



ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia  
Nation Religion King

អង្គជំនុំជម្រះវិសេសវិស័យក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia  
Chambres extraordinaires au sein des Tribunaux cambodgiens

Royaume du Cambodge  
Nation Religion Roi

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

Case File No: 003/07-09-2009-ECCC-OCIJ

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Before: **The Co-Investigating Judges**

Date: **21 June 2016**

Language(s): **English [Original in English]**

Classification: **PUBLIC**

**ORDER ON REQUEST TO OBTAIN ENGLISH TRANSLATIONS OF THREE GERMAN DECISIONS AND ONE DUTCH DECISION**

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## I. PROCEDURAL HISTORY

1. Disagreements between the Co-Investigating Judges (“CIJs”) in this case were registered on 7 February 2013, 22 February 2013, and 17 July 2014.
2. On 19 April 2016, I invited scholars, academic organisations and any other organisation operating in the field of international criminal law to submit written *amicus curiae* briefs on whether an attack against a state’s own armed forces amounts to an attack directed against a civilian population (“Call for Submissions”).<sup>1</sup>
3. Eleven *amicus curiae* briefs were filed in response to the Call for Submissions.<sup>2</sup>
4. In a letter dated 3 June 2016, the Meas Muth Defence (“Defence”) requested that the CIJs obtain English translations of three German decisions and one Dutch decision referred to in a large number of the *amicus curiae* briefs (“Request”).<sup>3</sup>

## II. SUBMISSIONS

5. The Defence request that the CIJs obtain English translations of three German cases: *R. Case*, *P. and Others Case*, and *H. Case*, and one Dutch case: *In re Pilz*, which were referred to in seven of the eleven *amicus curiae* briefs filed in response to the Call for Submissions.<sup>4</sup>
6. The Defence argue that it is essential to their response to the *amicus curiae* briefs and the Call for Submissions that they review full and accurate English translations of these decisions, and not merely the case summaries provided in English.<sup>5</sup> The Defence also note that they have no staff or interns who can read or speak German or Dutch, and thus they are at a disadvantage in preparing their response.<sup>6</sup>

## III. DISCUSSION

7. While I am to some extent sympathetic to the Defence’s position, they are not entitled to receive English translations of all documents referred to in briefs under either the laws of Cambodia or the Internal Rules of the ECCC. Further, such an unfettered right does not exist under international human rights standards, in particular Article 14 of the International Covenant on Civil and Political Rights (“ICCPR”) which is incorporated into ECCC proceedings by virtue of Article 13 of the Agreement between the United Nations and the Cambodian Government

<sup>1</sup> Case File No. 003-D191, *Call for Submissions by the Parties in Cases 003 and 004 and Call for Amicus Curiae Briefs*, 19 April 2016.

<sup>2</sup> See Case File No 003-D191/3, D191/4, D191/5, D191/6, D191/7, D191/8, D191/9, D191/10, D191/11, D191/12 and D191/13.

<sup>3</sup> Case File No. 003-D191/16, *Request that the Office of the Co-Investigating Judges obtain English translations of three German decisions from the Supreme Court of the British Occupied Zone and one Dutch decision from the Special Court of Cassation*, 3 June 2016 (“Request”).

<sup>4</sup> Request, p.1; *R. Case* (StS 19/48), Supreme Court for the British Occupied Zone, 27 July 1948; *P. and Others Case* (StS 111/48), Supreme Court for the British Occupied Zone, 7 December 1948; *H. Case* (StS 309/49), Supreme Court for the British Occupied Zone, 18 October 1949; and *In re Pilz*, Special Court of Cassation, 5 July 1950.

<sup>5</sup> Request, p.1.

<sup>6</sup> *Ibid.*



and Article 33 *new* of the ECCC Law.<sup>7</sup> The rights enshrined under Article 14 of the ICCPR also apply at the pre-trial stage of ECCC proceedings.<sup>8</sup>

8. Article 14(3)(f) of the ICCPR does not provide a right to full translation of all documents, as set out in *Hill and Hill v. Spain*<sup>9</sup> in the context of Article 14(3)(b). The complaint was that Spain failed to provide translations of a number of documents that would have helped the Defence to better understand the charges and to organize their defence. The Committee held that the right to a fair trial did not mean that a defendant who does not understand the language used in Court, has the right to be furnished with translations of all *relevant* documents in a criminal investigation, provided that the *relevant* documents were made available to his lawyer [emphasis added].
9. The jurisprudence of the European Court of Human Rights (“ECtHR”) provides useful guidance as to the scope of the rights referred to in Article 14(3)(a) and (f) of the ICCPR given these provisions are mirrored in Article 6(3)(a) and 6(3)(e) of the European Convention on Human Rights (“ECHR”). Article 6(3)(a) ECHR states that everyone charged with a criminal offence has the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusations against him.<sup>10</sup> There is no right under Article 6(3)(a) ECHR, however, for the accused to have a full translation of the court files.<sup>11</sup> Article 6(3)(a) ECHR mainly applies to the notification as well as indictment of an accused, and to relevant documentary material such as key witness statements needed in order to understand the nature and cause of the accusations.<sup>12</sup>
10. Article 6(3)(e) ECHR, on the other hand, provides that everyone charged with a criminal offence has the right to free assistance of an interpreter if he cannot understand or speak the language used in court.<sup>13</sup> This, in the consistent case law of the ECtHR, guarantees the right to the free assistance of an interpreter for translation or interpretation of “*all documents or statements in the proceedings which it is necessary for the accused to understand in order to have the benefit of a fair trial.*”<sup>14</sup>
11. However, the ECtHR in *Kamasinski v Austria* also stated that the absence of a written translation of a judgment does not in itself entail a violation of Article 6(3)(e) and that “*the interpretation assistance provided should be such as to*

