.1**, Chhum Seng, T. 17 Aug 2015, p. 55, lns 6-8.

<sup>3640</sup> **E1/325.1**, Mam Soeurm, T. 29 Jul 2015, p. 11, lns 9-25.

<sup>3641</sup> **E1/327.1**, Kan Thorl, T. 10 Aug 2015, p. 54, ln. 9; **E1/330.1**, Chhit Yoeuk, T. 13 Aug 2015, p. 73, lns 2-6; **E1/334.1**, Yi Laisauv, T. 20 Aug 2015, p. 39, ln. 10; **E1/323.1**, Sen Sophon, T. 27 Jul 2015, p. 41, lns 21-22.

<sup>3642</sup> **E1/331.1**, Chhum Seng, T. 17 Aug 2015, p. 54, ln. 20 to p. 55, ln. 24.

<sup>3643</sup> *See e.g.* **E1/360.1**, Pan Chhuong (2-TCW-918), T. 1 Dec 2015, p. 32, lns 2-22.

<sup>3644</sup> *See e.g.* **E1/340.1**, Sam Sak, T. 2 Sep 2015, p. 14, lns 14-15.

<sup>3645</sup> **E1/360.1**, Pan Chhuong (2-TCW-918), T. 1 Dec 2015, p. 32, lns 2-22, p. 34, lns 10-20.

<sup>3646</sup> **E1/330.1**, Chhit Yoeuk, T. 13 Aug 2015, p. 85, lns 19-20; **E1/332.1**, Chhum Seng, T. 18 Aug 2015, p. 24, lns 14-16; **E1/327.1**, Kan Thorl, T.10 Aug 2015, p. 55, ln. 15, p. 77, lns 22-23.

<sup>3647</sup> *See* **E3/659**, 1980 Becker Interview with Ieng Thirith, ERN 00182322.

<sup>3648</sup> **E3/659**, 1980 Becker Interview with Ieng Thirith, ERN 00182322.

<sup>3649</sup> *See infra* Chapter 6-V-D-4-(a), on the traitorous activities of Ta Val and other Northwest Zone cadres.



1082. As is the overall evidence elicited about the Trapeang Thma Dam, evidence provided with regard to working conditions is mixed and not representative of a systematic pattern. Furthermore, there is clear evidence about Ruos Nhim's efforts to implement harsh working conditions in the Northwest Zone, in violation of the CPK policies.<sup>3650</sup> Therefore, evidence on working conditions at the Trapeang Thma Dam is unsuitable to demonstrate any policy.

## 2. Living Conditions Were Reasonable Under the Circumstances

### (a) Living Conditions in the Tram Kok Cooperatives

1083. Several Tram Kok cadres testified in court on living conditions. The probative value of their evidence is far greater than anecdotal testimony from separate individuals, as the cadres not only lived in the cooperatives but were also responsible for their organisation. All cadres who testified about living conditions agreed that everyone was treated equally. Hospital director Riel Son, Tram Kok District chief Pech Chim, and commune chief Khoem Boeun said that everyone had equal access to medical services and medicine.<sup>3651</sup> Khoem Boeun added that in her commune, there was equal access to education, and equal surveillance.<sup>3652</sup> Commune chief Nut Nov confirmed that, as the Closing Order suggested,<sup>3653</sup> 'new people' were likelier to get sick simply because they were "not used to engag[ing] in labour in the rice field".<sup>3654</sup> While this could be seen as insensitive towards 'new people' or as subjecting them to grave conditions considering the limited farming experience of some of them,<sup>3655</sup> the evidence shows that this was taken into account, with 'new people' assigned lighter work than 'base people',<sup>3656</sup> and work duties being assigned based on capacity, as discussed above.<sup>3657</sup>

1084. On food rations, cadres and some witnesses and civil parties gave evidence that everyone had the same food rations.<sup>3658</sup> Only two civil parties said otherwise, claiming that "base people"

<sup>3650</sup> See *infra* Chapter 6-V-D-4-(a), on the traitorous activities of Ta Val and other Northwest Zone cadres.

<sup>3651</sup> **E1/279.1**, Riel Son, T. 18 Mar 2015, p. 16, lns 2-7, p. 21, lns 3-5; **E1/297.1**, Khoem Boeun, T. 5 May 2015, p. 14, lns 16-22; **E1/291.1**, Pech Chim, T. 23 Apr 2015, p. 67, lns 11-18.

<sup>3652</sup> **E1/297.1**, Khoem Boeun, T. 5 May 2015, p. 14, ln. 23 to p. 15, ln. 3; **E1/299.1**, Ek Hoeun, T. 8 May 2015, p. 70, lns 22-23; **E1/296.1**, Khoem Boeun, T. 4 May 2015, p. 86, lns 5-9.

<sup>3653</sup> **D427**, Closing Order, para. 313.

<sup>3654</sup> **E1/276.1**, Nut Nov, T. 12 Mar 2015, p. 44, lns 15-18.

<sup>3655</sup> **E3/7333**, Burgler, Eyes of Pineapple, ERN 01002194; **F16**, Nuon Chea's Appeal Brief, para. 368.

<sup>3656</sup> See *supra*, Chapter 6-II-D-4-(b).

<sup>3657</sup> See *supra*, Chapter 6-II-D-4-(b).

<sup>3658</sup> **E1/291.1**, Pech Chim, T. 23 Apr 2015, p. 59, lns 24-25, p. 90, lns 2-6; **E1/290.1**, Pech Chim, T. 22 Apr 2015, p. 24, lns 5-7; **E1/297.1**, Khoem Boeun, T. 5 May 2015, p. 14, lns 10-15; **E1/264.1**, Sao Han, T. 17 Feb 2015, p. 92, lns 2-3; **E1/289.1**, Thann Thim, T. 21 Apr 2015, p. 24, lns 9-16; see also **E1/255.1**, Chang Srey Mom, T. 2 Feb 2015, p. 21, lns 12-23.

somehow had additional food rations.<sup>3659</sup> Setting aside the limited probative value of civil party statements, even if such differentiation did occur, the evidence shows that it did not occur universally or in accordance with a deliberate policy. In fact, as stated above, the CPK policy consecrated the notion of the ‘people’, who, whether ‘new’ or ‘old’, were fundamental contributors to society.<sup>3660</sup> They could not, therefore, be simultaneously treated as the ‘enemy’.<sup>3661</sup> Furthermore, the alleged differentiation does not necessarily evidence a discriminatory intent. One witness stated, for instance, that the fact that “base people” received additional food correlated to the fact that they did the most, and most difficult, work.<sup>3662</sup> In terms of starvation, notwithstanding the inherent difficulties of feeding a population in the face of an existential crisis, several cadres report that no-one died of starvation.<sup>3663</sup> The remaining allegations of starvation often stem from civil parties,<sup>3664</sup> however, there is significant evidence that the food shortage was not systemic but depended on the commune.<sup>3665</sup> This is far from establishing a systematic pattern of action required to infer an official policy from the evidence.

1085. In specific response to the allegation of discrimination between ‘new’ and ‘base’ people, it is important to note the testimony of Tram Kok District chief Pech Chim that where ‘base people’ had more food than ‘new people’, this too was a “shortcoming that was “against the policy” which occurred because the district “did not control everything [...] in certain cooperatives” despite them doing their “level best to be in line with the policy”.<sup>3666</sup> District office cadre Ek Hoeun, similarly, testified that ‘base people’ would be sanctioned for conflicts or discrimination against ‘new people’, and could not even refer to ‘new people’ as “new people” or “17 April people”, because the “very strict policy” was of everyone having “mutual respect for one another”.<sup>3667</sup> The Co-Prosecutors have attempted to fill the evidentiary void on living conditions at the Tram Kok Cooperatives with out-of-court evidence. However, these documents are woefully unfit for purpose and thus do not merit discussion at this stage.<sup>3668</sup>

<sup>3659</sup> **E1/283.1**, Oem Saroeurn, T. 26 Mar 2015, p. 12, lns 8-12; **E1/252.1**, Chou Koemlan, T. 26 Jan 2015, p. 59, lns 9-15, p. 78, ln. 22 to p. 79, ln. 2.

<sup>3660</sup> *See supra*, Chapter 6-II-1.

<sup>3661</sup> **E3/1783**, Report of Chen Yung-Kuei’s Visit, ERN 00498181, *see also supra* Chapter 6-II-C-2-(a).

<sup>3662</sup> **E1/264.1**, Phneou Yav, T. 17 Feb 2015, p. 20, lns 4-6.

<sup>3663</sup> **E1/297.1**, Khoem Boeun, T. 5 May 2015, p. 11, lns 3-5; **E1/277.1**, Nut Nov, T. 16 Mar 2015, p. 42, lns 4-10.

<sup>3664</sup> *See e.g.* **E1/252.1**, Chou Koemlan, T. 26 Jan 2015, p. 50, lns 19-23; **E1/262.1**, Ry Pov, T. 12 Feb 2015, p. 41, lns 5-10.

<sup>3665</sup> *See e.g.* **E1/299.1**, Ek Hoeun, T. 08 May 2015, p. 14, lns 17-19; **E1/269.1**, Phann Chhen, T. 25 Feb 2015, p. 15, lns 17-20.

<sup>3666</sup> **E1/291.1**, Pech Chim, T. 23 Apr 2015, p. 60, lns 6-21.

<sup>3667</sup> **E1/299.1**, Ek Hoeun, T. 8 May 2015, p. 9, ln. 15 to p. 10, ln. 3.

<sup>3668</sup> *See* **E3/1593**, Kiernan, Pol Pot Regime, ERN 01150087 (which cites no sources). The Co-Prosecutors also cite several unreliable ‘Tram Kok District Records’ (*see* **E1/293.1**, Document Presentation, T. 27 Apr 2015, p. 35, ln.

**(b) Living Conditions at the 1<sup>st</sup> January Dam Worksite**

1086. Each village and cooperative was in charge of arranging food for their own members working on the worksite;<sup>3669</sup> food conditions, therefore, would depend on the situation of each village or cooperative at a given time.<sup>3670</sup> Despite some witnesses and civil parties' complaints about food, people from some other areas of the dam had sufficient food most of the time, including fish and steamed rice.<sup>3671</sup> To ensure sufficient food for their people, some village chiefs organised villagers to fish, to raise livestock, and to plant vegetables in accordance with the party's instruction<sup>3672</sup> to supplement the food supply.<sup>3673</sup> The people could also find supplementary food on their own.<sup>3674</sup> It is natural that the food situation – both in terms of quantity and quality – at the time cannot be compared to the situation nowadays, especially given the general difficulties the country faced.<sup>3675</sup> However, there is absolutely no evidence that the food scarcity was the result of a deliberate policy to mistreat the people.

1087. As to the medical situation, the evidence shows that there were medics on the worksite to provide medicine and treatment.<sup>3676</sup> Many people recovered from their illnesses after the medicine, including witness Pech Sokha.<sup>3677</sup> Depending on the circumstances, some people were sent to hospital for treatment, and those who recovered returned to work.<sup>3678</sup> The evidence also shows that the DK purchased various medicines from foreign countries<sup>3679</sup> and distributed

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25 to p. 39, ln. 9), which, even if they could be relied upon, show that “new people” and “base people” were arrested because of alleged infractions: *see* **E1/293.1**, Document Presentation, T. 27 Apr 2015, p. 38, ln. 10 to p. 39, ln. 9 (referring to E3/4164).

<sup>3669</sup> *See e.g.* **E1/302.1**, Or Ho, T. 20 May 2015, p. 26, ln. 7 to p. 27, ln. 22, p. 28, lns 17-22; **E1/301.1**, Or Ho, T. 19 May 2015, p. 61, lns 18-25; **E1/318.1**, Yean Lon, T. 17 Jun 2015, p. 6, lns 13-15, p. 8, lns 4-11; **E3/8303**, ‘WRI of Uth Seng’, ERN 00491748.

<sup>3670</sup> *See e.g.* **E1/301.1**, Or Ho, T. 19 May 2015, p. 62, lns 13-17.

<sup>3671</sup> **E1/301.1**, Or Ho, T. 19 May 2015, p. 62, lns 7-17; **E1/302.1**, Or Ho, T. 20 May 2015, p. 28, lns 14-16, p. 57, lns 6-17; **E1/310.1**, Sou Soeurn, T. 4 Jun 2015, p. 92, lns 4-17.

<sup>3672</sup> *See e.g.* **E3/8**, 1976 CPK Four-Year Plan, ERN 00104044; **E3/135**, Flag, Jun 1977, ERN 00446866-67.

<sup>3673</sup> *See e.g.* **E1/301.1**, Or Ho, T. 19 May 2015, p. 61, lns 22-25; **E1/302.1**, Or Ho, T. 20 May 2015, p. 28, ln. 23 to p. 29, ln. 3, p. 36, ln. 18 to p. 37, ln. 8, p. 57, lns 6-17.

<sup>3674</sup> *See e.g.* **E1/301.1**, Or Ho, T. 19 May 2015, p. 13, lns 7-9, p. 72, lns 22-23, p. 83, lns 16-19; **E1/305.1**, Meas Laihour, T. 26 May 2015, p. 61, lns 2-13.

<sup>3675</sup> *See e.g.* **E1/301.1**, Or Ho, T. 19 May 2015, p. 62, lns 7-13; **E1/310.1**, Sou Soeurn, T. 4 Jun 2015, p. 64, lns 12-23; **E1/304.1**, Meas Laihour, T. 25 May 2015, p. 91, lns 3-5; **E1/302.1**, Pech Sokha, T. 20 May 2015, p. 91, 12-20; **E3/5513**, ‘WRI of Ieng Chham’, A73.

<sup>3676</sup> *See e.g.* **E1/302.1**, Or Ho, T. 20 May 2015, p. 11, lns 12-16; **E1/304.1**, Meas Laihour, T. 25 May 2015, p. 73, lns 10-19; **E1/317.1**, Yean Lon, T. 16 Jun 2015, p. 40, lns 10-14.

<sup>3677</sup> **E1/303.1**, Pech Sokha, T. 21 May 2015, p. 44, ln. 25 to p. 45, ln. 10; **E1/304.1**, Meas Laihour, T. 25 May 2015, p. 73, lns 16-19; **E1/305.1**, Meas Laihour, T. 26 May 2015, p. 60, ln. 24 to p. 61, ln. 1; **E1/307.1**, Un Rann, T. 28 May 2015, p. 27, lns 6-11; **E1/326.1**, Om Chy, T. 30 Jul 2015, p. 74, lns 5-8.

<sup>3678</sup> *See e.g.* **E3/301**, Or Ho, T. 19 May 2015, p. 72, lns 6-9; **E1/302.1**, Or Ho, T. 20 May 2015, p. 10, ln. 22 to p. 11, ln. 4, p. 11, lns 12-16, p. 12, lns 11-16, p. 13, lns 3-11; **E1/326.1**, Om Chy, T. 30 Jul 2015, p. 80, lns 7-12; **E1/310.1**, Sou Soeurn, T. 4 Jun 2015, p. 68, lns 12-14.

<sup>3679</sup> *See e.g.* **E3/2941**, Commerce Ministry Report, 15 Jan 1978, ERN 00583816-17; **E3/1765**, Examination of the Implementation of Policy Line, ERN 00523591.

medicines to each zone on a monthly basis to treat malaria.<sup>3680</sup> It also organised each zone to spray pesticide to eradicate mosquitoes in a bid to prevent malaria altogether.<sup>3681</sup> Regarding the contested issue of the CPK's promotion of traditional medicine, there is nothing criminal in that; in fact, most western countries today recommend "natural remedies" for common ailments and the effectiveness of traditional medicine has even been recently recognised by the Nobel Committee.<sup>3682</sup> Moreover, the evidence shows that the CPK gathered formulas of traditional medicine throughout the country to be tested in Phnom Penh<sup>3683</sup> in order to eventually be able to locally produce such medicine.<sup>3684</sup>

1088. Regarding blankets, mosquito nets, mats, or hammocks in the sleeping quarters, people were informed to bring their own to the worksite.<sup>3685</sup> In other words, whether or not they worked on the construction site, the living conditions in this regard would have remained the same. Aware of the general shortage in the country, the CPK had made plans and set up measures to purchase and produce such necessities to distribute to the people.<sup>3686</sup> Nevertheless, it is naturally a progressive process for the majority of the population to have sufficient supplies. Even nowadays, Cambodia cannot ensure such supplies for the entire population.<sup>3687</sup>

1089. Overall, the evidence regarding working conditions at the 1<sup>st</sup> January Dam clearly refutes Judge Fenz' Manichean belief that those conditions had surely been abhorrent.<sup>3688</sup> Instead, the evidence shows that there was barely any work-related or condition-related death at the 1<sup>st</sup> January Dam. For instance, Or Ho testified that in his unit of 100 people, only three died of a soil-collapse accident, and one or two died of disease.<sup>3689</sup> Pech Sokha testified that he never witnessed death from starvation.<sup>3690</sup> Meas Laihour testified that none in her unit died of illness.<sup>3691</sup> Yean Lon testified that he did not know of any death of people working on the dam

<sup>3680</sup> **E3/9648**, Statistics on Medicines Imported From China, 1-14 Aug 1976.

<sup>3681</sup> **E3/1765**, Examination of the Implementation of Policy Line, ERN 00523591; *see also*, **E1/303.1**, Pech Sokha, T. 21 May 2015, p. 48, Ins 9-10; **E1/305.1**, Meas Laihour, T. 26 May 2015, p. 60, Ins 19-23.

<sup>3682</sup> *See supra*, Chapter 6-II-E, in regard to the effectiveness of traditional medicine.

<sup>3683</sup> **E3/226**, Meeting on Health and Social Affairs, 10 Jun 1976, ERN 00183366.

<sup>3684</sup> **E3/226**, Meeting on Health and Social Affairs, 10 Jun 1976, ERN 00183370-71.

<sup>3685</sup> **E1/302.1**, Or Ho, T. 20 May 2015, p. 15, ln. 18 to p. 16, ln. 1; **E1/326.1**, Om Chy, T. 30 Jul 2015, p. 59, Ins 14-19, p. 83, ln. 17 to p. 84, ln. 9.

<sup>3686</sup> *See supra*, Chapter 6-II.

<sup>3687</sup> *See supra*, Chapter 6-III, for some details on conditions in Cambodia today.

<sup>3688</sup> *See* **E1/301.1**, Or Ho, T. 19 May 2015, p. 71, ln. 14 to p. 77, ln. 3 (Judge Fenz questioned a witness for 15 minutes to establish the rate of worker deaths at the 1<sup>st</sup> January Dam. When the witness maintained that in two years, three died in accidents and one or two from illnesses, Judge Fenz sarcastically quipped that "that sounds like a healthy working environment", showing her Manichean belief.); *see also supra* Chapter 2-II-B-3-a.

<sup>3689</sup> **E1/301.1**, Or Ho, T. 19 May 2015, p. 71, ln. 23 to p. 74, ln. 21.

<sup>3690</sup> **E1/302.1**, Pech Sokha, T. 20 May 2015, p. 91, Ins 17-21.

<sup>3691</sup> **E1/305.1**, Meas Laihour, T. 26 May 2015, p. 60, Ins 24-25.

construction of any work-related reasons.<sup>3692</sup> Only one civil party claimed that one person from her village died of overwork. However, her evidence suggests that the person fell sick and died about 14 days after he returned from the 1<sup>st</sup> January Dam to rest in his village.<sup>3693</sup>

**(c) *Living Conditions at the Kampong Chhnang Airfield Construction Site***

1090. There is limited evidence on the living conditions at the Kampong Chhnang Airfield Construction Site. Despite some soldiers' complaints about food insufficiency,<sup>3694</sup> the actual amount of food distributed to them was unclear in most cases.<sup>3695</sup> It thus cannot be established whether the food rations which the CPK and the military authorities set for soldiers – 15 *thang* (375 kg) of rice per soldier per year<sup>3696</sup> and 23 cans of rice for 10 soldiers daily<sup>3697</sup> – were strictly implemented at the airfield. The evidence does show, however, that soldiers had cooked rice, soup, as well as some meat and fish.<sup>3698</sup>

**(d) *Living Conditions at the Trapeang Thma Dam Worksite***

1091. Long hall shelters were built to accommodate the workers onsite.<sup>3699</sup> Just as flagged in respect of the 1<sup>st</sup> January Dam, due to a general shortage of supplies in the country, workers were requested to bring their hammocks, mosquito nets and mattresses.<sup>3700</sup> As noted immediately above, even nowadays, Cambodia cannot ensure such supplies for the entire population. Evidence on food ration varied greatly. Some witnesses testified that occasional food shortages occurred.<sup>3701</sup> In that case, rations were reduced to ensure that “everyone could have the same amount of food”.<sup>3702</sup> In addition to rice and gruel, witnesses stated that workers also had dry fish from time to time.<sup>3703</sup> Workers were also allowed to find supplementary food,

<sup>3692</sup> E1/317.1, Yean Lon, T. 16 Jun 2015, p. 41, ln. 25 to p. 42, ln. 2.

<sup>3693</sup> E1/306.1, Hun Sethany, T. 27 May 2015, p. 56, ln. 6 to p. 58, ln. 2.

<sup>3694</sup> Others reported that the food was sufficient, e.g., E1/313.1, Chan Morn, T. 10 Jun 2015, p. 76, ln. 24 to p. 77, ln. 5; E3/5526, ‘WRI of Srun Chey’, ERN 00426309.

<sup>3695</sup> In the few cases where the witness or civil party discussed the actual amount of food, the rations they allegedly had did not meet the rations set by the CPK or the military authorities. See e.g. E1/321.1, Chum Samoeurn, T. 24 Jun 2015, p. 54, lns 7-22; E1/319.1, Sem Hoeurn, T. 22 Jun 2015, p. 52, lns 12-13.

<sup>3696</sup> E3/1136, ‘Rice Consumption Plan for the Military in 1976’, 4 Jan 1976.

<sup>3697</sup> E3/807, All Divisions Meeting, 1 Mar 1977, ERN 00933845.

<sup>3698</sup> E.g. E1/313.1, Chan Morn, T. 10 Jun 2015, p. 76, ln. 24 to p. 77, ln. 5; E1/508.1, Nuon Trech, T. 7 Dec 2016, p. 6, lns 15-20; E1/319.1, Sem Hoeurn, T. 22 Jun 2015, p. 51, lns 18-22; E1/321.1, Chum Samoeurn, T. 24 Jun 2015, p. 54, lns 7-11.

<sup>3699</sup> E1/323.1, Sen Sophon, T. 27 Jul 2015, p. 43, lns 5-9.

<sup>3700</sup> E1/324.1, Mam Soeurn, T. 28 Jul 2015, p. 75, ln. 2; E1/329.1, Lat Suoy, T. 12 Aug 2015, p. 21, lns 8-10; E1/323.1, Sen Sophon, T. 27 Jul 2015, p. 66, lns 10-13, on the CPK's efforts to import new supplies for workers see *supra* Chapter 6-V-C-2 living conditions at the First January Dam.

<sup>3701</sup> E1/333.1, Tak Boy, T. 19 Aug 2015, p. 54, lns 6-7 and lns 17-18; E1/331.1, Chhum Seng, T. 17 Aug 2015, p. 57, ln. 25 to p. 58, lns 1-3.

<sup>3702</sup> E1/335.1, Chhum Huy, T. 24 Aug 2015, p. 16, lns 21-22.

<sup>3703</sup> E1/331.1, Chhum Seng, T. 17 Aug 2015, p. 58, lns 7-8; E1/336.1, Nhip Horl, T. 25 Aug 2015, p. 17, lns 3-4.

such as fish, on their own.<sup>3704</sup> Witnesses testified that medics were on standby on the worksite to treat sick people,<sup>3705</sup> and to take care of the wounded workers.<sup>3706</sup> Sick people were treated with traditional medicines,<sup>3707</sup> and one witness testified that “modern medicines” were also available and provided to workers to “boost their health”.<sup>3708</sup> Furthermore, workers who were seriously sick were referred to the nearby hospital.<sup>3709</sup>

1092. Evidence shows that some workers died from malaria.<sup>3710</sup> However, this unfortunately was not unusual at the time and it remains relatively common in Cambodia nowadays. DK authorities did fight to eradicate malaria by all means. Actions were in particular taken in Sector 5 of the Northwest Zone, where the Trapeang Thma Dam was located and a April 1977 report stated that “[p]eople are also given injections and anti-malaria sprays are applied throughout the zone.”<sup>3711</sup> Further evidence shows that anti-malaria medicines were imported from China to treat people.<sup>3712</sup> However, mosquito-borne diseases are inherently difficult to avoid when immunisations are not available: witness, for instance, the recent difficulties in containing the Zika virus epidemic. In any event, as with the overall evidence related to the Trapeang Thma Dam, evidence regarding living conditions is anecdotal and shows key discrepancies from one unit to another. Such evidence cannot establish a systematic pattern in that regard.

1093. Finally, there was no discrimination. ‘New’ and ‘base people’ were given the same food<sup>3713</sup> and the same medicines<sup>3714</sup> and were subjected to the same working conditions.<sup>3715</sup> Cadres and chiefs of units all testified that they did not receive any instruction to discriminate against ‘new people.’<sup>3716</sup> Finally, Chhit Yoeuk, chief of a district mobile unit and Ta Val’s

<sup>3704</sup> E1/336.1, Nhip Horl, T. 25 Aug 2015, p. 18, lns 6-7.

