



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des Tribunaux cambodgiens

ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

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Nation Religion King**

**Royaume du Cambodge
Nation Religion Roi**

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត

**Office of the Co-Investigating Judges
Bureau des co-juges d'instruction**

Case File No: 003/07-09-2009-ECCC-OCIJ

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**DECISION ON THE INTERNATIONAL CO-PROSECUTOR'S REQUEST TO REJECT
THE APPOINTMENT OF THE CO-LAWYERS FOR MEAS MUTH ON THE BASIS OF
IRRECONCILABLE CONFLICTS OF INTEREST**

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Noting the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, dated 27 October 2004 (“ECCC Law”);

Noting the International Co-Prosecutor’s Second Introductory Submission, dated 20 November 2008, initiating Case File No.003,¹ which was placed on the Case File on 7 September 2009;²

Noting the judicial investigation relating to alleged violations of the **1956 Penal Code, Crimes against Humanity and Grave Breaches of the Geneva Conventions of 12 August 1949**, offences defined and punishable under Articles 3, 5, 6, 29 and 39 of the ECCC Law and Articles 500, 501, 503, 505, 506, 507 and 508 of the 1956 Penal Code;

Noting Rules 21, 22, and 72 of the ECCC Internal Rules (“Internal Rules”);

Noting Articles 6, 7, and 9 of the DSS Administrative Regulations on the Assignment of Counsel (“DSS ARs”);

Considering the International Co-Prosecutor’s Request that Appointment of Co-Lawyers-Designate be Rejected on the Basis of Irreconcilable Conflicts of Interest (“Request for Rejection”³);

Noting that on 7 February 2013, Judges You Bunleng (“National CIJ”) and Harmon (“International CIJ”) signed a Written Record of Disagreement concerning *inter alia* this Decision.

¹ Case File No. 003-D1, *Co-Prosecutor’s Second Introductory Submission Regarding the Revolutionary Army of Kampuchea*, 20 November 2008.

² Case File No. 003-D1/1, *Acting International Co-Prosecutor’s Notice of Filing of the Second Introductory Submission*, 7 September 2009.

³ Case File No. 003-D56/1, *International Co-Prosecutor’s Request that Appointment of Co-Lawyers-Designate be Rejected on the Basis of Irreconcilable Conflicts of Interest*, 24 December 2012. (“Request for Rejection”)



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A. PROCEDURAL HISTORY

1. On 18 December 2012, the Chief of the Defense Support Section informed the Co-Investigating Judges that he had assigned Ang Udom and Michael Karnavas (“Co-Lawyers-Designate”) to represent Meas Muth (“Suspect”), a suspect in Case 003.⁴ He also informed the Co-Investigating Judges that he had met with the Suspect to confirm his choice of counsel and that he had received waivers from both the Suspect and Ieng Sary (at the time one of the Accused in Case 002) covering any conflicts of interest arising from the then-concurrent representation of both individuals by the Co-Lawyers-Designate.⁵
2. On 24 December 2012, the International Co-Prosecutor filed the *Request that Appointment of Co-Lawyers-Designate be rejected on the Basis of Irreconcilable Conflicts of Interest (“Request for Rejection”)*.⁶ In the *Request for Rejection*, the International Co-Prosecutor alleged that the then-concurrent representation by the Co-Lawyers-Designate of Ieng Sary and the Suspect would generate “numerous, serious and irreconcilable conflicts of interest that would irreversibly prejudice the administration of justice before the ECCC”.⁷ The International Co-Prosecutor thus requested the Office of the Co-Investigating Judges to reject the appointment of the Co-Lawyers-Designate.⁸
3. On 7 February 2013, the Chief of the Defence Support Section filed the *Request for Clarification* seeking an acknowledgment or response recognizing or rejecting the assignment of the Co-Lawyers-Designate to represent the Suspect.⁹
4. On 11 February 2013, the International CIJ ordered the Co-Lawyers-Designate to suspend communications with the Suspect until the issuance of a decision confirming their assignment to him and to disclose to the Co-Investigating Judges and to the Co-Prosecutors the waivers obtained from both Ieng Sary and the Suspect.¹⁰ He also invited the Co-Lawyers-Designate to make submissions on the potential conflict of interest and the Co-Prosecutors to file submissions in reply.¹¹
5. On 28 February 2013, noting the lack of compliance by the Co-Lawyers-Designate with the Order, the International CIJ extended the deadline for the Co-Lawyers-Designate to disclose the waivers and file submissions.¹²
6. On 4 March 2013, the Co-Lawyers-Designate filed the *Submissions of the Co-Lawyers on Potential Conflict of Interest in Representation of Mr. Meas Muth in Case 003 (“Co-Lawyers-*

⁴ Case File No. 003-D56, *Assignment of Co-Lawyers to Represent Mr. Meas Muth, a Suspect in Case 003*, 18 December 2012, para. 11.

⁵ *Ibid.*, paras 3-4.

⁶ Case File No. 003-D56/1, *Request that Appointment of Co-Lawyers-Designate be rejected on the Basis of Irreconcilable Conflicts of Interest*, 24 December 2012.

⁷ *Request for Rejection*, para. 1.

⁸ *Ibid.*

⁹ Case File No. 003-D/56/6, *Request for Clarification*, 7 February 2013.

¹⁰ Case File No. 003-D56/3, *Decision and Scheduling Order Concerning Request for Appointment of Co-Lawyers Designate*, 11 February 2013 (“Order”), paras 25-26.

¹¹ *Ibid.*

¹² Case File No. 003-D56/4, *Re-scheduling Order Concerning Request for Appointment of Co-Lawyers Designate*, 28 February 2013.



Designate's Submissions").¹³ The Co-Lawyers-Designate submitted that no irreconcilable conflicts of interest arose from their then-concurrent representation of Ieng Sary and the Suspect, and that both clients had given their written consent to the concurrent representation.¹⁴ For these reasons, the Co-Lawyers-Designate requested that the *Request for Rejection* be dismissed.¹⁵

7. On 14 March 2013 Ieng Sary died. On the same day, the Trial Chamber ordered the termination of the proceedings against him.¹⁶

8. On 15 March 2013, the International Co-Prosecutor filed the *Request to Reschedule Submissions*, asking for a new schedule for submissions due to the changed circumstances caused by Ieng Sary's death.¹⁷

9. On that same day, the Co-Lawyers-Designate filed a *Notice of Termination of Proceedings against Ieng Sary in Case 002* asserting that the death of Ieng Sary rendered moot the *Request for Rejection*, and asking that the International CIJ lift the order prohibiting communication with the Suspect.¹⁸

10. On 19 March 2013, the International CIJ rejected the request from the Co-Lawyers-Designate, confirming the ban on communication with the Suspect and setting a new schedule for the submissions from the parties.¹⁹

11. On 3 April 2013, the Co-Prosecutor filed the *Supplementary Submissions on Conflict of Interest of Co-Lawyers-Designate* ("ICP Supplementary Submissions") whereby he reiterated the request to reject the appointment of the Co-Lawyers-Designate on the grounds of irreconcilable conflict of interest or, in the alternative, ineffective waiver of rights.²⁰

12. On 23 April 2013, the Co-Lawyers-Designate filed the *Co-Lawyers' Response to International Co-Prosecutor's Supplementary Submissions on Conflict of Interest of Co-Lawyers-Designate* ("Co-Lawyers-Designate's Response").²¹

13. On 2 May 2013, the International CIJ partly lifted the ban on communication and allowed the Co-Lawyers-Designate to communicate with the Suspect in relation to his claim of indigence and request to benefit from the ECCC's legal aid scheme.²² The International CIJ suspended the schedule for pleadings set out in the Order, pending the resolution of the indigence issue.²³

¹³ Case File No. 003-D56/4/1, *Leave to Exceed Page Limitation & Submissions of the Co-Lawyers on Potential Conflict of Interest in Representation of Mr. Meas Muth in Case 003*, 4 March 2013. ("Co-Lawyers-Designate's Submissions")

¹⁴ *Co-Lawyers-Designate's Submissions*, p. 1.

¹⁵ *Co-Lawyers-Designate's Submissions*, para. 45.

¹⁶ Case File No. 003-D56/4/2.1.1, *Termination of the Proceedings against the Accused Ieng Sary*, 14 March 2013.

¹⁷ Case File No. 003-D56/4/3, *International Co-Prosecutor's Request to Reschedule Submissions*, 15 March 2013.

¹⁸ Case File No. 003-D56/4/2, *Notice of Termination of Proceedings Against Ieng Sary in Case 002*, 15 March 2013.

¹⁹ Case File No. 003-D56/5, *Second Decision and Re-scheduling Order Concerning Request for Appointment of Co-Lawyers Designate*, 19 March 2013 ("Second Scheduling Order").

