

KRT TRIAL MONITOR

Case 002 ■ Issue No. 28 ■ Hearing on Evidence Week 23 ■ 18-20 July 2012



Case of Nuon Chea, Khieu Samphan and Ieng Sary

Asian International Justice Initiative (AIJI), a project of East-West Center and UC Berkeley War Crimes Studies Center

...[The Communist Party was going from then on to be the air that people breathe rather than a separate, political body that had nothing to do with people's lives.

- Professor David Chandler, Expert Witness

I. OVERVIEW

After a three-week break, the Trial Chamber reconvened and heard the testimony of Professor David Chandler, an eminent scholar of Cambodian history, particularly on the Khmer Rouge regime. He was first summoned by the Chamber as an expert witness in Case 001, and testified at length on the rationale of the establishment and the daily management of the notorious S-21 prison.¹ In the present case, the Chamber once again solicited his expert opinion to provide enlightenment on various topics relevant to Case 002/01.

Due to the late start of the proceedings this week, the Chamber announced a Friday hearing, despite an objection from Ieng Sary's international counsel, Mr. Michael Karnavas. The three days of proceedings was sufficient to conclude Chandler's examination by the Bench, the OCP, and the Civil Party counsels. The hearing will resume on Monday, 23 July 2012, with questions from the Defense Teams.

II. SUMMARY OF WITNESS TESTIMONY

Professor David Porter Chandler,² a 79-year-old Australian-American from Melbourne, Australia, is the author of several books on Cambodia and the DK regime, which have been used as reference in the OCIJ's Closing Order.³ During his examination, passages from these books were used as a framework by the Bench, OCP, and Civil Party lawyers for their questions on topics within Case 002/01.⁴

The Witness gave detailed testimony on the DK regime, based on his research with DK documents, and interviews with survivors and former cadres. He gave important context on CPK's central administrative structure, which, to date, none of the other witnesses have been able to sufficiently provide. He also described the CPK Statute and CPK policies, and presented his opinion on whether these reflected reality in DK. Chandler was also forthright in admitting when he was not certain on some topics. He revealed that he revised some of his opinions in his books in light of subsequent documents, the Case 001 trial, and even the Closing Order.

A. CPK Administrative Structure

Chandler confirmed that there was “no genuine distinction” between the DK government and the political party behind it, the CPK. “There were no balancing elements to the party rule that were independent of it.” It was “a government by and for the ruling party,” he added.

1. “Angkar” as a Collective Leadership

In his testimony, Chandler repeatedly stated that the DK leadership was a “collective leadership.” When asked about the meaning of “Angkar” in the context of three Standing Committee minutes, Chandler responded that “Angkar” pertained to the group which made decisions at meetings collectively; it did not refer to Pol Pot alone. There was no “one-man rule” during the regime. He clarified, however, that decisions Pol Pot made were “final.” He noted that people were not told what Angkar was, and while this Khmer word means “organization,” people thought “it was a person’s name, that there was a single person behind this—an unseen person.” The Witness recalled one of the survivors saying, “Angkar has as many eyes as a pineapple,” denoting its omniscience during the regime.

2. Central and Standing Committees

The Witness testified that major policies must have been approved by the Central and Standing Committees. He stated that these Committees were “a supervisory and policy-forming body.” He added later that he understood “Party Center” to refer to the Central Committee. Chandler described the Standing Committee as a smaller group with overlapping membership as the Central Committee. The Standing Committee met more often than the Central Committee, but the specific powers vested to it by the Central Committee were unclear.

3. Office 870

Chandler could not give a definitive answer on the role of Office 870, as the documents he read provided an overlap of roles among this enigmatic office, the Standing Committee, Central Committee, Pol Pot, and Pol Pot and Nuon Chea together. It seemed to him that “870” was a code name for Pol Pot. On the other hand, he believed that Office 870 was the “nerve center” that “managed the paperwork and the flow going in and out of the Party Center.” He asserted that Office 870 was an “address that’s used to refer to lots of other small offices” where the central operations of the CPK were conducted. There was no evidence to show that it included people outside the Central Committee, as “it was a very small director group whose membership was kept secret. That’s part of the reason for using the code name.” He then made this distinction: while the head of the office was Khieu Samphan, “when you say the head of 870, that’s Pol Pot.”

4. The People’s Representative Assembly (PRA)

According to Chandler, the PRA met for three days to approve the establishment of the DK government. It was never reconvened. During the PRA’s sole meeting, a supposed Assembly report assigning the highest positions in government was read, and Chandler highlighted the fact that the Assembly’s Standing Committee was almost same as that of the CPK. Moreover, he pointed out that appointments made during the 30 March 1976 Standing Committee meeting were the same as those made during the Assembly. For the Witness, this indicated that the appointments were not decided, but only affirmed by the Assembly after the list was handed down by the CPK leadership.

Abdulahak read out an extract from a Foreign Broadcast Information Service (**FBIS**) report that the election conducted on 20 March 1976 resulted in a 98% eligible voter turn-out. Chandler, however, expressed doubt on the accuracy of this figure. He related that while some people remembered voting (even Prince Sihanouk reportedly participated in the election), this information was released for overseas consumption to show that there was an orderly transition of power to the new regime. Taking this into consideration, Chandler stated that the election could not be given any credence.

5. Prince Norodom Sihanouk as Head of State during DK

Chandler indicated that when the CPK seized power, Prince Sihanouk acted as the head of state, which was a continuation of his “figurehead” status prior to DK. The Witness explained that that “it was very important for him (Sihanouk) to be maintained for the outside world, and for some people inside Cambodia.” However, the CPK war against feudalism conflicted with its association with Sihanouk. After the death of Chinese leader Zhou Enlai in 1976, the CPK reportedly allowed Sihanouk to retire from his position. Based on a transcript of a report by the FBIS, Khieu Samphan announced that on 4 April 1976, the Council of Ministers approved Sihanouk’s retirement. In Chandler’s view, through this report, the CPK did not only apprise the international community but also clarified Sihanouk’s position to the confused populace. This, according to Chandler, was in keeping with its aim to project “a rational regime who’s friendly and honouring” the leading figure in Cambodia.

