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**A Review of the Negotiations**  
**Leading to the Establishment**  
**of the Personal Jurisdiction of the**  
**Extraordinary Chambers in the Courts of Cambodia<sup>1</sup>**

Introduction

The October 2004 Cambodian Law establishing the Extraordinary Chambers in the Courts of Cambodia (ECCC)<sup>2</sup> does not contain any provisions regarding interpretation. However, the Agreement Between the UN and Cambodia, an international treaty that preceded and informed the final version of the ECCC Law, provides in Article 2 that the Agreement is subject to the Vienna Convention on the Law of Treaties.<sup>3</sup>

The Vienna Convention is widely considered a codification of customary international law on the subject of treaty interpretation. Article 31 of the Convention states that treaties should generally be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>4</sup>

Article 1 of the ECCC Law provides: “The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.”

Article 1 of the UN-Cambodia Agreement, the stated purpose of which is to “regulate the cooperation between the United Nations and the Royal Government of Cambodia” in respect of the Khmer Rouge trials, reproduces the text of Article 1 of the ECCC Law in identical terms.

In this particular case, in determining who falls within the ECCC’s personal jurisdiction as being “most responsible for the crimes and serious violations...”, the Court’s judicial bodies may look not only to the ordinary meaning of these terms, but also to the

context and the object and purpose of the Agreement. Again in this case, it appears clear that the ECCC Law forms part of the context of the Agreement in accordance with Article 31(2) of the Vienna convention, as an “instrument which was made by one or more parties in connection with the conclusion of the treaty.”

Moreover, given the inherent ambiguity in the terms “most responsible”, Article 32 of the Vienna Convention authorizes recourse, as a supplementary means of interpretation, to the drafting history of the UN Agreement and the circumstances of its conclusion.<sup>5</sup> Of course, in this case, they are inextricably bound to the negotiating history of the ECCC Law itself.

Accordingly, the following historical analysis of the long negotiations between the UN and Cambodia, with much involvement by the US, concerning the personal jurisdiction of the ECCC, which led to the inclusion of the terms “most responsible” in both the Cambodian ECCC Law and the UN-Cambodia Agreement, is of the greatest interest and pertinence to the current deliberations of the ECCC judicial bodies, including resolution of the ongoing controversy concerning widened investigations at the Court.

### The Peoples Republic of Kampuchea

The December 1978 founding communiqué of the Solidarity Front for the Salvation of the Kampuchean Nation provided the general foundation for political and legal policy of the People’s Republic of Kampuchea (PRK). The PRK was proclaimed in January 1979 following the disintegration of the Communist Party of Kampuchea (CPK)-led Democratic Kampuchea (DK) regime and the flight of most of the CPK’s highest-ranking cadre, led by Party Central Committee Secretary Pol Pot,<sup>6</sup> to the Cambodia-Thailand frontier, where they reorganized their remnant forces to conduct a guerilla insurgency against the PRK and its Vietnamese backers.<sup>7</sup> Among the original members of the Solidarity Front were a number of CPK cadre who had gone to Vietnam in 1977-78 amidst purges of the CPK ranks, including Heng Samrin, Chea Sim and Hun Sen,<sup>8</sup> all of whom subsequently held prominent posts in the PRK regime, Heng Samrin as chief of state, Chea Sim as Minister of Interior<sup>9</sup> and Hun Sen as premier.<sup>10</sup>

The Solidarity Front communiqué distinguished three levels of erstwhile CPK political and military figures. At the top were those it described as DK “ringleaders.” The next level down comprised those it termed administrative “cadre” and military “officers.” Below them were those characterized as state “personnel” and “enlisted men” of the armed forces.<sup>11</sup> Referring to atrocities perpetrated while the CPK was in power, the communiqué committed the new regime “sternly to punish the ringleaders of treason to the nation who stubbornly oppose the people and owe blood debts to the people.” However, it also promised “leniency vis-à-vis those who are honest and who understand and sincerely correct their wrongdoings” and “to praise and appropriately encourage those who perform feats on behalf of the revolution,” i.e., the PRK. The Solidarity Front thus declared that it was ready “to warmly welcome and create favourable conditions for officers and enlisted men” in the CPK’s armed forces and “for cadre and personnel of the traitorous [i.e., DK] state power to return to and join hands with the people.”<sup>12</sup>

In April 1979, the PRK promised to try those who had "massacred" people under CPK rule, but said that with the exception of Pol Pot and DK Deputy Prime Minister for Foreign Affairs and CPK Central Committee Standing Committee Member Ieng Sary,<sup>13</sup> those who "served the interests" of the new revolution were awarded an exemption. Harsh treatment was again to be meted out only to those who continued "stubbornly" to oppose the PRK, regardless of what they might previously have done or not done. People's courts were to be instituted to try and "severely punish" such enemies of the new regime.<sup>14</sup>

On 15 July 1979, the PRK promulgated a decree-law establishing a "Revolutionary People's Tribunal for the Trial of the Genocide Crime of the Pol Pot-Ieng Sary Clique."<sup>15</sup> Its Chairman, Kèv Chenda, used the term "ringleaders" to identify Pol Pot and Ieng Sary when he explained that it had been decided that they would be tried because they had "committed most of the crimes," thereby apparently making this the definition of a ringleader.<sup>16</sup> As for others, the decree-law referred back to the Solidarity Front communiqué and undertook to continue its "policy of compassion and leniency vis-à-vis any person who joined the armed forces or state power apparatus of Pol Pot-Ieng Sary," as long as they "sincerely reformed." They would continue to be rewarded if they "created feats on behalf of the revolution."<sup>17</sup> In August, the Court found Pol Pot and Ieng Sary guilty of the "implementation of a plan of systematic massacre of many strata of the population on an increasingly ferocious scale."<sup>18</sup> The verdict argued they should be "held responsible for ordering and planning the perpetration of the crime of genocide" and were personally responsible for it because "Pol Pot ... held the highest office" and Ieng Sary "held high offices with real power [and] shared leadership with Pol Pot," thereby apparently elaborating on the meaning of the notion of a ringleader. It also stated that Pol Pot had "mapped out home and foreign policy lines and policies and directed their implementation," and that Ieng Sary, as foreign minister, was "directly responsible for the execution of intellectuals and students living in the country or returning from abroad."<sup>19</sup>

Thus, while PRK policy characterized the CPK regime as comprised of three levels of personnel and advocated prosecution of the upper-most level, this policy was politically qualified by the proviso that beyond Pol Pot and Ieng Sary, those who had either defected from CPK ranks before the establishment of the PRK or who rallied to it thereafter would be spared trial or imprisonment. Although there were a few exceptions to this rule,<sup>20</sup> many former CPK cadre who had switched sides in 1977-1979 were integrated into PRK administrative and military structures at all levels, and those who defected over the next decade were largely allowed to rejoin society without punishment. Among those who became PRK cadre were, according to an internal regime report, "some who have blood debts, who have killed with their own hands or issued direct orders to kill ... or who made lists of cadre, Party members and the masses and reported them to the higher level to be killed." Their culpability was, however, argued away: "examining and considering [the issue of their blood debts] is extremely complicated because under Pol Pot there were some people who acted directly and some who acted from a distance, some people with a lot of blood debts and some with a few, some people who were compelled to do things and some who did them of their own accord." Moreover, it was asserted, some ex-CPK who truly had blood debts had not been "moved by malice" when they killed. Anyway, for those who had

eventually themselves suffered at the hands of Pol Pot and risen up against him, there should generally be no talk of blood debts. The best solution was simply to post those notoriously responsible for killings away from places where they would be personally known to the population.<sup>21</sup>

As for those ex-CPK who came over during the next decade of armed conflict in the tens of thousands, they were termed “mised” people who as a matter of policy were allowed “to return to their families and the national fold” after a brief period of re-education,<sup>22</sup> and “a good number of these became state employees.”<sup>23</sup> While meanwhile trying a handful of lower-level (alleged) Khmer Rouge for continuing violent opposition to the PRK,<sup>24</sup> the PRK began from 1981 to move beyond holding only Pol Pot and Ieng Sary responsible for the CPK crimes of 1975-78. Also in 1981, the CPK announced its self-dissolution,<sup>25</sup> but its previous leadership continued to function under a de facto Standing Committee of the Central Committee that comprised surviving pre-1979 members Pol Pot, Nuon Chea, Mok, Ieng Sary and Son Sen<sup>26</sup> and newly promoted members Khieu Samphan and Kè Pork,<sup>27</sup> both of whom were formerly members of the CPK Central Committee.<sup>28</sup> The PRK called for their insurgency to be disarmed so its “leaders” could be “brought to trial before an international tribunal, just as the German Nazis were sentenced at Nuremberg.”<sup>29</sup> Over the next several years, there was no definitive public PRK enumeration of who might be included among the Khmer Rouge “leaders” it wanted tried, but in addition to Pol Pot and Ieng Sary, there were mentions of Khieu Samphan and Son Sen<sup>30</sup> in contexts suggesting they were part of the political or military leadership of what the PRK called the “Pol Pot clique” or “the Pol Pot gang.”<sup>31</sup> These mentions were coupled with ongoing demands that the Khmer Rouge “must be eliminated in the political and military fields” and promises that “individuals or groups” who dissociated themselves from Pol Pot could participate in the political life of the country.<sup>32</sup> In 1986, after Australian Foreign Minister Bill Hayden endorsed the earlier PRK calls for an international tribunal, it said that “Pol Pot and his accomplices” must be punished, indicating that this meant enforcing the existing 1979 verdicts and sentences and conducting additional trials in an international court.<sup>33</sup> In 1987-88, amidst further PRK pleas for the establishment of such a jurisdiction,<sup>34</sup> PRK chief of state Heng Samrin reportedly identified “the genocidal Pol Pot and his nearest aides” as including Pol Pot himself, Pol Pot’s wife Khieu Ponnary, Ieng Sary and his wife Ieng Thirith, and Nuon Chea. Heng Samrin characterized them as figures “unacceptable” to the PRK as political interlocutors,<sup>35</sup> thus suggesting they were candidates for prosecution.

Premier Hun Sen provided a longer and slightly modified list of people described as “Khmer Rouge leaders” who he said must be removed from Cambodian political life: Pol Pot, Ieng Sary, Ieng Thirith, Khieu Samphan, Son Sen, Mok, Nuon Chea and Kè Pork,<sup>36</sup> apparently making them his prosecution list when he wrote to the United Nations Secretary-General that “Khmer Rouge genocidal criminals” should be “brought to trial.”<sup>37</sup> At this time, the top echelon of the insurgent Khmer Rouge leadership had been slightly revamped and comprised Pol Pot, Nuon Chea, Mok, Ieng Sary, Son Sen, Khieu Samphan and new members Sâm Bît and Meas Mut.<sup>38</sup> Kè Pork had been removed from all official positions and retired.<sup>39</sup> Ieng Thirith, who had been DK Minister of Social Action, but evidently not a member of the Party Central Committee, when the CPK was in

power,<sup>40</sup> had been demoted to general secretary of the insurgent Ministry of Foreign Affairs after 1979.<sup>41</sup>

### State of Cambodia and the 1991 Paris Agreements

Hun Sen envisaged trial of his eight candidates for prosecution as part of a political settlement of the armed conflict between the PRK, on the one hand, and the Khmer Rouge and other armed opposition groups allied with them, such as that led by former King Norodom Sihanouk, FUNCINPEC,<sup>1</sup> on the other. He insisted that such a deal also required a dismantling of Khmer Rouge armed forces but would allow organized political participation in post-conflict elections by Khmer Rouge other than those on his list.<sup>42</sup> In what seems to have been an attempt to make clear this distinction, he specified that he wanted to see brought “to trial the Pol Potist ringleaders responsible for crimes of genocide,” apparently alluding to the eight.<sup>43</sup> Similarly, they evidently comprised the “Pol Pol clique” which Hun Sen’s government (meanwhile renamed the State of Cambodia -- SOC) said “must be sent to trial by [an] International Tribunal”<sup>44</sup> and prosecuted “in conformity with the UN Convention on the Prevention and the Punishment of the Crime of Genocide.”<sup>45</sup> Such judicial accountability was defined in SOC’s negotiating position with regard to a political settlement as a necessary concrete measure to prevent the recurrence of the “genocidal policies and practices of the Pol Pot regime,”<sup>46</sup> and into 1990 SOC called on the UN to “open an international court along the lines of the Nuremberg Tribunal to try the Pol Pot criminals.”<sup>47</sup>

These SOC demands were rejected not only by the Khmer Rouge and their Cambodian allies, but by most of the foreign governments involved in negotiating the political settlement with the Cambodian parties. When Cambodian and foreign delegates had met for negotiations in Paris in 1989, China strongly opposed any retrospective look at CPK crimes, and the members of the Association of Southeast Asian Nations (ASEAN) also objected. Most Western governments, including the US, proclaimed their deference to ASEAN wishes. Those not inclined to this stance raised technical difficulties about the application of the Genocide Convention to the Cambodian situation.<sup>48</sup>

It became increasingly clear that the political solution would not only preclude trials, but was likely to result in the inclusion of Khieu Samphan and Son Sen, now styling themselves leaders of the *Partie* of Democratic Kampuchea (PDK), in a Supreme National Council (SNC)<sup>49</sup> to symbolize Cambodian sovereignty while the UN oversaw demobilization of Khmer Rouge and other Cambodian armed forces and organized elections in which the Khmer Rouge would participate.<sup>50</sup> The two were duly named SNC members in September 1990,<sup>51</sup> sitting alongside Hun Sen and other Cambodian politicians as “representative individuals with authority among the Cambodian people”<sup>52</sup> while intense negotiations about the details of a political settlement continued. SOC did not give up its insistence that all “the eight undesirables,” including Khieu Samphan and Son Sen, “must be eliminated,” but now envisaged this happening via and after the UN-organized elections,<sup>53</sup> presuming that in a free and fair vote, the population would exclude the Khmer Rouge from power.<sup>54</sup> In this context, SOC continued to talk about trying “the Pol Potist ringleaders” as a

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<sup>1</sup> *Front Uni National pour un Cambodge Indépendant, Neutre, Pacifique, et Coopératif.*

necessary “concrete measure aimed at preventing the repetition of the genocidal regime,”<sup>55</sup> repeating that they should be brought before an international tribunal.<sup>56</sup>

During further negotiations in 1991 that finally led to the signature of a set of peace agreements at a conference in Paris in October, Hun Sen and other SOC officials thus had to participate in SNC meetings alongside Khieu Samphan and Son Sen (“representing the genocidal regime”),<sup>57</sup> whom SOC exempted from calls for prosecution as long as it deemed their membership of the SNC contributed to a political settlement of the war.<sup>58</sup> However, it still looked forward to trying “the Khmer Rouge ringleaders ... at an appropriate time,”<sup>59</sup> that is, under a post-election government following a Khmer Rouge ballot box defeat<sup>60</sup> and in an international court.<sup>61</sup> It also indicated that in addition to the “top leaders,” trying “other leaders would be considered” on a case-by-case basis, saying it believed “the Cambodian people will want to see the Khmer Rouge leaders brought to trial.”<sup>62</sup> In this regard, it insisted that a distinction must be made between “the leaders in the State of Cambodia Government,” who must not be treated as criminals but as victims, and “the Pol Pot-Ieng Sary-Khieu Samphan clique and a number of its close followers ... who committed genocidal acts.”<sup>63</sup> This harked back to years of insistence that the original founders of the December 1978 Solidarity Front, including ex-Khmer Rouge such as Hun Sen, Chea Sim and Heng Samrin, must be credited with having “completely toppled the genocidal Pol Pot regime.”<sup>64</sup>

In the final negotiations, SOC failed to get specific reference to trials or the issue of genocide written into the texts of the agreements.<sup>65</sup> However, these omissions were partially compensated for by the inclusion in the Paris Agreements of allusions to atrocities under CPK rule and to the SOC demand for judicial accountability. These were implied in the agreements’ requirement that Cambodia “take effective measures to ensure that the policies and practices of the past shall never be allowed to return” and that other signatories to the treaty recognize the need for “special measures to assure” the non-return of those policies and practices.<sup>66</sup> These formulations reflected a compromise between a proposal by SOC and the US delegation to the conference that the agreements’ Final Act make a specific reference to the Genocide Convention and opposition to this by the PDK, among others. The language was intended to refer to the DK genocide and the fact that Cambodia was states-party to the Genocide Convention and signified a change in US policy.<sup>67</sup> In his speech to the conference, then US Secretary of State James Baker highlighted the US shift and made its meaning explicit when he declared:

What makes the case of Cambodia so extraordinary - and its claim for international support so compelling - is the magnitude of the suffering its people have endured. The Khmer Rouge were no ordinary oppressors. In the name of revolution, they used violence against their own people in a way that has few parallels in history. We condemn these policies and practices of the Khmer Rouge as an abomination to humanity that must never be allowed to recur.

To prevent such a recurrence, we have encouraged the incorporation of strong human rights guarantees into this settlement agreement. And I can assure ... the Cambodian people ... that we will steadfastly sustain our efforts

to ensure that the human rights of the Cambodian people are supported by the international community. Cambodia and the US are both signatories to the Genocide Convention, and we will support efforts to bring to justice those responsible for the mass murders of the 1970s if the new Cambodian government chooses to pursue this path.<sup>68</sup>

The US position was thus non-specific as regards targets for prosecution, talking in principle of sending “to a tribunal those responsible for genocidal crimes.”<sup>69</sup> Its position became a little more specific when the US Congress later passed “The Cambodian Genocide Justice Act.” This legislation made it US policy “to bring to justice the national political and military leadership of the Khmer Rouge” and “to encourage the establishment of a national or international criminal tribunal for the prosecution of those accused of genocide in Cambodia.”<sup>70</sup>

Hun Sen argued that the Paris Agreements did not have the effect of “rescinding” the August 1979 verdicts and sentences against Pol Pot and Ieng Sary and said this position was backed by the US and the UK. However, he indicated that new prosecutions could be brought against them, saying doing so was “a matter for the new government.”<sup>71</sup> Sihanouk broadly endorsed the US-SOC position, declaring that he supported the creation of “an international tribunal to try criminals who committed the most heinous crime[s],” specifically mentioning Pol Pot, Ieng Sary and Mok.<sup>72</sup> During apparently SOC-orchestrated demonstrations<sup>73</sup> in November 1991 against the presence of Son Sen and Khieu Samphan in Phnom Penh as SNC members, SOC characterized them as “the former chief murders of the people” who like other leaders of the “genocidal Pol Pot gang” must be put on trial by the UN before an international tribunal.<sup>74</sup> It reiterated that a trial of “the Pol Potist ringleaders” would be the result of elections that would reflect popular demands for this outcome.<sup>75</sup> Sihanouk envisaged a similar scenario.<sup>76</sup> However, in the aftermath of the attacks on the Son Sen and Khieu Samphan, SOC said it would continue to implement the Paris Agreements and respect their involvement in carrying out the political settlement.<sup>77</sup> It adhered to this position throughout 1992.<sup>78</sup>

In January 1993, citing PDK violations of the Paris Agreements, including military attacks and a threatened boycott of the UN-organized elections scheduled for May, SOC declared that the PDK had forfeited its right to SNC membership and demanded that “the Khmer Rouge be evicted from the peace process ... and be declared insurgents and outlaws.”<sup>79</sup> It thereafter said that if this could not be achieved before the popular vote, it should be done after.<sup>80</sup> In March, SOC proposed setting up an international court along the lines then being talked about by the UN for Yugoslavia to try the “Khmer Rouge” for recent “systematic killings” of Vietnamese “based on racial hatred,” which it described as crimes against humanity, but there was no mention of crimes committed in 1975-1979.<sup>81</sup> At an SNC meeting on 4 April 1993, Hun Sen argued that recent PDK killings of Cambodians, Vietnamese and UN personnel was genocidal vis-à-vis the Cambodians and Vietnamese and part of an attempt to prevent or destroy the elections in order to preclude a democratic outcome that would result in the PDK being outlawed and its “leaders” tried. On this occasion, he proposed either that the UN arrest Pol Pot, Ieng Sary, Mok, Khieu Samphan and possibly other leaders and turn them over to a SOC Cambodian tribunal operating under

UN supervision for trial for genocide, or that a SOC tribunal itself issue the arrest warrant and proceed with a trial.<sup>82</sup> Three days later, he proposed to UN Secretary-General Boutros Boutros-Ghali the alternative that “the Khmer Rouge leaders be tried before an International Tribunal” both for the crimes they committed while in power from 1975 to 1979 and for more recent atrocities.<sup>83</sup> In campaigning for election of SOC’s Cambodian People’s Party (CPP), Hun Sen promoted this platform, saying that “genocidal ringleaders” like Pol Pot, Ieng Sary, Mok and Khieu Samphan should be tried pursuant to the provisions of the Genocide Convention either immediately or following the ballot.<sup>84</sup>

### The Royal Government of Cambodia

In the event, the May 1993 elections were won by the FUNCINPEC Party under the leadership of Prince Norodom Ranariddh and resulted in the formation of a FUNCINPEC-CPP coalition with Ranariddh as First Prime Minister and Hun Sen as Second Prime Minister. Sihanouk became constitutional monarch, reigning but not ruling over what was now the Royal Government of Cambodia (RGC). After the formation of the RGC coalition and amidst ongoing fighting between it and the Khmer Rouge, some of the RGC’s ministers continued to say that “Khmer Rouge leaders, especially Pol Pot and Ieng Sary,” should be put on trial,<sup>85</sup> although the official coalition platform did not mention the possibility of trials, declaring only that “any members of the Khmer Rouge group” would be welcome to “return to the national community,” including “representatives of the Khmer Rouge group,” who it said could be appointed to posts as “government advisors.”<sup>86</sup> However, the highest ranking one to do so anytime soon was Mèn Kèv, a member of Khmer Rouge military leadership in northern Cambodia,<sup>87</sup> and by June 1994, amidst on-going Khmer Rouge guerrilla warfare against the coalition, Hun Sen’s CPP, at least, resumed publicly calling for the trial of those responsible for “the genocidal crimes of the Khmer Rouge.”<sup>88</sup>

In July 1994, the coalition put through the legislature a “Law Proscribing the ‘Democratic Kampuchea’ Group,” specifying punishments under existing law, addition its own new provisions for punishing contemporary crimes and providing a simple political and legal characterization of CPK hierarchies and structures. Referring to only two DK levels, “leaders” and “members,” the law defined the “‘Democratic Kampuchea’ Group” as the same entity as that which captured power in April 1975 and committed crimes in 1975-79, saying it comprised a “political organization” and “military forces.” It declared the “leadership” of the Group responsible for committing the 1975-79 crimes, but stated that political and military “members” of the Group could also be responsible for crimes to the extent that they acted to “give orders, conspire to or engage directly” in criminality. Article 3 of the law made it possible to prosecute “members of the political organization or military forces” of the “‘Democratic Kampuchea’ Group” for “secessionist activities, acts of destruction against the Royal Government, acts of destruction against organs of the state authority, and incitement of the population to take up arms against the state authority.”<sup>89</sup> Other articles provided for a period of six months during which members of the “‘Democratic Kampuchea’ Group” could “come back to live under the authority of the Royal Government ... without being condemned for the crimes they have committed.” It added that “the leaders of the ‘Democratic Kampuchea’ Group” could not benefit from



such immunity,<sup>90</sup> although the possibility of a Royal Pardon after arrest and conviction for crimes committed was not excluded.<sup>91</sup>

