

មជ្ឈមណ្ឌលឯកសារកម្ពុជា

Memorandum: Prosecuting Nuon Chea for Khmer Rouge War Crimes

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Dedicated to Pou.

I. Introduction

During the 1970s, the newly independent nations of Southeast Asia were at the center of the world's attention, engaged in battles with economically and militarily powerful states . Newspapers covered North Vietnam's victory over the United States, the battle between Russia and China for influence in the region, and the secretive US bombing of Cambodia. Overshadowed by these global political struggles, a bitter regional conflict raged between two nations that should have been allies. Since the early twentieth century the young communist leaders of Cambodia and Vietnam sought to overthrow French colonialism and American imperialism. The leaders of both movements grew up in the oppressive French colonial system and left their native lands to travel and study abroad. They returned home, where their disenchantment with political and economic conditions often led them to guerilla warfare waged from remote locations. In 1930 they allied to create the Indochinese Communist Party. It would seem that a Vietnam-Cambodia partnership would be mutually beneficial to both countries.

Instead, war broke out between the two nations. The Khmer Rouge, a regime that thrived on generating fear and distrust among its own people, accused the North Vietnamese of espionage and attempts at regional dominance. These fears were probably not entirely without merit: the Vietnamese had betrayed the Khmer Rouge in the 1954 Geneva Convention. The Vietnamese also did not try to disguise their paternal feelings toward Cambodia, referring to their relationship as “anh-em” in Vietnamese, meaning the older brother and the little brother. As a result, while the Khmer Rouge imposed a regime of terror on their own people, they invaded Vietnamese villages in Ha Tien and Tay Ninh province. The majority of the Vietnamese living in Phnom Penh were expelled in 1975. Khmer husbands were forced to turn in their Vietnamese wives to be executed. The fighting between the two countries was initially kept

secret from the international community. It came to a head in 1977, leading to intensified repression of the Vietnamese in Cambodia and the eventual Vietnamese invasion of Phnom Penh.

The Vietnamese were called the “hereditary enemy” by the Khmer Rouge, and villagers, even those living in the Eastern Zone, could not disagree with the party line at the risk of their own lives. Widespread killings were reported throughout the region, and the anti-Vietnamese clamor began in 1977. As Ben Kiernan points out, the increased hostility towards the Vietnamese in official party statements reflects the “close relationship between internal repression...and the Pol Pot regimes’ attacks into Vietnamese territory.”

The crimes committed against the Vietnamese prisoners in S-21 can be prosecuted as war crimes under the Geneva Conventions. A war crimes charge for abuses of Vietnamese soldiers is more viable than a claim for the lives of Cambodian soldiers because of the higher bar for non-international conflict. Civil law evidence standards are very flexible, and judges can look at almost any material they feel is relevant. A claim against Nuon Chea is particularly possible because of the availability of evidence against him compared to the other defendants.

The third Geneva Convention, which protects prisoners of war, requires an “international armed conflict” and victims that can be classified as “protected persons” under the agreement. Additionally, Article 6 of the Law of the Extraordinary Chambers requires crimes to reach the level of “grave breaches” in order to qualify as war crimes.

II. The Confessions

Approximately 488 Vietnamese were arrested and brought to Tuol Sleng during the Khmer Rouge period, including 381 men, 59 women, and 47 children. They were arrested in Vietnam, in the disputed territory near the border, and throughout Cambodia. Most were

civilians, many were soldiers. There were even soldiers from the South Vietnamese army, referred to as “soldiers for the contemptible Thieu-Ky regime.”

The confessions and biographies of approximately 50 Vietnamese prisoners, as well as execution logs documenting their murder, are held in the archives of Tuol Sleng, the notorious Khmer Rouge prison that housed approximately 20,000 prisoners between 1975-1979. Often these confessions were written only hours or days before their execution. Former employees of Tuol Sleng, or S-21, have confirmed that these Vietnamese prisoners were indeed held, tortured, and executed. Telegrams from Khmer Rouge cadres in the Eastern Zone also allude to the abuse and torture of Vietnamese prisoners. The Tuol Sleng confessions, however, provide the best evidence of war crimes because they contain the identities of specific victims with their exact time of capture, detention, and death. The UN Convention Against Torture limits the use of confessions wrought by torture in legal proceedings. The convention does allow, however, for the confessions to be used as evidence of torture committed. Using the confessions in this context obviously does not create the same policy problems as relying on them for their substantive content.

