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BEFORE THE PRE-TRIAL CHAMBER OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (ECCC)

Criminal Case File No.: 002/19-09-2007-ECCC-OCIJ(PTC11)

Case Name: KHIEU SAMPHAN

Filed to: PRE-TRIAL CHAMBER

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DEFENCE APPEAL AGAINST THE DECISION TO DENY THE REQUEST FOR TRANSLATION OF KHIEU SAMPHAN'S CASE FILE

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Filed to:

Pre-Trial Chamber

Judge PRAK Kimsan
Judge NEY Thol
Judge HUOT Vuthy
Judge Katinka LAHUIS
Judge Rowan DOWNING

Office of the Co-Prosecutors

Ms CHEA Leang
Mr Robert PETIT

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MAY IT PLEASE THE PRE-TRIAL CHAMBER**I. INTRODUCTION AND REQUEST**

1. By Order dated 19 June 2008,¹ The Co-Investigating Judges (Co-Investigating Judges) decided to deny Khieu Samphan's request for full translation of all documents on the case file.²
2. The Co-Investigating Judges recognize it: their decision is an acknowledgement of failure: "the right to be tried within a reasonable period of time would be seriously undermined by any requirement for full translation of all documents on the case file into three official languages of the ECCC."³
3. In recognition of this, the Co-Investigating Judges set forth the attending measures: during the investigation phase, translation of the case materials is limited to Introductory Submissions and the Final Submissions, as well as the footnotes and indexes of the factual elements of the documents produced by the Co-Prosecutors.⁴
4. Cognizant of the fact that this limitation cannot but undermine the rights of the charged persons,⁵ the Co-Investigating Judges urge all parties, in particular the Defence and the Charged Person, to exhibit utmost pragmatism: since the ECCC cannot translate all the materials, the Charged Person and his Defence team are urged to "collaborate" with the Administration. Under the supervision of the CJI and with the assistance of a translator, KHIEU Samphan is therefore requested to choose the elements of proof he considers relevant and which require translation as a matter of priority for his trial!
5. For the Defence this raises the question: is this really his responsibility? Isn't KHIEU Samphan presumed innocent?
6. Contrary to the Co-Investigating Judges's assertion, their decision was certainly not guided by consideration for the right to a fair trial, but rather by budgetary considerations!
7. The Defence Co-Lawyers of KHIEU Samphan submit that:
 - The refusal to order full translation of all documents in Khieu Samphan's case

¹ Order on Translation Rights and Obligations of the Parties, 19 June 2008 ("the Order").

² Paragraphe D.1 of the Order.

³ Paragraph A.3 of the Order.

⁴ Paragraph B.4 of the Order

⁵ Paragraph A.3 of the Order

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file is without legal basis;

- The absence of translation and the measures ordered seriously impair the rights of KHIEU Samphan;
- KHIEU Samphan is therefore being detained arbitrarily and should be released.

8. Pursuant to Rule 74(3(b)), the Defence Co-Lawyers therefore respectfully request the Pre-Trial Chamber to:

- SET ASIDE the Order of the Co-Investigating Judges for lack of a legal basis;
- NOTE the violations of KHIEU Samphan's rights as a result of the absence of translation;
- Therefore ORDER the immediate and unconditional release of KHIEU Samphan.

II. FACTS AND PROCEDURAL BACKGROUND

9. On 18 July 2007, the Co-Prosecutors filed an Introductory Submission and requested an order for the arrest and provisional detention of five suspects, including KHIEU Samphan. The case file submitted by the Co-Prosecutors (CP) is colossal: 135 folders of documents were attached in evidence against five suspects. The vast majority of these documents are only available in Khmer. About 30% of them are in English, while only 10% are in French.⁶ These documents are therefore not available in the language of Mr VERGÈS, the international Co-Lawyer for KHIEU Samphan.

10. On 19 November 2007, KHIEU Samphan was nonetheless placed in provisional detention, "in light of the many documents and written statements contained in the Case File".⁷

11. On 14 February 2008, during the interview of his client, Mr. VERGÈS voiced strong objection: "the 16,000 pages annexed to the Introductory Submission have yet to be translated into French, an official language of this Court (...); until such a time as these materials have been translated, [the Defence] will continue to refuse to respond to questions" [free translation].⁸ At this same hearing, Mr Alexander Bates, Senior Assistant Prosecutor,

⁶See Annex 1- Email of Mr Charles K. Muraya, Chief of the Records Section, to Socheata Seng, Case Manager of Mr. KHIEU Samphan's case file, providing statistics on the documents produced in the various official languages.

