

2010

Accused's Right to Document Translation...

John K. Sawyer

Follow this and additional works at: https://scholarlycommons.law.case.edu/war_crimes_memos



Part of the [Criminal Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Sawyer, John K., "Accused's Right to Document Translation..." (2010). *War Crimes Memoranda*. 60.
https://scholarlycommons.law.case.edu/war_crimes_memos/60

This Memo is brought to you for free and open access by the War Crimes at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in War Crimes Memoranda by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.



CASE WESTERN RESERVE
UNIVERSITY
SCHOOL OF LAW

MEMORANDUM FOR THE OFFICE OF THE CO-PROSECUTORS
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

ISSUE: ACCUSED'S RIGHT TO DOCUMENT TRANSLATION

SPECIFICALLY ADDRESSING WHAT THE RIGHTS ARE OF THE ACCUSED TO THE TRANSLATION OF DOCUMENTS (IN HIS OR HER OWN LANGUAGE AND/OR IN THE LANGUAGE OF HIS OR HER COUNSEL) AND THE CONCOMITANT OBLIGATIONS OF THE PARTIES. ALSO, THE ISSUES WERE EXAMINED WITH REFERENCE TO THE 20 FEBRUARY 2009 PRE-TRIAL CHAMBER DECISION IN KHIEU SAMPHAN'S APPEAL.

Prepared by John K. Sawyer
J.D. Candidate, May 2012
Fall Semester, 2010

TABLE OF CONTENTS

I. Introduction..... 7

 A. Scope..... 7

 B. Summary of Conclusions..... 7

 i. The practice of the ECCC, in regards to translation rights, comports with current international human rights norms..... 7

 ii. The accused is not entitled to translation of every court document. However, some documents, such as indictments, orders, and decisions, are required to be translated..... 7

 iii. All parties before the court have an obligation to “progressively manage” translation requests. To aid management, the court is obligated to ensure all parties have adequate access to a translator..... 8

 iv. Generally, the practices of the ECC are in keeping with other tribunal practices. While some variations between other tribunals are apparent, these variations are not determinative of incompatibilities..... 8

 v. The current ECCC practices, in regard to the right of the accused to translation of documents, function to ensure a fair and timely trial. Thus, ECCC practices are in line with the statutory and procedural framework of its mandate..... 8

II. Factual Background..... 9

 A. Khieu Samphan..... 9

 B. Order on translation rights and obligations of the parties 9

 C. Defense appeal against the translation order 11

 D. Co-Prosecutors’ response to the Defense appeal..... 15

 E. Pre-Trial Chamber Decision on Khieu Samphan’s appeal..... 17

III. Translation rights and procedures under international tribunals..... 19

 A. International Criminal Court..... 19

1. Translation rights as defined by the Rome Statute and Rules of Procedure and Evidence	19
2. Rights and procedures as interpreted in ICC case law.....	21
B. International Criminal Tribunal for the Former Yugoslavia.....	25
1. Translation rights and procedures as defined by the Statute of the International Criminal Tribunal for the Former Yugoslavia and Rules of Procedure and Evidence.....	25
2. Rules and Procedures as interpreted in ICTY case law.....	27
C. Translation provisions of the International Criminal Tribunal for Rwanda.....	31
1. The Statute of the International Tribunal for Rwanda.....	31
2. The ICTR Rules of Procedure and Evidence	31
D. Translation provisions of the Special Court for Sierra Leone.....	33
1. Statute of the Special Court for Sierra Leone.....	33
2. Rules of Procedure and Evidence	33
IV. Translation rights under human rights instruments and courts.....	34
A. International human rights instruments.....	34
B. Translation rights as interpreted in human rights courts.....	36
V. Translation rights and procedures under the ECCC.....	38
A. Law on the Establishment of the Extraordinary Chambers.....	38
B. ECCC Internal Rules.....	39
C. ECCC Practice Direction.....	39
VI. Conclusion.....	40

Table of Authorities

Statutes, Rules, and Covenants

1. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS 5; 213 UNTS 221.
2. Extraordinary Chambers in the Courts of Cambodia, Internal Rules, Feb. 1, 2008, *available at* http://www.eccc.gov.kh/english/internal_rules.aspx .
3. Extraordinary Chambers in the Courts of Cambodia, Practice Direction- Filing of Documents before the ECCC, Jun. 5, 2009, ECCC/2007/1/Rev.4.
4. International Covenant on Civil and Political Rights, Dec. 16, 1966, U.N.T.S. 171.
5. ICTR Rules of Procedure and Evidence, Jun. 29, 1995, U.N. Doc. ITR/3/REV.1.
6. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Rules of Procedure and Evidence, IT/32/Rev. 44 (as amended Dec. 10, 2009).
7. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Oct. 27, 2004, NS/RKM/1004/006.
8. Rome Statute of the International Criminal Court, Jul. 17, 1998, U.N. Doc A/CONF.183/9.
9. Rules of Procedure and Evidence of the International Criminal Court, Sep. 10, 2002, ICC-ASP/1/3.
10. Special Court for Sierra Leone, Rules of Procedure and Evidence, as amended Mar. 7, 2003, *available at* <http://www.sc-sl.org/DOCUMENTS/tabid/176/Default.aspx> .
11. Statute of the International Tribunal for Rwanda, Nov. 8, 1994, U.N. Doc S/RES/955.
12. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, May 25, 1993, U.N. Doc/S/Res/827.
13. Statute of the Special Court for Sierra Leone, Jan. 16, 2002, *available at* <http://www.sc-sl.org/DOCUMENTS/tabid/176/Default.aspx> .

14. Universal Declarations of Human Rights, Dec. 10, 2948, U.N. Doc A/810.

Cases

Extraordinary Chambers in the Courts of Cambodia

15. Prosecutor v. Samphan, Case File No. 002/19-09-2007-ECCC/OCIJ, Co-Prosecutors' Response to Khieu Samphan's Appeal on Translation Rights and Obligations of the Parties (Aug. 28, 2008).
16. Prosecutor v. Samphan, Case File No. 002/19-09-2007-ECCC/OCIJ, Decision on Khieu Samphan's Appeal Against the Order on Translation and Rights and Obligations of the Parties (Feb. 20, 2009).
17. Prosecutor v. Samphan, Case File No. 002/19-09-2007-ECCC/OCIJ, Defense Appeal Against the Decision to Deny the Request for Translation of Khieu Samphan's Case File (Aug. 14, 2008).
18. Prosecutor v. Samphan, Case File No. 002/19-09-2007-ECCC/OCIJ, Order on Translation Rights and Obligations of the Parties (Jun. 23, 2008).

International Criminal Court

19. 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).
20. Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the Defense for Matheiu Ngudjolo Chui's Request Concerning Translation of Documents (May 15 2008).
21. Prosecutor v. Kony, Case No. ICC-02/04-01/05, Decision on "Requete de la defense en extension de delai afin de repondre aux 'observataions de la defense sur les demandes de participation a la procedure a/0010/06, a/0064/06 a a/0070/06, a/0070/06, a 0081/06 a a0/0104/06 et a/0111/06 a a/0127/06" (Feb. 23, 2007).

International Criminal Tribunal for the Former Yugoslavia

22. Prosecutor v. Naletilic, Case No. IT-98-34-A, Decision on Defence's Motion Concerning Translation of All Documents (Oct. 18, 2001).
23. Prosecutor v. Prlic, IT-04-74-PT, Order for the Translation of Documents (Jan. 17, 2006).

24. Prosecutor v. Seselj, IT-03-67-PT, Order on Translation of Documents (Mar. 6, 2003).

UN Human Rights Committee

25. Harward v. Norway, Communication No. 451/1991, U.N. Doc. CCPR/C/51/D/451/1991, Human Rights Committee (Aug. 16, 2004).

