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BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

Criminal Case File N°: 002/19-09-2007-ECCC-OCIJ (PTC12)

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**IENG SARY'S REPLY TO THE CO-PROSECUTORS' RESPONSE TO IENG SARY'S
APPEAL ON TRANSLATION RIGHTS AND OBLIGATIONS OF THE PARTIES**

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), pursuant to the Decision of the Pre-Trial Chamber,¹ hereby files this Reply to the Office of the Co-Prosecutors’ Response to IENG Sary’s Appeal against the Order on Translation Rights and Obligations of the Parties (“OCP Response”), filed on 15 August 2008 and notified to the parties on 25 August 2008.

I. SUMMARY OF ARGUMENT

1. The attempt by the OCP to limit the scope of what constitutes a denial of a request for investigative action under Internal Rule 74(3)(b) is without support in law or logic.
2. The OCP’s arguments on the substantive issue of whether all documents in the case file should be translated into English and Khmer lack merit or are otherwise irrelevant. Rather than explaining why the evidence crucial to the Defence should not be translated, the OCP focuses on listing material which has been translated. Furthermore, the jurisprudence emanating from the ICC, ICTR and ICTY is neither relevant nor accommodating in the context of the very different system employed at the ECCC.
3. The OCIJ’s system / policy for translating documents as reflected in its Translation Order is unworkable and inefficient: it exacerbates the violation of equality of arms rather than alleviating it. Furthermore, the supposed duty of collaboration between the members of the Defence team imposed by the OCIJ and supported by the OCP may not be used to justify the continued violation of Mr. IENG Sary’s right to participate in his own defence and right to effective representation.

II. LAW

4. The applicable law for deciding this appeal is set out in Mr. IENG Sary’s Appeal.²

III. ARGUMENT

A. The appeal is admissible

¹ Case of IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ (PTC12), Decision to determine IENG Sary’s Appeal on the basis of written submissions only, 10 September 2008. In this decision the Pre-Trial Chamber granted Mr. IENG Sary 7 days to file the reply.

² IENG Sary’s Appeal. Against the OCIJ’s Order on Translation Rights and Obligations of the Parties, 22 July 2008 (“Appeal”), paras. 1, 3, 9-10, 20-23.



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5. The OCP's claim that the Appeal is inadmissible as "Rule 74(3) exhaustively enumerates the types of orders against which a Charged Person may appeal to the Pre-Trial Chamber"³ and that 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"⁴ is irrelevant. The Appeal was filed on the basis that the Order on Translation Rights and Obligations of the Parties ("Translation Order")⁵ was a denial of a request for investigative action and thus appealable under Internal Rule 74(3)(b).⁶
6. Concerning the scope of an investigative action under Rule 74(3)(b), the OCP asserts that "seeking translations of documents does not amount to seeking investigative action"⁷ and that translation is simply a "matter of judicial administration".⁸ The OCP fails to justify this narrow view of investigative action.
7. The Defence filed two formal requests to the OCIJ to undertake the investigative action of organizing the translation of all the documents allegedly supporting the Introductory Submission.⁹ These were not translation requests for single documents, which are routinely submitted by each party to the Interpretation and Translation Pool ("ITP") via the ECCC's online system. While the latter requests, if refused by the ITP, would not necessarily give rise to a right of appeal before the Pre-Trial Chamber (but may give rise to an internal appeal before the Director of Administration), the requests submitted by the

³ OCP Response, para. 26.

⁴ *Id.*

⁵ The PTC, in its recent Decision on IENG Sary's Appeal concerning Legal Officer David Boyle, found that Rule 74(3) does not allow appeals against a *decision* of the OCIJ and hence it had "no jurisdiction over the Appeal." Case of IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ (PTC08), Decision on IENG Sary's Appeal against Letter Concerning Request for Information Concerning Legal Officer David Boyle, 28 August 2008, para. 17. However according to Rule 74(3), the PTC may review certain *orders* issued by the OCIJ. In the case at hand, the OCIJ issued an Order, therefore the PTC cannot deny that it has jurisdiction over the Appeal on this basis.

