

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

**FILING DETAILS**

**Case No:** 002/19-09-2007-ECCC/TC      **Party Filing:** Co-Prosecutors  
**Filed to:** Trial Chamber      **Original Language:** English  
**Date of document:** 16 July 2013

**CLASSIFICATION**

**Classification of the document  
suggested by the filing party:** PUBLIC

**Classification by the Chamber:** សាធារណៈ/Public

**Classification Status:**

**Review of Interim Classification:**

**Records Officer Name:**

**Signature:**



**CO-PROSECUTORS' RESPONSE TO KHIEU SAMPHAN'S WITHDRAWAL FROM  
TESTIFYING AND A REQUEST FOR ADVERSE INFERENCES TO BE DRAWN**

**Filed by:**

**Co-Prosecutors**  
CHEA Leang  
Andrew CAYLEY

**Distributed to:**

**Trial Chamber**  
Judge NIL Nonn. President  
Judge YOU Ottara  
Judge Silvia CARTWRIGHT  
Judge YA Sokhan  
Judge Jean-Marc LAVERGNE  
Reserve Judge THOU Mony  
Reserve Judge Claudia FENZ

**Civil Party Lead Co-Lawyers**  
PICH Ang  
Elisabeth SIMONNEAU FORT

**Accused**  
NUON Chea  
KHIEU Samphan

**Lawyers for the Defence**  
SON Arun  
Michiel PESTMAN  
Victor KOPPE  
KONG Sam Onn  
Anta GUISSÉ  
Arthur VERCKEN  
Jacques VERGÈS

## I. INTRODUCTION AND PROCEDURAL HISTORY

1. Commencing 23 May 2013, the Accused Khieu Samphan testified in the proceedings before the Trial Chamber by answering questions put to him by Civil Parties.<sup>1</sup> In response to a request by the Co-Prosecutors on 23 May 2013 that the Chamber schedule further hearings for the questioning of the Accused by the Judges, Co-Prosecutors and other parties, the Chamber issued a direction to both Accused to confirm their intentions with respect to testifying by 27 May 2013.<sup>2</sup> Having thus been given additional time to consult his counsel, on 27 May 2013, Khieu Samphan confirmed that he intended to continue giving evidence and that he will answer questions from the Judges and other parties.<sup>3</sup>
2. On 8 July 2013, however, the Defence for Khieu Samphan (“Defence”) informed the Trial Chamber and the Parties by written notice that the Accused was withdrawing from testifying (“Withdrawal Notification”).<sup>4</sup> The Withdrawal Notification stated that the Accused’s decision to reverse course was premised on the Chamber’s refusal to grant a number of conditions concerning the questioning of Khieu Samphan,<sup>5</sup> but also raised complaints concerning a host of matters wholly unrelated to the conditions of the Accused’s examination.<sup>6</sup> On the day that the Withdrawal Notification was notified to the Parties, the Co-Prosecutors requested and were granted by the Trial Chamber an opportunity to respond the following day in court.<sup>7</sup>
3. During that opportunity, the Co-Prosecutors advised the Chamber that they viewed the Accused’s stated reasons for withdrawing from testifying as wholly unfounded and foreshadowed the filing of this response.<sup>8</sup> Addressing the specific conditions which the Accused sought to impose on his examination after 27 May 2013, the Co-Prosecutors noted that none of the conditions had a basis in fair trial rights recognised in national or international law. Nevertheless, the Co-Prosecutors stated that they were prepared to accommodate most of the conditions in order to afford the Accused every opportunity to

<sup>1</sup> **E1/196.1** Transcript, 23 May 2013, at p.15 [Khieu Samphan’s Counsel confirms that he will respond to questions from Civil Party Chau Ny], p.16 [Civil Party poses questions to Khieu Samphan] and p.17 – 18 [Khieu Samphan responds to Civil Party’s questions]; **E1/197.1** Transcript, 27 May 2013, at pp. 21-23, 82-85; **E1/198.1** Transcript, 29 May 2013, at pp. 18-24, 29, 54-55, 85-89; **E1/199.1** Transcript, 30 May 2013, at pp. 16-18, 80-83; **E1/200.1** Transcript, 4 June 2013, at pp. 24-25, 68-70, 109-110.