⁷ *Khieu Samphan*, Provisional Detention Order, para. 5, Court Document C26, ERN 00152991-00152996.

⁸ *Khieu Samphan*, Written Record of Interview, Court Document D75, ERN 00164223-00164225.

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indicated that “it is desirable that each page be translated into each official language.”⁹

12. On 23 April 2008, while KHIEU Samphan’s appeal against provisional detention was before the Pre-Trial Chamber, this issue was yet to be resolved. As stated by Mr Vergès at the hearing, KHIEU Samphan was still unable to enjoy his right to due process since one of his lawyers, the international co-lawyer, could not examine the case file in a language he understands. In a decision rendered that same day, the Pre-Trial Chamber noted the situation and adjourned the hearing to a date to be advised.¹⁰
13. Two months thereafter, KHIEU Samphan’s Defence team asked the Chief of the Court Management Section (CMS) whether KHIEU Samphan’s case file was being translated.¹¹ The Defence team did not receive a reply.
14. In the 23 June 2008 Order on Translation Rights and Obligations of the Parties, the Co-Investigating Judges notified KHIEU Samphan of their decision to deny his request for translation.
15. On 30 June 2008, the Defence Co-Lawyers filed a notice of appeal with the Greffier of the Co-Investigating Judges, and are hereby filing the present appeal.

III. APPLICABLE STATUTORY PROVISIONS

16. The Defence requests that in examining the reasons for the Co-Investigating Judges’ decision to deny the request and in the interest of a fair trial, the Pre-Trial Chamber be mindful of KHIEU Samphan’s rights and the obligations of the ECCC.

A) Rights of the Charged Person

Languages and translation

17. Pursuant to Article 26(2) of the “Agreement Between the United Nations and the Government of the Kingdom of Cambodia Concerning Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea” (“the Agreement”) and Article 45 new of the “Law on the Establishment of Extraordinary Chambers in the Courts

⁹ *Khieu Samphan*, Written Record of Interview, Court Document D75, ERN 00164220-00164222.

¹⁰ Decision on Application to Adjourn Hearing on Provisional Detention, 23 June 2008, C-26-I-25.

¹¹ Copy of 5 June 2008 letter to Mr. Tony Krahn’s letter regarding translation; submitted to the Co-Investigating Judges on 2008, A185.

of Cambodia Concerning the Prosecution of Committed During the Period of Democratic Kampuchea” (“Law on ECCC”), “the official working languages of the Extraordinary Chambers and the Pre-Trial Chamber shall be Khmer, English and French.”

Principles of interpretation

18. **Article 12(1) of the Agreement**, which provides that “[t]he procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level”
19. **Article 21(1) of the ECCC Internal Rules**, which provides that the applicable law shall be interpreted so as to always safeguard the interests of the Charged Persons so as to ensure legal certainty and transparency of the proceedings, in light of the inherent specificity of the ECCC.

Right to liberty and security

20. Pursuant to the presumption of innocence, **Article 203 of the Code of Criminal Procedure of the Kingdom of Cambodia** provides that “in principle, the accused shall remain at liberty. Exceptionally, the charged person may be provisionally detained (...).”
21. **Article 63(3) of the ECCC Internal Rules** provides:
“The Co-Investigating Judges may order the Provisional Detention of the Charged Person only where the following conditions are met: (a) there is well founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary Submission; and (b) The Co-Investigating Judges consider Provisional Detention to be a necessary measure (...).”
22. **Article 9 of ICCPR**, of which Cambodia has been a party since 26 May 1992 and which is directly applicable to national law,¹² adds that: “1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are

¹² Decision of the Constitutional Council, dated 19 July 2007.

