

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

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**NUON CHEA'S RESPONSE TO THE PROPOSED TRANSFER OF EVIDENTIARY
MATERIAL TO THE TUOL SLENG MUSEUM**

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PART 1. INTRODUCTION

1. Pursuant to the Trial Chamber's memorandum dated 5 April 2019,¹ the Co-Lawyers for Nuon Chea (the "Defence") submit this response to the Trial Chamber's proposal to transfer evidentiary material relating to the S-21 Security Centre ("S-21") to the Tuol Sleng Museum (the "Response").

PART 2. BACKGROUND

2. On 7 December 2016, the Trial Chamber (the "Chamber") informed the Parties that it had received documentation from Professor Walter Heynowski related to S-21. This included an orange logbook and several loose pages. The loose pages were found to be "badly deteriorated."²
3. On 26 December 2016, the Greffier received another package from Prof. Heynowski, this time containing approximately 500 photographs of S-21 detainees. Many of the pages were found to be in poor condition or stuck together.³
4. On 27 December 2016, following an oral request by the Co-Prosecutors, the Chamber admitted the orange logbook as evidence in Case 002/02.⁴ The logbook allegedly provides daily records of the number of persons in and out of S-21 over a period of eight months in 1977.⁵
5. On 28 December 2016, the Chamber sent a letter to the Director of the Tuol Sleng Museum (the "Museum"), Chhay Visoth, advising him of the logbook and loose pages received from Prof. Heynowski.⁶ The letter proposed to transfer the loose pages to the Museum as they were in "very poor condition and require[d] immediate care for preservation by a professional archivist." It also stated that the Chamber would transfer the logbook to the Museum "as a final donation in due course."⁷ The loose pages were

¹ E443/12, Trial Chamber Memorandum entitled 'Proposed Transfer of S-21 Materials Provided by Prof. Walter Heynowski (2-TCW-946) to the Tuol Sleng Museum', 5 Apr 2019 ("Trial Chamber Memo on Proposed Transfer of Heynowski Documents").

² E443/2/1, Trial Chamber Memorandum entitled 'Further Documents Obtained from Professor Heynowski', 5 Jan 2017, para. 1 ("Trial Chamber Memo on Obtained Heynowski Documents").

³ E443/2/1, Trial Chamber Memo on Obtained Heynowski Documents, para. 2.

⁴ E443/3, 'Decision on Request to Admit Logbook and to Recall Two Witnesses Regarding S-21', 27 Dec 2016, para. 3 ("Decision Admitting S-21 Logbook as Evidence").

⁵ E443/3, Decision Admitting S-21 Logbook as Evidence, para. 1.

⁶ E443/4, Letter from the Trial Chamber to the Director of the Tuol Sleng Museum regarding 'Donation of Documents from Professor Walter Heynowski and Request for Information', 28 Dec 2016, para. 1 ("Letter from the Trial Chamber to the Tuol Sleng Museum").

⁷ E443/4, Letter from the Trial Chamber to the Tuol Sleng Museum, para. 2.

physically transferred to the Museum on 29 December 2016⁸ and were not admitted as evidence in Case 002/02.

6. On 12 January 2017, following a request from the Co-Prosecutors and the Khieu Samphân Defence, the Chamber admitted the photographs provided by Prof. Heynowski as evidence in Case 002/02.⁹
7. On 28 March 2019, the Chamber issued its fully reasoned, written judgement in Case 002/02 (the “Trial Judgement”).¹⁰
8. On 2 April 2019, the Chamber received a letter from Chhay Visoth requesting the transfer of the photographs and the orange logbook donated by Prof. Heynowski (the “Heynowski Documents”) to the custody of the Museum.¹¹ The letter states, *inter alia*, that the Museum would like to begin the process of evaluating and conserving the Heynowski Documents, and to prepare for their possible inclusion in an upcoming exhibition due to open on 19 August 2019.¹²
9. On 8 April 2019, the Parties were notified of the Chamber’s intention to transfer the Heynowski Documents to the Museum, and were requested to provide their objections, if any, by 22 April 2019.¹³
10. On 9 April 2019, Nuon Chea notified the Chamber of his intention to appeal the Trial Judgement.¹⁴

PART 3. APPLICABLE LAW

11. Rule 9(6) of the Internal Rules provides:

At the direction of the Co-Prosecutors the Co-Investigating Judges or the Chambers, as appropriate, the Office of Administration shall be responsible for the preservation, storage and security of evidence including exhibits, statements and documents obtained in the course of preliminary investigations, judicial investigations, trials, and appeals.

