

**BEFORE THE TRIAL CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**FILING DETAILS**

**Case No:** 002/19-09-2007-ECCC/TC  
**Filing Party:** Nuon Chea Defence Team  
**Filed To:** Trial Chamber  
**Original Language:** English  
**Date of Document:** 11 December 2015



**CLASSIFICATION**

**Classification Suggested by the Filing Party:** PUBLIC

**Classification of the Trial Chamber:**

**Classification Status:**

**Review of Interim Classification:**

**Records Officer Name:**

**Signature:**

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**NUON CHEA'S REQUEST TO RECONSIDER ADMITTING ONE EXTRACT  
AND TO ADMIT TWO ADDITIONAL EXTRACTS  
FROM THE HUMAN RIGHTS WATCH REPORT '30 YEARS OF HUN SEN'**

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## I. INTRODUCTION

1. The Co-Lawyers for Mr Nuon Chea (the ‘Defence’) submit this request (the ‘Request’) for the Trial Chamber to:
  - reconsider its decision of 29 June 2015 concerning the admission into evidence of Chapter II of the Human Rights Watch report entitled ‘*30 Years of Hun Sen: Violence, Repression, and Corruption in Cambodia*’, pursuant to the Chamber’s power to entertain requests for reconsideration; and
  - admit into evidence chapters III and IX of the same report, pursuant to Rule 87(4).
2. As a preliminary matter, the Defence submits that the present Request should be classified as public, not only because all the information it contains is drawn from or could be known from the public record, but also because it raises issues of significant public importance.

## II. PROCEDURAL HISTORY AND BACKGROUND

### A. The Human Rights Watch Report ‘*30 Years of Hun Sen*’

3. On 12 January 2015, the renowned international human rights non-governmental organisation Human Rights Watch (‘HRW’) published a report entitled ‘*30 Years of Hun Sen: Violence, Repression, and Corruption in Cambodia*’ (the ‘HRW Report’).<sup>1</sup> Its release coincided with the 30-year anniversary of Hun Sen’s prime ministership, making him the ‘sixth longest-serving political leader in the world today’.<sup>2</sup> The HRW Report presents Hun Sen’s track record from ‘his time as a Khmer Rouge commander during the 1970s’ until present, summarising it as follows:

[Hun Sen] joins an exclusive club of men in power who, through politically motivated violence, control of the security forces, manipulated elections, massive corruption, and the tacit support of foreign powers, have been able to remain in power well beyond the time any leader in a genuinely democratic political system has ever served. [...]

Hun Sen has been linked to a wide range of serious human rights violations: extrajudicial killings, torture, arbitrary arrests, summary trials, censorship bans on

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<sup>1</sup> E347.3, Human Rights Watch, *30 Years of Hun Sen: Violence, Repression, and Corruption in Cambodia*, Jan 2015 (‘HRW Report’); also publicly available at <https://www.hrw.org/report/2015/01/12/30-years-hun-sen/violence-repression-and-corruption-cambodia>.

<sup>2</sup> E347.3, HRW Report, ERN 01086008 (p. 1).

assembly and association, and a national network of spies and informers intended to frighten and intimidate the public into submission. [...]

Hun Sen's main tactic has been the threat and use of force.<sup>3</sup>

4. Detailed insights are presented into various episodes in Hun Sen's lengthy career. Relevantly for the purposes of the present Request, the HRW Report

describes his role as Khmer Rouge commander in the 1970s in areas in which crimes against humanity were committed against the Muslim Cham population [in Chapter II]; documents his responsibility as prime minister for forced labor [under the *Ke hoach nam* or 'K5' program, in Chapter III] [and] explains how Hun Sen has obstructed justice for international crimes perpetrated in 1975-1979 by the Khmer Rouge, relying on his control of a Cambodian judiciary that also ensures continuing impunity for abuses in the present [in Chapter IX].<sup>4</sup>

5. Chapter II of the HRW Report, entitled '*Hun Sen in the Khmer Rouge*', describes Hun Sen's rapid ascent through the ranks of the military forces of the Communist Party of Kampuchea ('CPK') in the East Zone from April 1970 onwards.<sup>5</sup> Hun Sen became a member of the Sector 21 Battalion 55 committee by 1973,<sup>6</sup> and by 17 April 1975, the chief of staff and deputy commander of an autonomous regiment in Sector 21 comprising notably of Battalion 55.<sup>7</sup> Chapter II then explains how in the months after 17 April 1975, unrest grew among Cham communities Krauch Chhmar district in Sector 21, culminating in Cham rebellions on the island of Koh Phal and in Svay Khleang commune, the latter of which was violently suppressed by Sector 21 forces including Battalion 55. The Koh Phal and Svay Khleang rebellions are mentioned in the Closing Order,<sup>8</sup> are within the scope of Case 002/02,<sup>9</sup> and have been discussed by a number of witnesses during the hearings on the treatment of the Cham.<sup>10</sup>
6. As the Defence noted in its 29 September 2015 request to call additional witnesses on the treatment of the Cham who could testify on events in East Zone Sector 21,<sup>11</sup> it is a

<sup>3</sup> E347.3, HRW Report, ERNs 01086008–01086009 (pp. 1–2).

