



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង

Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

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

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..... <u>SANN RADA</u>	

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

Date: 10 November 2016
Original language(s): Khmer/English/French
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DECISION ON NUON CHEA'S REQUEST FOR INVESTIGATIVE ACTION IN RELATION TO ALEXANDER HINTON (2-TCE-88)

Co-Prosecutors
CHEA Leang
Nicolas KOUMJIAN

Accused
NUON Chea
KHIEU Samphan

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1. INTRODUCTION

1. The Trial Chamber is seised of an Internal Rule 93 request by the NUON Chea Defence for investigative action aimed at obtaining a number of documents on which expert Alexander Laban Hinton (2-TCE-88) relied on in preparation of his book, *Why did they Kill?*¹ The documents sought by the NUON Chea Defence are: (1) a survey carried out by Mr. Hinton (2-TCE-88) in Banyan village in 1994-1995, and responses thereto; (2) the audio recordings of any interview Mr. Hinton (2-TCE-88) conducted in preparation of his book, particularly of his key informants, as well as the transcriptions of such interviews; (3) notes taken by Mr. Hinton (2-TCE-88) during his research in Cambodia; and (4) the code sheet containing the names of the people referred to in his book by pseudonyms only (“Code Sheet”) (collectively, “Source Material”).² The NUON Chea Defence also requests that the parties be given an opportunity to make representations on whether the Source Material should be admitted into evidence and on whether any further action should be taken.³

2. SUBMISSIONS

2. The NUON Chea Defence submits that it is indispensable that it gains access to the records of interviews conducted by Mr. Hinton (2-TCE-88) in preparation of his book, *Why did they Kill?*, and to the identity of these interviewees in order to assess the veracity of Hinton’s claims and the weight to be given to his evidence.⁴ The NUON Chea Defence notes that Mr. Hinton (2-TCE-88) testified that during his trips to Cambodia prior to 2002, he interviewed or talked to about 150 to 200 individuals in Banyan village, the Kampong Cham and Kampong Siem areas, Region 41, and Phnom Penh.⁵ People he interviewed included former DK cadres, detainees, alleged guards or people who worked at S-21, villagers, journalists, human rights workers, politicians and acquaintances.⁶ He also stated that he has audio recordings, transcriptions and/or notes of his interviews and research.⁷

¹ NUON Chea’s Request for Investigative Action (Request for Documents) in Relation to Alexander Laban Hinton (2-TCE-88), E405, 9 May 2016 (“Request”), paras 1, 40. Mr. Hinton testified as an expert in Case 002/02, from 14 to 17 March 2016 (see E1/401.1, E1/402.1, E1/403.1, E1/404.1).

² Request, paras 25, 40

³ Request, para. 40.

⁴ Request, paras 1, 24, 38.

⁵ Request, paras 4-6, 28-29.

⁶ Request, paras 4, 6.

⁷ Request, paras 10, 39.

3. The NUON Chea Defence submits that in his book, Mr. Hinton (2-TCE-88) neither names the individuals he interviewed nor refers in the footnotes to any of the interviews he conducted.⁸ Rather, he uses pseudonyms or refers to individuals in general terms. When asked about the identity of some individuals, including his key informant “Teap”, Mr. Hinton (2-TCE-88) was unable to respond. He stated that he could not remember all the names, as he used the Code Sheet that he did not have with him.⁹

4. The NUON Chea Defence submits that the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Court (“ICC”) requires that experts provide sufficient information as to the methodology used and sources relied on, and contends that Mr. Hinton (2-TCE-88) failed to do so.¹⁰ The NUON Chea Defence notes that in addition, the sources used by the expert need to be clearly indicated and accessible.¹¹ The NUON Chea Defence submits that there is absolutely no information regarding the authenticity and reliability of Mr. Hinton (2-TCE-88)’s evidence and no evidence, other than his own statements, that he actually conducted field research in Cambodia or interviewed any individuals.¹²

5. The NUON Chea Defence contends that access to Mr. Hinton (2-TCE-88)’s source material is necessary to assess the veracity of his assertions, and that without access to this material the NUON Chea Defence is effectively prevented from challenging the basis on which he reached his conclusions.¹³ It further submits that the request could not have been made earlier, as it was hoping to elicit information from Mr. Hinton (2-TCE-88) during his examination, but he was ultimately unable to provide specific information regarding his sources.¹⁴

6. The NUON Chea Defence submits that the Trial Chamber is also prevented from properly assessing the evidence of the expert without access to the source material. The NUON Chea Defence points to the Trial Chamber’s separate decision to deny the admission into evidence of a Human Rights Watch report on the basis that, amongst other reasons, some of the references were vague and failed to indicate the person interviewed. The NUON Chea

⁸ Request, para. 11.

⁹ Request, paras 12-13.

¹⁰ Request, paras 20-23 (and references therein), 31-32.

¹¹ Request, para. 20.

¹² Request, para. 34.

¹³ Request, paras 36-37.

¹⁴ Request, para. 27.

