

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**CO-PROSECUTORS' RESPONSE TO NUON CHEA'S FURTHER SUBMISSIONS
RELATING TO REQUEST FOR CLARIFICATION OF PROVENANCE / CHAIN OF
CUSTODY OF DC-CAM DOCUMENTS**

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I. INTRODUCTION

1. On 9 February 2012, the defence for Nuon Chea (the “Defence”) filed a request entitled “Further Submissions Relating to Request for Clarification of Provenance / Chain of Custody of DC-Cam Documents”¹ (the ‘Defence Submissions’) which was notified to the parties in Khmer on 15 February 2012.
2. The Defence Submissions makes argument “regarding the request of 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 proceedings.”² The Defence Submission follows requests made by the Defence – during its questioning of witness Mr. Youk Chhang – for disclosure of information about the chain of custody and provenance of documents before the Chamber that were sourced from his organisation, DC-Cam.³
3. Specifically, the Defence Submissions request the information contained in the following two database fields:
 - (a) “Source/provenance note (317)” – The Defence notes that the DC-Cam manual for its Cambodia Genocide Data Bases provides that this field is “[u]sed to record information on the source of the item, former/current owners.”⁴ The Defence asserts that Youk Chhang testified that the field is “where information as to provenance and chain of custody would be recorded for documents received by DC-Cam.”⁵
 - (b) “Note relating to copy being catalogued (316)” – The Defence asserts Youk Chhang testified that this field “contains information regarding the question whether DC-Cam possesses the original version of the document or rather a copy, among other information.”⁶
4. At the time of the original oral requests for the information contained in fields 316 and 317, the Defence ambiguously premised its request on the information’s “crucial

¹ E1/39.1/1 Further Submissions Relating to Request for Clarification of Provenance / Chain of Custody of DC-Cam Documents, 9 February 2012.

² *Ibid.* at para. 1.

³ E1/39.1 Transcript, 6 February 2012, pp. 80:1 – 81:1.

⁴ E1/39.1/1 at para. 2.

⁵ *Ibid.*

⁶ *Ibid.* at para. 3.

importance” and the “unprecedented situation that a private organization has been so instrumental in the collection of evidence in a criminal case.”⁷ The Trial Chamber indicated it would respond to the Defence requests in due course.⁸

5. In the Defence Submissions, the Defence requests the disclosure of information from the two fields on two grounds. First, it asserts that the information is highly relevant because it 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 OCP intends to rely.”⁹ Second, the Defence asserts that the information will aid in the “potential authentication of [DC-Cam] documents, as it will provide the parties with relevant information regarding the (location and/or (non-)existence of) the original (DK era) document.”¹⁰
6. The Co-Prosecutors hereby respond to the Defence Submissions, pointing out that the information requested is not necessary to the Chamber’s assessment of the admissibility of documentary evidence. The standard sought to be applied by the Defence is more stringent than that already determined by the Chamber. Applying the correct standard, the OCP has already placed before the Chamber ample information establishing authenticity of documents it seeks to have admitted, through lengthy written submissions and evidence adduced at oral hearings during the trial.

II. PROCEDURAL BACKGROUND

7. Over the course of the past ten months, the Co-Prosecutors have provided a series of document lists to the Chamber and other Parties. On 19 April 2011, the Co-Prosecutors filed their list of documents on which they intended to rely at trial.¹¹ Following the Trial Chamber’s direction to parties to identify the documents and exhibits they considered relevant to the first phase of the trial,¹² the Co-Prosecutors filed their First Phase Document List on 22 July 2011.¹³ On 1 November 2011, the Co-Prosecutors filed their Notification of Documents to be put before the Trial Chamber in connection with those witnesses and experts who may be called during

⁷ E39.1 at pp. 80:16 – 81:1.

⁸ *Ibid.* at p. 89:21-22.

⁹ E1/39.1/1 at para. 4.

¹⁰ *Ibid.*

¹¹ E9/31 Co-Prosecutors’ Rule 80(3) Trial Document List, 19 April 2011.

¹² E1/4.1 Public Transcript of Initial hearing, 27 June 2011, p. 25.

