

SEVEN CANDIDATES FOR PROSECUTION:
ACCOUNTABILITY FOR THE CRIMES OF THE KHMER ROUGE

by

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and
Coalition for International Justice*

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Stephen Heder is the principal author of this report. Dr. Heder, a political scientist with the University of London's School of Oriental and African Studies, is a leading scholar on Cambodia. He has authored numerous articles and monographs on Cambodian history, and is fluent in the Khmer language. During several visits to Cambodia in 1998-2001, Dr. Heder examined newly-available DK-era documents gathered by the Documentation Center of Cambodia. This report sets forth the principal conclusions derived from Dr. Heder's analysis of those documents. Dr. Heder is also responsible for English translations of material from these documents that is quoted in this report.

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CIJ, whose Executive Director is Nina Bang-Jensen, is an international, non-profit organization working to support the international criminal tribunals for the former Yugoslavia and Rwanda and other international humanitarian law initiatives through advocacy, fundraising, collaboration with other non-governmental organizations, and technical legal assistance.

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* Any opinions attributable to Mr. Tittlemore in this report are not given in his capacity as an official of the Inter-American Commission on Human Rights or the Organization of American States and do not necessarily reflect the views of those institutions.

TABLE OF CONTENTS

<i>Executive Summary</i>	5
I. <i>Introduction</i>	7
II. <i>Recent Initiatives to Prosecute CPK Crimes</i>	13
III. <i>The Means and Methods of CPK Crimes</i>	26
A. <i>CPK Policies of Mass Executions</i>	26
1. <i>Purges of Individuals Associated with the Former Khmer Republic</i>	30
2. <i>Purges of Non-Communist Members of the DK Population</i>	32
3. <i>Purges of CPK Cadre</i>	34
B. <i>CPK Command and Control Structures</i>	41
IV. <i>The Cases Against Seven Individuals</i>	49
A. <i>Summary of Findings</i>	49
B. <i>The Cases Against the Individual Officials</i>	51
1. <i>Nuon Chea</i>	51
a. <i>Evidentiary Analysis</i>	51
i. <i>Position and Role in the CPK</i>	51
ii. <i>Confessions</i>	53
iii. <i>Reports from the Grassroots</i>	55
b. <i>Legal Analysis and Conclusions</i>	59
i. <i>Individual Responsibility</i>	59
ii. <i>Superior Responsibility</i>	62
2. <i>Ieng Sary</i>	63
a. <i>Evidentiary Analysis</i>	63
i. <i>Position and Role in the CPK</i>	63
ii. <i>Speeches and Statements by Ieng Sary or his Office</i>	63
iii. <i>Confessions</i>	68
v. <i>Reports from the Grassroots</i>	72
b. <i>Legal Analysis and Conclusions</i>	75
3. <i>Khieu Samphan</i>	77
a. <i>Evidentiary Analysis</i>	77

- b. *Legal Analysis and Conclusions* 81
- 4. *Ta Mok* 83
 - a. *Evidentiary Analysis* 83
 - i. *Position and Role in the CPK* 83
 - ii. *Post-DK Statements by Ta Mok and other Officials* 83
 - iii. *Confessions* 85
 - b. *Legal Analysis and Conclusions* 87
 - i. *Individual Responsibility* 87
 - ii. *Superior Responsibility* 88
- 5. *Kae Pok* 89
 - a. *Evidentiary Analysis* 90
 - i. *Position and Role in the CPK* 90
 - ii. *Confessions* 91
 - iii. *Reports from the Grassroots* 92
 - b. *Legal Analysis and Conclusions* 93
 - i. *Individual Responsibility* 93
 - ii. *Superior Responsibility* 94
- 6. *Sou Met and Meah Mut* 95
 - a. *Evidentiary Analysis* 95
 - i. *Positions and Roles in the CPK* 95
 - ii. *Minutes of General Staff Meetings* 95
 - iii. *Reports and other Documents from Sou Met and Meah Mut* 105
 - b. *Legal Analysis and Conclusions* 106
 - i. *Individual Responsibility* 106
 - ii. *Superior Responsibility* 107
- V. *Conclusion* 109
- Appendix - Individual Criminal Responsibility* 110

Executive Summary

Using newly-available archival evidence, this report examines the responsibility of seven senior officials for their roles in developing and implementing the murderous policies of the Communist Party of Kampuchea (CPK), known to its enemies as the “Khmer Rouge,” during the mid- to late-1970s. While extensive work has been done in the past to document and analyze evidence of CPK crimes generally, this is the first comprehensive legal analysis of available evidence against specific individuals for international crimes. Through this analysis, the report also sheds new light on how the CPK designed and implemented policies of mass execution.

Previously-unpublished evidence concerning the planning and conduct of the CPK’s execution policies confirm that these policies were devised at the highest levels of the Communist Party and were implemented through a coordinated chain of command. The policies targeted members of three groups:

- individuals associated with the former Khmer Republic regime;
- non-Communist members of the Cambodian population; and
- Party members, or “cadre,” within the CPK suspected of being traitors.

In the case of CPK cadre, the policies were generally carried out through a system of arrests, interrogations, and subsequent executions, with some interrogations conducted through torture; former Khmer Republic officials and non-Communists were generally executed without any prior interrogation.

Our examination of the archival evidence suggests that there is a *prima facie* case that the seven individuals examined in this report are criminally responsible for planning or implementing these policies under principles of individual responsibility and, in most instances, pursuant to the doctrine of superior responsibility.¹ The seven are:

- Deputy Secretary of the CPK Central Committee **Nuon Chea**, who is implicated in devising and implementing the Party’s execution policies;
- Deputy Prime Minister for Foreign Affairs and Central and Standing Committee member **Ieng Sary**, who repeatedly and publicly encouraged and also facilitated arrests and executions within his Foreign Ministry and throughout Cambodia;
- Democratic Kampuchea (DK) State Presidium Chairman **Khieu Samphan**, who encouraged lower level CPK officials to perpetrate executions and, at least in some instances, monitored and contributed to the implementation of Party policies by regional authorities;
- Zone Secretaries and Central Committee Members **Ta Mok** and **Kae Pok**, who, as heads of Party Zones, directed or otherwise facilitated the arrest by subordinates of

¹ See *infra* note 13 and the Appendix for a discussion of the two principal bases of individual criminal responsibility used in this report, “individual responsibility” and “superior responsibility.”

suspected traitors in their Zones, and failed to prevent or punish atrocities perpetrated by their subordinates; and

- CPK Military Division Chairmen **Sou Met** and **Meah Mut**, who played direct roles in the arrest and transfer of cadre from their Divisions for interrogation and execution, and failed to prevent or punish atrocities perpetrated by their subordinates.

The report's conclusions are based upon the examination by Stephen Heder of archival records during several visits to the Documentation Center in Cambodia in 1998, 1999 and 2001 and subsequent research and assessment. While our analysis points to significant evidence of individual criminal responsibility on the part of seven men, it in no way is meant to imply that these seven are the only individuals against whom there is credible and substantial evidence of criminal responsibility for CPK atrocities.

In publishing this report, the War Crimes Research Office and the Coalition for International Justice hope to contribute to the efforts of Cambodians to secure some measure of justice, however belatedly, for what they endured, as well as to contribute to the creation of an accurate historical record. By focusing on the responsibility of individual leaders for their actions, the report should serve as a reminder that the deaths and suffering of millions of people were the result of calculated policies and actions by individuals, not the result of undifferentiated chaos or conflict. Further, by providing an analysis of available evidence, it is hoped that the results of this study will serve as a benchmark against which to measure the progress of any tribunal established to investigate and prosecute CPK-era crimes.

I. INTRODUCTION

As many as two million people – nearly one-third of the Cambodian population – are believed to have perished at the hands of the CPK when it ruled Cambodia, then called Democratic Kampuchea (DK), from April 1975 to January 1979. Between 500,000 and one million Cambodians appear to have been executed outright; others died of starvation and disease as a result of the policies and practices of the CPK.² More than twenty years later, no one has been brought to justice for these crimes. But if senior CPK officials seemed secure in their untouchability, recent developments have for the first time presented the possibility that Cambodians may at last be afforded some measure of justice.

The question whether senior CPK officials should be made to answer for the crimes of the 1970s was placed squarely in the foreground of public attention in 1996. In August of that year, a former senior CPK official, Ieng Sary, came forward to negotiate with the Cambodian government concerning the terms under which thousands of dissident DK forces, which had operated as a guerrilla force since the CPK was ousted from power in January 1979, would break away from CPK leader Pol Pot. In exchange for Sary's pledge of mass CPK defections, the Cambodian monarch granted Ieng Sary an amnesty, both from his 1979 conviction *in absentia* by the People's Republic of Kampuchea for genocide and from prosecution under a 1994 Cambodian law outlawing the Khmer Rouge.³ But far from putting to rest questions relating to Ieng Sary's fate, the amnesty provoked a substantial debate about whether Ieng Sary and other CPK officials should be prosecuted for DK-era crimes.

Further impetus for trials was provided by a second, more violent, episode of disintegration within former CPK ranks in June 1997. That month, Pol Pot moved to quell dissension within the guerrilla movement that he continued to lead against the Cambodian government by murdering another former CPK official, Son Sen, and attempting to murder a third, Ta Mok. The latter escaped, and captured Pol Pot, along with the CPK's long-time Deputy Secretary Nuon Chea, and the movement's perennial figurehead, Khieu Samphan, near the Thai border. News that Ta Mok had detained Pol Pot presented the prospect of at last bringing

² For a detailed account of executions attributable to CPK forces, see BEN KIERNAN, *THE POL POT REGIME: RACE, POWER, AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975-1979* (1996) [hereinafter KIERNAN, *THE POL POT REGIME*]. The summary in this paragraph is based on an assessment of the data as detailed in Stephen Heder, *Racism, Marxism, Labeling and Genocide*, in Ben Kiernan, "The Pol Pot Regime", 5 *SOUTH EAST ASIA RESEARCH* (1997) [hereinafter *Racism, Marxism, Labeling and Genocide*]. For a recent survey and analysis of the various estimates of the overall death toll, see Patrick Heuveline, "*L'insoutenable Incertitude du Nombre: Estimations des Décès de la Période Khmer Rouge*", in 6 *POPULATION* 1103 (1998). Victims of these atrocities included members of the CPK itself and its army who were accused of "treason" from April 1975 on; "foreign aliens" and "national minorities" tarred as upper class, such as the Vietnamese, Chinese and the Islamic Cham; Buddhist and Muslim monks and leaders; and ordinary urban Cambodians from the majority Khmer ethnic group who were also stereotyped as upper class when they were evacuated from Phnom Penh and other towns and sent to live in agricultural cooperatives the CPK had established in the countryside. For a discussion of the development and implementation of the CPK execution policies, see *infra*, Part III(A).

³ Ieng Sary and Pol Pot were convicted in 1979 of genocide by the Vietnamese-backed government of the People's Republic of Kampuchea. Held *in absentia* and without any semblance of fair process, the trial enabled the Vietnamese government to present evidence supporting an officially-sanctioned version of events and information about DK, but did not attempt to link Pol Pot and Ieng Sary directly to any recognizably criminal offences. Consequently, the prosecutions are widely regarded to have constituted an illegitimate "show trial". See Report of the Group of Experts for Cambodia Established pursuant to General Assembly Resolution 52/135 (February 1999), Annex, U.N. Doc. A/53/850, S/1999/231 [hereinafter "UN Group of Experts Report"], ¶ 43. This trial was accompanied by a Vietnamese policy of granting immunity from prosecution to all former CPK members who were prepared to work against the DK regime. This included current Cambodian Prime Minister Hun Sen, who had been a junior CPK military cadre, as well as several other individuals who are now senior officials in Hun Sen's ruling Cambodian People's Party.

to justice a man whose name had come to symbolize impunity for unconscionable crimes. But, despite urgent efforts by the U.S. government to bring Pol Pot to justice, no international tribunal was available or established for this purpose, and no government was willing to request Pol Pot's extradition. A coup in Cambodia the following month derailed any immediate prospect of prosecuting Pol Pot, and his death in April 1998 forever deprived Cambodians of the opportunity to see him brought to trial. Once again, far from dampening public demands for a legal accounting, these developments intensified Cambodians' resolve to secure a measure of justice for DK-era atrocities.

Alongside these developments, the United Nations has for several years pursued with Cambodian authorities negotiations over possible methods for bringing surviving CPK leaders to trial. Although not the only issues of consequence, among the most important questions that have arisen during these negotiations are: (1) Who should be the focus of prosecutions? and (2) How can the independence of the judicial process be assured?⁴

In July 2000, after over one year of negotiations, the United Nations and the Royal Government of the Kingdom of Cambodia discussed the details of a possible agreement in principle on the creation of a tribunal organized under Cambodian law with UN participation. This led to the passage by the National Assembly on January 2, 2001, and the subsequent approval by the Cambodian Senate, of legislation establishing the "Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea." The legislation provides for the prosecution of senior leaders of Democratic Kampuchea and those who were most responsible for crimes committed between April 17, 1975 and January 6, 1979. Those crimes are prescribed under the legislation to include genocide,⁵ crimes against humanity, and grave breaches of the 1949 Geneva Conventions, as well as certain crimes under domestic Cambodian law, in particular homicide, torture and religious persecution. The Constitutional Council in Cambodia returned the legislation to the National Assembly in mid-February 2001 to correct a purported inconsistency between the law and Cambodia's 1993 Constitution. Once this is done, it will remain for the legislation to be approved by the Constitutional Council and King Sihanouk or, in his absence, an acting Chief of State and for an agreement to be signed between the Cambodian government and the United Nations before a tribunal can be convened

In this setting, the War Crimes Research Office (WCRO) of American University's Washington College of Law, in cooperation with the Coalition for International Justice (CIJ), engaged Stephen Heder to examine newly-available documentary evidence of CPK crimes with the aim of assessing individual responsibility of surviving CPK leaders. In December 1998 and January 1999, in August and September 1999, and again in February 2001, Dr. Heder traveled

⁴ Those negotiations are summarized in Part II, *infra*.

⁵ While the conduct revealed by the evidence of CPK activities during its period of rule in Democratic Kampuchea might in some instances suggest responsibility for the crime of genocide, it is far from clear whether the overall patterns of killings may satisfy the definition of genocide under the 1948 Genocide Convention, and at most might apply to only a small portion of the Cambodian killings. The UN Group of Experts concluded in this regard that whether the Khmer Rouge committed genocide with respect to part of the Khmer national group turns on "complex interpretive issues, especially concerning the Khmer Rouge's intent with respect to its non-minority-group victims," and did not take a position on the issue. See e.g. UN Group of Experts Report, *supra* note 3, ¶ 65.

to Cambodia, where he analyzed this archival evidence at the Documentation Center of Cambodia (DC-Cam).⁶

Dr. Heder's analysis sought to address a significant gap in past and current studies of CPK accountability. Although extensive efforts have been made to document and analyze evidence of CPK crimes, none of these initiatives has focused on the question of individual responsibility of particular CPK officials for crimes under applicable international legal principles.

The analysis in this report is based upon Dr. Heder's review of documents not previously available to researchers and recently assembled by the Documentation Center of Cambodia, supplemented by Dr. Heder's knowledge of their historical and political context.⁷ Most of these new documents were held in the archives of the Royal Government, which inherited them from the post-DK Cambodian authorities. The documents lay dormant in government archives largely due to a lack of impetus for any trial process, and were discovered as a result of DC-Cam's investigative endeavors. The new evidence studied by Dr. Heder include annotated "confessions" extracted from CPK cadre and others who were arrested, often tortured, and finally executed by officials at Office S-21,⁸ minutes of meetings of the General Staff of the armed forces attached to the CPK Central Committee,⁹ records of interviews with several former CPK officials,¹⁰ reports from CPK Zones and Sectors,¹¹ and notebooks of senior CPK security officials.¹²

⁶ DC-Cam is a Cambodian research institute established in 1995 under the auspices of the Yale University-based Cambodian Genocide Program. Since 1997, DC-Cam has functioned autonomously to serve as a public resource for Cambodians and others wishing to pursue legal redress for DK-era crimes.

⁷ Most of the documents that form the basis of our analysis, including those relating to recent negotiations between the UN and the Cambodian Government to establish a CPK tribunal, remain unpublished. Accordingly, unless otherwise indicated, all documents cited in this report and any pertinent translations thereof may be found on file with Stephen Heder or the Documentation Center of Cambodia.

⁸ While a large collection of confessions was previously available, DC-Cam's archives include newly-discovered confessions. When citing confessions held in the former location of S-21 - now the Tuol Sleng Genocide Museum - this report makes use of the cataloguing system that was developed when the confessions were microfilmed by Cornell University as well as the original cataloguing system of the museum archive. The Cornell cataloguing system uses the letters CMR (Cornell Microfilm Reel) followed by a numeral. The Tuol Sleng archive (TSA) cataloguing system includes a letter followed by a numeral. All translations from Khmer text are by Stephen Heder.

⁹ Dr. Heder reviewed several different sets of minutes of senior meetings, including one comprising minutes of meetings of the Government cabinet, namely the Royal Government of National Union of Kampuchea (until December 1975), or the Government of Democratic Kampuchea (from January 1976), and of CPK Central Committee and Standing Committee meetings. Some of these minutes were gathered in 1979 from what was believed to be the office of the DK Ministry of Foreign Affairs by the Cambodian Khieu Kanharith, who was a member of the PRK National United Front and Secretary-General of the PRK Association of Journalists and is now a Secretary of State for Information in the Royal Government. Other sets of minutes were apparently obtained by DC-Cam from the Royal Government Ministry of Interior, where they had been held as part of a "Lon Nol Dossier" by its predecessor, the PRK Ministry of Interior. These minutes include additional records of Central Committee or Standing Committee and governmental meetings, as well as meetings of the General Staff of the DK army, formally known as the Revolutionary Army of Kampuchea. None of the sets of minutes has signatures, seals or other marks indicating origin or notarization. They are believed to have been prepared by officially-sanctioned notetakers for the purpose of maintaining Party files. Some are copied either to an unspecified "office" (muntir) or to "documentation" or "archives" (aekasar), presumably for future reference. In general terms, all of the sets of minutes reviewed have similar formats, and several of the matters described in the minutes refer to events that can be corroborated by other sources. These events include trips abroad, elections to the national assembly, formation of the Government of Democratic Kampuchea, and details of the armed conflict with Viet Nam.

¹⁰ Interviews with surviving or deceased CPK officials upon which this analysis is in part based include the records of four interviews with Ieng Sary. Two were conducted by Stephen Heder, who tape-recorded a three-hour conversation with Sary on December 17, 1996 and took notes on a ten-minute conversation with him on January 4, 1999; one was conducted by journalist Elizabeth Becker in 1981; and a fourth was conducted by the late journalist Neil Davis in 1983. This report also refers to an interview by Stephen Heder in August 1980 with Khieu Samphan at the then Headquarters of the CPK Central Committee in Siem Reap province on the border with Thailand, as well as to quotations and other information from videotaped interviews between journalist

As elucidated in this report, our research has confirmed the existence throughout the period of CPK rule of several policies of mass executions and has illuminated key features of those policies and the role that senior CPK officials played in devising and implementing them. Although the testimonies of relatives of victims, demographic data and the existence of numerous mass graves had previously attested to the perpetration of mass murders throughout Democratic Kampuchea, the newly-available evidence goes further by tying senior and other high-level CPK officials to records that explicitly refer to large-scale killings and the torture of prisoners. The newly-available evidence also confirms that arrests and executions in rural areas were reported by lower-level officials to central authorities, and reveals that arrests and executions were discussed in meetings of military commanders. Accordingly, whereas policies of murder and torture could previously be inferred from the pattern of such crimes and were suggested by certain general official statements, the documentation we have reviewed confirms that many, if not all, of these crimes were committed as a matter of policy and that senior officials were knowingly involved in their development and implementation.

Our research supports the conclusion that the policies of mass executions were devised at the highest levels of the Communist Party and targeted members of three principal groups through a coordinated chain of command: individuals associated with the former Khmer Republic regime; non-Communist members of the DK population; and cadre within the CPK who were suspected of being "traitors." In the case of CPK cadre, the policies were generally carried out through a system of arrests, interrogations, and subsequent executions, with some interrogations conducted through torture. Former Khmer Republic officials and non-Communists were generally executed without any prior interrogation. Evidence indicating that CPK officials were aware of widespread arrests inside and outside of the Party plays a key role in our analysis of the potential criminal responsibility of each of those officials.

We have also identified evidence implicating seven senior CPK officials in planning or executing these policies, through two principal doctrines of criminal responsibility: individual responsibility for having ordered or otherwise contributed directly and substantially to the commission of the crimes, and, in most cases, superior responsibility for crimes committed by their subordinates.¹³ In Section IV we provide a detailed discussion of the potential liability of

Nate Thayer and Pol Pot, Nuon Chea and Ta Mok in 1997, and a partially autobiographical "history" presented to Thayer by Nuon Chea that same year. Finally, the analysis considers public accounts of interviews between Thayer and Duch in May 1999. See generally Nate Thayer, *Death in Detail*, FAR EASTERN ECONOMIC REVIEW, May 13, 1999, at 20; Nate Thayer, *I am in Danger*, FAR EASTERN ECONOMIC REVIEW, May 13, 1999.

¹¹ These reports include telegrams that originated in the Zones and subordinate CPK Sectors or regions and appear to have been sent or copied to the General Staff. These documents are generally without signature, although often the name of the sender is indicated. They were obtained by DC-Cam from the Royal Government Ministry of Interior, which inherited them from the PRK Ministry of Interior. They appear to have been sent by radio, perhaps in code, and then transcribed for limited circulation to named individuals in the senior leadership for their information and possible action, with copies made for "office" (*muntir*) and "documentation" or "archives" (*aekasar*), where they were kept for future reference. Their existence was not known before DC-Cam obtained them from the Ministry of Interior, in original form. Like the minutes of meetings, some of the events to which they refer can be corroborated by other sources, such as episodes of border fighting with Cambodia's neighbors.

¹² These notebooks were collected by DC-Cam from the headquarters of the CPK Central Security Office. Among those are the notebooks of several interrogators at S-21, including first-ranked S-21 interrogator Tong Song Heuan, commonly known as Pon, and third-ranked Mâm Nai, commonly known as Chan. The originals of several such notebooks, written by hand in writing that clearly matches numerous notes signed by Pon and Chan and running to hundreds of pages, are on file in DC-Cam. Mâm Nai *alias* Chan is known to be alive. The fate of Pon is unclear.

¹³ This report adopts the terminology of the current *ad hoc* UN International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since

each official, and a general discussion of the legal principles and standards governing individual criminal responsibility is provided in the Appendix. We conclude that there is compelling and substantial evidence that:

- Deputy Secretary of the CPK Central Committee **Nuon Chea**, commonly known as “Brother Number Two,” played a leading role in devising the CPK’s execution policies. There is also substantial evidence that Nuon played a central role in implementing those policies.
- Deputy Prime Minister for Foreign Affairs and Central and Standing Committee member **Ieng Sary** is individually responsible for repeatedly and publicly encouraging arrests and executions in his Foreign Ministry and throughout Democratic Kampuchea.¹⁴
- DK State Presidium Chairman and Central Committee Member **Khieu Samphan** was aware of the policies of arresting, torturing, and executing purported enemy agents, and encouraged and, at least in some instances, monitored and contributed to the implementation of this policy.
- Former Secretary of the Southwest Zone and Central Committee Member **Ta Mok** played a central role in implementing the Communist Party’s execution policies. This included directing subordinates to arrest and execute Party cadre, and failing to prevent or punish atrocities perpetrated by his subordinates in the Southwest Zone.
- Former Secretary of the North/Central Zone and Central Committee member **Kae Pok** played a direct and substantial role in executions of CPK cadre by investigating and facilitating the arrests of suspected traitors in his Zone. It also appears that Pok, as Secretary of a Zone, may be held responsible as a superior for failing to prevent or punish atrocities committed by his subordinates.

1991 (“ICTY”), which has articulated two grounds for establishing individual criminal responsibility based upon that tribunal’s governing statute and relevant post-World War II war crimes jurisprudence: “individual responsibility” under Article 7(1) of the ICTY Statute for planning, instigating, ordering, committing or otherwise aiding and abetting in the planning, preparation or execution of a crime, and “superior responsibility” under Article 7(3) of the ICTY Statute for knowing or having reason to know that a subordinate was about to commit or had committed serious violations of international humanitarian law and failing to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. For an example of references to these categories of individual criminal responsibility by the ICTY Appeals Chamber, see *The Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Appeals Chamber Judgment, March 24, 2000 [hereinafter “Aleksovski Appeals Chamber Judgment”], ¶ 170. See also Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, Annex to the Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), 48 U.N. SCOR (3175th mtg.), U.N. Doc. S/RES/808 (1993) [hereinafter “ICTY Statute”], arts. 7(1), 7(3); Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, Annex to UN Security Council Resolution 955, 49 U.N. SCOR (3453rd mtg.), U.N. Doc. S/RES/955 (1994) [hereinafter “ICTR Statute”], arts. 6(1), 6(3). A detailed discussion of pertinent principles and jurisprudence governing individual criminal responsibility and their applicability to DK-era crimes is provided in the Appendix.

¹⁴ Despite the adoption by the Cambodian Parliament of legislation establishing a Khmer Rouge tribunal, Prime Minister Hun Sen has continued to propose that Ieng Sary might be spared prosecution, possibly under the 1996 amnesty granted to him by King Norodom Sihanouk. See *supra*, note 3. It is our view, however, that immunity from prosecution cannot properly be afforded to Ieng Sary for atrocities perpetrated during the period of CPK rule in Cambodia. This conclusion is based upon prevailing international principles and jurisprudence that deny any legal effect to amnesties for atrocities such as genocide or torture. For further discussion, see Part II, *infra*.

- CPK Military Division Chairmen **Sou Met** and **Meah Mut** were directly involved in the arrest and transfer to S-21 for execution of cadre from their Divisions. The evidence similarly suggests that both officials may be responsible for arrests and executions perpetrated by subordinates in their respective Divisions.

One CPK official who has figured prominently in discussions of CPK accountability, but who is not the subject of detailed analysis in this report, is **Kang Kech Eav**, widely known as **Duch**. From 1976 to 1978, Duch served as Chairman of S-21 and Secretary of its Party branch. Office S-21 was responsible for many of the interrogations and executions carried out during the period of CPK rule. At least 14,000 people were executed there, many after having been tortured or otherwise compelled to confess.¹⁵ Not only is the evidence implicating Duch in CPK atrocities both notorious and substantial, but in freely-conducted conversations with journalists in 1999 he openly admitted overseeing torture and mass executions at S-21, while also speaking with apparently authoritative knowledge of the involvement of others.¹⁶ Thus, while Duch is rightly regarded as a leading candidate for prosecution before a tribunal established to try DK-era crimes, his case does not necessitate extensive further analysis in this report.

More generally, it is worth emphasizing again that the conclusions set forth in this report are preliminary. While our analysis points to significant evidence of criminal responsibility on the part of seven men, it in no way is meant to imply that they are the only individuals against whom there is credible and substantial evidence of criminal responsibility for CPK atrocities. Nor is it meant to constitute an exhaustive analysis of all possible evidence available against each individual, but rather amounts to a review of certain documentary evidence that should lead to further extensive investigations.

As previously noted, by publishing this analysis, we hope to contribute to Cambodians' efforts to secure justice, however belatedly, for the crimes of the CPK. It is also our hope that this study will serve as a benchmark against which to measure the progress of any CPK trials that might ultimately be convened. Finally, by publishing previously-unknown details concerning the means and methods of CPK crimes, we hope that this report will contribute to the broader project of establishing a historical record of those crimes. Consistent with this objective, the report examines the evidence of Khmer Rouge crimes in a broader fashion than might otherwise be appropriate in a legal analysis of CPK atrocities.

¹⁵ See DAVID P. CHANDLER, VOICES FROM S-21: TERROR AND HISTORY IN POL POT'S SECRET PRISON 40 (1999) [hereinafter CHANDLER, VOICES FROM S-21], for estimates of the number of executions carried out at S-21. Chandler bases his estimates on remaining S-21 archives. Documents signed by Duch ordering the torture and execution of prisoners held for interrogation at S-21 have long been identified. See, for example, a list of prisoners dated May 30, 1978 and entitled "A Synopsis of Persons with Connections to Tendencies," which contains a note in what Duch has acknowledged to be his handwriting that reads: "Beat to death every last one of them" and is followed by Duch's signature. Another such document in what Duch has also acknowledged to be his handwriting and bearing his signature authorizes interrogators to torture and beat to death the detained Secretary of the CPK's Northeast Zone. It is dated October 1, 1976.

¹⁶ In this regard, it seems apparent through media interviews that Duch, who had converted to Christianity in the early 1990s, was prepared at the time of his arrest to be a cooperative, repentant witness, to admit his own role in overseeing torture and executions at S-21, and to talk about the involvement of others. See, e.g., Seth Mydans, *Khmer Rouge Executioner Found, Willing to Stand Trial*, CHIC. TRIB., Apr. 30, 1999, at 22.

II. RECENT INITIATIVES TO PROSECUTE CPK CRIMES

Despite the scale and severity of CPK crimes, no credible efforts to punish those responsible were initiated until recently. The only trial that has been instituted in connection with these crimes was manifestly lacking in legitimacy. In 1979 Viet Nam arranged for the People's Republic of Kampuchea, the government it had installed in Cambodia that year, to try and convict Pol Pot and Ieng Sary of "genocide" as defined under the law authorizing the prosecutions.¹⁷ This joint trial, held *in absentia*, lacked any semblance of fair process and is generally regarded as a show trial.

But in 1996, the United Nations began to revisit the issue of accountability for CPK crimes at the initiative of then newly-appointed Special Representative of the Secretary-General on Human Rights in Cambodia, Ambassador Thomas Hammarberg.¹⁸ In April 1997, his efforts resulted in a resolution by the UN Commission on Human Rights calling upon the UN Secretary-General to "examine any request by Cambodia for assistance in responding to past serious violations of Cambodian and international law as a means of addressing the issue of individual accountability."¹⁹ The disintegration of Pol Pot's insurgency and his detention by Ta Mok in mid-1997 added further impetus and urgency to this inquiry.

In a letter to UN Secretary-General Kofi Annan dated June 21, 1997, then First Prime Minister Norodom Ranariddh and then Second Prime Minister Hun Sen requested "the assistance of the United Nations and the international community in bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979."²⁰ Explaining that Cambodia did not have the "resources or expertise necessary to conduct this very important procedure," the co-Prime Ministers wrote that they were "aware of similar efforts to respond to the genocide and crimes against humanity in Rwanda and the former Yugoslavia" and requested "that similar assistance be given to Cambodia."²¹

The UN General Assembly subsequently adopted a resolution requesting the Secretary-General to examine the Cambodian government's appeal, possibly by appointing a Group of

¹⁷ See July 1979 Law, reproduced in Somnomreuang Robâh Tolakar Kat-toh Bân Pralay Puch-sah Pol Pot-Ieng Sary [Dossier of the Court Judging the Pol Pot-Ieng Sary Genocidal Clique], Phnom Penh, Ministry of Propaganda, 1981, pp. 305-308, art. 1 (defining "genocide" for the purposes of the 1979 law as "the pre-planned mass killing of many innocent people, expulsion of the people from the towns and their villages in order to concentrate and compel them to work to the point where their strength was broken in conditions that destroyed them both physically and mentally, smashing religion, wrecking the cultural infrastructure and other relations within family and society").

¹⁸As noted in the Introduction, the Cambodian government's decision in September 1996 to grant Ieng Sary a pardon provided fresh impetus for exploring the possibility of bringing senior CPK officials to trial for DK-era crimes.

¹⁹ Commission on Human Rights Resolution 1997/49, U.N. ESCOR, "Situation of Human Rights in Cambodia," U.N. Doc. E/CN.4/RES/1997/49 (1997).

²⁰ Letter dated June 21, 1997 from the First and Second Prime Ministers of Cambodia addressed to the Secretary-General [hereinafter "June 21, 1997 Letter"], annexed to U.N. Doc. A/1997/488 (24 June 1997), "Identical letters dated June 23, 1997 from the Secretary-General Addressed to the President of the General Assembly and the President of the Security Council."

²¹ June 21, 1997 Letter, *supra* note 20. The letter was followed in July 1997 by a coup of Hun Sen's forces against those of Prime Minister Ranariddh's United National Front for an Independent, Neutral, Prosperous and Cooperative Cambodia ("FUNCINPEC"), as a result of which Hun Sen and his Cambodian People's Party assumed overwhelming control of the Cambodian government.

Experts to study the issue.²² Secretary-General Annan then appointed a three-member Group of Experts to evaluate the existing evidence with a view to determining the nature of the crimes committed by CPK leaders from 1975 to 1979, assessing the feasibility of their apprehension, and exploring legal options for bringing them to justice.²³ The Group of Experts visited Cambodia in November 1998 and presented its report to Secretary-General Annan on February 22, 1999.

The report concluded that available evidence could support prosecutions on charges under both Cambodian and international law, including in particular the charge of crimes against humanity.²⁴ After considering various options, the Group of Experts recommended that the United Nations establish a tribunal to try CPK officials for atrocities committed from April 1975 to January 1979.²⁵

The Cambodian government, now under the exclusive control of Hun Sen following a July 1997 coup, rejected the Group of Experts' recommendations, including those pertaining to the structure and personal jurisdiction of the proposed tribunal. In a letter to Secretary-General Annan dated March 3, 1999, the Cambodian government cautioned that any decision to bring CPK leaders to justice must take account of Cambodia's need for peace and national reconciliation and that, if not conducted properly, trials of CPK leaders could create panic among other former CPK members and lead to renewed guerrilla warfare.²⁶ Cambodia made this claim despite the fact that by this time the insurgency was in a state of terminal collapse.²⁷ Prime Minister Hun Sen expressed his willingness to allow foreign participation in a domestic trial²⁸ but rejected a compromise proposal from the UN's Office of Legal Affairs for a "mixed tribunal" under predominantly international control.²⁹

²² *Situation of Human Rights in Cambodia*, G.A. Res. 52/135, U.N. GAOR, 52d Sess., Supp. No. 49, at 288, 289; U.N. Doc. A/52/49 (1999).

²³ See Identical letters dated March 15, 1999 from the Secretary-General Addressed to the President of the General Assembly and the President of the Security Council, U.N. Docs. A/53/850, S/1999/231 (1999) [hereinafter "March 15, 1999 Letters"].

²⁴ UN Group of Experts Report, *supra*, note 3. The Group of Experts concluded that while the CPK was in power the people of Cambodia had been "subjected ... to almost all of the acts enumerated in the [Genocide] Convention," citing evidence of acts of genocide "against the Cham, Vietnamese and other minority groups, and the Buddhist monkhood." However, they cautioned that it might be a "difficult task" to prove that the CPK carried out acts "with the requisite intent" to destroy such ethnic and religious groups "as such." *Id.*, ¶¶ 61-63. On the other hand, the Group of Experts expressed confidence that the killing of defeated Khmer Republic and purged CPK officials constituted crimes against humanity because of the extent to which the victims were targeted in a mass or systematic way through acts that were "committed with a discriminatory motive based on ... political viewpoint." *Id.*, ¶¶ 31-32, 78. The Group of Experts also concluded that torture was routinely practiced and that DK forces had committed war crimes, including massacres of civilians and wanton destruction of towns, during armed conflict with Viet Nam and other neighboring countries. *Id.*, ¶¶ 72-74.

²⁵ *Id.*, ¶¶ 139, 148.

²⁶ See March 15, 1999 Letters, *supra* note 23.

²⁷ It has been widely speculated that the more pertinent problem for Cambodia's post-1997 Prime Minister, Hun Sen, may have been that he and several other prominent individuals are former junior or mid-ranking CPK officials and therefore might be vulnerable to prosecution themselves if the prosecutor's mandate were open-ended.

²⁸ Hun Sen's position was laid out in a March 12, 1999 aide-memoire to the UN. See also Statement Made on April 18, 1999 by the Cabinet of Samdech Hun Sen, Prime Minister of the Royal Government of Cambodia.

²⁹ United Nations Office of Legal Affairs, "Draft Law on the Establishment of a Tribunal for the Prosecution of Khmer Rouge Leaders Responsible for the Most Serious Violations of Human Rights." For an account of Hun Sen's public response, see *Hun Sen Won't Let U.N. Control Genocide Trials*, WASH. TIMES, Aug. 20, 1999, at A14.

Since then, United Nations political and legal officials have continued to pursue negotiations with the Cambodian government, with the United States at times playing a mediating role. While seeking an agreement that would provide international legitimacy and foreign funding, the Cambodian government has steadfastly insisted on maintaining what it regards as its sovereign position. Above all, it has insisted that Cambodians chosen by Hun Sen dominate key appointments to the Tribunal. Further – and of particular relevance to the issues addressed in this report -- it has firmly rejected initial UN recommendations that cast a comparatively wide prosecutorial net.

On this last question, the UN Group of Experts Report had recommended that “any tribunal [should] focus upon those persons most responsible for the most serious violations of human rights during the reign of Democratic Kampuchea.”³⁰ This category would naturally “include senior leaders with responsibility over the abuses” but would not be limited to such leaders; it would also include “those at lower levels who are directly implicated in the most serious atrocities.”³¹ The Group of Experts did not wish to suggest either a numerical limit on those who might be targets of inquiry or to identify specific potential targets by name, but nonetheless expressed their view “that the number of persons to be tried might well be in the range of some 20 to 30.”³²

Although unwilling to suggest targets of investigation by name, the Group of Experts clearly contemplated that certain surviving leaders of the DK regime would be encompassed within the phrase “senior leaders with responsibility over the abuses.”³³ Among the surviving members of that regime who almost certainly would have been contemplated as targets are five of the subjects of this report: Nuon Chea, Ta Mok, Ieng Sary, Kae Pok and Khieu Samphan. All five were members of the CPK Central Committee, formally the Party’s highest governing body, and were the most senior DK leaders still alive in 1999.³⁴ The Group of Experts apparently believed that further investigations under the auspices of an international tribunal might justify indictments not only against these men, but also against other surviving CPK cadre who were “most responsible for the most serious violations of human rights.”

³⁰ UN Group of Experts Report, *supra* note 3, ¶ 110.

³¹ *Id.*

³² *Id.*

³³ That the Group of Experts had specific individuals in mind is implicit in such statements as their observation that the “majority of persons who would form the targets of investigation are currently in Cambodia” and that almost all of these individuals “seem to be in areas formally under the administration of the Cambodian Government, some residing in areas close to the Thai border.” *Id.*, ¶ 112. At times, the Group of Experts explicitly refer to certain individuals, such as Ta Mok, in a fashion that makes clear their presumption that the named individuals would be targets of a fair prosecutorial process. See, e.g., *id.* Elsewhere, after referring to the location of “suspects,” the Group of Experts provides the example of leaders of the Democratic Kampuchea regime who were received by the government in Phnom Penh in December 1998, a reference that clearly includes Nuon Chea and Khieu Samphan. *Id.*, ¶ 114.

³⁴ The person who would have been the prime target for CPK era crimes, Pol Pot, died in April 1998. Although it was generally reported that he died of a heart attack, later reports speculated that Pol Pot committed suicide, an account that Thai authorities have vigorously challenged. See generally Nate Thayer, *Chance of a Lifetime*, FAR EASTERN ECONOMIC REVIEW, Jan. 28, 1999, at 24; Nate Thayer, *Dying Breath*, FAR EASTERN ECONOMIC REVIEW, Apr. 30, 1998, at 18. Another senior CPK figure who would have been a principal target of investigation, Son Sen, was killed in 1997. In a videotaped interview with journalist Nate Thayer in October 1997, Pol Pot admitted ordering the execution of Son Sen, who had served as Chairman of the General Staff. Recorded as “Pol Pot Trip Two Interview,” *Copies des Rushes* BETA SP K7 No 15 and 16 PAL TC.L.

The Group of Experts doubted, however, whether those most deserving of punishment would be subject to fair process if Cambodian courts were the fora for prosecutions. Their report noted that a key part of the Cambodian government's strategy in ending the remaining military threat posed by remnants of the CPK guerrilla force "has been to grant *de facto* amnesties to all former Khmer Rouge for their post-1979 activities" with certain exceptions, "as well as to abstain from prosecuting Khmer Rouge leaders for crimes during the period of Democratic Kampuchea."³⁵

Hun Sen resisted the Group of Expert's recommendation as to potential targets of prosecution.³⁶ In doing so, Hun Sen was acting in accordance with his long-standing policy of offering amnesty, exemption from prosecution or the prospect of a pardon to DK suspects, regardless of their seniority or apparent culpability, as long as they were prepared to end their opposition to his government.³⁷ Hun Sen had invited or allowed Ieng Sary, Kae Pok, Nuon Chea and Khieu Samphan to pledge loyalty to him between 1996 and 1998, and opposed arresting any of them once they did. He refused to accept the surrender only of Ta Mok, whom he detained in early March 1999.³⁸ Hun Sen justified this approach by characterizing Ta Mok as a stubborn opponent of the government who, therefore, could not enjoy immunity from prosecution.³⁹

Based in part upon Hun Sen's statements, the UN experts expressed concern that prosecutions in domestic courts would be highly selective. In their view, there was no guarantee that decisions concerning whom to investigate and indict, and whom to convict or acquit, would be based upon the evidence rather than a "political agenda." Hun Sen's statements compounded the experts' broader concerns relating to the administration of justice in Cambodia. Their report highlighted "the routine subjection of judicial decisions to political influence" in Cambodia, and concluded that it was "nearly impossible for prosecutors, investigators and judges to be immune from such pressure."⁴⁰

Through much of 1999 Hun Sen continued to insist that an international trial would provoke a violent reaction from DK remnants and disrupt Cambodia's political stability and

³⁵ UN Group of Experts Report, *supra* note 3, ¶ 97.

³⁶ In transmitting the Group of Experts Report to the UN General Assembly and Security Council, for example, UN Secretary General Kofi Annan indicated that, upon considering the Group of Experts Report, the Government of Cambodia named only Ta Mok as a potential defendant in a trial before Cambodian Courts under Cambodian law. March 15, 1999 Letters, *supra* note 23.

³⁷ In September 1999 Hun Sen reiterated this position in a speech to the UN General Assembly in which he indicated that the need to provide justice had to be "carefully balance[d]" against the "paramount" need for what he called "national reconciliation" with the "last remnants of the genocidal Khmer Rouge" who had "surrendered." *UN Oratory: Pleas for Help, Pride in Democracy*, N.Y. TIMES, Sept. 21, 1999, at A21. Hun Sen sought to justify his overall approach as being characteristically Cambodian and well-suited to Cambodia's political conditions. For example, welcoming Nuon Chea and Khieu Samphan to his home in late 1998, Hun Sen declared that the two men should not be tried either internationally or domestically but should benefit from "a pure Cambodian solution," which he said was to "dig a hole and bury the past" as far as any allegations against them were concerned. Chris Fontaine, *U.N. Trial Refused of Khmer Bosses*, CHATTANOOGA FREE PRESS, Dec. 28, 1999, at A3.

³⁸ Times Wire Reports, *Infamous Khmer Rouge Chief Held in Cambodia, Faces Trial*, L.A. TIMES, Mar. 7, 1999, at A9.

³⁹ *Khmer Rouge Defectors Reportedly to Come to Capital*, Reuters, Dec. 26, 1999.

⁴⁰ UN Group of Experts Report, *supra* note 3, ¶¶ 129, 133.

economic development. Further, he insisted, opening the issue to a public debate would result in the obstruction of legislation pertaining to trials by purportedly hard-line elements within his ruling Cambodian People's Party. Both of these arguments were increasingly questioned by many observers,⁴¹ and by the end of the year Hun Sen appeared to accept that he had no choice but to make at least some accommodation to rising international pressures for a credible accounting – pressure that enjoyed strong support from an emergent Cambodian civil society.⁴²

In December 1999, Hun Sen's negotiators, in the form of a special Task Force created to address the CPK trial issue, put forward a new proposal for a domestic trial with international participation.⁴³ The proposal incorporated provisions that many believed were designed to allow Hun Sen to decide who would be indicted, who would be convicted, and what crimes the defendants would be found to have committed. In particular, the draft included provisions that could have facilitated substantial political influence over prosecution and judgment. For example, although the draft included a provision for judgments by a "super-majority" that would require the agreement of at least one foreign judge with all bench decisions, there was no analogous requirement for the co-prosecutors.⁴⁴ Accordingly, the Cambodian prosecutors could exercise a veto power over contested indictments. It also remained unclear how far Hun Sen was prepared to go in widening the scope of prosecutions.⁴⁵ Seeking to replicate a feature of the regular Cambodian justice system inherited from the French, the government insisted that the court include an investigating judge. Originally, the government had proposed a single investigating judge appointed by the Cambodian Government, but Hun Sen subsequently added a second non-Cambodian co-investigating judge as an apparent *quid pro quo* for Japanese aid.

⁴¹ Hun Sen's claims were undermined by mounting proof that no DK remnants were about to resume armed struggle, as well as by evidence that many in the CPP favored some form of internationalized trials of former CPK members.

⁴² In a joint statement made public on October 22, 1999, for example, the leaders of the Bar Association of Cambodia, Legal Aid of Cambodia and the Cambodian Defenders' Project insisted that "judicial independence in trials for former Khmer Rouge leaders can only be achieved if all court officials are appointed by" the UN. "Statement on Judicial Independence in Khmer Rouge Trials," Oct. 22, 1999.

⁴³ *Chhbap Sdei-pi Kar Bångkaoet Aoy Mean Ang-chumnumchumreah Visamanh Knong Tolakar Kampuchea Daoembey Kat Sech-kdey Aovkrettakam Dæl Prapreut Laoeng Nôv Knong Rayea'-kal Nei Kampuchea Pracheathipatai* ("Law on the Creation of Extraordinary Chambers within the Courts of Cambodia to Try Crimes Committed During the Democratic Kampuchea Period"), Dec. 1999.

⁴⁴ *Id.*, art. 22. The draft proposal provided for a majority of Cambodian judges in all trial chambers, each of which would be chaired by a Cambodian judge. *Id.*, art. 11. All Cambodian judges were to be appointed by the Hun Sen-controlled Supreme Council of the Magistracy. *Id.*, art. 13. Although the draft allowed the UN Secretary-General to propose non-Cambodian judges after consultation with the government, the Supreme Council would also have to approve all nominees. *Id.* Provisions for Cambodian and non-Cambodian co-prosecutors similarly empowered the Council to appoint the Cambodians and approve the non-Cambodians. *Id.*, art. 20. Although non-Cambodian judges and prosecutors were allowed non-Cambodian staff, such staff would have to be approved by these judicial officials' Cambodian counterparts and be subject to reassignment by a Director of an Office of Administration appointed by the government. *Id.*, arts. 25, 26. Moreover, all Cambodian staff would have to be Cambodian civil servants. *Id.*, art. 15, 24, 26. Finally, although various provisions guaranteed suspects legal counsel of their choice, no mention was made of the possibility of allowing foreign lawyers to act as defenders. See *id.*, arts. 29, 33.

⁴⁵ Hun Sen continued to say, for example, that the first of the senior CPK leaders to accept the Cambodian government's authority, Ieng Sary, should not be tried. From a translation of a "private interview" of Hun Sen by the German press agency DPA, Phnom Penh, Dec. 15, 1999. See also "Cambodia Sends Draft Khmer Rouge Law to UN", Reuters, Phnom Penh, Dec. 21, 1999. In arguing for an exemption from prosecution for Ieng Sary, Hun Sen also referred to Sary's 1996 amnesty for his 1979 "genocide" conviction.

The United Nations' chief legal counsel declared that the Organization was wary of involving itself in what could be perceived as a "sham trial."⁴⁶ Hun Sen's revised proposal was also rejected by a coalition of eighteen Cambodian human rights groups, which stressed that the proposal did "not ensure the most essential characteristic" for a fair trial, "the independence of the court."⁴⁷

The UN responded to the Cambodian proposals with a confidential Office of Legal Affairs "non-paper" of January 5, 2000, which called for several significant modifications to the December 1999 draft.⁴⁸ The UN insisted that organs and staff of the tribunal be politically and financially independent from any government authority and that the process not be selective with regard to suspects.⁴⁹ It also insisted that Ieng Sary's 1996 amnesty not be a bar to his prosecution. Despite the UN response, Hun Sen decided to push ahead with cabinet adoption of the December 1999 draft. He insisted that, if the United Nations had concerns, the Organization should send a delegation forthwith to Phnom Penh to discuss them with the government.⁵⁰ The UN responded by expressing hope that any future discussions might "eventually" lead to "a draft that meets international standards."⁵¹

In January and February 2000 Hun Sen found himself faced with continued UN insistence on a fair trial and the possibility that some elements of the political opposition, the public and even perhaps members of his own CPP might actively ally with the UN position.⁵² In consequence, Hun Sen adopted the stance that he maintained for most of the remainder of the year - refusing to sign any agreement with the United Nations until Parliament had passed a trial law, delaying the passage of any law in order to avoid having to conclude an agreement with the United Nations, and obstructing any public or parliamentary debate that might result in the passage of a law not to his liking. Consistent with this approach, Hun Sen indicated in February 2000 that he was ready to defer parliamentary consideration of the bill until mid-April pending a visit by a UN delegation to Phnom Penh.⁵³

Following further correspondence between the UN Secretary-General and Hun Sen,⁵⁴ the two met in Bangkok in February 2000 and announced that "the door was still open for further

⁴⁶ *Cambodia Approves Khmer Rouge Trial*, Associated Press, Phnom Penh, Jan. 6, 2000.

⁴⁷ *Cambodia Vows Speedy Khmer Rouge Trial in Next Few Months*, Associated Press, Phnom Penh, Jan. 6, 2000.

⁴⁸ The UN document also called for the execution of a UN-Cambodia agreement on the two parties' binding mutual obligations to conduct a trial conforming to international standards of fairness, which the government would incorporate into a domestic law. UN Office of Legal Affairs, "Non-Paper on Khmer Rouge Trial," Jan. 5, 2000.

⁴⁹ *Id.*

⁵⁰ *Cambodia Will Not Wait for the UN*, Associated Press, Phnom Penh, Jan. 4, 2000; *Cambodia Shuns UN Invite to Discuss Khmer Rouge*, Reuters, Phnom Penh, Jan. 7, 2000; *Hun Sen Will Discuss Trial, But On Own Turf*, SOUTH CHINA MORNING POST, Jan. 8, 2000.

⁵¹ UN, "Daily Press Briefing of the Office of the Spokesman for Secretary-General," Jan. 6, 2000.

⁵² Laura McGrew, *The Thorny Debate on Justice for Pol Pot's Madness*, PHNOM PENH POST, Feb. 19 - Mar. 2, 2000.

⁵³ *Prince Ranariddh to Urge UN Role in Khmer Rouge Trial*, Kyodo, Phnom Penh, Feb. 7, 2000.

⁵⁴ In a letter to Hun Sen dated February 8, 2000, the UN Secretary-General reiterated that UN engagement in the process of establishing a tribunal remained "contingent upon meeting minimal international standards of justice, fairness and due process of law, without which the process will not be credible and will not be seen to be credible." Letter from Kofi Annan to Hun Sen, Feb. 8, 2000.

discussion” and that the UN would send a legal team to Phnom Penh “soon.”⁵⁵ Negotiations in March 2000 between the Cambodian government and a UN team headed by Undersecretary for Legal Affairs Hans Corell ended with no real agreement, however, due principally to disagreement over the degree of influence that the Cambodian government would exercise over judges and prosecutors.⁵⁶ The UN also continued to insist throughout these negotiations that Ieng Sary's 1996 amnesty not be a bar to his prosecution.

Through US Senator John Kerry, the United States government sought to break the impasse by proposing that conflicts between prosecutors and among investigating judges regarding the issuance of an indictment be resolved by a five-person panel of judges assembled from those already on the bench of the envisioned court, including three Cambodians and two international judges appointed by the Secretary-General.⁵⁷ Under this formula, if only one of the two co-prosecutors or only one of the two co-investigating judges proposed pursuing an indictment, a super-majority vote of at least four judges would be required to block that proposal. The US also put forward a June 15, 2000 deadline for parliamentary ratification and a UN-Cambodia agreement.

Building on this proposal, the United Nations prepared draft articles of cooperation and in April 2000 proposed them for signature by the Cambodian government.⁵⁸ The draft, which neither side made public, specified that domestic enabling legislation and any “subsequent amendments” by the Cambodian parliament must be “in full conformity” with the proposed articles of cooperation. The text of the articles incorporated a slightly modified version of the Kerry proposal for an arbitration panel for contentious indictments, but also required certain concessions by the Cambodian government. In particular, the UN text envisaged the establishment of a Cambodian court in the form of “Extraordinary Chambers in the Courts of Cambodia” with jurisdiction *ratione materiae* to prosecute homicide and torture as proscribed under the 1956 Penal Code of Cambodia, as well as the international crimes of genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions, and crimes against internationally protected persons.

