



**អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា**

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

A190/II/20

**អង្គបុរេជំនុំជម្រះ**

PRE-TRIAL CHAMBER  
CHAMBRE PRELIMINAIRE

*In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea.*

Criminal Case File N°002/19-09-2007-ECCC/OCIJ (PTC11)

**Before:** Judge PRAK Kimsan, President  
Judge Rowan DOWNING  
Judge NEY Thol  
Judge Katinka LAHUIS  
Judge HUOT Vuthy

**Greffiers** CHUON Sokreasey  
Anne-Marie BURNS

**Date:** 20 February 2009

<b>ឯកសារដើម</b>	
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL	
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**PUBLIC**

**DECISION ON KHIEU SAMPHAN'S APPEAL AGAINST THE ORDER ON TRANSLATION RIGHTS AND OBLIGATIONS OF THE PARTIES**

**Co-Prosecutors**

CHEA Leang  
Robert PETIT  
YET Chakriya  
William SMITH  
PICH Sambath  
Vincent de WILDE d'ESTMAEL  
Anees AHMED

**Lawyers for the Civil Parties**

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KIM Mengkhy  
MOCH Sovanary  
Silke STUDZINSKY  
Martine JACQUIN  
Philippe CANNONE  
Pierre Olivier SUR  
Elizabeth RABESANRATANA  
Olivier BAHOUAGNE

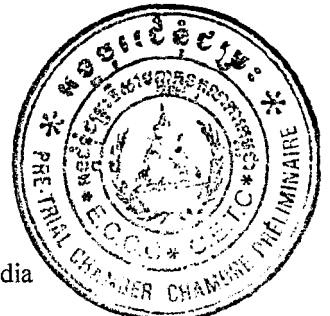
**Charged Person**

KHIEU Samphan

**Co-Lawyers for the Defence**

SA Sovan  
Jacques VERGÈS

<b>ឯកសារចម្លងត្រឹមត្រូវតាមដើម</b>	
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មន្ត្រីបម្រើករណីក្តី/Case File Officer/L'agent chargé du dossier: ..... C.A. Fuy .....	



**THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”)** is seized of the “Defence Appeal against the Decision to Deny the Request for Translation of KHIEU Samphan’s Case File” dated 22 July 2008 (“Appeal”).

### I. BACKGROUND

1. The Pre-Trial Chamber refers to, repeats and adopts the Report of Examination, dated 2 December 2008, on the proceedings and legal and factual issues in this case, which forms part of this Decision.
2. On 19 June 2008, the Co-Investigating Judges issued the Order on Translation Rights and Obligations of the Parties (“Translation Order”), which was addressed to all Parties in Case File 002/19-09-2007-ECCC/OCIJ, including the Charged Person.<sup>1</sup>
3. On 30 June 2008, the Co-Lawyers filed a Notice of Appeal against the Translation Order<sup>2</sup>, and, on 22 July 2008, they filed the Appeal Brief<sup>3</sup>.
4. On 28 August 2008, the Co-Prosecutors filed their “Response to Khieu Samphan’s Appeal on Translation Rights and Obligations of the Parties” (“Co-Prosecutors’ Response”).<sup>4</sup> In their Response, the Co-Prosecutors requested that the Pre-Trial Chamber determine the Appeal on the basis of written submissions alone. They also requested that the Appeal be decided together with the appeal filed by Ieng Sary that also challenges the Translation Order<sup>5</sup> as, they submit, “both Appeals raise similar issues of law and fact”<sup>6</sup>.
5. The Co-Lawyers for the Civil Parties did not file any responses.
6. On 4 November 2008, the Pre-Trial Chamber granted the “Request for a Public Hearing on the Appeal against the Decision to Deny the Request for Translation of Khieu Samphan’s Case

<sup>1</sup> Order on Translation Rights and Obligations of the Parties, 19 June 2008, A190 (“Translation Order”).

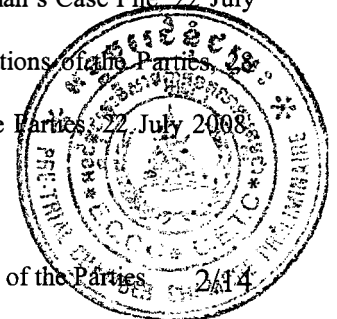
<sup>2</sup> Register of Appeals, 30 June 2008, A190/I.