Several of the confessions were transcribed in Vietnamese by Tuol Sleng employees while the prisoners were being interrogated, but the majority were recorded in Khmer. The interrogations of Vietnamese prisoners were performed mainly by Mam Nay, a deputy interrogator, and Chann, both of whom spoke Vietnamese fluently. Mam Nay would later transcribe the confessions. The majority of the prisoners were arrested in the Eastern Zone, along the Vietnamese border, by Division 703 of the Khmer Rouge army. Sometimes the soldiers in Division 703 transported the prisoners to Tuol Sleng themselves; other times, prison guards and executioners were sent to Svay Rieng to bring the prisoners back to Phnom Penh.

Of the confessions that have been recovered, four prisoners were female and forty three were male. Their ages range from 20-35. Discussions with former S-21 officials have shown that there were probably more women prisoners; however, their confessions may have not been written or maybe lost. There is photographic evidence of one Vietnamese female prisoner who committed suicide by throwing herself from the third floor of the prison. Execution logs also show that there were other female prisoners for who confessions have not been found. The female prisoners were usually captured during battles along the disputed border between the two areas; it is possible that some might have been the wives of Khmer villages. Some of the women confess to being spies for the Vietnamese government. One female prisoner, Nguyen Thi Bach Hue, was a former lounge singer at the Rex Hotel in Saigon. She was captured near the Cambodian border while visiting relatives and confessed to being a spy for the Vietnamese government.

The majority of the male prisoners were soldiers and officers in the Vietnamese army, captured during battle or on reconnaissance missions. The soldiers generally gave detailed information about their rank, the actives and location of their battalion, and their military training. Three of the male prisoners confessed to being members of the elite Yellow Star Division from Song Be, a special division for monitoring prisons. Several men were arrested in boats in the Cambodian sea and confessed to being members of the Vietnamese navy. Others were local officials, villagers, and ethnic minorities who were arrested as spies for helping the army. Most of the men were in their mid-twenties. The majority of the prisoners say they were arrested in Cambodia, even if they were very close to the border. Twelve of the prisoners say in their confessions that they were arrested in Vietnam, in Tay Ninh, Ha Tien, and Dong Thap, provinces near the Cambodian border where fighting was very heavy.

III. Prosecuting War Crimes Under the ECCC Law

Article 6 of the ECCC Law authorizes the tribunal to try suspects for grave breaches of the Geneva Convention committed against protected groups during the Khmer Rouge period. Under the Geneva Convention, these grave breaches must have been committed during a period of declared war or “armed conflict” between two nations. In order to try senior Khmer Rouge leaders for war crimes under ECCC law, the prosecutors must establish that the crimes took place during a period of armed conflict, that the crimes were committed against protected persons, as defined by the Geneva Convention, and that the acts were grave breaches as listed by the convention and Article 6 of the ECCC law.

a. Armed Conflict

Article 2 of the Geneva Convention states that the convention applies to all cases of declared war or “any other armed conflict” that might arise between two or more states. The International Tribunal of Yugoslavia attempted to define “armed conflict” in the convention: “resort to armed forces between states or protracted armed violence between government authorities and organized armed groups or between such groups within a state.” This imprecise definition demonstrates how difficult it is to identify “armed conflict” in modern times, a problem not foreseen by the drafters of the Geneva Convention, who lived in a generation of wide scale global battles. The convention, which has become anachronistic in the latter half of the 20th century, assumed it would be easy to determine when and where armed conflict was taking place. The battles of the past 50 years, as opposed to massive scale fighting of the two world wars, has not always been so easy to define as the boundaries between war and peace, adversaries and allies have become blurred. There is still a good deal of disagreement among

legal scholars about the exact threshold of armed conflict and intensity of fighting required in order to justify the application of the Convention.

Determining the exact date of the armed conflict between Vietnam and Cambodia is further complicated by the war's secretive nature and the fact that neither country ever declared war against the other. The Khmer Rouge government officially broke diplomatic relations with the Vietnamese in December 1977: before the announcement the outside world had little knowledge about the border conflict raging between the two states.

