

# មជ្ឈមណ្ឌលឯកសារកម្ពុជា

## MEMORANDUM

TO: Anne Heindel, DC-Cam Legal Advisor  
FROM: Sadie Blanchard, DC-Cam Legal Associate of Documentation Center of Cambodia, Yale Law School  
DATE: July 18, 2008  
RE: **Obligation of ECCC Regarding Document Translation for Defendants and Their Attorneys**

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### QUESTIONS PRESENTED

- I. What are the obligations of the ECCC regarding translation of documents into the language of the accused?
  
- II. What are the obligations of the ECCC regarding translation of documents in defendants' case files for the benefit of defendants' attorneys?

### ANALYSIS

Two translation issues have been raised before the ECCC: rights of the charged person to translation of documents into his or her own language,<sup>1</sup> and the court's obligations to translate documents into the language of a charged person's attorney.<sup>2</sup>

This memo will assess the ECCC's obligations toward charged persons and their attorneys with respect to document translation. The ECCC Law and Rules do not expressly provide for document translation for defendants or attorneys.<sup>3</sup> The Practice Direction on Filing of Documents (Practice Direction) provides the only explicit rules on

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<sup>1</sup> See Order on Translation Rights and Obligations of the Parties, Criminal Case File No. 002/14-08-2006, Investigation No. 002/19-09-2007-ECCC-OCIJ, 1-2 [hereinafter Order on Translation].

<sup>2</sup> See *id.*; Prosecutor v. Khieu Samphan, Case No. 002/19-09-2007-ECCC/OCIJ (PTC04), Decision on Application to Adjourn Hearing on Provisional Detention Appeal, ¶ 4 (Pre-Trial Chamber, 23 Apr. 2008).

<sup>3</sup> See Law on the Establishment of the Extraordinary Chambers as Amended 27 October, 2004, No. NS/RKM/1004/006, art. 35(f) [hereinafter ECCC Law]; ECCC Internal Rules (*as adopted 1 Feb. 2008*), R.30 [hereinafter Internal Rules].

document translation and is limited to filings.<sup>4</sup> Because the ECCC core documents do not clearly define the scope of the right to document translation for accused and their attorneys,<sup>5</sup> this memo will look to international standards, in keeping with Article 33 new of the ECCC Law.<sup>6</sup>

### ***I. Defendant's Rights to Translation Into a Language He or She Understands***

This section will examine the defendant's right to have documents translated into a language he or she understands. The ECCC Law and Rules do not explicitly provide for document translation for defendants, but they do provide for "the use of an interpreter."<sup>7</sup> Other courts have held a right to "interpretation" to encompass a right to translation of some documents.<sup>8</sup> The ECCC Practice Direction on Filing of Documents provides the only explicit rules on providing documents in the language of the accused, requiring that all filings be in the charged persons' native language of Khmer in addition to one of the other official languages.<sup>9</sup>

The ECCC instruments do not clearly define the scope of defendants' rights to translation of documents other than filings. Founding documents of other international courts and

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<sup>4</sup> See Filing of Documents Before the ECCC, Practice Direction ECCC/01/2007/Rev.2, arts. 2.2, 7.1 & 7.2 [hereinafter Practice Direction].

<sup>5</sup> This fact is noted in the Order on Translation, *supra* note 1, § A.1-.2.

<sup>6</sup> ECCC Law, art. 33.

<sup>7</sup> Article 35(f) of the ECCC Law guarantees "the free assistance of an interpreter if the accused cannot understand or does not speak the language used in the court." Rule 30 of the Internal Rules says, "Any witness or party may also request the use of an interpreter where needed." In professional interpretation and translation vernacular, "interpretation" and "translation" are distinct undertakings: interpretation facilitates *oral* communication across languages, while translation facilitates *written* communication. See, e.g., "Terms of the Profession," National Association of Judiciary Interpreters and Translators, available at [www.najit.org](http://www.najit.org) (last visited 18 July 2008).

<sup>8</sup> Article 20(4)(f) of the International Criminal Tribunal for Rwanda Statute [hereinafter ICTR Statute] is almost identically worded to Article 35(f) of the ECCC Law. The ICTR has found that "Article (20)(4)(f) of the Statute covers, not only oral proceedings, but also, to an extent to be determined subsequently for the purposes of the case at bench, some documents relating to his case." Prosecutor v. Muhimana, Case No. ICTR-95-I-B-I, Decision on Defence Motion for the Translation of Prosecution and Procedural Documents into Kinyarwanda, ¶ 16 (Trial Chamber I, 6 Nov. 2001). Article 6(3)(e) of the European Convention on Human Rights is also worded almost identically to Article 35(f). In *Leudicke v. Germany* and *Kamasinski v. Austria*, the European Court of Human Rights held that Article 6(3)(e) applies not only to oral statements made at trial but also to documentary material. *Leudicke v. Germany*, Application Nos. 6210/73; 6877/75; 7132/75, Judgment, 28 Nov. 1978, ¶ 48. See also *Kamasinski v. Austria*, Application No. 9783/82, Judgment, ¶ 74 (European Court of Human Rights, 19 Dec. 1989).

<sup>9</sup> Practice Direction, arts. 7.1 & 7.2.

human rights instruments have been similarly vague regarding the scope of the right to translation. The Rome Statute and the International Criminal Court (ICC) Rules of Procedure and Evidence (ICC Rules) provide the most explicit guarantees of defendant's translation rights.<sup>10</sup> The Rome Statute guarantees "free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks."<sup>11</sup> Likewise, though courts use varying language when defining the scope of translation rights, they have generally pared the issue down to the question of what translations are necessary to meet the requirements of fairness. For example, the European Court of Human Rights (ECHR) has said that the right includes "translation or interpretation of all those documents or statements in the proceedings instituted against [the defendant] which it is necessary for him to understand in order to have the benefit of a fair trial."<sup>12</sup>

Courts have framed the fairness principle in three ways. The U.N. Human Rights Committee (HRC) has viewed it from the perspective of providing adequate facilities for the preparation of defense.<sup>13</sup> The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have viewed it as a balance between the defendant's interest in receiving translated documents and his or her right to be tried without undue delay, realizing that as translation requirements increase, the speed of the proceedings decreases.<sup>14</sup> The ICC and ECHR have stated that such translations must be provided as to "enable the defendant to have

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<sup>10</sup> See Rome Statute of the International Criminal Court, arts. 55(1)(c) & 67(1)(f) [hereinafter Rome Statute]; International Criminal Court, Rules of Procedure and Evidence, R.42, R.76(3), R.187 & R.203 [hereinafter ICC Rules].

