UNAKRT
United Nations Assistance to the Khmer Rouge Trials

UNITED NATIONS ADMINISTRATIVE JUDGE

Case No.:	**UNAKRT/UNAJ/SCC/2016/3**
Before:	**Justice Florence Ndepele MWACHANDE-MUMBA**
Greffier:	**Paolo LOBBA**
Date:	**31 October 2016**
Language:	**English**
Classification:	**PUBLIC**

DECISION ON APPLICATION FOR JUDICIAL REVIEW OF AN ADMINISTRATION'S DECISION ON PAYMENT OF EXTERNAL TRANSLATION EXPENSES

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1. **Justice Florence Ndepele MWACHANDE-MUMBA**, Judge of the Supreme Court Chamber of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea between 17 April 1975 and 6 January 1979 ("ECCC"), nominated on 10 August 2016 by Knut ROSANDHAUG, Coordinator of the United Nations Assistance to the Khmer Rouge Trials ("UNAKRT") and Deputy Director of the Office of the Administration ("Deputy Director") as the United Nations Administrative Judge ("Administrative Judge"), following a request by Michael G. KARNAVAS and ANG Udom, Co-Lawyers for MEAS Muth, a Charged Person in Case 003 ("Co-Lawyers" or "Applicants", as appropriate), made pursuant to Article 11.1 of the ECCC Legal Services Contract ("Legal Services Contract"), regarding a non-fee dispute with Isaac ENDELEY, Head of the Defence Support Section ("DSS") ("Head of the DSS" or "Respondent", as appropriate),[1] is seized of the "MEAS Muth's Co-Lawyers' Application for Judicial Review of an Administrative Decision Concerning a Request for the Payment of a Translator from the Legal Consultant Budget Line", submitted on 17 October ("Application"), to which the Respondent responded on 24 October ("Response").[2]

2. The present "non-fees dispute"[3] between the Applicants and the Respondent arises in relation to an administrative decision issued by the Respondent on 28 July ("Impugned Decision").[4] The Impugned Decision denied the Applicants' request that payment for external translation services be made using the funds allocated to the Case 003 Defence team ("Defence") to recruit support staff ("Budget for Support Staff"),[5] rather than the lump sum paid to the Co-Lawyers to cover incidental costs ("Expense Payments").[6]

[1] Letter from the Deputy Director to Administrative Judge, 10 August 2016.
[2] DSS Response to MEAS Muth's Co-Lawyers' Application for Judicial Review of an Administrative Decision Concerning a Request for the Payment of a Translator from the Legal Consultant Budget Line, 25 October 2016.
[3] Legal Services Contract, Article 11.1.
[4] Letter from the Respondent to the Applicants entitled "Re: Decision on Your Request for Payment of External Translation Expenses", 28 July 2016.
[5] ECCC Legal Assistance Scheme as amended in December 2014 ("Legal Assistance Scheme"), Sections D and H.
[6] Legal Assistance Scheme, Section C.

I. PROCEDURAL HISTORY

3. On 19 April, the International Co-Investigating Judge ("ICIJ") issued a call for *Amicus Curiae* briefs to address a question of law relating to crimes against humanity.[7] By 19 May, 11 *amici curiae* had filed their submissions in English only.[8] On 19 May, the Co-Lawyers and the International Co-Prosecutor filed their respective submissions on the same question of law.[9] According to the Applicants, the parties in Case 003, as well as eight *amici curiae*, referred in their submissions to one Dutch and three German cases, of which no full translations were available in the English language, only summaries.[10]

4. On 3 June, the Co-Lawyers requested that the ICIJ obtain an English translation of the four aforementioned cases, pointing out that this would be essential to file their response to the International Co-Prosecutor's and *amici curiae* submissions and that no German nor Dutch speakers were present in their team, giving rise to a situation of disadvantage for the Defence.[11] By order of 21 June, the ICIJ, while "sympathetic" to the Co-Lawyers' position, rejected their request, but suggested that the aforesaid translations could either be financed using the DSS' or the Co-Lawyers' funds; or obtained through the Interpretation and Translation Unit ("ITU").[12]

5. On 22 June, the Defence, following the advice given in the ICIJ Order, contacted the Head of the ITU, but was informed that, since "the languages requested are not among the three working languages of the Court", they should "contact DSS".[13]

6. On 23 June, the Defence, as recommended in the ICIJ Order and by the Head of the ITU, redirected its request to the Head of the DSS, who indicated that the DSS was unable

[7] Call for Submissions by the Parties in Cases 003 and 004 and Call for *Amicus Curiae* Briefs, 19 April 2016, D191.
[8] MEAS Muth's Co-Lawyers' Requests Related to Forthcoming Application for Judicial Review of an Administrative Decision Concerning a Dispute Regarding the Budget Line for Payment of a Translator, 16 August 2016 ("Preliminary Application"), fn. 3.
[9] Annex to "MEAS Muth's Co-Lawyers' Requests Related to Forthcoming Application for Judicial Review of an Administrative Decision Concerning a Dispute Regarding the Budget Line for Payment of a Translator"", 16 August 2016 ("Annex to Preliminary Application"), para. 2.
[10] Preliminary Application, paras 1-2.
[11] Preliminary Application, para. 2 (referring to Letter from the Co-Lawyers to the Co-Investigating Judges, "Request that the Office of the Co-Investigating Judges obtain English translations of three German decisions from the Supreme Court of the British Occupied Zone and one Dutch decision from the Special Court of Cassation", 3 June 2016).
[12] Order on Request to Obtain English Translations of Three German Decisions and One Dutch Decision, 21 June 2016, D191/16/1, (referred to in Preliminary Application, para. 3) ("ICIJ Order"), paras 7, 16-20.
[13] Preliminary Application, Attachment 2 (Electronic mail from Head of ITU to Defence, "Re: FW: Translation of German and Dutch documents into English", 22 June 2016).

to assist, since its funds for translation are earmarked for translation into Khmer.[14] The Head of the DSS suggested that the Defence either use "the monthly expense payments of USD 750.00 to cover the cost of" the translations sought, or use the remaining funds in the Defence's "consultancy budget for 2016 to recruit external language consultants".[15] He also offered to provide further assistance, "for instance with the preparation of contracts for external consultants".[16]

7. On 24 June, the parties in Case 003 were notified of the completion of the Khmer translations of the *amici curiae* briefs and, consequently, the 15-day deadline for the parties, including the Defence, to submit their responses to the briefs fell on 11 July.[17]

8. The Defence asked the ITU for a list of external translators and, after having contacted five of them, selected Janja PAVETIĆ-DICKEY, who completed her assignment by 8 July, as requested.[18]

