

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

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

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**I. INTRODUCTION**

A190/II/5

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 IENG Sary seeks a reversal of the Translation Decision by claiming that (1) it violates his right to participate in his defence by not providing to him all the documents on the case file in Khmer, the language he understands, (2) it violates his right to effective legal representation by not providing those documents in English, the language of his international counsel, and (3) it violates the equality of arms by reversing the burden of translation from the Court to the defence.<sup>4</sup>
3. The Co-Prosecutors request that the Pre-Trial Chamber dismiss this Appeal. It 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, and (3) provision of an additional free translator to the defence team does not reverse the equality of arms but adds to its linguistic capacity.

<sup>1</sup> *Case of Ieng Sary*, Order on Translation Rights and Obligations of the Parties, Criminal Case File 002/14-08-2006, 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 Ieng Sary*, 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), 22 July 2008, paras. 7-8 [*hereinafter* Appeal].

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

**II. PRELIMINARY REQUESTS**

A 190/II/C

*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 Appellant has also made a similar request.<sup>6</sup> 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>7</sup>

*Public Information*

5. 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>
6. 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 this Rule.

**III. RELEVANT PROCEDURAL BACKGROUND**

7. On 10 January 2008, claiming “every intention of assisting his legal team in preparation of his defence”, the Appellant asked the Co-Investigating Judges for translation into Khmer of all “supporting documentation” to the Introductory Submission.<sup>9</sup> On 6 May 2008, going beyond his request of 10 January 2008, he also requested “translation of all said documents in English.”<sup>10</sup> Other

<sup>6</sup> Appeal, p. 6.

<sup>7</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>8</sup> Rules, rule 77(6).

<sup>9</sup> *Case of Ieng Sary*, Request for Expedited Translation of all Supporting Documentation to the Introductory Submission, Criminal Case File No. 002/19-09-2007-ECCC-OCIJ, 10 January 2008, ERN 00157754-00157756, A120.

<sup>10</sup> *Case of Ieng Sary*, Lack of Response for Request for Expedited Translation of all Supporting Material to the Introductory Submission into Khmer and English, Criminal Case File No. 002/19-09-2007-ECCC-OCIJ, 6 May 2008, ERN 00186401-00186403, A120/I.

Charged Persons also made certain requests for translation of documents on the Case File to the Co-Investigating Judges.<sup>11</sup>

8. Meanwhile, on 23 April 2008, during a provisional detention appeal hearing of Co-Charged Person KHIEU Samphan, his international 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>12</sup> While adjourning the hearing, the Pre-Trial Chamber noted that the refusal of the international 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>13</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>14</sup>
9. 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 seized 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>15</sup>
10. The Translation Decision, among other things, provided that a defendant is entitled to receive in a language he or she understands (Khmer) the following documents: (1) 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. It noted that the judicial 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>16</sup>

<sup>11</sup> Translation Decision, p. 2.

<sup>12</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>13</sup> Khieu Samphan Adjournment Decision, para. 9.

<sup>14</sup> Khieu Samphan Adjournment Decision, para. 12.

<sup>15</sup> Translation Decision, para. E4.

<sup>16</sup> Translation Decision, para. C3.

11. 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>17</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>18</sup> In order for this collaborative process to be “concrete and effective”, it ruled that each defence team was entitled to a full-time translator free of charge from the Office of Administration.<sup>19</sup>
12. Aggrieved by the Translation Decision, the Appellant has preferred this Appeal. As noted above, he claims that that the Decision (1) violates his right to participate in his defence by not providing him all the documents on the Case File in Khmer, the language he understands, (2) violates his right to effective legal representation by not providing those documents in English, the language of his international counsel, and (3) violates the equality of arms by reversing the burden of translation from this Court to the defence.<sup>20</sup>

#### IV. THE LAW

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

13. 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>21</sup> The Practice Direction provides for filing of pleadings in Khmer (the language all the current Charged Persons understand) and one other official language.<sup>22</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 and spoke.<sup>23</sup> The European Court of Human Rights (“ECHR”) requires the translation or interpretation of all those documents that are necessary for the defendant to

<sup>17</sup> Translation Decision, para. A4.

<sup>18</sup> Translation Decision, para. E2.

<sup>19</sup> Translation Decision, para. E3.

<sup>20</sup> Appeal, paras. 7-8.

<sup>21</sup> ECCC Law, art. 35(f); Rules, rule 30.

<sup>22</sup> Practice Direction, arts. 7.1, 7.2.

