

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

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**NOTICE TO THE TRIAL CHAMBER REGARDING
RESEARCH AT DC-CAM**

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I. INTRODUCTION

1. Counsel for Nuon Chea (the ‘Defence’) hereby submits this notice (the ‘Notice’) to the Trial Chamber regarding independent research that it will undertake at DC-Cam. The Defence puts the Trial Chamber on notice that it will attempt to verify the chain of custody and provenance of those documents on which the OCP intends to rely.¹

II. PROCEDURAL HISTORY

A. Independent Research by the Defence

2. On 10 January 2008 the OCIJ informed the Defence that it was not allowed to conduct any independent investigations.

Before this Court, the power to conduct judicial investigations is assigned **solely** to the two independent Co-Investigating Judges and not to the parties. There is no provision which authorises the parties to accomplish investigative action in place of the Co-Investigating Judges, as may be the case in other procedural systems. Of course, the parties have the right, under Rules 55(10) and 58(6), to **request** the Co-Investigating Judges to undertake investigative action (...).²

3. On 5 April 2011, during the trial management meeting, counsel Michiel Pestman inquired whether the prohibition on independent investigations by the Defence was still in force.³
4. To date, the Defence has not received a response by the Trial Chamber to this request for clarification. The Defence therefore needs to assume that the prohibition on independent investigations is still in force.

B. DC Cam Documentation

5. On 9 February 2012 the Defence filed its ‘Further Submissions relating to Request for Clarification of Provenance / Chain of Custody of DC-Cam Documents’⁴ requesting the Trial Chamber to (in short) request DC-Cam to provide relevant information relating to

¹ Document No. **E-161.1**, ‘Annex A -- Documents Received from the Documentation Centre of Cambodia [DC-Cam] that have been included on Annexes 1-20 of the Co-Prosecutors’ Rule 80(3) First Phase Document List E109/4.1’, 23 January 2012, ERN 00770511-00770624.

² Document No. **A-110/I**, Letter from OCIJ to SON Arun and Michiel PESTMAN, 10 January 2008, ERN 00157729-00157730, p. 2 (emphasis added).

³ Document No. **E-1/2.1**, ‘Transcript of Hearing’, 5 April 2011, ERN 00664215-00664345, p. 116:3-14.

⁴ Document No. **E-1/39.1/1**, ‘Further Submissions Relating to Request for Clarification of Provenance/Chain of Custody of DC-Cam Documents’, 9 February 2012, ERN 00777270-00777276 (‘Further Submissions’).

provenance and chain of custody of DC-Cam documents on which the OCP intends to rely.

6. On 9 April 2012 the Trial Chamber issued its ‘Decision on Objections to Documents to be Put Before the Chamber on the Co-Prosecutors’ Annexes AI-AS and to Documents Cited in Paragraphs of the Closing Order Relevant to the First Two Trial Segments of Case 002/01’ (‘Trial Chamber Decision’), which stated, as far as relevant:

27. On request, DC-Cam will attempt to trace the origin of a document. However, YOUK Chhang testified that none of the parties to Case 002 have made any requests to DC-Cam for original documents. Further, the NUON Chea Defence admitted that they do not allege that DC-Cam had itself forged documents.⁵ Although the Defence assert that DC-Cam was not sufficiently thorough in ascertaining the provenance and authenticity of documents, the testimony of VAN THAN Dara and YOUK Chhang was otherwise uncontested.

28. On the basis of the testimony of CHHANG Youk and VANTHAN Dara, the Trial Chamber considers the methodology used by DC-Cam in obtaining, archiving and preserving contemporaneous DK-era documents to be reliable. It therefore considers that contemporaneous DK-era documents originating from DC-Cam are entitled to a rebuttable presumption of *prima facie* relevance and reliability (including authenticity). Whilst information regarding provenance and chain of custody need not be provided in relation to individual documents proposed for admission before the Chamber, the Chamber is satisfied that the processes employed by DC-Cam provides no reasonable apprehension that documents originating from this source could have been subject to tampering, distortion or falsification. The originals of all such documents are retained by DC-Cam and the Defence could have requested access to these documents where any genuine concern as to the accuracy of the copy contained on the Case File or as to the provenance or reliability of particular documents existed. The Chamber accordingly finds no basis to entertain either the request of the NUON Chea Defence for additional information stored on the DC-Cam databases or the KHIEU Samphan Defence to retain all DC-Cam original documents for the duration of the trial.⁶

⁵ The Defence notes that this is not an accurate rendering of its position regarding possible forgeries by DC-Cam. The only comments by the Defence regarding this issue were made during the hearing of witness Youk Chhang, when counsel stated ‘Clearly, I have not suggested that DC-Cam has embarked on forging documents.’ Counsel merely stated the obvious, in the sense that he had not, during the hearing, alleged that DC-Cam had embarked on forging documents. Document E-1/38.1, ‘Transcript of Trial Proceedings’, 2 February 2012, ERN 00777033-00777149, pp. 88-20-89:4.2.