9. After making a preliminary inquiry of the Head of the DSS, the Defence submitted, on 15 July, the translator's invoice to the DSS, requesting that payment be made from the Budget for Support Staff.[19] The Head of the DSS undertook to "start processing [the request] forthwith" and indicated that he would inform the Defence "if there are any problems".[20] On the same date, the Office of the Administration informed the Head of the DSS that, since no contract with the translator had been drawn up prior to the translation services being performed, it was unable to process the requested payment, unless the Deputy Director provided *ex post facto* approval.[21] The Head of the DSS then wrote a Memorandum to the Deputy Director ("DSS Memorandum of 15 July") "requesting him to approve, on an exceptional basis, the preparation of an *ex post facto* contract".[22]

10. On 18 July, the Head of the DSS informed the Defence of the difficulties he had encountered in having the invoice settled as requested and of the need to obtain *ex post*

[14] Preliminary Application, Attachment 4 (Electronic mail from Head of DSS to Defence "Re: Translation of German and Dutch documents into English", 24 June 2016).
[15] *Ibid.*
[16] *Ibid.*
[17] Annex to Preliminary Application, para. 8.
[18] Annex to Preliminary Application, paras 10-12.
[19] Preliminary Application, para. 6 and Attachment 6 (Letter from Co-Lawyers to Head of the DSS, "Request for payment of external translation expenses", 15 July 2016); Annex to Preliminary Application, paras 14-17.
[20] Preliminary Application, Attachment 7 (Electronic mail from Head of DSS to Defence "Re: Letter from MEAS Muth Defence regarding payment of translation expenses", 15 July 2016).
[21] Impugned Decision, para. 6.
[22] Impugned Decision, para. 6.

facto approval.[23] The Head of the DSS also indicated that the Deputy Director was disinclined to grant such authorisation, but that he intended to further discuss the matter with the Deputy Director.[24] He cautioned however that, should the Deputy Director maintain his position, the Defence would be left with no other option than to settle the invoice by drawing funds from the Co-Lawyers' Expense Payments.[25]

11. On 21 July, the Defence provided the Head of the DSS with explanations regarding the procedure followed to make the payment request. Notably, the Defence clarified that there had been a procedural error, in that one of the Defence team members believed that payment would be made from the Expense Payments funds and, therefore, failed to liaise with the DSS to make arrangements regarding the preparation of the contract with the external translator.[26]

12. On 22 July, the Head of the DSS, following a request from the Deputy Director to provide further justification for his application for *ex post facto* approval, sent the Deputy Director a second Memorandum ("DSS Memorandum of 22 July"), summarising the explanations conveyed by the Defence during the meeting of the previous day.[27]

13. On 26 July, the Head of the DSS informed the Defence that he had received the Deputy Director's final decision on the request ("Deputy Director Decision of 25 July"), from which he quoted, in part, as follows:

> As you are aware, ex post facto sourcing actions are only accepted in exceptional circumstances. The justifications for ex post facto need to clearly explain the if and how, not performing the ex post facto sourcing action would have seriously jeopardized the operational capacity. Regardless of the justifications provided, all ex post facto actions must follow all UN procurement practices and procedures, including transparency and open competition. Further, pursuant to Financial Rule 101.2, any official responsible for authorizing any ex post facto procurement action may be held personally and financially liable if the action cannot be properly justified or if the justifications are not accepted by the authorities invested with the delegated authority – I in this case – to approve such procurement actions.[28]

[23] Preliminary Application, Attachment 8 (Electronic mail from Head of DSS to Co-Lawyers, "Re: Letter from MEAS Muth Defence regarding payment of translation expenses", 18 July 2016).
[24] *Ibid.*
[25] *Ibid.*
[26] Annex to Preliminary Application, para. 19; Impugned Decision, para. 7.
[27] Impugned Decision, para. 7.
[28] Preliminary Application, Attachment 8 (Electronic mail from Head of DSS to Co-Lawyers, "Re: Letter from MEAS Muth Defence regarding payment of translation expenses", 26 July 2016).

The Head of the DSS further explained that the Deputy Director denied the request for *ex post facto* approval, since he was not satisfied that the situation put forward by the Defence met the aforementioned requirements.[29] The Head of the DSS concluded that the "only remaining option" for the Defence was to settle the invoice drawing funds from the Expense Payments.[30]

14. On the same date, the Co-Lawyers requested the Head of the DSS to provide the Deputy Director Decision of 25 July, so that they could make an informed determination regarding whether to lodge an appeal against that decision.[31] They further enquired as to "how long it would have taken to obtain the authorizations referred to" in the quoted passage of the Deputy Director Decision of 25 July and whether payment of the translator from the Expense Payments would bar any appeal against the said decision or prevent the potential reimbursement of funds.[32]

15. On 28 July, the Head of the DSS issued the Impugned Decision, wherein he recapitulated the background and confirmed the decision concerning the Co-Lawyers' request for payment. He also replied to the Co-Lawyers' additional queries as follows: (i) he was not in a position to disclose the Deputy Director Decision of 25 July, since it was "an internal administrative document" addressed to him, not to the Co-Lawyers;[33] (ii) payment of the translator from the Expense Payments would bar reimbursement in the case of a favourable decision on appeal, "since that is one of the uses for which the discretionary expense payments are intended".[34]

16. On 1 August, the Co-Lawyers requested the Deputy Director to appoint an administrative judge to settle a non-fee dispute and to provide them with a copy of the Deputy Director Decision of 25 July.[35] The Deputy Director did not respond to the request directly, but the Head of the DSS stated that he had been instructed by the Deputy Director

[29] *Ibid*.
[30] *Ibid*.
[31] Preliminary Application, Attachments 9 (Electronic mail from Michael KARNAVAS to Head of DSS "Re: Letter from MEAS Muth Defence regarding payment of translation expenses", 26 July 2016), and 10 (Letter from Co-Lawyers to Head of DSS "Re: The Deputy Director of Administration's decision on our 15 July 2016 request for payment of external translation expenses", 26 July 2016).
[32] Preliminary Application, Attachment 10 (Letter from Co-Lawyers to Head of DSS "Re: The Deputy Director of Administration's decision on our 15 July 2016 request for payment of external translation expenses", 26 July 2016).
[33] Impugned Decision, para. 9.
[34] Impugned Decision, para. 1.
[35] Preliminary Application, Attachment 12 (Letter from Co-Lawyers to Deputy Director "Request to appoint an administrative judge and for a copy of your decision", 1 August 2016).

to inform the Co-Lawyers that their requests could not be processed, as they were deemed to be procedurally defective.[36] In relation to the request for document production, the Head of the DSS communicated the view that "documentation related to the [Deputy Director]'s office does not fall under the scope of Article 11.1 of your Legal Services Contract".[37]

17. On 3 August, the Co-Lawyers filed an application with the Co-Investigating Judges, with a view to obtaining disclosure of the Deputy Director Decision of 25 July, a request that was apparently denied due to lack of jurisdiction.[38]

18. On 9 August, the Co-Lawyers submitted a second request to the Deputy Director for the appointment of an administrative judge pursuant to Article 11.1 of the Legal Services Contract and for production of the Deputy Director Decision of 25 July.[39] The Co-Lawyers declared that they "dispute" the Impugned Decision, which "is based on" the Deputy Director Decision of 25 July and that they were unsuccessful in their attempt to amicably resolve the dispute.[40]

19. On 10 August, the Deputy Director, pursuant to Article 11.1 of the Legal Services Contract, nominated Justice Florence Ndepele MWACHANDE-MUMBA as the United Nations Administrative Judge "with the request to look into the admissibility or otherwise of the representation, and if admissible to arbitrate and advise [him] of [her] findings".[41]

20. On 16 August, the Applicants filed their Preliminary Application, requesting that the Administrative Judge: (i) clarify the procedure applicable to the present proceedings; (ii) compel the Deputy Director to provide them with a copy of his decision of 25 July and the related correspondence with the DSS; and (iii) clarify whether payment of the translator from the Expense Payments will affect the resolution of their present application.

