

D158/5/3/10

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

Case File No. : 002/19-09-2007-ECCC/ OCIJ (PTC19, 20, 21, 22)

Date of Document : 19 May 2009

Party Filing : Co-Lawyers for Civil Parties

Original Language : English

Classification of the Document Suggested by the Filing Party : Public

ឯកសារដើម	
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL	
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception):	
20 / MAY / 2009	
ម៉ោង (Time/Heure): 15:45	
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: SAN N. BADA	

CO-LAWYERS FOR CIVIL PARTIES' RESPONSE ON THE APPEALS BY CHARGED PERSONS NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH ON THE CO-INVESTIGATING JUDGES ORDER ON ELEVENTH REQUEST FOR INVESTIGATIVE ACTION

Filed by:

Co-Lawyers for Civil Parties:

- Mr. YUNG Panith
- Mr. LOR Chuntly
- Mr. NY Chandy
- Ms. Silke STUDZINSKY
- Mr. David BLACKMAN

Distributed to:

Pre-Trial Chamber:

- Judge PRAK Kimsan, President
- Judge Rowan DOWNING
- Judge NEY Thol
- Judge Katinka LAHUIS
- Judge HUOT Vuthy

Copied to:

Office of the Co-Prosecutors:

- Ms. CHEA Leang
- Mr. Robert PETIT
- Mr. YET Chakriya
- Mr. William SMITH
- Mr. PICH Sambath

Charged Persons:

- NUON Chea
- IENG Sary
- KHIEU Samphan
- IENG Thirith

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25 / 05 / 2009	
មន្ត្រីទទួលបន្ទុកសំណុំរឿង /Case File Officer/L'agent chargé du dossier: C. P. Sary	

**Counsel for the Charged
Persons:**

SON Arun
Michiel PESTMAN
Victor KOPPE
ANG Udom
Michael KARNAVAS
PHAT Pouv Seang
Diana ELLIS
SA Sovan
Jacques VERGES

**Co-Lawyers for Civil
Parties:**

Mr. HONG Kimsuon
Mr. KONG Pisey
Mr. KIM Mengkhy
Ms. MOCH Sovannary
Ms. Martine JACQUIN
Mr. Philippe CANONNE
Mr. Pierre-Olivier SUR
Ms. Annie DELAHAIE
Ms. Elizabeth
RABESANDRATANA

I. INTRODUCTION

1. On 27 March 2009, the Counsel for Charged Person Nuon Chea submitted their 11th request for Investigative action ('Investigative Request') to the Office of the Co-Investigating Judges (the 'OCIJ') pursuant Rules 21 (1), 55(10) and 58 (6) of the ECCC Internal Rules (the Rules).¹ Nuon Chea's submission was subsequently joined by the other Defendants, Ieng Sary, Ieng Thirith, and Khieu Samphan.²
2. This Investigative Request was mainly related to the spreading corruption allegation within the ECCC, specifically concerning the involvement of the ECCC's Director of Administration, as has been indicated by several inquiries, including the UN's Office of Internal Oversight Services (the 'OIOS').³ As such, the Counsel for Charged Person Nuon Chea has given reference to numerous facts, which has sufficiently shown that this is a serious matter.⁴ Therefore, they requested OCIJ to obtain from the UN, the Royal Government of Cambodia ("RGC"), and/or any other organization or individual the results of 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'.⁵ They also invited 'the OCIJ to request an administrative inquiry into the outstanding allegations of corruption at the tribunal'.⁶

¹ Nuon Chea's Eleventh request of Investigative action, 27 March 2009, Doc. No. D/158 [hereinafter referred to as: Investigative Request].

² Ieng Sary's Motion to Join and Adopt Nuon Chea's Eleventh Request for Investigative Action, 27 March 2009, Doc. No. D-158/2; Motion in Support of Nuon Chea's Eleventh Request for Investigative Action for Disclosure of OIOS Report and Related Documents, 30 March 2009, Doc. No. D-158/3; Mémoire de KHIEU Samphan pour soutenir la 11eme Demande d'acte d'instruction par les avocats de NUON Chea [FR], 3 April 2009, Doc. No. D-158/4.

