

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**CO-PROSECUTORS' RESPONSE TO NUON CHEA'S "NOTICE TO THE TRIAL
CHAMBER REGARDING RESEARCH AT DC-CAM"**

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I. INTRODUCTION AND PROCEDURAL HISTORY

1. On 20 December 2007, the defence for Nuon Chea (“Defence”) sent a letter to the Office of the Co-Investigating Judges giving notice, *inter alia*, of their intention to conduct their own investigation on behalf of their client.¹ The Co-Investigating Judges replied by letter dated 10 January 2008, noting that the right to conduct investigations lies solely with the Co-Investigating Judges.²
2. On 19 June 2009, the Co-Investigating Judges advised that “[i]t is important to recall that the parties are entirely free to review any document from any public source in their search for evidence and, if necessary, request the Co-Investigating Judges to place such evidence on the Case File. Such preliminary inquiries do not affect the prohibition for the parties to accomplish their own investigative action.”³
3. On 9 April 2012, the Trial Chamber issued a decision admitting certain documents submitted by the Co-Prosecutors and cited to in relevant paragraphs of the Case 002 Closing Order. The defence teams had previously had numerous opportunities to object orally and in writing to the proposed admittance of the documents.⁴ At the request of the defence teams, the Trial Chamber also called as witnesses the Director and Deputy Director of DC-Cam.⁵ The Trial Chamber “rejected all Defence objections concerning the provenance of DC-Cam documents”⁶ and held that “contemporaneous DK-era documents originating from DC-Cam are entitled to a rebuttable presumption of *prima facie* relevance and reliability (including authenticity).”⁷ The Trial Chamber also noted that “[t]he 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

¹ A110 Letter from Nuon Chea Defence to the Office of the Co-Investigating Judges, 20 December 2007.

² A110/I Letter from the Office of the Co-Investigating Judges to the Defence for Nuon Chea, 10 January 2008.

³ D164/2 Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD, 19 June 2009, para. 14.

⁴ E185 Decision on Objections to Documents Proposed to be Put Before the Chamber on the Co-Prosecutors’ Annexes A1-A5 and to Documents Cited in Paragraphs of the Closing Order Relevant to the First Two Trial Segments of Case 002/01, 9 April 2012, paras. 7-19.

⁵ *Ibid.*, para. 7.

⁶ *Ibid.*, para 24.

⁷ *Ibid.*, para. 28.

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on the Case File or as to the provenance or reliability of particular documents existed.”⁸

4. On 19 June 2012, the Defence filed a *Notice to the Trial Chamber Regarding Research at DC-Cam* (“Notice”) indicating its intention to:

*approach DC-Cam in order to properly verify the chain of custody and relevance of documents that the OCP intends to rely upon... The Defence understands the ruling of the Trial Chamber to mean that such an approach does not violate the OCLJ-imposed prohibition on independent investigations by the Defence.*⁹

5. In this Response, the Co-Prosecutors request the Trial Chamber to confirm the actions that would and would not be permissible for the Defence to take pursuant to their Notice.

II. ARGUMENT

6. The Internal Rules¹⁰ (“Rules”), and the Law on the Establishment of the ECCC¹¹, assign to the Office of the Co-Investigating Judges the power to conduct investigations following the Introductory Submission.¹² Any party that is seeking information must therefore make a “request [to] the Co-Investigating Judges to make such orders or undertake such investigative action as they consider useful for the conduct of the investigation.”¹³ After the commencement of trial, the power to conduct additional investigatory actions passes to the Trial Chamber.¹⁴ “There is no provision which authorises the parties to accomplish investigative action in place of the ... Judges, as may be the case in other procedural systems.”¹⁵

⁸ *Ibid.*, para. 28.

⁹ E211 Notice to the Trial Chamber regarding research at DC-Cam, 19 June 2012, para. 13-14. Notified 20 June 2012.

¹⁰ See, generally, Rule 55.

¹¹ Article 23new of the ECCC Law: “All investigations shall be the joint responsibility of two investigating judges, one Cambodian and another foreign, hereinafter referred to as Co-Investigating Judges, and shall follow existing procedures in force.”

¹² The Co-Prosecutors have the power to conduct preliminary investigations, which powers terminate on sending an Introductory Submission to the Office of the Co-Investigative Judges. Rules 50, 53; **D164/2** *supra* note 3, para. 14 (“The filing of an Introductory Submission not only seizes the Co-Investigating Judges of a case, but it simultaneously terminates the Co-Prosecutors’ authority to accomplish investigations into the same facts.”).

¹³ Rule 55(10).

¹⁴ Rule 93 (1): “Where the Chamber considers that a new investigation is necessary it may, at any time, order additional investigations. Such order shall indicate which judge or judges shall conduct the new investigation.”

¹⁵ **A110/II** Copy of Response to a letter from the lawyers for NUON Chea, dated 20 December 2007, on the conduct of the judicial investigation, 10 January 2008, para. 3.

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7. The Office of the Co-Investigating Judges has reiterated that parties may not conduct their own investigations, instead they may make any investigatory requests through the appropriate chamber.¹⁶ The Co-Investigating Judges have specifically refused attempts by parties to interview witnesses.¹⁷ However, the Pre-Trial Chamber has confirmed a holding of the Co-Investigating Judges that the prohibition on investigatory action by parties does not extend to include reviewing documents that are available from public sources.¹⁸
8. The Defence's Notice is not specific as to the actions they intend to take at DC-Cam "in order to properly verify the chain of custody and relevance of documents that the OCP intends to rely upon".¹⁹ Based on the foregoing, the Co-Prosecutors submit that the Defence may review any publicly available information and documents at DC-Cam, but are prohibited from conducting any investigatory acts in addition to that, including, but not limited to, interviews of DC-Cam staff and reviewing documents or other information at DC-CAM that is not publicly available.²⁰ Furthermore, any submissions based on investigatory acts that were not within the power of the Defence to conduct should be deemed inadmissible.

¹⁶ *Ibid*, para. 3.

¹⁷ *Ibid*.

¹⁸ **D365/2/10** Decision on Co-Prosecutors' Appeal Against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File Which Assists in Proving the Charged Persons' Knowledge of the Crimes, 15 June 2010, para. 12 ("The Pre-Trial Chamber finds that there has been no offensive conduct by the Appellants in respect of them making any impermissible investigation. On the contrary, they have based the Request only upon documents from a 'public source'. They have not made an investigation, rather, their action amounted to the request for admission of documents which had been the subject of identification as a result of permissible enquiries of public sources and not investigation. ... If the requested documents were only discoverable by enquiry of non public sources this may have amounted to an investigation."); **D164/2** *supra* note 3, para. 14 ("It is important to recall that the parties are entirely free to review any document from any public source in their search for evidence and, if necessary, request the Co-Investigating Judges to place such evidence on the Case File. Such preliminary inquiries do not affect the prohibition for the parties to accomplish their own investigations.").

¹⁹ **E211** *supra* note 9, para. 13.


²⁰ As the Defence have been notified, improper investigatory acts by a party could be subject to sanction. See **A110/I** *supra* note 2, para. 3.

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III. RELIEF REQUESTED

9. For the reasons set forth above, the Co-Prosecutors do not object to the Defence's Notice insofar as they seek to access publicly available information at DC-Cam, but respectfully request the Trial Chamber to confirm that any additional investigatory acts are prohibited.

Respectfully submitted,

Date	Name	Place	Signature
28 June 2012	CHEA Leang Co-Prosecutor	Phnom Penh	
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