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

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APPEAL AGAINST THE CLOSING ORDER

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Before:

The Pre-Trial Chamber

Judge PRAK Kimsan
Judge NEY Thol
Judge HUOT Vuthy
Judge MARCHI-UHEL
Judge Rowan DOWNING

Co-Prosecutors

CHEA Leang
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MAY IT PLEASE THE PRE-TRIAL CHAMBER

I. Introduction

1. The Co-Lawyers for the Defence of Mr Khieu Samphan hereby appeal against the Co-Investigating Judges' Closing Order dated 16 September 2010[1] (the "**Order**"). They invite the Pre-Trial Chamber to find that the Order violates the rules governing the investigation and prematurely concludes an investigation that is incomplete and that was conducted exclusively to elicit inculpatory evidence.

2. The Closing Order refers the case for trial and defines the scope of future proceedings before the Trial Chamber. It must thus be a model document.

3. However, this does not hold true in this instance. The Order was not preceded by any adversarial debate and it does not address the issue of whether there is any link between Mr Khieu Samphan and the facts. The judicial investigation has not established the truth. Further investigations must be undertaken in order to guarantee a fair trial.

4. Consequently, pursuant to Rules 74(3) and 21 (1) of the Internal Rules (the "**Rules**"), Khieu Samphan's Co-Lawyers request the Judges of the Pre-Trial Chamber to:
   - Declare this Appeal admissible;
   - Find that numerous requests for leave to file documents required for bringing the truth to light were dismissed by the Co-Investigating Judges;
   - Find that the majority of the investigations were limited to a vague and general consideration of crimes, fails to establish any link between Khieu Samphan and the facts;
   - Find that the *a minima* conduct of the judicial investigation is not sufficient;
   - Rule that the scope of the investigation does not reflect the truth.

5. Consequently, the Pre-Trial Chamber ought to:
   - REVOKE the Closing Order;

[1] Closing Order, 15 September 2010, D427.
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- ORDER continuation of the investigation.

6. In any case:
   - Direct the Co-Investigating Judges to continue the judicial investigation;
   - Find that it is impossible to indict Khieu Samphan at this stage of the proceedings.

II. Factual and procedural background

7. On 18 July 2007, the Co-Investigating Judges were seised of the Co-Prosecutors' Introductory Submission.[2]

8. On 19 November 2007, Khieu Samphan was charged with crimes against humanity and grave violations of the Geneva Conventions of 12 August 1949 and placed under provisional detention.[3]

9. On 14 January 2010, after eighteen months of judicial investigation, the Co-Investigating Judges notified that they considered the judicial investigation concluded.[4] One month prior to that, they had announced that Khieu Samphan was being charged with genocide and all the domestic crimes set out in the ECCC Law (**'Law on the Establishment of the ECCC'**) ; this time, they referenced all the forms of liability that had hitherto been ignored, in particular, joint criminal enterprise.[5]

10. Although the investigation was officially concluded in January, the case file has continued to grow and now contains 355,810 pages of documents.[6] It was forwarded to the Co-Prosecutors only on 19 July 2010.[7]

11. Less than one month thereafter, the Co-Prosecutors issued their Final Submission – a

[2] Introductory Submission, 18 July 2007, *D3*.
[3] Provisional Detention Order, 19 November 2007, *C26*.
[4] Notice of Conclusion of Judicial Investigation, 14 January 2010, *D317*.
[5] Written Record of Interview, 18 December 2009, *D285*
[6] Statistics provided by the ECCC Archives Unit on 24 September 2010 (attached hereto).
[7] Forwarding Order, 19 July 2010, *D385*.

941-page document[8] which has not been translated into French. They were unable to base their submissions on the facts under investigation owing to the short time-limit.

12. On 16 September 2010, that is, the day before the authorized maximum period of provisional detention[9] of Nuon Chea was due to expire,[10] the Co-Investigating Judges issued their Closing Order – a 772-page document, including more than three hundred pages of footnotes and references in English only.

13. On 22 September 2010, the Co-Lawyers for the Defence filed a Notice of Appeal with the Greffier of the Co-Investigating Judges,[11] and today they are filing the present brief.

III. Legal grounds

A. Obligation of fairness in the conduct of the judicial investigation

14. Rule 21(1) of the Rules (a) provides that "ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties."

15. Proceedings before the ECCC, which are predominantly inquisitorial, comprise two stages: the judicial investigation "compulsory for crimes within the jurisdiction of the ECCC" as set out in Rule 55(1) of the Rules; and the trial proper conducted, as appropriate, in accordance with the scope of the investigation. It is, therefore, the preliminary investigation that "[TRANSLATION] lays the foundation for proceedings, defines the scope, delineates the confines of the trial", "[TRANSLATION] [an] inalienable bond (…) binds the pre-trial investigation to criminal justice"[12]

16. In this sense, the investigation, a condition *sine qua non* for trial proceedings before the ECCC, is a stage which must guarantee a fair trial. Fairness and, above all, equality of

[8] Final Submission, 16 August 2010, *D390*.
[9] Rule 63 of the ECCC Internal Rules.
[10] Provisional Detention Order, 19 September 2007, *C9*.
[11] Khieu Samphan's Notice of Appeal, 21 September 2010, *D427/4*.
[12] Helle (F.) *Traité de the investigation criminelle, Tome deuxième, Traité de the investigation préparatoire et de la mise en accusation*, 1865, p. 195, paras.1978 and 1979 (attached hereto).

arms at the pre-trial stage are the underpinnings of judicial certainty during the trial on the merits.

17. This is why the European Court of Human Rights (ECHR) – a source of guidance on international practices, particularly for the ECCC Pre-Trial Chamber – has held that the right to a fair trial is applicable at the investigative phase. It is settled law that *"the primary purpose of Article 6 (art. 6) as far as criminal matters are concerned is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", but it does not follow that the Article (art. 6) has no application to pre-trial proceedings."*[13] It is therefore applicable from the very moment a person is "charged",[14] that is to say, when the person is served with *"the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence"*.[15]

B. <u>Scope of the Closing Order</u>

- The Closing Order concludes the judicial investigation

18. Rule 67(1) of the Rules provides that the Co-Investigating Judges *"conclude the investigation by issuing the Closing Order, either indicting a Charged Person and sending him or her to trial or dismissing the case"*. Rule 76(7) of the Rules provides that *"[s]ubject to appeal, the Closing Order shall cure any procedural defects in the judicial investigation. No issues concerning such procedural defects may be raised before the Trial Chamber or the Supreme Court Chamber"*.

- The Closing Order defines the scope of proceedings

19. Rule 79 of the Rules provides that "*The Trial Chamber shall be seised of an Indictment from the Co-Investigating Judges or the Pre-Trial Chamber.*" Rule 98 (2) of the Rules recalls the existence of this link: *"The Judgment shall be limited to the facts set out in the Indictment"*.

[13] ECHR, *Imbrioscia v. Switzerland*, 24 November 1993, Application No. 13972/88, para. 36 (attached hereto).
[14] ECHR, *Reinhardt and Slimane-Kaïd v. France*, 31 March 1998, Applications Nos. 23043/93 and 22921/93, para. 93 (attached hereto).
[15] ECHR, *Deweer v. Belgium*, 27 February 1980, Application No. 6903/75, para. 46 (attached hereto).

C. Matters relating to a fair trial

20. Article 31 of the Constitution of Cambodia 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, the covenants and conventions related to human rights, women's and children's rights."*

21. Rule 21(1) of the ECCC Internal Rules provides:

> *"1. The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement. In this respect:*
> *a) ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties. They shall guarantee separation between those authorities responsible for prosecuting and those responsible for adjudication;*
> *b) Persons who find themselves in a similar situation and prosecuted for the same offences shall be treated according to the same rules;*
> *c) The ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings; and*
> *d) Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established. Any such person has the right to be informed of any charges brought against him/her, to be defended by a lawyer of his/her choice, and at every stage of the proceedings shall be informed of his/her right to remain silent."*

1. Equality before the law

22. The Cambodian Constitution provides that *"[e]very Khmer citizen shall be equal before the law, enjoying the same rights, freedom and fulfilling the same obligations regardless of race, colour, sex, language, religious belief, political tendency, birth origin, social status, wealth or other status"*.[16]

23. Article 3 of the Cambodian Penal Code states that *"[c]riminal actions apply to all natural persons or legal entities regardless of race, nationality, religion, sex or social status"*.