<sup>3</sup> Defence Appeal against the Decision to Deny the Request for Translation of KHIEU Samphan’s Case File, 22 July 2008, A190/I/1 (“Appeal Brief”).

<sup>4</sup> Co-Prosecutors’ Response to KHIEU Samphan’s Appeal on Translation Rights and Obligations of the Parties, 28 August 2008, A190/I/4 (“Co-Prosecutors’ Response”).

<sup>5</sup> IENG Sary’s Appeal against the OCIJ’s Order on Translation Rights and Obligations of the Parties, 22 July 2008, A190/II/1.

<sup>6</sup> Co-Prosecutors’ Response, para. 5.



File” filed by the Co-Lawyers and set a hearing date for 8 December 2008.<sup>7</sup> The Chamber rescheduled the hearing to 4 December 2008, in response to an application filed by the international Co-Lawyer.<sup>8</sup>

7. On 3 December 2008, the Co-Prosecutors filed a “Request for Placing a Video Clipping on the Case File” (“Request”).<sup>9</sup> In their Request, the Co-Prosecutors indicated that the video was available on the share drive maintained by the Court Management Section, which can be accessed by the Co-Lawyers. Considering that the video was filed one day before the commencement of the hearing, that it was available to the Co-Lawyers and that the Co-Lawyers had the opportunity to present their observations on the Request and/or the video itself, the Pre-Trial Chamber grants the Request and decides that the video will be placed on the Case File.
8. Before the hearing, the Pre-Trial Chamber received access to the Case File, which was updated.
9. On 4 December 2008, the Pre-Trial Chamber held the hearing, in public.
10. At the opening of the hearing, Ms. Silke STUDZINSKY, a Co-Lawyer representing a number of Civil Parties, presented an application to make oral submissions during the hearing. By a decision delivered orally, the Pre-Trial Chamber dismissed the application on the basis that although they were given the opportunity to do so, the Co-Lawyers for the Civil Parties did not, prior to the hearing, formally express their intention to present oral arguments at the hearing and provide adequate notice of the nature of their submissions. The written version of the Pre-Trial Chamber’s decision was made available on 5 December 2008.<sup>10</sup>
11. The Pre-Trial Chamber denies the request of the Co-Prosecutors to decide this Appeal together with the appeal against the Translation Order lodged by the Charged Person Ieng Sary, as the arguments raised in the two appeals are different and the Parties could not respond to these arguments.

<sup>7</sup> Decision on KHIEU Samphan’s Request for a Public Hearing, 4 November 2008, A190/I/8.

<sup>8</sup> Revised Scheduling Order for Public Hearing, 14 November 2008, A190/I/10.

<sup>9</sup> Co-Prosecutors’ Request for Placing a Video Clipping on the Case File, 3 December 2008, A190/I/15.

<sup>10</sup> Written Version of Oral Decision on Application by the Co-Lawyer for the Civil Parties Concerning Oral Submissions, 4 December 2008, A190/I/16.



## II. ADMISSIBILITY OF THE APPEAL

12. On 19 June 2008, the Co-Investigating Judges issued their Translation Order, which was notified to the Parties on 23 June 2008. The Co-Lawyers for the Charged Person filed a Notice of Appeal, in accordance with Internal Rule 75, on 30 June 2008. The Appeal Brief was filed on 22 July 2008 and therefore in time.

### a. Submissions of the Parties

13. The Co-Lawyers for the Charged Person request that the Pre-Trial Chamber 1) set aside the Co-Investigating Judges' decision denying the request for translation of the Case File, 2) note the violations of the Charged Person's rights as a result of the absence of translation and 3) immediately and unconditionally release the Charged Person.<sup>11</sup> They do so on the grounds that the Co-Investigating Judges' decision lacks a legal basis and that the Charged Person's rights have been violated to such an extent that it is no longer possible to uphold his right to a fair trial.<sup>12</sup>

14. The Co-Lawyers more particularly argue that the Translation Order violates the Charged Person's rights to legal assistance, to participate in the proceedings, to equality of arms, to have adequate time and facilities to prepare a defence and to be tried within a reasonable time.<sup>13</sup> They emphasise that the Translation Order violates the Charged Person's right to effective legal assistance by not providing for the translation of the entire Case File into a language that the Charged Person's international Co-Lawyer understands.

