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Justice for All: Protecting the Translation Rights of Defendants in International War Crime Tribunals

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**JUSTICE FOR ALL: PROTECTING THE TRANSLATION RIGHTS OF
DEFENDANTS IN INTERNATIONAL WAR CRIME TRIBUNALS**

*Kavitha R. Giridhar**

International war crimes tribunals have been established to restore justice in those states that have suffered from genocide, crimes against humanity, and war crimes. In this quest for justice, it is imperative that the rights of the accused are protected. International human rights instruments and the statutes of the war crime tribunals grant the accused a right to understand the charges against him or her and the free assistance of an interpreter. International judicial decisions have determined this right includes the right to translation. However, in implementing this included right the tribunals have held that the accused do not possess an absolute right to the translation of documents. This Note examines the importance of translation with regard to the legitimacy of the international criminal system, the accused's right to procedural due process, and the equality of arms principle. It proposes that the needs of both the defense and the tribunals can be met by providing each defense team with its own interpreters.

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I. INTRODUCTION

*“[W]e win justice quickest by rendering justice to the other party.”*¹

- Mohandas Gandhi

The international community has long upheld the principle that all individuals—even those accused of the greatest crimes—have the right to due process in international criminal proceedings.² Within these due process rights is the right to participate in one’s trial and the right to have adequate time and facilities to prepare a defense.³ To effectuate these rights for those defendants who do not understand the language of the court, the international community has granted the right to the free assistance of an interpreter.⁴ The right to interpretation has been enforced in the international criminal tribunals through both their statutes and decisions. However, the emerg-

¹ MOHANDAS GANDHI, *AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH THE TRUTH* 160 (1983).

² Universal Declaration of Human Rights, art. 10, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

³ Rome Statute, art. 67(1), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; Statute of the International Tribunal for the Former Yugoslavia, art. 21(4), May 25, 1993, U.N. Doc. S/RES/827 [hereinafter ICTY Statute]; Statute of the International Tribunal for Rwanda, art. 20(4), November 8, 1994, U.N. Doc. S/RES/955 [hereinafter ICTR Statute]; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, art. 35, October 27, 2004, No. NS/RKM/1004/006 [hereinafter ECCC Statute]; Statute of the Special Court for Sierra Leone, art. 17, Aug. 14, 2000, U.N. Doc. S/RES/1315 [hereinafter SCSL Statute]; Statute of the Special Tribunal for Lebanon, art 16, March 29, 2006, U.N. Doc. S/RES.1757 [hereinafter STL Statute]. *See also* International Covenant on Civil and Political Rights, art. 14, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 [hereinafter ICCPR].

⁴ Without such rights, a trial would only be a “babble of voices” to the defendant. United States *ex rel.* Negron v. New York, 434 F.2d 386, 388 (2d Cir. 1970) (holding that in order to protect the defendant’s constitutional right to participate in his own trial and confront witnesses, consistent interpretation should be provided by the court).

ing jurisprudence regarding the accused's right to translation is far more diverse and tenuous.⁵

This Note contends that translation rights are as important as interpretation rights and should be protected as such. Part II begins by examining the development of the right to interpretation and the accompanying right to translation in international law. Part III then proceeds to a review of judicial decisions addressing the narrow right to translation. It reveals that a defendant has a limited right to translation. Part IV discusses three factors that compel broadening the right to translation: (1) the legitimacy of the international criminal system; (2) the accused's due process rights; and (3) the equality of arms principle. Part V concludes that the international war crime tribunals should provide each defense team with its own translator(s) according to need.

II. THE RIGHT TO TRANSLATION IN INTERNATIONAL LAW

The right of an accused war crime defendant to the free assistance of an interpreter derives from three sources: (1) human rights instruments; (2) the statutes of the international criminal tribunals and human rights courts; and (3) judicial decisions. The right to translation, while not stated explicitly in international treaties and statutes, has arisen from the international courts' interpretation of an accused's right to interpretation.

A. *Human Rights Instruments*

The Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) provide the minimum guarantees of due process in international law.⁶ The UDHR sets forth general principles of human rights, including the right to a fair trial.⁷ It grants that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."⁸ The ICCPR also provides that every person before a tribunal is entitled to a fair, public, and independent trial.⁹ In order to uphold this right for those defendants who do

⁵ Interpretation and translation are often used interchangeably; however, they are two distinct terms. Interpretation refers to the oral rendering of one language into another. Translation refers to the written rendering of one language to another. David J. Heller, *Language Bias in the Criminal Justice System*, 37 CRIM. L.Q. 344, 348 (1994-1995).

⁶ HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 134-6, 151-154 (Oxford Univ. Press 2008) (1996).

⁷ UDHR, *supra* note 2, art. 10.

⁸ *Id.*

⁹ ICCPR, *supra* note 3, art. 14. ("[E]veryone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.").

not speak the language of the tribunal, the ICCPR grants every accused the right to understand the charges against him or her and the proceedings of the court.¹⁰ This right includes the right to the free assistance of an interpreter.¹¹

B. Statutes of the International Criminal and Human Rights Tribunals

The International Military Tribunal (IMT) in Nuremberg was the first international tribunal to prosecute war criminals. The IMT Charter reflected a concern for the procedural protections of the accused.¹² The rights originally proposed in the American draft of the Charter were later expanded to include translation and interpretation.¹³ Article 16 of the IMT Charter provided for an interpreter during trial and also included the defendant's right to a copy of the indictment and supplementary materials in a language he or she understood.¹⁴

The Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention of Human Rights, embraces the general principles of the UDHR and ICCPR. The Convention entered into force on September 3, 1953 and is enforced by the European Court of Human Rights (ECHR). It provides that everyone charged with a criminal offense has the minimum right to be "informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him" and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court."¹⁵

¹⁰ *Id.* ("[E]veryone 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; (b) to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing; and . . . (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.").

¹¹ *Id.* art. 14(f).

¹² Jeffrey L. Spears, *Sitting in the Dock of the Day: Applying Lessons Learned from the Prosecution of War Criminals and Other Bad Actors in Post-Conflict Iraq and Beyond*, 176 *MIL. L. REV.* 96, 112 (2003).

¹³ *Id.*

¹⁴ Charter of the International Military Tribunal, in *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement)*, art. 16, August 8, 1945, 58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280. Specifically, article 16 states that: "In order to ensure a fair trial for the Defendants, the following procedure shall be followed: (a) the Indictment shall include full particulars specifying in detail the charges against the Defendants. A copy of the Indictment and of all the documents lodged with the Indictment, translated into a language which he understands shall be furnished to the Defendant at a reasonable time before the Trial . . . (c) a preliminary examination of a Defendant and his Trial shall be conducted in, or translated into, a language which the Defendant understands."

¹⁵ The Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Nov. 4, 1950, 213 U.N.T.S. 222. Article 6, entitled Right to a Fair Trial, section 3 states that:

The current international war crime tribunals and the International Criminal Court (ICC) have followed the IMT and ECHR.¹⁶ The language in the tribunals' statutes mirror the language found in the ICCPR and the European Convention of Human Rights. Each provide the accused the right to be informed of the charges against him or her in a language which he or she understands, to have adequate time and facilities for the preparation of his or her defense, and to have the free assistance of an interpreter if he or she cannot understand or speak the language used in the international tribunal.¹⁷ In addition, the ICC grants the accused the right to translation of documents that are necessary to meet the requirements of fairness, if the documents are not in a language the defendant fully understands or speaks.¹⁸

C. *International Jurisprudence and the Right to Interpretation*

With the exception of the ICC, the right to translation is not explicitly provided for in any current international tribunal statute. However, international courts have held that the right to translation is implicit within the right to interpretation. The ECHR found that the right to the free assistance of an interpreter includes the right to the translation of those documents necessary to ensure a fair trial.¹⁹ In particular, a defendant has the

Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defense; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; and (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

¹⁶ Currently there are five international war crime tribunals. There are two ad hoc tribunals created by the United Nations—the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. There are also three hybrid tribunals, which use a combination of international and national law. These include the Extraordinary Chambers in the Courts of Cambodia, the Special Court for Sierra Leone and the Special Tribunal for Lebanon.

¹⁷ Rome Statute, *supra* note 3, art. 67(1); ICTY Statute, *supra* note 3, art. 21(4); ICTR Statute, *supra* note 3, art. 20(4); ECCC Statute, *supra* note 3, art. 35; SCSL Statute, *supra* note 3, art. 17(4); STL Statute, *supra* note 3, art. 16(4). *See also* ICCPR, *supra* note 3, art. 14.

¹⁸ Rome Statute, *supra* note 3, art. 67(1).

¹⁹ Luedicke, Belkacem et Koc v. Germany, App. No. 6210/73, Eur. Ct. H.R. at 17 (1978) (holding that the right to the free assistance of an interpreter is the right to “translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand in order to have the benefit of a fair trial”).

right to translation of those documents that enable him or her to understand the case and adequately prepare a defense.²⁰

The international criminal tribunals have followed the precedent of the ECHR and determined that the right to free assistance of an interpreter includes the translation of documents. The tribunals have further upheld the ECHR finding that a defendant is not entitled to translation of all documents, but rather the defendant has a qualified right to translation.²¹ Without such a limitation, the tribunals fear a defendant's right to an expeditious trial could be harmed.²² The magnitude of the crimes before the international war crime tribunals has generated an enormous amount of documents. The mandatory translation of thousands of documents would likely lead to long delays.²³ Moreover, requests for translation of all documents by one defendant could adversely impact other defendants' right to an expeditious trial by creating a backlog.²⁴ The tribunals are also concerned with efficient alloca-

²⁰ *Kamasinski v. Austria*, App. No. 9783/82, Eur. Ct. H.R. at 30 (1989) (finding that there is no requirement to translate all items of written evidence or official documents but rather "interpretation assistance should be such as to enable the defendant to have knowledge of the case against him and to defend himself").