24. Rule 21(1) b) provides that *"Persons who find themselves in a similar situation and*

[16] Article 31 of the Constitution of Cambodia.

prosecuted for the same offences shall be treated according to the same rules".

25. Article 7 of the Universal Declaration of Human Rights provides that *"[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination".*

26. According to Articles 14 and 26 of the International Covenant on Civil and Political Rights, *"All persons shall be equal before the courts and tribunals"* and *"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law".*

2. Equality of arms

27. Recalling the standard definition of equality of arms in international law,[17] the Pre-Trial Chamber held in the trial of Kaing Guek Eav *alias* Duch that *"[e]quality of arms is the principle in law that, in a trial, the defence and the prosecution must have procedural equality to ensure that the conduct of judicial proceedings is fair".*[18]

28. Rule 21(1)(a) sets forth the duty to *"preserve a balance between the rights of the parties"* during proceedings.

29. The European Court of Human Rights has held that *"[e]quality of arms" implies that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent."*[19] *In a case in which the applicant was neither notified of the Prosecutor's submissions nor of the possibility of responding to them, the ECHR held that "the principle of the equality of arms does not depend on further, quantifiable unfairness flowing from a procedural inequality. It is a matter for the defence to assess*

[17] ICTY, Appeals Chamber, 15 July 1999, *Prosecutor v. Dusko Tadic*, IT-94-I-A, para. 44: "The principle of equality of arms between the prosecutor and accused in a criminal trial goes to the heart of the fair trial guarantee."
[18] Decision on Ieng Sary's Request to Make Submissions in Response to the Co-Prosecutors' Request for the Application of Joint Criminal Enterprise, 3 July 2009, *E90*, para. 4.
[19] ECHR, *Dombo Beheer BV v. The Netherlands*, 27 October 1993, Application No. 14448/88, para. 33; ECHR, *Foucher v. France*, 18 March 1997 Application No. 22209/93, para. 34 (attached hereto).

whether a submission deserves a reaction".[20]

3. Rights of the Defence

30. Before the ECCC, the Co-Investigating Judge is the sole finder of fact. As the Charged Persons is not empowered to conduct his own investigation, his rights must be especially guaranteed.

- Right to be informed of the charges

31. Article 35(a) (new) of the ECCC Law provides that any accused has the right to be informed in detail of the nature and cause of the charge against him or her.

32. Under Rule 21(1) (d) of the Rules, any person suspected of having committed a crime *"Any such person has the right to be informed of any charges brought against him/her"*.

33. In this regard, Rule 57(1) of the Rules provides that at the time of the initial appearance, the Co-Investigating Judges must inform the charged person of the charges against him or her.

34. In order to give effect to this right, the Closing Order also has to be specific. In its decision on the Co-Prosecutors' Appeal against the Closing Order in the Kaing Guek Eav *alias* Duch case, the Pre-Trial Chamber recalled that *"[i]nternational standards require that an indictment set out the material facts of the case with enough detail to inform the defendant clearly of the charges against him so that he may prepare his defence. The international tribunals' jurisprudence has drawn distinctions on the level of particularity required in indictments depending on the alleged mode of liability, as the materiality of such facts as the identity of the victim, the place and date of the events for which the accused is alleged to be responsible and upon the alleged proximity of the accused to the events"*. [21]

[20] ECHR, *Bulut v. Austria*, 22 February 1996, Application No. 17358/90, para. 49 (emphasis added) (attached hereto).
[21] Decision on Appeal against Closing Order Indicting Kaing Guek Eav *alias* Duch, 5 December 2008, *D99/3/42*, paras. 47 and 48 (emphasis added).
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- Right to prepare one's defence

35. Article 38 of the Constitution of Cambodia provides that *"[e]very citizen shall enjoy the right to defense through judicial recourse"*.

36. Article 13(1) of the Agreement between the United Nations and the Government of Cambodia provides that *"[t]he rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process. Such rights shall, in particular, include the right: to a fair and public hearing; to be presumed innocent until proved guilty; to engage a counsel of his or her choice; to have adequate time and facilities for the preparation of his or her defence (…)."*[22]

37. Such rights, defined broadly, are actually applied during the judicial investigation. The right of access to the judicial investigation case file is set out in Rule 55 (6) of the Rules: *"At all times, (…) the lawyers for the other parties shall have the right to examine and make copies of the case file under the supervision of the Greffier of the Co-Investigating Judges, during working days and subject to the requirements of the proper functioning of the ECCC."*[23]

- Right to request investigative actions

38. Rule 55(10) provides that *"[a]t any time during an investigation, (…) a Charged Person (…) may request the Co-Investigating Judges to make such orders or undertake such investigative action as they consider useful for the conduct of the investigation."* [24]

D. Obligations of the Co-Investigating Judges

39. As early as in 1865, François Hélie, the eminent French jurist wrote about the pre-trial investigation: "[TRANSLATION] *In order to provide the courts with evidence to support its decisions, the investigation must be armed with the most effective investigative tools.*

[22] See also Article 35(b) (new) of the ECCC Law.
[23] Emphasis added.
[24] Emphasis added.
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As it runs the risk of prejudicing private interests, its action must be surrounded by guarantees that such interests are protected]".[25]

1. Independence and impartiality

40. As a judge, the Co-Investigating Judge has a general obligation to be independent and impartial. Article 2 of the Code of Judicial Conduct provides that *"[j]udges shall be impartial and ensure the appearance of impartiality in the discharge of their judicial functions. Judges shall avoid any conflict of interest, or being placed in a situation which might reasonably be perceived as giving rise to a conflict of interest."*

41. Article 25 of the ECCC Law provides that *"[t]he Co-Investigating Judges shall be appointed from among (…) all of whom shall have high moral character, a spirit of impartiality and integrity, and experience. They shall be independent in the performance of their functions and shall not accept or seek instructions from any government or any other source."*

42. The international Judges are under a higher duty to be independent and impartial. As recalled by the United Nations Under-Secretary-General for Legal Affairs, Mr Hans Correll: *"[i]nternational judges are operating under the eyes of the whole world, and the impression they give and the manner in which they perform their work will directly reflect of the standing of the institution that they serve".*[26]

2. Obligation to decide on the basis of all the facts

43. Article 125 of the Code of Criminal Procedure of Cambodia provides that the investigating judge is seised of the facts specified in the introductory submission and must investigate only those facts.

44. Rule 53 of the Rules provides that *"[i]f the Co-Prosecutors have reason to believe that*

[25] HELIE (F.), *Traité de the investigation criminelle, ibid.* p.196, para. 1983 (attached hereto).
[26] CORRELL (H.), 'Ethical Dimensions of International Jurisprudence and Adjudication', address delivered at Brandeis Institute for International Judges Sessions on "The New International Jurisprudence: Building Legitimacy for International Courts and Tribunals ", 10 June 2002 (attached hereto).
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crimes within the jurisdiction of the ECCC have been committed, they shall open a judicial investigation by sending an Introductory Submission (…). The Submission shall be accompanied by the case file and any other material of evidentiary value in the possession of the Co-Prosecutor, including any evidence that in the actual knowledge of the Co-Prosecutors may be exculpatory." Rule 55 adds that *"[t]he Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission. (…) Where new facts have been referred to the Co-Prosecutors, the Co-Investigating Judges shall not investigate them unless they receive a Supplementary Submission"*. Pursuant to these two Rules read jointly, the Co-Investigating Judges have the obligation to investigate all the facts alleged in the Introductory Submission and, where applicable, the Supplementary Submission.

45. Rule 67 of the Rules echoes the provisions of Article 247 of the Code of Criminal Procedure of Cambodia. In issuing a Closing Order, the Co-Investigating Judges must address all the facts of which they have been seised and only such facts. They have only two options: either dismiss the case for one of the reasons set out in Rule 67(3) or indict the charged person and send him or her to trial on the basis of the facts.