<sup>3705</sup> E1/327.1, Kan Thorl, T. 10 Aug 2015, p. 59, lns 6-7; E1/329.1, Lat Suoy, T. 12 Aug 2015, p. 49, lns 15-16; E1/331.1, Chhum Seng, T. 17 Aug 2015, p. 49, ln. 5; E1/333.1, Tak Boy, T. 19 Aug 2015, p. 54, ln. 16; E1/335.1, Chhuy Huy, T. 24 Aug 2015, p. 19, lns 18-19.

<sup>3706</sup> E1/323.1, Sen Sophon, T. 27 Jul 2015, p. 68, lns 23-25.

<sup>3707</sup> E1/327.1, Kan Thorl, T. 10 Aug 2015, p. 59, lns 4-5; E1/323.1, Sen Sophon, T. 27 Jul 2015, p. 68, lns 7-8. E1/329.1, Lat Suoy, T. 12 Aug 2015, p. 49, ln. 17; E1/331.1, Chhum Seng, T. 17 Aug 2015, p. 62, lns 10-12.

<sup>3708</sup> E1/356.1, Mun Mot (2-TCW-996), T. 26 Oct 2015, p. 33, lns 11-12; *see also supra* Chapter 6-V-C-2 on the living conditions at the 1<sup>st</sup> January Dam and the legitimacy for the CPK to develop traditional medicine.

<sup>3709</sup> E1/328.1, Kan Thorl, T. 11 Aug 2015, p. 12, lns 17-19.

<sup>3710</sup> E1/329.1, Lat Suoy, T. 12 Aug 2015, p. 21, lns 19 to 21.

<sup>3711</sup> E3/160, DC-Cam Collection of DK Internal Communications, 1975-1978, ERN 00143455.

<sup>3712</sup> *See* E3/9648, Statistics on Medicines Imported From China, 1-14 Aug 1976, ERN 00233531; E3/1765, Examination of the Implementation of Policy Line, ERN 00523591; E3/2941, Commerce Ministry Report, 15 Jan 1978, ERN 00583816.

<sup>3713</sup> E1/328.1, Kan Thorl, T. 11 Aug 2015, p. 29, lns 7-8; E1/356.1, Mun Mot (2-TCW-996), T. 26 Oct 2015, p. 63, lns 8-9.

<sup>3714</sup> E1/356.1, Mun Mot (2-TCW-996), T. 26 Oct 2015, p. 63, lns 10-15.

<sup>3715</sup> E1/328.1, Kan Thorl, T. 11 Aug 2015, p.29, lns 2-4; E1/333.1, Tak Buy, T. 19 Aug 2015, p.41, ln. 25 to p.42, ln. 10; E1/356.1, Mun Mot (2-TCW-996), T. 26 Oct 2015, p. 62, ln. 23 to p. 63, ln. 4.

<sup>3716</sup> E1/328.1, Kan Thorl, T. 11 Aug 2015, p. 29, lns 10-12; E1/356.1, Mun Mot (2-TCW-996), T. 26 Oct 2015, p. 62, ln. 23 to p. 63, ln. 4.

assistant for a few months,<sup>3717</sup> confirmed that, indeed, “there was no distinction between the Old and the New People”.<sup>3718</sup>

### **3. Conclusion on Working and Living Conditions: People Were Not Enslaved**

1094. Again, the totality of the evidence, when looked at objectively and without the lenses of the Manichean narrative, shows that the existence of an enslavement policy cannot be established beyond reasonable doubt. On the whole, allegations of an imposition of harsh working and living conditions, and discrimination are unfounded. In fact, it was the CPK policy that all working people were treated on equal footing, received the same rations, and worked the same working hours. While there was not an abundance of food, this was a product of the difficult situation the whole country was at the time. Food rations were organised such that people had equal share of the limited resources. People were allowed to fish and find supplementary food for their rations. There were medical services available. People could seek permission to leave the cooperative or worksite to visit their home village. However, despite the clear and correct CPK policy, it was the lower-level cadres – the unit chiefs and battalion commanders – who had the discretion to set the working and living conditions of working people under their immediate control. As such, variations in the conditions experienced cannot be considered reflective of general policy and cannot be attributed to the CPK or to Nuon Chea as one of the alleged members of the JCE. Finally, even if it were appropriate to extrapolate from any of the crime sites conclusions about DK’s conditions nationwide, the variation of situations demonstrated by the evidence precludes the inference of a nationwide policy.<sup>3719</sup>

#### **D. THE SECURITY MEASURES IN PLACE IN THE COOPERATIVES AND WORKSITES WERE LEGITIMATE**

1095. While there were legitimate and lawful measures to discipline violators of rules, allegations of mistreatment, of killings, and of disappearances are mostly exaggerations that have been undermined by testimonies in court. Additionally, where there are reports of mistreatment, this was due to local authorities’ contravening Party policy and not in accordance to official orders. Hence, this Part steps through the unfounded allegations of punishment, disappearances, and killings, where relevant.

<sup>3717</sup> E1/330.1, Chhit Yoeuk, T. 13 Aug 2015, p. 30, ln. 13 to p. 31, ln. 21 and p. 38, lns 1-9.

<sup>3718</sup> E1/330.1, Chhit Yoeuk, T. 13 Aug 2015, p. 92, lns 17-24.

<sup>3719</sup> See *supra*, Chapter 3-II, on the discussion of common means and “pattern evidence”.

## 1. Preliminary Matter: The Specific Situation of Trapeang Thma Dam who was the Theatre of Acts of Sabotage

1096. As noted above, the Trapeang Thma Dam Worksite was under the authority of Ruos Nhim – a key Vietnamese collaborator in attempted *coups d'état* to overthrow the CPK and legitimate DK government. In accordance with this treasonous plot, despite the legitimate purpose of the Trapeang Thma Dam, Ruos Nhim and his subordinates asked local cadres to pursue activities of sabotage in order to incite people to rebel and to turn against the CPK.<sup>3720</sup>

1097. Evidence shows that such extensive treasonous activities were going on in the Trapeang Thma Dam area. Lat Suoy, who worked as a guard at the dam, described how Northwest Zone forces had hidden weapons in the forest in anticipation of the arrival of the forces from the Southwest.<sup>3721</sup> Moreover, a May 1977 report from Sector 5 stated that rice and salt intended for the people were “hidden” by “enemies” in places such as “Phnom Srok”, where the Trapeang Thma Dam is located, and “Sisophon District” a neighbouring district in Sector 5.<sup>3722</sup> Further evidence also shows that medicines intended for distribution to the people were withheld by treasonous cadres in the Northwest Zone.<sup>3723</sup>

1098. Witnesses also confirmed that Ta Val, Sector 5 mobile unit chief and overall person in charge of the worksite, was personally involved in treason. Mobile unit chief Mun Mot (2-TCW-996) testified that he attended a meeting led by Ta Val to discuss plans for rebellion. Ta Val announced to members of the Dam’s mobile units that they were “all captains”, presumably meaning that they could lead the traitorous forces.<sup>3724</sup> During this same meeting, Ta Val distributed scarves, white shirts, and nice sandals donated by Sao Phim, Secretary of the East Zone to the assembled mobile unit members,<sup>3725</sup> to encourage people to join his forces.

1099. The CPK defence and security policy made it clear that only the Zone Standing Committee, the Central Office Committee, or the General Staff had authority in terms of

<sup>3720</sup> See *supra* Chapter 3-VI-A-1-(a), on the Northwest Zone cadres’s efforts to deplete the CPK’s capabilities; Part 3-VI-B-1, on sabotage and subversion’s efforts of the Northwest Zone cadres; Chapter 3-VI-B-2, on stockpiling of food by the Northwest Zone cadres.

<sup>3721</sup> E1/329.1, Lat Suoy, T. 12 Aug 2015, p. 10, Ins 4-8.

<sup>3722</sup> E3/178, Weekly Report of Sector 5 Committee, ERN 00342708.

<sup>3723</sup> E3/659, 1980 Becker Interview with Ieng Thirith, ERN 00182325, see also *supra* Chapter 3-VI-B-1, on sabotage and subversion’s efforts of the Northwest Zone cadres.

<sup>3724</sup> E1/356.1, Mun Mot (2-TCW-996), T. 26 Oct 2015, p. 44, ln. 10 to p. 46, ln. 4; E3/9076, ‘DC-Cam Interview of Mun Mot [2-TCW-996]’, ERN 00731172, See also *supra*, Chapter 3-VI-B-2.

<sup>3725</sup> E1/356.1, Mun Mot (2-TCW-996), T. 26 Oct 2015, p. 57, Ins 3-4; E3/9076, ‘DC-Cam Interview of Mun Mot [2-TCW-996]’, ERN 00731172.



security matters.<sup>3726</sup> However, the evidence shows that Ta Val in contrast gave free rein to unit chiefs at the Trapeang Thma Dam in that regard, and encouraged them to implement harsh punishments.<sup>3727</sup> Witnesses further testified that Ta Val was “cruel”,<sup>3728</sup> “wicked”,<sup>3729</sup> and “agitated”<sup>3730</sup> and that “everyone was happy” when he was removed.<sup>3731</sup>

1100. Indeed, these treasonous activities were eventually uncovered by the CPK, leading to the lawful arrests of Ta Val and other Sector 5 cadres, including Ta Hoeng, Sector 5 secretary;<sup>3732</sup> Ta Rin, Sector 5 secretary after Ta Hoeng;<sup>3733</sup> Ta Cheal, Sector 5 deputy secretary;<sup>3734</sup> Ta Maeng, Preah Netr Preah district secretary;<sup>3735</sup> and Ta Sam At, Preah Netr Preah district deputy secretary.<sup>3736</sup> The Trapeang Thma Dam leadership was subsequently replaced by cadres from Southwest Zone<sup>3737</sup> who were appointed to redress the situation.<sup>3738</sup> As a result, evidence on security at the Trapeang Thma Dam greatly varies from one unit to another. In any event, any alleged crimes discussed were committed by traitorous forces reporting to Ruos Nhim and acting in diametric-opposition to the legitimate and lawful CPK nationwide defence and security policy.

## 2. Evidence about ‘Disappearances’ and Killings is Mere Speculation

### (a) Alleged ‘Disappearances’ and Killings in Tram Kok Cooperatives

1101. The Closing Order’s allegations *vis-à-vis* security in the Tram Kok Cooperatives have largely been addressed in Chapter 4 regarding Kraing Ta Chan, the re-education and detention

<sup>3726</sup> E3/12, Central Committee Decisions, 30 Mar 1976, ERN 00182809: “The right to smash inside and outside the ranks [...] If in the base framework, to be decided by the Zone Standing Committee. Surrounding the Center Office, to be decided by the Central Office Committee. Independent Sectors, to be decided by the Standing Committee, The Center Military, to be decided by the General Staff.”

<sup>3727</sup> See E3/12, Central Committee Decisions, 30 Mar 1976, ERN 00182809: “The right to smash inside and outside the ranks [...] If in the base framework, to be decided by the Zone Standing Committee. Surrounding the Center Office, to be decided by the Central Office Committee. Independent Sectors, to be decided by the Standing Committee, The Center Military, to be decided by the General Staff”; E1/330.1, Chhit Yeouk, T.13 Aug 2015, p. 94, lns 12-16; see also *supra* Chapter 4-II, on the CPK’s national defence and security policy.

<sup>3728</sup> E1/333.1, Tak Boy, T. 19 Aug 2015, p. 70, ln. 7; E1/360.1, Pan Chhuong (2-TCW-918), T. 1 Dec 2015, p. 77, ln. 18.

<sup>3729</sup> E1/333.1, Tak Boy, T. 19 Aug 2015, p. 70, ln. 7.

<sup>3730</sup> E1/360.1, Pan Chhuong (2-TCW-918), T. 1 Dec 2015, p. 77, ln. 18.

<sup>3731</sup> E1/332.1, Chhum Seng, T. 18 Aug 2015, p. 51, lns 14-18.

<sup>3732</sup> E1/330.1, Chhit Yoeuk, T. 13 Aug 2015, p. 58, lns 1-14.

<sup>3733</sup> E1/330.1, Chhit Yoeuk, T. 13 Aug 2015, p. 55, lns 13-15.

<sup>3734</sup> E1/330.1, Chhit Yoeuk, T. 13 Aug 2015, p. 59, lns 23-25 to p. 60 ln. 1.

<sup>3735</sup> E1/328.1, Lat Suoy, T. 11 Aug 2015, p. 87, lns 1-5.

<sup>3736</sup> E1/330.1, Chhit Yoeuk, T. 13 Aug 2015, p. 59, lns 23-25 to p. 60 ln. 1.

<sup>3737</sup> E1/324.1, Mam Soeurm, T. 28 Jul 2015, p. 83, lns 9-18; E1/327.1, Kan Thorl, T. 10 Aug 2015, p. 70, lns 14-16; E1/331.1, Chhit Yoeuk, T. 17 Aug 2015, p. 11, lns 4-9.

<sup>3738</sup> See *supra*, Chapter 3-VI-B-1, on sabotage and subversion by the Northwest Zone cadres.

centre for the District.<sup>3739</sup> Thus, this Part addresses the only two remaining additional matters. The first is the Closing Order's vague allegations as to killing within the cooperatives, noting people's general fear of being killed<sup>3740</sup> and claiming that people "disappeared" or were "smashed" for their disobedience.<sup>3741</sup> However, the live evidence is mixed and thus insufficient to prove these allegations beyond reasonable doubt.<sup>3742</sup> The second, discussed later in this Part, is alleged acts of torture.

**(b) Alleged 'Disappearances' and Killings at the 1<sup>st</sup> January Dam Worksite**

1102. There is no credible evidence that any of the alleged 'disappearances' at the 1<sup>st</sup> January Dam constituted illegal deprivation of liberty involving the DK authorities, nor is there evidence that the officials refused to acknowledge the deprivation of liberty or intentionally concealed the fate or whereabouts of the 'disappeared' individuals. For instance, some witnesses or civil parties said in court that people 'disappeared' after being called to study sessions, or being reassigned to other tasks in other locations, or being hospitalised.<sup>3743</sup> There is no evidence that these official reasons for their absence from the worksite were untrue, especially given the evidence that there was frequent rotation and transfer of work forces and hospitalisation of ill or injured people.<sup>3744</sup> Lastly, the Defence recalls the Supreme Court Chamber's finding that the allegation of 'disappearance', even if proven, is insufficient to prove that killing occurred.<sup>3745</sup>

1103. Further, the evidence is insufficient to prove beyond reasonable doubt that any alleged killings of people who worked on the construction site took place. It is further worth noting that former zone secretary Ke Pauk's son Ke Pick Vannak – who was also Ke Pauk's messenger and who often visited the 1<sup>st</sup> January Dam worksite – told the Co-Investigating Judges that he never saw or heard of any arrest or killing of people working on the construction site.<sup>3746</sup> As already stated above, there is insufficient evidence linking Baray Choan Dek Pagoda to 1<sup>st</sup> January Dam and this site is therefore outside of the scope of this discussion.<sup>3747</sup>

<sup>3739</sup> See *supra*, Chapter 4-V-B-1-(a) and 2-(a), on the factual and legal basis for detention Kraing Ta Chan.

<sup>3740</sup> **D427**, Closing Order, paras 311, 312.

<sup>3741</sup> **D427**, Closing Order, paras 311, 316.

<sup>3742</sup> **E1/193.1**, Ieng Phan, T. 20 May 2015, p. 69, lns 19-20, p. 69, lns 22-24, p. 70, lns 15-23; **E1/215.1**, Pech Chim, T. 1 Jul 2013, p. 60, lns 4-7, p. 78, lns 10-14; **E1/291.1**, Pech Chim, T. 23 Apr 2015, p. 56, ln. 16 to p. 57, ln. 1, p. 62, lns 21-25, p. 75, ln. 6.

<sup>3743</sup> See e.g. **E1/310.1**, Sou Soeurm, T. 4 Jun 2015, p. 26, ln. 8 to p. 27, ln. 6; **E1/308.1**, Seang Sovida, T. 2 Jun 2015, p. 38, lns 11-20, p. 50, lns 10-20; **E1/307.1**, Un Rann, T. 28 May 2015, p. 11, lns 12-21.

<sup>3744</sup> See *supra*, Chapter 6-V-C-2, on working and living conditions at the 1<sup>st</sup> January Dam.

<sup>3745</sup> **F36**, Case 002/01 Appeals Judgement, paras 472, 482-83.

<sup>3746</sup> **E3/35**, 'WRI of Ke Pick Vannak', ERN 00346150.

<sup>3747</sup> See *supra*, Chapter 6-VI-A-2.

(c) *Alleged ‘Disappearances’ and Killings at the Kampong Chhnang Airfield Construction Site*

1104. The evidence does not establish that any of the alleged ‘disappearances’ was an illegal deprivation of liberty, that the DK officials were involved in the alleged ‘disappearance’, or that they intentionally concealed information on the whereabouts of soldiers allegedly ‘disappeared’. Some witnesses claimed that soldiers – particularly soldiers from units other than their own – ‘disappeared’, without providing detailed evidence on the circumstances of such alleged ‘disappearance’.<sup>3748</sup> In the absence of evidence on such circumstances, it cannot be established beyond reasonable doubt that the soldiers in the same unit as the ‘disappeared’ soldiers were not informed of their whereabouts. In fact, the evidence shows that soldiers were often informed when members of their own unit were arrested<sup>3749</sup> or reassigned to work in another location.<sup>3750</sup> Although some witnesses speculate that those who were purportedly reassigned were in fact arrested,<sup>3751</sup> such personal speculation is unsupported by other evidence. Thus their evidence does not disprove the official reason that the soldiers were indeed sent to attend training or reassigned to other tasks.<sup>3752</sup>

1105. Therefore, in the absence of sufficient evidence to the contrary, it cannot be established beyond reasonable doubt that the DK authorities intentionally concealed information of ‘disappeared’ individuals by providing false excuses such as that they were sent for training or to other locations.<sup>3753</sup> The evidence also shows that some of the ‘disappearance’ may have been in fact the soldiers’ military desertion from their duties at the construction site.<sup>3754</sup> In addition, and as already noted immediately above, the Defence recalls that the allegation of ‘disappearance’, even if proven, is insufficient to prove that killing occurred.<sup>3755</sup>

<sup>3748</sup> See e.g. **E1/320.1**, Him Han, T. 23 Jun 2015, p. 73, lns 11-12; **E1/312.1**, Chan Morn, T. 9 Jun 2015, p. 37, lns 16-21; **E1/313.1**, Chan Morn, T. 10 Jun 2015, p. 33, lns 8-12.

<sup>3749</sup> See, **E1/319.1**, Sem Hoern, T. 22 Jun 2015, p. 12-22; **E1/315.1**, Keo Loeur, T. 12 Jun 2015, p. 16, lns 19-22.

<sup>3750</sup> See e.g. **E1/325.1**, Khin Vat, T. 29 Jul 2015, p. 64, lns 20-22, p. 66, ln. 25 to p. 67, ln. 5; **E1/319.1**, Sem Hoern, T. 22 Jun 2015, p. 51, lns 11-14; **E1/508.1**, Nuon Trech, T. 7 Dec 2016, p. 19, ln.25 to p. 20, ln. 7.

<sup>3751</sup> **E1/325.1**, Khin Vat, T. 29 Jul 2015, p. 64, lns 20-22, p. 66, ln. 25 to p. 67, ln. 5.

<sup>3752</sup> See e.g. **E1/315.1**, Keo Loeur, T. 12 Jun 2015, p. 12, lns 12-21, p. 22, ln. 23 to p. 23, ln. 4 (After working at the airfield for two months, Keo Loeur was selected to attend training of terrain surveying techniques in Phnom Penh for three months. After the training, he was reassigned to work in the survey section at the airfield.); **E1/318.1**, Kong Siek, T. 17 Jun 2015, p. 72, lns 1-8 (Kong Siek’s unit was transferred back to Division 450 after a few months’ work at the airfield).

<sup>3753</sup> **D427**, Closing Order, para. 1474 (“Aside from withholding information, the authorities provided evidently false reasons to justify the absence of those who disappeared, stating for example that they had been [...] sent to ‘study’ [...]”).

<sup>3754</sup> **E3/1094**, Rep. from M-401, 4 Aug 1978, ERN 00143618-19.

<sup>3755</sup> **F36**, Case 002/01 Appeals Judgement, paras 472, 482-83.

1106. Regarding allegations of killing, no witnesses or civil parties witnessed any killings at the Kampong Chhnang Airfield Construction Site. Most claimed that they “would be killed” if certain circumstance had occurred. Only two alleged that there were killing sites where soldiers from the airfield were taken to be killed. However, their allegations are unsubstantiated. Sem Hourn speculated that a place about 500 metres west of the airfield was a killing site simply because the soldiers were prohibited from going there.<sup>3756</sup> Chan Morn said that he suspected that soldiers were taken by trucks to be killed at night at a different location, namely about three kilometres northwest of the airfield.<sup>3757</sup> He also said that, from his sleeping area which was about 180 metres from the said location, he heard the sound of the truck and the sound of screaming, and that he smelt bad odour near that location afterwards.<sup>3758</sup> However, he admitted that it was too dark to see, and that he was not sure if the screaming was the sound of humans or that of animals, which were often hunted in this area.<sup>3759</sup> In any event, during the investigations, no sign of pits of graves with human remains were detected in the location identified by Chan Morn.<sup>3760</sup> Apart from that location, the Co-Investigators were also unable to discover any mass graves in the vicinity of the airfield.<sup>3761</sup> The evidence, therefore, is insufficient to prove that any soldiers from the construction site were killed as alleged.

**(d) *Alleged ‘Disappearances’ and Killings at the Trapeang Thma Dam Worksite***

**(i) Alleged ‘Disappearances’**

1107. The Closing Order charges Nuon Chea with enforced disappearance for the alleged ‘disappearance’ of workers, “especially ‘new people’”.<sup>3762</sup> It further alleges that “people would be taken for execution on a nightly basis in groups ranging from two or three up to 15 to 20 people at once. None of the arrestees were ever seen returning.”<sup>3763</sup> Once again, as with all evidence regarding Trapeang Thma Dam, however, evidence elicited at trial was vague and contradictory. Witnesses’ testimonies are anecdotal and not representative of the situation on the whole dam. When there is evidence of possible arrests or ‘disappearance’, those were isolated incidents violating the CPK policy and do not support a systematic pattern of conduct.

<sup>3756</sup> E1/319.1, Sem Hourn, T. 22 Jun 2015, p. 38, ln. 10 to p. 39, ln. 16.

<sup>3757</sup> E1/312.1, Chan Morn, T. 9 Jun 2015, p. 40, ln. 2 to p. 41, ln. 16; E3/8043, ‘Site Identification Report: Kampong Chhnang Airfield’, ERN 00436946.

<sup>3758</sup> E1/312.1, Chan Morn, T. 9 Jun 2015, p. 40, ln. 2 to p. 41, ln. 16, p. 43, ln. 22 to p. 44, ln. 8.

<sup>3759</sup> E1/313.1, Chan Morn, T. 10 Jun 2015, p. 32, lns 5-12.

<sup>3760</sup> E3/8043, ‘Site Identification Report: Kampong Chhnang Airfield’, ERN 00436946.

<sup>3761</sup> E3/8043, ‘Site Identification Report: Kampong Chhnang Airfield’, ERN 00436947.

<sup>3762</sup> D427, Closing Order, para. 346.

<sup>3763</sup> D427, Closing Order, para. 348.

1108. Many witnesses stated that they did not witness any arrest or ‘disappearances’.<sup>3764</sup> Some witnesses only heard from others about alleged ‘disappearances’ and therefore provided hearsay evidence lacking of probative value.<sup>3765</sup> Finally, other witnesses discussed some alleged ‘disappearances’ without explaining how they learnt about it, or without providing any details as to the identity of the persons who allegedly disappeared.<sup>3766</sup> Their evidence is marginal and therefore insufficient to establish beyond reasonable doubt the crime of enforced ‘disappearance’. Evidence that arrests happened at the Trapeang Thma Dam is similarly contradictory, vague and unreliable. Only one witness provided first-hand testimony about an alleged arrest. She claimed that she saw from a distance the arrest of 15-20 people at night.<sup>3767</sup> However, she did not provide any details either on the identity of the persons allegedly arrested or on the persons who allegedly conducted these arrests. Therefore, her evidence is insufficient to establish that these alleged arrests were conducted following orders of CPK cadres. Similarly, her evidence does not make it possible to establish the reasons leading to these alleged arrests and is therefore insufficient to conclude beyond reasonable doubt that they were unlawful.

1109. Other evidence in relation to alleged arrests was provided by witnesses who speculated after noticing that one person was not working at his former workplace anymore.<sup>3768</sup> However, as stated above, many mobile units were involved in the Trapeang Thma Dam construction, and some workers from district and cooperative mobile units were assigned to work there on an *ad hoc* basis, for a few weeks only, before being reassigned to another site.<sup>3769</sup> Since workers were rotated, it is very much possible that some people were not seen again at their previous workplace. Tak Boy, chief of a 30 members platoon at the dam,<sup>3770</sup> confirmed that “members were removed from one particular unit and placed in another unit”.<sup>3771</sup> Thus, without further details, the fact that certain workers were no longer seen at their previous workplace does not establish beyond reasonable doubt that enforced ‘disappearances’ or arbitrary arrests occurred.

