



UNAKRT

United Nations Assistance to the Khmer Rouge Trials

THE UNITED NATIONS ADMINISTRATIVE JUDGE

Case File No: UNAKRT/UNAJ/2021/01 and UNAKRT/UNAJ/2021/02

Before: Judge Claudia FENZ, sitting as an administrative judge

Date: 31 May 2021

Language: English

Classification: Public

**DECISION ON APPEALS BY CO-LAWYERS FOR YIM TITH AGAINST
FEE CLAIM DECISIONS FOR FEBRUARY AND MARCH 2021**

Co-Lawyers for YIM TITH:

SO Mosseny

Suzana TOMANOVIĆ

UNAKRT Coordinator:

Knut ROSANDHAUG

Officer in Charge of DSS:

KONG Sokun

A. INTRODUCTION

1. I have been appointed as a United Nations Administrative Judge pursuant to nominations dated 8 April 2021 and 26 April 2021 in respect of two fee disputes between the Co-Lawyers for YIM Tith and the ECCC's Defence Support Section ("DSS").
2. The first dispute concerns the Co-Lawyers' fees for the month of February 2021. The second dispute relates to March 2021. I shall refer to these collectively as the 'fee disputes'.
3. The fee disputes have a common origin insofar as, in DSS's forward-looking decisions on the Co-Lawyers' 'action plan' for each month, DSS imposed a limit on the number of hours work in respect of which each Co-Lawyer would be paid. That limit was 75 hours per calendar month. Thereafter, DSS refused to remunerate the Co-Lawyers for any work above this limit, on the basis that additional hours had not been justified. For their part, each Co-Lawyer seeks to be paid for 150 hours of work in February 2021, and again in March 2021.
4. I have considered the Co-Lawyers' written submissions filed on 19 April 2021 (as to the February fee dispute) and 27 April 2021 (as to the March fee dispute). I have also considered DSS's written submissions filed on 19 April 2021 and 6 May 2021 respectively.¹ Annexed to the parties' submissions was a substantial volume of material, much of which was unnecessarily duplicative and/or disorganised. I have considered all the material put before me. The documents in the relevant case file opened in respect of each appeal form the basis for my decision.²
5. As to the relevant legal framework, the parties mainly rely on certain provisions in: (i) the Co-Lawyers' Legal Services Contracts;³ (ii) the ECCC's Legal Assistance Scheme

¹ The submissions include various allegations and counter-allegations, including accusations by the Co-Lawyers of bad faith on the part of the former Head of the DSS, and accusations by DSS that the Co-Lawyers intentionally misconstrued a judicial decision and/or will perpetrate a "*vexatious abuse of process*". I did not find such submissions to be helpful. Where I have not addressed such submissions, it is because I find it unnecessary to do so in the context of the issues upon which fee disputes turn.

² See UNAKRT/UNAJ/2021/01, Decision, 12 April 2021.

³ SO Mosseny's contract was signed on 10 October 2019 (Co-Lawyers' February Appeal, Attachment 3); Suzana TOMANOVIĆ's contract was signed on 11 October 2019 (DSS's Response to February Appeal

(“LAS”);⁴ and/or (iii) DSS’s Administrative Regulations (“DSS Regulations”). I have considered those instruments in their entirety. The Annex to my decision includes excerpts that I consider to be most relevant to the resolution of the fee disputes. I shall cross-refer to certain of those provisions in my decision, without repeating lengthy excerpts.

6. My decision is structured as follows:

| | | |
|----------|---|---------------------|
| A | Introduction | [1] – [10] |
| B | Background and procedural history | [11] – [13] |
| B1 | Correspondence in October and November 2020 | [14] – [18] |
| B2 | Co-Lawyers’ February Action Plan | [19] – [22] |
| B3 | DSS’s February Action Plan Decision | [23] – [24] |
| B4 | The Pre-Trial Chamber’s Decisions | [25] – [29] |
| B5 | Co-Lawyers’ February Fee Claim | [30] – [34] |
| B6 | DSS’s February Fee Claim Decision | [35] – [43] |
| B7 | Co-Lawyers’ March Action Plan | [44] – [46] |
| B8 | DSS’s March Action Plan Decision | [47] – [49] |
| B9 | Co-Lawyers’ March Fee Claim | [50] – [55] |
| B10 | DSS’s March Fee Claim Decision | [56] – [64] |
| C | Admissibility and Standard of Review | [65] – [72] |
| D | Merits | [73] – [101] |
| D1 | Submissions | [73] – [79] |
| D2 | Analysis | [80] – [105] |
| D2.1 | DSS’s approach | [80] – [91] |
| D2.2 | Hours claimed by the Co-Lawyers | [92] – [99] |
| D2.3 | Appropriate remedy | [100] |
| D2.4 | February Fee Claim | [101] |
| D2.5 | March Fee Claim | [102] – [104] |

7. Before I turn to the background and procedural history of the fee disputes, it is convenient to summarise the background to the underlying legal framework. Pursuant to the ECCC Agreement, Article 17 (*Financial and other assistance of the United Nations*), subparagraph (c), it is the UN that is responsible for the remuneration of defence counsel. It also bears emphasising that persons accused before the ECCC have

Response, Attachment 1 and Co-Lawyers’ February Appeal, Attachment 4). I understand the Co-Lawyers’ contracts to be the same in all material respects for the purpose of the issues in dispute.

⁴ Co-Lawyers’ February Appeal, Attachment 5. The version of the LAS to which I have been referred was as amended in December 2014.

a fundamental right to have counsel provided if they do not have sufficient means to pay for counsel themselves (*see* Article 13 of the ECCC Agreement).

8. Internal Rule 11 established the DSS under the general authority of the Office of Administration, but the DSS is autonomous with regard to “*substantive defence matters*” set out therein. Among other things, Internal Rule 11 grants to DSS the power to issue administrative regulations, after consultations with the Bar Association of the Kingdom of Cambodia, including criteria for determining the remuneration of defence lawyers. I mentioned the relevant DSS Regulations at paragraph 5 above. Internal Rule 11(2)(h) requires that DSS to “[*m*]onitor and assess the fulfilment of contracts [*with defence lawyers*], and authorize corresponding remuneration in accordance with Defence Support Section administrative regulations”.
9. Since defence costs are borne by the UN, this led to the establishment of the LAS administered by DSS. I understand that the LAS borrows concepts from other domestic and international tribunals, and DSS’s submissions included documents and remuneration policies from other courts and tribunals. I considered these and will make passing reference to them in my reasons below, but it is obvious that the ECCC’s system is independent of those courts and tribunals and tailored to the ECCC’s specific circumstances. There is therefore a limit to extent to which analogies may be drawn.
10. The current version of the LAS was amended in December 2014. Pursuant to both the DSS Administrative Regulations and the LAS, it is DSS’s responsibility to ensure that all suspects, charged persons and/or accused persons before the ECCC are represented by an effective team of lawyers. Further, Internal Rule 21 refers to certain “*Fundamental Principles*” applicable to the interpretation of Administrative Regulations. For instance, they “*shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims*”. Pursuant to Internal Rule 22(4), lawyers have “*an obligation to promote justice and the fair and effective conduct of proceedings.*” My attention has also been directed towards the “*General Conditions of Contracts for the Services of Consultants or Individual Contractors*” which are said to be an integral part of the Co-Lawyers’ contracts.⁵

⁵ Letters from UNAKRT Coordinator dated 9 and 26 April 2021, copied to the parties.

B. BACKGROUND AND PROCEDURAL HISTORY

11. The fee disputes concern proceedings in Case 004. My knowledge of those largely confidential proceedings is necessarily limited. The parties did not provide me with much background. An administrative judge may require a Co-Lawyer or the DSS to provide any further information which may be required for the purpose of an appeal.⁶ However, both parties refer to the ECCC's Completion Plan (Revision 27).⁷ This included a short description of Case 004's status as at December 2020:

On 28 June 2019 the co-investigating judges issued two separate closing orders in case 004 against Yim Tith in each judge's working language only (Khmer and English, respectively), with translations to follow. The international co-investigating judge indicted Yim Tith for genocide, crimes against humanity, war crimes and domestic offences. The national co-investigating judge dismissed the case for lack of personal jurisdiction. The closing orders were accompanied by decisions on civil party applications. The Khmer and English translations of the closing orders in this case were notified on 14 August and 5 September 2019, respectively. Five appeals were filed against the closing orders: the defence and national co-prosecutor appealed the international co-investigating judge's closing order (indictment); the international co-prosecutor and civil parties appealed the national co-investigating judge's dismissal order; and the defence further appealed the issuance of separate closing orders. In addition, on 13 September 2019, the civil parties filed an appeal against the international co-investigating judge's order on the admissibility of civil parties. The Pre-Trial Chamber's projection that its judgement(s) on appeals against the closing orders will be delivered by the first quarter of 2021 remains unchanged.⁸

12. The Completion Plan (Rev. 27) also contained the following projection:

In case 004, appeals against the closing orders were fully briefed by 27 March 2020. The projection to have the judgement(s) on appeals against the closing orders, subject to the complexity and magnitude of the appeals, issued by the first quarter of 2021, remains. The decision on the appeal against the international co-investigating judge's order on admissibility of civil party applications is expected by the third quarter of 2021 at the earliest.⁹

13. I shall return to the Completion Plan (Rev. 27) below because one aspect of the fee disputes concerns DSS's reliance on the projections that it contained.

⁶ LAS, F13.

⁷ See e.g., Co-Lawyers' February Appeal, para. 11; and DSS's Response to February Appeal, para. 12.

⁸ ECCC Completion Plan (Rev. 20), p. 5, DSS's Response to February Appeal, Attachment 8.

⁹ ECCC Completion Plan (Rev. 20), p. 7.

B1. Correspondence in October and November 2020

14. Although the fee disputes concern February and March 2021, my attention was directed towards some correspondence between the Co-Lawyers and DSS in earlier months. I have considered this correspondence by way of background.
15. On 20 October 2020, the Co-Lawyers submitted a work plan for the YIM Tith Defence Team for November 2020. Some back-and-forth with DSS followed, including in respect of the composition of the YIM Tith Defence Team and how work was to be divided between its members.¹⁰ On 21 October 2020, the Co-Lawyers explained to DSS that they were “*preparing to brief the Pre-Trial Chamber at a hearing*” and that they also had to prepare for a possible trial.¹¹ At that stage, DSS acknowledged that appeals “*may require further submissions at an oral hearing*”, but added that DSS was “*no longer able to justify the full 150 hours with two international legal consultant*”.¹²
16. DSS’s suggestion was challenged by the Co-Lawyers. On 24 October 2020, DSS elaborated on its position by reference to the “*limited financial situation facing UNAKRT*” and, as I read the relevant email correspondence provided to me, DSS invited the Co-Lawyers to collaborate with DSS by reducing the size of their defence team. The Head of DSS, Toshimi HISAMURA, wrote to the Co-Lawyers in the following terms: “*DSS will compensate monthly remuneration up to 150 hrs in accordance with the established level of fees and fee claims*”. She continued, however, that she would “*feel more confident in justifying how our budget is spent at DSS, should the fee of a Defence Team be used for Co-Lawyers instead of their support staff*”.¹³
17. On 30 October 2020, the Co-Lawyers wrote to DSS to challenge any suggestion that they should effectively forfeit one senior legal consultant from their team in order to be compensated for 150 hours of work per month going forward.¹⁴ The Co-Lawyers’ letter was some 14 pages long and made a number of points, but the central theme was that their client’s fair trial rights could not be weighed against budgetary concerns. The Co-

¹⁰ Co-Lawyers’ March Appeal, Attachment 29 (emails of 20-21 October 2020).

