PROGRESS AND PROBLEMS: DEFENSE COUNSEL AT THE EXTRAORINARY CHAMBERS IN THE COURTS OF CAMBODIA

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I. INTRODUCTION

The Extraordinary Chambers in the Courts of Cambodia (ECCC) was established in 2002 in order to bring to trial senior leaders of the Khmer Rouge regime for genocide, crimes against humanity, grave breaches of the Geneva Conventions, and violations of domestic Cambodian law that occurred during the period from April 17, 1975 until January 6, 1979.[1] Activity at the court began in 2007 when the Internal Rules were adopted.[2]

Much of the ECCC's structure and procedures conform to the French-influenced Cambodian Civil Law tradition. There are four major offices involved in the adjudication process: The Judicial Chambers, the Office of the Co-Investigative Judges (OCIJ), the Office of the Co-Prosecutors (OCP), and the Defense Unit. The Co-Investigating Judges are charged with carrying out an impartial investigation of the crimes alleged by the prosecution.[3] The Co-Prosecutors initiate the OCIJ investigation and carry the burden of persuasion at trial.[4] Judges lead the trial and other hearings by putting questions to the witnesses and accused persons and acting as the decision maker in all aspects. The Defense Unit coordinates defense teams to represent the accused persons throughout the proceedings.

In July of 2007, the ECCC detained its first accused person, Kaing Guek Eav (alias Duch), and charged him with crimes against humanity, grave breaches of the Geneva Conventions, Homicide, and Torture.[5] Subsequently, Nuon Chea was detained on September

[1] 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, Art. 1 (Dec. 18, 2002).
[2] Internal Rules (Jun. 12, 2007).
[3] Art. 5.
[4] Art. 6.
[5] Case of Kaing Guek Eav, Case No. 001/18-07-2007, Order of Provisional Detention (Jul. 31, 2007).

19, 2007, Ieng Sary and Ieng Thirith were detained on November 14, 2007, and Khieu Samphan was detained on November 19, 2007.[6]

The five accused persons were divided into two cases: Case 1 against Kaing Guek Eav (alias Duch) for crimes that occurred at or in conjunction with Tuol Sleng Prison (S-21), and Case 2 against Nuon Chea, Ieng Sary, Khieu Samphan, and Ieng Thirith, for their leadership role in the Khmer Rouge regime, which resulted in wide-spread atrocities throughout Cambodia for the duration of the ECCC's temporal jurisdiction. In July of 2010, Kaing Guek Eav (alias Duch) was sentenced to 35 years for crimes against humanity and grave breaches of the Geneva Conventions.[7] The trial for Case 2 is expected to begin in fall of 2011.

Defense counsel at the ECCC have passionately represented their clients at all stages of the proceedings and it is important to recognize the crucial role they play in the truth seeking-process as well as their diligent efforts to uphold the rights of their clients. Particularly in the context of international legal procedures influenced by the inquisitorial legal tradition, defense has a difficult, up-hill battle at nearly every stage of the proceedings. However, in the course of their representation, there have been some tactics used that seem to breach permissible bounds of advocacy.

This paper looks at the conduct of defense counsel in Case 2 and examines ways in which they have made substantial contributions toward detention conditions, fair trial rights, and equality of arms, as well as ways in which their conduct, in doing so, may exceed permissible standards of advocacy and approach procedural abuse, misconduct and unnecessary inefficiencies. **Section II** identifies the rules applicable to defense counsel

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[6] Case of Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ, Provisional Detention Order (Nov. 14, 2007); Case of Nuon Chea, Case No. 002/19-09-2007-ECCC/OCIJ, Provisional Detention Order (Sept. 19, 2007); Case of Khieu Samphan, Case No. 002/19-09-2007-ECCC/OCIJ, Provisional Detention Order (Nov. 19, 2007); Case of Ieng Thirith, Case No. 002/19-09-2007-ECCC/OCIJ, Provisional Detention Order (Nov. 14, 2007).
[7] Case of Kaing Guek Eav, Case No. 001/18-07-2007, Judgment (Jul. 26, 2010).

appearing before the ECCC, as well as practical considerations associated with defense work at international criminal courts. **Section III** looks at the various ways in which defense teams have contributed positively to the fair trial rights of the accused. **Section IV** looks at examples of defense tactics that seem to run afoul of the jurisprudence and professional norms of Cambodia, the ECCC, and international courts. **Section V** summarizes the conclusions.

II. RULES GOVERNING DEFENSE COUNSEL

Fair trial rights and the equity of arms between the prosecution and defense are key principles of international criminal law. As Former President of the ICTY Antonio Cassesse observed regarding the draft procedure for the ICTY: "the judges made considerable efforts to put both the prosecution and the defense on the same footing…so as to safeguard the rights of the accused and ensure a fair trial."[8]

There are a few key areas where defense may be disadvantaged. First, defense teams at international tribunals may be afforded fewer resources than the prosecution.[9] Second, because of their duty to engage in a preliminary investigation before the OCIJ takes over the main investigation, the prosecution generally will have had months, if not more time, to work with the facts and evidence before the defense comes onboard.[10] Last, given the attention and publicity surrounding many of the atrocities tried at international courts and the gravity of those offenses, it is unlikely the presumption of innocence is always fully preserved.

Defense has a formidable task when representing accused persons at international courts, and possibly should be afforded greater procedural leeway relative to what may be permissible in domestic courts given these challenges. Defense can be expected to attack

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[8] Michael Karnavas, *Gathering Evidence in International Criminal Tribunals – The View of the Defense Lawyer*, *in* INTERNATIONAL CRIMINAL JUSTICE: A CRITICAL ANALYSIS OF INSTITUTIONS AND PROCEDURES 90-91 (Michael Bohlander ed., 2004) (citing Antonio Cassesse, *Statement by the President Made at Briefing to Members of Diplomatic Missions*, Feb. 11, 1994).
[9] Karnavas, *supra,* at 91-92.
[10] *Id.* at 96-97.

almost everything possible, and such conduct is often allowed because of the desire to support fair trial rights of the accused. But also important is the desire to have efficient, respected trials.

In an attempt to enhance the courts ability to maintain efficient trials restrictions are imposed on defense counsel's representation before the ECCC. As a starting point, the Law and Rules of the ECCC offer an outline of sanctionable conduct. Rule 38 of the Internal Rules identifies a non-exhaustive list of actions that can be classified as misconduct. It states:

> The Co-Investigating Judges or the Chambers may, after a warning, impose sanctions against or refuse audience to a lawyer if, in their opinion, his or her conduct is considered offensive or abusive, obstructs the proceedings, amounts to an abuse of process, or is otherwise contrary to Article 21(3) of the Agreement.[11]

Article 21(3) of the ECCC Law states "counsel…shall…act in accordance with the present Agreement, the Cambodian Law on the Statutes of the Bar and recognized standards of ethics of the legal profession.[12] Additionally, Rule 35 gives the ECCC Chambers authority to sanction persons who interfere with the administration of justice, which includes disclosing confidential information, failing to comply with certain orders of the OCIJ and Chambers, and interfering with witnesses.[13] Finally, Rule 37 grants the Chambers power to dismiss any persons who disrupt proceedings from participating in those and future proceedings.[14]

Beyond the ECCC Rules, defense counsel's behavior should be assessed against the standards of professional conduct set by the Cambodian Bar, which are incorporated into the

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[11] Rul. 38(1).
[12] Art. 21(3).
[13] Rul. 35. (The ECCC may sanction or refer to the appropriate authorities, any person who knowingly and willfully interferes with the administration of justice, including any person who: a) discloses confidential information in violation of OCIJ order, b) without just excuse fails to comply with an order to attend, or produce documents or other evidence before the OCIJ or Chambers, c) destroys or otherwise tampers in any way with any documents, exhibits or other evidence in a case before the ECCC, d) threatens, intimidates, causes any injury, or offers bribe to, or otherwise interferes with a witness).
[14] Rul. 37. ("In view of Chambers, any person disrupting proceedings, they shall issue a warning first. In cases of continued disruption, the Chambers may order the person disrupting proceedings to leave or may be removed from courtroom or premises of ECCC, and in cases of repeated misconduct, may order exclusion of that person from proceedings").