European Court of Human Rights

26. Kamasinski v. Austria, Application No. 9783/82, Eur. Ct. H.R. (Dec. 19, 1989).

Law Reviews and Memorandum

27. Kavitha Giridhar, Memorandum, International War Crimes Research Portal (2009) available at http://law.case.edu/war-crimes-research-portal/by_year.asp?year=2009 .
28. Joshua Karton, *Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony*, 41 VAND. J. TRANSNAT'L L. 1 (2008).
29. Wolfgang Schomburg, *The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights*, 8 NW. U.J. INT'L HUM. RTS. 1 (2009).

Books

30. KAI AMBOS & MOHAMED OTHMAN, NEW APPROACHES IN INTERNATIONAL CRIMINAL JUSTICE: KOSOVO, EAST TIMOR, SIERRA LEONE AND CAMBODIA 186 (2003).

Periodicals

31. Richard L. Parry, *Khmer Rouge head of state Khieu Samphan charged with genocide*, TIMES ONLINE, Dec. 18, 2009. <http://www.timesonline.co.uk/tol/news/world/asia/article6961756.ece> .
32. *Top Khmer Rouge leader charged*, BBC NEWS, Nov.11, 2007, <http://news.bbc.co.uk/2/hi/asia-pacific/7101154.stm> .

I. INTRODUCTION

A. Scope

This memorandum discusses the rights of the accused to the translation of documents at trial before the Extraordinary Chambers of the Courts of Cambodia (ECCC).^{*} Specifically, the right to document translation will be addressed with regard to the accused's right to translation into his or her own language and/or the language of his or her counsel. Further, the concomitant rights of the parties in relation to translation requests will be examined. Additionally, this memorandum will examine the current translation rights practices of the ECCC as applied in the Khieu Samphan case. Moreover, the ECCC's practices will be analyzed against other international tribunal practices and international human rights norms.

B. Summary of Conclusions

i. The practice of the ECCC, in regards to translation rights, comports with current international human rights norms.

The ECCC's practice, in regards to translation rights, preserves the fundamental rights afforded to all people under various international human rights instruments. Specifically, the accused's right to understand the charges against him are preserved. Additionally, the accused's right to understand what elements of proof will be used to prove the charges against him are preserved. Finally, the accused's right to free access to a translator is maintained.

ii. The accused is not entitled to translation of every court document. However, some documents, such as indictments, orders, and decisions, are required to be translated.

The accused is not entitled to the translation of all documents in his case file. However, as prescribed by the Pre-Trial Chamber's decision, the Indictment and documents supporting the

^{*} What are the rights of the accused to the translation of documents (in his or her own language and/or in the language of his or her counsel) at trial before the ECCC? What are the concomitant obligations of the parties?

Indictment's elements of proof are required to be translated. Further, introductory submissions, court orders, and Chamber decisions require translation.

iii. All parties before the court have an obligation to “progressively manage” translation requests. To aid management, the court is obligated to ensure all parties have adequate access to a translator.

The Pre-Trial Chamber's decision creates a system in which the Defense and the Court Management Section share document translation obligations. The defense must work to maximize its linguistic capacity to reduce the need for document translation. Further, the Court Management Section must work with the Defense to prioritize translation requests.

iv. Generally, the practices of the ECCC are in keeping with other tribunal practices. While some variations between other tribunals are apparent, these variations are not determinative of incompatibilities.

The ECCC's document translation practices comport with both the statutory frameworks and practices of other international tribunals. Like those of similar tribunals, the ECCC's practices protect both the accused's right to understand the charges against him and his right to a trial without delay. Further, while some tribunals differ as to the translation obligations of the parties, the ECCC takes a hybrid approach that draws from the various practices of the other tribunals.

v. The current ECCC practices, in regard to the right of the accused to translation of documents, function to ensure a fair and timely trial. Thus, ECCC practices are in line with the statutory and procedural framework of its mandate.

The ECCC Law, Practice Directive, and Internal Rules establish the framework under which the ECCC operates. Enumerated throughout these governing documents is the right of the accused to a fair trial without delay. The current ECCC practice concerning document translation meets the minimum requirements set forth under the various articles and rules enumerated in the ECCC's governing documents.

II. FACTUAL BACKGROUND

A. Khieu Samphan

Khieu Samphan is the Khmer Rouge's former head of state.¹ In December 1998, Mr. Samphan surrendered himself to the Cambodian government.² He was the fifth suspect of the remaining Khmer Rouge leadership to be targeted by the ECCC.³ Mr. Samphan has been charged with war crimes, crimes against humanity, and genocide.⁴

B. Order on translation rights and obligations of the parties

On June 23, 2008, the Office of the Co-Investigating Judges issued an order related to the translation rights and obligations of the parties.⁵ In assessing what translation rights the accused was entitled to, the Co-Investigating Judges assessed the various provisions and principles that govern translation rights.⁶ Notably, the Co-Investigating Judges recognized that there is “no

¹ See generally *Top Khmer Rouge leader charged*, BBC News, Nov. 11, 2007, <http://news.bbc.co.uk/2/hi/asia-pacific/7101154.stm> (discussing Khieu Samphan role as the former Khmer Rouge's head of state and his arrest) [reproduced in accompanying notebook at Tab 32].

² KAI AMBOS & MOHAMED OTHMAN, *NEW APPROACHES IN INTERNATIONAL CRIMINAL JUSTICE: KOSOVO, EAST TIMOR, SIERRA LEONE AND CAMBODIA* 186 (2003) [reproduced in accompanying notebook at Tab 30].

³ *Top Khmer Rouge leader charged*, *supra* note 1.

⁴ Richard L. Parry, *Khmer Rouge head of state Khieu Samphan charged with genocide*, Times Online, Dec. 18, 2009. <http://www.timesonline.co.uk/tol/news/world/asia/article6961756.ece>. [reproduced in accompanying notebook at Tab 31].

⁵ Prosecutor v. Samphan, Case File No. 002/19-09-2007-ECCC/OCIJ, Order on Translation Rights and Obligations of the Parties (Jun. 23, 2008) [hereinafter Order on Translation] [reproduced in accompanying notebook at Tab 18].

⁶ *Id.* at para. A.

statutory provision detailing the extent of translation rights and obligations.”⁷ Therefore, the Judges looked to a number of sources, including the Internal Rules of the ECCC, the Practice Directives of the ECCC, and the 2004 Law on the Establishment of the Extraordinary Chambers (ECCC Law).⁸ The relevant Internal Rules and Practice Directions were examined under a framework that recognized two basic rights afforded to the accused, namely the right of a charged person to a fair trial and the right to a trial within a reasonable period of time.⁹ Further, the Judges examined various provisions of human rights instruments and the practices of other international tribunals.¹⁰ Applying the above mentioned framework the Judges concluded:

Accordingly, and adapting the above to the particular structure of the ECCC, a charged person is entitled to the translation in Khmer of any Indictment of the Co-Investigating Judges Under Rule 67(1) of the IR, since that constitutes the final characterization and founding of the charges on which a charged person is sent forward for trial. In addition, a charged person is entitled to translation into Khmer of the elements of proof on which any such Indictment would rely.¹¹

Additionally, the Judges identified other translation rights the accused was entitled to. Among these rights, the accused is entitled to translation of the Introductory Submissions and the Final Submissions of the Co-Prosecutors.¹² The above-mentioned documents are to be translated into the working languages of the ECCC, namely Khmer, English, and/or French.¹³ Other court

⁷ *Id.* at para A(1).

⁸ *Id.* at para.A(2).

⁹ *Id.* at para. A(3).

¹⁰ *Id.* at para. B(2).

¹¹ *Id.* at para. B(4).

