

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**CO-PROSECUTORS' RESPONSE TO KHIEU SAMPHAN'S 'REQUÊTE AUX
FINS DE PRODUCTION À L'AUDIENCE DES DOCUMENT D'ÉPOQUE EN
ORIGINAL'**

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I. INTRODUCTION

1. On 6 February 2012, the defence team for Khieu Samphan (“the Defence”) filed its *Requête aux fins de production à l’audience des document d’époque en original* (“the Request”).¹ The primary relief sought by the Request is an order from the Trial Chamber directing the Documentation Center of Cambodia (“DC-Cam”) to transfer, in respect of all documents on the case file dating from Democratic Kampuchea (“DK”) era, any originals of those documents in its possession to the ECCC. In addition, the Defence requests the Chamber to: satisfy itself of the exact number of documents on the case file that are retained by DC-Cam and considered to be original; and to order DC-Cam to provide details of the chain of custody for each original contemporaneous document it produces. However, as no legal argument in support of these two additional forms of relief is articulated by the Defence in the body of the Request, the Co-Prosecutors consider that they have not been sufficiently pleaded and therefore limit their response to the primary relief sought.
2. The Co-Prosecutors submit that the Chamber should reject the Defence request to order DC-Cam to produce the originals of all contemporaneous DK documents in its possession to the ECCC. In particular, we submit that (a) there is no legal requirement for the originals of all contemporaneous documents held by DC-Cam to be produced at this time; (b) contrary to the Defence assertion, originals were consulted during the course of the judicial investigation and copies thereof placed on the case file; and (c) there would be significant logistical difficulties in storing all originals at the ECCC throughout the trial. If however, the Chamber is minded to inspect originals at this stage, the Co-Prosecutors propose that a small sample of each different category of documents maintained by DC-Cam, rather than DC-Cam’s entire collection, be transferred to the ECCC.

¹ **E168**, *Requête aux Fins de Production à L’audience des Document D’époque en Original*, 6 February 2012 (“Request”). The Request was notified in French and Khmer on 8 February 2012 making the deadline for responses 20 February 2012.

II. RELEVANT BACKGROUND

3. The Chamber set aside the week of 16 to 19 January 2012² for the parties to make submissions on general principles governing the admission of documentary evidence and to engage in adversarial argument in relation to the admission of the documents cited in the footnotes to the paragraphs of the Closing Order relating to historical background³ and the documents listed in Annexes 1 to 5 of the Co-Prosecutors' First Phase Document list.⁴
4. During the hearings the Defence reiterated its position, as set out in earlier written filings, that the originals of documents on the case file should be produced.⁵ The Co-Prosecutors argued that, consistent with the jurisprudence of the international criminal tribunals, there was no legal requirement for originals of all documents to be produced.⁶ The Defence further supported the request, made by the Nuon Chea defence, for the director of DC-Cam to be summonsed to appear before the Chamber to provide details on the documents in its collection.⁷
5. Following the oral hearings, the Chamber summonsed Vanthan Peou Dara, the Deputy Director of DC-Cam, to give testimony on DC-Cam's methods for collecting, compiling and storing documents.⁸ Mr. Peou Dara appeared before the Chamber and provided testimony from 23 to 25 January 2012.⁹ At the request of all three defence teams, the Chamber subsequently summonsed the director of DC-Cam, Chhang Youk, to testify before it.¹⁰ Mr Youk appeared before the Chamber and provided testimony on 1, 2 and 6 February 2012.¹¹

² See E159 Memorandum entitled 'Scheduling of oral hearing on documents', 11 January 2012.

³ These documents were provided an E3 classification on 5 December 2011 and considered by the Chamber to have been put before it. See E1/16 Written Record of Proceedings on 5 December 2011 (Day 4) at p.4 and its attachment E1/16.2.

⁴ E109/4 Co-Prosecutors' Response to the Trial Chamber's request for documents relating to the first phase of trial, 22 July 2011 and its attachments E109/4.1-4.20.

⁵ See E131/6 Objections to the admissibility of other parties' document lists for the first session of the first trial, 14 November 2011, at paras. 46-7; E9/29 List of Documents, 19 April 2011, at paras. 17-19.

⁶ E1/27.1 Transcript 16 January 2012, at p.72.

⁷ *Ibid.* at p.128.

⁸ E131/23 Witness Summons, 13 January 2012.

⁹ See E1/31.1 Transcript 23 January 2012, E1/32.1 Transcript 24 January 2012, E1/33.1 Transcript 25 January 2012.

¹⁰ E159/2 Witness Summons, 26 January 2012.