B. CPK Statute

Chandler stated that he understood the CPK Statute as having set out the ideas, organization and purposes of the CPK as an instrument of the Cambodian revolution, and as the governing party of DK.

1. Democratic Centralism

Articles 3 and 6 of the CPK Statute provide for “democratic centralism,” which the Witness explained as a contradiction, as there was nothing democratic about the centralism that characterized the communist parties throughout the world, including the CPK. Nevertheless, communist parties considered themselves as the embodiment of the popular will. “They felt this to be a collective leadership acting in the interests of the worker-peasant sectors of Cambodian society and the revolutionary ideas of Marxism-Leninism,” Chandler stated. He elaborated that, despite this belief, only members were entitled to talk about party affairs: while there were discussions from one level to the next, and it was possible that some thoughts and decisions reached the leadership, whatever the leadership decided came down the levels with the force of law.⁵ He emphasized that the ruling group had the final word on everything.

Article 6 (4) of the CPK Statute contains the terms “lower echelon” and “upper echelon.” Chandler described this as a “pyramidal structure” where “a larger group deferred to a smaller group, which is again larger than the next group.” The top group, the collective leadership, was the driving force of the organization.

2. Criteria for Membership in the CPK

Drawing from Article 5 of the CPK Statute (particularly subsections 1, 3, 5, 7 and 8, on the criteria for CPK membership), the OCP asked the Witness if these criteria reflected actual practice. Chandler described the criteria for membership as a “a set of ideal conditions” for what the party expected from its members. He noted that criteria such as “strong

revolutionary stance” were largely dependent on judgments each person makes, and are “vaguely worded so it’s quite easy to trip someone up on some of these definitions.”

C. CPK Policies

Chandler affirmed that the five policies in the Closing Order, particularly the first three on forced movement, establishment of cooperatives and worksites, and killing of enemies, represented some of the most important policies of the CPK. The Witness indicated that these were discussed during political meetings in the lower levels but were never identified as policies adopted by the party. These policies were also explained in the *Revolutionary Flag*. As it went further down the DK structure, “some of the policies became not very clearly articulated, but still, part of their everyday life,” Chandler testified.

1. Forced Movement of the Population

The Witness stated that while the evacuation of Phnom Penh was decided as a national policy on February 1975, even prior to its adoption, several towns, including Takeo, Oudong, and Kratie, had already been previously evacuated. The 17 April 1975 evacuation was thus not an unprecedented move of the population. Rather, it was the “climax” of this repetitive pattern of evacuation, explained Chandler. According to Chandler, the KR gave several reasons for the evacuation, including food shortage and fear of American attack. However, he stood by his opinion in a passage of his book that the overriding reason for the evacuation was “the desire to assert the victory of the CPK, the dominance of the countryside over the cities and the privileged position of the poor.”

He recounted consistent survivor reports on the 17 April evacuation describing conditions as “awful” and “colossally harsh” because April was the hottest time of the year, and people were forced out of the city no matter their age or health, without possessions, and without any sense of where they were going. He believed this was consistent with DK perspective that, “...doing things in a hurry was the correct way to do things. Doing things slowly was the old way of doing things.” Chandler added that, “these people were not considered to have any value whatsoever as human beings...(as) these were people who had chosen not to join their ranks.” When asked if forced evacuations had occurred in other countries, the Witness enumerated previous evacuations in history⁶ but emphasized that there was “nothing as severe as this in recorded history.”

Chandler indicated that people were transferred from Phnom Penh to provinces from which their families originated or where they had relatives. In early 1976, they were gathered and sent up to the Northwest Zone by truck, train, and on foot. This, Chandler stated, was the second phase of the evacuation.

2. Forced Labor and Cooperatives

The establishment of cooperatives commenced in the “liberated territories” in 1973, particularly in the Southwest Zone under Ta Mok. Chandler stressed that, after 17 April 1975, slave labor was enforced throughout the country, with everyone working all day in the sun. However, some of the most difficult work in some of the most inhospitable parts of the country were given to the “new people.” In the Northwest Zone, one million “new people” suffered under harsh conditions, resulting in “tens of thousands of deaths.”

3. Enemies

In his book *Voices from S-21*, Chandler wrote: “The ideology of Democratic Kampuchea, as we have seen, was premised on continuous class warfare and continuous revolution. ‘Enemies’ were everywhere and needed to be destroyed.”⁷ In his testimony, he stated that at the early stages of the regime, the CPK considered as enemies people who held official positions in the Khmer Republic. Subsequently, this animosity spread to the so-called “April 17th people” and suspected enemies within the CPK. “This shift came in mid-1976 and it’s reflected in the... growing pessimism in the documents” that he studied.

In order to discover enemies, it became “imperative to grasp the biographies” of people. To the CPK, elements of one’s past indicated how a person acted and worked. Everyone had to prepare biographies for use in study sessions because the regime reportedly used these biographies extensively to “dredge up” information and maintain control.

a. Members of the Lon Nol Regime

In one of his books, Chandler wrote of the purge against members of the Lon Nol government, as confirmed by refugee reports and some DK documents. This campaign was allegedly discontinued in June 1975. Chandler explained however, that the discovery of Lon Nol elements among the “new people” was enough to pull them out of the workforce and have them imprisoned or executed. As such, while the purge officially ceased in June 1975, in reality, it continued throughout the DK regime.

b. “New People”

According to Chandler, the CPK called those who remained in towns and did not participate in the revolution as “new people” or the “April 17th people” and regarded them as traitors and enemies. The CPK reportedly told people in rural areas that city-dwellers were the main enemies and that American bombers came from Phnom Penh. This, Chandler explained, was the reason why some forces from rural areas that entered the the capital during the “liberation” were extremely angry with the urban populace.

