

# KRT TRIAL MONITOR

Case 002 ■ Issue No. 42 ■ Hearing on Evidence Week 37 ■ 5-8 November 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

*I don't know how I can forget about this. My children, these days, keep telling me to forget something about the past, but I can't. It's too difficult to do so.*

- Mom Sam Ourn, Civil Party

## I. OVERVIEW

Returning from a week-long break in honor of the King's coronation day and the former King's birthday, the Court heard testimony this week from one witness, one Civil Party, and the expert medical doctor appointed to assess Ieng Sary's medical condition and fitness to stand trial. The Witness, Mr. Sum Chea, was a young Khmer Rouge soldier in the North Zone who assisted in the capture of Phnom Penh. The Civil Party, Ms. Mom Sam Ourn, was a French professor who worked for the Ministry of Education in Phnom Penh before the city's fall. Amongst the damage and sufferings she endured was the death of her husband and six of her eleven children during the Democratic Kampuchea regime.

The Court was not in session on Wednesday, as Parties prepared for Thursday's hearing on Ieng Sary's medical condition and fitness to stand trial. On Thursday, expert geriatrician Professor John Campbell took the stand to answer questions regarding his report on Ieng Sary's current state of health. Professor Campbell found Ieng Sary mentally fit to stand trial, though physically much more frail than he was two months ago. The Trial Chamber issued an interim decision for Ieng Sary to return to the detention center and to observe the proceedings from his holding cell. However, he is exempt for the month of November, as he already explicitly waived his right to see the month's remaining set of witnesses and Civil Parties.

## II. SUMMARY OF WITNESS AND CIVIL PARTY TESTIMONIES

Witness Sum Chea, a former Khmer Rouge soldier, was questioned about his involvement in the "liberation" of Phnom Penh and the subsequent forced evacuation of the city's population. Civil Party Mom Sam Ourn provided details of her experiences during her family's forced transfer from Phnom Penh and during their time in the provinces under the DK regime.

## **A. Sum Chea's Testimony**

Sum Chea's testimony lasted for the entirety of Monday's proceedings.<sup>1</sup> The Witness testified on his role as a low-level Khmer Rouge Revolutionary Army soldier starting in 1972, on his battalion's movements towards Phnom Penh, and on the fall of the capital in April 1975. Questions by Parties predominantly focused on events relating to the evacuation of city residents, the relations among various Zone forces in the capital, and the treatment of former Lon Nol soldiers and officials by Khmer Rouge forces.

### **1. Division One of the North Zone**

Sum Chea was born in 1953<sup>2</sup> in Prey Chhor District, Kampong Cham Province. He voluntarily became a Khmer Rouge soldier in 1972 after Americans bombarded several provinces and Prince Norodom Sihanouk broadcasted an appeal "to his children to go to the forest." He worked as a soldier in Division 1 of the North Zone, which was led by someone named Voeung. Sum Chea additionally received educational trainings from Voeung and other village chiefs to "make people feel the suffering" from American bombardments and from the Lon Nol "enemies." Heading south from Kampong Cham provincial town, his squad engaged in combat in Skone, Thnal Kaeng, Prey Kdam, Ta Tha Bridge, until they reached Baseth, to the north of the capital. He claimed that he never held any rank or position from 1972 to 1975. Prior to the fall of Phnom Penh, Sum Chea and his fellow soldiers were stationed for roughly two months in Baseth. When they attacked Phnom Penh in 1975,<sup>3</sup> his squad moved south from Baseth at night, through Khmounh, and progressing to Tuol Kork, inside the city itself.

### **2. The Liberation and Evacuation of Phnom Penh**

Upon arrival in Phnom Penh, Sum Chea found the city "confused" and chaotic, with guns scattered everywhere and people holding white flags as they walked around the city streets. He and his fellow soldiers could not identify former Lon Nol forces, as people had already removed their uniforms and looked like civilians. The Witness and his fellow soldiers received orders from his battalion commander, a man named Hak, to evacuate the whole population of the city for seven days so the city could be cleared. In reference to an earlier meeting with Hak regarding the plan of attack on the city, Sum Chea stated his belief that such orders came from some higher level.<sup>4</sup>

The Witness was told that, if people resisted leaving, he "had to do what [he] could" to make them leave the city. The Witness insisted that people under his division's supervision did not resist and thus maltreatment was unnecessary in their area. However, he testified that people in other areas of the city did not want to leave, so they faced harsher treatment by other soldiers and were sometimes forced to leave at gunpoint. In this respect, Sum Chea confirmed his statement to the OCIJ that he heard from others that "the East Zone army was the harshest."<sup>5</sup> He said he did not personally see any of these incidents of mistreatment, but Hak told him of such stories, saying "without mistreating some of the people, we would not manage to evacuate the city." In an additional attempt to make people leave the city, Khmer Rouge forces told people they only had to leave for four days to avoid fighting or American bombardment. The Witness stated that, after five to six days, the entire population had left the city, which was then completely empty.

### **3. Tasks of North Zone Troops**

Sum Chea explained that Hak ordered him to evacuate people, and his division was in charge of moving civilians north from Psar Thmei (Central Market) to the Chroy Changvar Bridge and on to Kilometer Nine of National Road Five. He stated that North Zone forces

were stationed along the road near the French Embassy. At the Embassy, the Witness stated he “saw no *barang* (referring to French people or foreigners), and the Embassy was empty and quiet and only soldiers were there.” Additionally, he was stationed at Calmette Hospital, near the Embassy, where he saw people pushing sick relatives out of the hospital in pushcarts, as all were expected to leave the city. The Witness explained that some Khmer Rouge medics entered hospitals to take available medicines for treatment of soldiers at Ba Thom Hospital, which had been repurposed for the military’s use. However, Sum Chea also stated that Calmette Hospital’s medical staff and doctors had already abandoned the patients and fled before he arrived. When asked if the battalion was provided any information to offer evacuees regarding where to find food or water for their journey, the Witness replied, “The soldiers themselves could not afford enough food to eat, never mind the people.”