²⁰ Case File No. 003-D56/7, *International Co-Prosecutor's Supplementary Submissions on Conflict of Interest of Co-Lawyers-Designate*, 3 April 2013 ("ICP Supplementary Submissions"), para. 84.

²¹ Case File No. 003-D56/9, *Leave to Exceed Page Limitation & Co-Lawyers' Response to International Co-Prosecutor's Supplementary Submissions on Conflict of Interest of Co-Lawyers-Designate*, 23 April 2013. ("Co-Lawyers-Designate's Response")

²² Case File No. 003-D56/12, *Decision on Communication between Co-Lawyers-Designate and Suspect*, 2 May 2013, paras 15-16.

²³ *Ibid.*



14. On 2 October 2013, upon determination by DSS of the Suspect's indigent status, the International CIJ lifted the suspension of the schedule for filings on the potential conflict of interest, and invited the Co-Prosecutors to submit a reply to the *Co-Lawyers-Designate's Response*.²⁴
15. On 11 October 2013, the International Reserve Co-Prosecutor submitted the *International Reserve Co-Prosecutor's Reply Concerning Conflict of Interest of the Co-Lawyers-Designate ("Reply")*.²⁵
16. On 27 November 2013, the Co-Lawyers-Designate filed *Meas Muth's Expedited Request for the OCIJ to Reconsider whether it has Jurisdiction to Determine Alleged Conflicts of Interest ("Expedited Request")*, whereby they submitted that the Co-Investigating Judges did not have jurisdiction over the conflict of interest issue.²⁶
17. On 29 November 2013, the International CIJ found the Expedited Request to be admissible as a supplementary filing on the issue of the alleged conflict of interest and granted the Co-Prosecutors five days to respond.²⁷
18. On 5 December 2013, the International Co-Prosecutor submitted the *International Co-Prosecutor's Reply Concerning Meas Muth's Expedited Request for the OCIJ to Reconsider Whether it has Jurisdiction to Determine Alleged Conflicts of Interest ("ICP Reply to Expedited Request")*.²⁸
19. On 18 December 2013, the Co-Lawyers-Designate filed *Meas Muth's Request for Leave to Reply to International Co-Prosecutor's Reply Concerning Meas Muth's Expedited Request for the OCIJ to Reconsider Whether it has Jurisdiction to Determine Alleged Conflicts of Interest ("Co-Lawyers-Designate Reply")*.²⁹
20. On 19 December 2013, the International CIJ granted the Co-Lawyers-Designate leave to reply to the *ICP Reply to Expedited Request*.³⁰
21. On 27 December 2013, the Co-Lawyers-Designate filed *Meas Muth's Reply to International Co-Prosecutor's Reply Concerning Meas Muth's Expedited Request for the OCIJ*

²⁴ Case File No. 003-D56/14, *Order Resuming the Schedule for Filings on the Issue of the Alleged Existence of a Conflict of Interest in the Representation of Meas Muth*, 2 October 2013, paras 9-10.

²⁵ Case File No. 003-D56/15, *International Reserve Co-Prosecutor's Reply Concerning Conflict of Interest of the Co-Lawyers-Designate*, 11 October 2013. ("Reply")

²⁶ Case No. 003-D56/17, *Meas Muth's Expedited Request for the OCIJ to Reconsider whether it has Jurisdiction to Determine Alleged Conflicts of Interest*, 27 November 2013 ("Expedited Request").

²⁷ Case No. 003-D56/16, *Order on Meas Muth's Expedited Request on OCIJ Jurisdiction to Determine Conflicts of Interest*, 29 November 2013.

²⁸ Case File No. 003-D56/16/1, *International Co-Prosecutor's Reply Concerning Meas Muth's Expedited Request for the OCIJ to Reconsider Whether it has Jurisdiction to Determine Alleged Conflicts of Interest*, 6 December 2013 ("ICP Reply to Expedited Request").

²⁹ Case File No. 003-D56/16/2, *Meas Muth's Request for Leave to Reply to International Co-Prosecutor's Reply Concerning Meas Muth's Expedited Request for the OCIJ to Reconsider Whether it has Jurisdiction to Determine Alleged Conflicts of Interest*, 18 December 2013.

³⁰ Case File No. 003-D56/16/2, *Order on Meas Muth's Request for Leave to Reply on Jurisdiction*, 19 December 2013, p. 3.



to Reconsider Whether it has Jurisdiction to Determine Alleged Conflicts of Interest (“Co-Lawyers-Designate Reply”).³¹

B. SUMMARY OF SUBMISSIONS

22. Both the International Co-Prosecutor’s *Request for Rejection* and the *Co-Lawyers-Designate’s Submissions* were filed before the death of Ieng Sary. Upon Ieng Sary’s death, the International CIJ ordered the parties to make further submissions on the impact of these changed factual circumstances on the matters raised in the *Request for Rejection*.³² Following the second round of submissions from the parties, only those arguments which remain applicable after the death of Ieng Sary are summarized below.

I. Request for Rejection and Co-Prosecutor’s Supplementary Submissions

23. The International Co-Prosecutor requests the Co-Investigating Judges to reject the appointment of the Co-Lawyers-Designate for the following reasons: first, that a close factual nexus exists between the crimes for which Ieng Sary was, and the Suspect is, alleged to be responsible;³³ second, that it is reasonably foreseeable that this factual nexus would create several irreconcilable conflicts of interest should the Co-Lawyers-Designate continue to represent the Suspect, since their duties to, and affinity for, the deceased Ieng Sary remain in force;³⁴ third, that these conflicts of interest have the potential to irreversibly prejudice the administration of justice;³⁵ and fourth, that these conflicts have not, and cannot, be cured by the waivers signed by both clients, as they are both procedurally and substantively unsound, and incurable after the death of Ieng Sary.³⁶

a. Existence of a close factual nexus between Ieng Sary and the Suspect

24. The International Co-Prosecutor argues that the alleged “close factual nexus” exists on three accounts.³⁷ First, both Ieng Sary and the Suspect are alleged to bear criminal responsibility for the same criminal acts or omissions relating to the Kampong Chhnang airport site, the arrest and purge of Division 164 cadres and foreign nationals at S-21, and military attacks on Vietnamese territory.³⁸ Second, both Ieng Sary and the Suspect are alleged to have participated in the same joint criminal enterprise.³⁹ Third, Ieng Sary and the Suspect were in a close hierarchical and functional relationship because the Suspect, as Secretary of Division 164,⁴⁰

³¹ Case File No. 003-D56/16/4, *Meas Muth’s Reply to International Co-Prosecutor’s Reply Concerning Meas Muth’s Expedited Request for the OCIJ to Reconsider Whether it has Jurisdiction to Determine Alleged Conflicts of Interest*, 27 December 2013.

³² *Second Scheduling Order*, pp. 6-7.

³³ *Request for Rejection*, paras 35-41; *ICP Supplementary Submissions*, paras 49-53.

³⁴ *Request for Rejection*, paras 42-50; *ICP Supplementary Submissions*, paras 57-69.

³⁵ *Request for Rejection*, paras 52-53; *ICP Supplementary Submissions*, paras 70-77.

³⁶ *ICP Supplementary Submissions*, paras 78-83. See also *Request for Rejection*, para. 51.

³⁷ *Request for Rejection*, Section VI, paras 35-41; *ICP Supplementary Submissions*, paras 49-53, 57-62.

³⁸ *Request for Rejection*, paras 35-37; *ICP Supplementary Submissions*, paras 49-50. With regard to the arrests, the International Co-Prosecutor states that 396 members of Division 164 under the Suspect’s command were detained at S-21. *ICP Supplementary Submissions*, para. 49, citing Case File No. 002-D427, *Closing Order* at para. 424.

³⁹ *Request for Rejection*, para. 38; *ICP Supplementary Submissions*, paras 49, 51.