The UN proposal also provided that the minority of non-Cambodian judges were to be chosen by the Hun Sen-dominated Supreme Council of the Magistracy from a list provided solely by the UN Secretary-General.⁵⁹ Through this proposal, the UN apparently sought to preclude the appointment of “friendly” non-Cambodian judges by foreign governments. Similarly, the proposal provided that the UN-appointed prosecutor must be chosen from a list provided by the Secretary-General, and was to be assisted by a deputy international prosecutor

⁵⁵ *Cambodian PM Says 'Door Still Open' for UN Talks*, Reuters, Bangkok, Feb. 12, 2000; *UN Confident of Agreement with Cambodia on Khmer Rouge Trial*, Associated Foreign Press, Bangkok, Feb. 12, 2000; *UN Team for Cambodia*, NATION, Feb. 13, 2000.

⁵⁶ *UN Hopes for Agreement on Genocide Tribunal Framework Fade*, SOUTH CHINA MORNING POST, Mar. 21, 2000.

⁵⁷ The proposal was delivered by Senator John Kerry at a meeting between Kofi Annan and Hun Sen during a summit of developing nations in Cuba in April 2000, and came to be known as the “Kerry proposal.” *Cambodian Television*, Apr. 17, 2000; *Cambodia Lauds Fresh US Proposal to Break Khmer Rouge Trial Deadlock*, Associated Foreign Press, Phnom Penh, Apr. 17, 2000; *Hun Sen Accepts UN Proposal on Trial: US Senator*, Kyodo, Phnom Penh, Apr. 29, 2000.

⁵⁸ Letter from Kofi Annan to Hun Sen dated April 18, 2000.

⁵⁹ *Id.*

appointed in the same manner. Moreover, the proposal called for the appointment by the United Nations of an international deputy director of court administration with responsibility for recruiting the court's international staff.⁶⁰

Notably absent, however, was any specification of the right of suspects to foreign counsel and any provision for protection for witnesses beyond that afforded by the court itself.⁶¹ Further, the text provided for prosecution only of "senior leaders of DK responsible for serious violations of Cambodian and international law," omitting reference to other suspects who may bear significant responsibility for CPK-era atrocities. Finally, the text contained an "opt out" clause to the effect that if the Secretary-General was not in a position to finance UN participation because member-state governments declined to provide funding, the Organization would be released from its obligations to the government.⁶²

Also in April 2000, however, Hun Sen withdrew his support for the arbitration panel envisioned by Senator Kerry. This led to a series of further exchanges between the United Nations and the Cambodian government⁶³ and a visit to Phnom Penh by Hans Corell in July 2000. During this visit, Corell retabled the still-unpublished April 18, 2000 UN draft articles of cooperation, with explicit provision for modifying the personal-jurisdiction clause based upon negotiations.⁶⁴ Corell maintained the Organization's insistence that all non-Cambodian judges, including the co-investigating judge, and the non-Cambodian co-prosecutor must be selected from lists submitted by the UN Secretary-General, although all judges and prosecutors would ultimately be appointed by the Supreme Council of the Magistracy. The Cambodian judges would constitute a majority and chair the court at the first instance, appeals, and supreme levels of adjudication. The Organization's proposal added that co-prosecutors must be experienced "in the conduct of investigations and prosecutions of criminal cases." The UN-proposed amendments also reaffirmed that, while the court's chief administrator would be appointed by the government, the Secretary-General would appoint the deputy administrator, who would in turn be "responsible for the recruitment and administration of all international staff." The UN proposals opened up the

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Memorandum of Understanding Between the UN and the RCG Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Apr. 18, 2000.

⁶³ In a letter to the UN Secretary-General dated April 22, 2000, Hun Sen proposed an alternative to the UN position pursuant to which charges would not go forward unless a super-majority of the "pre-Trial chamber" voted in favor of a disputed indictment. The Cambodian prosecutor and judges could, therefore, block an indictment. *Hun Sen Withdraws Acceptance of US Formula on Trial*, Kyodo, Phnom Penh, Apr. 25, 2000. UN Secretary-General Kofi Annan responded by reaffirming the United Nations' position that the government should formally express its agreement with the terms of the UN proposal and then present the agreement to the National Assembly. *Hun Sen Rejects UN Request for Agreement on Khmer Rouge Trial*, Kyodo, Phnom Penh, Apr. 28, 2000. See also *Cambodia Says No Khmer Rouge Law Till after 23 May*, Reuters, Phnom Penh, Apr. 25, 2000; *Termites Blamed as Legislators Delay Genocide Tribunal Debate*, SOUTH CHINA MORNING POST, Apr. 26, 2000.

⁶⁴ This text, headed "Draft 5 July 2000," notes that it is "the same as the 18 April 2000 text, except where there are changes in bold." The only significant change was the inclusion in the clause relating to personal jurisdiction of a comment that its terms are to be modified with as yet unagreed "additional text" to be "inserted" once agreed upon. Possible changes were laid out in two marked-up versions of the text of the government's draft law, which included UN-proposed amendments reflecting the substance of the Organization's April 18 draft international agreement and more recent UN positions. One version suggested that the law's personal-jurisdiction clause be changed to cover "senior leaders of DK and those who were **most** responsible for crimes and serious violations" of international humanitarian law during the DK period. The other version suggested that the clause be changed to cover "senior leaders of DK and **other Cambodian nationals who, because of their special functions or duties, were most** responsible for crimes and serious violations" in that period. (emphasis in original).

possibility that Cambodian staff could be selected from among non-civil servants, but left their appointment to the government.

Finally, the UN-proposed amendments permitted the Organization to opt out of the tribunal process as the UN's April 18 text had envisaged. At the same time, the UN's July 2000 proposal would permit the government to continue prosecutions in accordance with Hun Sen's earlier preferred option, enunciated in early 1999, of ensuring international participation through bilateral agreements with individual governments or personalities. The UN specified that if it failed to sign a memorandum of understanding with the Cambodian government, or alternatively signed a memorandum of understanding and named officials to the tribunal but UN Member States failed to provide funds for salaries and other necessary expenses, the resulting vacancies in international positions could be filled by the Supreme Council of the Magistracy from candidates recommended by the governments of UN Member States or from among "other foreign legal personalities." If such nominations were not forthcoming, the trial could proceed with the vacancies being filled with Cambodians.⁶⁵

The Cambodian Government's Task Force responded with numerous proposed amendments to the UN's draft agreement. These included removing paragraphs pertaining to the qualifications of judges and prosecutors as well as all references to the super-majority requirements as first proposed by Senator Kerry to resolve disputes over contentious indictments. Also eliminated were the provisions addressing amnesties and rights of the accused other than their right to counsel.⁶⁶

The Cambodian response was followed by what the United Nations described as "frank and comprehensive discussions,"⁶⁷ after which Hans Corell declared that the UN had "done [its] part" and that the issue was now "squarely with the government." Corell also indicated that the United Nations wanted the entire process, including the passage of a Cambodian law in conformity with the draft articles of cooperation, completed before the UN General Assembly convened in September.⁶⁸ Departing from Phnom Penh on July 7, 2000, Corell left behind slightly revised versions of the text he had presented upon his arrival, thereby rejecting the Task Force's suggestions and implicitly insisting upon almost all of the commitments that the UN had originally demanded from Cambodia in April 2000.⁶⁹

⁶⁵ Draft Law, "Phnom Penh, 5 July 2000 at 6:00 PM."

⁶⁶ Task Force Text, Headed "Amendments Proposed For the Draft Memorandum of Understanding/Articles of Incorporation" (as described by the UN delegation), July 5, 2000.

⁶⁷ UN, "Statement Attributable to the Spokesman for the Secretary-General," July 6, 2000.

⁶⁸ *Cambodia, UN End Talks on Khmer Rouge Trial*, Kyodo, Phnom Penh, July 6, 2000; *UN Declares Success in Khmer Rouge Trial Talks*, Reuters, Phnom Penh, July 6, 2000; *UN Urges Swift Action on Khmer Rouge Trial*, Reuters, Phnom Penh, July 7, 2000.

⁶⁹ UN Text Headed "July 7, 2000 Draft," "Phnom Penh, 7 July 2000 at 3:00 p.m." For example, the July 7 version strengthened the requirement that the law passed by Parliament could not subsequently be amended. In an apparent concession to Hun Sen, the new text added amendments calling upon judges to attempt to reach unanimous decisions. However, it also required their disagreements to be spelled out in separate majority and minority views, which would allow an international judge to explain his or her case separately from Cambodian judges. The UN text strengthened formal provisions for the independence of the prosecutor, specifying that he or she must act without government instructions. Picking up on clauses from the April 18 text, the July text also introduced language providing for the foreign prosecutor to be assisted by one or more foreign deputy prosecutors nominated by the United Nations. New phrases were added to the provisions on investigations and trial and appeal proceedings further specifying that, while these should take place according to existing procedures in Cambodian law, guidance could be sought in international standards, although this would remain entirely optional. Provisions for protection of witnesses and victims were fortified by making the court as well as the government

In the period that followed, there were further delays in consideration by the Cambodian legislature of the UN proposal.⁷⁰ In his August 2000 report to the UN General Assembly on the Situation of Human Rights in Cambodia, Secretary-General Annan noted that the tribunal draft law was stalled in the Legislative Commission⁷¹ and that legislative consideration of possible trial legislation would not be completed before the UN General Assembly convened in September 2000. Hun Sen refused even to discuss the tribunal when he traveled to New York for the annual General Assembly session.⁷² Following that session, CPP representatives suggested that the issue of a Khmer Rouge trial was not a priority for the Cambodian government, although it was still planning to go forward with prosecutions.⁷³

As the next session of the National Assembly – scheduled for October 16, 2000 – approached, the body's Legislative Commission still had not received any of the documents from Corell's July visit. The draft law was not on its agenda, leaving the Assembly and the public uninformed about the substance of the UN proposals and Hun Sen's responses to them. In mid-October, this lack of information became a matter of intensified public controversy as documents from the July meeting began to leak. Members of the Legislative Commission complained that they were unable to work competently on the draft law without the July texts. In the meantime, domestic and international human rights advocates criticized those documents that were available.⁷⁴

Despite these problems, on January 2, 2001, the National Assembly approved legislation establishing the "Extraordinary Chambers in the Court of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea," with the Senate adding its approval on January 15, 2001.⁷⁵ In mid-February, however, the Constitutional Council returned the legislation to the National Assembly to correct a purported technical error, namely the fact that the law refers to a clause in the 1956 Criminal Code that provides capital punishment for a "felony of the third degree," while the 1993 Constitution prohibits the death penalty.⁷⁶ As matters currently stand, therefore, several steps remain in order for this legislation to become law. In addition to re-passage by the National Assembly and the Senate, the

responsible for this function. The July 7 version continued to grapple with the question of personal jurisdiction. A commentary incorporated into the UN text headed "July 7, 2000 Draft," for example, recalled that the United Nations had agreed in July that personal jurisdiction should be limited to "senior leaders" and not many others. At the same time, the commentary warned that the formulation in the draft law text approved by the Cabinet in January might be framed too broadly in light of the number of defendants the court could reasonably be expected to handle.

⁷⁰ See, e.g., *No Date Yet for Parliamentary Debate on Khmer Rouge Trial*, Kyodo, Phnom Penh, July 27, 2000.

⁷¹ *Situation of Human Rights in Cambodia: Report of the Secretary-General*, U.N. GAOR, U.N. Doc. A/55/291, Aug. 11, 2000.

⁷² *Cambodia Won't Discuss Khmer Rouge Trial at UN Meeting*, Reuters, Phnom Penh, Sept. 4, 2000.

⁷³ *Khmer Rouge Trial Not Top Priority for Cambodia: Minister*, Kyodo, Phnom Penh, Sept. 12, 2000.

⁷⁴ *UN Accepts Flawed Tribunal for KR*, PHNOM PENH POST, Oct. 13-26, 2000.

⁷⁵ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia For the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 5th Session of the 2nd Legislature, Dec. 29, 2000 and Jan. 2, 2001 [hereinafter "January 2001 DK Law"]. See Seth Mydans, *Cambodian Deputies Back War Crimes Court*, N.Y. TIMES, Jan. 3, 2001.

⁷⁶ See Constitutional Council Decision No. 040/002/2001, Feb. 12, 2001.

legislation must be approved by the Constitutional Council and signed by the chief of State, King Sihanouk, or, in his absence, by the acting chief of State, Chea Sim.

As of the end of June 2001, there had been little apparent movement on the legislation. On May 22, 2001, UN Secretary-General Kofi Annan told reporters that his office had received no communication from the Cambodian government on the tribunal for six months and that there had been no visible movement since the Constitutional Court's February decision.⁷⁷ Although Prime Minister Hun Sen had previously indicated that the revised legislation would likely be finalized before a donors' conference for Cambodia scheduled to take place in Tokyo June 11-13, 2001, on June 5, 2001 senior cabinet minister Sok An confirmed that the draft bill would not be submitted to the National Assembly until after the conference. He explained: "The government is too busy, so we decided to do it after we return from the meeting."⁷⁸

On the last day of the donors' conference, however, Prime Minister Hun Sen predicted that the Khmer Rouge law could be enacted by August with hearings starting by the end of the year. According to the Prime Minister, "[w]e, as the Cambodian government, would like to end the Khmer Rouge issue as soon as possible ... We do not like that the Khmer Rouge ghosts continue to haunt us."⁷⁹ This was followed by a post-conference briefing by senior minister Sok An in which he claimed that donor countries made two requests during the meeting that Sok An thought Cambodia would have "no problem" fulfilling: the quick establishment of a Khmer Rouge tribunal and the appointment of general auditors for Cambodia.⁸⁰ Some movement on the former request occurred on June 22, 2001, when the Council of Ministers voted to delete the death penalty clause from the Khmer Rouge legislation. In comments made prior to the vote, Prime Minister Hun Sen claimed that the "first job" for the proposed court will be the trials of the only two officials in custody, Ta Mok and Duch, apparently because the maximum pre-trial detention period under Cambodian law for Mok and Duch expires in March 2002.⁸¹ UN Secretary-General Kofi Annan's office was subsequently reported as declaring that no internationally recognized trials could take place until Cambodia had signed a legal memorandum of understanding with the United Nations, a proposition that Prime Minister Hun Sen most recently appears to have rejected by stating that "if the draft law is adopted, we will not practice the agreement between the Cambodian government and the U.N."⁸²

The legislation tracks to a large extent the July 2000 draft document that formed the basis of discussions between the Royal Government's Task Force and the United Nations. It provides, for example, that the Court's subject-matter jurisdiction will include genocide as defined under the Genocide Convention of 1948, crimes against humanity, and grave breaches of the 1949 Geneva Conventions, as well as homicide, torture and religious persecution as

⁷⁷ *UN Urges Cambodia to Speed Up Khmer Rouge Trial Process*, Radio Australia, Australian Broadcasting Corporation, May 22, 2001.

⁷⁸ *Cambodia Khmer Rouge Trial Law Delayed Further*, Reuters, June 5, 2001; *Cambodia's Hun Sen Heads for Tokyo Optimistic on Aid Package*, Associated Foreign Press, June 6, 2001.

⁷⁹ *Khmer Rouge Trial Could Happen by Year-end*, Reuters, June 13, 2001.

⁸⁰ *Cambodia Aid Package Boosts Relations with Japan: Minister*, Associated Foreign Press, June 14, 2001.

⁸¹ *Draft Law for Khmer Rouge Trial Amended; No Death Penalty*, Associated Press, June 22, 2001.

⁸² Barbara Crossette, *Pact Sought on Khmer Rouge Trials*, N.Y. TIMES, June 28, 2001; *Cambodian PM Comments Raise Doubts on Khmer Rouge Tribunal*, Associated Press, June 29, 2001.

proscribed by the 1956 Penal Code of Cambodia, when those crimes were committed between April 17, 1975 and January 6, 1979.⁸³ Pursuant to the new law, the “extraordinary chambers” can exercise personal jurisdiction over “senior leaders of Democratic Kampuchea and those who were most responsible” for the crimes committed during the DK era.⁸⁴

But the law also deviates from the July 2000 draft in several significant respects. In particular, the provisions on defense counsel remove all references to defendants’ right to counsel of their choice, and provisions respecting trial proceedings, indictments, and arrests are relaxed to permit the government to apply national legislation that may not comply with international standards.⁸⁵ Further, the law does not clearly mandate that the Cambodian government must apprehend suspects who do not surrender voluntarily – a point upon which the United Nations has insisted -- nor does it clearly state that responsibility for appointing the court’s deputy lies with the United Nations.

Perhaps most importantly, the law omits any statement to the effect that previous pardons are not a bar to prosecution, raising the possibility that the amnesty previously granted to Ieng Sary might be allowed to stand.⁸⁶ Reinforcing this concern, Hun Sen has continued to express his unwillingness to include Ieng Sary among the targets of a CPK trial process.⁸⁷

To exempt Ieng Sary from prosecution for certain offenses, such as genocide and torture, would be inconsistent with Cambodia’s international legal obligations.⁸⁸ Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia recently observed in this regard that national measures by a state to absolve perpetrators of torture through an amnesty law would violate the general international legal principle proscribing torture and relevant treaty provisions. Such an amnesty should, therefore,

not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had *locus standi* before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked *inter alia* to disregard the legal value of the national authorising act. What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime.⁸⁹

⁸³ January 2001 DK Law, *supra* note 75, arts. 3-8.

⁸⁴ *Id.*, art. 2.

⁸⁵ *Id.*, arts. 24-35.

⁸⁶ *Id.*, art. 40.

⁸⁷ Seth Mydans, *Cambodian Deputies Back War Crimes Court*, N.Y. TIMES, Jan. 3, 2001 (indicating that in December 2000, Hun Sen claimed that “massive unrest” could result if Ieng Sary were targeted by the tribunal).

⁸⁸ See generally Diane F. Orentlicher, *Addressing Gross Human Rights Abuses: Punishment and Victim Compensation*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY (L. Henkin & J.L. Hargrove, eds. 1994).

⁸⁹ Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T, Judgment of December 10, 1998 (ICTY Trial Chamber II), ¶ 155. (hereinafter “Furundžija Judgment (ICTY Trial Chamber II)”). The defendant appealed the Trial Chamber’s Judgment to the ICTY Appeals Chamber, and the Appeals Chamber dismissed the appeal in a judgment dated July 21, 2000, without specific comment on this point. Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-A, Judgment of July 21, 2000 (ICTY Appeals Chamber).

As noted, it remains for the domestic legislative process to be completed, and the court envisaged in the new Cambodian law will not come into existence until the United Nations and the Cambodian government conclude a formal agreement. In this respect, the United Nations has communicated its concerns about discrepancies between the Cambodian law and the draft agreements proposed by the UN in April and July 2000. On January 9, 2001, Hans Corell wrote to the Cambodian Government noting those differences and requesting changes and clarifications in the draft law before the Senate vote. None of the United Nations' requested changes was made before the bill was passed in the Senate, however. Representatives of the Cambodian Government have since indicated that the UN concerns were either insubstantial or could be addressed in the formal agreement between the government and the United Nations. To-date, the UN Secretary-General has maintained his call for a legal memorandum of understanding between the United Nations and the Cambodian government as a precondition to internationally recognized trials.⁹⁰

In sum, then, the terms of the legislation adopted by the Cambodian Government raise a number of troubling questions as to the fairness and scope of future trials. The ongoing negotiations between the UN and Cambodian government are, therefore, critical and warrant close attention. Most fundamentally, serious questions remain regarding the lack of independence and impartiality on the part of Cambodian judges, prosecutors and other court officials, the possibility that non-Cambodian judges may also be susceptible to influence from their own government or the government of Cambodia, and the relative authority of Cambodian and non-Cambodian officials within the tribunal. Other issues of particular concern include the extent to which the tribunal's prosecutor will be bound by past or future grants of amnesty or pardons by the Cambodian government, the ability of defendants to choose their own counsel and the extent to which the Cambodian government may accept its responsibility to apprehend indictees.

⁹⁰ Barbara Crossette, *Pact Sought on Khmer Rouge Trials*, N.Y. TIMES, June 28, 2001.

III. THE MEANS AND METHODS OF CPK CRIMES

A. CPK Policies of Mass Executions

Our research confirms the core conclusions of several historians concerning CPK policies of mass execution,⁹¹ and at the same time establishes new and more detailed information about those policies. As elaborated below, several distinct policies of execution were devised at the highest levels of the CPK and implemented through the machinery of its hierarchy. The patterns of arrests, torture and executions described in this Part appear to constitute basic elements of several serious crimes under international law, including crimes against humanity.⁹²

Of particular relevance in this regard are three policies that appear to have been adopted by the CPK leadership and implemented through the CPK hierarchy during the DK era:

- Immediately after April 17, 1975 and the fall of the Khmer Republic regime, a senior group of officials, apparently including Pol Pot, Nuon Chea and Son Sen, decided upon a policy to execute all Khmer Republic military officers and senior civil servants. This policy was implemented first by military units and then by Zone and lower level security offices.⁹³
- In early 1976, a decision was disseminated in the name of the Central Committee granting Zone Party Committees and certain other Party Committees the authority to execute those allegedly guilty of serious crimes against the revolution. This decision was implemented by Zone, Sector, District and cooperative security forces.
- Around September 1976, a decision was adopted, apparently by Pol Pot, Nuon Chea and Son Sen, to the effect that a widespread conspiracy against the leadership existed within the Party that required the execution of all cadre and others within the Party who could be compelled to confess to being enemy secret agents. While this initiative had origins in a CPK Central Committee policy dating to 1971 that such agents were to be executed, the late 1976 decision vastly increased the scope of such executions. The new decision was implemented by S-21, the CPK's Central Security Office, rather than

⁹¹ See, e.g., KIERNAN, THE POL POT REGIME, *supra* note 2; CHANDLER, VOICES FROM S-21, *supra* note 15.

⁹² Crimes Against Humanity are defined in various international instruments, including the following: Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter "IMT Charter"], art. 6 (defining crimes against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated"); ICTY Statute, *supra* note 13, art. 5 (defining crimes against humanity as murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds, and other inhumane acts, when committed in armed conflict, whether international or internal in character, and directed against any civilian population); ICTR Statute, *supra* note 13, art. 3 (defining crimes against humanity as including the crimes of murder, extermination and torture, when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds). See also UN Group of Experts Report, *supra* note 3, ¶¶ 66-71.

⁹³ The CPK divided Democratic Kampuchea into Zones, which in turn were divided into Sectors. Below the Sectors lay District, Sub-districts and Cooperatives. By 1978, there were seven Zones divided into approximately 32 Sectors, through which the Central Committee disseminated policy directives to regional and local officials. See UN Group of Experts Report, *supra* note 3, ¶ 17. For further detail as to the leadership and functions of the Zones, see Part III(B), *infra*.

by local security offices, with the cooperation of Zone Secretaries, at least until the Secretaries themselves were slated to be arrested and executed.

In the sections that follow, we set forth a detailed analysis of the bases for these conclusions. First, however, it is necessary to address the moral, methodological and legal issues raised by some of the documentary material examined by Dr. Heder.

Insights gleaned from the recorded "confessions" of CPK cadre, including notations added by persons other than the "confessors," contributed to our conclusions, particularly those relating to the late 1976 policy. The confessions themselves are a product of the very policies whose criminality is the subject of this report. Most individuals arrested by the CPK were interrogated and tortured or otherwise coerced into signing a written confession.⁹⁴ Almost without exception, the confessors were executed once their final statement was completed.⁹⁵

To rely upon statements extracted in these circumstances raises acute ethical and methodological issues. The very notion of using a confession that is known to be the result of torture would, in most circumstances, be so morally repellent as to preclude its use. It would be a perverse distortion of the law's civilizing aim to award torturers and murderers any historical victories. It is at least as important to avoid punishing the memories of those who suffered agonizing deaths at the hands of their torturers.

In recognition of the moral and evidentiary taint attaching to statements elicited by torture, there is an emerging rule in international law, reflected in Article 15 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("UN Torture Convention")⁹⁶ and more recently in the Rules of Procedure and Evidence of the International Criminal Tribunals for the former Yugoslavia and Rwanda and the Statute of the International Criminal Court,⁹⁷ generally precluding the use of such statements as legal evidence.

But some aspects of the material we have analyzed do not raise the ethical concerns underlying this trend and, indeed, would be admissible in court proceedings even under the

⁹⁴ Duch freely admitted in post-DK interviews that he used "torture ... accompanied by psychological tactics," such as falsely telling prisoners "they would be released if they talked." He explained, "[t]his was a lie but it worked." He added that there were no specific instructions from the Party on how to conduct the executions carried out under his oversight, but he recalled, "usually we slit their throats." See Thayer, *Death in Detail*, *supra* note 10.

⁹⁵ Among the extant S-21 archives are hundreds of execution schedules giving the name and date of prisoners' executions. For examples, with translations, see David Hawk, Khmer Rouge Prison Documents from the S-21 (Tuol Sleng) Extermination Center in Phnom Penh, Items 14-19 (unpublished manuscript).

⁹⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987 [hereinafter "UN Torture Convention"]. See *similarly* Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Series No. 67, *entered into force* February 28, 1987, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev. 1 at 83 (1992), art. 10.

⁹⁷ International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.18 (June 2000), Rule 95 "Exclusion of Certain Evidence"; International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/Rev.8 (June 2000), Rule 95 "Exclusion of Certain Evidence"; Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, as corrected by the process-verbaux of 10 November 1998 and 12 July 1999 [hereinafter "ICC Statute"], art. 69(7).

most stringent exclusionary rule. In particular, confessions elicited through torture and related documentation could be introduced as evidence of the torture itself.⁹⁸ While the UN Torture Convention generally prohibits the use of statements resulting from torture as evidence in legal proceedings, it provides an exception when the confession is introduced “against a person accused of torture as evidence that the statement was made.”⁹⁹

The policy considerations underlying the UN Torture Convention’s approach may support similar uses of confessions as evidence that crimes other than torture, including extermination, were committed. For example, it seems consistent with the approach of the UN Torture Convention to allow confessions to be introduced into evidence in order to establish the likely state of knowledge of defendants to whom confessions describing mass executions were circulated.

To the extent that the general exclusionary rule of the UN Torture Convention is designed to ensure that confessions elicited through physical violence are not used to convict the torture victim, this concern is obviously inapposite when the confessions are used instead to establish the criminality of those responsible for the abuse. Similarly, to the extent that the Convention’s general rule of exclusion is designed to deter state authorities from using torture, that concern would in effect be turned on its head if the exclusionary rule were used to shield perpetrators from legal responsibility for their crimes.

Still, unavoidable moral as well as legal considerations become paramount if coerced confessions are relied upon for the evidentiary value of their content. Beyond the ethical issues raised by reliance on confessions whose very existence bears witness to bestial behavior, the circumstances in which such statements were elicited necessarily casts doubt upon their reliability. While this concern is not implicated when confessions are introduced as evidence that a defendant was aware of, or otherwise responsible for, abuses attending the confessions, it becomes acutely important when coerced confessions are relied upon for the evidentiary value of their substantive assertions.

Keenly aware of this concern, we have concluded that, while much of the material to which S-21 “confessions” attest is indeed manifestly false, the confessions cumulatively provide important insights into the criminal policies that are the subject of this report. Significantly, the confessions themselves played a key role in implementing those policies - a point that can be appreciated only by examining their content. For example, confessions of CPK cadre suspected of being “traitors” were used to identify additional suspected “traitors” within the Party for arrest and interrogation following which, as a matter of policy, the latter were murdered.

In addition, it appears that the confessions were produced for a larger purpose: to convince some skeptical individuals in the CPK leadership, and to confirm the suspicions of

⁹⁸ For example, the October 1977 “confessions” of a Central Zone Division 174 battalion cadre named Nheum Sim *alias* Saut was marked for transmission to Nuon Chea and included a note from Saut’s interrogator explaining that “it was only after I tortured (tearunakam) him that he confessed to the story of having been a police informer and a CIA systematically right up to the time of his arrest.” “Notes on Nheum Sim *alias* Saut, Former Agriculturalist, Who Before His Arrest was Member, Battalion 701, Regiment 601, Division 174, Central Zone, 26 October 1977,” marked “One Copy to Brother Nuon, 11 November 1977.” DC-Cam Document BBKKh176. Consistent with Article 15 of the UN Torture Convention, this confession could properly be admitted into evidence to prove that Saut made the statement as a result of torture perpetrated by Saut’s interrogator.

⁹⁹ UN Torture Convention, *supra* note 96, art. 15.

others, that the "conspiracies" alleged by the Party existed, that these conspiracies explained the regime's failures, and that further arrests were required in order to give proper effect to the regime's policies, even if this involved arresting individuals who were long-term personal friends and political colleagues of CPK leaders. Thus confessions were rewritten under the interrogators' instructions to portray failures in the implementation of CPK economic, military and other policies as resulting from anti-CPK plots directed by foreign intelligence agencies. More particularly, the confessions were crafted to demonstrate that CPK policies were not achieving their goals because the structures that CPK leaders had created to implement those policies had been infiltrated by Cambodian agents of CIA, KGB, Vietnamese and other suspected enemies.

Thus an essential feature of the confessions is their incorporation of fabricated claims, aimed at justifying CPK policy failures. Notably, however, the confessions consistently accepted as uncontroversial the very existence and nature of those policies. These facts formed the essential scaffolding on which the coerced "admissions" of foreign-sponsored counter-revolutionary activities were secured. That these facts were taken as uncontroversial is significant but not surprising: The policies themselves were common knowledge in CPK ranks – accepted as fact by prisoners, interrogators and readers of the confessions alike.¹⁰⁰

In accordance with those policies, confessors' "admissions" that they had failed to carry out CPK policy justified their own execution. Once implicated in confessions, supposed "agents" blamed for the failure of CPK policies were arrested by S-21 and compelled to "confess" their crimes, as well as to identify their co-conspirators. In this fashion, the confessions played a central role in realizing the Party's extermination policies.

In light of the dearth of precedents involving efforts to introduce coerced confessions into evidence before international tribunals, it is impossible to know to what extent this sort of evidence would be ruled admissible before a court applying relevant international standards. It is partly with this uncertainty in mind that we have sought to articulate wherever relevant precisely why and how we have drawn inferences from apparently coerced confessions. Another consideration underlying our methodology is that, even if certain material is ultimately deemed inadmissible as evidence, it may provide investigators with reliable leads to other sources of evidence. Much of the evidence derived from confessions that we summarize in this report can be cross-checked - as we have done - against sources that may be admissible as evidence in a criminal proceeding.

It bears repeating that these considerations should in no way be applied in a fashion that may undermine the integrity of legal process, diminish the deep commitment to core human values embodied in international law, or otherwise breach fundamental principles of morality.

¹⁰⁰ Under the circumstances in which the confessions were extracted, there was no discernible motive on the part of the CPK to falsify information in the confessions concerning the existence or nature of the Party's execution policies. Notably, the confessions were not intended for public dissemination and were only copied to select senior CPK leaders.

1. Purges¹⁰¹ of Individuals Associated with the former Khmer Republic

Confessions of Communist cadre who were themselves later executed at S-21 for alleged treason describe how, immediately after the Communists' liberation of Phnom Penh on April 17, 1975, orders were given to their armed forces to round up and kill military officers and civil servants of the defeated Khmer Republic regime. As Communist armed forces evacuated residents from Phnom Penh and other newly-captured areas into rural Zones already under CPK administration, they were also finding "enemy" members of the former Khmer Republic regime. The latter were "successively captured, especially certain high-ranking officers, from captain up, all of whom were ... smashed," a euphemism for murder.¹⁰² Not long after, the CPK Organization instituted a formal policy of arresting and executing military and civilian members of the prior Khmer Republic regime. According to the "confessions" of Cho Chhan, *alias* Sreng, the Communist Party "put forward a policy of successively smashing officers, starting from the generals and working down through to the lieutenants, as well as government investigative agents, policemen, military police personnel and reactionary civil servants".¹⁰³ Eventually the scope of victims was expanded to include former enlisted men in the Khmer Republic armed forces who had been "activists" against the revolution.¹⁰⁴

Meanwhile, the CPK dismantled the political structures it had established with non-Communist opponents of the Khmer Republic in 1970, the Royal Government of National Union of Kampuchea (GRUNK) and the National United Front of Kampuchea (FUNK), both of which were headed by then Prince Norodom Sihanouk. This led to the purportedly voluntary retirement

¹⁰¹ The term "purge" appears often in CPK documentation. It frequently, though not exclusively, refers to the execution of the Party's suspected enemies. An example in which the context almost certainly indicates the use of the term to mean "execute" is found in the minutes of an October 9, 1976 General Staff meeting in which Son Sen, who chaired the meeting, emphasized that it was "imperative to purge no-good elements absolutely in the sense of an absolute class struggle" and explained that this purge was "premised on three principles":

Category 1: The dangerous category: they must be absolutely purged.

Category 2: The ordinary liberal category: they must be educated again and again in our education schools.

Category 3: The category of those who have merely been incited by the enemy, merely believed the enemy incitement. As a first step, they should undergo refashioning to get them no longer to believe the enemy.

"Minutes of the Meeting of Secretaries and Deputy Secretaries of Divisions and Independent Regiments, 9 October 1976, 14.00 hours" (N0001500).

¹⁰² "Confessions" of Mæn Meng *alias* Chhin (CMR 78.2/TSA M172), "Text Transcribed from a Tape Recording: Responses of Mæn Meng *alias* Chhin, Division 920", Mar. 23, 1977, at 6-7. The CPK term "smash" (*kâmtech*) is a translation of the Vietnamese Communist term *Tieu diet*, which in turn is a cognate for the Chinese Communist term *xiaomie*, conventionally translated as "eliminate," "abolish," "exterminate," or "wipe out." See Tu Dien Viet-Khome (Ha Noi: Nha Xuat Ban Khoa Hoc Xa Hoi, 1978), p. 1553; Hanying Cidian (Beijing: Shangwu Yinshuguan, 1984), p. 758. While the CPK on occasion used the term *kâmtech* metaphorically to refer to the Party's struggle against its perceived enemies, it also used the term on many occasions as a euphemism for killing. See David Hawk, "Khmer Rouge Prison Documents from the S-21 (Tuol Sleng) Extermination Center in Phnom Penh," Items 14-19, reprinting various "execution schedules" from S-21, each of which reads at the top *chhmuoh neak-toh kâmtech* ("names of prisoners smashed"). The terms "sweep" and "crush," like "smash," were routinely used with reference to individuals to indicate euphemistically that they had been killed.

¹⁰³ "Confessions" of Cho Chhan *alias* Sreng (CMR 12.25/TSA C120), "I Would Like to Report on the Commissioned Officers Who Exited to the North Zone," Mar. 23, 1977, at 1-2.

¹⁰⁴ *Id.*

of Prince Sihanouk,¹⁰⁵ and was eventually followed by the secret arrest and execution of most non-Communist cabinet-level GRUNK and senior FUNK officials¹⁰⁶ and the consolidation of power in the DK government headed by Pol Pot.

Pol Pot and other senior CPK officials insisted while still in power that such political killings were extremely limited or were simply not occurring,¹⁰⁷ and indeed asserted that neither a "security organ" nor prisons existed in the country.¹⁰⁸ These officials sought to conceal not only the existence of the central S-21 security or "Special Branch" (*sântebal*) office in Phnom Penh, but also the entire system of similar organs that were replicated under local CPK control in the Zones and Sectors into which the Party divided the country, as well as in the pre-Communist Districts that continued as administrative units.¹⁰⁹ They also sought to conceal the fact that security functions were carried out at the most basic "grassroots" (*mulathan*) level by the chairmen of cooperatives and village administrative committees through the deployment of militia (or "guerillas") known as *chhlop*.¹¹⁰

¹⁰⁵ "Minutes of the Front Standing Committee, 11 March 1976"; "The Decisions of the Central Committee on a Number of Miscellaneous Matters," Mar. 30, 1976, at 5 [hereinafter "Decisions of the Central Committee on a Number of Miscellaneous Matters."].

¹⁰⁶ See Steve Heder, *Pol Pot and Khieu Samphan* 12-13 (Monash University Centre of Southeast Asian Studies Working Paper No 70, 1991) [hereinafter *Pol Pot and Khieu Samphan*].

¹⁰⁷ Although CPK officials admitted that some senior leaders of the old regime had been executed, the official position was that "civil servants, officers and soldiers ... had, like other urban dwellers, been dispersed into peasant cooperatives," where at worst they were confined to "worksites for the re-education of dangerous and hardened repeat offenders." FRANCOIS RIGAUX, UN SOCIALISME A LA SPARTIATE: LE KAMPUCHEA DEMOCRATIQUE 1, 19, 21 (1978) (unpublished manuscript) [hereinafter RIGAUX] (recounting Rigaux's 1978 officially-authorized visit to DK). Leading cadre of the DK Foreign Ministry echoed this claim when they told a delegation of US Communists that the "thousands" of purported CIA and other enemy spies and agents who had supposedly established counter-revolutionary networks in Phnom Penh in hopes of sabotaging the revolution from within after the CPK victory had been dispersed by the general evacuation of the capital. It was stressed that these would-be counter-revolutionaries had been given a chance to mend their ways in the countryside, albeit under the close supervision of the peasants. KAMPUCHEA TODAY: AN EYEWITNESS REPORT FROM CAMBODIA 25-27 (1978). This tract produced by members of the Communist Party (Marxist-Leninist) of the USA explains that the official story of how and why Phnom Penh was evacuated was "told by many people," including Ieng Sary. Other passages suggest that parts of the explanation may have come from the "Secretary-General" of the Ministry, So Hong.

¹⁰⁸ See RIGAUX, *supra* note 107.

¹⁰⁹ This description of the nation-wide security system is based on readings of the biographical appendices to S-21 "confessions," which make possible a reconstruction of the structure of security forces. They suggest that specific security units with their own Party-branch secretaries generally operated only down to the District level. For an example of the "confessions" of a District-level security cadre, which gives some indications of how the system worked at that level and interacted with those below it, see "Responses of Æm Min *alias* Sæn, Round 1: On the Case of Æm Min *alias* Sæn Himself, Member, Baray District, Sector 42," (CMR 27.13/TSA E19), May 14, 1977.

¹¹⁰ "The people" were supposed to play a role in security at this level. This idealized role for "the people" in cooperatives is described in an October 8, 1978 entry in an untitled notebook, mostly in the hand of Tong Soeng Heuan *alias* Pon, the first-ranked interrogator of S-21. The entry indicates that if "there are in one cooperative undercover, burrowing enemies conducting activities causing us constant complications," then "good cadre rely on the people to sort this out" by ensuring that "the people understand their duty of ... defending the country." As long as they do, "enemies and adversaries who dare to attack the revolution will be all gone: the people will smash them." Illustrations of how this ideal was supposedly put into practice in the countryside comes from two documents authored by Kâng Chap *alias* Sæ *alias* Chan Sâm, Secretary of the North Zone. The first, "Telegram 254, Band 745, Respectfully Presented to Beloved Committee 870," signed Sæ, Jan. 10, 1978, reports to the Central Committee that the North Zone was "relying in particular on the basic classes, to sweep undercover enemies ... cleanly away." The second, "Telegram Number 324, Band 1230, Respectfully Presented to Beloved Committee 870," Apr. 10, 1978, reports: "We are in the process of continuing to sweep cleanly away the contemptible remnants one after the other, both those who oppose our revolution overtly and those who do so by covert means. This we are doing by relying more and more solidly on the ordinary people, in particular the ordinary people of the basic classes, who see with more and more crystal clarity who is a friend and who is an enemy."

This pyramid of security services was responsible for carrying out a routine procedure for finding and executing former Khmer Republic officials who had slipped through the evacuation net and made it to the countryside. Local Communist authorities were supposed to draw "up list after list" of those to be executed. Their lists were then submitted to the Party Committees of seven Zones, which finally "sorted out" who was to be killed.¹¹¹ This was in line with the March 1976 CPK Central Committee decision according to which "the right to decide on smashing within and outside the ranks" of the Party should be exercised in the "grassroots" by each Zone Standing Committee.¹¹² It appears that this authority was often exercised in practice by the Zone Party Secretary, operating with the assistance of the member of the Zone Committee responsible for security.¹¹³ Also in practice, however, authority to execute was delegated to or usurped by District or lower level Party cadre,¹¹⁴ including cooperative-level authorities who relied heavily on the *chhlop* and other villagers whom they recruited as undercover informers to report on the pasts and activities of their fellow villagers.¹¹⁵

2. Purges of Non-Communist Members of the DK Population

The March 1976 Central Committee decision, referred to above, also granted Zone Party Committees and certain other Party Committees general authority to execute non-Party members who were allegedly guilty of serious crimes against the revolution. With the exception of Khmer Republic officers and officials and, later, of Vietnamese nationals, who were also referred to as "Yuon,"¹¹⁶ it is not evident that mass executions of any other particular groups, class, racial, religious or otherwise, were ever ordered. It is clear, however, that according to the CPK's class-based analysis, certain class groups and ethnic and religious communities were associated with the opposition, and consequently individuals from these groups were more likely to be targeted for execution. The same can be said of those with various kinds of associations with the pre-1975 regime.¹¹⁷

¹¹¹ "Confessions" of Cho Chhan *alias* Sreng (CMR 12.25/TSA C120), "I Would Like to Report on the Commissioned Officers Who Exited to the North Zone," Mar. 18, 1977, at 1-2.

¹¹² Decisions of the Central Committee on a Number of Miscellaneous Matters, *supra* note 105.

¹¹³ See, in particular, the "confessions" of Meah Æm (CMR 80.30/TSA M264), "Overt Organigram of the Northwest Zone Security Ministry: Responses of Meah Æm, Cadre for Summarizing Security Documents," Feb. 4, 1978, which shows the Zone's three-man Security Committee answering directly and exclusively to Zone Secretary (Ruoh) Nheum.

¹¹⁴ A DC-Cam report, "Mapping of the Killing Fields of Cambodia, 1998," lists more than 400 detention and/or execution centers throughout the country, and this data is no doubt incomplete. It nevertheless suggests that each of the more than 100 Districts of DK contained at least one and in some cases several such centers. (See Table 1, "A List of Site Names for 1995, 1996, 1997, and 1998.") Other data in this report, including the results of on-the-spot research, appears to corroborate this conclusion.

¹¹⁵ For an account of the activities of *chhlop* based on contemporary refugee reports, see *id.* at 123; FRANCOIS PONCHAUD, CAMBODIA: YEAR ZERO 114 (1979). See also MARTIN STUART-FOX AND BUNHAENG UNG, THE MURDEROUS REVOLUTION: BUNHAENG UNG'S LIFE WITH DEATH IN POL POT'S KAMPUCHEA 54-55 (1986).

¹¹⁶ "Yuon" is a Khmer colloquial term for Vietnamese that was officially defined as pejorative by the CPK and is now considered as such by most Vietnamese themselves.

¹¹⁷ The security services and *chhlop* operated in a social setting in which the population as a whole was officially divided into three categories called *penh-set* ("full-rights"), *triem* ("candidate") and *pannhaoe* ("depositee"). This system combined a definition of their rights as members of cooperatives with a vocabulary for labeling people in terms of their perceived or potential disloyalty to the revolution. Those consigned to the lowest category were subject not only to discrimination in terms of political rights and economic rewards, but also of arbitrary execution. Thus in first phases of the DK regime, generally speaking,

Non-Khmer ethnic groups, particularly the rural Cham community, were subjected to displacement similar to that used against the urban population in 1975.¹¹⁸ Like urban Khmer, they were required to give up much of their previous identity, including distinctive religious practices, dress, and dietary habits, and were also required to forfeit their language in favor of Khmer.¹¹⁹ The Chinese population of Cambodia, which had already been dispersed by the evacuation of urban areas together with urban Khmer, was treated similarly.

the full rights group received the full theoretical food ration (or more), had the right to join any political organization, including the Party and the army, and [to] hold any political position. The candidate group was second on ration [and] distribution lists and had rights to hold certain low-ranking political positions. The depositors were last on distribution lists, first on execution lists, and had no political rights.

STEVE HEDER, *KAMPUCHEA: OCCUPATION AND RESISTANCE 2* (1980). In the second half of 1978, this tripartite division was officially abolished, but elided into what Pol Pot referred to more prosaically as a distinction between "good, medium and weak elements" among the population and within the Party. Pol Pot, "Let Us Continue to Firmly Hold Aloft the Banner of Victory of the Glorious Communist Party of Kampuchea in Order to Defend Democratic Kampuchea, Carry On Socialist Revolution and Build Up Socialism" (Sept. 27, 1978), at 4 [hereinafter "Pol Pot, Let Us Continue"]. Informally, both within Party circles and at the mass level, this tripartite division tended to be reduced to a simple dichotomy between "veteran" and "new" people that categorized the population on the basis of whether they had come under Communist control before or after April 1975. From the beginning, although the leadership made a clear distinction between being a "depositee" or one of the "new people" and being a politically "bad element," local security services were given to understand that the "new people" contained a high proportion of "no-good" elements. For one example of this thinking, see the DC-Cam document "Record of the Standing Committee Tour of the Northwest Zone, 20-24 August 1975," Aug. 26, 1975, (N0001022), according to which an unnamed representative of the Standing Committee told the Zone that "every type of horrible element exists among the ... new people." The representative explained that although the "overwhelming majority of veteran and new people" in Cambodia were "good," generally things were more "OK with the veteran people," and it was necessary to "be vigilant against no-good elements among the new people taking advantage of things, because these contemptibles won't stay with us even if we were to give them sufficiency" in terms of food rations. The representative's instructions were to "split up new forces and not allow them to concentrate" while making sure not to allow the enemies of the revolution "to conduct activities" among them. See *similarly* "Minutes of the Meeting of Secretaries and Deputy Secretaries of Divisions and Independent Regiments, 18 August 1976, 14.15 hours," Aug. 18, 1976, (N0001379).

¹¹⁸ The CPK incorporated ethnic and religious stereotyping of such groups into a paradigm of class, such that every intensification of the class struggle meant an intensification of attacks on ethnic and religious groups characterized as problematic in terms of class background and tendencies. For a more extensive discussion, see *Racism, Marxism, Labeling and Genocide*, *supra* note 2.

¹¹⁹ As in other Communist regimes, the more Communism the CPK attempted to impose, the greater its attack on minorities and other groups that were seen as threatening to the Communist project. For an historical survey demonstrating this development in the Soviet Union and China, and how this tendency reflects inherently vague and elastic Marxist notion of class, see Steve Heder, "Race and Class in Revolutionary Genocide," in *ANATOMY OF GENOCIDE* (Alexandre Kimenyi and Otis Scott, eds., forthcoming). Like the "new people," they were treated by many security cadre, cooperative chairman and the *chhlop* as "expendable" ("*tuk meun châmnneh dâk meun kha*", literally, "nothing to be gained by keeping [alive], nothing to be lost by removal"). Examples of the use of this phrase, which was widely repeated locally, seem to be lacking in official CPK texts. Thus, the CPK's policy vis-à-vis the Islamic Cham, who had earlier been declared as lacking a laboring strata, was "to split [them] up" geographically, even though they were considered "brothers and sisters" of other Cambodians. See "Telegram 15, With Respect to Beloved Brother Pol [Pot]," signed *Chhon* [apparently an *alias* for Sao Pheum, Secretary of the East Zone], Nov. 30, 1975, (N0001045). For an example of the tendency to categorize Cham with "former soldiers" and other "contemptible enemies" and blame them for counter-revolutionary "phenomena", see "Telegram 94, Band 1100, With Respect to Beloved Brother Pol [Pot]," signed "Comrade [Kae] Pok," Apr. 2, 1976 (N0001187). Another DC-Cam document points toward the condemnation that was likely to fall on "17 April elements [i.e., new people] coming from Phnom Penh who are Cham nationals," whose counter-revolutionary tendencies had been revealed when they had "engaged in activities protesting about their religiously-based dietary beliefs in the cooperatives' communal dining hall, during which they brought up and spoke in terms ... of the Constitution" of Democratic Kampuchea, which formally guaranteed freedom of religion. (This document, "Weekly Report of the Sector 5 Committee," May 21, 1977, bears no DC-Cam cataloguing mark). Within the armed forces, being of Cham nationality was treated as comparable to being of "petty bourgeois" class background, and thus grounds for dismissal from the ranks if there was any other evidence of political unreliability. As for other religious groups, Buddhist monks were considered members of the "special class strata," similar in classness (*vannapheap*) to former enemy soldiers and police officers. Policy was to ensure that "monks were gone ... in the sense that they ... gave up their religion" and were "dissolved" into "collectively organized peasants," and thus no longer a matter "for any concern." "On Grasping and Implementing the Party's Political Line of Gathering National-Democratic Front Forces," Sept. 22, 1975 (Document 2).

Thus from the day of liberation until the last day of DK, the security services, assisted by the *chhlop* and "the people," arrested, detained and executed wave after wave of alleged counter-revolutionaries and spies they identified in multiple population categories. Beginning in the latter half of 1976, the security services received signals from Party leadership that they must augment their efforts to identify former Khmer Republic officials who had escaped execution because "no-good" elements among the population were not merely undesirable, but part of a vast anti-Communist conspiracy and must therefore urgently be eliminated.¹²⁰ The local security forces responded by arresting, interrogating and killing people who fell into these categories.

3. Purges of CPK Cadre

The widespread executions of individuals associated with the former Khmer Republic and non-Communist members of the population were accompanied by purges that, at first, were aimed at identifying and expelling individuals within the CPK itself who had what were deemed undesirable class backgrounds or who were accused of ideological weakness. These were followed by the systematic arrest and execution of many more CPK cadre. The significant number of confessions attributable to these cadre suggests that the CPK implemented this internal purge both extensively and aggressively. For this reason, and because numerous documents relating to internal CPK purges have been identified, many at the former site of S-21, much of the analysis in this report relates to the Party's internal purge agenda.

Former S-21 Chairman Duch has indicated in post-DK interviews that an "oral instruction" was issued in the name of the CPK in 1971 that anyone identified as a secret agent serving the intelligence organizations of the Party's enemies would be arrested, interrogated to identify other enemies within the Party, and then executed in order to "rid our ranks of the enemy." This "rule of the Party" was carried over into the post-1975 period and, according to Duch, was solidified as a result of a decision of the whole Central Committee, and not just Pol Pot.¹²¹ Thus, it continued to be the policy that whoever was detained on these grounds "must die."¹²²

¹²⁰ This shift is perhaps most clearly signaled in Son Sen's "summing up" of "enemy situations" at a meeting of senior military cadre he convened as General Staff Chairman on August 30, 1976. Referring to reports and allegations of various forms of dissidence, deviance, protest and unhappiness both among ordinary people and in the revolutionary ranks, he declared: "From the discussion, it is apparent that the enemy has commenced activities, and these are activities endowed with a leadership network The enemy would like to take the opportunity to gather up no-good elements, the status- and rank-conscious, those whose families we have swept out, those whom we have removed from their positions, and those who have not internalized the revolutionary movement and can't keep up with the rest, and, at the same time, the new people." See "Minutes of the Meeting of Secretaries and Deputy Secretary of Divisions and Independent Regiments, Aug. 30, 1976, 14.00 hours" (N0001407).

¹²¹ According to Duch, some of the relatively early arrests of well-known cadre, such as DK Minister of Propaganda Hu Nim, a junior CPK member detained in April 1977, were approved by the entire Central Committee, but later decisions to arrest such high-ranking Party figures as Standing Committee member and East Zone Secretary Sao Pheum and to conduct mass arrests of Party members in the East and other Zones in mid-1978 were made in special and much more secret meetings by three men: Pol Pot, Nuon Chea and Son Sen. This decision-making circle closed even more after July 1978, when, according to Duch, he ceased making reports to Son Sen and answered instead only to Nuon Chea. See Thayer, *I am in Danger*, *supra* note 10; Thayer, *Death in Detail*, *supra* note 10.

¹²² Nate Thayer, *Death in Detail*, *supra* note 10. See also Nate Thayer, *Duch Confesses*, FAR EASTERN ECONOMIC REVIEW, May 13, 1999. In a May 19, 1978 entry in his note book, number three-ranked S-21 interrogator Mâm Nai *alias* Chan reiterated this permanent rule when he wrote that "persons already arrested must be considered clearly as secret agents [*kinh*]. Only thus will interrogation produce something."

