

**BEFORE THE TRIAL CHAMBER****EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC/TC**Party Filing:** The Defence for IENG Sary**Filed to:** The Trial Chamber**Original language:** ENGLISH**Date of document:** 12 October 2012**CLASSIFICATION****Classification of the document  
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**IENG SARY'S RULE 87(4) REQUEST REGARDING MATERIAL WHICH MAY BE  
USED DURING THE EXAMINATION OF ELIZABETH BECKER**

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CHEA Leang  
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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), pursuant to Rules 87(3) and 87(4) of the ECCC Internal Rules (“Rules”), hereby requests to put a book review authored by Professor David Chandler, *Requiem for the 1970s: Elizabeth Becker’s When The War Was Over*, before the Trial Chamber and to be afforded the opportunity to use this book review during Ms. Becker’s examination. This Request is made necessary because this book review is relevant, probative and necessary for ascertaining the truth in Case 002/01. In doing its due diligence, the Defence began searching for material relevant to Professor Chandler and Ms. Becker’s testimony, including this book review, when it became apparent that Professor Chandler and Ms. Becker could be called as witnesses in Case 002. Despite the Defence’s best efforts, it only recently located a copy of the book review. The book review satisfies the Rule 87(3) criteria: **a.** it is relevant and not repetitious; **b.** it was obtained within a reasonable time; **c.** it is suitable for its intended use; **d.** it is allowed under the law; and **e.** it is neither intended to prolong the proceedings nor frivolous. The book review was not available to the Defence prior to the commencement of trial. Admission of the document will not cause prejudice to any party as there is ample time to review and assess the document ahead of Ms. Becker’s testimony.

## I. RELEVANT FACTS

1. On 18 July 2007, the OCP filed its Introductory Submission in Case 002, in which it cited Professor Chandler and Ms. Becker in support of many of its submissions.<sup>1</sup> The IENG Sary Defence team was formed in November 2007.<sup>2</sup> Immediately upon formation, as part of its due diligence, the Defence began reviewing and analyzing the Introductory Submission and the sources cited in its footnotes, including the citations to Professor Chandler’s and Ms. Becker’s books. On 17 January 2008, the Defence hired historian Michael Vickery as an expert consultant. In the course of strategizing and preparing for the possible examination of Professor Chandler and / or Ms. Becker, the Defence learned that Professor Vickery possessed a clipping of a review by Professor Chandler of Ms. Becker’s book, *When the War was Over*.
2. On 21 January 2008, Professor Vickery emailed Professor Chandler to ask for the date and place of publication of his book review, as Professor Vickery’s clipping of the book

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<sup>1</sup> Introductory Submission, 18 July 2007, D3.

<sup>2</sup> See Lawyer’s Recognition Decision, 12 November 2007, D36.

review did not provide this information.<sup>3</sup> Professor Chandler replied that his review was published in *Indo-China Issues* in 1986.<sup>4</sup>

3. On 24 January 2008, observing that the format of his clipping of the book review did not resemble the usual format of *Indo-China Issues* submissions, Professor Vickery requested clarification from Professor Chandler as to the place of the book review's publication.<sup>5</sup> Professor Chandler replied that he believed the title of the journal was *Indo-China Issues*, but stated that he would check Monash University's files.<sup>6</sup> It appears that Professor Chandler did not check Monash University's files because he provided no further information regarding his book review.
4. On 28 January 2011, the OCP proposed to the Trial Chamber that Professor Chandler and Ms. Becker be heard as expert witnesses.<sup>7</sup> The Defence began preparing its response and its own witness lists. The Defence anticipated using Professor Chandler's book review in its examination of Professor Chandler and / or Ms. Becker if they were called to testify before the Trial Chamber. In the intervening period between January 2008 and January 2011, Professor Vickery had misplaced his clipping of Professor Chandler's book review. Professor Vickery and the Defence attempted to locate a copy of the book review by searching online and physical library databases in the United States and Australia, including the *Indo-China Issues* archives. These search efforts were unsuccessful.
5. In June 2012, prior to Professor Chandler's scheduled testimony, the Defence requested permission to use his book review during its examination of Professor Chandler.<sup>8</sup> The Trial Chamber rejected the Defence's request to admit the book review as evidence because the Trial Chamber could not assess the relevance of the book review since the Defence had not yet located a copy of it.<sup>9</sup> The Trial Chamber further noted that the

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<sup>3</sup> Email from Professor Vickery to Professor Chandler, 21 January 2008.

<sup>4</sup> Email from Professor Chandler to Professor Vickery, 21 January 2008.

<sup>5</sup> Email from Professor Vickery to Professor Chandler, 24 January 2008.

