



UNAKRT

United Nations Assistance to the Khmer Rouge Trials

THE UNITED NATIONS ADMINISTRATIVE JUDGE (UNAJ)

Case N°: 001/21-05-2013-UNAJ

Before: Judge Rowan DOWNING

Greffier: Entela JOSIFI

Date: 25 June 2013

PUBLIC REDACTED

**DECISION ON APPLICATION REQUESTING FUNDING FOR LEGAL CONSULTANT'S
FLIGHT TO THE OFFICE OF THE CO-LAWYER**

Co-Lawyer [REDACTED]:

UNAKRT Coordinator

A [REDACTED]

[REDACTED]

Head of Defence Support Section of UNAKRT:

R [REDACTED]

THE UNITED NATIONS ADMINISTRATIVE JUDGE is seized of an Application filed by the foreign Co-Lawyer for E [REDACTED], who is under investigation in Case 004, A [REDACTED] [REDACTED] (the “Applicant”)¹ requesting funding for the flight of the Defence team’s Legal Consultant to the office of the Applicant (the “Application”).²

PRELIMINARY MATTER:

[REDACTED] At the outset, it is noted that the jurisdiction of the UNAJ over this matter derives from his nomination by the Coordinator of UNAKRT, pursuant to paragraph 11.1³ of the Legal Services Contract (LSC), entered into between the Applicant and the United Nations on 5 October 2012, which provides the framework for resolution of non-fee disputes between the parties to the LSC. It is further noted that, although R [REDACTED] [REDACTED], the Head of the Defence Support Section of UNAKRT (“Head of DSS of UNAKRT”), asserts the matter is inadmissible, the parties to these proceedings do not contest the UNAJ’s jurisdiction over this matter and that it has been established that there is no other alternative, including the United Nations internal justice mechanisms, for the resolution of this matter.⁴

¹ Note that, in order to conform to the language used in paragraph 11.1 of the LSC, the term “Appellant” referring to the Co-Lawyer, as used in the UNAJ’s Directions of 24 May 2013, for the purposes of this procedure and the Decision, is henceforth changed to “Applicant.”

² Appeal to the United Nations Administrative Judge Requesting Funding for Legal Consultant Flight to the Office of the Co-Lawyer, 28 May 2013 (the “Application”).

³ Paragraph 11.1 of the LSC reads: “Non-Fee Disputes. Except for disputes relating to the payment of fees claimed under Paragraph 9 of this Contract, any dispute, controversy or claim between the Parties *relating to the terms and conditions* of this Contract shall be resolved amicably between the Contracting Co-Lawyer and the Head of DSS. In the event that the Parties are unable to settle such dispute, controversy or claim amicably within 60 days, each Party may refer such dispute, controversy or claim to the international judge nominated by the Coordinator of UNAKRT as the UN Administrative Judge.”

⁴ It is noted that this is a proceeding for judicial review of an administrative decision, which decision is made by the Head of DSS in the course of his/her specific role within the context of a *specific* contract of engagement for the provision of legal consultant services undertaken within the specific context of the laws applicable before the ECCC. One of the parties to the LSC is the United Nations, the other is the Applicant. The LSC is a contract similar to, but not having all of the indicia of, an employment contract due to it being for the provision of independent legal services by a consultant to a Suspect. The Applicant, being a consultant contracted under the LSC, is not a staff member of the United Nations for the purposes of seeking redress before the United Nations internal justice mechanisms, namely the United Nations Dispute Tribunal (UNDT) and United Nations Appeals Tribunal (UNAT). See paragraph 10 of the UN contract (P-104 (10-6)). See also *Turner v. Secretary General of the United Nations*, Case UNDT/NBI/2010/59, Judgment UNDT/2010/170, 24 September 2010, para. 36: “The [UNDT] finds that Counsel assigned by the Registrar of the [International Criminal Tribunal for Rwanda] ICTR to represent an accused person does not hold the status of United Nations staff members within the meaning of Article 3 of the UNDT Statute. Therefore, the Tribunal finds that it does not have jurisdiction *ratione personae* over ICTR Defence Counsel.” Thus the Applicant had no other alternative but to bring this matter before the UNAJ under the specific terms of the LSC and not before the UNDT or the UNAT. There are also *general*

PROCEDURAL HISTORY:

2. On or about 15 May 2013, R [REDACTED], acting in his capacity as the Chief of the Defence Support Section of UNAKRT, finalised a decision refusing to authorise a return flight ticket from Phnom Penh, Cambodia, to the Applicant's office in Amsterdam, The Netherlands for one of [REDACTED] E's Defence team, Legal Consultant, F [REDACTED] (the "Impugned Decision").
3. On 17 May 2013, the Applicant requested from the Coordinator of UNAKRT the appointment of a United Nations Administrative Judge to hear a 'non-fee dispute' between the Head of DSS of UNAKRT, R, [REDACTED] and the Applicant in relation to the impugned decision.
4. On 21 May 2013, the Coordinator of UNAKRT nominated the undersigned Judge as the UNAJ with the instruction "to look into the admissibility or otherwise of the [Application], and if admissible to hear the [Application] and advise [the Coordinator of UNAKRT] of [the] findings." The nomination letter was accompanied by copies of the Guide to the Legal Assistance Scheme, as amended on 1 February 1999 (the "Guide to the LAS") and of the Legal Services Contract entered into between the Applicant and the United Nations.
5. On 24 May 2013, the UNAJ, after having asked the views of the parties to these proceedings, issued Directions for the Conduct of these Proceedings which were notified to the parties by the Greffier on the same day (the "UNAJ Directions").
6. On 27 May 2013, in pursuance with point two of the UNAJ Directions, the Head of DSS of UNAKRT disclosed documents in his possession which are relevant to the matter under review. Such documents were:

terms incorporated into the LSC, one of which in respect of arbitration, but such clause is not relevant as it is of a general nature relating to the general conditions of contracts for the services of consultants or individual contractors whereas the Applicant proceeds under *more specified terms* such as those of a Legal Services Contract.

- a. The Legal Services Contract entered between the Applicant and the United Nations;
 - b. The Guide to the ECCC Legal Assistance Scheme;⁵
 - c. An email titled “travel request,” dated 29 April 2013, from the Applicant to the Head of DSS of UNAKRT;
 - d. An email titled “Re: travel request,” dated 30 April 2013, from the Head of DSS of UNAKRT to the Applicant;
 - e. An email titled “travel – request – request for reconsideration,” dated 1 May 2013, from the Applicant to the Head of DSS of UNAKRT;
 - f. An e-mail titled “Re: travel request – request for reconsideration,” dated 3 May 2013, from the Head of DSS of UNAKRT to the Applicant;
 - g. An attachment to the Head of DSS of UNAKRT’s email of 3 May 2013, being the Agenda of a DSS Meeting held on 7 September 2012;
 - h. An email titled “legal consultant flight to Amsterdam,” dated 8 May 2013 from the Appellant to the Head of DSS of UNAKRT;
 - i. An email titled “Re: legal consultant flight to Amsterdam” dated 15 May 2013 from the Head of DSS of UNAKRT to the Applicant;
 - j. A copy of the initial consultancy contract signed on 14 August 2013 by the Legal Consultant recruited by the DSS to work on the [Applicant’s] team together with an email from the Human Resources Management Section detailing the offer.
7. Further, on 28 May 2013, upon instruction by the UNAJ, the Head of DSS of UNAKRT added to his submission the following documents:
- a. A copy of the Form P-104 forming part of the LSC between the Appellant and the United Nations;
 - b. An excerpt from the ECCC Revised Budget for 2012-2013 relating to the defence travel budget;

⁵ Note that the text of this document is identical to that of the copy to the Guide to ECCC’s Legal Assistance Scheme forwarded to the UNAJ by the Coordinator of UNAKRT.

8. Following specific request by the UNAJ, the Head of DSS of UNAKRT indicated in his submission by e-mail of 28 May 2013 that “[he does] not have immediate or direct access to the facts and figures related to the budget expenditures to date” and that no minutes were kept of the meeting of 7 September 2012.
9. On 28 May 2013, in pursuance with point three of the UNAJ Directions, the Applicant filed the Application requesting an oral hearing.
10. On 4 June 2013, in pursuance with point four of the UNAJ Directions, the Head of DSS of UNAKRT filed a Response (the “Response”),⁶ submitting that no oral hearing is necessary.
11. On 5 June 2013, the UNAJ determined that there would be no hearing on the matter and the Greffier, in pursuance with point five of the UNAJ Directions, advised the Applicant of UNAJ’s instruction that he may file a Reply to the Response by 7 June 2013.
12. On 7 June 2013 the Applicant filed a Reply to the Response attaching to it a number of authorities “which [had] not been submitted previously by either party to the current dispute” (the “Reply”).⁷ The UNAJ allowed the Head of DSS of UNAKRT to submit his observations in relation to these newly submitted authorities, only in respect of their relevance to this matter, by Monday 10 June 2013.
13. On 10 June 2013 the Head of DSS of UNAKRT submitted his Observations (the “Observations”)⁸ in relation to the newly submitted authorities indicating that: the documents that show that the Defence has not been granted access to the Case File are relevant and support DSS’ assessment that “it is not necessary and reasonable at this stage of the procedure for the [United Nations] to incur certain expenses”; The

⁶ Response to the Appeal to the UNAJ Requesting Funding for Legal Consultant’s flight to Office of Co-Lawyer, 4 June 2013.

⁷ Reply to the Response to the Appeal to the UNAJ Requesting Funding for Legal Consultant’s flight to Office of Co-Lawyer, 7 June 2013.

⁸ Head of DSS of UNAKRT’s Observations regarding the Relevance of Additional Authorities submitted by the [Applicant], 10 June 2013.

DSS does not have access to the Co-Prosecutors' Third Introductory Submission; Documents relating to Charged Persons are not relevant; Defence's own public statements, especially those related to other cases, do not carry probative value; Documents supporting the argument that the current request should be granted due to other requests having been rejected are not relevant.

BACKGROUND:

14. On 6 June 2003 the United Nations entered into an agreement with the Royal Government of Cambodia concerning the prosecution under Cambodian Law of crimes committed during the period of Democratic Kampuchea (the "Agreement").⁹
15. On 27 October 2004 the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC) was promulgated concerning the prosecution under Cambodian Law of crimes committed during the period of Democratic Kampuchea including genocide, crimes against humanity and grave breaches of the Geneva Conventions (the "ECCC Law").¹⁰
16. On 12 June 2007 the Plenary Session of the ECCC adopted the first version of the ECCC's Internal Rules (the "Internal Rules"). Since then, the Internal Rules were revised eight times, the current version being that adopted on 3 August 2011.
17. On 9 July 2007 the DSS, pursuant to Rule 11 of the Internal Rules, adopted the DSS Administrative Regulations.
18. The mission of ECCC's Office of Administration is to "ensure an effective and efficient functioning of the administration" of the court and is run by a Cambodian Director who is appointed by the Royal Government of Cambodia and a Deputy Director who is appointed by the Secretary General of the United Nations. The United Nations part of the administration of the court is responsible for the recruitment of all

⁹ Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian Law of crimes committed during the period of Democratic Kampuchea, 6 June 2003.