<sup>2</sup> **E1/196.1** Transcript, 23 May 2013, at pp.36-37 [Co-Prosecutors’ request], pp.44-47 [Accused’s request for time to consult his counsel, and the Chamber’s directions]

<sup>3</sup> **E1/197.1** Transcript, 27 May 2013, at pp. 2-4.

<sup>4</sup> **E288/4** Conclusions de la Défense de M. Khieu Samphan relatives à l’interrogatoire de l’Accusé, 8 July 2013 (“Withdrawal Notification”).

<sup>5</sup> **E288/4** Withdrawal Notification, at para. 7.

<sup>6</sup> **E288/4** Withdrawal Notification, at paras. 11- 40.

<sup>7</sup> Emails of William Smith and Matteo Crippa, 8 July 2013.

<sup>8</sup> Draft Transcript 9 July 2013, at p. 28.

answer questions. The Co-Prosecutors thus: a) agreed to provide the Accused, within 24 hours, a list of topics on which he would be examined, as well as a list of documents to be used in his examination; and b) indicated that they would not object to the Accused being given extra time to prepare for the examination.<sup>9</sup> The Co-Prosecutors also submitted that the Accused has unilaterally and unequivocally waived his right to remain silent by giving evidence in the course of the trial, and that, in these circumstances, should he affirm his refusal to answer questions at this stage of the trial, the Trial Chamber should draw adverse inference from his silence.<sup>10</sup>

4. When Khieu Samphan was asked by the Trial Chamber whether he would agree to being examined by the Judges and the other parties in light of the additional accommodations agreed to by the Co-Prosecutors, the Accused stated that he would not.<sup>11</sup> In seeking to explain this decision, the Defence and the Accused focused solely on their disagreement with the Trial Chamber's decisions on matters unrelated to the testimony of the Accused.<sup>12</sup>
5. The Co-Prosecutors hereby respond by written submission to the Withdrawal Notification and the Defence's oral submissions, as indicated during their in-court submissions.<sup>13</sup> They reiterate, in the strongest terms, that the Accused's claim that his rights would be violated if he were to answer questions without all of his conditions being fulfilled have no basis in law or in fact. There is no right in law, or procedure in practice, for accused to be given lists of questions or documents before they are examined by prosecutors. Nevertheless, the Co-Prosecutors are prepared to accommodate most of the conditions (as summarised above) so that there can be no suggestion that the Chamber stopped short of exhausting every reasonable avenue to give the Accused an opportunity to testify before drawing negative inferences against him.
6. The Co-Prosecutors further submit that the various ancillary complaints raised by the Defence have already been fully litigated and adjudicated, that the Defence's description of those issues is misleading and/or false, and that the Accused's fair trials rights have in no way been infringed.

---

<sup>9</sup> Draft Transcript, 9 July 2013, at pp. 32-33.

<sup>10</sup> Draft Transcript, 9 July 2013, at pp. 33-35.

<sup>11</sup> Draft Transcript, 9 July 2013, at pp. 41-42.

<sup>12</sup> Draft Transcript, 9 July 2013, at pp. 41, 43-47.

<sup>13</sup> Draft Transcript, 9 July 2013, at p. 28.

7. The Co-Prosecutors request that the Trial Chamber re-affirm that should Khieu Samphan fail to testify, it will draw an adverse inference from his selective provision of evidence. The Co-Prosecutors further request an opportunity to state in court, in Khieu Samphan's presence, the topics and facts on which they would have questioned him, and on which they will request the Chamber to draw adverse inferences as part of their final trial brief. The Co-Prosecutors respectfully submit that this statement should be made before the conclusion of the evidential proceedings.

