

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

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**CO-PROSECUTORS' RESPONSE TO KHIEU SAMPHAN'S MOTION REGARDING
THE CO-PROSECUTORS' DISCLOSURE OBLIGATIONS**

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I. INTRODUCTION

1. The Co-Prosecutors hereby respond to Khieu Samphan's motion regarding their disclosure obligations ("Motion").¹ Khieu Samphan claims that the disclosures made since October 2014 by the International Co-Prosecutor ("ICP"), primarily of material emanating from the investigations in Cases 003 and 004, as well as some DC-Cam documents disclosed by the Co-Prosecutors together, were (i) not in conformity with the Co-Prosecutors' disclosure obligations, and (ii) violate the rights of the defence.²
2. To the contrary, the Co-Prosecutors have fully complied with all disclosure obligations particularised by the Trial Chamber ("Chamber") and confirmed by the Supreme Court Chamber ("SCC") to be applicable at the ECCC. By doing so, the Co-Prosecutors have ensured that the defence's fair trial rights, far from being violated, have been respected and upheld. The disclosure procedures proposed by Khieu Samphan would impair the Chamber's ability to fulfil its obligation to ascertain the truth and impede progress towards the expeditious completion of the Case 002/02 trial. Moreover, Khieu Samphan gives no explanation for why he is objecting only now to the procedures the Prosecution has been following for almost a year. For the reasons set out below, it is respectfully requested that the Chamber dismiss the Motion in its entirety.

II. SUBMISSIONS

a. The Co-Prosecutors have fully complied with their disclosure obligations

3. Khieu Samphan asserts that the ICP has repeatedly "distorted the applicable law",³ which in his view, permits the Co-Prosecutors to disclose only materials falling into one of two categories: (i) exculpatory evidence; and (ii) prior statements of witnesses testifying in Case 002/02.⁴ He asserts that by doing so, the ICP is "introducing inculpatory evidence *en masse* into the [Case 002/02] trial".⁵
4. On the contrary, it is Khieu Samphan who misconstrues the applicable law regarding disclosure. As a central flaw, his submission fails to recognise the fundamental distinction between the Co-Prosecutors' duty to disclose evidence flowing from Internal Rule 53(4) and a party's right to seek admission of new evidence pursuant to Internal Rule 87(4).

¹ E363 Conclusions de la Défense de M. KHIEU Samphan sur l'obligation de communication des co-Procureurs, 24 August 2015 (filed in French and Khmer on 27 August 2015, notified 28 August 2015).

² E363 Motion, paras 3-5.

³ E363 Motion, para. 6 (unofficial translation).

⁴ E363 Motion, paras 8, 31, 48. Describing the ICP's formulation of the applicable law as "more or less in line with the Chamber's" (Motion, para. 9 (unofficial translation)), Khieu Samphan appears to accept that written records of interview which contain information about Case 002/02 witnesses are also disclosable.

⁵ E363 Motion, para. 10 (unofficial translation).

5. As Khieu Samphan correctly acknowledges,⁶ the source of the Co-Prosecutors' disclosure obligation is found in the Chamber's memorandum of 24 January 2012 ("Trial Chamber Memorandum") in which it:

Consider[ed] that Internal Rule 53(4) imposes a continuing obligation on the Co-Prosecutors to disclose to the Trial Chamber any material in [their] possession that may suggest the innocence or mitigate the guilt of the Accused or *affect the reliability of the evidence*.⁷

The Chamber expressed its view that, "[i]t is in the interests of ascertaining the truth that the Trial Chamber has access to these documents".⁸ The SCC has confirmed the same continuing obligation.⁹ As a specific exception to the general rule, due to the unique nature of Civil Party Applications ("CPAs"), the Chamber recently issued guidance¹⁰ governing the disclosure of CPAs from Cases 003 and 004.

6. A plain reading of the Trial Chamber Memorandum therefore mandates disclosure not only of evidence that may "suggest the innocence or mitigate the guilt of the Accused", but also of all materials that may "affect the reliability of the evidence". This is a broad obligation as any evidence that is relevant to Case 002/02, whether inculpatory or exculpatory, may affect the reliability of other evidence at some level, and must therefore be disclosed. Whilst there are textual differences between the Trial Chamber Memorandum and Internal Rule 53(4), notably in Internal Rule 53(4)'s requirement that the Co-Prosecutors disclose material that "affects the

⁶ E363 Motion, paras 7, 11.

⁷ E127/4 Trial Chamber Memorandum, "Disclosure of witness statements for witnesses who may testify in Case 002", 24 January 2012, para. 1 (emphasis added). The Chamber has subsequently confirmed this obligation. See, e.g. E127/7/1 Trial Chamber Memorandum, "Information concerning Case 003 and Case 004 Witness Statements that may be relevant to Case 002", 16 August 2013, para. 2; E127/7/2 Trial Chamber Memorandum, "Admission of Case 003 and 004 statements relevant to Case 002", 23 September 2013, para. 2. These memoranda are both cited by Khieu Samphan at E363 Motion, fn. 9.

⁸ E127/4 Trial Chamber Memorandum, para. 1.

⁹ F2/4/2 Decision on Part of Nuon Chea's Third Request to Obtain and Consider Additional Evidence in Appeal Proceedings of Case 002/01, 16 March 2015 ("SCC Decision on NC's Third Request"), para. 17. The Co-Prosecutors note the translational error in the French version of the SCC's Decision cited by Khieu Samphan at para. 11 of his Motion. The authoritative English version confirms that "the Co-Prosecutors are under a continuing obligation to disclose to the Chambers and the parties 'any material in [their] possession that may suggest the innocence or mitigate the guilt of the Accused or affect the reliability of the evidence...'. In error, the French translation recalls that "les co-procureurs ont l'obligation constante de communiquer aux Chambres et aux parties 'toutes pièces susceptibles, à leur connaissance, d'établir l'innocence du suspect ou de la personne mise en examen, de constituer un élément à décharge ou d'affecter la crédibilité d'un élément à charge', tel qu'énoncé à la règle 53 4) du Règlement intérieur" (emphasis added). A comparison of the French versions of the SCC's decision and the Trial Chamber Memorandum cited by the SCC further highlights this error, with the Trial Chamber Memorandum confirming the Co-Prosecutors' obligation to disclose evidence that would have "des conséquences sur la fiabilité qu'il est possible d'accorder à des éléments de preuve" (E127/4 Trial Chamber Memorandum, para. 1).

