

D158/5/3/1

**BEFORE THE PRE-TRIAL CHAMBER**

**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**Criminal Case File N°:** 002/19-09-2007-ECCC/OCIJ(PTC ~~20~~<sup>20</sup>)  
**Filed to:** The Pre-Trial Chamber  
**Date:** 4 May 2009  
**Party Filing:** The Defence for IENG Sary  
**Language:** English  
**Requested Classification:** Public

**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**

**Filed by:**

**Co-Lawyers**  
 ANG Udom  
 Michael G. KARNAVAS

**Distributed to:**

**The Pre-Trial Chamber Judges:**  
 Judge PRAK Kimsan  
 Judge NEY Thol  
 Judge HUOT Vuthy  
 Judge Katinka LAHUIS  
 Judge Rowan DOWNING

**Co-Prosecutors:**  
 CHEA Leang  
 Robert PETIT

**Defence for Nuon Chea**  
**Defence for Khieu Samphan**  
**Defence for Ieng Thirith**

**Civil Party Lawyers**

**ឯកសារដើម**  
 ORIGINAL DOCUMENT/DOCUMENT ORIGINAL  
 ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception):  
 ..... 04 / 05 / 2009 .....  
 ម៉ោង (Time/Heure): ..... 15:07 .....  
 មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé  
 du dossier: ..... U.C.H. ARUN .....  
 ឯកសារនេះត្រូវបានបញ្ជូនដោយស្វ័យប្រវត្តិ  
 CERTIFIED COPY/COPIE CERTIFIÉE CONFORME  
 ថ្ងៃ ខែ ឆ្នាំ បញ្ជាក់ (Certified Date/Date de certification):  
 ..... 05 / 05 / 2009 .....  
 មន្ត្រីបញ្ជាក់សំណុំរឿង/Case File Officer/L'agent chargé  
 du dossier: ..... C.A. 714 .....

**INTRODUCTION**

Mr. IENG Sary, through his Co-Lawyers (“the IENG Sary Defence”), hereby files this Appeal Against the Order on Request for Investigative Action issued by the Co-Investigating Judges (“OCIJ”) on 3 April 2009 (“Appeal”).<sup>1</sup> Essentially, the OCIJ denied the Eleventh Request for Investigative Action filed by the NUON Chea Defence<sup>2</sup> on the ground that it fell outside of the OCIJ’s jurisdiction to “ascertain the truth” - a power which the OCIJ found was limited to the crimes charged. In making this finding, the OCIJ fundamentally mischaracterized the Request: effectively denying a request not in fact made. The scope of the Request,<sup>3</sup> which the IENG Sary Defence joined on 27 March 2009,<sup>4</sup> was specific, calling for: (1) the results of the OIOS [Office of Internal Oversight Services] inquiry (“OIOS Report”); (2) any correspondence between the UN and the RCG [Royal Cambodian Government] related to the OIOS inquiry; (3) any other information suggesting an organized regime of institutional corruption at the Extraordinary Chambers in the Courts of Cambodia (“ECCC”).<sup>5</sup> The Request merely invited the OCIJ to “request an administrative inquiry into the outstanding allegations of corruption at the tribunal.”<sup>6</sup> The purpose of the Request, and by logical extension the Appeal, is for the Defence to be provided with the Requested Information in order to verify the impact of corruption on: (a) the factual conclusions reached or to be reached by the OCIJ in assessing the evidence it gathered/examined in relation to the Introductory Submission; and/or (b) the fairness and integrity of the judicial investigation *per se*. The three elements of the Request are thus clearly identified, manifestly relevant to the unqualified right to a fair trial and undoubtedly within the Statutory and inherent powers of the OCIJ to carry out.

**I. FACTUAL HISTORY**

<sup>1</sup> *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, Order on Request for Investigative Action, 3 April 2009 (“OCIJ Order”).

<sup>2</sup> *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, Eleventh Request For Investigative Action, 27 March 2009, (“Request”).

<sup>3</sup> *Id.*, para. 22.

<sup>4</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary’s Motion to Join and Adopt Nuon Chea’s Eleventh Request for Investigative Action, 27 March 2009 (“Motion to Join”).

<sup>5</sup> Collectively “Requested Information”.

<sup>6</sup> Request, para. 22.

1. As set out extensively by the Request, unresolved allegations of corrupt practices at the ECCC have beleaguered the tribunal for over two years.<sup>7</sup> For the sake of judicial economy the IENG Sary Defence incorporates that factual history by reference.
2. Since the filing of the Request further reports have emerged from two internationally renowned news organizations, CNN and The Economist, concerning the corruption allegedly at the very heart of the ECCC.
  - a. On 31 March 2009, CNN presented a news item relating to the systemic corruption at the ECCC. Featuring interviews with various ex-staff members from the National side of the ECCC it detailed the procedure for how money was to be taken from employees and who it was given to.<sup>8</sup> Earlier that same day, in response to a donation by the Government of Japan of \$200,000 which was provided to pay the salaries of Cambodian staff at the ECCC,<sup>9</sup> Prime Minister Hun Sen had expressed disdain for the court during a speech in which he said he would prefer to see the court run out of money saying “I wish the court would have a budget shortfall as soon as possible.”<sup>10</sup>
  - b. On 2 April 2009, and in fact the day before the OCIJ Order was issued, the Economist published an article further detailing these corruption allegations.<sup>11</sup> This article alleged that “[t]hree of the court’s staff, who spoke on condition of anonymity, accuse Sean Visoth, the court’s chief of administration, of collecting money from every Cambodian in his department, including court employees and Cambodian legal assistants in the office of the co-investigating judges and co-prosecutors. [...] Some of the cash, they were told, was intended for Sok An, a deputy prime minister.”<sup>12</sup> This allegation was even more serious than those which had emerged in the preceding two years as it concerned corruption not only in the Office of Administration but also within the OCIJ and Office of the Co-Prosecutors. It also bears recalling that this article also confirmed with regards to Director of Administration SEAN Visoth, that “a UN corruption review had named him and requested his removal.”

<sup>7</sup> *Id.*, paras. 4-11.

<sup>8</sup> See Transcript of CNN News Report titled ‘Cambodian war crimes court in corruption probe’, aired on CNN on 31 March 2009. See also Transcript of the CNN documentary “World Untold Stories: Killing fields: Long Way to Justice” aired on CNN International 1 May 2009 which repeated and developed these reports.

<sup>9</sup> See Press Release from Embassy of Japan titled “Japanese Assistance for the Project to Enhance Judicial Process in the Extraordinary Chambers in the Courts of Cambodia”, 20 March 2009.

<sup>10</sup> Andrew Buncombe, *The Independent*, 1 April 2009, ‘Khmer Rouge jail boss begs for forgiveness’.

<sup>11</sup> See *The Economist*, 2 April 2009, The court on trial, Accusations of corruption threaten to discredit the trial of the Khmers Rouges, (“Economist Article”).

<sup>12</sup> Emphasis added.

