

## BEFORE THE PRE-TRIAL CHAMBER

## EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**CO-PROSECUTORS' RESPONSE TO KHIEU SAMPHAN'S APPEAL ON  
TRANSLATION RIGHTS AND OBLIGATIONS OF THE PARTIES**

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## I. INTRODUCTION

1. In a decision delineating translation rights and obligation of parties during judicial investigation ("Translation Decision"), the Co-Investigating Judges ordered that a charged person be provided, in a language he understands (1) the indictment with the elements of proof that the indictment relies upon, and (2) the introductory and final submissions with the indices of factual elements that those submissions rely upon.<sup>1</sup> Noting the finite translation capacity of the Court Management Section, the Co-Investigating Judges also required the defence teams to reduce their translation requirements by utilising linguistic capacity within their teams and in the Defence Support Section.<sup>2</sup> The Co-Investigating Judges directed that each defence team be provided a translator, free of charge.<sup>3</sup>
2. The charged person KHIEU Samphan seeks a reversal of the Translation Decision by claiming that (1) it violates his right to effective legal representation by not providing those documents in French, the language of his international counsel, and (2) it erroneously reverses the burden of translation of documents from the Court to the defence. Claiming an abuse of process, he seeks an unconditional release from detention.<sup>4</sup>
3. The Co-Prosecutors request that the Pre-Trial Chamber dismiss this Appeal. The Appeal is inadmissible as the Translation Decision is not one of the decisions against which a charged person can appeal to the Pre-Trial Chamber.<sup>5</sup> Even otherwise, the Appeal is without merit as (1) applicable law and international standards require only certain (and not all) documents to be translated into a language the defendant understands, (2) a defendant has no right to have all documents translated into the language of his international counsel, especially when the defence team and the Defence Support Section have sufficient linguistic capacity, (3) provision of an additional free translator to the defence team does not reverse the equality of arms but adds to its linguistic capacity, and (4) as the Translation Decisions does not violate any fair trial rights of the Appellant, no abuse of process has occurred that deserves any remedy, much less an unconditional release.

<sup>1</sup> *Case of Khieu Samphan*, Order on Translation Rights and Obligations of the Parties, Criminal Case File 002/19-09-2007-ECCC-OCIJ, 23 June 2008, ERN 00196923-00196930, A/90, para. B4 [*hereinafter* Translation Decision].

<sup>2</sup> Translation Decision, para. A4.

<sup>3</sup> Translation Decision, paras. B2-B3.

<sup>4</sup> *Case of Khieu Samphan*, Appeal Against the Decision to Deny the Request for Translation of Khieu Samphan's Case File, Criminal Case File No. 002/19-09-2007-ECCC-OCIJ (PTC 11), 22 July 2008, para. 7 [*hereinafter* Appeal].

<sup>5</sup> Internal Rules, rule 74(3) [*hereinafter* Rules].

## II. PRELIMINARY REQUESTS

### *Oral Hearing Is Not Required*

4. The Co-Prosecutors submit that an oral hearing is not required as the parties have sufficiently briefed the Pre-Trial Chamber on the factual and legal issues relevant to this Appeal. They request that the Pre-Trial Chamber determine this Appeal on written pleadings alone. The Practice Direction on Filing of Documents ("Practice Direction") and the practice of the Pre-Trial Chamber in similar cases permit such a disposal.<sup>6</sup>
5. The Co-Prosecutors request that, in the interest of judicial economy, this Appeal be decided together with the Appeal filed by IENG Sary that also challenges the Translation Decision.<sup>7</sup> Both Appeals raise similar issues of law and fact.

### *Public Information*

6. The Co-Prosecutors request that the Pre-Trial Chamber place this Response on the ECCC's website along with such other filings related to this Appeal that it deems fit. This is consistent with Rule 77(6), which provides that the Pre-Trial Chamber may decide that all or a part of any of its hearings (and, by inference, pleadings and decisions) are made public. In doing so, the Pre-Trial Chamber should consider that this would be in the interest of justice and does not affect public order or any protective measures authorized by this Court.<sup>8</sup>
7. In holding its hearings in public, seeking assistance from *amici curiae*, rendering public decisions and placing pleadings of the parties and its decisions on the ECCC's website, the Pre-Trial Chamber's practice has consistently reflected the spirit of Rule 77(6).

