



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

ឯកសារធានថតចម្លងត្រឹមត្រូវតាមច្បាប់ដើម
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ការិយាល័យសហចៅក្រមស៊ើបអង្កេត
BUREAU DES CO-JUGES D'INSTRUCTION
OFFICE OF THE CO-INVESTIGATING JUDGES

A: **Defence Teams for IENG Sary,** Date: 11 December
TO: **NUON Chea and Khieu Samphan** 2009

CC **Other Defence Teams, Office of the Co-Prosecutors, Civil Party**
Lawyers

DE: **YOU Bunleng**

FROM: **Marcel LEMONDE**
Co-Investigating Judges

PUBLIC

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OBJET: **YOUR "REQUEST FOR INVESTIGATIVE ACTION", CONCERNING,**
SUBJECT: **INTER ALIA, THE STRATEGY OF THE CO-INVESTIGATING JUDGES IN**
REGARD TO THE JUDICIAL INVESTIGATION

REF: 002/19-09-2007-ECCC-OCIJ – D171, D130/7 & D130/7/2

1. On 21 May 2009, the IENG Sary Defence Team sent us a "request for investigative actions" (hereinafter the "Request" - D171), consisting, in reality, of more than 20 disparate requests for information, under four headings:

- i. The procedural law applied by the Co-Investigating Judges and the Office of the Co-Investigating Judges Investigators to the judicial investigation;
- ii. The Co-Investigating Judges' planning and overall strategy for the judicial investigation;
- iii. The qualifications and experience of the Office of the Co-Investigating Judges Investigators and their standard operating procedures;
- iv. The collection and analysis of exculpatory evidence, notably how the Co-Investigating Judges consider possible alternative theories of events set out in the Introductory Submission. (para. 7).

In its Request, the Defence contends that "the Case File does not reflect exactly the law, strategy and methodology applied by the Co-Investigating Judges in conducting the investigation. Moreover, there is no proof as to whether there is any system in place and, if so, whether it is being scrupulously followed by the



OCIJ Investigators in searching for exculpatory evidence". (introductory paragraph)

2. On 9 June 2009, the NUON Chea Defence Team gave notice that it was joining in the Request (D171/2). In its Notice, it adopted all the submissions in the Request, asserting that this was indeed a request for investigative action since: "*the information requested directly relates to how the OCIJ's factual conclusions ought to be evaluated*". (para.1).
3. On 24 August 2009, the Lawyers for Mr KHIEU Samphan joined in the Request (D171/3), specifying that "*the request is not aimed at calling into question the role of the Co-Investigating Judges as such, but rather at verifying the reliability of the investigations as conducted by the Office of the Co-Investigating Judges in relation to Case File 002*".

*

4. It is important to emphasise first of all that the Request – which is unusual and somewhat surprising in view of the procedural system applicable before the ECCC – does not contain any request for investigative action, but rather a request for explanations, which this letter will endeavour to address. It is also important to emphasise that as to form, the Request fails to abide by the requirements of the Co-Investigating Judges¹ to limit each request to a single issue so as to facilitate a quick response. Nonetheless, by way of exception, the Co-Investigating Judges will deal with each request in this comprehensive response, under the four headings mentioned above. Lastly, in its Request of 17 July 2009, as reiterated by letter dated 7 August 2009, the IENG Sary Defence requested information about the methodology employed by the Co-Investigating Judges in determining the probative value of information obtained by torture.² The request received a first response by Memorandum dated 30 October 2009;³ the outstanding questions will be addressed in the present response.

I. The law applied by the Co-Investigating Judges

5. This heading comprises two sub-headings, which call for only one answer concerning:

i. which law is being applied by the Co-Investigating Judges in the judicial investigation;
ii. if more than one law is being applied, what criteria are used in the selection process.
 (para. 14)

6. Pursuant to the ECCC Law and the Agreement Between the United Nations and the Royal Government of Cambodia signed on 6 June 2003 (the Agreement), the law applicable before the ECCC is essentially set out in the Internal Rules, which

¹ A193, **CIJ's Memorandum on the Formal Presentation of Requests**, 19 June 2008.