D158/5/3/1

3. On 2 April 2009, when the IENG Sary Defence attempted to raise the issue of corruption before the Pre-Trial Chamber during the oral hearing on the appeal against the Provisional Detention Order,<sup>13</sup> it was prevented from doing so.<sup>14</sup> During their response to this attempt by the IENG Sary Defence however, the Co-Prosecutors asserted that “it’s public knowledge that an application to go into the question of corruption is before [the Co-Investigating Judges].”<sup>15</sup>
4. The following week, on 6, 7, and 8 April, H.E. Peter Taksoe-Jensen arrived in Phnom Penh to meet with H.E. Deputy Prime Minister SOK An to discuss the ongoing allegations of corruption at the ECCC and instituting a mechanism for reporting of future corruption allegations to both the national and UN sides of the court. By Taksoe-Jensen’s own admission and despite his own wish “to put the issue of corruption behind us” (*and, as such, pretend that all is well and good, an attitude which must be considered to reflect official UN policy towards the corruption allegations*) the meeting was a failure; no credible modalities addressing allegations of corruption were established or agreed upon.<sup>16</sup> Despite this failure, reports emerged after the meeting that certain donor countries to the ECCC, such as Australia, had pressurized Taksoe-Jensen to accept the inadequate corruption mechanism proposed by the RCG and “release Australian monies for the Khmer Rouge tribunal, which were frozen last year due to the kickback allegations.”<sup>17</sup> It does appear however that until now, the UN had resisted releasing this money “until questions of corruption were properly addressed.”<sup>18</sup>

## II. PRELIMINARY OBSERVATIONS

### A. Admissibility of the Appeal

5. The Request was filed “pursuant to Rules 21(1), 55(10), and 58(6) of the ECCC Internal Rules (the “Rules”).”<sup>19</sup> Under Rule 74(3)(b) the Charged Person may appeal an order of the OCIJ “refusing requests for investigative action allowed under these IRs.” The OCIJ

<sup>13</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC17), IENG Sary’s Appeal Against the OCIJ Order on Extension of Provisional Detention, 10 December 2008.

<sup>14</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC17) Transcript of hearing, 2 April 2009, p. 33.

<sup>15</sup> *Id.*, p. 26.

<sup>16</sup> See Statement of Peter Taksoe-Jensen, Phnom Penh, 8 April 2009 (“Taksoe-Jensen Statement”).

<sup>17</sup> Douglas Gillison and Isabelle Roughol, *Cambodia Daily*, Gov’t Says It is Backed By Donors in Tribunal Talks, 9 April 2009.

<sup>18</sup> Sok Khemara, *VoA Khmer*, 23 April 2009, Tribunal Breakdown Puts Onus on Donors: UN, (“Khemara Article”).

<sup>19</sup> Request, para. 1.

Order clearly constituted an order refusing an investigative request and as such is admissible under Rule 74(3)(b).

6. The Appeal remains admissible under Rule 74(3)(b) even though the Co-Investigating Judges declared that “they lacked jurisdiction to accomplish the requested investigative action”<sup>20</sup> rather than deciding upon the merits of the Request.<sup>21</sup> In granting a right of appeal against OCIJ decisions denying a request for investigative action, Rule 74(3)(b) does not distinguish between whether such a request was denied on the merits or denied on an alleged lack of jurisdiction. The fact that the Request was denied is the only salient factor to be considered and which gives rise to the right of appeal.
7. The Request was filed by the NUON Chea Defence on 27 March 2009. The IENG Sary Defence<sup>22</sup> and the Khieu Samphan Defence<sup>23</sup> subsequently filed motions to join the Request, with the Ieng Thirith Defence filing a motion in support.<sup>24</sup> In joining the Request, the IENG Sary Defence informed the OCIJ that it “unreservedly adopts all facts and legal arguments set out by the NUON Chea defence”<sup>25</sup> In so joining the Request, the IENG Sary Defence has full standing to appeal pursuant to Rule 74(3)(b); the OCIJ Order, by addressing all Defence teams who joined in or supported the Request, confirms this fact.
8. Mr. IENG Sary’s right of appeal is independent of any appeal filed by the other Charged Persons who also have standing.<sup>26</sup>

## B. Request For An Oral Hearing

9. Pursuant to Rule 77, the IENG Sary Defence respectfully requests an oral hearing for this Appeal. Pursuant to Rule 77(3), “the presumption for all pre-trial appeals is that there

<sup>20</sup> OCIJ Order, Disposition.

<sup>21</sup> See also OCIJ Order, para. 10 whether the OCIJ asserts that “independently from any considerations relating to the merits of the allegations in the Request, one cannot but observe that accepting 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.”

<sup>22</sup> See Motion to Join, p. 1.

<sup>23</sup> *Case of KHIEU Samphan*, 002/19-09-2007-ECCC/OCIJ, Déclaration de la Défense 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 Avril 2009.

<sup>24</sup> *Case of IENG Thirith*, 002/19-09-2007-ECCC/OCIJ, Motion in Support of Nuon Chea’s Eleventh Request for Investigative Action for Disclosure of OIOS Report and Related Documents, 30 March 2009.

<sup>25</sup> Motion to Join, p. 1.

<sup>26</sup> Unsurprisingly the NUON Chea Defence, the KHIEU Samphan Defence and the IENG Thirith Defence are all also appealing the OCIJ Order, See *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ(PTC19), Notice of Appeal, 7 April 2009; *Case of KHIEU Samphan*, 002/19-09-2007-ECCC/OCIJ(PTC19), Notice of Appeal, 9 April 2009. *Case of IENG Thirith*, 002/19-09-2007-ECCC/OCIJ(PTC19), Notice of Appeal, 13 April 2009.

will be an oral hearing<sup>27</sup> and the Pre-Trial Chamber has repeatedly granted a request for an oral hearing in an appeal for which there was disagreement between the parties.<sup>28</sup> The two criteria for justifying an oral hearing are: (1) the importance of the issue; and (2) the fact that one of the parties had requested an oral hearing.<sup>29</sup> For the present Appeal, the IENG Sary Defence is specifically requesting on oral hearing. Accordingly, it should be granted.

10. As a matter of substance, the issues raised in the Appeal require a public oral hearing. The Appeal should be the subject of oral submissions as it:
- a. raises complex issues that have not previously been raised before the Pre-Trial Chamber as the Pre-Trial Chamber refused to allow submissions on this issue to be made by either the IENG Sary Defence or KHIEU Samphan Defence in the recent oral hearings;<sup>30</sup>
  - b. displays in full the attitude of the OCIJ towards transparency and accountability of its actions and the right to a fair trial which will persist throughout the investigation unless remedied by the Pre-Trial Chamber;
  - c. clearly and unequivocally impacts squarely upon the legacy of the ECCC in providing a supposed example of fair and transparent judicial proceedings.<sup>31</sup>
11. As four Defence teams will be represented in this Appeal and will therefore file separate appeal briefs, each team must be permitted sufficient time to present oral arguments during the oral hearing. Each Defence team must be allowed the same amount of time to present oral arguments on appeal (approximately one and a half hours each) as would be permitted if that party were the only one to appeal. Each Charged Person brought before the ECCC has individual fair trial rights and the Chamber before which they appear may not treat these persons collectively even when they may share similar interests.
12. The oral hearing is requested to be held at the Pre-Trial Chamber's earliest convenience,

<sup>27</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC18), Ieng Sary's Appeal Against the OCIJ Order on Breach of Confidentiality of the Judicial Investigation & Request for Expedited Filing Schedule and Public Oral Hearing, 10 March 2009, para. 10 ("Confidentiality Appeal").