¹³ E109/4 Co-Prosecutors’ Response to the Trial Chamber’s Request for Documents Relating to the First Phase of the Trial, 22 July 2011; E109/4.1-4.20.

the first three weeks of trial and attached a document list.¹⁴ The Defence filed general objections to the document list.¹⁵ The Co-Prosecutors responded to the Defence objections by filing their Consolidated Response to Objections to Co-Prosecutors' Document List for First Trial Session on 1 December 2011.¹⁶ Then on 23 December 2011, the Co-Prosecutors filed their Rule 92 submission outlining the indicia of reliability in relation to each document on their 1 November 2011 document list.¹⁷

8. On 5 January 2012, the Defence filed its Rule 92 objections to documents, reiterating its previously filed general objections with respect to the admission of documentary evidence at trial.¹⁸ The Defence also requested that the Director of DC-Cam, Youk Chhang, be called as a witness at trial.¹⁹
9. The Trial Chamber held oral hearings on the admissibility of documentary evidence between 16 and 19 January 2012, allocating three days for the discussion of objections to five categories of documents.²⁰
10. Two witnesses were called and testified on, *inter alia*, the collection and archiving practices of DC-Cam. Mr. Vanthan Dara Peou, the Deputy Chief of DC-Cam, testified over the course of three days, from 23 to 25 January 2012.²¹ Mr. Youk Chhang, the Director of DC-Cam, also testified over the course of three days, in February 2012.²² Both witnesses were subject to examination by all parties.

III. APPLICABLE LAW

11. The Trial Chamber recently clarified the standard to be applied when assessing the admissibility of documentary evidence at the ECCC. The Chamber's ruling was filed

¹⁴ E131/1/4 Co-Prosecutors' Notification of Documents to be Put Before the Chamber in Connection with Those Witnesses and Experts Who May Be Called During the First Three Weeks of Trial with Confidential Annex A, 1 November 2011; E131/1/4.1 Annex A, 1 November 2011.

¹⁵ E131/1/9 Nuon Chea's Objections, Observations, and Notifications Regarding Various Documents to Be Put Before the Trial Chamber, 14 November 2011, paras. 17-19.

¹⁶ E131/1/19 Consolidated Response to Objections to Co-Prosecutors' Document List for First Trial Session, 1 December 2011.

¹⁷ E158 Co-Prosecutors' Rule 92 Submission Regarding Indicia of Reliability of the 978 Documents Listed in Connection with Those Witnesses and Experts Who May be Called During the First Three Weeks of Trial, 23 December 2011.

¹⁸ E131/1/12 Nuon Chea's Document Objections & Further Submissions Pursuant to Rule 92, 5 January 2012.

¹⁹ *Ibid.* at para. 3.

²⁰ E159 Trial Chamber Memorandum re: Scheduling of oral hearing on documents 16-19 January 2012), 11 January 2012.

²¹ E1/31.1 Transcript of Trial Proceedings, 23 January 2012; E1/32.1 Transcript of Trial Proceedings, 24 January 2012; E1/33.1 Transcript of Trial Proceedings, 26 January 2012.

²² E1/37.1 Transcript of Trial Proceedings, 1 February 2012; E1/38.1, Transcript of Trial Proceedings, 2 February 2012; E1/39.1 Transcript of Trial Proceedings, 6 February 2012.

with the parties in written form through its Memorandum dated 30 January 2012 (“the Memorandum”). The operative paragraph in the Memorandum, most pertinent to the present response is as follows:

“Internal Rule 87(3)(c) [] requires documents intended to be put before the Chamber to satisfy prima facie standards of relevance, reliability and authenticity. Where, for example, a document does not appear to be a forgery, or unrepresentative of the original, the Chamber shall consider the document to have been put before it. Objections of this type must be raised at the time it is proposed to put a document or other evidence before the Chamber. Any further submissions as to the document’s reliability shall go instead to the weight to be accorded to it by the Chamber.”²³