15. In their Appeal Brief, the Co-Lawyers for the Charged Person state that the present Appeal is submitted pursuant to Internal Rule 74(3)(b).<sup>14</sup>

16. The Co-Prosecutors submit that the Charged Person's Appeal is inadmissible since: "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."<sup>15</sup> The Co-

<sup>11</sup> Appeal Brief, para. 80.

<sup>12</sup> Appeal Brief, paras 75-76.

<sup>13</sup> Appeal Brief, paras 56-71.

<sup>14</sup> Appeal Brief, para. 8.

<sup>15</sup> Co-Prosecutors' Response, para. 26.



Prosecutors argue that although the issue of translation falls within the decision-making powers of the Co-Investigating Judges, the decisions of the Co-Investigating Judges on this issue are not appealable. They add that translation is a matter of judicial administration and is beyond the scope of Internal Rule 74(3).<sup>16</sup>

17. The Co-Prosecutors further submit that the Translation Order does not undermine any of the Charged Person's fair trial rights:

“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, resources of the Defence Support Section, the full-time translator assigned by the Translation [Order] and the efforts of Court Management Section to provide timely translation services.”<sup>17</sup>

#### **b. Jurisdiction of the Pre-Trial Chamber**

18. Internal Rule 73 provides:

##### **“Rule 73. Additional Jurisdiction of the Pre-Trial Chamber**

In addition to its power to adjudicate disputes between the Co-Prosecutors or the Co-Investigating Judges, as set out in the Agreement and the ECCC Law, the Chamber shall have sole jurisdiction over:

- a) appeals against decisions of the Co-Investigating Judges, as provided in Rule 74;
- b) applications to annul investigative action, as provided in Rule 76; and
- c) the appeals provided for in Rules 11(5) and (6); 23(7) and (9); 35(6) and 38(3) of these IRs [Internal Rules].”

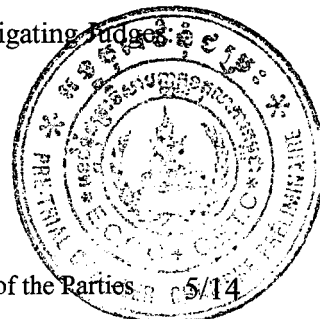
19. Internal Rule 74 further provides in relevant part:

##### **“Rule 74. Grounds for Pre-Trial Appeals**

1. No appeal shall lie against decisions of the Co-Investigating Judges where the matter has already been heard by the Chamber pursuant to the dispute settlement provisions in Rule 72.
2. The Co-Prosecutors may appeal against all orders by the Co-Investigating Judges.
3. The Charged Person may appeal against the following orders of the Co-Investigating Judges:
  - a) confirming the jurisdiction of the ECCC;

<sup>16</sup> Co-Prosecutors' Response, para. 29.

<sup>17</sup> Co-Prosecutors' Response, para. 39.



- b) refusing requests for investigative action allowed under these IRs;
- c) refusing requests for the restitution of seized items;
- d) refusing requests for expert reports allowed under these IRs;
- e) refusing requests for additional expert investigation allowed under these IRs;
- f) relating to provisional detention or bail;
- g) refusing an application to seize the Chamber for annulment of investigative action; or
- h) relating to protective measures.”

20. As the Appeal is based on Internal Rule 74(3)(b), the Pre-Trial Chamber shall determine whether it is lodged against an order of the Co-Investigating Judges “refusing [a request] for investigative action allowed under these IRs”.

### **Requests for investigative action by a Charged Person**

21. Internal Rule 55(10) provides charged persons the right to request investigative actions:

“At any time during an investigation, the Co-Prosecutors, a Charged Person or a Civil Party may request the Co-Investigating Judges to make such orders or undertake such investigative action as they consider necessary for the conduct of the investigation. If the Co-Investigating Judges do not agree with the request, they shall issue a rejection order as soon as possible and, in any event, before the end of the judicial investigation. The order, which shall set out the reasons for the rejection, shall be notified to the parties and shall be subject to appeal.”