²¹ *Prosecutor v. Dyilo*, Case No. ICC-01/04-01/06, Decision on the Requests of the Defense of 3 and 4 July 2006 (Aug. 4, 2006) (holding that the accused has a "right to be informed in detail of the nature, cause and content of the charges against him" but this right "does not grant Thomas Lubanga Dyilo [the accused] the right to have all procedural documents and all evidentiary materials disclosed by the Prosecution translated into a language that Thomas Lubanga Dyilo fully understands and speaks"); *Prosecutor v. Naletilic & Martinovic*, Case No. IT-98-34-T Decision on Defense's Motion Concerning Translation of All Documents (Oct. 18, 2001); *Prosecutor v. Muhimana*, Case No. ICTR-95-1-B-I, Decision on the Defense Motion for the Translation of Prosecution and Procedural Documents into Kinyarwanda, the Language of the Accused, and into French, the Language of his Counsel (Nov. 6, 2001); *Prosecutor v. Khieu Samphan*, Case No. A190/I/90, Decision on Khieu Samphan's Appeal Against the Order on Translation Rights and Obligations of the Parties, ¶ 40 20 (February 2009) ("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 documents contained in their Case File into their own language or that of their lawyer(s).").

²² *Prosecutor v. Ljubicic*, Case No. IT-00-41-PT, Decision on Defense Counsel's Request for Translation of All Documents, 3 (Nov. 20, 2002) ("[W]hile the Tribunal is committed to ensuring the accused's right to a fair and expeditious trial, translation in advance of each and every document into BCS [Bosnian, Croatian or Serb] . . . 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.").

²³ ICTR Judge Mose stated: "international criminal proceedings face certain challenges generally not found at the national level. There is a considerable volume of documents required in trying the alleged architects of these genocidal atrocities, many of which are high-ranking members of governments." Erik Mose, *The ICTR: Experiences and Challenges*, 12 NEW ENG. J. INT'L & COMP. L. 1, 8 (2005).

²⁴ *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, Decision on Submission of Tolimir Requesting Translation of Documents and Transcripts, 2 (July 20, 2007). As the Registry

tion of limited resources, and do not want to translate documents unless necessary.²⁵ Therefore, the tribunals have held that an accused is not entitled to translation of all documents and have instead strived to find a balance between the right of a defendant to participate in his or her trial with these other rights and goals.²⁶

III. INTERNATIONAL CRIMINAL JURISPRUDENCE AND THE NARROW RIGHT TO TRANSLATION

The foregoing analysis reveals that while international criminal tribunals recognize a right to translation, they have limited that right to certain documents. These limitations differ amongst the tribunals. This section will review the tribunals' decisions concerning the translation of the indictment, legal filings, discovery documents, and evidence.

A. *The Indictment*

The indictment formally puts a defendant on written notice of the factual and legal bases for the charges against him or her.²⁷ Due to the importance of this document, the international criminal tribunals have consistently recognized the right of the accused to have the indictment and its supplementary materials translated into a language he or she understands. This is demonstrated in both the tribunals' procedural rules and decisions.

The Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Special Tribunal for Lebanon (STL) obligate the Prosecutor to disclose to the Defense, in a language that the accused understands, the indictment and any supporting ma-

explained in its submission "a requirement to translate transcripts into BCS [Bosnian, Croatian, Serbian] would impose such an onerous obligation upon the Conference and Language Services Section that it would significantly impact upon the fair trial rights of all accused appearing before the tribunal . . ." *Id.*

²⁵ Prosecutor v. Ljubovic, Case No. IT-00-41-PT, Decision on Defense Counsel's Request for Translation of All Documents, 3 (Nov. 20, 2002) (holding that translation of each and every document would delay trials and use up valuable time and resources).

²⁶ Prosecutor v. Muhimana, Case No. ICTR-95-1-B-I, Decision on the Defense Motion for the Translation of Prosecution and Procedural Documents into Kinyarwanda, the Language of the Accused, and into French, the Language of his Counsel, ¶ 12 (Nov. 6, 2001). *See also* Order on Translation Rights and Obligations of the Parties, Extraordinary Chambers in the Courts of Cambodia, Criminal Case File No. 002/14-08-2006, Investigation No. 002/19-09-2007-ECCC-OCIJ, ¶ A3 (Sept. 19, 2007) [hereinafter Order on Translation] (concluding that the right of a charged person to a fair trial and the right of a charged person to a trial within a reasonable period of time must be considered when determining which documents must be translated).

²⁷ *See* Kamasinski v. Austria, App. No.9783/82 Eur. Ct. H.R. at 32 (1989).

terials.²⁸ The International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL) also require the Prosecutor to disclose the indictment to the defendant in his or her language; however, the rule does not state that the indictment's supporting materials must be in a language that the accused understands.²⁹ The SCSL Rules of Procedure and Evidence further specify that if the Registrar knows the accused does not understand English, he or she must translate the indictment into a language the accused understands.³⁰ If the accused is illiterate, or his or her language is purely oral, the SCSL Registrar must ensure that the indictment is read to the accused by an interpreter, and that he or she is served with a recording of the interpretation.³¹

Beyond the Rules of Procedure and Evidence, the tribunals have also recognized the importance of indictments in their decisions. The Extraordinary Chambers of the Courts of Cambodia (ECCC) has recognized that an accused has a right to translation into Khmer the elements of proof on which the indictment relies, thereby granting the accused the right to receive many of the indictment's supplementary materials in a language he or she understands.³² The ICTY and ICTR have reached similar conclusions, holding that the accused is entitled to receive the indictment in his or her language.³³

B. *Legal Filings to the Court*

The international criminal tribunals have taken a narrow approach when interpreting an accused's right to the translation of legal filings. Because these documents are considered to have little evidentiary value, the tribunals have held that they do not need to be translated into the language of the accused.

²⁸ STL Rules of Procedure and Evidence, Rule 110(A), U.N. Doc. STL/BD/2009/01/Rev.1 (June 10, 2009) [hereinafter STL Rules]; ICTY Rules of Procedure and Evidence, Rule 66, U.N. Doc. IT/32/Rev. 43 (July 24, 2009) [hereinafter ICTY Rules].

²⁹ ICTR Rules of Procedure and Evidence, Rule 66, U.N. Doc. ITR/3/Rev.17 (Mar. 14, 2008) [hereinafter ICTR Rules]; SCSL Rules of Procedure and Evidence, Rule 66 (May 27, 2008) [hereinafter SCSL Rules].

³⁰ SCSL Rules, *supra* note 29, at Rule 52.

³¹ *Id.*

³² Order on Translation, *supra* note 26, ¶ B4.

³³ Prosecutor v. Karadzic, Case No. IT-95-5/18-PT, Decision on the Accused's Request that all Materials, including Transcripts, be Disclosed to Him in Serbian and Cyrillic Script, ¶ 7 (Sept. 25, 2008) (holding that while Rule 3 of the Rules of Procedure and Evidence and Article 21(4) of the Statute do not entitle the accused to receive all documents in a language he or she understands, the accused is entitled to receive the indictment in his or her language); Prosecutor v. Simba, Case No. ICTR-01-76-I, Decision on Defense Request for Protection of Witnesses, Deliberations, ¶ 1 (Aug. 25, 2004) ("[A]ccording to Article 20 of the Statute, Rule 3 of the Rules, and established jurisprudence, the Accused is entitled to be provided with the Indictment . . . in a language he understands.").

The ICTY has made clear that all motions, written arguments, and other documents need only be filed in one of its working languages.³⁴ The Tribunal explained that these documents do not have evidentiary value and therefore the accused does not have a right to receive them in a language he or she understands.³⁵ The ICTY further rationalized that the Registrar does not have the time or money to translate motions into the language of the accused.³⁶ However, the ICTY has made exceptions for pro se defendants who do not understand one of the working languages of the Tribunal. In such cases, the ICTY has held that the motions filed by the Prosecution are to be in a language that the accused understands.³⁷

The ICTR adopted a similar rationale to the ICTY. It held that the accused do not possess a right to translation of case filings beyond the indictment. Closing briefs, motions, briefs, transcripts, memorandums, and other such documents do not need to be translated into a language of the accused, as the trial chamber would not use such materials to make a decision.³⁸ The ICTR held that these documents only need to be in a working language of the Tribunal.

³⁴ Prosecutor v. Delalic, Case No. IT-96-21-T, Decision on Defense Application for Forwarding the Documents in the Language of the Accused, ¶ 14 (Sept. 25, 1996).

³⁵ *Id.* ¶ 10 (“[N]either Article 21(1) nor Article 21(4)(a) entitles the accused to submit or receive motions in his language because these do not fit within the parameters of the evidence upon which the Trial Chamber will base its determination of the charges against him.”). The courts also presume that counsel knows a working language of the court. *See* Prosecutor v. Ljubicic, Case No. IT-00-41-PT, Decision on Defense Counsel’s Request for Translation of All Documents, 3 (Nov. 20, 2002) (stating that presumably at least one of the defense counsels is fluent in one of the official languages of the court, and therefore the defendant is capable of fully participating in proceedings). *See also* International Criminal Tribunal for the Former Yugoslavia (Sept. 25, 1996), <http://www.icty.org/sections/AbouttheICTY/Defense> (requiring that a defense counsel must have written and oral proficiency in one of the two working languages of the Tribunal—although this may be waived under certain circumstances).

