



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

ព្រះរាជាណាចក្រកម្ពុជា  
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia

Nation Religion King

Royaume du Cambodge

Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង

Trial Chamber

Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 002/19-09-2007/ECCC/TC

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**Before:** Judge NIL Nonn, President  
Judge Jean-Marc LAVERGNE  
Judge YA Sokhan  
Judge Claudia FENZ  
Judge YOU Ottara

**Date:** 2 June 2016  
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**DECISION ON NUON CHEA REQUEST TO RECONSIDER ADMITTING ONE EXTRACT AND TO ADMIT TWO ADDITIONAL EXTRACTS FROM THE HUMAN RIGHTS WATCH REPORT '30 YEARS OF HUN SEN'**

**Co-Prosecutors**  
CHEA Leang  
Nicolas KOUMJIAN

**Accused**  
NUON Chea  
KHIEU Samphan

**Civil Party Lead Co-Lawyers**  
PICH Ang  
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**Lawyers for the Defence**  
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## 1. INTRODUCTION

1. The Trial Chamber is seised of a request filed on 11 December 2015 by the NUON Chea Defence to 1) reconsider its Decision E347/1 of 29 June 2015 rejecting a request by the KHIEU Samphan Defence to admit Chapter II the Human Rights Watch Report titled “30 Years of Hun Sen: Violence, Repression, and Corruption in Cambodia” published in January 2015 (“HRW Report”) and 2) admit Chapters III and IX of the same HRW Report pursuant to Internal Rule 87(4).<sup>1</sup> The other Parties did not make submissions in response.

2. On 5 February 2016, the Chamber rejected the Request.<sup>2</sup> The Chamber hereby provides reasons for its decision.

## 2. SUBMISSIONS

3. The NUON Chea Defence submits that the correct standard for reconsideration covers not only new evidence or new circumstances, as previously ruled by the Trial Chamber, but also situations in which the initial decision was erroneous or caused an injustice. This broader standard for reconsideration has been adopted by the Pre-Trial Chamber and commonly applied at the ICTY.<sup>3</sup> The NUON Defence submits that both a clear error by the Chamber and a change in circumstances warrant reconsideration of Decision E347/1.<sup>4</sup> The Defence submits that the Trial Chamber erred in applying a stricter standard of scrutiny by carrying out an in-depth assessment of the probative value of Chapter II of the HRW Report, while Internal Rules 87(3) and 87(4) only require a *prima facie* assessment of relevance and reliability.<sup>5</sup> Regarding a change in circumstances, the Defence submits first that the postponement of the hearing of witnesses on the trial topic of the Treatment of the Cham, the death of proposed witness CHEA Sim in June 2015, and a pending decision on its request E370 to hear more witnesses on the same topic, have limited the Defence opportunities to examine witnesses and impaired its ability to present its case. The Defence also submits that

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<sup>1</sup> 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 Sean’, E347/2, 11 December 2015, para. 1 (“Request”).

<sup>2</sup> Decision on NUON Chea Request to Reconsider Admitting one Extract and to Admit two Additional Extracts from the Human Rights Watch Report ‘30 Years of HUN Sean’, E347/3, 5 February 2016, para. 2.

<sup>3</sup> Request, paras 12-13.

<sup>4</sup> Request, para. 15.

<sup>5</sup> Request, para. 16.

its arguments in support of the admission of Chapter II of the HRW Report are substantially different and more detailed than those advanced by the KHIEU Samphan Defence.<sup>6</sup>

4. The NUON Chea Defence also submits that Chapter II of the HRW Report meets the prima facie requirements of relevance and reliability set forth in Internal Rules 87(3) and 87(4) because the HRW Report was published in January 2015, after the opening of the trial, and provides credible and corroborated evidence suggesting that the troops under HUN Sen's command were involved in suppressing the Cham rebellions at Koh Phal and Svay Khleang. Finally, the NUON Chea Defence submits that Chapter II should be admitted in the interests of justice as it is potentially exculpatory for NUON Chea because it identifies East Zone military units as being responsible for crimes allegedly committed against the Cham in Svay Khleang.<sup>7</sup>

