BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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Submissions of the Defence for Mr KHIEU Samphân on the Co-Prosecutors' disclosure obligation

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Before:

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MAY IT PLEASE THE TRIAL CHAMBER

1. Since 2011, under the pretext of their obligation to disclose exculpatory material, the Co-Prosecutors have disclosed various documents to the Trial Chamber ("the Chamber") and the Parties.
2. In three years of trial in Case 002/01, between 2011 and 2013, the International Co-Prosecutor disclosed in two stages, a total of 48 written records of interviews and audio-recordings from Case Files 003 and 004.[1]
3. In the tens months of trial in Case 002/02, as of October 2014 to this day, the International Co-Prosecutor disclosed, in 15 stages, a total of 1221 documents[2] from Case Files 003 and 004 and two documents from DC-Cam[3]. In addition, the Co-Prosecutors disclosed jointly two further documents from DC-Cam. [4]
4. The Prosecution has given notice of further disclosures whilst judicial investigations in Cases 003 and 004 proceed until at least 2016.[5]
5. The Defence for Mr KHIEU Samphân ("the Defence") hereby moves the Chamber to intervene by virtue of its duty "to ensure that trials are fair and expeditious".[6] The disclosures are (I) inconsistent with the obligation of disclosure binding the Co-Prosecutors and (II) violate the rights of defence.

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[1] International Co-Prosecutor's Disclosure to Trial Chamber regarding interviews of Case 002 witnesses in cases 003 and 004, 6 October 2011, **E127** (request for direction on how to proceed); International co-Prosecutor's Disclosure to Trial Chamber of Case 002 Witness Statements in Cases 003 and 004 in Compliance with Trial Chamber Memorandum E127/4, 2 February 2012, **E127/5**; International Co-Prosecutor's Disclosure of Written Records of Interview from Case Files 003 and 004, 7 August 2013, **E127/7**.

[2] Records of witness interviews, civil party applications, appended documents and other documents.

[3] [As there is insufficient space in this motion to provide the full titles of certain references, they will be provided solely in the table of authorities]; Disclosure of 17 October 2014, **E319**; Disclosure of 22 January 2015, **E319/8**; Disclosure of 11 February 2015, **E319/12**; Disclosure of 18 February 2015, **E319/13**; Disclosure of 27 February 2015, **E319/15**; Disclosure of 16 March 2015, **E319/20**; Disclosure of 18 March 2015, **E319/19**; Disclosure of 13 April 2015, **E319/21**; Disclosure of 3 June 2015, **E319/23**; Disclosure of 9 June 2015, **E319/24**; Disclosure of 23 July 2015, **E319/25**; Disclosure of 3 August 2015, **E319/26**; Disclosure of 10 August 2015, **E319/27**; Disclosure of 12 August 2015, **E319/28**; Disclosure of 12 August 2015, **E319/29**.

[4] Co-Prosecutors' disclosure of DC-CAM documents relevant to Case 002, 21 July 2015, **E353**.

[5] Transcript of hearing ("T.") of 10 August 2015, **E1/327.1**, p. 13, l. 12-23, before 09.40.45; p. 14, l. 5-6; p. 27, l. 19 to p. 28, line 1, before 10.11.05.

[6] Interim Decision on Part of NUON Chea's First Request to Obtain and Consider Additional Evidence in Appeal Proceedings of Case 002/01, 1 April 2015, **F2/4/3**, para. 22 and footnote ("fn.") 38.

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I. FAILURE TO DISCHARGE THE DISCLOSURE OBLIGATION

A. Change in grounds advanced from Case 002/01 to Case 002/02

6. From the time of his first disclosure in the trial of Case 002/02, the International Co-Prosecutor's consistent modus operandi has been to distort the applicable law concerning his disclosure obligation. Acting alone, or, in rare instances, with his national counterpart, he has systematically justified his disclosures 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 to 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 (emphasis added).[7]

7. The International Co-Prosecutor draws on the Chamber's 24 January 2012 memorandum, which he insidiously distorts. In fact, in its memorandum, the Chamber held verbatim:

> The Chamber considers 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. It is in the interests of ascertaining the truth that the Trial Chamber has access to these documents, not least because consideration of the prior statements will assist in evaluating the credibility of these witnesses.[8]

8. Not once, therefore, did the Chamber refer to any obligation whatsoever of disclosure of "relevant material, whether inculpatory or exculpatory". The Chamber adverted to a single obligation incumbent on the Co-Prosecutors: disclosure of exculpatory material and the prior statements of witnesses.[9]

9. The distortion in which the International Co-Prosecutor engages in the trial of Case 002/02 is no accident and in no way can be considered an oversight. In the trial of Case 002/01, he couched the applicable law in terms, which, on the whole, were consonant with those enunciated by the

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[7] **E319**, para. 1; **E319/8**, para. 2; **E319/11**, para. 3; **E319/13**, para. 3; **E319/15**, para. 3; **E319/20**, para. 3; **E319/19**, para. 3; **E319/21**, para. 3; **E319/23**, para. 3; **E319/24**, para. 3; **E353**, para. 2; **E319/25**, para. 3; **E319/26**, para. 3; **E319/27**, para. 6; **E319/28**, para. 3; **E319/29**, para. 3.

