

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

FILING DETAILS

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**CO-PROSECUTORS' RESPONSE TO "IENG SARY'S REQUEST FOR A DIRECTION
STATING THAT TIME LIMITS DO NOT COMMENCE UNTIL FILINGS ARE NOTIFIED
IN BOTH WORKING LANGUAGES OF THE DEFENCE"**

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I. INTRODUCTION

1. On 18 March 2011, Ieng Sary through his Defence (the “Defence”) filed a request in English entitled “Ieng Sary’s Request For A Direction Stating That Time Limits Do Not Commence Until Filings Are Notified In Both Working Languages of the Defence”¹ (the “Request”) which was notified to the parties in Khmer on 23 March 2011. The Defence Request “moves for the Trial Chamber to issue a Practice Direction stating that time limits do not commence until filings are notified in both official working languages of each party.”² They assert “the Motion is made necessary in order to protect Mr. Ieng Sary’s right to a defence and adequate facilities for the preparation of his defence.”³ They base their request on the fact that English is the only common language between all members of the Defence team, consequently, if a filing, order or decision is received in Khmer and French the majority of the team will be unable to read it and subsequently act upon it. They claim this will therefore violate Ieng Sary’s right to a defence and adequate facilities for the preparation of his defence.⁴
2. For the reasons set out below, the Co-Prosecutors submit that the Request be dismissed as the Trial Chamber does not have the power to amend Practice Directions *per se* and more fundamentally the Defence have not demonstrated that a violation of Ieng Sary’s right to a defence and adequate facilities for the preparation of his defence has occurred or is likely to occur by the implementation of Revision 6 of the Practice Direction on “Filing of Documents Before the ECCC”⁵ (the “Practice Direction”).

II. RELEVANT FACTS

3. On 19 June 2008 the Co-Investigating Judges issued an order entitled “Order on the Translation Rights and Obligations of the Parties”⁶ (the “Translation Order”) notified to the parties on 23 June 2008. As the title indicates the Translation Order sets out the translation rights and obligations of the parties at the ECCC. Specifically, the Order confirmed the right of this Accused to supplement his legal team with a full-time translator who possessed a language combination of his choice.

¹ Document No. **E67**, “Ieng Sary’s Request For A Direction Stating That Time Limits Do Not Commence Until Filings Are Notified In Both Working Languages of the Defence,” 18 March 2011, ERN 00655116-21 [the “Request”].

² Request at page 1.

³ Request at page 1.

⁴ Request at page 1.

⁵ Document No. **ECCC/01/2007/Rev.6**, Practice Direction on the Filing of Documents Before the ECCC, [the “Practice Direction”].

⁶ Document No. **A190**, “Order on the Translation Rights and Obligations of the Parties,” 19 June 2008, ERN 00196923-30 [the “Translation Order”].

4. On 11 September 2008 the Defence in their reply to the “Co-Prosecutors’ response to Ieng Sary’s Appeal on Translation Rights and Obligations of the Parties” (the “Reply”) notified the Pre-Trial Chamber that they elected not to supplement their legal team with a full-time translator who possessed a language combination of their choice as made available by the Co-Investigating Judges two and a half months earlier.⁷ As justification for their inaction they stated “*electing not to make use of such inadequate facilities should not be a reason to reject the Defence’s argument. It simply shows the consistency of the Defence’s position in word and deed.*”⁸
5. On 20 February 2009 the Pre-Trial Chamber confirmed the availability of the full time translator who specialises in languages of the Accused’s choice as an extra resource to Ieng Sary in their decision on this Defence’s appeal of the Translation Order (the “First Translation Decision”);

“In addition to his legal team, the Charged Person has been allowed "free of charge and full time, the assistance of a translator (between two official working languages to be specified by the defence team) to ensure that the charged persons and the defence teams can have certain documents translated as required, to assess the teams' translation requirements for transmission to CMS [Court Management Section] and to assist the teams' collaboration with CMS (*footnote removed*). In this respect, it is noted that international jurisprudence has recognised that providing a defendant with an interpreter is an adequate substitute for provision of the translation of certain documents (*footnote removed*).”⁹

6. On 9 March 2011 the parties were notified of amendments to the Practice Directions in particular to the time and languages in which applications or pleadings should be filed.