³⁶ Prosecutor v. Delalic, Case No. IT-96-21-T, Decision on Defense Application for Forwarding the Documents in the Language of the Accused, ¶ 10 (Sept. 25, 1996) (“[T]he provisions of Article 21(4)(a) and (f) do not entitle the Defense to have the Registrar expend the substantial time and cost required for the translation of motions into the language of the accused.”).

³⁷ Prosecutor v. Seselj, Case No. IT-03-67-PT, Order on Translation (Mar. 6, 2003) (mandating that any future motions filed by the Prosecution be done in BCS for as long as the accused represents himself); Prosecutor v. Karadzic, Case No. IT-95-5/18-PT, Decision the Accused’s Request that all Materials, including Transcripts, be Disclosed to Him in Serbian and Cyrillic Script (Sept. 25, 2008) (holding that the motions should continue to be translated into BCS, the language of the accused, because the accused was representing himself).

³⁸ Prosecutor v. Muhimana, Case No. ICTR-95-1-B-I, Decision on the Defence Motion for the Translation of Prosecution and Procedural Documents into Kinyarwanda, the Language of the Accused, and into French, the Language of his Counsel, ¶¶ 25–26 (Nov. 6, 2001) (referencing the demands of a fair trial in Prosecutor v. Delalic et al., Case No. IT-96-21-T,

The ECCC has held that introductory submissions and final submissions of the co-prosecutors, as well as all footnotes and indexes of the factual elements on which those submissions rely, should be translated into Khmer.³⁹ The Practice Direction on the Filing of Documents Before the ECCC requires that documents shall be filed in Khmer, as well as in English or French.⁴⁰ However, in its Order of Translation, the ECCC states that case filings, such as pleadings, internal notes, and correspondence need not be translated into the language of the accused since such documents do not demonstrate elements of proof for the determination of the trial and chamber.⁴¹

C. *Discovery*

1. Incriminatory materials

The Rules of Procedure and Evidence of the various war crime tribunals require the prosecutor to disclose any incriminatory materials to the defense. However, the tribunals have concluded that a defendant does not have the right to receive all incriminatory materials in a language he or she understands.

The ICTY and STL Rules of Procedure and Evidence specifically require the Prosecutor to disclose certain materials in a language of the accused, such as statements, depositions, or transcripts taken.⁴² They further state that the Prosecution shall, upon request, permit the Defense to inspect any books, documents, photographs, and tangible objects in the Prosecutor's custody or control that are material to the preparation of the Defense, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.⁴³ The ICTR and SCSL also require the disclosure of the above materials; however, there is no requirement to provide these documents in a language the accused understands.⁴⁴

The ICTY has found that its disclosure requirements do not entitle the accused to receive all discoverable materials in a language he or she understands. Instead, translation is limited to only those documents which form the basis of the determination by the Trial Chamber of the charges

Decision on Defence Application for Forwarding Documents in the Language of the Accused (Sept. 25, 1996)).

³⁹ Order on Translation, *supra* note 26, ¶ B4.

⁴⁰ Practice Direction on the Filing of Documents Before the ECCC, ECCC/01/2007/Rev.2, art. 7.1 (2007).

⁴¹ Order on Translation, *supra* note 26, ¶ C3.

⁴² STL Rules, *supra* note 28, Rule 110(A); ICTY Rules, *supra* note 28, Rule 66.

⁴³ STL Rules, *supra* note 28, Rule 110(B); ICTY Rules, *supra* note 28, Rule 66(B).

⁴⁴ ICTR Rules, *supra* note 29, at Rule 66(A–B); SCSL Rules, *supra* note 29, Rule 66(A).

against the accused.⁴⁵ The ICTY specified that in discovery the following documents must be translated into the language of the accused: (a) all documents referring directly to facts which “constitute the grounds of the charges in the Indictment;” (b) all documents which “refer directly to one of the accused;” and (c) all documents concerning “the specific area where the crimes were allegedly committed in the time frame set out in the indictment.”⁴⁶ The ICTY further clarified that discovery provided by the parties to each other shall be in the original language of the document, if that is the language of the accused, or in one of the working languages of the tribunal. “If the original language of the document is one other than the language of the accused or one of the working languages, discovery shall be in one of the working languages.”⁴⁷

The ICTR decisions mirrored the rationale of the ICTY. It also recognizes the ECHR decisions, which found that the defendant has a right to the translation of documents as to “enable the defendant to understand the case against him and to defend himself, notably by being able to put before the court his version of the events.”⁴⁸ The ICTR concluded that this does not entitle the defendant to have all discoverable materials translated.⁴⁹ Specifically, the ICTR held under Article 20 that the accused is entitled to obtain, in a language he or she understands, all evidentiary materials which relate to the determination by the Trial Chamber of the charges against him or her.⁵⁰ However, the accused is not entitled to receive materials in his or her language, which though subject to disclosure, will not be presented in trial.⁵¹

The ECCC has not specifically dealt with the issue of translation and disclosure of incriminatory materials. However, in the ECCC Order of

⁴⁵ Prosecutor v. Delalic, Case No. IT-96-21-T, Decision on Defence Application for Forwarding the Documents in the Language of the Accused, ¶ 8 (Sept. 25, 1996).

⁴⁶ Judicial Supplement 28 for Prosecutor v. Naletilic & Martinovic, Case No. IT-98-34-T Decision on Defence’s Motion Concerning Translation of All Documents (Oct. 18, 2001), available at http://www.icty.org/x/file/Legal%20Library/jud_supplement/supp28-e/naletilic.htm (on Nov. 13, 2001 the Trial Chamber clarified its Oct. 18, 2001 decision on which documents do and do not have to be translated).

⁴⁷ Prosecutor v. Delalic, Case No. IT-96-21-T, Decision on Defense Application for Forwarding the Documents in the Language of the Accused, ¶ 8 (Sept. 25, 1996).

⁴⁸ Prosecutor v. Muhimana, Case No. ICTR-95-1-B-I, Decision on the Defence Motion for the Translation of Prosecution and Procedural Documents into Kinyarwanda, the Language of the Accused, and into French, the Language of his Counsel, ¶ 21 (Nov. 6, 2001) (citing *Kamasinski v. Austria*, App. No. 9783/82 Eur. Ct. H.R. at 30 (1989)).

⁴⁹ *See id.* ¶ 25 (citing Prosecutor v. Delalic, Case No. IT-96-21-T, Decision on Defence Application for Forwarding the Documents in the Language of the Accused (Sept. 25, 1996) (specifically the ICTY held that those materials that would not be presented at trial do not need to be translated)).

⁵⁰ *Id.* ¶ 22. *See also* ICTR Statute, *supra* note 3, art. 20(4).

⁵¹ *Id.* ¶ 25.

Translation, the court addressed the issue of translation and evidence. The Order states that the accused has a right to translation into Khmer the indictment and any of “the elements of proof of which any such indictment would rely.”⁵² Therefore, at a minimum, the prosecutor has a duty to disclose, in a language of the accused, those documents which will have an evidentiary value to the court at trial. However, similar to the ICTY and ICTR, the ECCC has held that not all materials contained in a defense team’s case files need to be translated into the language of the accused or his or her counsel.⁵³ The ECCC explained that if it were to grant such a request, the defendant’s right to an expeditious trial could be jeopardized.⁵⁴

2. Exculpatory materials

The international war crimes tribunals also require the prosecutor to disclose any information that may reasonably suggest the innocence or mitigate the guilt of the accused, or affect the credibility of the prosecutor’s evidence.⁵⁵ While tribunals agree the prosecutor has a duty to disclose exculpatory materials, the tribunals are split on whether these materials must be translated into a language the accused understands.

The ICC has held that the accused does not have a right to exculpatory materials in a language he or she understands. It has limited translation to the charging document and the list of evidence.⁵⁶ Therefore, it has effectively denied the defense the right to obtain exculpatory materials in the language of the accused. Like the ICC, the ECCC has held that there is no requirement to translate exculpatory materials into a language of the accused.⁵⁷ In the Translation Order, the ECCC held that only materials con-

⁵² Order on Translation, *supra* note 26, ¶ B4 (citing Prosecutor v. Delalic, Case No. IT-96-21-T, Decision on Defence Application for Forwarding the Documents in the Language of the Accused, ¶ 8 (Sept. 25, 1996)).

⁵³ Prosecutor v. Khieu, Case No. A190/1/20, Decision on Khieu Samphan’s Appeal Against the Order on Translation Rights and Obligations of the Parties, ¶¶ 40–41 (Feb. 20, 2009) (“[N]either ECCC Law nor the Internal Rules provide charged persons an explicit right to receive all documents contained in their Case File into their own languages 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.”).

⁵⁴ *Id.* ¶41.

⁵⁵ See ICTY Rules, *supra* note 28, at Rule 68; ICTR Rules, *supra* note 29, at Rule 68; SCSL Rules, *supra* note 29, Rule 68; STL Rules, *supra* note 28, at Rule 113; ECCC Internal Rules (Rev. 1), at Rule 53.4 (Feb. 1, 2008) [hereinafter ECCC Internal Rules].

⁵⁶ Prosecutor v. Dyilo, Case No. ICC-01/04-01/06, Decision on the Requests of the Defence of 3 and 4 July 2006, 5–6 (Aug. 4, 2006).