ECCC's misconduct rules through Article 21(3). Article 24 addresses counsel's duty to judges, stating "[t]he lawyer preserves for the judges, in independence and dignity, the respect due to their position […and] is strictly prohibited from engaging in disloyal and disruptive conduct."[15]

Last, it is important to consider Cambodia's inquisitorial legal tradition, which animates the ECCC's procedural rules, as well as the adversarial influence on the court by virtue of its internationalized status.[16] Adversarial courts tend to place greater value on legal competition, zealous representation and the strong relationship between the client and their attorney.[17] Inquisitorial systems tend place less emphasis on competition and zealous representation, and instead focus mainly on facilitating an objective truth-seeking process.[18] In this way, some behavior permissible in an adversarial system may face greater scrutiny in an inquisitorial one.

Being part of the domestic Cambodian legal system, the ECCC's procedure is largely reflective of an inquisitorial system.[19] However, the court has characterized itself as an internationalized court on multiple occasions. In its first ever decision, the OCIJ described the court as a "special internationalized tribunal"[20] and, during the Case 1 trial, the Trial Chamber stated that the ECCC is "a specially constituted, independent and internationalized court."[21]

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[15] Micheal Bohlander, Roman Boed & Richard J. Wilson, DEFENSE IN INTERNATIONAL CRIMINAL PROCEEDINGS: CASES MATERIALS AND COMMENTARY, 855 (Transitional Publishers 2006) (citing The Code of Ethics for Lawyers Licensed with the Bar Association of the Kingdom of Cambodia, Art. 24).
[16] Case of Kaing Guek Eav (alias Duch), Case No. 001/18-07-2007-ECCC-OCIJ, Decision on Request for Release, ¶ 10 (Jun. 15, 2009).
[17] Jenia Iontcheva Turner, Legal Ethics in International Criminal Law, 10 CHI. J. INT'L L. 685, 701 (Winter 2010).
[18] *Id.*
[19] Robert Petit & Anees Ahmed, A Review of the Jurisprudence of the Khmer Rouge Tribunal, *draft version*, p.5 (Feb. 2010).
[20] Case of Kaing Guek Eav (alias Duch), Case No. 001/18-07-2007-ECCC-OCIJ, Order of Provisional Detention, ¶ 20 (Jul. 31, 2007).
[21] Kaing Guek Eav, Decision on Request for Release, *supra*, at ¶ 10.

III. PROMOTING A FAIR AND IMPARTIAL TRIAL

One of the most important functions of defense counsel is protecting their client's fair trial rights, such as due process and the right to an impartial trial. To that end, defense counsel at the ECCC have shined a critical light on corruption and partiality at the court, offered guidance to the OCIJ investigation, worked to get translation of the case file, and improved detention conditions.

a) ATTACKING CORRUPTION

Corruption at the ECCC has been an issue for nearly the duration of the court's existence. In 2007, allegations of corruption began appearing in local media sources, including the Voice of Khmer Youth, which claimed that domestic ECCC judges and administrative staff had to pay 30% of their salary to secure their positions at the court.

Starting in 2007, the UN Development Program (UNDP) released an audit report that concluded Cambodian officials at the ECCC had engaged in corruption related to staff hiring, as well as general mismanagement of court operations.[22] The UNDP was, at the time, managing UN funds to the tribunal and, based on their audit, recommended the UN pull out unless the ECCC initiate reforms to address corruption issues.[23]

Later, in 2008, the United Nations Office of Internal Oversight Services (UN-OIOS) carried out a confidential investigation of additional corruption allegations.[24] The report remained confidential, but was submitted to the Cambodian government.[25] Additionally, German delegates, after meeting with the ECCC's International Deputy Director of Administration, released a report concluding that Cambodian administrative staff had been

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[22] John Ciorciari, Justice and Judicial Corruption, Cambodia Tribunal Monitor, *available at* http://www.cambodiatribunal.org/component/content/article/39.html?phpMyAdmin=KZTGHmT45FRCAiEg7OLlzXFdNJ4 (last visited May 11, 2010).
[23] *Id.*
[24] Micheal Saliba, Allegations of Corruption at ECCC: Overview, Cambodia Tribunal Monitor (Sept. 28, 2009), *available at* http://www.cambodiatribunal.org/blog/2009/09/allegations-of-corruption-at-eccc.html (last visited May 11, 2010).
[25] *Id.*

required to pay part of their salary to maintain their post.[26] Possibly most damaging to public confidence in the ECCC, the report concluded that Sean Visoth, Director of Administration for the Cambodian side, engaged in the alleged corruption.[27]

Along side these efforts by the UN to investigate and resolve corruption issues, defense teams played an important role, engaging the Pre-Trial Chamber to protect their client's right to a fair and impartial trial. In a request for investigative action dated March 27, 2009, the Nuon Chea defense team asked the OCIJ to investigate administrative corruption by seeking out information from "…the UN, the Royal Government of Cambodia, and/or any other organization or individual."[28] This request was joined by Ieng Sary, Ieng Thirith, and Khieu Samphan.[29]

Among the general request to investigate any corruption at the ECCC, the defense teams asked the OCIJ to obtain a UN-OIOS report summarizing the results of the UN's investigation into administrative corruption.[30] Notably, defense teams' motions were effectually supported by the Civil Parties when they too united and requested that the OCIJ obtain and release the OIOS report.[31] Little, however, resulted as the Chambers denied both on grounds that the allegations related to Cambodian national staff members in the Office of Administration only and, therefore, had no bearing on the ECCC's judicial process.[32]

Any sort of corruption is a serious threat to the fair trial rights of an accused and, as such, it would seem almost negligent for defense not to formally raise the issue with the

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[26] *Id.*
[27] *Id.*
[28] Case of Nuon Chea, Case No. 002/19-09-2007-ECCC/OCIJ, Eleventh Request for Investigative Action, ¶ 22 (Mar. 27, 2009).
[29] Case of Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ, Ieng Sary's Motion to Join and Adopt Nuon Chea's Eleventh Request for Investigative Action (Mar. 27, 2009); Case of Ieng Thirith, Case No. 002/19-09-2007-ECCC/OCIJ, Motion in Support of Nuon Chea's Eleventh Request for Investigative Action for Disclosure of the OIOS Report and Related Documents (Mar. 30, 2009); Case of Khieu Samphan, Case No. 002/19-09-2007-ECCC/OCIJ, Declaration de la Defense aux Fins D'Adoption de la Onzieme Demande D'Acte D'Instruction de M. Nuon Chea Relative aux Allegations de Corruption au sein des CETC (Apr. 3, 2009).
[30] Nuon Chea, Eleventh Request for Investigative Action, *supra*, at ¶ 22.
[31] Case of Kaing Guek Eav, Case No. 001/18-07-2007-ECCC/TC, Group 1—Civil Parties' Co-Lawyers' Request that the Trial Chamber Facilitate the Disclosure of An UN-OIOS Report to the Parties (May 11, 2009).
[32] *Id.*

court. Further, corruption undermines the court's credibility. As one observer noted, "corruption is one issue that simply can't be ignored. The ECCC cannot make survivors of Democratic Kampuchea whole for the abuses they suffered. What it can do is deliver…credible verdicts and the promise of a judicial system that will better protect…Cambodians' rights in the future."[33] Acting as a watchdog, defense helps reinforce the court's legitimacy by exposing it to constant criticism and oversight, and ensure that issues such as corruption are publically addressed.