## II. ARGUMENT

### *A. The Defence's Requested Conditions Regarding Khieu Samphan's Testimony have no basis in Fair Trial Rights*

8. The Defence list five requested conditions concerning the questioning of Khieu Samphan, the rejection of which was the purported initial reason for his decision not to testify. Those conditions are:
- a. a list from the Parties and the Trial Chamber of the questions (by topic) to be put to the Accused;
  - b. a list from the Parties and Trial Chamber of the documents they intend to use during questioning;
  - c. three weeks of preparation time without hearings from the time of provision of the lists of questions and documents;
  - d. provision of access for the defence counsel to the ECCC Detention Unit on weekends; and
  - e. that Khieu Samphan only be scheduled to testify in half day sessions.<sup>14</sup>
9. The Defence claim, without authority, that these requests are common practice at all international criminal courts and especially reasonable at the ECCC.<sup>15</sup> In fact, as the Co-Prosecutors stated in court on 9 July 2013, none of these conditions are requirements under international law. The Defence reference two cases in support of the assertion that their requested conditions are not deviations from international practice (*Prosecutor v. Mpambara* and *Prosecutor v. Kalimanzira*<sup>16</sup>), but apparently lack sufficient faith in the relevance of those alleged holdings to provide citations to the specific decisions and

---

<sup>14</sup> E288/4 Withdrawal Notification, at para. 7.

<sup>15</sup> E288/4 Withdrawal Notification, at para. 7.

<sup>16</sup> E288/4 Withdrawal Notification, at para. 26.

paragraphs that would support this sweeping assertion. In fact, even according to the Defence's own description, these cases relate only to providing preparatory time prior to testimony, not to any of the other conditions the Accused has requested.

10. Nonetheless, as stated above, the Co-Prosecutors are prepared to provide a list of topics upon which they intend to question the Accused<sup>17</sup> as well as a list of documents they intended to use during questioning, on the proviso that it is impossible to list definitively in advance every document or sub-topic that might become relevant in the course of the examination.<sup>18</sup> The Co-Prosecutors recall the President's indication to the Accused that it is impossible to provide in advance a list of questions to be put in an adversarial examination, where the President stated: "during the adversarial proceeding, it is unlikely to know in advance the questions that will be put to you. That is the nature of the adversarial hearing; it is not a kind of questions you put on the blackboard in the school."<sup>19</sup>
11. The Co-Prosecutors also do not object to any additional time the Trial Chamber felt it is appropriate to grant Khieu Samphan and his counsel to prepare for the Accused's testimony, while noting that the Accused has had access to the Case File for over five years, that he has been represented by national and international counsel throughout the judicial investigation and trial, and that he and his counsel have heard and tested the evidence that has been presented in court over a period of a year and a half. The Co-Prosecutors note in this respect that Khieu Samphan indicated to the Chamber and the other Parties that he intended to give evidence as early as March 2011.<sup>20</sup>
12. As for the Defence's complaint with respect to restrictions of access to the ECCC Detention Unit, the Co-Prosecutors note that, after raising this with the Trial Chamber in August 2012,<sup>21</sup> the Counsel apparently did not pursue the matter further before raising it 10 months later at the Trial Management meeting in June 2013.<sup>22</sup> This dilatory conduct exposes the sheer disingenuousness of the Defence's reliance on the issue of access in the context of Khieu Samphan's refusal to testify. At no stage between August 2012 and June

---

<sup>17</sup> Draft Transcript 9 July 2013, at p.32. The Defence has previously noted that it is only seeking a general list of topics. See **E1/197.1** Transcript 27 May 2013, at pp. 3-4 ("what he's requesting, of course, is not for all of the questions; it is the general topics that will be brought up, as well as the documents. ... What he's asking for only is a general idea of the topics together with the agenda.").

<sup>18</sup> Draft Transcript 9 July 2013, at p. 32.

<sup>19</sup> **E1/197.1** Transcript 27 May 2013, at p.3.

<sup>20</sup> See **E9/17** Uncontested Facts, para. 4.

<sup>21</sup> **E288/4** Withdrawal Notification, at para. 19.

<sup>22</sup> **E1/207.1** Transcript 13 June 2013, at p. 39.