<sup>23</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].

understand in the interest of a fair trial.<sup>24</sup> Other tribunals have held a right to interpretation to encompass a right to translation of certain documents.<sup>25</sup>

14. International judicial bodies have viewed 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>26</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>27</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, notably by being able to put before the court his version of the events.”<sup>28</sup>
15. A defendant’s translation rights do not extend to all documents on the Case File.<sup>29</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>30</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>31</sup> The ICTY has even denied a self-representing defendant translation of all documents.<sup>32</sup>

<sup>24</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>25</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>26</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>27</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. Ljubcic*, Case No. IT-00-41-PT, Decision on Defence Counsel’s Request for Translation of All Documents, 20 November 2002, p. 3 [*hereinafter* Ljubcic Decision].

<sup>28</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>29</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>30</sup> Seselj Decision, p. 1; Muhimana Decision, para. 12.

<sup>31</sup> Lubanga Decision, pp. 5-6; Katanga Decision, p. 6.

<sup>32</sup> Seselj Decision, p. 1.

16. Providing a defendant with an interpreter is an adequate substitute for provision of certain documents in a language he understands.<sup>33</sup> The ICTR has said 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 the contents."<sup>34</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*

17. Rule 67 requires that the defendant must be immediately provided with a copy of Closing Order (indictment) by the Co-Investigating Judges. However, this provision does not expressly grant the defendants the right to receive the indictment in a language they understand. International tribunals, almost 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>35</sup> The ICTY and ICTR provide this material in the language of the defendants as a matter of right.<sup>36</sup> This right applies to all supporting material, regardless of whether it is presented at trial.<sup>37</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>38</sup> It 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>39</sup>

18. In addition to the indictment and its supporting material, courts 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>40</sup> (2) evidence to be presented at trial;<sup>41</sup> (3) exculpatory material in the

<sup>33</sup> Harward Decision, para. 9.5

<sup>34</sup> Muhimana Decision, para. 30.

<sup>35</sup> ICTY Rules, rule 47(G); ICTR Rules, rule 47(G).

<sup>36</sup> ICTY Rules, rule 66(A); ICTR Rules, rule 66(A).

<sup>37</sup> Seselj Decision, p. 1; Ljubic Decision, p. 3; Muhimana Decision, para. 23.

<sup>38</sup> ICC Rules, rule 121(3).

<sup>39</sup> Lubanga Decision, p. 7.

<sup>40</sup> Muhimana Decision, para. 23; ICTY Rules, R.66(A)(ii); Seselj Decision, p. 1; Ljubic Decision, p. 1.

<sup>41</sup> Muhimana Decision, para. 25.

possession and knowledge of the prosecution.<sup>42</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>43</sup> The Tribunal justified this limitation as its instruments does not entitle a defendant to receive *all* material in a language he understands, but only such material that will determine his or her guilt or innocence at trial.<sup>44</sup> The ICC, however, has declined to provide translations of exculpatory evidence.<sup>45</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>46</sup> The Court pointed out that the only evidentiary material the prosecution is expressly required to translate are statements of prosecution witnesses.<sup>47</sup>

*Who Bears The Burden Of Translating The Documents?*

19. This Court's instruments do not expressly delegate the role of translation to any particular organ. The Practice Direction places the responsibility of translating certain pleadings on the Court Management Section,<sup>48</sup> but there is no explicit delegation of translation of other types of documents, particularly evidentiary.
20. 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>49</sup> In contrast, before the ICC, except for documents that the prosecution is required to provide in the language of the defendant, the defence teams are responsible to organize their resources to protect the rights of the defendant.<sup>50</sup>

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

21. Neither this Court's basic documents nor those of similar other tribunals contain express provisions governing a defence counsel's right to translation of documents.
22. 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

<sup>42</sup> Ljubicic Decision, p. 3.

<sup>43</sup> Naletilic Decision, p. 3 (Translation Decision, fn. 14).

<sup>44</sup> Delalic Decision, para. 8 (Translation Decision, fn. 7).

<sup>45</sup> Lubanga Decision, pp. 5-8.

<sup>46</sup> Lubanga Decision p. 7.

<sup>47</sup> Chui Decision, p. 4 (citing ICC Rules, rule.76(3)).

<sup>48</sup> Practice Direction, art. 7.2.

<sup>49</sup> Muhimana Decision, paras. 10, 13.

