

IN THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA  
BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES

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ELEVENTH REQUEST FOR INVESTIGATIVE ACTION

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## I. INTRODUCTION

1. Pursuant to Rules 21(1), 55(10), and 58(6) of the ECCC Internal Rules (the 'Rules'), counsel for Charged Person Nuon Chea (the 'Defence') submit this request for investigative action to the Office of the Co-Investigating Judges (the 'OCIJ').
2. Based on publically available information, it appears that the ECCC's Director of Administration has been found to have engaged in corrupt practices at the tribunal. While the precise nature and extent of such putative malfeasance is not yet publically known, the Defence suspects the existence of an organized regime of institutional corruption throughout the court during the pending judicial investigation into Mr Nuon's alleged criminal activity. In order to assess what, if any, corrosive effects such alleged corruption has had on the administration of justice thus far at the ECCC, full and transparent disclosure is required. As neither the Royal Government of Cambodia (the 'RGC') nor the United Nations (the 'UN') have been willing to assist the Defence in this regard, the OCIJ's cooperation is now sought.
3. The instant request contains no confidential material: all references and citations are to publically available facts and sources. Accordingly, this document has been identified by the Defence as a public one and should be characterized as such by the OCIJ.

## II. RELEVANT FACTS

### A. Allegations of Corruption at the ECCC

4. Unresolved allegations of corrupt practices at the ECCC have beleaguered the tribunal for over two years:
  - a. In January 2007, *The Voice of Khmer Youth*, a Khmer-language newspaper, suggested that ECCC judges, prosecutors, and other officials were required to 'contribute thirty percent of their salar[ies] to the [Cambodian People's Party]' in exchange for their positions at the court.<sup>1</sup>

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<sup>1</sup> So Phal, *The Voice of Khmer Youth*, 31 January 2007, 'CPP-Appointed Judges, Prosecutors in KR Court See 30% of Their Wages Deducted' (translation); see also Cat Barton, *The Phnom Penh Post*, 23 February–8 March 2007, 'Kickback claims stain the KRT'.

- b. In September 2007, the *The Cambodia Daily* reported that an anonymous Cambodian employee of the ECCC ‘claimed that he had to hand over 25 percent of his salary in exchange for his job’ and ‘that three other employees at the court had told him directly that they too had to make payments’.<sup>2</sup>
- c. In June 2008, ECCC Director of Administration Sean Visoth circulated a notice within the tribunal regarding—apparently—fresh allegations of corruption.<sup>3</sup>
- d. In late-2008, a former ECCC employee speaking anonymously to *The Phnom Penh Post* gave perhaps the most detailed description of the alleged graft scheme to date: The monthly salary is ‘paid in full, but when you [collect] it, you put it in an envelope and give it to the collector [...]. In front of people, you’re told to say, “No one is taking away my money”, [and] the money transferred into your account is the full amount, but then you have to [...] give over the percentage’.<sup>4</sup>
- e. At an unspecified time, another anonymous ‘court staffer’ spoke to *The Phnom Penh Post* in similarly detailed terms: ‘For the first four months [of my contract], I paid 70 percent [of my salary in kickbacks], then it went down to 10 percent [...]. Let’s say you are the supervisor. You have 30 people under you, so the people under you know to give their envelope [containing the kickback] to you, and you hand it to Sean Visoth. [...] *In all the sections, it’s the same thing.*’<sup>5</sup> Explaining the reasons behind his/her asserted anonymity, the source described a set of twin fears: negative professional repercussions and harm to family members.<sup>6</sup>

To date, none of these allegations has been publically resolved.

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<sup>2</sup> Erika Kinetz, *The Cambodia Daily*, 25 September 2007, ‘Report Finds Flaws in ECCC Administration’.

<sup>3</sup> Douglas Gillison, *The Cambodia Daily*, 29 July 2008, ‘ECCC Receives New Graft Allegations on Eve of Funds Drive’, p 29.

<sup>4</sup> Cat Barton, *The Phnom Penh Post*, 27 February 2009, ‘Tribunal graft charges spread: German delegation exposes results of secret UN probe; staff concur’, p 1.

<sup>5</sup> *Ibid*, p 2 (emphasis added).

<sup>6</sup> *Ibid* (‘I’m afraid, if they know I talk to you, they’re not going to take a gun and shoot me in my face, but they will find some way [to fire me] [...] or they [will hurt] my kids. [...] Anyone who speaks, they will be terminated [...]. They will set up their committee and find a way to get rid of that person who has talked [...].’)