<sup>3764</sup> E1/328.1, Kan Thorl, T. 11 Aug 2015, p. 4, ln 3; E1/333.1, Tak Boy, T. 19 Aug 2015, p. 57, ln. 7, p. 78, ln. 13; E1/336.1, Nhiep Horl, T. 25 Aug 2015, p. 40, lns 5-8; E1/340.1, Mean Loeuy, T. 2 Sep 2015, p. 78, lns 17-19; E1/360.1, Pan Chhuong (2-TCW-918), T. 1 Dec 2015, p. 64, lns 5-12.

<sup>3765</sup> E1/324.1, Mam Soeurm, T. 28 Jul 2015, p. 68, lns 21-25; E1/335.1, Chhuy Huy, T. 24 Aug 2015, p. 32, lns 10-16.

<sup>3766</sup> E.g.: E1/323.1, Sen Sophon, T. 27 Jul 2015, p. 40, lns 21-23, p. 43, lns 20-24; E1/330.1, Chhit Yoeuk, T. 13 Aug 2015, p. 82, lns 8-9, p. 84, lns 3-5; E1/340.1, Mean Loeuy, T. 2 Sep 2015, p. 61, lns 21-23 and p. 62, lns 2-7; E1/352.1, Sot Sophal, T. 30 Sep 2015, p. 8, lns 8-12.

<sup>3767</sup> E1/334.1, Yi Laisaov, T. 20 Aug 2015, p. 83, lns 1-23.

<sup>3768</sup> E1/324.1, Mam Soeurm, T. 28 Jul 2015, p. 55, lns 21-25 to p. 56, lns 1-5; E1/330.1, Chhit Yoeuk, T. 13 Aug 2015, p. 60, lns 14-22; E1/332.1, Chhum Seng, T. 18 Aug 2015, p. 7, lns 24-25.

<sup>3769</sup> See *supra* Chapter 6-V-A-4 on the structure and personnel at the Trapeang Thma Dam worksite.

<sup>3770</sup> E1/333.1, Tak Boy, T. 19 Aug 2015, p. 41, lns 8-20.

<sup>3771</sup> E1/333.1, Tak Boy, T. 19 Aug 2015, p. 79, lns 14-15.

(ii) Alleged Killings

1110. According to the Closing Order, “[m]any [people] were killed by being beaten and thrown into the reservoir basin. Others would be made to dig their own graves and then clubbed to death.”<sup>3772</sup> Once again, however, the live evidence contradicts these allegations. The majority of witnesses testified that they did not see any executions at the Trapeang Thma Dam.<sup>3773</sup> Sot Sophal is the only witness who provided first-hand testimony on the alleged execution of two people at the Trapeang Thma Dam.<sup>3774</sup> However, he was not able to provide any details on the exact identity of the person who conducted those killings, or on the identity of the alleged victims and his evidence is not corroborated by any other testimony. Therefore, his anecdotal evidence cannot serve as a basis to establish any policy. Chhum Seng testified about the alleged killing of 11 persons at the Trapeang Thma Dam. However, he did not witness any killing. Indeed, Chhum Seng only witnessed 11 persons being “taken away” and stated that he was tasked, the day after this event, to “flatten the place” where 11 bodies were buried.<sup>3775</sup> As Sot Sophal, Chhum Seng was not able to provide the identity of either the persons who were allegedly killed or the persons who allegedly conducted the killings. His testimony is not corroborated by any other witnesses either. In any event, Chhum Seng confirmed that Ta Val was the one who ordered the alleged killing of those 11 persons,<sup>3776</sup> and further asserted that he and the other unit chiefs have been granted the “right to kill” their subordinates by Ta Val.<sup>3777</sup> If it even can be accepted that this incident occurred, at best it can be taken as an isolated incident, which is the exclusive result of Ta Val’s instructions in violation of the CPK policy.

1111. The remaining evidence related to alleged killings at the Trapeang Thma Dam amounts to mere hearsay<sup>3778</sup> or pure speculation.<sup>3779</sup> Demonstrating the power of Manichean ‘accepted truths’, witnesses were often quick to conclude that someone was killed, after having noticed only one’s ‘disappearance’ and having no evidence to substantiate the conclusion of killing.<sup>3780</sup>

<sup>3772</sup> **D427**, Closing Order, para. 349.

<sup>3773</sup> See e.g. **E1/340.1**, Mean Loey, T. 2 Sep 2015, p. 78, lns 11-13; **E1/356.1**, Mun Mot (2-TCW-996), T. 26 Oct 2015, p. 41, ln. 18-21.

<sup>3774</sup> **E1/352.1**, Sot Sophal, T. 30 Sep 2015, p. 12, ln 20 to p. 15 ln. 3.

<sup>3775</sup> **E1/332.1**, Chhum Seng, T. 18 Aug 2015, p. 70, lns 15-25.

<sup>3776</sup> **E1/332.1**, Chhum Seng, T. 18 Aug 2015, p. 71, lns 15-17.

<sup>3777</sup> **E1/332.1**, Chhum Seng, T. 18 Aug 2015, p. 69, lns 13-24.

<sup>3778</sup> **E1/334.1**, Tak Buy, T. 20 Aug 2015, p. 9, lns 13-15.

<sup>3779</sup> See e.g. **E1/334.1**, Yi Laisauv, T. 20 Aug 2015, p. 74, lns 21-24; **E1/334.1**, Tak Boy, T. 20 Aug 2015, p. 12, lns 3-7; **E1/335.1**, Chhuy Huy, T. 24 Aug 2015, p. 37, lns 13-14.

<sup>3780</sup> **E1/323.1**, Sen Sophon, T. 27 Jul 2015, p. 74, lns 24-25, p. 75, ln. 3; **E1/340.1**, Sam Sak, T. 2 Sep 2015, p. 14, lns 20-25; see also *supra* Chapter 6-V-D-3 on alleged ‘disappearances’ at the Trapeang Thma Dam and Chapter 2-II-A-4, on the suggestive power of Manichean ‘accepted truths’ over witnesses, civil parties, and ‘experts’.

In that respect, the Defence recalls the Supreme Court Chamber's finding that the allegation of 'disappearance', even if proven, is insufficient to prove that killing occurred.<sup>3781</sup>

1112. Most fancifully of all, the Closing Order highlights a clear Manichean 'accepted truth' in alleging that "[w]itnesses report of pregnant women being beaten, killed and thrown into the reservoir basin, as the CPK cadre would say that "the dam would hold firmly only if pregnant women were killed and placed at the sluice gate".<sup>3782</sup> Questioned about these allegations, Chhit Yoeuk, chief of a district mobile unit and Ta Val's assistant for a few months,<sup>3783</sup> testified that he never heard about this.<sup>3784</sup> In fact, he never saw any pregnant women on the worksite.<sup>3785</sup> This ridiculous allegation is based on the written statement of one witness who did not provide the source of his knowledge<sup>3786</sup> and did not testify at trial, and on the account of Yi Laisauv. While the latter alleged witnessed the killing of a pregnant woman,<sup>3787</sup> she did not provide any further details: there is no evidence on the identity of the perpetrators, or on any order they may have acted upon. If it even can be accepted that this incident occurred, at best it can be taken as an isolated incident which in no way illustrates a policy and which cannot be linked to Nuon Chea or any alleged JCE member. This is even less likely considering that respect and protection of women were a strong Party line of which violation was severely repressed.<sup>3788</sup>

### 3. There Was No Torture or Inhumane Treatment at the Cooperatives and Worksites

#### (a) *Alleged Torture in the Tram Kok Cooperatives*

1113. The Closing Order further alleges that people in the Tram Kok Cooperatives would be tortured with 'hot' or 'cold' methods during interrogations.<sup>3789</sup> It relies exclusively on the unreliable so-called 'Tram Kok District Records' to substantiate this, which falls well short of a finding beyond reasonable doubt.<sup>3790</sup> Moreover, none of the live evidence – primarily from civil parties – provided a sufficient alternative evidentiary basis to establish that torture at the

<sup>3781</sup> **F36**, Case 002/01 Appeals Judgement, paras 472, 482-83.

<sup>3782</sup> **D427**, Closing Order, para. 349.

<sup>3783</sup> **E1/330.1**, Chhit Yoeuk, T. 13 Aug 2015, p. 30, ln. 13 to p. 31, ln. 21, p. 38, lns 1-9.

<sup>3784</sup> **E1/330.1**, Chhit Yoeuk, T.13 Aug 2015, p. 86, ln. 24 to p. 87, ln. 5, p. 88, lns 3-7 and p. 89, lns 4-8.

<sup>3785</sup> **E1/330.1**, Chhit Yoeuk, T. 13 Aug 2015, 85, ln. 4 to p. 86, ln. 23.

<sup>3786</sup> **E3/7799**, 'WRI of Liv Saleang', ERN 00277833.

<sup>3787</sup> **E1/334.1**, Yi Laisauv, T. 20 Aug 2015, p. 74, lns 21-24.

<sup>3788</sup> *E.g.*: **E3/765**, Youth, 10 Oct 1978, ERN 00539994; *see also supra*, Chapter 5-I-C-2-(c), on the repression of sexual offences against women.

<sup>3789</sup> **D427**, Closing Order, para. 317.

<sup>3790</sup> *See supra*, Chapter 4-IV-F-1, regarding the inherently low probative value of the 'Tram Kok District Records'.

Tram Kok Cooperatives occurred. It either referred simply to ‘*tearunakamm*’,<sup>3791</sup> rendering it unclear if the method amounted to torture under international law; was interpreted in English as referring to “torture” when the original Khmer testimony made no mention of it;<sup>3792</sup> was multiple hearsay;<sup>3793</sup> was speculative;<sup>3794</sup> or was possibly outside the scope.<sup>3795</sup> Only one civil party, Thann Thim, described in some detail being beaten.<sup>3796</sup> However, even if this occurred, there was no evidence that he was beaten pursuant to a policy, and he only identified subdistrict militia as being involved. Thus, in light of the evidence described in Chapter 4-II-D-2, Chapter 6-IV-B-4-(d), and Chapter 7-IV-E on local deviation from policy, it could equally be inferred that he was beaten by local militia on their own initiative. In addition, as a civil party, his account has inherently limited probative value, and in any case, it is uncorroborated.

**(b) *Alleged Physical Punishment at the 1<sup>st</sup> January Dam Worksite***

1114. Only one witness testified about witnessing physical punishment on the worksite: Uth Seng, who said that he saw a unit chief whip some members of his unit on a few occasions, below their knees and with no major injuries ensuing.<sup>3797</sup> However, this isolated case does not show the existence of any general practice,<sup>3798</sup> policy, or instructions from any authority higher than this particular unit chief. Neither is there evidence that any higher authorities had knowledge of such alleged incidents.

1115. Uth Seng also claims that this unit was a “special unit”. However, he never explained how he knew that this was so. It appears that he only assumed so because he heard from his

<sup>3791</sup> E1/263.1, Em Phoeung, T. 16 Feb 2015, p. 23, lns 8-14; E1/252.1, Chou Koemlan, T. 26 Jan 2015, p. 70, ln. 20 to p. 71, ln. 2; E1/286.1, Tak Sann, T. 1 Apr 2015, p. 39, lns 18-22; E1/287.1, Eam Yen, T. 2 Apr 2015, p. 4, lns 4-8, 18-19; E1/283.1, Oem Saroeurn, T. 26 Mar 2015, p. 12, lns 23-25-p. 13, lns 1-9. *See supra*, Chapter 4-V-C-1-(b), on how ‘*tearunakamm*’ can refer to situations well short of crimes against humanity.

<sup>3792</sup> E1/263.1, Em Phoeung, T. 16 Feb 2015, p. 23, lns 8-14 (English: “tortured”); E1/263.1, Em Phoeung, T. 16 Feb 2015, p. 18, lns 6-7 (Khmer internal translation: “mistreated and beat”); E1/252.1, Chou Koemlan, T. 26 Jan 2015, p. 70, ln. 20 to p. 71, ln. 2 (English: “tied up, [...] tortured”); E1/252.1, Chou Koemlan, T. 26 Jan 2015, p. 55, lns 13-18 (Khmer internal translation: “tied up and beaten”); E1/286.1, Tak Sann, T. 1 Apr 2015, p. 39, lns 18-22 (English: “we would be punished”).

<sup>3793</sup> E1/278.1, Riel Son, T. 17 Mar 2015, p. 16, lns 14-20; E1/252.1, Chou Koemlan, T. 26 Jan 2015, p. 70, ln. 20 to p. 71, ln. 2.

<sup>3794</sup> E1/252.1, Chou Koemlan, T. 26 Jan 2015, p. 88, ln. 11 to p. 89, ln. 6.

<sup>3795</sup> E1/263.1, Em Phoeung, T. 16 Feb 2015, p. 23, lns 8-14 (Takeo province); E1/286.1, Eam Yen, T. 1 Apr 2015, p. 59, ln. 16 to p. 60, ln. 14 (unknown location).

<sup>3796</sup> E1/287.1, Thann Thim, T. 2 Apr 2015, p. 28, ln. 4 to p. 30, ln. 24; E1/289.1, Thann Thim, T. 21 Apr 2015, p. 51, lns 12-25.

<sup>3797</sup> E1/308.1, Uth Seng, T. 2 Jun 2015, p. 97, ln. 2 to p. 98, ln. 22.

<sup>3798</sup> Some unit chiefs never mistreated or punished their unit members. Instead they treated them like brothers and sisters. *See e.g.* E1/302.1, Or Ho, T. 20 May 2015, p. 7, lns 14-18, p. 9, lns 13-18, p. 18, lns 14-17; E1/318.1, Yean Lon, T. 17 Jun 2015, p. 25, lns 15-20.



unit chief that there were “special units” established to deter people from being lazy.<sup>3799</sup> He heard that those in “special units” were made to work harder, and he said people were thus afraid of being put in the “special units”.<sup>3800</sup> However, in contrast to Uth Seng’s hearsay evidence and speculations, Or Ho testified that his unit was a “special force” which was used to set a model for the others.<sup>3801</sup> This unit worked harder and for longer hours, and was given more food.<sup>3802</sup> People admired the “special forces” and they worked hard in the hope that they could be put in this unit.<sup>3803</sup> Given that Or Ho was in a “special force” unit, his testimony has much higher probative value than that of Uth Seng who was never in a “special unit” and only based himself on hearsay and speculation. This positive connotation of the “special unit” is also consistent with evidence as to a similar unit at the Trapeang Thma Dam<sup>3804</sup> and similar to “unit 1” at the Tram Kok Cooperatives.<sup>3805</sup> As to Meas Laihour’s testimony that there was a cage in the forest near her village where some individuals from the worksite were detained as a form of punishment,<sup>3806</sup> the Defence notes that another witness Kong Uth who was from the same village testified that she never saw or heard of such cages.<sup>3807</sup> It cannot, therefore, be proven beyond reasonable doubt that such practice existed.

**(c) Alleged Physical Punishment at the Trapeang Thma Dam Worksite**

1116. While the Closing Order suggests that people who did not meet their work quota faced ‘disappearances’ and executions,<sup>3808</sup> the live evidence undermines this general allegation. Usually, workers were simply asked to work longer hours to complete their tasks,<sup>3809</sup> and stronger workers were asked to assist others to achieve their quota.<sup>3810</sup> At the same time, and as noted above, the evidence also shows that Ta Val expressly granted unit chiefs extensive authority in terms of security and discipline in clear contravention of CPK policy. One witness even stated that “chiefs of unit had a right to execute any individual, and the order came from

<sup>3799</sup> E1/308.1, Uth Seng, T. 2 Jun 2015, p. 87, lns 7-9; E1/309.1, Uth Seng, T. 3 Jun 2015, p. 43, lns 14-15, p. 43, ln. 25 to p. 44, ln. 10, p. 44, lns 20-22.

<sup>3800</sup> E1/308.1, Uth Seng, T. 2 Jun 2015, p. 86, lns 18-22

<sup>3801</sup> E1/301.1, Or Ho, T. 19 May 2015, p. 82, lns 1-8 & 19-22

<sup>3802</sup> E1/301.1, Or Ho, T. 19 May 2015, p. 81, lns 19-23, p. 82, lns 4-8 & 14-17.

<sup>3803</sup> E1/301.1, Or Ho, T. 19 May 2015, p. 81, lns 17-23, p. 82, lns 13-14.

<sup>3804</sup> See *infra*, Chapter 6-V-A-1-(d) and 2-(d).

<sup>3805</sup> See *supra*, Chapter 6-V-A-1-(a) and 2-(a).

<sup>3806</sup> E1/305.1, Meas Laihour, T. 26 May 2015, p. 72, ln. 9 to p. 73, ln. 1.

<sup>3807</sup> E1/322.1, Kong Uth, T. 25 Jun 2015, p. 30, ln. 25 to p. 31, ln. 6.

<sup>3808</sup> D427, Closing Order, paras 346-349.

<sup>3809</sup> E1/330.1, Chhit Yoeuk, T. 13 Aug 2015, p. 79, lns 20-22, p. 80, lns 6-7; E1/324.1, Sen Sophon, T. 28 Jul 2015, p. 15, ln. 24 to p. 16, ln. 1; E1/334.1, Tak Boy, T. 20 Aug 2015, p. 38, lns 8-9.

<sup>3810</sup> E1/335.1, Chhuy Huy, T. 24 Aug 2015, p. 62, lns 10-17; E1/327.1, Kan Thorl, T. 10 Aug 2015, p. 78, lns 1-9; E1/336.1, Nhip Horl, T. 25 Aug 2015, p. 15, lns 7-8.

*Ta Val*.”<sup>3811</sup> Thus, to the extent that certain witnesses testified about workers being reprimanded,<sup>3812</sup> invited to attend criticism and self-criticism meetings,<sup>3813</sup> or sent to reeducation<sup>3814</sup> because they did not achieve their tasks, these incidents, even if they happened, were isolated and a result of rogue unit chiefs instructed by *Ta Val* to impose harsh punishments. As already stated, implementing tough conditions was part of the plan designed by Ruos Nhim to stir up discontent among people and turn them against the CPK and towards treason.<sup>3815</sup> Such evidence is insufficient to demonstrate a general policy in any regard.

1117. Finally, the Closing Order alleges that “there were “Special Case Units” where those considered to be avoiding work or of having an “ideological disease” were placed for observation and reeducation.”<sup>3816</sup> As is the case at the 1<sup>st</sup> January Dam,<sup>3817</sup> and similar to “unit 1” at the Tram Kok Cooperatives,<sup>3818</sup> however, the “special unit” was not a place of punishment, rather, special units gathered exceptionally productive workers who were “an exemplary model for the mobile units”.<sup>3819</sup> Only “male and female youths” who were able to carry one cubic metre of dirt in ten trips were selected to join the special unit.<sup>3820</sup> Those workers were referred to as the “absolute force”.<sup>3821</sup> Since the work of special unit members was more demanding, their food rations were increased proportionally.<sup>3822</sup>

## VI. CRIMES CHARGED FOR COOPERATIVES AND WORKSITES

1118. Due to space limitations and the comprehensive discussion of crimes in previous Chapters, this Section adopts those arguments *mutatis mutandis* and focuses on addressing a number of core charges most specific to cooperatives and worksites. The Defence highlights, however, that all crimes charged *vis-à-vis* cooperatives and worksites are crimes against humanity, and, as set out in Chapter 4-VI-G-1, the Co-Prosecutors have failed to establish the necessary chapeau element for all crimes against humanity, namely that there was a

<sup>3811</sup> E1/332.1, Chhum Seng, T. 18 Aug 2015, p. 71, lns 20-22, p. 69, lns 13-24.

<sup>3812</sup> E1/351.1, Sot Sophal, T. 29 Sep 2015, p. 86, ln. 17.

<sup>3813</sup> E1/334.1, Yi Laisauv, T. 20 Aug 2015, p. 42, lns 5-6, *see also* E1/340.1, Sam Sak, T. 2 Sep 2015, p. 25, lns 2-10; E1/340.1, Mean Loey, T. 2 Sep 2015, p. 62, lns 14-15

<sup>3814</sup> E1/340.1, Mean Loey, T. 2 Sep 2015, p. 61, lns 21-23.

<sup>3815</sup> *See supra*, Chapter 6-V-D-4-a, on the treasonous activities led by Ruos Nhim and implemented by *Ta Val* at the Trapeang Thma Dam.

<sup>3816</sup> D427, Closing Order, para. 336.

<sup>3817</sup> *See supra*, Chapter 6-V-D-1.

<sup>3818</sup> *See supra*, Chapter 6-V-C-1.

<sup>3819</sup> E1/328.1, Lat Suoy, T. 11 Aug 2015, p. 82 lns 1-2.

<sup>3820</sup> E1/328.1, Lat Suoy, T. 11 Aug 2015, p. 80 ln. 25 to p. 81, ln. 6.

<sup>3821</sup> E1/328.1, Lat Suoy, T. 11 Aug 2015, p. 82, ln. 11.

<sup>3822</sup> E1/328.1, Lat Suoy, T. 11 Aug 2015, p. 81, lns 23-24; E1/331.1, Chhum Seng, T. 17 Aug 2015, p. 58, ln. 23 to p. 59, ln. 2; E1/324.1, Mam Soeurm, T. 28 Jul 2015, p. 79, lns 13-25, p. 80, lns 1-5.

‘discriminatory’ attack. Therefore, no crime against humanity can be established whatsoever. Even if this chapeau element is satisfied, the evidence shows that none of the charged crimes has been prove beyond reasonable doubt. The discussion below focuses on the charges of enslavement, extermination, attacks on human dignity and political persecution.

#### A. THE CONSTITUTIVE ELEMENTS OF ENSLAVEMENT HAVE NOT BEEN ESTABLISHED

1119. Chapter 4 of this Brief sets out the elements of enslavement.<sup>3823</sup> To reiterate, forced labour, like military conscription, is not, in itself, enslavement. Instead, it must be accompanied with an exercise of supposed property rights over or “similar deprivation of liberty” of the victim.<sup>3824</sup> The requisition of labour is lawful in certain circumstances so this fact alone is insufficient to establish that forced labour occurred.<sup>3825</sup>

1120. The CPK’s cooperatives and worksites cannot be characterised as forced labour. Firstly, the defence of the country was the impetus for the CPK’s decision to build a military airfield.<sup>3826</sup> Military personnel were entrusted to carry out this mission.<sup>3827</sup> Clearly, such construction was not targeted for the social or economic development, but work of a military characteristic, required of military personnel.<sup>3828</sup> Secondly, the requisition of labour from both civilians and soldiers is lawful “in cases of emergency or calamity threatening the life or well-being of the community”<sup>3829</sup> – such as that which the DK faced, as already stated above.<sup>3830</sup> The work required at cooperatives and worksites were not forced labour, rather were lawful – and indeed, critical – means to reconstruct the country and feed the population.<sup>3831</sup>

1121. Furthermore, the working conditions fail to demonstrate the characteristics required for such conditions to constitute enslavement.<sup>3832</sup> As stated in Chapter 4, objective proof of lack of free consent must be shown; the mere subjective opinion of the victims is insufficient.<sup>3833</sup>

<sup>3823</sup> See *supra*, Chapter 4-VI-C.

<sup>3824</sup> ICTY, *Krnjelac* Trial Judgement, para. 359; ICTY, *Kunarac et al.* Trial Judgement, paras 542-43; ICTY *Kunarac et al.* Appeals Judgement, para. 119.

<sup>3825</sup> See *supra*, Chapter 4 for the discussion of the permissible instances of compulsory labour; see also ICTY, *Blaškić* Appeals Judgement, para. 597.

<sup>3826</sup> See *supra*, Chapter 6-V-B-3.

<sup>3827</sup> See *supra*, Chapter 6-V-B-3.

<sup>3828</sup> ICCPR, Art. 8(3)(c)(ii); ILO Convention, Art. 2.2; see also ILO, General Survey on the Abolition of Forced Labour, 1979, paras 25-26, for a discussion of the social and economic nature of labour as falling outside of the definition of ‘purely military characteristic’.

<sup>3829</sup> ICCPR, Art. 8 (3) (c) (iii); see also ECHR, Art. 4(3); ILO Convention Art. 2(2); see *supra* Chapter 4-VI-C.

<sup>3830</sup> See *supra*, Chapter 6-II-A.

<sup>3831</sup> See *supra*, Chapter 6-II.

<sup>3832</sup> ICTY, *Krnjelac* Trial Judgement, para. 359; ICTY, *Kunarac et al.* Trial Judgement, paras 542-43; ICTY *Kunarac et al.* Appeals Judgement, para. 119.

<sup>3833</sup> ICTY, *Krnjelac* Appeals Judgement, para. 195.

