

មជ្ឈមណ្ឌលឯកសារកម្ពុជា

INVESTIGATIVE INERTIA DURING THE ECCC TRIAL PHASE THE 1979 “S-21 VIDEO” & CHILD SURVIVOR NORNG CHANPHAL

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– Documentation Center of Cambodia Archives –

The grainy black and white video portrays the Khmer Rouge detention center, codenamed “S-21” (Security 21), just days after the Khmer Rouge abandoned the site where approximately 14,000 Cambodians were tortured and killed. The “S-21 video” portrays both the front and rear gates, the fence of corrugated sheet iron topped with rows of barbed wire, a wooden shack that is no longer there, and Buildings A, B, and C overlooking freshly plowed dirt where coconut trees, graves, and the Tuol Sleng Genocide Museum ticket booth now sit. In general, S-21 retains the same physical structure today as it did in early January 1979. However, the S-21 video taken by Ho Van Tay, the Vietnamese cameraman, also depicts graphic scenes of decomposing corpses left shackled to metal bed frames, as well as Vietnamese soldiers with two babies and two young children found at S-21.¹ In addition to the S-21 video, two rolls of photographic film, totaling 70 photographs, were also taken. The photographs depict an additional baby, bringing the total number of child and infant survivors to five.² One of those babies died of exhaustion soon after the Vietnamese discovered the children, while the two additional infants’ whereabouts are unknown. However, two older children included in the S-21 video – and the video itself – survived the thirty intervening years and have recently resurfaced. One of those child survivors, Nong Chanphal, testified on 2 July 2009 before the Extraordinary Chambers in the Courts of Cambodia (ECCC) at the trial of Kaing Guek Eav, alias Duch, the director of S-21. The recently acquired S-21 video was never shown in full at trial due to concerns about the film’s relevance and authenticity. On 29 July 2009, the Trial Chamber ruled the S-21 video inadmissible.³

¹ Five children were there, but the film only depicts four. Interview with Ho Van Tay, conducted by Dany Long, February 16, 2009, English translation by Dacil Q. Keo and Terith Chy. According to the interview of Tay, “There were no others outside of those five children.”

² The three pictures on the left above, are images taken from the pictures.

³ Decision on the Vietnamese Film Footage Filed by the Co-Prosecutors and on Witnesses CP3/3/2 and CP3/3/3, available at http://www.eccc.gov.kh/english/cabinet/courtDoc/388/E5_10_5_EN.pdf

1979 S-21 VIDEO – THE “VIETNAMESE FILM FOOTAGE”

From 1978-1988, Ho Van Tay was the supervisor of the film office at a television station in Ho Chi Minh City, Vietnam.⁴ In 1979, Tay arrived in Cambodia to follow the movements of Vietnamese troops and create documentary films from the subsequent footage. In February 2009, DC-Cam staff member Dany Long interviewed Ho Van Tay in Ho Chi Minh City. According to this interview, on 10 January 1979, Tay discovered S-21 while in a car with his driver and assistant; the awful smells emanating from S-21 led them to what initially appeared to be a school.⁵ Upon finding the five infants and children inside a low-level enclosure located behind S-21, Tay told the driver to call the Vietnamese troops due to the children’s very weak appearance. The Vietnamese troops carried the children outside of the center and called upon Cambodian female troops to tend to the children. Male Cambodian troops were also present at S-21 in early January 1979, most notably Khang Sarin.⁶ Tay then proceeded to film S-21, starting with the corpses in the smaller rooms on the lower floor and then moving to the upper floors that consisted of bigger rooms with beds. Tay recalled that in one of the rooms on the upper floor, there were several very fat chickens pecking on the corpses lying on the bed.

The S-21 film footage and photographs were initially stored at Ho Chi Minh City Television (HTV) and a copy of the original video still remains in the control of the Vietnamese state archives. In addition to the S-21 video, Tay stated that in 1979 the Vietnamese military transported at least one truckload of Democratic Kampuchea films from Cambodia to Vietnam.

In the early 1990’s, Youk Chhang, Director of the Documentation Centre of Cambodia (DC-Cam), learned about the existence of video footage shot at S-21 shortly after the Khmer Rouge fled the detention center. In the early 2000s, Nic Dunlop, a reporter, provided Youk with several pictures of corpses inside the rooms at S-21. Dunlop also informed Youk that the Vietnamese government possessed a video of S-21 from January 1979. Youk inquired about this film and was told that Cambodia possessed a copy in the People's Republic of Kampuchea (PRK) archive located in Phnom Penh; however, the alleged existing Cambodian copy of the film was never found. The PRK archive told Youk that the video was lost during the United Nations Transitional Authority in Cambodia (UNTAC) election.

After the ECCC became operational in 2006, the Office of the Co-Prosecutors (OCP) conducted their preliminary investigation of suspects from 2006 – August 2007. During this preliminary investigation, on 8 March 2007, DC-Cam provided the OCP a copy of every video it had related to the Democratic Kampuchea period, totaling 195 films on 231 DVDs. On 18 January 2008, for unknown reasons, Cambodian Co-Prosecutor Chea Leang contacted Youk instead of OCP Investigator Craig Etcheson to request five of those films. The Defense also contacted Youk about the films. Youk, in turn, requested Etcheson to share the films with Chea Leang and the Defense. However, during the search for the 5 films, the OCP realized it had misplaced 27 of the 195 films. After the films were located in the OCP office two weeks later on

⁴ Ho Van Tay also traveled to Cambodia in 1978 to film the Vietnamese Delegation to Democratic Kampuchea.

⁵ Interview with Ho Van Tay, conducted by Dany Long, February 16, 2009, English translation by Dacil Q. Keo and Terith Chy.

⁶ Khang Sarin is now an influential Cambodian politician.

5 February 2008,⁷ the OCP made all the films available to the OCIJ in March 2008 and the videos subsequently went into the case file during the investigative phase.

Throughout the investigative stage, Youk and the OCP held weekly meetings every Thursday. At one of these meetings in the fall of 2007, Youk notified Mr. William Smith, Deputy Co-Prosecutor, about Khmer Rouge (KR) films in France,⁸ KR films in the possession of the Vietnamese government, and paper documents at the CPP archive. Youk provided the OCP with the addresses of the Vietnamese State Archives in Vietnam and the CPP archive in Phnom Penh. Mr. Smith then forwarded the addresses and S-21 video information to the Office of the Co-Investigating Judges (OCIJ).⁹ According to a conversation between Youk and OCP Investigator Craig Etcheson, the OCIJ contacted the Vietnamese State Archives, but did not receive a response and interpreted this as evidence that Vietnam was unwilling to cooperate. However, the OCIJ's investigation was confidential; therefore, full information relating to their efforts to procure the video is not publicly known. When Craig Etcheson was asked to verify what he had earlier said to Youk about whether or not the OCIJ contacted the Vietnamese and CPP archives, he would neither confirm nor deny that this conversation occurred, citing the confidentiality of the judicial investigation.

Knowing that the video was still in the possession of the Vietnamese State Archives, Youk reached out to the Vietnamese government about the S-21 video. When Dany Long, team leader of the Promoting Accountability Project at DC-Cam, traveled to Vietnam in November of 2008 with Kokthay Eng, DC-Cam Research Director/Deputy Director, Youk requested that they inquire with the Vietnamese government about the S-21 video. They were successful in tracking down the video and this began a round of negotiations with the Vietnamese State Archives about transferring the original film to DC-Cam.