<sup>6</sup> Email from Professor Chandler to Professor Vickery, 24 January 2008.

<sup>7</sup> Co-Prosecutors' Rule 80 Expert, Witness and Civil Party Lists, Including Confidential Annexes 1, 2, 3, 3A, 4 and 5, 28 January 2011, E9/4.2.

<sup>8</sup> IENG Sary's Rule 87(4) Request Regarding Material Which May Be Used During the Examination of Expert David Chandler, 13 June 2012, E172/24/3, para. 7.

<sup>9</sup> Trial Chamber Memorandum titled "Response to Co-Prosecutors' Request to provide Case File 002 Documents to Experts and IENG Sary's Rule 87(4) request regarding material to be used during the examination of Expert David CHANDLER (E172/24/2 and E172/24/3)," 21 June 2012 ("Trial Chamber 21 June 2012 Memorandum"), E172/24/4, para. 7.

document had been in the public domain since 1986.<sup>10</sup> The Trial Chamber stated that “[s]hould the document be located in time, it may however be utilized in questioning of the experts, subject to the same conditions above [i.e. utilizing the review to formulate questions and timely providing advance courtesy copies to the Trial Chamber and the other parties].”<sup>11</sup>

6. From 18 July 2012 through 25 July 2012, Professor Chandler appeared before the Trial Chamber as an expert witness. He testified on a range of matters concerning Case 002/01.<sup>12</sup> The Defence continued its search for a copy of the book review.
7. On 29 September 2012, Professor Vickery discovered the clipping of Professor Chandler’s book review in his archives in Chiang Mai, Thailand.<sup>13</sup> Upon obtaining a copy of the clipping, the Defence immediately began the process of having it placed on the Shared Materials Drive, so as to make it available to the Trial Chamber and all parties,<sup>14</sup> and having it translated into Khmer and French.

## II. LAW AND ARGUMENT

8. Elizabeth Becker is not an expert on Democratic Kampuchea. This is a matter that has been repeatedly argued by the Defence<sup>15</sup> and is substantiated by Professor Chandler, the *doyen* of Cambodian history,<sup>16</sup> in his review of Ms. Becker’s book. Upon reading Ms. Becker’s book, Professor Chandler found that: **a.** Ms. Becker did not conduct wide or

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<sup>10</sup> *Id.*, para. 7.

<sup>11</sup> *Id.*

<sup>12</sup> See Transcript, 18 July 2012, E1/91.1; Transcript, 19 July 2012, E1/92.1; Transcript, 20 July 2012, E1/93.1; Transcript, 23 July 2012, E1/94.1; Transcript, 24 July 2012, E1/95.1; Transcript, 25 July 2012, E1/96.1.

<sup>13</sup> Email from Professor Vickery to IENG Sary Defence team’s Legal Consultant, 29 September 2012; Email from Professor Vickery to IENG Sary Defence team’s Legal Consultant, 1 October 2012.

<sup>14</sup> Professor Chandler’s book review, written in English, has been translated into Khmer and French and placed on the Shared Materials Drive. It has English ERNs 00850333-00850336, Khmer ERNs 00852445-00852452 and French ERNs 00852981-00852987. For the Trial Chamber’s and parties’ convenience, the book review is attached as an annex in all three languages. See Shared Materials Drive “SMD” Protocol, which states that material that has not yet been analyzed for relevance to the Case File, but which may contain relevant exculpatory or inculpatory information, may be placed on the SMD so that the parties may have access to the material (paras. 1-2).

<sup>15</sup> See IENG Sary’s Second Request for Investigative Action, 2 April 2009, D160, para. 15, citing David P. Chandler, *Requiem for the 1970s: Elizabeth Becker’s When The War Was Over, Indo-China Issues*, 1986, information provided by Michael Vickery; IENG Sary’s Initial Objection to the OCP Proposed Experts & Request for Leave to File Supplementary Submissions within 30 Days, 24 February 2011 (“IENG Sary’s Initial Objection to Experts”), E9/4/9, paras. 15-16. See also IENG Sary’s Joint Observations to Certain Witnesses and Experts Requested by the Co-Prosecutors, Civil Parties and NUON Chea Following the Trial Chamber’s Tentative List of Witnesses, 15 July 2011, E93/12, para. 19, stating that Ms. Becker is not an expert.