[8] Disclosure of witness statements for witnesses who may testify in Case 002, 24 January 2015, **E127/4**, first paragraph.

[9] See also two other memorandums of the Chamber in the trial of Case 002/01: Information concerning the Case 003 and Case 004 Witness Statements that may be relevant to Case 002, 16 August 2013, **E127/7/1**, para. 2; Admission of Case 003 and 004 statements relevant to Case 002, 23 September 2013, **E127/7/2**, paras. 2 and 4.

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Chamber.[10] At the time, his intention was to disclose only the exculpatory evidence, since he was privy to the prior statements of witnesses who might give evidence or the interviews of witnesses containing information on those who had given evidence.[11] At the time, for every statement disclosed he even specified the precise ground for disclosure ("[name of witness] testified in 002/01", "Contains exculpatory elements", or "Relates to [name of witness] who testified in 002/01").[12]

10. Now in the trial of Case 002/02, the International Co-Prosecutor discloses anything that he considers "relevant" to Case 002. For each document, he merely provides the relevant point(s) of the Indictment, at times stating whether the calling of a witness was proposed or adjudged.[13] Hence, under the pretext of a distorted obligation of disclosure, the International Co-Prosecutor introduces incriminating material wholesale in the midst of the trial.

B. Rehearsal of applicable law

11. The Supreme Court Chamber had recent occasion to rehearse the applicable law on the matter:

> The Supreme Court Chamber recalls 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", as confirmed by Internal Rule 53(4). This duty is a component of fair trial, accords with the prosecutorial role of assisting the court in ascertaining the truth and, as such, extends to the appeal proceedings (emphasis added).[14]

12. Internal Rule 53(4) mirrors the instruments of the international criminal courts and tribunals. By way of example,[15] rule 68(i) of the Rules of Procedure and Evidence of the ICTY and rule 68(A) of the Rules of Procedure and Evidence of the ICTR lay down: "the Prosecutor shall, as soon as practicable, disclose to the Defence any material which in the actual knowledge of the Prosecutor

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[10] Request for directions of 6 October 2011, **E127**, paras. 6-10; Disclosure of 2 February 2012, **E127/5**, paras. 2 and 3; Disclosure of 7 August 2013 **E127/7**, para. 2.
[11] Request for directions of 6 October 2011, **E127**, para. 1; Disclosure of 2 February 2012, **E127/5**, para. 1; Disclosure of 7 August 2013, **E127/7**, para. 4.
[12] Confidential annex, "List of CF 003 and 004 Written Records Proposed to be Disclosed in Case File 002", **E127/7.1** of the Disclosure of 7 August 2013, **E127/7**.
[13] See the annexes to the disclosures.
[14] 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, **F2/4/2**, para. 17.
[15] See also, article 67(2) of the Rome Statute of the International Criminal Court (Rights of the accused); article 113 of the Rules of Procedure and Evidence of the Special Tribunal for Lebanon.
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may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence".

13. The Appeals Chamber of the two ad hoc tribunals has frequently recalled "the fundamental importance" of its "positive and continuous" obligation arising from that provision and has held that the duty cast on the Prosecutor to disclose exculpatory evidence was "essential to a fair trial".[16] It has underscored repeatedly that it rests with the Prosecution to discharge this onerous task:

> The significance of the fulfilment of the duty placed upon the Prosecution by virtue of Rule 68 has been stressed by the Appeals Chamber, and the obligation to disclose under Rule 68 has been considered as important as the obligation to prosecute. Indeed, the rationale behind Rule 68 is that the responsibility for disclosing exculpatory evidence rests solely on the Prosecution, and that the determination as to what material meets Rule 68 disclosure requirements falls within the Prosecution's discretion. The Prosecution is under no legal obligation to consult with an accused to reach a decision on what material suggests the innocence or mitigates the guilt of an accused or affects the credibility of the Prosecution's evidence. The issue of what evidence might be exculpatory evidence is primarily a facts-based judgement made by and under the responsibility of the Prosecution. [...]
>
> Rule 68, imposing disclosure obligations on the Prosecution, is an important shield in the accused's possession (emphasis added).[17]

14. It is assumed that the Prosecution is acting in good faith in the exercise of its discretion, save where it is shown that it abused it.[18]

15. Moreover, the Prosecution must disclose such exculpatory material "as soon as practicable" – [the English version of] rule 53(4) of the Internal Rules of the ECCC is framed in identical terms – which has prompted the Appeals Chamber of the ad hoc tribunals to point out: "This is a

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[16] For example, *Mugiraneza v. The Prosecutor*, ICTR-99-50-A, Appeal Judgement, 4 February 2013, para. 63; *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006 ("*Karemera et al.* Decision"), para. 9.