## B. Official Reactions and Developments

5. Responses by both the RGC and the UN have been less than forthright. While multiple independent inquiries have been conducted into the ECCC's leadership, management, and human-resources practices, none of these audits included a clear mandate to review allegations of corruption.<sup>7</sup> In fact, in January 2008, the RGC declined an offer by the United Nations Development Programme ('UNDP') to secure international assistance for an investigation into the allegations as 'a way to ensure the continued public and donor confidence in the tribunal'.<sup>8</sup>
  
6. In the wake of the June 2008 claims, RGC Deputy Prime Minister Sok An informed the UN's Office of Legal Affairs ('OLA') that Cambodia had both the means and the right to deal with the allegations without international interference.<sup>9</sup> The RGC quickly announced the establishment of a new anti-corruption committee to hear and resolve any graft claims raised by tribunal staff.<sup>10</sup> At the same time, with no advance notice, Keo Thyvuth, the court's Cambodian chief of personnel, was transferred to a position at the RGC's Council of Ministers,<sup>11</sup> and Sean Visoth promised to resign if he were implicated in corruption at the ECCC.<sup>12</sup> For its part, the UN's Office of Internal Oversight Services ('OIOS') undertook a confidential review of 'concrete, if still unverified' kickback allegations made by 'more than one Cambodian court staffer'.<sup>13</sup>
  
7. UNDP-administered funding for the tribunal's Cambodian side was indefinitely frozen in August 2008 while donor-countries considered their response to the kickback allegations.<sup>14</sup> To date, there has been no resolution of the matter; and Cambodian-side

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<sup>7</sup> Erika Kinetz, *The Cambodia Daily*, 25 September 2007, 'Report Finds Flaws in ECCC Administration'; Erika Kinetz, *The Cambodia Daily*, 20 February 2008, 'Gov't Rejects UN Call to Probe ECCC', p 2; Ly Menghour, *The Mekong Times*, 28 April 2008, 'KRT hopes HR audit clears mismanagement doubts', p 5.

<sup>8</sup> Erika Kinetz, *The Cambodia Daily*, 20 February 2008, 'Gov't Rejects UN Call to Probe ECCC', p 1.

<sup>9</sup> Douglas Gillison, *The Cambodia Daily*, 9–10 August 2008, 'Government Asserts Jurisdiction Over KR Tribunal Graft Claims', p 3.

<sup>10</sup> Neth Pheaktra, *The Mekong Times*, 18 August 2008, 'KRT forms new anti-corruption committee', p 5.

<sup>11</sup> Craig Guthrie, *The Mekong Times*, 12 August 2008, 'KRT appoints new chief of troubled personnel department', p 2; Prak Chan Thul & Douglas Gillison, *The Cambodia Daily*, 12 August 2008, 'ECCC Gets New Cambodian Chief of Personnel', p 28; Douglas Gillison, *The Cambodia Daily*, 13 August 2008, 'Court: Staff Rotation Unrelated to Allegations', p 27.

<sup>12</sup> Neth Pheaktra, *The Mekong Times*, 18 August 2008, 'KRT forms new anti-corruption committee', p 5.

<sup>13</sup> Douglas Gillison, *The Cambodia Daily*, 5 August 2008, 'UN "Reviews" Claims of Graft: ECCC Official', p 1.

<sup>14</sup> Douglas Gillison, *The Cambodia Daily*, 6 August 2008, 'ECCC Funding Delayed Over Graft Claims', p 1; Douglas Gillison, *The Cambodia Daily*, 12 August 2008, 'KR Tribunal Donors Extend Funding Delay', p 28.

payroll obligations for March 2009—which had threatened to go unpaid<sup>15</sup>—have been met with an eleventh-hour emergency contribution from Japan.<sup>16</sup>

8. In September 2008, the findings of the OIOS inquiry—which identified more than one individual suspected of wrongdoing—were forwarded to the RGC.<sup>17</sup> Approximately one month later, UNAKRT Coordinator Knut Rosandhaug allegedly told a visiting German delegation that Sean Visoth had been investigated by the UN and found to be ‘guilty of corruption’.<sup>18</sup> Additionally, Mr Rosandhaug appears to have noted that—in his opinion—‘the UN would have to withdraw from the tribunal if the national government continue[d] to refuse to investigate the allegations of corruption’.<sup>19</sup> Very shortly thereafter, Mr Sean announced his indefinite departure from the tribunal.<sup>20</sup> Citing continued health-related issues, he has yet to return to the ECCC.<sup>21</sup>
9. In December 2008, the RGC and OLA began negotiations aimed at strengthening anti-corruption mechanisms at the tribunal, resulting in the so-called ‘breakthrough’ of February 2009: parallel reporting procedures based on the court’s ‘formula of super-majority, a basic principle of the functioning of the ECCC’.<sup>22</sup> However, the proposed

<sup>15</sup> Georgia Wilkins, *The Phnom Penh Post*, 3 March 2009, ‘ECCC says no pay for nationals’, p 1; Douglas Gillison, *The Cambodia Daily*, 3 March 2009, ‘KR Judges: Salaries Hinging on UN, Gov’t Talks’, p 24.

<sup>16</sup> Douglas Gillison, *The Cambodia Daily*, 21–22 March 2009, ‘Japan Fills the March Payroll for the ECCC’, pp 1, 15; Georgia Wilkins, *The Phnom Penh Post*, 23 March 2009, ‘Japan Supplies ECCC with \$200,000’, p 2.

<sup>17</sup> Douglas Gillison, *The Cambodia Daily*, 18 September 2008, ‘Gov’t Receives UN Findings on KR Tribunal Graft Review’, p 28; Douglas Gillison, *The Cambodia Daily*, 20–21 September 2008, ‘Government: UN Review of KRT Wrong to Name Names’ p 5; Georgia Wilkins, *The Phnom Penh Post*, 22 September 2008, ‘KR court graft review unfairly names and shames, govt says’, p 2.