<sup>16</sup> PHILIP SHORT, *POL POT: THE HISTORY OF A NIGHTMARE* 290 (John Murray 2004), E3/9.

original research;<sup>17</sup> **b.** she drew heavily from the work of others;<sup>18</sup> **c.** she did not consistently attribute sources to their authors;<sup>19</sup> and **d.** her lack of fluency in Khmer “trip[ped] her up” in the historical sections of her book.<sup>20</sup> The Trial Chamber has deemed Ms. Becker an expert witness,<sup>21</sup> even though she is a journalist without a relevant degree who has only published one book on Democratic Kampuchea – a book that contains demonstrated flaws in its methodology and content. Any evidence that goes to the heart of Ms. Becker’s credibility as an expert witness and the integrity of her scholarship – such as Professor Chandler’s review of her book – must be admitted by the Trial Chamber as evidence that is relevant and probative in Case 002/01.

9. Pursuant to Rule 87(3), evidence must be admitted provided that it is relevant and not repetitious; obtained within a reasonable time; suitable to prove the facts it purports to prove; allowed under the law; and not intended to prolong the proceedings or frivolous. Rule 87(4) requires that the party requesting the admission of evidence must satisfy the Trial Chamber that the evidence was not available before the opening of the trial. As demonstrated *infra*, Professor Chandler’s book review satisfies the criteria of Rule 87(3) and the requirements of Rule 87(4). The Trial Chamber should admit this document and permit the Defence to use it during the examination of Ms. Becker.

**A. Professor Chandler’s book review satisfies the Rule 87(3) criteria and should be admitted by the Trial Chamber.**

**1. The book review is relevant and not repetitious.**

10. Professor Chandler reviewed and analyzed the quality of the research and methodology that led to the publication of Ms. Becker’s book *When the War was Over*. In classifying Ms. Becker as an expert witness, the Trial Chamber found that, “by virtue of [her] research and publication of [a book] on the relevant period, [she possesses] specialised

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<sup>17</sup> David P. Chandler, *Requiem for the 1970s: Elizabeth Becker’s When The War Was Over*, 1986, at 2, 5 (“Chandler Book Review”).

<sup>18</sup> *Id.*, at 3-5, 7.

<sup>19</sup> *Id.*, at 2, 7.

<sup>20</sup> *Id.*, at 7.

<sup>21</sup> Decision on Assignment of Experts, 5 July 2012, E215.

knowledge in the proposed field of expertise.”<sup>22</sup> As illustrated below, Professor Chandler found to the contrary.

11. Professor Chandler found Ms. Becker’s book “loosely edited and written.”<sup>23</sup> He observed that Ms. Becker had drawn heavily from the work of others, sometimes without acknowledgment, and that Ms. Becker had failed to sufficiently research the topic on her own. With regard to Ms. Becker’s methodology and research methods, Professor Chandler found the following flaws:

(1) A “serious problem with Becker’s decision to emphasize historical factors [for the rise of the Khmer Rouge] is that *her understanding of the Cambodian past does not spring from particularly wide reading or research*”;<sup>24</sup>

(2) In the section on pre-colonial times and the Angkorean era, “[Ms. Becker] has relied largely on English-language materials, many of them overtaken or qualified by recently published work”;<sup>25</sup>

(3) In her account of the colonial period (1863-1954), Ms. Becker “fail[ed] to consult monographical material about Cambodia composed since independence, most of it in French”;<sup>26</sup>

(4) Ms. Becker’s political analysis of the Sihanouk period (1941-1970) is “relatively sketchy,” except “where she draws heavily on what she calls the ‘pioneering work’ of Ben Kiernan and Stephen Heder”;<sup>27</sup>

(5) Ms. Becker’s writing on the development of Cambodian radicalism in the 1950s and 1960s “*does not represent original research*”;<sup>28</sup> and

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<sup>22</sup> *Id.*, para. 18.

<sup>23</sup> Chandler Book Review, at 7.

<sup>24</sup> *Id.*, at 2 (emphasis added).

<sup>25</sup> *Id.*, at 2-3.

<sup>26</sup> *Id.*, at 3.

<sup>27</sup> *Id.* Professor Chandler also notes that Ms. Becker follows Benedict Kiernan’s work “fairly closely” in this regard. *Id.*, at 4.

<sup>28</sup> *Id.*, at 5 (emphasis added). Professor Chandler again notes that Ms. Becker’s work draws heavily on the work of scholars such as Benedict Kiernan, Michael Vickery and Stephen Heder.

(6) Throughout the book, “*particularly in the allegedly historical sections*, Becker’s lack of fluency in Cambodian trips her up, and *while the work of other scholars is mined extensively* ... their names occasionally disappear from Becker’s notes.”<sup>29</sup>

12. Professor Chandler concludes that Ms. Becker’s book fails to live up to her claim that she had “answer[ed] the crucial questions about the Khmer Rouge and Cambodia.”<sup>30</sup> As he notes, this claim “is a tall order for someone who cannot read Khmer, and who has failed to immerse herself (for six years at least) in a wide range of accessible, but highly contradictory primary and secondary sources.”<sup>31</sup> Professor Chandler’s findings are directly relevant to Ms. Becker’s status and credibility as an expert witness and to assessing the reliability and value of her testimony.