¹¹ Co-Lawyers’ March Appeal, Attachment 29 (email dated 21 October 2020 at 22:02).

¹² Co-Lawyers’ March Appeal, Attachment 29 (email dated 22 October 2020 at 18:23).

¹³ Co-Lawyers’ March Appeal, Attachment 29 (email dated 24 October 2020 at 16:12).

¹⁴ Co-Lawyers’ March Appeal, Attachment 31.

Lawyers also stressed that it was their decision as to how to allocate a pre-approved budget across their team.

18. Toshimi HISAMURA responded on 4 November 2020. She acknowledged the Co-Lawyers' "*need to maintain the existing level of your defence capacities prior to a hearing before the Pre-Trial Chamber (PTC), which amounts to [REDACTED] monthly.*"¹⁵ Toshimi HISAMURA proceeded to note that the YIM Tith defence team had been paid approximately [REDACTED] since filing an appeal in December 2019, and this was said to be more than some other defence teams had received in the period before a hearing before the Pre-Trial Chamber their cases. Toshimi HISAMURA further stated that DSS was committed to ensuring that "*a proper balance is struck between the rights of a defendant, including her/his effective representation at every stage of judicial proceedings, and transparent administration of public funds*".¹⁶

B2. Co-Lawyers' February Action Plan

19. After the clash in October and November, it appears that the Co-Lawyers' work plans and fee claims for December 2020 and January 2021 proceeded without controversy. The parties have not drawn my attention to any correspondence or developed specific submissions for the period immediately before the February fee dispute emerged in late January 2021.
20. On 19 January 2021, the Co-Lawyers submitted their work plan for the YIM Tith Defence Team for February 2021.¹⁷ This document was said to be submitted out of professional courtesy rather than procedural obligation. It included a non-exhaustive list 10 work items as follows:

1. *Continue analysis of Case File 004.*
2. *Analyse the legal arguments already made in Case 004 and jurisprudence emanating therefrom.*
3. *Analyse the Case 004 [REDACTED]*
4. *Analyse the [REDACTED]*

¹⁵ Co-Lawyers' March Appeal, Attachment 30.

¹⁶ Co-Lawyers' March Appeal, Attachment 30, para. 4.

¹⁷ DSS's Response to February Appeal, Attachment 29.

5. *Analyse [REDACTED]*
6. *Conduct in-depth fact analysis of evidence in the Case 004 case file.*
7. *Continue CaseMap and TextMap preparations.*
8. *Liaise with the client to ensure he is informed regarding the proceedings.*
9. *Administration of HR issues.*
10. *General Case administration.*

21. On 20 January 2021, the Co-Lawyers submitted their Form-20 ‘Action Plan’ for February 2021, as required of them by section E2 of the LAS.¹⁸ I note that the LAS assigns different codes for various “*Standard Tasks*” under ‘Section A’. The Co-Lawyers’ February Action Plan envisaged that they would each spend 150 hours on Section A tasks, to be broken down as follows.

| | | |
|-----------|--------------------------------|------------------|
| <i>A2</i> | <i>Correspondence</i> | <i>10 hours</i> |
| <i>A5</i> | <i>Administration</i> | <i>3 hours</i> |
| <i>A6</i> | <i>Case File / Dossier</i> | <i>127 hours</i> |
| <i>A8</i> | <i>Procedural applications</i> | <i>10 hours</i> |

22. The Co-Lawyers’ February Action Plan did not identify any items under Section B “*Specific Tasks*”. I note that the LAS identifies “*Preparation for Court hearings*” under Section B tasks, rather than Section A tasks.

B3. DSS’s February Action Plan Decision

23. On 28 January 2021, DSS approved 75 hours for each Co-Lawyer rather than the 150 hours they had requested (the “**February Action Plan Decision**”).¹⁹ DSS gave short reasons as follows:

- (1) At paragraph 1, DSS explained that the approved number of hours were “*in line with the latest Completion Plan (rev 27)*”, with the “*possibility that additional hours can be billed up to 90 hours, if considered as necessary and reasonable by DSS*”.
- (2) At paragraph 2, DSS referred to information obtained from the Office of Administration, namely it had asked Chambers (including the Pre-Trial

¹⁸ Co-Lawyers’ February Appeal, Attachment 6; DSS’s Response to February Appeal, Attachment 3.

¹⁹ Co-Lawyers’ February Appeal, Attachment 7.

Chamber) to provide at least three-months' notice of any proposed hearing for logistical reasons given the COVID-19 pandemic. Given that DSS had not received any notification from the Pre-Trial Chamber, DSS inferred that there would be no oral hearing before the Pre-Trial Chamber in Case 004.

- (3) At paragraph 3, DSS referred to obligations to ensure that “*a proper balance is struck between the rights of an indigent defendant, including effective representation at every stage of judicial proceedings, and the transparent administration of public funds*”. I note that this language broadly tracked language used in Toshimi HISAMURA’s letter of 4 November 2020, to which I have already referred.

24. This reduction from 150 hours to 75 hours was marked in manuscript on the Co-Lawyers’ February Action Plan, but without specific reference being made to any of the particular ‘Section A’ tasks identified by the Co-Lawyers (see paragraph 21 above).

B4. Pre-Trial Chamber’s Decisions dated 18 March 2021

25. On 3 February 2021, the YIM Tith Defence challenged the February Action Plan Decision by making submissions to the Pre-Trial Chamber.²⁰ DSS responded on 12 February 2021, having been invited to respond by the Pre-Trial Chamber.²¹ DSS’s position was that actions plans are part of a “*consultation process*” and do not constitute “*final decisions on remuneration.*”²² DSS also disputed the “*standing*” of the Pre-Trial Chamber in any event which, in effect, I understand to be a question of jurisdiction, and DSS asserted absolute immunity.²³ DSS proceeded to identify some 14 factors, among others, that it said it had taken into account in arriving at the February Action Plan Decision.²⁴

²⁰ Co-Lawyers’ February Appeal, Attachment 8.

²¹ Co-Lawyers’ February Appeal, Attachment 11; and DSS’s Response to February Appeal, Attachment 4 (“**DSS Submissions to Pre-Trial Chamber**”).

²² DSS Submissions to Pre-Trial Chamber, para. 8.

²³ DSS Submissions to Pre-Trial Chamber, paras. 15-16.

²⁴ DSS Submissions to Pre-Trial Chamber, para. 22.

26. The 14 factors identified by DSS expanded on the reasons given in the February Action Plan Decision itself, including by reference to the letter from the Co-Lawyers to DSS dated 19 January 2021, the Co-Lawyers' letter dated 30 October 2020, and earlier email correspondence from October 2020. I have already referred to the Co-Lawyers' letter dated 30 October 2020²⁵ and email correspondence from earlier in October 2020 which pertained to the wider composition of YIM Tith's Defence team and the appropriateness, or not, of DSS seeking to restrict the number of international consultants to be retained.²⁶
27. DSS's submission to the Pre-Trial Chamber disclosed correspondence between DSS and the Office of Administration.²⁷ I understand this to be an email dated 26 January 2021 which recorded the Office of Administration's view that there would not be any oral hearing in Case 004 in the light of the Completion Plan (*Rev. 27*). The Office of Administration's assessment was based on the fact that it had, for logistical reasons, asked judges to provide at least 3 months' notice of any proposed hearing. This indication from the Office of Administration resulted from a request from the Head of DSS for insight "*as to why the PTC is scheduling a decision within the third quarter [sic] for Case 004 without a hearing.*" I have been provided with a copy of the relevant email dated 26 January 2021²⁸ and the Completion Plan to which I have already referred.²⁹ I find that this email was the underlying basis for paragraph 2 of the February Action Plan Decision (see paragraph 23(2) above).
28. On 1 March 2021, the Pre-Trial Chamber invited the parties to Case 004 to make submissions on whether the Pre-Trial Chamber should conduct an oral hearing on the appeals against the Closing Orders in Case 004. Following submissions, on 18 March 2021 the Pre-Trial Chamber informed the parties to Case 004 that it had decided to proceed to determine the appeals on the basis of their written submissions only.³⁰

²⁵ DSS's Response to February Appeal, Attachment 5.

²⁶ DSS's Response to February Appeal, Attachment 6.

²⁷ Decision on Oral Hearing in Case 004, D381/41, 18 March 2021, para. 1.

²⁸ DSS's Response to February Appeal, Attachment 7.

²⁹ DSS's Response to February Appeal, Attachment 8.

³⁰ Decision on Oral Hearing in Case 004, D381/41, 18 March 2021.

29. Also on 18 March 2021, the Pre-Trial Chamber issued its Decision on YIM Tith's submission to which I referred at paragraph 23 above.³¹ The Pre-Trial Chamber unanimously held that the submission was inadmissible, but proceeded to make some observations, which I shall set out in full because the Co-Lawyers place heavy reliance on them (internal footnotes omitted).

16. *Nevertheless, the Pre-Trial Chamber considers it pertinent to address certain errors in the DSS's justification for the reduction of the billable ceiling from 150 to 75 hours. In particular, the Chamber notes the DSS' misplaced reliance on the current Completion Plan and information obtained from the Office of Administration, informing its speculative view that there will be no bearing in Case 004. The Chamber reiterates that it is within the sole competence of the Pre-Trial Chamber to decide whether an oral hearing on the Case 004 Closing Order Appeals will be held. Neither the Completion Plan nor the views of the Office of Administration on this matter, should be determinative in guiding the DSS' justification for the reduction of the number of approved hours in the Action Plan Decision.*

17. *Moreover, the Chamber considers inappropriate the DSS' reference to a need to strike a 'balance' between the rights of the defendant and the transparent administration of public funds, insofar as this implies that budgetary considerations may be balanced against a defendant's rights to effective legal representation. The Chamber recalls the DSS' obligation pursuant to Internal Rule 21(1) to interpret the applicable Administrative Regulations so as to always safeguard the interests of the Accused and, accordingly, urges the DSS to allocate resources on the basis of what is necessary and reasonable for YIM Tith's effective defence.*

B5. Co-Lawyers' February Fee Claims

30. On 22 March 2021, shortly after the Pre-Trial Chamber's decisions, the Co-Lawyers submitted their respective fee claims for February 2021. The Co-Lawyers' emails, each dated 22 March 2021, explained that Forms 22 and 24 were based on paragraphs 16 and 17 of the Pre-Trial Chamber's Decision dated 18 March 2021.³² Each Co-Lawyer

³¹ Co-Lawyers' February Appeal, Attachment 13: Decision on YIM Tith's Urgent Request for Dismissal of the Defence Support Section's Action Plan Decision, D381/42, 18 March 2021.

