

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

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NUON CHEA'S REQUEST FOR INVESTIGATIVE ACTION (REQUEST FOR DOCUMENTS) IN RELATION TO ALEXANDER LABAN HINTON (2-TCE-88)

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I. INTRODUCTION

1. Pursuant to Rule 93 of the Internal Rules, the Co-Lawyers for Mr Nuon Chea (hereinafter, the “Defence”) submit this request for the Trial Chamber to order Mr Alexander Laban Hinton (2-TCE-88) to provide the Defence with the records of interviews he undertook in preparation for his book, *Why Did They Kill?*¹ The Defence submits that access to those documents is indispensable to assessing the veracity of Mr Hinton’s claims and the weight to be given to his evidence.

II. BACKGROUND

2. On 12 February 2016, the Trial Chamber informed the parties that Mr Hinton was to testify during the week of 14 March 2016.² 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”.³ Mr Hinton testified between 14 and 17 March 2016.⁴

A. Categories of Individuals Interviewed by Mr Hinton

3. During his testimony, Mr Hinton was questioned on the methodology used to prepare his book *Why Did They Kill?* He explained that his sources were divided into three categories: individuals (‘human sources’), work of other scholars, and documents.⁵
4. Regarding the first category, Mr Hinton testified that he interviewed individuals who were presented to him as former DK cadres, detainees and alleged guards from S-21, as well as villagers from Banyan village and people from the Kampong Cham city area, in Region 41.⁶ In Phnom Penh, Mr Hinton conducted interviews with journalists, human rights workers, politicians, acquaintances,⁷ and individuals who allegedly worked at S-21.⁸

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

² Email from the Trial Chamber Senior Legal Officer to the Parties, 12 Feb 2016.

³ Email from the Trial Chamber Senior Legal Officer to the Parties, 24 Feb 2016.

⁴ See T. 14 Mar 2016 (HINTON Alexander L., E1/401.1); T. 15 Mar 2016 (HINTON Alexander L., E1/402.1); T. 16 Mar 2016 (HINTON Alexander L., E1/403.1); T. 17 Mar 2016 (HINTON Alexander L., E1/404.1).

⁵ T. 15 Mar 2016 (HINTON Alexander L., E1/402.1), p. 14, ln. 21 to p. 15, ln. 21, p. 105, ln. 12 to p. 106, ln. 5.

⁶ T. 14 Mar 2016 (HINTON Alexander L., E1/401.1), p. 37, lns. 12-24.

⁷ E3/3346, ERN EN 00431463. No French or Khmer translation available.

⁸ T. 16 Mar 2016 (HINTON Alexander L., E1/403.1), p. 17, lns. 21-25.

5. Mr Hinton testified that over the course of his field trips to Cambodia prior to 2002 (when he finalised his book),⁹ he talked to about 150 to 200 individuals.¹⁰ Mr Hinton divided his human sources between “key informants”, with whom he had what he called one or several “in-depth interview(s)”, and individuals with whom he just had casual conversations, a method he referred to as “participant observations”.¹¹
6. When asked by the Trial Chamber to provide a detailed account of the individuals to whom he spoke, Mr Hinton provided the following information: he had multiple interviews with about 10-20 people, and 30 minutes to 2 hours interviews with certain individuals whom he interviewed only once. He surveyed 95 to 100 households first, in Banyan, where he spent a couple of hours talking to a household representative. In addition, Mr Hinton testified that he talked to other individuals after the survey.¹² In total, Mr Hinton testified he had interviews of various length with around 150 to 200 individuals.¹³ Summing up, Mr Hinton classified the type of interviews he had in three categories: people with whom he had multiple interviews, people with whom he had just one interview, and finally, people with whom he had general conversations.¹⁴
7. Mr Hinton also testified about a survey which he had prepared when he first arrived in Banyan in 1994-1995, and which contained questions related to the individuals’ experiences under the Democratic Kampuchea (“DK”) regime.¹⁵ Mr Hinton testified that about 100 people responded to his survey.¹⁶
8. Regarding the treatment of Vietnamese, Mr Hinton testified that he talked to “maybe half a dozen” individuals in Banyan village, who referred to the arrest and execution of Vietnamese.¹⁷ When he conducted his survey in Banyan village in 1994-1995, several villagers told him that all Vietnamese were killed in the village, although there were not many ethnic Vietnamese living in this area.¹⁸ He also spoke to “Teap”, to another

⁹ T. 16 Mar 2016 (HINTON Alexander L., E1/403.1), p. 26, lns.1 9-20.

