

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

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**CO-PROSECUTORS' RESPONSE TO NUON CHEA'S REQUEST FOR
INVESTIGATIVE ACTION IN RELATION TO ALEXANDER HINTON (2-TCE-88)**

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I. INTRODUCTION

1. Nuon Chea's request that expert witness Alexander Hinton (2-TCE-88) be ordered to provide primary source research materials relating to the preparation of his book¹ ("Request") should be denied,² as it (i) is untimely; (ii) amounts to a 'fishing expedition'; (iii) is a belated attempt to challenge Hinton's expertise; and (iv) would result in an undue delay of proceedings. However, should the Trial Chamber ("Chamber") believe it is conducive to ascertaining the truth, the Co-Prosecutors' request calling 2-TCW-884 – whom Nuon Chea has presumed is a source relied on by Hinton – to testify.

II. SUBMISSIONS

(i) The Request is untimely

2. Nuon Chea has been aware of Hinton's proposed evidence in Case 002/02 since at least May 2014, when the OCP and the Civil Party Lead Co-Lawyers proposed to call Hinton as an expert.³ Indeed, Nuon Chea requested that Hinton testify in Case 002/01, though he was ultimately not called.⁴ Hinton's book 'Why Did They Kill?', in which he describes his methodology and the use of source material,⁵ was placed on the Case 002 case file in 2012.⁶

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

² **E405** Nuon Chea's request for investigative action (request for documents) in relation to Alexander Laban Hinton (2-TCE-88), 9 May 2016.

³ OCP: **E301/2/1.1** Annex A: Co-Prosecutors trial plan and tentative witness list for Case 002/02, 11 December 2013, EN 00965524; **E305/6.1** Annex I: Co-Prosecutors' combined witness, civil party and expert list for Case 002/02 in recommended order of trial segments and appearance, 9 May 2014, EN 00986545; **E305/6.2** Annex II: OCP updated witness, civil party and expert lists, 9 May 2014, EN 00986563; **E305/6.4** Annex III: OCP updated witness, civil party and expert summaries, 9 May 2014, EN 00986617; **E305/7.1.3** Annex III: updated summaries of witnesses, civil parties and experts, 16 May 2014, EN 00986497; **E307/3/2.2** Annex I: Co-Prosecutors' revised combined, witness, civil party and expert list for Case 002/02 in recommended order of trial segments and appearance 28 July 2014, EN 01003004; Civil Party Lead Co-Lawyers: **E305/7.1.3** Annex III: updated summaries of witnesses, civil parties and experts, 16 May 2014, EN 00986497; **E305/7.1.1** Annex I – Updated witness, civil part and expert lists, 1 July 2014, EN 00986456.

⁴ **E93/4.3** Materials in Preparation for Trial Proceedings: Witness Summaries – Nuon Chea Defence Team, 21 June 2011, EN 00708009; **E312.2** Annex II: Individuals requested by the parties in relation to Case 002/01 but not ultimately heard before the Trial Chamber, 7 August 2014, EN 01004778.

⁵ See e.g., **E3/3346** Alexander Hinton, *Why Did They Kill?*, EN 00431458; EN 00431435-36; EN 00431463-73; EN 00431743-91.

⁶ **E185/1.3** Annex C – Decision on objections to documents proposed to be put before the Chamber in Co-Prosecutors' Annexes A6-A11 and A14-A20 and by the other parties, 3 December 2012, EN 00884569.

3. The Parties were informed by the Chamber on 12 February 2016 that Hinton would testify on 14-17 March 2016.⁷ On 3 March 2016, Nuon Chea requested the admission into evidence of 17 documents “closely related to the material before the Chamber, including Hinton’s book *Why Did They Kill*” which would “go to the probative value of his book as well as that of the evidence he will give in Court”.⁸ On 8 April 2016, weeks after Hinton testified, Nuon Chea requested admission of additional materials into evidence to challenge Hinton’s evidence.⁹
4. Nuon Chea has thus long been aware that Hinton’s book is based on original source material and has had ample opportunity to request such material. His choice not to do so until seven weeks after Hinton’s testimony – and after two additional evidence requests specifically directed to Hinton’s testimony, including one following his testimony – demonstrates either a lack of due diligence or an attempt to delay the proceedings.
5. Nuon Chea’s suggestion that the Request could not have been made earlier as he “was hoping to elicit information regarding the identity of Hinton’s sources during his examination in court” is illogical.¹⁰ Hoping to obtain certain categories of information from Hinton’s testimony did not prevent Nuon Chea from requesting such information at the earliest opportunity and would have put Hinton on notice that he should bring the material, if possible. Indeed, as Hinton testified, “had I known before I came here that this information would be requested, I would have gone and systematically reviewed my records.”¹¹