[17] *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-A, Appeal Judgement, 17 December 2004 ("*Kordic and Cerkez* Appeal Judgement"), paras. 183 and 242. See also, *Kajelijeli v. The Prosecutor*, ICTR-98-44A-A, Appeal Judgement, 17 May 2005, para. 262; *Karemera et al.* Decision, para. 9; *Kamuhanda v. The Prosecutor*, ICTR-99-54A-R68, *Decision on Motion for Disclosure*, 4 March 2010 ("*Kamuhanda* Decision"), para. 14; *Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, *Décision sur les requêtes de Ferdinand Nahimana aux fins de divulgation d'éléments en possession du Procureur et nécessaires à la défense de l'Appelant et aux fins d'assistance du Greffe pour accomplir des investigations complémentaires en phase d'appel*, 8 December 2006 ("*Nahimana et al.* Decision"), para. 7. See furthermore, *Ngirabatware v. The Prosecutor*, MICT-12-29-A, *Decision on Ngibaratware's Motions for Relief for Rule 73 Violations and Admission of Additional Evidence on Appeal*, 21 November 2014 ("*Ngirabatware* Decision"), para. 15.

[18] *Nahimana et al.* Decision, para. 7; *Kamuhanda* Decision, para. 14; *Ngirabatware* Decision, para. 15.

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continuing obligation that applies whenever the Prosecution receives new information, rather than a requirement that all exculpatory evidence be disclosed by a certain point in the trial."[19]

16. That being so, the Prosecution may be relieved of the obligation, where the accused is apprised of the relevant exculpatory evidence and such evidence is accessible, as in the case, for example, of transcripts of evidence given in public sessions.[20]

17. As to evidence given by witnesses in court, it was determined that:

> Rule 68 *prima facie* obliges the Prosecution to monitor the testimony of witnesses, and to disclose material relevant to the impeachment of the witness, during or after testimony. If the amount of material is extensive, the parties are entitled to request an adjournment in order to properly prepare themselves.[21]

18. Whereas all of the prior statements of witness who testify in court do not necessarily fall within the purview of that disclosure obligation (since, for example, they do not go to the credibility of a witness), they must nonetheless be disclosed inasmuch as they are necessary to the preparation of the Defence.[22]

C. Deliberate omissions and misrepresentation of its duty on the part of the Prosecution

19. From the outset of the trial of Case 002/02, the International Co-Prosecutor has acted in deliberate violation of the applicable law and disclosed an ever-increasing volume of material "relevant to Case 002", "whether inculpatory or exculpatory". At this juncture in the proceedings, the Co-Prosecutors' sole obligation is to disclose exculpatory material in their possession. Indeed, the investigative phase (preliminary investigations and judicial investigations) and the preparation phase, which precedes trial, have reached an end. The substantive hearings in the trial of Case 002/02 are in progress.

20. Acting as if he were still at the stage of the preliminary investigations and introductory submissions, the International Co-Prosecutor also discloses these hundreds of documents without the slightest information to allow the Defence to sift out exculpatory material. Yet, the Appeals

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[19] *Prosecutor v. Haradinaj et al.*, IT-04-84-A, Appeal Judgement, 19 July 2010, para. 110.
[20] *Prosecutor v. Blaskic*, IT-95-14-A, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000 ("*Blaskic* Decision"), para. 38; *Prosecutor v. Bralo*, IT-95-17-A, *Decision on Motions for Access to Ex Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material*, 30 August 2006 ("*Bralo* Decision"), para. 30; *Karemera et al.* Decision of 30 June 2006, paras. 14 and 15.
[21] *Prosecutor v. Krstic*, IT-98-33-A, Appeal Judgement, 19 April 2004, paras. 204-206; *Prosecutor v. Blaskic*, IT-95-14-A, Appeal Judgement, 29 July 2004, paras. 301-302.
[22] *Blaskic* Decision, para. 16; Rule 66(A)(ii) of the Rules of Procedure and Evidence of the ICTY. (At the Ad hoc tribunals, unlike at the ECCC, the Prosecution decides which of its witnesses to call, and not the Chamber).
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Chamber of the ad hoc tribunals has taken the view that the Prosecution must specify which material, in its view, is exculpatory, when disclosing a bundle of documents to the Defence. Thus, it held:

> the Prosecution must actively review the material in its possession for exculpatory material and, at the very least, inform the accused of its existence. In the view of the Appeals Chamber, the Prosecution's Rule 68 obligation to disclose extends beyond simply making available its entire evidence collection in a searchable format. A search engine cannot serve as a surrogate for the Prosecution's individualized consideration of the material in its possession.[23]

21. The circumstances in the matter *sub judice* differ in that not only does the stage of the proceedings bar the Prosecution from disclosure of anything other than exculpatory documents, but also the manner of disclosure of bundles of documents is far worse inasmuch as the Defence does not even have a search engine. The Defence is forced to scrutinise the entire collection of disclosed documents for exculpatory material.[24] In any event, the International Co-Prosecutor abrogates his obligation to determine which material could exonerate the Accused,[25] absolving himself from "[the need] to draw the attention of the Defence"[26] to that material.

22. On 10 August 2015, further to an objection from the Defence teams to the tendering of a bundle of documents, the Prosecution made it known that, in future, it would proceed otherwise, so as to "reduce the burden on the Defence".[27] Not only does the situation remain aberrant, but it is also woefully inadequate. Thus, the Prosecution will, in the future, divide its subsequent disclosure bundles into two sets − documents whose admission into evidence it intends to seek and those whose admission it does not expect to seek.[28] Yet this modicum of information, trifling to the Prosecution, does not necessarily mean that the material in question is exculpatory. Nor will it lessen the task of the Defence, which will, nonetheless, have to scrutinise the entire collection of documents disclosed, if only to respond to the International Co-Prosecutor's motions to tender

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[23] *Karemera et al.* Decision, paras. 10 and 15; *Bralo* Decision, para. 35.
[24] See *supra*, para.10 and *infra*, para. 45.
[25] See *supra*, paras. 13-14.
[26] *Karemera et al.* Decision, para. 11.
[27] T. 10 August 2015, **E1/327.1**, p. 18, l. 19-21, at around 09.51.50; p. 19 l. 15-18, at around 09.52.25; Notice of New Procedure for Disclosure of Civil Party Applications from Cases 003 and 004 to Case 002/02, 4 August 2015, **E319/14/1** ("Notice **E319/14/1**"), paras. 1 and 8.
[28] Notice **E319/14/1**, para. 9; T. 10 August 2015, **E1/327.1**, p. 19 at around 09.53.11, pp. 33-35, at around 10.24.04.
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material into evidence, and then to canvass it once its admission has, in effect, been rubber-stamped.[29]

23. On 10 August 2015, the Prosecution advanced, for the first time, the pretext that it was "very difficult" to determine what affects the credibility of the incriminating evidence, and hence that it "want[s] to err on the safe side" and "make sure there's disclosure available", so as to avoid the accusation of withholding information.[30] Yet, it was able to so determine in the trial of Case 002/01.[31] Moreover, as the Prosecution itself puts it, it was trained to deal with complex cases concerning international crimes.[32] What is more, it announced that, "for [...] reasons which people may understand", it would seek the admission into evidence of a more substantial proportion of the documents it discloses.[33]

24. What is quite clear to all and sundry is that the Prosecution is acting in its sole interest. In misrepresenting the applicable law and advancing false pretexts, the Prosecution subverts its role in the administration of justice solely to serve its own ends. Whether it overwhelms the Defence in the course of the trial or whether it buries the exculpatory evidence under a mountain of incriminating evidence − however it proceeds − the Prosecution is allowing itself a second bite at the cherry, as regards bolstering its case after completion of the judicial investigation in Case 002 and gives some prospect to the confidential investigations underway in Cases 003 and 004.

25. The International Co-Prosecutor certainly never had the intention to discharge his continuing obligation to disclose the exculpatory material in his possession, let alone on every occasion that he is privy to fresh information.[34] Indeed, he purports to have conducted a review of the material in his possession, only as of the delineation by the Chamber of the ambit of the trial of Case 002/02 and when required to list his evidence in prospect of trial.[35]

26. He brazenly objects to motions from Defence Counsel for adjournments of hearings in which to analyse the documents:

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[29] See *infra*, para. 39.
[30] T. 10 August 2015, **E1/327.1**, pp. 15-16, between 09.43.28 and 09.44.48.
[31] See *supra*, para. 9; International Co-Prosecutor's Response to Supreme Court Decision F2/4/2 Regarding Disclosure, 3 April 2015, **F2/4/2/1**, fns. 2 and 3.
[32] T. 10 August 2015, **E1/327.1**, p. 14, l. 6-9, after 09.40.45.
[33] T. 10 August 2015, **E1/327.1**, p. 35, l. 22-24 before 10.25.35.
[34] See *supra*, para. 15.
[35] Disclosure of 17 October 2014, **E319**, para. 2; T. 28 October 2014, **E1/244.1**, p. 16, l. 5-11 at around 14.04.58.
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> I don't believe they will but if they find magically that there is in this material something that would be of, would have affected the questions […] then they can make a motion later to have that witness recalled. (emphasis added).[36]

