

# មជ្ឈមណ្ឌលឯកសារកម្ពុជា

## “Keeping Them Alive, One Gets Nothing; Killing Them, One Loses Nothing”<sup>1</sup>: Prosecuting Khmer Rouge Medical Practices as Crimes against Humanity

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### I. Introduction

The Communist Party of Kampuchea (CPK), also known as the Khmer Rouge, gained control of Cambodia, then called Democratic Kampuchea, in 1975 with the intent of setting in motion a “national democratic revolution” and “liberat[ing] the Kampuchean nation and the poor peasant class” from feudalism and U.S. imperialism.<sup>2</sup> Their pure socialist revolution was based on three strategic premises— independence, sovereignty and self-reliance<sup>3</sup>—which could only be achieved by throwing off the chains of colonialism and starting life anew at “Year Zero.”<sup>4</sup> From the beginning of their dictatorial reign, the Khmer Rouge implemented severe socialist policies intended to completely restructure Cambodian society. The Party Center, known as *Angkar* (“The Organization”) believed “the party leading the revolution had to be a party of the working class”<sup>5</sup>; as a result, the capitalist and intellectual oppressors of the Kampuchean people—those with medical, legal,

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<sup>1</sup> GENOCIDE IN CAMBODIA: DOCUMENTS FROM THE TRIAL OF POL POT AND IENG SARY, 294 (Howard J. De Nike, John Quigley & Kenneth J. Robinson eds., 2000) [hereinafter GENOCIDE IN CAMBODIA] (explaining that these words formed a famous slogan the Khmer Rouge used to describe the choice between providing medical care and nutrition to the population or letting them die. Translated from the Khmer: *Touk Ka Min Cham Nenh, Dak Chenh Ka Min Khat*); see also ELIZABETH BECKER, WHEN THE WAR WAS OVER: CAMBODIA AND THE KHMER ROUGE REVOLUTION, 249 (rev. ed. 1998) (Translated from the Khmer as “if you keep this man there is no profit, if he goes there is no loss.”).

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<sup>2</sup> Nuon Chea, Deputy Secretary of the Communist Party of Kampuchea, Statement of the Communist Party of Kampuchea to the Communist Workers’ Party of Denmark (July 30-31, 1978), in Documentation Center of Cambodia Archives Document No. D13311 (remarks translated into English by Ngo Pin, the official interpreter of Democratic Kampuchea).

<sup>3</sup> *Id.*

<sup>4</sup> See, e.g., FRANCOIS PONCHAUD, CAMBODIA: YEAR ZERO (1978) (After the Khmer Rouge takeover of Phnom Penh in April 1975, the regime erased all vestiges of life under previous regimes and used the term “Year Zero” to signify the completeness of their new revolutionary beginning.).

<sup>5</sup> Nuon Chea, *supra* note 2.

financial and academic training—had to be eliminated and replaced with true revolutionaries from the peasantry.<sup>6</sup> The population was then divided into two categories: “old people” and “new people.” “Old people” (also known as “base people”) had lived in Khmer Rouge-controlled areas during the war and were therefore favored by the new regime, while “new people” (also known as “April 17 people”) had lived in the cities and were “liberated” from their Western ties by the Khmer Rouge’s triumphant march into Phnom Penh on April 17, 1975.<sup>7</sup> Emphasizing self-sufficiency and independence from foreign influence above all else, the Khmer Rouge eradicated modern technology, machinery, education and health systems in favor of a return to an agrarian society based solely on the people’s physical labor.

The deleterious effects of the Khmer Rouge’s push for “The Super Great Leap Forward” (*moha loot phloh moha oschar*)<sup>8</sup> were felt deeply in Cambodia’s medical sector, which was decimated by the regime’s policies in two major ways. First, Western-style medical facilities and scientific medicine were prohibited throughout the country. Hospitals were stripped bare of medical equipment and shut down; the trained medical staff working in them were executed or evacuated to the countryside to work in agricultural communes. Child medics, most of whom were illiterate and had received no medical training, replaced doctors and nurses as the country’s primary care givers. The use of scientifically-proven medication to treat illness and disease was banned, as it was seen as a Western invention and therefore anathema to the Khmer Rouge’s policy of self-reliance; instead, child medics created home-made remedies from plants and other natural compounds. Offers of medicine and food from international organizations and foreign governments were also initially denied

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<sup>6</sup> *Id.*

<sup>7</sup> See, e.g., BECKER, *supra* note 1, at 202; see also Case 002 Closing Order, Case No. 002/19-09-2007-ECCC-OCIJ, ¶ 227 (Office of the Co-Investigating Judges, Sept. 15, 2010) [hereinafter Case 002 Closing Order].

<sup>8</sup> DAVID P. CHANDLER, BEN KIERNAN & CHANTHOU BOUA, POL POT PLANS THE FUTURE: CONFIDENTIAL LEADERSHIP DOCUMENTS FROM DEMOCRATIC KAMPUCHEA, 1976-1977, 11 (1988).

as “the Khmer Rouge were wedded to the notion of ‘self-sufficiency’ and convinced that those offers were simply means for foreign powers to manipulate and subvert countries like Cambodia.”<sup>9</sup>

Second, the Khmer Rouge leadership approved of several types of medical experimentation on living human subjects that often resulted in their death. The use of home-made remedies to treat common illnesses and injuries was by its nature experimental, as the compounds were not scientifically tested and dosages were not regulated. Khmer Rouge officials also ordered experimental surgeries to be conducted by child medics on unwilling patients for the study of human anatomy and the removal of certain organs to be used in home-made remedies. Finally, medical experiments were conducted on prisoners in Khmer Rouge detention facilities as a method of torture and of extracting blood for use in transfusions for injured military cadre.

Those who suffered most from the destruction of the healthcare system in Democratic Kampuchea were the very people on whose behalf the Khmer Rouge purported to launch their revolution: the urban working class and peasant farmers in the countryside. As many as two million people are believed to have died during the Khmer Rouge era (April 1975 to January 1979), amounting to nearly one-third of the Cambodian population.<sup>10</sup> Between 500,000 and one million Cambodians were

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<sup>9</sup> BECKER, *supra* note 1, at 170. (As discussed in Part IIe below, the Khmer Rouge leadership eventually began importing some types of Western-style medication, particularly for the treatment of malaria, when it became clear that their policy of using only home-made remedies was causing the death of their workforce on a massive scale.)

<sup>10</sup> STEPHEN HEDER WITH BRIAN D. TITTEMORE, SEVEN CANDIDATES FOR PROSECUTION: ACCOUNTABILITY FOR THE CRIMES OF THE KHMER ROUGE 7 (2001); *see also* Ben Kiernan, *The Demography of Genocide in Southeast Asia: The Death Tolls in Cambodia, 1975-79 and East Timor, 1975-80*, 35:4 CRITICAL ASIAN STUDIES 585, 586-87 (2003) (Kiernan puts the death toll between 1.671 and 1.871 million people, or 21 to 24 percent of the population.).

apparently executed outright; the others who died did so primarily from starvation, disease and the medical policies and practices of the Khmer Rouge.<sup>11</sup>

The denial of medical care and medical experimentation in Democratic Kampuchea were not the ad-hoc result of the confusion and chaos that beset any country following a civil war; Khmer Rouge officials at the highest levels knowingly implemented these medical policies as part of their larger strategy to make Democratic Kampuchea self-sufficient and independent. Pol Pot, the regime's senior-most leader, mandated the use of home-made remedies rather than scientifically-tested medication at a meeting of top Khmer Rouge officials, saying: "We have to establish a research team to do research and conduct experiments on traditional drugs. Even though we do not have proper formulas, we can still produce them. We are practicing self-reliance in medicine."<sup>12</sup> Nuon Chea, the regime's second-in-command, also spoke publicly about the need for medical care in Democratic Kampuchea to reflect the regime's revolutionary goals; to the Party, a potential medic's devotion to Party ideology was more important than his medical training or ability.<sup>13</sup> These directives by the two most powerful leaders within the Khmer Rouge regime—made to other Party officials and in public speeches—as well as other comments detailed below show that the decision to revolutionize medical care and conduct medical experiments was made knowingly and intentionally at the Party Center and disseminated to lower level cadre for implementation.

The individuals most responsible for drafting the CPK's medical policies, including Pol Pot and Nuon Chea, were those that comprised the Party Center and its affiliated committees. According to the Statute adopted at the CPK Congress meeting

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<sup>11</sup> HEDER, *supra* note 10.

<sup>12</sup> Sokhym Em, '*Rabbit Dropping' Medicine*, 30 SEARCHING FOR THE TRUTH, 22 (June 2002) [hereinafter Sokhym, '*Rabbit Dropping' Medicine*]

<sup>13</sup> Sokhym Em, '*Female Patients*', 33 SEARCHING FOR THE TRUTH 25, 26 (Sept. 2002) [hereinafter Sokhym, '*Female Patients*'] (Interview with Matt Ly).

in January 1976, the Party’s “highest leading body” was its Central Committee,<sup>14</sup> which was tasked with

‘implementation of the Party’s lines . . . throughout the country,’ ‘giving instructions to all’ its subordinate ‘Zone, Sector and Municipal Organizations and to the Party organs taking responsibility for various nation-wide departments,’ and ‘administering and deploying cadre and Party members within the Party as a whole . . . while maintaining a clear and constant grasp on their biographies and political, ideological and organizational stances and constantly educating and indoctrinating them in terms of politics, ideology and organization.’<sup>15</sup>

The Central Committee was further divided into sub-committees, the most important of which was the Standing Committee.<sup>16</sup> Several top Khmer Rouge leaders later admitted to the Standing Committee’s *de facto* role as the “uppermost leadership body” in the country.<sup>17</sup> An October 1975 Standing Committee meeting noted that it would “‘keep track’ of the implementation of the Party line by the various departments subordinated to it,”<sup>18</sup> implying that all major Party decisions were approved by the members of the Standing Committee.

Three of the four senior CPK leaders currently on trial in Case 002 at the Extraordinary Chambers in the Courts of Cambodia (ECCC) (the Accused)—Nuon Chea, Ieng Sary and Khieu Samphan—held leadership roles in the Central Committee and/or Standing Committee during the Khmer Rouge era. Nuon Chea, known as “Brother Number Two” in the Khmer Rouge leadership hierarchy behind Pol Pot, was the Deputy Secretary of the Central Committee from 1960 onward.<sup>19</sup> He was also the Chairman of the Standing Committee, where he was placed in charge of “Party

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<sup>14</sup> HEDER, *supra* note 10, at 42.

<sup>15</sup> *Id.*; see also Case 002 Closing Order, *supra* note 7, ¶ 37.

<sup>16</sup> HEDER, *supra* note 10, at 43 (Although the Statutes adopted at the CPK Congress in January 1976 do not mention the existence of the Standing Committee, it is “verified by many internal documents dating to the time bracketing the January 1976 Congress.”); see also Case 002 Closing Order, *supra* note 7, ¶ 41.

<sup>17</sup> HEDER, *supra* note 10, at 43

<sup>18</sup> Gathering of the Standing [Committee], 9 October 1975, *quoted in* HEDER, *supra* note 10, at 44.

<sup>19</sup> HEDER, *supra* note 10, at 42; see also BECKER, *supra* note 1, at 173.

work, social welfare, culture, propaganda and formal education;”<sup>20</sup> these responsibilities likely included oversight of the country’s medical care systems. Ieng Sary was a member of both the Central Committee and the Standing Committee and was placed in charge of Party and State foreign affairs.<sup>21</sup> Khieu Samphan joined the Central Committee in 1971 as an alternate member, and had become a full member by the time of the CPK Congress in January 1976.<sup>22</sup> That same year Khieu Samphan publically proclaimed his role as Chairman of the Democratic Kampuchea State Presidium, a role that, though largely ceremonial, allowed him to become a public spokesman for the regime’s policies.<sup>23</sup> In 1977, Khieu Samphan was promoted to Chairman of “Office 870,” which operated as a cabinet for the CPK Central Committee.<sup>24</sup>

It is difficult to discern which Central and Standing Committee members had ultimate decision-making power because the CPK governing Statute states that “the CPK was to be lead by the system of ‘*collective leadership*’ and the principle of ‘*democratic centralism*.’”<sup>25</sup> This meant that individual Committee members did not have the authority to make decisions on their own, but had to act in unity with the other members.<sup>26</sup> As a result, progress reports sent to the Committees from Zone commanders and other mid-level cadres were usually addressed to the Committees as a whole rather than any specific individual.

According to Cambodia scholar Stephen Heder, however, the reports do suggest “that both Nuon Chea and Ieng Sary were part of the same routine information loop that also included Pol Pot, Von Vet and Son Sen [the other

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<sup>20</sup> HEDER, *supra* note 10, at 44.

<sup>21</sup> *Id.*; see also BECKER, *supra* note 1, at 173.

<sup>22</sup> HEDER, *supra* note 10, at 80.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Case 002 Closing order, *supra* note 7, ¶ 34 (emphasis in original).

<sup>26</sup> *Id.*

members of the Standing Committee]. At the very least, any one reading these reports would be on notice that serious crimes were being committed.”<sup>27</sup> Khieu Samphan, as a full member of the Central Committee, was also “privy to the policies originating from that body.”<sup>28</sup> Furthermore, as Chairman of Office 870, he had “the duty ‘to keep track of the implementation’ of the Standing Committee’s policy decisions. In this capacity, Khieu Samphan would have become aware of the Standing Committee’s . . . decisions.”<sup>29</sup> There is little doubt, therefore, that Noun Chea, Ieng Sary and Khieu Samphan directly participated in or had knowledge of decisions made by the Central and Standing Committees with regard to the denial of medical care and medical experimentation in Democratic Kampuchea.

Ieng Thirith, the fourth senior Khmer Rouge leader to be indicted by the Co-Investigating Judges at the ECCC, was the Minister of Social Affairs and Action under the CPK regime. Though she was not part of the Central or Standing Committees, witnesses state that she attended Central Committee meetings.<sup>30</sup> Ieng Thirith was responsible for implementing the medical policies and food rationing that led to illness and death for hundreds of thousands of Cambodians.<sup>31</sup> Additionally, she was sent by Pol Pot to investigate and report on health issues in the Northwest Zone and therefore knew that many Cambodians were starving and ill during the regime’s reign.<sup>32</sup>

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<sup>27</sup> HEDER, *supra* note 10, at 58.

<sup>28</sup> *Id.* at 80.

<sup>29</sup> *Id.*

<sup>30</sup> Case 002 Closing Order, *supra* note 7, ¶ 38.

<sup>31</sup> BECKER, *supra* note 1, at 171.

<sup>32</sup> See JAYA RAMJI-NOGALES AND ANNE HEINDEL, GENOCIDE: WHO ARE THE SENIOR LEADERS TO BE JUDGED? THE IMPORTANCE OF CASE 002 6 (2010); BECKER, *supra* note 1, at 236.

In early February 2011, Ieng Thirith's attorneys raised concerns about their client's mental health and fitness to stand trial,<sup>33</sup> and the ECCC Trial Chamber scheduled hearings in August 2011 to consider health examinations conducted for Ieng Thirith and Nuon Chea. A Court spokesman said the health examinations "confirmed that further expert assessment of Ieng Thirith's mental fitness to stand trial was needed."<sup>34</sup> In November 2011, the ECCC Trial Chamber found Ieng Thirith unfit to stand trial and ordered her unconditionally released. The Co-Prosecutors immediately appealed this decision to the ECCC Supreme Court Chamber,<sup>35</sup> and in December 2011, the Supreme Court granted the appeal, ordering Ieng Thirith to continue medical treatment in detention and to be re-evaluated in six months time.<sup>36</sup> Though it is possible or even likely, that Ieng Thirith will not stand trial before the ECCC, the sections below will include analysis of her role in promulgating medical policies under the CPK regime and her potential criminal liability for that role.

This memo will describe in detail the two major results of the Khmer Rouge's policies of independence and self-sufficiency with respect to the country's medical sector—the denial of access to proper medical care and medical experimentation on unwilling human subjects. It will then examine the role of the Four Accused in creating and implementing these policies. In the final section, the memo will analyze the possibility of prosecuting the Four Accused at the ECCC for the suffering and death that resulted from the regime's medical policies.

## **II. Denial of Access to Medical Care and Medicine**

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<sup>33</sup> Bridget Di Certo, *Ieng Thirith hospital-bound*, PHNOM PENH POST, Dec. 14, 2011, available at <http://www.phnompenhpost.com/index.php/2011121453352/National-news/ieng-thirith-hospital-bound.html>.

<sup>34</sup> Thomas Miller, *Ieng Thirith Needs Exam*, PHNOM PENH POST, Aug. 18, 2011, available at <http://www.phnompenhpost.com/index.php/2011081851111/National-news/ieng-thirith-needs-exam.html>.

<sup>35</sup> *Prosecutor v. Ieng Thirith*, Case No. 002/19-09-2007-ECCC-TC, Immediate Appeal Against Trial Chamber Decision to Order the Release of the Accused Ieng Thirith, Nov. 18, 2011.

<sup>36</sup> *Prosecutor v. Ieng Thirith*, Case No. 002/19-09-2007-ECCC-TC/SC(09), Decision on Immediate Appeal against the Trial Chamber's Order to Release the Accused Ieng Thirith, 24 (Dec. 13, 2011).

