

KRT TRIAL MONITOR

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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

(On situation in Phnom Penh prior to 17 April 1975) I also observed the general situation in the city was that people were on ...constant fear because of the ongoing bombardments and shelling of the city. And it was my hope and I think that everybody at the time shared my hope, as well -- that there would be no more war once this situation was over¹

- Meas Saran, Civil Party

I. OVERVIEW

This week the Chamber held a two-day hearing as Tuesday was slated for the appeal hearing before the Supreme Court Chamber on Ieng Thirith's unconditional release from detention.² The Trial Chamber firstly heard the responses from the relevant Parties on Dr. John Campbell's testimony of Ieng Sary's health and fitness last week,³ whereby the Accused's counsel suggested the Trial Chamber delay ruling on this issue. The week also saw the testimony of Witness Pe Chuy Chip Se, former clerk at Pongro Security Center and the start of Civil Party Meas Saran's. This week's hearings were managed effectively, although some sessions lasted beyond the usual end time during the Witness' testimony.

II. SUMMARY OF WITNESS AND CIVIL PARTY TESTIMONIES

Pe Chuy Chip Se, a soldier for the Khmer Rouge before being assigned to Pongro Security Center at Siem Reap and Oddar Meanchey Sector, testified on Monday and Wednesday. After his testimony, Civil Party Meas Saran, a doctor and victim of the Phnom Penh evacuation of 17 April 1975, testified during Wednesday's last session and will resume his testimony next week.

A. Testimony of Witness Pe Chuy Chip Se

Pe Chuy Chip Se (TCW-507), a 58-year-old teacher from Siem Reap, took the stand and was accompanied by Duty Counsel Moeurn Sovan⁴. In 2008, he was interviewed twice by OCIJ, and his examination was primarily based on the OCIJ interviews and his interview by Henri Locard⁵. The testimony related to the operations of Pongro Security Office⁶, where he was a clerk between 1972 and 1977. He also provided accounts on the evacuation of Siem Reap, the treatment of Lon Nol government and military personnel, and the urban evacuee conditions in cooperatives.

1. Involvement in Khmer Rouge



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The Witness joined the Khmer Rouge as a soldier in 1971 and was involved in the battlefield until KR launched the Chenla II campaign in 1972. When National Counsel for Nuon Chea, Son Arun, pressed him for details on his induction to KR, Pe Chuy Chip Se stated that he actually had no intention to join, but he was arrested and brought to Santuk Mountain, where he was then enlisted to the movement. He also admitted that he deserted from the army during the Chenla II campaign. He then went home to his home village at Chi Kraeng District in Siem Reap Province and started working at the Pongro Security Office. During his testimony he made references to actions he took as part of the security forces in the security center, he maintained to Prosecutor Lysak that his role since 1972 was that of a clerk who prepared documents and kept records of the prisoners, including their biographies and confessions. After 1977, the Witness testified that he was sent back to his village and worked as part of mobile unit there.

leng Sary's National Counsel, Ang Udom, confronted the Witness with a prospective Witness⁷ OCIJ statement that identified Pe Chuy Chip Se as a member of Pongro Security Office. The Witness stated that this misperception was common because he was close to Ta Kun, the Head of the Security Office, but he was actually only a clerk. He rejected this testimony, stating that with his petty bourgeoisie background, he could not be part of the structure of KR.

2. Local Administrative and Communication Structure and Internal Purges

The Witness was aware that the Khmer Rouge established an underground organization comprised of CPK and Youth League members, though he was not a member and did not know precisely how the organization worked. On Pongro Security Office structure, he recounted that Ta Voan had been Secretary and was replaced by Ta Kun. The Secretary reported to the District Committee, which initially was led by Ta San; Ta Sok later replaced Ta San. According to the Witness, Ta Sot occupied the position of Secretary of the Sector, which encompassed Siem Reap and Oddar Meanchey.

Ta San had been accused of being a traitor, and his replacement, Ta Sok, came from Kampot, which during DK era was part of the Southwest Zone. Ta Sok then accused Ta Voan and his associates of treason and replaced the Secretary of Pongro Security Office with Ta Kun. Eventually Ta Kun and others at the Center were also arrested under suspicion of treason, and the Security Office was dismantled in 1977. The Witness described the situation as follows:

“The people who worked in that security centre were accused of betrayal by the Khmer Rouge and that was not only for the Pongro Security Centre. The accusation was nationwide, because from one group to another, the Khmer Rouge always accused all the previous group of betrayal”.⁸

The Witness held that the Head of Security Center had limited decision-making power and had to wait for orders from the District Secretary/Committee on matters such as deciding whether a prisoner should be executed. The Witness did not know, however, whether District Level authorities also had to await orders from the higher echelons.

Pe Chuy Chip Se was able to shed light on the communication process in terms of prisoners' confessions, as he was a clerk compiling them into a ledger, which was then submitted to the Head⁹ of Security Office. The Head would pass these findings to the Chief¹⁰ of District who in turn would determine the severity of the noted offences and propose appropriate action. The options were to be released, detained, or executed. He also recalled that at times Ta San would come to the Security Office and meet detainees.

Regarding receiving information, the Witness stated that he attended meetings on work procedures and security concerns at his office and barely had access to radio broadcasts. However, his leaders told him that Pol Pot was Secretary of CPK and Khieu Samphan was the President of the State Presidium.

3. Evacuation

When Chi Kraeng District fell to KR in 1970, some of Kampong Kdei's population was evacuated. The Witness recounted only the Chinese, civil servants, and teachers were transferred to villages 30 to 40 kilometers away from the Kampong Kdei Market, but did not know why those particular groups were targeted.

