

BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IENG SARY'S MOTION AGAINST THE USE OF ALL MATERIAL COLLECTED BY THE DOCUMENTATION CENTER OF CAMBODIA

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”) hereby moves the Trial Chamber not to rely on any material collected from the Documentation Center of Cambodia (“DC-Cam”) during trial. This Motion is made necessary because DC-Cam material is unsuitable to prove any fact it purports to prove. DC-Cam material is tainted by bias against Mr. IENG Sary as DC-Cam’s mandate is that there was genocide and material is to be collected to support this claim. The authenticity of DC-Cam material cannot be verified. Any trial – even in part – based upon DC-Cam material will violate Mr. IENG Sary’s right to a fair trial. The Defence requests a hearing to discuss this matter.

I. APPLICABLE LAW

1. The Trial Chamber can only make a decision on evidence that has been put before it and subjected to examination.¹ Evidence can be put before the Trial Chamber by the parties or by the Trial Chamber itself.² The Trial Chamber may reject a request for evidence being put before it where it finds that it is unsuitable to prove the facts it purports to prove.³ The Trial Chamber held that “the wording of Rule 87(3) refers to ‘evidence from the case file’, it is apparent from the entirety of Rule 87 that material on the case file is not ‘evidence’ as such until it is produced in court in accordance with Rule 87(2).⁴
2. The Pre-Trial Chamber has stated that “were [the Defence] to have actual doubts as to the authenticity of materials relied upon by the OCIJ in the Closing Order due to their source and/or chain of custody, [it retains] the opportunity to challenge such authenticity before the Trial Chamber.”⁵ The Defence is following the jurisprudence laid out by the Pre-Trial Chamber in challenging the use of DC-Cam material before the Trial Chamber.

II. BACKGROUND

A. Interviews with Youk Chhang – Director of DC-Cam

3. The following interviews took place between Mr. Youk Chhang, Director of DC-Cam, and the OCIJ in relation to how DC-Cam collects evidence:

¹ Rule 87(2).

² Rule 87(3).

³ Rule 87(3)(c).

⁴ *Case of KAING Guek Eav alias “Duch”,* 001/18-07-2007-ECCC/TC, Decision on the Admissibility of Material on the Case File as Evidence, 26 May 2009, E43/4, ERN: 00332849-00332857, para. 6.

⁵ *Case of IENG Sary,* 002/19-09-2007-ECCC/TC, Confidential Decision on Appeal Against OCIJ Order on Nuon Chea’s Sixteenth (D253) and Seventeenth (D265) Requests for Investigative Action, 6 April 2010, D253/3/5, ERN: 00492722-00492729, para 13.



- a. In an interview dated 19 March 2009 (“19 March Interview”), Mr. Youk Chhang provided information regarding the authenticity of DC-Cam documents. He stated that he alone confirms the authenticity and chain of custody for a document through personal inspection.⁶ Mr. Youk Chhang stated that only one document tested for its authenticity in the history of the collection of documents from DC-Cam was found to be fake.⁷ He believed this to be an “isolated incident” and believed all other documents to be authentic.⁸
- b. In an interview dated 24 June 2009, Mr. Youk Chhang was interviewed in relation to the Mass Graves Mapping Project emanating from the deaths at the Kraing Ta Chan Security Center. DC-Cam has collected documents related to the Kraing Ta Chan Security Center.⁹ Mr. Youk Chhang stated that material, such as shackles, was collected from Kraing Ta Chan.¹⁰ The original documents in relation to Kraing Ta Chan have been lost.¹¹ Mr. Youk Chhang stated that the copied documents were found at Tuol Sleng in 1995.¹² The documents were put into folders.¹³ This material was classified as originals.¹⁴ Mr. Youk Chhang then sent DC-Cam staff to interview those individuals mentioned in these documents.¹⁵
- c. With respect to staff working on the Mass Graves Mapping Project, Mr. Youk Chhang stated that there were many meetings that could be “considered as a form of training.”¹⁶ Further, there was training in the use of GPS.¹⁷ Mr. Youk Chhang stated that he interviewed four or five separate witnesses from each

⁶ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, OCIJ Interview with Youk Chhang, 31 March 2009, D150, ERN: 00294419-00294424, p. 3.