⁶ Document No. E-185, ‘Decision on Objections to Documents to be Put Before the Chamber on the Co-Prosecutors’ Annexes AI-AS and to Documents Cited in Paragraphs of the Closing Order Relevant to the First Two Trial Segments of Case 002/01’, 9 April 2012, ERN 00798257-00798273, paras 27-28 (footnote references in original omitted).

III. RELEVANT FACTS

7. Since 10 January 2008, the Defence has had to operate under the OCIJ-imposed prohibition of independent investigative action by the Defence. To date, the Trial Chamber has not lifted that restriction.
8. Justifiably concerned about the chain of custody and provenance of documents that were going to be relied upon in this case, and bearing in mind the prohibition on independent investigative action by the Defence, the Defence has consistently chosen the most logical and sensible approach to this issue: it followed the system put in place at the ECCC and requested the relevant competent authority (the OCIJ) to verify the chain of custody and provenance of the documents it (the OCIJ) intended to rely upon in the issuing of its Closing Order.
9. The first Defence request relating to this issue dates back to 20 December 2007, by now four and a half years ago.⁷ The request was not only timely, it was unambiguous: the Defence asked the OCIJ 'that any and all documents relied upon for any purpose are properly authenticated and their chain of custody duly investigated and recorded.'⁸
10. Nevertheless, even today, the proper information as to provenance and chain of custody of DC-Cam Documents is still lacking, our repeated and timely requests⁹ for this information notwithstanding. The Trial Chamber, in dismissing our request for further information as to chain of custody and provenance (which information is purportedly readily available at DC-Cam) made the following remarks as to the Defence approach towards the DC-Cam documents:

The originals of all such documents are retained by DC-Cam and the Defence could have requested access to these documents where any genuine concern as to the accuracy of the

⁷ Document No. **A-110**, Letter re 'Conduct of the Judicial Investigation', 20 December 2007, ERN 00157351-00157352.

⁸ Document No. **A-110**, Letter re 'Conduct of the Judicial Investigation', 20 December 2007, ERN 00157351-00157352, p. 1.

⁹ Further Submissions, paras 10-13 (describing Defence requests to the OCIJ throughout the investigation, including in the 2009 Seventeenth Request for Investigation, to 'identify, with precision, the source of each specific item of [...] documentary material' that it was intending to rely on in the Closing Order' 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').

copy contained on the Case File or as to the provenance or reliability of particular documents existed.¹⁰

And:

On request, DC-Cam will attempt to trace the origin of a document. However, YOUK Chhang testified that none of the parties to Case 002 have made any requests to DC-Cam for original documents.¹¹

11. In essence, the Trial Chamber blames the Defence for not requesting access to the originals of the documents supplied by DC-Cam at an earlier stage of the investigation. This line of reasoning is both unconvincing and unfair:

- As discussed, the Defence was *barred* from doing its own investigations and therefore properly assumed that to directly approach the single most important source of evidence in the case against our client -- at a time when the OCIJ itself was in direct contact with that source regarding the same documents -- would have directly violated the OCIJ-imposed prohibition on defence investigations. Under the regime as set up by the OCIJ it was clearly not for the Defence to independently verify whether the documents that the OCIJ was planning to rely upon for its indictment were in fact authentic; any other view simply does not take into account the realities (if not legal boundaries) of the investigative stage.¹²
- As discussed, the Defence *did* take the only measure to verify authenticity, chain of custody and provenance of relevant DC-Cam documents available to it under the system established by the OCIJ, by *requesting the OCIJ* to do so.
- The Defence was *not equipped* to conduct a full and thorough provenance/chain of custody review of the hundreds of thousands of

¹⁰ Trial Chamber Decision, para. 28.

¹¹ Trial Chamber Decision, para. 27.