21. On 24 August, the Administrative Judge issued the "Directions concerning Conduct of Proceedings", in which she, *inter alia*: (i) instructed the Deputy Director to provide both her and the Applicants with a copy of the Deputy Director Decision of 25 July; (ii) instructed the Respondent to provide both her and the Applicants with a copy of the DSS

[36] Preliminary Application, Attachment 13 (Letter from Head of DSS to Co-Lawyers, "Re: Request to appoint an administrative judge and for a copy of your decision", 5 August 2016).
[37] *Ibid.*
[38] Preliminary Application, para. 9.
[39] Preliminary Application, Attachment 14 (Letter from Co-Lawyers to Deputy Director and Head of DSS, "Second request to appoint an administrative judge and for a copy of your decision", 9 August 2016).
[40] *Ibid*., p. 2.
[41] Letter from the Deputy Director to Administrative Judge, 10 August 2016.

Memorandum of 15 July and the DSS Memorandum of 22 July ("DSS Memoranda", collectively); (iii) set out the procedure to be followed in the present proceedings, including the time and page limits for the filing of the Application and the Response, with no reply being envisaged; and (iv) advised that payment of the translator from the Expense Payments would not prejudice the resolution of the case before her.[42]

22. On 26 August, the Administrative Judge informed the Parties as follows:

> Yesterday the [Deputy Director] communicated via e-mail to the Administrative Judge that, while he is prepared to provide a copy of the requested document to the Administrative Judge (which he has already done), he will not release such document to a third party (i.e. the Applicants), since this may necessitate formally lifting the privileges and immunities granted to the United Nations by Article 19 of the Agreement between the United Nations and the Royal Government of Cambodia ("Agreement") and the Vienna Convention on Diplomatic Relations. He maintained that the requested document was issued by him in his capacity as the Coordinator of UNAKRT pursuant to Article 17(c) of the Agreement, which provides that remuneration of defence counsel is the responsibility of the United Nations. As such, in his view, "the correspondence falls within the privileges and immunities granted to United Nations".
> The Deputy Director further stated that the dispute referred to the Administrative Judge is the decision rendered by the Head of the [DSS], who adopted it pursuant to the autonomous authority provided to him by Rule 11 of the ECCC Internal Rules. In the Deputy Director's opinion, the correspondence of the Head of the DSS with him in this case was in the Head of DSS's capacity as a UN staffer designated to discharge the certifying officer functions under the UN Financial rules and as such internal to the United Nations.
> The Deputy Director finally clarified that he stands ready to facilitate the process of requesting the Secretary-General of the United Nations authorisation to lift the said privileges and immunities, should the Administrative Judge consider it appropriate.
> The Administrative Judge takes note of the representations made by the Deputy Director and does not pronounce on whether the requested document falls within the category of 'inviolable' documents referred to by the Deputy Director or whether the said document contains information of sensitive and confidential nature which would warrant a confidential classification. The Administrative Judge considers that it is her duty to ensure that proceedings be conducted in keeping with the tenets of due process. In particular, she will have to strike a reasonable balance between the need to allow the Applicants to properly prepare and present their case, while protecting against the risk of unauthorised disclosure of confidential information. She will have to determine, for example, whether to request authorisation for disclosure to the Secretary-General, or to request the Applicants to base their appeal only on the reasoning provided in the decision adopted by the Head of the DSS that they intend to impugn. Before making her final determination on how to proceed further with the proceedings, the Administrative Judge considers it appropriate to afford the Parties an opportunity to make representations thereupon.

[42] Electronic mail sent from Greffier of the Administrative Judge, entitled "Directions concerning Administration Proceedings and Related Matters issued by UN Administrative Judge Mumba", 24 August 2016, 12:28PM. All communications through electronic mail referred to in the present decision are on file with the Supreme Court Chamber.

> The Parties are therefore advised that, if they so wish, they may make written submissions, in English only, not exceeding ten pages, to be lodged with the Case File Officer no later than Tuesday 30 August at 4:00 p.m.[43]

23. On 30 August, the Applicants and the Respondent filed their submissions ("Applicants Submission on Disclosure" and "Respondent Submission on Disclosure", respectively).[44]

24. On 31 August, the DSS informed the Administrative Judge via e-mail that the Deputy Director had not objected to the DSS Memoranda being disclosed to her, and accordingly enclosed them thereto.[45]

25. On the same date, the Administrative Judge communicated to the Parties her decision concerning the Applicants' request for disclosure, which read, in relevant part, as follows:

> Having duly considered the mentioned submissions and documents [i.e. the Applicants Submission on Disclosure, Respondent Submission on Disclosure, Deputy Director Decision of 25 July and DSS Memoranda], the Administrative Judge determined that it is in the interests [of] justice to request the United Nations' Secretary-General authorisation for lifting the privileges and immunities asserted by the [Deputy Director] upon the aforementioned documents. The Administrative Judge found that the documents are material to the Co-Lawyers case and that, most importantly, there is an overarching need to ensure transparency of proceedings. She also considered that the said documents only relate to the issue raised by the [Applicants] and dealt with by the DSS, and should therefore b[e] made available to the Parties in their entirety, not through excerpts or summaries thereof. Full reasons for this dictum will be provided with the final decision.[46]

26. Upon request from the Administrative Judge, the UN Under-Secretary-General for Legal Affairs and UN Legal Counsel Miguel de SERPA SOARES, by letter dated 22 September, authorised the disclosure of the Deputy Director Decision of 25 July and the DSS Memoranda ("Requested Documents", collectively) to the Applicants, "solely for the

[43] Electronic mail sent from Greffier of the Administrative Judge, entitled "Follow-up to Directions concerning Conduct of Proceedings", 26 August 2016, 2:34PM.
[44] MEAS Muth's Co-Lawyers' Submissions on the Disclosure of the Deputy Director of Administration's Decision and the Head of the Defence Support Section's Memoranda, 30 August 2016; Submission Regarding the Disclosure of Internal Documents, 30 August 2016.
[45] Electronic mail sent from Legal Officer of the DSS, entitled "Memoranda sent to the UNAKRT Coordinator", 31 August 2016, 12:53PM.
[46] Electronic mail sent from Greffier of the Administrative Judge, entitled "Interlocutory Decision by Administrative Judge Mumba", 31 August 2016, 2:45PM.

purposes of the administrative proceedings over which [the Administrative Judge] preside[s]".[47]

27. On 10 October, the Applicants submitted a motion requesting that the Administrative Judge instruct the DSS and/or the Office of the Administration to set aside funds from the Budget for Support Staff pending the resolution of the present dispute ("Request to Set Aside Funds").[48]

28. On 11 October, the Requested Documents were disclosed to the Applicants.[49]

29. In compliance with the time limits set in the Directions concerning Conduct of Proceedings, the Applicants submitted, on 17 October, their Application; and the Respondent, on 24 October, his Response.