3. Obligation to ascertain the truth, whether the evidence is inculpatory or exculpatory

46. Rule 55(5) of the Rules sets out the two requirements in Article 127 of the Code of Criminal Procedure of Cambodia: *"In the conduct of judicial investigations, the Co-Investigating Judges may take any investigative action conducive to ascertaining the truth. In all cases, they shall condu*ct their investigation impartially, whether the evidence is inculpatory or exculpatory."[27]

47. On the one hand, the power of the Investigating Judges derives from the manifestation of the truth. In this regard, the Pre-Trial Chamber considers that *"[r]equests for investigative actions should be interpreted as being requests for actions to be performed by the Co-Investigating Judges or, upon delegation, by the ECCC investigators or the judicial police, with the purpose of collecting information conducive to ascertaining the*

[27] Emphasis added.
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truth."[28] Under Rule 60, *"[t]he Co-Investigating Judges may take statements from any person whom they consider conducive to ascertaining the truth, subject only to the provisions of Rule 28."*

48. At this stage, a judge who fails to conduct the investigation in such a way as to seek both inculpatory and exculpatory evidence necessarily takes sides. The Closing Order must reflect such impartial search for the truth. Rule 67(4) only requires that the Closing Order must be "reasoned", with no further specification. Nevertheless, to interpret this provision, the Pre-Trial Chamber could legitimately seek guidance in Article 184 (new) of the French Penal Code, as amended by the Law of 5 March 2007. This article specifies that orders issued by an investigating judge *"[TRANSLATION] indicate the legal characterization of the fact alleged against the person under judicial examination and, specifically, explaining why the investigating judge believes there is or there is not sufficient ground to bring charges against the suspect. Such reasons are considered in light of the prosecution's submissions and the observations submitted by the parties to the investigating judge, pursuant to Article 175, specifying the inculpatory and exculpatory evidence relating to each of the persons under judicial examination."*

49. The Paris Court of Appeal has ruled to the same effect. In a Decision it rendered on 20 January 2009,[29] it held that *"[TRANSLATION] Under Article 184 paragraph 2, the investigating judge has the obligation to not only give reasons for his or her decision to indict the suspect, but also, where applicable, to respond to the observations of the parties]"* (Decision, p. 10, para. 8). This is why it found that a closing order that merely refers to the prosecutor's submissions without specifying both inculpatory and exculpatory evidence relating to the persons under judicial investigation, even in the absence of the observations by the lawyers, does not meet the requirements of Article 184 (Decision, p. 10, para. 9). The Paris Court of Appeal emphasised that these new provisions correspond to the requirements set out in Article 6(3) of the European Convention on Human Rights regarding the right to be informed in detail of the nature

[28] Decision on Khieu Samphan's Appeal against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, *A190/I/20*, para. 28; Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, *D164/4/13*, para. 19.

[29] Paris Court of Appeal, 10th Division, Section A, 20 January 2009, No. RG 08/04110, page 10 paras. 8 and 9 and page 11 para. 1 (annexed). In the same vein, the Paris High Court, 16th Division, 2nd Section, 3 July 2009, Decision No. RG 0808230220, page 6, para. 3 (annexed).

and cause of the charges (Decision, p. 11, para. 1).

IV. Preliminary remarks

1. This appeal is admissible

50. This Appeal is admissible under Rule 74(3)(a) since the Closing Order recognizes the jurisdiction of the ECCC, and under Rule 21(1) since the said Closing Order violates the rules of investigation guaranteeing the right to a fair trial.

- The Closing Order recognizes the jurisdiction of the ECCC

51. Although the option of appealing against the Closing Order is not specified in the Rules, Rule 74(3)(a) nevertheless provides that *"[t]he Charged Person or the Accused may appeal against the following orders or decisions of the Co-Investigating Judges: [(a)] confirming the jurisdiction of the ECCC;"*

52. In the instant case, the Closing Order is an indictment. In it, the Co-Investigating Judges specify the crimes and forms of liability applicable to Mr Khieu Samphan,[30] thereby confirming the ECCC Trial Chamber's overall jurisdiction to try him. The Closing Order is therefore *"a decision confirming the jurisdiction of the ECCC"*, pursuant to Rule 74(3)(a). Consequently, the Charged Person has the right to appeal against the Closing Order in its entirety. It is worth noting that during criminal proceedings in French civil law, the accused may appeal against an indictment issued by an investigating judge since the enactment of the Law of 15 June 2000 reinforcing protection for the presumption of innocence.[31]

- The Closing Order violates the rules of investigation guaranteeing the right to a fair trial

[30] Closing Order, 15 September 2010, *D427*, para. 1299.
[31] Articles 181 and 186 of the French Penal Code amended by Law No. 2000-516 of 15 June 2000 reinforcing safeguards for the presumption of innocence and victims' rights. (attached hereto).

53. As a judicial authority, the Pre-Trial Chamber is the guarantor of the principles of a fair trial, as enshrined in Rule 21(1). In accordance with settled law, the Pre-Trial Chamber systematically determines whether *"[t]he Pre-Trial Chamber will examine whether Internal Rule 21 requires that it adopts a broader interpretation of the Charged Person's rights to ensure the proceedings during the investigation are fair and adversarial and that a balance is preserved between the rights of the Parties."*[32]

54. The present Order was manifestly issued in breach of the rules of investigation, in particular, the need to hear Mr Khieu Samphan concerning the Final Submission and to provide him with all the investigation documents allowing him to prepare his defence. Wherefore, the Pre-Trial Chamber has jurisdiction to hear this appeal.

2. Powers of the Pre-Trial Chamber

55. In its Decision on the Co-Prosecutors' Appeal against the Closing Order in the Kaing Guek Eav *alias* Duch case, the Pre-Trial Chamber held that it *"is empowered to decide independently on the legal characterisation when deciding whether to include in the Closing Order the offences."*[33] In its decision on the appeal, the Pre-Trial Chamber recalled that it sought guidance in international rules of procedure in altering the legal characterizations adopted by the Co-Investigating Judges.[34]

56. The Pre-Trial Chamber considers that within the ECCC, it plays the role of the examining chamber in the Cambodian judicial system.[35] Under the Code of Criminal Procedure of Cambodia, the examining chamber possesses broad powers when seised of an appeal (Articles 260 to 265), just like the investigating chamber under French civil law (Articles 199 to 202, 206 to 207-1 and 210 to 214).[36] In this regard, it should also be noted that the indictments chamber is also empowered "[TRANSLATION] *to assess the value of evidence gathered during the investigation and decide whether to bring any*

[32] Decision on Khieu Samphan's Appeal against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, *A190/I/2*, para. 36; Decision on Ieng Sary's Appeal against Co-Investigating Judges' Decision Refusing to Accept the Filing of Ieng Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, *D390/1/2/4*, para. 13.
[33] Decision on Appeal against Closing Order Indicting Kaing Guek Eav *alias* "Duch", 5 December 2008, D99/3/42, para. 41.
[34] Closing Order, 15 September 2010, *D427*, para. 1566.
[35] Decision on Appeal against the Provisional Detention Order of Kaing Guek Eav *alias* "Duch", 3 December 2007, *C5/45*, para.7.
[36] Articles 199 to 202, 206 to 207-1 and 210 to 214 of the French Code of Criminal Procedure (attached hereto).

charges" (*Touvier* Decision, 27 November 1992, p. 6).[37]

57. Furthermore, the Pre-Trial Chamber may determine whether the proper procedure has been followed in the proceedings.[38] In their separate opinions, which are indeed very thoughtful, International Judges Catherine Marchi-Uhel and Rowan Downing, recently recalled that *"[i]t is imperative that this Chamber do its utmost to ensure that the charged persons are provided with a fair trial"*.[39] This is not simply a personal comment, but rather an appeal to be mindful of judicial obligations at the highest level of international justice, because the integrity of the ECCC is at stake. The International Judges issued a public decision after deliberating as a full bench, a formal signal of the proper conduct of the proceedings and the exigencies of justice.