⁶ Appeal, paras. 1-6.

⁷ OCP Response, para. 30.

⁸ *Id.*, para. 32.

⁹ Case of IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ, Request for Expedited Translation of All Supporting Documentation to the Introductory Submission, 10 January 2008 ("Request"); Case of IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ, Letter titled "Lack of Response to Request for Expedited Translation of All Supporting Documentation to the Introductory Submission into Khmer and English, 6 May 2008.

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Defence to the OCIJ were manifestly different, impacting on Mr. IENG Sary's overall fair trial rights.¹⁰

8. Listing the actions conducted by the OCIJ under Internal Rule 55(5), the OCP concludes that decisions on translation requests "do not fall under these actions and, therefore, cannot be described as investigative actions."¹¹ However, the OCP admits that this is only an "illustrative list."¹² As such, the absence in Rule 55(5) of deciding on requests for translation of the entire case file does not determine whether such an action constitutes an investigative action. Illustrative lists merely illustrate the types of acts which are considered to fall within a category and are not exhaustive lists, which, by their very nature, must explicitly list every act falling within the category. The substance of the action requested to be completed by the OCIJ must therefore be considered, rather than simply the name of the request, to verify whether it constitutes an investigative action and thus falls within Rule 74(3)(b). For the reasons set out in the Appeal,¹³ the Translation Order clearly amounted to a denial of a request for investigative action and is thus appealable under Rule 74(3)(b).

B. The ECCC investigative system requires that all documents in the case file be translated into the language of the Charged Person

9. The OCP sets out eight reasons why Mr. IENG Sary should not be entitled to translation into Khmer of all documents on the case file. As is so often the case, quantity masks the lack of quality and relevance of these arguments.
10. The first argument raised by the OCP is that Mr. IENG Sary, in addition to Khmer, has a "similar, if not greater, proficiency in French."¹⁴ The implication here is that Mr. IENG Sary is therefore able to review evidence in French and does not require such material to be translated into Khmer. The OCP is procedurally barred from raising this argument. In the Translation Order, the OCIJ held that "none of the charged persons has as yet

¹⁰ See Article 24 of 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, with amendments promulgated 27 Oct 2004 as discussed in the Appeal, paras. 22-26.

¹¹ OCP Response, para. 31.

¹² *Id.*, para. 30.

¹³ Appeal, para. 3.

¹⁴ OCP Response, para. 34.



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officially accepted capacity in one of the other working languages of the tribunal”.¹⁵ If the OCP wished to appeal the fact that Mr. IENG Sary has opted to use Khmer (his first/native language) as opposed to French as his working language before the ECCC, it could have utilized its unlimited ability to appeal any decision by the OCIJ under Internal Rule 74(2) to argue that Mr. IENG Sary was able to understand the evidence in French and therefore should be barred from receiving all of the evidence to be used by the OCP and OCIJ in Khmer. By failing to exercise this right, the OCP is barred from raising this argument now.

11. Furthermore, while it is clear that Mr. IENG Sary speaks and understands a certain level of French, the OCP has provided insufficient proof that Mr. IENG Sary would be able to fully exercise his right to participate in his defence by thoroughly reviewing and analyzing evidence in this language. As has been held by the ICC, “if there is any doubt as to whether the person fully understands and speaks the language of the Court, the language being requested by the person should be accommodated.”¹⁶ As such, if Mr. IENG Sary wishes the requested material to be provided in Khmer, such a request should be accommodated, especially considering his age and present state of health.
12. The second, third and fourth arguments¹⁷ raised by the OCP do not bear on the issue of whether Mr. IENG Sary should be provided with all the documents allegedly supporting the Introductory Submission. These arguments simply list the documents that have or will be translated into Khmer, such as: footnotes and indices accompanying the introductory submission, evidentiary material collected by the OCIJ and pleadings. By highlighting that most of the evidentiary submissions that formed part of the Introductory Submission were made available in Khmer and/or French, the OCP recognizes the importance of providing these materials to Mr. IENG Sary. Remarkably, the OCP fails to justify why all requested evidence should not be translated.
13. The fifth argument raised by the OCP is the supposed duty of collaboration imposed on the Defence team.¹⁸ The fact that some members of the Defence team have “wide

¹⁵ Translation Order, para. B1.