Firstly, there was no exercise of ownership over people. Secondly, the allegations of the exercise of total control over the working people are completely misguided. Freedom of movement as a human right is not absolute. There are lawful restrictions to it. For instance, in terms of the military, desertion and absence without leave are punishable by law in any country. As to the civilians, it is also legitimate and common in domestic systems that people may not leave their required working locations during work hours without permission. Evidence on the four sites does not show any restrictions beyond these lawful ones.<sup>3834</sup> Thirdly, food and medication rations were set to ensure that everyone had a fair share of the limited resources available, rather than a measure of control.<sup>3835</sup> Finally, there is no credible evidence of cruel treatment and abuse at any of the four crime sites.<sup>3836</sup>

## **B. EXTERMINATION NEVER TOOK PLACE**

1122. Chapters 4 and 5 discuss the elements of extermination. In sum, it must be proven that the alleged perpetrator caused deaths on a large scale and intended to do so. Firstly, there is no credible forensic or eyewitness evidence of large-scale deaths by killings. Therefore, the Trial Chamber cannot rely only on hearsay, multiple hearsay and speculation, which all have low probative value, for a conviction of extermination.<sup>3837</sup> As stated by the Supreme Court Chamber, each instance of death must be proven beyond a reasonable doubt,<sup>3838</sup> and ‘disappearances’ cannot serve as evidence for a conviction for murder.<sup>3839</sup> Regarding deaths caused by the imposition of conditions of life, in order to establish extermination, it must be proven that such conditions were imposed deliberately to cause death on a large scale.<sup>3840</sup> Conditions beyond anyone’s control cannot be used as evidence of extermination. In actuality, no such nefarious deprivation of necessities occurred at cooperatives and worksites within the scope of Case 002/02. In fact, food, shelter, and medicine were provided as much as possible given the scarcity of resources. Furthermore, there is not enough credible evidence to prove that there were actually deaths on a large scale due to the conditions.<sup>3841</sup>

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<sup>3834</sup> See *supra*, Chapter 6-V-C.

<sup>3835</sup> See *supra*, Chapter 6-V-C.

<sup>3836</sup> See *supra*, Chapter 6-V-D.

<sup>3837</sup> See *supra*, Chapter 6-V-D.

<sup>3838</sup> **F36**, Case 002/01 Appeals Judgement, paras 420, 536, 540.

<sup>3839</sup> **F36**, Case 002/01 Appeals Judgement, paras 472, 482-83.

<sup>3840</sup> See ICTR, *Kayishema and Ruzindana* Trial Judgement, para. 146, for examples of such conditions like the imprisonment of people while depriving them of necessities, or infecting a group with a deadly virus and withholding medical care.

<sup>3841</sup> See *supra*, Chapter 6-V-C.

1123. In any event, Nuon Chea did not have direct intent to cause large-scale deaths, nor knowingly created conditions of life that would lead to a large number of deaths. The situation was already dire prior to the CPK coming into power. The organisation of labour through cooperatives and worksites and setting rations for food and medicine were to ensure the survival of the population, not death.<sup>3842</sup> Indeed, improving the livelihoods of the people was the fundamental basis for all of the CPK's policies,<sup>3843</sup> and the CPK made all possible efforts to raise the standard of living over time.<sup>3844</sup> Furthermore, the CPK policy was actually to increase its population, which clearly counters the allegations that the CPK intended to cause death of the population on a mass scale.<sup>3845</sup>

### C. THERE WAS NO POLITICAL PERSECUTION

1124. Chapter 5 fully sets out the elements of the crime of political persecution. In sum, it must be proven that the conduct amounted to actual discrimination in fact,<sup>3846</sup> and, the alleged perpetrator intended to discriminate on political grounds.<sup>3847</sup> Firstly, there was no evidence of discrimination. All working people were subject to the same conditions.<sup>3848</sup> Any differentiation was not discriminatory but a normal differentiation of duties based on people's skills and abilities.<sup>3849</sup> Secondly, the alleged victims of political persecution at the cooperatives and worksites within the scope of Case 002/02 were not members of a discernible political group,<sup>3850</sup> nor did the CPK consider them as members of a political group.<sup>3851</sup> Thirdly, more specifically at the Kampong Chhnang airfield, the soldiers were doing their military duties rather than being punished for their alleged connection with "bad elements".<sup>3852</sup> In any event, there was no intention to discriminate against these alleged targeted groups on political grounds. Furthermore, as stated above, in communist ideology, the "people" (which includes "new people") were revered.<sup>3853</sup> Again, the CPK policy's legitimate purpose was the improvement of the living standards of the people.

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<sup>3842</sup> See *supra*, Chapter 6-II.

<sup>3843</sup> See *supra*, Chapter 6-II-B-1.

<sup>3844</sup> See *supra*, Chapter 6-II-D.

<sup>3845</sup> See *infra*, Chapter 7-III-B-2.

<sup>3846</sup> ICTY, *Krnojelac* Trial Judgement, para. 431; ICTY, *Tadić* Trial Judgement, para. 710.

<sup>3847</sup> ICTR, *Akayesu* Appeals Judgement, para. 583.

<sup>3848</sup> See *supra*, Chapter 6-V-B.

<sup>3849</sup> See *supra*, Part-6-V-C.

<sup>3850</sup> See **F36**, Case 002/01 Appeals Judgement, para. 667.

<sup>3851</sup> See *supra*, Chapter 6-II-B about 'new people' and Chapter 4 about 'enemies'.

<sup>3852</sup> See *supra*, Chapter 6-V-B.

<sup>3853</sup> See *supra*, Chapter 6-II-C-2.

**D. THE ELEMENTS ARE NOT ESTABLISHED FOR THE CRIME OF OTHER INHUMANE ACTS THROUGH ‘ATTACKS AGAINST HUMAN DIGNITY’**

1125. ‘Other inhumane acts’ is a residual category of crimes against humanity which include acts of sufficiently similar in gravity to enumerated acts already considered crimes against humanity.<sup>3854</sup> Such gravity assessment must take into account, amongst other considerations, the context in which it occurred.<sup>3855</sup> Again, given the dire circumstances that Cambodia was in at the time,<sup>3856</sup> the working and living conditions alleged to be “attacks against human dignity” are not comparably grave as to rise to the level of a crime against humanity.

**E. OTHER CRIMES EQUALLY HAVE NOT BEEN ESTABLISHED**

1126. The arguments made above apply *mutatis mutandis* to all the crimes not explicitly discussed above. In particular, regarding allegations of enforced ‘disappearances’, mere statements that “people were taken away” amount to rumours. They are devoid of factual substantiation of illegal deprivation of liberty or intentional concealment of people’s whereabouts; hence, it would be impossible to establish beyond reasonable doubt the core elements of the crime.<sup>3857</sup>

**VII. JCE I IN RESPECT OF COOPERATIVES AND WORKSITES**

1127. Nuon Chea cannot be held criminally responsible for any alleged crimes in connection to the four cooperatives and worksites through the mode of liability of JCE I. This is because there was no common purpose involving the commission of any of the alleged crimes. There was also no shared intent between Nuon Chea and all the other alleged JCE members to commit any of these crimes. To the contrary, and as shown in Section II, the cooperatives and worksites were established for the purposes of rebuilding and defending the country. This policy was not criminal in itself, nor did it involve the commission of any crimes. In fact, as discussed above, given that the quality of the people’s lives was the ultimate goal and cornerstone of this policy, it would not be logical for any crimes against the people’s interest to be involved in this policy.

1128. It is also shown in Sections II, V, and VI that neither Nuon Chea nor other alleged JCE members (except a few, such as key collaborator of Vietnam Ruos Nhim) had the intent to enslave, mistreat, persecute, or exterminate DK citizens through the establishment and

<sup>3854</sup> ICTY, *Galić* Trial Judgement, para. 152.

<sup>3855</sup> *Case 001, E188*, Trial Judgement, para. 367; ICTY, *Galić* Trial Judgement, para. 153.

<sup>3856</sup> *See supra*, Chapter 6-II.

<sup>3857</sup> *See supra*, Chapter 5.

operation of cooperatives and worksites. On the contrary, these organisations and projects were set up for the purpose of overcoming the temporary hardship and ultimately improving people's standard of living. In any event, the evidence shows that apart from agreeing to the initiation of these four projects, Nuon Chea did not have any significant contribution to their subsequent operation. As illustrated above, the four cooperatives and worksites were not under Nuon Chea's authority. The Tram Kok Cooperatives' operations were under the authority of the District, with only general oversight by the Sector and Zone; Kampong Chhnang Airfield was under military authority; and the two dam construction sites were under the authority of public works and industry ministries. Nuon Chea, therefore, played no role in operations at any of the four cooperatives and worksites charged in Case 002/02.

1129. Additionally, Nuon Chea had no knowledge of the detailed day-to-day conditions at any of the four sites, or any alleged crimes committed there. The Co-Prosecutors took pains to try to prove that Nuon Chea visited the Tram Kok Cooperatives, as discussed in Section V-A-1 above.<sup>3858</sup> However, the substantiation of this claim is flimsy. Civil party Chou Koemlan supported her claim of learning that Nuon Chea had visited by insisting that “[a]ll the Base People knew” “since 1975” that Nuon Chea was a senior DK leader, even though Nuon Chea's role was in fact then low-profile.<sup>3859</sup> Finally, setting aside the inherently limited probative value of civil party evidence – particularly absent any corroborative evidence<sup>3860</sup> – even if Nuon Chea did visit, this is in any case of limited relevance since it was not explained what he learned about the cooperatives from such a visit. All that the evidence can show is that Nuon Chea knew the cooperatives existed;<sup>3861</sup> knew that they were recognised as a model district; and may have on one occasion read about the measurements and directions of some of its canals.<sup>3862</sup>

1130. As to the other crime sites, there is no credible evidence that Nuon Chea ever visited Kampong Chhnang Airfield, the 1<sup>st</sup> January Dam, or the Trapeang Thma Dam. There is also no evidence that he was ever made aware of any information that may reasonably alert him of any crimes at these four sites, to the exception of Trapeang Thma Dam, where new cadres were

<sup>3858</sup> See e.g. **E1/252.1**, Chou Koemlan, T. 26 Jan 2015, p. 60, lns 10-14, p. 61, lns 7-12, p. 63, lns 20-23, p. 82, ln. 12 to p. 83, ln. 3; **E1/253.1**, Chou Koemlan, T. 27 Jan 2015, p. 3, ln. 23.

<sup>3859</sup> **E1/253.1**, Chou Koemlan, T. 27 Jan 2015, p. 41, lns 5-25.

<sup>3860</sup> See *supra*, Chapter 2-III-B-2-(a), on the limited relevance of civil party accounts even in court.

<sup>3861</sup> The existence of cooperatives is mentioned in the following publications: **E3/750**, Youth, Nov 1975, ERN 00522465; **E3/135**, Flag, Jun 1977, ERN 00446850, 00446852; **E3/119**, FBIS Reports, 14 Aug 1975, ERN 00167391; **E3/289**, FBIS Reports, 23 Jul 1977, ERN 00168509; **E3/1361**, FBIS Reports, 11 Apr 1978, ERN 00168811; Washington Post, The New Cambodia, ERN 00419915; L'Express, Le Socialisme par le Vide, ERN S 00011155.

<sup>3862</sup> **E3/774**, Youth, Mar-Apr 1978, ERN 00529444.

appointed to replace the suspected ones. It cannot be inferred, therefore, that Nuon Chea accepted any of the alleged crimes to be part of the party policy.

#### **VIII. CONCLUSION ON THE CPK'S POLICY TO ESTABLISH COOPERATIVES AND WORKSITES AND ITS IMPLEMENTATION AT FOUR CRIME SITES**

1131. The evidence *vis-à-vis* the Tram Kok Cooperatives, 1<sup>st</sup> January Dam Worksite, Kampong Chhnang Airfield Construction Site, and Trapeang Thma Dam Worksite wholly undermine the Closing Order and Co-Prosecutors' portrayal of DK as a "prison without walls". At all sites, working and living conditions were not grave considering the circumstances in DK at the time. Moreover, the evidence showed that any poor conditions owed to local authorities' deviation from correct CPK policy, for which Nuon Chea is not responsible. This is most obvious in respect of the Trapeang Thma Dam, for which the Defence has shown that events that occurred owed to that construction site being under the authority of Ruos Nhim, who endeavoured to stir up discontent and turn the people against the CPK in order to overthrow Nuon Chea, the CPK and legitimate DK government. In any event, none of the charged crimes, nor Nuon Chea's responsibility under the mode of liability of JCE I or under other modes of liability (as discussed in Chapter 8), has been established beyond reasonable doubt.

1132. As the Defence noted in Chapter 2, Case 002/02 – more so than any previous trial at this Tribunal – is shrouded in an inescapably ideological and emotionally charged Manichean filter. The epicentre of the (unacceptable) ideological focus of this trial is the CPK policy on cooperatives and worksites and its alleged implementation at the four cooperatives and worksites charged in this trial. However, as noted in Section I above, communism should not be on trial here. In the end, the core legal question should be whether the underlying intent of the CPK policy on cooperatives and worksites was criminal. As discussed in Section II and substantiated throughout this Chapter, the cooperatives and worksites policy the CPK imposed was not only lawful but legitimate and logical in the face of the existing challenges. Likewise legitimate and lawful, as discussed in the Chapter that follows immediately below, was the CPK's regulation of marriage during the DK.



## CHAPTER 7. THE CPK'S NATIONWIDE REGULATION OF MARRIAGE

### I. INTRODUCTION

1133. The Closing Order defines one of the five policies forming part of the JCE's alleged common purpose to "implement and defend the CPK socialist revolution" as "the regulation of marriage by whatever means necessary".<sup>3863</sup> It alleges that increasing population growth was part of the policy's objectives,<sup>3864</sup> which was to be implemented by forcing couples to marry.<sup>3865</sup> Nuon Chea is charged with other inhumane acts through forced marriage, and rape in the context of forced marriage, as crimes against humanity.<sup>3866</sup>

1134. There was indeed a CPK policy regulating marriage: "[f]irst, both parties agree. Second, the collective agrees." It formed part of the CPK Revolutionary Principles, which constitute "the laws, the rules, the views, the stances and the morality" of the CPK that every revolutionary was to "respect and follow".<sup>3867</sup> The CPK also had a policy to promote population growth, something perfectly normal under the difficult economic and demographic conditions which existed when it assumed power. Prior mutual consent and approval of public authorities are elements of nearly all states' policies on marriage throughout the world.<sup>3868</sup> Further, in 1974, 45% of states globally had policies aimed at influencing population growth, and until 1999, states such as France, Norway, Germany and Sweden had various measures into place to encourage people to have children.<sup>3869</sup>

1135. As far as the Defence knows, none of these states has ever been seriously accused of forcing people to marry people to realise these policy goals. It is unlikely that such policies would even be frowned upon. One can only wonder why then, the existence of such legitimate policies would be seen as inherently criminal and necessitating forced marriage. The reason is simply a Manichean drive to demonise every action ever taken by the CPK. The mere fact that certain individuals may have been married without their consent or in coercive circumstances does not establish a nationwide policy, in the same way that women being married without their

<sup>3863</sup> **D427**, Closing Order, paras 216-217, 845.

<sup>3864</sup> **D427**, Closing Order, para. 217; *see also* **E1/242.1**, Case 002/02 Opening Statements (Co-Prosecutors), T. 17 Oct 2014, p. 36, Ins 8-10.

<sup>3865</sup> **D427**, Closing Order, paras 216-217, 845.

<sup>3866</sup> **D427**, Closing Order, paras 1430-1433, 1442-1447.

<sup>3867</sup> **E3/765**, Youth, Oct 1978, ERN 00539989-99.

<sup>3868</sup> *See infra*, Chapter 7-III-A.

<sup>3869</sup> UN DESA, Population Ageing & Population Decline, p. 11, table 10, 2a (Population Growth Policies), 3a (Fertility Policies).

consent in a small village in France would not mean that the French government pursued a policy of forced marriage. It is as simple as that.

1136. One must recall the cultural context as well. As both experts Kasumi Nakagawa and Peggy Levine testified, and many civil parties confirmed, pre-DK marriages were always arranged by parents. Future spouses' opinions were usually not even solicited. Sometimes their consent was sought, but even then, the context of Cambodian culture meant that opposing one's parents' suggestion would often be unthinkable, and children believed that their parents would decide what was best for them.<sup>3870</sup> Such organisation of marriage is still commonplace nowadays, even if cultural mores in Cambodia are slowly changing. The reality is that by charging Nuon Chea with forced marriage and rape in the context of forced marriage, the Closing Order and the Co-Prosecutors have effectively put the entire (and still widespread) practice of arranged marriage on trial here.

1137. However, as with the CPK's cooperatives and worksites policy, one's feelings about arranged marriage are irrelevant. Just as it should not be a trial about Marxist-Leninist ideology, this trial should not be about culture either. Although it states the blatantly obvious, what this trial should be about are the core legal issues that are contested. What is incontestable is that between 1975 and 1979, arranged marriage was not a crime under customary international law, and certainly not a crime against humanity.<sup>3871</sup>

1138. The likely reason why the CPK's legitimate policies have been portrayed as inherently criminal is that the issue of sexual violence and particularly forced marriage has become the "hot topic" in international criminal law. The SCSL – a court widely decried by commentators as politically biased, ineffective, and with legally unsound judgements<sup>3872</sup> – earned its "claim to fame" by being the first court to recognise "forced marriage" as an international crime. This Tribunal, which is facing very similar critiques as discussed in Chapters 1 and 2, must be equally tempted to carve its stone on the edifice of international criminal justice by being the

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<sup>3870</sup> See e.g. **E1/462.1**, Om Yoeum (2-TCCP-274), T. 23 Aug 2016, p. 26, ln. 5 to p. 27; **E1/463.1**, Sou Sotheavy, T. 24 Aug 2016, p. 63, lns 8-20; **E1/488.1**, Preap Sokhoeum, T. 24 Oct 2016, p. 16, ln. 24 to p. 17, ln. 17; **E1/480.1**, Peggy Levine, T. 10 Oct 2016, p. 53, ln. 7, to p. 55, ln. 5, p. 67, ln. 7 to p. 68, ln. 20; **E1/472.1**, Nakagawa Kasumi, T. 13 Sep 2016, p. 39, ln. 4 to p. 40, ln. 25.

<sup>3871</sup> See *infra*, Chapter 7-V-A.

<sup>3872</sup> See e.g. SCSL, *RUF Appeals Judgement, Partially Dissenting and Concurring Opinion of Justice Shireen Avis Fisher*; pp. 512 and f; comments of alternate Judge El Hadji Malik Sow following the delivery of the Appeals Judgement in the Taylor case, which were struck out of the official records, reproduced in Easterday & Kendall, *Judge Sow's Reflections on Taylor Judgement & SCSL Legacies*; Schabas, *Taylor Judgement Suggests a More Modest Level of Participation*; Jalloh, *SCSL: Achieving Justice?*; Easterday, *Obscuring JCE Liability: SCSL's Conviction of Gbao*; Mettraux, *JCE has Grown Another Tentacle!*.

first to enter a conviction for arranged marriage despite the inadequate evidentiary basis. After all, this would be a high-profile way to justify the 260 million US dollars spent on the Tribunal.<sup>3873</sup> However, this cannot be permitted. When the DK is compared with Sierra Leone during the civil war with the proper historical, political, and social context in mind, one thing is clear: far from being alike, the contexts and practices significantly differed on key elements not only concerning the context but also the question of consent, the “ceremony”, and the post-marriage communal life.<sup>3874</sup> As rightly put by the ICTY Appeals Chamber, “not every denial of a fundamental human right is serious enough to constitute a crime against humanity”.<sup>3875</sup> When assessing the facts and evidence objectively and in the dispassionate, independent and rational way the Supreme Court Chamber set out in its “Sâm Sithy” threshold,<sup>3876</sup> the only possible conclusion is that the evidence here, even if established beyond reasonable doubt, does not reach the requisite gravity threshold to qualify as the crime against humanity of other inhumane acts through forced marriage as created by the SCSL.

1139. Perhaps another reason for such demonised perceptions of the CPK’s policies *vis-à-vis* marriage and population growth is the relentless lobbying by civil society and civil parties’ representatives. This lobbying has surged in recent years thanks to a flood of international funding on researching sexual violence. Notably, expert Levine qualified such activism as having brought in a “shame factor” regarding people’s marriage under DK, explaining that “the more the topic of forced [marriage] came on to the -- to the agenda, the more those people that I was interviewing started to feel ashamed”.<sup>3877</sup> It is important to recognise that most ensuing research carried out is fundamentally flawed and biased, since it takes as a starting point the quest of locating victims of sexual violence and forced marriage, instead of observing a representative, or at least random, sample of the DK population to determine what marriage practices occurred.

1140. Another troubling aspect of the activism around sexual violence is the cottage industry of publications lobbying for the crime of forced marriage to be established as a self-standing crime against humanity. For instance, one document on which the Co-Prosecutors extensively relied is a report by a freshly-graduated intern at the Cambodian Defenders Project.<sup>3878</sup> Three

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<sup>3873</sup> ECCC Financial Outlook, 31 Mar 2016.

<sup>3874</sup> See *infra*, Chapter 7-V-C.

<sup>3875</sup> ICTY, *Kordić & Čerkez* Appeals Judgement, para. 102.

<sup>3876</sup> See *supra*, Chapter 2-III-A-1, for a detailed explanation of this threshold.

<sup>3877</sup> E1/480.1, Peggy Levine, T. 10 Oct 2016, p. 46, lns 10-12.

<sup>3878</sup> E3/3416, Toy-Cronin, Stories of Sexual Violence During DK; E1/472.1, Nakagawa Kasumi, T. 13 Sep 2016, p. 31, ln. 21 to p. 32, ln. 2.

years later, she wrote a paper calling for forced marriage to become a separate crime against humanity.<sup>3879</sup> Another emblematic example is the *Amicus Curiae* brief filed in Case 002/02, which blatantly states what it wishes the law to be, rather than what it was between 1975 and 1979.<sup>3880</sup> Not only are such publications inherently biased and mostly irrelevant, they are also legally unsound for they do not respect the principle of legality (*nullum crimen sine lege*) by discussing the state of the law at the relevant time.

1141. It is tempting and easy to bow to such activist pressure and approach the question of marriage under DK from an emotional perspective, under the “bringing-justice-to-the-victims” banner. Nonetheless, this is a court of law, not a reality TV show chasing ratings. The Tribunal must rein in its urge to convict at all costs and resist the temptation to serve as a policymaker. Indeed, one must be cautious not to brush aside basic criminal trial principles and fair trial rights in favour of activism. Focus must be on the law as well on the credibility and reliability of evidence. The Co-Prosecutors must prove their case in accordance with their burden of proof. Every single constitutive element of the crime of other inhumane act through forced marriage must be established beyond reasonable doubt. As explained throughout the present Chapter, this will prove an impossible task.

1142. Unsurprisingly – given the Manichean predilection of the Chamber as discussed in Chapter 2 – all individuals who came to testify during the segment on forced marriage stated that they were forced to get married. The Chamber was clearly not going to “waste” a trial day by summoning people who had said that they could marry who they wanted, or that they were able to refuse a proposal to get married, as this would not fit the Manichean narrative. However, the Chamber did not anticipate that a large number of individuals called outside of the relevant segment would provide exculpatory evidence on marriage. Most remarkably, this evidence overwhelmingly confirms the official consent-based policy to regulate marriage, and shows that it was reflected in practice.<sup>3881</sup>

1143. Many witnesses and civil parties explained that people were not forced to marry. Indeed, there is nothing pointing to a systematic or consistent pattern of individuals being required to marry without their consent or under coercive circumstances. On the contrary, the very limited evidence shows that a variety of practices existed throughout DK: some people alleged they

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<sup>3879</sup> E418/6.1.14, Toy-Cronin, What is Forced Marriage.

<sup>3880</sup> E418/4, *Amicus Curiae* Brief on Forced Marriage; see also E418/1, Nuon Chea’s Response to Request for Leave to Submit *Amicus Curiae* Brief on Forced Marriage.

<sup>3881</sup> See *infra*, Chapter 7-III.

were forced to marry; other said they could refuse a proposal to be married; and others said they could propose a person they wanted to marry. Some said that there was almost no ceremony; others testified that their parents could attend; others that there would be a party, extra food, or Buddhists monks to perform rituals. Some speculated that they were monitored after their marriage, others that there was never such practice in place.<sup>3882</sup> Most importantly, the vast majority of the individuals who came to testify and got married under DK were never asked any questions about their marriage. Finally, the two experts summonsed to testify on marriage, Nakagawa and Levine, both testified of the absence of a nationwide policy of forced marriage.

1144. This Chapter starts by discussing preliminary issues in Section II. CPK marriage policy is addressed in Section III, and the evidence related to the practice of marriage throughout DK in Section IV. Finally, a discussion of the crimes charged is contained in Section V, while the main mode of liability charged, JCE I is discussed in Section VI.