⁴⁰ *Request for Rejection*, para. 35, citing Case File No. 003-D1, *Second Introductory Submission Regarding the Revolutionary Army of Democratic Kampuchea*, 20 November 2008 at paras 43, 52.



reported to Ieng Sary both directly and indirectly, through Son Sen.⁴¹ In support of this proposition, the International Co-Prosecutor relies on military telegrams and a confidential telephone message.⁴²

25. As further proof of a hierarchical relationship between Ieng Sary and the Suspect, the International Co-Prosecutor cites an interview of the Suspect where he stated:

*“If you want to know everything about that time, just go and ask Ieng Sary. Do not ask me or low ranking officials. Ieng Sary was a leader. For me there is no problem with the court. I will say everything: what I know and what I did, the low ranks had to respect the orders.”*⁴³

Finally, the International Co-Prosecutor recalls that in the *Decision and Scheduling Order Concerning Request for Appointment of Co-Lawyers Designate* (“11 February 2013 Decision”) the International CIJ had noted the involvement of Ieng Sary in the negotiations to release Thai fisherman arrested by Division 164 officers under the command of the Suspect.⁴⁴

b. The alleged existence of conflicts of interest

26. The International Co-Prosecutor submits that this close factual nexus implies that the Suspect’s legal interests in advancing pivotal lines of defence are materially adverse to those advanced in favour of Ieng Sary, in wholly interconnected proceedings.⁴⁵ Thus, argues the International Co-Prosecutor, it is not merely foreseeable but virtually certain that multiple conflicts of interest will emerge as the investigation develops.⁴⁶ Specifically, the Co-Lawyers-Designate would face challenges related to the ability and willingness to pursue certain lines of defence, to plead certain mitigating factors, and to their duty to disclose privileged information.⁴⁷

i. *The inability and unwillingness to pursue certain lines of defence, including cooperation, and arguing certain mitigating factors*

27. The International Co-Prosecutor submits that the duty of loyalty owed by the Co-Lawyers-Designate to Ieng Sary persists even after his death⁴⁸ and that it would prevent the Co-Lawyers-Designate from pursuing certain lines of defence on behalf of the Suspect.⁴⁹ Because the two individuals are charged with the same crimes and operated in a hierarchical framework, the Co-Lawyers-Designate acting for the Suspect would be unable to pursue any lines of defence implicating his superiors, who include Ieng Sary.⁵⁰

⁴¹ *Request for Rejection*, paras 39-40; *ICP Supplementary Submissions*, paras 50, 52, 60.

⁴² *Request for Rejection*, para. 40; *ICP Supplementary Submissions*, para. 52.

⁴³ *Request for Rejection*, fn. 77; *ICP Supplementary Submissions*, para. 61; *Reply*, para. 31.

⁴⁴ *ICP Supplementary Submissions*, para. 53, citing Case File No. 003-D56/3, *Decision and Scheduling Order Concerning Request for Appointment of Co-Lawyers Designate*, 11 February 2013, para. 22. The International CIJ had relied on the following documents in the *Decision*: Case File No. 002-E3/1751, newspaper article titled “Thai Foreign Minister’s visit to Cambodia”; Case File No. 002-D108/28.222, newspaper article titled “Cambodia offer to release Thai fishermen”; Case File No. 002-E3/928 (D1.3.30.25 in Case 003); Case File No. 002-E3/1752.

⁴⁵ *ICP Supplementary Submissions*, para. 62.

⁴⁶ *ICP Supplementary Submissions*, paras 57-62; *Request for Rejection*, 24 December 2012, paras 42-50.

⁴⁷ *Request for Rejection*, para. 42.

⁴⁸ *ICP Supplementary Submissions*, para. 15.

⁴⁹ *Request for Rejection*, paras 43-44, 47-50; *ICP Supplementary Submissions*, para. 62.

⁵⁰ *Request for Rejection*, para. 43.



28. For instance, the Co-Lawyers-Designate would be unable to independently advise the Suspect on the merits of cooperation with the ECCC because in so doing they could violate their still-existing duty of loyalty by implicating Ieng Sary, who was the Suspect's superior.⁵¹ Further, though it may be in the Suspect's interest to establish that he acted under duress or on the basis of superior orders of the Standing Committee, of which Ieng Sary was part, the Co-Lawyers-Designate would be unable to advocate as such without violating their duty of loyalty to Ieng Sary.⁵²

29. In this regard, the International Co-Prosecutor argues that, in the interview where the Suspect stated that "*Ieng Sary was a leader*" and suggested that the interviewer talk to him in order to "*know everything about that time*", the Suspect directly implicates Ieng Sary and seeks to absolve himself from any kind of responsibility.⁵³ By contrast, the Co-Lawyers-Designate in Case 002 sought to establish that Ieng Sary knew "*nothing...concerning any of the arrests.*"⁵⁴ Accordingly, it would be in the interest of Ieng Sary's lawyers to discredit this statement; while if true, the statement would absolve the Suspect of responsibility and aid a defence or plea of following superior orders.⁵⁵

30. The International Co-Prosecutor also asserts that the Co-Lawyers-Designate continue to advocate for the interests of Ieng Sary, "materially limiting the free exercise of their fiduciary duties to the Suspect."⁵⁶ The International Co-Prosecutor points out that Co-Lawyer-Designate Michael Karnavas publicly stated at Ieng Sary's funeral that he is "*attached*" to his deceased client.⁵⁷ He also submits that, after the death of Ieng Sary, the Co-Lawyers-Designate promoted an advocacy website whose purpose was to highlight the "*current practice by...the ECCC, of suppressing Defence filings...depriv[ing] Mr. Ieng Sary of a fair trial.*"⁵⁸ Given these facts, the Co-Lawyers-Designate would be unable to advise the Suspect on the merits of complying with the confidentiality of the judicial investigation without compromising their continuing duty of loyalty to Ieng Sary and undermining the perceived veracity of the claims made on the defence website.⁵⁹ Thus, a conflict of interest arises due to the Co-Lawyers-Designate's personal interest in their professional reputations, their duties of loyalty to Ieng Sary, and their personal attachment to the deceased.⁶⁰

ii. Disclosure of confidential information provided by Ieng Sary

31. The International Co-Prosecutor further submits that the Co-Lawyers-Designate continue to owe a duty of confidentiality to Ieng Sary, even after his death.⁶¹ Given the "interconnected factual matrix" between the two cases, it is "reasonable [sic] foreseeable" that confidential information provided to the Co-Lawyers-Designate by Ieng Sary could be used to disadvantage Ieng Sary's interests, or advantage the Suspect's defence, in circumstances where their respective

⁵¹ *Request for Rejection*, para. 49.

⁵² *Request for Rejection*, paras 47-50.

⁵³ *ICP Supplementary Submissions*, paras 61-62.

⁵⁴ *ICP Supplementary Submissions*, para. 62, citing Case File No. 002-E1/61.1, *Transcript*, 9 April 2012, p. 26.

⁵⁵ *Ibid.*

⁵⁶ *ICP Supplementary Submissions*, para. 65.

⁵⁷ *Ibid.*

⁵⁸ *ICP Supplementary Submissions*, para. 66.

⁵⁹ *ICP Supplementary Submissions*, para. 68.

⁶⁰ *ICP Supplementary Submissions*, paras 65-68.

⁶¹ *ICP Supplementary Submissions*, para. 8.



interests are materially adverse.⁶² This would generate a serious conflict of interest in the course of the representation of the Suspect.⁶³

- c. These conflicts of interest cannot be waived because of prejudice to the administration of justice.

32. The International Co-Prosecutor argues that the conflicts of interest described above cannot be waived due to potential prejudice to the administration of justice at the ECCC.⁶⁴ In particular, the International Co-Prosecutor argues that:

- i) Irreversible prejudice to the administration of justice would occur if Suspects and Accused were not provided with independent counsel who could mount a thorough defence on their behalf;⁶⁵
- ii) Prejudice would occur because the Suspect has been identified by the Trial Chamber as a witness in Case 002, and remains a potential witness in Case 002/02, which will include charges overlapping with the scope of the investigation in Case 003.⁶⁶ There is a risk that the Suspect's prior statements or evidence could be used to implicate the central leadership, contrary to Ieng Sary's interests.⁶⁷ Moreover, as counsel for the Suspect in Case 003, the Co-Lawyers-Designate would have access to, and influence over, a witness in a case in which they have a personal and professional stake in the outcome.⁶⁸
- iii) The fact that the Suspect informed the International CIJ of his decision to remain silent shows that this decision was taken in order to diminish the possibility of a conflict.⁶⁹ In this way, the Co-Lawyers-Designate have already affected the proceedings in Cases 002, 003, and 004.⁷⁰ Moreover, the "overwhelming perception" that the Suspect took this decision in the interests of his counsel, rather than in his own interests, would diminish public confidence in the ECCC and prejudice the administration of justice.⁷¹

33. According to the International Co-Prosecutor, the appointment of the Co-Lawyers-Designate raises the risk of an appeal based on ineffective assistance of counsel.⁷² Further, considering the insufficiency of the waivers, if the Suspect withdrew his consent, he would be able to substantially delay proceedings while waiting for the assignment of new counsel.⁷³ Therefore, the Co-Investigating Judges should refuse to confirm appointment as part of their inherent power to protect the interests of the ECCC as an institution.⁷⁴

⁶² ICP Supplementary Submissions, para. 63.

⁶³ Ibid.

⁶⁴ ICP Supplementary Submissions, para. 70.

⁶⁵ ICP Supplementary Submissions, paras 70-72.

⁶⁶ ICP Supplementary Submissions, para. 73.

⁶⁷ Reply, para. 33.

⁶⁸ ICP Supplementary Submissions, paras 73-74, Reply, paras 32-33.

⁶⁹ ICP Supplementary Submissions, para. 76.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Request for Rejection, paras 51, 53.

⁷³ Request for Rejection, para. 53.

