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**NUON CHEA DEFENCE TEAM**  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

Phnom Penh, 15 October 2009

Office of the Co-Investigating Judges:  
Judge You Bunleng  
Judge Marcel Lemonde

**Re: Lack of Confidence in the Judicial Investigation**

Dear Judges:

We understand that you aim to complete the judicial investigation of Case File 002 by the end of 2009. In light of this fast-approaching deadline, we wish to highlight certain case-related developments and clearly articulate our position with respect to your office's apparent approach to the proceedings thus far.

Since the beginning of the case, we have expressed and maintained our client's willingness to participate in the ongoing investigation, subject to full respect for his fundamental rights.<sup>1</sup> And we have sought assurances that the OCIJ is conducting its investigation impartially as required by Rule 55(5).<sup>2</sup> Unfortunately, despite some conciliatory assertions on your part, many of your actions have led us to question the actual neutrality of the ECCC's investigative process:

- With regard to the anticipated 'confrontation' between Nuon Chea and Kaing Guek Eav ('Duch'), your office has refused to address several key concerns related to our client's procedural rights.<sup>3</sup> It was, in large part, your failure to provide adequate clarification that led Nuon Chea to forego the proposed exercise. While 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.
- The Ieng Sary Defence Team has sought the disclosure of information related to, among other things: (i) your overall investigative strategy, (iii) the qualifications and experience of your investigators, and (iii) the collection and analysis of exculpatory evidence.<sup>4</sup> Your office has yet to provide any of the requested information.

<sup>1</sup> See Document No A-110, Defence Letter to OCIJ re 'Conduct of the Judicial Investigation', 20 December 2007, p 1.

<sup>2</sup> See Document No D-116, 'Request for Adjournment of Confrontation', 18 November 2008, para 10.

<sup>3</sup> See Document Nos D-114, 'Request for Clarification of Summonses of Lawyer', 5 November 2008; D-114/1, OCIJ Response, 11 November 2008; D-116, 'Request for Adjournment of Confrontation', 18 November 2008; D-116/1, OCIJ Response, 18 November 2008; D-114/2, 'Request for Further Clarification of Summonses', 9 January 2009.

<sup>4</sup> See Document No D-171, Ieng Sary's Third Request for Investigative Action, 21 May 2009; see also Document No D-171/2, 'Notice of Joinder to Ieng Sary's Third Request for Investigative Action', 9 June 2009.

**ឯកសារដើម**

ORIGINAL DOCUMENT/DOCUMENT ORIGINAL

ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception):  
..... 15 / 10 / 2009 .....

ម៉ោង (Time/Heure) : ..... 11:00 .....

មន្ត្រីទទួលបន្ទុកសំណុំរឿង / Case File Officer/L'agent chargé  
du dossier: ..... C.A. Jay .....

**ឯកសារច្បាប់ចម្លងត្រឹមត្រូវតាមច្បាប់ដើម**

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ថ្ងៃ ខែ ឆ្នាំ ធ្វើការបញ្ជាក់ (Certified Date/Date de certification):  
..... 16 / 10 / 2009 .....

មន្ត្រីទទួលបន្ទុកសំណុំរឿង / Case File Officer/L'agent chargé  
du dossier: ..... Uch Arun .....