“8.3 Any response to an application or pleadings shall be filed together with any list of authorities within 10 calendar days of notification of the document to which the participant is responding.”¹⁰

“8.5 Except as *otherwise directed* by the Co-Investigating Judges or a Chamber of the ECCC, time limits commence on the first calendar day following the day of service of the Notification of the document in Khmer and one other official language of the ECCC. *Exceptionally*, the Co-Investigating Judges or a Chamber may decide that the time limits commence on the first calendar day following the day of filing in all three languages (*emphasis added*).”¹¹

⁷ Document No. **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, ERN 00223734-46 (the “Reply”).

⁸ Reply, para. 31.

⁹ Document No. **A190/II/9**, Pre-Trial Chamber’s “Decision on Ieng Sary’s Appeal Against the OCIJ’s Order on Translation Rights and Obligations of the Parties, 20 February 2009, 00283298-3310 [the “First Translation Decision”].

¹⁰ Practice Direction, Article 8.3.

¹¹ Practice Direction, Article 8.5.

III. RELEVANT LAW

7. The ECCC Internal Rules (the “Rules”) glossary defines a “Practice Direction” as:

“regulations covering detailed aspects of the conduct of the work of the ECCC, *adopted by the Rules and Procedure Committee*, in accordance with the ECCC Law, the Agreement, and these IRs (*emphasis added*).”¹²

8. Rule 21 (1) entitled “Fundamental Principles” mandates how the ECCC Law, Internal Rules, Practice Directions and Administrative Regulations are to be interpreted:

“The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement.....”

9. Rule 10 (3) authorizes the Head of the Defence Support Section (DSS), amongst other particular ECCC position holders to request a meeting of the Rules and Procedure Committee for the purpose of adopting Practice Directions relating to the functioning of the ECCC:

“The Committee shall adopt Practice Directions relating to the functioning of the ECCC, subject to subsequent review in Plenary Session. For this purpose, the Committee shall meet as required at the initiative of the President, or at the request of a Judge, a Co-Investigating Judge, a Co-Prosecutor, the Head of the Defence Support Section, the Head of the Victims Support Section, the Civil Party Lead Co-Lawyers and the Director or Deputy Director of the Office of Administration.”

10. Rule 22 (4) mandates that the Co-Lawyers for the Accused shall be subject to the various ECCC regulatory schemes including ECCC Practice Directions:

“4. Lawyers in the performance of their duties, lawyers shall be subject to the relevant provisions of the Agreement, the ECCC Law, these IRs, ECCC Practice Directions and administrative regulations, as well as the Cambodian Law on the Statutes of the Bar and recognized standards and ethics of the legal profession. They have an obligation to promote justice and the fair and effective conduct of proceedings.”

11. Rule 22 (1) and (1) (c) obligates a foreign lawyer selected by the Accused to work in collaboration and in conjunction with the national lawyer selected:

“1. Any person entitled to a lawyer under these IRs shall have the right to the assistance of a national lawyer, or a foreign lawyer in *collaboration* with a national lawyer, of their own choosing, as follows:....(c) A foreign lawyer shall work in *conjunction* with a national lawyer before the ECCC (*emphasis added*).”

¹² ECCC Internal Rules (Revision 7) as revised on 23 February 2011 (the “Rules”).

12. Rule 22 (5) provides the Co-Lawyers for the Accused the right to recruit lawyers of their choice to assist them in their work:

“5. National and foreign lawyers have the right to recruit legal teams to assist in their work. However, defence lawyers for indigent persons must choose from among persons included in the list referred to in Rule 11(2) (i). Where a defence lawyer for an indigent person wishes to recruit a person who is not on the list referred to in Rule 11(2)(i), that person must first complete the formalities for inclusion in that list.”