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<sup>6</sup> Filing of Documents Before the ECCC, Practice Direction 01/2007/Rev.1, 5 October 2007, art. 8.4 [*hereinafter* Practice Direction]; *Case of Ieng Sary*, Decision on Appeal Concerning Contact Between the Charged Person and his Wife, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 05), 30 April 2008, ERN 00184951-00184956, A104/II/7, para. 8.

<sup>7</sup> *Case of Ieng Sary*, Defence Appeal Against the OCIJ's Order on Translation Rights and Obligations of the Parties, Criminal Case File No. 002/19-09-2007-ECCC-OCIJ (PTC 12), 22 July 2008.

<sup>8</sup> Rules, rule 77(6).

### III. RELEVANT PROCEDURAL BACKGROUND

8. On 14 February 2008, the Appellant's international counsel informed the Co-Investigating Judges that the Appellant would not respond to the latter's questions until all the documents annexed to the introductory submission were translated into French.<sup>9</sup>
9. On 23 April 2008, during a provisional detention appeal hearing, the same counsel sought an indefinite adjournment of the proceedings until all the documents on the case file were made available in that counsel's language, French.<sup>10</sup> While adjourning the hearing, the Pre-Trial Chamber noted that the refusal of the counsel to continue to act was a constructive withdrawal from the appeal and had a direct and adverse effect on KHIEU Samphan's fundamental right to be represented.<sup>11</sup> The Chamber noted that the Rules recognised the need for collaboration between the Cambodian and international counsel, finding that Rule 21(1) effectively directed this collaboration by requiring the linguistic issues to be fully addressed by a team of counsel. Absent such collaboration, the Pre-Trial Chamber added, the defendant had the alternative to select a new counsel to represent him.<sup>12</sup>
10. On 19 June 2008, the Co-Investigating Judges issued their Translation Decision seeking to decide all the pending requests for translations. The Translation Decision noted a lack of statutory provision regarding translation rights and dealt with such rights during the pre-trial stage when the Co-Investigating Judges were seised of the judicial investigation. The Co-Investigating Judges noted that the Pre-Trial Chamber and the Trial Chamber may issue such further orders as the interests of justice and fair trial rights might dictate.<sup>13</sup>
11. The Translation Decision, among other things, provided that a defendant is entitled to receive in a language he or she understands (in the case of all the current defendants, Khmer) the following documents: (1) the indictment under Rule 67(1); (2) elements of proof on which the indictment relies; (3) introductory and final submissions of the Co-Prosecutors and the footnotes and the indices of factual elements on which those submissions rely. The Translation Decision noted that the judicial

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<sup>9</sup> Translation Decision, p. 2.

<sup>10</sup> *Case of Khieu Samphan*, Decision on Application to Adjourn Hearing on Provisional Detention Appeal, Criminal Case File No. 002/19-09-2007-ECCC-OCIJ (PTC 04), 23 April 2008, ERN 00180341-00180344, C26/I/25, para. 2 [*hereinafter* Khieu Samphan Adjournment Decision].

<sup>11</sup> Khieu Samphan Adjournment Decision, para. 9.

<sup>12</sup> Khieu Samphan Adjournment Decision, para. 12.

<sup>13</sup> Translation Decision, para. E4.

decisions and the filings of the parties would continue to be provided in Khmer and at least one other language of the choice of the defendants, as required by the Practice Directions.<sup>14</sup>

12. The Translation Decision required the parties to resolve their translation needs by using the linguistic capacity within their teams and from the Defence Support Section.<sup>15</sup> Laying down a regime of progressive translation management, it asked the parties to reduce their translation needs through optimising their linguistic capacity, to assess and transmit their priorities to the Court Management Section and to collaborate with it towards a consensus regarding the management of those priorities.<sup>16</sup> In order for this collaborative process to be “concrete and effective”, it ruled that each defence team was entitled to a gratis full-time translator from the Office of Administration.<sup>17</sup>
13. Aggrieved by the Translation Decision, the Appellant has preferred this Appeal. As noted above, he claims that the Decision (1) violates his right to effective legal representation by not providing all the documents in French, the language of his international counsel, and (2) it erroneously reverses the burden of translation of documents from the Court to the defence. Accordingly, claiming an abuse of process, the Appellant seeks an unconditional release from detention.<sup>18</sup>