Initially, the purge of CPK ranks through the dismissal and detention of cadre did not necessarily require execution, but did function to label many who were subsequently killed during the process in which S-21 extracted an increasing number of confessions that implicated more CPK members as "traitors."¹²³ As Son Sen proclaimed to senior military cadre in October 1976, the Party was determined to remove from its ranks those "whose entry into the Party was not in a proper state" because their backgrounds were considered undesirable in terms of class background, ideology or other respects.¹²⁴ Son Sen justified this by reference to a purported "plan laid down by the enemy ... to attack us in a deep, long-term undercover way, by going deep into the army and deep into the grassroots and even of taking hold of important posts." He asserted that it was therefore "imperative further to evaluate our cadre" and purge their ranks "by getting a clear grasp of biographies and by keeping track of [their] implementation of the line."¹²⁵

CPK policy, in line with that of other Communist parties, required prospective and current Party members to clarify their class and political backgrounds and recent and current political and other activities through "biographies." A review of the marginal notes composed by senior military cadre who vetted the "abbreviated biographies"¹²⁶ of subordinate cadre and combatants of army divisions attached to the Central Committee reveals that "bad" class background, family connections and behavior were sufficient to put the latter at risk of "removal" (*dâk*) from positions of political responsibility and from active duty.

Removal was just the prelude, however, to what was ultimately transformed into a full-scale purge through executions that reached to the highest levels of the CPK leadership, including both the Central Committee and its Standing Committee.¹²⁷ These intra-Party killings were propelled downward and outward to envelop an increasing number of victims by a process of identifying scapegoats to explain the failure of key CPK policies. According to the foremost of these failed policies, it was through what the leadership called a "phenomenally great leap forward" (*moha lotphloah moha âhchar*) that the revolution in Cambodia could achieve Communism more quickly, fully and successfully than the Soviet, Vietnamese, Chinese or other Communists had been able to do.¹²⁸ This ultimately meant that the communization of

¹²³ More particularly, prior to September 1976 it appears that not all suspected CPK dissidents, deviants or threats to Party unity who were detained were executed. For example, a few who were detained but not deemed agents of foreign intelligence were not executed. They included a former Central Committee member, Kæv Meah, who had been sent by Pol Pot to represent the CPK in Hanoi and was placed under house arrest in 1975 upon his return to Cambodia, where he remained until being moved to S-21 in September 1976 for interrogation and execution. "Confessions" of Kæv Meah *alias* Bon (CMR 50.14/TSA K146). In the latter half of 1976, however, detention without execution appeared to have been abandoned.

¹²⁴ "Minutes of the Meeting of Secretaries and Deputy Secretaries of Divisions and Independent Regiments, Oct. 9, 1976, 14.00 hours" (N0001500).

¹²⁵ "Minutes of the Meeting of Secretaries and Deputy Secretaries of Divisions and Regiments, Oct. 18, 1976, 14.15 hours" (N0001505).

¹²⁶ Among other information, such "biographies" (*pravoateroup*) gave the "class-ness" (*vannapheap*), family history, political history, nationality (*chuncheat*) and "morals" (*soelathoar*) record of the cadre or combatant. A collection of such documents is held by DC-Cam.

¹²⁷ In an interview on August 4, 1980, Khieu Samphan admitted that by the time DK fell, almost half of the Central Committee and its Standing Committee membership had been purged on suspicion of being enemy agents. *Pol Pot and Khieu Samphan, supra* note 106, at 10.

¹²⁸ According to Ieng Sary, a CPK Standing Committee meeting in September 1975 reached a "common view" among all its members that it was imperative to carry out a "really fast communization" of Cambodia, and that in order to achieve this "an

Cambodia produced more failures and generated more opposition than any other Communist regime had done, even if that opposition was almost completely suppressed. Mass death from starvation and disease, combined with execution of those who questioned or complained about the policies that produced them, were institutionalized into a system whose logic was, as one participant in the killings later said, that ultimately everybody in Cambodia would be "beaten to death and disposed of [*vay-chao*], except Pol Pot."¹²⁹ By the end of 1978, virtually the entire Communist Party leadership had either already been purged and executed or was on purge lists and about to be detained and killed,¹³⁰ and the purge had also hit S-21 very heavily. Thus, the CPK security apparatus itself ultimately was as much subject to purge as other CPK structures.¹³¹

The evolution of these intra-Party purges is reflected in statements made by General Staff Chairman Son Sen. Son Sen had argued during a meeting in early September 1976 with cadre from S-21 and other units that "absolute" measures were necessitated by "the increasingly very sharp contradictions and by the ever stronger class hatred of the enemies of the Kampuchean revolution."¹³² He added in subsequent meetings that the situation had changed because class contradictions were becoming "even more acute between our revolution and the enemy."¹³³ It had become "imperative to have an absolute standpoint about purging

absolute dictatorship of the proletariat must be imposed." Interview with Ieng Sary by Steve Heder, December 17, 1996, Chanthaburi, Thailand. A September 19, 1975 CPK document, "Assessment of the Grasp on and the Implementation of the Political Line on Economic Reconstruction and Arrangements for Building Up the Country in Every Domain," argues that the CPK was "already 30 years ahead of the Chinese, Korean and Vietnamese revolutions" in terms of its organization of production, and that Cambodia was in possession of objective economic advantages that would allow it to build socialism at a pace that would leave these and other revolutions far behind. As articulated through a July 16, 1978 entry in the notebook of first-ranked S-21 interrogator Tong Soeng Heuan *alias* Pon [hereinafter "Notebook of Interrogator Pon"], the CPK revolution was an improvement on the "strong" revolutionary tradition invented by the Bolsheviks in October 1917, which had been "broken" after the death of Stalin in 1953, and which had been taken up by Mao Zedong in 1949, but which the Chinese Communist Party had pursued in a faded [*sra-ap*] manner. A similar view is recorded in a August 10, 1978 entry in the notebook of Mâm Nai *alias* Chan, the third-ranked S-21 interrogator, which reads: "1917-53: Lenin's revolutionary banner red and high; after 1953, faded away [*sra-ap vinh*] because Lenin and Stalin were no longer around; ... 17 April 1975, crimson and high revolutionary banner of Kampuchea again victorious."

¹²⁹ Quoted in Steve Heder, *Kampuchea: October 1979-August 1989*, Report Prepared for the US Department of State Bureau of Intelligence and Research Office of Public Research, at 23.

¹³⁰ *Racism, Marxism, Labeling and Genocide*, *supra* note 2, at 127-133. Among those about to be purged were General Staff Chairman Son Sen and Central Zone Secretary Kae Pok. For allegations implicating Kae Pok as an alleged "traitor," see the "confessions" of Penh Thuok *alias* Von Vet (CMR 124.17/TSA P374), untitled 54-page transcript, undated but almost certainly from November 1978, pp. 46-51. By the second half of 1978, there were also indications that Ta Mok, the only other Zone Secretary who had survived, might be the next Standing Committee member to be killed. A July 16, 1978 entry in the notebook of S-21 interrogator Pon points toward suspicions that Ta Mok, whose Southwest Zone was being purged at the time of the Vietnamese invasion that overthrew DK, had been involved in traitorous activities since 1968, when he allegedly helped "the enemy attack all the revolutionary forces in the city" of Phnom Penh. Notebook of Interrogator Pon, *supra* note 128. There are also indications that Ieng Sary may have been on the purge list. The confessions of Standing Committee alternative member Kung Sophal *alias* Koe (CMR 57.33/TSA K351), "I Would Like Respectfully Please to Report on My Traitorous Activities from the Beginning and Ever Since," Nov. 12, 1978, have an appended list of "traitors." The last name on this list is "Sary at the Foreign Ministry." Sary had recruited Koe into the Communist movement.

¹³¹ For an account of the destruction of S-21 itself, see CHANDLER, *VOICES FROM S-21*, *supra* note 15. Several passages in the confessions of Chhay Keum Huor *alias* Hok (CMR 21.25/TSA C383) identify Duch as part of Hok's supposed CIA network. "Responses of Chhay Keum Huor *alias* Hok (at the Ministry of Foreign Affairs) About the History of My Party-Betraying Activities," *passim*. Hok had recruited Duch into the Communist movement.

¹³² "Minutes of Meeting with the Organization's Office, 703 and S-21, September 9, 1976" (N0001445).

¹³³ "Minutes of the Meeting of Secretaries and Deputy Secretaries of Divisions and Independent Regiments, September 16, 1976, 07.00 hours" (N0001449).

counter-revolutionary elements," because it had become obvious from "the class perspective" that "contradictions are of a more acute character than before" and thus that particular vigilance was required "against enemy attacks on us from within through burrowing from within the grassroots and our army."¹³⁴ It was, he said, urgent to conduct political education to ensure that such beliefs "permeate[d] all the way to the bottom" of the CPK power structure, so that even the lowest ranks would "understand the state of contradictions arising from the enemies burrowing from within and from the enemies' tricks."¹³⁵ A few months later, according to Son Sen, the CPK realized that even this view underestimated the seriousness of class struggle in DK. The Party had still failed to "see deeply into antagonistic and internal contradictions," and thus the Party had to carry out even more far-reaching purge measures than it had previously realized were necessary.¹³⁶

Senior CPK leaders insisted that everything that went wrong in DK could be attributed to politically-inspired acts of counter-revolutionary criminals. Son Sen explained that even the most "trivial activities attacking the revolution" were the result of the schemes of organized networks of traitors.¹³⁷ Thus, according to Son Sen, all of the apparently "trivial phenomena" that hindered the achievement of the Party's goals should not be viewed as "normal" problems of a socialist or other society, but should be dealt with by eliminating the internal enemies who were always endeavoring to "attack our revolution."¹³⁸ According to Son Sen's analysis, the constant petty theft plaguing DK as well as mysterious phenomena such as "defecating in pathways and knocking on doors at night" were all part of a vast counter-revolutionary plot.¹³⁹ Any skepticism in this regard was itself grounds for purge. For example, one of the counter-revolutionary crimes "confessed" to by a vice chairman of Son Sen's General Staff was having believed that a fire that destroyed a boat carrying petroleum products was the result of the explosion of a battery rather than a politically-inspired "wrecking."¹⁴⁰

CPK leaders also maintained that purge victims were simultaneously agents of several enemy intelligence agencies. Son Sen asserted that "two major enemy activity networks" conspired to sabotage and overthrow the Cambodian revolution, "the American-imperialist-

¹³⁴ "Minutes of the Meeting of Secretaries and Logistics of Divisions and Independent Regiments, September 19, 1976, 0700 Hours" (N0001451). In this context, Son Sen's reference to "purging" very probably included the execution of suspected traitors as well as methods of purging short of execution.

¹³⁵ "Minutes of the Meeting of Secretaries and Deputy Secretaries of Divisions and Independent Regiments, October 9, 1976, 14.00 hours" (N0001500).

¹³⁶ "Minutes of the Meeting of Secretaries and Deputy Secretaries of Divisions and Independent Regiments, March 1, 1977" (DC-Cam document catalogued with the mark L0045/08BBK).

¹³⁷ "Minutes of the Meeting of Secretaries and Deputy Secretaries of Divisions and Independent Regiments, October 9, 1976, 14.00 hours," (N0001500).

¹³⁸ "Minutes of the Meeting of Secretaries and Logistics of Divisions and Independent Regiments, December 15, 1976, 7 o'clock."

¹³⁹ "Minutes of the Meeting of Secretaries and Deputy Secretary of Divisions and Independent Regiments, August 30, 1976, 14.00 hours" (N0001407); "Minutes of the Meeting of Secretaries and Logistics of Divisions and Independent Regiments, September 19, 1976, 0700 Hours" (N0001451).

¹⁴⁰ "Confessions" of Seat Chhæ *alias* Tum (CMR 138.11/TSA S153), "Responses: Seat Chhæ *alias* Tum, ex-Secretary of Sector 22 - East Zone: On the History of His Own Personal Activities Betraying the Party," Nov. 3, 1977, at 54.

French-Taiwan-CIA network" and "the revisionist Soviet-Viet Nam network."¹⁴¹ The agents of the conspiracy were Party cadre who were said to be CIA operatives and who were also said to have "intimate connections with the revisionist" Soviets and Vietnamese.¹⁴² CIA agents were backed by "the revisionists" and helped by other "traitors inside the country." As Son Sen put it, "in sum, the CIA and the revisionists are one."¹⁴³ This approach led to never-ending searches both inside the Party and among ordinary people for "every last single traitorous element who [was] an undercover link of the CIA, KGB or Vietnamese."¹⁴⁴

In the latter half of 1976, one basis for the arrest of senior cadre was their failure adequately to support the initial stages of the purge process aimed at cleansing the Party of individuals with undesirable class backgrounds.¹⁴⁵ By 1978, the "class struggle" was intensifying in such a way that an acceptable class background provided no protection from purge if current "active contributions" to implementation of the Party line were deemed lacking.¹⁴⁶

Cadre detained by S-21 were often compelled to implicate themselves and other supposed traitors in "thinking of nothing but having fun, eating, drinking [alcohol] and womenflesh."¹⁴⁷ Such thoughts not only proved that they were "lacking in the morals of communist life," but constituted a fatal "display of enemy morality."¹⁴⁸ Thus, for example, one

¹⁴¹ "Minutes of the Meeting of Secretaries and Logistics of Divisions and Independent Regiments, September 19, 1976, 0700 Hours," (N0001451).

¹⁴² *Id.*

¹⁴³ "Minutes of the Meeting of Secretaries and Deputy Secretaries of Divisions and Independent Regiments, March 1, 1977."

¹⁴⁴ "Weekly Report of the Sector 5 Committee," May 21, 1977 (DC-Cam document with no cataloguing mark visible).

¹⁴⁵ As one victim stated to his S-21 interrogators, this was "a time of a vigorous purge" that aimed at eliminating "petty bourgeois" and upper strata peasant influences from within the CPK, along with those who were ideologically weak. This confession described the process by which he was expected to identify purge targets:

Every month, positive and negative experiences were deduced about the understanding of each comrade, and it was manifest that some comrades were developing rapidly, and that some were at a standstill, unable to get a systematic grip on the Party's political, ideological and organizational lines. They could grasp it only in places. The remnants of the old standpoints of the petty bourgeois and peasant classes had not yet been entirely eliminated.

The confessor stated, however, that he had failed to take this seriously enough. His "mistake" was that he "did not follow up the biographies of Party and core organization members in detail and then take purge measures to purify within the Party. This provided the enemy with easy opportunities to penetrate and undermine the Party from within." By allowing this, he wrote, he had acted "not in accord with the Party's proletarian stance." Non Suon *alias* Chey Suon *alias* Seng *alias* Chey (CMR 13.28/TSA C150), "XII's First Response: Not Yet Confessed, Speaks Only of His Virtues" [17-page handwritten document dated Nov. 1, 1976 at end], at 12-15. Chey was Chairman of the DK Agriculture Committee and held ministerial rank.

¹⁴⁶ S-21 interrogators were increasingly instructed to search for traitors by assessing whether they performed their tasks of defending and building DK and sorting out popular living standards "powerfully or not." The interrogators were informed that "in reality," the CIA, KGB and Vietnamese had "fashioned" agents among "every class strata: intellectuals, monks, feudalists, the bourgeoisie, landlords, all strata of the peasantry, workers and labourers." Notebook of Interrogator Pon, *supra* note 128, entry of Aug. 11, 1978.

¹⁴⁷ "Confessions" of Chea Non *alias* Suong (CMR 13.33/TSA C155), "The Responses of Chea Nun *alias* Suong, Written Before He Was Tortured" [six-page handwritten document dated Feb. 20, 1977 on margin], at 4.

¹⁴⁸ Chea Non *alias* Suong (CMR 13.33/TSA C155), "On My Traitorous Activities" [56-page handwritten document dated 23(?) March at the beginning and March 28, 1977 at the end], at 31-32.

cadre confessed to having engaged in "moral depravity" with some 300 women, not only to satisfy his sexual appetite, but also in order then to blackmail some of the women into helping him to carry out plots of "economic sabotage."¹⁴⁹

This reference to "sabotage" is one of countless indications that a major function of the system of forced "confessions" was to create elaborately fabricated official excuses for the failures of the CPK's "socialist revolution" for Pol Pot,¹⁵⁰ other senior CPK leaders and, likely, subordinates who might otherwise condemn Party policies in the absence of such explanations. There were, of course, many massive governmental failures that the CPK ultimately was not able to explain, including widespread famine¹⁵¹ and defeats in border battles with the Vietnamese.¹⁵²

¹⁴⁹ Chea Sin *alias* Sun (CMR 16.4/TSA C180), "A Record of the Responses of the Contemtable Sun, Secretary of Sector 20, East Zone: Post 17 April 1975" [35-page typescript with 10-page biographical appendix and dated June 20, 1978 at its end], at 30.35. Similarly, those who surreptitiously consumed beer were "CIA drinkers." See Chea Non *alias* Suong (CMR 13.33/TSA C155), "Liaison with Links in the East" [19-page handwritten document with two-page biographical preface, dated April 30, 1977 at beginning and May 1, 1977 at end], at 15-16. One Central Committee member "confessed" before being executed that his "wrong implementation" of the policy lines of the Communist Party, and particularly his bad attitude toward Pol Pot and other "Brother leaders of the Party", was attributable to the evil "essence" of his "class origin", which was portrayed as manifest in his "love of a good time and revelry, drink and women, etc." See Chou Chet *alias* Thang Si (CMR 12.22/TSA C117), "IV. From Apr. 17, 1975 to Mar. 26, 1978" [71-page handwritten document dated May 20, 1978], at 69-70. At the time of his arrest, Chou Chet was Secretary of the West Zone. The "confessions" of another cadre presented the supposed fact that he had "performed the most grotesquely vicious immoral acts" with women as evidence that he was simultaneously "a servant of the contemptible Ho Chi Minh ... and the plans of the American CIA." See Meah Mon *alias* Sâmngang *alias* Sithun (CMR 71.10/TSA M28), "Responses of Meah Mon *alias* Kæv Sâmngang, Chairman of the East Zone General Staff" [undated seven-page typescript], at 7.

¹⁵⁰ See *infra* notes 158 to 165 and accompanying text.

¹⁵¹ The allegation that arsonist-saboteurs were responsible for ruining the revolutionary economy was endlessly replayed in S-21 "confessions". Similar allegations were invoked to explain the massive starvation in DK's Northwest Zone, where many hundreds of thousands of evacuees were sent as a matter of Party policy to clear land and work on the cooperatives that were supposed to achieve a phenomenally great leap forward in paddy yield and output. The resulting catastrophes of production and crises of consumption were blamed not on these and related policies, but on the purported treasonous wrecking activities of "CIA cliques" and other undercover enemies in the revolutionary ranks. For an ex-post facto analysis of how collectivized agriculture has generally led to such negative results, see FREDERIC L. PRYOR, *THE RED AND THE GREEN: THE RISE AND FALL OF COLLECTIVIZED AGRICULTURE IN MARXIST REGIMES* (1992). For specific analyses of how the Great Leap model that the CPK was emulating led to famine, see G.H. Chang and G.Z. Wen, *Communal Dining and the Chinese Famine of 1958-1961*, 46 *ECON. DEV. & CULTURAL CHANGE* 1 (1997); DALI L. YANG, *CALAMITY AND REFORM IN CHINA: STATE, RURAL SOCIETY, AND INSTITUTIONAL CHANGE SINCE THE GREAT LEAP FAMINE 21-67* (1996); and *Special Issue: China's Great Famine*, 9 *CHINA ECON. R.* 1 (1998). Further in this regard, the purged number three cadre of the Zone "confessed" that in addition to burning rice, he was involved in plots to "lead the people ... not to farm paddy," "to destroy paddy at harvest time," to harvest "the paddy such that some was left behind," not to be "careful about the transport of paddy such that it leaked out and was scattered everywhere," and to "engage in wrecking when dams or canals were being constructed, such as by destroying digging tools, basketry for carrying dirt and knives, etc." Such "CIA activities" were purportedly intended to cause "the people to suffer from shortages of rice and water and not have enough to eat in order to facilitate winning these forces over to the counter-revolution." These "wrecking" activities apparently explained why "propaganda was being conducted about the lack of rice," why "production was made to retrogress a lot," and why "the yield was reduced." See "confessions" of Ruoh Mav *alias* Say (CMR 125.10/TSA R10), "Responses of Say, Northwest Zone Member, Parts Four and Five" [51-page handwritten undated document, part of a six-part series dated July 6, 1977 at end], at 45; "I Would Like to Salute the Respected Organization and Present a Report to the Organization on My History of Treason, As Follows" [54-page handwritten document dated Sept. 22, 1977 at end], at 37-39,48-50.

¹⁵² The breakthroughs into DK territory made by Vietnamese troops that launched counter-attacks from late 1977 in reaction to earlier DK incursions into Vietnamese territory were supposedly due not to the obvious military superiority of the Vietnamese army, but to the plots of Vietnamese agents inside the DK army who "opened the way" to let Vietnamese attackers deep into Cambodia. As a January 21, 1978 entry in the notebook of interrogator Mâm Nai *alias* Chan indicates, he and other S-21 interrogators were told that "internal enemies" had "led the Yuon [Vietnamese] ... onto our soil" during fighting in late 1977. Notebook of Interrogator Mâm Nai *alias* Chan [hereinafter "Notebook of Interrogator Chan"], entry of January 21, 1978. For a clear example of how this script was written into "confessions" of cadre arrested thereafter, see those of Sok Knol *alias* Peam *alias* Lin (CMR 131.1/TSA S42), which were heavily edited by S-21 interrogators to conform to the official account.

The security services were encouraged to adopt the rule that "wherever there are catastrophes or under-achievements in terms of building the country, defending the country and sorting out popular living standards, enemies exist in those places." Purging enemies would result, therefore, in "either leap forward steps of improvement or further great leap forward steps" in these three domains.¹⁵³ In other words, purging would result in general economic success, including the ability to provide the population with sufficient food, as well as military victories in armed conflict with Vietnam.

In this manner, the confessions also helped to sustain false accounts for Pol Pot and other recipients of the confessions about CPK "successes" that had supposedly occurred and would continue to occur as a result of the purges. Even as the economic and political situation in the country plummeted to new depths, with widespread hunger and terror in 1978, S-21 interrogators were, according to the training session notes of some of those interrogators, instructed to paint a picture of a CPK "collectivist" regime that was "deeply engrained" in the hearts of the Cambodian people.¹⁵⁴ This was because, the interrogators were falsely told, the "people have enough to eat: rice, maindishes, and sidedishes; progress and advancement has been achieved."¹⁵⁵ The interrogators were reassured that "when the Party arrests contemptible traitors and sorts out popular living standards, the people are happy and pleased with our Party."¹⁵⁶ Above all, according to the most Kafka-esque of their training sessions, the interrogators were asked to believe that, "throughout the whole of our Kampuchea, the people are not worried about being ... slaughtered."¹⁵⁷

The resulting confessions buttressed Pol Pot's publicly-stated beliefs, as of September 1978, that the status of the Cambodian revolution was "excellent in all fields"¹⁵⁸ because conditions in DK were "better than before."¹⁵⁹ In particular, he indicated that "living conditions ha[d] been assured for everyone,"¹⁶⁰ with 90 per cent of the population enjoying higher living standards than at any time in Cambodia's history, and that the national birth rate was higher and the death rate lower than before 1970.¹⁶¹ Thus, in Pol Pot's view the CPK had "deep roots" among the people, nearly all of whom supported its "socialist revolution."¹⁶² The only persons who challenged this, according to Pol Pot, were "a small handful" of "agents of the

¹⁵³ Notebook of Interrogator Chan, *supra* note 152, entry of July 25, 1978.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*, entry of Apr. 12, 1978.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Pol Pot, Let Us Continue, *supra* note 117.

¹⁵⁹ *Id.*, at 17.

¹⁶⁰ *Id.*, at 18.

¹⁶¹ *Id.*, at 19.

¹⁶² *Id.*, at 24.

enemy" who had been "reduced to a complete isolation."¹⁶³ While he continued to conceal S-21's existence by claiming that the agents held there were merely being kept "under the control of the collectivist people,"¹⁶⁴ the confessions generated by S-21 continued to provide Pol Pot with false reassurances, which he appeared to believe, that any signs of failure in the Cambodian revolution were attributable to CIA-KGB-Vietnamese plots against the Communist Party.¹⁶⁵

B. CPK Command and Control Structures

The civilian and military chains of command within the Communist Party apparatus were integral to the development and implementation of the policies of purges throughout the DK regime. The seven officials studied in this report occupied senior positions within this hierarchy, by virtue of which they were able to influence the development and implementation of Party policies directly and, in most cases, through their subordinates. As a foundation for our analysis of each of these officials' potential criminal responsibility, it is thus necessary first to describe the relevant CPK command and control structures.

According to the Statutes adopted at a CPK Congress in January 1976, the Party's "highest leading body" was its Central Committee.¹⁶⁶ Pol Pot had been Secretary of the Central Committee since 1963¹⁶⁷ and Nuon Chea its Deputy Secretary since 1960.¹⁶⁸ The Statutes declared that the Central Committee's duties included "implementation of the Party's lines ... throughout the country," "giving instructions to all" its subordinate "Zone, Sector and Municipal Organizations and to the Party organs taking responsibility for various nation-wide departments," and "administering and deploying cadre and Party members within the Party as a whole ... while maintaining a clear and constant grasp on their biographies and political, ideological and organizational stances and constantly educating and indoctrinating them in terms of politics, ideology and organization."¹⁶⁹

Zone Party Committees in turn were ordered to "go down and meld themselves concretely with their Sectors, Districts, [Party] branches and grassroots ... in order to lead and

¹⁶³ *Id.*, at 35.

¹⁶⁴ *Id.*, at 36.

¹⁶⁵ As previously noted, while the justifications for CPK policy failures set forth in confessions were manifestly fabricated, the confessions did not call into question, and indeed consistently and commonly accepted as fact, the existence and nature of CPK policies themselves, including those involving mass executions.

¹⁶⁶ *Leakhanteka pak kommuynih kampuchea* ("Statutes of the Communist Party of Kampuchea"), art. 23.

¹⁶⁷ DEMOCRATIC KAMPUCHEA, BIOGRAPHY OF COMRADE POL POT, SECRETARY OF THE CENTRAL COMMITTEE OF THE COMMUNIST PARTY OF KAMPUCHEA (1978) [hereinafter "BIOGRAPHY OF COMRADE POL POT"].

¹⁶⁸ NUON CHEA, THE HISTORY OF THE STRUGGLE MOVEMENT OF OUR KAMPUCHEAN PEASANTS FROM 1954 TO 1970 (1997) [hereinafter NUON CHEA, THE HISTORY OF THE STRUGGLE MOVEMENT] (unpublished auto-biographical text presented by Nuon Chea to Nate Thayer in October 1997). Despite its title, Nuon Chea's document deals with some post-1970 events. For one example of an official public confirmation of Nuon Chea's position as Deputy Secretary of the Central Committee, see "Speech by Comrade Nuon Chea, Deputy Secretary of the Central Committee of the Communist Party of Kampuchea, Chairman of the Standing Committee of the Assembly of People's Representatives of Kampuchea at the Banquet Given in Honour of the Delegation of the Assembly of the People's Representatives of Kampuchea, Peking, September 3, 1978."

¹⁶⁹ Statutes of the Communist Party of Kampuchea, *supra* note 166, art. 23.

implement duties among the masses."¹⁷⁰ As of 1976, there were six Zones: the East, with Sao Pheum (purged in May 1978)¹⁷¹ as Secretary; the Southwest, with Ta Mok as Secretary; the Northwest, with Ruoh Nheum (purged in June 1978)¹⁷² as Secretary; the West, with Chou Chet *alias* Thang Si (purged in March 1978)¹⁷³ as Secretary; the North, with Kae Pok as Secretary; and the Northeast, with Ya (purged in September 1976)¹⁷⁴ as Secretary.¹⁷⁵ Later, after Pok's North Zone was re-designated the Central Zone, a new North Zone was created with Kâng Chap *alias* Sae (purged in August 1978)¹⁷⁶ as Secretary.¹⁷⁷

The 1976 Statutes mentioned the existence of an "Organization Commission of the Central Committee" and a "Party Committee of the General Staff" of the armed forces, and in this latter regard provided for the maintenance of a "main force army belonging to the Centre."¹⁷⁸ However, the Statutes made no mention of two bodies that other sources indicate were highly significant to the formulation and implementation of the Party's policies: the Standing Committee of the Central Committee and the Military Committee of the Central Committee.

The existence of the Standing Committee of the Central Committee is verified by many internal documents dating to the time bracketing the January 1976 Congress.¹⁷⁹ Its role as the *de facto* uppermost leadership body was later publicly admitted.¹⁸⁰ Its existence as far back as 1960 has also been described in interviews and documents written by surviving former members, including Nuon Chea,¹⁸¹ Ta Mok¹⁸² and Ieng Sary.¹⁸³ No official Khmer-language

¹⁷⁰ *Id.*, art. 19.

¹⁷¹ Pheum reportedly shot himself to death on June 3, 1978 as forces assigned to arrest him since late May closed in. People's Republic of Kampuchea, People's Revolutionary Tribunal Held in Phnom Penh for the Trial of the Genocide Crime of the Pol Pot-Ieng Sary Clique, "Greetings to our Party's Victories in the leadership of the CIA's Kampuchean workers' Party on June 3rd 1978 [sic]" (Document 2.5.16, Aug. 1979).

¹⁷² Nheum *alias* Muol Un (CMR 87.21/TSA M191) was arrested on June 11, 1978.

¹⁷³ Si was arrested on Mar. 26, 1978. See CMR 12/22/TSA C117.

¹⁷⁴ Nei Saran *alias* Maen San *alias* Sieng *alias* Ya (CMR 80.36/TSA M270) was arrested on Sept. 26, 1976.

¹⁷⁵ For public identifications of the Zone Secretary positions of Pheum, Mok, Nheum, Si and Pok, see the Radio Voice of Democratic Kampuchea, Dec. 6, 14, 10, 12 and 6, 1977, respectively.

¹⁷⁶ Sae's "confessions" (CMR 17.6/TSA C209) specify that he was arrested on Aug. 15, 1978.

¹⁷⁷ Voice of Democratic Kampuchea (radio broadcast, Dec. 8, 1977).

¹⁷⁸ Statutes of the Communist Party of Kampuchea, *supra* note 166, art. 1.

¹⁷⁹ E.g. "Gathering of the Standing [Committee], 9 October 1975"; "Gathering of the Standing [Committee], 2 November 1975 at Seven in the Evening"; "Minutes of the 9 January 1976 Quorum of the Standing Committee"; "Minutes of the Standing Committee Quorum [Night of] 22 February 1976"; "Minutes of the Standing Committee Quorum of 17 May 1976"; "Minutes of the Standing Committee Quorum 30 May 1976."

¹⁸⁰ The "Communiqué of the Central Committee of the Communist Party of Kampuchea Concerning the Preparations for the Dissolution of the Communist Party of Kampuchea", December 6, 1981, mentions various meetings of the "Standing Committee of the Central Committee" to consider and decide upon key policies.

¹⁸¹ NUON CHEA, THE HISTORY OF THE STRUGGLE MOVEMENT, *supra* note 168.

document listing the Standing Committee's members has emerged, and various accounts of its membership differ somewhat. But no one -- including Nuon Chea, Ta Mok or Ieng Sary -- denies that all three of these men were members.

According to Nuon Chea, the Standing Committee had three members in 1960 and four in 1963.¹⁸⁴ Ieng Sary has further indicated that as of September 1975 the Standing Committee comprised Pol Pot, Nuon Chea, Sao Pheum, himself, Son Sen, Ta Mok and Von Vet¹⁸⁵ (purged in November 1978).¹⁸⁶ A translated document that was entered into evidence at the 1979 show trial of Pol Pot and Ieng Sary¹⁸⁷ appears to list the Standing Committee members in April 1977 as Pol Pot, Nuon Chea, Sao Pheum, Ta Mok, Von Vet, Van (Ieng Sary), Ruoh Nheum, Khiev (Son Sen) and "Ke."¹⁸⁸

Minutes of a Standing Committee meeting held on October 9, 1975 record that the Committee decided on the "allocation of tasks" and other "operational matters," which placed Pol Pot "in overall charge of the military and the economy," Nuon Chea in charge of "Party work, social welfare, culture, propaganda and formal education," Van (Ieng Sary) in charge of both Party and State foreign affairs, and Khiev (Son Sen) in charge of the armed forces "General Staff and security." While stressing that the Standing Committee did not "want all the work to be concentrated" in its hands, minutes of an October 1975 Standing Committee meeting noted that this body would "keep track" of the implementation of the Party line by the various departments subordinated to it.¹⁸⁹

¹⁸² As in his interview with Nate Thayer in mid-October 1997, recorded on "Khmer Rouge Pol Pot Trip Two 'Interview' Copies des Rushes BETA SP K7 No 12 VHS PAL TC.I".

¹⁸³ Stephen Heder interview with Ieng Sary, Dec. 17, 1996, *supra* note 10.

¹⁸⁴ Nuon Chea names its members in 1960 as Tou Samut (killed in 1962), himself and Saloth Sar (Pol Pot), and its members in 1963 as Saloth Sar, himself, Sao Pheum and Ieng Sary. NUON CHEA, THE HISTORY OF THE STRUGGLE MOVEMENT, *supra* note 168.

¹⁸⁵ Ieng Sary, Dec. 17, 1996. Sary also indicated that Northwest Zone Secretary Ruoh Nheum joined the Committee sometime later.

¹⁸⁶ According to his "confessions" dossier (CMR 124.17/TSA P374) Von Vet *alias* Penh Thuok *alias* Sok Thuok entered S-21 on November 2, 1978.

¹⁸⁷ Although, as mentioned in the Introduction, no direct evidence against Pol Pot and Ieng Sary was adduced during these proceedings, a number of reports on CPK documents, which in Dr. Heder's opinion appear to be authentic, were presented to the Tribunal. It is believed that the originals of these documents may have been archived in Viet Nam.

¹⁸⁸ People's Republic of Kampuchea, Tribunal Populaire Revolutionnaire Siegeant a Phnom Penh Pour Le Judgment du Crime de Genocide Commis Par la Clique Pol Pot-Ieng Sary, "Extrait de Proces-Verbal de la Reunion du Comite Executif du 11 Avril 1977" (Document 2.5.23, Phnom Penh, August 1979). "Ke" does not correspond to the name of any known senior figure. It has been speculated that "Ke" might be a mistaken transcription for Kae (Pok). See Ben Kiernan, Ieng Sary's Regime: A Diary of the Khmer Rouge Foreign Ministry, 1976-79 (New Haven: Yale Center for International and Area Studies, September 1998). This seems unlikely, however, because, in other internal documents, Kae Pok always appears as "Pok" and never as "Kae." Another possible explanation is that the reference to "Ke" could be a mistaken transcription for Sae (*alias* Kâng Chap), who was at the time secretary of the (new) North Zone.

¹⁸⁹ "Gathering of the Standing [Committee], 9 October 1975." Appointments in the April 1976 cabinet of the Government of Democratic Kampuchea gave Standing Committee members posts that reflected their assignments by the Standing Committee. Pol Pot was named Premier, while Ieng Sary and Son Sen were confirmed as, respectively, Deputy Premiers for Foreign Affairs and for National Defence, and Von Vet was named Deputy Premier for the Economy. Nuon Chea was named Chairman of the Standing Committee of the Revolutionary People's Assembly of Kampuchea. *Communiqué de Presse de la Premiere Session Pleniére de la Premiere Legislature de l'Assemblée des Représentants du Peuple du Kampuchea*, Apr. 14, 1976.

As further evidence of the existence and membership of the Standing Committee of the Central Committee, a Vietnamese translation of what is identified as the notebook of a cadre who attended the Party Congress of November 1978 includes the following entry:

2 November 1978

1.) The matter of assignments in the organization of the Centre and the Standing Committee

Pol: Secretary for general matters, responsible for Party and Military Affairs

Nuon: Deputy Secretary, responsible for education and propaganda, health, social welfare, culture and indoctrination

Mok: Deputy Secretary, in charge of the rural base areas/agriculture

Van [Ieng Sary]: Standing Committee, responsible for Party and State external affairs

Von: Standing Committee, responsible for economics and planning

Khiev [Son Sen]: Party/Staff, National Defense

Koe [later purged¹⁹⁰]: Deputy Secretary, Logistics.¹⁹¹

Another body that is not mentioned in CPK Statutes but the existence of which is confirmed in other documents was the Military Committee of the Central Committee. According to an official commentary on the Statutes, such a body could be established in the name of the Central Committee as a "separate department" under its "direct or indirect charge."¹⁹² It was later publicly revealed that a Military Committee had existed since at least 1970, from which time it had been chaired by Pol Pot.¹⁹³ According to Ieng Sary, from 1970

¹⁹⁰ According to his "confessions," Koe *alias* King Sophâl (CMR 57.33/TSA K351) was arrested before the end of the Congress.

¹⁹¹ *Tai lieu ve Dai hoi lan thu V cua bon Pon-Pot-Ieng Xa-ry Khoang thang 11-1978* ("Document about the Fifth Congress of PP-IS around November 1978"), notebook at 33. (The authors are grateful to Rich Arant and David WP Elliott for translations of this text from Vietnamese. The original Khmer-language document may be archived in Hanoi). This listing of Standing Committee corresponds with the recollection of Chap Lonh, a member of the Kampung Saom Municipal Party Standing Committee who attended the Congress and who told Dr. Heder in an interview on March 11, 1980 that the Standing Committee presented at the Congress comprised seven members: Pol Pot, Secretary; Nuon Chea, First Deputy Secretary; Ta Mok, Second Deputy Secretary; Ieng Sary, full member; Von Vet, full member; Son Sen, candidate member; Koe, candidate member. See Masato Matsushita and Stephen Heder, "Interviews with Kampuchean Refugees at Thai-Cambodia Border," February-March 1980, No. 28.

¹⁹² *Whip Up a Movement Constantly to Study the Party Statutes in Order to Strengthen and Expand Ever More Mightily Internal Party Unity to Serve the Tasks of Socialist Revolution, Socialist Construction and National Defence*, 7 BANNERS OF REVOLUTION 60 (1976). This article gave as examples of such bodies the nation-wide military department, the nation-wide government department, the nation-wide culture department, the nation-wide social action department, the rubber department and the ports department.

¹⁹³ BIOGRAPHY OF COMRADE POL POT, *supra* note 167.

to 1975 its other members were Nuon Chea, Sao Pheum, Ta Mok and Son Sen.¹⁹⁴ The translated notebook entries from the November 1978 Party Congress place the "Party Centre Military Committee...under the leadership of the Centre's Standing Committee" and describe it as "responsible for all military" matters. This same source lists the Committee's members and duties as follows:

Pol: Chairman

Nuon: Deputy, responsible for political matters

Mok: Deputy, responsible for military matters

Van: Committee member¹⁹⁵

Khiev: Committee member, Chairman of the Staff Council.¹⁹⁶

Various documents and statements link the Military Committee of the Central Committee to security policies and practices, which in turn circumvented the structures and processes that were formally responsible for dealing with alleged activities by ordinary people and Party members deemed to be "criminal" or "treasonous." These circumvented structures and processes were prescribed in the DK Constitution that came into force on January 5, 1976¹⁹⁷ and in the Party Statutes that were promulgated that same month.¹⁹⁸

¹⁹⁴ Sary said the wartime Secretary of the Party's North Zone, Koy Thuon *alias* Thuch (purged February 1976; see below) "was involved" in the Military Committee's activities, "but not in a substantive way." He also claimed that Ta Mok's role in the Committee "was minor compared to Sao Pheum." Sary's account of the wartime composition of the Military Committee appears to correspond with a March 1972 public announcement which indicated that Pol Pot (as Saloth Sar) was Chief of the Military Directorate of the Army of what were then known as the Kampuchean People's National Liberation Armed Forces. Nuon Chea and Sao Pheum (as So Vanna) were named, respectively, Chief and Deputy Chief of the Army Political Directorate, Ta Mok (as Thieun Chhit) as Chief of the Army Directorate of Military Material; and Son Sen as Chief of the Army General Staff. *Mission du Gouvernement Royal d'Union Nationale du Cambodge* (Paris), *Bulletin d'Information*, Mar. 31, 1972.

¹⁹⁵ This identification of "Van" as a member of the Military Committee has significant implications for the role of Ieng Sary in the Committee's functions given that Van was his official alias. At the same time, it is possible that this reference might be a mistaken transcription for "Von." The matter should therefore be revisited if and when the original Khmer-language notebook becomes available.

¹⁹⁶ "Document about the Fifth Congress of PP-IS around November 1978." The notes also identify a General Staff Committee comprising Son Sen (Khiev) as Chairman and (Sou) Met, Ta Mok and Reuan as "Standing Members."

¹⁹⁷ The DK Constitution provided for an unspecified "highest level of punitive sanction" for "opposition and wrecking activities of a systematic character that endanger the state," while declaring that other "crimes" must be dealt with through "re-education and refashioning within the context of state or popular organs." The Constitution also prescribed that "courts constituted as People's Courts belonging to the people" would "embody the people's justice and defend the people's rights and democratic freedoms" while "punishing all counter-revolutionary activities and activities opposing the people's state." *Roatthoammanun Prateh Kampuchea Pracheathipatai* ("Constitution of Democratic Kampuchea"), arts. 9 and 10. There is no evidence, however, that the People's Courts were ever established.

¹⁹⁸ In particular, the Party Statutes provided that

any Party member or Party echelon that opposes the political line of the Party, the ideological stance of the Party, the organizational stance of the Party or the Party Statutes; that causes fissures in the Party's internal solidarity and unity; that creates factions; that conducts activities to wreck the Party, the revolution or the people; that abandons their Party duties; that brings about a breach in secrecy endangering the Party, revolution or people; that causes a loss of Party funds or property; that behaves immorally or as a hooligan, or that does not engage in lifestyle meetings for three consecutive months, etc., is in violation of the Party's organizational discipline and must be lightly or severely disciplined, as follows:

According to a document issued on behalf of Ieng Sary in September 1996, security policy was formulated at the top of the CPK by a secret "Security Committee" within the Military Committee, and within this by yet another "secret committee" headed by Nuon Chea, with Son Sen as its "member."¹⁹⁹ When asked during a December 1996 interview to clarify the September document, Sary indicated that in fact there was a single committee responsible for both military and security affairs, but that in practice security policy was formulated by Pol Pot, Nuon Chea and Son Sen.²⁰⁰ This account appears to be broadly corroborated by Duch's account of the manner in which the CPK security system functioned.

It is also notable that neither the Constitution nor the Party Statutes nor the Central Committee decisions mandated any police or security forces to deal with opposition activities or other conduct by ordinary people or Party members that would be deemed punishable by the CPK. Most notably, there was no official reference to S-21 despite its prominent role in the CPK security apparatus. Lists of attendees of General Staff meetings and study sessions and documents on the distribution of supplies held at DC-Cam, however, reveal that for purposes of indoctrination and administration, S-21 was treated as the equivalent of one of the armed forces divisions or independent regiments and therefore under Son Sen's authority as Chairman of the General Staff.²⁰¹ Consistent with this arrangement, either S-21 Party branch secretary Duch or other senior cadre representing S-21 attended several meetings convened by Son Sen of secretaries and deputy secretaries of Centre divisions and independent regiments.²⁰² Duch and

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- a. criticism-warning;
 - b. transfer of/removal from duties;
 - c. exclusion from the Party/various punitive sanctions in accordance with the crime, e.g., whether systematic anti-Party activities or Party-betraying activities.

The practical meaning of the Constitution and Statutes' euphemistic concept of ultimate "punitive sanctions" was revealed three months later in the unpublicized March 30, 1976 decision of the Central Committee that authorized CPK Zone Standing Committees to carry out "smashing within and outside the ranks" at the grassroots level. The decision also conferred this execution power upon Party Committees of the various specialized "offices" attached to the CPK Central Committee, to the Standing Committees of "independent" local Sectors (i.e., those not subordinated to Zones), and to the General Staff of the armed forces. Like the Zones, these other authorities employed this execution power in respect of both Party members and ordinary people under their jurisdiction. The March 30, 1976 Central Committee decision therefore implied that, at least at that time, the CPK would ignore constitutional undertakings about "people's courts" and emasculate the provisions of the Party's statutes respecting conscientiousness, collectivism and multi-level consultation in imposing punitive sanctions. It also left uncertain how decisions to apply punitive sanctions to members of the Central Committee, much less the Standing Committee, would be reached. See Decisions of the Central Committee on a Number of Problems, *supra* note 105.

¹⁹⁹ See The Research and Documentation Center of the Democratic National Union Movement, "The True Fact [sic] About Pol Pot's Dictatorial Regime, 1975-78," Sept. 8, 1996 [hereinafter "The True Fact"]. Sary was President of the Democratic National Union Movement, which was established as part of the process whereby he pledged his loyalty to the government in exchange for an amnesty for his 1979 conviction for genocide.

²⁰⁰ Stephen Heder Interview with Ieng Sary, Dec. 17, 1996, *supra* note 10.

²⁰¹ For documents that treat S-21 as a main force Centre division or regiment, see "First General Staff Study Session, 20 October 1976, Revolutionary Life Outlook *Mo-21*" (N0001494); and "Revolutionary Army of Kampuchea, General Staff, Overall Force Statistics for March 1977, April 7, 1977" (N000065).

²⁰² See "Minutes of the Meeting of Secretaries and Deputy Secretaries of Divisions, Secretaries and Deputy Secretaries of Regiments, Aug. 2, 1976, 07.30 hours" (N0001373); "Minutes of Meeting with the Organization's Office, 703 and S-21, Sept. 9, 1976" (N0001445); "Minutes of the Meeting with Comrade Tal Division 290 and Division 170, Sept. 16, 1976, 16.15 hours" (N0001451); and "Minutes of the Meeting of Secretaries and Logistics of Divisions and Independent Regiments, Sept. 19, 1976, 0700 Hours" (N0001451)

eleven other S-21 cadre similarly attended the General Staff's first nation-wide study session for Central Committee military cadre in October 1976, at which 300 cadre from armed forces units throughout the country were present.²⁰³

Formally speaking, the Central Committee had "overall responsibility" for all matters, whether of a military or civilian nature. In practice, however, responsibility for military affairs was delegated to the Military Committee chaired by Pol Pot and composed of Nuon Chea, Sao Pheum, Ta Mok and Son Sen. These officials appear to have been principally responsible for overall military policy, although, as noted above, Ieng Sary has claimed in post-DK interviews that Sao Pheum and Ta Mok's membership in the Committee was only nominal. The "army belonging to the Centre" comprised the divisions and independent regimes that answered to the Military Committee through the General Staff,²⁰⁴ of which Son Sen was Chairman.

In addition to the army of the Centre, each Zone, Sector and District had armed units answering to the CPK Committee at the relevant level, and agricultural cooperative chairmen had the above-mentioned armed "guerrillas" or "militia" (*chhlop*) at their disposal. Again, in theory the Zone, Sector and District Party Committees were in "overall charge" of all matters within their jurisdiction, whether military or civilian. At the same time, all Zones and most Sectors had their own military General Staffs, whose Chairmen were typically members of the Zone and Sector Party Committees. The effective chain of command appears to have been similar to that of the Centre, namely from the Party Committee Secretary to the General Staff Chairman to the unit Party Secretaries. In some Zones, the General Staff Chairman doubled, as Son Sen originally did, as Security Chairman. Elsewhere, the roles appear to have been divided, with separate General Staff and Security chiefs answering to the same Party Secretary.²⁰⁵

Since "military" men carried no rank it is in some respects impracticable to differentiate them from "civilians." Nevertheless, it appears as though Party Secretaries at various levels, such as Pol Pot at the Centre, Ta Mok in the Southwest Zone, and Kae Pok in the old North/Central Zone, were not, strictly speaking, military officials, but rather political cadre with responsibility for military matters. The same appears to have been true in the Sectors and Districts: at every level, the Party Secretary was a "civilian." However, the Party Secretary had "military units of organization" (*angkapheap yothea*) under his control, and exerted this authority through General Staffs.

The documents we have analyzed therefore disclose the existence of a coordinated military and civilian hierarchy within the CPK, of which the seven officials addressed in this report were key members. As will be apparent in the following part, the senior CPK leadership

²⁰³ "First General Staff Study Session, 20 October 1976, Revolutionary Life Outlook *Mo-21*" (N0001494). See also "Table of Statistics on Students Studying at the First General Staff Study Session," Oct. 20, 1976" (N0001512); "First General Staff Study Session, 20 October 1976, Revolutionary Life Outlook, Table of Splitting Up into Groups by Unit of Organization" (N0001511).

²⁰⁴ For one listing of these, see "Revolutionary Army of Kampuchea, General Staff, Overall Force Statistics for March 1977, Apr. 7, 1977" (N000065). The order of battle changed significantly in 1978 because of purges, reorganization and expansion of the armed forces.

²⁰⁵ For an overall account of the military organization in the East Zone, see the confessions of Meah Mut *alias* Kaev Samnang (CMR 71.10/TSA M28). Mon was Chairman of the East Zone General Staff, and, unusually, concurrently Chairman of the East Zone Security Service (codenamed S-79). The more usual arrangement is described in the confessions of Meah AEm (CMR 80.30/TSA M264), a security cadre of the Northwest Zone.

utilized this hierarchy to implement the Party's policies of atrocities. These aspects of the CPK command and control structure will become legally relevant, as they imply the individual criminal responsibility under the doctrine of "superior responsibility" of certain of these CPK officials for crimes committed by subordinates under their *de jure* or *de facto* control.²⁰⁶

It should also be noted at this stage of the analysis that the standard of proof may vary in establishing superior responsibility on the part of the seven officials, depending upon whether they are considered to have been military commanders or civilian leaders. As analyzed in further detail in the Appendix, it is well-established that both military commanders and civilian leaders may be held responsible under the doctrine of superior responsibility for crimes committed by their subordinates. Some contemporary authorities suggest, however, that the mental element, or *mens rea*, standard applicable to civilian leaders may be more rigorous than that applicable to military leaders. In particular, Article 28 of the Statute for the International Criminal Court provides that a military commander may be held responsible for the unlawful conduct of his subordinates if he "knew or, owing to the circumstances at the time, should have known" that his subordinates were committing or were about to commit such crimes. Non-military superiors, on the other hand, are accountable under this version of the doctrine of superior responsibility if they "knew, or consciously disregarded information which clearly indicated" that the subordinates were committing or about to commit crimes. The distinction between these provisions therefore suggests that superior responsibility for civilian leaders may require proof that unambiguous information concerning subordinate crimes in fact came to the attention of the superior and was consciously disregarded. In contrast, a more objective standard of *mens rea* apparently applies to a military commander, whose state of knowledge may be drawn from his surrounding circumstances without necessarily establishing that specific information concerning crimes in fact came to his attention.²⁰⁷ Accordingly, while the state of the law in this area remains unsettled, it is possible that the civilian or military leadership status of each of the seven CPK officials might influence the applicable standard of proof for the purposes of their prosecution under the doctrine of superior responsibility.

The evidence canvassed above suggests that the lines of civilian and military leadership within the CPK were not entirely distinct, with some officials playing dual roles within their areas of jurisdiction. It also suggests that five of the CPK officials under study in this report exercised military command authority in conjunction with their civilian leadership responsibilities: Nuon Chea, as a member of the Central Committee's Military Committee; Ta Mok and Kae Pok, as Secretaries of Party Zones; and Sou Met and Meah Mut, as Secretaries of CPK Military Divisions. In contrast, Khieu Samphan and Ieng Sary appear to have occupied predominantly

²⁰⁶ As elaborated upon in the Appendix, individual criminal responsibility for international crimes may be founded in the doctrine of "superior responsibility." According to this doctrine, superiors may be held responsible for the unlawful acts of their subordinates if they knew or had reason to know that their subordinates were about to commit or had committed such crimes and the superiors failed to take the necessary and reasonable measures to prevent the acts or punish the perpetrators thereof. Moreover, according to judicial interpretations of superior responsibility, the existence of a *de jure* grant of authority to a superior over his or her subordinates, while a significant index of a superior-subordinate relationship to which the doctrine applies, is not essential where a sufficient degree of *de facto* control by a superior over a subordinate is demonstrated. See *infra* Appendix.

