

BEFORE THE TRIAL CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

**FILING DETAILS**

**Case No:** 002/19-09-2007-ECCC/TC **Party Filing:** Co-Prosecutors

**Filed to:** Trial Chamber **Original Language:** English

**Date of document:** 28 February 2013

**CLASSIFICATION**

**Classification of the document  
suggested by the filing party:**

PUBLIC

**Classification by Trial Chamber:**

សាធារណៈ/Public

**Classification Status:**

**Review of Interim Classification:**

**Records Officer Name:**

**Signature:**




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**CO-PROSECUTORS' REQUEST TO ESTABLISH PROCEDURE REGARDING  
ADMISSION OF DOCUMENTS NOT TRANSLATED IN ALL ECCC LANGUAGES**

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## I. INTRODUCTION

1. The Co-Prosecutors submit this request in order to clarify the status of translation issues and establish the procedure to address the admissibility of documents or other evidence not translated in all three official languages of the ECCC. Such decisions should be made in accordance with ECCC precedent and international practice, and thus may only exclude evidence that an Accused is unable to sufficiently understand due to the lack of translation. Certain types of evidence, such as photographs, video and maps, do not require translation in order to adequately understand their evidentiary purpose. The Interpretation and Translation Unit (ITU) has completed the translation of the vast majority of trial documents whose translation is necessary, and it is expected that all remaining translations will be completed prior to the end of trial. The Co-Prosecutors submit that a procedure must be established in order to adjudicate these issues, and thus propose that (a) the Accused be required to identify by the end of trial any documents they contend should be excluded on this basis and (b) the Co-Prosecutors be afforded the opportunity to respond to any such objections.

## II. PROCEDURAL BACKGROUND

2. On 19 October 2012, the Trial Chamber issued a memorandum regarding “Forthcoming document hearings,” which requested the Co-Prosecutors to seek to limit the written witness statements to be put before the Chamber to those that could be “made available in all official ECCC languages by Friday 29 February 2013.”<sup>1</sup> In response, the Co-Prosecutors have made a concerted effort to reduce the number of statements they seek to rely upon, and have informed the Chamber and the parties that they expect to be able to reduce the number of statements proposed for admission by as much as 40 per cent. The Lead Co-Lawyers were requested to make the same effort for Civil Party Applications by Monday 4 March 2013.<sup>2</sup>
3. In a 3 December 2012 decision regarding the admission of documents identified in Co-Prosecutors’ Annexes A6-A11 and A14-A20, the Trial Chamber stated:

*Regarding the availability of translations of documents into all ECCC official languages, the Trial Chamber has previously indicated that parties seeking the introduction of documents at trial bear the burden of ensuring their timely availability in all three official languages. Although the Chamber has previously granted some latitude where the parties are precluded from doing so due to workload constraints of the Interpretation and Translation Unit*

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<sup>1</sup> E223/2 Memorandum titled “Forthcoming document hearings and response to Lead Co-Lawyers’ memorandum concerning the Trial Chamber’s request to identify Civil Party applications for use at trial (E208/4) and Khieu Samphan Defence request to revise corroborative evidence lists (E223),” 19 October 2012, at para. 9. The reference to “Friday 29 February” was presumably a typo or error.

<sup>2</sup> *Ibid.* at para. 12.

*(“ITU”), it has recently directed parties, in consultation with the ITU, to adjust the quantity of material that they seek to tender into evidence to that which can be made available in all official ECCC languages by Monday, 4 March 2013.<sup>3</sup>*

