

**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: 03 March 2016



CLASSIFICATION

Classification Suggested by the Filing Party: CONFIDENTIAL
Classification of the Trial Chamber: សម្ងាត់/Confidential
Classification Status:
Review of Interim Classification:
Records Officer Name:
Signature:

**NUON CHEA'S RULE 87(4) REQUEST FOR ADMISSION INTO EVIDENCE OF
17 DOCUMENTS RELEVANT TO ALEXANDER LABAN HINTON'S TESTIMONY
(2-TCE-88)**

Filed By

Nuon Chea Defence Team:
SON Arun
Victor KOPPE
LIV Sovanna
PRUM Phalla
Doreen CHEN
Xiaoyang NIE
Marina HAKKOU
Léa KULINOWSKI

Distribution

Co-Lawyers for Khieu Samphân:
KONG Sam Onn
Anta GUISSÉ

Co-Prosecutors:
CHEA Leang
Nicholas KOUMJIAN

Co-Lawyers for the Civil Parties:
PICH Ang
Marie GUIRAUD

I. INTRODUCTION

1. Pursuant to Rule 87(4) of the ECCC Internal Rules, the Co-Lawyers for Mr Nuon Chea (hereinafter, the “Defence”) submit this request to have admitted into evidence 17 documents in order to use them during the examination of Alexander Laban HINTON (2-TCE-88) (“Mr Hinton”). The requested documents relate to Mr Hinton’s background, independence and impartiality, as well as the treatment of Vietnamese and Buddhists. Their admission into evidence would permit the Defence to challenge Mr Hinton’s expertise as well as his book,¹ and would therefore be conducive in establishing the truth.

II. APPLICABLE LAW

2. All evidence is admissible, unless otherwise provided in the Internal Rules.² The Chamber may reject a request for evidence where it finds that the evidence is irrelevant or repetitious; impossible to obtain within a reasonable time; unsuitable to prove the facts it purports to prove; not allowed under the law, or if it is intended to prolong proceedings or is frivolous.³ To satisfy the requirements of Rule 87(3), the proposed evidence needs only be *prima facie* relevant and reliable.⁴ 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”, subject to the general requirements of Rule 87(3).⁵ While Rule 87(4) states that the requested evidence must not have been available before the opening of the trial, the Trial Chamber has been interpreted it as also encompassing evidence which was available before the opening of the trial but which could not have been discovered earlier with the exercise of due diligence can be admitted.⁶
3. In certain situations, evidence which did not “strictly speaking” satisfy this criterion has been admitted: where the evidence was closely related to material already before the

¹ **E3/3346**, Alexander Hinton, *Why Did They Kill?*

² Rule 87(1) of the Internal Rules.

³ Rule 87(3) of the Internal Rules.

⁴ **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. 26 (“Decision on Rule 87(4) Requests”).

⁵ A year into the Case 002/02 trial, the TC held that the parties must submit Rule 87 (4) Requests for documents which were on the case file but which had not been included in the list of documents admitted by the Trial Chamber, even if those had been disclosed by the Prosecution subsequently to the initial documents filings, *see* Draft transcripts of 26 Jan 2016, p. 24.

⁶ **E313**, ‘Case 002/01 Judgement’, 7 Aug 2014, para. 25; **E289/2**, Decision on Rule 87(4) Requests, para. 3.

Chamber and where the interests of justice required the sources to be evaluated together; where the proposed evidence is exculpatory and requires evaluation to avoid a miscarriage of justice, or where the other parties do not object to the evidence.⁷