¹⁰ E319/14/2 Trial Chamber Memorandum, "Trial Chamber Guidelines on the Disclosure of Case 003 and 004 Civil Party Applications in Case 002/02", 24 August 2015 ("CPA Guidelines"). The Co-Prosecutors note that Khieu Samphan was not in possession of this decision, or the earlier courtesy copy, when he circulated the courtesy copy of his Motion.

002/19-09-2007-ECCC/TC

credibility of the *prosecution* evidence”, it is clear that the Chamber took this into account when drafting its memorandum. In any event, even under the original language of Rule 53(4), any relevant evidence would have the effect of ‘affecting’, *i.e.* enhancing or diminishing, the credibility of prosecution evidence.

7. In accordance with the Trial Chamber Memorandum, the Co-Prosecutors, or the ICP acting alone, have, since October 2014, transparently set out their disclosure practice in *each* public filing requesting the Chamber’s permission to disclose evidence, as follows:

The Trial Chamber has stated that the obligation to disclose *relevant* material, whether *inculpatory* or *exculpatory*, is an obligation that is owed to the Trial Chamber, as well as the Accused, as it is “in the interests of ascertaining the truth that the Trial Chamber has access to these documents.” Moreover, this Chamber has previously held that “Internal Rule 53(4) imposes a continuing obligation on the Co-Prosecutors to disclose to the Trial Chamber any material in its possession that may suggest the innocence or mitigate the guilt of the Accused or affect the reliability of the evidence.”¹¹

8. In light of this declaration, the Co-Prosecutors have understood the Chamber’s acceptance of all disclosure to date as indicative of the Co-Prosecutors’ compliance with their disclosure obligations, particularly because the disclosure procedure enacted by the Chamber establishes its role as gatekeeper to all disclosures subsequently made to the parties.¹² Were the Chamber of the view that the Co-Prosecutors were acting contrary to their obligations or in contravention of the Accused’s fair trial rights in making this disclosure, it could and would

¹¹ Emphasis added, internal citations omitted. See **E319** International Co-Prosecutor’s Disclosure of Statements from Case File 004, 17 October 2014, para. 1; **E319/8** International Co-Prosecutor’s Disclosure of Statements from Case File 004 relevant to 1st Segment of Case 002/02 Trial, 22 January 2015, para. 2; **E319/13** International Co-Prosecutor’s Disclosure of Documents from Case File 004 Relevant to Case 002 pursuant to Case 004-D193/11, 18 February 2015, para. 3; **E319/15** International Co-Prosecutor’s Disclosure of Documents from Case File 004 relevant to Case 002 pursuant to Case 004-D193/13, 27 February 2015, para. 3; **E319/19** International Co-Prosecutor’s Disclosure of Documents from Case File 004 relevant to Case 002 pursuant to Case 004-D193/15, 18 March 2015, para. 3; **E319/20** International Co-Prosecutor’s Disclosure of Documents from Case File 004 relevant to Case 002 pursuant to Case 004-D193/16, 16 March 2015, para. 3; **E319/21** International Co-Prosecutor’s Disclosure of Documents from Case File 004 relevant to Case 002 pursuant to Case 004-D193/21, 13 April 2015, para. 3; **E319/24** International Co-Prosecutor’s Disclosure of Documents from Case File 004 relevant to Case 002 pursuant to Case 004-D193/24, 9 June 2015, para. 3; **E353** Co-Prosecutors’ Disclosure of DC-Cam documents relevant to Case 002, 21 July 2015, para. 2; **E319/25** International Co-Prosecutor’s Disclosure of Documents from Case File 004 relevant to Case 002 pursuant to Case 004-D193/28, 23 July 2015, para. 3; **E319/26** International Co-Prosecutor’s Disclosure of Documents from Case File 004 relevant to Case 002 pursuant to Case 004-D193/30, 3 August 2015, para. 3; **E319/27** International Co-Prosecutor’s Disclosure of Documents from Case File 003 and Case File 004 relevant to Case 002 pursuant to Case 003-D100/12 and Case 004-D193/33, 10 August 2015, para. 6; **E319/28** International Co-Prosecutor’s Disclosure of Documents from Case File 004 relevant to Case 002 pursuant to Case 004-D193/34, 12 August 2015, para. 3; **E319/29** International Co-Prosecutor’s Disclosure of Two Documents from Case File 004 relevant to Case 002 pursuant to Case 004-D193/37, para. 3.

¹² Initially, the Co-Prosecutors disclose materials only to the Chamber. Only when it has reviewed these documents, and signalled its acceptance by requesting the Greffier of the Chamber to place the documents onto the case file, can the Co-Prosecutors execute disclosure to the parties. See **E127/7/2** Trial Chamber Memorandum, “Admission of Case 003 and 004 statements relevant to Case 002/02”, 23 September 2013.

have rejected these disclosures in whole or in part and issued the appropriate orders, but it has not done so. Moreover, in its CPA Guidelines, the Chamber acknowledged that “the nature of CPAs is to present inculpatory rather than exculpatory evidence”,¹³ and confirmed the Co-Prosecutors’ *prima facie* obligation to disclose them as part of their ongoing duty to disclose documents “which may affect the credibility of evidence”.¹⁴ This approach to disclosure by the Chamber is entirely consistent with the ECCC’s truth-finding role as the ascertainment of the truth is the primary function of this court, and all the chambers have recognised it as a key principle guiding their decisions.¹⁵

9. Indeed, this Chamber has unequivocally confirmed that it “must ascertain the truth”¹⁶ and has highlighted the discretion afforded to it “to take any action conducive to [doing so]”.¹⁷ Thus, this Chamber’s interests in having access to all evidence conducive to ascertaining the truth mandates a broad approach to disclosure regardless of Khieu Samphan’s preferences. Indeed, only last month, the Chamber *sua sponte* requested the Co-Investigating Judges (“CIJs”) to disclose any statement or information they may have gathered in the course of their investigations in Case 004 regarding an individual who “may be of assistance to the Chamber in ascertaining the truth”.¹⁸
10. Pursuit of the truth militates against the imposition of rigid procedural formalities, and contrary to Khieu Samphan’s contention,¹⁹ the fact that Case 002/02 is now at the trial stage of proceedings is of little relevance. The Chamber, like the CIJs, must continue to seek to ascertain the truth, and it is incumbent upon the Co-Prosecutors to bring all relevant evidence to the attention of the Chamber. As the SCC explained, the duty set out in the Trial Chamber Memorandum “is a component of [a] fair trial, [and] accords with the prosecutorial role of

¹³ E319/14/2 CPA Guidelines, para. 4.