30. On 25 October, the Applicants and the Respondent, following an invitation from the Administrative Judge, filed written submissions on the applicability of Article 9.2 of the Legal Services Contract ("Applicants Submission on Applicability" and "Respondent Submission on Applicability", respectively).[50]

31. On 27 October, the Applicants filed a request for leave to reply to the Response.[51] The Administrative Judge dismissed the request because in the Directions concerning Conduct of Proceedings she had advised that "[n]o replies shall be allowed"[52] and the Applicants failed to provide compelling reasons, such as a change in circumstances, that would warrant reconsideration of the Directions.[53] Additionally, she considered the case to have been fully briefed.[54]

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[47] Letter from UN Under-Secretary-General for Legal Affairs and UN Legal Counsel Miguel de SERPA SOARES to Administrative Judge referenced 2016-OLC-000395, 22 September 2016, received through electronic mail on 24 September 2016.
[48] MEAS Muth's Co-Lawyers' Request to Set Aside Portion of 2016 Legal Consultant Budget Pending Resolution of Administrative Dispute, 10 October 2016.
[49] Electronic mail sent from the Administrative Judge, entitled "Directions Concerning Document Disclosure and Administrative Proceedings", 11 October 2016, 1:04PM.
[50] Electronic mail sent from the Defence, 25 October 2016, 12:38PM, and Electronic mail sent from the Respondent, 25 October 2016, 4:24PM.
[51] Electronic mail sent from the Defence, entitled "Request for Leave to Reply & Reply", 27 October 2016, 9:01AM.
[52] Electronic mail sent from Greffier of the Administrative Judge, entitled "Directions concerning Administration Proceedings and Related Matters issued by UN Administrative Judge Mumba", 24 August 2016, 12:28PM, para. 5.
[53] Electronic mail sent from Greffier of the Administrative Judge, entitled "Re: Request for Leave to Reply & Reply", 27 October 2016, 10:13AM.
[54] *Ibid.*

II. ADMISSIBILITY

32. The Applicants bring the present dispute pursuant to Article 11.1 of the Legal Services Contract, which reads as follows:

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

33. A review of this provision shows that, as a preliminary matter, the dispute between the Applicants and the Respondent fits the requisite time limit and subject matter jurisdiction under which such claims may be made. Furthermore, the Administrative Judge considers that the procedural history demonstrates clearly that attempts to resolve the dispute amicably have been made, yet without success, and that the Impugned Decision is the Respondent's final determination on the matter. Therefore, the dispute is properly before the Administrative Judge and the Application is admissible.

III. MERITS

1. Request for Disclosure of Internal Administrative Documents

34. The Applicants requested that the Deputy Director be compelled to provide them an unabridged copy of his decision of 25 July and all related correspondence with the DSS,[55] as those documents were deemed necessary to meaningfully exercise the Applicants' right to seek judicial review of the Impugned Decision,[56] and to ensure respect for their due process rights.[57] In this regard, the Applicants contended that the Deputy Director Decision of 25 July did not amount to "privileged correspondence", but to an "administrative decision", which the Respondent adopted in turn.[58] Without full access to the Deputy Director Decision of 25 July and the DSS Memoranda, it was argued, the Applicants would not be fully informed of the factual basis upon which the Deputy Director denied *ex post*

[55] Preliminary Application, paras 11-15.
[56] Preliminary Application, paras 13-14.
[57] Applicants Submission on Disclosure, para. 6.
[58] Applicants Submission on Disclosure, para. 5.

facto approval and the "specific justifications" he considered.[59] Therefore, the Applicants asked that the Administrative Judge, if convinced of the privileged character of those documents, request the UN Secretary-General to waive any attendant privileges and immunities.[60] The Applicants further argued that, should the UN Secretary-General decline authorisation, the interests of justice require that the Administrative Judge grant the Application.[61]

35. The Respondent posited that, as the dispute was between the Applicants and the Respondent and involved a decision issued by the latter, the correspondence between the Respondent and the Deputy Director amounted to "internal administrative documents that are not the subject of the appeal".[62] The Respondent recalled Article 19(c) of the Agreement between the United Nations and the Royal Government of Cambodia ("Agreement")[63] and Article 27 of the Vienna Convention on Diplomatic Relations ("Vienna Convention").[64] He stated that, in consequence of the privileges and immunities asserted by the Deputy Director, the documents requested by the Applicants fell within a class of "inviolable" documents and accordingly could not be disclosed, until such privileges and immunities would be lifted or the Deputy Director would authorise the DSS to proceed with the disclosure.[65] The Respondent further averred that non-disclosure would not affect the fairness of proceedings, since the Impugned Decision quoted the most relevant passages of the Deputy Director Decision of 25 July, omitting elements that are immaterial to the present review proceedings. The Respondent finally argued that the dispute could be decided on the basis of the Impugned Decision and the arguments put forward by the Parties.

36. In deciding the Applicants' request to obtain copy of the Requested Documents, the Administrative Judge sought guidance in the jurisprudence of the United Nations' internal justice mechanism addressing similar issues.[66] The regulations applicable to the United

[59] Applicants Submission on Disclosure, paras 5-6, 14.
[60] Applicants Submission on Disclosure, paras 16-19.
[61] Applicants Submission on Disclosure, para. 20.
[62] Respondent Submission on Disclosure, para. 3.
[63] Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, signed 6 June 2003 (entered into force 29 April 2005).
[64] Vienna Convention on Diplomatic Relations, signed 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964).
[65] Respondent Submission on Disclosure, paras 4-5.
[66] The Administrative Judge was cognisant of the different legal framework as well as the distinct array of powers applicable in the context of the UN formal system of administration of justice, in which applications

Nations Dispute Tribunal ("UNDT") and United Nations Appeals Tribunal ("UNAT") empower both organs to order production of documents or such other evidence as they consider necessary for a fair and expeditious disposal of the proceedings.[67] This power is discretionary in nature[68] and "is typically found in legal tribunals of all kinds charged with the duty of determining disputes".[69] The case law showed that, as long as the requested material is relevant to the issues in the case, that is, it elucidates them or assists in their determination,[70] the guiding yardstick in evaluating requests for disclosure is "whether the disclosure sought is necessary for a fair disposal of the proceedings and [to] do justice to the parties".[71]