## **A. Evacuation of Hospitals and Destruction of Healthcare Infrastructure**

The Khmer Rouge's revolutionary restructuring of the country's healthcare sector began with the evacuation of existing hospitals and the destruction of modern medical equipment and technology. One of the "eight provisions" the Khmer Rouge formulated for turning Democratic Kampuchea into a utopia stated "Angkar is obliged to abolish all hospitals and their staff left by previous regimes with a view to establishing hospitals of a new style with a socialist character—revolutionary pureness and cleanliness."<sup>37</sup> In compliance with the provision, when the Khmer Rouge took control of Democratic Kampuchea in April 1975, patients, doctors and nurses were removed from hospitals in Phnom Penh and the provinces and forced to relocate to Khmer Rouge-controlled communes in the countryside.<sup>38</sup> Some of the patients were recovering from potentially lethal diseases and injuries but were forced to join the thousands upon thousands of "new people" being evacuated from the cities and in to communes.<sup>39</sup> Even pregnant women in labor were required to leave the hospital and begin the march to the provinces.<sup>40</sup>

Once evacuated, the hospitals were ransacked—medical instruments were destroyed or left to rust; bedding and sanitary equipment were removed and replaced with rudimentary beds and dirty mats; clean lavatories were replaced with latrines; and doors and windows were disassembled for their spare parts.<sup>41</sup> At the Khmer-

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<sup>37</sup> Sokhym Em, *Female Patients*, *supra* note 13, at 26.

<sup>38</sup> *See, e.g.*, KAMPUCHEA: DEATH AND REBIRTH (GERMANY, 1980) (documentary film) ("Many patients had to leave the hospital. Wounded people with their bodies covered with crusted blood, with sodden bandages who should have been changed, begged for help. But there was nobody there who could help them. Everyone tried to help themselves, to escape the terror of the [Pol Pot, Ieng Sary] clique."); *see also* Case 002 Closing Order, ¶ 225.

<sup>39</sup> HAING S. NGOR WITH ROGER WARNER, *SURVIVING THE KILLING FIELDS: THE CAMBODIAN ODYSSEY OF HAING S. NGOR* 84 (1988).

<sup>40</sup> CAROL WAGNER, *SOUL SURVIVORS: STORIES OF WOMEN AND CHILDREN IN CAMBODIA* 177-79 (2002).

<sup>41</sup> *See* GENOCIDE IN CAMBODIA:, *supra* note 1, at 332 (Hospitals that were targeted in Phnom Penh included the Revolution Hospital (formerly Calmette Hospital), the Khmer-Soviet Friendship Hospital and the January 7 Hospital).

Soviet Friendship Hospital—a gift from the Soviet Union to neutral Cambodia and at the time one of the most modern facilities in Southeast Asia—electrical generators, refrigerators for medicine, and healthcare equipment were destroyed; the operating rooms were left in ruins.<sup>42</sup> Other medical facilities, such as the former Ta Khmau psychiatric hospital in Kandal Province (also known as the Prek Tnaot Asylum) were turned into detention centers.<sup>43</sup>

In addition to hospitals, hubs of medical knowledge were destroyed. The library of the Medical Faculty in Phnom Penh, which contained medical manuscripts, books and periodicals, was raided and its collection set on fire. The Phnom Penh Medical School was emptied of its students, who were evacuated from the city,<sup>44</sup> and its laboratory equipment, which was thrown onto the sidewalks.<sup>45</sup> Other valuable medical technology was moved to unattended warehouses, where it was allowed to fall into disrepair.<sup>46</sup> In a few short days, the medical prowess of Cambodia's finest doctors and the modern technology of its largest hospitals were obliterated, to be replaced by the Khmer Rouge's self-sufficient revolutionary medical system.

### **B. Purges of Trained Medical Staff**

When the Khmer Rouge fell from power in January 1979, less than fifty medical doctors had survived the regime's purges of urban dwellers and

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<sup>42</sup> See KAMPUCHEA: DEATH AND REBIRTH. (The film shows footage of the Khmer-Soviet Friendship Hospital abandoned and destroyed. The narrator described what they saw: "We find the installations smashed with every sign of malicious destruction. The dull enmity of the Pol Pot clique for the Soviet Union was here transferred to a medical installation, once one of the most modern in Southeast Asia.")

<sup>43</sup> Pong Rasy Pheng, *Place of Asylum Transformed into Incarceration Center*, 9 SEARCHING FOR THE TRUTH, 16 (Sept. 2000) (describing what the Khmer Rouge did when they arrived at the asylum center. They expelled the staff and opened the doors so that the patients, many of whom were suffering from mental illness, could escape. The building was then outfitted with metal foot and handcuffs chained to the walls and floors).

<sup>44</sup> KAMPUCHEA: DEATH AND REBIRTH, *supra* note 42.

<sup>45</sup> GENOCIDE IN CAMBODIA, *supra* note 1, at 332.

<sup>46</sup> *Id.*

intellectuals.<sup>47</sup> Trained medical staff fell victim to the Khmer Rouge's policy of replacing "new people" with "old people," as allegiance to the Party was valued more highly than medical qualifications or experience. According to Nuon Chea, "Revolutionary medics have to be from the worker-farmer class because it is the biggest and most progressive class . . . *The party needs stance more than ability in building the country.*"<sup>48</sup>

The initial purges of the country's trained medical staff occurred on April 17, 1975, when the Khmer Rouge captured Phnom Penh. Soldiers ordered the evacuation of the city's hospitals, and physicians, nurses, midwives and other medical personnel were forced to leave their posts, sometimes in the midst of operations or other treatment.<sup>49</sup> They were driven out of Phnom Penh along with the rest of the "new people" and made to march toward the "liberated zones" in the countryside.<sup>50</sup> Doctors who were recognized by Khmer Rouge cadre on the march were arrested and disappeared.<sup>51</sup>

The evacuation and elimination of trained doctors and nurses was not confined to Phnom Penh; scenes from that city's takeover were replayed throughout the country as doctors were stripped of their credentials and forced to become physical laborers for the Khmer Rouge. The town of Battambang was evacuated on

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<sup>47</sup> See WAGNER, *supra* note 40, at 14, 96 ("After the Khmer Rouge regime there were only forty doctors left in the country. Nearly all the older doctors had died, so we had no specialists or experts. There wasn't a single psychiatrist in Cambodia. Only eighteen out of the fifty medical students in my class survived, and I was the only woman."); *Coping with the Psychological Trauma of the Khmer Rouge* (Documentation Ctr. of Cambodia) 4, May 29, 2007 ("In the early 1970s, Cambodia had an estimated 450 qualified doctors; only 43 of them survived the Khmer Rouge regime. Most of the educated people in the country had either died during the regime or fled the country in its aftermath.")

<sup>48</sup> Sokhym, *Female Patients*, *supra* note 13 (emphasis added); see also Sokhym Em, *Revolutionary Female Medical Staff in Tram Kak District*, 34 *Searching for the Truth*, 24, 25 (Oct. 2002) [hereinafter Sokhym, *Revolutionary Female Medical Staff*] ("A letter of Office 870 [Office of the Central Committee] and a letter by comrade Son Sen, called Khieu, revealed that 'a medical staff has to have good political attitude and social class.'")

<sup>49</sup> See GENOCIDE IN CAMBODIA, *supra* note 1, at 325; NGOR, *supra* note 39, at 77-79.

<sup>50</sup> See GENOCIDE IN CAMBODIA, *supra* note 1, at 325.

<sup>51</sup> *Id.* at 326 (listing names of doctors that had been arrested, disappeared and/or murdered during the evacuation of Phnom Penh).

April 25, 1975, and trained medical staff there were removed from hospitals and clinics.<sup>52</sup> The day before the evacuation, the Khmer Rouge leadership in the area called a meeting of the Battambang provincial hospital staff and declared, “The peasant class is a pioneering class, capable of leading the country in all sectors . . . *Angkar* announces the dismissal of the present hospital director and requests that you elect a new hospital director from among janitors and cleaners because these people are also from the poor peasant class.”<sup>53</sup> The order from *Angkar* was carried out, and a new director was chosen from the janitorial staff. The “revolutionary physicians” that replaced the hospital’s old staff were required to undergo only one week of medical training.<sup>54</sup>

When the trained medical staff had been purged from the country’s hospitals and clinics, young children who had no formal education or relations to enemies of the regime (“clean cut” children)<sup>55</sup> were routinely chosen by the Khmer Rouge to become Democratic Kampuchea’s new revolutionary medical staff.<sup>56</sup> Girls between the ages of eleven and fifteen, who had never studied medicine and were often illiterate, were particularly susceptible to being chosen to work as nurses at Khmer Rouge hospitals.<sup>57</sup> “April 17” women, however, were rarely given jobs as nurses because Pol Pot mandated in 1978 that healthcare not be delivered in a capitalist or Westernized fashion.<sup>58</sup> In fact, many young girls wanted to become nurses, as the Khmer Rouge regarded the health sector as second in importance only to national

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<sup>52</sup> Michelle Vachon, *Revolutionary Medicine*, CAMBODIA DAILY, Apr. 24-25, 2010 at 6.

<sup>53</sup> *Id.* (as told by Dr. Hun Chhunly).

<sup>54</sup> *Id.*

<sup>55</sup> Keo Kanitha Kim, *Clean-Cut Children, A Failure of the Revolution*, 21 SEARCHING FOR THE TRUTH 20, 20 (Sept. 2001).

<sup>56</sup> *Id.* (“Only children can purely serve the revolution and eliminate reactionism, since they are young, obedient, loyal and active,” said Ieng Thirith, Minister of Culture and Social Affairs, in a Council of Ministers meeting on May 31, 1976.”).

<sup>57</sup> See GENOCIDE IN CAMBODIA, *supra* note 1, at 328; Sokhym, *Female Patients*, *supra* note 13, at 26; Sokhym, *Revolutionary Female Medical Staff*, *supra* note 48, at 25; Case 002 Closing Order, *supra* note 7, ¶ 313.

<sup>58</sup> Sokhym, *Revolutionary Female Medical Staff*, *supra* note 48, at 25-26.

defense.<sup>59</sup> Additionally, medical staff were relatively insulated from the physical labor of planting rice and the oppression of the local commune authority.<sup>60</sup>

Training for these young women (and sometimes men) lasted at most three months and as little as several days,<sup>61</sup> after which period they were considered to be professional physicians and nurses.<sup>62</sup> Medical instruction consisted mostly of teaching the children how to recognize different types of home-made medicines and how to give injections.<sup>63</sup> Because most nurses and physicians under the Khmer Rouge were illiterate, many of them could only recognize medicine by its shape and color<sup>64</sup> and could not understand medical documents (which were often written in French) or read or write prescriptions.<sup>65</sup> Injections were practiced on banana trees and cushions.<sup>66</sup>

The brevity of the medical training, coupled with the medical staff's illiteracy, produced disastrous results. Though it appears that many of the medics did indeed want to help the sick and injured, their rudimentary training led them to make lethal mistakes.<sup>67</sup> The same medication and dosages were given to all patients regardless of their illness.<sup>68</sup> Injections were either given improperly, filled with the incorrect

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<sup>59</sup> *Id.* at 25. (“The Khmer Rouge had a slogan ‘daughters should grow up to be medical staff, while sons, to be soldiers.’”).

<sup>60</sup> *Id.*

<sup>61</sup> “Meng Sokhom: A Khmer Rouge Medical Staff Cadre, 44 SEARCHING FOR THE TRUTH, 24 (2003) (Khmer Edition; Translated from the Khmer by Suyheang Kry of the Documentation Center of Cambodia) (Meng Sokhom received only eight days of training before beginning work at a hospital as a nurse).

<sup>62</sup> See Sokhym, *Female Patients*, *supra* note 13; Sokhym, *Revolutionary Female Medical Staff*, *supra* note 48, at 27; Case 002 Closing Order, *supra* note 7, ¶ 313.

<sup>63</sup> See Keo, *supra* note 55; Sokhym, *Female Patients*, *supra* note 13.

<sup>64</sup> See Keo, *supra* note 55; Vachon, *supra* note 52, at 7 (“In Battambang town, [Dr. Chhunly] writes, the civilian hospital staff was illiterate or barely literate and distributed only drugs they made themselves and had named “rabbit stool.”).

<sup>65</sup> Sokhym, *Revolutionary Female Medical Staff*, *supra* note 48, at 27.

<sup>66</sup> Keo, *supra* note 55.

<sup>67</sup> Sokhym, *Female Patients*, *supra* note 13.

<sup>68</sup> See *id.*; GENOCIDE IN CAMBODIA, *supra* note 1, at 330 (“Most often, a given medicine was a ‘cocktail for a hundred diseases.’”).

medication or filled with a liquid that was mistaken for medication.<sup>69</sup> Because they were not trained to recognize the symptoms of various diseases, nor were there technical instruments to guide their examinations, the Khmer Rouge medics were only able to effectively treat and diagnose obvious illnesses like wounds, diarrhea, cholera and mild fevers.<sup>70</sup> “Hidden” diseases relating to the womb, bowel or stomach—which could not be felt with the hand<sup>71</sup> or seen with the eye—went undiagnosed, and patients who complained of these illnesses were accused of pretending to be sick or having a “consciousness” disease.<sup>72</sup> Patients whose diseases were too serious to treat were simply left to die.<sup>73</sup>

### C. Reliance on Home-Made Medication

The Khmer Rouge’s healthcare revolution also included a prohibition on the use by medical staff of scientifically-tested medication to treat illness and injury.<sup>74</sup> *Angkar* declared, “[w]e do not rely on technology. We develop our country through revolutionary attitude. Things that are not revolutionary are not to be done. Socialist medical staff must eliminate rubbish from the old society and modern medication.”<sup>75</sup> As part of *Angkar*’s emphasis on self-reliance, Pol Pot officially mandated that all medicine used in the country should be manufactured by Khmer Rouge cadre in their

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<sup>69</sup> See Sokhym, *Female Patients*, *supra* note 13 (“In 1975 Kim An, a resident of Toul Tbeng village, Cheang Torng subdistrict, almost died because of an injection. Immediately after the medic removed the syringe, she experienced a seizure and became unconscious. He had apparently injected Kim An with chicken soup, which had been placed close to the medicine.”); NGOR, *supra* note 39, at 147-49 (discussing attempt by author, a trained physician, to treat a sick baby who was instead given an injection of excessive amounts of Vitamin B by Khmer Rouge medics and subsequently died).

<sup>70</sup> Sokhym, *Female Patients*, *supra* note 13.

<sup>71</sup> *Id.* at 27.

<sup>72</sup> *Id.* at 26, 27.

<sup>73</sup> Sokhym, *Revolutionary Female Medical Staff*, *supra* note 48, at 27.

<sup>74</sup> See, e.g., *id.* at 26 (“Patients received only tablets produced by Angkar.”).

<sup>75</sup> Sokhym Em, *Rabbit Dropping’ Medicine*, *supra* note 12, at 22.

hospitals and clinics: “[w]e have to establish a research team to do research and conduct experiments on traditional drugs. *Even though we do not have proper formulas, we can still produce them. We are practicing self-reliance in medicine.*”<sup>76</sup>

The CPK Ministry of Health conducted training sessions for Khmer Rouge medical cadre—mostly female medics—to teach them how to manufacture remedies for common illnesses such as fevers, headaches, stomachaches and faintness.<sup>77</sup> This home-made ‘medicine’ consisted of plant roots, tree bark, the sap of the tropical thnung tree, and other “natural” compounds.<sup>78</sup> It was known throughout the country as “rabbit dropping” or “rabbit pellet” medicine (*achtunsai*) because of its appearance and ineffectiveness. Made without scientific testing, rabbit pellets more often killed patients or made them worse than healed them,<sup>79</sup> especially because they were given to all sick patients regardless of their symptoms.<sup>80</sup>

The medical staff conscripted to make these compounds knew they were ineffective but felt forced to obey *Angkar’s* commands.<sup>81</sup> Similarly, many patients who were given rabbit pellets knew the medicine was either ineffective or dangerous but had no choice not to take them.<sup>82</sup> Some individuals were so hungry that they ate

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<sup>76</sup> *Id.* (emphasis added); see also Sokhym, *Female Patients*, *supra* note 13 (“The few medicines [the local Khmer Rouge] hospital possessed were produced by the medical staff themselves because Khmer Rouge leaders rejected western medical science.”).

<sup>77</sup> Sokhym, *‘Rabbit Dropping’ Medicine*, *supra* note 12.

<sup>78</sup> *Id.* See also Case 002 Closing Order, *supra* note 7, ¶ 313.

<sup>79</sup> Sokhym, *‘Rabbit Dropping’ Medicine*, *supra* note 12; see also Lakhena Tat, *The Struggling of a 6 January Nurse*, 2d. Quarter, *SEARCHING FOR THE TRUTH* 8, 8 (2008); GENOCIDE IN CAMBODIA, *supra* note 1, at 330 (“Bark, roots, and leaves of medicinal herbs cut into fine pieces were dried in the sun on a mat where poultry, pigs, children, and [traditional healers]... might walk on them. Preparations were made without any measurement of dosage. Most of those medicine-making houses had no scale, no test tubes or any other measuring instruments.”).

<sup>80</sup> See, e.g., Sokhym, *Female Patients*, *supra* note 13; GENOCIDE IN CAMBODIA, *supra* note 1, at 330; Vachon, *supra* note 52, at 7; Case 002 Closing Order, *supra* note 7, ¶¶ 342, 360.

<sup>81</sup> Sokhym, *‘Rabbit Dropping’ Medicine*, *supra* note 12.