27. Responding to the Chamber's disquiet at the impact of disclosure of scores of documents in connection with a site shortly before witnesses were to give evidence on the site, the Prosecution asserted that it was no impediment to proceeding further "[because] [t]here is a wealth of information that has been available to the Parties for a long time", specifically the records of witness interviews "from Case 002, which have been available since the judicial investigation".[37] It further states:

> It's inconceivable […] that these new […] civil party applications from Case 004 cover any new ground. I've looked over them myself, and indeed, I would describe them as [...] corroborative of what the other [witnesses and civil parties] […] have said. (emphasis added).[38]

28. Moreover, whereas the applicable law relieves him from so doing,[39] the International Co-Prosecutor seizes the opportunity, acting alone or with his national counterpart, to introduce four public documents from DC-Cam, which could have been included in their lists of documents years ago and which do not meet the criteria for admission into evidence mid-trial.[40]

29. These four public documents aside, whilst the trial in Case 002/02 is underway, the Prosecution draws its evidence from the ongoing, confidential judicial investigations in Cases 003 and 004. The investigations are subject to secrecy "[i]n order to preserve the rights and interests of the parties".[41] As the International Co-Prosecutor stated, "[t]he International Co-Investigating Judge made an exception to the confidentiality", by granting him leave to disclose to the Chamber and the parties in 002/02 material obtained in those judicial investigations.[42] Of note is that the International Co-Prosecutor makes this exception the rule by disclosing the material wholesale whilst the trial of Case 002/02 is in full swing.

30. The wholesale disclosure of material from Cases 003 and 004 also has an advantage, which only the Civil Parties have had the honesty to voice:

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[36] T. 5 March 2015, **E1/272.5**, p. 48, l. 13-19 before 15.49.06.
[37] T. 27 July 2015, **E1/323.1**, p. 10, l. 7-9 and p. 9, l. 24-25 at around 09.23.21.
[38] T. 27 July 2015, **E1/323.1**, p. 10, l. 15-21, at around 09.24.37.
[39] See *supra*, para. 16.
[40] E319/24.4.2 (25 January 2007); E353.1 (14-19 June 2011), E353.2 (16 March 2011). Document E319/23.4.1 (25 June 2012) has only now been included, whereas it concerns a witness proposed by the Prosecution in both the trial of Case 002/01 and the trial of Case 002/02. Moreover, the witness gave evidence on 11 January and 8 April 2013.
[41] Internal Rule 56(1).
[42] T. 5 March 2015, **E1/272.5**, p. 28, l. 3-4, at around 14.39.31.
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> And so it is therefore directly of interest to us that as many documents as possible be disclosed as part of Case 002/02 particularly bearing in mind the uncertainties over Cases 003 and 004 in which numerous civil parties are also party. So we are fundamentally in favour of a continuing process of disclosures and that it should continue as broadly as possible.[43]

31. Having regard to the applicable law, the sole lawful exception to the confidentiality of the judicial investigations in Cases 003 and 004 is the disclosure during the trial in the ongoing Case 002/02 of exculpatory material and the prior statements of witnesses whom the Chamber intends to call. The continuing obligation cast on the Prosecution to disclose exculpatory material is not intended to serve the interest of the Prosecutors and the Civil Parties, or to offer some prospect to the evidence collected during confidential judicial investigations in other cases, whose prospects are uncertain. The obligation constitutes a shield for the accused and is paramount to the fairness of the trial.[44]

32. Accordingly, the inexcusable conduct displayed by the Prosecution, which acts wholly with impunity, violates the right of Mr KHIEU Samphân to a fair trial.

