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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA
BEFORE THE PRE-TRIAL CHAMBER

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APPEAL AGAINST ORDER ON ELEVENTH REQUEST FOR INVESTIGATIVE ACTION

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I. INTRODUCTION

1. Pursuant to Rules 73, 74, and 75 of the ECCC Internal Rules (the 'Rules'), counsel for Charged Person NUON Chea (the 'Defence') submit this appeal to the Pre-Trial Chamber (the 'PTC') against the 'Order on Request for Investigative Action' (the 'Order')[1] issued by the Office of the Co-Investigating Judges (the 'OCIJ'). For the reasons stated below, the Defence submits that: (i) the appeal is admissible; (ii) the OCIJ has the inherent jurisdiction to provide the requested relief; (iii) the request was sufficiently factually motivated; and (iv) it would be futile to await resolution of the matter by the Royal Government of Cambodia (the 'RGC') and/or the United Nations (the 'UN').

II. PROCEDURAL HISTORY

2. The Defence filed its 'Eleventh Request for Investigative Action' (the 'Request') on 27 March 2009,[2] requesting 'the OCIJ to obtain from the UN, the RGC, and/or any other organization or individual: the results of the [UN's Office of Internal Oversight Services (the 'OIOS')] inquiry; any correspondence between the UN and the RGC related to the OIOS inquiry; and any other information suggesting an organized regime of institutional corruption at the ECCC'.[3] Additionally, the Defence invited 'the OCIJ to request an administrative inquiry into the outstanding allegations of corruption at the tribunal'.[4]

3. Counsel for Charged Persons Ieng Sary, Ieng Thirith, and Khieu Samphan filed separate motions in support of the Request.[5] The Office of the Co-Prosecutors (the 'OCP') advanced no submissions in response to either the Request or the subsequent defence filings.

4. On 3 April 2009, the OCIJ denied the Request, concluding that: (i) it has no jurisdiction to provide the relief sought;[6] (ii) the 'negative effects' of corruption are speculative;[7] and (iii) the matter is currently being dealt with by the RGC and the UN.[8]

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1 Document No D-158/5, 3 April 2009.
2 Document No D-158.
3 *Ibid*, para 22.
4 *Ibid.*
5 Document Nos D-158/2, 'Ieng Sary's Motion to Join and Adopt Nuon Chea's Eleventh Request for Investigative Action', 27 March 2009; D-158/3, 'Motion in Support of Nuon Chea's Eleventh Request for Investigative Action for Disclosure of OIOS Report and Related Documents', 30 March 2009; and D-158/4, 'Déclaration de la Défence aux Fins d'Adoption de la Onzième Demande d'Acte d'Instruction de M. Nuon Chea Relative aux Allégations de Corruption au Sein des CETC', 3 April 2009.
6 Order, para 8 ('The power of the [OCIJ] to "take any investigative action conducive to ascertaining the truth" is limited to their jurisdiction, under Article 2 of the ECCC Law', which sets out the tribunal's personal, subject matter, and temporal jurisdiction.); para 9 (Rule 55(2) permits the OCIJ to 'only investigate the facts

III. FACTUAL BACKGROUND

5. The Defence adopts by reference the submissions contained at paragraphs four through twelve of the Request. Since the filing of that document, additional relevant developments have unfolded:

   a. In March 2009, Amnesty International declared that the outstanding corruption allegations 'have cast significant doubts on the [ECCC's] competence, independence, and impartiality' and noted that the 'failure of the government and the UN to respond to the allegations in a transparent way further threatens to undermine the institution's credibility'.[9]

   b. On 27 March 2009, Trial Chamber Judge Silvia Cartwright offered a succinct assessment of the issue, noting that if the court were to become unduly compromised, 'a number of the [international] judges would pack our bags and go away'.[10]

   c. On 1 April 2009, it was reported that '[t]wo employees of the court's Office of Administration told CNN of an ongoing kickback scheme involving Cambodian staff', with one of the informants putting the total amount at 30,000–40,000 USD per month.[11] 'They are supposed to pay a certain amount [of] money—a certain percentage [...]. So every month, they have to put it in an envelope—and give it to ... each section has one person go around to collect it ... the money is in cash, in US dollars.'[12] The same report noted that the matter 'has been under investigation

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set out in an Introductory Submission or a Supplementary Submission by the Co-Prosecutors'.); para 10 (The OCIJ's 'power cannot be extended to ascertaining the truth "about this tribunal" as the Defence wishes, as this issue is totally foreign to the facts covered by the current judicial investigation'.); and para 11('[A]ccepting the Request would amount to an abuse of power, since the facts at issue do not come within the jurisdiction of the Co-Investigating Judges under the ECCC Law.')

7 Order, para 12 ('Of course, the [OCIJ] must guarantee that the ongoing judicial proceedings are irreproachable in every way, especially by ensuring that all confirmed acts that interfere with the administration of justice are "sanction[ed] or refer[red] to the appropriate authorities" by virtue of Internal Rule 35. Nevertheless, nothing in the Request justifies any affirmation that we are currently faced with such acts, since it limits itself to raising speculation as to hypothetical negative effects of any form of corruption on the proceedings'.)

8 Order, para 13 ('Finally, a request by the [OCIJ] for an administrative inquiry into this issue would be superfluous, since the Cambodian and United Nations authorities are already seised of the issue and already have all of the information contained in the Request at their disposal.')

