

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

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**NUON CHEA'S RULE 87 (4) AND RULE 93 REQUESTS RELATED TO 2-TCE-82
(NAKAGAWA KASUMI)**

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I. INTRODUCTION

1. On 12 August 2016, the Trial Chamber ordered the parties to file any Rule 87(4) regarding 2-TCE-82 (NAKAGAWA Kasumi) no later than 31 August 2016.¹ On 23 August 2016, the Trial Chamber appointed 2-TCE-82 (NAKAGAWA Kasumi) as an expert on the Regulation of Marriage during the Democratic Kampuchea (“DK”) Regime.²
2. Pursuant to Rule 87(4) of the Internal Rules, the Co-Lawyers for Mr. Nuon Chea (the “Defence”) submit this request (“Request”) to have admitted into evidence two documents related to the upcoming testimony of 2-TCE-82 (NAKAGAWA Kasumi).
3. In addition, pursuant to Rule 93 of the Internal Rules, the Defence requests the Trial Chamber to order 2-TCE-82 (NAKAGAWA Kasumi) to provide the parties with the recording of the interviews which she and her students performed in the preparation of her study “Gender-Based Violence During the Khmer Rouge Regime, Stories of Survivors from the Democratic Kampuchea (1975-1979)” (E3/2959) as well as those obtained in the context of the preparation of the Cambodian Defenders Project’s report to which she contributed, entitled “I Want to Tell You, Stories of Sexual Violence during Democratic Kampuchea (1975-1979)” (E3/3416).

II. APPLICABLE LAW

A. Rule 87 (4)

4. All evidence is admissible, unless otherwise provided in the Internal Rules.³ 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.⁴ To satisfy the requirements of Rule 87(3), the proposed evidence needs only be *prima facie* relevant and reliable.⁵ 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

¹ Email from the Legal Officer of the Trial Chamber to the Parties, ‘Preparation for experts 2-TCE-81 and 2-TCE-82’, 12 August 2016.

² **E431**, ‘Decision on Designation of 2-TCE-82’, 23 Aug 2016.

³ Rule 87(1) of the Internal Rules.

⁴ Rule 87(3) of the Internal Rules.

⁵ **E289/2**, ‘Decision on Civil Party Lead Co-Lawyers’ Internal Rule 87(4) Request to Put Before the Chamber New Evidence (E289) and KHIEU Samphân’s Response (E289/1)’, 14 Jun 2013, para. 26 (“Decision on Rule 87(4) Requests”).

ascertaining the truth”, subject to the general requirements of Rule 87(3).⁶ While Rule 87(4) states that the requested evidence must not have been available before the opening of the trial, the Trial Chamber has 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.⁷

5. 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 Chamber and where the interests of justice required the sources to be evaluated together; where the proposed evidence was exculpatory and required evaluation to avoid a miscarriage of justice; or where the other parties did not object to the evidence.⁸

B. Rule 93

6. 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.⁹ 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.¹⁰ The necessity criteria contained in Rule 93 means that the investigation must be in the interests of justice.¹¹ 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.¹²

C. Experts

7. 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

⁶ 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* T. 26 Jan 2016 (Oral Ruling), p. 24, lns 11-13.

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

⁸ **E289/2**, Decision on Rule 87(4) Requests, para. 3.

⁹ Rule 93(1) of the Internal Rules.

¹⁰ Rule 93(2) of the Internal Rules.

¹¹ **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.

¹² *Ibid.*

witnesses.¹³ In particular, the President of the Chamber shall guarantee the free exercise of defence rights, pursuant to Rule 85(1) of the Internal Rules.

8. Each accused before the Court is entitled to have adequate time and facilities for the preparation of their Defence,¹⁴ to examine evidence against them and to obtain the presentation and examination of evidence on their behalf under the same conditions as evidence against them.¹⁵ 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.¹⁶ In particular, the President of the Chamber shall guarantee the free exercise of the Defence rights.¹⁷

9. 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.

