D158/5/4/10

BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

Appeal Nos.	:	002/19-09-2007-ECCC/OCIJ (PTC 19, ~~20, 21 & 22~~)
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CO-PROSECUTORS' JOINT RESPONSE TO DEFENCE APPEALS AGAINST THE CO-INVESTIGATING JUDGES' ORDER DENYING REQUEST FOR INVESTIGATIVE ACTION REGARDING ALLEGATIONS OF ADMINISTRATIVE CORRUPTION

Filed by:

Office of the Co-Prosecutors:
CHEA Leang
Robert PETIT
YET Chakriya
William SMITH
SENG Bunkheang
Vincent de WILDE d'ESTMAEL
Anees AHMED

Distribute to:

Pre-Trial Chamber:
Judge PRAK Kimsan, Presiding
Judge Rowan DOWNING QC
Judge NEY Thol
Judge Katinka LAHUIS
Judge HUOT Vuthy

Counsel for the Charged Persons / Appellants:
SON Arun
Michiel PESTMAN
ANG Udom
Andrew IANUZZI
Michael G. KARNAVAS
PHAT Pouv Seang
Diana ELLIS
SAR Sovan
Jacques VERGES

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1. INTRODUCTION

1.1 Background

1. The Co-Prosecutors file this joint response ("Response") to the appeals ("Appeals") of Charged Persons NUON Chea,[1] IENG Sary,[2] IENG Thirith[3] and KHIEU Samphan[4] ("Appellants") that separately seek the reversal of the Co-Investigating Judges' common order ("Order") on request for investigative action ("Request") regarding allegations of administrative corruption in this Court.[5] The Request, submitted by NUON Chea, asked the Co-Investigating Judges to obtain and disclose certain information regarding allegations of administrative corruption, including the report of an inquiry conducted by the United Nations Office of Internal Oversight Services ("OIOS Report") in relation to those allegations.[6] The Request also "invited" the Co-Investigating Judges to request an administrative enquiry into allegations.[7] IENG Sary, IENG Thirith and KHIEU Samphan filed motions before the Co-Investigating Judges to "join", "adopt" or "support" the Request.

2. The Order refused the Request. According to it, (1) the Co-Investigating Judges "lack jurisdiction to accomplish the requested investigative action"; and (2) there were "no grounds to request an administrative investigation".[8]

1.2 All Appeals concern the same issues

3. Notwithstanding that the Order was issued on the basis of substantive submission by only one party (NUON Chea), the Order, as stated, has been appealed by four Charged Persons,

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1 *Case of NUON Chea,* Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 21), Appeal Against Order on Eleventh Request for Investigative Action, 4 May 2009, D158/5/1/1 [*hereinafter* NUON Chea('s) Appeal].

2 *Case of IENG Sary,* Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 20), Ieng Sary's Appeal Against the Co-Investigating Judges' Order on Request for Investigative Action Regarding Ongoing Allegations of Corruption and Request for an Expedited Oral Hearing, 4 May 2009, D158/5/3/1 [*hereinafter* IENG Sary('s) Appeal].

3 *Case of IENG Thirith,* Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 19), Ieng Thirith Appeal Against the Office of the Co-Investigating Judges' "Order on Request for Investigative Action" of 3 April 2009, 4 May 2009, D158/5/4/1 [*hereinafter* IENG Thirith('s) Appeal].

4 *Case of KHIEU Samphan,* Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 22), *Appel de la défense de M. Khieu Samphan contre l'ordonnance des co-juges d'instruction sur demande d'acte d'instruction en date du 03 avril 2009*, 4 May 2009, D158/5/2/1 [*hereinafter* KHIEU Samphan('s) Appeal].

5 *Case of NUON Chea,* Case File No. 002/19-09-2007-ECCC-OCIJ, Order on Request for Investigative Action, 3 April 2009, D158/5 [*hereinafter* Order].

6 *Case of NUON Chea,* Case File No. 002/19-09-2007-ECCC-OCIJ, Eleventh Request for Investigative Action, 27 March 2009, D158 [*hereinafter* Request].

7 Request, para. 22.

8 Order, para. 13.

all of whom are parties to Case File No. 002. Their Appeals, therefore, raise common or similar facts and questions of law.

4. NUON Chea's Appeal submits that the Co-Investigating Judges' rejection of the Request was "incorrect as a matter of law, public-policy, and common sense."[9] It argues that the Co-Investigating Judges' jurisdiction is "not nearly as limited as the Order suggests", and that they have the inherent power to provide the requested relief.[10] The Appeal contends that the Request was sufficiently factually motivated given the relief sought,[11] and that it would be "futile" to await resolution of the corruption matter by the Government of Cambodia and/or the United Nations.[12]

5. IENG Sary's Appeal likewise submits that the requested action fell within both the statutory[13] and inherent[14] jurisdictions of the Co-Investigating Judges, the latter relating to this Court's duty to ensure that its judicial proceedings are fair and impartial.[15] This Appeal, following NUON Chea's Appeal, argues that the elements of the Request were "clearly identified [and] manifestly relevant to the unqualified right to a fair trial"[16] and that the Co-Investigating Judges took an "overly restrictive approach to setting the limits of [their] statutory jurisdiction".[17]

6. IENG Thirith's Appeal merely adopts the arguments set out in NUON Chea's Appeal.[18]

7. KHIEU Samphan's Appeal, similar to NUON Chea's Appeal, argues that the Co-Investigating Judges have the jurisdiction to accept the Request.[19] This Appeal claims that a

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9 NUON Chea Appeal, para. 35.
10 *Id*, paras. 22-25.
11 *Id*, paras. 26-30.
12 *Id*, paras. 31-34.
13 IENG Sary Appeal, paras. 18-21.
14 *Id*, paras. 22-34.
15 *Id*, para. 22.
16 *Id*, p. 1.
17 *Id*, para. 13.
18 "The Appellant adopts the arguments set out in the "NUON Chea Appeal Against Order on Eleventh Request for Investigative Action": IENG Thirith Appeal, para. 6.
19 KHIEU Samphan Appeal, para. 7.

failure by the Co-Investigating Judges to undertake the requested action amounts to violation of the rule of law and a failure to provide an equitable and just judicial process.[20]

2. SUMMARY OF ARGUMENT

8. Allegations of corruption within the ECCC—specifically, that certain national administrative officials paid money to obtain and/or retain their positions within this Court[21]—have unduly tainted the reputation of this Court and raised doubts about its credibility and legacy. Corruption, in any form, is unacceptable and must be investigated and dealt with by the appropriate authorities. The Co-Prosecutors affirm their desire to see this issue, which has plagued the Court for more than two years, swiftly and satisfactorily resolved.

9. However, in the circumstances of these Appeals, the requested investigative action falls outside the scope of the powers of the Co-Investigating Judges. Nor does any inherent power of this Court enable them to accept and act on the Request. The Co-Investigating Judges' power to undertake investigative action is limited to the confines of this Court's substantive jurisdiction to bring to trial senior leaders and those who were most responsible for the crimes committed under Democratic Kampuchea between 1975 and 1979,[22] and "the facts set out in an Introductory Submission or a Supplementary Submission".[23]

10. In addition, there is nothing in the Appeals that establishes any nexus between the alleged corrupt conduct and the judicial decision making of this Court; nor do the Appeals allege any infringement of the fair trial rights of the Appellants. If that was indeed the case, then the Co-Investigating Judges would have had the power to (1) sanction any interference in the administration of justice (Internal Rule 35 ("Rules")), (2) seek annulment of tainted proceedings for "procedural defects" (Rule 76), (3) act to disqualify one or both of themselves for bias (Rule 34).

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20 *Id*, para. 16.