² D130/7, **IENG Sary's lawyers' letter concerning the identification of, and reliance on, evidence obtained through torture**, 17 July 2009; D130/7/2 **IENG Sary's lawyers 2nd letter concerning the identification of, and reliance on, evidence obtained through torture**, 7 August 2009.

³ D130/11/2, **CIJ' Response to Nuon Chea's Fifteenth Request for Investigative Action and Related Letters from Ieng Sary's Lawyers**, 30 October 2009.

were adopted by all the ECCC Judges at a Plenary on 12 June 2007, as summarized in the fifth preambular paragraph of the Rules:

(...) the ECCC have adopted the following Internal Rules, the purpose of which is to consolidate applicable Cambodian procedure for proceedings before the ECCC and, pursuant to Articles 20 new, 23 new, and 33 new of the ECCC Law and Article 12(1) of the Agreement, to adopt additional rules where these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application, or if there is a question regarding their consistency with international standards.

7. This principle was confirmed by the Pre-Trial Chamber in a decision dated 26 August 2008, as follows:

The Internal Rules contain a self-contained regime of procedural law related to the unique circumstances of the ECCC, made and agreed upon at the plenary. They do not stand in opposition to the Cambodian Criminal Procedure Code (...) but the focus of the ECCC differs substantially enough from the normal operation of Cambodian criminal courts to warrant a specialized system. Therefore, the Internal Rules constitute the primary instrument to which reference should be made in determining procedures before the CPC.⁴

Pursuant to this principle, the Pre-Trial Chamber has stated, for example, that the procedure set out in the Internal Rules in relation to requests for annulment form a self-contained regime and are a substitute for the Code in this respect.⁵

8. Moreover, Rule 2 of the Internal Rules sets forth the procedure applicable in case of lacunae in this *corpus juris*:

Where in the course of ECCC proceedings, a question arises which is not addressed by these IRs, the Co-Prosecutors, Co-Investigating Judges or the Chambers shall decide in accordance with Article 12(1) of the Agreement and Articles 20 new, 23 new, 33 new or 37 new of the ECCC Law as applicable, having particular attention to the fundamental principles set out in Rule 21 and the applicable criminal procedural laws. In such a case, a proposal for amendment of these IRs shall be submitted to the Rules and Procedure Committee as soon as possible.

9. The Co-Investigating Judges followed this procedure on 12 November 2007 when deciding to place Mr IENG Sary in “police custody” in order to grant his request for adjournment of the adversarial hearing preceding a decision on provisional detention, so as to have adequate time for the preparation of his defence.⁶ Rule 63(1) on Provisional Detention was amended thereafter, on 1 February 2008, at the request of the Co-Investigating Judges, so as to resolve this lacuna.
10. The articles of the ECCC Law and the Agreement which are cited in Article 2 of the Internal Rules provide that, in case of lacuna, the Judges “*may seek guidance*

⁴ D55/I/8 (PTC06), *Decision on Nuon Chea’s Appeal against Order Refusing Request for Annulment*, 26 August 2008, para. 14.

⁵ *The Pre-Trial Chamber finds that the Internal Rules address sufficiently the annulment procedure and are therefore applicable. Parties considering that any part of the proceedings is null and void will have to submit a reasoned application to the Co-Investigating Judges first, requesting them to seize the Pre-Trial Chamber..”* D55/I/8 (PTC06), *Decision on Nuon Chea’s Appeal against Order Refusing Request for Annulment*, 26 August 2008, para. 16.