4. On 13 February 2013, the Trial Chamber extended its request to “all materials proposed for admission,” and directed the parties “in consultation with ITU, to ensure all categories of evidence tendered by them are so available by 4 March 2013 and that all material proffered can be made available before the Chamber in all three official ECCC languages prior to the conclusion of the hearing of evidence in Case 002/01.”<sup>4</sup>
5. Pursuant to the Trial Chambers’ instructions, the Co-Prosecutors have reviewed the translation status of the documents that have been put before the Chamber by the Co-Prosecutors, other parties and the Chamber itself. With respect to documents that were put before the Chamber by other parties, or admitted and assigned E3 numbers by the Chamber itself, the Co-Prosecutors have identified a total of 126 documents with E3 numbers that were not documents proposed by the Co-Prosecutors in their Trial Document Annexes. Of those 126 documents, approximately one half (62) are still not available in all three languages. By contrast, of the nearly 5,000 documents that have been put before the Chamber by the Co-Prosecutors, almost all requested translations have been completed. Based on the ITU translation interface, the Co-Prosecutors estimate that they have only 218 translation requests that remain outstanding, representing less than 5% of the total documents tendered by the Co-Prosecutors. (The translation interface shows an additional 61 OCP translation requests that have been completed, but are awaiting final review or uploading.)
6. The high percentage of completed translations for the documents tendered by the Co-Prosecutors is due to the fact translation requests for necessary documents were submitted to ITU in 2011, following the Co-Prosecutors’ identification and filing of their Rule 80(3) Trial Document lists. Since that time, the Co-Prosecutors have worked with ITU to prioritize their translation requests and ensure that significant documents were translated in a timely manner and available when required in the trial proceedings. ITU’s expected date for completion of these translations, shown in the translation interface, indicates that 124 of the pending requests will be completed in February, March or April 2013, another 63 in May 2013 and the remaining 31 requests by June 2013.

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<sup>3</sup> **E185/1** Decision on Objections to Documents Proposed to be Put Before the Chamber in Co-Prosecutors’ Annexes A6-A11 and A14-A20 and by the Other Parties, 3 December 2012, at para. 16.

<sup>4</sup> **E246/1** Memorandum titled “Response to Motions E246 and E185/1/1 and other sundry requests concerning documents and deadlines,” 13 February 2013, at para. 3.

### III. APPLICABLE LAW

7. In accordance with Article 35 new of the ECCC Law, which refers to the “minimum guarantees [in] Article 14 of the International Covenant on Civil and Political Rights,” the Accused have the following explicit rights relevant to the issue of translation: (i) “to be informed promptly and in detail in a language that they understand of the nature and cause of the charge against them;” (ii) to “examine evidence against them and obtain the presentation and examination of evidence on their behalf under the same conditions as evidence against them;” and (iii) to “have the free assistance of an interpreter if the accused cannot understand or does not speak the language used in the court.” Internal Rule 21(1)(d) reiterates the first of these rights.
8. The Pre-Trial Chamber (“PTC”) has developed significant jurisprudence on the issue of translation rights in disposing of appeals by the Defence for Ieng Sary<sup>5</sup> and Khieu Samphan.<sup>6</sup> Being specific to the legal framework and language support services of the ECCC, this jurisprudence remains both instructive and persuasive.
9. In contrast to the “explicit rights” found in the ECCC Law and Internal Rules, the PTC has held that: (i) “neither the ECCC Law nor the Internal Rules provide Charged Persons an explicit right to receive all documents contained in their Case File in their own language *or that of their lawyer(s)*;<sup>7</sup>” and (ii) “the fact that a language is one of the three official languages of the Court does not amount, in itself, to a right for the Charged Person to have all documents contained in his Case File translated into this language.”<sup>8</sup> The PTC has also reviewed and synthesised the relevant jurisprudence of international criminal tribunals and regional human rights courts.<sup>9</sup>
10. Whilst Defence teams elect two languages of preference for their work at the ECCC, PTC jurisprudence takes account of the Accused’s actual understanding of the official languages of the ECCC in assessing their ability to understand documents, not merely their stated choice of language or the preferences of their lawyers. For instance, the PTC considered the fact that although French was not a language adopted by his Defence team, Accused Ieng Sary has some fluency in French, having studied in France,<sup>10</sup> as previously acknowledged by his Defence

<sup>5</sup> **A190/II/9** Decision on Ieng Sary’s Appeal against the OCIJ’s Order on Translation Rights and Obligations of the Parties, 20 February 2009 (“Ieng Sary Appeal Decision”).