One of the potential criticisms of defense's request here is that it falls outside the explicitly stated scope of the OCIJ's investigative power, which is limited to the crimes alleged in the Introductory Submission filed by the Office of the Co-Prosecutors.[34] Defense argued that the administrative corruption affected the ability of their client to receive a fair trial and thus fell within the acceptable range of matters the OCIJ could investigate related to Case 2. It's unclear whether the administrative corruption alleged and investigated at the ECCC involved circumstances that could lead to an unfair trial. Notably, there were no corruption allegations against national or international staff members from any of the offices that participate in the adjudication process, including the Chambers, the OCIJ, the Co-Prosecutors Office, the Defense Unit, and the Victims Unit.

A second potential criticism is that defense was seeking a duplicate investigation, which may run afoul of rules limiting counsel from filing duplicitous motions or requests. In addition to asking for the release of the OIOS report, defense also requested the OCIJ engage in an identical investigation. As an investigation was already underway, it seems duplicitous for defense to push the issue on the OCIJ. Indeed, as a result of the UN investigation, safeguards and mechanisms were put in place to prevent and address any corruption charges that arise. On August 12, 2009 the UN released a statement announcing the establishment of

[33] Ciorciari, *supra.*
[34] Saliba, *supra*.

an independent counselor at the ECCC, who would be available to investigate corruption issues and other due process and fair trial issues related to the ECCC administration and staff.[35]

b) PROMOTING AN INDEPENDENT AND IMPARTIAL PROCESS

The OCIJ plays a substantial role in the proceedings by carrying out the investigation into crimes alleged, developing a case file of evidence related to those crimes and writing the final indictment, which establishes the charges an accused will be tried for. Therefore, it is critical to the fair trial rights of the accused that officers of the OCIJ remain impartial throughout the investigation. As final decision makers, judges must also be impartial and independent if the accused is to realize a fair trial.

As part of their efforts to ensure a fair and impartial trial, defense teams have filed OCIJ requests to investigate certain judges and OCIJ officers for bias or partiality, including Steve Heder, David Boyle, Judge Prak, Judge Thol, Judge Lahuis and Judge Downing.

Defense first shined a light on potential bias within the OCIJ when Ieng Sary's team sent a letter to the OCIJ in September of 2007 requesting an investigation of David Boyle, an OCIJ legal officer.[36] In the letter, Ieng Sary's counsel requested a list of information about Boyle, including everything he has authored, all conferences, training seminars, hearings, lectures, workshops and meetings related to the ECCC or Khmer Rouge that he has attended, and what information was known to the OCIJ when deciding to hire him.[37]

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[35] UN Press Release L/3146, Joint Statement on the Establishment of Independent Counsellor at Extraordinary Chambers in Courts of Cambodia, Department of Public Information (Aug. 12, 2009), *available at* http://www.un.org/news/press/docs/2009/13146.doc.htm (last visited Apr. 27, 2010).
[36] Case of Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ, Letter titled Request for Information on 'the apparent bias and conflict of interest concerning MM S. Heder and D. Boyle (May 27, 2008).
[37] *Id.*

These allegations of bias were based on a statement Boyle made at a conference in Phnom Penh in 2007.[38] Discussing Ieng Sary's pardon, Boyle observed that, as a way to avoid delays at trial over issues arising from uncertainty in the law, such as the treatment of Ieng Sary's domestic pardon, judges could work with the OCIJ and Office of the Co-Prosecutors to determine the applicable procedures before trial.[39] Defense for Ieng Sary asserted that this statement indicated Boyle's potential belief that defense had no role in determining fair trial issues related to Ieng Sary.[40] Arguing that legal officers should be "above suspicion"[41], defense felt Boyle may be "unqualified to hold any position within the OCIJ."[42] When the OCIJ rejected the request, the defense team appealed, hinting that the OCIJ's refusal to investigate the requested items was an indication of an office-wide disregard for the standards of impartiality.[43]

Similarly, Ieng Sary's defense team shined a skeptical light on Steve Heder, an OCIJ Investigator, requesting that he be removed from the OCIJ for bias.[44] As defense pointed out, Heder worked for the Office of the Co-Prosecutor before moving to the OCIJ and has authored a book titled "Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge" in which Heder identifies Ieng Sary as a likely candidate for prosecution.[45] Based on this evidence, defense argued Heder's involvement with the OCIJ could give rise to real or apparent bias and, therefore, he should be removed from the OCIJ

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[38] Case of Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ (PTC), Appeal of Mr. Ieng Sary Against the OCIJ's Decision on the Defense Request for Information Concerning the Apparent Bias & Potential Existence of Conflict of Interest of OCIJ Legal Officer David Boyle, ¶ 1 (Jun. 6, 2008).
[39] *Id*. (citing a report from a conference titled *International Criminal Court Programme: Articulation Between the International Criminal Court and the Khmer Rouge Tribunal,* organized by FIDH, LICADHO and ADHOC, *available at* http://www.vrwg.org/Publications/02/FIDHcambodge420ang.pdf).
[40] Ieng Sary, Appeal of Decision on Apparent Bias & Potential Existence of Conflict of Interest of OCIJ Legal Officer David Boyle, *supra.*
[41] *Id*. at ¶ 5.
[42] *Id*. at ¶ 2.
[43] *Id.* at ¶ 7 (defense states: "With all do respect for the OCIJ, this letter displays both a misunderstanding of the Request and a worrying refusal to provide the information requested").
[44] Case of Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ, Application for Disqualification of OCIJ Investigator Stephen Heder and OCIJ Legal Officer David Boyle in the Office of the Co-Investigative Judges (Jul. 8, 2009).
[45] *Id.*

investigation.[46] The Chamber, in a decision that avoided the merits of defense's argument, dismissed the appeal as inadmissible.[47] In the same motion, the Pre-Trial Chamber addressed Ieng Sary's request to disqualify Boyle, also finding the request inadmissible.[48]

In another instance, during the early stages of Case 2, Nuon Chea's defense team wrote an open letter to the OCIJ, presenting them with a list of complaints and accusations.[49] Notably, Nuon Chea's defense team publically accused the OCIJ of "…not conduct[ing] its investigation in an impartial manner."[50]

Nuon Chea's defense team offered various examples to support their allegations. First, they cited the OCIJ's refusal to grant an investigative request from Ieng Sary asking the OCIJ to disclose information related to the experience and qualifications of OCIJ investigators, their investigative strategy, and the collection and analysis of exculpatory evidence.[51] The letter also cites examples of investigative requests submitted by the defense that had, at the time, not yet been responded to. Lastly, and most accusatorial, Nuon Chea's defense team cited recent rumors that Judge Lemonde stated, at a private meeting in his home, that "[he] would prefer that [the OCIJ] find more inculpatory evidence than exculpatory evidence."[52]

In addition to their attempts to promote a fair and impartial investigation, defense teams also worked to ensure an impartial trial by raising issues of potential bias amongst Judges of the Pre-Trial Chamber. The Nuon Chea defense team took the lead, submitting a request to the Pre-Trial Chamber to have the credentials of Judge Prak disclosed, including: his university degrees or equivalent qualifications; current and previous employment; current

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[46] *Id.* at ¶ 1.
[47] Case of Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ, Decision on the Charged Person's Application for Disqualification of Drs. Stephen Heder and David Boyle, ¶ 22 (Nov. 30, 2009).
[48] *Id.*
[49] Case of Nuon Chea, Case No. 002/19-09-2007-ECCC/OCIJ, Letter to the OCIJ Concerning Defense's Lack of Confidence in the Judicial Investigation (Oct. 15, 2009).
[50] *Id*. at 3.
[51] *Id*. at 1.
[52] *Id*. at 2-3.

and previous political affiliations; current and previous activities in civil, public, or international affairs; familial, professional, and/or financial ties to any officials of the Royal Government of Cambodia, and; any other information which may objectively give rise to the appearance of bias.[53]

A little over one month after requesting that Judge Prak submit his credentials to the defense team, Nuon Chea's defense team focused their efforts on Pre-Trial Chamber Judge Ney Thol, formally requesting his disqualification in a submission to the Pre-Trial Chamber dated January 28th, 2008.[54] Judge Ney Thol is a member of the Royal Cambodian Armed Forces (RCAF) and affiliated with the Cambodian People's Party (CPP), the current majority party in Parliament.[55] While admitting that they have found no evidence of actual bias,[56] the defense sought to dismiss him from the bench because they felt his membership in the RCAF and CCP could give rise to a perception of bias.[57] It is worth noting that defense's request did not address why Judge Ney Thol's affiliation with the RCAF and CCP could create a perception of bias. However, considering later investigative requests filed by defense teams, it is likely that this was an early attempt to root out alleged improper influence on the ECCC by the Cambodian government.