³ Investigative Request, para 6.

⁴ *Ibid*, para 4-11.

⁵ *Ibid*, para 22.

⁶ *Ibid*, para 22.

3. Following such request, the OCIJ released its order on 3 April 2009, stating that they lack jurisdiction to accomplish the requested investigative action and there were no grounds to request an administrative investigation.⁷ They also held that the ‘negative effects’ of corruption are speculative;⁸ and the matter is currently being dealt with by the RGC and the UN.⁹ Subsequently, the Counsels of Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan, filed their appeal on such order on 4 May 2009.¹⁰ These separate appeals mainly requested the Pre-Trial Chamber to grant the request of investigative actions initially requested by Nuon Chea, as this issue of corruption goes fundamentally to the very continuation of ECCC proceedings.

4. The Co-Lawyers for Civil Parties fully support the defense counsels’ request for further investigation by ECCC concerning the matter of corruption. Civil Parties, as parties to the proceeding, hereby request the Pre-Trial Chamber to declare that ECCC, specifically the OCIJ has a jurisdiction to conduct investigative action upon this matter. It is indeed, within the scope of ECCC to resolve the matter concerning (1) fair, independent and impartial trial; and (2) interference of the administration of justice. Moreover, we also implore the Court to deal with this issue in a speedy manner as this substantially affects the Civil Parties’ interests and the very existence of the ECCC.

ARGUMENT

⁷ *Case of Nuon Chea*, 002/19-09-2007-ECCC/OCIJ, OCIJ Order on Request for Investigative Action, 3 April 2009, (“Order”), para 12.

⁸ *Ibid*, para 12.

⁹ *Ibid*, para. 13.

¹⁰ *Case of Nuon Chea*, 002/19-09-2007-ECCC/OCIJ (PTC 21), Appeal Against Order on Eleventh Request for Investigative Action, 4 May 2009, Doc. No. D158/5/1/1 [hereinafter Nuon Chea Appeal]; *Case of Ieng Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 20), Ieng Sary’s Appeal Against the Co-Investigating Judges’ Order on Request for Investigative Action Regarding Ongoing Allegations of Corruption & Request for an Expedited Oral Hearing, 4 May 2009 [hereinafter Ieng Sary Appeal], Doc. No. D158/5/3/1; *Case of Ieng Thirith*, 002/19-09-2007-ECCC/OCIJ (PTC19), Appeal against Office of the Co-Investigating Judges’ “Order on Request for Investigative Action” of 3 April 2009, 4 May 2009, Doc.No. D158/5/4/1 [hereinafter Ieng Thirith Appeal]; *Case of Khieu Samphan*, 002/19-09-2007-CETC-BCJI (CP22), Appel de la Défense de M. Khieu Sampan Contre L’Ordonnance des Co-Juges D’Instruction sur Demande d’Acte d’Instruction en date du 3 April 2009, 4 May 2009 [hereinafter Khieu Samphan Appeal], Doc.No. D158/5/2/1.

A. The principle of fair, independent and impartial trial tribunal serves as a basis for ECCC to operate, as well as going to the very core of whether the Rule of Law will govern these proceedings

5. The purpose of the establishment of ECCC is to meet international standards of justice, and to insure a fair, independent and impartial trial.¹¹ This goal is reflected in Article 33new of ECCC law, which affirms that the proceeding in the ECCC adheres to the international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights.¹² This is in line with the very general principle of international law, that everyone alleged with criminal charges or any lawsuit has the right to trial by a competent, independent and impartial tribunal established by law.¹³

¹¹Identical letters dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council mentioned in the Report of the Group of Experts for Cambodia Pursuant to General Assembly Resolution 52/135, 53rd Sess., Agenda Item 110(B), U.N. Doc. A/53/850, S/1999/231, P 96 (1999); Herbert D. Bowman, "Not Worth the Wait: Hun Sen, the UN, and the Khmer Rouge Tribunal, UCLA Pacific Basin Law Journal, 2006.

