



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

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

A: **NUON Chea's Defence Team**  
TO: Messrs SON Arun, Michiel  
PESTMAN and Victor KOPPE

Date: 27 October 2009

DE: **YOU Bunleng**  
FROM:

**Marcel LEMONDE**

**Co-Investigating Judges**

**PUBLIC**

<p><b>ឯកសារបញ្ជាក់ថាជាច្រើនត្រឹមត្រូវតាមច្បាប់ខ្មែរ</b> CERTIFIED COPY/COPIE CERTIFIÉE CONFORME</p> <p>ថ្ងៃ ខែ ឆ្នាំ នៃការបញ្ជាក់ (Certified Date/Date de certification): ..... 28 / 10 / 2009 .....</p> <p>មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier:..... Uch Arun .....</p>
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OBJET: **YOUR LETTER OF 15 OCTOBER 2009 EXPRESSING YOUR "LACK OF**  
SUBJECT: **CONFIDENCE IN THE JUDICIAL INVESTIGATION"**

REF: 002/19-09-2007-ECCC-OCIJ - D 221

Dear Counsel,

We duly acknowledge receipt of your letter referenced above in which you explain why you say you lack confidence in the judicial investigation and question its impartiality.

In fact, when you write that *"we have little confidence that the ECCC's 'system' will be able to deliver a just result for our client"* it seems to us, however, that what you are challenging is foremost the legal framework under which the ECCC operates and not the impartiality of the judicial investigation. You cite the following examples:

1) The anticipated confrontation between Nuon Chea and Kaing Guek Eav (Duch). With respect to the practice of confrontations, you point out that *"[w]hile the nuances of this particular practice may be quite familiar to French jurists, it is a foreign concept to many civil-law lawyers including members of the Cambodian bar"*. In this regard, you write: *"your office has refused to address several key concerns related to our client's procedural rights"*. This comes as a surprise to us. Indeed, in our letter dated 10 January

<p><b>ឯកសារទទួលបាន</b></p> <p>DOCUMENT RECEIVED/DOCUMENT REÇU</p> <p>ថ្ងៃ ខែ ឆ្នាំ (Date of receipt/Date de reception): ..... 28 / 10 / 2009 .....</p> <p>ម៉ោង (Time/Heure):..... 10:00 .....</p> <p>មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier:..... Uch Arun .....</p>
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2008,<sup>1</sup> we provided a number of clarifications about the conduct of the judicial investigation even though we are under no obligation under the Internal Rules to do so. We also provided further clarification concerning the confrontation process<sup>2</sup> in our letter of 10 November 2008.<sup>3</sup> Upon receipt of our letter, you informed us that you were requesting a postponement of the confrontation.<sup>4</sup> Your request was granted.<sup>5</sup> Following this exchange of correspondence, in a bid to answer the questions that you had, Judge Marcel Lemonde received you several times, when Messrs Pestman and Koppe were present in Phnom Penh. During these meetings, (which were held in the presence of Mr Andrew Ianuzzi), you initially advised us that your client was not ready to participate in a confrontation, but that he would not be averse to submitting to an interview. It was agreed that you would advise us of his final position on this issue before the end of July 2009. Finally, Mr Ianuzzi informed the Office of the Co-Investigating Judges (by ordinary e-mail dated 6 July 2009, 4.14 p.m.) that Mr Nuon Chea did not wish to be interviewed. On the basis of the foregoing, we are particularly surprised to read that “[i]t was, in large part, your failure to provide adequate clarification that led Nuon Chea to forego the proposed exercise.”

<sup>1</sup> A110/1.

<sup>2</sup> The procedure has in fact already been used before the ECCC in the judicial investigation pertaining to Case File 001 - D86/18, Written record of the confrontation of Duch, Thursday 28/ February 2008, F\_ERN 00165464-00165466, E\_ERN 00165460-00165463, K\_ERN00165456-00165459; D86/19, Written record of the confrontation of Duch, Friday, 29 February 2008, F\_ERN 00166571-00166580, E\_ERN 00166561-00166570, K\_ERN00166588-00166599.

<sup>3</sup> D114/1. In our letter, we stated: “*In the year since NUON Chea's interview with the Co-Investigating Judges on 25 October 2007, a significant amount of inculpatory evidence has been placed on the case file in the form of declarations against your client by DUCH ("Declarations"). Accordingly, the Co-Investigating Judges considered it was incumbent upon them, at this point in the investigation, to highlight the Declarations and provide NUON Chea and DUCH with the opportunity to confront each other on them and thereby place on the record any comments they may have. The procedures to be adopted at a confrontation are a matter of judicial discretion taking into account inter alia the objectives sought to be achieved and the rights of the parties. This particular confrontation (held under Rules 21, 58(4) and 58(2) of the Internal Rules of the ECCC; confrontations are provided for under Cambodian law – see article 147 of the Code of Criminal Procedure and, prior to the entry into force of the Code, under article 81 of the Law of 8 March 1993) has been limited to the objective above although further confrontations may be held, with different purposes, at the instigation of the Co-Investigating Judges or at the request of the parties. The Co-Investigating Judges will commence the scheduled confrontation with the following statement to the charged persons: 'We remind you that you have the right to remain silent and not reply to any statement or question put to you today. You should, moreover, note that adverse inferences may be drawn should you decide to exercise that right'. The Co-Investigating Judges will then put forward a series of statements or questions arising out of the Declarations. The charged persons will not be required to speak in order to allow their lawyers propose a question: those lawyers, as well as the Co-Prosecutors, will be permitted to suggest questions (including which go to credibility) to the Co-Investigating Judges, who may allow them after an assessment of their relevance to the objective of the confrontation and in accordance with the good conduct of proceedings. The charged persons will be permitted reasonable consultation with their lawyers before responding to any questions or statements. The length of the sessions will be determined by the Co-Investigating Judges on the day, having consulted the parties. (...) However, if following this clarification you consider an adjournment is necessary, please provide a reasoned request which we shall consider*”.