<sup>18</sup> Bundestag Delegation, ‘[Draft] Report on the trip to Cambodia and Indonesia by a delegation of the Committee for Human Rights and Humanitarian Aid, 25 October–3 November 2008’ (available at <http://www.bundestag.de/ausschuesse/a17/reisen/ASEAN2008.pdf>); see also Douglas Gillison, *The Cambodia Daily*, 26 February 2009, ‘UN Officer Cites Gov’t Meddling in Tribunal: Panel’, p 1; Isabelle Roughol, *The Cambodia Daily*, 27 February 2009, ‘Report Citing Gov’t Meddling in ECCC Taken Off Web’, p 24; Cat Barton, *The Phnom Penh Post*, 27 February 2009, ‘Tribunal graft charges spread’, pp 1–2; Michiel Pestman, Victor Koppe, and Andrew Ianuzzi, *The Phnom Penh Post*, 27 February 2009, ‘Letter to the editor’, p 6.

<sup>19</sup> Bundestag Delegation, ‘[Draft] Report on the trip to Cambodia and Indonesia by a delegation of the Committee for Human Rights and Humanitarian Aid, 25 October–3 November 2008’ (available at <http://www.bundestag.de/ausschuesse/a17/reisen/ASEAN2008.pdf>).

<sup>20</sup> Douglas Gillison, *The Cambodia Daily*, 27 November 2008, ‘Official: Rumors About ECCC Chief’s Exit False’, p 31.

<sup>21</sup> *Ibid*; see also Prak Chan Thul & Douglas Gillison, *The Cambodia Daily*, 11 February 2009, ‘KR Tribunal Chief Sole Witness in Closed Probe’, p 31; Cat Barton, *The Phnom Penh Post*, 27 February 2009, ‘Tribunal graft charges spread: German delegation exposes results of secret UN probe; staff concur’, p 2; Michiel Pestman, Victor Koppe, and Andrew Ianuzzi, *The Phnom Penh Post*, 27 February 2009, ‘Letter to the editor’, p 6.

<sup>22</sup> UN-RGC ‘Joint Statement’, 23 February 2009 (available at [http://www.eccc.gov.kh/english/cabinet/fileUpload/108/Joint\\_Statement\\_EN.pdf](http://www.eccc.gov.kh/english/cabinet/fileUpload/108/Joint_Statement_EN.pdf)); see also Douglas Gillison & Yun Samean, *The Cambodia Daily*, 24 February 2009, ‘UN, Gov’t to Split ECCC Graft Oversight’, pp 1–2; Georgia Wilkins, *The Phnom Penh Post*, 24 February 2009, ‘UN and govt to protect tribunal’, pp 1–2.

mechanism—which does not provide for independent oversight—failed to immediately assuage outstanding donor concerns and was roundly criticized by international court-monitors as a cosmetic solution rather than a meaningful reform.<sup>23</sup>

10. Since the allegations first surfaced in early-2007, various organizations and individual commentators—noting the threat to the tribunal’s credibility and independence posed by widespread corruption—have openly called for investigations. These include: the Open Society Justice Initiative,<sup>24</sup> the Documentation Center of Cambodia,<sup>25</sup> Human Rights Watch,<sup>26</sup> the European Commission,<sup>27</sup> UNDP,<sup>28</sup> a consortium of Cambodian non-governmental justice organizations,<sup>29</sup> and long-time ECCC monitor Professor John Hall.<sup>30</sup>

<sup>23</sup> Douglas Gillison, *The Cambodia Daily*, 26 February 2009, ‘OSJI: Reconsider KR Tribunal Anti-Graft Measures’, p 2; Georgia Wilkins, *The Phnom Penh Post*, 26 February 2009, ‘Watchdog slams UN over KRT’, pp 1–2; Sok Khemara, *Voice of America*, 2 March 2009, ‘Some Remain Skeptical of Tribunal Corruption’.

<sup>24</sup> James Goldston (OSJI executive director), Press Release, 14 February 2007, ‘Corruption Allegations at Khmer Rouge Court Must Be Investigated Thoroughly’ (stating ‘the ECCC should immediately implement further measures to combat corruption and protect the court’s independence and transparency’) and Press Release, 12 February 2009, ‘Khmer Rouge Tribunal ‘s Credibility Jeopardized by Corruption and Political Interference on Eve of First Trial’ (stating the ECCC ‘must demonstrate that it is not a tool of the Cambodian government and ensure a fair and transparent judicial process’ and ‘should take aggressive action to respond to the allegations of corruption’).

<sup>25</sup> Youk Chhang (DC-Cam director), *The Cambodia Daily*, 1 February 2008, Op-Ed, ‘Provisos to US Directly Funding KR Tribunal’, p 31 (calling for an independent review of the corruption allegations and for ‘decisive action against any employee found to have engaged in malfeasance’).

<sup>26</sup> Sara Colm (HRW senior researcher), *The Cambodia Daily*, 16 June 2008, Op-Ed, ‘ECCC Needs Reforms First, Money Next’, p 35 (noting that ‘[i]t is also necessary to properly address outstanding corruption allegations that have never been adequately investigated’).