⁵⁷ In the case of Khieu Samphan, the Pre-Trial Chamber found that his defense team was in position to identify exculpatory materials as he was appointed a fulltime translator. However, as a general rule applying to all accused, the ECCC has not held that the accused have a

taining “elements of proof” need to be translated.⁵⁸ The “element of proof” requisite implicitly denies the translation of exculpatory materials.⁵⁹

Unlike the ICC and the ECCC, the ICTY has held that the accused has a right to obtain exculpatory materials in a language he or she understands.⁶⁰ The ICTY held that, pursuant to its statute and rules, and the existing judicial practice, the standard regarding translation of documents during the pre-trial stage requires that exculpatory materials be translated and submitted to the accused in a language he or she understands.⁶¹

D. Evidence

As with the indictment, the international courts have consistently upheld the accused’s right to translation of evidence. The ICTY has held that evidence submitted to the court must be in a language the accused understands. In the seminal case, *Prosecutor v. Delalic*, the ICTY explained that such a requirement is necessary to uphold the accused’s rights to be equal before the court and to be informed of the charges against him or her.⁶² Citing the holding of *Prosecutor v. Delalic*, the ICTR held that evi-

right to receive exculpatory materials in a language the accused or his or her counsel understands. *Prosecutor v. Khieu*, Case No. A190/I/20, Decision on Khieu Samphan’s Appeal Against the Order on Translation Rights and Obligations of the Parties, ¶ 49 (Feb. 20, 2009).

⁵⁸ Order on Translation, *supra* note 26, ¶ B4 (citing *Prosecutor v. Delalic*, Case No. IT-96-21-T, Decision on Defence Application for Forwarding the Documents in the Language of the Accused, ¶ 8 (Sept. 25, 1996)).

⁵⁹ Ieng Sary’s Appeal Against the OCIJ’s Order on Translation Rights and Obligations of the Parties, ¶ 14, *Prosecutor v. Sary Ieng*, Crim. Case File No. 002/19-09-2007-ECCC-OCIJ (PTC) (July 22, 2008) [hereinafter *Sary Defense Appeal*].

⁶⁰ See *Prosecutor v. Ljubicic*, Case No. IT-00-41-PT, Decision on Defence Counsel’s Request for Translation of All Documents, 3 (Nov. 20, 2002); see also *Prosecutor v. Prlic, et.al*, Case No. IT-04-74-PT, Order for the Translation of Documents, 2 (Jan. 17, 2006), available at <http://www.icty.org/x/cases/prlic/tord/en/060117-2.htm> (reinforcing the *Ljubicic* requirement that the exculpatory materials must be translated into the language of the accused).

⁶¹ *Prosecutor v. Ljubicic*, Case No. IT-00-41-PT, Decision on Defence Counsel’s Request for Translation of All Documents, 3 (Nov. 20, 2002).

⁶² *Prosecutor v. Delalic*, Case No. IT-96-21-T, Decision on Defence Application for Forwarding the Documents in the Language of the Accused, ¶ 6 (Sept. 25, 1996) (“[A]ll evidence submitted by either party at trial should be made available in one of the working languages and in the language of the accused. This is required to satisfy the guarantees of Article 21(1) and (4)(a) of the Statute.”) Article 21(1) provides that all persons before the Tribunal shall be equal. Article 21(4)(a) further provides that all accused shall be informed promptly and in detail in a language he or she understands of the nature and cause of the charge against him or her. See ICTY Statute, *supra* note 3, art. 21.

dence presented at trial must be in the language of the accused in order to have a fair trial.⁶³

The ECCC has not directly addressed whether evidence submitted to the court must be in a language the accused understands. However, the ECCC has stated that the accused is entitled to translation of the elements of proof on which any indictment may rely.⁶⁴ The court went on to quote *Prosecutor v. Delalic*, stating that “the rights of the accused are completely protected by making sure that all elements of proof produced at trial are communicated to him in his language.”⁶⁵ By quoting this language, the ECCC has implicitly adopted the ICTY and ICTR view that evidence submitted to the court must be in a language the accused understands. The ECCC has also noted 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 or her rights during the investigation.”⁶⁶ For example, in the case of Khieu Samphan, almost all of the evidentiary material generated by the Co-Investigating Judges was translated into Khmer and French, the languages of the accused and his counsel.⁶⁷

IV. BROADENING THE RIGHT TO TRANSLATION

The current right of the accused to translation of documents is too narrow. Crucial documents such as legal filings and discovery of incriminatory and exculpatory materials are often left untranslated in the ICC and the ad hoc and hybrid tribunals. There are three factors that compel the broadening of the accused’s right to translation: (1) the legitimacy of the international criminal system; (2) the accused’s due process rights to participate in his or her proceeding, prepare an adequate defense and take part in a fair trial; and (3) the equality of arms principle.

A. *Legitimacy of the International Criminal System*

The purpose of the international criminal system is to promote justice and accountability.⁶⁸ In order to serve this purpose, the tribunals must

⁶³ *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-I, Decision on the Defence Motion for the Translation of Prosecution and Procedural Documents into Kinyarwanda, the Language of the Accused, and into French, the Language of His Counsel, ¶¶ 22, 25 (Nov. 6, 2001).

⁶⁴ Order on Translation, *supra* note 26, ¶ B4.

⁶⁵ *Id.*

⁶⁶ *Prosecutor v. Khieu*, Case No. A190/I/20, Decision on Khieu Samphan’s Appeal Against the Order on Translation Rights and Obligations of the Parties, ¶ 43 (Feb. 20, 2009)(citing *Imbroscia v. Switzerland*, App. No. 13972/88, Eur. Ct. H.R. at 10 (1993); *Granger v. the United Kingdom*, App. No. 11932/86, Eur. Ct. H.R. at 12–13 (1990)).

⁶⁷ *Id.* ¶ 44.

⁶⁸ See U.S. Department of State, *Office of War Crime Issues*, <http://www.state.gov/s/wci/>

be perceived as a fair and legitimate source of law enforcement. Legitimacy cannot be achieved without upholding the procedural due process rights of the accused.⁶⁹

The international criminal tribunals are young institutions.⁷⁰ Their legitimacy is not yet consolidated. Many citizens who live within the jurisdiction of the war crimes tribunals perceive the tribunals as biased.⁷¹ The ICTY, for example, is still very unpopular in Serbia.⁷² In a study conducted by the Organization for Security and Co-operation in Europe, seventy-two percent of Serbs surveyed had a mostly or extremely negative view of the ICTY.⁷³ The highest stated reason for this view was the perception that the ICTY was “unfair, partial and unobjective.”⁷⁴ Other stated reasons for this negative view include the belief that the ICTY only tried Serbs, the ICTY was anti-Serbian, and that the ICTY was an illegal or political court.⁷⁵ Only two percent of those surveyed felt the ICTY was a fair, impartial and objective court.⁷⁶

index.htm (last visited Mar. 8, 2011)(The Office of War Crimes Issues works closely with governments, international institutions and nongovernmental organizations to see that international and domestic war crimes tribunals succeed in securing peace, stability and the rule of law.).

⁶⁹ For other articles discussing the legitimacy of international criminal tribunals *see generally* Gert-Jan Alexander Knoops, *Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective*, 15 CRIM. L. FORUM 365, 366 (2004) (arguing legitimacy can be established through creating prosecutorial guidelines); David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, Georgetown Law Faculty Working Papers 2008, at 13, available at http://scholarship.law.georgetown.edu/fwps_papers/67 (claiming that international criminal tribunals derive their legitimacy from fair procedures and punishment not political authority).

⁷⁰ *See* Kevin Sullivan & Peter Finn, *Karadzic Case Offers Court a Chance to Repair Its Image*, WASH. POST, July 24, 2008, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/07/23/AR2008072300557_pf.html. Michael Scharf, a war crimes specialist and professor at Case Western Reserve University, notes that in 2008 the ICTY was only 15 years old. He said “. . . for international institutions, 15 years old is still very young.”

⁷¹ *Id.* One Serb citizen stated, “It [the ICTY] is a first-class political court; it’s a farce.” Government spokesman Milivoje Mihajlovic elaborated, “The Serbian people don’t trust The Hague; they think it’s one-sided.”

⁷² *Id.*

⁷³ Organization for Security and Co-Operation in Europe Mission to Serbia, PUBLIC PERCEPTION IN SERBIA OF THE ICTY AND THE NATIONAL COURTS DEALING WITH WAR CRIMES, 14–15 (2009), available at http://www.osce.org/publications/srb/2009/12/41942_1399_en.pdf.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

The legitimacy of the ITCR has also been questioned. Many Hutus feel the ICTR has been one-sided.⁷⁷ There is evidence that approximately 25,000 to 45,000 Hutus died at the hands of the Rwanda Patriotic Front (RPF); however, there have been no indictments against Tutsi RPF officials.⁷⁸ Critics of the ICTR claim it is a victor's tribunal, granting impunity for Tutsi leaders who participated in the massacre of Hutus.⁷⁹

Those citizens who identify themselves with the accused, such as the Serbs or the Hutus, often feel the tribunals are unfair and partial. In order to diminish this perception, the tribunals must uphold the highest standards of due process.⁸⁰ When a defendant, for example of Serb ethnicity, cannot understand important documents and does not have the resources to translate said documents, the trial could appear unfair to his fellow Serbs. The perception of impropriety can easily be manipulated by those in power to incite the public. For example, in its May 2010 report, the Office of the High Representative in Bosnia and Herzegovina reported that as part of their pro-secessionist speech, Republika Srpska leaders criticized the rulings of the ICTY.⁸¹ These politicians took advantage of any perception of judicial illegitimacy in order to gain power.

Moreover, if trials are perceived as unfair, reconciliation in these post-conflict areas will not be attained.⁸² Unlike national courts, the mission of the ad hoc and hybrid tribunals go beyond the scope of holding individu-

⁷⁷ Katherine Iliopoulos, *ICTR Accused of One-Sided Justice*, GLOBAL FORUM POLICY (Aug. 31, 2009), <http://www.globalpolicy.org/component/content/article/163-general/48103-ictr-accused-of-one-sided-justice.pdf>.