- 2013 did the Defence allege that its ability to prepare for proceedings or take instructions from their client was adversely affected by the access arrangements of the Detention Unit.
13. Finally, as the Co-Prosecutors noted in court, the Trial Chamber has already granted the request for Khieu Samphan to testify only in half day sessions.<sup>23</sup>
  14. The accommodations proposed at the hearing on 9 July and reiterated above address in substance all of the conditions the Accused has sought to impose on his examination.
  15. Nevertheless, when Khieu Samphan was asked by the President whether he would agree to testify if these accommodations were made,<sup>24</sup> the Accused stated that “this exercise does not limit to the fact that the Court has not entertained my requests as indicated. There are other legal implications behind the decision.”<sup>25</sup> He cited, however, only one reason, that being the imposition of page limits for final trial briefs, claiming that it was “part of the Court intention to prevent my counsels from properly represent[ing] me in the courtroom.”<sup>26</sup> The same topic was addressed by Judge Lavergne, who noted that the concessions made by the Co-Prosecutors would “allow the Khieu Samphan defence team to prepare for questioning of their accused client.”<sup>27</sup> In response, the Defence referenced a raft of purported rights violations entirely unconnected to the questioning of the Accused.<sup>28</sup> Counsel Vercken, when asked by Judge Lavergne to explain “how this particular issue is at all related to Mr. Khieu Samphan’s willingness to answer questions”<sup>29</sup> referred to the standards adopted by the Chamber for admitting documentary evidence<sup>30</sup> (a decision made over a year ago<sup>31</sup>) and claimed that the Defence was being subjected to a “trap” and “manipulation”.<sup>32</sup>
  16. It is abundantly clear that the Accused, on the advice of his Counsel, has made the decision to withdraw from testifying for reasons unrelated to either the modalities of his testimony or other supposed procedural concerns. Instead, the Defence try to tie this

---

<sup>23</sup> Draft Transcript 9 July 2013, at p. 28; Email from Trial Chamber Senior Legal Officer, 8 July 2013.

<sup>24</sup> Draft Transcript 9 July 2013, at p. 41.

<sup>25</sup> Draft Transcript 9 July 2013, at p. 41.

<sup>26</sup> Draft Transcript 9 July 2013, at p. 41.

<sup>27</sup> Draft Transcript 9 July 2013, at p. 42.

<sup>28</sup> Draft Transcript 9 July 2013, at p. 43-47.

<sup>29</sup> Draft Transcript 9 July 2013, at pp. 42-43.

<sup>30</sup> Draft Transcript 9 July 2013, at p. 43.

<sup>31</sup> **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, at paras. 20-36.

<sup>32</sup> Draft Transcript 9 July 2013, at p. 45.

decision to a bevy of decisions of the Trial Chamber with which they disagree, and present a thoroughly misleading interpretation of those decision.

17. For the avoidance of doubt, the Co-Prosecutors continue to be prepared to grant the Accused and the Defence the legally unrequired accommodations noted above and thus give them further strategic advantage to prepare for Khieu Samphan's testimony.

*B. The Defence's Allegations of other Violations of Fair Trial Rights are Meritless*

18. As stated above, through the Withdrawal Notification and their oral submissions on 9 July 2013, the Defence have alleged a number of violations of Khieu Samphan's fair trial rights which a) are entirely baseless; and b) have no connection to the testimony of the Accused. All of these issues have been previously litigated before the Chamber wherein the Defence had the opportunity to present their views and best arguments. As Judge Cartwright stated in court, "the Chamber has afforded Khieu Samphan and his defence team precisely the same opportunities to respond to all issues at trial."<sup>33</sup> The Co-Prosecutors have also addressed each of these issues as they have arisen, and will therefore only address them briefly here to highlight the lack of foundation to the Defence's allegations.
19. First, the Defence make reference to the scope of trial and of the questioning that may be directed at Khieu Samphan concerning the administrative structures and the alleged joint criminal enterprise.<sup>34</sup> Despite the Chamber's numerous written and oral directives on this issue (the latter usually in response to Defence objections seeking to limit the relevant evidence that the Prosecution can adduce to meet its burden of proof), the scope of this trial seems to still elude the Defence. As the Chamber stated only recently, "[f]rom the outset, the Chamber has ruled that all parties may lead evidence in relation to the roles and responsibilities of all Accused in relation to all policies of the DK era."<sup>35</sup> The Trial Chamber has also included, from the outset, all Closing Order paragraphs related to administrative structures in the Case 002/01 trial.<sup>36</sup> The Defence cannot plausibly claim that uncertainty regarding the scope of questioning is a legitimate grievance.

---

<sup>33</sup> Draft Transcript 9 July 2013, at p. 51.

<sup>34</sup> E288/4 Withdrawal Notification, at para. 14.

<sup>35</sup> E284 Decision on *Severance* of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013, para. 117.