In January 1995, the six-month deadline was extended for an apparently unspecified period for ordinary Khmer Rouge soldiers and people living under Khmer Rouge control, who were promised that they would “always” be welcome and not be prosecuted if they came over to the RGC side.<sup>92</sup> At this time, the government claimed that almost 6,000 had defected since 1994,<sup>93</sup> and explained that among those who had defected since September 1993, 2,970 had been integrated into the RGC army, including three brigadier-generals, nine colonels, 30 lieutenant colonels, 39 majors and 120 captains.<sup>94</sup> In mid-1995, it stated that 5,000 had defected since the promulgation of the legislation outlawing the KR.<sup>95</sup>

While pursuing this policy, the government renewed the 1979 practice of distinguishing three levels of Khmer Rouge. At the top were “ringleaders, Pol Pot, Ieng Sary, Khieu Samphan, Ta Mok, and so on,”<sup>96</sup> who apparently comprised what it called the “Khmer Rouge inner circle” headed by Pol Pot and including others variously described as “top” or “high-ranking” Khmer Rouge.<sup>97</sup> Next came military “commanders” and “officers”<sup>98</sup> and others simply described as “leaders.”<sup>99</sup> Finally, there were the ordinary troops.<sup>100</sup> The policy meant that all those in the latter two categories were welcome to join the RGC side.<sup>101</sup> As for those at the top, the reinstated policy of putting them on trial was reaffirmed throughout 1995 and into 1996, with it being specified they should be tried in an international court for genocide, including genocide in 1975-1979. The names of Pol Pot, Nuon Chea, Ieng Sary, Mok and Khieu Samphan were mentioned,<sup>102</sup> and it was clarified that Pol Pot and Ieng Sary could be retried.<sup>103</sup> Plans were made to arrest them.<sup>104</sup>

### The Pardon/Amnesty of Ieng Sary

Meanwhile, Khmer Rouge division-level and higher-ranking military cadre who defected were welcomed and integrated into the RGC armed forces, such as Division 980 political commander Heng Sarat.<sup>105</sup> The government also opened negotiations that resulted in the defection of Kèv Pung<sup>106</sup> alias Heng Pong, described as a member of the Khmer Rouge “Central Committee,”<sup>107</sup> who was made deputy commander of the RGC’s Military Region 3.<sup>108</sup> From April 1996, it initiated talks with two Khmer Rouge division commanders in western Cambodia, Division 415 Chairman I Chhean, based in Pailin, and Division 450 Chairman Sok Pheap, based Malai.<sup>109</sup> Both Chhean and Pheap were previously associated with Ieng Sary.<sup>110</sup> Chhean had been a courier for Ieng Sary at the Ministry of Foreign Affairs while the Khmer Rouge were in power, but after the regime collapsed in 1979 he had fled to the Pailin area where he established Division 415.<sup>111</sup> Ieng Sary had instead established himself from 1979 in the Malai region, where while continuing to retain the post of Democratic Kampuchea Deputy Prime Minister in Charge of Foreign Affairs, he had been put in charge of a newly created “Sector 102” headquartered at Malai and which exercised authority over Pheap’s Division 450.<sup>112</sup>

However, in 1982, former Democratic Kampuchea head of State Khieu Samphan took over Ieng Sary’s foreign affairs functions<sup>113</sup> and Ieng Sary fell out with senior Khmer

Rouge military leader Son Sen over military tactics.<sup>114</sup> Although Ieng Sary was instead put in charge of Finance and Economy,<sup>115</sup> by 1984, Pol Pot and Mok accused him of “enemy” tendencies because he turned a blind eye to trading activities that were contrary to the political line.<sup>116</sup> Ieng Sary then had differences with Pol Pot over who should replace Pol Pot should Pol Pot die, as a result of which he was further marginalized, including by being excluded from leadership discussions about negotiations for a political settlement.<sup>117</sup> By 1991, if not earlier, Ieng Sary had effectively lost senior leadership power,<sup>118</sup> and by 1992 ceased exercising military authority,<sup>119</sup> although he remained in charge of the Malai base through 1993, when he left the area.<sup>120</sup> From 1994, he had been under medical treatment in Bangkok and was no longer active in Khmer Rouge affairs.<sup>121</sup> Ieng Sary was thus uninvolved in and indeed unaware of the RGC’s contacts with Chhean and Pheap.<sup>122</sup>

At a secret military meeting in June 1996, the government reaffirmed policy for achieving defections, which was that those breaking away should have their security, functions, property and rights of political participation guaranteed, including the possibility of being incorporated into the RGC administration, military and police.<sup>123</sup> Covert talks with Chhean and Pheap intensified and were carried out by high-ranking RGC officials under the personal direction of Hun Sen and Ranariddh.<sup>124</sup> This encouraged their dissidence and that of other Khmer Rouge division commanders with regard to the leadership of Pol Pot, Nuon Chea, Mok and Son Sen, and in July the leadership accused Chhean and Pheap of treason, threatening purge and possibly arrest and execution.<sup>125</sup>

On 1-2 August, Chhean and Pheap met with senior RGC officials to finalize plans for their “breakaway” from the Khmer Rouge together with their units and possibly some other Khmer Rouge military cadre and combatants. They were given a tape-recorded message from Hun Sen promising Chhean and Pheap they would retain their current posts, but as RGC officials, not Khmer Rouge.<sup>126</sup> On 6 August, while Pol Pot, Nuon Chea, Mok and Son Sen conferred and decided to proceed to arrest the two men, Chhean and Pheap brought Ieng Sary, then still in hospital in Bangkok, into the picture for the first time and asked for his advice, with Chhean coming to see him and Pheap sending him a written report. He advised them to resist arrest. By 8 August, Pheap and a senior RGC military official joined the discussions with Ieng Sary in Bangkok, a fact which became public knowledge.<sup>127</sup> Perhaps for this reason and also because Pol Pot assumed that Ieng Sary must be behind Chhean’s and Pheap’s insubordination,<sup>128</sup> a Khmer Rouge radio broadcast proclaimed that Ieng Sary had “unmasked himself as an enemy.”<sup>129</sup>

A few hours later, Hun Sen revealed in a speech that he had received an official report informing him that Chhean, Pheap, their divisions and some other Khmer Rouge forces had “separated themselves from the Khmer Rouge” and joined the RGC. He vowed they would be treated in accordance with previous promises.<sup>130</sup> As he was speaking, he took a telephone call informing him that a Khmer Rouge “senior leader” would “also come along,” which was an allusion to Ieng Sary. He said he would “welcome” this “top leader” denounced as a traitor by Khmer Rouge radio, advising him

either to take refuge in the areas controlled by Divisions 415 and 450 or to simply cross over into an established RGC zone, bringing with him any forces under his authority.<sup>131</sup> Simultaneously, Hun Sen began attempting to persuade Ieng Sary to leave hospital in Thailand to go to the breakaway areas to join the defectors and give them moral and political backing,<sup>132</sup> and Chhean and Pheap also asked him to come to the border<sup>133</sup> to provide “guidance” and leadership for their units.<sup>134</sup> Divisions 415, 450 and elements of another Khmer Rouge unit publicly declared they supported Ieng Sary in preference to the existing Khmer Rouge command, describing Ieng Sary as their “leader” in an 8 August communiqué that was broadcast by RGC radio the next day.<sup>135</sup>

The sudden change in policy vis-à-vis Ieng Sary was confirmed by Hun Sen on 9 August in a formal announcement welcoming the Division 415 and Division 450 defectors and proclaiming – in another obvious reference to Ieng Sary – that “any individual” deemed “traitorous” by “ringleader Pol Pot” was by definition someone who wanted “peace, national reconciliation and development.” He called upon Division 415 and Division 450 to provide sanctuary for Ieng Sary as a “patriotic leader.” He explained that he was grateful to Ieng Sary for having “done something valuable for tens of thousands of people,” and that Ieng Sary’s current “good deeds ... offset” his previous “mistakes.”<sup>136</sup> He made this appeal unilaterally, without consulting co-premier Ranariddh because, he said it was necessary to act immediately “to end the war.”<sup>137</sup> On 12 August, Ieng Sary agreed to Chhean’s and Pheap’s request and took up Hun Sen’s offer, saying he would head a breakaway organization for “genuine national reconciliation” to be called the Democratic National Union Movement (DNUM) and would include other defectors.<sup>138</sup> On 13 August, Ieng Sary re-entered his old base at Malai<sup>139</sup> from which he issued a statement describing himself as “a former leader of Democratic Kampuchea” and declaring he had decided to resume a leadership position while cutting himself “off from the organization, policy, and working procedures of the cruel and fascist regime of Pol Pot.”<sup>140</sup> Hun Sen responded by saying “the good deeds he has performed to make amends for his past mistakes should be recognized and welcomed.”<sup>141</sup>

On 17 August, Hun Sen went to Ranariddh’s residence and prevailed on his co-premier to concur that Ieng Sary should be pardoned by King Sihanouk for his 1979 PRK conviction with Pol Pot for genocide and be granted immunity from prosecution pursuant to the 1994 law outlawing the Khmer Rouge. Ranariddh signed a co-letter of request to Sihanouk, but continued to say he believed it was wrong to leave Ieng Sary unpunished.<sup>142</sup> A week later, Sihanouk said he would reluctantly consider the request if the government and national assembly jointly demanded it,<sup>143</sup> on the condition that the legislature did so by at least a two-thirds majority.<sup>144</sup> On 11 September, Hun Sen pushed the process forward by sending Ranariddh the draft of a second letter to the King to be signed by both of them asking for the pardon/amnesty, saying that Ieng Sary’s actions were “very valuable for peace and national reconciliation” and that granting the request would not be detrimental to government or the nation. Ranariddh signed, and three days later the two of them arranged an audience with Sihanouk at which they convinced him that swiftly granting the pardon/amnesty was necessary for the sake of peace and national reconciliation. Sihanouk assented and signed in their presence after being reassured by

the co-premiers that they would deliver the support of at least two-thirds of the national assembly,<sup>145</sup> which they eventually did.<sup>146</sup>

Defending Sihanouk's Royal Decree, Hun Sen argued that the pardon/amnesty did "not differ" from what had been done in 1979. He explained that the primary aim of his policy remained "to push the Democratic Kampuchean organization towards its disintegration," while finding a way not to "ignor[e] the crimes of the Democratic Kampuchea organization." He contended that the fact that Ieng Sary had "broken with the Democratic Kampuchea Group" made him "different" from Pol Pot, Khieu Samphan, Mok and Son Sen, because the latter continued to oppose the RGC.<sup>147</sup> He also pointed out that if Ieng Sary resumed "secessionist" activities, he would "automatically become guilty again."<sup>148</sup> He left open the possibility that if the other ringleaders ceased their opposition activities, they might enjoy the same treatment as Ieng Sary.<sup>149</sup> Until they did, he settled on excoriating a "hardline" Khmer Rouge leadership group as comprising Pol Pot, Nuon Chea, Mok, Son Sen and Khieu Samphan.<sup>150</sup>

Meanwhile, in the context of the earlier indefinite extension of the amnesty provisions of the 1994 law, Hun Sen reassured current and former middle-level Khmer Rouge military and administrative cadre, including commanders with the equivalent of general officer rank, that like ordinary Khmer Rouge combatants, they did not require any pardon or amnesty in order to defect,<sup>151</sup> and they could continue to hold their Khmer Rouge positions, but as part of the RGC.<sup>152</sup> From August through December 1996, thousands more middle- and basic-level Khmer Rouge rallied to the RGC, a process in which Ieng Sary played only a minor role, it instead being for the most part engineered by Hun Sen and Ranariddh.<sup>153</sup> Indeed, the process was characterized by the de facto disintegration of the DNUM, which he in any case did not formally lead,<sup>154</sup> with many of the original DNUM adherents declaring they did not recognize Ieng Sary's supposedly resumed authority, but that of the RGC.<sup>155</sup> By the end of 1996, the RGC calculated that almost 18,000 of its troops were former Khmer Rouge,<sup>156</sup> and the defectors included many that were apparently considered mid-level Khmer Rouge, such as Ny Kân,<sup>157</sup> Sàm Bít,<sup>158</sup> Sou Mēt,<sup>159</sup> Meas Mut,<sup>160</sup> Yeum Tit,<sup>161</sup> and Ieng Phan. Except for Ny Nân, the brother of Son Sen, the others had all been cadre under Mok when the CPK was in power and were under Nuon Chea at the time of their defection.<sup>162</sup>

### Engagement of the UN and Implosion of the KR

The pardon/amnesty of Ieng Sary prompted the UN's human rights office in Cambodia to formulate suggestions to the UN Secretary-General's independent Special Representative for Human Rights in Cambodia, Thomas Hammarberg, regarding what position he should take in his reporting to UN bodies on the issue of accountability for Khmer Rouge crimes.<sup>163</sup> In initiating discussion in November 1996, the office briefed Hammarberg that the government had long made a distinction "between the leadership group (Pol Pot, Nuon Chea, Ta Mok, Ieng Sary, and perhaps Son Sen and Khieu Samphan)," who had hitherto been "in principal not pardonable," and "the rest of the cadres and combatants," who were offered amnesty. However, like the RGC, the human rights office also distinguished between three layers of leadership: those at the very top,

which it described as “senior figures of the Khmer Rouge,” including Ieng Sary; a next level down, comprising persons with regional authority and including at least some implicated in “massive” crimes; and cadre at lowest levels, presumably in direct charge of the Khmer Rouge “rank and file.”<sup>164</sup>

The UN human rights discussions went forward amidst continuing Khmer Rouge defections and integration of defectors into the RGC army during the first part of 1997<sup>165</sup> and prompted Hammarberg to push the possibility of UN involvement in a process of judicial accountability for DK-era crimes. As a result of his efforts, an April 1997 resolution by the intergovernmental UN Commission on Human Rights called on UN Secretary-General Kofi Annan to “examine any request from Cambodia for assistance in responding to past serious violations of Cambodian and international law, including assistance in investigating responsibility for past international crimes,”<sup>166</sup> thus using a formulation giving no guidance regarding levels of responsibility for those crimes. In early June 1997 discussions between Special Representative Hammarberg and co-premiers Ranariddh and Hun Sen pursuant to this resolution, Hammarberg was equally indefinite, committing himself only to helping the RGC find “appropriate means ... to establish the truth about the atrocities” and “to bring to justice those found guilty” of committing them.<sup>167</sup>

These talks took place against the backdrop of a further implosion of the Khmer Rouge “hardline” leadership generated in part by on-going efforts by CPP and FUNCINPEC to bring about more defections, including possibly of hardliners themselves.<sup>168</sup> Evidently referring to such feelers, Khmer Rouge radio had, on 2 May 1997, denounced what it described as “espionage” schemes that were supposedly threatening its struggle,<sup>169</sup> and on 9 June, Pol Pot summoned Nuon Chea, Mok and Son Sen to a meeting in the northern Cambodia district town of Anlung Veng. Son Sen, fearing he was about to be arrested, declined the invitation. That same night, Pol Pot ordered several NADK commanders who had once been protégées of Son Sen to execute him. They proceeded to his residence and killed him and everyone else in the compound, including his wife and children.<sup>170</sup> On the morning of 10 June, Khieu Samphan read out a radio “announcement” of the “arrest of the traitorous network of Son Sen,” which he described as just “one of the important traitorous networks of the contemptible ... puppet Hun Sen,” suggesting that more arrests and executions were to come.<sup>171</sup>

Mok's military subordinates reacted to the execution of Son Sen and indications that Mok was also to be killed by mustering troops against Pol Pot, even as forces responsive to Pol Pot indeed made preparations to seize and execute Mok.<sup>172</sup> By 14 June, the troops of one of Mok's subordinates had established control of Anlung Veng and the Khmer Rouge radio transmitter there. Protected by the cadre who had executed Son Sen, Pol Pot fled north toward the Thai border, accompanied by Nuon Chea and Khieu Samphan. The next day, the forces in control of Anlung Veng issued a statement proclaiming that “treason by Pol Pot” had taken “place from the night of 9 June to 14 June 1997.” However, this incident had been “resolved and normalcy restored as of 14 June 1997.”<sup>173</sup>

Three days later, a special announcement was issued saying that Pol Pot had been militarily bottled up along the Thai border and had "asked to capitulate."<sup>174</sup> Once Pol Pot realized he was beaten, he had "reverted to the technique of moderation," hoping that Mok's anger against him could be assuaged. Pol Pot had dispatched two envoys to meet Mok and explain to him that "Pol Pot would like to submit;" that he "was willing to recognize Ta Mok as his replacement as ... leader;" that he was prepared to have "Anlung Veng radio broadcast that he was a traitor and had been captured and detained;" and that he was prepared to face "a rally of the masses at Anlung Veng at which" he would be denounced.<sup>175</sup>

These terms were agreed, and it was announced that Pol Pot had been "captured" as of 19 June.<sup>176</sup> Khmer Rouge radio declared that "the people and masses" of Cambodia would certainly "welcome the new era after the end of Pol Pot's dictatorial regime."<sup>177</sup> This broadcast laid down the script for a "rally of the people in Anlung Veng welcoming the end of the Pol Pot treason affair and of Pol Pot's dictatorship."<sup>178</sup> As Pol Pot and Mok had agreed, representatives of the "masses" took turns denouncing Pol Pot to an audience that included Mok, but not Khieu Samphan, who refused to participate.<sup>179</sup>

#### June 1997 Letter to the UN and the KR's Final Collapse

As Pol Pot was being denounced, Ranariddh and Hun Sen signed a letter drafted for them by staff of the UN human rights office in Phnom Penh in which they asked for "the assistance of the UN" in "responding to past serious violations of Cambodian and international law as a means of bringing about national reconciliation, strengthening democracy and addressing the issue of individual accountability." Conceding that the RGC did "not have the resources or expertise" necessary to conduct such procedures, the letter expressed a hope for assistance "similar" to that which had resulted in the establishment of the International Criminal Courts for Yugoslavia and Rwanda.<sup>180</sup> This correspondence did not have anything specific to say about potential suspects. However, at the request of the officer in charge of the UN human rights office in Cambodia, I drafted a memorandum in my personal capacity suggesting that the office might want to contribute to the process by beginning to collate "evidence directly linking specific living former CPK leaders and cadre with particular war crimes, crimes against humanity and acts of genocide." The memorandum implicitly defined "leaders" as members of the CPK Central Committee, including of its superordinate Standing Committee,<sup>181</sup> while referring separately to "senior cadre of the S21 Security Office." It named the four then living former members of the Standing Committee as Pol Pot, Nuon Chea, Mok and Ieng Sary, and identified eight persons as among known or probable former Central Committee members believed or certain to still be alive: Khieu Samphan, Kae Pok [Kè Pork], Sàm Bît, Khe Mut [alias Meas Mut], Sau Met [alias Sou Mēt], Teut [alias Yeum Tit], So Sareuan [alias Sau Saroeun] and Khat Raen [Rèn]. It also listed the names of five S21 cadre know or possibly alive, starting with Kaing Guek Euv alias Duch, identified as S21 Chairman.<sup>182</sup> It turned out that several of those named were dead, including So Saroeun and Rèn.<sup>183</sup>

The appearance of Ranariddh-Hun Sen agreement on accountability belied a confrontation between them that had been brewing for months, which was essentially over who would dominate the coalition, but which also involved mutual accusations that they were plotting to use their respective Khmer Rouge allies to make military moves against each other. On 4 July 1997, the confrontation eventuated in a coup by Hun Sen against Ranariddh after troops loyal to latter resisted attempts by those loyal to Hun Sen to disarm them.<sup>184</sup> The aftermath of the coup and the preparations for and holding of elections pitting CPP against FUNCINPEC in July 1998 preoccupied the two parties and the UN in Cambodia, but efforts by CPP in particular to bring about the collapse of the Khmer Rouge, including via further defections of "hardliners" continued alongside further moves by the UN to bring about a judicial process of accountability for crimes committed under CPK rule.