<sup>28</sup> *Case of KHIEU Samphan*, 002/19-09-2007-ECCC/OCIJ (PTC11), Decision on KHIEU Samphan's Request for a Public Hearing, 4 November 2008; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC17), Decision on Co-Prosecutors' Request to Determine the Appeal on the Basis of Written Submissions and Scheduling Order, 29 January 2009, ("Written Submissions Decision").

<sup>29</sup> Confidentiality Appeal, citing Written Submissions Decision, para. 6.

<sup>30</sup> See *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC17) Transcript of hearing, 2 April 2009, p. 33; *Case of KHIEU Samphan*, 002/19-09-2007-ECCC/OCIJ (PTC15), Transcript of hearing, 3 April 2009, p. 46.

<sup>31</sup> Indeed during the negotiations surrounding the creation of the ECCC, the UN negotiators were concerned that widespread reports of corruption and a lack of independence and capacity in the domestic Cambodia court system would prevent the court from delivering justice and meeting international standards. See *The Duch Trial at the Extraordinary Chambers in the Courts of Cambodia*, Open Society Justice Initiative Report, March 2009, p.5.

D158/5/3/1

namely when the Pre-Trial Chamber is next sitting which is in the week of 1-5 June 2009.<sup>32</sup> A finding of widespread and systematic corruption within the ECCC could have an impact on the participation of the UN in these proceedings,<sup>33</sup> as well as the continued funding of the national side of the ECCC by the United Nations Development Program and consequently the continuation of the judicial proceedings. This impact is real and demands expeditious, conscientious and transparent action.

### III. SUMMARY OF ARGUMENT

13. The IENG Sary Defence submits the following arguments in support of the Appeal:
- A. The OCIJ took an overly restrictive approach to setting the limits of its statutory jurisdiction in rejecting the Request. The information requested of the OCIJ through the Request fell squarely within the statutory jurisdiction of the OCIJ under the ECCC Agreement,<sup>34</sup> the Law Establishing the Extraordinary Chambers<sup>35</sup> and the Internal Rules.<sup>36</sup> The Requested Information is therefore not “totally foreign to the facts covered by the current judicial investigation,”<sup>37</sup> but rather forms an intrinsic and inescapable part of the investigation.
  - B. Notwithstanding any alleged statutory limitations on the OCIJ to provide the Requested Information, the OCIJ has the inherent power and duty to regulate the fairness of judicial proceedings under international human rights law which requires that the Requested Information be provided to the Defence teams.
  - C. The Request is not based on “speculation as to hypothetical negative effects of any form of corruption of the proceedings”<sup>38</sup> but specific and reasonable interpretations of evidence to which the Charged Persons/Defences have access. Further information

<sup>32</sup> According to the Pre-Trial Chamber, it will next hold oral hearings during the week of 1-5 June 2009. *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Interoffice Memorandum, Pre-Trial Chamber Sessions for the first half of 2009, 19 December 2008.

<sup>33</sup> *See* Article 28 of the Agreement which allows the UN to “cease to provide assistance, financial or otherwise, pursuant to the present Agreement” should the “Royal Government of Cambodia change the structure or organization of the Extraordinary Chambers or otherwise cause them to function in a manner that does not conform with the terms of the present Agreement.”

<sup>34</sup> Agreement Between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the period of Democratic Kampuchea, 6 June 2003 (“Agreement”).

<sup>35</sup> Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with amendments promulgated 27 Oct 2004, NS/RKM/1004/006 (“Establishment Law”).

<sup>36</sup> Internal Rules (Rev.3), As revised on 6 March 2009 (“Rules”).

<sup>37</sup> OCIJ Order, para. 10.

<sup>38</sup> *Id.*, para. 12.

DIS8/5/3/1

regarding the extent of the corruption at the ECCC subsequent to the OCIJ Order confirms these allegations.

- D. The central element of the Requested Information, namely the OIOS Report, does not belong to the Cambodian Government but to the United Nations, which initiated the OIOS investigation. The OIOS Report may thus be the object of an investigative action and the OCIJ may not hide behind the Cambodian Government's denials of the requests for this material made by the Charged Persons/Defences.
- E. In the alternative, if the OIOS Report may only be obtained by an investigative action by the OCIJ directed towards the Cambodian Government *via* a request for assistance pursuant to Article 25 of the Agreement, or under the procedures relating to requests for disclosure under international jurisprudence, all the necessary criteria for both have been met.

#### IV. LAW

##### A. Jurisdiction over the judicial investigation

14. Under Article 5(1) of the Agreement, the OCIJ is exclusively and statutorily responsible for the conduct of the pre-trial investigation. While the Defence teams may request that the OCIJ conduct specific investigative actions, they are prohibited from carrying out their own investigations; all requests for investigative action must be channeled to the OCIJ.<sup>39</sup> The purpose of this exclusive jurisdiction is clear: to protect the integrity and independence of the investigation from interference by the parties - the Co-Prosecutors, Defence or Civil Parties.
15. The function of the OCIJ's broad and exclusive investigative powers is to "ascertain the truth" regarding the facts set out in the OCP's Introductory Submission.<sup>40</sup>

##### B. Scope of the judicial investigation and investigative actions

16. Rule 55(5) also places upon the Co-Investigating Judges the obligation to act as an impartial organ of justice, gathering and evaluating both incriminating and exculpatory

<sup>39</sup> The OCIJ has previously emphasized the limited role of the parties with respect to ECCC investigations: "Before this Court, the power to conduct judicial investigations is assigned solely to the two independent Co-Investigating Judges and not to the parties. There is no provision which authorizes the parties to accomplish investigative action in place of the Co-Investigating Judges, as may be the case in other procedural systems. [...] The capacity of the parties to intervene is thus limited to such preliminary inquiries as are strictly necessary for the effective exercise of their right to request investigative action." *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, OCIJ Memorandum to the Defence, 10 January 2008, p. 2.

<sup>40</sup> Rule 55(5).



DISB/5/3/1

material to the same extent. The use of the imperative “shall” indicates that no discretion exists for the OCIJ with regard to the conduct of an impartial investigation and its duty to search for and disclose to the parties both incriminating and exculpatory evidence.

17. Rule 55(2) limits the scope of the judicial investigation conducted by the OCIJ. It provides that “the OCIJ shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission.” Article 2 of the Establishment Law also limits the ECCC’s competence to that of bringing to trial “those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.”