Around the same time, on 11 December 2008, the ECCC Trial Chamber ordered the Co-Prosecutors to file a “list of exhibits, namely any tangible objects, they intend to offer in the case” and a “list of the new documents they intend to offer in the case.”¹⁰ The deadline for the Co-Prosecutors to file their witness list and additional material was set to expire on 24 December 2008, Christmas Eve. On 19 December 2008, the Co-Prosecutors submitted their final lists of evidence, wherein the Co-Prosecutors stated that they did not intend to offer any “tangible objects” as exhibits, but did intend to offer “scanned documentary evidence currently available on the Case File including the photographic and video material.”¹¹ They made no mention of the original S-21 video,¹² the KR films in France, or additional films in Vietnam. However, it was well known by OCP Investigators that a few scenes from James Gerrand's documentary “Cambodia, Kampuchea” – which were already in the case file – were taken directly from the S-21 video that was in the possession of the Vietnamese government.

⁷ Email from Craig Etcheson to Youk Chhang, Tuesday, February 05, 2008.

⁸ For further information about missing Democratic Kampuchea era films in the possession of a private business in France, see *Missing Films from Democratic Kampuchea: A French Mystery*, available at <http://www.dccam.org/Archives/Films/Youk%20Missing%20Films%20from%20Democratic%20Kampuchea.pdf>

⁹ The OCIJ was responsible for all investigations after the OCP submitted their Introductory Submission in August of 2007.

¹⁰ Notification of a Trial Management Meeting and Order to the Parties to File Additional Materials, Case No. 001/18-07-2007-ECCC/TC, 11 December 2008, E5, ERN 250117-250121, paragraphs 4(b) and 4(c).

¹¹ Co-Prosecutors' Response to Trial Chamber's Order, para. 18.

¹² Cambodia Daily Volume 41 Issue 40: “KR Prosecutors Seek to Include S-21 Films,” DC-Cam Doc 7158.

Meanwhile, the negotiations between DC-Cam and Vietnam proved fruitful, and on 26 December 2008, Youk traveled to Ho Chi Minh City to pick up a copy of the S-21 video, which Vietnam donated to DC-Cam. That same day, DC-Cam announced to the international media, including Kyodo and Radio Free Asia, that it had received the film footage and over one thousand photographs from the government of Vietnam. The Vietnamese State Archives donated a total of 470 minutes of footage shot between 1973 and 1984 to DC-Cam, including the original S-21 video. At the time, Youk publicly commented on the importance of the footage, “[S]ome of the documentaries are related to information that can serve as evidence [at the ECCC] that has not been used or analyzed yet.”¹³ While in Vietnam, Youk also contacted the director of the S-21 video, Ho Van Tay, leading to an interview with Tay in January of 2009 by DC-Cam’s Dany Long in Ho Chi Minh City.

Aware that DC-Cam was now in possession of the S-21 video, on 5 January 2009, the OCP assigned their investigator, Craig Etcheson, to review the footage and ascertain its probative value. On 6 January 2009, Investigator Etcheson and Senior Assistant Prosecutor Tan Senarong reviewed the footage at DC-Cam and determined the films were relevant to Case Files 001 and 002. On 7 January 2009, the OCP urgently requested a copy of the S-21 video. Youk made a copy the same day, which the OCP picked up on 8 January 2009.¹⁴ The OCIJ subsequently made a request for the new footage. DC-Cam informed the OCIJ that it copied all the films and they would be made available through the OCP/ECCC.

In a pleading filed on 28 January 2009, the Co-Prosecutors asked the ECCC’s newly convened Trial Chamber to accept the S-21 footage as evidence.¹⁵ The OCP cited ECCC Internal Rule (IR) 39(4), concerning the Trial Chambers ability to extend filing deadlines or to allow for late submissions.¹⁶ The OCP also cited IR 92, authorizing the parties to make written submissions any time before the closing statements regarding “any evidence that they consider conducive to ascertaining the truth.”¹⁷ International Deputy Co-Prosecutor William Smith said, “Given that the evidence in question here was not discovered until after the date on which the list of new documents and exhibits was initially due, it is appropriate for the Trial Chamber to take such action here and allow the filing of a supplemental list.”¹⁸ The pleading further states, “The Co-Prosecutors had no knowledge of or basis on which to obtain these films prior to” the

¹³ “Vietnam Donates Khmer Rouge Films” by Kong Sothanarith, VOA Khmer, 26 December 2008 available at <http://voanews.com/khmer/2008-12-26-voa2.cfm>.

¹⁴ “The Office of the Co-Prosecutors recently received this new information one week after we submitted the witness list and the additional documents to the Trial Chamber, we received the news through the International news and through the Documentation Centre of Cambodia that they received these short films from the Government of Vietnam, therefore the Office of the Co-Prosecutors recently sent our investigators to examine the short films to see how important it is related to our case file 001. After the examination of the film we concluded that it is important relevance to the case file 001, and we requested the Documentation Centre to send us the materials to the Office of the Co-Prosecutors.” Statement of Ms. Chea Leang, Transcript of 18 February 2009, Case 001, Line 11-22, Page 37.

¹⁵ Cambodia Daily Volume 41 Issue 40: “KR Prosecutors Seek to Include S-21 Films,” DC-Cam Doc 7158.

¹⁶ IR Rule 39.4 “The Co-Investigating Judges or the Chambers may, at the request of the concerned party: a) extend any time limits set by them; or b) recognise the validity of any action executed after the expiration of a time limit prescribed in these IRs on such terms, if any, as they see fit. See also Rule 92 Revision 2: “The parties may, up until the closing statements, make written submissions as provided in the Practice Direction on filing of documents, and put before the Chamber any evidence that they consider conducive to ascertaining the truth.”

¹⁷ January 28, 2009, Motion of Co-Prosecutors to Submit New Evidence; see also IR 39 and 92 (2nd version).

¹⁸ January 28, 2009, Motion of Co-Prosecutors to Submit New Evidence.

announcement of DC-Cam regarding the procurement of films from the government of Vietnam. Upon learning about the existence of the footage, the OCP allege that they “acted with due diligence to obtain copies of the films, review them for probative evidence and disclose such evidence to the Trial Chamber.”¹⁹ The OCP noted that the footage was especially salient to corroborate witness testimony and documents collected during the CIJ investigation indicating that children of arrested Khmer Rouge cadres were detained at S-21 along with their parents, to show the conditions of S-21 in January 1979, and to provide evidence of a building that no longer exists.²⁰

At the Initial Hearing for the Duch trial on February 17 & 18, 2009, the Trial Chamber did not allow the Prosecution to submit the video into evidence. Although Kar Savuth, Duch’s Cambodian lawyer, earlier stated that the footage presented no new accusations and therefore would not affect the case against his client,²¹ at the Initial Hearing, Mr. Savuth objected to the submission of the video footage as evidence on several grounds. First, the defense stated that the film and potential new witnesses should have been vetted by the Co-Investigating Judges who spent a year preparing cases and concluded their 10-month investigation of Duch in May of 2008.²² Second, Mr. Savuth noted that it was provided by Vietnam: “This video is politically motivated to disguise the truth” and “[t]he reason we cannot accept the film footage is because this film footage has been produced by the Socialist Republic of Vietnam.”²³ Kar Savuth further noted that the Vietnamese cameraman should be called to testify at the trial to confirm the authenticity.²⁴ Finally, Mr. Savuth questioned how the children could have escaped Duch’s order to kill everyone at S-21 as the Vietnamese marched on the capital, doubting that the children seen in the films had in fact survived S-21.²⁵ “Why only [sic] the children were seen in the film? We were told that there were no children left at S-21. They were all executed,” he said.²⁶ Savuth continued, “When the children had not eaten for seven days and nights, how could they survive? If they could not survive, why did they appear in the film?”²⁷

In the 10 March 2009 Decision on Admissibility of New Materials and Direction to the Parties, the OCP’s assured the Trial Chamber “that they were unaware of, and could not reasonably have known of its existence before the date it was discovered or revealed by [DC-Cam].” The Trial Chamber relied on this assurance to find that “it was impossible for the Co-Prosecutors to obtain the film footage within the relevant time period.”²⁸ Additionally, the Chamber noted, “[I]t was filed at the first available opportunity thereafter and is prima facie relevant material.”²⁹ The Chamber declared the S-21 video admissible, subject to a review of the film’s relevance and authenticity during the substantive hearing.³⁰

¹⁹ ¶17, January 28, 2009, Motion of Co-Prosecutors to Submit New Evidence.