10. 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.

11. 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”.¹⁸ As a result, there must be sufficient information as to the sources used in

¹³ 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.

¹⁴ 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’).

¹⁵ Article 35 (e) new of the Law on the Establishment of the ECCC.

¹⁶ Article 33 new of the Law on the Establishment of the ECCC.

¹⁷ Rule 85 of the IR.

¹⁸ ICTY: **E405.1.3**, *Prosecutor v. Galić*, IT-98-29-T, Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philipps, 3 Jul 2002, p.2; **E405.1.4**, *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; **E405.1.5**, *Prosecutor v. Gotovina et al.*, IT-06-90-T, Decision on Disclosure of Expert Materials, 27 Aug 2009, para. 10.

support of the statements made by the expert.¹⁹ In particular, the sources used by expert witnesses must be clearly indicated and accessible,²⁰ to allow the other party to challenge the basis on which the expert witness reached his conclusions or his/her methodology.²¹

12. 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.²² 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.²³ 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.²⁴

¹⁹ ICTY, **E405.1.6**, *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; **E405.1.7**, *Prosecutor v. D. Milošević*, IT-98-29/1-T, Decision on Admission of Expert Report of Robert Donia, 15 Feb 2007, para. 8; **E405.1.8**, *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.

²⁰ ICTY, **E405.1.6**, *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; **E405.1.7**, *Prosecutor v. D. Milošević*, IT-98-29/1-T, Decision on Admission of Expert Report of Robert Donia, 15 Feb 2007, para. 8; **E405.1.8**, *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; **E405.1.4**, *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; **E405.1.5**, *Prosecutor v. Gotovina et al.*, IT-06-90-T, Decision on Disclosure of Expert Materials, 27 Aug 2009, para. 10.

²¹ ICTY, **E405.1.6**, *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; **E405.1.7**, *Prosecutor v. D. Milošević*, IT-98-29/1-T, Decision on Admission of Expert Report of Robert Donia, 15 Feb 2007, para. 8; **E405.1.8**, *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; **E405.1.4**, *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; **E405.1.5**, *Prosecutor v. Gotovina et al.*, IT-06-90-T, Decision on Disclosure of Expert Materials, 27 Aug 2009, para. 10.

²² ICTY: **E405.1.5**, *Prosecutor v. Gotovina et al.*, IT-06-90-T, Decision on Disclosure of Expert Materials, 27 Aug 2009, para. 10.

²³ ICTY: **E405.1.7**, *Prosecutor v. D. Milošević*, IT-98-29/1-T, Decision on Admission of Expert Report of Robert Donia, 15 Feb 2007, para. 8; **E405.1.9**, *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; **E405.1.4**, *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* **E405.1.8**, *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.

²⁴ ICTY: **E405.1.4**, *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.

13. 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.²⁵ The ICC has also followed this practice.²⁶

14. 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 during cross-examination and taken into consideration in evaluating the weight of the report, should it be admitted.²⁷

III. ARGUMENTS

A. Rule 87(4) Request

(i) Overview of the Documents

15. The first document the Defence tenders into evidence is the Curriculum Vitae of 2-TCE-82 (NAKAGAWA Kasumi), which was received from the Trial Chamber on 23 August 2016.²⁸ The document relates to 2-TCE-82's (NAKAGAWA Kasumi's) background and expertise, which are relevant to her nomination as an expert witness in the present case and to the weight to be attributed to her evidence.

16. The second document is an expert report on forced marriage during the Sierra Leone conflict, prepared by Zainab H. Bangura and Christiana T. Solomon in May 2005 for the Prosecutor of the Special Court for Sierra Leone ("SCSL").²⁹ It is contained in **Public**

²⁵ See e.g. ICTY: **E405.1.10**, *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; **E405.1.3**, *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; **E405.1.9**, *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.

²⁶ ICC, **E405.1.13**, *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; **E405.1.14**, *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.