⁷ *Id.*, p. 4.

⁸ *Id.*

⁹ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, OCIJ Interview with Youk Chhang, 15 September 2009, D204/3, ERN: 00346959-00346966 (“24 June Interview”), p. 3.

¹⁰ *Id.*, p. 4.

¹¹ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, OCIJ Interview with Youk Chhang, 15 September 2009, D204/2, ERN: 00342450-00342455 (“28 May Interview”), p. 4.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 24 June Interview, p. 6.

¹⁷ *Id.*

commune to find a location of a mass grave.¹⁸ Mr. Youk Chhang stated that most of these witnesses exaggerated their accounts.¹⁹

B. Lack of information on the Case File concerning the OCIJ's methodology

4. On 10 January 2008, the OCIJ made it explicit to the parties that it was solely responsible for investigating Case 002.²⁰ On 25 February 2010, this was reaffirmed by the OCIJ.²¹
5. On 21 May 2009, through IENG Sary's Third Request for Investigative Action, the Defence requested from the OCIJ information concerning its methodology, planning and overall strategy of the judicial investigation.²² On 11 December 2009, the OCIJ sent the Defence a letter stating that it has discretion as to how it conducts the investigation.²³ No further information as to its methodology was disclosed by the OCIJ.
6. On 17 July 2009, the Defence submitted a Request concerning the OCIJ's identification of, and reliance on, evidence obtained through torture ("Torture Request").²⁴ On 28 July 2009, the OCIJ issued its Order on the Use of Statements which were or may have been Obtained by Torture.²⁵ It did not respond to the Torture Request, except insofar as it could be considered to explain that the OCIJ has no guidelines to prevent the prohibited use of torture tainted evidence, but will allow the use of such evidence for any purpose, as long as it is determined to be reliable once all information is on the Case File.²⁶ On 7 August 2009 the Defence submitted a second Request concerning the OCIJ's identification of, and reliance on, evidence obtained through torture. It explained, *inter alia*, that "[t]he information sought in [the Torture Request] was vital for us to verify whether a fair, diligent and thorough judicial investigation was being conducted and

¹⁸ *Id.*

¹⁹ *Id.*, p. 7.

²⁰ *Case of NUON Chea*, Office of the Co-Investigating Judges, Response to your letter dated 20 December 2007 concerning the conduct of our judicial investigation, A110/I, 10 January 2008, p. 2.

²¹ *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ, Order issuing warnings under Rule 38, 25 February 2010, D367, ERN: 00478513-00478519 ("Warnings Order"), paras. 8-9.

²² *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Third Request for Investigative Action, 21 May 2009, D171, ERN: 00330819-00330834, para. 7(ii).

²³ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Letter from the Co-Investigative Judges to Defence Teams of IENG Sary, NUON Chea, and Khieu Samphan, re: Your "Request for Investigative Action", concerning, *inter alia*, the strategy of the Co-Investigating Judges in regard to the Judicial Investigation, D171/5, D130/7 & D170/7/2, ERN: 00414038-00414049, paras. 15, 40-43.

²⁴ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Request Concerning the OCIJ's Identification of, and Reliance on, Evidence Obtained through Torture, 17 July 2009, D130/7, ERN: 00352184-00352185.

²⁵ *Case of IENG Thirith*, 002/19-09-2007-ECCC/OCIJ, Order on Use of Statements which were or may have been Obtained by Torture, 28 July 2009, D130/8, ERN: 00355926-00355933.

²⁶ *Id.*, para. 28.

whether the OCIJ was impartially collecting and evaluating the evidence relating to the allegations contained in the Introductory Submission, as required by the Internal Rules.”²⁷

On 30 October 2009, the OCIJ issued a letter to the Defence wherein it stated that any information regarding torture tainted evidence could not be provided until the end of the investigation, when the Case File is complete, because only at that time will the OCIJ have assessed each piece of evidence which raises the issue of torture on a case by case basis.²⁸ No information as to the methodology regarding torture tainted evidence was disclosed by the OCIJ.