<sup>4</sup> E347.3, HRW Report, ERNs 01086009–01086010 (pp. 2–3).

<sup>5</sup> E347.3, HRW Report, ERN 01086021 (p. 14).

<sup>6</sup> E347.3, HRW Report, ERN 01086022 (p. 15).

<sup>7</sup> E347.3, HRW Report, ERN 01086026 (p. 19).

<sup>8</sup> D427, 'Closing Order', 15 Sep 2010, paras 281 and 758.

<sup>9</sup> E301/9/1.1, 'Annex: List of Paragraphs and Portions of the Closing Order Relevant to Case 002/02', paras (3)(i) and (xi).

<sup>10</sup> See T. 7 Sep 2015 (It Sen, E1/342.1); T. 8 Sep 2015 (It Sen/Sos Ponyamin, E1/343.1); T. 9 Sep 2015 (Sos Ponyamin, E1/344.1); T. 17 Sep 2015 (Him Man, E1/349.1); T. 28 Sep 2015 (Him Man/No Sates, E1/350.1); and T. 29 Sep 2015 (No Sates, E1/351.1).

<sup>11</sup> See E370, 'Nuon Chea's Urgent and Consolidated Request to Expedite Two Already-Requested Witnesses and Summons Four Additional Witnesses Regarding the Treatment of the Cham', 29 Sep 2015 ('Request for Additional Witnesses'), para. 13.

poorly-kept secret that the HRW Report was written by Stephen Heder, even if he is not officially credited as such. As the Defence argued in its appeal brief against the judgement in Case 002/01:

[T]here is probably not a single living person more directly involved in and responsible for building the case against Nuon Chea at this Tribunal [than Stephen Heder]. Heder drafted the blueprint for the Introductory Submissions in March 2004 with the publication of *Seven Candidates for Prosecution*, including explicit reference to the elements of crimes for which he believed Nuon Chea was responsible. He was then employed with the Co-Prosecutors while the Introductory Submissions were drafted and then immediately afterwards by the Co-Investigating Judges for the purposes of investigating those submissions and drafting the Closing Order.<sup>12</sup>

7. Similarly, in a 23 July 2015 motion submitted to the Supreme Court Chamber, the Co-Prosecutors described how:

Stephen Heder also has a wide range of expertise in matters relating to the DK era. For more than 30 years, Heder conducted extensive examinations of CPK and DK-related documents, collaborated with other Cambodia experts, and interviewed numerous CPK cadres and Cambodians affected by the DK regime, including Khieu Samphan, Ieng Sary and Van Rith. His findings have been compiled in numerous books, including: *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge, Cambodian Communism and the Vietnamese Model: Imitation and Independence, 1930-1975*, and *Pol Pot and Khieu Samphan*. Heder was also employed as an analyst and investigator within the Office of the co-prosecutor and the Office of the Co-Investigating Judges (“OCIJ”) and was further engaged by the OCIJ in a consultative capacity.<sup>13</sup>

## B. Use of the HRW Report in Case 002/02

8. On 9 April 2015, the Co-Lawyers for Khieu Samphân filed a Rule 87(4) request to admit Chapter II of the HRW Report into evidence in Case 002/02. They contended that the chapter contained relevant evidence on the East Zone, ‘notably on the evolution of military structure’ and ‘a discussion devoted to the 1975 Cham rebellion in that zone’,<sup>14</sup> and would thus assist the Chamber in ascertaining the truth.

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<sup>12</sup> See, F16, ‘Nuon Chea’s Appeal against the Trial Judgment in Case 002/01’, 29 Dec 2014 (‘Appeal’), para. 182.

<sup>13</sup> F2/4/3/3/3, ‘Co-Prosecutors’ Response to Nuon Chea’s Response to Questions on the Supreme Court Chamber’s Additional Investigation into Footage in the Possession of Filmmakers Rob Lemkin and Thet Sambath’, 23 Jul 2015, para. 14 (footnotes omitted).

<sup>14</sup> E347, ‘Demande de versement au dossier 002/02 de nouveaux documents en vertu de la règle 87-4 du Règlement intérieur’, 9 Apr 2015 (‘Khieu Samphân’s Request’), para. 6, internal translation by the Defence (the original French reads as follows: ‘*En effet, il fournit des informations sur la Zone Est du Kampuchéa Démocratique (« KD »), notamment sur l’évolution des structures militaires et un développement entier est consacré à la rébellion de 1975 des Chams dans la zone*’).