II. MULTIPLE VIOLATIONS OF THE RIGHTS OF THE DEFENCE

A. Right to an expeditious trial

33. At the ECCC, further to an introductory submission from the Co-Prosecutors, the Co-Investigating Judges collect evidence[45] and the case file of the judicial investigation forms the basis of the parties' and, subsequently, the Chamber's preparation for trial.[46] Once trial is underway, the admission of evidence is an exception and subject to particularly stringent requirements.[47] As put by the Co-Prosecutors themselves, the subsequent trial should be more expeditious as a result of the judicial investigation.[48]

34. The judicial investigation in Case 002 lasted three years and two months, during which over 1000 witnesses and civil parties were heard and thousands of documents were tendered into the case file.[49] Upon completion of the judicial investigation, the Co-Prosecutors considered, akin to the Co-Investigating Judges, the investigation to be concluded and issued a reasoned final

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[43] T. 5 March 2015, **E1/272.5**, p. 35 l. 23 to p. 36, l. 4, before 15.22.37.
[44] See *supra*, para. 13.
[45] Internal Rules 53 and 55.
[46] Internal Rules 55(11), 67, 69, 79(1) and 80.
[47] Internal Rule 87(4); Memorandum of 25 October 2011, **E131/1**, p. 4, penultimate paragraph.
[48] Co-Prosecutors' Response to KHIEU Samphân and NUON Chea's Joint Request in Relation to Modalities of Questioning Witnesses, **E355/1**, para. 14.
[49] Closing Order, 15 September 2010, **D427**, paras. 3 and 17; see *supra*, para. 27.
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submission.[50] On 15 September 2010, the judicial investigation was concluded by a 772-page Indictment.[51] The Co-Prosecutors did not appeal the Indictment.

35. Now, over four years after the judicial investigation was concluded, the Prosecution introduces to Case File 002 hundreds of fresh exhibits, running to thousands of pages, which the Defence must now consider with the trial of Case 002/02 in full swing. In so doing, the Prosecution re-opens the judicial investigation in Case 002, supplementing it itself by means of the judicial investigations in Cases 003 and 004. By so proceeding, it is able to bolster its case out of time, but slows the trial of Case 002/02, whose investigation was already extensive. Indeed, much court time has been taken up by the disclosures, and some proceedings have been disrupted and adjourned (for an insufficient duration).[52]

B. Equality of arms

36. Disclosure, as effected by the Prosecution in the trial of Case 002/02, puts the Defence "under conditions which […] place [it] at a substantial disadvantage as regards [its] opponent".[53] By virtue of its standing as a party to Cases 003 and 004, the Prosecution may take action, whereas the Defence must suffer the consequences.

37. Unlike the Defence, the Prosecution may intervene in the judicial investigations in Cases 003 and 004. It may, for example, bring all manner of motions for investigative action in 003 and 004 for the purposes of and in the light of 002/02. It may, for instance, move the Investigating Judges in Cases 003 and 004 to hear certain witnesses, with a view to later calling them to testify in 002/02. Further still, it may move them to hear a witness who gave evidence in the trial of Case 002/02, if the evidence given in court did not suit it.

38. What is more, the Prosecution has a considerable head start on the Defence as regards the preparation and presentation of its case. The Prosecution has much earlier access than the Defence to the material gathered in judicial investigations in Cases 003 and 004. It knows far in advance which material it will seek to have admitted into evidence.[54] Thus, it may to seek to call witnesses who were never heard in Case 002, whereas the Defence was not even privy to their

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[50] Internal Rule 66(5); Co-Prosecutors' final submission, 16 August 2010, **D390**.
[51] Internal Rule 67(1); Closing Order, 15 September 2010, **D427**.
[52] See *infra*, para. 43.
[53] For example, *Kordic and Cerkez* Appeal Judgement, para. 175.
[54] See *supra*, para. 22.
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statements at that point in time.[55] Motions to that end are granted and the witnesses, of whom the Defence was hitherto unapprised, are heard at trial. So, for example, it is striking that when the Trapeang Thma Dam site was considered, out of the ten witnesses and civil parties heard by the Chamber in court, five had not been questioned during the judicial investigation in Case 002.[56]

39. That head start also enables the Prosecution to enter motions for the admission into evidence of scores of documents *en bloc*, shortly after disclosure.[57] Such motions are also granted, *en bloc*, on the grounds that: (a) the documents pertain directly to the issues to be tried in Case 002/02;[58] (b) statements taken by the Office of the Co-Investigating Judges are presumed reliable and authentic;[59] and (c) no party objected to the motions.[60] That goes without saying. Not only does the Defence lack the time to consider the documents,[61] but is also not in a position to rebut the presumption of reliability applied by the Chamber as it does not have access to the audio-recordings of the statements or any information or scope for action as regards the conduct of the judicial investigations in Cases 003 and 004, to which it is not a party.