The Witness asserted that the “new people” were watched for missteps and were mistrusted. They were also continuously threatened, as the CPK slogan “keeping you is no gain, losing you is no loss” constantly rang in their ears to remind them that they were worthless. Moreover, the Witness revealed that there were also indications that in the early period of the regime, the “new people” went through a process of re-education – constructing “better” people – to help them become “true Cambodians.” Nevertheless, he believes that there was no systematic intention on the part of the leadership to destroy the “new people,” who numbered between 2.5 to 3 million, as this would have ruined the country. The death of “new people,” Chandler stated, “was an effect that was produced, to a large extent, by chance, by ferocity, and by other things.”

c. Internal Enemies

In reaction to excerpts of the July 1976 issue of the *Revolutionary Flag*,⁸ Chandler stated that the party was worried that they recruited people who were not sufficiently examined during the civil war. He said that by this time, internal enemies had become “the important target of DK rather than Lon Nol remnants.” The shift may have been triggered by two bombings: first, in Siem Reap, which the Witness said was caused by local authorities, but “made the regime nervous;” and second, a grenade explosion near the Royal Palace, which was interpreted as an attack against the regime and turned “the whole DK searchlight onto the East,” launching what later became a series of internal purges.

When asked about Koy Thuon's arrest, the Witness said this was not related to the East Zone purges, but was part of a third wave of purges against intellectuals and people connected with Koy Thuon. Diplomats were also not spared. According to Chandler, those with suspected ties with the Soviet Union and Vietnam were purged with the implicit agreement of Ieng Sary:

There's hardly ever in Cambodia a smoking gun for this sort of decision, but diplomats arrested from the diplomatic core or from inside the ranks of B-1, those arrests had to have met the approval or at least come to the knowledge of Ieng Sary, who was foreign minister. People would not be coming to the foreign ministry at night and snatching officials out from under him. He was advised. Whether he, himself, said "we should," that's what we don't know. We know these people left the foreign ministry. We know he was trusted by the regime. We know the way things worked. There are some confessions that say one copy is sent to Brother Van, who was informed about something that was in his interest.

d. S-21 Security Center

The Witness recounted that S-21 was established in the latter part of 1975 to root out the regime's enemies: former members of the Lon Nol regime, some foreigners, minorities, and suspected traitors. When Kaing Guek Eav alias "Duch"⁹ was placed in command of S-21, he opened a new facility in Tuol Sleng for interrogation and torture. Chandler described S-21 as a prison for serious offenders, while an affiliated facility, Prey Sar (S-24), served as a re-education facility. Nobody was released from S-21. Chandler affirmed that S-21's mission was "to protect the (Party) Center and to locate and basically sweep clean...purge, perceived opponents of the regime." To this end, confessions were forced out of most prisoners of S-21.

e. Re-education and Smashing of Enemies

As regards "re-education" and "smashing of the enemy," the Witness explained that these were the two procedures that were available when confronted with perceived enemies: "If some of the evidence was contradictory or ambiguous, the person was considered to be an appropriate candidate for re-education. If not, (he) was a candidate for execution."

4. Targeting of Specific Groups

Chandler testified that the CPK encouraged Cambodian citizens to "pursue, engage and win a race war against the Vietnamese...and any one else in the country who was not Khmer." Additionally, the KR targeted suspected Vietnamese sympathizers, Buddhist monks, and the Cham Muslims to curtail all other voices of authority.

a. Treatment of the Vietnamese

"The Vietnamese were probably targeted from the beginning," Chandler opined. In 1972, the North Vietnamese and the Americans agreed to a ceasefire, without the agreement of the KR. This reportedly fomented resentment from the KR leadership, as they felt they were deserted by the Vietnamese. Chandler's book *Tragedy of Cambodian History*, states that, "in 1973, when nearly all the Vietnamese troops were gone, the CPK cadres began calling them the Number One Enemy."¹⁰ Raids into Vietnam were conducted towards the end of the regime "to kill the Vietnamese because they were Vietnamese." "By the end of 1978, they had a policy of eliminating the Vietnamese," Chandler revealed.

Even Khmers who returned from exile in North Vietnam in 1973, ostensibly to help the revolution, were subjected to persecution, in what Chandler described as a campaign that foreshadowed the modus operandi of S-21. These people's loyalty was suspect, because they had been in Hanoi for a long time. During the war with Vietnam, people with "Cambodian bodies, Vietnamese heads" were targeted.

b. Treatment of Buddhist Monks

Chandler testified that Buddhist monks were not allowed to exercise any authority because as in other revolutions, religion was abolished. Monks who "would make the job for the Khmer Rouge more difficult" were reportedly silenced. The Witness went on to explain that if people listened to former authority figures such as monks and intellectuals, "cultural obedience" might arise, and former Buddhists might start obeying them again. "They represented an implicit threat by just maintaining their collective identity," Chandler explained.

c. Treatment of Cham Muslims

In Chandler's opinion, the Cham were not targeted at the beginning of the regime. They were considered as members of Cambodian society and their religion was tolerated. The policy on the Cham changed however, on account of their revolt against the Khmer Rouge. "This led the Khmer Rouge to change their mind and find that these people were inherently dangerous, and this led to the systematic persecution of these people." The Witness interpreted reports that the Cham were forced to eat pork as a form of sadism of KR cadres that was meant to hurt, offend, humiliate, and isolate the Cham.

Civil Party international counsel Mr. Olivier Bahougne read a passage from a statement by a Cham Civil Party relating how their village was emptied and the Cham women separated and executed. Chandler confirmed that, by the end of 1978, the Khmer Rouge held an open policy of exterminating the Cham.

