A 190/II/1

**BEFORE THE PRE-TRIAL CHAMBER**

**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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# IENG SARY'S APPEAL AGAINST THE OCIJ'S ORDER ON TRANSLATION RIGHTS AND OBLIGATIONS OF THE PARTIES

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**Distribution to:**

**The Pre-Trial Chamber**
**Judges:**
PRAK Kimsan
NEY Thol
HOUT Vuthy
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Rowan DOWNING

**Co-Prosecutors:**
CHEA Leang
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Mr. IENG Sary, through his Co-Lawyers ("the Defence"), pursuant to Rule 74(3)(b) of the ECCC Internal Rules ("Rules") hereby files this Appeal against the Order on Translation Rights and Obligations of the Parties issued by the Office of the Co-Investigating Judges ("OCIJ") on 19 June 2008 (" Translation Order") and notified to the parties on 23 June 2008. The Defence filed its notice of appeal of this decision on 2 July 2008, within the time limit specified by Rule 75(1).

## I. ADMISSIBILITY OF THE APPEAL

1. The Defence submits that the original Defence request filed on 10 January 2008[1] constitutes a request for investigative action under Rule 55(10). The denial of this Request by the OCIJ in its Translation Order of 19 June 2008 therefore constitutes an order refusing a request for investigative action allowed under the Rules; thus appealable under Rule 74(3)(b).

2. In the Request, the Defence highlighted that "without having in the Khmer language the list of citations and cited materials we are unable to provide effective legal assistance and representation to our client, Mr. IENG Sary."[2] As a consequence, the OCIJ was requested to translate all of the material referenced in the Request, namely the endnotes to the Introductory Submission as well as the documents they cite to, and any other additional material generated and to be generated by and through the OCIJ.[3] On 6 May 2008 the Defence filed a letter recalling its previous Request.[4] In this Letter, the Defence reminded the OCIJ of its previous Request[5] to translate the material supporting the Introductory Submission into Khmer and further requested that "all documents that are in Khmer be translated into English."[6] These two requests were both denied by the OCIJ in their Order of 19 June 2008.

3. There appears to be no clear definition of what constitutes a request for investigative action under Rule 55(10). It clearly is not meant to cover every request to the OCIJ as

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[1] 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").
[2] Request, at 2.
[33] Request, at 3.
[4] 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 ("Letter").
[5] Letter, para. 1.
[6] Letter, para. 6.

this would render the rest of the possible avenues of appeal irrelevant. However, the Defence submits that an investigative action must not be interpreted in such a narrow manner as to deprive the Defence of the means to genuinely challenge the decisions of the OCIJ in relation to the way in which the judicial investigation is conducted. The Defence therefore submits that the logical meaning of an investigative action is any action which affects the substance of the investigation. This effectively means anything that relates to obtaining evidence that is placed in the case file which pertains to guilt or innocence.

4. The refusal by the OCIJ to order the translation of the documents allegedly supporting the guilt of Mr. IENG Sary amounts to a refusal to carry out an action that would have added evidence to the case file. As such, it is a refusal to carry out an investigative action and is appealable under Rule 74(3)(b).

5. If a narrower definition of investigative action was envisaged, the Rules would have explicitly provided such a definition. Instead of using the phrase "request for investigative action" the Rules could have referred to a request to interview a witness or a request to investigate a certain counter allegation. Such a narrow definition however, was obviously rejected as it may have severely limited the ability of the OCIJ to conduct the investigation. As such, only a wide interpretation of investigative action is appropriate, which, by extension, grants a wide right of appeal under Rule 74(3)(b).

6. The Defence also submits that due to the nature of this appeal, there is no need for an oral hearing and it should be decided solely on the basis of written pleadings.

## II. SUMMARY OF ARGUMENT

7. The Defence submits that the Translation Order violates Mr. IENG Sary's right to participate in his own defence[7] as this is only protected if he is able to see the evidence submitted against him in a language which he fully understands, namely Khmer. The Translation Order also violates Mr. IENG Sary's fundamental right to effective legal representation[8] as it prevents his foreign lawyer from being able to

[7] Request, at 2. Letter, para. 4 "The translation of documents in Mr. IENG Sary's language is indispensable if he is to fully exercise his right to participate in his own defence."
[8] Request, at 2.

review and analyze the evidence against his client in a language which he can understand, namely English.