## V. ARGUMENT

### A. The Request fell within the statutory jurisdiction of the OCIJ

18. It bears emphasizing that the OCIJ is granted exclusive jurisdiction over the judicial investigation by the Agreement and Internal Rules. If the OCIJ rejects an investigative request from the Defence, the Defence is statutorily prohibited from taking the matter into its own hands and conducting the investigations itself.<sup>41</sup> The only option for the Defence is to appeal such a refusal under Rule 74(3)(b). Although the OCIJ is limited to investigating the facts set out in the Introductory Submission by Rule 55(2) and Article 2 of the Establishment Law, these provisions may not be relied upon by either the OCIJ or OCP to limit the temporal scope of the facts that may be relevant to ascertaining the truth of the alleged crimes set out in the Introductory Submission. Relevant facts may therefore precede or postdate the period of Democratic Kampuchea.<sup>42</sup>
19. The OCIJ should have interpreted its statutory jurisdiction broadly – while still within the reasonable limits of interpretation - in assessing whether to grant requests for investigative action by the parties. Such a broad interpretation is most warranted when, as argued herein, the subject matter is intrinsic to the integrity of the OCIJ’s investigative obligations to produce a fair, balanced and scrupulously objective /corruption free analysis of the evidence (incriminating and exculpatory) relevant to the Introductory Submission.

<sup>41</sup> *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, OCIJ Memorandum to the Defence, 10 January 2008, p. 2.

<sup>42</sup> *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary’s First Request for Investigative Action, 20 March 2009, paras. 2-8

DIS 8/5/3/1

20. Instead of choosing such a reasonable and logical approach to the limits of its investigative jurisdiction, the OCIJ chose an artificially limited and simplistic view of what constitutes “ascertaining the truth” in the context of Rule 55(5). In justifying its deliberately myopic interpretation of its investigative authority under Rule 55(5) the OCIJ disingenuously mischaracterized the Request so that it would fall outside the scope of its interpretation.
21. The OCIJ Order highlighted that the Defence had requested that the OCIJ collect “information conducive to ascertaining the truth about this tribunal”<sup>43</sup> and “identify any corrupt elements within the Court.”<sup>44</sup> It then proceeded to dismiss the Request on the basis that the power to investigate the facts set out in an Introductory Submission or a Supplemental Submission by the OCP “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.”<sup>45</sup> The OCIJ, quite simply, misapprehends the substance and purpose of the Request. The Defence made the Request in part so that - when provided with the Requested Information - it could verify whether the reported findings of corruption (as acknowledged by the highest UN representative at the ECCC – Knut Rosandhaug) impact upon the factual conclusions reached or to be reached by the OCIJ in assessing the evidence it gathered/examined in relation to the Introductory Submission. Indeed, evidence relating to the factual conclusions reached or to be reached by the OCIJ in assessing the evidence it gathered/examined in relation to the Introductory Submission is clearly exculpatory (as described in more detail below). Consequently, the Request is not “totally foreign to the facts covered by the current judicial investigation”<sup>46</sup> as alleged by the OCIJ; it is an intrinsic part of its judicial investigation mandated by Article 2 of the Agreement and Rule 55(2).

**B. The Requested Information falls squarely within the OCIJ’s inherent jurisdiction to regulate the fairness of judicial proceedings**

22. Assuming *arguendo* that the Request falls outside the OCIJ’s jurisdiction under Article 2 and Rule 55(2), the OCIJ is nonetheless under a further inherent duty to ensure that judicial proceedings are fair and impartial. This was the second purpose of the Request,

<sup>43</sup> OCIJ Order, para.3, *citing* Request, para. 17.

<sup>44</sup> *Id.*, *citing* Request, para. 21.

<sup>45</sup> *Id.*, para. 10 (Italics in original).

<sup>46</sup> *Id.*

namely to verify whether the Requested Information had any impact upon the fairness and integrity of the judicial investigation *per se*.

23. The OCIJ Order itself recognized that “the Co-Investigating Judges must guarantee that the ongoing judicial proceedings are irreproachable in every way.”<sup>47</sup> This reflects the view of the Pre-Trial Chamber which, in deciding upon the admissibility of an appeal, recognized that a broader right of appeal may lie than simply those listed specifically in Rule 74(3) due to the need to “ensure that proceedings during the investigation are fair.”<sup>48</sup>
24. The doctrine of inherent jurisdiction to ensure the fairness of proceedings is further explained by the ICTY Appeals Chamber in the *Delalić* case. It held that there is an: “inherent power which the Tribunal has, deriving from its judicial function and from the provisions of Articles 20 [the Trial Chamber shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the RPE, with full respect for the rights of the accused] and 21 [right of the accused to a fair and public hearing] of its Statute, to control its proceedings in such a way as to ensure that justice is done and, particularly in relation to matters of practice, that the trial proceeds fairly and expeditiously.”<sup>49</sup>
25. Similarly, the ICTY Appeals Chamber in *Blagojević* held that “the only inherent power that a Trial Chamber has, is to ensure that the trial of an accused is fair.”<sup>50</sup> This doctrine has been much used by both the *ad hoc* International Tribunals such as the International Criminal Tribunals for the former Yugoslavia<sup>51</sup> and Rwanda<sup>52</sup> and the International Criminal Court.<sup>53</sup> In simple terms it allows the Court exercising its inherent jurisdiction to

<sup>47</sup> *Id.*, para. 12.

<sup>48</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC12), Decision on IENG Sary’s Appeal Against the OCIJ’s Order on Translation Rights and Obligations of the Parties, 20 February 2009, para. 31 (“IENG Sary Translation Decision”); *Case of KHIEU Samphan*, 002/19-09-2007-ECCC/OCIJ(PTC13), Decision on Khieu Samphan’s Appeal against the Order on Translation Rights and Obligations of the Parties’, 20 February 2009, para 28.

<sup>49</sup> *Prosecutor v. Delalić et al.* IT-96-21, Order on the Motion to Withdraw as Counsel Due to Conflict of Interest, 24 June 1999.

<sup>50</sup> *Prosecutor v. Blagojević*, IT-02-60-AR73.4, Public and Redacted Reason for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, 7 November 2003, para. 7.

<sup>51</sup> *Prosecutor v. Tadić*, IT-94-1, Appeal Judgement, 15 July 1999, para. 322; *Prosecutor v. Tadić* IT-94-1, Judgement on Allegations of Contempt Against Prior Counsel, *Milan Vujin*, 31 January 2000; *Prosecutor v. Kunarac et al.* IT-96-23, Decision on the Request of the Accused *R. Kovac* to allow Mr. *M. Vujin* to appear as Co-counsel acting pro-bono, 14 March 2000. See also M. Buteau and G. Oosthuizen, *When the Statute and Rules Are Silent: The Inherent Powers of the Tribunal*, in R. MAY, D. TOLBERT, J. HOCKING, K. ROBERTS, B. BING JIA, D. MUNDIS AND G. OOSTHUIZEN (EDS.), *ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD* (The Hague: Kluwer Law International, 2001) 65–81 for a thorough discussion of the extent of these inherent powers.

<sup>52</sup> *Prosecutor v. Nyiramasukoko and Ntahobali*, ICTR-97-21-T, Decision on Ntahobali’s Motion for Withdrawal of Counsel, 22 June 2001, para. 20. See also Louise Symons, *The inherent powers of the ICTY and ICTR*, *International Criminal Law Review* 3: 369–404, 2003.