Indeed, in November of 2009, the Nuon Chea defense team asked the OCIJ to investigate the extent to which the Royal Government of Cambodia (RGC) has interfered with proceedings at the court.[58] The request asked the OCIJ to examine RGC influence on

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[53] Case of Nuon Chea, Case No. 002/19-09-2007-ECCC/PTC, Letter to Judge Prak Requesting Disclosure of Credentials (Dec. 19, 2007).
[54] Case of Nuon Chea, Case No. 002/19-09-2007-ECCC/PTC, Urgent Application for Disqualification of Judge Ney Thol (Jan. 28, 2008).
[55] *Id*. at ¶ 24.
[56] *Id*. at ¶ 23.
[57] *Id*. at ¶ 24.
[58] Case of Nuon Chea, Case No. 002/19-09-2007-ECCC/OCIJ, Request for Investigation, ¶ 20 (Nov. 30, 2009).

the ECCC by interviewing numerous officials, including Prime Minister Hun Sen and King Norodom Sihanouk.[59]

The Nuon Chea team requested the OCIJ to investigate judicial tampering by the RGC based on two cited instances. In the first instance, Hun Sen publically criticized the court and seemed to indicate his ability to refuse demands of the court because he felt the ECCC was wasting money.[60] In the statement, Hun Sen also addressed his disapproval of having members of government acting as witnesses for the court.[61] The second piece of evidence cited as an example of RGC interference was a statement from a government spokesman made after six RGC officials had been summoned by the OCIJ.[62] The government spokesman stated that the RGC officials could appear in court voluntarily, but that the government's position is that they should not give testimony.[63]

Accusations of partiality and a lack of independence have not been limited to the domestic judges at the ECCC. In one example, defense for Ieng Sary requested the Pre-Trial Chamber to address allegations of bias against two of the international judges, Katinka Lahuis and Rowan Downing.[64] Prime Minister Hun Sen had made statements to the media that some foreign judges at the ECCC had received orders from their governments, which defense applied to the Lahuis and Downing to question their independence as judges.[65] The Chamber, after noting that Hun Sen's statements, even if believed, did not make any specific

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[59] *Id*.
[60] *Id.* at ¶ 6 (quoting a public statement of Hun Sen made in Takeo Province, "They are not getting along with each other in that court. There is nothing just to prolong time to spend money. If they give money, it can be spend but if there is no money, that is fine. They want to put pressure on us that we have to sign in order to get money. I said no. If you don't give, that's fine. When you run out of money, you can walk out. It is very complicated. Now they frightened. Once, they wanted to call some people to testify. I said no and don't be so annoyance [*sic*, throughout]" (Sept. 9, 2009).
[61] Case of Nuon Chea, Request for Investigation, *supra,* at ¶ 20.
[62] *Id.* at ¶ 7-20.
[63] *Id*.
[64] Case of Ieng Sary, Case No. 002/20-10-09-ECCC/OCIJ, Decision on Ieng Sary's Request for Appropriate Measures Concerning Certain Statements by Prime Minister Hun Sen Challenging the Independence of Pre-Trial Judges Katinka Lahuis and Rowan Downing, ¶ 10 (Nov. 30, 2009).
[65] *Id*. at ¶ 11.

allegations toward any individual judge and defense showed no other evidence indicating the two accused judges lacked independence.[66]

Like corruption, a lack of independence or impartiality among judges or OCIJ officers poses a significant threat to the fair trial rights of the accused and the legitimacy of the ECCC. While entirely baseless claims unnecessarily delay proceedings, given the gravity of harm that could result, it is both expected and desirable to have defense teams engage in a sort of vetting activity, placing scrutiny on the judges and legal officers that make up this new court. Further, by addressing accusations of bias afforded by the defense, the ECCC is given beneficial opportunities to promote legitimacy and public confidence by engaging in such vetting. Last, by acting as a watchdog and exposing judges and legal officers to enhanced scrutiny, defense increases the likelihood that bias, or the perception of it, will be rooted out; further promoting fair trial rights.

We are, of course, concerned with delaying procedure unnecessarily. However, by providing specific requests limited to individuals, as most of defense's requests did, minimal OCIJ resources are needed thus reducing procedural delays. More generalized requests, such as those to investigate the extent to which the RGC has allegedly influenced the ECCC, have diminishing benefits as they require a larger investigation, placing greater weighting on court resources and causing longer delays. Regardless, it is understandable that defense would raise these issues and, given the court's youth and the real problems of corruption in Cambodia, it seems desirable for the court to at least address these grave concerns.

To be sure, inquisitorial legal systems tend to take a more restrained view of advocacy. Instead of emphasizing zealousness, codes of conduct from inquisitorial systems tend to emphasize "dignity, conscience, independence, integrity and humanity, moderation

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[66] *Id*. at ¶ 11.

and courtesy, and with respect to clients, competence, devotion, diligence and prudence."[67] However, within inquisitorial systems, legal officers and judges are required to be impartial and independent. While it may not be expected or desired for defense to act with the same level of zealousness seen in adversarial systems, when confronted with the need to protect fair trial rights and enhance the court's legitimacy, it seems useful and important to subject the court to defense's critical scrutiny.

There is some concern that by promoting such defense tactics, the court would be inviting frivolous requests to investigate every officer of the court. Indeed, the number of people who defense have requested be investigated or dismissed seems to indicate some potential abuse. However, the gains to due process and legitimacy achieved by allowing defense substantial leeway to file motions seem to outweigh these costs.

c) ASSISTING THE OCIJ INVESTIGATION

The OCIJ is tasked with impartially investigating crimes alleged by the OCP and, if sufficient evidence is gathered, issuing an indictment against individuals for those crimes.[68] As part of the investigation process, the OCIJ is required to seek out both exculpatory and inculpatory evidence. However, the OCP retains the burden of persuasion at trial and defense counsel maintains the duty to present the accused person's defense. As the OCP and defense teams are the ones to advocate at trial, only they know the specifics of their argument and what sort of evidence would be useful to their case. Therefore, it is crucial that both defense teams and the OCP remain involved in the investigation by submitting investigative requests, asking the OCIJ to seek out specific documents, witnesses or other evidence the requesting side finds relevant to their case.

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[67] Turner, *supra*, at 701.
[68] Art. 5.