In March 1998, a further implosion in Anlung Veng resulted in the expulsion of Mok from his headquarters by forces who associated themselves with Kè Pork,<sup>185</sup> the politically retired former CPK Central Committee Member who was on Hun Sen's original list of eight apparent candidates for prosecution and who now became the most senior ex-CPK cadre to "break away" since Ieng Sary. On 26 March, Pork and Hun Sen issued a pair of coordinated statements. Pork declared himself "opposed to the chief hardline assassins Pol Pot, Ta Mok, Khieu Samphan and Nuon Chea," saying he had separated himself from their "control, leadership and command" and wanted "to rejoin the Royal Government." He called on Hun Sen to "please ... kindly recognize" his defection and allow him to be "integrated into national society like" Ieng Sary. Hun Sen's reply "warmly, movingly and joyfully" welcomed Pork's "patriotic and peace-loving spirit" and his "correct decision ... to contribute to ... national reconciliation." He gave Pork a "guarantee" of enjoyment of the "political rights and other benefits enjoyed by ordinary Cambodian citizens without discrimination" and promised him induction into the RGC army.<sup>186</sup>

While Mok fled north from Anlung Veng, Pol Pot, who remained in Mok's custody, died.<sup>187</sup> Then, after most remaining second-echelon Khmer Rouge cadre surrendered to the RGC with their troops between May and early December 1998,<sup>188</sup> Mok, Nuon Chea and Khieu Samphan reportedly found themselves under Thai military house arrest as RGC emissaries pursued negotiations with them about their terms of surrender.<sup>189</sup> After Hun Sen "privately" assured Nuon Chea and Khieu Samphan that they would not be tried internationally, and if they were tried domestically, the process would end in a pardon, their Thai handlers moved them to Pailin, where Ieng Sary had been based since his pardon/amnesty in 1996.<sup>190</sup> Hun Sen's final negotiations with the two resulted in an announcement on 25 December that Nuon Chea and Khieu Samphan had surrendered "unconditionally."<sup>191</sup> In letters addressed on that date to Hun Sen, they requested only "to live as ... ordinary citizen[s]." In his reply, Hun Sen expressed his "warmest welcome" to both, thanked them for their "precious will to end war and seek peace, national reconciliation and national union" and wished them the "blessings of longevity, social prestige, happiness, strength and enlightenment," but made no other undertakings.<sup>192</sup> Seemingly reassured that they were in no immediate danger of arrest, Nuon Chea and Khieu Samphan agreed to come to Phnom Penh for a meeting with Hun

Sen.<sup>193</sup> It was in further sealing this arrangement that Hun Sen proclaimed on 28 December that Cambodia should "dig a hole and bury the past" as far as Nuon Chea and Khieu Samphan were concerned.<sup>194</sup>

This left Mok as the last of the original eight "ringleaders" still alive and at large, and the CPP Deputy Army Chief-of-Staff declared that Mok should "take sole responsibility for the genocidal crimes" of the DK era.<sup>195</sup> On 9 January 1999, RGC radio said that unlike Nuon Chea and Khieu Samphan, Mok would have no chance to "go scot-free."<sup>196</sup> Hun Sen was adamant that he would "refuse to accept [the] surrender" of Mok.<sup>197</sup> Mok's on-going attempts to negotiate a deal<sup>198</sup> were therefore futile. After final integration of all remaining KR combatants into the RGC army in February 1999,<sup>199</sup> he was left, as the RGC Defence Minister remarked, with "no chance ... to fight the government again."<sup>200</sup> The army then activated an operation to bring him in for trial, using the method of laying "bait to attract the fish" to effect his arrest.<sup>201</sup> On 6 March, while Mok tried to continue "negotiations ... regarding the terms of his surrender," a senior RGC general announced that he had been taken into custody that day "while he was trying to cross from Thailand into Cambodia."<sup>202</sup> He was apparently seized as a result of "a deal with Thai military units that had given him sanctuary across the border."<sup>203</sup> RGC television reported that the arrest "implement[ed] the orders of ... Hun Sen," and that "the culprit" had been brought to Phnom Penh for detention.<sup>204</sup>

In May 1999, Mok was joined in detention by former S21 Chairman Duch. In April 1999, Duch had emerged from obscurity to speak openly to several foreign journalists.<sup>205</sup> In his first published remarks, he implicated both Nuon Chea and Mok in responsibility for killings.<sup>206</sup> Hun Sen soon declared he had issued orders to the effect that Duch should be brought in to serve as a trial witness.<sup>207</sup> On 7 May, a government spokesman said Duch had been placed in protective custody as "one of the most important eyewitnesses for trials of Khmer Rouge leaders."<sup>208</sup> On 9 May, he was flown to Phnom Penh and put in the same stockade as Mok,<sup>209</sup> after which he was charged under Article 3 of the 1994 anti-DK law.<sup>210</sup>

### The Group of Experts and US Involvement

While all this was happening, the UN machinery jump-started by the Ranariddh-Hun Sen letter of 21 June 1997 to Kofi Annan was running forward and having to address two main issues brought into relief by events in Cambodia: who would be tried and in what jurisdiction? With regard to personal jurisdiction, the questions were whether any "ringleader(s)" beyond Mok would be tried and whether Duch and others who had never been labelled "ringleaders" would be held accountable. With regard to venue, the question was whether Hun Sen was still prepared to contemplate an international tribunal, or whether he had switched to a policy of insisting on trials in a Cambodian court or some sort of "mixed" tribunal. The latter question is not being addressed here, and it will have to suffice to say that Hun Sen had indeed abandoned the position in favour of an international trial that had been quite consistently pushed by PRK, SOC and the post-1993 elected government up through 1998.<sup>211</sup> However, from at least the point at which Nuon Chea and Khieu Samphan submitted to RGC authority, the position publicly



articulated was just as consistently that trials must be in a Cambodian court, albeit possibly with international participation. This ultimately resulted in an agreement to establish the UN-assisted ECCC. Conversely, although Hun Sen had apparently become ambivalent about trying Ieng Sary, Ieng Thirith, Nuon Chea, Khieu Samphan and Kè Pork along with Mok, he and other RGC officials increasingly reverted publicly to the PRK/SOC position according to which all of them, including Ieng Sary, could be tried. They also never objected to a trial of Duch.<sup>212</sup> It therefore turned out that the more contentious issue was whether, beyond Duch, anyone who was not on Hun Sen's original list of eight "ringleaders" would be within the ECCC's personal jurisdiction, that is, the extent to which those who had since 1979 been conceptualized as middle-level Khmer Rouge leaders should be considered candidates for prosecution. The remainder of this narrative should be read with that question particularly in mind.

Following the then co-premiers' June 1997 letter, Special Representative Hammarberg had recommended to the General Assembly that the Secretary-General appoint a Group of Experts to "evaluate the existing evidence of responsibility for ... Khmer Rouge human rights violations."<sup>213</sup> A General Assembly resolution of 12 December 1997 was in response to the Cambodian letter and endorsed Hammarberg's recommendation. The resolution stated that "the most serious human rights violations in Cambodia in recent history have been committed by the Khmer Rouge," expressed concern that "no Khmer Rouge leader has been brought to account for these crimes," and declared that there was a need to address "individual accountability" for them. Thus introducing the broad concept of "leaders" into the legal record without indicating what was meant by the term, the resolution suggested that the focus of the proposed Group of Experts should be on this category of CPK perpetrators.<sup>214</sup> In a February 1998 report to the UN Human Rights Commission, Hammarberg stressed that the extent of CPK leaders' responsibility must be judicially clarified to ascertain whether or not they were among those responsible for widespread abuses, while adding that investigations should also identify other alleged "most serious violators of human rights" for prosecution. He added he believed that current and former Khmer Rouge leaders should not be allowed to participate in Cambodian politics if it was proved that they were among those responsible for widespread crimes.<sup>215</sup> A new General Assembly resolution a week later repeated the language of that of December 1997, again expressing concern that "no Khmer Rouge leader has been brought to account for his crimes," while reiterating the body's request that the Secretary-General to reply concretely to the June 1997 letter by appointing the Hammarberg-proposed Group of Experts "to evaluate the existing evidence and propose further measures" in order to address the issue of individual accountability.<sup>216</sup>

In April 1998, the US energetically entered the scene by proposing an alternative set of formulations regarding possible future prosecutions when it informally circulated a draft UN Security Council resolution on the possible establishment of an International Tribunal for Cambodia, specifying in this opening diplomatic gambit<sup>217</sup> that its purpose would be to prosecute undefined and unnamed "senior members of the Khmer Rouge leadership who planned or directed serious violations of international and humanitarian law" committed in Cambodia between April 1975 and January 1979, thus putting the notion of strata among leaders into the international discourse. Affirming this would

mean that only “certain persons” among those responsible would be tried,<sup>218</sup> the draft attached a statute for the proposed tribunal reiterating these powers of prosecution.<sup>219</sup> This provoked protests from nongovernmental human rights groups, which pointed out that there was no foundation in international law or practice for limiting prosecution in this fashion, precluding in advance trial of “individuals who were not in senior leadership positions, but whose crimes might have been just as abhorrent.”<sup>220</sup>

However, the US appeared not to entirely rule out such possibilities, as the draft’s Article 8 indicated that others “who planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution” of crimes might also be held individually responsible for them, including subordinates who acted pursuant to a superior order. Similarly, although Articles 17 and 19 suggested that prosecutors might charge only senior leaders, they could pursue such charges by investigating lower-downs as regards their involvement.<sup>221</sup> Nevertheless, the UN also interpreted the draft to mean that in practice the US envisaged prosecution only of “senior members of the Khmer Rouge leadership,”<sup>222</sup> whereas, in fact, the US hope was that UN Security Council acceptance of this language could lay the foundation for a reasonably broad, but not unlimited, prosecutorial latitude to go after Khmer Rouge at the leadership level.<sup>223</sup> As the US belatedly explained to the UN, it believed that given Hun Sen’s likely resistance to a tribunal for fear of the political instability it might bring down upon him if he appeared to be voluntarily agreeing to prosecutions, it was necessary for the Security Council to have competence over the matter in order initially to impose a trial of the Khmer Rouge “top leadership,” with which Hun Sen could say he had no choice but to go along and which would create “the possibility of conducting a broader investigation and judicial process within the country.”<sup>224</sup>

Meanwhile, in the context of conversations with Hammarberg in April-May 1998 about implementing the June 1997 letter, Hun Sen welcomed the idea of a Group of Experts and “stated that it was important that the Khmer Rouge leaders at long last were brought to justice.” He talked about a plan to arrest “the three,” by which Hammarberg understood Hun Sen to mean the then still at large former CPK “ringleaders” on Hun Sen’s list of eight: Nuon Chea, Mok and Khieu Samphan. On Ieng Sary, Hun Sen insisted that the pardon/amnesty decree was formulated in a way that did not protect him from new procedures relating to genocide. In fact, he said, he had convinced Ieng Sary to be available if a tribunal was set up. This appeared to include Ieng Sary as a fourth suspect within the notion of “leaders” or “senior members of ... the leadership” then being mentioned in UN and US circles. Hun Sen also explained he was concerned that as long as “he was still working on convincing the remaining KR units to give up the fighting,” there was a risk that public discussions about bringing “Khmer Rouge leaders” to a tribunal might “discourage further defections.” This appeared to leave open the door to expanding the scope of the prosecution once these defections had been achieved. Reviewing his talks with Hun Sen and others in Cambodia, Hammarberg remarked there seemed “to be a general understanding that only leaders and the worst killers and torturers would be tried.”<sup>225</sup>

Against this background, the UN Office of Legal Affairs (OLA) and Hammarberg considered in June-July 1998 what the mandate of a Group of Experts should be. The original draft terms of reference for it said it “should explore the number, identity and whereabouts of Khmer-Rouge leaders.”<sup>226</sup> This was later revised to call upon the Experts to “estimate the number of Khmer Rouge leaders likely to stand trial, and their identity.” These specifications were considered necessary because, “while the exact number or identity of those presumed responsible cannot be determined in advance, or in a way which would later bind the criminal jurisdiction established, an estimated number and presumed identity ... would be a factor in the determination of the kind of jurisdiction to be recommended.”<sup>227</sup> However, concern was raised that asking the Experts to determine the identity of the Khmer Rouge leaders would provoke an adverse RGC reaction. It was suggested that the group’s mandate only be to ascertain “the number of Khmer Rouge leaders” to be tried, as this would be sufficiently clear to indicate the extent of the intended suspect targeting within the Khmer Rouge “hierarchical structure.”<sup>228</sup> A recommendation was then made to drop explicit references to either identity or numbers in order to be even more certain not to trigger RGC political sensitivities. It was suggested the stated mandate should be the more general one of “assessing the feasibility of bringing Khmer Rouge leaders to justice.”<sup>229</sup> Regardless of the language, Hammarberg, at least, assumed that Nuon Chea, Mok, Ieng Sary, Khieu Samphan and Duch would likely be suspects.<sup>230</sup>

On 31 July 1998, Secretary-General Annan adopted the most cautious formulation, mandating the Group of Experts.<sup>231</sup>

- (a) To evaluate the existing evidence with a view to determining the nature of the crimes committed by Khmer Rouge leaders in the years from 1975 to 1979;
- (b) To assess, after consultation with the Governments concerned, the feasibility of bringing Khmer Rouge leaders to justice and their apprehension, detention and extradition or surrender to the criminal jurisdiction established;
- (c) To explore options for bringing to justice Khmer Rouge leaders before an international or national jurisdiction.<sup>232</sup>

The Group comprised judges Sir Ninian Stephen and Rajsoomer Lallah and law professor Steven R. Ratner.<sup>233</sup> They were assisted by a number of specialists, such as David Ashley, who served as the Group's adviser on Cambodian affairs and the Khmer Rouge<sup>234</sup> and had previously worked for the UN's human rights office in Cambodia. In preparation for the Group's visit to Cambodia in November 1999,<sup>235</sup> Group member Ratner, who was already broadly familiar with the evidence, composed a memorandum seeming to interpret the concept of leaders generically without presuming guilt. He noted that Khmer Rouge “atrocities were committed by very large numbers of people with varying levels of governmental authority.” He stated that “leaders” who ordered atrocities, or who knew that atrocities were being or about to be committed by their subordinates and failed to prevent, stop or punish them would be culpable, but this culpability of leaders could not be assumed: it would have to be proven. As for

subordinates, Ratner stressed they would not be able to defend themselves by arguing they committed crimes under duress or coercion or failure to understand that their orders to commit crimes were illegal.<sup>236</sup> The US, for its part, believed that the emerging UN approach went beyond the prosecution of senior leaders to envisage targeting “the middle-level leadership,”<sup>237</sup> something which fit with a maximalist version of its goals.<sup>238</sup> A broader notion of leaders was in line with the fact that in the correspondence at this time between the UN and the RGC with regard to the contemporary political situation in Cambodia, both defined political “leaders” broadly, as including, for example, all members of the national assembly,<sup>239</sup> regardless of whether they held posts in Cambodia’s civil administration or armed forces.

During the Experts’ November fact-finding in Cambodia, both the generic term “leaders” and language differentiating between levels within the CPK leadership were in the air, but it was primarily the UN which made the distinction, doing so in manner indicating its intention that second-tier leaders be candidates for prosecution. A November 1998 RGC “platform” said its intent was that the “leaders of the outlawed Khmer Rouge would be put on trial.”<sup>240</sup> Discussions between the Group and Hun Sen were about bringing to justice “Khmer Rouge leaders,” and in this context, Hun Sen affirmed “the question of who to arrest would be decided by the tribunal.” Adopting a minimalist position,<sup>241</sup> US Ambassador Kenneth Quinn stated to the Group that in order to avoid “the risk of renewed fighting if large-scale arrests were carried out,” the court should “concentrate on a small number of leaders (between 7-9), on whom there is a consensus between the political parties (Ta Mok and to a lesser degree Khieu Samphan and other leaders),” while noting that the FUNCINPEC Party “would prefer a much larger group of leaders [be] brought to trial.” He argued that unless the process was “limited to a number of KR leaders,” it was very likely to have a politically destabilizing effect. Japanese Ambassador Masaki Saito was in favour of an even narrower range of prosecutions, making the case that it should include only those “Khmer Rouge leaders” who had not “defected, surrendered, been amnestied or otherwise integrated in the Cambodian society,” specifying that leaders like Ieng Sary and Kè Pork should be excluded. As with the US Ambassador, Saito’s logic was political, that “the casting of a wide net of indictees will only destabilize the society and obstruct the efforts of the Government to encourage defection from KR strongholds.” RGC Interior Minister Sar Kheng similarly declared that “people who were amnestied or had defected to the side of the Government should not be pursued,” at least given the situation as of late 1998 (“at this stage”), in which “an open-ended prosecution would cause instability.” Justice Lallah replied that “while he understood how important it was for the Government not to be seen as prosecuting those who were amnestied or had shifted to its side, it is equally clear that the Prosecutor’s independence in that regard should be maintained, although it is expected that he would be politically sensible.”<sup>242</sup>

At a press conference at the conclusion of the visit, Group Chairman Sir Ninian Stephen indicated what this might mean. He stated the evidence examined suggested the Khmer Rouge “top leaders” might comprise “5, 10, 15 individuals,” while other Khmer Rouge leaders guilty of crimes numbered in the “thousands, many thousands.” He contrasted these to the hundreds of thousands of persons, including “exceedingly small

fish,” who – in the case of Rwanda – had “obeyed orders and committed acts” in violation of international criminal law, but had been detained domestically. He indicated prosecutions in Cambodia would not cover such minnows, nor would those tried include all the “many thousands” at the middle levels, while saying indictments would be based on the “investigations concluded.” The Experts emphasized that sorting out who exactly was most culpable would require a trial “impeccable in its independence and its thoroughness and its honesty,” relying on “a wholly independent investigator team reporting to an independent prosecutor,” with “judges ... equally independent of any pressures.”<sup>243</sup>

Stephen thus put forward a three-level categorization of Khmer Rouge figures, not dissimilar to that articulated by the Solidarity Front in December 1978, by the RGC, SOC and in recent RGC formulations, as recognized in the UN human rights office analysis of November 1996. Stephen’s version seemingly combined the PRK/SOC/RGC concept of “ringleaders” and US concept of “senior” leaders in the phrase “top leaders,” below which he suggested there were other “leaders” and finally ordinary perpetrators at the very bottom. Internally, the Group talked about a structure extending from “the highest level of political and military leadership” down to a “command structure” at the district and even down as far as the village levels, pointing to the existence of leaders with command authority there. The Group’s notion of top leaders may have been a reference to members of the Standing and Central Committees, perhaps reflecting my note to the UN human rights office, with which it can reasonably be assumed to have been familiar, and other information available to it, such as reports that the original Standing Committee had comprised no more than “7 to 10 persons.”<sup>244</sup>

The long-standing three-tiered schema was reaffirmed by Prime Minister Hun Sen in January 1999, when he issued a statement explaining his decision to welcome the defection, rather than arrest, of Nuon Chea and Khieu Samphan. He talked about high-level leaders, low-level leaders and the “rank-and-file.” He characterized Nuon Chea and Khieu Samphan as “top leaders.” In this context, Hun Sen promised he would not “accuse this or that person on behalf of the prosecutor” of any court mandated to try CPK crimes, affirming that initiating cases was the prerogative of the prosecution, not his, and explaining that “as politicians, we should exercise our activities within the given limit.” He added he would not “dare to provide any guarantee” of non-prosecution to anyone, regardless of how closely they might be connected to him.<sup>245</sup> On the other hand, in an aide memoire submitted to the UN on 21 January, Hun Sen spoke of bringing only “top KR leaders to trial.”<sup>246</sup>

The US was at this time continuing publicly to promote the idea of making a distinction between the “most senior” CPK and other leaders, categorizing Nuon Chea, Mok and Khieu Samphan, among others, as being at the senior level in the hierarchy and stressing that its immediate concern was prosecutions at that echelon.<sup>247</sup> However, one US official used a possibly more expansive formulation when he stated that his government’s overall aim was “to bring the men most responsible for the mass murder of the 1970s to trial,”<sup>248</sup> and at a meeting with OLA in February 1999, the US explained it favoured a trial of “the top leadership of the Khmer Rouge,” but also envisaged the

eventual “possibility of conducting a broader investigation and judicial process,” to the extent political circumstances allowed.<sup>249</sup> This made clear the underlying US position, even if just getting the process started was the immediate objective.<sup>250</sup> Thus, in talks with a Chinese official, the US Ambassador for War Crimes Issues David Scheffer suggested that about ten of the most senior Khmer Rouge leaders be tried, with the RGC putting the proposed names forward to the court, thus adding around four names it selected to Hun Sen’s list of eight, only six of whom remained alive at this point.<sup>251</sup>

These statements and exchanges coincided with the Experts’ writing of their report, which was completed and transmitted to Kofi Annan and Hun Sen on 22 February 1999,<sup>252</sup> then made public in March. In setting forth the factual and legal background, the report described a CPK control structure comprised of “government, military and party” bureaucracies,<sup>253</sup> headed by the Centre in Phnom Penh, underneath which there were zones, sectors, districts, sub-districts and cooperatives, noting that the Centre’s effective control over the lower levels was unclear.<sup>254</sup> Analyzing these details, it further entrenched the picture of a three-echelon structure of senior leaders, other leaders and direct perpetrators. It referred to a regime “top leadership,”<sup>255</sup> alluding to the late Pol Pot as the regime’s “supreme leader”<sup>256</sup> and characterizing Nuon Chea, Mok and Khieu Samphan as among its membership (either as “senior leaders” or “most senior officials”).<sup>257</sup> It included them in a wider notion of “leadership”<sup>258</sup> or “leaders” to whom crimes were generally attributed.<sup>259</sup> Speaking in terms of “senior,” “regional and local officials,”<sup>260</sup> it mentioned that units at various levels had their own leaderships, typically organized into CPK-established committees<sup>261</sup> and thus comprised of multiple “leaders,” such as at the zone level.<sup>262</sup> It also apparently conceptualized the central DK government (cabinet of ministers) as one such unit, perhaps comparable to the Central Committee, perhaps at a lower level.<sup>263</sup> It juxtaposed the phrase “military commanders” with that of “civilian leaders” in a manner implying the two were synonymous and equal with regard to potential criminal liability.<sup>264</sup> It described the cadre of the East Zone who escaped purges and took refuge in Vietnam after May 1978 as “zone leaders.”<sup>265</sup> (As the highest-ranking of these cadre were members of the zone general staff and of sector committees and also secretaries of districts, it seems the Experts may have subsumed persons in such posts in the general notion of “zone leaders.”<sup>266</sup>) The report drew attention to the establishment of prisons from S21 down to the districts and stated that “local cadres” were “given authority over people’s lives and deaths.”<sup>267</sup> At the same time it distinguished between “immediate participants” in crimes and their “superiors,”<sup>268</sup> or, in a reverse formulation, between “leaders” and “much lower-level officials who may have actually carried out atrocities” under orders from or with the knowledge of “leaders.”<sup>269</sup> However, it also indicated that that not all “leaders” might be sufficiently implicated in crimes to justify bringing them to trial.<sup>270</sup>

The background section of the report thus concluded that, as a matter of fact, Khmer Rouge “atrocities were committed by very large numbers of people with varying levels of governmental authority.”<sup>271</sup> It concluded that, as a matter of law, “definitive findings concerning the guilt of individuals require an examination of detailed evidence deemed admissible by a particular forum regarding precise events and the role of individual actors in them.”<sup>272</sup> It emphasized this necessitated bearing in mind that, with

regard to leaders, “international law has long recognized that persons are responsible for acts even if they did not directly commit them,”<sup>273</sup> and that criminal responsibility should thus cover not only “military commanders and civilian leaders” who ordered atrocities, but also those who “knew or should have known that atrocities were being or about to be committed by their subordinates and ... failed to prevent, stop or punish them.”<sup>274</sup> This distinction seemed to differentiate between intermediate leaders who gave orders and senior leaders who were their superiors.

On the above factual and legal premises, the report’s operative paragraphs on “targets of investigation” endeavoured to fulfill the unstated underlying purpose of its terms of reference by using “the number of Khmer Rouge leaders” to be tried to indicate the extent of the intended suspect targeting within the Khmer Rouge “hierarchical structure.”<sup>275</sup> Discussing the possibility of bringing Khmer Rouge “leaders” to justice, it reiterated that atrocities “were committed by thousands of individuals, with varying levels of responsibility across the country,”<sup>276</sup> but endorsed position that “low-level cadre ... who actually committed various atrocities” should not be considered “leaders” and should thus not be considered for prosecution for their crimes.<sup>277</sup> Turning to “senior leaders”<sup>278</sup> and “leaders” generally,<sup>279</sup> it declared that both should be considered candidates for prosecution,<sup>280</sup> but with the crucial and absolute proviso that no one should be prosecuted simply because they held formal leadership positions. It warned that “the list of top governmental and party officials may not correspond with the list of persons most responsible for serious violations of human rights in that certain top governmental leaders may have been removed from knowledge and decision-making; and others not in the chart of senior leaders may have played a significant role in the atrocities. This seems especially true with respect to certain leaders at the zonal level, as well as officials of torture and interrogation centres such as Tuol Sleng” (S21).<sup>281</sup> Instead of any legally unsound formalistic approach, it recommended that the:

tribunal focus upon those persons most responsible for the most serious violations of human rights during the reign of Democratic Kampuchea. This would include senior leaders with responsibility over the abuses as well as those at lower levels who are directly implicated in the most serious atrocities. We do not wish to offer a numerical limit on the number of such persons who could be targets of investigation. It is, nonetheless, the sense of the Group from its consultations and research that the number of persons to be tried might well be in the range of some 20 to 30.<sup>282</sup>

This recommendation should be interpreted in the light of the background part of the report and the overall context in which it was formulated. It seems clear the import was that targets for prosecution should be senior and other leaders most responsible for crimes, with senior leaders understood as referring to members of the Standing and Central Committees, and other leaders understood as referring to additional figures who were not necessarily members of these top committees, but were heads or members of

other committees leading other units, including but not only at the zonal level, among them the S21 Committee and DK government ministries. In other words, they should be selected on the basis of their de facto culpability from the upper and intermediate echelons of the regime, but not from the lowest levels, i.e., that of hands-on perpetrators.