8. Moreover, the system imposed by the OCIJ on the Defence for carrying out translations during the investigative stage actually reverses the burden of organizing translation from the State authorities that are bringing and investigating the case against Mr. IENG Sary, namely the OCP and OCIJ, onto Mr. IENG Sary and his Defence team. This constitutes a violation of the principle of equality of arms.

## III. ARGUMENT

### A. Translation of documents into the language of Mr. IENG Sary

9. The OCIJ held that "a number of international criminal tribunals have relied on the jurisprudence concerning Article 6(3)(e) of the ECHR [...] 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 events.'"[9] Based on this reasoning the OCIJ held that a charged person is entitled to the translation into Khmer of only the following documents:

    1) any Indictment of the Co-Investigating Judges under Rule 67(1) of the IR, namely the Closing Order;

    2) the elements of proof on which any such Indictment would rely;

    3) the Introductory Submission;

    4) the Final Submissions of the Co-Prosecutors, as well as all footnotes and indexes of the factual elements on which those Submissions rely.[10]

10. The logical consequence of this ruling is that the following documents will <u>not</u> be translated into Khmer:

[9] Translation Order, at 4 *citing in support* Luedicke, Belkacem et Koc v. Germany, judgement of 28 November 1978, Series A no 29, § 48 and Kamasinski v. Austria, judgement of 19 December 1989, Series A no. 168, §74, Muhimana§§16-17, *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision, 4 August 2006.
[10] Translation Order, at 5.

1) the documents mentioned in the footnotes to the Introductory and Final Submissions of the Co-Prosecutors; and

2) any documents which are collected by the OCIJ which do not constitute "elements of proof", excluding therefore exculpatory evidence.

11. The Defence submits that such a decision violates the right of Mr. IENG Sary to participate in his own defence. This includes the rights to effectively participate in any and all relevant proceedings, by being able to: understand the nature of the charges; understand the course of the proceedings; understand the details of the evidence; instruct counsel/ assist in his or her own defence; and, to understand the consequences of the proceedings.[11] The exercise of this right is predicated however on the provision of the evidence against Mr. IENG Sary submitted by the OCP in a language which he understands, namely Khmer. The evidence must also be provided early enough in the judicial investigation for him to have sufficient time to make proper use of that evidence. Limiting the translation into Khmer of the Introductory Submission and its footnotes but not the actual supporting documentation on which it is based deprives Mr. IENG Sary of the opportunity to properly review, analyze and make use of the evidence against him. As a consequence he is not able to meaningfully exercise this fundamental right.

12. The Defence has repeatedly brought to the attention of the OCIJ and the Pre-Trial Chamber the importance of this right and the fact that Mr. IENG Sary fully intends to exercise it before the ECCC.[12] In the Translation Order, the OCIJ recognized a

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[11] *Prosecutor v. Strugar*, IT-01-42-T, Decision re the Defence Motion to Terminate Proceedings, 26 May 2004, para. 36. *See also Lagerblom v Sweden*, ECHR, 14 April 2003, para. 49 establishing that Article 6 of the European Convention on Human Rights "guarantees the right of an accused to participate effectively in a criminal trial."

[12] *See* Case of IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ, Interoffice Memorandum titled "Meeting of 18 December 2007", 20 December 2007; 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, "As noted in our previous discussion and correspondence Mr IENG Sary has every intention of assisting his legal team in preparation of his defence"; 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 OCP's Response to the Defence Appeal on Provisional Detention Reply to invitation of PTC, 18 February 2008, paras. 24, 26-27. "Mr. IENG Sary has an unqualified right to participate effectively in any and all criminal proceedings against him, including, inter alia: the right to be present and assisted by/provide assistance to counsel, as well as the right to hear and follow proceedings."; Case of IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ(PTC03), IENG Sary's Expedited Request for an Extension of the Page and Time Limits, 12 March 2008, para. 25 "The Pre-Trial Chamber was aware that IENG Sary had been hospitalized on 13 February and that preparation of the Defence submissions on jurisdiction "requires the active and sustained participation of Mr. IENG Sary" which is the exercise of "an unqualified right to participate effectively in any and all criminal proceedings against him"; Case of IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ, Request for IENG Sary to be Examined by a Psychiatric Expert to Determine

plethora of rights which appeared to be relevant in assessing the obligation to translate the documents supporting the Introductory Submission.[13] Conspicuous by its absence was the right of a Charged Person to participate in his own defence, notwithstanding the fact that Mr. IENG Sary had specifically invoked this right in requesting translation of the documents into Khmer.