³² Co-Lawyers' February Appeal, Attachment 18 (for Suzana TOMANOVIĆ); and Attachment 24 (SO Mosseny).

submitted a timesheet on Form 22, claimed the maximum 150 hours, and certified on Form 24 that the information submitted was true.³³

31. I have reviewed these timesheets in some detail. Suzana TOMANOVIĆ's timesheet records that she worked 168.5 hours in February 2021. SO Mosseny's timesheet records that he worked exactly 150 hours in February 2021. I make three brief observations about the February timesheets at this stage.
32. First, they are difficult to decipher. The narrative column in respect of "[w]ork done towards task" is not always illuminating. For example, the narrative relating to 'Task ID A7' ("*Case file analysis*") habitually refers to numerous documents by their respective document number alone. The reader is not told what the documents are, or the issues and work to which the documents relate, or are said to give rise. This makes the task of any administrative judge, asked to consider an appeal in respect of DSS's Fee Claim Decision, and the individual items in a Co-lawyer's fee claim, very difficult, if not impossible. Any auditor would also face the same difficulty.
33. Secondly, both timesheets record large blocks of work, from 08:00 to 19:00 on each day, usually with two or three entries ascribing a number of hours to a particular task code (the bulk being 'A7 Case File Review'). For example, SO Mosseny's timesheet repeatedly ascribes 1 hour to Task ID A2 ("*Team Correspondence*") and 7 hours to 'Task ID' A7 ("*Case File Review*"), without specifying when, within the 13 hours between 08:00 and 19:00, a task was performed
34. Thirdly, Ms TOMANOVIĆ's timesheet for February 2021 includes numerous duplicate entries. For example, the text "*reading/analyzing case file in preparation for the oral hearing* [REDACTED]", appears on each of the following dates: 4 February, 6 February; 8 February, 9 February, 11 February, 12 February, 13 February, 15 February, 16 February, 17 February, 18 February, 19 February, 20 February, 22 February, 23 February, 24 February, 26 February and 27 February, that is some 18 days.

³³ Co-Lawyer's February Appeal, Attachment 14 (for SO Mosseny) and Attachment 15 (for Suzana TOMANOVIĆ).

B6. DSS's February Fee Claim Decision

35. On 24 March 2021, DSS issued a "*Fee Claim Decision*" in respect of each Co-Lawyer's February fee claim.³⁴ In each case, DSS reduced the number of hours to be compensated to 75 hours. Although there is a column on the Co-Lawyers' timesheets for DSS to make comments in respect of each individual line entry (titled "*DSS Comments:*"), no individualised comments were made. Little if any effort appears to have been made to scrutinise the individual line entries. It was not pointed out, for example, that Ms TOMANOVIĆ's timesheet included numerous duplicate entries. Instead, DSS simply maintained its prior view that "*a total of 75-hour billable hours is considered necessary and reasonable, as per the February 2021 Action Plan Decision.*"
36. DSS did not provide any reasoning to explain its view. In respect of particular tasks, DSS simply added the following under the comments section of the template:
- (1) Suzana TOMANOVIĆ's hours in respect of "*A7: Case file*" were commented as "*reduced*" from 146.5 hours to 53 hours; and
 - (2) SO Mosseny's claimed hours in respect of "*A7: Case file*" were commented as "*reduced*" from 119 hours to 45 hours and, in addition, a task described as "*Review/comment on a draft email to DSS (23 Feb)*" was commented as "*reduced*" from 1 hour to zero.
37. On 24 March 2021, the Co-Lawyers asked DSS to provide reasons for these reductions. For example, Ms TOMANOVIĆ specifically asked why her "*A7 tasks*" had been reduced.³⁵ DSS responded in identical terms to each Co-Lawyer as follows:

*DSS maintained the 75hour [sic] in accordance with the fee claim procedures stipulated in the Section F of the Legal Assistance Scheme. I did not see your justification for additional hours in the submitted fee claim.*³⁶

³⁴ Co-Lawyers' February Appeal, Attachment 19 (for SO Mosseny); and Attachment 20 (for Suzana TOMANOVIĆ).

³⁵ Co-Lawyers' February Appeal, Attachment 21 (email chain).

³⁶ Co-Lawyers' February Appeal, Attachment 21 (email chain in respect of Suzana TOMANOVIĆ); and Attachment 22 (email chain in respect of SO Mosseny).

38. The Co-Lawyers requested that the February Fee Claim Decisions be reconsidered, and a flurry of correspondence followed.³⁷ In essence, I understand the Co-Lawyers' position to have been that the comments made by the Pre-Trial Chamber (see paragraph 29 above) undermined DSS's February Action Plan Decision, such that the February Fee Claim Decisions ought to be reconsidered. In contrast, I understand DSS's position to have been, in essence, that the Co-Lawyers had to justify any work above the 75 hours limit in the February Action Plan Decision, and it was said that they had failed so to do. The "*ceiling*" (as DSS called it) of 75 hours was therefore said to be maintained. DSS did not refer to its earlier caveat (see paragraph 23(1) above) that additional hours could be billed up to 90 hours, if considered necessary and reasonable by DSS.
39. On 29 March 2021, DSS sent an email to the Co-Lawyers stating that the February Fee Claim Decision might be reconsidered if further justification was provided, but DSS proceeded to state that the justification was "*currently nil*".³⁸ The Head of DSS proceeded to identify 10 factors which, it was said, had been taken into account at the end of January 2021 when determining the "*billable ceiling that was reasonable and necessary*" for February 2021. The 10 factors set out in the email were as follows:
1. *DSS's responsibility to ensure that the co-lawyers are able to provide effective legal advice and representation to Mr Yim Tith.*
 2. *The co-lawyers' work plan for February 2021, previous formal communications and email correspondences regarding the work and resources of the defence team.*
 3. *The staffing of the defence team* [REDACTED]
 4. [REDACTED].
 5. *That maintaining a team of legal assistants serves in part to ensure effective representation of the client and preparation of his defence.*
 6. *The current stage of proceedings in case 004 (being the pre-trial stage following submission of appeal briefs against closing orders, responses and replies).*
 7. *That the co-lawyers filed their final written submissions in case 004 in the first quarter of 2020.*
 8. *That the co-lawyers sought to invoice in February 2021 for the continued review of case materials and preparation for proceedings which may or may not take place.*

³⁷ Co-Lawyers' February Appeal, Attachments 22, 23, 24, 25, 26, 27; DSS's Response to February Appeal, Attachment 10.

³⁸ Co-Lawyers' February Appeal, Attachment 21; DSS's Response to February Appeal, Attachment 11.

8. *That the Internal Rules do not appear to require any further written submissions from the parties in case 004 at this stage of proceedings.*
 9. *That DSS is unaware of any request by the Pre-Trial Chamber for written submissions at this stage.*
 10. *The recent practice of the Pre-Trial Chamber of holding oral hearings on the appeals against closing orders.*
40. More correspondence followed, but the impasse remained. Toshimi HISAMURA's position, as further indicated in an email dated 30 March 2021, was that DSS awaited "additional justifications" in order to reconsider the February Fee Claim Decision.³⁹ Toshimi HISAMURA referred to her "previous email" for the explanation why the hours claimed in the Co-Lawyers' timesheets had been reduced. I understand this to be a reference to the 10 factors identified in her email of 29 March 2021, which I have extracted at paragraph 39 above. For their part, the Co-Lawyers accused Toshimi HISAMURA of "making up" new factors for the February Action Plan Decision.⁴⁰ The Co-Lawyers also perceived that DSS had declined to issue a written decision on their requests that the February Fee Claim Decisions be reconsidered.
41. On 31 March 2021, the Co-Lawyers asked the UNAKRT Coordinator to appoint an administrative judge to hear an appeal.⁴¹ The Co-Lawyers also queried whether DSS had followed the correct procedure in reviewing their fee claims because Toshimi HISAMURA, as head of DSS, had reviewed her own decision without a 'first instance' decision being taken by a DSS Legal Officer or Administrative Assistant.
42. On 1 April 2021, Toshimi HISAMURA wrote to the Co-Lawyers stating that they had "provided no reasons which would allow DSS to determine whether work done in excess of the approved 75-hour ceiling was reasonable and necessary, and thus whether it is remunerable."⁴² Toshimi HISAMURA continued that DSS considered the Co-Lawyers' appeal to an administrative judge to mean that they did "not intend to provide the information required" under their contracts and the LAS.

³⁹ Co-Lawyers' February Appeal, Attachment 21; DSS's Response to February Appeal, Attachment 11.

⁴⁰ Co-Lawyers' February Appeal, Attachment 21; DSS's Response to February Appeal, Attachment 12.

⁴¹ Co-Lawyers' February Appeal, Attachment 28: Letter from Co-Lawyers to the Deputy Director of Administration, 31 March 2021, p.3. The Co-Lawyers also queried whether DSS had followed the correct procedure in reviewing their fee claims because Toshimi HISAMURA, as head of DSS, had reviewed her own decision without a 'first instance' decision taken by a DSS Legal Officer or Administrative Assistant.

⁴² Co-Lawyers' February Appeal, Attachment 29: Letter from Toshimi HISAMURA, Head of DSS to the Co-Lawyers, 1 April 2021.

43. On 8 April 2021, the Co-Lawyers sent their appeal to the UNAKRT Coordinator. Pursuant to my direction, this was re-filed on 19 April 2021.