21 See Request, paras. 4-11; NUON Chea Appeal, paras. 2-6; IENG Sary Appeal, para. 2.

22 Law on the Establishment on the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, amended pursuant to the Agreement on 27 October 2004, NS/RKM/1004/006, Art. 2 [*hereinafter* ECCC Law].

23 Internal Rules (Rev. 3), as revised on 6 March 2009, Rule 55(2) [*hereinafter* Rules].

11. The allegation that certain national administrative officials of this Court pay money to obtain or to retain their positions, while clearly unacceptable in any institution, particularly a judicial body, falls either (1) under the disciplinary jurisdiction of the Government of Cambodia (Rule 6(5)), or (2) under the ordinary criminal jurisdiction of the municipal court of Phnom Penh. While the Government of Cambodia and the United Nations, in the recent past, have been meeting actively and regularly to create a meaningful oversight mechanism, the principal Appellant NUON Chea's foreign counsel have also invoked criminal proceedings before the municipal criminal courts. Both these activities are ongoing.

12. For these reasons, the Co-Prosecutors request that the Pre-Trial Chamber dismiss the Appeals.

3. NATURE OF THIS RESPONSE

3.1 Corruption allegations are unproven

13. The Co-Prosecutors note that there have been allegations, over a two-year period, of payment of money by national staff of the ECCC to obtain or retain positions in the Court—acts which may or may not have taken place. The Co-Prosecutors, therefore, do not take any position on all the factual submissions made by the Appellants, except to the extent that the Co-Prosecutors directly address in this Response.

3.2 Admissibility of Appeals not denied

14. As stated, the Appeals have been separately filed by Charged Persons NUON Chea, IENG Sary, IENG Thirith and KHIEU Samphan while the impugned Order was essentially issued on the substantive Request of a single party, NUON Chea. However, in the interests of justice and to ensure a quick resolution of the Appeals, the Co-Prosecutors do not take any position on the issue of standing of IENG Sary, IENG Thirith and KHIEU Samphan to file their Appeals, or the admissibility of those Appeals.

3.3 Nature of the Appeals warrants a joint response by the Co-Prosecutors

15. As stated, and previously raised by the Co-Prosecutors in their application for extension of page and time limits to file their joint response to the Appeals, the Appeals are directed

against a common order of the Co-Investigating Judges.[24] The Appeals also raise similar facts and issues of law.[25] On these considerations, and in the interest of judicial economy, it is appropriate that the Appeals are dealt with, and decided, jointly by the Pre-Trial Chamber.[26] The Co-Prosecutors, accordingly, file this Response as a joint response to the Appeals to assist the Pre-Trial Chamber in its determination of the issues raised.

4. PRELIMINARY OBSERVATIONS

4.1 Oral Hearing

16. Each of the Appellants requests a public oral hearing of the Appeals.[27] The Co-Prosecutors do not take a position on this issue.

17. IENG Sary's Appeal also requests that, if an oral hearing is granted, each party should be allowed to be heard for approximately an hour and a half.[28] In respect of the Appellant IENG Thirith, this would be completely superfluous, since her Appeal merely adopts the arguments set out in NUON Chea's Appeal.[29] By supporting in full NUON Chea's Appeal, IENG Thirith is taking the position that her interests will be adequately represented by NUON Chea's arguments. The right to be heard does not necessarily entitle an Appellant to an oral hearing; it may include a reasoned and public determination on written pleadings alone.[30] This is sufficient for the requirements of fairness of proceedings.[31]

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24 *Case of NUON Chea et al*, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 19, 20, 21 & 22), Co-Prosecutors' Application for Extension of Page and Time Limits to File Their Joint Response to the Appeals Against the Corruption Order, 6 May 2009, D158/5/4/2, para. 2.

25 *Ibid.*

26 *Ibid.*

27 NUON Chea Appeal, para. 35; IENG Sary Appeal, paras. 9-12; IENG Thirith Appeal, para. 7; KHIEU Samphan Appeal, para. 34.

28 IENG Sary Appeal, para. 11.

29 IENG Thirith Appeal, para. 6.

30 *Jussila v. Finland*, Judgment, 23 November 2006, Application No. 73053/01, Grand Chamber of the European Court of Human Rights, para. 41.

31 *Vilho Eskelinen et al v. Finland*, Judgment, 19 April 2007, Application No. 63235/00, Grand Chamber of the European Court of Human Rights, para. 74.

5. RESPONSE

5.1 Introduction

18. The key issue raised in the Appeals is whether the Co-Investigating Judges have the power, in law, to accept the Request. To answer this question, the Co-Prosecutors shall address: (1) the jurisdiction of the Co-Investigating Judges, statutory or inherent, to accept the Request; and (2) the nature of this Court's duty to protect fair trial rights of the defendants and to ensure the integrity of its proceedings and processes.

5.2 Alleged corruption at the ECCC

5.2.1 Corruption is abuse of power and must be addressed

19. Corruption, defined as the abuse, or misuse, of entrusted power for private gain,[32] is anathema to justice. Insidiously, and despite international and national human rights guarantees that judges shall be independent and impartial, corruption has intruded into judicial systems in nations across the world.[33] Where judicial corruption occurs, the damage can be pervasive and extremely difficult to reverse. Such abuse of power can result in inappropriate influence on the impartiality and independence of the judicial processes and can distort the course of justice.[34]

20. Corrupt activity must be addressed. The ECCC must not only operate, but be seen to operate, to the highest standards of transparency and fairness given the nature of the proceedings and the seriousness of the charges brought against defendants tried before it.[35] In particular, this Court must exhibit basic judicial guarantees of independence and impartiality and afford to those tried before it fair and public hearings consistent with the concepts of natural justice, or due process, under domestic and international legal systems.[36] Mixed or hybrid courts, such

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32 Diana Rodriguez, ed., "Executive Summary: Key Judicial Problems" in Global Corruption Report 2007: Corruption in Judicial Systems (Transparency International, 2007), p. xxi [*hereinafter* Global Corruption Report].

33 See Justice Michael Kirby, 'Tackling Judicial Corruption – Globally', speech at the St James Ethics Centre, Sydney, available at: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_stjames.htm

34 Diana Rodriguez, ed., "Executive Summary: Key Judicial Problems" in Global Corruption Report, p. xvi.

35 *Prosecutor v. Jean-Paul Akayesu,* Case No. ICTR-96-4-T, Judgement, 2 September 1998. The ICTY stated that the seriousness of the charges brought against the accused meant the ICTY carries an obligation consistent with national and local courts to provide the accused with a fair trial in full respect of all his or her rights: para. 29.

36 'ILOAT Reform', Opinion prepared by Geoffrey Robertson Q.C., Doughty Street Chambers, London,

as this one, bear the additional burden of setting best practice examples for domestic courts to follow.[37] If the ECCC is not independent and impartial, it cannot administer justice fairly in accordance with national and international human rights standards.[38] The perceived independence and impartiality of international and hybrid courts and tribunals are important requisites for legitimacy in the eyes of the parties, potential litigants and the international community.[39] The notions of independence and impartiality are indispensable to the long-term reputation and credibility of international and internationalized adjudication.[40]

5.2.2 The alleged administrative corruption does not constitute judicial corruption

21. The factual history of the corruption allegations is set out in the Request.[41] The Co-Prosecutors consider that they do not need to address their veracity for the determination of these Appeals. The Co-Prosecutors, therefore, do not do so.

22. When corrupt behaviour is associated with a court, it is often perceived as judicial corruption, in the sense of corrupt acts or omissions (such as bribery) resulting in improper and unfair delivery of judicial decisions.[42] However, it is a dangerous misconception that this is always, or necessarily, so.

