

**BEFORE THE CO-INVESTIGATING JUDGES
OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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REQUEST FOR ANNULMENT FOR ABUSE OF PROCESS

Filed by:

Lawyers for the Defence of Mr KHIEU
Samphan
SA Sovan
Jacques VERGÈS

Before:

The Office of the Co-Investigating
Judges
Judge YOU Bunleng
Judge Marcel LEMONDE

The Co-Prosecutors

CHEA Leang
Robert PETIT

Civil Party Lawyers and Unrepresented

Civil Parties

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I- INTRODUCTION AND REQUEST

1. As confirmed by the Trial Chamber, “[t]he general rule is that documents should be available in all three languages of the Court”¹ in order to be presented at trial and considered by the Chamber. Though this rule was issued by the Trial Chamber during the trial of Mr KAING EAK EAV alias Duch, the decision actually concerns the issue of translation at all stages of the proceedings.
2. More than a principle, what the Chamber recently recalled is self-evident: in order for proceedings to be conducted fairly, documents must be understood by all parties, on the one hand, and by the judges who have to rule on the merits of the documents and/or their probative value, on the other. They must therefore be translated. This truism applies, à fortiori, at the investigative stage, because the investigation is, par excellence, a stage when the case file is examined scrupulously. Translation of documents thus appears to be an essential condition for the validity of the proceedings.
3. De facto, this decision renders the Co-Investigating Judges’ *Order on Translation Rights and Obligations of the Parties*² moot and highlights the procedural defect consisting in systematically placing untranslated documents in the judicial investigation case file. A procedural defect which affects interests such that it renders not only the acts concerned, but also the entire prosecution and investigation null and void.
4. For these reasons, the Lawyers for the Defence request the Co-Investigating Judges:
 - To take note of the MOOTNESS of the *Order on Translation Rights and Obligations of the Parties*;
 - To SEISE THE PRE-TRIAL CHAMBER with a view to the annulment of the judicial investigation and prosecution for abuse of process;
 - In the meantime, to order the immediate and unconditional RELEASE of Mr KHIEU Samphan.

¹ *Oral decision on translation* (transcript), 19 May 2009, *Document No. E1/21.1*, p. 32, lines 4-6.

² *Order on Translation Rights and Obligations of the Parties*, 19 June 2008, *Document No. A190*.

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II- Relevant legal provisions**A- Request for annulment****1. Jurisdiction of the Co-Investigating Judges**

5. Pursuant to Internal Rule 76(2): “[w]here, at any time during the judicial investigation, the parties consider that any part of the proceedings is null and void, they may submit a reasoned application to the Co-Investigating Judges requesting them to seise the Chamber with a view to annulment. The Co-Investigating Judges shall issue an order accepting or refusing the request as soon as possible and, in any case, before the Closing Order. Such orders shall be subject to appeal in accordance with these IRs.”

2. Conditions for annulment of an act

6. Under Article 252 of the *Code of Criminal Procedure*, in addition to the cases of nullity expressly provided for specific procedural defects, “[p]roceedings shall also be null and void if the violation of any substantial rule or procedure stated in this Code or any provisions concerning criminal procedure affects the interests of the concerned party. Especially, rules and procedures which intend to guarantee the rights of the defense have a substantial nature.” Similarly, Internal Rule 48 provides that “[i]nvestigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application.”

B- The rights at issue

7. The Defence hereto incorporates by reference all the legal provisions relied upon in the “Defence Appeal against the Order refusing the Request for translation of Mr KHIEU Samphan’s case file”, which was filed before the Pre-Trial Chamber on 22 July 2008.³
8. More particularly, the Defence recalls the following rights and provisions:

³ “Defence Appeal Against the Decision to Deny the Request for Translation of Mr KHIEU Samphan’s Case File”, *Document No. A190//1*, 22 July 2008, (Defence Appeal).