¹⁰ Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004.

international staff and all administration of the international components of the ECCC.¹¹

19. The Office of Administration has established a Defence Support Section which is run by the Head of the DSS. The DSS enters into contracts with defence lawyers for any indigent Suspects, Charged Persons, Accused or other persons entitled under the Internal Rules. The DSS monitors and assesses the fulfilment of all contracts entered into with defence lawyers, provides the lawyers with lists of personnel eligible to assist defence teams and authorises corresponding remuneration in accordance with DSS' administrative regulations.¹²
20. On 7 September 2009, the International Co-Prosecutor of the ECCC filed the "Third Introductory Submission" with the Co-Investigating Judges requesting them to begin a judicial investigation in Case 004.
21. On 24 February 2012 the International Reserve Co-Investigating Judge notified E [REDACTED] in writing that "he is named as a suspect in an ongoing investigation" (Case 004) for a number of criminal offences, including Genocide, Crimes Against Humanity and Grave Breaches of the Geneva Conventions of 12 August 1949, and that he has a number of rights including the right to be defended by a lawyer of his/her choice (the "Notification of Suspect Rights").¹³ Later, in May 2013, the International Co-Investigating Judge noted that the Notification of Suspects' Rights decision "bestowed upon the Suspect the rights expressly set forth in Internal Rule 21(1)(d): [...] to be defended by a lawyer of his/her choice."¹⁴
22. On 1 March 2012 the 2012-2013 budget request for the ECCC was endorsed by the Group of Interested States. On 9 March 2012 the document titled: "ECCC Budget 2012-2013" was placed on ECCC's official website. In its introductory part the document reads:

¹¹ Agreement, Article 8, ECCC Law Articles 30 and 31 new, Internal Rules, Rules 8 and 9.

¹² Internal Rules, Rule 11.

¹³ Case File No. 004, Notification of Suspect Rights, D110, 24 February 2012.

¹⁴ Decision on Motion and Supplemental Brief on Suspect's Right to Counsel, Case No. 004/07-2009-ECCC-OCIJ, 17 May 2013, D122/6, para. 57.

“S. 1. This document represents the budget request for the Extraordinary Chambers in the Courts of Cambodia (ECCC) for 2012 and 2013. Based on the anticipated needs of the Court for the coming two years, the ECCC is requesting approval of the proposed total budget in the amount of \$89.6 million, of which \$45.7 million is for 2012 and \$43.9 million is for 2013 inclusive of contingency.

[...]

S. 4. While it is currently expected that the Court’s timeline will run until 2018 this document presents the overall resource requirements for the period 2012-2013 for consideration by donors, with *detailed explanations of the activities planned over the next two years. Projected resource estimates for the period 2014 -2015 will be the same level as 2013* which is \$43.9 million each year for international and national component.”

23. On 10 August 2012 the Human Resources Section of UNAKRT emailed to F [REDACTED] an Offer, on behalf of the Secretary-General of the United Nations, to work as a Legal Consultant in ECCC’s DSS. F [REDACTED] started to work for the DSS as a Legal Consultant on 14 August 2012 and is currently serving in the same position (the “Legal Consultant”).

24. On 7 September 2012 the members of Defence Teams, as then constituted, were said to be in attendance at a meeting where, as indicated by the copy of the agenda of the meeting that has been provided by the Head of DSS of UNAKRT,¹⁵ the discontinuation of the practice of authorising foreign travel for legal consultants was apparently discussed. There are no minutes or formal attendance record of this meeting.

25. On 5 October 2012 the Applicant was engaged by the United Nations “for the purpose of providing legal representation to [E] [REDACTED], an indigent or partially indigent Suspect, Charged Person or Accused”¹⁶ in Case 004 before the ECCC. The Applicant acts “as Co-Lawyer together with the Cambodian Co-Lawyer.”¹⁷ The Applicant was provided with full funding to travel to Phnom Penh at the time of his

¹⁵ Application, para. 6 adopted in para 1 of the Response.

¹⁶ LSC, para. 1.1.

¹⁷ United Nations Contract (p-104(10-6), first section.

engagement. The Applicant undertook another fully funded trip to Phnom Penh in January 2013.¹⁸

26. On 14 December 2012 the Supreme Court Chamber of the ECCC, upon a finding that Ieng Thirith, one of the Accused in Case 002, was unfit to stand trial, suspended the proceedings against her and placed her under judicial supervision.¹⁹ The necessity for the ECCC to fully engage a Defence team for Ieng Thirith was, afterwards, significantly reduced.²⁰

27. On 11 February 2013 the Head of DSS of UNAKRT informed the Applicant by email that he was “unable to authorise [the Applicant’s] travel at [that] time” by providing the following reasons: “there are currently no proceedings requiring [the Applicant’s] physical presence in Cambodia”; “communications with the other members of your Defence Team can be conducted by other means”; “currently [the Suspect] has a competent Cambodian Co-Lawyer who is not only quite capable of meeting with him regularly to receive instructions but can also communicate more easily with him in the Khmer Language” and that “budgetary allocations were made for a maximum of two round trips for [the Applicant] in 2013.”

28. On 26 February 2013 the document titled: “ECCC Revised Budget Requirements 2012-2013” was placed on the ECCC’s official website. The second paragraph of the Summary of this document reads:

“This document presents a downward revision of the 2012-2013 budget based on projected expenditures for 2012 and updated requirements for the Court for 2013. The combined revised budget for 2012/2013 totals \$34.3 million for 2012 and \$35.4 million for 2013 including programme support costs. During 2012, in light of the shortfall in financial contributions, it became necessary

¹⁸ Response, para. 22.

¹⁹ Case 002, Decision on Immediate Appeal against the Trial Chamber’s Order to unconditionally Release the Accused Ieng Thirith, 14 December 2012, Supreme Court Chamber, E138/1/10/1/5/7.

²⁰ See for instance Case 002, Decision on the Implementation of the Supreme Court Chamber’s Decision on Immediate Appeal against the Trial Chamber’s Order to unconditionally Release the Accused Ieng Thirith, 26 March 2013, Trial Chamber, E138/1/10/1/5/8/1.

for the international component to utilise the contingency reserve of \$4.2 million which had accrued since 2008. In addition, given the need to meet monthly cash shortfalls, contributions to the reserve were discontinued, and consequently, the reserve has been fully depleted.”

29. The document further explains budget decrease in relation to consultants, official travel of staff and to methodology for managing the travel budget for the defence lawyers as follows:

“27. In the 2013 revised budget a decrease of \$320,300 is proposed under consultants and experts, based on the historical spending patterns of this budget item, and the current projected needs. The total number of experts that are required by the court order are reduced for cases 002, 003 and 004.

[...]

29. The revised 2013 travel budget is decreased by \$53,300 as part of the austerity measures. Official travel of staff will be limited to those missions which are deemed critical for UNAKRT to carry out its programme of work.

[...]

Defense Support

31. The overall requirements for Defense Support resources in 2013 are reduced by \$2,111,900 broken down as follows:

a) Defense expenses for Case 2 - Ieng-Thirith is reduced by \$506,600 as she was deemed unfit to stand trial due to her medical condition. A budget of \$113,090 is required for minimum level of legal representation under the Legal Assistance Scheme in the event that the Supreme Court Chamber determines that the ECCC should retain jurisdiction over the accused.

b) The *internal methodology for managing the travel budget for the defense lawyers has been revised, and funds will now be consolidated for all lawyers, rather than by defense team.* Based on the historical expenditure pattern, an amount of \$241,900 is budgeted to meet the travel requirements of DSS lawyers for the year 2013, resulting in a savings of \$271,100.

c) The projected cost of the defense teams, which includes expenses of defense lawyers, case managers, investigators/analysts and legal consultants, are significantly reduced for cases 3 and 4 in the revised budget, resulting in a savings of \$1,334,200. This reduction is based on the anticipated pace of the judicial process during 2013.”

30. On 14 March 2013 the Trial Chamber found that the death of the Accused Ieng Sary (in Case 002) has the effect of terminating all criminal and civil actions against him before the ECCC.²¹ It was, therefore no longer necessary for the Defence team for Ieng Sary to be engaged by the ECCC.

31. On 29 April 2013, the Applicant requested from the Head of DSS of UNAKRT to authorise a flight for the Defence Team’s Legal Consultant from Phnom Penh to the Applicant’s office in Amsterdam (the “Travel Request”). The Applicant made the Travel Request “pursuant to Paragraph A.2 of the Guide to the LAS which states that Legal Consultants are entitled to a flight to the office of the Foreign Co-Lawyer every six months. The Applicant grounded the request as follows:

- The Legal Consultant had been working at the ECCC for more than six months, and

²¹ Case 002, Termination of the Proceedings against the Accused Ieng Sary, 14 March 2013, Trial Chamber, E270/1.

- that request was necessary due to the fact that the Applicant himself was “precluded from traveling to Cambodia as regularly as [he] had planned.”²²

32. On 30 April 2013 the Head of DSS of UNAKRT rejected the Travel Request by providing the following reasons:

- The practice of authorising foreign travel for Legal Consultants has been discontinued since the previous summer;
- All Defence Teams were notified orally [of the discontinuation of such practice] during a general meeting last year;
- Defence Teams no longer have discretion in the use of their own travel budget because all separate budgets of the Defence Teams have now been merged into a single smaller one;
- “The rationale for authorizing Legal Consultants to travel to the office of their Foreign Co-Lawyer in the past was that the latter did not generally travel to Phnom Penh for long periods of time during the investigations and pre-trial phases of procedure. In your case, however, you have been specifically notified that you are authorised to travel from Amsterdam to Phnom Penh every six months, thereby eliminating the need for [the Legal Consultant] to travel as well.”

33. On 1 May 2013 the Applicant asked the Head of DSS of UNAKRT to reconsider the rejection of the Travel Request (the “Request for Reconsideration”) on the basis that the rejection was not grounded in law and that the law was applied incorrectly. The Applicant developed his argument as follows:

- The relevant rule is still in force as there has not been any formal amendment/annulment to the Guide to the LAS;
- The Head of DSS of UNAKRT never (not at the time of his hiring or in the context of many exchanges they had related to the Guide to the LAS)

²² For more details see also paragraph 27 above.

informed the Appellant of any rules within the LAS that would no longer apply;

- The reduction in the frequency of travel (from four to two times per year) for the Appellant makes the Travel Request for the Legal Consultant more necessary;
- The Legal Consultant's travel is part of the Defence's work-plan and it's rejection hampers the effective functioning of the Defence team and, ultimately, violates the Suspect's right to an effective defence.

34. On 3 May 2013, the Head of DSS of UNAKRT addressed Applicant's Request for Reconsideration as follows:

- "We are currently undertaking a comprehensive review of the LAS in an effort to streamline the DSS policies, processes and practices. This will take some time to complete as the final document will have to be vetted and approved at the UNHQ in New York";
- "In the meantime, I would encourage you to consult with us informally to see what may or may not be feasible before you make any concrete plans";
- All the members of [the Applicant's] Team who were on board at the time were notified of the meeting of September 2012 as well as of the agenda;
- There are simply no funds available in the 2013 budget for the foreign travel of Legal Consultants. This is a "policy position necessitated by the reality on the ground" such as the recent merger of the previously separate travel budgets for each Defence team. "The decision to merge the travel budgets was made at a much higher level than DSS and we had no say in the matter."