²⁰ Cambodia Daily Volume 41 Issue 40: “KR Prosecutors Seek to Include S-21 Films,” DC-Cam Doc 7158.

²¹ The Phnom Penh Post February 2, 2009 Doc 7168 “KR tribunal prosecutors move to include S-21 films as evidence”.

²² Cambodia Daily Volume 41 Issue 40: “KR Prosecutors Seek to Include S-21 Films,” DC-Cam Doc 7158.

²³ Ek Madra, “‘Killing Fields’ lawyers clash over torture film”; DC-Cam Doc 7268.

²⁴ *Id.*

²⁵ The Cambodian Daily, February 19, 2009 “Tribunal Calls Nearly 40 Witnesses in Duch Trial” Doc 7281.

²⁶ *Id.*

²⁷ *Id.*

²⁸ ¶ 12, 10 March 2009 Decision on Admissibility of New Materials and Direction to the Parties.

²⁹ *Id.*

³⁰ Reasoning ¶ 4, 10 March 2009 Decision on Admissibility of New Materials and Direction to the Parties.

During the opening statement by the Co-Prosecutors on the second day of trial on 31 March 2009, the Prosecution showed a video – “Cambodia, Kampuchea” by James Gerrand – before the Trial Chamber. This video contained clips taken directly from the original S-21 video. Mr. Francois Roux, the international defense lawyer for Duch, objected to the presentation of these clips because the issue of whether the S-21 video could be shown was still before the Trial Chamber. The Trial Chamber asked the OCP to clarify whether “this video footage is a new footage or the existing one which is already in the case file?”³¹ The international co-prosecutor, Mr. Robert Petit, responded by assuring the Chamber that “that every single piece of evidence that will be talked about by us today, that will be shown to you on your monitors, are in the case and have been in the case file.”³² He further added that “[a]ll the evidence in the case file, can be referred to by the parties, it is after that, up to [the Chamber] to decide what evidence [the Trial Chamber] need[s] to base [their] judgement on and to weigh that evidence accordingly.”³³ Dissatisfied with the OCP’s response, Mr. Roux responded that the “prosecution presents this film which is for all intents and purposes identical to the one that has been the subject of an application before [the Trial Chamber].”³⁴ Roux continued, “[W]e have had a year and a half of investigations on an adversarial basis with the Office of the Prosecutor. A number of documents were discussed or debated during the investigation. But some were not the subject of an adversarial debate.”³⁵ Roux finished by stating, “A few days before the beginning of this trial, the Co-Prosecutors announced that they had found an exceptional document that they absolutely wished to produce. And so what do we find out today? We find out that they had in their records something which they had failed to discuss adversarially [sic] during the investigation. This something is the same film! The same footage! This is not a fair trial!”³⁶ The Trial Chamber noted the objection by the Defense but considered that the objection was inappropriate at that point.

When asked about the similarity of the video in the case file and the recently discovered S-21 video, Youk Chhang explained that clips or segments of the original S-21 video were used, with or without permission of the Vietnamese government in the 1980s, in films regarding the Khmer Rouge. Therefore, there are videos in the case file that contain segments of footage that are identical to the S-21 video. The OCP Investigator was aware of this.

When child survivor Norng Chanphal eventually testified on 2 July 2009, the prosecution requested that the Chamber play the S-21 video. The defense again contested the authenticity of the video. On that day, the Chamber noted that it was not ready to decide the matter of whether the footage would be shown in full. Nevertheless, the prosecution requested that Chanphal be allowed to view the S-21 video and comment on its authenticity, arguing that the footage is relevant to all aspects of the case and provides evidence of the conditions of S-21, the murders, and the torture equipment utilized. The Chamber maintained its position, stating it would decide whether to show the S-21 video at a later date.

³¹ Page 17, lines 13-15, Transcript of Proceedings “Duch” Trial Public, Case File N° 001/18-07-2007-ECCC/TC, 31 March 2009, 0903H, Trial Day 2.

³² *Id.* at page 17, lines 17-20.

³³ *Id.* at page 18, lines 5-8.

³⁴ *Id.* at page 19, lines 17-19.

³⁵ *Id.* at page 20, lines 16-25, page 21, line 1.

³⁶ *Id.*

Notwithstanding the above position of the Trial Chamber, in the afternoon session of 2 July 2009, Judge Cartwright did allow a still image from the S-21 video to be shown. The still image showed two small naked children in front of the group of Vietnamese and female Cambodian soldiers. Chanphal testified that he and his little brother were the boys in the S-21 video, but at that time he was unaware that they were being filmed.

After the 29 July 2009 Decision on the Vietnamese Film Footage, it is unlikely that the original S-21 video (or other videos that contain images from the S-21 video) will ever be shown in full at trial. For Case 001, the possibility is nonexistent. However, for Case 002, it is possible that the OCIJ could place the S-21 video on the case file and then show it at trial.

THE S-21 CHILD SURVIVORS

DOCUMENTATION OF CHILD SURVIVORS

The S-21 video recently acquired by DC-Cam was not the first evidence of child survivors at S-21. Evidence and documentation of child survivors initially emerged during the proceedings of the People's Revolutionary Tribunal (PRT) in August of 1979 that convicted Pol Pot and Ieng Sary, in *absentia*, of genocide. PRT documents were published in *People's Revolutionary Tribunal Held in Phnom Penh of the Trial of the Genocide Crime of the Pol Pot-Ieng Sary Clique, Documents (August – 1979)*, compiled by a "group of Cambodian Jurists" and also in a later book, *Genocide in Cambodia*. The PRT documents included in these two resources include statements by witnesses about the Khmer Rouge. For example, the investigation report from the PRT mentions a child survivor of S-21, "[a] young boy named Phal."³⁷ Phal reportedly gave a statement to the PRT saying, *inter alia*, "My name is Phal, 10 years old, my father, Chen and my mother Yeux were murdered by Pol Pot. I have two brothers: Lit,³⁸ 8 years old and the other died at Tuol Sleng prison at the age of 5 months. I was imprisoned with my mother and two brothers."³⁹

³⁷ P. 133, Testimony of Surviving Prisoners, Investigation Report, People's Revolutionary Tribunal Held in Phnom Penh of the Trial of the Genocide Crime of the Pol Pot-Ieng Sary Clique, Documents (August 1979), by "A Group of Cambodian Jurists."

³⁸ When asked the name of his younger brother, Norng Chanphal's testimony was translated as, "The brother name Norng Chanly, alias A Let. He's my brother, my younger brother, of course, who went with me to Phnom Penh." Page 25, lines 7-9, Transcript of Proceedings "Duch" Trial Public, Case File N° 001/18-07-2007-ECCC/TC, 2 July 2009, 0905H, Trial Day 38.

