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du dossier: C.A.FRY



ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia

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អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the
Courts of Cambodia

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត

Office of the Co-Investigating Judges
Bureau des Co-juges d'instruction

សំណុំរឿងព្រហ្មទណ្ឌ

Criminal Case File /Dossier pénal

លេខ/No: 002/14-08-2006

លេខស៊ើបអង្កេត/Investigation/Instruction

លេខ/No: 002/19-09-2007-ECCC-OCIJ

ប័ណ្ណសម្រេចស្តីពីសិទ្ធិនិងកាតព្វកិច្ចរបស់

ភាគីទាក់ទងនឹងការបកប្រែ

**Order on Translation Rights and Obligations
of the Parties**

**Ordonnance sur les droits et obligations des
parties relatifs aux traductions**

We, You Bunleng and Marcel Lemonde, Co-Investigating Judges of the Extraordinary Chambers of the Court of Cambodia ("ECCC"),

Noting Article 12 of the Agreement between the Royal Government of Cambodia and the United Nations of 2003 ("the 2003 Agreement")

Noting Articles 24, 35 and 45 of the Law on the Establishment of the Extraordinary Chambers of 27 October 2004 ("the 2004 Law"),

Noting Rules 11(4), 21, 22(1), 55(6) and 69(2) of the Internal Rules ("the IR")

Noting Articles 2, 7 and 8 of the Practice Direction on Filing of Documents¹ ("the PD")

Noting the judicial investigations opened against **KAING Guek Eav, alias DUCH** and against **NUON Chea and others,**

Charged with **Crimes against humanity** and **Grave Breaches of the Geneva Conventions of 12 August 1949,** offences defined and punishable under Articles 5, 6, 29 (New) and 39 (New) of the Law on the establishment of the Extraordinary Chambers, dated 27 October 2004.

Noting the application of the defence team of **IENG Sary** dated 10 January 2008 (A120) for the translation into Khmer of the citations and cited material in the Initial Submissions

¹ ECCC/01/2007/Rev.2, the most recent revision being in April 2008

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Extraordinary Chambers in the Courts of Cambodia, National Road 4, Choam Chao, Dangkao Phnom Penh
Mail Po Box 71, Phnom Penh Tel: +855(0)23 218914 Fax: +855(0) 23 218941.

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Boite postale 71, Phnom Penh. Tel: +855(0)23 218914 Fax: +855(0) 23 218941.



("IS")². That application referred to two earlier communications (20 and 21 December 2007, D52 and D53, respectively) but neither expressly made a translation request. This defence team's letter of 6 May 2008 (A120/I) repeated the earlier request for translation into Khmer, requested translation of the same material into English and reminded the Co-Investigating Judges of their obligation to translate all other material generated during the investigations into Khmer and English,

Noting the declaration of the international co-lawyer for KHIEU Samphan to the Co-Investigating Judges of 14 February 2008 (D75) explaining that his client would not respond to their questions until all annexes to the IS were translated,

Noting the declaration of the international lawyer for KHIEU Samphan before the Pre-Trial Chamber on 23 April 2008, to the effect that he declined to continue to act for his client since all case file documents were not available in French, as well as the decision of the Pre-Trial Chamber of the same date in response,

Noting three translation requests (into Khmer and French) made to date from the DUCH defence team,

Noting the letter of 5 June 2008 (A185) from the defence team of KHIEU Samphan to the Co-Investigating Judges, which attached a letter from that team of the same date to the Chief of the Court Management Section ("CMS") of the Office of the Administration. The letter to CMS requested the communication of all elements of the case file which had already been translated into French and, further, an indication of the date when the remainder of the case file would be available in French.

Considering the lack of a statutory provision on the extent of translation obligations and rights,

Considering that the content of such obligations and rights gives rise to an important question of general interest, so the Co-Investigating Judges have decided to address this memorandum to all Parties,

Reasons for the Decision:

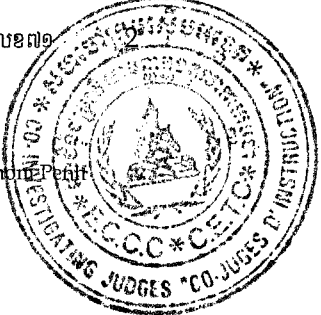
A. Provisions and principles governing translation rights and obligations

1. Article 45 of the 2004 Law provides that the official working languages of the ECCC shall be Khmer, English and French. Certain specific but limited provisions apart (and addressed below), there is no statutory provision detailing the extent of translation rights and obligations.