5. Other Policies

Aside from the criminal policies of the CPK as alleged in the Closing Order, other CPK policies that marked the regime were also discussed in Chandler's testimony.

a. Policy of Secrecy

Spurred by their successful implementation of the policy of secrecy as a means of evading arrest during Sihanouk's rule, the CPK leaders reportedly considered it necessary to continue secrecy in the regime. "They saw no virtue in explaining who they were, what they were doing, and a great virtue in continuing what had been, for them, a very successful policy," Chandler intimated. He believed that the leaders were transparent to each other, but the levels of transparency weakened down the line of command. On the other hand, they demanded transparency from the rest, as people outside the party were not trusted.

b. The Four-Year Plan and the Three-Tons-per-Hectare Objective

Chandler stated that Cambodia had tremendous potential in agriculture, but CPK agricultural policies failed to succeed because the regime neither considered the milieu in 1975 nor understood the reasons for the failure of the Great Leap Forward. The Four-Year Plan approved by the leadership was therefore "built on the assumption that the liberated energies of the poor...would be enough to fuel, to be the engine of the revolution and produce these targets," indicated Chandler. For unknown reasons however, the Plan was never put into

effect; as Chandler testified, “it was never widely circulated and it was withdrawn from execution, although the slogan ‘three tons per hectare’ continued through the end of the regime.”

The three-ton-per-hectare plan frightened the people who were supposed to carry it out, Chandler said. In an attempt to get close to the target, “they cut back on the amounts of rice that was supposed to be set aside for seeds and for feeding the population...” Chandler remarked on the irony of situation: several thousands of tons of rice were exported to China to make it appear that the country was producing a surplus, while all over Cambodia, starvation, malnutrition, and deaths were rising. All these, he concluded, resulted from a program launched from the idea of self-sufficiency and non-reliance on foreign aid.

D. Authenticity of Central Committee Meeting Minutes

The Bench, through Judge Silvia Cartwright, inquired regarding the authenticity of the records of the Central Committee’s meeting on 30 March 1976, entitled *Decisions of the Central Committee*, during which important and far-reaching policies were made. Chandler said that documents like this were not distributed widely but “very closely held” by a few people, and only a handful of these documents survived. He had no doubts as to the authenticity of the DK Central Committee minutes that he saw.

E. Roles of the Central Committee

Chandler testified that, as of 30 March 1976, Nuon Chea and Ieng Sary were members of the Central Committee. He was uncertain however, as to Khieu Samphan’s status. Nuon Chea was reportedly responsible for party organizational work and education. Chandler disputed Nuon Chea’s assertion that, as a politician, his position is less powerful than those of Military Committee members.¹¹ The Witness explained that while Nuon Chea deferred to Pol Pot as the CPK secretary, he was engaged in all aspects of the regime:

...It seems he was very much on top and engaged in day-to-day policy matters on all parts of the Cambodian enterprise, including military affairs, including even sometimes foreign affairs... to take a capitalist equivalent, it is a parallel calling Pol Pot the president and Nuon Chea the CEO of Cambodia. I think this is the kind of responsibilities that he had, but this is just for speculation. I think it’s certainly in his interest to diminish the range of his activities that have been recorded in other sources, but I think the evidence is overwhelming, that he is extremely active in many, many spheres of the regime.

According to the Witness, Ieng Sary’s role in DK was also clear. The Accused remained active in policy-making and implementation for Cambodian foreign affairs throughout the regime. In contrast, “Khieu Samphan’s work in the Presidium is unclear to me to this day,” Chandler disclosed. Nevertheless, he said Khieu Samphan acted as a liaison officer between Sihanouk and was also responsible for tasks relating to commerce, such as accounting and pricing. Chandler also indicated that after the arrest of Sua Vasi, alias “Doeun,” Khieu Samphan took his place as chairman of Office 870. In Khieu Samphan’s autobiography, the Accused asserted that he did not do anything substantial when he held this position.

III. LEGAL AND PROCEDURAL ISSUES

This Week, issues revolved around the role of the expert witness in adducing evidence, and the extent of testimony that is acceptable for the parties to solicit from such a witness. Moreover, the subject of the admissibility of documents resurfaced, with the Chamber

clarifying that a denial of requests for admission of new documents does not preclude Parties from referring to the contents of these documents.

A. Scope of Expert Witness Testimony

The Chamber and the Parties spent a considerable time of this week's proceedings defining the scope of an expert witness' testimony.

1. Testimony Limited to the Expertise of the Witness

As an academic and historian, the Witness was called to testify and give his expert opinion on the DK regime. During the course of Chandler's testimony, the Defense raised objections to some of his answers on the ground that they were outside the scope of his expertise. The Chamber sustained a number of these objections and ruled that the Witness was incompetent to answer queries on the following:

- (i) the legal interpretation of CPK Statute terminologies, which, based on Karnavas' objection, required a constitutional scholar;
- (ii) the meaning of "obedience" during DK, which required expertise in psychology;
- (iii) whether leaving corpses without burial devalued victims, which required a personal opinion; and
- (iv) a question on the difference between Christianity and Islam, which was deemed to be a "religious matter."

2. Speculation

During the proceedings, Chandler's frequent use of phrases that appeared speculative or uncertain, such as "I think" or "I'm not sure but..." prompted objections from the Defense, particularly from the Ieng Sary's counsels. Initially, the Chamber was ambiguous regarding objections of this nature and ruled that, "the objection is accepted in principle." Judge Cartwright explained that, "if this expert answers a question and he makes it clear that the answer is based on the research that he has conducted, then it is not speculation," implying that predicating an answer with "I think" does not necessarily indicate speculation. After Ieng Sary's international counsel, Mr. Ang Udom, objected to Chandler's utterance of "I think" on Friday, the Chamber made the following definitive ruling:

(R)egarding the wording used by Professor Chandler, the Chamber notes that it is appropriate for him to use this phrase in his capacity as an expert. The Chamber observes that this phrase cannot be used by an ordinary witness because ordinary witnesses are not experts.