¹⁴ E319/14/2 CPA Guidelines, para. 4.

¹⁵ See, e.g. **Supreme Court Chamber: F2/5** Decision on part of Nuon Chea’s Requests to Call Witnesses on Appeal, 29 May 2015, para. 23; **F2/4/2 SCC** Decision on NC’s Third Request, para. 17. **Trial Chamber: E348/4** Decision on Khieu Samphan’s Request for Confrontation among Witness Srey Than and Civil Parties Say Sen and Saut Saing and Disclosure of Audio Recordings of Interviews of Say Sen, 12 June 2015 (“Decision on Khieu Samphan’s Request for Confrontation”), paras 9, 14; **Pre-Trial Chamber: D313/2/2** Decision on Co-Prosecutors’ Appeal against the CIJs’ Order on Request to place additional evidentiary material on the Case File dated 31 December 2009, 20 May 2010, para. 11; **Office of the Co-Investigating Judges:** Pursuant to Internal Rule 55(5), “the Co-Investigating Judges may take any investigative action conducive to ascertaining the truth”.

¹⁶ E312 Final Decision on witnesses, experts and civil parties to be heard in Case 002/01, 7 August 2014, para. 27. See also para. 22.

¹⁷ E348/4 Decision on Khieu Samphan’s Request for Confrontation, para. 9.

¹⁸ E358 Trial Chamber Memorandum, “Request for Information and Disclosure”, 21 August 2015.

¹⁹ E363 Motion, para. 20.

002/19-09-2007-ECCC/TC

assisting the court in ascertaining the truth.”²⁰ Moreover, it forms part of the ECCC’s role in providing reparations to victims of human rights abuses, which “is achieved through the ‘verification of facts and full and public disclosure of the truth’ as fostered by the findings of the Co-Investigating Judges and three Chambers”.²¹

11. Khieu Samphan’s comparisons between Internal Rule 53(4) and the quasi-corresponding rules at the *ad hoc* Tribunals²² are inapposite. In contrast to the standard adopted by the Chamber in its memorandum, ICTY RPE rule 68(i) and ICTR RPE rule 68(A) contain a different and narrower obligation, which mandates only the disclosure of exculpatory evidence, including that which *negatively*²³ affects the credibility of *Prosecution* evidence. Moreover, the rationale and purposes of the disclosure rules at the ECCC and *ad hoc* Tribunals differ. The ECCC operates within a civil law system where the investigations are carried out by judges to whom the Co-Prosecutors owe their obligation of disclosure.²⁴ At the *ad hoc* tribunals, investigations are carried out by the parties, and ICTY/ICTR RPE rule 68 requires only disclosure to the Defence as evidence is never disclosed to the trial chambers. It is therefore unsurprising, but also irrelevant to the determination of the ECCC Co-Prosecutors’ obligations, that the jurisprudence Khieu Samphan cites only contains reference to the ICTY/ICTR Prosecutor’s obligation to disclose exculpatory evidence.²⁵
12. It is astonishing that Khieu Samphan raises these challenges only now,²⁶ after almost a year of accepting each of the Co-Prosecutors’ disclosures, and after the topic of disclosure has been

²⁰ **F2/4/2** SCC Decision on NC’s Third Request, para. 17, *citing* at fn. 41 Code of Criminal Procedure of the Kingdom of Cambodia, Article 4; Case 001-E72/3 Decision on Civil Party Co-Lawyers’ Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, 9 October 2009 (“Decision on Civil Parties Co-Lawyers’ Joint Request”), paras 24-25 (Dissenting Opinions of Judge Lavergne). See also Case 001-E72/3 Decision on Civil Parties Co-Lawyers’ Joint Request, para. 20 (“According to Cambodian criminal procedure, the prosecutorial authority must also assist in ascertaining the truth”).

²¹ Case 001-F28 Appeal Judgement, 3 February 2012, para. 661, *citing* UN Basic Principles on Reparations, Article IX(22)(b).

²² **E363** Motion, paras 12, 13.

²³ This difference is also clear on the face of the rules themselves when comparing the French versions of the ICTY/ICTR RPE and ECCC Internal Rules. ICTY RPE rule 68(i) states in relevant part: “le Procureur communique ... à la défense tous les éléments dont il sait effectivement qu’ils sont de nature à ... *porter atteinte* aux éléments de preuve de l’Accusation” (emphasis added). Similarly, ICTR RPE rule 68A states: “Le Procureur communique ... à la défense tous les éléments dont il sait effectivement qu’ils sont de nature à ... *porter atteinte* à la crédibilité de ses éléments de preuve à charge” (emphasis added). In contrast, ECCC Internal Rule 53(4) requires: “Les co-procureurs doivent ... communiquer ... toutes pièces susceptibles, à leur connaissance, ... *d’affecter* la crédibilité d’un élément à charge” (emphasis added).

²⁴ **E127/4** Trial Chamber Memorandum, para. 1.

²⁵ See **E363** Motion, para. 13, *citing, inter alia, Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Appeals Chamber, Judgment, para. 183.

²⁶ Khieu Samphan’s co-lawyer conceded his team’s delay in raising the issue. See **E1/338.1** T. 27 August 2015, p. 23, 10.13.30. (Mr Vercken: “You can fault us for not having reacted sufficiently early enough ...”)

002/19-09-2007-ECCC/TC

raised and subjected to adversarial argument before the Chamber on numerous occasions.²⁷

His lawyers' previous remarks had largely been limited to the time required for review of the materials, and their availability in French.²⁸ Strikingly, Khieu Samphan's lawyer himself, far from rejecting the disclosure received from the Co-Prosecutors, has highlighted its necessity:

In order to properly cross-examine that witness, it is, of course, important for us to take cognizance not only of the statements by this witness, but *all other statements that have been placed on the record by the Prosecution and which may deal with the same subject.*²⁹

13. Moreover, Khieu Samphan's position in this Motion is the complete opposite of that of his co-Accused, Nuon Chea, whose defence team has welcomed, and indeed actively sought, the disclosure of all documents from Cases 003 and 004 that are *relevant* to Case 002/02.³⁰ Nuon Chea has confirmed the importance of disclosed evidence, stating:

[t]his evidence is not only of critical relevance to the very heart of the Defence's case, and not only of critical relevance to Case 002/02 (and the appeal in Case 002/01) but also appears, at least on initial review, to fundamentally affect the nature of the evidence on the case file in respect of several key issues being contested.³¹

14. This sentiment is reflected in the requests Nuon Chea has made pursuant to Internal Rule

²⁷ The issue was discussed at length during proceedings on, *inter alia*, 28 October 2014, 5 March 2015; 27 July 2015; and 10 August 2015.