V. Request for a public hearing

58. Rule 77(3) lays down the principle of holding a hearing before the Pre-Trial Chamber, where an appeal has been filed. The Pre-Trial Chamber may decide to rule solely on the basis of the parties' written submissions only after hearing their views.[40]

59. Under Rule 77(6), *"[t]he Chamber may, at the request of (...) party, decide that all or part of a hearing be held in public, in particular where the case may be brought to an end by its decision, including appeals or applications concerning jurisdiction."*

60. This holds true in this instance. The Defence is requesting a public hearing before the Pre-Trial Chamber.

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[37] Court of Cassation, Criminal Division, *Touvier* Decision, 27 November 1992, No. 92-82409, page 6, lines 55 to 57 (annexed).
[38] Article 261 of the Code of Criminal Procedure of Cambodia.
[39] Second Decision on Nuon Chea's and Ieng Sary's Appeal against OCIJ Order on Requests to Summon Witnesses, 9 September 2010, *D314/2/10,* Opinions of Judges Catherine Marchi-Uhel and Rowan Downing, para.12.
[40] Rule 77 (3): *(a) The President of the Chamber shall verify that the case file is up to date and set a hearing date. (b) The Pre-Trial Chamber may, after considering the views of the parties, decide to determine an appeal or application on the basis of the written submissions of the parties only. (c) (...).*

VI. Grounds of appeal

61. Khieu Samphan has been excluded from adversarial proceedings which ought to prevail throughout the judicial investigation and necessarily precede the Closing Order. In spite of the rules of investigation guaranteeing the right to a fair trial, the Co-Investigating Judges have conducted an incomplete and impartial judicial investigation as clearly reflected by the Closing Order.

A. Lack of adversarial debate

62. "*Being the only opportunity for an adversarial debate during the pre-trial stage of a criminal case, [the judicial investigation affords] the parties the opportunity to not only acquaint themsel*ves *with the contents of the case file as it is built, but also to discuss it.*"[41] The Defence was nevertheless denied any opportunity for adversarial debate: it was unable to respond to the Prosecutors' Submission; it did not have access to elements of proof in French and it was kept in the dark by a non-transparent investigation.

1. Denial of the right to respond to the Final Submission

63. In principle, Cambodian law does not specifically provide for the right to file written submissions in response to the final submission.[42] In the Kaing Guek Eav *alias* Duch case, the Co-Investigating Judges nonetheless allowed the Defence to make submissions, which were specifically referenced in the Closing Order.[43] Relying on this precedent, Ieng Sary sought to avail himself of this right, but the Co-Investigating Judges denied him the exercise of this right.[44]

64. The Judges' decision was reversed by the Pre-Trial Chamber, which held that the

[41] SIZAIRE(V.), "*Quel modèle pour l'ínstruction ?* " in AJ Pénal 2009, p.388 (attached hereto).
[42] Article 264 of the Code of Criminal Procedure of Cambodia provides that "*[w]hen the investigating judge considers that the investigation is terminated, he shall notify the Royal Prosecutor, the charged person, the civil parties and the lawyers. Two days later, the investigating judge sends the case to the Royal Prosecutor for examination. If the Prosecutor considers that further investigative measures are necessary, the Royal Prosecutor shall act in compliance with the provisions stated in Article 132 (Investigative actions requested by Prosecutor) of this Code.*"
[43] Defence Brief, 24 July 2008, *D96/I*, cited in the Closing Order in the Kaing Guek Eav, *alias* Duch case, 8 August 2008, *D99*.
[44] Co-Investigating Judges' Letter Rejecting Right to respond to the Co-Prosecutors' Final Submission, 19 August 2010, *D390/1/1*.

Defence had the right to file submissions in response to the Final Submissions, in accordance with the right to a fair trial, in particular, the rights to equality of arms and to equality before the law.[45] The Pre-Trial Chamber deemed it proper to seek guidance in Article 175 of the French Code of Criminal Procedure, as amended by the Law of 5 March 2007 aimed at reinforcing balance in criminal procedure. Paragraph 5 of the Article provides that parties may make their submissions before the investigating judge and challenge the prosecution's final submission.[46] This provision is aimed at strengthening the adversarial nature of the investigation so as to guarantee the Defence's rights at the crucial stages of criminal proceedings.[47]

65. The Pre-Trial Chamber therefore directed the Co-Investigating Judges to place Ieng Sary's submissions on the case file without delay. The said submissions are specifically referred to in the Closing Order.[48]

66. Mr Khieu Samphan is yet to receive the French translation of the Co-Prosecutors' Final Submission;[49] this is a manifest violation of his right to translation.[50] According to the Practice Direction on the Filing of Documents, this means that Mr Khieu Samphan has not received service of the final submission.[51] His right to respond to the Final Submission has been violated, in breach of his right to a fair trial.

67. This also breaches the doctrine of equality before the law, since, unlike all the other Charged Persons, Khieu Samphan has not been in a position to acquaint himself with this document or to exercise or choose to exercise his right to respond thereto.

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[45] Decision Decision on Ieng Sary's Appeal against Co-Investigating Judges' Decision Refusing to Accept the Filing of Ieng Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, *D390/1/2/4*, para. 23.

[46] Article 175 para. 5: "[TRANSLATION]At the end of the one-month or three-month time-limit, the Public Prosecutor and the parties shall have a ten-day time-limit, in the case of a charged person in detention, or one month in other cases, to file with the Investigating Judge supplementary submissions or observations in response to the observations or submissions of which they have had notice."

[47] Law No. 2007-291 of 5 March 2007 is aimed at safeguarding balance in criminal proceedings, page 4 (attached hereto).

[48] Closing Order, 15 September 2010, *D427*, p. 8.

[49] Final submission, 16 August 2010, *D390*.

[50] Decision on Khieu Samphan's Appeal against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, *A190/I/20*.

[51] Article 8, Practice Direction on the Filing of Documents Before the ECCC, ,01/2007/Rev.4.

68. As confirmed by Pre-Trial Chamber, exercise of the right to respond goes hand in hand with the equality of arms doctrine, according to which *"each party must be afforded a reasonable opportunity to present his case."*[52] The ECHR has also ruled on this issue. In a case in which the applicant was not notified of the prosecution submissions or of the possibility of responding thereto, the ECHR held that *"[i]t is a matter for the defence to assess whether a submission deserves a reaction."*[53] It found that the equality of arms doctrine had not been respected and, *ipso facto*, the applicant's right to a fair trial had been breached.

2. Evidence not available in French and in Khmer

69. The Pre-Trial Chamber recognized Khieu Samphan's right to receive a French translation of the Closing Order and of the evidence in support of the charges contained therein, thereby confirming the Co-Investigating Judges' Order.[54] It was solely on this condition that the Pre-Trial Chamber Judges recognised that the Charged Person was in a position to exercise his rights during the judicial investigation and that fairness of the proceedings was guaranteed.[55]

70. It should be noted that the Closing Order contains 772 pages, including 337 pages of footnotes, all in English.[56]

71. In the section on Mr Khieu Samphan's role, 36 Democratic Kampuchea telegrams[57] and three of his speeches have not been translated into French;[58] KIM Vun *alias* Choam's testimony, which is cited four times, is available in Khmer only,[59] and the French translations of the books mentioned by the Co-Investigating Judges[60] have not been

[52] ICTY, *Prosecutor v.Dusko Tadic*, *ibid.* para.48 (attached hereto).
[53] ECHR, *Bulut v. Austria*,. para. 49 (emphasis added) (attached hereto).
[54] Order on Translation Rights and Obligations, 19 June 2008, *A190.*
[55] Decision on Khieu Samphan's Appeal against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, *A190/I/2*, para 43.
[56] Order, *ibid.*, para. 1299.
[57] Order, ibid., footnote 4692.
[58] D313/1.2.328 (cited in footnotes 4771, 4773, 4800, 4801, 4864, 4871) ; D108/28.242 (cited in footnotes 4706, 4715, 4771, 4774, 4800, 4803; 4804, 4805, 4862, 4863, 4864, 4865, 4866, 4867, 4871) ; D108/43/7 (cited in footnote on page 4716).
[59] D201/10 Written record of interview of witness KIM Vun *alias* Choam (cited in footnotes 4657, 4775, 4778, 4781).
[60] IS4.1 E. BECKER, *When the War was over: Cambodia and the Khmer Rouge Revolution*, Public Affairs New

placed on the case file either, in spite of the specific request by the Defence to this effect.[61] Therefore, the pages referenced are neither pages of the French version not those of the Khmer version, but pages of the English version of the Order; this should be declared admissible, taking into account the rules adopted with regard to the language of the proceedings.