²⁷ ICC: **E405.1.15**, *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; **E405.1.16**, *Prosecutor v. Ruto & Sang*, ICC-01/09-01/11, Decision on Sang Defence Application to Exclude Expert Report of Mr Hervé Maupeu (N. ICC-01/09-01/11-844), 7 Aug 2013, para. 27.

²⁸ **E431.1**, attached to **E431**, 'Decision on Designation of 2-TCE-82', 23 Aug 2016. It was submitted for translation in French and Khmer on 29 August 2016.

²⁹ Expert Report on the Phenomenon of "forced marriage" in the Context of the Conflict in Sierra Leone and, More Specifically in the Context of the Trials against the RUF and AFRC Accused Only, Zainab H. Bangura and Christiana T. Solomon, May 2005, contained as an annex to SCSL, Case SCSL-2004-16-T, Prosecution Filing of Expert Report Pursuant to Rule 94(bis) and Decision on Prosecution Request for Leave to Call An Additional Expert Witness, 8 Aug 2005. It was submitted for translation in French and Khmer on 29 August 2016.

Attachment 1. The report discusses the context, meaning and consequences of forced marriage, and particularly the phenomenon of “bush wives” during the Sierra Leonean civil war. Since the SCSL was the first and only international criminal jurisdiction to rule on the question of forced marriage, and since the Cambodian Defenders Project report on Sexual Violence during the DK (E3/3416), for which 2-TCE-82 (NAKAGAWA Kasumi) was a research assistant and project manager, contains references and comparison with the situation of women in the Sierra Leonean conflict,³⁰ the Defence wishes to discuss the situation in Sierra Leone with 2-TCE-82 (NAKAGAWA Kasumi), referencing the expert report.

(ii) *The Documents are Relevant, Reliable and Authentic*

17. The two documents closely relate to the study authored by 2-TCE-82 (NAKAGAWA Kasumi), E3/2959,³¹ and to the Cambodian Defenders Project report on Sexual Violence during the DK, to which she contributed.³² In addition, they relate to the charges on the regulation of marriage, contained in, *inter alia*, paragraphs 306- 324, 1430-1433, 1442-1447 of the Closing Order.³³ Both documents are reliable and authentic, as one was authored by 2-TCE-82 (NAKAGAWA Kasumi) herself. The other was authored by individuals recognised as experts by the SCSL and was admitted into evidence as such.

(iii) *The Documents Must be Admitted Into Evidence in the Interests of Justice*

18. The trial in Case 002/02 commenced in June 2011.³⁴ 2-TCE-82’s (NAKAGAWA Kasumi’s) Curriculum Vitae was made available to the parties on 23 August 2016.³⁵ While the expert report on forced marriage in Sierra Leone was available prior to the start of the trial, the parties were only informed of the upcoming testimony of 2-TCE-82 (NAKAGAWA Kasumi) on 3 June 2016. In any event, the report is closely related to material already before the Chamber, including E3/3416 and E3/2959.³⁶ The Defence submits that the interests of

³⁰ **E3/3416**, ‘I Want to Tell You, Stories of Sexual Violence during Democratic Kampuchea (1975-1979)’, the Cambodian Defenders Project. ERN EN 00449473, 00449498, 00449504.

³¹ **E3/2959**, ‘Stories of Survivors from the Democratic Kampuchea (1975-1979)’, NAKAGAWA Kasumi, Dec 2008.

³² **E3/3416**, ‘I Want to Tell You, Stories of Sexual Violence during Democratic Kampuchea (1975-1979)’, the Cambodian Defenders Project.

³³ **D427**, ‘Closing Order, 15 Sep 2010.

³⁴ **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.

³⁵ **E431**, ‘Decision on Designation of 2-TCE-82’, 23 Aug 2016.

