

THE TRIAL CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS**

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**RESPONSE TO CO-PROSECUTORS' REQUEST TO ADMIT TWO NEW ITEMS
INTO EVIDENCE**

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Judge YA Sokhan**Co-Prosecutors**CHEA Leang
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MAY IT PLEASE THE TRIAL CHAMBER

I - INTRODUCTION

1. On 9 December 2001, the Co-Prosecutors notified the parties of a request for the Trial Chamber to admit two new items (a video and a book) into evidence. The Co-Prosecutors' Request was brought under Internal Rules 92 and 87(4).¹
2. Mr KHIEU Samphan objects to the out of time request and moves that it be rejected, on the ground that it does not meet the requisite legal criteria.

II - ARGUMENT

3. The Trial Chamber has of late recalled that Internal Rule 87(4)² sets "an extremely high threshold" of showing that documents could not have been disclosed within the applicable deadlines even "*with the exercise of due diligence*". Moreover, this Rule requires the requesting party to demonstrate that the late admission of such documents is "*vital*" in the interests of justice.³
4. The Chamber affirmed in the *Duch* case that "*to be declared admissible a new document must (...) where exceptional circumstances exist, and the applicant seeks to file the document after the expiration of the time limit, he/she shall demonstrate that it was impossible to comply with the deadline, and further, that the document has been filed at the first available opportunity thereafter*".⁴ In addition, the Chamber ensures that "*there is no reason to infer that the delay in filing this material was intentional*".⁵

¹ Co-Prosecutors' Disclosure of a KHIEU Samphan Video Interview and Book Entitled 'Behind The Killing Fields: A Khmer Rouge Leader and One of His Victims' by Gina Chon and Thet Sembath, 5 December 2011, E152 ("Co-Prosecutors' Request"). Since the Request was notified on 9 December 2011 in English and Khmer, the present Response is filed pending service of the French version.

² "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."

³ Witness lists for early trial segments, deadline for filing of admission, challenges to documents and exhibits, and response to Motion E109/5, 25 October 2011, E131/1, p. 4.

⁴ Decision on Admissibility of New Materials and Direction to the Parties, 10 March 2009, D288/6.5/10/2, para. 6.

⁵ *Ibid.*, para. 12.

5. In this instance, the Co-Prosecutors have not demonstrated having exercised due diligence and that it was impossible for them to comply with the deadline set by the Chamber.

A – The first item: the video

6. The Co-Prosecutors claim that on 1 November 2011, they discovered online a video interview with Mr KHIEU Samphân. According to them, the video was posted online by an individual claiming to be KHIEU Samphân.

7. The Co-Prosecutors fail to specify when the alleged interview took place or when the video was posted online, or even the address of the website on which they discovered the video. They merely assert, without providing any verifiable proof, that the video was not available before 27 June 2011.⁶ In reality, this assertion alone certainly fails to demonstrate that it was impossible for them to comply with the deadline set by the Chamber (for the record, 19 April 2011).⁷

8. Further, the Co-Prosecutors claim that they discovered the video on 1 November 2011; however, they did not disclose it until 9 December 2011, more than one month later.

B – The second item: the book

9. The Co-Prosecutors claim that they became aware of a book by Gina Chon and Thet Sambath entitled: *Behind the Killing Fields: A Khmer Rouge Leader and One of His Victims* on 30 November 2011. They indicate that the book was published in 2010 and that the ECCC Library acquired it in August 2011.⁸

10. While the acquisition of a book by the ECCC Library cannot mark the start of any judicial time limits in the instant case, it is worth noting that the book was published in 2010 and that the Co-Prosecutors had no excuse whatsoever for their failure to comply with their obligation to exercise diligence in this regard.

⁶ Co-Prosecutors' Request, para. 3.

⁷ The initial deadline of 13 April 2011 was changed to 19 April 2011 after the announcement of the judicial recess: Order to File Material in Preparation for Trial, 17 January 2011, E9; Memorandum on judicial recess during the Khmer New Year period, 25 March 2011, E68.

⁸ Co-Prosecutors' Request, para. 5.

11. Besides, even if the date of acquisition of the book by the Library were to be taken into account, the acquisition occurred four months before the Co-Prosecutors allegedly became aware of the book.

12. The Chamber will note in passing that by e-mail dated 2 August 2011, the entire ECCC staff (and this includes the Co-Prosecutors) was informed that the ECCC Library had acquired the book.⁹

13. In conclusion, the Co-Prosecutors have not demonstrated having exercised due diligence; neither have they shown that it was impossible for them to comply with the deadline set by the Chamber, nor that they submitted the two items at the earliest opportunity after the deadline.

14. Moreover, they have not demonstrated that the admission of these two new items is vital in the interests of justice, or that they meet the tests of relevance, reliability and authenticity set out in Internal Rule 87(3).¹⁰ Mr KHIEU Samphân will expand on his arguments on these points orally, as necessary.

FOR THESE REASONS

15. Mr KHIEU Samphân requests the Trial Chamber:

- TO REJECT the Co-Prosecutors' Request.

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

⁹ E-mail dated 2 August 2011, 10.58 a.m.: *New Books arrival*, annexed hereto.

¹⁰ Objections to the Admissibility of Other Parties' Document Lists for the First Session of the First Trial (28 November - 16 December 2011), 14 November 2011, E131/6.