<sup>82</sup> See *id.* (“Comrade Krin, the chief of a hospital in Dei Chhnang, Western Zone, swallowed three tablets of rabbit dropping medicine, one after another, trying to make a quick recovery from malaria. But he died immediately after taking them. At a hospital in Kampong Cham, three pregnant women miscarried soon after taking rabbit dropping medicine. Oeun almost lost her life in a hospital in Prey Lvea because of rabbit dropping medicine. Each time she took them, she was “poisoned,” became dizzy, and lost her ability to reason.”).

rabbit pellets for any potential nutritional value they had, despite the possible adverse effects the pills could have on the individuals' health.<sup>83</sup>

In addition to manufacturing home-made rabbit pellets, the Khmer Rouge created liquid concoctions that were used in injections for sick and wounded patients. The "natural" compounds used in the rabbit pellets were turned into liquid and injected into patients' veins and hips.<sup>84</sup> As one former doctor purged by the Khmer Rouge recalled, "They also had serum for injections, sweet and salty water stored in soft drink bottles covered with plastic bags. That water frightened me as did their injections of coconut milk."<sup>85</sup> Another former doctor explained that certain kinds of fresh coconut juice can have healing qualities in emergency situations, but Khmer Rouge medics were not trained to know which coconuts had medicinal uses, which ones were fresh, or how to cut them without contaminating them. Coconut juice-injections were therefore often lethal.<sup>86</sup> Because many Khmer Rouge medics were illiterate, there were additional problems of injecting patients with what the medics thought was home-made medicine but was actually unrelated liquid left near the injection needles. Some patients were injected with such things as water, chicken soup and palm juice for this reason.<sup>87</sup>

Separate from the illnesses and deaths caused by the contents of the injections were those caused by the method with which injections were given. Without a steady supply of modern medical equipment, the injection serums were kept in old soda bottles that were not properly sterilized.<sup>88</sup> Khmer Rouge medics used the same few syringes and blunt needles over and over again. Before an injection, nurses wiped the needle "clean" with their fingers; a needle was sometimes used for multiple injections

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<sup>83</sup> See NGOR, *supra* note 39, at 256.

<sup>84</sup> See Keo, *supra* note 55.

<sup>85</sup> WAGNER, *supra* note 40, at 99.

<sup>86</sup> See NGOR, *supra* note 39, at 116-17.

<sup>87</sup> See Sokhym, *Female Patients*, *supra* note 13.

<sup>88</sup> See GENOCIDE IN CAMBODIA, *supra* note 1, at 328; NGOR, *supra* note 39, at 255.

before it was “disinfected” by the nurses’ fingers.<sup>89</sup> As a result, the infection rate after injections reached 90 percent in some remote villages, and sick individuals became fearful of treatment by injection.<sup>90</sup>

#### **D. Availability of Western Medicine to Khmer Rouge Leadership**

While the vast majority of Cambodian citizens living under the Khmer Rouge regime suffered and died from treatable illnesses because they were denied medical care or improperly treated, the Khmer Rouge leadership and cadre had access to modern medical technology and scientifically-tested medicine. It appears that there were at least three tiers of medical care available in Democratic Kampuchea under the Khmer Rouge. At the highest level, the Party Center and other top cadre had access to reasonably modern Western-style medical care in the country’s major cities.<sup>91</sup> The P-17 Hospital in Phnom Penh had modern medical equipment and instruments that had been imported from abroad. Ieng Thirith and her husband received medical checkups and treatment there, and between 1977 and 1978, Khieu Samphan and Nuon Chea also visited the hospital several times.<sup>92</sup> Outside the cities, where such modern medical equipment was not readily available, the best scientific medicine was still reserved for top Khmer Rouge cadre. Chinese-made medications such as aspirin, sulfaguanidine, anti-malarials, chloramphenicol and tetracycline were regularly provided to top officials.<sup>93</sup>

At the next level, lower-ranking Khmer Rouge cadre and “old people” (“base people”) could seek treatment in smaller regional and military hospitals that

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<sup>89</sup> See GENOCIDE IN CAMBODIA, *supra* note 1, at 328; NGOR, *supra* note 39, at 255.

<sup>90</sup> See GENOCIDE IN CAMBODIA, *supra* note 1, at 329; WAGNER, *supra* note 40, at 152 (relating the story of ‘Bopha,’ a woman who survived the Khmer Rouge regime’s medical treatment: “Once I became very sick with a high fever, and I ran away from the nurse because I didn’t want to get an injection.”).

<sup>91</sup> See NGOR, *supra* note 39, at 255; GENOCIDE IN CAMBODIA, *supra* note 1, at 294 (“It is true that some scientific medicines were used, but they were reserved exclusively for the rulers.”).

<sup>92</sup> Long Dany, “Batt Nan: The Former Nurse at Hospital P-17 Talking about Ieng Thirith,” 89 SEARCHING FOR THE TRUTH, 26 (2007) (Khmer Edition; Translated from the Khmer by Suyheang Kry of the Documentation Center of Cambodia).

<sup>93</sup> GENOCIDE IN CAMBODIA, *supra* note 1, at 328.

sometimes had access to scientific medicine and that might have been staffed by medical personnel trained prior to the Khmer Rouge takeover in 1975.<sup>94</sup> “Old people” were better able to avoid serious illness and death than the “new people” because they had fought with the Khmer Rouge during the civil war and therefore were favored by *Angkar*. Khmer Rouge medics, who were also “old people,” oftentimes tried to give their compatriots better than average medical treatment and reserved any scientific medication they had for other “old people” and the Khmer Rouge cadres.<sup>95</sup>

“New people” and other worker-peasants were resigned to treatment at clinics staffed by young children and offering only home-made rabbit pellets and injections.<sup>96</sup> Because they were unaccustomed to agricultural work and poor food rations, the “new people” fell prey to disease and malnutrition far more easily than old people. Yet their status as “new people” made them “practically ineligible for medicine that could help them, [and] they died from diarrhea, dysentery, malaria, and typhoid.”<sup>97</sup> “New people” were also often accused of having “consciousness illnesses” rather than actual medical ailments (usually because their illnesses were not visible and therefore unable to be diagnosed by the child medics) and they were denied treatment as a result.<sup>98</sup> Women especially were not allowed to seek treatment at a hospital until they were unconscious.<sup>99</sup> When “new people” were given the rare opportunity to be treated in a hospital, they received inferior treatment to the “old people” and the Khmer Rouge cadre. A Khmer Rouge medic at P-1 Hospital claimed

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<sup>94</sup> NGOR, *supra* note 39, at 255; *see also* Vachon, *supra* note 52, at 7 (“In Battambang town, [Dr. Chhunly] writes, the civilian hospital staff was illiterate or barely literate and distributed only drug they made themselves and had named “rabbit stool.” Khmer Rouge military hospitals, however, employed some staff who had been trained prior to 1975 and used proper medicine imported from China for Khmer Rouge officials and soldiers.”).

<sup>95</sup> Sokhym, *Revolutionary Female Medical Staff*, *supra* note 48, at 26.

<sup>96</sup> NGOR, *supra* note 39, at 255.

<sup>97</sup> BECKER, *supra* note 1, at 247.

<sup>98</sup> Sokhym, *Female Patients*, *supra* note 13.

<sup>99</sup> *Id.* at 27.

that the hospital treated both children whose parents were Khmer Rouge cadres and those whose parents were “new people;” the “new” children were never treated well, the medic said, and many of them died every day from treatable illnesses like tetanus, measles, small pox, tuberculosis, jaundice, fever and diarrhea.<sup>100</sup> Most of these diseases were brought on or exacerbated by neglect and lack of hygiene on the part of the nurses at the hospital.<sup>101</sup>

This tiered system of care serves as evidence of the Party Center’s knowledge that the medical services they provided to the majority of Democratic Kampuchea’s citizens were woefully inadequate. It also gives lie to the Party’s commitment to self-reliance in the medical sector, as Western-style medical equipment was available to those same individuals who forbade its use for the good of the revolution.

#### **E. Importation of Western-Style Medicine**

One of the most severe consequences of the Khmer Rouge’s push for self-reliance was the country’s isolation from the international economic community. The closure of markets, the banning of the use of currency and the prohibition on trade with other countries lead to years of severe autarky, the negative effects of which were felt most deeply by the “new people” and the worker-peasant class. In 1977, with a population on the brink of exhaustion and a full-scale war with Vietnam on the horizon, the Party Center increasingly looked to foreign capitalist countries to supply the regime with the basic items it could not produce: medicine, food and weapons.<sup>102</sup>

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<sup>100</sup> *Id.* at 28.

<sup>101</sup> *Id.*

<sup>102</sup> Nayan Chanda, *Cambodia Goes to Market*, FAR E. ECON. REVIEW, May 20, 1977 (Documentation Center of Cambodia Archives Document No. D16186); see also BEN KIERNAN, THE POL POT REGIME: RACE, POWER, AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975-79, 376 (2d. ed. 2002) [hereinafter KIERNAN, THE POL POT REGIME] (“Like the pace of other developments in Democratic Kampuchea, foreign trade picked up rapidly in early 1977.”); BECKER, *supra* note 1, at 247 (“The epidemics were so widespread that first year that the Khmer Rouge broke their golden rule of self-

In the first three months of 1977, for example, Democratic Kampuchea purchased more than HK\$16 million (US\$3.5 million) worth of foreign goods in Hong Kong from primarily British, French and American suppliers, compared with HK\$11 million worth in all of 1976.<sup>103</sup> Of this amount, HK\$1,172,346 was devoted to purchases of foreign-made medication, compared to HK\$1,635,455 during the entirety of 1976.<sup>104</sup> Most of this medication was for the treatment of malaria, which even official Cambodian media sources admitted in 1977 was seriously affecting the ability of the population to work in the rice fields.<sup>105</sup> As a result of the malaria-epidemic, “Cambodian leaders have relaxed their previous insistence on relying on home-grown herbal medicines”<sup>106</sup>; by the end of 1977, they had imported 227 tons of American DDT and 1,250 tons of DDT from a British firm in Hong Kong.<sup>107</sup> Even in 1976, Democratic Kampuchea was reported to have bought US\$1.6 million worth of DDT from an American company for anti-malarial spraying and to have accepted a small quantity of anti-malarial drugs as a gift from the American Quakers.<sup>108</sup>

### **III. Denial of Medical Care: What the Party Center Knew**

There is evidence that the Khmer Rouge leadership currently awaiting trial at the ECCC knew of the harm caused by their policy of ‘revolutionizing’ the country’s medical sector, especially the decision to replace trained medical staff with young, illiterate revolutionary medics. At one meeting of the CPK’s Central Committee attended by Pol Pot, Nuon Chea, Khieu Samphan and Ieng Thirith, a hospital chief named Sim Leanghak (alias Sei) presented a report that stated there were many

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sufficiency and asked for DDT from an American charity to help control mosquitoes carrying malaria.”).

<sup>103</sup> Chanda, *supra* note 102 (“And as invoices for purchases are submitted to the Bank of China for payment, it seems Peking is providing the finance.”).

<sup>104</sup> *Id.* (see table from the Census and Statistics Department in Hong Kong).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> KIERNAN, THE POL POT REGIME, *supra* note 102, at 382 (The cost of the DDT from the British firm could be reflected in the financial accounting of the medication Democratic Kampuchea purchased from Hong Kong in 1997).

<sup>108</sup> Chanda, *supra* note 102.

instances where the wrong drugs were provided to patients in Khmer Rouge hospitals because the nurses were illiterate.<sup>109</sup> Ieng Thirith admitted at that meeting that nurses did have a difficult time treating patients because they were uneducated<sup>110</sup> and trained in medical skills by Chinese doctors who did not speak the nurses' language.<sup>111</sup>

Ieng Thirith was also aware that at the April 17 Hospital, hundreds of Khmer Rouge medical cadre were imprisoned and executed for minor offenses against the Party (such as lack of morality and lack of responsible speech), and others were arrested for causing the deaths of patients by improper treatment.<sup>112</sup> These arrests were not ordered for the purpose of addressing poor medical treatment in the country, but rather as a way for the hospital to present a front for the Party Center that everything was functioning as it should. Ieng Thirith attended the meetings where these arrests occurred, making her privy to information about improper treatment resulting in patient deaths. Though she most likely knew, or at least should have known, that it was the Party Center's medical policies that led untrained medics to accidentally kill patients, she made no move to prevent arrests or improve the treatment available at the hospital. Throughout the country, no changes were made to retrain doctors and nurses during the Khmer Rouge's reign.

The Party Center also had knowledge of the ineffectiveness—and lethality—of the Khmer Rouge's home-made medicines. At a meeting of the Party's Standing Committee, Ieng Thirith reported on the ineffectiveness of many Khmer Rouge medicines. Pol Pot nevertheless insisted that they be used: “Ineffective or effective, these drugs have to be used so that we can learn.”<sup>113</sup> Additional evidence of the Party

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<sup>109</sup> Sokhym, *Revolutionary Female Medical Staff*, *supra* note 48, at 27.

<sup>110</sup> See Keo, *supra* note 55; Sokhym, *Revolutionary Female Medical Staff*, *supra* note 48, at 27.

<sup>111</sup> Sokhym, *Revolutionary Female Medical Staff*, *supra* note 48, at 27.

<sup>112</sup> Sokhym Em, *Criticism and Self-Criticism*, 31 SEARCHING FOR THE TRUTH 18, 18 (July 2002).

<sup>113</sup> Sokhym, *'Rabbit Dropping' Medicine*, *supra* note 12, at 23.

Center's knowledge comes from Pol Pot's directive in 1976 that Ieng Thirith visit the Northwest Zone to investigate charges of shortcomings in the health, diet and housing of the worker-peasants.<sup>114</sup> Ieng Thirith found evidence of many "problems" there:

'Conditions there were very queer.' . . . 'In Battambang I saw they [the cadre] made all the people go to the rice fields. The fields were very far away from the villages. The people had no homes and they were all very ill . . . I know the directives of the Prime Minister [Pol Pot] were that no old people, pregnant women, women nursing babies, or small children were to work in the fields. But I saw everybody in the open rice fields, in the open air and very hot sun, and many were ill with diarrhea and malaria.'<sup>115</sup>

In her report to the Party Center regarding her visit, Ieng Thirith blamed "enemy agents" for the sub-standard living conditions she witnessed rather than the Party's medical policies or its deportation of 800,000 people to the Northwestern Zone:<sup>116</sup> "Agents had got into our ranks . . . and they had got into the highest ranks. They had to behave with double faces in order to make as if they were following our line."<sup>117</sup>

Ieng Thirith was not the only Khmer Rouge leader to report to the Party Center on the deplorable living conditions most Cambodians faced. In its June 1977 report to Office 870 (the cabinet of the Central Committee), the Southwest Zone authorities vaguely admitted to problems with the people's living conditions in the various districts under their control:

[Region 25]: The people's living standard: Nowadays, the people's living condition seems to be all right. Although the living standard of the people in Kien Svay and Leuk Dek District has faced the problem, it is getting better . . . At region 33, the people's living standard seems to be all right, but if there is a problem, it will be at the sub-districts. Anyway it can be addressed. . . . The living standard and health of the people in the 4 regions [combined]: Nowadays, in Kampot, Kampong

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<sup>114</sup> BECKER, *supra* note 1, at 236. (Interview between Ieng Thirith and Elizabeth Becker).

<sup>115</sup> *Id.*

<sup>116</sup> KIERNAN, THE POL POT REGIME, *supra* note 102, at 236.

<sup>117</sup> BECKER, *supra* note 1, at 236.

Speu and Takeo Province, the people have got cholera, and some people died.<sup>118</sup>

Nhim Ros, the Second Vice President in the State Presidium, also submitted regular reports to Office 870 that contained information about people's living conditions. In one dated May 16-17, 1978, he summarized the poor living conditions that existed in all regions of the country<sup>119</sup> and then specifically mentioned his own problems with the country's lack of medical care:

I have received the telegram in which it said I was allowed to stay in hospital. My illness came as a result of changing blood pressure. Now the disease has developed to a heap [sic] pain that lasted for two or three days, making it impossible for me to sit and walk. I got ill from overwork and incessant work. There is no medical worker for treatment. There has been a young medical worker but [he/she] has just been taught how to measure blood pressure and give away medicines [to patients]. For my treatment, I will go for it when I am seriously ill because now I have much work to do especially on people's living conditions and many other works.<sup>120</sup>

From at least 1976 on, then, the Party Center knew from various sources of the deplorable health conditions its policies had created, yet no substantive steps were taken over the next three years to improve the standard of medical care available to the Cambodian people.

A third piece of evidence highlighting the Party Center's knowledge of the severity of the country's healthcare crisis can be seen in the leadership's resort to the importation of medical supplies from neighboring countries. By 1977 at the latest, the Party Center was aware of the failure of its home-made compounds to protect the country's citizens from malaria and to effectively treat those who were infected. While the DDT and anti-malarial medication imported after 1977 may have ameliorated the malaria epidemic in the country, thousands of individuals had

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<sup>118</sup> Rep. No. 10 to Office 870 of the Central Committee (June 3, 1977) *in* Documentation Center of Cambodia Archives Document No. D01610.

<sup>119</sup> Rep. No. 326 to Office 870 of the Central Committee (May 16-17, 1978) *in* Documentation Center of Cambodia Archives Document No. D02131.

<sup>120</sup> *Id.*

already succumbed to the illness by then. Furthermore, the importation of anti-malarial medication was merely a stop-gap measure intended to prevent the population from becoming too ill to complete their work assignments. It was not a systematic attempt to reform the country's medical infrastructure and, therefore, did nothing to stem the tide of death and chronic illness caused by other diseases that continued to go undiagnosed and untreated by the Khmer Rouge child medics.

Perhaps the clearest evidence that the Party Center knew of and in fact mandated the denial of medical care and the use of homemade remedies in Democratic Kampuchea is the overwhelming universality of the experience Cambodians in distinct parts of the country had with respect to medical care. Though this memo does not provide a perfect sampling of the quality and availability of medical care in each of the country's provinces during the Khmer Rouge era, it does show that men and women in distinct parts of the country shared in common the same suffering from untreated illness and the same fear of homemade remedies and injections. Hospitals were evacuated the same way in Phnom Penh as they were in Battambang.<sup>121</sup> Young children were forced to become medics in each of Democratic Kampuchea's provinces, and they all underwent the same brief and cursory training. Cambodians throughout the country referred to homemade remedies as "rabbit pellets" and received the same types of injections.

When Cambodian refugees streamed into Thailand in the final months of the Khmer Rouge regime, they told similar stories of death and illness from lack of medicine and trained medical staff.<sup>122</sup> After compiling interviews with refugees at the Thai border with Democratic Kampuchea in 1978, one reporter for the *New York*

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<sup>121</sup> See, e.g., Sokhym, *Female Patients*, *supra* note 13; Sokhym, *Revolutionary Female Medical Staff*, *supra* note 48, at 27.