22. Internal Rule 58(6) further provides:

“At any time during an investigation, the Charged Person may request the Co-Investigating Judges to interview him or her, question witnesses, go to a site, order expertise or collect other evidence on his or her behalf. The request shall be made in writing with a statement of factual reasons for the request. If the Co-Investigating Judges do not grant the request, they shall issue a rejection order as soon as possible, and in any event, before the end of investigation. The rejection order shall state the factual reasons for rejection. The Charged Person shall immediately be notified of the rejection order. The Charged Person may appeal the rejection order to the Pre-Trial Chamber.”

23. The Internal Rules do not explicitly define the expression “investigative action”. However, its meaning can be inferred when reading together different provisions of the Internal Rules.



24. With this respect, Internal Rule 55(5) provides:

“In the conduct of judicial investigations, the Co-Investigating Judges may take any investigative action conducive to ascertaining the truth. In all cases, they shall conduct their investigation impartially, whether the evidence is inculpatory or exculpatory. [...]” (emphasis added)

25. The Pre-Trial Chamber considers that the process of ascertaining the truth necessarily involves the collection of information. In civil law systems, this is, indeed, described as being the purpose of a judicial investigation.<sup>18</sup> In the French system, investigative actions are described as being acts by which an investigating judge searches for evidence.<sup>19</sup> The Pre-Trial Chamber notes that the Cambodian system, on which the Internal Rules are based, is rather similar to the French system.

26. The Pre-Trial Chamber observes that Internal Rule 58(6), which specifically enumerates requests that can be made by a charged person to the Co-Investigating Judges, refers only to actions that aim at gathering evidence.

27. Another indication that investigative actions are aimed to collect information can be found in Internal Rule 62, which deals with the possibility for the Co-Investigating Judges to delegate their power to undertake investigative actions to ECCC investigators or the judicial police. Internal Rule 62 provides in relevant part:

“1. The Co-Investigating Judges may issue a Rogatory Letter requiring any Investigator from their Office, or the Judicial Police, to conduct investigative action. However, only the Judicial Police shall have the power to undertake any coercive action.

2. A Rogatory Letter shall not be issued in a general form, and shall clearly specify the nature of investigative work to be done, which must relate directly to the crime or crimes under investigation. [...]

3. The delegates shall act under the supervision of the Co-Investigating Judges and shall report only to them concerning the enforcement of the Rogatory Letter. When a Rogatory Letter has been issued to an ECCC Investigator or the Judicial Police, that person shall proceed as follows:

<sup>18</sup> Pierre Chambon and Christian Guéry, *Droit et pratique de l'instruction préparatoire*, Dalloz: 2008, p. 8.

<sup>19</sup> Jean Pradel, *Manuel de Procédure Pénale*, Cujas: 2000, para. 723: “Positivement, les actes d'instruction sont tous les actes de recherche des preuves accomplis par le juge d'instruction et tous ceux qui ont été accomplis au cours de l'enquête de police en ce qu'ils font partie de la procédure d'instruction.”



- a) The Judicial Police or Investigator shall draw up a written record of his or her investigations and findings, which shall comply with the provisions of Rule 51(8) as appropriate;
- b) The Judicial Police or Investigators shall not question the Charged Person. Investigators may interview Civil Parties as provided in Rule 59(6);
- c) The Judicial Police may search for and seize evidence, as authorised by the Co-Investigating Judges.

[...]"

28. On the basis of these considerations, the Pre-Trial Chamber finds that requests for investigative actions should be interpreted as being requests for action to be performed by the Co-Investigating Judges or, upon delegation, by the ECCC investigators or the judicial police, with the purpose of collecting information conducive to ascertaining the truth.

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

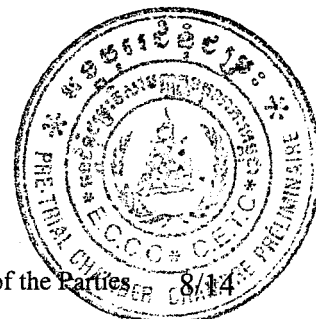
29. The Translation Order determines the rights and obligations of the Parties in relation to translation. With this respect, the Co-Investigating Judges mentioned:

“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 [...]”<sup>20</sup>

30. The Translation Order does not constitute an action that aims at collecting information. Furthermore, it is noted that the Co-Investigating Judges were not requested to undertake any action themselves, which is a characteristic of an investigative action, as mentioned above.