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➤ **Official languages**

9. “The official working languages of the Extraordinary Chambers and the Pre-Trial Chamber shall be Khmer, English and French.”⁴

➤ **Right to be defended in court by a lawyer of one’s own choosing**

10. The right to defend oneself before the courts is a constitutional right enshrined in Article 38 of the Constitution. According to international standards, this right encompasses the right of everyone “in full equality (...) to defend himself (...) through legal assistance of his own choosing (...).”⁵

11. Before the ECCC, a Charged Person may choose to be defended by “a national lawyer, or a foreign lawyer in collaboration with a national lawyer” on the condition that the latter is (*inter alia*) “fluent in Khmer, French or English,”⁶ that is, in at least one of the three official languages of the ECCC.

➤ **The right of the lawyer of one’s own choosing to have access to the judicial investigation case file and to represent his/her client effectively**

12. Once recognised to represent their client, the lawyers “[a]t all times, (...) shall have the right to examine and make copies of the case file”⁷ They also have the right, at all times, “[TRANSLATION] to obtain a copy of any other relevant document to discuss with his client”.⁸

13. In return, they have the duty to defend their client effectively.⁹ They are also required to notify the Greffier of “the official language(s) in which, in addition to Khmer, they intend to file and receive documents”.¹⁰ The time limits start to run upon “notification

⁴ Article 26(2) of the *Agreement Between the United Nations and the Royal Government of Cambodia Concerning the 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 the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea*, (“the ECCC Law”).

⁵ Article 35 of the ECCC Agreement, *International Covenant on Civil and Political Rights* (ICCPR), 16 December 1966, Article 14(3)(c).

⁶ Internal Rule 11(4)(c)(v), [Rev. 3], 6 March 2009.

⁷ Internal Rule 22(3).

⁸ Internal Rule 55(6).

⁹ Regarding this obligation, see for example case law of the Human Rights Committee (HRC)- *Pinto v. Trinidad and Tobago*, No. 232/1987; *Kelly v. Jamaica*, No. 253/1987.

¹⁰ Practice Direction, ECCC/2007/1/Rev.4, 5 June 2009.

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(...) of the document to which the party is responding (...) in the ECCC official language which the party has elected”.¹¹

➤ **Principles of equality and the judicial authorities’ duty to guarantee the rights of the Charged Person**

14. The principle of equality before the law is a constitutional principle enshrined in Article 31 of the Constitution. Before the ECCC, this principle is enshrined in Internal Rules 21(1)(a) and (b), which provide that “ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties. (...). Persons who find themselves in a similar situation and prosecuted for the same offences shall be treated according to the same rules”; it is also enshrined in Article 14(1) of the *International Covenant on Civil and Political Rights* (“ICCPR”).
15. Article 14(1) of the ICCPR also enshrines the principle of equality of arms as an essential requirement of a fair trial.¹²

III- Key facts

A- “An intense translation effort is therefore required before actual investigative work can start”

16. On 12 October 2004, Mr Koffi Annan, then United Nations Secretary-General, reported to the General Assembly on *the Khmer Rouge trials*.¹³ The translation issue was broached candidly in the report. According to the United Nations Secretary, it posed a real challenge for the trials. Indeed, he stated that “[i]t is expected that the Chambers will rely heavily on documentary evidence. Some 200,000 pages (...) The documentation in question is nearly all in Khmer and only a small part of it has been translated to date. An intense translation effort is therefore required before actual investigative work can start”.¹⁴ (emphasis added)
17. Mr Koffi Annan thereupon proposed to put in place a system for meeting this challenge: “[f]or reasons of cost-effectiveness, translation work of a non-privileged

¹¹Article 8.3 of the *Practice Direction on the Filing of Documents*.

¹²HRC - *Franck Robinson v. Jamaica*, Communication No. 223/1987, UN. Doc. CCPR/C/35/D/223/1987. (1989); See also in European human rights law, Article 6(1) of the European Convention on Human Rights: *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.

¹³Report of the Secretary-General on Khmer Rouge trials, A/59/432, 12 October 2004.

¹⁴Report of the Secretary-General on Khmer Rouge trials, A/59/432, 12 October 2004, para. 20.