#### IV. THE LAW

##### *Defendant's Right To Translation Of Documents In His Language Is Limited*

14. The basic documents of this Court do not expressly provide for translation of documents for defendants. However, they do provide for “the use of an interpreter.”<sup>19</sup> The Practice Direction provides for filing of pleadings in Khmer (the language all the current defendants understand) and one other official language.<sup>20</sup> Likewise, the basic instruments of other similar tribunals do not expressly delineate the scope of a defendant’s translation rights. The International Criminal Court (“ICC”) provides the clearest enunciation of a defendant’s translation rights. It guarantees free assistance of an interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented in the Court were not in a language which the defendant fully understood or spoke.<sup>21</sup> The European Court of Human Rights (“ECHR”) requires

<sup>14</sup> Translation Decision, para. C3.

<sup>15</sup> Translation Decision, para. A4.

<sup>16</sup> Translation Decision, para. E2.

<sup>17</sup> Translation Decision, para. E3.

<sup>18</sup> Appeal, para. 7.

<sup>19</sup> ECCC Law, art. 35(f); Rules, rule 30.

<sup>20</sup> Practice Direction, arts. 7.1, 7.2.

<sup>21</sup> Rome Statute of the International Criminal Court, arts. 55(1)(c), 67(1)(f) [*hereinafter* Rome Statute]; International Criminal Court, Rules of Procedure and Evidence, rules 42, 76(3), 187, 203 [*hereinafter* ICC Rules].

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the translation or interpretation of all those documents that are necessary for the defendant to understand in the interest of a fair trial.<sup>22</sup> Other tribunals have held that the right to interpretation encompasses a right to translation of certain documents.<sup>23</sup>

15. International judicial bodies have considered translation rights in three different ways. The Human Rights Committee ("HRC") has viewed them from the perspective of providing adequate facilities for the preparation of the defence.<sup>24</sup> The *ad hoc* tribunals have viewed them as a balance between the defendant's interest of receiving translated documents and his or her right to be tried without undue delay, realizing that as translation requirements increase, the speed of the proceedings decreases.<sup>25</sup> The ICC and ECHR have stated that such translations must be provided that "enable the defendant to have knowledge of the case against him and to defend himself."<sup>26</sup>
16. A defendant's translation rights do not extend to all documents on the case file.<sup>27</sup> The International Criminal Tribunals for the Former Yugoslavia ("ICTY") and Rwanda ("ICTR") have denied requests for translation of all documents on the basis that translation, in advance, of documents into the language of the defendant, beyond what was required, may jeopardize the defendant's right to an expeditious trial because of the substantial time and resources required.<sup>28</sup> The ICC has held that the principle of fairness did not grant the defendant the right to translation of all procedural documents and the disclosed evidentiary materials.<sup>29</sup> The ICTY has denied, even to a self-representing defendant, the translation of all documents.<sup>30</sup>

<sup>22</sup> *Leudicke v. Germany*, Application Nos. 6210/73, 6877/75, 7132/75, Judgment, 28 November 1978, para. 48 [*hereinafter* Leudicke Decision]; *Kamasinski v. Austria*, Application No. 9783/82, Judgment, 19 December 1989, para. 48 [*hereinafter* Kamasinski Decision].

<sup>23</sup> ICTR Statute, art. 20(4)(f); ECHR, art. 6(3)(e); ECCC Law, art. 35(f); *Prosecutor v. Muhimana*, Case No. ICTR-95-I-B-I, Decision on Defence Motion for the Translation of Prosecution and Procedural Documents into Kinyarwanda, 6 November 2001, para. 16 [*hereinafter* Muhimana Decision]; Leudicke Decision, para. 74.

<sup>24</sup> *Harward v. Norway*, Communication No. 451/1991, U.N. Doc. CCPR/C/51/D/451/1991, Human Rights Committee, 16 August 1994, para. 9.4 [*hereinafter* Harward Decision].

<sup>25</sup> *Prosecutor v. Seselj*, Case No. IT-03-67-PT, Order on Translation, 6 March 2003, p. 1 [*hereinafter* Seselj Decision]; Muhimana Decision, para. 12; *Prosecutor v. Ljubicic*, Case No. IT-00-41-PT, Decision on Defence Counsel's Request for Translation of All Documents, 20 November 2002, p. 3 [*hereinafter* Ljubicic Decision].