²⁸ See, e.g., **E1/272.5** Trial Management Meeting, T. 5 March 2015, pp. 17-21, 14.16.13-14.29.00.

²⁹ **E1/275.1** T. 11 March 2015, p. 87, 15.55.40. See also **E1/263.1** T. 16 February 2015, p. 6, 09.19.58-09.21.02 (Ms Guissé: "so long as we have not been able to apprise ourselves on [the statements], so long as we have not been able to confront ourselves with the evidence, we cannot formulate our own opinion. So once again, I would insist on the fact that this is a matter of proper preparation in order for the proper conduct of trial in order to allow a proper adversarial hearing to unfold.")

³⁰ See **E1/272.5** Trial Management Meeting, T. 5 March 2015, p. 14, 14.09.43 (Mr Koppe: "...we are also concerned about whether the Case 003 and 004 case files also contain other *relevant* evidence in addition to witness and civil party statements, for example documents. Frankly we have no business with the International Co-Investigating Judge in Cases 003 and 004, just as he, I think, has no business in this courtroom. *That is why we have asked that the Chamber order the International Co-Prosecutor to advise you and all of us whether there may indeed be other types of relevant evidence on those case files, and if so we ask the Chamber to order the Prosecution to request the disclosure of this evidence as soon as possible.*" (Emphasis added)). **E1/272.5** Trial Management Meeting, T. 5 March 2015, pp. 9-10, 13.59.17-14.01.36 (Mr Koppe: "[W]hen we look at the disclosure statements more generally we can see that across the board they seem to contain information of critical relevance to multiple aspects of the Defence case. ... [W]e will also need to submit this newly disclosed evidence to the Supreme Court Chamber..."). In the same regard, see **E319/16** Nuon Chea's Motion in Relation to Disclosures from Case 003 and 004 and Response to the International Co-Prosecutor's Filing Providing Information in this Regard, 5 March 2015, para. 12.

³¹ **E319/16** Nuon Chea's Motion in Relation to Disclosures from Case 003 and 004 and Response to the International Co-Prosecutor's Filing Providing Information in this Regard, 5 March 2015, para. 5, *recalling* statements containing evidence as to (i) the existence of divisive internal factions within the CPK during the DK; (ii) acts and conduct of several CPK leaders, including Nuon Chea, Ta Mok, Sao Phim and Ruos Nhim; (iii) events "contested across all trial segments in case 002/02 as well as events *already adjudicated* in Case 002/01"; (iv) the acts and conduct of witnesses who "have testified, are scheduled to testify, have been requested to testify or should now be called to testify"; (v) detailed authority structure and operations in the Southwest and Northwest Zones; (vi) evidence directly relevant to the existence of policies including forced marriage and the treatment of the Cham and Vietnamese.

87(4) for admission of this evidence in the Case 002/02 trial³² and for its consideration by the SCC in the Case 002/01 appeal.³³

15. Khieu Samphan complains that “the Prosecution is burying exculpatory evidence under a mountain of inculpatory evidence”³⁴ thereby giving itself the opportunity to reinforce its case after the investigation in Case 002 has closed. There are several flaws to this argument. First, it ignores the right afforded to the Co-Prosecutors in any event to seek the admission of new inculpatory evidence during the trial pursuant to Internal Rule 87(4), which provides that “[d]uring the trial, ... at the request of a party, the Chamber may ... admit *any* new evidence which it deems conducive to ascertaining the truth”,³⁵ provided the criteria in Rules 87(3) and (4) are met. The Co-Prosecutors do not need to ‘manipulate’ their disclosure obligations to do so. Rather, disclosure allows the full extent of the relevant evidence known to the Prosecution to be made available to the Chamber and the Case 002 parties, to use as they see fit either in examination of witnesses or by seeking its admission as evidence. This serves the primary interests of ensuring that the Chamber may ascertain the truth, and the Accused are fully

³² See, e.g., **E319/30** Nuon Chea’s Rule 87(4) Request for Admission of Six Statements and One Annex relevant to Case 002/02, 24 August 2015; **E346** Nuon Chea’s Consolidated Rule 87(4) Request to Hear Additional Witnesses for the First Case 002/02 Trial Segment on the Tram Kok Cooperatives and Kraing Ta Chan Security Centre, 3 April 2015.

³³ **F2/4** Third Request to Consider and Obtain Additional Evidence in Connection with the Appeal against the Trial Judgment in Case 002/01, 25 November 2014.

³⁴ **E363** Motion, para. 24 (unofficial translation).