⁶ C14 *Police Custody Decision*, 12 November 2007, p. 2.

in procedural rules established at the international level". In this context, where necessary, the Co-Investigating Judges also take into account the procedure applicable in comparable civil law systems, including the French system, on which the Cambodian system is based. The Pre-Trial Chamber proceeds likewise, noting that "*the Cambodian system, on which the Internal Rules are based, is rather similar to the French system*".⁷

11. In fact, the Internal Rules are the result of a consolidation exercise which relied first and foremost on the draft Cambodian criminal procedure code, which was finally adopted by Parliament on 7 June 2007 ("the Code"). The fact that some of the provisions of the Code were not incorporated in the Internal Rules does not constitute a "lacuna" within the meaning of Rule 2. They were deliberately left out because they were manifestly ill-adapted to the unique circumstances of the ECCC. This is the case, for example, for Book Three, Title 2 of the Code on enquiry of *flagrante delicto* cases.
12. In short, the Co-Investigating Judges strictly follow the procedure set forth in the Internal Rules in the conduct of their judicial investigation and ensure that it is followed by all OCIJ staff, both national and international.

II. Planning and strategy

13. This second category of requests for information relates to the Co-Investigating Judges' overall strategy in the conduct of the judicial investigation, the stages into which the judicial investigation has been separated and the schedule by which the Co-Investigating Judges plan to complete these stages. (para. 20)
14. In support of this request for greater transparency, the Defence asserts that "*the investigation conducted by the OCIJ should be neutral, transparent, and readily apparent from reviewing the Case File*". (para.17)
15. It is important to call to mind the provisions of the Internal Rules, which are patently clear. Under Rule 55(5), the Co-Investigating Judges, who are required to conduct both inculpatory and exculpatory investigations, may take "*any investigative action conducive to ascertaining the truth*". They must also ensure that the proceedings are brought to a conclusion within a reasonable time [Rule 21(4)]. In this connection, it is in all conscience that they formulate the *strategy* for the conduct of the judicial investigation – and *choose the means* of ascertaining the truth – and they possess the discretionary power to do so. Moreover, the strategy may change over time, depending on the evidence gathered, in order to ensure that the ascertainment of the truth is impartial at all times.⁸
16. Moreover, the Case File is the repository for all the material deriving from investigative action; such material is placed on it, whether it is inculpatory or

⁷ A190/II/9 (PTC12) *Decision on Ieng Sary's Appeal against the OCIJ's Order on Translation Rights and Obligations of the Parties*, 20 February 2009, para. 20.

⁸ See A193, CIJ's *Memorandum on the Formal Presentation of Requests*, 19 June 2008, p. 2; and D164/2 *Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD*, 19 June 2009, para. 6.

exculpatory. It must be noted that the use of a dual reference system for documents and assigning an ERN number to each page of the Case File is aimed at facilitating transparent access to the materials it contains and not at “disclosing” the Judges’ strategy.

17. As concerns the schedule of the judicial investigation, whereas the Co-Investigating Judges are not required to do so, they have disclosed as precisely as possible the stages of the impending proceedings, indicating, *inter alia*, that they intend to bring the investigations to a close towards the end of 2009.

III. Qualifications and experience of the Office of the Co-Investigating Judges Investigators and Standard Operating Procedures

18. This heading in fact comprises two sets of distinct questions:

A. *Qualifications and experience*

19. In this regard, the Defence is requesting the Co-Investigating Judges to place on the Case File information in answer to the following questions:

- i. *whether any investigators have worked in any other key investigative entity such as DC Cam or COP in addition to the OCIJ;*
- ii. *the prior investigative experience of each investigator before joining the OCIJ;*
- iii. *information which could affect the impartiality of any past or present OCIJ investigator which is either within the knowledge of the CIJs or has been brought to their attention by one of the parties;*
- iv. *the training (legal or otherwise) that has been provided to the investigators. (para. 26)*

20. Similar to a number of previous Defence requests,⁹ this one seems to be premised on the idea that there is an issue regarding the competence or impartiality of the investigators, without providing any reason for such a suspicion. This seems like the beginnings of an application to disqualify the investigators, for which there is no provision in the Internal Rules. As we have stated previously,¹⁰ this type of request is without legal basis – a position that has been affirmed by the Pre-Trial Chamber.¹¹

⁹ A121 Request for Information concerning Potential Conflict of Interest, 10 January 2008; A162 Request for Information concerning the Apparent Bias and Potential Existence of Conflict of Interest of OCIJ Legal Officer David Boyle, 4 March 2008; and A252 Request by the Lawyers of IENG Sary for Information concerning the Potential Existence of Conflict of Interest of OCIJ Investigator Steve Heder, 30 January 2009.