B7. Co-Lawyers' March Action Plan

44. In parallel to the above developments in respect of the February fee dispute, a similar dispute in respect of the Co-Lawyers' March fee claim started to brew. On 19 February 2021, the Co-Lawyers submitted their work plan for the YIM Tith Defence Team for March 2021.⁴³ Their Form-20 for March 2021 envisaged that each Co-Lawyer would spend 150 hours on Section A tasks, to be broken down as follows:

| | | |
|-----------|--------------------------------|------------------|
| <i>A2</i> | <i>Correspondence</i> | <i>10 hours</i> |
| <i>A5</i> | <i>Administration</i> | <i>3 hours</i> |
| <i>A6</i> | <i>Case File / Dossier</i> | <i>127 hours</i> |
| <i>A8</i> | <i>Procedural applications</i> | <i>10 hours</i> |

45. The Co-Lawyers' March Action Plan did not identify any items under Section B "*Specific Tasks*".
46. On 22 February 2021, Toshimi HISAMURA asked the Co-Lawyers whether there was "*any pending request for written submissions next month and/or a scheduling order for an oral hearing before the PTC.*" She continued: "*[w]ithout addition [sic] information, DSS will need to maintain the decision of 28 January 2021.*" The Co-Lawyers responded on 23 February 2021 in forceful terms, repeating points they had made before.⁴⁴

B8. DSS's March Action Plan Decision

47. On 26 February 2021, Toshimi HISAMURA issued a document titled "*Response to your Action Plan.*"⁴⁵ I shall refer this as the "*March Action Plan Decision*" for consistency. This indicated that 75 hours had been approved by DSS as necessary and reasonable for March 2021, "*with the possibility that additional hours can be billed at*

⁴³ Co-Lawyers' March Appeal, para. 6; Attachment 6.

⁴⁴ Co-Lawyers' March Appeal, Attachment 7.

⁴⁵ Co-Lawyers' March Appeal, Attachment 9.

the end of the month, if considered as necessary and reasonable by DSS.” A footnote recorded that DSS would “consider the views (if any) of the Pre-Trial Chamber in its decision concerning DSS’s February Action Plan, when it is filed.”

48. DSS did not provide any substantive reasoning to explain its view. To the extent anything was said, March Action Plan Decision provided brief comments on the Co-Lawyers’ Section A tasks in the following terms:

| | | |
|-----------|--------------------------------|--|
| <i>A2</i> | <i>Correspondence</i> | <i>Reasonable</i> |
| <i>A5</i> | <i>Administration</i> | <i>Reasonable</i> |
| <i>A7</i> | <i>Case File</i> | <i>Reduced</i> |
| <i>A8</i> | <i>Procedural applications</i> | <i>Reasonable: When billing, please specify.</i> |

49. At paragraph 2 of the March Action Plan Decision, repeating paragraph 3 of the February Action Plan Decision, DSS referred to an obligation to ensure that “*a proper balance is struck between the rights of an indigent defendant, including effective representation at every stage of judicial proceedings, and the transparent administration of public funds*”.

B9. Co-Lawyers’ March Fee Claims

50. On 4 and 5 April 2021, the Co-Lawyers submitted their respective timesheets and fee claims for March 2021. Each Co-Lawyer submitted a timesheet on Form 22, claimed the maximum 150 hours and certified the information to be true on Form 24.⁴⁶
51. I have also reviewed the March timesheets in some detail. Suzana TOMANOVIĆ’s timesheet for March 2021 records that she worked 195.25 hours that month. SO Mosseny’s timesheet records that he worked 150 hours in March 2021. The March timesheets are similar in format to the February timesheets that I commented upon at paragraph 32 above and following. Again, the narrative column in respect of work done relating to Task Code A7 “*Case file analysis*” frequently refers to numerous documents by their respective document number alone. Again, the timesheets record large blocks

⁴⁶ Co-Lawyers’ March Appeal, Attachments 13 and 14 (for Suzana TOMANOVIĆ); and Attachments 15-17 (for SO Mosseny).

(2) SO Mosseny's timesheet entries record repeated identical text as follows: *"reading/analyzing case file in preparation for the PTC Decision (possible outcomes: 1. Dismissal of the case, 2. Dismissal of the Closing Orders and return the Case File to CIJ, 3. Dismissal of the Closing Orders and issuances of the PTC's Closing Order, 4. Sending Mr. YIM Tith to trial)* [REDACTED] [REDACTED] [REDACTED]". This identical entry appears on each of 19 March, 20 March, 22 March, 23 March, 25 March, 26 March, and 29 March, that is some 7 days. I note that the documents referred to in respect of 30 March and 31 March differ, and the entry in respect of 19 March included documents additional to the identical text that I have quoted, namely "[REDACTED]".

55. I also note that Ms TOMANOVIĆ's timesheet recorded time in respect of litigating the March Fee Claim Decision, including the following entries: 25 March (2 hours); 26 March (2 hours); 30 March (3 hours); and 31 March (4 hours). SO Mosseny timesheet similarly recorded time in respect of litigating the March Fee Claim Decision, including the following entries: 25 March (3 hours); 26 March (4 hours); 30 March (4 hours); and 31 March (4 hours).

B10. DSS's March Fee Claims Decisions

56. On 6 April 2021, Toshimi HISAMURA wrote to each Co-Lawyer to say that she had found *"no explanation of unplanned work"* in the Co-Lawyers' timesheets and that justification for the *"additional 75 hours"* was required. She referred to the *"ceiling of 75 hrs under the task A7"* (my emphasis). She further stated that, without *"Section C and/or unforeseen work"* being explained with sufficient detail, DSS was unable to certify payment.⁴⁷

57. The Co-Lawyers responded on the same day, repeating a number of points they had made before and accusing DSS of *"intentionally breaching the law to deprive us of the remuneration for reasonable and necessary work we did in February and March 2021"*

⁴⁷ Co-Lawyers' March Appeal, Attachment 19 (email chain for Suzana TOMANOVIĆ); and Attachment 20 (for SO Mosseny).

in order to fulfil our contractual obligations to provide effective legal advice and effective representation to the Accused'.⁴⁸

58. On 7 April 2021, Toshimi HISAMURA raised a small number of specific queries in respect of Ms TOMANOVIĆ's timesheet for March 2021, specifically in respect of missing task codes for some entries for 1, 4 and 26 March 2021.⁴⁹ On 8 April 2021, Ms TOMANOVIĆ submitted a corrected Form 22 and apologised for her mistakes.⁵⁰ The only corrections added certain task codes to the entries. I have not been alerted to any other changes.
59. On 8 and 9 April 2021 respectively, DSS issued its "*Fee Claim Decision*" in respect of each Co-Lawyer's fee claim for March 2021.⁵¹ In each case, DSS reduced the number of hours to be compensated from the 150 hours claimed to 75 hours in total (i.e. not only under task A7 (see paragraph 56 above). As I noted at paragraph 35 above, there is a column on the Co-Lawyers' timesheets for DSS to make comments in respect of each individual line entry (titled "*DSS Comments:*") but, as with its February Fee Claim Decision, no individualised comments were made in respect of the March items. Little if any effort appears to have been made to scrutinise the individual line entries. It was not pointed out, for example, that Suzana TOMANOVIĆ's timesheet included numerous duplicate entries. Instead, the March Fee Claim Decisions referred to Toshimi HISAMURA's email dated 6 April 2021 (see paragraph 56 above) and a suggested lack of justification for *additional* work as being the reason why DSS "*maintains its view that a total of 75 billable hours is considered as necessary and reasonable for work in March 2021, as per the March 2021 Action Plan Decision.*"
60. DSS did not provide any reasoning to explain its view, other than a general reference (at paragraph 5) to the "*current stage of proceedings*". In respect of particular tasks, DSS simply added the following under the comments section of the template:

⁴⁸ Co-Lawyers' March Appeal, Attachment 19 (email chain).

⁴⁹ Co-Lawyers' March Appeal, Attachment 19 (email chain).

⁵⁰ Co-Lawyers' March Appeal, Attachment 19 (email chain).

⁵¹ Co-Lawyers' March Appeal, Attachment 21 (for SO Mosseny); and Attachment 22 (for Suzana TOMANOVIĆ).

- (1) Ms TOMANOVIĆ's hours in respect of "A7: Case file" were commented upon as "reduced" from 147.5 hours to 30.75 hours; and her hours in respect of "A8: Procedural applications" were also commented as "reduced" from 23.5 hours to 20 hours, with the additional note added that the March Action Plan had indicated 10 hours for such tasks.⁵²
 - (2) SO Mosseny's hours in respect of in respect of "A7: Case file" were commented upon as "reduced" from 99 hours to 32 hours; and his hours in respect of "A8: Procedural applications" were also commented as "reduced" from 28 hours to 20 hours, with the additional note added that the March Action Plan had indicated 10 hours for such tasks.⁵³
61. The March Fee Claim Decision in respect of Suzana TOMANOVIĆ contained the following statement (at paragraph 5), that is not present in respect of the March Fee Claim in respect of SO Mosseny:
- "In line with the approved action plan for March 2021, and the decision on hearing by the Pre-Trial Chamber of 18 March 2021, a total of 75 hours is considered as necessary and reasonable at the current stage of the judicial proceedings."*
62. On 13 April 2021, the Co-Lawyers requested that DSS reconsider the March Fee Claim Decisions and approve the 150 hours that had been claimed "*as reasonable and necessary in the pre-hearing appellate phase of proceedings as was previously approved by DSS to the Co-Lawyers for the entirety of this phase.*"⁵⁴
63. On 19 April 2021, Toshimi HISAMURA denied the request for reconsideration, referring once again to the lack of justification for "*additional resources*" at the fee claim stage. She stated that DSS was "*unaware of any requests by the Pre-Trial Chamber (PTC) for written submissions from Mr Yim Tith's defence team at the current*

⁵² A number of the entries coded "A8" on Ms TOMANOVIĆ's timesheet relate to litigation of the fee claim disputes. DSS do not appear to have made any principled objection to this, but DSS reduced the number of hours.

⁵³ A number of the entries coded "A8" on SO Mosseny's timesheet relate to the litigation of the fee claim disputes. See fn. 52 above.

⁵⁴ Co-Lawyers' March Appeal, Attachment 23.

phase of the judicial proceedings prior to and/or following the PTC decision on 18 March.”⁵⁵

64. For completeness, I note that, on 19 April 2021, Toshimi HISAMURA concluded her assignment as Chief of DSS. KONG Sokun was designated as the “*Officer-in-Charge*” of DSS until further notice. This has no bearing on the matters before me.

C. ADMISSIBILITY AND STANDARD OF REVIEW

65. The Co-Lawyers identify an “*ambiguity*” between their contracts and the LAS as to the deadline for their appeal: whereas clause 11.3 of their contracts refer to a deadline of 7 days after “*receiving the review of the Head of DSS*”; section F11 of the LAS refers to a deadline of 14 days “*of the receipt of the DSS Review Decision*” to request the appointment of an administrative judge.
66. The whole of clause 11 of the Co-Lawyers’ Contracts is poorly drafted. Whereas clause 11.1 relates to “*Non-Fees Disputes*”, clause 11.2 relates to the “*Request for Review of fee disputes*”. Clause 11.3 in turn relates to the “*Judicial appeal of fee claim decision*” and provides that a Co-Lawyer has the “*right to appeal*” a decision by “*the Head of the DSS*” to maintain an original fee claim decision, but does so by reference back to Clause 11.1 (which, as I have noted, relates to “*Non-Fees Disputes*”).
67. The Co-Lawyers followed the prudent course by requesting the appointment of an administrative judge on 31 March 2021 and, following DSS’s decision of 1 April 2021, filed their appeal in respect of the February Fee Claim Decision with the UNAKRT Coordinator on 8 April 2021. To similar effect, the Co-Lawyers’ appeal in respect of the March Fee Claim Decision was filed on 26 April 2021, following DSS’s decision refusing to reconsider that decision on 19 April 2021. The appeals are within time and are admissible.
68. The parties have not developed any submissions on the standard of review that I should apply, or the powers that I have as an administrative judge in respect of fee disputes. I have been provided with a decision by Judge Downing, sitting as an administrative

⁵⁵ Co-Lawyers’ March Appeal, Attachment 24.

judge in relation to a dispute over flights for a legal consultant, which contains a careful analysis of the standard that an administrative judge applies when reviewing administrative decisions.⁵⁶ That decision is of limited assistance in the present context, however, because the Co-Lawyers have an express right of appeal pursuant to their contracts, as I have noted above, and pursuant to the LAS.