9. On 29 June 2015, the Trial Chamber issued a memorandum rejecting the request of the Co-Lawyers for Khieu Samphân (the ‘Decision’).<sup>15</sup> As will be discussed further below,<sup>16</sup> the Trial Chamber was dismissive of the HRW Report’s ‘relatively narrow perspective’ and methodology; suggested it was ‘more a summary of the multiple and diverse sources referenced than an assessment of said sources’; and criticised its ‘particularly vague’ references. The Trial Chamber concluded that Chapter II of the HRW Report was therefore ‘unsuitable to prove the facts it purports to prove [...] and is not conducive to ascertaining the truth’.<sup>17</sup>
10. On 7 and 8 September 2015, the first witness for the treatment of the Cham, It Sen, appeared. His testimony addressed, *inter alia*, the Cham rebellion at Koh Phal. During his cross-examination, International Co-Lawyer for Nuon Chea Victor Koppe asked It Sen whether he had ‘heard of Battalion 55 of the Sector 21 Regiment’;<sup>18</sup> whether he had heard of one of its commanding officers, Hun Sen;<sup>19</sup> and whether he had heard if Hun Sen, as a commanding officer of Battalion 55, had been involved in suppressing the Koh Phal rebellion.<sup>20</sup>
11. Counsel Koppe’s questions triggered a heated debate within the Trial Chamber. International Senior Assistant Co-Prosecutor Dale Lysak demanded to know the basis for Counsel Koppe’s questions. Upon learning that it was the HRW Report and that the Defence alleged that Stephen Heder was its author, Co-Prosecutor Lysak responded that ‘Human Rights Watch was not at Kaoh Phal’;<sup>21</sup> that ‘there is nothing about Steve Heder in this document. He’s making that up’;<sup>22</sup> and that when Counsel Koppe ‘assert[s] something as a fact when there is nothing in the investigation about it and it comes from a document that’s not been put in evidence, these proceedings are distorted’.<sup>23</sup> Judge Jean-Marc Lavergne noted that the relevant excerpt of the HRW Report was not on the case file,<sup>24</sup> recalling the Trial Chamber Memorandum.<sup>25</sup> International Co-Lawyer for

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<sup>15</sup> E347/1, ‘Decision on KHIEU Samphan’s Request Pursuant to Internal Rule 87(4) to Admit New Documents to Case 002/02’ (‘Trial Chamber Memorandum on HRW Report’), 29 Jun 2015, para. 7. *See, also*, paras 3–4.

<sup>16</sup> *See* para. 15 below.

<sup>17</sup> E347/1, Trial Chamber Memorandum on HRW Report, para. 4.

<sup>18</sup> T. 8 Sep 2015 (It Sen / Sos Ponyamin, E1/343.1), p. 17:16–23.

<sup>19</sup> T. 8 Sep 2015 (It Sen / Sos Ponyamin, E1/343.1), p. 18:1–3.

<sup>20</sup> T. 8 Sep 2015 (It Sen / Sos Ponyamin, E1/343.1), p. 18:7–8.

<sup>21</sup> T. 8 Sep 2015 (It Sen / Sos Ponyamin, E1/343.1), p. 21:2–3.

<sup>22</sup> T. 8 Sep 2015 (It Sen / Sos Ponyamin, E1/343.1), p. 25:17–18.

<sup>23</sup> T. 8 Sep 2015 (It Sen / Sos Ponyamin, E1/343.1), p. 21:4–7.

<sup>24</sup> T. 8 Sep 2015 (It Sen / Sos Ponyamin, E1/343.1), p. 20:9–10.

<sup>25</sup> T. 8 Sep 2015 (It Sen / Sos Ponyamin, E1/343.1), p. 22:23 to 23:1.

Khieu Samphân Anta Guissé reacted by querying ‘[i]f we do not intend to confront the witness with a particular document, why do we have to base all of our questions on a document?’<sup>26</sup> Counsel Koppe concluded that the reaction to the HRW Report represented ‘an attempt to avoid evidence which might incriminate present government members as the perpetrators of the actual genocides, if there were any, in [19]75’,<sup>27</sup> which amounted to ‘trying to hide the truth of what really happened’.<sup>28</sup> Nevertheless, he was ultimately forbidden from using the HRW Report, with Judge Claudia Fenz ruling as follows:

Well, it cannot come as a great surprise. I mean, this is how criminal proceedings work; if you want to confront the party with something if you put forward an allegation you have to cite the basis for this. If the basis is a document which hasn’t been admitted during the proceedings or actually specifically rejected as in this case, find another basis and move on.<sup>29</sup>

### III. APPLICABLE LAW

#### A. Requests for Reconsideration

12. Requests for reconsideration are not contemplated by the Rules. However, the Trial Chamber has ruled that it will entertain such requests ‘where a fresh application justified by new evidence or new circumstances is made’.<sup>30</sup> The Pre-Trial Chamber, following established ICTY Appeals Chamber jurisprudence, has adopted a broader test, ruling that its power to reconsider its decisions applies not only where there is a ‘change of circumstances’ (which could result from ‘new facts or arguments’<sup>31</sup>), but also where the Chamber ‘finds that the previous decision was erroneous or [...] caused an injustice’.<sup>32</sup>

<sup>26</sup> T. 8 Sep 2015 (It Sen / Sos Ponyamin, E1/343.1), p. 23:10–13.