¹⁰ T. 16 Mar 2016 (HINTON Alexander L., E1/403.1), p. 9, lns. 12-14, and p. 17, lns. 11-16.

¹¹ T. 14 Mar 2016 (HINTON Alexander L., E1/401.1), p. 13, lns. 5-22; T. 15 Mar 2016 (HINTON Alexander L., E1/402.1), p. 106, lns. 1-2; p. 115, lns. 15-16; T. 16 Mar 2016 (HINTON Alexander L., E1/403.1), p.9, lns. 4-23.

¹² T. 16 Mar 2016 (HINTON Alexander L., E1/403.1), p. 17, lns. 11-16.

¹³ T. 16 Mar 2016 (HINTON Alexander L., E1/403.1), p. 9, lns. 12-14, and p. 17, lns. 11-16.

¹⁴ T. 16 Mar 2016 (HINTON Alexander L., E1/403.1), p. 17, lns. 5-16; p. 18, lns. 2-8.

¹⁵ T. 14 Mar 2016 (HINTON Alexander L., E1/401.1), p. 13, ln. 23 to p. 14, ln. 15.

¹⁶ T. 16 Mar 2016 (HINTON Alexander L., E1/403.1), p. 9, lns. 12-14.

¹⁷ T. 15 Mar 2016 (HINTON Alexander L., E1/402.1), p. 31, ln. 24 to p. 32, ln. 5.

¹⁸ T. 15 Mar 2016 (HINTON Alexander L., E1/402.1), p. 30, lns. 10-20.

person who worked at the district office, and to “a couple of people who were village heads” regarding the execution of Vietnamese in the area of Region 41.¹⁹

9. During the examination by the Defence, Mr Hinton testified that in order to verify the information provided by individuals he spoke to, he used the process of triangulation, attempting to compare the information provided by one individual with that of other individuals.²⁰
10. Mr Hinton testified that he had audio recording, transcriptions and/or notes of his interviews and his research.²¹

B. Use of Pseudonyms

11. In his book, Mr Hinton uses pseudonyms to refer to the individuals he talked to²² and refers to individuals in very general terms such as “a DK village head from the Banyan area”,²³ “[o]ne Banyan villager, who was an “old person” during DK”²⁴ or “[a] Cambodian man.”²⁵ There is no reference to any interview conducted by Mr Hinton in the footnotes of his book,²⁶ and explicit references to what specific individuals told him are a rare sight.
12. In court, Mr Hinton testified that as part of his research protocol, pseudonyms were used to refer to the people he talked to and that as a result, he could not remember the names of the individuals he spoke to.²⁷ When asked whether he could provide the Chamber and the parties with the identity of his key informant “Teap”, Mr Hinton responded that he would have to check in his notes to determine whether his name can be disclosed, and check with his university whether he could disclose it in light of the

¹⁹ T. 15 Mar 2016 (HINTON Alexander L., E1/402.1), p. 29, ln. 23 to p. 30, ln. 4.

²⁰ T. 15 Mar 2016 (HINTON Alexander L., E1/402.1), p. 123, ln. 16 to p. 124, ln. 18; p. 126, lns. 12-17.

²¹ T. 15 Mar 2016 (HINTON Alexander L., E1/402.1), p. 27, lns. 8-18; T. 16 Mar 2016 (HINTON Alexander L., E1/403.1), p. 7, ln. 18; T. 15 Mar 2016 (HINTON Alexander L., E1/402.1), p. 25, lns. 21-23.

²² E3/3346, ERN EN 00431743 (no FR or KH Translation available): “In what follows, I use pseudonyms for the people I interviewed and quote in this study. I employ the real names of the Tuol Sleng survivors who have written about their experiences using their own names, major public figures, and the DK cadres and soldiers named in documents and in my interviews.” See e.g. E3/3346: “Chlat”, ERN EN 00431658, ERN FR 00707459; “Khel”, ERN EN 00431481 (no FR or KH Translation available); “Neari”, ERN EN 00431484 (no FR or KH Translation available); “Teap”, ERN EN 00431707, (no FR or KH Translation available); “Lor”, ERN EN 00431444 (no FR or KH Translation available); see also T. 15 Mar 2016 (HINTON Alexander L., E1/402.1), p. 24, lns. 12-15.