B. Witness' Reference to the Closing Order

Chandler's reference to the Closing Order during his testimony was a contentious issue. Karnavas objected to the fact that (i) Chandler had read the Closing Order, and (ii) appeared to have drawn conclusions based on what he learned from the Closing Order instead of his research. Counsel requested the Chamber instruct the Witness to disclose when his responses were based on the Closing Order to enable the Chamber to determine how much weight to afford the Witness' answers. International CPLCL Ms. Elizabeth Simonneau-Fort supported Karnavas' request, stating that this will help clarify matters. The Chamber overruled the objection, and through Judge Cartwright, indicated that Chandler was allowed to review the conclusions that he has drawn from his own research in previous years. Chandler was then directed to clarify when his opinions were modified as a consequence of reading the Closing Order.

While it is understandable that it is important for the Witness to disclose if and when he based his expert opinion on the Closing Order to assist the Bench in evaluating the evidentiary value of his testimony, it is unconventional to allow the Witness to provide testimony based on the Closing Order. Notably, the Closing Order is the “Indictment”¹² and by its very nature, charges the Accused with committing specified offenses, the modalities by which these offenses were committed and the material facts that support these charges. Evidence is introduced in trial to prove the charges under the indictment. While the Bench is composed of professional judges capable of sifting through the evidence, reference to the Closing Order by a witness may lead to a situation where evidence from witness testimony originates from the very same allegations contained in the Closing Order.

C. Request for Disclosure of Documents Used for Testimony

Counsels for Nuon Chea and Ieng Sary challenged the Witness’ use of documents cited in the Closing Order during his testimony. Karnavas requested Chandler to disclose all the materials he had used in his preparation for his appearance in court. Counsel indicated that it would be difficult for the Ieng Sary Defense to properly prepare for their examination if they did not have this information. The Nuon Chea Team took on a different approach: international counsel Mr. Jasper Pauw asked the Witness to indicate whether he had access to documents supporting the Closing Order, and whether there were documents in the Closing Order that has changed his understanding of the DK regime. The Witness stated that there was no way for him to provide footnotes for all his sources,¹³ and Abdulhak explained that it would be impossible for the Witness to comply with these request. In an effort to be as transparent and accommodating as possible however, Abdulhak informed the Chamber that he would indicate the documents on which his questions were based in order to contain the Witness’ answers to specific documents.

The Chamber did not rule on the issue and merely stated that the Defense Teams could raise this again during their examination of the Witness. According to the Chamber, the Defense Teams would be allowed to address possible gaps in the Witness’ testimony during their closing arguments. When pressed to respond to the issue again on Thursday, the President stated that the Chamber had already ruled on the matter the day before.

D. Admission of “New Documents” under Rule 87(3) and 87(4)

The Nuon Chea Defense submitted two requests, based on Rule 87 (3) and (4), to use certain documents to test the credibility of expert witness David Chandler.¹⁴ Although counsels for Nuon Chea reaffirmed their position that material used solely for impeachment purposes is not subject to Rule 87,¹⁵ they nonetheless indicated that they had “no choice but to submit the present request pursuant to Rule 87” in accordance with the Trial Chamber’s rulings.¹⁶

On Wednesday, the Chamber, through Judge Cartwright, rejected the Nuon Chea Defense’s first request for having been filed out of time. However, there was no need to include 1 of the 20 documents in the Nuon Chea Defense’s Rule 97(4) request because this was already in other Parties’ documents lists. On Thursday morning, the Chamber rejected the second request on the same grounds. These decisions are consistent with the Chamber’s previous rulings on this issue.¹⁷

International counsel Mr. Andrew Ianuzzi objected to the Chamber’s rulings “for the record.” President Nil Nonn interrupted and declared that the Nuon Chea Defense’s remedy was to “appeal to the Supreme Court Chamber. The Trial Chamber is not vested with the power to review its decision.” Ianuzzi argued that he was merely putting the appeal on record based

on the practice in the United States, and that the Chamber was certainly competent to review its own rulings. However, the President cut him off and ended the discussion.

Significantly, the right to immediate appeal is limited to only to four categories of incidents under Rule 104 (4). This does not include rulings covering Rule 87, which “may be appealed only at the same time as an appeal against the judgment on the merits.” Thus, if the Trial Chamber refuses to revisit its rulings during trial (such as those involving Rule 87), it is likely that these issues would be rendered moot at the time of appeal.

1. Contents of Rejected Documents may be Used in Examining a Witness

On Thursday afternoon, Pauw asked the Chamber for guidance on the use of documents rejected by the Trial Chamber in examining witnesses. He added that while the Nuon Chea Defense tried to comply with the Chamber’s earlier ruling on the use of “new documents” (discussed in the previous section), he admitted that, “they just cannot get it right,” alluding to their Rule 87(4) requests denied by the Chamber. Citing an earlier Trial Chamber Response addressed to the Ieng Sary Defense,¹⁸ he asked if they can rely on the contents of the documents to formulate their questions to Professor Chandler.

To address this query, Judge Cartwright quoted the Chamber’s Response dated 16 July 2012, stating that while it was addressed to the Ieng Sary Defense, the Response applied to the Nuon Chea Team as well:

“...there is no barrier to the Ieng Sary Defence calling on their contents when formulating questions to the expert, where the Ieng Sary Defence provides advance courtesy copies of this material to the Chamber and the other parties.”¹⁹

Pauw stated that the documents they would like to use have already been uploaded to the shared materials drive for the other Parties to access. The Chamber’s Response provided an opportunity for the use of documents not in the Case File to challenge witness credibility, a recurring issue in this trial.

2. Limits on Rejected Documents to be Uploaded on the Shared Materials Drive

On Friday, Judge Cartwright said that a large number of materials (over 1,100 documents) were uploaded to the Chamber’s daily trial interface.²⁰ She emphasized that the purpose of requiring “advance courtesy copies of material that does not comply with Rule 87 is to allow the parties and the Chamber to understand the nature of the questioning” but uploading such a voluminous amount of documents clearly undermined this purpose and was “of little benefit at all.” As a result, the Chamber limited the upload of documents in this category to “no more than five to ten documents, and at least two weeks in advance of the examination,” to allow the Parties the opportunity to review the documents.