<sup>27</sup> T. 8 Sep 2015 (It Sen / Sos Ponyamin, E1/343.1), p. 24:6 and 21–24.

<sup>28</sup> T. 8 Sep 2015 (It Sen / Sos Ponyamin, E1/343.1), p. 26: 8–9.

<sup>29</sup> T. 8 Sep 2015 (It Sen / Sos Ponyamin, E1/343.1), p. 25:24 to 26:4.

<sup>30</sup> E238/11/1, ‘Decision on IENG Sary’s Request for Reconsideration of the Trial Chamber Decision on the Accused’s Fitness to Stand Trial and Supplemental Request’, 19 Dec 2012 (‘Decision on Ieng Sary Fitness Reconsideration Request’), para. 7.

<sup>31</sup> Case 001/18-07-2007-ECCC/OCIJ (PTC 02), D99/3/41, ‘Decision on IENG Sary’s Motion for Reconsideration of Ruling on the Filing of a Motion in the Duch Case File’, 3 Dec 2008, para. 6; *Prosecutor v. Galić*, Case no. IT-98-29, Decision on Defence Request for Reconsideration, 16 Jul 2004 (‘*Galić* Decision on Reconsideration’), 9<sup>th</sup> recital.

<sup>32</sup> D164/4/9, ‘Decision on Request to Reconsider the Decision for an Oral Hearing on the Appeals PTC 24 and PTC 25’, 20 Oct 2009 (‘Pre-Trial Chamber Reconsideration Decision’), para. 12; C22/I/68, ‘Decision on Application for Reconsideration of Civil Party’s Right to Address Pre-Trial Chamber in Person’, 28 Aug 2008, para. 25; *Galić* Decision on Reconsideration, 8<sup>th</sup> recital.

13. There was no reason for the Trial Chamber to depart from this latter test, which is that commonly applied at the ICTY. The Trial Chamber's rationale for setting a narrower test was that parties have the right to appeal its decisions.<sup>33</sup> However, at the ICTY, parties enjoy both the right of appeal (including an extensive right to file interlocutory appeals, which is not the case at the ECCC), and the right to request the trial chamber to reconsider its own decisions on the grounds highlighted above. The Defence accordingly submits that the correct standard for reconsideration covers not only 'new evidence or new circumstances', but also situations in which the Chamber 'finds that the previous decision was erroneous or [...] caused an injustice'.

#### **B. Requests for Admission of New Evidence**

14. Pursuant to Rule 87(4), at any stage during the trial a party may request the Chamber to 'admit any new evidence which it deems conducive to ascertaining the truth', provided 'that the requested [...] evidence was not available before the opening of the trial' and subject to the general requirements of Rule 87(3).<sup>34</sup> Evidence may also be admitted 'where the interests of justice so require, in particular where it is exculpatory and requires evaluation in order to avoid a miscarriage of justice',<sup>35</sup> or where it 'closely relate[s] to material already before the Chamber and [...] the interests of justice require the sources to be evaluated together'.<sup>36</sup> To satisfy the requirements of Rule 87(3), the proposed evidence needs only be *prima facie* relevant and reliable.<sup>37</sup> Accordingly, '[q]uestions regarding the probative value and thus weight to be accorded to documents are irrelevant to the assessment of their conformity with the Rule 87(3) criteria'.<sup>38</sup>

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<sup>33</sup> E238/11/1, Decision on Ieng Sary Fitness Reconsideration Request, para. 7, note 24.

<sup>34</sup> E313, 'Case 002/01 Judgment', 7 Aug 2014, para. 25.

<sup>35</sup> E307/1, 'Decision on Parties' Joint Request for Clarification Regarding the Application of Rule 87(4) (E307) and the Nuon Chea Defence Notice of Non-Filing of Updated Lists Evidence (E305/3)', 11 Jun 2014, para. 3; accord E190, 'Decision Concerning New Documents and Other Related Issues', 30 Apr 2012, para. 36.

<sup>36</sup> E289/2, 'Decision on Civil Party Lead Co-Lawyers' Internal Rule 87(4) Request to Put Before the Chamber New Evidence (E289) and KHIEU Samphan's Response (E289/1)', 14 Jun 2013, para. 3.

<sup>37</sup> E313, 'Case 002/01 Judgment', 7 Aug 2014, para. 26.

<sup>38</sup> E185/1, 'Decision on Objections to Documents Proposed to be Put before the Chamber in Co-Prosecutors' Annexes A6-A11 and A14-A20 and by the Other Parties', 3 Dec 2012, para. 13; E185/2, 'Third Decision on Objections to Documents Proposed for Admission before the Trial Chamber', 12 Aug 2013, para. 20(i).

## IV. ARGUMENT

### A. Request to Reconsider Admitting Chapter II of the HRW Report

15. Reconsideration is warranted due to a clear error in the Trial Chamber's decision, as well as by a change of circumstances. Chapter II of the HRW Report is admissible under Rule 87(4) and (3) and should be admitted into evidence in Case 002/02.