<sup>26</sup> *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on the Requests of the Defence of 3 and 4 July 2006, 4 August 2006 [*hereinafter* Lubanga Decision].

<sup>27</sup> Harward Decision, para. 9.5; *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, Decision on Defence for Mathieu Ngudjolo Chui's Request Concerning Translation of Documents, 15 May 2008, pp. 3, 5 [*hereinafter* Katanga Decision]; *Prosecutor v. Chui*, Case No. ICC-01/04-02/07, Decision on the Defence Request Concerning Time Limits, 27 February 2008, p. 4 [*hereinafter* Chui Decision]; Muhimana Decision, para. 25.

<sup>28</sup> Seselj Decision, p.1; Muhimana Decision, para. 12.

<sup>29</sup> Lubanga Decision, pp. 5-6; Katanga Decision, p. 6.

<sup>30</sup> Seselj Decision, p. 1.

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17. Providing a defendant with an interpreter is an adequate substitute for provision of certain documents in a language he understands.<sup>31</sup> The ICTR has stated that if its Registry found it difficult to have certain documents translated into the defendant's language, it (the Registry) may have them interpreted "to enable [the defendant] to get a gist of its contents."<sup>32</sup> The ICC provides an interpreter to the defendant in lieu of providing him or her with translations of documents beyond what is required by its instruments.

*Types Of Documents Required To Be Translated Into The Defendant's Language*

18. Rule 67 requires that the defendant must be immediately provided with a copy of the closing order (indictment) by the Co-Investigating Judges. However, this provision does not expressly grant a defendant the right to receive the indictment in a language he or she understands. International tribunals, without exception, provide defendants with indictments in a language they understand, although the jurisprudence on the translation of the material supporting the indictment is not consistent.<sup>33</sup> The ICTY and ICTR provide this material in the language of the defendants as a matter of right.<sup>34</sup> This right also applies to all supporting material, regardless of whether it is presented at trial.<sup>35</sup> The ICC, however, provides translation only of a list of evidence supporting the indictment in the defendant's language. In *Lubanga*, it ruled that a translation of the detailed description of the charges together with a list of evidence will adequately inform the defendant of the nature, cause, and content of the charges against him.<sup>36</sup> It, therefore, denied the defendant's application for the documents supporting the indictment in his language but instead provided him the permanent use of an interpreter.<sup>37</sup>
19. In addition to the indictment and its supporting material, international tribunals have held that various other evidentiary materials must be disclosed to the defendant in his or her language. The descriptions of these documents vary. For example, *ad hoc* tribunals have required that the following materials must be translated into a language the defendant understands: (1) statements of witnesses the prosecution intends to call at trial;<sup>38</sup> (2) evidence to be presented at trial;<sup>39</sup> (3) exculpatory

<sup>31</sup> Harward Decision, para. 9.5

<sup>32</sup> Muhimana Decision, para. 30.

<sup>33</sup> ICTY Rules, rule 47(G); ICTR Rules, rule 47(G).

<sup>34</sup> ICTY Rules, rule 66(A); ICTR Rules, rule 66(A).

<sup>35</sup> Seselj Decision, p. 1; Ljubicic Decision, p. 3; Muhimana Decision, para. 23.

<sup>36</sup> ICC Rules, rule 121(3).

<sup>37</sup> Lubanga Decision, p. 7.

<sup>38</sup> Muhimana Decision, para. 23; ICTY Rules, R.66(A)(ii); Seselj Decision, p. 1; Ljubicic Decision, p. 1.