<sup>122</sup> See, e.g., Henry Kamm, *The Agony of Cambodia*, N.Y. TIMES MAGAZINE, Nov. 19, 1978 at 40; Lewis M. Simons, *Disease, Hunger Ravage Cambodia as Birthrate Falls*, THE WASHINGTON POST, July 22, 1977 at A16.

*Times Magazine* wrote about what he learned of the medical system under the Khmer Rouge:

Medical care is dispensed only by Khmer Rouge medics, who are said to have no medical training and to concentrate their care on cadres and soldiers rather than the people. The only medicines available are traditional remedies made of herbs, roots and tree bark. 'The sick person stays in his hut and waits for death,' said [one refugee].<sup>123</sup>

Though it is possible that Zone commanders in every part of the country independently mandated the use of homemade medicines and the removal of scientifically-trained medical staff, it is more likely that these uniform directives came from the Party Center. The individuals who comprised that body, including Nuon Chea, Khieu Samphan, Ieng Sary and Ieng Thirith, could thus be held responsible for the hundreds of thousands of deaths that resulted from their medical policies.

#### **IV. Medical Experimentation**

##### **A. Experimentation to Test Effectiveness of Remedies**

Pol Pot's directive to practice "self-reliance in medicine"<sup>124</sup> not only resulted in the purging of trained medical staff and the denial of scientific medical care to Cambodian citizens; it also led to medical experimentation on human subjects for the purposes of testing Khmer Rouge-made remedies and for torture in detention facilities. With respect to medical experimentation to test drugs' effectiveness, it appears as though all medical treatment under the Khmer Rouge was experimental in a general sense. The regime's medics prescribed rabbit pellets to the sick regardless of their symptoms, gave injections of coconut juice for the sole purpose of observing their effects on patients, and failed to measure medication dosages or the

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<sup>123</sup> *Id.* at 152.

<sup>124</sup> Sokhym, 'Rabbit Dropping' Medicine, *supra* note 12.

amount of certain natural substances that went into each batch of homemade medicine.<sup>125</sup>

In a speech given to mark the third anniversary of the Khmer Rouge's April 17, 1975 takeover, Khieu Samphan explicitly acknowledged the general experimental nature of medical treatment in Democratic, even if he couched it in terms of progress rather than failure:

In the field of health and social affairs, many units have fulfilled or exceeded the plan of producing medicines for improving the people's standard of living . . . Each cooperative has its medical center and its center of making medicines. By this way, we have given an impulse to all forces of the people's mass to actively participate everywhere in making medicines. *Although they are still at the handicraft stage*, our medicines meet the needs of our people and their efficiency has unceasingly been improved. It is only by doing so that we can carry out our line of independence, sovereignty and self-reliance in the production of medicines as well as in all other fields.<sup>126</sup>

This general experimental nature of the Khmer Rouge's medical practices was a direct consequence of the regime's emphasis on self-reliance and its prohibition on access to basic medical care; without the ability to follow scientific guidelines on medicine production, testing medicine on humans became inevitable.

In addition to the general experimentation on humans derived from inadvertent and intentional drug testing on patients, Khmer Rouge medics also specifically conducted planned medical experiments on human subjects to study anatomy, pharmacology and physiology.<sup>127</sup> In a hospital in Kampong Cham province, for example, a group of "surgeons" was directed by the Khmer Rouge to conduct studies on how tissue healed by conducting a laparotomy on a living, non-consenting

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<sup>125</sup> GENOCIDE IN CAMBODIA, *supra* note 1, at 295, 330.

<sup>126</sup> Khieu Samphan, President of the Presidium of the State of Democratic Kampuchea, Speech at the Mass Meeting Held on the Occasion of the Third Anniversary of the Glorious April 17 and the Founding of Democratic Kampuchea speech (April 17, 1978), *in* Documentation Center of Cambodia Archives Document No. D21934, at 7-8 (emphasis added).

<sup>127</sup> GENOCIDE IN CAMBODIA, *supra* note 1, at 329; *see also* DAVID CHANDLER, VOICES FROM S-21: TERROR AND HISTORY IN POL POT'S SECRET PRISON 32 (1999) [hereinafter CHANDLER, VOICES FROM S-21] ("Elsewhere in the country, fatal surgery was sometimes carried out on anaesthetized prisoners to teach anatomy to medical cadres.").

human. The person's small intestine was cut off and its ends joined so the physicians could study the healing process; within three days the patient had died of the wounds sustained to his abdomen.<sup>128</sup> A second group of Khmer Rouge-trained physicians in the same hospital opened the chest of a living patient to observe his heart, resulting in the patient's immediate death.<sup>129</sup> In a military hospital near Battambang, Khmer Rouge health staff practiced general anesthesia and tracheal catheter insertion on living and non-consenting patients.<sup>130</sup>

Another common medical experiment under the Khmer Rouge concerned the removal of gall bladders and their use in home-made medicine. In some instances, gall bladders were taken from individuals who had already been executed by the Khmer Rouge;<sup>131</sup> some hospitals received shipments of gall bladders from Khmer Rouge detention facilities where they had been extracted from prisoners.<sup>132</sup> In other instances, Khmer Rouge soldiers cut open the bellies of living humans to extract their gall bladders.<sup>133</sup> The medical cadres were able to distinguish between gall bladders from healthy persons, which were full of fluid, and those from unhealthy individuals, which were not.<sup>134</sup> The 'healthy' gall bladders were sent to nearby hospitals where their fluids were mixed with flour and a variety of plants to make a version of rabbit pellet medicine.<sup>135</sup> Khmer Rouge medics also conducted experimental surgery to remove living humans' gall bladders and compare them with those from corpses; these tests had no medicinal value.<sup>136</sup>

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<sup>128</sup> GENOCIDE IN CAMBODIA, *supra* note 1, at 329.

<sup>129</sup> *Id.*

<sup>130</sup> Sokhym, *Revolutionary Female Medical Staff*, *supra* note 48, at 27.

<sup>131</sup> See Sokhym, 'Rabbit Dropping' Medicine, *supra* note 12, at 23.

<sup>132</sup> See Sokhym, *Revolutionary Female Medical Staff*, *supra* note 48, at 27.

<sup>133</sup> See Sokhym, 'Rabbit Dropping' Medicine, *supra* note 12, at 23.

<sup>134</sup> *See id.*

<sup>135</sup> See Sokhym, *Revolutionary Female Medical Staff*, *supra* note 48, at 27.

<sup>136</sup> GENOCIDE IN CAMBODIA, *supra* note 1, at 329.

## **B. Experimentation as Torture in Detention Facilities: S-21 Case Study**

Khmer Rouge medics had a steady stream of human test subjects on which to conduct experiments in the detention facilities the regime established throughout the country. Like the Nazi medical doctors who worked in concentration camps, Khmer Rouge child medics experimented on prisoners in the regime's security centers both as a form of torture and in a sadistic attempt to learn more about human anatomy. Nowhere was the practice of experimenting on prisoners more systematized and extensive than at S-21 (Tuol Sleng), the headquarters of the Khmer Rouge special police and the center for torturing and executing people accused of betraying the regime.<sup>137</sup>

The general medical conditions at S-21 created an environment conducive to carrying out experimentation on humans. Workers at the detention facility were divided into three main units: interrogation, documentation and defense.<sup>138</sup> Within the defense unit, the largest unit at S-21 and headed by Khim Vat (alias Ho), was a subunit staffed by fifteen paramedics that certified deaths and provided rudimentary medical services to sick and wounded prisoners. According to the confession of one of these paramedics after the fall of the Khmer Rouge, there were only three Khmer Rouge-trained medical personnel at S-21 responsible for overseeing thousands of prisoners.<sup>139</sup> Many of the medical staff were children who knew little about medicine; they simply asked injured and ill prisoners routine questions and then prescribed

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<sup>137</sup> See BECKER, *supra* note 1, at xiv; GENOCIDE IN CAMBODIA, *supra* note 1, at 372 (“There were other camps which were to some extent dependent on Tuol Sleng, notably the camp of Takhmau, formerly a psychiatric hospital, the camp of the former National Police Headquarters south of the New Market, the Vat Phnom camp set up in the former Navy officers building, the camp of the former Sangkum High school, and the camp of Prey Sar west of Phnom Penh in Kandal province. All these dependent camps were placed under the command of Tuol Sleng, and were also known under the abbreviation of ‘S-21,’ that is ‘Security 21’ which reported directly to the Defense ministry of the Pol Pot-Ieng Sary regime.”).

<sup>138</sup> CHANDLER, VOICES FROM S-21, *supra* note 127, at 17.

<sup>139</sup> *Id.* at 31 (The paramedic forced to confess was Phoung Damrei (alias Phoeun)).

them homemade medication such as rabbit pellets.<sup>140</sup> As a result, according to prison records, thousands of prisoners died from malaria, diarrhea, “emaciation,” “tiredness,” and mistreatment.<sup>141</sup>

Because Tuol Sleng was a secret facility, its existence known only to the Party Center and those who worked there,<sup>142</sup> only the general contours of the regime’s medical experimentation on prisoners there can be ascertained. Several medical study notebooks were recovered at S-21 after the Vietnamese invasion in 1979 that suggest prison personnel carried out such experiments as bleeding prisoners to death and seeing how long it took for dead bodies to rise to the surface of a tank of water.<sup>143</sup> One such notebook, found in a house near Tuol Sleng, contains five handwritten pages on “Human Experiments” (*pisaot menuh*) that record the results of eleven experiments on seventeen prisoners, living and dead:<sup>144</sup>

They begin, ‘1. A 17-year-old girl, with her throat and stomach slashed, put in water from 7:55 p.m. until 9:20 a.m., when the body begins to float slowly to the top, which it reaches by 11:00 am. 2. A 17-year-old girl bashed to death, then put in water as before, for the same period, but the body rises to the top at 1:17 p.m.’ Similar details were recorded for ‘a big woman, stabbed in the throat, her stomach slashed and removed,’ and ‘a young male bashed to death,’ then ‘four young girls stabbed in the throat,’ and ‘a young girl, still alive, hands tied, placed in water.’<sup>145</sup>

The clearest evidence that the medical staff at Tuol Sleng conducted experiments on humans comes from the testimony of Kaing Guek Eav (alias Duch), the Chairman and Secretary of S-21 from 1976 to 1979, in Case 001 before the ECCC. In his June 16, 2009 testimony, Duch admitted he was aware of four types of medical experimentation conducted at Tuol Sleng:

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<sup>140</sup> GENOCIDE IN CAMBODIA, *supra* note 1, at 374; *see also* Case 002 Closing Order, *supra* note 7, ¶ 445.

<sup>141</sup> CHANDLER, VOICES FROM S-21, *supra* note 127, at 31.

<sup>142</sup> *Id.* at 7.

<sup>143</sup> *Id.* at 32.

<sup>144</sup> KIERNAN, THE POL POT REGIME, *supra* note 102, at 439.

<sup>145</sup> *Id.*

First, the live prisoner was used for the surgical study and training. Second, the blood drawing was also done and it became a practice until my time, and there are some S-21 surviving documents that I instructed them to do, based on the instructions from the upper echelon regarding the blood drawing in order to protect those people who need blood transfusions. . . . So, as a result, there were about 100 victims who died due to blood drawing. That is the second case. For the third case, the medicine which was prepared, normally they would use to experiment on the prisoners because if they used the experiment -- if they used the drugs on themselves that would not be the method, but they used the newly composed medicine to trial on the prisoners. The fourth case, Uncle Nuon [Chea] gave me some medicine to use and test on the prisoners, although I was sure that the powder was used in exchange of the paracetamol [a mild pain relief drug], but anyway it was used to test on the prisoners, although the medicine was not poisonous -- but the prisoners knew that the medicine was an experimental one. So these are the four cases of medical experiments conducted at S-21.<sup>146</sup>

The first type of medical experimentation—surgery on living and dead prisoners—was conducted to study human anatomy and to train new Khmer Rouge medics on operation techniques.<sup>147</sup> Vivisections were commonly performed for these reasons.<sup>148</sup> Duch testified that anatomy studies were conducted on live prisoners or on prisoners killed specifically for experimental surgery because they were better test subjects than those who had died ‘naturally’ from torture or disease in the detention center.<sup>149</sup>

Bloodletting, a second type of experimentation conducted at Tuol Sleng, was a practice initiated by Son Sen, the CPK Minister of Defense.<sup>150</sup> When blood supplies ran low at hospitals that treated wounded Khmer Rouge military cadre, such as Hospital 98 and the Khmer-Soviet Friendship Hospital in Phnom Penh, blood was drawn from prisoners at the detention facility and used in transfusions for the

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<sup>146</sup> *Prosecutor v. Kaing Guek Eav alias “Duch,”* Case No. 001/18-07-2007/ECCC-TC, Transcript of Proceedings 81-2 (Trial Chamber, June 16, 2009).

<sup>147</sup> *Id.* at 94-5.

<sup>148</sup> Bethany Lindsay, *Duch Admits to Draining Live Victims’ Blood*, CAMBODIA DAILY, June 17, 2009, at 1.

<sup>149</sup> *Id.*

<sup>150</sup> *Prosecutor v. Kaing Guek Eav alias “Duch,”* Case No. 001/18-07-2007/ECCC-TC, Transcript of Proceedings 91 (Trial Chamber, June 16, 2009).

combatants.<sup>151</sup> The detainees would be taken to the medical office at Tuol Sleng and made to lie blindfolded on their backs on a bed while their legs were shackled. The blood was then drawn out through needles inserted into the prisoners' veins.<sup>152</sup>

Initially, prisoners were not screened for disease before their blood was drawn, and Khmer Rouge soldiers who received transfusions often developed skin rashes as a result.<sup>153</sup> Duch testified that he eventually implemented a stricter screening process so that only 'healthy' prisoners were selected for bloodletting. But he also admitted that the bloodletting process at S-21 was never regulated, resulting in the death of about 100 prisoners because "the blood was drawn until there was no blood in their body."<sup>154</sup> Prek Khan, a former S-21 interrogator gave further evidence that bloodletting procedures were not well-controlled. He testified that four to ten individuals had their blood drawn at the same time, and that oftentimes blood was taken until the prisoner "gasp[ed] or was dying."<sup>155</sup> When asked if the blood drawing practice was meant to kill the detainees, Prek Khan answered "So far as I witnessed after blood was drawn no one would ever leave because they were dying already while they were being—their blood was being taken."<sup>156</sup>

Medical experimentation also occurred at Tuol Sleng through the practice of testing homemade remedies on sick and wounded prisoners rather than allowing them access to Western-style medicine. It appears that the dire medical conditions

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<sup>151</sup> *Prosecutor v. Kaing Guek Eav alias "Duch,"* Case No. 001/18-07-2007/ECCC-TC, Transcript of Proceedings 91-2 (Trial Chamber, June 16, 2009); *Prosecutor v. Kaing Guek Eav alias "Duch,"* Case No. 001/18-07-2007/ECCC-TC, Transcript of Proceedings 37 (Trial Chamber, July 21, 2009); see also Lindsay, *supra* note 148, at 29.

<sup>152</sup> *Prosecutor v. Kaing Guek Eav alias "Duch,"* Case No. 001/18-07-2007/ECCC-TC, Transcript of Proceedings 36 (Trial Chamber, July 21, 2009) (Testimony of former S-21 interrogator Prek Khan).

<sup>153</sup> *Prosecutor v. Kaing Guek Eav alias "Duch,"* Case No. 001/18-07-2007/ECCC-TC, Transcript of Proceedings 91 (Trial Chamber, June 16, 2009).

<sup>154</sup> *Id.* at 82.

<sup>155</sup> *Prosecutor v. Kaing Guek Eav alias "Duch,"* Case No. 001/18-07-2007/ECCC-TC, Transcript of Proceedings 37, 38 (Trial Chamber, July 21, 2009); see also Cheang Sokha, *Former interrogator recalls blood-drawing at Tuol Sleng: Duch subordinate details torture by electric shock, suffocation*, PHNOM PENH POST, July 22, 2009.

<sup>156</sup> *Prosecutor v. Kaing Guek Eav alias "Duch,"* Case No. 001/18-07-2007/ECCC-TC, Transcript of Proceedings 37, 38 (Trial Chamber, July 21, 2009).

created throughout Democratic Kampuchea under the Khmer Rouge were also in place at Tuol Sleng. Sek Dan, a child medic at Tuol Sleng beginning in 1978, testified at the Duch trials about his experience distributing medicine and cleaning the wounds of detainees at the prison.<sup>157</sup> During the time he worked in Tuol Sleng, Sek Dan was illiterate and, like the other child medics, had not received any medical training before being assigned to work at S-21 (Duch testified that young boys from the provinces were actually chosen to work as child medics at S-21 because of their “limited memory and education.”<sup>158</sup>) Sek Dan testified that most of the prisoners he treated had diarrhea, fever or headaches and had torture wounds on their backs, fingers and toes.<sup>159</sup> Yet he “knew for sure at that time there was nothing but the rabbit pellets medicines” to treat detainee’s illnesses, and only saline solution to treat wounds.<sup>160</sup> Furthermore, prisoners were only given enough medicine to keep them alive until they could be interrogated, and their wounds were only treated to shorten recovery time so torture sessions could begin again.<sup>161</sup> Asked by judges Silvia Cartwright and Jean-Marc Lavergne to describe the types of medication given to detainees, Sek Dan testified:

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<sup>157</sup> *Prosecutor v. Kaing Guek Eav alias “Duch,”* Case No. 001/18-07-2007/ECCC-TC, Transcript of Proceedings 2-3, 23 (Trial Chamber, Aug. 3, 2009) (At trial, Duch questioned whether Sek Dan was a medic at Tuol Sleng because there seemed to be a discrepancy between the current age Sek Dan gave in court (48 years old) and the age he said he was when he began working at Tuol Sleng (11 years old). Duch did admit that he selected young boys from Kampong Chhang province, where Sek Dan was from, to work at S-21, and that it was possible Sek Dan made a mistake about his age when he began working at the prison because of “low memory.”); *see also* Associated Press, *Ex-Khmer Rouge Medic Testifies in Cambodia Trial*, N.Y. TIMES, Aug. 3, 2009.