31. The Pre-Trial Chamber finds that the Appeal is not lodged against an order refusing a request for investigating action. It does not fall within the ambit of appealable matters set out in Internal Rule 74(3)(b).

<sup>20</sup> Translation Order, p. 2.



32. The Pre-Trial Chamber further notes that there is no other specific provision in the Internal Rules allowing the Charged Person to appeal the Translation Order before the Pre-Trial Chamber.
33. The Internal Rules provide for a number of orders that can be appealed to the Pre-Trial Chamber by charged persons. The list is exhaustive and the Pre-Trial Chamber has jurisdiction to decide only on appeals against the mentioned orders and decisions. Other orders of the Co-Investigating Judges are subject to control through the annulment procedure, which ensures that a charged person may request that a proceeding affected by procedural defect which infringes his/her rights be annulled.<sup>21</sup> The Pre-Trial Chamber observes that this procedure is different from the appeal procedure and therefore requires different actions from the Co-Lawyers to lead the issue before the Pre-Trial Chamber.

### **The right to a fair trial**

34. The Pre-Trial Chamber notes that the Co-Lawyers allege that the Translation Order impairs the Charged Person's right to a fair trial, as explained in paragraph 14 above.
35. With this respect, Internal Rule 21 provides:

#### **“Rule 21. Fundamental Principles**

1. 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. In this respect:

a) ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties. [...]

[...]

d) Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established. Any such person has the right to be informed of any charges brought against him/her, to be defended by a lawyer of his/her choice, and at every stage of the proceedings shall be informed of his/her right to remain silent.”

<sup>21</sup> Internal Rule 76(4) *a contrario* and Rule 48.



36. The Pre-Trial Chamber will examine whether Internal Rule 21 requires that it adopts a broader interpretation of the Charged Person's rights to appeal in order to ensure that proceedings during the investigation are fair and adversarial and that a balance is preserved between the rights of the Parties.
37. The Translation Order provides that the Charged Person is entitled to receive translation into French of the following documents:
- any Indictment of the Co-Investigating Judges;
  - the elements of proof on which any such Indictment would rely;
  - the Introductory Submission and any Final Submissions by the Co-Prosecutors;
  - the footnotes and indexes of factual elements on which those Submissions rely (concretely, D3 and D3/I-V);
  - all judicial decisions and orders; and
  - all filings by the Parties before the ECCC, as provided by Article 7.1 of the Practice Direction on Filing Documents before the ECCC.<sup>22</sup>
38. Pursuant to the Translation Order, these documents shall also be transmitted in Khmer, the Charged Person's mother tongue.
39. The Co-Investigating Judges specify that this order is designed to determine the rights and obligations of the Parties during the investigation and 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."<sup>23</sup>
40. The Pre-Trial Chamber observes that the Charged Person has, pursuant to Internal Rule 21(1)(d), the right to be informed of the charges brought against him. However, neither the ECCC Law nor the Internal Rules provide charged persons an explicit right to receive all documents contained in their Case File into their own language or that of their lawyer(s). The fact that a language is one of the three official languages of the Court does not amount, in itself, to a right for the Charged Person to have all documents contained in his case file translated into this language.

<sup>22</sup> Practice Direction on Filing Documents and Appendices, ECCC/01/2007, Rev. 3.

<sup>23</sup> Translation Order, para. E.4.



41. Consistent with the reasoning in the Translation Order<sup>24</sup>, jurisprudence of international tribunals has repeatedly held that a defendant's right to translation of documents into a language he or she understands does not extend to all documents in his/her case file<sup>25</sup>, even in the case where a defendant is self-represented<sup>26</sup>. A request for translation of the entire case file into the language of the defendant's lawyer has also been denied.<sup>27</sup> More particularly, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") have denied requests for translation of all documents on the basis that "translation in advance of each and every document into the [language of the accused] beyond what is required by the Statute and Rules may seriously jeopardize the Accused's right to an expeditious trial because of the very substantial time and resources required for translation of all documents."<sup>28</sup> The International Criminal Court ("ICC") has held that the fairness principle does "not grant [the defendant] the right to have all procedural documents and all evidentiary materials disclosed by the Prosecution translated."<sup>29</sup>
42. The Pre-Trial Chamber notes that the right for the Co-Lawyers to have access to the Case File during the investigation does not mean that all the material collected should automatically be translated into their language.<sup>30</sup>
43. The Pre-Trial Chamber finds, however, that depending on the specific circumstances of a case, translation of document(s) might be necessary to ensure that a charged person is able to exercise his/her rights during the investigation.<sup>31</sup> By deciding that "the key requirement is to allow a

<sup>24</sup> Translation Order, paras A.2 and B.2.