<sup>39</sup> Muhimana Decision, para. 25.

material in the possession and knowledge of the prosecution.<sup>40</sup> The ICTY determined that besides evidence supporting the indictment, the prosecution must translate those documents that form the basis of the determination of charges against the defendant.<sup>41</sup> It justified this limitation as its instruments do not entitle a defendant to receive all material in a language he or she understands, but only such material that will determine his or her guilt or innocence at trial.<sup>42</sup> The ICC, however, has declined to provide translations of exculpatory evidence.<sup>43</sup> It has also found that the prosecution is not required to translate all documents that it is obliged to disclose to the defence.<sup>44</sup> It clarified that the only evidentiary material the prosecution is expressly required to translate are statements of prosecution witnesses.<sup>45</sup>

*Who Bears The Burden Of Translating The Documents?*

20. This Court's instruments do not expressly delegate the role of translation to any particular organ. Although the Practice Direction places the responsibility of translating certain pleadings on the Court Management Section, there is no explicit delegation of translation of other types of documents, particularly evidentiary material.<sup>46</sup>
21. The ICTR requires its registry to translate documents that have been found necessary to be provided to the defendant in his or her language.<sup>47</sup> In contrast, at the ICC, save for documents that the prosecution is required to provide in the language of the accused, the defence teams are responsible for organizing their resources to protect the accused's rights.<sup>48</sup>

*There Is No Right Of Translation Of Documents Into Defence Counsel's Language*

22. Neither this Court's basic documents nor those of similar other tribunals contain provisions governing a defence counsel's right to translation of documents. In *Muhimana*, the ICTR considered whether a defence counsel, who was conversant only in French, was entitled to have all materials disclosed by the prosecution served in French, and to have the registry ensure free translation of those materials. The Tribunal required that two types of documents should be translated into both the

<sup>40</sup> Ljubicic Decision, p. 3.

<sup>41</sup> Naletilic Decision, p. 3 (Translation Decision, fn. 14).

<sup>42</sup> Delalic Decision, para. 8 (Translation Decision, fn. 7).

<sup>43</sup> Lubanga Decision, pp. 5-8.

<sup>44</sup> Lubanga Decision p. 7.

<sup>45</sup> Chui Decision, p. 4 (citing ICC Rules, rule.76(3)).

<sup>46</sup> Practice Direction, art. 7.2.

<sup>47</sup> Muhimana Decision, paras. 10, 13.

<sup>48</sup> Chui Decision, p. 5; Katanga Decision, pp. 3, 6



working languages: (1) the parties' submissions, and (2) the evidence that would be adduced at trial.<sup>49</sup> In that case, though one of the defence counsel spoke and understood only French, the other spoke both French and English.<sup>50</sup> The Tribunal determined that the ability of one counsel to translate did not alleviate the Tribunal's obligation to translate decisions, written submissions and evidence.<sup>51</sup> It nonetheless hoped that "through fruitful collaboration" one counsel would be able to help the other "to understand the contents of the documents."<sup>52</sup>

23. In *Lubanga*, the defendant requested translation of documents disclosed by the prosecution into French, one of the working languages of the ICC that he understood.<sup>53</sup> In a decision denying the request, the ICC considered that although the defendant's counsel was required to be fluent in only one of the working languages of that Court, he had filed motions in both English and French.<sup>54</sup> Similarly in *Ljubicic*, the ICTY held that although the defendant could not understand all the documents in the case, "at least one of the defense counsel is presumed to be fluent in one of the official languages of the Tribunal and should be capable of fully participating in the proceedings."<sup>55</sup>

*Need For Cooperation Between Defence Counsel To Address Linguistic Difficulties*

24. Rule 22(1) provides all defendants the right to have a Cambodian counsel, or an international counsel "in collaboration with" a Cambodian counsel.

25. *Muhimana*, as stated above, considered the ability of one counsel to understand both English and French relevant to its decision on what French translations to provide for the other counsel. It encouraged the counsel to collaborate to understand documents beyond a basic set that were provided in translation. In *Khieu Samphan*, this Pre-Trial Chamber suggested that if the defendant's international counsel was unable to work with his Cambodian co-counsel to address translation issues, the defendant's recourse was his ability to choose a different international counsel.<sup>56</sup>

<sup>49</sup> Muhimana Decision. paras. 32-33.

<sup>50</sup> Muhimana Decision. para. 31.

<sup>51</sup> Muhimana Decision. paras. 32-33.

<sup>52</sup> Muhimana Decision. para. 33.

<sup>53</sup> Lubanga Decision, pp. 2, 4.

<sup>54</sup> Lubanga Decision, p. 4.

<sup>55</sup> Ljubicic Decision. p. 3.

<sup>56</sup> Khieu Samphan Adjournment Decision, para. 12.