³⁹ Testimony of "Phal" as it originally appeared, errors included, in *People's Revolutionary Tribunal Held in Phnom Penh of the Trial of the Genocide Crime of the Pol Pot-Ieng Sary Clique*: "My name is Phal, 10 years old, my father, Chen and my mother Yeux were murdered by Pol Pot. I have two brothers: Lit, 8 years old and the other died in Tuol Sleng prison at the age of 5 months. I was imprisoned with my mother and two brothers. The Pol Pot men separated us from our mother since our arrival at Tuol Sleng. As he was very hungry, my little brother kept crying all the time and later died. In the day time, they let me and Lit in the kitchen. At night we slept in the second floor of building "C", whereas my mother were fettered in small compartment, in the basement of the same building. We each had only a pair of trousers and a disarrayed shirt. We slept without mosquito nets and blankets. At night we were a prey to innumerable mosquitoes. Each meal we were given a spoon of soup with a little salt. Each time Polpotists got angry they beat us mercilessly. They hit us on the head. They kicked us at the back when we did not go quickly. Once as we heard gun-shots, I am my brother hid behind a heap of clothes taken from the prisoners. At that moment I saw they were killing a boy, a little bigger than me. He was bashed against a tree beside the kitchen. I did not know where they threw the body of the boy. When they all left the prison, we came to the kitchen. As we had no means of cooking rice, we ate the rest of the fermenting soup. We also ate the rest of the food reserved for

In an interview of Norng Chanphal conducted at DC-Cam on 20 July 2009, Chanphal stated that he initially became aware of the statements attributed to him by the PRT in the early 1980s. After seeing Chanphal's alleged statement in a book summarizing the 1979 PRT, Chanphal's older brother in Takeo Province went to look for Chanphal at the orphanage in Phnom Penh. As a result, they were reunited after their separation during the Khmer Rouge period.

Chanphal acknowledges that he participated in informal interviews after his rescue from S-21, but he did not testify before the PRT and did not understand at the time that he was providing assistance to the 1979 trial. After thirty years, during the 20 July 2009 interview, Chanphal read his alleged testimony before the 1979 PRT for the first time. His observations regarding this testimony are as follows: First, the 1979 testimony is extremely detailed, and Chanphal doesn't remember ever giving such a detailed account of his experience. Second, from what he can remember, there is little truth and consistency in the PRT testimony compared to what he remembers providing. He noted a few consistencies, such as his reference specifically to Building "C" and sleeping on the second floor. However, Chanphal was never shown a picture of his dead "disemboweled mother," he was never tortured or beaten, never saw prisoners "plunged into water tanks," and never saw anyone killed. Chanphal further noted that his statements were possibly mixed with statements from other survivors.

The DC-Cam interviewer, Terith Chy, noted that the low quality of investigators in 1979 and the fact that the authors of the compilation would not identify themselves by name, but instead only as "a group of Cambodian jurists," raising serious questions about the veracity of the statements. Chanphal added that his statements might have resulted from leading questions posed to him that he didn't fully understand as a child, and he would respond to them in the affirmative. Furthermore, the possibility exists that many of Chanphal's alleged statements were intentionally altered or exaggerated in order to secure an overwhelming conviction of Pol Pot and Ieng Sary. For example, the PRT investigative reports have Phal allegedly stating the following: "Each time Polpotists got angry they beat us mercilessly," "While I was in prison I saw the most atrocious tortures by the Polpotists against prisoners," and after torturing a prisoner he says "the Polpotists burst into gleeful laughters [sic]."⁴⁰ While the language attributed to Phal reads more like zealous propaganda than a young child giving a statement about his experience

pigs. While I was in the prison I saw the most atrocious tortures by the Polpotists against prisoners. They burned an iron stick and used it to perforate the noses of the prisoners. The women prisoners were plunged into water tanks. Some days before their departure, they showed me a photo of my disemboweled mother." Following is another type of killing that young Phal described in his declaration: "Once, after lunch I saw 5 Polpotists taking to the gallows one prisoner who wore white knee-breeches and a blue shirt. After knotting his neck, they pulled up the other end of the rope in a way that the poor prisoner rose in the air. Then they loosened the rope and let the prisoner falling down from a high gallows. The victim suffered this sort of torture for the second time, before his body was dragged to a cell beside the electroshock room. After some time, they brought out another prisoner who had on only knee-breeches. They killed him in the same manner. After his death, I saw his tongue out of his mouth. And then they led the third who went slowly, because his hands were busy keeping his unbraced knee-breeches. They beat and kicked him by his back to make him go quickly. He was then hung up in the air. As his knee-breeches slipped down to his feet, the Polpotists burst into gleeful laughters." P. 134-5, Testimony of Surviving Prisoners, Investigation Report, People's Revolutionary Tribunal Held in Phnom Penh of the Trial of the Genocide Crime of the Pol Pot-Ieng Sary Clique, Documents (August 1979), by "A Group of Cambodian Jurists."

⁴⁰ P. 134-5, Testimony of Surviving Prisoners, Investigation Report, People's Revolutionary Tribunal Held in Phnom Penh of the Trial of the Genocide Crime of the Pol Pot-Ieng Sary Clique, Documents (August 1979), by "A Group of Cambodian Jurists."

at S-21, the documentation of such statements lend credence to Chanphal's story that he survived S-21.

Actual footage of alleged child survivors of S-21 appeared on John Pilger's documentary, "Year Zero: The Silent Death of Cambodia," when it was aired in October of 1979. Four male survivors including Vann Nath and Ung Pech are shown with the four alleged children survivors.⁴¹ Also, the film "Children of Cambodia," produced by the People's Republic of Kampuchea (PRK) in the 1980s, contains images of alleged child survivors of S-21.

In the years following the Khmer Rouge the location and identity of the child survivor(s) were known. After Chanphal was sent to an orphanage, delegations would visit the orphanage and request to see the place where he was detained at S-21. Chanphal would guide them around S-21 and recall what happened to him.⁴²

REMERGENCE OF NORNG CHANPHAL

However, over the years the child survivors' whereabouts and identities faded, remaining only in memories, documents, photographs, and videos. When Youk began to research S-21 extensively in 2000, he gradually learned about the existence of child survivors. Youk even encouraged Cambodian/French film director Rithy Panh to shoot a film about S-21⁴³ and to include the child survivors' stories if they could be tracked down. One of the child survivors, Norng Chanphal, was located. While Rithy Panh's 2003 documentary, *S-21: The Khmer Rouge Killing Machine* reunited former prisoners and their former captors; Panh chose not to include the child survivor.

After DC-Cam obtained the S-21 video from the government of Vietnam in November 2008, DC-Cam began a new search equipped with pictures of the five former child detainees at S-21, who would now be in their 30s or 40s, and who could possibly provide first-hand evidence of the crimes that occurred at S-21.⁴⁴ However, it would not be the newly acquired S-21 video or renewed efforts by DC-Cam that would bring the child survivors out of obscurity. Instead, at the beginning of February 2009, television and radio broadcasts led Chanphal back to the spotlight. First, Radio Free Asia broadcasted a show about the upcoming Duch trial. According to Terith Chy of DC-Cam, a person called in to the radio show claiming to be a child survivor of S-21 and requesting more info about the ECCC. Terith heard the show and tried to obtain the caller's contact information; however, the caller could not be tracked down and it was feared that the child survivor would be lost, once again, to anonymity.

Instead, after watching a TV program about the approaching ECCC civil party application deadline,⁴⁵ on 4 February 2009, Norng Chanphal initially traveled by himself to Tuol Sleng Genocide Museum. The Tuol Sleng staff told him to contact the ECCC or DC-Cam. When Chanphal arrived at the ECCC Victims Unit, he attempted to file a civil party application – claiming to be a child survivor of S-21. However, the Victims Unit could not process his

⁴¹ <http://www.andybrouwer.co.uk/blog/2009/02/child-survivors.html>

⁴² Page 95, lines 8-14, Transcript of Proceedings "Duch" Trial Public, Case File N° 001/18-07-2007-ECCC/TC, 2 July 2009, 0905H, Trial Day 38.

⁴³ Based on the DC-Cam monograph: *Victims and Perpetrators?*

⁴⁴ Phnom Penh Post February 6, 2009 "Search for S-21 child prisoners begins," DC-Cam Doc 7185.