69. Section F13 of the LAS provides that an administrative judge may require a Co-Lawyer or DSS to “*provide any further information which may be required for the purpose of the appeal.*” This provision is intended to support an administrative judge’s review of a decision in circumstances where a particular piece of information has not been provided by the parties. This provision is not intended, however, to require an administrative judge to re-do the entire fee claim process. The onus is squarely on the Co-Lawyers to demonstrate their grounds of objection in order to prove why their appeals should succeed, as required by section F11 of the LAS.
70. Pursuant to section F14 of the LAS, with respect to each item appealed against in respect of a fee claim decision, an administrative judge shall determine whether the work claimed was “*justified as actually done, and/or necessary and reasonable for the effective representation*” of their client. An administrative judge is also directed to take account two factors: (a) the level of experience at which the Co-Lawyer has been engaged; and (b) the professional background of the Co-Lawyer.
71. Pursuant to section F15 of the LAS, the administrative judge may:
 - (a) Alter the determination of the Head of DSS in respect of each item appealed against, whether by increase or decrease, as the Judge thinks fit;
 - (b) Confirm DSS’s Review Decision, in whole or in part;
 - (c) Order DSS to pay or withhold payment for the Co-Lawyer’s work in filing the appeal.

⁵⁶ Decision on Application Requesting Funding for Legal Consultant’s Flight to the Office of the Co-Lawyer, Case No. 001/21-05-2013, UNAJ, 25 June 2013.

72. I proceed on the basis that the use of the word “*may*” in section F15, when introducing the three sub-paragraphs identified above, means that those sub-paragraphs provide an administrative judge a non-exhaustive list of powers. I note that the Co-Lawyers, in at least one of their appeals, request that I instruct DSS to “*reconsider*” its fee claim decision “*taking into consideration the PTC Decision of 18 March 2021 and in accordance with the correct procedure for reviewing Fee Claims.*”⁵⁷ DSS did not directly address the alternative remedies under section F15 of the LAS. As I have already noted, however, section F14 of the LAS also contains a requirement that the administrative judge “*shall determine whether the work claimed for by the Co-Lawyer was justified as actually done, and/or necessary and reasonable for the effective representation*” of their client. In my view, in an appropriate case, it could be preferable for an administrative judge to remit a fee decision to DSS for further consideration, for example when the material submitted by the parties is incoherent or lacks detailed analysis. Such an approach may be necessary in the future if the standard of record-keeping and reasoning evident in the material before me does not improve.

D. MERITS

D1. Submissions

73. The Co-Lawyers start from the position that DSS’s decision in respect of their February Action Plan was unlawful. They criticise DSS’s subsequent attempts to justify its Action Plan Decisions as belated. They submit that the belated reasons do not cure the flaw in DSS’s approach, which is said to be DSS’s failure to recognise the consequences of the Pre-Trial Chamber’s Decision of 18 March 2021.⁵⁸ In a footnote, the Co-Lawyers also seek to reserve their position in respect of whether the LAS requires a first instance decision to be taken by someone other than that Head of DSS, before any further review is performed by the Head of DSS.⁵⁹

74. The Co-Lawyers also submit that DSS’s decisions stem from an unlawful policy that is said to have been introduced in or around October 2020, whereby DSS started to

⁵⁷ Co-Lawyers’ February Appeal, Remedy, p.12. The Remedy sought in the Co-Lawyers’ March Appeal is phrased slightly differently at p.15. It requests that I instruct DSS simply to re-issue Fee Claim Decisions “*approving 150 hours for each Co-Lawyer as reasonable and necessary performed work.*”

⁵⁸ Co-Lawyers’ February Appeal, paras. 29-30.

⁵⁹ Co-Lawyers’ February Appeal, fn. 37.

perform a balancing exercise insofar as the Co-Lawyers' needs were weighed against budgetary considerations. In addition to challenging the lawfulness of this alleged new policy per se, the Co-Lawyers complain that it treats their client differently compared to other ECCC accused whom, it is said, faced no such policy.⁶⁰ This submission is made in starker terms in the Co-Lawyers' second appeal, but I understand the underlying point to be advanced in respect of both Fee Claim Decisions, namely that DSS appeared to want to "*strike a balance*" between their client's rights and the availability of funds, or at least "*the transparent administration of funds*".⁶¹

75. In other words, the Co-Lawyers' submission is that DSS started to 'factor in' the availability of funds into its fee claim decisions, when this should not be a relevant consideration because fair trial rights cannot be weighed or balanced. Rather, the only relevant consideration should be whether the work for which the Co-Lawyers sought to be remunerated was necessary and reasonable for the effective representation of their client. The Co-Lawyers consider that the Pre-Trial Chamber's comments in paragraphs 17-18 of its Decision of 18 February 2021 support their submission.
76. In respect of the February Fee Claim Decision, the Co-Lawyers therefore requested that I reverse the February Action Plan Decision and direct DSS to reconsider the Fee Claim Decision "*taking into consideration the PTC Decision of 18 March 2021 and in accordance with the correct procedure for reviewing Fee Claims.*"⁶²
77. In respect of the March Fee Claim Decision, the Co-Lawyers request that I dismiss the March Action Plan Decision and Fee Claim Decisions and direct DSS to issue the Fee Claim Decisions by approving 150 hours for each Co-Lawyer as necessary and reasonable for the effective representation of their client in the pre-hearing appeal stage.⁶³
78. Turning to DSS's position, it submits that a 75-hour "*billable ceiling*" was approved for each month (February and March) in its Action Plan decisions and that the Co-Lawyers have not justified any increase beyond this number of hours. In respect of the

⁶⁰ Co-Lawyers' March Appeal, para. 23.

⁶¹ Co-Lawyers' March Appeal, para. 25.

⁶² Co-Lawyers' February Appeal, pp. 14-15.

⁶³ Co-Lawyers' March Appeal, pp. 14-15.

February 2021 Action Plan Decision, DSS now states that some 20 “*pertinent factors*” were taken into account, including a “*phase of objectively diminished activity*”.⁶⁴ The same reasons are said to apply to the March 2021 Action Plan Decision.⁶⁵ DSS contend that the Pre-Trial Chamber’s decision of 18 March 2021 was itself a “*post facto justification*” whereas, as at the date of the February Action Plan Decision, the available information was that (i) no notice of an oral hearing had been provided; and (ii) the probability of there being a hearing was becoming increasingly remote.

79. DSS further submits that references to the “*transparent administration of public funds*” should be uncontroversial because the Co-Lawyers need to justify their work in order for fee claims to be paid.⁶⁶ The suggestion that a new policy emerged in October 2020 is therefore refuted, as is the suggestion that DSS’s approach to the Co-Lawyers’ fee claims differed from that adopted in respect of other defence teams.⁶⁷ Finally, DSS raises the spectre of a spiralling “*vexatious abuse of process which has the effect of placing undue influence on DSS’s autonomy*”. This suggestion was based on an observation that the Co-Lawyers “*may*” continue to challenge future fee claims decisions. I am implored to render a decision “*at the soonest possibility*.”⁶⁸

D2. Analysis

D2.1 DSS’s approach

80. I find that DSS’s decision-making in respect of the fee disputes was flawed. DSS did not meet the requirement to give reasons as stipulated in F7 of the LAS. I wish to stress, at this point, that the Co-Lawyers’ correspondence and submissions throughout the process repeatedly failed to address in sufficient detail the underlying issue of what work actually needed to be done for the effective representation of their client. This contributed to the flawed process and the escalation of the disputes with DSS.

81. I am not persuaded, however, by the Co-Lawyers’ submission or reservation that DSS was somehow improperly constituted.⁶⁹ The submission has not been developed and

⁶⁴ DSS’s Response to February Appeal, para. 4.

⁶⁵ DSS’s Response to March Appeal, para. 3.

⁶⁶ DSS’s Response to February Appeal, para. 14.

⁶⁷ DSS’s Response to March Appeal, para. 5.

⁶⁸ DSS’s Response to March Appeal, para. 7.

⁶⁹ See paras. 41 and 73.

the argument does not alter my approach to the Co-Lawyers' appeals in any event. It does not make a difference to my approach, in deciding these appeals, if the Head of DSS's appeal decision was technically either a review or a reconsideration.

82. I shall now summarise the reasons why I find that DSS's decision-making was flawed. First, while I recognise the attempts by DSS to gather relevant information by placing reliance on (i) the projections in the Completion Plan (Rev. 27), and (ii) the information provided by the Office of Administration on 26 January 2021 as to the Administration's assessment of the diminishing likelihood of a future oral hearing before the Pre-Trial Chamber in Case 004, the unavoidable fact remains that, until 18 March 2021, the Pre-Trial Chamber (as the only authority to make the relevant determination) had not decided on scheduling, or not scheduling, an oral hearing. In these circumstances, one might reasonably ask: what did DSS expect the Co-Lawyers to do? What if the Pre-Trial Chamber ordered an oral hearing? Would the Co-Lawyers have been entitled to seek to delay the hearing on the basis that their resources had been insufficient to provide effective representation for their client? I do not need to resolve this question because it is now academic. In my view, however, the fact that DSS did not contemplate this possibility, especially in the light of the Pre-Trial Chamber's subsequent comments,⁷⁰ casts substantial doubt on the reliability of DSS's decision-making process in respect of the Action Plans and, crucially, its subsequent Fee Claim Decisions.
83. Secondly, DSS's initial decisions to reduce the number of hours from the 150 sought in the Co-Lawyers' Action Plans, and later claimed in their Fee Claims, to the figure of 75 hours per month, were almost entirely unreasoned.⁷¹ I can discern no obvious logic to the decision simply to divide in half the number of hours for which the Co-Lawyers would be paid. The arbitrary nature of that division is clear because the February Action Plan Decision implied that the primary factor upon which DSS relied in reaching its conclusion was the assessment that there would be no oral hearing, but no substantive

⁷⁰ See para. 29 above.