37. The jurisprudence of the UNDT and UNAT made it clear that document production may also be ordered in relation to confidential material, where fairness might be jeopardised, failing disclosure.[72] In such cases, a decision to order disclosure was found to be dependent upon a balancing test, in which the judge would balance the tenets of fairness, including the right of an applicant to properly prepare and present his or her case, against the need to protect classified information in a prudent manner.[73] In this regard, it was ruled that an applicant must generally have access to "all evidence on which the authority bases

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for judicial review may only be filed by, or in the name of, current or former UN staff members (UNDT Statute, Article 3). However, since the present dispute arose out of a "contract similar to, but not having all of the indicia of, an employment contract" (Decision on Application Requesting Funding for Legal Consultant's Flight to the Office of the Co-Lawyer, 25 June 2013, 001/21-05-2013-UNAJ ("Administrative Judge Decision on Travel"), fn. 4), related to subject-matter within the purview of the UNDT and UNAT, i.e. alleged non-compliance with the terms of such a contract (*cf.* UNDT Statute, Article 2(1)(a)) and was brought against the United Nations as one of the parties to the contract, she found it appropriate to consider the jurisprudence of the UNDT and UNAT as persuasive authority (*see also* Administrative Judge Decision on Travel, para. 57). *See generally* G. Lamond, 'Persuasive Authority in the Law', in 17 *The Harvard Review of Philosophy* (2010) 16, p. 24 *et seq*.

[67] UNDT Statute, Article 9(1); UNDT Rules of Procedure, Article 18(2); UNAT Statute, Article 8(1); UNAT Rules of Procedure, Article 10(1).

[68] *Calvani v. Secretary-General of the United Nations*, Case No. 2010-044, Judgement No. 2010-UNAT-032, 30 March 2010 ("*Calvani* Appeal Judgement (UNAT)"), para. 9; *Abbasi v. Secretary-General of the United Nations*, Case No. UNDT/NY/2009/107, Judgement No. 2010/UNDT/055, 31 March 2010 (*Abbasi* Judgement (UNDT)"), para. 14 (ruling that "[i]f these conditions [fairness and probative value] are satisfied the judge *may* order disclosure") (emphasis added). *See also Onifade v. Secretary-General of the United Nations*, Case No. 2016-879, Judgement No. 2016-UNAT-668, 30 June 2016 ("*Onifade* Appeal Judgement (UNAT)"), para. 28.

[69] *Koda v. Secretary-General of the United Nations*, Case No. UNDT/NY/2009/047/JAB/2008/091, Judgement No. UNDT-2009-024, 30 September 2009 ("*Koda* Judgement on Production of Documents (UNDT)"), para. 7.

[70] *Koda* Judgement on Production of Documents (UNDT), para. 9.

[71] *Bertucci v. Secretary-General of the United Nations*, Case No. 2010-116, 2010-117, Judgement No. 2011-UNAT-121 ("*Bertucci* Appeal Judgement (UNAT)"), para. 39; *Abbasi* Judgement (UNDT), para. 14(ii).

[72] *Koda* Judgement on Production of Documents (UNDT), para. 8 ("if the document is one that fairness requires to be produced, confidentiality will only be preserved in 'exceptional circumstances'"); *Abbasi* Judgement (UNDT), para. 14.

[73] *Morin v. Secretary-General of the United Nations*, Case No. UNDT/NY/2010/054, Judgement No. UNDT/2011/069, 12 April 2011 ("*Morin* Judgement (UNDT)"), paras 33, 43.

(or intends to base) its decision" and that exceptions to this principle, stemming, for example, from the "internal law of the United Nations", had to be interpreted strictly.[74] It followed that, as a general rule, requirements of transparency and respect for law prevailed "over claims of confidentiality that are not sufficiently specific and justified".[75] The judge may, upon request from the administration, verify the confidentiality of the document.[76] The judge may also address legitimate concerns regarding confidentiality relying on measures such as redaction of sensitive information and the use of pseudonyms, or requesting that the applicant give a written undertaking regarding confidentiality.[77] Although no sanctions were envisaged in case of non-compliance with a judicial order for document production, a judge would be entitled to draw appropriate inferences from the refusal of the administration to provide a certain document.[78]

38. The approach followed by the UN internal dispute resolution mechanism resonated with the principles governing "discovery" under United States' administrative law. A summary review of the jurisprudence showed that courts generally granted an applicant's request for document production when it was material,[79] if they considered that a failure to do so would infringe due process, or cause a party to suffer undue prejudice.[80] Courts found, in particular, that they had to apply a balancing test, in which relevant factors for consideration included privilege, confidentiality, interference, relevance, materiality, and due process.[81] Several other systems, including those following the civil law tradition, applied the principle that, in disputes between private complainants and an administrative

[74] *Bertucci* Appeal Judgement (UNAT), paras 46-48; *Koda* Judgement on Production of Documents (UNDT), paras 8-9.
[75] *Bertucci* Appeal Judgement (UNAT), para. 48.
[76] *Bertucci* Appeal Judgement (UNAT), para. 50.
[77] *See e.g. Koda* Judgement on Production of Documents (UNDT), para. 19; *Abbasi* Judgement (UNDT), para. 14; *Morin* Judgement (UNDT)"), paras 44(c) and 45
[78] *Bertucci* Appeal Judgement (UNAT), para. 51.
[79] *McClelland v. Andrus*, 606 F.2d 1278, 1286, 1286 (D.C. Cir. 1979).
[80] *Greene v. Mc Elroy*, 360 U.S. 474, 496 (1959); *McClelland v. Andrus*, 606 F.2d 1278, 1286 (D.C. Cir. 1979).
[81] *Goldberg v. Kelly*, 397 U.S. 254, 276 (1970); *Greene v. Mc Elroy*, 360 U.S. 474, 492-495, 507-508 (1959) (weighing considerations of confidentiality against due process); *McClelland v. Andrus*, 606 F.2d 1278, 1286, 128--1290 (D.C. Cir. 1979) (balancing the Government's executive privilege to maintain information private, and the possibility of interference by the disclosure of documents against the relevance, materiality of the request, and the possibility of infringing due process); *NLRB v. Robbins Tire & Rubber Co*. 437 U.S., 214, 239-240, 242-243 (1978) (assessing whether to grant discovery, considering the government's interest of avoiding interference in labour cases, and the risks to due process).

agency, judges would be empowered to compel the public body to produce a document which was material to the dispute, albeit subject to varying conditions.[82]

39. In conclusion, the Administrative Judge found that, with all due consideration being given to the institutional differences between the present mode of dispute settlement and the United Nations internal system of justice,[83] her *sui generis* role as a United Nations' arbitrator, nominated by an officer of the United Nations pursuant to an arbitration clause stipulated in a contract entered into between the Applicants and the United Nations, necessarily implied that, in keeping with a legal principle that transcends individual administrative law systems, she was vested with the authority to order the production of documents that were material to the dispute before her, where the disclosure of these documents was found to be necessary to a fair disposal of the proceedings.[84] The confidential classification of a document was not deemed to be an insurmountable impediment to the exercise of this power, but instead required that the judge struck a reasonable balance between considerations of relevance, confidentiality and due process.