<sup>36</sup> See E124/7.3 *Severance Annex*, at p. 1.

20. Second, the Defence complain, now, that two of the four Co-Lawyers for Khieu Samphan did not join the case until November 2011, whereas the third joined in January 2012, and that, therefore, they have not had adequate opportunity to prepare.<sup>37</sup> Yet, as Counsel Kong, Vercken and Guissé themselves acknowledge, at no stage did they seek a deferment of evidentiary proceedings, nor have they ever complained that the timing or pace of the proceedings have in any way inhibited their ability to perform their functions. This is, therefore, a belatedly manufactured claim made a year and a half after the Counsel's appointment and clumsily packaged together with other baseless complaints in order to create, retroactively, a picture of supposedly insurmountable difficulties that the Counsel have had to confront. Each of these Counsel, together with a team of consultants, have been representing their client for over a year and a half, while a fourth Co-Lawyer, Jacques Vergès, has been representing him since December of 2007.<sup>38</sup> In this period, they have filed dozens of motions, appeals and requests and have opposed, in writing, the vast majority of motions filed by the Co-Prosecutors. They have undertaken extensive cross examinations of witnesses and experts who gave evidence incriminating their client. And they have availed themselves of opportunities to challenge the admission of all of the documentary evidence proposed by the Co-Prosecutors. Therefore, these Counsel cannot credibly claim that they have at any stage been denied time or facilities to perform their functions fully and competently.
21. Third, the Defence complain about the Trial Chamber's methods of scheduling witnesses.<sup>39</sup> This claim also is unfounded. Having received the parties' written witness proposals, the Trial Chamber gave advance notice of witnesses that it intended to call some five months prior to the start of the trial. This list was subsequently amended and augmented as the trial unfolded. Throughout the proceedings, the Chamber has provided advance notice to the Parties as to the scheduling of groups of witnesses (with additional notice for individual witnesses within each group), also giving notice as to changes in the schedule, which changes were occasioned by factors beyond the Chamber's control, such as logistics and witnesses' availabilities. To the extent that changes have been made, they have in fact affected the Co-Prosecutors far more than the Defence. As the Co-Prosecutors have been delegated the questioning-in-chief of all the witnesses and experts whom they proposed in this trial, the Defence have had additional time to prepare for

---

<sup>37</sup> E288/4 Withdrawal Notification, at para. 15.

<sup>38</sup> D45 Lawyer's Recognition Decision, 13 December 2007.

<sup>39</sup> E288/4 Withdrawal Notification, at para. 17.



their examinations. The Khieu Samphan Defence has in fact had more time to prepare for witness examinations than any party because they typically undertook their questioning last – after the Co-Prosecutors, Civil Parties, Judges, and the other Defence teams. The Defence’s allegation of a lack of time to prepare is further belied by their own requests to question a number of witnesses before the other Defence teams.

22. Fourth, the Defence raise the use of evidence from the first trial in subsequent trials.<sup>40</sup> No legal explanation is given for how this legal position affects the Accused’s decision with respect to testifying in this trial. In fact, there is no between the two matters. In the Severance Order, issued in September 2011, the Accused was informed that the evidence heard in this trial would form the foundation of future trials. He applauded the Severance Order, then stated, on several occasions, that he would testify, and finally testified at several points in the trial. The Defence’s raising of the use of evidence in future trials as a supposed reason for the strategic reversal in the Accused’s position with respect to testifying is therefore entirely unfounded.
23. Fifth, the Defence and Khieu Samphan argue that the page limits for closing briefs are too short.<sup>41</sup> The issue of page limits for closing briefs has been the subject of much debate before the Trial Chamber and the Defence have had ample opportunity to weigh in on the matter.<sup>42</sup> Furthermore, there cannot be any valid claim that the principle of equality of arms is being compromised when there is a 1:1 ratio of pages between the Co-Prosecutors and each of the Accused. Additionally, as the Co-Prosecutors noted in court, if the Accused feels that he needs more time and space to state his case, this militates in favour and not against his giving evidence.<sup>43</sup>
24. Sixth, the Defence make various complaints regarding the admission of documents.<sup>44</sup> In court, the Co-Prosecutors noted the misleading and erroneous nature of the Defence’s submissions.<sup>45</sup> The admissibility of documents, and their probative value, have been thoroughly litigated before this Chamber with ample opportunity for the Defence to make submissions and presentations. They have not always availed themselves of these opportunities, but that is their choice. Indeed, they were recently given an opportunity to

---

<sup>40</sup> E288/4 Withdrawal Notification, at para. 30.