<sup>11</sup> Rome Statute, art. 67(1)(f).

<sup>12</sup> *Leudicke*, *supra* note 8, ¶ 48.

<sup>13</sup> *Harward v. Norway*, Communication No. 451/1991, U.N. Doc. CCPR/C/51/D/451/1991, ¶ 9.4 (Human Rights Committee, 16 Aug. 1994). The complainant was contesting his conviction on the grounds that over one thousand pages of documents in his case file were in a language he did not understand. The court based its decision on "whether, in the specific . . . case, the failure of the State party to provide written translations of all documents used in the preparation of the trial has violated [the defendant's] right to a fair trial, more specifically his right under article 14, paragraph 3(b) [of the ICCPR] to have adequate facilities to prepare his defense."

<sup>14</sup> See *Prosecutor v. Seselj*, Case No. IT-03-67-PT, Order on Translation, 1 (Trial Chamber II, 6 March 2003); *Muhimana*, *supra* note 8, ¶ 12; *Prosecutor v. Ljubicic*, Case No. IT-00-41-PT, Decision on Defence Counsel's Request for Translation of All Documents, 3 (Trial Chamber I, 20 Nov. 2002).

knowledge of the case against him and to defend himself, notably by being able to put before the court his version of events.”<sup>15</sup> The ECCC Co-Investigating Judges (OCIJ) have likewise acknowledged these principles of fairness as a framework for their Order on Translation Rights (Order).<sup>16</sup>

### ***A. Applying The Fairness Principle: Defendant is Not Entitled to Translation of Everything***

In agreement with the observation of the OCIJ in the Order on Translation Rights,<sup>17</sup> international courts have repeatedly held that a defendant’s right to translations of documents into a language he or she understands extends neither to all documents in the case file<sup>18</sup> nor to all filings submitted.<sup>19</sup> The ICTY and ICTR have denied requests for translation of all documents on the basis that “translation in advance of each and every document into the [language of the accused] beyond what is required by the Statute and Rules 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.”<sup>20</sup> The ICC has held that the fairness principle does “not grant [the defendant] the right to have all procedural documents and all evidentiary materials disclosed by the Prosecution

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<sup>15</sup> Prosecutor v. Dyilo, Case No. ICC-01/04-01/06, Decision on the Requests of the Defence of 3 and 4 July 2006 (Pre-Trial Chamber I, 4 Aug. 2006) (*quoting Kamasinski, supra* note 8, ¶ 74).

<sup>16</sup> Order on Translation, *supra* note 1, §§ A.3-.5, B.2.

<sup>17</sup> *Id.* §§ A.3, B.2.

<sup>18</sup> See *Harward, supra* note 14, ¶ 9.5; Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on Defence for Mathieu Ngudjolo Chui’s Request Concerning Translation of Documents, 3, 5 (Pre-Trial Chamber I, 15 May 2008) [hereinafter *Katanga*]; Prosecutor v. Chui, Case No. ICC-01/04-02/07, Decision on the Defense Request Concerning Time Limits, 4 (Pre-Trial Chamber I, 27 Feb. 2008) [hereinafter *Chui*]; *Muhimana, supra* note 8, ¶ 25; *Seselj, supra* note 15, at 1; *Ljubicic, supra* note 15, at 3; Prosecutor v. Naletilic, Case No. IT-98-34-T, Decision on Defence’s Motion Concerning Translation of All Documents, 3 (Trial Chamber I Section A, 18 Oct. 2001); Prosecutor v. Delalic, Case No. IT-96-21-T, Decision on Defence Application for Forwarding the Documents in the Language of the Accused, ¶ 8 (Trial Chamber, 25 Sept. 1996); Klimentyev v. Russia, Application No. 46503/99, Judgment, 16 Nov. 2006, ¶ 109; *Kamasinski, supra* note 8, ¶ 74.

<sup>19</sup> See *Katanga, supra* note 19, at 3, 5; *Chui, supra* note 19, at 4; *Dyilo, supra* note 16, at 6; *Muhimana, supra* note 8, ¶¶ 12, 26; *Seselj, supra* note 1, at 1; *Ljubicic, supra* note 15, at 3; *Kamasinski, supra* note 8, ¶ 74.

<sup>20</sup> *Seselj, supra* note 1, at 1; see also *Muhimana, supra* note 8, ¶ 12; *Ljubicic, supra* note 15, at 3; see also *Delalic, supra* note 19, ¶ 8 (holding that guarantees to translations given in the Statute of the International Criminal Tribunal for the Former Yugoslavia (*as amended* 28 Feb. 2006) [hereinafter ICTY Statute] “do not extend to all material.”).

translated.”<sup>21</sup> The ECHR has held that a defendant’s fair trial rights were not violated by the fact that not all the documents in his case file were in a language he understood.<sup>22</sup> The ICTY has denied even a pro se defendant translation of all documents.<sup>23</sup>

***B. Defense Team’s Ability to Understand Documents Mitigates  
Unfairness of Defendant’s Inability***

Multiple international courts have held that an attorney’s ability to understand documents mitigates possible unfairness from the defendant’s inability to understand the documents himself or herself. Relatedly, the ICTY has held that the mere availability to an accused of an attorney who could understand documents mitigates against unfairness, even if the accused chooses not to utilize such an attorney.

In *Harward v. Norway*, the U.N. Human Rights Committee determined that the ability of a defendant’s attorney to read documentary evidence in his case file mitigated against unfairness in a Norwegian court’s refusal to translate all documents into a language the defendant understood. The HRC reasoned that the defendant

was represented by a Norwegian lawyer of his choice, who had access to the entire file, and that the lawyer had the assistance of an interpreter in his meetings with Mr. Harward. Defense counsel therefore had opportunity to familiarize himself with the file and, if he thought necessary, to read out Norwegian documents to [the defendant] . . . so that [the defendant] could take note of its contents through interpretation.<sup>24</sup>

In *Dyilo*, a case before the ICC, the accused requested translation of prosecution disclosures into French, the working language of the court which he understood.<sup>25</sup> In its decision denying the request, the ICC took into consideration that although the defendant’s attorney is required by the Rome Statute to be fluent in only one of the

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<sup>21</sup> *Dyilo*, *supra* note 16, at 5-6; *see also Katanga*, *supra* note 19, at 6 (holding provision of translations of interview notes, transcripts, and witness statements sufficient and denying the defense request to be furnished automatically with translations of all submissions).

<sup>22</sup> *Klimentyev*, *supra* note 19, ¶¶ 102, 109.