⁷⁴ ICP Supplementary Submissions, paras 70-77.



d. The waivers are defective and incurable

34. Alternatively, the International Co-Prosecutor submits that, should the Co-Investigating Judges disagree that the described conflicts are irreconcilable, the waivers provided by the defence are too general and broad to display fully informed consent.⁷⁵ Appointing counsel without appropriate waivers would fail to guard against a claim of ineffective assistance of counsel. Furthermore, after Ieng Sary's death, his waiver is no longer curable.⁷⁶

II. Co-Lawyers-Designate's Submissions and Co-Lawyers-Designate's Response

35. The Co-Lawyers-Designate, after stressing the fundamental nature of the right to counsel of one's own choosing, contest both the existence of a close factual nexus between the alleged conduct of Ieng Sary and Meas Muth, and the existence of irreconcilable conflicts of interest.⁷⁷ In the *Co-Lawyers-Designate's Response*, they also take issue with the inclusion of a "novel" argument in the *ICP Supplementary Submissions* – relating to damaging public confidence in the ECCC and the administration of justice" – as beyond the contours of the *Second Scheduling Order*.⁷⁸

a. There is no close factual nexus as alleged by the International Co-Prosecutor

36. With regard to the existence of a close factual nexus between the cases of Ieng Sary and the Suspect, the Co-Lawyers-Designate respond that they emphatically pursued a line of defence demonstrating that Ieng Sary had no involvement with S-21 or matters of national defence, as can be gleaned from their examinations of Duch and David Chandler in Case 002.⁷⁹ Ieng Sary and the Suspect state that they "*had no contact with or knowledge of each other's roles or alleged conduct. Their roles, function and conduct were separate, discrete and distinct from 1975-1979.*"⁸⁰ Thus, neither client relies or relied on a defence that would implicate the other client.⁸¹

37. The Co-Lawyers-Designate further contend that the International Co-Prosecutor has not proved the existence of a close hierarchical and functional relationship between Ieng Sary and the Suspect.⁸² The Central Committee was comprised of approximately 30 members and met only once every 6 months,⁸³ and there is no evidence showing that Ieng Sary and the Suspect had any contact with each other as its members.⁸⁴ Moreover, the fact that Ieng Sary's name appears on documents as having been copied on a telegram or report is not evidence that he actually received them.⁸⁵ Evidence in Case 002 indicated that all telegrams were delivered to Pol Pot who then decided which individuals would actually receive them.⁸⁶

⁷⁵ *ICP Supplementary Submissions*, paras 78-79.

⁷⁶ *ICP Supplementary Submissions*, para. 83.

⁷⁷ *Co-Lawyers-Designate's Submissions*, p. 1, para. 45; *Co-Lawyers-Designate's Response*, para. 53.

⁷⁸ *Co-Lawyers-Designate's Response*, para 1.

⁷⁹ *Co-Lawyers-Designate's Submissions*, para. 27.

⁸⁰ *Ibid.*

⁸¹ *Co-Lawyers-Designate's Submissions*, para. 32.

⁸² *Co-Lawyers-Designate's Submissions*, para. 29.

⁸³ *Co-Lawyers-Designate's Submissions*, para. 30.

⁸⁴ *Ibid.*

⁸⁵ *Co-Lawyers-Designate's Submissions*, paras 29-30, 43.

⁸⁶ *Co-Lawyers-Designate's Submissions*, para. 29.



38. The Co-Lawyers-Designate also take issue with the quote concerning Ieng Sary attributed to the Suspect by a newspaper and relied upon by the International Co-Prosecutor.⁸⁷ They argue that “*some dated newspaper quote should [not] be given serious weight or consideration, especially given all of the unknowns,*” including “[w]hat exactly was said, in what context and for what reasons.”⁸⁸

39. With regard to the documents cited in the *11 February 2013 Decision*, which refers to statements allegedly made by Ieng Sary in relation to the arrest and killing of Thai fishermen, the Co-Lawyers-Designate contend that they have little evidentiary value, as they bear no indicia of reliability, accuracy, truthfulness, or completeness.⁸⁹ There is no indication of the dates and places where Ieng Sary made these alleged statements.⁹⁰ Further, neither the news summaries nor the newspaper articles contain indications as to their authorship, making it impossible for the Suspect to exercise his right of confrontation.⁹¹ Even assuming that Ieng Sary may have contacted the Thai government, nothing more can be gleaned than that fact alone as he could have been merely relaying a message by virtue of his position.⁹² Finally, the Co-Lawyers-Designate argue that these documents do not prove that he was involved in the process of making any such decisions.⁹³

b. No conflict of interest arises

40. The Co-Lawyers-Designate submit that the arguments advanced by the International Co-Prosecutor on the existence of a conflict of interest are wholly speculative. The International Co-Prosecutor has no insight into the Co-Lawyers-Designate’s strategy for defending the Suspect and is simply “*constructing a belief.*”⁹⁴

c. Ability and willingness to pursue certain lines of defence, including cooperation and arguing mitigating factors

41. With regard to the possibility of cooperation with the court, the Co-Lawyers-Designate submit that the Suspect “*has been fully appraised of the positives and negatives of cooperation in Case 003[...] [I]t was with full knowledge and deliberation, and after first being advised by DSS and subsequently the Defence, [...] that he signed the notice invoking his right to remain silent.*”⁹⁵ Thus, the Trial Chamber’s consideration of Duch’s cooperation as a mitigating factor is irrelevant in Case 003.⁹⁶ Moreover, the Suspect intends to fully challenge the charges against him and present a strong defence.⁹⁷ Both Ieng Sary and the Suspect maintain that there was no superior-subordinate relationship between them such as to allow the Suspect to argue duress or the defence of superior orders with regard to Ieng Sary.⁹⁸

⁸⁷ *Co-Lawyers-Designate’s Response*, para. 34.

⁸⁸ *Ibid.*

⁸⁹ *Co-Lawyers-Designate’s Submissions*, para. 31.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Co-Lawyers-Designate’s Response*, para. 33.

⁹⁵ *Co-Lawyers-Designate’s Submissions*, para. 39.

⁹⁶ *Co-Lawyers-Designate’s Submissions*, para. 37.

⁹⁷ *Ibid.*

⁹⁸ *Co-Lawyers-Designate’s Submissions*, para. 41.



42. The Co-Lawyers-Designate also submit that there are multiple examples where defence lawyers have represented clients in factually related cases at the International Criminal Tribunal for the former Yugoslavia (“ICTY”), such as the Srebrenica trials.⁹⁹

43. Additionally, the Co-Lawyers-Designate submit that the International Co-Prosecutor’s arguments about Co-Lawyer-Designate Karnavas’ attendance at Ieng Sary’s cremation and the public website set up by the Co-Lawyers-Designate constitute a baseless *ad hominem* attack.¹⁰⁰ Their participation in the ceremony and the statements reported by the press merely indicate mutual respect and show the level of commitment that the Co-Lawyers-Designate provide to their clients.¹⁰¹ The Co-Lawyers-Designate further submit that their website, which was set up in 2009 for transparency purposes, serves primarily as a research tool. Although it contains a few articles and press releases, it does not advocate on behalf of Ieng Sary.¹⁰²

d. Use of confidential information

44. With regard to the use in Case 003 of confidential information obtained from Ieng Sary, the Co-Lawyers-Designate submit that neither client possesses any knowledge that could impact on the other client, and that speculation on this matter should not form the basis for the Co-Investigating Judges’ decision on their appointment.¹⁰³ Even though the duty of confidentiality may affect a lawyer’s duties to another client, it does not necessarily follow that this will always be the case.¹⁰⁴ The Co-Lawyers-Designate submit that on the basis of the theories of the case employed to defend both the Suspect and Ieng Sary, the Co-Lawyers-Designate have more than a good-faith basis for asserting that no knowledge obtained from one client would be used to the detriment of the other.¹⁰⁵ If anything, the Suspect would benefit from the Co-Lawyers-Designate’s experience and familiarity with the temporal events in question.¹⁰⁶

e. There will be no prejudice to the administration of justice

45. The Co-Lawyers-Designate submit that the International Co-Prosecutor made only hypothetical assertions on whether the prior representation of Ieng Sary presented a significant risk of an adverse impact on the Suspect;¹⁰⁷ whether the Co-Lawyers-Designate would attempt to influence the Suspect in reference to Case 002;¹⁰⁸ and whether the Suspect would or would not receive a robust defence from the Co-Lawyers-Designate.¹⁰⁹

46. The Co-Lawyers-Designate also take issue with the International Co-Prosecutor’s position that the Co-Lawyers-Designate acted unethically and harmed the administration of justice by advising the Suspect of his fair trial rights.¹¹⁰ The Co-Lawyers-Designate submit that the Suspect is entitled to exercise his right to remain silent.¹¹¹ Thus, it is inappropriate to imply

⁹⁹ *Co-Lawyers-Designate’s Response*, para. 37.