III. ARGUMENTS

A. Overview of the Documents

(i) *Documents Related to Mr Hinton's Background and Methodology*

4. Document 1 is Mr Hinton's CV as of 2012, as available on the website of the Rutgers-Newark University (USA) where Mr Hinton is a professor.⁸ It is contained in **Public Attachment 1** and contains a list of the academic positions he held or is holding, his education, his fieldwork, the publications he authored or edited as well as the various lectures, workshops and conferences which he attended. It shows Mr Hinton's background and expertise, which are relevant to his nomination as an expert witness in the present case. In addition, the list of publications and lectures, workshops and conferences illustrate Mr Hinton's area of expertise, namely the underlying social causes for the commission of massive crimes (which he qualifies as genocide for Cambodia) by ground perpetrators, the social context of the commission of such crimes, as well as their impact on victims. The CV also shows that later on in his career, Mr Hinton undertook an analysis on victims of mass crimes and their search for justice, including the origins, role and limitations of transitional justice. Importantly, Mr Hinton's CV shows that his area of expertise does not include the treatment of Cambodia's minorities – in particular Vietnamese and Buddhists – during the Democratic Kampuchea period ("DK period"), nor does it include the structure of the DK or the operations of S-21 – which the OCP had listed in its witness list. Document 1 is therefore relevant to establishing the scope of Mr Hinton's expertise.
5. Document 2 is an excerpt of the third volume of *The Encyclopedia of Genocide and Crimes Against Humanity* published in 2005, wherein Mr Hinton defines "cultural anthropology" (**Public Attachment 2**). In particular, Mr Hinton holds that "[a]nthropology, the study of human beings through time and across place, is characterized by the concept of culture, a particular set of methods (ranging from anatomical analysis to ethnographic fieldwork), and a holistic perspective". The

⁷ E289/2, Decision on Rule 87(4) Requests, para. 3.

⁸ Source: <http://dga.rutgers.edu/wp-content/uploads/2012/10/HintonCV.DGA10.28.12.pdf>.

document is relevant to understanding Mr Hinton's background and area of expertise and is therefore assists in understanding Mr Hinton's approach to the events which took place during the DK period.

6. Document 3 is an article written by Volodymyr Dibrova in the Ukrainian Weekly of 30 June-7 July 2013 and entitled "Mapping the Great Famine: a new project at Harvard" (**Public Attachment 3**). The author reproduces part of an interview he had with Mr Hinton regarding the field of "genocide studies". He writes that:

Prof. Hinton noted that, apart from the inevitable methodological, tactical and logistical problems that arise at every stage of data-gathering, the difficulty of verifying the reliability of sources, evaluating statistics and comparing official documents with the testimonies of eyewitnesses, genocide studies are further complicated by purely political considerations.⁹

7. The document highlights the inherent uncertainties regarding the field of expertise of Mr Hinton – anthropology – and underlines that any factual statement made by Mr Hinton must be approached with these limitations in mind.

(ii) Documents Related to Mr Hinton's Lack of Neutrality and Objectivity

8. Document 4 is a list of the board of directors and advisors to the Documentation Center of Cambodia ("DC-Cam") as of February 2016, originating from the official DC-Cam website.¹⁰ Mr Hinton is listed as an "associate advisor" since 2004. Document 5 is an overview of the Cambodian Genocide Memory Project, a collaborative project between the Center for the Study of Genocide and Human Rights (created and directed by Mr Hinton) and DC-Cam. The project "explores both the origins and dynamics of the Cambodian genocide as well as the ways in which Cambodians have remembered, coped with, and sought truth, justice, and reconciliation after the Khmer Rouge atrocities".¹¹ The documents are contained in **Public Attachments 4 and 5**. Both documents illustrate the connection between Mr Hinton – who, as an expert, is under an obligation to testify with the utmost neutrality and objectivity¹² – and DC-Cam, an NGO which takes the position that a genocide occurred in Cambodia at this time. They demonstrate that Mr Hinton is unable to provide neutral or independent evidence as

⁹ Public Attachment 3, p. 2.

¹⁰ Source: <http://www.dccam.org/Abouts/Board/Board.htm>.

¹¹ Source: <http://www.ncas.rutgers.edu/center-study-genocide-conflict-resolution-and-human-rights/cambodian-genocide-memory-project>.

¹² **E215**, 'Decision on Assignment of Experts', 5 Jul 2012, para. 15 ("Experts Decision"); see also *Prosecutor v Nahimana et al*, Case No. ICTR-99-52-A, Appeals Judgement, 28 Nov 2007, para. 199; *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Decision on Expert Status of Reynaud Theunens, 12 Feb 2008, para. 29.

first, his evidence may be influenced by his collaboration with DC-Cam and therefore not be objective, and second, it is unlikely that Mr Hinton will take a position that differs from that of his associates in order not to endanger their close cooperation or common interests. Documents 4 and 5 are therefore relevant to Mr Hinton's expertise, bias and independence.