<sup>6</sup> **A190/I/20** Decision on Khieu Samphan’s Appeal against the Order on Translation Rights and Obligations of the Parties, 20 February 2009 (“Khieu Samphan Appeal Decision”).

<sup>7</sup> **A190/I/20** Khieu Samphan Appeal Decision, *supra* note 6 at para. 40; see also **A190/II/9** Ieng Sary Appeal Decision, *supra* note 5 at para. 34 [emphasis added].

<sup>8</sup> **A190/I/20** *Ibid.*; see also **A190/II/9** *Ibid.*

<sup>9</sup> **A190/I/20** *Ibid.* at para. 41; see also **A190/II/9** *Ibid.* at para. 35.

<sup>10</sup> **A190/II/9** *Ibid.* at para. 39

team.<sup>11</sup> The PTC also took account of the composition and language skills of a “multilingual defence team”<sup>12</sup> (including Co-Lawyers, consultants and other jurists), as well as access to translators and interpreters,<sup>13</sup> in finding that the Translation Order of the Co-Investigating Judges was “in accordance with international standards in respect of translation rights.”<sup>14</sup>

11. The Statute of the International Criminal Court (“ICC”) grants more expansive documentary translation rights than those explicitly provided in ECCC Law, including the right of the accused person “to have, free of any cost [...] such *translations as are necessary to meet the requirements of fairness*, if any [...], documents presented to the Court are not in a language which the accused fully understands and speaks”<sup>15</sup> The ICC Rules of Procedure and Evidence, subordinate to the Statute, specify that *prosecution witness statements* are the only category of documents subject to an explicit requirement to be made available “in original and in a language which the accused fully understands and speaks.”<sup>16</sup> In both *Lubanga* (2006)<sup>17</sup> and *Ngudjolo* (2008),<sup>18</sup> cited with approval by the ECCC PTC,<sup>19</sup> the ICC Pre-Trial Chamber (Single Judge) rejected Defence requests for all documents to be disclosed in advance of the confirmation of charges hearing to be translated into French, finding that the words “as are necessary to meet the requirements of fairness” in Article 67(1)(f) of the Rome Statute:

*does not grant [...] the right to have all procedural documents and all evidentiary materials disclosed by the Prosecution translated into a language that [the Accused] fully understands and speaks, and that this interpretation is fully consistent with the case law of the ECHR on this matter.*<sup>20</sup>

12. These same legal principles and considerations of fairness continue to be relevant to translation rights and obligations during the trial phase, although the categories of evidentiary material for which translation is required will likely be broader than during pre-trial proceedings.

<sup>11</sup> **A190/II/8** Ieng Sary's Reply to the Co-Prosecutors' Response to Ieng Sary's Appeal on Translation Rights and Obligations of the Parties, 11 September 2008, A190/II/8 (“Reply”), para. 11 [referring to the fact that the Accused “speaks and understands a certain level of French”].

<sup>12</sup> **A190/I/20** Khieu Samphan Appeal Decision, *supra* note 6 at para. 50.

<sup>13</sup> **A190/I/20** *Ibid.* at paras. 46-47; see also **A190/II/9** Ieng Sary Appeal Decision, *supra* note 9 at paras. 40-41.

<sup>14</sup> **A190/I/20** *Ibid.* at para. 50; see also **A190/II/9** *Ibid.* at para. 44.

<sup>15</sup> Rome Statute of the International Criminal Court, 2185 U.N.T.S. 90 (entered into force: 1 July 2002), Article 67(1)(f).

<sup>16</sup> Rules of Procedure and Evidence, ICC-ASP/1/3/ (Part.II-A) (entered into force: 9 September 2002), Rule 76(3).

<sup>17</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Requests of the Defence of 3 and 4 July 2006, 4 August 2006 (“*Lubanga*”).