<sup>53</sup> *Prosecutor v. Lubanga*, ICC-01/04-01/06-1401, 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 IENG SARY’S APPEAL AGAINST CO-INVESTIGATING JUDGES’ ORDER ON REQUEST FOR INVESTIGATIVE ACTION & REQUEST FOR AN EXPEDITED ORAL HEARING Page 10 of 22

DISB/5/3/1

- exercise powers that “are wider and more extensive, permeating all proceedings at all stages and filling any gaps left by the Rules.”<sup>54</sup>
26. In a decision analogous to the present case, the ICTR in *Ntabakuze and Kabiligi*<sup>55</sup> granted a Defence request for disclosure of a UN report dated 1 August 1997 in the possession of the President of the ICTR and under seal (having been provided to him by the Prosecutor for the purpose of adjudicating on this motion). The Trial Chamber held that since the report was not in the possession of the Prosecutor, Rule 66(B) (which set out disclosure of materials by Prosecutor) and Rule 68 (describing disclosure of exculpatory material) did not apply. The Trial Chamber nonetheless found that it was in the interests of justice to invoke its inherent power and make the report available to the parties.<sup>56</sup> Despite the Trial Chamber claiming that the circumstances were exceptional and that its action was not to be considered as setting any precedent,<sup>57</sup> the report was provided to two other Defence teams.<sup>58</sup> This demonstrates that the inherent duty to ensure proceedings are fair is not a duty that may only be exercised in exceptional circumstances but it is a duty that must be exercised in every case.
27. This inherent duty, in practice, means that any judge or chamber responsible for a case must either at the request of one of the parties or *proprio motu* take every possible action to ensure that the proceedings are fair. If there are any indicia that the fairness of proceedings has been compromised in any way, the judge or chamber must do all it can to at least satisfy itself that this is not the case.
28. The impact of corruption on the fairness of judicial proceedings has been confirmed by the United States Supreme Court in the case of *Bracy v. Gramley*. Here, the US Supreme Court granted the petitioner’s request for disclosure of material relating to judicial

---

accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008,, paras. 53-54.

<sup>54</sup> I. Jacob, *The Inherent Jurisdiction of the Court* (1970) 23 Current Legal Problems 50-51. See also WILLIAM A. SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE* (Cambridge, 2006), p.115 explaining that “Inherent powers have been invoked as a justification for departure from the RPE.”

<sup>55</sup> *Prosecutor v. Ntabakuze and Kabiligi*, ICTR-96-34-I, Decision on Kabiligi’s Supplementary Motion for Investigation and Disclosure of Evidence, 8 June 2000 (“*Ntabakuze and Kabiligi* Decision”).

<sup>56</sup> *Id.*, paras. 14-16.

<sup>57</sup> *Id.*, para. 17

<sup>58</sup> *Prosecutor v. Imanishimwe*, ICTR-99-46-I, Decision on Imanishimwe’s Motions for Amendment of the Indictment and Disclosure, 23 August 2000; *Prosecutor v. Samanza*, ICTR-97-20-I Decision on *Samanza*’s Motion for Subpoenas, Depositions, and Disclosure, 20 October 2000.

D158/5/3/1

corruption upon showing “good cause” that the alleged corruption had affected the fairness of his trial.<sup>59</sup>

29. Corruption not only undermines the fairness of judicial proceedings but also their very integrity.<sup>60</sup> The preamble to the UN Convention against Corruption (“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>61</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>62</sup> Article 11 of this same Convention explains that:

“Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary.”

30. RCG 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 [...]. It [also] provokes irrational decision-making [...]. The issue is not whether corruption should be fought but rather how and with what means.<sup>63</sup>

31. The effect of court corruption on the fairness of proceedings is even more acute at the ECCC where there is often no strict separation between the judicial section of the court and the Administration. For instance, as raised by the Defence in a separate context, the Greffiers to the Pre-Trial Chamber are often “straddling the divide between Court Management Section and the Pre-Trial Chamber”.<sup>64</sup> Although these Greffiers are

<sup>59</sup> Warden (96-6133), 520 U.S. 899 (1997). It bears highlighting that as the petitioner in *Bracy v. Gramley* was convicted and consequently his right to discovery was not automatic; he needed to show “good cause” for making the disclosure request. By contrast, no such “good cause” is needed during the investigative stage at the ECCC; disclosure is automatic. See also *Miliniene v. Lithuania*, (Application no. 74355/01), Judgment, 24 June 2008, para. 38 where the European Court of Human Rights emphasized “importance of thwarting the corrosive effect of judicial corruption on the rule of law in a democratic society.”

<sup>60</sup> Corruption is defined by Transparency International, the leading anti-corruption NGO in the world, as “the abuse of entrusted power for private gain.” As further explained, it “undermines democracy and the rule of law.” See Transparency International website for these definitions at [http://www.transparency.org/about\\_us](http://www.transparency.org/about_us).

<sup>61</sup> Convention, p 5 adopted by the United Nations General Assembly on 31 October 2003 (Resolution 58/4).

<sup>62</sup> *Id.*, p iii.

<sup>63</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 (emphasis added).

<sup>64</sup> See Letter from Ang Udom and Michael G. Karnavas to Sean Visoth and Knut Rosandhaug, ECCC Director and Deputy Director of Administration respectively titled “Improper intervention by the Pre-Trial Chamber Judges into the judicial functions of the Court Management Section”, 3 December 2008, p. 4.

D158/5/3/1

formerly employed by the “Chambers and Judicial Officers Section” they are also involved in the affairs within the jurisdiction of the Administration.<sup>65</sup>

32. The OCIJ Order is silent as to whether the OCIJ ever considered that the Requested Information could affect the fairness of proceedings. Nonetheless, justifying its denial of the Request, the OCIJ asserts that the Request was limited to “raising speculation as to hypothetical negative effects of any form of corruption of the proceedings.”<sup>66</sup> This strongly suggests that the OCIJ did not consider the Requested Information to affect the fairness of proceedings. This is patently incorrect. The risk of corruption within the Administration section having a deleterious impact on the fairness of proceedings is real and concrete and any evidence relating to that issue must therefore be provided to the Charged Persons/Defences.
33. While it is unfathomable that the OCIJ remained unaware of the corruption allegations reported almost daily in the Cambodian press over the preceding 2 years<sup>67</sup> the Request would have at least put the OCIJ on notice of the corruption allegations at the ECCC and the impact it may have on the fairness of proceedings. Even assuming that the Request was the first time that the OCIJ became aware of this problem, it should at the very least have ordered that it be provided with the OIOS Report to satisfy itself that the judicial investigation had not been compromised. The failure to do so strongly suggests that the OCIJ had premeditated not to disclose the Requested Information, regardless of the implications of its content.
34. The OCIJ has placed form over substance in order to relieve itself from any further duty to ensure the fairness of proceedings which would arise from the corruption allegations. As such, it behooves to underscore, that the law and attendant rules governing the obligations of the OCIJ must be based not on the application of form but the pursuit of justice.<sup>68</sup> Simply, the OCIJ wishes to “see no evil, hear no evil, speak no evil.”<sup>69</sup> Indeed, a pertinent analogy may be drawn between the OCIJ’s wilful blindness and the type of conduct actionable under the doctrine of superior responsibility: a commander can not ignore information within his actual possession compelling the conclusion that criminal

<sup>65</sup> See Organisational Chart of the ECCC explaining the different sections within the ECCC.

<sup>66</sup> OCIJ Order, para. 12.

<sup>67</sup> See Request, paras, 4-111 detailing the many newspaper articles from the Cambodia Daily and Phnom Penh Post regarding corruption at the OCIJ.