³⁵ Emphasis added. The Co-Prosecutors’ ability to seek the admission of new inculpatory evidence under Rule 87(4) accords fully with domestic Cambodian law, French criminal procedure, and international jurisprudence. **Cambodia:** Code of Criminal Procedure of Cambodia, Article 321: “Evidence evaluation by [the] Court: Unless it is provided otherwise by law, in criminal cases all evidence is admissible. The court has to consider the value of the evidence submitted for its examination, following the judge’s intimate conviction.” **France:** *Rapport annuel 2010*, Cour de cassation, Troisième Partie, La communication de pièces nouvelles à l’audience, pp. 187-188: S’agissant des nouvelles pièces produites à l’audience, le principe posé par la chambre criminelle est que l’article 6§3b [de la Convention Européenne des Droits de l’Homme] ne fait pas obstacle à ce que le ministère public verse aux débats des pièces nouvelles mais à la condition que ces pièces soient soumises à un débat contradictoire et qu’un délai soit, le cas échéant, accordé à l’accusé ou à son conseil, pour les examiner (Cass Crim., 9 mars 1994, No 93-83.461; Cass Crim., 30 octobre 1996, No. 96-80.020: “*Le ministère public a le droit de produire tous documents qui lui paraissent utiles à la manifestation de la vérité, sauf le droit, pour les autres parties, d’examiner les pièces produites et de présenter toutes observations à leur sujet, sans qu’il soit nécessaire que le président les invite spécialement à le faire.*”). Unofficial translation: With regard to new evidence produced during trial hearings, the principle established by the criminal chamber (“chambre criminelle”) is that Article 6(3)(b), [ECHR] does not prevent the Prosecution from introducing new evidence, provided that the evidence is subject to adversarial debate and that, if necessary, time be granted to the Accused or his counsel to examine it (see decisions of the Cour de Cassation (Criminal Chamber), Cass. Crim., 9 March 1994, No 93-83.461; Cass. Crim., 30 October 1996, No. 96-80.020: “*The Prosecution has the right to produce any document it considers useful in ascertaining the truth, but all other parties have a corollary right to examine and comment on the said documents without the President having to specifically invite them to do so.*”). **International Criminal Tribunals:** International jurisprudence recognises that the Prosecution may re-open its case for the introduction of new evidence in certain circumstances. See e.g. (ICTY) *Prosecutor v. Mladić*, IT-09-92-T, Decision on Prosecution Motion to Re-Open its Case-in-Chief, 23 October 2014; (SCSL) *Prosecutor v. Taylor*, SCSL-03-1-T, Decision on Public with Confidential Annexes A and B Prosecution Motion to Call Three Additional Witnesses, 29 June 2010.

apprised of all relevant evidence so as to receive a fair trial. It must be remembered that the new evidence being collected in Cases 003 and 004 that is directly relevant to Case 002/02 is not being generated by the Co-Prosecutors, but by the CIJs.

16. Secondly, the reality is that most written records of interview contain both inculpatory and exculpatory evidence, and their disclosure may therefore assist the Defence in the preparation of their case.³⁶ It is clear that what may be described as ‘exculpatory’ from the point of view of the Defence teams must be broadly defined in order to ensure the fairness of proceedings. For example, where a witness states that he worked 15 hours per day at a worksite, evidence from others that they worked 12 or 20 hours per day may affect the reliability of that evidence. The Defence teams have themselves sought to undermine the credibility of evidence on the basis of what the Co-Prosecutors consider to be negligible inconsistencies in witness evidence. The detailed questioning by Nuon Chea’s Defence team of Meas Sokha regarding the torture of a cyclo driver³⁷ is an example of this.
17. The multifaceted role that this new disclosure plays in the cases of each party to the Case 002/02 proceedings, and in enabling the Chamber to ascertain the truth, is demonstrated clearly by the case of [REDACTED]. Her written record of interview was disclosed in February 2015, following which the Co-Prosecutors proposed her as a witness for the Tram Kak Cooperatives trial segment³⁸ and she was selected by the Chamber. Just like the Co-Prosecutors, the Chamber,³⁹ Khieu Samphan,⁴⁰ Nuon Chea⁴¹ and the Civil Parties⁴² all

³⁶ For example, at the hearing of 7 September 2015, during their response to the OCP presentation of key documents in relation to the 1st January Dam, Trapeang Thma Dam and Kampong Chhnang Airport sites, the Defence quoted passages from documents considered as essential by the prosecution, including written records of interview. The passages read by the Defence were, in their view, exculpatory.

³⁷ **E1/249.1** Meas Sokha, T. 21 January 2015, pp. 82-104, 15.04.50–16.01.30; **E1/250.1** Meas Sokha, T. 22 January 2015, pp. 9-11, 10.28.16 – 10.33.40 (asking detailed questions regarding the incident, attendant circumstances, and condition of the camp at the time); **E1/250.1** Meas Sokha, T. 22 January 2015, pp. 2-6, 10.10.26 – 10.20.55 (Mr Koppe: “We are convinced that Meas Sokha never witnessed the torture incident of a fat cyclo driver, suffocated by a plastic bag. We are convinced he made up his story.... the only way to show this Court that this is an unreliable Witness is asking him about details, details as to the events that he claims to have witnessed. If he is not -- if he is not able to properly describe the events, if he is not able to give details of what happened, we think he’s unreliable”).

³⁸ **E319/17** International Co-Prosecutor’s Request Pursuant to Rules 87(3) & 87(4) to admit documents and to hear an additional trial witness relating to Tram Kak District/Kraing Ta Chan Segment of Case 002/02, 5 March 2015.

³⁹ [REDACTED] p. 4, 09.12.06-09.13.42 (“based on the information contained in the Case file, in particular the written records of the interviews by OCIJ, the Chamber is of the view that this witness, or the witnesses, have important information for this case.”) See also **E319/17/1** Decision on International Co-Prosecutor’s Request Pursuant to Rules 87(3) and 87(4) to Admit Documents and to Hear an Additional Trial Witness relating to the Tram Kak District/ Kraing Ta Chan Segment of Case 002/02, 8 April 2015, para. 1 (“The Nuon Chea and Khieu Samphan Defence teams support hearing additional Witness [REDACTED] ... and the Civil Party Lead Co-Lawyers do not object.”).

⁴⁰ **E1/275.1** T. 11 March 2015, p. 86, 15.54.21 (Mr Vercken: “the written statement of this person has been referred to a lot and used during these proceedings, so we therefore do not object to the summoning of this person to
Co-Prosecutors’ Response to Khieu Samphan’s Disclosure Motion

noted the importance of her evidence. When questioning her, both Defence teams used elements of her prior statements to advance their cases.⁴³

18. Khieu Samphan criticises the failure to identify the exculpatory elements in the disclosed material,⁴⁴ yet he fails to demonstrate any obligation to do so by reference to any ECCC law or jurisprudence. The Co-Prosecutors maintain their position that such an exercise is not required, nor is it an efficient use of their time and resources, given that is likely to be of limited, if any, use to the defence teams. Complex evidence and numerous defence theories, not all of them explicitly defined by the defence teams, and some of them illogical in the eyes of the Co-Prosecutors, mean that, without intimate knowledge of the current and future theories of both defence teams,⁴⁵ it is impossible to determine what is exculpatory. As Nuon Chea's lawyers have pertinently pointed out, it is the defence teams, not the Co-Prosecutors, who are in the best position to know their case,⁴⁶ and thus what evidence may be exculpatory.
19. A salient example is the evidence regarding Ta Val, Sector 5 Mobile Work Chairman. The Co-Prosecutors consider evidence that he was a ruthless killer to be inculpatory. However, it appears to be Nuon Chea's case that the purge of the Northwest Zone was exculpatory, enabling the Centre to replace the cadres there, including Ta Val, with more benign Southwest Zone cadres. In accordance with this theory, Nuon Chea's defence team used what the Co-Prosecutors would have considered inculpatory statements during the questioning of numerous witnesses regarding the Trapeang Thma Dam worksite.⁴⁷

appear before this Chamber, because we are very much attached to Rule 84, which has to do with respect for adversarial proceedings.”).