2. The extent of such rights and obligations must therefore be determined from a range of sources. Pursuant to Rule 2 of the IR, guidance can be obtained from, *inter alia*, Article 12

² The Inventory Numbers for the IS, relevant for current purposes are: D3 (Initial Submission including footnotes), D3/I (schedule) and D3/II to D3/V (Annexes A-D).

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Extraordinary Chambers in the Courts of Cambodia, National Road 4, Choam Chao, Dangkao Phnom Penh
Mail Po Box 71, Phnom Penh Tel: +855(0)23 218914 Fax: +855(0) 23 218941
Chambres extraordinaires au sein des tribunaux cambodgiens, Route nationale 4, Choam Chao, Dangkao, Phnom Penh
Boite postale 71, Phnom Penh. Tel: +855(0)23 218914 Fax: +855(0) 23 218941.



of the 2003 Agreement, Articles 24 and 35 of the 2004 Law, Rules 21, 55(6) and 69(2) of the IR and from Articles 2, 7 and 8 of the PD, including notifications under Article 2(2) of the PD³. These sources must be supplemented by the relevant jurisprudence and practice of other international(ised) criminal courts, regard being had to the particular structure of the ECCC namely, the judicial investigations by the Co-Investigating Judges who are seised of the case file until a Closing Order is adopted under Rule 67(1) of the IR⁴. Finally, the elements of the fundamental right to a fair hearing, and relevant international jurisprudence thereon, are also of particular pertinence in this context.

3. On the one hand, account must be taken of the right of the charged person to a fair trial, which includes the right to be informed promptly and in detail in a language that they understand of the nature and cause of the charge against him or her; to have adequate time and facilities for the preparation of their defence; the right to "equality of arms" and, notably, to examine evidence against them and obtain the presentation and examination of evidence on their behalf under the same conditions as evidence against them⁵; finally to have the free assistance of an interpreter if the charged person cannot understand or does not speak the language used in the court.

On the other hand, the right to a trial within a reasonably period of time would be seriously undermined by any requirement for full translation of all documents on the case file into the three official working languages of the ECCC⁶.

4. Moreover, the Parties (including the charged persons) must contribute to the resolution of their own language needs, by using the linguistic capacity within their teams and from the Defence Support Section, and by usefully cooperating with the translation process. Failure to do so could prejudice the rights of the defence, notably to a hearing within a reasonable period of time⁷.

In the first place, the requirement that the defence team collaborate can be derived from Rule 21(3) of the 2003 Agreement as well as Rules 11(4) and 22(1) of the IR so that the "linguistic and legal issues may be fully addressed by a team of lawyers representing a charged person"⁸. Equally, the national and international co-prosecutors, and the members

³ Khmer, since the amendment of the PD in April 2008, as well as French for the DUCH and KHIEU Samphan teams; English for the IENG Sary, IENG Thirith and NUON Chea teams and English for the Co-Prosecutors.

⁴ Rules 55(6) and 69(2) of the IR

⁵ ECHR *Bulut v. Austria*, judgment of 22 February 1996, Reports 1996-II, § 47

⁶ ICTY *Prosecutor v. Ljubcic*, no. IT-00-41, Decision of 20 November 2002

⁷ One of the criteria retained by the ECHR by which it assesses the reasonableness of the length of criminal proceedings is the conduct of the Parties to the criminal proceedings, as well as the complexity of the case and what is at stake for the accused (see, among many authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII and, recently, *Krawczak v. Poland*, no. 40387/06, 8 April 2008, § 29)

⁸ ECCC Pre-trial Chamber, case no. 002/19-09-2007-ECCC/OCIJ (PTC04) concerning KHIEU Samphan, decision of 23 April 2008, §§ 6, 11 and 12; ICTY *Prosecutor v. Delalic*, no. IT-96-21, decision of 25 September 1996, § 1; ICTR *Prosecutor v. Muhimana*, no. ICTR-95-1-B-I, Decision of 6 November 2001, § 33(f)

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Extraordinary Chambers in the Courts of Cambodia, National Road 4, Choam Chao, Dangkao Phnom Penh
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of their team, are expected to collaborate to optimize their office’s linguistic capacity⁹. Secondly, it is also essential that the Parties cooperate with CMS¹⁰ to ensure a collaborative determination of their precise translation needs and useful management of translation priorities¹¹.