<sup>68</sup> See generally Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Walter L. Moll trans., Harvard University Press, 1936).

<sup>69</sup> This common saying is typically used to describe someone who does not want to be involved in a situation.

DIS 8/5/3/1

offences are being committed or are about to be committed;<sup>70</sup> there is an affirmative duty to act constructively. In the present instance and against the overwhelming evidence of corrupt behavior within the ECCC, the OCIJ is deliberately avoiding contact with and knowledge of the contents of the OIOS Report so that it need not act: an exquisite case of maintaining blissful ignorance.

**C. The Request was not sufficiently specific and set out why the Requested information was exculpatory with regards to the facts set out in the Introductory Submission, or affected the fairness of proceedings**

35. As set out above, the purpose of the Request was to verify whether the Requested Information which sheds more light on the reported findings of corruption, impact upon:

- a. the factual conclusions reached or to be reached by the OCIJ in assessing the evidence it gathered/examined in relation to the Introductory Submission; and/or
- b. the fairness and integrity of the judicial investigation *per se*

36. For the Request to be granted under either of these bases, the IENG Sary Defence accepts that the Request must be: (1) sufficiently specific to warrant investigative action (i.e. explain as precisely as possible what is needed); and (2) establish, at least to a *prima facie* level, the exculpatory nature of the Requested Information or its effect on the fairness of proceedings (i.e. explain why it is needed). According to the OCIJ, the Request “limits itself speculation as to hypothetical negative effects of any form of corruption of the proceedings.”<sup>71</sup> This assertion is without merit. Both of these criteria were fulfilled and require the OCIJ to exercise either its statutory or inherent jurisdiction to provide the Requested Information.

**i. The Request was sufficiently specific**

37. Although the Pre-Trial Chamber has provided guidance on what constitutes a request for investigative action under Rule 55(10)<sup>72</sup> it has not, until now, been provided with the opportunity to delineate the required level of specificity of an investigative request. Consequently, useful guidance on the required level of specificity may be provided by the

<sup>70</sup> *Prosecutor v. Delalić et al*, IT-96-21-T, Judgement, 16 November 1998, para. 387; *Prosecutor v. Strugar*, IT-01-42-T, Judgement, 31 January 2005, para. 416; *Prosecutor v. Halilović*, IT-01-48-T, Judgement, 16 November 2005, para. 69.

<sup>71</sup> OCIJ Order, para. 12.

<sup>72</sup> IENG Sary Translation Decision, paras. 23.

DISB/5/3/1

jurisprudence of the ICTY and ICTR relating to requests for disclosure. As at these *ad hoc* International Tribunals the Prosecutor is statutorily responsible for conducting the investigation rather than an investigating judge, requests for disclosure of particular documents submitted to the Prosecutor at those tribunals are akin to requests for investigative action requesting disclosure of particular information at the ECCC.

38. When requesting exculpatory materials from the Prosecutor, the Defence before the ICTY is not required to be so specific as to precisely identify which documents shall be disclosed.<sup>73</sup> The request must simply be “sufficiently specific as to the nature of the evidence sought.”<sup>74</sup> These criteria have been met in the instant case for the following reasons. The information requested by the Charged Persons/Defences was clearly identified as being: (1) the results of the OIOS inquiry; (2) any correspondence between the UN and the RCG related to the OIOS inquiry; (3) any other information suggesting an organized regime of institutional corruption at the ECCC. These are all clearly set out in the ‘Relief Sought’ section of the Request.<sup>75</sup> The Request is for specific information concerning a report already prepared by the United Nations OIOS into corruption at the ECCC. Contrary to the characterization of the Request by the OCIJ, it is neither a request for an investigation into allegations of corruption at the Court nor a general request to ascertain the truth about the tribunal. The specificity of the Request was entirely overlooked by the OCIJ.

**ii. The Request explained why the Requested Information was exculpatory or affected the fairness of proceedings**

**a. Evidence of corruption at the ECCC may affect the factual conclusions reached or to be reached by the OCIJ and is thus exculpatory**

39. The Request set out extensively why corruption within the Administration may affect the factual conclusions to be reached by the OCIJ.<sup>76</sup> These allegations were not simply

<sup>73</sup> *Prosecutor v. Blaškić*, IT-95-14-A, Decision on the Appellant’s Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 40; *Prosecutor v. Rutaganda*, ICTR-96-3-A, Decision on the Urgent Defence Motion for Disclosure and Admission of Additional Evidence and Scheduling Order, 12 December 2002.

<sup>74</sup> *Prosecutor v. Tihomir Blaskić*, IT-95-14-AR108bis, A. Ch., Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 Oct. 1997, para. 32.

<sup>75</sup> Request, p. 14.

<sup>76</sup> Request, para. 19. The possible effects on the factual conclusions reached by the OCIJ were listed as: (1) 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; (2) case-file officers may

IENG SARY’S APPEAL AGAINST CO-INVESTIGATING JUDGES’ ORDER ON REQUEST FOR INVESTIGATIVE ACTION & REQUEST FOR AN EXPEDITED ORAL HEARING

Page 15 of 22



DIS 5/13/11

limited to “speculation as to hypothetical negative effects of any form of corruption of the proceedings”<sup>77</sup> but were reasonable interpretations of the genuine and present effect on the factual conclusions reached by the OCIJ by corruption within the Office of Administration.

40. The sufficiency of the reasoning justifying the exculpatory nature of the Requested Information is supported by the allegations set out in the Economist article that corruption had also spread to “Cambodian legal assistants in the office of the co-investigating judges and co-prosecutors.” Hence, it is not simply the hypothetical impact of any form of corruption on the proceedings as the OCIJ alleges. Assuming what is reported by the Economist is accurate, then there is a very real effect of corruption amongst some of the members of the OCIJ’s staff which directly impacts upon the OCIJ’s factual conclusions reached during the judicial investigation.

**b. Evidence of corruption at the ECCC may affect the fairness of judicial proceedings**

41. The concerns regarding the impact on the fairness of proceedings caused by the allegations of corruption are set out in more than sufficient detail in the Request bearing in mind that the Charged Persons/Defences does not have the specific information such as the OIOS Report upon which they are based. Without being provided with the OIOS Report the allegations must by their very nature be hypothetical. Nevertheless, while the corrupt actions that could be carried out by members of staff of the Administration are of course hypothetical, their precise roles and responsibilities set out in the Request are based on how these are established by the Rules.<sup>78</sup> These roles and responsibilities are supported by the Terms of Reference for the positions within the OCIJ as posted on the official ECCC website.<sup>79</sup> For the OCIJ to dismiss the Request on the ground that the

---

fabricate, alter, mislay, and/or destroy evidence which is favorable to the Defence; (3) 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; (4) translators and interpreters may omit exculpatory evidence from translated documents or deliberately misinterpret testimony which is favorable to the Defence; (5) witness-handlers may improperly instruct or attempt to influence witnesses and experts to testify falsely against the Defence; or (6) 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.

<sup>77</sup> OCIJ Order, para. 12.

<sup>78</sup> Request, para. 15.