### Cambodian Reaction and UN Follow-Up

In correspondence constituting a preliminary response to the report, Hun Sen wrote to Kofi Annan on 3 March 1999 appearing to support prosecutions only of the top tier of Khmer Rouge leaders. He reiterated his commitment to accountability for “Khmer Rouge leaders,” while stating he did not envisage prosecution of “other Khmer Rouge officers and its rank and file.”<sup>283</sup> RGC Foreign Minister Hor Namhong indicted that among those covered by Hun Sen’s notion of “leaders” were Nuon Chea, Mok and Khieu Samphan.<sup>284</sup>

However, in a note released to the media on 12 March, the UN appeared to back the Experts’ broader conceptualization of the notion of “leaders,” indicating that all those “Khmer Rouge leaders” against whom there was evidence of sufficient criminality could be targeted for judicial proceedings.<sup>285</sup> Although Kofi Annan stated in a meeting that day with Hor Namhong “that the number of Khmer Rouge leaders and prospective suspects is relatively small,” he also insisted that the “Khmer Rouge has long ceased to be a military threat,” and that “the stability of the country would not be seriously threatened by their apprehension.”<sup>286</sup> Underlying this diplomatic phrasing was a UN endorsement of the vision the US had articulated in February of a progressive enlarging the number of suspects to be targeted, based on a calculation that that trials could begin with “a few key KR leaders,” but because this first step would take considerable time to set up and carry out, the scope of prosecution could be expanded over time.<sup>287</sup> Hun Sen’s other statements notwithstanding, he appeared not to rule out such an eventual widening in principle when he declared that: “as for other charges on other people aside from Ta Mok, it will be a unique jurisdiction of the court to make charges. I myself, as well as other people, have no rights whatsoever to charge this or that person, or to pre-determine how many people will stand trial. I myself never provide [a] guarantee to anyone to be free from the charges issued by the court of law.”<sup>288</sup>

The UN position was summed up in Kofi Annan’s 15 March 1999 letter presenting the Experts’ Report to the General Assembly and Security Council, declaring it was his “view that Khmer Rouge leaders responsible for the most serious of crimes should be brought to justice.” He also stated that Hun Sen had expressed to the Group of Experts “his Government’s willingness and readiness to apprehend any person indicted,” while adding that Hun Sen was concerned that trials could “create a panic among other former Khmer Rouge officers and rank and file,” if “improperly conducted” from the RGC’s perspective.<sup>289</sup> Annan reiterated his basic view in 24 March correspondence to the members of the Experts’ Group, praising their report’s “depth of legal analysis” and affirming that “the Khmer Rouge leaders responsible for the most serious of crimes should be brought to trial.”<sup>290</sup>



Hun Sen wrote to the Secretary-General the same day, saying the issue of which “Khmer Rouge leaders” to try “depends entirely on the competence of the tribunal.”<sup>291</sup> He also soon indicated his readiness to follow the path of gradually enlarging prosecution, saying in a meeting with US Senator John Kerry he did not want to begin investigations with a wide net, but that if a legitimate investigation provided sufficient evidence, more individuals could be tried. In reporting this to the UN, Kerry argued that if the notion was established that investigations could do this, a process could be built giving the international community the capacity to expand the net to judge additional suspects.<sup>292</sup> A public statement by Hun Sen’s cabinet on the discussions with Kerry explained: “The indictment and prosecution of other Khmer Rouge leaders are the sole competence of the court. The Royal Government is not entitled to give orders to the judicial branch to do this or that.”<sup>293</sup> Hun Sen similarly told Hammarberg that it would be “be up to the prosecution to decide” on indictments.<sup>294</sup> This position was backed by other RGC officials, such as Interior Minister Sar Kheng, who told the UN in Phnom Penh that the detained Duch was implicating others during interrogation, and assured it that those to be prosecuted included “not only try Nuon Chea and Khieu Samphan, but also Ieng Sary, as well as other KR leaders, depending on the evidence proving their involvement in the massacre.”<sup>295</sup>

In his April 1999 presentation to the UN Commission on Human Rights, Hammarberg endorsed the Experts’ recommendation that prosecutions target “those who were most responsible for the most serious violations,” including not only senior leaders responsible in this sense, but also those at lower levels who were directly implicated in the most serious atrocities.<sup>296</sup> Kofi Annan’s own report to the Commission called for “legal proceedings against Khmer Rouge leaders,” reproducing the language of the Experts’ report in explaining they had recommended that:

as a matter of prosecutorial policy, the prosecutor limit his or her investigations to those persons most responsible for the most serious violations of international human rights law. This would include senior leaders with responsibility over the abusers as well as those at lower levels who are directly implicated in the most serious atrocities. The Experts emphasized that the list of top governmental and party officials in Democratic Kampuchea might not correspond with the list of persons most responsible for serious violations of human rights in that certain top governmental leaders may have been removed from the decision-making chain of command and knowledge withheld from them, while others not appearing in the chart of senior leaders may have played a significant role in the atrocities. This seems especially true, the Experts noted, with respect to certain leaders at the zone level, as well as officials of torture and interrogation centres such as Tuol Sleng.<sup>297</sup>

On this basis, the Commission then agreed a resolution, formulated in consultation with the RGC,<sup>298</sup> again strongly appealing to the government “to take all necessary measures to ensure that those who are most responsible for the most serious violations of human rights are brought to account,”<sup>299</sup> while Foreign Minister Hor Namhong, acting on the personal instructions of Hun Sen, informed the UN in Cambodia that court prosecutors and judges would “have the fullest freedom to decide on the basis of evidence in their custody as to who should be tried.”<sup>300</sup> The prime minister himself wrote to Kofi Annan on 28 April, repeating that the scope for indictment and prosecution of “Khmer Rouge leaders rested in the sole competence of the court to decide.”<sup>301</sup> That same day, Hammarberg drafted a letter to Kofi Annan in which he spoke about “proceedings against those responsible for genocide and other crimes against humanity,” recalling the formulation the Secretary-General had used in transmitting the Experts’ report to the Security Council and the Secretary-General when he wrote that “Khmer Rouge leaders responsible for the most serious of crimes should be brought to justice.”<sup>302</sup>

Despite the apparent convergence of views, the UN was concerned both that the RGC might not follow through on its commitments and that the language be used to describe the scope of prosecution was so vague. In a note addressed to US Senator Kerry on 13 May 1999, Kofi Annan voiced misgivings that the RGC might proceed with a “trial of selected Khmer Rouge leaders which would leave other key leaders unpunished,” stressing that this “would not serve the cause of justice and accountability.”<sup>303</sup> The UN wanted RGC guarantees that prosecutorial and judicial decisions would be “taken solely on the basis of the evidence presented and available,” and “that any Khmer Rouge leader indicted by the Tribunal” would be arrested. The UN position was that a “trial of selected Khmer Rouge leaders which would shield other leaders presently situated in Cambodian territory from legal process, would be an unacceptable form of selective justice,” rejecting any suggestion that it would be possible to live with “a selective trial, even if within the trial due process of law is respected.”<sup>304</sup>

### Refining the Personal Jurisdiction

The converse worry was raised by Hammarberg, who believed there was a need to find a better legal formulation which would more clearly limit the number of prosecutions without giving an implicit amnesty to those outside the limited group.<sup>305</sup> Hammarberg also explained to the UN that although “Hun Sen of course has a history with KR, he was not one of the responsible leaders,” the UN must “not say anything which could be wrongly interpreted” as suggesting Hun Sen might be within the court’s personal jurisdiction or would otherwise threaten Hun Sen’s position. His analysis was that Hun Sen wanted “to bring the KR leaders to justice - if this could be done at a political price he can accept.”<sup>306</sup> During July-August 1999, the UN worked on crafting a new form of words reflecting the various anxieties. The objective was to come up with “a provision defining the targeted political and military leadership” of the Khmer Rouge by establishing a personal jurisdiction that would “reconcile the fear of an open-ended prosecution with the principle of the independence of the Prosecutor and the Tribunal as a whole.”<sup>307</sup>

On 1 July, Ralph Zacklin, an Assistant Secretary-General at OLA, drafted a note to Kofi Annan in which he suggested that "less than a dozen" major leaders would be tried, among others culpable. On 2 July, Hammarberg concurred in principle with this quantification of the court's personal jurisdiction, but remarked that "it may not be so easy to find a formulation which will have that consequence - and still meet principal requirements - when drafting this part of the law." He recalled that the Experts had "used the expression 'those most responsible for the most serious violations of human rights'," which had been echoed by the UN Commission on Human Rights. He affirmed "this wording was intended to include 'senior leaders with responsibility over the abuses as well as those at lower levels who are directly implicated in the most serious atrocities'." He also explained that one of a number of persons in this latter category:

might be the former head of Toul Sleng, Kang Khek leu, alias Duch, who .... has admitted to having ordered the execution of several thousand men, women and children. He had no leading position in the party but is regarded as highly responsible for the mass killing. If he were not indicted, there would definitely be questions.<sup>308</sup>

On 18 July 1999, Zacklin finalized his note to the Secretary-General. In transmitting it the next day, he specified that it reflected consultations with Hammarberg and also the UN Secretariat's Department of Political Affairs regarding a trial of "the Khmer Rouge political and military leadership," one that must guarantee that the UN "would not be perceived to be taking part in a sham trial whose main purpose would be to leave those shielded by the Government untouched."<sup>309</sup> Zacklin's final text read:

The personal jurisdiction of the tribunal shall be defined to reach the major political and military leaders of the Khmer Rouge and those most responsible for the most serious violations of human rights. Thus, all Khmer Rouge leaders presently in Cambodia shall be included - as their responsibility for the crimes committed flows from their position as leaders and the principle of "command responsibility" - and other persons most responsible for the most serious violations of human rights shall not be excluded. While the political and military leadership is a well defined group of probably less than a dozen, other persons responsible for the most serious of crimes is a much larger, less defined group.<sup>310</sup>

The numbers mentioned in and the wording of the formulation invite the inference that the major leaders category was an allusion to Standing and Central Committee members and the "most responsible" category to leaders in committees at lower levels in the CPK political and military hierarchical structure, and that whereas all of those in the first category who were sufficiently culpable should be tried, only some in the latter who met the culpability requirement should be prosecuted, including Duch but also others,

such as DK Government ministers and regional authorities above the grassroots level. The phrase “most responsible” thus evidently emerged as a general codeword for the middle tier of CPK leaders against whom there was evidence of responsibility for the most serious crimes, or that tier plus Duch regardless of whether he was to be categorized as a leader (in line with the Experts’ analysis), or as not a leader (in line with Hammarberg’s opinion). This was a crucial juncture in the UN formulation of a personal jurisdiction for the court and produced phrasing that the US very much welcomed and in principle backed from this point forward, although it sometimes at least tactically retreated to a more conservative position, as did the UN.<sup>311</sup>

OLA’s position formed the basis for a briefing presented to the Security Council stating that the court’s “personal jurisdiction shall include the major political and military leaders of the Khmer Rouge and those responsible for the most serious violations of human rights,” and stressing that “as a matter of principle, the United Nations will not agree to be, or be seen to be associated with a process of selective justice.”<sup>312</sup> On 29 July 1999, the Cambodian ambassador to the UN met with Zacklin and affirmed that the RGC’s position in principle was “to prosecute Khmer Rouge leaders,” and that it agreed that “the question of the personal jurisdiction of the tribunal ... and who will be brought to justice should be left for the Tribunal to determine.”<sup>313</sup>

On 4 August 1999, Zacklin wrote to the ambassador about a planned visit by him and other UN officials to Cambodia to discuss the formation of a court, during which the UN and RGC each presented a draft law on the establishment of a tribunal. Zacklin attached a note to the letter specifying that “the personal jurisdiction of the tribunal shall be defined to reach the major political and military leaders of the Khmer Rouge and those most responsible for the most serious violations of human rights.”<sup>314</sup> This phrasing was repeated in Article 11 of the UN draft law, which laid down a personal jurisdiction covering “Khmer Rouge leaders and persons responsible for the most serious violations of human rights.”<sup>315</sup> It also specified this included anyone in these categories who planned, instigated, ordered, committed or otherwise aided or abetted in the planning, preparation of execution of genocide or crimes against humanity, even if the crime was committed by a subordinate or the person acted on orders of a superior leader.<sup>316</sup>

The RGC appeared to move in the opposite direction when, to conduct negotiations with the UN, it established a “Task Force for Cooperation with Foreign Legal Experts and Preparation of the Proceedings for the Trial of Senior Khmer Rouge Leaders,” headed by Senior Minister Sok An.<sup>317</sup> Although the draft tribunal law the RGC presented to the UN delegation specified nothing with regard to personal jurisdiction,<sup>318</sup> the name given to the Task Force seemed to signal a government intention to restrict prosecution to the top-most echelon of the CPK and thus not to try leaders or others at lower levels, perhaps not even Duch, given the previous formulations used by the UN and the RGC. Therefore, the UN took the opportunity of commenting on the RGC draft<sup>319</sup> to underline that the UN objective remained “the prosecution of those most responsible for the most serious violations of human rights committed during the period of the Khmer Rouge regime,”<sup>320</sup> not necessarily just senior leaders.

Zacklin drove home the point yet again at a press conference at the end of his August negotiating visit to Phnom Penh, declaring:

The personal jurisdiction of this tribunal would extend to the leaders of the KR who were most responsible for the most serious crimes which had been committed. We do not have any pre-determined list of such individuals. It would be for the Prosecutor of the tribunal in the execution of his mandate under the law which has established the tribunal to bring about the prosecution or indictment of individuals. Now, in order to do that, obviously he/she will have to connect individuals concerned to the crimes of which they are accused. So it is in the nature of such a tribunal that whoever the Prosecutor investigates and brings indictments against before a judge, and if the indictment is confirmed by the judge, then that person would have to be taken into the custody of the tribunal.<sup>321</sup>

From the UN perspective, the upshot of Zacklin's visit was that the RGC had still failed to "provide adequate assurances that it would not engage in an exercise of selective justice."<sup>322</sup> It concluded that the talks had been about issues "more political than legal," and revealed that "the primary aim for the government is to retain control of the exercise while at the same time benefiting from international endorsement."<sup>323</sup>

On 16 September 1999, Hun Sen came to New York to attend the General Assembly and met Kofi Annan. He presented an aide memoire as a basis for their talks, which affirmed that previous UN-RGC meetings had reached "general agreement on the need to bring the KR leaders, who are responsible for vast destruction and mass killing, to trial,"<sup>324</sup> but without going into details. He stated to the Secretary-General that:

his government had successfully managed to isolate the surviving KR leaders while encouraging the surrender of others. These surrenders, however, did not necessarily mean that charges against them would be waived.<sup>325</sup>

However, Hun Sen again failed to explicitly commit the RGC to arrest Khmer Rouge leaders other than those already in custody,<sup>326</sup> and although Senior Minister Sok An told the UN at a follow-up meeting on 20 September that RGC "did not intend to try only two Khmer Rouge leaders,"<sup>327</sup> the UN continued to fear the RGC might turn its back on the "process once only a handful of KR officials have been charged." It believed things would turn out differently only if "sufficient momentum and attention" was "gained by a KR trial with UN and international support that it would be virtually impossible for Hun Sen to walk away from the process halfway through."<sup>328</sup> The bottom line for the UN was that "the two year negotiation with the Government of Cambodia at different stages, levels and forms, has failed to produce a common understanding on the nature of the tribunal and its personal scope of jurisdiction," perceiving no real commitment on the

part of the RGC to an independent tribunal which would be able to arrest all indicted Khmer Rouge leaders.<sup>329</sup>

The US meanwhile remained very much engaged in the negotiations. In late September 1999, US Ambassador Kent Wiedemann met with Task Force head Sok An and said he understood the authorities were worried that “under UN proposals the personal jurisdiction of” the court were such that it “might at some stage indict a very large number of persons on the pattern of Yugoslavia or Rwanda.” To assuage these RGC fears at this stage in the negotiations,<sup>330</sup> Wiedemann suggested the court “could limit the personal jurisdiction to as few as six or seven persons, that is, the senior most leaders of the KR most responsible for crimes against humanity, war crimes, genocide, etc.,” drawn largely from the CPK Standing Committee.<sup>331</sup> In early October, Hammarberg adopted a similar approach with Hun Sen. While insisting there would have to be guarantees that there could be no political interference in the court and the whole process would be independent, he floated the notion that the law establishing it could make clear that a limited number would be prosecuted, using a formulation like “the Standing Committee of the Central Committee and those responsible for the most egregious crimes” to restrict prosecution to the uppermost leadership tier, plus Duch.<sup>332</sup>

However, OLA did not endorse Hammarberg’s idea, concluding there was still no “common understanding” on the court’s “personal scope of jurisdiction,”<sup>333</sup> and Wiedemann’s proposal did not fully reflect the position of the US government.<sup>334</sup> An October 1999 US “non-position” paper argued that legislation governing a tribunal “could authorize investigation of a narrow group of suspects (senior Khmer Rouge leaders, Duch and those of that ilk, who were most responsible for the most heinous crimes of significant magnitude),” but it also stated that the RGC “should be encouraged to be flexible on the possible list of suspects so that a more credible number is established, such as up to 20 suspects. The court may not pursue that many investigations to prosecution, but it should have the latitude to do so if the evidence is found to indict.”<sup>335</sup>

In November 1999, the General Assembly began considering a new resolution on Cambodia, based on a draft which once again endorsed the language and position of the Experts, strongly appealing to the RGC “to ensure that those most responsible for the most serious violations of human rights are brought to account.”<sup>336</sup> Although in December the assembly’s Third Committee revised this to a call for bringing “to justice the Khmer Rouge leaders most responsible for the most serious violations of human rights,”<sup>337</sup> the original language was restored in final version of the resolution as adopted by the plenary Assembly.<sup>338</sup>

Meanwhile, on 20 December 1999, the Cambodian Ambassador to the UN presented it with a draft translation of a much revised RGC draft law.<sup>339</sup> In this translation, the law’s Article 1 stated it was intended “to bring to justice senior leaders of Democratic Kampuchea and other persons responsible for the most serious violations of Cambodian criminal laws, international laws and customary, and international conventions ..., committed between April 17, 1975 and January 6, 1979,” a formulation repeated in its definition of the court’s competence in Article 2.<sup>340</sup> A US Embassy translation rendered

the personal jurisdiction aspects of the two passages as: “senior leaders of Democratic Kampuchea and those who were responsible for serious violations.”<sup>341</sup> Over the next several weeks, the RGC changed several parts of the draft,<sup>342</sup> ultimately conveying an English translation of the “final draft” of its tribunal law to the UN on 18 January 2000.<sup>343</sup> The personal jurisdiction language in this text was slightly revised, at least in the translation, to “senior leaders of Democratic Kampuchea and those who were responsible for crimes and serious violations of Cambodian penal law, international law and custom, and international conventions recognized by Cambodia,”<sup>344</sup> but the UN considered these modifications substantively inconsequential.<sup>345</sup>

The UN seems originally to have been legally satisfied that this formulation covered the personal jurisdiction it desired, as evidenced by the fact that a UN “Non-Paper” it conveyed to the RGC on 5 January 2000<sup>346</sup> commenting on the draft made no criticism of the language *per se*.<sup>347</sup> However, it remained seriously concerned that the personal jurisdiction might not be implemented in practice.<sup>348</sup> UN anxieties had been heightened by a Hun Sen speech on 22 December 1999, during which he proclaimed that only “four to five (Khmer Rouge leaders) will be tried.”<sup>349</sup> Although he declined to explicitly identify those who would be tried, he said two were already in prison, a clear allusion to Mok and Duch, and described the others as old Khmer Rouge leaders,<sup>350</sup> an apparent reference to Nuon Chea, Khieu Samphan<sup>351</sup> (making for four) and Ieng Sary (five), even if the former two had been left at large and Ieng Sary had a pardon for his 1979 conviction.<sup>352</sup> Hammarberg commented that Hun Sen’s statement was tantamount to naming in advance those to be indicted. He also characterized as unfortunate a further statement by Hun Sen that Hun Sen himself should be excluded from prosecution.<sup>353</sup>

The UN’s 5 January 2000 Non-Paper replied by insisting that “international standards of justice and fairness warrant that the process itself not be selective, and that the principle of accountability be given comprehensive interpretation.” Explaining what this meant, it quoted remarks by Secretary-General Annan to the effect that justice and accountability required the punishment of the “entire political leadership” of the Khmer Rouge.<sup>354</sup> In a January 2000 set of talking points for discussions with the US, Japan and France, the UN similarly stressed that “the single most important requirement on which the United Nations has consistently insisted is viable guarantees from the Cambodian Government that all indictees in Cambodian territory be arrested and surrendered to the tribunal.” Although such a provision was in the RGC draft law, the UN wanted this to be “accompanied by practical guarantees” of implementation.<sup>355</sup> What was specifically required was arrest guarantees with regard to any “Khmer Rouge leaders who are shielded by the government.”<sup>356</sup>

At a cabinet meeting on 6 January 2000, Hun Sen admitted he had committed a faux pas with his declaration that only four or five persons would be tried, telling his ministers “I should not comment on or say anything that is within the bounds of the judiciary.” In a press interview on 7 January, Hun Sen said anyone who specified the number of leaders to be tried “is wrong, and that includes UN legal Experts who mentioned 20 or 30 people,” adding that by giving an exact number of the Khmer Rouge leaders to be tried, “We abuse the court of law.”<sup>357</sup> For its part, the US affirmed at a

meeting with the UN in late January 2000 that it backed the Experts' notion that the court should try "20-30 Khmer Rouge leaders" and hoped this would eventually happen, noting that "U.S. support and political pressure would be required at every stage of the life of the tribunal to ensure the arrest and surrender" of such persons.<sup>358</sup> The UN nevertheless continued to be worried that it would end up being "seen to collaborate in a process of selective justice for a few politically convenient indictees,"<sup>359</sup> and this seemed to be given grounds by a CPP policy pronouncement calling for trials of "the former principal leaders of the genocidal regime," without mentioning any other category of suspects.<sup>360</sup>

The UN meanwhile also still had its reverse trepidation. Therefore, in the context of new UN-RGC discussions in March 2000, the UN suggested to the RGC that, legally speaking, the phrase "those who were responsible for crimes and serious violations" was excessively vague and actually went beyond anything the UN had ever proposed, implying an extension of the personal jurisdiction to the lowest tier of the Khmer Rouge hierarchical structure. During the talks, UN Under-Secretary-General and OLA head Hans Corell expressed concern that this formulation "may be too broad to reflect the concept that I sense that the Government has in mind for the whole endeavour." Then, after the formal meetings concluded and Task Force official Om Yentieng came to see Corell off at the airport, the two of them "agreed that as far as the 'senior leaders' are concerned, there is no problem," after which Om Yentieng "referred to those 'most responsible for the crimes committed during the period at hand'." Corell pointed out "that this qualification does not feature in the draft law as presently formulated," explaining that "the present text basically encompasses any person who committed crimes during the period of Democratic Kampuchea." Following up in a letter to Sok An, Corell wrote:

Is this really the intention? The Co-Investigating Judges and the Co-Prosecutors must have a clear mandate; to act upon a mandate as broad as the one reflected in your Article 1 would expose them to criticism as soon as they do not pursue a broad range of cases that would fall under the provision. The spontaneous remark of Mr. Om Yintieng at the airport leads me to believe that perhaps the government's concept of the scope of the legislation is not correctly reflected in the draft law. If this is the case, we have a serious problem which must be corrected before the law is adopted. I see this mainly as an internal Cambodian matter.

