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Documenting The Crimes Of Democratic Kampuchea

John D. Ciorciari with Youk Chhang

John D. Ciorciari (A.B., J.D., Harvard; M.Phil., Oxford) is the Wai Seng Senior Research Scholar at the Asian Studies Centre in St. Antony's College, University of Oxford. Since 1999, he has served as a legal advisor to the Documentation Center of Cambodia (DC-Cam) in Phnom Penh.

Youk Chhang has served as the Director of DC-Cam since January 1997 and has managed the fieldwork of its Mass Grave Mapping Project since July 1995. He is also the Publisher and Editor-in-Chief of DC-Cam's monthly magazine, SEARCHING FOR THE TRUTH, and has edited numerous scholarly publications dealing with the abuses of the Pol Pot regime.

The Democratic Kampuchea (DK) regime was decidedly one of the most brutal in modern history. Between April 1975 and January 1979, when the Communist Party of Kampuchea (CPK) held power in Phnom Penh, millions of Cambodians suffered grave human rights abuses. Films, museum exhibitions, scholarly works, and harrowing survivor accounts have illustrated the horrors of the DK period and brought worldwide infamy to the "Pol Pot regime."¹ Historically, it is beyond doubt that elements of the CPK were responsible for myriad criminal offenses. However, the perpetrators of the most serious crimes of that period have never been held accountable for their atrocities in an internationally recognized legal proceeding. Only in the past several years has renewed international and domestic interest raised the likelihood that certain surviving CPK leaders will be prosecuted. In August 2001, King Norodom Sihanouk signed a law establishing special chambers to try the alleged crimes of certain former CPK officials.² In June 2003, after long and difficult negotiations,

the United Nations and the Cambodian government signed an agreement to create the proposed “Khmer Rouge (KR) tribunal.”³

The envisioned tribunal would possess jurisdiction over the “perpetrators of the most serious offenses” of the DK era. It would be empowered to hear prosecutions for eight enumerated crimes—homicide, genocide, religious persecution, crimes against humanity, torture, war crimes, destruction of cultural property, and crimes against internationally protected persons.⁴ Defendants would be tried before a mixed panel of Cambodian and international judges with a supermajority provision ensuring that any decision would require the vote of both domestic and international judges.⁵ As of this writing, questions about the tribunal remain. The June 2003 agreement requires ratification by the Cambodian National Assembly, and international funding for the process remains uncertain. However, more than twenty-four years after the overthrow of the DK regime, a legal accounting for some of the most heinous crimes of the CPK appears increasingly likely.

This chapter explores the roles that documentary evidence can play in proving some of the most serious crimes of the DK period.⁶ The KR Tribunal Law is taken as the governing statement of substantive criminal law. Although the KR Tribunal Law does not resolve all issues regarding the scope of the eight crimes in question, it does provide an appropriate framework for analyzing the cases against former CPK leaders. A formal legal accounting process is likely to adopt the substantive provisions of the KR Tribunal Law, which have essentially been accepted by both the Cambodian government and the United Nations. Moreover, with a few exceptions discussed below, the KR Tribunal Law adopts relatively standard definitions of the eight crimes in question and appears to be consistent with the universally recognized principle of *nullem crimen sine lege*, defining the various crimes as they existed during the 1975-79 period.⁷ Thus, even if a KR tribunal does not convene, an informal accountability forum or truth commission would be likely to adopt similar definitions.

Like the KR Tribunal Law, this chapter focuses on high-ranking CPK officials and other perpetrators of the most serious criminal offenses in Democratic Kampuchea. There are several reasons for such a focus. First, individuals such as Nuon Chea, Kaing Guek Eav (*alias* Duch), Chhit Choeun

(*alias* Mok), Ieng Sary, Mam Nai, and Khieu Samphan are the most likely defendants to appear before the prospective tribunal.⁸ Second, the cases against those individuals present the most interesting legal and evidentiary challenges, because they involve the attribution of both direct criminal responsibility and superior responsibility, as discussed below. Third, CPK leaders are the most appropriate subjects for legal inquiry, because they bear the greatest official (and quite probably moral) responsibility for the policies and conduct of the Pol Pot regime. Limits on the jurisdiction of an accountability forum are also a practical necessity. Trying even a fraction of the official members of the CPK would be prohibitively expensive, time-consuming, and complex, and doing so would rip deeply at the fabric of contemporary Cambodian society. Finally, there is a concern that trials of too many defendants could destabilize Cambodia politically. Balancing practical constraints with the aims of justice and the need for national reconciliation requires focusing on a limited universe of the most serious offenders.⁹

To reveal the truth, promote justice and national reconciliation, and advance the rule of law in Cambodia, it is imperative that those most responsible for the crimes of the DK regime be held accountable and that their crimes be proven to a legal standard.¹⁰ Documentary evidence is an invaluable asset in meeting those objectives. After its 1979 fall from power, the CPK left behind a large number of documentary materials, including official correspondence, public proclamations, and the personal records of party members. Many documents from foreign sources also exist, as well as post-1979 materials from survivors of Democratic Kampuchea. Together, such materials provide some of the most compelling evidence against DK leaders. Proving the crimes of the CPK is not a simple task, but as demonstrated below, documents can make a major contribution.

INTRODUCTION

This chapter begins by reviewing the available documentary evidence against DK leaders, focusing on the extensive holdings of the Documentation Center of Cambodia (DC-Cam)¹¹ and the associated Tuol Sleng Archives (TSL).¹²

We begin by illustrating the breadth of potential evidence relating to the Pol Pot regime, briefly describing the available materials and how they were obtained. We next address practical issues surrounding the use of documentary evidence against DK leaders. In particular, the chapter discusses the relevant rules of evidence, including the likely treatment of hearsay and confessions and the possible requirement of authentication. It then deals with the critical task of unraveling the coded language that pervades CPK documentation. Taken together, these first sections canvas the available documentary materials and examine the steps needed to convert those materials into a formidable body of legal evidence.

The remainder of this chapter turns to issues of substantive criminal law, demonstrating how duly admitted documentary evidence can be used to prove specific crimes by specific CPK perpetrators. We first distinguish the two major forms of criminal liability applicable to DK leaders—direct and superior responsibility—and highlight the importance of establishing command relationships. The chapter then demonstrates briefly how documents can prove the positions and authority of particular surviving CPK officials. Next, the discussion turns to the issue of ultimate importance—reviewing the eight crimes set forth in the KR Tribunal Law and exploring ways that documents can be used to prove the crimes of particular CPK leaders. After that survey of available evidence, we offer some brief concluding remarks.

THE AVAILABLE DOCUMENTARY MATERIALS

Documentary evidence can take many forms—including handwritten or typed material, films, photos, and audio recordings. Assembling relevant and probative documents constitutes one of the first major steps in any criminal investigation, and that process is particularly challenging with respect to the crimes of the CPK. The widespread nature of atrocities in Democratic Kampuchea makes it necessary to pursue evidence from diverse locations and sources. Compounding the difficulty is the fact that CPK leaders deliberately carried out their activities as secretly as possible. In a 1978 speech, Nuon Chea explained,

[s]ecret work is fundamental in all that we do. For example, the elections of comrades to leading work are secret. The places where our leaders work are secret. We keep meeting times and places secret, and so on. . . . Only through secrecy can we be masters of the situation and win victory over the enemy, who cannot find out who is who. . . . We base everything on secrecy.¹³

DK officials managed to burn many of their documents before the Vietnamese army and affiliated Cambodian insurgents took Phnom Penh in January 1979.¹⁴ Furthermore, political upheaval in Cambodia after 1979 led to the scattering of many surviving CPK documents from their original locations at DK administrative sites. Finally, the passage of time has challenged the physical integrity of documents and provided opportunities for dispersal or destruction.

Much of the important work of identifying, collecting, and organizing relevant documentary materials has already been completed. Over the past several years, DC-Cam has amassed well over 600,000 pages of documentation from the Pol Pot era, petitions and interview transcripts taken from survivors of the regime, and a variety of other potential evidence. DC-Cam by no means possesses a monopoly on documentation relevant to the crimes of CPK leaders, but it is the largest existing repository of such materials.¹⁵ The Tuol Sleng Archives (TSL) represent a second major repository of potential evidence. The personal archives of certain leading journalists and scholars—containing interview transcripts from meetings with CPK officials, victims, and survivors—are also a valuable source of potential evidentiary information.

The available documentary materials against CPK leaders can be divided broadly into two major categories. The first includes materials produced during the Pol Pot era. DK cadres and officials authored most of the documents dating from the 1975-79 period, but confessions of CPK prisoners and documents from foreign countries are also available. The second major category of documentary evidence includes materials produced after the fall of the DK regime in 1979. These are primarily petitions and interview transcripts from survivors of the DK period, but they also include mapping reports describing extant physical evidence. Additional materials undoubtedly exist, and it is the continuing challenge of DC-Cam and historical and legal investigators to identify and collect them.

Documents Dating From The DK Era

A number of documentary materials exist from the Pol Pot period. Most were discovered by officials of the People's Republic of Kampuchea (PRK), which replaced the CPK as Cambodia's *de facto* governing authority after Vietnamese forces and allied members of the National Council of Kampuchea Defense Restoration Solidarity Front (the *Renakse* or "Front") seized Phnom Penh on January 7, 1979. Together, these documents can help to prove the occurrence of specific crimes, demonstrate the knowledge and complicity of DK leaders, and clarify the CPK chain of command.

CPK Correspondence

The first major tranche of documentary evidence against former DK leaders comprises extensive official correspondence between members of the CPK. Such correspondence includes reports from lower-ranking officials to their superiors, directives from superiors to subordinates, and requests for assistance or information. CPK correspondence was generally typed, with some appearing on official letterhead but most printed on plain paper. These items of CPK correspondence, sometimes called the "Khmer Rouge telegrams," were discovered by a Vietnamese team of experts in 1979 and promptly placed in the custody of the Documentation Office of the PRK Ministry of Interior, renamed the Cambodian Ministry of the Interior (MOI). They were held in the custody of the MOI until their delivery to DC-Cam.

Confession Transcripts

Confession reports are a second important type of CPK documentation.¹⁶ The confession reports usually contain transcripts of confessions and attached reports by CPK interrogators, some of which indicate criminal conduct. Certain confession reports also include notes written in the margins by high-ranking officials, most notably Security Chief Kaing Guek Eav *alias* Duch, head of the CPK's state security organization, the *Santebal*.¹⁷ Confessions extracted from

prisoners at the infamous Tuol Sleng prison (also known as “Office S-21”) are particularly numerous.

The TSL documents, which include most of the confessions and most of the CPK biographies, were discovered and identified in 1979. Departing DK officials had simply left the confession transcripts in Office S-21. In an interview with Nate Thayer, Duch asserts that in January 1979,

[CPK Deputy Secretary Nuon Chea] didn’t tell me that the Vietnamese were invading so I had no time to burn the documents. When I met Nuon Chea in 1983, he told me, ‘[a]ll the papers from the party were burned except yours. You are stupid.’¹⁸

Although Nuon Chea was incorrect in claiming that all of the other CPK documents had been destroyed, the TSL collection is one of the largest and most important bodies of surviving documentary evidence. PRK officials organized the documents and preserved them with the founding of the TSL and the Tuol Sleng Genocide Museum in 1980, where they have remained to the present day.

Most of the remaining confession transcripts and many of the CPK biographies come from the so-called *Santebal* collection. The documents in the *Santebal* collection were discovered by a team of Vietnamese experts in 1979 at a large private villa located on 240 Street in Phnom Penh. Like the “Khmer Rouge telegrams,” these documents were delivered to the PRK Ministry of the Interior and remained in the MOI their delivery to DC-Cam. The *Santebal* collection has been supplemented by two confessions, amounting to approximately 200 pages, provided to DC-Cam by a private individual under a condition of anonymity.

Committee Minutes And Reports

Reports from DK political and military committees represent a third form of documentary evidence from the Pol Pot era. Minutes from meetings of the CPK Central Committee, the Standing Committee of the Central Committee, zone and regional committees, and certain military bodies have been preserved. In addition, the DK leadership issued a limited number of public proclamations. One of the most noteworthy proclamations was made at a CPK Congress in early 1976, and a record has survived.¹⁹ Such documents are extremely useful in

discerning the authority of specific individuals in the CPK hierarchy and establishing the mental states of party leaders.

Many of the committee minutes come from the *Santebal* collection and relate to the proceedings of CPK military divisions. Other minutes relate to meetings of the Standing Committee, the top decision-making body in the CPK (discussed below). Excerpts from some Standing Committee minutes are held in the Cambodian National Archives, where they were deposited by *Renakse* officials after the conclusion of the PRK People's Revolutionary Tribunal, organized in Phnom Penh to try the "genocidal Pol Pot-Ieng Sary clique" in August 1979. Copies of other Standing Committee minutes are held in DC-Cam, given to the Center by scholars Ben Kiernan, David Chandler, and Julio Jeldres. Chandler and Kiernan obtained those copies from Khieu Kanharith, now Cambodia's Secretary of State for Information and previously the editor of *Kampuchea*, a weekly Cambodian newspaper. Khieu obtained those documents directly from the PRK *Renakse* office after the People's Revolutionary Tribunal of 1979.

CPK Biographies

A fourth variety of documents from the 1975-1979 period includes the biographies of CPK prisoners and CPK party members. DK officials recorded biographical information about each of the prisoners entering S-21 and certain other detention facilities. CPK officials also took down biographical information when individuals joined the party. DC-Cam holds the biographies of several thousand prisoners, with photographs attached, and over 19,763 biographies of CPK cadres and soldiers, many of which contain photographs as well. The information from employee and prisoner biographies can be valuable in determining the identities of particular victims or perpetrators and establishing relevant chains of command. The biographies come from both the TSL and *Santebal* collections.

Foreign Documents

Foreign documents provide a further source of potential evidence dating from the DK period. Over 1,000 pages of reports jointly signed by CPK officials with counterparts from the Chinese or Vietnamese officials are on file at DC-Cam. These documents describe the CPK's commercial dealings with China, Vietnam, and other countries and include information about foreign supply of civilian and military goods to Democratic Kampuchea. Those documents, now on file with DC-Cam, come from the MOI via the National Archives of Cambodia.

Media Materials

Original copies of three DK periodicals entitled “Revolutionary Youth” (*Yuvachon ning Yuveaney Padevat*), “Revolutionary Flag” (*Tung Padevat*), and “Flag of the Front” (*Tung Renakse*) also exist. These magazines were produced by the CPK on a monthly basis between 1975 and 1979 and distributed to officials throughout Democratic Kampuchea. They include advice and exhortations from Party leaders, news reports of alleged CPK successes in various endeavors, and sometimes poetry.²⁰ DC-Cam holds original copies of almost all of the published issues of these monthly periodicals between 1975 and 1979.²¹

In addition to the CPK periodicals, approximately ninety-five films and instructional videos produced by the Pol Pot regime with its Chinese advisors have been identified.²² Like the Party magazines, films include directives for CPK members and general propaganda trumpeting the successes of the regime. Ev Panaka discovered the CPK film collection in the files of the DK Cinema Department. They were stored in the PRK (and later Cambodian) Ministry of Culture and Fine Arts, Cinema Department until 1998, when they were sent to France for restoration.²³ Six films produced by the East German government in Cambodia during the DK era exist as well. These films, produced by DEFA-Studio, show critical historical information about the DK regime and include extensive visual evidence of widespread criminal activity in Democratic Kampuchea. German Ambassador Dr. Helmut Ohlraun gave original copies of the files to DC-Cam in 2001.²⁴

Diaries And Notebooks

A variety of other documentary materials exist from the DK period, such as the personal notebooks and diaries of 520 CPK cadres, soldiers, and other officials, including the infamous Duch, Head of the *Santebal*, and Mam Nai, chief interrogator at Office S-21. The notebooks and diaries sometimes include hundreds of pages of notes or narrative, recording day-to-day experiences under the DK regime and, in some cases, offering chilling and incriminating accounts of criminal behavior. DC-Cam obtained most of these handwritten CPK notebooks and diaries from institutions and private individuals. Survivors of the DK regime often found notebooks or diaries when returning to their former homes or workplaces after January 1979.²⁵

Post-DK Documentary Materials

In addition to documents from the DK period, DC-Cam holds extensive materials produced after January 1979. These documents are often every bit as important and useful as those dating from the DK regime. They offer a great deal of information about the abuses suffered by DK survivors and the experiences of interviewed victims and perpetrators during the Pol Pot era.

Survivor Petitions

The most numerous post-DK documents are petitions authored by survivors of the DK regime in the early 1980s. Usually called the *Renakse* documents, the petitions were collected by local officials of the PRK regime. After January 1979, the PRK had succeeded the CPK as the *de facto* authority in most of Cambodia, and PRK officials collected petitions in districts and provinces throughout the country.²⁶ DC-Cam has most of the 1,166,307 handwritten *Renakse* petitions reported by PRK authorities on file. The petitions were not authored under penalty of perjury, and their evidentiary weight will hinge on adjudicators' assessment of their reliability. Many detail CPK atrocities and name specific victims, witnesses, and perpetrators. Some petitions also identify the locations of CPK prisons, interrogation centers, and mass graves. Between 1983 and 1997, the *Renakse* petitions were locked in a storage facility in the PRK Front

Office, which later became the Cambodian Ministry of International Ceremonies, under the charge of Chea Kien. In 1997, Chea delivered the petitions *en masse* to DC-Cam, where they remain.

In addition to the *Renakse* materials, DC-Cam possesses twenty-nine petitions authored by Vietnamese citizens to the PRK government in Phnom Penh. The Vietnamese petitions, written between 1979 and 1983, complain of numerous offenses committed against them and their families by CPK cadres during the Pol Pot era. They were obtained from Vietnamese government files and delivered to DC-Cam by a Vietnamese official under a condition of anonymity. Finally, numerous petitions were submitted via international human rights organizations and political bodies during and shortly after the DK period. Those petitions were often included in official reports from agencies of the United Nations, Amnesty International, and other organizations.²⁷

1979 Trial Documents

A second major category of post-DK documentation comes from the 1979 Popular Revolutionary Tribunal in Phnom Penh. Documents from the 1979 Tribunal include witness statements, reports by PRK criminal investigators, excerpts from CPK documents, accounts from the foreign press, and records of the trial proceedings and guilty verdict. DC-Cam obtained these documents from Min Khin, former head of the PRK Genocide Research Committee, in 1996. Min, who now serves as Cambodia's Minister of International Ceremonies for the Royal Palace, obtained the documents directly from Keo Chanda, the responsible PRK authority, shortly after the 1979 trial.²⁸

The principal shortcoming of the 1979 trial documents—even more than the *Renakse* petitions—is the appearance of political bias. The PRK Decree establishing a tribunal states conclusively that the “Pol Pot-Ieng Sary clique” was guilty of massive criminal offenses, before any evidence had been presented in court. The defendants were not present, and the PRK People's Revolutionary Council, a sworn adversary of the CPK appointed all of the attorneys, judge, and ten “assessors” (akin to jurors).²⁹ Before the trial began, Keo Chanda, the PRK Chair of the Legal Affairs Committee, publicly pronounced on behalf of the government that the Pol Pot-Ieng Sary clique was guilty of the crimes charged

and needed to be punished.³⁰ At the trial, no evidence was put forward on behalf of the defendants. Consequently, while many of the documents emanating from that trial doubtlessly contain relevant factual material, an adjudicator may consider them less reliable due to concerns of bias.

Interview Transcripts

Interview transcripts from leading scholars, journalists, and DC-Cam staff members are a third source of post-DK documentary materials. These transcripts represent one of the most important and powerful sources of potential evidence against the leaders of the Pol Pot regime. A few interview transcripts date from the DK period, but most interviews were conducted after 1979. Adjudicators will need to assess the reliability of these transcripts by considering the date of the interview in question and the likelihood that the interviewee's memory permitted an accurate account.

Scholars including Ben Kiernan and Steve Heder have recorded some of the most revealing interviews, and prominent journalists such as Nate Thayer and Nayan Chanda have likewise produced extremely valuable transcripts. All four men have conducted interviews with former high-ranking CPK officials, among others. David Chandler, Alex Hinton, David Ashley, Elizabeth Becker, and others also hold collections of potentially valuable interview transcripts. DC-Cam has also amassed a large number of interview transcripts. Its research teams have conducted over 1,000 transcribed interviews of DK survivors in recent years, including hundreds of interviews of former CPK cadres. Those materials are readily available for use in a legal proceeding and, in many cases, have been conducted with the pursuit of legally useful information specifically in mind. To the extent that these interview transcripts are made available to criminal investigators, they can serve as a valuable source of evidence. Their weight will be even greater if interviewers and interviewees are willing to testify to their conversations and affirm the accuracy of interview transcripts.

Mapping Reports

Finally, mapping reports prepared by the Director and staff of DC-Cam are an important form of potential secondary evidence produced in the post-DK period. The mapping reports were prepared with the advice and assistance of technical experts and the application of global positioning system technology. They have been accumulated through extensive field research, involving both physical exploration and hundreds of interviews. The mapping reports now detail the locations and characteristics of over 19,440 mass burial pits throughout Cambodia. They also include information about countless skeletal remains and over 167 prisons or detention facilities apparently dating from the DK era, many of which contain the remnants of torture devices.³¹

In combination with photographs and transcripts from interviews with witnesses, the mapping reports highlight the abundant physical evidence of the crimes of the CPK. To maximize their utility, expert forensic testimony will be required, establishing the age of the human remains and the likely manner of death. By analyzing the age of materials and substances found at particular prisons and torture sites, forensic experts may also be able to link them to the DK period.

Collectively, the various types of documentation described above can play an invaluable role in proving the crimes of CPK leaders. In all categories, “smoking gun” documents are comparatively rare. The shrouded nature of the Pol Pot regime, as well as the number and complexity of their offenses, requires that documents be used in concert to prove specific offenses. By proving the occurrence of criminal acts, the knowledge or intent of particular leaders, and the relevant command relationships, documentary materials can function as links in an evidentiary chain, thereby establishing culpability.

Despite their strengths, however, the materials described above are best understood as “raw” evidentiary materials. In order to ensure that documents are admissible as legal evidence and carry the maximum probative weight, several practical issues must also be considered. The following section discusses the features that documentary materials must possess to satisfy the rules governing the admissibility of evidence and exert the maximum evidentiary weight against the leaders of the DK regime.

DOCUMENTS AS LEGAL EVIDENCE:

ENSURING ADMISSIBILITY AND MAXIMIZING PROBATIVE POWER

Refining “raw” evidentiary materials into useful and powerful legal evidence requires clearing a number of hurdles. This section reviews the major steps required. First, to be admissible in a criminal tribunal against CPK leaders (or justly considered in any accountability forum), documentary materials must meet basic standards governing the admissibility of evidence. They must be judged relevant, probative, reliable, and authentic. Second, once documents have been admitted, using them to their full potential requires deciphering the coded language of the DK regime. Documents authored by the CPK contain many euphemisms, aliases, and coded names for offices and institutions, and decoding them is key to harnessing the documents’ evidentiary potential. Each of these issues is addressed in turn.

Meeting The Thresholds For Admissibility

The rules of evidence governing a KR Tribunal will not be entirely clear until the tribunal is conclusively established and commences its work.³² International law provides only vague guidelines on how to treat evidence. Thus, although some precedents have been established, tribunals have generally taken an *ad hoc* approach and applied relatively liberal rules of evidence, following the French civil law tradition.³³ The international criminal tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR, respectively) and International Criminal Court (ICC) have taken this approach, borrowing only sparingly from the much more complex and demanding common law rules of evidence applied throughout the British Commonwealth and United States.³⁴ Cambodian courts also apply liberal rules of evidence based on civil law principles, which Cambodia inherited from the French colonial era.³⁵ For purposes of using documents before a DK accountability forum, some of the most important rules of evidence will relate to the preliminary thresholds of relevance and probative value, the treatment of hearsay and confessions, and the possible requirement of authentication.