#### **4. Capture of Former Lon Nol Soldiers**

Referring to Sum Chea’s interview with OCIJ investigators, the Prosecutor asked the Witness about his previous statement that, “after seven or eight days, [the Khmer Rouge] set up loudspeakers, broadcasting to Lon Nol soldiers to go back to their duty stations.” The Witness recalled that a man named Khoeun, who led the executions of former Lon Nol cadres, told him of this plan. Checkpoints were set up at Chroy Changvar Bridge and Psar Thmei to check for Lon Nol soldiers. According to the Witness, those who managed to hide their pasts were researched, and their biographies were discovered and publicized through the loudspeakers as well. Khoeun sent trucks, first utilized by the Lon Nol forces, to collect the former Lon Nol cadres and bring them to Prek Pnov, where they were killed. Additionally, Sum Chea confirmed he was aware that other executions of Lon Nol soldiers took place at Toul Kork as well.

#### **5. After the Spring of 1975: Assignments Outside Phnom Penh**

Following his duties in Phnom Penh, Sum Chea was sent back to Baseth and to Toul Songkai to build dams and canals and to help grow rice. He explained, “Soldiers were used like cattle.” He was disarmed, treated like an “ordinary citizen,” and forced to do farming. At the time of the “liberation” of Phnom Penh, he only knew Prince Norodom Sihanouk’s leadership position, but later, at a celebratory meeting at Olympic Stadium, he learned of the new government leaders, including Pol Pot, who received a large applause.<sup>6</sup>

#### **6. Witness Demeanor and Credibility**

The defense teams sought to rebut Sum Chea’s statements, as further questioning revealed that he did not witness many events firsthand. For example, the Witness did not observe Khmer Rouge soldiers utilizing loudspeakers to capture Lon Nol soldiers, but he testified that this was a widespread Khmer Rouge policy. These types of statements led the defense teams to consider his testimony as based largely on hearsay from Khoeun. Further, repeated questioning and clarifications from Judge Jean-Marc Lavergne and international counsel for Nuon Chea, Mr. Jasper Pauw, led Sum Chea to restate his observation multiple times that there were no civilians at the French Embassy. When questioned by international defense counsel for Ieng Sary, Mr. Michael Karnavas, Sum Chea said that the Embassy was already empty just three days after the “liberation” of Phnom Penh.<sup>7</sup> Pauw also attempted to use the research of Michael Vickery to challenge Sum Chea’s statements that Calmette Hospital was deserted of medical staff by the time he arrived there. However, this was not permitted by the Bench.

Additionally, the Witness had earlier defined the respective jurisdictions of the city for various zone forces, but Pauw presented statements from the former Deputy Division Commander in the Eastern Zone, Heng Samrin, who offered different lines of jurisdiction.<sup>8</sup> Heng Samrin’s

comments consistently stated that the Eastern Zone forces were more “gentle” than the others, conflicting with the claim of the Witness that he heard they were the “harshest.” On another point of inconsistency, the Witness mentioned how he listened regularly to patriotic songs on the radio, even though he previously stated that he never had a radio on which to listen to broadcasts released by the FUNK while in Phnom Penh. Karnavas concluded with an honest confirmation from Sum Chea that, “Much of what [he] told us today is what others told [him], but [he] did not witness or do [him]self.”

In a number of instances, Sum Chea turned to his duty counsel to receive aid in responding to particular questions; at one point, President Nil Nonn even reminded him that the duty counsel was present only in case he feared his response would cause him to incriminate himself. As such, it is plausible that the Witness feared such self-incrimination or minor association with certain events of the DK.

## **B. Mom Sam Ourn’s Testimony**

Civil Party Mom Sam Ourn’s testimony lasted for the entirety of Tuesday’s proceedings.<sup>9</sup> The Civil Party testified on her experiences during the forced evacuation of her family out of Phnom Penh on 17 April 1975. She then described conditions in the provinces where they were sent to live and work, and she provided insight into the treatment of “new” people by the “base” people. The Civil Party also described her past connections to Saloth Sar *alias* Pol Pot and Ieng Sary while studying at Lycée Sisowath, and she pointedly referred to the lack of clarity that persists today regarding the disappearances and presumed deaths of her husband and six of her eleven children.

### **1. Evacuation of Phnom Penh**

The daughter of a Royal Palace doctor, Mom Sam Ourn was born in 1927 in Phnom Penh.<sup>10</sup> The Civil Party was trained as a French professor, a position she held at Lycée Kampot until 1970, when she transferred to the book-writing section at the Ministry of Education in order to be closer to her husband in Phnom Penh.<sup>11</sup> In the early morning of 17 April 1975, Mom Sam Ourn heard the sound of tanks near her house, which was located to the south of Independence Monument.<sup>12</sup> As she went to unlock the family safe to gather some valuables in case she had to flee, she felt the gun of a Khmer Rouge soldier press against her back. She could identify the soldier by his black attire and red-checkered scarf. As the soldier continued pointing the gun at her and accused her of “paying attention to [her]self rather than helping the revolution,” her children cried loudly. The soldier took her eyeglasses, labeling them anti-revolutionary, even though she could not see anything without them.<sup>13</sup> He then notified her that her family had to leave the city, because the Americans were coming to bomb it, but they did not need to pack anything, because they would be able to return in a few days. Soldiers confiscated the keys to a Land Rover owned by her husband’s company and a new car. Her husband took their youngest daughter and some food into the remaining car, a small Volkswagen, but he was made to leave in a different direction than the rest of the family, who set out on foot.