5. In determining therefore the relevant translation rights and obligations, Judges must take into account the above principles, as well as considerations of judicial economy linked to the organization of the ECCC and its translation services.¹²

B. Translation into the language of the charged person

1. The first principle emerging from international criminal court practice and procedure concerns the extent to which a charged person is entitled to have case file documents translated into a language which he or she understands. Since none of the charged persons has as yet officially accepted any capacity in one of the other official working languages of the tribunal, the relevant language for these purposes is Khmer.

2. The only specific legal provisions directly concerning the right of a party to receive information and documents in a particular language, concern the charged persons: Article 24 of the 2004 Law (“Suspects shall be unconditionally entitled to ... the right to interpretation, as necessary, into and from a language they speak and understand”) and Article 35 (f) of the 2004 Law (“to have the free assistance of an interpreter if the accused cannot understand or does not speak the language used in the court”). Article 7 of the PD now requires filings in Khmer (as well as another official working language) and, further, that a charged person will be notified of filings in those languages.

A number of international criminal tribunals have relied on jurisprudence concerning Article 6(3)(e) of the ECHR, a provision similar to Article 24 and 35(f) cited above, to find that a charged person cannot require a written translation, into his own language, of *all* items of written evidence or official documents in the procedure: rather the key requirement is to allow a charged person 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”¹³.

3. However, the right of a charged person to “*be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him (...)* [requires] *special attention to be paid to the notification of the “accusation” to the [Charged Person].(...)* [The] *indictment plays a crucial role in the criminal process in that it is from the moment of its*

⁹ See also *Muhimana*, § 27; and *Ljubicic*

¹⁰ Responsible for managing translation requirements of the ECCC (Article 7(2) of the PD) under the supervision of the Co-Investigating Judges and/or the relevant Chamber

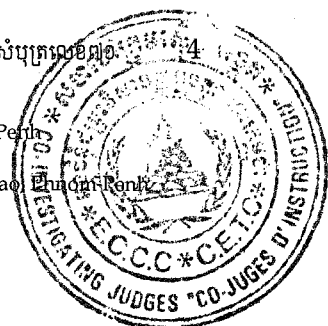
¹¹ ECCC Pre-Trial Chamber cited above, §§ 6, 11 and 12; ECHR *Klimentyev v. Russia* judgment of 16 November 2006, § 108

¹² ICTY *Prosecutor v. Saric*, no. IT-95-9, Decision of 21 May 1998; *Muhimana*, § 12

¹³ ECHR *Luedicke, Belkacem et Koç v. Germany*, judgment of 28 November 1978, Series A no 29, § 48 and ECHR *Kamasinski v. Austria*, judgment of 19 December 1989, Series A no. 168, §74, ICTR *Muhimana* §§ 16-17, ICC *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision of 4 August 2006

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service that the defendant is formally put on written notice of the factual and legal basis of the charges against him. A defendant not conversant with the court's language may in fact be put at a disadvantage if he is not provided with a written translation of the indictment in a language he understands.”¹⁴

4. Accordingly, and adapting the above to the particular structure of the ECCC, a charged person is entitled to the translation into Khmer of any Indictment of the Co-Investigating Judges under Rule 67(1) of the IR, since that constitutes the final characterization and founding of the charges on which a charged person is sent forward for trial. In addition, a charged person is entitled to translation into Khmer of the elements of proof on which any such Indictment would rely¹⁵: as pointed out in the above-cited *Delalic* decision, “The rights of the accused are completely protected by making sure that all elements of proof produced at trial are communicated to him in his language”.

The charged person is also entitled to the translation into Khmer of the IS and the Final Submissions of the Co-Prosecutors, as well as of all footnotes and indexes of the factual elements on which those Submissions rely. Concretely as regards the IS, this amounts to D3 and D3/I-V.

These translation rights must be considered at all times a matter of priority and, in particular, for the DUCH case file given the advanced stage of the proceedings.

C. Remaining Translation rights and obligations

1. The documents referred to at B. above must be translated into the other official working language(s) having regard to the Parties' notifications under Article 2(2) of the PD namely, into both French and English for both case files. Indeed, in Case File 002/19-09-2007-ECCC-OCIJ, although NUON Chea, IENG Sary and IENG Thirith would require translation in English only, KHIEU Samphan defence team has notified under Article 2(2) of the PD that it would file and receive documents in French (as well as Khmer). Likewise, in Case File 001/18-07-2007-ECCC-OCIJ, DUCH chose French while the Co-prosecutors opted for English.