Tuol Sleng was located in Phnom Penh, and prisoners were tortured and executed far away from the embattled border region. According to the ICTY, however, there can still be a sufficient nexus between the armed conflict and crimes committed even if they occur in a different location. The Appeals Chamber in the *Kordic* case said it was enough for the crimes to be closely related to "hostilities occurring on other parts of the territories controlled by parties to the conflict." In this case, the Vietnamese soldiers and civilians from the border areas were arrested because of their suspected involvement in the ongoing armed conflict between the two countries. Their removal to Tuol Sleng does not remove their status as prisoners of war and civilians.

The prosecutors should try to establish the earliest possible start date for the armed conflict to be able to admit evidence of more killings and torture. A breakdown of events on a yearly basis shows potential start dates for the conflict.

1975

The hostilities between Vietnam and Cambodia began long before the breach in relations in 1977. Although the two countries had been allies against the French and the Americans, the Khmer Rouge deeply resented Vietnam's annexation of ancient Khmer lands that occurred long

before Western powers arrived on the scene. Border fighting to recover these lands began as early as 1974 and began to intensify in 1975. Some historians mark this early fighting as the start date of the armed conflict, encompassing almost the entire Khmer Rouge period. One of the earliest signs of hostility was the so-called Pvo Lov incident that happened in June 1975. The Khmer Rouge shelled Vietnam's Phu Quoc Island as early as April 19, and the Vietnamese took Wei Island in June. This event is surrounded by uncertainty, but it is continuously discussed by both sides as a serious clash. Vietnam contended well into 1978 that Cambodia has not returned approximately 515 Vietnamese captured during the event. The ostensible goal of this fighting was to recover ancient Khmer lands that made up modern day Southern Vietnam. This fighting ended, according to Ben Kiernan, when the strategic opportunity created by the temporary weakening of South Vietnam and the rise to power of the Khmer Rouge had passed. Pol Pot passed off these early skirmishes as a misunderstanding on the part of lower cadres and quickly tried to patch things up with the Vietnamese. This event could represent the start of the armed conflict, and it is also likely that the 515 missing were some of the earliest victims of war crimes. Telegrams discussing Vietnam's concerns about these 515 missing people were sent to Nuon Chea, making him culpably responsible for this action, as will be discussed later.

1976

Fighting was particularly concentrated at the beginning of 1976, from December and January until March. Fighting continued throughout February. There were constant bombings along the border, attacks on villages and kidnappings, and attempted invasions by sea. At one point, the Vietnamese reportedly said to their Cambodian counterparts that their people wondered why there was still fighting when the war was over. Negotiations and discussions were continuing between the two sides at this point- Pol Pot said that he wanted to maintain an

atmosphere of solidarity, and blamed the bloody clashes on the impatience of lower cadres. But internally, the Vietnamese and Cambodians already saw each other as enemies.

Fighting continued throughout the early part of 1976. The skirmishes continued, on and off, throughout the year. There is evidence of village burning and kidnapping of soldiers and civilians, occurring throughout 1976, and further interviews along the Eastern Zone and in Mondulkiri might reveal witnesses to this fighting and abuses committed against Vietnamese soldiers and civilians.

1977

The armed conflict had certainly begun by April 1977, so crimes committed by Nuon Chea after that date are covered by the Geneva Convention. There was a large escalation of troops along the border in April, followed by wide scale engagements in September. Khmer Rouge leaders publicly acknowledged the war with Vietnam after that point, and political propaganda dating after April 1977 repeatedly referred to the Vietnamese as the enemy. Historians and local Cambodians also acknowledge this as the beginning of the full scale war. Khmer Rouge correspondence shows a definite spike in the number of battles after this period, which corresponds with the sharp increase in the number of Vietnamese prisoners in Tuol Sleng.