**V. ARGUMENT***The Appeal Is Inadmissible*

26. Rule 74(3) exhaustively enumerates the types of orders against which a charged person may appeal to the Pre-Trial Chamber. This Rule does not envisage an appeal against an order denying requests for translation of documents into the language of the charged person or his counsel. Accordingly, the Appeal is inadmissible and should be dismissed.

27. The exhaustive nature of Rule 74(3) is shown by the following:

- i. A plain reading of Section D of the Rules indicates that the principal jurisdiction of the Pre-Trial Chamber is to adjudicate disputes between the Co-Prosecutors and the Co-Investigating Judges.<sup>57</sup> The Agreement and the ECCC Law envisaged this as the sole function of the Pre-Trial Chamber.<sup>58</sup> Rule 73 provides the "Additional Jurisdiction" of the Pre-Trial Chamber and clearly limits it to the situations contained therein.
- ii. The title of Rule 74 - *Grounds of Appeal* - is self-explanatory. It indicates that only the orders enumerated in that Rule can be appealed to the Pre-Trial Chamber. While it permits the Co-Prosecutors to appeal all orders of the Co-Investigating Judges, it limits the appellate rights of a charged person to the orders identified in Rule 74(3).
- iii. The Rules do not grant a residuary jurisdiction to the Pre-Trial Chamber in that they do not provide it an omnibus power (like that of a national supreme court) to hear appeals against any decision of the Co-Investigating Judges preferred by any party.

28. Article 267 of the Cambodian Criminal Procedure Code, in similar terms, provides restrictive rights to appeal the decisions of the investigating magistrates. It does not envisage an appeal against an order denying translation of documents into the language of the defendant or his counsel.

29. In sum, issues relating to translations, although falling within the decision-making powers of the Co-Investigating Judges, are not appealable. Translation is a matter of judicial administration, to the extent that it is managed by the registries of other international tribunals.<sup>59</sup> Consequently, an appeal against the Translation Decision is beyond the scope of Rule 74(3) and should, therefore, be dismissed as inadmissible.

<sup>57</sup> Rules, rules 71–72.

<sup>58</sup> Agreement, art. 7; ECCC Law, arts. 20(new), 23(new).

<sup>59</sup> Muhimana Decision, paras. 10, 13.

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*All Documents On The Case File Are Not Required To Be Translated*

30. The Appellant submits that by not providing all documents on the case file to his international counsel in French, the only language the counsel understands, the Translation Decision violates the Appellant's right to effective representation by counsel.<sup>60</sup> The Co-Prosecutors submit that this contention is misconceived both on facts and in law.
31. First, as stated above, while the Appellant has a right to receive certain (not all) documents in a language he understands, he has no such right to receive those or other documents in the language of his counsel. The Appellant arguably understands and speaks all the three official languages of this Court. Khmer is his native language. French is the language in which he studied as a student and wrote and spoke in his capacity as one of the senior-most representative of the *Khmer Rouge*, before, during and after Democratic Kampuchea. Besides, he has proficiency in English which is demonstrated by his public speeches in that language.<sup>61</sup>
32. Second, the introductory, supplementary and final submissions have always been made available to the Appellant in Khmer and at least one other official language of this Court. The Co-Investigating Judges have already ordered the translation of all the footnotes and the indices of the factual elements relied therein into Khmer. In addition, most of the evidentiary documents that formed part of those submissions, including most of the witness statements recorded and victim complaints received were made available in Khmer and/or French.
33. Third, after the commencement of the judicial investigation, almost all the evidentiary material generated by the Co-Investigating Judges, including documentary and testamentary evidence, has been made available in Khmer and/or French. The same trend is expected to continue in the future.
34. Fourth, the Practice Direction requires that all pleadings filed before this Court are at least in Khmer and one other official language. The Co-Investigating Judges and the Pre-Trial Chamber have adopted the practice of rendering their decisions in Khmer and at least in one other official language.
35. Fifth, this Court's founding documents require that linguistic and legal issues may be fully addressed by a team of counsel representing the defendants.<sup>62</sup> Accordingly, the Appellant has been provided an international counsel who has to work "in collaboration with" his Cambodian counterpart. The

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<sup>60</sup> Appeal, para. 7.

<sup>61</sup> Interview of Khieu Samphan, February 2004, <http://www.youtube.com/watch?v=pTe1CN41Oqw&feature=related> (time mark 4:00-8:10).