40. Turning to the specific circumstances of the case, the Administrative Judge firstly considered that it was not entirely clear whether the two international instruments recalled by the Deputy Director were applicable to the present dispute. The Agreement binds the United Nations and the Royal Government of Cambodia in their reciprocal relationship. Similarly, the Vienna Convention, notably Article 27, is not directly applicable, and may

[82] *See e.g. R v. Secretary of State for the Home Department, ex parte Al Fayed*, [1998] 1 WLR 763, p. 775 (power to order discovery in applications for judicial review); *Al Rawi and others v. The Security Service and others*, 13 July 2011, [2011] UKSC 34, paras 144-145 (describing the common law doctrine of "public interest immunity"); *Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi* (Italian Law on Administrative Proceedings and Access to Administrative Documents), Law No. 241/1990, as amended by Law No. 15/2005, Article 22 (mandating disclosure of *atti endoprocedimentali*, i.e. internal administrative documents, such as reports, that constitute the basis of the final administrative decision); *Rossi v. Ministry of Communications* (Judgment of the Italian *Consiglio di Stato*), No. 06286/2008 reg. ric., 26 February 2015 (holding that, owing to a generally applicable principle, when an administrative decision refers, as part of its reasoning, to an internal administrative document, such as a disciplinary body's report, the right to an effective defence dictates that such internal document be disclosed); *Ley de Transparencia, acceso a la información pública y buen gobierno* (Spanish Law on Transparency and Access to Public Information), Law No. 19/2013, Article 14 *et seq*. (stating that a judge may order disclosure of administrative documents when there is a competing interest that supersedes the interests of maintaining confidentiality).

[83] *See* fn. 66, above.

[84] *See also* UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013), Article 27(3); Model Rules on Arbitral Procedure with a General Commentary, adopted by the International Law Commission, 10th session (1958), in *Yearbook of the International Law Commission*, 1958, Vol. II, p. 83 *et seq*., Article 17(2).

only be invoked "for interpretative purposes or by use of reference".[85] In other words, both the Agreement and the Vienna Convention appeared to be primarily directed at domestic authorities and thus intended to impose obligations on States. Of more direct relevance could have been the Convention on the Privileges and Immunities of the United Nations ("General Convention"),[86] which was referred to neither by the Deputy Director nor the Respondent. In this respect, however, the Administrative Judge noted that, in addition to the General Convention being equally directed at domestic authorities in the first place, the UN Secretary-General stated that the UN privileges and immunities envisaged therein do not adversely affect a commitment of the United Nations to arbitration, but provide protection "against possible court proceedings initiated prior to or after the [arbitration] award".[87] Therefore, while the recalled provisions would bar, for example, a request from national authorities that the United Nations provide them with copies of its internal communications or other "documents and materials",[88] it remained questionable whether such norms, designed to govern disputes between States or between States and international organisations, applied, without more, to an arbitral procedure before a United Nations' administrative judge. Nevertheless, in the interest of efficiency and without making any determination thereupon, the Administrative Judge proceeded based on the Respondent and the Deputy Director's understanding that the Requested Documents fell within a category of documents covered by legal privilege.

41. The decisive point in granting the Applicants' request for disclosure was that it seemed evident to the Administrative Judge that, contrary to the Deputy Director's and Respondent's averments, the Requested Documents could not be simply regarded as "correspondence" or "internal administrative documents",[89] but rather as "documents relating to the process that led to the contested administrative decision", which, as such, "are part of the case file" and, normally, "cannot be withheld on the grounds of

[85] P. Bachmayer, 'Facilities in Respect of Communications (Article III Sections 9-10 General Convention)', in A. Reinisch (ed.), *The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies: A Commentary*, Oxford University Press, 2016, p. 247 (citing to United Nations Secretariat's and United Nations Office of Legal Affairs' official documents).
[86] Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly of the United Nations on 13 February 1946, 15 UNTS 1946/1947.
[87] Review of the Efficiency of the Administrative and Financial Functioning of the United Nations, 24 April 1995, A/C.5/49/65, para. 6.
[88] Agreement, Article 18. *See also* Agreement, Article 19(1)(c); Vienna Convention, Article 27(2); General Convention, Article 2, Section 4 and Article 5, Section 18(a).
[89] *See* para. 22, above; Respondent Submission on Disclosure, para. 3.

confidentiality".[90] In examining whether legitimate confidentiality reasons were present, the Administrative Judge considered whether the disclosure of the Requested Documents to the Applicants might have compromised the interests of the United Nations or the personal safety of any persons, arriving at the conclusion that, on a *prima facie* assessment, none of these factors came into consideration.[91] The Requested Documents only related to facts and evaluations pertaining to the issue raised by the Applicants and dealt with by the DSS, without disclosing any unrelated circumstances or information which, if disclosed, would have been likely to undermine the freedom and independence of the internal deliberative process of the Office of the Administration or the United Nations in general.

42. The Administrative Judge then considered the request for disclosure in the light of due process. Whereas the key passage of the Deputy Director Decision of 25 July had been reproduced verbatim to the Applicants,[92] it was appropriate that the Applicants were placed in a position allowing them to meaningfully prepare and present their case in proceedings for judicial review; this required full access to the file.[93] Of particular note was that the Applicants' request for payment was, in effect, disposed of by the Deputy Director in his decision of 25 July, rather than by the Respondent, whose role was limited to conveying the Applicants' representations to the Deputy Director and formally adopting, without the exercise of autonomous powers of appreciation, the latter's decision.[94] Most importantly, the Administrative Judge found that there was an overarching need to ensure the transparency of proceedings, especially given that, due to the internal organisational structure of the Office of the Administration, the Applicants could not directly interact with the effective decision maker, i.e. the Deputy Director, and, as an undesirable consequence,

[90] *Bertucci* Appeal Judgement (UNAT), paras 46-47.
[91] *See* Secretary-General's bulletin titled "Information sensitivity, classification and handling", ST/SGB/2007/6, 12 February 2007, Section 1.2.
[92] Impugned Decision, para. 8; Preliminary Application, Attachment 8 (Electronic mail from Head of DSS to Co-Lawyers, "Re: Letter from MEAS Muth Defence regarding payment of translation expenses", 26 July 2016).
[93] *See Applicant v. Secretary-General of the United Nations*, Case No. 1388, Judgement No. 1304, 29 September 2006, p. 7 (quoting with approval a statement appended to the United Nations Administrative Tribunal's Judgement No. 1245 (2005)).
[94] Response, para. 15 (in which the Head of the DSS stated that he "simply *does not have the authority* […] to order payment for work performed prior to the preparation of a valid contract" (emphasis added)); Preliminary Application, Attachment 8 (Electronic mail from Head of DSS to Co-Lawyers, "Re: Letter from MEAS Muth Defence regarding payment of translation expenses", 26 July 2016) ("I have just received the *[Deputy Director]'s final decision* on this request"; "he [the Deputy Director] declines the request to approve the payment" (emphasis added)); *ibid*., (Electronic mail from Head of DSS to Co-Lawyers, "Re: Letter from MEAS Muth Defence regarding payment of translation expenses", 18 July 2016) (confirming that authority to approve *ex post facto* sourcing actions rested with the Deputy Director and implying that, should the Deputy Director maintain his position, there would be no margin of discretion left to the Respondent).

could not be certain as to the "specific justifications"[95] of which he was apprised through the intermediary of the Respondent and had thus considered in making his decision.[96] In this respect, the Administrative Judge found it essential that the Applicants' allegations of "opacity"[97] could be tested against the facts.