- Your office 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.<sup>5</sup> Furthermore, you have indicated that your ‘duty of impartiality’ does not impose a positive obligation to seek out exculpatory materials<sup>6</sup> and any such search your office may undertake (presumably as a discretionary matter) must be subordinated to ‘the requirement for trial within a reasonable time’.<sup>7</sup>
- 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.<sup>8</sup> And you have failed to address the concerns of at least one defence team with regard to your definition, identification, use, and intended disclosure of ‘evidence obtained by or derived from torture’.<sup>9</sup>
- Although 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.
- The treatment of our Seventh Request for Investigative Action—in particular (i) the fact that Judge You Bunleng did not sign the letters to the Royal Palace; (ii) your office’s insistence on dealing with an intermediary in the face of interference; and (iii) your demand that Norodom Sihanouk present himself at the ECCC premises as opposed to proposing to hear his testimony at the Royal Palace (to us, an obvious matter of protocol)—appeared deliberately designed to ensure a negative result.
- In dealing with our Second Request for Investigative Action—a request whose specific aim was to challenge Duch’s reliability/credibility—the delegated OCIJ investigator assigned to the task relied largely on information from Duch himself. And he did not look beyond information already contained on the case file despite a clear mandate to undertake fresh investigations. As noted in our recent letter to your office, ‘this is an investigative approach that is unsatisfactory’.<sup>10</sup>
- By far, the most troubling development in the case to date has been the recent revelation that, at an August 2009 meeting at his private residence, Judge Lemonde allegedly instructed senior international OCIJ officials to curtail their investigations of exculpatory circumstances. (No Cambodian staff members were present at the meeting.) According to the former head of the OCIJ’s intelligence and analysis

<sup>5</sup> Document No D-164/2, ‘Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD’, 19 June 2009, para 6 (emphasis added).

<sup>6</sup> SMD Order, para 15.

<sup>7</sup> SMD Order, para 10.

<sup>8</sup> Document No D-130/8, ‘Order on the use of statements which were or may have been obtained by torture’, 28 July 2009.

<sup>9</sup> Document D-130/7, Letter from Ieng Sary Defence Team to OCIJ, 17 July 2009 (the ‘Ieng Sary Request’). *N.B.* The Ieng Sary Defence Team recently reiterated the specific queries contained in its request. See Document D-130/7/2, Letter from Ieng Sary Defence Team to OCIJ, 7 August 2009.

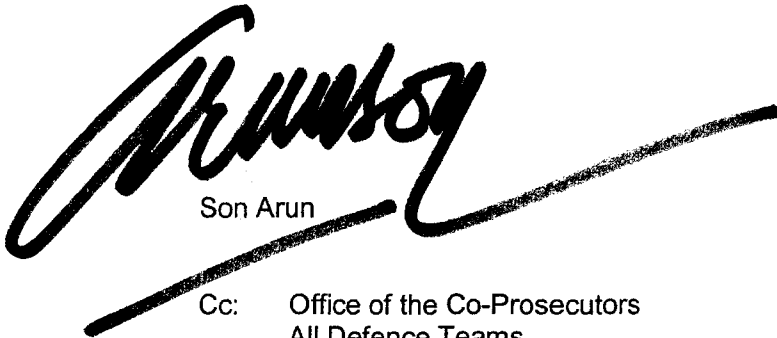
<sup>10</sup> Document D-100/7, Letter from Nuon Chea Defence Team to OCIJ, 29 September 2009, p 1.

team, Judge Lemonde informed those in attendance: 'I would prefer that we find more inculpatory evidence than exculpatory evidence.'<sup>11</sup> If true, the instruction (i) amounts to a clear breach of Rule 55(5), which requires the OCIJ to equally seek out both exculpatory and inculpatory material; (ii) calls into question Judge Lemonde's fitness to retain his post; and (iii) undermines the integrity of over two years of investigative work at the tribunal.

Individually, and *a fortiori* together, these failings lead us to conclude that your office has not conducted its investigation in an impartial manner. In fact, we suspect that you have spent the better part of the last two years confirming a particular set of historically accepted 'truths'. Despite your obligation to do so, we have seen no evidence of any attempt to test the received wisdom or to explore alternative, exculpatory theories. Moreover, your failure to engage the parties in any meaningful way has only increased our apprehension. In short, we have little confidence that the ECCC's 'system' will be able to deliver a just result for our client.

Accordingly, unless and until you address our concerns in writing within seven days of the filing of this letter, we will: (i) advise Nuon Chea not to submit to any OCIJ interview, 'confrontation', or other proposed procedure and (ii) take additional measures pursuant to Rule 34.

Regards,



Son Arun



Michiel Pestman & Victor Koppe

Cc: Office of the Co-Prosecutors  
All Defence Teams  
Defence Support Section

<sup>11</sup> Douglas Gillison, *The Cambodia Daily*, 9 October 2009, pp 1, 23.