5. The NUON Chea Defence further seeks the admission into evidence of Chapter III and IX of the Report entitled 'Hun Sen and the "K5" Forced Labour Program' and 'Hun Sen and the Subversion of the Khmer Rouge Tribunal', respectively, pursuant to Internal Rules 87(3) and 87(4). The Defence asserts that the request is timely and that both chapters discuss issues relevant to Case 002/02. The Defence submits that Chapter III provides relevant information that may assist the Chamber in ascertaining the truth regarding the implementation of the K-5 programme conducted by the Cambodian government in 1984-1989. According to the NUON Chea Defence, thousands of Cambodians died during the construction of fortifications at the Thai-Cambodian border and these deaths must be distinguished from those resulting from crimes within the jurisdiction of the ECCC.<sup>8</sup> The NUON Chea Defence submits that Chapter IX discusses HUN Sen's obstruction of, and exercise of undue influence in the ECCC proceedings. The Defence asserts that the conclusions reached in the HRW Report are of crucial significance for Case 002/02 as they provide serious cause for concern regarding the impartiality and independence of the Trial Chamber and its ability to uphold NUON Chea's right to a fair trial.<sup>9</sup> Finally, the NUON Chea Defence submits that both Chapter III and IX must be admitted in the interests of justice as Chapter III is exculpatory and Chapter IX is indispensable for avoiding a miscarriage of justice.<sup>10</sup>

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<sup>6</sup> Request, paras 17-19.

<sup>7</sup> Request, paras 20-23.

<sup>8</sup> Request, paras 25-26.

<sup>9</sup> Request, paras 28-29, also referring to its Application E314/6.

<sup>10</sup> Request, paras 27, 30.

### **3. APPLICABLE LAW**

6. Pursuant to Internal Rule 87(4), the Trial Chamber may admit, at any stage of the trial, all evidence that it deems conducive to ascertaining the truth, provided that evidence also satisfies the *prima facie* standards of relevance, reliability and authenticity required under Rule 87(3). The Chamber determines the merit of a request to admit new evidence in accordance with the criteria in Rule 87(3). Rule 87(4) also requires that any party seeking the admission of new evidence shall do so by a reasoned submission. The requesting party must satisfy the Trial Chamber that the proposed evidence was either unavailable prior to the opening of the trial or could not have been discovered with the exercise of reasonable diligence. However, in certain cases, the Chamber has admitted evidence which does not strictly speaking satisfy this criterion, including in instances where evidence relates closely to material already before the Chamber and where the interests of justice require the sources to be evaluated together, and where the proposed documents are exculpatory and require evaluation to avoid a miscarriage of justice.<sup>11</sup>

### **4. FINDINGS**

#### **4.1. 'Reconsideration' of decision regarding Chapter II**

7. The Trial Chamber recalls that neither Cambodian law, which is the primary source of procedural law applicable to the ECCC, nor the Internal Rules, the purpose of which is to consolidate applicable Cambodian procedure and ensure that the procedural framework applicable to the ECCC is comprehensive and consistent with international standards,<sup>12</sup>

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<sup>11</sup> Trial Chamber memorandum entitled "Decision on NUON Chea's Rule 87(4) Request to Hear one Additional Witness for the Trial Topic on the Trapeang Thma Dam Worksite", E368/1, 22 October 2015, para. 3; and Trial Chamber "Decision on International Co-Prosecutor's Request to Admit Documents relevant to Tram Kok Cooperatives and Kraing Ta Chan Security Center and Order on Use of Written records of Interview from Case Files 003 and 004, E319/7, 24 December 2014, para. 8. *See also* Trial Chamber memorandum entitled "Decision on NUON Chea's Rule 87(4) Request for Admission of Six Statements and One Annex Relevant to Case 002/02", E319/30/1, 15 September 2015, para. 2; and Response to the Internal Rule 87(4) Request of the Co-Prosecutors, NUON Chea, and KHIEU Samphan (E236/4/1, E265, E271, E376, E376/1), E276/2, 10 April 2013, para. 2.