Pe Chuy Chip Se did not witness the 1975 evacuation of Siem Reap himself, as he was working at Pongro Security Office at the time. However he had heard that everyone was evacuated on foot from the city on 17 April 1975. Pe Chuy Chip Se heard from others that civilians were forced to leave the city and were threatened with punishment and even murder. People perished due to diseases and lack of food and medical assistance. He described the situation as miserable for the evacuees, specifically noting the distance that they had to cover, especially by those who came from Phnom Penh.

4. Cooperatives and Treatment of 17 April People and the Chams

The Witness recalled that Chi Kraeng fell to the hands of Khmer Rouge in 1970. KR encouraged the population to resist Lon Nol, and at that point families began to be separated: children went to the forest to join the resistance or to take refuge whilst parents remained and joined the cooperatives. When Siem Reap was evacuated, the civilians were moved to the villages. The Witness did not know how many people were evacuated, but maintained that not every evacuee resettled at Chi Kraeng came from Siem Reap. Upon arrival to the cooperatives, the people were divided to do different tasks in different locations by the head of cooperatives, who separated family members from each other.

The evacuees were viewed as New or 17 April people and lived in constant fear. They were all considered to be of a different class and accused of being affiliated with American imperialists; they were thus subjected to surveillance and hard labor. While communal eating was already practiced prior to their arrival, the Old People did not readily receive the evacuees; in fact, the KR encouraged the locals to treat them as those who lived with Lon Nol's administration.

The 17 April people had to hide their background, and those found out to be linked to Lon Nol's regime would be executed. The Old People spied on the New, who were often accused of theft, immoral conduct and laziness. While some Old People were also arrested for the same offences, the punishment of each greatly differed (see section on Pongro Security Office below).

After 1975, some Cham people were evacuated to the Witness's native village. They were placed in the locals' houses and forced to eat pork, which is forbidden in the Cham's religion, Islam. Like the New People, they were forced to engage in hard labor, including digging canals. Discrimination against these targeted groups persisted beyond 1977; Pe Chuy Chip Se witnessed it after he returned to his village when Pong Ro Security Center closed.

Additionally, during Ta Sok's reign as Head of District Committee, the 17 April People accused of rebelling against the KR were executed at Kampong Kdei. The Witness described how the New People were accused of killing KR soldiers were tricked; they were

told to attend a meeting with a machete, axe, or club, but were then arrested for violating the KR's rule against bearing weapons. They were then tied and loaded onto a truck to be taken away.

5. Pongro Security Office

Pe Chuy Chip Se understood from his leaders that the Security Center, in existence from 1972-1977, was a place to reeducate and refashion detainees. However, he recalled that some of those prisoners were eventually killed and believed that "the deeper purpose of it was to execute them."¹¹

Pongro Security Office prisoners were all civilians labeled by his superiors as imperialists and capitalists. The Witness testified that in his capacity as a security officer of Pongro Security Center, he was sometimes asked to go to Kampong Kdei market to search for and arrest people who had committed offences, ranging from theft, laziness, or "moral misconduct," which translates to "prenuptial affairs. In 1974 those accused of being "bandits" by the District Committee were arrested and imprisoned in the Security Office. These "bandits" were those who ran to the forest from KR and stole food from the villages.

Prisoners were also handed over by the commune leaders, who would submit information about the detainees. The Witness was ordered to mark whether a detainee was an Old or New person; if a prisoner was part of the New People, s(he) would be placed in a different place from the Old, or if both types had to be detained in the same, the New People would be situated in an inferior place. The punishment meted out for the same offense was graver for the New People.

Only female detainees were allowed to go out and work. Some of the prisoners were also subjected to interrogation, when they would be tortured if they refuse to answer questions or confess. This torture included whipping or beating by sticks or clubs. Some prisoners were executed and buried in a site away from the Security Office. Some detainees would also perish due to their poor diet of thin gruel or the conditions during the cool season.

6. Treatment of Lon Nol Soldiers and Officials

Prior to 1975, captured Lon Nol's soldiers were immediately executed, the Witness stated. After 17 April 1975, during Siem Reap's evacuation, the evacuated Lon Nol former officials and soldiers as well as their families were kept in old apartment buildings at Kampong Kdei market. Like Pongro Security Office, Kampong Kdei market was also located at Chi Kraeng District; these locations were 7 KM away from each other. According to the Witness, the former officials, soldiers and their families were detained, interrogated, and executed¹². He had learned this information from other people. Pe Chuy Chip Se confirmed the statement in his OCIJ interview that these people, along with their families, were transported by trucks under the pretext that they would be taken to a study session, when in fact, they were to be executed at Mkak, 10 kilometers away from the Security Center. The Witness claimed he had no knowledge on which KR units were in charge of guarding and executing the detainees. However, he maintained that the executions were arranged by people from the Sector and not the local forces, which he had heard from some of the executors upon their return from Mkak. He denied that security forces from Pongro Security Office had any role in the execution. The Witness also stated that he had heard about the manner of executions, namely how everyone including children were blindfolded then executed, from three people who used to live in his village.

7. Demeanor and Credibility

The Witness testimony was generally consistent throughout his testimony and with the OCIJ and Henri Locard interviews, particularly with regards to the evacuation, local administrative structure, and sequence of events. However, the Witness seemed to distance himself from some events described in previous interviews, particularly with relation to executions. When confronted with particularly grisly descriptions of executions, the Witness would state that he had heard the information from other sources. At one point Son Arun confronted him with a description in Locard's interview in which the Witness admitted he had killed two prisoners. Pe Chuy Chip Se stated that he only beat prisoners, the precise number of which he could not recall, and only did so because KR did not trust him. In fact, throughout his testimony it was revealed that much of what he testified to when interviewed by Henri Locard and OCIJ was hearsay, including the manner Siem Reap's evacuation was conducted.