²⁰⁷ The ICTY Appeals Chamber has interpreted Article 7(3) of the ICTY Statute, by which a superior may incur criminal responsibility for criminal acts of subordinates "if he knew or had reason to know that the subordinate was about to commit such acts or had done so," as requiring proof that information was available to a military commander that should have put him on notice of offenses committed by subordinates. The Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landžo, Appeals Chamber Judgment, February 20, 2001 (ICTY), ¶ 209 (the "Celebici Appeals Chamber Judgment"). As of April 2001, the ad hoc tribunals have not addressed the question of whether civilian superiors are also subject to this same standard of *mens rea*. *Id.*, ¶ 208.

civilian leadership roles. In light of the present uncertainty in international legal standards for establishing superior responsibility, we have evaluated the evidence pertaining to each individual according to the more rigorous standard of *mens rea* requiring the superior to have been in possession of information that should have put him on notice of offenses committed by subordinates. As discussed in Part IV, each of the officials in respect of whom evidence of superior responsibility has been identified appears to have been in possession of sufficient information to satisfy this *mens rea* standard.

IV. THE CASES AGAINST SEVEN INDIVIDUALS

A. Summary of Findings

As explained in the Appendix, our analysis is based on the premise that the most serious abuses attributable to the CPK entail the commission of international crimes, including in particular crimes against humanity.²⁰⁸ This report focuses on evidence that may establish individual criminal responsibility for these crimes.

Under the law applied by both postwar and contemporary international criminal tribunals, criminal responsibility for these offenses can be established through two principal routes. Following the terminology of the two ad hoc UN tribunals, the first requires the prosecutor to establish a defendant's "individual responsibility" by proving that he or she knowingly, directly and substantially contributed to the crime in question. Establishing individual responsibility is most straightforward when a defendant actually committed the criminal act in question, but can also be established through other forms of criminal participation. These include ordering the criminal conduct, participating in a common design or purpose to commit the crimes, or otherwise aiding and abetting the crimes.²⁰⁹ The second route is through the doctrine of "superior responsibility." Under this doctrine, criminal responsibility may arise by virtue of a defendant's failure to prevent or punish crimes committed by individuals under that defendant's authority and control.²¹⁰

The documents we have analyzed implicate each of the seven officials whom we consider in this Part in mass executions and related atrocities based upon one or both broad

²⁰⁸ See Appendix; cf. U.N. Group of Experts report, *supra* note 3, ¶¶ 58-79 (identifying war crimes, crimes against humanity, and genocide as crimes for which a Khmer Rouge tribunal should be afforded jurisdiction to prosecute).

²⁰⁹ The Charter of the International Military Tribunal at Nuremberg and similar instruments governing the jurisdiction of post-World War II international criminal tribunals prescribed several modes of conduct by which individual responsibility was considered to arise, including perpetrating, instigating, ordering, abetting, and participating in a plan or enterprise to commit a crime. See e.g. IMT Charter, *supra* note 92, art. 6 (providing in part that "[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan." See also Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, adopted at Berlin, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 January 1946 [hereinafter "Control Council Law No. 10"], art. II(2). Among the most recent codifications of the principle of individual responsibility for serious violations of international humanitarian law are the Statutes of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, both of which prescribe two grounds of criminal responsibility for serious violations of international humanitarian law that are particularly relevant to Khmer Rouge prosecutions: individual responsibility for having planned, ordered, instigated, committed or otherwise aided and abetted in that crime; and superior responsibility for failing to prevent or punish crimes committed by subordinates under the defendant's authority and control. ICTY Statute, *supra* note 13, art. 7(1); ICTR Statute, *supra* note 13, art. 6(1). Owing in part to distinctions in their governing statutes, the post-World War II tribunals did not use the terminology of individual criminal responsibility in precisely the same manner as the current ad hoc UN tribunals. At the same time, the ICTY and the ICTR have referred to and relied upon the jurisprudence of the Nuremberg war crimes tribunals as an authoritative guide to interpreting and applying the principles of individual criminal responsibility for contemporary war crimes prosecutions.

²¹⁰ As indicated in the Appendix, the well-established doctrine of superior responsibility renders military commanders and civilian leaders legally responsible for crimes committed by their subordinates when relevant elements are substantiated. The doctrine has been articulated in various forms through treaties, the military codes of nations and the jurisprudence of post-World War II military tribunals. See e.g. [Hague] Convention [No. X] for the Adaptation of Principles of the Geneva Convention to Maritime War, October 18, 1907, art. 19; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to Victims of International Armed Conflicts, 1125 U.N.T.S. 3 (8 June 1977) [hereinafter "Protocol I"], arts. 86, 87; *In re Yamashita*, 327 U.S. 1 (1946); ICTY Statute, *supra* note 13, art. 7(3) (holding superiors responsible for offenses committed by a subordinate if the superior "knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof"); ICTR Statute, *supra* note 13, art. 6(3).

categories of criminal responsibility. One of the seven – Nuon Chea – appears to have participated in devising the CPK's execution policies and also played a central role in implementing those policies, in part through orders to his subordinates.

With respect to the first basis for establishing individual criminal responsibility, the evidence we examined may support a finding that each official planned, ordered, or otherwise contributed directly and substantially to the widespread commission of executions and related crimes such as torture. Evidence of such conduct includes documents and testimony indicating that Nuon Chea ordered subordinates, including Ta Mok and Duch, to commit executions; that Ieng Sary, Kae Pok, Sou Met and Meah Mut directed or facilitated the arrest and transfer of cadre under their authority to Office S-21, where they at the very least had reason to believe the transferred cadre would be interrogated and then executed; and that Ieng Sary and Khieu Samphan made public statements that advocated and encouraged the commission of arrests and executions by Party members.

The evidence also suggests that each of the seven individuals took part in this conduct with the required mental element (*mens rea*) of individual responsibility, namely knowledge of the executions and other atrocities that were occurring throughout Democratic Kampuchea and of their own contributions to those atrocities. Evidence of such knowledge includes confessions, regional reports and other documents that were marked for transmission to certain of the seven officials that make specific reference to instances of arresting, interrogating, torturing and "smashing" suspected Party enemies. This evidence also includes reports apparently authored by Sou Met and Meah Mut that refer or allude to the arrest and execution of traitorous cadre and other "enemies" within the official's regional jurisdiction. These documents, together with the significant number of lower-level cadre under each official's authority who were arrested and transferred to S-21, constitute substantial evidence that these officials were aware of the atrocities perpetrated within their jurisdictions and elsewhere and, moreover, that they were aware that their own acts or omissions contributed to the atrocities.

Turning to the second basis for establishing individual criminal responsibility, the documents we have analyzed provide evidence of the three principal elements of superior responsibility in respect of most of the seven officials addressed in this report: the existence of a superior-subordinate relationship; evidence that the superior knew or had reason to know that his subordinates were committing or were about to commit crimes; and the superior's failure to take reasonable and necessary measures to prevent or punish the crimes. In this connection, the evidence reviewed in this Part indicates that Nuon Chea, Kae Pok, Ta Mok, Sou Met and Meah Mut held positions of significant *de jure* authority in the CPK hierarchy, and also exercised *de facto* control over subordinates falling within their jurisdiction. These officials appear to have acquired knowledge of atrocities committed by their subordinates in part through the officials' membership in various CPK committees, including the Standing and Military Committees of the Central Committee, and through the apparent circulation of "confessions", regional reports, and other Party documents. Finally, we have not identified any evidence that the senior officials took sufficient measures to prevent the crimes of their subordinates or to punish the perpetrators; indeed, in several cases, particularly those of Sou Met and Meah Mut, the suspects lauded implementation of the execution policies as necessary steps to protect the Communist Party against its enemies.

In the case of both grounds for individual criminal responsibility, the totality of evidence suggests that in almost all cases, arrested cadre were compelled to confess and were

subsequently executed -- and that this was widely known and understood within the Communist Party.²¹¹ Accordingly, knowledge on the part of an official that individuals had been “arrested”, had given confessions, or had been named as traitors in the confession of another, appears to constitute further evidence of knowledge of torture and executions on the part of that official.

B. The Cases Against Seven Individuals

1. Nuon Chea

There is substantial and compelling evidence that Nuon Chea, commonly known as “Brother Number Two”, played a leading role in devising the CPK’s execution policies. There is also substantial evidence that Nuon played a central role in implementing those policies.

a) Evidentiary Analysis

i. Position and Role in the CPK

Nuon Chea was a native of a part of Cambodia that had been administered by Siam during World War II. He attended university in Bangkok and then moved to Thailand, where he joined the Communist Party of Thailand in 1950. A few months later he returned home and transferred his membership to the Vietnamese-dominated Indochinese Communist Party then attempting to establish a Communist movement among Cambodians. When a full-fledged Cambodian Communist Party was finally established in 1960, Nuon became Deputy Secretary of its Central Committee and a member of its Standing Committee, the most senior bodies responsible for Party policy, and held those posts continuously thereafter.²¹²

These positions placed Nuon Chea in the inner circle of men who directed the CPK’s policies of execution. Indeed, it seems highly likely that Nuon Chea, together with Pol Pot and Son Sen, played a leading role in devising the policies, although further investigation in this regard is recommended. As noted earlier, the chains of command within the Communist Party apparatus were integral to the development and implementation of DK-era execution policies.

Significant insights into Nuon Chea’s role in developing and implementing DK-era execution policies have been provided by Duch, who served as Chairman of S-21 from 1976 to 1978, in a context that lends credibility to Duch’s claims. As previously noted, Duch has freely admitted to his own responsibility for overseeing torture and mass executions at S-21. In the context of his self-incriminating disclosures, Duch has implicated Nuon Chea as a leading architect of the Party’s execution policies and a central actor in ensuring their implementation. As noted below, Duch’s core claims in this regard are corroborated by other evidence.

Duch has identified Nuon, along with Pol Pot and Son Sen, as one of the key-decision makers at a meeting sometime in the first half of 1978 at which it was decided to conduct a

²¹¹ See Part III, esp. notes 121, 122 and accompanying text.

²¹² See Nuon Chea’s handwritten *pravoat châlanañat tâ-sou robâh kasikâr k/ch yoeng pi chhnam 1954 dâl chhnam 1970* (“History of the Struggle Movement of Our C[am]b[odian] Peasants from 1954 to 1970”), given to Nate Thayer in 1997; and the video-taped remarks by Ta Mok during Thayer’s interview of Nuon Chea on “Khmer Rouge Pol Pot Trip Three ‘Nuon Chea’, *Copie des Rushes* BETA SP K7 No 24.”

massive purge of the CPK East Zone.²¹³ The purge was launched on May 25, 1978 and was carried out by Son Sen and Kæ Pok, among others.

Duch's statements place Nuon Chea in a position of central responsibility for implementing other purges. In Duch's words, while Pol Pot directed the search for "enemies within the Party" after 1975, "he used Nuon Chea to do the work" of successive waves of arrests of CPK members in Zone after Zone. According to Duch, it was Nuon Chea, not Pol Pot, who "directly ordered the killings" through orders either to Son Sen or directly to Duch himself.²¹⁴ Sometimes, then, Duch received orders to execute certain individuals directly from Nuon Chea; other times from Son Sen acting pursuant to Nuon's direct orders. Together, Duch said, "Son Sen and Nuon Chea ordered the arrest and killing of many of the Party leaders."²¹⁵

Beginning in mid-1978, Duch was in a position to receive direct orders from Nuon to carry out specific executions. In July 1978, Duch was "transferred" to Nuon Chea, answering directly to him rather than to Son Sen after the latter was assigned "to command the fighting in the East with the Vietnamese."²¹⁶ During the ensuing period, Nuon Chea gave execution orders to Duch, some in writing,²¹⁷ of specific officials and groups. Duch has claimed, for example, that Nuon "ordered 300 [Khmer Rouge] soldiers arrested. He called to meet me and said, 'Don't bother to interrogate them -- just kill them.' And I did." Then, Duch admitted, in the very "last days before the Vietnamese came I personally killed the remaining prisoners. ... I was called by Nuon Chea to his office and he ordered me to kill all the remaining prisoners. I asked Nuon Chea to allow me to keep one Vietnamese prisoner alive to use for propaganda on the radio, and he replied, 'Kill them all. We can always get more and more.' I was like a waterboy for Nuon Chea."²¹⁸

"For some people," Duch recalled, "Nuon Chea wanted me to give him pictures of their dead bodies for proof [that they had in fact been executed]. He ordered me to bring pictures of dead bodies to his office." Duch specified that Standing Committee member Penh Thuok *alias* Von Vet, who was arrested in early November 1978, and former General Staff cadre Chhay Keum Huor *alias* Hok, who was arrested in late December, "were ordered killed by Nuon Chea, he said. ... I even had to exhume the body of Von Vet from the earth to take a picture of him dead because Nuon Chea wanted proof he was killed."²¹⁹

²¹³ Thayer, *Death in Detail*, *supra* note 10; Thayer, *I Am in Danger*, *supra* note 10.

²¹⁴ Thayer, *Death in Detail*, *supra* note 10.

²¹⁵ See The Research and Documentation Center of the Democratic National Union Movement, "The True Fact [sic] About Pol Pot's Dictatorial Regime, 1975-78," *supra* note 198. In a similar vein, Duch said that arresting people was an "everyday job of Nuon Chea and Son Sen," with Nuon in command of the purge machine and Son Sen "the second man for the killing."

²¹⁶ See Thayer, *I Am in Danger*, *supra* note 10 ; Thayer, *Death in Detail*, *supra* note 10.

²¹⁷ Thayer, *I Am in Danger*, *supra* note 10.

²¹⁸ In carrying out executions, Duch followed the "orders of my superiors, Nuon Chea and Son Sen." See Thayer, *Death in Detail*, *supra* note 10.

²¹⁹ For corroboration of the arrest of these two men, see "Confessions" of Von Vet, (CMR 124.17/TSA P374); "Confessions" of Hok, (CMR 21.25/TSA C383).

These purge-related activities were in line with the general responsibilities for Party work that Nuon Chea was given in October 1975²²⁰ and made Nuon "the principal man for the killings." Although, according to Duch, "Pol Pot knew about S-21," he "did not direct it personally. He left that to Nuon Chea as No. 2 in the Party."²²¹ Duch's account of the key role played by Nuon Chea in implementing Party policy is corroborated by the evidence derived from the content²²² and transmission²²³ of confessions themselves, as well as from uncoerced sources.²²⁴

Finally, Duch's claims that he was following the orders of his superiors also indicates that the corresponding transformation of S-21 from a military stockade to a device for implementing the Party purge policies ultimately resulted from the exercise by Pol and Nuon of their powers in the Military Committee of the Central Committee.²²⁵

ii. Confessions

²²⁰ Document entitled "Gathering of the Standing [Committee], 9 October 1975."

²²¹ Thayer, *Death in Detail*, *supra* note 10.

²²² For example, the confessions of the Chairman of the East Zone Security Chairman Kæv Sâmngang *alias* Meah Mon indicate that it was Nuon Chea who initiated the early phases of the purge process in the East Zone in mid-1976 during a visit when he proposed the arrest of the Zone military cadre Li Phæn *alias* Phâl who was seized a month later when this proposal was confirmed by a letter in the name of the Central Committee. See "Confessions" of Phâl, CMR64.5/L40; "Confessions" of Meah Mon *alias* Kæv Sâmngang (CMR 71.10/TSA M28); "Responses of Meah Mon *alias* Kæv Sâmngang, East Zone General Staff: On the History of His Own Activities of Betrayal," June 2, 1978, pp. 50-52.

²²³ As indicated previously, the DC-Cam files contain "confessions" or similar S-21 documents (e.g., reports on the "biographies" of detained cadre) that are marked for transmission to 20 persons, including S-21 Chairman Duch and the late Son Sen. This information is compiled from DC-Cam's "List and the translation of the cover pages of the 'at risk' documents bearing signatures and notes of the Khmer Rouge leaders, Prepared for the UN Commission of Experts, August-September 1998" and "The Selected List of Documents Category J, Prepared for the UN Commission of Experts, August-September, 1998." Twenty-seven "confessions" are marked specifically for transmission to Nuon Chea, more than to anyone else. While only one "confession" is marked for transmission to Pol Pot by name, 33 "confessions" are marked for transmission to "the Organization," and another 21 for transmission to "Brother," which could mean either Pol Pot or Nuon Chea or both. On these cover sheets of "confessions," as elsewhere, the meaning of the term "Organization" (*ângkar*) and of the salutation "Brother" (*bang*) can only be derived from context. In some contexts, "Organization" is merely a general euphemism for the CPK. In others, it is clearly euphemism for Pol Pot and Nuon Chea, who were also known as Brother Number One and Brother Number Two, respectively. For a clear illustration of the hierarchy at the top of the Party, see the "confessions" of Chheum Sâm-aok *alias* Pâng *alias* Seuang (CMR 15.6/TSA C175), which he addresses, first, "with respect to both the lofty respected Brothers," second, to all the other "respected and beloved Brothers" of the "lofty respected Party" and, finally, to "the beloved Brothers of the Special Branch" [untitled "confession" dated 2 June 1978]. (Pâng was the Chairman of the CPK Party School, S-71.). On the "confessions" in question, "Organization" must mean either Pol Pot or Nuon Chea or both, and "Brother" must mean either "Brother Number One" or "Brother Number Two" or both. All of this suggests that Nuon Chea may indeed have played a more important role than Pol Pot in dealing with "confessions" and purges.

²²⁴ For example, the notebooks of S-21 interrogator Mâm Nai *alias* Chan record that Pol Pot's aide-de-camp Chheum Sâm-aok *alias* Pâng was detained on Nuon Chea's order in mid-1978. See Untitled Notebook of Mâm Nai *alias* Chan, number three-ranked interrogator at S-21 covering January-October 1978, entry for August 11, 1978, reading "when enemy responses implicated" Pâng, "a report was made to Brother Number Two [Nuon Chea], who authorized his arrest." These notebooks also contain an entry in which Nuon Chea is put forward as a "model of socialist revolution" because he displays none of the kind of personal sentiments that "gum up with work of serving the nation". As proof of this, it cites the fact that "Brother Number Two [Nuon Chea] arrested his own nephew named Sat." *Id.*, entry for 3 May 1978. The identity of "Sat" is not clear, although "confessions" exist for individuals with this *alias* and might therefore relate to the same person. These confessions include those of So Nem *alias* So Sat (CMR 140.9/TSA S184), who entered S-21 on October 1, 1975; and Lach Sam *alias* Sat (CMR 66.9/TSA L73), who entered on December 9, 1977. Similarly, the "confessions" of West Zone Secretary Chou Chet *alias* Thang Si indicate that Thang Si was visited by Nuon Chea in 1976 and was instructed by him to make sure that all former Khmer Republic soldiers in the Zone were executed "because it was not easy for them to abandon their old ideas". Si replied that he was loyally "sweeping away anybody and everybody who opposed the revolution" along with their children. Confessions of Chou Chet *alias* Thang Si (CMR 12.22/TSA C117), "IV. From 17 April 1975 to 26 March 1978," May 20, 1978, np.

²²⁵ See *The True Fact*, *supra* note 199.

While Duch's testimony and other evidence implicate Nuon Chea as an author of CPK purge policies generally and as having ordered specific executions, many S-21 confessions provide strong circumstantial evidence that Nuon had, at the very least, knowledge of executions and torture. For example, the October 1977 confessions of a Central Zone Division 174 battalion cadre named Nheum Sim *alias* Saut include a note from Saut's interrogator marked "One Copy to Brother Nuon" explaining that "it was only after I tortured (*tearunakam*) him that he confessed to the story of having been a police informer and a CIA systematically right up to the time of his arrest."²²⁶ The confessions that same month of Sieng Pauy *alias* Sean, who served as a combatant in Bak Prea, Daun Tri and other Districts of Northwest Zone Sector 4, include a similar interrogator's note. The note explains that initially, the prisoner "did not confess," but that "once I started torture, he was willing to confess about his systematic contacts, activities and plans right up to the time the Organization arrested him."²²⁷

The confessions of Sieng Pauy *alias* Sean provide evidence of Nuon Chea's knowledge of executions as well as of torture. Referring to former Khmer Republic military personnel, the interrogator's note summarizes the parts of Sean's "confessions" recalling that in "early 1976, the directive of the Organization was to sweep out all those of officer rank [*puok bandasak*] in Bak Prea District in order to smash and dispose of them." The note also mentions that in February 1977, Sean again was assigned "to lead troops to sweep out those of officer rank, this time in Daun Try District." According to the note, these troops arrested "a lot of those of officer rank ... and smashed and disposed of them."²²⁸

"Smashings" are also mentioned in the confessions of Kung Kien *alias* Eung Vet, the secretary of a battalion in Central Committee Division 164. This document has a notation stating that the confession was presented to Nuon Chea "personally."²²⁹ Eung Vet's confessions have several marginal comments that Duch has acknowledged he wrote. One comment explains that "we have already smashed" someone named as Euan *alias* Sophâl. Another notes that "according to my information," a person denigrated as the "contemptible Tan Meng" was smashed in 1974. A third comment by Duch adds that "the grassroots have already smashed" someone named Sâm.²³⁰

²²⁶ "Notes on Nheum Sim *alias* Saut, Former Agriculturalist, Who Before His Arrest was Member, Battalion 701, Regiment 601, Division 174, Central Zone, 26 October 1977," marked "One Copy to Brother Nuon, 11 November 1977." DC-Cam document BBKKh176.

²²⁷ "On the Record of the Activities of Sieng Pauy *alias* Sean, formerly Secretary of a Company, Battalion 45, Sector 4; Before Being Arrested Was Combatant at the Office of Daun Try District (Number 42), Sector 4, Northwest, 28 October 1977," marked "Two Copies Sent to Brother Nuon, 9 November 1977." DC-Cam document BBKKh734.

²²⁸ The main text of the note, in which the interrogator presents a full record of Sean's confessions, provides more details of both operations. It identifies the unit involved in the early 1976 campaign as Company 453 of Sector 4, and says its assignment was "to go and sweep clean those of officer rank in Khpop District, known as Bak Prea (Number 41), in Sector 4." The February 1977 operation, according to the confessions, used "one platoon of troops to sweep clean the enemy in Daun Try District, in accordance with the Organization's plan."

²²⁹ "Responses of Kung Kien *alias* Eung Vet, Secretary of Battalion 631, Regiment 63, Division 164: On the History of the Activities of Kung Kien *alias* Eung Vet: 'He Himself Confesses', 26 May 1977," marked as follows: "'Presented to Brother Nuon (Personally) Secret,' with the additional comments: '1. This document is very clear. 2. Most of the persons involved are from the units [illegible]; a number of others involved are from [Sectors] 33 and 35, 23 May 1977.'" DC-Cam document BBKKh300.

²³⁰ The main text of these "confessions" also include an account of a June 1977 conversation between the Vet and another Division 164 battalion secretary, at which the other battalion secretary purportedly declared:

Now some of our forces have already been arrested by the Organization. But not all of them. If we keep on with activities and those whose covers are blown are arrested by the Organization, don't implicate each other in your responses. Regardless of whether you respond by implicating someone else or not, you're dead, so it's better not to respond than to respond, because once you're arrested by the revolution, no one ever comes back. It's already certain you'll vanish.

Finally, all of the above confessions mention numerous arrests and give names of purported "traitors," "CIA links" and the like who were apparently still at large and about to be arrested or who were at least at risk of arrest. As appears to have been the standard practice, the names of those already arrested and those implicated are interspersed throughout the main texts of the "confessions" and then summed up in lists appended either to the front or the back of that text, presumably to ensure the arrest, interrogation and murder of those implicated in confessions.²³¹

It is also noteworthy that certain documents transmitted to Nuon Chea appear to contain information about arrests not just for his information, but also seeking direction from Nuon as to whether to conduct further arrests. For example, the July 1977 confessions of Khaek Bin *alias* Sou, a former Northwest Zone cadre who had been assigned to head the DK Liaison Committee for the Cambodia-Thailand border,²³² include a notation apparently addressed to Nuon Chea, which reads:

Dear Respected Brother, 1. These responses implicate Comrades Khlaeng, Ren, Khauy, Kou, Muon, etc.²³³ At the same time, moreover, they implicate Kreun. 2. The namelist at the end sums up the persons who are implicated by name as traitors.

The appendix, entitled "I Would Like to Report to the Organization About the CIAs that Participated in My Traitorous Activities," contains the names of sixteen people who are noted in hand-written annotations as having been "arrested already." Other names are marked with the hand-written annotation "not yet," while still others are accompanied by question marks. These notations appear to reflect indications by Duch to his superiors, including Nuon Chea, about Duch's actions to that point, and would also appear to have provided Mok with a list of those whose arrests remained to be carried out.

iii. Reports from the Grassroots

Telegrams and other messages originating from the CPK's various Zones, Sectors and other locations add considerably to the evidence of Nuon Chea's imputed knowledge about killings and ill-treatment throughout DK. Like other CPK-era documents, these communications often use

Id.

²³¹ For example, the "confessions" of Sean have an appendix entitled "Table of Names of Traitors in the Biography of Sieng Pauy *alias* Sean." It contains the names of twelve persons noted as arrested and of 29 others named by Sean as "traitors," but apparently not yet arrested. The "confessions" of Nheum Sim *alias* Saut include an appendix entitled "Table of Traitors Named in the Biography," which lists the names of eight people who have already been arrested and gives the names of 19 "traitors" who had not yet been arrested.

²³² "Article Transcribed from a Tape of Responses to Questions, Khaek Bin *alias* Sou: Contacts with the Thai: On the History of His Own Traitorous Activities, Transcribed on 21 July 1977," marked "Brother Nuon Has Already Received a Copy." DC-Cam document.

²³³ Khlaeng, Chhum Then *alias* Khauy and Sau Leng *alias* Ren were, respectively, the Secretary and Deputy Secretary and Member of the Northwest Zone Division 2, based in Pailin. In Sou's appendix, Khauy and Ren are noted as "not yet" arrested, but their arrests came soon thereafter. According to S-21 files, Ren (CMR 147.3/TSA S304) entered there on August 24, and Khauy (CMR 21.33/TSA C391) on September 1, 1977. Khlaeng was also arrested. Ran Chet *alias* Kou (CMR 127.5/TSA R59) was the Deputy Secretary of Sector 3 of the Northwest Zone and is listed as having entered on December 14, 1977. Muon was apparently the Secretary of a Northwest Zone battalion. See the "confessions" of Aem Nut *alias* Song (TSA/E29), "History of the Traitorous Activities of Aem Nut *alias* Song, Deputy Secretary, Northwest Zone Security," Mar. 18, 1978.

euphemisms such as "smash" and "sweep cleanly away" to report killings. In some cases, the documents solicit authorization to conduct executions.

These reports are sometimes addressed specifically to Pol Pot, including by abbreviation or by his *alias* 009, but more often they are addressed simply to "Brother" or "the Organization," or the Central Committee by its code number 870. But they were routinely slated to be copied to a list of recipients that included Nuon Chea. More particularly, these reports were routinely marked for copying and presentation (*châmlâng choun*) to some or all of the five members of the Standing Committee who were usually resident in the capital, Phnom Penh: Pol Pot (referred to as "Uncle"), Nuon Chea (referred to as "Uncle Nuon"), Ieng Sary (referred to as "Brother Van"), the late Von Vet (referred to as "Brother Von") and the late Son Sen (referred to as "Brother Khiev").²³⁴ The reports do not resolve who among the five had decision-making authority on what issues, or in what forums decisions were made. But they do suggest that both Nuon Chea and Ieng Sary were part of the same routine information loop that also included Pol Pot, Von Vet and Son Sen. At the very least, any one reading these reports would be on notice that serious crimes were being committed.

Of particular relevance to our analysis, Nuon Chea was noted for distribution on reports that solicited instructions or authorization to detain or execute suspected traitors. These include, for example, requests to execute members of an upland minority group and former DK military personnel who had been judged "enemies" after interrogation,²³⁵ as well as requests for advice on what to do with prisoners who had "confessed" to wanting to join an armed opposition group,²³⁶ local Party cadre who refused to follow orders from above,²³⁷ and local cadre who had committed "morals violations" and had been implicated in the "confessions."²³⁸

Also of significance are reports from military divisions marked for distribution to Nuon Chea that contained evidence of executions and other atrocities, including war crimes. For example, Nuon was copied on a December 1977 message from the Central Committee naval Division 164 Secretary Meah Mut,²³⁹ in which Mut expressed his determination to defend "the socialist Kampuchean motherland by sweeping cleanly away and without half-measures the undercover elements of the enemy, whether the Yuon [Vietnamese] or other enemies."²⁴⁰

Several of the reports marked for distribution to Nuon Chea related to incidents that arose in the context of the conflict along the DK-Viet Nam border. In particular, after the armed conflict

²³⁴ The list usually appears at the bottom of the documents, and, like the documents themselves, is usually typewritten. Starting in early 1978, Brother Khiev is often not on the list, apparently because he was on duty on the Vietnamese border. In addition to the specified members of the Standing Committee, the list also typically indicates that the documents were to be copied to the "Office" and to "Documentation."

²³⁵ Telegram 07, Band 545, "Be It Please Reported to Respected Brother, June 15, 1977."

²³⁶ Telegram 14, Band 273, "Respected and Beloved Organization Be Informed that, June 25, 1977."

²³⁷ Division 260, Political Section, "Report: Presented to Beloved and Missed Brother 009, April 14, 1978."

²³⁸ Telegram Number 54, Band 290, "Respectfully Presented to Respected Brother, April 23, 1978."

²³⁹ Meah Mut is alive; in addition to this self-incriminating telegram, there is much more documentary evidence implicating him in crimes. See Part IV.6, *infra*.

²⁴⁰ Telegram Number 00, Band 354, "Respectfully Presented to Committee Mo-870," Dec. 31, 1977, signed Mut, p. 92.

along that border intensified in 1977, Nuon and others were copied on an increasing number of battlefield reports that revealed information about the disposition of Vietnamese civilians and combatants taken prisoner, and also discussed what appear to have been attacks on Vietnamese civilian targets. For example, an October 29, 1977 telegram from the East Zone, addressed to Office 870, requested "the view of *Mo-870* with regard to the problem of those Yuon we were able to capture in the homes of ordinary people in Ta Dev village." It offered that "if *Mo-870* so requires, we will send them to you," adding that "we are currently holding them and extracting responses from them."²⁴¹ Another telegram from the East Zone, dated November 18, 1977, reported an attack on Truong, a garrison and a market town in Vietnamese territory, during which the attacking DK forces "burned down 94 enemy houses and campsites" and "swept the enemy cleanly out of the market and out from north of the market," although the message said "the results in terms of those killed and war booty seized have not yet been obtained;"²⁴² it is clear from CPK usage of the Khmer-language terms employed that the mention of enemy "houses" refers to civilian homes. A telegram of March 20, 1978, apparently from Son Sen, reported the capture of "three head" of Vietnamese, two of whom had been "shot and disposed of" upon attempting to escape, and one of whom had been "presented to 21", that is, presumably, S-21.²⁴³ A summary report from Division 164 Secretary Mut on April 1, 1978 noted that "the number of Yuon" his unit had "captured and shot to death from 27 March 1978 through 30 March 1978 is 120 head."²⁴⁴ This could potentially constitute evidence of war crimes committed by CPK cadre, to the extent that under prevailing rules of international humanitarian law enemy soldiers who surrender or are otherwise rendered *hors de combat* may not be executed or otherwise abused.²⁴⁵

Moreover, since mid-1977 Nuon had been copied on telegrams from the Democratic Kampuchea Ambassador in Viet Nam, Sok Chhean (later purged), reporting then still private Vietnamese protests about alleged Democratic Kampuchea atrocities along the Cambodia-Viet Nam border. On June 15, 1977, for example, Chhean recounted a visit from a Vietnamese official who had lodged a complaint about an attack by Democratic Kampuchea forces on June 14, 1977 that the official said had involved "slaughtering" Vietnamese and "torching" their homes and had thus brought "about enormous casualties." The official added that "the fact that the Kampuchean army committed such transgressions, slaughtering, burning and smashing is not something" the Vietnamese side was "raising according to reports, but something for which there can be clear and

²⁴¹ Telegram 60, Band 378, "Respectfully Presented to Beloved and Missed *Mo-870*," Oct. 29, 1977, signed Chhon, p. 105.

²⁴² Telegram Number 82, Band 328, "Respectfully Presented to Beloved and Missed Brother Pol," Nov. 18, 1977, signed Chhon, p. 58.

²⁴³ Telegram 16, Band 598, "Respected and Beloved Brother 009 Be Informed," Mar. 20, 1978, signed 47, which seems to be a codename for Son Sen, pp. 97-98.

²⁴⁴ Division 164, Political Section, "Secret Telephone dated April 1, 1978," signed Mut, p. 139. The phraseology is ambiguous as to whether the number refers to Vietnamese who were executed after capture, to Vietnamese captured and different Vietnamese shot under other circumstances, or some combination of the two.

²⁴⁵ See e.g. Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field ("First Geneva Convention"), art. 12; Geneva Convention II for the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea ("Second Geneva Convention"), art. 12; Geneva Convention III Concerning the Treatment of Prisoners of War ("Third Geneva Convention"), art. 3; Protocol I, *supra* note 210, art. 10; Protocol of 8 June 1977 Additional to the Geneva Conventions of 12 August 1949 and Concerning the Protection of Victims of Non-International Armed Conflict ("Protocol II"), art. 7 (providing that the wounded, sick and shipwrecked shall be respected and protected in all circumstances and that any attempts on their lives or violence to their persons are prohibited).

irrefutable evidence," and he offered to make photographic evidence available.²⁴⁶ In a message dated July 20, 1977 Chhean said the same Vietnamese official had complained in a letter that during three days of shelling earlier in the month, the Kampuchean army had hit "areas heavily populated by ordinary people, with major casualties, including at least 30 dead and 50 wounded, and with "many homes ... burned down."²⁴⁷ On August 4, Chhean reported allegations circulating in Hanoi to the effect that "the Kampuchean army has committed mass killings of 1,000 ordinary Vietnamese people at Ha Tien in Kien Giang province."²⁴⁸ At the end of the month, he described another official Vietnamese démarche, which alleged ten more "ordinary people" had been killed in further attacks.²⁴⁹ Accordingly, these documents appear to provide evidence of the possible commission of war crimes, including the deliberate targeting by Cambodian military forces of civilians and civilian objects and the perpetration of disproportionate attacks.²⁵⁰

Meanwhile, by late January 1978, messages from the East Zone copied to Nuon reported on internal purges as well as on border fighting. These internal CPK messages appeared to corroborate the broad outlines of official Vietnamese allegations. Further, the text leaves no doubt that the CPK officials who composed these messages realized that civilians as such were being killed. For example, a telegram of January 19, 1978 indicated that during attacks two kilometers deep into Vietnamese territory, forces operating out of the Zone's Sector 24 had not only "smashed 30 enemy military homes," but also "burned down a number of homes of ordinary people."²⁵¹ In addition, they had "smashed two enemy motor boats in which everybody was ordinary enemy people, on account of which the ordinary people in these boats were all smashed to smithereens."²⁵² Thus, "in sum, we smashed 30 head of enemy this 18 January."²⁵³ There were also unknown casualties from the "continued shooting" of 107mm rockets into the Vietnamese market town of Hok Ngeu, which had thus been set on fire.²⁵⁴ The manner in which these incidents were described suggests that it was not CPK policy to take all necessary precautions in its military operations to avoid injury, loss or damage to civilian populations, or indeed to refrain from making civilian populations the object of attack, as required under international humanitarian law.²⁵⁵ On the

²⁴⁶ Telegram 46, Band 600, "Respected and Beloved Brother," June 15, 1977, pp. 83-84.

²⁴⁷ Telegram 56, Band 660, July 20, 1977, pp. 21-22. While the commission of war crimes must be determined in the circumstances of each individual case, the wounding or death of a significant number of civilians by an armed force suggests a failure on the part of that armed force to distinguish between military and civilian targets, and possibly the deliberate targeting of civilians.

²⁴⁸ Telegram 62, Band 1474, "Respectfully Presented to Respected and Beloved Mo-81," Aug. 4, 1977, pp. 68-71.

²⁴⁹ Telegram 68, Band 1630, "Respectfully Presented to Beloved and Missed Mo-81," Aug. 30, 1977, signed Chhean, pp. 113-115.

²⁵⁰ See e.g. Protocol I, *supra* note 210, arts. 51, 52 (providing that the civilian population as such, individual civilians and civilian objects shall not be the object of attack).

²⁵¹ Telegram Number 15, Band 791, "Respectfully Presented to Beloved and Missed Brother P, We would like to report on the situation in Sector 23, Sector 24 and on the Route 22 battlefield, as follows," Jan. 19, 1978, signed Chhon, pp. 91-93.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ See Basic Principles for the Protection of Civilian Populations in Armed Conflict, G.A. Res. 2675, 25 U.N. GAOR Supp. (No. 28) at 76, U.N. Doc. A/8028 (1970) [hereinafter "UN General Assembly Resolution 2675"], ¶¶ 3, 4 (affirming as basic principles for the protection of civilian populations in armed conflict that in the conduct of military operations, every effort must be made to

home front, ordinary Cambodian people who had purportedly been herded off by attacking Vietnamese forces but were now "gathered back up by us" were "being re-educated, differentiated and purged."²⁵⁶

Taken together, the evidence summarized above belies Nuon Chea's claim that he and other senior CPK officials

knew nothing at all about the killings. This was the lower-downs acting irresponsibly, such that my younger-sibling[s]-in-law and younger sibling[s] were all smashed. The lower-downs did the smashing, and we did not go down to as far as the lower levels.²⁵⁷

b) Legal Analysis and Conclusions

The evidence reviewed in the preceding section establishes a *prima facie* case of Nuon Chea's criminal responsibility for CPK crimes on several different bases. Most seriously, this evidence implicates Nuon under principles of individual responsibility for his role in ordering crimes by his subordinates. In addition, Nuon may be individually responsible for crimes committed by others as an aider and abettor. His participation with other leading CPK officials in designing the Party's murderous policies also makes Nuon liable to prosecution pursuant to the doctrine of "common design or purpose." Finally, Nuon Chea may be criminally responsible for DK-era crimes pursuant to the doctrine of superior responsibility.

i) Individual Responsibility

a. Issuing Orders

If, as the evidence summarized above suggests, Nuon Chea issued orders to subordinates to commit serious international crimes, he is liable to prosecution under the broad rubric of individual responsibility. Particularly relevant in this regard are the documents and statements indicating that Nuon Chea gave affirmative orders to individuals under his effective authority and control to commit executions. In other instances, Nuon Chea ordered the arrest of certain individuals, with the apparent intent that these individuals would be subject to further

spare civilian populations from the ravages of war, that all necessary precautions should be taken to avoid injury, loss or damage to civilian populations, and that civilian populations as such should not be the object of attack). See also Protocol I, *supra* note 210, arts. 48, 51, 57, 58; Protocol II, *supra* note 245, art. 13.

²⁵⁶ Telegram Number 15, Band 791, "Respectfully Presented to Beloved and Missed Brother P, We would like to report on the situation in Sector 23, Sector 24 and on the Route 22 battlefield, as follows," Jan. 19, 1978, signed Chhon, pp.91-93. A follow-up message from the East explained that "ordinary people who were living near the border have all been made to withdraw and stay at the rear, and they are constantly in re-education meetings. Moreover, Yuon enemy link elements are being purged so that they are not chaotically in amongst the good ordinary people, and they are being kept under separate surveillance and being re-educated separately." Telegram Number 16, Band 634, "Respected and Beloved Brother P," Jan. 25, 1978, signed Chhon, pp.101-102. Another message, dated March 20, 1978, reported that Vietnamese attacks seemed to be concentrated on certain East Zone Sector forces whose "contemptible" leading cadre had purportedly been providing intelligence to the Vietnamese, and that "measures" were being "taken with initiative against anyone who is no good" among these Sector forces. Telegram Number 16, Band 318, "Respected and Beloved Brother 009, Be Informed," Mar. 20, 1978, signed 47, p. 103.

²⁵⁷ Nuon made it clear that by "lower-downs" he meant Zone Secretaries. He mentioned by name purged Secretary of the West Zone, Chou Chet *alias* Thang Si and the purged former North Zone Secretary Koy Thuon *alias* Thuch, the former Secretary of the old North Zone. He also mentioned Mok's Southwest Zone without naming Mok himself. As he put it, "the contemptible Si and Thuch groups acted irresponsibly, and not a few died over in the Southwest as well." NUON CHEA, THE HISTORY OF THE STRUGGLE MOVEMENT, *supra* note 168.

crimes, including execution. Perhaps the clearest example of this is Duch's claim that Nuon "ordered 300 [Khmer Rouge] soldiers arrested. He called to meet me and said, 'Don't bother to interrogate them - just kill them.' And I did."²⁵⁸

b. Common Purpose or Design Doctrine

1. *Actus Reus*

The "common purpose or design" doctrine provides a second potential basis for establishing Nuon Chea's individual responsibility for CPK crimes. As discussed in greater depth in the Appendix, criminal responsibility under this doctrine requires proof of three elements: that the accused acted with a plurality of persons; the existence of a common plan, design, or purpose which amounts to the commission of a crime; and evidence that the accused participated in the common plan or design. If these elements were satisfied with respect to Nuon, the doctrine would operate to make him responsible not only as a co-perpetrator of the crimes resulting from his orders, but also for crimes resulting from the activities of Pol Pot, Son Sen, and any other co-authors of the execution policies.

The first two elements of the doctrine may be satisfied by virtue of evidence, principally in the form of post-DK statements by Duch supported by documentary accounts of Nuon Chea's membership in the upper echelons of the CPK leadership, indicating that Nuon Chea was one of a group of senior leaders, which also included Pol Pot, Son Sen and possibly others, who devised the three execution policies summarized in Part III. In particular, his position as Deputy Secretary and his membership in the "super-secret committee" of the Standing Committee supports the view that Nuon Chea was a central figure in the formulation of the Party's execution policies.²⁵⁹ Duch has also claimed in this respect that Nuon Chea, along with Pol Pot and Son Sen, planned the 1978 East Zone purge.²⁶⁰

The third element of the common purpose or design doctrine would seem to be readily satisfied by the extensive evidence of Nuon Chea's participation in the implementation of these policies. This includes Duch's claim that Nuon Chea, along with Pol Pot and Son Sen, planned the 1978 East Zone purge,²⁶¹ evidence that Nuon Chea directed the search for enemies within the Party after 1975 primarily through orders given to his subordinates,²⁶² including Duch,²⁶³ and

²⁵⁸ Thayer, "Death in Detail," *supra* note 10.

²⁵⁹ See *supra* text accompanying notes 199, 200, 212.

²⁶⁰ See *supra* text accompanying note 213.

²⁶¹ See *supra* text accompanying note 212.

²⁶² See *similarly* *Trial of Carl Bauer, Ernst Schramech, & Herbert Falter*, in United Nations War Crimes Commission, 7 LAW REPORTS OF TRIALS OF WAR CRIMINALS 21 (1949) (holding that as a colonel who ordered a subordinate to kill a French guerrilla soldier, "Bauer's personal liability in this case lay in that he originated the crime by giving orders to his subordinates in pursuance of Hitler's instructions. Such responsibility is covered by Article 6, last paragraph, of the Nuremberg Charter:

Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any . . . crimes are responsible for all acts performed by any persons in execution of such plan.

. . . From this it follows that, if a superior is prosecuted because of orders issued to subordinates, he is held responsible as primary or joint perpetrator, as the case may be"). See *similarly* *The Prosecutor v. Dusko Tadic*, Opinion and Judgment, 7 May 1997, Case No. IT-94-1 (ICTY Trial Chamber I) [hereinafter "Tadic Judgment (Trial Chamber I)"] at ¶ 192 (suggesting that "to hold criminally

the substance of several confessions that implicate Nuon Chea in directing the Party's purge policies, for example by proposing the arrests of cadre in certain Zones²⁶⁴ and instructing Zone Secretaries to ensure that all former Khmer Republic soldiers were executed.²⁶⁵

2. *Mens Rea*

To establish individual responsibility based upon the common purpose or design doctrine, a prosecutor must prove that a defendant intended to perpetrate the crime for which the plan or design is formulated. Nuon Chea's intention to participate in the formulation of the CPK's execution policies can to a significant extent be inferred from the fact of his collaboration with Pol Pot and Son Sen, as discussed above. This inference in turn is corroborated by evidence suggesting that Nuon Chea actively and publicly supported and implemented the Party's policies. This evidence includes Duch's statements that Nuon Chea ordered him to arrest and kill certain cadre and, on occasion, to bring him photographs to confirm their deaths.²⁶⁶ The reliability of Duch's claims is underlined by several of the twenty-seven confessions addressed to Nuon Chea, which contain notes apparently seeking direction from Nuon Chea as to whether to arrest additional individuals identified as traitors in the confessions. Indeed, several of these notes reporting on the "smashing" of specific cadre were composed by Duch, corroborating his contention that he reported to Nuon Chea in undertaking arrests and executions at S-21. Finally, in addition to confessions and accompanying notes, the S-21 interrogator's notes indicate that at least one prisoner was detained pursuant to Nuon Chea's order.²⁶⁷

c. *Aiding and Abetting*

Finally, Nuon Chea may also be criminally responsible as an aider and abettor by virtue of his contributions to the commission of certain arrests and executions. Particularly relevant in this regard are the previously-mentioned reports from Zones that sought direction or authorization from Nuon Chea and other Party leaders to detain or execute suspected traitors.²⁶⁸ In the absence of evidence that Nuon Chea issued directions in response to these inquiries, the evidence suggests that, at a minimum, Nuon Chea was a participant in a decision-making process that facilitated arrests and executions at lower levels and thereby contributed to those crimes.

That Nuon Chea knew his conduct would have a substantial effect on the commission of offenses is suggested by the evidence, discussed above, indicating that a plethora of information concerning the fact and nature of arrests and executions was apparently available to

liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act").

²⁶³ See *supra* notes 214-219 and accompanying text.

²⁶⁴ See, e.g., *supra* note 222, citing Meah Mon confession.

²⁶⁵ See, e.g., *supra* note 224, citing Thang Si confession.

²⁶⁶ See *supra* text accompanying note 219.

²⁶⁷ See *supra* note 224, citing Chan notebook.

²⁶⁸ See *supra* notes 235-238 and accompanying text.

him. These included, for example, confessions directed to Nuon Chea that contained notes from the interrogators specifically referring to the fact that torture had been used to extract the confession and that the prisoners had been "disposed of." Also probative are messages and reports from Zones on the Cambodian-Vietnam border describing incidents that appear to constitute serious violations of international humanitarian law, including the intentional shelling of areas heavily populated by civilians and the burning of civilian homes.²⁶⁹

- ii. Superior Responsibility
 - a. Superior-Subordinate Relationship

As developed more fully in the Appendix, the key elements of the superior responsibility doctrine require proof of three factors: that a superior-subordinate relationship existed by which the superior exercised actual authority over the subordinate; that the superior knew or had reason to know that a crime was about to be committed or had been committed by a subordinate; and that the superior did not take the necessary and reasonable measures to prevent the crime or to punish the perpetrator or perpetrators thereof. With respect to Nuon Chea's relationships with subordinates, as the Deputy Secretary of the Central Committee, a member of the Standing Committee, and a member of the "super-secret committee" for security members within the Military Committee, Nuon Chea enjoyed significant *de jure* authority, perhaps second only to Pol Pot. In addition, Nuon Chea's ability to issue orders to subordinates, who appear to have included Son Sen and Duch, attests to his *de facto* power to effectively control the actions of those under him. Ieng Sary has stated that Nuon Chea, with Pol Pot and Son Sen, decided themselves to order executions,²⁷⁰ and Duch has claimed that his S-21 executions were conducted according to Nuon Chea's orders.²⁷¹ Duch has also maintained that Nuon Chea was critical, along with Pol Pot and Son Sen, to the initiation of the 1978 East Zone purge.²⁷² Moreover, the fact that Duch stated that he executed three hundred cadre at the behest of Nuon Chea suggests that subordinates implemented his orders and that Nuon Chea, with the power to issue orders, possessed the material ability to sway the actions of those under him.²⁷³ Duch's statement of Nuon Chea's authority is again corroborated by an S-21 interrogator's notebook with a note claiming that the prisoner was detained on Nuon Chea's

²⁶⁹ See *supra* notes 251-256, citing January 1978 and March 1978 telegrams from the East Zone. See also UN General Assembly Resolution 2675, *supra* note 255, ¶¶ 3, 4 (requiring that every effort be made in the conduct of military operations to spare civilian populations from the ravages of war, that all necessary precautions should be taken to avoid injury, loss or damage to civilian populations, and that civilian populations as such should not be the object of attack).

²⁷⁰ Stephen Heder interview with Ieng Sary, Dec. 17, 1996, *supra* note 10.

²⁷¹ See *supra* notes 214-219 and accompanying text.

²⁷² See *supra* text accompanying note 213.

²⁷³ See, e.g., *supra* note 218 and accompanying text.

order.²⁷⁴ Finally, several documents soliciting instructions or authorization to detain or execute suspected traitors were marked for transmission to the Standing Committee, of which Nuon Chea was a member, and therefore provide additional corroborative evidence of Nuon Chea's *de facto* authority.²⁷⁵

b. *Mens Rea*

Evidence suggests that Nuon Chea knew or had reason to know that crimes were about to be or had been committed by his subordinates. In particular, Nuon Chea's claims that he was ignorant of executions committed by subordinates²⁷⁶ are belied by both direct and circumstantial evidence of his knowledge of the crimes. Moreover, to the extent that it may be established that Nuon Chea held a superior position in a military capacity, for example through his membership in the Military Committee, sufficient information appears to have been directed to his attention to give him notice of executions and other atrocities committed by his subordinates.

Circumstantial evidence of Nuon's actual knowledge, as well as evidence that he was put on notice of offenses committed by subordinates, includes the fact that he is connected, by name or by reference to the Standing Committee,²⁷⁷ to the distribution lists of a number of documents, among them twenty-seven confessions specifically addressed to him.²⁷⁸ Of crucial importance, several of the confessions contain notes composed by interrogators that specifically refer to the infliction of torture.²⁷⁹ Accordingly, if Nuon Chea had read these documents, he would have had knowledge of at least the possibility that subordinates were committing atrocities. And as noted in the Appendix, it is not necessary to prove that Nuon Chea actually acquainted himself with this information, only that it was provided to or otherwise available to him.²⁸⁰

Other corroborating evidence - including a note that one of the confessions was handed to him personally²⁸¹ - appears to constitute significant evidence that Nuon Chea knew of crimes physically perpetrated by subordinates in the Party. Finally, circumstantial evidence as to the coordinated nature of CPK crimes, the similar *modus operandi* for these crimes, and the broad-based and voluminous nature of the executions committed throughout DK, further suggest that Nuon Chea had sufficient notice, if not actual knowledge, of these atrocities by his subordinates in the Communist Party.

2. Ieng Sary

²⁷⁴ See *supra* note 224.

²⁷⁵ See *supra* notes 235-238 and accompanying text.

²⁷⁶ See *supra* note 257 and accompanying text.

²⁷⁷ See *supra* note 212 and accompanying text.

²⁷⁸ See *supra* note 223.

²⁷⁹ See *supra* notes 226, 227 and accompanying text.

²⁸⁰ See Celebici Appeals Chamber Judgment, *supra* note 207, ¶ 207.

²⁸¹ See *supra* note 229.

There is significant evidence of Ieng Sary's individual responsibility for CPK crimes, for repeatedly and publicly encouraging arrests and executions within his Foreign Ministry and throughout Democratic Kampuchea and for facilitating or failing to prevent the mass arrests and transfers to S-21 of Foreign Ministry personnel.

- a) Evidentiary Analysis
 - i. Position and Role in the CPK

Evidence relating to Ieng Sary's career history indicates that he held senior positions in the upper echelons of the Communist Party that provided him some degree of influence over the conduct of Party cadre, as well as platforms for publicly endorsing the Party's execution policies. His senior positions would also have made him privy to information concerning widespread arrests and interrogations within and outside the Communist Party.

Ieng Sary became a member of the Communist Party of France while a student in Paris in the early 1950s, and joined the Central Committee of the Cambodian Communist Party at its Congress in 1960 and its Standing Committee at its Congress in 1963.²⁸² Prior to the following CPK Congress, held in September 1971, he was dispatched by the Party to Beijing, arriving in August 1971 with the title of "Special Emissary of the Section of the Royal Government Inside the Country" ostensibly to work with Chief of State Norodom Sihanouk.²⁸³ Sihanouk had declared in Beijing in 1970 that the Royal Government of National Union of Kampuchea (GRUNK) and the National United Front of Kampuchea (FUNK) opposed those who had overthrown him on March 18 of that year.²⁸⁴ By his own account, Sary's real purpose was to subvert and control GRUNK and FUNK to ensure their unquestioning support for the CPK armed struggle inside Cambodia, which aimed at establishing a Communist regime there. Sary also handled the CPK's international relations.²⁸⁵

Sary returned to Cambodia approximately one week after the CPK victory on April 17, 1975, and in August 1975 he was formally named a Deputy Prime Minister for Foreign Affairs.²⁸⁶ In this capacity he helped oversee the return to Cambodia of various GRUNK and FUNK diplomats and others, some of whom he had recruited into the CPK but most of whom were non-Communists. This was in line with a CPK policy decision of September 1975, which in principle allowed Cambodians abroad to return but insisted that the role of non-Communist GRUNK and FUNK "dignitaries" must be to "assist" the CPK and that they must remain under its

²⁸² NUON CHEA, HISTORY OF THE STRUGGLE MOVEMENT, *supra* note 168.