#### (i) *Error of Reasoning*

16. The Trial Chamber's Decision was clearly in error. The test for the admission of new evidence merely requires that the proposed evidence be *prima facie* relevant and reliable. Any assessment of the probative value and thus weight to be accorded to the proposed evidence goes beyond the threshold required for the admission of new evidence under Rule 87(4) and (3).<sup>39</sup> The Trial Chamber concluded that Chapter II of the Report was 'unsuitable to prove the facts it purports to prove' and 'not conducive to ascertaining the truth', and that, as such, it failed to meet the admissibility standard set out in Rule 87(3) and (4). However, the Chamber misinterpreted both provisions by applying a wholly different, stricter standard and deciding to undertake a 'thorough scrutiny' of the proposed evidence. It assessed the methodology of the Report and discussed the accuracy and pertinence of a number of references included in the footnotes.<sup>40</sup> The Chamber's analysis amounts to no less than an in-depth assessment of the probative value of Chapter II of the HRW Report – a degree of scrutiny which is inappropriate when assessing the admissibility of evidence.<sup>41</sup> The Chamber should remedy this error by using its power to reconsider its decision and apply the correct legal standard for the admission of new evidence.

#### (ii) *Change of Circumstances*

17. Furthermore, reconsideration is rendered necessary by an overall change of circumstances. In its recent scheduling decisions, the Trial Chamber has postponed the

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<sup>39</sup> See para. 14 above.

<sup>40</sup> E347/1, Trial Chamber Memorandum on HRW Report, para. 4.

<sup>41</sup> Questions regarding the assessment of the probative value and weight to be afforded to the evidence should be considered by the Trial Chamber at a later stage in the judgment. The Defence notes that the Chamber did not apply this level of rigour in assessing the probative value of the evidence in its Case 002/01 judgment (see F16, Appeal, paras 163, 170, 172–179, and *passim*). On the contrary, the Chamber relied abundantly on similar secondary sources, such as François Ponchaud's book – consisting in 'a summary of multiple and diverse sources', with 'vague references', and relying on anonymous statements –, without the slightest discussion of the reliability and credibility of this evidence (see F16, Appeal, para. 164, note 423).

hearing of evidence concerning the treatment of the Cham to a future date, with no clear indication as to when it would resume.<sup>42</sup> It is also taking unusually long to rule on the Defence's pending request for additional witnesses.<sup>43</sup> Moreover, Chea Sim, a key witness included on the Defence's witness list<sup>44</sup> who could have testified on the alleged policy to destroy the Cham people,<sup>45</sup> died in June 2015.<sup>46</sup> Considered as a whole, these events have limited opportunities for the Defence to examine witnesses and adduce evidence concerning the treatment of the Cham, giving reason to fear that its ability to present its case may be impaired significantly. As a result, every piece of evidence that the Defence can tender on this particular subject carries a particularly high value. As discussed above, the HRW Report has taken increasing significance in the Case 002/02 proceedings, giving rise to lengthy discussion between the parties.<sup>47</sup>

18. Moreover, a change of circumstances may also result from new arguments.<sup>48</sup> The arguments put in the present Request in support of the admission of Chapter II of the Report are substantially different from and more detailed than those presented by the Defence for Mr Khieu Samphân in its original request.<sup>49</sup>
19. In light of these new circumstances, the Trial Chamber should use its power to reconsider its decision and admit Chapter II of the HRW Report into evidence.

**(iii) Admissibility of Chapter II of the HRW Report**

20. Chapter II of the HRW Report clearly meets the requirements of Rule 87(4) and (3). The Report was published after the opening of the trial,<sup>50</sup> and the proposed extract

<sup>42</sup> On 7 October 2015, the Trial Chamber decided to adjourn the hearing of evidence on the treatment of the Cham and to 'reschedule the hearing again after the Pchum Ben festival', indicating: 'our senior legal officer will email you and the Parties our ruling as well as the rescheduling of hearing testimonies of witnesses' (T. 7 Oct 2015 (E1/355.1), pp. 14:19 to 15:1). On 9 October 2015, the Senior Legal Officer of the Trial Chamber sent an email informing the parties that 'the Trial Chamber will finish with the topic Trapeang Thma Dam and start with the first witnesses on the topic Treatment of the Vietnamese'. No information has been communicated to the parties as to whether and when the hearing of evidence concerning the treatment of the Cham will resume.

<sup>43</sup> The Defence's Request for Additional Witnesses has been pending for more than two months (since 29 September 2015).

<sup>44</sup> See E9/4/4.4, 'Annex A: Proposed Witness List', 15 Feb 2011 (witness no. 75); E305/4.1, 'Annex A: Updated Witness, Civil Party and Experts List', 8 May 2014 (witness no. 2).

<sup>45</sup> See E370, Request for Additional Witnesses, para. 5.

