

KINGDOM OF CAMBODIA

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**IN THE MUNICIPAL COURT OF PHNOM PENH
BEFORE THE OFFICE OF THE ROYAL PROSECUTOR**

CRIMINAL COMPLAINT

Complainants

Michiel Pestman & Andrew Ianuzzi
ECCC Defence Counsel
PO Box 71 (Room 201)
Phnom Penh, Kingdom of Cambodia

Office of the Royal Prosecutor

Yet Chakriya
Royal Prosecutor
No 31 Monireth Boulevard
Phnom Penh, Kingdom of Cambodia

I. INTRODUCTION

1. Pursuant to Article 6 of the Code of Criminal Procedure of the Kingdom of Cambodia ('CCP'), the Complainants—defence counsel at the Extraordinary Chambers in the Courts of Cambodia ('ECCC')—hereby submit this criminal complaint to the Office of the Royal Prosecutor of the Municipal Court of Phnom Penh (the 'ORP'). The Complainants are victims¹ of violations of Articles 522, 538, 546, and 549 of the Penal Code of the Kingdom of Cambodia² (the 'Penal Code') and/or analogous provisions contained in any other previously applicable Cambodian criminal statute.³ In particular, the Complainants allege that illegal interference by members of the Royal Government of Cambodia (the 'RGC' or the 'Government'), as well as the failure of certain RGC officials to respond to summonses duly issued by the ECCC Office of the Co-Investigating Judges (the 'OCIJ'), amount to 'Offences Against the Nation'⁴ and have undermined the integrity of the proceedings in Case 002 at the ECCC.

II. FACTUAL BACKGROUND

2. Since the ECCC's inception, members of the Government have actively interfered with the administration of justice at the court. In particular, the following individuals have committed the following specific acts:
 - a. **Kong Sam Ol:** In July 2009, the RGC Minister to the Royal Palace, actively prevented OCIJ letters inviting Norodom Sihanouk to testify at the ECCC in Case 002 from reaching the King Father himself.⁵
 - b. **Hun Sen:** In September 2009, in a public speech delivered in Takeo, the RGC Prime Minister admitted to personally vetoing certain ECCC witnesses.⁶

¹ See CCP, Article 6 ('Any person who claims to be a victim of an offence can file a complaint.')

² See Reach Kram, NS/RKM/1109/022, 4 January 2010 (promulgating the 'Penal Code which was adopted by the National Assembly on 12 October 2009 in the 3rd Session of the 4th Legislature which was entirely approved on legal form and substance by the Senate on 17 November 2009, in the 6th Session of the 2nd Legislature').

³ See, e.g., 'Provisions Dated 10 September 10 1992 Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period' (the 'UNTAC Code'). *N.B.* On information and believe, prior to final adoption of the current Penal Code, the 1992 UNTAC Criminal Code was the criminal law in force in Cambodia.

⁴ See para 3, *infra*.

⁵ See Document No D-122/5, Letter from the OCIJ to Kong Sam Ol, 15 July 2009, ERN 00350280; Document No D-122/5/1, Letter from Kong Sam Ol to the OCIJ, 17 July 2009, ERN 00351389–00351392; Document No D-122/5/3, Letter from Kong Sam Ol to the OCIJ, 22 July 2009, ERN 00355672–00355674. *N.B.* Judge You Bunleng refused to sign the letters.

- c. **Chea Sim, Heng Samrin, Hor Namhong, Keat Chhon, Ouk Bunchhoeun, and Sim Ka:** Duly summoned by the OCIJ on 25 September 2009,⁷ none of these former Khmer Rouge cadres—respectively: the President of the Senate, the President of the National Assembly, the RGC Minister of Foreign Affairs, the RGC Minister of Economy and Finance, and two senators from the Cambodian People’s Party (collectively, the ‘Six Insiders’)—appeared at the ECCC to provide testimony as ordered. No valid reasons for the refusals to appear were ever provided.
- d. **Khieu Kanharith:** In October 2009, the RGC Minister of Information publicly stated that, although the Six Insiders ‘could appear in court voluntarily, the government’s position was that they should not give testimony. He said that foreign officials involved in the court could “pack their clothes and return home” if they were not satisfied with the decision’.⁸ To date, not one of the Six Insiders has voluntarily provided any testimony with respect to Case 002 to any ECCC judicial official.
- e. **Khieu Sopheak:** In June 2010, the spokesman for the RGC Ministry of the Interior ‘repeated the [Government’s] opposition to the [Case-003-and-004] investigations [...], citing Hun Sen’s continued warnings of unrest: “Just only the five top leaders [are] to be tried,” Lt Gen Sopheak said. “Not six. Just five. The court must secure the stability and the peace of the nation,” he said. “The conflict and internal instability we don’t want’.⁹