<sup>27</sup> Rafael Dochao Moreno (EC Charge d’Affaires), quoted in *The Cambodia Daily*, 1 August 2008, ‘EC, UN Want Inquiry if KRT Allegations Surface’, p 28 (‘The EC is concerned and hopes that the ECCC will use any possible means and effort to investigate any allegations.’); James Moran (EC Asia director), quoted in *The Phnom Penh Post*, 4 March 2009, ‘EC review raises KRT graft’, p 1 (‘There needs to be a resolution as soon as possible [to the issue of corruption], and this must be sorted out.’)

<sup>28</sup> Unidentified UNDP spokesperson, quoted in *The Cambodia Daily*, 1 August 2008, ‘EC, UN Want Inquiry if KRT Allegations Surface’, p 28 (‘Allegations of corruption or any misappropriation of funds are a serious matter, and if such allegations are presented and found to have merit, they should be fully investigated and appropriate action taken where required.’)

<sup>29</sup> Joint NGO Statement, *The Phnom Penh Post*, 10 September 2008, Comment, ‘Address graft charges or jeopardize the KR tribunal’, p 6 (calling on the ECCC ‘to assure the public it has adequate mechanisms to deal with allegations of corruption in a timely and conclusive manner’).

<sup>30</sup> John Hall, *Far Eastern Economic Review*, 2 March 2009, ‘Judging the Khmer Rouge Tribunal’ (‘Despite years of ineffectual handwringing by the UN, donors and monitors, the ECCC has failed to adequately address persistent accusations of corruption and political interference.’); see also John Hall, *International Herald Tribune*, 10 March 2009, Op-Ed, ‘Trial on Trial’ (‘[T]he allegations are extremely serious and must be addressed. To this point the Cambodian authorities have routinely dismissed as “unverified” all allegations of corruption that have been brought to their attention. But now the chief Cambodian administrator at the tribunal is implicated by name in the parliamentary report of a donor nation, and that requires clear, thorough and independent review by a competent investigative body.’).

11. Notably, the international judges have indicated that they will not tolerate threats to the tribunal's independence and impartiality. Speaking in early-2007, French Co-Investigating Judge Marcel Lemonde took a firm position on the matter:

‘The international judges have maintained that they cannot participate in a trial that would not be a fair trial, before an independent and impartial court [...]. “This is a non-negotiable issue and, if these conditions were not met, the judges would just have no choice but require the UN to withdraw”, [...]. “This is not a threat or, worse, bluff—it’s just the reality”.’<sup>31</sup>

New Zealand's Silvia Cartwright, one of two international judges in the court's Trial Chamber—appearing to speak on behalf of all the judges—was equally resolute:

‘One of the major issues that has been troubling for all the judges is that of corruption within the ECCC. We welcome all efforts to ensure that the allegations are dealt with fully and fairly and that independent measures are put in place to make sure [that claims] are resolved in a transparent manner. We are agreed that these historic trials, which are so important for the people of Cambodia, must not be tainted by corruption.’<sup>32</sup>

These concerns were recently echoed by Richard Rogers, chief of the tribunal's Defence Support Section (the ‘DSS’) in his closing remarks to the latest ECCC plenary session.<sup>33</sup>

### C. Defence Efforts

12. Since September 2008, the Defence has been seeking a transparent resolution of the allegations in order to ensure Mr Nuon's right to a fair investigation and possible trial. Initial efforts to obtain the results of the OIOS inquiry were rebuffed by the UN and Cambodian sides of the tribunal, as well as by the RGC.<sup>34</sup> A municipal investigation

<sup>31</sup> Cat Barton, *The Phnom Penh Post*, 23 February–8 March 2007, ‘Kickback Claims Stain the KRT’.

<sup>32</sup> Douglas Gillison, *The Cambodia Daily*, 2 September 2008, ‘ECCC Judges Meet To Discuss Trial Procedures’, p 2.

<sup>33</sup> ‘DSS: Press Statement’, 6 March 2009 (‘The DSS welcomes the statement by the international judges affirming their concern about unresolved allegations of corruption within the ECCC. This reinforces their position at the last Plenary that kick-back allegations must be dealt with “fully and fairly [...] and in a transparent manner” and will be a comfort to all those who fear that the administration of justice within the ECCC may fall prey to political compromise.’)

<sup>34</sup> 19 September 2008 letter from Nuon Chea Defence Team to Sean Visoth and Knut Rosandhaug (seeking confidential disclosure of the OIOS report and related correspondence); 20 October 2008 letter from Knut Rosandhaug to Nuon Chea Defence Team (invoking the UN's privileges and immunities with respect to the requested documentation); 24 October 2008 letter from Sean Visoth to Nuon Chea Defence Team (denying knowledge/custody of the requested documentation); and 31 October 2008 letter from Michiel Pestman and Victor Koppe to Sok An (requesting disclosure of the same material by the RGC). *N.B.* No reply was ever received from Sok An. *See also* Douglas Gillison, *The Cambodia Daily*, 25 September 2008, ‘Nuon Chea Team: Alleged Graft at ECCC Could Harm Fairness’, p 24; Georgia Wilkins, *The Phnom Penh Post*, 25 September 2008, ‘Graft could taint trials at the KRT: defense lawyers’, p 3; Douglas Gillison, *The Cambodia Daily*, 29 October 2008, ‘Nuon Chea Team Barred Access to Graft Charges’, p 27; Douglas Gillison, *The Cambodia Daily*, 7 November 2008, ‘Nuon Chea Team Asks Sok An for Graft Findings’, p 29; Georgia