¹² Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea, 10 August 2001, with inclusion of Amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) [hereinafter ECCC Law], art 33new

¹³ Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3rd Sess., at 72, U.N. Doc. A/810 (1948) [hereinafter UDHR], Art. 10 and 19; International Covenant on Civil and Political Rights, Dec. 16, 1966, Art. 9, 14, 15, 999 U.N.T.S. 171 [hereinafter ICCPR], Art 14(1); American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673 [hereinafter ACHR], Article 8(1) and 27(2); African Charter on Human and Peoples' Rights, June 27, 1981 [hereinafter Banjul Charter], Art. 7(1) and 26; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 U.N.T.S. 221, E.T.S. 5, as amended by Protocol No. 3, E.T.S. 45, Protocol No. 5, E.T.S. 55, and Protocol No. 8, E.T.S. 118 [hereinafter ECHR], Article 6 (1); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa Case) Notwithstanding Security Council Resolution 276 (1970), ICJ Rep. 1971, separate opinion Vice President Ammoun, at 76; UN Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 [hereinafter: UN Basic Principles on the Independence of the Judiciary], para 5.

This inherent right,¹⁴ which is also embodied under the national law of Cambodia,¹⁵ requires that an accused is tried by a judge who is neutral and decides the outcome in accordance with the evidence and the law.

6. The independence and impartiality of the ECCC requires that no inappropriate or unwarranted interference exist in the judicial process.¹⁶ It is clearly mentioned under Article 10new of ECCC Law that the judges of ECCC shall have a spirit of impartiality and integrity, and shall be independent in the performance of their functions, and shall not accept or seek any instruction from government and any other source.¹⁷ Thus, they shall decide matters before them on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect from any quarter for any reason.

7. In this case, the corruption allegation will affect the fairness, independence and

¹⁴UDHR, Arts. 9-11; ICCPR, Art. 9, 14, 15; Banjul Charter, Art. 3, 6, 7; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 7, 1978, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I], Art. 75; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non International Armed Conflicts, Dec. 7, 1978, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II], Art. 6; ACHR, Art. 7, 8, 9; ECHR, Art. 5, 6, 7; Standard Minimum Rules for the Treatment of Prisoners, U.N. Doc. A/CONF/611, annex 1, E.S.C. Res. 663C, 24 U.N. ESCOR Supp. No. 1, at 11, U.N. Doc. E/3048 (1957), amended by E.S.C. Res. 2076, 62 U.N. ESCOR Supp. No. 1 at 35, U.N. Doc. E/5988 (1977) (Part II. A. Prisoners Under Sentence and Part II. C. Prisoners Under Arrest or Awaiting Trial); Pieter van Dijk, Universal Legal Principles of Fair Trial in Criminal Proceedings, in *Human Rights in a Changing East-West Perspective* 89, 90 (Rosas et al. eds. 1990): "In 1948, ... [the right to a fair trial] was affirmed as a basic human right by the Universal Declaration of Human Rights and by the American Declaration of the Rights and Duties of Man,"; See, e.g., *Prosecutor v. Furundzija*, IT-95-17/1-A, Judgment, ¶ 182 (Appeals Chamber, 21 July 2000).

Constitution of the Kingdom of Cambodia, Art. 21, 134 (unofficial translation at <http://www.cdpcambodia.org/constitution.asp>, visited 11 May 2009); Law on the Organisation and Functioning of the Supreme Council of Magistracy, Kram du 22 Décembre 1994 sur l'Organisation et le Fonctionnement du Conseil Supérieur de la Magistrature; ECCC Law, Art. 10.

¹⁶ UN Basic Principles on the Independence of the Judiciary, para 4.

¹⁷ ECCC Law, Art. 10new.

impartiality of ECCC and the failure to deal with the issue now obviously will taint any result. In this regard, it is likely that the alleged corruption will impact the whole judicial process. As is stipulated by Judge Georghios M. Pikis in *Lubanga*, the principle of fair trial is not confined to the trial itself, but extends to the preparatory processes preceding the trial, indeed to every aspect of the proceedings.¹⁸ Although, up to this moment there has been no indication that judges have shown a bias tendency towards one party or another, but corruption within the administration of the court will give the appearance of corruption within the Court and also could lead to administrative bias towards a party.