⁷⁸ *Id.* The ICTR prosecution is not always concerned about the perception of fairness. In a 2003 interview, then ICTR Prosecutor Richard Goldstone said that "I certainly didn't have evidence of massive crimes committed by the RPF. I wouldn't have issued an indictment against [Bosnian Muslims at the ICTY] for the sake of . . . saying what an even-handed chap I am. I think crimes have to be of the magnitude that justify doing it."

⁷⁹ Daniel Wallis, *Rwanda Genocide Court Poses Questions on Justice*, REUTERS, Aug. 7, 2008, available at <http://www.reuters.com/article/idUSL768889220080807>.

⁸⁰ Judge Wald of the ICTY recounts one instance where the Appeals Chamber reversed three of five convictions for insufficiency of evidence and procedural errors below. She stated many in the prosecutor's office and victims' groups were extremely displeased, but she believes this ruling proved that "we were indeed a court dedicated to fair and impartial justice, not victors' revenge." Patricia Wald, *International Criminal Courts – A Stormy Adolescence*, 46 VA. J. INT'L L. 319, 325–26 (2005–2006).

⁸¹ The Office of the High Representative in Bosnia and Herzegovina further reported that in the lead-up to the elections in October 2010, the political atmosphere in the country had deteriorated: anti-Dayton activities continued and the use of nationalist rhetoric had increased. U.N. Office of the High Representative, 37th Report of the High Representative for Implementation of the Peace Agreement on Bosnia and Herzegovina to the Secretary-General of the United Nations, Nov. 1, 2009–April 30, 2010, (May 19, 2010), available at http://www.ohr.int/other-doc/hr-reports/default.asp?content_id=44970.

⁸² CHRISTOPH J.M. SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE 48 (2001).

als accountable for violations of law and deterring future violations.⁸³ Their purpose is to also restore peace and security to the region.⁸⁴ International war crime tribunals are only established after governments have fallen or have been radically altered due to war, ethnic or religious conflict, political upheaval, genocide, or other systemic disruptions.⁸⁵ A tribunal that is perceived as unfair, or as a victor's court, may serve as an impetus to reignite past conflict. Due to the high stakes involved, it is imperative that international war crimes tribunals are perceived as fair and legitimate.

B. Upholding the Due Process Rights of the Accused

Due process refers to the procedures that a government must follow before it deprives a person of life, liberty, or property.⁸⁶ These procedures are safeguards to ensure fairness in legal proceedings. Certain due process guarantees are basic and should always be provided, such as notice of charges, an opportunity for a meaningful hearing, and an impartial judge.⁸⁷

These procedures cannot be taken lightly. As Justice Frankfurter of the United States Supreme Court stated:

The requirement of 'due process' is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble . . . 'due process' unlike some legal rules, is not a technical concept with a fixed content unrelated to time and, place and circumstances.⁸⁸

In international war crime tribunals, where the crimes and decisions are of such a large magnitude, the accused must be afforded the utmost protection of their due process rights.

International law has recognized that in order for a defendant to exercise his or her right to due process of law, he or she must possess certain language rights. The ICCPR and statutes of the international criminal tribunals grant the accused the right: 1) to be informed promptly, and in detail, in a language which he or she understands, of the nature and cause of the charge against him or her; 2) to have adequate time and facilities for the preparation of his or her defense; 3) to communicate with counsel of his or her own choosing; and 4) to have the free assistance of an interpreter if he

⁸³ U.S. Department of State, *supra* note 68.

⁸⁴ *Id.*

⁸⁵ Luban, *supra* note 69, at 7.

⁸⁶ ERWIN CHERMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 523 (2d ed. 2002).

⁸⁷ *Id.*

⁸⁸ Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring).

or she cannot understand or speak the language used in court.⁸⁹ The tribunals have held that the right to interpretation includes the right to translation. However, the courts have qualified this right, holding that there is no requirement to translate transcripts, motions, and disclosed materials into a language the accused understands.

The international tribunals have tried to remedy this situation by placing the burden on the defendant to comprise a defense team that can speak both the language of the defendant and a working language of the tribunal.⁹⁰ The majority of courts have held that when an attorney on the defense team speaks one of the languages of the court, the accused is not entitled to the translation of all documents.⁹¹ These decisions assume that the defendant's language rights will be satisfied through his or her counsel. However, the defendant's due process rights are still violated, despite the ability of his or her counsel to understand a working language of the court. These holdings undermine three due process rights of the accused: (1) the right to participate in his or her trial; (2) the right to adequately prepare a defense; and (3) the right to a fair trial.

First, by not requiring the translation of transcripts, motions, and discovery, the tribunals have diminished the capacity of a defendant to participate in his or her own defense. A defendant must be fully informed in order to make knowledgeable decisions on how to proceed. Furthermore, defendants can better assess the evidence against them than their counsel can, since they were directly involved in the situation. Therefore, especially with regards to discovery, it is important for the accused to be able to understand the documents received. Without such understanding, a defendant cannot adequately challenge the credibility of the prosecutor's evidence.

Moreover, many of the defendants before the international criminal tribunals were either high-ranking politicians or military officials. This

⁸⁹ ICCPR, *supra* note 3, art. 14; Rome Statute, *supra* note 3, art. 67(1); ICTY Statute, *supra* note 3, art. 21(4); ICTY Statute, *supra* note 3, art. 20(4); ECCC Statute, *supra* note 3, art. 35; SCSL Statute, *supra* note 3, art. 17; STL Statute, *supra* note 3, art. 16.

⁹⁰ Order on Translation, *supra* note 26, ¶ A4 (“[T]he Parties must contribute to the resolution of their own language needs, by using the linguistic capacity within their teams and from the Defence Support Section. . .”).

⁹¹ Prosecutor v. Ljubicic, Case No. IT-00-41-PT, Decision on Defence Counsel's Request for Translation of All Documents, 3 (Nov. 20, 2002) (holding that the defendant is not entitled to translation of all documents as one of his attorneys was fluent in the official language); Prosecutor v. Karemera, Case No. ICTR-98-44-T, Decision on Extension of Time to Respond to the Prosecutor's Two Motions, ¶4 (Sept. 27, 2006) (“[A] trial document not available in a language understood by the Accused should not serve as pretext for requesting an extension of time, in particular when Defence Counsel are capable of properly assisting the Accused.”).

places them in a “unique position to provide instruction” to their lawyers.⁹² In *Öcalan v. Turkey*, the ECHR held that:

[A]s a result of the position he [the defendant] occupied in the armed organisation concerned (the PKK), the applicant was one of the people best able to assess the relevance to the defense of the substantial body of evidence that had been adduced by the prosecution. He was much better placed and better informed than his lawyers to determine who within the PKK bore responsibility for which acts and to what degree. It should be noted that the prosecution attributed to the applicant moral responsibility for several hundred acts of violence that were not physically carried out by him. It is reasonable to suppose that had he been permitted to study the prosecution evidence directly and for sufficient time, he would have been able to identify arguments relevant to his defense other than those his lawyers had raised themselves without the benefit of his instructions.⁹³

Considering the positions of power held by many of the defendants, it is essential that their ability to participate in their defense is protected. They can help discern what occurred, who is responsible, and the accuracy of the prosecution’s evidence. This right is necessary, not only to uphold due process for the defendant, but also to ensure that justice is achieved.

Second, the tribunal’s limitations on the right to translation weaken the ability of the defendant to adequately prepare a defense. The ICCPR and tribunal statutes grant the defendant “adequate time and facilities for the preparation of his defense.”⁹⁴ However, without a broader right to translation, this right cannot be effectively satisfied. As mentioned above, there are circumstances in which the courts have held it is sufficient for documents to be either in the working languages of the tribunal or in the language of the accused, but not necessarily both. For example, the ICTY held that discovery provided by the parties to each other shall be in the original language of the document, if that is the language of the accused, or in one of the working languages of the tribunal.⁹⁵ Thus, at the ICTY, a defendant’s ability to prepare his or her defense may be undermined because either the defendant or defense counsel does not understand the disclosed materials. This puts the defendant at a severe disadvantage.

⁹² Defense’s Motion Requesting Translation of Disclosure and Relevant Materials into French, ¶ 19, *Prosecutor v. Dyilo*, Case No. ICC-01/04-01/06 (July 4, 2006) [hereinafter *Dyilo Defense Motion*].

⁹³ *Öcalan v. Turkey*, App. No. 46221/99, Eur. Ct. H.R., ¶ 161 (2003).

⁹⁴ Rome Statute, *supra* note 3, art. 67(1); ICTY Statute, *supra* note 3, art. 21(4); ICTR Statute, *supra* note 3, art. 20(4); ECCC Statute, *supra* note 3, art. 35; SCSL Statute, *supra* note 3, art. 17; STL Statute *supra* note 3, art 16. *See also* ICCPR, *supra* note 3, art. 14.

⁹⁵ *Prosecutor v. Delalic*, Case No. IT-96-21-T, Decision on Defence Application for Forwarding the Documents in the Language of the Accused, ¶ 8 (Sept. 25, 1996).

Even with a team of bilingual lawyers who speak both the language of the accused and the court, the defendant's right to adequate preparation would not be satisfied. If defense lawyers spend time and resources on translation, this would detract from their ability to prepare substantive legal arguments thereby diluting the defendant's right to adequately prepare a defense. Moreover, it is not the duty of a defense lawyer to translate documents. It is the duty of the court to provide adequate facilities to all its defendants, including those who do not speak the language of the court.