⁴⁵ Page 79, lines 22-25, Transcript of Proceedings "Duch" Trial Public, Case File N° 001/18-07-2007-ECCC/TC, 2 July 2009, 0905H, Trial Day 38.

application on the grounds that it was two days after the ECCC's deadline of 2 February 2009.⁴⁶ The Victims Unit staff, Ms. Huy Samphoas, suggested that he go to DC-Cam's office to see if the S-21 biographies of his parents could be located and to inquire into the possibility of becoming a fact witness. Upon arrival at DC-Cam, Youk questioned Chanphal about certain details of his story and eventually confirmed that he was in fact one of the child survivors of S-21. Youk then showed Chanphal the newly acquired S-21 video and Chanphal confirmed that he was the older child in the video and noted his willingness to testify at trial if needed.⁴⁷ One day later, DC-Cam found his father's S-21 biography.

On 13 February 2009, DC-Cam announced to the public that Norng Chanphal and his younger brother, Norng Chanly, had been located and confirmed that the brothers were two of the five children in the S-21 video donated by Vietnam. DC-Cam also noted Chanphal's knowledge that at least one of the five children in the video had died. As further evidence that Chanphal was indeed the child survivor, on 20 February 2009, three days after recognizing a picture of the now grown-up S-21 child survivor in a local paper, Khiev Kola, a retired NGO worker and a former reporter covering the PRT, contacted Youk because he had interviewed the child survivor in 1979. As proof of their interview, Kola emailed Youk a photograph taken with Chanphal in 1979, and Chanphal subsequently confirmed its authenticity. Kola later visited Youk at DC-Cam and donated the original photo of Norng Chanphal and ten other photos of Khmer Rouge leaders that he discovered in 1979 in an old building in Phnom Penh.⁴⁸

Civil party lawyer Alain Werner requested that the ECCC extend the deadline of the civil party application due to Chanphal's unique situation as a survivor of S-21 and because he was unaware of the ECCC's proceedings. However, on March 10, 2009, the Trial Chamber ruled that the "[l]awyers representing Mr. Chanphal ha[d] not provided the Chamber with any information to suggest that exceptional circumstances prevented him from filing his application within the prescribed deadline." Accordingly, Chanphal's application to become a civil party was denied. The Chamber noted that whether or not the OCP could call Chanphal as a witness would be decided at a later date. His status as a witness was subsequently approved on 10 April 2009. Civil party lawyers Karim Khan and Alain Werner decided that after Norng Chanphal was admitted as a witness, it would not be proper for them assist Chanphal because he was not a civil party.

On DC-Cam's own initiative, Terith Chy and Dara Vanthan of DC-Cam took Chanphal's statement on 13 February 2009, and soon thereafter provided a copy to the Prosecution. The Prosecution served this statement on the Defense team on July 1, 2009, one day before Chanphal was set to testify. At trial on July 2, 2009, international co-Prosecutor William Smith requested that the Chamber take notice of a motion it had filed that morning, minutes before 9 A.M. The motion requested the addition to the case file of Chanphal's February statement in accordance with IR 87(4). The prosecution acknowledged that "the statement should have been provided [earlier] by the prosecution, but because of the disconnect between his civil party application and

⁴⁶ March 10 Trial Chamber Decision. 2 February 2009 was fixed as the deadline by the Chamber in accordance with Rule 23(4) of the Internal Rules, "To be admissible, civil party applications must be filed within the Victims Unit at least 10 (ten) working days before the initial hearing."

⁴⁷ Phnom Penh Post February 13, 2009 "Researchers locate two of four child S-21 survivors" DC-Cam Doc 7205 & 7219.

⁴⁸ See the far-right photo on the first page.

[Chanphal] granting [sic] status of witness, that connection was not made and the provision of the statement was overlooked.”⁴⁹ In addition, the Prosecution specifically noted the importance of allowing the parties to refer to the interview during the testimony of Chanphal.

The Cambodian defense counsel, Mr. Savuth, and international defense counsel, Ms. Canizares, successfully argued to the Trial Chamber that the interview should not be entered into the case file or relied upon during that day’s testimony. Mr. Savuth argued that the Defense had received the interview the day before Chanphal’s testimony, even though the Prosecution had possession of the document since February 2009, and therefore the Defense had no time to review the interview and prepare.⁵⁰ Moreover, Ms. Canizares noted that it should not be allowed in because DC-Cam, an NGO, took the statement of the witness, instead of an officer of the ECCC with the witness under oath. Accordingly, Chanphal appeared on July 2, 2009, without the supporting statement.⁵¹

NORNG CHANPHAL’S TESTIMONY

Norng Chanphal’s father was a Communist Party of Kampuchea (CPK) cadre and in 1978 he was sent to Phnom Penh. Two months later, Chanphal, his mother, and his younger brother were also sent to Phnom Penh with the promise of being reunited with Chanphal’s father. After spending three days at a train station, they were taken to S-21 along with two other women and their three babies. Upon arriving at S-21, Chanphal watched as guards beat his ill mother until she collapsed. S-21 guards pulled her up from the ground by her hair and subsequently slapped and kicked her. Finally, the staff photographed her for the S-21 prisoner biography. Instead of being reunited with their father, whom they never saw again, the three were confined to a large cell along with the two other women and their babies. Chanphal noted that one of the children was a three-year-old girl, another was a girl younger than three, and the last was a child still breast-feeding. After spending a foodless night on the floor, Chanphal, his brother, and the other children were separated from their mothers. Nine years old, Chanphal was the eldest of the five children at S-21. They were taken to the workshop area behind Building “C” of S-21 where carpenters and blacksmiths worked alongside a pigpen. The children slept behind the workshop and an elderly woman looked after them. From the workshop area, Chanphal could look up to the window of the cell where he was initially detained with his mother. Chanphal testified, “When I stayed at the rear of the workshop I could look behind and saw my mother, who was standing with her hands holding the bars of the window, looking at me. I knew that she would want to talk to me [about] something but it was rather far from the place where she was standing and from my location. I looked at her for a moment and then I never saw her again.”⁵²

During the evacuation of S-21 in early January 1979, the elderly caretaker urged Chanphal to leave S-21 with her, but he would not leave without his mother. Chanphal could not carry the

⁴⁹ Page 3, lines 8-11, Transcript of Proceedings “Duch” Trial Public, Case File N° 001/18-07-2007-ECCC/TC, 2 July 2009, 0905H, Trial Day 38.

⁵⁰ The Defense also challenged the interview on the basis that an NGO, DC-Cam, conducted the interview and not court officials. Therefore, the interview was conducted without the administration of an oath and should not be used by the Chamber.

⁵¹ See generally pages 13-15, Transcript of Proceedings “Duch” Trial Public, Case File N° 001/18-07-2007-ECCC/TC, 2 July 2009, 0905H, Trial Day 38.

⁵² Page 52, lines 1-6, Transcript of Proceedings “Duch” Trial Public, Case File N° 001/18-07-2007-ECCC/TC, 2 July 2009, 0905H, Trial Day 38.

sick children, so he hid them under a piece of cloth at the workshop. Waiting near the building where he thought his mother was detained, he, his younger brother, and the three-year-old child who could walk, hid near a stack of clothes and broken furniture. Chanphal eventually ventured out of his hiding spot to search for his mother, but was frightened by the corpses chained to beds and returned to the workshop and stayed with the other children. They drank rainwater and ate spoiled gruel until two Vietnamese soldiers found them and prepared a duck with rice for them. Around a day later, a large group of Vietnamese and Cambodian soldiers arrived at S-21. After a brief time living with the Vietnamese soldiers, Chanphal lived in a local orphanage near Olympic Stadium.

Of the five children detained at S-21, one of the younger children died at S-21, presumably due to exhaustion and starvation. The other four children survived. Chanphal and his younger brother were placed in different orphanages in Phnom Penh and the two young girls perhaps lived in Germany or Japan after a German citizen adopted them. DC-Cam continues to search for the two young girls.

S-21 PRISONER BIOGRAPHIES

During the operation of S-21 as a detention and interrogation office, the staff recorded detailed biographies of the prisoners and meticulously recorded the interrogations. Due to the rapid entry of Vietnamese forces into Phnom Penh in early January 1979, Duch and the staff of S-21 did not have sufficient time to destroy these damning documents. The prisoner biographies are now used as evidence before the ECCC of those who were detained at S-21.