35. On 8 May 2013 the Appellant emailed the Head of DSS of UNAKRT informing him of the view that a "dispute between us has arisen [concerning the Travel Request] relating to the terms and conditions of [the Applicant's] contract" and invited the

Head of DSS of UNAKRT, pursuant to Section 11.1 of the LSC, “to explore on short notice the possibilities for an amicable solution.”

36. On 15 May 2013, the Head of DSS of UNAKRT emailed the Applicant reinstating the rejection of the Travel Request and adding the following to the reasons already expressed:

- While your contract with the United Nations stipulates that “if necessary” you “may be assisted by a Legal Consultant,” it does not state that the Legal Consultant must travel to your office in Amsterdam in order to assist you;
- All Legal Consultants recruited by the DSS to assist Co-Lawyers are quite capable of performing their functions satisfactorily from the ECCC premises in Phnom Penh;
- The Guide to the LAS is not and does not apply in the same manner as the law; it has not been formally adopted by the Plenary; it is essentially just a series of policy and procedure guidelines designed to assist me in the administration of the LAS.

37. In the email of 15 May 2013, the Head of DSS of UNAKRT explained his use of discretion in applying the Guide to the LAS in the following terms: “in interpreting [the LAS] provisions, I have to take stock of the practical realities on the ground including budgetary constraints. In this instance, the practical reality is that there are no provisions in the 2013 UNAKRT budget for the foreign travel of Legal Consultants.”

38. The Applicant replied on the same day of 15 May 2013 expressing concern that the Head of DSS of UNAKRT did not take into account in his decision making process the needs and rights of Applicant’s client, observing the Head of DSS of UNAKRT’s refusal to enter into an amical settlement and informing the Head of DSS of UNAKRT that the Applicant was therefore “compelled to request the appointment of an administrative judge.”

39. On 17 May 2013 the Applicant was recognised by the International Co-Investigating Judge as the foreign Co-Lawyer for E [REDACTED] (the “Recognition Decision”).²³ In the Recognition Decision, the International Co-Investigating Judge observing that the national Co-Lawyer for E [REDACTED] “[REDACTED] lacks experience in international criminal law whereas A [REDACTED] [REDACTED] has expertise in that field” found it “*unnecessary to address the issue of whether the Suspect should be granted the right to two Co-Lawyers.*”²⁴ On the same day of 17 May 2013, the Applicant requested from the Coordinator of UNAKRT “the appointment of a United Nations Administrative Judge to hear the ‘non-fee dispute’ between the Head of DSS and the Applicant in relation to the impugned decision.”

ADMISSIBILITY:

Submissions of the Applicant:

40. The Applicant submits that the issue of payment for the flight of the Legal Consultant is admissible to the UNAJ under paragraph 11.1 of the Legal Services Contract which provides the framework for resolution of non-fee disputes between the parties to the LSC, namely the Applicant and the United Nations. The Applicant suggests that his entitlement under Article 10.2 of the LSC to the assistance of a Legal Consultant coupled with the fact that, under Section A.2 of the Guide to the LAS, Legal Consultants are entitled to one return flight every six months to the office of their Co-Lawyer, would make the refusal of the Travel Request a violation by the United Nations of its obligations under the LSC to provide the Applicant with the effective assistance of a legal consultant. The Applicant suggests that the Guide to the LAS “must be interpreted so as to ensure the Appellant the assistance of the Legal Consultant in a manner consistent with the Legal Services Contract.”

²³ Decision on Motion and Supplemental Brief on Suspect’s Right to Counsel, Case No. 004/07-2009-ECCC-OCIJ, 17 May 2013, D122/6, para 109.

²⁴ Recognition Decision, para. 93.

41. The Applicant adds with concern that the violation of this obligation by the Head of DSS of UNAKRT places a restriction on Applicant's primary obligation, under paragraph 6.1 of the LSC, to provide "*effective* legal advice and representation" to his client.

Response by the Head of DSS of UNAKRT:

42. The Head of DSS of UNAKRT submits that "none of the terms or conditions of the LSC are involved in this dispute" therefore the Application should be declared inadmissible before the UNAJ.
43. The Head of DSS of UNAKRT argues that the Appellant's claim that the United Nations has a contractual obligation to provide the Appellant with the effective assistance of a legal consultant is completely unfounded because the language of paragraph 10.2 of the LSC does not confer a mandatory right or entitlement upon the Appellant and that it is within the inherent discretion of the DSS to assess if that is necessary. This notwithstanding, the Head of DSS of UNAKRT confirms that the DSS recruited the Legal Consultant to work on the Appellant's Defence team.
44. The Head of DSS of UNAKRT adds that, as neither paragraph 10.2 of the LSC nor the initial contract signed on 14 August 2012 by the Legal Consultant mention any obligation on the part of the United Nations to provide funding for such travel of legal consultants, the rejection of the Travel Request cannot be viewed as a violation of a contractual obligation under the LSC.
45. The Head of DSS of UNAKRT further avers that the Guide to the LAS is a policy document which is not incorporated into the LSC and that therefore there is no basis in law for bringing a complaint against deviations from a strict application of the wording of the Guide to the LAS before the UNAJ. The Head of DSS of UNAKRT, however, admits that revisions to the Guide require that "the final document be vetted

and approved by various actors, including multiple departments at the United Nations Headquarters in New York.”²⁵

Reply by the Applicant:

46. The Applicant submits in reply that, at this stage, it is irrelevant whether or not the appointment of a legal consultant is conditional or mandatory because the decision finding the assistance of a legal consultant necessary has already been taken. The Applicant insists that the LSC should be interpreted in a manner which safeguards the rights of E [REDACTED].
47. The Applicant suggests that the Head of DSS of UNAKRT, seeking to minimise its obligations, “inserts an incorrect disjunction between the LSC and the Guide to the LAS” and that the Head of DSS of UNAKRT’s position in respect of the Guide is difficult to follow. On the one hand the Head of DSS of UNAKRT downplays the importance of the Guide by emphasising that its provisions can be ignored and on the other hand he states that amendments to the Guide require the full involvement and approval of the United Nations Headquarters in New York, which suggests that the Guide is an important source of law that applies directly to the United Nations and that it should be used in interpreting the obligations outlined in the LSC. The Applicant adds that it has been the practice of the DSS to use the Guide in respect of other obligations arising under the LSC such as payment.

UNAJ’s Considerations:

48. At the outset, reference is made to: 1) The terms of the Legal Services Contract entered into between the Applicant and the Head of DSS of UNAKRT and to the terms of Form P-104 which is part of the LSC; 2) The provisions of DSS Administrative Regulations; 3) The text of the Guide to the Legal Assistance Scheme, which was provided to the UNAJ by the Coordinator of UNAKRT and was also

²⁵ Response, para. 27.

provided by the Head of DSS of UNAKRT as an attachment to the list of the documents disclosed on 27 May 2013; and 4) Reference is also made and guidance is sought from relevant articles of the Statute and Rules of Procedure of the United Nations Dispute Tribunal and from relevant parts of its jurisprudence.

49. It is observed that an analysis of the language of paragraph 10.2 of the LSC²⁶ is not necessary under the circumstances where the DSS has already recruited the Legal Consultant to assist the Applicant which confirms that, in the instant matter, the DSS has found the assistance of the Legal Consultant to be *necessary*.
50. The UNAJ further observes that, whereas paragraph 11.1 of the LSC explicitly refers to *any* dispute “*relating to the terms and conditions of the Contract*,” none of the terms of the LSC makes explicit reference to the Guide to the LAS. The UNAJ notes, however, that the terms of the LSC, paragraph 10.2, explicitly foresee the possibility of the assignment of a legal consultant, if seen necessary, to assist the Co-Lawyers for the purposes of an “effective preparation of the defence” which in turn, in terms of paragraph 6.1 of the LSC,²⁷ is identified as the “primary obligation” of the Applicant under the LSC.
51. The UNAJ further notes paragraph 1.6 of the DSS Administrative Regulations which provides that: “the DSS *may* require candidates to *accept the terms and conditions of the Legal Assistance Scheme* before including them fully in the UNAKRT list.” Although it is not made explicitly clear from the submissions before the UNAJ whether the Applicant has formally (i.e. in written) “accepted” the terms and conditions of the Guide to the LAS, it is noted that the Applicant refers in his submissions to the UNAJ to the fact that DSS forwarded to him a copy of the Guide

²⁶ Paragraph 10.2 of the LSC reads: “Legal Consultants/Case Managers. If necessary, for the effective preparation of the defence, the Co-Lawyers may be assisted by a Legal Consultant and/or a Case Manager. The Co-Lawyers shall make a joint request to the DSS for a Legal Consultant and/or a Case Manager to be appointed explaining the nature of the tasks to be undertaken and the duration of any appointments. If the DSS agrees that such appointments are *necessary*, the Co-Lawyers shall select a Legal Consultant and/or a Case Manager from the list of Legal Consultants and the list of Case Managers who shall be appointed by the DSS on the basis of periodically renewable contracts and assigned to the case on a full time basis.”

²⁷ Paragraph 6.1 of the LSC reads: “*Primary obligation*. The Contracting Co-Lawyer shall provide *effective legal advice and representation* to the Accused as his or her defence lawyer with respect to the proceedings before the ECCC.”

to the LAS at the time of his recruitment and to “exchanges” he and the Head of DSS of UNAKRT had in relation to the Guide to the LAS.²⁸ The UNAJ finds that the reference to the Guide in the DSS Administrative Regulations is not incidental and, notwithstanding the optional nature of the acceptance inferred by the use of the term “may” in paragraph 1.6 of the DSS Regulations, the fact that the Applicant is included in the UNAKRT list of lawyers sufficiently implies acceptance. Adherence by the Applicant to the terms of the Guide is, therefore, to be considered as sufficiently linked to the process of his recruitment to warrant an intrinsic link between the Guide and the terms of his employment. Such linkage between the terms of a contract and the governing regulations and established policies is also reinforced by the fact that the main purpose of the Guide and the primary obligation of the Appellant under the LSC are identical, such being: “to ensure effective legal advice and representation.”

52. To illustrate the depth and breadth of the relationship between the terms of a contract and relevant administrative issuances in international organisations the UNAJ takes guidance from the elucidating provisions of Article 2.1(a) of the UNDT Statute²⁹ which read:

“The Dispute Tribunal shall be competent to hear and pass judgment on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of

²⁸ See Applicant’s Request for the Reconsideration of the Travel Request in email, dated 1 May 2013, from the Applicant to the Head of DSS of UNAKRT.

²⁹ See also *Sefraoui v. Secretary General of the United Nations*, Case No.: UNDT/NY/2009/024/IAB/2008/046, Judgment No: UNDT/2009/095, 24 December 2009, para 13: “the Secretary General is obliged by his contract with the employees to comply with all the statutory instruments [...] governing such matters *and established practices which amount to undertakings or representations by the Secretary-General to employees as to the applicable procedures*,” see also para. 18: “The expectation that a staff member is entitled is that the Secretary-General and those acting under his authority will *comply in good faith with the terms* of the contract of employment, *in particular, the instruments governing the matter in question*.”

employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules *and all relevant administrative issuances in force at the time of alleged non-compliance.*”³⁰

53. Having read the terms of the Guide and those of the LSC both setting as a guiding principle and primary obligation the “*provision of effective legal advice and representaion,*” considering all of the above and the fact that, as admitted by the Head of DSS of UNAKRT, amendments to the Guide require the full involvement *and approval* of the United Nations Headquarters in New York, the UNAJ finds that the Guide to the LAS is a relevant administrative issuance pertinent to the terms of engagement of the Applicant for the purposes of providing effective legal assistance and representation.