The road was very crowded, and Mom Sam Ourn explained that Khmer Rouge loudspeakers instructed the people to move out of the city and soldiers threatened people at gunpoint to move faster. They did not provide any transport, food, medicine, or water to those who needed it. The Civil Party stated: “They treated us inhumanely. They treated us as if we were animals or non-Cambodian.” She repeatedly described the grisly sight of a roadside lined with bodies, some of which were mutilated with their heads smashed. Some corpses were dressed in civilian clothes, while others wore uniforms of the former Lon Nol military. The Civil Party also saw people passing out due to exhaustion and dehydration, as well as pregnant women giving birth or having miscarriages along the roads. Although

Khmer Rouge soldiers continued to threaten evacuees to move quickly, Mom Sam Oeurn never heard them say anything about who gave the order to leave Phnom Penh.

## **2. Initial Experiences in the Provinces: Phnom Penh to Samraong**

Mom Sam Oeurn reunited with her husband in his Volkswagen automobile at Monivong Bridge, and they attempted to go to Svay Rieng Province, where her husband came from. However, the bridge was blocked, so they spent the night at Samraong Pagoda. They stayed quiet all night, hiding from fear of the sound of gunfire, the sight of dead bodies, and the smell of smoke. The next morning, they were told to leave, and they continued to follow the riverbank through Svay Rolum, where they attempted to gather ingredients, as they were not given any food. At one pagoda along the way, Khmer Rouge soldiers came and confiscated the family's car, which a soldier who did not know how to drive subsequently wrecked.

The Civil Party explained that, during the journey, they were "under strict surveillance" by Khmer Rouge soldiers who continuously asked her and her husband about their occupations. She lied and refused to tell them she was a professor of French, saying she was merely a housewife. In response to specific questioning on this topic by Civil Party Lawyer Beini Ye, Mom Sam Oeurn responded: "I did not tell them the truth because I was afraid that I would be taken away to be executed... I was treated badly already, let alone having revealed my identity then all of my family could have been wiped out." She also explained that she understood the Khmer Rouge did not like intellectuals, so she pretended "to be somebody ignorant."

The Civil Party and her family continued to go along the riverbank for approximately 40 kilometers, until reaching Samraong commune, where they had to stay. One daughter suffered from "ulcer in the ear" and another fainted during the exhausting journey on foot. They spent two nights at the house of a local named Kong Neang, who pitied her family's many tired children and secretly offered them food and accommodation. On the second day at Samraong commune, she saw a boat carrying crowds of people across the river and returning only with their belongings; her family assumed these people had been killed. The Civil Party also testified that she never received instructions to return to Phnom Penh, even though they heard no aerial bombardment.

At Samraong, the Khmer Rouge asked her husband and sons to herd cows and collect grass for their feed. Her second son was not used to this type of work, and he fell and was crushed by one cow, breaking his jaw, among other injuries. Soldiers then berated Mom Sam Oeurn for raising her children in a "feudalist" family, never teaching them anything useful. The Civil Party explained that the "feudalist class" or the "17<sup>th</sup> of April People" referred to rich and wealthy people, while the "base" people were poor peasants who were good at looking after cattle and doing farming. Mom Sam Oeurn stated that, following her transfer from Phnom Penh, she encountered both good and bad "base" people. The bad ones accused "new" people, like her, as "opportunists or those who came to steal away their food." The Civil Party said, "I kept telling them that it was not my fault. It was somebody else's fault who brought us here." She did also encounter "base" people who were very kind to her and gave her food to eat.

## **3. Further Movement: Samraong to Preaek Koy to Kaoh Khsach Chorlear**

After one week in Samraong, her family was ordered to move to Sa'ang District in Preaek Koy commune, Kandal Province, approximately 10 to 20 kilometers away. Here, Mom Sam Oeurn attended meetings led by the commune chief, who pushed residents to work harder and mocked "new" people for never having lived in the countryside. When she developed a



skin problem, likely from malnutrition, she was teased that she probably “contracted a communicable disease from [her] husband, because [her] husband lives in the city and he had some affairs with many other ladies in town.” While in Preaek Koy, Mom Sam Ourn was separated from her husband and all of her children, except for one who suffered from asthma. Her husband was told to herd animals south of Preaek Koy. The eldest children went to build dams and dykes, others built roads at Tuol Krasang, while the youngest ones were brought to Boeng Chhuk Pagoda 20 kilometers away, to stay with the children of the “base” people in the children’s unit.

Once, while forced to watch a propaganda movie, Mom Sam Ourn was told about Pol Pot. She recognized his image as Saloth Sar, an acquaintance from her time studying at Lycée Sisowath in Phnom Penh. She also stated that, at this secondary school, she knew Ieng Sary, even though she did not study in the same class with either men. The Civil Party was also acquaintances with Khieu Ponnary, wife of Saloth Sar, and she also studied with Ieng Thirith’s elder sister, Ieng Thirath. The Civil Party stated that, “Ieng Sary and Saloth Sar were each at different classes, and I was in another class, and I knew him very well. I knew Saloth Sar very well,” but she did not know of any political opinions he may have held at the time.