¹² *Id.*

¹³ Order on Translation, *supra* note 5, at para. C(1).

documents including pleadings, internal notes, and correspondences are not elements of proof, and therefore, are not required to be translated into the accused’s language.¹⁴ However, other court documents are to be translated into Khmer and another language as declared by the parties under Article 2(2) of the Practice Directives.¹⁵

In regards to the translation obligations of the parties, the Judges first noted that the current “translation workload” of the Court Management Section (CMS) is heavy and that translation requests could overly burden the CMS.¹⁶ Therefore, translation requests should be managed progressively.¹⁷ Accordingly, each party must “optimize their linguistic capacity” and work with the CMS to prioritize management of translation requests.¹⁸ Further, each “defense team should have at its disposal [...] the assistance of a translator.”¹⁹ Finally, the Co-Investigating Judges recognized that the Trial Chamber is responsible for the management of translation requests once they have been given control over the case.²⁰

C. Defense appeal against the translation order

¹⁴ *Id.* at para. C(3).

¹⁵ *Id.*

¹⁶ *Id.* at para. E(1).

¹⁷ *Id.*

¹⁸ *Id.* at para. E(2).

¹⁹ *Id.* at para. E(3).

²⁰ *Id.*

On August 14, 2008, the Defense filed an appeal against the Translation Order.²¹ The Defense argued that the Co-Investigating Judges' opinion was guided not by the desire to ensure a fair trial, but rather by a desire to mitigate higher budgetary costs.²² The Defense requested that the Pre-Trial Chamber examine the rights afforded to Mr. Samphan under the "rights and obligations of the ECCC."²³ Specifically, the Defense noted a number of provisions including: Articles 26(2) and 12(1) of the Agreement Between the United Nations and the Government of the Kingdom of Cambodia Concerning Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (the Agreement); Article 2 of the International Covenant on Civil and Political Rights (ICCPR); Articles 38 and 31 of the Constitution of the Kingdom of Cambodia; and the United Nations Charter.²⁴ The Defense argued that the Translation Order had no legal basis under ECCC law.²⁵ The Defense claimed that under Article 26(2) the official working languages of the ECCC are Khmer, French, and English.²⁶ Further, pursuant to Article 31(1) of the Vienna Convention on the Law of Treaties of 1969, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms in their context and in the light of its object and purpose."²⁷ This provision,

²¹ Prosecutor v. Samphan, Case File No. 002/19-09-2007-ECCC/OCIJ, Defense Appeal Against the Decision to Deny the Request for Translation of Khieu Samphan's Case File (Aug. 14, 2008) [hereinafter Defense Appeal] [reproduced in accompanying notebook at Tab 17].

²² *Id.* at para. 6.

²³ *Id.* at para. 16.

²⁴ *Id.* at 4-7.

²⁵ *Id.* at 7.

²⁶ *Id.* at para. 29.

²⁷ *Id.* at para. 30.

the Defense argued, has the effect of demonstrating that the ECCC is to function in all three official languages.²⁸ Additionally, the Defense argued that the Translation Order disregarded the specificity of the ECCC as compared to other international tribunals.²⁹ Noting that the ECCC is the first civil-law based international tribunal, the Defense argued that legal principles from common-law based international tribunals could be “dangerous to apply unduly.”³⁰

The Defense also argued that the Translation Order denied Mr. Samphan the rights he is entitled to.³¹ Noting Article 35 of the ECCC Law, the Defense argued that the Translation Order violated the accused’s right to legal assistance. Article 35 states that “in determining charges against the accused, the accused shall be equally entitled to communicate with counsel of their own choosing [...]”³² Article 35, the defense argued, entitles Mr. Samphan to the full assistance of both of his counsel, one of whom was unable to examine the case file in a language he understands.³³ Thus, Mr. Samphan is being denied the right to the full assistance of one of his counsel, which the Defense states is unacceptable under the current law of the ECCC.³⁴ Additionally, the Defense argued that the accused was being denied his right to participate in the

²⁸ *Id.* at para. 31.

²⁹ *Id.* at para. 32.

³⁰ *Id.*

³¹ *Id.* at para. 39.

³² *Id.* at para. 55.

³³ *See id.* at para. 60. (noting that defense counsel Verges is unable to examine the case file in a language he understands, namely French).

³⁴ *Id.*

proceedings.³⁵ Specifically, the Defense argued that the Co-Investigating Judges unduly burdened the accused to choose which documents should be translated to prove his innocence.³⁶ Thus, the Co-Investigating Judges shifted the responsibility from the Court onto the accused thereby denying his right to participate in the proceedings.³⁷

Further, the defense noted that the Translation Order further disadvantaged the accused in relation to document translation as compared to the Prosecution.³⁸ The Prosecution had ample time to file thousands of supporting documents while the Defense was to be content with “excerpts,” so as not to unduly delay the proceedings.³⁹ Finally, in relation to the right to participate in the proceedings, the Defense argued that because the accused had chosen French as his second language he was being disadvantaged.⁴⁰ The majority of the Prosecution’s documents were published in English and Khmer, and thus, the Defense counsel could not understand the language of the majority of the court documents.⁴¹

Finally, the Defense argued that the Translation Order violated the accused’s right to a trial within a reasonable time. “Article 35(c) new of the Law on ECCC provides for the right of the Charged Person to be tried without delay, pursuant to Article 14 of the ICCPR.”⁴² Further,

³⁵ Defense Appeal, *supra* note 21, at para. 62.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at para. 65.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at para 68.

international humanitarian law ensures that if pre-trial detention becomes arbitrary or unreasonable the accused should be released.⁴³ The Defense argued that the lack of translation halted all court proceedings and that the accused had been held in detention for nine months.⁴⁴ Thus, the pre-trial detention had become unreasonable especially in light of the fact that the Translation Order had not, in the Defense's view, remedied the translation issues plaguing the proceedings.⁴⁵

D. Co-Prosecutors' response to the Defense's appeal

The Co-Prosecutors filed a response to the Defense's appeal of the Translation Order on August 28, 2008.⁴⁶ The Co-Prosecutors argued that the Translation Order was not a decision the accused was entitled to appeal.⁴⁷ Further, the Co-Prosecutors argued that the appeal was without merit.⁴⁸ As to the merits of the appeal, the Co-Prosecutors argued that not all of the documents in the case file are entitled to translation.⁴⁹ Specifically, the Co-Prosecutors noted that the accused was entitled to translation of some documents in a language he understands.⁵⁰ This right

⁴³ *Id.* at para. 69.

⁴⁴ *Id.* at para. 71.

⁴⁵ *Id.*

⁴⁶ Prosecutor v. Samphan, Case File No. 002/19-09-2007-ECCC/OCIJ, Co-Prosecutors' Response to Khieu Samphan's Appeal on Translation Rights and Obligations of the Parties (Aug. 28, 2008) [hereinafter Co-Prosecutors' Response] [reproduced in accompanying notebook at Tab 15].

⁴⁷ *Id.* at para. 3.

⁴⁸ *Id.*

⁴⁹ *Id.* at para. 30.

⁵⁰ *Id.*

does not extend to the accused’s counsel.⁵¹ Further, arguably the accused had command of all three working languages of the ECCC, which should limit translation needs.⁵² Additionally, the Co-Prosecutors noted that “the introductory, supplementary, and final submission have always been made available to the Appellant in Khmer and at least one other official language of the Court.”⁵³ The Co-Prosecutors also noted that the Defense was made up of counsel that understood and spoke Khmer as well as French and English.⁵⁴ In addition, the Translation Order did not preclude further documents from being translated.⁵⁵ While some core documents are to be translated into Khmer and another working language of the ECCC, other requests are permitted but must be prioritized by urgency with the CMS.⁵⁶ The Co-Prosecutors further argued that application of legal principles from other international tribunals was appropriate.⁵⁷ Additionally, “while there may be systematic differences,” the translation rights confirmed by the Translation Order made any difference “inconsequential.”⁵⁸

The Co-Prosecutors also dismissed the notion that the Translation Order denied the accused the effective assistance of counsel.⁵⁹ The Co-Prosecutors noted that there was “virtually

⁵¹ *Id.* at para. 31.

⁵² *Id.*

⁵³ *Id.* at para. 32.