B. Testimony of Civil Party Meas Saran

After Pe Chuy Chip Se's testimony, the Trial Chamber summoned Meas Saran (TCCP 82) to testify. The Civil Party was born on 12 May 1949 in Svay Rieng Province. A widower with one child, Meas Saran currently lives in Phnom Penh and works in the medical field. Civil Party Lawyer Christine Martineau questioned him during the last session of Wednesday, and his testimony was scheduled to resume on Thursday, 22 November 2012.

1. Professional Background Before DK Regime

Meas Saran attended a medical school from 1969 to 1972. He then worked in the tuberculosis section at Preah Ketu Mealea Hospital, the second largest hospital in Phnom Penh. In 1973, he left the hospital and became a soldier to fulfill the military obligation that "all the medical staff had to become a soldier for 18 months." During the recruitment process, Meas Saran chose the less-hostile Sisophon, where he married his wife. In the military training center for the fourth infantry, he treated many newly recruited soldiers despite the lack of a proper pharmacy. In late 1974, Meas Saran, accompanied by his eight-month pregnant wife, was summoned to return to Phnom Penh.

2. Situations in Phnom Penh Prior to 17 April 1975

Upon arrival in Phnom Penh, Meas Saran was asked to gather at Borei Keila, which he described was not a proper hospital, but rather an emergency center with five operating theaters. He described that the hospital was more like a surgery center, taking care of the victims of KR's constant bombardment of Phnom Penh.

According to Meas Saran, Borei Keila and the operating theaters were under the authority of Brigadier General Ong Song Soeun (phonetic). At the time, many medical personnel came to Borei Keila due to a government appeal for medical schools to send their students.

A few days before the capture of Phnom Penh, the overall situation in Phnom Penh was "indescribable"; people were in "constant fear" of continued bombardment and shelling of the capita as well as the influx of people from the countryside. The Civil Party described the situation as panicked and chaotic. Yet, some people were "relaxed and happy", the Civil Party added, believing that the Khmer Rouge's victory would bring peace to the country.

During the night before the fall of Phnom Penh, there were ambulances racing against time to bring the wounded to Borei Keila. Intense fighting between the two opponents echoed across Chroy Chang Va Bridge urged Meas Saran to go to the upper story of the building he was working in, where he saw fire burning all around. While some people then decided to leave the center out of fear, he decided to stay longer even though he was off duty and supposed to switch shifts with someone who had not arrived yet.

3. The Arrival of Khmer Rouge Soldiers

On the morning of 17 April around 8 am, there were only “solo gunfire” from every corner, and the Civil Party saw Khmer Rouge soldiers advanced toward the capital from the West. He testified that there were tanks with soldiers on the top. The soldiers were in black outfits with black slippers and Maoist caps, and some were half naked. They carried guns pointed into the air and went past Borei Keila, heading eastward. The Civil Party followed one Khmer Rouge soldier to ask what was going on, and watched him enter a house, stay for half an hour, and then leave. Afterwards, Meas Saran saw a young girl of about eight years old outside the building, holding her *sarong*, crying. He did not know what happened to the girl, but this terrified him, so he returned to the Center.

Meas Saran described the situation inside Borei Keila on 17 April 1975: there were dead bodies and roughly 50 patients lying on the floor. In addition, the wounded were also lying along the corridor and in front of the building. However, after 9 or 10 am, Meas Saran testified that there were not many wounded coming in to the center while medical personnel had to leave. Consequently, many more patients were left untreated.

4. Leaving Phnom Penh

At around 10 am on 17 April 1975, medical personnel, with soldiers behind him, shouted that Meas Saran had to leave the hospital immediately because the US would bomb the area. Amongst the patients in the hospital, there was a little girl whose wound left her stomach exposed. The Civil Party was torn, between caring for the girl, who at that time had no one, and looking for his eight-month pregnant wife. In the end Meas Saran left her, despite the girl’s pleading him to take her with him.

The Civil Party attempted to reach the northeast part of the city, as his wife was staying there with relatives, but he was forced to head to National Road Number 1. He then decided to go to his house along the way and, out of confusion as to what to bring, decided to take only one of his wife’s shirts, which he carried until he arrived at his wife’s home village.

As he progressed with the other evacuees, the Civil Party recounted, KR soldiers were patrolling the exodus; he could hear gunfire from every angle, which he guessed was from soldiers firing into the air. Meas Saran stated that it was “crowded” and “congested” when the mass reached Monivong Boulevard. He also witnessed fighting erupt between seven to eight Khmer Rouge soldiers and a Lon Nol soldier who refused to surrender. The fighting ended with the Lon Nol soldier shot dead.

After crossing the Monivong Bridge, Meas Saran and others decided to stay under it to await the time when they could return home. During this stay, the Khmer Rouge soldiers offered no assistance: not food, water, nor medicine. He survived by stealing sugar from a warehouse, trading pork he obtained by claiming a stray pig was his with rice, and drinking the river water. After three days had passed with no announcement allowing the people to come back to Phnom Penh, the Civil Party grew suspicious, which was increased by the absence of US bombing. This suspicion led Meas Saran not to respond when on the fourth and fifth day announcement was made through mobile microphone to appeal to civil servants, soldiers, and senior military officers to return to Phnom Penh to resume their work to rebuild the country because the war had ended. Meas Saran saw families head back to the direction of Phnom Penh. These people never returned, but as Meas Saran himself did not respond to the appeal, he did not know what happened to them. The Civil Party waited at that spot for two weeks.