into the allegations—initiated by international counsel for Mr Nuon in January 2009<sup>35</sup>—was abruptly and prematurely terminated by the Royal Prosecutor<sup>36</sup> after Sean Visoth produced copies of the inconclusive human-resources audits referred to above.<sup>37</sup> The matter is currently on appeal to the Cambodian Prosecutor-General,<sup>38</sup> who has recently been apprised of Mr Rosandhaug’s remarks regarding Mr Sean’s investigation by the UN.<sup>39</sup> Moreover, the Defence has written to UN Secretary-General Ban Ki-moon requesting a waiver of the UN’s asserted privileges and immunities with respect to the OIOS inquiry and related correspondence.<sup>40</sup> While Defence efforts to date have received the support of the DSS,<sup>41</sup> the ECCC’s Cambodian judges have threatened international counsel with legal action.<sup>42</sup>

### III. RELEVANT LAW

#### A. Requests for Investigative Action

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Wilkins, *The Phnom Penh Post*, 7 November 2008, ‘Defence lawyers urge Sok An to hand over KRT corruption info’, p 3.

<sup>35</sup> Criminal Complaint No 44-09-01-2009, filed by Michiel Pestman, Victor Koppe, and Andrew Ianuzzi with the Office of the Royal Prosecutor attached to the Phnom Penh Municipal Court; *see also* Phorn Bopha & Katie Nelson, *The Cambodia Daily*, 9 January 2009, ‘Nuon Chea Defence Submits Graft Complaint’, p 29; Cat Barton, *The Phnom Penh Post*, 9 January 2009, ‘KRT staff targeted by lawyers’, p 1; Prak Chan Thul & Douglas Gillison, *The Cambodia Daily*, 13 January 2009, ‘Municipal Court Starts ECCC Corruption Inquiry’, p 28; Prak Chan Thul & Douglas Gillison, *The Cambodia Daily*, 21 January 2009, ‘Nuon Chea Lawyer Called in Kickbacks Probe’, p 29; Georgia Wilkins, *The Phnom Penh Post*, 21 January 2009, ‘Probe “will not interrupt KRT”’, p 3; Georgia Wilkins, *The Phnom Penh Post*, 23 January 2009, ‘KRT lawyer called to municipal court’; Phann Ana & Douglas Gillison, *The Cambodia Daily*, 4 February 2009, ‘Witnesses Summoned in City’s ECCC Kickback Investigation’, p 30; Georgia Wilkins, *The Phnom Penh Post*, 4 February 2009, ‘Corruption probe to continue, but joint sessions inconclusive’.

<sup>36</sup> Order to File Without Processing, 5 February 2009; *see also* Douglas Gillison & Prak Chan Thul, *The Cambodia Daily*, 7–8 February 2009, ‘Phnom Penh Court Halts ECCC Investigation’, pp 1, 11; Georgia Wilkins, *The Phnom Penh Post*, 9 February 2009, ‘Defence lawyers condemn halt of KR tribunal probe’, p 3.

<sup>37</sup> Prak Chan Thul & Douglas Gillison, *The Cambodia Daily*, 11 February 2009, ‘KR Tribunal Chief Sole Witness in Closed Probe’, pp 1, 31.

<sup>38</sup> Douglas Gillison & Prak Chan Thul, *The Cambodia Daily*, 20 February 2009, ‘Nuon Chea Team to Pursue Graft Inquiry at Court’, p 29;

<sup>39</sup> Bethany Lindsay & Phorn Bopha, *The Cambodia Daily*, 4 March 2009, ‘Nuon Chea Lawyers Seek Inquiry Into Report’, p 21.

<sup>40</sup> 23 February 2009 and 4 March 2009 letters from Michiel Pestman, Victor Koppe, and Andrew Ianuzzi to Ban Ki-moon; *see also* Douglas Gillison, *The Cambodia Daily*, 25 February 2009, ‘Nuon Chea Lawyers Ask UN Chief for ECCC Graft Report’, p 26; Georgia Wilkins, *The Phnom Penh Post*, 25 February 2009, ‘KRT lawyers call to Ban Ki-moon’, p 2.

<sup>41</sup> Douglas Gillison & Prak Chan Thul, *The Cambodia Daily*, 17–18 January 2009, ‘KR Defence Chief: Judges Put Fairness at Risk’, pp 1–2; Georgia Wilkins, *The Phnom Penh Post*, 19 January 2009, ‘KRT defence supports probe’, p 3.

<sup>42</sup> Katie Nelson & Phorn Bopha, *The Cambodia Daily*, 10–11 January 2009, ‘ECCC Judges Threaten Legal Action Over Kickback Claims’, p 5; Cat Barton, *The Phnom Penh Post*, 12 January 2009, ‘KRT judges threaten lawsuit’, p 2.