9. Document 6 is a welcome statement from Mr Hinton regarding the Center for the Study of Genocide and Human Rights¹³ which he created in 2007.¹⁴ It is contained in **Public Attachment 6**. Welcoming people who are taking interest in the Center, Mr Hinton provides some insight on his personal motivations for creating the Center:

My own path to establishing the Center dates back to the 1990s, when I travelled to Cambodia as a graduate student in anthropology. There, **I witnessed first-hand the effects of genocide** and made a commitment not just to conduct scholarly research into the origins and effects of such violence, but to seek ways to prevent it by raising awareness and undertaking educational initiatives. (Emphasis added)

10. This statement provides valuable insight into Mr Hinton's views on the DK period and the underlying motivations for his research. It further demonstrates that Mr Hinton has already concluded that a genocide occurred during the DK period, despite the fact that expert witnesses must not express opinions on ultimate issues of fact, a role which is reserved for the Trial Chamber.¹⁵ Further, it also illustrates Mr Hinton's "emotional involvement" which the subject-matter area on which he is supposed to testify – since what he calls the "effects of genocide", a charge in the present case, led him to dedicate his life to the subject, therefore possibly precluding him from testifying in a neutral and objective manner.¹⁶
11. Document 7 is an article published on Rutgers-Newark University's website on Mr Hinton, entitled "Hinton helped bring one of two major American archives of Khmer Rouge-related documents to the R-N Campus in 2005" (**Public Attachment 7**).¹⁷ It describes how Mr Hinton has helped put into place an agreement which, according to the article, "brought one of two major American archives of Khmer Rouge related documents to the RN [Rutgers-Newark] campus in 2005" which, *inter*

¹³ Source: <http://www.ncas.rutgers.edu/center-study-genocide-conflict-resolution-and-human-rights/directors-welcome>.

¹⁴ Source: <http://www.ncas.rutgers.edu/center-study-genocide-conflict-resolution-and-human-rights/about-us>.

¹⁵ E215, Experts Decision, para. 16.

¹⁶ See *supra*, fn 6.

¹⁷ Source: <http://www.newark.rutgers.edu/about-us/have-you-met-rutgers-newark/alex-hinton>.

alia, “helped [...] U.N. officials – who prosecuted those involved in the killing fields”.¹⁸ It therefore appears that Mr Hinton may have been directly involved in collecting or gathering evidence which was later used at the ECCC – a role which is not mentioned anywhere in his CV – and which has the potential to severely impact Mr Hinton’s neutrality and independence as an expert witness. Indeed, while mere employment by a party to the proceedings does not preclude an individual from testifying as an expert, the ICTY held that an individual who, as a result of the “particular circumstances of his involvement in the investigation and preparation of the Prosecution’s case” was “too close to the Prosecution presenting the case to be regarded as an expert”, would not bear the appearance of impartiality on which the Trial Chamber could rely.¹⁹ Since no further information is contained in the article, it is necessary for the Defence to be able to examine Mr Hinton on this topic, on the basis of Document 7, in order to test his objectivity, neutrality and independence.

12. Document 8 is Mr Hinton’s biography as prepared by the Rutgers-Newark University (**Public Attachment 8**). According to his university’s website, Mr Hinton is currently working on two book projects related to the ECCC (referred to as the “Khmer Rouge tribunal”). The first of these books, *Man or Monster? The Trial of a Khmer Rouge Torturer*, should be published later this year by Duke University Press.²⁰ The mere title of the book gives the impression that Mr Hinton is unable to look at the trial at the ECCC in an objective and non-sentimental manner. While his on-going book is related to Case 001, there is an overlap between the *Duch* case and Case 002/02 regarding S-21. Further, Mr Hinton’s work on the preparation of this book is relevant to establishing whether – by looking so closely as the first trial, the ECCC and underlying evidence – Mr Hinton is able to provide expert witness testimony in case 002/02 with the requisite neutrality and objectivity. Finally, as the subject matter of the second book is not mentioned, the question remains open as to whether Mr Hinton intends to write a book on the present trial – something which could influence his ability to testify as an expert or the contents of his testimony.

¹⁸ Public Attachment 7, p. 2.

¹⁹ *Prosecutor v. Milutinović et al.*, Case IT-05-87-T, Transcripts of 13 July 2006, T.840-841; *Prosecutor v. Milutinović et al.*, Case IT-05-87-T, Decision on Prosecution Request for Certification of Interlocutory Appeal of Decision on Admission of Witness Philip Coo’s Expert Report, 30 August 2006, para. 10; *Prosecutor v. Dordević*, Case IT-05-87/1-T, Decision on Defence Notice on Rule 94bis, 5 March 2009; *see also Prosecutor v. Taylor*, Case SCSL-03-1-T, Decision on Defence Application to Exclude the Evidence of Proposed Prosecution Witness Corinne Dufka or, in the Alternative, to Limit Its Scope and on Urgent Prosecution Request for Decision, 19 June 2008.