⁷¹ The Co-Lawyers, as part of the remedy sought, request that I dismiss or reverse DSS's Action Plan Decisions. The legal framework does not envisage such a remedy. The administrative judge hears an appeal from the fee claim decision, not from DSS's (earlier) decision on an action plan. I accept, however, that it may be appropriate to consider DSS's approach to an action plan if it is directly relevant to its subsequent fee claim decision. In both appeals, I find it appropriate to consider this broader context in order cut through the technical debate between the parties as to whether work claimed by the Co-Lawyers was pre-approved or, alternatively, whether it had to be justified on the basis that the work was previously unforeseen.

explanation was offered as to why that state of affairs would equate to a 50 per cent reduction in the full-time/maximum workload envisaged by the legal framework.

84. Thirdly, neither the February Action Plan Decision nor the March Action Plan Decision engaged in any meaningful way with the Co-Lawyers' proposed work plans for those months. Instead, DSS steadfastly adhered to the 'ceiling' that it had set in its Action Plan Decisions, despite having indicated in the March Action Plan Decision that DSS would "*consider the views (if any) of the Pre-Trial Chamber in its decision concerning DSS's February Action Plan.*" I am not persuaded by the belated reasons offered by DSS to justify its earlier decisions. None of the reasons offered later on managed to explain why or how DSS arrived at the figure of 75 hours per month, or why each month was the same even though the circumstances plainly changed once it had been confirmed by the Pre-Trial Chamber on 18 March 2021 that there would not be an oral hearing in Case 004.
85. Fourthly, DSS's Fee Claim Decisions did not engage with the work described in the Co-Lawyers' timesheets at all. DSS simply remarked "*reduced*" against each Co-Lawyer's number of hours in order to arrive at the pre-ordained figure of 75 hours per month. I found at paragraphs 35 and 59 above, for example, that DSS made little if any effort to scrutinise individual entries.⁷² To the extent that DSS did engage with specifics, the results are difficult to reconcile with its overall approach. For example, in the March Fee Claim Decision, DSS approved the payment of 20 hours for "*Procedural applications*". This was double the amount estimated (10 hours) in the Co-Lawyers' March Action Plan, and reflects in part additional work in respect of the fee claim disputes. However, the additional 10 hours in respect of "*Procedural applications*" did not transpose to any increase in the 'ceiling' of 75 hours. Rather, DSS maintained the ceiling by imposing an even more severe cut to the number of hours approved in respect of "*A7: Case file.*"
86. I therefore find DSS's approach to the February and March Action Plans, and DSS's Fee Claim Decisions in respect of those two months, to have been unsatisfactory. Insofar as the Co-Lawyers allege a new and unlawful policy that purports to balance a

⁷² The template used by DSS could be improved *inter alia* by changing the title of the relevant column to read "*DSS Reasoning on Item Claimed.*" This would invite the decision-maker to engage with much greater precision.

defendant's rights against the availability of funds, the material before me does not clearly establish that to be so. I do find, however, that DSS's repeated reference to "*a proper balance*" being struck between the rights of a defendant and the "*transparent administration of public funds*" was, at the least, worded in a clumsy and misguided way. I therefore endorse the sentiment in paragraph 17 of the Pre-Trial Chamber's decision of 18 March 2021 which was, it seems to me, more cautiously expressed than some of the Co-Lawyers' submissions suggested. It is also fair to note, however, that section B2 of the LAS records that UN policies require that remuneration "*shall be the minimum amount necessary to obtain the services required*"; and section F of the LAS makes repeated reference to the need to justify fees paid including, including to auditors. Therefore, DSS's references (see paragraphs 18, 23(2) and 49 above) to "*transparent administration of public funds*" were understandable and unobjectionable in themselves. It is the repeated clumsy and misguided reference to a "*proper balance*" that has caused concern.

87. The central question before me, however, is whether DSS's ultimate fee claim decisions were wrong. This involves a factual assessment of the key material before me, namely the Action Plans, the Fee Claims and DSS's Fee Claim Decisions. I do not consider that the Co-Lawyers have come close to substantiating the allegation that they have been discriminated against compared to other Co-Lawyers representing different persons before the ECCC. Just because Co-Lawyers in another case were remunerated for 150 hours at a particular time in their proceedings, it does not follow that the Co-Lawyers in Case 004 are somehow guaranteed to be remunerated for 150 hours in any particular month. An administrative judge appointed to decide fee claim disputes should focus on the key facts of the particular appeal(s), and the work said to have been justified as necessary and reasonable for the effective representation of the Co-Lawyers' client in the circumstances, rather than be drawn into unnecessary areas with incomplete information in respect of the more sweeping allegations advanced.
88. The legal framework envisages that an administrative judge is asked to address "*each item appealed against*" to decide whether the work claimed was justified as actually done, and/or necessary and reasonable for the effective representation of a client.⁷³ It would not make sense to interpret "*justified as done*" and "*necessary and*

⁷³ LAS, F14.

reasonable...” as alternative propositions. I consider that work must both be justified as actually done, and have been “*necessary and reasonable*”, in order for it to be remunerated.

89. Save for the focus on the Pre-Trial Chamber’s decision, the material and submissions before me do not address “*each item appealed against*”. Rather, they focus primarily on the generic question as to whether the Co-Lawyers should be remunerated for 150 hours of work, or 75 hours of work. This tainted the entire process and restricts the level of detail into which an administrative judge, on an appeal, can be expected to enter. In other words, both parties have adopted a broad-brush approach. DSS sought to criticise the Co-Lawyers in this regard, by asking whether “*the 76th, 77th, 78th ... 149th and 150th hours*” had been sufficiently justified as necessary and reasonable.⁷⁴ That submission overlooked the fact that DSS had not condescended into detail, to explain why individual items of work claimed had not been justified and were not necessary and reasonable.
90. Four points may be highlighted from the legal framework. First, “*Co-lawyers are unlikely to be able to work on cases full time at all stages of the trial process.*”⁷⁵ It is for this express reason that Co-Lawyers are assisted by teams of lawyers. Secondly, 150 hours is the maximum number of hours that each Co-Lawyer can be paid per month.⁷⁶ Under the legal framework, action plans are not required during a trial, but are required at other stages.⁷⁷ These fee disputes concern a late phase during the appeal process of the pre-trial stage of proceedings. For much of this period, lawyers are essentially waiting for the Pre-Trial Chamber’s decision. Thirdly, pursuant to the LAS, it is “*not expected that Co-Lawyers will work full time on the case during the investigative stage, allowing them to maintain their ordinary practice.*”⁷⁸ Fourthly, DSS is entitled to set a cap on hours “*depending on the stage of proceedings.*”⁷⁹ Indeed, considering the parties’ submissions in their entirety, both parties accept that matters

⁷⁴ DSS’s Response to February Appeal, para. 7.

⁷⁵ LAS, section A, “*Defence Teams.*”

⁷⁶ LAS, section E4, “*Work Limits.*”

⁷⁷ The LAS distinguishes the investigative stage from the “*trial proper*”, i.e., the substantive hearing under Internal Rule 89 bis. See LAS, section E3, explaining that no Action Plan is required during the “*trial proper*”.

⁷⁸ LAS, section F2, “*Time Sheets.*”

⁷⁹ LAS, section B5, “*Fees for Co-Lawyers.*”

can change depending on the particular stage of proceedings and the work that is required at a particular point in time (*see e.g.* paragraphs 16, 18, 23(3) and 62 above).

91. The fee disputes emerged at the appeal stage of the pre-trial phase of Case 004, at a time when the Co-Lawyers were waiting to hear from the Pre-Trial Chamber as to whether there would be an oral hearing or not (Internal Rule 77(3)). I find that, in the particular circumstances of these appeals, in the absence of being told by the Pre-Trial Chamber that there would not be an oral hearing, the Co-Lawyers were justified in preparing on the basis that there might be an oral hearing until they were told otherwise. It may be that the parties and DSS would have benefited from a much earlier indication from the Pre-Trial Chamber, but that is irrelevant for present purposes because I must address the situation as it stood.
92. DSS accepted that 75 hours per month was reasonable and necessary for February and March 2021. It follows from what I have said in paragraph 90 above that this figure should be increased. However, a different approach is needed in respect of the period up to 18 March 2021, as opposed to the later period after 18 March 2021, once it became clear beyond doubt that there would not be an oral hearing before the Pre-Trial Chamber in Case 004. In other words, all other things being equal, I find that a larger number of hours was, in principle, justified as necessary and reasonable for the period up to 18 March 2021, as opposed to the period from receipt of the Pre-Trial Chamber's decision until the end of March 2021.

D2.2 Hours claimed by the Co-Lawyers

93. This brings me to the specific work claimed by the Co-Lawyers. In my assessment, the Co-Lawyers' Action Plans and Timesheets fall well short of justifying the 150 hours claimed as necessary and reasonable for each of February and March 2021. The Action Plans provided little by way of detail tailored to the specific stage of proceedings. The vast majority of the projected hours were lumped under the Task Code 'A7: Case File' for reading and analysing the dossier. In circumstances where DSS questioned whether the number of hours projected was necessary and reasonable, a sensible step would have been to provide fuller explanation of the particular matters that still needed to be researched and analysed at this stage of the proceedings. Instead, battle lines were drawn based on the Co-Lawyers' perceived entitlement to a blanket remuneration of

150 hours per month, even though it is clear from the legal framework that there is no such entitlement (or something equivalent to a ‘lump sum’) at the investigation stage at the ECCC. I reject the Co-Lawyers’ apparent suggestion that DSS’s statements in October or November 2020 (see paragraphs 16 and 62 above) amounted to a guarantee that 150 hours was to be paid throughout the “*pre-hearing appellate phase of proceedings*”, irrespective of the circumstances. No such guarantee could be given under the rules. The legal framework acknowledges that work intensity varies over the course of proceedings, and therefore provides for a different approach to be taken at different stages. 150 hours is the maximum permitted during a trial proper (see paragraph 89 above).

94. I give the Co-Lawyers substantial leeway in respect of the manner in which they prepared their Action Plans for February and March 2021. I have found that the practical reality was that an oral hearing might have been approaching, and the Co-Lawyers were, in principle, entitled to proceed on that basis. However, I am now asked to determine the Co-Lawyers’ appeals based on the number of hours of work for which they claim remuneration. The Co-Lawyers’ appeals face much greater difficulties in respect of the work they actually identified in the timesheets submitted to DSS. They were required to provide sufficient detail pursuant to section F1 of the LAS. In my assessment, the Co-Lawyers’ timesheets do not do so; and they also fail to satisfy the requirements that DSS is required to apply under the LAS, in particular section F3. Although I recognise that there are differences between each Co-Lawyer’s timesheets, all four timesheets that I have reviewed contain serious deficiencies. I find that the timesheets repeatedly (i) fail to justify work as having been done and (ii) fail to show that the work described was necessary and reasonable for the defence of their client. I shall give three examples of the deficiencies I have identified.
95. First, the ‘work done’ narrative on all four timesheets is not detailed enough to explain the work that was accomplished towards the task, as required by section F3(c) of the LAS. As to the period before 18 March 2021, generic references to reading lists of documents in preparation for a possible oral hearing are unilluminating. As to the period after 18 March 2021, generic references to reading and analysing the Case File in preparation for different eventualities, in the absence of specific description as to the work actually done, also fall far short.