23. The allegations of corruption that are the subject of these Appeals are outside the judicial processes of the ECCC. The behaviour in question is "corrupt" in that it is an act that misuses power for private gain (financial gain for the person/s in receipt of the money, and employment for the staff member); yet it does not result in, and is in fact in no way linked to, the improper or unfair delivery of judicial decisions. A bribed judge will, of course, be

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for the Information Meeting on the ILO Administrative Tribunal Reform and related matters. Available online at http://www.ilo.org/public/english/staffun/info/iloat/robertson.htm

37 Yuval Shany & Sigall Horovitz, Judicial Independence in The Hague and Freetown, *Leiden Journal of International Law*, 21 (2008), p. 120 [*hereinafter* Shany & Horovitz].

38 United Nations Press Release, "The United Nations Special Representative of the Secretary General for human rights in Cambodia and the Special Rapporteur on the Independence of Judges and Lawyers express concern over judicial independence in Cambodia in the light of recent judicial appointments", 23 August 2007.

39 Shany & Horovitz, p. 120.

40 *Ibid.*

41 Request, paras. 4-14. See also NUON Chea Appeal, paras. 2-6, IENG Sary Appeal, para. 2.

42 Mary Noel Pepys, "Corruption within the Judiciary: Causes and Remedies", in Global Corruption Report, p. 4. Transparency International, a civil society organisation fighting against corruption globally, identifies two types of corruption that most affect judiciaries: political interference in judicial processes by the government, and bribery: Diana Rodriguez, ed., "Executive Summary: Key Judicial Problems" in Global Corruption Report, p. xxii.

neither independent of the parties, nor impartial and a criminal acquittal or conviction before a judge who accepts a bribe to secure that result is "extravagantly flawed".[43] The element of "the equality of arms", or the procedural equality of the parties, would be clearly missing. However, nothing in the present Appeals suggests that this Court is faced with any conduct of this sort, as the corrupt behaviour in question—assuming it were true—concerns the payment of money to secure employment by certain administrative officials—as distinct from the payment of a bribe to secure a particular judicial decision.

5.3 Applicable Law

5.3.1 Fundamental principles governing this Court

24. This Court was created by an agreement between the United Nation and the Government of Cambodia ("Agreement"):

> to bring to trial senior leaders of Democratic Kampuchea and 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 recognised by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.[44]

25. The Agreement states that this Court shall exercise its jurisdiction in accordance with international standards of justice, fairness and due process of law as set out in articles 14 and 15 of the International Covenant on Civil and Political Rights ("ICCPR").[45] The Agreement applies as law in Cambodia and binds this Court.[46]

26. The Agreement also stipulates that the judicial investigation of the Co-Investigating Judges should be limited to:

> senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions

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[43] Thomas M. DiBiagio, 'Judicial Corruption, the Right to a Fair Trial, and the Application of Plain Error Review: Requiring Clear and Convincing Evidence of Actual Prejudice or Should we Settle for Justice in the Dark?' (1998) 25 *American Journal of Criminal Law* 595, p. 627.

[44] ECCC Law, art. 2.

[45] Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of the Crimes Committed Under the Period of Democratic Kampuchea, 6 June 2003, art. 12(2) [*hereinafter* Agreement].

[46] ECCC Law, art. 47.

> recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.[47]

27. The Agreement envisaged that the procedure of this Court shall be in accordance with the Cambodian law.[48] Where existing Cambodian procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, guidance may be sought in procedural rules established at the international level.[49]

5.3.2 Statutory powers of the Co-Investigating Judges

5.3.2.1 General

28. While the Agreement and the Law on the Establishment of the ECCC ("ECCC Law") are the founding documents of this Court, the Rules consolidate applicable procedural law before this Court as mandated by Article 12(1) of the Agreement and Articles 20, 23 and 33 of the ECCC Law.[50] Pursuant to the Rules, the Co-Investigating Judges have powers to, among other things, (1) undertake investigative action, and (2) take action regarding conduct that interferes with the administration of justice.

5.3.2.2 Power to investigate

29. First, as regards the power to undertake investigative action, Rule 55(10) provides Charged Persons the right to request, "[a]t any time during an investigation", the Co-Investigating Judges to "make such orders or undertake such investigative action as they consider necessary for the conduct of the investigation". Rule 58(6) further provides that, at any time during an investigation, a Charged Person may request the Co-Investigating Judges to, among other things, "collect other evidence on his or her behalf".

30. The Co-Investigating Judges are also empowered, in the conduct of judicial investigations, to take "any investigative action conducive to ascertaining the truth".[51] In all cases, they are mandated to conduct their investigation impartially, whether the evidence is incriminatory or

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47 Agreement, art. 5(3).
48 *Id*, art. 12(1)
49 *Ibid*; ECCC Law, art. 20.
50 Rules, Preamble.
51 Rule 55(5).

exculpatory. To that end, they may "seek information and assistance from any state, the United Nations or any other intergovernmental or non-governmental organization, or other sources that they deem appropriate".[52] Article 23 of the ECCC Law provides that in carrying out the investigations, the Co-Investigating Judges "may seek the assistance of the Royal Government of Cambodia, if such assistance would be useful to the investigation, and such assistance shall be provided."

31. The Rules do no explicitly define the expression "investigative action". However, the Pre-Trial Chamber has held that the meaning of this expression can be inferred.[53] The Pre-Trial Chamber found that:

> requests for investigative actions should be interpreted as being requests for action to be performed by the Co-Investigating Judges or, upon delegation, by the ECCC investigators or the judicial police, with the purpose of collecting information conducive to ascertaining the truth.[54]

32. The Co-Investigating Judges' power to undertake investigative action is limited under the Rules to "the facts set out in an Introductory Submission or a Supplementary Submission."[55] Their power is also limited to their jurisdiction under Article 2 of the ECCC Law.[56]

5.3.2.3 Power to sanction

33. Second, the Rules provide that the "ECCC [including the Co-Investigating Judges] may sanction or refer to the appropriate authorities, any person who knowingly and wilfully interferes with the administration of justice".[57] For the punitive sanction of this provision to trigger: (1) a person must interfere with the administration of justice, and (2) this interference must be done knowingly and wilfully.

34. A punitive sanction under Rule 35 can be initiated after the relevant judicial authority has a reason to believe that a person may have committed an act leading to interference with the

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52 *Ibid.*

53 *Case of KHIEU Samphan*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC11), Decision on Khieu Samphan's Appeal Against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/I/20, para. 23.

54 *Id,* para. 28. See also *Case of IENG Sary,* Case File No. 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, A190/II/9, para. 21, where the Pre-Trial Chamber held that Rule 58(6) "refers only to actions that aim at gathering evidence".

administration of justice. Upon this belief, the authority may: (1) deal with the matter summarily, (2) conduct further investigation, or (3) refer the matter to the appropriate authorities of the Government of Cambodia or the United Nations.[58] Cambodian law applies "in respect of sanctions imposed" against the person found to be in breach of Rule 35.[59]

5.3.2.4 Disqualification mechanism

35. Additionally, the Rules also provide the mechanism for disqualification of ECCC judges, including the Co-Investigating Judges. Pursuant to Rule 34, any party may file an application for disqualification of a judge in any case (1) in which the Judge has a personal or financial interest, or (2) concerning which the Judge has, or has had, any association which objectively might affect his or her impartiality, or objectively give rise to the appearance of bias.[60] A party who files an application for disqualification of a judge must clearly indicate the grounds for disqualification, and provide supporting evidence.[61]

5.3.3 Powers recognised as "inherent" by other courts are statutory at the ECCC

36. Various *ad hoc* international tribunals, like those for the former Yugoslavia ("ICTY"),[62] Rwanda ("ICTR")[63] and Sierra Leone ("SCSL"),[64] and permanent judicial bodies such as the International Criminal Court ("ICC")[65] and the International Court of Justice ("ICJ"),[66] have recognised inherent powers, deriving from their judicial functions, to control their proceedings in such a way as to ensure that justice is done.[67] The ICJ, in the *Northern*