<sup>158</sup> *Prosecutor v. Kaing Guek Eav alias “Duch,”* Case No. 001/18-07-2007/ECCC-TC, Transcript of Proceedings 50 (Trial Chamber, Aug. 3, 2009).

<sup>159</sup> *Id.* at 7, 9-10.

<sup>160</sup> *Id.* at 7 (Later on in his testimony, Sek Dan appears to admit other types of medicine in addition to rabbit pellets were available at Tuol Sleng: “Q[uestion]. All of this medicine was it always rabbit pellets or were there different kinds of medicines, other than the rabbit pellets? A[nswer]: There were some other medicines too and delivered in different forms except from the rabbit pellet medicine.”); *see also* *Prosecutor v. Kaing Guek Eav alias “Duch,”* Case No. 001/18-07/2007/ECCC-TC, Transcript of Proceedings 31-32 (Trial Chamber July 1, 2009) (Bou Meng, one of the few prisoners to survive S-21, said torture wounds on his back were treated by pouring bowls of salt water over them.).

<sup>161</sup> *Prosecutor v. Kaing Guek Eav alias “Duch,”* Case No. 001/18-07-2007/ECCC-TC, Transcript of Proceedings 10, 21-22 (Trial Chamber, June 16, 2009); *Prosecutor v. Kaing Guek Eav alias “Duch,”* Case No. 001/18-07-2007/ECCC-TC, Transcript of Proceedings 36 (Trial Chamber, July 13, 2009).

“Those medicines were locally produced; they were known as rabbit pellet medicine. They were black in colour. . . . They were only produced after 1975. . . . Those medicines could provide some treatments, some of them were effective and some were not. I actually ate a handful of those medicines and it did not have any effect on me; I ate those medicines because I was hungry.”<sup>162</sup>

Other child medics at Tuol Sleng also testified that they were illiterate, received only basic medical training<sup>163</sup> and were only able to provide homemade remedies to sick and injured prisoners. Nam Mon, a medic at Tuol Sleng from the time she was 15-years-old,<sup>164</sup> said that Western-style medication like paracetamol was available for distribution to the prisoners in the early years of the regime; when the supplies ran out, however, only “traditional herb medicines” were distributed to the patients.<sup>165</sup> Nam Mon testified that she did not know what was in the medication; Khmer Rouge cadres at Tuol Sleng simply gave it to her and told her to hand it out to the prisoners.<sup>166</sup> She was able to distinguish one homemade remedy from another only by looking at the labels on the bottles, which she could not read but which looked different.<sup>167</sup>

In addition to the general experimental nature of medical care at Tuol Sleng, Duch appears to have carried out planned experiments at the direction of Nuon Chea

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<sup>162</sup> *Prosecutor v. Kaing Guek Eav alias “Duch,”* Case No. 001/18-07-2007/ECCC-TC, Transcript of Proceedings 17-19 (Trial Chamber, June 16, 2009).

<sup>163</sup> *Prosecutor v. Kaing Guek Eav alias “Duch,”* Case No. 001/18-07-2007/ECCC-TC, Transcript of Proceedings 17 (Trial Chamber, July 13, 2009) (Nam Mon described this training at her civil party testimony before the Tribunal: “I undertook the medical training by doing hands-on practice, by providing real wound cleaning, for instance. I was pretty young. I was taught how to recognize the medicine when it was given to me, and that I could then distribute those medicines to the patients. . . . I only learned to memorize what I was told. For example, for this particular medicine, it was for the treatment of a particular sickness or disease, so I memorized what I was told but I, myself, could not read.”).

<sup>164</sup> *Prosecutor v. Kaing Guek Eav alias “Duch,”* Case No. 001/18-07-2007/ECCC-TC, Transcript of Proceedings 53 (Trial Chamber, July 13, 2009) (Duch testified that Nam Mon was not a medic at S-21 because, according to him, there were no female medics “produced by S-21” at the detention facility. (In his July 22, 2009 testimony, Duch admitted two female detainees at S-21 were chosen to become medics.) Several other medics and S-21 staff, including Prek Khan (July 21, 2009 testimony at page 40) said they personally saw female medics at the prison. Prek Khan said he does not remember Nam Mon specifically, but that “from the way she spoke [during her testimony at the Tribunal] I was pretty sure that she was that female medic.”).

<sup>165</sup> *Id.* at 13.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 17-18.

to test new medication on patients. When asked at trial how he participated in the medical experiments conducted at S-21, Duch responded:

Mr. President, I personally did it [the medical experiments]. Nobody knew and only two people were aware of this. That was I, myself, and Uncle Nuon [Chea]. I did it personally. Each day I gave them two pills and next day I gave them two more pills for three days in a row. The rest saw me taking these three people and letting them stay at the photography and the painting section. In the afternoon I took the pills, by myself, to give them to take. So I did this by myself and people would know that this is a medical experiment, and the victims themselves knew it was a medical experiment. This is another type of criminal act that I committed.<sup>168</sup>

Duch later claimed that without Nuon Chea's knowledge, he replaced the potentially poisonous experimental medication with paracetamol:<sup>169</sup> "I swapped the flower pills and I used the paracetamol pills instead because the pill was in the capsule form . . . I threw away the flower inside—the powder inside, and then I cleaned inside the capsule with a cotton bud and I replace it with paracetamol powder."<sup>170</sup> Duch claims to have done this because he feared Nuon Chea's pills were poisonous, and if the prisoners died as a result "they would die under my act with my own hands, who gave them the medicine, the poison. That's why I tried not to be involved in the killing of those people directly."<sup>171</sup>

Medical experimentation continued at Tuol Sleng until the Vietnamese invasion of January 1979 pushed the Khmer Rouge from power. The practice of bloodletting may have ended a few months earlier, when the medics trained to drain blood and conduct transfusions were swept up in purges of Khmer Rouge cadre at Tuol Sleng and the hospitals in Phnom Penh.<sup>172</sup> Duch and the rest of the medical staff

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<sup>168</sup> *Prosecutor v. Kaing Guek Eav alias "Duch,"* Case No. 001/18-07-2007/ECCC-TC, Transcript of Proceedings 83-4 (Trial Chamber, June 16, 2009).

<sup>169</sup> Lindsay, *supra* note 148, at 29.

<sup>170</sup> *Prosecutor v. Kaing Guek Eav alias "Duch,"* Case No. 001/18-07-2007/ECCC-TC, Transcript of Proceedings 96 (Trial Chamber, June 16, 2009).

<sup>171</sup> *Id.* at 99.

<sup>172</sup> *Id.* at 92.

at Tuol Sleng remained at the prison until the evening of January 7, 1979, when they walked out of Phnom Penh and disappeared from sight.<sup>173</sup>

## **V. Medical Experimentation: What the Party Center Knew**

Because Pol Pot himself ordered the replacement of scientific medicine with experimental homemade remedies to treat illnesses during the CPK regime, other Party Center members certainly knew of this facet of Khmer Rouge medical experimentation. Both Pol Pot and Khieu Samphan spoke directly and publically about the need to use medicines “still at the handicraft stage” whether or not they were effective.<sup>174</sup> Their words prove not only that they knew of the experimental nature of Khmer Rouge-created remedies, but also that they knew about and indeed mandated their use.

Nuon Chea also appears to have known and approved of the fact that the medical treatment available in Democratic Kampuchea was, at best, rudimentary. In a July 1978 speech to the Communist Workers’ Party of Denmark, he admitted that a medical cadre’s commitment to the Party’s ideological stance was more important than his medical training.<sup>175</sup> He further stated that international humanitarian aid should be rejected, no matter the cost to Cambodian citizens’ health and well-being:

We try to teach our people the principle of self-reliance in order to avoid making ourselves a burden for friendly countries. While they might like to help us, they must make their own revolutions and improve the living standard of their own people. Thus, we try as much as possible to avoid outside aid, to overcome all forms of suffering without seeking aid unless it is absolutely necessary.<sup>176</sup>

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<sup>173</sup> CHANDLER, VOICES FROM S-21, *supra* note 127, at 22-23.

<sup>174</sup> Khieu, *supra* note 126, at 7-8; Sokhym, ‘Rabbit Dropping’ Medicine, *supra* note 12, at 23.

<sup>175</sup> Sokhym, *Female Patients*, *supra* note 13, at 26.

<sup>176</sup> Nuon, *supra* note 2.

Finally, as Minister of Social Affairs and Action, Ieng Thirith oversaw the provision of medical care throughout the country and was therefore in a position to know that the use of home-made medication was a form of medical experimentation.

There is also substantial evidence linking the Party Center to the medical experiments that took place in detention facilities like Tuol Sleng. Duch admitted to journalists as early as 1999 that Nuon Chea was deeply involved in and aware of activities at Tuol Sleng, including executions, medical experimentation and forced confessions.<sup>177</sup> In the first days of his trial at the ECCC, Duch again admitted that he dealt directly with Son Sen, the Minister of Defense, and with Nuon Chea, both of whom were believed to have been acting on behalf of the entire Standing Committee.<sup>178</sup> In his June 16, 2009 testimony before the ECCC, Duch further said Nuon Chea had specific knowledge of the human experiments conducted at Tuol Sleng, even ordering Duch to give potentially poisonous medicine to prisoners to test its effect.<sup>179</sup> The orders for this research on poison are believed to have come from the entire Central Committee, with Nuon Chea acting as liaison to Duch.<sup>180</sup>

Nuon Chea's connection to medical experimentation at Tuol Sleng is the most direct of any of the defendants awaiting trial at the ECCC. But because of their positions in the Central and Standing Committees, Khieu Samphan and Ieng Sary also likely knew these experiments were being conducted at S-21. Reports on killings and other activities at S-21 were signed by Nuon Chea and contained "notations to or from 'Elder Brother' or simply the ominous 'Organization,' as the Standing

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<sup>177</sup> Nic Dunlop and Nate Thayer, Cambodia: Duch Confesses, FAR E. ECON. REVIEW, May 6, 1999.

<sup>178</sup> *Prosecutor v. Kaing Guek Eav alias "Duch,"* Case No. 001/18-07-2007/ECCC-TC, Transcript of Proceedings 63 (Trial Chamber, April 1, 2009).

<sup>179</sup> *Prosecutor v. Kaing Guek Eav alias "Duch,"* Case No. 001/18-07-2007/ECCC-TC, Transcript of Proceedings 82 (Trial Chamber, June 16, 2009).

<sup>180</sup> *Prosecutor v. Kaing Guek Eav alias "Duch,"* Case No. 001/18-07-2007/ECCC-TC, Transcript of Proceedings 79 (Trial Chamber, April 1, 2009).

Committee of the Communist Party was known.”<sup>181</sup> The fact that these reports were sent to the Party Center as a whole indicates that the other members of that group had at least a general sense of the killing and torture occurring at Tuol Sleng but took no affirmative steps to prevent it.

It is less clear how much Ieng Thirith knew about medical experiments conducted on prisoners at CPK detention facilities. She was not a formal member of the Central or Standing Committees, and therefore she may not have been privy to the same information as Nuon Chea, Khieu Samphan and Ieng Sary. However, as the Minister of Social Affairs and Action, responsible for overseeing the country’s healthcare facilities and operations, it is still very likely that Ieng Thirith had knowledge of the experiments conducted on living patients, even if she did not have a role in approving such experiments.

## **VI. Prosecuting the Accused for the Denial of Medical Care and Medical Experimentation**

In September 2010, the Co-Investigating Judges of the ECCC indicted Nuon Chea, Khieu Samphan, Ieng Sary and Ieng Thirith for crimes against humanity, grave breaches of the Geneva Conventions, genocide and violations of Cambodian criminal law as set forth in the 1956 Cambodian Penal Code.<sup>182</sup> The Co-Investigating Judges’ Closing Order indicting the Accused also documented evidence of their involvement in or knowledge of CPK policies mandating the denial of medical care and medical experimentation throughout the country. It is possible, therefore, that the prosecution will present further evidence of the four leaders’ involvement with these medical policies and practices at trial; such evidence could lead to criminal convictions for Nuon Chea, Khieu Samphan and Ieng Sary based in part on their roles ordering the denial of basic medical care and approving medical

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<sup>181</sup> Dunlop and Thayer, *supra* note 177.

<sup>182</sup> Case 002 Closing Order, *supra* note 7, ¶ 1613.

experimentation on prisoners and sick civilians. As described more fully in the introduction to this memo (*supra* pages 7-8) it is unlikely that Ieng Thirith will ever be convicted for medical crimes because the ECCC is unlikely to ever find her mentally fit to stand trial, despite the Supreme Court's recent ruling that she should not be released from detention and that her mental health should be reevaluated in May, 2012.<sup>183</sup> However, this section will include analysis of her knowledge and actions during the relevant time period, as one means of creating a historical record of her potential criminal culpability.

Because it is more likely that The Accused's acts with regard to medical crimes will be prosecuted as crimes against humanity (specifically the crimes against humanity of extermination; enslavement; torture; persecutions on political, racial and religious grounds; and other inhumane acts) rather than war crimes, genocide or violations of Cambodian law, this memo will focus on the *chapeau* and enumerated acts of crimes against humanity, their development in international law and whether the denial of medical care and medical experimentation do in fact amount to crimes against humanity.

## **A. Crimes Against Humanity**

### **a. Definition of Crimes against Humanity**

Crimes against humanity are a category of international crimes that involve particularly odious offenses constituting a widespread or systematic attack against a civilian population.<sup>184</sup> They were first recognized and prosecuted on an international scale during the post-World War II tribunals established to try German and Japanese leaders for war-time atrocities—the International Military Tribunals at Nuremberg

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<sup>183</sup> *Prosecutor v. Nuon Chea, Khieu Samphan, Ieng Sary & Ieng Thirith*, Case No. 002/19-09-2007-ECCC-TC/SC(09), Decision on Immediate Appeal against the Trial Chamber's Order to Release the Accused Ieng Thirith, 24 (Dec. 13, 2011).

<sup>184</sup> ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 98 (2d ed. 2008).

and for the Far East, and the Control Council Law No. 10 cases.<sup>185</sup> Crimes against humanity are prohibited and may consequently be punished during both times of war and peace,<sup>186</sup> can be perpetrated by domestic state authorities,<sup>187</sup> and can be directed against *any* civilian population,<sup>188</sup> regardless of nationality. For these reasons, it is likely that if the Khmer Rouge leadership can be prosecuted at the ECCC for medical crimes, it will be under the Tribunal's relatively broad crimes against humanity jurisdiction rather than that of genocide (which requires specific discriminatory intent to destroy, in whole or in part, a particular group<sup>189</sup>), war crimes (which requires the existence of an international armed conflict and restricts protections to certain groups of people<sup>190</sup>) or crimes under Cambodian penal law

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<sup>185</sup> London Charter of the International Military Tribunal, art. 6 (Aug. 8, 1945), *available at* <http://avalon.law.yale.edu/imt/imtconst.asp> ("The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: . . . (c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."); Control Council Law No. 10 art. II (Dec. 20, 1945), *available at* <http://avalon.law.yale.edu/imt/imt10.asp> ("1. Each of the following acts is recognized as a crime: . . . (a) Crimes against Humanity. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated."); International Military Tribunal for the Far East art. 5 (Jan. 19, 1946) ("Jurisdiction over Persons and Offences. . . . The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: . . . (c) Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan").

<sup>186</sup> CASSESE, *supra* note 184, at 99. *See also* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 73 (1st ed. 2003). Though the international criminal tribunals established in the wake of World War II required a link between crimes against humanity and war, present customary international law bans crimes against humanity whether they are committed in time of war or peace. The abandonment of the nexus between crimes against humanity and war was clear by 1973, as evidenced by several international treaties that dropped the nexus (eg: the 1948 Genocide Convention, the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, and the 1973 Convention on Apartheid).

<sup>187</sup> CASSESE, *supra* note 184, at 98.

<sup>188</sup> *Id.* at 99.

<sup>189</sup> *See, e.g., id.* at 145.

<sup>190</sup> *See, e.g., id.* at 82.

(which does not adequately provide for large scale, systematic, criminal activity by state actors).

The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC Law), as amended in 2004, sets the subject matter jurisdiction of the ECCC, and it provides for the prosecution of crimes against humanity as defined in the language of the Statute of the International Criminal Tribunal for Rwanda (ICTR):<sup>191</sup>

Article 5: The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed crimes against humanity during the period 17 April 1975 to 6 January 1979. Crimes against humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, such as: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds; other inhumane acts.<sup>192</sup>

This definition of crimes against humanity contains both contextual elements (the *chapeau*) and enumerated acts; if the Accused's acts or omissions with respect to the denial of medical care or medical experimentation have met each of these contextual elements and fit into one or more of the enumerated acts, the prosecution should pursue convictions against them for medical crimes under their existing crimes against humanity indictment.

#### **b. The *Nullum Crimen Sine Lege* Principle**

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<sup>191</sup> WAR CRIMES RESEARCH OFFICE, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, INTERNATIONAL CRIMINAL LAW: A DISCUSSION GUIDE FOR THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 3, 29 (2007) [HEREINAFTER ECCC DISCUSSION GUIDE]. While the ECCC Framework Agreement provides that the subject matter of the Extraordinary Chambers shall be 'crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court,' the definition included in the 2001 ECCC Law was not amended to reflect this view. Instead, the language of ECCC Law Article 5 closely tracks the definition in the Statute of the International Criminal Tribunal for Rwanda (ICTR). *See also* Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, art. 5, Oct. 27, 2004, *available at* <http://www.eccc.gov.kh/en/documents/legal/law-establishment-extraordinary-chambers-amended> [hereinafter ECCC Law].

<sup>192</sup> ECCC Law, *supra* note 191, art. 5.