He asked Sok An to "take a very close look at Article 1 of the draft law" and get back to the UN about the formulation.<sup>361</sup>

The problem was addressed again in a 28 March 2000 UN analysis of the Cambodian draft law. It commented that the personal jurisdiction "definition in Article 1 is probably not reflecting the idea that the Cambodians have themselves on the scope of the jurisdiction. The focus on senior leaders is of course correct, but the reference to 'those who were responsible for crimes and serious violations' is so broad that it



encompasses almost anyone who was involved. We doubt that this is intentional. Some qualifications are necessary.” At this juncture, the UN considered narrowing the personal jurisdiction perhaps almost as much as earlier mooted by US Ambassador Wiedemann and Annan’s Special Representative Hammarberg. The possibility was reflected in the analysis’ comment that “maybe language along the lines ‘and those who, because of their special functions or duties, were most responsible for the crimes and serious violations, etc’” should be adopted.<sup>362</sup> This was an obvious allusion to Duch, but it was unclear how far beyond Duch it would reach, even if it was phrased in the plural.

Then, in a series of formal meetings with Sok An and Om Yentieng at the very end of March and beginning of April, US Ambassador for War Crimes Issues David Scheffer “pressed hard on the Article 1 clarification” requested by the UN, and Sok An seemed “agreeable” to revising the form of words.<sup>363</sup> The US put forward a revised draft tribunal law with basically the same narrowed personal jurisdiction being put on the table by the UN: “The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who, *because of their special functions or duties, were most responsible for crimes and serious violations.*”<sup>364</sup>

However, in correspondence addressed to Hun Sen on 19 April, Kofi Annan reverted to broader talk of a “trial of those most responsible for the serious crimes committed,” while saying there was a need for a “more precise” definition of “the scope of personal jurisdiction” than that in the RGC draft law.<sup>365</sup> Hun Sen replied on 22 April using the formulation “bringing to trial senior leaders of Democratic Kampuchea.”<sup>366</sup> The UN Commission on Human Rights in a new resolution nevertheless stuck to its persistent call for ensuring that “those most responsible for the most serious violations of human rights are brought to account,”<sup>367</sup> while in a meeting with Hun Sen at the end of April, the US Senator John Kerry repeatedly asked Hun Sen whether he agreed to change Article 1, but the prime minister “responded no, not at this time.”<sup>368</sup> For his part, Kerry, too, returned to a broader formulation, stating the US was in favour of prosecuting “senior Khmer Rouge leaders” and “those most responsible” for Khmer Rouge atrocities.<sup>369</sup> A US State Department Office of War Crimes Issues press guidance on Kerry’s talks confirmed that the US position was to “to investigate and prosecute senior Khmer Rouge leaders of the 1975-79 period and to bring to justice those most responsible for the atrocities of the Pol Pot regime.”<sup>370</sup> On 29 April, Kerry was asked by journalists whether the specifics regarding personal jurisdiction had been discussed and agreed, noting there were those advocating “opening it way up to include a large jurisdiction,” but also suggestions “the political leaders within the CPP” wanted it narrowed in the name of precluding a “political witch-hunt.” Kerry responded:

Well, the scope of the tribunal is pretty clear. It is to try those who are most responsible for the serious crimes committed during the period of 1975-79. That's the scope. There's been some discussion about trying to be more precise in defining that. And it was agreed that both Mr. Sok An and Mr. Hans Corell will discuss that and sort of flesh that out.<sup>371</sup>

The next day, Kerry spoke again of holding “accountable those people most responsible and for the most serious crimes.”<sup>372</sup>

### July 2000 Negotiations in Phnom Penh and Finalization

Confronted with on-going confusion, Corell remained determined to nail down a clearly agreed definition of personal jurisdiction in Article 1, especially because of what he saw as Hun Sen’s propensity to change his mind on this as well as other issues.<sup>373</sup> From May 2000, the notion of including the “most responsible” formulation in the second part of the personal jurisdiction began to regain primary currency in the UN. A draft set of minutes on the outcome of negotiations with the RGC stated “the personal jurisdiction extends to senior leaders of Democratic Kampuchea [and those most responsible for] the crimes falling within the jurisdiction of the Court.”<sup>374</sup> However, in a 19 May letter to Kofi Annan, Hun Sen spoke very restrictively of “the prosecution of the senior leaders of Democratic Kampuchea most responsible for the most serious crimes.”<sup>375</sup> In view of the discrepancy, Corell in a 23 June 2000 letter to Sok An made “conclusion of our discussion of the scope of personal jurisdiction” a priority for upcoming UN-RGC talks envisaged to begin on 4 July,<sup>376</sup> after which a government press advisory announced that the purpose of Corell’s visit was “to discuss outstanding issues with regard to the establishment of a court to try the most senior leaders of Democratic Kampuchea.”<sup>377</sup>

The first item on the agenda for the 4-7 July talks was indeed: “The scope of personal jurisdiction (Article 1 of the draft law and the corresponding provisions in the draft MOU between the UN and the Royal Government of Cambodia).” As the discussions progressed, it became apparent that the government concurred that “the draft law ... before the National Assembly extends the jurisdiction of the Tribunal too much.” Amidst consideration of various options as regards reformulation of Article 1, “the UN delegation underlined that the issue was a political one, which the Cambodian authorities had to decide upon.”<sup>378</sup> On 5 July, the UN tabled a draft of a text for “[Articles of Cooperation] [Memorandum of Understanding] Between the UN and the RGC [in/Concerning] the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea.” This 5 July UN document revised an earlier such text dating back to 18 April 2000 and had the notation that all changes from that previous draft were “indicated by square brackets or text in bold.” The new UN draft’s Articles 3 and 5 contained the phrase “the scope of the prosecution is limited to senior leaders of Democratic Kampuchea,” followed by “[**additional text from Article 1 of the draft law to be inserted**]”<sup>379</sup>

Also on 5 July, the UN provided two sets of comments on the RGC draft law. In the first it adopted a relatively minimalist position, suggesting that the court’s personal jurisdiction should be “senior leaders of DK and **other Cambodian nationals who, because of their special functions or duties, were most** responsible for crimes and serious violations.”<sup>380</sup> In the second, relatively maximalist set, the UN used the phrase “senior leaders of DK and those who were **most** responsible for crimes and serious violations.”<sup>381</sup> The two sides reportedly agreed the second formulation on 6 July.<sup>382</sup> However, the next day, both options still seemed under consideration. In a new set of comments on the draft law,

the UN used the phrase “senior leaders of DK and those who were **most** responsible for **the** crimes and serious violations.” However, this was followed by:

**Note: The UN delegation has at an early stage expressed concern that the draft Article 1 presently before the National Assembly is too broad; it practically covers everyone who had any part in the criminal activities of the Khmer Rouge. Such a result is obviously not intended by the government, and it would be impossible for the Extraordinary Chamber to deal with such a magnitude of cases. The UN delegation has therefore added the word "most" as an illustration of how one could limit the scope of personal jurisdiction in a reasonable way. If other solutions are contemplated to achieve the same result, the UN is of course prepared to examine them. At the express request of HE Sok An, the UN delegation has examined such solutions, while emphasizing that the formulation of this article is a political decision to be taken at the national level. We must, however, reiterate that the language of the provision has to be commensurate with the capacity of the Extraordinary Chambers. With this proviso, we suggest that an alternative text could be, for example, "and the most notorious perpetrators of the crimes and serious violations, etc."<sup>383</sup>**

Similarly, in the UN’s final version of a draft for articles of cooperation/memorandum of understanding between itself and the RGC, the personal jurisdiction clause still read: “senior leaders of DK [additional text from Article 1 of the draft law to be inserted],”<sup>384</sup> further indicating the matter was not completely decided, or at least had not been formalized by the government.

Once back in New York, Corell corresponded to Sok An, saying he had given further thought to the personal jurisdiction issue. He wrote:

I think that it is an extremely sensitive issue of policy: how to limit the scope of personal jurisdiction in such a way that the Extraordinary Chambers can manage to deal with the caseload. (It is important to note in this context that those suspects of crimes who would fall outside the competence of these Chambers do not thereby escape responsibility. How this matter will be dealt with - prosecution before the national court or no prosecution but e.g. a Truth and Conciliation Commission - is a separate matter for the Royal Government of Cambodia to decide upon.) On my return to New York, it struck me that the word "notorious" may be convenient for the purpose. However, it could also

be problematic since it might be seen as violating the principle of presumption of innocence.

He promised to write further to Sok An about the matter soon.<sup>385</sup>

With the exact wording still pending, Corell issued an invitation to interested member states to attend a briefing on 13 July 2000 about “the establishment of a national court in Cambodia with United Nations assistance to try the senior leaders of Khmer Rouge et al.”<sup>386</sup> A note to those member states employed the same formulation.<sup>387</sup> Asked at the meeting to clarify the meaning of “et al,” he stated that “in this context” it meant “others most responsible.”<sup>388</sup>

He still used the phrase “senior leaders of Khmer Rouge et al” when he wrote his follow-up letter to Sok An. Subsequent passages read:

We have given further thought to the formulation of the condition in the second leg of the provision that would achieve a reasonable limitation of the scope of personal jurisdiction.

Upon further examination, we have come to the conclusion that the word "notorious" could cause problems. When I expressed concern about a possible violation of the principle of presumption of innocence, it was because among the synonyms you find words like "undeniable" and unquestionable.” For your information I quote the following synonyms from Webster's Dictionary including Thesaurus or Synonyms and Antonyms: egregious, evident, known, manifest, obvious, open, overt, patent, plain, undeniable, undenied, undisputed, unquestionable, well-known.

Another problem is that the persons most responsible may, after all, not have been "notorious" or "well-known.” The prosecution should not be limited in this respect.

Therefore, upon further reflection, we think that by adding the word "most" to the text of the 18 January draft would provide sufficient guidance for the Co-Investigating Judges and the Co-Prosecutors to formulate a strategy. Ultimately, this is of course for the Legislature to decide upon.<sup>389</sup>

With the UN having made the definition of the court’s personal jurisdiction a political decision for the RGC, the government reportedly on 1 September 2000 asked the National Assembly to reconsider the draft law it had proposed back in December-January, with Sok An presenting the issue to the assembly’s legislative committee. The committee then reviewed, made some amendments to and approved eight of the original draft’s

articles.<sup>390</sup> This reportedly included altering the personal jurisdiction clauses of the law to say that it encompassed “senior leaders of DK and those who were most responsible for crimes and serious violations.”<sup>391</sup> This incorporated the wider of the two formulations on offer from the UN, employing a form of words derived from the Experts report and echoing phrasing repeatedly endorsed by the UN Commission on Human Rights and UN General Assembly. Aware of the outcome, the US expressed satisfaction in October that among those to be put on trial would be “top KR leaders,” plus Duch. It stated that the top leaders in the frame included Nuon Chea, Mok, Ieng Sary and his wife (Ieng Thirith), Khieu Samphan and Kè Pork,<sup>392</sup> once again reaffirming the now long-standing interpretation of phrases like “top leaders” as meaning members of the Standing and Central Committees, while adding a DK government minister (Ieng Thirith) to this definition, thus making it congruent with Hun Sen’s original list of eight. Hun Sen also commented, publicly affirming that not only figures like Mok and Duch, but also like Nuon Chea, Khieu Sampan and Kè Pork would be tried.<sup>393</sup> He also reminded everyone that it was important to distinguish between those members of the Khmer Rouge who committed genocide and those who helped to overthrow the genocidal regime: “The ones who committed crimes, genocide, and cooperated with crimes and genocide should be punished, not the ones that overthrew the genocide.” He specified he meant that any additional suspects beyond the top leaders must not include anyone who – like Chea Sim, Heng Samrin and himself – could be credited with having “helped to overthrow the genocide” after defecting from the CPK.<sup>394</sup>

By the beginning of December 2000, the National Assembly’s Legislative Committee finished its review of the draft law, passing it on to the whole assembly with the personal jurisdiction language including the senior leaders and most responsible formulation intact.<sup>395</sup> Discussion and debate began on 29 December.<sup>396</sup> The bill passed on 2 January 2001, again with this language,<sup>397</sup> such that the relevant Articles 1 and 2 stipulated that the court would, according to the government translation, “bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.”<sup>398</sup> This text was conveyed to the UN, which “carefully studied” it and about which it raised a number of concerns. However, none of these related to the court’s personal jurisdiction, clearly indicating the UN was now fully happy with its formulation.<sup>399</sup> The language was retained in the version of the law adopted by the National Assembly in January 2001 and promulgated once also adopted by the Senate and agreed by the Constitutional Council.<sup>400</sup> It was repeated in the 6 June 2003 RGC-UN agreement on the establishment of a court<sup>401</sup> and again retained in an amended version of the tribunal law adopted via the same process as the original and promulgated in October 2004.<sup>402</sup> It was similarly incorporated into UN body resolutions, such as that of the General Assembly in May 2003.<sup>403</sup>

### Interpreting the Language

As the language was that proposed by the UN and derived from the Experts’ Report, it could be construed that its meaning was that attributed to it by the Experts,

Special Representative Hammarberg, the UN Human Rights Committee, the UN General Assembly, the UN Secretary-General, the UN Office of Legal Affairs and the US. Although UN bodies refrained from naming names, that meaning was evidently that “senior leaders” referred to members of the CPK Standing Committee and its subordinate Central Committee and possibly of the DK Government, while others “most responsible” either referred to intermediate-level political and military leaders, with DK Government ministers perhaps instead in this category, or to such intermediate-level leaders plus Duch, on the proviso that there was sufficient evidence against such persons. On the other hand, others “most responsible” did not cover the lowest echelons of the Khmer Rouge, that is, it did not refer to the rank-and-file, hands-on perpetrators, even if they were CPK cadre exercising some authority over other CPK members. The fact that the RGC had rejected the most restrictive formulations put forward for consideration by Hammarberg, the US and the UN, all suggesting if not always explicitly spelling out a jurisdiction of senior leaders plus Duch alone, in favour of the broader formulation “most responsible” can only be understood as RGC acceptance in principle of a wider personal jurisdiction encompassing the middle CPK echelons as potential candidates for prosecution.

At the same time, the original law was adopted on the basis of explanations and comments by government and parliamentary figures providing some indication that their intent and understanding was that its meaning would be narrowly construed. Speaking to the assembly, Senior Minister and assembly member Sok An referred to the “senior leader” and “most responsible” language to stress that the law aimed “to try a small targeted group,” a “group that is not widespread,” that was defined “distinctly and obviously to the smallest number,” and which excluded “all the lower ranks and the rank-and-file” from prosecution. Other members of the assembly declared that except for senior leaders, everyone else “who used to serve in the Democratic Kampuchea regime,” including political and military cadres and combatants, need “not worry at all” about being prosecuted.<sup>404</sup> However, Sok An also commented on the Nuremberg, Tokyo and Rwanda tribunals in a manner that – taken together – suggested an expansive interpretation of the ECCC personal jurisdiction. He spoke positively of the three courts while recalling that Nuremberg had tried 24 Nazi “leaders” and Tokyo 28 Japanese “leaders” and mentioning that the ICTR had (at this time) “completed 45 cases of high-ranking leaders.”<sup>405</sup> The Nuremberg cases included government ministers, governors of occupied territories, army field marshals and generals, police generals and navy commanders,<sup>406</sup> those at Tokyo government ministers, army field marshals and generals, navy rear admirals and admirals and governor-generals of occupied territories.<sup>407</sup> A review of information on the Rwanda international tribunal cases as of December 2000 reveals they included government ministers, military commanders down to the battalion level, and chief administrators several of Rwanda’s eleven prefectures and 145 communes,<sup>408</sup> the former each with populations in the hundreds of thousands, the latter each in the tens of thousands.<sup>409</sup> Sok An’s remarks therefore seemed to suggest that the ECCC could try figures of these various types, including national and local perpetrators.

A contrary indication came from Assembly Vice Chairman Heng Samrin. Speaking immediately after the original law’s passage in January 2001, he reportedly appealed “to those who used to serve with the Khmer Rouge not to worry because the court

will only try the Khmer Rouge leaders and those who have had responsibility for the regime,"<sup>410</sup> or, according to a variant press account, stated to ex-Khmer Rouge, "Please don't worry, we will only [prosecute] the leaders and the people who were responsible for the [Khmer Rouge] regime."<sup>411</sup> However, shortly thereafter, Hun Sen, while saying that only "top leaders" and Duch would be tried, stated the total could be as high as ten, which would have meant adding three to his original list.<sup>412</sup> In August 2001, Hun Sen again suggested this possibility when commenting on the law during a press interview in which he was asked "How far should the tribunal go?" He replied: "It's up to the court of law. But as a citizen of Cambodia, I don't think it should cover more than 10 people," explaining he was against prosecuting "all the lower-level [cadres]."<sup>413</sup> It can be reasonably inferred that the expectation was that the three more beyond Nuon Chea, Ieng Sary, Mok, Khieu Samphan, Kè Pork, Ieng Thirith and Duch would be drawn from among additional surviving Central Committee members and others categorized as above the bottom level.

Although the UN remained satisfied with the court's stated personal jurisdiction, it still harboured concerns "that what matters is not so much the letter of the law but its good faith implementation." It was skeptical whether Hun Sen was "seriously interested in bringing to justice" all the "Khmer Rouge leaders" formally covered by the law, believing that foreign diplomatic pressure to "induce" their surrender "to the court would be crucial to its success."<sup>414</sup> For this reason among others, in 2002, the UN withdrew from further negotiations with the RGC over the formation of the court, internally citing "numerous statements from Hun Sen and other senior officials [that] called into question their commitment to bringing the Khmer Rouge leaders to justice." More fundamentally, a note to the Secretary-General recorded, "the decision to end the negotiations was based on our serious concern, from four years of experience, that once the Chambers were established, the Government would interfere in the proceedings in ways that would compromise the trials and the Cambodian people's hope for justice, and besmirch the reputation of the Organization" (i.e., the UN). Among other things, the UN feared that "the Cambodian judges and prosecutor could, under pressure choose defendants based on political considerations," and the RGC might simply not have the will or means to arrest suspects.<sup>415</sup> In a telephone conversation with Kofi Annan on 21 June 2002 and a follow-up letter to the Secretary-General on 28 June, Hun Sen protested the "sincerity and commitment of the RGC regarding the proposed trial of the senior leaders of the Khmer Rouge most responsible for the most serious crimes." Although he also talked about crimes committed by "Khmer Rouge leaders" and "perpetrators" more generally, his reformulation of the personal jurisdiction clause seemed to signal an intent to eliminate the possibility of trying anyone outside the top tier,<sup>416</sup> and in this same period, Foreign Minister Hor Namhong identified Nuon Chea, Ieng Sary and Khieu Samphan as the kind of individual suspects the RGC wanted tried.<sup>417</sup>

The UN remained unconvinced that the RGC was prepared to prosecute second-tier leaders, believing that "the Cambodian Government does not intend to allow a free, fair, and non-selective trial process of all Khmer Rouge leaders living in its territory, but rather a carefully monitored process under its full political control."<sup>418</sup> Nevertheless, talks between the UN and the RGC resumed in early 2003, as requested by the UN General Assembly reiterating that the court should have personal jurisdiction over senior

leaders of Democratic Kampuchea and those who were most responsible for the crimes,<sup>419</sup> thus meeting an RGC demand that there should be no reformulation of the court's personal jurisdiction.<sup>420</sup> Indeed, the RGC took this opportunity to reiterate the original 1979 Vietnamese-PRK policy of focusing on ringleaders but practicing leniency towards other political and military cadres and ordinary combatants who were "sincerely repentant."<sup>421</sup> In public statements at the June 2003 signing ceremony for the UN-RGC Agreement on the establishment of the ECCC, Hans Corell said it marked "the end of one phase in the effort to bring the leaders of the Khmer Rouge to justice," specifying that he was referring to "senior leaders of Democratic Kampuchea and those who were most responsible for the atrocities." He stressed this goal could be achieved only "if the political will is there."<sup>422</sup> Sok An, speaking as head of the Task Force for trying "senior Khmer Rouge leaders" spoke of moving forward to "to bring to account the perpetrators," without further elaboration on this point.<sup>423</sup>

By the end of 2003, the UN had agreed with the RGC that "for the purpose of workload planning and resource-needs estimation, a range of from 5 to 10 indictees" was "assumed." In this regard, Kofi Annan stressed that "it will be the prerogative of the co-prosecutors and co-investigating judges, within the parameters of the Agreement" establishing the court, "to decide exactly who is to be investigated and prosecuted."<sup>424</sup> Correcting news reports that the two sides had agreed a specific number of indictees, the Secretary-General's spokesperson insisted "it would have been highly improper to do so," reaffirming the number would have to be decided by the prosecution and investigating judges. He also stated that the five to ten figure should not be understood as set in stone, saying it "could change depending on the investigative and prosecutorial strategy that the future court may wish to adopt."<sup>425</sup>

When the Cambodian national assembly finally met to discuss the agreement and finalization of a domestic law mandating the court in October 2004, members of parliament from parties opposed to the CPP questioned court's personal jurisdiction. They complained that it would let former CPK local authorities – from the zone down to the cooperative level – responsible for serious atrocities get away with murders committed on the basis of their own arbitrary decisions. In rejecting their concerns on behalf of CPP, Deputy Prime Minister Sok An stressed the court's personal jurisdiction was a done deal with the international community, saying further discussion was pointless. He reiterated that senior leaders were "the most important targets" of the tribunal, noting that "no more than ten" of these were in the prosecution frame. He said that a few lower ranking ex-CPK suspected of having committed crimes "much more serious" than their comrades might be prosecuted, if evidence could be adduced that their acts could be so characterized.<sup>426</sup>

## Conclusion

In sum, as Hans Corell has affirmed, it is "crystal clear" from the the very texts of the Cambodian law and UN-RGC agreement resulting from the the UN-RGC negotiation process described above that they established "two categories of suspects: 'senior leaders of Democratic Kampuchea and those who were most responsible for the crimes,'" and



that any suggestion to the contrary is “close to surrealistic.” There is also absolutely no evidence nor any reason to believe there was any kind of other UN-RGC agreement delimiting “who should be prosecuted or not,” as the accredited negotiators from OLA refrained from specifying names, while their intent was always that the ECCC’s “investigating judges and the prosecutors should go where the evidence leads them and where the suspects qualify” within the two distinct categories of “senior leaders” and others “most responsible,” without any discussion of the matter by the UN or the “political echelon in Cambodia.”<sup>427</sup>

The above description also makes it clear that it was broadly understood that the notion of Khmer Rouge senior leaders included members of the CPK Standing Committee and its subordinate Central Committee. As of 2004, among those who had been publicly named as fitting into this category were four of the persons on Hun Sen’s original list of eight: Nuon Chea, Mok, Ieng Sary and Khieu Samphan (Kè Pork having died in 2002<sup>428</sup>). The fifth surviving person from Hun Sen’s list, Ieng Thirith, was publicly identified as a candidate either as a senior leader by virtue of her having been a DK government minister, or categorized on the same grounds as another “leader” and thus a potentially most responsible second-tier figure. Duch had been added to the list more or less explicitly as an example of an other most responsible, bringing the total of named suspects to six. If four or more additional suspects were to be put forward as candidates for prosecution, it was most logical to assume that they should be drawn from among as yet unidentified or publicly unnamed members of the Central Committee, DK government ministers and mid-level CPK cadre, political or military. Certainly, despite some inconsistency, neither Hun Sen nor other authoritative RGC officials had definitively ruled out the possibility that middle-echelon CPK cadre could be prosecuted, as long as early defectors like Hun Sen himself, Chea Sim and Heng Samrin were excluded. This was so even if there was much to indicate such an expansive but qualified coverage was not their preference, and thus that there was reason to doubt the sincerity of RGC statements to the effect that they were prepared to accept an interpretation of the ECCC’s personal jurisdiction including middle level CPK “leaders.” In any case, from the history of the negotiations, it is clear this was the interpretation intended by the UN and is also the most reasonable interpretation, legally speaking. Of course, the fact that former mid-echelon “leaders” were intended as possible candidates for prosecution did not make all of them indictable, much less guilty. Such grave matters could only be decided by probative evidence adduced via genuine, impartial and effective investigations to ascertain the truth about their culpability for crimes covered by the ECCC subject matter jurisdiction.