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55 Rule 55(2).
56 Similarly, the French system confines investigating judges' authority to the allegations set forth in the investigatory charge: French Code of Criminal Procedure (Code de Procédure Pénale), arts. 79-190.
57 Rule 35(1).
58 Rule 35(2).
59 Rule 35(5).
60 Rule 34(2).
61 Rule 34(3).
62 ICTY Rules of Procedure and Evidence, rule 15(A).
63 ICTR Rules of Procedure and Evidence, rule 15(A)..
64 SCSL Rules of Procedure and Evidence, rule 15(A).
65 ICC Rules of Procedure and Evidence, rule 34(1).
66 Statute of the ICJ, art. 17(2).
67 See, generally, in relation to such inherent power: *Northern Cameroons Case* (*Cameroon v United Kingdom*) ICJ Reports 1963, pp. 29, 103-104 [*hereinafter* Northern Cameroons]; *Nuclear Tests Case* (*Australia v France*) ICJ Reports 1974, para. 23, both cases followed by the ICTY Appeals Chamber in *Prosecutor v Blaskic*, Case IT-95-14-AR108bis, Judgment on Request of Republic of Croatia for Review of Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 25 [*hereinafter* Blaskic Subpoena Decision].

Cameroons Case in 1963, and in the *Nuclear Tests Case* in 1974, reiterated the existence of the inherent jurisdiction of an international judicial body "enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits [...] shall not be frustrated", and on the other, to provide for the orderly settlement of all matters in dispute to ensure the observance of the "inherent limitations on the exercise of the judicial function" of the judicial body, and to "maintain its judicial character".[68]

37. These inherent powers become particularly relevant when the tribunals deal with matters of procedure, for it is these matters that primarily ensure that the trial is fair and expeditious.[69] These powers are expressed, in part, in the discretion given to the criminal tribunals to frame their procedural rules and to do such things as are necessary for the preparation and conduct of the trial.[70]

38. The inherent powers doctrine is commonly invoked with reference to a tribunal's power to deal with conduct that interferes with the administration of justice.[71] The power of a tribunal to punish conduct "which tends to obstruct, prejudice or abuse its administration of justice"[72] is necessary to ensure that its exercise of the jurisdiction is not frustrated and that its judicial functions are safeguarded.[73] Essentially then, inherent powers enable a court to ensure that its proceedings are fair.[74]

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68 *Northern Cameroons,* p. 29; cited in *Prosecutor v. Beqa Beqaj,* Case No. IT-03-66-T-R77, Judgement on Contempt Allegations, 27 May 2005, para. 11 [*hereinafter,* Beqa Beqaj Contempt Judgment].

69 *Prosecutor v. Delalic et. al.,*Case No. IT-96-21-A, Separate opinion of Judge Hunt on Motion by Esad Landzo to Preserve and Provide Evidence, Trial Chamber III, 22 April 1999, para. 3 [*hereinafter* Delalic].

70 Blaskic Subpoena Decision, para. 25. The Blaškic Subpoena Decision was in turn followed in *Prosecutor v Tadic*, Case IT-94-1-A, Judgment, 15 July 1999, para. 322.

71 Blaskic Subpoena Decision, footnote 27; *Prosecutor v Tadic,* IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000 [*hereinafter,* Tadic Contempt Judgment]. See also Beqa Beqai Contempt Judgment, para. 9.

72 Tadic Contempt Judgment, para. 16, quoting a passage from the Report of the (UK) Committee on Contempt of Court, published in 1974, which is "widely accepted as a correct assessment of the purpose and scope of the law of contempt at common law as developed over the centuries".

73 *Id*, para. 18.

74 *Prosecutor v. Blagojevic*, IT-02-60-AR73.4, Public and Redacted Reason for Decision on Appeal by Vidoje Blagojevic to Replace his Defence Team, 7 November 2003, para. 7: "the only inherent power that a Trial Chamber has, is to ensure that the trial of an accused is fair".

39. Notwithstanding, these inherent powers have been codified at the ECCC, consistent with the practice of civil law jurisdictions.[75] The power of this Court to punish those who knowingly and wilfully interfere with its administration of justice (similar to contempt in other jurisdictions)[76] is statutorily recognised in this Court's basic documents. The Rules, as discussed above, mandate the judges of this Court to take action regarding conduct that interferes with the administration of justice (Rule 34). In addition, Article 33 of the ECCC Law and Rule 21(1) mandate all organs of this Court, including the Co-Investigating Judges, to ensure that proceedings before it, among other things, are "fair".[77] Owing to this codification of inherent powers, recognition of those powers at the ECCC is unnecessary and immaterial.

5.3.4 Fair trial rights of defendants tried by this Court

40. The principles of a fair, independent and impartial tribunal are fundamental and universal, mandated by international human rights law[78] and reflected in the founding documents of this Court. Consistent with the spirit of the Agreement and the ECCC Law, and given the "inherent specificity" of this Court, Rule 21(1) entrenches "fundamental principles" including that proceedings before this Court shall be "fair and adversarial"[79] and that all the basic documents of this Court must be interpreted "to always safeguard the interests of the [defendants] and victims and so as to ensure [...] transparency of proceedings."[80]

41. Quoting Article 35(new) of the ECCC Law, the Pre-Trial Chamber noted that defendants before this Court enjoy fair trial rights "from the beginning of the judicial investigation."[81] In a similar vein, the International Criminal Court ("ICC")—whose investigative phase is not

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75 Tadic Contempt Judgment, para. 17. For example, the German Penal Code punishes as a principal offender anyone who incites a witness to make a false statement, and the French *Nouveau Code Penal* punishes those who pressure a witness to give false evidence or to abstain from giving truthful evidence – see Tadic Contempt Judgment, footnote 20.

76 Tadic Contempt Judgment, paras. 16, 26. See also *Prosecutor v. Delalic et. al.* IT-96-21. Order on the Motion to Withdraw as Counsel Due to Conflict of Interest, 24 June 1999. Cited in Ieng Sary Appeal, para. 24.

77 Rule 21(1)(a).

78 Enshrined in instruments such as the Universal Declaration of Human Rights (arts. 10, 23), the International Covenant on Civil and Political Rights (art. 14(1)), and regional treaties such as the European Convention on Human Rights (art. 6).

79 Rule 21(1)(a).

80 Rule 21(1).

81 *Case of NUON Chea*, Decision on Nuon Chea's Appeal Regarding Appointment of an Expert, D54/5/6, ERN 00233617-00233627, para. 25.

materially dissimilar to that of this Court—has held that fair trial guarantees are not limited to trial itself, but also extend to processes preceding the trial, indeed to every aspect of the proceedings.[82]

42. Fundamental to the fair trial rights of defendants is the right to be tried by an independent and impartial judiciary.[83] This concept mandates that all ECCC judges shall be independent in the performance of their functions and shall not accept or seek instructions from any source.[84] This guarantee is given statutory effect by virtue of Article 33 of the ECCC Law, which expressly adopts Article 14 of the ICCPR. Article 14 of the ICCPR states that, in the determination of any criminal charge, "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".[85]

43. Substantively identical guarantees are also contained in other international instruments including the European Convention on Human Rights ("ECHR"),[86] the Inter-American Convention on Human Rights ("IACHR")[87] and the African Charter on Human and Peoples' Rights ("ACHPR").[88] The Cambodian Constitution also mandates an independent and impartial judiciary.[89]

5.3.4 Test for bias encompasses actual and perceived bias

44. The Appellants contend that the allegations of corruption may threaten the rights of the defendants to a fair trial before an independent and impartial judiciary.[90] For this assertion to

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82 *Situation in the Democratic Republic of the Congo, in the case of the Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled "Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain other Issues raised at the Status Conference on 10 June 2008, ICC-01/04-01/06 OA 13, 21 October 2008, Separate Opinion of Judge Georghios M. Pikis, para. 44.