²⁰ Source: <http://www.ncas.rutgers.edu/center-study-genocide-conflict-resolution-and-human-rights/alex-hinton>.

13. Document 9 is an article written by Mr Hinton entitled “Begrudgement, reconciliation and the Khmer Rouge”, published in DC-Cam’s *Searching for the Truth* issue N. 20 of August 2001. It is contained in **Public Attachment 9**. In this publication, Mr. Hinton makes a number of statements regarding the guilt of the Accused. He refers to Pol Pot, Ieng Sary, Nuon Chea, Khieu Samphan, Son Sen and the other top leaders of the DK as “genocidal perpetrators”.²¹ He also describes what he calls Khmer Rouge “genocidal policies”,²² and mentions “the top leaders of the KR who implemented this policy of genocide”.²³ Document 9 clearly shows that Mr Hinton has already prejudged core elements related to the guilt of the Accused in the present case – the existence of so-called genocidal policies, and the role of the Accused therein – thereby demonstrating his bias and rendering it impossible for him to provide neutral and objective evidence. Further, the article demonstrates that Mr Hinton fails to provide any factual or documentary support for his far-reaching claims. It is therefore also relevant to his methodology and the overall reliability of his book.
14. Document 10 is an article entitled “Why did they kill (1)?” authored by Mr Hinton and published in the Phnom Penh Post on 7 October 2005 (**Public Attachment 10**). Therein, Mr Hinton unequivocally states that in his view, there has been a genocide in Cambodia during the DK period, in both the sense of the Genocide Convention and in a broader sense.²⁴ He also explains the purpose of his book:

To understand the Cambodian genocide, we must focus on these circumstances – in other words, on the larger historical context in which the mass violence came to take place. My book provides a framework for understanding the process by which genocide comes to take place, what I refer to as “genocidal priming”. [...] Genocidal priming includes such processes as socioeconomic upheaval, the rise to power of ideologues seeking to radically re-engineer society, the reorganization of society in a manner that makes the dehumanization, disempowerment, and eventual extermination of victim groups easier, the emergence of an ideology of hate that legitimates such killing, and so forth.²⁵

15. Like Document 9, Document 10 illustrates the bias of Mr Hinton regarding core issues of the case and his inability to provide neutral and objective evidence as required by his status as an expert witness. Further, it also highlights the importance of the greater historical context in order to understand what happened during the DK period. It is relevant to both Mr Hinton’s expertise and to the weight to be given to his evidence.

²¹ Public Attachment 9, p. 30.

²² Public Attachment 9, p. 25.

²³ Public Attachment 9, p. 25.

²⁴ Public Attachment 10, p. 1.

²⁵ Public Attachment 10, p. 2.

16. Document 11 is an article published by Mr Hinton in the *Phnom Penh Post* on 27 June 2011 and entitled “Opinion: Is there justice in Cambodia?” (**Public Attachment 11**). Discussing Case 002/01, Mr Hinton writes that “[t]he Closing Order for case two gives a taste of what is to come. This 772-page document details how the **Khmer Rouge [sic] leaders** centralised control and operated **their machine of terror and death.**”²⁶
17. Document 12 is an article written by Tom Fawthrop for *Al-Jazeera*, entitled “Time running out for Khmer Rouge tribunals” and dated 22 April 2013 (**Public Attachment 12**). Mr Hinton, asked about Cambodia and the ECCC following the death of Ieng Sary, called the DK regime “a regime that had committed genocide”.²⁷
18. Both documents 11 and 12 highlight that Mr Hinton has already pre-judged key elements of the case – the existence of a genocide and the guilt of the Accused – which demonstrate his bias. The documents support the Defence’s argument that Mr Hinton is not in a position to assist the Court in a neutral and objective manner and that therefore, his evidence (including his book) should be given no weight.

(iii) Documents Related to the Treatment of Vietnamese and Buddhists

19. The Defence has consistently asserted that there has never been a policy to destroy Vietnamese or Cham or to target Buddhists during the DK period (or a policy to commit crimes for this matter). It has explained the existence of a plan to overthrow the CPK leadership which was being plotted at various levels of the CPK, including by high level individuals such as Sao Phim, Ruos Nhim, Vorn Vet and Koy Thuon, who were supported by Vietnam. Individuals were arrested on the basis of reasonable reasons to believe that they were involved in treason, irrespective of their ethnical or religious background.²⁸ Since Mr Hinton’s book discusses the relations between Vietnam and Cambodia and their impact on the treatment of Vietnamese during the DK period,²⁹ the Defence would like to question him on it and on the importance and impact of the historical relations between Cambodia and Vietnam.