<sup>23</sup> *Seselj*, *supra* note 1, at 1.

<sup>24</sup> *See Harward*, *supra* note 14, ¶ 9.5.

<sup>25</sup> *Dyilo*, *supra* note 16, at 2, 4.

working languages of the court, he had filed motions in both English and French.<sup>26</sup> It is unclear what effect this consideration had on the court's decision to deny the defendant's request. However, it is noteworthy that the court considered this factor in its decision.

Similarly, in *Ljubicic*, the ICTY issued a decision on the defendant's request to have all documents submitted to the defense in the defendant's language.<sup>27</sup> The court held that although the defendant could not understand all the documents in the case, "at least one of the defense counsel is presumed to be fluent in one of the official languages of the Tribunal and should be capable of fully participating in the proceedings."<sup>28</sup> Therefore, the defendant was not entitled to translation of all documents, but only those required by the ICTY Rules, ICTY Statute, and standards of fairness as discussed in Part E.1 to Part E.5 below.

The ICTY has also considered an accused's refusal to choose available defense counsel fluent in both one of the official languages of the court and the language of the accused as a factor in denying his request for translation of all documents. In *Seselj*, the accused wished to represent himself and informed the court that he would accept court documents and prosecution materials only in Serbian.<sup>29</sup> The court denied his request for all documents but granted him translation of prosecution motions (without attachments) for as long as he represented himself.<sup>30</sup> In doing so, the court granted him more than was required by the ICTY Statute, ICTY Rules, and practice of the tribunal, but less than all documents he requested.<sup>31</sup>

The *Seselj* decision suggests that a defendant's failure to take advantage of options provided him by the structural documents of the court to address language difficulties

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<sup>26</sup> *Dyilo*, *supra* note 16, at 4 (denying defense request to require prosecution to provide translation of all documents that prosecution is required to disclose to defense, denying defense request to have all future deadlines run from receipt of procedural documents in French, but granting defense free use of an interpreter for translation of documents provided to the defense).

<sup>27</sup> *Ljubicic*, *supra* note 15.

<sup>28</sup> *Id.* at 3.

<sup>29</sup> *Seselj*, *supra* note 1, at 1.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

may be used as a rationale to limit his ability to request translation of documents into a language he understands beyond what is required by the Rules and Statute. The ECCC OCIJ has already invoked this principle twice, saying, “the Parties (including the charged person) must contribute to the resolution of their own language needs, by using the linguistic capacity within their teams and from the Defence Support Section.”<sup>32</sup> The reasoning in these international decisions will likely be applied by the ECCC to deny any defendant’s request to have all evidentiary documents that exist in English or French translated into Khmer, if the defendant has a foreign attorney who is able to understand the documents.

### *C. Provision of Interpreter May Cure Non-Translation of Documents*

The HRC and ECHR have determined that providing a defendant with an interpreter is an adequate substitute for provision of certain documents in a language the defendant understands.<sup>33</sup>

Similarly, the ICTR has said that if the Registry of the court finds it difficult to have certain documents translated into the language of the accused, it may have them interpreted “to enable the Accused to get a gist of the contents.”<sup>34</sup> Moreover, it is the practice of the ICC to provide an interpreter to the defense team in lieu of providing it with translations of documents beyond a required core set.<sup>35</sup>

The OCIJ’s Order, providing that “each defence team should have at its disposal, as soon as possible, free of charge and full time, the assistance of a translator . . . to ensure that

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<sup>32</sup> Order on Translation, *supra* note 1, § A.4; *see also* *Khieu Samphan*, *supra* note 2, ¶ 12.

<sup>33</sup> *See Harward*, *supra* note 14, ¶ 9.5 (holding that the failure to provide a defendant with written translations of documents did not violate the defendant’s fair trial rights because he had access to an interpreter who could orally interpret the documents as the defense counsel read them to the accused); *Kamasinski*, *supra* note 8, ¶¶ 80, 81, 85 (holding that because a defendant was provided with oral interpretations of the indictment and judgment, his right to a fair trial was not violated by the absence of written translations of these documents).

<sup>34</sup> *Muhimana*, *supra* note 8, ¶ 30.

<sup>35</sup> *See* Part I.D, *infra*, for full discussion.

the charged persons and the defence teams can have certain documents translated as required,”<sup>36</sup> is thus in keeping with the practice of other international courts.

#### ***D. Where Should the Burden of Document Translation be Placed?***

The ICTR and the ICC have taken two different approaches to providing document translation into the language of the accused. The ICTR requires the Registry of the court to translate documents that have been found necessary to meet the requirements of fairness.<sup>37</sup> The ICC, on the other hand, has said that beyond those documents the prosecution is expressly required to provide in translation to the accused, it is the defense counsel’s responsibility to compose the defense team in a manner that will “allow him to . . . properly be assisted in the presentation of the case before the Chamber and . . . effectively protect the rights of [the defendant].”<sup>38</sup>

The ICC has therefore denied requests to require translations of all procedural documents and evidentiary documents the prosecution is required to disclose, choosing instead to provide defense teams with interpreters to allow them to address their own document translation needs.<sup>39</sup> The Rome Statute and ICC Rules of Procedure and Evidence do not expressly place this obligation on the defense, but instead require the court to arrange necessary translation.<sup>40</sup> The court has chosen to fulfill this obligation by providing the defense with the resources to carry out its own document translation.<sup>41</sup>

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<sup>36</sup> Order on Translation, *supra* note 1, § E.3.

<sup>37</sup> *Muhimana*, *supra* note 8, ¶¶ 10, 13. The ICTY operates similarly to the ICTR, requiring the Registry to produce document translations. See *Delalic*, *supra* note 19, Part III: Disposition.)

<sup>38</sup> *Chui*, *supra* note 19, at 5; see also *Katanga*, *supra* note 19, at 3, 6 (citing *Chui* and denying defendant translations of all submissions and decisions in the case but ordering that an interpreter be available to defendant on shorter than 24 hour notice).

<sup>39</sup> See *Katanga*, *supra* note 19, at 6; *Chui*, *supra* note 19, at 7; *Dyilo*, *supra* note 16, at 8.

<sup>40</sup> Rule 42 of the RPE provides that “the court shall arrange for the translation and interpretation services necessary to ensure implementation of its obligations under the Statute and Rules.”

<sup>41</sup> *Dyilo*, *supra* note 16, at 8.