Preliminary Thresholds: Relevance And Probative Value

In common-law courts and international tribunals, documents are normally admissible as evidence only if they are judged to be relevant and probative.³⁶ However, the French civil law standard is much more flexible. According to the *principe de la liberté de preuves*, a criminal adjudicator has the discretion to examine any type of evidence that he or she chooses.³⁷ Rather than screening evidence for a jury, civil law judges are responsible for weighing criminal evidence themselves. It is unclear whether a DK accountability forum will follow the civil law principle, but even if the preliminary thresholds of relevance and probative value are applied, they are seldom difficult to meet. They require only that a document bear on a fact consequential to the proceedings and make the existence of that fact more or less probable.³⁸ The breadth of alleged crimes of the DK regime and the importance of establishing chains of command mean that an enormous body of evidence will be relevant and probative in any proceeding against the CPK.

Under both common law principles and the rules followed by international criminal tribunals, however, documents against DK leaders could be excluded when their “probative value is substantially outweighed by the need to ensure a fair trial.”³⁹ This issue of fairness (or “prejudice” in common-law lexicon) is sometimes invoked in jury trials, when gruesome photographs or evidence of past crimes may unfairly sway jurors against the defendant. Given the expected absence of a jury in a DK accountability forum, this rule is less likely to result in the exclusion of evidence. Disturbing photographs from Tuol Sleng, Choeung Ek (the “Killing Fields” burial ground), and other emotive evidence is apt to be admitted as necessary for the proof of the horrific alleged atrocities. In addition, it is not clear that a DK accountability forum will adopt the ICTY standard. Civil law provides no similar basis for excluding evidence. Rather, adjudicators are responsible for considering all evidence and discounting certain materials as they see fit.⁴⁰

The Treatment Of Hearsay

Perhaps the most obvious difference between the civil law and common law treatment of evidence is the body of rules surrounding hearsay. Normally

defined as “an out-of-court statement used to prove the truth of the matter asserted,” hearsay is deemed problematic at common law, because it does not afford judges or lawyers an in-court opportunity to examine the individual who made the statement in question.⁴¹ Many of the documents relevant to the crimes of the CPK would probably constitute hearsay at common law and be excluded unless they fell into a complex set of exceptions. However, the rule against hearsay is not likely to be applied in a proceeding against CPK leaders. Hearsay has been admissible in all major international tribunals and is admissible under the civil law rules governing Cambodian courts.⁴² Adjudicators apply their own judgment regarding the weight that evidence should carry and are under no obligation to divulge their reasons for evidentiary assessments.⁴³

The Weight Of Confessions

Confessions are a second type of “problematic” documentary evidence that deserve attention. In an accounting for CPK leaders, confession transcripts can provide valuable information. While some transcripts run only a few pages, others are hundreds of pages long and contain a wealth of potentially useful facts. In addition to various admissions, they often include extended accounts of the confessor’s personal history during the Pol Pot era. Such information helps to establish CPK policies and practices, the identities of victims and criminal perpetrators, and the DK chain of command. The authors of confessions included “purged” CPK officials, cadres, their family members, or other civilian prisoners. They constitute a significant fraction of the surviving material authored by Party employees and their relatives.

Under the rules of evidence, confessions are not deemed inherently unreliable, but their weight varies greatly according to the means by which they were obtained. When facts demonstrate that a confession was extracted by torture, the resulting confession is generally inadmissible as evidence against the confessor.⁴⁴ Such evidence is of dubious veracity, and admitting it would violate the confessor’s procedural rights while creating perverse policy incentives for law enforcement officials.⁴⁵

The rule against the use of forced confessions applies to most of the CPK confession transcripts. As discussed below, interrogation reports and other evidence show beyond doubt that torture was routinely used to extract confessions during the DK era. Nevertheless, CPK confession transcripts may still provide useful evidence. The U.N. Convention Against Torture allows confessions to be admitted as evidence of the torture itself, and this principle may support the use of confession transcripts to prove other crimes of the CPK as well.⁴⁶ Using confession transcripts as evidence against CPK leaders would not violate the legal and policy considerations that normally exclude forced confessions.

Authenticating Documents

Satisfying the preliminary requirements above is only one step toward using documentary materials as evidence in a tribunal or other accountability forum. In addition, documents must meet legal standards of authenticity if an adjudicator so demands.⁴⁷ With respect to the crimes of the CPK, this issue is magnified by the fact that the relevant Party documents are over twenty years old. In some cases, witnesses may come forward and testify to the authenticity of particular materials. Experts may also swear to the authenticity of interview transcripts. However, when oral testimony is not available, there remain two primary ways to authenticate documents—through physical analysis or through proving the chain of custody.⁴⁸ Both of these tasks will be particularly important in authenticating materials dating from the DK era and, if necessary, the *Renakse* petitions as well.

The most obvious method of authentication is to physically scrutinize a document. Handwriting analysis is the first logical step, as most CPK documents and essentially all of the *Renakse* petitions were hand-written. Although no trained experts in the analysis of Khmer handwriting have been identified, eminent scholars and judges should be able to compare documents of particular importance to verify the putative author's handwriting and signature. In addition, individuals personally familiar with a putative author's handwriting can testify.⁴⁹ Duch has already provided valuable information by identifying his own handwriting and the handwriting of both Son Sen and Nuon Chea.⁵⁰ Handwriting analysis is a powerful tool, because unlike other authentication procedures, it can

narrow documents to a particular author. An adjudicator needs only one authenticated example of an individual's handwriting—from any reliable source, be it related or unrelated to the criminal charges at hand—to begin.

In addition to handwriting analysis, which provides direct proof of a document's origins, physical scrutiny of a document can provide circumstantial evidence of authenticity. Some of the documents authored by CPK officials were typed or written on official letterhead, while others were marked with distinguishing seals. For example, documents emanating from the DK Armed Forces and government ministries sometimes bore official government seals.⁵¹ Such marks should help to prove that certain documents are authentic and date from the DK period. While seals or other distinctive marks cannot prove who authored a given document, they do narrow the range of persons who reasonably could have drafted or handled it.

Unfortunately for prosecutors, many CPK documents—including most correspondence letters and minutes of committee meetings—do not bear official seals, stamps, or letterhead. Some telegrams do not even include signatures, stating only the name of the sender or the name of a particular CPK office. For those materials, forensic testing can provide a valuable means of authentication. Forensic science can establish the age of the paper on which a document is printed. Experts may also be able to date the ink on a document and to distinguish newer from older print. This latter procedure can uncover any tainting of the document by subsequent written additions. Proving that a document was written during the DK era obviously does not determine the identity of its author, but dating procedures may be able to exclude the possibility of post-DK fabrication and thereby increase the probability that the document is authentic. Forensic analysis may also be important in demonstrating that copies of original documents held by DC-Cam, the TSL, or leading scholars reflect the originals if some original documents are not available.⁵²

To complement physical analysis, another way to establish that documents are authentic is to trace their chain of custody, which provides valuable circumstantial evidence of their origins. A combination of witness testimony and transfer agreements can prove the chain of custody for most of the documents. In numerous cases, the chain of custody can account for groups of documents all the

way back to CPK offices in 1979. Such tracing clearly supports their authenticity.⁵³ This process is particularly important in relation to documents that lack identifying marks, seals, letterhead, or verifiable handwriting.

The chain of custody of the TSL documents can be traced with relative ease. Both before and after their discovery in 1979, shortly after the closure of Office S-21, they have remained in a single location. Penn Eng discovered the documentary collection and guarded them until 1980. Between 1980 and 1984, Ing Pech was responsible for the custody of the TSL materials, followed by Ly Heang during the 1984-86 period. Chey Sopheara, the current Director of the Tuol Sleng Genocide Museum, has managed and protected the collection since 1986. With the exception of the late Ing Pech, all men are alive and could testify to the integrity of the documentary collection, describing their means of guarding and preserving the TSL files.

As described above, DC-Cam obtained its documentary collection from a variety of sources, and proving some chains of custody may be more complicated. DC-Cam has contracts describing the transfer of many of its documents from the MOI or the National Archives, and the Director of DC-Cam is available to testify about the means by which all documentary materials were obtained and subsequently protected. Proving the chain of custody before documents arrived at DC-Cam may pose greater difficulty unless individuals responsible for the various collections during the PRK period and the early 1990s are willing to testify. Custodians from the PRK Ministry of Interior and the MOI would need to demonstrate—through transfer agreements or oral testimony—how they came to possess certain documents and how they protected such materials from tampering. Individual, foreign, or private donors of documentary materials may have to provide similar assurances if adjudicators so request.

Overall, the vast majority of the documentary materials described above should be admissible as evidence before a DK accountability forum. The rules of evidence applied are likely to be quite liberal, permitting hearsay and permitting adjudicators to draw from any materials they deem relevant and probative with respect to the crimes of the CPK. The problems with using forced confessions as evidence have been noted. However, provided that CPK confession transcripts are not used against their coerced authors, adjudicators will have wide latitude to use information in the transcripts to consider the cases against former CPK

leaders. Finally, authentication may prove important with respect to certain documents, but in general, a combination of direct proof and circumstantial evidence should confirm the origins of the vast majority of the documents described above. To the extent that handwriting analysis is not available or sufficient, identifying marks on documents, forensic procedures, and well-established chains of custody should ensure the authenticity of the written materials in question.

Maximizing Probative Value—Unraveling CPK Coded Language

After securing the admissibility of documents relating to the DK regime, the next major step faced by a prosecutor is to maximize their probative value. Of course, there are countless rhetorical and organizational means to enhance a document's power in court. This section focuses on one issue of particular importance to documents relating to the DK regime—for many such documents, especially those authored by the CPK, maximizing probative power will require “decoding” them. CPK documents, including communiqués, reports, minutes of meetings, and proclamations, can provide some of the most compelling evidence against leading defendants. They come from official sources that are normally presumed to be reliable, and they are the most important sources of evidence for proving the high-level chain of command and establishing the all-important states of mind of key DK officials. However, using CPK documents requires deciphering the coded names and language that pervaded the lexicon of the Pol Pot era.

Although the documents certainly suggest the meaning of certain coded language, the most relevant terms are not defined with explicit clarity. Among the most important terms are “smash,” “sweep,” “screen,” “enemies,” and “no-good elements.” Historians agree that those terms were used as an internal code, both to order and to report some of the many alleged crimes of the CPK. Nevertheless, the task of proving that the coded terms referred to criminal acts remains.

Defining the key coded terms will almost certainly require testimony from experts and former members of the regime. High-ranking members of the CPK

apparatus are ideal witnesses in this regard, though their appearance cannot be guaranteed, and their testimony may not even be decisive. Unless the witness was relatively high in the CPK hierarchy or had special access to top leaders, he or she may not be able to prove that the party chiefs interpreted a coded word in a certain way. In the absence of formal testimony, some such evidence can be found in the interview transcripts. For example, in a 1991 interview with Ben Kiernan, former Eastern Zone military commander Heng Samrin asserted that *kâmtech* (“smashing”) meant to kill, but that *komchat* (“getting rid of”) was a more general term.⁵⁴

Interview transcripts explain only some of the coded terms. Consequently, even if they are afforded full evidentiary weight, expert testimony will also be invaluable. Some scholarly analysis on CPK coded language has already been done. For example, Stephen Heder has conducted a thorough evaluation of the terms “smash” and “sweep,” employed frequently in CPK party documents and communications.⁵⁵ He has arrived at the conclusion, supported by other sources, that “smashing” denoted killing, while “screening” encompassed a broader range of activities used to rid the CPK of its perceived adversaries. The terms “enemies” and “no-good elements” also appear frequently in the documentation, referring to perceived opponents of the DK regime. Each of these critical coded terms is discussed below in greater detail.

“Smash”

One of the most commonly used code words in the CPK documents is *kâmtech* (“smash”). The term is used in a number of contexts. For example, one document refers to “smashing” a clay pot, which is consistent with the English usage of the term. At other times, authors vow to “smash” broad political entities, such as “U.S. imperialism” or “Vietnamese intervention.” However, the most important use of the word is in reference to human beings, when it appears to denote the act of killing. Numerous documents report completed “smashings” or ongoing attempts to “smash” people. Sometimes, those reports refer to armed Thai or Vietnamese combatants and do not implicate a crime. However, in most instances, the “smashed” individuals are prisoners and other civilians, which points strongly toward criminal liability. Some of those documents were

addressed to top party leaders, which could establish their knowledge of illicit acts.

Heder's assertion that "smash" meant to kill is based on etymology, documentary clues, and interviews. His conclusion was confirmed by Heng Samrin and is well supported by CPK correspondence. One example is a 1977 report detailing activities near the Thai border. The author reports a skirmish between Free Khmer rebels and CPK soldiers: "our soldiers chased them, breaking up the group and killing many. [Our soldiers] are surrounding and investigating to smash the rest of them."⁵⁶ This latter usage suggests that "smash" meant killing when applied to human beings. Other documents imply the same meaning, such as a February 1976 report from the Vietnamese border that asserts foreign troops "equipped with [various weapons] infiltrated our territory. . . . We smashed them all, using hand grenades."⁵⁷ Other CPK documents show consistent usage of the term.⁵⁸ A Tuol Sleng prisoner list, naming "smashed" victims, is further harrowing proof of the word's meaning.⁵⁹

"Screening" And "Sweeping"

The CPK also made frequent references to "screening" (*somroet-sâmrang*) or "sweeping away" (*bâh sâm-at*) various people and groups, both in CPK party directives and reports. These terms are somewhat more difficult to define than *kâmtech*, because their meaning is more vague. According to Heder, "sweeping" encompassed killing and a number of lesser measures, such as removing party opponents from office.⁶⁰ Documentary clues suggest that while "sweeping" did not always refer to killing, the terms sometimes included that meaning. In his confession report, a former Deputy Secretary of the CPK Northern Zone asserts that the Party had a policy of "successively smashing" Lon Nol officers and that Khmer Republic "enlisted men . . . were also to be swept out."⁶¹ The syntax suggests that the terms *kâmtech* and *bâh sâm-at* were used synonymously.⁶² A similar inference can be made elsewhere in the confession, where the author reports that the Party leadership "had decided that [Rut Bunsay] . . . was to live . . . [but] there was also a son-in-law of Rut Bunsay . . . against whom the sweep measures have already been taken."⁶³

Heder cites additional evidence that “sweeping” included acts of killing even when it did not refer to them exclusively.⁶⁴ For example, the confession of a former Secretary of the Central Committee’s Division 450 reported that he was given orders on “the establishment of a committee for sweeping out high-ranking [Lon Nol] military officers and civil servants.” Those officials arrested and interrogated would be “turn[ed] over to the sweeping out teams” to decide who would be “smashed” and who would live.⁶⁵ In this context, “sweeping” appears to have been a process that authorized and encouraged killing as one means to eliminate adversaries. The same would appear to be true of the Party’s 1978 directive to “sweep cleanly away the concealed enemies boring from within who are CIA agents, *Yuon* [Vietnamese] running dog agents, and KGB agents.”⁶⁶ In the context of the brutal purges of the Eastern Zone and the killing of countless accused CIA, KGB, or *Yuon* spies, the term “sweeping” could only have included extra-judicial killing.

The precise meaning of “screening” is slightly harder to pin down in the documents. It generally refers to ridding the CPK of its perceived internal enemies. Some uses of the term, especially in phrases such as “screen absolutely” or “screen cleanly” appear to imply killing, possibly after torture and the extraction of forced confessions. Chea Sim reports that in the 1975 Party Congress, Nuon Chea emphasized the need to carefully “screen internal agents.” Chea Sim has asserted that

[t]his was a very important order to kill. Their careful screening was to take all measures so that people were pure. The line laid down must be followed at all costs. . . . If people could not do it, they would be taken away and killed. . . . The words ‘carefully screen’ were the killing principle . . . and were stated strongly on May 20.⁶⁷

Evidence in other CPK documents is less clear. For example, Son Sen asserted that “no-good elements who take chances to infiltrate into the Party . . . and in the army must be absolutely screened.”⁶⁸ At subsequent meetings, he added that: “no-good elements must be definitely screened.”⁶⁹ One of his subordinates, Suong, reported in October 1976 that certain “no-good elements had been gathered, but not yet screened.” At the same time, a Comrade Sokh reported that

“Division 170 had screened 70 no-good elements and put them aside.”⁷⁰ None of these uses of the term excludes killing, but the term remains vague.

If it can be proven that orders to “screen” people were generally understood in the CPK ranks to authorize extra-judicial killing, an adjudicator may hold DK leaders who issued “screening” orders responsible for resulting executions. However, at times “screening” seems to have implied a process of checking people analogous to a security clearance. For example, the minutes of one high-level military meeting discuss “building and purifying [CPK Units], especially by screening [no-good] elements.”⁷¹ Another document reports that “there are still some persons in our line who have not been completely screened . . . we have gradually arrested some of them and are searching them.”⁷² The meaning of the word “screening” in CPK parlance merits further investigation and may require corroboration from oral testimony.⁷³ Without a clearer definition, the term could have diminished evidentiary utility.

“Enemies,” “Traitors,” And “No-Good Elements”

Three other terms commonly used in the CPK documentation are “enemies” (*khmang*), “traitors” (*jung k’bât*), and “no-good elements” (*samah s’pheap a-krâh*). They clearly refer to individuals singled out for re-education, punishment, and purging by the CPK. The exact definition of those terms can have a major impact on the strength and applicability of the available documentary evidence. One major avenue to establishing that top CPK leaders committed either genocide or crimes against humanity is to prove that the DK regime defined “enemies,” “traitors,” and “no-good elements” in a manner that resulted in intentional proscribed attacks against members of protected groups.

Proving that “enemies” included political adversaries is the easiest to document. In the “Commandments of *Angkar* (the ‘Organization’),” which CPK troops recited on a regular basis, the Party defined its principal “enemy.” Commandment 10 reads:

Thou shalt behave with great meekness toward the laboring people and peasants, and the entire population. Toward the enemy,

however, the American imperialists and their lackeys, thou shalt feed thy hatred with force and vigilance.⁷⁴

At a five-hour address in October 1977, Pol Pot gave a similar definition of the enemies of Cambodia's Communist revolution:

Within the new Kampuchean society there exist such life-and-death contradictions as enemies who belong to various spy networks working for the imperialists, and international reactionaries are still planted among us to carry out subversive activities against our revolution.⁷⁵

Many other high-level references to "enemies" are made, almost always relating to imperialists and class enemies of the Communist revolution.⁷⁶

Most often, the alleged imperialist enemies are tied to the CIA, KGB, or Vietnam.⁷⁷ In 1976, Son Sen proclaimed to the military leadership that, "there are two main enemy networks." Network 1 contained "American imperialists, French, Taiwanese, [and the] CIA." Network 2 contained "revisionists such as the Soviets and Vietnamese." These two networks "together liked to fight against our revolution."⁷⁸ Like the Soviet and Chinese Communist regimes, documents show that the CPK perceived external and internal enemies in the context of a larger class struggle. Those inside of Cambodia who opposed the extreme Maoism espoused by the CPK were at once "enemies" and "traitors." The terms appear to have little distinction in CPK parlance, except that "traitors" were people inside the CPK ranks, while "enemies" also described external foes.

There is also a strong argument that "enemies" referred to the Vietnamese people in general. Articles in the CPK's magazine *Tung Padevat* often refer to what one article called "the aggressive, expansionist, territory-swallowing, genocidal *Youn* [Vietnamese] enemy."⁷⁹ In a 1981 press release, the CPK asserted that it was founded in 1960 "in order to fight the Vietnamese."⁸⁰ In September 1978, the CPK also published a "Black Book" chronicling the historical abuses Vietnam had committed against Cambodia.⁸¹ Chandler has argued that the CPK deliberately turned the Vietnamese into the national, historical *khmang* of the Khmer people.⁸² Frequent diatribes against "the Vietnamese"—not simply the members of Vietnam's ruling party or armed

forces—supports the position that the CPK leadership considered anyone of Vietnamese nationality or ethnicity to be an enemy of Democratic Kampuchea.⁸³

The connection between alleged “traitors” and imperialist enemies is clear from confession transcripts, as well as CPK correspondence. For example, a report in May 1976 asserts that, “we already killed Moeun for his traitorous act of inspiring people to oppose [the Party].”⁸⁴ Another report equates treason with “betrayal of the socialist line.”⁸⁵ A third example describes “American imperialists, Thais, and traitors who foster their schemes to invade us.”⁸⁶ Confessions provide an even stronger indication that “traitors” were defined as internal enemies of the CPK and its class revolution. Almost all of the forced confessions relate to counter-revolutionary acts, usually involving espionage or lesser forms of participation with the internal and external enemies of *Angkar*.⁸⁷

It is quite clear that “enemies” and “traitors” were generally individuals singled out on political grounds. The more difficult task is to ascertain the meaning of “no-good elements.” In his 1977 address, Pol Pot suggested that “no-good elements” were one type of enemy.⁸⁸ Another document suggests that no-good elements were similar to traitors, in that both were internal enemies of the Party leadership.⁸⁹ As noted above, the normal CPK usage of the term arises in directives to “screen out no-good elements.” The best definition appears to be that “no-good elements” were persons, like alleged traitors, who opposed the DK regime from within.

Convincing evidence suggests that the coded terms discussed above refer to protected political groups—the perceived opponents of the Communist revolution in Cambodia. However, for such documents to be useful in a genocide prosecution, it is also necessary to show that certain racial, religious, ethnic, or national groups were inherently seen as “enemies,” “traitors,” or “no-good elements.”⁹⁰ As discussed above, Muslim Chams, Vietnamese, and Buddhist monks appear to fall into those disfavored categories. Other groups, such as hill tribes, Christians, ethnic Thais and Chinese, and the Kampuchea Krom may also have been viewed as “enemies” or “no-good elements.” That issue is a subject of ongoing study at DC-Cam and elsewhere that merits further attention.

Office Names

A related challenge to using the CPK correspondence as evidence is the need to decode the names given to various Party offices. Many documents are addressed to or signed by office numbers and codes, rather than people.⁹¹ For example, many documents are addressed to “Office (*Munti*) 870.” To establish criminal knowledge and the chain of command, that office code must be conclusively tied to particular people. Documentary evidence shows that “870” referred to the office of the CPK Central Committee.⁹² In a 1999 interview with Stephen Heder, Ieng Sary confirmed that understanding and acknowledged that Khieu Samphan was the Chairman of Office 870 after 1977, where he was responsible for keeping track of the Central Committee’s policy implementation.⁹³ Other office codenames, such as “Office 560,” “Office 09,” and “Office 401” must also be deciphered, using a combination of witness testimony and documentary clues.⁹⁴

Although most offices and government bodies were referred to with numbers, the very highest command was often described as *Angkar* (the “Organization.”) Numerous CPK documents are addressed to this entity, and *Angkar* was the object of countless references in all types of available documentation. To the extent that one can define *Angkar* as a coherent group of individual leaders, those leaders may be held responsible for certain broad party commands. Criminal knowledge may also be attributed to any such individuals through the documents addressed to *Angkar*. It is clear that *Angkar* sometimes referred to the CPK in a broad sense, but it also appears to have been used to refer specifically to Pol Pot, and possibly to Nuon Chea.⁹⁵

CPK Aliases

Code names are equally important in the CPK documents. Almost all of the high-ranking members of the CPK were known by one or more aliases, and proving which alias belonged to which official is essential to any legal accounting. Most of the documents that refer to top CPK leaders use their aliases instead of their given names. For example, Runglert Laodi is called “Nuon Chea,” “Brother Number 2,” or “Rung Lert;” Kim Trang is referred to as “Van,”

“Kim Sree,” or “Ieng Sary;” Khieu Samphan is also “Hem;” and Chhit Choeun becomes “Mok,” “Ta 15,” or “Ek Choeun.” Wading through this morass of assumed names is a necessary step in applying documentary evidence against specific defendants.

