



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា ឯកសារដើម

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Chambres extraordinaires au sein des tribunaux cambodgiens

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អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

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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 No: 002/18-11-2010-ECCC/PTC (16)

Before: Judge PRAK Kimsan, President
Judge Rowan DOWNING
Judge NEY Thol
Judge Catherine MARCHI-UHEL
Judge HUOT Vuthy

Date: 15 December 2010

PUBLIC

DECISION ON REQUEST FOR TRANSLATION OF ALL DOCUMENTS USED IN SUPPORT OF THE CLOSING ORDER

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Decision on Request for Translation of All Documents Used in Support of the Closing Order

THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seized of “Request for Translation of all Documents Used in Support of the Closing Order” filed by the Lawyers for the Defence of Mr. KHIEU Samphan (“the Accused”; and “the Co-Lawyers”) on 18 November 2010 (the “Request”).¹

I. PROCEDURAL BACKGROUND AND SUBMISSIONS

1. On 16 September 2010, the Co-Investigating Judges filed the Closing Order.²
2. On 21 October 2010, the Co-Lawyers filed their Appeal Against the Closing Order (“the Closing Order Appeal”).³
3. On 2 November 2010, the Pre-Trial Chamber ordered the Interpretation and Translation Unit (ITU) to translate all footnotes in the Closing Order into the French language by 18 November 2010 (“the PTC Order”).⁴ The footnotes were translated into the French language, as ordered, and notified to the Co-Lawyers.⁵
4. On 18 November 2010, the Co-Lawyers filed the Request. In the Request, the Co-Lawyers observe that the 5,419 footnotes in the Closing Order “refer to numerous documents that are yet to be placed on the case file in the French language.”⁶ The Co-Lawyers ask the Pre-Trial Chamber to direct and/or order the ITU to promptly translate all documents used in support of the Closing Order into the French language.⁷ The Co-Lawyers cite the opinions of translation experts⁸ and the Pre-Trial Chamber’s Decision on KHIEU Samphan’s Appeal Against the Order on Translation Rights and Obligations of the Parties of 20 February 2009 (“the Translation Rights Decision”)⁹ noting in particular that in the Translation Rights Decision, the Pre-Trial Chamber affirmed the right of the

¹ Request for Translation of all Documents Used in Support of the Closing Order, 18 November 2010, PTC 16, Doc. No. 1, original French ERN: 00624923-00624925 (“the Request”).

² Closing Order, 16 September 2010, D427.

³ Appeal Against the Closing Order, 21 October 2010, D427/4/3 (“the Closing Order Appeal”), original French ERN: 00616891-00616920.

⁴ Order to Interpretation and Translation Unit (ITU) Concerning Translation of Footnotes of Closing Order into the French Language and Directions to Defence of KHIEU Samphan, 2 November 2010, ERN 00618774 (“the PTC Order”).

⁵ The Closing Order with French language footnotes was notified on 18 November 2010 (new ERN: 00624132-00624921).

⁶ Request, para. 5.

⁷ Request, paras 1, 7.

⁸ Request, paras 2, 3.

⁹ Decision on KHIEU Samphan’s Appeal against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/I/20 (“the Translation Rights Decision”).



charged person “to receive translation into French of (...) the elements of proof on which any [the] Indictment would rely.”¹⁰ The Co-Lawyers rely on the views expressed by the experts and the Translation Rights Decision to support their statement that “willful disregard of [the existence of documents on the Case File that are not available in the French language] by the Pre-Trial Chamber and Trial Chamber would be tantamount to a travesty of justice and would render the prospective judgement defective.”¹¹

5. Having considered whether the interests of any party would be harmed by the determination of this matter on the basis of the Request alone, the Pre-Trial Chamber has concluded that there is no prejudice to the parties resulting from the Pre-Trial Chamber’s disposition of this Request prior to receipt of any responses.