13. The Defence adopts by reference the submissions contained in its previously filed requests for investigative action.<sup>43</sup> Furthermore, the OCIJ is specifically empowered to ‘[s]eek information and assistance from [...] the United Nations’.<sup>44</sup> Additionally, the Pre-Trial Chamber (‘PTC’) has recently found that ‘requests for investigative actions should be interpreted as being requests for actions to be performed by the Co-Investigating Judges or, upon delegation, by the ECCC investigators or the judicial police, with the purpose of collecting information conducive to ascertaining the truth’.<sup>45</sup> Moreover, in the same decision, the PTC acknowledged the pressing need ‘to ensure that proceedings during the investigation are fair’.<sup>46</sup>

### B. Independence and Impartiality

14. Pursuant to the ECCC Agreement and Law, Mr Nuon has the right to be prosecuted, investigated, and tried by an ‘independent and impartial tribunal’—as provided in the International Covenant on Civil and Political Rights, to which Cambodia is a party.<sup>47</sup> Of course, tribunals are necessarily measured by the standards applicable to those officials who comprise them. This is reflected in the relevant jurisprudence, which requires judges to act—and to be seen to act—independently and impartially.<sup>48</sup> The rationale behind this international norm applies with no less logical force to other senior court officials, especially at complex war-crimes tribunals where multiple interrelated and interdependent organs are charged with a variety of sensitive tasks, any one of which may affect the fairness of the proceedings. Such a contextual assessment is crucial to ensuring ‘practical and effective’ defence rights rather than merely ‘theoretical or

<sup>43</sup> Document Nos D-101, ‘Third Request for Investigative Action’, 18 August 2008, paras 6–8; D-102, ‘Fourth Request for Investigative Action’, 27 August 2008, paras 5–6; D-105, ‘Fifth Request for Investigative Action’, 26 September 2008, para 7; D-113, ‘Sixth Request for Investigative Action’, 30 October 2008, para 6; D-122, ‘Seventh Request for Investigative Action’, 1 December 2008, para 5; and D-126, ‘Eighth Request for Investigative Action’, 22 January 2009, para 5.

<sup>44</sup> Rule 55(5)(c).

<sup>45</sup> Document No A-190/I/20, Pre-Trial Chamber, Public ‘Decision on Khieu Samphan’s Appeal against the Order on Translation Rights and Obligations of the Parties’, 20 February 2009, para 28.

<sup>46</sup> *Ibid.*, para 36.

<sup>47</sup> ICCPR, Article 14(1); *see also* ECCC Agreement, Articles 3(3), 5(3), 6(3), 12(2), and 13(1); ECCC Law, Articles 10 new, 19, 25, and 33 new; and Document No C-11/21, ‘Urgent Application for Disqualification of Judge Ney Thol’, 29 January 2008, para 10.

<sup>48</sup> *See* Document No C-11/21, ‘Urgent Application for Disqualification of Judge Ney Thol’, 29 January 2008, paras 11, 16–20.

illusory' ones.<sup>49</sup> As the European Court of Human Rights has long maintained, 'it is of fundamental importance in a democratic society that the courts inspire confidence in the public and above all, as far as criminal proceedings are concerned, in the accused'.<sup>50</sup>

### C. The Office of Administration

15. According to the ECCC Law, the 'staff of the judges, the investigating judges and prosecutors of the Extraordinary Chambers *shall be supervised* by [the] Office of Administration',<sup>51</sup> whose director 'shall be a person of high moral character and integrity'.<sup>52</sup> Under the director's leadership, the Office of Administration shall:
- a. 'support the Chambers, the Office of the Co-Prosecutors, the Office of the Co-Investigating Judges [...] in the performance of their functions and shall be responsible for their administration and servicing';<sup>53</sup>
  - b. 'be responsible for the security of the ECCC';<sup>54</sup>
  - c. 'be responsible for [...] information technology [...] of the ECCC';<sup>55</sup>
  - d. 'keep a database containing copies of all case files of Preliminary Investigations, Judicial Investigations, and cases before the Chambers' and 'will ensure that such copies are only made available to the parties, experts or other authorized persons';<sup>56</sup>
  - e. 'assist the Greffiers [...] in serving summonses and giving notice of orders';<sup>57</sup>

<sup>49</sup> See, e.g., *Artico v Italy*, ECHR App No 6694/74, 'Judgment', 13 May 1980, para 33 ('[T]his is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive.')

<sup>50</sup> *Panovits v Cyprus*, ECHR App No 4268/04, 'Judgment', 11 December 2008, para 94 (emphasis added); see also Document No C-11/21, 'Urgent Application for Disqualification of Judge Ney Thol', 29 January 2008, para 11 (citing jurisprudence of the European Court of Human Rights).

<sup>51</sup> ECCC Law, Article 30 (emphasis added).

<sup>52</sup> ECCC Law, Article 31 new.

<sup>53</sup> Rule 9(1); see also ECCC Agreement, Article 8(1) ('There shall be an Office of Administration to service the Extraordinary Chambers, the Pre-Trial Chamber, the co-investigating judges and the Prosecutors' Office.')

<sup>54</sup> Rule 9(2).

<sup>55</sup> Rule 9(3).

<sup>56</sup> Rule 9(5).

<sup>57</sup> Rule 9(5).