## Notes

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<sup>1</sup> I have previously published a number of small academic pieces on the negotiations that led to the establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC). Like the current review, these publications were based on a combination of official public UN, US and Cambodian government documents, press reports and other materials in the public domain, on the one hand, and internal UN, US and Cambodian government records leaked by various persons directly or indirectly to me since the mid-1990s in my capacity as a long-time student of Cambodian affairs, on the other. Although I worked for the UN on ECCC-related matters from January 2006 to May 2011, none of the sources used here came to me via my privileged access to ECCC case files. Indeed many, to my knowledge, are -- perhaps oddly -- not in current ECCC possession, or at least were not as of the time I ceased my services to the court. Instead, most have been in my research files for more than a decade, but some of the internal UN, US and Cambodian documents I have not hitherto used as a basis for publications, either because I never had the time to go through them all or because I did not previously consider it was appropriate to make such use of them. However, over the years, and especially recently, accounts based in part on these same sources have been made public by persons involved in the negotiations, most notably former Special Representative of the UN Secretary-General for Human Rights in Cambodia Thomas Hammarberg and former US Ambassador for War Crimes Issues David Scheffer. Ambassador Scheffer's forthcoming book, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton: Princeton University Press, 2012), contains a full chapter on the ECCC's creation. Former UN Under-Secretary-General for Legal Affairs Hans Corell, who played a key role in the negotiations to create the ECCC, has also spoken to the media about the negotiation's import for the ECCC's current processes, doing with in response to questions about its capacity to implement its personal jurisdiction in connection with the intense controversy over ECCC Case Files 003 and 004 (Mike Eckel, "Cambodia's Kangaroo Court," *Foreign Policy*, 21 July 2011). In this same context, Cambodian Government Council of Ministers spokesperson Phay Siphon has suggested that those concerned about the ECCC's personal jurisdiction "go back to see what is the mandate through the law – what is the mandate through the government and the UN." ("Jurisdiction Key in 003 Fight," *Phnom Penh Post*, 23 June 2011). This can be reasonably construed as a Cambodian government call for a further review of what are arguably the legally-binding positions taken by it and the UN in their talks with one another to establish the ECCC (see David Boyle's "Introduction"). I also note the remark of the Vice President of the ECCC Plenary Dame Silvia Cartwright with regard to public scrutiny of the ECCC and particularly judicial consideration of Case Files 003 and 004, suggesting that relevant "focused commentary" is welcome (<http://www.eccc.gov.kh/sites/default/files/media/5-VP%20Cartwright%20Speech%2010th%20ECCC%20Plenary%28Eng%29.pdf>). It therefore seems there is an urgent and legitimate public interest in a more detailed clarification of the course of the interactions leading to the establishment of the ECCC personal jurisdiction, based on the internal record and other sources. Although, unlike Ambassadors Hammarberg, Scheffer and Corell, I cannot claim any personal inside knowledge of the negotiations, the materials in my possession make it possible for me to attempt such a detailed reconstruction, and one that is more comprehensive and hopefully more precise than those published to date, including my own work. Moreover, since embarking on this effort, I have benefitted from comments on a draft of this text by Ambassadors Scheffer and Corell, the latter with all due respect for the UN Staff Regulations, which meant it was possible for him to remark only on materials that are already in the public domain. Their generosity has made it possible for me to correct various errors of fact and interpretation, and I am greatly indebted to them for their assistance in this regard. Other persons, including current and former UN officials familiar with the course of the negotiations or with expertise on relevant legal issues, have also provided comments and corrections, but prefer to remain anonymous. Naturally, I take full responsibility for the accuracy of and any remaining inaccuracies in the text. In this regard, I note that I imagine it should be possible for the UN to take a discretionary decision to make all relevant records of the negotiations officially available to the ECCC along with certification of their authenticity, pursuant to Article 21 of the 1946 Convention on the Privileges and Immunities of the United Nations, but I leave it up to those with the necessary legal qualifications to determine whether this is so. If it is indeed the case, this course of action would make possible rectification of any mistakes I may have made.

<sup>2</sup> Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).

<sup>3</sup> Agreement Between The United Nations And The Royal Government Of Cambodia Concerning The

Prosecution Under Cambodian Law Of Crimes Committed During The Period Of Democratic Kampuchea.

<sup>4</sup> Vienna Convention on the Law of Treaties, 155 U.N.T.S. 331, 23 May 1969, art. 31(1).

<sup>5</sup> Vienna Convention on the Law of Treaties: Article 32: Supplementary means of interpretation

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.”

<sup>6</sup> Extraordinary Chambers in the Courts of Cambodia, Office of the Co-Investigating Judges, “Closing Order” (D427), 15 September 2010, Paragraph 38.

<sup>7</sup> Stephen R. Heder, “Pol Pot at Bay: People’s War and the Breakdown of the 1991 Paris Agreements” (PhD Dissertation: School of Oriental and African Studies, 1999), pp.10-14.

<sup>8</sup> “Front Central Committee Membership,” SPK, 4 December 1978, Foreign Broadcasts Information Service (FBIS) Daily Report Asia and Pacific, 4 December 1978, pp.H8-9.

<sup>9</sup> “People’s Revolutionary Council Formed,” SPK, 8 January 1979, FBIS Daily Report Asia and Pacific, 9 January 1978, p.H1.

<sup>10</sup> “Hun Sen Elected Chairman,” Phnom Penh Domestic Service, 14 January 1985, FBIS Daily Report Asia and Pacific, 14 January 1985, p.H7.

<sup>11</sup> “Communiqué of the Solidarity Front for the Salvation of the Kampuchean Nation, 2 December 1978.”

<sup>12</sup> “Communiqué of the Solidarity Front for the Salvation of the Kampuchean Nation, 2 December 1978.”

<sup>13</sup> Extraordinary Chambers in the Courts of Cambodia, Office of the Co-Investigating Judges, “Closing Order” (D427), 15 September 2010, Paragraphs 43 and 63.

<sup>14</sup> “Decision on the Trial of Those Who Had Committed Crimes Against the Public During the Pol Pot-Ieng Sary Era,” April 15, 1979, as transmitted in French by SPK, 22 April 1979.

<sup>15</sup> Translated from the Khmer text of the July 1979 law as reproduced in *Somnomreuang Robâh Tolakar Kattoh Bân Pralay Puch-sah Pol Pot-Ieng Sary* [Dossier of the Court Judging the Pol Pot-Ieng Sary Genocidal Clique] (Phnom Penh: Ministry of Propaganda, 1981), pp.305-308. Article 3.

<sup>16</sup> SPK, 28 July 1979.

<sup>17</sup> Article 2.

<sup>18</sup> People’s Revolutionary Tribunal Held in Phnom Penh for the Trial of the Genocide Crime of the Pol Pot-Ieng Sary Clique, “Judgment of the Revolutionary People’s Tribunal Held in Phnom Penh from 15 to 19 August 1979,” p.5.

<sup>19</sup> “Judgment,” pp.28-29,33,36-38.

<sup>20</sup> Documentation Center of Cambodia interview of Suos Thi (KDI0355), 25 August 2003.

<sup>21</sup> Evan Gottesman, *Cambodia after the Khmer Rouge: Inside the Politics of Nation Building* (New Haven: Yale University Press, 2002), pp.33,46,54,60,67-68.

<sup>22</sup> See, for example, “Mass Agitation Work,” Phnom Penh Domestic Service, 2 October 1980, FBIS Daily Report Asia and Pacific, 9 October 1980, p.H11; “Kampuchea Editorial,” Phnom Penh Domestic Service, 2 July 1983, Foreign Broadcasts Information Service, 7 July 1983, p.H4; “Speech by General Secretary Heng Samrin,” Phnom Penh Domestic Service, 28 June 1990, FBIS EAS 90-127, 2 July 1990, p.50; “‘Enemy Troops’ Surrender in Banteay Meanchey,” 2 October 1991, FBIS EAS 91-191, 2 October 1991, p.44.

<sup>23</sup> “SPK Comments on Amnesty International Report,” 6 June 1987, FBIS EAS, 8 June 1987, p.11.

<sup>24</sup> See, for example, “Phnom Penh Court Sentences 4 Pol Pot ‘Agents,’” SPK, 23 October 1991, FBIS Daily Report Asia and Pacific, 26 October 1981, p.H2.

<sup>25</sup> Central Committee of the Communist Party of Kampuchea, “Communiqué of the Central Committee of the Communist Party of Kampuchea Concerning the Dissolution of the Communist Party of Kampuchea” (English typescript in the author’s possession, dated 6 December 1981), pp.3-5.

<sup>26</sup> “Closing Order” (D427), Paragraph 43.

<sup>27</sup> Heder, “Pol Pot at Bay,” p.15.

<sup>28</sup> “Closing Order” (D427), Paragraph 38.

<sup>29</sup> “Beijing Tries to Resurrect the Criminal Pol Pot Corpse,” Phnom Penh Domestic Service, 16 June 1981, FBIS Daily Report Asia and Pacific, 18 June 1981, p.H4.

<sup>30</sup> “Kampuchea Editorial Cites Tasks for New Year,” Phnom Penh Domestic Service, 17 April 1981, FBIS Daily Report Asia and Pacific, 21 April 1981, p.H5; “Hun Sen Speech,” Phnom Penh Domestic Service, 10

July 1982, FBIS Daily Report Asia and Pacific, p.H8; "Kampuchea Commentary Scores Coalition Government," Phnom Penh Domestic Service, 27 July 1982, FBIS Daily Report Asia and Pacific, 29 July 1982, p.H3; "Chea Sim Address," Phnom Penh Domestic Service, 16 August 1983, FBIS Daily Report Asia and Pacific, 17 August 1983, p.H3.

<sup>31</sup> "Hun Sen Protests UN Decision on Kampuchea," Phnom Penh Domestic Service, 18 October 1984, FBIS Daily Report Asia and Pacific, 18 October 1984, p.H1.

<sup>32</sup> "Hun Sen Interview on Meeting with Hayden," Phnom Penh Domestic Service, 12 March 1985, FBIS Daily Report Asia and Pacific, 14 March 1985, p.H5.

<sup>33</sup> "SPK Hails Hayden Call for Pol Pot Trial," SPK, 2 July 1986, FBIS Daily Report Asia and Pacific, 8 July 1986 p.H1; "SPK Comments on Beijing Support for CGDK Leaders," SPK, 12 September 1986, FBIS Daily Report Asia and Pacific, 15 September 1986, p.H2; "SPK Calls Latest UN Resolution 'Another Error'," SPK, 22 October 1986, FBIS Daily Report Asia and Pacific, 24 October 1986, p.H1.

<sup>34</sup> "Organizations Condemn Pol Pot," Phnom Penh Domestic Service, 20 May 1987, FBIS Daily Report Asia and Pacific, 21 May 1987, p.H2; "SPK Comments on Amnesty International Report," 6 June 1987, FBIS EAS, 8 June 1987, p.I1; "Hun Sen Receives Australian Aid Delegation," 11 March 1988, FBIS EAS-88-048, 11 March 1988, p.26; "Hun Sen's Message to UN Secretary General," 6 October 1988, FBIS EAS-88-194, 6 October 1988, p.29.

<sup>35</sup> "Heng Samrin Refuses to Talk with 5 Khmer Rouge Leaders," *Bangkok Post*, 14 August 1987, pp.1,3.

<sup>36</sup> "Hun Sen Sees Political Role for Khmer Rouge," AFP, 28 October 1988, FBIS EAS-88-209, p.29; "SPK Reports Hun Sen Remarks on Khmer Rouge," SPK, 30 October 1988, FBIS EAS-88-210, p.36; "Hun Sen Holds News Conference 16 December 1988," Phnom Penh Domestic Service, 16 December 1988, FBIS EAS-88-243, p.47; "Hun Sen Interviewed on Paris Conference," Phnom Penh Domestic Service, 5 August 1989, FBIS EAS-89-151, pp.36-42.

<sup>37</sup> "Hun Sen Sends Message to UN on Khmer Rouge," SPK, 9 December 1988, FBIS EAS-88-238, p.38.

<sup>38</sup> Heder, "Pol Pot at Bay," p.115; Christophe Peschoux, "*DK-Cadres-biographie*" (1990) and "DK-bio and Military Data (June-September 1992)," Steve Heder, UNTAC, Information/Education Division, "PDK Leadership and Policy," 3 November 1992.

<sup>39</sup> Peschoux, "DK-Bio and Military Data," UN Cambodia Office of the High Commissioner for Human Rights file (UNCOHCHR), "Interviews Conducted at Phum Dong Village, Phnom Malai, Banteay Meanchey Province," 27 September 1996.

<sup>40</sup> "Closing Order" (D427), Paragraphs 1207,1213.

<sup>41</sup> Voice of Democratic Kampuchea, 1 June 1984, FBIS Daily Report Asia and Pacific, 1 June 1984, p.H7; Voice of the National Army of Democratic Kampuchea, 11 April 1987, FBIS Daily Report Asia and Pacific, 13 April 1987, p.H4.

<sup>42</sup> "Hun Sen Holds News Conference 16 December 1988," Phnom Penh Domestic Service, 16 December 1988, FBIS EAS-88-243, pp.46-47; "Hun Sen Interviewed on Paris Conference," Phnom Penh Domestic Service, 5 August 1989, FBIS EAS-89-151, pp.36-42.

<sup>43</sup> "Further on Hun Sen 5 April News Conference," Phnom Penh Domestic Service, 5 April 1989, FBIS EAS-89-065, pp.47-49.

<sup>44</sup> "Commentary Urges Elimination of Pol Pot Clique," Phnom Penh Domestic Service, 22 May 1989, FBIS EAS-89-099, pp.37-38; "Paris Meeting Asked to Address Pol Pot Issue," Phnom Penh Domestic Service, 29 August 1989, FBIS EAS-89-167, pp.37-38.

<sup>45</sup> "Seminar on Genocide Ends," Phnom Penh Domestic Service, 22 July 1989, FBIS EAS-89-140, p.56.

<sup>46</sup> "Communication Circulated to the Participants at the Request of the Delegation of Mr. Hun Sen: Genocide in Cambodia from 1975 to 1978 (CPC/89/COM), 21 August 1989; "Hun Sen Briefs Media on Paris Conference," 5 September 1989, FBIS EAS-89-172, 7 September 1989, pp.26-28.

<sup>47</sup> "Inclusion of Pol Pot Solution Opposed," Phnom Penh Domestic Service, 29 May 1990, FBIS EAS-90-104, 30 May 1990, p.45.

<sup>48</sup> Hurst Hannum, "International Law and Cambodian Genocide: The Sounds of Silence," *Human Rights Quarterly* (Volume 11, Number 1: 1989), pp.136-137.

<sup>49</sup> "Hun Sen Gives News Conference in Tokyo 6 Jun," Phnom Penh Domestic Service, 10 June 1990, FBIS EAS-90-113, p.39.

<sup>50</sup> "Background Note on the Negotiating Process," in UN, Department of Public Information, *Agreements on a Comprehensive Political Settlement of the Cambodia Conflict* (DPI1180-92077-January 1992-10M), p.iv; UN, General Assembly, Security Council (A/45/472-S/21689), 31 August 1990, *Annex: Statement of*

*the Five Permanent Members of the Security Council of the UN on Cambodia (28 August 1990); Appendix: Framework for a Comprehensive Political Settlement of the Cambodian Conflict.*

<sup>51</sup> "10 September 1990 Joint Statement of the Informal Meeting on Cambodia, Issued at Jakarta on 10 September 1990".

<sup>52</sup> UN, General Assembly, Security Council (A/45/472-S/21689), 31 August 1990, *Annex: Statement of the Five Permanent Members of the Security Council of the UN on Cambodia (28 August 1990); Appendix: Framework for a Comprehensive Political Settlement of the Cambodian Conflict.*

<sup>53</sup> "Hun Sen Gives News Conference in Tokyo 6 Jun," Phnom Penh Domestic Service, 10 June 1990, FBIS EAS-90-113, p.39.

<sup>54</sup> "Resistance Said Not Sincere in Search for Peace," Phnom Penh Domestic Service, 5 October 1990, FBIS EAS-90-195, p.41.

<sup>55</sup> "Hun Sen Sees Political Solution as 'Remote'," SPK, 8 January 1991, FBIS EAS-91-005, 8 January 1991, p.41.

<sup>56</sup> "Those Who Should Be Dragged Out for Trial Before the Court of Justice," Phnom Penh Domestic Service, 15 January 1991, FBIS EAS-91-011, 16 January 1991, pp.31-32.

<sup>57</sup> "Phnom Penh Threatens to Retaliate," Phnom Penh Samleng Pracheachon Kampuchea Radio," 4 July 1991, FBIS EAS-91-129, 5 July 1991, p.32.

<sup>58</sup> "Chea Sim Optimistic About Beijing SNC Talks," Kyodo Bangkok, 13 July 1991, FBIS EAS-91-135, 15 July 1991, p.36; "Wants Trial for Khmer Rouge," *The Nation* (Bangkok), 14 July 1991, p.A3.

<sup>59</sup> "Hor Namhong 3 July Interview with BBC," SPK, 5 July 1991, FBIS EAS-91-130, 8 July 1991, p.39.

<sup>60</sup> "Hor Namhong Gives Press Interview 13 Sept," Phnom Penh Samleng Pracheachon Kampuchea Radio, 16 September 1991, FBIS EAS-91-180, 17 September 1991, p.31; "Hor Namhong on Last 'Obstacle' to Peace Accord," AFP Phnom Penh, 13 September 1991, FBIS EAS-91-178, 13 September 1991, p.42; "Hun Sen Praises Accord, Criticizes Khmer Rouge," SPK, 25 October 1991, FBIS EAS-91-209, 29 October 1991, p.32.

<sup>61</sup> "Phnom Penh Calls for Trial of Pol Pot Clique," Phnom Penh Samleng Pracheachon Kampuchea Radio, 7 August 1991, FBIS EAS-91-153, 8 August 1991, p.46.

<sup>62</sup> "Chea Sim Optimistic About Beijing SNC Talks," Kyodo Bangkok, 13 July 1991, FBIS EAS-91-135, 15 July 1991, p.36; "Wants Trial for Khmer Rouge," *The Nation* (Bangkok), 14 July 1991, p.A3.

<sup>63</sup> "Radio: Pol Pot Accomplices Should Pay for Crimes," Phnom Penh Domestic Service, 15 January 1991, FBIS EAS-91-011, 16 January 1991, p.31.

<sup>64</sup> See, for example, "Chea Sim Addresses Service for 'Day of Hatred'," Phnom Penh Domestic Service, 20 May 1990, FBIS EAS-90-099, 22 May 1990, p.46.

<sup>65</sup> "Hun Sen on Extraordinary Assembly Session," Phnom Penh Domestic Service, 8 March 1991, FBIS EAS-91-047, 8 March 1991, p.26; "Column Reports Interview with Hun Sen," *Bangkok Post*, 3 May 1991, p.4; "Hun Sen Interviewed on Cease-Fire, Peace Talks," *Le Monde*, 22 May 1991, p.9; "Demand on Genocide Reference Reiterated," Phnom Penh Samleng Pracheachon Kampuchea Radio, 6 September 1991, FBIS EAS-91-174, 9 September 1991, p.32; ; "Hor Namhong on Last 'Obstacle' to Peace Accord," AFP Phnom Penh, 13 September 1991, FBIS EAS-91-178, 13 September 1991, p.42

<sup>66</sup> Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, Preamble and Article 15.

<sup>67</sup> Cambodia Documentation Commission, *1991 Annual Report* (New York: 1991), pp.4-9; author's interviews of Cambodian and US delegates at the conference, Paris, 20-23 October 1991.

<sup>68</sup> Author's notes from the signing ceremony, Paris, 23 October 1991.

<sup>69</sup> "Hun Sen Meets U.S. Official, Discusses Aid," Phnom Penh Samleng Pracheachon Kampuchea, 28 October 1991, FBIS EAS-91-209, 29 October 1991, p.33.

<sup>70</sup> "Cambodia Justice Genocide Act" (H.R.2333-106), 1994 (<http://www.gpo.gov/fdsys/pkg/BILLS-103hr2333enr/pdf/BILLS-103hr2333enr.pdf>).

<sup>71</sup> "Hun Sen Comments on Protecting Khmer Rouge," London ITV, 12 November 1991, FBIS EAS-91-219, 13 November 1991, p.36; "Hun Sen Gives 17 Nov News Conference," Phnom Penh Samleng Pracheachon Kampuchea Radio, 19 November 1991, FBIS EAS-91-224, 20 November 1991, p.41.

<sup>72</sup> "Sihanouk Addresses Mass Rally," Phnom Penh Samleng Pracheachon Kampuchea Radio, 16 November 1991, FBIS EAS-91-222, 18 November 1991, p.31.