8. It is also mentioned specifically in Internal Rule 8 that the Office of Administration shall support the Chambers, the Office of the Co-Investigating Judges and the Office of Co-Prosecutors in performance of their functions and shall be responsible for their administration and servicing.¹⁹ Corruption within the Office of Administration will therefore affect other organs of this tribunal, including the judicial Chambers.
9. Moreover, up until the present moment, there has been no indication of effort from RGC to tackle this issue.²⁰ In contrast with the OCIJ conclusion that this issue is being dealt between UN and RGC,²¹ there seems to be no solution coming from the discussion between both parties.²² We fear that if this problem is not resolved immediately, the right of the parties, including Civil Parties, will be breached, as the proceeding will no longer be impartial. If the corruption issues continue to exist, the ECCC will no longer serve as a legitimate body to pursue

¹⁸ Situation in the Democratic Republic of the Congo, in the case of the Prosecutor v. Thomas Lubanga Dyilo, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, ("Lubanga"), ICC-01/04-01/06 OA 13, 21-10-08, Separate opinion of Judge Georghios M. Pikis, para 44.

¹⁹ Rule 8 of the Internal Rules.

²⁰ Nuon Chea Appeal, para. 5 (i), Douglas Gillison, *The Cambodia Daily*, No More KR Prosecution, Hun Sen Says', 1 April 2009, p. 2.

²¹ OCIJ Order, para. 13.

²² Nuon Chea Appeal, para. 5 (i)

“justice, national reconciliation, stability, peace and security”²³, as demanded by people of Cambodia and international community as a whole.²⁴ As such, the objective of the establishment of ECCC will not be achieved.

10. Therefore, the ECCC should resolve this matter. As the ECCC run on the basis of judicial independence and impartiality guaranteeing the fair trial principle including the Rule of Law, it is within the scope of the ECCC to deal with this problem, no matter how distasteful.

B. It is within the scope of this Court, including the OCIJ, to investigate any interference in its administration as means to exercise its inherent power

11. Internal Rule 35 of ECCC stipulated that ECCC may sanction or refer to the appropriate authorities, any person who knowingly and willfully interferes with the administration of justice. This is also acknowledged by OCIJ in its Order.²⁵ In this case, the corruption allegation has seriously interfered with the administration of justice. The ECCC, as a hybrid tribunal, established for the purpose of ensuring justice for Cambodian society, and for the international community, has been tainted by such allegations. Failing to deal with it now will further create loss of trust of the international community and Cambodian people and will eventually hamper the justice process in bringing the former Khmer Rouge leaders and those most responsible to trial. There is little doubt that investigating this matter is within the scope of Rule 35, and, if true, will seriously interfere with the administration of justice.

12. Moreover, it is mentioned in the ECCC Law that the Co-Investigating Judges shall conduct investigations on the basis of information obtained from any institution, including the Government, United Nations organs, or non-

²³ Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of the Crimes Committed Under the Period of Democratic Kampuchea, 6 June 2003 [hereinafter referred to as: Agreement], preamble.

²⁴ Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of the Crimes Committed Under the Period of Democratic Kampuchea, 6 June 2003, preamble

²⁵ OCIJ Order, para. 12

governmental organizations. Therefore, it is also under the scope of the OCIJ to conduct investigations on the basis of OIOS inquiry concerning matters of corruption.