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established by law; (...) 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. (...) 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”

Rights of accused and right to a fair trial

23. **Article 38 of the Constitution** of the Kingdom of Cambodia provides that “[e]very citizen shall enjoy the right to defence through judicial recourse.”
24. Articles 13(1) of the Agreement, 35 new of the Law on the ECCC and 21 of the Internal Rules set forth the rights of the accused, pursuant to Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR). Pursuant to Article 35 new, the accused is entitled equally to (a) be informed promptly and in detail in a language that they understand of the nature and cause of the charge against them; (b) to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their choosing; (c) to be tried without delay;¹³ (d) to be tried in their own presence and to defend themselves in person or with the assistance of counsel of their own choosing, to be informed of this right and to have legal assistance assigned to them free of charge if they do not have sufficient means to pay for it; (e) to examine evidence against them and to obtain the presentation and examination of evidence on their behalf under the same conditions as evidence against them; (f) to have the free assistance of an interpreter if the accused cannot understand the language used in the court;¹⁴ (g) not to be compelled to testify against themselves or to confess guilt.”

1. Responsibilities of State and judicial authorities

Constitution of the Kingdom of Cambodia

25. **Article 31** provides that “[t]he Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human rights,

¹³On this point see also Article 13(1) of the Agreement.

¹⁴On this point see also Article 24 new of the Law on ECCC, which provides that “during investigation, (...) [Suspects are also entitled to] the right to interpretation, as necessary, into and from a language they speak and understand”; also, Rule 30 of the ECCC Internal Rules provides that “in case of need, the Co-Prosecutors, Co-Investigating Judges and Chambers shall use interpreters. Any witness or party may also request the use of an interpreter where needed (...)”.

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the covenants and conventions related to human rights, women's and children's rights." **Article 109** provides that "[t]he Judiciary shall (...) protect the rights and freedoms of the citizens."

United Nations Charter

26. States must achieve the promotion of universal respect for and observance of human rights and fundamental freedoms, hence the rights of the individual or subject.

ICCPR

27. **Article 2 of the ICCPR:** 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant. 3. Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted."

IV. GROUNDS OF APPEAL

**A) The decision denying the request for translation of all the documents in
KHIEU Samphan's case file is without legal basis**

28. The decision to deny KHIEU Samphan's request for translation relies on no less than 12 legal provisions.¹⁵ In combination, they are interpreted in light of abundant international case law, which, however, is not applicable in the instant. This creates confusion and has a veneer of legality, which masks the actual reasons for the decision, namely judicial economy.

1) There is a clear statutory provision on translation

29. Pursuant to Article 26(2) of the Agreement (reiterated in Article 45 new of the Law on ECCC), "the official working languages of the ECCC shall be Khmer, English and French."

30. Being a treaty, the Agreement must be interpreted in accordance with Article 31(1) of the Vienna Convention on the Law of Treaties of 1969 pursuant to which "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms in their context and in the light of its object and purpose."

31. In relation to translation, interpretation of this provision is very simple: the ECCC is intended to function in three languages, namely Khmer, English and French. These three languages are of the same and equal value as official languages. The Parties are therefore required to work and communicate in these three languages. This interpretation is confirmed by Rule 12(4)(c)(v) of the Internal Rules, according to which, a foreign lawyer must "be fluent in Khmer, French or English"

2) The decision to deny the request for translation of the case file takes no account of the specificity of the ECCC

32. While the Co-Investigating Judges specifically refer to Article 45 new of the Law, they rely mainly on the case law of the International Tribunals in concluding that not all evidentiary materials are to be translated. While the case law of the international tribunals may be relevant in many respects in that it sheds light on the applicable statutory provisions before the ECCC, it would be *dangerous* to apply it unduly.

33. It is important to bear in mind that the ECCC is the first hybrid or international court that is not based on common law. It is based on a non-adversarial civil law system comprising a distinct investigation phase. However, whereas the Co-Investigating Judges claim to "adapt" the case law in question to the specificity of ECCC, in reality, they simply apply it to the

¹⁵ See the Order.

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reasoning adopted in systems that do not comprise an investigation phase.