¹⁶ *Prosecutor v. Katanga*, ICC-01/04-01/07, Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled “Decision on the Defence Request Concerning Languages, 27 May 2008, para. 3.

¹⁷ OCP Response, paras. 35-37.

¹⁸ *Id.*, para. 38.

experience of working in Cambodia” or have been “called to the Bar in the United States” is irrelevant.

14. Any linguistic abilities in Khmer of certain members of the Defence team may not be invoked to justify a violation of the right of Mr. IENG Sary to fully participate in assisting in his own defence. This right is separate and additional to his right to effective representation.¹⁹
15. The sixth argument raised by the OCP is that the Defence team had previously filed solely in English before the amendment of the Practice Direction in April 2008.²⁰ This is similarly irrelevant to the issue at hand. Filings generated by the Defence need not be reviewed by Mr. IENG Sary with the same amount of detail that is required of evidence which may be used to convict or acquit him. Mr. IENG Sary’s contribution to Defence filings, while fundamental, may be – as has been – provided orally.
16. The seventh argument raised by the OCP is the reference to the jurisprudence of the ICTY, ICTR and ICC. The OCP claims that the regime implemented in the Translation Order reflects the most “liberal regime of disclosure adopted by the ICTY and ICTR.”²¹ This is patently untrue. As the Defence highlighted in the Appeal, at least one Chamber of the ICTY has required that exculpatory evidence be translated into the language of the accused.²² The regime established by the Translation Order is far less favorable to Mr. IENG Sary than that system.
17. The eighth argument raised by the OCP is that the Defence may request the Court Management Section to translate further documents.²³ However, as well as constituting the very violation of the equality of arms addressed below, this is only a right in theory. Only documents required by the maximum number of participants would be translated, thus subordinating Mr. IENG Sary’s rights to those of other Charged Persons, Civil

¹⁹ Each of these rights has been analyzed in past Defence filings. *See, e.g.*, Case of IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), Expedited Request for a Reasonable Extension of Time to File Challenges to Jurisdictional Issues & Reply per the Invitation of the Pre-Trial Chamber to the Office of the Co-Prosecutors’s Response to the Defence Appeal on Provisional Detention, 18 February, 2008; Case of IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ, Request for IENG Sary to be Examined by a Psychiatric Specialist to Determine Fitness to Stand Trial, 14 March 2008.

²⁰ OCP Response, para. 39.

²¹ *Id.*, para. 40.

²² Appeal, para. 18, *citing Prosecutor v. Ljubičić*, IT-00-41, Decision on the Defence Counsel’s Request for Translation of All Documents, 20 November 2002, at 3.

²³ *Id.*, para. 41.

Parties and the OCP itself. Such a subordination denudes this right of any practical meaning.

18. The OCP Response singularly fails to address the central Defence argument relating to the application of jurisprudence from the ICC, ICTY and ICTR, namely that at these other tribunals “the investigation stage is very different from the same stage at the ECCC”.²⁴ The OCP asserts that while “there may be systemic differences [...] the remedy tailored by the Rules and confirmed by the Translation Decision make those differences, if any, inconsequential.”²⁵ The only explanation seemingly provided for why these differences become inconsequential is that “his access to documents can be facilitated by collaboration within his legal team and with the assistance from the Defence Support Section.”²⁶ This does not make the difference “inconsequential” but constitutes a violation of equality of arms, placing as it does the burden on the Defence to organize translations of documents submitted by the OCP.
19. The difference between the ECCC system and the system of other international tribunals is significant and requires a translation regime specifically tailored to this Cambodian Court. For example, the ICC system follows a noticeably different approach to the investigative stage and thus its jurisprudence on this issue should not automatically apply at the ECCC. The hearing to confirm the indictment at the ICC where the Prosecution first submits evidence against the person charged, akin to the Closing Order at the ECCC, must take place within a “reasonable time after the person's surrender or voluntary appearance before the Court.”²⁷ Despite repeated delays, in the cases where such hearings have been held, they have still been held approximately eight months,²⁸ nine months²⁹ and five months³⁰ respectively after the initial appearance before the ICC. When there is therefore a very short time between a charged person's initial appearance and the beginning of the confirmation hearing, the requirement to translate all the exculpatory