13. It is clear that the right of Mr. IENG Sary to participate in his own defence is not one considered important by the OCIJ. This is clear from the failure of the OCIJ to respond to the Defence request for a psychiatric examination of Mr. IENG Sary filed on 14 March 2008.[14] Furthermore, in a decision on a request by Mr. NUON Chea for a psychiatric expert, the OCIJ considered that the issue of fitness to stand trial "does not arise at this stage since the question of your client being sent forward for trial is not a current one."[15] Simply, it appears that the OCIJ does not consider that the right to participate in one's own defence needs to be upheld during the investigation stage.

14. The Translation Order also limited the translation into Khmer to "elements of proof".[16] The necessary implication is that the evidence that is part of the case file but which does not amount to an element of proof (for it does not allegedly prove the guilt of the charged person), need not be translated into Khmer, the language of Mr. IENG Sary. This therefore excludes exculpatory evidence from the ambit of those documents that will be translated.

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Fitness to Stand Trial, 14 March 2008, para. 6. "Mr. IENG Sary has an unqualified right to participate effectively in any and all criminal proceedings against him, including, inter alia, the right to be present and the assisted by/provide assistance to counsel, as well as the right to hear and follow proceedings"; Case of IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ, Letter to the OCIJ titled "Lack of Response to "Request for IENG Sary to be examined by a Psychiatric Specialist to Determine Fitness to Stand Trial" filed on 14 March 2008, 19 June 2008, para 2"The right to participate in one's own defence is a fundamental right of the accused, and is guaranteed by ECCC Law and confirmed by a multitude of human rights instruments as detailed in the Request".

[13] Translation Order, at 3. The OCIJ highlighted the rights 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"; the right to examine evidence against them; and the right to have the free assistance of an interpreter if the charged person cannot understand or does not speak the language used in court.

[14] See Case of IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ, Request for IENG Sary to be Examined by a Psychiatric Expert to Determine Fitness to Stand Trial, 14 March 2008. After this request was not responded to for over three months the Defence filed, on 2 July 2008 its "Appeal Against the Constructive Dismissal by the OCIJ of the Request for IENG Sary to be Examined by a Psychiatric Expert to Determine Fitness to Stand Trial".

[15] Case of NUON Chea, Case No. 002/19-09-2007-ECCC/OCIJ, OCIJ Letter, 14 March 2008.

[16] Translation Order, at 5.

15. The OCIJ relied heavily on jurisprudence of the ICTR and ICTY[17] to justify this limitation. However the ECCC does not follow the same procedure as the essentially accusatorial systems at the ICTY or ICTR; jurisprudence from these *ad hoc* tribunals are not directly applicable to the situation at the ECCC. This is especially the case when the issue to which the jurisprudence relates is inextricable from the nature of the judicial system that is being employed.

16. At the ICTY and ICTR, the investigation stage is very different from the same stage at the ECCC. At both the ICTY and ICTR an indictment is drawn up by the Prosecution, upon a determination that a *prima facie* case exists, which then transmits it to a judge of the Trial Chamber.[18] The indictment and supporting material is then reviewed by a pre-trial judge and if the judge is satisfied that a *prima facie* case has been established he must confirm the indictment and "issue such orders and warrants for the arrest, detention, surrender or transfer of persons."[19] There then follows an often long pre-trial phase before trial commences. In such a system, the discussion of the evidence takes place during the trial, not during a judicial investigation phase. Therefore, it is only necessary to be provided with the incriminating evidence in the language of the accused at that stage of proceedings. Furthermore, even if the Prosecution is not obliged to provide the exculpatory material to the accused in his own language, the Defence is at least provided with the resources and time in advance of trial to organize the translation itself thus upholding the right to adequate time and facilities to prepare the defence. The system is predicated on an equality of arms between the Prosecution and Defence with fewer obligations on the former balanced out by significantly greater resources to the latter.