- f. 'be responsible for the preservation, storage and security of evidence including physical evidence, statements and documents obtained in the course of preliminary investigations, judicial investigations, trials, and appeals';<sup>58</sup> and
- g. 'be responsible for coordinating the training of ECCC personnel and supporting training of the ECCC judicial bodies'.<sup>59</sup>

In order to accomplish these diverse responsibilities, the Office of Administration has statutory authority over nine discrete sections of the tribunal, including the Court Management Section ('CMS').<sup>60</sup> CMS—by far, the ECCC's largest section in terms of personnel—is tasked with a range of important and sensitive matters, including: witness and expert support; supervision of greffiers; custody of evidence; maintenance of records and archives; and coordination of translation and interpretation.<sup>61</sup>

#### D. Anti-Corruption Principles

16. In principle, both the UN and the RGC recognize the damaging effects of corruption on democratic institutions. The preamble to the UN Convention against Corruption (the 'Convention')—to which Cambodia acceded on 5 September 2007—highlights 'the seriousness of problems and threats posed by corruption to [...] the rule of law'.<sup>62</sup> In the Convention's forward, former UN Secretary-General Kofi Annan describes corruption as 'an insidious plague' whose 'corrosive effects [...] undermine democracy and the rule of law [...]'.<sup>63</sup> Since assuming his current position, Ban Ki-moon has consistently echoed the assertions of his predecessor by decrying corruption as an obstacle to human rights and the rule of law. For his part, RGC Deputy Prime Minister Sok An has been equally emphatic in his rhetoric: 'The Royal Government is conscious that corruption poses a threat [...] to democratic institutions and fundamental rights and freedoms [...].

<sup>58</sup> Rule 9(6).

<sup>59</sup> Rule 9(7).

<sup>60</sup> See 'Organizational Chart of the ECCC' (available at <http://www.unakrt-online.org/Links-Logos-Thumbs/Organizational%20Chart-English.pdf>). The eight other sections are Budget and Finance, DSS, General Services, Information and Communication Technologies, Personnel, Public Affairs, Security and Safety, and the Victims Unit. *N.B.* The DSS is 'autonomous with regard to the substantive defence matters set out in' Rule 11.

<sup>61</sup> *Ibid.*

<sup>62</sup> Convention, p 5 (available at [http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf)).

<sup>63</sup> *Ibid.*, p iii.

It [also] provokes irrational decision-making [...]. The issue is not whether corruption should be fought but rather how and with what means.<sup>64</sup>

#### IV. ARGUMENT

##### **A. The Purpose of the Request is to Collect Information Conducive to Ascertaining the Truth about the ECCC**

17. Based on the publically available facts set forth above—in particular, the recent revelation regarding the OIOS investigation—it appears that the tribunal may be contaminated by an organized regime of institutional corruption. At this stage, the Defence can only speculate as to the scope of the malfeasance and the resulting improper and/or ‘irrational’ decisions made, on account of such misconduct, by ECCC staff members. However, taking the allegations as reported to date at face value suggests that all personnel within the Office of Administration—and possibly beyond—*may* be professionally compromised; and the resulting damage to the court *may* be commensurately egregious. Accordingly, the Defence hereby seeks to collect ‘information conducive to ascertaining the truth’ about this tribunal: in particular, to determine whether the ECCC is capable of delivering the kind of justice which accords with international standards of fairness.<sup>65</sup> As the UN and the RGC have been unwilling to assist in this inquiry, the Defence now turns to the OCIJ which has the statutory jurisdiction to consider the request; the legal authority and means to obtain the sought-after information; and, not least, the moral obligation to ensure the fairness of the proceedings.

##### **B. Widespread Institutional Corruption May Threaten Mr Nuon’s Right to an Independent and Impartial Prosecution, Investigation, and Trial**

18. Unresolved allegations of widespread corruption at the ECCC cast doubt on the institutional integrity of the tribunal. Any individual who has demanded and/or provided money in exchange for employment, apart from having committed a crime under Cambodian law, does not possess the requisite probity to ensure the fairness of the proceedings. If staff members entrusted with sensitive tasks are willing to engage in graft, then those individuals may be equally willing to follow improper instructions,

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<sup>64</sup> ‘Governance Action Plan’, speech by Sok An, Senior Minister, Minister in charge of The Office of the Council of Ministers, and Chairman of the Council for Administrative Reform Consultative Group Meeting, Phnom Penh, 19–21 June 2002 (available at <http://www.camnet.com.kh/ocm/government/government126.htm>).

<sup>65</sup> Ultimately, the ‘truth’ of the allegations set forth in the Introductory Submission is inextricable from the probity of those charged with searching for it.

such as the manipulation of evidence to support a preordained political outcome. Or— even more subtle—having been ‘bought and paid for’, they may feel obliged to perform their official functions in accordance with the actual or perceived expectations of their paymasters. To be sure, corruption is as much a means of exercising control over those it necessarily compromises as it is a source of ill-gotten financial gain. Regardless of the motivation, the result—a tainted workforce—is potentially inconsistent with the notions of judicial and institutional independence.