<sup>73</sup> Amnesty International, *State of Cambodia: Human Rights Developments, 1 October 1991 to 31 January 1992* (AI Index ASA 23/02/92, April 1992), pp.33-36.

<sup>74</sup> "Demonstrations Termed Huge," Phnom Penh Samleng Pracheachon Kampuchea Radio, 28 November

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<sup>75</sup> "Chea Sim Interviewed by Australian Reporter," Phnom Penh Samleng Pracheachon Radio, 29 November 1991, FBIS EAS-91-231, 2 December 1991, pp.46-47.

<sup>76</sup> "Sihanouk: U.S. 'No Role' in Khmer Rouge Fate," AFP Phatthaya, 5 December 1991, FBIS EAS-91-234, 5 December 1991, pp.34-35.

<sup>77</sup> "Hun Sen's 'Message to the Nation'," Samleng Pracheachon Kampuchea Radio, 28 November 1991, FBIS EAS-91-230, 29 November 1991, p.38.

<sup>78</sup> "Hun Sen Rules Out Latest Demands," Phnom Penh Samleng Pracheachon Kampuchea Radio, 5 July 1992, FBIS EAS-92-129, 6 July 1992, p.33.

<sup>79</sup> "Declaration of the State of Cambodia," Phnom Penh, 5 January 1993.

<sup>80</sup> "Le Monde Interviews Hun Sen," *Le Monde*, 19 March 1993, p.5; "Hun Sen Criticizes UNTAC Policy," Phnom Penh Samleng Pracheachon Radio, 19 March 1993, FBIS EAS-93-053, 22 March 1993, pp.37-38.

<sup>81</sup> UNTAC Information/Education Division, "Report of SoC Press Conference 16 March 1993," 16 March 1993; "Government Seeks War Crimes Trials of Khmer Rouge," AFP Phnom Penh, 16 March 1993, FBIS EAS-93-049, 16 March 1993, p.52.

<sup>82</sup> "Reiterates Call for Trial," Phnom Penh Samleng Pracheachon Kampuchea Radio, 4 April 1993, FBIS EAS-93-063, 5 April 1993, pp.23-24; UNTAC Information/Education Division, "SoC Press Conference on 20 April 1993," 20 April 1993; "Hun Sen Makes Statement After SNC Meeting," Phnom Penh Samleng Pracheachon Kampuchea Radio, 4 April 1993, FBIS EAS-93-064, 6 April 1993, pp.36-37; "Paper Supports Call for Khieu Samphan Arrest," Phnom Penh Samleng Pracheachon Kampuchea Radio, 6 April 1993, FBIS EAS-93-065.

<sup>83</sup> "Hun Sen Urges Khmer Rouge Expulsion from SNC," Phnom Penh Samleng Pracheachon Kampuchea Radio, 7 April 1993, FBIS EAS-93-066, 8 April 1993, pp.57-58.

<sup>84</sup> "Hun Sen Addresses Voters in Kandal Province," Phnom Penh Samleng Pracheachon Kampuchea Radio, 6 April 1993, FBIS EAS-93-069, 13 April 1993, pp.45-46; "Text of Hun Sen's Speech in Takeo Province," Phnom Penh Samleng Pracheachon Kampuchea Radio, 17 April 1993, FBIS EAS-93-078, 26 April 1993, pp.55-59; "Hun Sen Addresses Kampot City People 20 Apr," Phnom Penh Samleng Pracheachon Kampuchea Radio, 21 April 1993, FBIS EAS-93-080, pp.31-32.

<sup>85</sup> "All Khmer Rouge But Pol Pot, Ieng Can Return," AKP, 9 September 1993, FBIS EAS-93-174, 10 September 1994, p.45.

<sup>86</sup> "Political Platform of New Royal Government," Phnom Penh National Voice of Cambodia Radio, 29 October 1993, FBIS EAS-93-211, 3 November 1993, p.32.

<sup>87</sup> US Embassy, "Debrief of Ex-Senior Khmer Rouge Commander," nd (but dated by context to late 1994).

<sup>88</sup> "Chea Sim Marks CPP Anniversary," Phnom Penh National Radio, 28 June 1994, FBIS EAS-94-125, 29 June 1994, pp.39-40.

<sup>89</sup> "Law Proscribing the 'Democratic Kampuchea' Group," 15 July 1994, pp.1-4 (unofficial UN translation dated 19 July 1994).

<sup>90</sup> Articles 5 and 6.

<sup>91</sup> "Entire Bill Adopted," AKP, 8 July 1994, FBIS EAS-94-131, 8 July 1994, p.35.

<sup>92</sup> "Ranariddh on Khmer Rouge Amnesty Extension," Phnom Penh National Radio, 19 January 1995, FBIS EAS-95-013, 20 January 1995, pp.54-55; "Defence Ministry Seeks Extended KR Grace Period," *Reaksmei Kampuchea*, 20-21 January 1995, pp.1-2; "King on Khmer Rouge Issue, Foreign Policy," Phnom Penh National Radio, 24 January 1995, FBIS EAS-95-016, 25 January 1995, p.58; "Sar Kheng Discusses Future of Khmer Rouge," Phnom Penh National Radio, 4 June 1995, FBIS EAS-95-108, 6 June 1995, p.67.

<sup>93</sup> "Ranariddh on Khmer Rouge Amnesty Extension," Phnom Penh National Radio, 19 January 1995, FBIS EAS-95-013, 20 January 1995, pp.54-55.

<sup>94</sup> "KR defections almost 7,000," Ros Sokhet, *Phnom Penh Post*, Volume 4 Issue 1, January 13 - 26, 1995.

<sup>95</sup> "Army Drops Leaflets Urging KR Defections," AFP Phnom Penh, 21 June 1995, FBIS-EAS-95-11, 21 June 1995, pp.49-50.

<sup>96</sup> "Commentary Condemns KR 'Ghost Government'," Phnom Penh National Radio, 12 July 1995, FBIS-EAS-95-134, 13 July 1995, pp.48-49.

<sup>97</sup> "Station Calls on Khmer Rouge Fighters to Return," Phnom Penh National Radio, 21 September 1995, FBIS-EAS-95-186, 26 September 1995, pp.66-67.

<sup>98</sup> "Station Calls on Khmer Rouge Fighters to Return," Phnom Penh National Radio, 21 September 1995, FBIS-EAS-95-186, 26 September 1995, pp.66-67; "Commentary on Khieu Samphan's New Year

Message,” Phnom Penh National Radio, 13 April 1995, FBIS-EAS-95-072, 14 April 1995, p.58.

<sup>99</sup> “Government Rejects Negotiations with Khmer Rouge,” *Reaksmei Kampuchea*, 18 August 1995, pp.1,2.

<sup>100</sup> “Commentary Condemns KR ‘Ghost Government’,” Phnom Penh National Radio, 12 July 1995, FBIS-EAS-95-134, 13 July 1995, pp.48-49; “Commentary on Khieu Samphan’s New Year Message,” Phnom Penh National Radio, 13 April 1995, FBIS-EAS-95-072, 14 April 1995, p.58; “Government Rejects Negotiations with Khmer Rouge,” *Reaksmei Kampuchea*, 18 August 1995, pp.1,2.

<sup>101</sup> “Commentary Condemns KR ‘Ghost Government’,” Phnom Penh National Radio, 12 July 1995, FBIS-EAS-95-134, 13 July 1995, pp.48-49; “Government Rejects Negotiations with Khmer Rouge,” *Reaksmei Kampuchea*, 18 August 1995, pp.1,2.

<sup>102</sup> “KR Censured for Choice to Continue War,” Phnom Penh National Radio, 7 February 1995, FBIS EAS-95-027, 9 February 1995, p.48; “Commentary Supports U.S. Genocide Investigation,” Phnom Penh National Radio, 8 February 1995, FBIS EAS-95-027, 9 February 1995, p.47; “Commentary Supports U.S. Genocide Probe,” 27 February 1995, FBIS EAS-95-039, 28 February 1995, p.64; “Khmer Rouge Urged to Rejoin ‘National Society’,” Phnom Penh National Radio, 12 April 1995, FBIS EAS-95-072, 14 April 1995, p.59; “International Court Trial of KR Leaders Urged,” *Reaksmei Kampuchea*, 28-29 August 1995, pp.1-2; “Cambodia: Sihanouk Urges Speedy Trial of Khmer Rouge Leaders,” AFP Phnom Penh, 7 March 1996, FBIS EAS-96-046, 7 March 1996, p.62; “Cambodia: Commentary Views Day of Remembrance of Khmer Rouge Terror,” Phnom Penh National Radio, 20 May 1996, FBIS EAS-96-099, 21 May 1996, p.64; “Cambodia: Communiqué on CPP Central Committee Meeting,” Phnom Penh National Radio, 26 June 1996, FBIS EAS-96-125, 27 June 1996, p.29; “King to Consider Ieng Sary Amnesty,” Phnom Penh National Radio, 23 August 1996, FBIS-EAS-96-165, 23 August 1996, p.61.

<sup>103</sup> “Commentary Urges Cooperation with U.S. Probe,” Phnom Penh National Radio, 1 May 1995, FBIS EAS-95—084, 2 May 1995, p.69; “King to Consider Ieng Sary Amnesty,” Phnom Penh National Radio, 23 August 1996, FBIS-EAS-96-165, 23 August 1996, p.61.

<sup>104</sup> “Cambodia: Official on Fate of Khmer Rouge,” *Reaksmei Kampuchea*, 4-5 March 1996, pp.1-2.

<sup>105</sup> “‘High-Ranking’ KR Defector Describes Purges,” *Phnom Penh Post*, 25 August-7 September 1995, p.5.

<sup>106</sup> “Hun Sen Guarantees Ieng Sary’s Life, Security,” Phnom Penh National Radio, 15 August 1996, FBIS-EAS-96-160, 16 August 1996, p.57.

<sup>107</sup> “Cambodia: Military TV Confirms Defection of Major KR General,” AFP, 4 March 1996, FBIS EAS-96-044, 5 March 1996, pp.79-80; “Cambodia: Negotiator on Defection of Khmer Rouge General,” *Phnom Penh Post*, 8-21 March 1996, pp.1,3; Office of the UN Secretary-General’s Representative in Cambodia (UNOSGRC), “Monthly Report for October 1996,” 4 November 1996.

<sup>108</sup> “Khmer Rouge Defectors Ask Position in Government,” *Reaksmei Kampuchea*, 22 August 1996, pp.1,11.

<sup>109</sup> UNOSGRC, “Weekly Report #103 Covering the Period from 2 to 8 September 1996,” 9 September 1996; Author’s interviews of Pol Sareuan and Sou Keum Sun, Phnom Penh, 29 June 1997.

<sup>110</sup> Peter Bartu, “Disarmament, Demobilization and Transitional Justice Project Cambodia Case Study, Annex C: History Khmer Rouge Defections 1993 – 1999,” October 2006.

<sup>111</sup> Peschoux, *DK-Cadres-biographie*; Author’s interview of I Chhean, Chanthaburi, Thailand, 17 December 1996.

<sup>112</sup> “Khmer Rouge Brands Ieng Sary a Traitor,” Radio of the Provisional Government of National Union and National Salvation of Cambodia,” 7 August 1996 (2330 GMT), FBIS EAS-96-154, 8 August 1996, p.66; Peschoux, *DK-Cadres-biographie*; UNCOHCHR, “Provide some known elements of the past to put current developments in historical perspective,” 4 September 1996.

<sup>113</sup> Coalition Government of Democratic Kampuchea, Cabinet of the Prime Minister, Information and Press, Document No 01/82/CG, “Declaration of the Formation of the Coalition Government of Democratic Kampuchea,” dated 22 June 1992; and Coalition Government of Democratic Kampuchea, Press Release, “Proclamation of His Royal Highness Samdech Norodom Sihanouk, President of Democratic Kampuchea, Signed on July 9 and Announced by the Radio of Democratic Kampuchea on July 11, 1982,” dated 9 July 1982.

<sup>114</sup> UNCOHCHR, “Phon Phaen (Ex-Deputy Commander of Division 705, Now District Governor of Sampoer Luang) Sampoer Luang, Front 250,” 25 January 1997.

<sup>115</sup> See Coalition Government of Democratic Kampuchea, Cabinet of the Prime Minister, Information and Press, Document No 01/82/CG, “Declaration of the Formation of the Coalition Government of Democratic Kampuchea,” dated 22 June 1992; and Coalition Government of Democratic Kampuchea, Press Release,

"Proclamation of His Royal Highness Samdech Norodom Sihanouk, President of Democratic Kampuchea, Signed on July 9 and Announced by the Radio of Democratic Kampuchea on July 11, 1982," dated 9 July 1982; David Ashley interview with Thai Bun Ret, Vice-Chairman (Military) of Division 912, Siem Reap, 24-25 May 1995.

<sup>116</sup> UNCOHCHR, "Interview with Mao Sam Oeun, Phnom Penh," 9-10 October 1996,

<sup>117</sup> UNCOHCHR, "Talk with Om Van," 26 January 1997; UNCOHCHR, "Om Van, Phum Dong, Malai," 26 January 1997.

<sup>118</sup> Peschoux, "*DK-Cadres-biographie*" and "DK-bio and Military Data;" FUNCINPEC-ANKI Intelligence Report, "Activities of the Khmer Rouge," 12 July 1990; Heder, "PDK Leadership and Policy;" UNCOHCHR, "Provide some known elements of the past to put current developments in historical perspective," 4 September 1996; "Station Calls on Khmer Rouge Fighters to Return," Phnom Penh National Radio, 21 September 1995, FBIS-EAS-95-186, 26 September 1995, pp.66-67; UNCOHCHR, "Talk with Om Van," 26 January 1997.

<sup>119</sup> David Ashley interview with Thai Bun Ret, Vice-Chairman (Military) of Division 912, Siem Reap, 24-25 May 1995; UNCOHCHR, "I Chhean (Ex-Commander of NADK Big Division 415, Mayor of Pailin), Pailin, 27 January 1997;

<sup>120</sup> "Khmer Rouge Brands Ieng Sary a Traitor," Radio of the Provisional Government of National Union and National Salvation of Cambodia," 7 August 1996 (2330 GMT), FBIS EAS-96-154, 8 August 1996, p.66.

<sup>121</sup> UNCOHCHR, "Interviews Conducted at Phum Dong Village, Phnom Malai, Banteay Meanchey Province," 27 September 1996; UNOSGRC, JW, "Defection Case: Talk with Col. Vong Kim Han," 14 August 1996; UNCOHCHR, "Talk with Om Van," 26 January 1997.

<sup>122</sup> UNOSGRC, JW, "Defection Case: Talk with Col. Vong Kim Han," 14 August 1996; UNCOHCHR, "Interviews Conducted at Phum Dong Village, Phnom Malai, Banteay Meanchey Province," 27 September 1996; UNCOHCHR, "Phon Phaen (Ex-Deputy Commander of Division 705, Now District Governor of Sampoieu Luang) Sampoieu Luang, Front 250," 25 January 1997; UNCOHCHR, "Talk with Om Van," 26 January 1997; UNCOHCHR, "Prum Sou, Deputy Governor of Banteay Meanchey Province, Ex-Commander of NADK Small Division 519, Phnom Penh," 22 January 1997; "Khmer Rouge Defector Ieng Sary Issues Statement," Phnom Penh National Radio, 16 August 1996, FBIS EAS-96-160, 16 August 1996, p.59.

<sup>123</sup> "Hun Sen on Senior Khmer Rouge Defections," Phnom Penh National Radio, 8 August 1996 (GMT 0500), FBIS-EAS-96-154, 8 August 1996, p.64; "Hun Sen Appeals to Other Khmer Rouge to Defect," Phnom Penh National Radio, 9 August 1996 (GMT 0500), FBIS-EAS-96-155, 9 August 1996, p.38.

<sup>124</sup> "Hun Sen on Senior Khmer Rouge Defections," Phnom Penh National Radio, 8 August 1996 (GMT 0500), FBIS-EAS-96-154, 8 August 1996, p.63; UNOSGRC, "Weekly Report #103 Covering the Period from 2 to 8 September 1996," 9 September 1996; UNOSGRC, JW, "Defection Case: Talk with Col. Vong Kim Han," 14 August 1996; Peter Bartu, "Disarmament, Demobilization and Transitional Justice Project Cambodia Case Study, Annex C: History Khmer Rouge Defections 1993 – 1999," October 2006.

<sup>125</sup> "Khmer Rouge Documents Claim Change in Policy," Kyodo Phnom Penh, 10 August 1996, FBIS-EAS-96-156, 12 August 1996, p.74; UNOSGRC, JW, "Defection Case: Talk with Col. Vong Kim Han," 14 August 1996; Khmer Rouge Defector Ieng Sary Issues Statement," Phnom Penh National Radio, 16 August 1996, FBIS EAS-96-160, 16 August 1996, p.60; UNOSGRC, "Weekly Report #103 Covering the Period from 2 to 8 September 1996," 9 September 1996; UNCOHCHR, "Interviews Conducted at Phum Dong Village, Phnom Malai, Banteay Meanchey Province," 27 September 1996; UNCOHCHR, "Phon Phaen (Ex-Deputy Commander of Division 705, Now District Governor of Sampoieu Luang) Sampoieu Luang, Front 250," 25 January 1997;. UNCOHCHR, "Talk with Om Van," 26 January 1997; UNCOHCHR, "Om Van, Phum Dong, Malai," 26 January 1997; UNCOHCHR, "I Chhean (Ex-Commander of NADK Big Division 415, Mayor of Pailin), Pailin, 27 January 1997.

<sup>126</sup> "Hun Sen on Senior Khmer Rouge Defections," Phnom Penh National Radio, 8 August 1996 (GMT 0500), FBIS-EAS-96-154, 8 August 1996, p.63; UNOSGRC, JW, "Defection Case: Talk with Col. Vong Kim Han," 14 August 1996; UNOSGRC, "Weekly Report #103 Covering the Period from 2 to 8 September 1996," 9 September 1996; UNOSGRC, "Monthly Report for November 1996.

<sup>127</sup> "Top Khmer Rouge Defectors Reportedly in Bangkok," AFP Phnom Penh, 8 August 1996, FBIS-EAS-96-154, 8 August 1996, pp.65-66; UNOSGRC, JW, "Defection Case: Talk with Col. Vong Kim Han," 14 August 1996; UNCOHCHR, "Interviews Conducted at Phum Dong Village, Phnom Malai, Banteay



Meanchey Province,” 27 September 1996; UNCOHCHR, “Talk with Om Van,” 26 January 1997; UNCOHCHR, “Om Van, Phum Dong, Malai,” 26 January 1997; UNCOHCHR, “I Chhean (Ex-Commander of NADK Big Division 415, Mayor of Pailin), Pailin, 27 January 1997.

<sup>128</sup> UNCOHCHR, “I Chhean (Ex-Commander of NADK Big Division 415, Mayor of Pailin), Pailin, 27 January 1997.

<sup>129</sup> “Khmer Rouge Brands Ieng Sary a Traitor,” Radio of the Provisional Government of National Union and National Salvation of Cambodia,” 7 August 1996 (2330 GMT), FBIS EAS-96-154, 8 August 1996, p.66.

<sup>130</sup> “Hun Sen on Senior Khmer Rouge Defections,” Phnom Penh National Radio, 8 August 1996 (GMT 0500), FBIS-EAS-96-154, 8 August 1996, p.63.

<sup>131</sup> “Hun Sen Reports ‘Thousands’ of Khmer Rouge Defecting,” AFP Phnom Penh, 8 August 1996, FBIS-EAS-96-154, 8 August 1996, p.65; “Hun Sen on Senior Khmer Rouge Defections,” Phnom Penh National Radio, 8 August 1996 (GMT 0500), FBIS-EAS-96-154, 8 August 1996, p.63; “Hun Sen Guarantees Ieng Sary’s Life, Security,” Phnom Penh National Radio, 15 August 1996, FBIS-EAS-96-160, 16 August 1996, pp.57-58.

<sup>132</sup> UNOSGRC, “Monthly Report for November 1996.

<sup>133</sup> UNCOHCHR, “Talk with Om Van,” 26 January 1997; UNCOHCHR, “Om Van, Phum Dong, Malai,” 26 January 1997; UNCOHCHR, “Interviews Conducted at Phum Dong Village, Phnom Malai, Banteay Meanchey Province,” 27 September 1996.

<sup>134</sup> Khmer Rouge Defector Ieng Sary Issues Statement,” Phnom Penh National Radio, 16 August 1996, FBIS EAS-96-160, 16 August 1996, p.60; UNCOHCHR, “Prum Sou, Deputy Governor of Banteay Meanchey Province, Ex-Commander of NADK Small Division 519, Phnom Penh,” 22 January 1997; Suong Sikoeun, “From Pol Pot’s Winter to the Malai-Pailin Spring,” *Phnom Penh Post*, 15-28 November 1996.

<sup>135</sup> “Communiqué Issued by Divisions 450, 415 and Unit 250,” 8 August 1996, Phnom Penh National Radio, 9 August 1996, FBIS-EAS-96-156, 12 August 1996, pp.71-72.

<sup>136</sup> “Hun Sen Appeals to Other Khmer Rouge to Defect,” Phnom Penh National Radio, 9 August 1996 (GMT 0500), FBIS-EAS-96-155, 9 August 1996, p.38; “Hun Sen Comments on Khmer Rouge Defector Ieng Sary,” *Reaksmei Kampuchea*, 12-13 August 1996, pp.1,8; “Hun Sen Guarantees Ieng Sary’s Life, Security,” Phnom Penh National Radio, 15 August 1996, FBIS-EAS-96-160, 16 August 1996, pp.57-58.

<sup>137</sup> “Hun Sen Guarantees Ieng Sary’s Life, Security,” Phnom Penh National Radio, 15 August 1996, FBIS-EAS-96-160, 16 August 1996, pp.57-58.

<sup>138</sup> UNCOHCHR, “Prum Sou, Deputy Governor of Banteay Meanchey Province, Ex-Commander of NADK Small Division 519, Phnom Penh,” 22 January 1997; Khmer Rouge Defector Ieng Sary Issues Statement,” Phnom Penh National Radio, 16 August 1996, FBIS EAS-96-160, 16 August 1996, p.60; UNCOHCHR, “Talk with Om Van,” 26 January 1997; UNCOHCHR, “Phon Phaen (Ex-Deputy Commander of Division 705, Now District Governor of Sampoeu Luang) Sampoeu Luang, Front 250,” 25 January 1997.

<sup>139</sup> UNCOHCHR, “Talk with Om Van,” 26 January 1997.

<sup>140</sup> Khmer Rouge Defector Ieng Sary Issues Statement,” Phnom Penh National Radio, 16 August 1996, FBIS EAS-96-160, 16 August 1996, p.60.

<sup>141</sup> “Hun Sen Guarantees Ieng Sary’s Life, Security,” Phnom Penh National Radio, 15 August 1996, FBIS-EAS-96-160, 16 August 1996, pp.57-59.