⁶ According to a translation provided by the ECCC Public Affairs Section, the Prime Minister made the following remarks: ‘They are not getting along with each other in [the ECCC]. [...] They want to put pressure on us that we have to sign in order to get money. I said no. If you don’t give, that is fine. When you run out of money, you can walk out. It is very complicated. Now they are frightened. *Once, they wanted to call some people to testify. I said no and don’t be [such an] annoyance.*’ (emphasis added).

⁷ See Document No **D-136/2/1**, ‘Witness Summons’, 25 September 2009, ERN 00387202–00387203; Document No **D-136/3/1**, ‘Witness Summons’, 25 September 2009, ERN 00401699–00401700; Document No **A-299/1**, ‘Witness Summons’, 25 September 2009, ERN 00387141–00387142; Document No **A-296/1**, ‘Witness Summons’, 25 September 2009, ERN 00387137–00387138; Document No **A-298/1**, ‘Witness Summons’, 25 September 2009, ERN 00387139–00387140; Document No **A-297/1**, ‘Witness Summons’, 25 September 2009, ERN 00380693–00380694.

⁸ Sebastian Strangio & Cheang Sokha, *Phnom Penh Post*, ‘Gov’t testimony could bias KRT: PM’, 9 October 2009.

⁹ Douglas Gillison, ‘KRT Begins Investigation of Five New Regime Suspects’, *The Cambodia Daily*, 8 June 2010. *N.B.* This announcement came on the heels of Judge You Bunleng’s removal of his name from previously signed rogatory letters in Cases 003 & 004. See OCIJ Internal Memorandum, from You Bunleng to Marcel Lemonde, 8 June 2010, re ‘Dossiers 003 et 004’ (unofficial translation from the original French); Douglas Gillison, ‘Khmer Rouge Tribunal Judge Backs Out of New Inquiries’, *Cambodia Daily*, 10 June 2010; Douglas Gillison, ‘KR Judge Does Not Sign On To New Investigations’, *Cambodia Daily*, 9 June 2010.

- f. **Hun Sen:** In October 2010, the RGC Prime Minister bluntly told visiting UN Secretary General Ban Ki-moon that Cases 003 and 004 were ‘not allowed’.¹⁰
- g. **Khieu Kanharith:** In May 2011, the RGC Minister of Information stated that foreign nationals looking to investigate Cases 003 & 004 should ‘pack their bags and return home’.¹¹
- h. **Hor Namhong:** In October 2011, the RGC Minister of Foreign Affairs was quoted as saying: ‘only Cambodia can decide how many additional suspects the Khmer Rouge Trial will prosecute’.¹²
- i. **Phay Siphon:** In October 2011, the spokesman for the RGC Council of Ministers ‘said Judge Blunk’s departure from the tribunal showed that he had misunderstood the principles of a mixed court. “He [Judge Blunk] failed to understand the wisdom of setting up the ECCC, which is the partnership between the government and the UN,” he said. “We will stand on our ground regarding the ECCC. There will be no case 003 or 004.” *“The government doesn’t want failure; that is why it only allows Case 002 to take place.”*’¹³

All of these public comments suggest—as one of the Tribunal’s Cambodian judges has indicated—that RGC interference is a fact of life at the ECCC: ‘How can we say that the court is a model of independent justice if the government *does not let us do our job?*’¹⁴

¹⁰ See AFP Report, ‘Cambodian PM Says No Third Khmer Rouge Trial’, 27 October 2010 (‘Cambodian Prime Minister Hun Sen told visiting UN Secretary General Ban Ki-moon on Wednesday that a second Khmer Rouge war crimes trial due to start early next year would be the last. Hun Sen “clearly affirmed that case three is not allowed”, Foreign Minister Hor Namhong told reporters after Ban met with the premier. “We have to think about peace in Cambodia,” he said.’)