Of course, even if the tribunal rules that the official start date of the international armed conflict did not occur until January 1978, when relations between the two nations officially terminated, there were still a large number of prisoners abused and executed in Tuol Sleng after that date. According to Sorya Sim's research and upcoming books, there were 414 Vietnamese arrested in 1978 and 171 executions at Tuol Sleng. The arrests peaked in April of that year and began to climb again in September, October, and November, the months leading up to the large scale Vietnamese invasion of Cambodia.

b. Protected Persons

The Geneva Convention preserves the rights of victims who fall under the label of “protected persons.” Under the Third Geneva Convention, “protected persons” include members of the armed forces, as well as members of militias or volunteer corps forming part of such armed forces, who are party to the conflict and who have fallen into the power of the enemy. The Fourth Geneva Convention offers a much wider range of protection, applying to persons who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or an occupying power of which they are not a national.

Virtually all of the Vietnamese prisoners at Tuol Sleng, according to the information in their biographies, are protected persons under the Third or Fourth Geneva Convention. The soldiers are covered as prisoners of war under the Third convention. Most Vietnamese living under the Khmer Rouge were considered residents of the country, rather than Cambodian citizens, so even those civilians captured within the border fall under the protection of the agreement. Of course, the Vietnamese civilians who were kidnapped from Vietnam are also protected.

The Vietnamese government, for political reasons of its own, has claimed that the Khmer Rouge never actually captured any Vietnamese Soldiers. Vietnamese government officials argue that the Khmer Rouge dressed civilians in military uniforms in order to make themselves appear victorious on the battlefield. In some confessions, particularly those belonging to men accused of being members of the Vietnamese navy, this assertion might be true. These men say they are members of the navy, but they offer vague details about their rank, mission, and their commanders. They also claim to have thrown their guns and maps overboard before their arrest-

the Khmer Rouge probably forced these men to fabricate a story covering up the lack of evidence against them. Nuon Chea might try to use this as a defense, arguing that the men were not actually soldiers and therefore not protected by the Third Geneva Convention. For the majority of Vietnamese soldiers, however, their confessions contain such detailed accounts that it is difficult to fathom they are not who they claim to be. Him Huy, one of the chief executioners of Tuol Sleng, has also disputed the claim, stating that the Vietnamese soldiers were already in uniform when they were brought to the prison. In any case, even if these men were not soldiers, they would still be Vietnamese nationals protected under the Fourth Geneva Convention as civilians in the hands of the enemy.

Additionally, Nuon Chea might attempt to argue that some civilians (or all) of the civilians in Tuol Sleng forfeited their rights under the Fourth Convention because they confessed to being spies for the Vietnamese government. The Fourth Convention states in Article 5 that such people are not “entitled to claim such rights and privileges under the present convention as would, if exercised in the favor of such individual persons, be prejudiced to the securing of the state.” The Article goes on to say that civilians expected of spying forfeit their rights to communication.

This argument fails for two reasons. First, the Geneva Convention also states in Article 5 that “such persons shall nevertheless be treated with humanity” and be given a fair trial. The condition of prisoners in Tuol Sleng was anything but humane; neither was their brutal execution. Second, relying on the forced confessions to prove these people were spies would violate the principles of the UN Convention Against Torture: many of these prisoners were brutally tortured until they lied about being spies in an attempt to save their own lives.

c. Grave Breaches

Article 6 of the ECCC law gives the tribunal jurisdiction over those war crimes deemed to be “grave breaches” of the 1949 Geneva Convention. There is strong evidence that the Khmer Rouge committed at least three of these grave breaches in its treatment of the Vietnamese prisoners at Tuol Sleng: willful killing, torture or inhumane treatment, serious injury to body or health.

The Tuol Sleng execution logs offer direct proof of the grave breach of willful killing. The logs list the name, age, sex, nationality, and the occupation of the victim, along with the day they were killed. The execution logs are corroborated by the statements of former executioners and Tuol Sleng employees. Him Huy has freely admitted that the Vietnamese, like all prisoners, were tortured and then executed after writing a confession. Him Huy cannot remember the names of any specific Vietnamese prisoners; however, further interviews with prison guards might produce evidence about the fate of specific prisoners. These guards may also have additional information about the torture and abuse of Vietnamese prisoners that would qualify as additional grave breaches.

In addition to the documented execution of Tuol Sleng victims, there is also evidence of grave breaches being committed against Vietnamese troops and civilians along the border. Atrocities committed in Vietnamese villages were photographed by the international press. Unfortunately, the ECCC law limits the tribunal’s jurisdiction to crimes committed inside Cambodia.