⁴¹ **E1/275.1** T. 11 March 2015, p. 47, 13.34.09 (Mr Koppe: “... of course, there's no doubt that this witness is very relevant and I think she should be scheduled as soon as possible. ... we do not object to having that witness scheduled as soon as possible.”).

⁴² **E1/275.1** T. 11 March 2015, p. 91, 16.07.32 (Ms Guiraud: “We have no objections for having this witness proposed by the Co-Prosecutors appear”).

⁴³ **Nuon Chea:** [REDACTED], pp. 15-17, 09.47.54-09.53.56 (Questions regarding Ta Mok and the Party's concern that the people had sufficient to eat); pp. 19-21, 09.58.25-10.05.14 (Questions regarding her prior statement that there had been no forced marriage in her commune). **Khieu Samphan:** [REDACTED], pp. 59-60, 14.12.15-14.14.10 (Questions regarding her prior statement that Khieu Samphan, Pol Pot and Nuon Chea had not visited her area); pp. 63-64, 14.24.45-14.27.25 (Questions regarding the resolution of issues at the commune level without reference to the upper echelons).

⁴⁴ **E363** Motion, paras 9, 20-23.

⁴⁵ Which, as Khieu Samphan's national co-lawyer has pointed out, are not the same. See **E1/272.5** Trial Management Meeting, T. 5 March 2015, p. 19, 14.20.44 (“we have different views from those of the Co-Prosecutor, and even the Defence, the counsel for the two Accused may have different views”).

⁴⁶ **E1/272.5** Trial Management Meeting, T. 5 March 2015, p. 8, 13.57.32 (Mr Koppe: “Mr. President, with all due respect, given it's us and not the Prosecution running our case, the Prosecution's assessments have often been inaccurate and unhelpful ...”).

⁴⁷ See e.g. **E1/329.1** Lat Suoy, T. 12 August 2015, pp. 50-51, 11.26.16–11.30.29 (relying on **E3/8991** DC Cam Statement of Bou Mao, 16 June 2011, ERN (En) 00969903 (Ta Val was “very good at reprimanding others”); **E3/7805** Written Record of Interview of Chiep Chhean, 20 December 2008, ERN (En) 00277815 (“[Ta Val] was

b. The Co-Prosecutors' Fulfilment of their Disclosure Obligations does not violate Fair Trial Rights

i. The Right to an Expeditious Trial

20. Khieu Samphan fails to substantiate his claim that the disclosures have violated his conditional right to an expeditious trial. He cites no jurisprudence or law, nor does he make any attempt to show that the disclosures have unduly prolonged the trial. Khieu Samphan simply states that disclosure “slows down the 002/02 trial”⁴⁸ and that “many hours of hearings have been devoted to communications, others were upset and (insufficiently) adjourned.”⁴⁹ However, a claim that complying with applicable disclosure obligations, or any other trial procedures, requires time is not a demonstration that trial is not proceeding expeditiously.
21. Indeed, Article 33new of the ECCC Law, which states the Chamber’s obligation to conduct an expeditious trial, also mandates that the Chamber conduct a trial that is fair and procedurally proper, stating: “the trial court shall ensure that trials are fair and expeditious, and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses.”⁵⁰ It is therefore clear that the expeditiousness of trial is also subject to other considerations. “Existing procedures in force” require the disclosure of these documents, and as Khieu Samphan argues later in his motion,⁵¹ adequate time and facilities for the parties to consider them. Khieu Samphan has failed to substantiate a claim that the trial is not expeditious under the circumstances.
22. Moreover, the right to an expeditious trial is in relation to *undue* delays. A delay as the result of a necessary procedural process, such as disclosure, is inherently not undue. As explained by some judges of the PTC, expeditiousness of proceedings requires that “proceedings ‘shall be brought to a conclusion within a *reasonable* time’ or ‘without *undue* delay.’ The requirement of ‘reasonableness’ in expediting the proceedings is there in order to ensure that any such decision would not infringe upon the rights of *all those involved* in the proceedings and is made in a way that is consistent with the proper administration of justice.”⁵² The proper administration of justice requires the proper application of disclosure.

also a killer”)); E1/324.1 Sen Sophon, T. 28 July 2015, pp. 17-20, 09.47.55-09.53.50 (relying on E3/8991); E1/333.1 Tak Boy, T. 19 August 2015, pp. 84-88, 15.36.14-15.51.04 (relying on E3/7805).

⁴⁸ E363 Motion, para. 35 (unofficial translation).

⁴⁹ E363 Motion, para. 35 (unofficial translation).

⁵⁰ Emphasis added.

⁵¹ E363 Motion, paras 42-46.

⁵² Case 003-D11/3/4/2 Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant [Redacted] (Opinion of Judges Chung and Downing), 13 February 2013, para. 36 (internal citations omitted; emphases in original).

ii. *The Principle of Equality of Arms*

23. Khieu Samphan argues that the Co-Prosecutors' disclosures violate the principle of equality of arms. He claims that this inequality manifests in three ways. First, in that the Co-Prosecutors are parties to Cases 003 and 004 and therefore may make investigative requests in those Cases.⁵³ Second, that the Co-Prosecutors gain access to the documents that are ultimately disclosed in advance of Khieu Samphan.⁵⁴ And third, that the staff of the Office of the Co-Prosecutors is larger than his staff, allowing the Co-Prosecutors to better manage disclosure.⁵⁵ None of these claims has merit.
24. This Chamber has held that equality of arms concerns procedural equality amongst the parties in *presenting* their cases.⁵⁶ "Equality of arms is the principle in law that, in a trial, the defence and the prosecution must have procedural equality to ensure that the conduct of judicial proceedings is fair."⁵⁷ Furthermore, the SCC has recognised that "the equality of arms does not require that the procedural rights of the prosecution and the defence are identical in every respect."⁵⁸ The ICTY Appeals Chamber decision cited by the SCC for that principle further explains that the purpose behind the equality of arms principle is "to give to each party equal access to the processes of the Tribunal, or an equal opportunity to seek procedural relief where relief is needed."⁵⁹
25. Khieu Samphan quotes the Appeal Judgment in *Kordić and Čerkez* in claiming that the inequalities he alleges place him at a "substantial disadvantage as regards his opponents."⁶⁰ The decision and paragraph the ICTY Appeals Chamber cited to for that principle describe a decision of the European Court of Human Rights that, like the SCC and this Chamber, ties

⁵³ E363 Motion, para. 37.