5. Civil Party Demeanor and Credibility

Meas Saran responded to Counsel Martinneau in a detailed manner, and was generally composed. However, he was visibly overcome with emotion as he recounted the dilemma of having to choose between searching for his wife and the little girl at the hospital.

III. LEGAL AND PROCEDURAL ISSUES

This week saw a number of legal procedural issues regarding Ieng Sary's health and the Witness examination procedure. In response to Dr. John Campbell's testimony last week, Ieng Sary's Defense proposed to pause the question of the Accused's fitness until it had to be addressed, namely when a Witness or Civil Party important to his case started to testify. Given at the same time International Counsel for Ieng Sary, Michael Karnavas, also emphasized his belief that his client was unfit, the Chamber seemed to be uncomfortable with the suggestion to delay the ruling. The Counsel however cautioned that should the Chamber immediately decide upon this issue, Ieng Sary's Defense might have to withdraw the present waivers to be present on a number of Witnesses and Civil Parties and go down the road of severing their client's case from the other Co-Accused. These measures, given the frail health of the Accused, bear the risk of prolonging the trial even more. Other legal issues this week included those often occur during examination of a Witness, including questioning the veracity of OCIJ interview record, use of documents in putting questions to Witness, as well as maintaining questions within the scope of Case 002/01.

A. Responses of Parties to Medical Expert's Testimony

On Monday, Ieng Sary's Defense, OCP, and Civil Parties were provided with the opportunity to respond to Dr. John Campbell's testimony on 8 November 2012 regarding Ieng Sary's fitness to stand trial¹³. Counsel Karnavas submitted that it was crucial to find "a just and acceptable solution"¹⁴ on the health and fitness of his client; though until that point the Defense had not filed submission to terminate proceedings against Ieng Sary, the 89-year-old Accused's health was precarious. Karnavas emphasized that the issue of competency had to be addressed at some point, taking into account Ieng Sary's fair trial rights as enshrined in Articles 31 and 38 of Cambodian Constitution as well as Article 14 of the International Covenant on Civil and Political Rights (ICCPR)¹⁵. However, the Counsel furthered that to discuss this issue now would be "premature". Given that Ieng Sary has waived the right to be present in the examination of witnesses scheduled to testify during November, the proceedings may continue without his client's presence.

On the testimony of Dr. John Campbell, Karnavas held that the Defense would not at this point file detailed objections despite finding the doctor's conclusions "fanciful". Karnavas pointed out the great differences between his observations when meeting his client with Dr. Campbell's description of the Accused's state of health.

Ieng Sary's Counsel proceeded to impress upon the Chamber that a second opinion needs to be sought, and urged to summon Dr. Bursztajn, whose pro-bono preliminary medical opinion had been previously submitted to the Chamber.¹⁶ Karnavas submitted that the Chamber should consider providing Dr. Bursztajn the information Dr. Campbell had, and ask him to provide an independent evaluation. Karnavas concluded by assuring that Ieng Sary's Defense Team was open to other parties summoning their own experts, and requesting the Chamber that, should the written submission for appointment of an Expert that the Defense would file forthwith be rejected, the rejection be in the form of a written decision.

Karnavas' response triggered clarification questions from the bench. Judges Cartwright and Lavergne both asked Ieng Sary's international counsel to verify the stance on the Accused's

fitness. Karnavas equivocally maintained that the Defense Team had always considered the client as unfit and unable to participate meaningfully in the trial. Should the Chamber agree with Dr. Campbell's testimony that Ieng Sary simply needed to pay attention, Karnavas would challenge them to present Ieng Sary in the courtroom during the proceedings on a bed or gurney to allow the public to see whether his client was truly able to participate. He recounted that Ieng Sary's participation was limited to periods of five to 15 minutes at a time, which, Karnavas submitted, did not allow his client to have meaningful participation in the trial. However, Karnavas explained, the Defense Team would pursue the issue with "a very measured approach." He reiterated that Ieng Sary already waived his right to confront certain witnesses and civil parties, and this would allow time for the Accused's health to possibly improve. Once Witnesses or Civil Parties important to the case against Ieng Sary were to be summoned, then the issue of his client's fitness to stand trial would need to be revisited, depending on the Accused's health status. This arrangement, Karnavas held, would help expedite the trial. Ieng Sary's international counsel also assured Judge Lavergne that Ieng Sary instructed the waivers willingly and intelligently, as his client's short periods of attentiveness still allowed him to do so.

In response to Dr. Campbell's testimony, International Prosecutor William Smith noted that while Ieng Sary's physical condition was fragile and had declined since 3 September 2012, he was considered to be in adequate condition to be released from the hospital. Smith stated that what the Trial Chamber had was an Accused who was frail but also one who has been found by Dr. Campbell "as mentally fit to plea and physically fit to stand trial."¹⁷ On Karnavas' suggestion to bring Ieng Sary to the courtroom, Smith viewed this as inappropriate as it would not provide the Accused with his necessary comfort level. The International Prosecutor agreed with Dr. Campbell's recommendation for Ieng Sary to continue following the proceedings from the holding cell. Smith expressed confidence of Dr. Campbell's qualification as professor in geriatric medicine and the doctor's recommendations

Smith reminded the Chamber that the issue at hand was not about the number of health issues Ieng Sary had, but whether he was mentally fit to plea.¹⁸ The International Prosecutor reminded the Chamber that there was no real evidence that Ieng Sary's mental capacity has declined between September and November. According to ICTY's Strugar decision,¹⁹ Ieng Sary's seven capacities that determined one's fitness to stand trial had been tested and the Accused had passed the September and November medical examinations. The Prosecutor asked the Chamber to adjudicate based on the evidence at hand, which did not include Ieng Sary's counsel's observations or the conclusions in Dr. Bursztajn's email.²⁰

On Karnavas' proposal that the Chamber consult Dr. Bursztajn, the International Prosecutor held that, while this was at the discretion of the Chamber, the Accused had already been examined by three medical experts²¹ in the period of two months, each time yielding the same result, namely that Ieng Sary was fit to stand trial. He questioned the necessity of summoning new experts when there was no significant change in the Accused's mental capacity and cautioned that it may result in endless summoning of alternative medical experts every time a Party was dissatisfied with the findings.