72. Here again, this puts an additional burden on Mr Khieu Samphan's Co-Lawyers, contrary to the principles of equality before the law and equality of arms. It must be emphasised that the language distribution in the Closing Order is noteworthy. As the cover page indicates, in view of the fact that the Order was prepared and drafted in French and Khmer – the mother tongues of the Co-Investigating Judges – the footnotes pose a problem. If indeed they are meant to support the Judges' reasoning, why is it that they were written in English only? Who wrote them, and why were they translated into Khmer only?

73. This *de facto* situation further highlights the dangerous lack of transparency of the judicial investigation.

3. Lack of transparency in the Co-Investigating Judges' course of action

74. Two factors contributed to the lack of transparency in the judicial investigation: the vagueness of the rogatory letters and the unexplained delays in placing them on the case file.

75. Under old French law, delegation of powers in criminal proceedings was prohibited as a rule and the term "rogatory letter" did not figure in the old code of criminal investigations.[62] Issuing the rogatory letters was gradually imposed by practice and the law eventually gave investigating judges the option to issue rogatory letters.

York 1986 (note de bas de page 4857) ; D313/1.2.6 J. SWAIN *River of Time*, Vintage London 1998 (notes de bas de page 4857 et 4859); D313/1.2.4 W. DEAC *Road to the Killings Fields – The Cambodian War of 1970-1975*, Texas A&M University Press, (note de bas de page 4859) ; D222/1.15 P. SHORT Pol Pot : The History of a Nightmare, Paperback London 2005 (note de bas de page 4859) ; D222/1.3 D. CHANDLER *Brother Number One* (note de bas de page 5385). Chacun de ces ouvrages est disponible en version française.

[61] Letter from Khieu Samphan, 20 July 2010, *A406*.

[62] CHAMBON (P.) et GUERY (C.), *Droit et pratique de the investigation préparatoire*, Dalloz Action, 2007/2008, paras.150.08; 151.13 and 151.21 (attached hereto).

76. Delegation of powers by a judge must be done according to strict rules. It is no accident that the Code of Criminal Procedure of Cambodia devotes an entire section thereto.[63]

77. The Rules is not as direct. Rule 62(1) only provides that *"[t]he Co-Investigating Judges may issue a Rogatory Letter requiring any Investigator from their Office, or the Judicial Police, to conduct investigative action. However, only the Judicial Police shall have the power to undertake any coercive action"*. Rule 62(2) adds that *"[a] Rogatory Letter shall not be issued in a general form, and shall clearly specify the nature of investigative work to be done, which must relate directly to the crime or crimes under investigation. The Co-Investigating Judges shall set the time limit for compliance with a Rogatory Letter."*

78. As observed by Professor Bernard Branchet in his Expert Report, throughout the investigation, the rogatory letters issued by the Co-Investigating Judges were couched in such general and vague terms that it was impossible to identify the purpose of the delegation of powers by the Judges (Expert Report, p. 17, para. 82).[64] The Co-Investigating Judges alternately requested the investigators "*to identify and, if possible, locate (...) any surviving witnesses to the factual circumstances outlined in the Introductory Submission by the Co-Prosecutors on 18 August 2007*",[65] to request them to specify the facts *"generally concerning the crimes under judicial investigation and, in particular, the role of the Charged Persons"*[66] or to locate archives *"relating to the above-referenced ongoing judicial investigation by the ECCC"*.[67] With a few exceptions, where witnesses were summoned, no information was provided about their biography or the purpose of their interview.[68]

79. A reading of the written records of witness interview therefore reveals that the investigators had very little information on the interviewees, and the interviews were

[63] Code of Criminal Procedure of Cambodia, Book IV, Heading 1, Chapter 2, Section 8.
[64] Professor Bernard Branchet's Expert Report, p. p.17 para. 82 (attached hereto).
[65] See Rogatory Letters D25, D94 and D107.
[66] See Rogatory Letters D129, D145, D151, D169, D170, D200, D201, D208, D217, D247, D231, D246, D277, D278 and D296.
[67] See Rogatory Letters D43, D82, D104, D159, D161, D175 and D248.
[68] Professor Bernard Branchet's Expert Report, p.18 para. 83 (attached hereto), see Rogatory Letters D145, D151, D169, D170, D208, D217, D232, D247, D277, D278 and D368.

conducted haphazardly.[69] The execution of international rogatory letters in France offers an interesting comparison. The rogatory letter does not only facilitate understanding of its purpose, but it provides a summary of each witness' biography,[70] and the investigators' reports contain a complete account of the actions all undertaken.[71]

80. The Defence was therefore not in a position to follow the investigation and nothing was done to facilitate its intervention. Furthermore, unexplained delays in placing the Rogatory Letters on the case file contributed to the exclusion of the Defence from proceedings.

81. Although the Code of Criminal Procedure of Cambodia and the Internal Rules do not contain any specific provisions regarding time limits, the provisions of the French Code of Criminal Procedure, which is the source of guidance for the Cambodian Code, are enlightening. The last paragraph of Article 151 provides that *"[t]he investigating judge fixes the time limit within which the rogatory letter must be returned to him with the official reports drafted for its execution by the judicial police officer. Failing such determination, the rogatory letter and the official reports must be transmitted to him within a week of the end of the operations executed pursuant to the letter.]"*[72] The general circular of 1 March 1993 states that "[TRANSLATION] *this provision is aimed at preventing undue prolongation of the time for returning the rogatory letters and ensuring that the investigating judge is not kept uninformed of the evolution of the case and is not in a position to determine the case. It also clears up any ambiguity as to when the rogatory letter should be placed on the case file".*[73]

82. As Professor Bernard Branchet again emphasizes in his expert report (Expert Report, p. 22, para. 106),[74] in numerous instances, the reports of execution of Rogatory Letters were placed on the case file very belatedly,[75] not to mention the fact that translation into

[69] Regarding deliberate omission of exculpatory evidence, see D25/34; as regards inability to proceed with critical questioning, see D25/30.
[70] International Rogatory Letter, 13 March 2009, *D199.*
[71] See records of witness interview D199/6 to D199/21.
[72] emphasis (attached hereto).
[73] Our emphasis (attached hereto).
[74] Professor Bernard Branchet's Expert Report , page 22 para. 106 (attached hereto)
[75] For example: the Rogatory Letter Completion Report D231/1 dated 25 June 2009 was placed on the case file on 5 January 2010; Closing Order D248/7 (16 November 2009) was placed on the case file on 4 February 2010 while the Investigators' Reports (D248/2 to D248/6.3) dated back to May and August 2009, Site Identification

French was often delayed for several months,[76] or even for more than one year.[77] In fact, some reports have only been sent for translation in the last few days![78] As regards Rogatory Letters requesting the judicial assistance of Foreign States, the unfruitful results of the measures purportedly taken by the Co-Investigating Judges were not brought to the Defence's until 2010.[79] Moreover, seven Rogatory Letters – including Letter D125, which is among the key Rogatory Letters in the judicial investigation – have yet to be translated into French,[80] not to mention three rogatory letter completion reports and notes by the Co-Investigating Judges.[81]

83. Furthermore, 5,421 documents were placed on the case file after the judicial investigation file was forwarded to the Co-Prosecutors on 19 July 2010.[82] On the one hand, there is no guarantee that the Co-Investigating Judges actually took into account these documents, and on the other hand, the Defence was again denied the opportunity of any adversarial debate.

84. Yet, the possibility of following the work of the judges and the transparent nature of their actions are positive guarantees of a fair trial. While in inquisitorial systems, it was long held that an effective investigation meant excluding the personal under judicial examination, it is now established that confidentiality of the investigation must no longer apply to charged persons and transparency is a condition sine *qua non* for a fair trial. Keeping charged person abreast of the strategy and methods employed is a guarantee against arbitrary decisions.