<sup>50</sup> Chui Decision, p. 5; Katanga Decision, pp. 3, 6



Registry ensure free translation of those materials. The Tribunal required that two types of documents should be translated into the two working languages: (1) the parties' submissions, and (2) the evidence that would be adduced at trial.<sup>51</sup> In that case though one of the defence counsel spoke and understood only French, the other spoke both French and English.<sup>52</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>53</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>54</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>55</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>56</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>57</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. In *Muhimana*, as stated above, the ICTR 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

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

<sup>52</sup> Muhimana Decision. para. 31.

<sup>53</sup> Muhimana Decision. paras. 32-33.

<sup>54</sup> Muhimana Decision. para. 33.

<sup>55</sup> Lubanga Decision, pp. 2, 4.

<sup>56</sup> Lubanga Decision, p. 4.

<sup>57</sup> Ljubicic Decision. p. 3.

translation issues, the defendant's recourse was his ability to choose a different international counsel.<sup>58</sup>

## 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>59</sup> The Agreement and the ECCC Law envisaged this as the sole function of the Pre-Trial Chamber.<sup>60</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. Similarly, Article 267 of the Cambodian Criminal Procedure Code 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. The Appellant also claims that the denial of translations of documents amounted to a refusal to undertake an investigative action by the Co-Investigating Judges and is, therefore, appealable under Rule 74(3)(b).

<sup>58</sup> Khieu Samphan Adjournment Decision, para. 12.

<sup>59</sup> Rules, rules 71–72.

<sup>60</sup> Agreement, art. 7; ECCC Law, arts. 20(new), 23(new).

30. Seeking translations of documents does not amount to seeking investigative action. Although “investigative actions” are not explicitly defined in the Rules, Rule 55(5) provides an illustrative list of actions to be conducted by the Co-Investigating Judges, namely to: a) summon and question suspects and charged persons, interview victims and witnesses and record their statements, seize physical evidence, seek expert opinions and conduct on-site investigations; b) provide safety and support to potential witnesses and other sources; c) seek information and assistance from any State, d) issue such orders as may be necessary to conduct the investigation, including summonses, arrest warrants, detention orders and arrest and detention orders.<sup>61</sup>
31. Decisions on translation requests do not fall under these actions and, therefore, cannot be described as investigative actions. Indeed, not all actions taken by the Co-Investigating Judges is investigative in nature. For example, Rule 74(3) mentions jurisdictional and provisional detention decisions of the Co-Investigating Judges. These decisions (or “actions”) are, on their face, not “investigative”.<sup>62</sup>
32. In sum, issues relating to translations although fall within the decision making powers of the Co-Investigating Judges yet are not investigative in nature. Hence, they are not appealable. Translation is a matter of judicial administration, to the extent that it is managed by the Registry in other international tribunals.<sup>63</sup> Consequently, an appeal against the Translation Decision is beyond the scope of Rule 74(3) and should, therefore, be dismissed as inadmissible.

*All Documents On The Case File Are Not Required To Be Translated Into The Defendant's Language*

33. The Appellant submits that by not providing all documents on the Case File to him in Khmer, a language he understands, the Translation Decision violates his right to participate in his own defence. The Co-Prosecutors submit that this contention is misconceived both on facts and in law.
34. First, Khmer is not the only language that the Appellant understands. He has similar, if not greater, proficiency in French in which he studied as a student and wrote and spoke in his capacity as one of the most senior representative of the *Khmer Rouge*, before, during and after Democratic Kampuchea. A French medical expert who examined his fitness to participate in judicial investigation recorded that the Appellant answered his questions in fluent French.<sup>64</sup>

<sup>61</sup> Rules, rule 55(5).

<sup>62</sup> Rules, rule 74(3).

<sup>63</sup> Muhimana Decision, paras. 10, 13.

<sup>64</sup> *Case of Ieng Sary*, Report of Expertise, Case No. 002/19-09-2007-ECCC/OCIJ, 14 May 2008, ERN 00189152–00189176, D76/IV, p. 5.