²³ E3/3346, ERN EN 00431710-11. No French or Khmer translation available.

²⁴ E3/3346, ERN EN 00431599. No French or Khmer translation available.

²⁵ E3/3346, ERN EN 00431695. No French or Khmer translation available.

²⁶ E3/3346, ERN EN 00431743- 1767. No French or Khmer translation available.

²⁷ T. 15 Mar 2016 (HINTON Alexander L., E1/402.1), p. 24, lns. 12-15.

“human subject protocol” applicable to his research.²⁸ He also referred to a “code sheet” which could permit him to identify the names of the individuals to whom he spoke.²⁹

13. Mr Hinton did not bring any of his notes, transcriptions or any material he used in the preparation of his book to the ECCC when he appeared, and was therefore unable to respond to the parties’ questions regarding the identity of the people he interviewed.³⁰

III. APPLICABLE LAW

14. Rule 93 of the Internal Rules permits the Trial Chamber, at any time during the proceedings and where it finds it necessary, to order additional investigations.³¹ The investigations may consist of, *inter alia*, interviewing witnesses, conducting searches or seizing any evidence, or ordering expert opinions. Such additional investigations must be done under the same conditions as that of the Co-Investigating Judges.³²
15. The necessity criteria contained in Rule 93 means that the investigation must be in the interests of justice.³³ Further, the Trial Chamber’s discretion must be understood within the context of the ECCC legal framework, including Mr Nuon Chea’s right to a fair and expeditious trial.³⁴
16. At all times, the Trial Chamber must ensure that trials are fair and expeditious, and are conducted with full respect for the rights of the Accused and the protection of victims and witnesses.³⁵ In particular, the President of the Chamber shall guarantee the free exercise of defence rights, pursuant to Rule 85(1) of the Internal Rules.
17. Each accused before the Court is entitled to have adequate time and facilities for the preparation of their Defence,³⁶ to examine evidence against them and to obtain the presentation and examination of evidence on their behalf under the same conditions as

²⁸ T. 15 Mar 2016 (HINTON Alexander L., **E1/402.1**), p. 24, lns. 10-21; p. 25, lns. 19-20.

²⁹ T. 15 Mar 2016 (HINTON Alexander L., **E1/402.1**), p. 25, lns. 21-23.

³⁰ T. 15 Mar 2016 (HINTON Alexander L., **E1/402.1**), p. 24, lns. 10-15; p. 25, lns. 19-23; T. 16 Mar 2016 (HINTON Alexander L., **E1/403.1**), p. 16, lns. 1-4.

³¹ Rule 93(1) of the Internal Rules.

³² Rule 93(2) of the Internal Rules.

³³ **E294/1**, ‘Decision on NUON Chea Request to Admit New Documents, To Initiate an Investigation and To Summons Mr. Rob LEMKIN’, 24 Jul 2013, para. 11.

³⁴ **E294/1**, ‘Decision on NUON Chea Request to Admit New Documents, To Initiate an Investigation and To Summons Mr. Rob LEMKIN’, 24 Jul 2013, para. 11.

³⁵ Article 33 New of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea.

³⁶ Article 35 (b) new of the law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (‘Law on the Establishment of the ECCC’).

evidence against them.³⁷ It is the duty of the Trial Chamber to protect those rights, and to ensure that trials are fair and expeditious and are conducted with full respect for the rights of the accused and for the protection of victims and witnesses.³⁸ In particular, the President of the Chamber shall guarantee the free exercise of the Defence rights.³⁹

18. Rule 31 of the Internal Rules regulates the appointment of experts by the ECCC. It contains no provision regarding the sources upon which the expert relies for his/her report/evidence.
19. Article 33 New of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea provides that, if the ECCC's existing procedures do not deal with a particular matter or if there is uncertainty regarding their interpretation or application, or if there is a question regarding their consistency with international standard, guidance may be sought in procedural rules established at the international level. As a result, the practice and jurisprudence of the other international tribunals provide useful guidance.
20. The ICTY has held that "[a]n expert witness is expected to give his or her expert opinion in full transparency of the established or assumed facts he or she relies upon and of the methods used when applying his or her knowledge, experience or skills to form his or her expert opinion".⁴⁰ As a result, there must be sufficient information as to the sources used in support of the statements made by the expert.⁴¹ In particular, the sources used by expert witnesses must be clearly indicated and accessible,⁴² to allow the

³⁷ Article 35 (e) new of the Law on the Establishment of the ECCC.