## II. PRELIMINARY ISSUES RELATED TO THE REGULATION OF MARRIAGE

### A. CIVIL PARTY ACCOUNTS MUST BE TREATED WITH EXCEPTIONAL CAUTION

1145. 87.5 % of those who appeared in the regulation of marriage segment – that is 12 out of 16 persons – were civil parties, who are not required to provide evidence under oath. Thus, they are under no obligation to tell the truth.<sup>3883</sup> As noted throughout this Brief, there have been many occasions where civil parties provided a drastically different or exaggerated<sup>3884</sup> live account as compared to their civil party application.<sup>3885</sup> This frequently occurred regarding accounts of their marriages. Mom Vun said that her husband was killed in 1975, but her civil party application omits this. Instead, she listed him as a witness to the facts, suggesting he was still alive.<sup>3886</sup> Oum Suphany, who said in a 2010 Phnom Penh Post article that “the Khmer Rouge” forced her to marry, testified that it was her mother in law who “forced” her to get married to her already then-boyfriend whom she loved.<sup>3887</sup>

1146. Furthermore, civil parties have been exposed to the Manichean narrative through Tuol Sleng Museum exhibits, documentaries, or civil society. Many have, like Oum Suphany, given

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<sup>3882</sup> See *infra*, Chapter 7-IV.

<sup>3883</sup> **F16**, Nuon Chea’s Appeal Brief, paras 201-206.

<sup>3884</sup> See *e.g. supra*, Chapter 4-II-C-1, concerning the credibility issues of civil parties Meas Sokha and Say Sen.

<sup>3885</sup> See *e.g. supra*, Chapter 5-I-D-4, regarding Lach Kry’s evidence of mass killings of Vietnamese in Prey Veng.

<sup>3886</sup> **E1/477.1**, Mom Vun, T. 20 Sep 2016, p. 18, ln. 19 to p. 19, ln. 24, p. 21 lns 4-8.

<sup>3887</sup> **E1/252.1**, Oum Suphany, T. 26 Jan 2015, p. 21, ln. 4 to p. 22, ln. 10; see also **E1/488.1**, Preap Sokhoeurn, T. 24 Oct 2016, p. 62, lns 10-17, p. 65, lns 15-22.

interviews to the press or been involved in documentaries, which may impact upon the reliability of their evidence, just as the Supreme Court Chamber ruled in regard to the infamous Sâm Sithy.<sup>3888</sup> Pen Sochan’s evidence is largely based on what she learned from the various persons she spoke to during the documentary in which she starred and who she did not know during the DK.<sup>3889</sup> It is therefore more crucial *vis-à-vis* regulation of marriage than any other issue that civil parties’ accounts – which constitute the vast majority of the incriminating evidence regarding marriage – to be treated with exceptional scrutiny and caution.<sup>3890</sup>

**B. UNLIKE MOST ‘EXPERTS’ WHO APPEARED THROUGHOUT THE TRIAL, KASUMI NAKAGAWA AND PEGGY LEVINE ARE LARGELY RELIABLE**

**1. Kasumi Nakagawa’s Mostly-Reliable Evidence Must Still be Assessed with Caution**

1147. Kasumi Nakagawa is a social researcher who studied international policy, and particularly Cambodia. She describes herself as a “gender expert” and has undertaken numerous studies on the condition of women in Cambodia.<sup>3891</sup> In particular, she undertook research on gender-based violence during DK in 2006 and 2008. Her team collected information from 1,500 persons in 5 different provinces,<sup>3892</sup> with the aim of “collecting stories that were linking [*sic*] to sexual violence”.<sup>3893</sup> Out of these, 100 persons were selected for an interview with Nakagawa and her team. The Defence notes that Nakagawa was comparatively better than most ‘experts’ who appeared in Case 002/02 in terms of following a strict work plan and methodology, and being transparent regarding her sources.<sup>3894</sup> She was also cautious about limiting the scope of her evidence, acknowledging the limits of her research and therefore of her conclusions.<sup>3895</sup>

1148. However, Nakagawa’s evidence must nevertheless be approached with caution. It is particularly noteworthy that she admitted to having destroyed the totality of the “records, transcripts, translations and tapes of the interviews” used for her research, “on the basis of confidentiality and security concerns of the interviewees”, thereby preventing the parties from

<sup>3888</sup> F36, Case 002/01 Appeals Judgement, para. 480.

<sup>3889</sup> E3/7233R, Film by Chan and Suon, ‘Red Wedding’.

<sup>3890</sup> F36, Case 002/01 Appeals Judgement, para. 313.

<sup>3891</sup> E1/472.1, Nakagawa Kasumi, T. 13 Sep 2016, pp. 22-24.

<sup>3892</sup> E1/472.1, Nakagawa Kasumi, T. 13 Sep 2016, p. 29, lns 6-20.

<sup>3893</sup> E1/472.1, Nakagawa Kasumi, T. 13 Sep 2016, p. 28, lns 12-19.

<sup>3894</sup> E1/472.1, Nakagawa Kasumi, T. 13 Sep 2016, p. 28, ln. 22 to p. 31, ln. 1, p. 32 lns 6 – 17.

<sup>3895</sup> See e.g. E1/472.1, Nakagawa Kasumi, T. 13 Sep 2016, p. 32, lns 10-17, p. 39, lns 4-9, p. 43, ln. 22 to p. 44, ln. 4, p. 63, lns 8-19, p. 71, ln. 25 to p. 72, ln. 1, p. 74, lns 7-11, p. 83, lns 11-17, p. 85, ln. 24 to p. 86, ln. 1, p. 106, ln. 25 to p. 107, ln. 4; E1/473.1, Nakagawa Kasumi, T. 14 Sep 2016, p. 22, lns 10 – 14, p. 26, lns 13-18, p. 80, lns 20-21, p. 107, lns 4-6.

assessing the veracity of her claims.<sup>3896</sup> Furthermore, her initial selection of individuals to be approached was not random nor was it undertaken in a way to ensure representativeness. Instead, her research was premised on a clear selection bias: identifying “victims of sexual violence”. As noted before, Nakagawa testified that the goal was “to collect any stories that were linking to sexual violence during the Democratic Kampuchea.”<sup>3897</sup> In other words, her research was not to objectively assess the level of sexual violence which occurred during DK, but to find victims thereof. This inherently limits the information to which she had access to, and the weight of her conclusions, as those are not representative of the situation under DK. Such selection bias does, however, enhance the weight to be given to her conclusion that she could not find any evidence of a policy on forced marriage. If an expert who focuses on finding victims of sexual violence and forced marriage cannot find evidence of a nationwide policy, *a fortiori* – and as confirmed by Levine’s research – even if the research was conducted on a representative or random population sample, the conclusion would be the same.

## 2. Peggy Levine’s Evidence is Mostly Credible But Must be Viewed in Context

1149. Peggy Levine appeared before the Court as an expert on regulation of marriage and crimes against humanity.<sup>3898</sup> She holds a Doctor of Philosophy in Medical Anthropology, undertook doctoral research on “Cambodian Weddings, Births and Ritual Harm Under the Khmer Rouge”, and published the result of her research.<sup>3899</sup> Unlike any other ‘expert’ in this court, Levine followed a strict methodology, free from selection bias, and was fully transparent regarding her sources. First, she explained that she was doing research on a “policy about weddings”, not on forced marriage.<sup>3900</sup> She interviewed 192 persons – 11 couples and a random selection of 170 persons, from 18 different regions, between January 1997 and May 2005.<sup>3901</sup> Her research therefore attempted to be more representative of the general population than Nakagawa’s. Levine was also very transparent regarding her sources; her thesis contains detailed tables summarising the results of her research, in statistical form, as well as lists of questions which were asked to her interviewees, and their respective answers.<sup>3902</sup> Just as

<sup>3896</sup> E431/4, Decision on Kasumi Rule 87(4) & Rule 93 Requests, para. 5; *see also* E431/5, Written Reasons for Decision on Kasumi Rule 87(3), 87 (4) & Rule 93 Requests, para. 37.

<sup>3897</sup> E1/472.1, Nakagawa Kasumi, T. 13 Sep 2016, p. 28, lns 12-13.

<sup>3898</sup> E433, Decision on Appointment of 2-TCE-81.

<sup>3899</sup> E3/1794, Levine, Contextual Study into Weddings and Births.

<sup>3900</sup> E1/481.1, Peggy Levine, T. 11 Oct 2016, p. 18, lns 16-18.

<sup>3901</sup> E3/1794, Levine, Contextual Study into Weddings and Births, ERN 00482502; E1/480.1, Peggy Levine, T. 10 Oct 2016, p. 22, lns 14-16, p. 32, lns 5-18, p. 47, lns 16-25, p. 64, lns 17-22.

<sup>3902</sup> E3/1794, Levine, Contextual Study into Weddings and Births, ERN 00482502, 00482649; E1/480.1, Peggy Levine, T. 10 Oct 2016, p. 48, lns 2-25, p. 58, ln. 25 to p. 59, ln. 10, p. 81, lns 6-12, p. 82, lns 1-14.

importantly, Levine was fully aware of the existing “western bias”, highlighting the social differences between the concepts of marriage and love in and out of Cambodia.<sup>3903</sup> Like Nakagawa, Levine was cautious regarding limiting the scope of her evidence, admitting when something was outside of the scope of her research or knowledge. She is therefore mostly credible. Having said that, her research focused only on a very small sample of the population. Therefore, her evidence should be viewed with this context and shortcoming in mind.

1150. Finally, it is worth highlighting that both experts called in relation to the regulation of marriage agreed with the conclusion that there was no evidence of a nationwide policy to force people to marry. According to Nakagawa and Levine, the only policy in place was a legitimate one, based on consent and approval of the public authorities, like any country in the world, as discussed in the Section below.

### III. THE CPK’S POLICY TO REGULATE MARRIAGE

1151. There was therefore nothing inherently criminal for the DK government to be involved in the preparation and recognition of marriages between 1975 and 1979. On the contrary, the CPK’s official rules on marriage, based on consent and acquiescence of the public authorities, reflected international practice.

1152. Marriage is the act, ceremony, or process by which the legal relationship of spouses is constituted. The legality of the union may be established by civil, religious, or other means as recognised by the laws of each state.<sup>3904</sup> The US Supreme Court recently held, when ruling on the constitutionality of same-sex marriage, that “marriage is a keystone of the Nation’s social order” and “at the center of many facets of the legal and social order.”<sup>3905</sup> It is uncontroversial to state that marriage is a social contract between two individuals that creates rights and duties between the spouses and towards the state. As a result, it is natural for states to regulate marriage. States impose rules to control, and so limit, people’s right to marry. Common limitations today include a minimum age and prohibitions of same-sex marriage, polygamy, bigamy, and marriage between immediate family members. In many places, certain procedures must be followed prior to a marriage being approved by the state, which vary depending on the individuals’ situation.

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<sup>3903</sup> E1/480.1, Peggy Levine, T. 10 Oct 2016, p. 83, lns 7-24; E1/481.1, Peggy Levine, T. 11 Oct 2016, p. 88, lns 6-18, p. 99, lns 15-19, p. 123, ln. 24 to p. 124, ln. 2; E3/1794, Levine, Contextual Study into Weddings and Births, ERN 00482502, 00482649.

<sup>3904</sup> UN DESA, Principles & Recommendations for a Vital Statistics System, p. 4.

<sup>3905</sup> US, *Obergefell v. Hodges*, p. 4.



1153. Part A of this Section describes the official CPK’s legitimate and lawful consent-based marriage policy. Part B shows that the evidence heard throughout the trial confirms that the practice throughout DK aligned with that policy.

**A. THE CPK’S POLICY TO REGULATE MARRIAGE WAS THAT “FIRST, BOTH PARTIES AGREE”<sup>3906</sup>**

**1. The CPK’s Policy to Regulate Marriage Was Lawful and Legitimate**

1154. As noted in Section I, the CPK’s policy to regulate marriage is contained in the “12 Precepts of a Revolutionary”, which were first established in 1968. They are described as “the laws, the rules, the views, the stances and the morality of the Communist Party of Kampuchea, of communists, and of our Kampuchean revolutionary people”.<sup>3907</sup> In sum, “[e]very revolutionary must respect and follow” these principles.<sup>3908</sup> In fact, the non-respect of these principles would lead to the failure of the revolution.<sup>3909</sup> Several witnesses, including cadres, confirmed that they were to be strictly adhered to.<sup>3910</sup>

1155. The 6th Precept unequivocally premises the question of “setting up a family” on two key principles: “**First, both parties agree. Second, the collective agrees, and then it is done.**”<sup>3911</sup> There is no space for alternative interpretations here: consent is clearly the fundamental basis for marriage. No policy or ideology could be set out more clearly. Pol Pot reiterated this principle on 5 August 1978, stating that:

On building up a family: The young men and young women build up families on a voluntary basis. After marriage, should problems arise within the family, the masses give to the partners in order to sort out their problems. Should the parties concerned find it impossible to cohabit any longer, they have the choice of divorce. Neither of the parties concerned needs to go to court. Normally the question of separation is very rare as both the husband and wife have a high political consciousness and each family enjoys a well guaranteed existence in a national society which is sound and uncorrupt. Therefore, no contradiction is permanent and unable to be settled within the family.<sup>3912</sup>

<sup>3906</sup> E3/765, Youth, Oct 1978, ERN 00539994.

<sup>3907</sup> E3/765, Youth, Oct 1978, ERN 00539989.

<sup>3908</sup> E3/765, Youth, Oct 1978, ERN 00539988.

<sup>3909</sup> E3/765, Youth, Oct 1978, ERN 00539989.

<sup>3910</sup> See e.g. E1/297.1, Khoem Boeun, T. 5 May 2015, p. 47, ln. 20 to p. 48, ln. 4, p. 54, lns 12-24; E1/412.1, Sun Vuth, T. 31 Mar 2016, p.7, ln. 22 to p. 8, ln. 2; E1/422.1, Lach Mean, T. 26 Apr 2016, p. 40, ln. 24 to p. 41, ln. 11; E1/428.1, Him Huy, T. 5 May 2016, p. 68, ln. 15 to p. 69, ln. 18.

<sup>3911</sup> E3/765, Youth, Oct 1978, ERN 00539994 (emphasis added).

<sup>3912</sup> E3/76, FBIS Report, 26 Sep 1978, ERN 00170426 (emphasis added).

1156. In October 1978, a special issue of the Revolutionary Youth was published, reiterating the 12 Precepts.<sup>3913</sup> Notably, the principles of mutual consent and approbation of public authorities are still the law in Cambodia today.<sup>3914</sup> Moreover, while relentlessly demonised by the Manichean narrative, the CPK policy was in line with the International Convention on Consent to Marriage, which still applies today.<sup>3915</sup> It uncontroversial to recall that prior consent of the spouses, and approval of public authorities, are the key elements of any marriage policy worldwide. As explained below, such policy was in fact largely followed in practice.<sup>3916</sup>

1157. The prohibition of any type of sexual violence under DK was also unequivocal. It formed part of the same 6<sup>th</sup> Precept that required consent for marriage. It too, is unequivocal; it reads: “do not behave in any way that violates females”.<sup>3917</sup> Having 14-16-year-old *chhlops*<sup>3918</sup> monitoring the newly married couples in order to ensure they had sex together simply defies all logic. First, the 6<sup>th</sup> Precept could not be clearer: any sexual offence would violate females. This would inherently include forced sexual intercourse with one’s wife, or the encouragement of rape. Second, Cambodia has always been a conservative society. Sex is still taboo, and respect for elders is also a cultural cornerstone. Having people, *a fortiori* children, listening to older, newly-married couples to assess whether they had sexual intercourse would go against cultural norms. The same applies to any order for husbands to rape their wives. It is plainly absurd.

1158. Any instruction, suggestion or encouragement that people should be “arranged” to get married must be viewed in light of this unequivocal policy. The existence of a requirement for mutual consent was inherent to the question of marriage; no more and no less. The Closing Order itself recognises that “official documents and statements refer to the supposed voluntary basis of such marriages”.<sup>3919</sup> The live evidence also fails to demonstrate the existence of an official policy requiring people to be forcibly married. On the contrary, it unequivocally shows that the only official position about marriage was that it was based on consent and permitting divorce.

1159. In light of this unequivocal policy, it is clear that if certain individuals were forced to marry in certain locations, this owed to the actions of overzealous, rogue, autonomous local

<sup>3913</sup> **E3/765**, Youth, Oct 1978, ERN 00539988.

<sup>3914</sup> Cambodian Civil Code, Arts 955, 958.

<sup>3915</sup> 1962 Convention on Marriage, Art. 1.

<sup>3916</sup> *See infra*, Chapter 7-III-B.

<sup>3917</sup> **E3/765**, Youth, Oct 1978, ERN 00539994.

<sup>3918</sup> The *chhlop* have been widely described as subdistrict militia or security guards.

<sup>3919</sup> **D427**, Closing Order, para. 219.

authorities or cadres, or to local authorities' misunderstanding of the policies.<sup>3920</sup> However, the fact that certain individuals may have misunderstood or violated the policy cannot in any way serve to establish that the policy was intended to coerce people into marrying.

## 2. A Population Growth Policy Does Not Equal a Forced Marriage Policy

1160. In addition, the Closing Order and Co-Prosecutors both try to equate a population growth policy with a forced marriage policy in a desperate attempt to obtain a conviction in the absence of actual evidence.<sup>3921</sup> This should not be permitted. As stated above, not only is there no evidence that there was any nationwide forced marriage policy in the DK, but CPK documents conditioned any marriage on the consent of both future spouses, as many cadres also confirmed.<sup>3922</sup> The CPK did have a Four-Year Plan to increase the population of Cambodia to 15 million, in order to build but also protect the nation.<sup>3923</sup> However, after decades of war, this is something which most countries would have put in place. As stated above, by 1974, 45% of the world had policies aimed at influencing population growth, and until 1999, countries such as France, Norway, Germany, and Sweden had various measures in place to encourage people to have children.<sup>3924</sup> In fact, the UN itself has a "population division" and an expert group which analyses "policy responses to population ageing and population decline".<sup>3925</sup> Such concerns are based on two legitimate facts: (1) states' risk of having fewer births than are necessary for generations to replace themselves and thus ensure the state's survival, and (2) general issues of population ageing.<sup>3926</sup>

1161. Population growth policies are logically interlinked with fertility and birth. Japan for instance, considers the "tendency of the young to delay marriage" the "direct cause of the country's declining fertility rate".<sup>3927</sup> Today, states promote childbirth through such policies promoting gender equality, life-work balance, support for families with children, matchmaking, and fertility centres in order to face the population decline.<sup>3928</sup> Similarly, in many states,

<sup>3920</sup> See *supra*, Chapter 4-II-C-2; see *infra*, Chapter 7-IV-E.

<sup>3921</sup> **D427**, Closing Order, para. 218; **E1/242.1**, Case 002/02 Opening Statements (Co-Prosecutors), T. 17 Oct 2014, p. 36, lns 8-10.

<sup>3922</sup> See *supra*, Chapter 7-II-A.

<sup>3923</sup> See e.g. **E3/775**, Revolutionary and Non-Revolutionary World Views on Family Building, which contains no indication that people would be forced to marry.

<sup>3924</sup> UN DESA, Population Ageing & Population Decline, p. 11, Table 10, 2a (Population Growth Policies), 3a (Fertility Policies).

<sup>3925</sup> UN DESA, Population Ageing & Population Decline, p. 5.

<sup>3926</sup> See generally UN DESA, Population Ageing & Population Decline.

<sup>3927</sup> UN DESA, Population Ageing & Population Decline, p. 4.

<sup>3928</sup> 2014 Report on Social Security in Japan, pp. 47-52; Time Magazine, Japan Eyes Matchmaking; Japan PM and Cabinet, Policies to Realize a Society Where All Citizens are Dynamically Engaged, p. 10.

newlyweds are encouraged to live together, take care of each other, and have children.<sup>3929</sup> Suggesting that encouraging births within the population would amount to or involve forcing people to marry is simply ludicrous. If one followed this logic, then 45% of states in 1974 were committing crimes against humanity.<sup>3930</sup> In fact, one could argue that forcing people to marry would actually go against the goal to promote childbirth: if people are in unwanted relationships, by essence, procreation will be more difficult and less likely to succeed.

**B. THE CPK’S POLICY TO REGULATE MARRIAGE, IN PRACTICE, RENDERED IT “IMPOSSIBLE FOR ANY MARRIAGES TO BE CELEBRATED WITHOUT MUTUAL AGREEMENT”<sup>3931</sup>**

**1. The Statements of CPK Leaders are Consistent with the Official Policy**

1162. Chuon Thy (2-TCW-859), a West Zone regiment commander who was sent to the East Zone, testified about a June 1978 meeting in Kampong Chhnang where Pol Pot encouraged the arrangement of marriages for people. Pol Pot expressly stated that people should not be forced to marry, and that only if they agreed should marriage be arranged,<sup>3932</sup> something he repeated two months later to a Belgian Communist delegation.<sup>3933</sup> Chuon Thy (2-TCW-859) further explained that in practice, “if people wanted to get married, then they would make such a proposal to Angkar and the arrangements were made.”<sup>3934</sup> Finally, Chuon Thy (2-TCW-859) testified that he had never heard references to forcing people to get married during any of the education sessions he attended.<sup>3935</sup>

1163. Chea Deap and Phan Him were both female combatants who were part of the Ministry of Commerce in Phnom Penh. Chea Deap gave unsworn evidence about a meeting to which allegedly all combatants attended,<sup>3936</sup> where Khieu Samphân allegedly stated that all females above 19 should be arranged to marry.<sup>3937</sup> However, her statement is directly contradicted by Phan Him, who appeared as a witness and therefore testified under oath. She explained having

<sup>3929</sup> See e.g. French Civil Code, Arts 212-215; Cuban Family Code, Arts 25, 26; Philippine Family Code, Art. 1.

<sup>3930</sup> UN DESA, Population Ageing & Population Decline, p. 11, table 10, 2a (Population Growth Policies), 3a (Fertility Policies).

<sup>3931</sup> E1/290.1, Pech Chim, T. 22 Apr 2015, p. 45, lns 6-10.

<sup>3932</sup> E1/490.1, Chuon Thy (2-TCW-859), T. 26 Oct 2016, p. 16, lns 8-11, p. 16, ln. 20 to p. 17, ln. 4.

<sup>3933</sup> E3/76, FBIS Report, 26 Sep 1978, ERN 00170426.

<sup>3934</sup> E1/490.1, Chuon Thy (2-TCW-859), T. 26 Oct 2016, p. 6, lns 7-10.

<sup>3935</sup> E1/490.1, Chuon Thy (2-TCW-859), T. 26 Oct 2016, p. 6, lns 10-12, lns 21-23.

<sup>3936</sup> E1/467.1, Chea Deap, T. 31 Aug 2016, p. 4, lns 11-14.

<sup>3937</sup> E1/466.1, Chea Deap, T. 30 Aug 2016, p. 89, lns 15-23.

never attended such meeting.<sup>3938</sup> In any event, as stated above, there is nothing inherently criminal in such statement illustrating a policy of population growth.

## 2. Cadres' Evidence Shows that the CPK's Policy to Regulate Marriage Was Based on Consent

1164. The majority of the highest-ranking live evidence heard (which was at the District and Autonomous Sector level) was unanimous: there was never a policy to force people to marry. Tep Poch (2-TCW-850), who was on the District committee in Baray District, Kampong Thom, in the Central (Old North) Zone, stated that “[t]he marriage criteria were: firstly, the issue of age; the girls would have to be at least 18 years old; secondly, both persons loved each other dearly; and thirdly, the parents approved the marriage.”<sup>3939</sup> Pech Chim, former Tram Kok District chief in the Southwest Zone, testified that before organising a marriage, local authorities had to consult the couples and their parents.<sup>3940</sup> Sao Sarun, a committee member of Autonomous Sector 105 from 1975 and ultimately the Autonomous Sector Secretary from 1978, testified in Case 002/01 that combatants' wedding ceremonies were organised after having asked whether the parents approved of the marriage, and after the bride and groom were asked about their approval as well.<sup>3941</sup>

1165. Lower level cadres gave similar evidence. Khoem Boeun, chief of Cheang Tong Commune in Tram Kok District, confirmed the practice of consulting couples and their parents<sup>3942</sup> and explained that she received such instructions from the District.<sup>3943</sup> Defence-requested witness Seng Ol (2-TCW-1025), who was the chairperson of the woman's unit in Nhaeng Nhang commune in Tram Kok District reporting to Khoem Boeun, and who was in charge of marrying people, gave evidence to the Co-Investigating Judges that marriages were never coerced in her unit.<sup>3944</sup> She said that the policy was that adults aged 24-26 could request to get married if they wished,<sup>3945</sup> and that only if both parties agreed would they be married.<sup>3946</sup> Unfortunately, Seng Ol (2-TCW-1025) was never able to testify in court due to health concerns. You Vann (2-TCW-894), a deputy commune chief in Ro'ang Commune, Kampong Siem

<sup>3938</sup> E1/467.1, Phan Him, T. 31 Aug 2016, p. 102, ln. 3.

<sup>3939</sup> E3/5293, 'WRI of Tep Poch (2-TCW-850)', ERN 00351705, confirmed in E1/461.1, Tep Poch (2-TCW-850), T. 22 Aug 2016, p. 84, lns 12.

<sup>3940</sup> E1/290.1, Pech Chim, T. 22 Apr 2015, p. 49, lns 1-4; E1/297.1, Khoem Boeun, T. 5 May 2015, p. 71, ln. 20.

