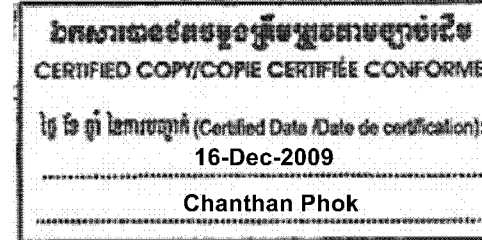


Phnom Penh, 1 December 2009

To: Co-Investigating Judges
YOU Bunleng
Marcel LEMONDE

Phnom Penh, Cambodia



Investigation No. 002/19-09-2007

Subject: **Note by the Co-Lawyers for the Defence Concerning the Request for Procedural Measures**

Your Honours,

We once again wish to call your attention to the violation of the rights of our client, Mr KHIEU Samphan, in the ongoing judicial investigation against him before the ECCC. The example we wish to submit to you this time is symptomatic of a general situation which we have echoed in an appeal that is pending before the Pre-Trial Chamber, and to which we wish to refer you.¹

The situation at issue is as follows: by motion dated 25 November 2009, our fellow defence lawyers, the Co-Lawyers for the Defence of Mr NUON Chea, filed before you a “Request for Adoption of Certain Procedural Measures”.² This Request received the immediate support of the Co-Lawyers for Mr IENG Sary.³ On 11 November 2009, the Co-Counsel for the Defence of Ms IENG Tirith also filed a request in respect of the proceedings.⁴

These documents were filed in English and in Khmer, in accordance with the Practice Direction on the Filing of Documents. Therefore, the English-speaking parties (in particular, the Co-Prosecutors) received them in their two working languages. As is virtually always the case, we, of course, did not receive notification of these documents

¹ Appeal against the Order on the Request for annulment, 29 October 2009, *D197/I/5*.

² Request for Adoption of Certain Procedural Measures, *D235*.

³ Ieng Sary’s Motion to Join Nuon Chea’s Request for Adoption of Certain Procedural Measures, 12 November 2009, *D235/I*.

⁴ Defence Request for Additional Time at the End of the Investigations, *D237*, 11 November 2009.

in French. Nonetheless, as we were eager to participate in the ongoing proceedings, we requested the French translation of Mr NUON Chea's Request on 6 November. Despite all the translators' efforts, we did not receive the French translation of the document until 24 November. The day after, 25 November, even before we were in a position to decide whether we wanted to join in our fellow defence lawyers' Request or to add certain observations, the parties received notification of the Co-Investigating Judges' Order on the matter, in English and in Khmer.⁵ In the final analysis, only Mr NUON Chea's Request was notified to us officially upon our formal request for translation, and this happened two days after the relevant Order had been issued.

As you would understand, this situation is unacceptable.

Needless to say, the above situation is in violation of the most basic rights of the defence, but what is even more surprising is that it is inconsistent with the Co-Investigating Judges' Order on translation. According to the said Order, not only must "the translation into all three official working languages of all judicial decisions and orders [...] be systematic in the interest of a good administration of justice",⁶ but also "all filings (...) must be translated into the other official working language(s) (...) namely into French and English for both case files".⁷ As a matter of fact, it was because the Pre-Trial Chamber considered that the Co-Investigating Judges' Order recognises "[the Charged Person's right] to receive translation into French (...) [of] all filings by the Parties (...) as provided by Article 7.1 of the Practice Direction on the Filing of Documents"⁸ that it found that the Order effectively safeguards the Charged Person's rights as enshrined in Rule 21 of the Rules.⁹

Now, the question is whether these decisions are mere lip service. In a recent Order, you recalled that your Order on translation is still relevant and that even though there was no

⁵ *Order on Request for Adoption of Certain Procedural Measures, D235/2*, 25 November 2009.

⁶ *Order on Translation Rights and Obligations of the Parties, A190*, 19 June 2008, Section C, para. 2.

⁷ *Ibid.*, Section C, para. 3.

⁸ *Decision on KHIEU Samphan's Appeal against the Order on Translation Rights and Obligations of the Parties*, 20 February 2009, *A190/II/20*, para. 37.

⁹ *Ibid.*, para. 50.

translation of the so-called essential documents, Mr KHIEU Samphan's rights were not violated, since the said documents are "[TRANSLATION] in the process of being translated". You thus recognized rights that are futile and illusory.¹⁰ Yet, Judge LEMONDE did not hesitate to assert those rights in requesting (in very concrete terms this time) an extension of time to file his response to the applications for disqualification, arguing that it was "impossible for [him] to respond to the application filed by the defence for Mr KHIEU's Samphan before receiving official notification of the application filed by the Defence for Mr IENG Sary, as the latter refers to the former".¹¹ In fact, it would appear that Judge LEMONDE was allowed the extension of time, since he was able to file his response to the applications for disqualification, outside the time limits prescribed in the Rules.

All this is in stark contrast with the systematic refusal of requests filed by Mr KHIEU Samphan; indeed, he was recently rebuffed in regard to his request for a hearing on the admissibility his appeal against the Order allowing the use of statements which were or may have been obtained by torture.¹² Does this mean regretting that the Pre-Trial Chamber did not respond to Judge LEMONDE by saying that Mr IENG Sary's application was "in the process of being translated"?

The conclusion to be drawn from the foregoing is not ours, but rather yours and the Pre-Trial Chamber's. Since you consider that translation of certain documents – including all decisions and all filings by the parties – is necessary "to ensure that a charged person is able to exercise his/her rights during the investigation",¹³ it would only be logical for you to also consider that the Charged Person cannot exercise his rights without these translations. In this instance, Mr KHIEU Samphan is without the translations; therefore, everyone must conclude that he cannot exercise his rights during the judicial investigation.

¹⁰ In this regard, it is noteworthy that we now have proof that most of these documents are not "in the process of being translated".

¹¹ Request for Extension of Time to Respond to the Applications for Disqualification, 22 October 2009, 02.

¹² *Decision on "Khieu Samphan's Note to the Pre-Trial Chamber Concerning Proceedings 130"*, 18 November 2009, D130/10/9.

¹³ *Decision on Khieu Samphan's Appeal against the Order on Translation Rights and Obligations of the Parties*, 20 February 2009, A190/I/20, para. 43.

Accept, Your Honours, the assurances of our highest regards.

For the Co-Lawyers for the Defence

Jacques VERGÈS