¹⁰ A121/I Request for information regarding an eventual conflict of interest: (...) *the rules governing the incompatibility of functions, aimed at guaranteeing the independence and impartiality of courts, only apply to magistrates, not to investigators*”; A162/II CIJ’s Response to the Request by the Lawyers of IENG Sary for information on the apparent bias and potential existence of a conflict of interest of OCIJ Legal Officer David Boyle, 26 May 2008; and A252/2 CIJ’s Response to the Request by the Lawyers of IENG Sary for information concerning Mr Steve Heder, 29 May 2009.

¹¹ Pre-Trial Chamber Decision on the Charged Person’s Application for Disqualification of Drs. Stephen Heder and David Boyle, 22 September 2009, para. 15: “*The Pre-Trial Chamber notes that the procedural rules established at the international level regarding disqualification apply exclusively to judges and do not extend to staff members of a court.*”

B. Standard Operating Procedures

21. The Defence is requesting a whole series of miscellaneous information about the functioning of the Office of the Co-Investigating Judges. First, it raises the following questions, which call for a combined answer:

- i. whether all reports collated by the OCIJ are placed on the Case File and what happens to the reports that are not added to it;*
- ii. whether reports have been made by the investigators detailing further observations at the scene, actions of investigators and disposition of all evidence recovered and if so whether they are all placed on the Case File ;*
- iii. whether evidence other than witness testimony is being obtained and whether it is all placed on the Case File.*

22. With respect to the outcome of the investigations, it is important to recall that all investigative action is placed on the Case File. All evidence gathered or produced by the Investigators and any other investigative action requiring justification – such as requests for technical assistance – is effected through a Rogatory Letter.

23. The evidence is placed on the Case File in the form of written records of interview, seized items, site identification reports, and so on; any additional explanations are provided in the Report of Rogatory Letter Completion, as necessary. Only the Case File is a procedural record and any OCIJ internal documents that are not used in the proceedings (including preparatory legal analyses and strategic assessments), do not legally exist for this very reason. By virtue of procedural principles established at the international level, they clearly do not have to be disclosed.¹²

24. In order to avoid overloading the Case File with large quantities of documents that have no probative value in relation to the ongoing judicial investigation, documents obtained by the Investigators or received from the parties are vetted for inculpatory or exculpatory evidence; such documents are placed on the Case File; the rest being placed in the directory known as the “SMD” in order to make them readily accessible to the parties.

25. The Defence also raises the following question:

Whether safeguards have been put in place to ensure that the investigations are conducted in such a manner so as not to violate the rights of suspects, not to harass or intimidate witnesses or victims, and to ensure the maximum protection and preservation of evidence.

¹² See, for example: **ICTY Rules of Procedure and Evidence**, Rule 70 Matters not subject to disclosure (adopted on 11 February 1994): *A) Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure or notification under these Rules;* and **ICTY Trial Chamber**, *Prosecutor v. Blagojević and Jokić, Decision on Vidoje Blagojević’s Expedited Motion to Compel the Prosecution to Disclose its Notes from Plea Discussions with the Accused Nikolic and Request for an Expedited Open Session Hearing*, 13 June 2003: “Rule 70 (A) aims to protect work product from disclosure, as it is in the public interest that information related to the internal preparation of a case, including legal theories, strategies and investigations, shall be privileged and not subject to disclosure to the opposing party”.

