

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

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**FURTHER SUBMISSIONS RELATING TO REQUEST FOR CLARIFICATION OF
PROVENANCE / CHAIN OF CUSTODY OF DC-CAM DOCUMENTS**

Filed by

Nuon Chea Defence Team:
SON Arun
Michiel PESTMAN
Victor KOPPE
Andrew IANUZZI
Jasper PAUW
PRUM Phalla

Distribution

Co-Accused

Co-Prosecutors:
CHEA Leang
Andrew CAYLEY

Co-Lawyers for Civil Parties:
PICH Ang
Elisabeth SIMONNEAU-FORT

A. Introduction

1. Counsel for the Accused Nuon Chea (the ‘Defence’) hereby submits further submissions regarding the request for clarification of the provenance and chain of custody of documents provided by the Documentation Center of Cambodia (‘DC-Cam’) on which the Office of the Co-Prosecutor (‘OCP’) intends to rely at this stage of the proceedings.¹

B. The Request by the Defence

2. During the hearing of witness Mr. Youk Chhang on 6 February 2012, the Defence requested the Trial Chamber to request DC-Cam to provide certain information contained in DC-Cam’s database of documents. Specifically, the Defence requested the disclosure of the information contained in the database field with the label ‘**Source/provenance note (317)**’, which is (according to DC-Cam’s manual for its Cambodia Genocide Data Bases²) the field ‘*[u]sed to record information on the source of the item, former/current owners.*’ Mr. Youk Chhang explained during questioning that this was indeed the field where information as to provenance and chain of custody would be recorded for documents received by DC-Cam.
3. The Defence also requested the disclosure of the information contained in the field with the label ‘**Note relating to copy being catalogued (316)**’ which, according to Mr. Youk Chhang, contains information regarding the question whether DC-Cam possesses the original version of the document or rather a copy, among other information.

C. The Information Contained in These Fields Will Clarify Provenance and Chain of Custody of Documents, and Assist in the Verification of Their Authenticity

4. The relevance of the information contained in these two database fields is hard to overstate. The information contained in these fields will provide the parties with a comprehensive overview of all available information (at DC-Cam) regarding the provenance and chain of custody of each individual DC-Cam document on which the

¹ These documents are listed in **Doc. No. E161.1**, ERN 00770511-00770624, ‘Documents Received from the Documentation Centre of Cambodia [DC-Cam] that have been included in annexes 1-20 of the Co-Prosecutors’ Rule 80(3) First Phase Document List E109/4.1’

² DC-Cam Manual for Cambodia Genocide Databases, **Annex 1**.

OCP intends to rely. It will furthermore aid in the potential authentication of such documents, as it will provide the parties with relevant information regarding the (location and/or (non-)existence of) the original (DK era) document.³

5. The Trial Chamber has already ruled that '[T]estimony as to chain of custody and provenance will assist the Chamber in assessing the weight to be attributed to particular documents.'⁴ Clearly, any other relevant information relating to the chain of custody and provenance (not stemming from 'testimony' as such but rather from an allegedly well-maintained database) will equally assist the Trial Chamber in assessing the weight to be attributed to particular documents.⁵
6. It must be stressed that relevant information relating to chain of custody is *readily available* in DC-Cam's database. Mr. Youk Chhang has moreover indicated that he is willing and able to provide this information to the Trial Chamber, should the Trial Chamber request so. There exists no principled reason to not request the provision of this relevant and available information. This is especially true considering that in the civil law system the Trial Chamber has an *independent* duty to affirmatively ascertain the truth. The truth regarding these documents is readily available at DC-Cam.
7. It is furthermore not unlikely that provision of the information contained in these two database fields will yield significant *exculpatory* results. The Defence bases this reasoned assumption on the testimony of Mr. Youk Chhang and the testimony of his deputy director Mr. Vanthan Dara Poeu: throughout this testimony it has become clear that DC-Cam has *not* consistently kept written records of interviews with donors of documents (pertaining to the provenance and chain of custody), nor has it

³ The Trial Chamber has already ruled that the question whether a document is an original or a photocopy is relevant from an evidentiary perspective, with originals being accorded more 'weight'. **Doc. No. E162**, ERN 00772276-00772277, Trial Chamber Memorandum 31 January 2012, para. 4. Arguably, it also matters whether a document is a direct copy of an original, or a copy of a copy, or (not unheard of at DC-Cam) a copy of a copy of a copy (or worse). In short, information as to the type (original or not) of document before the Trial Chamber is of crucial relevance.