(ii) The Request is overly broad

6. Instead of seeking the identity of Hinton’s sources – as Nuon Chea asserts was his intention during Hinton’s testimony¹² – Nuon Chea is now requesting all of the primary source research material Hinton compiled for his book, namely, a survey of 95-100 people;

⁷ **E405.1.1** Email from the Trial Chamber Senior Legal Officer to the Parties, 12 February 2016.

⁸ **E387** Nuon Chea’s rule 87(4) request for admission into evidence of 17 documents relevant to Alexander Laban Hinton’s testimony (2-TCE-88), 3 March 2016, para. 34.

⁹ **E396** Nuon Chea’s rule 87(4) request for admission of three letters, one video and one audio in relation to the late King Father Norodom Sihanouk, 8 April 2016. *See also*, **E396/3** Nuon Chea’s reply to Co-Prosecutors’ response to Nuon Chea’s rule 87(4) request to admit evidence in relation to the late King Father Norodom Sihanouk, 3 May 2016.

¹⁰ **E405** Request para. 27.

¹¹ **E1/403.1** Transcript of Proceedings, 16 March 2016, EN 01219446, lns. 1-4.

¹² **E405** Request para. 27.

audio recordings, transcriptions, translations and any written record of all interviews; and a code sheet of pseudonyms for sources.¹³ The Request is so overly broad as to amount to a fishing expedition.¹⁴

7. In requesting the Chamber to obtain this material, Nuon Chea relies on jurisprudence that is inapplicable in the present circumstances.¹⁵ Expert reports at the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Court are prepared with agreed parameters of a requesting party or chamber for a specific case. Hinton’s independent academic research for the purposes of a Ph.D dissertation and subsequent book – partly the basis of his designation as an expert in the area of genocide studies by the Chamber¹⁶ – is not analogous. Additionally, while relying on the jurisprudence of the ad hoc tribunals, Nuon Chea fails to note that the ICTY requires parties to file any challenge to the qualifications or the report/statement of an expert “[w]ithin thirty days of disclosure of the statement and/or report of the expert witness”.¹⁷
8. The Request’s rationale would mean that all experts called before the Chamber would be required to provide every piece of underlying primary source research material that support their expert opinion. This would clearly undermine the purpose of calling experts and would prohibitively delay proceedings. Moreover, Nuon Chea’s implicit position that an expert’s opinion based on unnamed sources cannot be relied upon is contradicted by his failure to request sources from experts he himself has requested. Michael Vickery is scheduled to testify in the upcoming trial segment on purges. His writing on Cambodia is substantially based on sources he refers to only by initials in his book in order to maintain confidentiality.¹⁸ To date, Nuon Chea has made no request for the Chamber to force Vickery to disclose the names of his sources.¹⁹

¹³ E405 Request, para. 40(a).

¹⁴ See, E294/1 Decision on Nuon Chea Request to admit new documents, to initiate an investigation and to summons Mr. Rob Lemkin, 24 July 2013, para. 23.

¹⁵ E405 Request, paras. 20-21.

¹⁶ E388 Decision on Designation of 2-TCE-88, paras. 13-14.

¹⁷ International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, IT/32/Rev.49, 22 May 2013, Rule 94bis (B).

¹⁸ E3/1757 Michael Vickery, *Cambodia 1975-1982*.

¹⁹ See also, *Prosecutor v Charles Taylor*, SCSL-03-1-T, Decision on the Defence motion for the disclosure of the identity of a confidential ‘source’ raised during cross-examination of TF1-355, 6 March 2009.