II. PRELIMINARY REMARKS

6. The Pre-Trial Chamber observes that it has previously addressed the translation rights of the parties to proceedings before the ECCC on several occasions.¹² This has entailed the issuance of decisions concerning appeals against orders of the Co-Investigating Judges and the issuance of an order. As a preliminary matter, the Pre-Trial Chamber recalls that in the Translation Rights Decision, the appeal of the Accused was found inadmissible.¹³ As the Translation Rights Decision necessarily focused on the admissibility of the appeal submitted to the Pre-Trial Chamber, it is necessary in this decision to discuss, in detail, the underlying order of the Co-Investigating Judges dated 23 June 2008 that was the subject of the Translation Rights Decision (“the Translation Order”).¹⁴
7. In the decisions and orders made by the Pre-Trial Chamber concerning translation rights, the Chamber has upheld, implicitly and explicitly, the characterisation given by the Co-Investigating Judges of a closing order as requiring, at issuance, “special attention to be paid to the notification of the ‘accusation’ to the [Charged Person].”¹⁵ This special attention is paid in light of the right of a charged person to be informed promptly, in a language in which he understands and in detail, of the nature and cause of the accusation

¹⁰ Request, para. 2.

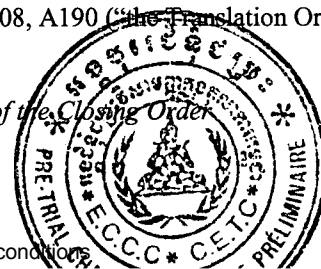
¹¹ Request, para. 5.

¹² See, e.g. Decision on IENG Sary’s Appeal Against the OCIJ’s Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/II/9, the Translation Rights Decision, the PTC Order.

¹³ Translation Rights Decision, para. 50.

¹⁴ Order on Translation Rights and Obligations of the Parties, 23 June 2008, A190 (“the Translation Order”).

¹⁵ Translation Order, page 4.



against him. The Co-Investigating Judges have stated that the indictment plays a “crucial role in the criminal process in that it is from the moment of its service that the defendant is formally put on written notice of the factual and legal basis of the charges against him.”¹⁶ In recognition of the fair trial rights of a charged person and in accordance with its previous orders¹⁷ pertaining to the nature of an indictment, the Co-Investigating Judges and the ITU worked together to ensure that the Accused was provided with the indictment and the elements of proof on which the indictment relies in a language that he understands.

8. In the Closing Order Appeal, the Co-Lawyers cite the Translation Order for the proposition that not only must the Accused receive a written translation of the indictment in a language that he understands, but also in the French language, as the Co-Lawyers elected the French language pursuant to Article 2.2 of the Practice Direction on Filing of Documents before the ECCC.¹⁸ After receiving the Closing Order Appeal, the Pre-Trial Chamber gave due consideration to the rights of the Accused, as described in the preceding paragraph, in deciding to issue the PTC Order, both in its delivery of instructions in the form of an order to the ITU and also in the direction given to the Co-Lawyers concerning the granting of 15 additional calendar days to file supplementary submissions on appeal. Both components of the PTC Order reflect the Chamber’s view that the Closing Order must be readable in the French language, including by permitting the reader to refer to footnotes in the French language that contain the correct page references to French language documents on the Case File.

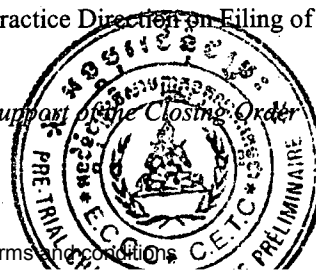
III. CONSIDERATION OF THE REQUEST

9. In their Request, the Co-Lawyers cite the Translation Rights Decision in support of the proposition that the elements of proof on which the indictment relies must be translated into the other official working language selected by the Accused. They state that “Mr. KHIEU Samphan’s right *“to receive into French of (...) the elements of proof on which*

¹⁶ Translation Order, page 5.

¹⁷ Translation Order, page 5.