83 *Gonzalez del Rio v. Peru*, Communication No. 263/1987, U.N. Doc. CCPR/C/46/D/263/1987, 28 Oct 1992.

84 Agreement, art. 3(3); ECCC Law, art. 10(new).

85 ICCPR, art. 14(1).

86 ECHR, art. 6(1).

87 IACHR, art. 8(1).

88 ACHPR, art. 7(1). See also, Bangalore Principles of Judicial Conduct (2002) (Bangalore Draft Code of Judicial Conduct 2001, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002).

89 Constitution of the Kingdom of Cambodia, art. 128.

90 NUON Chea alleges that the allegations of corruption "may threaten [his] right to an independent and impartial prosecution, investigation, and trial": Request, para. 18. Likewise, IENG Sary claims that the fairness of judicial proceedings may be affected by the corruption allegations: IENG Sary Appeal, para. 41.

be sustained in law, the conduct that is alleged to threaten impartiality and independence must be of a character that is sufficient to undermine the presumption as to a judge's (or judges') impartiality and/or independence and, therefore, sufficient to deny a defendant a fair hearing. An alternative way of framing the question of whether bias exists is whether the allegedly corrupt acts create concerns about impartiality and/or independence; whether there is a nexus between the alleged acts of corruption and the conduct of the judge(s) at trial, as well as actual bias of the judges resulting from their extrajudicial conduct.[91]

45. In Continental European judicial systems, it is required that a judge should not only be actually impartial, but should also appear to be impartial.[92] The European Court of Human Rights requires disqualification of a judge where there is either a lack of subjective impartiality or a lack of objective impartiality.[93] In *Furundzija*, the ICTY held that a judge should not only be subjectively free from bias but that there should also be nothing in the surrounding circumstances that objectively gives rise to an appearance of bias. Therefore, an ECCC judge would be considered to lack independence and impartiality (and, therefore, the fair trial rights of accused being tried by him or her impinged) if either (1) "actual bias exists" (subjective test) or (2) there is an "unacceptable appearance of bias" (objective test).[94]

46. The jurisprudence laid down in *Furundzija* is applied generally by international tribunals and is consistent with the test for bias of a judge applied by the Pre-Trial Chamber.[95] This test, in relation to the disqualification of judges, is contained in Rule 34(2), which refers to both an

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91 The United States cases of *Shaw v. Commonwealth of Pennsylvania* 580 A.2d 1379 (Pa. Super. Ct. 1990) and *People v. Titone* 600 N.E.2d 1160 (Ill. 1992) establish two requirements that must be found before a judge will be rendered biased, or lack of independence/impartiality will be established, namely: (1) a nexus between the activities in question [i.e. corruption] and the judge's conduct at trial; and (2) bias resulting from the trial judge's extrajudicial conduct: *Titone* at 1166.

92 See, for example, German Code of Criminal Procedure (Strafprozeßordnung), arts. 22-24; French Code of Criminal Procedure (Code de Procédure Pénale), art 668; Italian Code of Criminal Procedure (*Codice de Procedura Penale*), arts. 34-36; Dutch Code of Criminal Procedure (Wetboek van Strafvordering), arts. 512-519. As a general rule, these countries also consider actual bias as being grounds for disqualification.

93 *Findlay v. United Kingdom*. [1997] 24 EHRR221, para. 73 [*hereinafter* Findlay].

94 *Prosecutor v. Furundzija* Case No. IT-95-17/1-A, Judgement, 21 July 2000, para. 189-190 [*hereinafter* Furundzija Judgement]; *Prosecutor v. Brdanin & Talic,* Decision on Application by Momir Talic for the Disqualification and Withdrawal of a Judge, ICTY Trial Chamber II, 18 May 2000, para. 13, footnote 36.

95 *Case of NUON Chea*, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 01), Public Decision on the Co-Lawyers' Urgent Application for the Disqualification of Judge Ney Thol Pending the Appeal Against the Provisional Detention Order in the Case of Nuon Chea, C11/29, 4 Februay 2008, para. 20 [*hereinafter* Judge NEY Thol Decision].

actual bias and a perceived bias.[96] The Pre-Trial Chamber followed the *Furundzija* jurisprudence while deciding on NUON Chea's application for disqualification of Judge NEY Thol on grounds of his political affiliation and membership of the Royal Cambodian Armed Forces. In so doing, this Chamber noted that a presumption of impartiality applies to the judges of this Court by virtue of Article 3.3 of the Agreement.[97] This presumption derives from their oath of office and the qualifications required for their appointment.[98] An applicant seeking to displace it bears a high burden[99] and must adduce sufficient evidence to establish that the judge in question can be objectively perceived to be biased.[100] In the absence of the evidence to the contrary, it must be assumed that judges "can disabuse their minds of any irrelevant personal beliefs or predispositions".[101]

47. The Pre-Trial Chamber, applying *Furundzija,* held that there is an appearance of bias if:

    i. A judge is a party to a case, or has a financial or proprietary interest in the outcome of a case, or if his decision will lead to the promotion of a cause, in which he or she is involved, together with one of the parties. Under these circumstances, a judge's disqualification from a case is automatic; or

    ii. The circumstances would lead a reasonable observer, properly informed, to apprehend bias.[102]

48. A reasonable observer, in this context, must be an informed person, with the knowledge of all the relevant circumstances, including the tradition of integrity and impartiality, and aware of the fact that impartiality is one of the duties that the judges swear to uphold.[103] What is

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96 *Id*, para. 12.
97 *Id,* para. 15. See also *Prosecutor v. Dario Kordic et al.*, Case No. IT-95-14/2-PT, Decision of the Bureau, 4 May 1998, p. 2; *Prosecutor v. Akayesu,* Judgment of the Appeals Chamber, Case No. ICTR-96-4, 1 June 2001, para. 90 [*hereinafter* Akayesu Appeal Judgment].
98 Judge NEY Thol Decision, para. 16.
99 *Id*, para. 15.
100 *Id*, para. 19; Akayesu Appeal Judgment, para. 88; Furundzija Judgment, para. 196.
101 Furundzija Judgment, para. 196.
102 Judge NEY Thol Decision, para. 20.
103 *Id,* para. 21.

required of the "reasonable observer" is an "appreciation both of how institutional pressures [can operate]."[104]

5.3.5 Application of the bias test in international jurisdictions

49. In *Furundzija*, the ICTY denied a request for disqualification of a judge on the ground that she was adjudicating a case that could, and did, advance a legal and political agenda that she helped create while being a member of the United Nations Commission on the Status of Women, prior to her appointment to the ICTY.[105] In *Akayesu,* the ICTR rejected the claim by the defence that political pressures had ruined that Tribunal's independence and impartiality. The defendant asserted that public and private remarks made by judges, coupled with "pressures and special arrangements", revealed a lack of impartiality towards the defendant. The ICTR noted that the burden to establish its lack of impartiality by "adequate and reliable evidence" was on the defendant, and that mere "bald allegations" of bias and selective prosecution were insufficient to meet that burden.[106] Similarly, the ICJ, in *The Wall Case,* denied a request by Israel to preclude a judge from sitting in that case on the ground of the judge's prior role as a diplomat in the Palestine–Israel dispute and the views expressed by him on that issue in an interview. The Court held that on those facts it could not hold that the judge had "previously taken part in the case" in any capacity.[107]

50. In *Nzirorera*, the accused requested the ICTR to withdraw his counsel, alleging, among other things, that the counsel had acted dishonestly and to the detriment of the interests of his client and of the Tribunal, by asking his legal assistant to alter his fee claims to maximise the counsel's payments.[108] The Tribunal acknowledged that that this was a "serious allegation which needs to be investigated by the proper authority"; however, it held that the allegation of financial dishonesty by counsel is an administrative matter that falls under the power of

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[104] *Prosecutor v. Norman,* Case No. SCSL-2004-14-AR72(E), Separate Opinion of Geoffrey Robertson, 13 March 2004, para. 18 [*hereinafter* Norman Decision].