Participation in the OCIJ investigation is especially important for defense. As Michael Karnavas, Co-Lawyer for Ieng Sary, pointed out, the prosecutor holds the burden of persuasion at trial, but is also responsible for carrying out an initial investigation and requesting the OCIJ to investigate further if the prosecution finds sufficient evidence of a crime.[69] Such a system increases the likelihood that the investigation, and accompanying case file, will be weighted toward inculpatory evidence.[70] It is, therefore, crucial for defense counsel to engage the investigating judges to give input regarding evidence to consider, witnesses to interview, and questions to ask those witnesses, in order to lessen the potential for an inequity of arms between prosecution and defense.[71]

Problems of equality of arms were serious problems at other courts such as the ICTY, ICTR, and Special Court for Sierra Leone, and the Law and Rules of the ECCC are seen by some critics as following the same path.[72] The Law directs the Office of Administration to assist all offices of the court, including prosecutors and investigating judges, but leaves out defense.[73] The Rules are replete with examples of situations where Judges, Co-Prosecutors, and Co-Investigating Judges are given decision making power, yet there are no rules that give defense the right to participate, be heard, or even be informed of proceedings.[74] To be sure, Rule 11 did create a Defense Support Section, funded by the United Nations, to support defense teams.[75] Still, to the extent the structure and rules of the court limit the defense's ability to realize an equity of arms, it seems to reinforce the need to have defense counsel aggressively engaged in the investigation process.

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[69] Karnavas, *supra*, at 83-84.
[70] Karnavas, *supra*, at 84.
[71] *Id*.
[72] Suzanna Linton, Putting Cambodia's Extraordinary Chambers in Context, Singapore Year Book of International Law, 11 S.Y.B.I.L. 195, 245 (2007).
[73] *Id.*
[74] *Id.*
[75] *Id.*

At the ECCC, defense teams have actively engaged the OCIJ with investigative requests since the beginning of the investigation. Many of the requests remain confidential, so it is impossible to assess their substance. However, the fact that defense teams are filing numerous requests[76] seems a positive sign that they have been giving input and advice to the OCIJ as the investigation is carried out.

Despite the apparent value of having defense teams actively engaging the OCIJ, there are some who argue defense teams at the ECCC should retain a very limited role during the investigation process. The ECCC is a hybrid court with a French-influenced inquisitorial criminal procedure.[77] In line with the inquisitorial model, the OCIJ is tasked with carrying out the investigation impartially, seeking both inculpatory and exculpatory evidence.[78] In such a system, some argue defense is not expected to gather evidence on their own and their primary duty is to interpret evidence gathered by the state in a manner favorable to their client.[79]

That being said, the inquisitorial system discussed in theoretical arguments is born of domestic legal systems, such as France and Germany. As such, it may be more relevant to systems processing relatively smaller, less complicated criminal cases such as a homicide or theft, as opposed to war crimes. In Case 2 at the ECCC, the OCIJ has been tasked with investigating four people for numerous atrocities that occurred throughout Cambodia over the course of nearly five years, affecting countless victims. The case is further complicated by the large range of potential defenses and arguments for mitigation employable at a trial of this size and complication. While inquisitorial legal theory may remain applicable to domestic

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[76] Case of Nuon Chea, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ Acknowledgement of Request for Investigative Action (with Acknowledgements dated Aug. 11, 2008; Aug. 19, 2008; Aug. 27, 2008; Sept. 26, 2008; Oct. 30, 2008; Nov. 10, 2008; Jan. 22, 2009; Jan. 30, 2009; Feb. 25, 2009; Apr. 2, 2009; Jun. 5, 2009; Jun. 16, 2009; Aug. 14, 2009; and Sept. 2, 2009). Case of Ieng Sary, Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ Acknowledgement of Request for Investigative Action (with Acknowledgements dated Mar. 23, 2009; Apr. 7, 2009; May 26, 2009; May 29, 2009; Jun. 5, 2009; Sept. 25, 2009; and Oct. 19, 2009).
[77] Petit, *supra*, at p.5-6.
[78] Rul. 55(5).
[79] Turner, *supra*, at 699.

courts adjudicating smaller-scale crimes, it becomes impractical given the scope of the crimes alleged in Case 2. The OCIJ simply can't be expected to fully wrap their heads around the cases of both the defense and the prosecution. Instead, prosecution and defense must act as assistants, guiding the OCIJ toward relevant facts and information.

d) CLARIFYING TRANSLATION RIGHTS

The ECCC operates in Khmer, French and English.[80] As one can imagine, the task of translating documents, evidence, and pleadings into the three working languages is a monumental task. In the court's early days, translation rights were vague and no clear directives existed. These issues prompted defense to engage the OCIJ and Pre-Trial Chamber in attempts to clarify and broaden translation rights of the accused. At the same time, however, some defense counsel may have exploited translation issues to make frivolous claims for release.

Since the early days of the court's operations, defense counsel engaged the OCIJ and the Pre-Trial Chamber in various debates to determine the extent of their client's right to have documents translated into their working language. Addressing issues raised by defense, the OCIJ sough to clarify translation rights in June of 2008 when they issued an Order on Translation Rights and Obligations.[81] While recognizing the positive impact full translation would have on fair trial and equality of arms goals, the OCIJ also recognizes the need to maintain efficient proceedings.[82]

With compromise in mind, the Order stated that all documents must be produced in Khmer and either French or English.[83] The Order also guaranteed translation of key documents for the accused, including the OCIJ Indictment, the OCP's Introductory

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[80] Art. 45 new.
[81] Case of Nuon Chea and others, Case No. 002/19-09-2007-ECCC-OCIJ, Order on Translation Rights and Obligations of the Parties, ¶ C3 (Jun. 20, 2008).
[82] *Id.* at ¶ A3.
[83] *Id.* at ¶ C3.

Submission and Final Submission, any footnotes or indexes of the factual elements which the OCP submissions rely on, and any other "elements of proof" used at trial.[84] Further, the Order envisions cooperation between the Court Management Section and defense teams to get significant documents translated into a third language where necessary.[85] Defense teams appealed the order, pushing for full translation of the case file.[86]

While it may be unreasonable to expect a full translation of the case file, which is composed of thousands of pages, the desire to have the most complete translation possible is understandably important to the rights of the accused persons. More complete translation offers defense teams the opportunity to read more evidence in the case file, to react more quickly to issues as they arise, and to limit the amount of their own office's resources that must be expended to translate things not handled by the ECCC's Translation Unit. Additionally, as a result of defense motions and requests, translation issues had ample judicial coverage, leading to greater procedural clarity.

Even if one views translation issues as a hindrance on procedural efficiency, the problem seems best viewed as a systemic one and not a burden one could reasonably expect defense to ignore. Explicitly stated in the Law, the ECCC functions in Khmer, English, and French.[87] As such, one could expect there to be concerns raised about, for example, a Khmer speaking lawyer having equal access to documents in the case file which may only be in English. More problems arise when one considers that an accused has the right to choose the counsel of his choice. Where charged persons, like Khieu Samphan, have chosen a U.N. approved French-speaking lawyer, it should be expected then that his lawyer would request to have as much of the evidence and documents in the case file translated into French, and to

[84] *Id.* at ¶ B4.
[85] *Id.* at ¶ E2.
[86] Case of Ieng Sary, Case No. 002/19-09-2007-ECCC-OCIJ, Ieng Sary's Appeal Against the OCIJ's Order On Translation Rights and Obligations of the Parties (Jul. 22, 2008); Case of Khieu Samphan, Case No. 002/19-09-2007-ECCC-OCIJ, Defense Appeal Against Decision to Deny the Request for Translation of Khieu Samphan's Case File (Jul. 22, 2008).
[87] Art. 45 new.

have that translation done as quickly as possible. Indeed, failure to do so may even be seen as a breach of one's professional duty.