96. Secondly, timesheets are supposed to demonstrate that specific work was indeed done. Section F3(g) requires that there “*should not be days with identical tasks and identical timings which appear to have been cut and pasted from the previous day.*” The Co-Lawyers’ timesheets breach that provision repeatedly, both before 18 March 2021 and after 18 March 2021. I highlighted some examples at paragraphs 52 - 54 above, but there are many other examples.
97. Thirdly, the Co-Lawyers’ timesheets do not provide timings with sufficient detail to demonstrate that work was actually done, contrary to section F3(f) of the LAS, as I noted at above.
98. I recognise and stress that timesheets should not impose an undue burden on Co-Lawyers, but it is reasonable to expect much clearer information to be provided in order to justify that work being done is indeed necessary and reasonable. The requirements in section F3 of the LAS are both sensible and clear. I do not wish to prescribe additional criteria, or to add unnecessary glosses to the plain meaning of ‘necessary and reasonable’. There is not one single formula to be imposed, including by an administrative judge. There are, however, straightforward ‘common-sense’ steps that would make the position much clearer. For example, a Co-Lawyer could identify the page length of particular documents, or indicate the specific issues to which a document relates and the use to which it is being put at that particular time, for example to prepare particular draft outlines of their oral submissions or particular grounds of appeal or response. This would also allow the Co-Lawyers to demonstrate their work product, if necessary.
99. A Co-Lawyer could also briefly explain why a particular document fell to be considered on that particular day, for example if he or she was preparing oral submissions on a particular point which required certain documents (or sections of documents) to be considered in respect of that point. This would answer any concerns where some of the documents identified are old, or may have been referred to in earlier entries (perhaps even in an earlier month), but the documents needed to be reviewed again (although one might expect the Co-Lawyer or a team member to have prepared notes on an earlier occasion). In short, I find that the Co-Lawyers’ habitual listing of document numbers as being read and analysed in their February and March timesheets was inadequate.

100. Drawing these threads together, on the one hand, I have concluded that DSS's decision-making in respect of the Co-Lawyers fee claims for February and March 2021 was flawed and its fee claim decisions should therefore be increased from the 75 hours that it had accepted as otherwise being reasonable and necessary in respect of each month. On the other hand, I have concluded that the Co-Lawyers failed to justify the full 150 hours that they claimed for each month.

D2.3 Appropriate remedy

101. This is a borderline case in which, given the above-described deficiencies in the process, it may have been appropriate to quash DSS's fee claim decisions and simply remit the matter to be considered afresh. In the circumstances, however, it is appropriate for the parties to know as soon as possible where they stand rather than elongate the process further still. On balance, I am satisfied that there is just about sufficient material to allow me to determine the Co-Lawyers' appeals rather than send the matter back to DSS. That being said, the nature of the material before me, in particular the unsatisfactory nature of the Co-Lawyers timesheets, is such that I must approach the appeals on a broad-brush basis.

D2.4 February Fee Claim

102. In respect of February 2021, I find that each Co-Lawyer has, just about, managed to demonstrate that they should be remunerated for 115 hours of work. It was, in principle, necessary and reasonable for the Co-Lawyers to prepare for a possible appeal hearing in the circumstances. On the other hand, the Co-Lawyers' February timesheets contain serious deficiencies and do not come close to demonstrating that 150 hours was, in fact, necessary and reasonable to work in February 2021. Taking into consideration the stage of proceedings and the nature of the deficiencies in the Co-Lawyers' February timesheets, I find that there should be a substantial deduction from the maximum number of hours that might otherwise have been applicable. I have applied the same approach to both Co-Lawyers, even though it could be said that this is more generous towards Ms TOMANOVIĆ because there were even more serious examples of unexplained duplication evident in her February timesheet.

D2.5 The March Fee Claim

103. In respect of March 2021, I find it to be necessary to adopt a different approach to the period before the Pre-Trial Chamber’s decision compared to the period after that decision.
104. For the period up to and including 18 March 2021, I conclude that each Co-Lawyer should be remunerated for a total of 60 hours. I arrive at this figure based on essentially the same broad-brush basis as I applied in respect of the February Fee Claim, transposed to this period of 18 days in March 2021.
105. For the period from 19 to 31 March 2021, however, I consider that a much more modest increase is justified compared to the relevant proportion of 75 hours approved by DSS. Although I accept that the Co-Lawyers were entitled to claim for some time in March 2021 in respect of their appeals of the fee claim decisions, and the timesheets justify some work as being necessary and reasonable to consider the developments of the Pre-Trial Chamber’s decisions dated 18 March 2021, numerous entries submitted by the Co-Lawyers simply copied and pasted one day into another. Serious deficiencies in the Co-Lawyers’ timesheets are therefore manifest during this particular period, and the possibility of an oral hearing had been decisively removed by the Pre-Trial Chamber. I find that I should therefore apply a much more substantial deduction in respect of the hours claimed for the period 19 March to 31 March 2021. Each Co-Lawyer shall be remunerated for 35 hours for the period 19 – 31 March.⁸⁰ The overall result is that each Co-Lawyer shall receive 95 hours for March 2021. This shall include their work in March in respect of the instant appeals.

⁸⁰ Suzana TOMANOVIĆ claimed some 79.75 hours in respect of the period 19 – 31 March, of which 52 hours was for “*reading/analyzing case file...*” SO Mosseny claimed some 71 hours in respect of the period 19 – 31 March, of which 46 hours was for “*Case file analysis...*”.

DISPOSITION

For these reasons, and under the authority of the letters of appointment dated 8 April 2021 and 26 April 2021, I hereby:

DECIDE:

1. To admit the Co-Lawyers' appeals in respect of the February Fee Claim Decision and the March Fee Claim Decision;
2. To alter the determination of the Head of DSS in respect of the February Fee Claim by increasing the number of hours for which each Co-Lawyer should be remunerated from 75 hours to 115 hours;
3. To alter the determination of the Head of DSS in respect of the March Fee Claim by increasing the number of hours for which each Co-Lawyer should be remunerated from 75 hours to 95 hours;
4. To dismiss all other relief sought by the Co-Lawyers;

ORDER:

1. DSS shall pay each Co-Lawyer for 115 hours of work in respect of their February Fee Claims;
2. DSS shall pay each Co-Lawyer for 95 hours of work in respect of their March Fee Claim; and
3. To the extent that the Co-Lawyers' work in respect of filing these appeals is recorded in their timesheet for April 2021, and provided those entries comply with the relevant legal framework, DSS shall pay the Co-Lawyers in respect of this work pursuant to section F15(c) of the LAS.

Judge Claudia FENZ
UN Administrative Judge

31 May 2021



ANNEX LEGAL FRAMEWORK

DSS ADMINISTRATIVE REGULATIONS

D – Fees

[...]

13 *Action Plans and Time sheets*

- 13.1 *Co-lawyers will be required to complete Form 20: Action Plan on a monthly basis outlining in detail the tasks that need to be completed in order to provide effective legal advice and representation to the accused and allocating those tasks to individual members of the defence team. The Defence Support Section will consider the Action Plan and agree tasks that are necessary and reasonable for the preparation of the defence. Only pre-agreed tasks will be paid for save where unforeseen tasks are necessary and reasonable and justified as such.*
- 13.2 *Co-Lawyers will only be allowed to work on the case to the extent permitted by the work limits and time limits stated by the DSS.*
- 13.3 *In order to be paid for work completed, Co-lawyers and other members of defence teams will be required to maintain an accurate record of all preparatory work that is completed and the time that is spent in court through time sheets in a format provided by the DSS.*

14 *Payment of Fees*

- 14.1 *Co-Lawyers will be required to complete Form 24: Fees Claim on a monthly basis detailing the work that has been completed and the fee that is claimed. Timesheets must be attached to that claim form. Where a claim is for written work, that work product must be attached to the claim. Where a claim is for meetings, a note of that meeting must be provided or shown to the DSS.*
- 14.2 *The Defence Support Section will consider the claim form and pay fees for all work that was agreed in advance and has been completed. Where unforeseen additional work has been undertaken which was not agreed in advance, the Co-Lawyer must justify the work as being necessary and reasonable.*
- 14.3 *All fees must be paid into a nominated bank account in the name of the lawyer receiving the fee.*
- 14.3 [sic] *Disputes of fee payment shall be dealt with according to the terms of the contract.*

ECCC LEGAL ASSISTANCE SCHEME⁸¹

A. OVERVIEW

[...]

- *Defence Teams. Co-lawyers are unlikely to be able to work on cases full time at all stages of the trial process. They will be assisted by defence teams consisting of Legal Consultants and a Case Manager, as well as other experts that may be necessary. The Co-Lawyers may also be assisted by DSS Case Assistants and Interns. See Section D.*
- *Action Plans. Each month the Co-Lawyers are required to prepare an Action Plan stating the tasks that they will undertake, taking into account the other members of the team. This Action Plan must be approved by the DSS in advance of the work being done. Unforeseen tasks that are necessary and reasonable will also be paid for. However, during active trial, the submission of Action Plans will not be required. See Section E.*
- *Time Sheets and Fee Claims. Co-Lawyers will have to fill in contemporaneous time sheets in order to demonstrate the work that they have done towards the approved Action Plan. Co-Lawyers will be paid each month in accordance with a fixed timetable for the submission of completed Timesheets and Fee Claims. See Section F.*

[...]

B FEES FOR CO-LAWYERS

[...]

5. *Cap on Hours. Co-Lawyers will be subject to a maximum number of hours that may be paid in a given month, to be set by the DSS depending on the stage of proceedings. Hours worked beyond this cap will not be remunerated.*

[...]

E ACTION PLANS

1. *Except during the trial, Co-Lawyers are required to submit on a monthly basis an Action Plan outlining the tasks that they intend to complete in the following month and indicating how many hours will be spent on each task. This plan is then reviewed by the DSS. Only tasks that the DSS approves as necessary and reasonable for the effective defence of the client can be paid for. This encourages Co-*

⁸¹ The DSS Administrative Regulations specify that Co-Lawyers will be paid in accordance with the ECCC's Legal Assistance Scheme ("LAS"). The version of the LAS in force is as amended in December 2014.