¹² The mere fact that the Defence has been in contact with DC-Cam on several occasions, and that DC-Cam has been helpful in answering certain other, unrelated, queries, does in no way establish a legal duty to engage from that moment on in verification of the authenticity of all documents that exist on the case file (even assuming, *arguendo*, that DC-Cam would have been willing to provide such assistance to the Defence, which is not at all clear).

documents that were placed on the case file during the investigation; it simply lacked the time and resources to do so. The OCIJ, with its numerous investigators, both Khmer and international, would have been the most logical and most adequately equipped office of the ECCC to conduct such an investigation.¹³

- As argued in our ‘Further Submissions’, it is only sensible that the party that wants to rely on certain documents, or proffers documents as evidence, provides the other parties with relevant information as to provenance and chain of custody; this is all the more true if such information is readily available (as purportedly is the case with regard to the DC-Cam documents). In this case, therefore, it was *up to the OCP* to provide this information to the parties. It cannot seriously be maintained that the Defence has a legal duty to independently verify or uncover such information relating to evidence proffered by another party. Not only does this follow from even a superficial logical assessment of the argument, it flows from the burden of proof that rests on the OCP: if the OCP desires to have Nuon Chea convicted on the basis of evidence it has supplied, it also carries the burden of demonstrating that this evidence is reliable. More generally, concerns over chain of custody and provenance of documents which are to be used as evidence are not merely a ‘defense concern’; the OCP and the OCIJ, and now the Trial Chamber, have a legal duty to be concerned about this issue.
- It is only *through (and after) the questioning* of Vanthan Dara and Youk Chhang that serious concerns as to provenance and chain of custody of DC-Cam documents came to light. Indeed, the questioning of these witnesses has served its purpose of uncovering concerns that were not *prima facie* clear to the Defence. There could not have existed a duty on the Defence to have intimate knowledge of DC-Cam procedure and its flaws; indeed, uncovering this type of information is one of the purposes of cross-

¹³ And after the OCIJ, it would have been the *OCP* that would have been the most logical office to conduct such a review. Not only did they have numerous professionals working on their staff that should be considered capable of assisting in the research of chain of custody and provenance of documents, some with direct knowledge of DC-Cam procedures, it should also not be forgotten that it was the OCP that decided to rely on a great number of DC-Cam documents in their Introductory Submission; *see below*, fn 14.

examination.¹⁴ Now that it has been established, through cross-examination, that serious flaws exist, it is incumbent on the parties (and the Trial Chamber) to further explore the extent of those flaws.

- The Trial Chamber Decision appears to criticize the objections by the Defence for a lack of specificity as to specific documents. However, the Defence position is clear: we wish to challenge the authenticity and/or admission of *any* document for which no adequate chain of custody or information as to provenance can be provided. Importantly, we can only formulate such a challenge if we are provided with information as to the existence or non-existence of such data. DC-Cam's database contains readily accessible data that will enable the parties to determine whether or not information as to the chain of custody and provenance exists.¹⁵ As stated before, such information is not only important in order to determine the authenticity and admissibility of documents, but it is also, as the Trial Chamber itself has recognized,¹⁶ crucial when assessing the probative value of the evidence.

12. Concerns as to provenance and chain of custody of DC-Cam documents are now more acute than ever, as the Trial Chamber has started to rely on those documents during the proceedings, even though the provenance and chain of custody of these documents is entirely opaque. Every day that this practice continues, serious damage is being done to the fair trial rights of our client.

IV. CONCLUSION

13. Accordingly, the Defence will now itself approach DC-Cam in order to properly verify the chain of custody and relevance of documents that the OCP intends to rely upon, as

¹⁴ This is true in any system of law; however, here this observation is even more pertinent, considering that DC-Cam was the main collaborating party of the OCP and the OCIJ, and not the Defence; the OCP and the OCIJ had extensive dealings with DC-Cam, not the Defence; and if there was an obligation on any party (and the defence submits: there was) to familiarize oneself with DC-Cam's inners working, it was for *those* ECCC institutions, not the Defence. (Again, the simple fact that there were some unrelated contacts between DC-Cam and the Defence does not turn the Defence into an expert on DC-Cam's methods of document collection.)

¹⁵ The Defence clarifies that this is only the first step in the analysis of chain of custody and provenance; whether the information contained in the database is *adequate* can only be assessed after it has been reviewed.

¹⁶ Document No. **E-162**, Memorandum re 'Trial Chamber response to portions of E114, E114/1, E131/1/9, E131/6, E136 and E158', 31 January 2012, ERN 00772276-00772277, para. 7.

described in Document No. E-161.1 -- work that the OCIJ, and before them the OCP, should have performed years ago.¹⁷

14. The Defence understands the ruling of the Trial Chamber¹⁸ to mean that such an approach does not violate the OCIJ-imposed prohibition on independent investigations by the Defence. The Defence trusts that the Trial Chamber will inform us if this understanding is incorrect.

CO-LAWYERS FOR NUON CHEA



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¹⁷ It should be noted that the Defence is still not adequately equipped to conduct such an investigation in any comprehensive manner.

¹⁸ Trial Chamber Decision, paras 27-28.