7. On 12 February 2010, the Defence requested details of investigative procedures adopted and employed by the OCIJ and a clear explanation of the OCIJ planning and strategy.²⁹ On 25 February 2010, the OCIJ warned the Defence for sending this letter, amongst other letters, and refused to answer the request set out in this letter.³⁰

C. Previous Annulment Request

8. On 20 July 2010, the Defence requested the annulment of all material collected from DC-Cam (“Annulment Request”).³¹ The annulment request was made due to the OCIJ not having exhibited that it had exercised the necessary due diligence in verifying the authenticity, credibility and reliability of DC-Cam material.³²
9. On 3 September 2010, the OCIJ refused the Annulment Request on the grounds that the allegations in the Annulment Request are unfounded (“OCIJ Order”).³³ The OCIJ went on to explain how witnesses obtained from DC-Cam were re-interviewed before being

²⁷ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Letter from IENG Sary Re: Letter concerning the OCIJ’s identification of, and reliance on, evidence obtained through torture, 7 August 2009, D130/7/2, ERN: 00360855-00360856, p. 2.

²⁸ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Letter from the OCIJ Re: NUON Chea’s Fifteenth Request for Investigative Action and Related Letters from IENG Sary’s Lawyers Concerning Evidence Obtained through Torture, 30 October 2009, D130/11/2, ERN: 00398434-00398436, p. 3.

²⁹ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Letter from IENG Sary Defence Team to Co-Investigating Judges in Support and Joinder in part of NUON Chea’s Nineteenth to Twenty-Fifth (Inclusive) Requests for Investigative Action, 12 February 2010, D355, ERN: 00454228-00454232, p. 4.

³⁰ Warnings Order, p. 7.

³¹ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary’s Application to Seize the Pre-Trial Chamber with a Request for Annulment of all Evidence Collected from the Documentation Center of Cambodia, 20 July 2010, D387, ERN: 00568560-00568574.

³² *Id.*

³³ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order Refusing IENG Sary’s Requests for Annulment (D381 and D387), 3 September 2010, D402, ERN: 00600676-00600680, para. 9.

accepted as witnesses in the proceedings.³⁴ The OCIJ did not substantively address the concerns of the Defence with respect to any other material obtained from DC-Cam.

10. On 15 September 2010, the Defence filed an appeal to the OCIJ Order on the basis the OCIJ applied the incorrect test in assessing whether to seize the Pre-Trial Chamber with the annulment request (“Annulment Appeal”).³⁵ Otherwise, the substance of the Annulment Appeal remained the same as the Annulment Request.

11. On 30 November 2010, the Pre-Trial Chamber made its decision on the Annulment Appeal.³⁶ The Pre-Trial Chamber held that annotations on documents by Youk Chhang, Director of DC-Cam, are not a prejudice to the inclusion of these DC-Cam documents on to the Case File.³⁷ The Co-Investigating Judges are not obliged to “clarify” or “explain” the particulars of evidence gathering, including from specific sources.³⁸ The Annulment Appeal was rejected.

III. ARGUMENT

A. Where the manner and surrounding circumstances in which material is obtained is unknown or cannot be tested, it should be deemed to be unsuitable to prove the facts it purports to prove

12. The Pre-Trial Chamber has held that “the manner and surrounding circumstances in which evidence is obtained, as well as its reliability and effect on the integrity of the proceedings, will determine its admissibility.”³⁹ The Trial Chamber can take guidance in that it should reject a request for evidence to be put before it where the manner and

³⁴ *Id.*

³⁵ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 72), IENG Sary’s Appeal Against the OCIJ’s Order Rejecting IENG Sary’s Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Investigative Acts Performed by or with the Assistance of Stephen Heder & David Boyle and IENG Sary’s Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Evidence Collected from the Documentation Center of Cambodia & Expedited Appeal Against the OCIJ Rejection of a Stay of the Proceedings, 15 September 2010, D402/1/2, ERN: 00603546-00603561.

³⁶ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 72), Decision on IENG Sary’s Appeal Against the OCIJ’s Order Rejecting IENG Sary’s Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Investigative Acts Performed by or with the Assistance of Stephen Heder & David Boyle and IENG Sary’s Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Evidence Collected from the Documentation Center of Cambodia & Expedited Appeal Against the OCIJ Rejection of a Stay of the Proceedings, 30 November 2010, D402/1/4, ERN: 00622294-00622314 (“PTC Annulment Decision”).