When Chanphal first went to DC-Cam's offices on 4 February 2009, the staff located the S-21 biography of his father - Norng Chen – and provided it to the Prosecution.⁵³ Norng Chen's biography included the name of his wife – Mom Yaong – but DC-Cam's initial search for the S-21 biography of Chanphal's mother proved fruitless.

DUCH'S REFUTATION OF CHANPHAL'S TESTIMONY

When the Prosecution introduced the S-21 biography of Chanphal's father's at trial on 2 July 2009, Duch acknowledged that if a S-21 biography existed for someone, then he accepted as true his or her detention at S-21 and eventual murder. Therefore, Duch accepted responsibility for the detention and death of Chanphal's father. However, because Chanphal's parents were not taken to S-21 together, Duch concluded that the father was taken to S-21, as proved by the biography, and the mother and children to some other detention center because no S-21 bio existed for her. Duch testified, "Probably his mother had suffered at [an]other security office, or maybe his mother was sent to S-24. So we would like the Office of Co-Prosecutors to help trace down the documents."⁵⁴ Duch added the caveat that, "If we can find the S-21 document on the biography of his mother, then I would accept a complete testimony of Mr. Norng Chanphal, with respect."⁵⁵

⁵³ DC-Cam Doc K07350.

⁵⁴ Page 88, lines 4-7, Transcript of Proceedings "Duch" Trial Public, Case File N° 001/18-07-2007-ECCC/TC, 2 July 2009, 0905H, Trial Day 38.

⁵⁵ *Id.* at page 83, lines 22-25.

DISCOVERY OF THE MOTHER'S S-21 BIOGRAPHY

Sotheany Hin of DC-Cam was familiar with Norng Chanphal and his time at S-21 because she transcribed his victim application. Sotheany attended trial the day that Chanphal testified about his suffering at S-21 as a child and how his family was torn apart by the Khmer Rouge. Sympathetic towards Chanphal for having testified to such horrific personal details and then having Duch reject his testimony that he was at S-21, Sotheany felt compelled to resume the investigation for the mother's bio. Sotheany looked at the S-21 biography of Chanphal's father, specifically the spelling of Chanphal's mother's name. Remembering that at trial she heard Chanphal pronounce his mother's name slightly different than she remembered reading it on the father's S-21 biography, Sotheany considered possible alternative spellings for the mother's name. Switching letters of her last name around, she eventually found a name in the computer database - Mom Yauv (Doc K08732) – that she thought might be Chanphal's mother. She pulled this biography from the DC-Cam files and consulted with Sok Vannak of the Promoting Accountability project, who has extensive experience with prisoner biographies. Sotheany, Sok Vannak, and other DC-Cam staff collectively concluded that this biography was indeed the mother of Norng Chanphal and the husband of Norng Chen. To support their conclusion, they noted that both of the S-21 files had the same place of birth, similar spousal names, and they were arrested in the same place. Youk emailed the mother's S-21 biography to Mr. Bill Smith of the OCP on 3 July 2009.

On July 8, 2009, the prosecution requested that the newly uncovered S-21 biography of Chanphal's mother be included in the case file and considered “put before” the Chamber. Duch acknowledged Mom Yauv's S-21 biography, her presence at S-21, and that of her children. He then stated, “I would like to seek forgiveness from Norng Chanphal.”

THE ECCC TRIAL PHASE

The ECCC's civil law approach to investigations has no analogue in prior international criminal practice. Of the present ad hoc tribunals – the ECCC, ICTY, ICTR, Special Court for Sierra Leone (SCSL), and the Special Tribunal for Lebanon (STL) – only the ECCC utilizes investigating judges to conduct the majority of all investigations.⁵⁶ The current ECCC IR

⁵⁶ The common law based investigative stage at the ICTY and ICTR begins with the Prosecutor preparing an indictment. Once the Prosecutor is determined that a *prima facie* case exists, he or she transmits the indictment to a judge of the Trial Chamber. The indictment and its supporting material are then reviewed by a judge of the Trial Chamber for the determination of whether a *prima facie* case has been established by the Prosecution. If the judge is satisfied that a *prima facie* case has been established, the judge then confirms the indictment, but if the judge is not satisfied, then the indictment is dismissed. After confirming an indictment, “the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.” Normally after the arrest, detention, surrender or transfer of the indicted person(s), there is a long pretrial phase before the trial commences. Judges do not participate in the pretrial investigations because the prosecution and defense exclusively handle the investigations. Prosecutors investigate with the primary purpose of unearthing incriminating evidence against the accused, while defense lawyers investigate with the objective of exculpating the accused. In international courts or tribunals based on the common law the discussion of the evidence occurs mainly at trial. At the trial phase, which occurs under the supervision of the trial judges, the parties present the evidence accumulated during their respective investigations.

In contrast, the formation of the ECCC was influenced by the French non-adversarial system. Initially, during the preliminary investigations, the Co-Prosecutors put together the case file. “When the Co-Prosecutors have reason

establishes a structure that encourages “investigative inertia” during the trial phase. Unlike the common law based tribunals, where the prosecution and defense are viewed as the “engines of the investigation” throughout, before the ECCC, no party is responsible for continuing to investigate new evidence or leads once the trial phase begins. After the conclusion of the preliminary investigation by the Prosecution in August 2007, the IR allowed only the OCIJ to conduct investigations. The OCIJ concluded its extensive ten-month investigation of Duch’s case in May 2008. Once the OCIJ submitted the Final Closing Order on 8 August 2008, the Defense, Prosecution, Civil Parties, and the OCIJ were not authorized to conduct additional investigations into Case 001.⁵⁷ At this point, the case was in the trial phase and it was left to the discretion of the Trial Chamber whether to conduct any additional investigations.

ECCC INTERNAL RULE 93 – ADDITIONAL INVESTIGATIONS

According to ECCC Internal Rule 93, only the Trial Chamber can provide for additional investigations:

1. Where the Chamber considers that a new investigation is necessary it may, at any time, order additional investigations. Such order shall indicate which judge or judges shall conduct the new investigation.
2. Such judge(s) may, under the same conditions as the Co-Investigating Judges:
 - a) go anywhere within the territorial jurisdiction of the ECCC; b) interview witnesses; c) conduct searches; d) seize any evidence; or e) order expert opinions.

to believe that crimes under ECCC jurisdiction were committed, they sanction the opening of a judicial investigation by sending an introductory submission (IS) to the Co-Investigating Judges together with the case file.” The IS must include, *inter alia*, “a summary of the facts, the type of offence(s) alleged, the relevant provisions of the law that defines and punishes the crimes” and must “be accompanied by the case file and any other material of evidentiary value in the possession of the Co-Prosecutors,” including exculpatory evidence. If the factual allegations in the Introductory Submission are sufficient, then the Co-Prosecutors requests the CIJs to charge those individuals mentioned in the IS. The OCIJ then becomes “the engine of the proceedings,” because it is tasked with investigating and collecting the “documentary and testimonial evidence that form[s] the case file on which the Chamber and the parties will rely for the trials and appeals.” However, the CIJs only investigate the facts included in the Introductory Submission or a Supplementary Submission. When the CIJ determine that the investigation is complete, they notify all parties and their lawyers, and forward the case file to the CPs. If the CPs agree that the investigation is finished, they then complete a final submission and return the case file to the CIJ. The final submission by the CPs requests that the CIJs either indict the Charged Person and send him or her forward to trial, or dismiss the case. The CIJs then formally conclude the investigation by issuing a Closing Order, that either indicts the charged person or dismisses the case. If an Indictment is issued in the Closing Order, the OCIJ forwards the case file to the Trial Chamber to set a date for trial.