2. The translation into all three official languages of all judicial decisions and orders should be systematic in the interests of the good administration of justice¹⁶.

3. Remaining case file documents, such as pleadings, internal notes and correspondence, are not elements of proof for the determination of the trial chamber and are not therefore covered by the requirement to translate into the language of the charged person¹⁷. However,

¹⁴ *Kamasinski*, § 79; *ICTY Prosecutor v. Delalic*, no. IT-96-21, decision of 25 September 1996, § 8; *ICTY Prosecutor v. Naletilic and Martinov*, no. IT-98-34-T, decision of 18 October 2001; *Ljubicic* decision; *Muhimana* decision, §§ 15-25; and *ICC Lubanga* decision

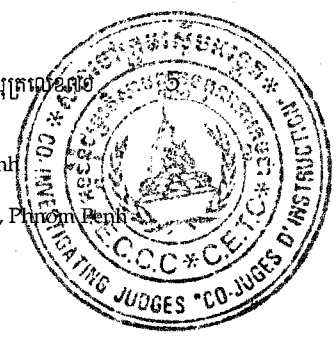
¹⁵ *ICTY Prosecutor v. Delalic*, no. IT-96-21, decision of 25 September 1996, § 8; *Ljubicic*; *Muhimana*, §§ 22-25 and 33

¹⁶ *Delalic* § 14; *Muhimana* § 29 and 32-33

¹⁷ *Delalic* § 10; *Muhimana*, § 26

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Extraordinary Chambers in the Courts of Cambodia, National Road 4, Choam Chao, Dangkao Phnom Penh
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as noted above since April 2008, all filings are to be in Khmer, as well as one of the other official working languages. They must be translated into the other official working language(s) having regard to the Parties' notifications under Article 2(2) of the PD namely, into French and English for both case files.

4. As noted above, these translation rights must be considered a matter of priority for the DUCH case file.

D. Response to pending translation requests

1. According to the principles defined above, the translation requests on behalf of IENG Sary and KHIEU Samphan have been transmitted to CMS for translation, but only in respect of case file documents no. D3 and D3/I-V.

2. The Co-Investigating Judges will respond separately to the requests from the DUCH defence team filed in the Case File 001/18-07-2007-ECCC-OCIJ only.

E. Progressive Management of translation rights and obligations

1. Having regard to the above principles, the current translation workload as well as the finite translation resources of the ECCC, it is inevitable that the Parties' translation requests do conflict. Therefore, as in other international(ised) criminal tribunals, the Parties' translation priorities will need to be managed progressively.

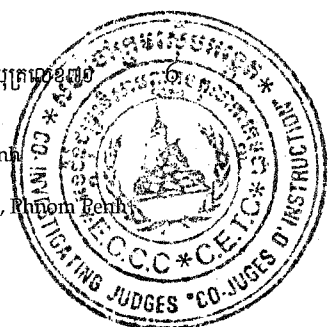
2. The Parties are required therefore to fulfill their obligations outlined at paragraph A4 above. In particular, the Co-Investigating Judges require the Parties to reduce their translation needs through optimizing their linguistic capacity, to assess and transmit to CMS their consequent translation priorities and, further, to collaborate actively with CMS to work towards a consensus as regards the management of those priorities. In the event of a failure to achieve such consensus, CMS must report to the Judges with a view to the Judges resolving the matter¹⁸ by, *inter alia*, fixing specific priorities and, if necessary, translation quotas¹⁹.

In so collaborating with the administration of the Tribunal, the Parties must consider, as regards documents which exist already in Khmer and one other language, how further urgent translation to a third language can be avoided having regard to the Parties' language capacities. Moreover, the Parties must ensure that they request translation of extracts of documents whenever this could suffice for their needs.

3. In order to ensure that this collaborative process is as "concrete and effective"²⁰ as possible, the Co-Investigating Judges consider that each defence team should have at its disposal, as soon as possible, free of charge and full time, the assistance of a translator

¹⁸ *Muhimana*, §§ 10 and 28
¹⁹ Above-cited ICTY *Seselj* decision
²⁰ *Kamasinski*, § 74

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(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 and to assist the teams' collaboration with CMS.²¹ The principle of equality of arms does not require the same for the Co-Prosecutors given the added staff resources of the latter.