13. In the practice of other international tribunals, any act considered as affecting the proceeding, is referred to as ‘contempt’.²⁶ It specifically relates to the certain provisions on contempt in their procedural law. This is due to inherent power given to the International Tribunals which requires them to possess the power to make all those judicial determinations that are necessary for the exercise of its primary jurisdiction.²⁷ The Tribunals are also deemed as having inherent power, deriving from its judicial function, to control its proceedings in such a way as to ensure that justice is done,²⁸ and to ensure that trials and appeals proceed fairly and expeditiously.²⁹ This inherent power also requires the Tribunals to deal with conduct which interferes with its administration of justice.³⁰

14. In this case, it is an inherent power of the ECCC to ensure that justice is done. It is also within the scope of ECCC, to ensure that trials proceed fairly,³¹ and expeditiously. As such, it is important to investigate any interference of judicial administration, including the corruption issue, as it will later affect the proceeding that is supposed to be conducted fairly and expeditiously and transparently. This inherent power, along with the mandate under Rule 35, creates jurisdiction for ECCC to deal with the corruption issue and to conduct further investigation concerning it.

²⁶ ICTY, *Prosecutor v. Jović*, Case IT-95-14 & 14/2-R77, Trial Chamber Judgment, 30 August 2006, para 11, (“Jović Trial Judgment”); ICTY, *Prosecutor v. Marijačić & Rebić*, Case IT-95-14-R77.2, Trial Chamber Judgment, 10 March 2006, para 13-15 (“Marijačić & Rebić Trial Judgment”); *Prosecutor v. Margetić*, Judgment on Allegations of Contempt, 7 February 2007, para 77; ICTY, *Prosecutor v. Aleksovski*, Case IT-95-14/I-AR77, Judgment on Appeal by Anto Nobile Against Finding of Contempt, 30 May 2001, para 41 (“Nobile Appeal Judgment”); ICTY, *Prosecutor v. Baton Haxhiu*, Case no. IT-04-84-R, Judgment on Allegation of Contempt, 24 July 2008, para 9 (“Haxhiu Trial Judgment”).

²⁷ ICTY, *Prosecutor v. Blaskić* (IT-95-14-AR108bis), Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1009, 29 October 1997, para 22.

²⁸ ICTY, *Prosecutor v. Delalić et al.* (IT-96-21-A), Separate Opinion of Judge Hunt, 22 April 1999, para 3.

²⁹ *Ibid.*

³⁰ ICTY, *Prosecutor v. Tadić* (IT-94-1-A-R77), Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000, para 13.

³¹ Rule 21 of ECCC Internal Rules

C. The Corruption issue substantially affects the Civil Parties interest as they face the threat of ECCC discontinuation

15. The interest of Civil Parties, in this case is to ensure that ECCC fully upholds the principle of judicial independence and impartiality. Any decision that is made by ECCC, will not serve as a means to pursue justice for the victims if it is tainted by any corrupt act within its administration. Moreover, Civil Parties implore that this issue to be dealt with in a speedy manner as it will impede and substantially delay the proceeding, specifically in relation with Case 2, in which no indication has been given as to when the trial will begin.
16. As a matter of fact, due to this corruption issue, ECCC faces a possibility of ceasing to exist. Pursuant to article 28 of the Agreement between UN and RGC concerning the establishment of ECCC, the UN reserves the right to cease to provide assistance, financial or otherwise if RGC causes the ECCC to function in a manner that does not conform to the terms of the agreement.³² This includes a possibility that the UN will withdraw its cooperation if the ECCC does not perform their function in accordance with international standards of justice, fairness and due process of law,³³ and uphold the rights of the Accused to a fair and public hearing.³⁴
17. Various reports have confirmed this notion. Statements made by the Deputy director of Administration/UNAKRT Coordinator, Knut Rosandhaug have indeed indicated UN withdrawal if the RGC continues to refuse to investigate the corruption allegations.³⁵ Similar indication was also given by the Trial Chamber Judge Silvia Cartwright, mentioning that if the court were to become unduly compromised, ‘a number of the [international] judges would pack their bags and go

³² Agreement, art. 28.

³³ *Ibid*, art. 12 (2).

³⁴ *Ibid*, art. 13 (1).