Fortunately, deciphering coded names should be less challenging than the issue of other coded language discussed above. Historians have reached a relative consensus, based largely on interviews with former CPK officials. The aliases of the most notorious CPK leaders have become widely known and used by the public. For those reasons, proving aliases is unlikely to be a major evidentiary obstacle. Nevertheless, it is important that documentary evidence corroborate the claims of historical experts and other witnesses. Some documents from the DK era do so by referring to an individual by multiple names, placing an alias in parentheses.⁹⁶

Harnessing The Potential Of Documentary Evidence

Deciphering CPK coded language—after establishing the relevance, probative value, and authenticity of the available documents—will help to ensure that the materials described above possess the greatest weight possible in proving the crimes of former DK leaders. To accomplish that goal, however, it is clear that documentary evidence will need to be supplemented by oral testimony. The preceding discussions, especially those relating to authentication and the decoding of CPK terminology, provide clear reminders that documentary evidence does not exist in isolation. To be most convincing, documents must be coupled with convincing testimony from experts and survivors of the Pol Pot regime. Thus, to maximize the probative power of documentary evidence before any DK accountability forum, it will be necessary to enlist qualified historians, former CPK officials, and other key witnesses.

Of course, after documents have been admitted as legal evidence and properly “decoded,” the principal task still remains—proving that particular CPK defendants were guilty of particular criminal offenses. This is the domain of substantive criminal law, which sets forth the elements of the major alleged crimes of the CPK. The following sections show how available documentary

evidence can be used to prove that individual CPK leaders were responsible for the eight principal crimes enumerated in the KR Tribunal Law.

**DOCUMENTS AS PROOF:
ESTABLISHING COMMAND RELATIONSHIPS**

The KR Tribunal Law gives the proposed Extraordinary Chambers jurisdiction over eight criminal offenses—homicide, genocide, religious persecution, crimes against humanity, torture, war crimes, destruction of cultural property, and violations of the 1961 Vienna Convention on Diplomatic Relations. Under both international law and the KR Tribunal Law, individual defendants can be held liable for any of those offenses via either direct responsibility or superior responsibility. Before discussing the eight crimes, this section briefly describes the differences between direct and superior responsibility and highlights the importance of establishing CPK chains of command. It then explores some of the ways that existing documentary materials may be used to prove the position and authority of individual DK leaders.

Forms Of Responsibility—Direct And Superior Liability

Before proceeding to discuss the individual crimes enumerated in the KR Tribunal Law, it is important to emphasize that CPK defendants may be held liable for any of those eight offenses via either direct or superior responsibility. Direct responsibility attaches whenever the defendant “planned, instigated, ordered, or aided and abetted, or committed” the crime in question.⁹⁷ Thus, defendants need not have committed the ultimate criminal act themselves to be liable. This principle is important with respect to the CPK. Although an estimated 1.7 million people died under the DK regime, and millions suffered other abuses, the inner members of the “Pol Pot clique” usually did not pull the trigger or commit torture themselves. To convict them requires tracing orders, plans, and other means whereby CPK leaders planned, ordered, or aided and abetted the crimes of their subordinates.⁹⁸

By contrast to direct responsibility, superior liability attaches as a result of the defendant's criminal inaction or omissions. Article 29 of the KR Tribunal Law describes the principle as follows:

The fact that [relevant criminal acts] were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and 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 punish the perpetrators.⁹⁹

This formulation of the principle is entirely consistent with the law established by international criminal tribunals.¹⁰⁰ “Reasonable measures” include giving instructions to subordinates regarding their legal responsibilities, operating a monitoring and reporting system to uncover past and potential crimes, and taking appropriate disciplinary measures. The defendant's actual or constructive knowledge of the impending or past crime in question can be proven by direct or circumstantial evidence. Relevant circumstantial evidence includes the number, type, and geographic scope of illegal acts, the way those acts were committed, the number and identities of the perpetrators, the *modus operandi*, and the superior's location at the time of the act or acts.¹⁰¹

The line between direct and superior responsibility often blurs, as orders and plans melt into complicity and conscious omissions. In a large and complex organization like the CPK, functionaries several steps removed from the Party's Central Committee often carried out criminal acts pursuant to orders and vague plans passed to them through several layers of bureaucracy. Whether DK leaders ordered crimes in the field, or whether they merely knew about offenses and were complicit in them, is sometimes very difficult to ascertain. Direct liability and superior responsibility are not mutually exclusive. A CPK leader can simultaneously be charged with direct and superior responsibility for the same crime, and he or she can be convicted on one or both counts.¹⁰² In either case, a

vital evidentiary task will be to elucidate chains of authority and command in Democratic Kampuchea.

Establishing The Command Structure Of Democratic Kampuchea

Proving the relevant chains of command in Democratic Kampuchea requires two distinct steps. One must first adduce evidence to establish the political structure of the DK regime and ascertain the authority reserved for particular posts. Secondly, evidence must show that particular CPK defendants and perpetrators occupied positions that placed them in positions of “authority and control” or “command and control” vis-à-vis subordinates who perpetrated proven criminal acts. Connecting individual criminal acts to high-ranking CPK officials is an essential—and sometimes quite challenging—evidentiary task.

In most cases, documents must be used in an additive fashion to establish CPK relationships of authority or command. In some cases, official CPK laws and declarations explicitly detail the roles of certain government officials and describe some aspects of the overall party organization. CPK correspondence also provides a considerable amount of information, as do minutes of committee meetings, confession transcripts, Party biographies, interview transcripts, and petitions. Such documents often refer to individual officials, political groups, and military subdivisions, which helps to elucidate the structure of the DK regime. Used in concert, they provide a reasonably complete picture of the interwoven CPK military and political chains of command.

According to statutes adopted at a Party Congress in January 1976, the CPK Central Committee was the “highest leading body” in the DK regime.¹⁰³ However, there is no conclusive evidence that the Central Committee ever met during the DK period. Both the Constitution of Democratic Kampuchea (the “DK Constitution”), promulgated in January 1976, and the March 1976 “Decisions of the Central Committee on a Variety of Questions” (the “1976 Decisions”)—which in some respects superseded the Constitution—were silent about the workings or membership of the Central Committee.¹⁰⁴ The DK Constitution and 1976 Decisions created a “State Presidium” to be the nominal executive power of the DK regime and a “People’s National Assembly” to hold legislative power. However, there is no substantial evidence that the State Presidium ever convened,

and the “nominal” posts of Democratic Kampuchea were apparently subject to control from the CPK Party Center (*mocchim pak*).

Ample evidence confirms that the secretive Standing Committee of the CPK Central Committee was the principal source of *de facto* authority in Cambodia between 1975 and 1979.¹⁰⁵ Minutes of the Standing Committee corroborate that fact.¹⁰⁶ The Standing Committee made sweeping decisions regarding foreign relations, national defense, transportation, and economic and agricultural policy, even after the passage of the 1976 Decisions.¹⁰⁷ Minutes from the first meeting of the newly created Council of Ministers on April 22, 1976 are also revealing. The speaker at that meeting was “Comrade Secretary” of the Standing Committee (Pol Pot), and records show that Pol announced policy decisions, rather than requesting or debating them.¹⁰⁸ These pieces of evidence suggest that the Standing Committee remained in *de facto* control over national policy, even if the vague 1976 Decisions purported to limit or terminate the committee’s *de jure* control.

Within the Standing Committee, documentary evidence reveals that *de facto* authority originated with the Party Secretary and Deputy Secretary.¹⁰⁹ Chea Sim, Heng Samrin, and Mat Ly all attended a CPK party meeting on May 20, 1975, and each man reported in subsequent interviews that the CPK Secretary (Pol Pot) and Deputy Secretary (Nuon Chea) acted together, dominating the agenda at the meeting and issuing directive to the entire Party.¹¹⁰ Both Duch and Ieng Sary have confirmed that the Secretary and Deputy Secretary were the leading officials of the regime.¹¹¹ The primacy of the Secretary and Deputy Secretary is underscored by minutes from meetings of the Standing Committee. Numerous officials (including Ieng Sary and Khieu Samphan) issued “reports” and requested advice. By contrast, speeches and comments from the Secretary or Deputy Secretary are never termed “reports.” They are instead described as “ideas,” “advice,” or “conclusions,” reinforcing that the Secretary and Deputy Secretary were the top officials in Democratic Kampuchea.

Beneath the Standing Committee, which normally comprised seven to ten individuals, were the DK military apparatus and the regional and local administrative bodies of the regime. Democratic Kampuchea was organized into six Zones (*phumipeak*)—Eastern, Northern/Central, Northwest, Southwest, and

Western—and a special region surrounding Phnom Penh. Each Zone was further subdivided into a number of Regions (*damban*). Regions were composed of various districts, sub-districts, and communes or villages. On a local level, the political geography of Democratic Kampuchea was often very similar to the present.¹¹²

Under the governing statutes of the CPK, the CPK Central Committee and Zone Committees were ordered to spread Party programs to the grassroots. The “duties” of the Central Committee included “implement[ing] the Party’s lines . . . throughout the country”; “giving instructions” to all subordinate Zone, Region, and local party organizations and “nation-wide departments”; and “administering and deploying cadre and Party members within the party as a whole.”¹¹³ Zone leaders (including Ta Mok) were instructed, with their Zone Party Committees, to “go down and meld themselves concretely with their Regions, districts, [CPK] branches, and grassroots . . . in order to lead and implement duties among the masses.”¹¹⁴ These directives illustrate the clear chain of political command emanating from the CPK Center to Zone leaders, Region leaders, and their subordinates.

The Military Committee of the Standing Committee appears to have had day-to-day control over the armed forces, subject to the oversight of the “Party Center.” Beneath the level of the Military Committee, the DK chain of command flowed from the Commander-in-Chief and his General Staff to Zone Military Committees. The military was divided into approximately twenty-six divisions—which were under the control of specific Zone leaders—and each division comprised multiple regiments. Two “independent regiments” were exceptional, taking orders directly from the Commander-in-Chief and General Staff. Independent regiments were further divided into battalions. Numerous correspondence documents and committee minutes reinforce the fact that superiors in the CPK Center gave orders to subordinates working at the Zone, division, and regiment levels.¹¹⁵

A special branch of the CPK political structure was the *Santebal*, the DK state security organization. The *Santebal* was in charge of all law enforcement matters in Democratic Kampuchea and operated the country’s extensive penal system and network of prisons. The *Santebal* was also charged with internal Party security and various intelligence-gathering functions, which gave it some

features of a “secret police” organization, such as the Soviet NKVD. Documents and interview transcripts reveal that Office S-21 was the central administrative site and prison for the CPK’s extensive internal security matters. Correspondence also reveals that the *Santebal* was connected directly to Central Committee leaders at the highest levels. Few if any bureaucratic layers separated the top Standing Committee members from the Chief of S-21, who also served as the *Santebal* Security Chief.

Determining Individuals’ Positions In The CPK

In addition to establishing the authority of particular bodies and positions in the DK regime, documentary evidence can help to prove which offices surviving CPK leaders occupied during the Pol Pot era. As discussed above, to hold men like Nuon Chea, Ieng Sary, Ta Mok, Duch, Mam Nai, and Khieu Samphan liable for many of the crimes of the DK regime, it is essential to prove that they held positions of effective authority or command vis-à-vis lower ranking criminal perpetrators.

Minutes of a meeting held on November 2, 1975 show that Nuon Chea, Ieng Sary, and Khieu Samphan were all members of the CPK Standing Committee at that time.¹¹⁶ Nuon Chea had served as CPK Deputy Secretary since 1960 and continued to hold that position until at least 1978.¹¹⁷ With Ta Mok, he served as a Deputy to Pol Pot on the Military Committee of the Standing Committee.¹¹⁸ He was also President of the People’s National Assembly and served with Ta Mok as a Deputy to Pol Pot on the Military Committee of the Central Committee.¹¹⁹ Evidence suggests that Nuon Chea’s position as the head of the National Assembly carried less *de facto* authority than his role on the Standing Committee, but it did place him in a post of formal superiority over a large number of civilian CPK officials. Further evidence of Nuon Chea’s broad authority comes from abundant CPK correspondence addressed or copied to him. Reports from Duch, the security chief of Tuol Sleng prison, and other CPK officials reinforce the proof of Nuon Chea’s broad-ranging authority.¹²⁰ The documents sent to him report matters ranging from agriculture to internal security to foreign and military affairs. Taken together, documentary evidence can prove

that he exercised the highest level of command authority during the DK regime; his *de facto* (and possibly *de jure*) authority extended to almost every subordinate member of the CPK ranks.

Ieng Sary possessed comparable authority. Like Nuon, he had been a member of the CPK Center since its foundation in the early 1960s.¹²¹ Under the 1976 Decisions, he was the Deputy Prime Minister in charge of foreign affairs.¹²² Chek Sam, a former CPK cadre who served as Ieng's messenger, has stated that Ieng corresponded regularly with Duch, Pol Pot, Khieu Samphan, and others. Chek also asserts that Ieng acted as one of the four or five top leaders of the Standing Committee—along with Pol Pot, Ta Mok, and Nuon Chea—at a meeting of the Party Center in September 1977.¹²³ The many CPK memoranda and telegrams addressed to Ieng confirm his position of broad-ranging authority.

Similar analyses reveal that Khieu Samphan and Ta Mok wielded *de facto* and *de jure* authority over a wide range of civil and military affairs. Ta Mok was the CPK Secretary of the Southwest Zone, a member of the Standing Committee for most of the 1975-79 period, and a key member of the Military Committee. Khieu Samphan was the President of the DK State Presidium and later the head of "Office 870," the powerful office of the CPK Central Committee.¹²⁴ Both men had been part of the CPK Center since the early 1960s, and both were members of the Standing Committee for most of the 1975-79 period.¹²⁵ Like Nuon Chea and Ieng Sary, their positions in the CPK Center placed them in a *de facto* superior-subordinate relationship vis-à-vis almost every member of the CPK ranks.

Interviews with Duch have added further information about the workings of the CPK hierarchy. According to Duch, command and control of the party's security policies and plans for organized killing emanated from three top individuals. "The first was Pol Pot, the second was Nuon Chea, the third Ta Mok."¹²⁶ He asserts that Khieu Samphan was familiar with DK security policies but "did not have the right to decide who to arrest and order killed. He was a notetaker."¹²⁷ Duch describes Ieng Sary's responsibilities as mostly "outside Cambodia" and asserts that Ieng had little to do with internal security matters.¹²⁸ Consequently, while documents suggest that Khieu Samphan and Ieng Sary had broad-ranging authority as Standing Committee members, Duch casts some doubt on their material ability to control internal security affairs and punish subordinates guilty of criminal behavior. This issue will require detailed legal investigation.

Duch's account of the workings of the CPK Standing Committee have received only limited and piecemeal corroboration from other surviving leaders of the Pol Pot regime. For example, Khieu Samphan asserts that he "did not have the right to participate in decisions on important matters."¹²⁹ And Nuon Chea claims that he "was only in charge on the education and of the National Assembly. I did not have the right to give orders, to make any decision. I could not decide about arrest and torture." He asserts that Pol Pot and Son Sen made all security decisions.¹³⁰ Ieng Sary asserts that he "did not know about the killings [and] was only in charge of foreign affairs."¹³¹ To determine the value of these claims, an accountability forum will obviously need to establish the reliability of each individual's account. The possibility of self-serving testimony underscores the importance of documents as potential evidence of the structure of the Party leadership.

Duch and Mam Nai appear to have been less involved in broad national policymaking, but their roles in Office S-21 are essentially irrefutable. By his own admission, Duch was the Head of the *Santebal* and Tuol Sleng prison. Many signed notes and internal memoranda confirm that fact, as does the testimony of surviving S-21 prison guards.¹³² Evidence makes it quite clear that Duch had command authority over all members of the *Santebal*, though his relationship to CPK cadres outside of the security ranks is unclear. Mam Nai's position as Duch's deputy and Chief Interrogator is also confirmed from various sources, including internal documents and the testimony of surviving S-21 cadres.¹³³ Mam Nai appears to have had the narrowest command authority among the individuals described herein. There is little evidence that he functioned as a superior to any CPK officials or cadres outside of the *Santebal*.

Much more evidence exists about specific positions and chains of command in Democratic Kampuchea. This section has merely intended to show how documents can be pieced together to establish the authority of specific potential defendants. The six men discussed above are some of the most likely defendants before a KR Tribunal and are thus appropriate examples. The most important conclusion to be drawn about Nuon Chea, Ieng Sary, Ta Mok, and Khieu Samphan is that their high positions in the CPK Center appear to have given them effective authority over all or nearly all of the party apparatus below

them. The repeated purges of CPK officials and cadres beneath them—though often arbitrary and criminal—show that the inner circle of the Pol Pot regime had the ability to punish (and possibly prevent) criminal offenses throughout Democratic Kampuchea. Duch and Mam Nai appear to have had more limited official authority, restricted to the ranks of the *Santebal*. Nevertheless, the central role of the *Santebal* in many of the most serious crimes of the DK era renders its leaders responsible for a very broad range of criminal offenses, as discussed below.

**DOCUMENTS AS EVIDENCE:
PROVING THE SUBSTANTIVE CRIMES OF CPK LEADERS**

Even after establishing the CPK command structure through minutes, reports, communiqués, biographies, and other documents, proving each of the eight crimes under the KR Tribunal Law poses significant challenges. Each crime requires the establishment of at least two core elements, known as *actus reus* (the act requirement) and *mens rea* (the mental state requirement). As discussed below, some of the required elements are more difficult to prove than others. The following sub-sections discuss each of the eight crimes enumerated in the KR Tribunal Law, highlighting their most elusive elements and suggesting ways in which documentary evidence can help to prove each offense.

Homicide

The first crime covered by the KR Tribunal Law is homicide, which is divided into three degrees.¹³⁴ To be guilty of homicide, a CPK leader must be held responsible for a specific act of killing. In a limited number of cases, documents provide relatively clear and compelling proof that DK leaders committed or ordered homicide. For example, on one list of prisoners at S-21, Duch wrote and signed a note instructing his subordinates to “kill them all.”¹³⁵ In addition, during an interview with journalist Nate Thayer, Duch asserted that Nuon Chea was “the principal man for the killings . . . [by late 1978] my prison was full. Nuon Chea ordered 300 [CPK] soldiers arrested. He called to meet me

and said, ‘Don’t bother to interrogate them—just kill them.’ And I did.”¹³⁶ In a similar confession, Duch added that

[i]t is true that the last days before the Vietnamese came I personally killed the remaining prisoners [at Tuol Sleng] . . . 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.”¹³⁷

Surviving documents and other information suggests that as many as 20,000 people were “processed” through Tuol Sleng.¹³⁸ Fewer than ten survivors are known. “It was a fact that everybody in the Communist Party knew that everyone arrested must be killed,” Duch asserts. “It was the rule of our party.”¹³⁹

If an adjudicator accepts Duch’s account, both he and Nuon can clearly be held liable for many counts of homicide. Similar evidence suggests that Ta Mok committed or directly oversaw or participated in some acts of homicide. In a hand-written note on one confession, Duch wrote that Ta Mok has already “smashed . . . the contemptible Tan Meng.”¹⁴⁰ Duch has also asserted that, “Ta Mok had his own prison . . . at Cherie O’Phnoe in Kampot Province. Many were killed there.”¹⁴¹

A mountain of direct and circumstantial evidence proves that illegal killings occurred throughout Democratic Kampuchea between 1975 and 1979. Interview transcripts, petitions, and other documents gathered from the survivors of the DK regime are the most numerous sources of such evidence.¹⁴² Hann Heng asserted CPK cadres carried out myriad atrocities in a local prison in Siem Riep. The cadres violated women with machine guns and killed them. They threw babies into the air and caught them with sharp bamboo sticks, discarding their dead bodies in pits. They bound and blindfolded some adults, clubbed them to death, and tied up a mother while crushing her baby before her eyes.¹⁴³ Unn Vong reported witnessing a local CPK official named Kha torture fifteen members of his family and eating the liver of one of his victims before killing each of them in turn.¹⁴⁴ These are just two of the 347 *Renakse* petitions, comprising 1,521 pages

and 27,071 signatures, from the Siem Riep area.¹⁴⁵ The DC-Cam mapping reports are also a forceful source of corroborating secondary evidence.

Despite the abundance of homicide accounts, it remains necessary to prove that CPK leaders bear either direct or superior responsibility via orders or culpable omissions. With the notable exception of certain S-21 documents, CPK correspondence contains few direct orders to kill specific people. The same is true for interview transcripts and other sources of documentary information. One must therefore establish that CPK leaders issued general orders, aided or abetted the crimes, participated in a “common purpose or design,” or possessed culpable knowledge but failed to prevent or punish abuses.

A broad-ranging CPK plan authorizing the detention and execution of certain party enemies is relatively clear. At the broadest level, the CPK leadership directed subordinates to purge Cambodia of its opponents. For example, Son Sen chaired a 1976 General Staff meeting and asserted that it was “imperative to purge no-good elements absolutely in the sense of an absolute class struggle.” He then proceeded to say that the most “dangerous” people should be “absolutely purged,” while others should simply be “re-educated” or refashioned.¹⁴⁶ On March 30, 1976, the CPK Central Committee explicitly gave CPK officials the “authority to smash (people) inside and outside the ranks.”¹⁴⁷ In addition, Duch has asserted that the purges of thousands of cadres in the Eastern Zone during 1978 originated from a meeting of top DK leaders. “Pol Pot ordered it. At the meeting was [sic] Nuon Chea, Khieu Samphan, Pol Pot, and Son Sen.”¹⁴⁸ Other interview transcripts reveal a concerted plan to detain and kill officials from the Lon Nol regime.¹⁴⁹ Some of the policies to destroy ethnic or religious groups (discussed below) add to the evidence that the CPK Center ordered organized killing on a massive scale.

These and many additional documents establish that the members of the CPK Central Committee issued directives authorizing extra-judicial executions. Duch has asserted that, “the decisions for the killings were made not by one man, not just Pol Pot, but by the whole central committee.”¹⁵⁰ In some specific cases of homicide, such as the killing of former Lon Nol officials, directives from the CPK Center may be clear enough to constitute a direct order and establish direct liability for individual DK leaders. For other executions, the existence of broad party directives should amount to “aiding and abetting” killings via moral

encouragement and direction. The CPK plans to purge party enemies also meet the standard of a “common purpose or design” in many cases as well. Interviews with former CPK cadres suggest that CPK plans and directives had considerable influence on the activities of lower-level cadres in the field.¹⁵¹ CPK correspondence supports that inference, as subordinates repeatedly report their “progress” on killing enemies within or outside of the Party.¹⁵²

Even when DK leaders cannot be held responsible directly for widespread acts of homicide, they may be found guilty under the doctrine of superior responsibility. Given the overwhelming evidence from petitions, mapping reports, interview transcripts, and other sources, it is practically inconceivable that Zone leaders were not aware of mass homicide occurring beneath them. Duch asserts that Pol Pot, Nuon Chea, and Ta Mok were all directly involved in planning mass killings, while Khieu Samphan also “knew of the killings,” though “less than the others.”¹⁵³ CPK Zone leaders also made regular reports to the Central Committee, as demonstrated by the minutes of high-level CPK meetings. Correspondence from regional and district-level officials also shows a regular reporting practice, and some of those letters contain explicit accounts of extra-judicial killing.¹⁵⁴ The extraordinary number of deaths and mass burials throughout Cambodia during such a brief time period offers strong circumstantial evidence that all high-ranking CPK officials had actual or constructive knowledge of homicide but failed to take adequate measures to prevent killings or to adequately punish the guilty subordinates.

Genocide

A second offense listed in the KR Tribunal Law is genocide.¹⁵⁵ Although historians, the media, and members of the public have consistently labeled the DK regime as “genocidal,” proving genocide is a complex task. The act requirement of genocide is very broad and includes killing, causing serious bodily or mental harm, preventing births, and inflicting destructive conditions of life upon a victimized group. Abundant documentary and physical evidence shows that such acts occurred in Democratic Kampuchea. The KR Tribunal Law also permits prosecution of anyone who attempted or conspired to commit acts of genocide.