The ICC based its decision on the absence in its core documents of express provisions requiring the prosecution to provide documents in translation.<sup>42</sup> In contrast to the ICC, the ICTR has found the Registrar rather than the defense responsible for performing translation for the accused.<sup>43</sup> In deciding thus, the ICTR cited provisions of its Statute and Rules that delegate responsibilities to the Registry.<sup>44</sup> A comparison of the core documents of the ICTR and the ICC shows that their different practices are not derived from structural differences in their founding statutes.<sup>45</sup> The difference appears instead to stem from a small divergence in the two courts' internal rules and regulations, and from divergent interpretations by the chambers of what these instruments require.

The only substantive difference between the ICTR and ICC provisions addressing this topic lies in Rule 3(E) of the ICTR Rules of Procedure and Evidence. Rule 3(E) says that “[t]he Registrar shall make *any necessary arrangements* for interpretation and translation of the working languages.”<sup>46</sup> The ICC does not have a comparable provision in its Rules of Procedure and Evidence. The closest provision lies in the ICC Regulations of the Court (ICC Regulations), which provides that the Registrar shall make translations of *specified* documents, including decisions and certain texts.<sup>47</sup> However, the ICC Regulations do not preclude the Registrar from administering translations of other documents. Moreover, other ICC provisions that mirror ICTR provisions giving translation responsibility to the Registrar would appear to make the Registry a natural home for translation administration in the ICC.<sup>48</sup>

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<sup>42</sup> *Dyilo, supra* note 16, at 4-5 (“Considering that rule 76(3) is the only provision which expressly imposes upon the prosecution a statutory obligation to provide the Defence with evidentiary materials in a language the defendant understands”).

<sup>43</sup> *Muhimana, supra* note 8, ¶¶ 10, 13.

<sup>44</sup> *Muhimana, supra* note 8, ¶¶ 10, 13 (citing Statute of the International Tribunal, International Criminal Tribunal for Rwanda, art. 16(1) [hereinafter ICTR Statute] and International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, R.3(E) & R.33(A) (*as amended* 15 June 2007) [hereinafter ICTR Rules]).

<sup>45</sup> *Compare* ICTR Statute, art. 16(1) *with* Rome Statute, art. 43; *compare* ICTR Rules, R.33(A) *with* ICC Rules, R.13(1); *compare* ICTR Rules, R.3(E) *with* ICC Regulations of the Court, regulation 40 [hereinafter ICC Regulations].

<sup>46</sup> ICTR Rules, R.3(E) (emphasis added).

<sup>47</sup> ICC Regulations, regulation 40.

<sup>48</sup> *See supra* note 45.

It appears, then, that the ICC’s decision to place translation duties on the defense team was made largely at the discretion of the chamber rather than following from the requirements of the ICC Rules and the ICC Regulations. The court’s practice of making the defense responsible for its own translations originated in *Prosecutor v. Dyilo*.<sup>49</sup> That decision noted that its rule providing for translations of statements of prosecution witnesses, “is the only provision which expressly imposes upon the prosecution a statutory obligation to provide the Defence with evidentiary materials in a language the defendant understands.”<sup>50</sup>

The ECCC core documents do not expressly delegate the role of document translation to a particular section of the court. The Practice Direction on Filing of Documents (Practice Direction) delegates responsibility for translating filings to the Court Management Section,<sup>51</sup> but there is no explicit delegation of translation of other types of documents. The OCIJ Order places responsibility in the Defence Support Section and the Court Management Section, as well as, to some extent, the defense teams themselves.<sup>52</sup> The different approaches adopted by the ICTR and the ICC suggest that the ECCC has more than one option for how to administer its obligations to translate documents for defendants.

### *E. Minimum Obligations*

This section of the memo will discuss the ECCC’s obligations for translation under its own core documents and examine what translations other courts have required.

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<sup>49</sup> See *Katanga*, *supra* note 19, at 5 (citing *Dyilo* (“the Lubanga Case”) as the source of the determination that it is the permanent Counsel’s responsibility to compose the defense team in a manner that will effectively protect the defendant’s rights); *Dyilo*, *supra* note 16, at 4-5.

<sup>50</sup> *Dyilo*, *supra* note 16, at 4-5; Rules of Procedure and Evidence, R.76(3).

<sup>51</sup> Practice Direction, art. 7.2.

<sup>52</sup> Order on Translation, *supra* note 1, § A.3 (“the Parties (including the charged persons) must contribute to the resolution of their own language needs, by using the linguistic capacity within their teams and from the Defence Support Section”), E.2 (“the Co-Investigating Judges require the Parties to reduce their translation needs through optimizing their linguistic capacity, to assess and transmit to [the Court Management Section] their consequent translation priorities and, further, to collaborate actively with CMS to work towards a consensus as regards the management of those priorities”), & E.3 (“In order to ensure that this collaborative process is as ‘concrete and effective’ as possible, the Co-Investigative Judges consider that each defence team should have at its disposal, as soon as possible, free of charge and full time, the assistance of a translator”).

## ***1. Indictment***

Rule 67 of the ECCC Internal Rules provides that the accused must be immediately notified and provided with a copy of the issuance of a Closing Order by the Co-Investigating Judges, which will contain either an indictment or dismissal of the charges. Neither this provision nor any other in the Statute or Rules expressly grants defendants the right to receive the indictment in a language they understand, but the OCIJ has found that the charged person is entitled to translation into Khmer of any indictment.<sup>53</sup>

It is common practice for other international tribunals to provide an accused with a translation of the indictment. Both the ICTR and ICTY Rules of Procedure and Evidence explicitly grant the accused the right to a copy of the indictment in a language he or she understands.<sup>54</sup> Multiple decisions from the UN Human Rights Committee, the ICC, and the ICTY note that the defendant was provided a translation of the indictment or charging document.<sup>55</sup> Only one case has been found in which the accused was not given a translation of the indictment.<sup>56</sup> This ECHR decision may be less protective because it is older and because the ECHR gives some measure of deference to its state parties' judicial practices.

## ***2. Material Supporting Indictment***

Jurisprudence addressing whether material supporting an indictment must be translated into a language the accused understands diverges greatly. The ICTY and ICTR have

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<sup>53</sup> Order on Translation, *supra* note 1, § B.4. The OCIJ has also determined that the charged person is entitled to translation of the Introductory Submission and Final Submission of the Co-Prosecutors. These items are unique among international criminal tribunals to the ECCC and have not been found in other courts' jurisprudence. *Id.*

<sup>54</sup> International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, R.47(G) (*as amended* 12 July 2007) [hereinafter ICTY Rules]; ICTR Rules, R.47(G).