B. <u>The investigation is incomplete and partial</u>

85. The Closing Order ought to be revoked because it derives from an incomplete and

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Report D125/221 was placed on the case file on 21 July 2010 whereas it was prepared on 21 April 2009.
[76] See Rogatory Letter D175: the French translation was placed on the case file 11 months late.
[77] See Rogatory Letter D145: the French translation was placed on the case file one year and one month late.
[78] See service of the French version of Closing Order D359/1/1 (attached hereto).
[79] See Co-Investigating Judges' Note D199/26, which was placed on the case file on 8 January 2010;Closing Order D292/3 was placed on the case file on 10 February 2010, Co-Investigating Judges' Note D291/6 was placed on the case file (only in Khmer and English) on 9 April 2010 and the Closing Order D359/1/1 *ibid.* placed on the case file on 18 May 2010 (in Khmer and in English only).
[80] See Rogatory Letter Completion Reports D123, D125, D169, D201, D203, D231 and D373.
[81] See Rogatory Letter D203/1 and D373/1, and Co-Investigating Judges' Note D291/6.
[82] List of documents placed on the case file after the Forwarding Order, prepared by the ECCC Court Management Section, 5 October 2010 (attached hereto).

partial investigation.

1. The investigation is incomplete

86. Mindful of rendering quality justice, Pre-Trial Chamber international Judges Catherine Marchi-Uhel and Rowan Downing, asserted in their separate opinions that *"[p]reventing testimony from witnesses that have been deemed conducive to ascertaining the truth may infringe upon the fairness of the trial."*[83]

87. In this regard, it is noteworthy that the Co-Investigating Judges did not seek the cooperation of Foreign States, whereas numerous third States accepted to offered access to their archives in order to assist the ECCC to ascertain the truth regarding Mr Khieu Samphan's innocence. Thus, according to His Excellency Kurt Schumann, Ph.D Political Science, who was First Secretary at the Embassy of the Democratic Republic of Germany (GDR) in Phnom Penh from 1968 to 1972, "[TRANSLATION] *There are a number of witnesses in Vietnam, China and among the agents of the CIA, who could contribute to the ascertainment of the truth.*"[84] The German diplomat adds that in the absence of any evidence, Mr Khieu Samphan will be prosecuted on political grounds. This being the case, it was the Co-Investigating Judges' obligation to clarify the position of Mr Khieu Samphan within the regime of Democratic Kampuchea so as to ensure that the judicial proceedings regarding his responsibility does not give rise to political manipulation of the trial. Furthermore, the head of archives within the Bulgarian Ministry of Foreign Affairs indicated that he was prepared to cooperate;[85] Mr Khieu Samphan is waiting for a response from the French National Archives[86] and from the Cuban Central Committee.[87] The few archives from foreign countries which were placed on the case file were not assessed by the Co-Investigating Judges. Accordingly, 97 documents from the GDR archives, which evidence is vital to understanding the international challenges that the Democratic Kampuchea regime had to deal with and, in

[83] Second Decision on Nuon Chea's and Ieng Sary's Appeals Against OCIJ Order on Requests to Summon Witnesses, 9 September 2010, *D314/2/10,* Opinions of Judges Catherine Marchi-Uhel and Rowan Downing, para.12.
[84] Account of Dr Schumann, Berlin, 7 July 2010 (attached hereto).
[85] Email from Borislav Stanimirov, head of archives in the Bulgarian Ministry of Foreign Affairs, 7 May 2010 (attached hereto).
[86] Letter to Bernon, National French Archives, Phnom Penh, 14 July 2010 (attached hereto).
[87] Letter to the Central Committee of the Republic of Cuba, Phnom Penh, 14 July 2010 (attached hereto).

particular, the fact that Mr Khieu Samphan did not participate in the crimes committed, are mentioned only three times.[88] However, the German reports are crystal clear as to the fact that Mr Khieu Samphan is not named as a criminal or as someone who had any executive authority within the Government of Democratic Kampuchea nor indeed that he had any intent to commit genocide.

88. The Co-Investigating Judges simply made reference to the media reports. Despite the Pre-Trial Chamber's decision that the media allegations do not amount to reliable evidence,[89] the Co-Investigating Judges still went ahead and cited more than 60 documents from the media in the section of the Order concerning Mr Khieu Samphan's alleged role, some of them more than twenty times,[90] as a way to repeat and manipulate the judicial discourse for the purpose of the trial.

89. Furthermore, the Co-Investigating Judges omitted to interview many a witness, even though those witnesses were considered conducive to ascertaining the truth. When the Defence requested the summoning of three National Security Advisors who served during the period of Democratic Kampuchea, – Henry Kissinger, Brent Scowcroft and Zbigniew Brzezinski – in order to obtain information on the role of the United States and the number of deaths from the US bombings of Cambodian territory,[91] their request was purely and simply rejected.[92]

90. When the Defence requested to place on the case file *"documents relating to Mr Khieu Samphan's real activity during the period of Democratic Kampuchea*,[93], the Co-Investigating Judges again denied their request. Yet, the Pre-Trial Chamber found that *"the Request contained a prima facie reason for the Co-Investigating Judges to believe that the DC-Cam documents referred to by Dr. Etcheson in paragraph 31 and footnote*

[88] Order, *D359/1/1.1.44 (*footnotes 3778, 3781); *359/1/1.1.51* (footnote 4108)..
[89] Decision on KHIEU Samphan's Application to Disqualify Investigating Judge Marcel Lemonde, 14 December 2009, *Case File No. 002/13-10-2009-ECCC/PTC(02) Document 07.*
[90] Order; D262.2 Foreign Broadcast Information Service January 1975 is cited 23 times: see footnotes 4637, 4660, 4669, 4701 (five times), 4715, 4716, 4717, 4720 (two times), 4730, 4743 (two times), 4745, 4746, 4747, 4771 (two times) and 4861 (two times).
[91] Nuon Chea's Fifth Request for Investigative Action, 26 September 2008, *D105,* and KHIEU Samphan's Request for Investigative Action, 29 June 2009, *D105/3.*.
[92] Order on NUON Chea's Requests for Investigative Action Relating to Foreign States (D101, D102, D105, D126 & D128), 13 January 2010, *D315.*
[93] Request to Place on the Case File All the Documents Relating to Mr Khieu Samphan's Real Activity During the Period of Democratic Kampuchea, 2 March 2010, *D370.*

341 of his Record of Analysis are conducive to ascertaining the truth. The Co-Investigating Judges committed a mixed error of law and fact by concluding otherwise" [94]

91. Moreover, the Co-Investigating Judges limited their investigations to evidence about the crimes alleged in paragraphs 37 to 72 of the Introductory Submission and omitted to investigate any link between the Charged Persons and the alleged crimes, despite requests by the Co-Prosecutors and clarifications about the scope of the judicial investigation.[95] In this regard, Professor Bernard Branchet's Expert Report speaks volumes. Out of 58 rogatory letters, only 9 – all of which were issued at the end of the judicial investigation in 2009 and 2010 – are aimed at determining "[TRANSLATION] *whether there is a direct or indirect link between these crimes and the Charged Persons or the organs of Democratic Kampuchea to which they belonged"* (Expert Report, p. 17, para.78)[96]. The Order is further testimony to this, in that only 25 of the 450 pages of reasoning concern Mr Khieu Samphan.