Third, the decisions to deny the defendant the translation of exculpatory materials go against the basic notions of a fair trial. It offends the principle that an innocent man should not be imprisoned. The Rules of Procedure and Evidence require the prosecution to disclose documents that may reasonably suggest the innocence or mitigate the guilt of the accused.⁹⁶ However, the ICC and ECCC do not find it necessary to translate such documents.

In the ICC case, *Prosecutor v. Dyilo*, the defendant requested the court to order the prosecution to disclose all potential evidence, exculpatory material, and other relevant material in French, the working language of the defense.⁹⁷ In its decision, however, the court limited translation to the charging document and the list of evidence.⁹⁸ Therefore, it effectively denied the defense the right to obtain exculpatory materials in the language of the accused. The ECCC reached a similar conclusion. In its Translation Order, the ECCC held that only materials containing "elements of proof" need to be translated.⁹⁹ In its motion to appeal the Translation Order, one defense team stated that the "element of proof" requisite necessarily implies that exculpatory evidence does not fall within those documents requiring translation.¹⁰⁰

The ICC and ECCC have held that disclosed materials without an evidentiary value need not be translated. However, exculpatory materials are of equal importance for they establish that the prosecution has not met its evidentiary burden. The ICC and ECCC should follow the ITCY, which held that exculpatory materials must be translated and submitted to the accused in a language he or she understands in order to comport to the stan-

⁹⁶ ICTY Rules *supra* note 28, Rule 68; ICTR Rules, *supra* note 29, Rule 68; SCSL Rules, *supra* note 29, Rule 68; STL Rules, *supra* note 28, Rule 113; ECCC Internal Rules, *supra* note 55, Rule 53.

⁹⁷ Dyilo Defense Motion, *supra* note 92, ¶ 4.

⁹⁸ *Prosecutor v. Dyilo*, Case No. ICC-01/04-01/06, Decision on the Requests of the Defence of 3 and 4 July 2006, 5–6 (Aug. 4, 2006).

⁹⁹ Order on Translation, *supra* note 26, ¶ B4.

¹⁰⁰ Sary Defense Appeal, *supra* note 59, ¶ 14.

dards established by its statute, rules and existing judicial practice.¹⁰¹ By denying the translation of exculpatory materials, those tribunals have weakened the defendant's right to a fair trial.

C. *The Principle of Equality of Arms*

The principle of equality of arms is considered fundamental to a fair trial. It is based on the premise that "each party must be afforded a reasonable opportunity to present his case—including his evidence—under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent."¹⁰² Accordingly, the defendant is entitled to sufficient legal resources to assert his or her innocence against the prosecution¹⁰³ and may not be placed at an unfair disadvantage.¹⁰⁴

The ICTY has held that the equality of arms principle requires that both parties are accorded procedural equality and that the Prosecution and Defense should be equal before the court.¹⁰⁵ However, the ICTY notes that the equality of arms principle cannot be as stringently enforced in its proceedings as in domestic proceedings. The Appeals Chamber stated that unlike domestic courts, international tribunals do not have the power to directly control matters that affect the fairness of the court.¹⁰⁶ Instead, they must operate through the States. As the chamber explained:

The Tribunal must rely on the cooperation of States because evidence is often in the custody of a State and States can impede efforts made by counsel to find that evidence. Moreover, without a police force, indictees can only be arrested or transferred to the International Tribunal through the cooperation of States or, pursuant to Sub-rule 59*bis*, through action by the Prosecution or the appropriate international bodies. Lacking independent means of enforcement, the ultimate recourse available to the International Tribunal in the event of failure by a State to cooperate, in violation of its obligations under Article 29 of the Statute, is to report the non-compliance to the Security Council. In light of the above considerations, the Appeals Chamber is of the view that under the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpreta-

¹⁰¹ Prosecutor v. Ljubicic, Case No. IT-00-41-PT, Decision on Defence Counsel's Request for Translation of All Documents, 3 (Nov. 20, 2002). *See also* Prosecutor v. Prlic, Case No. IT-04-74-PT, Order for the Translation of Documents (Jan. 17, 2006), available at <http://www.icty.org/x/cases/prlic/tord/en/060117-2.htm> (reiterating the requirement that exculpatory materials must be translated into a language of the accused).

¹⁰² Hentrich v. France, App. No. 13616/88, Eur. Ct. H.R. at 18 (1994).

¹⁰³ GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE 145–46 (3d. ed. 2006).

¹⁰⁴ Delcourt v. Belgium, App. No. 2689/65, Eur. Ct. H.R. at 15 (1970).

¹⁰⁵ Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶¶ 50–52 (July 15, 1999).

¹⁰⁶ *Id.* ¶ 51.

tion than that normally upheld with regard to proceedings before domestic courts.¹⁰⁷

The Chamber concluded that the parties must be equal before the tribunal and that it has a duty to provide assistance if a party so needs.¹⁰⁸

While the tribunals may be entitled to some latitude when enforcing the equality of arms principle, this latitude cannot be so wide as to make the principle illusory. The tribunals purport that the parties must be equal before it, however, in reality the prosecutor's office has significantly more resources than the defense. In the ICTY, ICTR, and ECCC, the prosecution is its own organ within the court with no defense equivalent.¹⁰⁹ Only the SCSL and STL have a specific organ dedicated to the defense.¹¹⁰ This structure alone creates a disadvantage to the defense.

The Prosecutor's office is also substantially better funded than the defense. In the 2004-2005 term, the budget for the ICTY was \$271,854,600 United States Dollars (USD).¹¹¹ Of that budget, the Prosecutor's office received nearly \$100 million USD whereas the defense only received \$29.5 million USD.¹¹² In the SCSL, the prosecution takes up a large percentage of the \$83 million USD budget; however, the defense only receives \$4 million USD.¹¹³

The gap in resources extends beyond money. A prosecutor's office has greater access to evidence than the accused.¹¹⁴ Each prosecutorial team is invariably composed of numerous lawyers, police investigators, inspectors, analysts, in-house experts, and case-managers, whereas the defense has

¹⁰⁷ *Id.* ¶¶ 51–52.

¹⁰⁸ *Id.* ¶ 52.

¹⁰⁹ *About the ICTY*, INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sections/AbouttheICTY> (last visited Mar. 8, 2011); INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, <http://www.unictr.org/tabid/107/default.aspx> (last visited Mar. 8, 2011); *Introduction to the ECCC*, EXTRAORDINARY CHAMBERS OF THE COURTS OF CAMBODIA, http://www.eccc.gov.kh/english/about_eccc.aspx (last visited Mar. 8, 2011).

¹¹⁰ *About the Defence Office*, SPECIAL TRIBUNAL FOR LEBANON, <http://www.stl-tsl.org/sid/28> (last visited Mar. 8, 2011).

¹¹¹ Brianne McGonigle, *De Facto v. De Jure Equality in the International Criminal Tribunal for the Former Yugoslavia*, 13 AM. U. HUM. RTS. BR. 10, 11 (2005).

¹¹² Sylvia de Bertodano, *What Price Defence? Resourcing the Defence at the ICTY*, 2 J. INT'L CRIM. JUST. 503, 507 (2004).

¹¹³ Kevin Heller, *(In)equality of Arms at the International Tribunals*, OPINIO JURIS (Feb. 7, 2006), <http://lawofnations.blogspot.com/2006/02/inequality-of-arms-at-international.html> (quoting James Cockayne, an international lawyer, scholar and policy analyst). See also President of the Special Court, *Fourth Annual Report 2006-2007*, 40 (2006-2007) available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=SaCsn9u8MzE%3d&tabid=176>.

¹¹⁴ Gabrielle McIntyre, *Equality of Arms – Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the former Yugoslavia*, 16 LIEDEN J. INT'L L. 269, 275 (2003).

limited resources available for pre-trial preparation.¹¹⁵ These disparities in resources are exemplified in translation services. Moreover, the prosecution can share evidence amongst its teams, whereas defense teams must always start their investigation from ground zero. They cannot share evidence, as it would be a conflict of interest. In tribunals where there have been numerous cases, such as the ICTY, the prosecution rarely needs to find new evidence, and as such, their need for translation is much lower than the defense.¹¹⁶ As discussed above, the tribunals have held that the defense is not allowed to receive all materials received in discovery in a language he or she understands. This, when coupled with the lack of resources to obtain their own evidence, puts the defense at a significant disadvantage.

Furthermore, the defendant is entitled to discovery of certain documents from the prosecutor. However, the international courts have held it is not necessary to receive all these documents in the language of the accused.¹¹⁷ This puts the two parties on unequal footing. The prosecution can fully understand all the documents that may potentially be submitted to the court, whereas the defendant is only entitled to receive those documents that form the basis of the determination by the Trial Chamber of the charges against the accused. Furthermore, this gives the prosecution the power to determine what will form the basis of the determination by the trial chamber.

The decisions to deny the translation of exculpatory evidence violate the essence of the equality of arms principle. The defense is entitled to the same procedural equality as the prosecution. However, such decisions tip the scale towards the prosecution. While the courts acknowledge the importance of the prosecutor's duty to disclose exculpatory material, they ignore the practical implications of denying the translation of such materials. The right to receive exculpatory materials becomes meaningless when

¹¹⁵ John Jackson, *Finding the Best Epistemic Fit for International Criminal Tribunals: Beyond the Adversarial-Inquisitorial Dichotomy*, 7 J. INT'L CRIM. JUST. 17, 27 (2009).

¹¹⁶ Interview with Emmanuelle Marchand, Legal Assistant, Stanišić Defense Team and Lea Kulinowski, Case Manager, Stanišić Defense Team (Nov. 18, 2010).