26. All OCIJ Investigators have been instructed by the Co-Investigating Judges to conduct their investigations with strict respect for the rights and principles set forth in the Internal Rules. Where necessary, they may call upon the Witness and Expert Support Unit (WESU) to facilitate contacts with witnesses. As for the interviewing of witnesses, compliance with all formal requirements is recorded in the written record of interview, including a reminder of the right against self-incrimination. The interviews are recorded in virtually all instances, and the recordings are available to the parties and may be consulted if there is any dispute as to whether these rights are being respected, as prescribed in our Order on the Request for Transcription.¹³ Here again, the Request seems to be premised on the idea that there is a “presumption of bad faith” on the part of the Investigators, but offers no proof thereof.

27. The Defence is also asking:

Whether records are kept of every payment for expenses by OCIJ Investigators to witnesses, when these payments are made and who decides upon the amount paid.

28. All payments to witness by the Investigators, as well as the reason and date of such payments are recorded in what is called the “OCIJ Expenses” and “Witness Expenses” registers. Upon return from mission, a corresponding Witness Receipt Form is submitted for verification by WESU before claims are paid. The amounts paid are based on rates set by administrative decision, and only cover loss of salary, meals and transport costs.

29. The Defence further asks:

- i. Whether there is consistent approach by the OCIJ to consider witnesses and offers of protective measures or immunity agreements;*
- ii. Whether there is a consistent approach to potential defence witnesses who might require more protective measures than witnesses whose evidence incriminates the accused.*

30. With regard to protective measures, the Co-Investigating Judges apply the provisions of Rule 29 of the Internal Rules, which very clearly defines the conditions and procedure for implementing such measures. Moreover, all decisions relating to requests for protective measures are placed on the Case File. For the reasons stated in previous orders,¹⁴ the Co-Investigating Judges have refused to adopt a policy granting general protective measures, considering that requests for protective measures must be decided on a case-by-case basis. Witnesses, whether inculpatory or exculpatory, are equally entitled to request any protective measure they consider justified, and the response takes all relevant factors into consideration, including, where applicable, the nature of the testimony. To date, such measures have been granted to individuals only in rare instances, and have been limited in scope.¹⁵

¹³ D194/2, **Order on Request for Transcription**, 6 November 2009.

¹⁴ D98, **Order on Protective Measures**, 8 August 2008 (victims); D110, **Order Concerning Protective Measures**, 28 October 2008; and D196/5, **Ordonnance sur demande de mesures de protection dans le Réquisitoire supplétif des Co-procureurs concernant les génocides de Cham**, 29 September 2009.

¹⁵ See, for example: D85/1, **Order Concerning Protective Measures**, 21 May 2008; and D106, **Order Concerning Protective Measures for Witnesses**, 28 October 2008.

31. As for “insiders”, like any other witnesses, only the procedure set forth in Rule 28 is applicable during the judicial investigation; Rule 28 does not provide for “immunity agreements”, but only for the possibility, with the agreement of the Co-Prosecutors, “to give assurance” to a witness:

(...) that the evidence provided in response to the questions: a) will be kept confidential and will not be disclosed to the public; and b) will not be used either directly or indirectly against that person in any subsequent prosecution by the ECCC.

This assurance is given by letter from the Co-Investigating Judges, of which a template is attached hereto. Where such assurance is given to a witness, this is also mentioned in the written record of interview. Further, all forwarding orders seeking the views of the Co-Prosecutors before giving such assurances, pursuant to Rule 28(4), and the responses thereto, are placed on the Case File as soon as a corresponding written record of interview is placed thereon.

32. Another question asked by the Defence is:

Whether the OCIJ investigators have kept a list of questions they asked of persons they interviewed.

33. The written records of witness interview record the questions asked as well as the answers. As explained above¹⁶ the interviews are systematically recorded. Again, the conditions for the establishment of records of interview within the context of the written procedure at the judicial investigation stage, and the conditions for consulting the recordings in case of dispute, have already been clarified by the Co-Investigating Judges.¹⁷

34. The next question concerns the chain of custody:

Whether the OCIJ Investigators have maintained a chain of custody of all evidence collected and added to the Case File.