¹¹ James O’Toole, *Phnom Penh Post*, ‘Wrangling ahead in Case 003’, 17 May 2011 (‘However these matters are resolved, the larger issue of whether the Cambodian government will reverse its long-standing opposition to Cases 003 and the still-pending 004 remains. In response to Cayley’s statement last week, Information Minister Khieu Kanharith repeated a warning to the court’s international staff about these cases, saying those interested in investigating them should “pack their bags and return home”.’)

¹² Julia Wallace & Neou Vannarin, *Cambodia Daily*, ‘Additional KR arrests in Cambodia’s hand, Hor Namhong says’, 5 October 2011.

¹³ Alice Foster & Phorn Bopha, *Cambodia Daily*, ‘Judge Resigns KR Court Over Gov’t Pressure’, 11 October 2011 (emphasis added).

¹⁴ James Goldston, *Wall Street Journal*, Op-Ed, ‘Cambodia’s Court at a Crossroads’, 1 March 2010 (emphasis added).

III. APPLICABLE LAW

3. Book 4 of the Penal Code defines various ‘Offences Against the Nation’. Such offences include, under Title 2, multiple instances of ‘Infringement on Justice’, which title further comprises, among other violations, certain instances of: ‘Infringement on Authorities of the Courts’ (Chapter 1); ‘Infringement on Activities of the Courts’ (Chapter 2); and ‘Violation of Certain Decisions of the Court’ (Chapter 4). Of particular relevance to the instant case are the following seven articles:

Article 520: Interference in the Performance of Functions of the Court (misdemeanor)

Any act of a public official [...] in office who refuses to follow the judgment, decision, or order of a judicial authority is punishable by an imprisonment from 2 (two) years to 5 (five) years and a fine from 4,000,000 (four million) Riels to 10,000,000 (ten million) Riels.

Article 522: Publication Aimed at Putting Pressure on a Jurisdiction (misdemeanor)

Any publication, prior to the final decision of the court, of any commentary aimed at putting pressure on the court where a lawsuit is filed, in order to influence the decision of the court, is punishable by imprisonment from 1 (one) month to 6 (six) months, and a fine from 100,000 (one hundred thousand) Riels to 1,000,000 (one million) Riels.

Article 525: Attempt

The attempt to commit misdemeanors specified in Article 520 (Interference in the Performance of Functions of the Court) [...] of this Code carries the same punishment as misdemeanors.

Article 538: Refusal to Appear (misdemeanor)

Any person who is summoned to testify as witness before a prosecutor or an investigating judge or a criminal court and refuses to appear himself/herself following the summons without any valid reason is punishable by imprisonment from 1 (one) month to 6 (six) months and a fine from 100,000 (one hundred thousand) Riels to 1,000,000 (one million) Riels.

Article 546: Intimidation of a Witness (misdemeanor or felony)

Any act of intimidation committed by a perpetrator alone or with the consent of a third party to instigate a witness not to give any statement or to provide false oral or written testimony is punishable by imprisonment from 2 (two) years to 5 (five) years and a fine from 4,000,000 (four million) Riels to 10,000,000 (ten million) Riels. If the offence produces an effect, it is punishable by imprisonment from 5 (five) years to 10 (ten) years.¹⁵

Article 549: Publication Aimed at Putting Pressure on a Witness (misdemeanor)

Any publication, prior to the final decision of the court, of any commentary aimed at putting pressure on a witness in order to influence the testimony of the witness is punishable by imprisonment from 6 (six) days to 1 (one) month and a fine from 10,000 (ten thousand) Riels to 100,000 (one hundred thousand) Riels.

Article 586: Taking Measures to Prevent Law Enforcement (misdemeanor or felony)

The acts committed by a civil servant or a citizen entrusted with public mandates through an election in office or during the performance of his/her function to take measures to prevent law enforcement is punishable by an imprisonment from 2 (two) years to 5 (five) years and a fine from 4,000,000 (four million) Riels to 10,000,000 (ten million) Riels. If it produces an effect, this offence is punishable by an imprisonment from 5 (five) years to 10 (ten) years.

¹⁵ See also UNTAC Code, Article 51 (‘Any person who threatens, intimidates, or places pressure upon a witness in a judicial proceeding is guilty of the misdemeanor of coercion and thereby incurs a punishment of one to two years in prison.’)