²⁶ Emphasis added.

²⁷ Public attachment 12, p. 4.

²⁸ See, **F2/8**, ‘Nuon Chea’s Sixth Request to Consider and Obtain Additional Evidence in Connection with the Appeal against the Trial Judgement in Case 002/01’, 11 Sep 2015, paras 23-69.

²⁹ **E3/3346**, Hinton, *Why Did They Kill?* pp. 213-220 (ERN EN: 00431655-00431662).

20. Document 13 is a publication by Mr Hinton entitled “Transitional Justice Time: Uncle San, Aunty Yan, and the Khmer Rouge Tribunal”, which was published in the book *In Genocide and Mass Atrocities in Asia: Legacies and Prevention* edited by Deborah Mayerson and Annie Pohlman, Routledge, 2013. It is contained in **Public Attachment 13**. In this article, Mr Hinton discusses transitional justice and its impact on victims, through the example of the ECCC and Cambodia. Mr Hinton notes that transitional justice has a tendency to “erase historical and sociocultural complexities”.³⁰ He writes that, at the ECCC:

What happened prior to 1975 and between 1979 and 2003 is flattened and erased, a temporal erasure that is one of the hallmarks of dichotomous transitional justice time. In other words, transitional justice time de-historicizes, in contrast to the truth claim with which it is often associated. We learn nothing of the origins or the immediate aftermaths of the conflict, such as the Viet Nam War or the geopolitical politics that helped civil war until the late 1990s.³¹

He further notes that:

Despite the oft-heard claims that the Khmer Rouge Tribunal will reveal 'the truth', transitional justice time involves erasures as a broader understanding of Cambodian society, history and geopolitics – factors that provide the critical backdrop and aftermath of the genocide – disappear from sight, diminishing understanding and producing an eclipsed truth.³²

21. Mr Hinton concludes that:

To seek to unpack the assumptions of transitional justice is not simply to dismiss it. It is to engage in a 'critical transitional justice studies'[sic] that allows us to recognize the gaps within and shadows behind that which is assumed and naturalized. In particular, this imaginary has a tendency to erase historical and sociocultural complexities, ones that are directly relevant to the presumed normative goods of 'truth', 'prevention', and 'understanding the past' that are so often asserted in transitional justice rhetorics. Even for a strong supporter of transitional justice initiatives, such understanding is crucial, for it suggests alternative ways in which such mechanisms for dealing with the legacies of the past might unfold. To ignore such critical thinking is to risk remaining, like the initial construction of Uncle San, caught, unknowing, in the webs of the transitional justice imaginary.³³

22. Document 14 is an article that was written by Mr Hinton in 2014, entitled “Justice and time at the Khmer Rouge Tribunal: in memory of Vann Nath, painter and S-21 survivor”. It was published in *Genocide Studies and Prevention*, an international journal and is contained in **Public Attachment 14**. Mr Hinton looks at the participation of Vann Nath – a former S-21 prisoner – in the *Duch* trial at the ECCC, and Mr Vann’s

³⁰ Public Attachment 13, p. 96, second paragraph.

³¹ Public Attachment 13, p. 91-92.

³² Public Attachment 13, p. 92, second paragraph.

³³ Public Attachment 13, p. 96, second paragraph.

perception of it. During his analysis, Mr Hinton takes the position that the temporal jurisdiction of the ECCC was limited in order not to frustrate the United States, and that its personal jurisdiction was limited in order not to include Cambodian officials who are currently in power:

The agreement to form the ECCC, which took years to broker, included a limited temporal jurisdiction (“17 April 1975 to 6 January 1979”) that would satisfy the United States and China, superpowers implicated in the origins, dynamics, and aftermaths of the conflict, and a personal jurisdiction (“senior leaders” and those “most responsible”) acceptable to Cambodian officials who wanted to avoid an expanding series of investigations that could imperil peace or even implicate current leaders, many of whom are former Khmer Rouge.³⁴