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nature would be outsourced, with strict control of quality and consistent use of terminology. Raw material would first be screened for relevancy and sensitivity before being submitted for translation. This would require an in-house capability for initial summary translation from Khmer into English and French. Privileged documentation and records produced by the Chambers during the proceedings would be handled by in-house translators".¹⁵

B- Translation system and negligence on the part of the ECCC

18. In reality, the system proposed by the United Nations Secretary-General to ensure the translation of the case file into the official languages was never put in place.
19. Firstly, the ECCC Translation Unit has never actually had the means to undertake it. For a long time, the Translation Unit was treated as a poor cousin within the Court: inadequate budget, acute understaffing and non-existent or unfeasible quality control. The ECCC Administration absolutely omitted to plan for providing such services, with its capability limited just to catering to the day-to-day translation needs of the Court.
20. Secondly, the Translation Unit has never been instructed to translate the case file, simply because none of the judicial authorities made such a request. The Co-Investigating Judges did not deal with the problem until the defence teams of Mr KHIEU Samphan and Mr IENG Sary complained and, on the pretext of guaranteeing the right of Charged Persons to be tried within a reasonable time, they ultimately dismissed their requests. In fact, the judicial investigation had been ongoing for months, but this aspect of the proceedings had simply been overlooked.
21. Lastly, the system was designed in such a way that there is absolutely no mechanism to systematically translate all materials placed in the case file. In order for a document to be translated, a formal request must in fact be made by a party and/or the judges. The request is recorded in an electronic interface; it is then processed confidentially and is finally notified to the parties. In other words, translation is provided "upon request".

¹⁵Report of the Secretary-General on Khmer Rouge trials, A/59/432, 12 October 2004, para. 20.

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22. On the one hand, this means that the availability of a document in all three languages is unpredictable and that it is impossible to know the criteria on which translating (or not translating) documents is based. The situation with regard to the request by the Lawyers for Ms IENG Tirth to exclude evidence which was or may have been obtained by torture is a prime example of this. Three significant documents were filed in connection with this proceeding. Only one of the three documents – the Co-Prosecutors' response to Ms IENG Tirth's original request – was also notified to the parties in French translation. Why was it the only document to be translated into French? Which party (or parties) or which section(s) requested the translation? Does the fact that this document was translated imply that it received greater consideration from the Office of the Co-Investigating Judges? There is no evidence to that effect.
23. On the other hand, it is a system which fundamentally creates inequalities. In fact, and pursuant to Article 2.2 of the *Practice Direction on the Filing of Documents*, each party is entitled to choose the official language(s) in which, in addition to Khmer, they intend to file and receive documents".¹⁶ Still according to the Direction, a document is deemed to have been notified to a party upon receipt of the document by the party in its second working language (in practice, French or English), and the time limits only start to run from that moment.
24. The great majority of the parties to Case File 002 – with the exception Mr KHIEU Sampan, Mr KANG GUEK EAV and two groups of lawyers representing the civil parties –, including the Office of the Co-Prosecutors, chose English as their second working language. This means that most of the filings of the parties to the proceedings are in English and Khmer. Since the Translation Unit is not empowered to translate documents systematically, only those parties who chose the working languages of the filing party actually receive documents in their two working languages. With some exceptions, the other parties, (usually the French-speaking ones) never receive such documents in their second working language. From a legal standpoint, this means that these parties are not notified.

¹⁶Practice Direction, ECCC/2007/1/Rev. 4, 5 June 2009, Article 2 (2).