As a preliminary matter, it should be noted that prior to convicting the Accused of crimes against humanity, the ECCC Trial Chamber must establish that the Accused's acts or omissions constituted existing crimes under the Cambodian penal code or international law from April 1975 to January 1979.<sup>193</sup> This is in keeping with the international criminal law principle of legality (also referred to as *nullum crimen sine lege*—"no crime without law"), which prohibits the retroactive application of criminal laws.<sup>194</sup> The doctrine states that an individual may only be held criminally liable for his actions if they constituted crimes at the time he committed them.<sup>195</sup>

The *nullum crimen sine lege* principle is referenced in Article 33 of the ECCC Law, which states that the ECCC "shall exercise [its] jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights [ICCPR]."<sup>196</sup> ICCPR Article 15 states:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. . . .
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.<sup>197</sup>

*Nullum crimen sine lege* is an affirmative defense that the Accused must raise specifically with respect to crimes against humanity and/or medical crimes liability. If the Accused do raise this defense, the ECCC Trial Chamber must conduct three

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<sup>193</sup> *Prosecutor v. Kaing Guek Eav alias "Duch,"* Case No. 001/18-07-2007/ECCC/TC, Judgment (Trial Chamber, July 26, 2010) ¶ 283 [hereinafter Case 001 Judgment].

<sup>194</sup> ECCC DISCUSSION GUIDE, *supra* note 191, at 77.

<sup>195</sup> CASSESE, *supra* note 184, at 27.

<sup>196</sup> ECCC Law, *supra* note 191, art. 33.

<sup>197</sup> International Covenant on Civil and Political Rights, art. 15, Dec. 19, 1966, 999 U.N.T.S. 171.

inquiries:<sup>198</sup> first, whether the challenged law existed between April 1975 and January 1979<sup>199</sup>; second, whether any relevant existing laws were sufficiently specific at the relevant time so that the Accused could foresee criminal liability for their actions;<sup>200</sup> and third, whether the existing laws were sufficiently accessible to the Accused such that they had appropriate notice of the foreseeable criminal liability.<sup>201</sup>

With regard to the first inquiry, the ECCC Trial Chamber in its Case 001 Judgment assessed “whether crimes against humanity as defined in Article 5 of the ECCC Law formed part of customary international law [from April 1975 to January 1979].”<sup>202</sup> The Chamber found that the notion of crimes against humanity as an independent concept involving individual criminal responsibility was first recognized in the Nuremberg Charter and at the Nuremberg Tribunal established after World War II.<sup>203</sup> The ECCC Trial Chamber went on to quote the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY), which stated in its *Tadic* Judgment that “since the [Nuremberg] Charter, the customary status of the prohibition against crimes against humanity and the attribution of individual criminal responsibility for their commission have not been seriously questioned.”<sup>204</sup>

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<sup>198</sup> Jared L. Watkins & Randle C. DeFalco, *Joint Criminal Enterprise and the Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia*, 63:1 RUTGERS L. REV. 193, 202-05 (2011) [hereinafter Watkins & DeFalco].

<sup>199</sup> *Id.* at 202; ECCC DISCUSSION GUIDE, *supra* note 191, at 77. Sources of international law relevant to the determination of whether an act was criminal at the time it was committed are listed in Article 38(1) of the Statute of the International Court of Justice. They include (1) international conventions or treaties, (2) customary international law; (3) general principles of law recognized by the international community, and (4) judicial decisions and teachings. United Nations Charter, Statute of the International Court of Justice, art. 38, ¶ 1, Oct. 24, 1945, 59 Stat. 1031, 1978; *see also* Case 002 Closing Order, *supra* note 7, ¶ 1302.

<sup>200</sup> Watkins & DeFalco, *supra* note 198, at 203; CASSESE, *supra* note 184, at 41; Case 002 Closing Order, *supra* note 7, ¶ 1302.

<sup>201</sup> Watkins & DeFalco, *supra* note 198, at 204.

<sup>202</sup> Case 001 Judgment, *supra* note 193, ¶ 283. The Trial Chamber looked to customary international law, one of the sources of international law listed in Article 38(1) of the Statute of the International Court of Justice, because Cambodian law contained no provisions relevant to crimes against humanity prior to 1975, nor was Cambodia a party to any international treaty relevant to these crimes prior to that date. *See* Case 001 Judgment, *supra* note 193, ¶ 284.

<sup>203</sup> Case 001 Judgment, *supra* note 193, ¶ 285. *See also supra* note 185.

<sup>204</sup> Case 001 Judgment, *supra* note 193, ¶ 289; *Prosecutor v. Tadic*, Case No. IT-94-1, Trial Chamber Judgment, ¶ 623 (May 7, 1997).

As mentioned above, jurisdiction over crimes against humanity was also included in Article 5(c) of the Charter of the International Military Tribunal for the Far East (Tokyo Charter) and in Law No. 10 of the Control Council for Germany. Subsequently, in 1946, the United Nations General Assembly adopted two resolutions affirming the principles established in the Nuremberg Charter and recommending extradition and punishment of persons accused of crimes listed in the Charter;<sup>205</sup> these resolutions show the process whereby crimes against humanity moved from specific provisions in the statutes of the post-World War II Tribunals to crimes that became a general, integral part of customary international law.<sup>206</sup>

The specific offenses with which the Accused could be charged for denial of medical care and medical experimentation—extermination, enslavement, torture, persecution and other inhumane acts—have also consistently been recognized as constituting crimes against humanity since the Nuremberg-era Tribunals.<sup>207</sup> Extermination, enslavement, persecution and other inhumane acts “were explicitly included as constituting crimes against humanity” in Article 6(c) of the Nuremberg Charter, Article 5(c) of the Tokyo Charter, and Article II of the Control Council Law No. 10. Torture was subsumed into other inhumane acts in the Nuremberg and Tokyo Charters, but was explicitly listed as a crime against humanity in the Control Council Law No. 10.<sup>208</sup> It is therefore clear that both crimes against humanity as a general concept and the specific crimes against humanity of extermination,

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<sup>205</sup> CASSESE, *supra* note 184, at 107; G.A. Res. 3(1), U.N. Doc. A/RES/3(1) (Feb. 13, 1946), *available at* <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/032/54/IMG/NR003254.pdf?OpenElement> (on the extradition and punishment of war criminals); G.A. Res. 95(1), U.N. Doc. A/RES95(1) (Dec. 11, 1946), *available at* <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/46/IMG/NR003346.pdf?OpenElement> (affirming the principles of international law recognized by the Charter of the Nuremberg Tribunal).

<sup>206</sup> CASSESE, *supra* note 184, at 107.

<sup>207</sup> Case 001 Judgment, *supra* note 193, ¶ 293

<sup>208</sup> *Id.*

enslavement, torture, persecution and other inhumane acts existed prior to April 1975.

The second inquiry in the *nullum crimen sine lege* analysis requires the ECCC Trial Chamber to determine whether, given the existing definition of crimes against humanity in 1975 and the types of crimes against humanity recognized at that time, (e.g., extermination, enslavement, torture, persecution and other inhumane acts) it was foreseeable to the Accused that causing mass death and suffering by withholding medical care and conducting medical experiments constituted crimes against humanity. The ECCC Trial Chamber's analysis of this question should be informed by the precedent of the "Doctors' Trial," (officially *U.S.A. v. Karl Brandt*), held under Control Council Law No. 10 to prosecute medical doctors and others accused of medical experimentation and mass murder under the Nazi Euthanasia Program (to be discussed further *infra*, page 58).<sup>209</sup>

With respect to the third and final inquiry in the *nullum crimen sine lege* analysis—whether the existing laws were sufficiently accessible to the Accused such that they had appropriate notice of the foreseeable criminal liability—the precedents set by the Nuremberg and Tokyo Tribunals as well as the Control Council No. 10 cases would have been sufficiently accessible to the Accused in April 1975 to put them on notice that criminal responsibility attached to the crimes against humanity of extermination, enslavement, torture, persecution and other inhumane acts. The establishment of the Nuremberg and Tokyo Tribunals was an international event that took place during the Accused's lifetimes, and their precedents led to major changes in the development of international law. Furthermore, the precedent of the "Doctors' Trial," which was also held during the Accused's lifetimes, would have provided clear

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<sup>209</sup> *U.S.A. v. Karl Brandt*, Case No. 1, Trials of War Criminals before the Nuremberg Military Tribunals (NMT) (Aug. 20, 1947), summary available at [http://nuremberg.law.harvard.edu/php/docs\\_swi.php?DI=1&text=medical](http://nuremberg.law.harvard.edu/php/docs_swi.php?DI=1&text=medical).

notice to them that a government system of medical mistreatment could amount to a crime against humanity. Furthermore, the appalling nature of a crime can be taken into account when determining whether a law was sufficiently accessible to the Accused such that they had knowledge of the criminality of their actions.<sup>210</sup> The ECCC Trial Chamber may therefore find that conducting medical experiments on living, non-consenting adults and promulgating a policy of denying basic medical care to the sick and injured is of such an appalling nature that the Accused should have known their actions were criminal even without precedents like the “Doctors’ Trial” to caution them.

Though a comprehensive description of the historical evolution of the relevant crimes against humanity is outside the scope of this paper, the next subsections will define the *actus reus* and *mens rea* of extermination, enslavement, torture, persecution and other inhumane acts, and will support the argument that these crimes were sufficiently defined, foreseeable and accessible by 1975 to enable ECCC prosecution of the Four Accused related to medical abuses in Democratic Kampuchea. Furthermore, the subsequent subsections will argue that the abovementioned crimes against humanity incorporated specific medical crimes such as the denial of medical care and medical experimentation prior to 1975.

### **c. Crimes Against Humanity *Chapeau* Elements**

Offenses listed in Article 5 of the ECCC Law can constitute crimes against humanity only if the following *chapeau* elements are established: (1) there must be an attack that forms a nexus with the acts of the accused; (2) the attack must be widespread or systematic; (3) it must be directed against any civilian population; (4) it must be on national, political, ethnical, racial or religious grounds; and (5) the

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<sup>210</sup> Case 002 Closing Order, *supra* note 7, ¶ 1302; Watkins & Randle, *supra* note 198, at 204; Case 001 Judgment, *supra* note 193, ¶ 295.

accused must have the requisite knowledge.<sup>211</sup> Each of these *chapeau* elements will be analyzed in turn below.

### **1. Attack and Nexus**

Article 5 of the ECCC Law provides no definition of the term “attack,” but the ECCC Trial Chamber defined it in the Judgment of Case 001 as “a course of conduct involving the multiple commission of acts of violence.”<sup>212</sup> The Chamber went on to note that an accused does not need to commit all of the acts of violence that comprise the attack, but that his or her actions must be part of the broader attack. An attack is distinct from armed conflict and may precede, outlast or continue through such hostilities.<sup>213</sup> The ICTY Appeals Chamber has further found that an attack is “not limited to the use of armed force [but] encompasses any mistreatment of the civilian population.”<sup>214</sup> In the Case 001 Judgment, the ECCC Trial Chamber found that “the attack” was comprised of the international armed conflict in Democratic Kampuchea between April 1975 and January 1979, which included the entry of Khmer Rouge forces into Phnom Penh on April 17, 1975, the forcible transfer of civilians out of Phnom Penh, enforced labor under extremely difficult conditions and the dismantling of the judiciary and other organs of the state.<sup>215</sup>

Though not explicitly listed as a requirement in the Article 5 definition of crimes against humanity, the ECCC has found that there must be a nexus between the acts of the accused and the attack, such that the acts of the accused “are not wholly divorced from the context of the attack.”<sup>216</sup> The ICTY and ICTR have interpreted their own statutes to require this nexus as well, finding that the acts that

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<sup>211</sup> Case 001 Judgment, *supra* note 193, ¶ 297.

<sup>212</sup> *Id.* ¶ 298 (citing *Prosecutor v. Nahimana*, Case No. ICTR-99-52-A, Appeals Chamber Judgment, ¶ 981 (Nov. 28, 2007) [hereinafter *Nahimana* Appeal Judgment]).

<sup>213</sup> *Id.* ¶ 299.

<sup>214</sup> *Prosecutor v. Kunarac*, Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, ¶ 86 (July 12, 2002) [hereinafter *Kunarac* Appeal Judgment].

<sup>215</sup> Case 001 Judgment, *supra* note 193, ¶ 320.

<sup>216</sup> *Id.* ¶ 318.

constitute crimes against humanity “must share some relation, temporal or geographical, with the attack.”<sup>217</sup> The underlying acts can be committed before or after the main attack, but they cannot be “so far removed from that attack that, having considered the context and circumstances in which [they were] committed, [they] cannot reasonably be said to have been part of the attack.”<sup>218</sup> Because the Accused’s policies of denying basic medical care and conducting medical experiments were intimately related to many aspects of the attack—such as the forced transfer of civilians to the countryside and enforced labor in cooperatives—the prosecution will likely be able to show that there is a nexus between the attack and the acts of the Accused with respect to medical crimes.

## **2. Widespread or systematic**

According to customary international law, only offenses that are “of extreme gravity and not...limited to a sporadic event but [are] part of a pattern of misconduct”—can constitute crimes against humanity.<sup>219</sup> The ECCC has said that “‘widespread’ refers to the large-scale nature of the attack and the number of victims, while the term ‘systematic’ refers to the organised nature of the acts of violence and the improbability of their random occurrence.”<sup>220</sup> According to the ECCC, criteria to be taken into account when determining the widespread or systematic nature of an attack include: “the consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities, or any identifiable patterns of crimes.”<sup>221</sup> The wording in Article 5 of the ECCC Law is disjunctive, meaning an attack can be either widespread or systematic;

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<sup>217</sup> ECCC DISCUSSION GUIDE, *supra* note 191, at 34.

<sup>218</sup> Case 001 Judgment, *supra* note 193, ¶ 318.

<sup>219</sup> CASSESE, *supra* note 184, at 100; *see also* Case 001 Judgment, *supra* note 193, ¶ 300.

<sup>220</sup> Case 001 Judgment, *supra* note 193, ¶ 300 (citing *Kunarac* Appeal Judgment, *supra* note 214, ¶ 94; *Nahimana* Appeal Judgment, *supra* note 212, ¶ 920; *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, Trial Chamber Judgment, ¶ 78 (Mar. 2, 2009)).

<sup>221</sup> Case 001 Judgment, *supra* note 193, ¶ 301 (citing *Kunarac* Appeal Judgment, *supra* note 214, ¶ 95).

in practice, it is often difficult to distinguish the criteria for one element from the other “since a widespread attack targeting a large number of victims generally relies on some form of planning or organization.”<sup>222</sup>

The “widespread or systematic” *chapeau* element would likely be satisfied at the ECCC Trial Chamber with respect to medical crimes because, as shown through Sections I-V above, the CPK regime’s denial of basic medical care and its approval of medical experimentation in detention facilities was both centrally planned and felt by prisoners and civilians throughout Democratic Kampuchea.

### **3. Directed against any civilian population**

The third *chapeau* element requires crimes against humanity to be directed against any civilian population. The ECCC has looked to the law of armed conflict, in particular Additional Protocol I and the Third Geneva Convention, to define “civilian” as including “all persons who are not members of the armed forces or otherwise recognised as combatants.”<sup>223</sup> The *chapeau’s* inclusion of the term “population” was intended to reiterate the requirement that crimes against humanity must be of a collective nature rather than a single or isolated attack on civilians.<sup>224</sup> The ECCC has made clear, however, that an attack does not have to be directed at the *entire* civilian population of a certain geographic area, but that it is “sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian ‘population’ as opposed to a limited and randomly-selected

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<sup>222</sup> Case 001 Judgment, *supra* note 193, ¶ 300.

<sup>223</sup> *Id.* ¶ 304; Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, *available at* <http://www.icrc.org/ihl.nsf/WebART/375-590007?OpenDocument>; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 50, June 8, 1977, 1125 U.N.T.S. 3, *available at* <http://www.icrc.org/ihl.nsf/WebART/470-750064?OpenDocument>.

<sup>224</sup> Case 001 Judgment, *supra* note 193, ¶ 302.

number of individuals.”<sup>225</sup> Furthermore, the ECCC noted that the jurisprudence of the ICTY and ICTR requires only that the population must be “predominately civilian”<sup>226</sup> and that the presence of non-civilians in the general population does not deprive the population of its civilian character.<sup>227</sup>

This third *chapeau* element would likely be satisfied in a prosecution of the Accused for medical crimes because the victims of such crimes were overwhelmingly civilians. Civilian urban dwellers (“new people”) forced to work in cooperatives in the countryside after the CPK regime took power suffered most gravely from the regime’s policy of denying basic medical care, and civilians imprisoned in CPK detention centers for alleged ties to the enemy suffered from the regime’s decision to conduct medical experiments on prisoners.

#### **4. National, political, ethnical, racial or religious grounds**

Article 5 of the ECCC Law further requires that an attack be committed on national, political, ethnical, racial or religious grounds. The ECCC Trial Chamber has interpreted this requirement as attaching to the nature of the attack, not the underlying offenses.<sup>228</sup> Statutes of other international tribunals, such as that of the ICTY, Nuremberg, Tokyo and the Control Council Law No. 10 cases do not require this added element of discrimination, making the ECCC’s jurisdiction over crimes against humanity more narrow than customary international law requires for the

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<sup>225</sup> *Id.* ¶ 193, ¶ 303 (citing *Kunarac* Appeal Judgment, *supra* note 214, ¶ 90 and *Sesay* Appeal Judgment, *supra* note 221, ¶ 719).

<sup>226</sup> *Id.* ¶ 305 (citing *Kunarac* Appeal Judgment, *supra* note 214, ¶ 91).

<sup>227</sup> *Id.* ¶ 306.