<sup>142</sup> “‘Rift’ Between Leaders on Future Khmer Rouge Defectors,” AFP Phnom Penh, 17 August 1996, FBIS-EAS-96-161, 19 August 1996, pp.60-61; “Khmer Rouge Defectors Ask Position in Government,” *Reaksmei Kampuchea*, 22 August 1996, pp.1,11; UNOSGRC, “Monthly Report for August 1996,” 4 September 1996; “Hun Sen on Murder Attempt, Khmer Rouge,” Phnom Penh National Radio, 23 August 1996, FBIS-EAS-96-166, 26 August 1996, pp.56-57; UNOSGRC, “Monthly Report for November 1996;” “Hun Sen Speech,” Phnom Penh National Radio, 16 November 1996, FBIS-EAS-96-172, 16 November 1996, pp.62-63.

<sup>143</sup> “King to Consider Ieng Sary Amnesty,” Phnom Penh National Radio, 23 August 1996, FBIS-EAS-96-165, 23 August 1996, p.61.

<sup>144</sup> UNOSGRC, “Weekly Report #102 Covering the Period from 19 to 25 August 1996,” 26 August 1996.

<sup>145</sup> UNOSGRC, “Amnesty for Ieng Sary,” 9-15 September 1996.

<sup>146</sup> UNOSGRC, “Weekly Report #105 Covering the Period from 16 to 22 September 1996.”

<sup>147</sup> National Voice of Cambodia Radio, 16 September 1996.

- <sup>148</sup> National Voice of Cambodia Radio, 28 September 1996.
- <sup>149</sup> Indeed, the CPP Defense Minister had earlier refused to rule out the possibility of a similar deal for Pol Pot himself. National Voice of Cambodia Radio, 13 August 1996 broadcast of an interview with Tie Banh.
- <sup>150</sup> National Voice of Cambodia Radio, 22 October 1996.
- <sup>151</sup> “Hun Sen on Murder Attempt, Khmer Rouge,” Phnom Penh National Radio, 23 August 1996, FBIS-EAS-96-166, 26 August 1996, pp.56-57.
- <sup>152</sup> “Hun Sen Guarantees Ieng Sary’s Life, Security,” Phnom Penh National Radio, 15 August 1996, FBIS-EAS-96-160, 16 August 1996, pp.57-59.
- <sup>153</sup> UNOSGRC, “Weekly Report #103 Covering the Period from 2 to 8 September 1996,” 9 September 1996; “Hun Sen Says Khmer Rouge Division 519 Joins Government,” Phnom Penh National Radio, 10 August 1996, FBIS-EAS-96-156, p.72; Peter Bartu, “Disarmament, Demobilization and Transitional Justice Project Cambodia Case Study, Annex C: History Khmer Rouge Defections 1993 – 1999,” October 2006; “Declaration by Khmer Rouge Defectors,” Phnom Penh National Radio, 16 August 1996, FBIS-EAS-96-161, 19 August 1996, pp.62-63; UNCOHCHR, “Prum Sou, Deputy Governor of Banteay Meanchey Province, Ex-Commander of NADK Small Division 519, Phnom Penh,” 22 January 1997; “KR forces may be slashed in half,” Huw Watkin, *Phnom Penh Post*, Volume 05 Issue 17, August 23 - September 5, 1996; UNOSGRC, “Amnesty for Ieng Sary,” 9-15 September 1996; *Cambodia Daily*, 2 October 1996; “Keo Pong: CPP’s point man for KR negotiations,” Claudia Rizzi, *Phnom Penh Post*, Volume 05 Issue 19, September 20 - October 3, 1996; *Cambodia Daily*, 9 October 1996; *Nation*, 8 October 1996; UNOSGRC, “Monthly Report for October 1996,” 4 November 1996; UNOSGRG, “Monthly Report for November 1996,” *Cambodia Times*, 4 November 1996; UNOSGRC, “Weekly Report #109 Covering the Period from 21 to 27 October 1996,” 28 October 1996; *Cambodia Daily*, 25 October 1996; *Cambodia Daily*, 15 November 1996; *Bangkok Post*, 5 November 1996; *Cambodia Daily*, 6 November 1996; *Cambodia Today*, 11 November 1996; “Kampot free of KR but confusion over Paet,” Jason Barber and Ker Munthit, *Phnom Penh Post*, December 13 -26, 1996; *Cambodia Today*, 29 November 1996; “CPP gains some ground in competition for defectors,” Christine Chaumeau and Reuters, *Phnom Penh Post*, Volume 05 Issue 26, December 27, 1996 -January 9, 1997; UNOSGRC, “Monthly Report for December 1996,” *Cambodia Daily*, 6 December 1996; *Cambodia Today*, 9 December 1996; *Cambodia Daily*, 12 December 1996.
- <sup>154</sup> Author’s interview of DNUM Secretary General Long Norin, Phnom Penh, 29 June 1997.
- <sup>155</sup> *Phnom Penh Post*, 4-17 October 1996; UNOSGRC, “Your Visit to Cambodia (Part I),” 3 March 1997; *Cambodia Daily*, 4 November 1996; *Cambodia Today*, 4 November 1996; Phnom Penh Radio, 3 November 1996; *Reaksmei Kampuchea*, 2 November 1996; *Bangkok Post*, 3 November 1996; “DNUM gives in to integration,” Christine Chaumeau and Ker Munthit, *Phnom Penh Post*, Volume 05 Issue 23, November 15 - 28, 1996; *Cambodia Today*, 4 November 1996; *Reaksmei Kampuchea*, 9 November 1996; *Bangkok Post*, 4 November 1996; UNOSGRC, “Monthly Report for October 1996,” 4 November 1996; *Cambodia Today*, 6 November 1996; *Cambodia Daily*, 7 November 1996; Phnom Penh radio, 8 November 1996; *Cambodia Daily*, 8-10 November 1996; *Reaksmei Kampuchea*, 10 November 1996; *Cambodia Today*, 13 November 1996; *Cambodia Daily*, 18 November 1996.
- <sup>156</sup> *Cambodia Today*, 27 November 1996.
- <sup>157</sup> UNOSGRC, “Monthly Report for December 1996;” UNCOHCHR, “DK Movement Structure ca Mid-1996,” June 1997.
- <sup>158</sup> “Ta Mok aide jumps to govt,” *Phnom Penh Post*, Volume 05 Issue 25, December 13 - 26, 1996.
- <sup>159</sup> UNCOHCHR, “DK Movement Structure ca Mid-1996,” June 1997.
- <sup>160</sup> UNOSGRC, “Monthly Report for December 1996;” UNCOHCHR, “DK Movement Structure ca Mid-1996,” June 1997.
- <sup>161</sup> UNCOHCHR, “DK Movement Structure ca Mid-1996,” June 1997.
- <sup>162</sup> UNCOHCHR, “DK Movement Structure ca Mid-1996: Background Notes,” June 1997.
- <sup>163</sup> UNCOHCHR, “Amnesty to Ieng Sary and DK Leaders,” 12 November 1996.
- <sup>164</sup> Office of the Centre for Human Rights in Cambodia, to Thomas Hammarberg, “Your Second Mission – Amnesty to Ieng Sary and other DK Leaders” and “Suggested Draft Statement on the Issue of Amnesty to Ieng Sary and Other Figures or Senior Cadres of Democratic Kampuchea (‘Khmer Rouge’),” 14 November 1996;
- <sup>165</sup> UNCOHCHR, “Visit and Interview with Captured Soldiers at Taing Korsang Camp. On Sat. 19-7-97, Afternoon,” 21 July 1997.
- <sup>166</sup> UN Commission on Human Rights, “Situation of Human Rights in Cambodia” (E/CN.4/1997/49), 11

April 1997; Thomas Hammarberg, "Efforts to Bring the Khmer Rouge Leaders to Justice: Discussions Between the Cambodian Government and the UN," 1999, p.5.

<sup>167</sup> UN General Assembly, "Human Rights Questions: Human Rights Questions, Including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms: Report of the Secretary-General, Situation of Human Rights in Cambodia" (A/52/489), 17 October 1997, p.7.

<sup>168</sup> Author's interviews of Pol Saroeun, Sou Keum Sun, Nhek Bunchhay and Khan Savoeun, Phnom Penh, 27 June-4 July 1997. Unless otherwise indicated, the following account of the implosion of the "hardline" leadership that follows is based on accounts provided by these senior CPP and FUNCINPEC military officials in charge of negotiations with the Khmer Rouge.

<sup>169</sup> Radio of the Provisional Government of National Union and National Salvation of Cambodia (RPGNUNSC), 1 May 1997.

<sup>170</sup> For photographs of the bodies of Son Sen and Yun Yat, see *Phnom Penh Post*, 27 June-10 July 1997.

<sup>171</sup> From a tape recording of Khieu Samphan's broadcast made by the author.

<sup>172</sup> *Sechkdey Thlængkar Robâh Kana'-doeknoam Ruom nei Châlana Bângruop-Bângruom-Cheat Pracheatheupatai Ampi Sapheapkar Nôv Anlung Vêng* [Communiqué of the Joint Leading Committee of the Democratic National Unification Movement on the Situation in Anlung Veng], dated 2 July 1997 and signed by Ieng Sary.

<sup>173</sup> RPGNUNSC, 16 June 1997.

<sup>174</sup> *Sechkdey Prakah Piseh Robâh Roathaphibal Bândâh Asân Sammakki Cheat Neung Sângkruoh Cheat Neung Kana-pak Sammakki Cheat: Pol Pot Sarapheap Haoey!* [Special Proclamation of the Provisional Government of National Solidarity and Salvation and the National Solidarity Party: Pol Pot Has Capitulated!].

<sup>175</sup> "Communiqué of the Joint Leading Committee."

<sup>176</sup> *Sechkdey Prakah Piseh Robâh Roathaphibal Bândâh Asân Sammakki Cheat Neung Sângkruoh Cheat Neung Kana-pak Sammakki Cheat: Chap Pol Pot Ban* [Special Proclamation of the Provisional Government of National Solidarity and Salvation and the National Solidarity Party: Pol Pot Has Been Captured], 20 June 1997.

<sup>177</sup> RPGNUNSC, 19 June 1997.

<sup>178</sup> *Mitinh robâh Pracheachun nôv Anlung Vêng Ab-âr Sator Kar Bânhchâp Preutekar Kbât Robâh Pol Pot Bânhchâp Robâh Phdachkar Robâh Pol Pot Haoey Neung Kar Chap-phdaoem Yukasamay Thmei Pracheachun Sammakki Ækapheap Chea Thlong Muoy Mean Seutsereipheap Chea Mchah Dei Kangkap Veahsana Khluon Daoy Khluon-æng Ruom Chea Muoy Kâmlang Cheat Teang Ah Tâ-sou Bânhchâp Sângkream Chhlean-pean Robâh Yuon Kommuynih Neung A-yâng Yuon Kommuynih Sâmrech Phsah-phisar Cheat Neung Santepheap Peut-prakât* [Rally of the People in Anlung Veng Warmly Welcoming the End of the Pol Pot Treason Affair and of Pol Pot's Dictatorship and the Beginning of a New Era in Which the People Are a Monolithic Solidarity Bloc Enjoying the Rights and Freedoms of Masters of the Land, Grasp Their Destiny in Their Own Hands and Join with All National Resistance Forces to End the Aggressive War of the Yuon Communists and the Contemptible Puppets of the Yuon Communists and to Achieve Genuine National Reconciliation and Peace], 20 June 1997; cf. RPGNUNSC, 20 June 1997.

<sup>179</sup> "KR Radio 22 June 1997," translation by Ham Samnang, *The Cambodia Daily*. Ta Mok spoke to close the meeting, although the radio did not identify him: author's interview of DNUM Secretary General Long Norin, Phnom Penh, 29 June 1997. Thiounn Thioeun, a Khmer Rouge minister who was present, described Khieu Samphan's refusal to denounce Pol Pot: author's interview, Phnom Penh, 26 July 1999.

<sup>180</sup> A copy of this letter, addressed to the United Nations Secretary-General, is in the author's possession.

Background from author's interviews of Christophe Peschoux and Brad Adams, Phnom Penh, 29 June 1997.

<sup>181</sup> "Closing Order" (D427), 15 September 2010, Paragraphs 41-43.

<sup>182</sup> Memo From Steve Heder to David Hawk, OIC, UNCOHCHRPP, 30 June 1997.

<sup>183</sup> So Saroeun was executed by Mok after the denunciation of Pol Pot. Author's interview of Khoem Ngun, Phnom Penh, 28 December 1998. The person I thought was Rèn, a son-in-law of Mok, had died in the 1980s. Christophe Peschoux, "*DK-Cadres-biographie*" (1990) and "DK-bio and Military Data (June-September 1992).

<sup>184</sup> Author's interviews of Pol Saroeun, Sou Keum Sun, Nhek Bunchhay and Khan Savoeun, Phnom Penh, 27 June-4 July 1997.

<sup>185</sup> "Preah Vihear: the jewel in the crown," [Jason Barber](#) and [Bou Saroeun](#), *Phnom Penh Post*, Volume 07 Issue 7, April 10 - 23, 1998; "Khmer Rouge tries to crawl from the grave," [Post staff](#), *Phnom Penh Post*, Volume 07 Issue 7, April 10 - 23, 1998; "One Khmer in 100 now displaced by strife," *Phnom Penh Post*, Volume 07 Issue 8, April 24 - May 7, 1998.

<sup>186</sup> Both Pork's declaration and Hun Sen's statement were broadcast by National Voice of Cambodia Radio, 26 March 1998. Pork was eventually made a general officer in the Royal Government's army. NGO Forum, *Cambodia News Digest*, Issue No 31, 12 February 1999.

<sup>187</sup> *Far Eastern Economic Review (FEER)*, 30 April 1998 and 28 January 1999. At the time of Pol Pot's death, Mok and his subordinates were exploring possibilities of turning him over to an international court as part of a deal whereby Mok would obtain a status similar to Ieng Sary's. Author's interviews of Pol Saroeun, Sou Keum Sun, Nhek Bunchhay and Khan Savoeun, Phnom Penh, 27 June-4 July 1997.

<sup>188</sup> "Rebel rank-and-file roosting with northwest warlord," Elizabeth Moorthy, *Phnom Penh Post*, Volume 07 Issue 12, June 19 - July 2, 1998; "Life's a party in gov't-controlled Anlong Veng," Tom Fawthrop, *Phnom Penh Post*, Volume 07 Issue 12, June 19 - July 2, 1998; "Defection of KR politicians isolates Mok," Bou Saroeun and Peter Sainsbury, *Phnom Penh Post*, Volume 07 Issue 12, June 19 - July 2, 1998; "RCAF says 250 resistance troops ready to defect," Post Staff, *Phnom Penh Post*, Volume 07 Issue 16, July 31 - August 6, 1998; "Kratie guerrillas sold short after defection," Bou Saroeun and Peter Sainsbury, *Phnom Penh Post*, Volume 7 Issue 19, September 4 - 17, 1998; "The KR ends its 47-year war," Bou Saroeun and Peter Sainsbury, *Phnom Penh Post*, Volume 07 Issue 27, Dec. 11 - 24, 1998.

<sup>189</sup> *FEER*, 17 December 1998.

<sup>190</sup> "Khmer Rouge Leaders Were 'Cornered'," Reuters, Phnom Penh, 26 December 1999, quoting an interview with *FEER* correspondent Nate Thayer; "Top Khmer Rouge Leaders Defect," AP, Pailin, 27 December 1999.

<sup>191</sup> "Two of Khmer Rouge's Leaders Surrender," Reuters, Phnom Penh, 26 December 1999.

<sup>192</sup> Letters signed by Khieu Samphan and Nuon Chea, 25 December 1999, Pailin; letter signed by Hun Sen as prime minister and armed forces commander-in-chief, Phnom Penh, 25 December 1999.

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- <sup>386</sup> "Special Briefing by the Legal Counsel on Cambodia."
- <sup>387</sup> Hans Corell, "Note to interested Member States: Establishment of a national court in Cambodia to try senior leaders of Khmer Rouge et al.," 13 July 2000.
- <sup>388</sup> Daphna Shraga, "Note to the File: Cambodia court to try senior Khmer Rouge leaders and others: Briefing to Member States by the Legal Counsel," 18 July 2000.
- <sup>389</sup> Hans Corell Letter to Sok An, 14 July 2000.
- <sup>390</sup> "Cambodian Assembly Reviews the Draft of Genocide Trial Law," AP, Phnom Penh, 1 September 2000;"KR Tribunal Drowning in Smokescreens and Politics," *Phnom Penh Post*, 15-28 September 2000.
- <sup>391</sup> "UN Accepts Flawed Tribunal for KR," *Phnom Penh Post*, 13-26 October 2000.
- <sup>392</sup> Email Posting by US Ambassador Kent Wiedemann, 16 October 2000.
- <sup>393</sup> "Khmer Rouge Leaders Will Not Escape the Law: Hun Sen," AFP, New York, 11 September 2000; "Cambodian PM Urges Forming Tribunal," AP, Roka Khnor, 18 October 2000.
- <sup>394</sup> "Khmer Rouge Leaders Will Not Escape the Law: Hun Sen," AFP, New York, 11 September 2000.
- <sup>395</sup> "Khmer Rouge Draft Law Ready for Debate in Cambodian Parliament," AFP, Phnom Penh, 1 December 2000.
- <sup>396</sup> "All Parties Line Up to Launch "Killing Fields" Bill," *South China Morning Post*, 30 December 2000.
- <sup>397</sup> "Trial Law Sails Through Assembly," *Phnom Penh Post*, 5-18 January 2001.
- <sup>398</sup> HJ 1/3/01, "Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea," Article 1 (General Provisions) and Article 2 (Competence).
- <sup>399</sup> Hans Corell Letter to Sok An, 9 January 2001.
- <sup>400</sup> Royal Decree (ns/rkm/0801/12), 10 August 2001.
- <sup>401</sup> "Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea,"

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([http://www.eccc.gov.kh/english/cabinet/agreement/5/Agreement\\_between\\_UN\\_and\\_RGC.pdf](http://www.eccc.gov.kh/english/cabinet/agreement/5/Agreement_between_UN_and_RGC.pdf)).

<sup>402</sup> Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006); “Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea”

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<sup>403</sup> United Nations, General Assembly, “Khmer Rouge trials” (A/RES/57/228), 22 May 2003.

<sup>404</sup> Documentation Center of Cambodia, “Minute on the Session of the National Assembly of the Kingdom of Cambodia,” December 29, 2000; UNCOHCHR, “The NA Session Starts the Debate on Draw Law on KR Trial,” December 29, 2000; “Draft Law on the Establishment of Extra-ordinary Chambers,” *Searching for the Truth* (English) (Number 13: February 2001), p.86.

<sup>405</sup> “Draft Law on the Establishment of Extra-ordinary Chambers,” *Searching for the Truth* (English) (Number 14: February 2001), p.44.

<sup>406</sup> Michael R. Marrus, *The Nuremberg War Crimes Trial of 1945-46: A Documentary History* (Boston: Bedford Books, 1997), *passim*.

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<sup>409</sup> Republique Rwandaise, *Recensement General de la Population et de l’Habitat Au 15 Aout 1991* (December 1992).

<sup>410</sup> “Cambodia to Try Khmer Rouge Leaders,” *Washington Post*, 3 January 2000.

<sup>411</sup> “Trial Law Sails Through Assembly,” *Phnom Penh Post*, 5-18 January 2001.

<sup>412</sup> David Scheffer, “The Negotiating History of the ECCC’s Personal Jurisdiction, posted 22 May 2011 (<http://blog.cambodiatribunal.org/2011/05/negotiating-history-of-ecccs-personal.html>).

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<sup>414</sup> Daphna Shraga, “Note for the File Cambodia - Trial of Khmer Rouge leaders,” 23 August 2001.

<sup>415</sup> Hans Corell, “Note to the Secretary-General, Subject: Trial of Khmer Rouge leaders - What now?,” 11 February 2002, p.2.

<sup>416</sup> Hun Sen Letter to Kofi Annan, 28 June 2002.

<sup>417</sup> Sergio Vieira de Mello, “Note to the Secretary-General: Khmer Rouge Tribunal,” 2 July 2002.

<sup>418</sup> Hans Corell, “Note to the Secretary-General: General Assembly draft resolution on a Khmer Rouge tribunal (Draft 17 October 2002),” 17 October 2002, p.2

<sup>419</sup> United Nations, General Assembly, “Khmer Rouge trials” (A/RES/57/228 A), 18 December 2002, p.2.

<sup>420</sup> Royal Cambodian Permanent Mission to the UN, “Statement by the Cambodian Delegation to the UN Regarding the Establishment of Extraordinary Chambers Within the Courts of Cambodia,” January 13, 2002.

<sup>421</sup> Royal Government of Cambodia, “Presentation by His Excellency Sok An, Senior Minister, Minister in Charge of the Office of the Council of Ministers, Kingdom of Cambodia, and President of the Task Force for Cooperation with Foreign Legal Experts and Preparation of the Proceedings for the Trial of Senior Khmer Rouge Leaders,” at the Conference on The Rule of Law and the Legacy of Conflict, Gaborone, Botswana, January 16 to 19, 2003.

<sup>422</sup> “Statement by Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel of the United Nations, on the occasion of the signature of the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea Phnom Penh, 6 June 2003.”

<sup>423</sup> “Remarks by His Excellency Sok An, Senior Minister, Minister in Charge of the Office of the Council of Ministers, Chairman of the Task Force for Cooperation with Foreign Legal Experts and Preparation of the Proceedings for the Trial of Senior Khmer Rouge Leaders, at title Signing Ceremony of the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, 6 June 2003, Chaktomuk Theatre, Phnom Penh.”

<sup>424</sup> United Nations, General Assembly, “Report of the Secretary-General on Khmer Rouge Trials” (A/59/432), 12 October 2004, paragraph 16.

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<sup>425</sup> Fred Eckard, “Agreement Reached for Khmer Rouge Trials in Cambodia,” United Nations, Highlights of the Noon Briefing, UN Headquarters, New York, 17 December 2003; “UN Team, Cambodia Agree on Issues Related to the Establishment of Khmer Rouge Court,” 17 December 2003 (<http://www.un.org/apps/news/ticker/tickerstory.asp?NewsID=9252>).

<sup>426</sup> Documentation Center of Cambodia, “Transcript: The First Session of the Third Term of the Cambodian National Assembly, October 4-5, 2004,” supplemented by the author’s notes on the debate at the assembly, at which he was present; “Presentation by Deputy Prime Minister Sok An to the National Assembly on the Ratification of the Agreement between Cambodia and the United Nations and Amendments to the 2001 Law Concerning the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea” and “Cambodian National Assembly, October 4-5, 2004: Debate and Approval of the Agreement between the United Nations and the Royal Government of Cambodia and Debate and Approval of Amendments to the Law on Trying Khmer Rouge Leaders,” *Searching for the Truth* (English) (Third Quarter 2004), pp.21-54.

<sup>427</sup> Letter from Hans Corell to the author, 25 July 2011.

<sup>428</sup> “Ke Pauk,” *Guardian* (London), 21 February 2002.