Even if a few acts are proven, they can support a finding of guilt if accompanied by proof of the requisite *mens rea*, which is generally much more difficult to establish.

The Crime Of “Auto-Genocide”

According to the conventional definition, genocide requires that the defendant intended to destroy all or part of “a national, ethnical, racial or religious group.” Groups defined by political, social, or economic characteristics are not protected.¹⁵⁶ Historians agree that most of the victims of CPK atrocities were ethnic Khmer nationals, who comprised approximately 80 percent of the population.¹⁵⁷ One 1978 party directive captures the CPK’s drive to eliminate many ethnic Khmer nationals:

Our duty is . . . to attack absolutely, powerfully, and successively these CIA, *Yuon* [Vietnamese], and KGB agents [who] take the form of traitorous ethnic Khmers [and] attack them and attack them again until they are liquidated and successively liquidated again and again.¹⁵⁸

Nothing in the Genocide Convention requires that a protected group constitute a minority. However, the application of the genocide law to the ethnic Khmer majority is unclear. Describing the CPK’s attacks on ethnic Khmers as “genocide” is problematic, given the uncertainty of a customary prohibition against “political genocide”¹⁵⁹ and the unlikelihood that the CPK sought to destroy majority ethnic Khmers on genocidal grounds.¹⁶⁰ The motives for their destruction appear to have been more ideological or political than ethnic, national, racial, or religious. Therefore, whether the CPK’s “auto-genocide” is punishable as such remains uncertain. Consequently, the remainder of this discussion will focus on “traditional” genocide against protected minority groups.

Doctrinal Genocide In Democratic Kampuchea

The largest minority groups in Democratic Kampuchea included ethnic Vietnamese, Buddhist monks, Cham Muslims, northeastern hill tribes, ethnic Thais or Chinese, and possibly “Kampuchea Kroms.”¹⁶¹ To establish the commission of “traditional” genocide, evidence must show that CPK leaders intended to physically destroy one or more of those groups, entirely or in part, and

committed some act or omission toward that end. In both Rwanda and the former Yugoslavia, the intent of certain leaders to wipe out protected minority groups was quite clear, because leaders made explicit—and recorded—statements to that effect.¹⁶² The same was true in Nazi Germany. In Democratic Kampuchea, leaders likewise provided evidence of their genocidal intent, though less publicly. Documentary and testimonial sources reveal that CPK leaders singled out those protected groups for destruction on the basis of their national, religious, or ethnic identities. The CPK's attacks on ethnic Vietnamese, Buddhist monks, and Cham Muslims are among the best studied and provide good examples.

Perhaps the most obvious genocidal plan of the CPK Center was its expressed goal to destroy the Vietnamese people. Heng Samrin has described the plan, unveiled by Pol Pot at a meeting of high-level officials in the Eastern Zone on January 6, 1978. According to Heng, Pol Pot instructed each Cambodian to kill 30 Vietnamese people, whether those persons be combat troops or innocent civilians.¹⁶³ That account is strikingly confirmed by a Phnom Penh Radio broadcast by the CPK on May 10, 1978, which gave the following directive to all party members:

One of us must kill 30 Vietnamese. . . . So far, we have succeeded. . . . We should have two million troops for 60 million Vietnamese. However, two million troops would be more than enough to fight the Vietnamese, because Vietnam has only fifty million inhabitants. . . . We need only 2 million people to crush the 50 million Vietnamese, and we would still have six million people left
¹⁶⁴

The message voices a clear intent to destroy the Vietnamese people in their entirety. Even if the CPK had multiple motives for the plan, their public directive can only be interpreted as genocidal. Moreover, Pol Pot's Eastern Zone address confirms that the plan came from the very highest authority in Democratic Kampuchea. CPK leaders who can be proved to have ordered, committed, or otherwise aided or abetted in subsequent acts of genocide bear direct responsibility for the crime. Those who knew about the likelihood of genocidal abuses and failed to take countervailing action can be held criminally liable under the doctrine of superior responsibility. The open public expression of the plan makes it quite probable that most CPK leaders were aware of a directive to

destroy the Vietnamese, and there is no evidence that the surviving CPK leaders discussed herein opposed the measure.

The continued presence of ethnic Vietnamese within Cambodia was ruled out by Nuon Chea at a Party Congress as early as May 1975. According to multiple interviewees, Nuon asserted that “we cannot allow any Vietnamese minority” to live in Cambodia.¹⁶⁵ Although expulsion was one means to rid Cambodia of the Vietnamese, many sources of evidence—including the infamous radio broadcast discussed above—reveal that killing Vietnamese was also part of the genocidal CPK plan. Heng Samrin asserts that “after liberation those [ethnic Vietnamese] who remained had to go . . . those who did not go were killed. . . . [The CPK] started to kill them in 1976.”¹⁶⁶ In 1976, Vietnamese were barred from exiting Democratic Kampuchea, and by April 1977, the CPK Center sent out a specific order instructing local officials to arrest all ethnic Vietnamese—and all Khmers with Vietnamese language ability or Vietnamese friends—and hand them over to the *Santebal*.¹⁶⁷ A document issued by the U.S. State Department reported that CPK officials began arresting ethnic Vietnamese in Northern Cambodia during 1977 and beating them “to death with poles.”¹⁶⁸

The CPK drive to extinguish the Vietnamese as a people was also active at home, adding to the likelihood that leaders were aware of a plan to destroy the Vietnamese. Interview transcripts reveal many other incidents in which men and women were singled out for arrest and execution on the basis of their Vietnamese ethnicity.¹⁶⁹ Tuol Sleng prison records demonstrate that groups of ethnic Vietnamese civilians were arrested and brought to the Killing Fields.¹⁷⁰ CPK propaganda contained ubiquitous references to the evils of the Vietnamese people, the most “noxious and acute enemies” of Democratic Kampuchea.¹⁷¹ Many directives identify the Vietnamese as primary “enemies” of the revolution and reiterate that enemies are to be “smashed,” “screened out,” or otherwise eliminated. After extended field research in 1979, Kiernan identified almost no ethnic Vietnamese survivors of the Pol Pot regime. According to the available evidence, approximately 100,000 ethnic Vietnamese were expelled in 1975 and 1976. By late 1978, almost all of the remaining 100,000 Vietnamese in Cambodia had been killed.¹⁷² Circumstantial evidence makes it likely that all (or nearly all)

CPK leaders possessed culpable knowledge and superior responsibility—if not direct individual liability—for the genocidal attacks on ethnic Vietnamese.

The members of the CPK Center also left compelling evidence of their intent to eradicate Buddhism and destroy Buddhist monks. Multiple interview transcripts establish that Pol Pot and Nuon Chea ordered Party members to “wipe out,” “defrock,” or “kill” all of the Buddhist monks in Cambodia at CPK’s May 1975 Party Congress.¹⁷³ According to Heng Samrin, Nuon and Pol called monks a “special class,” the most important to fight. “Pol Pot said that no monks were to be allowed, no festivals were to be allowed any more, meaning ‘no more religion.’” Nuon Chea added that “*wats* [Buddhist temples] would not be allowed.”¹⁷⁴

Whether the DK leadership instructed party members to kill all monks, or simply to eliminate them as a class by forcing them to abandon their religion, remains uncertain. Heder and Tittmore draw attention to a subsequent CPK document asserting that CPK policy was to ensure that “monks were gone . . . in the sense that they . . . gave up their religion.”¹⁷⁵ No absolute guidelines exist regarding what constitutes intent to “destroy” a particular group. Most scholars agree that the Genocide Convention (and hence the KR Tribunal Law) requires the intent to bring about the physical elimination of members of a group from the population.¹⁷⁶ However, attacks on cultural, historical, linguistic, and ideational aspects of a group’s existence can also be probative of genocidal intent.¹⁷⁷ There is general consensus among attendees that Pol Pot and Nuon Chea, the top officials of *Angkar*, targeted monks for elimination. Whether that elimination was meant to include the physical killing of all monks or the killing them “in part” and defrocking of many others, the CPK leadership does appear to have possessed the requisite genocidal intent with respect to this group of victims.

Petitions and interview transcripts affirm that these high-level directives were quickly translated into killing and other atrocities throughout Democratic Kampuchea.¹⁷⁸ Buddhist temples were destroyed, monks were forced to defrock and work in the cooperatives, and many monks were deliberately killed. Reports from human rights agencies also reveal a massacre of fifty-seven monks in the Ok Forest in Siem Riep province and similar abuses at the Chompulack pagoda in Kandal province.¹⁷⁹ Documents from the 1979 Tribunal are generally consistent with the *Renakse* petitions and interview transcripts, even if the issue of possible

political bias clouds their evidentiary value. A series of nine reports by monastic committees or individual monks describe a wide array of abuses, including forced labor, denial of rights to worship, destruction of religious property, and killing.¹⁸⁰

By their own evaluation, the CPK plan to eliminate Buddhist monks was highly successful. In September 1975, a CPK document asserted that Buddhist monks “have disappeared by 90 to 95 percent,” the rest being nothing to worry about.¹⁸¹ Chanthou Boua’s research identified that of nearly 3,000 monks from eight selected Cambodian monasteries, only seventy survived the Pol Pot regime.¹⁸² By 1978, Yun Yat, the DK Minister of Culture and Education, declared that Buddhism was incompatible with the April 17 revolution and had become “a relic of the past, forgotten and surpassed.”¹⁸³ The presence of all high-ranking party officials at the 1975 Party Congress—and public comments like the press interview by Yun Yat—make it very likely that all CPK leaders knew of the plan to eliminate the Buddhist monkhood. There is no evidence that any high-ranking CPK official took countervailing action on behalf of the monks.

Direct evidence that CPK leaders intended to destroy the Cham Muslims is relatively scarce, but circumstantial evidence is abundant. Many survivor petitions and interview transcripts allege that Chams were frequently targeted for destruction. Expert analysis by Kiernan and others show that Chams suffered disproportionate killing.¹⁸⁴ Osman Ysa asserts that out of approximately 700,000 Chams living in Cambodia in 1975, fewer than 200,000 survived the regime.¹⁸⁵ The disproportionate impact of CPK policies does not automatically prove genocidal *mens rea*, but it is part of the “general context” that adjudicators may use to infer such intent.¹⁸⁶ The more extreme the disproportionate impact, the more likely a court is to infer genocidal intent. For example, DK survivor Srong Muhammad reported that the CPK killed approximately 1,000 Chams in early 1976 by placing them aboard sinking ships in the Mekong River.¹⁸⁷ That act suggests that local officials sought to commit genocide against the Chams (destroying them at least “in part”), but it does not prove the culpability of CPK leaders.

Perhaps the strongest evidence that the CPK leadership targeted Chams comes from a pair of interviews Kiernan conducted with survivors in the Northern Zone. Two interviewees, Ya Mat and Os El, give consistent reports of a

“Document 163” allegedly distributed by the CPK Center in 1978. According to Ya Mat,

[the document] said we will not spare the Chams, because if spared they will resist It said that the Cham race is not to be spared, because it has a history of resisting the socialist revolution, and also in the Champa period “So we undertake a policy of discarding them now.” They were hand in hand with the Vietnamese, so they must all be killed off. . . . The document said that, “now, they must be smashed to pieces. Whatever department they are in, they must be smashed to pieces.”¹⁸⁸

No copy of the alleged “Document 163” appears to have survived, reducing the weight it could possess in proving that CPK leaders possessed the requisite intent for genocide against the Chams. The same is true for another document identified by Ya Mat, who asserts that a 1975 CPK directive told Chams “if we did not eat [pork], they would not let us ‘live in the revolution.’ They would abolish us. There was no Cham race or Cham country . . . there were to be no Chams, no Chinese, no nothing.”¹⁸⁹

The evidence provided by Ya Mat finds support from Uknha Sos Kamry, who served as a local official under the Pol Pot regime. Kamry recalls a 1977 meeting among CPK officials in the region, where the meeting chairman declared, “[t]he enemies of *Angkar* come in many categories, but the biggest enemies are the Cham. The plan is to destroy them all before 1980.”¹⁹⁰ Kamry asserts that he later read a CPK publication entitled *The Advanced Cooperative Plan* which stated that, “The targeted enemy are the Cham. They must all be destroyed before 1980.”¹⁹¹ Taken together, the evidence of this publication and “Document 163” provide significant evidence of a relatively high-level plan of genocidal attacks against the Chams.

Biographies, confessions, and interview transcripts describe many CPK practices apparently designed to destroy Islam in Cambodia and wipe out the Chams’ distinct ethnic and religious identity. DK survivor Sop Kotijah added that by 1976, a new CPK policy was adopted banning the practice of Cham religion. From 1975 onward, Chams throughout Cambodia were denied the right to pray and forced to eat pork and care for pigs against their Muslim convictions.¹⁹² During Ramadan, Chams were prohibited to fast or to read the Qur’an, and CPK

cadres forced Chams to use the pages of the Islamic holy text as toilet paper.¹⁹³ They were also denied the right to a separate ethnic existence, as Cham language, dress, and names were summarily banned.¹⁹⁴

The banning of Islam, the forced assimilation of the Chams, and the widespread and disproportionate abuses committed against them all suggest that the CPK leadership intended to destroy Chams, “in whole or in part.”¹⁹⁵ There is little concrete documentary proof that top-ranking CPK officials knew about the treatment of Chams, because the orders banning Islam have not survived, and CPK correspondence seldom refer to the Chams by name. Nevertheless, circumstantial evidence of superior knowledge abounds. High-ranking members of the CPK were certainly aware of the broad prohibition of religious practice. The existence of myriad attacks against the lives and basic rights of Chams throughout Democratic Kampuchea also makes it highly probable that top leaders bore constructive (if not actual) knowledge of genocidal offenses being committed by individuals beneath them in the CPK hierarchy.

The examples provided above are only the best-known and most obvious cases of apparent genocide in Democratic Kampuchea. Documentary evidence also reveals abuses carried out against groups including ethnic Chinese, Thais, Laos, Kampuchea Kroms, Christians, and hill tribes in Cambodia’s Northeast.¹⁹⁶ Considerably less evidence surrounds some of these groups than others, and the treatment of less well-studied minorities under the Pol Pot regime deserves further scholarly attention.¹⁹⁷ Although the CPK Center singled out ethnic Vietnamese, Buddhist monks, and Chams for special attack, genocide against other minority groups also may be alleged in a DK accountability forum.

Genocide, the most notorious of crimes, is often associated with the Pol Pot regime, and proving this heinous offense has been a focus of efforts to hold CPK leaders accountable for their offenses. While the issue of punishing “auto-genocide” against the ethnic Khmer majority remains in doubt, cases for “traditional” genocide—against groups such as ethnic Vietnamese, Buddhist monks, and Chams—are compelling. Culpability can quite probably be attached to all of the members of the CPK Center and high-level officers of the *Santebal*. All such individuals had reason to know of genocidal plans and practices, and all had at least some means of preventing or punishing criminal abuses in their ranks.

Religious Persecution

Like genocide, the crime of religious persecution normally couples a relatively broad act requirement with a narrower and more challenging standard of *mens rea*.¹⁹⁸ However, the KR Tribunal Law draws its definition of religious persecution from Articles 209 and 210 of the 1956 Cambodian Penal Code, which set forth an unusually narrow definition of the crime. Those articles prohibit only offenses against the life or person of a monk, either during the monk's religious practice or on the basis of that practice.¹⁹⁹ Furthermore, the 1956 Penal Code protects only monks practicing a religion "*recognized by the Cambodian government.*" Officially recognized religions were not listed, and notes to the text of the 1956 Penal Code suggest that only Buddhist monks were protected from persecution under Articles 209 and 210. The notes refer readers to Articles 495 *et seq.*, which include crimes of general applicability, for offenses against persons who are not Buddhist monks.²⁰⁰ The apparent non-protection of other religious groups leaves a large potential gap in the KR Tribunal Law and represents its greatest deviation from "standard" definitions of the eight crimes under its jurisdiction.

Article 3 of the KR Tribunal Law nevertheless describes Articles 209 and 210 as encompassing the crime of "religious persecution," a crime developed more extensively in international law than in the Cambodian domestic context. The KR Tribunal Law thus suggests a broader definition of the crime than the 1956 Penal Code. Standard international definitions of religious persecution protect the members of any religious group and include a wide range of acts, ranging from outright extermination to the denial of basic rights of citizenship.²⁰¹ No international convention explicitly prohibited religious persecution during the 1975-1979 period, but a strong argument exists that religious freedom was a fundamental human right under the U.N. Charter, Universal Declaration of Human Rights, and International Covenant on Civil and Political Rights. That arguably made religious persecution a crime under customary international law.²⁰² The ambiguity of the 1956 Penal Code—and therefore the KR Tribunal Law—makes it difficult to predict how a tribunal would define the crime.

It is beyond dispute that religious groups were intentionally targeted for persecution during the DK era. The Constitution of Democratic Kampuchea,

approved in late 1975 and officially in force by January 1976, provided the clearest proof of intent to persecute certain religious groups, stating that “[a]ll reactionary religions that are detrimental to Democratic Kampuchea and the Kampuchean people are strictly forbidden.”²⁰³ Although the DK Constitution did not define “reactionary” religions, subsequent acts and CPK policies show that Buddhism, Christianity, and Islam were all considered such and outlawed. The May 1975 Party directives to eliminate Buddhism and Buddhist monks have already been discussed; they clearly satisfy the *mens rea* for religious persecution against Buddhists.²⁰⁴ By late 1975, the CPK had issued a sweeping prohibition on all religious practice in Democratic Kampuchea.²⁰⁵

Many survivor petitions and interview transcripts from throughout Cambodia affirm that Buddhist and Islamic religious practices were banned, and monks were defrocked or otherwise abused. The myriad offenses described above (relating to genocide) show that Muslims, as well as Buddhists, were persecuted throughout the Pol Pot era.²⁰⁶ The foregoing evidence demonstrates the clear intent of the CPK central leadership to persecute Buddhist monks and other religious groups. The widespread nature of the persecution and nationwide decrees banning “reactionary” religions make it extremely likely that members of the CPK Center, and possibly also high-ranking cadres in the *Santebal*, knew or should have known about religious persecution in Democratic Kampuchea. The extent of their culpability for religious persecution will depend much on the definition of the crime adopted by a KR tribunal or other DK accountability forum, but documentary evidence of religiously motivated persecution is abundant.

Torture

Under the KR Tribunal Law and general international law, torture involves the intentional infliction of severe mental or physical suffering on a victim, either to extract a confession or as a form of punishment or intimidation.²⁰⁷ Of the eight major crimes enumerated in the KR Tribunal Law, torture is certainly among the easiest to document. Some of the most compelling pieces of evidence include documents addressed to high-ranking officials, which

establish their command responsibility. One powerful example is a telegram dated March 21, 1976 addressed to Pol Pot and copied to Nuon Chea, Ieng Sary, and Son Sen, in which a CPK officer named Chhon reported about an individual captured by CPK soldiers near the Vietnamese border. “We tortured, hit, and interrogated him and found that he had about twenty partisans in Preach Sdech District.”²⁰⁸ Another highly incriminating example was a letter dated September 25, 1976 to Duch from Pon, an S-21 interrogator. The letter related to a prisoner labeled “IX,” and the relevant portion reads:

[o]n September 25, 1976, we received instruction from *Angkar* to torture. We began to torture him with about 20 to 30 lashes in the morning. At the evening, we tortured him with about 20 to 30 (wire) lashes . . . IX began to make an oral confession, which has the same meaning as his written text.²⁰⁹

The reference to orders from *Angkar* provides powerful evidence that the top CPK leaders possessed the requisite *mens rea* for torture. Duch’s allegations that Son Sen and Nuon Chea often gave him orders to torture and kill detainees adds to that evidence, as does Duch’s frequent correspondence with the CPK Center.²¹⁰ Proof against Nuon Chea is particularly strong. In one file sent to Nuon, interrogators Hong and Seng reported that “[Sieng Pauy *alias* Sean] did not answer [our questions]; but he did once tortured.”²¹¹ Another file sent to Nuon reported: “When [the interrogator] tortured Pich Chay, he conceded and spoke about CIA spies.”²¹²

Evidence against high-ranking individuals and key *Santebal* cadres is thus abundant. The criminal responsibility of Duch, the Security Chief responsible for Office S-21, is almost beyond doubt. Duch has explicitly admitted to repeatedly ordering torture—and carrying out torture himself—in interviews with Nate Thayer.²¹³ If those interview transcripts are accepted as reliable, or if Duch or Thayer credibly testifies to their contents, his conviction is a near certainty. Furthermore, on one page of the confession of Hak Seang Lay taken at Tuol Sleng prison, Duch wrote and signed a note to “resume carrying out torture.”²¹⁴ In another hand-written note about one “uncooperative” prisoner, Duch instructed his subordinates to “use the hot method, even if it kills him, it is OK.”²¹⁵

Other powerful sources of evidence are official reports from CPK prison interrogators, most often at Tuol Sleng, who admit to torturing prisoners to extract confessions. For example, in one confession report from Prison S-21, an interrogator wrote:

[w]e pressed [the victim] on a point that the prisoner lived with traitors. When constantly pressed to answer on this point, he refused to say, and we carried out some torturing. Then he confessed he was a traitor. After he so confessed, I asked for a traitorous network, also about their plans and activities. As he was still unclear in his answer to this point, we further tortured him, and then he spoke out.²¹⁶

Other interrogation reports contain similar admissions.²¹⁷ These numerous admissions of torture make it easy to establish the underlying crimes of certain CPK subordinates.

The strength of the CPK interrogator reports is that they contain explicit confessions. If those documents are authenticated, they will be extremely difficult to contradict. Those reports can also be traced to at least one high-ranking CPK official with ease. However, they account for only a small fraction of the physical acts of torture carried out by CPK officials. Interview transcripts from surviving CPK cadres and prisoners relate many more incidents at Tuol Sleng when DK officials burned prisoners to death, slashed their chests, burnt them with cigarettes, subjected to them to electric shock, removed their fingernails, submerged them in water, denied them food, or otherwise tortured them.²¹⁸ As one of many examples, Tongsin Hean *alias* Pon wrote the following in a cover note on Hu Nim's confession report: "[t]his is [his] answer after we beat him four or five times. He was humbled by the beatings and the water torture."²¹⁹

CPK interrogators' notebooks include further evidence that torture was a routine practice of the *Santebal*. Mam Nai *alias* Chan, who was Duch's Chief Interrogator, described some of his principles of torture in a personal notebook. "Break them with propaganda or break them with torture, but don't let them die. Don't let them get so feeble you're unable to question them."²²⁰ In a 1976 S-21

study notebook, interrogators were instructed to use a seven-point procedure for interrogations. Torturing prisoners, extracting information, and pressuring detainees with political propaganda were all part of the recommended procedures.²²¹

Descriptions in the mapping reports provide evidence of torture devices that remain embedded in the walls and floors of makeshift prisons throughout Cambodia. Although forensic scientists may not be able to tie the devices to particular victims, their existence can corroborate descriptions given in survivor petitions and interview transcripts. Those sources include many claims of torture.²²² They serve to confirm that torture was carried out in a large number of locales and was widespread under the CPK. Duch confirms that fact and has even described the difference between his torture techniques at S-21 and Ta Mok's in the Chrey O Phnoeu Prison in Kampot Province:

I knew from experience that if [prisoners] were only tortured they wouldn't say anything. So torture had to be accompanied by psychological tactics; so I told them they would be released if they talked. This was a lie, but it worked. Ta Mok didn't care about the mental state of the victims. He just tortured them and killed them.²²³

The widespread occurrence of torture in Democratic Kampuchea, combined with the internal memoranda discussing torture, provides compelling circumstantial evidence that all senior CPK officials knew or should have known about the crimes. The repeated incidents—some of them reported in official memoranda—also provide compelling proof that high-ranking officials condoned or failed to punish the offense. Torture is thus one of the easiest crimes to tie to former leaders of the CPK Center and the leaders of the *Santebal*.