With regards to counsel Karnavas' proposal for the Chamber to delay ruling on Ieng Sary's fitness to stand trial until necessary, Prosecutor Smith cautioned that this was a dangerous proposal, as this may be a ground for the Team's appeal at a later date. He proposed that the Chamber issue the ruling on this matter, and re-examination could occur should there be any change in the Accused's health condition.

The International Lead Co-Lawyer for Civil Parties, Elisabeth Simonneau-Fort, broadly concurred with the Prosecutor's stance. She insisted that Ieng Sary's Defense had not provided any medical argument to disprove Dr. Campbell's conclusions. Seemingly to argue

against the possibility that Dr. Campbell was biased against leng Sary, Simonneau-Fort reminded the Chamber that the Expert had previously examined leng Thirith, and his findings were the basis for the former Accused to be found unfit to stand trial. She also reminded that leng Sary had a duty to the Civil Parties and the public to attend the trial.

In his response to the submissions by the OCP and Civil Parties, Counsel Karnavas firstly pointed out that what happened to leng Thirith had no bearing for the Defense Team as she was not his client. He also assured the Chamber that leng Sary's counsels were not engaging in a tactic to prepare grounds of appeal by deliberately setting up an error in the trial proceedings. Karnavas warned the Chamber however, that if the Chamber made a ruling that his client was fit to stand trial, it would force the Defense Team's hand to advise leng Sary to withdraw his waivers and ensure the Accused come in full presence in the courtroom physically or via video link. Karnavas vehemently stated that he did not want to participate in a "charade" where parties pretended his client was participating while he was unable to.

On the capability of his client to meaningfully participate in the trial, Karnavas cited paragraph 55 of the ICTY's Appeal Judgment of the *Strugar* case, which he opined qualified the standards set by the case's Trial Judgment. He referred to ICTY's Appeal Chamber's determination that the standard for meaningful participation should be considered based on "a reasonable and common sense manner at such a level that is possible for him or her to participate in the proceedings"²². Referring to his client's intermittent consciousness and constant pain, Karnavas held that by using "common sense" it was obvious leng Sary was unable to follow the proceedings.

At the final stage of this portion of the hearing, Judge Cartwright expressed her concern about the counsel's proposal that the trial should proceed without any ruling on leng Sary's fitness to stand the trial while at the same time the Defense held that their client was actually unfit. According to her, this would mean that the Chamber was commencing the trial despite the possibility that leng Sary was unfit. Karnavas explained to the Judge that he was still hoping that his client would get better, and thus the trial should proceed with the portions of the proceedings his client had waived the right to attend in. The Counsel again issued the warning that if the Chamber insisted to issue the decision that his client was fit to stand trial, then the Defense Team would advise leng Sary to withdraw his waivers and demand full view of their client during proceedings to show what was defined as competent to stand trial in this court. President Nil Nonn then closed the hearing on the Parties' response to Dr. Campbell's testimony and announced that a decision would be issued in due course.

B. Practice of Putting Previously Unseen Documents Before the Witness

The Trial Chamber was once again confronted with questions regarding protocol for placing documents before a witness during trial. While questioning Pe Chuy Chip Se, Dale Lysak consulted a July 1991 annotated interview between the Witness and Dr. Henri Locard that the Witness had not seen prior to the proceedings that day. Pauw initially objected to Lysak's use of the interview on technical grounds, stating that it was the Court's practice to first ask the Witness whether he had seen the document; if not, the document would have to be removed. Lysak countered this objection, claiming that Pauw had incorrectly stated the Court's practices and that, to the contrary, there have been "many circumstances" in which witnesses have been allowed to look at documents they had not seen before, especially when the document contains an interview attributed to the Witness. The Chamber overruled the objection.

C. Practice of Using Documents From Individuals Scheduled to Testify Before the Court

Immediately following Pauw's objection cited above, Karnavas put forth a familiar objection that has been raised repeatedly in recent weeks. Recognizing that Locard is slated to give evidence as a witness before the Chamber, Karnavas asked if the Court was now in the same situation as with authors like Philip Short, in which counsel is attempting to use documents from a witness who has not yet testified before the Court. This matter first arose during the Documentary Hearing on 19 October 2012, in which the Trial Chamber refused to allow International Defense Counsel for Nuon Chea, Andrew Ianuzzi, submit documents from experts Philip Short and Stephen Heder pending their appearances as expert witnesses before the Court.²³ A week later, the Chamber clarified its ruling, stating the following:

To read an excerpt from a book written by someone who is going to appear subsequently is not appropriate. However, the Defence may use a document and the substance of the document to put questions to the witness. But we should avoid using complete quotations from such documents...quoting the analysis of an expert to lay the foundation for a witness's question is not appropriate insofar as that analysis has not been confirmed and discussed with the expert.²⁴

In response to Karnavas' objection, Lysak clarified that he would only ask about statements attributed specifically to the Witness, not on comments or observations by Henri Locard. Lysak also recalled Witness Phy Phuon's testimony²⁵, in which the Chamber allowed the parties to question the Witness based on his statements included in Philip Short's book. President Nil Nonn ultimately ruled that the Defense objections were "somehow not sustained," adding that because the Locard document was attributed directly to Pe Chuy Chip Se, parties would be allowed to use this document in examining the Witness.