⁵⁷ See IR 51 which states that the OCP can only carry out “preliminary investigations to determine whether evidence indicates that crimes within the jurisdiction of the ECCC have been committed and to identify Suspects and potential witnesses;” see also IR 58(6) “At any time during an investigation, the Charged Person may request the Co-Investigating Judges to interview him or her, question witnesses, go to a site, order expertise or collect other evidence on his or her behalf;” see also IR 60(1) “1. The Co-Investigating Judges may take statements from any person whom they consider conducive to ascertaining the truth, subject only to the provisions of Rule 28,” see also IR 84(1) “In any case, the Accused shall have the absolute right to summon witnesses against him or her, whom the Accused was not able to examine during the pre-trial stage,” see also IR 93 “Additional Investigations by the Trial Chamber - 1. Where the Chamber considers that a new investigation is necessary it may, at any time, order additional investigations. Such order shall indicate which judge or judges shall conduct the new investigation. 2. Such judge(s) may, under the same conditions as the Co-Investigating Judges: a) go anywhere within the territorial jurisdiction of the ECCC; b) interview witnesses; c) conduct searches; d) seize any evidence; or e) order expert opinions.”

As of August 2009, the ECCC Trial Chamber has not utilized IR 93 to conduct additional investigations during the trial phase. The ensuing investigative inertia appears to result in knowledgeable organizations like DC-Cam conducting some of the necessary research or interviews and then transmitting this information to the ECCC. For example, if DC-Cam had not conducted additional research into the mother's S-21 biography, and the Trial Chamber had maintained its course of inaction regarding additional investigation, in all likelihood, the mother's biography would still be unknown and the matter of whether Chanphal was an S-21 child survivor would be a contested issue before the court. Instead of utilizing IR 93 to conduct an additional investigation of the S-21 video and the individuals contained in it, a member of DC-Cam, on her own initiative, located the document the day after the witness testified. If, after the discovery of the S-21 video, the Trial Chamber had instead opened an additional investigation into this matter, the judge(s) ordered to conduct the investigation could have requested or seized the video from DC-Cam, verified its authenticity, attempted to ascertain the existence and whereabouts of the soldiers or children in the video, and if successful, interviewed the soldiers and the child survivors according to 93(2)(b). Further information regarding the child survivor's parents could have been investigated and the S-21 biographies uncovered by the appointed investigator(s) with the assistance of the witnesses and DC-Cam. Ho Van Tay, who filmed the S-21 video, has offered his complete cooperation with the ECCC, and could verify the authenticity of the video.

Admittedly, there are drawbacks to an additional investigation under IR 93. The most notable deterrents are that judicial resources are required to conduct investigations and the concern that additional investigations could cause a substantial delay. The Chamber even noted that significant trial delays could ensue if "the Chamber [had] to undertake a number of supplementary investigations" in its Decision on the Vietnamese Film Footage, *i.e.*, the S-21 video. However, as demonstrated by Sotheany's investigation, it is supplementary investigations pertaining to new pieces of evidence or witnesses that can uncover valuable documents such as the mother's S-21 bio. While additional investigation order by the Chamber would likely require a substantial amount of work and judicial resources on the front end, this work would be conducted outside of the trial setting, allowing the trial to continue as scheduled. The payout for the substantial work required up front would be a more expedient admission of evidence or questioning of a witness at trial, because a judge would have already thoroughly vetted the issue. Nonetheless, serious concerns could still be raised about whether a Chamber-appointed judge would be motivated in the same way as the parties would be to follow each lead in the new investigation.

When the existence of the S-21 video emerged publicly on 26 December 2008, instead of the Trial Chamber initiating an additional investigation under IR 93, OCP Investigator Craig Etcheson and Senior Assistant Prosecutor Tan Senarong reviewed the video at DC-Cam in early January of 2009. It is not clear which IR authorized Etcheson and Tan Senarong to conduct this review for probative value or whether such a review would be considered an additional investigation into new evidence.⁵⁸ Nevertheless, once the Prosecution found the video probative, it had little choice but to attempt to admit the S-21 video into evidence under IR 92 ("The parties

⁵⁸ The parties have different interpretations of the IR and it is not clear how much independent investigation or research by a party would intrude on the province of the Trial Chamber after the submission of the OCIJ's Final Order.

may, up until the closing statements, make written submissions ... and put before the Chamber any evidence that they consider conducive to ascertaining the truth”) and IR 39(4) (dealing with late submissions of evidence and extension of filing deadlines).⁵⁹

ECCC INTERNAL RULE 87(4) – ADMITTING NEW EVIDENCE DURING TRIAL

In March 2009, the ECCC Rules Committee amended IR 87, the rules of evidence, by adding a new provision, IR 87(4):

During the trial, either on its own initiative or at the request of a party, the Chamber may summon or hear any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth. Any party making such request shall do so by a reasoned submission.... The requesting party must also satisfy the Chamber that the requested testimony or evidence was not available before the opening of the trial.

IR 87(4) is now the sole means of submitting new evidence for admission or summoning new witnesses during the trial phase. Therefore, the OCP have no other choice but to submit any subsequent newly discovered evidence according to the requirements of IR 87(4). However, IR 87(4) has no provision authorizing the parties to conduct any additional investigations into newly acquired evidence or witnesses. Furthermore, according to IR 93, neither the Prosecution, nor any other party, is allowed to submit a request to the Trial Chamber for an additional investigation. While IR 87(4) allows a party to request the addition of a new witness or evidence based on a reasoned submission, it is unclear how much information is required in order for the request to be considered a “reasoned submission.” If a new piece of evidence emerges, some manner of investigation by the parties is presumably required for a reasoned submission. In that situation, what IR authorizes the Prosecution, Defense, or Civil Parties to conduct such an investigation?⁶⁰ And if they don’t, then will DC-Cam or another knowledgeable organization be forced to conduct the research or investigation for them?⁶¹

While Rule 87(4) allows a relatively relaxed admission process for new evidence and witnesses, no procedures are in place to have the evidence or witnesses vetted by a Chamber-appointed investigator. This amended rule appears more in alignment with the common law system, where evidence is presented for the first time at trial, and argued accordingly by both parties at trial. The lack of investigatory work on the front end could lead to a lengthier trial because the new witnesses or evidence admitted will be discussed and debated by the Chamber, the OCP, the Civil Parties, and the Defense for the first time at trial.

⁵⁹ January 28, 2009, Motion of Co-Prosecutors to Submit New Evidence; see also IR 39 and 92 (2nd version).

⁶⁰ Apparently, the Prosecution reads the IR as not allowing them to conduct any research or investigation into new evidence or witness. For example, when the Prosecution submitted the S-21 biography of Chanphal’s mother on 8 July 2009, they noted: “We would like to confirm that the Office of the Co-Prosecutors did not make any request to the DC-Cam to provide us with this document. The DC-Cam itself has conducted a research [sic] and they found this document spontaneously, and it was found after they heard the testimony of Norng Chanphal. Upon receiving this document, the Office of the Co-Prosecutors has made several copies to be distributed to the parties to the proceedings.” Page 2, lines 5-13, Transcript of Proceedings “Duch” Trial Public, Case File N° 001/18-07-2007-ECCC/TC, 2 July 2009, 0902H, Trial Day 41.

⁶¹ Only DC-Cam contacted Chanphal’s younger brother, Norng Chanly, to inquire about his recollection, if any, of S-21. The younger brother lives approximately fifteen minutes outside of Phnom Penh.

ADDITIONAL VIDEOS FROM DEMOCRATIC KAMPUCHEA ERA DISCOVERED

In the near future, the ECCC will be presented with additional documentary film as potential evidence that contains possible new witnesses. On July 29, 2009, Vietnam confirmed to Youk Chhang that in 1979 a large Vietnamese military truck, filled with Khmer Rouge era film reels, departed Cambodia for Ho Chi Minh City. Upon arrival in Vietnam, the films were deposited at the Vietnamese State Archives. Youk noted that the archive staff initially panicked when he inquired about the films because their location was unknown. During the intervening thirty years, the archives had moved locations, and the films were lost or misplaced in the shuffle. However, during the course of the day, Youk and the staff were able to locate the videos. While many of the film reels on that truck have since rotted in storage or disappeared, at least thirty-one film reels are confirmed intact and in good condition. Fortunately, it is believed that many of the films that rotted were archived separately, and remain somewhere else in storage. In time, the rotting films will be examined in the hopes of salvaging portions of the footage.