40. The Defence, therefore, has no reasonable possibility to object to the wholesale admission of fresh prosecution evidence mid-trial, whether it concerns the calling of new witnesses or the admission of new written statements instead of *viva voce* evidence. Such written statements should not, in any event, be admitted if only on account of the very limited probative value which the Chamber is supposed to attach to them,[62] particularly in the case of civil party applications.[63] Indeed, the Chamber has the discretion to decline their admission "by reference to the probative

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[55] *Co-Prosecutors' Rule 87-4 Motion Regarding Proposed Trial Witnesses for Case 002/02*, 28 July 2014, **E307/3/2**, paras. 19-22.
[56] The five witnesses were proposed in respect of that site in motion **E307/3/2** aforementioned (paras. 29-33).
[57] Request of 13 November 2014, **E319/5** (31 documents); Request of 3 February 2015, **E319/11** (4 documents); Request of 5 March 2015, **E319/17** (22 documents); Request of 25 May 2015, **E319/22** (89 documents).
[58] Decision of 24 December 2014, **E319/7**, para. 11; Memorandum of 26 February 2015, **E319/11/1**, para. 5; Memorandum of 8 April 2015, **E319/17/1**, para. 4; Memorandum of 17 July 2015, **E319/22/1**, paras. 5-6.
[59] Memorandum of 26 February 2015, **E319/11/1**, para. 5; Memorandum of 8 April 2015, **E319/17/1**, para. 4; Memorandum of 17 July 2015, **E319/22/1**, para. 4.
[60] Decision of 24 December 2014, **E319/7**, para. 11; Memorandum of 26 February 2015, **E319/11/1**, para. 5; Memorandum of 17 July 2015, **E319/22/1**, para. 1.
[61] See *infra*, paras. 42-43.
[62] Case 002/01 Judgement, 7 August 2014, **E313**, para. 34 and fn. 94.
[63] No decision on the admissibility of the applications seems to have been taken in Cases 003 and 004 (E-mail from Ms GUIRAUD of 7 August 2015 (11h20), entitled "Re: Next Witnesses - notice to parties"). Moreover the documents would appear not to be reliable (T. 20 August 2015, p.18, at around 09.51.22), as was the case of the applications received in Case 002 (T. 3 April 2015, **E1/288.1**, p. 15, at around 09.42.47).
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value of the evidence and the fairness to the accused of admitting [them] late in the proceedings".[64] Yet, it refrains from exercising that discretion, reinforcing the substantial advantage of the Prosecution vis-à-vis the Defence.

41. Furthermore, the Prosecution has considerably more staff than the Defence, allowing it specifically to dedicate one person "full time to co-ordinate disclosure".[65] The Defence has no such luxury and cannot give up one member of its team, not even on a quarter-time basis, to the matter of such disclosure, given the other tasks with which it must contend.

C. Right to adequate time and facilities for the preparation of his defence

42. The Defence is already struggling to prepare for the ongoing trial, with hearings held four days a week and frequent last-minute changes to the order of appearance of witnesses.[66] It must also allow for the appeal in the trial of case 002/01, which, too, is most labour-intensive. Outside of the courtroom, all of its time, judicial recess included, is consumed by these two proceedings, and without any additional resources whatsoever. Whereas the Defence can be flexible, it cannot perform feats of acrobacy.

43. Since it does not have the time to consider the fresh material introduced wholesale at such a late juncture, the Defence requests extensions of time and adjournments of hearings. The Chamber does, at times, grant such requests, but always in a highly unsatisfactory manner. As a matter of fact, it has, to date, allowed one adjournment, amounting to total of 11 days of hearings since the substantive trial hearings commenced.[67] However, the Defence now has to compile a compendium of the documents disclosed, classified by witness or document number, which it struggles to update given the rate and ever-increasing volume of disclosure. The compendium is necessary to identify and afford priority consideration to documents concerning witnesses who are due to give evidence. The Defence can only proceed on a case-by-case basis and has been in a position to scrutinise in depth only a limited number of the 1221 documents hitherto disclosed, focussing on those connected to the witnesses appearing before the Chamber. For even greater

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[64] *Kordic and Cerkez* Appeal Judgement, para. 222.
[65] T. 10 August 2015, **E1/327.1**, p. 34, l. 16-17, at around 10.23.14.
[66] Moreover, the Chamber gives the parties notice of whom it has decided to hear as the segments proceed, just four weeks or thereabouts before the segment commences.
[67] E-mail from the Chamber of 17 February 2014 (17h14) entitled "Trial scheduling in light of Case 004 statement disclosures" (three days in total); T. 19 March 2015, **E1/280.1**, p. 39, l. 18-20, at around 11.19.42 (four consecutive days); T. 27 July 2015, **E1/323.1**, p. 31, l. 19 to p. 32, l. 6, at around 13.14.00 (four consecutive days).
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reason, the Defence does not have the time to respond to the International Co-Prosecutor's motions for the admission into evidence of documents (in batches of ten or so).[68] The Defence is entirely overwhelmed and sees no way out absent "an adjournment to properly prepare [itself]".[69]