Defence contends that the Chamber's reasoning in that decision applies unequivocally to the book and evidence of Mr. Hinton (2-TCE-88). It further submits that the Trial Chamber had previously used Internal Rule 93 in Case 002/01 to request the provision of information from an expert, and that the same course of action should be followed.¹⁵ It concludes that the collection and analysis of the sources used by Mr. Hinton (2-TCE-88) is in the interests of justice given that this information is fundamental to assessing his evidence.¹⁶

7. The Co-Prosecutors respond that the Request should be denied as it is untimely, amounts to a "fishing expedition", is a belated attempt to challenge Mr. Hinton (2-TCE-88)'s expertise and would result in an undue delay of proceedings. In the alternative, the Co-Prosecutors request calling 2-TCW-884 to testify.¹⁷

8. The Co-Prosecutors respond that the NUON Chea Defence has been aware of Mr. Hinton (2-TCE-88)'s proposed evidence since at least May 2014 and that on 12 February 2016, the Chamber notified the Parties that Mr. Hinton (2-TCE-88) would testify from 14-17 March 2016. Further, they note that the NUON Chea Defence requested Mr. Hinton (2-TCE-88) be called to testify in Case 002/01, although he was ultimately not called in that case. Mr. Hinton (2-TCE-88)'s book, in which the expert describes the use of the Source Material, was also placed on the Case File for Case 002 in 2012. In light of the above, the Co-Prosecutors submit that the NUON Chea Defence had ample opportunity to request the Source Material and its failure to do so previously demonstrates either lack of due diligence or an attempt to delay the proceedings.¹⁸

9. The Co-Prosecutors contend that the NUON Chea Defence's submission that it could not make the Request earlier because it was hoping to elicit the requested information during the testimony of Mr. Hinton (2-TCE-88)'s testimony is illogical. The Co-Prosecutors submit that requesting this information before Mr. Hinton (2-TCE-88)'s testimony would have put the expert on notice that he should bring the material, if possible.¹⁹

10. The Co-Prosecutors submit that the Request is overly broad and amounts to a fishing expedition. Further, it submits that the NUON Chea Defence relies on ICTY and ICC

¹⁵ Request, para. 24 referring to Request for Information Concerning Summaries Prepared by 2-TCE-33, 9 February 2012, E169.

¹⁶ Request, para. 38.

¹⁷ Co-Prosecutors' Response to NUON Chea's Request for Investigative Action in Relation to Alexander Hinton (2-TCE-88), E405/1, 19 May 2016 ("Response"), para. 1.

¹⁸ Response, paras 2-4.

¹⁹ Response, para. 5.

jurisprudence that is inapplicable to the circumstances of this case. While expert reports before those courts are prepared on agreed parameters of a requesting party or a chamber for a specific case, Mr. Hinton (2-TCE-88) prepared independent academic research for the purposes of his Ph. D.²⁰ Moreover, the Co-Prosecutors submit that the NUON Chea Defence's implicit position that an expert's opinion based on unnamed sources cannot be relied upon, is contradicted by its failure to request sources from other experts it has requested, such as Michael Vickery.²¹

11. The Co-Prosecutors submit that the Request is a belated attempt to challenge Mr. Hinton (2-TCE-88)'s expertise and that the NUON Chea Defence allegation that there is no evidence that Mr. Hinton (2-TCE-88) was ever in Cambodia is not credible.²²

12. The Co-Prosecutors also respond that the NUON Chea Defence was not effectively prevented from challenging the basis upon which Mr. Hinton (2-TCE-88) reached his conclusions, as it extensively examined the expert in relation to his fieldwork and the use of source material in court. According to the Co-Prosecutors, the NUON Chea Defence fails to identify the facts it wishes to challenge now and does not explain why it was unable to challenge the conclusions reached by Mr. Hinton (2-TCE-88) based on other evidence on the Case File when it had the opportunity to do so.²³

13. The Co-Prosecutors note that before disclosing the identity of confidential sources, Mr. Hinton (2-TCE-88) would have to consult with his university in relation to their protocol on sources. Considering the number of people Mr. Hinton (2-TCE-88) spoke with, this would be a time-consuming process. It also appears that some of the interviews are only in Khmer, which would also require a lengthy translation process. In conclusion, the Co-Prosecutors submit that if granted, this Request would unduly delay the proceedings and impede the Chamber's obligation to guarantee an expeditious trial.²⁴

14. Finally, the Co-Prosecutors submit that given the NUON Chea Defence's stated certainty that Mr. Hinton (2-TCE-88)'s key informant is 2-TCW-884, it fails to explain why requesting the appearance of 2-TCW-884 would not satisfy its claim that there is no evidence

²⁰ Response, paras 6-7.

²¹ Response, paras 7-8.

²² Response, paras 9-10.

²³ Response, para. 11.