⁴ **Doc. No. E162**, ERN 00772276-00772277, Trial Chamber Memorandum 31 January 2012, para. 7

⁵ The Defence accordingly stresses that the requested additional clarification is not just relevant with regard to the question as to whether certain documents should be admitted or not, but also (and perhaps more importantly) with regard to the question of evidentiary *weight* that must be accorded to these documents.

systematically recorded names of prior custodians.⁶ Accordingly, it is not unlikely that the requested action will reveal a lack of relevant information with regard to the provenance and chain of custody of at least a certain number of documents; and it may well reveal additional concerns relating to their authenticity. Considerations of fair trial thus require the production of said information, considering that this information (or perhaps lack thereof) will impact directly on (in the words of the Trial Chamber) ‘the weight to be attributed’ to documents on which the OCP wishes to rely.

D. Burden is On the Proferring Party

8. It is for the party proferring documents as evidence to provide the other parties and the Trial Chamber with relevant information regarding the authenticity, provenance and chain of custody of those documents, if such information is available. Of course, in this instance, it is the *OCP* that wants to rely on the DC-Cam documents. It was thus *for the OCP* to provide the necessary information that can assist the parties in verifying the authenticity, provenance and chain of custody of said documents.
9. Importantly, it has become clear (through the hearing of Mr. Youk Chhang) that relevant information on these issues relating to the documents that the OCP wishes to rely on *is* available at DC-Cam and is contained in its database, more specifically in ‘fields 316 and 317’. There existed thus no obstacle for the OCP to provide the parties with this supplementary and relevant information. Considering that the OCP has so far failed to do so, and considering that the information remains clearly relevant, the Trial Chamber should step in and (for reasons of expediency) request DC-Cam directly to provide said information.

⁶ Moreover, it has transpired that DC-Cam has developed an idiosyncratic way of labeling documents as ‘original’, even when in fact the document at DC-Cam is merely a photocopy; the information in ‘field 316’ could shed more light on this issue.

E. Nuon Chea has Early and Repeatedly Asked for Information on Provenance and Chain of Custody

10. The OCP suggested during the hearing that the Defence had never provided any indication ‘that the OCP should go back and obtain evidence as to the provenance and chain of custody’ with regard to (certain documents) provided by DC-Cam.⁷

11. It must be stressed that, in fact, the Nuon Chea Defence team has (since an early stage) *consistently insisted on proper authentication of all relevant documents*, including a provision of their chain of custody and provenance. The clearest example of this inquisitive approach by the Defence can be found in Nuon Chea’s Seventeenth Request for Investigative Action, filed on 8 December 2009 (which is more than two years ago, and *before* the closing of the investigation by the OCIJ), in which the Defence requested the OCIJ ‘to identify, with precision, the source of each specific item of [...] documentary material’ that it was intending to rely on in the Closing Order,⁸ and to [e]stablish, with precision, the chain-of-custody---from inception to receipt by the OCIJ---for each specific item of said documentary material.’⁹ Indeed, the Defence announced that ‘Nuon Chea intends to contest the authenticity of all inculpatory documentary material on the case file and hereby reserves his right to do so at any stage of these proceedings. In order to properly and fairly formulate such evidentiary challenges [...] information related to the material's source, chain-of-custody, and

⁷ Draft Transcript of Hearing of 6 February 2012, page 84. Somewhat along the same lines, the Trial Chamber inquired ‘whether this request for information was made [during] the three years of preparatory investigations [...]’. Draft Transcript of Hearing of 6 February 2012, page 79. While such a request was obviously not made in relation to the actual documents on the OCP List of DC-Cam documents (as the Defence had no way of knowing in advance what documents the OCP would rely upon during the trial stage, and certainly could not have predicted the ‘subdivision’ of the trial in several distinct parts), such a request *was* made in relation to the documents that the OCIJ wished to rely on in the indictment of our client, which included numerous DC-Cam documents (see para. 11 of these Submissions).

⁸ **Doc. No. D265**, ERN 00411348-00411358, Nuon Chea’s Seventeenth Request for Investigative Action, 8 December 2009. The Defence request related to said category of documents (only) as those were, by definition, relevant to the case of Nuon Chea, as they were, by definition, considered by the OCIJ to be inculpatory. Similarly, in our current request we do not ask for information relating to *all* documents on the case file, but only those documents that the OCP intends to rely on, as these should be, by definition, considered to be inculpatory. The Defence accordingly has an interest in a proper verification of chain of custody and provenance.