92. Finally, Professor Bernard Branchet's Expert Report highlights the fact that the Co-Investigating Judges omitted to undertake a character inquiry (Expert Report, p. 16, para. 79).[97] While the Rules do not require them to perform this task, French law, which is a source of guidance for the ECCC Judges, requires a character inquiry in criminal cases (Art. 81, para. 6 of the French Code of Criminal Procedure).[98]

93. In the instant case, the Co-Investigating Judges simply ordered a psychological assessment in order to determine whether the Charged Persons were fit to stand trial.[99] And despite Khieu Samphan's refusal to undergo a psychological assessment, the experts nonetheless submitted a report.[100] The section of the Closing Order purportedly

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[94] Decision on the Appeal Against the 'Order on The Request to Place on the Case [File] the Documents Relating to Mr. Khieu Samphan's Real Activity', *D370/2/11*, para. 33.
[95] Co-Prosecutors' Response to the Co-Investigating Judges Request to Clarify the Scope of the Judicial Investigation Requested in its Introductory and Supplementary Submissions, 13 August 2008, *D98/I.*.
[96] Professor Bernard Branchet's Expert Report, p. 17, para. 78 (attached hereto). See Rogatory Letters D232, D233, D234, D276, D279, D280, D369, and also D94 and D123.
[97] Professor Bernard Branchet's Expert Report, p. 16, para. 79 (attached hereto).
[98] Article 81, paragraph 6 of the French Code of Criminal Procedure (attached hereto).
[99] Expertise Order, 17 September 2009, *B36.*
[100] Psychiatric Expert Report, 22 November 2009, B36/5

concerning Mr Khieu Samphan's character does not in any way describe his character and contains only passages of biographical data.[101]

94. At any rate, the Co-Investigating Judges failed to fulfill the obligation to precisely investigate all the facts of which they were seised in order to ascertain the truth. The Order is the result of an abuse of process in that it closes a judicial investigation that is clearly not completed, simply because of the impending expiration of the lawful period of Mr Nuon Chea's provisional detention.[102]

2. Judicial investigation clearly focused on inculpatory evidence

95. The lack of impartiality is manifested in several ways: Judge Marcel Lemonde's bias, the disproportionate number of dismissed Defence requests and the slanted and incomplete presentation of the Closing Order.

96. Firstly, it clearly emerges that the dismissal of the case was never envisaged during the judicial investigation and that Mr Khieu Samphan was clearly presumed to be guilty. This bias was openly expressed by Judge Marcel Lemonde in the media. Following the issuance of the Order, Judge Lemonde expressed satisfaction in the press about the indictment of the four Charged Persons, saying: *"We are able to rejoice in at last having a document that will allow the staging of trials that Cambodians have awaited for 30 years"*[103] and asserted that *"[the Charged Persons] do not feel happy, but they do not feel surprised"*.[104]

97. The Investigating Judges' unacceptable bias was apparent throughout the investigation and it prompted a number of applications for disqualification from the Defence.[105] In

[101] Order paras. 1598 to 1604.
[102] Nuon Chea Provisional Detention Order, 19 September 2007, *C9.*
[103] The Cambodia Daily, 17 September 2010, p. 2, (attached hereto).
[104] The Cambodia Daily, 17 September 2010, p. 1 (attached hereto).
[105] Ieng Sary's Application to Disqualify Judge Marcel Lemonde & Request for a Public Hearing, 9 October 2009, *Case File No. 002/9-10-2009-ECCC/PTC(01) Document 01*, KHIEU Samphan's Application to Disqualify Co-Investigating Judge Marcel Lemonde, 13 October 2009, *Case File No. 002/13-10-2009-ECCC/PTC(02) Document 01*; Nuon Chea's Application for Disqualification of Judge Marcel Lemonde, 29 October 2009, *Case File No. 002/29-10-2009-ECCC/PTC(04) Document 1*; Ieng Thirith's Application to Disqualify Co-Investigating Judge Marcel Lemonde, 7 December 2009, *Case File No. 002/7-12-2009-ECCC/PTC(05) Document 1*; Ieng Sary's Second Rule 34 Application to Disqualify Judge Marcel Lemonde and Joinder to Ieng Thirith Defence Application for Disqualification of Co-Investigating Judge Marcel Lemonde and

fact, the international Co-Investigating Judge did acknowledge the fact that the judicial investigation came under a great deal of criticism: *"We were unable to obtain everything we wanted. (…) We were unable to hear certain witnesses. (…) We sometimes had problems in obtaining answers from governments to which were asking questions"*.[106]

98. Even though the Pre-Trial Chamber found the Defence's evidence against Judge Lemonde insufficient for it to decide his qualification,[107] there is no doubt that the international Co-Investigating Judge's attitude impaired the search for the truth.

99. Throughout the judicial investigation, the Co-Investigating Judges applied the principle of *"sufficient charges"*, a flawed principle, pursuant to which *"an investigating judge may close a judicial investigation once he has determined that there is sufficient evidence to indict a Charged Person"*,[108] and seek the truth without fulfilling the obligation to seek exculpatory evidence.[109] This principle was castigated by the Pre-Trial Chamber precisely in relation to the SMD,[110] but, quite clearly, the Co-Investigating Judges never abandoned it. In the Closing Order, they again make reference to the principle devised for the express purpose of justifying the indictment.[111]

100. The Office of the Co-Investigating Judges consistently refused to divulge the methods it employed in the search for the truth despite the concerns expressed several times by the Defence.[112]

Request for a Public Hearing, 11 December 2009, *Case File No. 002/7-12-2009-ECCC/PTC(07) Document 1.*

[106] The Cambodia Daily, 17 September 2010, p. 2 (attached hereto).
[107] Decision on Khieu Samphan's Application to Disqualify Co-Investigating Judge Marcel Lemonde, 14 December 2009, *Case No. 002/13-10-2009-ECCC.PTC(02) Document 07.*
[108] Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD, 19 June 2009, *D164/2*, para. 6.
[109] Order, para. 15.
[110] Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, *D164/4/13*, paras.37 and 38.
[111] Order,. paras.1320 to 1327.
[112] Ieng Sary's Third Request for Investigative Action, 21 May 2009, *D171*; Khieu Samphan's Notice of Adoption of IENG Sary's Third Request for Investigative Action, 24 August 2009, *D171/3*; Letter from the Nuon Chea Defence to the Office of the Co-Investigating Judges concerning lack of confidence in the judicial investigation, 15 October 2009, *D221*; Ieng Sary's support and joinder in part of Nuon Chea's nineteenth to twenty-fifth Requests for Investigative Action, 12 February 2010, *D355.*

101. Moreover, Professor Bernard Branchet's Expert Report reveals that the Co-Investigating Judges denied the Defence's requests for investigative actions were (Expert Report, p. 17, para. 80).[113] Thirteen out of fifty Defence requests – or nearly a third – were denied in their entirety, as opposed to 1 out of 40 of the Co-Prosecutors' requests, or less than 3%, and 1 out of 10 for the Civil Parties. In addition, whereas the Co-Prosecutors' or the Civil Parties' requests granted earlier prompted substantive investigations, it was not so for the entirety of the Defence requests, notably requests addressed to Foreign States.[114]

102. Also, documents filed by the Prosecution were automatically recorded and placed on the case file by the Greffiers, [115] unlike documents from the Defence. In fact, the Pre-Trial Chamber vindicated Mr Khieu Samphan on this point.[116]

103. The bias in the judicial investigation is clearly apparent in the Closing Order. The Defence will only cite the most glaring examples.

104. The Co-Investigating Judges deliberately excluded a crucial French Ministry of Foreign Affairs document in which France's ambassador in Bangkok in 1977 outlined the reasons why *"Mr Khieu Samphan's] real power seems to be much more limited than his official rank would suggest*".[117]

105. In the section of the Closing Order dealing with Khieu Samphan's role, Kaing Guev Eav *alias* Duch seems to be the Co-Investigating Judges' key witness. Unsound and unfounded as it is, his testimony is cited 34 times in twenty pages. Regarding his alleged knowledge of S-21, the Co-Investigating Judges rely exclusively on his statements to support their charges.[118] Yet the information provided by Duch is inconsistent[119] and

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[113] Professor Bernard Branchet Expert Report, p. 17, para. 80 (attached hereto).
[114] Ibid., p. 17, para. 81 (attached hereto).
[115] See Greffiers' Notes D157/1; D195/ ; D223/1; D224/1; D262/1; D152/1; D190/1.
[116] Decision on the Appeal Against the 'Order on the Request to Place on the Case [File] the Documents Relating to Mr. Khieu Samphan's Real Activity', para. 33.
[117] See D199/26.2.172. This document is not cited in the section on Khieu Samphan's role (only at paragraph 889 concerning Mr Nuon Chea).
[118] Order. para. 1182 - footnotes 4820 to 4824.
[119] See IS20.18. Before the Military Tribunal in March 1999, Kaing Guev Eav *alias* Duch clearly stated during questioning that behind Mr Khieu Samphan's title as President of the State Presidium, his actual role was managing all materials issued to rural areas. When naming members of the Central Committee, he placed him in last position.

numerous facts show that he is not at all a reliable witness: he changed his defence strategy in the last minute, challenged the jurisdiction of the Court and will go to any length to secure his release. It is quite clear that he is not in a position to testify on the role or responsibility of the Khmer Rouge Head of State, as he did not know him then.