<sup>25</sup> *Prosecutor v. Lubanga*, ICC-01/04-01/06, "Decision on the Requests of the Defence of 3 and 4 July 2006", Pre-Trial Chamber I, 4 August 2006 ("*Lubanga*"), pp. 5-6; *Prosecutor v. Katanga*, ICC-01/04-01/07, "Decision on Defence for Mathieu Ngudjolo Chui's Request Concerning Translation of Documents", Pre-Trial Chamber I, 15 May 2008, pp. 3 and 5; *Prosecutor v. Chui*, ICC-01/04-02/07, "Decision on the Defense Request Concerning Time Limits", Pre-Trial Chamber I, 27 February 2008, pp. 3-4; *Prosecutor v. Muhimana*, ICTR-95-I-B-I, "Decision on Defence Motion for the Translation of Prosecution and Procedural Documents into Kinyarwanda", Trial Chamber I, 6 November 2001 ("*Muhimana*"), para. 25; *Prosecutor v. Seselj*, IT-03-67-PT, "Order on Translation", Trial Chamber II, 6 March 2003 ("*Seselj*"), p. 1; *Prosecutor v. Ljubicic*, IT-00-41-PT, "Decision on Defence Counsel's Request for Translation of All Documents", Trial Chamber I, 20 November 2002 ("*Ljubicic*"), p. 3; *Prosecutor v. Naletilic*, IT-98-34-T, "Decision on Defence's Motion Concerning Translation of All Documents", Trial Chamber I, 18 October 2001, p. 3; *Prosecutor v. Delalic*, IT-96-21-T, "Decision on Defence Application for Forwarding the Documents in the Language of the Accused", Trial Chamber, 25 September 1996, para. 8; *Kamasinski v. Austria*, Application No. 9783/82, 19 December 1989 ("*Kamasinski*"), para. 74.

<sup>26</sup> See *Seselj*.

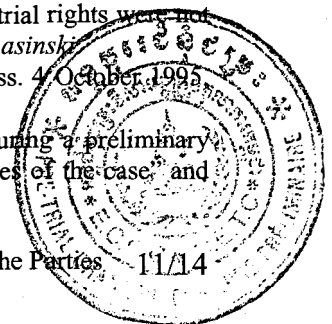
<sup>27</sup> *Muhimana*, paras 31-33.

<sup>28</sup> *Ljubicic*, p. 3; See also *Seselj*, p. 2 and *Muhimana*, para. 12.

<sup>29</sup> *Lubanga*, p. 6. The European Court of Human Rights ("ECHR") has held that a defendant's fair trial rights were not violated by the fact that not all the documents in his case file were in a language he understood: *Kamasinski*.

<sup>30</sup> This appears to be also the approach followed by the French system. See in particular Crim. Cass. 4 October 1995 Bull. crim. no. 293; Jean Pradel, *Manuel de Procédure Pénale*, Cujas: 2000, para. 383.

<sup>31</sup> The ECHR has consistently held that the manner in which fair trial rights are to be applied during a preliminary investigation "depends on the special features of the proceedings involved and on the circumstances of the case," and



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’<sup>32</sup>, the Co-Investigating Judges have set out a standard that shall ensure that the Charged Person is able to exercise his rights during the investigation and thus ensure the fairness of the proceedings at this stage.

44. The Pre-Trial Chamber notes that in accordance with the Translation Order, the Charged Person has received the following material in French and Khmer:

- the Introductory Submission, including its footnotes which identify the material supporting the Co-Prosecutors’ allegations;
- the Schedules, annexed to the Introductory Submission, which consist of a list containing a description of evidentiary material in support of specific events or alleged crimes;
- Annex C of the Introductory Submission, which consists of a list of all documents that were part of the Case File at the time of the filing of the Introductory Submission, accompanied by a description of the content of each of these documents;
- after the commencement of the judicial investigation, almost all the evidentiary material generated by the Co-Investigating Judges, including documentary evidence and written records of interviews (in Khmer and/or French); and
- all the orders and decisions of the Co-Investigating Judges and the Pre-Trial Chamber as well as the pleadings filed by the Parties in relation to appeals lodged by the Charged Person.