In 1977, a vehicle came to pick up Mom Sam Ourn’s husband, five of her daughters, and one son. The commune chief told her they would all be reunited soon. She was sent to Kaoh Khsach Chunlea prison, where she stayed along with many wives of former Khmer Republic soldiers. They were not allowed to communicate with each other, and the Civil Party witnessed one woman’s execution for stealing fruit, at which point, she said: “I thought to myself my day would come soon as well, my turn would come soon.” When only five of her children – her youngest daughter and four eldest sons – came to look for her at the prison after the regime’s fall, she realized the rest of the family “had been executed.”

#### **4. Civil Party Statement of Suffering, Demeanor, and Credibility**

During her statement of suffering, Mom Sam Ourn referred to many events and experiences she had described to Parties’ during their examination, but she additionally focused on a few specific matters. The Civil Party repeatedly stated that she lives with medical implications associated with the trauma suffered under the DK regime. Her eyes grew weaker without glasses, and she can no longer have a proper night’s sleep, due to constant shaking and traumatic memories. She now has leg pain from improper treatment under the Khmer Rouge. The consequences of her experiences in DK remain far greater in terms of mental health: the Civil Party constantly considers the possibility that her daughters were raped before they were killed; she still regularly recalls the image of a woman being executed for stealing some fruit to eat; she still longs for her husband’s return. She also explained that, after the fall of the DK regime, she was left without any property, so she lied about her age to receive work immediately to pay for her remaining children’s education. Mom Sam Ourn concluded her statement with a poignant sense of appreciation for her remaining children as well as some of the kinder “base” people she met, because they helped her to continue living and to “move on.”

The Civil Party provided immediate and sharp responses to most questions. With the exception of a few requests to Mr. Son Arun for clarification or repetition, she never had any trouble understanding questions asked of her. As one of the older people ever to testify in the trial, Mom Sam Ourn provided a remarkable amount of detail and showed a strong ability to recall most of what she experienced or witnessed under the DK.

### **III. LEGAL AND PROCEDURAL ISSUES**

#### **A. Questioning OCIJ Procedures and the Reliability of the Witness**

The defense again questioned the OCIJ's interview practices, the reliability of the witness, and the witness' source of knowledge. Karnavas noted that, at the beginning of his testimony, Witness Sum Chea said he had two interviews with representatives of the OCIJ. However, there was only a written record of one interview and no record at all of the other. Karnavas stressed that this calls into question Sum Chea's source of knowledge and therefore all of his testimony. Combined with other issues with his testimony, including that it contained hearsay and possible factual inaccuracies (see II.A.6), the possibility that the Witness had been prepped casts doubts on his testimony.

Internal Rule 76(7) states that all procedural challenges regarding the work of the OCIJ must be brought up during the pre-trial stage.<sup>14</sup> However, in this case, Parties could not have known that there was an inconsistency between the OCIJ's recorded work and its actions until the Witness appeared in court. The Witness stated at the beginning of his testimony that he had two interviews with the OCIJ. Prior to that, Parties were only aware of the one, recorded interview. This is quite a significant oversight, and, therefore, Karnavas' challenge of the Witness on this basis was important.

The Internal Rules present some guidelines to the Co-Investigating Judges for how to conduct and record witness interviews. According to Internal Rule 55(7), the OCIJ investigators must create a written record of every interview.<sup>15</sup> Rule 25(2) states:

A person may be questioned without being audio or video-recorded where the circumstances prevent such recording taking place. In this case, the reasons for not recording the questioning shall be stated in writing... Such a statement shall be set out in a written record...<sup>16</sup>

On 2 November, Ieng Sary's team submitted a request to the Trial Chamber for a public hearing on this issue.<sup>17</sup> Pursuant to Internal Rules 93 and 21,<sup>18</sup> Ieng Sary requested, through his counsel, for the Trial Chamber to exercise its investigative powers to hear public testimony from the OCIJ investigators who were involved in the unrecorded interviews, "to determine if any further action should be taken, and to determine the weight, if any to ascribe to the statements in question if admitted."<sup>19</sup> The defense team thinks this is especially crucial because the OCP has requested to put thousands of witness statements before the Trial Chamber without calling those witnesses to testify in court.

In their submission, the Ieng Sary defense team noted they discovered an additional 12 instances where OCIJ investigators conducted unrecorded interviews with witnesses; this is in addition to the instances pointed out by all defense teams in past requests and in Court.<sup>20</sup> On this basis, the team alleged that the practice of conducting unrecorded interviews was "a widespread and systematic practice, condoned if not actively encouraged by the Co-Investigating Judges themselves: a policy set at the highest levels of the upper echelon of the OCIJ." The defense argued that this impacts on Ieng Sary's fair trial rights, particularly to mount a defense and examine the evidence against him.<sup>21</sup>

#### **B. Questions Based on other Persons' Statements**

Discussion continued on whether Parties may base their questions on expert writings or statements by other people. Prosecutor Dale Lysak, argued that it may be appropriate for Parties to base questions on statements by other individuals who were also present for the events in question, if the counsel putting questions can establish a direct link between the relevant witness and person who made the statement or contents of the statement.

However, Lysak objected to Pauw's questions based on Ben Kiernan's interview of Heng Samrin because he did not feel that Pauw established the relevant link, and he was concerned that Pauw was leading the witness or feeding him answers. Lysak also said Pauw was being purposefully obtuse in saying he does not understand the ruling regarding questions based on expert or other's statements.