Lawyers to plan in advance the work that is necessary to prepare the case, and also means that they are able to know what they will be allowed to invoice for before they have undertaken a particular task. Work should be allocated between the two Co-Lawyers, taking into account the roles of the Legal Consultants, Evidence Analysts and the Case Manager.

- 2 *During the period of a provisional contract the Co-Lawyers must draw up and submit to the DSS an Action Plan using Form 20: Action Plan covering the proposed tasks for the first month under the finalized Legal Services Contract. Thereafter, a new Action Plan must be submitted by the 20th day of the month covering the work to be done in the following month. The Action Plan must be agreed between the Co-Lawyers and signed by both of them.*

[...]

- 4 *Work Limits. The maximum number of hours that each Co-Lawyer can be paid under the LAS per month is normally 150 hours or 20 days. If, in extenuating circumstances, more than one International or Cambodian Co-Lawyer is assigned to represent a client, the number of hours will not be increased. The Co-Lawyers concerned may share the work load as they wish, but only up to the same cap on the number of hours. A Co-Lawyer who is assigned to more than one suspect, charged person, accused or appellant may be remunerated for a combined total of up to 175 hours per month, still subject to the maximum of 150 for any one client.*

- 5 *Section A – Standard Tasks. In order to simplify the process of predicting the work that needs to be done, Section A of the Action Plan contains standard tasks that are likely to be undertaken every month. These are:*

[...]

- *A1: Team Meetings. This covers meetings between members of the defence team.*
- *A2: Correspondence. This includes correspondence between the team and also general written correspondence required to prepare the case. This also includes checking email correspondence.*

[...]

- *A5: Administration. This includes fee claims and time sheets and recruiting matters. Co-Lawyers should not bill more than 3 hours for filling out fee claims time sheets per month.*

[...]

- *A7: Case File. Reading and analysing the dossier. Some detail should be given on the time sheet as to what work was done.*
 - *A8: Procedural applications. This covers the short (less than 5 pages) administrative and procedural applications that constantly occur during the case. More substantial applications should be planned in Section B.*
- 6 *Section B – Specific Tasks. This section of the Action Plan contains specific tasks that are expected during the course of the month. For example:*
- [...]*
- *Preparation for Court hearings. If there is a significant hearing, some preparatory work will be required.*
- 7 *Section C - Unforeseen Tasks. In addition the Co-Lawyers will be paid for any necessary and reasonable task which falls into these categories but which was not specifically included in the Action Plan. These tasks must be justified as part of the Fee Claim process, explained in Section F below.*

F FEE CLAIMS

- 1 *Fees will be paid on a monthly basis on the submission of completed time sheets.*

Time Sheets

- 2 *Co-Lawyers must personally complete contemporaneous time sheets with sufficient detail to allow the DSS to be able to justify the fee paid to the lawyer. Co-Lawyers will bill at an hourly rate when not in active trial. It is not expected that Co-Lawyers will work full time on the case during the investigative stage, allowing them to maintain their ordinary practice. [...]*

Best Practice

[...]

3. *The following rules will be applied by the DSS in assessing fee claims and time sheets submitted.*

[...]

- c. *Detail. The ‘work done’ narrative should be detailed enough to explain the work that was accomplished towards the task and to enable the team to justify the work if needs be, and to allow*

the DSS to justify the payment to auditors. Without this, the claim cannot be paid.

- e. Contemporaneous. Time sheets should be completed at the time the work is being done. Handwritten Preparation Timesheets may be submitted. The DSS may ask to see the original time sheets if there are concerns that they are not being completed contemporaneously.*
- f. Timings. Timings should be given with sufficient detail to demonstrate that the work was actually done, rather than the form being filled in at the end of the day. Times should be given to specific tasks, rather than allocating a number of tasks to a 4, 8 or 12 hour block. The Co-Lawyer should round each time entry up or down to the nearest quarter of an hour.*
- g. Repeats.. Preparation time sheets are intended to demonstrate that specific work was actually done. There should not be days with identical tasks and identical timings which appear to have been cut and pasted from the previous day.*

[...]

Fee Claim

- 4. Co-Lawyers may claim their fees on a monthly basis by completing Form 24: Fees Claim, indicating the total number of hours or days claimed together with the fee claimed. Form 24 must be signed personally by the lawyer making the claim and forwarded to the DSS Legal Officer and Administrative Assistant.*
- 5 The following documents should be attached to Form 24: Fees Claim:*
 - Time Sheets. Either the Preparation Timesheet or the Hearings Timesheet should be attached.*
 - Updated Action Plan. 'Section C: Unforeseen Work' should be completed, with sufficient detail to enable the DSS to justify the work and the fee claimed.*
- 6 The DSS will review the claim. Where the hours claimed in Section A and B were in excess of the hours that were predicted, or where tasks are claimed in Section C for unforeseen work, then the DSS may require further justification before paying these additional hours.*
- 7 The DSS will issue a Fee Claim decision indicating the amount that has been paid and giving reasons where the entire fee claimed was not paid.*

- 8 *The DSS may refuse to certify payment in whole or in part if the Co-lawyer fails to complete the service specified in the contract to the satisfaction of the United Nations. This includes, but is not limited to:*
- *If work for which a claim has been submitted has not actually been carried out;*
 - *If work has been carried out which was not included in the Action Plan and is not considered to be necessary and reasonable; or*
 - *If the work was included within the Action Plan but the hours invoiced were far greater than those envisaged for the task and no adequate explanation was provided.*

Request for Review

- 9 *If a Co-Lawyer is not satisfied with the Fee Claim Decision then he or she may request a review by the Head of the DSS. The Co-Lawyer should write to the Head of the DSS with a full explanation and sufficient documents to support the request for review. The Head of the DSS will issue a written response to the request.*

Appeal

- 10 *Where a Co-Lawyer is dissatisfied with the Review Decision of the Head of the Defence Support Section the Co-Lawyer may request the Deputy Director of Administration (DDOA)/UNAKRT Coordinator to appoint a UN Administrative Judge (UNAJ) to hear an appeal.*
- 11 *The request to appoint a UNAJ must be filed with the DDOA within 14 days of the receipt of the DSS Review Decision. The appeal must be in writing and must specify separately each item appealed against, showing (where appropriate) the amount originally claimed, the amount determined by the DSS and the grounds of objection to the determination.*
- 12 *The Co-Lawyer shall attach:*
- a. *The relevant Timesheet (Forms 22 or 23) and Fee Claim (Form 24);*
 - b. *The relevant DSS Fee Claim Decision;*
 - c. *The DSS Review Decision;*
 - d. *Further particulars, information and documents relevant to the appeal.*
- 13 *The Head of the DSS shall provide a written response to the appeal within 14 days. The UNAJ may require the Co-Lawyer or the Head of the DSS to provide any further information which may be required for the purpose of the appeal. The appeal is limited to written submissions.*
- 14 *With respect to each item appealed against, in assessing the appeal the UNAJ shall determine whether the work claimed for by the Co-Lawyer*

was justified as actually done, and/or necessary and reasonable for the effective representation of the charged person, suspect or accused. In doing so, the UNAJ shall take into account the following factors:

- a. The level of experience at which the Co-Lawyer has been engaged;*
- b. The professional background of the Co-Lawyer.*

15 The UNAJ may:

- a. Alter the determination of the Head of the DSS in respect of each item appealed against, whether by increase or decrease, as the Judge thinks fit.*
- b. Confirm the DSS Review Decision, in whole or in part.*
- c. Order the DSS to pay or withhold payment for the Co-Lawyer's work in filing the appeal.*

16 Where the fees are increased or decreased, the UNAJ shall authorise the DSS to pay the increase or make the deduction in the next payment to the Co-Lawyers under the Legal Assistance Scheme.

17 The UNAJ is only required to provide reasons for the decision in disputes involving amounts of over \$1,000.

18 The UNAJ shall communicate his decision and, where required, the reasons for it in writing to the Co-Lawyer and the Head of the DSS. The decision of the UNAJ is final and binding on the parties.

Co-Lawyers' Legal Services Contracts with the United Nations

7 **Obligations of the Contracting Lawyer for Fee Claims**

- 7.1 **Action Plan.** *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.*
- 7.2 **Time Sheets.** *The Contracting Co-Lawyer is required to keep a detailed record of the time that is spent on preparatory work in a format provided by the DSS.*
- 7.3 **Fee Claim.** *Each month, the Contracting Co-lawyer shall submit to the DSS a fee claim form in a format provided by the DSS detailing the work done in furtherance of the approved Action Plan, and unforeseen, non-approved work which was necessary and reasonable. The DSS shall review the fee claim and make an assessment to determine whether work was actually done, whether it was in accordance with the Action Plan or if not whether it was necessary and reasonable before approving payment.*
- 7.4 **Supporting documentation.** *The fee claim must be supported by completed time sheets.*

[...]

9 **Consideration by the UN**

[...]

- 9.2 *Only tasks that were outlined in the proposed Action Plan and, if applicable, Transfer Plan and were approved by the DSS pursuant to paragraphs 7.1 and 8.6 of this Contract shall be compensated under this Contract, save that unforeseen, necessary and reasonable tasks will be paid for if justified by the Contracting Co-Lawyer.*
- 9.3 *Compensation shall not be paid if:*
- a. *The work or hours claimed were not agreed in the approved Action or Transfer Plan and are not justified as necessary and reasonable;*
 - b. *The work or hours claimed were agreed in the approved Action or Transfer Plan, but cannot be justified as having been carried out; or*

- c. *The work was included in the approved Action or Transfer Plan but the hours invoiced were greater than those envisaged for the task and no adequate explanation was provided.*

[...]

11 Dispute resolution

[...]

11.2 *Request for review of fee disputes. If any dispute, controversy or claim arises out of the payment of a fee under paragraph 9 of this Contract, the Contracting Co-Lawyer may request the Head of the DSS to review a fee claim decision within 14 days of receiving the decision from the DSS. Any request for review shall be made in writing, shall state why the fee claim decision was incorrect, and shall be accompanied by any documents that support the request for review. The Head of the DSS shall endeavour to make a decision on the request for review within 14 days of receiving it.*

11.3 *Judicial appeal of fee claim decision. In the event that the Head of the DSS decides to maintain the original fee claim decision, in whole or in part, the Contracting Co-Lawyer has the right to appeal such a decision, in whole or in part, to the international judge nominated by the Coordinator of UNAKRT as the UN Administrative Judge, referred to in paragraph 11.1 above, within 7 days of receiving the review decision of the Head of the DSS.*

12 General Conditions of Contracts

12.1 *The Contracting Co-Lawyer shall be assigned to provide legal representation during the proceedings against the Accused, in compliance with the terms and conditions as defined in this Contract and in the General Conditions of Contracts for the Services of Consultants or Individual Contractors (hereinafter "General Conditions"), as set out in ST/AI/1999/7/Amend.1./Annex (P.104) (3-06), which are attached to this Contract and made an integral part of it.*