35. All the evidence collected by the Investigators, including documents, written records of interview and reports, is submitted to the Greffiers, the only persons empowered to store it and to place it on the Case File within the Office of the Co-Investigating Judges. As for all the evidence produced by the Investigators themselves, only the original version is accepted and is placed on the Case File by the Greffiers. As for documents, the Investigators establish the chain of custody between the Office of the Co-Investigating Judges and the organisation or person having these documents in their custody. This chain of custody is contained in the report of completion of rogatory letter and any attachments thereto.

36. We will now respond, as stated in our Memorandum dated 30 October 2009,¹⁸ to a similar request for information on the methodology employed by the

¹⁶ See para. 24.

¹⁷ See D194/2, **Order on Request for Transcription**, 6 November 2009, *inter alia*, para. 7 *et seq.*

¹⁸ D130/11/2, **CIJ’ Response to Nuon Chea’s Fifteenth Request for Investigative Action and Related Letters from Ieng Sary’s Lawyers**, 30 October 2009, para. 3.

Co-Investigating Judges in determining the probative value of information obtained by torture:

*“(...) 3. To what extent has the OCIJ set standards on what constitutes information obtained by torture;
4. To what extent has the OCIJ established standards on the use of information obtained by torture; (...)”*¹⁹

37. In relation to Democratic Kampuchea, this concerns primarily admissions contained in the S-21 files that are referred to globally as “confessions”. In this respect, the Co-Investigating Judges refer to their Order on the use of statements which were or may have been obtained by torture, especially paragraph 19 thereof.²⁰ As the Order is currently under appeal, the Co-Investigating Judges find it ill-suited to add any comments, but simply wish to note that these statements will be analysed on a case-by-case basis as part of the Closing Order. In so doing, the Co-Investigating Judges will follow the relevant standards established under international law in this area, by employing the same methodology as when they used these documents for witness and charged person interviews. After the Closing Order, the Defence will have ample time to prepare for the trial, as it will only commence several months thereafter, such that the rights of the Defence will not be threatened.

IV. Collecting and analysing exculpatory evidence

38. The last heading comprises several questions about the investigation of alternative versions of events and exculpatory evidence. The questions are:

- i. Whether alternative versions of the events as set out in the IS have been discussed by the OCIJ;*
- ii. What these alternative versions are;*
- iii. Whether the CIJs have instituted a robust system for identifying, collecting and evaluating exculpatory evidence during the judicial investigations;*
- iv. Whether the CIJs verify that such a system is being applied by all OCIJ Investigators to whom they delegate responsibility for carrying out investigations via Rogatory Letters.*

39. In support of this request for information, the Defence of Mr Khieu Samphan has argued that *“investigating inculpatory and exculpatory circumstances equally requires one to resist the tendency where – devastated by the evil one observes – one drifts into a form of despondency and, in the end, too easily giving credence to it after agonizing over it”*.²¹

40. In general, it must be emphasised that “[TRANSLATION] *The law gives [investigating judges] all the necessary authority (...) in order to guarantee their*

¹⁹ D130/7, **IENG Sary’s lawyers letter concerning the identification of and reliance on evidence obtained through torture**, 17 July 2009; D130/7/2 **IENG Sary’s lawyers 2nd letter concerning the identification of and reliance on evidence obtained through torture**, 7 August 2009 ; see also: D130/11, **Nuon Chea’s Fifteenth Request for Investigative Action**, 1 September 2009, para. 7.

²⁰ D130/8, **Order on use of statements which were or may have been obtained by torture**, 28 July 2009, para. 19.

²¹ D171/3, **Notice of Adoption of IENG Sary’s Third Request for Investigative Action, Rule 55-10**, 24 August 2009, para. 2; 24 August 2009, para. 2; quoted from *Traité de l’instruction criminelle*, Chapter IV “Attributions générales du Juge d’instruction”, Faustin Hélie, p. 257.

freedom of action, and thereby enable them to perform their work".²² This explains why the Co-Investigating Judges have broad discretion when deciding how to gather inculpatory and exculpatory evidence in ascertaining the truth²³ and, in particular, why neither the systems put in place for the practical functioning of the Office of the Co-Investigating Judges nor the internal discussions within the OCIJ are part of the Case File, and why they are not subject to disclosure to the parties.