³⁷ *Id.*, para. 25.

³⁸ *Id.*

³⁹ *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ (PTC 06), Decision on Nuon Chea’s Appeal Against Order Refusing Request for Annulment, 26 August 2008, D55/I/8, ERN: 00219322-00219333, para. 41, *citing Prosecutor v. Brđanin*, IT-99-36-T, Decision on the Defence “Objection to Intercept Evidence”, 3 October 2003, para. 55.

surrounding circumstances in which evidence is obtained is unknown or cannot be tested. This material is unsuitable to prove the facts it purports to prove.

13. Rule 95 of both the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and International Criminal Tribunal for Rwanda (“ICTR”) Rules of Procedure and Evidence states: “No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.” The ECCC should take guidance from this tried and tested rule as Case 002 will be similar to trials at the ICTY and ICTR due to the similarity in the alleged crimes and scale of evidence used. Substantial doubt must be cast over the reliability of material which is collected by unknown methods or methods which cannot be tested. This material should not be permitted to be before the Trial Chamber.

B. DC-Cam material is unsuitable to prove the facts it purports to prove

i. The history of DC-Cam makes it a biased organization

14. DC-Cam was created as a result of the United States of America’s Cambodian Genocide Justice Act in 1994.⁴⁰ The Cambodian Genocide Justice Act assumes crimes against humanity were committed and there was genocide.⁴¹ DC-Cam’s mandate was to “collect relevant data on crimes of genocide committed in Cambodia.”⁴² This is still part of its mission today.⁴³ It was not created to seek the truth or to determine whether genocide or crimes against humanity occurred, but to verify this predetermined conclusion. This is clear from the emails which are regularly distributed by DC-Cam to its mailing list, which bear titles such as: “Genocide Education Project: The Teaching of ‘A History of

⁴⁰ 22 U.S.C. 2656, Part D, §§ 571–74.

⁴¹ *Id.*, § 572. “a. In General. -- Consistent with international law, it is the policy of the United States to support efforts to bring to justice members of the Khmer Rouge for their crimes against humanity committed in Cambodia between April 17, 1975, and January 7, 1979. b. Specific Actions Urged. -- To that end, the Congress urges the President -- 1. to collect, or assist appropriate organizations and individuals to collect relevant data on crimes of genocide committed in Cambodia; 2. in circumstances which the President deems appropriate, to encourage the establishment of a national or international criminal tribunal for the prosecution of those accused of genocide in Cambodia; and 3. as necessary, to provide such national or international tribunal with information collected pursuant to paragraph (1).”

⁴² *Id.*

⁴³ The DC-Cam website states: “DC-Cam is working to reconstruct Cambodia’s modern history, much of which has been obscured by the flames of war and genocide.” DC-Cam website, *available at*: <http://www.dccam.org/About/History/Histories.htm>.



Democratic Kampuchea (1975-1979)';⁴⁴ "Former Khmer Rouge stronghold gets first textbook about atrocities committed in the 1970s,"⁴⁵ "Cambodian schools to hang anti-genocide banners,"⁴⁶ "Family Tracing and Reconciliation STORY FROM THE CAMBODIAN GENOCIDE SURVIVORS"⁴⁷ and "GENOCIDE: THE IMPORTANCE OF CASE 002."⁴⁸ All these emails pre-judge that genocide took place in Cambodia between 1975 and 1979. The DC-Cam pro-genocide mandate, prior to any judgement being handed down by the Trial Chamber as to whether there was genocide, shows that any document obtained from DC-Cam is likely to be tainted by bias and therefore unsuitable to prove the facts it purports to prove.

15. The bias of DC-Cam is evident from the close ties of DC-Cam with the OCP. There have been people which have worked both for DC-Cam and the OCP. For example, Ea Meng-Try. Mr. Ea worked as a researcher for the OCP for "more than a year."⁴⁹ He has also worked for DC-Cam, which obtained a scholarship for him to obtain an advanced degree.⁵⁰ Stephen Heder worked for the OCP in drafting the Introductory Submission⁵¹ and then switched to the OCIJ to assist in the investigation process of the Introductory Submission he had assisted in drafting. In essence, Mr. Heder was tasked with drafting allegations against Mr. IENG Sary and then investigating these very same allegations. Mr. Heder is also an associate advisor of DC-Cam.⁵²

ii. DC-Cam material cannot be verified as authentic

⁴⁴ Email from DC-Cam to mailing list entitled: "Genocide Education Project: The Teaching of 'A History of Democratic Kampuchea (1975-1979)'," 24 June 2010.