<sup>79</sup> See Terms of Reference for: P2 Associate Legal Officer within the Office of Administration, reference EC-AN-07-1214; P4 Legal Officer in the Office of Administration, reference EC-AN-08-1225; P2 Senior Personnel Assistant within Personnel Section in Office of Administration, reference EC-AN-08-0116.

DIS 8/5/3/1

allegations are hypothetical therefore places far too high a burden on the Charged Persons/Defences.

42. Furthermore, the Request did not just rely on one isolated instance of corruption to explain the effect of this cancer on the fairness of judicial proceedings. The Request listed in detail the widespread allegations of corruption set out in the Cambodian and international press over the preceding two years.<sup>80</sup> These allegations were reportedly discussed by Knut Rosandhaug, Deputy Director of Administration at the ECCC and a visiting German delegation.<sup>81</sup> According to what was reported, Mr. Rosandhaug represented that the UN investigative conclusions, as reflected in the OIOS Report, revealed that the UN had found Sean Visoth, Director of Administration at the ECCC to be 'guilty of corruption'.<sup>82</sup> These allegations have also been recently supplemented by the news reports of both CNN and the Economist. Thus, for the OCIJ to assert that the Request simply 'raises speculation' about corruption implies that the OCIJ considers that both Mr. Rosandhaug and the German delegation are lying or at the very least mistaken in their recollection and knowledge of corruption. To dismiss the Deputy Director of Administration's representations as speculation when he has actually reviewed the OIOS Report is in fact entirely disingenuous.<sup>83</sup>
43. In reality, the OCIJ is simply and deliberately placing the Defence in a Catch-22 situation.<sup>84</sup> The OCIJ will not grant the Request for the Requested Information because the effects of the corruption are apparently not described with sufficient concreteness. It is beyond cavil that without access to the Requested Information, more specificity concerning these allegations and their effect on proceedings is a virtual impossibility. The only way to overcome this impasse is to provide the Requested Information to the Defence. Hence, this Appeal.

<sup>80</sup> Request, paras. 4-11.

<sup>81</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 ("German Delegation Report")'.

<sup>82</sup> *Id.*

<sup>83</sup> It is important to note that to the knowledge of the Defence, neither the German delegation, nor Mr. Rosandhaug have disavowed themselves of the allegations set out in the German Delegation Report.

<sup>84</sup> This expression derives from the 1961 novel of the same name by Josef Heller concerning the latter stages of World War II. It describes a set of rules, regulations or procedures, or situation which present the illusion of choice while preventing any real choice. The archetypal Catch-22, as formulated by Heller, involves the case of John Yossarian, a U.S. Army Air Forces bombardier, who wishes to be grounded from combat flight duty. To be grounded, he must be officially evaluated by the squadron's flight surgeon and found unfit to fly, which would be an automatic diagnosis of the insanity of any willing pilot because only a mad person would take on the missions, because of the danger. But to get the diagnosis he must ask for it, and in doing so shows he has enough sanity to try not to fly missions.

**D. The OIOS Report does not belong to the Cambodian Government but to the United Nations and is thus subject to disclosure.**

44. It cannot be overstated that the OIOS Report was not commissioned by the RCG but rather it was initiated, *proprio motu*, by the United Nations side of the ECCC. Although the Report was provided to the RCG, the UN retains ownership over it. The UN must therefore not hide behind the Cambodian Government's denials of the Defence's requests for the report in this regard as it has done in the past.<sup>85</sup>
45. The UN was involved in the creation and functioning of the ECCC due to its supposed desire to ensure that the Khmer Rouge trials were conducted fairly with full regard for due process.<sup>86</sup> The UN had repeatedly expressed its concern that there was substantial judicial corruption in Cambodia.<sup>87</sup> It had initially proposed a fully international court as the only way to ensure fair trials and protect against political interference and corruption<sup>88</sup> and even pulled out of negotiations when it perceived that this fairness was not guaranteed by the judicial system proposed by the RCG.<sup>89</sup> The judicial system eventually produced by the negotiations ensures extensive international participation in the ECCC at all levels. Indeed, one of the two Co-Investigating Judges is international and the office itself is extensively staffed with both internationals and Cambodians.
46. The issue of corruption is now – hypocritically - being treated by the UN as a political issue. At the same time, the UN is cleverly attempting, through obfuscation, to have the problem disappear without further legal ramifications. Rather than calling for a full and

<sup>85</sup> See Request, para. 12. See also Press Release in response to the statement of H.E. Peter Taksoe-Jensen, the United Nations Assistant Secretary-General for Legal Affairs, dated 8 April 2009, by Ang Udom and Michael G. Karnavas, Co-Lawyers for Mr. IENG Sary, 9 April 2009 in which the aforementioned Co-Lawyers "respectfully request Mr. Taksoe-Jensen to provide all Defence teams at the ECCC with the OIOS Report immediately."

<sup>86</sup> See for example Transcript of Briefing by Hans Correll, Under Secretary General for Legal Affairs and United Nations Legal Counsel, 8 February 2002 reproduced in Helen Jarvis, *Trials and Tribulations: The Latest Twists in the Long Quest for Justice for the Cambodian Genocide*, Critical Asian Studies 34:4 (2002) 607, 617 ("8 February 2002 Transcript"). In this briefing, Correll explains that "international standards of justice [were] necessary for the continued participation of the United Nations."

<sup>87</sup> "[T]he level of corruption in the court system and the routine subjection of judicial decisions to political influence would make it nearly impossible for prosecutors, investigators and judges to be immune from such pressure in the course of what would undoubtedly be very politically charged trials. The decisions on whom to investigate and indict, and to convict or acquit, must be based on the evidence and not serve to advance the political agenda of one or another political group. This is necessary in order to respect the integrity of the proceedings and to accord fundamental fairness to defendants." Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135, 22 February 1999, para. 133 (emphasis added).

<sup>88</sup> *Id.*, para. 139.

<sup>89</sup> The Office of Legal Affairs of the United Nations Secretariat announced on 8 February 2002 that it had ended negotiations with the RCG regarding the establishment of the Khmer Rouge Tribunal. During the briefing at which this was announced Hans Correll, explained that the UN's withdrawal was because "the Extraordinary Chambers, as currently envisaged, would not guarantee the independence, impartiality and objectivity that a court established with the support of the United Nations must have." 8 February 2002 Transcript, p. 617.

transparent inquiry on the effect of corruption on the fairness of the trials held, in part, under the UN flag, the UN publicly speaks of the need “to put the issue of corruption behind [it].”<sup>90</sup> Using the RCG as nothing more than a “shield” to prevent full disclosure of the Report is quite simply antithetical to the interests of justice. It is rather inelegant, to say the least, for the UN – which preaches the world over about judicial integrity and transparency – to be hiding behind the proverbial skirts of the RCG while at the same time claiming to have the moral imperative to lecture against corrupt practices.