Judge Cartwright further clarified that the content or substance of the excluded documents could be used, but the Chamber will not allow any quotes from documents or the specification of these documents. In addition, the documents have to be relevant to the issues in Case 002/01.

E. Right of Other Parties to Argue on Issues Raised before the Chamber

After the exchange between Ianuzzi and President Nil Nonn [see III.D(1)], Karnavas attempted to intervene, requesting that the Nuon Chea Defense be allowed to “make an offer of proof” to cure the shortcomings of their request. The President interrupted Karnavas, stating that the Nuon Chea Defense’s issue “is not your business and you are not supposed

to make any motion on this.” Karnavas was unable to reply, as the President deactivated his microphone. Taking issue with the President’s pronouncement, Khieu Sampan’s international counsel, Mr. Arthur Vercken, argued that, “a question raised by a defense team may concern the Defense as a whole, and it consequently seems to me to be logical that we should be entitled to speak.” The President simply responded that the Chamber had already ruled on this issue.

F. Objection to the Witness Testifying on Duch’s Testimony in Case 001

On Wednesday afternoon, Chandler’s answer to a question included a reference to Duch’s testimony in Case 001. Karnavas objected, stating that, “the gentleman is now giving testimony on evidence that was provided by Duch in his trial and is factoring that into his testimony.” The Chamber however, did not address this objection.

G. Submission of Witness’s In-Court Notes for Placement in the Case File

Noticing that the Witness was reading from notes he took while the OCP asked him questions, Ang Udom requested that the Chamber instruct Chandler to submit these notes so that they could be placed in the Case File. Ang Udom contended that the request was no different from the Prosecution’s request to have Nuon Chea’s notes submitted to the Case File in December 2011.

The President rejected the request on the ground that it was unreasonable. He continued that the notes were to help the Witness answer a complicated question and that all answers provided by the Expert will be available in the transcript.

H. Ieng Sary’s Medical Condition

Ieng Sary has been participating in the proceedings from his holding cell since after his hospitalization. At the end of the hearing on Wednesday (18 July 2012), the President referred to a physician’s report dated 11 July 2012 stating that Ieng Sary suffers from dizziness and gets tired too quickly, and recommending that he should remain in the holding cell for the next 10 days (or until 22 July). Nevertheless, though the 10 days had not yet passed, the Chamber required Ieng Sary’s presence in court the next day.

In compliance with the Chamber’s directive, Ieng Sary was in the courtroom on Thursday morning, 19 July. Karnavas immediately requested Ieng Sary to be allowed to stay in his holding cell because of his medical condition. Counsel related that the court doctor refused to give him an update on his client’s health, and had walked away when he tried to talk to him, actions that Karnavas found “abhorrent.” On Karnavas’ suggestion, and after confirming that the court physician did not submit a medical report for that day (Thursday), the Chamber called the physician to the stand. The physician reported that Ieng Sary could sit upright and be in the courtroom for one or two hours. The Chamber did not rule immediately, but after the break, it allowed Ieng Sary to participate in the proceedings from the holding cell for the rest of the day. Ieng Sary was not in court on Friday.

IV. TRIAL MANAGEMENT

The Trial Chamber faced notable scheduling challenges this week. The schedule was adjusted a few days before the resumption of the hearings. Moreover, translation difficulties increased, on account of the fast pace of the Witness’ testimony.

A. Time Management

After the three-week summer recess, the trial was originally slated to resume on Monday, 16 July 2012. However, the Prosecutor assigned to lead the OCP's examination fell ill, resulting in a two-day postponement of the resumption of the proceedings. The change in schedule prompted the Chamber to call a hearing on Friday. It appeared that upon notification of the change in schedule, Karnavas requested the Chamber by e-mail not to hold sessions on Friday due to a pre-arranged commitment to lecture in a seminar on that day. Karnavas reminded the Chamber that the OCP's request for a two-day postponement was also made via e-mail, and it was granted without consulting other Parties. Further, he emphasized that the delay was a situation created by the Prosecution, and for the Chamber "to say yes to the Prosecution and no to the Defense, it will be sending yet another signal that one party enjoys more rights than the others." Pauw supported Karnavas' request, emphasizing the need for the Parties to be treated equally, and the right of the Accused to be represented by his counsel.

The next day, the Chamber denied Karnavas' request. Judge Cartwright stated that the Parties knew at the outset of the trial that, while Fridays were generally kept free of hearings, they must be flexible, as there would be occasions that would necessitate the Chamber to sit on a Friday. Judge Cartwright further pointed out that in any case, Ieng Sary's national lawyer was present to represent him.

Time allocations to Parties. The Chamber allotted a total of three days this week for the OCP and the Civil Parties to examine the Witness. It granted the Civil Parties the five hours they requested to conduct their questioning, and allowed the OCP extra time on Thursday to compensate the time lost when other issues were discussed. The Defense Teams, on the other hand, were given two and a half days among them. The Chamber rejected Ianuzzi's request to extend the Defense Teams' time to three days, with an assurance that an extension would be granted if the Defense lost time to objections and other matters.

B. Courtroom Etiquette

At the start of the proceedings on Thursday, Karnavas took the floor and informed the Chamber that he noticed that Chandler initiated *ex parte* communications with the OCP. He emphasized that, "once a witness is on the stand, there should be no communications." Abdulhak took exception to this allegation, which he considered to impute impropriety and Witness bias. He clarified that the Witness approached him to ask about the schedule but he referred the Witness to the Chamber. The Chamber reminded Chandler that as a witness, he should not communicate with any of the parties.