43. For the foregoing reasons, the Administrative Judge determined that it was in the interests of justice to request the UN Secretary-General authorisation to disclose the Requested Documents to the Applicants. As outlined above,[98] the request was acceded to and the Requested Documents were disclosed to the Applicants.

2. Application for Judicial Review of the Impugned Decision

44. The Applicants request that the Administrative Judge vacate the Impugned Decision and instruct the Office of the Administration to reimburse the International Co-Lawyer for MEAS Muth from the Budget for Support Staff for the cost of the translator's invoice, which he settled on 25 August.[99] The Applicants argue that the Impugned Decision applied inapposite requirements to their request for payment of external translation services.[100] Rather than making reference to the UN Financial Regulations,[101] the Respondent should have relied on Section H of the ECCC Legal Assistance Scheme ("Legal Assistance Scheme")[102] and Article 9.2 of the Legal Services Contract, which focus upon whether an unforeseen defence task was necessary and reasonable to ensure the effective legal representation of a client – a condition that in the present case, the Applicants submit, was fulfilled.[103] The Applicants further posit that, in any event, they acted in good faith and

[95] Applicants Submission on Disclosure, para. 14.
[96] The Administrative Judge noted, in passing, that the aforementioned structural and procedural arrangements might have restricted the Applicants' liberty to devise the defence strategy that they believed most suitable to plead their case before the Deputy Director (*see* Applicants Submission on Disclosure, para. 9). Possible solutions that might be adopted in the future to alleviate this shortcoming in the procedure include establishing a practice that permits co-lawyers, as appropriate, to submit written pleadings to be appended to the Head of the DSS' own communications to the Deputy Director. The Administrative Judge further observed that the current interface caused the emergence of procedural uncertainties also on the part of the Administration. For example, she found it inappropriate that the Deputy Director did not respond directly to the Co-Lawyers' request of 1 August (*see* para. 16, above), given that the Deputy Director was unequivocally the entity within the Office of the Administration that should have addressed a request made pursuant to Article 11.1 of the Legal Services Contract.
[97] Applicants Submission on Disclosure, para. 13. *See also ibid.*, paras 6, 9, 10, 14.
[98] Para. 26, above.
[99] Application, request for relief.
[100] Application, paras 7-9.
[101] Secretary-General's bulletin titled "Financial Regulations and Rules", ST/SGB/2003/7, 9 May 2003 ("UN Financial Regulations").
[102] Amended December 2014.
[103] Application, paras 7-9, 13, 17.

complied with the UN procurement principles in the selection of the translator; hence, neither the Respondent nor the Deputy Director would have risked incurring any financial liability pursuant to Rule 101.2 of the UN Financial Regulations had they authorised the *ex post facto* contract.[104] Finally, the Applicants aver that the Respondent did not explicitly represent to them that the drawing up of a contract was necessary in advance of the translation services being carried out.[105]

45. The Respondent contends that, even though the Applicants were familiar with the procedures governing the engagement of consultants, they failed to follow the applicable rules; among those rules, the Respondent mentioned, *inter alia*, the UN Financial Regulations, para. 9 of Section H of the Legal Assistance Scheme and Article 10.4 of the Legal Services Contract.[106] The Respondent submits that the Applicants made a "conscious decision" to use funds from their Expense Payments and should not be allowed to belatedly switch to a different budgeting option, given that they were unable to provide a valid justification for their request.[107] The Respondent further maintains that the Applicants did not show that their client, or the Defence team, would suffer prejudice should the translator be paid out of their Expense Payments.[108]

46. To the extent that the Applicants argue that the Impugned Decision relied on inapplicable law and incorrect legal standards, the Administrative Judge notes that the UN Financial Regulations describe their scope of applicability in broad terms as covering "all the financial management activities of the United Nations".[109] Procurement, in particular, is defined so as to include, *inter alia*, "all actions necessary for the acquisition […] of services"[110] to support the activities of the United Nations at its offices, missions and "Tribunals".[111] Therefore, these legal texts are clearly applicable in the context of the UNAKRT, and thus to matters relating to the "remuneration of defence counsel",[112] unless otherwise provided. Although recognising the specificity of the activities that are expected

[104] Application, paras 10-13.
[105] Application, paras 2-3.
[106] Response, paras 2, 17, 19, 21-23, 29.
[107] Response, paras 2-3, 30.
[108] Response, paras 30-31.
[109] UN Financial Regulations, Rule 101.1.
[110] UN Financial Regulations, Regulation 5.12.
[111] United Nations Procurement Manual, Revision 7, 7 July 2013 ("UN Procurement Manual"), Section 1.1 (1)(a).
[112] Agreement, Article 17(c).

and required of a defence team engaged in criminal proceedings,[113] the Administrative Judge is unconvinced that this factor justifies departure from the United Nations' generally applicable principles of procurement. Such specificity might concern the goals underlying the provision of legal assistance and representation, not the methods employed to acquire the property, products and services that are necessary to achieve them.

47. The Administrative Judge further considers that, in fact, the regulations articulated in the Legal Services Contract and Legal Assistance Scheme, which the Applicants submit should have applied, align with the UN procurement principles, notably those of "effective and efficient financial management".[114] The Applicants refer in particular to Section H of the Legal Assistance Scheme,[115] which permits the use of the Budget for Support Staff, *inter alia*, to recruit experts "on a short-term basis for discrete tasks".[116] In this respect, the Administrative Judge notes however that, pursuant to para. 9 of Section H, "[a]ny request to hire an expert must be submitted for *advance approval* by DSS".[117] In the Administrative Judge's opinion, this language plainly reaffirms a common principle of efficient financial management in large organisations, which is implied by the very concept of recruitment (or hiring), frequently referred to in the Legal Assistance Scheme,[118] namely, that the engagement of an individual should normally be preceded by the conclusion of a contract.[119] It is undisputed that the Applicants failed to follow that principle in the recruitment of the translator. As for the Applicants' request for application of Article 9.2 of the Legal Services Contract and their emphasis on the fact that the translations were "necessary and reasonable",[120] the Administrative Judge considers that this provision primarily applies, as the normative context suggests,[121] to tasks personally