<sup>46</sup> Saing Soenthrith, 'CPP President Chea Sim Dead', *The Cambodia Daily*, 8 Jun 2015.

<sup>47</sup> See paras 10 and 11 above.

<sup>48</sup> See para. 12 above.

<sup>49</sup> See and compare paras 20–23 below, and E347, Khieu Samphân's Request, para. 6.

<sup>50</sup> The Trial Chamber has held that the trial in Case 002/02 commenced in June 2011: see E307/1, 'Decision on Parties' Joint Request for Clarification Regarding the Application of Rule 87(4) (E307) and the NUON Chea Defence Notice of Non-Filing of Updated Lists of Evidence (E305/3)', 11 Jun 2014, para. 2; E307/1/2, 'Decision on Joint Request for *de novo* Ruling on the Application of Internal Rule 87(4)', 21 Oct 2014, para. 6.

discusses issues relevant to Case 002/02, and is corroborated by other evidence on the case file. It is also in the interests of justice to admit this material into evidence.

21. Chapter II of the HRW Report is *prima facie* relevant and reliable. It provides detailed information on events described in the Closing Order, notably the suppression of the Cham rebellions at Koh Phal and Svay Khleang.<sup>51</sup> The Report cites credible, corroborated evidence suggesting that troops under Hun Sen's command were involved in suppressing the Cham rebellion at Svay Khleang. It indicates that from mid-April 1975, Hun Sen was Chief of Staff for Battalion 55 in East Zone Sector 21:

About 1972, Hun Sen was appointed as company commander, in charge of some 130 special forces personnel who were part of a Sector 21 unit. This was designated Battalion 55 and comprised a total of three military companies. [...]

After April 17, 1975, but while still in the hospital, Hun Sen was appointed as chief of staff of an autonomous special regiment in the East Zone, one of three such units in various parts of the zone. As per CPK practice, in this structure the CPK sector secretary exercised authority over the sector military. Created out of the wartime Sector 21 regiment, it comprised Battalions 55, 59, and 75. Hun Sen was concurrently a deputy commander of the regiment, so he held positions giving him authority over all of the regiment's 2,000 men. By May 1975, Hun Sen was well enough to attend meetings, and shortly thereafter he joined his regiment, which had been deployed to the border with Vietnam in Me Mut district of Sector 21.<sup>52</sup>

The HRW Report goes on to discuss Hun Sen's role in the suppression of the Cham rebellions in Krauch Chhmar district in Sector 21 in September-October 1975:

Other accounts contradict Hun Sen's version, indicating that although Krauch Chhmar district forces may have dealt on their own with Koh Phal village, Battalion 55 of the Sector 21 Regiment was directly involved in the subsequent attack on Svay Khleang. According to one testimony by a former Sector 21 regiment combatant, after the unrest broke out and had already spread to Svay Khleang, Battalion 55 was dispatched from the border to suppress it. This is corroborated by the account of a Krauch Chhmar resident who observed Sector 21 troops moving into battle, saying that the units that suppressed the Cham unrest in 1975 were Krauch Chhmar District Military forces, based at the district seat on the Mekong, and Battalion 55, which came up into Krauch Chhmar from rubber plantations to the south, thus arriving from further away and therefore later than Krauch Chhmar forces. This is consistent with a Svay Khleang villager's account that after Krauch Chhmar district troops appeared from the west, hundreds of other troops in a different type of uniform and carrying heavy weapons arrived. A fourth source, who also lived in the Svay Khleang village during the attack declared that there were four attack prongs, including Krauch Chhmar district forces who dug in as a blocking force west of Svay Khleang and forces belonging to the Sector 2 regiment from the border, which carried out assaults from the east, the south, and from on boats in the Mekong. This source specified that the attackers bombarded the village with 60 and 82 millimeter mortar rounds, while also firing on villagers with assault rifles and rocket-propelled grenades, killing hundreds of

<sup>51</sup> See para. 5 above.

<sup>52</sup> E347.3, HRW Report, ERNs 01086022 and 01086026 (pp. 15 and 19).

villagers. He also said the Sector troops came up through rubber plantations in, or to the south of, Krauch Chhmar.<sup>53</sup>

This evidence is clearly conducive to ascertaining the truth, as it can assist the Chamber in identifying those responsible for the crimes allegedly committed against the Cham in Krauch Chhmar district.