[105] Furundzija Judgment, para. 215.

[106] Akayesu Appeal Judgement, para. 90.

[107] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order, 30 June 2004, (2004) ICJ Rep 3.

[108] *Prosecutor v Joseph Nzirorera*, Case No. ICTR-44-T, Decision on Nziorera's Motion for Withdrawal of Counsel, Trial Chamber II, 3 October 2001 [*hereinafter* Nziroera Decision].

the Registry, and not a Trial Chamber.[109] In *Norman,* Judge Robertson held that the judicial independence of the SCSL was not affected by funding arrangements because there was no "realistic danger" that the arrangements were, or would be, productive of pressure on the judges of the Special Court to decide cases in a particular way.[110] In a separate case, the SCSL disqualified Judge Robertson from hearing that case as he had expressed views in a published book about the crimes committed by a party to that case.[111]

5.3.6 Independence and impartiality of court officials other than judges

51. Importantly, the presumption of impartiality attaches only to the judges of the ECCC.[112] There is no equivalent guarantee of impartiality of administrative staff; nor have the Appellants been able to point to any law supportive of that proposition. On the contrary, consistent with the jurisprudence discussed above, and as this Court has recognised, the relevant law suggests that the guarantee of independence and impartiality "only appl[ies] to magistrates";[113] that is, judicial officers who are responsible for the investigation, trial or the appeal of a defendant. This decision attained finality after no defendant chose to appeal it.

5.3.7 Conduct not linked to judicial decision making does not impinge on fair trial rights

52. Behaviour which, although immoral or illegal, is not linked to judicial decision making, does not impinge on fair trial rights. Improper conduct has been observed in other jurisdictions, where such conduct does not necessarily lead to criminal cases being dismissed if not having a bearing on the fair trial rights of the defendants. Until recently, the head of the British judiciary—the Lord Chancellor—was simultaneously the speaker of the United Kingdom's upper house of Parliament and a member of the executive, which presented problems of conflict of interest.[114] In the United States, judicial elections are marred by concerns that donations to judges' election campaigns will inevitably influence judicial decision making.

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109 The Trial Chamber reached this conclusion from their consideration of Article 16(1) of the ICTR Statute, and the Directive on the Assignment of Defence Counsel, which together establish the authority of the Registrar over all administrative matters relating to assigned Defence Counsel: *id,* para. 20.

110 Norman Decision, para. 3.

111 *Prosecutor v. Sesay*, Case No. SCSL-2004-15-AR15, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, 13 March 2004.

112 Judge NEY Thol Decision, paras. 15-16.

113 *Case of IENG Sary*, Request for Information Regarding an Eventual Conflict of Interest, Case File No. 002/19-09-2007-ECCC/OCIJ, ERN 00159515 – 00159516, A121/1, 24 January 2008, p. 2.

114 Diana Rodriguez, ed., "Executive Summary: Key Judicial Problems" in Global Corruption Report, p. xxiii.

Sixty per cent of appellate judges and eighty per cent of trial judges at state level in the United States face contested elections and only eleven per cent of judges face no elections. Especially in contested elections, and sometimes in retention elections also, judges raise campaign funds.[115] Yet the United States Supreme Court has, with only one very recent exception,[116] consistently denied petitions for review even in cases where one of the parties was a major campaign contributor to the judge hearing its case.[117]

53. The United States Supreme Court has recognised that a defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials.[118] Absolute neutrality can hardly, if ever, be achieved.[119] Political sympathies do not, of themselves, imply a lack of impartiality.[120] Likewise, the nationality or religion of a judge cannot, in the absence of contrary evidence, constitute evidence of bias or impartiality.[121] As in any court, the judges must divorce themselves from their emotions.[122] In *Eichmann,* the defence argued that the Israeli judges hearing the case against a Nazi defendant accused of war crimes would not be able to try the case without bias. The fear was expressed not against any of the judges in particular but against all three, on the grounds that they were "sons of the Jewish people and citizens of the State of Israel".[123] The Judges agreed they were not, and nor were they required to be, neutral in respect of the crime; what mattered was that they were fair in respect of the accused.[124]

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115 Roy A. Schotland, 'Judicial elections in the United States: is corruption an issue?', in Global Corruption Report, *id,* p. 27.

116 *Caperton v. A.T. Masey Coal Company,* No. 08-22, heard by the U.S. Supreme Court on 3 March 2009. Decision of the Supreme Court is yet to be delivered. Discussed in Adam Liptak, 'Justices Hear Arguments on Money-Court Nexus', *The New York Times,* 4 March 2009.

117 Roy A. Schotland, 'Judicial elections in the United States: is corruption an issue?', Global Corruption Report, , p. 27.

118 *United States v Hasting,* 461 U.S. 499, 508 (1983); *Delaware v Van Arsdall,* 475 U.S. 673, 681 (1986), cited in DiBiagio, *supra,* para. 613, footnote 130.

119 Furundzija Judgement, para. 203. See also *Attorney General v. Adolf Eichmann,* Case. No. 40/61 in the District Court of Jerusalem, District Court of Jerusalem, Appeal Session 02-03. Available online at: http://www.nizkor.org/ftp.cgi/people/e/eichmann.adolf/transcripts/ftp.py?people/e/eichmann.adolf/transcripts//Appeal/Appeal-Session-02-03.

120 Furundzija Judgement, para. 203.

121 *Attorney General v. Adolf Eichmann,* Case. No. 40/61 (District Court of Jerusalem) Session No. 6, 1 Iyar 5721 (17 April 1961), Decision No. 3 [*hereinafter* Eichmann Decision]. Available online at: http://www.nizkor.org/ftp.cgi/people/e/eichmann.adolf/transcripts/ftp.py?people/e/eichmann.adolf/transcripts/Sessions/Session-006-01.

122 *Ibid.*

123 *Ibid.*

124 *Ibid.*

5.4. Argument

5.4.1 The Request does not fall within the statutory jurisdiction of the Co-Investigating Judges

54. The Request does not fall within the jurisdiction of the Co-Investigating Judges. There is nothing in the Agreement,[125] ECCC Law[126] or the Rules which bestows power on the Co-Investigating Judges to accept and act on the Request.

55. This Court is a creature of an international treaty (Agreement) and an act of the Cambodian Parliament (ECCC Law). It was established with a specific and limited jurisdiction. By virtue of Article 2 of the ECCC Law, this Court is confined to concerning itself with specific crimes committed within a specific location and time period. It is within this frame of reference that the Co-Investigating Judges must consider their legal ability to act on an investigative request.