<sup>18</sup> *Prosecutor v. Mathieu Ngudjolo Chui*, Case No. ICC-01/04-02/07, Decision on Defence Requests concerning time limits, 27 February 2008 (“*Ngudjolo*”).

<sup>19</sup> **A190/I/20** Khieu Samphan Appeal Decision, *supra* note 6 at p. 11, n. 25; see also **A190/II/9** Ieng Sary Appeal Decision, *supra* note 9 at p. 10, n. 19.

<sup>20</sup> *Lubanga*, *supra* note 17 at p. 6; see also *Ngudjolo*, *ibid.* at p. 4.

13. The case of *Naletilić and Martinović* (2001)<sup>21</sup> provides a practical example of a Trial Chamber's dual responsibility to uphold international standards of fairness in implementing translation rights whilst safeguarding against undue delay. One week after the start of trial, a Defence team requested "translations of all documents *intended to be tendered and subsequently admitted by the Prosecutor* into the language the accused understands."<sup>22</sup> There were 963 Prosecution exhibits eventually admitted at trial.<sup>23</sup> Five weeks after the start of trial, Trial Chamber I found that the guarantees provided by Article 21(4) of the ICTY Statute (which correspond in substance to the rights applicable before the ECCC) require that "all evidence admitted at trial" (i.e. "which forms the basis of the determination by the Chamber of the charges against the Accused") must be "provided in *a* language the Accused understands."<sup>24</sup>
14. In *Naletilić and Martinović*, ICTY Trial Chamber I found that it could not apply a bright-line rule to exclude evidence that (i) was not yet available in a language the Accused understands; but (ii) had *already been tendered for admission* though not yet admitted by the Chamber. The judges instead ordered that such evidence "shall be translated as soon as practicable"<sup>25</sup> A limited exclusionary rule was applied, after a three week grace period, but *only* affecting exhibits which the Parties still *intended to submit for admission* which were "not available [at the time of submission] in *a language* the accused understands as well as *one* of the official languages of the Tribunal."<sup>26</sup>

#### IV. SUBMISSIONS

15. As a general principle, the Co-Prosecutors submit that the Trial Chamber must support and facilitate all reasonable efforts to ensure that relevant admissible evidence is not excluded, but rather that the parties are afforded the opportunity to rely on such evidence and that the Chamber is able to substantively consider such evidence as part of its ultimate role – the ascertainment of the truth regarding the allegations of the Closing Order.

##### A. Admissibility Depends on the Ability of the Accused to Adequately Understand the Evidence

16. Pursuant to the law of the ECCC and other international tribunals set forth above, the Trial Chamber may not simply exclude all evidence that has not been translated into the three official

<sup>21</sup> *Prosecutor v. Mladen Naletilić aka "Tuta" and Vinko Martinović aka "Štela"*, Case No. IT-98-34, Decision on Defence's Motion concerning Translation of all Documents, 18 October 2001 ("*Naletilić and Martinović*").

<sup>22</sup> *Ibid.* at pp. 1-2.

<sup>23</sup> ICTY Case Information Sheet, "Tuta & Štela" (IT-98-34) Naletilić and Martinović" at p. 3 (available on ICTY website).

<sup>24</sup> *Naletilić and Martinović*, *supra* note 23 at p. 3 [emphasis added].

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.* [emphasis added].

languages of the ECCC. There is no requirement under either ECCC law or international practice that all evidence be translated into all official languages of a court. Rather, where an Accused objects to the admission of evidence on this basis, the applicable standard is whether the Accused is able to adequately understand the evidence proffered against him, considering the proposed use of the evidence and any other relevant circumstances.