¹¹ See E1/37.1 Transcript 2 February 2012; E1/38.1 Transcript 2 February 2012; E1/39.1 Transcript 6 February 2012

6. On 26 January 2012 the Chamber gave an oral ruling on the standards for the admission of evidence¹² and later confirmed this in a memorandum dated 31 January 2012 (“Admissibility Ruling”).¹³ The Chamber held that original documents and detailed information on authenticity, provenance and chain of custody were not required for the purposes of admission into evidence, stating:

*“[Documents are admissible where they] 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.”*¹⁴

7. The Chamber noted however, that when it comes to the assessment of evidence, original documents “are a preferred method of proof and will be accorded more weight than photocopies of documents.”¹⁵ In the context of the documentary evidence in this case, it is submitted that this ruling should be limited to photocopies other than photocopies in respect of which: (a) the originals still exist; (b) the originals are in a known location; and (c) there are no reasonable grounds put forward by the party challenging the photocopies to question that they are not true copies of the originals. Where these three conditions are, it is submitted the photocopy or electronic copy should be afforded the same weight as the original hard copy.

III. ARGUMENT

A. There is no legal requirement for the production of all original documents from DC-Cam at this stage of the proceedings

8. As the Co-Prosecutors have previously submitted,¹⁶ there is no absolute requirement, at the ECCC or in other international criminal tribunals, for original documents to be produced. The so-called “best evidence rule” must be viewed in the context and circumstances of the case. It is appropriate to take into account trial management considerations, including delays, practical difficulties and expense,

¹² E1/34.1 Transcript 26 January 2012 at pp.85-88.

¹³ **E162** Trial Chamber Response to Portions of E114, E114/1, E131/1/9, E131/6, E136 and E158, 31 January 2012 (“Admissibility Ruling”).

¹⁴ *Ibid.* at para 2.

¹⁵ *Ibid.* at para. 4.

¹⁶ See **E114/1** Co-Prosecutors’ response to ‘Jeng Sary’s objections to the admissibility of certain categories of documents’, 16 September 2011; **E131/19** Consolidated Response to Objections to Co-Prosecutors’ Document List for First Trial Session, 2 December 2011 at paras. 55-59; E1/23.1 Transcript 15 December 2011 at p.86; E1/24.1 Transcript 10 January 2012 at pp.53-55; E1/27.1 Transcript 16 January 2012 at p.17; E1/27.1 Transcript 19 January 2012 at p52-53.

when determining what the best evidence is and whether originals need to be produced.

9. In its Admissibility Ruling, referred to above, the Chamber made it clear that, as a general matter, originals are not required at the admissibility stage, as long as a document meets *prima facie* standards of relevance and reliability. This is consistent with the Chamber's repeated oral rulings that the originals of documents are not required to be presented to witnesses throughout the course of their testimony.¹⁷ In making such rulings, the Chamber specifically noted the difficulties that the production of the originals to witnesses would cause, having regard to the large number of documents on the case file.¹⁸
10. Of course, there may be limited circumstances in which the production of the original is required before a document can be admitted. For example, in its Admissibility Ruling, the Chamber suggests that a document that appears to be a "forgery or unrepresentative of the original" may not be admitted. No such circumstances exist in the present case. In this regard, the Defence's reliance on the decision of this Chamber in the *Duch* case¹⁹ and a decision of the International Criminal Tribunal for Yugoslavia (ICTY) in the *Bagosora* case²⁰, in which originals were required to be produced, is misplaced.
11. In *Duch* and *Bagosora*, the document under challenge was a handwritten document, purportedly written by the accused, and the accused raised serious concerns as to its authenticity. Thus, in *Duch*, the accused denied that he wrote the document in question and that such document ever existed. In stark contrast, the Defence here seeks the production of *all* original documents, where the Defence has repeatedly failed to raise any specific challenges as to the authenticity of any particular document, even when given ample opportunities to do so both in writing and in oral hearings. The Defence has simply failed to cast the relevant documents into sufficient doubt so as to justify the production of the original hard copy documents for examination.

¹⁷ E1/23.1 Transcript 15 December 2011 at p.86; E1/24.1 Transcript 10 January 2012 at pp. 9-10, 51; E1/25.1 Transcript 11 January 2011 at pp.8,41.

¹⁸ E1/23.1 Transcript 15 December 2012 at p.86; E1/24.1 Transcript 10 January 2012 at pp. 9-10, 51.

¹⁹ D288/6.5/10/2 Decision on Admissibility of New Materials and Direction to the Parties, 10 March 2009.

²⁰ *Prosecutor v Bagosora*, ICTR-98-41-T, Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C), 14 October 2004.

12. It follows that there is no requirement to order the production of the hard copy originals from DC-Cam at this stage. Should the Chamber consider, at the time of the assessment of the evidence, that it needs to inspect the original hard copy documents in order to satisfy itself that the electronic copies on the case file are true copies and can be afforded full weight, appropriate arrangements can be made at that time.