[113] *See* Application, para. 9.
[114] UN Financial Regulations, Rule 101.1, Regulation 5.8.
[115] Application, paras 7, 17.
[116] Legal Assistance Scheme, Section H, para. 1.
[117] Legal Assistance Scheme, Section H, para. 9 (emphasis added). *See also* Legal Services Contract, Article 10.2 and 10.4 (requiring co-lawyers to make a written request to the DSS for the appointment of consultants).
[118] *See e.g.* Legal Assistance Scheme: Section A, seventh unnumbered paragraph; Section D, para. 1; Section H, paras 1, 4.
[119] The principle that actions with budgetary implications normally need to be subject to prior approval underlies the whole Legal Assistance Scheme: *see e.g.* Section A, fourth unnumbered paragraph and Section E, para. 1 (regarding prior approval of the Action Plan by DSS); Section D, para. 1 (recruitment of support staff); Section G, para. 1 (travel); Section H, para. 8 (investigations).
[120] Application, paras 13, 17, 19
[121] *See* Legal Services Contract, Article 9 (dealing with payment and compensation for *the Co-Lawyers'* work and travel as well as "[c]ertain costs incurred during investigations, *with prior approval by the DSS*" (emphasis added)); Legal Assistance Scheme, Section E, para. 7 ("*the Co-Lawyers* will be paid for any necessary and reasonable task which […] was not specifically included in the Action Plan" (emphasis added)).

performed by the Co-Lawyers and not previously included in the Action Plan or Transfer Plan. Even assuming that Article 9.2 of the Legal Services Contract sets a general standard to evaluate "Defence-related expenses",[122] the fact that the translations were required to "provide effective legal advice and representation"[123] does not override the need to respect other financial and administrative regulations.[124]

48. The Applicants argue that the Impugned Decision unreasonably rejected their request to pay the translator's invoice using the Budget for Support Staff.[125] The Administrative Judge, based on a summary assessment, observes that the Applicants appear to have complied with the UN procurement principles,[126] including those of "transparency and open competition" mentioned by the Deputy Director.[127] Given that the Applicants were under considerable time pressure during the time at which they selected the translator[128] and that all circumstances indicate they acted in good faith, it might well have been reasonable to provide *ex post facto* approval for their action, of which the Respondent has not challenged the necessity and reasonableness to ensure an effective legal advice and representation.[129] However, the role of the Administrative Judge is not to substitute her own judgment for that of the Administration, but to examine whether the Administration properly exercised its discretion.[130] In the present case, the Impugned Decision denied that the Applicants' justification as to why a prior contract was not requested qualified as the requisite "exceptional circumstances" in order to approve *ex post facto* sourcing actions.[131] In view of the Applicants' explanation that their procedural misstep was due to a "misunderstanding within the Defence team",[132] the Administrative Judge finds that there was a failure of due diligence and that the determination contained in the Impugned Decision cannot be regarded as falling outside the Administration's margin of appreciation.

[122] Applicants Submission on Applicability, p. 1; Respondent Submission on Applicability, para. 2.
[123] Legal Services Contract, Article 6.1.
[124] The Administrative Judge is unpersuaded by the Applicants Submission on Applicability, in which they point to the Administrative Judge Decision on Travel, para. 78. That same decision states clearly that, while the criteria of reasonableness and necessity enshrined in Article 9.2 of the Legal Services Contract are "the primary consideration" – namely the logically first and topically most important one – it is not the only consideration (Administrative Judge Decision on Travel, para. 104).
[125] Application, para. 19.
[126] *See* Annex to Preliminary Application, paras 10-11.
[127] Para. 13, above. *See also* UN Financial Regulations, Regulation 5.12.
[128] Para. 7, above.
[129] Response, para. 30.
[130] *See* Administrative Judge Decision on Travel, para. 60.
[131] Impugned Decision, para. 8 (quoting Deputy Director Decision of 25 July).
[132] Preliminary Application, para. 5. *See also* Applicants Submission on Disclosure, Annex A (Draft Letter from the Defence to the DSS, "Our 15 July 2016 request for payment of external translation expenses"), referring to a "misunderstanding" and a "miscommunication" within the defence team.

With reference to the Applicants' argument that a contract for the translator could not have been timely obtained in any event,[133] the Administrative Judge finds it to be speculative.[134]

49. The Administrative Judge turns to address the Applicants' allegations of procedural impropriety in the Administration's conduct of the proceedings. Firstly, the Deputy Director's reference to the potential personal financial liability under Rule 101.2 of the UN Financial Regulations contained in his decision of 25 July, as adopted in the Impugned Decision,[135] directly implements the UN Procurement Manual[136] and therefore, irrespective of the specific requirements for such liability coming into effect,[137] is not misplaced as such. As for the allegations regarding the conduct of the Respondent, the Administrative Judge, having carefully considered the procedural history as set forth by the Parties,[138] does not see any flaw in the way he handled the proceedings. She emphasises that, even assuming *arguendo* that the Respondent did not *explicitly* inform the Defence that the conclusion of a contract should have occurred prior to the engagement of the translator, the Applicants (as well as the Defence senior team members involved in the process) could be expected to be able, even without guidance from the DSS, to interpret the relevant provisions of the Legal Assistance Scheme, which leave little room for doubt that a contract is required prior to the engagement of support staff.[139] In addition, the Administrative Judge notes that the Respondent had, in fact, informed the Defence as early as 24 June that it could use the Budget for Support Staff to "*recruit* external language consultants", offering his assistance "for instance with the preparation of contracts for external consultants".[140] Therefore, the proper steps that the Defence was to take in order to hire the translator as an expert, and thus have her paid using the Budget for Support Staff, were abundantly clear from the outset, and the procedural defect causing the denial of the Defence's request for payment cannot in any way be attributed to the conduct of the Respondent.

[133] Preliminary Application, para. 5.
[134] *See also* Response, para. 29 (indicating that, on a previous occasion, a similar recruitment process lasted a few days only).
[135] Impugned Decision, para. 8 (quoting Deputy Director Decision of 25 July).
[136] UN Procurement Manual, Section 12.10 (4)(a).
[137] *See* Application, paras 12-13.
[138] *See*, in particular, Annex to Preliminary Application, paras 9, 15; Impugned Decision, para. 5; Application, paras 2-3; Response, paras 4-12.
[139] *See also* Response, para. 29 (pointing out that the Applicants "have about nine years' experience at the ECCC and on multiple occasions they have requested the [Head of the DSS] to assist them in preparing contracts for their Defence consultants and experts").
[140] Preliminary Application, Attachment 4 (Electronic mail from Head of DSS to Defence "Re: Translation of German and Dutch documents into English", 24 June 2016) (emphasis added).

50. The Request to Set Aside Funds has become moot.

IV. DISPOSITION

51. For the foregoing reasons, the Administrative Judge **DECLARES** the Application admissible and **DENIES** it on the merits.

Phnom Penh, 31 October 2016

Justice Florence Ndepele MWACHANDE-MUMBA
United Nations Administrative Judge