9 Amnesty International, 'Cambodia: After 30 years Khmer Rouge crimes on trial', AI Index: ASA 23/003/2009, p 3.

10 New Zealand Press Association, 'Tough Job Ahead for NZ Judge Dame Silvia Cartwright', 27 March 2009.

11 Dan Rivers, CNN, 'Cambodian war crimes court in corruption probe', 1 April 2009.

12 *Ibid.*

by OIOS, whose work is confidential' and that the 'result of the [UN] probe will be submitted to the Cambodian government for further action'.[13]

d. Also on 1 April 2009, an op-ed piece by a Phnom Penh-based journalist (who has been covering the corruption story for over two years) appeared in the *Wall Street Journal*. Again—as it had been in early 2007[14]—it was suggested that Cambodian judges may be involved in the alleged scheme: 'At the heart of the corruption charges is a single allegation: Cambodian employees, including some judges, were given lucrative positions at the court on the basis they would then pay a portion of their salaries every month to the government officials who secured them their jobs.'[15]

e. On 2 April 2009, it was reported that 'Sean Visoth [...] had been to the United Nations in New York twice at the end of 2008, "for discussions".'[16]

f. On 4 April 2009, *The Economist* reported that three anonymous court staffers had 'accuse[d] Sean Visoth [...] of collecting money from every Cambodian in his department, including court employees and Cambodian legal assistants in the office of the [OCIJ and OCP] [...]. Some of the cash, they were told, was intended for Sok An, a deputy prime minister.'[17] In the same article, Khieu Kanharith, the RGC spokesman, confirmed that 'a UN corruption review had named [Mr Sean] and requested his removal'.[18] The explanation advanced by the Tribunal for Mr Sean's long absence—that he is on sick-leave—was 'a political excuse', Mr Khieu added.[19] Also in the same article, Co-Investigating Judge Marcel Lemonde intimated a compromised judicial environment at the ECCC: 'It's very easy to be a pure international judge in a pure international tribunal very far away from Cambodia, far away from *this corrupt atmosphere*.'[20]

g. In its March/April 2009 issue, *Foreign Affairs* reported that, since taking power in 1997, Hun Sen's government has been 'fostering an expansive system of corruption, all the while ignoring any challenges or complaints from organizations and

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[13] *Ibid.*
[14] *See* Request, para 4(a).
[15] Cat Barton, *The Wall Street Journal*, 'Disorder in the Court', 1 April 2009.
[16] Sok Khemara, VOA Khmer, 2 April 2009.
[17] *The Economist*, 'The Khmers Rouges and justice: The court on trial', 4 April 2009, p 31.
[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid*, p 32 (emphasis added).

governments around the world'.[21] According to the report, comprehensive US-funded studies published in 2004 and 2005 'showed in stunning detail that Cambodian government officials steal between $300 million and $500 million a year (most years, the state's annual budget is about $1 billion)'.[22] The author noted that the outstanding allegations of corruption at the ECCC 'have enraged UN officials but have evoked little surprise among Cambodians. After all, they learn about corruption firsthand—starting in the first grade'.[23] The same report quoted Ok Serei Sopheak, a prominent political consultant in Cambodia: 'Everyone is corrupt. [...] It's a way of life here'.[24]

h. On 24 April 2009, international co-prosecutor Robert Petit finally added his voice to the chorus of corruption critics: 'This has got to go away so it no longer shares the headlines with the more important work of the court. Half the headlines are about *the problem they refuse to deal with. It threatens the continuation of the court. It's a very real problem.*'[25]

i. With regard to the ongoing anticorruption negotiations between the UN and the RGC, 'Hun Sen said that he had ordered Cabinet Minister and Deputy Prime Minister Sok An four times not to sign further agreements regarding the ECCC'.[26] Nevertheless, UN Assistant Secretary-General for Legal Affairs, Peter Taksoe-Jensen, arrived in Phnom Pehn for a third round of talks on 6 April 2009.[27] Mr Taksoe-Jensen indicated that he would not discuss the issue of the OIOS findings with his RGC counterparts,[28] but noted that 'the UN was currently "processing" a [...] request from Nuon Chea's legal team to release the controversial findings'.[29] After spilling over into an unscheduled third day of talks, the parties reached an impasse.[30] Ultimately, no agreement was concluded, and Mr Taksoe-Jensen 'said that the [UN] would have no

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[21] Joel Brinkley, *Foreign Affairs*, 'Cambodia's Curse: Struggling to Shed the Khmer Rouge's Legacy', 16 April 2009, p 112.
[22] *Ibid*, p 118.
[23] *Ibid*, p 115.
[24] *Ibid*, p 118.
[25] *Asia Sentinel*, 'Khmer Rouge Trial Threatened', 24 April 2009 (emphasis added).
[26] Douglas Gillison, *The Cambodia Daily*, 'No More KR Prosecutions, Hun Sen Says', 1 April 2009, p 2.
[27] Douglas Gillison, *The Cambodia Daily*, 'UN To Negotiate Anticorruption Mechanism at ECCC', 6 April 2009, p 32; *see also* Sok Khemara, VOA Khmer, 'UN Legal Official Arrives for More Talks', 6 April 2009.
[28] Georgia Wilkins, *The Phnom Penh Post*, 6 April 2009, 'KRT graft probe off agenda', 6 April 2009, p 2.
[29] *Ibid.*
[30] Vong Sokheng & Georgia Wilkins, *The Phnom Penh Post*, 'No agreement as UN, govt strive to tackle graft at KRouge court', 7 April 2009, p 2; Eang Mengleng & Isabelle Roughol, *The Cambodia Daily*, 'ECCC Anti-Corruption Talks Continue', 8 April 2009, p 29.