## **2. The book review was obtained within a reasonable period of time.**

13. Although this document may have been in the public domain since 1986,<sup>32</sup> as detailed *supra*, it took the Defence considerable time to find it. The book review was written prior to the widespread use of computer technology and exists, to the knowledge of the Defence, in hard copy only. Upon locating a hard copy of the book review, the Defence made this Request at the earliest possible opportunity, after having the book review placed on the Shared Materials Drive and translated into Khmer and French. The Trial Chamber has previously admitted evidence that was technically available prior to the trial where admission of that evidence caused no prejudice to the other parties and where it was submitted sufficiently in advance of the witness’s testimony.<sup>33</sup> Here, for the following reasons, no party will be prejudiced by the Defence’s use of the book review:

- a. The Defence seeks the admission of only one document;
- b. This document is less than 10 pages in length;

<sup>29</sup> *Id.*, at 7 (emphasis added). See also *Id.*, at 2: “This particular connection [between traditions of banditry, millenarianism and peasant rebellion and the roots of Cambodian radicalism] has been examined in detail by Vickery in *Cambodia 1975-1982*, which is cited in Becker’s bibliography but nowhere in her notes” (emphasis added); *Id.*, at 7: “References to Michael Vickery, for example, *should have appeared* at several points in the text (e.g. pp. 109, 134, 250 and 254) where Becker *appears to be paraphrasing* his ‘pioneering’ work” (emphasis added).

<sup>30</sup> *Id.*, at 8. See ELIZABETH BECKER, *WHEN THE WAR WAS OVER* 15 (Simon & Schuster, 1<sup>st</sup> ed. 1986); ELIZABETH BECKER, *WHEN THE WAR WAS OVER* xiv (PublicAffairs, 2<sup>nd</sup> ed. 1998), E3/20.

<sup>31</sup> Chandler Book Review, at 8.

<sup>32</sup> See Trial Chamber 21 June 2012 Memorandum, para. 7.

<sup>33</sup> *Id.*, para. 8.

- c. There is sufficient time in advance of Ms. Becker's testimony for all parties to review and assess the document; and
- d. There is ample opportunity for the Trial Chamber to disclose this document to Ms. Becker prior to her appearance before the Trial Chamber.

**3. The book review is suitable to prove the facts that it purports to prove.**

14. Professor Chandler's book review is a "suitable" means of assessing Ms. Becker's credibility as a witness<sup>34</sup> for the following reasons:

- a. Professor Chandler testified before the Trial Chamber for six days as an expert witness in Case 002/01<sup>35</sup> and as an expert witness in Case 001;<sup>36</sup>
- b. Professor Chandler is a retired historian who taught history at Monash University in Australia;<sup>37</sup>
- c. Professor Chandler possesses a PhD,<sup>38</sup> specializing in Cambodian history;<sup>39</sup>
- d. Professor Chandler speaks Khmer<sup>40</sup> and is knowledgeable about Cambodian culture; and
- e. Over the course of three decades, Professor Chandler has written four books and several articles on the Democratic Kampuchea era.<sup>41</sup>

15. The Defence does not concede that Professor Chandler's testimony and evidence is beyond challenge.<sup>42</sup> However, Professor Chandler is an authoritative voice on Cambodia

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<sup>34</sup> See Rule 87(3)(c).

<sup>35</sup> Transcript, 18 July 2012, E1/91.1; Transcript, 19 July 2012, E1/92.1; Transcript, 20 July 2012, E1/93.1; Transcript, 23 July 2012, E1/94.1; Transcript, 24 July 2012, E1/95.1; Transcript, 25 July 2012, E1/96.1.

<sup>36</sup> *Case of KAING Guek Eav alias "Duch,"* Case 001/18-07-2007-ECCC/TC, Transcript, 6 August 2009, E1/59.1.

<sup>37</sup> Transcript, 18 July 2012, E1/91.1, p. 10.

<sup>38</sup> *Id.*, p. 19.

<sup>39</sup> *Id.*, p. 14.

<sup>40</sup> *Id.*, p. 12.

<sup>41</sup> *Id.*, p. 13-17.

<sup>42</sup> See Transcript, 23 July 2012, E1/94.1; Transcript, 24 July 2012, E1/95.1, in which the Defence vigorously questioned and challenged Professor Chandler regarding his research and methodology.



who has analyzed Ms. Becker's book and, as noted *supra*, has identified several flaws in her methodology and the substance of her book.