That being said, a few select pleadings related to translation issues seem motivated by the desire to hinder the court's efficiency. In one such instance, Counsel for Khieu Samphan took an extreme position on translation rights, initiating annulment proceedings based on these issues. Counsel for Khieu Samphan used translation issues to condemn the proceedings as unfair to his client,[88] arguing the OCIJ Order on Translation Rights violates substantial procedural rights[89] and criticizing the Translation Unit as being treated as a "poor cousin within the court…[with] non-existent or unfeasible quality control."[90] Here, defense for Khieu Samphan used translation issues to attack the legitimacy of the ECCC and request the release of their client. Failing to acknowledge the procedural impossibility of having the entire case file translated into all three working languages of the court, defense argued the OCIJ practice of putting documents not translated into Khmer, English and French on the case file qualified as an abuse of process and required the nullification of the entire judicial investigation and the release Khieu Samphan.[91]

It is important to raise translation issues for the reasons stated above, but making abusive comments and requesting the annulment of proceedings seems to go beyond permissible standards of advocacy. Given the real difficulty of representing a client in a case where a substantial portion of the mounting evidence against your client is in a language different than your own, it may be understandable that defense for Khieu Samphan would declare the unfairness of the OCIJ's translation ruling. However, while acknowledging that defense will, and in most cases should, seize every opportunity to seek their client's release,

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[88] Case of Khieu Samphan, Case No. 002/19-09-2007-ECCC-OCIJ, Request for Annulment for Abuse of Procedure (Aug. 27, 2009).
[89] *Id*. at ¶ 3.
[90] *Id*. at ¶ 19.
[91] *Id.* at ¶ 35-57.

the abusive comments made to the court remain irrelevant and inappropriate. As will be discussed in Section IV, abusive language toward the court has been consistently held impermissible and can, depending on the circumstances, give rise to sanctions against the lawyer making such comments.

e) IMPROVING DETENTION CONDITIONS

Pursuant to Rule 63(3), the OCIJ may provisionally detain charged persons if there is a well founded reason to believe they committed the crimes under investigation and there are conditions present that indicate a need to detain the charged person, such as protecting public order, protecting evidence, and ensuring they appear at trial.[92] With regard to Case 2, the four accused have been held in provisional detention since their arrests in late 2007.[93]

During that time, the court has responded to a number of defense requests, mainly for release, beginning when all four of the accused appealed their initial provisional detention orders.[94] The Pre-Trial Chamber dismissed all, with the exception of Khieu Samphan's, which was withdrawn.[95]

While defenses' motions have rarely been granted, the dialogue has helped develop a better understanding of detention rules. Indeed, while rejecting defense's motions above, the Pre-Trial Chamber used the opportunity to establish useful jurisprudence regarding detention. Importantly, the Pre-Trial Chamber set a standard of review that examines the OCIJ procedure, the underlying facts supporting detention, and whether those facts remain in

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[92] Petit, *supra,* at 12-13.
[93] Case of Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ, Provisional Detention Order (Nov. 14, 2007); Case of Nuon Chea, Case No. 002/19-09-2007-ECCC/OCIJ, Provisional Detention Order (Sept. 19, 2007); Case of Khieu Samphan, Case No. 002/19-09-2007-ECCC/OCIJ, Provisional Detention Order (Nov. 19, 2007); Case of Ieng Thirith, Case No. 002/19-09-2007-ECCC/OCIJ, Provisional Detention Order (Nov. 14, 2007).
[94] Case of Nuon Chea, Case No. 002/19-09-2007-ECCC-OCIJ, Decision on Appeal Against Order on Extension of Provisional Detention (May 4, 2009); Case of Ieng Sary, Case No. 002/19-09-2007-ECCC-OCIJ, Decision on Appeal Against Order on Extension of Provisional Detention (May 11, 2009); Case of Ieng Thirith, Case No. 002/19-09-2007-ECCC-OCIJ, Decision on Appeal Against Order on Extension of Provisional Detention (May 11, 2009).
[95] *Id.*

place.[96] Additionally, the Pre-Trial Chamber has chosen to offer the OCIJ substantial discretion in exercising their Rule 63(3) authority.

In addition to arguing against detention generally, defense teams have addressed detention conditions. In one of their earlier successes, Ieng Sary's defense won an appeal against an OCIJ decision refusing to authorize visitation between Ieng Sary and Ieng Thirith, who had been married 57 years as of January 29, 2008, when the appeal was lodged.[97] The OCIJ had limited contact between Ieng Sary and Ieng Thirth to once a week.[98] The Pre-Trial Chamber set aside that order, saying it unjustifiably violated the two charged persons' right to be treated with humanity.[99] Following that ruling, defense for Nuon Chea also motioned to have the OCIJ's order segregating the accused set aside.[100] After being rejected by the OCIJ, the defense appealed and the Pre-Trial Chamber granted the appeal, and set aside the OCIJ's segregation order.[101]

Detention conditions may not affect the substantive elements of the relevant cases, but it is worth including because of the potential for improving the day-to-day quality of life of the accused. Kept in pre-trial detention for nearly three years already, and given their old age and the real possibility that one or more may die before ever reaching trial, any improvements in their detention conditions are quite important. Additionally, by defense putting the question to the Pre-Trial Chamber, the Chamber was given an opportunity to uphold certain rights of detainees, a subtle reminder that they are, regardless of the crimes and evidence against them, innocent until proven guilty and, as such, any decisions to limit their freedoms are subject to judicial review.

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[96] Petit, *supra,* at 13.
[97] Case of Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ, Decision on Appeal Concerning Contact Between the Charged Person and his Wife (Apr. 30, 2008).
[98] *Id.* at ¶ 21.
[99] *Id.* at ¶ 21.
[100] Case of Nuon Chea, Case No. 002/19-09-2007-ECCC-OCIJ, Request for Modification of Detention Conditions (Mar. 21, 2008).
[101] Case of Nuon Chea, Case No. 002/19-09-2007-ECCC-OCIJ, Decision on Nuon Chea's Appeal Concerning Provisional Detention Conditions, (Sept. 26, 2008).

IV. GOING TOO FAR: DISRUPTING PROGRESS AT THE ECCC

At the ECCC, some defense counsel have been criticized by the public and sanctioned by the court for engaging in overly disruptive behavior, thought to indicate a desire to undermine or block progress at the court. As discussed above, much of defense's actions thus far actually seem quite desirable and, if not, at least understandable given their duty to protect the rights of their clients. However, there are some notable instances where the defense's conduct seems impermissibly disruptive or abusive, in violation of ECCC rules. Specifically, counsel have verbally abused judges and breached procedural rules.

a) VERBALLY ABUSING JUDGES AND OFFICERS OF THE COURT

While still in its infancy, the ECCC was faced with clearly confrontational, and arguably abusive, conduct from defense counsel for Khieu Samphan. In one of the earlier confrontations between a defense team and the Pre-Trial Chamber, Jacques Verges, Co-Lawyer for Khieu Samphan, intentionally disrupted proceedings in an apparent act of protest against what Verges alleges is an illegitimate tribunal.

Defense for Khieu Samphan had appealed an OCIJ Order to extend Khieu Samphan's provisional detention and an OCIJ Order to deny Khieu Samphan's request for release.[102] After persuading the Pre-Trial Chamber to reject the Co-Prosecutor's suggestion to decide both appeals based on written submissions alone, a hearing had been granted for February 27, 2009, to determine both issues.[103] However, one day before the proceedings, national defense lawyer for Khieu Samphan requested a delay because Verges was not present.[104] The

[102] Case of Khieu Samphan, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 14 and 15), Warning to International Co-Lawyer, ¶ 1 (May 19, 2009).
[103] *Id.* at ¶ 2-4.
[104] *Id.* at ¶ 5.

delay was granted, and the hearing rescheduled for the following day.[105] The following day Verges was absent again and the court granted a motion to delay proceedings once more.[106]

On April 3, 2009, the hearing commenced with Verges present.[107] However, once present, it appears that he was unwilling to participate. When first asked to make his submission to the Chamber, Verges only stated "My friend Mr. Sovan [National Co-Lawyer for Khieu Samphan] has spoken on behalf of the defense. The defense has a joint position. Mr. Sovan has said what I think and I do not feel that there is any need to repeat what he has already said."[108]