34. The fact of the matter is that in the decisions of the International Tribunals referred to by the Co-Investigating Judges, a distinction is made between evidence disclosed by the Prosecution (“discovery disclosure”), on the one hand – materials which have not been translated, and evidence tendered at trial or in support of the indictment – on the other hand, which must be translated (see cited *Delalic* Decision).¹⁶
35. In such common law systems, evidence is discussed during the trial phase as there is no equivalent preliminary investigation phase. In principle, the accused persons are charged upon their arrest and therefore entitled to translation upon arrest in a language they understand of the indictment and the entire body of evidence underpinning the indictment.
36. In civil law systems, charged persons are not notified of the charges against them and supporting evidence until the closing order is issued. During the investigation phase, and in order to safeguard the rights of the defence, such systems provide for counsel’s right to examine the investigation file, of course, in a language counsel understands. It is the language of counsel that takes precedence, and not that of the accused.¹⁷
37. Before the closing order is issued, the Introductory Submission is the only document putting the Defence on notice as to the potential charges against their client, and it forms an integral part of the case file. Now, such evidentiary materials cannot be compared to the “discovery disclosure”, which is specific to common law systems. The fact that the Co-Prosecutors make reference to all these documents in the footnotes in the Introductory Submissions clearly indicates that they consider them to be potential evidentiary materials. Further, these documents are part and parcel of the case file. In all probability, they could be used at trial without being mentioned in the closing order.
38. The Defence submits that despite its semblance of legality, the decision handed down by the Co-Investigating Judges is based on purely practical considerations and takes no account of the ECCC’s obligation to give effect to KHIEU Samphan’s rights.

3) The Defence is entitled to effectiveness of its rights

¹⁶ Paras. B 3 et B 4 of the Order.

¹⁷ The ECHR decisions (*Luedicke, Kamasinski*) cited by the Co-Investigating Judges were rendered in civil law courts and do not detract from this observation; in all the authorities cited, counsel had access to the file in a language he understood, namely the working language of the court. In the cited *Klimentyev* decision, the need to translate the untranslated evidentiary elements of the case file was not challenged (para. 32)

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39. The Co-Investigating Judges do recognize that the absence of translation may be prejudicial to both a fair trial and the rights of the Defence, and are well aware that these rights must be given effect.¹⁸ They nonetheless impose it on the Charged Person to give them effect.
40. Oddly enough, in order to justify their decision to deny the request for translation and to order some remedial measures, the Co-Investigating Judges invoke the right of the Charged Person to a trial within a reasonable period of time. According to them, the Charged Person (and his Defence counsel) should determine the evidence he wishes to rely on in making his case and cooperate usefully with the translation process. Failure to do so “would prejudice the rights of the defence, notably to a hearing within a reasonable period of time.”¹⁹
41. Contrary to the assertion of the Co-Investigating Judges, there is no legal basis for imposing such an obligation on the Defence and the Charged Person. Articles 21(3) of the Agreement and Rules 11(4) and 22 (1) of the Internal Rules cited by the Co-Investigating Judges contain no such provision.²⁰
42. While Co-Lawyers must comply with the applicable statutory provisions before the ECCC, they are under no obligation to “collaborate” with the Administration! This stems from an incorrect interpretation of the applicable statutory provisions, and is clearly contrary to the duties of counsel who are “absolutely bound by professional confidentiality”.²¹ Transmitting to the CMS (and if this is not possible, the Co-Investigating Judges²²) a list of documents the Defence requires to be translated as a matter of priority accompanied with “the reasons for the translation request and, in particular, the priority accorded” amounts to violation of this duty and of the “inviolability of all the documents” relating to his functions as counsel.²³
43. Moreover, the cited case law of the European Court of Human Rights (“ECHR”) is not relevant in this instance. While the account may be taken of “the conduct of the applicant”²⁴

¹⁸ Paragraph A 3 of the Order.

¹⁹ Paragraph A 4 of the Order.

²⁰ Article 23(1) recalls the duty of counsel to act in accordance with the statutory provisions applicable before the ECCC and recognized standards and ethics of the legal profession. Rule 11(4) sets forth the criteria and procedures for the inclusion of lawyers and other personnel in the lists the Defence Support Section. Rule 22(1) recalls the right of the charged person to be defended by a lawyer of his/her choice, national and/or national and foreign.

²¹ Code of Ethics, Article 7.

²² Reasons for the Order, para. 4.

²³ Article 42 new of the Law on the ECCC.