**4. The book review is allowed under the law.**

16. Professor Chandler's book review is allowed under ECCC and Cambodian law. It was not created or obtained in an illegal manner.

**5. Use of the book review is not intended to prolong the proceedings nor is it frivolous.**

17. Professor Chandler's book review is not intended to prolong the trial and is not frivolous. The book review directly relates to the substance of and basis for Ms. Becker's testimony. It will assist the Trial Chamber in ascertaining the truth and assessing Ms. Becker's credibility.

**B. Professor Chandler's book review satisfies the requirement of Rule 87(4).**

**1. The book review was not "available" to the Defence before the opening of the trial.**

18. In keeping with its due diligence obligations, the Defence reviews all material it can locate that is relevant to each witness, Civil Party and expert. As stated *supra*, the Defence searched for a copy of Professor Chandler's book review but was previously unable to locate a copy or accurate information about its place of publication, despite contacting Professor Chandler himself and searching online and physical databases.

19. The OCP has stated that material should not be excluded simply because it was not put before the Trial Chamber prior to the start of trial or was not included on a party's Rule 80 document list.<sup>43</sup> As Deputy Co-Prosecutor William Smith stated in court: "[W]e agree that ... circumstances can arise where documents become significant at a later time, in relation to the -- testing witnesses [sic] credibility.... [W]e're not suggesting that every document has to be placed before the Chamber."<sup>44</sup> Here, although Professor Chandler's book review was in existence prior to the opening of the trial, it was not in the Defence's

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<sup>43</sup> Response by Co-Prosecutors to Rule 87 Requests by IENG Sary and NUON Chea to Use Material During the Examination of Philip Short, 5 September 2012, E226/2, para. 1.

<sup>44</sup> Transcript, 5 April 2012, E1/60.1, p. 51.

possession, despite the Defence's best search efforts. As such, the document was not "available" to the Defence before the opening of trial within the meaning of Rule 87(4).<sup>45</sup> As the Defence has provided a copy of Professor Chandler's book review in all three languages to the Trial Chamber and the parties well in advance of Ms. Becker's testimony, no party will suffer prejudice from the admission of this document.

### III. CONCLUSION

20. Ms. Becker is a journalist who wrote a book that borrows heavily from the work of others; it is neither an academic nor a scientific endeavor.<sup>46</sup> The Defence has argued that the Trial Chamber should not consider Ms. Becker as an expert witness for the *exact* reasons cited by Professor Chandler in his book review: Ms. Becker's failure to conduct original research; her reliance on the work of others; her failure to attribute sources; and her inability to speak Khmer. Professor Chandler is a widely-published scholar of Cambodian history who conducted an in-depth review of Ms. Becker's work. This book review is relevant to determining the extent and depth of Ms. Becker's "specialised knowledge" of the Democratic Kampuchea period and assessing her credibility and reliability as an expert witness. This book review must not be excluded simply because it was published in 1986, prior to the start of the trial. Rather, it should be admitted to allow for a complete evaluation of Ms. Becker's testimony and evidence. Were the Trial Chamber to exclude Professor Chandler's book review, the Trial Chamber would demonstrate to the public and the parties a lack of commitment to ascertaining the truth in Case 002/01 and upholding its obligation to ensure a fair trial for the parties.

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<sup>45</sup> The Trial Chamber, considering ICTY and ICTR jurisprudence, has held that "the notion of 'availability' of evidence is linked to the exercise of due diligence." Decision Concerning New Documents and Other Related Issues, 30 April 2012, E190, para. 23.

<sup>46</sup> The Defence notes that the Trial Chamber has stated that it will not call Benedict Kiernan or Michael Vickery as witnesses in Case 002/01. Consequently, the Trial Chamber should disregard any portion of Ms. Becker's book or testimony that cites or is based on either of these two scholars' work. See Trial Chamber Memorandum titled "Preliminary indication of individuals to be heard during population movement trial segments in Case 002/01," 2 October 2012, para. 6; Trial Chamber Memorandum titled "Proposed testimony of Benedict KIERNAN before the Trial Chamber," 13 June 2012, p. 2.

**WHEREFORE**, for all the reasons stated herein, the Defence respectfully requests to put Professor Chandler's book review, *Requiem for the 1970s: Elizabeth Becker's When The War Was Over*, before the Trial Chamber and to be afforded the opportunity to use this book review during the examination of Ms. Becker.

Respectfully submitted,

ANG Udom



Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 12<sup>th</sup> day of **October, 2012**