⁴⁵ Email from DC-Cam to mailing list entitled: "Former Khmer Rouge stronghold gets first textbook about atrocities committed in the 1970s," 23 June 2010.

⁴⁶ Email from DC-Cam to mailing list entitled: "Cambodian schools to hang anti-genocide banners," 22 June 2010.

⁴⁷ Email from DC-Cam to mailing list entitled: "Family Tracing and Reconciliation STORY FROM THE CAMBODIAN GENOCIDE SURVIVORS," 6 July 2010.

⁴⁸ Email from DC-Cam to mailing list entitled: "GENOCIDE: THE IMPORTANCE OF CASE 002," 6 June 2010.

⁴⁹ See *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, Co-Prosecutors' Request for Appointment of Experts, 14 December 2009, D281, ERN: 00417039-00417048, para. 11.

⁵⁰ See DC-Cam website, <http://www.dccam.org/About/Staff/Staff.htm>.

⁵¹ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Request for Information Concerning the Potential Existence of Conflict of Interest of OCIJ Investigator Stephen Heder, dated 30 January 2009, A252, ERN: 00282718-00282722, para. 4. See also *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, OCIJ Letter to the Defence concerning the Defence Letter entitled Request for Information regarding an eventual conflict of interest, dated 24 January 2008, A121/I, ERN: 00159515-00159516, p.1.

⁵² See DC-Cam website, <http://www.dccam.org/About/Board/Board.htm>.



16. DC-Cam staff employ an entirely subjective test when determining the authenticity of a document.⁵³ This method of verifying documents as authentic cannot be tested. Consequently, substantial doubt must be cast on the reliability of the “tested” documents to be classified as authentic. The OCIJ has not placed on the Case File any attempts it has made to remedy this defect, nor obtained the qualifications or experience of DC-Cam staff in document verification. Based on this alone, DC-Cam material classified as authentic by DC-Cam cannot be deemed suitable to be classified as authentic. This makes DC-Cam material entirely unsuitable to prove the facts it purports to prove.
17. DC-Cam has a large number of copied documents in its filings, which it classifies as originals.⁵⁴ Immediately, there is severe doubt cast over the classification of DC-Cam material. If DC-Cam cannot correctly classify material, documents which have passed through its possession cannot prove the facts they purport to prove. Furthermore, any copied document must face more scrutiny than an original document as to its authenticity and reliability, as it is not an original. Neither DC-Cam nor the OCIJ have provided any information as to why they consider a copied document to be authentic and reliable.
18. There is nothing on the Case File that demonstrates DC-Cam’s methodology regarding any interview of donors of documents. For example, the OCIJ has not verified whether all donors are actually interviewed by DC-Cam. Or if they are interviewed, the OCIJ has not provided information concerning if and how DC-Cam uses the information from any such interviews to test the authenticity of the donated document. As there is no chain of custody on the Case File for DC-Cam material prior to it being collected by the OCIJ, the origin of DC-Cam material is unknown, making it unsuitable to prove the facts they purport to prove.
19. Guidance can be taken from the ICTR where the factors determining the reliability of evidence include “the place in which the document was seized, in conjunction with testimony describing the chain of custody since the seizure of the document; corroboration of the contents of the document with other evidence; and the nature of the document itself, such as signatures, stamps, or even the form of the handwriting.”⁵⁵ For example, in *Prosecutor v. Bagosora*, the Trial Chamber held that annexes in a report

⁵³ 19 March Interview, p. 3-4.

⁵⁴ See for example, 28 May Interview, p. 4.