³⁸ Article 33 new of the Law on the Establishment of the ECCC.

³⁹ Rule 85 of the IR.

⁴⁰ ICTY: *Prosecutor v. Galić*, IT-98-29-T, Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philipps, 3 Jul 2002, p.2; *Prosecutor v. Galić*, IT-98-29-T, Decision on the Prosecution Motion for Reconsideration of the Admission of the Expert Report of Prof. Radinović, 21 Feb 2003, para. 9; *Prosecutor v. Gotovina et al.*, IT-06-90-T, Decision on Disclosure of Expert Materials, 27 Aug 2009, para. 10.

⁴¹ ICTY, *Prosecutor v. Stanišić & Župljanin*, Written Reasons for the Trial Chamber's Oral Decision Accepting Dorothea's Hanson as an Expert Witness, 5 Nov 2009, para. 10; *Prosecutor v. D. Milošević*, IT-98-29/1-T, Decision on Admission of Expert Report of Robert Donia, 15 Feb 2007, para. 8; *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution Motion to Exclude the Expert Report of Kosta Čavoški, 5 Apr 2013, para. 22;

⁴² ICTY, *Prosecutor v. Stanišić & Župljanin*, Written Reasons for the Trial Chamber's Oral Decision Accepting Dorothea's Hanson as an Expert Witness, 5 Nov 2009, para. 10; *Prosecutor v. D. Milošević*, IT-98-29/1-T, Decision on Admission of Expert Report of Robert Donia, 15 Feb 2007, para. 8; *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution Motion to Exclude the Expert Report of Kosta Čavoški, 5 Apr 2013, para. 22; *Prosecutor v. Galić*, IT-98-29-T, Decision on the Prosecution Motion for Reconsideration of the Admission of the Expert Report of Prof. Radinović, 21 Feb 2003, para. 9; *Prosecutor v. Gotovina et al.*, IT-06-90-T, Decision on Disclosure of Expert Materials, 27 Aug 2009, para. 10.

other party to challenge the basis on which the expert witness reached his conclusions or his/her methodology.⁴³

21. If the parties and the Trial Chamber are unable to assess the probative value of the proposed expert report as a result of the lack of transparency, the result might be its non-admission into evidence, or that only limited weight can be attached to the expert report.⁴⁴ In the absence of clear references or accessible sources, the ICTY will not treat such a statement or report as an *expert* opinion, but as the *personal* opinion of the witness, and weigh the evidence accordingly.⁴⁵ In other words, the parts of an expert report and/or testimony for which the sources relied upon are unclear, or where the parties had no opportunity to test or challenge the witnesses who provided the information will be given limited weight, if any.⁴⁶
22. As a result, it is an established practice at the ICTY that the party calling the expert discloses the expert report together with the underlying sources.⁴⁷ The ICC has also followed this practice.⁴⁸
23. In addition, the ICC held that any issues surrounding the sources used, or the referencing, structure or methodology of the report, are matters that can be addressed

⁴³ ICTY, *Prosecutor v. Stanišić & Župljanin*, Written Reasons for the Trial Chamber's Oral Decision Accepting Dorothea's Hanson as an Expert Witness, 5 Nov 2009, para. 10; *Prosecutor v. D. Milošević*, IT-98-29/1-T, Decision on Admission of Expert Report of Robert Donia, 15 Feb 2007, para. 8; *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution Motion to Exclude the Expert Report of Kosta Čavoški, 5 Apr 2013, para. 22; *Prosecutor v. Galić*, IT-98-29-T, Decision on the Prosecution Motion for Reconsideration of the Admission of the Expert Report of Prof. Radinović, 21 Feb 2003, para. 9; *Prosecutor v. Gotovina et al.*, IT-06-90-T, Decision on Disclosure of Expert Materials, 27 Aug 2009, para. 10.

⁴⁴ ICTY: *Prosecutor v. Gotovina et al.*, IT-06-90-T, Decision on Disclosure of Expert Materials, 27 Aug 2009, para. 10.