¹⁰⁰ *Co-Lawyers-Designate’s Response*, paras 29-32, 35.

¹⁰¹ *Co-Lawyers-Designate’s Response*, para. 30.

¹⁰² *Co-Lawyers-Designate’s Response*, paras 31-32, 35.

¹⁰³ *Co-Lawyers-Designate’s Submissions*, para. 35.

¹⁰⁴ *Co-Lawyers-Designate’s Response*, paras 7-11.

¹⁰⁵ *Co-Lawyers-Designate’s Response*, para. 18.

¹⁰⁶ *Co-Lawyers-Designate’s Response*, para 19.

¹⁰⁷ *Co-Lawyers-Designate’s Response*, para 20.

¹⁰⁸ *Co-Lawyers-Designate’s Response*, paras 45-46.

¹⁰⁹ *Co-Lawyers-Designate’s Response*, para. 41.

¹¹⁰ *Co-Lawyers-Designate’s Response*, paras 48-49.

¹¹¹ *Co-Lawyers-Designate’s Response*, paras 42-45, 48-49, 53.



that the administration of justice has been harmed because the Suspect has been counselled to do so and has in fact done so.¹¹²

47. The Co-Lawyers-Designate characterize the International Co-Prosecutor's submission that the Suspect should not be armed with tactical means to delay the proceedings as a baseless accusation.¹¹³ They assert that the International Co-Prosecutor has provided no evidence that the Co-Lawyers-Designate have engaged in Case 002, or will engage in Case 003, in any tactical conduct that is questionable or unethical.¹¹⁴

f. Validity of the waivers

48. Finally, the Co-Lawyers-Designate argue that the waivers obtained by Ieng Sary and the Suspect are effective, and that the International Co-Prosecutor's arguments against their validity are based on conjecture and speculation.¹¹⁵ Waivers, by their nature, do not contain specific facts about a case or about what exactly was discussed.¹¹⁶ It is up to the lawyer to thoroughly advise the client on the implications of consenting to the representation, and this was done in this case.¹¹⁷

49. The Co-Lawyers-Designate acknowledge that the judicial authority must be convinced that certain criteria are met before accepting waivers.¹¹⁸ But under the International Co-Prosecutor's argument, either the Suspect's lawyers would have to divulge privileged information relating to the substance of the representation, or he himself would have to provide information about his defence strategy, in order to satisfy the judicial authority.¹¹⁹ This "absurd" result is not required by ECCC jurisprudence.¹²⁰

50. Further, the Co-Lawyers-Designate assert that there is no procedural requirement at the ECCC to direct a client towards independent counsel before waiving a conflict.¹²¹ The Chief of the Defence Support Section discussed the appointment and waiver with the Suspect.¹²²

51. With regard to the International Co-Prosecutor's argument that Ieng Sary's waiver becomes insufficient because of his passing, the Co-Lawyers-Designate submit that this position is not supported by the applicable law.¹²³ Speculation that the Co-Lawyers-Designate would need to seek additional instructions from Ieng Sary is an insufficient basis to declare the present waiver invalid or insufficient.¹²⁴

¹¹² *Co-Lawyers-Designate's Reponse*, para. 48.

¹¹³ *Co-Lawyers-Designate's Submissions*, para. 44.

¹¹⁴ *Ibid.*

¹¹⁵ *Co-Lawyers-Designate's Submissions*, para. 42, *Co-Lawyers-Designate's Response*, paras 50-52.

¹¹⁶ *Co-Lawyers-Designate's Response*, para. 50.

¹¹⁷ *Ibid.* See also *Co-Lawyers-Designate Submissions*, para. 5.

¹¹⁸ *Co-Lawyers-Designate's Response*, para. 27.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Co-Lawyers-Designate's Response*, para. 28.

¹²² *Co-Lawyers-Designate's Response*, para. 51.

¹²³ *Co-Lawyers-Designate's Response*, para. 52.

¹²⁴ *Ibid.*



III. The International Reserve Co-Prosecutor's Reply

52. In the *Reply*, the International Reserve Co-Prosecutor¹²⁵ submits that the Co-Lawyers-Designate apply a subjective test to the case, “*arguing in effect that a conflict of interest will not be established as long as they considered themselves personally satisfied that no such conflict exists and personally assert that no such conflict would arise.*”¹²⁶

53. With regard to the Co-Lawyers-Designate’s contention that, based on the theories of the case under which both the Suspect and Ieng Sary have instructed counsel to proceed, there is no risk of conflict of interest, the International Reserve Co-Prosecutor observes that a theory of the case often evolves over the course of the proceedings.¹²⁷ Given the proximity of the superior-subordinate relationship between Ieng Sary and the Suspect, their interests are reasonably foreseeable to be or become adverse in any proceedings against the Suspect.¹²⁸ Their relationship is also as close or closer than the proximity between defendants in ICTY case law, wherein counsel was barred for conflicts of interest.¹²⁹

54. The International Reserve Co-Prosecutor takes issue with the Co-Lawyers-Designate’s representation of ICTY practice in the appointment of defence counsel.¹³⁰ He argues that the Co-Lawyers-Designate failed to distinguish between ICTY cases where counsel previously served as a member of the prosecution from cases involving defence counsel representing multiple clients indicted for similar facts.¹³¹ The standard of proof is justifiably lower in the second scenario.¹³²

55. The International Reserve Co-Prosecutor concludes by reiterating that, if the conflict is not resolved at this stage in the proceedings, the administration of justice may be irreversibly prejudiced.¹³³ It will affect any decision by the Suspect to give evidence to the Co-Investigating Judges in Case 003 and to the Trial Chamber in Case 002.¹³⁴ There is also a risk that the Co-Lawyers-Designate might withdraw at some stage of the investigation because of the conflict, thus delaying the proceedings.¹³⁵

IV. Expedited Request

56. The Co-Lawyers-Designate state that the International CIJ’s *Decision on Motion and Supplemental Brief on Suspect’s Right to Counsel*,¹³⁶ issued in Case File 004, made holdings relevant to the jurisdiction of the Co-Investigating Judges over the alleged conflict of interest in Case 003, which were unavailable to the Co-Lawyers-Designate at the time when they filed their submissions.¹³⁷

¹²⁵ The International Reserve Co-Prosecutor, Nicholas Koumikian, has now been appointed as International Co-Prosecutor.

¹²⁶ *Reply*, para. 6, citing para. 17 of *Co-Lawyers-Designate’s Response*.

¹²⁷ *Reply*, para. 11.

¹²⁸ *Reply*, para. 13.

¹²⁹ *Ibid.*

¹³⁰ *Reply*, para. 15.

¹³¹ *Reply*, para 17.

¹³² *Reply*, paras 17-18.

¹³³ *Reply*, para. 33.

¹³⁴ *Reply*, paras 32-33.

¹³⁵ *Reply*, para. 31.

¹³⁶ Case File 004-D122/6, *Decision on motion and Supplemental Brief on Suspect’s Right to Counsel*, 17 May 2013.

¹³⁷ *Expedited Request*, para. 2.



57. The Co-Lawyers-Designate claim that through this decision the International CIJ confirmed that matters relating to conflicts fall within the competence of DSS, and that this solution is supported by both Cambodian and French law.¹³⁸

58. The Co-Lawyers-Designate submit that the proper authorities for determining conflict of interest, namely DSS and the Bar Association of the Kingdom of Cambodia (“BAKC”), have already determined that no conflict of interest exists.¹³⁹ DSS retains control to reconsider its decisions concerning counsel and, had DSS considered that a conflict of interest affected the representation, “*it would have acted.*”¹⁴⁰ The Co-Lawyers-Designate also submit that the competent appellate body having jurisdiction over matters concerning conflicts of interest is the Pre-Trial Chamber.¹⁴¹

59. The Co-Lawyers-Designate submit that the International CIJ, in finding in Case 004 that he had jurisdiction over conflicts of interest of counsel, relied on French jurisprudence which is not applicable at the ECCC and which dealt with a different situation from the case at hand.¹⁴²

60. The Co-Lawyers-Designate submit that neither of the procedural avenues indicated by the International Co-Prosecutor give the International CIJ jurisdiction over conflict of interest.¹⁴³ With regard to admitting the *Request for Rejection* as an appeal based on Internal Rule 11(6), the Co-Lawyers-Designate argue that, as held by the Pre-Trial Chamber, Internal Rule 74(2) only provides the Co-Prosecutors with a right to appeal orders related to the criminal investigation, and that Rule 11(6) grants a right to appeal only to defendants whose claim of indigence has been rejected.¹⁴⁴ In relation to the admissibility of the *Request for Rejection* as a “free-standing request”, the Co-Lawyers-Designate argue that the Co-Prosecutors should be restricted from making such requests where they are not related to the ongoing cases or investigations of crimes.¹⁴⁵

61. In the Co-Lawyers-Designate’s submission, DSS is in charge of the appointment of lawyers, and the Co-Investigating Judges have no jurisdiction to overturn DSS decisions.¹⁴⁶

V. Response to the Expedited Request

62. In the *ICP Reply to Expedited Reply*, the International Reserve Co-Prosecutor submits that the Co-Investigating Judges exercise “*exclusive appellate jurisdiction over the administrative determinations of DSS concerning the appointment of counsel.*”¹⁴⁷ The International Reserve Co-Prosecutor also recalls that in Case 004, the International CIJ determined that he has jurisdiction to review any contestation based on the possible existence of a conflict of interest.¹⁴⁸ In the alternative, the International Reserve Co-Prosecutor submits that

¹³⁸ *Expedited Request*, paras 26-27: “[t]he Bar Council shall examine and resolve all problems concerning the conduct of the legal profession”, quoting article 19 of the 1995 *Law on the Statutes of the Bar*.