²⁸³ Letter to Norodom Sihanouk from Khieu Samphan, "Deputy Premier [and] Minister of Defence," in the name of "the Section of the Council of Ministers Inside the Country," July 12, 1971.

²⁸⁴ Sihanouk proclaimed that GRUNK and FUNK aimed to "liberate the Motherland from the dictatorship and oppression by the clique of traitorous and pro-imperialist reactionaries headed by Lon Nol," the most prominent leader of the group that had overthrown him. *23 March Communiqué: Issued in Peking by Sihanouk's Private Secretariat*, NEW CHINA NEWS AGENCY, SOUTH VIETNAM LIBERATION PRESS AGENCY, Mar. 24, 1970.

²⁸⁵ Stephen Heder's interview with Ieng Sary, Dec. 17, 1996, *supra* note 10.

²⁸⁶ Broadcast of the Radio Voice of FUNK, Aug. 12, 1975.

"administration." The policy decision also spoke of the need for the "training and refashioning" of returnees through labor.²⁸⁷

According to the "confessions" of the non-Communist former GRUNK Ambassador to Yugoslavia, Huot Sâmbat, Sary welcomed returning GRUNK diplomats and politicians in December 1975. Sary told them that after a period of initial ideological training, they would be sent to the countryside to undertake agricultural labor and that, following further ideological training, some would be integrated into his Ministry of Foreign Affairs and others would be sent back to diplomatic posts abroad.²⁸⁸ This remained CPK policy during the first half of 1976.²⁸⁹

The policy changed dramatically, however, in the second half of 1976. Increasingly, CPK leaders, including Ieng Sary, were publicly urging the routing out and "smashing" of enemy agents and traitors within and outside of the Party. By late 1976, leading CPK officials were carrying out or acquiescing in the arrest of Party members and former members of FUNK and GRUNK throughout Cambodia. Those arrested were being transferred in increasing numbers to S-21, where they were questioned and then killed. The Foreign Ministry itself became the site of numerous arrests and detentions of personnel, many of whom were subsequently sent to S-21, where they were executed following interrogation.

ii. Speeches and Statements by Ieng Sary or his Office

As Deputy Prime Minister in charge of Foreign Affairs, Sary began in 1976 making public speeches and on-the-record remarks to foreign Communist and non-Communist journalists openly endorsing the arrests of alleged enemy agents in CPK ranks and the "smashing" of their purported anti-regime plots. Although Sary has on several occasions denied having had contemporaneous knowledge of DK policies of extermination,²⁹⁰ he in fact came as close as any senior DK official in

²⁸⁷ "Document Number 6, September 22, 1975: On the Grasping and Implementation of the Political Line of Gathering in the Party's National People's Democratic United Front Forces" (uncatalogued DC-Cam document). We are not aware of any evidence that there was a plan at the time this decision was made to execute those non-Communist GRUNK and FUNK officials who returned.

²⁸⁸ (CMR 35.1/TSA H89) "Responses of Huot Sâmbat: 20th Round: Former Ambassador of the Front: On Liaison with the Links Who Returned to Cambodia First," Oct. 4, 1976, np.

²⁸⁹ See "Summary of Decisions of the Standing Committee at Its Meetings on 19, 20 and 21 April 1976" and "Minutes of the Standing Committee 17 May 1976," reporting that Pol Pot reiterated that former GRUNK ambassadors would not be allowed to resume their old posts, but could only act as "assistants" to politically reliable Party members, and then only after a further period of "re-education."

²⁹⁰ For example, in a December 16, 1996 interview with Stephen Heder, Sary claimed that he had only known after the fact about the decision to execute Khmer Republic military officers, senior officials and "secret agents." Even while the Party was in power, however, Ieng Sary conceded that some former Khmer Republic officers and officials had been executed. In what journalist Elizabeth Becker described as the first forthright response of the Cambodian government to allegations of mass killings of members of the old society elite, Sary explained to her in December 1978, "[f]rankly speaking about the so-called slaughter, the massacres, we could not avoid the killings." However, Sary denied that these had been mass or systematic, arguing that CPK policies had "solved this problem" of what to do with former Khmer Republic personnel "with a good solution" that achieved the effect of "avoiding many more killings." "Maybe that is not your belief," Sary said, "but we are responsible and we grasp the real situation in our country." Elizabeth Becker, *The Cambodian Experiment: Great Change at Heavy Cost*, WASH. POST, Dec. 29, 1978; Elizabeth Becker, *A Journey into the New Cambodia*, WASH. POST, Dec. 26, 1978. Sary has admitted that he was aware of arrests. Yet in another interview with Becker in 1981, Sary declared that he "wasn't aware" of executions of alleged CPK "traitors" before 1979 because he was "not in charge of security." Although he admitted that Pol Pot, Nuon Chea, Sao Pheum and Son Sen made reports to the Standing Committee on security matters, he said that all they reported were arrests, not executions."

On January 4, 1999, Sary once more insisted that he did not know that cadre who were arrested were being routinely executed, and that he had no authority to order an arrest. He claimed that his only role in such matters had been to argue strongly against the arrest of Foreign Ministry department heads targeted for arrest by S-21, but whom he presumed at the time would only be sent for "re-education," not execution. At the same time, however, he admitted having occasionally been made aware of executions and ill

power ever did to describing publicly and in real time the CPK policy of executing such persons. As explained below, these statements may have encouraged the commission of further atrocities. Further, they may help establish a key element of Sary's criminal responsibility for the commission of certain DK-era crimes – that he knowingly contributed to their commission.

On a number of occasions while DK atrocities were being perpetrated, Sary implicitly acknowledged and justified the underlying policies. For example, in a speech on April 17, 1977, the second anniversary of the CPK capture of Phnom Penh, Sary described DK practices aimed at countering efforts by “the enemy” during the preceding year to “destroy the fruits of our victory.” In response to those efforts, Sary said, “our Cambodian people and Revolutionary army have smashed all the enemies' tricks, crushed their spy network and succeeded in preserving our national independence, sovereignty, territorial integrity and the sacred fruits of our revolution.”²⁹¹ As indicated previously, when used in relation to individuals, the terms “smash” and “crush” almost inevitably refer to execution.²⁹² This speech followed a large-scale intra-Party purge in February and March 1977 of “petty bourgeois intellectual links” accused of plotting coups d'état against Pol Pot and Nuon Chea.²⁹³

Similarly, in a speech to the UN General Assembly in October 1977, Sary declared that because “enemies of all stripes were seeking by every method to destroy” DK, its people had to “constantly keep on guard their revolutionary vigilance” and had “utterly crushed all their attempts at ... subversion,” thus “consolidating and developing the accomplishments of the revolution and of the revolutionary power.”²⁹⁴ This was followed by numerous other statements attributable to Ieng Sary or his Ministry that apparently provided justifications for the purges.²⁹⁵

treatment of people undergoing interrogation in the grassroots through his receipt of copies of reports on local matters, but claimed to have seen few such documents. Stephen Heder Interview with Ieng Sary, Jan. 4, 1999, *supra* note 10.

²⁹¹ Phnom Penh radio address, Apr. 17, 1977.

²⁹² See *supra* note 102.

²⁹³ This purge resulted in the arrest and subsequent execution of many cadres with this social background who were removed from Party chapters in ministries and offices in Phnom Penh, including the Ministry of Foreign Affairs. Among these was a Foreign Ministry department head and former GRUNK ambassador to Cuba and China, Tauch Kham Deuan, whose arrest and “confessions” are discussed below.

²⁹⁴ Cited in Democratic Kampuchea, Ministry of Foreign Affairs, Department of Press and Information, *Kampuchea Democratique* (Phnom Penh, Mar. 1978), p. 32.

²⁹⁵ For example, in a March 17, 1978 statement directed to the Non-Aligned Movement, which was made as the intra-CPK purge gathered pace, Sary accused Viet Nam of having “carried out all kinds of ... underground” activities against DK, including “spying, subversive and undermining activities” and “attempts at coup d'etat to overthrow the regime of DK.” Untitled statement in the name of Ieng Sary headed “Democratic Kampuchea, Ministry of Foreign Affairs, Phnom Penh, 17 March 1978” (Translation). Among other things, Sary specifically alleged that Viet Nam had “use[d] the open relations through Liaison Committees” established along the DK-Viet Nam border to “carry out activities of subversion, spying, undermining, incitements to uprising and to attempt to stage coups d'etat to overthrow the regime of Democratic Kampuchea in September 1975, April 1976, April 1977 and September 1977,” and again in January 1978. *Id.* Sary said that despite earlier defeats, Viet Nam was continuing to carry out “activities of underground and open subversion, interfering in the internal affairs of Kampuchea aiming at creating discords and at uprising the Kampuchea's people.” *Id.* This was, he said, all “part of the Vietnamese plan aiming at setting up a puppet regime in Kampuchea.” *Id.* In May 1978, he explained to a friendly delegation of US Communists how the CPK had “defeated every attempt of the enemy to overthrow our political power through coups d'etat”:

In 1975, we were immediately faced with grave threats to the security of the revolution both in terms of attacks on our borders as well as from within our own ranks. The CIA, the KGB, the Vietnamese and others were all intent on mobilizing their forces for a coup d'etat against us. ... In April 1976 and then again in September 1976, we arrested Vietnamese and KGB agents along the border as well as inside Phnom Penh. They were plotting to organize a coup d'etat against us. In 1977, ... the security problem persisted as our enemies continued to conspire against us. Kampuchean nationals in the pay of the CIA wanted to stage a coup in January of 1977. At the end of January,

In similar terms, a September 1977 internal report from the Ministry of Foreign Affairs acknowledged the practice of executions of DK's political enemies. The report declared that purges within the ministry itself had "basically smashed and swept cleanly away the enemies who were CIA, KGB and Yuon [Vietnamese] territory-swallowers."²⁹⁶ In an apparent allusion to the follow-up arrests that had ensued from S-21's interrogation of those detained during the February-March 1977 purge wave, this document reported that "the major apparatuses belonging to the enemy who made the plans for and led the desire for a coup d'état to seize state power back from our workers and poor peasants have been smashed and swept cleanly away."²⁹⁷

While many of Ieng Sary's statements were contemporaneous with CPK atrocities, others provided support for such crimes after the fact. Thus, in the middle of 1978, Sary and his Ministry fully endorsed the decision made in early May at a secret meeting of Pol, Nuon and Son Sen and recorded by Khieu Samphan to conduct a massive purge of the CPK East Zone, which was launched on May 25, 1978 and carried out by Son Sen and Kæ Pok, among others.²⁹⁸ A statement issued on June 25 of that year in the name of the "spokesman" of the Foreign Ministry hailed the purge in the East and other Zones as "the annihilation" of a "new plan of coup d'état fomented by the Socialist Republic of Viet Nam aiming at overthrowing Democratic Kampuchea." It said the Cambodians involved in this plot were "agents infiltrated and organized since a long time by Viet Nam in order to carry out the plan of coup d'état and personally lead this coup d'état." They had supposedly held "secret meetings...especially in February, March, April and the beginning of May 1978 in order to achieve the plan of coup d'état," and thus "relapsed into crime," but had been "broken ... into pieces."²⁹⁹

In praising arrests and "smashings" of KGB-CIA-Vietnamese conspirators and conspiracies, Sary was reproducing what was said in the confessions of those purged, suggesting his knowledge and approval of DK policies underlying the coerced extraction of those confessions and perhaps also his familiarity with the contents of particular confessions. Sary's March 1978 account of "coups d'état," for example, echoed the accounts in numerous confessions since 1976 of purported plots that the Vietnamese supposedly directed³⁰⁰ and foreshadowed arrests over the

these elements held a rendezvous with the American CIA personnel at a point on the Thailand border. The American CIA man asked the Kampuchean, "How can you foment a coup when the Vietnamese have already failed?" He told them to go back and gather more forces and wait for April. In March, however, we arrested these CIA agents. Again in September, we captured a small group of people who were planning to attack our government. Some of them had been working for the CIA as far back as 1958, disguised as revolutionaries all the time.

Kampuchea Today, at 8, 47-50 (quoting Ieng Sary).

²⁹⁶ "Working with the Committees of Every Unit of Organization" (DC-Cam document with no cataloguing mark visible), Sept. 12, 1977, at 140-146. As noted previously, the term "sweep," like "smash" and "crush," was routinely used with reference to individuals to indicate euphemistically that they had been killed.

²⁹⁷ *Id.*

²⁹⁸ Thayer, *Death in Detail*, *supra* note 10; Thayer, *I Am in Danger*, *supra* note 10.

²⁹⁹ "Note of the Ministry of Foreign Affairs of Democratic Kampuchea", June 25, 1978.

³⁰⁰ For examples, see the "confessions" of Chan Chakrei alias Nôv Mean (CMR 15.7/TSA C176), "An Overall Perspective on the in Cambodia Plan of the Undercover Khmer Serei: The Complete Text of Chakrei, 170," Aug. 3-4, 1976, p. 25; Non Suon alias Chey Suon (CMR 13.28/TSA C150), "The Ninth Response of XII of Agriculture: Part Two: 1. Liaison Activities with Brother Khuon from May 1975 Until Early 1976 in Conformity with Ya's Introduction; 2. The Receipt of Plans from Viet Nam via Chhouk, Secretary of Sector 24," Jan. 15-16, 1977, pp. 6-7 and "XII's 13th Response: Post-Liberation Activities," Jan. 29 – Feb. 4, 1977, pp. 19-20; Sok Knol alias Pearn

next weeks and months of cadre who made similar confessions.³⁰¹ This suggests that Sary was aware of and agreed in general terms with the Party's strategy of arresting and eradicating those accused of "treason" by Pol, Nuon and Son Sen. The statements that Ieng Sary made to US Marxist-Leninists in April 1978 similarly reflected the confessions made by the cadre arrested in connection with the five supposed coups d'état that Sary mentioned,³⁰² as did the June 1978 Foreign Ministry announcement on the arrest of East Zone and other cadre purportedly involved in a sixth coup.³⁰³ These statements not only suggest that Sary was familiar with the subject matter of coerced confessions; they also imply that he agreed with the general policy adopted by Pol, Nuon, Son Sen of arresting and "smashing" those CPK members and others who were identified in these confessions as agents of the CIA, KGB and Vietnamese.

iii. Confessions

The substance of certain confessions indicates that Sary may have played a personal role in effecting the arrests of certain officials, and that the premises of the Foreign Ministry, for which Sary was responsible, was used as a place of detention for arrested Party cadre. Moreover, it appears that certain confessions came to Ieng Sary's direct attention, suggesting that he was aware of the Party's arrest and interrogation practices and of his own contributions to those practices. At least two "confessions" of cadre under the Foreign Ministry's authority were marked for transmission to Sary, and there is eyewitness testimony that Sary read in Ministry meetings from at least two other confessions. One of the two confessions copied to Sary, together with other evidence examined in Section IV(B)(2)(a)(iv) below on reports from the grassroots, provides evidence that Sary was aware that persons arrested pursuant to DK policies would likely be executed.

alias Lin (CMR 131.3/TSA S42), "On the Case of Sok Khnol alias Lin alias Peam, Chairman of the East Zone Office," Feb. 18, 1978; p. 4; Cho Chhan alias Sreng (CMR 12.25/TSA C120), "Post-17 April 1975 Activities," Feb. 23-24, 1977, p. 27; and Yun Seuan alias Yuoh (CMR 163.1/TSA Y63), "A Summary about the Case of Yun Seuan alias Yuoh, the Cottage Industry Chairman of the East Zone," Mar. 4, 1977, np.

³⁰¹ For some examples, see the "confessions" of Meah Chhuon *alias* Chhean (CMR 71.12/TSA M30), "Responses of the Contemptible Chhean, Secretary of Sector 22, East Zone, 21 June 1978," at 7, 11; "confessions" of Chou Chet *alias* Thang Si (CMR 12.22/TSA C117), "IV. From 17 April 1975 to 26 March 1978," May 9, 1978, np, and "IV. From 17 April 1975 to 26 March 1978," May 20, 1978, np; "confessions" of Heng Keum (CMR 35.8/TSA H96), "Responses of Heng Keum, Secretary of Division 5, East Zone: On the History of His Own Activities of Betrayal, 22 June 1978," pp. 20,45, and "Notes on the Responses of Heng Keum, Secretary of Division 5, East Zone Before His Arrest: On the Situation of the Secret Tunnels in the East Zone, 11 June 1978," p. 7; "confessions" of Kung Chea Sin *alias* Khoem *alias* Sun (CMR 16.4/TSA C180), "Record of the Responses of the Contemptible Sun, Secretary, Sector 20, East Zone, After 17 April 1975," June 20, 1978, p. 10; and "confessions" of Sâm Huoy *alias* Meah Tal (CMR 144.3/TSA S249), "Responses of Sâm Huoy *alias* Meah Tal, Secretary of Division 290, on the Story of His Own Personal Activities of Betrayal," nd, p. 28.

³⁰² For examples, see the early 1976 "confessions" of Sok Chhân (CMR 145.13/TSA 277), a cadre of Central Committee Division 170; the "confessions" of Duong Sam, a cadre of West Zone Sector 15; the late 1976 "confessions" of Mæan San *alias* Ya (CMR 80.36/TSA M270), the Secretary of the Northeast Zone; the "confessions" of Suoh Nôv *alias* Chhouk (CMR 132.4/TSA S54), Secretary of East Zone Sector 24; the "confessions" of Huot Sâmbat (CMR 35.1/TSA H89), the former GRUNK Ambassador to Yugoslavia; and the "confessions" of Hak Sieng Lay Ni *alias* Lân (CMR 39.10/TSA H224), the former GRUNK Deputy Secretary of State for Foreign Affairs. See also the early 1977 "confessions" of Pa Phâl *alias* Sot (CMR 110.11/TSA P126), Secretary of autonomous Sector 106; the "confessions" of Cho Chhan *alias* Sreng (CMR 12.25/TSA C120), Deputy Secretary of the old North Zone; the "confessions" of Tauch Kham Deuan (CMR 174.14/TSA T119), the head of a Foreign Ministry Department; and the "confessions" of Khæk Bin *alias* Sou (CMR 48.20,49.1/TSA K105), the Chairman of the DK-Thailand Liaison Committee.

³⁰³ For examples, see the "confessions" of Meah Chhuon *alias* Chhean (CMR 71.3/M31); Heng Keum (CMR 35.8/TSA H96); the "confessions" of Meah Mon *alias* Kæv Sâmnamg (CMR 71.10/TSA M28); the "confessions" of Chheum Sâm-aok *alias* Pâng (CMR 15.6/TSA C175); the "confessions" of Sâm Huoy *alias* Meah Tal (CMR 144.3/TSA S249); and the "confessions" of Sok Knol *alias* Peam *alias* Lin (CMR 131.3/TSA S42).

The February 1978 confessions of Meat Touch *alias* Kæm, a North Zone CPK cadre who had been appointed DK Ambassador to Laos in 1976, are marked in what appears to be Nuon Chea's handwriting for transmission to "Comrade Van" (Sary's *alias* when the CPK was in power) and have an additional note in what Duch has acknowledged to be his handwriting informing the "respected Brother" that Kæm "engaged in two activities in Laos: 1. In the imperialist department, he was in contact with the United Nations High Commissioner for Refugees organization...; 2. With the Yuon [Vietnamese], he worked constantly with the Yuon Ambassador." Kæm "confessed" that he indoctrinated Cambodians resident in Vientiane, the capital of Laos, to "see the difficulties and suffering of the people" back in Cambodia, including "the suppression of rights and freedoms among the people, and the implementation of a dictatorial regime that was massacring the people." Kæm's appended "List of Names of Persons Involved in My Activities" includes the names of ten persons identified as having been "arrested already," and the names of 50 persons implicated in "treason" or other purported crimes who apparently had not yet been arrested.³⁰⁴

A second set of confessions marked for Sary's attention are those of San Pau, a combatant at the Phnom Penh "State Market," which was under the authority of the Foreign Ministry. The conclusion of these confessions, that "on 28 July 1978, the Organization arrested me and sent me straight to this place" (i.e., S-21), is followed by an appendix entitled "On Traitorous Forces Excerpted from the History of the Activities of San Pau, Combatant of the State Market." This includes the names of 34 individuals, two of whom are listed as having already been arrested.³⁰⁵

Further evidence that Sary had knowledge of confessions is provided by Laurence Picq, a French woman who worked at the Foreign Ministry. According to Ms. Picq, Sary read from the confessions of Van Piny *alias* Teut and Lean Sirivut, both of whom were later executed, to cadre in April 1978 and in so doing appeared to credit Piny's and Sirivut's "admissions" of being enemy agents.³⁰⁶ In this way, Sary affirmed the broader DK policy of targeting for arrest – which almost inevitably led to execution – CPK cadre believed to be 'agents' of foreign enemies.

Piny, a former GRUNK Deputy Foreign Minister, had recently been arrested out of the K-17 re-education camp (at Boeng Trabæk, in Phnom Penh) for ex-GRUNK and ex-FUNK officials, of which he was at the time chairman.³⁰⁷ Van Piny had trained as a diplomat and been a left-leaning student leader in the 1960s. He then became a leading member of FUNK in France in 1970 before relocating to Beijing. Van Piny's initial confessions described conflicts with Sary in Beijing during which Van Piny sided with non-Communist GRUNK diplomats in arguments over appointments and policy, and also instances in which he opposed CPK policies once he was placed in "re-education" after his return to Cambodia from China in September 1975.³⁰⁸ What Sary endorsed,

³⁰⁴ "Responses of Meat Touch *alias* Kæm, Kampuchean Ambassador in Laos: On the History of His Own Traitorous Activities, 9 February 1978" (BBKKh412).

³⁰⁵ "Responses of San Pau, State Market Combatant: On the History of His Own Treasonous Activities, 2 August 1978" (BBKKh353).

³⁰⁶ LAURENCE PICQ, *BEYOND THE HORIZON: FIVE YEARS WITH THE KHMER ROUGE* 122 (1989). Picq wrongly noted the spelling of the second individual's name as "Leang Sereivut".

³⁰⁷ See "Camp de rééducation de Beng Trabek sous la direction des Khmer Rouge (KR) dd Février 1977 au 7 Janvier 1979", nd, np; "Princess Sisowath Ayravady: Declaration" (Fait à Paris, le 22 Octobre 1989).

³⁰⁸ Van Piny *alias* Teut (CMR 183.29/TSA V26), untitled 13-page "confessions" dated Dec. 20, 1977.

however, was Van Piny's later confessions in which Van Piny portrays himself as an agent of the French intelligence services and of the CIA.³⁰⁹ The same admission of serving foreign intelligence agencies sealed the fate of Lean Sirivut, who had joined FUNK as a student in France in 1970, returned to Cambodia via Beijing after April 1975, and spent the remainder of his life in "re-education" until he was arrested and executed. Sirivut was arrested out of the K-15 camp (at Boeng Trabæk in Phnom Penh) in November 1977 in the wake of a series of criticisms by inmates of the camp of the CPK cadre in charge of it. Lean Sirivut "confesses" to acting on behalf of the CIA and KGB.³¹⁰

Van Piny's confessions point to a possible pattern according to which CPK, GRUNK and FUNK figures with a history of conflict with Sary, as well as disagreement with CPK policy, were the victims of arrest. This implication is reinforced by contrasting Piny's confessions with other documents, discussed below, suggesting that Sary attempted to assist certain Foreign Ministry officials to avoid execution.³¹¹ Another example of this possible pattern can be found in the confessions of Tauch Kham Deuan, who was originally one of the selected FUNK and GRUNK officials in Beijing inducted secretly by Ieng Sary into "the Party that Brother Ieng Sary represented" there.³¹² Kham Deuan "confesses" to having disagreed with the Party policy against peace negotiations with the Khmer Republic in 1972, when he was GRUNK ambassador to Cuba, and over the role of Sihanouk in early 1975, when Kham Deuan was GRUNK ambassador to China. He returned to Cambodia in December 1975 and, after a period of ideological training, was assigned to work in Sary's Foreign Ministry in February 1976, consistent with CPK policy at this time. Then, following a period at agricultural labour in the countryside in March, Kham Deuan returned to the Foreign Ministry. There, according to his confessions, he became involved in a plot supposedly codenamed S-808 directed by Viet Nam and carried out by KGB and CIA agents, of which he confessed he was one, to overthrow and execute Pol Pot, Nuon Chea and Ieng Sary, to arrest Khieu Samphan, among others, and to set up a new government. Kham Deuan was arrested on March 14, 1977, following the arrest of several officials of the Foreign Ministry³¹³ who had previously confessed to being part of Vietnamese and KGB plot against the regime.³¹⁴

³⁰⁹ See four-page "Summarized Article" of Piny's S-21 interrogator, Vun, Mar. 4, 1978.

³¹⁰ Lean Sirivut (CMR 67.9/TSA L101) "The History of the Treason of Lean Sirivut," Feb. 3, 1978.

³¹¹ See *infra* note 322, 323 and accompanying text.

³¹² Kham Deuan was inducted in September 1971. See CMR 174.14/TSA T119, "Responses of Tauch Kham Deuan, Coming from the Ministry of Foreign Affairs, on the History of His Own Activities," Apr. 18, 1977, pp. 23-24.

³¹³ Among the arrested officials were Heng Pech *alias* Chhân and Sean An, who, according to "confessions" evidence, had also had disputes with Ieng Sary. Chhân, a former student in the Soviet Union who joined FUNK in Beijing in 1970 and was appointed GRUNK Deputy Secretary of State for Military Supplies, first met Sary in 1971 when, as described in his confessions, "the Organization inside the country arrive[d] in Beijing." After Chhân fulfilled Sary's requirements that he work hard at "tempering" himself through labour and adopting an "absolute" attitude, Sary allowed Chhân to return to Cambodia in 1973, and he arrived inside the country in 1974. After spending additional time in the countryside, Chhân was summoned to Phnom Penh in the wake of the CPK victory in April 1975 and assigned to work at the Ministry of Foreign Affairs constructing "guest houses" for foreign diplomats. During 1976, according to his "confessions", Chhân contradicted Sary at meetings in the Foreign Ministry. When Sary asserted that life in Democratic Kampuchea was less difficult than during the war, Chhân responded with an aphorism from Lenin, whom he quoted as saying, "War is the time of seizing power. It's not as difficult as holding power." Chhân's confessions also describe conflicts with Sary over the construction of badminton courts and about the CPK's refusal to make greater use of technicians and technology. They furthermore describe how Chhân lambasted "leading cadre" of the Foreign Ministry for failing to accept criticism from the masses and for always relying on organizational instead of ideological methods to solve problems. Finally, Chhân's confessions indicate that although Sary declared in a November 1976 study session that the CPK's socialism, including its system of agricultural cooperatives, was "evolving well," he believed from his own observations that the reality in the countryside was one of ill-health, crop failure, food shortages, and authoritarian local cadre who fed themselves well at the expense of ordinary people. Chhân was arrested on December 18, 1976, and duly "confessed" to being a KGB agent. Heng Pich *alias* Chhân (CMR 39.3/TSA H217), "Heng Pich *alias* Chhân", Jan. 4, 1977, np; and "The First Round of the Answers of

It remains unclear whether such professional conflicts, assuming they occurred, led Sary to become involved in the decisions to arrest these men or any of the 50 or more cadre and other personnel subordinated to or closely associated with the Foreign Ministry who are known to have produced "confessions" prior to their executions at S-21.³¹⁵ However, the abbreviated "Biographies of Detained Prisoners" produced with attached mugshots by S-21 include a number that indicate that they were initially detained on the grounds of the Ministry of Foreign Affairs³¹⁶ and therefore tend to further implicate the Foreign Affairs Ministry and its leadership in arrests and executions. That other prisoners were "taken in" by S-21 from the Ministry of Foreign Affairs is attested to in various reports to Duch from S-21 interrogator Mâm Nai *alias* Chan.³¹⁷

The use of the Foreign Ministry as a place of detention, where certain Party cadre were forced to reside and generally could not leave, is described in the confessions of one CPK cadre, Khæk Bin *alias* Sou, who had been Chairman of the DK-Thailand Liaison Committee based in the Northwest Zone province of Batdambang. He recalls that "on 4 March 1977, a telegram from the Revolutionary Organization summoned me to Phnom Penh" from the Northwest. Sou then spent a month traveling with Sary on a tour of South and Southeast Asia.³¹⁸

Upon his arrival back in the country, Sou's "confessions" say,

the Revolutionary Organization detained and held me at the Ministry of Foreign Affairs here in Phnom Penh right up through May and June, during which time I was given no clear-cut duties. In other words, I remained at the Ministry of Foreign Affairs until 21 June 1977, at which time the Ministry of Security arrested me.³¹⁹

Heng Pich *alias* Chhân, Combatant of Office Bâ-1, Ministry of Foreign Affairs," Jan. 15, 1977, np.

³¹⁴ "Responses of Tauch Kham Deuan, Coming from the Ministry of Foreign Affairs, on the History of His Own Activities," Apr. 18, 1977, pp. 25-48. Similarly, Sien An, a one-time classmate of Sary at lycée in Phnom Penh and at a university in France, joined FUNK in Beijing and became GRUNK Ambassador to Viet Nam. However, according to the "confessions" of Sien An's wife, the two men developed ill-feelings toward one another when Sary was in Beijing and An was in Hanoi, and An felt that Sary was "dogmatic" and that Sary did not like him. An was arrested at approximately the same time as Chhân. "Confessions" of Prum Sieng (CMR 116.2/TSA P150), "Answers of Prum Sieng, Sean An's Wife," Jan. 16, 1977, np; for Sean An's own "confessions" file, which appears to be incomplete, see CMR 139.5/TSA 163.

³¹⁵ This observation is based upon Dr. Heder's examination of "confessions" held by DC-Cam and in the Tuol Sleng Genocide Museum.

³¹⁶ See, for example, the "biographies" of Aoy Kâng *alias* Mâm (DC-Cam Document I08455) ("confessions" in CMR 104.13/TSA O92); Yeum Yeuan *alias* Phop (DCCam Document I08456) ("confessions" in CMR 164.9/TSA Y83); Hak Seang Lay Ni *alias* Lân (DC-Cam Document I08457) ("confessions" in CMR 39.10/TSA H224); and Seng Kek Heang (DC-Cam Document I08502).

³¹⁷ For some examples of such reports, see Chan's reports of Aug. 21 and 27, 1977 and Sept. 8 and 23, 1977 (all contained in DC-Cam Document D1456, each of which give the names of prisoners received from the Ministry of Foreign Affairs).

³¹⁸ This part of Sou's "confessions" is confirmed by DK and other radio broadcasts. According to the former, Sary left Phnom Penh on March 4, 1977 and returned on April 1, 1977, having visited Burma, Sri Lanka, Singapore, Malaysia and Pakistan. For his departure, see Phnom Penh Radio, Mar. 4, 1977. For his return, see Phnom Penh radio, Apr. 1, 1977. A Burmese broadcast about Sary's visit to Rangoon lists the delegation members accompanying him as including Sam Sâm *alias* Roat, the Director of the ministry's Political Department; Thiounn Prasith *alias* San, Director of the Asian Affairs Department; Khæk Bin *alias* Sou, the Director of the Protocol Department; Ngov Song Eng *alias* Seila, the head of the Southeast Asia Section; and I Chhean, Sary's "security officer." Rangoon radio, Mar. 14, 1977.

³¹⁹ Sou "confesses" to having been a CIA agent since before he was recruited as a Communist in the 1960s. See CMR 48.20,49.1/TSA K105 and BBKKh353, "Article Transcribed from a Tape of Responses to Questions, Khæk Bin *alias* Sou: Contacts with the Thai: On the History of His Own Traitorous Activities, Transcribed on 21 July 1977."

It was while Sou was languishing in the Ministry that Ieng Sary made the speech on the anniversary of CPK victory in which he hailed the smashing of the "spy networks" of unnamed "enemies" and claimed that this was how the DK was preserving "the sacred fruits of our revolution."³²⁰ It was also in this period that some DK diplomatic personnel were recalled from their posts abroad after being implicated in earlier S-21 "confessions" and sent almost directly to S-21 upon their return, again suggesting involvement by the Foreign Ministry in arrests.³²¹

Very unusually, however, several department-level Foreign Ministry officials were named in the "confessions" of Tauch Kham Deuan and others arrested around this time as "traitors" for allegedly serving the CIA, KGB and Vietnamese, and yet were never arrested purportedly due to Sary's intervention. Almost all of these individuals had worked closely with Sary in Beijing or elsewhere.³²² Moreover, there are indications, again from the substance of confessions, that Sary may have attempted to assist other cadre to avoid execution. The confessions of Sun Ti *alias* Teanh, a former cadre of the armed forces General Staff who had been moved to the Ministry of Foreign Affairs before being arrested in December 1978, suggest that Sary may have coached Teanh by telling him that if he were arrested, he should explain that he was wrongly accused of being a CIA agent by others arrested before him, that he was innocent of "treason," and that therefore his life should be spared. A note Teanh addressed "with respect to the Brother Secretary of the Party", i.e., Pol Pot, via Duch, reads:

³²⁰ Radio Voice of Democratic Kampuchea, Radio Broadcast, Apr. 17, 1977.

³²¹ One such official was a non-Communist former student in the Soviet Union, Tan Chhay Heng, who had been a Secretary of the GRUNK Embassy in Yugoslavia. He hosted Sary there in 1972, when Sary accompanied Sihanouk, and in 1974, when Sary accompanied Khieu Samphan. Soon after April 1975, according to his "confessions," Heng sought permission to return to Cambodia, but received no response. Then, in mid-1976, he learned that Sary had told Cambodians living in France that Cambodia under the leadership of the "Revolutionary Organization" had abolished private property and made all resources collective property. Sary had said that all urban intellectuals had been evacuated to the countryside and that money was no longer in use in the country. Heng "confesses" that he believed that the evacuation of the towns would generate dissatisfaction among "millions" of people and would provoke opposition among rusticated intellectuals if their standards of living did not rise rapidly, which would be impossible unless Cambodia received considerable foreign aid. Nevertheless, Heng was encouraged to believe that the situation in DK was good and improving by DK Ministry of Foreign Affairs bulletins that he began to receive at his post in Yugoslavia. Then, on April 16, 1977, Heng received a letter from the DK Ambassador in China, Pich Cheang *alias* Thau, telling him that the "the Cambodian Ministry of Foreign Affairs had decided" that he was to return to Cambodia. He "confesses" to being concerned that the situation in Cambodia had evolved in such a way that former members of FUNK abroad like himself might no longer enjoy the confidence of the leadership. Such concerns were heightened by the lack of communication from earlier returnees. Nevertheless, Heng left Belgrade on May 7, 1977 and landed in Phnom Penh on May 14, 1977. After being held for two days in an office that he could not identify, he was transferred to S-21, where he "confessed" to being a KGB agent. Tan Chhay Heng (CMR 178.22/TSA T199), "First Round of Responses of Tan Chhay Heng, Embassy Secretary Coming from Yugoslavia: On His Own History of Betrayal", June 8, 1977, pp. 32-59. According to S-21 records, Heng died in S-21 from "illness" at "the place for doing torture during interrogation." See "Office S-21: Daily Roster of Prisoner Forces in Hand, 17 July 1977," in David Hawk, "Khmer Rouge Prison Documents from the S-21 (Tuol Sleng) Extermination Center in Phnom Penh," item 13. For one set of earlier "confessions" implicating Heng, see Hak Seang Lay Ni *alias* Lân (CMR 39.10/TSA H224), "Responses of Hak Seang Lay Ni *alias* Lân, Foreign Affairs, Third Round," Jan. 2, 1977.

³²² They included: Thiounn Prasith *alias* San, who had been Secretary General of the Politburo of the FUNK Central Committee, GRUNK Minister in charge of "Coordination of the Struggle for National Liberation", and Secretary of the local CPK branch in Beijing; Keat Chhon *alias* Mut, a FUNK Central Committee member who was "Minister Delegate to the Chairman of the GRUNK Council of Ministers" in Beijing, whom Sary inducted into the CPK in Beijing; Chan Yourann, a FUNK Central Committee member who had been GRUNK Ambassador to Senegal and remained a non-Communist; Ok Sakun *alias* Mân, a FUNK Central Committee member who had been head of the GRUNK Mission in France; Suong Sikeuan, a FUNK Central Committee member who was chief of the FUNK Propaganda and Information Office in Beijing; and Pech Bun Ret, who had been GRUNK ambassador in Guinea and Albania. According to a statement by Sikeuan in 1996, this group was spared arrest and thus their lives were saved due to Sary's "intervention." See *Open letter from Suong Sikeuan to Laurance Picq, 5 October 1996*, PHNOM PENH POST, Nov. 15-28, 1996.

My respects to the Party, which I respect more than my life. With respect, Comrade, friend, I have done wrong. I have not betrayed the Party. Before, I did not respond [i.e., to interrogation]. After being heavily beaten with the bar, I responded by making things up. I would like to consecrate my life to the Party. I ask the Party please not to arrest those wrongly named in my reports. These friends of ours are in fact good. I'm neither CIA nor a Khmer Serei ["Free Khmer", that is, a member of a supposedly CIA-backed Cambodian anti-Communist movement]. I would like ... that the Party and Comrade spare my life. I am a Communist who would like to consecrate my life to the Party. All this is [happening] because the contemptible Von [Vet], the contemptible Khæt and the contemptible Kung Sophâl implicated me in their answers as CIA I did not join up with them. Phnom Penh, 15 December 1978, [signed] Sun Ti *alias* Teanh.

In the margin, Teanh wrote, apparently to Duch:

These views are the substance of what Brother Van [i.e., Ieng Sary] instructed me at the Office of the Ministry of Foreign Affairs. Please, comrade, don't tear this up, as it is my last voice. 15 December 1978.³²³

While this note suggests that Sary attempted to assist Teanh protect himself from the allegations against him, it only adds to the evidence indicating that Sary shared the common knowledge within the Party that arrest on such allegations almost always led to execution.

iv. Reports from the Grassroots

Ieng Sary's likely knowledge for much of the period of CPK rule of killings and other crimes outside of Phnom Penh is further suggested by the fact that Sary was part of the same exclusive Standing Committee information network for reports from the grassroots as Pol Pot, Nuon Chea, Von Vet and Son Sen. This meant that Sary was copied on most of the telegrams and other messages described in Part IV.1, *supra*, that were addressed to Nuon Chea and other senior officials. These included reports on the arrest and ill-treatment of alleged enemy "agents" near the border with Viet Nam,³²⁴ the "smashing" of DK combatants who were allegedly in contact with the CIA in Thailand,³²⁵ and the interrogation of "no-good elements" in Central Committee military units.³²⁶ These reports also included requests to execute members of an upland minority group and former DK military personnel who had been judged "enemies" after interrogation,³²⁷ as well as for advice on what to do with prisoners who had "confessed" to wanting to join an armed opposition

³²³ Untitled item from his file (CMR 159.11/TSA S637). Teanh was nevertheless executed, as were other General Staff cadre who were evidently assigned to the Foreign Ministry in late 1978 pending arrest by S-21. These included Duch's predecessor as S-21 Chairman, In Lon *alias* Nat, who had joined the General Staff in 1976. In September 1978, Nuon Chea reassigned him to the Foreign Ministry. As a DK diplomat, he travelled first to Yugoslavia, and then to the United Nations in late 1978 together with Ieng Sary. While Sary went on to undertake further diplomatic work abroad, Nat returned to Phnom Penh, where he was arrested. In Nat *alias* Lon (CMR 43.10/TSA I66), "I Would Like to Report to the Communist Party of Kampuchea About the Dry Season Plan," pp. 3-4; and "Report to the Communist Party of Kampuchea on My Activities of Contacts with Foreigners," Dec. 31, 1978, pp. 1-3.

³²⁴ "Telegram 21, Band 676, Presented with Respect to Beloved and Missed Brother Pol, March 21, 1976" (N0001158).

³²⁵ "Telegram 50, Band 948, Presented with Respect to Beloved and Missed Brother, July 18, 1976" (N0001345).

³²⁶ "To Brother Respected and Missed Brother 89 [Son Sen], March 3 1976" (N0001147).

³²⁷ Telegram 07, Band 545, "Be It Please Reported to Respected Brother, June 15, 1977."

group,³²⁸ local Party cadre who refused to follow orders from above,³²⁹ and local cadre who had committed "morals violations" and been implicated in the "confessions".³³⁰ In addition, the reports included proposals to send suspected enemy "links" in the local armed forces for interrogation by S-21.³³¹ As available evidence does not suggest that Sary had authority to decide upon arrests and executions,³³² it appears likely that the proposals and requests for advice contained in these documents were directed to Pol Pot, Nuon Chea and, in some instances, Son Sen, rather than Sary. Nevertheless, transmission of copies of these documents to Sary would have provided him with knowledge of the fate of the victims of arrests and interrogations.

Furthermore, documents marked for transmission to Ieng Sary as well as to Nuon and other Standing Committee members in Phnom Penh included reports on numerous other incidents relating to the commission of possible atrocities. Among these are reports describing: the "sweeping away" (i.e. execution) of "undercover enemies" among former Khmer Republic personnel; the taking of measures against those deviating from CPK economic policies, and the purging of DK combatants accused of being "henchmen of undercover enemies";³³³ the co-operation between local political authorities and armed forces in smashing "all types of enemies,"³³⁴ the determination of Central Committee military units to sweep "cleanly away and without half-measures the undercover elements of the enemy,"³³⁵ the measures taken by local authorities to sweep cleanly away "enemies" who had fled from cooperatives or deserted from the armed forces³³⁶ or had allowed Vietnamese military penetrations;³³⁷ the discovery of "enemies" and "traitors" who were hoarding rice or suggesting that people flee to Thailand,³³⁸ the arrest of networks of "contemptible traitors" among ranking CPK cadre and their "henchmen" as part of large-scale purges of oppositionists in the Party,³³⁹ the "measures" taken against "contemptible" leading cadre who had allegedly been passing information to the Vietnamese;³⁴⁰ and the purging of ordinary people who had been taken to Viet Nam during Vietnamese incursions along the border³⁴¹

³²⁸ Telegram 14, Band 273, "Respected and Beloved Organization Be Informed that, June 25, 1977."

³²⁹ Division 260, Political Section, "Report: Presented to Beloved and Missed Brother 009, April 14, 1978."

³³⁰ Telegram Number 54, Band 290, "Respectfully Presented to Respected Brother, April 23, 1978."

³³¹ Telegram Number 21, Band 74, "Respectfully Presented to Respected Organization 870, December 21, 1977."

³³² According to Duch, for example, Sary "did not have the right to decide [on] killings." Thayer, *Death in Detail*, *supra* note 10.

³³³ Telegram 60, Band 1473, "Respectfully Presented to Beloved and Missed Committee 870, September 6, 1977."

³³⁴ Telegram 100, Band 292, "Please Be Informed, Brother Nheum, November 6, 1977."

³³⁵ Telegram Number 00, Band 354, "Respectfully Presented to Committee Mo-870, December 31, 1977."

³³⁶ Telegram 254, Band 745, "Respectfully Presented to Beloved Committee 870, January 10, 1978."

³³⁷ Telegram Number 71, Band 334, "Presented to Respected Brother, January 13, 1978."

³³⁸ Telegram Number 69, Band 228, "Presented to Respected Brother, January 11, 1978."

³³⁹ Telegram Number 324, Band 1230, "Respectfully Presented to Beloved Committee 870, April 10, 1978."

³⁴⁰ Telegram Number 16, Band 318, "Respected and Beloved Brother 009, Be Informed, March 20, 1978."

³⁴¹ Telegram Number 15, Band 791, "Respectfully Presented to Beloved and Missed Brother P, We would like to report on the situation in Sector 23, Sector 24 and on the Route 22 battlefield, as follows, January 19, 1978."

and of suspected Vietnamese "enemy link elements" among ordinary Cambodians living near the border.³⁴²

Moreover, Ieng Sary was copied on messages directed to Nuon Chea requesting advice about what to do with Vietnamese prisoners of war,³⁴³ mentioning the torching of civilian targets in Viet Nam³⁴⁴ and the "smashing" of Vietnamese civilians on Vietnamese territory,³⁴⁵ and reporting Vietnamese protests about alleged DK massacres of civilians³⁴⁶ and shelling of civilian targets.³⁴⁷

Finally, Sary was copied on some documents that, for an as-yet unknown reason, were not copied to Nuon Chea. These included an April 8, 1978 telegram reporting that Central Committee Division 703 Secretary Pin had been wounded when his vehicle hit an anti-tank mine, an incident that was blamed on "internal enemies." As a result, efforts were being made to "assess and research to find internal enemies in order to take timely measures" against them.³⁴⁸ Another message of the same day reported that DK forces had fought their way "into the Dong Thap population centre and the market south of Trapeang Peam and Toeng Chouv," all on Vietnamese soil, and brought "about the death and injury of many head while burning down hundreds of homes." It also reported that DK forces were "continuing to fire into Toeng Chouv with 107s and DK75s" (rockets and recoilless rifles, respectively). This message added that "the situation in the grassroots" in Cambodia itself "is that we are continuing with further purges one after the other."³⁴⁹

Altogether, these reports would appear to have provided Ieng Sary and others named on the distribution lists with substantial information about crimes committed not only at S-21 against cadre in Sary's own ministry, but also about atrocities committed more broadly throughout Cambodia. Further, as a senior leader in the Communist Party, Sary clearly would have been aware that these actions were perpetrated in the name of the Party.

b) Legal Analysis and Conclusions

The analysis in the preceding section reveals evidence of public speeches and statements made by Sary or issued by his Ministry that explicitly advocated or defended after the fact the Party's execution policies and that can reasonably be assumed to have encouraged

³⁴² Telegram Number 16, Band 634, "Respectfully Presented to Beloved and Missed Brother P, January 25, 1978."

³⁴³ Telegram 60, Band 378, "Respectfully Presented to Beloved and Missed Mo-870, October 29, 1977."

³⁴⁴ Telegram Number 82, Band 328, "Respectfully Presented to Beloved and Missed Brother Pol, November 18, 1977."

³⁴⁵ Telegram Number 15, Band 791, "Respectfully Presented to Beloved and Missed Brother P, We would like to report on the situation in Sector 23, Sector 24 and on the Route 22 battlefield, as follows," Jan. 19, 1978.

³⁴⁶ Telegram 46, Band 600, "Respected and Beloved Brother, June 15, 1977;" Telegram 62, Band 1474, "Respectfully Presented to Respected and Beloved Mo-81, August 4, 1977;" Telegram 68, Band 1630, "Respectfully Presented to Beloved and Missed Mo-81, August 30, 1977."

³⁴⁷ Telegram 56, Band 660, July 20, 1977.

³⁴⁸ Telegram Number 19, Band 150, "Respected and Beloved Brother, Be Informed, April 8, 1978." The document contains the handwritten notation, "Brother Van."

³⁴⁹ Telegram Number 18, Band 208, "Respected and Beloved Brother, Be Informed, April 8, 1978." As with Telegram Number 19, Telegram Number 18 contains the handwritten notation, "Brother Van."

officials at lower levels of the Party hierarchy to follow corresponding orders issued through the Party apparatus. This in turn suggests that Sary knowingly contributed directly and substantially as an aider and abettor to the commission of crimes throughout the country.

Ieng Sary appears to have contributed to the perpetration of atrocities in Democratic Kampuchea by encouraging the Party's execution policies and by facilitating or failing to prevent the mass arrests and transfers to S-21 of Foreign Ministry personnel.

Sary's complicity in DK-era atrocities may reasonably be inferred from his repeated and public encouragement of executions and other crimes in numerous public addresses and speeches, particularly in light of his position and status in the Party.³⁵⁰ Examples of such public remarks include a speech that Sary is reported to have made over Phnom Penh radio on April 17, 1977 declaring that the Cambodian people and Revolutionary Army had "smashed all the enemies' tricks" and "crushed their spy network,"³⁵¹ and a statement issued by Sary's ministry on June 25, 1978 hailing the purges that were conducted in the East Zone and other Zones in late May of 1978. The latter attributed the purges to a failed coup d'état plan by Viet Nam and warned supporters of such plans not to persist in their activities or they would likewise "suffer ignominious and heavy defeats."³⁵² Several of these statements foreshadow accounts of conspiracies set forth in the confessions extracted from cadre in the weeks and months that followed,³⁵³ suggesting that Sary and his Ministry endorsed the general view according to which the Party's top leadership, above all Pol and Nuon, were threatened by conspiracies within the Party that were properly eradicated by eliminating those involved.

All of these statements were made at times when atrocities were rampant, not only in Cambodia more broadly but specifically within Sary's Foreign Ministry. That Sary's comments may have contributed directly and substantially to the implementation of the Party's execution policies – for example, by encouraging them – is therefore strongly implied by the context in which those statements were made.

Further, while we have not reviewed any evidence indicating that Sary actively proposed or had the authority to order the arrest or execution of particular cadre, the considerable number of personnel in his ministry who were arrested, together with evidence revealing that the grounds of the Foreign Ministry were used to detain arrested cadre, suggest that Ieng Sary may have explicitly or tacitly authorized these acts. Indeed, as noted above, some documents, including confessions that mention Ieng Sary's interactions with certain confessors, suggest that

³⁵⁰ International criminal tribunals have determined that individual responsibility can arise from conduct that, while not tangible, facilitates or encourages the perpetration of a crime by, for example, providing moral support. See e.g. Furundžija Judgment (ICTY Trial Chamber II), *supra* note 88, ¶ 232 (concluding that "[o]n the issue of the nature of assistance rendered, the German cases suggest that the assistance given by an accomplice need not be tangible and can consist of moral support in certain circumstances. While any spectator can be said to be encouraging a spectacle . . . the spectator in these cases was only found to be complicit if his status was such that his presence had a significant legitimizing or encouraging effect on the principals"). See also *United States v. Otto Ohlendorf et al.*, in IV TRIALS OF WAR CRIMINALS UNDER CONTROL COUNCIL LAW NO. 10 572 (1949) [hereinafter "Einsatzgruppen Case"] (finding with respect to defendant Waldemar Klengelhoefer that he "has stated that his function in the Einsatzgruppe operation was only that of interpreter. Even if this were true it would not exonerate him from guilt because in locating, evaluating, and turning over lists of Communist Party functionaries to the executive department of his organization he was aware that the people listed would be executed where found. In this function, therefore, he served as an accessory to the crime").

³⁵¹ See *supra* notes 291-293 and accompanying text.

³⁵² See *supra* note 299 and accompanying text.

³⁵³ See *supra* note 301.

Sary was aware of arrests and confessions of cadre in his ministry and failed to intervene to prevent these activities.

Finally, Ieng Sary's knowledge of his contributions to atrocities can to a significant extent be inferred from the evidence described above. This includes, for example, Sary's own admissions that he knew by 1978 that some Khmer Republic officials had been executed and that reports of executions and ill-treatment at local levels had come to his attention,³⁵⁴ as well as reports and other documents that in fact appear to have been circulated to him during the time when atrocities were being perpetrated.³⁵⁵

³⁵⁴ See *supra* note 290.

³⁵⁵ See *supra* notes 324-331 and accompanying text.

3. Khieu Samphan

The evidence discovered in connection with Khieu Samphan, former Chairman of the DK State Presidium, while not as extensive as that identified in relation to the other subjects of this analysis, nevertheless implicates Samphan in CPK crimes. Available documentation points to Samphan's knowledge of CPK atrocities and suggests that he personally contributed to those crimes by making public statements supporting the underlying policies and by monitoring the manner in which regional and other authorities implemented them.

a) Evidentiary Analysis

Several categories of documents suggest that Khieu Samphan was well aware of the existence and implementation of the Party's execution policies. These include documents indicating that, through much of the DK period, Khieu Samphan occupied a number of senior CPK positions. Reports indicate, for example, that Khieu Samphan joined the Central Committee in 1971, perhaps as an alternate member.³⁵⁶ Pol Pot claimed that as of 1975, Khieu Samphan had "the status of a Central Committee member," an ambiguous formulation that seemed to suggest less than full membership.³⁵⁷ In any event, by the time of the CPK Congress in January 1976 Khieu Samphan was a full member of the Central Committee. As such, he was privy to the policies originating from that body, including the policy of arresting and executing persons suspected of being enemies of the regime.³⁵⁸ Even if his publicly proclaimed role as Chairman of the DK State Presidium established in 1976 was largely ceremonial, Samphan's membership in the Central Committee would have made him, as with all other Committee members, aware of the policy of executing all purported enemy agents.