²⁴ *Frydelender v. France*, Judgement of 27 June 2000, para. 43: “It reiterates that the “reasonableness” of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute” (see, *inter alia*, *ECHR Comingersoll S.A. v. Portugal*, para. 19).

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in assessing the reasonableness of the proceedings, the accused right to be tried within a reasonable time must not deprive him the exercise of his other rights to a fair trial!

44. In accordance to the interpretation adopted by the Human Rights Committee (HRC), States are obligated “to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction”.²⁵ This obligation does not concern individuals, (except in very few circumstances, which do not apply to the instant case) who are the right-holders under the Covenant and the beneficiaries of the protection it affords.²⁶
45. In accordance to the interpretation adopted by the Human Rights Committee (HRC), States are obligated “to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction”.²⁷ This obligation does not concern individuals, (except in very few circumstances, which do not apply to the instant case) who are the right-holders under the Covenant and the beneficiaries of the protection it affords.²⁸
46. However, these obligations are binding on every State as a whole. As stated by the HRC “the obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole”. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party.²⁹ In particular, the obligations are binding on the ECCC as a judicial organ.³⁰
47. In the instant case, the ECCC Judges, the CP and the Office of Administration as “State authorities” are required to safeguard and give effect to KHIEU Samphan’s rights, and not the other way round!

4) The State authorities failed to exercise due diligence

48. The fact that the Co-Investigating Judges consider that the translation of the case file could impair the right to be tried without delay does not relieve the State and the authorities representing it of their obligations. The State authorities are required to exercise “due diligence” in the conduct of the proceedings particularly where the Charged Person is in

²⁵ General Comments of the Human Rights Committee, No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (Eightieth session), U.N. Doc. HRI/GEN/1/Rev.7 (2004), para. 3.

²⁶ Article 31 de la Constitution du Royaume du Cambodge et article 2 du PIDCP

²⁷ General Comments of the Human Rights Committee, No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (Eightieth session), U.N. Doc. HRI/GEN/1/Rev.7 (2004), para. 3.

²⁸ Ibid. supra, paragraphe 3

²⁹ Ibid., para. 4.

³⁰ Article 109 of the Constitution.

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- provision detention.³¹ In the instant, they have failed to discharge their obligation.
49. In the first place, translation needs were not properly assessed by the signing parties to the EEEC Statutes. The ECCC budget does not accommodate this crucial aspect of the proceedings; also, the Office of Administration lacks the financial resources and the staff to translate the case file.³²
50. Secondly, the CP decided to file more than 60,000 pages of documents in support of the Introductory Submission. The Defence submits that it could have been otherwise. What if the Co-Prosecutors had decided to rely not on 135 folders of evidence, as is actually the case, but rather on 2 folders of evidence selected for their relevance and probative value? No one could have envisaged depriving the parties of translation of these documents! In such a circumstance, it would have been possible to arrange for translation of any new documents tendered into evidence in the course of the proceedings, and thereby meet the reasonable period requirement.
51. Lastly, the Co-Investigating Judges as both State authorities and also as the organs charged with responding swiftly to the requests of the Charged Persons during the investigation³³ said nothing for months regarding the issue of translation thereby denying KHIEU Samphan enjoyment of his rights.
52. In the final analysis, none of the State authorities supposed to uphold KHIEU Samphan's rights exercised due diligence in ensuring his right to be tried within a reasonable time. These three authorities together are responsible. Indeed, the HRC has clearly stated that an authority "may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility."³⁴
53. Moreover, "[a] failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State".³⁵ Under no circumstances, for example, can the authorities invoke budgetary considerations or lack of

³¹ On this point, see ECHR: *Tomasi v. France*, 27 August 1992, para 84.

³² See, *inter alia*, see Court Management Section report on translation dated 30 June 2008, Doc. A190-III.

³³ Article 133 of the Code of Criminal Procedure of the Kingdom of Cambodia, and Rule 55(10) of the Internal Rules.

³⁴ *Ibid.* footnote 27, para. 4

³⁵ *Ibid.*, para. 14. Moreover, "it is for the Contracting States to organise their legal systems in such a way that their courts can guarantee to everyone the right to a final decision within reasonable time." ECHR *Frydlender v. France*, Judgement of 27 June 2000, para 45.