4. Finally, the Co-Investigating Judges note that it is for the Trial Chamber, once seized of the case file, to manage the translation requirements of any trial, as the interests of the proper administration of justice and of the right to a fair trial dictate. The Pre-Trial Chamber will also set the translation rights and obligations for applications and appeals submitted under Rules 71-78 of the IR.

For these reasons,

1. CMS will provide by **30 June 2008** to the Co-Investigating Judges and to the Parties, a complete index of all pending translation requests in both case files, with projected dates by which it is envisaged those requests can, resources permitting, be completed ("CMS Translation Table"). Such projected translation dates of CMS would be indicative as they may have to be altered on the basis of, *inter alia*, intervening priorities.

2. The Parties (both case files) must submit by 14 July 2008 to CMS a list of the precise case file documents which they require to be translated as a matter of priority as well as any request to alter a prior uncompleted translation request including:

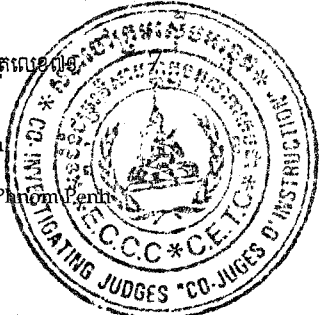
- an indication of whether full or partial translation of the document is required;
- the number of pages to be translated and into which language(s);
- the priority to be accorded to the translation (Category A within one month, Category B within 2-3 months and Category C within 3-4 months); and
- the reasons for the translation request and, in particular, for the priority accorded.

3. CMS will retain a Register of the Parties translation requests, will not share those requests with the other Parties and will produce a revised CMS Translation Table (covering both case files) without referring to the identity of the party requesting the specific translation.

4. CMS and the Parties must strive to achieve consensus on any overlapping priorities and, if this is not possible, CMS shall report to the Co-Investigating Judges (with a copy of the CMS Translation Table following the confidentiality principles outlined at 3. above) who will resolve the dispute by, *inter alia*, fixing specific priorities and, if necessary, translation quotas. CMS may provide further information, including concerning the parties making the translation requests, confidentially to the Co-Investigating Judges.

²¹ *Muhimana* § 30

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា មានទីតាំងស្ថិតនៅ ផ្លូវជាតិលេខ៤ សង្កាត់ ចោមចៅ ខណ្ឌ ដង្កោ ក្រុង ភ្នំពេញ ប្រអប់សំបុត្រលេខ៧១
 ទូរស័ព្ទលេខ +៨៥៥(០)២៣ ២១៨៩១៤ ទូរសារលេខ +៨៥៥(០)២៣ ២១៨៩៤១។
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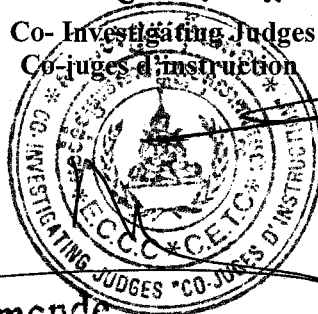
5. CMS are asked to provide to the Co-Investigating Judges and to the Parties, a revised CMS Translation Table in both case files, immediately following the filing of the Final Submissions of the Co-Prosecutors and of the Closing Order of the Co-Investigating Judges in the Duch case file.

6. The five defence teams must indicate to the Office of the Administration by **30 June 2008** their language preference (two official working languages) for the translator referred to at paragraph E3 above, and as soon as possible thereafter the Office of the Administration is to ensure the nomination to each defence team, for a fixed but renewable period of two months, of such translators. An extension of this nomination is at the discretion of the Office of Administration, following consultation with the Co-Investigating Judges.

Done in Phnom Penh, on the nineteenth day of June 2008

សហចៅក្រមស៊ើបអង្កេត

Co-Investigating Judges
Co-juges d'instruction



ឃុំ ប៉ុល ធឿន

MARCEL Lemonde

The present order was written in Khmer and in English and then translated into French.

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា មានទីតាំងស្ថិតនៅ ផ្លូវជាតិលេខ៤ សង្កាត់ ចោមចៅ ខណ្ឌ ដង្កោ ក្រុង ភ្នំពេញ ប្រអប់សំបុត្រលេខ៧១ 8

ទូរស័ព្ទលេខ +៨៥៥(០)២៣ ២១៨៩១៤ ទូរសារលេខ +៨៥៥(០)២៣ ២១៨៩៤១។

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