IV. Nuon Chea’s Culpability

a. Nullum Crimen Sine Lege

Under the international legal principle “nullum crimen sine lege” a person cannot be held

criminally responsible for an act that was not a crime at the time it was committed. While *nullum crimen sine lege* limits the prosecution of Khmer Rouge leaders in other spheres, it will not protect them in the face of war crimes charges. Both Cambodia and Vietnam were signatories of the Geneva Conventions during the entire Khmer Rouge period, so any wartime abuses of soldiers or criminals would be a crime under international law.

b. Direct and Command Responsibility

Under Article 29 of the ECCC Law, a suspect is responsible for a crime if they “planned, instigated, ordered, aided, abetted, or committed” the crime in question. This type of culpability is called direct or individual responsibility under international law. Additionally, Article 29 states that a superior is responsible for a crime committed by a subordinate if the superior had effective command and control over the subordinate and knew or had reason to know that the subordinate was about to commit such acts or had done so and failed to take necessary and reasonable measures to punish the perpetrators. Known as superior or command responsibility, this type of culpability allows a wider range of suspects to be punished under ECCC law.

i. Direct Responsibility for Crimes Committed Against the Vietnamese

There is little physical evidence that ties Nuon Chea directly to the crimes committed against the Vietnamese in Tuol Sleng. His initials are not on the cover pages of any of the confessions, and none of the documents discussing the executions of these prisoners were copied to him. He was, however, copied on a telegrams reporting that Vietnamese prisoners of war had been sent to Tuol Sleng. This document is critical in tying Nuon Chea to the crimes. Duch, the former commander of Tuol Sleng, told journalist Nate Thayer that Nuon Chea knew about the Vietnamese prisoners and ordered them to be executed, along with the other prisoners, before the fall of Phnom Pneh in 1979. Duch’s accusation would be critical in making Nuon Chea directly

responsible for the deaths under the Geneva Convention. There are no known documents to corroborate Duch's testimony, however, and it is unknown how much weight the tribunal will attach to his statements. Ben Kiernan has uncovered one document, "Directive from the CPK Center," dated April 1, 1977, that orders the arrest of all ethnic Vietnamese or those with Vietnamese connections. Duch has no obvious motivation to lie, as he himself has already confessed to committing gruesome crimes against the prisoner. If Duch testifies and is deemed credible, it is very likely that Nuon Chea can be held directly responsible for the deaths of the Vietnamese prisoners.

ii. Command Responsibility for Crimes Committed Against the Vietnamese

If the tribunal finds that Nuon Chea was not directly responsible for the crimes committed against the Vietnamese prisoners, it is highly likely they will find he had command responsibility for the acts. As a member of the elite Standing Committee, Nuon Chea's de facto authority extended to almost every subordinate Khmer Rouge cadre, including Duch and the other workers at Tuol Sleng. At trial Nuon Chea will likely claim that he was only in charge of the National Assembly, not Tuol Sleng, and that he had virtually no decision-making power. The numerous reports from Duch and other interrogators that were sent to Nuon Chea help to dispute this position. Additionally, there is significant evidence that Vietnamese soldiers were being held in Tuol Sleng. In addition to the telegram notifying Nuon Chea that Vietnamese prisoners were being held, the confession of many of these prisoners were broadcast over the national radio, "in every commune and throughout the rice paddies." It is virtually impossible, then, that Nuon Chea did not know that Vietnamese prisoners were being held and possibly tortured in Tuol Sleng. Additionally, telegrams from the Eastern Zone would have alerted him that war crimes were being committed. Because Nuon Chea failed to prevent or punish his

subordinates for committing these crimes, he would be liable under the theory of command responsibility.

V. Conclusion

The crimes committed by the Khmer Rouge occurred over two decades ago, and there is limited evidence available for their prosecution. The confessions of the Vietnamese prisoners held in Tuol Sleng, however, might prove particularly valuable for making a war crimes claim against Nuon Chea, and possibly Duch himself. These documents, along with Khmer Rouge correspondence and accounts from historians, help to establish Nuon Chea's culpability for grave violations of the Geneva Conventions. The prosecution team of the Extraordinary Chamber should further analyze and examine these documents for their potential legal significance in the upcoming trial.

End.