<sup>7</sup> Article 33*new* of the ECCC Law and Article 13 of the Agreement between the United Nations and the Royal Government of Cambodia expressly incorporate Article 14 of the ICCPR, to which Cambodia is a signatory. Article 14(3) of the ICCPR provides: “*In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees in full equality (...) (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him (...); (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court (...)*”. See also Internal Rule 21 containing comparable provisions

<sup>8</sup> Case File No. 002-D264/2/6, *Decision on Ieng Thirith’s Appeal against the Co-Investigating Judges’ Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process (D264/1)*, 10 August 2010, para. 13.

<sup>9</sup> 2 April 1997, UNHRC, 526/1993 at para 14.2..

<sup>10</sup> ECHR, Article 6(3)(a); ECtHR, *X v Austria* (dec), 29 May 1975, p.71.

<sup>11</sup> ECtHR, *X v Austria* (dec), 29 May 1975, p.70.

<sup>12</sup> ECtHR, *Kamasinski v Austria*, 19 December 1989, para. 79.

<sup>13</sup> ECHR, Article 6(3)(e).

<sup>14</sup> ECtHR, *Luedicke, Belkacem and Koç v Germany*, 28 November 1978, para. 48; ECtHR, *Kamasinski v Austria*, 19 December 1989, para. 74.



*enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events.*"<sup>15</sup>

12. Similarly, Article 3(1) – (4) of the Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings only requires the translation of essential documents and provides as follows:

### Article 3

#### Right to translation of essential documents

1. Member States shall ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned are, within a reasonable period of time, provided with a written translation of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings.
  2. Essential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment.
  3. The competent authorities shall, in any given case, decide whether any other document is essential. Suspected or accused persons or their legal counsel may submit a reasoned request to that effect.
  4. There shall be no requirement to translate passages of essential documents which are not relevant for the purposes of enabling suspected or accused persons to have knowledge of the case against them.
13. The American Convention on Human Rights also mentions the right to interpretation and translation in Article 8(2)(a):
- 8(2) [...] During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
- (a) the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court[.]
14. I was unable to find any decision on this provision by the Inter-American Court of Human Rights or any other commentary regarding its interpretation.
15. Finally, Article 67(f) of the Rome Statute contains a similar restriction:
- (f) To have, free of any cost, the assistance of a competent interpreter and such translations *as are necessary to meet the requirements of fairness*, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks [emphasis added].
16. On this basis, I am not satisfied that Meas Muth has a right to obtain the translation of the documents sought in the Request at the expense of the ECCC.

<sup>15</sup> ECtHR, *Kamasinski v Austria*, 19 December 1989, para. 74.



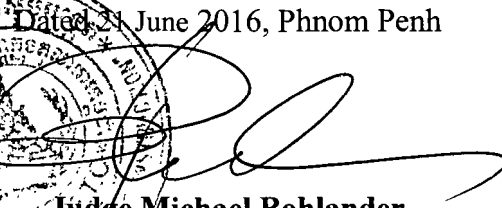
17. Furthermore, in the context of international criminal proceedings it is foreseeable to counsel that, in representing their client, it may become necessary to consult sources in languages other than those spoken by members of the defence team. It is therefore also within the responsibilities of lawyers practicing in international criminal law to set aside funds which may need to be used for such translations.
18. Upon communication with the DSS, I have learnt that the Defence's funds are not completely earmarked for the payment of staff, and that the DSS may have further funds set aside for translation jobs. In addition, I also understand that the Co-Lawyers are paid a monthly lump sum, also not earmarked for any specific expense, for general administrative expenses.
19. Finally, I have also learnt that the Interpretation and Translation Unit has the ability of providing translations from languages other than Khmer and French into English, if requested.
20. The Defence should therefore use the funds at their disposal to obtain the translation of the documents listed in the Request.

This decision is filed in English, with a Khmer translation to follow.

**FOR THE FOREGOING REASONS, I:**

21. **DENY** the Request.

Dated 21 June 2016, Phnom Penh



**Judge Michael Bohlander**  
**សម្តេចជំនួយស៊ើបអង្កេតអន្តរជាតិ**  
**International Co-Investigating Judge**  
**Co-juge d'instruction international**