²⁴ Appeal, para. 16.

²⁵ OCP Response, para. 42.

²⁶ *Id.*, para. 42.

²⁷ Article 61(1), Rome Statute of the ICC.

²⁸ *Prosecutor v. Lubanga*, ICC-01/04/01/06. The initial appearance of Thomas Lubanga was held on 17 March 2006. The Confirmation Hearing commenced on 9 November 2006.

²⁹ *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07. The initial appearance of Germain Katanga was held on 22 October 2007. The Confirmation Hearing commenced on 27 June 2008.

³⁰ *Id.* The initial appearance of Matthew Ngudjolo Chui was held on 11 February 2008. The Confirmation Hearing commenced on 27 June 2008.

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material or other material necessary for the preparation of the defence would unquestionably substantially delay the trial. It is therefore unsurprising that such a request has been denied.³¹ Refusal to translate the material at this stage is however compensated at the ICC by the time available to translate the material after the decision confirming the charges but before the commencement of trial. This additional time after the confirmation hearing allows the exculpatory material, which had not been translated previously, to be translated.³²

20. Conversely, the expedited schedule between the issuance of the Closing Order and the commencement of trial at the ECCC allows the Defence no time to translate and review the relevant material. Because of these marked differences between the ECCC system and the ones adopted by the ICC, ICTY and ICTR, an automatic transposition of jurisprudence from those institutions should be avoided without an examination of the rationale behind that jurisprudence.
21. The OCP seems to misunderstand the nature of the investigative stage. This can be seen by its later assertion that even if the translation regime is unfair, this appears acceptable as it “does not lay down the translation rights and obligations of parties for all stages of the proceedings.”³³ Violations of Mr. IENG Sary’s rights must cease immediately and may not be compensated later by a more favorable decision. The investigative stage is fundamental to the fairness and expeditiousness of the eventual trial. Failure to provide Mr. IENG Sary with translation into Khmer of the requested documents, thereby violating his right to participate in his own defence, would infect the entire trial process.

C. Translation of documents into the language of the Foreign Co-Lawyer

22. The OCP claims that “there is hardly any international instrument or legal authority, binding on this Court, which guarantees all documents on a defendant’s Case File to be

³¹ *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on the Requests of the Defence of 3 and 4 July 2006, 4 August 2006.

³² In the *Lubanga* case, the time between the decision confirming the charges and the commencement of the trial would have amounted to 17 months, were proceedings not stayed for another reason. *Prosecutor v. Lubanga*, ICC-01/04/01/06, Decision on the Confirmation of Charges, 29 January 2007. The Trial Chamber later confirmed that the trial would commence on 23 June 2008. *Prosecutor v. Lubanga*, ICC-01/04/01/06, Transcript of hearing on 13 March 2008, p. 10.

³³ OCP Response, para. 43.



translated into the language of the defence counsel.”³⁴ This is however, nuanced by the admission that whenever “on rare occasions tribunals have granted such requests, they have encouraged the defence teams to use their in-house linguistic capacity to get over any counsel’s lack of linguistic capacity in the language of the defendant”³⁵ thus admitting that such translations have been ordered. What the OCP has singularly failed to address, however, is why at the ECCC such translations should not be provided.