further discussions about corruption-reporting mechanisms at the court'.[31] Despite the failure, it was announced that the 'United Nations continues to be convinced that the Court will meet the principle of fair trial'.[32]

j. In a joint statement released on 17 April 2009, the Cambodian Center for Human Rights and the Asian Human Rights Commission neatly summed up the danger posed by the unresolved issue: 'Corruption introduces an element of external control that affects both the tribunal's independence and the fairness of the trials—a person paying kickbacks is not truly independent and impartial.'[33] Moreover, the organizations were critical of the recent failures to tackle the issue; this, they say, 'has sent out a signal to Cambodians that corruption is tolerated and, when required, accountability disregarded'.[34] The groups concluded that, when viewed in conjunction with 'the widely reported sustained political interference', the corruption issue 'has very much undermined the dignity and reputation of the [ECCC]'.[35]

k. At the time of filing, April payroll obligations for Cambodian staff had not been met.[36] In response to this recurring crisis, the Australian government has apparently authorized the release of its pledged funds to the Cambodian side of the tribunal, despite the failure to reach a UN-sanctioned anticorruption agreement. However, the UN Development Program ('UNDP')—which administers donor monies—said recently it 'was not in a position to release the funds at this time', pending 'a resolution of the [corruption] allegations'.[37] But given the stalemate between the UN and the RGC, reaching such a juncture seems unlikely.

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[31] Bethany Lindsay & Eang Mengleng, *The Cambodia Daily*, 'UN Negotiations End With No Agreement', 9 April 2009, p 27; *see also* Vong Sokheng, *The Phnom Penh Post*, 'No agreement at ECCC graft talks', 9 April 2009, p 3.

[32] Statement of Peter Taksoe-Jensen, Phnom Penh, 8 April 2009.

[33] Joint Statement by the Cambodian Center for Human Rights and the Asian Human Rights Commission, 'CAMBODIA: Tolerance of corruption at the Khmer Rouge Tribunal is unacceptable', 17 April 2009, AHRC-STM-090-2009.

[34] *Ibid.*

[35] *Ibid.*

[36] Sok Khemara, VOA Khmer, 'Tribunal Breakdown Puts Onus on Donors: UN', 23 April 2009. *N.B.* On 30 April 2009, the Japanese government announced an emergency contribution of four million USD to the tribunal's Cambodian side. However, it was reported on 1 May 2009 that '[p]aychecks for April for the court's 251 Cambodian staff were not issued Thursday, which would otherwise have been payday'. Douglas Gillison, *The Cambodian Daily*, 'Japan Funds ECCC's Local Side Through 2009', 1 May 2009, p 1.

[37] Chun Sakada, VOA Khmer, 'Calls mount for release of tribunal funding', 21 April 2009.

6. In short, 'cumuli of corruption'[38] continue to hover ominously over the tribunal, and there is no indication that the RGC, the UN, or the donors are willing and/or able to take the necessary steps to clear the air.

IV. APPLICABLE LAW

A. Jurisdiction & Standard of Appellate Review of the Pre-Trial Chamber

7. Rule 73 vests this Chamber with 'sole jurisdiction over [...] appeals against decisions of the Co-Investigating Judges, as provided in Rule 74'. Pursuant to Rule 74(3)(b), a charged person may appeal against any order of the Co-Investigating Judges 'refusing requests for investigative action allowed under' the Rules.[39] Pursuant to well-established civil-law appellate practice, this Chamber should review the request *de novo*, without any deference to the legal or factual findings of the OCIJ. In making its determination, the PTC has unfettered discretion to uphold, modify, or suspend the Order based upon the existing case-file and any additional information presented by the parties on appeal.[40]

B. Requests for Investigative Action, Independence & Impartiality, and the Office of Administration

8. The Defence adopts by reference the submissions contained at paragraphs thirteen through fifteen of the Request.

C. Anti-Corruption Principles

9. The Defence adopts by reference the submissions contained at paragraph sixteen of the Request. Furthermore, the Defence directs the PTC to the comments of Justice Désirée Bernard of the Caribbean Court of Justice on the negative impact of corruption on judicial proceedings and the courts' role in combating it:

   a. Judicial support staff are 'expected to conform to high moral standards of behavior befitting an institution charged with the responsibility of preserving the law and dispensing justice. They are expected to be scrupulously honest and fair in their

[38] Ian Andrews, *l'Osservatore Romano*, 'Swiss Guard implicated in Vatican kick-back scandal' 19 June 1974.
[39] *See also* Rule 55(10) ('The order, which shall set out the reasons for the rejection, shall be notified to the parties and shall be subject to appeal.')
[40] *See, e.g.*, Document No C-9/4/1, 'Appeal Against Order on Extension of Provisional Detention', 16 October 2008, para 9 (citing ECCC jurisprudence).