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C- Current situation regarding the translation of Case File 002**1. Documents available in all three official languages**

25. According to recent statistics provided to the Defence by the Records and Archives Unit, the file transmitted by the Co-Prosecutors in support of the Introductory Submission includes documents totalling 53,725 pages. The file prepared by the Co-Investigating Judges contains 102,746 pages. Case File 002 would therefore contain a total of 156,471 pages.
26. Out of these 156,471 pages of documents and potential evidentiary materials, only 17,971 pages are available in the three official languages or slightly more than one tenth of the case file; 45,114 pages are available in Khmer only or one third of the case file, and 20,791 pages are available in English or in Khmer only (the vast majority of the documents being in English only).¹⁷

2. Documents available in the working languages of the parties

27. All documents in the case file combined, 19,777 pages are available in Khmer and in French, as opposed to 42,380 documents in Khmer and English or less than half.
28. The Defence cannot compile a full catalogue of all the documents which, to date, have not been notified in its working languages or which were notified several months late. It will limit itself to identifying the documents whose translation was deemed mandatory and essential to guaranteeing the right of the Charged Person to a fair trial.¹⁸

➤ Introductory Submission

29. It took exactly one year and three months to obtain the final version of the Introductory Submission and a further three months to obtain the Schedule of evidence in support of the Introductory Submission (Annex C) in Mr KHIEU Samphan's two working languages.

¹⁷ Case file 002 statistics as per 26th August 2009 by Charles Muraya. It is impossible to provide any figures concerning the languages of the documents in the Co-Prosecutors' Shared Materials Drive.

¹⁸ *Decision on Khieu Samphan's Appeal against the Order on Translation Rights and Obligations of the Parties*, 20 February 2009, Document No. A190/I/20, para. 44.

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➤ *Office of the Co-Prosecutors' Supplementary Submissions*

30. The Office of the Co-Prosecutors filed a first Supplementary Submission on 1 April 2008. It was not until seven months thereafter that this document was notified in French, without any annex.¹⁹ In the end, the Defence did not have access to the complete document until 10 August 2009.²⁰

31. The Office of the Co-Prosecutors filed a second Supplementary Submission on 4 May 2008. This document is not available in French.²¹

➤ *Co-Prosecutors' requests for investigative action*

32. On 21 and 24 July 2009, the Co-Prosecutors filed seven requests for investigative action. These documents are not available in French.²²

➤ *Civil Parties' requests for investigative action*

33. On 08 and 24 July 2009, the Civil Parties filed two requests for investigative action.²³ On 28 July 2009, the defence teams of Ms IENG Tirth and Mr NUON Chea filed a response to one of the requests.²⁴ All these documents are not available in French.

➤ *Requests for investigative action filed by defence teams*

34. In all, the defence teams of Mr NUON Chea, Mr IENG Sary and Ms IENG Tirth have filed 21 requests for investigative action. Out of these 21 requests, only four have been translated into French.

¹⁹ It was translated into French on 28 January 2009, *Document No. D83*.

²⁰ This Annex A was translated into Khmer on 20 June 2008 and into French on 11 August 2009.

²¹ Co-Prosecutors' Response to the Forwarding Order of the Co-Investigating Judges and Supplementary Submission, 30 April 2009, *Document No. D146/3*.

²² Co-Prosecutors' Request for Investigative Action Regarding Wat Tlork Security Center, 16 July 2009, *Document No. D181*; Co-Prosecutors' Request for Investigative Action Regarding Sang Security Center, 16 July 2009, *Document No. D182*; Co-Prosecutors' Request for Investigative Action Regarding Kraing Ta Chan Security Center, 16 July 2009, *Document No. D183*; Co-Prosecutors' Request for Investigative Action regarding North Zone Security Center, 16 July 2009, *Document No. D184*; Co-Prosecutors' Request for Investigative Action Regarding Stung Tauch Execution Site, 16 July 2009, *Document No. D185*; Co-Prosecutors' Request for Investigative Action Regarding Phum 3 Security Center, 17 July 2009, *Document No. D186*; Co-Prosecutors' Request for Investigative Action Regarding Kok Kduoch Security Center, 21 July 2009, *Document No. D187*.

²³ Co-Lawyers of Civil Parties' Investigative Request Concerning the Crimes of Enforced Disappearance, 30 June 2009, *Document No. D180*; Second Request Concerning Forced Marriages and Forces Sexual Relations, 15 July 2009, *Document No. D188*.