<sup>55</sup> *Harward*, *supra* note 14, ¶ 9.2; *Katanga*, *supra* note 19, at 5; *Dyilo*, *supra* note 16, at 6; *Seselj*, *supra* note 1, at 1; *Ljubicic*, *supra* note 15, at 3; Prosecutor v. Prlic, Case No. IT-04-74-PT, Order for the Translation of Documents, 1 (Pre-Trial Chamber, 17 Jan 2006).

<sup>56</sup> *Kamasinski*, *supra* note 8 (holding that failure to provide a written translation neither prevented him from defending himself nor denied him a fair trial because the indictment was not complex and he was provided oral explanation of it).

provided the strongest protection for defendants. At the ICTY, the right to receive translations of evidence supporting the indictment is enshrined in its Rules of Procedure and Evidence.<sup>57</sup> The court has confirmed this rule repeatedly in its jurisprudence, stressing that the right applied to all supporting material, regardless of whether or not it would be presented at trial.<sup>58</sup>

The ICTR has also held that the accused were entitled to translation of all evidentiary material supporting the indictment, regardless of whether it will be offered at trial, as required by Rule 66(A) of the Rules of Procedure and Evidence.<sup>59</sup> Rule 66(A) requires the prosecution to disclose to the defense copies of the supporting materials, but does not explicitly require disclosure in translation. In support of its decision to nevertheless require translation of these documents, the court cited the accused's right to a fair trial, the right to be informed in detail in a language he or she understands of the nature and cause of the charges against them, and the right to have the free assistance of an interpreter if he or she cannot speak or understand the language of the court.<sup>60</sup>

The ICC provides somewhat weaker protection, requiring translation only of a list of evidence supporting the indictment in a language the accused understands. In *Prosecutor v. Dyilo*, the ICC held that a translation of “the detailed description of the charges together with a list of evidence . . . provided for in rule 121(3) of the Rules will adequately inform . . . [the defendant] of the nature, cause, and content of the charges against him.”<sup>61</sup> Though the court denied the defense request to be served with documents supporting the indictment and additional documents in the defendant's language, it did give him permanent use of an interpreter for translating documents.<sup>62</sup>

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<sup>57</sup> ICTY Rules, R.66(A).

<sup>58</sup> *Seselj*, *supra* note 1, at 1; *Ljubivic*, *supra* note 15, at 3; *Naletilic*, *supra* note 19, at 1; *Delalic*, *supra* note 19, ¶ 6; *Prlic*, *supra* note 55, at 1.

<sup>59</sup> *Muhimana*, *supra* note 8, ¶ 23; *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-I, Decision on the Defence Motion for Disclosure of Evidence, ¶ 15 (Trial Chamber II, 4 Feb. 2006).

<sup>60</sup> *Muhimana*, *supra* note 8, ¶ 16.

<sup>61</sup> *Dyilo*, *supra* note 16, at 6 (footnote omitted). Rule 121(3) of the ICC Rules provides, “The Prosecutor shall provide to the Pre-Trial Chamber and the person, no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing.”

<sup>62</sup> *Dyilo*, *supra* note 16, at 7.

The lowest level of protection was granted by the HRC in *Harward v. Norway*. The HRC held that a defendant's rights were not violated by the fact that he was provided translations of only the indictment together with statements of co-defendants and court records.<sup>63</sup> The court reasoned that because his counsel had access to the documents and the assistance of an interpreter, the accused had the ability to familiarize himself with the documents in his case file; therefore, his rights under the ICCPR were not violated.<sup>64</sup>

In keeping with the strongest protection that has been provided, the OCIJ has determined that charged persons shall receive translation into Khmer of the elements of proof on which any indictment relies.<sup>65</sup>

### ***3. Additional Evidentiary Material***

In addition to the material supporting the indictment, courts have held that additional evidentiary material must be disclosed to the defense in translation, but the particular documents that must be translated varies from court to court.

#### ***a. Documents Found to be Sufficient, But Not Necessarily Required***

Some courts have not laid down a specific list of documents that are required to be translated but have determined a certain set of documents to be sufficient. The HRC has said that in addition to the indictment, provision of statements of co-defendants and court records in translation were sufficient to protect the defendant's right to a fair trial, where

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<sup>63</sup> See *Harward*, *supra* note 14, ¶¶ 3.3, 9.5.

<sup>64</sup> *Id.* ¶ 9.5.

<sup>65</sup> Order on Translation, *supra* note 1, § B.4. The OCIJ has also ordered that "all footnotes and indexes of the factual elements on which [the Introductory and Final] Submissions rely" shall be translated. *Id.* Because no other international courts have dealt with introductory and final submissions, there is no source for direct comparison of this part of the decision. If the Submissions can be analogized to the indictment, provision of at least translation of footnotes and indexes of evidentiary materials would be in keeping with the lower level of protection provided by the ICC. See *supra* text accompanying notes 56 & 57.

his counsel was able to understand the documents in the case file.<sup>66</sup> The ICC has also determined that the prosecution is not required to translate all documents that it is obliged to disclose to the defense.<sup>67</sup> The court has pointed out that the only evidentiary material the prosecution is expressly required to translate are statements of prosecution witnesses.<sup>68</sup> In one decision, the ICC considered provision of translations of interview notes, transcripts, and witness statements sufficient and denied the defense request to be furnished automatically with translations of all submissions.<sup>69</sup> It is not clear whether these items will in all cases be required by the court to be translated or were granted beyond a minimum requirement. It is worth noting that no ICC case has progressed beyond the pre-trial stage, so it remains unclear what translations the ICC will require for evidence to be presented at trial.

### ***b. Necessary Documents***

The ICTY has determined that besides evidence supporting the indictment, the prosecution must translate those documents “that form[] the basis of the determination by the Chamber of the charges against the accused.”<sup>70</sup> The rationale for this limitation is that the guarantees of interpretation and translation for defense in the ICTY Statute<sup>71</sup> do not entitle the accused to receive *all* material in a language he understands, but only material that will form the basis of the court’s decision on his guilt or innocence. Because the trial chamber will make this decision “by considering only the evidence adduced during [the trial] proceeding by the parties[,] [t]he rights of the accused are fully protected by ensuring that all evidence submitted at trial is provided in his language.”<sup>72</sup>

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<sup>66</sup> See *Harward*, *supra* note 14, ¶¶ 9.2, 9.5.

<sup>67</sup> *Dyilo*, *supra* note 16, at 7.

<sup>68</sup> *Chui*, *supra* note 19, at 4 (citing ICC Rules, R.76(3)).

<sup>69</sup> *Katanga*, *supra* note 19, at 6.