B. Originals were consulted during the course of the judicial investigation and copies thereof placed on the case file

13. The Defence asserts that the originals of documents on the case file have never been inspected by the Co-Prosecutors or the Co-Investigating Judges and that Chhang Youk confirmed as much in his oral testimony.²¹ This is an inaccurate assertion and misrepresents Chhang Youk's testimony. In making this assertion, the Defence appears to rely solely on a statement made by Chhang Youk, under cross-examination, that Co-Prosecutors and the Co-Investigating Judges did not request "verification with the original documents". However, when the relevant portion of Chhang Youk's testimony is examined in full and taken together with other statements he made on this issue during the course of his testimony and with other evidence on the case file, it becomes clear that the Co-Investigating Judges did consult original documents and obtained scans of original documents from DC-Cam. The relevant portion of the testimony is as follows:

*To date, the -- both the Co-Prosecutors and the Co-Investigating Judges have never requested verification with the original documents, but they have so far scan those documents from the original document; like Mr. Heder from OCIJ has done that so far.*²²

14. The point was confirmed by Chhang Youk at other times during his testimony. He stated:

*The OCIJ has so far requested that the scanning was -- be made from the original documents.*²³

[A]t the Office of Co-Investigating Judges, they look at the – the numbers in the bracket below the document number and then they go to

²¹ E168 Request, supra note 1 at para. 3 (citing Draft Transcript (French), 2 February 2012 at p.13 lines 18-20) and para. 16.

²² E1/38.1 Transcript 2 February 2012 at p.13 (emphasis added)

²³ Ibid. at p.15.

*those original documents and they request that those document[s] be scanned from the originals.*²⁴

15. Information on the case file and available to all parties also confirms that the Office of the Co-Investigating Judges (OCIJ) regularly obtained colour scans of original documents held by DC-Cam, in many cases having consulted those originals in person at DC-Cam's offices. By way of example, the Co-Prosecutors refer to OCIJ rogatory completion reports dated 22 February 2008,²⁵ 6 February 2009,²⁶ 17 February 2009,²⁷ 26 August 2009,²⁸ 27 August 2009,²⁹ and 31 August 2009³⁰ relating to the receipt of documents from DC-Cam which state that originals were consulted and / or colour copies of originals obtained. An inspection of the documents filed together with these reports indeed reveals that they include numerous colour scans of original documents.
16. The Defence argument that the original hard copies need to be produced to the Chamber because originals have never been viewed or requested is therefore untenable.

C. There would be significant logistical difficulties in storing all originals at the ECCC throughout the trial

17. The Defence notes that, according to Chhang Youk's testimony, it would take only one month for the original documents held by DC-Cam to be collected and produced to the Chamber.³¹ The Defence gives no consideration, however, to the other difficulties that would arise from the transfer of DC-Cam's entire collection of original DK era documents.
18. Firstly, the transfer of this collection, which comprises thousands of pages of documents, would place severe strain on, if not overwhelm, the Records and Archives Unit (RAU)'s safe storage capacity. Secondly, the regular handling of the original documents by the parties and by witnesses throughout the trial would

²⁴ *Ibid.* at p.16.

²⁵ **D43/IV** Report of the Execution of Rogatory Letter, 22 February 2008.

²⁶ **D175/5** Report of the Execution of Rogatory Letter, 6 February 2009.

²⁷ **D175/6** Report of the Execution of Rogatory Letter, 17 February 2009.

²⁸ **D248/5.3** Report of the Execution of Rogatory Letter, 26 August 2009.

²⁹ **D248/5.4** Report of the Execution of Rogatory Letter, 27 August 2009.

³⁰ **D248/6.3** Report of the Execution of Rogatory Letter, 31 August 2009.

³¹ **E168** Request, supra note 1 at para. 9 (citing Draft Transcript (French), 2 February 2012 at p.32 lines 14-25).

necessarily result in deterioration of the original documents, which are between 35 and 40 years old and already in fragile condition.³²



D. In the alternative, a selective sample of original documents maintained by DC-Cam should be transferred to the ECCC

19. Given the availability of electronic copies of original documents on the case file, and the absence of doubt as to the authenticity of these copies, the Co-Prosecutors submit that the hard copy originals should remain in the safe custody of DC-Cam unless and until the Chamber deems it necessary to consult them during the evaluation of the evidence.
20. If however, the Chamber is minded to inspect originals at this stage, the Co-Prosecutors propose that rather than transfer DC-Cam's entire collection it would be sufficient to transfer a selective sample of the different categories of document maintained by DC-Cam, including for example biographies, confessions, CPK publications. This would allow the Chamber to satisfy itself that the electronic copies on the case file are representative of the original documents.

IV. RELIEF REQUESTED

21. For the reasons expressed above, the Co-Prosecutors request the Trial Chamber to:
- (1) reject the Request; or
 - (2) in the alternative, order that a selective sample of original documents be produced by DC-Cam to the ECCC.

Respectfully submitted,

Date	Name	Place	Signature
20 February 2012	CHEA Leang Co-Prosecutor	Phnom Penh	
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³² Chhang Youk testified that some documents in particular are torn or decayed. See E1/37.1 Transcript 1 February 2012 at pp.117-118.