(iii) The Request is a belated attempt to challenge Hinton's expertise

9. Nuon Chea has already been given the opportunity to challenge Hinton's designation as an expert, and chose not to do so. On 30 July 2014, the Trial Chamber invited the Parties to make observations on Khieu Samphan's allegations²⁰ that, inter alia, Hinton lacked independence due to his work with the Documentation Center of Cambodia.²¹ Nuon Chea made no submissions.²²
10. Moreover, the Request erroneously limits Hinton's expertise to the research he conducted in Cambodia in the early 1990's.²³ As is clear from the Chamber's decision designating Hinton as an expert, his expertise in genocide studies is broader than his field work in Cambodia – which formed part of the basis of his book – and encompasses his specialised knowledge and experience gained from academic and research positions.²⁴ Further, it is obvious that Hinton's book draws upon sources beyond the research he conducted in Cambodia and that his expert testimony was based on research conducted after his book was published as well as various other sources.²⁵ Nuon Chea's assertion that “there is simply no evidence that Hinton actually conducted field research in Cambodia” is not credible.²⁶
11. Nuon Chea's claim that he is “effectively prevented from challenging the basis – if any – upon which Mr Hinton reached his conclusions” lacks merit.²⁷ His examination of Hinton provided that opportunity. Nuon Chea extensively examined Hinton in relation to his fieldwork and use of material other than his research in Cambodia and Hinton clearly

²⁰ **E1/240.1** Transcript of Proceedings, 30 July 2014, EN 01004200; EN 01004204-06.

²¹ **E305/9** Opposition de la Défense de M. Khieu Samphân à la comparution de certaines personnes proposées aux fins d'audition au cours du procès 002/02 et demande de clarification sur la portée exacte des débats suite à la nouvelle décision de disjonction E301/9/1, 30 May 2014, paras. 39-40.

²² **E388** Decision on Designation of 2-TCE-88, para. 8.

²³ **E405** Request, paras. 5-8.

²⁴ **E388** Decision on Designation of 2-TCE-88, paras. 13-14.

²⁵ See e.g., **E1/401.1** Transcript of Proceedings, 14 March 2016, EN 01217257, lns. 5-14; EN 01217276, ln.20-EN 01217278, ln.23; **E1/402.1** Transcript of Proceedings, 15 March 2016, EN 01218202, lns.8-14; EN 01218207, lns.8-21; EN 01218208, lns.15-23; EN 01218209, lns.7-11; EN 01218298, lns.1-5; EN 01218307, ln.15-EN 01218311, ln.1; EN 01218324, ln.1-EN 01218324, ln.9; EN 01218327, ln.25-EN 01218328, ln.25; **E1/403.1** Transcript of Proceedings, 16 March 2016, EN 01219439, ln.15-EN 01219440, ln.8; EN 01219455, lns.6-24; EN 01219561, lns.13-19; **E1/404.1** Transcript of Proceedings, 17 March 2016, EN 01221404, lns.8-17.

²⁶ **E405** Request, para. 34.

²⁷ Ibid, para. 36.

answered such questions.²⁸ Nuon Chea neither identifies what facts he wishes to now challenge nor explains why he was unable to challenge Hinton's conclusions based on other evidence on the case file when he had the opportunity.

(iv) The Request, if granted, would unduly delay proceedings

12. Hinton indicated when testifying that he would have to consult his university in relation to their protocols on sources, as well as contact individual sources to ask whether his or her name could be used before releasing the source material.²⁹ Given that Hinton spoke to approximately 200 people for the purposes of his field work in Cambodia,³⁰ it is clear that this would be a time-consuming process. Additionally, it appears from his testimony that Hinton conducted his interviews in Khmer and it is unclear whether translations exist.³¹ The process of translating such records, if necessary, would likely extend for months.
13. The Trial Chamber has previously expressed concern – with reference to the age of the accused and other uncertainties³² – that a similarly broad investigation request by Nuon Chea would not be completed within a reasonable period, based on the amount of time it would take the Parties to review the information and for it to be translated.³³ That Nuon Chea is also seeking an opportunity to make representations on “whether the sources should be admitted into evidence” and “whether any further action should be taken”,³⁴ further demonstrates how the Request – which fails to show how the fairness of the proceedings are or could be affected – would impede the Chamber's obligation to guarantee an expeditious trial.³⁵