⁵⁴ *Id.*

⁵⁵ Co-Prosecutors’ Response, *supra* note 46, at para. 37.

⁵⁶ *Id.*

⁵⁷ *Id.* at para 38.

⁵⁸ *Id.*

no international instrument that guarantees all documents on a defendant's case file to be translated into the language of the defense counsel, especially when that language is not claimed to be the language of the defendant.”⁶⁰ In fact, the Co-Prosecutors argued that the Translation Order attempted to create a mechanism for turning over documents to the Defense in a language other than Khmer.⁶¹ Finally, the Co-Prosecutors argued that the Translation Order provisions providing the Defense free use of a translator did not shift the burden of translation onto the defense.⁶² The translator is provided to better assist the Defense in case of urgent translation issues while maintaining the CMS' translation burden.⁶³ The Co-Prosecutors also noted that the Defense had “elected not to use any facilities provided by the Court Management Section.”⁶⁴

E. Pre-Trial Chamber Decision on Khieu Samphan's appeal

On February 20, 2009, the Pre-Trial Chamber issued its ruling on the appeal filed by the accused.⁶⁵ As an initial matter, the Pre-Trial Chamber found that, pursuant to Internal Rule 74(3)(b), the Translation Order is not an appealable matter.⁶⁶ The Pre-Trial Chamber also found

⁵⁹ *Id.* at para. 39.

⁶⁰ *Id.* at para. 40.

⁶¹ *Id.* at para. 42.

⁶² *Id.* at para. 45.

⁶³ *Id.* at para. 44.

⁶⁴ *Id.* at para. 46.

⁶⁵ Prosecutor v. Samphan, Case File No. 002/19-09-2007-ECCC/OCIJ, Decision on Khieu Samphan's Appeal Against the Order on Translation and Rights and Obligations of the Parties (Feb.. 20, 2009) [reproduced in accompanying notebook at Tab 16].

⁶⁶ *Id.* at para. 31.

that the Translation Order did not violate the rights of the accused.⁶⁷ Specifically, the Pre-Trial Chamber noted that under the Translation Order the accused was entitled to receive translation into French and Khmer of the following documents:

- any Indictment of the Co-Investigating Judges;
- the elements of proof on which any such Indictment would rely;
- the Introductory Submission and any Final Submission by the Co-Prosecutors;
- the footnotes and indexes of factual elements on which those Submissions rely (concretely, D3 and D3/I-V);
- all judicial decisions and orders;
- all filings by the Parties before the ECCC, as provided by Article 7.;1 of the Practice Direction on Filings Documents before the ECCC.⁶⁸

Further, the Pre-Trial Chamber observed that “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.”⁶⁹ Additionally, the Pre-Trial Chamber noted that “the right of the Co-Lawyers to have access to the Case File during the investigation does not mean that all the material collected should automatically be translated into their language.”⁷⁰ However, the Pre-Trial Chamber found that in certain circumstances translation might be necessary to preserve the right to a fair trial.⁷¹ Subsequently, the Pre-Trial Chamber found that the following materials are to be translated into French and Khmer:

- the Introductory Submission, including its footnotes which identify the material supporting the Co-Prosecutors’ allegations;

⁶⁷ *Id.* at para. 50.

⁶⁸ *Id.* at para. 37 (D3 and D3/1-V refer to specific “substance” related documents contained in the case file).

⁶⁹ *Id.* at para. 40.

⁷⁰ *Id.* at para. 42.

⁷¹ *Id.* at para. 43.

- the Schedules, annexed to the Introductory Submission, which consist of a list containing a description of evidentiary material in support of specific events or alleged crimes;
- Annex C of the Introductory Submission, which consists of a list of all documents that were part of the Case File at the time of the filing of the Introductory Submission, accompanied by a description of the content of each of these documents;
- after the commencement of the judicial investigation, almost all the evidentiary material generated by the Co-Investigating Judges, including documentary evidence and written records of interviews (in Khmer and/or French); and
- all the orders and decisions of the Co-Investigating Judges and the Pre-Trial Chamber as well as the pleadings filed by the Parties in relation to appeals lodged by the Charged Person.⁷²

Finally, the Pre-Trial Chamber affirmed that the bulk of international jurisprudence recognizes that “providing an interpreter to the accused is an adequate substitute for provision of the translation of certain documents.”⁷³ Overall, the Pre-Trial Chamber found that the accused’s rights Under Rule 21 were not violated.⁷⁴

III. Translation rights and procedures under international tribunals

A. International Criminal Court

1. Translation rights as defined by the Rome Statute and Rules of Procedure and Evidence

The Rome Statute of the International Criminal Court (Rome Statute) established the International Criminal Court (ICC).⁷⁵ Article 50 of the Rome Statute dictates that English and French are the working languages of the court.⁷⁶ Article 67 of the Rome Statute states the rights

⁷² *Id.* at para. 44.

⁷³ *Id.* at para. 47.

⁷⁴ *Id.* at para. 50.

⁷⁵ Rome Statute of the International Criminal Court art. 1, Jul. 17, 1998, U.N. Doc A/CONF.183/9 [reproduced in the accompanying notebook at Tab 8].

⁷⁶ *Id.* at art. 50.

of the accused.⁷⁷ Generally, Article 67 states that the accused is entitled to a public, fair and impartial hearing.⁷⁸ Specifically, Article 67(a) entitles the accused “to be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks.”⁷⁹ Further, Article 67(f) provides that the accused is entitled:

to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks.⁸⁰

The ICC maintains its internal rules and procedures in The Rules of Procedure and Evidence.⁸¹ Rule 41(2) of the Rules of Procedure and Evidence allows the President of the court to “authorize the use of an official language of the Court as a working language if it considers that it would facilitate the efficiency of the proceedings.”⁸² Additionally, Rule 42 of the Rules of Procedure and Evidence deals with translation and interpretation services.⁸³ Specifically, Rule 42 provides that “the court shall arrange for the translation and interpretation services necessary to ensure the implementation of its obligations under the Statute and the Rules.”⁸⁴

⁷⁷ *Id.* at art. 67.

⁷⁸ *Id.*

⁷⁹ *Id.* at art. 67(a).

⁸⁰ *Id.* at art, 67(f).

⁸¹ Rules of Procedure and Evidence of the International Criminal Court, Sep. 10, 2002, ICC-ASP/1/3 [reproduced in the accompanying notebook at Tab 9].

⁸² *Id.* at rule 41(2).

⁸³ *Id.* at rule 42.

⁸⁴ *Id.*

2. Rights and procedures as interpreted in ICC case law

The Pre-Trial Chamber of the ICC addressed translation rights in the case of the *Prosecutor v. Thomas Lubanga Dyilo*.⁸⁵ In *Lubanga*, the Pre-Trial Chamber responded to the Defense's request to have witness statements and "documents on which the Prosecution intends to rely at the confirmation hearing" translated into French.⁸⁶ The Defense's request was made in light of the fact that Thomas Lubanga Dyilo fully understood and spoke French, and further, that French was one of the working languages of the court.⁸⁷ The Pre-Trial Chamber noted that Article 67 of the Rome Statute entitled Dyilo to be informed of the charges in a language that he understood.⁸⁸ Further, the Pre-Trial Chamber recognized that, under Article 67, Dyilo was also entitled to a trial without delay and the free assistance of an interpreter.⁸⁹ In addition, the Pre-Trial Chamber looked to other international courts for guidance. Specifically, they looked to the European Court of Human Rights case *Leudicke v. Germany* which interpreted Article 6(3)(e) of the European Convention on Human Rights (ECHR) to extend the right to assistance of an interpreter to include, not just oral statements, but also documentary material and the pre-trial proceedings.⁹⁰ Additionally, the Pre-Trial Chamber cited the European Court of Human Rights

⁸⁵ *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) [reproduced in the accompanying notebook at Tab 19].

⁸⁶ *Id.* at 2.