17. Applying these principles, there are entire categories of evidence for which translations are not required. For example, there should be no requirement that photographs, video, diagrams, drawings or maps be translated, where their relevance depends on portrayed images or events, rather than written or spoken words. Even where such materials contain some written words, the Accused will generally be able to adequately understand the nature of such evidence without any translation or through the assistance of DSS interpreters or members of his defence team. Moreover, videos that consist of or include interviews of the Accused can be sufficiently understood by the Accused in their original form. Some of those video interviews already include subtitles and/or voice-overs translating the statements into English or French. Video excerpts with relevant audio content that have been played in court during witness examinations or document presentations have been translated into all languages in the trial transcripts.
18. S-21 confessions are another category of documentary evidence that is admissible irrespective of translation of the content of those documents. One of the purposes for which the Co-Prosecutors have put these confessions before the Trial Chamber is to prove the identity of prisoners who were detained and subjected to interrogation at S-21. Such evidentiary purpose does not require translation of the content of the confession. Rather, such evidence can be adequately understood by the title and description of the confessions contained in Annex 10 of the Co-Prosecutors' Rule 80(3)(d) Document List, which information is translated and available in all three ECCC languages.<sup>27</sup> Moreover, both the Accused and their national counsel are able to read and understand this information on the S-21 documents themselves.
19. Where the Co-Prosecutors are also relying on annotations on the confessions, or reports written by interrogators or Duch to their superiors, those portions of the confession have been translated. Because many detainees have multiple confession documents, it is necessary to review all the confessions for a given individual in order to determine whether relevant translations exist for that individual.<sup>28</sup>

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<sup>27</sup> **E9/31.10** Annex 10 (S-21 Confessions) to Co-Prosecutors' Rule 80(3)(d) Document List, 19 April 2011.

<sup>28</sup> In many cases, OCIJ put on the Case File both the entire confession of a detainee and, under a separate document number, color excerpts of that same confession. The Co-Prosecutors included all relevant Case File documents for

20. S-21 prisoner, interrogation and execution lists are another example of documents that do not require translations in all languages in order to be sufficiently understood by the Accused. These documents consist of lists of prisoner names, and the date of their arrest and/or execution. The original versions of these S-21 records are in Khmer, and there is thus no issue of the ability of the Accused or their national counsel to understand such documents. Nor is it necessary for prisoner lists to be translated into both English and French in order to be understood by non-Khmer speakers, as identities of prisoners and dates can be adequately understood in either language. The Co-Prosecutors further note that they have submitted into evidence a master list in Khmer and English that includes all S-21 prisoners who appear in the underlying original Khmer documents,<sup>29</sup> and that Annex 9 of their Trial Document List also contains a description of each individual S-21 prisoner list that is translated in all 3 languages.<sup>30</sup> For these reasons, it is submitted that the S-21 prisoner list evidence can be sufficiently understood relying on the original documents, existing translations, the master OCP S-21 Prisoner List and Annex 9 descriptions, and there is no reason to exclude from evidence any of these documents.<sup>31</sup>
21. Accordingly, the Trial Chamber cannot apply a bright-line rule that any evidence not translated into all three ECCC languages is automatically excluded. Rather, the Chamber must evaluate the purpose of the proffered evidence and determine whether or not the Accused can adequately understand that evidence in its existing form without complete translations in all languages.

**B. Translation of Trial Documents Should Continue Until the Conclusion of the Hearing of Evidence**

22. The Trial Chamber's 13 February 2013 memorandum states that the purpose of the Chamber's directive is to ensure that translations are available to the Chamber "prior to the conclusion of the hearing of evidence in Case 002/01."<sup>32</sup>
23. As noted in Section II, one-half of the documents tendered into evidence by the Defence or Trial Chamber presently lack translations in all three languages, and less than 5% of the Co-

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a given S-21 detainee in their Annex 10, but have endeavoured not to request repetitive translations from ITU. Accordingly, in some cases the relevant translation will be found with the color excerpt version of the confession, and in other cases it may be found with the black and white complete version of the confession.

<sup>29</sup> E3/342 Revised S-21 Prisoner List.