106. In violation of the *in dubio pro reo* principle, the formulation of the Co-Investigating Judges' discourse is entirely inculpatory. Even without any evidence, the Co-Investigating Judges were prepared to assert that Mr Khieu Samphan *"would have had access"* to minutes of the Standing Committee meeting, that he *"would have known of and participated in"* the arrest and subsequent execution or suicide of standing committee members,[120], that he *"would have participated in the formulation of a document"* on social classes[121], or that he *"would have [read]"* certain publications of the Party.[122]

107. Whereas a large body of evidence clearly points to the fact that Mr Khieu Samphan neither participated in nor had knowledge of the facts at issue, the Co-Investigating Judges formulate a charge on uncertain grounds. A notable example is Khieu Samphan's alleged participation in the transfer of people from the Central, South-West, West and East Zones, which was allegedly decided after the Central Committee's visit to the North-West Zone. *"While there is no record of who participated in this visit, even if Khieu Samphan was not part of this mission"*, they conclude that he did participate therein based on their personal assumptions.[123]

108. The Co-Investigating Judges also draw wrong inferences from documents, whereas those documents are very clear. For instance, they assert that *"as a full-rights member of the Central Committee, [Khieu Samphan] could, consider and discuss and join in the decision making"* with regard to all matters.[124] This charge is not only absurd but also entirely unfounded; Article 3 of the Statutes of the Communist Party of Kampuchea (CPK), which is cited, does not say that the Head of State: *"consider[ed] and discuss[ed] and join[ed] in decision making on all Party matters, doing this according*

[120] Order *ibid* para. 1185. Emphasis added.
[121] Order *ibid* para. 1192. Emphasis added.
[122] Order *ibid.* para. 1198 et 1199.
[123] Order, para. 1162.
[124] Order, para 1131.

to the principle of democratic centralism".[125] This was confirmed by contemporaneous witnesses; Khieu Samphan never participated in, planned or contributed to the country's internal security and neither did he participate in, plan or contribute to the prosecution of any members of the opposition. This was not part of his culture, training or political intent.

109. Finally, the Co-Investigating Judges confirm the charges without citing any element of proof. For example, they assert that Mr Khieu Samphan contributed and assisted in devising policy regarding the Chams, but they offer no documentary records in support of their allegations; such being the case, this is an extremely serious charge, which is damaging to the integrity of the Court as an international judicial organ.[126]

3. Dangerous judicial investigation

110. Seised of the Defence's Appeal[127] against the Co-Investigating Judges' Order on use of statements which were or may have been obtained by torture,[128] the Pre-Trial Chamber recalled that *"[n]otwithstanding any observations to the contrary by the Co-Investigating Judges in the Order, Article 15 of the CAT is to be strictly applied. There is no room for a determination of the truth or for use otherwise of any statement obtained through torture."*[129]

111. In response to the Defence's requests for information and clarification,[130] the Co-Investigating Judges committed themselves to provide clarifications on the use of evidence obtained by torture in the Closing Order. They asserted that *"[i]t is only when each piece of direct or derivative evidence that we have identified as raising an issue of torture has been assessed, on a case by case basis (…) that the Defence requests can be*

[125] IS9.1., Statute of the Communist Party of Kampuchea, Article 3.
[126] Order, para. 1195.
[127] Khieu Samphan's Appeal against the Order on Use of Statements Which Were or May Have Been Obtained by Torture, 27 August 2008, *D130/10/1.*
[128] Order on Use of Statements Which Were or May Have Been Obtained by Torture, 28 July 2009, *D130/8.*
[129] Decision on Admissibility of the Appeal against Co-Investigating Judges' Order on Use of Statements Which Were or May Have Been Obtained by Torture, 27 January 2010, *D130/10/12*, para.28.
[130] Ieng Sary's Lawyers' Request Concerning the OCIJ's Identification of, and Reliance on, Evidence Obtained Through Torture, 17 July 2009, *D130/7* ; Ieng Sary's Second Letter Concerning Identification of, and Reliance on Evidence Obtained Through Torture, 7 August 2009, *D130/7/2* ; Nuon Chea's Fifteenth Request for Investigative Action, 1 September 2009, *D130/11.*

satisfied in (…) the Closing Order".[131]

112. This is not true of the present case: the Order says nothing about this issue. Here again, the Co-Investigating Judges have surrendered all their analytical and interpretation powers to the Pre-Trial Chamber.

113. Worse still, the Co-Investigating Judges have manifestly violated the exclusionary rule. The Defence has proof that one of the charges against Khieu Samphan is based partly on the contents of a confession. In paragraph 1188 of the Order, the Co-Investigating Judges claim that *"Khieu Samphan was present during the arrest of Von Vet on 2 November 1978 at the headquarters of the Standing Committee (…)."* The confession of PENH Thuok, *alias* VON Vet, which was obtained at S-21,[132] is cited in support of this claim. However, VON Vet mentions the date of his arrest in the middle of a confession that was obtained or may have been obtained by torture.[133]

114. In this regard, in a very recent ruling dated 18 August 2010, the French Court of Cassation overturned a 13 July 2010 Decision of the Paris Examining Chamber *[Chambre de l'instruction]* which had held that "[TRANSLATION] *the charges (…) stem from a body of evidence, including statements (…) allegedly obtained by torture]", and the judges pointed out further '[that it was not a matter for them to determine the circumstances under which the charges against the accused were identified"* (decision of 18 August 2010, p. 2, lines 50 to 54). The Court also held that ""[TRANSLATION] *in so deciding, without further details about any other evidence in support of the charges (…) and although the prejudice suffered from violation of Article 15 of the Convention Against Torture (…) was without effect at law, the Investigations Division did not give reasons for its decision".* (decision, p. 2, lines 55 to 58).[134]

115. The Pre-Trial Chamber therefore ought to direct the Co-Investigating Judges to continue their investigations for exculpatory evidence, for it is impossible to prosecute

[131] Co-Investigating Judges' Letter, 30 October 2009, *D130/11/2.*
[132] Order, footnote 4845.
[133] IS5.74 S-21 Confession of PENH Thuok, alias VON Vet, alias PENH Thouk *alias* Von p.14.
[134] *Cour de Cassation, Chambre criminelle*, 18 August 2010, Decision No. 10-85717, page 2, lines 50 to 58 (annexed hereto).

President Khieu Samphan under the same conditions as Ieng Sary or Nuon Chea, who have confessed and acknowledged the crimes they personally planned and committed.

116. Consequently, the Pre-Trial Chamber has the obligation to revoke the Order in order to facilitate the task of the Co-Investigating Judges in the search for the truth, and to heed the quest of Mr Khieu Samphan's Lawyers for better justice, failing which, the Pre-Trial Chamber will be considered complicit in the irregularities and violations denounced *supra*.

117. **For these, reasons,** the Defence respectfully requests the Pre-Trial Chamber to:

- **Declare** this Appeal admissible;
- **Find** that numerous requests for actions essential for ascertaining the truth have been denied by the Co-Investigating Judges ;
- **Find** that the majority of the investigative actions have been limited to a cursory and general examination of the crimes, without determining whether there is any link between Khieu Samphan and the facts;
- **Find** that the *a minima* conduct of the judicial investigation is not sufficient;
- **Rule** that the scope of the investigations does not reflect the truth.

118. Consequently:

- **Revoke** the Closing Order ;
- **Order** continuation of the judicial investigation.

119. In any case:

- **Instruct** the Co-Investigating Judges to continue the judicial investigation;
- **Rule** that it is impossible to send Khieu Samphan for trial before the Trial Chamber at the current stage of the proceedings.

Respectfully,

	SA Sovan Jacques VERGÈS Philippe GRÉCIANO	Phnom Penh Paris	
Date	Name	Place	Signature