13. The translation rights and obligations of the parties during the pre-trial phase have been examined by the Pre-Trial Chamber. Based on a review of ECCC and comparative international criminal law the Chamber held that all documents contained in the Case File are not required to be translated into the Accused’s own language or that of their lawyers. The fact that the language of a document is one of the three official languages does not of itself amount to a right to have all documents in the case file translated into this language.¹³ The principle of fairness did not necessarily grant a defendant the right to have all procedural documents and evidentiary materials disclosed translated.¹⁴ It is an international standard – at the pre-trial stage at least - that providing a defendant with an interpreter is an adequate substitute for provision of the translation of certain documents.¹⁵
14. In a further Pre-Trial Chamber decision regarding translation rights and obligations at the ECCC issued on 15 December 2010¹⁶ (the “Second Translation Decision”) the Chamber noted the responsibility of Defence teams to collaborate internally and co-operate externally with the ECCC translation process to optimize the effectiveness of that process. They deemed this collaboration and co-operation was necessary in order to enable the charged person to “have knowledge of the case against him and to defend himself, notably by being able to put before the Chamber his version of events.”¹⁷ They held useful co-operation with the ECCC translation process included the requirement that all members of the Defence teams collaborate internally by optimizing their linguistic capacity. Specifically, regarding the translation into - or from - a third language the Pre-Trial emphasized ;

¹³ First Translation Decision, para. 34-35.

¹⁴ First Translation Decision, para. 35.

¹⁵ First Translation Decision, para. 41.

¹⁶ Document No. **002/18-11-2010-ECCC/PTC (16) 18-2**, Pre-Trial Chamber’s “Decision on Request for Translation of all Documents Used in Support of the Closing Order,” 15 December 2010, 00631021-28 [the “Second Translation Decision”].

¹⁷ Second Translation Decision, para. 10.

“that in order to protect the fair trial rights of the Accused, including by avoiding unnecessary delays, the parties are instructed to consider how to avoid unnecessary requests for translation into a third language, in particular by, for example, giving due regard to the linguistic capacities of defence teams, by requesting extracts of documents whenever possible, *and by utilising the services of the translators provided full time and free of charge by the Court (footnote removed – emphasis added)*. These measures were identified by the Co-Investigating Judges as means to achieving a concrete and effective collaborative process for managing translation during the pre-trial stage. *(footnote removed)*”¹⁸

15. The duty of lead Counsel to manage the staffing of their teams from a linguistic viewpoint has been recognized at the International Criminal Court in the case of *Mathieu Ngudjolo Chui*.¹⁹ The Pre-Trial Judge held that in order to protect an Accused’s fair trial rights the Accused’s lead Counsel has a responsibility to compose the Defence team in such a manner which will allow him to be properly assisted in the presentation of the case and to effectively protect the rights of the Accused.²⁰

IV. ARGUMENT

A. The Trial Chamber Does Not Have Power to Amend Practice Directions

16. The Request is confusing in that in its Introductory paragraph the Defence states it “moves for the Trial Chamber to issue a Practice Direction” and then in its concluding paragraph it requests the Trial Chamber “issue a Direction” that time limits only start when filings are notified to the Defence in all three languages or at least the officially notified languages of the Defence. As correctly stated by the Defence Article 8.5 allows the Trial Chamber to alter the commencement of time limits for responding to applications and pleadings specifically mentioning that in exceptional circumstances the time limits may start the day after notification in all three languages.
17. Taken as a whole the intent of Article 8.5 appears to limit the discretion of the Chamber to allow for deadlines to commence from a date other than the day after the application or pleading has been notified in Khmer or another official language of the ECCC only in situations where exceptional circumstances exist. Whether exceptional circumstances exist would be determined on a case by case basis. With regards to this Request, as it is based on a hypothetical situation – as the Defence is not responding to an application or pleading, no such circumstances exist, and therefore the Request should be dismissed.

¹⁸ Second Translation Decision, para. 10.

¹⁹ *The Prosecutor v. Mathieu Ngudjolo Chui*, Situation in the Democratic Republic of the Congo, Decision on the Defence Request concerning time limits,” 27 February 2008, International Criminal Court, Document No. ICC-01/04-02/07.

²⁰ *The Prosecutor v. Mathieu Ngudjolo Chui* at page 5.