¹³⁹ *Expedited Request*, paras 5, 28.

¹⁴⁰ *Expedited Request*, para. 29.

¹⁴¹ *Expedited Request*, p. 1 and paras 27, 31.

¹⁴² *Expedited Request*, paras 30-31; France, Cour d’Appel de Pau, 1^{ère} Chambre, 14 January 1998.

¹⁴³ *Expedited Request*, paras 32-41.

¹⁴⁴ *Expedited Request*, paras 33-36.

¹⁴⁵ *Expedited Request*, paras 38, 41.

¹⁴⁶ *Expedited Request*, paras 39-41.

¹⁴⁷ *ICP Reply to Expedited Request*, paras 6-11.

¹⁴⁸ *ICP Reply to Expedited Request*, para. 8.



the Co-Investigating Judges exercise exclusive authority over self-standing requests under Article 21(1) of the ECCC Agreement and Article 42(3) of the ECCC Law, as further regulated by Articles 6.2 and 7.4 of the DSS Administrative Regulations.¹⁴⁹ Under these provisions, the engagement/assignment by the DSS of Co-Lawyers, pursuant to the Administrative Regulations, remains provisional pending both an assessment of means and a request by the DSS to the Co-Investigating Judges or relevant Chamber for “an order *confirming* the provisional assignment of the lawyer to be *admitted* as such by the Extraordinary Chambers in accordance with Article 21(1) of this Agreement.”¹⁵⁰ Moreover, Article 7.4 of the DSS Administrative Regulations, concerning removal of lawyers, also provides that “the ECCC may determine that a Co-Lawyer is no longer eligible to defend a suspect...before the ECCC.”¹⁵¹

63. Lastly the International Reserve Co-Prosecutor contests the Co-Lawyers-Designate’s position that conflicts of interest issues may only be addressed by DSS and the President of the BAKC. Procedural rules established at international level regulate conflict of interest proceedings.¹⁵² Therefore, the International Reserve Co-Prosecutor requests the Co-Investigating Judges to reject the *Expedited Request* and to rule on the *Request for Rejection*.¹⁵³

VI. Reply to the Response on Expedited Request

64. The Co-Lawyers-Designate object to the International Co-Prosecutor’s submission that he has standing to file the Request for Rejection pursuant to Internal Rule 11(6), arguing that this Internal Rule only provides persons claiming indigence with a right to appeal decisions concerning their indigence.¹⁵⁴

65. The Co-Lawyers-Designate further argue that, in Case 004, the International CIJ determined that he had jurisdiction to review a decision of Reserve International Co-Investigating Judge Kasper-Ansermet, but not to review decisions of DSS on the appointment of lawyers.¹⁵⁵

66. The Co-Lawyers-Designate also contest that the Co-Investigating Judges have jurisdiction to rule on the *Request for Rejection* pursuant to Article 21(1) of the ECCC Agreement and Article 7.4 of the DSS ARs. Article 7.4, argue the Co-Lawyers-Designate, states that the “ECCC” has the power to remove lawyers, and that ECCC precedent shows that the organ provided with this power is DSS, not the CIJs.¹⁵⁶

67. Finally, the Co-Lawyers-Designate contest the applicability of established international practice to the issue of their alleged conflict of interest, because the matter is already regulated by the Internal Rules and the DSS ARs, which designate the BAKC and DSS as the competent organs for the resolution of these issues.¹⁵⁷

¹⁴⁹ *ICP Reply to Expedited Request*, para. 12.

¹⁵⁰ *ICP Reply to Expedited Request*, para. 13, citing DSS Administrative Regulations, Article 6.2(b). (emphasis in submission)

¹⁵¹ *ICP Reply to Expedited Request*, para. 14, citing DSS Administrative Regulations, Article 7.4.

¹⁵² *ICP Reply to Expedited Request*, para. 15.

¹⁵³ *ICP Reply to Expedited Request*, para. 16.

¹⁵⁴ *Co-Lawyers-Designate Reply*, paras 1-3, 6-13.

¹⁵⁵ *Co-Lawyers-Designate Reply*, paras 4-5.

¹⁵⁶ *Co-Lawyers-Designate Reply*, paras 14-18.

¹⁵⁷ *Co-Lawyers-Designate Reply*, paras 19-23.



C. APPLICABLE LAW

I. Framing provisions of the ECCC Agreement and ECCC Law

68. Article 12 of the *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* (“ECCC Agreement”) provides that the procedure of the ECCC shall be “*in accordance with Cambodian law*” and, where it is silent, guidance may be “*sought in procedural rules established at the international level*”. In addition, the ECCC must “*exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights*”.

69. Similarly, Article 23 (new) of the ECCC Law provides that, if the “*existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application [...] the Co-Investigating Judges may seek guidance in procedural rules established at the international level*”.

II. ECCC Agreement provisions on the right of an accused to counsel of his choosing

70. Pursuant to Article 13 of the ECCC Agreement, “accused” persons before the ECCC shall have the right to “*engage a counsel of his or her choice*”, in accordance with the International Covenant on Civil and Political Rights.

71. Article 21(1) of the ECCC Agreement provides that: “*the counsel of a suspect [...] who has been admitted by the Extraordinary Chambers shall not be subjected by the Royal Government of Cambodia to any measure which may affect the free and independent exercise of his or her functions under the present agreement*”.

III. Relevant DSS Administrative Regulations on the appointment of counsel

72. Article 6.2(b) of the DSS Administrative Regulations (“DSS ARs”) provides that DSS shall “*forward Form 7: Request for Engagement/Assignment of Co-Lawyers to the Investigating Judges or the relevant chamber to issue an order confirming the provisional assignment of the lawyer to be admitted as such by the Extraordinary Chambers in the terms of Article 21(1) of the Agreement*”.

73. Article 7.2 of the DSS ARs states that a suspect, charged person, or accused may apply to the ECCC to change both or either of the Co-Lawyers, and that this may only be permitted in exceptional circumstances. Similarly, Article 7.3 of the DSS ARs allows the Co-Lawyers, in the presence of exceptional circumstances, to apply to the ECCC to withdraw from a case to which they are engaged or assigned.

74. Article 7.4 of the DSS ARs states that the ECCC may determine that a Co-Lawyer is no longer eligible to defend a suspect, charged person or accused before the ECCC.



IV. Provisions of the ECCC Agreement and Internal Rules on the professional responsibilities of counsel appearing before the ECCC

75. Article 21(3) of the ECCC Agreement provides that counsel at the ECCC are to act “*in accordance with the [Agreement], the Cambodian Law on the Statutes of the Bar and recognized standards and ethics of the legal profession*”.

76. ECCC Internal Rule 22(4) provides that: “*lawyers shall be subject to the relevant provisions of the Agreement, the ECCC law, these IRs, ECCC practice directions and administrative regulations, the Cambodian Law on the Statutes of the Bar and recognized standards and ethics of the legal profession. They have an obligation to promote justice and the fair and effective conduct of proceedings.*”

V. DSS Administrative Regulations and Cambodian provisions on conflicts of interest

77. Article 9 of the DSS ARs, titled “Conflict of Interest”, provides that:

“9.1 A Co-Lawyer shall not engage in activity that is incompatible with the discharges of his duties as the legal representative of the accused [...]

9.2 Co-Lawyers shall exercise all care to ensure that no conflict of interest arises. They shall put the client’s interests before their own or those of any other person [...]

9.3 Where a conflict of interest arises, a co-lawyer shall at once inform all potentially affected clients of the existence of a conflict and either withdraw from the representation of one or more clients or seek the full and informed consent in writing of all potentially affected clients to continue representation.”

78. Article 25 of the Code of Ethics for Lawyers Licensed with the Bar Association of the Kingdom of Cambodia (“BAKC Code of Ethics”) provides, in its relevant part, that:

“A lawyer shall not accept the following cases: [...]

When the interest of a client conflicts with the interest of another client in the case that the lawyer or his/her law group is working on; [...]