<sup>12</sup> *See* Internal Rules Preamble, last paragraph: "[...] the ECCC have adopted the following Internal Rules, the purpose of which is to consolidate applicable Cambodian procedure for proceedings before the ECCC and, pursuant to Articles 20 new, 23 new, and 33 new of the ECCC Law and Article 12(1) of the Agreement, to adopt additional rules where these existing procedures do not deal with a particular matter, or if there is uncertainty

foresee that it may reconsider its own decisions. The Chamber considers that the only remedy under the ECCC legal framework for alleged errors in reasoning in a Trial Chamber decision is an appeal to the Supreme Court Chamber. The NUON Chea Defence refers to international jurisprudence in support of its submission that the Trial Chamber does have a power of reconsideration. As provided under the Agreement<sup>13</sup>, the Chamber may seek guidance in procedural rules established at the international level only in closely prescribed circumstances, such as where existing procedures do not deal with a particular matter or where there is a question of consistency with international standards. The Chamber does not consider that such guidance must be sought in the instant case. The Chamber notes that the expeditiousness of trials and legal certainty were among the fundamental principles guiding the drafters of the Internal Rules.<sup>14</sup> In establishing a procedural framework with a view to facilitating the smooth and expeditious conduct of trials, the drafters chose to place strict limitations on which decisions could be subject to immediate appeal.<sup>15</sup> This approach stands in contrast to that established in the legal frameworks of the *ad hoc* Tribunals. Allowing reconsideration as requested by the Defence would not fit with the unique procedural framework for the ECCC as it would introduce uncertainty on the procedures established by the Chamber and cause unnecessary delays in the proceedings as the Chamber could be forced to revisit indefinitely its own decisions, thus running counter to the very same guarantees of expeditiousness and fairness that the drafters sought to protect. Accordingly, in line with its established jurisprudence, the Chamber rejects the NUON Chea Defence submission in this regard. The Chamber may, however, consider a request anew where a "fresh application justified by new evidence or new circumstances is made",<sup>16</sup> which will result in a new decision based on the new evidence or circumstances.

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*regarding their interpretation or application, or if there is a question regarding their consistency with international standards."* Internal Rules (Rev.9), p. 6.

<sup>13</sup> See Art. 12(1) of the Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea (ECCC Agreement); see also Art. 33 of the Law on the Establishment of the Extraordinary Chambers as amended.

<sup>14</sup> All provisions of the ECCC legal framework and in particular the Internal Rules "[...] shall be interpreted so as [...] to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC [...]". Further, according to Internal Rule 21 which lists the fundamental principles "*Proceedings before the ECCC shall be brought to a conclusion within a reasonable time*". See Internal Rule 21 (1) and (4).

<sup>15</sup> See Internal Rule 104(4).

<sup>16</sup> Trial Chamber memorandum entitled "Decision on KHIEU Samphan's urgent request for reconsideration of scheduling order of the substance of case 002/02", E314/5/3, 16 October 2014, para. 2; See also Trial Chamber memorandum entitled "Decision on the Co-Prosecutor's Request for Reconsideration of the decision regarding Admission of Newly Available United States Diplomatic cables (E282/2/1) and KHIEU Samphan's Response (E282/2/1/1), E282/2/1/2, 1 August 2013, para. 3; Trial Chamber memorandum entitled "Decision on KHIEU Samphan's Urgent Request for Clarification of the Trial Chamber Decision of 15 August 2013 relating to the

8. The Chamber will now assess whether the NUON Chea Defence has identified other new evidence or new circumstances that would now justify the admission into evidence of Chapter II of the HRW Report. The Chamber finds that the NUON Chea Defence has not demonstrated how the death of CHEA Sim, the rescheduling of witnesses or a delay in rendering a decision on issues related to the treatment of the Cham constitute new circumstances justifying a new decision on the matter. Regarding the latter two points, the Trial Chamber has informed the parties of its decision on request E370<sup>17</sup> and has heard sufficient evidence concerning this trial topic. The NUON Chea Defence have further failed to demonstrate that their arguments are substantially different from those previously advanced by the KHIEU Samphan Defence in its initial request. While more voluminous and detailed, the NUON Chea Defence's arguments are similar in substance to those of the KHIEU Samphan Defence in that they both submit that Chapter II contains relevant evidence regarding the alleged suppression of the Cham rebellion in 1975 in the East Zone and should therefore be admitted into evidence pursuant Internal Rules 87(3) and 87(4).

9. In the absence of new evidence or new circumstances, the Chamber rejects the Request to consider anew the admission into evidence of Chapter II of the HRW Report.