44. Moreover, a considerable number of the documents disclosed are not translated into the Court's three working languages. When they are available in at least two languages, French is not one of them.[70] This factor further frustrates the endeavours of the Defence, which works in Khmer and French, and whose Khmer-speaking team members work exclusively on the hearings and preparation therefor. Further still, it bears recalling that the Defence is beset by translation problems, which affect a great many documents already admitted in the trial of Case 002/02.[71]

45. Further still, the manner in which the documents are disclosed does not allow the Defence to identify which are exculpatory[72] and to rapidly and readily access the information therein. Until March 2015, the documents were disclosed in hard copy only. Thenceforth, they have been disclosed electronically in a shared folder, rather than in Zylab, and are simply classified by document number. The Defence has to compile a comprehensive compendium so that it can quickly identify to which witness or which type of document the number relates. The Defence has no means of searching the collection of documents. What is more, it has to convert every document so that it can perform keyword searches within individual documents, which is not even possible in all cases on account of the diagonal marking across every page to denote that a document is strictly confidential.

46. Furthermore, confusion arises from the distinction drawn by the Prosecution and countenanced by the Chamber – a distinction not made in 002/01– between that which is merely disclosed or "placed on Case File 002" and that which is admitted into evidence in 002/02. Given the stay of those proceedings which fall outwith Cases 002/01 and 002/02,[73] it begs the question as to the meaning of "placing on Case File 002". Furthermore, and above all, given the ever-increasing

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[68] See *supra*, para. 39, fn. 57.
[69] See *supra*, para. 17, fn. 21.
[70] T. 27 July 2015, **E1/323.1**, p. 12, l.12-13, before 09.29.46.
[71] For example, many DC-Cam documents proposed by the Co-Prosecutors and admitted by the Chamber remain untranslated: T. 28 July 2015, **E1/324.1,** pp. 9-10, at around 09.10.45; T. 29 July 2015, E1/325.1, pp. 7-9, between 09.17.56 and 09.22.09.
[72] See *supra*, para. 10.
[73] Decision on Khieu Samphan's Immediate Appeal Against the Trial Chamber's Decision on Additional Severance Of Case 002 and Scope of Case 002/02, 29 July 2014, **E301/9/1/1/3**, para. 91.
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volume of documents disclosed at ongoing hearings, nobody is able to keep track and the rule concerning admission into evidence, which supposedly shields the accused, is being eviscerated. In fact, it would now seem to be the case that because the disclosed documents have a reference number and "[TRANSLATION] can be consulted",[74] it is permissible to make use of that corpus in court, circumventing the route of an express application to that end,[75] which the Chamber required to be made in writing at least two weeks before the witness is to give evidence.[76]

47. **IN SUM**, the situation in which the Prosecution has dishonestly put the Defence and the Chamber is intolerable. Had it merely discharged its obligation to disclose exculpatory material in accordance with Internal Rule 53(4), the state of affairs would be quite different. It behoves the Chamber to act accordingly, to the ends of a fair and expeditious trial.

[74] T. 19 August 2015 [unrevised French version], p. 52, l. 17-14, at around 11.30.26.
[75] T. 19 August 2015, p. 53, l. 11-14, after 13.48.46.
[76] Memorandum of 3 August 2012, **E218**, paras. 22-23; Memorandum of 10 April 2013, **E276/2**, para. 2.
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FOR THESE REASONS

48. The Defence for Mr KHIEU Samphân moves the Trial Chamber to:

In the main,

- IMPART the list of all of the witnesses whom it intends to call in the trial of case 002/02;
- STRICTLY REMIND the Prosecution that it must disclose only the exculpatory material and the prior statements of the witnesses called by the Chamber;
- PROSCRIBE any further disclosure by the Prosecution of material falling outwith the two aforementioned categories;
- DIRECT the Prosecution to review all material hitherto disclosed, determine to which of the two aforementioned categories it belongs, and, inform, forthwith, the parties of the outcome by 11 September 2015;
- DETERMINE that, in accordance with the volume of documents so identified, time will be accorded to the Defence in which to consider the said documents and, if need be, contest the Prosecution analysis;
- DETERMINE that upon conclusion of this matter, all documents unlawfully disclosed and/or tendered into evidence and falling outwith the two aforementioned categories will be categorically struck from the case file;

In the alternative, should the Chamber allow the Prosecution to continue to disclose "relevant" material derived from Cases 003 and 004 and to seek its admission into evidence;

- STAY the trial of Case 002/02 until such time as the judicial investigations in Cases 003 and 004 are concluded.

	Mr KONG Sam Onn	Phnom Penh	[signed]
	Ms Anta GUISSÉ	Paris	[signed]
	Mr Arthur VERCKEN	Phnom Penh	[signed]

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