Besides eliding sociohistorical dynamics linked to the rise of the Khmer Rouge, like the Vietnam War and the U.S. bombing of the Cambodian countryside, this temporal jurisdiction erases other key events, such as the fact that, after being deposed, the Khmer Rouge were rearmed by the U.S., China, and other powers due to geopolitics. Indeed, the Khmer Rouge were even given Cambodia’s seat at the UN. It was only after the 1993 UN elections in Cambodia that many foreign government officials began to speak of the mass violence committed by the Khmer Rouge – as opposed to using euphemisms (for example, “the unfortunate events of the past”) as they had often done during the Cold War. Such events are too often omitted in juridical time, which prefers discrete intervals (the time and place of criminality), efficiency and parsimony (in terms of juridical process), and progress (toward a verdict with its attendant qualities, closure and evidentiary truth).³⁵

23. Mr Hinton takes the position that the limitation on the temporal jurisdiction of the ECCC results in an incomplete picture of events, going against its established aim to establish the truth:

Time, however, constitutes a much bigger backdrop at the ECCC and is directly linked to the ways in which truth and knowledge are produced in the court. One of the most obvious illustrations of this point is temporal jurisdiction. The ECCC is authorized to examine mass human rights violations that took place while the Khmer Rouge were in power – not before and not after. **As opposed to seeking a deeply historicized understanding of the genocide, the court provides a temporally limited one.**³⁶

The Duch trial, for example, did reveal new things about the operation of S-21 but, by focusing on the years of Khmer Rouge rule in Cambodia, **the case ultimately produced a “truth” bleached of historical process** and an understanding of the factors that enabled the Khmer Rouge to rise to power.³⁷

For if one key objective of a tribunal is to reveal the truth that has been hidden by the politics of memory, then why not explore the structural and historical roots of the genocide and the ways in which it is linked to geopolitics?³⁸

³⁴ Public Attachment 14, p. 11, fifth paragraph.

³⁵ Public Attachment 14, p. 11, sixth paragraph.

³⁶ Public Attachment 14, p. 10, Juridical Time, second paragraph. Emphasis added.

³⁷ Public Attachment 14, p. 11, third paragraph. Emphasis added.

³⁸ Public Attachment 14, p. 11, fourth paragraph. Emphasis added.

24. Mr Hinton concludes that “[t]he temporal jurisdiction of the KRT [Khmer Rouge Tribunal] highlights this point, as complicated pasts are backgrounded even as truth claims are made. This temporal foreshortening is paradoxical, for, according to its own logic, truth is required for closure yet **the temporal modality of transitional justice is one of shrinkage and thus a truncated history.** In the end, such insights ask us to critically reflect upon the presuppositions of transitional justice and ask what sorts of truths are produced and for what reasons.”³⁹
25. Documents 13 and 14 relate to the Defence’s position that truth cannot be achieved without an in-depth analysis of the history of Cambodia. This is particularly true regarding the charges related to the treatment of Vietnamese, given the Defence’s position is that Vietnam sponsored an internal rebellion within Cambodia in order to fulfil its long term historical aim of absorbing Cambodia into an Indochinese Federation and that involvement in this rebellion motivated the arrests of certain individuals during the DK regime. Since Mr Hinton is, according to the Trial Chamber, an expert on the treatment of Vietnamese, the Defence wishes to examine him on the topic. Further, these documents are also relevant to establishing context for Mr Hinton’s research in Cambodia and the preparation of his book *Why Did They Kill?*
26. Document 15 is an article written by William A. Schabas in 2001, entitled “Problems of International Codification – were the atrocities in Cambodia and Kosovo Genocide?” It can be found in **Public Attachment 15**. Mr Schabas, a well-known human rights law and international criminal law professor, discusses the existence of genocide – in the legal sense - in Cambodia during the DK period. He takes the position that crimes committed as part of a political objective do not generally qualify as genocide:
- Destruction of cultural institutions and forced assimilation are very effective techniques for destroying religious or ethnic groups. They are prohibited by international law. The problem here is that these are not acts of genocide within the scope of article II of the Convention.⁴⁰
27. Document 15 therefore contradicts Mr Hinton’s position that a genocide took place in Cambodia, and supports the Defence’s position that allegations regarding the treatment of Cham or Vietnamese do not fall within the scope of the Genocide Convention.

³⁹ Public Attachment 14, p. 13, fourth paragraph. Emphasis added.

⁴⁰ Public Attachment 15, p. 291.