In 1977, Khieu Samphan was promoted to Chairman of "Office 870," which operated as a form of cabinet for the CPK Central Committee.³⁵⁹ Although not formally a decision-making post, the Chairman of Office 870 had the duty "to keep track of the implementation" of the Standing Committee's policy decisions. In this capacity, Khieu Samphan would have become aware of the Standing Committee's arrest and execution decisions.³⁶⁰ In particular, it was in his capacity as

³⁵⁶ United States Embassy, Phnom Penh, Khmer Republic, "Khieu Samphan," March 1975. This two-page biography of Samphan compiled by the United States Embassy Political Section from intelligence and other sources states that Samphan was "reliably considered to be a member of the Central Committee" that had been established at the most recent CPK Congress, in September 1971.

³⁵⁷ Pol Pot made this claim to a delegation of Thai Communists in August 1977. See "Excerpts from the Document Entitled Pol Pot Presents the Cambodian Party's Experiences to Khamtan, the Secretary General of the Communist Party of Thailand (Informal Talks Held in August 1977)," translation by Christopher E Goscha and Thomas Engelbert of a Vietnamese translation of a CPK document.

³⁵⁸ Stephen Heder interview with Ieng Sary, Jan. 4, 1999, *supra* note 10. According to Chandler, "[t]he Party Center was the nerve center of the country. Its membership altered over time, but its highest-ranking members, who were also those more directly concerned with the operations of S-21 – Pol Pot, Nuon Chea, Ta Mok, Son Sen, and Khieu Samphan – remained members throughout the regime and, indeed, into the 1990s." CHANDLER, VOICES FROM S-21, *supra* note 15, at 15.

³⁵⁹ "870" was a code-number for the Central Committee. For recounts of early reports of Khieu Samphan's appointment to Office 870, see *Pol Pot and Khieu Samphan*, *supra* note 106. These reports were confirmed in Dr. Heder's interview with Ieng Sary on January 4, 1999. This followed the arrest in February of that year of Office 870's previous Chairman, Sua Vasi *alias* Deuan, who had held this post since at least October 1975. See Deuan, "Confessions" (CMR 153.13,154.1/TSA S474). " For some information on Deuan's actual functions, see his "confessions", "On My (Deuan's) Traitorous Plans Regarding Emplacing Traitorous Forces Inside the Organisation's Office," April 18, 1977; and "My (Deuan's) Encounter and Conversation With Phin of the Ministry of Public Works Near the Srah Khlung in Front of Onnalom Pagoda in Around August 1976 (I Don't Remember Precisely)," June 2, 1977.

³⁶⁰ Office 870 was one of the offices given the authority in 1975 to make decisions on "smashing within and outside the ranks" of the Party. "Gathering of the Standing [Committee], 9 October 1975" (referring to this body as "the 870 Political Office"). However, this

Chairman of Office 870 that Khieu Samphan was present as a "note taker" at a secret meeting in the first half of 1978 at which Pol Pot, Nuon Chea and Son Sen ordered the purge and execution of East Zone Secretary Sao Pheum and most other leading CPK military and political cadre in the East Zone.³⁶¹

That Khieu Samphan knew of CPK atrocities is reinforced by evidence of his apparent familiarity with the existence and content of confessions. As with Ieng Sary, certain evidence indicates that Khieu Samphan read from the substance of confessions during public gatherings and was therefore aware of their existence and content. According to a former CPK member interviewed in 1996, at a meeting in the Olympic Stadium in late 1976 Khieu Samphan read out the confessions of Mæn San *alias* Ya, the Secretary of the Northeast Zone,³⁶² as well as confessions of other recently arrested persons.³⁶³ In his confessions Ya "admits" to the crime of treason, a crime that was widely recognized within the Communist Party to result in execution; accordingly, Samphan's familiarity with this confession strongly suggests his knowledge of Ya's fate and that of similar "confessors."

Khieu Samphan may also have received reports from the grassroots that would have put him on notice of the arrest and ill-treatment of alleged enemy "agents" near the border with Viet Nam,³⁶⁴ the "smashing" of DK combatants who were allegedly in contact with the CIA in Thailand,³⁶⁵ and the interrogation of "no-good elements" in Central Committee military units.³⁶⁶ Reports containing this and other information, previously described in Part IV (1) and (2) concerning Nuon Chea and Ieng Sary, were marked to be sent to "Office" (*muntir*) and to "documentation" or archives (*aekasar*). Because the formal functions of Office 870 included monitoring the implementation of Standing Committee policies, there is reason to believe that the "Office" in question in these reports may have been Office 870, which Khieu Samphan chaired from early 1977, and/or that Office 870 was in charge of the Central Committee archives.

This evidence is buttressed by incriminating statements by or attributable to Khieu Samphan since the fall of Democratic Kampuchea. On July 15, 1987, Khieu Samphan's Office of the Vice President of Democratic Kampuchea for Foreign Affairs issued a document attempting to absolve Pol Pot and himself and others then still alive of any responsibility for "mass killings" or avoidable deaths while the CPK was in power.³⁶⁷ Despite its general aim, the document concedes

authority appears to have been usurped by S-21. "The Decisions of the Central Committee on a Number of Miscellaneous Matters," *supra* note 105.

³⁶¹ Thayer, *Death in Detail*, *supra* note 10; Thayer, *Duch Confesses*, *supra* note 10.

³⁶² "Confessions" of Mæn San *alias* Ya (CMR 80.36/TSA M270). Mæn San had been arrested in September 1976.

³⁶³ Cited in CHANDLER, VOICES FROM S-21, *supra* note 15, at 59-60, 180, n. 47. GRUNK figures like Huot Sâmbat may have been among such persons.

³⁶⁴ "Telegram 21, Band 676, Presented with Respect to Beloved and Missed Brother Pol, March 21, 1976" (N0001158).

³⁶⁵ "Telegram 50, Band 948, Presented with Respect to Beloved and Missed Brother, July 18, 1976" (N0001345).

³⁶⁶ "To Brother Respected and Missed Brother 89 [Son Sen], March 3 1976" (N0001147).

³⁶⁷ Office of The Vice-President of Democratic Kampuchea in charge of Foreign Affairs, "What Are the Truth and Justice About the Accusations Against Democratic Kampuchea of Mass Killings from 1975 to 1978?" (July 15, 1987).

that the CPK executed some 11,000 of its own members for being Vietnamese agents. Of these, according to the document, only some 8,000 appear to have been truly involved in trying "to systematically carry out activities to overthrow Democratic Kampuchea."³⁶⁸ The remaining 3,000 executed persons "died from our mistakes." These were people who were mistakenly netted in the course of "measures to arrest and punish ... Vietnamese agents." Significantly, the document acknowledged that these victims were executed even though they were either "minor offenders or innocent civilians."³⁶⁹ This statement directly contradicts a prior statement that Samphan believed that only one person was falsely accused, arrested, and executed.³⁷⁰

The release of this document was preceded by other statements by or attributable to Khieu Samphan in which he conceded knowledge of at least some arrests and executions, though he typically insisted that he and other surviving CPK Central Committee members did not commit mass murder. During an interview conducted in August 1980, the year following the collapse of the CPK regime, for example, Samphan claimed that any executions that had occurred had been committed by traitors within the CPK, who had been executed. After asking himself rhetorically and euphemistically whether there had been "things that adversely affected the lives of the people," he replied, "there were indeed," although "not on the scale of a massacre." He quickly added that the existence of such killings "should be clarified: they existed as a result of the Vietnamese agents, Khmer agents who the Vietnamese infiltrated into the ranks of our state power, where they furthermore had quite important roles," such as Zone Secretaries. Then, in an apparent allusion to the purges of these and other alleged "traitors," Khieu Samphan said that, "by 1977-78 we had basically sorted them out and put proper order into the situation inside the country."³⁷¹

Other evidence indicates that Khieu Samphan personally contributed to CPK crimes. While no evidence has surfaced to date indicating that Khieu Samphan had the right to decide whom to arrest and order killed on his own authority or that he was directly involved in the execution of former Khmer Republic officials, he publicly endorsed taking measures against the enemies of the revolution in a way that suggests knowledge and support of the policy of executing purported enemy agents. For example, in a commentary on the Constitution broadcast on the occasion of its promulgation in December 1975, Khieu Samphan warned that "foreign imperialists" were trying to "infiltrate" and "subvert" DK. He declared a determination to "fight them no matter what disguises they use" and to "oppose them at all costs."³⁷² At the time this statement was made, S-21 was

³⁶⁸ They included the alleged organizers of six supposed "coups d'etat," the leaders ("chief traitors") of which it said acted "in connivance with the Vietnamese."

³⁶⁹ *Id.*, pp.5-7.

³⁷⁰ Stephen Heder interview with Khieu Samphan, at the then-headquarters of the CPK Central Committee in Siem Reap province immediately over the border from Thailand, August 4, 5, 1980. During this interview, Samphan maintained that maintained that none of the leading Party cadre who had been killed were innocent, with the exception of "one old man, in the West."

³⁷¹ *Id.*

³⁷² Tape-recorded report by Khieu Samphan to the FUNK Third National Congress, Dec. 14, 1975, as broadcast by Phnom Penh radio, January 5, 1976. This was followed by more general, but perhaps more indicative, statements. In an April 1976 address on the first anniversary of the "liberation" of Phnom Penh, he called on the Cambodian people always to maintain a "spirit of revolutionary vigilance" against their enemies. Tape-recorded speech by Khieu Samphan at a mass meeting in Phnom Penh on April 15, 1976, as broadcast by Phnom Penh radio on April 15, 1976. Four months later, in a speech to a conference of the Non-Aligned Movement, he asserted that DK's purported domestic policy successes were attributable in part to the maintenance of "internal security throughout [the] country", which he declared had created "an excellent environment in which our people can work to rehabilitate and rebuild the economy and country and gradually strengthen their administrative power." Tape-recorded speech delivered in Colombo, Sri Lanka on August 18, 1976, as broadcast by Phnom Penh radio on August 21, 1976.

already operational and at least 18 persons who had been arrested and were subsequently executed there had produced "confessions" indicating that they were enemy secret agents. In light of Khieu Samphan's position in the CPK power structure, statements of this nature may have encouraged lower-level cadre to arrest and execute suspected traitors, including those from the former Khmer Republic.

The substance of certain confessions also indicates that in late 1976, Khieu Samphan was directly involved in work on the Party's behalf to investigate dissidence in the Ministry of Propaganda and, in this capacity, was aware of the suicide of at least one ministry cadre suspected of treason, Prum Sam-A, who had feared arrest and execution.³⁷³ When dissident remarks made by Sam-A came to the attention of "the Organization," likely a reference to Nuon Chea,³⁷⁴ the Organization dispatched Khieu Samphan to the Ministry of Propaganda to transmit instructions "to conduct further investigations in order to determine whether or not he was an enemy." In early 1977 Sam-A realized that he was about to be arrested and killed himself. Khieu Samphan immediately reported his suicide to "the Organization," again probably a reference to Nuon Chea, following which Samphan gave instructions that Sam-A's body "be disposed of secretly."³⁷⁵

Other confessions provide indications that after his assumption of the Office 870 Chairmanship, Khieu Samphan began working directly with the senior leadership of the Party, either through Nuon Chea or possibly with the Standing Committee as a whole, to ensure proper implementation of his Party superiors' decision to carry out a more general purge of Communist Party ranks. In August 1977, for example, according to the confessions of West Zone Secretary Chou Chet *alias* Thang Si, Khieu Samphan arrived in the West Zone to conduct an investigation into the unclear situation earlier purges and other problems had provoked. His investigation looked into conflicts between Si and his Deputy, Heng Pal, and his reports apparently contributed to a decision by the Organization to arrest Si.³⁷⁶

These events were followed by a speech delivered by Khieu Samphan, as Chairman of the State Presidium, on or about April 17, 1978, as part of celebrations for Democratic Kampuchea's April 17 National Day, in which he exalted in the "bitter defeats" of alleged agents of the Vietnamese inside the Communist Party who had already been arrested. Samphan said that they had engaged in "activities of subversion, spying and setting up cells, and attempts of coups d'etat in order to overthrow the Communist Party of Kampuchea and the Government of Democratic Kampuchea." He indicated he was not concerned that purges might deplete the ranks of the revolution's cadre, because they could be replaced with newer and better cadre.³⁷⁷ Delivered

³⁷³ According to the confessions of DK Minister of Propaganda Hu Nim, in late 1976 Prum Sam-A came under severe political suspicion after it was reported to Nuon Chea that Sam-A had connections with an already-arrested "traitor" and after Sam-A criticized deaths he declared resulted from CPK policies since April 1975. Sam-A voiced opposition to the CPK's evacuation of the towns, and also talked about his opposition to the CPK's insistence on constantly "intensifying class struggle." In Prum-Sam A's view, this had the effect of creating a large number of additional "class enemies," particularly among intellectuals. Hu Nim was arrested with reported Central Committee approval in April 1977. Chanthou Boua, trans, "Planning the Past: The Forced Confessions of Hu Nim", in David P Chandler *et al.*, eds., *Pol Pot Plans the Future* 311-313 (New Haven: Yale University Southeast Asia Studies Monograph Series 33, 1988).

³⁷⁴ See *supra* note 223.

³⁷⁵ Chanthou Boua, trans, *Planning the Past: The Forced Confessions of Hu Nim*, in David P Chandler *et al.*, eds., *Pol Pot Plans the Future* 311-313 (New Haven: Yale University Southeast Asia Studies Monograph Series 33, 1988).

³⁷⁶ Chou Chet *alias* Thang Si (CMR 12.22/TSA C117), "IV. From 17 April 1975 to 26 March 1978," May 20, 1978, pp.48-49.

³⁷⁷ [Democratic Kampuchea] (np, nd), "Speech by Comrade Khieu Samphan, President of the Presidium of the State of

during the first stages of a new series of widespread purges that netted not only Chou Chet, but also senior cadre in the East Zone, this speech was followed one month later by a massive purge of the East Zone as a result of a secret decision that, according to Duch, Khieu Samphan recorded.³⁷⁸

Confessions also indicate that Khieu Samphan assisted in the mid-1978 purge of the CPK East Zone by helping to ensure that at least one cadre marked for arrest did not suspect the imminence of his detention. This was Veung Chhaem *alias* Phuong, a fellow member of the Party Central Committee who was in charge of DK rubber production. Phuong visited Office 870 for discussions with Pol Pot and Nuon Chea, ostensibly about reorganization of the East Zone. In one meeting, Nuon Chea reassured Phuong that if there was anything he needed to make himself more comfortable, he should get it from Khieu Samphan. Khieu Samphan then hosted a dinner at Office 870 with Phuong and other Party Central Committee members who were about to be purged, at which they discussed the arrests that had taken place so far. Phuong was subsequently arrested on June 6, 1978 in Phnom Penh.³⁷⁹ Phuong's arrest may have been discussed at the 1978 meeting recorded by Khieu Samphan in which Pol Pot, Nuon Chea and Son Sen ordered the purge of the East Zone.³⁸⁰ Evidence relating to Phuong thus suggests that Khieu Samphan may have contributed to the commission of some CPK atrocities with full knowledge of the implications of his role.

b) Legal Analysis and Conclusions

Our analysis of evidence pertaining to DK State Presidium Chairman Khieu Samphan suggests his individual responsibility for executions perpetrated in Democratic Kampuchea. In addition to indicating that Khieu Samphan was aware of the Party's execution policies and failed to take any steps to bring them to an end, the evidence suggests that Samphan knowingly contributed to the implementation of the Party's execution policies by making public statements in support of those policies and by investigating on behalf of the Party the manner in which certain regional authorities implemented the policies.

As noted above, Khieu Samphan made numerous public statements from December 1975 forward endorsing the Party's efforts to purge itself of traitors. These included an April 1978 address on the first anniversary of the "liberation" of Phnom Penh in which Khieu Samphan exalted in the "bitter defeats" of alleged agents of the Vietnamese inside the CPK who had already been arrested for having engaged in "activities of subversion, spying and setting up cells, and attempts of coups d'etat in order to overthrow the Communist Party of Kampuchea and the Government of Democratic Kampuchea." Also as noted above, in that same speech, Khieu

Democratic Kampuchea, at the mass meeting held on the occasion of the Third Anniversary of the Glorious April 17 and the Founding of Democratic Kampuchea."

³⁷⁸ According to the ICTY, for example, individual responsibility will arise from any act of assistance by words or acts that lend encouragement or support to the commission of a crime. See Furundžija Judgment (ICTY Trial Chamber II), *supra* note 88, ¶ 235; Tadic Judgment (ICTY Trial Chamber II), *supra* note 262, ¶ 689.

³⁷⁹ Veung Chhaem *alias* Phuong (CMR 123.2/TSA P322), "On the Responses of Phuong, Chairman of the East Zone Rubber Plantations, About the Record of Phuong's Traitorous Activities from February 1978 Through to the End", July 23, 1978, pp. 76-77. In his "confessions" Phuong stated that as a result of the deceptions to which he was subjected, "during the four days that I was at Office 870 I never suspected that it was a certainty that the Organization would arrest me." *Id.*

³⁸⁰ See *supra* text accompanying note 361.

Samphan indicated that he was not concerned that purges might deplete the ranks of the revolution's cadre, because they could be replaced with newer and better cadre.³⁸¹ As the previous discussion indicates, these statements were made during periods when the execution of non-Communist members of the DK population and the purges within the CPK itself were proliferating. In light of Samphan's senior position, these statements may have had an encouraging effect on the perpetration of arrests and executions. Further, the contents of several confessions suggest that Samphan was actively involved in facilitating the identification and arrest of potential enemies by, for example, investigating suspected dissidents in the Ministry of Propaganda,³⁸² investigating the manner in which purges were being conducted in the West Zone so as to contribute to the arrest of CPK cadre Thang Si who was subsequently executed,³⁸³ and aiding in the arrest of another cadre from the East Zone in mid-1978 who was likewise executed.³⁸⁴

That Khieu Samphan was aware during these pertinent periods of the arrest, interrogation and eventual execution of Party cadre pursuant to CPK execution policies is suggested by several categories of evidence. As noted earlier, Khieu Samphan was from January 1976 onward a full member of the Central Committee and held the position of Chairman of Office 870 beginning in early 1977 with responsibilities extending to monitoring the Standing Committee's policy decisions.³⁸⁵ In both of these positions, Samphan would have been privy to documents and other information concerning the Party's execution policies. This would have included the Central Committee's March 1976 decision, discussed in Part III, *supra*, to delegate to Zone Party Committees and certain other Party committees the authority to execute those who were allegedly guilty of serious crimes against the revolution.³⁸⁶

Samphan also was present during the 1978 meeting at which Pol Pot, Son Sen and Nuon Chea decided to purge the East Zone.³⁸⁷ Other evidence indicates that Khieu Samphan read publicly from the content of confessions in late 1976;³⁸⁸ this, when considered in light of his likely knowledge of the Party's execution policies, also suggests that he was aware of the existence of confessions and possibly their function in implementing the policies.

Certain statements attributable to Khieu Samphan since the fall of Democratic Kampuchea further reinforce our conclusion that he was aware of DK atrocities. These include in particular the July 1987 statement issued by Khieu Samphan's Office of the Vice President of

³⁸¹ [Democratic Kampuchea] (np, nd), "Speech by Comrade Khieu Samphan, President of the Presidium of the State of Democratic Kampuchea, at the mass meeting held on the occasion of the Third Anniversary of the Glorious April 17 and the Founding of Democratic Kampuchea".

³⁸² See *supra* note 373 and accompanying text.

³⁸³ See *supra* note 376 and accompanying text.

³⁸⁴ See *supra* note 379 and accompanying text.

³⁸⁵ See *supra* notes 359-361 and accompanying text.

³⁸⁶ See *supra* note 112 and accompanying text.

³⁸⁷ See *supra* note 361 and accompanying text.

³⁸⁸ See *supra* notes 362-363 and accompanying text.

Democratic Kampuchea for Foreign Affairs suggesting that at least 3,000 minor offenders or innocent civilians were wrongfully executed by the CPK regime.³⁸⁹

³⁸⁹ See *supra* notes 367-369 and accompanying text.

4. Ta Mok

There is significant evidence that Ta Mok, the former head of the Southwest Zone and member of the Central Committee, played a central role in implementing the Communist Party's execution policies. This included directing subordinates to arrest and execute Party cadre and failing to prevent or punish atrocities perpetrated by his subordinates in the Southwest Zone.

a) Evidentiary Analysis

i. Position and Role in the CPK

Ta Mok joined the Indochinese Communist Party in 1950 in his home province of Takæv, where he held the position of District Chief. In the late 1950s he was active as a Communist organizing in the Southwest Zone, and in 1963 he was appointed a member of the Central Committee of the Cambodian Communist Party.³⁹⁰ In 1968, he became Secretary of the Southwest Zone, a post that provided the platform from which he became a member of the Standing and Military Committees of the Central Committee. These positions afforded Ta Mok the *de jure* and *de facto* authority to direct the conduct of CPK subordinates, in particular those in the Southwest Zone.

ii. Post-DK Statements by Ta Mok and other Officials

Considered together, post-DK statements made by Ta Mok and other officials suggest that Ta Mok was not only aware of the perpetration of atrocities in Democratic Kampuchea, but possessed and utilized the authority of a Zone head to implement the Party's execution policies. This evidence supports a case against Ta Mok of both individual and superior responsibility for CPK crimes.

Ta Mok has claimed to have been ignorant of DK-era atrocities. Speaking in 1997, Ta Mok admitted no responsibility for or knowledge of DK-era killings, but rather blamed such events on Pol Pot and Duch alone. He admitted that he had been "responsible for the countryside" in late 1978, but not for killings there or at S-21.³⁹¹ Insisting that the "crucial" individual in Kampuchea was Pol Pot, Mok said that the Central Committee Secretary was directly in charge of S-21, along with Duch. He argued that "Pol Pot ... was responsible" for S-21 because "in Kampuchea, Pol Pot was the Number One individual." Thus, by Mok's account, "all tasks in Kampuchea were those of the Number One individual. Even Nuon Chea knew nothing. And Son Sen, moreover, knew even less than nothing."³⁹²

Although Ta Mok conceded that the Standing Committee "held meetings" and "joint study sessions" in which its members "did consult and discuss things with one another," he asked rhetorically,

³⁹⁰ See Mok's remarks on "Khmer Rouge Pol Pot Trip Three 'Nuon Chea,' Copie des Rushes BETA SP K7 No 24; NUON CHEA, HISTORY OF THE STRUGGLE MOVEMENT, *supra* note 168.

³⁹¹ "Khmer Rouge Pol Pot Trip Two 'Interview,'" Copies des Rushes BETA SPK K7 NO 12 VHS PAL TC.I.

³⁹² *Id.*

Did Pol Pot consult on the question of killing human beings? Did he ask anyone else? It was Pol Pot and the prison chief ...: just the two of them. Once somebody was arrested, that prison chief took them for interrogation, then took things to Pol Pot, and Pol Pot made the decision. Inside the [Standing] Committee it was not understood what was going on. The Committee did not interfere in security matters.³⁹³

Thus, Ta Mok claimed to be "not certain, not clear about" what went on at S-21 because all such matters were exclusively "Pol Pot's affair."³⁹⁴

Statements of Ieng Sary and Duch, while apparently corroborating Ta Mok's claim that he had no direct responsibility over S-21, contradict Mok's protestations of complete ignorance of and non-involvement in its operations and in local killings in the Southwest Zone. According to Duch, "Ta Mok had his own prison" in the Southwest Zone where, under Ta Mok's authority, "many were killed" often after torture. Duch also claimed that he had heard that Ta Mok, acting on Nuon Chea's orders, "personally arrested" Standing Committee member Penh Thuok *alias* Von Vet "at his house" in Phnom Penh in November 1978 in order to send Von Vet to S-21.³⁹⁵ According to Sary, although after 1975 Ta Mok's membership in the Military Committee of the Central Committee was nominal,³⁹⁶ and although it was "Pol Pot, Nuon Chea [and] Son Sen" who made the overall decisions about "killings and massacres," they relied on Ta Mok in his capacity as a Zone Secretary to carry out their decisions in this regard.³⁹⁷ Nuon Chea remarked that "not a few died over in the Southwest" as a result of killings there.³⁹⁸ These statements are consistent with the authority that Ta Mok possessed as head of the Southwest Zone to implement the Party's execution policies. To this extent, the March 1976 Central Committee decision described in Part III appears to corroborate the assertions by Sary, Duch and Nuon Chea that Mok was deeply implicated in atrocities.

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ See Thayer, *Death in Detail*, *supra* note 10; Thayer, *I Am in Danger*, *supra* note 10. On the arrest of Von Vet, Duch claimed that he was repeating what he had been told by Nuon Chea's wife. See "Confessions" of Von Vet, CMR 124.17/TSA P374.

³⁹⁶ Stephen Heder interview with Ieng Sary, Dec. 17, 1996, *supra* note 10. Ieng Sary claimed that although in name Ta Mok and East Zone Secretary Sao Pheum "were still there" in the Military Committee, "in concrete terms, it was as if they weren't in it."

³⁹⁷ The True Fact, *supra* note 199,

³⁹⁸ NUON CHEA, THE HISTORY OF THE STRUGGLE MOVEMENT, *supra* note 168.

iii. Confessions

DC-Cam documents indicate that prisoners were transferred to S-21 from the Southwest Zone,³⁹⁹ and the S-21 archives contain the confessions of more than thirty CPK cadre and others from that Zone. In light of Mok's leadership position in the Zone, he must have been aware of the transfer of such a significant number of subordinates from his jurisdiction.

Moreover, Ta Mok appears to have received incriminating confessions that would have at the very least put him on notice of CPK crimes. Several confessions are marked for transmission to Mok, a sampling of which point not only to guilty knowledge on his part as to arrests and executions, including the mass murder of civilians, but also to his direct involvement in local killings and arrests of persons implicated in S-21 confessions. These include the confessions of Teum San *alias* Sit, the Secretary of a District in Southwest Zone Sector 25, which are marked as having been "Sent to Brother Mok Already, 12 November 1977," and also have the cover notation "Southwest." They describe a peasant demonstration in the Sector that was suppressed "by arresting the demonstrators and taking them to be killed and disposed of." Local armed forces arrested 50 demonstrators "and then took ten of them out and killed them."⁴⁰⁰

The March 1978 confessions of Saom Chea *alias* Sdaoeng, who until his arrest was the Secretary of Southwest Zone Sector 25, also suggest Ta Mok's knowledge of executions and his active role in vetting confessions, as they are marked with the statement "Comrade Mok Has Read Already; Handed over on 18 April 1978."⁴⁰¹ Chea describes a May 1975 meeting between his arrested predecessor as Sector 25 Secretary, Chey Suon (*alias* Ta Chey *alias* Seng),⁴⁰² and the then Secretary of Sector 24 of the neighboring East Zone, Suoh Nôv *alias* Chhouk, also already arrested,⁴⁰³ at which

Ta Chey stressed that nowadays there were powerful contradictions within the ranks between the line according to which it was necessary from then on to proceed and most of the leading cadre, who were not in unity with the Party over its contents, because the new road of making socialist revolution that was being travelled was repressive, dogmatic and constricted the rights and freedoms of every human being, and particularly of veteran cadre who had stuck with the struggle for a long time already, who had to be purged because this category was being labelled as having outmoded ideas, as carrying lots of old baggage, as

³⁹⁹ For examples of prisoners transferred from the Southwest Zone to S-21, see the notes from Chan to Duch on "prisoners taken in" dated August 24, 1977, September 29, 1977 and October 22, 1977 (all in DC-Cam document D1456).

⁴⁰⁰ "History of the Traitorous Political Activities of Teum Sen *alias* Sit, Secretary of Kah Thom District, Sector 25, Southwest Zone, 20 October 1977" (BBKKh440).

⁴⁰¹ "Responses of Saom Chea, Formerly Secretary, Sector 25, Southwest Zone: On the History of His Traitorous Activities, Transcription Completed 30 March 1978" (BBKKh644). In addition to the notation of transmission to Ta Mok, the cover sheet has an earlier note, in the hand of Duch, which reads: "Respected Brother, this document is clear only on his history as a CIA (both recruitment and his assignments to subordinate himself to one person after another's management right up through the contemptible Chey); his recent history is still not at all clear. I would like to present it to you provisionally for your information. With respect! Duch, 1 April 1978."

⁴⁰² For Ta Chey's "confessions", see CMR 13.28/TSA C150.

⁴⁰³ Suoh Nôv *alias* Chhouk (CMR 132.4/TSA S54) entered S-21 on August 31, 1976.

being unable to keep up with those who were making socialist revolution, who had to be swept cleanly away.⁴⁰⁴

The "confessions" of Kung Kien *alias* Eung Vet,⁴⁰⁵ described earlier because they implicate Nuon Chea in guilty knowledge of executions, are also attached to cover sheets indicating that the confessions were sent to Mok for follow up action in the form of notation that read, "excerpts presented to Comrade Mok already, [??] May 1977." Moreover, the marginal note on these confessions in what Duch has acknowledged to be his handwriting specifies that the "contemptible Tan Meng" was already "smashed" by "Brother 15," an *alias* for Ta Mok. The cover sheet notations also draw attention to the fact that some of the people whom the "confessions" allege were "involved" in treasonous activities "are from [Sectors] 33 and 35," both of which were part of the Southwest Zone. The implication that these "confessions" were sent to Ta Mok for follow-up action is heightened by numerous instances of marginal notes, underlining, "X" marks and boxing of names scattered throughout the text. The context in which these notes appear clearly indicates that the persons whose names were identified were contemplated as candidates for arrest and execution.⁴⁰⁶

Finally, Vet's "confessions" end with an appendix entitled "On the List of Traitorous Forces Within My Network." It lists a total of 65 names, four noted as "arrested," twelve noted as "removed by the Organization," and three noted as "removed abroad by the Organization." Twenty-six of the remaining names are either accompanied by an "X" mark or underlined.⁴⁰⁷ Accordingly, both the

⁴⁰⁴ According to these "confessions," Ta Chey was in favor of a movement "to oppose a Communist Party that was unjustly oppressing and slaughtering [kap-sâmlap] the people," a movement that "had a correct line, namely, to liberate the nation and people from a Communist regime that was oppressing and slaughtering the people by compelling the people to work like draught animals, without any rights or freedoms whatsoever." However, according to this account, those who hoped for such a movement

both in the grassroots and in the army were constantly being purged and swept cleanly away. The level of the Organization's clean sweeps was always constantly on the rise starting in early 1976 right through to 1977. Therefore all that anybody could think of was their worries and fears.

⁴⁰⁵ "Responses of Kung Kien *alias* Eung Vet, Secretary of Battalion 631, Regiment 63, Division 164: On the History of the Activities of Kung Kien *alias* Eung Vet: 'He Himself Confesses', 26 May 1977." DC-Cam document BBKKh300.

⁴⁰⁶ Thus a note in the margin of Vet's confessions specifying that "Sâm" has already been smashed by the grassroots is juxtaposed with another note next to a list of the names of 16 persons described as "links of Sâm" who were purportedly involved in "agitating the people so that they would have contradictions with the Revolutionary Organization." The note reads: "Please locate." Further down, next to names of four more people implicated as "traitors," a marginal note reads: "Find." Where Vet's "confessions" refer to one cadre who he says "the Organization has already arrested" and another cadre who he says is "currently in S-21," the confessions then list another four persons who "conducted activities contrary to the line," and an "X" is placed next to one of the four. A passage then appears in which Vet lists six more persons who he "confesses" ignored the Party line, and next to the last two there is again the instruction, "Please Find." Further down, Vet mentions another cadre, "Sângkum, formerly the Srae Cham district committee", who was supposedly involved in an anti-Party conspiracy, and here a box is drawn around the name Sângkum. Vet also "confesses" that shortly after April 1975, someone named "Srâh assigned Run and me to take a letter to Chhaom, District Committee in Sector 35, at Kah Tauch." A box is drawn around the name Chhaom and his location. Vet then "confesses" to being one of seven persons present at another conspiratorial meeting. The names of the six other individuals are underlined. After several more passages in which names of individuals implicated in Vet's "confessions" are underlined or have boxes placed around them, he [who? Vet?] mentions having attended a meeting of military cadre in Phnom Penh in October to November 1975, "at which time I met with Seuan (Battalion at Kah Kong) and Phat (Battalion at Kah Kong) These two [said] that a link who had come to live in Kah Kong was Thi (battalion) who was with them, too." At this point in the document, a marginal note appears that reads "Kah Kong" together with an "X" mark, and boxes are drawn around all three names, which had appeared higher up in the text with the instruction, "please locate." Then, again after several passages in which certain names are variously underlined or boxed, Vet's "confessions" implicate as traitors "Sâmnam (Secretary, Company, gone to study in China)," who Vet "confesses" he told to "liaise" with two other supposedly treasonous links, "Hân and Uoch." At this point in the document, a marginal note appears which reads "important", and the names Hân and Uoch are boxed.

⁴⁰⁷ Another example of confessions marked for transmission to Ta Mok that mention arrests and suggest that Mok may have been asked for authority to carry out more arrests are the "confessions" of Thou Hai, dated February 1978. These confessions are marked "hold for Sending to Comrade Mok, Relations to Sectors 25 and 33, Southwest," and have the additional notation, "Contacted 28

content and circulation of these confessions appear to implicate Ta Mok's knowledge of and involvement in executions.

b) Legal Analysis and Conclusions

The evidence reviewed in the preceding section establishes a *prima facie* case of Ta Mok's criminal responsibility for CPK crimes on several different bases. Most notably, it indicates that as the head of the Southwest Zone, Ta Mok directed subordinates to arrest and execute CPK cadre, giving rise to his individual responsibility for those crimes. The evidence also indicates that Ta Mok may be criminally responsible as a superior for failing to prevent or punish atrocities perpetrated by subordinates under his authority and control in the Southwest Zone.

i. Individual Responsibility

The documents we have examined include potentially probative evidence that Ta Mok may have ordered and, on occasion, personally conducted arrests of cadre in his capacity as Secretary of the Southwest Zone, and accordingly may be held responsible for the subsequent and inevitable execution of these individuals. Evidence of Ta Mok's involvement in such crimes includes Duch's description of Mok's prison in the Southwest Zone and his allegation that Mok personally arrested and sent to S-21 Standing Committee member Penh Thouk, commonly known as Von Vet, in November 1978.⁴⁰⁸

The contents of certain confessions further suggest Mok's personal involvement in executions. One confession, for example, contains a marginal note in Duch's handwriting indicating that Mok "smashed" cadre Tan Mang, which in the context suggests that Mok ordered the execution.⁴⁰⁹ Other notations on confessions include the word "find" and "X" marks next to the names of other cadre listed in the confessions as traitors, all of whom were located in Mok's Southwest Zone.⁴¹⁰ These notations imply that the confessions had been sent to Mok with direction as to whom to arrest, further suggesting Mok's personal involvement in the arrest and execution of cadre. Finally, evidence indicating that more than thirty CPK cadre from the Southwest Zone appear to have been sent to S-21 suggests that Mok, as head of the Zone, must have been aware of, if not involved in, the transfer and execution of this number of subordinates, all the more because Mok or his subordinates would have originally appointed these cadre and would have been responsible for appointing their replacements.

In addition to inferences that may appropriately be drawn from Mok's orders to his subordinates to commit crimes, indications of Mok's knowledge of arrests and executions include his participation in senior decision-making bodies responsible for the Party's policies,

March 1978." They conclude with a section entitled "Names Mixed Up in the Biography of Thou Hai," which gives the names of four people who have already been arrested. Each of the names of 14 other individuals, all residing in Southwest Zone Sector 25, is accompanied by an "X" mark. History of the Traitorous Activities of Thou Hai, Former Casual Worker, Before Arrest a Sawmill Worker at the A-5 Factory, 12 February 1978 [Notation:] Hold for Sending to Comrade Mok, Relates to Sectors 25 and 33, Southwest [Notation:] Contacted Mar. 28, 1978 (BBKKh38).

⁴⁰⁸ See *supra* note 395 and accompanying text.

⁴⁰⁹ See *supra* note 405 and accompanying text.

⁴¹⁰ See *supra* note 406 and accompanying text.

the apparent transmission of confessions to Mok and the transfer of a significant number of cadre from the Southwest Zone to S-21, where execution was imminent.

- ii. Superior Responsibility
 - a. Superior-Subordinate Relationship

Ta Mok's *de jure* authority over subordinates in the Communist Party is established by virtue of positions he held within the CPK hierarchy, including Secretary of the Southwest Zone and his membership in the Standing Committee.⁴¹¹ As indicated previously, the power attributed to the Southwest Zone Secretary was augmented by the March 30, 1976 decision by the Central Committee granting Zone secretaries complete control over "smashing" within and outside of party ranks in their Zones.⁴¹² These positions gave rise to Mok's potential responsibility as a superior. While he may have occupied a lower position in the hierarchy than Nuon Chea or Pol Pot, his authority and control over subordinates was significant.⁴¹³

In spite of his insistence that Pol Pot alone controlled the CPK's instruments of terror, Ta Mok conceded in a 1997 statement that he was "responsible" for the "countryside" at least from November 1978,⁴¹⁴ which is corroborated by the cadre notebook entries from the November 1978 Party Congress referred to in Part III.B, *supra*.⁴¹⁵ In light of this authority, the doctrine of superior responsibility would render Ta Mok criminally responsible for passing illegal orders emanating from Phnom Penh on to his subordinates and for failing to prevent and punish criminal activity by his subordinates in his region of responsibility.⁴¹⁶

Various types of evidence also suggest Mok's *de facto* control over subordinates. According to Duch, Mok had his own jail in the Southwest Zone where executions were carried out under Mok's authority.⁴¹⁷ Also, Ieng Sary has claimed that Pol Pot, Nuon Chea, and Son Sen all turned to Mok to execute the Party's policies in the Southwest Zone, implying that Ta Mok had the necessary authority, including effective control over subordinates, to carry out the decisions for purging CPK cadre as well as more generally for executing ordinary people

⁴¹¹ Ieng Sary has claimed that Ta Mok also was a member of the Military Committee, although Sary also claims that Mok's actual participation and importance on the Committee were negligible. *Supra* note 396.

⁴¹² See *supra* note 112 and accompanying text.

⁴¹³ It is well established that the doctrine of superior responsibility may apply to superiors at all levels. See, e.g., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz, Christopher Swinarski, Bruno Zimmerman eds., 1987), art. 87, ¶ 3553 (indicating that "[t]here is no member of the armed forces exercising command who is not obliged to ensure the proper application of the Conventions and the Protocol. As there is no part of the army which is not subordinated to a military commander at whatever level, this responsibility applies from the highest to the lowest level of the hierarchy, from the Commander-in-Chief down to the common soldier who takes over as head of the platoon to which he belongs at the moment his commanding officer has fallen and is no longer capable of fulfilling his task").

⁴¹⁴ See *supra* text accompanying note 391.

⁴¹⁵ See *supra* note 191 and accompanying text.

⁴¹⁶ See, e.g., United States v. von Leeb, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 at 560-561 (1951) [hereinafter the "High Command Case"] (finding the defendant von Leeb responsible for the Barbarossa Jurisdiction Order by passing it into the chain of command).

⁴¹⁷ See *supra* note 395 and accompanying text.

accused of being Khmer Republic officers.⁴¹⁸ This claim is buttressed by evidence of the *de jure* authority of Ta Mok and other Zone heads to decide upon executions, as delegated by the March 1976 Central Committee decision,⁴¹⁹ and by the significant number of cadre from the Southwest Zone who were ultimately transferred to S-21 and whose fate therefore must have come to Ta Mok's attention.

b. *Mens Rea*

DC-Cam's holdings contain evidence that discredits Ta Mok's pleas of ignorance and indicate that he knew atrocities were being committed in his Zone and elsewhere. This includes, for example, a marginal note on a confession suggesting that Ta Mok participated, personally or through directions to subordinates, in the execution of a suspected traitor.⁴²⁰ Statements by Sary that Ta Mok received orders from superiors to carry out executions⁴²¹ also controvert Mok's purported lack of knowledge.

This evidence is reinforced by the transmission and contents of cadre confessions. For example, several confessions were specifically earmarked for Ta Mok's perusal, the receipt of which is corroborated by notations that indicate that he did indeed read them.⁴²² These "confessions" include descriptions of a mass killing in the countryside, the purging of veteran cadre from the CPK's ranks, and the cleansing of the army and the "grassroots."⁴²³

Circumstantial evidence as to the widespread nature of the atrocities committed in Cambodia and in the Southwest Zone in particular, together with Mok's position as Zone Secretary, his membership in both the Standing and Military Committees of the Central Committee, and his confessed participation in "joint study sessions" of these Committees,⁴²⁴ further support the conclusion that Mok knew, or at the very least had sufficient reason to suspect, that Party cadre were about to commit or had committed atrocities.

5. Kae Pok

There is evidence that Kae Pok, as a former Secretary of the North/Central Zone and member of the Central Committee, played a direct and substantial role in executions of CPK cadre by investigating and facilitating the arrests of suspected traitors in his Zone. It also appears that Pok, as Secretary of a Zone, may be held responsible as a superior for failing to prevent or punish atrocities committed by his subordinates.

⁴¹⁸ See *supra* text accompanying note 397.

⁴¹⁹ See *supra* note 112 and accompanying text.

⁴²⁰ See *supra* note 405 and accompanying text, citing marginal notes in Duch's handwriting in the confessions of Kung Kien *alias* Eung Vet.

⁴²¹ See *supra* text accompanying note 397.

⁴²² See *supra* notes 400-407 and accompanying text.

⁴²³ *Id.*

⁴²⁴ See *supra* notes 390, 393 and accompanying text.

- a) Evidentiary Analysis
 - i. Position and Role in the CPK

Evidence respecting Kæ Pok's position in the Communist Party suggests his direct responsibility for facilitating the implementation of CPK execution policies and his awareness of and responsibility as a superior for atrocities committed by subordinates under him, primarily in the North/Central Zone.

Kæ Pok joined the Communist Party in the province of Kampong Cham in 1957 and rose to become Deputy Secretary of the old North Zone in 1967. He became Zone Secretary in 1975, remained in his post when the Zone was reorganized as the Central Zone in 1977, and retained his position despite threats that he might be purged himself. He was also a member of the CPK Central Committee while it was in power. As a Central Committee member he was likely privy to its involvement in developing or implementing execution policies, and as a Zone Secretary he had the same powers as Ta Mok to execute cadre within his Zone.

Kæ Pok's Deputy, Cho Chhan *alias* Sreng, recalled in "confessions" after being purged that security services in the North extending from the Zone level down into the villages were responsible for carrying out a routine procedure for finding and executing former Khmer Republic officials in the countryside. By this account, local authorities were required to draw "up list after list" of those to be done away with, which were then submitted to the Zone Party of which Pok was Secretary to "sort out" who was to be killed. The same local authorities then sought out and arrested the named officials for "sorting out," namely interrogation and execution.⁴²⁵

Moreover, as with Ieng Sary and Ta Mok, movements of prisoners from Kæ Pok's region to S-21 are confirmed by S-21 daily rosters of "prisoners taken in,"⁴²⁶ and confessions exist for more than 100 cadre and others from the old North/Central Zone who were detained and subsequently executed by S-21.⁴²⁷ As elaborated below, these documents suggest that significant numbers of Kæ Pok's own subordinates were arrested and executed. They also imply that Kæ Pok must have been aware of the arrest and execution of cadre through the CPK apparatus.

⁴²⁵ "Confessions" of Cho Chhan *alias* Sreng (CMR 12.25/TSA C120), "I Would Like to Report on the Commissioned Officers Who Exited to the North Zone," Mar. 18, 1977, pp. 1-2. According to Sreng's "confessions," "[t]he grassroots areas [had] all successfully implemented these Party instructions [of successively smashing officers]. Every sector has implemented them at the levels of general officer, field-grade officer, and junior officer, and then also down to the level of enlisted men (those who were active), who the Zone stated were also to be swept out. There was quite a powerful dynamism with regard to this matter. Each sector drew up list after list, which was proposed to the Zone and sorted out one after the other. Actions to search for these officers have continued constantly right up to the present ... They were discovered not because the Zone Committee knew who they were. Rather, they were discovered by the grassroots' inquiries and investigations among the masses."

⁴²⁶ For examples of transfers of prisoners from the old North Zone to S-21, see notes from Chan to Duch dated August 13, 14 and 22, 1977; September 21 and 27, 1977; and October 4, 5, 19 and 27, 1977.

⁴²⁷ This observation is based upon Stephen Heder's examination of "confessions" held by DC-Cam and in the Tuol Sleng Genocide Museum.

ii. Confessions

The confessions of cadre from the North/Central Zone suggest that the perpetration of arrests and executions came to Kae Pok's attention, and indeed that Kae Pok played a role in directing certain arrests that inevitably resulted in executions.

Among the confessions of more than 100 cadre and others from the old North/Central Zone who were detained and subsequently executed by S-21, four have been discovered that are marked for transmission specifically to Pok. Others are marked for transmission to the Central Zone without further specification, and therefore might also have been directed to Kae Pok as head of the Zone.⁴²⁸

Among the confessions specifically marked for transmission to Pok are several that implicate him in knowledge of killings in his Zone, such as those of Aem Min *alias* Saen, a Member of Baray District Committee in Sector 42 of the Zone who had concurrently been the District's Vice-Chairman for Security.⁴²⁹ Describing CPK policy in April 1975, Saen's confessions state:

[A]ccording to the Party's plan arrangements were to be made to receive the people evacuated from Phnom Penh and provincial towns as well, keeping them to be put in place to live in the villages and subdistricts of the people. And as for those who had gone undercover among the people, it was imperative to remove them and put them in one place. And then assess and investigate them clearly. If any were found to be officers, then smash them one by one.⁴³⁰

Later,

The Party ... made a second instruction. The Party had us search out and seek to arrest every last one of those of officer rank who had gone undercover in the people's villages and subdistricts, and arrest them and put them in the Security Office, where they were to be detained for a clear assessment to learn which were officers and which were not, and then gradually sort them out as per the concrete reality.⁴³¹

Saen's confessions also mention that all of the members of a group that went to live undercover in Koki Thom subdistrict, Baray District, Sector 42 in December 1976 were later "smashed by the Party."

⁴²⁸ As with the total number of confessions of old North/Central Zone cadre found at the site of S-21, details of the content of those confessions, including the officials to whom they were addressed, are based upon Dr. Heder's examination of "confessions" held by DC-Cam and in the Tuol Sleng Genocide Museum.

⁴²⁹ Responses of Aem Min *alias* Saen, Round 1: On the Case of Aem Min *alias* Saen Himself, Member, Baray District, Sector 42. They are marked: "One copy sent to Comrade Pok Already, 14 May 1977" (BBKKh353).

⁴³⁰ *Id.*

⁴³¹ *Id.*

Saen's confessions further suggest that Saen and fellow "traitors" in his District had violated Party policy as of April 1975 by allowing some individuals of officer rank whom they had identified as such to survive evacuation and live with other "new people" in District cooperatives. After the second Party instruction, Saen and other "CIA links" had again supposedly violated Party policy. They "came out overtly to seize and tie up those of officer rank who had gone undercover in the villages and subdistricts of the people," and had thus

openly ... made arrests without maintaining secrecy, contrary to the Party's policy; that is, we arrested those of officer rank in the rice fields and other fields, in the worksites and in the villages and subdistricts. This let the people, new and veteran, see our activities⁴³²

The result was apparently that a "number of those with officer rank" became frightened and were able to survive at least temporarily by fleeing into the jungle. Then, some 40 persons who "were arrested and brought in to be detained at the Baray District Security Office, Sector 42" on suspicion of having had officer rank were released after two months of assessment and investigation that in many cases purportedly confirmed the suspicions. According to Saen's confessions, this happened because Chân, then Secretary of Baray District,⁴³³ gave instructions "to go easy on some of the prisoners," saying "these prisoners were nobody other than our own flesh and blood, so we had to be lenient with them, release them and let them go to work, and if they were then to flee, let them go ahead and flee."⁴³⁴ Confessions therefore appear to have come to Pok's attention that clearly illustrated the manner in which intra-Party arrests and subsequent executions were effected.

Other confessions that were sent to Pok contain arrest directions that appear from their content and context to have been directed to him. These include confessions made in May 1977 by Li Hak, the Chairman of a Technical School on the outskirts of Phnom Penh, which contain a notation of May 8, 1977 that reads "one copy sent to Comrade Pok," and adds: "implicates Comrade Dan, spouse of Comrade Sin [?] and the names of a lot of others in the North." The appendix lists 85 individuals, ten of whom are noted as having been arrested. In addition, a number of names have an "X" mark next to them, a box drawn around them, or a line under them, perhaps suggesting they were to be arrested. Five of these were cadre in the North Zone or the neighboring Sector 106. There is also a notation on the appendix, which reads, "This list does not excerpt all names: please also read the document."⁴³⁵ The possibility that Pok, as the principal recipient of such confessions, may have directed the arrests of cadre through notations of this nature reinforces his likely knowledge not only of the existence of confessions, but the functions

⁴³² *Id.*

⁴³³ The fate of this individual is unknown.

⁴³⁴ With respect to arrests, Saen's "confessions" have an appendix entitled "Table of the Names of Traitors Entangled in the History of Aem Min *alias* Saen." It lists sixty-eight persons, ten of whom are said already to have been arrested. Among the remainder are not only Saen's fellow "CIA links" within the Party, but also the former Khmer Republic military officers whom he "confesses" they had traitorously allowed to live.

⁴³⁵ "First Responses of Li Hak, Post: Chairman of the Reuhsei Kaev Technical School: On History and Traitorous Activities of Li Hak, 4 May 1977" (BBKKh536). The North Zone figures whose names are marked are: Haem, Chamkar Loe District Commerce cadre; Khim En *alias* Va, Zone Industry Chairman; and Seuan, Zone Commerce cadre. Those in Sector 106 are: Kât, a Deputy District Secretary; and Chun, a Sector Commerce cadre. Haem is noted as already arrested. Khim En *alias* Va (CMR 44.14/TSA K17) was evidently arrested in June and left "confessions" dated June 18 and 26, 1977. The fate of Seuan, Kât and Chun is unknown.

that the confessions played in identifying additional victims of the Party's arrest and execution policies.

iii. Reports from the Grassroots

In addition to confessions, certain reports from the grassroots, some from Kae Pok himself, that were discussed above in connection with Nuon Chea implicate Kae Pok in arrests and purges; some of these reports also reveal a discriminatory element that targeted certain groups such as the Islamic Cham community for "purging."⁴³⁶ Kae Pok's own telegram of April 2, 1976, for example, identified Cham, ex-Khmer Republic soldiers and dissident cadre as participants in opposition activities, reported arrests of the latter, and promised to take measures against any other "undercover links" in the revolutionary ranks that his surveillance uncovered.⁴³⁷ Kae Pok also asked for the assistance of the Central Committee in identifying two combatants he arrested in March 1978,⁴³⁸ which in turn appears to further implicate Kae Pok in arrests perpetrated by the Communist Party. And as described in Part III, arrests of persons targeted by CPK policies led in almost all instances to the interrogation and execution at S-21 of those individuals.

b. Legal Analysis and Conclusions

The above evidence indicates that Kae Pok may be considered individually responsible for executions of cadre from the North/Central Zone by having taken an active role in investigating and facilitating the arrests of suspected traitors from that Zone. It also appears from the evidence that in his capacity as Secretary of the North/Central Zone, Kae Pok exercised *de jure* and *de facto* authority over lower-level cadre and therefore may be considered responsible as a superior for failing to prevent or punish atrocities committed by his subordinates.

i. Individual Responsibility

The foregoing evidence, including the confessions and reports from the grassroots, suggests that Kae Pok contributed substantially, directly and knowingly to the commission of DK crimes. The confession of Pok's Deputy, Cho Chhan, commonly known as Sreng, for example, suggests that Kae Pok was involved in determining which former Khmer Republic officials who were found in the countryside in the North/Central Zone were to be executed based upon lists provided by local authorities.⁴³⁹ A telegram of April 2, 1976 from Pok himself to the Central Committee also attests to his direct involvement in arrests and executions in his Zone. The document reports the arrests of dissident cadre for participating in opposition activities, and it

⁴³⁶ Documentary evidence also suggests that Kae Pok and other senior CPK officials engaged in discriminatory practices more broadly, without an apparent connection to the commission of murders or other atrocities. For example, the November 30, 1975 message from the cadre who identified himself as Chhon regarding deportations of Cham revealed that Pok at least initially refused to allow the Cham into the North Zone, saying he would accept only "pure Khmer." "Telegram 15, With Respect to Beloved Brother Pol," Nov. 30, 1975 (N0001045). Such conduct, while contrary to basic human rights norms, does not constitute international crimes *per se*, absent a connection with, for example, the additional elements necessary to establish a crime against humanity. See *supra* note 92 (providing definitions of crimes against humanity as articulated by various international instruments).