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equipment or staff to justify violation of the Charged Person's rights.³⁶

54. In stating that their decision to deny the request for translation of KHIEU Samphan's case file relies on considerations of judicial economy (...) the current workload as well as the finite translation resources",³⁷ the Co-Investigating Judges have deprived it of a legal basis.

B) The absence of translation and the measures ordered by Co-Investigating Judges seriously impair KHIEU Samphan's rights

55. Contrary to what the Co-Investigating Judges have attempted to demonstrate, KHIEU Samphan's right to a fair trial is not impaired by his conduct, but rather by the failure of the ECCC to exercise due diligence in the conduct of the proceedings. This has resulted in grave violation of KHIEU Samphan's rights.

1) Violation of KHIEU Samphan's right to legal assistance

56. Article 35 new of the Law on ECCC provides that 'in determining charges against the accused, the accused shall be equally entitled to communicate with counsel of their own choosing (...). Rule 22(1) of the Internal Rules entitles them to choose to be defended by "a national lawyer or a foreign lawyer in collaboration with a national lawyer."

57. Before the ECCC, this Rule holds particular significance. The specificity of the ECCC resides in its hybrid nature. It is aimed at ensuring fairness of the proceedings and respect for the international standards, while at the same time preserving Cambodia's sovereignty over the ongoing trials. It is effectively applied in the Office of the Co-Prosecutors³⁸ and was also taken into account when appointing the Judges.³⁹ The situation should not be different with regard to the Defence, in that KHIEU Samphan is entitled to the full assistance of both his lawyers, and to benefit from their concerted work.

58. As it turns out, KHIEU Samphan chose two lawyers, a national lawyer and a French

³⁶ On this point, see HRC - Communication No. 336/1988, *André Fillastre and Pierre Bizouarn v. Bolivia*, 27 September 1988, para. 6.5. See also *Mattocia v. Italy*, 25 July 2000, para. 80 - ECHRT; *Eckle v. Germany*, paras. 85 and 92.

³⁷ Order, paras. A5 and E 1. See also Court Management Section report on translation, 30 June 2008, A190-III.

³⁸ See, *inter alia*, Article 6 of the ECCC Agreement and Article 16 of the Law on the ECCC.

³⁹ Regarding Co-Investigating Judges, see Article 5 of the Agreement on the ECCC, Article 23 of the Law on the ECCC.

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international lawyer. Both these lawyers must be able to work in concert, but neither is the other's collaborator or boss. They must both attend the proceedings, and neither can substitute for the other.

59. They are both required to provide their client with effective representation.⁴⁰ According to the Code of Ethics of Lawyers Licenced With the Bar Association of Kingdom of Cambodia, the lawyers "determine[s], according to [their] conscience, the elements necessary to the needs of the [their] defense".⁴¹ They are also entitled to "obtain a copy of the case file, or record of proceedings, (...) together with any other relevant document to discuss their client" and "at all times, [have the right] to examine the case file".⁴²
60. Mr VERGÈS is unable to examine the case file in a language he understands. He therefore cannot participate in the defence of his client. This means that KHIEU Samphan is denied his right to the assistance of both his lawyers.

2) Violation of the right to participate in the proceedings

61. Article 35 new of the Law on ECCC and Rule 21 of the Internal Rules provide that the Charged Person shall "equally (...) be informed promptly and in detail in a language that he understands of the nature and cause of the charge against him, the right to examine evidence against him and to obtain the presentation and examination of evidence on his behalf under the same conditions as evidence against him and the right to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his choosing. Article 14(1) of the ICCPR also provides that "[a]ll persons shall be equal before the courts and tribunals."
62. By requiring the Charged Person to select certain documents for translation, the Co-Investigating Judges are encouraging him to select the evidence on which they will ultimately rely in ascertaining the truth, whereas this is their responsibility. The Co-Investigating Judges are the only ones empowered to direct the investigation. Only they are empowered to "take any investigative action conducive to ascertaining the truth" and "shall conduct their investigation impartially, whether the evidence is inculpatory or

⁴⁰HRC - *Pinto v. Trinidad and Tobago*, No. 232/1987; *Kelly v. Jamaica*, No. 253/1987.

⁴¹Code of Ethics, Article 7.