Crimes Against Humanity

Many acts proscribed by the laws against homicide, genocide, torture, or religious persecution may also comprise crimes against humanity if they meet certain criteria. The KR Tribunal Law adopts a relatively standard definition of the offense. Acts that may constitute crimes against humanity include murder,

enslavement, deportation, imprisonment, torture, rape, persecution, and other “inhuman acts,” provided that those acts were part of a “widespread or systematic” attack on a civilian population on ethnic, racial, national, or political grounds.²²⁴ There is debate in the legal community as to whether crimes against humanity required a nexus to international armed conflict as of 1975, and the KR Tribunal Law does not resolve the issue.²²⁵ In this chapter, it is assumed that no such nexus requirement existed during the Pol Pot era.²²⁶

“Widespread Or Systematic” Attacks

Establishing that certain CPK atrocities were widespread will be a relatively straightforward evidentiary task. One of the strengths of existing documentary materials is the breadth of their geographic coverage; correspondence, biographies, confessions, and interview transcripts describe criminal acts committed throughout Democratic Kampuchea. The *Renakse* petitions do so even more clearly. This proof of widespread abuses is reinforced by convincing physical evidence detailed in the mapping reports, which show the existence of mass burial pits, CPK prisons, and apparent torture devices in at least 16 of Cambodia’s 17 provinces and 170 districts.²²⁷

Even offenses that were not widespread can qualify as crimes against humanity if they were “systematic.” A systematic offense implies organization and coordination among the perpetrators. There are many examples of systematic offenses conducted by the CPK between 1975 and 1979, but two of the most obvious were the elimination of former Lon Nol officials and the “smashing” of suspected spies and traitors at Tuol Sleng and the “Killing Fields” of Choeung Ek.

Organized Killing Of Former Lon Nol Officials

Interview transcripts and petitions assert that during the evacuation of Phnom Penh in April 1975, checkpoints were set up on each of the major roads out of the city. Officials of the Lon Nol regime were deliberately filtered out of the deported ranks, and many were sent to be killed by CPK cadres. The confession reports of Maen Meng *alias* Chhin and Cho Chhan *alias* Sreng

acknowledge a conscious CPK plan to filter and purge Lon Nol officers. Chhin recounted that the CPK “successively captured [members of the preceding Lon Nol regime], especially certain high-ranking officers, from captain up, all of whom were . . . smashed.”²²⁸ Sreng confirmed that

Angkar put forth a policy of successively exterminating [former Lon Nol] officers, starting from the generals and working down through the lieutenants, as well as government security agents, policemen, military police personnel, and reactionary civil servants.²²⁹

The CPK also set up security services to locate Khmer Republic officials who escaped the checkpoints and made it to the countryside. Local CPK authorities were to draw up a list of those to be executed, and Zone Committees would decide whom they would kill.²³⁰ At the 1975 Party Congress, CPK leaders ordered their subordinates to “execute” or “scatter” the remaining former members of Lon Nol’s regime.²³¹ Nuon Chea added, “[w]e must get rid of former soldiers from the old regime; they will not change their ideas, so we have to smash them all.”²³²

Additional condemning evidence comes from various interview transcripts and petitions. For example, a DK official named San confirms the policy, asserting that documents from the CPK Center said:

[The CPK Center] had to kill Lon Nol officers and agents, and those officials who resisted them. . . . They told us that they would kill the officers and the agents. . . . [The CPK instructions] I read in 1975 talked about killing the wives and children of officers as well²³³

These documentary examples show the use of organized checkpoints and concentrated rounds of killing, a classic example of systematic criminal acts.

S-21 And The Killing Fields

The methodical processes of Tuol Sleng are even more clearly systematic, and they are much more heavily documented. As described above, torture was

carried out according to an orchestrated set of brutal procedures. The process of interrogating and killing S-21 prisoners included taking photographs of inmates, recording their biographical information, interrogating them, using torture if “necessary,” and sending them to be executed.²³⁴ The cold methodology of Tuol Sleng was reminiscent of Nazi concentration camps. Security Chief Duch has admitted to overseeing this organized process of terror at S-21, and he has implicated other leaders in the process, particularly Nuon Chea. He asserts that Nuon often ordered killings and, “for some people, Nuon Chea wanted me to give them 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.”²³⁵

Duch has also noted the practice of periodic purges of the CPK ranks, citing a massive 1978 purge of the Eastern Zone approved by Nuon, Ieng Sary, and Khieu Samphan and carried out by Ke Pauk, among others.²³⁶ Victims to be purged were often sent to S-21, but some were sent to regional prisons. According to Duch, “Ta Mok had his own prison” in the Southwest Zone, where Duch asserts that Ta Mok ordered many killings after torture.²³⁷ According to Heder and Tittmore, Khieu Samphan issued a document in 1987 acknowledging that the CPK executed approximately 11,000 of its own members for being Vietnamese agents. Khieu Samphan admitted that 3,000 of those persons were wrongfully put to death, even though they were only “minor offenders or innocent civilians.”²³⁸

Perhaps the most shocking systematic abuses of all were the mass killings at the “Killing Fields” of Choeng Ek. Him Huy, a CPK cadre who admits to driving prisoners to Choeng Ek and killing “one or two” himself, has described the process used for mass killings in a series of interviews. “Once a month, or every three weeks, two or three trucks” would take prisoners from S-21 to Choeng Ek. Prisoners were assembled in a small building where their names were checked against execution lists prepared by Suos Thi of S-21’s documentation branch. Him Huy asserts that prisoners were led in small groups to ditches and pits dug before by the permanent workers stationed at Choeng Ek:

[The prisoners] were ordered to kneel down at the edge of the hole. Their hands were tied before them. They were beaten on the back

of the neck with an iron ox-cart axle, sometimes with one blow, sometimes with two. . . . [A man named Ho] inspected the killings, and I recorded the names.²³⁹

The regularity and brutality of those killings perfectly fit the definition of a systematic offense. Myriad petitions and interview transcripts add to the huge quantity of circumstantial evidence that forced labor, imprisonment, torture, killing, and other offenses were carried out in an organized fashion throughout Democratic Kampuchea. Evidence for other crimes against humanity, such as forced labor, rape, persecution, and deportation, also abounds in the documents. To discuss all of them is beyond the scope of this chapter. The important conclusion to be drawn is that documentary evidence confirms the widespread and systematic nature of many such offenses.

Intent To Attack Protected Groups

Under Article 5 of the KR Tribunal Law, to hold a defendant guilty for crimes against humanity, evidence of discriminatory intent—on racial, national, ethnic, or political grounds—must also be found.²⁴⁰ Most analysts agree that by 1975 customary international law did not require evidence of discriminatory intent for any crimes against humanity except “persecution” and “institutionalized discrimination.”²⁴¹ Furthermore, certain scholars and jurists argue that under customary international law, crimes against humanity can also be committed against social and cultural groups.²⁴² While the position that a DK accountability forum will take on these substantive issues is not certain, it is important to emphasize that unlike genocide, crimes against humanity definitely can be committed on political grounds. In cases against DK leaders, this distinction has a major legal impact. While it is sometimes difficult to document CPK abuses based on the victims’ religion or race, evidence of broad political motives is much more abundant.

The arrest and killing of former Lon Nol officials (discussed above) is a classic example of politically motivated crimes against humanity. However, former Lon Nol officers represented only a fraction of the political victims of the CPK. Many ordinary Khmers were killed for political reasons as well. CPK correspondence, party proclamations, publications, and minutes of high-level

meetings contain numerous exhortations to “screen out” or crush the adversaries of the Communist revolution, usually referred to with blanket terms such as “enemies,” “traitors,” or “no-good elements.”²⁴³ Son Sen, a member of the CPK Standing Committee and DK Deputy Prime Minister in charge of National Defense, emphasized that even minor violations of CPK policy and moral principles should be treated as part of the deep “imperialist” conspiracy burrowing within the CPK.²⁴⁴ He advocated purging the ranks to rectify the Party’s problems.²⁴⁵

One example of politically motivated killings comes from Teum Sen’s confession file. It includes a report of a local political demonstration and asserts that CPK cadres suppressed it “by arresting the demonstrators and taking them to be killed.”²⁴⁶ The document was marked “sent to Brother Mok,” suggesting that Ta Mok possessed direct knowledge of the event. Without formal trials or access to counsel, thousands of other alleged “traitors” and people described as “Khmer bodies with Vietnamese minds” were tortured, shot, and dumped in burial pits. The motive for those illicit acts can only be described as political.

Confession transcripts, often accompanied by interrogators’ reports, add considerable evidence that the CPK used torture and killing against its perceived political adversaries. As discussed in the following section, reports make it clear that torture was a common practice in CPK prisons. The nature of the questions asked and the forced confessions obtained suggest that many CPK victims were targeted for political reasons. Most “confessions” involved admissions to espionage, betrayals of the party, or “imperialist” ties, all of which frequently resulted in death.²⁴⁷ Many of the “confessions” do not appear credible, such as admissions by Lean Sirivut and Tauch Kham Deuan that each worked on elaborate plots jointly designed by the CIA and KGB.²⁴⁸

Members of the “reactionary classes” were also singled out as political enemies to be purged. Son Sen issued directives at high-level military meetings to combat perceived class enemies of the revolution. He stated that “our core duty is to defend the Party, the revolution, the guidelines of socialist revolution, the statutes of the Party, and the Party organization which had created the guidelines of the Party.” A few lines later, he asserted that “[we] must absolutely screen no-good elements in the sense of a class struggle.”²⁴⁹ Many survivor

petitions and interview transcripts assert that local CPK cadres often identified individuals who spoke foreign languages or possessed wealth or foreign connections as “class enemies” and persecuted them.²⁵⁰ The wide number of such occurrences, combined with broad CPK directives to remove impure elements from the party and fight off the political enemies of the revolution, suggests culpable knowledge or intent on the part of leaders in the CPK Center and the *Santebal* security organization.

Along with homicide and torture, crimes against humanity will be among the easiest DK offenses to document. By encompassing attacks on political (as well as racial, ethnic, or national) grounds, crimes against humanity are considerably easier to prove than genocide, because political motives for killing and torture are omnipresent in surviving CPK documents and interview transcripts. The scope of the prohibition on crimes against humanity may be even wider if a DK accountability forum holds that customary international law protected social, cultural, economic, and other groups by 1975. The cold and meticulous methods of the CPK, especially within S-21, and the wide geographic scope of CPK abuses, make the crimes committed during the Pol Pot regime a textbook case of both widespread and systematic offenses. The sole caveat to bear in mind is the unsettled debate regarding the required nexus to international armed conflict. If a DK accountability forum holds that such a nexus was required as of the Pol Pot era, the challenge of proving crimes against humanity will be significantly greater and require an analysis of the scope of armed conflict in Democratic Kampuchea, as discussed below.

War Crimes

Like crimes against humanity, the prohibition against war crimes encompasses a wide range of criminal acts. They include killing, torture, inhumane treatment, destruction of property, hostage taking, and other acts enumerated in the Geneva Conventions of 1949.²⁵¹ To find a CPK leader responsible for those acts involves many of the same evidentiary issues discussed above. However, the added difficulty of proving war crimes under the Geneva Conventions is the clear requirement that those acts be committed during a time of international armed conflict. The legal definition of international “armed

conflict” has long been a subject of heated controversy. While it is clear that a formal declaration of war is not required, and *de facto* hostilities suffice, the precise level of force or incursion required to establish the existence of international armed conflict remains unclear.²⁵² This problem is even more acute in the case of non-international conflict, which is likewise subject to certain provisions of the Geneva Conventions.²⁵³

Establishing The Bounds Of Armed Conflict

In Democratic Kampuchea, the most obvious instance of international armed conflict arose between the CPK and Vietnam, beginning with border skirmishes as early as 1975 and culminating in the invasion and occupation of Cambodia in 1979. In 1978, domestic Khmer insurgents took up arms and clashed with the CPK forces as well, particularly in the Eastern Zone. Occasional skirmishes also occurred along the Thai border during the DK era. The key to proving war crimes will be to establish when and where those struggles crossed the necessary legal threshold and placed CPK atrocities within the frame of international armed conflict. Although the legal standard is not entirely clear, a logical starting point is to identify documentary evidence of conflict involving the CPK military or other armed forces.

CPK correspondence is one helpful source of information about the existence of an international armed conflict. One example is a report sent to the CPK central office (“870”) from the Eastern Zone in April 1977. It described “three clashes between our border-oriented troops and Vietnamese troops along the border of Svay Rieng district.” The author noted that soldiers on both sides “opened fire” on several occasions, using various shells, bombs, and machine guns. The report also describes numerous organized incursions across the border by soldiers of both armies, and it cites numerous deaths and injuries from the fighting. “Concerning the situation in various districts along the border, Region 23, in this month of April 1977, Vietnamese armed men provoke turmoil, open fire, and invade our territory every day,” it concludes.²⁵⁴ This document shows compellingly that *de facto* international armed conflict existed in the Eastern Zone during April 1977.

A memorandum from CPK officer Chhean provides a second example. It reports a meeting Chhean had with Sun, a representative of Vietnam and was copied to Nuon Chea, Ieng Sary, and Son Sen, among others. The report discusses “the previous issue of invasion, including the ones of Koh Fu Kuoc, Fu Chov, and some other Vietnamese territories along the border from Ha Tieng to Tay Ninh,” leading to the Vietnamese invasion of Po Lov in early June 1975.

Vietnam [had] decided to withdraw its troops from Po Lov and return back all Cambodian soldiers who had been arrested, [but] Cambodia hasn't yet returned the 515 Vietnamese people who had been caught From December 1975 up to [April 1977], Cambodia has imposed numerous troubles subsequently, such as catching 113 Vietnamese people from Kang Tum province and attacking Vietnamese military post Number 8.²⁵⁵

This documentary example shows that ongoing military invasions and clashes between Cambodia and Vietnam began as early as June 1975, near the outset of the DK regime.

Speeches of CPK leaders provide further evidence of the existence of international armed conflict. In a speech given during April 1978, Khieu Samphan discussed the “bitter, stubborn, continuous” fighting with Vietnam throughout the preceding year. He described the Vietnamese forces as launching a “large-scale” war against Democratic Kampuchea.²⁵⁶ Ieng Sary gave a similar speech in early 1978, describing the mounting armed conflict with Vietnam.²⁵⁷ Perhaps most tellingly, the CPK issued a radio broadcast announcing their successes against Vietnam and their intention to completely eliminate Vietnam as a country through military means.²⁵⁸

Numerous additional sources of evidence can be used to show that armed conflict existed between Vietnam and Cambodia during the DK era.²⁵⁹ By late 1977 and throughout 1978, the existence of armed conflict became virtually indisputable, as CPK forces launched raids into southern Vietnam and the Vietnamese army began its stepwise invasion by taking the Krek region of Cambodia.²⁶⁰ Of course, CPK correspondence is not the only source of proof. Interviews have revealed additional information, as have the numerous *Renakse* and Vietnamese petitions.²⁶¹ The work of expert historians and journalists can

also be extremely valuable in proving the existence of international armed conflict during the Pol Pot period.²⁶²

Proving Offenses Against Protected Persons

A second challenge of proving war crimes is identifying the commission of unlawful acts against the specific groups of persons protected by the Geneva Conventions of 1949. Those persons include non-combatant civilians, prisoners of war, and unarmed wounded soldiers.²⁶³ Again, CPK correspondence documents provide an obvious starting point, because they can establish leaders' knowledge about the acts in question.

Telegrams authored by Sok Chhean, the DK Ambassador to Vietnam during the summer of 1977, provide good examples of the existing documentation. The reports describe Vietnamese allegations of offenses committed by CPK soldiers. A June 14 report includes an accusation that CPK forces were “slaughtering” Vietnamese and “torching” their homes.²⁶⁴ On August 4, he reported allegations that the DK army had “committed mass killings of 1,000 ordinary Vietnamese people at Ha Tien.”²⁶⁵ At the end of August, Chhean sent a report regarding allegations of ten more civilian killings by the DK forces.²⁶⁶ These reports—copied to Nuon Chea, Ieng Sary, Khieu Samphan, and the CPK Central Office—placed their readers on clear notice of the possibility that their subordinates were committing war crimes.

Additional examples exist. One is a document addressed to Pol Pot and copied to Nuon Chea, Ieng Sary, and Son Sen, which reports ongoing conflict between Vietnamese soldiers and CPK troops. It describes the firing of “82mm cannon shells” and “grenade throwing . . . that left two of our soldiers dead, and four injured.” It also describes a series of incidents in which CPK troops deliberately killed non-combatant Vietnamese civilians. During the same week, the CPK captured a group of five Vietnamese carrying “mosquito nets, rice, and salt,” shooting and killing two of them.²⁶⁷ There is no indication that the captured group bore arms, and the text of the report, which refers alternately to “Vietnamese” and “Vietnamese soldiers,” suggests that the victims may well have included protected civilians.

Further examples of attacks on Vietnamese civilians emerge in late 1977 and early 1978.²⁶⁸ In a recent interview, former CPK soldier Leng Kim asserted that he and other members of Division 310 were ordered by Division commanders to kill Vietnamese civilians during border fighting in early 1977.²⁶⁹ Chek Sam *alias* Saom Sam Ol, a former CPK messenger, stated in another interview that DK troops arrested over 100 Vietnamese during the border fighting of 1977 and sent them to Office S-21.²⁷⁰ Records demonstrate that almost every Tuol Sleng inmate was sent to the Killing Fields of Choeung Ek and executed without trials.²⁷¹

It is important to note that some of the war crimes reported in the documents may fall beyond the legal confines of the KR Tribunal Law, which limits its jurisdiction to crimes committed on Cambodian soil. Many of the documents do not specify where Vietnamese civilians or prisoners of war were mistreated, which is a fact that requires further legal investigation. An informal legal inquiry brought outside the KR Tribunal Law may choose to adopt the same territorial subject-matter jurisdiction or to extend the inquiry to include CPK crimes committed outside of Cambodia's borders.

That CPK cadres committed some war crimes during the hostilities with Vietnam is beyond dispute, and many of those criminal acts can be tied to members of the CPK Center, if not to officials in the *Santebal* (whose access to information about the war is much less certain). The primary question regarding war crimes in any DK accountability forum will be the treatment of abuses outside of the "war zone" along the border between Democratic Kampuchea and Vietnam. A narrow definition of the conflict is likely to result in a narrow range of punishable offenses, while an extremely broad definition could result in many hundreds of thousands of punishable CPK attacks against protected Vietnamese and Cambodian civilians.

Destruction Of Cultural Property

Some of the documents that are most useful in proving war crimes will also be critical in establishing the liability of CPK leaders for the destruction of cultural property. The KR Tribunal Law defines the destruction of cultural property as a violation of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.²⁷² The Hague Convention

adopts a broad definition of cultural property, including monuments, archeological sites, groups of buildings, works of art, books, archives, scientific collections, libraries, and a variety of other pieces of “movable or immovable property of great importance to the cultural heritage of every people.”²⁷³ The offense of destroying cultural property could conceivably be subsumed under the umbrella of war crimes, because it is generally understood to carry criminal sanctions only during a time of international or domestic armed conflict.²⁷⁴ Once the spatial and temporal parameters of armed conflict are set, the principal evidentiary challenge is simply to show that items of cultural property were destroyed with the requisite knowledge or intent of CPK leaders.

Documentary evidence regarding the destruction of cultural property exists, although it is not as abundant as one might expect given the historical consensus that widespread attacks occurred on pagodas, mosques, churches, and various items of art and literature. One clear example of high-level intent to destroy cultural property appears in Item 6 of the 1976 Decisions, in which the CPK Center ordered that “the Armed Forces demolish” the Christian Cathedral.²⁷⁵ A former *Santebal* cadre, Iem Moeng, has acknowledged his receipt of an order to destroy the Cathedral and his participation in its demolition.²⁷⁶ However, the Cathedral was located in Phnom Penh and destroyed early in the Pol Pot period. Thus, the act would only be punishable if a DK accountability forum adopts a very wide definition of international armed conflict in Democratic Kampuchea.

The DC-Cam mapping reports identify many Buddhist pagodas, mosques, churches, and other religious buildings that were defaced and converted into prisons between 1975 and 1979. Interview transcripts provide evidence that CPK forces engaged in widespread destruction of mosques and pagodas.²⁷⁷ Documents from the 1979 Tribunal also include extensive reports of the destruction of cultural property.²⁷⁸ Numerous interviews and *Renakse* petitions offer further proof.²⁷⁹ For example, a surviving monk named Unn Tep asserts that CPK cadres destroyed Buddhist temples, religious schools and hospitals, and other attached facilities throughout Siem Riep.²⁸⁰

Like many of the crimes discussed above, the destruction of cultural property appears to have been sufficiently widespread to put all members of the CPK Center on notice and trigger a legal responsibility to investigate the offenses.

Ultimately, however, the key determinant of CPK leaders' liability for most alleged destruction of cultural property will be a DK accountability forum's determination regarding the scope of international armed conflict at the time of the alleged offenses.

Crimes Against Internationally Protected Persons

A final set of offenses enumerated in the KR Tribunal Law encompasses crimes against internationally protected persons pursuant to the 1961 Vienna Convention on Diplomatic Relations.²⁸¹ The Convention protects foreign diplomatic personnel, the premises of their embassy or mission, and their personal residence and belongings.²⁸² It insulates diplomatic personnel from criminal liability in the performance of their duties and protects the mission premises and other property from search and seizure.²⁸³ It also requires the receiving state to provide facilities for foreign diplomatic personnel and their families to leave the country quickly (with their property), and in the event of suspended relations or warfare, it requires the receiving nation to respect and protect the mission, its property and archives.²⁸⁴ The evacuation of foreigners from Democratic Kampuchea shortly after the CPK took power raises the possibility of a number of violations against diplomatically immune persons.

Documentary evidence that the CPK violated the Vienna Convention is relatively scarce. Interview transcripts can confirm that during April 1975, the CPK detained foreigners in the French embassy and proceeded to kill the Cambodian husbands of foreign diplomatic personnel.²⁸⁵ However, there is little evidence to connect top CPK leaders with those criminal acts. Duch has admitted killing eight foreigners at S-21 and alleges that "Nuon Chea ordered me to burn their bodies with tires to leave no bones."²⁸⁶ However, it does not appear that any of those victims were protected under the Vienna Convention. This remains an area in need of further research. In the absence of new documentary findings or relevant new interview transcripts, witness testimony will have to bear most of the weight for proving crimes against internationally protected persons.

CONCLUSION

This chapter has attempted to demonstrate some of the many issues surrounding the use of documentary evidence against former CPK leaders, including members of the CPK Center and the infamous *Santebal*. Naturally, the examples herein canvas only a fraction of the useful documentary resources available at DC-Cam and elsewhere, and no individual defendant has been addressed in exhaustive detail. Nevertheless, the examples herein demonstrate some of the strengths and shortcomings of the available documentary material. For certain crimes—including torture, homicide, and probably crimes against humanity—the mass of CPK documentary evidence is extremely powerful. Proving genocide will be slightly more difficult, forcing legal investigators to rely more heavily on interview transcripts. War crimes and the destruction of cultural property could be either difficult or easy to prove, depending on an adjudicator's ruling with respect to the existence of international armed conflict. Finally, CPK responsibility for crimes against diplomatically protected persons may be provable at some level but merits considerable further study.

Of course, the strength of evidence also varies across individuals. Duch has confessed to myriad crimes and could unquestionably be convicted even without such admissions. Mam Nai is also deeply implicated in the abuses of S-21 and faces nearly insurmountable evidence of torture. Evidence against Nuon Chea abounds in many documents bearing his name and a position that gave him extremely broad authority, and Ta Mok is mentioned sufficiently to ensure his culpability for at homicide, torture, and other offenses. Other CPK leaders, such as Khieu Samphan and Ieng Sary, are mentioned less frequently in the most incriminating documents. However, circumstantial and testimonial evidence may compensate for the limits on documentary sources of proof, and those leaders are apt to bear superior responsibility for many of the most heinous crimes of the Pol Pot regime.