⁸⁷ *Id.* at 4.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 5.

case *Kamasinki v. Austria* which limited the right to have an interpreter translate documents.⁹¹

The limitation in *Kamasinki* recognized that the right did not extend to all written documents but rather to documents that the accused needed to fully understand the case against him.⁹²

With the various provisions of the Rome Statute and the case law of the European Court of Human Rights as a framework, the Pre-Trial Chamber found that the “as are necessary to meet the requirements of fairness” language of Article 67 did not entitle Dyilo to the translation of all procedural documents and evidentiary materials.⁹³ Thus, the Pre-Trial Chamber denied the Defense’s request to have all documents translated into French.⁹⁴ However, the Pre-Trial Chamber did order the Prosecution “to file a French version of the Charging Document and List of Evidence.”⁹⁵ Additionally, the Pre-Trial Chamber ordered the Registrar to provide a free interpreter to the Defense team in order to deal with documents that were available only in English.⁹⁶

In *Prosecutor v. Kony*, the Pre-Trial Chamber addressed the issue of translation rights as applied to Defense counsel.⁹⁷ In *Kony*, one of the members of the Defense counsel requested an

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 6.

⁹⁴ *Id.* at 7.

⁹⁵ *Id.* at 8.

⁹⁶ *Id.*

⁹⁷ *Prosecutor v. Kony*, Case No. ICC-02/04-01/05, Decision on “Requete de la defense en extension de delai afin de repondre aux ‘observataions de la defense sur les demandes de participation a la procedure a/0010/06, a/0064/06 a a/0070/06, a/0070/06, a 0081/06 a

extension of the time limit to reply to various applications. Further, the Defense counsel asked if all documents relating to the victims' participation could be translated into French, since French was her "mother tongue."⁹⁸ She based her request on the principle that translation into French was necessary to allow the Defense to fully understand what had been written.⁹⁹ The Pre-Trial Chamber noted that counsel had described her oral and written mastery of English as excellent.¹⁰⁰ Further, in the counsel's application, she stated that she had "been working in English for many years."¹⁰¹ Additionally, the Pre-Trial Chamber considered the previous determination of the Single Judge that counsel's claim in a previous Defense application for translation contradicted the assertions made in her application form as to her language proficiencies.¹⁰² Finally, the Pre-Trial Chamber noted that it is the inherent power of the Chamber "to control the proceedings in such a way as to ensure that they be conducted fairly and expeditiously."¹⁰³ For the above mentioned reasons, the Pre-Trial Chamber rejected the request, finding that the translation request would unduly delay the proceedings.

In *Prosecutor v. Katanga and Chui*, the Pre-Trial Chamber affirmed its findings from *Lubanga*.¹⁰⁴ In *Katanga*, the Defense counsel for Chui requested that relevant documents be

a0/0104/06 et a/0111/06 a a/0127/06" (Feb. 23, 2007) [reproduced in the accompanying notebook at Tab 21].

⁹⁸ *Id.* at 5.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 7.

¹⁰³ *Id.*

translated into Chui’s working language, namely French.¹⁰⁵ This request had previously been included in a request that was rejected by the Single Judge, and therefore, was being considered by the Pre-Trial Chamber as a motion for reconsideration.¹⁰⁶ The Pre-Trial Chamber affirmed the translation rights afforded to the accused in the *Lubanga* case. The Pre-Trial Chamber noted that rule 76(3) of the Rules of Procedure and Evidence was the only provision “which expressly imposes on the Prosecution a statutory obligation to provide the Defense with evidentiary materials in a language which the suspect fully understands and speaks.”¹⁰⁷ Further, the Pre-Trial Chamber noted that, as required by the case law of the ICC, Mr. Chui had already received in French:

- (i) the warrant of arrest for Mathieu Ngudjolo Chui and the Decision on the Evidence and Information provided by the Prosecution for the Issuance of a Warrant of Arrest for Mathieu Ngudjolo Chui;
- (ii) the Prosecution Charging Document and List of Evidence; and
- (iii) The Interview Notes, Interview Transcripts, and Statements of the witness on which the Prosecution intends to rely at the confirmation hearing.¹⁰⁸

Subsequently, the Pre-Trial Chamber denied the Defense’s request to have all case file documents translated into French. The Chamber’s decision was based on the fact that the required translated documents, as defined in *Lubanga*, had already been received by the Defense.¹⁰⁹ However, the Pre-Trial Chamber did find that a twenty-four hour notice for

¹⁰⁴ Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the Defense for Matheiu Ngudjolo Chui’s Request Concerning Translation of Documents (May 15 2008) [reproduced in the accompanying notebook at Tab 20].

¹⁰⁵ *Id.* at 3.

¹⁰⁶ *Id.* at 5.

¹⁰⁷ *Id.* at 3.

¹⁰⁸ *Id.* at 5.

translator assistance was too long and ordered the Registrar to allow for a much shorter notice requirement.¹¹⁰

B. The International Criminal Tribunal for the Former Yugoslavia

1. Translation rights and procedures as defined by the Statute of the International Criminal Tribunal for the Former Yugoslavia and its Rules of Procedure and Evidence

The Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute) outlines the provisions that govern the functioning of the International Criminal Tribunal for the Former Yugoslavia (ICTY).¹¹¹ Article 21 of the ICTY Statute defines the rights of the accused.¹¹² Specifically, Article 21(4)(a) provides that the accused is entitled “to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.”¹¹³ Further, Article 21(4)(f) entitles the accused “to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal.”

Additionally, the ICTY Rules of Procedure and Evidence (ICTY Rules) describe the procedural rights the accused is entitled to under the ICTY Statute.¹¹⁴ Rule 42 of the ICTY

¹⁰⁹ *Id.* at 6.

¹¹⁰ *Id.*

¹¹¹ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, May 25, 1993, U.N. Doc/S/Res/827 [reproduced in the accompanying notebook at Tab 12].

¹¹² *Id.* at art. 21.

¹¹³ *Id.* at art. 21(4)(a).

¹¹⁴ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Rules of Procedure and Evidence, IT/32/Rev. 44 (as amended Dec. 10, 2009) [reproduced in the accompanying notebook at Tab 6].

Rules reaffirms the rights of the accused provided for in Article 21 of the ICTY Statute. Specifically, Rule 42(A)(ii) specifies that the Prosecutor must inform the accused of his right “to have free assistance of an interpreter if the suspect cannot understand or speak the language to be used for questioning.”¹¹⁵ Additionally, Rule 3 of the ICTY Rules discusses the issue of language in court proceedings.¹¹⁶ Rule 3(B) states that “an accused shall have the right to use his or her own language.”¹¹⁷ Further, Rule 3 defines the obligations of the parties in regards to translation requests. Rule 3(D) states:

Counsel for an accused may apply to the Presiding Judge of a Chamber for leave to use a language other than the two working ones or the language of the accused. If such leave is granted, the expenses of interpretation and translation shall be borne by the Tribunal to the extent, if any, determined by the President, taking into account the rights of the defense and the interests of justice.¹¹⁸

Practically, the translation burden is then borne by the registrar, through Rule 3(E). Rule 3(E) dictates that “the Registrar shall make any necessary arrangements for interpretation and translation into and from the working languages.”¹¹⁹

Rule 66 of the ICTY Rules governs the rules regarding disclosures made by the Prosecutor.¹²⁰ Rule 66(B) mandates that the prosecutor make available, at the request of the defense, any “books, documents, photographs, and tangible objects in the Prosecutor’s custody”

¹¹⁵ *Id.* at rule 42(A)(ii).

¹¹⁶ *Id.* at rule 3.

¹¹⁷ *Id.* at rule 3(B).

¹¹⁸ *Id.* at rule 3(D).

¹¹⁹ *Id.* at rule 3(E).