D. Reliability of Witness's Interview with OCIJ Investigators

On Wednesday morning, Pauw called into question the reliability of Pe Chuy Chip Se's interview with OCIJ investigators. According to Pauw and his team of Khmer speakers, in the recording of the OCIJ interview, the Witness can be heard asking to see his "notebook" or "notes," at which point he allegedly offers a different response than his initial answer.

Despite objection from International Co-Prosecutor Dale Lysak, who claimed that Pauw had had ample time to prepare a transcript of the recording if he so wished, the Trial Chamber accepted Pauw's submission to play the relevant section of the recording within the courtroom. After conferring with his colleagues from the Khieu Samphan defense team that indeed the Witness can be heard asking for his notes, counsel Pauw asked for the recording to be played a second time, during which the Court-appointed translators translated the statement in question as "Let me look at my notebook."

Nevertheless, Lysak objected to Pauw's mischaracterization of the statement, arguing that his Khmer colleagues on the Prosecution team could not clearly discern who was speaking in the audiotape. At this point, President Nil Nonn directly questioned the Witness whether he recognized the voice on the audio recording as his own, to which the Witness expressed that he was unsure. After further questioning, the President ultimately stated that he himself found the recording unclear and thought that the words used was not a reference to notes but to the need to go to the bathroom. Therefore, the President asked Pauw to proceed with a new line of questioning. Yet Pauw persisted with this matter and asked the President's permission to play a slightly longer portion of the audio recording to verify whether or not it was indeed the Witness's voice. Furthermore, in response to the President's speculation,

Pauw added that if it was a question of the Witness asking to relieve himself, it was “not logical” why the interview continued immediately following the request.

Dale Lysak again objected to Pauw’s mischaracterization of the Witness’s statements, and asked Pauw to “stop pretending” that people in the courtroom heard the word “notebook.” Lysak did not, however, object to defense counsel’s request to have the tape played once more. After much deliberation, Judge Cartwright, speaking on behalf of the Chamber, determined that there was no need to hear any more of the tape because the word heard on the tape and who had said it was unclear. In response to the Chamber’s ruling, Pauw made further submissions to play the tape for different purposes, earning him a warning from Judge Cartwright that he was essentially pursuing the same submission in different ways and should move onto another question.

The integrity of OCIJ investigations has come under scrutiny repeatedly in the past. Yet, the Trial Chamber has consistently ruled in favor of the presumption of integrity of the OCIJ’s investigations. In response to a request by Karnavas this past September to play an audio recording of a Witness’s OCIJ interview, the Chamber did not allow playback of the recording on the ground that the Parties should have raised questions relating to the OCIJ’s methods during the investigation phase of the case. Judge Cartwright, speaking on behalf of the Chamber, offered the following ruling:

Therefore, the general rule is that there is a legal presumption of the integrity of the investigation, that any concerns about the methods or the subject matter traversed during the investigation must be raised during the investigation...and can be rebutted only in exceptional instances. Any such rebuttal must relate not to technical issues, but to substance and, in raising an exception, you must satisfy the Trial Chamber that you have well-grounded concerns about the reliability of any part of the investigation. To use a well-known common law term -- you cannot embark on a fishing expedition.²⁶

Interestingly, later on in the proceedings, the Trial Chamber once again allowed Pauw to play an excerpt from the OCIJ interview audio recording to assess whether or not the Witness had been pressured by a person named Ta Chong (phonetic) not to provide certain details in his interview with Henri Locard.²⁷

E. Presence of Henri Locard in Public Gallery

In Monday’s concluding session, Karnavas pointed out that Henri Locard, whose interview with Pe Chuy Chip Se had been used extensively in examining the Witness, was present in the public gallery. The Counsel commented on the “serendipity” that Locard decided to attend the trial when Pe Chuy Chip Se, the person he had interviewed before, was testifying. As future witnesses were supposed to be confidential, Ieng Sary’s counsel suggested that the Chamber investigate whether the information of Pe Chuy Chip Se’s testimony schedule had leaked. Prosecutor Lysak was quick to assure the Chamber that the OCP had not contacted Locard, and the use of the interview was a coincidence as a result of his research last week to prepare for the day’s hearing. The Chamber did not comment on this matter.

F. Testimony Beyond the Scope of Case 002/01

Jasper Pauw objected to Prosecutor Seng Bunkheang’s queries to Pe Chuy Chip Se on the evacuation of Siem Reap, with the reason that it was not part of the scope of Case 002/01. In defense of his national colleague, Lysak submitted that the question was geared at

identifying the policy and practice of evacuation, to meet the Prosecution’s burden of proof that population movement was done nationwide in widespread and systematic manner, two elements in crimes against humanity. He reminded the Chamber that in previous occasions questions on the evacuation of other urban centers had been allowed based on the same reasoning. The President overruled the objection citing that the Witness was summoned to testify on his knowledge of the Khmer Rouge’s general policy on evacuations.

While Pongro Security Center was discussed extensively during Pe Chuy Chip Se’s testimony, the Chamber took proactive action during Civil Party Lawyer Nushin Sakarati’s examination, in which she sought details on the treatment of the prisoners. President Nil Nonn reminded the Lawyer that the Witness was summoned to shed light on first phase evacuation’s policy implementation and local administration, and security centers were outside the scope of the present trial. This seemed to indicate that discussion on Pongro Security Office was allowed only insofar as it related to the above issues.