Pauw continued to put questions based on Kiernan's interview of Heng Samrin, and based on Michael Vickery's book "Cambodia 1975-1982". However, Pauw stated that he would abide by any ruling by the Chamber, if it makes clear exactly what the standard is, and the rationale behind the ruling. Karnavas noted that Parties have been permitted to put questions on the basis of expert writings in the past. He further argued that, whatever the ruling, it must be applied equally to the Prosecution and defense.

The Chamber has consistently ruled not to allow Pauw's questions based on Kiernan's interview of Heng Samrin or on expert historian's comments, as those from Vickery or Philip Short. The Chamber did permit the OCP's questions based on a witness statement of another soldier who was in Witness Sum Chea's battalion in the north zone of Phnom Penh during the capture of the city.

### **C. Request for Civil Parties to Address the Whole Case 002**

National Civil Party Lawyer Hong Kim Soun requested that Civil Party Mom Sam Ourn be permitted to testify on all topics under Case 002 because her advanced age may prevent her from returning to testify at a later point in the trial. Mom Sam Ourn is between 85 and 87 years old. The Chamber did not permit Mom Sam Ourn to answer questions regarding all of Case 002; however, the President noted that she was permitted to state her suffering under all of Case 002 at the end of her testimony.

### **D. Objecting to Leading Questions**

Parties continued to debate the appropriate methods of questioning and to object to leading questions. This week, the OCP frequently objected to Pauw's questions, specifically those based on Heng Samrin's statement to Ben Kiernan, on the basis that there is no direct link between the witness on the stand and Heng Samrin, and that, by putting the statement before the witness before asking a relevant question, counsel was feeding the witness a possible answer. The OCP suggested that it might be more appropriate to ask general questions and then move into specifics based on others' testimony, if the counsel first establishes a direct link between the other person's experience and that of the witness.

This week, Karnavas objected particularly to international Prosecutor Vincent de Wilde d'Estmael's questions, arguing that they were leading questions. Karnavas said, "This counsel particularly and consistently insists on putting questions and then stating a possible response, which is inappropriate on the basis that it is clearly leading the witness." The Prosecution argued that this was not an attempt to lead the witness; rather, it was a method to make the question clearer. The Chamber did not address this issue during the proceedings this week. Often, a Party would object, the other side would respond, then the Chamber would say, "Counsel, you may proceed," with no response to the issues raised.<sup>22</sup>

## **III. IENG SARY'S MEDICAL CONDITION AND FITNESS TO STAND TRIAL**

On Thursday, the Trial Chamber heard expert medical witness Professor John Campbell regarding Mr. Ieng Sary's medical condition and fitness to stand trial. Professor Campbell previously examined Ieng Sary, Ieng Thirith, and Nuon Chea at the direction of the Trial Chamber, and testified regarding his findings on several occasions, most recently on 31



August 2012. This time, Professor Campbell reviewed all the attending doctors' reports, transcripts of hearings of their testimony before the Chamber, and any other relevant documentation before examining leng Sary. He examined the Accused over two days for his physical and mental capacity and fitness to observe proceedings.

#### **A. Expert's Opinion**

Professor Campbell found that leng Sary suffers from dizziness, back pain and severe heart disease. He stated that leng Sary has no trouble conversing while lying down, but that leng Sary is prone to dizziness if he sits up for long periods of time. He did not find any change in leng Sary's cognitive abilities and so he believes leng Sary is fit to stand trial based on the *Strugar*<sup>23</sup> criteria and has sufficient cognitive and physical abilities to observe the proceedings from the holding cell. However, he did not address what would happen if leng Sary were asked to testify.

In answer to questions from the Bench, made through Judge Silvia Cartwright, Professor Campbell opined that leng Sary does not need to stay in a hospital but can be sufficiently cared for in the detention center, with some additional personnel to help him with basic movements. Karnavas, after establishing that other doctors were only able to interview leng Sary for a maximum of 15 minutes, asked if Professor Campbell thinks that someone who can only answer questions for 15 minutes is capable of participating in their defense. Professor Campbell said this was not what he observed. Karnavas pressed him, saying, "I was not asking you that, I was asking you based on this scenario." Professor Campbell, however, effectively deflected such questions.

#### **B. International Standards for Fitness to Stand Trial**

The commonly-used fitness criteria were defined by the ICTY Trial Chamber II in *Prosecutor v. Pavle Strugar*. The *Strugar* criteria, as they are commonly referred to, are:

- to plead,
- to understand the nature of the charges,
- to understand the course of the proceedings,
- to understand the details of the evidence,
- to instruct counsel,
- to understand the consequences of the proceedings, and to testify.<sup>24</sup>

The ICTY Trial Chamber further specified that this is a non-exhaustive list, and that

[i]t would be entirely inappropriate, and unjustified, and antithetical to the application of international criminal law, to require that each of these capacities must be present at their notionally highest level, or at the highest level that a particular accused has ever enjoyed... Rather... what is required is a minimum standard of overall capacity below which an accused cannot be tried without unfairness or injustice.<sup>25</sup>

In this way, the Chamber left a lot of leeway for case-by-case judgment.<sup>26</sup> Furthermore, the ICTY Trial Chamber found that the assistance of legal counsel may be sufficient to compensate for an accused's diminished capacity and to make proceedings against an accused fair and just.<sup>27</sup> However, the Chamber acknowledged that an accused must have a certain level of cognizance in order to be able to use counsel sufficiently to stand trial fairly.<sup>28</sup>

Professor Campbell addressed each of the *Strugar* criteria in his report and his oral testimony, and stated that he found Ieng Sary capable of meeting each of these standards. Regarding the capacity to testify, Professor Campbell simply said, “Mr. Ieng Sary has a good understanding of court procedures—that the judges put questions, then the Prosecution, then Civil Parties, then defense counsels of the co-accused and his own counsel.” He did not address Ieng Sary’s physical ability to testify. Regarding the capacity to instruct counsel, Professor Campbell found that Ieng Sary presented consistent defense strategies and had a good memory of the Khmer Rouge period and regime. Thus, the Professor concluded that Ieng Sary has the capacity to inform counsel of his version of events and the topics that should be brought forward by counsel.