<sup>3941</sup> E1/82.1, Sao Sarun, T. 6 Jun 2012, p. 67, ln. 10 to p. 68, ln. 1, p. 72, lns 15-21.

<sup>3942</sup> E1/297.1, Khoem Boeun, T. 5 May 2015, p. 51, ln. 9.

<sup>3943</sup> E1/296.1, Khoem Boeun, T. 4 May 2015, p. 18, lns 16-18.

<sup>3944</sup> E3/5833, 'WRI of Seng Ol (2-TCW-1025)', A17.

<sup>3945</sup> E319/43.3.14, 'WRI of Seng Ol (2-TCW-1025)', A65.

<sup>3946</sup> E3/5833, 'WRI of Seng Ol (2-TCW-1025)', A17.

District, stated that marriages would be arranged only “if females agreed”,<sup>3947</sup> and that he never saw someone be married without consenting.<sup>3948</sup> Heng Lai Heang, a cadre in charge of the base and commune level in Kratie District in Sector 505, said that there was a policy to “arrange” people to marry in her area, but that it was based on consent, as parents would be asked whether they agreed, and “after they were matched [...] each couple was asked if they agreed, then the marriage would take place”.<sup>3949</sup> If people disagreed, she said, “there would not be any serious problem”.<sup>3950</sup> Even Duch, who has shown his determination to provide as much incriminating evidence as possible against Nuon Chea and the DK in general, in an effort to shift the blame from himself,<sup>3951</sup> testified that he was not aware of any policy of forced marriage.<sup>3952</sup>

### 3. The Two Experts Concluded that There Was No Nationwide Policy to Force People to Marry

1166. Finally, and as noted above, the two experts who testified on regulation of marriage both reached the same conclusion: there was never a nationwide policy requiring people to be forcibly married.<sup>3953</sup> Nakagawa also testified that in every place she visited during her research, she was told about the possibility to refuse a marriage proposal.<sup>3954</sup> While Levine oddly compared the regulation of marriage under DK to military conscription, her position was that people were “arranged” to get married, referring to “work camps chiefs” who “acted as matchmakers and paired couples from similar villages or regions”.<sup>3955</sup> With regards to her study, Levine stated that “[while] [r]espondents used the word “forced” to describe work conditions, but no one used the word forced to describe their marriage.”<sup>3956</sup> She unequivocally concluded that “as a trend, as a conclusion, were the weddings forced across time and place under DK, my answer is no.”<sup>3957</sup>

<sup>3947</sup> E3/9507, ‘WRI of You Vann (2-TCW-894)’, A5; *see also* E1/376.1, You Vann (2-TCW-894), T. 14 Jan 2016, p. 68, ln. 25 to p. 69, ln. 4; E1/377.1, You Vann (2-TCW-894), T. 18 Jan 2016, p. 50, lns 16-18.

<sup>3948</sup> E3/9507, ‘WRI of You Vann (2-TCW-894)’, A17, A31, A85; *see also* E1/376.1, You Vann (2-TCW-894), T. 14 Jan 2016, p. 68, ln. 25 to p. 69, ln. 4; E1/377.1, You Vann (2-TCW-894), T. 18 Jan 2016, p. 50, lns 16-18.

<sup>3949</sup> E1/476.1, Heng Lai Heang, T. 19 Sep 2016, p. 51, ln. 13 to p. 52, ln. 2.

<sup>3950</sup> E1/476.1, Heng Lai Heang, T. 19 Sep 2016, p. 51, lns 20-22.

<sup>3951</sup> *See supra*, Chapter 4-IV-D-1, on Duch’s general lack of credibility.

<sup>3952</sup> E1/443.1, Duch, T. 23 Jun 2016, p. 108, lns 3-8.

<sup>3953</sup> E1/472.1, Nakagawa Kasumi, T. 13 Sep 2016, p. 92, lns 14-16; E1/481.1, Peggy Levine, T. 11 Oct 2016, p. 42, lns 14-15, *see also* p. 17, lns 15-17, p. 19, lns 11-12, 20-22, p. 41, ln. 23; note also that expert Chandler testified in Case 002/01 that he was not aware of any “high-level documentation for the policy of the arranged marriages, E1/91.1, David Chandler, T. 18 Jul 2012, p. 46, lns 20-21.

<sup>3954</sup> E1/472.1, Nakagawa Kasumi, T. 13 Sep 2016, p. 78, lns 16-21.

<sup>3955</sup> E3/1794, Levine, Contextual Study into Weddings and Births, ERN 00482436.

<sup>3956</sup> E3/1794, Levine, Contextual Study into Weddings and Births, ERN 00482627.

<sup>3957</sup> E1/481.1, Peggy Levine, T. 11 Oct 2016, p. 42, lns 14-15.

### C. CONCLUSION ON THE CPK'S POLICY TO REGULATE MARRIAGE

1167. Once again, the Co-Prosecutors' attempts to demonise DK fail to be supported by actual evidence. There is nothing permitting a finding that the CPK, by undertaking its regular state-like functions of regulating marriage or by having a policy to encourage population growth, was in any way aiming or intending to require people to forcibly marry. On the contrary, the evidence overwhelmingly shows that the policy regulating marriage was based on mutual consent. While a policy could be deduced from the evidence, it would need to be inferred from a systematic pattern of conduct. The existence of a forced marriage policy would also need to be the only reasonable inference. As discussed in the following Section, however, the evidence precludes such finding.

### IV. FACTS RELATED TO THE REGULATION OF MARRIAGE

1168. While the Co-Prosecutors have recently nuanced their position that "forced marriage was conducted in every region and every organization of Democratic Kampuchea",<sup>3958</sup> and that there was a "system of forcible marriages",<sup>3959</sup> the burden of proof remains the same. The evidence needs to establish beyond reasonable doubt that forced marriage occurred in a systematic way throughout DK in order to illustrate the existence of a systematic pattern of conduct permitting the deduction of the existence of a nationwide policy.

1169. However, what is abundantly clear when looking at the totality of the evidence is that such pattern is impossible to establish. Notably, both experts Nakagawa and Levine emphasised the "diverse" aspect of marriage experiences in the DK.<sup>3960</sup> Furthermore, it is also important to recall that in its decision on severance and scope, the Chamber implicitly recognised that in order to establish a nationwide policy, at the minimum, one witness or civil party should be heard for each zone, as well as one expert.<sup>3961</sup> The Defence disagrees with this approach: even if an individual would testify with regards to each zone, it is insufficient to establish that a crime occurred systematically in this zone. Notwithstanding this fact, in the case of the allegations of other inhumane acts through forced marriage, and rape, this low standard was not even reached.

<sup>3958</sup> **E1/242.1**, Case 002/02 Opening Statements (Co-Prosecutors), T. 17 Oct 2014, p. 35, lns 6-9.

<sup>3959</sup> **E1/472.1**, Oral Arguments, T. 13 Sep 2016, p. 14, lns 13-20.

<sup>3960</sup> *E.g.* **E1/472.1**, Nakagawa Kasumi, T. 13 Sep 2016, p. 63, ln. 25 to p. 64, ln. 9, p. 71, lns 2-6; p. 78, lns 4-14, p. 82, lns 11-18; **E1/473.1**, Nakagawa Kasumi, T. 14 Sep 2016, p. 57, lns 10-25, p. 72, ln. 19 to p. 73, ln. 12; **E1/480.1**, Peggy Levine, T. 10 Oct 2016, p. 41, lns 2-5; **E1/481.1**, Peggy Levine, T. 11 Oct 2016, p. 16, lns 9-14; **E1/482.1**, Peggy Levine, T. 12 Oct 2016, p. 19, lns 19 to p. 20 ln. 4.

<sup>3961</sup> **E301/9/1**, Additional Severance of Case 002, para. 33: "The lead co-lawyers request the geographic expansion of the rape and forced marriage charges to include such crimes committed nationwide [...] this addition would require hearing one witness or civil party from each zone (seven in total) and one expert".

No evidence was heard regarding the East Zone, West Zone and the Northeast Zone during the segment on the regulation of marriage. Out of the 14 individuals<sup>3962</sup> who gave (mostly unsworn) evidence, three talked about events in Chamkar Leu and Prey Chhor Districts in the Central (Old North) Zone;<sup>3963</sup> three civil parties and one witness talked about the Southwest Zone, and mostly Takeo Province;<sup>3964</sup> and two civil parties provided information regarding their villages in Pursat Province, Northwest Zone.<sup>3965</sup> Limited evidence was also heard regarding Autonomous Sectors 105, 106 and 505,<sup>3966</sup> and two individuals talked about their mobile unit under the Ministry of Commerce in Phnom Penh.<sup>3967</sup> Moreover, and as discussed above, outside of the segment, most evidence highlights the existing CPK consent-based marriage policy, both in theory and in practice.

1170. The present Section addresses the (limited) evidence presented in court regarding each step of the marriage process, in chronological order. The selection of partners is discussed first in Part A. The question of consent is addressed in Part B. The actual marriage ceremony is explained in the third Part, Part C. Finally, the question of alleged monitoring and rape will be covered in Part D.

#### **A. THERE IS NO EVIDENCE OF A UNIFORM NATIONWIDE SPOUSE ‘SELECTION PROCESS’**

1171. Concerning the alleged selection of spouses, the evidence is largely inconsistent. While some gave evidence that “base people” could only marry “base people” and “new people” could only marry “new people”,<sup>3968</sup> others said this did not matter.<sup>3969</sup> Although some said that

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<sup>3962</sup> Excluding the two experts.

<sup>3963</sup> Om Yoeurn (2-TCCP-274) (rubber plantation, early 1977, Chamkar Leu District, Kampong Cham Province, Sector 41); Say Naroeun (impact statement, 1975, Au Thma Village, Chamkar Leu District, Kampong Cham Province, Sector 41); Preap Sokhoeun (cotton plantation, Angong Ta Loeng Village, Thma Pun Commune, Prey Chhor District (District 77), Kampong Cham Province, Sector 41).

<sup>3964</sup> Sou Sotheavy (Chek Village, Doung Commune, Bati District, Takeo Province); Nop Ngim (2-TCW-2002) (salt fields, Kampot Province); Yos Phal (mobile unit, Ang Poun, Prey Ampek Village, Srangae Commune, Treang District, Sector 107, Takeo Province); Seng Soeun (Thon Mon village, Baray Commune, Treang District, Sector 13, and more generally about S’ang District, Kandal Province).

<sup>3965</sup> Pen Sochan (Daeum Roka village, Pursat Province); Nget Chat (impact statement, Rumlech Worksite, Pursat Province).

<sup>3966</sup> Kul Nem (impact statement, provincial military, K-11, Mondulkiri, Autonomous Sector 105); Mon Vun (mobile unit, Sangkae Mean Chey Village, Kampong Kdei Commune, Chi Kreang District, Siem Reap Province, Autonomous Sector 106); Heng Lai Heang (Kantuot Village, Kantuot Commune, Kratie District, Kratie Province, Autonomous Sector 505).

<sup>3967</sup> Chea Deap and Phan Him.

<sup>3968</sup> **E1/309.1**, Uth Seng, T. 3 Jun 2015, p. 26, lns 3-8; **E1/262.1**, Ry Pov, T. 12 Feb 2015, p. 28, lns 17-21; **E3/5255**, ‘WRI of Au Hau’, 18 Nov 2008, ERN 00250047; **E3/7525**, ‘DC-Cam Interview of Chan Kea’, ERN 00885005-06.

<sup>3969</sup> See e.g. **E1/299.1**, Ek Hoeun, T. 8 May 2015, p. 76, lns 4-8; **E1/310.1**, Sou Soeun, 4 Jun 2015, p. 78, ln. 18 to p. 79, ln. 11; **E3/9507**, ‘WRI of You Vann (2-TCW-894)’, A88-A89.



minority groups had to marry people of the same group,<sup>3970</sup> others testified that Cham people were encouraged to marry non-Cham and that Vietnamese could marry Khmer nationals.<sup>3971</sup> Finally, while some claimed generally that “monks were forced to marry”,<sup>3972</sup> there was no detailed, credible evidence on that topic.<sup>3973</sup> On the contrary, Venerable Em Phoeung testified that he was able to refuse a marriage proposal with no consequence.<sup>3974</sup>

1172. Furthermore, a small number of persons gave unsworn statements about having to marry to handicapped soldiers.<sup>3975</sup> However, Seng Soeun, who served for a time as the deputy chief of the handicapped youth office of Sector 13 in the Southwest Zone, stated that no marriage was arranged for the unmarried handicapped soldiers when he was in charge.<sup>3976</sup> While he referred to an alleged recommendation from Ta Mok to arrange marriage for handicapped soldiers in the Southwest Zone, there is nothing to indicate that such instruction was in violation of the official consent-based policy.<sup>3977</sup> Expert Nakagawa was unable to say whether or not this practice was widespread, as a result of the small sample of the population she interviewed.<sup>3978</sup> Finally, a number of individuals testified that they personally could request or volunteer for marriage,<sup>3979</sup> or that their parents were involved in approving the marriage,<sup>3980</sup> or heard that people could freely marry.<sup>3981</sup> What is clear is that there is no consistent approach and therefore, no policy can be deduced from the facts.

## **B. EVIDENCE REGARDING CONSENT AND COERCIVE CIRCUMSTANCES IS SPECULATIVE**

1173. In order to establish lack of consent or coercive circumstances, objective evidence is needed.<sup>3982</sup> The mere feeling that one did not have a choice is insufficient to establish beyond

<sup>3970</sup> See e.g. **E1/380.1**, Prak Yut (2-TCW-938), T. 21 Jan 2016, p. 61, Ins 9-25; **E1/377.1**, You Vann (2-TCW-894), T. 18 Jan 2016, p. 33, ln. 18 to p. 34, ln. 16, p. 39, Ins 4-5, p. 56, ln. 16 to p. 57, ln. 11; **E1/375.1**, Ahmad Sofiyah, T. 13 Jan 2016, p. 74, ln. 14 to p. 75, ln. 3, p. 100, Ins 4-10; **E1/350.1**, Him Man, T. 28 Sep 2015, p. 16, Ins 4-8, 17-22; **E1/415.1**, Sos Kamrei, T. 6 Apr 2016, p. 79, Ins 8-20.

<sup>3971</sup> **E1/388.1**, Ysa Osman, T. 8 Feb 2016, p. 56, Ins 5-13

<sup>3972</sup> **E1/299.1**, Ek Hoeun, T. 8 May 2015, p. 17, Ins 3-8; **E1/252.1**, Chou Koemlan, T. 26 Jan 2015, p. 67, Ins 9-11; **E1/263.1**, Em Phoeung, T. 16 Feb 2015, p. 53, ln. 25 to p. 54 ln. 4.

<sup>3973</sup> See *supra*, Chapter 5-IV-D-4.

<sup>3974</sup> **E1/263.1**, Em Phoeung, T. 16 Feb 2015, p. 53, Ins 7-16.

<sup>3975</sup> **E1/462.1**, Om Yoeurn (2-TCCP-274), T. 23 Aug 2016, p. 14, Ins 3-9, p. 94, Ins 12-22.

<sup>3976</sup> **E1/465.1**, Seng Soeun, T. 29 Aug 2016, p. 15, Ins 16-22.

<sup>3977</sup> **E1/465.1**, Seng Soeun, T. 29 Aug 2016, p. 18, Ins 1-23, p. 22, Ins 5-13.

<sup>3978</sup> See **E3/3416**, Toy-Cronin, Stories of Sexual Violence During DK, ERN 00449491.

<sup>3979</sup> See e.g. **E1/332.1**, Chhum Seng, T. 18 Aug 2015, p. 22, Ins 4-6; **E1/183.1**, Chuon Thy (2-TCW-859), T. 24 Apr 2013, ERN 00905360-61; **E3/7525**, ‘DC-Cam Interview of Chan Kea’, ERN 00884994.

<sup>3980</sup> See e.g. **E1/346.1**, Sen Srun, T. 14 Sep 2015, p. 53, ln. 20 to p. 54, ln. 3.

<sup>3981</sup> See e.g. **E1/252.1**, Oum Suphany, T. 26 Jan 2015, p. 25, ln. 25 to p. 25 ln. 7; **E1/333.1**, Tak Boy, T. 19 Aug 2015, p. 59, Ins 2-4; **E1/274.1**, Neang Ouch, T. 10 Mar 2015, p. 32, Ins 17-21; **E1/332.1**, Chhum Seng, T. 18 Aug 2015, p. 22, Ins 4-6.

<sup>3982</sup> See *infra*, Chapter 7-V-B, concerning the nature of consent required.

reasonable doubt that the person did in fact not have a choice. During the segment on marriage, nine civil parties, two witnesses and two experts appeared; three civil parties also made an impact statement at the end of the segment. Nearly all individuals stated that “they did not dare to refuse” or “they could not refuse”, justifying this on the basis that “we had to obey the orders”. However, repeating the same claim over and over does not vest any probative value in it. Instead, such statements amount to mere rumours which cannot serve to objectively establish lack of consent beyond reasonable doubt.<sup>3983</sup> The fact is that only two persons gave tangible, specific reasons for feeling coerced into accepting a proposal to be married. This is insufficient to deduce the existence of a policy of forced marriage from it. Rather, it illustrates the local authorities’ ignorance or violation of one of the most basic principles of the CPK.<sup>3984</sup>

1174. After civil party Seng Soeun was transferred to the S’ang District office in around 1978, he said that Sao Phon, S’ang District Committee member, ordered him to gather biographies of young males and females from the District mobile unit to “arrange” and “match” them to get married.<sup>3985</sup> However, he also explained that people could “walk away” if they “didn’t like one another”,<sup>3986</sup> and said that, in his view, people were not forced.<sup>3987</sup>

1175. The pre-selected incriminating evidence heard during the segment on the regulation of marriage must be viewed in light of the totality of live evidence. Notably, the majority of the individuals who testified during other sections of the trial, most of whom were actually under oath, gave radically different evidence, explaining that marriages were not forced but based on consent, and people could refuse any marriage proposal without any consequences.<sup>3988</sup> Khoem Boeun, chief of Cheang Tong Commune in Tram Kok District, testified that in her commune, no one was forcibly married.<sup>3989</sup> Phneou Yav, a teacher in Tram Kok Cooperative, testified that people who refused to get married would just “wait for another partner for the next

<sup>3983</sup> **F36**, Case 002/01 Appeals Judgement, para. 419.

<sup>3984</sup> *See supra*, Section III-A-2 & 3, CPK Policy on marriage.

<sup>3985</sup> **E1/465.1**, Seng Soeun, T. 29 Aug 2016, p. 55, lns 1-7.

<sup>3986</sup> **E1/465.1**, Seng Soeun, T. 29 Aug 2016, p. 25, lns 10-16, p. 81, lns 5-12.

<sup>3987</sup> **E1/465.1**, Seng Soeun, T. 29 Aug 2016, p. 81, ln. 20 to p. 82, ln. 3.

<sup>3988</sup> *See e.g.* **E1/263.1**, Em Phoeung, T. 16 Feb 2015, p. 54, lns 5-14; **E1/264.1**, Phneou Yav, T. 17 Feb 2017, p. 34, lns 1-16; **E1/275.1**, Neang Ouch, T. 11 Mar 2015, p. 8, lns 2-16, p. 44, ln. 13 to p. 45, ln. 10; **E1/279.1**, Riel Son, T. 18 Mar 2015, p. 37, lns 14-21; **E1/301.1**, Or Ho, T. 19 May 2015, p. 67, lns 23-25; **E1/297.1**, Khoem Boeun, T. 5 May 2015, p. 20, lns 22-23; **E1/307.1**, Un Rann, T. 28 May 2015, p. 39, lns 4-8; **E1/310.1**, Sou Soeum, T. 4 Jun 2015, p. 74, ln. 19 to p. 75, ln. 1; **E1/325.1**, Mam Soeum, T. 29 Jul 2015, p. 27, ln. 6 to p. 28, ln. 10; **E1/327.1**, Kan Thorl, 10 Aug 2015, p. 74, lns 9-18; **E1/332.1**, Chhum Seng, T. 18 Aug 2015, p. 22, lns 4-6; **E1/333.1**, Tak Boy, T. 19 Aug 2015, p. 58, ln. 18 to p. 59, ln. 4; **E1/412.1**, Sun Vuth, p. 12, ln. 11 to p. 13, ln. 13; **E1/360.1**, Pan Chhuong (2-TCW-918), T. 1 Dec 2015, p. 35, ln. 5 to p. 36, ln. 18; **E1/490.1**, Chuon Thy (2-TCW-859), T. 26 Oct 2016, p. 4, ln. 7 to p. 5, ln. 6.

<sup>3989</sup> **E1/297.1**, Khoem Boeun, T. 5 May 2015, p. 20, lns 22-23; **E3/9480**, ‘WRI of Khoem Boeun’, A111-113.

marriage”.<sup>3990</sup> Kan Thorl, Deputy Chief of a platoon in Phnum Srok District, testified that people would be married only if they agreed with one another.<sup>3991</sup> Mam Soeurm a worker, confirmed this, testifying that people would usually consent to marriages at the Trapeang Thma Dam.<sup>3992</sup> Chuon Thy (2-TCW-859), the regiment commander from the West Zone military mentioned earlier, testified that while he had heard that in certain places, people were “forced” to get married, he was told at the same time that “[i]f they disagreed with the arrangement, they could return to their respective units” and that nothing would happen.<sup>3993</sup> Therefore, it is crystal clear that, based on the totality of the evidence, the only reasonable conclusion is that there was no consistent and systematic pattern of forced marriage.

**C. THE DIFFERENCE IN THE NATURE OF WEDDING CEREMONIES AS A RESULT OF THE DIFFICULT CONTEXT DOES NOT DEMONSTRATE FORCED MARRIAGE**

1176. The Closing Order alleges that marriage ceremonies followed a similar pattern, which illustrated the existence of a nationwide policy.<sup>3994</sup> Again, consistency in wedding ceremonies is not DK specific – in every single country in the world, when one gets married before the public authorities, the process would be the same: people are asked whether they consent to the marriage, they take an oath, and the public official certifies the union. By attempting to link the process of ceremonies under DK with the existence of a criminal forced marriage policy, the Closing Order shows yet another attempt to demonise every action taken by DK, irrespective of the evidence. It also illustrates a complete inability to look at facts in an objective, and legalistic manner.

1177. In any event, the evidence about the ceremonies held for marriage during DK also greatly varies: some individuals testified that their parents could not attend,<sup>3995</sup> others, that they could be present.<sup>3996</sup> Some said there were no celebrations or rituals;<sup>3997</sup> others, such as Tram Kok District chief Pech Chim, said that certain religious rituals were held.<sup>3998</sup> Venerable Em

<sup>3990</sup> **E1/264.1**, Phneou Yav, T. 17 Feb 2015, p. 34, lns 1-16.

<sup>3991</sup> **E1/327.1**, Kan Thorl, T. 10 Aug 2015, p. 81, lns 11-13.

<sup>3992</sup> **E1/325.1**, Mam Soeurm, T. 29 Jul 2015, p. 27, ln. 6 to p. 28, ln. 10.

<sup>3993</sup> **E1/490.1**, Chuon Thy (2-TCW-859), T. 26 Oct 2016, p. 10, lns 2-6.

<sup>3994</sup> **D427**, Closing Order, para. 855.

<sup>3995</sup> See e.g. **E1/333.1**, Tak Boy, T. 19 Aug 2015, p. 59, lns 11-14; **E1/90.1**, Khiev Neou, T. 21 Jun 2012, p. 67, lns 22-24.

<sup>3996</sup> See e.g. **E1/80.1**, Sar Kimlomouth, T. 4 Jun 2012, p. 72, lns 19-22; **E1/461.1**, Tep Poch (2-TCW-850), T. 22 Aug 2016, p. 82, lns 10-11; **E1/459.1**, Mey Savoeun, T. 17 Aug 2016, p. 90, lns 9-10.

<sup>3997</sup> See e.g. **E1/80.1**, Sar Kimlomouth, T. 4 Jun 2012, p. 72, lns 19-22; **E1/334.1**, Yi Laisaov, T. 20 Aug 2015, p. 61, lns 5-7; **E1/454.1**, Chin Saroeun, T. 3 Aug 2016, p. 35, lns 19-24, p. 66, lns 3-4; **E1/296.1**, Khoem Boeun, T. 4 May 2015, p. 21, lns 12-16; **E1/204.1**, So Socheat, T. 10 Jun 2013, p. 57, ln. 18 to p. 58, ln. 1.

<sup>3998</sup> **E1/291.1**, Pech Chim, T. 23 Apr 2015, p. 92, ln. 7 to p. 93, ln. 2.

Phoeung, who was a monk in charge of all the monks at Ang Roka Pagoda, was asked to preside over a marriage.<sup>3999</sup> Heng Lai Heang, who was part of the commune committee in Autonomous Sector 505, testified that there was a party for marriages.<sup>4000</sup> After the wedding, some individuals said that there was extra food,<sup>4001</sup> others could celebrate with their families,<sup>4002</sup> while others had to go back to work as normal.<sup>4003</sup> It is correct that wedding ceremonies were different during DK than nowadays: the country was at war, facing an existential threat, and it had very limited resources.