interactions with the public, but are exposed on a daily basis to temptations and requests from parties to litigation in the courts to alter and remove files and documents or misrepresent facts to try to influence judges with whom they work'.[41]

b. 'For a judicial system to function effectively, justice must not only be done but be seen to be done. Public perception is very important, and those who administer the court system must be perceived to be acting firmly and resolutely in eradicating any form of corruption.'[42]

c. Standards of judicial ethics 'should not be confined to judges or magistrates only, but should be formulated for all support staff and personnel employed within the system. [...] Such persons must be sensitized to the realization that they are an integral part of the court system, and misconduct on their part reflects adversely on the entire administration of justice'.[43]

d. 'Of course, the main stakeholder is the judiciary and those charged with its administration. The buck stops there, and the primary responsibility for eradicating corruption from the court system rests with the judiciary and its administrators.'[44]

D. Inherent Powers

10. Inherent powers are those that derive, not from statute or other express grant of authority, but rather from a court's very nature as such.[45] These powers are rooted in the imperative that courts everywhere must be in a position to fairly and effectively 'fulfill their judicial functions'.[46] The recognition of inherent powers—firmly rooted in the English common-law[47] but equally known to civil-law jurisdictions[48]—has been

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[41] Hon Désirée Bernard, OR, CCH, 'The Impact of Corruption within the Court System on its Ability to Administer Justice', 14th Commonwealth Law Conference, September 2005, p 4.

[42] Bernard, p 5.

[43] *Ibid*, p 6.

[44] *Ibid*, pp 7–8.

[45] *See* Chester Brown, 'The Inherent Powers of International Courts and Tribunals', in *The British Yearbook of International Law 2005* (Oxford 2006), p 205 ('The adjective "inherent" is used to describe something which "exist[s] in something as a permanent attribute or quality; forming an element, esp. a characteristic or essential element of something; belonging to the intrinsic nature of that which is spoken of". An "inherent power" might thus be said to be one that derives from an office, position, or status; an inherent power of a court might, then, derive "from its nature as a court of law".'); *see also ibid*, p 197, n 11 (citing extensive int'l scholarship from 1960 through 2005 at n 11) and pp 227–228.

[46] Brown, pp 228–229.

[47] Brown, p 205, n 58 (quoting Lord Blackburn in *Metropolitan Bank v Pooley*: 'from early times [...] the court had inherently in its power the right to see that its process was not abused by a proceeding without reasonable grounds,

enthusiastically embraced by modern domestic and international tribunals alike. All courts posses such powers, which include the authority to ensure the fundamental fairness of their proceedings and to prevent any abuses of process and/or rights.[49]

11. The justification for the exercise of inherent powers is two-fold, comprising a private aspect and a public one: the former relates to the settlement of the particular dispute before the tribunal, while the latter seeks to ensure the proper administration of justice as a general, normative matter.[50] One particular 'manifestation of the public function of international adjudication is the role that international courts play in the clarification and the progressive development of international law' and in upholding 'broader community interests'.[51]

12. The concept of inherent powers was first recognized, internationally, by the International Court of Justice (the 'ICJ') in 1974:

> '[...] the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand, to ensure that the exercise of its jurisdiction over the merits [...] shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute [...]. Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of states, and is conferred upon it in order that its basic judicial functions may be safeguarded. [...] Although much (though not all) of this incidental jurisdiction is specifically provided for in the Court's Statute, or in Rules of Court which

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so as to be vexatious and harassing—the court had a right to protect itself against such an abuse'.); *ibid*, p 205, n 59 (quoting Lord Morris in *Connelly v DPP*: 'There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.'); *see also* Lord Nicholls in *R v Looseley*, [2001] United Kingdom House of Lords Decisions 53, para 1 ('My Lords, every court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. By recourse to this principle courts ensure that executive agents of the State do not misuse the coercive, law-enforcement functions of the courts and thereby oppress citizens of the State.') *N.B.* Many other common-law jurisdictions have claimed inherent powers in various circumstances: 'to make rules of court and practice directions, to prevent abuse of the court's process, to remand cases involving pendent claims, to stay proceedings, to correct any injustice caused by an earlier order, such as where an individual is subjected to procedural unfairness, and to allow the admission of evidence'. Brown, pp 205–206, nn 60–65.

[48] Brown, p 206 ('While the use of inherent powers is certainly more prevalent in common-law countries, the exercise by courts of jurisdictional powers which are not expressly provided for in legislation or statutory rules is not unknown in civil-law countries.') (noting the practice in France, Germany, Norway, Sweden, and generally).

[49] Brown, p 231 ('The common-law doctrine of "abuse of process" is related to the concept of "abuse of rights", a term more familiar in civil legal systems.') *N.B.* Other well-known examples of a court's inherent powers include: determining the extent of its own jurisdiction; granting provisional measures; permitting the intervention of third parties; interpreting, revising, reconsidering, and/or rectifying judgments, decisions, and/or awards; framing rules of procedure/conduct and making procedural orders; issuing practice directions; ruling on counterclaims; reformulating submissions of the applicants; refraining from ruling on certain claims if it is not necessary to do so to resolve the issues in dispute; creating special procedures as a means of maintaining jurisdiction over a dispute; making site visits; ordering the preparation of expert reports; and providing redress to injured parties/award remedies. *See* Brown, p 200, n 24; p 201, nn 25–28; pp 201–202, nn 33–35; pp 212–215, 216, nn 129–135; and pp 217–222.