⁵⁵ *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Admission of Tab 19 of Binder Produced in Connection with the Appearance of Witness Maxwell Nkole, 13 September 2004, para. 8.



submitted as evidence by the Prosecution were inadmissible because the Prosecution did not provide any indication of where the documents were found, by whom they were found, or the chain of custody between discovery and production in court.⁵⁶ The documents at issue in *Bagosora* were photocopied, handwritten with no authorship noted, and no one was able to say where the documents were found or by whom.⁵⁷ At the ECCC, although evidence cannot be deemed inadmissible once on the Case File and the Closing Order has been issued, the Trial Chamber can reject a request for evidence being put before it where it finds that it is unsuitable to prove the facts it purports to prove. As noted above, **a.** DC-Cam material lacks a chain of custody, **b.** where documents are donated their place of origin is unknown, and **c.** nothing on the Case File demonstrates the qualifications of the staff at DC-Cam as handwriting experts or qualified historians of the Khmer Rouge period. Using the ICTR guidance, DC-Cam material cannot prove the facts it purports to prove.

iii. Example: Mass Graves Mapping Project

20. The Mass Graves Mapping Project demonstrates DC-Cam's flawed methodology in the collection of material. Material from Kraing Ta Chan has been classified as original by DC-Cam without ever having been evaluated as original.⁵⁸ The DC-Cam staff working on this project were not properly trained in collecting and assessing evidence.⁵⁹ DC-Cam's criteria for selecting witnesses to locate a mass grave are unknown.⁶⁰ Mr. Youk Chhang admitted that witnesses exaggerated the number of bodies in the graves and therefore DC-Cam could not determine the exact number of graves or number of bodies in the graves.⁶¹ The authenticity of the copied documents at DC-Cam in relation to Kraing Ta Chan has not been verified. It is not known if all the individuals mentioned in the documents were interviewed. If interviewed, it is not known where the interviews of the individuals mentioned in the documents are. It is not known whether the accounts given in these interviews corroborate what is written in the documents. No other verification has taken place for these documents, such as verification from historians, handwriting experts, etc. The OCIJ has not carried out any investigative action to remedy

⁵⁶ *Id.*, para. 10.

⁵⁷ *Id.*, para. 9.

⁵⁸ 28 May Interview, p. 4.

⁵⁹ *Id.*, p. 6.

⁶⁰ *Id.*

⁶¹ *Id.*, p. 7.



this defective evidence. As a result, DC-Cam material relating to Kraing Ta Chan is unsuitable to prove the facts it purports to prove.

iv. There is no information on the Case File to support that DC-Cam material is suitable to prove the facts it purports to prove

21. When making any decision, the Trial Chamber cannot make any assumptions, but must make its decision based only on evidence that has been put before the Trial Chamber and subjected to examination.⁶² Only evidence from the Case File can be put before the Trial Chamber.⁶³ The Pre-Trial Chamber has held that: “The Co-Investigating Judges ... are not obliged to ‘clarify’ or ‘explain’ the particulars of evidence gathering.”⁶⁴ As a result, there is nothing on the Case File to explain how the OCIJ collected DC-Cam material. The only information on the Case File as to how DC-Cam material was collected are the Youk Chhang interviews. The evidence on the Case File supports the view that DC-Cam material is unsuitable to prove the facts it purports to prove. There is no other material on the Case File to state otherwise.
22. With respect to witnesses in the proceedings who have been obtained initially by DC-Cam, the OCIJ has stated – on the Case File – how it used DC-Cam material so that it is suitable to prove the facts it purports to prove: “it was only after a court interview, recorded in the form of written record of interview that persons previously interviewed by DC-Cam were recognised as witnesses in the proceedings.”⁶⁵ The OCIJ implicitly admits here that DC-Cam material does need to be independently investigated by the OCIJ before being placed on the Case File. Witnesses obtained from DC-Cam material were independently investigated before their evidence was placed on the Case File. However for other DC-Cam material, no evidence exists on the Case File, other than Youk Chhang’s interviews, as to how it was investigated.

v. Allowing DC-Cam material to be used at trial will affect the fair trial rights of Mr. IENG Sary

⁶² Rule 87(2).

⁶³ Rule 87(4) states: “During the trial, either on its own initiative or at the request of a party, the Chamber may summon or hear any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth. Any party making such request shall do so by a reasoned submission. The Chamber will determine the merit of any such request in accordance with the criteria set out in Rule 87(3) above. The requesting party must also satisfy the Chamber that the requested testimony or evidence was not available before the opening of the trial.” (Emphasis added). Information from the OCIJ regarding its collection of DC-Cam material was available prior to the opening of trial. Indeed, the Defence requested it during the investigation stage of Case 002.