<sup>70</sup> *Naletilic*, *supra* note 19, at 3; see also *Prosecutor v. Delalic*, ¶ 8.

<sup>71</sup> The ICTY cited this limitation in interpreting three provisions of the ICTY Statute: (1) Article 21(4)(a), which provides for the right of the accused to be informed promptly and in detail in a language he understands the nature and cause of the charge against him; (2) Article 21(4)(b), which guarantees adequate facilities for the preparation of defense, and (3) Article 21(4)(f), which grants the accused free use of an interpreter if he cannot understand or speak the language of the court.<sup>71</sup> These articles of the ICTY Statute correspond to Article 35(a), (b), and (f) of the ECCC Establishment Law.

<sup>72</sup> *Delalic*, *supra* note 19, ¶ 8.

The ECHR applied a similar rule in *Klimentyev v. Russia*, holding that a defendant's rights were not violated by the lack of translation of documents in his case file that neither the indictment nor the verdict could be shown to have relied upon.<sup>73</sup>

In particular, the ICTR and ICTY have required that, in addition to all material supporting the indictment, the following discovery material must be translated into a language the defendant understands:

(1) witness statements for those witnesses the prosecutor intends to call to testify and written witness statements to be used at trial<sup>74</sup>

(2) evidentiary materials that will be presented at trial.<sup>75</sup>

The ICTY has additionally held that exculpatory material the prosecutor is required to disclose must be provided to the defendant in a language he understands.<sup>76</sup> The ICC has declined to provide translations of exculpatory evidence.<sup>77</sup>

The OCIJ Order on Translation of Documents does not clearly explain what evidence besides material supporting the indictment is required to be translated into the language of the accused. However, it suggests that evidence produced at trial, but nothing more, may be required. The OCIJ discusses only the requirement of translating material supporting the indictment, but in doing so it cites, without comment, to language from the ICTY requiring translation of evidence produced at trial: “[t]he rights of the accused are completely protected by making sure that all elements of proof produced at trial are

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<sup>73</sup> *Klimentyev*, *supra* note 19, ¶ 109.

<sup>74</sup> *Muhimana*, *supra* note 8, ¶ 23; *Niyitegeka*, *supra* note 60, ¶ 16; ICTY Rules, R.66(A)(ii); *Seselj*, *supra* note 1, at 1; *Ljubcic*, *supra* note 15, at 1.

<sup>75</sup> *Muhimana*, *supra* note 8, ¶ 25; *Naletilic*, *supra* note 19, at 3; *Delalic*, *supra* note 19, ¶¶ 6, 8.

<sup>76</sup> *Ljubcic*, *supra* note 15, at 3; *Prlic*, *supra* note 56, at 1.

<sup>77</sup> In *Dyilo*, *supra* note 16, at 5-8, the ICC's decision on the defense's motions of 3 and 4 July granted the defense translation of only the charging document and list of evidence. The defense motion of 4 July was requesting, *inter alia*, translation into French of exculpatory material. *Prosecution v. Dyilo*, Case No. ICC-01/04-01/06, “Requête aux fins de traduction en français des pièces communiqués et de toute autre pièce pertinente,” Public, 4 July 2006.

communicated to him in his language.”<sup>78</sup> The OCIJ Order later says, “Remaining case file documents, such as pleadings, internal notes and correspondence, *are not elements of proof for the determination of the trial chamber and are not therefore covered by the requirement to translate into the language of the charged person.*”<sup>79</sup> Here, the OCIJ explicitly mentions only pleadings and internal correspondence as documents falling outside the category of “elements of proof for the determination of the trial chamber” that are thereby excluded from translation requirements. However, this category also would include evidentiary documents in the case file that will not be presented at trial; thus, it is possible that, but nevertheless unclear whether, they are also excluding such documents from the translation requirement. This limitation would be in keeping with international practices; as discussed above in this Part, no international court translates every evidentiary item in the case file.

The Order does not address statements of witnesses who will be called at trial. Because these statements seem to fall within the category of elements of proof to be presented at trial, the Order suggests that they would be required to be translated. Such a finding would be consistent with the practices of other international courts, as the ICTR, ICTY, and even the ICC (which otherwise requires translation of the fewest documents) all require translation of witness statements.

#### ***4. Filings, Memoranda, Correspondence, and Similar Documents***

The Practice Direction on the Filing of Documents Before the ECCC requires that all documents shall be filed in Khmer as well as one of the other working languages of the tribunal.<sup>80</sup> As noted by the OCIJ in the Order on Translation of Documents, this provision ensures that the defendants will have access to all filings in a language they

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<sup>78</sup> Order on Translation, *supra* note 1, § B.4 (quoting *Delalic*, *supra* note 19, ¶ 8.)

<sup>79</sup> *Id.* § C.3 (emphasis added). The OCIJ goes on to say, however, that filings must be translated because of the Practice Direction on Filing of Documents, art. 2.

<sup>80</sup> See Practice Direction, art. 7.1.



understand,<sup>81</sup> giving them a stronger right to translation of this type of documents than defendants in other international courts.

The ICTR and ICTY have held expressly that accused are not entitled to receive in their language motions, briefs, memoranda, and other similar documents.<sup>82</sup> Additionally, numerous ICTY decisions outlining what documents must be translated for an accused omit motions.<sup>83</sup> Despite finding that accused are not entitled to motions, in *Muhimana* the ICTR voluntarily granted the accused translations of prosecution motions and other written arguments on an as-needed basis.<sup>84</sup>

### *5. Decisions and Orders*

Rule 102 of the ECCC Internal Rules provides in part, “The Greffier shall provide a copy of the judgment to the parties . . . .” In keeping with the standards of other international courts, the OCIJ have determined that “the translation into all three official languages of all judicial decisions and orders should be systematic in the interests of the good administration of justice.”<sup>85</sup>

The ICTY, ICTR, and ICC require that the defendant be provided translations of decisions and orders issued by the court.<sup>86</sup> Rule 144 of the ICC Rules of Procedure and Evidence provides that “Decisions of the Trial Chamber concerning admissibility of a case, the jurisdiction of the Court, criminal responsibility of the accused, sentence and reparations” shall be provided in writing to the accused in a language he understands, as necessary to meet the requirements of fairness. The ICTY Rules of Procedure and Evidence require that a “copy of the judgement and of the Judges’ opinions in a language

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<sup>81</sup> Order on Translation, *supra* note 1, § C.3.

<sup>82</sup> *Muhimana*, *supra* note 8, ¶ 26; *Delalic*, *supra* note 19, ¶ 10.