IV. TRIAL MANAGEMENT

Overall, this week’s proceedings went well, with effective time management. The Co-Accused participated in the proceedings either from the holding cell or the courtroom, with the exception of Ieng Sary on Wednesday. A judicial management issue also occurred, whereby President Nil Nonn seemed to misunderstand the request counsel Pauw made to the Chamber.

A. Attendance

Due to health concerns, Ieng Sary²⁸ and Nuon Chea²⁹ were absent from the courtroom throughout the week. Khieu Samphan observed the proceedings from his holding cell on Monday due to health issues, but was present in the courtroom all of Wednesday.

Parties Attendance All Parties were represented during the week; however, National CPLCP Pich Ang was absent during Session 4 on Wednesday, as noticed by Trial Monitors. This week, Khieu Samphan was represented by Anta Guisse along with her national counterpart, Kong Sam Onn.

Public Attendance

DATE	MORNING	AFTERNOON
Monday 12/11/12	<ul style="list-style-type: none"> ▪ Approximately 300 people from Kampong Cham province ▪ 20 foreign visitors 	<ul style="list-style-type: none"> ▪ 100 mechanism students, sponsored by Pour un Sourire d’Enfant organization
Wednesday 14/11/2012	<ul style="list-style-type: none"> ▪ About 200 people from Kandal province ▪ 30 foreign visitors 	<ul style="list-style-type: none"> ▪ Estimate 100 people from Kampong Cham province ▪ 5 foreign visitors

B. Judicial Management

On Monday President Nil Nonn seemed to be confused as to the nature of counsel Pauw’s request to keep the Pe Chuy Chip Se’s interview record by Henri Locard away from the Witness when he was not testifying.³⁰ Pauw submitted that this measure would prevent the witness from reading the document, running the risk of contaminating his testimony. This request was not addressed and when Pauw pressed for a ruling, the President stated the request would be decided upon on Wednesday morning and proceeded to adjourn the day’s

hearing. The Trial Monitors observed at the time that Judge Sylvia Cartwright gesticulated seemingly to intervene the ruling, but the proceedings was already concluded.

C. Time Management

The Chamber commendably tried to maximize the two trial days available this week. Some of the sessions were concluded over the usual time. However, the issue of just time allocation between Parties was raised. Both Nuon Chea’s counsel Jasper Pauw and Khieu Samphan’s international counsel, Anta Guisse, challenged the Chamber’s ruling when the President cautioned Pauw in the middle of his examination that the time allocated for the three Defense Teams almost ran out. Although not intending to question Pe Chuy Chip Se, Guisse pointed out that the OCP and Civil Party Lawyers were provided with extended time, and the same courtesy should be extended to the defense as well. In response, the President stated that the time allocation was not absolute, and provision of extra time depended on considerations such as whether a Party is putting forth relevant and non-repetitive questions. At the conclusion of his examination, Pauw again asked the Chamber to ensure fair treatment for all Parties and would consider the extra time provided to the OCP and Civil Parties if leng Sary’s Defense Team found itself in need of it as well. Judge Silvia Cartwright chastised the counsel, asking him to stop wasting the Court’s time on the “minor matter”. She reminded Pauw that the President already ruled on this matter and was treating the Parties fairly.

C. Translation and Technical Issues

There were minor translation and technical issues this week. For example, on Monday, there was an error in date translation, in which the fall of Phnom Penh was translated that it happened in “1979” rather “1975”. However, this error was corrected during the session.

D. Time Table

DATE	START	MORNING BREAK	LUNCH	AFTERNOON BREAK	RECESS	TOTAL HOURS IN SESSION
Monday 12/11/12	9:05	11:12-11:30	12:08-13:33	14:40-15:05	16:20	5 hours and 07 minutes
Wednesday 14/11/12	09:02	10:32-10:50	12:07-13:33	14:25-14:45	16:02	4 hours and 58 minutes
Average number of hours in session				5 hours 02 minutes		
Total number of hours this week				10 hours 05 minutes		
Total number of hours, days, weeks at trial				565 hours 11 minutes		
128 TRIAL DAYS OVER 39 WEEKS						

Unless specified otherwise,

- the documents cited in this report pertain to *The Case of Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan* before the ECCC;
- the quotes are based on the personal notes of the trial monitors during the proceedings;
- the figures in the *Public Attendance* section of the report are only approximations; 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



EAST-WEST
CENTER



AIJI TRIAL MONITORING



* 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 has previously been 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 Stephanie Fung, Havi Mirell, Aviva Nababan, Sovana Sek, 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 Trial Chamber. Transcript of Trial Proceedings. (14 November 2013). E144.1 [hereinafter 14 **NOVEMBER TRANSCRIPT**]. Lines 2-6. 95.

² KRT Monitor wrote a separate report on this hearing. See CASE 002 KRT TRIAL MONITOR. “Special Report: Ieng Thirith’s Fitness to Stand Trial” (December 2012).

³ CASE 002 KRT TRIAL MONITOR, Issue 42. Hearing on Evidence Week 39. (8-10 October 2012). [hereinafter **ISSUE 42**].

⁴ Pe Chuy Chip Se was examined in the following order: National Prosecutor Seng Bunkheang; International Prosecutor Dale Lysak; National Civil Party Lawyer Ven Pov; International Civil Party Lawyer Nushin Sarkarati; International Judge Jean-Marc Lavergne; National Co-Lawyer for Nuon Chea Son Arun; International Co-Lawyer for Nuon Chea Jasper Pauw; National Co-Lawyer for Khieu Samphan Ang Udom.