17. By contrast, at the ECCC the judicial investigation is solely under the control of the OCIJ with the roles and obligations of the OCP and Defence minimized in comparison with their roles at the *ad hoc* tribunals. Under Rule 55(5), the OCIJ "shall conduct their investigation impartially, whether the evidence is inculpatory or exculpatory." The Defence's right to conduct its own investigations is severely circumscribed as the OCIJ is responsible for finding evidence which "shows or tends

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[17] *Prosecutor v. Delalić*, IT-96-21, Decision on Defence Application for Forwarding the Documents in the Language of the Accused, 25 September 1996, para 8; *Prosecutor v. Ljubičić*, IT-00-41, Decision on the Defence Counsel's Request for Translation of All Documents, 20 November 2002 ("*Ljubičić* Decision"); *Prosecutor v. Muhimana*, ICTR-95-1-B-I, Decision, 6 November 2001.
[18] Article 18(4), ICTY Statute.
[19] Art 19(2), ICTY Statute.

to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence."[20] In these circumstances, where it is only the OCIJ which has the right and obligation to conduct investigations, it is a violation of Mr. IENG Sary's right to participate in his own defence to refuse to translate the fruits of those investigations.

18. To the extent that the cases cited by the OCIJ are applicable to the ECCC, the Defence notes that some of the cases cited do not actually support the very limited obligation to translate concluded by the OCIJ. In fact the *Ljubičić* decision, in addition to ordering the translation of elements of proof, also held that "based on the mainstream of the existing judicial practice, the current general standard regarding translation of documents during the pre-trial stage of the proceedings requires that the following material be submitted to the Accused in a language he understands [...] – *Exculpatory material* disclosed by the Prosecutor according to Article 68 of the Rules."[21] As such, although the *Ljubičić* Decision did support the provision of elements of proof in the language of the accused, the decision was not limited to that obligation.

19. Therefore the Defence submits that to only translate "elements of proof" the OCIJ is violating the right of Mr. IENG Sary to participate in his own defence in addition to violating its own duty of impartiality as it translates only the evidence that is inculpatory.

**B. Translation of documents into the language of the Foreign Co-Lawyer**

20. The Translation Order recalled that Mr. IENG Sary, in the Letter of 6 May 2008, had requested that all the documents supporting the allegations contained in the Introductory Submission be translated into English.[22] It also explained that the documents that would be translated into Khmer, as set out in part B of the Translation Order, would also be translated into the other official working languages of the ECCC, namely English and French. Therefore, the OCIJ rejected the Defence request for translation into English of the documents cited in the footnotes to the Introductory

[20] Rome Statute of the International Criminal Court, 17 July 1998, A/CONF.183/9, Art. 67(2).
[21] *Ljubičić* Decision, at 3.
[22] Translation Order, at 1-2.

Submission. The OCIJ also refused to translate into English exculpatory evidence which does not constitute an element of proof.

21. The Defence submits that by refusing to order the translation of "elements of proof" into English until the end of the judicial investigation and refusing to order the translation of evidence on the case file that does not constitute an element of proof, the Translation Order will deprive Mr. IENG Sary of effective representation throughout the investigative stage of proceedings.

22. Under Article 24 of the Establishment Law, "during the investigation, Suspects shall be unconditionally entitled to assistance of counsel of their own choosing." This right is the very bedrock upon which the Mr. IENG Sary's other rights are upheld as it is often only through representation by counsel that other rights may be protected. It is clear that the right to assistance under this provision does not simply apply to trial proceedings but ensures that Mr. IENG Sary has the right to assistance "during the investigation". By only ordering translation of the supposed "elements of proof" into English when the Closing Order is issued under Rule 67(1), the Translation Order deprives Mr. IENG Sary of meaningful assistance on substantive issues during the investigation stage.

23. The Defence further submits that the phrase "unconditionally entitled to assistance of counsel" in Article 24 encapsulates the right to effective counsel for the right to have any meaning.[23] In the circumstances of the judicial investigation against Mr. IENG Sary, the Defence submits that it is vital for the Foreign Co-Lawyer to be able to review and analyze all the evidence supporting the Introductory Submission to be able to effectively assist and advise Mr. IENG Sary. Without the Co-Lawyer being able to verify whether the documents support the allegations put forward by the OCP or whether they may lead to alternative avenues of investigation, it becomes impossible to exercise that right to effectively represent Mr. IENG Sary.