41. It must be recalled once again that the Co-Investigating Judges are fully cognizant of their obligation to investigate exculpatory evidence and they adhere to it strictly. The mere fact that they did not charge the Charged Persons in relation to all the allegations set out in the Introductory Submission is proof that they insist on conducting an independent and impartial investigation. Moreover, the Investigators have been instructed to be mindful of the fact that exculpatory evidence and alternative versions of events may emerge during the course of their interviews. Also, as part of their preparation for such interviews, they are given copies of any relevant parts of requests by parties that have been accepted by the Co-Investigating Judges.²⁴ Where applicable, the results are recorded in the written record of witness interview and placed on the Case File, thereby permitting the Co-Investigating Judges, and the parties, to verify the work in a transparent manner.
42. The content of an investigation for exculpatory evidence is not specified in the Internal Rules, nor is it specified in either the Cambodian or French Criminal Procedure Code. However, it is implicitly defined in Rule 53(4) of the Internal Rules, which provides that the exculpatory evidence the Co-Prosecutors must disclose includes: "*any material that in the actual knowledge of the Co-Prosecutors may suggest the innocence or mitigate the guilt of the Suspect or the Charged Person or affect the credibility of the prosecution evidence*". This definition is consistent with the definitions adopted by the International Criminal Tribunals.²⁵ The Co-Investigating Judges apply it when seeking such evidence during their investigation.
43. The fact remains that the Pre-Trial Chamber has clearly stated that the obligation to investigate exculpatory evidence – regarding documents and other materials –

²² *Traité de l'instruction criminelle*, Faustin Hélie, Chapter 4 "Attributions générales du Juge d'instruction", p. 158.

²³ D164/2, **Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD**, 19 June 2008; confirmed by Pre-Trial Chamber decision on appeal from our Order, dated 18 November 2009, para. 22 (D164/4/13).

²⁴ For example: D113/2, D160/2, D177/2, D179/3, D214/2, D218/2...

²⁵ **Rome Statute of the International Criminal Court**, Article 67(2), "*(...) In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence*"; **Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia**, Rule 68(i), *Subject to the provisions of Rule 70, (...) the Prosecutor shall, as soon as practicable, disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence (...)*; **Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda**, Rule 68(A), *The Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence (...)*.



is limited to reviewing materials “when there is a *prima facie* reason to believe that they may contain exculpatory evidence.”²⁶ The Defence argues that the Co-Investigating Judges cannot stand by and wait for possible requests by the Defence for investigative action before undertaking exculpatory investigations. This analysis, which relies on the right to remain silent, is clearly correct. It must be noted, however, that the search for alternative versions of events is necessarily limited to exculpatory evidence such as can reasonably be identified *proprio motu* by the Co-Investigating Judges on the basis of the Case File.²⁷

44. Finally, it must be recalled that it is open to the parties to call the attention of the Judges to any matters that, in their view, require a specific approach, including on the basis of materials on the Case File, and they do this regularly.

*

45. We do hope that these explanations have provided you with the clarifications you need for a better understanding of the procedural system applicable before the ECCC, and that they have helped clear up any misunderstanding.

²⁶ D164/4/13, Pre-Trial Chamber **Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the SMD**, 18 November 2009, para. 36.

²⁷ See, in this regard, ICC Appeals Chamber, *The Prosecutor v. Lubanga*, Decision of 11 July 2008, para. 36.



Annex
Template of letter issued
under Rule 28(4)

Date: .

From: YOU Bunleng
Marcel LEMONDE
Co-investigating judges
Extraordinary Chambers in the Courts of Cambodia

For the attention of

Dear Sir,

The Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia (ECCC), would like to take this opportunity to assure you that, in no case will the statements that you are going to make in this interview ever be used against you, directly or indirectly, as part of any prosecution before the ECCC.

I trust that this letter may help put your mind at ease with regards to this matter.

Yours sincerely,
.