As ‘infringements on justice’, as opposed to crimes against persons or property, all members of society—in particular, members of the legal community—are victimized by the commission of such offences.¹⁶

4. According to the Penal Code, ‘[n]o one shall be criminally responsible except for his or her own conduct’.¹⁷ Liability for such conduct may be incurred by way of various modes, including: (i) perpetration,¹⁸ (ii) co-perpetration,¹⁹ (iii) attempt,²⁰ (iv) instigation,²¹ and/or (v) complicity.²²
5. Pursuant to the Constitution of the Kingdom of Cambodia (the ‘Constitution’), certain Government officials benefit from limited functional immunity. In particular:

Article 80:

The deputies [of the National Assembly] shall enjoy parliamentary immunity.

No assembly member shall be subject to any prosecution, detention, or arrest because of opinions expressed during the exercise of his/her duties.

The accusation, arrest, or detention of an assembly member may be made only with the permission of the National Assembly or the Standing Committee of the National Assembly, in periods between Assembly sessions, except in cases of *flagrante delicto*. [...]

Article 104:

The members of the Senate shall enjoy parliamentary immunity.

No Senate member shall be subject to any prosecution, detention, or arrest because of opinions expressed during the exercise of his/her duties.

The accusation, arrest, or detention of any member of the Senate may be made only with permission of the Senate or the Standing Committee of the Senate, in periods between Senate sessions, except in cases of *flagrante delicto*. [...]

Article 126:

Each member of the Royal Government shall be liable for punishment for any crime or misdemeanor that he/she has committed in the course of his/her duty.

In such cases and when he/she has committed serious offenses in the course of his/her duty, the Assembly shall decide to file charges against him/her with the competent court.

The Assembly shall decide on such matters through a secret vote by a simple majority thereof.

Accordingly, members of the National Assembly and Senate—while free to express opinions *related to their legislative work as such*—have no immunity with respect to

¹⁶ See CCP, Article 6 (‘Any person who claims to be a victim of an offence can file a complaint.’)

¹⁷ Article 24.

¹⁸ See Penal Code, Article 25.

¹⁹ See Penal Code, Article 26.

²⁰ See Penal Code, Article 27.

²¹ See Penal Code, Article 28.

²² See Penal Code, Article 29.

extra-parliamentary issues such as those impacting on the work of the judiciary, a separate and independent branch of the RGC.²³ All members of the RGC—like all regular Cambodian citizens—are *unconditionally* liable for crimes and misdemeanors committed *outside the course of their official duties*.

IV. ARGUMENT

6. Given the facts outlined above, several members of the RGC have committed various ‘infringements on justice’:
 - a. By flouting duly issued OCIJ summonses and refusing to appear for testimony without any valid reason,²⁴ **Chea Sim, Heng Samrin, Hor Namhong, Keat Chhon, Ouk Bunchhoeun, and Sim Ka** have committed the crime of ‘Refusal to Appear’, punishable under Article 538 of the Penal Code by imprisonment and fine.
 - b. By openly and notoriously publishing their personal and/or extra-curricular views on whether Cases 003 and 004 at the ECCC should proceed,²⁵ **Khieu Sopheak, Hun Sen, Khieu Kanharith, Hor Namhong, and Phay Siphan** have committed the crime of ‘Publication Aimed at Putting Pressure on a Jurisdiction’, punishable under Article 522 of the Penal Code by imprisonment and fine. Such published views have been clearly aimed at putting pressure on the ECCC to drop Cases 003 and 004 prior to the final decision of the court.
 - c. By refusing to deliver OCIJ letters inviting Norodom Sihanouk to testify at the ECCC in Case 002 from reaching the King Father himself,²⁶ **Kong Sam Ol** has committed the crime of ‘Interference in the Performance of Functions of the Court’, punishable under Article 520 or 525 of the Penal Code by imprisonment and fine. Additionally, or in the alternative, **Kong Sam Ol** has—by the same conduct—violated Articles 546 and/or 586 of the Penal Code. With respect to these latter two provisions, as the offence has undoubtedly produced an effect—namely, the frustration of obtaining singularly relevant testimony—it is punishable by an additional term of imprisonment.

²³ See Constitution, Article 51 (‘The Legislative, Executive, and the Judicial powers shall be separate.’)

²⁴ See para 2(c), *supra*.

²⁵ See paras 2(e)–(i), *supra*.

²⁶ See para 2(a), *supra*.