19. The Office of Administration—mandated to ‘support’, ‘service’, and partially ‘supervise’ the judicial chambers, the OCIJ, and the OCP—is essentially responsible for running the court. And it is well-known that judges at tribunals such as the ECCC do not perform their work single-handedly. Rather, in the execution of their judicial functions, they are assisted—at times intimately—by a host of specialists. Indeed, all the material upon which judges ultimately deliberate is ‘pre-processed’ in some manner by the machinery of court-administration. In other words, the independence and impartiality of the judges is inextricably linked to the independence and impartiality of those who assist them. Therefore, entrusting any of the delicate tasks outlined above (at paragraph fifteen) to officials who are not independent and impartial could undermine the fairness of the proceedings. For example:
- a. legal officers, investigators, or greffiers—to whom certain quasi-judicial authority is delegated and who fall under the supervision of the Office of Administration—may deliberately take improper decisions contrary to the interests of the Defence, such as advising against legitimate requests for investigative action, failing to seek exculpatory evidence from known sources, or collaborating with disingenuous civil parties;
  - b. case-file officers may fabricate, alter, mislay, and/or destroy evidence which is favorable to the Defence;
  - c. ICT staff may intercept and pass on confidential electronic information, such as client instructions or Defence work-product, to the OCP or other adverse parties;
  - d. translators and interpreters may omit exculpatory evidence from translated documents or deliberately misinterpret testimony which is favorable to the Defence;

- e. witness-handlers may improperly instruct or attempt to influence witnesses and experts to testify falsely against the Defence; or
- f. security guards, cleaners, or waste-disposal staff—all of whom have potential access to confidential Defence material—may read or copy documents and pass on sensitive information to those who have no right to see it.

Any one of these possible breaches could unduly affect Mr Nuon's case and deprive him of his right to a fair investigation and trial. And the failure to assess this important right in its proper context risks rendering it a 'theoretical or illusory' one.<sup>66</sup>

20. At this stage, the Defence cannot assume that the apparently wide-ranging kickback scheme was terminated upon the Director of Administration's suspicious departure from the tribunal. Nor can the situation be assessed in vacuum: the Cambodian justice system is considered to be among the world's most corrupt,<sup>67</sup> and the ECCC is, after all, part of that system. Regrettably, given such a seemingly pervasive culture of corruption, the UN Secretary-General's former human-rights envoy to Cambodia may have been correct in his dire assessment of the tribunal: 'the weakness and corruption within the national legal system have infected the ECCC, instead of the ECCC influencing the [...] local [system]'.<sup>68</sup>
21. In any event, the proper administration of justice at a large and complicated tribunal such as this one depends upon the adherence to strict standards of integrity and the freedom from undue political influence on the part of *all key personnel*. The primary purpose of this request, therefore, is to assure ourselves, our client, and the public that the ECCC's judges, prosecutors, administrators, and support staff meet such necessarily high standards. The Defence is hopeful that the OCIJ will take this opportunity to assist us in our efforts to identify any corrupt elements within the court and, perhaps, to clear the cluttered path to justice in Cambodia.

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<sup>66</sup> See para 14, *supra*.

<sup>67</sup> See, e.g., Transparency International, Global Corruption Report 2008 (ranking Cambodia the world's eighteenth most corrupted country) (available at <http://www.transparency.org>, visited on September 2008).

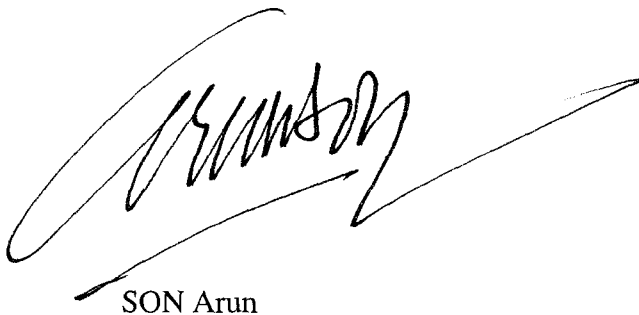
<sup>68</sup> Yash Gai, as quoted by Sebastian Strangio, 'Corruption may undermine Khmer Rouge justice', 23 February 2009 (available at <http://www.eurekastreet.com.au/article.aspx?aeid=11895>).

**V. REQUEST**

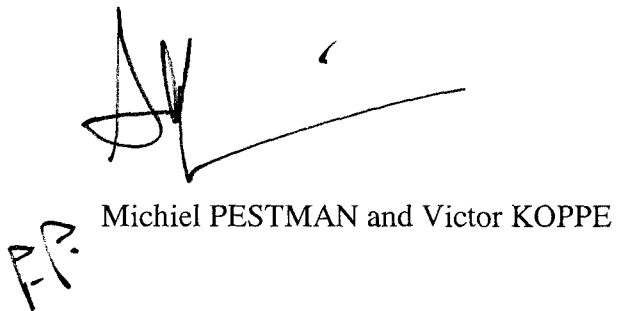
22. Accordingly, the Defence urgently requests the OCIJ to obtain from the UN, the RGC, and/or any other organization or individual:
- a. the results of the OIOS inquiry;
  - b. any correspondence between the UN and the RGC related to the OIOS inquiry; and
  - c. any other information suggesting an organized regime of institutional corruption at the ECCC.

Such material and information should be disclosed to the Defence and all other interested parties as soon as possible. Additionally, the Defence invites the OCIJ to request an administrative inquiry into the outstanding allegations of corruption at the tribunal.<sup>69</sup>

CO-LAWYERS FOR NUON CHEA



SON Arun



F.P. Michiel PESTMAN and Victor KOPPE

<sup>69</sup> N.B. The OCIJ has previously taken such action with respect to the disclosure of confidential information. See Document No A-260, Inter-Office Memorandum from OCIJ to Office of Administration ('Request for Administrative Inquiry'), 3 March 2009.