[50] Brown, pp 198, 208–209 n 82, 230, 231, 237.

[51] Brown, pp 232–233, 235.

> the Statute empowers the Court to make, it is really an inherent jurisdiction, the power to exercise which is a necessary condition of the Court—or any court of law—being able to function at all.'[52]

Since then, the ICJ approach—which perceives the issue 'from the viewpoint of the proper administration of justice'[53]—has been adopted by most, if not all, international tribunals (including the ECHR,[54] ICTY,[55] and ICTR[56]), with each recognizing the inherent power to control its own proceedings in such a way as to ensure that justice is done. Accordingly, 'international courts and tribunals [...] possess by definition the inherent power to deal with conduct interfering with their administration of justice [...]'.[57]

E. Tainted Evidence

13. A court must 'satisfy itself that the proceedings as a whole were fair, having regard to any possible irregularities before the case was brought',[58] including 'the way in which the evidence was dealt with'.[59] As courts have the ultimate discretion to admit or exclude evidence,[60] such determination must always be made with due caution, giving regard to the circumstances which 'best favour a fair determination of the matter before the Chamber'.[61] It may become necessary to exclude evidence—even after it has been admitted—where its probative value is substantially outweighed by the need to ensure a

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[52] Brown, pp 211–212 (quoting *Nuclear Tests (Australia v France)*, [1974] ICJ Rep 253, 259–260 and citing *Nuclear Tests (New Zealand v. France)*, [1974] ICJ Rep 457, 463; *Northern Cameroons (Cameroons v UK)*, [1963] ICJ Rep 15, 97, 103).

[53] Brown, p 195.

[54] *See, e.g., Putz v Austria*, ECHR, App No 18892/91, Judgment, 22 February 1996, para 33.

[55] *See, e.g., Prosecutor v Mucić et al*, IT-96-21-A*bis*, 'Judgment on Sentence Appeal', 8 April 2003, para 16; *Prosecutor v Tadić*, IT-94-1-A-R77, 'Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin', 31 January 2000, para 13; *Prosecutor v Tadić*, IT-94-1-A, 'Judgment', 15 July 1999, para 322; *Prosecutor v Blaškić*, IT-95-14-AR108*bis*, 'Judgment on Request of Republic of Croatia for Review of Decision of Trial Chamber II of 18 July 1997', 29 October 1997, para 25, n 27.

[56] *See, e.g., Prosecutor v Nyiramasuhuko and Ntahobali*, ICTR-97-21-T, 'Decision on Ntahobali's Motion for Withdrawal of Counsel', 22 June 2001, para 20; *Prosecutor v Barayagwiza*, ICTR-97-19-T, 'Decision on Defence Counsel Motion to Withdraw', 2 November 2000 ('Concurring and Separate Opinion of Judge Gunawardana'); *Kanyabashi v Prosecutor*, ICTR-96-15-A, 'Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I' ('Dissenting Opinion of Judge Shahabuddeen', p 17).

[57] Silvia D'Ascoli, 'Sentencing Contempt of Court in International Criminal Justice: An Unforeseen Problem Concerning Sentencing and Penalties', in *Journal of International Criminal Justice* (Oxford 2007), p 738.

[58] *Miailhe v France (No. 2)*, ECHR, App No 47/1995/553/639, Judgment, 26 September 1996, para 43.

[59] *Helle v Finland*, ECHR, App No 157/1996//776/977, Judgment, 19 December 1997, para 53.

[60] Karim Khan & Rodney Dixon, *Archbold International Criminal Courts: Practice, Procedure and Evidence* (Sweet & Maxwell 2005), § 9-27.

[61] *Prosecutor v Milosević*, IT-02-54-AR73.2, 'Decision on Admissibility of Prosecution Investigator's Evidence', 30 September 2002, para 18.

fair trial[62] or, in other words, where 'its prejudicial effect will adversely affect the fairness' of the proceedings.[63]

14. In this regard, Rule 95 of both the ICTY and ICTR provide for the 'exclusion of evidence on the grounds of the means by which it was obtained'; evidence which 'would seriously damage the integrity of proceedings' will be excluded. Likewise, SCSL Rule 95 provides that 'no evidence shall be admitted if its admission would bring the administration of justice into serious disrepute'. The ICTY has held that the source of the evidence is fundamental to its reliability and must be 'obtained under circumstances which cast no doubt on its nature and character'.[64]

15. Relevant jurisprudence has shown that there are a number of circumstances in which evidence must be excluded in order to maintain the integrity of the proceedings:

    a. The United States Supreme Court has adopted the doctrine of the 'fruit of the poisonous tree',[65] which requires the suppression of evidence that 'is in some sense the product of illegal governmental activity'.[66] This approach excludes derivative evidence obtained 'by exploitation of [such] illegality'.[67]

    b. The ECHR has found it useful to refer to the US approach in cases where 'the fairness of the criminal proceedings under examination had been irretrievably prejudiced',[68] and has held that the admission of statements obtained in violation of the doctrine 'contaminated [the proceedings] as a whole'.[69]

    c. In the United Kingdom, appellate courts have overturned the convictions of accused IRA terrorists in two notable cases where it was determined that the police had manipulated confessions and subsequently deceived the respective trial courts. In the case of the 'Guilford 4', the UK Court of Appeal found that: 'if [the police]