Overall, documents can provide a broad and relatively strong evidentiary foundation for the many cases awaiting CPK leaders. This chapter has discussed ways to document the crimes against the CPK—a monumental task, both in terms of human effort and importance. The reconciliation of Cambodia and the

prevention of similar atrocities in the future depend upon further efforts to clarify the legal responsibility of the CPK and to uncover more of the truth surrounding the abuses of the DK era.

If plans for a DK tribunal come to fruition, documentary evidence has the potential to ensure that any judgments issued are legally sound, not just morally desirable or politically defensible. To most observers, the CPK's responsibility for widespread atrocities is accepted as fact. The real value of criminal trials—or any accountability process—will not be to restate that broad historical conclusion and send the aging defendants to die in prison. The greatest contributions of an accountability process will be to establish the truth, as clearly as possible, and to promote the successful resurrection of law and order in Cambodia. Neither of those aims can be accomplished simply by quenching a thirst for revenge. To establish the truth and promote the rule of law in Cambodia, legal judgments against the CPK must be credible and meet both substantive and procedural standards of justice. Just as it has in the Nuremberg Court and successive international criminal tribunals, documentary evidence can play a central role in achieving those objectives.

NOTES

¹ The Communist Party of Kampuchea (CPK) was the extreme Maoist faction led by Pol Pot that governed Cambodia between approximately April 17, 1975 and January 6, 1979. The regime they established is frequently called the “Pol Pot regime.” The CPK renamed the state “Democratic Kampuchea” (DK), overthrowing Lon Nol’s pre-existing “Khmer Republic.” In this chapter, the “Pol Pot regime” and “DK regime” refer specifically to the CPK during their rule over Cambodia. The period between April 1975 and January 1979 is referred to as the “Pol Pot” or “DK” period, and terms such as “DK officials” and “DK policies” also refer specifically to the CPK.

² Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (Aug. 10, 2001) (enacted) [hereinafter KR Tribunal Law]. For a discussion of the negotiations leading to the law’s approval by the Cambodian National Assembly, Senate, and Constitutional Council, see Thomas Hammarberg, *How the Khmer Rouge Tribunal was Agreed*, in SEARCHING FOR THE TRUTH 18-20, 22-23 (2001). See also STEPHEN HEDER WITH BRIAN D. TITTEMORE, WAR CRIMES RESEARCH OFFICE, SEVEN CANDIDATES FOR PROSECUTION: ACCOUNTABILITY FOR THE CRIMES OF THE KHMER ROUGE 13-25 (2001), available at <http://www.wcl.american.edu/warcimes/khmerrouge.cfm>.

³ The CPK are often popularly referred to as the *Khmers Rouges* (KR), but that term is not precise. Prince Norodom Sihanouk coined the term in 1966 to distinguish

Communist insurgents from the republican *Khmers Bleus*. The term *Khmer Rouge* is used herein only when referring to the proposed forum for criminal trials of former CPK officials, commonly known as the “Khmer Rouge tribunal.”

⁴ KR Tribunal Law, *supra* note 2, Arts. 3-8.

⁵ In the event of U.N. and foreign non-participation, article 46 provides that the trials would be conducted entirely with domestic judges. *Id.* Art. 46. The Cambodian government has stated its intention to hold trials with or without U.N. involvement. Chris Decherd, *Cambodia Not Yet Giving Up on Cooperation, Top Lawyer Says*, AP WIRE, Feb. 11, 2002; Seth Mydans, *Khmer Rouge Trials Won't Be Fair, Critics Say*, N.Y. TIMES, Feb. 10, 2002, at A12.

⁶ Of course, documents do not become legal evidence until a tribunal or other accountability forum admits them as such. In this chapter, “documentary evidence” refers to materials that constitute *potential* evidence in a legal proceeding. “Legal evidence” refers to materials duly accepted as such.

⁷ This chapter does not delve deeply into debates regarding the definitions of the relevant substantive crimes as they existed between 1975 and 1979. For a good discussion of those issues, see STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY, ch. 13 (2d ed. 2001). For a brief description of the principle of *nullem crimen sine lege* (“no crime without law”), see *id.* at 21-24, 299-303.

⁸ The KR Tribunal Law limits the chambers’ jurisdiction to “senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of [applicable laws].” KR Tribunal Law, *supra* note 2, Art. 1. After King Sihanouk approved the revised KR Tribunal Law on August 10, Hun Sen expressed his expectation that only about ten CPK members would face the prospective tribunal and that low-ranking officials and cadres would not be targeted. *Regional Briefing: Cambodia*, FAR E. ECON. REV., Aug. 23, 2001, at 11. For simplicity, this chapter refers to former high-ranking CPK officials and other perpetrators of the most serious crimes of the Pol Pot era as “CPK leaders” or “DK leaders.”

⁹ A group of U.N.-appointed experts to Cambodia recommended that “any tribunal focus upon those persons most responsible for the most serious violations of human rights during the reign of Democratic Kampuchea.” See *Report of the Group of Experts for Cambodia*, established pursuant to G.A. Res. 52/135, U.N. GAOR, 53d Sess., Annex, ¶ 110, U.N. Doc. A/53/850, S/1999/231 (1999).

¹⁰ The task of proving CPK crimes to a legal standard will remain important even if a KR tribunal or other DK accountability forum does not convene. Without a well-publicized formal judgment, Cambodians would need an alternative—but equally convincing—demonstration of the truth. Without a court’s power of subpoena, documentation would provide the dominant source of evidence against CPK leaders. Rigorous legal assessments of those documents would thus become the closest surrogate for an accountability process in Cambodia.

¹¹ DC-Cam’s origins can be traced to the 1994 U.S. Cambodian Genocide Justice Act, which established an Office of Cambodian Genocide Investigation within the State Department’s Bureau of East Asian and Pacific Affairs. In early 1995, that office awarded a grant enabling Yale University’s Cambodian Genocide Program (CGP) to

conduct research, training, and documentation related to the alleged crimes of the DK period. The CGP established DC-Cam to spearhead its documentation efforts and to conduct training and research. On January 1, 1997, DC-Cam became an independent Cambodian research institute and now serves as the primary organization responsible for the collection of documents relevant to the alleged crimes of the Pol Pot regime.

¹² The archives of the Tuol Sleng Genocide Museum contain a large body of confessions written by prisoners at the infamous Tuol Sleng prison in Phnom Penh (also known as “Office S-21”), the CPK’s central security office and interrogation center between 1975 and 1979. In 1980, after the fall of the Pol Pot regime, the complex reopened as a genocide museum and archival center. TSL confession documents are catalogued in alphabetical order according to the surname of the documents’ authors, and that system is used to identify TSL documents throughout this chapter.

¹³ Nuon Chea, “Statement of the Communist Party of Kampuchea to the Communist Workers’ Party of Denmark” (July 1978) (DC-Cam Catalogue No. 13311) [hereinafter 1978 Nuon Chea Speech].

¹⁴ CPK Security Chief Duch recalls a conversation in which CPK Deputy Secretary Nuon Chea made that assertion. Nate Thayer, *Death in Detail*, FAR E. ECON. REV., May 13, 1999, at 21.

¹⁵ Most of the documents available at DC-Cam have been catalogued according to a system developed primarily by the CGP and experts from the University of New South Wales. For an explanation of the cataloguing system, followed throughout this chapter, see Nereida Cross & Helen Jarvis, *Cambodian Genocide Databases: Input Manual* (updated ed. 1999) (on file with DC-Cam).

¹⁶ For a brief discussion of the rules governing the use of confessions as evidence, see *infra* notes 44-46 and accompanying text.

¹⁷ The *Santebal* was responsible for matters of internal and intra-party security in Democratic Kampuchea. For a discussion of its workings, see “Responses of Em Min *alias* Saen, Round One” (TSL File No. E19). On Duch’s identity, see “Diploma de Professorat Secondaire du Premier Cycle” (DC-Cam Catalogue No. D21231) (noting the attendance of Kaing Guek Euy, who was born on February 15, 1945).

¹⁸ Thayer, *supra* note 14, at 21.

¹⁹ “Decisions of the Central Committee on a Variety of Questions” (Mar. 30, 1976) (DC-Cam Catalogue No. D00693) [hereinafter 1976 Decisions], *translated and reprinted in* DAVID P. CHANDLER ET AL., *POL POT PLANS THE FUTURE: CONFIDENTIAL LEADERSHIP DOCUMENTS FROM DEMOCRATIC KAMPUCHEA 1976-77*, at 1 (1988).

²⁰ As one young CPK cadre explained in a subsequent interview, “I was indoctrinated every day about the Khmer Rouge ideology through *Tung Padevat*.” Interview by Meng-Try Ea with Cheam Seou *alias* Soeu (Feb. 12, 2000) (on file with DC-Cam).

²¹ For an English translation of some of the surviving issues of REVOLUTIONARY YOUTH and REVOLUTIONARY FLAG, see *Revolutionary Youth and Revolutionary Flag* (Steve Heder trans. & ed.) (unpublished manuscript on file with DC-Cam). DC-Cam obtained most of its original copies of CPK magazines from private individuals, whose identities have been recorded.

²² For a list of the films, see Documentation Center of Cambodia, “Documentation Section: Khmer Rouge Films” (on file with DC-Cam).

²³ The CPK films are currently under the custody of Daniel Renoef of System TV

in Paris but are to be delivered to DC-Cam in the near future. See Matt McKinney & Thet Sambath, *Visit Renews Hopes for Return of Lost Khmer Rouge Films*, CAMBODIA DAILY, Aug. 15, 2002.

²⁴ See “East German (DEFA-Studio) Film Collection” nos. 1-6 (on file with DC-Cam).

²⁵ See generally “CPK Notebook Collection” nos. 1(nhk)-520(nhk) (on file with DC-Cam). DC-Cam has recorded the identity of the donor of each item.

²⁶ The potential of political bias is a significant issue in considering the *Renakse* petitions, because the stated political goals of the PRK included eliminating the CPK and winning recognition from the United Nations as the legitimate *de jure* government of Cambodia. See, e.g., Min Khin, “A Record on Total Crimes of China, Beijing and their Servants, Pol Pot, Ieng Sary and Khieu Samphan on the Cambodian People During 1975 and 1978” *Renakse* Collection, General File (on file with DC-Cam). In that 1983 petition, Min asserted that 3,314,768 people were killed under Pol Pot, the “servant of Chinese hegemony.” The tone of the document, the recent Chinese invasion of Vietnam, Min’s position as a PRK official, and the close ties between Hanoi and the PRK all suggest the possibility of bias, which could detract from the evidentiary value of this and certain other *Renakse* documents.

²⁷ For some examples, see COMMISSION ON HUMAN RIGHTS, U.N. SOCIAL AND ECONOMIC COUNCIL, MATERIALS SUPPORTING THE DECISION FROM THE INTERNATIONAL COMMISSION OF JURISTS UNDER COMMISSION ON HUMAN RIGHTS DECISION 9 (XXXIV), U.N. Doc. E/CN.4/Sub.2/414 (1979).

²⁸ For an English translation of the surviving documents from the 1979 Tribunal, see generally GENODICE IN CAMBODIA: DOCUMENTS FROM THE TRIAL OF POL POT AND IENG SARY 43-523 (Howard J. DeNike et al. eds., 2000) [hereinafter GENODICE IN CAMBODIA].

²⁹ See Decree Law No. 1: Establishment of People’s Revolutionary Tribunal at Phnom Penh to Try the Pol Pot-Ieng Sary Clique for the Crime of Genocide (July 15, 1979), *republished in* PRK RESEARCH AND PUBLICATION OFFICE, TRIBUNAL FOR THE PROSECUTION OF THE GENOCIDAL POL POT-IENG SARY CLIQUE 305 (1979).

³⁰ See Press Conference of Keo Chanda, Minister of Information, Press, and Culture, Chair of Legal Affairs Committee (July 28, 1979), *cited in* GENODICE IN CAMBODIA, *supra* note 28, at 47.

³¹ DC-Cam produces annual reports on mapping activities and keeps records of interviews conducted. See Annual Mapping Reports 1995-2001 (unpublished manuscripts on file with DC-Cam).

³² No detailed rules analogous to the ICTY, ICTR, or ICC Rules of Evidence and Procedure have been promulgated for the prospective KR Tribunal.

³³ Charles N. Brower, *Evidence Before International Tribunals: The Need for Some Standard Rules*, 28 INT’L LAW. 47, 47-48 (1994).

³⁴ For an overview of evidentiary rules applied by international criminal tribunals, see Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 COLUM. J. TRANS. L. 725 (1999).

³⁵ For a description of the modern Cambodian legal system and its origins, see Dolores A. Donovan, *The Cambodian Legal System: An Overview*, in REBUILDING

CAMBODIA: HUMAN RESOURCES, HUMAN RIGHTS, AND LAW 69-107 (Frederick Z. Brown ed., 1993).

³⁶ The rules of evidence governing the ICTY assert that “a chamber may admit any relevant evidence which it deems to have probative value.” International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, Rules of Evidence and Procedure, IT/32/Rev. 16, R. 89(C) [hereinafter ICTY Rules of Evidence and Procedure].

³⁷ See, e.g., CODE DE PROCEDURE PENALE, Art. 427 (Fr.) [hereinafter C. PR. PEN.]. For a discussion of the *principe de la liberté des preuves*, see MICHÈLE-LAURE RASSAT, PROCÉDURE PÉNALE 280-82 (1990); GASTON STEFANI, GEORGES LEVASSEUR & BERNARD BOULOC, PROCÉDURE PÉNALE 31 (17th ed. 2000) (noting that French law only applies the criteria of relevance and probative value in civil cases).

³⁸ GRAHAM C. LILLY, INTRODUCTION TO THE LAW OF EVIDENCE 24 (2d ed. 1987); JOHN W. STRONG ET AL., 1 MCCORMICK ON EVIDENCE 636-44 (5th ed. 1999).

³⁹ ICTY Rules of Evidence and Procedure, *supra* note 36, R. 89(C), (D); ICTR Rules of Evidence and Procedure, R. 89(C); ICC Statute, Art. 69(4). At common law, evidence can be excluded on similar grounds for being unduly prejudicial, confusing, or wasteful of time. STRONG ET AL., *supra*, note 38, at 644-48.

⁴⁰ RASSAT, *supra* note 37, at 297-98; STEFANI ET AL., *supra* note 37, at 35.

⁴¹ The inability to examine the author of a statement raises four commonly noted problems—concerns about the author’s memory, perception, ambiguity, and sincerity. See Laurence Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958-69 (1974). In-court examinations under oath are designed to mitigate those problems.

⁴² For a discussion of the ICTY’s treatment of hearsay, see Almiro Rodrigues & Cecile Tournaye, *Hearsay Evidence*, in RICHARD MAY ET AL., ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD 291 (2000); see also Prosecutor v. Aleksovski, Case No. IT-95-14/1-AR73, Decision on Prosecutor’s Appeal on Admissibility of Evidence, ICTY Appeals Chamber (Feb. 16, 1999).

⁴³ This is referred to as the *principe de l’intime conviction*. C. PR. PEN., *supra* note 37, Arts. 353, 427; STEFANI ET AL., *supra* note 37, at 105-08.

⁴⁴ Both the ICTY and ICTR have recognized the principle that confessions elicited by torture or other unlawful means are inadmissible as evidence. Rule 95 of the ICTY Rules of Procedure and Evidence asserts: “[n]o evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of these proceedings.” ICTY Rules of Evidence and Procedure, *supra* note 36, R. 95. See also International Tribunal for Rwanda, Rules of Procedure and Evidence, R. 95, ITR/3/Rev. 8 (June 2000).

⁴⁵ Using extracted confessions would also violate Article 15 of the U.N. Convention Against Torture. See 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, art 15, at 197, U.N. Doc. A/39/51 (1984), *entered into force* June 26, 1987 [hereinafter U.N. Torture Convention].

⁴⁶ HEDER WITH TITTEMORE, *supra* note 2, at 28.

⁴⁷ The ICTY rules permit the tribunal to “request verification of the authenticity of evidence obtained out of court.” ICTY Rules of Evidence and Procedure, *supra* note 36, R. 90(E).

⁴⁸ At common law, either direct proof (including witness testimony or handwriting analysis) or circumstantial evidence (including analysis of the physical appearance of the documents or their chain of custody) can be used to authenticate written materials. *See* 2 STRONG ET AL., *supra* note 38, at 36-59. There is no reason to believe that a KR tribunal would treat the matter of authentication differently.

⁴⁹ *Id.* at 41-43.

⁵⁰ *See* Nic Dunlop & Nate Thayer, *Duch Confesses*, FAR E. ECON. REV., May 6, 1999, at 20.

⁵¹ *See, e.g.*, “Letter of Permission to Comrade Hun” (DC-Cam Catalogue No. D07368) (bearing a seal from the Ministry of Commerce); “To Missed Comrade Mon” (DC-Cam Catalogue No. D01453) (with a seal from the Saang District CPK Committee); “Letter of Permisison to Phauk Chhoeun” (DC-Cam Catalogue No. D07303) (showing a seal from the DK Revolutionary Armed Forces); “To Beloved and Missed Comrade Duch” (DC-Cam Catalogue No. D07322) (bearing the seal of the Ministry of Industry).

⁵² As described in above, some of the DK era documents held at DC-Cam are copies, including the minutes of the DK Standing Committee provided to DC-Cam by foreign scholars. It is uncertain whether originals of all such documents will be located or made available at trial.

⁵³ At common law, this is normally sufficient proof of a document’s authenticity. 2 STRONG ET AL., *supra* note 38, at 27-49.

⁵⁴ Interview by Ben Kiernan with Heng Samrin (Dec. 2, 1991) [hereinafter Heng Samrin Interview], *cited in* BEN KIERNAN, *THE POL POT REGIME: RACE, POWER AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE 1975-79*, at 55-57 (1996).

⁵⁵ Stephen Heder, *Documentary Evidence Linking Surviving Senior and Other Leaders of the Communist Party of Kampuchea to Crimes Against Humanity in Cambodia, 1975-79: A Preliminary Sampling from the Holdings of the Documentation Center of Cambodia and Other Sources 15-24* (unpublished manuscript, on file with DC-Cam). For a list of key terms used by the CPK, see also Documentation Center of Cambodia, *DK Glossary* (unpublished text, on file with DC-Cam).

⁵⁶ “Report from Office 560” (on file with DC-Cam).

⁵⁷ “Dear Beloved Brother 89” (DC-Cam Catalogue No. L01136 (02bbk)).

⁵⁸ *See, e.g.*, “Report of Region 1” (DC-Cam Catalogue No. L001434 (08bbk)); “Minutes on the Standing [Committee’s] Visit to Southwest Zone, Aug. 20-24, 1975” (DC-Cam Catalogue No. L01022 (01bbk)); “Minutes of the Meeting of Secretary-Undersecretary of Divisions and Independent Regiments” (Nov. 11, 1976) (DC-Cam Catalogue No. L01537 (05bbk)). *See also* Telegram 54, “To Beloved and Missed Mo-870” (DC-Cam Catalogue No. N0141) (including a report that CPK forces “smashed” a Vietnamese intruder who “died on the spot”).

⁵⁹ *See* “Number of Prisoners taken in Building 21 Kh” (Apr. 7, 1977) (DC-Cam Catalogue No. D21173).

⁶⁰ Heder, *supra* note 55, at 15.

⁶¹ “Confessions of Cho Chhan *alias* Sreng” (TSL File No. C120).

⁶² Heder, *supra* note 55, at 16.

⁶³ “Confessions of Cho Chhan *alias* Sreng,” *supra* note 61.

⁶⁴ Heder notes that the term was often ambiguous but cites a number of documents

that suggest killing was implied as part of a “sweeping” process. Heder, *supra* note 55, at 17-22. For some indicative uses of the term “sweep” in CPK documents, see “Minutes of the Meeting of Secretaries and Under-Secretaries of Divisions and Independent Regiments” (Aug. 30, 1976) (DC-Cam Catalogue No. N00001407); “Confessions of Veung Chaem *alias* Phuong” (TSL File No. P322); “Confessions of Kheang Seum Han *alias* But” (TSL File No. K222).

⁶⁵ See “Confessions of Chea Nuon *alias* Suong” (TSL File No. C155).

⁶⁶ “Another Step in our Cooperatives’ Victories” 7 TUNG PADEVAT (July 1978) (DC-Cam Catalogue No. D21429).

⁶⁷ Interview by Ben Kiernan with Chea Sim (Dec. 3, 1991) [hereinafter Chea Sim Interview], *cited in* KIERNAN, *supra* note 54, at 55-57.

⁶⁸ “Minutes of the Meeting of Under-Secretaries of Division and Regiment” (Aug. 1, 1976) (DC-Cam Catalogue No. L01373 (04bbk)).

⁶⁹ See, e.g., “Minutes of the Meeting of Division and Independent Regiment Secretaries and Deputy Secretaries” (Aug. 18, 1976) (DC-Cam Catalogue No. 01379).

⁷⁰ “Minutes of the Meeting of Secretaries and Under-Secretaries of Independent Regiments” (Oct. 9, 1976) (DC-Cam Catalogue No. L01500 (05bbk)).

⁷¹ “Minutes of the Meeting of Under-Secretaries of Division and Regiment,” *supra* note 68.

⁷² “Minutes on the Standing [Committee’s] Visit to Southwest Zone” (Aug. 20-24, 1975) (DC-Cam Catalogue No. L01022 (01bbk)).

⁷³ The same is true of the term *komchat*, which Ben Kiernan translates as “scattering.” See KIERNAN, *supra* note 54, at 57.

⁷⁴ Transcript from Radio Phnom Penh (Jan 31, 1976), *cited in* FRANÇOIS PONCHAUD, *CAMBODIA: YEAR ZERO 188* (1978).

⁷⁵ “Long Live the Seventeenth Anniversary of the Communist Party of Kampuchea: Speech by Pol Pot” (Oct. 4, 1977) (DC-Cam Catalogue No. D21460) [hereinafter 1977 Pol Pot Speech] (transcript from the Foreign Broadcast Information Service), *cited in* DAVID P. CHANDLER, *VOICES FROM S-21: TERROR AND HISTORY IN POL POT’S SECRET PRISON 42*, 174 n.4 (1999).

⁷⁶ For a good example, see “Report on the Activities of the Party Center According to the General Political Tasks of 1976” (Dec. 20, 1976), *translated and reprinted in* CHANDLER ET AL., *supra* note 19, at 177. Sections 4(a) and 4(b) discuss “enemies from without” and “enemies from within,” equating them with class enemies in the Marxist fashion. *Id.* at 189-90. See also 1978 Nuon Chea Speech, *supra* note 13 (defining enemies as “the US imperialists, their lackies and the reactionary classes”).

⁷⁷ For many examples of CPK definitions of “enemies,” see generally Revolutionary Youth and Revolutionary Flag, *supra* note 21.

⁷⁸ “Minutes of Divisional and Regiment Secretary-Undersecretary Meeting on Logistics” (Sept. 19, 1976) (DC-Cam Catalogue No. L01451 (05bbk)).

⁷⁹ “Another Step in Our Cooperatives’ Victories,” *supra* note 66.

⁸⁰ DK Permanent Mission to the United Nations, “Communiqué of the Central Committee of the Communist Party of Kampuchea Concerning the Dissolution of the Communist Party of Kampuchea,” press release, (Dec. 11, 1981).

⁸¹ DEPARTMENT OF PRESS AND INFORMATION OF THE DK MINISTRY OF FOREIGN AFFAIRS, *BLACK BOOK: FACTS AND EVIDENCE OF ACTS OF VIETNAMESE AGGRESSION AND ANNEXATION AGAINST CAMBODIA* (1978) (DC-Cam Catalogue No. L162N01).