The thirty-one films that are in good condition all relate to the Democratic Kampuchea era. These thirty-one films are just the tip of the iceberg; potentially hundreds more could eventually emerge. On Friday, July 31, 2009, Youk plans to bring back to Cambodia an initial nine of the thirty-one films. These nine DK era film reels cover three topics: a Khmer Rouge delegation consisting of Ieng Sary, Khieu Samphan, and Ieng Thirith visiting Chairman Mao Zedong in China; a Khmer Rouge invasion into bordering Vietnamese provinces; and scenes of Vietnamese troops in Cambodia in the late 1970s. In addition to the films discovered, two hundred photos were discovered in a trashcan in the basement of the archive, completely forgotten about. These photos also relate to the Democratic Kampuchea era. They are being cleaned, scanned, and catalogued.

All of the film footage and photographs will eventually be transferred to DC-Cam. These videos will have to be analyzed and investigated by someone at the ECCC to determine their probative value. The individuals depicted in these videos are possible witnesses, as well as the film crews who produced them. The question becomes: Who will conduct this initial investigation into these newly discovered films to determine if they are relevant to the Duch trial? Due to the civil law nature of the ECCC, the OCP is not authorized to conduct investigations during the trial phase; only the Trial Chamber can order an additional investigation under IR 93. However, the Trial Chamber has shown no inclination towards ordering supplemental investigations due to potential trial delays. If the Trial Chamber does not order an additional investigation when a new piece of evidence emerges, some manner of preliminary investigation by the parties is presumably required for them to file a reasoned submission under IR 87(4). As mentioned above, no IR authorizes the Prosecution, Defense, or Civil Parties to conduct such an investigation.

IS ADDITIONAL INVESTIGATION SUPERFLUOUS?

In the Decision on the Vietnamese Film Footage, the Trial Chamber made clear that any further investigation into the S-21 video would be superfluous and delay the proceedings.⁶²

⁶² See generally Decision on the Vietnamese Film Footage Filed by the Co-Prosecutors and on Witnesses CP3/3/2 and CP3/3/3, available at http://www.eccc.gov.kh/english/cabinet/courtDoc/388/E5_10_5_EN.pdf

However, DC-Cam’s investigation into the S-21 video altered the outcome of the proceedings, and without that investigation and the discovery of Chanphal’s mother’s S-21 bio, the S-21 video, or images from it, would be a key piece of evidence in a hotly disputed issue – whether children were present at S-21.⁶³ While the Trial Chamber’s decision noted many valid reasons for not wanting to conduct further investigations, the decision did not address the root issue – the investigative inertia that exists during the ECCC’s trial phase because only the Trial Chamber can order additional investigations at that time.

The Vietnamese Film Footage Decision fails to mention that DC-Cam staff member Sotheany Hin discovered the mother’s S-21 biography after Chanphal testified. Without Sotheany’s investigation, there would have been no mother’s bio, and without the mother’s bio, Duch would not have acknowledged that Chanphal was at S-21, and without that acknowledgment, the S-21 video (or documentaries on the case file that use the images) becomes a determinative piece of evidence. It was only because of Sotheany’s independent investigation that on July 8, 2009, when the prosecution requested that the newly discovered S-21 biography of Chanphal’s mother be included in the case file and considered “put before” the Chamber, that Duch acknowledged the mother’s S-21 biography, her presence at S-21, and that of her children.

The Trial Chamber’s concern that significant trial delays would ensue if “the Chamber [had] to undertake a number of supplementary investigations” is understandable and legitimate. However, as demonstrated by Sotheany’s investigation, simple supplementary investigations pertaining to new pieces of evidence or witnesses can uncover incontrovertible documents. Incontrovertible evidence requires one party to admit the truth of a previously disputed fact. Once disputed facts are accepted as true, the Trial Chamber has one less contested issue before it. To claim that the S-21 video is superfluous is not a fair statement and the Chamber glosses over the DC-Cam investigation that eventually made the need for the S-21 video superfluous.

Furthermore, the Chambers states that to authenticate the S-21 video would require “supplementary investigations, including the identification and summoning of additional witnesses” and that that would likely “lead to significant trial delays.”⁶⁴ It is not clear why any identification or summoning would be necessary, considering Ho Van Tay has maintain that he is willing to cooperate in any manner necessary since early 2009 and confirmed this as recently as July 2009. Additionally, it is also unclear why the “verification of the reliability” of the footage would be “impossible to obtain within a reasonable time.”⁶⁵ The Chamber could have summoned Tay to testify in early 2009, and if a Chamber-appointed judge had vetted Tay prior to trial, his courtroom testimony could have focused on the single issue of the authenticity and reliability of the S-21 video.

The underlying issue is the lack of investigation during the trial phase. If the Trial Chamber does not order an additional investigation when a new piece of evidence emerges, *e.g.*, the thirty-one plus film reels from the DK era discovered on 29 July 2009, some manner of preliminary

⁶³ The Decision notes that the “Defence has also previously acknowledged that the policy of smashing enemies almost always extended to their families, including children.” ¶ 4. However, if that is the case that it was acknowledged, why did the Defence object so vigorously to the admission of the S-21 video? Also, the Decision does not state that the Defence has acknowledged that this extended to S-21.

⁶⁴ ¶ 6, Decision on the Vietnamese Film Footage Filed by the Co-Prosecutors and on Witnesses CP3/3/2 and CP3/3/3, available at http://www.eccc.gov.kh/english/cabinet/courtDoc/388/E5_10_5_EN.pdf

⁶⁵ *Id.* at ¶ 8.

investigation by the parties is presumably required for them to submit a reasoned submission under IR 87(4). Because the parties are not authorized to conduct an investigation and the court appears unwilling, will these newly discovered videos and photographs not be admitted as well under IR 87(3)? Will they also be deemed superfluous and repetitive because they might lead to more investigation or trial delays? Vetting new evidence or witnesses outside of the courtroom when they are initially discovered is not the cause of delay. Instead, the delay results from allowing multiple motions and expending considerable resources and time in the courtroom discussing why the evidence should or should not be admitted when the item or witness has not been properly investigated.

CONCLUSION

Addressing this investigative inertia at this juncture of the ECCC's existence, through amendments to the IR to allow for the parties to request further investigations⁶⁶ or a clarification by the Trial Chamber of the responsibilities of the parties, is far from a purely academic pursuit. The S-21 video, the newly discovered DK era film reels, and articles about additional missing films from the Democratic Kampuchea era in France support this argument.⁶⁷

While limited resources and time are an innate constraint of any tribunal, the solution is not barring new evidence from the trial. To deny that any further investigations are necessary in order to ostensibly avoid endlessly exploring matters not in dispute or to avoid dragging out the proceedings unnecessarily is an easy answer of the moment that avoids the root of the problem. Instead, a more coherent investigative procedure during the trial phase of the Duch case and throughout the infinitely more complex trial of Case 002, will increase the quality of evidence presented to the Chamber and in the end provide for more expeditious trials.

⁶⁶ For instance, allowing the OCP to request the Trial Chamber conduct an additional investigation under IR 93.

⁶⁷ For further information about missing Democratic Kampuchea era films in the possession of a private business in France, see *Missing Films from Democratic Kampuchea: A French Mystery*, available at <http://www.dccam.org/Archives/Films/Youk%20Missing%20Films%20from%20Democratic%20Kampuchea.pdf>