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[62] *Prosecutor v Akayesu*, ICTR-96-4-T, 'Judgment', 2 September 1998, para 136.
[63] *Prosecutor v Bagosora et al*, ICTR-98-41-AR93, 'Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence', 19 December 2003, para 16.
[64] *Prosecutor v Delalić et al*, IT-96-21-T, 'Decision on Zdravko Mucić's Motion for the Exclusion of Evidence', 2 September 1997, para 41.
[65] *Nardone v United States*, 308 U.S. 338, 341 (1939).
[66] *Nix v Williams*, 467 U.S. 431, 444 (1984).
[67] *Wong Sun v United States*, 371 U.S. 471, 485–488 (1963).
[68] *Panovits v Cyprus*, ECHR, App No 4268/04, Judgment, Joint Concurring Opinion of Judges Spielmann and Jebens, 11 December 2008, paras 10–11.
[69] *Ibid*; *see also Gäfgen v Germany*, ECHR, App No 2978/05, Judgment, 30 June 2008, para 105.

were prepared to tell this sort of lie, then the whole of their evidence becomes suspect'.[70] Similarly, in the case of the 'Birmingham 6',[71] it was determined that 'police evidence at trial [was] so unreliable [...] that the convictions [were] both unsafe and unsatisfactory'.[72]

16. These cases demonstrate the need to act expeditiously at the first sign of any potential problem related to the collection of evidence. Prevention, it is said, is better than cure.[73]

F. Exhaustion of Remedies

17. As a general principle of public international law, 'local remedies must be exhausted before international proceedings may be instituted'.[74] The rule has the effect of barring a claim on the international plane unless and until the applicant has taken all steps available to him in the state which is alleged to be responsible for the violation.[75] While the concept is not directly applicable within the realm of international criminal law, the rationale behind the general rule—and, by extension, the rule's exceptions—is useful in the instant case. Such rationale encompasses: (i) respect for the 'sovereignty and jurisdiction of the state competent to deal with the question through its judicial organs'[76] and (ii) the necessity of ensuring 'that the state is unwilling to have the wrong put right'.[77] However, only such remedies which are effective, available as a matter of reasonable possibility, and capable of providing redress need be exhausted.[78] If the local remedies do not satisfy these criteria, then there is no obligation to exhaust them prior to seeking external redress.

18. Remedies have been found to be ineffective—and consequently not requiring exhaustion—where, for example, there is subservience of the judiciary to the government or unreasonable delay in the administration of the remedy.[79] Moreover, particular

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[70] *R v Richardson; R v Conlon; R v Armstrong; R v Hill*, in *The Times*, 20 October 1989.
[71] *R v McIlkenny and Others*, [1992] All ER 417, 93 Cr App Rep 287, 27 March 1991.
[72] *Ibid.*
[73] *See* Benjamin Franklin, *Poor Richard's Almanac* ('An ounce of prevention is worth a pound of cure.'). *N.B.* Courts the world over have long acknowledged the application of common-sense approaches to complicated legal problems.
[74] *Interhandel Case (Switzerland v USA) (Preliminary Objections)*, ICJ, Judgment, 21 March 1959, Dissenting Opinion of Judge Armand-Ugo, p 27.
[75] *See, e.g.*, Ian Brownlie, *Principles of Public International Law* (Oxford 2003), p 472.
[76] Max Sørensen, *Manual of Public International Law* (St. Martin's 1968), p 584.
[77] Edwin Borchard, *The Diplomatic Protection of Citizens Abroad* (Kraus 1970), p 817.
[78] *Case of Certain Norwegian Loans (France v Norway)*, ICJ, Judgment, 6 July 1957, Separate Opinion of Judge Lauterpacht, p 39.
[79] *See, e.g., Interhandel Case (Switzerland v USA) (Preliminary Objections)*, ICJ, Judgment, 21 March 1959, Dissenting Opinion of Judge Armand-Ugo, p 27.

circumstances of fact can give rise to an ineffective remedy,[80] such as where 'there is proof of the existence of a practice or policy ordered or tolerated by the government, the effect of which is to impede certain persons from invoking internal remedies'.[81] Indeed, courts must take 'realistic account not only of the existence of formal remedies in the legal system [...] but also of the general context in which they operate' and must 'examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies'.[82] Pursuit of judicial remedies may be 'futile' when 'the general situation [...] was seen to create obstacles to the proper functioning of the system of the administration of justice'.[83]

19. In this regard, the case of *Shamayev and others v Georgia and Russia* is particularly instructive. Despite ongoing domestic proceedings, the ECHR determined that it had the authority to instigate its own fact-finding mission. The court found that this did not 'replace national supervision by the European supervision introduced by the Convention, but amounts to a procedural measure in the context of that supervision. Through its system of collective enforcement of the rights it establishes, the Convention reinforces, in accordance with the principle of subsidiarity, the protection afforded at the national level [...], but never limits it [...]'.[84]