<sup>30</sup> E9/31.9 Annex 9 (S-21 Prisoner Records) to Co-Prosecutors' Rule 80(3)(d) Document List, 19 April 2011.

<sup>31</sup> Of the 337 S-21 prisoner, interrogation and execution lists included in the Co-Prosecutors' Annex 9, 260 currently have English translations and 211 have French translations. If the Trial Chamber agrees that such documents do not have to be translated into both English and French, the Co-Prosecutors can instruct ITU that they need not do a significant number of the remaining pending translation requests.

<sup>32</sup> E246/1 Memorandum titled "Response to Motions E246 and E185/1/1 and other sundry requests concerning documents and deadlines," 13 February 2013, para. 3.



Prosecutors' trial documents still have missing translations. It will be several months before evidentiary hearings are completed, which should be ample time for ITU to complete the remaining pending translations. Under these circumstances, there is no reason for the Chamber to arbitrarily exclude evidence that is sought by all parties to the proceedings, when such translations are likely to be completed prior to the conclusion of the trial. Rather, the Chamber should allow ITU to continue translations of trial documents while the trial continues.

24. The Co-Prosecutors further observe that, because the trial is ongoing and important witnesses and experts remain to be examined, parties may ascertain the need for further translations based on developments in the remaining trial proceedings. For example, there are many books and other lengthy documents (such as monthly Foreign Broadcast Information Service reports) for which only relevant excerpts used in the trial are translated. Until the completion of trial, parties should be allowed to use the documents that have been put before the Chamber and admitted, including new untranslated excerpts from books or lengthy documents determined to be significant for a particular witness or other evidentiary reason. The Co-Prosecutors note that when short excerpts from lengthy documents are used and read during witness examinations, document presentations or other trial proceedings, a translation in all ECCC languages is immediately created that is recorded in the trial transcripts.
25. For these reasons, the Co-Prosecutors submit that the translation of trial documents should continue through the completion of evidentiary proceedings. There is no reason for the Trial Chamber to exclude otherwise admissible evidence objected to by the Defence, unless both (i) it has not been translated prior to the end of trial and (ii) the lack of translation prevents an Accused from sufficiently understanding that evidence.

**C. Proposed Procedure for Ruling on Objections to Documents Alleged to Have Incomplete or Missing Translations**

26. If the Trial Chamber is to consider excluding documents from evidence because of insufficient translations, a procedure needs to be established by which the Accused identify any documents they contend should be excluded for such reason, and the Co-Prosecutors are allowed to respond as to whether such documents are properly excluded in accordance with relevant legal principles.
27. The Co-Prosecutors propose that the Trial Chamber require the Accused, at the completion of evidentiary proceedings in this trial, to identify any documents to which they object on the basis that such documents have not been translated and are not understood by the Accused. To substantiate such objections, the Accused should be required to demonstrate that they are

unable to understand a document in the languages in which it is available, and explain why they could not obtain a sufficient understanding of the evidence through the assistance of DSS translators or members of their defence team.

28. The Co-Prosecutors would then be given four weeks to respond to such objections, for example, by either: (a) identifying the available translations of the document, either in Zylab or trial transcripts; (b) responding that no translation is required for such document, given the nature or intended use of the evidence; or (c) where a translation is missing and necessary, having ITU complete translation of the document (or its relevant excerpts) within that four week period.
29. Such approach would both protect the rights of the Accused and ensure that the parties and Trial Chamber are not deprived of the use of relevant evidence that assists in the ascertainment of the truth.

## V. CONCLUSION

30. For the foregoing reasons, the Co-Prosecutors respectfully request the Trial Chamber to:
- Determine the admissibility of documents or other evidence not translated in all ECCC languages in accordance with the ECCC precedent and international practice set forth herein;
  - Allow ITU to continue the translation of trial documents through the conclusion of evidentiary hearings in this trial; and
  - Establish a procedure for adjudicating objections to documents alleged to not have requisite translations at the closure of evidentiary proceedings.

Respectfully submitted,

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