²⁴ Joined Defence Response to Civil Parties Investigative Request Concerning Alleged Crime of Enforced Disappearance, 24 July 2009, *Document No. D180/2*.

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D-Repeated complaints by the Defence

35. The Defence has consistently complained about the fact that the judicial investigation case file has not been translated, first, to the Co-Investigating Judges, and then to the Pre-Trial Chamber, but in vain.
36. On 31 December 2008, following the invitation of the Co-Investigating Judges to file submissions on joint criminal enterprise, the Co-Lawyers for the Defence also called the attention of the Co-Investigating Judges to the fact that Mr KHIEU Samphan is “[TRANSLATION] placed in a situation of inequality compared to all the parties (...) who have access to the documents in their two working languages”.²⁵ The Co-Investigating Judges then (likely) ordered the translation of the documents concerning joint criminal enterprise without explicitly informing the Defence because, some weeks later, these documents were notified in French. However, no action was taken, as was being requested by the Defence, to re-establish fairness and ensure equal treatment. This was indeed a perfect illustration of the absurdity of the system and of the need to remedy it.

IV- Arguments

37. In accordance with the applicable provisions, the Pre-Trial Chamber considers that failure to abide by a substantial rule or procedure renders an act null and void for procedural defect in three specific instances: (1) where expressly prescribed in the text of the relevant provisions;²⁶ (2) where there is “a proven violation of a right of the Charged Person recognized in the ICCPR (...) [which] would harm the interests of the Charged Person”;²⁷ and lastly, (3) if not expressly prescribed by a relevant provision and where there has been no violation of a right recognized in the Covenant, where “the party making the application (...) [has] demonstrate[d] that its interests were harmed by the procedural defect”.²⁸

38. In this case, it is quite clear that placing untranslated documents in the case file is a

²⁵ Co-Lawyers' letter of 30 December 2008, *Document No. D97/3/5*.

²⁶ Decision on Appeal against Order refusing request for annulment, 26 August 2008, *Document No. D55/I/8*, para. 37.

²⁷ Decision on Appeal against Order refusing request for annulment, 26 August 2008, *Document No. D55/I/8*, paras. 40 and 42.

²⁸ Decision on Appeal against Order refusing request for annulment, 26 August 2008, *Document No. D55/I/8*, para. 42.

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violation of a substantial procedure (A), which amounts to a violation of a fundamental right, which, also, particularly harms the interests of Mr KHIEU Samphan (B). It is therefore a procedural defect which renders all investigative action null and void. Considering the pervasive nature of the irregularity, the proceedings should be stayed and Mr KHIEU Samphan released as soon as possible.

A-Placing untranslated documents in the case file is a “violation of a substantial procedure” (...)

39. According to the law applicable before the ECCC, “[t]he official working languages of the Extraordinary Chambers and the Pre-Trial Chamber shall be Khmer, English and French”.²⁹ In simple, plain terms, the Trial Chamber – which is now conducting the trial to determine the criminal responsibility of Mr KAING GUEK EAV alias Duch for the charges specified in Case File 001– has just confirmed the implications of this rule in relation to translation.

40. Indeed, the Chamber notes that “[TRANSLATION] any item in the case file may be considered evidentiary material if it is put before the Chamber (...) [and that] the general rule is that documents should be available in all three languages of the Court in order to be put before the Chamber”. It also adds that, by way of exception, it “will accept reference to documents which are available in Khmer and one other language of the Court.”³⁰ (emphasis added). This is the only conceivable and contemplated exception, and it is subject to strict conditions.³¹ It means that placing a document in the case file in only one language is definitively prohibited. The Chamber does not even refer to it.

41. The principle thus established applies, a fortiori, at the investigative stage which is, par excellence, a stage at which a review of the case file and assessment of the evidence are of paramount importance, in that it helps to determine whether or not to indict the Charged Person and send him or her for trial.³²

²⁹ Article 26(2) of the Agreement and Article 45 new of the ECCC Law.

³⁰ *Oral decision on translation* (French Transcript), 19 May 2009, *Document No. E1/21.1*, p. 34, lines 5-7 and p. 35, lines 2-5.