28. Document 16 is an article headed “Seeking justice in the killing fields” written by Mr Hinton and published in *The New York Times* on 31 May 2006. It is contained in **Public Attachment 16**. Mr Hinton discusses the establishment of the ECCC, raising a number of concerns including funding, age of the defendants, and its independence. Mr Hinton notes that:

There are serious concerns that the legal personnel do not have sufficient training or independence, raising the possibility that the tribunal will be manipulated by the Cambodian leadership and will fail to meet international legal standards. These concerns were heightened when the list of judicial officials was found to include judges who have close ties to Prime Minister Hun Sen's Cambodian People's Party (CPP), including an army general who is reported to be a member of the CPP's central committee and has presided over two trials that, under questionable circumstances, led to the conviction of political opponents.

29. Document 16 is relevant to Nuon Chea's fair trial rights. The Defence has consistently challenged the legitimacy and bias of the ECCC, which impacts on nearly every single aspect of the case. Mr Hinton, whom the Trial Chamber considers as an expert and who has spent years working on the causes and consequences of the DK period, including on matters related to justice for victims, could provide valuable information detailing what those impacts are and describing the shortcomings of transitional justice's search for the truth generally.
30. Document 17 is a description of a conference on *The Limits of Memory* which took place on 6 March 2010 and where Mr Hinton made a presentation on “juridical memory at the ECCC”. It is contained in **Public Attachment 17**. While the content of Mr Hinton's presentation is unavailable, the subject matter of the conference is described as “[e]very act of remembering also implies selective forgetting and reconstruction of the past, often according to present political or cultural needs. This conference addresses some of the limits to theories and practices of memory, focusing on how the uses and abuses of memory are often intimately tied together.” It is the position of the Defence that individuals who lived in stressful conditions, during war time, and often suffered traumatic events, cannot remember those events and details in a way that would be sufficient to provide a basis to establish guilt beyond reasonable doubt. Further, the Defence also submits that individual memories may in some instances be replaced by a “collective memory” through extensive outreach and dissemination of a public, one-sided, oversimplified story of the DK period which ignores the historical background, the role of Vietnam and the US, and diabolises the CPK.

31. The Defence submits that the document is relevant to serve as a basis for questioning Mr Hinton on the contents of his presentation, and particularly on the question of trauma and the accuracy of the memory of individuals who lived through the DK regime. Indeed, given that Mr Hinton's work focuses on the sociological and anthropological aspects of "victims" as illustrated by his numerous publications on the matter, and particularly the trauma they suffered and their participation in transitional justice,⁴¹ he could provide valuable insight into the question of collective memory and the impact of trauma on memory, issues closely linked with witnesses' credibility and the accuracy of evidence. Further, as illustrated by Documents 13 and 14 above, Mr. Hinton is of the view that analysing the historical and cultural background in Cambodia is crucial to understanding the crimes committed during the DK regime, including those alleged against Vietnamese and Buddhists. Finally, Documents 16, 17 and 18 can also provide context relevant in assessing Mr Hinton's book and his upcoming testimony.

B. The Documents Were Not Available Prior to the Start of the Trial or Should be Admitted Into Evidence in the Interests of Justice

32. The Trial Chamber held that the trial in Case 002/02 commenced in June 2011.⁴² On 12 February 2016, the Trial Chamber informed the parties that Mr Hinton was to testify during the week of 14 March 2016.⁴³ On 24 February 2016, the Trial Chamber ruled that Mr. Hinton would be called as an expert witness to testify on "on all matters within his knowledge or expertise primarily relevant to the Treatment of the Vietnamese and the Buddhists in Case 002/02".⁴⁴ In short, the parties did not know that Mr Hinton would appear as a witness in the present case until three weeks ago, and were unaware of the scope of his testimony until last week.

33. Documents 1, 3, 4, 5, 8, 11, 12, 13 and 14 were created after 2011 and were therefore not available prior to the start of the trial. While Documents 2, 6, 7, 9, 10, 15, 16 and 17 were available prior to the start of the trial, the Defence could not have anticipated using them since it was unaware that Mr Hinton would appear as a witness and did not know the scope of his expertise until very recently.

⁴¹ See Public Attachment 1, Publications.

⁴² 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.

⁴³ Email from the Trial Chamber Senior Legal Officer to the Parties, 12 Feb 2016.

⁴⁴ Email from the Trial Chamber Senior Legal Officer to the Parties, 24 Feb 2016.