¹²⁰ *Id.* at rule 66.

that would be “material” for the Defense’s case or that are intended to be used as evidence for the Prosecution.¹²¹

2. Rules and Procedures as interpreted in ICTY case law

In *Prosecutor v. Naletilic*, the Pre-Trial Chamber of the ICTY addressed a Defense motion concerning translation of documents.¹²² The Defense’s motion requested “translation of all documents, intended to be tendered and subsequently admitted by the Prosecutor, into the language the accused understands.”¹²³ The Defense’s motion acknowledged that the accused was entitled to a fair trial under Article 21(4) of the ICTY Statute and that a fair trial was “not guaranteed by the fact that Counsel understands and speaks English.”¹²⁴ In response, the Pre-Trial Chamber noted that Article 21 of the ICTY Statute and Rule 3 of the ICTY Rules do not “explicitly entitle the accused to receive all documents from the Prosecutor in a language he understands.”¹²⁵ However, the Pre-Trial Chamber did recognize that Article 21(4) does entitle the accused to receive any evidentiary document which “forms the basis of the determination by the Chamber of the charges against the accused.”¹²⁶ Subsequently, The Pre-Trial chamber decided that:

¹²¹ *Id.* at rule 66(B).

¹²² *Prosecutor v. Naletilic*, Case No. IT-98-34-A, Decision on Defence’s Motion Concerning Translation of All Documents (Oct. 18, 2001) [reproduced in accompanying notebook at Tab 22].

¹²³ *Id.* at 2.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 3.

all exhibits which the parties intend to submit for admission shall be available in a language the accused understands, as well as in at least one of the official languages of the Tribunal at the time of it being submitted to the Chamber for admission and that it is the responsibility of the party intending to submit the documents, to ensure that such translations are available.¹²⁷

Further, the Naletilic Pre-Trial Chamber ordered that all documents, going forward, that were “not in a language the accused understands as well as at least one of the official languages of the Tribunal [...] may not be submitted to the Chamber for admission.”¹²⁸ Finally, the Pre-Trial Chamber ordered that all documents already submitted must be translated as soon as “practicable.”¹²⁹ In the *Naletilic case*, the Pre-Trial Chamber recognized that the right to translation is not absolute but is limited to documents that make up the evidentiary support used to prove the charges against the accused. Further, the Pre-Trial Chamber placed the translation burden on the party submitting the documents to the Chamber.

In *Prosecutor v. Seselj*, Trial Chamber II considered whether the Prosecution’s motion to order the appointment of counsel to the accused required translation.¹³⁰ The accused was conducting his own defense and had previously sent a letter to the court stating that he would only accept court documents in Serbian.¹³¹ The Chamber recognized that, pursuant to Article 21(1) and 21(4)(a) of the ICTY Statute and Rule 53*bis*(B), 47(G) and Rule 66(A) of the ICTY Rules, the accused was entitled to the following documents in a language he understood:

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Prosecutor v. Seselj*, IT-03-67-PT, Order on Translation of Documents (Mar. 6, 2003) [reproduced in accompanying notebook at Tab 24].

¹³¹ *Id.* at 1.

- (a) a copy of the Indictment;
- (b) a copy of the supporting material which accompanied the Indictment against the Accused and all prior statements obtained by the Prosecutor from the Accused, irrespective of whether these items will be offered at trial;
- (c) discovery material which appeared in a language understood by the Accused at the time it came under the Prosecution's custody or control;
- (d) written decisions and orders rendered by the Trial Chamber or Appeals Chamber.¹³²

Subsequently, the Chamber ordered that the motion be translated into a language the accused understood.¹³³ The Chamber's decision was based on the finding that the accused had a right "to be heard in relation to the Prosecution's Motion."¹³⁴ Further, the Chamber ordered the Registry to provide any future motions filed by the Prosecution to the accused in a language he understood.¹³⁵ This order was limited to the time the accused was without counsel.¹³⁶ In the *Seselj* case, the ICTY affirmed previous rulings on translation rights as understood by the ICTY Statute and ICTY Rules. However, the Chamber seemed to give some deference to the fact that the accused was without representation. Thus, the Chamber acknowledged the right of the accused to review the motion in a language he understood as an extension of the right to be heard in a language he understood.¹³⁷

¹³² *Id.* at 2.

¹³³ *Id.* at 3.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

In *Prosecutor v. Prlic*, the ICTY Pre-Trial Chamber issued an Order for the Translation of Documents.¹³⁸ The order was in response to the accused's motion for translation of documents disclosed by the Prosecution.¹³⁹ As in the *Seselj* case, the accused had decided to conduct his own defense.¹⁴⁰ The Pre-Trial Chamber recognized that, pursuant to the ICTY Statute and ICTY Rules, the accused must have access to the following documents in a language which he understood:

- copy of the Indictment;
- Copies of the supporting material which accompanied the Indictment against the Accused, as well as all prior statements obtained by the Prosecutor from the Accused, irrespective of whether they re used at trial [...];
- copies of the statements (hard or electronic copies, or audio recordings) of all the witnesses whom the Prosecutor indentds to call to testify at trial, copies of all written statements taken accordance with Rule 92 *bis*, and copies of the statements of additional Prosecution witnesses when a decision is made to call those witnesses [...];
- material in the Prosecutor's custody or control which is covered by disclosure obligations and is written in a language the Accused understands [...];
- evidence made available by the Prosecutor which may suggest the innocence or mitigate the guilt of the Accused [...];
- written decisions and orders rendered by the Tribunal. [sic]¹⁴¹

Further, the Pre-Trial Chamber noted that the accused was conducting his own defense, and therefore, was entitled to receive, in addition to the documents listed above, "all the Prosecution motions as well as the responses by the Defense Counsel for the co-Accused."¹⁴² Subsequently, the Pre-Trial Chamber ordered that "all future motions, responses thereto, orders and decisions

¹³⁸ *Prosecutor v. Prlic*, IT-04-74-PT, Order on Translation of Documents (Jan. 17, 2006) [reproduced in the accompanying notebook at Tab 23].

¹³⁹ *Id.* at 2.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 3.

rendered by the pre-trial Judge and Trial Chamber II” be translated into a language the accused understood.¹⁴³ Again, the Pre-Trial chamber recognized the fundamental right to the translation of some documents as outlined in the ICTY Statute and ICTY Rules. Further, the Pre-Trial Chamber seemed to extend the right to translation in situations where the accused is conducting his own defense.

C. Translation provisions of the International Criminal Tribunal for Rwanda

1. The Statute of the International Tribunal for Rwanda

The Statute of the International Tribunal for Rwanda (Rwanda Statute) defines the provisions which govern the operation of the International Criminal Tribunal for Rwanda (ICTR).¹⁴⁴ Article 20 of the Rwanda Statute defines the rights of the accused.¹⁴⁵ Specifically, Article 20(4)(a) entitles the accused “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.”¹⁴⁶ Further, Article 20(4)(f) entitles the accused “to have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda.”¹⁴⁷

2. The ICTR Rules of Procedure and Evidence

¹⁴³ *Id.*

¹⁴⁴ Statute of the International Tribunal for Rwanda, Nov. 8, 1994, U.N. Doc S/RES/955. [reproduced in the accompanying notebook at Tab 11].

¹⁴⁵ *Id.* at art. 20.

¹⁴⁶ *Id.* at art. 20(4)(a).

¹⁴⁷ *Id.* at art. 20(4)(f).