18. If the Defence believe that the application of this Practice Direction is likely to violate its client's fair trial rights in the future the appropriate course would be to request the Head of Defence Support Section to seek an amendment of this Practice Direction through the procedure outlined in Rule 10 (3). This will ensure that consistency and certainty can be maintained in the regulation of proceedings at the ECCC through the making and enforcing of Practice Directions rather than through ad hoc decisions made on a case by case basis.

B. The Defence have Failed to Demonstrate There has Been or is Likely to be a Violation of Ieng Sary's Fair Trial Rights

19. The Defence argue in their Request that Revision 6 of the Practice Directions (referring to Articles 8.3 and 8.5) violates the fair trial rights of Ieng Sary specifically his rights to a defence and adequate facilities for the preparation of that defence.²¹ It is clear however that Revision 6 of the Practice Directions is not a violation of his rights, as such, as the Defence have not alleged that the hypothetical scenarios raised in their Request have in fact occurred. The more consistent position of the Defence is however that the application of Articles 8.3 and 8.5 to the filing practice in this case could lead to a violation of Ieng Sary's fair trial rights.²² The Co-Prosecutors submit there is no solid basis for this assertion for the reasons set out below.

Request Based on Speculation

20. First, this Request is based on speculative and hypothetical scenarios of the effects of the application of Articles 8.3 and 8.5 Practice Directions to the current filing practice in Case 2. These scenarios put forward lack grounding in the reality of past and projected future pleading practice before the Trial Chamber. The Defence argue if "a filing, order or decision" is filed in Khmer and French the majority of the team could not read it or act on it.²³ Yet in the last 2 and a half months, during this busy pre-trial litigation period, the Trial Chamber has not issued one order or decision in Khmer and French alone in the first instance. In addition, all parties to the proceedings have opted to file in Khmer and English with only one party, Khieu Samphan, who has chosen to file in Khmer and French. Consequently, the instances where the alleged violations are likely to occur are likely to be infrequent.

Request Assumes Trial Chamber Will Not Exercise Its Discretion Appropriately

²¹ Request at para. 9 and 14.

²² Request at para. 9.

²³ Request at para. 1.

21. Second, the request for a new Practice Direction presumes the Trial Chamber will not act in good faith when interpreting Articles 8.3 and 8.5. The Trial Chamber has an obligation pursuant to Rule 21 (1) to interpret the ECCC regulatory provisions including the Practice Directions in such a way as to always safeguard the interests of the Accused including his fair trial rights. In their Request the Defence have failed to demonstrate that if a particular filing is notified in Khmer and French and the Defence are acting with due diligence to use all facilities to understand that filing but still cannot do so that the Trial Chamber would not find “exceptional circumstances” and grant an extension of time to file pursuant to Article 8.5. The Defence have not demonstrated that such an exception would not be granted by the Trial Chamber when a legitimate, justified and genuine application for extension of time is made by the Defence.

Request Overstates the Practical Effect of Article 8.5

22. Third, the Defence have failed to show how in the few instances when filings in Khmer and French are likely to occur how, with collaboration of his national counsel or another Khmer-English team member, the Defence would not be able to secure an understanding of the filing that may need a response. The Defence claim that by removing these two team members from their duties by “requiring them to act as translators in an already understaffed and under-resourced team will deny adequate facilities for Mr. Ieng Sary to prepare his defence in other areas.”²⁴ It is submitted in light of the number of times this situation is likely to occur the detrimental effect, if any at all, of the application of Article 8.5 is greatly exaggerated.

23. The more concerning Defence assertion is that the team is understaffed and under-resourced thereby implying that Ieng Sary’s fair trial rights may not be fully exercised. However, the Defence provide no factual basis for this claim. It is submitted that if the Defence are making this assertion it is incumbent on them to provide evidentiary support so the Trial Chamber can determine its validity. The Trial Chamber has an obligation to safeguard the Accused’s fair trial rights pursuant to Article 33 new and Rule 21(1). Unless the Defence provide evidence of their claim that they are understaffed and under resourced their argument that the two Khmer-English speaking lawyers in the Defence team cannot assist the international counsel in understanding the pleadings in Khmer and French should be given no weight at all.