³¹ *Oral decision on translation* (French Transcript), 19 May 2009, *Document No. E1/21.1*, p. 34 and p. 35, lines 2-5.

³² On this point, see also arguments at paras. 32-38 of the Defence Appeal Brief.

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42. Where a judge or lawyer is dealing with a document that he or she does not understand, what are his or her options? He or she has only one possible course of action. Either he or she considers that the document contains potential evidence of the innocence or guilt of the Charged Person, in which case, he or she must understand its meaning and, accordingly, obtain a translation thereof, or he or she considers the document not to be conducive to ascertaining the truth, in which case, he or she ignores it. There is no middle ground. Now and by definition, the judicial investigation case file is a compilation of documents that are potentially inculpatory or exculpatory evidentiary material. Therefore, both the judges and the lawyers are absolutely bound to understand their exact content, unless they abdicate their respective responsibilities.
43. As such, translation is therefore truly the pre-condition of the existence of an act in the judicial process, in that without it, the act in question may no longer form the basis for ascertaining the truth whether at the investigative stage or at the trial stage.
44. Tendering untranslated documents is therefore a “violation of a substantial procedure” within the meaning of Article 252 of the *Code of Criminal Procedure*.

**B- (...) which particularly harms the interests of Mr KHIEU Samphan
(...)**

1. General situation

45. Two years into the judicial investigation, one third of the documents in the case file are still available only in Khmer; since the beginning of the judicial investigation, 31,601 pages of documents have been placed in the case file in Khmer with no translation whatsoever. Not only are these documents incomprehensible to any non-Khmer speaker – including Judge Marcel LEMONDE –, it is also impossible to know why they were filed, whether they are in the process of being translated or whether they were placed in the case file simply to increase the number of potentially evidentiary materials, whether inculpatory or exculpatory. Despite the efforts of the Translation Unit and the staff reinforcement, the proportion of untranslated documents still remains high and the case file still as inaccessible.
46. Since the ECCC prides itself on being a “hybrid” court, it cannot be honestly claimed

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that a fair trial will be conducted on the basis of a case file in which one third of the materials are available in one language only, namely Khmer, a language that is not understood by any of the international members in charge of the case, including the judges, the Co-Prosecutors and the Co-Lawyers.

2. Violation of the right to defend oneself and infringement of the rights of the defence of Mr KHIEU Samphan

47. A lawyer is entitled to have access to his or her client's case file, but it is not so in the present case. Mr VERGÈS does not have access to the case file in a language he understands, and is therefore simply unable to participate in the defence of Mr KHIEU Samphan, even though this difficult task devolves on him. Under the circumstances, Mr KHIEU Samphan is deprived of the assistance that he is entitled to receive from Mr VERGÈS. This amounts to a violation of Mr KHIEU Samphan's right to a fair trial, and in particular of his right to the effective assistance of his lawyers, his right to participate in the proceedings and his right to prepare his defence adequately.³³

3. The principle of equality of arms and discrimination against Mr KHIEU Samphan

48. All documents combined, the number of pages available in Khmer and in English in Case File 002 is much higher than the number of pages available in French and in Khmer. This means that the Co-Lawyers for the Defence of Mr KHIEU Samphan have access to a more limited number of documents which, in itself, is a violation of the principle of equality and, needless to say, raises fairness issues. Moreover, they are only exceptionally notified with the legal submissions filed in the case, unlike the English-speaking parties, including the Office of the Co-Prosecutors. Lastly, even where documents are deemed "essential",³⁴ it takes several months for the Co-Lawyers of Mr KHIEU Samphan to obtain them in their working languages (if at all).

49. Because Mr KHIEU Samphan chose the French language as his second working language, he is at a disadvantage compared to the other parties to the proceedings, in particular vis-à-vis the Office of the Co-Prosecutors.

³³ On this point, see arguments in support of the Defence Appeal Brief, paras. 55-71.

³⁴ See the Pre-Trial Chamber's decision on appeal quoted *supra*, para. 44.