1178. However, the practice of group weddings and limited practice of wedding rituals falls far from constituting an international crime or illustrating any forcible character of marriage. Such practice owed to the economic difficulties in which DK was at the time, as discussed above in Chapter 6-II.<sup>4004</sup> Instead of being a measure aimed at stigmatising and denying people's right to a wedding celebration, it was a merely practical, economical decision designed to ensure that people could still marry and have even a semblance of ceremony despite the dire circumstances at the time. Notably, the practice of group weddings exists in many countries nowadays, and permits less wealthy individuals to benefit from a ceremony they could otherwise not afford.<sup>4005</sup>

1179. The situation under DK, as presented by the majority of witnesses and civil parties, did not differ from that in any other country: the public authorities encouraged people to love each other and care for each other, which the spouses had to accept. While a few civil parties testified being encouraged to have children, there is nothing inherently criminal in encouraging newlyweds to do so. In most countries in the world, it is considered a normal thing for married people to have children. Regarding any prescription for sex, Tuch Sithan, who was with the Ministry of Social Affairs, testified that “[d]uring the times, this matter was not spoken of”.<sup>4006</sup> Expert Levine provides interesting evidence on this topic: she said that out of 192 persons she spoke to, 76 reported to have been prescribed to have sex.<sup>4007</sup> She puts such information into

<sup>3999</sup> **E1/263.1**, Em Phoeung, T. 16 Feb 2015, p. 20, ln. 20, p. 55, lns 2-14, p. 57, ln. 5 to p. 58, ln. 24, p. 60, lns 17-24.

<sup>4000</sup> **E1/476.1**, Heng Lai Heang, T. 19 Sep 2016, p. 15, lns 20-21.

<sup>4001</sup> *See e.g.* **E1/346.1**, Sen Srun, T. 14 Sep 2015, p. 53, lns 9-18; **E1/454.1**, Chin Saroeun, T. 3 Aug 2016, p. 66, lns 1-2; **E3/7525**, ‘DC-Cam Interview of Chan Kea’, ERN 00884999.

<sup>4002</sup> *See e.g.* **E1/459.1**, Mey Savoeun, T. 17 Aug 2016, p. 90, lns 10-19.

<sup>4003</sup> *See e.g.* **E1/334.1**, Yi Laisauv, T. 20 Aug 2015, p. 61, lns 8-13; **E1/339.1**, Chao Lang, T. 1 Sep 2015, p. 68, lns 1-3.

<sup>4004</sup> *See supra*, Chapter 6-II-A, concerning DK's economic difficulties.

<sup>4005</sup> *See e.g.* Guardian, Mass Wedding Held in South Korea; VoA, Cameroon Organizes Group Weddings for Refugees; Emirate 24/7, Mass Wedding for 129 Emiratis; Pakistan Today, Hindu Mass Wedding to be Held.

<sup>4006</sup> **E1/500.1**, Tuch Sithan, T. 21 Nov 2016, p. 74, lns 9-15.

<sup>4007</sup> **E3/1794**, Levine, Contextual Study into Weddings and Births, ERN 00482536.

perspective, explaining that this was done prior to DK as well. She also draws a parallel with “traditional weddings” where, according to her, there were “plays” about sexual relations at weddings.<sup>4008</sup> She further notes that this was a topic which should be subject to more in-depth research.<sup>4009</sup> In any event, since the official policy was that only people who give mutual consent should be permitted to marry, any encouragement for sexual intercourse cannot be seen as an encouragement for rape, as mutual consent is presumed.

**D. EVIDENCE REGARDING THE ALLEGED MONITORING OF THE CONSUMMATION OF MARRIAGES IS BASED ON RUMOURS AND SPECULATIONS**

1180. Several individuals provided evidence that once married, they were “monitored” by *chhlops* (i.e., Sub-district militia or security guards) during their first night together, in order to ensure that they “got along” or “had sex”. However, the near-totality of the evidence on this subject is based on assumptions, rumours and speculations: people saw that *chhlops* were outside their sleeping quarters, and assumed that they were there to monitor them having sex.<sup>4010</sup> All failed, however, to point to an objective reason for believing so. On the contrary, You Vann (2-TCW-894), Deputy Commune chief of Ro’ang Commune, stated that he had never heard of *chhlop* being instructed to monitor newlyweds in order to see whether they had sexual intercourse.<sup>4011</sup> Chuon Thy (2-TCW-859) testified having never heard about any instructions to monitor whether couples consummated their marriage, and that, in his unit, there was never such monitoring.<sup>4012</sup> Levine’s research showed that only 30% of her 192 respondents told her that they **thought** they were under surveillance.<sup>4013</sup> Numerous individuals testified throughout the trial that they were not monitored.<sup>4014</sup>

1181. Further, as mentioned above, references to 14-16-year-old children monitoring the newly married couples to ensure they had sex together appear incredible in light of the DK’s conservatism. A more plausible explanation for the presence of *chhlops* is that they were ensuring the security of the village. Indeed, their role was that of any police force: to secure the

<sup>4008</sup> E3/1794, Levine, Contextual Study into Weddings and Births, ERN 00482540.

<sup>4009</sup> E3/1794, Levine, Contextual Study into Weddings and Births, ERN 00482424.

<sup>4010</sup> See e.g. E1/264.1, Phneou Yav, T. 17 Feb 2015, p. 33, lns 17-24; E1/305.1, Meas Laihour, T. 26 May 2015, p. 18, lns 1-4; E1/321.1, Chum Samoeurn, T. 24 Jun 2015, p. 63, lns 11-16; E1/324.1, Mam Soeurn, T. 28 Jul 2015, p. 87, ln. 24 to p. 88, ln. 7; E1/361.1, Prak Doeun, T. 2 Dec 2015, p. 95, lns 16-22.

<sup>4011</sup> E3/9507, ‘WRI of You Vann (2-TCW-894)’, A90.

<sup>4012</sup> E1/490.1, Chuon Thy (2-TCW-859), T. 26 Oct 2016, p. 6, ln. 23 to p. 7, ln. 20.

<sup>4013</sup> E3/1794, Levine, Contextual Study into Weddings and Births, ERN 00482540-41 (emphasis added).

<sup>4014</sup> See e.g. E1/265.1, Sao Han, T. 18 Feb 2015, p. 43, lns 11-15; E1/274.1, Neang Ouch, T. 10 Mar 2015, p. 31, ln. 11 to p. 32, ln. 2; E1/291.1, Pech Tim, T. 23 Apr 2015, p. 9, lns 11-16; E1/296.1, Khoem Boeun, T. 4 May 2015, p. 98, lns 17-25; E1/322.1, Kong Uth, T. 25 Jun 2015, p. 37, lns 10-13; E1/454.1, Chin Sareoun, 3 Aug 2016, p. 78, lns 20-22; E1/490.1, Chuon Thy (2-TCW-859), T. 26 Oct 2016, p. 6, ln. 23 to p. 7, ln. 1.

location, and ensure that no crimes were committed. Throughout the world, and even within the UN,<sup>4015</sup> certain police officers do commit sexual offences or other crimes against individuals instead of fulfilling their role of protectors. The occurrence of such incident would never be interpreted as the state or the UN promoting or following a policy of rape or any criminal policy. The culprits would simply be viewed as rogue elements who failed to follow the applicable rules. The same reasoning should apply to the DK: the extremely limited incriminating evidence in terms of monitoring constitutes regrettable incidents where individuals acted in violation of the CPK's revolutionary principles.<sup>4016</sup> Concluding otherwise would just be another illustration of the blind following of the Manichean narrative with blatant disregard for facts and evidence. Four civil parties stated having been raped by their husband.<sup>4017</sup> While this may have happened, such isolated incidents do not illustrate the existence of a policy of forced marriage acquiescing rape inside a marriage. Importantly, Levine did not come across any report of rape in her study.<sup>4018</sup> Further, and as stated above, there was a strict CPK policy against sexual violence,<sup>4019</sup> and people were arrested if found guilty of rape.<sup>4020</sup>

#### **E. SOME LOCAL AUTHORITIES WERE ACTING IN VIOLATION OF THE POLICY**

1182. A number of witnesses and civil parties have explained that day-to-day regulation of marriage was in the hands of local authorities, generally the unit chief and village or commune chiefs. Nearly all witnesses and civil parties testified that only their unit chief and commune/village chiefs were involved in the marriage.<sup>4021</sup> A handful said that members of the District committee were present,<sup>4022</sup> but others, like Neang Ouch, the chief of Tram Kok District after Pech Chim, testified that the District was not involved in the organisation or celebration of weddings.<sup>4023</sup> Khoem Boeun, the chief of Cheang Tong Commune in Tram Kok District, explained that the "Centre" was not involved.<sup>4024</sup> This is of course logical: in no country are regional authorities involved in marriages. The most detailed evidence comes from Heng Lai Heang, a lower level cadre at base and commune level in Kratie District, Sector 505. She

<sup>4015</sup> See e.g. Guardian, Broken Promises for the Children of Bangui Abused by Peacekeepers.

<sup>4016</sup> See *supra*, Chapter 7-IV-A-1-(c), concerning the Revolutionary Precepts.

<sup>4017</sup> Om Yoeurn (2-TCCP-274); Preap Sokhoeurn; Pen Sochan; Mon Vun. Due to space limitations, the Defence does not discuss their evidence or credibility in detail here. It reserves the right to do so during oral arguments.

<sup>4018</sup> E3/1794, Levine, Contextual Study into Weddings and Births, ERN 00482541.

<sup>4019</sup> See *supra*, Chapter 7-IV-A-1-(c), on the 6<sup>th</sup> Revolutionary Precept.

<sup>4020</sup> See *supra*, Chapter 4-VI, on the crime of rape.

<sup>4021</sup> See e.g. E1/263.1, Em Phoeung, T. 16 Feb 2015, p. 56, ln. 9; E1/321.1, Chum Samoeurn, T. 24 Jun 2015, p. 64, ln. 64 to p. 65, ln. 1; E1/264.1, Phneou Yav, T. 17 Feb 2015, p. 31, lns 17-18.

<sup>4022</sup> E1/310.1, Sou Soeurn, T. 4 Jun 2015, p. 75, lns 4-8.

<sup>4023</sup> E1/274.1, Neang Ouch, T. 10 Mar 2015, p. 33, lns 7-13.

<sup>4024</sup> E1/297.1, Khoem Boeun, T. 5 May 2015, p. 71, lns 2-5; E3/9480, 'WRI of Khoem Boeun', A111, A113.

testified that marriages were organised as follows: “a particular ministry would be responsible for the marriage within the ministry; for an army unit, it would be organized by their respective sector chief. [...] for the ministry level, the office head would be responsible for such event.”<sup>4025</sup> Two points are clear from this variety of evidence: first, the Zones, let alone the “Centre”, were not involved in the day-to-day operations of marriage; second, the main authorities in charge were the village and commune chiefs.

1183. Many testified that there were deviations from the official CPK policy on the ground. Moeng Vet (2-TCW-1005), Deputy Chief of office in Division 117 within Autonomous Sector 505, said that while the principles on marriage were good, their implementation “depended on the individuals” and “was not consistent”.<sup>4026</sup> Pech Chim, Tram Kok District’s chief, confirmed this, and explained that as they were “so busy at the district level [...] sometimes, we gave such authority to the unit chiefs”, and that was the reason why there were “gaps in the practice”, *i.e.*, people who did not consent to marriage.<sup>4027</sup> As a result, a very reasonable inference from the totality of the evidence is that if crimes were committed, they were the result of overzealous, rogue, or autonomous local authorities or isolated individuals, or due to local authorities’ misunderstanding of the policies.

1184. Finally, there is no evidence that, where people were allegedly threatened, coerced into marrying, or physically or sexually assaulted after marriage, it was pursuant to official orders. There is also no evidence that such events were ever reported to the Zones level, and even less so to Nuon Chea or any alleged JCE member. Again, the official policy was based on consent, and in the absence of any link between the violations of this policy and Nuon Chea, he cannot incur any liability for crimes allegedly committed on the ground.

## **F. CONCLUSION ON FACTS RELATED TO THE REGULATION OF MARRIAGE**

1185. Ultimately, what characterises the evidence is its lack of clarity and consistency. The Defence recalls that as a result of the principle of *in dubio pro reo* (*i.e.*, when in doubt, for the Accused), and in light of the limited, indirect evidence regarding events of forced marriage, the only reasonable conclusion is that Nuon Chea had no involvement whatsoever with any crime committed on the ground. Even if the evidence was found to be reliable and given weight, the fact that some isolated individuals felt they were forced to be married over the whole DK period

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<sup>4025</sup> E1/476.1, Heng Lai Heang, T. 19 Sep 2016, p. 36, lns 2-11.

<sup>4026</sup> E1/449.1, Moeng Vet (2-TCW-1005), T. 27 Jul 2016, p. 42, lns 7-18, p. 43, ln. 22 to p. 44, ln. 10.

<sup>4027</sup> E1/291.1, Pech Chim, T. 23 Apr 2015, p. 3, ln. 3 to p. 4, lns 5-13.

is insufficient to demonstrate beyond reasonable doubt the existence of a state-level policy of forced marriage. In any event, the following Section shows that the constitutive elements of the crime of other inhumane acts through forced marriage under international criminal law cannot be established in the present case.

## **V. CRIMES CHARGED FOR THE REGULATION OF MARRIAGE**

1186. In the context of the policy of forced marriage, Nuon Chea is charged with rape, and with other inhumane acts through forced marriage. However, as set out in Chapter 4-VI-G-1, the Co-Prosecutors have failed to establish the necessary chapeau element for crimes against humanity, namely that there was a ‘discriminatory’ attack. Therefore, no crime against humanity can be established – including rape and other inhumane acts – at all. Even if the chapeau element is satisfied, it is noted below that the way marriages were regulated under DK, if anything, amount to ‘arranged marriage’ and not forced marriage, something which was not criminalised under customary international law in 1975-1979 (Part A). Second, the evidence does not meet the requisite standard to establish lack of consent, and the question of ‘coercive circumstances’ does not apply in the present case (Part B). Part C shows that the allegations related to marriage do not have the same level of gravity as other crimes against humanity and can therefore not qualify as ‘other inhumane acts’. Finally, Part D discusses the requisite *mens rea* for both other inhumane acts through forced marriage, and rape. The Defence does not explicitly address the *Amicus Curiae* brief,<sup>4028</sup> because of its limited relevance in presenting the law as it wishes it to be, rather than an objective presentation of the law in 1975-1979.

### **A. ARRANGED MARRIAGE IS NOT FORCED MARRIAGE AND WAS NOT AN INTERNATIONAL CRIME BETWEEN 1975 AND 1979**

#### **1. The Crime of Other Inhumane Acts Through Forced Marriage was Judicially Created in 2008 in Relation to Drastically Different Events**

1187. The crime against humanity of other inhumane acts through forced marriage was created in 2008 by the SCSL regarding events occurring between 1996 and 2002. In other words, it was created more than 30 years after DK, in relation to significantly different events. The SCSL found that during the Sierra Leonean conflict, when a village was captured by the rebels, women were gathered and told that they would be one of the rebels’ wife. They were then “attributed” to that individual, without ceremony or official recognition; had to undertake domestic duties

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<sup>4028</sup> E418/4, *Amicus Curiae* Brief on Forced Marriage; see also E418/1, Nuon Chea’s Response to Request for Leave to Submit *Amicus Curiae* Brief on Forced Marriage.



such as cleaning and cooking; and had to satisfy the sexual needs of their “husband”.<sup>4029</sup> The SCSL therefore defined forced marriage as follows:

a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim.<sup>4030</sup>

1188. It noted that forced marriage was “not predominantly sexual in nature”, and that the key element was the “forced conjugal association” upon the victim.<sup>4031</sup> Critically, it limited the definition of forced marriage as being “in the context of the Sierra Leone conflict”.<sup>4032</sup>

1189. However, even assuming that all of the evidence discussed in this Chapter is credible, the conditions of marriage under DK simply cannot be equated with those in Sierra Leone. In the DK, there was an official policy based on consent; people were asked if they agreed to get married; there is no evidence of physical force used; there is evidence of people refusing without consequence; there was no physical violence or threats; there was an official ceremony, recognised by public authorities; and there was no sexual enslavement or relationship of “ownership” between spouses.<sup>4033</sup> There was also no forced conjugal association as most individuals were sent to different locations after their marriage.<sup>4034</sup>

## **2. The Reality is that the Closing Order and the Co-Prosecutors Attempt to Criminalise Arranged Marriage**

1190. The SCSL Appeals Chamber noted that there is a difference between arranged and forced marriage, distinguishing the two practices as follows:

while traditionally arranged marriages involving minors violate certain international human rights norms [...], forced marriages which involve the abduction and detention of women and girls and their use for sexual and other purposes is clearly criminal in nature.<sup>4035</sup>

1191. The three elements identified by the Appeals Chamber as characteristics of forced marriage, namely the abduction, detention, and use for sexual and other purposes of women, are simply absent in the present case. In fact, what the evidence (again, if considered credible)

<sup>4029</sup> SCSL, *AFRC Appeals Judgement*, paras 190, 202; SCSL, *RUF Trial Judgement*, paras 1211-1212.

<sup>4030</sup> SCSL, *AFRC Appeals Judgement*, para. 196.

<sup>4031</sup> SCSL, *AFRC Appeals Judgement*, para. 190.

<sup>4032</sup> SCSL, *AFRC Appeals Judgement*, para. 196.

<sup>4033</sup> *See supra*, Chapter 7-IV.

<sup>4034</sup> *See e.g.* **E1/462.1**, Um Yoeurn (2-TCCP-274), T. 23 Aug 2016, p. 7, lns 10-16; **E1/487.1**, Preap Sokhoeurn, T. 20 Oct 2016, p. 90, ln. 20 to p. 91, ln. 3; **E1/483.1**, Pen Sochan, T. 13 Oct 2016, p. 50, lns 15-19.

<sup>4035</sup> SCSL, *AFRC Appeals Judgement*, para. 194.

shows is that if anything, some public authorities arranged marriage between individuals deemed to be suitable for each other, in line with Cambodian culture and tradition. People were asked whether they wanted to get married; they could refuse without consequences; and the role of the authorities was that of a facilitator. People were under no threat of death or violence. Rather, they felt they “had to” accept. This is no different to how young people may have felt prior to 1975 when their parents organised their marriage. In fact, civil party Om Yoeurn (2-TCCP-274), when talking about her parents’ proposal for her own marriage before 1975, used the same expression than many used when talking about their marriage under DK: “I did not dare [to refuse].”<sup>4036</sup> In sum, the Defence submits that if anything, marriages under DK were arranged, but not forced.

### 3. However, Arranged Marriage was not an International Crime in 1975-1979

1192. It is a fundamental principle of criminal law that conduct needs to be criminalised, and the perpetrator needs to know that such conduct is criminalised, for a conviction to be possible. However, prior to 1975, marriages in Cambodia were constantly arranged between parents, without or with little involvement from future spouses. Opposing one’s parents’ wishes would also often be seen as unacceptable.<sup>4037</sup> Cambodia was not exceptional in this sense – rather, it arguably reflected the norm. While there is no global data available on marriage practices prior to 1975, even in 1983, 92.5% of marriages worldwide had an arranged marriage element.<sup>4038</sup> It is only logical to assume that some 20 years earlier, the percentage was the same, if not higher. Indeed, the practice of arranged marriage still exists in Cambodia today, even though cultural mores are slowly changing. Indeed, even in 2006, about 60% of all marriages across the world were arranged.<sup>4039</sup> Ultimately, therefore, it is clear that between 1975 and 1979, arranged marriage was not a crime under customary international law. Therefore, Nuon Chea cannot be convicted for it without violating the principle of legality.

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<sup>4036</sup> **E1/462.1**, Om Yoeurn (2-TCCP-274), T. 23 Aug 2016, p. 26, ln. to p. 27.

<sup>4037</sup> See e.g. **E1/462.1**, Om Yoeurn (2-TCCP-274), T. 23 Aug 2016, p. 26, ln. 5 to p. 27; **E1/463.1**, Sou Sotheavy, T. 24 Aug 2016, p. 63, lns 8-20; **E1/488.1**, Preap Sokhoeurn, T. 24 Oct 2016, p. 16, ln. 24 to p. 17, ln. 17; **E1/480.1**, Peggy Levine, T. 10 Oct 2016, p. 53, ln. 7, to p. 55, ln. 5, p. 67, ln. 7 to p. 68, ln. 20; **E1/472.1**, Nakagawa Kasumi, T. 13 Sep 2016, p. 39, ln. 4 to p. 40, ln. 25.

<sup>4038</sup> Broude *et al.*, Cross-cultural Codes on Husband-Wife Relationships, pp. 263-280, 273-274.

<sup>4039</sup> US, *Gonzales v. Gao*, citing to the US Department of Homeland Security; see also ABC News, First Comes Marriage.

## B. THE EVIDENCE SHOWS CONSENT AND ABSENCE OF COERCIVE CIRCUMSTANCES

1193. As discussed above, the evidence unequivocally shows that people were always asked about their consent. Many could refuse a proposal to marry without any consequence. Those who testified that “they did not dare to refuse” failed to provide any objective reason for this, nor is there corroborative evidence, whether from their family members or others. Since all people did provide explicit consent to the marriage, the question is therefore not about the existence of consent, but rather, its quality. Pre-emptively addressing this issue, both the Closing Order and the -Prosecutors allege that at the time, the “prevailing circumstances” were “almost universally [...] coercive”,<sup>4040</sup> since the DK was “a prison without walls”.<sup>4041</sup> As a result, they submit that genuine and free consent was unattainable in such conditions. However, both fail to provide specific examples and objective reasons demonstrating why such genuine and free consent was impossible.

1194. While coercive circumstances do not require “a show of physical force”, elements such as “[t]hreats, intimidation, extortion and other forms of duress which prey on fear or desperation” are relevant in establishing their existence.<sup>4042</sup> Examples of coercive circumstances at the SCSL include abduction or knowledge that refusing to be a “wife”, would lead to rape by a number of soldiers.<sup>4043</sup> At the ICTY, coercive circumstances were found where victims were in a prison in very specific circumstances.<sup>4044</sup>

1195. No such condition can be established beyond reasonable doubt in the present case. On the contrary, most of the fears were based on rumours and speculations. However, a mere feeling that one did not have a choice is not enough to establish lack of consent.<sup>4045</sup> The absence of consent, or the existence of coercive circumstances, is a constitutive element of the crime of forced marriage. It must therefore be established beyond reasonable doubt. When it is deduced from the circumstances, it must be the only reasonable inference from the totality of the evidence. It is not the case here, as explained above.<sup>4046</sup> The Supreme Court Chamber’s

<sup>4040</sup> **D390**, Co-Prosecutors’ Final Submission, para. 1260, *citing to* ICTY *Kunarac et al.* Appeals Judgement, para. 130; ICTR, *Gacumbitsi* Appeals Judgement, para. 151; *Muhimana* Trial Judgement, para. 546.

<sup>4041</sup> *See also* **D427**, Closing Order, para. 158, *see also* paras 1395, 1427, 1431; **E1/242.1**, Case 002/02 Opening Statements (Co-Prosecutors), T. 17 Oct 2014, p. 27, Ins 4-5.

<sup>4042</sup> ICC, *Bemba* Trial Judgement, para. 103; ICTR, *Akayesu* Trial Judgement, para. 688.

<sup>4043</sup> SCSL, *AFRC* Appeals Judgement, paras 190.

<sup>4044</sup> ICTY, *Milutinović et al.* Trial Judgement, para. 200; *Kunarac et al.* Appeals Judgement, para. 132.

<sup>4045</sup> *See e.g.* ICTY, *Furundžija* Trial Judgement, para. 174: ‘The act is “accomplished by force or threats of force against the victim or a third person, such threats being express or implied and must place the victim in **reasonable fear** [that the victim] or a third person will be subjected to violence, detention, duress or psychological oppression’ (emphasis added).

<sup>4046</sup> *See supra*, Chapter-IV-B.

reasoning about murder applies equally to the crime of other inhumane acts through forced marriage: specific instances of forced marriage must be proved beyond reasonable doubt, irrespective of whether a specific conviction for forced marriage has been entered.<sup>4047</sup> Similarly, the overall conclusion that forced marriage occurred cannot be said to have been established beyond reasonable doubt if none of the specific instances that underpin that conclusion has been established to this standard.<sup>4048</sup>

1196. As also explained above, the argument was made that the “prevailing circumstances” were “almost universally [...] coercive”,<sup>4049</sup> and that the DK as “a prison without walls”, in order to show that marriages were forced.<sup>4050</sup> However, this argument amounts to stating that genuine consent was impossible for anyone, throughout all of DK, between 1975 and 1979. In other words, any and all actions undertaken during that time period would be inherently vitiated, for they were made without proper consent. No one was able to give consent: every labour was forced labour; every movement was forcible displacement; every marriage was forced; and every act of sex was rape. Such an argument is simply absurd and serves only to highlight the paucity of evidence and unswerving commitment to the Manichean narrative. It also contradicts the Co-Prosecutors’ own admission that not every person was forcibly married under DK,<sup>4051</sup> for if no one could give genuine consent, then all marriages would be forced by nature. In short, the absurd and theatrical “prison without walls” argument must be simply ignored.