⁸² David P. Chandler, *Seeing Red: Perceptions of Cambodian History in Democratic Kampuchea*, in *REVOLUTION AND ITS AFTERMATH: EIGHT ESSAYS* 42-50 (David P. Chandler & Ben Kiernan eds. 1983).

⁸³ For one example, see “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” (DC-Cam Catalogue No. D21934) [hereinafter 1978 Khieu Samphan Speech].

⁸⁴ “Report on May 6, 1976” (DC-Cam Catalogue No. L01225).

⁸⁵ “Dear Beloved and Missed Brothers” (DC-Cam Catalogue No. L01345 (04bbk)) (this document was copied to Nuon Chea and Ieng Sary, among others).

⁸⁶ “Minutes of the Work Meeting of the Military in Kampong Sam” (Aug. 3, 1976) (DC-Cam Catalogue No. L01374 (04bbk)). A similar account asserted that the United States, France, North Korea, Japan, and other hostile countries backed “traitorous” Khmers. “Minutes of the Comrade Meeting of [Division] 164” (Sept. 9, 1976) (DC-Cam Catalogue No. L01446 (05bbk)).

⁸⁷ One poignant example is in the confession of Suy Chheng Huot: “I am not a member of the CIA. I confessed to being CIA when confronted with my guilt. I beg *Angkar* to [kill] me because I have not followed the revolution” “Confession of Suy Chheng Huot” (TSL File No. S580), *cited in* CHANDLER, *supra* note 75, at 79. For other examples, see the sub-section dealing with torture, *infra*. See also *id.* (providing numerous documentary examples of confessions involving alleged treason via association with Vietnam or the CIA).

⁸⁸ Pol Pot said that “contradictions with these elements must be dealt with the same way we deal with any enemy.” See 1977 Pol Pot Speech, *supra* note 75.

⁸⁹ For a document showing that “traitorous” and “no-good” elements were closely linked in CPK parlance, see “Minutes of the Meeting of Under-Secretaries of Division and Regiment,” *supra* note 68.

⁹⁰ Again, it is worth noting that the definitions of “enemies” and “no-good elements” do not need to be strictly limited. It is sufficient to show that the definition of “enemies” encompassed protected groups (among others). For example, if CPK leaders imply that their subordinates should kill off all Muslims, Christians *and* all foreign military invaders, they may still be liable for genocide.

⁹¹ The most noted example is Office S-21, which is commonly accepted as the code for Tuol Sleng prison. Duch has admitted to that fact, as have other interviewees, and the Tuol Sleng Archives leave that question beyond any legal doubt.

⁹² See “Gathering of the Standing [Committee]” (Oct. 9, 1975) (DC-Cam Catalogue No. D677) (referring to CPK Central Committee as “the 870 Political Office”).

⁹³ Interview by Stephen Heder with Ieng Sary (Dec. 4, 1999). Prior to Khieu Samphan, Deuan had the role of Chairman of Office 870. “Confessions of Soeur Vasy *alias* Deuan” (TSL File No. S474). See also HEDER WITH TITTEMORE, *supra* note 2, nn.359-60 and accompanying text.

⁹⁴ For examples of documents from these offices, see “Dear Beloved *Angkar* with Respect” (DC-Cam Cambodia Catalogue No. L0001414 (08bbk)); “Telegram dated May 28, 1977” (DC-Cam Catalogue No. L0001431 (08bbk)); and “Report beginning from

Apr. 4, 1977 until Apr. 29, 1977” (DC-Cam Catalogue No. L01436 (08bbk)).

⁹⁵ “Confession of Im Chon, Battalion 350” (DC-Cam File No. 569bbkhh) (equating *Angkar* with Pol Pot). *See also* “Instructions on Usage of the Words ‘Angkar’ and ‘Party’” (June 11, 1977) (DC-Cam Catalogue No. D01266) (with Office 870 acknowledging that “the word *Angkar* is normally used to call individual people”).

⁹⁶ *See, e.g.*, “Biography of Bhopa *alias* Comrade Phoa” (DC-Cam File No. I327) (referring to Ieng Sary and Van as the same individual).

⁹⁷ KR Tribunal Law, *supra* note 2, Art. 29. This is consistent with the law applied in international criminal tribunals. *See* ICTY Statute, Art. 7(1); ICTR Statute, Art. 6(1); IMT Charter, Art. 6; ICC Statute, Art. 25.

⁹⁸ Direct responsibility can be established by proving that the defendant intentionally gave an explicit or implicit order (provided he had authority to give orders), participated in a conspiratorial “common purpose or design,” or assisted in the execution of the crime by giving practical or moral support. In general, any participation that directly and substantially affected the crime’s commission gives rise to direct responsibility. For a fuller discussion, see HEDER WITH TITTEMORE, *supra* note 2, at 112-16; RATNER & ABRAMS, *supra* note 7, at 129-32.

⁹⁹ KR Tribunal Law, *supra* note 2, Art. 29.

¹⁰⁰ Superior liability was applied in post-WWII tribunals and incorporated into the ICTY, ICTR, and ICC Statutes. *See* ICTY Statute, Art. 7(3); ICTR Statute, Art. 6(3); ICC Statute, Art. 28(a)(i).

¹⁰¹ For more detailed discussions of the principle of superior responsibility, see HEDER WITH TITTEMORE, *supra* note 2, at 116-25; RATNER & ABRAMS, *supra* note 7, at 132-35.

¹⁰² *See* Prosecutor v. Aleksovski, Case No. IT-95-14/1, Judgement, ICTY Trial Chamber, ¶ 228 (June 25, 1999); The Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-T, Judgement, ICTY Trial Chamber III, ¶¶ 369-71 (Feb. 26, 2001).

¹⁰³ Statutes of the Communist Party of Kampuchea, Art. 23, adopted at a CPK Congress in January 1976 (DC-Cam Catalogue No D21227).

¹⁰⁴ “Constitution of Democratic Kampuchea” promulgated Jan. 5, 1976 (DC-Cam Catalogue No. D21447) [hereinafter DK Constitution], *reprinted in* THE CAMBODIAN CONSTITUTIONS 1953-1993, at 81 (Raoul M. Jennar ed., 1995); 1976 Decisions, *supra* note 19.

¹⁰⁵ CPK leaders later acknowledged this fact in an unsigned document dissolving the Party. *See* “Communiqué of the Central Committee of the Communist Party of Kampuchea Concerning the Preparations for the Dissolution of the Communist Party of Kampuchea” (Dec. 6, 1981), *cited in* HEDER WITH TITTEMORE, *supra* note 2, at 42 n.180. The lack of a signature leaves the origins and authenticity of this document uncertain.

¹⁰⁶ *See, e.g.*, “Permanent Committee Meeting” (Nov. 2, 1975) (DC-Cam File No. D678).

¹⁰⁷ *See, e.g.*, “Minutes of the Standing Committee Meeting” (May 7, 1976) (DC-Cam File No. D697); “Minutes of the Standing Committee Meeting” (May 17, 1976” (DC-Cam File No. D702).

¹⁰⁸ *See* “First Meeting of the Council of Ministers” (April 22, 1976) (DC-Cam File No. D695).

¹⁰⁹ The legal ambiguity surrounding the structure of the DK regime makes it very difficult to pin down the ostensible *de jure* authority of those positions.

¹¹⁰ See Heng Samrin Interview, *supra* note 54; Chea Sim Interview, *supra* note 67; Interview by Ben Kiernan with Mat Ly (Jan. 21, 1986); Interview by Ben Kiernan with Sin Song (Aug. 12, 1980) [hereinafter Sin Song Interview] (relaying an account given to him by Chhouk, also confirming that Nuon Chea and Pol Pot were the two men in charge); Interview by Ben Kiernan with Kun Chhay (Oct. 16, 1980) [hereinafter Kun Chhay Interview], *cited in* KIERNAN, *supra* note 54, at 55-57 (relating the consistent account of Ret, an attendee who was later arrested by the CPK).

¹¹¹ Duch and Ieng Sary have confirmed Nuon Chea's leadership role as well. Thayer, *supra* note 14, at 20; Interview by Stephen Heder with Ieng Sary (Dec. 17, 1996) [hereinafter Ieng Sary Interview] (on file with DC-Cam).

¹¹² See DK MINISTRY OF EDUCATION, DK GEOGRAPHY (1977) (an official CPK text describing the administrative and political geography of Democratic Kampuchea, on file with DC-Cam).

¹¹³ Statutes of the Communist Party of Kampuchea, *supra* note 103, Art. 23.

¹¹⁴ *Id.* Art. 19.

¹¹⁵ An official CPK document showed this military structure very clearly in schematic form. See "National Army of Democratic Kampuchea: High Command" (DC-Cam Catalogue No. D21936).

¹¹⁶ "Permanent Committee Meeting," *supra* note 106. According to former CPK security cadre Ros Em, Ta Mok and Duch also participated in frequent high-level Party meetings in the Olympic Stadium (which may have been meetings of the mysterious Central Committee.) Interview by Dara P. Vanthan et al. with Ros Em, in Tuk Phos, Cambodia (July 2002) (transcript on file with DC-Cam).

¹¹⁷ Nuon acknowledged his position in an autobiographical text given to Nate Thayer in 1997 and in a speech in Beijing in 1978. See Nuon Chea, *The History of the Struggle: Movement of our Kampuchean Peasants from 1954 to 1970* (unpublished manuscript, on file with DC-Cam). See also "Speech by Comrade Nuon Chea, Deputy Secretary of the Central Committee of the Communist Party of Kampuchea, Peking" (Sept. 3, 1978) (DC-Cam Catalogue No. D21935).

¹¹⁸ For a discussion of documents elucidating Nuon's role in the military hierarchy and security affairs, see HEDER WITH TITTEMORE, *supra* note 2, at 44-47.

¹¹⁹ "The First Session of the Legislative People's National Assembly" (April 11-13, 1976) (DC-Cam Catalogue No. D21227); 1976 Decisions, *supra* note 19, Item 12 ("On Preparing and Organizing the State Organizations"). For a further discussion of documents elucidating Nuon's role in the military hierarchy and security affairs, see HEDER WITH TITTEMORE, *supra* note 2, at 44-47.

¹²⁰ See, e.g., Telegram 89 (DC-Cam Catalogue No. L01418 (08bbk)); Telegram 34 (DC-Cam Catalogue No. L01435 (08bbk)); Telegram 98 (DC-Cam Catalogue No. L0001422 (08bbk)); Telegram 36 (DC-Cam Catalogue No. L0001419 (08bbk)); Telegram 44 (DC-Cam Catalogue No. L0001420 (08bbk)). In recent interviews, Duch has also made it clear that Nuon Chea was responsible for many internal arrests and executions and gave Duch orders to carry out those acts. Thayer, *supra* note 14, at 20.

¹²¹ Chea, *supra* note 117.

¹²² 1976 Decisions, *supra* note 19, Item 12.

¹²³ Interview by Dara P. Vanthan et al. with Chek Sam, in Khnol, Cambodia (June

2002) [hereinafter Chek Sam Interview] (transcript on file with DC-Cam).

¹²⁴ 1976 Decisions, *supra* note 19, Item 12; Ben Kiernan, *Bringing the Khmer Rouge to Justice*, 1 HUM RTS. REV. 92, 96 (2000). He acknowledges being the President of the State Presidium and being a “full-rights member” of the Party Center by 1976. However, he denies having been the head of Office 870. Khieu Samphan, Letter Appealing to All of My Compatriots, *reprinted in* 21 SEARCHING FOR THE TRUTH 204 (2001).

¹²⁵ Chea, *supra* note 117. Heder and Tittmore discuss the Party positions and authority held by each of these men during the DK years. *See* HEDER WITH TITTEMORE, *supra* note 2, §4(B).

¹²⁶ Dunlop & Thayer, *supra* note 50, at 20.

¹²⁷ Thayer, *supra* note 14, at 21.

¹²⁸ Dunlop & Thayer, *supra* note 50, at 20.

¹²⁹ Samphan, *supra* note 124, at 3.

¹³⁰ Bou Saroeun, Vong Sokheng & Christine Chaumeau, *Khmer Rouge Deny Killer Role*, PHNOM PENH POST, July 20-Aug. 2, 2001.

¹³¹ Gina Chon, *Can The Cycle Of Violence Be Broken?*, ASIaweek, July 21, 2001.

¹³² Thayer, *supra* note 14, at 20-21; Chek Sam Interview, *supra* note 123; Interview by Dara P. Vanthan et al., with Kong Phai, in Kompong Tralach, Cambodia (June 2002) [hereinafter Kong Phai Interview]; Interview by Dara P. Vanthan et al., with Chhun Sophal, in Tuk Phos, Cambodia (July 2002); Interview by Dara P. Vanthan et al., with Lach Mean, in Samaki Meanchey, Cambodia (June 2002) [hereinafter Lach Mean Interview] (transcripts on file with DC-Cam).

¹³³ Lach Mean Interview, *supra* note 132; Kong Phai Interview, *supra* note 132; Interview by Dara P. Vanthan et al., with Prom Set, in Toek Phos, Cambodia (June 2002) (transcript on file with DC-Cam).

¹³⁴ The KR Tribunal Law asserts that the provisions governing homicide are Articles 501 and 503-8 of the 1956 Cambodian Penal Code. KR Tribunal Law, *supra* note 2, Art. 3.

¹³⁵ “3rd Division Units: Short Biographies of those Associated With the Tendency” (DC-Cam File No. D21311) (comprising an S-21 worksheet with marginalia signed by Duch). Handwriting and forensic analysis and Duch’s subsequent interview confessions should be able to prove that Duch authored the notes.

¹³⁶ Thayer, *supra* note 14, at 21.

¹³⁷ Duch has even described his techniques for execution. “We had no instruction from the party on how to kill them, but we did not use bullets. Usually we slit their throats We killed them like a chicken.” *Id.* at 20-21.

¹³⁸ *See* Anthony Barnett, Ben Kiernan & Chanthou Boua, *Bureaucracy of Death*, NEW STATESMAN, May 5, 1980, at 668-76.

¹³⁹ Dunlop & Thayer, *supra* note 50, at 19; Thayer, *supra* note 14, at 20.

¹⁴⁰ *See* “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” (DC-Cam Catalogue No. bbkkh300).

¹⁴¹ Thayer, *supra* note 14, at 20.

¹⁴² The examples of interview transcripts and petitions alleging acts of homicide by the CPK are extremely numerous. For a large number of paraphrased examples, see Dara P. Vanthan and Iem Sokhym, “*Renakse: Summary Report*,” in Elizabeth Moorthy et al., *Memorandum: A Preliminary Evaluation of Evidence Held by the Documentation Center*

of Cambodia (on file with DC-Cam).

¹⁴³ “Petition of Hann Heng” *Renakse* Collection, Siem Riep File (on file with DC-Cam).

¹⁴⁴ “Petition of Unn Vong” *Renakse* Collection, Siem Riep File (on file with DC-Cam).

¹⁴⁵ Similar petitions come from all parts of Cambodia. *See, e.g.*, “Petition of Im Hean” *Renakse* Collection, Kandal File (reporting that she witnessed CPK soldiers murder her brother, young children, and pregnant sister before her eyes) (on file with DC-Cam).

¹⁴⁶ “Minutes of the Meeting of Secretaries and Under-Secretaries of Independent Regiments,” *supra* note 70.

¹⁴⁷ 1976 Decisions, *supra* note 19, Item 1 (giving authority to Zone Committees, the Central Committee, the Staff Office of the Armed Forces, and the Standing Committees of independent regions—i.e., those without Zone affiliation—to kill people in their respective spheres of influence).

¹⁴⁸ Thayer, *supra* note 14, at 21.

¹⁴⁹ *See infra* notes 228-33 and accompanying text.

¹⁵⁰ Dunlop & Thayer, *supra* note 50, at 19.

¹⁵¹ *See generally* Documentation Center of Cambodia, “PA Project Transcript Files” (including transcripts of interviews with over 200 former CPK cadres, on file with DC-Cam).

¹⁵² For example, one document seeks to inform “*Angkar* on our activities of sweeping out traitors within [our military] ranks,” asserting that “[we] would like to report to *Angkar* that we have so far swept away many of the traitors. . . . A large number of traitors have been swept and smashed.” *See* “Dear Beloved *Angkar* with Respect,” *supra* note 94.

¹⁵³ Dunlop & Thayer, *supra* note 50, at 20. Interestingly, Duch claims that Ieng Sary “knew nothing He only knew a little of the internal situation of the country because his work was outside Cambodia.” *Id.* That assertion appears to be in tension with evidence that Ieng was present at many meetings of the Standing Committee, where internal security affairs were discussed. *See supra* notes 125-31 and accompanying text.

¹⁵⁴ One example is a report from an area near the Thai border. The reporter asserts that some members of the local CPK cooperative had attempted to flee to Thailand, “but the number of escapers, if compared to the last month’s, is much lesser with most of them smashed by us.” *See* “Report: Beginning from April 4, 1977 until April 29, 1977,” *supra* note 94. *See also* Telegram 102, “Number of Prisoners Taken in Building 21Kh” (on file with DC-Cam); “Minutes of the Meeting of the Secretary-Undersecretary of Divisions and Independent Regiment,” *supra* note 58.

¹⁵⁵ The KR Tribunal Law draws its (very standard) definition of genocide from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. *See* KR Tribunal Law, *supra* note 2, Art. 4.

¹⁵⁶ *Id.* For an argument that the customary law against genocide also protected political groups by the time the CPK came to power, see Beth Van Schaack, *The Crime of Political Genocide: Repairing the Genocide Convention’s Blind Spot*, 106 YALE L.J. 2259 (1997).

¹⁵⁷ KIERNAN, *supra* note 54, at 5.

¹⁵⁸ *The Party's Re-adjusted Orientation for Fulfilling 1978 Duties in the Days to Come*, TUNG PADEVAT, May-June 1978 (DC-Cam Catalogue No. D21428).

¹⁵⁹ WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 134, 141-42 (2000); RATNER & ABRAMS, *supra* note 7, at 285.

¹⁶⁰ *See, e.g.*, RATNER & ABRAMS, *supra* note 7, at 285-88; Frank Chalk, *Redefining Genocide*, in GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS 47, 50 (George J. Andreopolous ed., 1994); B. Whitaker, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, U.N. ESCOR, 38th Sess., at 16, U.N. Doc. E/CN.4/Sub.2/1985/6 (1985). For contrary views, see Hurst Hannum, *International Law and Cambodian Genocide: The Sounds of Silence*, 11 HUM. RTS. Q. 82, 104-04 (1989); HURST HANNUM & DAVID HAWK, THE CASE AGAINST THE STANDING COMMITTEE OF THE COMMUNIST PARTY OF KAMPUCHEA (1986) (arguing that the CPK sought to destroy the whole ethnic Khmer majority and replace it with a nation of individuals free from their cultural and economic legacy).

¹⁶¹ The “Kampuchea Kroms” are people of Khmer ancestry whose geographic roots lie in the south of modern-day Vietnam. Their status as protected minorities requires a demonstration that the Pol Pot regime considered and treated them as ethnic minorities. For one such argument, see KIERNAN, *supra* note 54, at 298-300.

¹⁶² A classic example was former Rwandan Prime Minister Jean Kambanda’s broadcast on radio RTL, encouraging the Hutu majority to massacre the Tutsi population. *See* Prosecutor v. Jean Kambanda, Case No. ICTR-97-23-S, Judgement and Sentence (Sept. 4, 1998).

¹⁶³ High-ranking officials including So Phim, Ke Pauk, and Son Sen were also present at the meeting. Heng Samrin Interview, *supra* note 54. *See also* second interview by Ben Kiernan with Heng Samrin (Dec. 7, 1992), *cited in* KIERNAN, *supra* note 54, at 387 n.3.

¹⁶⁴ “Phnom Penh Radio Broadcast” (May 10, 1978) (DC-Cam File No. D14789).

¹⁶⁵ Sin Song Interview, *supra* note 110; Heng Samrin Interview, *supra* note 54.

¹⁶⁶ Heng Samrin Interview, *supra* note 54, at 109 n.39.

¹⁶⁷ “Directive from 870 (the Party Center),” *cited in* KIERNAN, *supra* note 54, at 297. *See also* “Instructions on Usage of the Words ‘Angkar’ and ‘Party,’” *supra* note 95 (referring to the 870 directive).

¹⁶⁸ U.S. State Department, Interview with Cambodian Refugee in Buriram, Thailand: Report No. 10 (June 1978).

¹⁶⁹ Interview transcripts include accounts of a massacre of about 420 ethnic Vietnamese civilians in Kampong Cham during May 1977. *See* FBIS IV, Sept. 2, 1977, in BANGKOK POST, Sept. 1, 1977, at H1. *See also* interview by Ben Kiernan with Sing Y, in Alencon, France (Oct. 1979), *cited in* KIERNAN, *supra* note 54, at 297.

¹⁷⁰ *See, e.g.*, “List of the Names of Prisoners Who Entered in the Year 1976, S-21 Records” (DC-Cam File No. D21897).

¹⁷¹ *Learning from Important Experiences in the Fulfillment of the Party's First Semester 1978 Political Tasks*, TUNG PADEVAT (May-June 1978) (DC-Cam Catalogue No. 21428). According to another article in TUNG PADEVAT, “the *Yuon* (Vietnamese) stink to high heaven and are degradingly despised as nothing.” *The National Duties of All of Us*, TUNG PADEVAT (July 1978) (DC-Cam Catalogue No. 21429).

¹⁷² Ben Kiernan, *The Cambodian Genocide: Issues and Responses*, in GENOCIDE:

CONCEPTUAL AND HISTORICAL DIMENSIONS, *supra* note 160, at 197-202.

¹⁷³ Kun Chhay Interview, *supra* note 110; Interview by Jeremy Stone and Gregory Stanton with Mat Ly (July 1991), *cited in* KIERNAN, *supra* note 54, at 55-56.

¹⁷⁴ Heng Samrin Interview, *supra* note 54, at 55-57.

¹⁷⁵ *On Grasping and Implementing the Party's Political Line of Gathering National-Democratic Front Forces*, REVOLUTIONARY YOUTH, Sept. 1975 (DC-Cam Catalogue No. D21383) [hereinafter *On Grasping and Implementing*].

¹⁷⁶ SCHABAS, *supra* note 159, at 229.

¹⁷⁷ Matthew Lippmann, *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later*, 8 TEMPLE INT'L & COMP. L.J. 7-9 (1994).

¹⁷⁸ For one good example, see "Petition of Unn Tep" *Renakse* Collection, Siem Riep File (petition on file with DC-Cam).

¹⁷⁹ U.N. Doc. A/34/569 (1979) (on file with DC-Cam). For another example of attacks on monks, see interview by Michael Vickery with Nguon C., in Kaho I Dang Refugee Camp, Thail. (July 1980), *cited in* MICHAEL VICKERY, *CAMBODIA: 1975-1982*, at 193 (1984) (describing the killing of abbots and monks in Region 3 for refusing to defrock).

¹⁸⁰ See GENODICE IN CAMBODIA, *supra* note 28, at 144-55 (original copies on file with DC-Cam).

¹⁸¹ *On Grasping and Implementing*, *supra* note 175.

¹⁸² Chanthou Boua, *Genocide of a Religious Group: Pol Pot and Cambodia's Buddhist Monks*, in STATE-ORGANIZED TERROR: THE CASE OF VIOLENT REPRESSION 227-40 (P. Timothy Bushnell et al. eds., 1991).

¹⁸³ BBC Survey of World Broadcasts, FE/5773/B/5 (Mar. 25, 1978), *cited in* Analysis prepared on behalf of the Sub-Commission by its Chairman of materials submitted to it and the Commission on Human Rights under Decision 9 (XXXIV) of the Commission on Human Rights, U.N. Doc. E/CN.4/1335 (1979).