¹⁸ Closing Order Appeal, para. 69 citing the Translation Order. Practice Direction on Filing of Documents before the ECCC, ECCC/01/2007/Rev.5, art 2.2.

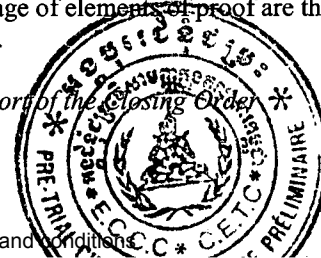


any [the Indictment] would rely” was affirmed by the Pre-Trial Chamber.¹⁹ The Pre-Trial Chamber concurs with this statement as to the effect of the Translation Rights Decision. In requesting an order or direction from the Pre-Trial Chamber, the Co-Lawyers do not, however, make a case, let alone provide any evidence, that the ITU has refused to implement the Translation Rights Decision. The PTC Order, which the ITU fully complied with, governs the same subject matter as the Translation Order and Translation Rights Decision and protects the same interests of the Accused. In the absence of evidence from the Co-Lawyers that the ITU has suddenly ceased complying with its obligations, the Pre-Trial Chamber hereby denies the Request as the Co-Lawyers do not demonstrate that the ITU is either unaware of its obligations or has relinquished its responsibilities with respect to the translation of the elements of proof on which the indictment relies. The Pre-Trial Chamber notes that in the particular circumstances of the PTC Order, the Chamber considered that the French language footnotes were necessary for the Co-Lawyers to review the Closing Order and understand the process employed by the Co-Investigating Judges in deciding to indict the Accused. Without the footnotes available to them, it would have been difficult for the Co-Lawyers to formulate their grounds of appeal for those limited issues that are appealable by the defence pursuant to the Internal Rules. In light of this difficulty and the time limits set by the Internal Rules, the Pre-Trial Chamber issued the PTC Order. The Pre-Trial Chamber considers that the elements of proof on which the indictment may rely are, unlike the footnotes themselves, materials that support the factual and legal findings of the Co-Investigating Judges and that they will be considered by the Trial Chamber in due course.²⁰

10. In order to facilitate understanding of the translation regimen in place and thereby promote judicial economy, the Pre-Trial Chamber will briefly summarise its position on the respective roles of the parties concerning translation of the documents that are elements of proof on which the indictment relies. The right of the Accused to have the documents that are elements of proof on which the indictment relies translated into the French language is not a right to have all such documents translated immediately or even

¹⁹ Request, para. 2. The Request cites para. 37 of the Translation Rights Decision. In this Decision the Pre-Trial Chamber refers to para. E.4. of the Translation Order.

²⁰ In the Translation Order, the Co-Investigating Judges consider that the elements of proof shall be assessed by the Trial Chamber. Translation Order, page 5. In addition, the jurisprudence of the ICTY cited in the Translation Order also clarifies that the Accused’s rights in relation to the language of elements of proof are those that relate to the use of the elements of proof at trial. Translation Order, page 5.



prior to the commencement of the trial. The Chamber reminds the Co-Lawyers that while the Accused has a right to the translation of such documents, members of the defence team of the Accused are required to usefully cooperate with the translation process.²¹ The terms “useful cooperation” and “useful management” are not defined in the Translation Order, however, the Translation Order is replete with directions as to proper processes and procedures that will allow for the 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.”²² This is the “key requirement” identified by the Co-Investigating Judges, which must be met as the parties, the administration of the ECCC, the chambers and the ITU consider the rights of the Accused and the fact that the Accused does not have the right to translation of every document on the case file into his language and/or that of his counsel.²³ The Pre-Trial Chamber agrees with the finding of the Co-Investigating Judges that useful cooperation by all members of the defence team includes a requirement for such members (i) to collaborate internally by optimising their linguistic capacity, (ii) to assess and transmit to CMS their consequent translation priorities and, (iii) to collaborate actively with CMS in managing translation priorities.²⁴ Further, in the particular case of translation into a third language, the Pre-Trial Chamber emphasises 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.²⁵ 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.²⁶ The Pre-Trial Chamber agrees with the Co-Investigating Judges who stated that “it is for the Trial Chamber, once seized of the case

²¹ Translation Order, page 3.