45. Amongst the documents referred to by the Co-Prosecutors in relation to the Charged Person’s individual liability, only a limited number are not available in Khmer or French.<sup>33</sup>

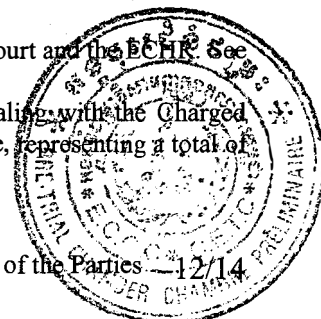
46. The Charged Person is represented by both an international and a national lawyer, as it is his right pursuant to Internal Rule 22. The Co-Prosecutors have submitted, and it was not contested by the Co-Lawyers, that the defence team of the Charged Person also comprises a legal

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that “in order to determine whether the aim of Article 6 - a fair trial - has been achieved, regard must be had to the entirety of the domestic proceedings conducted in the case”. See in particular *Imbroscia v. Switzerland*, Application no. 13972/88, 24 November 1993, para. 38. See also *Granger v. the United Kingdom*, Application no. 11932/86, 28 March 1990, para. 44.

<sup>32</sup> Translation Order, para. B.2. This is also the standard applied by the International Criminal Court and the ECHR. See in particular *Lubanga*, p. 5 quoting para. 74 of *Kamasinski*.

<sup>33</sup> Among the documents quoted in footnotes 406 to 484 of the Introductory Submission dealing with the Charged Person’s individual responsibility, only thirteen are not available in Khmer or French at this time, representing a total of 129 pages.



consultant who is proficient in French and English<sup>34</sup> and a Cambodian jurist who is proficient in Khmer, French and English.

47. 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.”<sup>35</sup> 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.<sup>36</sup>
48. The Charged Person is also allowed to identify specific documents and request their translation.<sup>37</sup>
49. The Pre-Trial Chamber notes that the ICTY and ICTR have found that exculpatory material shall be made available to the defendant in a language he or she understands in order for the defendant to be able to prepare his or her defence.<sup>38</sup> The Pre-Trial Chamber considers that the defence team is in a position to properly identify the material that could be exculpatory and then request translation of these specific documents, which it is allowed to do by the Translation Order.
50. The Pre-Trial Chamber finds that the Charged Person’s rights safeguarded in Internal Rule 21 are not violated. The Translation Order is in accordance with international standards in respect of translation rights. The provision of a translator for a multilingual team of lawyers ensures that all necessary linguistic requirements are properly met for this stage of the proceedings before the ECCC. The Pre-Trial Chamber therefore finds that Internal Rule 21 does not force it to interpret the Internal Rules in such a way that the Appeal against the Translation Order should be declared admissible.

<sup>34</sup> Co-Prosecutors’ Response, para. 35.

<sup>35</sup> Translation Order, para. E.3.

<sup>36</sup> *Kamasinski*, paras 80, 81 and 85; *Muhimana*, para. 30; *Lubanga*, p. 7.

<sup>37</sup> Translation Order, p. 7.

<sup>38</sup> *Ljubicic*, p. 3; *Prosecutor v. Prlic*, IT-04-74-PT, “Order for the Translation of Documents”, Pre-Trial Chamber 17 January 2006, p. 2; *Prosecutor v. Seselj*, IT-03-67-PT, “Decision on Form of Disclosure”, Trial Chamber 4 July 2006, para. 15; *Muhimana*, para. 22.



A190/T/20

**THEREFORE, THE PRE-TRIAL CHAMBER HEREBY DECIDES UNANIMOUSLY:**

The Appeal is inadmissible. ឃី

**Phnom Penh, 20 February 2009**

**Pre-Trial Chamber**


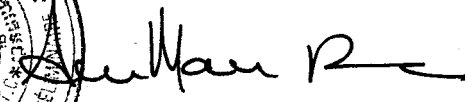






**Rowan DOWNING**    **NEY Thol**    **Katinka LAHUIS**    **HUOT Vuthy**    **PRAK Kimsan**



**CHUON Sokreasey**    **Anne-Marie BURNS**