⁸ E443/4.1, ‘Written Record of Transfer of Documents’, 29 Dec 2016.

⁹ E443/6, ‘Decision on the Requests by the Co-Prosecutors and the KHIEU Samphân Defence to Admit Photographs Related to the Documentation Provided by Professor Walter Heynowski (2-TCW-946)’, 12 Jan 2017, para. 5 (“Decision Admitting S-21 Photographs as Evidence”).

¹⁰ E465, ‘Case 002/02 Judgement’, 16 Nov 2018 [*sic* – 28 Mar 2019] (“Case 002/02 Trial Judgement”).

¹¹ E443/11, Request Letter from the Director of the Tuol Sleng Museum, 2 Apr 2019 (“Request Letter from the Tuol Sleng Museum Director”), para. 1.

¹² E443/11, Request Letter from the Tuol Sleng Museum Director, p. 2.

¹³ E443/12, Trial Chamber Memo on Proposed Transfer of Heynowski Documents, paras 5-6.

¹⁴ E465/1, ‘Nuon Chea’s Letter Authorising his Lawyers to File an Appeal against the Case 002/02 Judgement’, 9 Apr 2019 (“Nuon Chea’s Letter Authorising His 002/02 Appeal”).

12. The Tribunal's statutory framework is silent on whether evidence in the custody of the ECCC may be transferred to third parties.

PART 4. ARGUMENTS

I. IN PRINCIPLE, MATERIAL FORMING PART OF THE CASE FILE MUST NOT BE TRANSFERRED UNTIL ALL PROCEEDINGS HAVE CONCLUDED

13. The Defence in principle objects to the transfer of the Heynowski Documents from the ECCC to the Museum before the proceedings to which they pertain have been properly concluded.
14. The Heynowski Documents form part of the Case 002/02 record with the Chamber admitting the logbook and the photographs of S-21 prisoners as evidence on 27 December 2016 and 12 January 2017, respectively.¹⁵ Contrary to the Chamber's implicit suggestion,¹⁶ the relevance of these documents to the case, or indeed any of the evidentiary material on the record, has not dissipated since the rendering of the Trial Judgement.
15. Despite the close of the trial proceedings, Case 002/02 is still active and ongoing. Following the issuance of the Trial Judgement on 28 March 2019, Nuon Chea promptly notified the Chamber of his intention to appeal it.¹⁷ The Defence also submitted its first request for an extension of statutory limits on the filing of Nuon Chea's notice of appeal.¹⁸
16. Given these circumstances, therefore, it is imperative that the Heynowski Documents remain in the care and custody of the ECCC at least until the conclusion of all proceedings in Case 002/02. This is to ensure that the Parties continue to have prompt and unencumbered access to relevant evidentiary material in the case for the duration of the appeal. More importantly, keeping evidence in the ECCC custody ensures that safeguards for maintaining the chain of custody and protecting against evidence tampering are in place.

¹⁵ **E443/3**, Decision Admitting S-21 Logbook as Evidence, para. 3; and **E443/6**, Decision Admitting S-21 Photographs as Evidence, para. 5.

¹⁶ **E443/12**, Trial Chamber Memo on Proposed Transfer of Heynowski Documents, paras 5-6.

¹⁷ **E465/1**, Nuon Chea's Letter Authorising His 002/02 Appeal.

¹⁸ **F40/1.1**, 'Nuon Chea's Urgent First Request for an Extension of Time and Page Limits for Filing his Notice of Appeal against the Trial Judgement in Case 002/02', 3 Apr 2019.