<sup>83</sup> *Ljubicic*, *supra* note 15, at 3; *Naletilic*, *supra* note 19, at 3; *Delalic*, *supra* note 19, § III. Disposition.

<sup>84</sup> *Muhimana*, *supra* note 8, ¶ 27.

<sup>85</sup> Order on Translation, *supra* note 1, § C.2.

<sup>86</sup> *But see Kamasinski*, *supra* note 8, ¶ 85 (holding that the absence of a written translation of a judgment by itself does not violate the defendant’s rights because it was clear from defendant’s appeal filing, which described many details of the verdict, that oral explanations of the judgment were sufficient to allow him to understand the verdict).

which the accused understands shall as soon as possible be served on the accused if in custody.”<sup>87</sup> The ICTY has further held, as has the ICTR, that *all* written decisions and orders rendered by the trial or appeals chamber must be provided to the accused in a language he understands.<sup>88</sup>

## ***II. Rights of Defendants to Translation Into the Language of Their Attorneys***

Almost all of the international jurisprudence on translation of documents deals with translation into the language of the accused. Few decisions discuss translation for a defendant’s attorney, and even fewer consider the particular question faced by the ECCC of what to do when the attorney’s language is an official language of the court. This section will discuss the ECCC’s obligations to translate documents for defense counsel. This issue should be thought of primarily in terms of the right of the defendant to have adequate facilities to prepare his defense rather than as a right of the attorney.

### ***A. Attorney Requests for Translation Into a Working Language of the Court***

The ECCC Statute and the Internal Rules lack explicit provisions governing a defense attorney’s access to translations of written documents. The Practice Direction provides the only explicit rules but addresses only filings, stating that attorneys are entitled to receive filings in the official language of their choice.<sup>89</sup>

In *Prosecutor v. Muhimana*, the ICTR—which uses French and English as official languages—considered whether a defense attorney who spoke, read, and wrote only

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<sup>87</sup> ICTY Rules, R.98ter(D).

<sup>88</sup> *Seselj*, *supra* note 1, at 1; *Ljubicic*, *supra* note 15, at 3; *Prlic*, *supra* note 55, at 1; *Muhimana*, *supra* note 8, ¶¶ 29, 33.

<sup>89</sup> Practice Direction, art. 7.2 (“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 Management Section shall ensure the timely translation of documents filed in accordance with this Practice Direction.”). Article 45 of the ECCC Law provides that the official working languages of the court shall be Khmer, English, and French. The international lawyer is only required to be fluent in one of the official languages, Internal Rules, R.11(4)(c)(v), and any party may request the use of an interpreter, *id.* R.30.

French was entitled to have all materials disclosed by the prosecution served in French and to have the court Registrar ensure free translation of all written materials at any stage of the pre-trial proceedings.<sup>90</sup> The court held decisions and orders of the court were required to be translated.<sup>91</sup> In addition, it required that two types of documents submitted by the parties be translated into the two working languages: (1) the parties' written submissions, including motions, briefs, and other submissions, and (2) evidence subject to disclosure that would be adduced at trial.<sup>92</sup> In making this order the court reasoned, "it is imperative, for the proper administration of justice and for equality of treatment of the parties, that their written submissions, and particularly their briefs, are translated into the Tribunals' two working languages."<sup>93</sup> It also cited equality of arms as requiring translation of evidence presented at trial.<sup>94</sup>

The ability of one co-counsel to understand the language of documents was a factor in the *Muhimana* decision. Though one of the defendant's counsel spoke and understood only French, the other spoke both French and English.<sup>95</sup> The court determined the ability of one co-counsel to translate did not alleviate the court's obligation to translate decisions, written submissions, and evidence.<sup>96</sup> Nevertheless, the court "hope[d] that through fruitful collaboration between the Counsel and Co-counsel, the latter, who states that he has a working knowledge of English, will be able to help the former to understand the contents of the documents."<sup>97</sup>

In the ICC case *Dyilo*, discussed in Parts I.B and I.D supra, the defense requested receipt of translations of all procedural documents in French on two bases: first, that the accused spoke only French and, second, that the attorneys' working language was French.<sup>98</sup> In its decision, the court did not apparently address the language requirements of the attorney,

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<sup>90</sup> *Muhimana*, supra note 8.

<sup>91</sup> *Id.* ¶ 33.

<sup>92</sup> *Id.* ¶¶ 32-33.

<sup>93</sup> *Id.* ¶ 32 (quoting Prosecutor v. Akayesu, Case No. ICTR-96-4-A, Order for Translation of Appellant's Briefs, 3).

<sup>94</sup> *Id.* ¶ 32.

<sup>95</sup> *Id.* ¶ 31.

<sup>96</sup> *Id.* ¶¶ 32-33.

<sup>97</sup> *Id.* ¶ 33.

<sup>98</sup> *Dyilo*, supra note 16, at 2.

instead focusing on the defendant’s right to have documents in his language.<sup>99</sup> The court denied the request to order the prosecution to provide translations of all documents that it is required to disclose, requiring the prosecution instead to translate only the charging document and list of evidence.<sup>100</sup> The court also provided the defense team with an interpreter.<sup>101</sup> These are the same documents that it later provided in the *Katanga* case, where translation was requested only for the defendant and not also for his attorneys.<sup>102</sup> The *Katanga* case cited *Dyilo* in support of its decision without distinguishing obligations for translation to a defendant versus to an attorney,<sup>103</sup> perhaps indicating that the ICC does not recognize the translation needs of attorneys as a distinct issue.

The OCIJ Order has granted attorneys the same translation rights into working languages of the court as defendants.<sup>104</sup> The OCIJ has ordered that the following documents be translated for each attorney into the official language in which the attorney has given notice that he wishes to receive filings:<sup>105</sup>

(1) Indictment

(2) Proof on which indictment relies

(3) Introductory and Final Submissions of the Co-Prosecutors

(4) Footnotes and indexes of factual elements on which the Introductory and Final Submissions rely.

(5) Filings

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<sup>99</sup> *Id.* at 4-8.

<sup>100</sup> *Id.* at 7-8.

<sup>101</sup> *Id.*

<sup>102</sup> *Katanga*, *supra* note 19, at 5-6.

<sup>103</sup> *Id.* at 3, 5.

<sup>104</sup> See Order on Translation, *supra* note 1, § C.1 (“the documents referred to at B. above [which outlines translation rights for charged persons] must be translated into the other official working languages having regard to the Parties’ notifications under Article 2(2) of the [Practice Direction]”).

<sup>105</sup> Order on Translation, *supra* note 1, §§ B, C.