54. The Application is, therefore, admissible before the UNAJ pursuant to paragraph 11.1 of the LSC as it concerns a dispute directly “relating to the terms and conditions of the Contract.”

MERIT:

The Law:

55. Reference is made to: 1) The terms of the Legal Services Contract entered into between the Applicant and the Head of DSS of UNAKRT and to the terms of Form P-104 which is part of the LSC; 2) The provisions of DSS Administrative Regulations; 3) The text of the Guide to the Legal Assistance Scheme³¹; 4) The relevant articles of the Statute and Rules of Procedure of the United Nations Dispute Tribunal and relevant parts of its jurisprudence; 5) Guidance is also sought from the decisions of the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory

³⁰ Statute of the United Nations Dispute Tribunal, as adopted by the General Assembly by resolution 63/253 of 24 December 2008.

³¹ Note is made of the fact that *no amendments* (such as those related to the subject of this matter) to the Guide’s provisions in relation to travel of Legal Consultants appear anywhere in the official document of the Guide provided to the UNAJ.

of the former Yugoslavia (ICTY) in reviewing ICTY's Registrar's administrative decisions;³² 6) Finally, reference is made, and attention is drawn to all those concerned, to the United Nations Resolution adopted by the General Assembly on the Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.³³

Standard for review of administrative decisions:

56. The Head of DSS of UNAKRT suggests that, "should the UNAJ decide that the [Application] is admissible, [...] the only issue [...] to determine is *whether it is necessary and reasonable*, at this stage of the proceedings in Case 004, *for the United Nations to incur the cost* of transporting a Legal Consultant from Phnom Penh to Amsterdam and back in order for the Legal Consultant to meet with a Co-Lawyer."³⁴ The Applicant replies that the "Head of DSS of UNAKRT maintains an incorrect position with regards the standard of review that applies in the current dispute" and that "*it would be wrong and pretentious for the Head of DSS of UNAKRT to seek to place himself in the position of a legislator* and to substitute his own personal opinions and views for the provisions of a source of law that has been established with full involvement of and approval by the [United Nations]."³⁵ The Applicant suggests that "the denial of the [Travel Request] *should not be viewed in isolation* but as part of a pattern of rejection of each and every Defence initiative."³⁶

57. The UNAJ observes that the Agreement, ECCC Law, Internal Rules, DSS Regulations, the LSC or the Guide to the LAS do not define or give any guidance as to the standard of UNAJ's review of administrative decisions. The UNAJ is mindful that the matter in question relates to the dynamics and terms of a relationship between an individual and an international organisation rather than to such relationships as

³² See Decision on Defence Support Section Request for a Stay in Case 004 Proceedings before the Pre-Trial Chamber and for Measures Pertaining to the Effective Representation of Suspects in Case 004, PTC01(Doc No. 3), last sentence of para. 11.

³³ A/RES/67/187, 28 March 2013, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.

³⁴ Response, para. 13.

³⁵ Reply, para. 5.

³⁶ Reply, paras. 23 and 15, last sentence.

those typically subject to national laws or review bodies. The UNAJ is also mindful that this is a judicial review of an administrative decision. Therefore, the UNAJ in setting the standard for review of the administrative decision shall, first of all, seek guidance from relevant articles of the Statute and Rules of Procedure of the United Nations Dispute Tribunal, from relevant parts of its jurisprudence and to the fact that “[w]hen the General Assembly established the current [United Nations] system of administration of justice,³⁷ it affirmed that such system shall be “*consistent with the relevant rules of international law and the principles of rule of law and due process* to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike.”³⁸ Further, due to close similarities in position and functioning with the relevant bodies within international or hybrid criminal tribunals, the UNAJ shall seek guidance from the decisions of the President of the ICTY in reviewing ICTY Registrar’s administrative decisions where related to similar circumstances as those subject of the instant Application.

58. In particular, the UNAJ first observes that in the case of *D’Hellencourt*, the UNDT noted that, in its judgment in the case of *Van der Valk*, the United Nations Appeals Tribunal (UNAT) stated that: “*it cannot substitute its judgment for that of the Administration* in respect to reorganisation of posts or staff in the interest of economy and efficiency.”³⁹ Further in the case of *D’Hellencourt*, the UNDT observing that “*no discretion can be absolute*” noted that in the case of *Seaforth*, the UNAT recalled that: “*only where the Head of DSS of UNAKRT’s discretion is tainted by extraneous factors, such as prejudice, arbitrariness, improper motive, discrimination, for example, is such discretion subject to limitation.*”⁴⁰ In the case of *Obdeijn* the UNDT also noted that “when considering the propriety of a contested administrative decision, the Tribunal will consider, inter alia, *the lawfulness of any reasons given for the*

³⁷ The United Nations system of administration of justice includes the UNDT and UNAT.

³⁸ See *Obdeijn v. Secretary General of the United Nations*, Case No. UNDT/NY/2009/099/JAB/2009/044, Judgment UNDT/2011/032, 10 February 2011, para. 32 referring to General Assembly resolution 63/253.

³⁹ See *D’Hellencourt v. Secretary General of the United Nations*, Case No. UNDT/NB/2009/001, Judgment No. UNDT/2010/018, 29 January 2010, para. 44. See also *Sefraoui v. Secretary General of the United Nations*, Case No.: UNDT/NY/2009/024/JAB/2008/046, Judgment No: UNDT/2009/095, 24 December 2009, para 13 referring to UNAT Judgment No. 117 (1968), para IV.

⁴⁰ *Id.*, para. 45 referring to UNAT Judgment No. 1163 (2003) para. X.

contested decision”⁴¹ and that “any administrative decision entails a reasoned determination arrived at after consideration of *relevant facts* since there is a *duty and requirement on institutions to act fairly, transparently, and justly* in their dealings with staff members.”⁴² Lastly, the UNAJ notes the UNDT’s observation that “what constitutes an administrative decision would depend on a number of *factors like the status of the decision maker, the nature of the act, the law or regulation under which the act was performed and the nature of the consequences of the act on one or more individuals*”⁴³ and that “given the nature of the decisions taken by the administration, there cannot be a precise and limited definition of such a decision. What is or is not an administrative decision must be decided on a case by case basis and *taking into account the specific context of the surrounding circumstances when such decisions were taken.*”⁴⁴

59. The UNAJ observes that the Acting President of the ICTY in his decision on a request for review of Registrar’s decision, relying on the standard set by the Appeals Chamber in *Kvocka et al.*, stated that *such review is “neither a rehearing nor an appeal”* and that “such a decision may only be quashed if the Registrar has: a) *failed to comply with the relevant legal requirements*; b) *failed to observe basic rules of natural justice or to act with procedural fairness* toward the accused; c) *[took] into account irrelevant material or failed to take into account relevant material*; or d) reached a conclusion that *no reasonable person could have reached* on the material before the Registrar.”⁴⁵

60. To conclude, the UNAJ finds that a UNAJ’s standard for review of the decisions made by the administration, unlike that suggested by the Head of DSS of UNAKRT, is that of a judicial review of administrative decisions, meaning that while the UNAJ

⁴¹ See *Obdeijn v. Secretary General of the United Nations*, Case No. UNDT/NY/2009/099/JAB/2009/044, Judgment UNDT/2011/032, 10 February 2011, para. 28.

⁴² *Id.*, para. 33.

⁴³ See *D’Hellencourt v. Secretary General of the United Nations*, Case No. UNDT/NB/2009/001, Judgment No. UNDT/2010/018, 29 January 2010, para. 40 referring to UNDT Judgment 2010/010 dated 22 January 2010.

⁴⁴ *Id.* referring to UNDT Judgment 2009.090 dated 17 December 2009.

⁴⁵ *Prosecutor v. Vojislav Seselj*, Case No. IT-03-67-T, Decision on Vojislav Seselj’s Request for Review of Registrar’s Decision of 10 September 2009, 21 October 2009, para. 19 referring to *Prosecutor v. Kvocka et al.*, Case No. IT-98-30/1-A, Decision on Review of Registrar’s Decision to Withdraw Legal Aid from Zoran Zigic, 7 February 2003, para. 13.

cannot substitute his or her judgment for that of the Administration, the UNAJ has to examine whether the Administration in its decision making process has exercised its discretion fairly, transparently and justly and whether it has provided lawful reasons for its decisions.

61. In light of all the above, the UNAJ also finds that a UNAJ has the authority to quash such decisions where the Administration has a) failed to comply with the relevant legal requirements; b) failed to observe basic rules of natural justice or to act with procedural fairness toward the accused; c) taken into account irrelevant material or failed to take into account relevant material; or d) reached a conclusion that no reasonable person could have reached on the material before the Administration.

Burden of Proof:

62. The UNAJ notes that, in principle, where a dispute has arisen in relation to a decision, the party alleging a wrongdoing by the decision maker has to prove such in order for the reviewing authority to interfere with the decision or not. In this respect the UNAJ observes that “it has been UNAT’s long lasting jurisprudence that anyone alleging harassment, prejudice, discrimination or any other extraneous factor or improper motivation of a particular decision, has the *onus probandi* of such an assertion ((Cf. Judgments No. 554, *Fagan* (1992); no. 553, *Abrah* (1992); No. 312, *Roberts* (1983) and No. 428, *Kumar* (1988)). This is in fact in line with the well-known maxim of law that *the party who alleges a fact bears in principle the burden of proving its veracity*⁴⁶ or that “The Applicant should prove that the impugned administrative decision was in non compliance with [the] terms of contract.”⁴⁷ In a similar fashion, the ICTY’s *Kvočka et. al.* Appeal Decision reads in its paragraph 14 that “*the party contesting the administrative decision bears the onus of persuasion* and must show

⁴⁶ See *Sefraoui v. Secretary General of the United Nations*, Case. No. UNDT/NY/2009/024/JAB/2008/046, Judgment No. UNDT/2009/095, 24 December 2009, para. 19 referring to *Bye* UNDT/2009/083.

⁴⁷ See *D’Hellencourt v. Secretary General of the United Nations*, Case No. UNDT/NB/2009/001, Judgment No. UNDT/2010/018, 29 January 2010, para.42.

that (a) an *error of the nature described has occurred*, and (b) that such error has *significantly affected* the impugned decision to his detriment.”⁴⁸

63. On the other hand, the UNAJ considers that, as also noted in UNDT’s jurisprudence, “the Administration must be able to make at least a *minimal showing* that the staff member’s statutory right was honoured *in good faith* in that the Administration gave ‘the *fullest regard*’ to it.”⁴⁹ For current purposes, this is relevant to the decision making process in respect of matters concerning the Applicant.

The Administrative Decision of the Head of DSS:

64. The Head of DSS in rejecting the Travel Request on 30 April 2013 provided the following reasons:

- The practice of authorising foreign travel for Legal Consultants has been discontinued since last summer;
- All Defence Teams were notified orally [of the discontinuation of such practice] during a general meeting last year;
- Defence Teams no more have discretion in the use of their own travel budget because all separate budgets of the Defence Teams have now been merged into a single smaller one;
- “The rationale for authorising Legal Consultants to travel to the office of their Foreign Co-Lawyer in the past was that the latter did not generally travel to Phnom Penh for long periods of time during the investigations and pre-trial phases of procedure. In your case, however, you have been specifically notified that you are authorised to travel from Amsterdam to Phnom Penh every six months, thereby eliminating the need for [the Legal Consultant] to travel as well.”