22. The Report's account is corroborated by other evidence on the case file. In his written record of interview, Sau Seimech (requested as a witness by the Defence in a pending request before the Chamber<sup>54</sup>) confirmed that Battalion 55 received orders to suppress the Cham rebellion and described Hun Sen's responsibilities in the Sector 21 military staff at the time.<sup>55</sup> Furthermore, the HRW Report is consistent with the testimony of two Cham villagers from Svay Khleang. Man Zain told Ysa Osman that 'an additional force of hundreds, just arrived, wearing uniforms different from those of the district troops. They had backpacks and all types of weapons. They fired heavy weapons and small arms at the rebels'.<sup>56</sup> Fellow villager Sos Ponyamin confirmed in court that the military forces sent to suppress the rebellion 'did not use only the light weapons; they had heavy weapons as well. The sounds of gun fire deafened our ears.'<sup>57</sup> The findings of Chapter II of the HRW Report are particularly credible when read in conjunction with Chapter IX of the same Report. The assertion that Hun Sen is possibly responsible for the suppression of the Cham rebellion at Svay Khleang is compelling in light of Hun Sen's constant obstruction of ECCC proceedings, motivated by his apparent fear of seeing his conduct during the DK exposed to the public.<sup>58</sup> The description of the events at Svay Khleang and Koh Phal in Chapter II of the HRW Report is therefore *prima facie* credible and reliable.
23. Finally, it is in the interests of justice to admit Chapter II of the HRW Report, as it is potentially exculpatory for Nuon Chea. It identifies East Zone military units responsible for crimes allegedly committed against the Chams at Svay Khleang. This evidence is central to the Defence's case concerning the attribution of responsibility for the crimes

<sup>53</sup> E347.3, HRW Report, ERN 01086027 (p. 20).

<sup>54</sup> See E370, Request for Additional Witnesses.

<sup>55</sup> E3/5261, 'Written Record of Interview of SAU Seimech', 12 Dec 2008, ERNs 00274336 and 00274338.

<sup>56</sup> E3/2653, Ysa Osman, *The Cham Rebellion: Survivors' Stories from the Villages*, ERN 00219145 (interview of Man Zain).

<sup>57</sup> T. 8 Sep 2015 (Sos Ponyamin, E1/343.1), p. 95:2 and 6–7.

<sup>58</sup> See para. 2822 below.

charged. The Trial Chamber should accordingly use its power to reconsider its decision and admit Chapter II of the Report into evidence.

### **B. Request for Admission of Chapters III and IX of the HRW Report**

24. Chapters III and IX of the HRW Report, respectively entitled '*Hun Sen and the "K5" Forced Labor Program*' and '*Hun Sen and the Subversion of the Khmer Rouge Tribunal*', are admissible under Rule 87(4) and (3). The Report was issued after the opening of the trial,<sup>59</sup> and the proposed extracts discuss issues relevant to Case 002/02 and raise issues of significant public importance which should be considered in the interests of justice.

#### **(i) Chapter III: '*Hun Sen and the "K5" Forced Labor Program*'**

25. Chapter III of the HRW Report describes the K-5 programme conducted by the government of the People's Republic of Kampuchea in 1984–1989, which 'involved the mass mobilization of Cambodian civilians for labor on the Cambodia-Thai border and which led to the deaths of many thousands of Cambodians from disease and landmines'.<sup>60</sup> The programme aimed at constructing 'defensive fortifications and obstacles on the Cambodia side of the border, including the planting of large number of landmines [...] to prevent Pol Pot-led Khmer Rouge and other guerrillas from re-establishing their bases and infiltrating Cambodia from Thailand'.<sup>61</sup> Introduced under the auspices of Vietnam, it was approved in July 1984 and carried out under Hun Sen's leadership.<sup>62</sup> According to the HRW Report, '[e]ach province, district, commune and village in the [People's Republic of Kampuchea] was assigned a quota of "volunteers" to fill.'<sup>63</sup> It is estimated that in total, about one million Cambodians were involved in K-5, with tens of thousands dying as a result of 'miserable' working conditions, disease, and landmines.<sup>64</sup>

26. The above information is relevant to all crime sites within the scope of Case 002/02. As the Defence has repeatedly argued during the Case 002 proceedings, in the absence of any effort to excavate and carry out even the most basic form of forensic analysis of

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<sup>59</sup> See para. 20 above.

<sup>60</sup> E347.3, HRW Report, ERN 01086029 (p. 22).

<sup>61</sup> E347.3, HRW Report, ERN 01086029 (p. 22).

<sup>62</sup> E347.3, HRW Report, ERN 01086030 (p. 23).

<sup>63</sup> E347.3, HRW Report, ERN 01086031 (p. 24).

<sup>64</sup> E347.3, HRW Report, ERN 01086032 (p. 25).

mass graves, it is highly possible that a significant number of deaths may have been incorrectly attributed to the events of the DK period.<sup>65</sup> The DC-Cam mapping project, on which the Trial Chamber has relied to estimate the number of mass graves in Cambodia and the total number of deaths supposedly caused by DK policies,<sup>66</sup> was initiated in 1995<sup>67</sup> – that is, six years after the termination of the K-5 programme. The DC-Cam mapping project did not involve any excavation or analysis of the alleged crime sites. It did not attempt to ascertain the date of death of the human remains allegedly buried in the graves. There is therefore reason to believe that a number of the mass graves identified by DC-Cam may contain the remains of people who died as a consequence of their participation in the K-5 programme. Chapter III of the HRW Report provides relevant information in that respect, notably an estimate of the total number of deaths caused directly and indirectly by the K-5 programme. It can assist the Chamber in ascertaining with an increased degree of accuracy the number of deaths caused by the events within its jurisdiction. It is clearly conducive to ascertaining the truth in Case 002/02, and it is therefore admissible under Rule 87(4) and (3).