Verges broke his refusal to participate in order to solidify his protest of the court with a single statement that directly accused the Chambers of illegitimacy. When asked to discuss his arguments regarding defense's appeal of the OCIJ order, Verges stated "I shall remain silent because the head of state, of this state, has publically stated he wants this Chamber brought to a conclusion."[109] Verges concluded his statement by calling the judges "mere squatters."[110]

Here, the Pre-Trial Chamber utilized their power to sanction misconduct of lawyers and issued Verges two formal warnings: the first for abuse of process due to the hearings he missed;[111] and the second for abusive or offensive conduct due to the inflammatory statements made to the judges.[112] Both warnings were made pursuant to the Chamber's power to sanction misconduct under Rule 38 and pursuant to Article 21(3).[113] Under Rule 28, the ECCC is granted power to sanction lawyers for misconduct, which includes acts or

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[105] *Id.* at ¶ 5.
[106] *Id.* at ¶ 6-7.
[107] *Id.* at ¶ 8.
[108] Case of Khieu Samphan, Case No. 002/19-09-2007-ECCC/OCIJ, Transcripts of Pre-Trial Hearing, p. 24 (Apr. 3, 2009).
[109] *Id*. at p. 46-47.
[110] *Id.* at p. 47.
[111] Samphan, Warning to International Co-Lawyer, *supra*, at ¶ 27.
[112] *Id*. at ¶ 32.
[113] *Id*. at ¶ 31.

statements that the court finds "offensive or abusive, obstructs the proceedings, amounts to an abuse of process, or is otherwise contrary to Article 21(3)".[114]

Given the relative infancy of the ECCC and Verges reputation for disruptive conduct, the Pre-Trial Chamber may have been a little quick to give Verges a warning, but the factual circumstances support the sanction for verbal abuse, which should be prevented in order for the court to maintain control over dignified and efficient hearings.

In another example, discussed above, Verges seemed to exploit translation issues to attack the tribunal.[115] Arguing the OCIJ Order on Translation Rights violates substantial procedural rights[116] and criticizing the Translation Unit as being treated as a "poor cousin within the court…[with] non-existent or unfeasible quality control…"[117], Verges requested the full release of Khieu Samphan.[118] Translation rights were indeed vague, and much of defense's conduct helped build clarity. Verges' words and actions, however, seem to approach blatant disrespect toward the court, without contributing to the substance of his client's case. While the OCIJ's decision that every document on the case file need not be translated is well supported by the Law and Rules governing the ECCC, Verges announced his refusal to participate in proceedings until the entire case file was translated during an April 2008 hearing on the issue.[119] He then marched out of the courtroom and met reporters outside, where he stated "this never happens, except in dictatorships."[120] The OCIJ, in what some saw as a weak response, gave him a mild reprimand for the actions and statements made, and reminded him that his domestic co-counsel was capable of reading all relevant documents, as the Translation Order required translation into Khmer.

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[114] Rul. 38(1).
[115] Case of Khieu Samphan*,* Case No. 002/19-09-2007-ECCC-OCIJ, Request for Annulment for Abuse of Procedure (Aug. 27, 2009).
[116] *Id*. at ¶ 3.
[117] *Id*. at ¶ 19.
[118] *Id.*
[119] *Parlez-vous Khmer?*, Phnom Penh Post (Apr. 28, 2008).
[120] *Id.*

When compared with the ECCC's internal rules and the jurisprudence from other courts, the Pre-Trial Chamber's sanction of Verges for abuse of process and abusive language seems justified.

The Rules of Evidence and Procedure define misconduct as behavior that "…is considered offensive or abusive, obstructs the proceedings, amounts to an abuse of process, or is otherwise contrary to Article 21(3) of the Agreement."[121] The rules of the ICTY and ICTR read almost identically.[122] Further, ICTY Rule 44 disqualifies counsel who have acted in ways that "diminish[es] public confidence in the International Tribunal or the administration of justice, or otherwise bring the International Tribunal into disrepute".[123]

In *Prosecutor v. Jankovic* the ICTY Trial Chamber found that the accused, Radovan Stankovic, committed procedural abuse because his actions were meant only to disrupt and undermine the ICTY Chambers.[124] Stankovic, who had attempted to represent himself, was found to be disrupting procedure because of his practice of starting written submissions to the court with "To the Registry of the Monstrous Fascist Hague Tribunal", submitting written statements characterizing one of his assigned counsel as "an immoral bastard who works for this grotesque Hague Tribunal" and "a notorious scumbag", as well as submitting another statement describing his assigned counsel and an ICTY prosecutor as "fascist spies and complete bastards".[125] The Trial Chamber used these instances as grounds to limit the

[121] Rul. 38(1).
[122] ICTY Rul. 46 (defining misconduct as behavior that is "…offensive, abusive, or otherwise obstructs the proper conduct of the proceedings, or that a counsel…fails to meet the standard of professional competence."); ICTR Rul. 46 (defining misconduct as behavior that "...remains offensive or abusive, obstructs the proceedings, or is otherwise contrary to the interests of justice.").
[123] ICTY Rul. 44(A)(vi).
[124] Prosecutor v. Jankovic, Case No. IT-96-23/2-PT, Decision Following Registrar's Notification of Radovan Stankovic's Request for Self-Representation (Aug. 19, 2005).
[125] *Id*. at ¶ 22-23.

accused person's right to self-representation,[126] which the Chamber notes the accused has a presumptive right to.[127]

In other cases at the ICTY, the Chamber has found it necessary to limit the accused person's right to the lawyer of their choosing or the right to self-representation on grounds of disruptive behavior. In *Prosecutor v. Milosevic*, the Trial Chamber assigned defense counsel to Slobodan Milosevic on the grounds that his medical condition, although unintentional, was acting as an excessive disruption to court proceedings and therefore justified limiting Milosovic's right to represent himself, which he desired to exercise.[128] The Appeals Chamber upheld the decision, stating that unintentional disruptions can also give rise to limitations on the accused person's right to represent his or her self.[129]

It may be pointed out that in *Jankovic* and *Milosevic* it was the accused person making verbally abusive comments, not the lawyer. Regardless, it would seem the standard for defining abusive language would be similar, if not the same, for both accused persons and their defense counsel. In both of the above cases, the accused person's disruptive behavior led the courts to limit both person's right to self-representation. Although different from the warning to Verges, it seems that removing a presumptive right is substantially more severe than a warning, and thus, considering that both Verges and Stankovic made similar comments meant to insult and undermine officials of the respective tribunals, the PTC seems justified in labeling and warning Verges's disruptive and abusive behavior as misconduct.

Based on the rules and jurisprudence, and considering the totality of the circumstances, it seems that Verges's verbal attacks were fairly characterized as undesirable misconduct that should be prevented at the court. Refusing to participate in proceedings that

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[126] *Id*. at ¶ 25.
[127] *Id*. at ¶ 8.
[128] Prosecutor v. Milosovic, Case No. IT-02-54, Hearing, T.32357-32359 (Sept. 2, 2004).
[129] Milosovic v. Prosecutor, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, ¶ 19 (Nov. 1, 2004).

had been delayed multiple times at his explicit request, then only speaking to insult the tribunal with abusive language seems to fit any reasonable interpretation of behavior that is "abusive, or otherwise obstructs the proper proceeding," as does Verges's characterization of the court as a "dictatorship" in a statement made to the press.