⁴³⁷ "Telegram 94, Band 1100, With Respect to Beloved Brother Pol, 2 April 1976" (N0001187).

⁴³⁸ Telegram Number 32, Band 295, "Missed Committee 870 Be Informed," Mar. 29, 1978, signed Pok, p. 124.

⁴³⁹ See *supra* text accompanying note 425.

promises to take measures against any other "undercover links" in the revolutionary ranks that his surveillance uncovered.⁴⁴⁰ Also, as noted above, certain confessions appear to have been transmitted to Pok seeking his instructions, further indicating that Pok was directly involved in regulating the arrest and execution of cadre.

ii. Superior Responsibility

a. Superior-Subordinate Relationship

As a Zone Secretary and Central Committee member, Kae Pok possessed *de jure* authority over subordinates in the North/Central Zone, similar to the authority enjoyed by Ta Mok over subordinates in the Southwest Zone.⁴⁴¹ In addition, evidence has been identified which suggests Pok's *de facto* power over his subordinates. This includes, for example, the confessions of more than one hundred cadre and others from his North/Central Zone that were discovered at S-21 which suggests that Pok, as the head of the Zone, must have exercised some authority, actively or tacitly, to effect or facilitate the arrest and transfer of such a significant number of subordinates.⁴⁴² In addition, as in the case of Ta Mok, notations on certain confessions indicate that the documents had already been presented to Kae Pok as the head of the Zone for direction, further suggesting his *de facto* authority over the conduct of subordinates.⁴⁴³ Finally, confessional evidence describes a process by which local authorities drew up lists of suspected Khmer Republic officials in their areas and submitted them to the Zone Party, of which Pok was Secretary, to determine who was to be killed; the same local authorities then sought out and arrested the named officials for "sorting out," namely interrogation and execution.⁴⁴⁴ This process also suggests that Pok held a position of *de facto* as well as *de jure* superior authority in the CPK hierarchy.

b. *Mens Rea*

Other documentary evidence beyond the substance of confessions suggests that Pok knew or had reason to know of the atrocities committed by subordinates in his Zone who either executed Khmer Republic personnel or, under Pok's command, cooperated in the arrest of their fellow cadre. In particular, a report authored by Kae Pok vowed action against the Cham, ex-Khmer Republic soldiers, and wayward cadre, and included references to arrests in this regard.⁴⁴⁵ Further, four "confessions" are marked for distribution to Pok, including one that speaks of arrests of cadre in his Zone,⁴⁴⁶ while others were marked for transmission to the

⁴⁴⁰ See *supra* text accompanying note 437.

⁴⁴¹ See *supra* notes 112, 170-177 and accompanying text.

⁴⁴² See *supra* note 428 and accompanying text.

⁴⁴³ See *supra* note 435 and accompanying text.

⁴⁴⁴ See *supra* text accompanying note 425.

⁴⁴⁵ See *supra* text accompanying note 437.

⁴⁴⁶ See *supra* note 428 and accompanying text.

Central Zone and may therefore have come to Pok's attention by virtue of his responsibility for that Zone.⁴⁴⁷ As with the other CPK officials analyzed herein, evidence respecting such factors as the widespread nature of the atrocities and the number of victims involved further supporting the conclusion that Pok knew or had reason to know of atrocities within his Zone, and likely throughout Cambodia.

As noted in the introduction to this chapter, we have not identified any evidence suggesting that Pok took any or sufficient measures to prevent the crimes of his subordinates or to punish the perpetrators.

6. Sou Met and Meah Mut

Documents pertaining to CPK Military Division Chairmen Sou Met and Meah Mut provide compelling evidence of their direct involvement in the arrest and transfer to S-21 for execution of cadre from their Divisions. The evidence similarly suggests that both officials may be responsible for arrests and executions perpetrated by subordinates in their respective Divisions.

- a) Evidentiary Analysis
 - i. Positions and Roles in the CPK

Sou Met and Meah Mut are two surviving CPK cadre who held predominantly military ranks within the CPK just below the senior level, which positioned them to implement Party policies and influence the conduct of lower-level cadre.

Sou Met was Secretary of Central Committee Division 502,⁴⁴⁸ which incorporated the DK air force, and Meah Mut was Secretary of Central Committee Division 164, which incorporated the DK navy. Both had risen through the military ranks of the Southwest Zone and had family connections to its leadership. Met was the son of the late Ma Mâng *alias* Pang, who until his death in 1968 had been Secretary of the Southwest Zone. Meah Mut was the son-in-law of Mâng's successor, Ta Mok. Sou Met may have joined the Central Committee in November 1978, when he became a Standing Member of the General Staff Committee chaired by Son Sen.⁴⁴⁹ Of the seven officials who are the subject of this report, Met and Mut occupied positions which most clearly fell within the military hierarchy of the CPK, through the General Staff under Son Sen. As indicated in Part III, Son Sen, who was killed in 1997, was a member of the Central, Standing and Military Committees and was deeply implicated in CPK atrocities.

- ii. Minutes of General Staff Meetings

According to DC-Cam's holdings of the minutes of meetings of Central Committee military units as well as various messages between Son Sen and those units, in 1976 and 1977 Sou Met regularly and Meah Mut occasionally attended General Staff meetings, where they spoke, listened to reports by colleagues, and witnessed pronouncements by Son Sen. These minutes implicate Sou Met and Meah Mut's knowledge of arrests of civilians and CPK cadre as

⁴⁴⁷ *Id.*

⁴⁴⁸ Sou Met was, as mentioned above, among those to whom S-21 "confessions" were marked for transmission.

⁴⁴⁹ "Document about the Fifth Congress of PP-IS around November 1978."

revealed to them by Son Sen and by division and regimental cadre who attended these gatherings (almost all of whom are now dead), as well as their knowledge of various "smashings" and "sweepings," including of purge victims to whom the especially damning label of "super-traitors" was applied. The following detailed accounts of several of those meetings reveal Sou Met and Meah Mut's close involvement in and knowledge of the Party's arrest, interrogation and execution policies, and also reveal pertinent details of those policies as articulated by Chairman of the General Staff Son Sen.

On May 16, 1976, Sou Met attended a meeting of leading cadre of Central Committee divisions at which other secretaries reported on arrests their units had carried out -- arrests which, as indicated in Part III, were widely understood within the Communist Party to inevitably result in interrogation and death. Pin, the Secretary of Division 703 (later purged),⁴⁵⁰ informed those present of the arrest of "two skinny, long-haired persons...at the Central Market" in Phnom Penh, while Sâm Huoy *alias* Meah Tal (later purged),⁴⁵¹ the Secretary of Division 180 (290), reported that it had arrested "four enemies" -- "two CIAs" and "two soldiers."⁴⁵²

On August 30, 1976, Sou Met attended another General Staff meeting, which had as its first agenda item an "examination of enemy situations and measures." Opening the meeting, Son Sen reported that, four days earlier, there had been "enemy unrest at Ang Prouch, on the border between Kandal Steung district" of Sector 25 and the neighboring Sector 33, both in the Southwest Zone. Those involved in the unrest had "raised a white banner with the slogans 'Long Live Buddhism' [and] 'Long Live the White Khmer Front of Liberation from Rice by the Can'."⁴⁵³ This pro-Buddhist, anti-Communist, anti-communal movement had been "getting ready for major unrest," but it had "already been sorted out by the grassroots" political administration through the arrest of more than 160 people. Moreover, Son Sen explained, the "responses" of these individuals during interrogation revealed that there was "a nexus between this situation and our army," because the detainees had implicated Chan Charkei *alias* Nôv Mean, the former Secretary of Central Committee Division 170, which was based on the outskirts of Phnom Penh, as "their leader."⁴⁵⁴ Charkei had been removed as Division 170 Secretary and made a Vice Chairman of the General Staff on March 15, 1976 and was subsequently arrested on May 19, 1976.⁴⁵⁵

⁴⁵⁰ Pin was reportedly executed in 1979. See United States Embassy, Phnom Penh, "Debrief of ex-Senior Khmer Rouge Officer", 1994.

⁴⁵¹ Sâm Huoy *alias* Meah Tal entered S-21 on May 23, 1978 (CMR 144.3/TSA S249).

⁴⁵² "Minutes of the Meeting of Secretaries and Economics of Divisions, 0700 hours, 16 May 1976" (N0001229). A General Staff situation report covering the period from mid-July to the end of August 1976 notes that Division 164 had arrested four "workers" who had "cut the barbed wire and entered [an] ammunition dump" in late July. They had already been sent "to the police [nokorbal]." Summary of the Situation from July 15 until August 31, 1976 (N0001?08). The term *nokorbal* here appears to be a reference to the security services or "special branch" (*sânteba*).

⁴⁵³ "Minutes of the Meeting of Secretaries and Deputy Secretary of Divisions and Independent Regiments, 30 August 1976, 14.00 hours" (N0001407). "White Khmer" was a generic term for groups engaged in armed, anti-Communist, opposition activities. "Rice by the Can" refers to the food ration system according to which each individual member of a collective unit of organization was allocated a certain number of cans (or parts of cans) of uncooked rice per day.

⁴⁵⁴ *Id.*

⁴⁵⁵ For details of Chakrei's history, see Chan Chakrei *alias* Nov Mean (CMR 15.7/TSA C176).

As purported evidence that an "enemy ... leadership apparatus" was behind rural unrest and problems in the army, Son Sen pointed to the fact some Division 170 combatants had recently "deserted" and fled to East Zone Sector 20, and that there had also been "agitation to steal" in certain military units. Son Sen advised Sou Met and other senior military cadre present that they should "examine and keep track of no-good elements" in their divisions, and "organize for them to be administered separately," that is, cull them out of existing units and concentrate them some place apart. At the meeting, Sou Met reported that one of his men had deserted, while another had recently "hung himself to death." Other leading cadre recounted their units' recent arrests.⁴⁵⁶

Son Sen concluded at this meeting that it was "apparent that the enemy has commenced activities, and these are activities endowed with a leadership network because the news is the same and the slogans are the same." He warned:

The enemy would like to take the opportunity to gather up no-good elements, the status- and rank-conscious, those whose families we have swept out, those whom we have removed from their positions, and those who have not internalized the revolutionary movement and can't keep up with the rest, and, at the same time, the new people who don't yet understand things, whom we are putting in difficulty and temporarily lack food: the CIA enemy is finding opportunities to gather them all up to attack us.⁴⁵⁷

Sou Met attended another meeting of division leading cadre on September 16, 1976, where he listened to more reports of arrests and received more advice from Son Sen, and thereby gained further knowledge of the Party's policies targeting suspected "enemies."⁴⁵⁸ At this meeting, Son Sen expounded on what he referred to as "the enemy activities in the American imperialism and their lackeys department." In an apparent reference to the results of

⁴⁵⁶ Division 450 Secretary Chea Non *alias* Suong, who was later purged after having been arrested on or about February 17, 1977 (CMR 13.33/YSA C155), reported the arrest of a former courier who had fled into the forest "with the White Khmer." The Deputy Secretary of Division 310, Yim Chheuan *alias* Veuang, who entered S-21 on February 15, 1977 (CMR 165.13/TSA Y112), reported the arrest of two persons who had been "stealing food supplies in the Olympic Stadium and Calmette Hospital areas" of Phnom Penh. Under interrogation, these two detainees had "said they were looking to steal rice in order to make the trip" to their homes in the countryside. Veuang also reported that in Division 310 there was "theft and agitation to the effect that making socialist revolution means eating rice gruel with bindweed, and when we reach communism, we'll be eating plain bindweed." Central Committee Division 801 reported that one combatant of this unit deployed in the Northeast Zone who had tried to flee to Laos had been "caught and brought back," and under interrogation had said that "our revolution is strict and difficult, not like the Lao and Vietnamese Revolutions." A cadre from General Staff Logistics, who has not been identified with certainty but is named "Sav" and therefore may be Chhouk Sav (CMR 17.20/TSA C223, entered S-21 on November 2, 1977), revealed that an "old society fisherman" working under the General Staff "was active opposing the collective eating system, saying: 'What bullshit this socialist revolution is, eating rice gruel this way.'" *Id.*

⁴⁵⁷ Son Sen further insisted that although "95 per cent of the people ... are good," perhaps two per cent of the population comprised "no-goods," and that these existed within the army. He declared that it was "imperative to conduct further purges of no-good elements" and "to be absolute" with them "but not leftist." He explained this meant differentiating between those who were "supporters" of the enemy and those who were not, and among the supporters whether this was "because of not understanding or are they supporters because they are opponents in league with the enemy?" In either case, Son Sen insisted that the no-good elements must be removed from their units and be "concentrate[d] ... in one location" where they would be educated separately. He added that in no case should they be allowed "to go to the grassroots." *Id.*

⁴⁵⁸ For example, Division 310 Deputy Secretary Veuang revealed that his Division had detained a boy at Prek Kdam, north of Phnom Penh, "who said that a woman named Meuang ... assigned him to come and reconnoitre our arms dump in Phnom Penh." Prek Kdam is the site of a ferry crossing on the west bank of the Mekong River in Sector 15 (32) of the West Zone. No further information is available on Meuang. Also at this meeting, Division 703 Secretary Pin reported the arrest of "eight persons travelling by boat" off the coast of Kampung Saom who had been trying to escape to Viet Nam, and whom he said had been "sent back to the grassroots." "Minutes of the Meeting of Secretaries and Deputy Secretaries of Divisions and Independent Regiments, 16 September 1976, 07.00 hours" (N0001449).

the interrogation at S-21 of Cambodians who had been allowed to come back to Cambodia from the United States and other places since April 1975, he declared that "according to the responses of those returning from abroad who we sent to do production and who fled, they say they fled in order to report to the CIA in South Viet Nam." Their "responses" had supposedly also revealed a French and United States imperialist plan to attack Cambodian islands in the Gulf of Siam.⁴⁵⁹

Referring to "the infiltration links" of the previously arrested former Secretary of Division 170, Chan Chakrei *alias* Nôv Mean, Son Sen declared that "the Chakrei links are a major infiltration network that is in contact both with American imperialism and the revisionists" of the Soviet Union and Viet Nam, and that Chakrei's links had been "making contacts" within the Revolutionary Army "to win over those having contradictions over status and rank and those dissatisfied with our revolutionary regime." Son Sen indicated that this was because "Soviet, Vietnamese and CIA links were all connected to Chakrei," and claimed that "current agitation actions" within the armed forces demonstrated the existence of links to the CIA among "those with an incorrect revolutionary stance." All of this information proved that the army had been lax in allowing deserters and other undesirable elements who had been purged from the army during the 1970-1975 war to re-enter it after 1975, along with "newcomers who had never fought at all" and "even evacuees from Phnom Penh." Son Sen therefore called on leading cadre "to follow up troop biographies clearly and conscientiously, especially of those we have enrolled recently," apparently in order to weed out such elements by means that were not specified.⁴⁶⁰ Again, such directions appear to have exposed Division Secretaries like Sou Met and Meah Mut to the Party's "purge" policies and the methods by which they were carried out.

Both Sou Met and Meah Mut also attended a General Staff meeting convened on September 19, 1976, at which S-21 was represented by its number three cadre, Huy. They and other participants in this meeting heard another exposition on the situation from Son Sen, who called for continuing concern "about the activities of the enemies inside the country and inside

⁴⁵⁹ For returnees from the United States, see, for example, the "confessions" of Hieng Keumsreng (CMR 32.6/TSA H26), who was arrested in November 1975 and left "confessions" dated between December 25 and 29, 1975; Euang Huy You (CMR 91.11/TSA O45), who was detained on August 31, 1976 and left "confessions" dated between September 14, and 19, 1976; Srei Nam (CMR 150.8/TSA S373), who left "confessions" dated September 2, 1976; Heu Chheng Kuoy (CMR 36.23/TSA H142), who left "confessions" dated September 3 and 4, 1976; Nong Sâm-euan (CMR 85.5/TSA N84), who left "confessions" dated September 9, 1976; and Hing Sophat (CMR 33.6/TSA H50), who left "confessions" dated September 15, 1976. These individuals were among some 80 Khmer Republic military personnel undergoing training in the United States in April 1975 who demanded repatriation and resisted State Department attempts to dissuade them from returning home. Some threatened to starve or burn themselves to death if they had to stay in the United States. Eventually, the State Department offered to pay their air fares to Beijing so that they could go on to Cambodia, and the United Nations High Commissioner for Refugees facilitated their repatriation. See Cynthia Coleman, *Cambodians in the US*, in THE CAMBODIAN AGONY (David Ablin and Marlowe Hood, eds., 1987). See also *Cambodian Military Seek Repatriation*, US/Indochina Report (Washington, DC), Feb. 20, 1976.

⁴⁶⁰ "Minutes of the Meeting of Secretaries and Deputy Secretaries of Divisions and Independent Regiments, 16 September 1976, 07.00 hours" (N0001449). Also on September 16, 1976, Son Sen addressed a meeting of "Comrades" of Mut's Division 164, although it is not clear whether Mut was present. At this meeting, the participants discussed the discovery of alleged plans by a platoon cadre and some 40 other persons in the division to desert, and expressed concern about "strange activities" among "base people" near Kampung Saom that they blamed on former Khmer Republic soldiers engaged in "no-good movements." The term "base people" (*pracheachun mulathan*) refers simultaneously (and ambiguously) to those who lived in "liberated" base areas before April 1975 and those deemed to belong to what were considered "basic classes" (*vanna mulathan*), i.e., the "poor and lower-middle peasantry." Participants in this meeting also discussed the recent arrest of two ex-Khmer Republic first lieutenants. Son Sen instructed the Division to "arrest and interrogate" the accused platoon cadre, Vung Sruol, whose fate is unknown. He instructed it to make sure to "round up" deserters and make them "do production in one place," and also to "round up" all ex-Khmer Republic "soldier elements." He did not specify what should be done with the latter. "Minutes of Meetings of 164 Comrades, 9 September 1976" (N0001446).

our ranks," all of which were "CIA activities."⁴⁶¹ He emphasized that, although attacks by enemy networks "burrowing from within the grassroots and our army" had "been basically defeated" because the most important of these networks had now been "attacked and smashed," it remained

imperative to have the perspective that the enemies are not all gone; they are continuing further with their activities of attacking us. Therefore, do not be optimistic in a non-revolutionary way.

In particular, Son Sen told leading military cadre that they must "have an absolute standpoint about purging counter-revolutionary elements; don't be half-baked."⁴⁶²

Meah Mut and Sou Met also listened to reports of arrests from other leading division cadre. This included Division 310 Secretary Sbauv Him *alias* Euan (later purged),⁴⁶³ who reported that "a number of traitors" had been "discovered" in the division through what Euan described as "the concrete situation" and as a result of "responses from the outside," possibly a reference to "confessions" extracted at S-21.⁴⁶⁴

In his own report at this meeting, Meah Mut echoed elements of CPK purge policies, lamenting that there had been "powerful changes" for the worse with regard to "enemy situations" in September. First, he said, "thefts of everything have emerged." Second,

⁴⁶¹ In another apparent reference to those already identified as "traitors" by S-21 among Cambodians who had been allowed to return to the country from the United States and elsewhere, Son Sen said the first network included those who had "pretend[ed] to request to enter the country legally," as well as those infiltrators who had come "surreptitiously by way of the Thai border." According to Son Sen, their first "attack actions" had begun in June 1976. In an apparent allusion to their "confessions," Son Sen revealed that this network's plan was "to attack so as to liberate everything by 1980. They assassinate cadre and do surreptitious wrecking of fuel depots, airports and factories." A network of Soviet-Vietnamese agents had meanwhile also been "going all out to expand" their "infiltrators in the army and in the grassroots," also as part of a plan "to attack us and take us in 1980, like the CIA." As proof of their interconnectedness, Son Sen again offered

the case with the network of the contemptible Chakrei, who was a CIA who nevertheless had intimate connections with the revisionist networks in the grassroots of Sector 24 and Sector 25 that were connected to Viet Nam. He gathered in some cadre who had contradictions about rank and status. They got together with the idea of smashing our apparatus in April 1976. Simultaneously, they conducted little activities as political and military guerillas.

Despite the unmasking of Chakrei, continuing vigilance was imperative against the ongoing threat of an "enemy attack from the inside" by "those who are burrowing from within among us." Son Sen explained that those present must "grasp firmly the class perspective and that of class struggle," according to which the resulting contradictions "between revolution and imperialism-revisionism" were "of a more acute character than before." "Minutes of the Meeting of Secretaries and Logistics of Divisions and Independent Regiments, 19 September 1976, 0700 Hours" (N0001451).

⁴⁶² *Id.*

⁴⁶³ Sbauv Him *alias* Euan entered S-21 on February 17, 1977 (CMR 140.12/TSA S187).

⁴⁶⁴ In particular, Euan explained that "theft activities continue one after the other" and included thefts that were "political," which was "not something usual." He complained that although "re-education" to deal with such problems worked for "the good ones," who "mostly" improved, others "remain intractable and resist improvement." Moreover, despite more general political education, "one section of Party members" were "still not loyal" and were even "betraying the Party" because they were "dissatisfied and unhappy with the Party's Four Year [Economic] Plan," which had been under discussion at Party's highest levels since July 1976. "Minutes of the Meeting of Secretaries and Logistics of Divisions and Independent Regiments: 19 September 1976, 0700 Hours" (N0001451). The Plan had been discussed at meetings of the Standing Committee between 21 July and 2 August 1976. See *The Party's Four-Year Plan to Build Socialism in All Fields, 1977-1980*, in POL POT PLANS THE FUTURE: CONFIDENTIAL LEADERSHIP DOCUMENTS FROM DEMOCRATIC KAMPUCHEA, 1976-1977 36 (David Chandler *et al.*, eds, 1988). Pol Pot had presented the plan to a gathering of Communist Party cadre on August 21-23, 1976. See CHANDLER, VOICES FROM S 21, *supra* note 15.

somebody was "whipping up the word that there are tigers" about in Division 164's areas of operation. Third, "seven combatants from the motor pool set up a liberal unit of organization with their own commissar, commander and person in charge of logistics." Fourth, "combatants and cadre who have been hospitalized walk around freely." Finally, "some cadre" were misleading "their subordinates by saying the Organization has summoned them to a meeting, and then go motorcycle riding for fun."⁴⁶⁵

At the same meeting, Sou Met reported an "enemy situation" involving the discovery by Division 502 of a carbine in a place where a political study session was to be convened. This discovery had led him to "surmise ... that the enemy intended to kill our cadre while they were studying." He also reported that "no-good elements" in the Northwest Zone army who had been guarding an airfield near Batdambang town had been purged by the "grassroots" there. Furthermore, he lamented that, while most of his own cadre and combatants were "good and active in building socialism," some individuals were "still kicking back and insubordinate." In particular, one company cadre who had been assigned "to guard enemy women" had been accused of "being mixed up in problems of morality," that is sexual impropriety.⁴⁶⁶

Arrests by Sou Met's Division 502 were reported at a September 30, 1976 meeting of the General Staff presided over by one of its members, Siet Chhæ *alias* Tum (later purged).⁴⁶⁷ Under the agenda item "enemy situations," the minutes record that Sou Met's unit had been "able to arrest 15" combatants who had "deserted in September" and were now confined as "elements with tendencies and who are liberal."⁴⁶⁸ On October 9, 1976, Sou Met's deputy, Nhem San (later executed),⁴⁶⁹ sent a report to the General Staff on a new enemy situation that had resulted in Division 502's arrest two days previously of one Ov Pring,⁴⁷⁰ who had "responded" during interrogation that he "had conducted activities in Boeng Thom subdistrict, District 52, Sector 33, with the intention of conducting a demonstration on 12 October 1976 to oppose the

⁴⁶⁵ "Minutes of the Meeting of Secretaries and Logistics of Divisions and Independent Regiments, 19 September 1976, 0700 Hours" (N0001451). Mut evidently remained in Phnom Penh for some time after this meeting, and while there received reports on Division 164 actions from its Deputy Secretary, Hoeng Deuan *alias* Deum, who was detained in S-21 on April 21, 1977 (CMR 36.8; TSA H127). In a telegram on September 24, 1976, Deum explained that after the division had taken unspecified "measures against the enemy" that Mut had "decided," five of them "fled into the forest" but had been "pursued and arrested." A few days later, another telegram from Deum to Mut reported that on the night of September 23 the division had arrested "a boy, aged 16" who had "confessed" to being "an informer conducting reconnaissance for ... bandits" whom he said were armed with automatic rifles and pistols. "Telegram 11, To Brother Mut", Sept. 27, 1976 (N0001479).

⁴⁶⁶ "Minutes of the Meeting of Secretaries and Logistics of Divisions and Independent Regiments: 19 September 1976, 0700 Hours" (N0001415).

⁴⁶⁷ Siet Chhæ was publicly identified as a Member of the General Staff by the official Radio Voice of Democratic Kampuchea on February 7, 1977. He entered S-21 on April 29, 1977 (CMR 138.11/TSA S153).

⁴⁶⁸ "Minutes of the Meeting on Production Work, Night of 30 September 1976, Oct. 3, 1976" (N0001487).

⁴⁶⁹ On San's position as of October 1976, see "Table of Statistics on Students Studying at the First General Staff Study Session, 20 October 1976" (N0001512); and "First General Staff Study Session, 20 October 1976, Revolutionary Life Outlook, Table of Splitting Up into Groups by Unit of Organization" (N0001511). San was later made Secretary of Division 920, replacing Mæng Meng *alias* Chhin, who was purged in early 1977. (Chhin entered S-21 on March 16, 1977 [CMR 78.2/TSA M172]). In 1997, San was arrested by Ta Mok and condemned to "life imprisonment" for carrying out Pol Pot's order to kill Son Sen. See "Translation by David Ashley of 4 Tape Cassettes Recorded by Nate Thayer in Anlong Veng, 25 July 1997 [Final Version, 18 August 1997]". Ta Mok told Nate Thayer during an interview that San was executed in March 1998. See Nate Thayer, *The Resurrected*, FAR EASTERN ECONOMIC REVIEW, Apr. 16, 1998, Nate Thayer, *Nowhere to Hide*, FAR EASTERN ECONOMIC REVIEW, Apr. 23, 1998, Nate Thayer, *Dying Breath*, FAR EASTERN ECONOMIC REVIEW, Apr. 30, 1998.

⁴⁷⁰ The individual referred to as Ov Pring is otherwise unidentified.

revolution." Pring had also "revealed" the names of some 33 "of his cronies," all of which were listed in the report.⁴⁷¹

Meah Mut and Sou Met then attended an October 9, 1976 meeting of division cadre convened by Son Sen.⁴⁷² They heard Division 450 Secretary Suong (later purged) speak of problems with "cadre whose parents have been swept out" before listening to reports by their deputies Deum (later purged) and San. Deum reported four recent arrests by Mut's Division 164,⁴⁷³ and San similarly referred to "some arrests on the 502 front."⁴⁷⁴ He also reported that Division 502 suffered from "desertion to the grassroots," contacts with bandits and complaints by cadre.⁴⁷⁵ Finally, he reported that "more than 80 elements with political tendencies" had "already been removed" from the Division.⁴⁷⁶

Also notable during this meeting was Son Sen's presentation on how the "duty of defending the country" had been carried out with regard to a "certain number of traitors in the Party whom we have been able to arrest." He promised to inform those present of the "measures" taken in this connection "and a number of experiences we have deduced with regard to the task of defending the country."⁴⁷⁷

Son Sen also declared that "we have basically smashed the leadership links" of this suspected traitorous network. Using an established code word to describe those who were condemned to death, he said these leadership links "were big historical super-traitors to the

⁴⁷¹ "Report on Enemy Situations Re: On the Responses of Ov Pring, Who Was Arrested on 7 October 1976 at 11 AM, Oct. 9, 1976" (N0001499).

⁴⁷² "Minutes of the Meeting of Secretaries and Deputy Secretaries of Divisions and Independent Regiments, 9 October 1976, 14.00 hours" (N0001500).

⁴⁷³ *Id.* The first arrest, previously reported by telegram, was that of the "boy who was the son of a soldier and had been kidnapped by bandits who took him to live with them and made him come and reconnoitre. This boy said the command post of these bandits was on the summit of Phnum Kandal, where there are five of them living in a camp where they've pitched tents and set up camp beds." The second arrest was of "a 13-year-old girl in the Toek Sap area" of Prey Nup District, who "was among a group who had just gone into the forest recently." The third was of "a rice thief at the Kampung Saom pier, who said he had come all the way from Veal Rinh" in Prey Nup District. The fourth was of a combatant who had allegedly "tied five grenades under the bed" of a Division cadre, but this last detainee had escaped.

⁴⁷⁴ These arrests included that of Ov Pring. San reported that Pring "was part of a group that was about to hold a demonstration when they were arrested by the grassroots." *Id.*

⁴⁷⁵ In this connection, San gave as an example "the contemptible Sok [for whom there is no further information], from whom we got a number of answers, but then he hung himself to death" before interrogation was complete. Another problem was a company level cadre who was complaining that "when we transplanted [paddy] during the national people's democratic revolution there was progress, but when we transplant in the socialist revolution, we retrogress. Before we ate rice by the bushel, now we eat rice by the can." *Id.*

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.* Son Sen added that, "from the responses of these guys, we know a certain number of their plans." He explained:

The traitorous links we have arrested one after the other comprise three networks, but at the end of the day, there is but a single network. First, we arrested the traitorous links in Division 170. ...

At that time, our analysis with regard to the enemy to the West was that it was evolving toward becoming inconsequential. The victories of the revolution were improving our capabilities.... [W]e didn't take much notice of the enemies who were conducting activities to attack us from within.

Id. "The West" apparently refers to Thailand and the US-led "western world."

nation and Party."⁴⁷⁸ Those who had been "basically smashed" included such "CIAs on the inside," along with "the major traitorous forces belonging to them." He warned, however, that "their henchmen still exist." Thus, he instructed:

In terms of our perspective and standpoint, we must further heighten our spirit of revolutionary vigilance. ... It is therefore imperative to have lofty revolutionary vigilance and ensure defence of the Party and the army.

Concretely operationalizing revolutionary vigilance means having a firm grip on our units of organization, ensuring that the enemy is unable to burrow from within, and doing whatever needs to be done to make our army clean. Both the American imperialist-CIA side and the Yuon-Soviet-revision side have their plans for burrowing from within to create a new Party to oppose us.⁴⁷⁹

Son Sen therefore urged those present to indoctrinate subordinate cadre and combatants in their units "so that they understand the state of contradictions arising from the enemies burrowing from within and from the enemies' tricks."

Division 164's Deum was the first to declare that he "would like to be in unity with the Organization's presentation," adding: "before, I had suspected some and not suspected some because all these individuals held important leadership posts. I have now therefore heightened vigilance even more."⁴⁸⁰

After listening to more such statements by leading cadre from other units, Meah Mut spoke up to applaud the measures Son Sen said had been taken and to vow that he would clean up Division 164. Mut declared:

I would like to say about concern with the activities of the traitors within the Party, that this has been a great victory for our Party. This lesson has strengthened to another degree the standpoint of revolutionary vigilance.

⁴⁷⁸ *Id.* In 1975, the label of "super-traitors" had been applied to designate those condemned to extrajudicial execution by the then Royal Government of National Union of Kampuchea. Broadcast by the Radio Voice of the Phnom Penh FUNK, Feb. 26, 1975; AKI [the official GRUNK news agency], Apr. 1, 1975.

⁴⁷⁹ "Minutes of the Meeting of Secretaries and Deputy Secretaries of Divisions and Independent Regiments, 9 October 1976, 14.00 hours" (N0001500).

⁴⁸⁰ *Id.* Deum provided an explanation specifically in respect of Division 164:

In the past, the enemy conducted activities in the Division, but there were shortcomings in attacking the enemy, to which not a lot of attention was paid. With regard to this problem, if you think about it, 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.

I had known something about this problem of the enemy creating a new Party from the instructions one after the other of the Party, but it didn't go so deep as the information I've now heard from the Party.

From an examination of my forces, from 90 to 95 per cent of them are reliable, those who are loyal to the Party. But if you want unsullied faith that the army is clean, it seems not yet to be clean, and it is imperative to follow up with more purges.

Id.

We have been indoctrinated with the Party's standpoint that a correct standpoint analyzes these enemies as being American imperialists and revisionists with plans to attack our revolution.

As for the problem of the grasp on the unit of organization, cadre and combatants, it is not yet firm. No-good elements or enemies are still camouflaged and infiltrated in the rank-and-file. The most important factor is the grasp of the everyday ideology of the Core Organizations.⁴⁸¹

It is imperative to make arrangements to take measures so as to seize the initiative in advance. On this I would like to be in total agreement and unity with the Party. Do whatever needs to be done not to allow the situation to get out of hand and not to let them strengthen or expand themselves in the least.⁴⁸²

Division 502 Secretary Met spoke out in similar terms, declaring:

After the Party revealed the upper traitorous links belonging to American imperialism and the revisionists, I was happy and had more faith in the Party. This experience proves that our Party has a solid grip on things and a stance of constant vigilance. If there are contradictions, it grasps them clearly, and this is a victory for our Party.

With regard to this problem, it can be stipulated that the enemies have been basically eliminated, but it is imperative to take further measures to prevent this from happening a second, a third and a fourth and so on again time.

The enemy will not be able to do anything to us so long as our military is politically hard and clean. It is imperative to strengthen the Party politically, ideologically and organizationally. It is imperative to dare absolutely to conduct purges.⁴⁸³

Son Sen then asserted in his summing up that it was "imperative to purge no-good elements absolutely in the sense of an absolute class struggle."⁴⁸⁴

Thus, after hearing in unambiguous terms Son Sen's account of the CPK's policy of exterminating suspected traitors within the Party, Sou Met and Meah Mut expressed their wholehearted support for these initiatives and pledged to continue to carry them into effect.

Significantly, Sou Met was also at a meeting of division cadre convened by Son Sen on March 1, 1977, the agenda of which included not only "internal enemy situations" but also

⁴⁸¹ "Core organizations" referred to the Communist Party itself, its Youth League and Women's Association.

⁴⁸² "Minutes of the Meeting of Secretaries and Deputy Secretaries of Divisions and Independent Regiments, 9 October 1976, 14.00 hours" (N0001500).

⁴⁸³ *Id.*

⁴⁸⁴ Son Sen also gave instructions on "the problem of analysing or discovering the enemy. He explained that if untoward phenomena already exist, you must find the reason, the source, where they come from." Thus, "wherever an incident takes place, you must look there," and "if there is evidence, then you must follow up." At the same time "all units must be reorganized, and all biographies" of cadre and combatants in them "must be grasped again," that is, reviewed. Finally, he instructed that the names of "traitors" should not be disseminated. Thus, "in educating the brothers and sisters" who comprised the military's rank-and-file, they should be educated "only in terms of perspective and standpoint," not in terms of specifics. See "Minutes of the Meeting of Secretaries and Deputy Secretaries of Divisions and Independent Regiments, 9 October 1976, 14.00 hours" (N0001500).

"purging elements in units of organization to make them clean."⁴⁸⁵ Met declared that it was now "obvious that number of elements" from Division 502 who had been "previously arrested really are enemy elements," and revealed that "more than 50 no-goods" from the unit had "been sent to S-21."⁴⁸⁶ Although throughout these meetings Son Sen never explicitly said that those arrested for treason had been or would be executed, his constant use of the term "smashed" and his reference to at least the purported ringleaders as "super-traitors" seemed to leave no doubt. His delineation of a category of "absolute purge" for dangerous elements, to be dealt with by means more than repeated re-education, also pointed toward execution, albeit less clearly.

As in other meetings, Sou Met heard reports of arrests and purges in other Divisions,⁴⁸⁷ as well as another summing up from Son Sen, who stressed that things were worse than the Party had thought in late 1976. In particular, Son Sen indicated that, although in late 1976 the Party had "eliminated" the "treasonous networks" of East Zone Sector 24 Secretary Chhouk and Northwest Zone Secretary Ya, it had since "discovered another treasonous network," which had now also been "basically eliminated" - another "enormously great victory."⁴⁸⁸ Son Sen also claimed that all of this information yet again showed that both "the CIA and the revisionists are one and are similarly opposed to a correct revolution."⁴⁸⁹ Continuing threats to the Revolution

⁴⁸⁵ "Minutes of the Meeting of Secretaries and Deputy Secretaries of Divisions and Independent Regiments, 1 March 1977" (L0045).

⁴⁸⁶ *Id.*

⁴⁸⁷ For example, Met heard a report by Division 920 Secretary Chhin, who was about to be purged and entered S-21 on March 16, 1977 (CMR 78.2/TSA M172), that those elements of this division who had previously served with Vietnamese units and those who were "the children of soldiers, subdistrict chiefs and police" had been "purged and sent to do production in one place," but that there were "still enemies within" the division, and that Chhin was "following this up." He heard Regiment 488 Secretary Pheap report on its detention of "one person ... because he was close to a depot" and of problems because low-ranking cadre in the regiment had "persuaded combatants to drink alcohol" or "contradicted the prohibition that doesn't allow the free picking of fruit to eat." He heard a leading cadre of Division 450, Yan, say not only that there might "still be enemy elements inside" it, but that in addition "maybe 600 persons are elements who must be removed." He heard Regiment 152 Secretary Sim report on the arrest of two medics from that unit who had visited the Po-98 military hospital looking for combatants who had been purged. He heard Division 290 Secretary Meah Tal tell of how it had "removed" and "concentrated" an unspecified number of "no-good elements." He heard Division 703 Secretary Pin report on its arrest in Southwest Zone Sector 35 of "two or three persons from the districts ... who were mixed up with Sector 37." One was a "boy" who said under interrogation that he had been instructed "that if anything went wrong, he was to reply by implicating the Organization's troops." *Id.*

⁴⁸⁸ Son Sen specifically asserted in this regard that after

we arrested the contemptible traitors Chhouk, Ya and Chakrei, ... the important experiences deduced made it possible for us in 1977 to see more clearly the contradictions and the enemy. We previously did not see deeply into antagonistic and internal contradictions, and for the most part we gave more weight to the internal contradictions.

Id.

⁴⁸⁹ As a consequence, Son Sen stated that

the problem to which the utmost degree of attention must be paid is the antagonistic contradiction coming from the outside, by which I mean enemies from the outside who have infiltrated our revolution. Our revolution must continue further with opposition to the enemies of the revolution in the world, because each and every one of the traitorous forces in our country is connected to the enemies on the outside.

Revolutionary vigilance means constant absolute storming attacks on the enemies burrowing from within. In the absence of constant storming attacks on these enemies, don't talk about building up the country, because if enemies burrowing from within exist, they will impede us constantly.

Socialist revolution does not only mean merely eliminating private property rights. It also necessitates attacking the enemies who oppose the revolution internationally. The antagonistic contradictions inside and

meant that, while it was "imperative to continue with further political and ideological education, ... mere education is not enough: it is imperative to continue further with absolute purges." Thus, "the imperative measure vis-à-vis the troops is to purge absolutely the no-good elements."⁴⁹⁰

The minutes of General Staff meetings attended by Sou Met and Meah Mut therefore illustrate their close involvement in and knowledge of the Party's arrest, interrogation and execution policies. The minutes also reveal pertinent details of those policies as articulated by Son Sen, including in particular regular and persistent directions by Son Sen to leaders in the Party hierarchy, including Sou Met and Meah Mut, to identify, arrest and ultimately execute suspected traitors.

iii. Reports and other Documents from Sou Met and Meah Mut

Other records indicate that large numbers of cadre and combatants of Divisions 502 and 164 were sent to S-21. In the case of Sou Met, documents bearing his signature addressed to Duch facilitated the transfers. In light of previously summarized evidence that both Division Secretaries were fully apprised of and committed themselves to the CPK policies of extermination, their active role in facilitating arrests suggests that they substantially and knowingly contributed to the executions connected with their Divisions.

In a report dated September 1, 1976 containing his signature, Sou Met informed the General Staff that Battalion 513 of Division 502 had arrested "two persons, one named Sut and another named Eng, on 19 August 1976"⁴⁹¹ near the south wall of Pochentong airport. This followed an incident on August 15, 1976 when "some strangers stole some equipment" in Battalion 513's area of operation. According to Sou Met's report, during interrogation Sut and Eng identified themselves as combatants of the Central Committee's marine Regiment 152, and the report treats them as acting on behalf of an enemy network. It declares that, according to their "responses," they "were going around stealing things to eat, such as rice, chickens and various items." These "theft actions" had supposedly been "whipped up" as part of an enemy organizational plan by two persons named Sovan⁴⁹² and San,⁴⁹³ "whose agitation was that

outside the country remain acute.

Id.

⁴⁹⁰ Moreover, according to Son Sen, although in "the past, we have eliminated a lot of important traitorous links," it remained "imperative to continue with further revolutionary vigilance because remnants still remain, and new traitors will continue to be born." Again, Son Sen stressed that the enemy was "wrecking" the Cambodian revolution "through many phenomena of every description." Wherever "antagonistic contradictions" arose, they must be resolved through what he now called "absolute organizational methods." He again seemed to establish three categories of those who had to be purged: first, "enemy elements" whom it was "imperative to remove absolutely"; second, "liberals," who must "be rounded up and sent to do production as a single unit of organization"; and, third, those who owed some sort of political debt to the enemy, who "must be re-educated and concentrated in one place." *Id.*

⁴⁹¹ "Report Re: Situation Adjacent to the South Side of the Airport, Sept. 1, 1976" (N0001372). No information is available on the fate of the individuals Sut and Eng.

⁴⁹² This appears to be Long Phan *alias* Sovan, a courier of Battalion 234 of Regiment 152, who was evidently arrested in September 1976 and left "confessions" dated between September 25 and 29, 1976 (CMR 64.17/TSA L52).

⁴⁹³ The fate of the individual named San is unknown.

making revolution is difficult, there's not enough rice to eat, and that those who want to be bigshots should have formal officer ranks."⁴⁹⁴

In this context, it is apparent that Sou Met gave effect to Son Sen's directions relating to the purging of enemy elements by arresting and sending to S-21 more cadre and combatants who had deserted, engaged in "liberal activities" or did not respect "organizational discipline," as well as those implicated as traitors in the confessions of persons previously arrested. Notes addressed by Met to Duch on June 1 and 2, 1977 gave such reasons in explaining why persons from Division 502 were being sent to the S-21 Chairman.⁴⁹⁵ A similar note to Duch on October 4, 1977 accompanied two more prisoners.⁴⁹⁶ More generally, the extent of Sou Met's cooperation may be indicated by the fact that the confessions of some sixty-seven Division 502 cadre and combatants have been found in the S-21 archives.⁴⁹⁷

Although we have not discovered as much documentation relating to Mut's role in effecting arrests, his cooperation with the CPK arrest policy is suggested by the existence of the "confessions" of at least twenty-four Division 164 prisoners in the S-21 archives – as Secretary of the Division Mut must have been aware of this volume of arrests.⁴⁹⁸ And more directly, in a message sent to Son Sen on February 22, 1976, Meah Mut reported on the recent arrest by Division 164 of eight persons and the interrogation of one of them, whose "responses" identified those detained as members of "a group of ... bandits who are hiding out in the vicinities west and north of Veal Rinh," the seat of Prey Nup District, and who had been doing political opposition "work among the masses in the grassroots" there.⁴⁹⁹

b. Legal Analysis and Conclusions

⁴⁹⁴ "Report Re: Situation Adjacent to the South Side of the Airport, Sept. 1, 1976" (N0001372).

⁴⁹⁵ "To Beloved Comrade Brother Duch, Please Be Informed" (D1068), June 1, 1977; and "To Beloved Comrade Brother Duch, Please Be Informed" (D1075), June 2, 1977. The six prisoners are identified as Suo and Sok from the Division's Regiment 51, the secretary of which had recently committed suicide; Lay Chea ("brother of Lay Tri" and "younger brother of Lay Sarim"); Chap, Secretary of Battalion 503; Uk, Member of Battalion 512; and Keum Vek, "formerly in charge of two-way radio [communications] of a regiment". Battalion 503 Secretary Nây Chap (CMR 81.3/TSA N3) left "confessions" dated August 27 and September 10, 1977, and they were marked for transmission to Met (BBKKh732). Files on the others have not been located, although Lay Chea's brother, Sarim (CMR 68.7/TSA L134), had already left "confessions" dated May 20 and 23, 1977.

⁴⁹⁶ "To Beloved Comrade Brother Duch, Please Be Informed" (D1069), Oct. 4, 1977. The prisoners are identified as Srei Sareuan and Sâm Li. Srei Sareuan's "confessions" (CMR 137.3/TSA S131) were marked for transmission to Met. See "Responses of Srei Sareuan: On the Notes on the Responses of Srei Sareuan, Former Secretary, Battalion 260, Division 703, Before Arrest, Member, Battalion 621, Division 502, 19 October 1977"; [notation:] "One copy already sent to Comrade Met" (BBKKh24). They are among the examples of "confessions" sent to Met discussed above. Sâm Li appears to be Sâm Kin alias Li (CMR 158.12/TSA S612), Secretary of Regiment 52 of Division 502, whose files list him as having entered S-21 on October 3, 1977 and leaving "confessions" dated June 4, 1978. In his note to Duch, Met explains that "no enemy has responded confessing" anything about Sâm Li, but that he had been engaging in "no-good activities". Next to this, Duch has written a request for "a little additional assessment of the contemptible Kin".

⁴⁹⁷ This observation is based upon Stephen Heder's examination of "confessions" held by DC-Cam and in the Tuol Sleng Genocide Museum.

⁴⁹⁸ As with Sou Met, this observation is based upon Stephen Heder's examination of "confessions" held by DC-Cam and in the Tuol Sleng Genocide Museum.

⁴⁹⁹ "To Brother 89 [Son Sen], Feb. 22, 1976" (N0001125).

The evidence pertaining to CPK Military Division Chairmen Sou Met and Meah Mut suggests individual responsibility on the part of both of these individuals for facilitating the arrest and transfer to S-21 for execution of cadre from their Divisions. Further, the evidence strongly indicates that each official may be responsible as superiors for failing to prevent or punish arrests and executions in which their subordinates may have been involved.

i. Individual Responsibility

The evidence reviewed above reveals several instances in which Sou Met and Meah Mut appear to have facilitated the arrest and transfer to S-21 of cadre from their Divisions. This evidence includes reports from Sou Met and Meah Mut to the General Staff informing it of arrests and interrogations,⁵⁰⁰ as well as notes attributed to Sou Met that accompanied prisoners sent from his Division to S-21.⁵⁰¹ The fact that such transfers occurred is corroborated by the large number of confessions found at the former site of S-21 attributable to Division 502 and 164 personnel. Both Sou Met and Meah Mut are recorded as having made incriminating statements during meetings of division cadre regarding the arrest and transfer of “enemies” within their jurisdictions. The evidence summarized above also makes clear that Sou Met and Meah Mut were aware of the broader CPK policy to execute such prisoners. This evidence therefore suggests that Sou Met and Meah Mut directly, substantially and knowingly contributed to executions connected to their Divisions by condoning and facilitating the arrest and transfer of their own cadre to S-21. Such conduct may give rise to their individual responsibility for atrocities committed against those cadre.

ii. Superior Responsibility

a. Superior-Subordinate Relationship

While the foregoing evidence suggests that lower-level cadre in Sou Met and Meah Mut’s Divisions were the victims of executions for which Met and Mut may be held individually responsible, it also indicates that Met and Mut’s subordinates were themselves involved in perpetrating arrests of Party cadre and that Met and Mut bear responsibility for this conduct under the doctrine of superior responsibility.

Both Sou Met, the Secretary of Central Committee Division 502 which incorporated the DK air force, and Meah Mut, the Secretary of Central Committee Division 164 which incorporated the DK navy, appear to have enjoyed *de jure* authority over subordinates by virtue of their positions in the CPK military hierarchy, principally through the General Staff under Son Sen’s direction. In this capacity, both officials attended General Staff meetings on behalf of their Divisions, provided and received reports on activities in their and other Divisions, and received instructions from Son Sen respecting implementation of Party policies within their respective jurisdictions.

⁵⁰⁰ See, e.g., *supra* notes 491-494, 499 and accompanying text.

⁵⁰¹ See *supra* notes 495-496 and accompanying text, citing notes addressed from Sou Met to Duch on June 1 and 2, 1977 and October 4, 1977 transferring cadre from Division 502 to S-21. See *similarly* The Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landžo, Judgment of November 16, 1998 (ICTY Trial Chamber II), ¶ 764 (relying upon release documents that were signed by defendant Mucic as illustrating that he had control over detainees who would be released or transferred from the Celebici camp to another detention facility).

Indicia of *de facto* control over subordinates reinforces this evidence of *de jure* authority. This includes evidence indicating that Sou Met had the authority to direct the arrest and transfer of cadre. As noted, for example, notes documenting a September 30, 1976 meeting of the General Staff of the Central Committee military units state that Sou Met's Division 502 arrested fifteen soldiers who had deserted.⁵⁰² At a meeting on March 1, 1977, Sou Met reported that "50 no goods" from his Division had been arrested and sent to S-21.⁵⁰³ Most incriminating, Sou Met's signature appears on numerous documents that facilitated the transfer of cadre and combatants from Division 502 to S-21.⁵⁰⁴

Similar evidence has been identified in relation to Meah Mut, including a report from Meah Mut to Son Sen specifically describing the arrest and interrogation of suspected enemies by Mut's subordinates in Division 164.⁵⁰⁵ In addition, a September 24, 1976 telegram addressed to Mut from Division 164's then Deputy Secretary, Deum reported that "after we took the measures against the enemy that you decided five of them fled into the forest, were pursued and arrested by us."⁵⁰⁶

Finally, a substantial number of confessions – those from sixty-seven Division 502 cadre and combatants and twenty-four Division 164 prisoners – were found in the S-21 archives.⁵⁰⁷ Taken together with Sou Met and Meah Mut's apparent enthusiasm for implementing Party policy, as expressed at various General Staff meetings, this appears to constitute probative circumstantial evidence that Met and Mut exercised sufficient *de facto* control to compel subordinates in their Divisions to effect the arrests and transfer of cadre suspected of being traitors.

b. *Mens Rea*

Numerous accounts of meetings attended by Sou Met and Meah Mut at which arrests and executions were discussed provide the most significant body of evidence that the two Secretaries had knowledge of crimes committed by CPK cadre. Notes from meetings on August 30, 1976,⁵⁰⁸ September 16, 1976,⁵⁰⁹ September 19, 1976,⁵¹⁰ September 30, 1976,⁵¹¹ October 9, 1976,⁵¹² and March 1, 1977⁵¹³ reveal the presence of one or both officials at General Staff

⁵⁰² See *supra* note 468 and accompanying text.

⁵⁰³ See *supra* note 486 and accompanying text.

⁵⁰⁴ See *supra* notes 495-496 and accompanying text.

⁵⁰⁵ See *supra* note 499 and accompanying text.

⁵⁰⁶ "Telegram 11, to Brother Mut", September 24, 1976 (N0001459).

⁵⁰⁷ See *supra* notes 497, 498 and accompanying text.

⁵⁰⁸ See *supra* notes 453-457 and accompanying text.

⁵⁰⁹ See *supra* notes 458-460 and accompanying text.

⁵¹⁰ See *supra* notes 461-466 and accompanying text.

⁵¹¹ See *supra* notes 467-468 and accompanying text.

⁵¹² See *supra* notes 472-484 and accompanying text.

⁵¹³ See *supra* notes 485-490 and accompanying text.

meeting convened by Son Sen. At these meetings, participants discussed arrests, purges, and murders. Moreover, minutes from several meetings record Sou Met and Meah Mut as reporting on the implementation by their Divisions of the Party's execution policies and expressing their support for those policies.⁵¹⁴

Similarly, both Sou Met and Meah Mut appear to have authored reports transmitted to the General Staff that reported on arrests in their Divisions. For example, a report bearing Sou Met's signature dated September 1, 1976 describes the arrest and interrogation by a battalion under his command of two individuals on August 19, 1976.⁵¹⁵ Moreover, Sou Met appears to have composed notes directly to Duch, which subsequently accompanied cadre who were transferred from his Division to S-21.⁵¹⁶ This evidence, together with the fact that both officials held positions of moderate authority in the CPK hierarchy and that numerous cadre from both of their Divisions were arrested, further suggests that Sou Met and Meah Mut knew or had reason to know of arrests and executions conducted or facilitated by their subordinates and failed to take reasonable and necessary steps to prevent these atrocities or punish the perpetrators.