In case that the lawyer or his/her law group is the counsel or used to be the counsel for many clients, the lawyer can accept the case and protect the interest of a client, provided that he/she informs the other parties and receive the consent thereto and shall exert great diligence not to lose dignity, reputation, and confidentiality of the profession.”



D. PRELIMINARY MATTERS

a. International CIJ's jurisdiction to decide on the Request for Rejection and of the Co-Prosecutor's Supplementary Submissions

79. The right to choose counsel, enshrined in Article 13 of the ECCC Law and Article 14 of the 1966 International Covenant on Civil and Political Rights ("ICCPR"), is a fundamental right in criminal proceedings.¹⁵⁸ However, while fundamental in nature, this right is not absolute.¹⁵⁹

80. Pursuant to Article 21(1) of the ECCC Agreement and Rule 6.2 of the DSS ARs, the Co-Investigating Judges must confirm DSS' provisional assignment of a lawyer to a suspect. Rule 7.4 of the DSS ARs establishes that the ECCC can determine that a lawyer is "*no longer eligible*" to defend a suspect.

81. The possible existence of conflicts of interest is widely recognized by international standards and practice as an impediment to legal representation,¹⁶⁰ including to a suspect's choice of counsel of his own choosing.¹⁶¹ The ICTY Appeals Chamber stated that:

Safeguarding the interests of justice requires the prevention of potential conflicts of interest before they arise. If a Chamber determines that the risks and damage that could be caused [by a conflict of interest] are such as to jeopardise the right of the accused to a fair and expeditious trial or proper administration of justice, it takes the appropriate measure to restore and protect the fairness of trial and the integrity of the proceedings. [Such measures] can include ordering the withdrawal of counsel.¹⁶²

82. Article 23 (new) of the ECCC Law assigns the Co-Investigating Judges the responsibility for all investigations. This responsibility includes the obligation to safeguard the integrity of the investigation and to ensure the application of international standards of justice, fairness, and due process of law. This obligation includes judicial scrutiny over assignment of counsel.¹⁶³ They

¹⁵⁸ See also *Prosecutor v. Mejakić et al.*, IT-02-65-AR73.1, *Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simić*, 6 October 2004 ("*Mejakić Appeal Decision*"), para. 8.

¹⁵⁹ *Ibid.*

¹⁶⁰ See Article 14 of the Code of Conduct of Lawyers Practicing before the International Criminal Tribunal for the former Yugoslavia, 22 July 2009 ("*ICTY Code of Conduct*"); Articles 12 and 16 of the Code of Professional Conduct for Counsel practicing before the International Criminal Court, 2 December 2005; Article 11 of the Code of Professional Conduct for Defence Counsel and Legal Representatives of Victims appearing before the Special Tribunal for Lebanon, 14 December 2012; Article 9 of the Code of Professional Conduct for Defence Counsel practicing before the International Criminal Tribunal for Rwanda, 14 March 2008 ("*ICTR Code of Conduct*"); Article 15 of the Code of Professional Conduct for Counsel with Right of Audience before the Special Court for Sierra Leone, 13 May 2006; Rules 1.7 to 1.10 of the Model Rules for Professional Conduct of the American Bar Association.

¹⁶¹ *Prosecutor v. Ante Gotovina et al.*, Case No. It-06-90-AR73.2, *Decision on Ivan Čermak's Interlocutory Appeal against Trial Chamber's Decision on Conflict of Interest of Attorneys Čedo Prodanović and Jadranka Sloković*, 29 June 2007 ("*Gotovina Appeal Decision*"), para. 55; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.1, *Decision on Appeal by Bruno Stojić against Trial Chamber's Decision on Request for Appointment of Counsel*, 24 November 2004 ("*Prlić Appeal Decision*") para. 19.

¹⁶² *Gotovina Appeal Decision*, para. 16. See also *Prlić Appeal Decision*, paras 20, 22.

¹⁶³ *Prlić Appeal Decision*, para. 21; ICTY, *Prosecutor v. Hadžihasanović*, IT-01-47-PT, *Decision on the Prosecution's Motion for Review of the Decision of the Registrar to Assign Mr. Rodney Dixon as Co-Counsel to the Accused Kubura*, 26 March 2002 ("*Hadžihasanović Decision*"), paras 19, 21, 55; *Prosecutor v. Delić*, IT-04-83-PT, *Decision on Motion Seeking Review of the Registry Decision Stating that Mr. Stephane Bourgon Cannot be Assigned to Represent Rasim Delić*, 10 May 2005 ("*Delić Decision*") p. 2; *Prosecutor v. Popović et al.*, IT-05-88-T, *Decision on Third Request for Review of the Registry Decision on the Assignment of Co-Counsel for Radivoje Miletić*, 20 February 2007, p. 4.



also have an inherent power to determine incidental issues that arise as a direct consequence of the procedures of which they are seized by reason of the matter falling under their primary jurisdiction.¹⁶⁴ Consistent with this obligation, in confirming the appointment of counsel to a suspect in Case 004, the International CIJ specifically assessed the possible existence of a conflict of interest.¹⁶⁵

83. The International CIJ therefore rejects the Co-Lawyers-Designate's argument that he has no jurisdiction to consider the *Request for Rejection*, and that matters related to conflict of interest of counsel are to be determined solely by DSS or the BAKC, and on appeal by the Pre-Trial Chamber. While DSS has the primary responsibility to appoint counsel in accordance with the applicable regulations, it is well established in international law that judicial authorities have the power to review administrative decisions when they may impact on the fairness of the trial or otherwise prejudice the administration of justice.¹⁶⁶

84. The International CIJ therefore finds that the *Request for Rejection* is admissible.

b. Requests for leave to exceed the word limit and to file in English with the Khmer version to follow

85. Both the Co-Lawyers-Designate and the Co-Prosecutor requested leave to exceed the word limit in the *Co-Lawyers-Designate Submissions*,¹⁶⁷ the *ICP Supplementary Submissions*,¹⁶⁸ the *Co-Lawyers-Designate Response*,¹⁶⁹ and the *Co-Lawyers-Designate Reply*.¹⁷⁰

86. Pursuant to Article 5.4 of the Practice Direction on Filing of Documents before the ECCC, the limits on the length of filings can be extended in the presence of "exceptional circumstances". The International CIJ has taken into account the complexity of the subject matter dealt with by the pleadings; the lack of dispositions regulating removal of counsel in case of conflicts of interest in the Internal Rules and the need to explore international practice and standards on this issue; and finally, the importance of this matter for both the Suspect and the proper administration of justice. The International CIJ finds that these factors constitute exceptional circumstances and grants leave to exceed the page limit.

87. The Co-Prosecutor and the Co-Lawyers-Designate also sought to be allowed to file their pleadings in English, with the Khmer version to follow.¹⁷¹ Considering the importance of the matter being litigated as soon as practicable in order to preserve fair trial rights, the International CIJ grants leave, pursuant to Article 7.2 of the Practice Direction, to file in English with the Khmer version to follow.

¹⁶⁴ The doctrine of inherent jurisdiction is widely recognised and applied by international tribunals. Its applicability at the ECCC has also been recognised by the ECCC Pre-Trial Chamber : see, for instance, Case File No. 002-D14/1/2, *Order Suspending the Enforcement of the "Order on International Co-Prosecutors Public Statement Regarding Case File 003"*, 13 June 2011, para. 4. The ICTY Appeals Chamber stated that, in exercising this power, a judicial authority cannot appropriate a power that is conferred elsewhere. See *Mejakić Appeal Decision*, para. 7.

¹⁶⁵ Case No. 004-D122/6, *Decision on Motion and Supplemental Brief on Suspect's Right to Counsel*, 17 May 2013, paras 82, 99.

¹⁶⁶ See *supra* note 153.

¹⁶⁷ *Co-Lawyers' Submissions*, p. 1.

¹⁶⁸ *Co-Prosecutor's Supplementary Submissions*, para. 6.

¹⁶⁹ *Co-Lawyers' Response*, p. 1.

¹⁷⁰ *Co-Lawyers-Designate Reply*, p. 1.

¹⁷¹ *Request for Rejection*, para. 7; *Co-Lawyers' Submissions*, p. 1; *Co-Prosecutor's Supplementary Submissions*, para. 5; *Co-Lawyers' Response*, p. 1.



E. THE ALLEGED EXISTENCE OF AN IRRECONCILABLE CONFLICT OF INTEREST

I. Judicial scrutiny over alleged conflicts of interest

88. The ECCC Agreement and the Internal Rules contain general provisions requiring counsel to act, *inter alia*, in accordance with recognized standards and ethics of the legal profession.¹⁷² Article 9 of the DSS ARs and Article 25 of the BAKC Code of Ethics regulate counsel's obligations in the presence of a conflict of interest, but they are silent on the removal of conflicted counsel by the judicial authority in charge of ensuring the fairness and integrity of the proceedings. Therefore, in analyzing the issues presented by the *Request for Rejection*, the International CIJ will seek guidance in procedural rules established at the international level and will consider relevant international and national jurisprudence.¹⁷³

a. Definition of Conflict of Interest

89. The definition of what constitutes a conflict of interest varies from jurisdiction to jurisdiction. Generally, however, rules against conflict of interest are aimed at protecting the fiduciary relationship between a lawyer and his present and previous clients, and ensuring that, when representing a client, a lawyer has no impediments in the exclusive pursuit of the client's best interests.