<sup>228</sup> *Id.* ¶ 313.

period 1975 to 1979.<sup>229</sup> The ECCC has found that the required discriminatory intent can be broadly interpreted, however, to include negatively-defined groups or individuals and persons who are subjectively defined by perpetrators to be part of a discriminated-against group, despite their objective position outside said group.<sup>230</sup> The ECCC's inclusion of subjective determinations of a victim's identity is particularly important, as the Khmer Rouge leadership often changed the criteria used to select the regime's enemies based on the Party Center's conclusions about which political and ethnic groups Cambodians belonged to rather than their actual identity.

This *chapeau* element would also likely be satisfied in a prosecution of the Accused for medical crimes because the attack that occurred between 1975 and 1979 was committed, at the least, on national and political grounds. In the medical crimes context, “new people” received the worst medical care and the least access to proper medical facilities because the Party Center distrusted them for their alleged allegiance to the enemy—namely the Vietnamese or the West. Similarly, individuals were imprisoned in CPK detention centers because of suspected ties to Vietnam or other Party Center enemies. These same individuals were then targeted for medical experiments due to their status as political enemies of the state.

### **5. Requisite knowledge or *mens rea***

The ECCC Law also does not specify a knowledge or *mens rea* requirement, but the Trial Chamber has inferred from Article 5 that “in order to convict, an accused must have known that there is an attack on the civilian population and that his acts are a part thereof.”<sup>231</sup> The ECCC's interpretation thus follows that of the

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<sup>229</sup> *Id.* ¶ 314.

<sup>230</sup> *Id.* ¶ 315.

<sup>231</sup> *Id.* ¶ 319.

ICTR, which has previously found the same knowledge requirement.<sup>232</sup> At both the ICTR and ECCC, the accused need only know the general context of the attack of which his acts are a part; he does not have to intend his acts to be directed against the targeted population.<sup>233</sup>

The prosecution should be able to prove that the four Accused had the requisite *mens rea* to convict them for medical crimes. Because Nuon Chea, Khieu Samphan and Ieng Sary were high-ranking members of the CPK Central Committee and Standing Committee, they had intimate knowledge of “the general context of the attack” befalling Democratic Kampuchea between 1975 and 1979, and they knew that the policies they promulgated furthered this attack. Though Ieng Thirith was not a member of these committees, her position as Minister of Social Affairs and Action made her acutely aware of the attack occurring from 1975 to 1979 and that her actions overseeing the denial of medical care to innocent civilians were part of that attack.

#### **d. Crimes Against Humanity Enumerated Acts**

The enumerated crimes against humanity over which the ECCC has jurisdiction are:

- murder
- extermination
- enslavement
- deportation
- imprisonment
- torture
- rape
- persecutions on political, racial and religious grounds
- other inhumane acts<sup>234</sup>

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<sup>232</sup> ECCC DISCUSSION GUIDE, *supra* note 191, at 32.

<sup>233</sup> Case 001 Judgment, *supra* note 193, ¶ 313.

<sup>234</sup> ECCC Law, *supra* note 191, art. 5.

The Accused's policies of denying medical care and conducting medical experiments possibly implicate extermination; enslavement; torture; persecutions on political, racial and religious grounds; and other inhumane acts.

### 1. Extermination

**Actus reus:** Extermination involves the mass or large-scale destruction of a group of individuals.<sup>235</sup> The crime of extermination is distinguished from that of murder by the scale of destruction; whereas murder can be comprised of a singular incident, extermination contemplates acts or omissions that are collective in nature.<sup>236</sup> There is no minimum threshold for the number of victims targeted, however; the requirement of scale is instead assessed on a case-by-case basis taking all relevant factors into account.<sup>237</sup> Murder is also distinct from extermination because extermination of a group of individuals need not take immediate effect, and it can be perpetrated through acts of omission in addition to positive acts.<sup>238</sup> Such acts of omission might involve, for example, the denial of medicine or food to a group of individuals if the perpetrator's intention is to destroy those individuals.<sup>239</sup> The ICTR Trial Chamber in *Prosecutor v. Kayishema* defined the *actus reus* of extermination in part as the perpetrator's participation "in the mass killing of others or in the *creation of conditions of life* that lead to the mass killing of others, through his act(s) or omission(s)."<sup>240</sup> The Statute of the International Criminal Court (ICC) explicitly codifies the ICTR Trial Chamber's finding, stating that "[e]xtermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of

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<sup>235</sup> See, e.g., CASSESE, *supra* note 184, at 109; CLAIRE DE THAN & EDWIN SHORTS, INTERNATIONAL CRIMINAL LAW AND HUMAN RIGHTS 97 (2003) [hereinafter DE THAN & SHORTS].

<sup>236</sup> See, e.g., DE THAN & SHORTS, *supra* note 236, at 98.

<sup>237</sup> See, e.g., Case 001 Judgment, *supra* note 193, ¶ 336.

<sup>238</sup> DE THAN & SHORTS, *supra* note 236, at 98.

<sup>239</sup> *Id.*

<sup>240</sup> *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, ¶ 144 (May 21, 1999) (emphasis added).

access to food and medicine, calculated to bring about the destruction of part of a population.”<sup>241</sup>

In its Judgment in Case 001, the ECCC Trial Chamber found the customary international law prohibition of extermination to be “undisputed”<sup>242</sup> and followed the ICC and other international tribunals in characterizing extermination as “an act, omission or combination of each that results in the death of persons on a massive scale.”<sup>243</sup> The ECCC emphasized in its Case 001 Judgment that “the perpetrator’s role in the death of persons on a massive scale may be remote or indirect,”<sup>244</sup> confirming the longstanding view that the *actus reus* of extermination need not be a positive act or an act that takes immediate effect. The ECCC Trial Chamber also affirmed ICTY, ICTR and ICC jurisprudence in stating that “[a]ctions constituting extermination include creating conditions of life that are aimed at destroying part of a population, such as withholding food or medicine.”<sup>245</sup>

***Mens rea:*** In the Case 001 Judgment, the ECCC Trial Chamber required a showing that “the perpetrator acted with ‘the intent to kill persons on a massive scale, or to inflict bodily injury or create conditions of life that lead to death in the reasonable knowledge that such act or omission is likely to cause the death of a large number of persons.’”<sup>246</sup> The ICTY Trial Chamber has found that proof of recklessness or gross criminal negligence is not sufficient to hold an accused criminally responsible for extermination.<sup>247</sup> Neither of these *mens reas* are sufficient to hold an accused responsible for the crime against humanity of murder, and because

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<sup>241</sup> Rome Statute of the International Criminal Court art. 7(2)(b), July 17, 1998, 2187 U.N.T.S. 3.

<sup>242</sup> Case 001 Judgment, *supra* note 193, ¶ 334.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* ¶ 335.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* ¶ 338 (citing *Prosecutor v Bagosora*, Case No. ICTR-98-41-T, Trial Chamber Judgment, ¶ 219 (Dec. 18, 2009) [hereinafter *Bagosora* Trial Judgment]).

<sup>247</sup> *Prosecutor v. Stakic*, Case No. IT-97-24, Judgment, ¶ 642 (July 31, 2003).

extermination requires a greater scale of death than murder, it would not be logical to require a lower intent threshold in extermination cases than in murder cases.

***Denial of Medical Care as Extermination:*** Because the ECCC Trial Chamber has expressly listed “withholding food or medicine” as an example of an action constituting extermination, it will likely be fairly easy for the prosecution in Case 002 to prove at least some of the Four Accused committed the *actus reus* of this crime against humanity. The *actus reus* of extermination by denying medical care could be framed in one of two ways: as a positive act involving a government policy of systematic decimation of the country’s medical facilities, removal of its trained medical doctors and creation of home-made, scientifically untested medication, or as an act of omission involving government refusal to treat the sick and dying. In either instance, the CPK regime created conditions of life that lead to the death of at least hundreds of thousands of Cambodians in a four-year period,<sup>248</sup> a scale of destruction that likely satisfies the massiveness requirement of the crime of extermination.

The prosecution must also prove that the Accused had the requisite *mens rea* for the crime of extermination—the intent to kill persons on a massive scale, or to create conditions of life that lead to death in the reasonable knowledge that such act or omission is likely to cause the death of a large number of persons.<sup>249</sup> Though it will be more difficult for the prosecution to prove the Four Accused had the requisite *mens rea* than that they committed the required *actus reus*, there is evidence that at least some of the accused—namely Ieng Thirith and Nuon Chea—had “reasonable knowledge” that their acts or omissions with respect to medical care would likely cause death on a massive scale.

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<sup>248</sup> HEDER, *supra* note 10; As many as two million people are believed to have died during the Khmer Rouge era (April 1975 to January 1979), amounting to nearly one-third of the Cambodian population. Between 500,000 and one million Cambodians were apparently executed outright; the others who died did so primarily from starvation, disease and the medical policies and practices of the Khmer Rouge.

<sup>249</sup> Case 001 Judgment, *supra* note 193, ¶ 338.

As the Minister of Social Affairs and Action in the CPK regime, Ieng Thirith was responsible for implementing the regime's medical policies and for investigating and reporting on health issues around the country. According to the Co-Investigating Judges' Closing Order for Case 002, she was "responsible for the production, supply, and distribution of medicine [and] was kept apprised of the serious health problems which arose throughout the country, including the fact that medicine was traditional and experimental, was at best ineffective or of low quality, and was being administered by unqualified medical staff."<sup>250</sup> She personally traveled throughout Cambodia to survey cooperatives and worksites,<sup>251</sup> and in 1976 she saw first hand the dire living conditions the CPK had created in the Northwest Zone: "I saw everyone in the open rice fields, in the open air and very hot sun, and many were ill with diarrhea and malaria."<sup>252</sup>

Nuon Chea was "Brother Number Two" and the Chairman of the Standing Committee, which placed him in charge of overseeing social welfare generally and the Ministry of Social Affairs and Action in particular.<sup>253</sup> He made public statements after the purges of trained medical staff that devotion to the Party was more important than medical qualifications or experience in choosing new "revolutionary medics."<sup>254</sup> He had regular monthly meetings with Ieng Thirith about her Ministry work,<sup>255</sup> and he also attended at least one Central Committee meeting where reports were made as to the improper delivery of medicine to patients in Khmer Rouge hospitals because the nurses were illiterate.<sup>256</sup> Nuon Chea was regularly copied on telegrams sent by Zone leaders to the Party Center on aspects related to cooperatives

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<sup>250</sup> Case 002 Closing Order, *supra* note 7, ¶ 1246.

<sup>251</sup> *Id.* ¶ 1243.

<sup>252</sup> BECKER, *supra* note 1, at 236 (interview between Ieng Thirith and Elizabeth Becker).

<sup>253</sup> Case 002 Closing Order, *supra* note 7, ¶ 881.

<sup>254</sup> Nuon, *supra* note 2.

<sup>255</sup> Case 002 Closing Order, *supra* note 7, ¶ 887.

<sup>256</sup> Sokhym, *Revolutionary Female Medical Staff*, *supra* note 48, at 27.

and worksites, including working conditions and the prevalence of illness and disease.<sup>257</sup>

As members of the Central Committee, Khieu Samphan and Ieng Sary were integral members of the Party leadership and were part of the system of “collective leadership” in which important decisions were made in concert with other party leaders. They were privy to the same reports and information as Pol Pot and Nuon Chea, and they therefore knew, in all likelihood, what the CPK’s medical policies were and how they were affecting the Cambodian people.<sup>258</sup> Additionally, there is evidence that the CPK regime imported small amounts of scientific medicine to treat upper-echelon CPK members between 1975 and 1979, and that Khieu Samphan and Ieng Sary (as well as Nuon Chea and Ieng Thirith) received scientific medicine at a medical facility reserved for CPK leadership.<sup>259</sup> The fact that these leaders sought medicine from abroad rather than use the homemade remedies created by revolutionary medics is further proof that Ieng Sary and Khieu Samphan knew the medicine available in Democratic Kampuchea was ineffective or fatal.

## 2. Enslavement

***Actus reus:*** The crime of slavery is universally recognized not only as a crime against humanity but also as a crime in contravention of the laws of war and of customary international law generally.<sup>260</sup> Enslavement is “the exercise of any or all of the powers attaching to the right of ownership over a person.”<sup>261</sup> In its Judgment in

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<sup>257</sup> Case 002 Closing Order, *supra* note 7, ¶ 911.

<sup>258</sup> *Id.* ¶¶ 1001, 1131 (“As a full-rights member of the Central Committee, Ieng Sary [and Khieu Samphan] could “consider and discuss and join in the decision making” with regard to all matters.”).

<sup>259</sup> See NGOR, *supra* note 39, at 255; GENOCIDE IN CAMBODIA, *supra* note 1, at 294, 328.

<sup>260</sup> DE THAN & SHORTS, *supra* note 236, at 98.

<sup>261</sup> *Prosecutor v. Kunarac*, Case No. IT-96-23 & 23/1, Trial Chamber Judgment, ¶ 539-40 (Feb 22, 2001); see also Slavery Convention art. 1(1), Sept. 25, 1926, 60 LoN 254, available at <http://www2.ohchr.org/english/law/slavery.htm>. The definition of enslavement in the Rome Statute for the International Criminal Court is: “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.” Rome Statute of the International Criminal Court art. 7(2)(c), July 17, 1998, 2187 U.N.T.S. 3.

*Prosecution v. Kunarac*, the ICTY Trial Chamber defined the *actus reus* of enslavement as the exercise of these powers of ownership and the *mens rea* of enslavement as the intentional exercise of such powers.<sup>262</sup> The crime of enslavement does not require proof that the victim did not consent to being enslaved.<sup>263</sup> Citing to *Kunarac*, the ECCC Trial Chamber in the Case 001 Judgment stated that examples of the exertion of the powers of ownership over another include “control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.”<sup>264</sup>

***Mens Rea:*** As mentioned above, the *mens rea* of enslavement is the intentional exercise over another of the powers attaching to the right of ownership.<sup>265</sup>

***Denial of Medical Care and Medical Experimentation as Enslavement:*** In the medical care context, the *actus reus* of enslavement would likely be (1) the CPK regime’s near total control over the Cambodian population’s access to medicine and medical care and (2) the regime’s policy of conducting medical experiments on prisoners in various CPK detention facilities. The regime’s enslavement of the Cambodian population is clearest cut in the detention center context, where prison guards and other CPK officials “deliberately exercised total control and all of the powers attaching to the right of ownership over of [sic] the persons placed there, without them being given any real right to agree.”<sup>266</sup> Prisoners

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<sup>262</sup> *Prosecutor v. Kunarac*, Case No. IT-96-23 & 23/1, Trial Chamber Judgment, ¶ 539-40 (Feb 22, 2001).

<sup>263</sup> Case 001 Judgment, *supra* note 193, ¶ 343 (citing *Kunarac* Appeal Judgment, *supra* note 214, ¶ 120).

<sup>264</sup> *Id.* ¶ 342 (citing *Kunarac* Appeal Judgment, *supra* note 214, ¶119 (internal citations omitted)).

<sup>265</sup> Case 001 Judgment, *supra* note 193, ¶ 345 (citing *Kunarac* Appeal Judgment, *supra* note 214, ¶116); *see also* DE THAN & SHORTS, *supra* note 236, at 98.

<sup>266</sup> Case 002 Closing Order, *supra* note 7, ¶ 1392.

were not able to opt out of medical experiments, nor were they even made aware that they were the subjects of such experiments.

In the Case 002 Closing Order, the Co-Investigating Judges also found the legal elements of enslavement had been satisfied outside of detention centers, in the worksites and cooperatives established throughout the country as part of the “Super Great Leap Forward.” According to the Closing Order:

Total control was exercised over food (collectivized), accommodation, access to medical care and permission to travel, even for family events. Psychological control was exercised through constant surveillance by the *Chhlop*, self-criticism meetings, enforced disappearances, severe punishment for any attempted escape and the daily use of force, cruel treatment and abuse, threats and coercion aimed at imposing compliance with the regime’s policies. A large number of people were sent to security centres simply because they sought more food or complained about their living conditions.<sup>267</sup>

The ECCC Trial Chamber may find that a conviction for enslavement may need to encompass more than control over access to medicine and medical care, but exercising power over this area of one’s life could certainly be one component of such a conviction.

To prove that the Accused had the required *mens rea* of enslavement, the prosecution must show that each defendant intentionally exercised over another the powers attaching to the right of ownership. As explained in the section above on extermination, the intent of the Accused to exercise control over the Cambodian population’s access to medical care can be inferred from the direct role at least two of the Accused (Ieng Thirith and Nuon Chea) took in formulating the CPK medical policies, from the knowledge the Four Accused had about the state of medical care in the country, and from the degree of coercive control they exercised.<sup>268</sup>

### **3. Torture**

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<sup>267</sup> *Id.* at ¶ 1393.

<sup>268</sup> *Id.* at ¶ 1396.

**Actus Reus:** Like the prohibition against slavery, the prohibition against torture is absolute; it is a peremptory or non-derogable principle of international law.<sup>269</sup> Though there is some variation in the terminology used to define torture in the international treaties and agreements that prohibit it, the ECCC Trial Chamber has defined the crime in three parts. First, torture must involve “the infliction, by an act or omission, of severe pain or suffering, whether physical or mental.”<sup>270</sup> Both objective and subjective factors should be considered in determining what constitutes “severe pain or suffering”; objective factors include the severity of the harm inflicted and subjective factors include such attributes as the age, sex and state of health of the victim.<sup>271</sup> The ECCC Trial Chamber lists the following acts as being “sufficiently severe as to constitute torture”: “conditions imposed upon detention [that include] beating, sexual violence, prolonged denial of sleep, food, hygiene and medical assistance, as well as threats to torture, to rape or to kill relatives.”<sup>272</sup> Second, the perpetrator must inflict the act or omission in order to attain a certain result, such as obtaining information or a confession, punishing, intimidating or coercing a victim<sup>273</sup>; there is no requirement, however, that the perpetrator commit an act or an omission solely to attain this certain result.<sup>274</sup> Third, the crime of torture must be committed by or at the instigation of a public official or person acting in an official capacity.<sup>275</sup>

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<sup>269</sup> DE THAN & SHORTS, *supra* note 236, at 101; Case 001 Judgment, *supra* note 193, ¶ 352.