The ICTR Rules of Procedure and Evidence (ICTR Rules) further elaborate the translation rights of the accused.¹⁴⁸ Mirroring much of the language of the ICTY Rule 3, Rule 3(C) of the ICTR Rules states:

Counsel for the accused may apply to a Judge or a Chamber for leave to use a language other than the two working ones or the language of the accused. If such leave is granted, the expenses of interpretation and translation shall be borne by the Tribunal to the extent, if any, determine by the President, taking into account the rights of the Defense and the interests of justice.¹⁴⁹

Further, Rule 3(E) provides that the Registrar shall make any necessary arrangement for interpretation and translation of the working languages.¹⁵⁰ Additionally, Rule 47(G) addresses translation of the Indictment itself.¹⁵¹ Rule 47(G) states:

The indictment as confirmed by the Judge shall be retained by the Registrar, who shall prepare certified copies bearing the seal of the Tribunal. If the accused does not understand either of the official languages of the Tribunal and if the language understood is known to the Registrar, a translation of the indictment in that language shall also be prepared, and a copy of the translation attached to each certified copy of the indictment.¹⁵²

Further, Rule 55 addresses document translation as related to the execution of arrest warrants.¹⁵³ Specifically, Rule 55(B)(iii) dictates the Registrar shall transmit “a statement of the rights of the accused; and if necessary a translation thereof in a language understood by the accused” to the

¹⁴⁸ ICTR Rules of Procedure and Evidence, Jun. 29, 1995, U.N. Doc. ITR/3/REV.1 [reproduced in accompanying notebook at Tab 5].

¹⁴⁹ *Id.* at rule 3(C).

¹⁵⁰ *Id.* at rule 3(E).

¹⁵¹ *Id.* at Rule 47(G).

¹⁵² *Id.*

¹⁵³ *Id.* at Rule 55.

national authorities of the State where the accused resides.¹⁵⁴ Generally, the provisions laid out in the ICTR Statute and Rules are similar in both language and scope to the rules promulgated by other international tribunals, especially those of the ICTY.

D. Translation provisions of the Special Court for Sierra Leone

1. Statute of the Special Court for Sierra Leone

The Statute of the Special Court for Sierra Leone (SCSL Statute) establishes the provisions which govern the functioning of the Special Court for Sierra Leone (SCSL).¹⁵⁵ Article 17 of the SCSL Statute defines the rights of the accused.¹⁵⁶ Specifically, Article 17(4)(a) entitles the accused “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.”¹⁵⁷ Additionally, Article 17(4)(f) entitles the accused “to have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court.”¹⁵⁸

2. Rules of Procedure and Evidence

The Rules of Procedure and Evidence (SCSL Rules) enumerate the rights afforded to the accused in the SCSL Statute.¹⁵⁹ Rule 3 of the SCSL Rules pertains to the working languages of

¹⁵⁴ *Id.*

¹⁵⁵ Statute of the Special Court for Sierra Leone, Jan. 16, 2002, *available at* <http://www.sc-sl.org/DOCUMENTS/tabid/176/Default.aspx> [reproduced in accompanying notebook at Tab 13].

¹⁵⁶ *Id.* at art.17.

¹⁵⁷ *Id.* at art. 17(4)(a) .

¹⁵⁸ *Id.* at art. 17(4)(f).

¹⁵⁹ Special Court for Sierra Leone, Rules of Procedure and Evidence, as amended Mar. 7, 2003, *available at* <http://www.sc-sl.org/DOCUMENTS/tabid/176/Default.aspx> [reproduced in accompanying notebook at Tab 10].

the court.¹⁶⁰ Rule 3 provides that “the accused shall have the right to use his own language” and that the Registrar “shall make any necessary arrangements for interpretation and translation.”¹⁶¹

Additionally, Rule 52 addresses translation rights in relation to the service of an indictment.¹⁶²

Specifically, Rule 52 states:

An indictment that has been permitted to proceed by the Designated Judge shall be retained by the Registrar, who shall prepare certified copies bearing the seal of the Special Court. If the accused does not understand English and if the language understood is a written language known to the Registrar, a translation of the indictment in that language shall also be prepared. In the case that the accused is illiterate or his language is an oral language, the Registrar will ensure that the indictment is read to the accused by an interpreter, and that he is served with a recording of the interpretation.¹⁶³

Generally, the rights and provisions outlined in the SCSL Statute and SCSL Rules are in line with similar international tribunals. The SCSL ensures that fundamental documents related to the proof of the charges are to be translated. Further, the burden of translation falls onto the Court’s Registrar.

IV. Translation rights under human rights instruments and courts

A. International human rights instruments

The Universal Declaration of Human Rights (UDHR) enumerates the universal rights which belong to every person.¹⁶⁴ Throughout the UDHR, the notion of a fair trial is prevalent. Specifically, Article 11(1) of the UDHR states “everyone charged with a penal offense has the

¹⁶⁰ *Id.* at rule 3.

¹⁶¹ *Id.* at rule 3(B)(D).

¹⁶² *Id.* at rule 52.

¹⁶³ *Id.* at rule 52(C).

¹⁶⁴ Universal Declaration of Human Rights, Dec. 10, 2948, U.N. Doc A/810 [reproduced in accompanying notebook at Tab 14].

right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.”¹⁶⁵ The right to a fair trial has been further defined through the International Covenant on Civil and Political Rights (ICCPR).¹⁶⁶ Article 14(3) of the ICCPR details the minimum guarantees everyone facing any criminal charge is entitled to.¹⁶⁷ Specifically, Article 14(3)(a) entitles everyone “to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.”¹⁶⁸ Further, Article 14(3)(f) ensures that everyone facing any criminal charge shall “have the free assistance of an interpreter if he cannot understand or speak the language used in court.”¹⁶⁹ Additionally, the European Convention on Human Rights (ECHR) mirrors the language of the ICCPR and guarantees certain minimum rights.¹⁷⁰ Article 6 of the ECHR provides:

- 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 the 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;

¹⁶⁵ *Id.* at art. 11(1).

¹⁶⁶ International Covenant on Civil and Political Rights, Dec. 16, 1966, U.N.T.S. 171 [reproduced in accompanying notebook Tab 4].

¹⁶⁷ *Id.* at art. 14(3).

¹⁶⁸ *Id.* at art. 14(3)(a).

¹⁶⁹ *Id.* at art. 14(3)(f).

¹⁷⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS 5; 213 UNTS 221 [reproduced in accompanying notebook at Tab 1].

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.¹⁷¹

Generally, the language used in international human rights instruments has been applied throughout most international tribunals, with some slight deviations. Further, most tribunals have adopted this language with the understanding that all people are entitled to a fair trial. Inherent in this right is the ability of the accused to understand the charges against him and the evidence used to support the charges.

B. Translation rights as interpreted in human rights courts

In *Harward v. Norway*, the UN Human Rights Committee (UNHRC) addressed the issue of “whether [...] the failure of the State party to provide written translations of all the documents used in preparation of the trial violated Mr. Harward’s right to a fair trial under Article 14 of the ICCPR.”¹⁷² Mr. Harward argued that “he was hindered in the preparation of his defense.”¹⁷³ His claim was premised on the fact that, apart from the actual indictment and a small number of other documents, the majority of the court documents were only available in Norwegian, a language he did not understand. Further, he also argued that any requests for document translation were denied by the Norwegian courts.¹⁷⁴ In response, Norway argued that Mr. Harward had received translations of all essential documents, including the indictment, court records, and police reports.¹⁷⁵ In examining the issue, the UNHRC examined whether the lack of

¹⁷¹ *Id.* at art. 6.

¹⁷² *Harward v. Norway*, Communication No. 451/1991, U.N. Doc. CCPR/C/51/D/451/1991, Human Rights Committee at 9.4 (Aug. 16, 2004) [reproduced in accompanying notebook at Tab 25].

¹⁷³ *Id.* at 3.4.

¹⁷⁴ *Id.*

translated documents interfered with Mr. Harward's ability to prepare a defense.¹⁷⁶ The UNHRC noted that, while Mr. Harward did not receive the entirety of his case file translated into a language he understood, his counsel was fluent in the language of the court and he had access to an interpreter throughout the proceedings.¹⁷⁷ Consequently, the UNHRC found that Mr. Harward's rights were not violated.¹⁷⁸

In *Kamasinki v. Austria*, the European Court of Human Rights determined that inadequate translation had not violated Kamasinki's right to defend himself under Article 6 of the ECHR.¹⁷⁹ Mr. Kamasinki put forth a number of complaints about the amount and quality of translation throughout the trial proceedings and claimed that the interpretation inadequacies violated his right to a fair trial.¹⁸⁰ He argued that during the pre-trial investigations he was not provided with a competent interpreter or provided with written translations of the statements he made to the police or investigating judges. Further, he argued that only the titles of the crimes listed in the indictment were translated, while the substance of the indictment was only available in German.¹⁸¹ Additionally, Mr. Kamasinski alleged he did not receive an English translation of the judgment issued by the Regional Court.¹⁸² The ECHR, noting that Article 6(E) did not

¹⁷⁵ *Id.* at 4.7.