C. Translation issues

Translation issues remained a concern this week, with Parties and the monitors noting errors or absence of translation in Khmer and French in a number of instances. This may be attributed to the long questions quoting passages from Chandler's books and the fast tempo of the Witness' speech when he answered questions. The Chamber had to remind the Witness and the Prosecutor a number of times to slow down for the benefit of the translators and the transcriptionists.

D. Attendance

The attendance of the Parties this week was consistent with their participation in previous weeks. As regards attendance by the public, the increase in the number of observers this week may be attributed to excitement over the appearance of Professor Chandler.

Attendance of the Accused. Only Khieu Samphan remained in the courtroom throughout the week. Ieng Sary participated mostly from the holding cell, taking into consideration his fragile condition (see III.H). Nuon Chea, on the other hand, was present in the courtroom during the morning sessions throughout the week but retired to the holding cell in the afternoons.

Civil Party Attendance. The 10 seats in the courtroom reserved for Civil Parties were fully occupied throughout the proceedings this week.

Attendance by Counsels. All the parties were represented during the week’s proceedings, with the noticeable absence of Karnavas on Friday. The Chamber recognized an international Civil Party counsel, Ms. Beini Ye.

Attendance by the Public. On Wednesday, 726 participants, consisting of Civil Parties, villagers, foreign students and NGO members, observed the proceedings. Due to the number of people in attendance, some visitors from the provinces had to witness the trial remotely through the audio-visual link outside the courtroom. The press room was also crowded by media and NGOs from various institutions. The crowd receded in the afternoon, as the villagers had to return to their hometowns. On Thursday morning, the public gallery was again full, with about 100 foreign visitors and approximately 400 people from Bantey Srey District, Siem Reap. In the afternoon, 100 students replaced the villagers, staying for one session. During the fourth session, the gallery was occupied by only 20 foreign visitors. On Friday, there were fewer attendees, with approximately 100 students and villagers from Mok Kampol District, Kandal Province present until end of the third session. A few foreign visitors followed the hearing throughout the day.

E. Time Table

DATE	START	MORNING BREAK	LUNCH	AFTERNOON BREAK	RECESS	TOTAL HOURS IN SESSION
Wednesday 18/07/12	9:06	10:33-10:52	12:12-13:30	14:45-15:10	16:16	5 hours and 8 minutes
Thursday 19/07/12	9:00	10:35-10:55	12:05-13:30	14:40-15:00	16:05	5 hours
Friday 20/07/12	9:00	10:35-10:50	12:20-13:30	14:45-15:00	16:20	5 hours and 40 minutes
Average number of hours in session				5 hours 16 minutes		
Total number of hours this week				15 hours 48 minutes		
Total number of hours, days, weeks at trial				347 hours 6 minutes		
80 TRIAL DAYS OVER 24 WEEKS						

Unless specified otherwise,

- the documents cited in this report pertain to *The Case of Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan* (Case No. 002/19-09-2007-ECCC) before the ECCC;
- the quotes are based on the personal notes of the trial monitors during the proceedings; and
- photos are courtesy of the ECCC.

Glossary of Terms

Case 001	<i>The Case of Kaing Guek Eav alias “Duch”</i> (Case No. 001/18-07-2007-ECCC)
Case 002	<i>The Case of Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan</i> (Case No. 002/19-09-2007-ECCC)
CPC	Code of Criminal Procedure of the Kingdom of Cambodia (2007)
CPK	Communist Party of Kampuchea
CPLCL	Civil Party Lead Co-Lawyer
DK	Democratic Kampuchea
ECCC	Extraordinary Chambers in the Courts of Cambodia (also referred to as the Khmer Rouge Tribunal or “KRT”)
ECCC Law	Law on the Establishment of the ECCC, as amended (2004)
ERN	Evidence Reference Number (the page number of each piece of documentary evidence in the Case File)
FUNK	National United Front of Kampuchea
GRUNK	Royal Government of National Union of Kampuchea
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IR	Internal Rules of the ECCC Rev. 8 (2011)
KR	Khmer Rouge
OCIJ	Office of the Co-Investigating Judges
OCP	Office of the Co-Prosecutors of the ECCC
RAK	Revolutionary Army of Kampuchea
VSS	Victims Support Section
WESU	Witness and Expert Support Unit



* AIJI is a collaborative project between the East-West Center, in Honolulu, and the War Crimes Studies Center, University of California, Berkeley. Since 2003, the two Centers have been collaborating on projects relating to the establishment of justice initiatives and capacity-building programs in the human rights sector in South-East Asia. The Program is funded by the Open Society Foundation, the Foreign Commonwealth Office of the British Embassy in Phnom Penh, and the Embassy of Switzerland in Bangkok.

This issue of **KRT TRIAL MONITOR** was authored by Mary Kristerie A. Baleva, Adair Fincher, Princess B. Principe, Sovanna Sek, Kimsan Soy and Penelope Van Tuyl, as part of AIJI's KRT Trial Monitoring and Community Outreach Program. KRT TRIAL MONITOR reports on Case 002 are available at <www.krtmonitor.org>, and at the websites of the [East-West Center](http://www.eastwestcenter.org) and the [War Crimes Studies Center](http://www.warcrimesstudiescenter.org).

¹ See Asian International Justice Initiative. *Case 001 KRT Trial Monitor*. Issue No. 16, Annexure A (4-7 August 2009). 10.

² Chandler (TCE11) graduated from Harvard University with a bachelor's degree in English literature in 1954. He then earned a master's degree in South East Asian Studies from Yale University, and a PhD from University of

Michigan. He taught at Monash University from 1972 until his retirement in 1997, and also taught as a visiting professor at various universities in the U.S.A. He is able to speak and read the Khmer language fluently.

³ Chandler's books on the DK regime are: (i) a chapter on DK in *History of Cambodia*, its fourth edition released in 2007; (ii) *The Tragedy of Cambodian History: Politics, War, and Revolution since 1945*, published in 1993; (iii) *Pol Pot Plans the Future: Confidential Leadership Documents from Democratic Kampuchea*, co-edited with Ben Kiernan and Chantou Boua, published in 1988; (iv) *Brother Number One: A Political Biography of Pol Pot*, published in 1992; and (v) *Voices from S-21*, a book on the Tuol Sleng prison, published in 1999.