23. The Defence has set out extensively why it is crucial that the translations be provided in English for Mr. IENG Sary to be effectively represented.³⁶ The OCP has not challenged that there is such a right accorded to Mr. IENG Sary at the ECCC, nor has it shown how the Translation Order does not violate that right. The OCP instead refers to the fact that the international counsel is “expected to work in collaboration with the Cambodian counsel and utilise the linguistic capacity provided for and available in the defence team.”³⁷ Two criticisms of this assertion are pertinent.
24. Firstly, the Defence does collaborate linguistically, using its limited resources in the best possible way to protect the rights of Mr. IENG Sary. The Khmer speakers within the Defence team conduct legal and factual research in Khmer and also are obliged to perform in-house translations of motions filed before the Pre-Trial Chamber and OCIJ. However, there is a fundamental difference between these documents drafted by the Defence, and the mountains of evidence allegedly supporting the allegations contained in the Introductory Submission submitted by the OCP.
25. Secondly, the terminology employed by the OCP is instructive. The Defence is encouraged or expected to collaborate within the Defence team. No obligation to do so has been asserted, much less proved, by the OCP. Although the IENG Sary Defence does collaborate both within the team and with the Defence Support Section and the ITP, this collaboration may not be used as justification for violating Mr. IENG Sary’s rights.

D. Violation of equality of arms by the translation system ordered by the OCIJ

³⁴ *Id.*, para. 45.

³⁵ *Id.*, para. 45.

³⁶ Appeal, paras. 21-26.

³⁷ OCP Response, para. 46.

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26. The OCP argues that providing a translator specific to each defence team “does not create any new obligation for the defence but seeks to supplement their existing linguistic capacity to further enhance a defendant’s right to effective legal representation.”³⁸ This argument misconstrues the present and ongoing violation of equality of arms instituted by the filing of the Introductory Submission, which had not been translated into all three languages of the Court. While the Translation Order may slightly alleviate this substantial violation by providing for oral translations of some documents, it does not fully redress the violation. This can only be achieved by translating all the documents found in the Defence Request. By seeking to demonstrate that the present situation is completely fair to the Defence and that the translator is an additional resource that has been granted, the OCP either consciously misrepresents or unconsciously misconceives the reality of the situation.
27. Similarly flawed is the OCP’s assessment of the Defence’s objections to the translation system imposed by the OCIJ. The system will require the Defence to conduct a litany of individual requests for translation to the ITP, which will seemingly only be translated if a sufficient number of other parties to the proceedings also require these documents. This will impose an unnecessary administrative burden on the Defence teams. It will also unquestionably result in creating unnecessary divisions between the Defence teams as each team would have to demonstrate why the documents it wishes to be translated should take priority over another team’s requests.
28. The OCP’s attempt to introduce supposed limits on Mr. IENG Sary’s free choice of counsel by suggesting that he “choose an international counsel who resides in Phnom Penh to more effectively provide him legal representation,”³⁹ is not relevant to the issue at hand. Mr. IENG Sary voluntarily exercised his right to freely choose international counsel. The qualifications required of counsel by the DSS, make no mention of an obligation to remain in Phnom Penh during the investigative phase.⁴⁰ In fact, on the

³⁸ *Id.*, para. 49.

³⁹ *Id.*, para. 51.

⁴⁰ The criteria required of the International Co-Lawyer are the following: i) To be a current member in good standing of a recognised association of lawyers in a United Nations member state; ii) To have a degree in law or an equivalent legal or professional qualification; iii) To have at least ten years of relevant working experience in criminal proceedings, as a lawyer, judge or prosecutor, or in some other capacity; iv) To have established competence in criminal law and procedure at the international or national level; v) To be fluent in Khmer, French or



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contrary, during this stage “it is not expected that Co-Lawyers will work full time on the case during the investigative stage, allowing them to maintain their ordinary practice”⁴¹ and so relocation to Phnom Penh is not envisaged. Furthermore, the ECCC provides remote access to the case file so that the international co-lawyer may have the same access to the case file as any lawyer based in Phnom Penh. Therefore, the OCP’s assertion that the obligation upon a court to provide facilities for the preparation of the defence does not “extend to providing facilities anywhere in the world”⁴² is incorrect.