<sup>62</sup> Translation Decision, p. 3.

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Appellant's former and current Cambodian counsel – Me SOY Bory and Me SA Sovan – understand and work with equal ease in Khmer and French owing to their vast experience in and contribution to the Cambodian legal institutions. The Appellant's international counsel speaks and understands French and English and has a wide experience of Cambodia having visited it on numerous occasions.<sup>63</sup> The Appellant's defence team also employs another Cambodian jurist, Ms SENG Socheata, who studied in France and speaks and understands Khmer, French and English. In addition, the Appellant's defence team is comprised of an experienced French lawyer, Ms Charlotte MOREAU, as an international legal consultant and Ms Julie BARDECHE as a long term legal intern. Both Ms MOREAU and Ms BARDECHE are proficient in English and French. These national and international lawyers, among themselves, are capable of collaborating to "optimise their office's linguistic capacity" to address the Appellant's concerns for having non-Khmer documents on the case file being accessible to him.<sup>64</sup>

36. Sixth, the documents already available in Khmer, and those ordered to be provided in Khmer in the Translation Decision, reflect the most liberal regime of disclosure adopted by the ICTY and ICTR. The ICC's basic documents - drafted later in time and embodying the crystallised international law on those issues - are more restrictive. Beyond a core set of documents, the ICC adopts the policy of augmentation of the linguistic capacities of the defence teams to ensure that the defendant can effectively participate in his own defence. The Co-Investigating Judges have adopted a hybrid of these two approaches that does not undermine any fair trial right of the defendants.
37. Seventh, while the Co-Investigating Judges have ordered a core set of documents to be provided in the language that a charged person understands, they have not precluded the defence teams from requesting the translation of further documents from the Court Management Section on the basis of a common list and prioritisation of the documents that are most urgently required by maximum number of recipients. Indeed, the Translation Working Group, including a representative of the Defence Support Section, meets and acts on this premise.
38. The Appellant questions the use of the jurisprudence of the ICTY, ICTR and ICC in proceedings before this Court on the ground that the two legal systems are different.<sup>65</sup> He claims that before this Court a defendant participates in the proceedings much before he does in those tribunals and,

<sup>63</sup> <http://www.avocatparis.org/Eannuaire/Resultat2.aspx?cnbf=14610>(Record maintained by the Bar of Paris).

<sup>64</sup> Translation Decision, para. A4.

<sup>65</sup> Appeal, paras. 32 *et seq.*

therefore, the access to translations must be provided at much earlier stages so that he can effectively participate in the investigation. The Co-Prosecutors note that while there may be systemic differences, the remedy tailored by the Rules, and confirmed by the Translation Decision, make those differences, if any, inconsequential. While it is true that immediately after joining the judicial investigation, a defendant is called upon to make substantive evidentiary submissions during the adversarial hearing his access to documents can be facilitated by collaboration within his legal team and with the assistance from the Defence Support Section.

39. The fair trial requirements for provision of documents in the language that a defendant understands are amply met by recourse to the full linguistic capacities of the defence team, the resources of the Defence Support Section, the full-time translator assigned by the Translation Decision, and the efforts of Court Management Section to provide timely translation services. In any event, the Translation Decision does not lay down the translation rights and obligations of parties for all the stages of the proceedings. It states that the Trial Chamber and the Pre-Trial Chamber, whom it cannot bind, may take such decisions that they deem appropriate.

*The Translation Decision Protects The Defendant's Right To Effective Representation*

40. The Appellant claims that his right to effective representation by his international counsel has been violated by the failure of the Translation Decision to have all the documents on the case file translated into French, the language of his international counsel.<sup>66</sup> There is virtually no international instrument that guarantees all documents on a defendant's case file to be translated into the language of the defence counsel, especially when that language is not claimed to be the language of the defendant. Whenever on rare occasions tribunals have granted such requests, they have encouraged the defence teams to use their in-house linguistic capacity to get over any counsel's lack of linguistic capacity in the language of the defendant. The Co-Prosecutors, accordingly, submit that as no such right inheres in the Appellant, he cannot invoke it to claim ineffective legal representation.
41. The Appeals fails to recognise the special character of this Court where at every level – including in defence teams – international personnel work very closely with their Cambodian counterparts to bolster the collective linguistic and legal capacity. The international counsel does not work in vacuum. He is expected to work in collaboration with the Cambodian counsel and utilise the linguistic capacity provided for and available in the defence team. The Translation Decision

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<sup>66</sup> Appeal, paras. 56 *et seq.*

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augments this linguistic capacity by providing an additional dedicated translator to each defence team.