27. It is also in the interests of justice to admit Chapter III of the HRW Report into evidence, as it is exculpatory. It can also usefully inform the public about the actual scale of the crimes charged.

**(ii) Chapter IX: ‘Hun Sen and the Subversion of the Khmer Rouge Tribunal’**

28. Chapter IX of the HRW Report discusses Prime Minister Hun Sen’s constant obstruction of, and exercise of undue influence in, ECCC proceedings. Denouncing ‘serious flaws in the set-up of the ECCC’,<sup>68</sup> the Report describes Hun Sen’s ‘control of the courts’<sup>69</sup> and his ability to ‘limit the scope of investigations’ by ‘instruct[ing] Cambodian personnel at the court’.<sup>70</sup> Noting that ‘investigations and trials for Khmer Rouge crimes could risk exposing the actions he and other former Khmer Rouge in the CPP took during the Khmer Rouge period’,<sup>71</sup> it highlights ‘conclusive evidence of the

<sup>65</sup> See, e.g., T. 6 Sep 2012 (E1/123.1), pp. 26:3 to 27:8; T. 25 Sep 2012 (E1/126.1), p. 94:7 to 95:18; T. 7 Dec 2012 (E1/150.1), pp. 75:22 to 78:16, and 94:9 to 96:7.

<sup>66</sup> See E313, ‘Case 002/01 Judgement’, 7 Aug 2014, para. 174.

<sup>67</sup> A description of the DC-Cam mapping project is available online at: <http://www.dccam.org/Projects/Maps/Mapping.htm>.

<sup>68</sup> E347.3, HRW Report, ERN 01086069 (p. 62).

<sup>69</sup> E347.3, HRW Report, ERN 01086065 (p. 58).

<sup>70</sup> E347.3, HRW Report, ERN 01086068 (p. 61).

<sup>71</sup> E347.3, HRW Report, ERN 01086067 (p. 60).

lack of the necessary political will on the part of Hun Sen and his government to allow an independent, impartial and fair tribunal'.<sup>72</sup>

29. The Report's findings are of crucial significance for the entirety of Case 002/02 and ECCC proceedings in general, as they give serious cause for concern over the impartiality and independence of the Trial Chamber and over its ability to uphold Nuon Chea's right to a fair trial. The right to be tried by an impartial and independent tribunal is at the heart of the right to a fair trial.<sup>73</sup> ECCC judges must be 'independent in the performance of their functions' and not 'accept or seek any instructions from any government or any other source'.<sup>74</sup> The manner of appointment of judges, the existence of safeguards against external pressure, and the question whether judges present an appearance of independence are central to the assessment of a tribunal's independence.<sup>75</sup> The information contained in Chapter IX of the Report indicates that those fundamental safeguards are constantly at risk of being violated in proceedings before the ECCC. As the Defence has argued on repeated occasions, this risk has been confirmed by ample evidence of the Chamber's lack of independence and judicial integrity.<sup>76</sup> Chapter IX of the HRW Report confirms that Nuon Chea cannot be afforded a fair trial before the Trial Chamber. It is of utmost significance for Case 002/02, and should be admitted into evidence.
30. Chapter IX of the HRW Report should also be admitted in the interests of justice. The proper consideration of this evidence is indispensable to avoid a miscarriage of justice, and it raises issues of significant public importance. It is essential that the Cambodian people be made aware of the context in which Nuon Chea's trial has been unfolding since its opening, and of the ability and willingness of the Cambodian government to uphold their fundamental rights.

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<sup>72</sup> E347.3, HRW Report, ERN 01086069 (p. 62).

<sup>73</sup> *Universal Declaration of Human Rights*, UN Doc. A/RES/217 (III), Article 10; *International Covenant on Civil and Political Rights*, 999 UNTS 171, Article 14(1); *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 UNTS 221, Article 6(1). See, also, *Prosecutor v. Furundžija*, Case no. IT-95-17/1, Appeal Judgment, 21 Jul 2000, para. 177.

<sup>74</sup> Law on the Establishment of the ECCC, Article 10 new.

<sup>75</sup> See, e.g., *Findlay v. United Kingdom*, 25 Feb 1997, app. no. 22107/93.

<sup>76</sup> E314/6, 'Nuon Chea Application for Disqualification of Judges Nil Nonn, Ya Sokhan, Jean-Marc Lavergne, and You Ottara', 29 Sep 2014. See, also, F16, Appeal, paras 40–79.

**V. RELIEF**

31. For the reasons stated above, the Defence requests the Trial Chamber to:

- RECONSIDER its decision of 29 June 2015 and ADMIT into evidence Chapter II of the HRW Report; and
- ADMIT into evidence Chapters III and IX of the HRW Report.

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