G. Interference with the Administration of Justice

20. Rule 35 empowers the ECCC to 'sanction or refer to the appropriate authorities, any person who knowingly and wilfully interferes with the administration of justice'.[85] Specifically, '[w]hen the Co-Investigating Judges or the Chambers have reason to believe that a person may have committed [such interference], they may: (a) deal with the matter summarily; (b) conduct further investigations to ascertain whether there are sufficient grounds for instigating proceedings; or (c) refer the matter to the appropriate authorities of the Kingdom of Cambodia or the United Nations.'[86]

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[80] Brownlie, p 481.
[81] *Velasquez Rodriguez v Honduras*, Inter-American Court of Human Rights, Judgment, 29 July 1988, para 68.
[82] *Isayeva v Russia*, ECHR, App No 57950/00, Judgment, 6 July 2005, para 153.
[83] Dinah Shelton, *Remedies in International Human Rights Law* (Oxford 1999), p 25.
[84] *Shamayev and others v Georgia and Russia*, ECHR, App No 36378/02, Judgment,12 April 2005, para 500.
[85] Rule 35(1).
[86] Rule 35(2) (emphasis added).

V. ARGUMENT[87]

A. The Appeal is Admissible

21. The instant appeal is admissible pursuant to Rule 74(3)(b). Furthermore, it has been submitted within the time-frame imposed by Rule 75(3).

B. The OCIJ Has the Inherent Power to Provide the Requested Relief

22. The OCIJ's jurisdiction is not nearly as limited as the Order suggests. As outlined above, all courts have the inherent power to ensure the integrity of their own proceedings. Pursuant to this well-known doctrine, any act that threatens to obstruct, interfere with, or compromise the OCIJ's core duty of investigating the allegations of criminal activity contained in the OCP's Introductory Submission is necessarily a threat to the administration of justice and therefore within the OCIJ's inherent power to remediate—either after the fact or preemptively as a precautionary measure.

23. The exercise of such power in the instant case is supported by both the private and public rationales underlying the doctrine. As it relates to the adjudication of the particular charges (the private aspect), the manner in which the OCIJ's investigation is conducted obviously impacts the quality of the evidence collected. Therefore, rather than being 'totally foreign to the facts covered by the current judicial investigation',[88] the corruption issue is inextricably linked to the substantive allegations—as outlined in detail in the Request.[89] Additionally, from a normative perspective (the public aspect), the ECCC must protect itself from any abuses of process and ensure that justice is administered in such a manner as to advance the development of international and domestic practice. Moreover, as the jurisprudence suggests, the OCIJ should give some consideration to broader community interests—for example, demonstrating the importance of judicial integrity, independence, and impartiality to the Cambodian public and legal community.

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[87] The Defence adopts by reference the submissions contained at paragraphs seventeen through twenty-one of the Request.
[88] Order, para 10.
[89] *See* Request, paras 17–21.

24. The OCIJ has determined that 'accepting the Request would amount to an abuse of power'.[90] This conclusion—unsupported, as it is, by any exposition on the law of inherent powers and girded only by an undeveloped platitude on the 'principle of the Rule of Law'[91]—ignores the fundamental character of courts of law and unnecessarily emasculates the OCIJ in the process. Quite to the contrary of the OCIJ's analysis, the rejection of the Request amounts to a shirking of the Co-Investigating Judges' inescapable responsibility to administer justice. Idealistic notions depend for their effective application upon the down-to-earth *actions* of judges. In this case, the 'Rule of Law' would be best served by the OCIJ's (i) acknowledgment that the apparent behavior of the ECCC's Director of Administration has undermined the integrity of the tribunal and (ii) pledge to do something about it—to begin with, ordering the disclosure of the requested material.

25. Of course, judges must not overreach or abuse their powers, especially inherent ones. Yet, equally, they should not rely on notions of judicial restraint to shield themselves from politically sensitive questions. However unpalatable, it is necessary at times to grapple with such thorny issues. For the concrete reasons advanced in the Request and further developed below, this is one of those times. The 'sufficiently compelling' motive[92] in this case is nothing less than the proper administration of justice at the ECCC. As Jacques Verges recently suggested (evoking the UK law lords cited above), the corruption issue goes to the 'honor' of the tribunal as an institution.[93] This much, at least, the OCIJ appears to have conceded.[94]

C. The Request Was Sufficiently Factually Motivated Given the Relief Sought

26. The OCIJ has concluded that 'nothing in the Request justifies any affirmation that we are currently faced with [...] acts [that interfere with the administration of justice], since it limits itself to raising speculation as to hypothetical negative effects of any form of corruption on the proceedings'.[95] This assessment misses the point. While the Defence readily concedes that it cannot at this stage describe the actual ramifications of the

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[90] Order, para 11.
[91] Order, para 11 (capital letters in original).
[92] Order, para 11.
[93] *See* Transcript of PTC Appeal Hearing on Khieu Samphan Appeal Nos PTC-14 and PTC-15, 3 April 2009 ('I need not be more careful about your honor than you are yourselves.')
[94] *See* Order, para 12 ('Of course, the Co-Investigating Judges must guarantee that the ongoing judicial proceedings are irreproachable in every way.')
[95] Order, para 12.

alleged corruption scheme nor identify all of the suspected wrongdoers, such a lack of precision is not fatal to the Request—which is, after all, a request for *information*.