56. Any investigative request which, although satisfying the criteria for "investigative action" as defined by the Pre-Trial Chamber,[127] seeks to ascertain the truth about a subject matter which falls outside the facts sets out in an Introductory or Supplementary Submission and is unrelated to the Court's mandate under Article 2 of the ECCC law, is outside the Co-Investigating Judges' power. Although the Request is a "request for action to be performed by the Co-Investigating Judges...with the purpose of collecting information conducive to ascertaining the truth"[128], thereby satisfying this Court's definition of "investigative action", the information/action requested does not fall within any of the facts set out in an Introductory or Supplementary Submission. Instead, the Request, on its own showing, pertains to information "conducive to ascertaining the truth *about the ECCC*".[129]

57. Therefore, the Co-Investigating Judges have neither the authority nor the responsibility to investigate allegations of corruption unless they form part of their substantive investigation

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125 Agreement, art. 12(2).
126 ECCC Law, art. 47(new).
127 That is, a request "for action to be performed by the Co-Investigating Judges or, upon delegation, by the ECCC investigators or the judicial police, with the purpose of collecting information conducive to ascertaining the truth": *Case of KHIEU Samphan*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC11), Decision on Khieu Samphan's Appeal Against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/I/20, para. 23.
128 Request, para. 28.
129 *Id*, para. IV(A) (emphasis added).

of the facts contained in the introductory or supplementary submissions. The Co-Investigating Judges are, therefore, powerless to address allegations of administrative corruption at this Court.

5.4.2 Judicial disqualification procedure not applicable

58. As stated above, the Rules do not provide any power to the Co-Investigating Judges to investigate allegations of corruption amongst administrative employees unless such behaviour impinges on the fairness or legality of proceedings before the Court. The Rules, however, lay down procedure for the disqualification of a judge should he/she be engaged in an activity that may be detrimental to the requirements of independence and impartiality.[130]

59. Although styled as a request for investigative action, and not an application for disqualification of a judge, the Request did not point to anything on the record to suggest that one or more judges should be disqualified. The Appeals too, consequently, do not direct this Chamber to any evidence of actual or perceived bias on the part of any judge against any Appellant. Neither the Request nor the Appeals allege any judge's personal or financial interest in the outcome of the ECCC proceedings. Accordingly, assuming that the Request was an application for the disqualification of a judge, it was misconceived and, as such, was rightly rejected.

5.4.3 Interference in the administration of justice not established

60. Rule 35 authorises sanction or "reference to appropriate authorities" of a person who "knowingly and wilfully" interferes with the administration of justice. For the sanction of this provision to trigger: (1) a person must interfere with the administration of justice, and (2) this interference must be done knowingly and wilfully.

61. There is nothing on record that establishes that the alleged administrative corruption in this Court has led to: (1) any interference with the administration of justice, (2) that, and how, such acts were done "knowingly and wilfully", or (3) how these acts amounted to interference with the administration of justice. Absent such evidence, there is nothing to

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[130] Rule 34.

suggest that the Co-Investigating Judges should, or could, have taken action pursuant to Rule 35.

5.4.4 The Request does not fall within the inherent jurisdiction of the Court

62. The purpose of the inherent power is to ensure that a court has the ability to deal with any issues necessary for the conduct of matters falling within its jurisdiction.[131] As noted, inherent powers recognised by international jurisdictions have been codified at the ECCC. Notwithstanding, any inherent power of a court is restricted to action taken by it *within* its existing and established jurisdiction, to ensure that the exercise of that jurisdiction is not frustrated;[132] these powers do not render an otherwise *ultra vires* act *intra vires.* As stated above, the ICJ has held that the inherent jurisdiction of an international judicial organ enables it to take action, to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated; and to provide for the orderly settlement of all matters in dispute to ensure the observance of the "inherent limitations on the exercise of the judicial function" of the Court.[133] Analogous interpretation of the content and purpose of inherent powers is reflected in the jurisprudence of the ICTY, ICTR and the SCSL.[134]

63. Only under "exceptional circumstances" did the ICTR in *Ntabakuze and Kabiligi*[135] invoke its inherent powers to make available a sealed United Nations report to the parties, which that Tribunal was otherwise not obliged to disclose.[136] The ICTR specifically stated that the action taken "is not to be considered as setting any precedent with regard to future matters."[137] Further, unlike in the present case, the relevance of the sealed United Nations

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131 Beqa Beqai Contempt Judgement, para. 10.

132 See generally, *Northern Cameroons,* p. 29; Beqa Beqaj Contempt Judgment, para. 11.

133 *Northern Cameroons,* p. 29, cited in Beqa Beqaj Contempt Judgment, para. 11 (emphasis added).

134 Those tribunals have found that, although penal proceedings are provided for under their contempt jurisdictions, they also possess an inherent jurisdiction, deriving from their judicial functions, to ensure that the exercise *of their jurisdiction* is not frustrated and that their basic judicial functions are safeguarded. Tadic Contempt Judgment, para. 13, citing jurisprudence of the ICJ and the ICTY.

135 *Prosecutor v. Ntabakuze and Kabiligi,* Case No. ICTR-96-34-I, Decision on Kabiligi's Supplementary Motion for Investigation and Disclosure of Evidence, 8 June 2000 [*hereinafter* Kabiligi Decision] (referred to in IENG Sary Appeal, para. 26).

136 Because the Prosecutor was not in possession of the report, the report was not subject to disclosure under ICTR Rules – Kabiligi Decision, paras. 8-10.

137 Kabiligi Decision, para. 17.

report to the subject matter jurisdiction of the ICTR was unchallenged.[138] In those circumstances, the Tribunal was not seen to be acting *ultra vires* in disclosing the report pursuant to the inherent power doctrine.

64. As the inherent jurisdiction of this Court is limited to its duty, *within its existing jurisdiction*, to ensure that its proceedings are fair, the Co-Investigating Judges could not accept the Request—to do so would have been an act outside their power.

5.4.5 Judicial decision making not affected by the alleged administrative corruption

65. Any violation of fair trial rights is a serious matter. However, absent any link between the conduct in question and the alleged impairment of fair trial rights, any inquiry is "far-fetched and theoretical".[139] The allegations of payment of money by administrative officials to obtain or retain jobs, even if proved to be correct, do not necessarily lead to a conclusion of judicial bias. The Appellants have not provided any evidence, anecdotal or otherwise, of actual bias on the part of any judges against any of the defendants.

66. IENG Sary's Appeal alleges that evidence of corruption may affect the factual conclusions reached, or to be reached, by the Co-Investigating Judges, "and is thus exculpatory".[140] As stated, it is only in respect of the facts contained in the introductory or supplementary submissions that the Co-Investigating Judges are required to conduct their investigation, impartially and without regard to whether the evidence is incriminatory or exculpatory.[141]

67. The examples provided in the Request,[142] and referred to in IENG Sary's Appeal,[143] of the potential effects of corruption on the factual conclusions reached by the Co-Investigating Judges, are pure speculation. They fail to show any nexus between payment of money, if any, to obtain or retain employment and the Co-Investigating Judges' investigatory functions. The

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138 Counsel requesting the report argued that the attack the subject of the report (attack on President Habyarimana's plane) was an essential element in the planning and perpetration of the crimes committed in Rwanda in 1994. The Prosecution submitted that the Defence had not established that the Report was "material", as required for disclosure under Rule 66(B) of the ICTR.

139 Norman Decision, para. 18.

140 Ieng Sary Appeal, section (ii)(a), paras. 21, 39-40.

141 Rule 55(2), (5).

142 Request, para. 19.

143 Ieng Sary Appeal, para. 39.

statements made in NUON Chea's Appeal that there is a "*potential* problem related to the collection of evidence"[144], that staff members "*may* be equally willing to follow improper instructions" or "*may* feel obliged to perform their official functions in accordance with the actual or perceived expectations of their paymasters",[145] are likewise mere conjecture.

68. Neither the Request nor any of the Appeals allege any personal or financial interest in the outcome of the ECCC proceedings or any other way that the Court's processes, and thereby the fair trial rights of the defendants, are adversely affected by the alleged corrupt behaviour. None of the public sources of information has yielded any evidence of bias in any of the Case Files. The Appellants have not been able to highlight a single ruling by this Court that supports a contention of judicial bias. Neither has there been information put forward suggesting any motive on either side to "buy" a conviction or otherwise interfere with the proper administration of justice at this Court.