⁴⁵ ICTY: *Prosecutor v. D. Milošević*, IT-98-29/1-T, Decision on Admission of Expert Report of Robert Donia, 15 Feb 2007, para. 8; *Prosecutor v. Martić*, IT-95-11-T, Decision on Defence's Submission of the Expert Report of Professor Smilja Avramov pursuant to 94 bis, 9 Nov 2006, para. 9; *Prosecutor v. Galić*, IT-98-29-T, Decision on the Prosecution Motion for Reconsideration of the Admission of the Expert Report of Prof. Radinović, 21 Feb 2003, para. 9; *see also Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution Motion to Exclude the Expert Report of Kosta Čavoški, 5 Apr 2013, para. 22.

⁴⁶ ICTY: *Prosecutor v. Galić*, IT-98-29-T, Decision on the Prosecution Motion for Reconsideration of the Admission of the Expert Report of Prof. Radinović, 21 Feb 2003, para. 9.

⁴⁷ *See e.g.* ICTY: *Prosecutor v. Stanišić and Simatović*, IT-03-69-PT, Prosecution's Submission of the Expert Report of Christian Nielsen Pursuant to Rule 94bis With Annexes A and B, 2 Jul 2007, para. 1; *Prosecutor v. Karadžić*, IT-95-5/18-T, Prosecution's Motion for Admission of the Evidence of Eight Experts Pursuant to Rule 94bis and Rule 92bis, 9 Nov 2009, para. 17; *Prosecutor v. Mladić*, IT-09-92-T, Prosecution's Notice of Disclosure of Expert Report of Andras Riedlmayer (RM 618) Pursuant to Rule 94bis and Motion to Amend Rule 65ter Exhibit List, 25 Apr 2013, para. 7.

⁴⁸ ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13, Prosecution's Response to Joint Defence Request pursuant to Regulation 35 of the Regulations of the Court to Defer Notification Concerning Expert Witnesses (N. ICC-01/05-01/13-1242), 14 Sep 2015, para. 5; *Prosecutor v. Bemba et al.*, ICC-01/05-01/13, Decision on Joint Defence Request pursuant to Regulation 35 of the Regulations of the Court to defer Notification Concerning Expert Witnesses (N. ICC-01/05-01/13-1280), 22 Sep 2015, para. 11.

during cross-examination and taken into consideration in evaluating the weight of the report, should it be admitted.⁴⁹

IV. ARGUMENTS

22. As of now, the parties and the Trial Chamber do not have the following information regarding Mr Hinton's evidence:
- (a) The identity of the people he had formal interviews with and the contents of their interviews;
 - (b) The identity of the people with whom Mr Hinton had what he called "casual conversations", or the contents of these conversations; and,
 - (c) The contents and responses to the survey Mr Hinton undertook in 1994-1995.
24. The Defence hereby requests the Trial Chamber to order an investigation pursuant to Rule 93 of the Internal Rules in order for Mr Hinton to provide the parties with a number of documents which are indispensable to the assessment of the reliability of his book and his testimony, and therefore in the interests of justice. The Trial Chamber has used Rule 93 in Case 002/01 to request the provision of information from TCE-33 (now 2-TCE-87),⁵⁰ and the Defence submits that the same course of action should be followed in the present case.

A. Type of Material Requested

25. The Defence wishes to be provided with four types of documents:
- (a) The survey that Mr Hinton conducted in Banyan village in 1994, including the responses given thereto by the alleged 95-100 participants;
 - (b) The audio recordings of Mr Hinton's interviews with his "key informants" and any other audio recording Mr Hinton has made when interviewing individuals in the preparation of his book, as well as the Khmer transcriptions of these interviews and their English translations, where available;

⁴⁹ ICC: *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Decision on Defence Preliminary Challenges to Prosecution's Expert Witnesses (N. ICC-01/04-02/06-1159), 9 Feb 2016, para. 16; *Prosecutor v. Ruto & Sang*, ICC-01/09-01/11, Decision on Sang Defence Application to Exclude Expert Report of Mr Hervé Maupéu (N. ICC-01/09-01/11-844), 7 Aug 2013, para. 27.

⁵⁰ E169, 'Request for Information Concerning Summaries Prepared by TCE-33', 9 Feb 2012.