While not cited by the court, Verges's statements also seem to violate the rules of ethics applicable at the ECCC by publically diminishing the respect due to the judges of the ECCC. Indeed, Article 24 of the Ethical Code of the Cambodian Bar, incorporated into the ECCC Law through Article 21(3), requires counsel to preserve dignity and respect of judges and prevents counsel from engaging in disruptive or disloyal conduct.[130] Additionally, with regard for Verges's pubic statements, Article 15 of the Ethical Code of the Cambodian Bar prohibits counsel from engaging in any "public or media activities…unless in strict conformity with professional obligations."[131] It goes on to state that "[s]uch activities require the greatest prudence […and] [t]he President must be informed and, unless impossible, consulted prior to the activities."[132]

There may be some argument for justifying Verges's behavior on the grounds of zealous representation, in line with the adversarial legal tradition; a tradition once captured in the famous quote: "[A]n advocate…knows but one person in the world, and that person is his client. To save that client by all means and expedients…is his first and only duty…[and] he must go on reckless of consequence".[133]

However, the inquisitorial legal model animating the ECCC seeks a more objective approach, where all actors involved in the adjudication process are generally expected to

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[130] Bohlander, *supra*, 855 (citing The Code of Ethics for Lawyers Licensed with the Bar Association of the Kingdom of Cambodia, Art. 24).
[131] *Id*. at 854 (citing The Code of Ethics for Lawyers Licensed with the Bar Association of the Kingdom of Cambodia, Art. 15).
[132] *Id.*
[133] Turner, *supra*, at 687 (quoting 2 Trial of Queen Caroline 3 (James Cockcroft & Co 1874)).

work toward finding the truth[134] and "aggressive defense lawyers are more likely to [be seen as placing] obstacles on the road to truth."[135] While it's also important to note that many legal systems based on the inquisitorial tradition, including France's, have incorporated increasingly adversarial Defense tactics into their respective systems,[136] Verges's conduct seems to violate even the rules of conduct at the relatively more adversarial ICTY and ICTR.

b) VIOLATING PROCEDURE

Discussed earlier, the OCIJ's investigation into criminal acts is a crucial part of the adjudication process that can result in an indictment of one or more individuals, and, where there is an indictment, there is an accompanying case file that includes all of the facts and evidence gathered for trial. Here, the OCIJ is tasked with investigating substantially complicated allegations against multiple people. At the same time the OCIJ responds to requests from the OCP and defense, which must be addressed by the OCIJ before the end of the judicial investigation and which are subject to appeals.[137] Therefore, the sanctionable act of filing duplicitous or frivolous requests, or engaging in an otherwise obstructionist manner, can be particularly harmful in the context of ECCC Case 2.

In a recent instance, the defense team for Ieng Sary was sanctioned for filing duplicitous requests concerning matters already judicially addressed.[138] Here, Ieng Sary's defense team had re-raised issues of impartiality and a lack of confidence in the Co-Investigating Judges, despite the issue having been resolved by the OCIJ and addressed on appeal in the Pre-Trial Chamber.[139] As a result, the OCIJ issued a Rule 38 warning for

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[134] Turner, *supra*, at 699.
[135] *Id*. at 700.
[136] *Id*. at 699.
[137] Rule 55(10).
[138] Case of Ieng Sary, Case No. 002/19-09-2007-ECCC-OCIJ, Order Issuing Warning Under Rule 38 (Feb. 25, 2010).
[139] *Id.* at ¶ 11.

misconduct to the defense team, instructing them to cease all duplicitous filings and advising them that future violations would result in sanctions.[140]

In the same filing, the OCIJ also issued the defense for Ieng Sary two other warnings: one for violating the filing instructions and the other for violating confidentiality of the investigation.[141]

With regard to the first, it was a seemingly minor procedural issue where defense had been marking their filings to the OCIJ as "public".[142] If a party recommends a classification, such as public or confidential, the OCIJ requires that the filing state "the classification suggested by the party", which defense had not included in some past filings.[143]

With regard to the warning for violating confidentiality, in December of 2008 the defense team for Ieng Sary sent a letter to the ECCC Office of Administration stating "[t]he current practice by the Judicial Chambers and the Co-Investigating Judges…of suppressing defense filings which may be embarrassing or which call into question the legitimacy and judiciousness of acts and decisions of the judges…must be discontinued".[144] Ieng Sary's defense team then opened and maintained a website where they posted 9 case file documents, some of which were confidential.[145] The publishing of confidential documents was done roughly 10 days after they had received a letter from the OCIJ directing them not to publish any documents and reminding defense that "it is for the judges, not parties, to decide when and how to disclose confidential case file material."[146]

Despite the value of having defense engaged in the investigation process, filing frivolous pleadings and publishing confidential information causes unnecessary delays in

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[140] *Id.* at ¶ 15.
[141] *Id.*
[142] *Id.*
[143] *Id*.
[144] Case of Ieng Sary, Case No. 002/19-09-2007-ECCC-OCIJ, Order on Breach of Confidentiality, ¶ 2 (Mar. 3, 2009).
[145] *Id*. at ¶ 18-19.
[146] *Id*. at ¶ 3-5.

procedure and undermines respect for the court. Therefore, applying sanctions for such procedural abuse seems necessary and desirable to ensure the efficient conduct of trials.

Indeed, other courts have ruled similarly when confronted with accused persons abusing process. With regard to publishing confidential information, in *Prosecutor v. Seselj*, the ICTY Trial Chamber sanctioned the accused, Vojislav Seselj, for contempt of court in violation of Rule 77(A)(ii) when he published a book that contained confidential information concerning protected witnesses in his trial.[147] Seselj was sentenced to 15 months in prison for this conviction.[148] He was indicted on another charge of contempt for identical behavior – publishing confidential information about witnesses – in February of 2010.[149] Admittedly, in *Seselj* the information was about protected witnesses, a substantial fact not present in Ieng Sary's case. Also distinguishing the two cases, Ieng Sary's defense was sanctioned pursuant to Rule 38's definition of misconduct, not contempt, as was the case in *Seselj*. Regardless of the distinctions, publishing confidential information in direct violation of an OCIJ directive seems to be intentionally abusive of process and causes unnecessary delays, as the OCIJ and Pre-Trial Chamber must sanction the accused, then respond to appeals on the issue. In addition to the procedural distraction, by directly violating a court directive, the defense seems to undermine the respect that must be accorded court decisions.

Similarly, filing frivolous motions creates unnecessary procedural delays and shows mild disrespect to the court by raising issues that have already been decided. In another instance involving Vojislav Seselj, the accused person was cited by the ICTY Trial Chamber for obstructionism after he engaged in numerous disruptive tactics, including filing frivolous

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[147] Prosecutor v. Seselj, Case No. IT-03-67-PT, Judgment on Contempt Charge (Jul. 24, 2009).
[148] *Id.*
[149] Prosecutor v. Seselj, Case No. IT-03-67-R.77.3, Public Redacted Version of Second Decision on Prosecution's Motion Under Rule 77 Concerning Further Breaches of Protective Measures (Feb. 4, 2010).

motions.[150] The ICTY Trial Chamber noted the defendant, Seselj, was guilty of procedural abuse because his attitude and actions "substantially and persistently" obstructed the court.[151]

As the jurisprudence clearly indicates, some aggressive tactics can be expected from defense, but to the extent the court wishes to have a respectable and efficient process, it is essential to actively prevent defense from filing frivolous motions or violating court orders.

V. CONCLUSION

Thus far, defense at the ECCC have greatly enhanced the court's ability to produce a fair trial, respectful of the accuseds' rights. Through their efforts, detention conditions have been improved, corruption and partiality have been vigorously combated, translation rights have been clarified, and the OCIJ has been afforded defense's valuable guidance. However, there remain some instances where defense counsel, in their pursuit of a fair trial, have overstepped permissible boundaries of advocacy by verbally abusing judges and causing unnecessary disruptions and delays through procedural violations.

[150] Prosecutor v. Seselj, Case No. IT-03-67-PT, Decision on Assignment of Counsel (Aug. 21, 2006).
[151] Prosecutor v. Seselj, Case No: IT-03-67-PT, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defense, ¶ 26 (May 9, 2003).