⁴ This week, Chandler was questioned by President Nil Nonn, Judge Silvia Cartwright, Messgrs. Chan Dararasmey and Tarik Abdulhak of the OCP, and Mr. Hong Kimsuon, Ms. Christine Martineau, and Mr. Olivier Bahougne for the Civil Parties.

⁵ The Witness shared an anecdote on the phrase "democratic centralism" from Czechoslovakia:
A son asked his father, "What's democratic centralism?" And the father said, "I'll tell you. You go down in the courtyard of our apartment, stand there." The boy stood there, and the father fell out the window and hit the boy on the head. And the boy said, "Now what?" He said, "Now, you spit up."

⁶ Chandler recalled events such as the Burmese evacuation in Ayutthaya in 1767, and the Thai evacuation of Phnom Penh in 1832.

⁷ As cited by Prosecutor Tarik Abdulhak in court on 20 July 2012. See Chandler, David. *Voices from S-21: Terror and History in Pol Pot's Secret Prison*. California, U.S.A.: University of California Press (1999).

⁸ The July 1976 issue of the *Revolutionary Flag* read to Chandler states in part:

The aspect of harassment is routine. They wreck us by every means, from inside and from outside. But they're unable to attack us from outside so, they attack from within. To attack us from within, they must attack the line, cause turmoil in the line inside the Party, inside the army, inside our people, so they will be easy to split.

⁹ AIJI KRT Trial Monitor reports on Case 001 are available at <http://krtmonitor.org/category/case-001-reports/>.

¹⁰ As cited by Prosecutor Tarik Abdulhak in court on 19 July 2012. See Chandler, David. *The Tragedy of Cambodian History: Politics, War, and Revolution since 1945*. Boston, Massachusetts: Yale University Press (1993). 219.

¹¹ Later, Judge Cartwright read part of the minutes of the 26 March 1976 Standing Committee meeting showing Nuon Chea giving instructions and opinions on negotiations with the Vietnamese, including orders on the use of mines, and quoted as saying, "with Vietnam our problems are never ending. We must combine the political struggle, the diplomatic struggle, and use military force in combination." Chandler observed that this somewhat contradicts Nuon Chea's statement.

¹² See Internal Rule 67.

¹³ Chandler also indicated that if he had had ample time to prepare for his testimony, perhaps he would have been able provide his sources. In response, Karnavas pointed out that the Defense Teams were not being unfair to him. The Ieng Sary Defense had anticipated the issue and had asked for a document list. He stated that on 11 June 2012, they had sent a request to the Chamber requesting that the Witness keep track of all the documents he had used to prepare. He then stated that on 3 June 2012 the Chamber had sent a letter asking the Professor to comply with the request. When asked if Chandler had received the letter, he indicated he had, but had not prepared the list.

¹⁴ Nuon Chea Defense. "Rule 87 Request to Use Documents During Cross-Examination of Expert Witness Professor David Chandler" (12 July 2012). E172/27/1. Note that, in the first request, the Nuon Chea Defense requested the Chamber to admit 20 documents, 3 that were already in the Case File and 17 that were not. The Nuon Chea Defense argued that three documents in the Case File fell under Rule 87(3) or Rule 87(4). While the documents are not subject to the "unavailability requirement" of Rule 87(4), they were unavailable prior to trial. As regards the 17 other documents, they attempted to submit the documents under 87(4) as "new evidence" that was not available prior to the start of trial. See also, Nuon Chea Defense. "Second Rule 87 Request to Use Documents During Cross-Examination of Expert Witness Professor David Chandler" (17 July 2012). E172/27/2. In its request, the Nuon Chea Team sought to admit 11 more documents as "new evidence" under Rule 87(4).

¹⁵ See Asian International Justice Initiative. *Case 002 KRT Trial Monitor* [hereinafter, **CASE 002 TRIAL MONITOR**]. Issue No. 24. Hearing on Evidence Week 19 (28-31 May 2012). 14.

¹⁶ See Trial Chamber. "Directions regarding documents sought for impeachment purposes" (24 May 2012). E199. and Trial Chamber. "Decision Concerning New Documents and Other Related Issues" (30 April 2012). E190.

¹⁷ See **CASE 002 TRIAL MONITOR**. Issue No. 27, Hearing on Evidence Week 22 (19-21 June 2012).14.; **CASE 002 TRIAL MONITOR**. Issue No. 24, Hearing on Evidence Week 19 (28-31 May 2012).14.

¹⁸ Trial Chamber. "Response [to] your letter of 21 June 2012 concerning the Trial Chamber's Decision on Ieng Sary's Rule 87(4) Request (E172/24/4/1)" (16 July 2012). E172/24/4/4.

¹⁹ *Ibid.*

²⁰ The Nuon Chea Defense uploaded 150 documents, including translations, with 68 original documents. Abdulhak clarified that the OCP uploaded some 200 plus documents, 700 including translations. He added that they uploaded all of the confessions that they have sent to the Witness in order to give the parties notice.



WSDHANDACENTER
FOR HUMAN RIGHTS & INTERNATIONAL JUSTICE
Stanford University

This publication was originally produced pursuant to a project supported by the War Crimes Studies Center (WCSC), which was founded at the University of California, Berkeley in 2000. In 2014, the WCSC re-located to Stanford University and adopted a new name: the WSD Handa Center for Human Rights and International Justice. The Handa Center succeeds and carries on all the work of the WCSC, including all trial monitoring programs, as well as partnerships such as the Asian International Justice Initiative (AIJI).

A complete archive of trial monitoring reports is available online at:

<http://handacenter.stanford.edu/reports-list>

For more information about Handa Center programs, please visit:

<http://handacenter.stanford.edu>