17. Moreover, there is no practical reason justifying the transfer of custody of the Heynowski Documents to the Museum at this time. Those documents found to be in the worst condition (*i.e.*, the loose pages) have already been transferred,¹⁹ and there is no suggestion that the documents remaining at the ECCC require immediate preservation; indeed, based on the Defence's own inspection of the Heynowski Documents, this does not appear to be the case. Nor does the Chamber indicate that the Records and Archives Unit is unable to continue storing the Heynowski Documents on the ECCC premises for the duration of the appeal proceedings.
18. The Defence further notes in this regard that in his Request Letter to the Chamber, Chhay Visoth refers to an exhibition due to open later this year and expressed his interest in possibly including the Heynowski Documents. This however is not a relevant consideration as to whether evidentiary material forming part of an active case record at the ECCC should be transferred into the Museum's custody. It also raises questions as to how the Parties to the case could reasonably access these documents, and how the documents could be safeguarded from potential interference, if they were put on public display during the appeal proceedings. This is discussed further in Section II (A) below.
19. The issue of transferring custody of evidentiary material to third parties has not often been raised before international criminal courts and tribunals, as case records become part of their archives and remain in their sole custody. There are, however, a few examples from the ICTY that may provide some guidance. In *Simić et al.*, the ICTY Trial Chamber ordered the release of a bag of personal effects belonging to a witness, which had been tendered as an exhibit, back to the witness following the conclusion of the case.²⁰ This order was made after the time for appeal against the judgement had elapsed and there was no reason for further retention of the exhibit.
20. In *Radić*, the ICTY Appeals Chamber ordered the Registry to temporarily transfer a model of the Omarska Camp to the Prosecutor's Office of Bosnia and Herzegovina for use in a trial before the BiH State Court.²¹ The Chamber noted that: (i) the case had been referred to the State Court by the ICTY, and the tribunal had an obligation to support national institutions prosecuting violations of international humanitarian law in the

¹⁹ E443/4, Letter from the Trial Chamber to the Tuol Sleng Museum, para. 2.

²⁰ *Prosecutor v. Simić et al.*, IT-95-9-R77, 'Order Releasing Physical Evidence', 1 Aug 2000, p. 2.

²¹ *Prosecutor v. Radić*, IT-98-30/1-R.1, 'Decision on Prosecutor's Request to Transfer Model of Omarska Camp to Prosecutor's Office of Bosnia and Herzegovina', 10 Nov 2006, p. 4 ("*Radić* Decision").

former Yugoslavia; (ii) the Prosecutor did not intend to use the model in future proceedings; and (iii) neither of the parties objected to its transfer. Given, however, that the model formed part of the *Kvočka et al.* and *Tadić* case records, the model had to be returned to the ICTY Registry when there were no trials pending before the BiH State Court.²²

21. The factual circumstances of these examples from the ICTY are clearly distinguished from the present case. First, as previously stated, Case 002/02 remains active and the Heynowski Documents form part of its record. Second, there are no legal or practical reasons for permanently transferring custody of these documents to a third party at this point in time. The Heynowski Documents do not form part of the evidentiary material of another case, the ECCC is not statutorily obligated to assist the Museum, and there is no risk to the condition of the documents that requires the Museum's immediate intervention.
22. In view of the above, the Chamber must defer transfer of the Heynowski Documents until at least such time as all proceedings against Nuon Chea have been concluded.

II. WHEN TRANSFER IS JUSTIFIED, AN ACCESS POLICY AND A CHAIN OF CUSTODY MUST BE ESTABLISHED BEFORE TRANSFER IS EFFECTED

23. Should new circumstances arise justifying the immediate transfer of the custody of the Heynowski Documents to the Museum prior to the conclusion of Case 002/02, the Defence requests that the Museum, in conjunction with the Office of Administration of the ECCC, set out clear policies for: (i) making and handling access requests for the Heynowski Documents; and (ii) maintaining a chain of custody.