24. Firstly, the right to challenge at any stage during the proceeding the first prong of the test for ordering provisional detention, namely whether "there is well founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary Submission"[24] becomes impossible. Without being

[23] *See Artico v. Italy,* ECHR, 30 April 1980, para. 33.
[24] Rule 63(3)(a). Under Rule 64(3) the Charged Person may submit a further application for release if his or her circumstances have changed, not less than 3 months after the final determination of the previous application for

able to review the evidence in a language which counsel understands, it is impossible to challenge the factual basis for the crimes alleged and thus this dramatically limits the ability to challenge detention.

25. Secondly, the failure of the OCIJ to translate the "elements of proof" until the end of the judicial investigation effectively deprives the Defence of the ability to request "the Co-Investigating Judges to make such orders or undertake such investigative action as they consider necessary for the conduct of the investigation."[25] Failure to request an investigative action during the investigative stage due to the foreign co-lawyer being unable to understand the contents and import of a document may deprive Mr. IENG Sary of the right to have his case properly investigated.

26. With regards to the translation of exculpatory evidence, or evidence that forms part of the case file but which does not constitute an element of proof, the Defence submits that the same criticisms apply as were discussed above in relation to the translation of these documents into Khmer.[26] The consequence of this failure to translate into English is a violation of the right to effective representation of Mr. IENG Sary by his Co-Lawyers.

### C. Violation of equality of arms by the translation system ordered by the OCIJ

27. Despite the rejection by the OCIJ of the Defence's request for translation of all documents accompanying the introductory submission into English and Khmer, the OCIJ did 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 (between two official languages to be specified by the defence teams) 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."[27]

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release. Therefore, although the original provisional detention order was issued on 14 November 2007 to which an appeal was launched, the Mr. IENG Sary will be able to challenge his detention 3 months from the decision of the Pre-Trial Chamber on the Appeal Against the Provisional Detention Order.

[25] Rule 55(10).

[26] *See infra* paras. 9-19.

[27] Translation Order, at 6-7.

28. This translator is to be appointed for a "fixed but renewable period of two months [...]. An extension of this nomination is at the discretion of the Office of Administration, following consultation with the Co-Investigating Judges."[28]

29. The system imposed by the OCIJ, far from achieving the objectives of judicial economy set out by the OCIJ,[29] is wasteful and violates the principle of equality of arms by shifting the burden of organizing translation from the state authorities on to the individual.

30. Firstly, by providing separate translators to each of the five Defence teams to effectively translate the same documents, the OCIJ appears to be duplicating the work of the translators. The Defence finds it hard to understand how it would not be more efficient to join the separate resources of the translation section together to translate the documents submitted by the OCP in support of the Introductory Submission, than to provide one translator to each team. As each of the translators supplied to the team is "required to adhere to the strictest obligations of confidentiality pertaining to the nature and substance of their work during the assignment"[30] the translators would logically not be able to share any of the translations they have conducted with the other defence teams. Therefore, the five translators could simultaneously be translating the same document.

31. If the translations provided are simply oral rather than written, this does not help the foreign Co-Lawyer who is not based in Phnom Penh. It also means than unless the importance of a document is recognized immediately by the person to whom the oral translation is being addressed it becomes ineffective. It is often the case that for very large and complex cases such as those being prosecuted before the ECCC the importance of a piece of evidence only becomes apparent in conjunction with other pieces of evidence. As such, only written translations suffice to be able to compare one document against another.

32. Such a waste of time and resources appears to be completely contrary to the supposed rationale of the Translation Order. In contrast, were the translators to translate all the documents supporting the Introductory Submission jointly and systematically, this

[28] Translation Order, at 8.
[29] Translation Order, at 4, citing *Prosecutor v Sarić,* IT-95-9, Decision of 21 May 1998.
[30] *See* letter from Tony Kranh, Chief of CMS to Rupert Skilbeck, Principal Defender, titled "Assignment of translators in accordance with the order of the Co-Investigating Judges dated 19 June, 2008", 15 July 2008. Attached at Annex A.

duplication would not occur and they would be able to produce more translations per person. In addition, as the translator will only be provided for a period of two months there appears to be little that can be done within that short time to contribute to the translation requirements of each Defence team. The Translation Order does allow for an extension of this period, but this is "at the discretion of the Office of Administration"[31] with no criteria set down as to when an extension of this two month period could be refused.