<sup>41</sup> Draft Transcript 9 July 2013, at p. 41; E288/4 Withdrawal Notification, at paras. 33-34.

<sup>42</sup> See, e.g., E1/114.2 Transcript 27 August 2012, at pp. 12-29 (including Defence submissions on the issue at pp. 26-29); E163/5/4 Trial Chamber Memorandum: Further Notification of Modalities for Closing Briefs, 26 November 2012.

<sup>43</sup> Draft Transcript 9 July 2013, at p. 49.

<sup>44</sup> Draft Transcript 9 July 2013, at pp. 43-45.

<sup>45</sup> Draft Transcript 9 July 2013, at pp. 48-49.

inform the Trial Chamber, as stated by Judge Lavergne, “what are the documents that you are challenging and can you tell us how much time you need to challenge the documents so presented. ... Can you tell us where you stand? It is not very complicated.”<sup>46</sup> The Defence were unable, or unwilling, to provide the simple response requested. Judge Lavergne aptly observed that the Defence “attended the hearing during which documents were presented and you observed that other teams presented documents and challenged certain documents.”<sup>47</sup>

25. Most recently, on 9 July 2013, Mr Vercken and Mr Kong failed to use the time they had requested to make a presentation of key documents and to respond to the key documents presented by the Co-Prosecutors. Furthermore, when asked by the Chamber whether, given their lack of preparation on this date, they would like another opportunity to conduct a presentation (and how much more time they would need to prepare), they simply refused to provide a response, thereby foregoing yet another opportunity given to them for this purpose.
26. As the Co-Prosecutors noted in court, these belated and retroactive objections by the Defence amount to nothing short of a complete charade. The Defence is seeking to misrepresent the record of this trial and putting forward a series of meritless grievances to justify their client’s strategic decision to withdraw from testifying.

*C. The Trial Chamber Should Draw an Adverse Inference from Khieu Samphan’s Selective Silence*

27. In court on 9 July 2013, the Co-Prosecutors recalled the Trial Chamber’s warning of 18 April 2012, which warning put the Accused on notice that adverse inferences may be drawn from selective refusals to answer questions. The Co-Prosecutors noted that, having been given this warning, Khieu Samphan gave evidence in the course of the trial, thereby unequivocally waving his right to remain silent. Finally, they stated that adverse inferences should be drawn in the Chamber’s consideration of the evidence, if the Accused affirms his decision to refuse to answer questions.<sup>48</sup> Judge Lavergne emphasized this consequence to the Defence, stating “I also trust that the defence team has heard the request of the Co-Prosecutors, which consists of reiterating the ruling of the Chamber on

---

<sup>46</sup> E1/207.1 Transcript 13 June 2013, at p. 13.

<sup>47</sup> E1/207.1 Transcript 13 June 2013, at p. 15.

<sup>48</sup> Draft Transcript 9 July 2013, at pp. 29, 33-35.

the possible consequences of a refusal to answer questions at this particular stage of the proceedings.”<sup>49</sup> The Defence did not object or respond to these warnings.

28. There is no question that Khieu Samphan has waived his right to remain silent. He has given evidence on numerous occasions by making statements and answering questions from Civil Parties,<sup>50</sup> while at the same time assuring the Chamber and the Parties that he intended to testify.<sup>51</sup> As a Trial Chamber of the ICTY has held, “once an accused has decided to take the stand as a witness, he is under an obligation to answer questions, even if the answers may be self-incriminating.”<sup>52</sup> Khieu Samphan has elected to give evidence before the Chamber, and having done so he is not entitled to refuse to answer questions from the Parties and the Chamber without consequences. This Chamber’s warning as to the implications of this principle was clear:

[I]n assessing the guilt or innocence of the Accused in its verdict, the Chamber shall consider all of the evidence that has been put before it and subject to examination, including the testimony of the Accused and manner in which he testifies. In this regard, and where the Accused elects to alternate between silence and giving testimony, this may be noted by the Chamber when assessing his credibility. The relevant international jurisprudence indicates that adverse inference from selective decisions to remain silent may be drawn.<sup>53</sup>