¹¹⁷ See *Prosecutor v. Delalic*, Case No. IT-96-21-T, Decision on Defence Application for Forwarding the Documents in the Language of the Accused, ¶ 8 (Sept. 25, 1996) (determining that the Defense is not entitled to receive all discovery from the Prosecution in the language of the accused but rather only those documents which form the basis of the determination by the Trial Chamber of the charges against the accused); *Prosecutor v. Muhimana*, Case No. ICTR-95-1-B-I, Decision on the Defence Motion for the Translation of Prosecution and Procedural Documents into Kinyarwanda, the Language of the Accused, and into French, the Language of his Counsel, ¶¶ 22–25 (Nov. 6, 2001) (holding that under Article 20 the accused is entitled to obtain, in a language he understands, all evidentiary materials which relate to the determination by the Trial Chamber of the charges against him; however, he is not entitled to receive in his language materials, which though subject to disclosure, will not be presented in trial).

the defendant or his or her counsel cannot understand the very documents that could exonerate or mitigate his or her guilt.¹¹⁸ If the defense cannot understand such documents, it is at a distinct disadvantage in relation to the prosecution. Furthermore, due to the discrepancy between the defense and the prosecution in power, personnel, and funding, the defense is less likely to find exculpatory materials on its own.

V. SOLUTION: PROVISION OF TRANSLATORS

The international ad hoc and hybrid tribunals currently provide translation services through the Registry. This Note proposes that in addition, the international war crime tribunals should provide each defense team with its own translator(s) according to need.¹¹⁹ In the ICTY and ICTR, the defense is provided with a team consisting of two lawyers and up to three legal assistants and investigators.¹²⁰ The tribunals should also provide the defense with a translator, when they find it necessary to protect the due process rights of the accused.

The tribunals should adopt the approach used by the ICC in the *Decision on the Defense for Mathieu Ngudjolo Chui's Request for Leave to Appeal the Decision Concerning Translation of Documents*.¹²¹ In her decision, the Single Judge ordered "the Registrar to make permanently available to Mathieu Ngudjolo Chui, and free of any cost, a French interpreter to assist him for the purpose of the confirmation hearing with documents of the case which are only available in English."¹²² The Judge determined this was

¹¹⁸ The Dyilo defense argued that: "If the aim of such disclosure/provision of materials is to ensure that the defense has adequate time and facilities to prepare and that the suspect is able to freely communicate with his counsel in relation to this material as envisaged by article 67(1)(b), how is this aim achieved if the documents are provided in a language other than the working language of the counsel and suspect?" Dyilo Defense Motion, *supra* note 92, ¶ 9. The ICC ultimately rejected this argument. *See* Prosecutor v. Dyilo, Case No. ICC-01/04-01/06, Decision on the Requests of the Defence of 3 and 4 July 2006, at 7 (Aug. 4, 2006) (denying the defendant's request to order the prosecution to provide in French all the documents that the prosecution is required to disclose).

¹¹⁹ As seen in Table 1 defense teams at the ICTY are allotted 1000 euros for translation services, however, this is inadequate when considering the amount of materials that are disclosed to the defense in a language either the accused or counsel does not understand. These teams would greatly benefit from having additional translators.

¹²⁰ *See* de Bertodano, *supra* note 112, at 504; ICTR, *New Lump Sum System for the Remuneration of Defense Teams at ICTR*, ¶ 26, ADM09-0004/Rev.1 (F), available at http://69.94.11.53/ENGLISH/ldfms/New_Lump_Sum_System_of_ICTR.pdf.

¹²¹ Prosecutor v. Katanga & Chui, Case No. ICC-01/04-02/07, Decision on the Defence for Mathieu Ngudjolo Chui's Request for Leave to Appeal the Decision Concerning Translation of Documents (June 2, 2008).

¹²² *Id.* at 7. Similarly, in the ECCC case of Khieu Samphan, the accused was provided the assistance of a fulltime translator to assess the team's translation requirements to the Court Management Section and therefore protect his rights. *See* Prosecutor v. Khieu, Case No.

necessary to “adequately safeguard [the defendant’s] right to a fair trial.”¹²³ When there is a risk that a defendant’s due process rights may be violated due to a lack of translation, the court should appoint, free of cost, a translator(s) to provide such services.

To determine if the proposed solution is cost effective, the increased benefit to the defendant must be weighed against the increased cost to the tribunal. It should be noted that under this solution, the Registry would still translate those documents required by its regulations, the Rules of Evidence and Procedure and case law; however, any additional translation demands by a defense team would be handled internally. As will be demonstrated below, the cost to the tribunal will be negligible when looking at the overall budget, while the benefits to a defendant are immeasurable.

A. *Costs to the Tribunal*

The cost of an interpreter at an international criminal tribunal ranges approximately from \$66,482¹²⁴–\$95,107¹²⁵ USD a year. To determine the percentage increase of additional translation costs to a tribunal, the average length and cost per trial is necessary. The average length of the trial phase is one to two years.¹²⁶ However, the estimated cost of a trial is inconsistent throughout the literature. It has been estimated that a trial can cost as much as \$23 million¹²⁷ or as little as \$500,000,¹²⁸ and everything in between.¹²⁹

A190/1/90, Decision on Khieu Samphan’s Appeal Against the Order on Translation Rights and Obligations of the Parties, ¶ 47 (Feb. 20, 2009).

¹²³ Prosecutor v. Katanga & Chui, Case No. ICC-01/04-02/07, Decision on the Defence for Mathieu Ngudjolo Chui’s Request for Leave to Appeal the Decision Concerning Translation of Documents, 7 (June 2, 2008).

¹²⁴ See UNITED NATIONS: HUMAN RESOURCES, https://jobs.un.org/Galaxy/Release3/vacancy/Display_Vac_List.aspx?lang=1200&OCCG=18 (last visited Mar. 8, 2011); *Salaries, Allowances, Benefits and Job Classification*, UNITED NATIONS, http://www.un.org/Depts/OHRM/salaries_allowances/salary.htm (last visited Mar. 8, 2011).

¹²⁵ See *e-Recruitment*, INTERNATIONAL CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ICC/Recruitment/Job+opportunities/> (last visited Mar. 8, 2011).

¹²⁶ de Bertodano, *supra* note 112, at 504 (stating that trials regularly take two years at the trial stage alone); David Wippman, *The Costs of International Justice*, 100 AM. J. INT’L. L. 861, 874 (2006) (claiming in 2004 the average length of a trial was twelve months). These approximations do not include pre-trial or appeals time.

¹²⁷ This estimate was calculated by dividing the overall cost of the tribunal by the maximum number of people effectively tried. According to these calculations, the cost per defendant, in USD, is \$23 million at the SCSL, \$21 million at the ICTR and \$17.5 million at the ICTY. Thierry Cruvellier, *From the Taylor Trial to a Lasting Legacy: Putting the Special Leone Court Model to the Test*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE AND SIERRA LEONE COURT MONITORING PROGRAMME 23 (2009), http://ictj.org/static/Publications/ICTJ_SLE_TaylorTrialtoLastingLegacy_pb2009.pdf.

Difficulty	Monthly Allotment	Monthly allotment for interpretation and translation
1 (Difficult)	€25,738 + €3,000 ¹³⁰ = €28,738	€1000 maximum
2 (Very Difficult)	€25,738 + €9,000 = €34,738	€1000 maximum
3 (Extremely Difficult/ Leadership)	€25,738 + €15,000 = €40,738	€1000 maximum

Table 1: Calculation of the Lump Sum in ICTY

Due to the large discrepancies of per trial figures, this Note will use the allotments provided by the Legal Aid System to determine increased cost of an internal interpreter to the tribunal.¹³¹ Most defendants plead indigence, causing the tribunal to pay for their defense team.¹³² Therefore, looking at the monthly stipends allotted to defense teams will provide the most accurate assessment of the increased percentage in costs associated with an internal translator(s).

In the ICTY and ICTR, a lump sum payment scheme has been adopted. In the ICTY, a lump sum is allocated for a specific phase.¹³³ The amount allotted is according to difficulty, which is based on the estimated

¹²⁸ An International Crisis Group report estimated that the ICTR average price per defense team per year is \$125,000, in the ICTY its \$150,000. It claimed that the average cost of a trial was \$500,000. *International Criminal Tribunal for Rwanda: Justice Delayed*, INTERNATIONAL CRISIS GROUP 51 (June 7, 2001), <http://www.crisisgroup.org/~media/Files/africa/centralafrica/rwanda/International%20Criminal%20Tribunal%20for%20Rwanda%20Justice%20Delayed.ashx>.

¹²⁹ de Bertodano, *supra* note 112, at 504 (stating that trials can cost upwards of \$1 million).

¹³⁰ This number is based on a support staff component which varies according to the complexity of the case – €3,000 for level 1, €9,000 for level 2 and €15,000 for level 3.

¹³¹ The international criminal tribunals give an accused the right to counsel of his or own choosing, or the right to defend him or herself. If he or she is without sufficient means, he or she is given counsel free of charge. See Rome Statute, *supra* note 3, art. 67(1)(d); ICTY Statute, *supra* note 3, art. 21(4)(d); ICTR Statute, *supra* note 3, art. 20(4)(d); ECCC Statute, *supra* note 3, art. 35(d); SCSL Statute, *supra* note 3, art. 17(4)(d); STL Statute, *supra* note 3, art. 16(4)(d).

¹³² Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court*, 5 J. L & POL'Y 87, 103 (2001) (stating that in the ICTY, in all but four cases, the indictees have pleaded indigence and the Tribunal pays for their counsel).