⁴²Rule 55(6) of the Internal Rules; see also Rule 22(3) thereof.

exculpatory.”⁴³ By ceding to the parties the power to select the evidence they consider crucial, the Co-Investigating Judges have failed to discharge this duty and thereby denied KHIEU Samphan his right to effective participation in the proceedings.

63. There is no assurance that the exculpatory evidence contained in the investigation file will actually be updated and examined by the Co-Investigating Judges, or that KHIEU Samphan will have adequate time to prepare a defence against the evidence that will be disclosed to him as the translations become available.
64. Moreover, these measures do not allow for equality of arms. According to the HRC⁴⁴ and the ECHR,⁴⁵ equality of arms implies that each party must be afforded a reasonable opportunity to present his case in the same conditions as his opponent. Equality of arms “[also] obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.”⁴⁶
65. In the instant, KHIEU Samphan has clearly been put to a disadvantage in relation to the prosecution since the opening of the investigation proceedings: first, the Co-Prosecutors have had ample time to file hundreds of thousands of items of (inculpatory) evidence, while the Defence is expected to content themselves with “excerpts” and not delay the proceedings. Second, KHIEU Samphan chose French as his second working language⁴⁷ and most of the documents produced in a language other than Khmer are in English,⁴⁸ the second working language of the Office of the Co-Prosecutors. Therefore the Co-Prosecutors are able to examine hundreds of materials, but the Lawyers for the Defence cannot understand these materials.
66. Lastly, it is not within the powers of the Co-Investigating Judges to impose on the Co-Lawyers for the Defence how to proceed in the preparation of their case. The measures envisaged by the Co-Investigating Judges amount to unacceptable interference in the work of the defence, and there is no justification for such interference; moreover, it amounts to a

⁴³Rule 55(5) of the Internal Rules.

⁴⁴CDH- *Franck Robinson v. Jamaica*, Communication No. 223/1987, UN. Doc. CCPR/C/35/D/223/1987 (1989).

⁴⁵*Dombo Beheer B.V. v. The Netherlands* (civil), ECHR, Judgement of 27 October 1993, para. 33; *Bullut v. Austria*, ECHR, Judgement of 23 January 1996, para. 47.

⁴⁶ICTY, Appeals Chamber Decision in *Prosecutor v. Dusko Tadic*, 15 July 1999, para. 48, citing the decisions mentioned *supra*, footnote 46 [sic].

⁴⁷Article 2(2) of the Practice Direction.

⁴⁸For example, in the 123 folders of evidence submitted by the Co-Prosecutors in support of the Introductory Submission, 32,145 documents are in the Khmer language, 5,178 are in the English language and only 1,582 are in the French language, see Annex 1.

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serious infringement of [Khieu Samphan's] rights and liberties. Today, invoking the [charged person's] right to be tried within a reasonable period, the Co-Investigating Judges have decided that the Defence may consult only part of the case file, in [only] one of the official languages [of the ECCC]. It has also decided the procedure the Co-Lawyers are to follow in the defending their client. Who knows what they could decide next? Will it be that the Charged Person no longer has the right to request investigative actions because of "his right to be tried within a reasonable period"? There is no way to know.

3) Violation of the right to be tried within a reasonable period

67. Contrary to Co-Investigating Judges' assertion, it is the absence of translation of the case file which is delaying the proceedings, and not the legitimate requests of the Defence.
68. Article 35(c) new of the Law on ECCC provides for the right of the Charged Person to be tried without undue delay, pursuant to Article 14 of the ICCPR (also echoed in Article 6(1) of the ECHR). In concrete terms, Article 9(3) of the ICCPR provides that "[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release". This provision is also enshrined in Article 5(3) of the ECHR Convention.⁴⁹
69. International humanitarian law imposes two methods for ensuring that the trial is actually conducted without undue delay, and these methods have two distinct aims. According to the HRC, the protection provided under Article 9 is aimed at ensuring that "[p]re-trial detention should be an exception and as short as possible." This is a more stringent standard than the right set out in Article 14 of the ICCPR. According to the ECHR, while Article 5(3) is designed at ensuring that the person charged should not remain too long before being brought to trial, Article 6(1) is designed to avoid that a person charged should remain too long in a state of uncertainty about his fate.⁵⁰
70. According to this standard, the period of detention must be reasonable having regard to all the circumstances of the case.⁵¹ The period is to be determined counting from the date of

⁴⁹ "Everyone arrested or detained (...) shall be entitled to trial within a reasonable time or to release pending trial."