²⁴ Request at para. 13.

Request Fails to Recognize Leading Counsels Duty to Ensure Team is Balanced

24. Fourth, as held in the ICC case of *Mathieu Ngudjolo Chui*²⁵ the Defence has an obligation to select their staff and intern support in a manner that enables them to properly defend their client. Although the Defence have chosen to work in English and Khmer, in light of the working languages of the Court, the lead Counsel are expected within reason to have quick access to some French language translation assistance through staff, legal intern and interpreter capacity so that the team can respond quickly to such filings. There are many ways in which this obligation can be met and each team will necessarily achieve it in a different manner. However if this Defence chooses to ignore this duty they cannot make claim to the Chamber that their client is denied his fair trial rights when they have intentionally chosen not to organise their team properly. The failure of this Defence to organise their team in such a manner to be able to respond quickly to Khmer-French filings cannot support their claim that Ieng Sary's fair trial rights have been violated.

Request Fails to State it has Rejected Translation Services Offered

25. Fifth, from 23 June 2008 the Defence by virtue of the Translation Order has been offered a full time translator (who possesses two official working languages specified by the Defence team) to ensure that certain documents are translated as required. However, by the Defence notification to the Pre-Trial Chamber some two and a half months later they advised that they intentionally did not elect to use the services of such translator on the basis it was an inadequate response to their immediate request for translation of documents.²⁶ It is unclear to the Co-Prosecutors if the Defence have since decided to accept such a translator. However with on the basis of a clear statement of rejection of translation services offered to them, and in the absence of any statement that they have changed their position on accepting translation assistance, it is submitted that their claim of a violation of fair trial rights with regards to translation issues cannot genuinely be entertained.

Request Fails to Acknowledge Instantaneous Electronic Translation Services are Available

²⁵ *The Prosecutor v. Mathieu Ngudjolo Chui* at page 5.

²⁶ Reply, para. 31.

26. Sixth, the Defence can avail themselves of instantaneous electronic translation services that are available to them through the software the ECCC has provided and to those services that are freely provided on the internet. It is clear this translation assistance is not word perfect and has difficulty for accounting for language nuances and specialised terms yet the substance of the pleading can be easily understood and responses can be prepared accordingly. Any verification of specialist terms can be made without the need for a full translation.

Request Understates the Utility of Unofficial Translations

27. The Defence in fact state in their request that they may be able to obtain unofficial translations with great difficulty and yet fail to explain the difficulty and how they in fact can obtain French translations. If the great difficulty is borne by the Defence team it has some relevance but if that is borne by others that is a different matter. Either way there is no explanation as to how likely a French translation can be obtained in the event of a Khmer and French document filing. Consequently the Trial Chamber is not in a position to determine whether that in fact has an impact on the Defence team's work.

28. The implications of an unofficial translation have been overstated for two reasons. First, as long as the translation is of reasonable quality it is unlikely that it will differ greatly from the official version and consequently a different reading by the Trial Chamber is unlikely. Second, the Defence appear concerned that "it may unintentionally fail to act in strict accordance with an order of decision of the Trial Chamber."²⁷ Bearing in mind to this date the Trial Chamber have always filed in English and Khmer in the first instance, with no indication that they will depart from this practice, the situation the Defence raise is unlikely to occur.

Request Fails to Recognize the Numerous Options to Understand French and Khmer Filings

29. With numerous options open to the Defence to be able to understand filings that arrive in the language combination of French and Khmer and the isolated instances in which this has or will occur the Defence have failed to demonstrate that the effect of this Practice Direction amendment is likely to violate Ieng Sary's fair trial rights.


I. RELIEF REQUESTED

30. For the reasons set out above, the Co-Prosecutors request that the Motion be dismissed. Further the Co-Prosecutors request that pursuant to Article 33 new and Rule 21 (1) the

²⁷ Request at para. 12.

Trial Chamber order the Defence to provide full and complete details of their claim that their Defence team is understaffed and under-resourced – as they allege - in order to consider this and take any further action it considers necessary to safeguard Ieng Sary's fair trial rights.

Respectfully submitted,

Date	Name	Place	Signature
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