12. The Trial Chamber also found that, while there is no procedural requirement before the ECCC to call witnesses with personal knowledge to authenticate documents on the case file, testimony as to chain of custody and provenance will assist the Chamber in assessing the weight to be attributed to particular documents.”²⁴
13. The Chamber’s finding reflects the longstanding position of the Co-Prosecutors that “for evidence to be admitted at the ECCC, it must meet ‘minimum standards of relevance and reliability.’”²⁵ In meeting the *prima facie* standard of reliability, a multitude of factors may be taken into consideration according to the particular circumstances of each case.²⁶ As a related component to reliability, and pertinent to the present response, the Co-Prosecutors also emphasise the need to establish the authenticity of documentary evidence to a *prima facie* standard.
14. The Chamber has now clearly confirmed the Co-Prosecutors’ position that the test for admissibility requires only a *prima facie* standard. Thus the Chamber also confirmed the Co-Prosecutors’ position that “there is no requirement for authenticity of a document to be definitively established at this stage”.²⁷

²³ **E162** Trial Chamber Memorandum re: “Trial Chamber response to portions of E114, E114/1, E131/1/0, E131/6, E136 and E158”, 31 January 2012, para. 2.

²⁴ *Ibid.* at para. 7.

²⁵ **E131/19** Co-Prosecutors’ Consolidated Response to Objections to Co-Prosecutors’ Document List for First Trial Session, 1 December 2011, para. 57.

²⁶ **E114/1** Co-Prosecutors’ Response to “Ieng Sary’s Objections to the Admissibility of Certain Categories of Documents”, 16 September 2011, para. 10.

²⁷ **E131/19** Co-Prosecutors’ Consolidated Response to Objections to Co-Prosecutors’ Document List for First Trial Session, 1 December 2011, para. 59 (internal quotation marks omitted).

IV. ARGUMENT

i. The test applied is too stringent

15. As already noted by the Co-Prosecutors in oral submissions responding to the original Defence request, this wide-ranging inquiry into documents is not in accordance with the *prima facie* standard for admissibility set by the Memorandum.²⁸ The Defence Submissions suggest that the proffering party must definitively establish chain of custody before the test for authenticity of documents is met. In fact, no one indicator of reliability is determinative of that test, and none are required to be established beyond a *prima facie* standard at the admissibility stage of the inquiry.
16. The Defence request is the latest in a series of contradictory filings regarding the proper standard to be applied in assessing documents authenticity. In January of this year the Defence took the position that documents may be admitted provided they “meet the *prima facie* test of admissibility.”²⁹ According to the Defence, the “internal characteristics” and “external features” of the documents it tenders will suggest this *prima facie* reliability.³⁰ A document’s prior placement on the case file will also serve as an indicator of reliability, in the Defence’s recent estimation.³¹ Now chain of custody as a determinative factor in the test and the very high standard of proof the Defence now advocates in the Defence Submissions contradicts their earlier position in January of this year.
17. Through the Defence Submissions the Defence attempts to import a more stringent approach to the test for admissibility of documents than is applicable at the ECCC. The arguments in the Defence Submission that the significance of the requested information regarding chain of custody “cannot be over-emphasised” suggests a requirement that the chain be proven or established even where the authenticity of documents is not otherwise in doubt and other strong indicators supporting authenticity have been established to the appropriate standard.
18. The test for admissibility in relation to all three factors identified by Rule 87(3), and the test enunciated by the Chamber, is context specific and depends on a combination of available indicia. As demonstrated by the Co-Prosecutors in previous submissions

²⁸ E1/39.1 at p. 85:1-22.

²⁹ E131/1/13 Nuon Chea’s List of Documents to be Put Before the Chamber During the First Mini-Trial, 31 January 2012, para. 2.

³⁰ *Ibid.* at para. 4.

³¹ *Ibid.*

and logically inferred from the Chamber's ruling, evidence as to the documents' chain of custody is but one among the many possible indicators of authenticity.

19. The Defence has already conceded the application of this flexible approach to admissibility, as guided by international and Cambodian law, is appropriate at the ECCC. In oral submissions on 16 January 2012, the Defence admitted the Chamber is in "a unique position to craft a policy on the admission standard and ultimate evaluation of documents"³², and went on to describe the applicable standard as follows:

*10 First of all, as to the applicable law, we'd like to note at the
11 outset that given the nature of the ECCC and the limited number
12 of divisions relating to the admission of documents contained in
13 the Cambodian Code of Criminal Procedure which is, as we have
14 submitted many times, the primary and controlling body of
15 procedural law at this Tribunal, the Chamber has a great deal of
16 flexibility in how to proceed with respect to documents.³³*