29. As noted by the Co-Prosecutors, the application of this principle is in keeping with international jurisprudence.<sup>54</sup> The ICTY has held that where an Accused selectively testifies, those questions he refuses to answer could lead to “less favourable consideration of that aspect of testimony by the Trial Chamber when it assesses [the] testimony.”<sup>55</sup>
30. Khieu Samphan’s choice to give only selective testimony and not to answer questions should have two consequences: a) his oral statements before the Chamber should be

<sup>49</sup> Draft Transcript 9 July 2013, at p. 42.

<sup>50</sup> **E1/21.1** Transcript 13 December 2011, at p. 59; **E1/21.1** Transcript 13 December 2011, at pp. 70-80; **E1/26.1** Transcript 12 January 2012, at pp. 56, 67; **E1/196.1** Transcript 23 May 2013, at pp. 17-18; E1/197.1 Transcript, 27 May 2013, at pp. 21-23, 82-85; E1/198.1 Transcript, 29 May 2013, at pp. 18-24, 29, 54-55, 85-89; E1/199.1 Transcript, 30 May 2013, at pp. 16-18, 80-83; E1/200.1 Transcript, 4 June 2013, at pp. 24-25, 68-70, 109-110; *see generally* E174.

<sup>51</sup> **E1/15.1** Transcript 23 November 2011, at pp. 17-18, 48; **E1/21.1** Transcript 13 December 2011, at pp. 67-69; **E1/26.1** Transcript 12 January 2012, at p. 80; *see generally* **E174** Co-Prosecutors’ Request For Notice to Be Given to Accused Khieu Samphan on the Consequences of a Refusal to Respond to Questions at Trial, 17 February 2012.

<sup>52</sup> *Prosecutor v. Gotovina et al.*, IT-06-90-T, Decision on the Joint Defence Motion to Prohibit Use of Defence Documents by the Prosecution, 5 December 2008, at para. 9.

<sup>53</sup> **E1/63.1** Transcript 18 April 2012, at 11.12.32.

<sup>54</sup> Draft Transcript 9 July 2013, at pp. 33-34.

<sup>55</sup> *Prosecutor v. Blagojević and Jokić*, Decision on on Vidoje Blagojević’s Oral Request, 30 July 2004, at p. 7.



accorded little to no evidentiary weight;<sup>56</sup> and b) negative inferences should be drawn in the consideration of evidence against him.<sup>57</sup> In relation to the latter consequence, the Co-Prosecutors request an opportunity to state in court, in Khieu Samphan's presence, the topics and facts on which they would have questioned him, and on which they will request the Chamber to draw adverse inferences in their final trial brief.

### III. REQUEST

31. For the foregoing reasons, the Co-Prosecutors request the Trial Chamber to:

- a. **Dismiss** as unfounded the Defence's purported reasons for Khieu Samphan's withdrawal from testifying;
- b. **Confirm** that, should Khieu Samphan continue to refuse to submit to examination, this Chamber will consider all statements he has given or will give in light of that fact, and draw adverse inferences against him in its consideration of the evidence during deliberations; and
- c. **Grant** the Co-Prosecutors an opportunity to present, in the presence of the Accused and before the close of the evidentiary proceedings, the topics and facts on which they would have questioned Khieu Samphan and on which they will ask the Chamber to draw adverse inferences.

Respectfully submitted,

| Date         | Name                          | Place      | Signature                                                                            |
|--------------|-------------------------------|------------|--------------------------------------------------------------------------------------|
| 16 July 2013 | CHEA Leang<br>Co-Prosecutor   | Phnom Penh |  |
|              | Andrew CAYLE<br>Co-Prosecutor |            |  |

<sup>56</sup> See **E174** Co-Prosecutors' Request for Notice to be Given to Accused Khieu Samphan on the Consequences of a Refusal to Respond to Questions at Trial, 17 February 2012, paras. 16-20.

<sup>57</sup> **E174** Co-Prosecutors' Request for Notice to be Given to Accused Khieu Samphan on the Consequences of a Refusal to Respond to Questions at Trial, 17 February 2012, at paras. 21-25.