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50. Yet, under the principle of equality before the law, similarly situated persons are entitled to similar treatment;³⁵ only a reasonable and objective justification may warrant different treatment. Furthermore and under the principle of equality of arms – one of the cornerstones of the right to a fair trial³⁶ – a party must be able to present his or her evidence under the same conditions as his or her opponent, and this “obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case”,³⁷ not even in appearance.³⁸
51. Contrary to all considerations of fairness, Mr KHIEU Samphan is put at a disadvantage simply because he chose Mr SA Sovan, a Cambodian lawyer, and Mr Jacques VERGÈS, a French lawyer, both of whom are French-speaking, to defend him. This discrimination is unjustifiable and it is occurring simply because he is asserting his rights. It must also be noted that Mr KHIEU Samphan is not being afforded the opportunity to present his case in the same conditions as the Office of the Prosecutors, and that the judicial authorities are by no means prepared to ensure this fair balance.
52. Finally, the system in place seems to be directly anchored in utilitarian theories, which, except one, run counter to the wellbeing of “*the greatest number*”. The manner in which Mr KHIEU Samphan is being treated is thus deemed both acceptable and even necessary, the premise being that upholding his rights would pose a threat to the system; so the end justifies the means.

Yet, the individual rights enshrined in the relevant instruments before the ECCC do not accept such an interpretation, irrespective of whether it is adopted out of consideration for “*the greatest good for the greatest number*”. From a legal standpoint, the situation as it now stands is totally contrary to the principles of equality, adversarial proceedings and equality of arms, and is thus a blatant and continuing violation of the right to a fair trial.

³⁵ ECHR, *Fredin v. Sweden*, 12033/86, 18 February 1991, para. 60.

³⁶ HRC - *Franck Robinson v. Jamaica*, Communication No. 223/1987, UN. Doc. CCPR/C/35/D/223/1987 (1989); ECHR, *Dombo Beheer B.V. v. The Netherlands* (civil), 27 October 1993, para. 33; *Bulut v. Austria*, 23 January 1996, para. 47.

³⁷ ICTY Appeals Chamber Judgement, *Prosecutor v. Dusko Tadic*, 15 July 1999, para. 48.

³⁸ ECHR, *Bulut v. Austria*, *op. cit.* para. 47.

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C-(...) and this renders the procedural acts null and void in their entirety

53. As has been demonstrated, placing untranslated documents in the case file is a violation of a substantial procedure, which infringes the right to defend oneself before the courts and particularly harms Mr KHIEU Samphan's interests and rights. As such, failure to provide translations is a procedural defect which renders the acts concerned null and void.
54. Because of its pervasive nature, this procedural defect not only deprives the acts concerned of any utility (as they may no longer be used as a basis for ascertaining the truth), but also affects each and every act in the case file, because it raises a legitimate doubt as to the reliability of the judicial investigation. Thus, it is the procedural acts in their entirety which are defective, and it is all these acts which should be declared null and void.
55. In conclusion, it is clear that systematically tendering untranslated documents has an impact on the validity of the proceedings as a whole, and it stems from the recurring negligence of the judicial authorities, a utilitarian application of the rule of law and an utter disregard for the inquisitorial system.
56. According to the abuse of process doctrine, "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,³⁹ the proceedings must be stayed.

For these reasons,

57. The Co-Lawyers for the Defence invite the Co-Investigating Judges:
- To declare the *Order on Translation Rights and Obligations of the Parties* MOOT;
 - TO SEISE THE PRE-TRIAL CHAMBER with the view to annulment of

³⁹ICTR- *The Prosecutor v. Barayagwiza*, Appeals Chamber, Decision, para. 77.

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- the judicial investigation and the prosecution for abuse of process;
- TO ORDER the immediate and unconditional release of Mr KHIEU Samphan for abuse of process

**WITHOUT PREJUDICE,
AND JUSTICE WILL BE DONE**

	SA Sovan Jacques VERGÈS	Phnom Penh Paris	
Date	Name	Place	Signature