⁴⁸ *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Review of Registrar’s Decision to Withdraw Legal Aid from Zoran Zigic, 7 February 2003, para. 14.

⁴⁹ See *Sefraoui v. Secretary General of the United Nations*, Case. No. UNDT/NY/2009/024/IAB/2008/046, Judgment No. UNDT/2009/095, 24 December 2009, para. 20 referring to *Williamson* (1986) Judgment 362 of the United Nations Administrative Tribunal.

65. Further, on 3 May 2013, the Head of DSS addressed Applicant's Request for Reconsideration of the rejection of the Travel Request as follows:

"We are currently undertaking a comprehensive review of the LAS in an effort to streamline the DSS policies, processes and practices. This will take some time to complete as the final document will have to be vetted and approved at the UNHQ in New York";

- "In the meantime, I would encourage you to consult with us informally to see what may or may not be feasible before you make any concrete plans";

- All the members of [the Applicant's] Team who were on board at the time were notified of the meeting of September 2012 as well as of the agenda;

- There are simply no funds available in the 2013 budget for the foreign travel of Legal Consultants. This is a "policy position necessitated by the reality on the ground" such as the recent merger of the previously separate travel budgets for each Defence team. "The decision to merge the travel budgets was made at a much higher level than DSS and we had no say in the matter."

66. In the email of 15 May 2013, the Head of DSS of UNAKRT explained his use of discretion in applying the Guide to the LAS in the following terms: "in interpreting [the LAS] provisions, I have to take stock of the practical realities on the ground including budgetary constraints. In this instance, the practical reality is that there are no provisions in the 2013 UNAKRT budget for the foreign travel of Legal Consultants."

Submissions of the Applicant before the UNAJ:

Relief requested:

67. The Applicant asks from the UNAJ to "issue a decision ordering the Head of DSS of UNAKRT to:

- a. Authorise the [Travel] Request and provide funding for the Consultant's return flights to Amsterdam, and
- b. Interpret and apply the Guide to the LAS in a manner which safeguards the rights and interests of the Charged Person.”⁵⁰

Grounds for the Application:

68. The Applicant submits that the denial of the Travel Request by the Head of DSS of UNAKRT is in violation of the terms and conditions of the LSC insofar as it denies the Appellant the assistance of the Consultant to the extent necessary for the effective preparation of the defence. The Applicant argues that the Head of DSS of UNAKRT “cannot unilaterally place restrictions on the terms and conditions” of the Appellant’s LSC and that “no period of notification gives rise to a power on [the Head of DSS of UNAKRT’s] part to unilaterally vary the terms and conditions of the LSC.” The Applicant claims that as “no amendments to the Guide to the LAS had been incorporated by the time of the coming into force of the LSC, the [Applicant] has a legitimate expectation that the terms and conditions of the assistance of the Consultant are those set out in the Guide to the LAS at the time the LSC came into effect.”

69. Further, the Applicant avers that the Head of DSS of UNAKRT, in taking the impugned decision, failed to consider the relevant “fact that the Head of DSS of UNAKRT rejected the [Applicant’s] request for authorisation to travel to Phnom Penh four times in 2013” and argues that “the restrictions placed on the [Applicant’s] visits to Cambodia in 2013 serve only to increase the need for the Consultant to travel.” The Applicant views the rejection of the Travel Request as a “further restriction” on his primary obligation under the LSC to “provide *effective* legal advice

⁵⁰ Application, para. 34.

and representation,” within the meaning of the term (effective) as defined by international human rights standards.⁵¹

70. Lastly, the Applicant submits that the Head of DSS of UNAKRT in taking the impugned decision, followed a pattern⁵² of giving more weight to budgetary considerations as opposed to other more important and substantive considerations such as the effect the Head of DSS of UNAKRT’s decisions have not only on the Applicant’s capacity to fulfil his primary obligation under the LSC but also, what the Applicant sees as most important, on the right of his client to receive effective legal advice and representation.⁵³ The Applicant suggests that “the only legitimate response to practical and financial problems surrounding international criminal justice is to ‘not attempt to try persons in a way which does not accord with [their] rights’.”⁵⁴

71. The Applicant adds the observation that the fact that the International Co-Investigating Judge (ICIJ) recognised him as Counsel in Case 004 should be taken into account as a relevant factor in favour of Defence’s requests, including the Travel Request.⁵⁵

72. The Applicant, lastly suggests that the right to equality of arms is not being observed by the Head of DSS of UNAKRT in that, as the Applicant opines, “resources available to the Co-Prosecutors in Cases 003 and 004 substantially outweigh the resources available to the Defence, by far beyond what is reasonable.”⁵⁶

Response by the Head of DSS of UNAKRT:

73. The Head of DSS of UNAKRT “admits that the Guide to the LAS in its current form is not a perfect document as some of its provisions no longer correspond to the

⁵¹ The Applicant makes reference to a number of authorities from the European Court of Human Rights quoting explanations of the meaning of the term “effective” noting amongst others that “mere nomination does not ensure effective assistance.” See Application, paras. 25-27.

⁵² Application, paras 28-30. The Applicant supports the “pattern” argument by referring to documents related to this procedure and other letters from the Head of DSS of UNAKRT to the Applicant related to other requests.

⁵³ Application, paras. 28-30.

⁵⁴ Application, paras. 30-31 referring to jurisprudence from the ICTY and the International Criminal Court.

⁵⁵ Application, para. 32.

⁵⁶ Application, para. 33.

realities facing DSS and the Defence Teams” and that “in fact, efforts are *currently* underway to revise the Guide to the LAS and bring it in line with those realities as well as with the *financial* and *human resources* policies and practices of the United Nations.” The Head of DSS of UNAKRT further explains that “this process is likely to be a lengthy one, ultimately requiring that the final document be vetted and approved by various actors, including multiple departments at the United Nations Headquarters in New York.” The Head of DSS of UNAKRT states that “*in the meantime*, the Head of DSS of UNAKRT has favoured a consultative and conciliatory approach in his interaction with all the Defence Teams” and argues that changes to the Guide have “been openly discussed” with the Defence Teams and that “those concerned have been duly informed of whatever changes in practice.”⁵⁷

74. The Head of DSS of UNAKRT further explains that, in principle, “Administrators of the United Nations [...] have some inherent and entirely necessary discretion in the exercise of the decision making powers conferred on them” and that “in the unique context of the ECCC, it may be necessary from time to time to deviate from a very strict application of the provisions of the Guide to the LAS.”⁵⁸
75. The Head of DSS of UNAKRT explains his use of discretion in the following terms: “in administering the LAS and interpreting the provisions of the Guide to the LAS the Head of DSS of UNAKRT has always taken great care to strike a reasonable balance between the fundamental rights of the Suspect, Charged Person or Accused, on the one hand, and practical considerations on the other.”⁵⁹
76. The Head of DSS of UNAKRT explains that in deciding whether to authorise funding, the Head of DSS of UNAKRT has to consider the following factors:

- a. The applicable legal provisions,
- b. The impact of a denial on the Suspect, Charged Person or Accused, as well as

⁵⁷ Response, para. 27 see also paras. 20 and 21.

⁵⁸ Response, para. 17.

⁵⁹ Response, paras. 16 and 25.

- c. The available resources.⁶⁰

The applicable legal provisions:

77. The Head of DSS of UNAKRT, reiterating that the *Guide to the LAS* is not a binding contract between the Applicant and the United Nations, explains that the Guide is a “set of policy guidelines designed to assist the DSS Chief and Legal Officers in the administration of the ECCC’s Legal Assistance Scheme.”⁶¹

78. The Head of DSS of UNAKRT also points out that in evaluating Defence requests for funding or for the reimbursement of expenses, the DSS has “historically applied” the “necessary and reasonable” standard “based on *paragraphs 9.2 and 9.3(a) of the [Legal Services Contract]* dealing with Consideration by the United Nations.”⁶²

79. In the Response, the Head of DSS of UNAKRT also shows that in his decision making process in the instant case he made reference to the *Glossary of the Internal Rules* of the ECCC,⁶³ and to *decisions* issued in Case 004 by the International Co-Investigating Judge.⁶⁴

The impact of a denial of the Travel Request on the Suspect, Charged Person or Accused:

80. The Head of DSS of UNAKRT clarifies in the Response that he does not dispute that “a Suspect or Charged Person is entitled to the assistance of counsel.”⁶⁵ The Head of DSS of UNAKRT explains that “in deciding whether to authorise funding for Defence activity [...] where an activity is deemed to be necessary and reasonable for the defence of the Suspect, Charged Person or Accused, it will generally be authorised. Where it does not meet these criteria, it will generally be denied.”⁶⁶ The

⁶⁰ Id.

⁶¹ Response, para. 16.

⁶² Response, footnote. 6.

⁶³ Response, footnote. 7.

⁶⁴ Response, footnote. 9.

⁶⁵ Response, para. 15.

⁶⁶ Response, para. 25.

Head of DSS of UNAKRT also explains that in determining what is necessary and reasonable, he considers the circumstances of the case as a whole or, to put it in the Head of DSS of UNAKRT's own words, he "takes a significantly *broader view of 'the whole'*."⁶⁷

81. The Head of DSS of UNAKRT adds and argues that the Applicant fails entirely to demonstrate how failure to grant the Travel Request "impacts on the functioning of the Defence Team, or what prejudice could possibly accrue to the Suspect other than misguided assertions of a personal 'right' to such funding on the part of the Appellant."⁶⁸ In explaining why he rejected the Travel Request, the Head of DSS of UNAKRT takes the position that the Appellant's client is not a Charged Person,⁶⁹ but rather a Suspect who:

- i. Has not yet been charged with any crime;
- ii. Is not currently under arrest or in detention, and
- iii. Is not on trial.

Therefore, has *different rights* from a Charged Person.⁷⁰ The Head of DSS of UNAKRT further explains that in taking the impugned decision he has also taken note of the fact that, at this stage, there are no hearings or other activities scheduled by the Co-Investigating Judges in Case 004 and that the *Applicant did not explain in the Travel Request what benefit would be gained* from flying the Legal Consultant to Amsterdam at this stage, what can be done in Amsterdam that cannot be done in Phnom Penh and why now.⁷¹

82. The Head of DSS of UNAKRT contests the Applicant's statement in paragraphs 30-31 of the Application arguing that it is baseless to suggest that the rejection of the

⁶⁷ Response, para. 16.

⁶⁸ Response, para. 23, last sentence.

⁶⁹ See also Response, para. 28.

⁷⁰ Response, para. 14.

⁷¹ Id.