**E. In the alternative, if the OIOS Report may only be obtained by the OCIJ from the Cambodian Government, all the necessary criteria for being provided with the Report have been met**

**i. Requests For Assistance**

47. As stated above, to the best knowledge of the Defence, the OIOS Report and additional information are in the possession and under the control of the United Nations. However, to the extent that this is not the case, the OCIJ or Pre-Trial Chamber may only obtain the OIOS Report from the Cambodian Government via a Request for Assistance pursuant to Article 25 of the Agreement. This provision requires that the “the Royal Government of Cambodia shall comply without undue delay with any request for assistance by the co-investigating judges, the co-prosecutors and the Extraordinary Chambers or an order issued by any of them.”<sup>91</sup> The procedural requirements for such an RFA have been complied with.
48. It is settled international jurisprudence that a party seeking the production of a document or information from a State must:
- a. Identify, as far as possible, the document or information to which the application relates;
  - b. Indicate how it is relevant to any matter in issue before the chamber and is necessary for the determination of that matter; and
  - c. Explain the steps that have been taken by the applicant to secure the State’s assistance.<sup>92</sup>

<sup>90</sup> Taksoe-Jensen Statement; *See also* Sok Khemara Article.

<sup>91</sup> Emphasis added.

<sup>92</sup> Rule 54bis(A), ICTY RPE. *See also Prosecutor v. Milutinovic et al*, IT-05-87-T, Decision on Sreten Lukic’s Amended Rule 54bis Application, 29 September 2006, para. 6.

D158/5/3/1

49. An applicant has the obligation to demonstrate that, prior to seeking relief from a chamber that he has made a reasonable effort to persuade the State to provide the requested information voluntarily.<sup>93</sup> Only after the State declines to lend the requested support, should a party request a chamber for mandatory action.<sup>94</sup>
50. Firstly, the specific document or information to which the application relates has been identified.<sup>95</sup> Secondly, the Request and indeed this Appeal set out in detail how this report and the rest of the requested information is fundamental to the question of whether or not the Charged Persons are being fairly and impartially investigated.<sup>96</sup> Thirdly, the Request has also set out in detail the steps that have been taken by the Nuon Chea Defence to secure the OIOS Report and related information directly from the RCG authorities.<sup>97</sup>

## ii. Requests for Disclosure

51. Alternatively, to the extent that the Pre-Trial Chamber considers that the Request mirrors a request for disclosure at the ICTY and ICTR, the necessary procedural requirements for this type of request have been fulfilled.
52. A request for disclosure must: (1) prove that the requested material is within the possession of the Prosecutor (or in this case the OCIJ); and (2) must present a *prima facie* case that the materials sought are exculpatory.<sup>98</sup>
53. To the best knowledge of the Defence, the OIOS Report and the other Requested Information are not at present in the possession of the OCIJ. The OCIJ Order does not provide any further clarity in this respect. However, it is possible that the OCIJ has received a copy of the OIOS Report and has simply elected not to add it to the Case File as it is allegedly “totally foreign to the facts covered by the current judicial

<sup>93</sup> *Prosecutor v. Milutinovic et al.*, IT-05-87-T, Decision on Second Application of Dragoljub Ojdanic for Binding Orders Pursuant to Rule 54bis, 17 November 2005, para. 7.

<sup>94</sup> *Prosecutor v. Milutinovic et al.*, IT-05-87-AR108bis.2, Decision on the Request of the United States of America for Review, 12 May 2006, para. 32.

<sup>95</sup> Request, para. 22; OCIJ Order, para. 4. *See* paras. 37-38 *infra*.

<sup>96</sup> Request, paras. 18-21; *See also* paras. 41-43 *infra*.

<sup>97</sup> *Id.*, para. 12.

<sup>98</sup> *Prosecutor v. Kajelijeli*, Appeal Judgement, ICTR-98-44-A, 23 May 2005, para. 262; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Appeal Judgement, 17 December 2004, para. 179; *Prosecutor v. Brđanin*, IT-99-36-A, Decision on Appellant’s Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004, p. 3; *Prosecutor v. Blaškić*, IT-95-14-A, Appeal Judgement, 29 July 2004, para. 268; *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Ruling on Oral Application for the Exclusion of “Additional” Statement for Witness TF1-060, 23 July 2004, para. 9; *Prosecutor v. Norman et al.*, SCSL-04-14-PT, Decision on Disclosure of Witness Statements and Cross-Examination, 16 July 2004, para. 7.

DISB/S/3/1

investigation.”<sup>99</sup> It would therefore be in the possession of the OCIJ and the first limb of the test for requesting disclosure has been satisfied.

54. As for second limb of this test, the exculpatory nature or the effect on the fairness of proceedings of the Requested Information, this has been set out extensively above<sup>100</sup> and in the Request.<sup>101</sup>

## VI. CONCLUSION & RELIEF SOUGHT

55. Marcel Lemonde, the International Co-Investigating Judge has previously stated that:

‘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>102</sup>

56. However, Judge Lemonde has recently admitted that at the ECCC there was a “corrupt atmosphere.”<sup>103</sup> When presented with the reasonable opportunity by the Defence to actually verify whether the serious and sustained allegations of corruption at the ECCC would lead to unfair trials which would require the international judges to withdraw, the OCIJ elected to bury its head in the sand and dismiss the Request. This dismissal was also ordered with ill-considered haste in comparison to other requests by the Charged Persons/Defences which have been ignored or left on the shelf. The OCIJ Order was supposedly based on “the rule of law”<sup>104</sup> when, in fact, rejecting the Request constitutes a violation of this sacred principle. Inevitably, this creates the impression that the OCIJ is seeking to evade its inherent and inalienable obligation to ensure that proceedings are fair. After the abject and repeated failure of the UN’s Assistant Secretary General for Legal Affairs, H.E. Peter Taksoe-Jensen to hand over the Report to the ECCC Defence teams, only the Pre-Trial Chamber can ensure that the UN does not become complicit in corruption as an aider and abettor after the fact, rather than a force for good in seeking to root it out.

<sup>99</sup> OCIJ Order, para. 10.

<sup>100</sup> See paras 39-43, *infra*.

<sup>101</sup> Request, paras. 18-21.

<sup>102</sup> Cat Barton, *The Phnom Penh Post*, 23 February–8 March 2007, ‘Kickback Claims Stain the KRT’.

<sup>103</sup> Economist Article, p. 4.

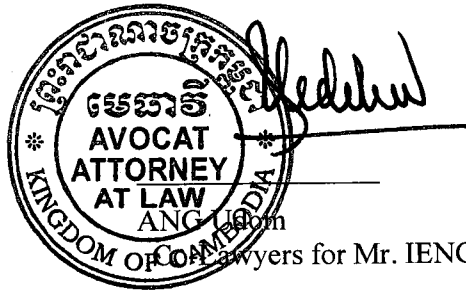
<sup>104</sup> OCIJ Order, para. 11.

D158/5/3/1

**WHEREFORE**, for all of the reasons stated herein, the Defence respectfully requests the Pre-Trial Chamber to:

- A. GRANT the IENG Sary Defence Appeal;
- B. ORDER the OCIJ to obtain and disclose to all ECCC Defence teams at its earliest convenience:
  - i) the results of the OIOS inquiry;
  - ii) any correspondence between the UN and the Royal Cambodian Government related to the OIOS inquiry; and
  - iii) any other information suggesting an organized regime of institutional corruption at the ECCC;
- C. SCHEDULE an oral hearing on this Appeal for the week of 1-5 June 2009.

Respectfully submitted,



Michael G. KARNAVAS

Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 4<sup>th</sup> day of **May, 2009**