### **C. Permission for Other Defense Teams to Speak**

International defense counsel for Nuon Chea Mr. Andrew Ianuzzi objected to an OCP request for more time for questioning, on the basis that it would cut into other Parties’ time to comment on the testimony of Professor Campbell. President Nil Nonn responded that Ianuzzi would not have such an opportunity, as the Chamber already stated that only Parties involved—the Ieng Sary defense team, Prosecution, and Civil Parties—would have the opportunity to speak at this hearing. He stated that Ianuzzi, and international counsel for Khieu Samphan Mr. Arthur Vercken, were simply present to observe. Ianuzzi then attempted to speak and was cut off three times, with the President repeatedly saying, “You are just here to observe. Please review the meaning of ‘observer’ if you do not understand.”

At the end of Tuesday, the Chamber stated that only relevant Parties would be permitted to participate in Thursday’s hearing. It was unclear if that meant it was a closed or open session, and who could participate. On Thursday morning, the President stated the times allotted to each party—Ieng Sary team, OCP and Civil Party Lawyers—and that “parties will have the opportunity to comment at the end.” This appears to be where the confusion lies, as Ianuzzi interpreted this statement to include himself and the Khieu Samphan team.

## **V. TRIAL MANAGEMENT**

This week, the Trial Chamber faced some challenges with legal and procedural issues during the testimonies of Witness Sum Chea and expert John Campbell. On Monday, objections from defense teams related to the use of evidence, and, on Thursday, the quality of the medical expert’s judgment. While they slowed down proceedings, they did not inhibit the Chamber from fully concluding each hearing by day’s end. Only a few objections were raised during the examination of Civil Party Mom Sam Oeurn and matters were promptly responded to by the Chamber.

### **A. Attendance**

Ieng Sary continued to be absent from the courtroom throughout the week. However, he was discharged from Khmer-Soviet Friendship hospital in order to participate remotely from the holding cell on Thursday, for the hearing on his fitness to stand trial. Nuon Chea only participated in the morning sessions and retired to the holding cell for the afternoon sessions on Monday and Tuesday. On Thursday, he was not present, as it was the hearing on Ieng Sary’s fitness to stand trial. Khieu Samphan was present in the courtroom for every session except on Thursday.

**Attendance by Civil Parties:** Approximately 15-30 Civil Parties attended the proceedings daily, either in the courtroom or in the public gallery.

**Attendance by the Parties:** All Parties were represented during the week, although international counsel for Khieu Samphan, Arthur Vercken, was one hour late on Monday morning, as reported by the greffier. During the hearing on Ieng Sary's fitness to stand trial on Thursday, both national and international defense counsels for Ieng Sary were present. Ianuzzi and Vercken also attended, but only as observers to the proceedings.

**Attendance by the Public:**

DATE	MORNING	AFTERNOON
Monday 05/11/12	<ul style="list-style-type: none"> <li>200 people from Prey Veng Province</li> </ul>	<ul style="list-style-type: none"> <li>100 people from Takeo Province</li> <li>20 foreign visitors</li> </ul>
Tuesday 06/11/12	<ul style="list-style-type: none"> <li>300 students from the University of Management and Economics</li> <li>8 monks from Kampot Province</li> <li>5 foreign observers</li> </ul>	<ul style="list-style-type: none"> <li>27 foreigners from TPO</li> <li>150 people from Kandal Province</li> </ul>
Thursday 08/11/2012	<ul style="list-style-type: none"> <li>100 monks</li> <li>250 people from Siem Reap Province</li> <li>20 foreign visitors</li> </ul>	<ul style="list-style-type: none"> <li>50 people from Kampong Cham Province</li> <li>10 foreign visitors</li> </ul>

**B. Time Management**

After suspending proceedings from 29 October until 2 November for two separate Cambodian national holidays, the Trial Chamber held proceedings on Monday, Tuesday and Thursday this week. The hearing of Witness Sum Chea utilized all allotted time on Monday, while the hearing of Civil Party Mom Sam Oeurn finished earlier than planned on Tuesday, because, with the exception of a brief series of questions from the national counsel for Nuon Chea, the defense teams asked no questions and provided no comments. The week concluded on Thursday with the testimony of medical expert, Professor John Campbell, regarding his assessment of Ieng Sary's fitness to stand trial. The Trial Chamber and all Parties concluded their questioning of Campbell by the day's end, and the Chamber was able to issue an interim ruling prior to the Court's adjournment for the week.