Travel Request, at this stage, may form grounds for the Court to abandon the proceedings against E [REDACTED].⁷²

The available resources:

83. The Head of DSS of UNAKRT explains that in his decision making process he also took into account the fact that “*funding is already allocated for the Appellant to travel on multiple occasions between Amsterdam and Phnom Penh during the investigations phase of the proceedings in Case 004*” and that he considered it “more reasonable for the Appellant to travel to Phnom Penh” where he could meet not only the Legal Consultant but also the Suspect.⁷³ Having said the above, the Head of DSS of UNAKRT however, suggests that the fact that other Applicant’s travel requests have been rejected is irrelevant to the matter under review before the UNAJ.⁷⁴
84. The Head of DSS of UNAKRT adds, that he considers the need for Legal Consultants to travel abroad unnecessary because all DSS *Legal Consultants are provided with office space and related facilities to enable them to communicate from distance with the Co-Lawyers overseas.*⁷⁵
85. In relation to his role, the Head of DSS of UNAKRT opines that the “Appellant is grossly mistaken as to the ‘mandate’ of DSS, which [the Appellant] states ‘should be to support the Appellant in his work’ and explains that “the role of DSS cannot be simply to approve and pay whatever the Appellant wishes. Rather the Head of DSS of UNAKRT has a *fiduciary responsibility to the United Nations and moreover the taxpayers of the ECCC Donor States* to ensure that the funds entrusted to his care are expended in the most judicious manner.”⁷⁶
86. The Head of DSS of UNAKRT, admitting that it is a matter beyond DSS’ inherent discretion, explains how he took into account in his decision making process ECCC’s

⁷² Response, para. 28.

⁷³ Response, para. 22.

⁷⁴ Response, para. 24.

⁷⁵ Response, para. 23.

⁷⁶ Response, para. 25.

*“serious funding crisis for the last few years” and the “austerity measures requirement” for a “substantial reduction in non-essential travel expenses.”*⁷⁷

Other *post factum* revealed considerations:

87. The Head of DSS of UNAKRT adds that, even without the budget crisis, it was brought to his attention that “the travel provision could easily be used (and appears to have been used in the past) by the Legal Consultants to improperly subsidise their personal travel home.”⁷⁸ The Head of DSS of UNAKRT in addition puts forward the explanation that “it should also be recalled that the policy of authorising the foreign travel of Legal Consultants was instituted in the early years of the ECCC when the *circumstances were quite different from what they are today*. During those early years, prior to the commencement of regular court hearings in Case 001 and Case 002, the foreign Co-Lawyers were not required to reside in Phnom Penh and tended to stay away for long periods of time before visiting their clients. The initial justification, then, for authorising the Legal Consultants to visit the offices of their Co-Lawyers overseas was, at least in part, to bridge that lengthy gap.”⁷⁹

Reply by the Applicant:

88. Referring to paragraph 21 of the Response, the Applicant avers that the change in policy of travel for Consultants assigned in relation to Case 004 places those the subject of investigation in this case at a disadvantage in comparison with those who were the subject of investigations in Cases 001 and 002.⁸⁰

89. The Applicant maintains that he was not informed of any changes to the Guide to the LAS.⁸¹

⁷⁷ Response, para. 18.

⁷⁸ Response, paras. 19 and 21 and footnote 13.

⁷⁹ Response, para. 21.

⁸⁰ Reply, para. 19 and 20.

⁸¹ Reply, para. 17.

90. The Applicant, in replying the Head of DSS of UNAKRT's contestation that the Applicant failed to demonstrate how rejection of the Travel Request impacts on the functioning of the Defence team, explains that it is "[*the Applicant's position to maintain confidentiality to the extent possible where the strategy of the Defence Team [...] is concerned*]" and, "with a view to informing the [UNAJ]," provides the following explanation for the necessity of the Travel Request:

- a. The travel was requested in order to allow the Applicant and the Legal Consultant to work on a motion relating to [REDACTED]
- b. The work is vital to the defence case;
- c. The presence of the Legal Consultant in Amsterdam is necessary as consultation with experts based in the Netherlands is envisaged;
- d. The Applicant's visits to Phnom Penh are not a substitute for the Legal Consultant's visit to Amsterdam given the fact that the Head of DSS of UNAKRT has limited these visits to two per year rather than the four visits requested by the Applicant.⁸²

91. In reply to Head of DSS of UNAKRT's position that rejection of travel is justified by the fact that, at this stage, the Applicant's client is not a Charged Person and that no hearings or other activity is scheduled in Case 004 at the moment, the Applicant submits that experience has taught him that "whether or not a successful defence is conducted at international(ised) criminal tribunals fully depends on the defence activities deployed *at the earliest phases* of the proceedings."⁸³ In this respect, the Applicant adds that submitting requests for investigative action only at the conclusion of investigations stage of proceedings would put the Defence at a disadvantage because "there is too little time at that stage to offer a meaningful contribution to the judicial investigation, especially in the uncertain context of Case 004."⁸⁴ The Applicant argues that the Head of DSS of UNAKRT is wrong in referring to his client as a "Suspect" and not as a "Charged Person." The Applicant puts forward his view

⁸² Reply, para. 6.

⁸³ Reply, paras. 7-8.

⁸⁴ Reply, para. 9.

that that the facts that the Third Introductory Submission has already been issued and that E [REDACTED] has been notified of the charges against him by the Reserve International Judge Kasper-Ansermet coupled with the definition of the term “Charged Person” by the Glossary of the ECCC Internal Rules and as interpreted in ECCC jurisprudence, make his client a “Charged Person.”⁸⁵ The Applicant, referring to ECCC Internal Rules and jurisprudence adds that, as a “Charged Person,” his client has to play an “active role” in the investigations and that the facts that he is not arrested, or detained or on trial are, therefore, irrelevant for the purposes of the matter under review.⁸⁶

92. In the Reply, the Applicant also makes reference, for the first time throughout the process under review, to paragraph H(4) of the Guide to the LAS which provides that “the defence must be able to conduct *preliminary investigations* in order to bring to the attention of the Co-Investigating Judges facts that are relevant for the defence. [...] *It will be for the lawyers to establish the extent to which they are permitted to act.* Therefore the DSS has made available to each defence team a budget to conduct preliminary investigations.”⁸⁷
93. The Appellant further asserts that “in the interpretations of these rights the Head of the DSS repeatedly resorts to interpretations triggering the most damaging outcome for [the Applicant’s] client.”⁸⁸ The Applicant maintains the allegation that “a pattern has emerged whereby the Head of DSS of UNAKRT denies requests by the Defence for assistance without providing adequate explanations and often in direct contradiction of relevant provisions of law and guidelines.”⁸⁹ The Applicant insists that such pattern is relevant and should be taken into account by the UNAJ in determining the current matter.⁹⁰

⁸⁵ Reply, paras. 11-13.

⁸⁶ Reply, paras. 14 and 15.

⁸⁷ Reply, para. 15.

⁸⁸ Reply, para. 16.

⁸⁹ Reply para. 10.

⁹⁰ Reply, paras. 16 and 23.

UNAJ's Considerations:

94. The UNAJ first observes that the Head of DSS of UNAKRT suggests in the Response that the only matter to determine is “whether it is necessary and reasonable, at this stage of the proceedings in Case 004, *for the [United Nations] to incur the cost [...]*.”⁹¹ The Head of DSS of UNAKRT does not explain the basis for including budgetary considerations in the standard for review. The UNAJ further observes that the Head of DSS of UNAKRT explains, *although only in a footnote in the Response*, that the DSS, in evaluating Defence requests for funding or for reimbursement of expenses, has historically applied the “*necessary and reasonable*” standard based on paragraphs 9.2 and 9.3(a) of the LSC.⁹² In order to find the meaning of “necessary and reasonable” the UNAJ reads paragraph 9.2 of the LSC, which in turn, directs the reader to paragraph 7.1 of the LSC which provides as follows:

“The Contracting Co-Lawyer together with any other Co-Lawyer assigned to the case shall submit a joint Action Plan outlining in detail the *tasks to be completed in order to provide effective legal advice and representation* to the Accused and allocating those tasks and the hours required to complete them to individual members of the defence team. The proposed Action Plan shall be completed in accordance with time limits, work limits and task restrictions that may be imposed by the DSS. The Action Plan and the tasks and assigned hours proposed therein shall be approved by the DSS as being necessary and reasonable *for the effective representation* of the Accused. The Contracting Co-Lawyer shall provide justification for work to be done in respect of any of the tasks outlined in the Proposed Action Plan, as requested by the DSS.”

95. The UNAJ finds that, according to the LSC, the *primary considerations* to be made, when a Defence task or action is being scrutinised, are whether such actions are necessary and reasonable *in order to provide effective legal advice and representation*. The UNAJ also draws attention to the wording of paragraph 11.1 of

⁹¹ Response, para. 13.

⁹² Response, footnote 6.

the LSC which clearly states that the non-fee disputes relate to the *terms and conditions of the Contract* which, the UNAJ notes are *primarily concerned*⁹³ with issues related to *the provision of effective legal assistance and representation* and for the fulfilment of which both parties to the Contract have obligations.

96. Having reviewed the impugned decision, the UNAJ finds that nothing in it demonstrates that the Head of DSS of UNAKRT's primary consideration in addressing the Travel Request was whether the actions proposed were necessary and reasonable *for the effective advice and representation* of E [REDACTED], as was required. The Head of DSS of UNAKRT does not even appear to have enquired further with the Appellant in this respect. The only articulated reasons for rejecting the Travel Request are related to budgetary considerations. This is demonstrative of a lack of understanding by the Head of DSS of UNAKRT that his primary role is to enable both the Applicant and the United Nations to fulfil the core obligations under the LSC which are aimed at providing effective legal assistance to those who, in the interests of justice, need it at all stages of the proceedings before the ECCC.
97. The UNAJ further notes a clear misunderstanding by the Head of DSS of UNAKRT *as to which are the applicable legal provisions* for the purposes of facilitating the fulfilment by the parties to the LSC of their contractual obligations. The Head of DSS of UNAKRT in making the impugned decision, first disregards the applicability of the provisions of the Guide to the LAS while subsequently admitting the importance of such document when indicating that its revisions are finalised by multiple departments at the UNHQ in New York. Second, the Head of DSS of UNAKRT, apart from disregarding the importance of the Guide as applicable, goes ahead and applies its purported amended provisions, while clearly being aware on his own admission, that such amendments have not yet been finalised. This is true due to the facts that: 1) As submitted by the Head of DSS of UNAKRT, the purpose of the meeting of 7 September 2012 was only "*to discuss*" the amendments to the Guide; 2) Revisions to the Guide require the full approval of United Nations HQ in New York

⁹³ Legal Services Contract, para. 6.1.

which, according to the Head of DSS of UNAKRT, has not happened yet and 3) The formal text of the Guide as forwarded by UNAKRT's Coordinator and as disclosed by the Head of DSS of UNAKRT on 27 May 2013 does not contain the amendments that the Head of DSS of UNAKRT applied in his decision making process. While it is normal and clear that the the Guide can be ammended, the principles of procedural fairness and legal certainty require that revisions can only be applied once finalised.

98. In addition to the fact that amendments to the Guide were applied without being finalised, the UNAJ observes that it is apparent that at the time of the recruitment of the Applicant there was no notification to *him* of the apparent informal variation or change to the Giude, as there were no minutees kept of the meeting of 7 September 2012 and nothing has been produced to disclose notification of any amendments to the Guide at the time the LSC was entered into by the Applicant. As mentioned above, notes of any amendments are not even found in the formal text of the Guide to the LSC as it is today. Natural justice and procedural fairness must be observed where a decision maker intends to take into account in his decision making process a matter not previously put or provided to a party and upon which an adverse action may result, so that they may comment. Any such comments have to be taken into account in making the decision.