20. Applying this flexible approach to document authentication, a plethora of indicators have already been identified and put before the Chamber by the Co-Prosecutors. On the specific issue of the documents' chain of custody, extensive information has already been proffered including *viva voce* evidence from two witnesses. Thus, the Chamber already has before it ample evidence to determine authenticity of documents based on a combination of indicia as it sees fit, which may include evidence of its chain of custody.
21. The high standard of proof asserted by the Defence Submissions in relation to chain of custody contradicts both the Chamber's ruling and the previous concession made on this position by the Defence. The *prima facie* standard applicable at the admissibility stage does not require the in depth and exhaustive provision of information requested by the Defence, especially in light of the substantial body of evidence and analysis provided already. Since there is no requirement that any component of the admissibility test be established beyond the *prima facie* standard, the Defence Submissions lack a legal basis. The Co-Prosecutors have already met their legal burden, as the proffering party, with regard to admissibility of the documents. The provision of such a far-reaching body of information would only delay proceedings and be superfluous to the Chamber's enquiry.

³² E27.1 Transcript of Trial Proceedings, 16 January 2012, p. 30:10-16.

³³ *Ibid.* at p. 30:10-16

ii. No specific challenge to documents

22. Of particular note, and in clear contradiction with the present filing, the Defence recently accepted that documents from the DC-Cam archive are due particular deference in terms of reliability.³⁴ In response to an OCP objection during examination of Mr Youk Chhang, the Defence confirmed they were not suggesting any documents sourced from DC-Cam were forged.³⁵ This is reflective of the numerous indicia of authenticity already identified by the OCP in relation to DC-Cam documents, including extensive *viva voce* evidence on their chain of custody and provenance. In the absence of any reasonable basis to question a particular document's authenticity the further broad inquiry suggested by the Defence is without merit.
23. The Defence has failed to point to any specific concerns or identify even narrowed groups of documents to which their stringent threshold of inquiry should apply. During oral submissions on admissibility, the Defence did suggest that a higher standard should apply to determining the authenticity of evidence which goes to the acts and conduct of the accused. While the OCP rejects an inconsistent application of the admissibility test, it notes that the Defence has made no effort to specifically identify even those documents it considers as falling under that category in order to justify the higher standard it advocates.
24. The Defence also admitted during oral submissions that, where further indications of a document's authenticity are requested, the Accused must first mount a (presumably reasoned) challenge to the relevant document first. The Defence submission was as follows:
- 8 However, once the Accused, especially*
9 in court, on being presented with a document, once the Accused
10 challenges the authenticity of that document, we submit -- we
11 submit that the onus then reasonably shifts to the Prosecution to
12 provide a further indication of that document's legitimacy,
13 specially - specially when no original has been provided.³⁶
25. No attempt has been made to mount such a challenge to any specific document in particular, though the defence now requests substantial 'further indication' of authenticity in relation to a large body of documents.

³⁴ E131/1/13 at para. 4.

³⁵ E1/38.1 Transcript of Trial Proceedings, 2 February 2012, pp. 88:18-20.


³⁶ E27.1 Transcript of Trial Proceedings, 16 January 2012, p. 36:8-13

26. Further, the Defence assertion that the requested material may render ‘exculpatory results’ is also unsound. The mere absence of evidence is not in and of itself exculpatory. Where a document’s authenticity is established through other sound indicia, the absence of extra evidence of its chain of custody does not exculpate the accused or undermine the credibility of documentary evidence in the case. Further, the Co-Prosecutors note that a large body of information regarding the chain of custody of DC-Cam material, has already been adduced and placed on the Case File. In these circumstances it is unclear whether the requested database fields would render any new information that would be of assistance to the Chamber or any other party.

V. RELIEF REQUESTED

27. The Defence request comes at an unreasonably late stage of the proceedings, involves an unjustifiably broad demand for information which, if granted, would risk similar requests for even more information superfluous to the Chamber’s enquiry. The request thus poses a risk of unnecessary delay to the present proceedings and is without legal justification. Thus, the Co-Prosecutors request that the Defence request be dismissed in its entirety.

Respectfully submitted,

Date	Name	Place	Signature
24 February 2012	CHEA Leang Co-Prosecutor	Phnom Penh	
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