²⁴ Response, paras 12-13.

that Mr. Hinton (2-TCE-88) interviewed any individuals. The Co-Prosecutors therefore submit that calling 2-TCW-884 would be an appropriate alternative measure to the Request.²⁵

15. The other Parties did not respond to the Request.

3. APPLICABLE LAW

16. Pursuant to Internal Rule 93, at any time, a Trial Chamber may order additional investigations where it considers that a new investigation is necessary. This necessity has to be justified by the interests of justice. Further, the Chamber's discretion to order additional investigations must be understood in the context of the ECCC legal framework, which guarantees the Accused's right to a fair and expeditious trial and grants the President the discretion to exclude any proceedings that unnecessarily delay the trial.²⁶ Such additional investigations may include interviewing witnesses, seeking information or conducting searches.²⁷

4. FINDINGS

17. The Trial Chamber finds that the Request filed by the NUON Chea Defence is untimely. The NUON Chea Defence was on notice that Mr. Hinton (2-TCE-88)'s book was based on original source material, and had an opportunity to request such material at an earlier date and in preparation for his questioning, but failed to do so. In this regard the Trial Chamber notes that (1) the NUON Chea Defence itself requested that Mr. Hinton (2-TCE-88) be called to testify in Case 002/01; (2) Mr. Hinton (2-TCE-88) was proposed as an expert in this case in May 2014; (3) on 30 July 2016, the Parties were given an opportunity to make observations on the proposed experts and the NUON Chea Defence made no submissions; (4) the parties were informed on 12 February 2016 that Mr. Hinton (2-TCE-88) would be called to testify in March 2016; (5) Mr. Hinton (2-TCE-88) was designated as an expert on 4 March 2016; and (6) Mr. Hinton (2-TCE-88) testified as an expert on 14 to 17 March 2016. The NUON Chea Defence simply suggests that "it was hoping to elicit information regarding the identity of Mr

²⁵ Response, paras 1, 14.

²⁶ Decision on NUON Chea Request to Admit New Documents, to Initiate and Investigation and to Summons Mr. Rob Lemkin, E294/1, 24 July 2013, para. 11.

²⁷ See Decision on NUON Chea Request to Admit New Documents, to Initiate and Investigation and to Summons Mr. Rob Lemkin, E294/1, 24 July 2013, para. 11; Request for information concerning summaries prepared by 2-TCE-33, E169, 9 February 2012, p. 1.

Hinton's sources during his examination in court".²⁸ The Trial Chamber finds that this trial strategy demonstrates a lack of due diligence. The Chamber therefore finds that the NUON Chea Defence could and should have made this request at a much earlier date if it thought that it would genuinely advance the interests of their client. The Trial Chamber does not find the justification of the NUON Chea Defence for failing to make the Request earlier to be persuasive.

18. The Trial Chamber considers that the measures requested by the NUON Chea Defence would unduly delay the fair and expeditious conduct of the proceedings and is thus not in the interests of justice. The Request is overly broad, generally seeking all primary source research material. The Chamber has previously declined to take investigative action where the request amounted to little more than a fishing expedition, given that this directly conflicts with the Chamber's obligation to conduct an expeditious trial.²⁹ In this case, the Request asks that the NUON Chea Defence be provided with a very broad range of documents and material, which is likely to be delayed given the volume of translation that would be required.

19. While the NUON Chea Defence correctly notes that the Chamber requested information pursuant to Internal Rule 93 from an individual who was proposed to be heard as an expert in Case 002/01, the current circumstances are distinguishable. In that case, the Chamber required clearly identified documents. Moreover this measure was taken far before the testimony of this individual, who was initially designated by the Trial Chamber as an expert, but who later was eventually heard as a mere witness.³⁰

20. It is ultimately for the Trial Chamber to assess the probative value of an expert's testimony in light of the evidence which has been provided relating to the sources and methodology employed by that expert. The Trial Chamber may take into consideration the lack of such information in assessing the probative value of the expert's evidence.

21. The Chamber now turns to the Co-Prosecutors' alternative request to call 2-TCW-884 to testify. The Chamber considers the identification of 2-TCW-884 by the NUON Chea Defence as a potential source used by Mr. Hinton (2-TCE-88) to be speculative and is therefore not

²⁸ Request, para. 27.

²⁹ See Decision on NUON Chea Request to Admit New Documents, to Initiate and Investigation and to Summons Mr. Rob LEMKIN, 24 July 2013, E294/1, paras 23-24.

³⁰ See Request for Information Concerning Summaries Prepared by 2-TCE-33, 9 February 2012, E169; Decision on Designation of 2-TCE-33, 26 April 2013, E283. See also testimony of 2-TCE-33, T., 9, 10, 11, 15, 16, 17 and 18 July 2013.

persuaded that it is necessary to call this witness at this time. While the alternative request is thus dismissed, the Chamber notes that its decision on the Co-Prosecutors' original request to call 2-TCW-884 to testify on other issues remains pending.

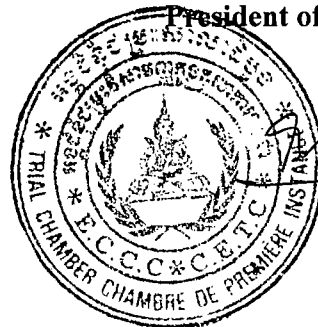
FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

DENIES the Request of the NUON Chea Defence.

DENIES the alternative request of the Co-Prosecutors to call 2-TCW-884 as a witness.

Phnom Penh, 10 November 2016

President of the Trial Chamber



Nil Nonn

Nil Nonn