<sup>4</sup> D116.

<sup>5</sup> D116/1.

2) Ieng Sary's Defence Team's third request for investigative action dated 21 May 2009.<sup>6</sup> The said request raises a number of issues relating to the law applicable before the ECCC, the overall strategy followed by the Co-Investigating Judges, the qualifications and experience of the investigators of the Office of the Co-Investigating Judges, as well as issues relating to the gathering and analysis of exculpatory evidence. We do not intend to let the request – on which we have been working for several months – go unaddressed, even though our response is made more complex by the need to clarify several points which seem to reveal a refusal to accept the existing procedural system. We simply wish to recall that, pursuant to Rule 55(10) of the Internal Rules, we have an obligation to rule upon such a request “in any event, before the end of the judicial investigation”.

3) Your requests for investigative action. In this regard, you write that “[a]lthough we have filed fifteen discrete requests for investigative action (many of which have explicitly identified potential sources of exculpatory evidence), over half of these remain unanswered. And despite the fact that we have requested in most cases to be consulted in advance ('in order to discuss and agree upon the most effective means of obtaining the requested information'), you have never once done so.” All your requests have been reviewed. Several have been accepted and are being executed. However, to facilitate your understanding of current investigative actions, we will be sending you letters detailing the status of each of your requests. Where a request is rejected, an order – subject to appeal under Rule 55(10) –, will be issued systematically, in any event, no later than the end of the judicial investigation. As for the second point that you raise, we refer you to the Internal Rules which do not require the Co-Investigating Judges to consult any party before acting.

4) Your second request for investigative action, the particular purpose of which is to impugn Duch's reliability and credibility. You criticise the investigative techniques used – which is your right –, but your criticism may be premature, given that the relevant investigations are still ongoing. Moreover, it is precisely because you were contesting Duch's reliability and credibility that we had planned to organise a confrontation.

5) Your seventh request for investigative action. We have already replied to a previous request for clarification in this regard in a letter dated 15 September 2009<sup>7</sup>. We have nothing to add to that answer. You write that [our answer] “*appeared deliberately designed to ensure a negative result.*” Everyone may make their own assessment.

You also read into some of our orders signs of a violation of the principle of impartiality of judicial investigations.

1) The Order of 19 June 2009 on the request for investigative action to seek exculpatory evidence in the SMD. You argue that “[y]our office [the Office of the Co-Investigating Judges] has publicly suggested that pursuant to the so-called principle of sufficiency, it would 'close [its] judicial investigation once [it] has determined that there is sufficient evidence to indict' Nuon Chea and the other Charged Persons (...) that [our] 'duty of

<sup>6</sup> D171.

<sup>7</sup> (D122/8)

*impartiality' does not impose a positive obligation to seek out exculpatory materials and any such search [our] office may undertake (presumably as a discretionary matter) must be subordinated to 'the requirement for trial within a reasonable time'.*" We find this summary of our decision somewhat simplistic; the reasoning underlying the order – made public by the Co-Investigating Judges –, is significantly more involved. We cannot say more as the decision in question is currently under appeal before the Pre-Trial Chamber.

2) The Order of 28 July 2009 on the use of statements which were or may have been obtained by torture. This is how you summarise the Order: "*You have announced your intention to rely on evidence obtained through torture – possibly for the truth of its contents – in order to substantiate allegations against Nuon Chea and the other Charged Persons*". Once again, to us, this order, which is public, is undeniably more complex. However, we cannot say more as the appeal is pending before the Pre-Trial Chamber.

3) The failure to address "*the concerns of at least one defence team with regard to [our] definition, identification, use, and intended disclosure of 'evidence obtained by or derived from torture'*". This request from Ieng Sary's Defence Team, dated 17 July 2009, is currently under review and will be answered in the coming days, it being noted that part of the answer has already been provided in the Order of 28 July 2009, *supra*.

Finally, you refer to the application for the disqualification of Judge Lemonde. Although the application was made public even before its formal submission to the Court greffiers, it is obviously impossible to comment upon it in any way as long as proceedings are pending before the Pre-Trial Chamber.

We hope this letter will address your concerns and wish to assure you that we will continue to conduct the judicial investigation with impartiality and with all necessary vigour.

Sincerely,