²² Translation Order, page 4.

²³ Translation Order, page 4 and Translation Rights Decision, para. 40 (stating that “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)...[t]he 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”). See also Translation Rights Decision, paras 41-42.

²⁴ Translation Order, page 6.

²⁵ Translation Order, pages 6-7.

²⁶ See Translation Order, page 6.



file, to manage the translation requirements of any trial, as the interest of the proper administration of justice and the right to a fair trial dictate.”²⁷

11. The Pre-Trial Chamber further notes that it is incumbent upon the Co-Lawyers to make a choice by identifying and prioritising translation requests internally and with the ITU of those materials that are needed for translation at this time to allow for trial preparation, as the Pre-Trial Chamber is not an appropriate body to give such directions to the ITU and particularly since the Co-Lawyers alone know the strategy they intend to follow.

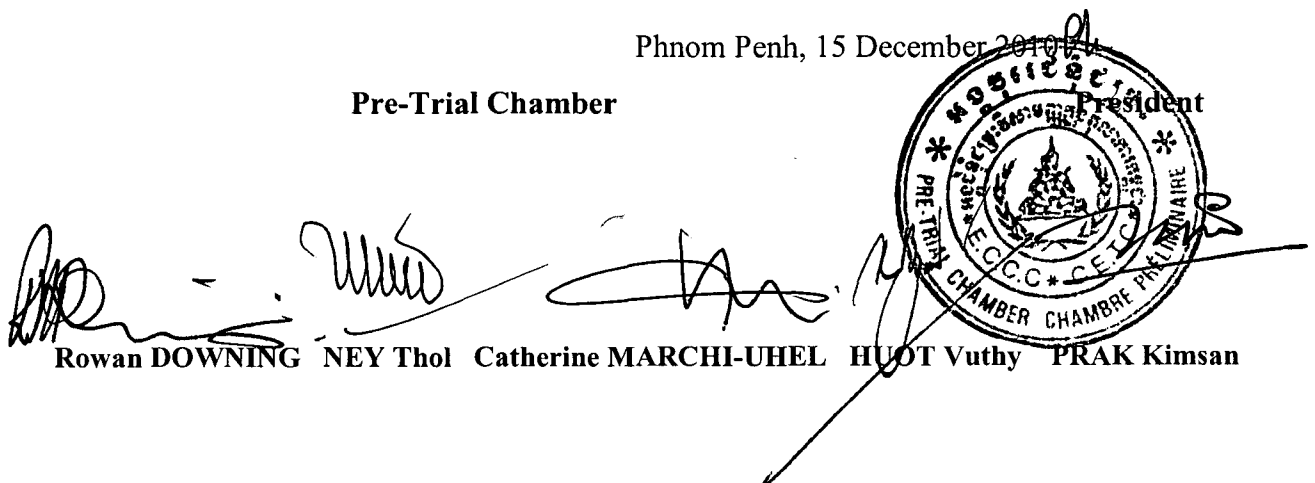
THEREFORE, THE PRE-TRIAL CHAMBER HEREBY UNANIMOUSLY:

DENIES the Request for an order or direction from the Pre-Trial Chamber to cause the ITU to immediately translate into the French language all documents that are elements of proof on which the indictment relies.

The Pre-Trial Chamber’s decision in this matter is without prejudice to the obligation of the ITU to translate into the French language all documents that are elements of proof on which the indictment relies, in accordance with the Translation Rights Decision.

Phnom Penh, 15 December 2010

Pre-Trial Chamber



Rowan DOWNING NEY Thol Catherine MARCHI-UHEL HUOT Vuthy PRAK Kimsan

²⁷ Translation Order, page 7.