**C. Courtroom Etiquette**

Karnavas struck a harsh tone this week. He attempted to discredit Witness Sum Chea and called the OCIJ interview practices into question on Monday. On Tuesday, he objected to de Wilde d'Estmael's style of questioning. In doing so, he utilized an aggressive rhetorical style, often sprinting through his words and almost yelling. On Tuesday, he even had to excuse himself, saying, "Sorry, too much coffee." Following this statement, he slowed down and presented his argument more calmly. On Thursday Karnavas aggressively questioned the expert witness, John Campbell, in a manner that earned him objections from the Prosecution, over-rulings from the Chamber, and specific responses from the Witness himself. In one instance, Karnavas stated that, "Clearly [Campbell] saw this because otherwise how could he be so cavalier about dismissing this." When the Prosecution objected, he quickly withdrew his use of "cavalier" as too strong.

The President's composure was also tested this week. Ianuzzi attempted to ask when his team would get the time to comment on the expert's testimony. The President cut him off, stating it was "perhaps a misunderstanding," as Parties other than the defense team for Ieng Sary were only present as observers, and they would not be heard. Ianuzzi was then told to sit. During the counsel's three further attempts to ask his question, he was consistently interrupted and denied by an increasingly loud President. In the English translation of this interchange, President Nil Nonn told Ianuzzi that, "you are just an observer, so you are not

entitled to be heard,” but the Khmer rendition suggested he used more aggressive phrasing, which meant, “Do you know what it means to observe? Maybe you should read more about that.”

#### **D. Translation and Technical Issues**

In addition to consistent issues with speaking properly into the microphone, there were some difficulties in translation. On Tuesday, because Civil Party Mom Sam Oeurn spoke and understood French fluently, she listened to de Wilde d’Estmael’s questioning in French and responded immediately in Khmer, without enough of a pause for the translator. On Thursday, Karnavas continually responded too quickly to medical expert John Campbell, making English-to-Khmer translation difficult. Following reminders from President Nil Nonn, both of these issues were, however, resolved without much delay.

#### **E. Time Table**

DATE	START	MORNING BREAK	LUNCH	AFTERNOON BREAK	RECESS	TOTAL HOURS IN SESSION
Monday 05/11/12	9:00	10:58-11:25	12:15-13:35	14:50-15:10	16:10	5 hours and 3 minutes
Tuesday 06/11/12	9:03	10:32-10:55	12:10-13:32	14:05	-	3 hours and 17 minutes
Wednesday 07/11/12	-	-	-	-	-	-
Thursday 08/11/12	9:10	10:32-10:50	12:07-13:32	14:20-14:40	16:05	4 hours and 52 minutes
Average number of hours in session				4 hours 24 minutes		
Total number of hours this week				13 hours 12 minutes		
Total number of hours, days, weeks at trial				555 hours 15 minutes		
126 TRIAL DAYS OVER 38 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



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\* 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 Samantha Lee, Danel Mattes, Aviva Nababan, 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](http://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).

<sup>1</sup> Sum Chea was examined in the following order: national Prosecutor Chorvoin Song; international Prosecutor Dale Lysak; national Civil Party Lawyer Ty Srinna; international Civil Party Lawyer Nushin Sarkarati; Judge Jean-Marc Lavergne; national counsel for Nuon Chea, Mr. Son Arun; international counsel for Nuon Chea, Mr. Jasper Pauw; international counsel for Ieng Sary, Mr. Michael Karnavas.



<sup>2</sup> At the time of his testimony, Witness Sum Chea stated he was 59 years old.

<sup>3</sup> Witness was unable to provide an exact date or month for the attack, other than 1975.

<sup>4</sup> Sum Chea clarified that Hak was under the command of Mr. Voeung, the Division Commander, but he was unable to explain who above them originally ordered the citywide evacuation.

<sup>5</sup> The record of Sum Chea's interview with OCIJ investigators has the document number D94/9.

<sup>6</sup> The Witness did not know the names of other senior leaders, and he only made mention of Prince Sihanouk and Pol Pot, following this conference.

<sup>7</sup> While evidence to the contrary has not been presented before the Court during the trial of Case 002, in Case 001 the author of the Gate, Francois Bizot, was summoned as a witness and his book was made as a reference for his examination. In the book, Bizot described that foreigners took refuge in the French Embassy after 17 April 1975 for weeks before the Khmer Rouge arranged for them to be transported to the Thai Border

<sup>8</sup> In one example, the Witness stated that only North Zone forces were stationed around Wat Phnom, but Heng Samrin claimed that the East Zone occupied areas up to Wat Phnom as well.

<sup>9</sup> Mom Sam Oeurn was examined in the following order: national Civil Party Lawyer Hong Kim Suon; international Civil Party Lawyer Beini Ye; national Prosecutor Chorvoin Song; international Prosecutor Vincent de Wilde d'Estmael; national Counsel for Nuon Chea, Mr. Son Arun. Civil Party was then offered the opportunity to make her Statement of Suffering.

<sup>10</sup> At the time of her testimony, Mom Sam Oeurn stated she was 84 years old, making her one of the oldest people to testify so far in the trial. Her recollection of events in the DK, however, remained quite strong.

<sup>11</sup> National Counsel for Nuon Chea, Mr. Son Arun, questioned the Civil Party regarding the period between 1970 and 17 April 1975, and her observations of events unfolding under the Lon Nol regime. Mom Sam Oeurn stated that she was not aware of any specific issues relating to refugees coming to Phnom Penh at the time, but she did notice that "the country was in trouble." Her husband was briefly arrested as a "progressive" along with two professors, and she noticed new student protests taking place against Lon Nol.

<sup>12</sup> Mom Sam Oeurn also testified that her father-in-law, who also lived with them at the time, left the house to investigate the source of the noises and never returned. She believed Khmer Rouge soldiers arrested him.