⁵⁰ ECHR *Stögmüller v. Austria*, (1602:62) Judgement of 10 November 1969 – Reasons, para.5.

⁵¹ *Ibid.*

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arrest and/or detention, and shall continue until the date of the trial judgement.⁵² Where the provisional detention exceeds such reasonable period, it becomes arbitrary and the individual must be released.

71. In the matter at hand, the proceedings in their entirety are being delayed by the absence of translation: KHIEU Samphan is no longer able to attend the investigation proceedings and the hearing of his appeal against provisional detention had to be postponed for this reason. No date has been set for resumption of proceedings. KHIEU Samphan has now been in provisional detention for nine months while awaiting a viable remedy to this situation. The Co-Investigating Judges have now confirmed that no solution is envisaged.

C) KHIEU Samphan should be released

1) KHIEU Samphan's situation

72. KHIEU Samphan has been in provisional detention since November 2007. He has not been able to effectively exercise his rights during this period. Since he is without the assistance of counsel, he cannot participate in the investigation proceedings, and has even been denied his right to a hearing on the legality of his detention.

73. In the impugned Order, the Co-Investigating Judges declare that it is impossible to provide translation of KHIEU Samphan's case file without undermining his right to a fair trial. The Co-Lawyers for the Defence submit that it is impossible to have a fair trial in the absence of translation; moreover, the ECCC was obligated to arrange for translation several months ago.

74. The situation is therefore in a deadlock and in the name of the right to a fair trial, KHIEU Samphan should be released..

2) KHIEU Samphan should be released

75. KHIEU Samphan has suffered multiple violations of his rights and is entitled to remedy: according to the HRC, Article 2(3) of the ICCPR "each State Party to the present Covenant undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy. The Committee considers that the Covenant generally entails appropriate compensation."⁵³

⁵² ECHR - *Wehmoff v. Germany*, para. 9.

⁵³ General Comments No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the

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76. Where there violation of the accused's rights is such that it is no longer possible to uphold his right to a fair trial, the proceedings must be stayed. The abuse of process doctrine may be relied on in two distinct situations: "(1) where delay has made a fair trial for the accused impossible; and (2) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct."⁵⁴
77. In this instance, both aspects of abuse of process come into play. The Co-Investigating Judges recognize that it would not be possible to translate all the materials since the ECCC lacks the material resources to do so. However without the translation, there cannot be a fair trial.
78. The Trial Chamber of the International Criminal Court was recently under obligation to apply this theory. In the referenced case, the accused was not afforded full access to the inculpatory evidence in his case at all stages of the proceedings. The Trial Chamber thus ordered a stay of proceedings⁵⁵ and the release of the accused as an "inevitable result" of its decision.⁵⁶
79. The Co-Lawyers are convinced that the Pre-Trial Chamber cannot but rule likewise in this instance

IV) RELIEF SOUGHT

80. The Co-Lawyers for the Defence therefore respectfully request the Pre-Trial Chamber to:
- SET ASIDE the decision denying the request for translation of KHIEU Samphan's case file due to lack of legal basis and violation of the defence's rights;
 - NOTE the violations of the defence's rights as a result of the absence of translation
 - ORDER THE IMMEDIATE and unconditional release of KHIEU Samphan.

Covenant (Eightieth session), U.N. Doc. HRI/GEN/1/Rev.7 (2004), para. 16.

⁵⁴ICTR - *The Prosecutor v. Barayagwiza*, Appeals Chamber Decision, para. 77.

⁵⁵ICC - *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together With Certain Other Issues Raised at the Status Conference on 10 June 2008, paras. 90-91.

⁵⁶CPI- Le Procureur c/Thomas Lubanga Dyilo- Décision sur la remise en liberté de Thomas Lubanga Dyilo, 2 juillet 2008- paragraphe 32

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Done at Phnom Penh, on 17 July 2008

(Signed)
Jacques VERGES

(Signed) 22/07/08
SA Sovan