⁵⁴ E363 Motion, paras 38 and 39.

⁵⁵ E363 Motion, para. 41.

⁵⁶ E299 Decision on Objections to the Admissibility of Witness, Victim and Civil Party Statements and Case 001 Transcripts Proposed by the Co-Prosecutors and Civil Party Lead Co-Lawyers, 15 August 2013, para. 21 (emphasis in original) (citing *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Appeals Chamber, Judgement, 28 November 2007, para. 173; *Jespers v. Belgium*, No. 8493, Eur. Comm'n H.R., 27 D.R. [1981] 61, p. 87).

⁵⁷ Case 001-E90 Decision on Ieng Sary's Request to Make Submissions in Response to the Co-Prosecutors' Request for the Application of Joint Criminal Enterprise, 3 July 2009, para. 4 (citing *Prosecutor v. Taylor*, SCSL-03-01-T, Appeals Chamber, Decision on Defence Notice of Appeal and Submissions Regarding the 4 May 2009 Oral Decision Requiring the Defence to Commence its Case on 20 June 2009, 23 June 2009, paras 16-18 and jurisprudence cited therein.).

⁵⁸ E95/8/1/4 Decision on Ieng Sary's Appeal Against Trial Chamber's Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 19 March 2012, para. 9 (citing *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-A, Appeals Chamber, Decision on Application by Mario Čerkez for Extension of Time to File his Respondent's Brief, 11 September 2001, paras 6-9).

⁵⁹ *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-A, Appeals Chamber, Decision on Application by Mario Čerkez for Extension of Time to File his Respondent's Brief, 11 September 2001, para. 7.

⁶⁰ E363 Motion, para. 36 (quoting *Prosecutor v. Kordić and Čerkez*, Appeal Judgment, 17 December 2004, para. 175).

equality of arms to the opportunity to present one's case, stating that the requirement of equality of arms encompasses "providing a 'fair balance' between the parties and ... that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent."⁶¹

26. None of the three issues raised by Khieu Samphan affect his equal opportunity to present his case and to seek procedural relief where needed. The Co-Prosecutors' involvement in Cases 003 and 004 in no way affects Khieu Samphan's ability to present his case in Case 002, and does not prevent him from seeking procedural relief, if need be, on an equal basis. Following disclosure, all parties have the ability and equal opportunity to use the disclosed documents as permitted by the Chamber. Indeed, this Chamber has previously made clear that "the role the Co-Prosecutors played in the Preliminary Investigation and other cases does not impact the equality of arms so long as all parties have procedural equality in *presenting* their case."⁶²
27. Nor does the fact that, by virtue of their involvement in Cases 003 and 004, the Co-Prosecutors gain access to the documents ultimately disclosed prior to the Chamber or other parties in Case 002 affect the ability of Khieu Samphan to present his case. This claim is ultimately one regarding resources in that Khieu Samphan is arguing that he does not have sufficient resources to review the disclosures in the time provided. However, the time needed by the parties to review the disclosed documents is taken into consideration by the Chamber in its trial management functions,⁶³ and this Chamber has previously allowed time for reviewing the disclosed documents as necessary, when requested and deemed reasonable.
28. Finally, and relatedly, the issue of the size of the staff of the Khieu Samphan Defence, as well as of the other parties, is presumably also taken into account by the Chamber in its trial management decisions. Moreover, "the right of an accused to have adequate time and facilities to prepare his or her defence does not imply that the Chambers are charged to ensure parity of resources between the Prosecutor and the Defence, such as the material equality of

⁶¹ *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-A, Appeals Chamber, Decision on Application by Mario Čerkez for Extension of Time to File his Respondent's Brief, 11 September 2001, para. 6.

⁶² **E299** Decision on Objections to the Admissibility of Witness, Victim and Civil Party Statements and Case 001 Transcripts Proposed by the Co-Prosecutors and Civil Party Lead Co-Lawyers, 15 August 2013, para. 21 (emphasis in original).

⁶³ See **E314/5/3** Decision on Khieu Samphan's Urgent Request for Reconsideration of Scheduling Order on the Substance of Case 002/02, 16 October 2014, para. 3 ("The Defence argument that it cannot draft its appeal brief while participating in Case 002/02 because of insufficient resources (which implies the related argument regarding equality of arms) has already been ... taken into consideration by the Chamber when it issued the Scheduling Order.").

002/19-09-2007-ECCC/TC

financial or personal resources.”⁶⁴ Additionally, it is simplistic to compare the size of the Co-Prosecutors’ staff solely with the staff of the Khieu Samphan Defence, for this ignores that the staffing size of the Office of the Co-Prosecutors is set in relation to their obligations not only in prosecuting Case 002 against Khieu Samphan, but also against Nuon Chea, and litigating against multiple defence teams in Cases 003 and 004. Moreover, the work of the Co-Prosecutors in relation to disclosure is far more onerous than that of Khieu Samphan. The Co-Prosecutors must review all documents produced in Cases 003 and 004 to evaluate them for disclosure, seek the disclosure of those relevant from the OCIJ, and disclose them to Case 002 along with analysis of their relevance for disclosure purposes. Khieu Samphan does not engage in any of these processes.