³⁵ Investigative Request, para 8, Bundestag Delegation, ‘[Draft] Report on the trip to Cambodia and Indonesia by a delegation of the Committee for Human Rights and Humanitarian Aod, 25 October-3 November 2008, available at <http://bundestag.de/ausschuesse/a17/reisen/ASEAN2008.pdf>.

away'.³⁶ In similar vein, Marcel Lemonde, the International Co-Investigating Judge, mentioned that the UN is required to withdraw if a fair, independent and impartial trial could not be achieved.³⁷ UNDP, which administer the donors fund for ECCC, has indefinitely frozen all funds for the tribunal until the question of corruption is resolved.³⁸ Human Rights Watch, usually a strong proponent of international tribunals, recently called on US President Barack Obama to withdraw all support for ECCC.³⁹ This evidences very strong rejection from the international community on the corruption allegations.⁴⁰ Thus, the ECCC has only two possible options, one to investigate corruption issues, or to end its mandate.

18. The existing threat of ECCC discontinuation substantially impacts the Civil Parties interest. The long and awaited moment of truth and reconciliation process after the Khmer Rouge period, as well as the hope of bringing justice for the people of Cambodia, especially the victims, will only be a false hope. All efforts that have gained expectations for the victims that justice will be done, will instead become an empty promise. As a party that is most directly affected by the crimes during the Khmer Rouge period, the Civil Parties will even suffer more loss if ECCC ceases to proceed, as all the effort in establishing the truth for the pursuit of justice and to seek collective and moral reparations become meaningless. This will be a sad day for Cambodia, its people and the international community for the ECCC to reject its mandate to adhere to the Rule of Law.

CONCLUSION

³⁶ Investigative Request, para 11, NZPA, 'Tough Job Ahead for NZ Judge Dame Silvia Cartwright', 27 March 2009.

³⁷ Investigative Request, para 7.

³⁸ IENG Sary Appeal, para. 55; Investigative Request, para. 11, Cat Barton, *The Phnom Penh Post*, 23 February-8 March 2007, 'Kickback Claims Stain the KRT.'

³⁹ Human Rights Watch, "Eight Initiatives the Obama Administration Should Take on International Justice," March 2, 2009 available at <http://www.hrw.org/en/news/2009/03/02/eight-initiatives-obama-administration-should-take-international-justice>.

⁴⁰ Investigative request, para. 10, this includes the European Commission, Human Rights Watch, long time ECCC monitor professor John Hall, and UNDP.

19. In conclusion, we submit that the corruption allegation within ECCC administration stands fully within the scope of Co-Investigating Judges authority to deal with and investigate thoroughly. As been mentioned above, the principle of fair, independent and impartial trial, along with the authority of ECCC to investigate any serious interference to the administration of justice has made it clear that it is indeed within the scope of OCIJ to deal with the corruption matter.
20. We further believe that the corruption issues must be dealt with expeditiously as failing to make a decision or holding one in abeyance substantially hampers the continuation of the justice process within ECCC. As this issue threatens the very existence of the continuation of the ECCC it is an urgent matter to be resolved.

REQUEST

21. For all the reasons stated above, Co-Lawyers of Civil Parties request that the Trial Chamber:
- a. Grant the Appeal by the all Co-Lawyers of Charged Persons in its entirety.
 - b. Orders OCIJ to conduct an investigation concerning the allegation of corruption occurring within the administration of ECCC, specifically to
 - i. Obtain from the UN, the Royal Government of Cambodia (“RGC”), and/or any other organization or individual: the results of 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;
 - ii. Request an administrative inquiry into the outstanding allegations of corruption at the tribunal, and;
 - iii. Forward the result of such investigation before the Chamber to decide the proper sanction for anyone involved in the kickback, allegation, if any, and to decide specific measures to be implemented to deter such unfair practices, if true, in the future.

Respectfully submitted,

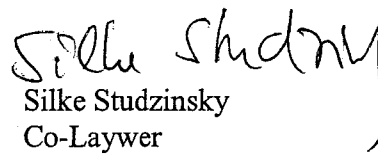


Yung Panith
Co-Lawyer



Lor Chuntay
Co-Lawyer

Ny Chandy
Co-Lawyer



Silke Studzinsky
Co-Lawyer



David Blackman
Co-Lawyer

Signed in Phnom Penh on 19 May 2009.