29. Nothing has been submitted by the OCP to overcome the Defence objections to oral translations of the evidence rather than official written translations provided by the Court Management Section. The inadequacy of the former is best explained by a recent oral decision of the ICC in *Lubanga*. The Pre-Trial Chamber was faced with the complex question of how it could review confidential material in the possession of the Prosecution to verify whether such material was exculpatory. The Prosecution, which had received the material on a confidential basis, proposed that the judges review the material in a certain location and then only take notes after they left, based on their memory. In assessing such a proposal, it was held that the Pre-Trial Chamber:

“is unlikely to approve a system that depends on its ability to memorise large quantities of information which it is unable to retain and study and which, furthermore, it is unable to compare with the other evidence in the case.”⁴³

30. It is noteworthy that a significant proportion of the evidence being reviewed was in French, a language not spoken by the judges. When this information was conveyed to the Office of the Prosecutor, an offer was immediately made to translate all this material into English so that it could be reviewed.⁴⁴ No duty of collaboration was required between the judges who spoke French and those who did not. The Defence submits that providing oral translations of the documents supporting the Introductory Submission, consequently

English; and vi) To be authorised by the Bar Council of the Kingdom of Cambodia to practise before the ECCC. See http://www.eccc.gov.kh/english/dss_the_list.aspx

⁴¹ Guide to the ECCC Legal Assistance Scheme, 21 January 2008. F.2.

⁴² OCP Response, para. 52.

⁴³ *Prosecutor v. Lubanga*, ICC-01/04/01/06, Transcript of hearing on 24 June 2008, pp. 30-33.

⁴⁴ *Id.*, p.30.



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requiring the Defence to memorize large quantities of information which it is unable to compare with the other evidence in the case, would be similarly ineffective. As such, complete written translations must be provided.

31. Finally, the OCP's assertion that the right to equality of arms has not been violated because the Defence has "elected not to avail [sic] of any facilities provided by the Court Management Service for translation of documents"⁴⁵ is without merit. The Defence fundamentally disagrees with the system imposed by the OCIJ as demonstrated by the Appeal. 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.

IV. CONCLUSION & RELIEF SOUGHT

32. The Introductory Submission filed by the OCP against Mr. IENG Sary on 18 July 2007 unfairly shifted the burden of translating the documents allegedly supporting the allegations contained therein from the OCP to the OCIJ. The Translation Order in turn shifted that burden on to the individual defence teams, which have the least amount of translation support and the most pressing need for the translations. This judicial buck-passing (transferring responsibility and / or blame) is unfortunate: a sad indictment of the relationship between the OCP and OCIJ. The Pre-Trial Chamber must adequately and expeditiously resolve the issues related to the translation raised in the Appeal. To do otherwise risks casting grave doubts on the commitment and sincerity of the ECCC to live up to its stated purpose: "the pursuit of justice."⁴⁶

WHEREFORE, for all of the reasons stated herein, the Defence respectfully requests the Pre-Trial Chamber to:

- a. ANNUL the OCIJ's "Order on Translation Rights and Obligations of the Parties, dated 19 June 2008;

⁴⁵ OCP Response, para. 52.

⁴⁶ Preamble to the Internal Rules.

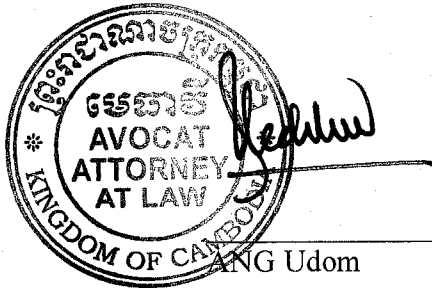


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- b. ORDER the Court Management Section to immediately translate all documents submitted by the OCP in support of the allegations contained in the Introductory Submission;
- c. ORDER the Court Management Section to translate all documents in the case file regardless of whether they constitute elements of proof.

Respectfully submitted,



ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **11th** day of **September, 2008**