33. Secondly, the system established by the OCIJ reverses the translation burden onto the Defence teams rather than on the authorities of the State, namely the OCP and OCIJ. Such an approach belies a fundamental misunderstanding of human rights law, which protects the rights of the individual against the power of the state, and thus places positive obligations on state authorities to protect the human rights of the accused.

34. Human rights law regulates the relationship between the individual and the State, by creating a positive obligation upon the State to protect the guaranteed rights of the individual. This central principal is reflected in the ICCPR which binds Cambodia under its Constitution.[32] In general terms the Human Rights Committee of the United Nations ("UNHRC") has stated that through Article 2 of the ICCPR, "a general obligation is imposed on States parties to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction."[33]

35. In relation to the present case, the translation obligation belongs to the OCP and the OCIJ. The UNHRC has stated that "the obligations of the Covenant in general and article 2 in particular are binding on every State party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local) are in a position to engage the responsibility of the State party."[34] This means that the Judges, Co-Prosecutors and the Office of Administration of the ECCC are all obliged to protect the rights of Mr. IENG Sary.

36. As the Defence highlighted to the OCIJ in its Letter:

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[31] Translation Order, at 8.
[32] Article 31 of the Cambodian Constitution states that "the Kingdom of Cambodia shall recognize and respect human rights as stipulated in … the covenants and conventions related to human rights." Cambodia signed and ratified the ICCPR on 17 October 1980 and 26 May 1992 respectively.
[33] General Comment No.31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, ("General Comment 31"), para.3.
[34] General Comment No.31, para.4.

> The Defence is of the view that the backlog in translation lies squarely at the door of the OCP. The Introductory Submission submitted to the OCIJ by the OCP is allegedly supported by approximately 16,000 pages of documents which are often in only one of the three official languages of the ECCC. The Defence submits that the obligation to translate these documents should have rested solely on the OCP. Until completion of all translations, no Introductory Submission should have been filed.[35]

37. The OCIJ elected not to follow the suggestion in the Letter to "invite the OCP to withdraw any documents allegedly supporting the allegations contained in the Introductory Submission that are not strictly relevant to allegations contained therein."[36] While recognizing that the OCIJ is a different branch of the state authorities than the OCP which is directly responsible for the translation backlog, it behooves underscoring that the OCIJ can not hide behind this difference to evade its responsibility. By attempting to pass its translation responsibilities onto the Defence, the OCIJ is impermissibly shifting its burden onto Mr. IENG Sary.

38. As the OCIJ admits, the Co-Prosecutors have "added staff resources" in comparison to the Defence teams. To place the translation burden onto Mr. IENG Sary would therefore constitute a violation of equality of arms which requires the maintenance of a fair balance between the parties.[37]

## IV. CONCLUSION & RELIEF SOUGHT

39. The Translation Order appears, in every facet, to be dictated by considerations of judicial economy and budgetary constraints and is an attempt to excuse and cover up the failure of the OCP to translate the material supporting the Introductory Submission prior to filing it with the OCIJ. The Defence submits that if the ECCC was not ready to provide fair and impartial trials then it should never have arrested and provisionally detained Mr. IENG Sary. The OCIJ must not be permitted to use its own failures, or indeed those of the OCP, to impose a regime on the Defence which violates the fundamental due process rights of Mr. IENG Sary.

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[35] Letter, para. 4.
[36] Letter, para 7.
[37] *Prosecutor v. Delalić et al.*, IT-96-21-T, Decision on the Prosecution's Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence, 4 February 1998, para. 45.

**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;

b. ORDER to 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 to the Court Management Section to translate all documents in the case file regardless of whether they constitute elements of proof.

Respectfully submitted,

AVOCAT ATTORNEY AT LAW KINGDOM OF CAMBODIA

ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **22nd** day of **July, 2008**