⁶⁴ PTC Annulment Decision, para 25.

⁶⁵ OCIJ Order, para. 9.



23. In determining whether evidence is unsuitable to prove the facts it purports to prove, guidance can be taken from the *ad hoc* tribunals where the Trial Chamber is the guardian and guarantor of the procedural and substantive rights of the Accused and may exclude evidence which violates an Accused's rights to a fair trial.⁶⁶ A key determination of whether evidence is admissible or not is if it lacks indicia of reliability and if so, it must be excluded.⁶⁷ Evidence may be excluded at any stage of the proceedings, even after its admission, if its probative value is outweighed substantially by the need to ensure a fair trial.⁶⁸ As discussed *supra*, the manner and surrounding circumstances in which DC-Cam material has been collected by the OCIJ has made DC-Cam material unsuitable to prove the facts it purports to prove. Use of this material at trial will seriously damage the integrity of the proceedings. Mr. IENG Sary will have unsuitable material used against him, violating his right to a fair trial. Any proceedings carried out relying upon unsuitable material would make a mockery of the ECCC and severely diminish its credibility as a model court for Cambodia.⁶⁹

C. The Trial Chamber should determine whether to accept DC-Cam material as evidence prior to the initial hearing

24. Prior to the initial hearing is the most judicially efficient time to adjudicate upon the admissibility of DC-Cam material. If the Trial Chamber finds that DC-Cam material is unsuitable to prove the facts it purports to prove prior to the initial hearing, the parties will know not to present this material at trial. This will, in turn, result in a more efficient and quicker trial and trial preparation.⁷⁰ It will also assist the Trial Chamber in that if it finds that DC-Cam material is unsuitable to prove the facts it purports to prove after the initial hearing, and even as late as after trial commencing, it will have to sift through and weed out the unsuitable DC-Cam material.

⁶⁶ *Prosecutor v. Martić*, IT-95-11-T, Decision Adopting Guidelines on the Standards of Governing the Admission of Evidence, 19 January 2006, para. 11.

⁶⁷ *Prosecutor v. Nyiramasuhuko*, ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004, para. 7.

⁶⁸ *Prosecutor v. Tadić*, IT-94-1-T, Decision on the Defence Motion on Hearsay, 5 August 1996, para. 18. See also *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para. 136, holding that the Trial Chamber "can freely assess the probative value of all relevant evidence....any relevant evidence having probative value may be admitted into evidence, provided that it is being in accordance with the requisites of a fair trial."

⁶⁹ "[The ECCC] will provide a new role model for court operations in Cambodia." ECCC website, *available at*: http://www.eccc.gov.kh/english/about_eccc.aspx.

⁷⁰ Mr. IENG Sary is entitled to have the proceedings against him concluded within a reasonable time. Rule 21(4) states: "Proceedings before the ECCC shall be brought to a conclusion within a reasonable time."

IV. REQUEST FOR A HEARING

25. A hearing is necessary to address the issues relating to whether DC-Cam material is suitable to prove the facts it purports to prove. Material to be used during trial must be determined as early as possible in order for all parties in Case 002 to prepare effectively for trial. This, in turn, will allow for smoother running of the trial. Issues surrounding DC-Cam material will be ripe to be heard at the trial management hearing scheduled between 5 April and 6 April.⁷¹ All parties will be able to submit their views and the opportunity for an informed debate is available to the Trial Chamber prior to the commencement of trial.

WHEREFORE, the Defence requests the Trial Chamber to exclude all material collected from DC-Cam from the Case File prior to the commencement of the trial in Case 002 and for DC-Cam material not to be admitted and relied upon during trial.

Respectfully submitted,

ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 24th day of February, 2011

⁷¹ *Case of NUON Chea*, 002/19-09-2007-ECCC/TC, Interoffice Memorandum from the Trial Chamber to all Parties in Case 002, Communication of dates of the Trial Management Meeting (Tuesday 5 April 2011 and Wednesday 6 April 2011), 3 February 2011, E9/5. ERN: 00641511-00641511.