35. Second, the Introductory and Supplementary Submissions to date have been made available to the Appellant in Khmer. 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.
36. Third, after the commencement of the judicial investigation, almost all the evidentiary material generated by the Co-Investigating Judges, including documentary and testimonial evidence has been in Khmer and/or French. The same trend is expected to continue in the future.
37. Fourth, the Practice Direction requires that all pleadings filed before this Court are at least in Khmer. 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.
38. Fifth, this Court's founding Agreement and the Rules require that linguistic and legal issues may be fully addressed by a team of counsel representing the defendants.<sup>65</sup> Accordingly, the Appellant has been provided an international counsel who has to work in conjunction with his Cambodian counterpart. The Appellant's current Cambodian counsel understands Khmer and English owing to his considerable experience with working for a reputed non-governmental organisation based in Phnom Penh. He routinely and solely signed and filed documents on behalf of the Appellant in English. The Appellant's international counsel speaks English and has a wide experience of working in Cambodia especially for defence rights. The Appellant has an additional Cambodian lawyer, working as a Case Manager, who too speaks and understands Khmer and English with ease. In addition, the Appellant's legal team comprises of a British lawyer, called to the Bar in the United States, who has defended complex international war crimes cases before the ICTY and ICC. Another lawyer has recently joined the Appellant's defence team as a long term intern. 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>66</sup> In addition, the Appellant retains on his team the services of Professor Michael Vickery who not just speaks, writes and understands Khmer with equal ease but is also an acknowledged authority on Khmer history and the period of Democratic Kampuchea.

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<sup>65</sup> Translation Decision, p. 3.

<sup>66</sup> Translation Decision, para. A4.

39. Sixth, until the amendment of the Practice Direction in April 2008, English (and not Khmer) was the sole preferred language of filing and receipt of documents of the Appellant's defence team. This showed that the Appellant and his counsel were fully capable of - or had the in-house linguistic capacity to - read, write and comprehend legal and evidentiary documents only in English and as such did not require documents in Khmer.
40. Seventh, 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 - though were clearer but 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.
41. Eighth, 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.
42. 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. He claims that before this Court a defendant participates in the proceedings much before he does in those tribunals and, therefore, the access to translations must be provided at much earlier stages including access to exculpatory material 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. In addition, there is no widely accepted right of provision of exculpatory material in the defendant's language. While the *ad hoc* tribunals provide this material, the ICC does not.

43. 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 Services (CMS) 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.

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

44. 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 English, the language of his international counsel. He also contends that the failure to have all the exculpatory evidence translated into English prevents the defence team from effectively participating in judicial investigation by seeking investigative actions, especially at the early stages of the proceedings.

45. As stated above, there is hardly any international instrument or legal authority, binding on this Court, which 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 submit that as no such right inheres in the Appellant, he cannot invoke it to claim ineffective legal representation.

46. 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, therefore, 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 bolsters this linguistic capacity by providing an additional dedicated translator to each defence team.

47. 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 translation 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.

*Translation Decision Ensures Equality of Arms*

48. 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.
49. 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>67</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 CMS are used efficiently and optimally. It shall also avoid duplication, a legitimate (albeit premature) fear expressed in the Appeal.
50. The provision of translators, the Co-Prosecutors anticipate, 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.
51. The Appellant claims that the additional translator will “not help the foreign co-lawyer who is not based in Phnom Penh.” This reasoning is flawed. It presumes that translations can only be oral and not written. Assuming that the translators only undertake oral translation, then the Appellant has a right to choose an international counsel who resides in Phnom Penh to more effectively provide him legal representation. He has voluntarily elected to retain an international counsel who chose not to be based in Phnom Penh. Counsel before similar tribunals, remunerated on similar standards, routinely

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<sup>67</sup> Translation Decision, para. E.4.

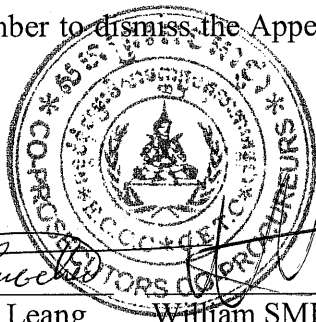
reside at the seats of the tribunals with a view to provide effective representation to their clients. While this Court must provide a defendant a right to “facilities for the preparation of his defence”, this does not extend to providing facilities anywhere in the world.

52. The equality of arms argument should also be rejected on the additional ground that the Appellant has elected not to avail of any facilities provided by the Court Management Service for translation of documents. In particular, he has not even responded to the direction in the Translation Decision seeking submissions from defence teams regarding prioritisation of translation requests.

## VI. CONCLUSION

53. The Co-Prosecutors, therefore, request the Pre-Trial Chamber to ~~dismiss~~ the Appeal as procedurally inadmissible and substantively devoid of merit.

Respectfully submitted,



*CHEA Leang*      *William SMITH*  
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CHEA Leang      William SMITH  
Co-Prosecutor      Deputy Co-Prosecutor

Signed in Phnom Penh, Kingdom of Cambodia on this fifteenth day of August 2008.