A. THE PROCEDURE FOR REQUESTING ACCESS TO THE DOCUMENTS SHOULD BE CLEARLY SET OUT

24. The Heynowski Documents, which are part of Case 002/02 record, must remain accessible to the Parties until at least the conclusion of the appeal proceedings. Although the Director of the Museum has provided assurances to the Chamber that the Museum can assure Parties' access to the original Heynowski documents during the ongoing judicial process before the ECCC,²³ it is unclear how such access will be effected.

²² *Radić* Decision, pp. 3-4.

²³ E443/11, Request Letter from the Tuol Sleng Museum Director, p. 2.

25. There is no instruction on the official website of the Museum as to the procedure of requesting access to the original documents in the Museum's custody. On a previous occasion in 2011 when seeking access to materials held at the Museum, the Defence was advised by the Museum staff to submit such requests through the Ministry of Culture and Fine Arts.
26. In order to streamline the process for requesting access to the Heynowski Documents and to avoid what would otherwise be a bureaucratic obstacle course, the Defence requires clarification on how the Parties should raise, and how the Museum will handle, access requests.
27. In particular, the Defence requires clarification on:
- Who will be the relevant Museum focal point, and what are their contact details;
 - Who will be the alternative focal point in case the first focal point is unavailable;
 - How should requests for access be made; and
 - How long it will take for the Museum to respond to these requests.
28. In addition, the Defence requests assurances from the Director of the Museum that any requests by the Parties to access the Heynowski Documents for case-related purposes will not be rejected, and that the Museum will provide all reasonable assistance in effecting the request in a timely manner. It must be stressed that use of the Heynowski Documents in connection with Case 002/02 should take precedence over any use of these documents by the Museum.
29. The Defence further requests that the Heynowski Documents not be put on exhibition at the Museum until the conclusion of the appeal proceedings in Case 002/02. Public display would not only create an unnecessary and otherwise avoidable obstacle to a party seeking access to the documents for case-related purposes, but it also increases concern of potential interference as they would be generally accessible to members of the public. The use of the Heynowski Documents by the Museum prior to the conclusion of all proceedings Case 002/02 should, therefore, be limited to conservation purposes.

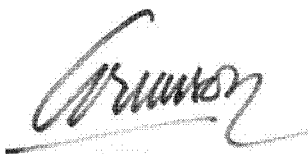
B. A CHAIN OF CUSTODY MUST BE ESTABLISHED THROUGH THE MUSEUM

30. As the Chamber acknowledges,²⁴ and as the Defence argued in its Closing Brief in Case 002/02,²⁵ chain of custody is an important factor relevant to the assessment of the reliability and authenticity of evidence. As such, it is imperative that a chain of custody be established through the Museum to ensure that the integrity of Heynowski Documents is preserved, and to avoid tampering or fraudulent activity.
31. In this regard, the Defence further notes that comparison can be drawn from the ICTY practice. The ICTY Appeals Chamber in *Radić* directed the Registry to establish a chain of custody through the BiH State Court for a model of the Omarska Camp that was to be **temporarily** transferred to the State Court. Although no longer in use in proceedings at the ICTY, the model continued to form part of the *Kvočka et al.* and *Tadić* case records. It is, therefore, the duty of the ICTY Registry to ensure its integrity.²⁶

PART 5. RELIEF

32. For the above reasons, the Defence objects to the transfer of the Heynowski Documents before all proceedings in Case 002/02 have been properly concluded.
33. In the event that new circumstances arise during the appeal proceedings in Case 002/02, justifying the immediate transfer of the Heynowski Documents, the Defence requests that an access and storage policy be established before transfer of the Heynowski Documents is effected, covering:
- (a) the process for parties to request access to the Heynowski Documents; and
 - (b) the method for recording the chain of custody.

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²⁴ E465, Case 002/02 Trial Judgement, para. 61.

²⁵ E457/6/3/1, 'Nuon Chea's Amended Closing Brief in Case 002/02', 28 Sep 2017, paras 487, 501-504.

²⁶ *Radić* Decision, pp. 2-3.