99. The UNAJ concludes that, for the purposes of this particular matter under review, the amendments to the Guide were not finalised, and the Applicant was not put on notice of any intended application of such in a timely and informed manner. Thus considerations of procedural fairness and natural justice in respect of the making of the decision have been ignored in the decision making process and the principle of legal certainty has not been adhered to.⁹⁴

⁹⁴ Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, S/2004/616, 23 August 2004, para. 6: "The rule of law is a concept at the very heart of the Organisation's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."

100. The UNAJ advises that any finalised amendments to the Guide should be such as to contribute to a facilitation that is in compliance with the other internationally recognised principles of procedural fairness in general, and in the case of criminal tribunals, also be in compliance with and exemplify other relevant principles related to the rights of those party to criminal proceedings. There are clear implications to a change in the Guide in respect of the ability of the engaged counsel to fulfil the contracted and professional obligation of providing proper legal assistance and representation for a client. To change the arrangements as to restrict a contracting party from being able to fulfil a contracted obligation, especially in respect of the provision of legal assistance, is not a matter that can be undertaken without the most serious of consideration, hence the need for direct consultation with any affected party.

101. The UNAJ observes that the Head of DSS of UNAKRT appears to have, knowingly, applied in his decision making process the non-final amendments to the Guide in a manner that openly disregarded and placed the Applicant and his client in a disadvantageous situation in comparison with the other Defence teams and their clients in Cases 001 and 002 while they were fulfilling their contractual obligation at the same stage of the proceedings as the Applicant is now. In this respect, the UNAJ particularly notes the misleading and irrelevant argument made by the Head of DSS of UNAKRT in his Response⁹⁵ by putting forward that the “policy of authorising foreign travel of Legal Consultants was instituted in the *early years of the ECCC* when the circumstances were quite different from what they are today.” Instead, the UNAJ considers that, such policy was and should remain relevant to the “early stages of the proceedings” in *all cases* before the ECCC and is not, as the Head of DSS of UNAKRT puts it, simply relevant to the “early stages of the ECCC.” A change of the policy now would clearly put those subject to investigations in Case 004 at a

⁹⁵ Response, para. 21.

disadvantage in comparison with those subject to investigations in Cases 001 and 002 and would therefore be in breach of the principle of equality before the law.⁹⁶

102. Considering all of the above, the UNAJ further finds that the Head of DSS of UNAKRT, in making the impugned decision, failed to comply with the applicable legal requirements and to observe the basic rules of natural justice or to act with procedural fairness. In this respect, the Head of DSS of UNAKRT also failed to make, at least, a minimal showing that the Applicant's or, what is more important the Applicant's client's potential rights, were considered in good faith.
103. Further, due to the above and for the following reasons, the UNAJ observes that the Head of DSS of UNAKRT, in making the impugned decision, took into account irrelevant matters and failed to take into account or give proper weight to relevant material.
104. The UNAJ observes that the Head of DSS of UNAKRT, as a decision maker, has addressed and mixed two decisions. The first decision he was required to make was directly in response to the request made by the Applicant, his only considerations in respect of this, as dictated by the terms of the LSC and primary objectives of the Guide to the LAS were whether the requested travel is *reasonable and necessary for the provision of legal advice to and representation of Applicant's client*. If the requested travel was rejected on the grounds that it was not found to be "reasonable and necessary for the provision of legal advice and representation" such finding had to be fully reasoned and the related decision had to be based on the law. If, on the other hand, the requested travel was found to be "reasonable and necessary for the provision of legal advice and representation," the second and distinct matter to determine was whether there was funding to support and implement any affirmative decision in respect of the first matter. If there was no funding, the Head of DSS of

⁹⁶ The Universal Declaration of Human Rights, Resolution A/Res/3/217 A adopted by the General Assembly of the United Nations on 10 December 1948, Article 10: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." Article 14(1) of the International Covenant on Civil and Political Rights, Article 14(1) : "All persons shall be equal before the courts and tribunals" and Article 26 "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law."

UNAKRT should have separately advised of such. This could then place the Applicant and his client in a position where they could make such applications before the ECCC as they may see it fit.⁹⁷ The Head of DSS of UNAKRT has lead himself into error in this decision making process by combining the two decisions into one and by considering and placing more weight on the budgetary matters, which are not relevant to the making of the first decision. It is apparent that the primary consideration of the Head of DSS of UNAKRT in reaching his decision was the budget. Matters of “whether the [United Nations] should pay” or “whether the [United Nations] has funding” to fulfil such primary obligation are secondary and of an auxilliary nature to the primary objectives of DSS’ role as foreseen by the matrix of relevant documents, such as stated policies, the contract and the law, including the law providing for the rights of a person subject to investigations for the most serious crimes known to mankind and other instruments which may have a bearing upon the proper decision making process.

105. The UNAJ finds that the decision making process in this matter, in some regards, is so flawed as to give the appearance of it being an arbitrary decision. The considerations of what travel is reasonable and necessary is to be restricted to what is *“reasonable and necessary” for the provision of legal assistance and representation* to E [REDACTED]. This does not involve a consideration of the budgetary limitations of the ECCC. When dealing with matters related to people who are at the very least suspected of the commission of the most heinous crimes known to mankind, their rights to be properly represented are of foremost importance, as is indicated by the LSC. What is reasonable is not to be seen or considered in respect of anything other than either the provision of effective legal advice or the provision of representation. It is not what may be “reasonable” in respect of the funds available to the ECCC. The primary obligation and the only contracted consideration is that of the legal representation of E [REDACTED]. The Head of DSS of UNAKRT has substantially strayed from the centrally relevant considerations.

⁹⁷ See Application, paras. 30-31.

Irrelevant matters taken into account and denial of natural justice:

106. In relation to Head of DSS of UNAKRT's argument that the Suspect has competent National Counsel and thus the greater involvement of International Counsel is not necessary, the UNAJ finds it to be an incorrect and irrelevant matter, as the very nature of the crimes for which E [REDACTED] is under investigation dictates that he be defended by a lawyer who has expertise in international law and practice as well as a national lawyer with expertise in respect of national procedures and laws. The UNAJ observes that the International Co-Investigating Judge has also noted that, "given the circumstances [where the national Co-Lawyer [REDACTED] lacks experience in international criminal law whereas A [REDACTED] [REDACTED] has expertise in that field], it is unnecessary to address the issue of whether the Suspect should be granted the right to two Co-Lawyers."⁹⁸
107. The UNAJ opines that the fact that the Guide to the LAS has not been properly and formally amended placed the decision maker in a difficult position, as he is basing the impugned decision upon a matter not specified in the policy but on rather his own perception of "austerity measures" consequent upon the "ECCC Revised Budget Requirements for 2012-2013." If such a matter was considered by the Head of DSS of UNAKRT to be relevant, it is clear that the Head of DSS of UNAKRT did not exercise his discretion properly. The UNAJ finds that the decision maker applied the budgetary "austerity measures" and his understanding of their effect upon the budget of the Court blindly. He did this without properly considering the need to facilitate for an effective defence and proper representation of a person placed under investigation.
108. Further, apart from being secondary to the primary considerations, if the budgetary considerations were necessary, if the decision were made in two parts, the Head of DSS of UNAKRT failed to take into account matters relevant to the budget. The UNAJ observes the Head of DSS of UNAKRT's explanation that there had been

⁹⁸ Decision on Motion and Supplemental Brief on Suspect's Right to Counsel, D122/6, The International Co-Investigating Judge, 17 May 2013, para. 93.

a change to the system of budget control and that no longer did each defence team have its own budgeted funds, but rather the funds were all combined and expenditure was subject to centralised control by the DSS. Under these circumstances, if he were to base any decision upon budgetary considerations, it was incumbent upon the Head of DSS of UNAKRT to actually consider the budgetary expenditure. However, following the provision of the list of documents disclosed by the Head of DSS of UNAKRT at the beginning of the proceedings before the UNAJ and of the files related to this matter, a query was made on behalf of the UNAJ for the Head of DSS of UNAKRT to confirm whether there were any further documents related to the matter. The response received from the Head of DSS of UNAKRT, by email to the Greffier of the UNAJ on 28 May 2013, was that “[the Head of DSS of UNAKRT does] not have immediate or direct access to the facts and figures related to the budget expenditures to date.” The UNAJ observes that the fact that no enquiry was made at all concerning the budget was reinforced by the further explanation by the Head of DSS of UNAKRT that “there is no correspondence with the Administration or with anyone else (other than the Appellant) about this matter.” It is thus apparent to the UNAJ that even when making a decision based upon budgetary considerations, the Head of DSS of UNAKRT did not make any enquiry as to the then state of expenditure of the budget for 2013 and as of 28 May 2013, at the very least, he did not know what were the expenditures of his department overall against the budget for the year. The Head of DSS of UNAKRT, therefore, made an uninformed decision. In this respect, judicial notice is taken of the death of Ieng Sary and the suspension of the proceedings and placement under judicial supervision of Ieng Thirith. The inferred fact from these is that one defence team is no longer drawing upon the pooled budgeted funds for the Defence for the year 2013 and the other Defence team’s engagement is reduced significantly. These would have been relevant matters to take into account, as would have been the overall expenditure of the budget at the date of the request and the projected expenditures for the balance of 2013. These matters would have been, in so far as budgetary matters are of any concern, matters of importance to consider and balance against all other factors in implementing any affirmative decision in respect of the right of a person to be properly represented,

given the stage of the investigation. It is apparent that this was not a process undertaken or which could have been undertaken, given the lack of knowledge of the Head of DSS of UNAKRT about these issues. The UNAJ finds that this matter discloses an apparent blind adherence to the policy of the application of austerity measures, notwithstanding any other relevant considerations.

109. The UNAJ further observes a *post factum* disclosure of a matter taken into account in the decision-making process, as stated in paragraph 19 of the Response that: “In addition to these overall budget cuts, it was brought to the attention of DSS, shortly after the Head of DSS of UNAKRT’s arrival that travel provision could easily be used (and appears to have been used in the past) by Legal Consultants to *improperly subsidise their personal travel home* when the Co-Lawyer’s office was near the Legal Consultant’s country of origin. Even without the budget crisis, such improper use of the Court’s limited funds is to be avoided at all costs.” The fact that this matter was taken into account is further supported by the statement in paragraph 20 of the Response where the Head of DSS of UNAKRT states that: “The Legal Consultant’s *personal interest in the matter*, as well as the related request to by-pass the usual 60-day period and to expedite the appeal process in order to ensure summer travel, are duly noted.” To this last sentence a footnote has been added, no doubt to lessen its impact, stating: “Despite this general observation, the Head of DSS of UNAKRT *does not have any evidence to suggest* that the Legal Consultant involved here intends to use the trip to Amsterdam as a pretext for travelling(sic) to his native Ireland during the summer.” The UNAJ finds this footnote to be entirely disingenuous. If this matter was not a consideration of any kind in the making of the decision, then why raise it as a *post factum* justification in the submissions? In addition to adding such serious allegations *post factum*, the Head of DSS of UNAKRT provides no evidence of the facts asserted to even be considered as a possibility. The UNAJ finds that not only has there been the taking into account of an irrelevant matter, but this also points at a denial of natural justice, procedural

unfairness and to an appearance of bias⁹⁹ by the Head of DSS of UNAKRT. That is so because, during the decision making process, the matters raised in paragraphs 19 and 20 of the Response were not put to the Appellant or to the Legal Consultant for them to comment upon, thus denying them both any procedural fairness or natural justice. The matters raised further directly question the personal and professional integrity of the Appellant and of the Legal Consultant and, by inference assert a breach of contract by either or both of them. The UNAJ considers that the apparent allegations could not be of a more serious nature. In the circumstances it was incumbent upon the Head of DSS of UNAKRT to put such matters directly to them for comment, which he did not. The nature and timing of such allegations coupled with the fact that such consideration was made in the absence of concrete evidence are sufficient for the UNAJ to apprehend bias.