¹⁷⁶ *Id.* at 9.5.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 9.6.

¹⁷⁹ *Kamasinski v. Austria*, Application No. 9783/82, Eur. Ct. H.R. (Dec.19, 1989) [reproduced in accompanying notebook at Tab 26].

¹⁸⁰ *Id.* at 72.

¹⁸¹ *Id.* at 78.

require all documents to be translated, found that the availability of an interpreter throughout the court proceedings obviated the need for document translation.¹⁸³ Further, the Court found that the bulk of the evidence indicated that the defendant was aware of the charges against him and was able to adequately mount a defense throughout the trial proceedings.¹⁸⁴ This finding seemed especially clear given that Mr. Kamasinski “sufficiently understood the judgment and its reasoning” well enough to challenge many aspects of the trial and to file an appeal against the sentence.¹⁸⁵

V. Translation rights and procedures under the ECCC

A. Law on the Establishment of the Extraordinary Chambers

The Law on the Establishment of the Extraordinary Chambers (ECCC Law) established the ECCC.¹⁸⁶ Article 35 of the ECCC Law defines the rights the accused is entitled to.¹⁸⁷ Specifically, Article 35(a) entitles the accused “to be informed promptly and in detail in a language that they understand of the nature and cause of the charge against them.”¹⁸⁸ Further, Article 35(c) entitles the accused “to be tried without delay.”¹⁸⁹ Finally, Article 35(f) entitles the

¹⁸² *Id.* at 84.

¹⁸³ *Id.* at 74.

¹⁸⁴ *Id.* at 81.

¹⁸⁵ *Id.* at 85.

¹⁸⁶ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea, Oct. 27, 2004, NS/RKM/1004/006 [reproduced in accompanying notebook at Tab 7].

¹⁸⁷ *Id.* at art. 35.

¹⁸⁸ *Id.* at art. 35(a).

¹⁸⁹ *Id.* at art. 35(c).

accused “to have the free assistance of an interpreter if the accused cannot understand or does not speak the language used in the court.”¹⁹⁰

B. ECCC Internal Rules

The ECCC Internal Rules define the procedures for proceedings before the ECCC.¹⁹¹

Rule 30 of the ECCC Internal Rules discusses the use of interpreters and states:

In case of need, the Co-Prosecutors, Co-Investigating Judges and Chambers shall use interpreters. Any witness or party may also request the use of an interpreter where needed. Each interpreter shall take an oath or affirmation in accordance with his or her religion or beliefs to interpret honestly, confidentially and to the best of his or her ability. Interpreters may not be selected from among ECCC Judges, Co-Prosecutors, Judicial Police, Investigators, parties or witnesses.¹⁹²

C. ECCC Practice Direction

The ECCC Practice Direction defines the rules for the filing of documents in the ECCC.¹⁹³ Article 7 of the ECCC Practice Direction discusses the language and translation of documents in the ECCC. Article 7.1 dictates that “all documents shall be filed in Khmer as well as in English and/or French.”¹⁹⁴ Further, Article 7.2 stipulates:

Any party who has notified the relevant greffiers under Article 2.2 shall duly file and receive all documents in Khmer and the other chosen official language(s). The Court

¹⁹⁰ *Id.* at art. 35(f).

¹⁹¹ Extraordinary Chambers in the Courts of Cambodia, Internal Rules, Feb. 1, 2008, available at http://www.eccc.gov.kh/english/internal_rules.aspx [reproduced in accompanying notebook at Tab 2].

¹⁹² *Id.*

¹⁹³ Extraordinary Chambers in the Courts of Cambodia, Practice Direction- Filing of Documents before the ECCC, Jun. 5, 2009, ECCC/2007/1/Rev.4 [reproduced in accompanying notebook at Tab 3].

¹⁹⁴ *Id.* at art. 7.1.

Management Section shall ensure the timely translation of documents filed in accordance with this Practice Direction.¹⁹⁵

Additionally, Article 7.2 specifies the obligations of the parties when filing documents with the ECCC stating:

Where the filing party is the author of documents, the filing party shall submit each language version of the document separately, provided that where there are terms which require precise definition in another language, such terms shall be stated in brackets.¹⁹⁶

VI. Conclusion

International courts must strive to balance the rights to which the accused are entitled. Often, this balancing act can create tension between the accused's rights. For instance, the accused "has a right to receive the indictment in a language he or she understands and those documents which constitute proof of the charges against the accused."¹⁹⁷ Practically, this right places increased translation burdens on the courts and counsels because "the sheer volume of documents that must be translated into several official or working languages of a tribunal creates unacceptable delays."¹⁹⁸ The ECCC's practices regarding the accused right to document translation as illustrated in the Translation Order and affirmed by the Pre-Trial Chamber Decision are in keeping with the standards set forth in the various governing documents

¹⁹⁵ *See id.* at art. 7.2 (Discussing the filing of documents before the court and notification of the relevant "greffiers" or registrar).

¹⁹⁶ *Id.* at art. 7.3

¹⁹⁷ Kavitha Giridhar, Memorandum, International War Crimes Research Portal 67 (2009) available at http://law.case.edu/war-crimes-research-portal/by_year.asp?year=2009 [reproduced in the accompanying notebook at Tab 27].

¹⁹⁸ Joshua Karton, *Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony*, 41 VAND. J. TRANSNAT'L L. 1, 40 (2008) [reproduced in the accompanying notebook at Tab 28].

regulating the ECCC. As to the ECCC Law, the translation rights outlined preserve the right to a fair trial while ensuring that the accused is tried without delay. Additionally, the translation rights prescribed in the Pre-Trial Chamber Decision are in keeping with both the ECCC Internal Rules and ECCC Practice Direction.

The accused is not entitled to the translation of all documents in the case file. However, the accused is entitled to the translation of documents necessary to inform the accused of the charges against him and to the translation of documents necessary to prove the charges in the indictment. Further, the accused is entitled to translation of all decisions issued by the various trial chambers. Additional translation requests are permitted and must be coordinated with the CMS. Finally, the assignment of a free interpreter mitigates the need for additional translation requests, especially in situations where time is limited.

Further, the ECCC's practices are in line with the practices of various international tribunals. The ECCC has adopted much of the same ICCPR statutory language used by other international tribunals. The outlined provisions, as defined under the ICCPR, have been found to be in keeping with the prevailing international standards and rights the accused is entitled to. Additionally, the ECCC, in assigning translation obligations to the parties, has adopted a dual approach. The ECCC has placed obligations both on the defense and on the CMS to ensure that translation requests are handled in a fair and expeditious manner.

Finally, from a human rights prospective, it has been recognized that "an accused party's access to fundamental fair trial rights is a key indicator of equitability in any system of justice [...]"¹⁹⁹ The ECCC's practices on document translation are in line with prevailing international

human rights standards. The Pre-Trial Chamber's decision and determination of what documents are required to be translated ensure the fundamental rights of the accused under Article 14 of the ICCPR and Article 6 of the ECHR. On the whole, The ECCC's standards and practices pertaining to document translation meet the standards both of the ECCC's founding documents and of the international community. The standards and practices promulgated by the ECCC preserve the fundamental fair trial rights to which the accused is entitled.

¹⁹⁹ Wolfgang Schomburg, *The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights*, 8 Nw. U.J. Int'l Hum. Rts. 1 (2009) [reproduced in accompanying notebook at Tab 29].