29. In regards to disclosed documents subsequently put forth by the Co-Prosecutors under Rule 87(4), Khieu Samphan has an opportunity to file a response to these motions. Should he require an extension of the deadline in order to file a response, he has the opportunity to make such a request to the Chamber. He therefore also has procedural equality in this regard.

iii. The Right to Adequate Time and Facilities

30. Khieu Samphan makes various claims that his right to adequate time and facilities to prepare his defence has been violated.⁶⁵ The Co-Prosecutors will address each of these in turn. Khieu Samphan first argues that the amount of extra time the Chamber has granted to the parties to review disclosed documents is insufficient,⁶⁶ and he claims that he has no time to respond to requests for admission pursuant to Rule 87(4).⁶⁷ Article 35new(b) of the ECCC Law entitles accused “to have adequate time and facilities for the preparation of their defence”. What constitutes adequate time is a fact-specific analysis, which includes evaluation of “the status and scale of the Prosecution’s disclosure, and the staffing of the Defence team.”⁶⁸ Chambers consider not only the need to safeguard the rights of the Accused, but also “the interest of the victims, the ... Tribunal, and of the international community as a whole, in having the trial proceed expeditiously and without unreasonable delay.”⁶⁹
31. Khieu Samphan makes no attempt in his motion to identify how much additional time he

⁶⁴ *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Appeals Chamber, Judgment, 17 December 2004, para. 176.

⁶⁵ **E363** Motion, paras 42-47.

⁶⁶ **E363** Motion, para. 43.

⁶⁷ **E363** Motion, para. 43.

⁶⁸ **ICTR**: *Augustin Ngirabatware v. Prosecutor*, ICTR-99-54-A, Appeals Chamber, Decision on Augustin Ngirabatware’s Appeal of Decisions Denying Motions to Vary Trial Date, 12 May 2009, para. 28.

⁶⁹ **STL**: *Prosecutor v. Salim Jamil Ayyash et al.*, STL-11-01/T/TC, Trial Chamber, Decision on Trial Management and Reasons for Decision on Joinder, 25 February 2014, para. 109 (internal quotations omitted).

needs to review the disclosed documents, nor did he file a request for extension of time to respond to the Co-Prosecutors' most recent Rule 87(4) motion based on disclosed documents.⁷⁰ If more time is required to review disclosed documents under Rule 53(4) or documents requested to be admitted under Rule 87(4), he should ask the Chamber with specificity and the Co-Prosecutors will respond as appropriate.

32. Khieu Samphan also complains that many of the disclosed documents are not translated into French.⁷¹ However, the SCC has previously noted that the Khieu Samphan Co-Lawyers are comprised of one International Co-Lawyer with indicated fluency in French only, one International Co-Lawyer with indicated fluency in both English and French, and one National Co-Lawyer with indicated fluency in both English and Khmer.⁷² In addition, the Khieu Samphan Defence has consultants and support staff fluent in various languages of the court. As the SCC has held, “[t]he Defence is therefore collectively fluent in English, French, and Khmer. Thus, although the three International Co-Lawyers may prefer to work in French, the issuance of the [documents] in English and Khmer in no way impedes the National and International Co-Lawyers from working together in order to jointly and meaningfully understand the contents of [documents]...”⁷³ Furthermore, given the interests of all parties that disclosure happen as soon as possible, and the Khieu Samphan Co-Lawyers' indicated fluencies in the English language, it would go “against the interests of all parties to have ... to wait until a French translation of the [documents were] ready before notification thereof.”⁷⁴
33. Khieu Samphan also complains about the modalities of the disclosure.⁷⁵ These modalities are requirements imposed by the International Co-Investigating Judge (“ICIJ”) as a condition for disclosure.⁷⁶ The ICIJ has requested that the Chamber ensure compliance of all parties with them.⁷⁷ Any additional difficulties or time required to deal with the materials under the modalities in place should be factored into any requests Khieu Samphan makes to the

⁷⁰ **E319/22/1** Decision on International Co-Prosecutor's Request to Admit Statements Pursuant to Rules 87(3) and 87(4), 17 July 2015, para. 1.

⁷¹ **E363** Motion, para. 44.

⁷² **E163/5/1/15** Decision on the Request by the Defence for Khieu Samphan for Trilingual Notification of the Supreme Court Chamber's Decisions, 30 April 2013, para. 4.

⁷³ *Ibid.*

⁷⁴ *Ibid.*, para. 8.

⁷⁵ **E363** Motion, para. 45.

⁷⁶ The Chamber, but not the parties, have access to the decisions of the ICIJ imposing these conditions. *See, e.g.*, Case 004-**D193/33** Decision on the International Co-Prosecutor's Case 002 Disclosure Requests D167, D193/7, D193/17, D193/31, and D193/32, 7 August 2015, paras 18-20. The Co-Prosecutors have communicated these conditions to the parties in their own disclosure filings.

⁷⁷ *See, e.g.*, Case 004-**D193/33** Decision on the International Co-Prosecutor's Case 002 Disclosure Requests D167, D193/7, D193/17, D193/31, and D193/32, 7 August 2015, para. 21.



Chamber for additional time to review disclosures.

34. Finally, Khieu Samphan also expresses confusion regarding disclosure to Case 002 and admission into evidence in Case 002/02.⁷⁸ It is unclear how this matter concerns Khieu Samphan's entitlement to adequate time and facilities to prepare his defence, however the Co-Prosecutors note that disclosed documents, although placed on the case file, are not automatically admitted into evidence. Admission into evidence happens pursuant to Rule 87(4) or, for certain documents, via the process described by Judge Lavergne at the transcript pages cited by Khieu Samphan.⁷⁹ As stated earlier, the issue of admitting documents into evidence is independent from the duty to disclose under the Internal Rules.

III. CONCLUSION

35. Khieu Samphan is requesting the Co-Prosecutors not to fulfil their disclosure obligations as required under Internal Rule 53(4) and related ECCC jurisprudence. Disclosing such material ensures that the Chamber has access to material that may assist it in ascertaining the truth and the Accused access to material that may assist them in challenging the evidence against them or presenting evidence for them. Other than ensuring that this fundamental obligation is fulfilled, the Co-Prosecutors gain no further benefit in these proceedings. If Khieu Samphan chooses not to review the disclosed material that is his right, however the obligation to disclose is not only owed to him but to the Chamber and Nuon Chea. As such, it should not be circumscribed by his own reluctance to review the relevant material.
36. For the foregoing reasons, the Co-Prosecutors respectfully request the Trial Chamber to dismiss the Motion in its entirety.

Respectfully submitted,

Date	Name	Place	Signature
7 September 2015	CHEA Leang Co-Prosecutor	Phnom Penh	
	Nicholas KOUMJIAN Co-Prosecutor		

⁷⁸ E363 Motion, para. 46.

⁷⁹ E1/333.1 T. 19 August 2015, pp. 52-53, 13.46.38-13.48.46.