⁹⁹ In relation to actions of a decision maker see *Abboud v. Secretary General of the United Nations*, Case No.: UNDT/NY/2009/055/JAB/2008/104, Judgment No.: UNDT/2010/001, 6 January 2010, para. 15: "It is a fundamental obligation of all decision-makers to act objectively and fairly, free of bias, favour towards or antipathy against any staff member in respect of whom a decision is to be made." See also *Zedan v. Secretary General of the United Nations*, Case No.: UNDT/NY/2010/021/UNAT/1634, Judgment No.: UNDT/2012/006, 11 January 2012, para. 34: "Whilst the burden of proving improper motivation on the part of the decision-maker rests on the Applicant (Parker 2010-UNAT-012, Hepworth 2011-UNAT-178, Jennings 2011-UNAT-184), it has to be accepted that the question whether or not a decision was tainted by bias or prejudice can only usually be decided on the basis of inferences drawn from the primary facts. Clearly, no individual is likely to admit bias, unfair prejudice or improper motive. Indeed, individuals may not even be aware of the exercise of their own bias or motives, which are sometimes unconscious." In relation to the test for appearance of bias see *Xu v. Secretary General of the United Nations*, Case No.: UNDT/NBI/2009/014, Judgment No.: UNDT/2011/092, 31 May 2011, referring to Lord Denning in *Metropolitan Properties Co (FGC) Ltd v. Lannon* [1968] 3 W.L.R. 694; [1969] 1 Q.B. 577: "There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased'." See also *Finniss v. Secretary General of the United Nations*, Case No. UNDT/NBI/2009/019, Judgment No.: UNDT/2012/200, 19 December 2012, para.s. 74 and 75: "The test for apparent bias is: Whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility [of] bias," referring to *Magill v. Porter* [2002] 2 AC 357 House of Lords (UNDT's Finniss case). In addition the UNAJ notes that, although the Head of DSS is not a judge, in the instant decision making process he has the authority to review and decide on a request made and the obligation to be fair, therefore, in similar terms, the UNAJ refers also to the same test for appearance of bias applied at the international tribunals, including the ECCC, which is: "There is an appearance of bias if [...] the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias." See Decision on Ieng Sary's and on Ieng Thirith Applications Under Rule 34 to Disqualify Judge Marcel Lemonde, 15 June 2010, Doc. Nos. 8 and 6 respectively, ERN 0052078-00520733, Applications PTC 05 & 07, paras. 21-25 referring to 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, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 01), 4 February 2008, C11/29, paras. 15-21 referring to *Prosecutor v. Furundzija*, IT-95-17/1A, Judgment, Appeals Chamber 21 July 2000, para. 189.

110. The UNAJ further notes that the primary considerations of the need to facilitate for a proper defence were not adequately or properly considered. The Head of DSS of UNAKRT has not demonstrated an adequate or proper consideration of the issue of the rights of E [REDACTED]. He has, on a number of occasions, rather endeavoured to undermine such by, for instance, insisting that E [REDACTED] is a “Suspect” and cannot be referred to as a “Charged Person.” Being mindful that such conclusions as to whether to refer to E [REDACTED] as a “Suspect” or a “Charged Person” at this stage of the proceedings is a matter that rests with the Co-Investigating Judges, the UNAJ observes Head of DSS of UNAKRT’s consideration that Case 004 is in the early stages of the investigation and notes that such may not mean that [REDACTED] E’s rights can be underestimated notwithstanding whether he is considered a Suspect or a Charged Person. The UNAJ notes the fact that different rights attach to each notion and considers that the Head of DSS of UNAKRT should have been more thorough and careful in examining the impact that his decision may have on the rights of E [REDACTED], especially given the circumstance that he is under investigation for the most serious of crimes.

111. In this respect, the UNAJ notes the Head of DSS of UNAKRT’s suggestion to review the impugned decision in isolation by submitting that “the simple fact that other unrelated requests have been denied cannot be a reason to approve the current request.”¹⁰⁰ The UNAJ, having reviewed the reasons for the impugned decision, notes that they disclose the fact that the Head of DSS of UNAKRT himself considered in his decision making process the effect of the other requests made by the Applicant. The UNAJ finds that: 1) The fact that the Head of DSS of UNAKRT considered the other requests himself; 2) The the lack of any reasoning, in the impugned decision, as to how it would effect the rights of E [REDACTED] to an effective defence and 3) the fact that the Head of DSS of UNAKRT does, in his rejection of the other requests, provide some insight as to his understanding of the right of E [REDACTED] to an effective defence, are sufficient reasons for the UNAJ to take into

¹⁰⁰ Response, para. 24.

consideration as relevant the other requests and Head of DSS of UNAKRT's pronouncements thereof. The UNAJ, having reviewed the other requests and related decisions, finds it apparent that the Head of DSS of UNAKRT discloses a pattern of failing to properly and thoroughly take into consideration the totality of rights attached to E [REDACTED] at this stage of proceedings.¹⁰¹ For instance, the provisions of paragraph H(4) of the Guide which provide for the possibility of the defence to "conduct [by itself] *preliminary* investigations which are to be distinguished from requests by the defence for investigations to be carried out by the Co-Investigating Judges themselves were not even considered. The Guide makes it clear that *it is for the lawyers* (not for the DSS) "to establish the extent to which they are permitted to act" and that "most preliminary investigations for the defence would be conducted by the Case Manager or the Legal Consultant." The pattern of rejecting Defence's requests, especially when the Co-Lawyers provide explanations for their requests, shows that the Head of DSS also, mistakenly, endeavours to replace the Co-Lawyers discretion in setting their defence strategy with his own.

112. In relation to Applicant's allegation that the right to equality of arms is not being observed by the Head of DSS of UNAKRT in that, as the Applicant opines, "resources available to the Co-Prosecutors in Cases 003 and 004 substantially outweigh the resources available to the Defence," the UNAJ finds that the Applicant did not provide any evidence to sustain such argument, therefore it shall not be taken into consideration.

113. Following all of the above, noting the Applicant's hesitance to disclose the defence strategy in the Travel Request,¹⁰² the UNAJ observes that the autonomy inferred upon the DSS by Internal Rule 11.1 with regard to the substantive defence matters is a safeguard which, in principle, allows for the Co-Lawyers and Defence teams to share their work plans and defence strategies with the DSS to the extent

¹⁰¹ Reply, Attachments 16-19.

¹⁰² Note is also made of the fact that, in the request for the reconsideration of the Travel Request, the Applicant indicated that the Travel Request was part of Defence's work-plan.

necessary and without being concerned with confidentiality matters.¹⁰³ Therefore, the UNAJ, having also noted the Head of DSS of UNAKRT's lack of enquiry at the time the Travel Request was made, finds that the Applicant could have been more detailed when making the Travel Request in justifying why it was "necessary" for the effective preparation of the defence.

114. It is lastly noted that the Head of DSS of UNAKRT has made, in paragraph 20 of his Response, an adverse observation about the request that this Application, (then referred to as an Appeal), be considered expeditiously while placing the request in a context "to ensuring summer travel" and not otherwise considering any reason for urgency related to the rights of a suspect to be provided with advice and representation. The UNAJ could not agree more that the matter requires *urgent* consideration, as it is dealing with the rights of a person who is under investigation for the alleged commission of the most serious crimes known to mankind. If this matter is not addressed urgently, E [REDACTED] may be unjustly denied the most fundamental right for legal assistance and representation which, in turn, is also a precondition for the observance and protection of his other rights in the proceedings before the ECCC. The UNAJ observes, however, that the comment in the Response, although gratuitous, was put grossly in error and gives an appearance of either a lack of understanding of such rights and or an apprehension of bias, given that urgency, although "duly noted," did not form part of the considerations in reaching the impugned decision or in refusing to consider an amicable settlement.

115. It is thus determined that the Impugned Decision was based upon irrelevant considerations, a failure to take into account relevant considerations, a denial of natural justice and it was procedurally unfair. In addition, the Head of DSS of UNAKRT has, in this matter, displayed, at least, an appearance of prejudice and bias,

¹⁰³ Reply, para. 6. Note also that the Head and staff of the DSS who are staff hired and subject to the United Nations Staff Regulations and Rules (see also ECCC Internal Rules, Rule 6) apart from the vested privileges and immunities have also professional obligations to observe in the fulfilment of their official duties Regulations 1.1 and 1.2 of the Staff Rules and Regulations of the United Nations, ST/SGB/2011/1, which represents another safeguard for observance of the confidentiality requirements.

as demonstrated by his *post factum* justification¹⁰⁴ and the misleading submissions made directly by him.¹⁰⁵

116. The UNAJ concludes that all of the above mentioned findings invalidate the impugned decision. Further, the UNAJ considers and advises that the appearance of bias by the Head of DSS of UNAKRT warrants his disqualification from rehearing the instant matter and that another Officer, instead of the Head of DSS of UNAKRT, needs to be nominated to make an *a fresh* review and new decision or decisions in respect of the Travel Request.¹⁰⁶

¹⁰⁴ See para. 109 above.

¹⁰⁵ Response, para. 21.

¹⁰⁶ See *Finniss v. Secretary General of the United Nations*, Case No. UNDT/NBI/2009/019, Judgment No.: UNDT/2012/200, 19 December 2012, para. 74.

DISPOSITION:

Considering all of the above and the authority of a UNAJ to remedy the situation,
THE UNAJ

DECIDES:

1. To admit the Application;
2. To set aside and quash the Impugned Decision in its entirety;
3. To remit the matter for reconsideration by an Officer (the “Nominee”), other than the Chief of the Defence Support Section of UNAKRT, who shall be nominated by the Co-ordinator of the United Nations Assistance to the Khmer Rouge Trials, and

DIRECTS:

1. That the Applicant be allowed to submit to the Nominee such additional material as he may advise within seven working days from the date of notification to him of this decision;
2. That the Nominee, in the decision making process, take due notice of the matrix of laws and legal documents applicable at the time of the request for the purpose of the decision or decisions;
3. That the Nominee, in the decision making process, first makes a primary decision on whether the request is *necessary for the provision of effective legal advice and representation to E [REDACTED]* which is different from any secondary decision in respect of budgetary considerations if necessary for the implementation of the primary decision, in the event the former is affirmative. The Nominee is expected to take into account in the decision making process,

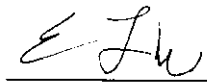
the applicable law, the relevant facts and material and, if necessary, to make thorough inquiries with all those concerned before reaching a decision;

4. That the Nominee, in the decision making process, shall abide by the principles of legal certainty and transparency, of procedural fairness and natural justice;
5. That the consideration of any decision or decisions be given such urgency as the Nominee may consider appropriate, considering the rights sought to be exercised and safeguarded;
6. Liberty to apply is reserved, if the parties require further directions.


Judge Rowan DOWNING

Dated this 25th day of June 2013

Certified on this 25th day of June 2013


Greffier Entela JOSIFI