V. Conclusion

In sum, our research has confirmed the existence throughout the period of CPK rule of several policies of mass executions and, moreover, has illuminated key features of those policies and the role that senior CPK officials played in devising and implementing them. The newly-available evidence ties CPK officials Nuon Chea, Khieu Samphan, Ieng Sary, Ta Mok, Kae Pok, Sou Met and Meah Mut to records that explicitly refer to large-scale killings and the torture of prisoners, confirms that arrests and executions in rural areas were reported by lower-level officials to central authorities, and reveals that arrests and executions were discussed in meetings of military commanders. Accordingly, this documentation confirms that many, if not all, of these crimes were committed as a matter of policy and that these seven officials were knowingly involved in the development and/or implementation of those policies. This evidence in turn strongly suggests the individual criminal responsibility of these individuals for DK-era crimes, based upon their own conduct and, in most cases, for the conduct of their subordinates.

⁵¹⁴ See, e.g., *supra* notes 465, 466, 482, 483 and accompanying text.

⁵¹⁵ See *supra* notes 491-494 and accompanying text.

⁵¹⁶ See *supra* notes 495-496 and accompanying text.

Appendix - Individual Criminal Responsibility

The evidentiary assessment set forth in Part IV is based upon relevant international legal principles of “individual criminal responsibility.” Those principles prescribe when an individual may be held criminally responsible under international law for his or her acts or omissions. This Appendix defines the basic elements and standards that we have used to delineate whether and in what respects the seven CPK officials under study may individually be considered criminally responsible for DK-era crimes.

Among the crimes that authorities have generally identified as having been perpetrated by the CPK and for which individuals might be prosecuted are war crimes, crimes against humanity, and, possibly, genocide.⁵¹⁷ Our analysis has generally proceeded on the premise that it will be possible for a prosecutor before a trial of the CPK to prove the basic elements of these crimes with regard to the seven individuals under study. We note in this respect that the pattern of arrests, torture and executions revealed by the documentary analysis underlying this report, including in particular the discussion in Part III, appears to reflect and to be generally consistent with the basic elements of several serious crimes that give rise to individual responsibility under international law, including in particular war crimes,⁵¹⁸ crimes against humanity⁵¹⁹ and, albeit less clearly, genocide.⁵²⁰

⁵¹⁷ See, e.g., UN Group of Experts Report, *supra* note 3, ¶¶ 58-79 (identifying war crimes and crimes against humanity, including genocide, among the crimes for which a Khmer Rouge tribunal should be afforded jurisdiction to prosecute). International instruments potentially relevant for the prosecution of DK-era crimes include the Charter of the International Military Tribunal at Nuremberg, which defined war crimes and crimes against humanity as follows:

War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

IMT Charter, *supra* note 92, art. 6.

⁵¹⁸ Part IV(1) of this report, for example, cites Zone and Division reports addressed to Nuon Chea that referred to incidents in the conflict along the DK-Viet Nam border in which DK forces killed civilians and burned civilian homes in Vietnamese territory. See Geneva Convention [IV] Relative to the Protection of Civilians in Time of War, signed at Geneva, 12 August 1949, 75 U.N.T.S. 287 [hereinafter “Fourth Geneva Convention”], art. 147 (defining grave breaches of the Convention as including the willful killing of civilians and the extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly).

⁵¹⁹ Part III of this report, for example, describes CPK execution policies that appear to have been perpetrated on a widespread or systematic basis and committed against sectors of the DK civilian population on political and possibly other grounds. See also ICTR Statute, *supra* note 13, art. 3 (defining crimes against humanity as including the crimes of murder, extermination and torture, when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds).

⁵²⁰ The 1948 Genocide Convention defines “genocide” as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.”). Convention on the Prevention and Punishment of the Crimes of Genocide, 78 U.N.T.S. 277 (9 December 1948) [hereinafter “Genocide Convention”], art. II. See also ICTY Statute, *supra* note 13, art. 4; ICTR Statute, *supra* note 13, art. 2.

It has long been recognized that individuals can be held criminally accountable for some violations of international law.⁵²¹ This principle was enforced before two international tribunals following World War II, one of which, the International Military Tribunal at Nuremberg (“IMT”) famously expressed the underlying concept: “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”⁵²² The IMT’s Charter and similar instruments governing post-World War II international criminal trials prescribed several modes of conduct by which individual responsibility for crimes within the jurisdiction of those tribunals was considered to arise. This included perpetrating, instigating, ordering, abetting, and participating in a plan or enterprise to commit a crime.⁵²³

Among the most recent codifications of the principle of individual criminal responsibility for serious violations of international humanitarian law have been the Statutes of the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR). Both Tribunals’ governing statutes prescribe two grounds of individual criminal responsibility for serious violations of international humanitarian law that are particularly relevant to CPK prosecutions: individual responsibility for committing or otherwise facilitating or contributing to the commission of a crime, for example by planning, ordering, instigating, or otherwise aiding and abetting in that crime; and superior responsibility for failing to prevent or punish crimes committed by subordinates under the defendant’s effective authority and control. While the governing instruments and jurisprudence of the ICTY and the ICTR post-date events in Democratic Kampuchea by over 20 years, these authorities are based upon and rely to a significant extent upon principles developed by post-World War II tribunals.⁵²⁴ As such, they

⁵²¹ Among the earliest codifications of the principle of individual criminal responsibility for violations of rules governed by international law appeared in the military codes and instructions of states for their armed forces. See, e.g., Lieber Code of 1863, promulgated as “Instruction for the Government of the United States in the Field by Order of the Secretary of War,” Washington D.C., 24 April 1863, art. 59 (providing in part that “[a] prisoner of war remains answerable for his crimes committed against the captor’s army or people, committed before he was captured, and for which he has not been punished by his own authorities”); William Winthrop, *MILITARY LAW AND PRECEDENTS* 778 (1886) (stating in respect of inter-state armed conflict that “[e]ach belligerent shall duly punish all persons within his lines who may be guilty of violations of the laws of war”). Further, following World War I, a clause was inserted in the Treaty of Versailles demanding the trial of the ex-Kaiser of Germany before an international tribunal. Ultimately, however, the Kaiser was never tried because The Netherlands refused to extradite him. See Treaty of Peace with Germany (The Treaty of Versailles), signed at Versailles, 28 June 1919, 3 Bevens 43, 13 A.J.I.L. (Supp.) 151 (28 June 1919), art. 228 (providing that “[t]he German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the law and customs of war. Such persons shall, if found guilty, be sentenced to punishment laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of the allies.”). See also HOWARD S. LEVIE, *TERRORISM IN WAR: THE LAW OF WAR CRIMES* 22-28 (1993).

⁵²² See International Military Tribunal, Judgment, 1 TRIAL OF THE MAJOR WAR CRIMINALS 228, *reprinted in* 41 AM. J. INT’L L. 172, 220-21 (1947) [hereinafter “IMT Judgment”] (asserting that “[i]nternational law imposes duties and liabilities upon individuals as well as states,” and, in particular, that “[i]ndividuals can be punished for violations of international law). See also Control Council Law No. 10, *supra* note 209, art. II(2) (providing that “[a]ny person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part there in or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organisation or group connected with the commission of any such crime...”).

⁵²³ See, e.g., IMT Charter, *supra* note 92, art. 6 (providing in part that “[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the freeing crimes are responsible for all acts performed by any person in execution of such plan”); Control Council Law No. 10, *supra* note 209, art. II(2) (providing that “[a]ny person without regard to nationality of the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (1) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime...”).

⁵²⁴ See, e.g., Tadic Judgment (ICTY Trial Chamber II), *supra* note 262, ¶ 674 (indicating that the Nuremberg war crimes

provide highly relevant guidance in assessing the individual criminal responsibility of senior DK officials.⁵²⁵

1. Individual Responsibility⁵²⁶

Individual responsibility for certain violations of international law has generally been recognized as arising from a variety of forms and degrees of participation in crimes that include but extend beyond the direct perpetration of a crime.⁵²⁷ As Article 7(1) of the ICTY Statute and Article 6(1) of the ICTR Statute explicitly recognize, individual criminal responsibility may encompass any conduct that contributes directly and substantially to the commission of a crime, for example through planning, ordering, instigating or otherwise aiding and abetting in that crime.⁵²⁸ Two legal “elements” must ordinarily be established by a prosecutor to attribute individual responsibility to a defendant for a crime: that the defendant took part in conduct that is shown to have directly and substantially contributed to the commission of a crime, referred to as *actus reus* or criminal act; and that his or her conduct was accompanied by a particular state of mind, normally intent or knowledge, referred to as the *mens rea* or mental state.

Without limiting the potential legal foundations for individual responsibility on the part of CPK officials for DK-era crimes, three grounds of individual responsibility for serious crimes under international law are particularly relevant in the context of the evidence implicating the seven officials studied in this report: ordering subordinates to commit crimes, aiding and abetting the commission of crimes, and developing and implementing a common purpose or design to commit crimes.

a. Ordering Crimes

Superior authorities have long been considered individually responsible for ordering subordinates to commit acts that violate international humanitarian law.⁵²⁹ This rule is reflected in Article 7(1) of the ICTY Statute and Article 6(1) of the ICTR Statute, which specifically provide

trials were the “most relevant sources” for determining the legal requirements of individual criminal responsibility).

⁵²⁵ Our legal analysis has considered pertinent ICTY and ICTR judgments released prior to the beginning of June 2001.

⁵²⁶ As indicated in the Introduction, this report adopts the practice of the ICTY, which has articulated two categories of grounds for individual criminal responsibility based upon that tribunal’s governing statute and relevant post-World War II war crimes jurisprudence: “individual responsibility” under Article 7(1) of the ICTY Statute for planning, instigating, ordering, committing or otherwise aiding and abetting in the planning, preparation or execution of a crime; and “superior responsibility” under Article 7(3) of the ICTY Statute, for knowing or having reason to know that a subordinate was about to commit or had committed serious violations of international humanitarian law and failing to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. For an example of references to these categories of individual criminal responsibility by the ICTY Appeals Chamber, see *Aleksovski Judgment* (ICTY Appeals Chamber), *supra* note 13, ¶ 170. See also ICTY Statute, *supra* note 13, arts. 7(1), 7(3); ICTR Statute, *supra* note 13, arts. 6(1), 6(3).

⁵²⁷ See, e.g., *The Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-T, International Criminal Tribunal for the Former Yugoslavia (Trial Chamber III) (hereinafter “Kordic Judgment (ICTY Trial Chamber III)”), ¶373 (interpreting Article 7(1) of the ICTY Statute as attaching criminal liability not only to those individuals who physically commit a crime but also to those who participate in and contribute to a crime in various ways).

⁵²⁸ ICTY Statute, *supra* note 13, art. 7(1); ICTR Statute, *supra*, note 13, art. 6(1).

⁵²⁹ See, e.g., *High Command Case*, *supra* note 416, at 520-521 (finding the defendants criminally responsible for passing the Commissar Order to subordinate units); *IMT Judgment*, *supra* note 522, at 221 (finding defendant Keitel responsible for implementing Hitler’s “Commando Order”).

that a person who “ordered” a crime shall be individually responsible for the crime.⁵³⁰ Trial Chamber I of the ICTY has in turn identified “planning, instigating or ordering” crimes as a particular subcategory of grounds for individual responsibility under Article 7(1) of the ICTY Statute.⁵³¹

Unlike the doctrine of superior responsibility, which involves the responsibility of a superior for an omission, namely failing to prevent or punish crimes committed by subordinates, ordering involves the commission of an act on the part of a superior.⁵³² According to trial chambers of both the ICTY and the ICTR, ordering a crime implies a superior-subordinate relationship between the person giving the order and the one executing it. No formal superior-subordinate relationship is required, however, so long as it is demonstrated that the accused possessed the authority to order.⁵³³ The issuance of an order expressly or implicitly constitutes the *actus reus* requirement and the intention that the crime ordered be committed constitutes the *mens rea* requirement.⁵³⁴ Further, the fact that an order was given can be proved through circumstantial evidence and the intent of a superior can be inferred from the fact that he or she issued a particular order; logically, a superior who knowingly issues a order is aware of and intends his or her action.⁵³⁵

b. Aiding and Abetting

In addition to ordering crimes, Article 7(1) of the ICTY Statute and Article 6(1) of the ICTR Statute prescribe “aiding” and “abetting” as grounds for individual criminal responsibility for serious violations of international law. According to ICTR Trial Chamber I, “aiding means giving assistance to someone,” while “abetting” involves “facilitating the commission of an act by being sympathetic thereto.”⁵³⁶ ICTR Trial Chamber I has also declared that “either aiding or abetting alone is sufficient to render the perpetrator criminally liable,” and that “it is not

⁵³⁰ See ICTY Statute, *supra* note 13, art. 7(1) (providing that “[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime”). See *similarly* ICTR Statute, *supra* note 13, art. 6; ICC Statute, *supra* note 97, art. 25.

⁵³¹ See *The Prosecutor v. Tihomir Blaškić*, Judgment, 3 March 2000, Case No. IT-95-14 (ICTY Trial Chamber I) [hereinafter the “Blaškić Judgment (ICTY Trial Chamber I)”, ¶¶ 278-282.

⁵³² In its discussion of superior responsibility in the Celebici judgment, ICTY Trial Chamber II distinguished between the legal bases anchoring direct and indirect responsibility. The Tribunal considered the former to flow from, and therefore to be regulated by, the general principles of accomplice liability. The latter, on the other hand, flows from the “affirmative duty on superiors to prevent persons under their control from committing violations of international law.” *Celebici Judgment* (Trial Chamber II), *supra*, note 501, at ¶ 334. As noted previously, the defence and the prosecution in the Celebici Case appealed certain aspects of Trial Chamber II’s treatment of superior responsibility to the ICTY Appeals Chamber. The ICTY Appeals Chamber dismissed these grounds for the appeals, however, and in so doing appears to have generally agreed with the trial chamber’s interpretation of the doctrine.

⁵³³ *Kordić Judgment* (ICTY Trial Chamber III), *supra* note 527, ¶ 388.

⁵³⁴ See *Blaškić Judgment* (ICTY Trial Chamber I), *supra* note 531, ¶¶ 281-282; *The Prosecutor v. Jean-Paul Akayesu*, Judgment, 2 September 1998, Case No. ICTR-96-4-T (ICTR Trial Chamber I) [hereinafter “Akayesu Judgment (ICTR Trial Chamber I)”, ¶ 483. In a judgment dated June 1, 2001, the ICTR Appeals Chamber dismissed Mr. Akayesu’s appeal from the Trial Chamber’s decision.

⁵³⁵ See, e.g., *Trial of Baba Masao*, Australian Military Court, in 11 LAW REPORTS OF TRIALS OF WAR CRIMINALS 60 (1947) (finding that “[t]here may be direct evidence of such intention of the commander if he directly participated in the crime or commanded it to be perpetrated or such intention may be inferred from some orders issued by him”).

⁵³⁶ *Akayesu Judgment* (ICTR Trial Chamber I), *supra* note 534, ¶ 484.

necessary for the person aiding or abetting another to commit the offense to be present during the commission of the crime."⁵³⁷

With respect to the *mens rea* for aiding and abetting, ICTY Trial Chamber I has held that "in addition to knowledge that his acts assist the commission of the crime, the aider and abettor needs to have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct."⁵³⁸ This *mens rea* threshold for aiding and abetting therefore necessitates an awareness of the act of participation coupled with a conscious decision to participate in the crime by providing assistance.⁵³⁹ The aider and abettor need not share the actual intent of the perpetrator; knowledge that his act will contribute to the crime is sufficient.⁵⁴⁰ Of particular relevance in the context of CPK crimes, knowledge can be drawn from the defendant's use or awareness of terms that, while seemingly innocuous, are nevertheless shown to have had a particular and commonly-understood meaning connected with the perpetration of atrocities.⁵⁴¹

⁵³⁷ *Id.*

⁵³⁸ Blaškić Judgment (ICTY Trial Chamber I), *supra* note 531, ¶ 286.

⁵³⁹ See Tadić Judgment (ICTY Trial Chamber II), *supra* note 262, at ¶ 674.

⁵⁴⁰ See Furundžija Judgment (ICTY Trial Chamber II), *supra* note 88, ¶ 245 (finding that "it is not necessary for the accomplice to share the *mens rea* of the perpetrator, in the sense of positive intention to commit the crime. Instead, the clear requirement in the vast majority of the cases is for the accomplice to have knowledge that his actions will assist the perpetrator in the commission of the crime"); *id.* at ¶ 146 (determining that "it is not necessary that the aider and abettor should know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he had intended to facilitate the commission of that crime, and is guilty as an aider and abettor").

⁵⁴¹ In the post-World War II case of the United States v. Otto Ohlendorf *et al.* under Control Council Law No. 10, for example, defendant Waldemar von Radetzky, an SS member who worked with a killing squad on the Eastern Front, denied any connection with a 1941 meeting where a plan was devised to liquidate all of the Jews living in a particular area. Radetzky denied having attended the meeting, and when asked of his contribution to the liquidation efforts, he claimed that he was not aware of the murderous intent of the plan. In rejecting this defense, the Tribunal commented:

Questioned about this meeting, the defendant testified that he was not present at it but that he had been ordered to negotiate with the field command about the furnishing of vehicles. He stated that he was of the impression that the Jews were to be resettled in Rovno. It is difficult to believe that the defendant did not know what "resettlement" meant in Einsatzgruppen circles.

Einsatzgruppen Case, *supra* note 350, at 577.

Similarly, in the same case, Erwin Schulz, an SS Brigadier General, claimed that he was unaware of the "Fuehrer Order" commanding the SS to liquidate Jews on the Eastern Front. Schulz did, however, admit to knowing of Reinhard Heydrich's speech in which the latter said that "all measures had to be taken against the Jews." In rejecting Schulz's claim of lack of knowledge, the tribunal found that "the expression 'all measures' certainly put Schulz on notice as to what was expected of the Einsatz units." *Id.* at 520.

Recent prosecutions before the Rwanda Tribunal have taken a like approach. In the case of The Prosecutor v. Georges Ruggiu, for example, ICTR Trial Chamber I, in accepting the defendant's guilty plea for having incited genocide, discussed the defendant's knowledge of particular words:

The accused admits that as part of the move to appeal for, or encourage, 'civil defence', he made a public broadcast to the population on several occasions to "go to work". The phrase "go to work" is a literal translation of the Rwandan expression that Phocas Habimana, Manager of the RTLM, expressly instructed the accused to use during his broadcasts. With time, this expression came to clearly signify "go fight against members of the RPF and their accomplices." With the passage of time, the expression came to mean, "go kill the Tutsis and Hutu political opponents of the interim government."

The Prosecutor v. Georges Ruggiu, Case No. ICTR 97-32-I, Judgment of June 1, 2000, (ICTR Trial Chamber I), ¶ 44(iv).

ICTY Trial Chamber II has held that the *actus reus* element for aiding and abetting is satisfied if it is shown that the defendant's participation "directly and substantially affected the commission of [the] offense through supporting the actual commission before, during, or after the incident."⁵⁴² The accused's conduct need not proximately cause the act of the principal perpetrator.⁵⁴³ Indeed, it is not necessary that the accused provide physical assistance. Giving moral support or encouragement,⁵⁴⁴ failing to act in certain circumstances,⁵⁴⁵ or merely being present during the crime's commission may, depending on the circumstances, be sufficient to meet the threshold.⁵⁴⁶

c. Common Purpose or Design Doctrine

Relying upon post-World War II jurisprudence, the ICTY Appeals Chamber has defined the elements of the common purpose or design doctrine as "those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons."⁵⁴⁷ As noted by the ICTY Appeals Chamber, the common purpose or design doctrine

⁵⁴² Tadic Judgment (ICTY Trial Chamber II), *supra* note 262, ¶ 692. The Tadic Judgment was appealed to the ICTY Appeals Chamber, which released its judgment on July 15, 1999. See *The Prosecutor v. Duško Tadic*, ICTY Appeals Chamber (15 July 1999) [hereinafter "Tadic Appeals Chamber Judgment"]. The ICTY Appeals Chamber generally agreed with the Trial Chamber's interpretation of the elements of aiding and abetting under Article 7(1) of the ICTY Statute, with the exception of the common purpose or design doctrine, which the Appeals Chamber, unlike the Trial Chamber, found could be considered as falling under Article 7(1). See *similarly* Celebici Judgment (ICTY Trial Chamber II), *supra* note 501, ¶ 326 (describing the elements of individual responsibility under Article 7(1) of the ICTY Statute generally as follows:

It is, accordingly, the view of the Trial Chamber that, in order for there to be individual criminal responsibility for degrees of involvement in a crime under the Tribunal's jurisdiction which do not constitute a direct performance of the acts which make up the offense, a showing must be made of both a physical and a mental element. The requisite *actus reus* for such responsibility is constituted by an act of participation which in fact contributes to, or has an effect on, the commission of the crime. Hence, this participation must have a direct and substantial effect on the commission of the illegal act.

See also Akayesu Judgment (ICTR Trial Chamber I), *supra* note 534, ¶¶ 473, 476 and 477.

⁵⁴³ See Blaškić Judgment (ICTY Trial Chamber I), *supra* note 531, at ¶ 285.

⁵⁴⁴ *Id.* at ¶ 283. See *similarly* Akayesu Judgment (ICTR Trial Chamber I), *supra* note 534, ¶ 694 (finding the defendant responsible under Article 6(1) of the ICTR Statute for aiding and abetting in acts of sexual violence by "allowing them to take place on or near the premises of the bureau communal and by facilitating the commission of such sexual violence through his words of encouragement in other acts of sexual violence which, by virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place.").

⁵⁴⁵ Blaškić Judgment (ICTY Trial Chamber I), *supra* note 531, at ¶ 284 (holding that "the *actus reus* of aiding and abetting may be perpetrated through an omission, provided this failure to act had a decisive effect on the commission of the crime and that it was coupled with the requisite *mens rea*"). See also *The Prosecutor v. Alfred Musema*, Judgment, January 27, 2000, Case No. ICTR-96-13 (ICTR Trial Chamber I) [hereinafter "Musema Judgment (ICTR Trial Chamber I)"], ¶ 123.

⁵⁴⁶ See *The Prosecutor v. Zlatko Aleksovski*, Trial Judgment, 25 June 1999, Case No. IT-95-14/1, ¶ 64 (ICTY Trial Chamber I) [hereinafter "Aleksovski Judgment (ICTY Trial Chamber I)"] (finding that "mere presence constitutes sufficient participation under some circumstances so long as it was proved that the presence had a significant effect on the commission of the crime by promoting it and that the person present had the required *mens rea*"). On appeal, Mr. Aleksovski did not challenge this aspect of the Trial Chamber's reasoning and the ICTY Appeals Chamber did not specifically comment upon it in dismissing his appeal. Aleksovski Appeals Chamber Judgment, *supra* note 13, ¶ 8.

⁵⁴⁷ Tadic Appeals Chamber Judgment, *supra* note 542, ¶ 190, *citing, inter alia*, the Trial of Georg Otto Sandrock *et al.*, British Military Court for the Trial of War Criminals, held at the Court House, Almelo, Holland, 24-26 November 1945, U.N.W.C.C., Vol. 1, p. 35; Trial of Gustav Alfred Jepsen and others, Proceedings of a War Crimes Trial held at Luneberg, Germany (13-23 August 1946), Judgment of 24 August 1946); Einsatzgruppen Case, *supra* note 350, at 3. The ICTY Appeals Chamber justified recognition of the common design or purpose doctrine as a basis for liability under Article 7(1) in part on the basis that the major international crimes are committed most commonly in war time situations and therefore often constitute "manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design." Tadic Appeals Chamber Judgment, *supra* note 542, ¶ 191.

recognizes that the types of crimes giving rise to individual responsibility under international law typically do not result from the criminal acts of individuals acting alone, but are rather part of a larger plan entailing collective criminality.⁵⁴⁸

The ICTY Appeals Chamber has identified three general categories of cases falling under the common purpose or design doctrine, one of which is particularly pertinent to the analysis of CPK crimes, namely “co-perpetration” cases.⁵⁴⁹ The *actus reus* element of co-perpetration cases comprises three factors: (1) a plurality of persons; (2) the existence of a common plan, design or purpose which amounts to or involves the commission of a crime; and (3) the participation of the accused in the common design.⁵⁵⁰ The *mens rea* element of co-perpetration cases is “the intent to perpetrate a certain crime” which is shared by all the co-perpetrators.⁵⁵¹

The ICTY Appeals Chamber has identified several distinctions between those who participate in a common purpose or design to commit a crime and aiders and abettors in a crime:

- (i) a participant in a common purpose or design is legally considered a co-perpetrator of the resulting crime, while the aider and abettor is always an accessory to a crime perpetrated by another person, the principal.
- (ii) With the common purpose or design doctrine, proof is required of the existence of a common concerted plan. In respect of aiding and abetting, no plan or agreement is required: indeed, the principal may not even be aware of the accomplice's contribution.
- (iii) In the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose. By contrast, the aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime.⁵⁵²

Finally, it is not necessary that the common purpose or design arise prior to the commission of the act. It can “materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.”⁵⁵³

⁵⁴⁸ See Tadic Appeals Chamber Judgment, *supra* note 542, ¶ 191.

⁵⁴⁹ According to the ICTY Appeals Chamber, the two additional categories of cases falling under the common design or purpose doctrine are: 1) cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside of the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose; and 2) the so-called “concentration camp” cases involving offenses committed by members of military or administrative units such as those running concentration camps. For a discussion of these categories, see Tadic Appeals Chamber Judgment, *supra* note 542, ¶¶ 196-204.

⁵⁵⁰ *Id.*, ¶ 227.

⁵⁵¹ *Id.*, ¶ 228.

⁵⁵² *Id.*, ¶ 229. See also Furundžija Appeals Chamber Judgment, *supra* note 88, ¶ 118.

⁵⁵³ Tadic Appeals Chamber Judgment, *supra* note 542, ¶ 227. See also Furundžija Appeals Chamber Judgment, *supra* note 88, ¶ 119.

2. Superior Responsibility

a. Nature of Superior Responsibility Doctrine

Where applicable, the doctrine of superior responsibility renders military commanders and civilian leaders criminally responsible themselves for crimes committed by their subordinates.⁵⁵⁴ The notion of superior responsibility is centuries-old,⁵⁵⁵ and has been articulated in various forms through treaties,⁵⁵⁶ the military codes of nations,⁵⁵⁷ and the jurisprudence of post-World War II military tribunals.⁵⁵⁸ The U.S. Department of Army Field Manual No. 27-10 on the Law of Land Warfare provides a contemporary articulation of the concept of command responsibility:

⁵⁵⁴ This doctrine developed principally through the law of armed conflict as a concept applicable to military leaders, and in this context has traditionally been referred to as "command responsibility." Both post-World War II tribunals and the ICTY and ICTR have also applied this doctrine to civilian leaders, and consequently the term "superior responsibility" has come to be used to refer more broadly to the responsibility of military and civilian leaders for crimes committed by their subordinates. As discussed below, a distinction appears to be emerging in the *mens rea* requirement for civilian as opposed to military superiors. For a seminal discussion of command responsibility in the military context, see William H. Parks, "Command Responsibility for War Crimes," 62 MILIT. L. REV. 1 (1973).

⁵⁵⁵ See e.g. GROTIUS, DE JURE, BOOK II (1625), Chapter XXI, Sec. ii (providing that "a community or its rulers may be held responsible for the crime of a subject if they knew of it and do not prevent it when they could and should prevent it").

⁵⁵⁶ See e.g. [Hague] Convention [No. X] for the Adaptation of Principles of the Geneva Convention to Maritime War, October 18, 1907, art. 19 (providing that "commanders-in-chief of the belligerent fleets must see that the above articles are properly carried out; they will have also to see cases not covered thereby, in accordance with the instructions of their respective Governments and in conformity with the general principles of the present Convention"); Protocol I, *supra* note 210, arts. 86, 87, providing as follows:

86.(1) The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.

(2) The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was about to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

87.(1) The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and report to competent authorities breaches of the Conventions and of this Protocol.

(2) In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.

(3) The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol and, where appropriate, to initiate disciplinary or penal action against violators thereof."

⁵⁵⁷ See, e.g., U.S. Department of Army Field Manual No., 27-10, Law of Land Warfare (1956) [hereinafter "U.S. Army Field Manual"], ¶ 501.

⁵⁵⁸ See, e.g., *In re Yamashita*, 327 U.S. 1 (1946); *United States v. List et al.*, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 at 759 (1951) [hereinafter the "Hostage Case"]; *High Command Case*, *supra* note 416.

In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with actual perpetrators but also with the commanders concerned. The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to ensure compliance with the law of war or to punish violators thereof.⁵⁵⁹

Prosecutors of Nazi and Japanese war criminals relied in part upon the doctrine of superior responsibility to establish the guilt of both military and civilian leaders,⁵⁶⁰ and the doctrine has also played a significant role in ICTY and ICTR prosecutions and indictments.⁵⁶¹ As is apparent from the analysis in Part IV of this report, the role of the seven officials under study within the CPK military and civilian leadership hierarchy and the manner in which mass atrocities were developed and implemented through the Party apparatus suggest that the doctrine of superior responsibility will be pertinent to establishing individual responsibility on the part of these officials.

b. Elements of Superior Responsibility

The doctrine of superior responsibility focuses on omission; the criminal responsibility of a superior is established when he knew or had reason to know that a subordinate was about to commit or had committed atrocities and failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.⁵⁶² Relying upon post-World War II jurisprudence as their principal reference, the ICTY and the ICTR have articulated three key elements that are necessary to establish superior responsibility:

- (1) a superior-subordinate relationship existed;
- (2) the superior knew or had reason to know that a crime was about to be committed or had been committed; and

⁵⁵⁹ U.S. Army Field Manual, *supra* note 557, ¶ 501.

⁵⁶⁰ See High Command Case, *supra* note 416; Hostage Case, *supra* note 558; United States v. von Weizsaecker, 14 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 at 308; United States v. Flick, 6 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 at 1187.

⁵⁶¹ As of this writing ICTY judgments that have considered the doctrine of superior responsibility include: Blaškić Judgment (ICTY Trial Chamber I), *supra* note 531; Aleksovski Judgment (ICTY Trial Chamber I), *supra* note 546, Aleksovski Appeals Chamber Judgment, *supra* note 13; Celebici Judgment (ICTY Trial Chamber II), *supra* note 501; Celebici Appeals Chamber Judgment, *supra* note 207. ICTR Judgments that have considered the doctrine of superior responsibility include: Musema Judgment (ICTR Trial Chamber I), *supra* note 545; The Prosecutor v. Clément Kayishema *et al.*, Judgment, May 21, 1999, Case No. ICTR-95-1-T (ICTR Trial Chamber II) [hereinafter "Kayishema Judgment (ICTR Trial Chamber II)"], appeal dismissed by ICTR Appeals Chamber June 1, 2001; Akayesu Judgment (ICTR Trial Chamber I), *supra* note 534.

⁵⁶² See, e.g., ICTY Statute, *supra* note 13, art. 7(3) (providing that "[t]he fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof"); ICTR Statute, *supra* note 13, art. 6(3); U.N. Group of Experts Report, *supra* note 3, ¶ 80.

- (3) the superior did not take the necessary and reasonable measures to prevent the crime or to punish the perpetrator or perpetrators thereof.⁵⁶³

Trial Chamber II of the ICTY has held that the doctrine of superior responsibility does not require proof that a superior's failure to comply with his duty caused the commission of the offense by the subordinate. That is, it need not be established that, but for the superior's failure to act, the offense would not have occurred.⁵⁶⁴

i. Existence of a superior-subordinate relationship

Superiors at various levels of an overall hierarchy are potentially liable for the acts of their subordinates.⁵⁶⁵ In addition, the superior-subordinate relationship extends not only to military commanders but also to individuals in civilian positions of authority, provided that a prosecutor can demonstrate that the civilian superior enjoyed a degree of control over subordinates similar to that possessed by military commanders.⁵⁶⁶ In the words of Trial

⁵⁶³ See *Aleksovski Judgment* (ICTY Trial Chamber I), *supra* note 546, ¶ 69; *Aleksovski Appeals Chamber Judgment*, *supra* note 13, ¶ 72; *Celebici Judgment* (ICTY Trial Chamber II), *supra* note 501, ¶ 346; *Celebici Appeals Chamber Judgment*, *supra* note 207, ¶ ; *Blaškić Judgment* (ICTY Trial Chamber I), *supra* note 531, ¶ 294. Similar elements are reflected in the Rome Statute establishing the International Criminal Court. ICC Statute, *supra* note 97, art. 28(2)(c) (“... a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: (a) the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (b) the crimes concerned activities that were within the effective responsibility and control of the superior; and (c) the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution”).

⁵⁶⁴ ICTY Trial Chamber II rejected the contention by the defence in the *Celebici* case of the requirement of a causal element that would require the prosecution to prove that the superior's failure to act caused the commission of the offense. The Tribunal indicated that it found no support for the existence of such a causation element in case law, treaty law, or most literature on the subject. Indeed, the Tribunal suggested that the very existence of a principle of superior responsibility for failure to punish is inherently incompatible with the notion of a causal link between the conduct of the superior and the perpetration of the offense, and therefore in and of itself demonstrates the absence of a causation requirement for superior responsibility. *Celebici Judgment* (ICTY Trial Chamber II), *supra* note 501, ¶ 400. See also *Kordić Judgment* (ICTY Trial Chamber III), *supra* note 527, ¶ 447.

As noted previously, the ICTY Appeals Chamber has also issued a judgment in the *Celebici* case, as a result of appeals filed by both the defence and the prosecution from the final judgment of Trial Chamber II. On the appeals, the defendant Mucic raised one issue relevant to the Trial Chamber's treatment of superior responsibility: that the Trial Chamber erred in fact and in law in finding that Mucic had, at the time when the crimes concerned in the case were being committed, the de facto authority of a commander in the *Celebici* Camp. *Celebici Appeals Chamber Judgment*, *supra* note 207, ¶ 183. The Prosecution also challenged the Trial Chamber's treatment of superior responsibility, on three grounds: that the Trial Chamber erred in law in its interpretation of the standard of “knew or had reason to know” as laid down in Article 7(3) of the ICTY Statute, *id.*, ¶ 216; that the Trial Chamber erred in law in holding that the doctrine of command responsibility requires the perpetrator to be part of a subordinate unit in a direct chain of command under the superior, *id.*, ¶ 242; and that the Trial Chamber erred when it decided that the defendant Hazim Delic was not a “superior” in the *Celebici* camp for the purposes of ascribing criminal responsibility to him under Article 7(3) of the ICTY Statute, *id.*, ¶ 294. The Appeals Chamber dismissed all of these challenges, in most instances explicitly concurring with the Trial Chamber's articulation and application of the doctrine of superior responsibility. See *id.*, ¶¶ 214, 241, 268, 314. Accordingly, where appropriate, the present analysis will refer to the decisions of both ICTY Trial Chamber II and the ICTY Appeals Chamber in the *Celebici* case on the issue of superior responsibility.

⁵⁶⁵ See ICRC COMMENTARY TO PROTOCOLS I AND II, *supra* note 413, art. 87, ¶ 3553.

⁵⁶⁶ See *Celebici Judgment* (ICTY Trial Chamber II), *supra* note 501, ¶ 378; *Aleksovski Judgment* (ICTY Trial Chamber I), *supra* note 546, ¶ 78 (finding that “a civilian must be characterized as a superior pursuant to Article 7(3) if he has the ability *de jure* or *de facto* to issue orders to prevent an offence and to sanction the perpetrators thereof”). In reaching its conclusion in the *Celebici* case, the ICTY relied extensively on post-World War II jurisprudence such as the judgment of the International Military Tribunal for the Far East. In particular, the ICTY referred to the finding by the IMTFE that former Japanese Foreign Minister Koki Hirota, in spite of his position in the civilian bureaucracy, was guilty of having disregarded his legal duty to take adequate steps to secure the observance and prevent breaches of the laws of war. *Celebici Judgment* (ICTY Trial Chamber II), *supra* note 501, ¶ 333-34. The ICTY also relied upon the decision of the U.S. Military Tribunal in *U.S. v. Frederick Flick*, in which six leading civilian industrialists were found guilty of crimes against humanity for their deportation and enslavement of civilians from occupied territories. *Id.*, ¶¶ 355-

Chamber II of the ICTY, “this conclusion is based upon the rationale that persons in de facto control are responsible for persons under their power, irrespective of whether a military or civilian function was served, and therefore the mere absence of formal legal authority to control the actions of subordinates should not be understood to preclude the imposition of such responsibility.”⁵⁶⁷

In this connection, the ICTY Appeals Chamber and the Trial Chambers of both the ICTY and the ICTR have considered the existence of effective control by a superior over his or her subordinates, whether *de jure* or *de facto*, as determinative of whether the doctrine of superior responsibility applies.⁵⁶⁸ Accordingly, while the existence of a *de jure* grant of authority is a significant indication of the existence of a superior-subordinate relationship to which the doctrine applies, it is not essential where, for example, a sufficient degree of *de facto* control by a superior over a subordinate is demonstrated. Thus, the factor that determines the exercise of superior responsibility is the possession of effective powers of control over the actions of subordinates. These powers may include disciplinary powers to coerce a subordinate to act in a certain manner,⁵⁶⁹ as well as the existence of a chain of command that demonstrates an individual’s authority over subordinates.⁵⁷⁰ Finally, more than one person can be considered a subordinate’s superior for purposes of the doctrine.⁵⁷¹

ii. *Mens Rea*

A superior has acted with the requisite *mens rea* if he or she had:

- (1) actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes; or
- (2) reason to know that his subordinates were committing or about to commit crimes.⁵⁷²

63.

⁵⁶⁷ *Id.*, ¶ 354. See *similarly* Celebici Appeals Chamber Judgment, *supra* note 207, ¶¶ 195-198; Blaškić Judgment (ICTY Trial Chamber I), *supra* note 531, ¶ 301.

⁵⁶⁸ See e.g. Celebici Appeals Chamber Judgment, *supra* note 207, ¶ 195; Celebici Judgment (ICTY Trial Chamber II), *supra* note 501, ¶¶ 364-70 (emphasizing that the actual possession or non-possession of control over the acts of subordinates must determine the nature of liability); Kayishema Judgment (ICTR Trial Chamber II), *supra* note 561, ¶ 222 (finding that “[t]he Chamber is under a duty . . . to consider the responsibility of all individuals who exercised effective control, whether that control be *de jure* or *de facto*”);.

⁵⁶⁹ See Blaškić Judgment (ICTY Trial Chamber I), *supra* note 531, ¶ 724 (citing as evidence of General Blaškić’s effective control over military police his ability to punish them); Celebici Judgment (ICTY Trial Chamber II), *supra* note 501, ¶ 767 (citing as evidence of Zdravko Mucic’s position as a superior the fact that “he had all the powers of a commander to discipline camp guards and to take every appropriate measure to ensure that maintenance of order”); Celebici Appeals Chamber Judgment, *supra* note 207, ¶ 266 (confirming that “effective control” of a superior over a subordinate, and not “substantial influence” that falls short of effective control, is the necessary standard of control to give rise to superior responsibility under customary international law).

⁵⁷⁰ Celebici Judgment (ICTY Trial Chamber II), *supra* note 501, ¶ 647 (stating that a subordinate unit of the superior or commander is a *sine qua non* for superior responsibility).

⁵⁷¹ See Blaškić Judgment (ICTY Trial Chamber I), *supra* note 531, ¶ 303.

⁵⁷² Celebici Appeals Chamber Judgment, *supra* note 207, ¶ 191, 209; Celebici Judgment (ICTY Trial Chamber II), *supra* note 501, ¶ 383.

With respect to the first standard, ICTY Trial Chamber II has identified factors that may serve as circumstantial evidence to prove actual knowledge on the part of a superior of crimes committed by his or her subordinates. These include:

- (a) The number of illegal acts;
- (b) The type of illegal acts;
- (c) The scope of illegal acts;
- (d) The time during which the illegal acts occurred;
- (e) The number and type of troops involved;
- (f) The logistics involved, if any;
- (g) The geographical location of the acts;
- (h) The widespread occurrence of the acts;
- (i) The tactical tempo of operations;
- (j) The modus operandi of similar illegal acts;
- (k) The officers and staff involved;
- (l) the location of the commander at the time.⁵⁷³

An individual's particular position within a bureaucracy, while not sufficient in and of itself, may also constitute credible circumstantial evidence of actual knowledge.⁵⁷⁴

With respect to the second standard, the ICTY Appeals Chamber, in interpreting Article 7(3) of the ICTY Statute in the context of pertinent post-World War II jurisprudence, rejected the notion that there is a duty on the part of a superior under customary law to know of all subordinate activity, a breach of which would give rise to criminal responsibility in the context of command or superior responsibility. Rather, the Appeals Chamber held that a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of the likelihood of offenses committed by subordinates.⁵⁷⁵ At the same time, the Appeals Chamber has endorsed a flexible interpretation

⁵⁷³ Celebici Judgment (ICTY Trial Chamber II), *supra* note 501, ¶ 386; Kordic Judgment (ICTY Trial Chamber III), *supra* note 527, ¶ 427.

⁵⁷⁴ See Aleksovski Judgment (ICTY Trial Chamber I), *supra* note 546, ¶ 80. In its judgment in the Aleksovski case, ICTY Trial Chamber I insisted, however, that a superior's position be weighted against geographic and temporal circumstances. "This means that the more physically distant the commission of the acts was, the more difficult it will be, in the absence of other indicia, to establish that the superior had knowledge of them." *Id.*

⁵⁷⁵ Celebici Appeals Chamber Judgment, *supra* note 207, ¶¶ 183-209, *citing, inter alia*, Hostage Case, *supra* note 558, at 1271-2.; Pohl Case, V TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1055; Yamashita Case, IV LAW REPORTS OF TRIAL OF WAR CRIMINALS at 35.; Protocol I, *supra* note 210, arts. 86, 87; U.S. Army Field Manual, *supra* note 557. See *similarly* Kayishema Judgment (ICTR Trial Chamber II), *supra* note 561, ¶ 228 (agreeing that the doctrine of superior responsibility "does not demand a prima facie duty upon a non-military commander to be seized of every activity of all persons under his or her control . . . the Chamber finds that the Prosecution must prove that the accused in this case either knew, or consciously disregarded information which clearly indicated or put him on notice that his subordinates had committed, or were about to commit acts in breach of Articles 2 to 4 of this Tribunal's Statute").

In contrast, ICTY Trial Chamber I, which presided over the Blaškić trial, concluded prior to the Appeals Chamber's decision in Celebici that a "criminal negligence" standard of *mens rea* was appropriate. Under the approach enunciated in Blaškić, taking into account a superior's particular position of "command" and the circumstances prevailing at the time, ignorance of crimes "cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties", namely the duty to be continually informed of the way in which their subordinates carry out the tasks entrusted to them. Blaškić Judgment (ICTY Trial Chamber I), *supra* note 531, ¶¶ 307-332. In finding that a criminal negligence standard could be applied in Blaškić's circumstances, the Tribunal referred to post-World War II precedent, including the Roehling case, in which the court argued that "lack of knowledge . . . can only be the result of criminal negligence." *Id.*, ¶ 318. Echoing this precedent, Trial Chamber I held that

if a commander has exercised due diligence in the fulfillment of his duties yet lacks knowledge that crimes are

of the nature and form of such information, and has held that it is sufficient for the relevant information to have been provided or available to the superior; it is not necessary to prove that he actually acquainted himself with the information. According to the Appeals Chamber:

A showing that a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he “had reason to know” [. . .] As to the form of information available to him, it may be written or oral, and does not need to have the form of specific reports submitted pursuant to a monitoring system. This information does not need to provide specific information about unlawful acts committed or about to be committed. For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge.

Finally, the relevant information only needs to have been provided or available to the superior, or in the Trial Chamber’s words, “in the possession of.” It is not required that he actually acquainted himself with the information.⁵⁷⁶

Some contemporary authorities suggest that the standard of *mens rea* for superior responsibility may differ as between military commanders and civilian leaders. Article 28 of the Statute for the International Criminal Court, which governs the doctrine of superior responsibility for the purposes of prosecutions before that tribunal, provides:

Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective

about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties: this commander had reason to know within the meaning of the Statute.

Id., ¶ 332.

⁵⁷⁶ Celebici Appeals Chamber Judgment, *supra* note 207, ¶¶ 206-207.

authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

- (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
- (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
- (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.⁵⁷⁷

The ICC Statute thus has adopted a “should have known” standard of *mens rea* only in respect of military commanders. For non-military superiors, Article 28 requires proof that a civilian superior either knew or consciously disregarded information that clearly indicated that subordinates were committing or about to commit crimes. This standard is similar to, but arguably stricter than, the *mens rea* standard articulated by the ICTY Appeals Chamber in the Celebici case. By prescribing the standard of “conscious disregard” of available information on the part of a non-military superior, Article 28(b) would apparently exclude as a sufficient basis for liability a negligent failure on the part of a civilian superior to inquire further despite the existence of suspicious, though inconclusive, information.

The *travaux préparatoires* for the ICC Statute suggest that the distinctions prescribed in Article 28 between civilian and military leaders, including the divergent *mens rea* requirements, responded to two issues raised by certain delegations: whether civilian superiors would normally have the same degree of control as military commanders and should therefore incur the same degree of responsibility; and whether civilian superiors would be in the same position as military commanders to prevent or repress the commission of crimes by their subordinates and punish the perpetrators.⁵⁷⁸

Such a distinction in the mental element for civilian and military leaders is not, however, apparent in the judgments of post-World War II military tribunals or the jurisprudence of the ICTY and ICTR. The Nuremberg and Tokyo military tribunals, for example, did not explicitly differentiate the legal standards applicable when finding military and civilian leaders responsible for World War II atrocities committed by their subordinates.⁵⁷⁹ As of this writing, the Trial and Appeals Chambers of the ICTY have not addressed the question whether the responsibility of

⁵⁷⁷ ICC Statute, *supra* note 97, art. 28.

⁵⁷⁸ See Per Saland, *International Criminal Law Principals*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 189 (Roy S. Lee, ed., 1999) at 202-204.

⁵⁷⁹ The Tokyo Tribunal, for example, found Japanese Foreign Minister Koki Hirota responsible for atrocities committed by Japanese troops that perpetrated the “Rape of Nanking” because, although he received ample information, he disregarded his duty to observe the laws of war. See *The Hirota Case*, 3 JUDGMENTS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 1 (1948); 20 RECORD OF PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (1946-1949)(Lib. Of Cong. Microfilm) 49,791. Similarly, in the prosecution of industrialist Friedrich Flick under Control Council Law No. 10, the U.S. Military tribunal found Flick accountable for the enslavement and deportation of civilian and POW slave labor in his industrial enterprises, under the theory that he had a duty to prevent the criminal acts of his subordinate Weiss. See *United States v. Flick*, 6 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1187, 1202 (1952).

civilian superiors is established by different standards than those applicable to military commanders.⁵⁸⁰ Accordingly, it is unclear whether the standards under Article 28 of the ICC Statute may be considered reflective of customary international law.

In light of these ambiguities, we have evaluated the evidence pertaining to each appropriate CPK official according to the comparatively stringent standard of *mens rea* articulated by the ICTY Appeals Chamber, namely requiring that the superior had information available that should have put him on notice of offenses committed by subordinates.

iii. Duty to Prevent and Punish

Finally, a superior will be held responsible for failing to take only such measures as are within his or her "material possibility."⁵⁸¹ These may include:

- (1) giving instructions to subordinates as to their responsibilities under international humanitarian law,⁵⁸²
- (2) instituting a monitoring and reporting system whereby violations of international humanitarian law would be reported to them;⁵⁸³ or
- (3) instituting and enforcing disciplinary measures against subordinates who commit crimes.⁵⁸⁴

Evidence that a superior punished his or her subordinates for their crimes may not necessarily operate as a complete defense to a charge of superior responsibility; rather, the duties to "prevent" and "punish" crimes constitute cumulative and not alternative obligations. The ICTY noted in this connection that

⁵⁸⁰ Celebici Appeals Chamber Judgment, *supra* note 207, ¶ 208.

⁵⁸¹ Celebici Judgment (ICTY Trial Chamber II), *supra* note 501, ¶ 395.

⁵⁸² *Id.*, ¶ 772 (noting that the Defendant Mucic never gave any instructions to the guards at the Celebici camp as to how to treat the detainees).

⁵⁸³ See, e.g., *id.*, ¶ 770 (concluding that

crimes committed in the Celebici prison-camp were so frequent and notorious that there is no way that Mr. Mucic could not have known or heard about them. Despite this, he did not institute any monitoring and reporting system whereby violations committed in the prison-camp would be reported to him, notwithstanding his knowledge that Hazim Delic, his deputy, had a penchant and proclivity for mistreating detainees. There is no doubt that Mr. Mucic was fully aware of the fact that the guards at the Celebici prison-camp were engaged in violations of international humanitarian law).

⁵⁸⁴ In its Judgment in the Celebici Case, ICTY Trial Chamber II found that the defendant Mucic did not take reasonable or appropriate action to prevent the crimes committed within the Celebici camp or to punish the perpetrators thereof. This was based upon evidence of detainees at the camp who claimed that they had never witnessed the punishment of any guard by Mucic or any disciplinary measures in general for the camp. The Trial Chamber also found that there was "no doubt" that Mucic had the authority to prevent the violations of international humanitarian law at the camp, and that there was no evidence that Mucic made any serious effort to prevent the continued violations or punish subordinates for such crimes during his tenure. *Id.*, ¶¶ 772, 774.

the obligation to 'prevent or punish' does not provide the accused with two alternative and equally satisfying options. Obviously, where the accused knew or had reason to know that subordinates were about to commit crimes and failed to prevent them, he cannot make up for the failure to act by punishing the subordinates afterwards.⁵⁸⁵

Current ICTY jurisprudence suggests that individual and superior responsibility may be charged and determined cumulatively against a defendant in respect of the same criminal acts or omissions.⁵⁸⁶ Thus, a defendant may be charged and convicted of having planned, ordered, instigated or otherwise aided and abetted in certain crimes committed by individuals under his authority and control, and may concurrently be found responsible as a superior for having failed to prevent or punish those crimes.

⁵⁸⁵ Blaškić Judgment (ICTY Trial Chamber I), *supra* note 531, at ¶ 336.

⁵⁸⁶ In its final judgment in the Aleksovski case, for example, ICTY Trial Chamber I found the defendant responsible under Article 7(1) of the ICTY Statute for outrages upon personal dignity contrary to Common Article 3 of the 1949 Geneva Conventions in relation to violence inflicted on Muslim detainees of Kaonik prison, and also found him responsible as a superior under Article 7(3) for having failed to prevent or punish subordinate guards for the same atrocities. Aleksovski Judgment (Trial Chamber I), *supra* note 546, ¶ 228, upheld on appeal without challenge on this point Aleksovski Appeals Chamber Judgment, *supra* note 13. See similarly Kordic Judgment (ICTY Trial Chamber III), *supra* note 527, ¶¶ 369-371 (finding the Defendant Cerkez responsible under both Article 7(1) and Article 7(3) of the ICTY Statute for the crimes alleged in Counts 5-6, 14-15, 17 and 19 in relation to certain military attacks, Counts 29-31, 33 and 35 in relation to imprisonment and other detention offenses, Count 42 relating to plunder, and Counts 41 and 44 in relation to destruction.). In apparent contrast to this approach, ICTY Trial Chamber I's stated in its judgment in the Blaškić case that it would be "illogical" to hold a commander responsible for planning, instigating or ordering the commission of crimes and at the same time reproach him for failing to prevent or punish those crimes, but acknowledged that the failure on the part of a superior to prevent or punish crimes committed by his subordinates under Article 7(3) of the ICTY Statute may form the basis for liability under Article 7(1) of the Statute for either aiding or abetting or instigating the commission of *further* crimes. Blaškić Judgment (ICTY Trial Chamber I), *supra* note 531, ¶ 337. In its disposition in the case, however, Trial Chamber I found Blaškić responsible under Article 7(1) of the ICTY Statute for ordering persecutions against the Muslim civilians of Bosnia and thereby for committing a crime against humanity as well as violations of the laws or customs of war and grave breaches of the 1949 Geneva Conventions committed, and at the same time observed that "[i]n any event, as a commander, he failed to take the necessary and reasonable measures which would have allowed these crimes to be prevented or the perpetrators thereof to be punished." *Id.*, Disposition. As a matter of practice, therefore, the ICTY Trial Chambers appear to have found defendants responsible as individuals and as superiors for the same criminal acts or series of criminal acts perpetrated by their subordinates, provided that the elements of both grounds of responsibility are present.