²⁸ See e.g., **E1/402.1** Transcript of Proceedings, 15 March 2016, EN 01218298, lns.1-5; EN 01218307, ln.15-EN 01218311, ln.23; EN 01218315, ln.16-EN 01218316, ln.18; EN 01218318, lns.12-17; EN 01218321, ln.2-EN 01218322, ln.5; EN 01218324, ln.1-EN 01218324, ln.9; EN 01218327, ln.25-EN 01218328, ln.25; **E1/403.1** Transcript of Proceedings, 16 March 2016, EN 01219437, ln. 24-EN 01219440, ln.8; EN 01219440, ln.21-EN 01219442, ln.7; EN 01219443, lns.9-16; EN 01219446, ln.1-EN 01219447, ln.13; EN 01219448, ln.14-EN 01219449, ln.7; EN 01219450, ln.16-EN 01219452, ln.11.

²⁹ **E1/402.1** Transcript of Proceedings, 15 March 2016, EN 01218217, lns.19-25; **E1/403.1** Transcript of Proceedings, 16 March 2016, EN 01219435, lns.17-19.

³⁰ **E1/403.1** Transcript of Proceedings, 16 March 2016, EN 01219438, lns.12-14; EN 01219446, lns.5-16.

³¹ **E1/401.1** Transcript of Proceedings, 14 March 2016, EN 01217259, lns. 2-8.

³² **E294/1** Decision on Nuon Chea Request to admit new documents, to initiate an investigation and to summons Mr. Rob Lemkin, 24 July 2013, para. 24.

³³ Ibid.

³⁴ **E405** Request para. 40(b)-(c).

³⁵ **E294/1** Decision on Nuon Chea Request to admit new documents, to initiate an investigation and to summons Mr. Rob Lemkin, 24 July 2013, para. 19 citing, *inter alia*, Article 33 new of the Law on the Establishment of



(v) Alternative measures are available

14. During Hinton's testimony, Nuon Chea raised the identity of a specific source referred to by Hinton.³⁶ Though Hinton was unable to confirm the identity of his source known by the pseudonym 'Teap',³⁷ Nuon Chea stated that he was "quite certain" that it is 2-TCW-884.³⁸ The Request also raises Nuon Chea's concerns about the identity of 'Teap',³⁹ but does not explain why a measure such as requesting that 2-TCW-884 be called to testify would not satisfy his claims that there is "no evidence that Hinton [...] interviewed any individuals".⁴⁰ The OCP submits that calling 2-TCW-884 to give evidence is an appropriate alternative measure. If 2-TCW-884 is not the 'Teap' that Hinton spoke to, it still appears from his WRIs that he could provide important information about crimes, particularly the arrest and execution of Cham, former Lon Nol soldiers and CPK cadres, in Sector 41 that were also the subject of Nuon Chea's examination of Hinton.⁴¹

III. RELIEF REQUESTED

For the reasons set out above, the Request should be denied in its entirety. In the alternative, the OCP requests that 2-TCW-884 be called to testify.

Respectfully submitted,

Date	Name	Place	Signature
19 May 2016	CHEA Leang Co-Prosecutor	Phnom Penh	
	Nicholas KOUMJIAN Co-Prosecutor		

Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, with the inclusion of amendments as promulgated on 27 October 2004.

³⁶ **E1/402.1** Transcript of Proceedings, 15 March 2016, EN 01218211, Ins. 4-18.

³⁷ Ibid, EN 01218215, Ins. 21-25 –EN 01218216, Ins. 2-21.

³⁸ **E1/402.1** Transcript of Proceedings, 15 March 2016, EN 01218214, Ins. 19-20; **E1/403.1** Transcript of Proceedings, 16 March 2016, EN 01219434, Ins. 4-9.

³⁹ **E405** Request, paras. 8, 12.

⁴⁰ Ibid, para. 34.

⁴¹ See e.g., **E1/402.1** Transcript of Proceedings, 15 March 2016, EN 01218297, Ins. 17-19; EN 01218315, Ins. 16-18. The OCP has previously proposed calling 2-TCW-884, see **E305/6.1** Annex I: Co-Prosecutors' combined witness, civil party and expert list for Case 002/02 in recommended order of trial segments and appearance, 9 May 2014, EN 00986546.