

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

FILING DETAILS

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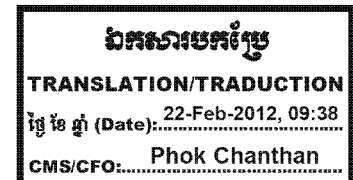
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**MOTION FOR THE ORIGINAL COPIES OF CONTEMPORANEOUS
DOCUMENTS TO BE PRODUCED BEFORE THE CHAMBER**

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Before:

The Trial Chamber
Judge NIL Nonn
Judge Silvia CARTWRIGHT
Judge YOU Ottara
Judge Jean-Marc LAVERGNE
Judge YA Sokhan

Co-Prosecutors
CHEA Leang
Andrew CAYLEY

All Civil Party Lawyers

All Defence Teams

MAY IT PLEASE THE TRIAL CHAMBER

I. FACTS AND INTRODUCTION

1. On 26 January 2012, the Trial Chamber issued an oral decision on documents. In that decision, the Chamber recognised that “*original documents are a preferred method of proof and will be accorded more weight than photocopies of documents.*”¹
2. Also on that date, the Chamber announced that Mr CHHANG Youk, Director of the Documentation Centre of Cambodia (DC-Cam), was scheduled to appear as a witness.²
3. Mr CHHANG Youk began his testimony on Wednesday, 1 February 2012. He testified that DC-Cam has made the undertaking to, *inter alia*, collect and preserve all existing Democratic Kampuchea-era documents.³ His organisation has provided nearly all of the documentary evidence to the Co-Prosecutors and the Co-Investigating Judges. Yet, as Mr CHHANG acknowledged,⁴ neither the Co-Prosecutors nor the Co-Investigating Judges have made any request to DC-Cam to inspect the originals of the thousands of documents that were provided to them as scans or copies of copies, and which now form the bulk of the case file before the Court.
4. As a consequence, the Trial Chamber is now placed in a situation where it must base its impending decision on photocopies provided by an organisation whose Director acknowledged on the stand that it never received any judicial mandate to preserve

¹ Transcript of Trial Proceedings, 26 January 2012, **E1/34.1**, p. 87, L. 6-7; Response to questions posed by the parties in certain passages of documents E114, E114/1, E131/1/9, E131/6, E136 and E158, Memorandum, 31 January 2012, **E162**, para. 4.

² Transcript of Trial Proceedings, 26 January 2012, **E1/34.1**, p. 89, L. 2-4.

³ Draft Transcript of Trial Proceedings, 1 February 2012, p. 100.

⁴ Draft Transcript of Trial Proceedings, 2 February 2012, p. 12, L. 24 – p. 17 L.2.

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evidence⁵, and who was extremely vague as to the method employed by DC-Cam staff in assessing the authenticity of the documents of which DC-Cam has sole custody.

5. For example, it will be noted that Mr CHHANG indicated that DC-Cam recorded as originals certain materials which only existed as copies, simply because those were the only copies available in Cambodia.⁶ He refused to tell the Chamber the location of the documents he regards as contemporaneous originals.⁷ He was also quite vague as to the method employed by DC-Cam staff in assessing the authenticity of contemporaneous documents.

6. On that particular point, Mr CHHANG told the court that to him, each new document he examined personally (as though that in itself were a guarantee) was like a good “*breakfast*”,⁸ and that he studied the colour of the document, the quality of the paper, the date it bore and the vocabulary used.⁹ Considering that the first two aspects cannot be verified on the basis of copies, that the latter two would obviously be avoided by any forger, and that no judicial authority of the ECCC has, to date, assessed the authenticity of those documents, the least that the Chamber can do is to make sure that the documents in question are submitted to the Chamber.

7. By this Motion, Mr KHIEU Samphan reiterates his doubts as to the reliability and authenticity of the documents from DC-Cam. He is of the view that where documents used in the case file are available in the form of alleged originals or as photocopies or copies of copies, the judges and the parties should be informed accordingly. In addition, any document for which an original is alleged to exist should be immediately made available for submission to the judges and the parties during proceedings.

⁵ Draft Transcript of Trial Proceedings, 2 February 2012, p. 13, L. 19-20.

⁶ Draft Transcript of Trial Proceedings, 1 February 2012, p. 34-36.

⁷ Draft Transcript of Trial Proceedings, 2 February 2012, p. 9, L. 16-18.

⁸ Draft Transcript of Trial Proceedings, 1 February 2012, p. 32, L. 24-25 and p. 54, L. 4-5.

⁹ Draft Transcript of Trial Proceedings, 1 February 2012, p. 35-36.