<sup>13</sup> Although early in her testimony, Mom Sam Oeurn explained that she "could not see anything" without her glasses, she responded to questioning from Beini Ye saying that she could still see things, just not as clearly. She also stated she attempted to use the broken glasses, but she also relied on her children's observations at the time.

<sup>14</sup> IR 76(7): Applications Concerning Procedural Defects. ... 7. Subject to any appeal, the Closing Order shall cure any procedural defects in the judicial investigation. No issues concerning such procedural defects may be raised before the Trial Chamber or the Supreme Court Chamber.

<sup>15</sup> IR 55(7): A written record shall be made of every interview. Each page of the written record shall be signed or fingerprinted after the interviewee reads it. If necessary, the Greffier of the Co-Investigating Judges, with the assistance of the interpreter, shall read the record back. IF the interviewee refuses to sign or fingerprint the record, the Greffier of the Co-Investigating Judges shall not this on the record.

<sup>16</sup> This may refer to any interview, or only to an interview of the Accused, as in IR 25(1). The Prosecutor argued the latter in "Co-Prosecutors' Response to Ieng Sary's Request that the Trial Chamber Seek Clarification from the OCIJ as to the Questioning of Witness Norng Sophang on 17 February 2009 and Summon the OCIJ Investigators to Give Evidence Regarding this Interview" (8 October 2012). E234/1. par. 25-26. 8-9. The Ieng Sary defense argued the former in E241, par. 11. 3-4.

<sup>17</sup> Ieng Sary Defense. "Ieng Sary's Request for the Trial Chamber to Hold a Public Hearing and Take Evidence Concerning the OCIJ's Widespread and Systematic Practice of Conducting Unrecorded Interviews with Witnesses" (2 November 2012). E241 [hereinafter **IENG SARY'S REQUEST**].

<sup>18</sup> IR 93: Additional Investigations by the Trial Chamber. 1. Where the Chamber considers that a new investigation is necessary it may, at any time, order additional investigations. Such order shall indicate which judge or judges shall conduct the new investigation. 2. Such judge(s) may, under the same conditions as the Co-Investigation Judges: a) go anywhere within the territorial jurisdiction of the ECCC; b) interview witnesses; c) conduct searches; seize any evidence; or e) order expert opinions. 3. For the purposes of such additional investigations, the judge(s) may issue Rogatory Letters to the Judicial Police.

IR 21: Fundamental Principles. 1. The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings... 3. No form of inducement, physical coercion or threats thereof, whether directed against the interviewee or others, may be used in any interview. If such inducements, coercion or threats are used, the statements recorded shall not be admissible as evidence before the Chambers, and the person responsible shall be appropriately disciplined in accordance with Rules 35 to 38...

<sup>19</sup> IENG SARY'S REQUEST, p. 2.

<sup>20</sup> The request specifically noted four previously-defined cases of unrecorded interviews of witnesses: those of Oeun Tan, Phy Phoun, Norng Sophang, and Sokh Chhin. IENG SARY'S REQUEST, para. 3-4.

<sup>21</sup> However, the Ieng Sary defense team's submission seems to contain some interpretations of the Internal Rules that does not appear squarely in line with the language of the Rules. For example, the defense cited Rule 51(8) as delineating the specific information that must be included in such a record, including "the duration of any

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interview and the duration of any breaks between interview periods.” (LENG SARY’S REQUEST, para 8.) Rule 51(8) does indeed describe the information that must be recorded in a report, and sub-part (g) includes the specific cited language. However, Rule 51(8) specifically refers to Co-Prosecutors’ report of every arrest of a suspect. IR 51 states: “Police Custody. (8) The Co-Prosecutors shall make a final report for every arrest, which shall include the following information: ... (g) The duration of any interview and the duration of any breaks between periods.”

<sup>22</sup> In the common law system, it is appropriate for a defense counsel to ask leading questions. However, it is not appropriate for the prosecution to ask leading questions. In the civil law system, it is not appropriate for any party to ask leading questions, as the purpose of the hearing is to ascertain the truth. The Cambodian legal system is a civil law system.

<sup>23</sup> *The Prosecutor v. Pavle Strugar*. IT-01-42-A. ICTY Trial Chamber II. “Decision Re the Defence Motion to Terminate Proceedings” (26 May 2004). [hereinafter, **STRUGAR TRIAL CHAMBER DECISION**].

<sup>24</sup> *Strugar* Trial Chamber Decision, par. 2, “Capacities of an accused”; *The Prosecutor v. Pavle Strugar*. IT-01-42-A. ICTY Appeals Chamber. “Judgment” (17 July 2008). [hereinafter, **STRUGAR APPEALS CHAMBER JUDGMENT**], par. 41.

<sup>25</sup> *Strugar* Trial Chamber Decision, par. 37.

<sup>26</sup> *Strugar* Trial Chamber Decision. The Chamber also used the following vague language: a chamber must view the accused’s capacities “overall and in a reasonable and commonsense manner” (par. 3); a decision on an accused’s fitness is “merely the balance of probabilities” (par. 4); an accused must be able to “sufficiently” exercise his rights (par. 3) at a “minimum standard of overall capacity” (par. 37).

<sup>27</sup> “The availability of counsel... may well adequately compensate for any deficiency of a relevant capacity.” *Strugar* Trial Chamber Decision, par. 22; also cited in Trial Chamber Decision, par. 28. 11.

<sup>28</sup> “The use of counsel requires, however, that the accused has the capacity to be able to instruct counsel sufficiently for this purpose.” *Strugar* Trial Chamber Decision, par. 22; also cited in Trial Chamber Decision, par. 28. 11.