¹³³ *Defense Counsel – Trial Legal Aid Policy*, ICTY ¶ 6 (Nov. 1, 2009), http://www.icty.org/x/file/About/Defence/trial_legal_aid_policy_2009.pdf.

duration and complexity of the phase.¹³⁴ (see Table 1 above).¹³⁵ The ICTY pays approximately \$38, 934–\$55,192 USD to defense teams per month.¹³⁶

The ICTR takes a slightly different approach. While it still uses a lump sum system, it does not follow the ICTY's graduated approach but rather relies on numerous factors to determine a proper allotment, such as:

(1) ICTR jurisprudence and practice in similar

Segment	Composition of the Team	Maximum Number of Hours/Member	Maximum Number of Hours in All
Preliminary Work	Lead Counsel	50	50
Legal Work	Lead Counsel, Co-Counsel, one or two Assistants	350	1400
Investigations	Lead Counsel and Co-Counsel	100	1000
	One or two Investigators	400	
Counter-evidence	Entire Team	350	1750
Meetings	Entire Team	72	360
Total			4560

Table 1: ICTR Overall Time Allotment for Preparation of Trial

cases; (2) the indications provided by the parties regarding the number of witnesses and experts, as well as the duration of proceedings; (3) the indications provided by the Chambers during status conferences or hearings; (4) the judicial calendar; and (5) the ICTR completion strategy.¹³⁷ Each phase of the proceedings is allotted a maximum amount of billable hours.¹³⁸ For

¹³⁴ *Id.* ¶ 1.

¹³⁵ *Id.* ¶ 37.

¹³⁶ This range was reached by converting the rates in Table 1 from Euros to USD at the exchange rate in March 2010.

¹³⁷ *New Lump Sum System for the Remuneration of Defense Teams at ICTR*, *supra* note 120, ¶ 9.

¹³⁸ *Id.* ¶ 19.

example, the preparation period cannot exceed 4,560 billable hours. (see Table 2).¹³⁹ The trial phase is billed at eight hours a day, with adjusted rates during periods of adjournment. ICTR defense teams receive monthly payments based on the hours used during the month considered.¹⁴⁰ The amount is determined by multiplying the amount of hours worked and the pay rate of each team member (see Table 3).¹⁴¹ Using the billable hour allotment and pay rate during trial phase, the ICTR pays approximately \$39,200–42,400 USD a month.¹⁴²

Defense Member	Remuneration Rate Per Hour in USD
Lead Counsel: Less than 15 years of experience	\$90
Lead Counsel: 15 to 20 years of experience	\$100
Lead Counsel: Over 20 years of experience	\$110
Co-Counsel	\$80
Assistants	\$25
Investigators	\$25

Table 2: ICTR Remuneration Rates

The cost to implement the *Chui* approach is minimal when looking at the total cost of trying a defendant. Based on the ICTY and ICTR monthly allotment rates listed above, the average cost per month, per defense team is \$47,063 USD.¹⁴³ The average cost of an interpreter is \$6,732.86 a month;¹⁴⁴ therefore an internal interpreter would increase the

¹³⁹ *Id.* ¶¶ 37, 38.

¹⁴⁰ *Id.* ¶ 41–46.

¹⁴¹ *Id.* ¶ 54.

¹⁴² This calculation was made based on the ICTR maximum limit of a five personnel defense team consisting of one lead counsel, one co-counsel, and a combination of assistants and investigators totaling three. Therefore at 8 hours a day, a defense team with lead counsel of less than 15 years would be paid as follows: lead counsel (8 hours x \$90) + co-counsel (8 hours x \$80) + assistants/investigators (3 personnel x 8 hours x \$25) = \$39,200. The rate increases to \$42,400 when the lead counsel has over 20 years of experience.

¹⁴³ This calculation was based on the average of the lowest possible monthly allotment and the highest possible monthly allotment: $(\$38,934 + \$55,192)/2 = \$47,063$.

¹⁴⁴ This calculation was based on the average annual salary of an interpreter, divided by twelve months: $(\$66,482 + 95,101)/2 = \$80,794.5$ average annual salary. $\$80,794.5/12 = \$6,732.56/\text{month}$.

defense cost to a tribunal by 14.3% per defendant.¹⁴⁵ However, this number must be put in context of the overall costs of the tribunal. For example, while the defense team budget per month is approximately \$38,934–\$55,192 USD in the ICTY, the monthly budget for the entire tribunal is \$25,157,991.67.¹⁴⁶ Paying an extra \$6,732.86 a month for a defense team translator would increase monthly costs to the tribunal by only 0.027 percent.¹⁴⁷

Moreover, the costs of implementing the proposed plan will be partially offset by reducing the delays that occur due to translation. By providing the defense with a translator, it would cut down on the burden of the Registry. Currently, when a tribunal finds it necessary to translate documents that are not ordinarily translated, the burden falls upon the Registry. However, under the proposed solution, any time a document is not covered by the Rules of Procedure and Evidence, the internal rules of the Registry and/or tribunal decisions, the defense would internally translate the document, saving Registry resources.¹⁴⁸ It would also reduce docket delays. Defendants would no longer have to bring motions to the court concerning the need to translate documents, or motions for time extensions to respond to untranslated documents submitted by the prosecutor. Only one initial motion would be brought, requesting an internal translator, and then the issue would be closed. By having a translator(s) on their teams, the defense would be responsible for its own translations and thus could not request additional translation or extensions unless under extraordinary circumstances. By reducing the burden on the Registry and Chambers, the tribunal will save money that can offset the costs of providing internal translators.

B. *Benefits to the Defendant*

The benefits of the proposed solution far outweigh the costs to the tribunal. The solution (1) reinforces the legitimacy of the international crim-

¹⁴⁵ This percentage was reached by dividing the monthly average salary of an interpreter by the average cost per month of a defense team: $(\$6,732.86/\$47,063) \times 100 = 14.3\%$.

¹⁴⁶ This estimate was based on the ICTY 2010-2011 budget - \$301,895,900. *The Cost of Justice*, ICTY, <http://www.icty.org/sid/325> (last visited Mar. 8, 2011). This calculation was based on 2010-2011 budget, divided by twelve months. The monthly average salary of an interpreter was then divided by the 2010-2011 monthly budget: $\$301,895,900/12$ months = \$25,157,991.67.

¹⁴⁷ *Id.* This calculation was made by taking the average monthly cost for an interpreter and dividing it by the total monthly costs of the tribunal. $(\$6,732.86/\$25,157,991.67) \times 100 = 0.027\%$.

¹⁴⁸ Internal translations would not be considered official since it is not done by a third party and therefore could not be used in court. However, the Registry burden would still be lightened as the defense would now know which documents it would need an official translation for and only send those documents to the Registry.

inal system; (2) protects the due process rights of the accused to participate in his or her trial, to adequately prepare a defense and to partake in a fair trial; and (3) restores the equality of arms between the prosecution and defense.

First, the proposed solution reinforces the legitimacy of the international criminal justice system. By creating a mechanism to safeguard the rights of the accused, the tribunal will more likely be perceived as a legitimate court rather than a victor's court. Any measure to further protect the due process rights of the accused will only benefit the tribunal's image before the public. A stronger public image also makes it harder for politicians to manipulate tribunal decisions to their advantage and increases the possibility of reconciliation in post-conflict areas.

Second, an internal translator protects the due process rights of the accused to participate in his or her trial, to adequately prepare a defense, and to partake in a fair trial. The suggested translator provision would allow the accused and/or counsel to understand documents that are currently not translated, such as motions and disclosed materials. This allows the defense the ability to assess the evidence accurately and determine how to proceed at trial. The proposed solution also provides the defense the opportunity to challenge the credibility of the prosecutor's evidence.

An internal translator would also allow the defendant to better prepare his or her defense. On defense teams where counsel speaks both the language of the court and the language of the accused, the team would no longer have to rely on its counsel to provide translations. With an additional translator(s) on team, counsel can fully concentrate on formulating a defense. On the other hand, where counsel only speaks the language of the court, the defendant will now benefit from having counsel that can better understand all disclosed materials. In this way, the solution could also potentially expedite the trial, as there would be fewer delays due to a lack of translation.

The provision would also safeguard the defendant's right to a fair trial by providing the defense with better resources to find exculpatory materials. Currently those defendants before the ICC and ECCC do not have a right to receive mitigating evidence in a language he or she understands. In the ICTY, a defense team may receive thousands of documents in a language counsel or other team members do not understand. While the defendant may understand these materials, he or she alone could not translate all said documents. An internal translator(s) would give defense teams autonomy over their preparations, including the ability to translate exculpatory materials.

Finally, such a solution would reestablish the equality of arms principle. While it is recognized that the budgets of the tribunals are constrained, the current disparities in funding between the prosecution and the defense warrant a change. The defense is entitled to have similar resources

to the prosecutor. While the defense and prosecution need not be equally funded, the tribunals should take steps to ensure greater equality between the two parties. Offering the defense a right to a translator would be one such step.

VI. CONCLUSION

Protecting the rights of the accused is not a popular cause. The defendants at the international war crime tribunals are charged with heinous crimes, vilified by the media and public, and widely presumed guilty.¹⁴⁹ However, it is exactly for these reasons that the tribunals should ensure that the accused are afforded the utmost protection of their rights. Amongst these rights are the accused's right to understand the charges and the proceedings before him, to participate in his or her trial, to adequately prepare a defense, and to take part in a fair trial. These rights cannot be fully recognized without broadening the defendant's right to translation. Moreover, such a measure would reinforce the legitimacy of the tribunals and uphold the equality of arms principle. Without impartiality and fairness for all those in front of the tribunals, justice cannot be served.

¹⁴⁹ de Bertodano, *supra* note 112, at 507.