8. As Mr KHIEU Samphan did earlier, in April 2011, he hereby requests the Trial Chamber to order that any documents alleged to be originals¹⁰ be produced to him. This is the least the Chamber can do, considering that during the judicial investigation, no documents were put to the Charged Persons in general or to Mr KHIEU Samphan in particular.¹¹

9. Moreover, this is easy to achieve, since Mr CHHANG has indicated that it would take DC-Cam only “one month” to provide the Chamber with the contemporaneous documents which it believes to have in its custody.¹²

II. DISCUSSION

10. Internal Rule 87 (2) provides: “*Any decision of the Chamber shall be based only on evidence that has been put before the Chamber and subjected to examination.*”

11. In the *Duch* case, the Trial Chamber specified that “*once produced before the Chamber, the probative value of this evidence, and hence the weight to be accorded to it, will then be assessed.*”¹³

12. In the same case, the Trial Chamber ordered the Co-Prosecutors to obtain the original of a document they were seeking to produce before the Chamber, after stating that, “*in order to assist the Chamber in its determination concerning the authenticity of this document, it is necessary to consider all material which might have a bearing on this issue.*”¹⁴

¹⁰ List of Documents, 19 April 2011, **E9/29**, para. 17-18 and 22.

¹¹ It was only during one interview with Mr KHIEU Samphan that a document, i.e. Minutes of the Meeting of 9 October 1975, was mentioned by the National Co-Prosecutor, without him even being presented neither an original nor a photocopied version: Written Record of Interview, 14 December 2007, **E3/37 (D47)**.

¹² Draft Transcript of Trial Proceedings, 2 February 2012, p. 31, L. 15-24; Mr. CHHANG Youk had earlier told the Co-Prosecutors that all original documents in the custody of DC-CAM were available upon the Tribunal’s request **whether they were in Cambodia or abroad**: Record of Witness Interview, 14 August 2007, **IS23.2**, p. 4.

¹³ Case 001, Decision on Admissibility of Material on the Case File as Evidence, 26 May 2009, **E43/4**, para. 7.

¹⁴ Case 001, Decision on Admissibility of New Materials and Direction to the Parties, 10 March 2009,

13. Before the *ad hoc* Tribunals, preference is also given to original documents; the *ad hoc* Tribunals “[...] rely on the best evidence available under the circumstance of the case.”¹⁵ For example, the International Criminal Tribunal for Rwanda held that:

*An original of a document is not a precondition for admissibility; the Chamber would expect that, when available, an original of a document should be provided for inspection to assist the parties in assessing the authenticity of the document.*¹⁶

14. As stated by the President of the Chamber, “documents are an important part of the evidence in Case 002.”¹⁷ Moreover, as stated by Judge Lavergne, “what we are chiefly concerned with are the documents that are part and parcel of these judicial proceedings.”¹⁸

15. The probative value of contemporaneous documents depends directly on their authenticity. This is why any materials that are considered contemporaneous originals by a non-judicial organisation and that serve as a basis for prosecution must imperatively be produced before the Chamber for inspection by the judges and the parties in the course of a public and adversarial hearing.

16. Failing this, pursuant to the rules applicable before the ECCC, to its jurisprudence, and to the jurisprudence of international criminal tribunals, and given that no prosecutor or investigating judge has ever seen these documents, copies of copies of any documents alleged to be contemporaneous will have no probative value, and the judges cannot accord them any weight.

D288/6.5/10/2, para. 8.

¹⁵ *Prosecutor v. Hadzihasanovic et al.*, IT-01-47-T, Decision on the Admissibility of Documents of the Defence of Mr. Hadzihasanovic, 22 June 2005, para. 15; *Prosecutor v. Perisic*, IT-04-81-T, *Order for Guidelines on the Admission and Presentation of Evidence and Conduct of Counsel in Court*, 29 October 2008, para. 35-36.

¹⁶ *The Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Prosecutor’s Motion for the Admission of Certain Materials under Rule 89 (C) of the Rules of Procedure and Evidence, 14 October 2004, para. 25.

¹⁷ Transcript of Trial Proceedings, 16 January 2012, **E1/27.1**, p. 2, L. 2.

¹⁸ Draft Transcript of Trial Proceedings, 2 February 2012, p. 8, L. 20-22.

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FOR THESE REASONS

17. Mr KHIEU Samphan requests the Trial Chamber to:
- DETERMINE the exact number of documents on the case file or referenced by the parties that DC-Cam has in its custody and considers as contemporaneous,
 - ORDER DC-Cam to produce the originals of those documents before the Court,
 - ORDER that for each document that DC-CAM considers to be a contemporaneous original and that it forwards to the Court, DC-CAM also provide details concerning the chain of custody, where available,
 - TO PRODUCE the said documents before the Chamber and allow the parties to inspect them.

	KONG Sam Onn	Phnom Penh	[Signed]
	Arthur VERCKEN	Paris	for [Signed]
	Jacques VERGÈS	Paris	for [Signed]
Date	Name	Place	Signature

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