#### **4.2. Rule 87(4) request regarding Chapter III and IX**

10. As a preliminary matter regarding the request to admit Chapters III and IX of the HRW Report, the Trial Chamber finds that it was not timely filed. Although the HRW Report was published after the opening of the trial, it has been in the public domain since its publication in January 2015. In the approximately eleven months between its publication and the submission of the present request, the NUON Chea Defence failed to either submit its own request or to react to the KHIEU Samphan request to admit a limited part of this report. The

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Admissibility of Statements and Transcripts (E299/1), E299/2, 10 September 2013, para. 5; Trial Chamber "Decision on IENG Sary's request for Reconsideration of the Trial Chamber decision on the Accused's Fitness to Stand Trial and Supplemental Request, E238/11/1, 19 December 2012, paras 7-8; and Trial Chamber memorandum entitled "Decision on NUON Chea's Request that the Chamber not provide prior statements to Tuol Chrey witnesses before testifying (E292/2), E292/2/1, 27 June 2013, para. 4

<sup>17</sup> See Trial Chamber memorandum entitled "Decision on NUON Chea request to expedite two previously proposed witnesses and summons four additional witnesses during the Case 002/02 Trial Topic on the Treatment of the Cham with Written Reasons to Follow, E370/3, 18 December 2015; and Trial Chamber "Decision on NUON Chea request to expedite two previously proposed witnesses and summons four additional witnesses during the Case 002/02 Trial Topic on the Treatment of the Cham and on National Co-Prosecutor's Request to Admit Written Testimony in lieu of in-court appearance", E370/4, 25 March 2016.

Trial Chamber finds that the NUON Chea Defence should reasonably have been aware of the relevance of Chapters III and IX and thus failed to exercise due diligence in making its Request on time. The Trial Chamber will assess, however, whether it is nonetheless in the interests of justice to admit Chapters III and IX of the HRW Report.

11. Chapter III, entitled “Hun Sen and the ‘K5’ Forced Labour Program”, describes the K5 program, said to have involved “the mass mobilization of Cambodian civilians for labour on the Cambodia-Thai border and which led to the deaths of many thousands of Cambodians from disease and landmines”.<sup>18</sup> While the Chamber acknowledges that said program may have caused casualties, it observes that these events occurred in 1984-1989, a period that falls outside the jurisdiction of the ECCC. The Chamber further notes that the conclusions drawn by the HRW Report with regard to the number of alleged deaths that directly resulted from the K5 program are unsourced.<sup>19</sup> The Chamber finds that an unsupported estimation of the number of alleged deaths attributed to the implementation of the K5 program is unsuitable to establish any reliable distinction between these deaths from those directly resulting from crimes within the jurisdiction of the ECCC.

12. Chapter IX deals with allegations of government interference and alleged lack of impartiality in the ECCC proceedings which, the NUON Chea Defence submits, gives serious cause for concern over the impartiality and independence of the Trial Chamber. In this respect, the Chamber notes that no specific allegation is made by the NUON Chea Defence with respect to the current case: the interference alleged refers to obstacles in the investigation of Cases 003 and 004. The Chamber finds that Chapter IX thus fails to identify any tangible impact of the alleged interference in this case. Further, the Chamber recalls that the procedure for challenges to the impartiality and independence of judges is regulated by Internal Rule 34 (IR34). The Chamber notes that the NUON Chea Defence has previously filed an IR34 application in this case and that this was dismissed by majority decision.<sup>20</sup> Accordingly, the Chamber finds that Chapter IX does not contain any relevant information that could assist the Chamber in ascertaining the truth in Case 002/02.

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<sup>18</sup> HRW Report, p. 22.

<sup>19</sup> See HRW Report, p. 25.

<sup>20</sup> See Trial Chamber “Decision on Applications for the Disqualification of Trial Chamber Judges”, E314/12, 14 November 2014; and Trial Chamber “Reasons for Decision on Applications for Disqualification”, E314/12/1, 30 January 2015.

**FOR THE FOREGOING REASONS, THE TRIAL CHAMBER HEREBY**

**REJECTS** the new request to admit Chapter II of the HRW Report;

**REJECTS** the request to admit Chapters III and IX of the HRW Report.

**Phnom Penh, 2 June 2016**  
**President of the Trial Chamber**