- (c) Mr Hinton's notes taken as a result of his so-called "participant observation" and any other written recording of his "casual" interviews; and,
- (d) The "code sheet" to which Mr Hinton referred during his testimony.⁵¹

B. Preliminary Matters

- 26. The Defence wishes to clarify from the outset that it is not seeking those documents to be admitted into evidence. It submits that this would be premature, without knowing what the documents are or their contents.⁵² At this stage, all the Defence requests is to be given a copy of the documents in order to assess first, the veracity of Mr Hinton's assertions, and second, whether any of the documents should be tendered into evidence pursuant to Rule 87(4) of the IR.
- 27. The Defence could not have submitted the present Request earlier, as it was hoping to elicit information regarding the identity of Mr Hinton's sources during his examination in court. As the Trial Chamber has observed, such information ultimately could not be obtained, as Mr Hinton was unable to provide any specific information regarding his sources, as described in paragraphs 11 and 13 above, and 31 to 34 below.

C. The Requested Materials are Necessary to Assess the Weight to be Given to Mr Hinton's Book and to His Testimony and to Establish the Truth

(i) Mr Hinton's evidence is largely based on his field work/interviews

- 28. Mr Hinton's expertise derives mostly from the field work he undertook in Cambodia in preparation of his PhD in 1992 and 1994-1995, and from the other researches he undertook prior to 2002, when updating his PhD to publish his book *Why Did They Kill?*
- 29. Mr Hinton testified that "the bulk" of the information contained in his book came from his research in the Kampong Cham and Kampong Siem area, in Region (Sector) 41.⁵³ In particular, he testified that the majority of his findings regarding what happened to people in Kampong Cham was based on the interviews he had.⁵⁴

⁵¹ See above, para. 12.

⁵² The Defence notes that, unlike when it requested the collection and admission into evidence of witness NHEM En's book, in the present circumstances, it is not aware of the nature or contents of the said documents, and is therefore unable to take a position as to whether those should be admitted into evidence.

⁵³ T. 16 Mar 2016 (HINTON Alexander L., E1/403.1), p. 123, ln. 19 to p. 124, ln. 14.

⁵⁴ T. 16 Mar 2016 (HINTON Alexander L., E1/403.1), p. 132, lns. 13-17; p. 133, ln. 23 to p. 134, ln. 1.

30. As a result, it is clear that the vast majority of Mr Hinton's assertions are based on the interviews he had prior to 2002 and that access to those interviews is fundamental to assessing his evidence.

(ii) *Mr Hinton failed to provide specific answers when asked about his sources*

31. In his book and when testifying, Mr Hinton gave evidence regarding the alleged CPK policies and actions, particularly regarding the treatment of Vietnamese. As stated unequivocally in the established international jurisprudence, an expert **must** provide sufficient information as to the methodology used and the sources upon which he/she relies to make statements.⁵⁵
32. In the present case, Mr Hinton did not provide specific and individualised sources for a large number of the statements he made, whether in his book or in during his testimony. At multiple times, when asked about the basis for his assertions, Mr Hinton either responded that he was unable to give specifics as he did not have his research materials with him,⁵⁶ or made general references to "secondary literature", "witness interviews" or "CPK documents".⁵⁷
33. Further, Mr Hinton was clearly confused in Court regarding the source of his knowledge, as he made multiple references to the *Duch* trial as well as to other documents which were posterior to his book.⁵⁸ He also made a number of statements that the evidence before the Court ultimately confirmed or would confirm his theories.⁵⁹ When asked about the verifiability of his sources, Mr Hinton stated that "[s]o I think an enormous amount of what I've said, regardless of the sources, is there for you on the record through these other interviews that have taken place. It's in the Court record, in a

⁵⁵ See *supra*, applicable Law Section, paras. 20-11. *Emphasis added*.

⁵⁶ T. 15 Mar 2016 (HINTON Alexander L., E1/402.1), p. 24, Ins. 16-21; p. 25, Ins. 20-23; p. 29, Ins. 8-9; p. 67, Ins. 7-8; T. 16 Mar 2016 (HINTON Alexander L., E1/403.1), p. 17, Ins. 1-3.