³⁶ **E3/2959**, ‘Stories of Survivors from the Democratic Kampuchea (1975-1979)’, NAKAGAWA Kasumi, Dec 2008; **E3/3416**, ‘I Want to Tell You, Stories of Sexual Violence during Democratic Kampuchea (1975-1979)’, the Cambodian Defenders Project.

justice require the Trial Chamber to evaluate the documents together. Finally, the admission into evidence of the two requested documents would assist the Trial Chamber in shedding light on 2-TCE-82's (NAKAGAWA Kasumi's) expertise and on her evidence regarding the regulation of marriage, which would be conducive to the overall ascertainment of the truth.

B. Rule 93 Request

19. The Trial Chamber referred to E3/2959 and E3/3416 to support its decision appointing 2-TCE-82 (NAKAGAWA Kasumi) as an expert,³⁷ and they will presumably form the basis of her questioning by the parties. In order to properly assess and challenge the evidence of 2-TCE-82 (NAKAGAWA Kasumi), it is necessary for the Defence to be given access to the actual interviews which form the basis of these two publications.

(i) Requested Documents

20. In E3/2959, 2-TCE-82 (NAKAGAWA Kasumi) indicates that the study was based on two types of sources:

- (i) The interviews of about 100 persons out of 1500 interviewees, selected "for the purpose of documenting their personal stories about gender crimes at the time" of the DK. The interviews were conducted by 2-TCE-82 (NAKAGAWA Kasumi) for the Cambodian Defender Project, a Human Rights NGO based in Phnom Penh;³⁸ and,
- (ii) About 600 interviews conducted by approximately 200 students of the Gender Studies course at Pannasastra University of Cambodia, regarding gender-based violence during the DK.³⁹ 2-TCE-82 (NAKAGAWA Kasumi) indicates that the contents of the interview is contained in reports submitted to her by the students.⁴⁰

21. E3/2959 contains only selected quotes from the said interviews,⁴¹ upon which the author draws conclusions. The interviewees are not identified but are referred to in very general terms such as, *inter alia*, "a female respondent",⁴² "a former Khmer Rouge soldier",⁴³

³⁷ E431, 'Decision on Designation of 2-TCE-82', 23 Aug 2016, para. 13.

³⁸ E3/2959, 'Stories of Survivors from the Democratic Kampuchea (1975-1979)', NAKAGAWA Kasumi, Dec 2008, ERN EN: 00421882.

³⁹ *Ibid.*, ERN EN: 00421880.

⁴⁰ *Ibid.*, ERN EN: 00421907.

⁴¹ *Ibid.*, E.g. ERN EN: 00421888, 00421892-00421897.

⁴² *Ibid.*, ERN EN: 00421892.

⁴³ *Ibid.*

“a woman who got married during the KR regime”.⁴⁴ No indication is provided regarding the location of the said individuals during the alleged events.

22. E3/3416 was written by Bridget Toy-Cronin, on the basis of the research undertaken by 2-TCE-82 (NAKAGAWA Kasumi) in Cambodia between March and August 2006.⁴⁵ It is based on the “interviews with almost one hundred survivors of DK who were identified through a survey of more than 1,500 Cambodians who were at least 12 years old when the Khmer Rouge came to power.”⁴⁶ It is unclear whether these 100 persons are the same as those referred to in E3/2959.⁴⁷ The names in the report are fictional, as they were used to protect the confidentiality of those who participated in the study.⁴⁸ There is also no indication of the location of the said individuals during the alleged events.

(ii) The Requested Documents are Necessary to Assess the Weight to be Given to the Evidence of 2-TCE-82 (NAKAGAWA Kasumi) and to Establish the Truth

23. The Defence does not have access to any of the sources or underlying information of the two reports which constitute the core of the work and expertise of 2-TCE-82 (NAKAGAWA Kasumi). It recalls that established international jurisprudence unequivocally states that an expert **must** provide sufficient information as to the methodology used and the sources upon which he/she relies to make statements.⁴⁹ At the present stage, the Defence is faced with two reports containing incriminating information, containing quotes from anonymous individuals, without having access to the underlying information, the identity of the individuals or their geographical location at the time, and without knowing the context in which the facts alleged in the reports took place. As a result, Mr Nuon Chea is effectively prevented from exercising his right to cross-examine and to challenge evidence since he is deprived of the most elementary information to do so.