34. Further, all but one⁴⁵ of the documents are either publications from Mr Hinton or publications reporting what Mr Hinton allegedly stated. They are closely related to material already before the Chamber, including Mr Hinton's book *Why Did They Kill*.⁴⁶ Further, documents 1 to 12 are related to Mr Hinton's background and expertise, and documents 13 to 17 are related to the substance of his expected evidence. All requested documents therefore go to the probative value of his book as well as that of the evidence he will give in Court. Their admission to the case file will therefore be conducive of the ascertainment of the truth.

C. The Documents are Relevant to Case 002/02

35. All the requested documents relate to the allegations regarding the treatment of the Vietnamese and the charges of genocide.⁴⁷ Further, since Mr Hinton has been appointed as an expert witness by the Trial Chamber, he is bound to testify on all matters within his knowledge or expertise primarily relevant to the Treatment of the Vietnamese and the Buddhists in Case 002/02 with the utmost neutrality and objectivity.⁴⁸ As an expert witness, Mr Hinton may not express opinions on ultimate issues of fact.⁴⁹ Documents 1 to 12 touch upon his background, expertise and bias and are therefore directly relevant to his appointment as an expert.
36. Documents 4 to 12 demonstrate that Mr Hinton has already reached his conclusion as to the fundamental issues of the case – namely that there has been a genocide in Cambodia and that the Accused played a significant role in it, including by intending it – and therefore provided conclusions ultimate issues of fact. This prevents him from testifying in a neutral and objective manner and demonstrates that Mr Hinton's expert evidence is tainted and that therefore, no weight should be given to it.
37. Finally, documents 13 to 17 relate to the treatment of Vietnamese and other minorities during the DK regime. As stated above, they provide historical context for the charges related to the treatment of Vietnamese and other minorities, and are also relevant to establishing context for Mr Hinton's research in Cambodia and the preparation of his book *Why Did They Kill?* which discusses the relationship between Vietnam and

⁴⁵ Document 15.

⁴⁶ E3/3346, Hinton, *Why Did They Kill?*.

⁴⁷ D427, 'Closing Order', 15 Sep 2010, paras 740-744 (Treatment of Buddhists) and 791-841 (Treatment of Vietnamese).

⁴⁸ E215, Experts Decision, para. 15.

⁴⁹ E215, Experts Decision, para. 16.

Cambodia.⁵⁰ Document 15 also supports the Defence's position that there was no policy to destroy minorities – be them Cham, Vietnamese or Buddhist – in Cambodia during the DK period.

38. The Defence recalls that in the case of a similar request regarding Expert Witness Ysa Osman, the Co-Prosecutors did not oppose the admission into the case file of documents which had been authored by the witness.⁵¹

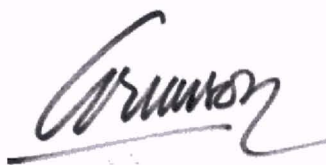
D. The Documents are Reliable and Authentic

39. All documents bear *prima facie* indicia of reliability. Documents 1, 5, 6, 7 and 8 were obtained from the official website of the Rutgers-Newark University, where Mr Hinton is a professor. Documents 2, 9-11, 13-14 and 17 have been written by Mr Hinton and/or are listed on his CV as publications. Document 4 was obtained from the official website of DC-Cam. Document 15 was authored by William Schabas, a well-renowned legal scholar. Finally, documents 3, 12 and 15 were published in well-known newspapers: the *Ukrainian Weekly*⁵² and *Al-Jazeera*.⁵³

IV. RELIEF

40. For the reasons stated above, the Defence respectfully requests the Trial Chamber to admit the 17 above mentioned documents into evidence in Case 002/02.

CO-LAWYERS FOR NUON CHEA



SON Arun



Victor KOPPE

⁵⁰ E3/3346, Hinton, *Why Did They Kill?* pp. 215-220 (ERN EN: 00431657-00431662).

⁵¹ T. 3 Feb 2016 (Objections to Nuon Chea Rule 87 Request, E1/387.1), pp. 104-105 (“this and a couple of the other documents that contain statements of the witness we would not object to and we could see, obviously, their relevance and it could help the Trial Chamber in the search for the truth to have those admitted. We don't object”); pp. 106-107 (“For Attachment 4, is again a document authored by the witness, so we think it's proper to include that and it'll be helpful to the Trial Chamber.”). See also E367/7, ‘Decision on NUON Chea's requests for admission of documents relevant to the testimony of 2-TCE-95’.

⁵² Source: <http://www.ukrweekly.com/uwwp/archive/>.

⁵³ Source: <http://www.aljazeera.com/indepth/features/2013/04/201341891039959566.html>.