⁵⁷ See e.g. T. 14 Mar 2016 (HINTON Alexander L., E1/401.1), p. 68, Ins. 14-20 ("Yes, there's a great deal of, first of all, secondary literature that speaks to that in the histories that have been written. My own primary data, in Kampong Siem Province, bears that out as well. I think, there, you can also look at Khmer Rouge documentation, ideology publications and you can find it in there, so I think there are a number of different sources that bear that out"); *ibid.*, at p. 110, Ins. 8-10 ("lots of evidence of this including the interrogator notebooks"); *ibid.* at p. 119, Ins. 9 ("there's clear evidence that that was played all the time"); T. 15 Mar 2016 (HINTON Alexander L., E1/402.1), p. 119, Ins. 4-7 ("there's a substantial body of evidence").

⁵⁸ See e.g. T. 14 Mar 2016 (HINTON Alexander L., E1/401.1), p. 66, Ins. 1-6; p. 68, Ins. 21-24; p. 69, Ins. 20-22; p. 101, Ins. 22-23; p. 111, Ins. 14-17; p. 121, Ins. 22-25; T. 15 Mar 2016 (HINTON Alexander L., E1/402.1), p. 62, Ins. 13-16.

⁵⁹ See e.g. T. 15 Mar 2016 (HINTON Alexander L., E1/402.1), p. 124, Ins. 19-22; p. 145, Ins. 6-9; T. 16 Mar 2016 (HINTON Alexander L., E1/403.1), p. 20, Ins. 16-19.

sense”.⁶⁰ Clearly, those were not available at the time Mr Hinton wrote his book, and therefore cannot be said to constitute “sources” for his expertise. Last but not least, Mr Hinton failed to provide specific references to these alleged individuals or documents which “confirmed” his theory.

34. In sum, whether in his book or during his testimony, Mr Hinton was unable to point to any underlying source with sufficient precision so as to permit the Defence or the Trial Chamber to assert the veracity of his claims. As a result, there is absolutely no information regarding the authenticity and reliability of Mr Hinton’s evidence. In fact, as of now, there is simply no evidence that Mr Hinton actually conducted field research in Cambodia or interviewed any individuals, other than his own statements.

(iii) Access to Mr Hinton’s sources is necessary to assert the veracity of his assertions

35. Being provided with the sources used by Mr Hinton is particularly important as he testified numerous times that his primary concern was “to represent the experience of people in the district”,⁶¹ and that he did general research and was not focused on the treatment of ethnic minorities.⁶² Mr Hinton testified that he talked to only “half a dozen” individuals regarding the treatment of Vietnamese.⁶³ Despite this, Mr Hinton’s evidence on the topic of the treatment of Vietnamese is considered as being that of an “expert”.
36. Without any information as to the specific sources upon which Mr Hinton relied for each specific assertion he made, and without being in possession of the underlying documents which Mr Hinton used to prepare his book, the Defence is effectively prevented from challenging the basis - if any - upon which Mr Hinton reached his conclusions. This violates Nuon Chea’s right to challenge evidence and his right to present evidence.⁶⁴ The Defence is effectively prevented from properly challenging Mr Hinton’s evidence and from presenting any evidence regarding, for instance, the credibility of the individuals to whom Mr Hinton talked. It is also prevented from presenting evidence challenging their statements, for it does not know “who said what”.

⁶⁰ T. 16 Mar 2016 (HINTON Alexander L., E1/403.1), p. 14, lns. 5-8.

⁶¹ T. 15 Mar 2016 (HINTON Alexander L., E1/402.1), p. 124, lns. 2-7.

⁶² T. 15 Mar 2016 (HINTON Alexander L., E1/402.1), p. 27, lns. 5-7.

⁶³ See *supra*, para. 8.

⁶⁴ Article 35 (b) and (e) of the Law on the Establishment of the ECCC.