24. The Trial Chamber is also prevented from properly assessing the reliability and probative value of 2-TCE-82’s (NAKAGAWA Kasumi’s) evidence. 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

⁴⁴ *Ibid.*, ERN EN: 00421896.

⁴⁵ E3/3416, ‘I Want to Tell You, Stories of Sexual Violence during Democratic Kampuchea (1975-1979)’, the Cambodian Defenders Project, ERN EN: 00449472.

⁴⁶ *Ibid.*, ERN EN: 00449474.

⁴⁷ *See supra*, para. 20 (i).

⁴⁸ E3/3416, ‘I Want to Tell You, Stories of Sexual Violence during Democratic Kampuchea (1975-1979)’, the Cambodian Defenders Project, ERN EN: 00449474.

⁴⁹ *See supra*, applicable Law Section, paras. 11. *Emphasis added.*

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”.⁵⁰ Further, it specifically pointed out that some references were “particularly vague” and, in some instances, they failed to indicate the person interviewed.⁵¹ These qualifications certainly apply to E3/2959 and E3/3416, as described above.⁵² The Trial Chamber eventually 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.⁵³ The Defence submits that the Trial Chamber’s reasoning applies unequivocally to the publications and evidence of 2-TCE-82 (NAKAGAWA Kasumi).⁵⁴

25. [REDACTED]

26. Access to the sources used by 2-TCE-82 (NAKAGAWA Kasumi) are indispensable to the assessment of the reliability and probative value of her publications and her testimony, and is therefore in the interests of justice. The Defence hereby requests the Trial Chamber to order an investigation pursuant to Rule 93 of the Internal Rules and to require 2-TCE-82 (NAKAGAWA Kasumi) to provide the parties with records of all the interviews she

⁵⁰ 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’).

⁵¹ E347/1, para. 4.

⁵² See *supra*, paras 20-21.

⁵³ E347/1, para. 4.

⁵⁴ 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.

conducted in the preparation of E3/2959 and E3/3416, as well as with the survey mentioned in E3/3416⁵⁷ and the 1500 responses thereto.

27. Such records should be provided to the Defence at the earliest opportunity and in any event prior to 2-TCE-82's (NAKAGAWA Kasumi's) appearance as an Expert witness, in order to protect Mr Nuon Chea's right to have adequate time and facilities to prepare his Defence, and at the latest one week before her expected testimony. In case 2-TCE-82 (NAKAGAWA Kasumi) has concerns regarding the disclosure of the identity of the individual interviewees, a version where their personal information is redacted (but including the location they were at during the alleged events) could be provided to the Defence. In this case, 2-TCE-82 (NAKAGAWA Kasumi) should be ordered to approach the relevant individuals in order to seek their consent to the disclosure of their identity to the parties in the present case.

28. The Defence wishes to clarify 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. At this stage, all the Defence requests is to be given a copy of the documents in order to assess first, the veracity of 2-TCE-82's (NAKAGAWA Kasumi's) assertions, and second, whether any of the documents should be tendered into evidence pursuant to Rule 87(4) of the IR.

IV. RELIEF

29. For the reasons stated above, the Defence requests the Trial Chamber to admit the two Documents into evidence in Case 002/02 pursuant to Rule 87(4) of the Internal Rules.

30. In addition, the Defence requests the Trial Chamber to order 2-TCE-82 (NAKAGAWA Kasumi) to provide the Chamber and the parties with the underlying records of interviews which were used in the preparation of E3/3416 and E3/2959, pursuant to Rule 93 of the Internal Rules, at least a week prior to her appearance.

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⁵⁷ E3/3416, 'I Want to Tell You, Stories of Sexual Violence during Democratic Kampuchea (1975-1979)', the Cambodian Defenders Project, ERN EN: 00449474.