¹⁸⁴ See KIERNAN, *supra* note 54, at 461. Kiernan also presents a good discussion of reported crimes committed against the Chams on the basis of their religion and ethnicity, drawing on a number of interview transcripts. *Id.* at 252-88. It includes reports of families killed because they refused to eat pork or spoke the forbidden Cham language, among other atrocities.

¹⁸⁵ OSMAN YSA, OUKOUBAH: JUSTICE FOR THE CHAM MUSLIMS UNDER THE DEMOCRATIC KAMPUCHEA REGIME 2-3 (2002) (DC-Cam Doc. Series No. 2). In a DK accountability forum, expert testimony may provide a valuable source of evidence in establishing the proportion of Cham Muslims killed.

¹⁸⁶ See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ICTR Trial Chamber I, ¶ 477 (Sept. 2, 1998); Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgement, ¶¶ 93, 531-45 (May 21, 1999).

¹⁸⁷ Interview by Nate Thayer with Srong Muhammad, in Nong Samet, Thail. (Aug. 1984) (transcript on file with DC-Cam). DK survivor Sles Ly also reported the existence of a large number of mass graves containing Cham remains. Interview by Nate Thayer with Sles Ly (Aug. 1984) (transcript on file with DC-Cam). Again, this is not enough to prove a high-level plan for genocide.

¹⁸⁸ Interview by Ben Kiernan with Ya Mat, *cited in* KIERNAN, *supra* note 54, at 280.

¹⁸⁹ *Id.* at 279. This evidence is consistent with an apparent CPK decree that effectively eliminated the right to existence of all minority groups, asserting: “[t]here is one Kampuchean revolution. In Kampuchea there is one nation, and one language, the Khmer language. From now on the various nationalities . . . do not exist any longer in Kampuchea.” See ELIZABETH BECKER, *WHEN THE WAR WAS OVER: CAMBODIA AND THE KHMER ROUGE REVOLUTION* 253 (1986). It does not appear that a surviving copy of this decree exists.

¹⁹⁰ Interview by Osman Ysa with Uknha Sos Kamry, in Phnom Penh, Cambodia (Oct. 1999), *cited in* YSA, *supra* note 185, at 6 (transcript on file with DC-Cam).

¹⁹¹ *Id.*

¹⁹² Interview by Nate Thayer with Kob Math, Sop Kotijah (Psa Baktouk) and Van Math (Aug. 1984) (transcripts on file with DC-Cam).

¹⁹³ Interview by Nate Thayer with Sop Kotijah, Nong Samet, Thail. (Aug. 1984) (transcript on file with DC-Cam).

¹⁹⁴ YSA, *supra* note 185, at 4-5.

¹⁹⁵ For a discussion of such practices based on a large number of interview transcripts, see *id.* at 1-8. See also Sorya Sim, “The Chams Under Pol Pot: Kampong Cham Province” (DC-Cam research paper, on file with DC-Cam); Interview by Nate Thayer with Sufeeyan Idres, in Khao-I-Dang Refugee Camp, Thail. (Dec. 1984) (on file with DC-Cam).

¹⁹⁶ For a discussion of evidence relating to some of these groups, see KIERNAN, *supra* note 54, at 288-309. See also Kannitha Keo, Khmer Krom Under the Khmer Rouge and Sorya Sim, Hill Tribes Under the Khmer Rouge Regime (unpublished manuscripts, on file with DC-Cam).

¹⁹⁷ As one example, François Ponchaud asserted that “if the Khmer Rouge know a person is a Christian, they take him away and kill him accusing him of belonging to the CIA.” PONCHAUD, *supra* note 74, at 155. Further research on Christians and other protected groups is essential.

¹⁹⁸ See KR Tribunal Law, *supra* note 2, Art. 3.

¹⁹⁹ CODE PENAL ET LOIS PENALES, ROYAUME DU CAMBODGE, Arts. 209-10 (1956) [hereinafter 1956 Penal Code]. The term “offenses” is translated from *attentats* in the original French text.

²⁰⁰ *Id.* (emphasis in original).

²⁰¹ The International Military Tribunal at Nuremberg defined “persecution” to include arrest and confinement, beatings, torture, confiscation of property, deportation, forced labor, denial of the rights to practice a profession, marry freely, or pursue education, and killing. See 22 TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 491-96 (1948) [hereinafter IMT TRIALS]. “Persecution” probably encompasses additional acts as well, such as the destruction of private property and the closure of religious institutions. RATNER & ABRAMS, *supra* note 7, at 120-22.

²⁰² According to this argument, the U.N.’s 1981 declaration against religious persecution and discrimination represented a restatement of pre-existing customary law. See Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief, GA Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, U.N. Doc. A/36/51 (1981) G.A. Res. 36/55, *adopted* Nov. 25, 1981. Whether religious

persecution gave rise to individual criminal liability during the Pol Pot era is disputable.

²⁰³ DK Constitution, *supra* note 104, Art. 20.

²⁰⁴ *See supra* notes 173-74 and accompanying text.

²⁰⁵ *See, e.g.*, Interview by Nate Thayer with Toun Ibrahim (Sept. 19, 1980) (transcript on file with DC-Cam).

²⁰⁶ *See supra* notes 178-95 and accompanying text.

²⁰⁷ This definition of torture in the KR Tribunal Law is taken from Article 500 of the 1956 Cambodian Penal Code. KR Tribunal Law, *supra* note 2, Art. 4. This formulation differs from the definition of torture common in international criminal law, which also requires that the act be committed by or at the instigation of a public official. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, Art. I, at 97, U.N. Doc. A/39/51 (1984). *See also* U.N. Declaration on Protection from Torture, G.A. Res. 3452, Annex, Art. 1, U.N. GAOR, 30th Sess., Supp. No. 34, at 91, U.N. Doc. A/1034 (1975).

²⁰⁸ Telegram 21, “To Respected Comrade Brother Pol” (DC-Cam Catalogue No. L01158 (02bbk)).

²⁰⁹ “Brother Duch: Measures (Already Taken) to Interrogate IX” (DC-Cam Catalogue No. 75). Duch also received other information about the torture of “IX,” later named as Man San *alias* Ya. *See* “Brother Duch: Measures for Interrogating IX (Man San *alias* Ya), Which Made the Subject (IX) Confess on September 26, 1976, in the Evening” (DC-Cam Catalogue No. 77).

²¹⁰ Thayer, *supra* note 14, at 20-21; Nate Thayer, *I Am in Danger*, FAR E. ECON. REV., MAY 13, 1999.

²¹¹ “Confession of Sieng Paury *alias* Sean” (DC-Cam Catalogue No. 734bbkhh).

²¹² “History of Pich Chay” (DC-Cam Catalogue No. 317bbkhh).

²¹³ *See* Thayer, *supra* note 14, at 20; Thayer, *supra* note 210.

²¹⁴ “Confessions of Hak Seang Layny, *alias* Lay, of the Foreign Ministry” (DC-Cam File No. N0007814, at 27).

²¹⁵ Nic Dunlop & Nate Thayer, *Chief of the Sinners*, FAR E. ECON. REV., May 6, 1999, at 22.

²¹⁶ “Confession of Chou Nhe” (DC-Cam File No. 83bbkhh).

²¹⁷ For example, one interrogator wrote that, “This is a confirmation to how I interrogated [Saut]. First, I asked him about his background and open situations. Then, he confessed when I tortured him” *See* “Conclusion of the Activities of Nhim Sim *alias* Saut” (DC-Cam File No. 176bbkhh, at 5). Another described his session with a prisoner as follows: “although I pressed him to answer, he did not answer; but he did once tortured.” *See* “Confession of Sieng Paury *alias* Sean,” *supra* note 211, at 7. Both of these prisoner files included notes addressed to Nuon Chea. For a compelling example, see “Note on the Confession of Koan Chan *alias* Chan” (DC-Cam File No. 202bbkhh, at 4). On one page of the report, the interrogator records at least five explicit uses of “torture” and additional “beatings” to extract confessions. *See also* “History of Pich Chay,” *supra* note 212 (including a statement by an interrogator that “when I tortured him, he conceded speaking about CIA spies”).

²¹⁸ *See, e.g.*, Interview by Meng-Try Ea with Khieu Ches *alias* Peou, in Kompong Tralach, Cambodia (Feb. 12, 2000); Interview by Meng-Try Ea with Cheam Soeu *alias*

Soeu, in Kompong Tralach, Cambodia (Feb. 12, 2000); Interview by Meng-Try Ea with Pann Sam *alias* Sam, in Samaki Meanchey, Cambodia (Feb. 13, 2000) (uncatalogued interview transcripts on file with DC-Cam).

²¹⁹ “Confession of Hu Nim” (DC-Cam Catalogue No. D00349).

²²⁰ “Notebook of Mam Nai *alias* Chhan” (DC-Cam File No. KNH166).

²²¹ “1976 Study Notebook” (DC-Cam Catalogue No. D06936).

²²² See, e.g., “Petition of Prom Sarom,” “Petition of Chhin Thil,” and “Petition of Pen Visés,” *Renakse* Collection, Kandal file (on file with DC-Cam). Chandler cites and discusses at length many more documents containing explicit mention of torture. See CHANDLER, *supra* note 75, at 53-140.

²²³ Thayer, *supra* note 14, at 20.

²²⁴ KR Tribunal Law, *supra* note 2, Art. 5.

²²⁵ For a good discussion of that issue, see RATNER & ABRAMS, *supra* note 7, at 50-57. See also Raymund Johansen, The Khmer Rouge Communications Documents and the “Nexus to Armed Conflict” Requirement for Crimes Against Humanity (1999) (unpublished manuscript, on file with DC-Cam).

²²⁶ Even if the nexus to international armed conflict is required, by 1978 hostilities between Cambodia and Vietnam may well have met that standard. See *infra* notes 254-62 and accompanying text.

²²⁷ For an analysis of DC-Cam’s findings from the Mapping Project, see Craig Etcheson, *The Number: Quantifying Crimes of Humanity in Cambodia*, in SEARCHING FOR THE TRUTH 13-18 (2001).

²²⁸ “Confessions of Maen Meng *alias* Chhin” (TSL File No. M172).

²²⁹ “Confessions of Cho Chhan *alias* Sreng” (TSL File No. C120).

²³⁰ *Id.* (discussed in HEDER WITH TITTEMORE, *supra* note 2, at 32).

²³¹ Sin Song and Kun Chhay assert that Pol Pot and Nuon Chea gave an order to kill the Lon Nol officials, but Heng Samrin asserts that they used the word “scatter,” which does not necessarily mean killing. In either case, the directive appears to have authorized killing as one possible course of action. See Sin Song Interview, *supra* note 110; Kun Chhay Interview, *supra* note 110; Heng Samrin Interview, *supra* note 54.

²³² See “Confession of Chou Chet,” DC-Cam Catalogue No. D13786.

²³³ Interview by Ben Kiernan with San (May 29, 1980). The existence of that policy is supported by a number of other interview transcripts as well. For examples, see KIERNAN, *supra* note 54, at 92-93.

²³⁴ For descriptions of the processes of Tuol Sleng based on numerous interviews with former *Santebal* cadres, see MENG-TRY EA & SORYA SIM, VICTIMS AND PERPETRATORS? TESTIMONY OF YOUNG KHMER ROUGE COMRADES 28-43 (2001) (DC-Cam, Doc. Series No. 1); CHANDLER, *supra* note 75, at 110-42.

²³⁵ Thayer, *supra* note 14, at 20-21. Duch also asserted that Pol Pot, Khieu Samphan, Son Sen, and other members of the CPK Central Committee were aware of S-21 activities.

²³⁶ *Id.*

²³⁷ *Id.*; Thayer, *supra* note 210.

²³⁸ 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), *cited in* HEDER WITH TITTEMORE, *supra* note 2, at 78 n.367. The basis on which Heder and Tittmore

conclude that Khieu Samphan wrote this unsigned document is unclear.

²³⁹ Interview by David Chandler with Kok Sros & Him Huy, *cited in* CHANDLER, *supra* note 75, at 140.

²⁴⁰ KR Tribunal Law, *supra* note 2, Art. 5. The KR Tribunal Law's inclusion of ethnic and national groups diverges from the ICTY and ICTR, which focus on racial, religious, and political groups. *See* RATNER & ABRAMS, *supra* note 7, at 62-66. Like the ICTY and ICTR, the KR Tribunal Law does not identify social, cultural, or economic groups as victims of crimes against humanity.

²⁴¹ RATNER & ABRAMS, *supra* note 7, at 65-66 (noting that the Nuremberg Court, ICTY, and ICC all took this essential position, "bifurcating" crimes against humanity).

²⁴² *Id.* at 64-66 (citing the 1954 Draft Code, which covers acts committed on social or cultural grounds, and the ICC Statute, which prohibits crimes against humanity committed on "other grounds that are universally recognized as impermissible under international law"). *See* International Law Commission Report 150-52 (1954); ICC Statute, Art. 7(1)(h).

²⁴³ *See, e.g.*, "Minutes of the Meeting of the Under-Secretary of Division and Regiment" (Aug. 2, 1976) (DC-Cam Catalogue No. 48 (04bbk)); "Minutes of the Meeting of Division and Independent Regiment Secretary(s) and Deputy Secretary(s)" (Aug. 18, 1976) (DC-Cam Catalogue No. L01379); "Minutes of the Meeting of Division and Independent Regiment Secretary(s) and Deputy Secretary(s)" (Aug. 30, 1976) (DC-Cam Catalogue No. L01407 (04bbk)).

²⁴⁴ "Minutes of Divisional and Regiment Secretary-Undersecretary of Logistics Meeting," *supra* note 78; "Minutes of Divisional and Independent Regiment Secretary-Undersecretary Meeting" (Sept. 16, 1976) (DC-Cam Catalogue No. L01449 (05bbk)).

²⁴⁵ "Minutes of the Meeting of Secretaries and Deputy Secretaries of Divisions and Independent Regiments" (Mar. 1, 1977) (DC-Cam Catalogue No. L0045 (08bbk)).

²⁴⁶ "History of the Traitorous Political Activities of Teum Sen *alias* Sit, Secretary of Kah Thom District, Region 25, Southwest Zone" (DC-Cam Catalogue No. BBKkh 440).

²⁴⁷ The Tuol Sleng archives contain many examples of "confessions" by alleged "traitors" and "spies." *See, e.g.*, "Confessions of Penh Thuok *alias* Vorn Vet" (TSL File No. P374); "Confessions of Chhay Keum Hor *alias* Hok" (TSL File No. C383); "Confessions of Van Piny *alias* Teut" (TSL File No. V26).

²⁴⁸ "The History of the Treason of Lean Sirivut" (TSL File No. L101); "Responses of Tauch Kham Deuan, Coming from the Ministry of Foreign Affairs, on the History of His Own Activities" (TSL File No. T119).

²⁴⁹ "Minutes of the Meeting of Secretaries and Under-Secretaries of Independent Regiments," *supra* note 70.

²⁵⁰ *See, e.g.*, Interview by Ben Kiernan with Sok (Aug. 1, 1980) (describing the killing of intellectuals and upper classes for minor offenses in the Eastern Zone during 1977); Interview by Dara P. Vanthan with Toeung Lanh, in Trach village, Kampong Thom province, Cambodia (Feb. 13, 2003). *See also* Vandy Kaonn, *Report on an Investigation into Crimes of the Pol Pot-Ieng Sary Clique Against the Population of Phnom Penh* (Aug. 15, 1979), *reprinted in* GENODICE IN CAMBODIA, *supra* note 28, at 287, 297-99.

²⁵¹ War crimes are defined in the KR Tribunal Law as "grave breaches of the Geneva

Conventions of 12 August 1949.” KR Tribunal Law, *supra* note 2, Art. 6.

²⁵² RATNER & ABRAMS, *supra* note 7, at 83-85. The International Committee of the Red Cross has proposed a broad definition, encompassing “[a]ny difference arising between two States and leading to the intervention of members of the armed forces.” *Id.* at 83.

²⁵³ Common Article 3 of the Geneva Conventions requires parties to a non-international conflict to apply, at a minimum, certain standards to people who are not actively participating in the hostilities. *Id.* at 91-93. However, the types of activity that give rise to a finding of “armed conflict” is even more hotly disputed than in the international context. Many statesmen and scholars have argued that a wide definition impinges on states’ sovereign rights to carry out police protection and counter-insurgency measures.

²⁵⁴ “To M. 870 with Respect: The Situation Along the Border in the Eastern Zone” (DC-Cam Catalogue No. L01423 (08bbk)).

²⁵⁵ Telegram 34, “To My Beloved and Respected Brother” (DC-Cam Catalogue No. L01435 (08bbk)).

²⁵⁶ 1978 Khieu Samphan Speech, *supra* note 83.

²⁵⁷ “Teng Sary’s Statement of the DK Ministry of Foreign Affairs” (Mar. 17, 1978) (DC-Cam Catalogue No. D21933).

²⁵⁸ “Phnom Penh Radio Broadcast,” *supra* note 164.

²⁵⁹ For example, a pair of reports to Son Sen described armed conflict between CPK forces and the Vietnamese early in 1976. See “Dear Beloved Brother 89,” *supra* note 57; “Dear Beloved and Missed Brother 89” (DC-Cam Catalogue No. L01147 (02bbk)). In a Standing Committee Meeting the following months, the ongoing armed fighting between Vietnam and the CPK was further described. “Minutes of the Standing Committee Meeting” (Mar. 26, 1976) (DC-Cam Catalogue No. L00174 (02bbk)). See also “To Uncle 89” (DC-Cam Catalogue No. L01094 (02bbk)), which reports skirmishes in January 1976 with the Vietnamese.

²⁶⁰ A CPK internal memorandum provides evidence drawn from contemporaneous journalistic accounts. It describes a “hot East battle [in Krek] . . . since the December 1977 invasion by the Vietnamese” and notes that “the armed forces of the Revolutionary Army of Kampuchea in another region called Svay Rieng in the Eastern Zone are intensely fighting with the Vietnamese.” The memorandum also describes continual Vietnamese incursions, artillery fire, and use of gas-poisoned bombs in the struggle. It notes many deaths and casualties in the Krek region and along the border. See “News Quoted From Foreign Radios” (TSL File No. D175). A letter from Ieng Sary to Son Sen in December 1978 also refers to the rising Vietnamese invasion. “Chinese Comrades Ask to Visit Eastern Zone with Following Requests” (TSL File No. D114).

²⁶¹ See, e.g., interview by John D. Ciorciari with Mai Oeun, Chamkar Tanget village, Kandal Province, Cambodia (Mar. 27, 2003) (transcript on file with DC-Cam).

²⁶² See, e.g., NAYAN CHANDA, BROTHER ENEMY: THE WAR AFTER THE WAR (1986); KIERNAN, *supra* note 54, ch. 4.

²⁶³ See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, Art. 13, 6 U.S.T. 3114, 75 U.N.T.S. 40 (Geneva Convention I); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, Art. 13, 6 U.S.T. 3217, 75 U.N.T.S. 94 (Geneva Convention II); Geneva

Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Art. 4, 6 U.S.T. 3316, 75 U.N.T.S. 138-39 (Geneva Convention III); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 4, 6 U.S.T. 3516, 75 U.N.T.S. 290 (Geneva Convention IV). The protected civilians are those who fall into the control of a power of which they are not nationals. With respect to the CPK, protected civilians would include Thai or Vietnamese citizens and any Thai or Vietnamese residents of Cambodia who were not citizens. RATNER & ABRAMS, *supra* note 7, at 87, 251.

²⁶⁴ Telegram 46, “Dear Respected Office 870” (DC-Cam Catalogue No. D02105 (15bbk)). This was followed on July 20 with a report discussing allegations that the DK army had fired shells at an area with dense civilian population, killing at least 30 and wounding at least 50 Vietnamese civilians. Telegram 56, “Dear Respected and Beloved Brother” (DC-Cam Catalogue No. D01749 (10bbk)). The disproportionate impact on civilians does not necessarily prove the commission of war crimes, but it may suggest a failure or unwillingness to avoid civilian targets. HEDER WITH TITTEMORE, *supra* note 2, note 247.

²⁶⁵ Telegram 62, “Dear Beloved Mo-81” (DC-Cam Catalogue No. D01769 (10bbk)).

²⁶⁶ Telegram 68, “To Beloved and Missed Mo-81” (DC-Cam Catalogue No. D01780 (10bbk)).

²⁶⁷ “To Respected Comrade Brother Pol,” *supra* note 208.

²⁶⁸ Telegram 60, “Respectfully Presented to Beloved and Missed Mo-870” (Oct. 29, 1977) (DC-Cam Catalogue No. D01887 (12bbk)); Telegram 82, “Respectfully Presented to Beloved and Missed Brother Pol” (DC-Cam Catalogue No. D01859); Telegram 16, “To Respected and Beloved Brother 009” (DC-Cam Catalogue No. D02081 (15bbk)). For additional examples, see HEDER WITH TITTEMORE, *supra* note 2, at 56-57 (citing a series of documents addressed to Pol Pot, Nuon Chea, and the office of the CPK Central Committee).

²⁶⁹ Leng acknowledged that CPK forces murdered unarmed civilians in Vietnamese territory but was unclear about similar offenses on the Cambodian side of the border. See interview by Dara P. Vanthan et al., with Leng Kim, in Tuk Phos district, Kampong Chhnang province, Cambodia (July 10, 2002) (transcript on file with DC-Cam). Offenses committed in Vietnam do not fall under the jurisdiction of the prospective KR Tribunal.

²⁷⁰ Interview by Dara P. Vanthan et. al., with Chek Sam *alias* Saom Sam Ol, in Baribo district, Kampong Chhnang province, Cambodia (July 12, 2002) [hereinafter Chek Sam Interview] (transcript on file with DC-Cam).

²⁷¹ For the most exhaustive review of the available historical evidence on Office S-21, see generally CHANDLER, *supra* note 75.

²⁷² KR Tribunal Law, *supra* note 2, Art. 7.

²⁷³ 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, Art. 4, 249 U.N.T.S. 215, 242-44.

²⁷⁴ *Id.* Art. 19, 249 U.N.T.S., at 256.

²⁷⁵ 1976 Decisions, *supra* note 19, Item 6.

²⁷⁶ Interview by Dara P. Vanthan et al., with Iem Moeng, Baribo district, Kampong Chhnang province, Cambodia (July 10, 2002) (transcript on file with DC-Cam).

²⁷⁷ See, e.g., Chek Sam Interview, *supra* note 270 (reporting widespread CPK destruction of religious buildings in the Battambang area); Interview by David Hawk with Him Mathot, Phnom Penh, Cambodia (Apr. 1981) (on file with DC-Cam).

²⁷⁸ DE NIKE ET AL., *supra* note 28, at 144-55.

²⁷⁹ For a brief discussion of the CPK's destruction of cultural property, based on multiple interviews, see BECKER, *supra* note 189, at 264-65.

²⁸⁰ "Petition of Unn Tep" *Renakse* Collection, Siem Riep File (on file with DC-Cam).

²⁸¹ KR Tribunal Law, *supra* note 2, Art. 8. Cambodia became a party to the Vienna Convention on Diplomatic Relations on August 30, 1965. See Multilateral Treaties Deposited with the Secretary-General, Status as of 31 December 1996, in EILEEN DENZA, *DIPLOMATIC LAW* 436, 437 (1998).

²⁸² See generally Vienna Convention on Diplomatic Relations, signed April 18, 1961, entered into force June 24, 1964, Arts. 22-45, 23 U.S.T. 3227, 500 U.N.T.S. 95.

²⁸³ *Id.* Arts. 22, 24, 27, 29-31.

²⁸⁴ *Id.* Arts. 44-45.

²⁸⁵ See WILLIAM SHAWCROSS, *SIDESHOW: NIXON, KISSINGER, AND THE DESTRUCTION OF CAMBODIA* 366-67 (rev. ed. 1987) (basing his account on interviews with survivors of the episode).

²⁸⁶ Thayer, *supra* note 14, at 20.