⁹ This Request was partially rejected, partially accepted; the Appeal before the PTC was declared inadmissible. (**Doc. No. D253/3/5**, 6 April 2010). In its First Consolidated Request for Investigative Actions, **Doc. No. E88**, 18 May 2011, the Defence requested the Trial Chamber to execute the same request for document authentication. The Trial Chamber dismissed this request. (**Doc. No. E116**, Decision on Nuon Chea’s Motion Regarding Fairness of the Investigation, 9 September 2011)

authenticity---some of which may prove exculpatory---must be made available to the Defence as soon as possible.’¹⁰

12. Indeed, the Defence provided a helpful Annex to its Seventeenth Request (**Annex 2** to these submissions) which (we suggested) could be used to compile the requested information, with room to provide details relating to the source of the documents, the chain of custody, method of authentication, and the relevance of the documents (‘proof of’). This is exactly the type of information that the Defence is yearning for still today, more than two years later, and which neither the examination of Youk Chhang nor the examination of his deputy director has provided.
13. Either way, this Seventeenth Request for Investigative action put the OCP on notice *already in December 2009* that the Defence would contest the provenance and chain of custody of documents.¹¹ Since, the OCP has had ample time to search for (and provide to the parties) relevant and satisfactory information relating to these issues (should this information exist). The OCP has chosen not to do so. This omission must now be repaired.

F. Rule 87(4) is Inapposite

14. The Trial Chamber raised the issue as to whether Rule 87(4) might apply towards the request by the Defence. The Defence submits that Rule 87(4) is inapposite with regard to the current request. This holds true because the Defence is *not* in any way asking for the admission of new evidence. The Defence is requesting the provision of *additional clarification* with regard to (already existing) evidence which has been put forward by the OCP. Put differently, we are merely asking the Trial Chamber to enable the parties to properly verify the chain of custody, provenance and authenticity of documents that

¹⁰ Seventeenth Request, para. 16.

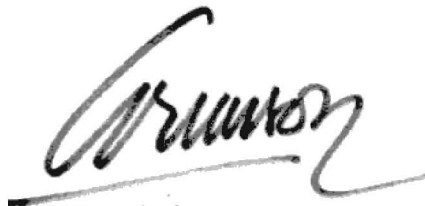
¹¹ But, of course, it should be stressed that there *was never any legal requirement* for the Defense to ‘put the OCP on notice’ regarding these issues; any professional investigative body would have realized at the very start of its investigation that straightforward questions relating to provenance and chain of custody of documentary evidence would become a topic of discussion during trial; moreover, it would have realized that (as discussed *supra*) the party which intends to rely on these documents is the party that needs to provide such information to the other parties and the Trial Chamber. The OCP has failed to do so. Moreover, it is clear that the OCP itself *foresaw* that issues relating to authenticity, chain of custody and provenance could become the topic of judicial scrutiny; this must have been the reason for interviewing Youk Chhang regarding these issues in 2009. In short, rather than criticizing the Defence for an alleged lack of due diligence, the OCP should be berating itself for not timely providing (and most likely: not even searching) relevant information that is, it has now transpired, readily available in DC Cam’s database. The OCP has shown little curiosity indeed as to the provenance of the documents it intends to rely on; the Defence can only guess as to the reasons for this attitude.

have already been proffered by the OCP; such verification is indispensable when assessing the weight to be afforded to these documents, as recognized by the Trial Chamber. The Defence is not requesting the admission of new evidence.

G. Conclusion and Request

15. For these reasons, as well as the reasons stated during the hearing on 6 February 2012, the Defence requests the Trial Chamber (for reasons of expediency) to request DC-Cam to provide the information contained in its (DC-Cam's) database fields '316' and '317' with regard to the documents on which the OCP intends to rely.¹²
16. Alternatively, the Defence requests the Trial Chamber to order the OCP to obtain said information from DC-Cam, in order to have the OCP properly discharge its duty of providing relevant and available information relating to evidence it intends to rely upon.

CO-LAWYERS FOR NUON CHEA



SON Arun



Michiel PESTMAN & Victor KOPPE

¹² These documents are listed in **Doc. No. E161.1**