⁵ Henri Locard is an academic on Cambodia. International Prosecutor Dale Lysak mentioned that he interviewed the Witness in 1991.

⁶ Pongro Security Office was interchangeably referred to as Security Center and Security Office by the Witness and Parties during this testimony

⁷ Ang Udom presented the name in writing to the Witness and asked him whether he knew the person but not to state the name aloud. The prospective Witness was identified as a person who also worked at Pongro Security Office. The Witness confirmed he knew the person.

⁸ 14 **NOVEMBER TRANSCRIPT**. Lines 2-6. 32.

⁹ Throughout the testimony Pe Chuy Chip Se (or the English translator) used the word “Head” and “Secretary” interchangeably to refer to the leader of the Security Office

¹⁰ Throughout the testimony Pe Chuy Chip Se (or the English translator) used the word “Chief” and “Secretary” interchangeably to refer to the leader of the District

¹¹ Trial Chamber. Transcript of Trial Proceedings. (12 November 2013). E1/143.1 [hereinafter **12 NOVEMBER TRANSCRIPT**. Line 25. 89

¹² When examined by International Counsel for Nuon Chea, Jasper Pauw, the Witness conceded that he was unsure whether there were civilian officials amongst the group

¹³ See **ISSUE 42**

¹⁴ 12 **NOVEMBER TRANSCRIPT** Line 19. 4.

¹⁵ The Constitution of the Kingdom of Cambodia 1993 and Subsequent Amendments 2001. (2001). Article 31 stated that, amongst others “The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human rights, the covenants and conventions related to human rights, women’s and children’s rights”. Article 38 stated that, amongst others “The prosecution, arrest, or detention of any person shall not be done except in accordance with the law”. International Covenant on Civil and Political Rights (ICCPR) Article 14 paragraph 3 determines, amongst others: “ 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. See United Nations. General Assembly. *International Convention on Civil and Political Rights* (1966). New York: United Nations. (Entry into force 23 March 1976.). ICCPR, Karnavas reminded the Chamber, were already incorporated in the Cambodian Constitution and embedded in the Agreement the Establishment Law and the Internal Rules of the ECCC.

¹⁶ During last week’s hearing Judge Sylvia Cartwright explained that the Parties were allowed to consult outside experts to scrutinize Dr. Campbell’s findings prior to the Doctor’s testimony. Ieng Sary’s Defense consulted Dr . Harold J. Burstzjan, an expert in forensic psychiatry from Harvard University. Dr. Burstzjan examined the materials submitted from the Defense, which did not include the Accused’s medical records prior to the most recent examination by Dr. John Campbell, and emailed his preliminary opinion on Dr. Campbell’s report.

¹⁷ 12 **NOVEMBER TRANSCRIPT**. Lines 16-17. 27

¹⁸ 12 **NOVEMBER TRANSCRIPT**. Lines 7-10. 31. Smith stated: “However, the issue before Your Honours is he mentally fit to plea? Can he understand the nature of the charges, the course of the proceedings, the details of the evidence? Can he instruct counsel, understand the consequence of the proceedings? Can he testify?”

¹⁹ See *The Prosecutor v. Pavle Strugar*. IT-01-42-A. ICTY Trial Chamber II. “Decision Re the Defence Motion to Terminate Proceedings” (26 May 2004). The *Strugar* criteria included the Accused’s fitness to plead, understand the nature of the charges, understand the course of the proceedings, understand the details of the evidence, to instruct counsel, understand the consequences of the proceedings, and testify.

²⁰ The International Prosecutor discredited the findings in the email as were based on incomplete medical data, without ever meeting the Accused

²¹ Smith was referring to the September 2012 examination of Ieng Sary by Dr. Campbell, Dr. Seena Fazel and Dr. Huot Lina as well as the recent examination by Dr. Campbell.

²² *The Prosecutor v. Pavle Strugar*. IT-01-42-A. ICTY Appeals Chamber. “Judgment” (17 July 2008). Par 55.

²³ See Trial Chamber. Transcript of Trial Proceedings Trial Day 120 (19 October 2012). E1/135.1. Pg. 40; Lines 7-18.

²⁴ See Trial Chamber. Transcript of Trial Proceedings. (25 October 2012). E1/139.1. Lines 6-15. 68.

²⁵ Rochoem Ton alias “Cheam” or “Phy Phuon” was a former high-ranking Ministry of Foreign Affairs cadre who testified before the Chamber from 25 July to 2 August. See CASE 002 KRT TRIAL MONITOR, ISSUE No. 29, Hearing on Evidence Week 24 (23-26 July); and CASE 002 KRT TRIAL MONITOR, ISSUE No. 30, Hearing on Evidence Week 25 (30-31 July, 1-2 August 2012).

²⁶ See CASE 002 KRT TRIAL MONITOR, ISSUE No. 35, Hearing on Evidence Week 30 (3-6 September 2012).

²⁷ Pe Chuy Chip Se stated that he was telling the OCIJ investigators that Ta Chong was pressurizing him not to talk in too much details with Henri Locard, because then then he would not be getting more money from him, presumably referring to the fact that there would be no more follow up interviews.

²⁸ Ieng Sary was identified to being in the holding cell on Monday and on Wednesday he was declared absent. The Greffier however stated that the Accused had waived his right to be present during Pe Chuy Chip Se and Meas Saran’s testimony.

²⁹ Nuon Chea had health complaints on Monday and after a doctor examined him, he was identified as suffering from fatigue and was allowed to observe the proceedings from the holding cell. He continued to be in the holding cell on Wednesday.

³⁰ Pe Chuy Chip Se testified on Monday and Wednesday this week.