42. Despite the lack of a recognised right to have documents in the language of the international counsel when he does not speak the language of the defendant, the Translation Decision has attempted to create a mechanism for the defence teams to receive translations of documents into non-Khmer languages promptly. The Decision provides for additional staffing dedicated to ensure that any documents requiring immediate or unexpected translation could be available in-house with the assistance of the free-of-charge in-house translators.

*The Translation Decision Ensures Equality of Arms*

43. The Appellant contends that the Translation Decision seeks to shift the equality of arms by placing the burden of translation on the defence and hence away from the “authorities of the State” who should ordinarily provide such translations.<sup>67</sup>
44. By providing a translator specific to each defence team, the Translation Decision does not seek to shift the burden of translation to the defence. This additional facility does not create any new obligation for the defence but seeks to supplement their existing linguistic capacity to further enhance a defendant’s right to effective legal representation. The Decision clearly states that the purpose of this measure was to “to ensure that the charged persons and their defence teams can have certain documents translated as required, to assess the team’s translation requirements for transmission to CMS and to assist the teams’ collaboration with CMS.”<sup>68</sup> Therefore, the burden on the Court Management Section, to the extent that there was one, has not shifted. Instead, the defence teams have been further strengthened to be in a better position to use the services of that Section. The new translators will also likely assist the defence teams to ensure that the resources of the Court Management Section are used efficiently and optimally.
45. The Co-Prosecutors anticipate that the provision of translators shall assist the defence teams in cases of shorter, unexpected or immediate translation requirements. Consistent with international jurisprudence, this would redound to the rights of the defendants and shall create no further obligation for the defence team.

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<sup>67</sup> Appeal, para. 7.

<sup>68</sup> Translation Decision, para. E.4.

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46. The equality of arms argument should also be rejected on the additional ground that the Appellant has elected not to use any facilities provided by the Court Management Section for translation of documents. In particular, he has not responded to the direction in the Translation Decision seeking submissions from defence teams regarding prioritisation of translation requests.<sup>69</sup>

## VI. CONCLUSION

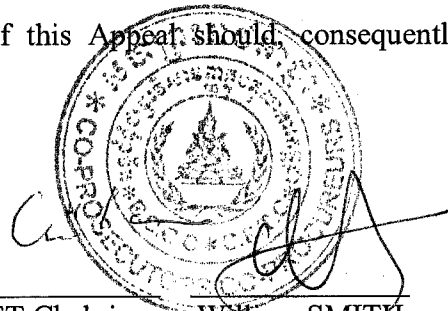
47. The Co-Prosecutors request that the Pre-Trial Chamber dismiss the Appeal as procedurally inadmissible and substantively devoid of merit. They request that the Pre-Trial Chamber hold that, since the Translation Decision does not violate any fair trial rights of the Appellant, there has been no abuse of process. Therefore, the Appellant is not entitled to any consequential relief, including release.

48. The Appellant's application for a public hearing of this Appeal should, consequently, also be dismissed.<sup>70</sup>

Respectfully submitted,

YET Chakriya  
Deputy Co-  
Prosecutor

William SMITH  
Deputy Co-  
Prosecutor



Signed in Phnom Penh, Kingdom of Cambodia on this twenty-eighth day of August 2008.

<sup>69</sup> *Case of Khieu Samphan*, Submission of Memorandum for Placement on Case File 002 Regarding the OCIJ Order on Translation Rights and Obligations of the Parties, Criminal Case File No. 002/19-09-2007-ECCC-OCIJ, 21 August 2008, ERN 00219017-00219019, A130/9.

<sup>70</sup> *Case of Khieu Samphan*, Request for a Public Hearing on the Appeal Against the Decision to Deny the Request for Translation of Khieu Samphan's Case File, Criminal Case File No. 002/19-09-2007-ECCC-OCIJ (PTC 11), 11 August 2008, ERN 00218008-00218012, A190/I/2.