<sup>270</sup> Case 001 Judgment, *supra* note 193, ¶ 354 (citing *Kunarac* Appeal Judgment, *supra* note 214, ¶ 142).

<sup>271</sup> *Id.* ¶ 355.

<sup>272</sup> *Id.* (citing *Prosecutor v. Delalic*, Case No. IT-96-21-T, Trial Chamber Judgment, ¶ 467 (Nov. 16, 1998)).

<sup>273</sup> Case 001 Judgment, *supra* note 193, ¶ 356.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* ¶ 357.

***Mens Rea:*** The acts or omissions that cause severe pain or suffering must be perpetrated intentionally.<sup>276</sup>

***Denial of Medical Care and Medical Experimentation as Torture:***

The *actus reus* of torture by medical mistreatment would be the regime's infliction of severe pain and suffering on individuals by denying them access to medical care or by conducting medical experiments on them, in order to intimidate or coerce them. The ECCC Trial Chamber's Judgment in Case 001 states that the "prolonged denial of . . . hygiene and medical assistance" are "sufficiently severe to constitute torture,"<sup>277</sup> but the Trial Chamber's findings on torture in CPK detention facilities contained no mention of medical experimentation or denial of medical care.<sup>278</sup> Similarly, the Co-Investigating Judges Closing Order in Case 002 does not explicitly list denial of medical care or medical experimentation as torture, though it does state its list of torture techniques is not exhaustive.<sup>279</sup>

However, *United States of America v. Karl Brandt*,<sup>280</sup> a Control Council No. 10 case heard between 1946 and 1947 and known as "The Doctors' Trial," provides precedent for convicting the Four Accused of torture for the medical experiments

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<sup>276</sup> *Id.* ¶ 358.

<sup>277</sup> *Id.* ¶ 355.

<sup>278</sup> *Id.* ¶ 360 ("The Chamber finds that the following interrogation techniques, as applied at S-21, inflicted severe physical pain or mental suffering for the purpose of obtaining a confession or of punishment, and constituted torture: severe beating, electrocution, suffocation with plastic bags, water-boarding, puncturing, inserting needles under or removing finger and toe nails, cigarette burns, forcing detainees to pay homage to images of dogs or objects, forced feeding of excrement and urine, direct or indirect threats to torture or kill the detainees or members of their family, the use of humiliating language, plunging detainees' heads in a water jar and lifting by the hands tied in the back, and one proven instance of rape. The Chamber further finds that this list is not exhaustive and that other torture techniques may have been carried out.").

<sup>279</sup> Case 002 Closing Order, *supra* note 7, ¶ 1410 ("Torture was both premeditated and institutionalized as the centrepiece of CPK policy against 'enemies'. It took the form, *inter alia*, of beatings, applying electric shocks, asphyxiation with a plastic bag, simulated drowning, puncturing and extracting fingernails and toenails and inserting needles in them, inflicting cigarette burns, forcing detainees to pay homage to images of dogs or other objects, force-feeding of excrement and urine, direct or indirect threats to torture or kill detainees or their family members, the use of humiliating language, plunging detainees in a water jar or suspending them by their hands tied behind their back.").

<sup>280</sup> *U.S.A. v. Karl Brandt*, Case No. 1, Trials of War Criminals before the Nuremberg Military Tribunals (NMT) (Aug. 20, 1947), summary available at [http://nuremberg.law.harvard.edu/php/docs\\_swi.php?DI=1&text=medical](http://nuremberg.law.harvard.edu/php/docs_swi.php?DI=1&text=medical).

prison personnel conducted in detention facilities. Karl Brandt and 22 other doctors and administrators in the Nazi regime were indicted on four counts, one of which was crimes against humanity, for conducting a series of medical experiments on concentration camp inmates. The experiments concerned the effects and treatments for high altitude conditions, freezing, malaria, bone regeneration and transplantation, saltwater consumption and sterilization, among other things.<sup>281</sup> Fifteen of the 23 defendants were found guilty of committing crimes against humanity, including torture, for their role in these medical experiments.<sup>282</sup> If the Accused are convicted of the crime of torture in relation to the regime's medical policies, then, it will most likely be for the medical experiments conducted in the detention centers the CPK operated across the country rather than the denial of medical care in worksites and cooperatives; the pain and suffering arising from denying access to medical care would likely be better prosecuted under the other four enumerated acts listed here.

The Four Accused must also be found to have the requisite *mens rea* to commit the crime of torture: the intentional infliction of severe pain or suffering. Like extermination and enslavement, the intent to commit torture can be inferred for at least some of the Accused due to their knowledge that torture was being committed by CPK cadres and detention center personnel, the widespread use of torture in many of the regime's detention facilities and the coordination of such torture techniques to intimidate victims. In Case 001, Duch explicitly linked Nuon Chea to the medical experiments conducted at the S-21 detention center, testifying

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<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

that Nuon Chea had direct knowledge of the medical tests being performed on prisoners and even ordered some of the experiments himself.<sup>283</sup>

#### 4. Persecution

**Actus Reus:** The crime of persecution involves an “act or omission which [ . . . ] discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law.”<sup>284</sup> The act or omission must actually have discriminatory consequences; discriminatory intent is not sufficient.<sup>285</sup> An act is discriminatory “when a victim is targeted because of the victim’s membership in a group defined by the perpetrator on specific grounds, namely on a political, racial or religious basis.”<sup>286</sup> One of the main purposes behind persecutory acts is to alienate a targeted segment of society by inducing such hardship on the group that it becomes segregated and subjugated.<sup>287</sup>

While there is no comprehensive, enumerated list of persecutory acts, they definitely include the underlying offenses for crimes against humanity (e.g., murder, extermination, enslavement, torture) and other relevant examples such as: “harassment, humiliation and psychological abuse, confinement in inhumane conditions, cruel and inhumane treatment, deportation, forcible transfer and forcible displacement, and forced labour assignments.”<sup>288</sup> These other examples of persecutory acts must be of “equal gravity or severity” to the acts that constitute the underlying offenses for crimes against humanity, so that not every discriminatory

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<sup>283</sup> *Prosecutor v. Kaing Guek Eav alias “Duch,”* Case No. 001/18-07-2007/ECCC-TC, Transcript of Proceedings 83-4 (June 16, 2009).

<sup>284</sup> Case 001 Judgment, *supra* note 193, ¶ 376 (citing *Bagosora* Trial Judgment, *supra* note 247, ¶ 2208; *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-1, Judgment and Sentence, ¶ 21 (June 1, 2000); *Prosecutor v. Simic*, Case No. IT-95-9-A, Appeals Chamber Judgment, ¶ 177 (Nov. 28 2006)).

<sup>285</sup> Case 001 Judgment, *supra* note 193, ¶ 377.

<sup>286</sup> *Id.*

<sup>287</sup> DE THAN & SHORTS, *supra* note 236, at 106.

<sup>288</sup> Case 001 Judgment, *supra* note 193, ¶ 378.

human rights violation amounts to a persecutory act.<sup>289</sup> In order to reach the level of severity or gravity required, persecutory acts are usually thought of as a series of acts or part of a pattern or practice instead of a single act in isolation<sup>290</sup>; persecutory acts also generally need to be gross or blatant denials of a fundamental human right.<sup>291</sup>

***Mens Rea:*** The perpetrator of a persecutory act or omission must act not only with intent to commit the act itself (be it murder or enslavement or confinement in inhumane conditions) but also with the intent to injure the victim because of his membership in a particular religious, racial or political group. The perpetrator therefore must act with “specific intent to discriminate,”<sup>292</sup> a requirement that is not present for the other enumerated crimes against humanity.

***Denial of Medical Care as Persecution:*** The prosecution’s ability to bring medically-related persecution charges against the Accused depends on whether the prosecution can define a class of individuals that was singled out on political, racial or religious grounds for particularly egregious medical mistreatment. One possibility for such a class is the “new people” or “April 17” people that lived primarily in Democratic Kampuchea’s urban areas prior to the Khmer Rouge take-over and tended to have greater connections to the Western world than the “old people” who lived in Khmer-Rouge strongholds during the war. There is evidence that “new people” did receive inferior medical care to “old people” and regime cadres despite the fact that they suffered from disease and malnutrition far more frequently. “New people” were treated almost exclusively at clinics staffed by young children, where only home-made medications were available, while “old people” were

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<sup>289</sup> *Id.* (citing *Prosecutor v. Kordić*, Case No. IT-95-14/2-A, Appeals Chamber Judgment, ¶ 671 (Dec. 17 2004); *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Chamber Judgment, ¶ 131 (July 29, 2004); *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Appeals Chamber Judgment, ¶ 199 (17 Sept. 17 2003)).

<sup>290</sup> DE THAN & SHORTS, *supra* note 236, at 108.

<sup>291</sup> Case 001 Judgment, *supra* note 193, ¶ 378.

<sup>292</sup> *Id.* ¶ 379 (citing *Prosecutor v. Kvočka*, Case No. IT-98-30/1-A, Appeals Chamber Judgment, ¶460 (Feb. 28, 2005)).

sometimes given access to Western medicines.<sup>293</sup> The Co-Investigating Judges noted in the Case 002 Closing Order that “new people” or “17 April people” were “subjected to harsher treatment than the old people, with a view to reeducating them or identifying ‘enemies’ among them.”<sup>294</sup>

The prosecution may have a difficult time establishing the dual *mens rea* required for persecution crimes<sup>295</sup>—intent to deny medical care and intent to deny medical care to “new people” specifically because of their alleged political views. As with extermination, enslavement and torture, this *mens rea* will be easier to prove for Nuon Chea and Ieng Thirith than Ieng Sary and Khieu Samphan. Ieng Thirith was specifically responsible for visiting medical clinics and hospitals throughout the country, and she reported on such visits to Nuon Chea. In this position, she would have likely been aware of the differences in treatment for “old people” and “new people” and may even have been part of promulgating that discriminatory policy. As the man who oversaw Ieng Thirith’s Ministry, Nuon Chea would also have direct knowledge of the inferior treatment given to “new people” and would likely have approved of this harsher treatment toward perceived enemies of the regime.<sup>296</sup>

## 5. Other Inhumane Acts

***Actus Reus:*** “Other inhumane acts” is a residual category of offenses intended not to be a catchall for any human rights abuse committed during an attack but rather a means of criminalizing “conduct which meets the criteria of a crime against humanity but does not fit within one of the other specified underlying

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<sup>293</sup> See, discussion Section II.D, *supra* at 15-18.

<sup>294</sup> Case 002 Closing Order, *supra* note 7, ¶ 1417.

<sup>295</sup> See, e.g., Randle C. DeFalco, *Accounting for Famine at the Extraordinary Chambers in the Courts of Cambodia: The Crimes against Humanity of Extermination, Inhumane Acts and Persecution*, 5 INT’L J. TRANSITIONAL JUSTICE, 142, 157 (2011), available at <http://ijtj.oxfordjournals.org/content/5/1/142.full.pdf?keytype=ref&ijkey=pdXaeZBMgrQTd9z>.

<sup>296</sup> Case 002 Closing Order, *supra* note 7, ¶ 1417.

crimes.”<sup>297</sup> As with persecutory acts, other inhumane acts must be “sufficiently similar in gravity to the other enumerated crimes” to constitute a crime against humanity. The seriousness or gravity of the offense is considered on a case-by-case basis, taking into account all relevant factors. The most important factors include “the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim including age, sex and health, as well as the physical, mental and moral effects of the act upon the victim.”<sup>298</sup> There is no requirement that the victim suffer long lasting or permanent harm as a result of the perpetrator’s act or omission, but the victim must have suffered serious harm to body or mind as a result of the perpetrator’s conduct.<sup>299</sup> Examples of inhumane acts recognized by the ECCC Trial Chamber in the Case 001 Judgment include forcible displacement and forcible transfer, severe bodily harm, detention in brutal and deplorable living conditions and beatings or other acts of violence.<sup>300</sup>

***Mens Rea:*** A perpetrator must either act with the intent to inflict serious mental or physical suffering on a victim or commit a serious attack upon the human dignity of a person, or act with knowledge that the act or omission would likely cause such suffering or attack.<sup>301</sup>

***Denial of Medical Care and Medical Experimentation as***

***Inhumane Acts:*** The *actus reus* of the inhumane acts of denying medical care and conducting medical experiments would be similar to that of extermination—inflicting

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<sup>297</sup> Case 001 Judgment, *supra* note 193, ¶ 367.

<sup>298</sup> Case 001 Judgment, *supra* note 193, ¶ 369 (citing *Prosecutor v. Vasilijevic*, Judgment, Case No. IT-98-32-A, Appeals Chamber Judgment, ¶ 165 (Feb. 25, 2004)); *see also* DE THAN & SHORTS, *supra* note 236, at 113 (citing *Prosecutor v. Mucic*, Case No. IT-96-21, Trial Chamber Judgment, ¶ 536 (Nov. 16, 1998) (“Whether the offense attains the level of seriousness of physical or mental harm required is decided by the particular circumstances of each individual case, taking into account such factors as ‘the nature of the act or omission, the context in which it occurs, its duration and/or repetition, the physical, mental and moral effects of the act on the victim and the personal circumstances of the victim, including age, sex and health.’”)).

<sup>299</sup> Case 001 Judgment, *supra* note 193, ¶ 369; DE THAN & SHORTS, *supra* note 236, at 113.

<sup>300</sup> Case 001 Judgment, *supra* note 193, ¶ 370.

<sup>301</sup> *Id.* ¶ 371; DE THAN & SHORTS, *supra* note 236, at 114.

serious bodily and mental harm on individuals through policies of withholding proper medication from them and/or conducting medical experiments on them. Unlike the crime of extermination, however, the crime of inhumane acts also accounts for physical and mental suffering that does not result in death, meaning the class of victims would include not only those who died as a result of medical experiments or lack of access to proper medical treatment but also those who survived the CPK regime and continue to experience pain and suffering from their prior ill-treatment.<sup>302</sup>

The Case 002 Closing Order found *prima facie* evidence that inhumane acts were committed at worksites, cooperatives and detention centers. The Co-Investigating Judges stated that “by depriving the civilian population of adequate food, shelter, medical assistance, and minimum sanitary conditions, the CPK authorities inflicted on victims serious mental and physical suffering and injury, as well as a serious attack on human dignity of similar gravity to other crimes against humanity.” The Closing Order went on to state that in many cases in CPK worksites and cooperatives, “no preventative steps were taken for medical conditions, [and] medical care was provided by medics with no medical training, medicine or equipment. Consequently the treatment was often ineffective and in some cases exacerbated illness.”<sup>303</sup> As to inhumane acts committed in CPK detention facilities, the Closing Order states that “[m]any detainees, weakened by poor living conditions and by mistreatment by guards and interrogators, fell sick, in which case they received no or insufficient medical treatment administered by untrained personnel without proper equipment and medicine.”<sup>304</sup>

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<sup>302</sup> See DeFalco, *supra* note 296, at 153-54.

<sup>303</sup> Case 002 Closing Order, *supra* note 7, ¶ 1437.

<sup>304</sup> *Id.* at ¶ 1438.

To prove the Accused had the requisite *mens rea* to be convicted of inhumane acts for denial of medical care and medical experimentation, the prosecution must show they intended to inflict serious mental or physical suffering on a victim or that they acted with knowledge that the act or omission would likely cause such suffering. This *mens rea* is similar to that of extermination and is a product of similar policy concerns. The prosecution should be able to show, in the least, that Nuon Chea and Ieng Thirith had knowledge that CPK medical policies were causing serious mental and physical suffering.

## **VII. Conclusion**

During the four-year reign of the Khmer Rouge in Democratic Kampuchea, “the people of Cambodia suffered one of the most horrific onslaughts of human rights abuses perpetrated by a government against its own population since the Second World War.”<sup>305</sup> One of the most egregious components of this onslaught was the CPK regime’s systematic decimation of the country’s medical system, including its hospitals, trained medical staff and store of scientifically-tested medications. The CPK’s establishment of a “revolutionary” medical regime called for the use of untrained, illiterate child medics to care for the sick and dying and for the distribution of home-made remedies that were never scientifically tested or approved. A tiered medical system ensured top-level Khmer Rouge leadership and “old people” were given better medical treatment than “new people,” resulting in a disproportionate level of death among that subset of Cambodians.

A second component of the Khmer Rouge’s attack against its own population came through the regime’s approval of medical experiments on living human subjects. While the vast majority of sick and injured Cambodians living under the

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<sup>305</sup> Steven R. Ratner, *The United Nations Group of Experts for Cambodia*, 93 AM. J. INT’L L. 948 (Oct. 1999).

Khmer Rouge fell victim to the experimental home-made remedies mandated by the regime, political prisoners in CPK detention facilities were singled out as subjects for experimental surgeries and studies of the human anatomy.

This memo has attempted to document these medical crimes and to analyze the possibility of accounting for them through prosecutions of Nuon Chea, Khieu Samphan, Ieng Sary and Ieng Thirith at the ECCC for the deaths that resulted from their medical policies. The most probable avenue for prosecution of the Accused for medical crimes is under the ECCC's fairly broad crimes against humanity jurisdiction. By 1975, the international community recognized both the general notion of crimes against humanity as an independent concept involving individual criminal responsibility and the specific crimes against humanity of extermination, enslavement, torture, persecution and other inhumane acts. The ECCC Trial Chamber can therefore use the rubric of these specific crimes against humanity to convict Nuon Chea, Khieu Samphan and Ieng Sary of medical crimes. While Ieng Thirith's mental deterioration in recent years likely means she will never stand trial for the crimes she allegedly committed, her role in perpetrating medical crimes would likely be highlighted through a conviction of her co-Accused. In this way, the ECCC Trial Chamber can provide a public accounting of these medical crimes and can deliver some measure of justice to victims who have waited almost four decades for their day in court.