69. The adjudicative reliability of the ECCC has, therefore, not been shown to be compromised; nor could it appear, to an objective observer informed of all relevant circumstances, to be compromised.

70. The Co-Prosecutors note that the obligation of this Court to provide a fair trial to those being tried before it is continuous and ongoing. Notwithstanding the present lack of nexus between the payment of money and judicial decision making, any information which is subsequently brought to the Court's attention should be considered seriously and evaluated in the context of protection of the fair trial rights of the defendants.

5.4.6 Rules do not permit unsubstantiated requests for information

71. The Rules, as well as Cambodian and international practice, do not permit requests for unsubstantiated omnibus information regarding judges and their investigators.[146] With the exception of the request for the OIOS Report,[147] the Request made sweeping and ambiguous

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[144] Nuon Chea Appeal, para. 16 (emphasis added).
[145] Request, para. 18 (emphasis added).
[146] *Case of NUON Chea*, Disclosure of Credentials, Case File No. 002/19-09-2007-ECCC/OCIJ, C11/13, 19 Dec 2007.
[147] Request, para. 22.

requests without specifying any evidence that could support an appearance or an inference of bias on the part of any judge of this Court.[148]

72. The Appellants are not entitled to an order to produce documents and information simply because the Appellants say that those documents may show that their fair trial rights may be affected. The Appellants are not entitled to conduct a "fishing expedition"—in the sense that they wish to examine the requested material in order to discover whether they have any argument at all to make.[149] A request for investigative action is *not* the same as obtaining discovery against a party.[150] Before obtaining an order for access to material where the right to such access is not conceded, the requesting party must identify expressly and precisely the legitimate forensic purpose for which access is sought.[151] It should be demonstrated that it is likely—or at least "on the cards"[152]—that the material produced will materially assist the case of the requesting party.[153] A request for investigative action filed in the mere hope that the requested information might reveal evidence that could support an impairment of fair trial rights, is clearly deserving of rejection.

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[148] For example, Request, para. 22(c), requests "any other information suggesting an organized regime of institutional corruption at the ECCC."

[149] The term "fishing expedition" has been defined as one where the party had no evidence that fish of a particular kind were in the pool but wanted to drag the pool in order to find out whether there were any such fish there or not: Delalic, para. 4, citing *Associated Dominions Assurance Society Pty Ltd v John Fairfax & Sons Pty Ltd* (1952) 72 WN (NSW) 250, p. 254. See also *Hennessy v Wright* (1888) 24 QBD 445, p. 448. The term has been recognised by senior appellate courts: *Air Canada v Secretary of State for Trade* [1983] 2 AC 394, p. 439 (per Lord Wilberforce); *Alister v The Queen* (1984) 154 CLR 404, p. 414 (per Gibbs CJ, and see also Brennan J at 455-456); as well as the ICTY and ICTR: *Prosecutor v Miroslav Kvocka et al.*, Case No. IT-98-30/1-A, Decision on Momcilo Gruban's Motion for Access to Material, 13 January 2003, para. 5; *Prosecutor v Bizimungu*, Case No. ICTR-99-50-T, Decision on Bicamumpaka's Motion for Disclosure of Exculpatory Evidence (MDR Files),17 November 2004, para. 11.

[150] See, in relation to the difference between and order to produce and a request for discovery, Delalic, para. 4; *Burchard v Macfarlane* [1891] 2 QB 241, p. 247; *Commissioner for Railways v Small* (1938) 38 SR(NSW) 564, pp. 573-574. Also compare *Bracy v. Gramley,* 520 U.S. (1997) [*hereinafter* Bracy Decision], cited by IENG Sary Appeal, para. 28, which did concern a request for discovery. Here, the U.S. Supreme Court granted the request of one of the petitioners, Bracy, for disclosure of material relating to judicial corruption. The "collateral corruption" alone was not sufficient to warrant discovery; the Supreme Court's decision to grant discovery was also based on a finding that Bracy's trial counsel may have been deliberately appointed to further the corrupt practices.

[151] The term "legitimate forensic purpose" is well recognised in the law relating to subpoenas (or orders to produce): Delalic, para. 4. See also, for example, *Burmah Oil Co Ltd v Bank of England* [1980] AC 1090 p. 1113-1114, [1979] 3 All ER 700, pp. 718 – 22, 731.

[152] Something is "on the cards" if there is a good chance that it will happen.

[153] *Alister v The Queen* (1984) 154 CLR 404, p. 414. This test was accepted by the New South Wales Court of Criminal Appeal as satisfying the requirement that there be some legitimate forensic purpose for having access to the documents: *Regina v Saleam* (1989) 16 NSWLR 14, pp. 17-18. Cited in *Delalic*, para. 4, footnote 5.

5.4.7 This Court is not the forum to investigate corruption outside its judicial process

73. Administrative officials of this Court are employees of the Government of Cambodia or the United Nations and, as such, are governed by the regulations of those entities.[154] Although these officials are also bound to perform their duties without any external interference,[155] they are subject only to the disciplinary supervision (including the power of removal) of the appropriate Cambodian and United Nations authorities.[156]

74. Accordingly, any proceedings for disqualification or sanctioning of such officials are outside the domain of this Court, unless the provisions of Rule 35 (which concerns an interference with the administration of justice) are invoked. It is neither appropriate nor lawful for a judicial body—like the Office of the Co-Investigating Judges—to investigate alleged misconduct when another body (or bodies) is the proper forum to determine whether there was illegal conduct and to conclude whether breach needs to be sanctioned and, if so, to what extent. The Co-Prosecutors reiterate that administrative corruption in the Court is an extremely serious matter which must not be tolerated. Any corrupt behaviour must be determined after giving the alleged offender a hearing by the appropriate authorities. However, at this stage, the judicial organs of this Court are not the appropriate bodies to investigate such behaviour.

5.4.8 External remedies not exhausted

75. NUON Chea's Defence have documented in the Request the steps taken, in their own capacity and on their client's behalf, to obtain the information requested—in particular, the OIOS Report.[157] These external means of obtaining the desired information have not yet been exhausted. The municipal inquiry into the allegations, initiated by international counsel for NUON Chea in January 2009,[158] is, to the Co-Prosecutors' knowledge, currently on appeal to the Cambodian Prosecutor-General.[159] Further, to the Co-Prosecutors' knowledge, the United

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[154] Rule 6.
[155] Rule 6(1).
[156] Rule 6(4).
[157] Request, para. 12.
[158] *Ibid.*
[159] *Ibid.*

Nations is currently considering a request from NUON Chea's Counsel for release of the OIOS Report.[160]

76. Despite the fact that, currently, these external remedies have not produced the desired result,[161] and even assuming, for the present purposes, that all external remedies were exhausted,[162] the Appellants have still not pointed to any authority which might support an additional power of this Court to deal with a matter not within its jurisdiction. The fundamental issue—the absence of a power vested in the Co-Investigating Judges, in law, to accept the request—remains.

5.5 The OIOS Report may be released to uphold this Court's credibility

77. Despite lack of jurisdiction, there are indeed "compelling motives"[163] to address, transparently and forcefully, this issue which may severely endanger this Court's reputation.

78. To this end, the Co-Prosecutors observe that the credibility of this Court's process would be enhanced by a release of the OIOS Report and a timely and credible resolution of this issue.

6. CONCLUSION

79. The Co-Prosecutors request that the Pre-Trial Chamber dismiss the Appeals.

Respectfully submitted,

YET Chakriya
Deputy Co-Prosecutor

William SMITH
Deputy Co-Prosecutor

Signed in Phnom Penh on this twenty-ninth day of May 2009.

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160 *Ibid.*
161 *Ibid.*
162 *Id,* paras. 17-19.
163 NUON Chea Appeal, para. 25.