27. As previously explained, tainted evidence has the potential to undermine the integrity of the OCIJ's work to date.[96] If it were later revealed that key personnel engaged in the types of inappropriate behavior suggested in the Request as a result of their participation in the alleged graft scheme, the entire judicial investigation would be compromised and the Defence would be required—at the very least—to move the OCIJ for a stay of proceedings. Indeed, as the relevant case law demonstrates, the consequences could be far more severe.[97]

28. Surely, given such high stakes, it is unnecessary to await a 'confirmed act'[98] of interference in order to undertake the very limited measures sought by the Request. In light of the ample evidence presented to date—which undoubtedly suggests a widespread regime of institutional corruption at the tribunal orchestrated by Sean Visoth—and the concerns described in the previous paragraph, swift action is called for in order to properly assess the previous and current state of affairs within the Office of Administration. The corrosive possibilities may be speculative; but this is only because the nature and extent of the corruption have been unnecessarily concealed from the Defence by the UN and the RGC. By ordering the disclosure of this material at the earliest possible juncture, the OCIJ could defuse—or at least mitigate—a potentially devastating situation.

29. Moreover, as argued in the Request and above, judges and other senior court officials must act, and be seen to act, independently and impartially. Even if there is no actual evidence at this stage that Defence rights have been impinged, the well-documented allegations—coupled with Hun Sen's recent comments[99]—are sufficient to suggest a lack of independence on the part of key actors at the ECCC. Therefore the Defence should be able to rely on the OCIJ to assist in the collection of material which goes to the resolution of this deeply troubling issue.

30. Simply put, the evidentiary approach embraced by the OCIJ is far too strict, as well as far too passive. The Defence has presented sufficient evidence to suggest that the threat posed by corruption is real, the risk great, and—if left untreated—the consequences

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[96] *See* Request, paras 18–21.
[97] *See* paras 13–15, *supra*.
[98] Order, para 12.
[99] *See* para 5(i), *supra*.

potentially harsh. There is no principled reason why the OCIJ should impede the Defence in uncovering acts of wrongdoing which threaten to undermine the proceedings by imposing an unnecessarily high burden of proof on what is essentially a straightforward request for disclosure.

D. It Would Be Futile to Await Resolution of the Matter by the RGC and/or the UN

31. The OCIJ suggests that a request 'for an administrative inquiry into this issue would be superfluous, since the Cambodian and United Nations authorities are already seised of the issue and already have all of the information contained in the Request at their disposal'.[100] However, the behavior of the UN and the RGC over the last several months—outlined in the Request and above—should make it abundantly clear to any reasonable observer that neither body has the intention of providing the Defence with the desired (and necessary) material. Moreover, because exposure of the alleged scheme would likely discredit senior CPP officials and embarrass the UN, neither institution possesses the requisite impartiality to deal with the matter.

32. As the above-cited jurisprudence suggests, the OCIJ must not evaluate the situation in a vacuum; rather, it should take due account of the prevailing context—in particular, (i) that there has been unreasonable delay in dealing with the Defence requests by the UN and (ii) the fact that corruption is tolerated (indeed encouraged) by the RGC. These factors have prevented the Defence from obtaining the sought after information and should be seen for what they are: 'obstacles to the proper functioning of the system of the administration of justice'.[101] The procedural history demonstrates that further reliance on 'the Cambodian and United Nations authorities'[102] would be an exercise in futility.

33. Under the circumstances, the Defence has done everything it could to obtain the relevant material. After initial requests to the UN and the RGC were rebuffed, the Defence sought redress in the local court system. When these efforts proved ineffective, further attempts were made with the UN, again to no avail. In this regard, the Defence has truly exhausted

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[100] Order, para 13.
[101] *See* para 18, *supra.*
[102] Order, para 13.

its 'local remedies' before attempting to bring the matter before the ECCC's judicial authorities, where—according to Justice Bernard's apt observation—'[t]he buck stops'.[103]

34. Furthermore, there is nothing stopping the OCIJ from requesting a subsidiary inquiry into the corruption allegations. Where the OCIJ suspects that any individual 'may have' interfered with the administration of justice, it may 'conduct further investigations to ascertain whether there are sufficient grounds for instigating proceedings'.[104] All that is required is 'reason to believe' that such conduct may have taken place.[105] Given the multiple revelations by staff members as well as the posture of both the UN and the RGC, one can hardly argue that something is not seriously amiss within the Office of Administration. And even assuming that the UN and/or the RGC were proceeding expeditiously and in good faith, the OCIJ's power to investigate potential interference with the administration of justice is in no way curtailed by the fact that such other bodies may appear to be addressing the issue.[106]

V. CONCLUSION

35. For the reasons stated above, the Defence submits that the OCIJ's rejection of the Request was incorrect as a matter of law, public-policy, and common-sense. Accordingly, the PTC should vacate the Order and grant the relief requested at paragraph 22 of the Request. Additionally, as the instant submissions contain no confidential material, this document should be classified by the PTC as a public one. Finally, a joint public hearing is requested at the earliest available opportunity.

CO-LAWYERS FOR NUON CHEA

SON Arun

Michiel PESTMAN and Victor KOPPE

[103] *See* para 9, *supra.*
[104] Rule 35(2).
[105] *Ibid.*
[106] *See* para 19, *supra.*