- d. By openly and notoriously publishing his personal and/or extra-curricular view on whether the Six Insiders should give testimony in Case 002 at the ECCC,²⁷ **Khieu Kanharith** has committed the crime of ‘Publication Aimed at Putting Pressure on a Witness’, punishable under Article 549 of the Penal Code by imprisonment and fine. Such published view has been clearly aimed at putting pressure on the Six Insiders not to provide testimony at the ECCC. Additionally, or in the alternative, **Khieu Kanharith** has—by the same conduct—violated Article 546 of the Penal Code.
- e. Finally, by openly and notoriously publishing his personal and/or extra-curricular view on whether certain unidentified witnesses should give testimony at the ECCC,²⁸ **Hun Sen** has committed the crime of ‘Publication Aimed at Putting Pressure on a Witness’, punishable under Article 549 of the Penal Code by imprisonment and fine. Such published view was clearly aimed at putting pressure on the referenced witnesses not to provide testimony at the ECCC. Additionally, or in the alternative, **Hun Sen** has—by the same conduct—violated Article 546 of the Penal Code.

Such executive obstruction in the work of what should be an independent judicial body is contrary to the principle of separation-of-powers enshrined in the Constitution, threatens to unduly compromise the integrity of the proceedings in Case 002 at the ECCC, and—quite simply—amounts to criminal activity under the Penal Code.

7. The above-named Government officials are individually criminally liable, as perpetrators,²⁹ for the various offences outlined in the previous paragraph. Moreover, it appears that, ‘by mutual agreement’, these same individuals acted pursuant to a common criminal plan in carrying out their ‘infringements on justice’ at the ECCC. As such they are all equally liable as co-perpetrators.³⁰ Additionally, **Hun Sen, Khieu Sopheak, Khieu Kanharith, Hor Namhong, and Phay Siphon** are each criminally responsible as instigators.³¹ And, in the alternative, the latter four are liable as accomplices³² to the principle perpetrator and prime mover of the RGC’s obstructive efforts, **Hun Sen**.

²⁷ See para 2(d), *supra*.

²⁸ See para 2(b), *supra*.

²⁹ See Penal Code, Article 25.

³⁰ See Penal Code, Article 26.

³¹ See Penal Code, Article 28.

³² See Penal Code, Article 29.

8. With respect to the claim set out above at paragraph 5(a), **Chea Sim, Heng Samrin, Ouk Bunchhoeun, and Sim Ka** cannot avail themselves of the parliamentary immunity provided by Article 80 or 104 of the Constitution.³³ The refusal to appear pursuant to a duly-issued summons cannot, in any sense, be deemed the expression of an opinion during the exercise of one's parliamentary duties.
9. As to all claims against all of the above-named individuals, none of the criminal activity alleged herein can be considered to have been 'committed in the course of [...] duty'.³⁴ Accordingly, there is no need for the ORP to receive permission from, or otherwise consult, the Assembly in order to proceed with investigating and charging the alleged perpetrators.

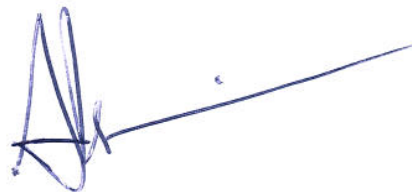
V. REQUEST FOR RELIEF

10. Accordingly, the Complainants hereby request the ORP to initiate criminal proceedings (in the form of a judicial investigation) pursuant to Articles 43 and 44 of the CCP against **Chea Sim, Heng Samrin, Hor Namhong, Keat Chhon, Ouk Bunchhoeun, Sim Ka, Khieu Sopheak, Hun Sen, Khieu Kanharith, Phay Siphon, and Kong Sam Ol**.³⁵

Done on 24 October 2011, at Phnom Penh, Kingdom of Cambodia:



Michiel PESTMAN



Andrew IANUZZI

³³ See para 4, *supra*.

³⁴ See Constitution, Article 126.

³⁵ *N.B.* Irrespective of whether any of the alleged perpetrators named herein are members of the Bar Association of the Kingdom of Cambodia (the 'BAKC'), the Complainants have declined to notify the BAKC president prior to filing the instant complaint. See Code of Ethics for Lawyers Licensed with the Bar Association, Article 26: Legal Action, ('The President shall receive prior notice of all legal actions undertaken by a lawyer against another lawyer, a judge, or another member of the legal profession or legal field.') The Complainants are of the view that the BAKC president would prevent (or attempt to prevent) them from taking action.