## (6) Judicial Decisions and Orders

As discussed in Part I.E.3.b above, it is not yet clear whether the Order also provides translation of evidence adduced at trial. If it does, this Order provides broad translation rights into the working languages of the tribunal for defendant's attorneys, in keeping with the ICTR's decision in *Muhimana*. Moreover, it would be more protective than the ICC's *Dyilo* decision. The Order to provide the defense team with a translator in addition to the named documents offers protection to the defense beyond that provided by the ICTR.

### ***B. Additional Translation Provided When a Defendant is Representing Himself***

The ICTY has found a defendant's right to document translation to be broader when he is acting as his own counsel. In these cases, the defendant requested documents in a language other than a working or official language of the court.<sup>106</sup> The ICTY—which uses French and English as working languages—determined in *Seselj* and *Prlic* that, in addition those documents that must be translated into a language the accused understands, the court would provide for a pro se defendant translations into Serbo-Croatian of prosecution motions, without attachments.<sup>107</sup> In *Prlic*, the court also granted translation of responses by defense counsel for the co-accused.<sup>108</sup> These decisions providing translations of motions to the accused are unique among ICTY decisions, representing additional rights for pro se defendants. As discussed above, numerous

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<sup>106</sup> Relatedly, the ICTY has addressed an attorney's language rights when the attorney requests to file documents in his own language, which is also the language of the accused but not a working language of the tribunal. In *Delalic*, citing Subrule 3(D) of the Rules of Procedure and Evidence, the court found that counsel is allowed to address the chamber in his language if it is the language of the accused, on the premise that it is desirable for counsel to be able to communicate easily with the accused and also to protect the right of the accused to choose his own counsel. *Delalic*, *supra* note 19, ¶ 12. It held, however, that the Rule did not entitle counsel to have all documents and transcripts of proceedings translated into counsel's language. *Id.* ¶¶ 13-14. See also Prosecutor v. Zaric, Case No. IT-95-9, Decision on Defence Application to Use the Native Language of the Assigned Counsel in the Proceedings, ¶ 7 & Part III. Disposition (Trial Chamber, 21 May 1998) (citing *Delalic* and refusing defense counsel's request).

<sup>107</sup> *Seselj*, *supra* note 1, at 1; *Prlic*, *supra* note 55, at 1.

<sup>108</sup> *Prlic*, *supra* note 55, at 1.

decisions outlining translation obligations to an accused who has counsel omit motions.<sup>109</sup> Additionally, a decision in the *Prosecutor v. Delalic* case explicitly says that the ICTY Statute does not entitle the accused (who was in that case represented by counsel) to submit or receive motions in his language.<sup>110</sup>

### ***C. The Role of Cooperation Between Co-Counsel for Addressing Language Difficulties***

ECCC Internal Rule 22(1) provides, “All Suspects, Charged Persons, Accused or any other persons entitled to a defence lawyer under these IRs, shall have the right to the assistance of a national lawyer, or a foreign lawyer in collaboration with a national lawyer, of their own choosing, as follows: . . . (c) A foreign lawyer listed with the Defence Support Section shall work in conjunction with a national lawyer in the defence of their client before the ECCC.”

As discussed in Part II.A above, in *Muhimana*, the ICTR considered the ability of one co-counsel to understand both English and French relevant to its decision on what French translation to provide for the other co-counsel.<sup>111</sup> The court held that the availability of one counsel who could understand both languages did not completely alleviate the court’s translation obligations for the other defense counsel. Nonetheless, the court encouraged the co-counsel to collaborate to understand documents beyond a core set that were provided in translation.<sup>112</sup>

The ICTY and the HRC have found that courts have a lower burden to translate documents into the language of the accused where a defendant can select an attorney fluent in a working language of the court (see Part I.B supra for full discussion). If the court’s obligation to translate documents into a language the accused understands can be limited in this way, similar reasoning may apply to translation difficulties for the

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<sup>109</sup> See supra note 84.

<sup>110</sup> *Delalic*, supra note 19, ¶ 10.

<sup>111</sup> See supra text accompanying notes 84-91.

<sup>112</sup> *Id.*

accused's attorneys. This principle lends support to the court's suggestion in its 23 April Decision that if Jacques Vergès was unable to work with his Cambodian co-counsel to address translation issues, Khieu's recourse is his ability to choose a different foreign attorney.<sup>113</sup> In its Order on Translation Rights and Obligations of the Parties, the ECCC Co-Investigating Judges again referred to this principle, saying "the 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."<sup>114</sup>

## CONCLUSION

The OCIJ Order on Translation adheres to the ECCC Law, Internal Rules, and Practice Direction on the Filing of Documents Before the ECCC. Moreover, the approach that the OCIJ has outlined for addressing translation, and the specific translation requirements it has found, are consistent with international standards of translation for defendants and their attorneys. The Order acknowledges and applies principles of fairness as conceptualized by other international courts and human rights instruments. It is correct in its determination that the court is not required to translate everything in the defendants' case files.

The Order's suggestion that the defense teams must use their capacity to address linguistic difficulties also comports with findings of other international bodies, including the ICTY, ICTR, ICC and the HRC. The Order's division of translation responsibility among the Court Management Section, Defence Support Section, and the defense teams is also well within the bounds of acceptability, as illustrated by the divergent approaches taken by the ICTR—which places responsibility in the Registry—and the ICC—which places much of the responsibility on the defense.

The list of specific documents the OCIJ has required to be translated into the working languages of the tribunal for defendants and attorneys is also consistent with international

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<sup>113</sup> *Khieu Samphan*, *supra* note 2, ¶ 12.

<sup>114</sup> Order on Translation, *supra* note 1, § A.4.

standards. The finding regarding each document at least meets minimum standards, and with respect to some documents it exceeds standards. For example, the Order's provision of filings in the language of the accused grants stronger protection for defendants than any other international tribunal. The provision of translation of all material supporting the indictment is in line with the strongest protection that has been found.

There are a few translation matters that have been left unanswered by the OCIJ's Order on Translation. The ECCC must address the vagueness in the Order regarding which evidentiary materials beyond those supporting the indictment must be translated. The Order's suggestion that evidence produced at trial, but nothing more, may be required would be consistent with international standards if the ECCC determines that statements of witnesses to be called at trial are included in this category. The Order also does not address whether exculpatory evidence must be translated. The ICTY has provided translation of exculpatory evidence, but the ICC has declined to do so, and nothing has been found from the ICTR addressing the matter. Thus, it is not clear whether the ECCC has an obligation under international standards to provide translation of exculpatory evidence to the defense.