37. Mr Hinton himself, in an interview dated 2013, stated that verifying the reliability of sources was one of the challenges faced by anthropologists.⁶⁵ This leads the Defence to think that perhaps, a number of statements made in Court by Mr Hinton were unfounded or simply incorrect. It is however unable to determine it without knowing the identity of the individuals upon which Mr Hinton relies, or the contents of their interviews. Since the Defence is prohibited from undertaking its own investigations in the ECCC framework, it is therefore dependent upon the Trial Chamber's powers to order the production of the elements necessary for the preparation of Mr Nuon Chea's Defence.
38. The Trial Chamber is also prevented from properly assessing the reliability and probative value of Mr Hinton's evidence, as there is no clear reference to the sources upon which Mr Hinton's opinion is based, and as those explicitly referred to are simply inaccessible. When ruling on the KHIEU Samphân Defence's request to have parts of the Human Rights Watch report entitled *30 years of Hun Sen: Violence, Repression, and Corruption in Cambodia* admitted into evidence, the Trial Chamber held that the Report "appears to be more a summary of the multiple and diverse sources references than an assessment of the said sources" and that it "necessitates thorough scrutiny of the referenced material".⁶⁶ Further, it specifically pointed out that some references were "particularly vague" and, in some instances, they failed to indicate the person interviewed.⁶⁷ These qualifications apply equally to Mr Hinton's book and evidence, as described above.⁶⁸ When ruling upon the KHIEU Samphân Defence's request, the Trial Chamber concluded that the Report was unsuitable to prove the facts it purported to prove, was not conducive to ascertaining the truth, and therefore denied its admission into evidence.⁶⁹ The Defence submits that the Trial Chamber's reasoning applies unequivocally to the book and evidence of Mr Hinton.⁷⁰ As things stand, Mr Hinton's

⁶⁵ E3/9703, 'Volodymyr Dibrova, 'Mapping the Great Famine: a new project at Harvard', Ukrainian Weekly, 30 Jun–7 Jul 2013', ERN EN 01211135, 2nd column. No French or Khmer translation available.

⁶⁶ E347/1, 'Decision on KHIEU Samphan's Request Pursuant to Internal Rule 87(4) to Admit New Documents to Case 002/02', 29 Jun 2015, para. 4 ('E347/1').

⁶⁷ E347/1, para. 4.

⁶⁸ See examples cited in paras. 8 and 11 above.

⁶⁹ E347/1, para. 4.

⁷⁰ While the Trial Chamber's decision was made in the context of the admissibility of the HRW Report pursuant to Rule 87(4) of the Internal Rules, which the Defence submitted was an overly high standard for this stage, in the present case [See E347/2, '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'', 11 Dec 2015], Mr Hinton's book has already been admitted into evidence. As a result, the question of the identification and analysis of his sources is directly related to the assessment of his evidence and the weight to be attributed to it by the Trial Chamber when rendering its judgement. Further, the Defence notes that Mr Hinton's evidence must be held to a higher standard as he is presented as an expert witness – and more particularly as the only (alleged) expert on the treatment of Vietnamese.

assertions are simply unverifiable. The collection and analysis of his sources is fundamental to assessing his evidence, in the interests of justice.

D. The Requested Materials Exist and Are in Mr Hinton's Possession

39. As stated above at paragraphs 9, 12 and 13, Mr Hinton testified about the existence of all the requested materials. In addition, he further stated that the research material he used for his book was "stored away" in his home, in the United States.⁷¹

V. RELIEF

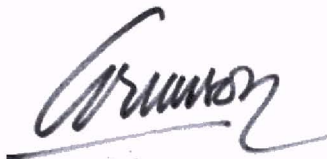
40. For the reasons stated above, the Defence respectfully requests the Trial Chamber to:

- (a) order Mr Hinton to provide the Defence with:
 - (i) The survey that Mr Hinton conducted in Banyan village in 1994-1995, including the responses given thereto by the alleged 95-100 participants;
 - (ii) The audio recordings of Mr Hinton's interviews with his "key informants" and any other audio recording Mr Hinton has made when interviewing individuals in the preparation of his book, as well as the Khmer transcriptions of these interviews and their English translations, where available;
 - (iii) Mr Hinton's notes taken as a result of his so-called "participant observation" and any other written recording of his "casual" interviews; and,
 - (iv) The "code sheet" to which Mr Hinton referred during his testimony;
- (b) afford the parties an opportunity to make representations on whether the sources should be admitted into evidence; and,

⁷¹ T. 15 Mar 2016 (HINTON Alexander L., E1/402.1), p. 25, lns. 20-23; T. 16 Mar 2016 (HINTON Alexander L., E1/403.1), p. 7, lns. 18-20.

- (c) afford the parties an opportunity to make representations on whether any further action should be taken in relation to the information emerged from the additional investigations.

CO-LAWYERS FOR NUON CHEA



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