### **C. THE EVENTS DO NOT REACH THE REQUISITE LEVEL OF GRAVITY FOR A CRIME AGAINST HUMANITY**

1197. “[S]evere suffering, or physical, mental or psychological injury” must have been caused to the victim for the crime of other inhumane act through forced marriage to be established.<sup>4052</sup> In addition, in order to fit in the category of “other inhumane acts”, forced marriage must be of a similar level of gravity as other crimes against humanity.<sup>4053</sup> It must be established beyond reasonable doubt.<sup>4054</sup> In the present case, even if the evidence were considered to be credible and reliable, it fails to show that the situation in which men and women found themselves when required to marry under DK was of the same level of gravity as other crimes against humanity

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<sup>4047</sup> **F36**, Case 002/01 Appeals Judgement, para. 420.

<sup>4048</sup> **F36**, Case 002/01 Appeals Judgement, para. 420.

<sup>4049</sup> **D390**, Co-Prosecutors’ Final Submission, para. 1260, citing to *Kunarac et al.* Appeals Judgement, para. 130; *Gacumbitsi* Appeals Judgement, para. 151; *Muhimana* Trial Judgement, para. 546.

<sup>4050</sup> See also **D427**, Closing Order, para. 158, see also paras 1395, 1427, 1431.

<sup>4051</sup> **E1/472.1**, Key Documents Hearing, T. 13 Sep 2016, p. 14, lns 13-20.

<sup>4052</sup> SCSL, *AFRC* Appeals Judgement, para. 196.

<sup>4053</sup> **F36**, Case 002/01 Appeals Judgement, para. 586.

<sup>4054</sup> **F36**, Case 002/01 Appeals Judgement, para. 188.

such as murder, torture, or extermination. As expert Levine testified, people she interviewed did not see anything illegitimate or illegal about their wedding arrangements under DK, and only after the lobbying on “forced marriage” started to take over the news did they start to feel “ashamed” about it.<sup>4055</sup>

1198. As discussed immediately above, the situation of victims during the Sierra Leonean war and DK differ widely in terms of gravity.<sup>4056</sup> In relation to DK, no one testified to feeling stigmatised as a result of their wedding. In fact, according to expert Levine, “[w]ith such harsh living conditions, many weddings represented a relief at that time”.<sup>4057</sup> Over 80% of Levine’s respondents considered their marriage a legitimate arrangement.<sup>4058</sup> While the Defence does not intend to diminish the suffering of victims of alleged forced marriage, it recalls that as held by the ICTY, “not every denial of a fundamental human right is serious enough to constitute a crime against humanity”.<sup>4059</sup> The practice under DK was that of arranged marriage, which, as also mentioned above, is still widespread even today. It does not reach the requisite level of gravity to constitute a crime against humanity.

#### **D. NO MENS REA CAN BE ESTABLISHED**

1199. In order to find that the crime of other inhumane acts through forced marriage took place, and of rape, it is necessary to establish beyond reasonable doubt that the alleged perpetrators knew that the act of marriage or sex occurred without the consent of the victim or in coercive circumstances.<sup>4060</sup> As stated above, however the evidence unequivocally shows that the CPK policy on marriage was based on mutual consent and approval of the public authorities, like any other state in the world.<sup>4061</sup> As a result of the absence of criminal policy, the allegation that JCE members and Nuon Chea had the requisite *mens rea* for other inhumane acts through forced marriage, and rape, must be established beyond reasonable doubt. However, the evidence proves nothing of the sort. There is no credible evidence linking any of the alleged crimes with a JCE member. There is no evidence that any incident was ever reported to Nuon Chea. There is equally no evidence permitting an inference that Nuon Chea otherwise knew that certain

<sup>4055</sup> E1/480.1, Peggy Levine, T. 10 Oct 2016, p. 46, lns 10-12; E1/481.1, Peggy Levine, T. 11 Oct 2016, p. 5, lns 14-21, p. 6, lns 2-8.

<sup>4056</sup> See *supra*, Chapter 7-IV-D and Chapter 7-IV-E.

<sup>4057</sup> E3/1794, Levine, Contextual Study into Weddings and Births, ERN 00482436, 00482627.

<sup>4058</sup> E3/1794, Levine, Contextual Study into Weddings and Births, ERN 00482442-43.

<sup>4059</sup> ICTY, *Kordić & Čerkez* Appeals Judgement, para. 102.

<sup>4060</sup> D427, Closing Order, para. 1431; SCSL, *AFRC*, Decision on Defence Motion for Acquittal, para. 106; ICTR, *Gacumbitsi* Appeals Judgement, paras 153, 157; *Muvunyi* Trial Judgement, para. 522; *Semanza* Trial Judgement, para. 346.

<sup>4061</sup> See *supra*, Chapter 7-IV-A, Chapter 7-IV-B and Chapter 7-IV-C.

individuals were required to marry without their consent and were victims of rape. As a result, a key constitutive element of the crime of other inhumane act through forced marriage, and of rape, is not established. Accordingly, a conviction simply cannot be sustained.

## VI. JCE I IN RESPECT OF THE REGULATION OF MARRIAGE

1200. Even if it was established that the crime of other inhumane acts took place, Nuon Chea cannot be held responsible for it under the mode of liability of JCE I. The reason is simple: there is no link between Nuon Chea, or other alleged JCE members, and a policy of forced marriage, nor is there any link between Nuon Chea and the events on the ground.

### A. NUON CHEA'S UNVERIFIABLE STATEMENT IN A BOOK IS NOT RELIABLE EVIDENCE

1201. The only shred of evidence to which the Co-Prosecutors desperately cling to is Nuon Chea's alleged statement, in the book *Behind the Killing Fields*, where he reportedly stated that "[t]he man always wants to choose a beautiful girl, so that's why we forced them to get married and Angka chose the wife".<sup>4062</sup> The Co-Prosecutors have qualified such statement as "basically a confession to forced marriage policy".<sup>4063</sup> However, it is nothing of the sort, for three reasons set out below.

1202. First, such view demonstrates a lack of basic legal knowledge about the definition of a confession. Confessions are only valid evidence if they are obtained as part of a legitimate legal process.<sup>4064</sup> Second, the authors admitted themselves to having "worked to make sure we told this story in the way we thought it should be told",<sup>4065</sup> which creates significant doubt as to the accuracy of Nuon Chea's words. While he does not submit that the totality of the book is unreliable or inaccurate, the Defence emphasises that Nuon Chea was never provided with a draft of the book before its publication, nor was he asked to confirm the representativeness of the various quotes attributed to him. Expert Levine, who is well-versed in research methodology, also expressed concerns about the representativeness and accuracy of Nuon Chea's statement in this book when confronted with it in court.<sup>4066</sup> Third, the CPK marriage policy is crystal clear: consent was required. In any event, Nuon Chea's alleged use of the term "forced" – particularly in light of the 6<sup>th</sup> Precept – does not suffice to establish any forcible

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<sup>4062</sup> E3/4202, Chon and Sambath, *Behind the Killing Fields*, ERN 00757496.

<sup>4063</sup> E1/410.1, Sao Sarun, T. 29 Mar 2016, p. 66, lns 14-15.

<sup>4064</sup> ECCC Establishment Law, Art. 33 New, Art. 35 (g) new; *see also* ICTY, *Prlić et al.*, Decision on Admission of Praljak's Evidence, paras 20-22; ICTY, *Erdemović* Sentencing Judgement, para. 16.

<sup>4065</sup> E3/4202, Chon and Sambath, *Behind the Killing Fields*, 2010, ERN 00757567.

<sup>4066</sup> E1/481.1, Peggy Levine, T. 11 Oct 2016, p. 112, ln. 14 to p. 113, ln. 5.

character of marriages, nor does a simple statement constitute proof beyond reasonable doubt. On the contrary, a more reasonable interpretation is that people were encouraged to get married, and that the authorities would get involved in an effort to ensure equal treatment of all in the context of marriage. In any event, this particular statement strikingly contradict Nuon Chea's position, which aligned with the official legitimate consent-based policy, and in lack of its lack of reliability, it must be given no weight. Such a meagre second-hand statement is insufficient to establish anything beyond reasonable doubt, whether regarding the existence of a policy or Nuon Chea's own *mens rea*.

**B. THE EVIDENCE RELATED TO TA MOK DOES NOT SHOW ANY CRIMINAL BEHAVIOUR**

1203. The only evidence heard linking the alleged crimes to an alleged JCE member was that mentioning Ta Mok. Civil party Chea Deap and witness Phan Him mentioned Ta Mok's involvement in their wedding. However, nothing in either person's evidence shows that Ta Mok encouraged or was aware of the fact that the individuals were not willing to marry. It must also be noted that while witness Nop Ngim (2-TCW-1002) testified about Ta Mok's presence at her wedding ceremony, her testimony in this regard cannot be relied upon, as her husband also gave evidence about Ta Mok's involvement and made no mention of his presence at the ceremony.<sup>4067</sup> Rather, their evidence shows that Ta Mok just facilitated the administrative organisation of their marriage. Finally, while civil party Seng Soeun testified that handicapped people were married with women from the pepper plantation in Sector 13 on the order or instruction from Ta Mok,<sup>4068</sup> nothing in his evidence refers to the existence of a policy or practice to marry people without their consent. In any event, there is no evidence that Ta Mok was acting in accordance with a common purpose, or that any of the JCE member shared his intent. There is similarly no evidence that he was acting upon the instructions, or with the knowledge, of Nuon Chea.

**C. THE ALLEGED REPORTING ON FORCED MARRIAGE DOES NOT REFER TO FORCE**

1204. The allegations of reporting about forced marriage in fact contain no reference to the fact that marriages were allegedly forced. Instead, the reports constitute legitimate public and demographic records. This is illustrated in particular by E3/1094, a July 1978 monthly report from Office 401 cited in the Closing Order, which in fact just refers to "arranged marriages",

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<sup>4067</sup> E1/469.1, Nop Ngim (2-TCW-1002), T. 5 Sep 2016, p. 72, ln. 8; E3/9110, 'DC-Cam Interview of Preab Kab', ERN 01063385.

<sup>4068</sup> E1/465.1, Seng Soeun, T. 29 Aug 2016, p. 17, ln. 10 to p. 18, ln. 6.

next to the number of deaths and births.<sup>4069</sup> It is clear that those figures were simple demographic measures to evaluate the population, and cannot be interpreted as illustration of a policy to force people to marry. While the Closing Order also refers to a 15 March 1978 telegram allegedly copied to Nuon Chea reporting on the visit of a Yugoslav delegation, that telegram in fact reads that “mobile unit members are **allowed to get married if a proposal for marriage is made**”.<sup>4070</sup> In short, there is no evidence of any forced marriage being reported.

1205. Finally, there was never a common goal to “implement and defend the CPK socialist revolution” through a policy of forced marriage.<sup>4071</sup> The CPK policy on marriage was based on mutual consent and approval of the public authorities, like any other country in the world. Similarly, the existence of a policy aiming to promote population growth cannot be equated to one of forced marriage or forced sexual intercourse within a marriage.<sup>4072</sup> Therefore, if there was a shared intent among certain JCE members,<sup>4073</sup> that intent was that marriages would take place according to the 6<sup>th</sup> Revolutionary Precept. Further, there is no link between the alleged crimes on the ground, as discussed in Part IV, and any JCE member, or Nuon Chea. As a result, none of the alleged crimes, even if established beyond reasonable doubt, could be attributed to a JCE member or to Nuon Chea. The remainders of the modes of liability are discussed in Chapter 8 of this Brief.

## VII. CONCLUSION ON THE CPK’S NATIONWIDE REGULATION OF MARRIAGE

1206. The CPK’s marriage policy is the fourth and final alleged JCE policy addressed in this Brief. It is also one of the areas in Case 002/02 most surrounded by external noise from civil society, activists, academics, and the media. Thus, it is especially thrust under the spotlight. This renders it even more important that determinations *vis-à-vis* the CPK’s regulation of marriage be dispassionate, independent, and tethered in reasoned evidentiary analysis. Yet again, however, once the shroud of the Manichean narrative is lifted, it becomes clear that the evidence is woefully insufficient to establish Nuon Chea’s responsibility for the crimes charged. In addition, in the few instances where crimes may have occurred, the evidence shows that this owes to deviations from correct CPK policy. That policy was unequivocally one that sought to regulate marriage and encourage population growth in ways that were not only legitimate and

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<sup>4069</sup> E3/1094, Rep. from M-401, 4 Aug 1978, ERN 00143630.

<sup>4070</sup> E3/1113, ‘Telegram 61’, 15 Mar 1978, ERN 00434864 (emphasis added).

<sup>4071</sup> D427, Closing Order, paras 216-217, 845.

<sup>4072</sup> See *supra*, Chapter 7-IV-A, Chapter 7-IV-B and Chapter 7-IV-C.

<sup>4073</sup> On the existence of a common purpose, see *supra*, Chapter 3-IX-A-1.



lawful, but reflected common global practice at the time. Marriage in the DK ultimately amounted to arranged marriage, a practice that remains prevalent in Cambodia and around the world today. The Closing Order and Co-Prosecutors' attempt to prosecute this amounts to an unacceptable attempt to put Cambodian culture, and arranged marriages altogether, on trial.

## **CHAPTER 8. OTHER MODES OF LIABILITY CHARGED**

### **I. INTRODUCTION**

1207. As stated above, the evidence does not establish any of the charged crimes beyond reasonable doubt, or the existence of a JCE.<sup>4074</sup> The arguments below are thus offered only in the alternative. Each constitutive element of the modes of liability must be established beyond reasonable doubt.<sup>4075</sup> Yet, no evidence was heard linking Nuon Chea's words, deeds or systematic patterns of action to the commission of crimes. The only direct link with Nuon Chea relates to legitimate governmental policies, none of which amounted to or involved the commission of crimes.<sup>4076</sup> Therefore, mere linkage with those policies is insufficient to meet the requisite standard of proof. In the absence of evidence regarding Nuon Chea's direct participation in any of the crimes charged, the only remaining option is to infer his participation (*actus reus*) and criminal intent (*mens rea*) from circumstantial evidence. In doing so, special attention must be paid as to whether actions are ambiguous and allow for several reasonable inferences, in which case the Nuon Chea must be acquitted.<sup>4077</sup> This is the case here, as demonstrated below. Section II discusses the four other modes of liability charged, *i.e.*, planning and instigating, ordering, aiding and abetting. Section III addresses superior responsibility.

### **II. PLANNING, INSTIGATING, ORDERING, AND AIDING AND ABETTING**

#### **A. THE OBJECTIVE ELEMENT (*ACTUS REUS*) IS NOT ESTABLISHED**

1208. Planning requires the design of criminal conduct, both at the preparatory and execution phases, constituting one or more crimes that are later perpetrated, while instigating refers to an action or omission prompting another to commit a crime.<sup>4078</sup> Ordering requires a specific instruction to commit a crime to be given to someone with whom the Accused was in a relationship of authority.<sup>4079</sup> Finally, aiding and abetting involves the provision of practical assistance, encouragement or moral support to the commission of a crime.<sup>4080</sup> All modes require

<sup>4074</sup> See *supra*, Chapters 4-7.

<sup>4075</sup> **F36**, Case 002/01 Appeals Judgement, para. 418.

<sup>4076</sup> See *supra*, Chapters 4-II, Chapter 5-II-C, Chapter 5-III-C, Chapter 5-IV-C, Chapter 6-II, Chapter 7-III.

<sup>4077</sup> ICTY, *Vasiljević* Appeals Judgement, paras 120, 131; *Krstić* Appeals Judgement, para. 41; *Brđanin* Trial Judgement, para. 970.

<sup>4078</sup> **E313**, Case 002/01 Trial Judgement, paras 698-700; ICTY, *Kordić & Čerkez* Appeals Judgement, paras 26-27; *Limaj* Trial Judgement, para. 513.

<sup>4079</sup> **E313**, Case 002/01 Trial Judgement, para. 702; see also ICTR, *Gacumbitsi* Appeals Judgement, para. 182; *Nahimana et al.* Appeals Judgement, para. 481.

<sup>4080</sup> **E313**, Case 002/01 Trial Judgement, para. 704; see also *Tadić* Appeals Judgement, para. 229; *Vasiljević* Appeals Judgement, para. 102.

the actions of the Accused to have a substantial effect on the commission of the crimes.<sup>4081</sup> Further, for ordering, there needs to be a causal relationship between the order and the commission of a crime.<sup>4082</sup>

1209. In the present case, there is no credible evidence directly or indirectly linking Nuon Chea with crimes alleged committed at any of the crime sites; there is no evidence of him planning, instigating, or aiding and abetting the commission of crimes; there is no evidence of him giving instructions to commit crimes. In fact, most of the witnesses and civil parties did not name any specific individual but just referred to “*Angkar*”, “the Party”, or “the upper echelon” as the perpetrator. This does not constitute a link with Nuon Chea. In fact, such evidence is even insufficient to attribute any action to the CPK, as terms like “*Angkar*”, “party”, and “upper echelon” were liberally used.<sup>4083</sup>

1210. Similarly, general calls to identify or arrest enemies, or unattributed, general, equivocal statements about a war enemy, Vietnam, cannot be interpreted as specific calls or orders to kill or otherwise target specific individuals, in the same way than French President Hollande’s call to fight the terrorist enemies does not amount to a call to kill Muslim people. They simply do not qualify as planning, instigating, ordering or otherwise aiding and abetting the commission of crimes, nor is there evidence that they would have any substantial effect on the commission of crimes. Further, Au Kanseng, Phnom Kraol, S-21 and Kampong Chhnang Airfield were under the control of the military, on which Nuon Chea had no relationship of authority, as a result of the strict separate chain of command between civilian and military authorities. Similarly, Trapeang Thma Dam was under the authority of Ruos Nhim, one of Vietnam’s collaborators in what the Defence suggests was an entirely separate JCE.<sup>4084</sup> It cannot be said that Nuon Chea had the authority to order the commission of crimes in these locations. In any event, there is still a need to demonstrate that Nuon Chea’s actions had a substantial effect on the commission of specific charged crimes. The lack of evidence precludes such finding.

<sup>4081</sup> **E313**, Case 002/01 Trial Judgement, paras 698-700, 702, 704; ICTY, *Kordić & Čerkez* Appeals Judgement, paras 26-27; *Vasiljević* Appeals Judgement, para. 102; *Tadić* Appeals Judgement, para. 229.

<sup>4082</sup> ICTR, *Nahimana et al.* Appeals Judgement, para. 481; *Nyiramasuhuko* Trial Judgement, para. 5593; ICTY, *Blaškić* Appeals Judgement, para. 42.

<sup>4083</sup> See e.g. **E3/740**, Directive on use of “*Angkar*” and “Party”; **E3/7492**, ‘DC-Cam Interview of Bou Thon’, ERN 00283839 (“*Angkar* is a cooperative.”); **E3/445**, ‘WRI of Sao Phen’, A3 (“*Angkar* was referred to [*sic*] upper echelons of the Khmer Rouge. I observed that the district level and higher ones were *Angkar* of Khmer Rouge. The district level was also referred to as *Angkar*”). There is also evidence that the term “party” was often used to refer to low level CPK leadership as opposed to the CPK itself, See e.g. **E3/1194**, ‘Telegram from Chhan to Brother’, 19 Oct 1976; **E3/1102**, ‘Telegram from Chhan to Dor’, 20 Oct 1976.

<sup>4084</sup> See *supra*, Chapter 3-IX-A, on JCE.

**B. THE SUBJECTIVE ELEMENT (*MENS REA*) IS NOT ESTABLISHED**

1211. To enter a conviction under planning, instigating, ordering, or aiding and abetting, it must be established beyond reasonable doubt that the Accused either intended the commission of the crime, or acted with the awareness of the substantial likelihood that his actions would result in the commission of a crime.<sup>4085</sup> *Mens rea* should be determined, above all, from the Accused's words and deeds, and should be evident from patterns of purposeful action.<sup>4086</sup> In addition, for aiding and abetting, it must be shown that the Accused knew that his conduct was assisting or facilitating the commission of a crime.<sup>4087</sup> Finally, in case of the specific intent crimes such as genocide, extermination and persecution, the Accused must know about the physical perpetrator's specific intent.<sup>4088</sup> As described in this Brief, however, the CPK's policies were legitimate and did not involve the commission of crimes.<sup>4089</sup> To the extent that crimes occurred, they were committed by local authorities in violation of these official policies. There is no specific evidence that crimes were reported to Nuon Chea or that he would otherwise be made aware of them. It is impossible to conclude that any action he may have taken was done with the awareness of the likelihood that crimes would be committed as a result.

1212. Similarly, as stated above, any generic inflammatory statement directed to opponents in situations of armed conflict is insufficient to establish any *mens rea*.<sup>4090</sup> Further, the mere holding of a high-level position in the DK's hierarchy is insufficient to deduce *mens rea* beyond reasonable doubt. The decision-making system in the CPK was one of majority vote.<sup>4091</sup> Thus, even if certain actions could be attributed to the "Centre", it is insufficient to establish that each member of the CPK Standing or Central Committees intended such action. Therefore, a finding that Nuon Chea's actions were undertaken with the awareness of the likelihood that crimes would be committed as a result would amount to pure speculation falling short of the beyond reasonable doubt standard. In the absence of proof of Nuon Chea's knowledge of any of the crimes charged, including those requiring specific intent, a finding that he instigated, planned, ordered or otherwise aided and abetted the charged crimes is precluded.

<sup>4085</sup> E313, Case 002/01 Trial Judgement, paras 698, 700, 702, 704.

<sup>4086</sup> ICTR, *Bagilishema* Trial Judgement, para. 63.

<sup>4087</sup> E313, Case 002/01 Trial Judgement, para. 704.

<sup>4088</sup> ICTY, *Krstić* Appeals Judgement, para. 140; *Blagojević & Jokić* Trial Judgement, para. 779; *Krnojelac* Appeals Judgement, para. 52; *Blagojević & Jokić* Trial Judgement, para. 772.

<sup>4089</sup> See *supra*, Chapters 4-II, Chapter 5-II-C, Chapter 5-III-C, Chapter 5-IV-C, Chapter 6-II, Chapter 7-III.

<sup>4090</sup> See *supra*, Chapter 5-III-D-2-b-(iii).

<sup>4091</sup> E3/130, CPK Statute, ERN 00184037; E3/787, *Angkar's* Ideology and Party's Discipline, ERN 00742432.

### III. ALTERNATIVE MODE OF LIABILITY: SUPERIOR RESPONSIBILITY

1213. First, a determination as to whether Nuon Chea had effective control over the physical perpetrators is precluded since those are not specifically identified but instead referred to as “*Angkar*”. In any event, it has not been established that Nuon Chea had *de jure* authority over any of the crime sites – in particular over the crime sites which were under exclusive military control. Even if it was established beyond reasonable doubt that Nuon Chea would have *de jure* authority over the physical perpetrators of the crimes charged, this is insufficient to establish that he had effective control over them.<sup>4092</sup> Instead, evidence demonstrating his ability to control their actions is required. Since there no evidence even linking him with the alleged physical perpetrators, it cannot be found that he had any *de facto* authority over them. Any other conclusion, in light of the existing evidence, would be a pure product of imagination. Second, there is simply no credible evidence that Nuon Chea knew, or had reason to know, that crimes were about to be committed, or had been committed by his subordinates there, as discussed immediately above in Section II-B. Finally, for crimes requiring specific intent such as genocide, extermination and persecution, it must be established beyond reasonable doubt that Nuon Chea knew the specific intent of the physical perpetrators.<sup>4093</sup> No evidence permits such a conclusion. As a result, even if Nuon Chea had effective control over the physical perpetrators, in the absence of evidence that he was aware of the commission of the specific crimes, he cannot be held responsible as a superior.

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<sup>4092</sup> ICTY, *Čelebići Appeals Judgement*, para. 197; ICTR, *Kayishema & Ruzindana Appeals Judgement*, para. 294; SCSL, *CDF Trial Judgement*, para. 238.

<sup>4093</sup> ICTY, *Brđanin Trial Judgement*, paras 719-720.

**CHAPTER 9. CONCLUSION AND RELIEF SOUGHT**

1214. As detailed in this Brief, it has not been proven beyond reasonable doubt that Nuon Chea is guilty of any of the crimes, pursuant to any of the modes of liability, with which he has been charged in the Closing Order in Case 002/02.

1215. Accordingly, for abovementioned reasons, the Defence requests the Trial Chamber:

- 1) to:
  - a. reconsider its decision not to admit the evidence in **Annex 1** and duly admit that evidence in the interests of justice; and
  - b. acquit Nuon Chea of all crimes with which he is charged in Case 002/02; or,
- 2) to, in the alternative and in the interests of justice:
  - a. re-open the Case 002/02 evidentiary hearing and:
    - i. reconsider its decision not to summons the witnesses in **Annex 2** and duly summons them to testify;
    - ii. reconsider its decision not to initiate the investigations in **Annex 3** and duly conduct those investigations; and
  - b. acquit Nuon Chea of all crimes with which he is charged in Case 002/02.

CO-LAWYERS FOR NUON CHEA



SON Arun



Victor KOPPE