90. For instance, according to the International Principles for the Conduct of the Legal Profession adopted by the International Bar Association, as a general principle, a lawyer cannot assume a position in which a client's interest conflicts with his or her own, or with the interests of present or former clients, unless the involved clients consent to such representation, in cases where consent is allowed.¹⁷⁴ The Solicitor's Code of Conduct of England and Wales states that a conflict of interest arises when "[a lawyer] owe[s] separate duties to act in the best interests of two or more clients in relation to the same or related matters, and those duties conflict, or there is a significant risk that those duties may conflict."¹⁷⁵

91. The codes of professional conduct for lawyers practicing before the ICTY and ICTR provide a detailed definition of conflict of interest, which is stated to arise:

- when representation of a client will be, or may reasonably be expected to be, adversely affected by representation of another client;
- when representation of another client will be, or may reasonably be expected to be, adversely affected by such representation;
- when the matter is the same or substantially related to another matter in which counsel had formerly represented another client, and the interests of the present client are materially adverse to the interests of the former client;

¹⁷² See Article 21(3) of the ECCC Agreement and Internal Rule 22(4).

¹⁷³ Article 12 of the ECCC Agreement and Article 23 (new) of the ECCC Law.

¹⁷⁴ See paragraph 3.1 of the Commentary to the International Bar Association ("IBA") Principles. The IBA Principles take into consideration national professional rules from states throughout the world, the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Havana (Cuba), 27 August to 7 September 1990, and the Universal Declaration of Human Rights, see Commentary to the IBA Principles, Introduction, paras 2-4.

¹⁷⁵ Solicitors Regulation Authority, Code of Conduct 2011, Glossary.



- or when counsel's professional judgement on behalf of the client will be, or may reasonably be expected to be, adversely affected by, *inter alia*, counsel's responsibilities to, or interests in, a third party.¹⁷⁶

92. According to ICTY jurisprudence, a conflict of interest between an attorney and a client arises not only when the representation prejudices or could prejudice the interests of the present or former clients, but also when, by reason of certain circumstances, it could prejudice the wider interests of justice.¹⁷⁷

b. Counsel's duties of confidentiality and loyalty

93. When representing a client, counsel is required to treat his or her interest as paramount and to be free of any influence which may conflict with the client's best interest.¹⁷⁸ The United Nations' Human Rights Committee stated that counsel should be able to advise and represent a client "*without restrictions, influence, pressure or undue interference from any quarter*".¹⁷⁹

94. Counsel's obligations to their clients include the duties of loyalty and confidentiality.¹⁸⁰ These duties apply to both former and present clients.¹⁸¹ The Co-Lawyers-Designate do not contest that they retain a duty of loyalty and confidentiality toward both Ieng Sary and Meas Muth.¹⁸²

95. The survival of the Co-Lawyers-Designate's duties of loyalty and confidentiality toward Ieng Sary is consistent with the principles underlying the fiduciary relationship between a lawyer and a client. It is also consistent with US case law, according to which these duties survive the death of a client,¹⁸³ and with the jurisprudence of the European Court of Human Rights and other

¹⁷⁶ Article 14 of the ICTY Code of Conduct and Article 9 of the ICTR Code of Conduct.

¹⁷⁷ *Prlić* Appeal Decision, para. 22; *Delić* Decision, p. 3.

¹⁷⁸ See *Gotovina* Appeal Decision, para. 28; Commentary to the International Principles on Conduct for Legal Professions, International Bar Association, 28 May 2011 ("IBA Principles"), paras 1.2 and 3.2.

¹⁷⁹ HRC, *General Comment no. 32*, UN Doc CCPR/C/GC/32, para. 34.

¹⁸⁰ BAKC Code of Ethics, 2012, Article 7; *Gotovina* Appeal Decision, paras 44-46, 48; Commentary to the IBA Principles, para. 3.2.

¹⁸¹ *Gotovina* Appeal Decision, paras 44-46; Australia, Supreme Court of Victoria, *Spincode Pty Ltd v. Look Software Pty Ltd & Ors*, 21 December 2001, [2001] VSCA 248, paras 44ff; UK, House of Lords, *Prince Jefri Bolkiah v. KPMG*, 18 December 1998, Lord Hope of Craighead; US, Supreme Court, *Swidler & Berlin and James Hamilton v. United States*, 25 June 1998, 524 U.S. 399 (1998), pp. 400ff; US, Court of Appeals, Second District, Division 5, California, *Goldstein v. Lees*, 28 March 1975, 46 Cal.App.3d 614 (1975), p. 620. See also paragraph 4 of the Commentary to the IBA Principles, which states that the obligation of confidentiality is usually without time limits and extends beyond the termination of the attorney-client relationship.

¹⁸² Co-Lawyers' Response, para. 16.

¹⁸³ According to the USSC, "*knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. While the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanishes altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime.*" (US, Supreme Court, *Swidler & Berlin and James Hamilton v. United States*, 25 June 1998, 524 U.S. 399 (1998)). With regard to the duty of loyalty, the Supreme Court of Illinois stated that: "*Clearly, the death of a client does not discharge an attorney's duty of loyalty. Nor does an attorney's discharge by a client free him to represent adverse interests.*" (Supreme Court of Illinois, *In re Williams*, 57 Ill.2d 63, 67 (1974) and *In re Michal*, 415 Ill. 150, 112 N.E.2d 603).



national courts, according to which after death people still retain a right to the preservation of their reputation and dignity, and these rights pass on to the heirs of the deceased.¹⁸⁴

c. Applicable standard for judicial scrutiny over alleged conflicts of interest

96. The International CIJ's duty to ensure conflict-free representation and to safeguard the integrity of the proceedings applies from the very beginning of the judicial investigation.¹⁸⁵ The safeguard of the interests of justice requires "*not only the existence of a mechanism for removing conflicts of interests after they have arisen but also the prevention of such conflicts before they arise*".¹⁸⁶

97. According to the ICTY Appeals Chamber, at the pre-trial stage reasonable foresight that conflicts of interest could arise, as opposed to mere speculation, constitutes a sufficient basis to disallow representation (reasonable foresight test).¹⁸⁷ This standard is consistent with the language used in the Codes of Professional Conduct for counsel appearing before the ICTY and ICTR.¹⁸⁸

98. The Co-Lawyers-Designate appear to contest the applicability of the reasonable foresight test, and in so doing they rely on a decision of the Trial Chamber in the *Hadžiasanović* case at the ICTY. In the *Hadžiasanović* Decision, the Trial Chamber applied a "real possibility" standard in assessing whether a former employee of the ICTY's Office of the Prosecution had a conflict of interest in representing an accused before the ICTY.¹⁸⁹ The "real possibility" standard, however, is specifically prescribed by the ICTY Code of Conduct for conflicts of interest of former staff members or officials of the ICTY who, at the time of their employment, participated personally and substantially in matters related to the case where they intend to act as defence counsel.¹⁹⁰ The test does not apply to conflicts of interest of defence counsel stemming from the concurrent or former representation of another client.

99. The International CIJ finds that at the judicial investigation stage of the proceedings, the reasonable foresight test appropriately addresses the need to ensure the fairness of the proceedings and to prevent conflicts of interest before they arise.¹⁹¹

¹⁸⁴ ECHR, *Editions Plon v. France*, 18 May 2004, no. 58148/00, para. 34. National Courts confirm this approach: see Germany, Federal Constitutional Court, Mephisto Case, BVerfGE 30, 173, 24 February 1971 and Marlene Dietrich Case, BGH 1 ZR 49/97, 1 December 1999, p. 6; France, Cass. Civ. 1ère, 22 October 2009; France, Cass. Civ. 1ère, 1st July 2010, no 09-15.479.

¹⁸⁵ *Prlić* Appeal Decision, Declaration, para. 3

¹⁸⁶ *Prlić* Appeal Decision, para. 25.

¹⁸⁷ *Prlić* Appeal Decision, Declaration, para. 2; *Gotovina* Appeal Decision, para. 23.

¹⁸⁸ See ICTY Code of Conduct, Article 14(D); ICTR, Code of Professional Conduct for Defence Counsel, Article 9(3).

¹⁸⁹ *Hadžiasanović* Decision, paras 53-54.

¹⁹⁰ Article 14(c) of the ICTY Code of Conduct.

¹⁹¹ See ICTY, Appeals Chamber, *Prosecutor v. Gotovina et al.*, IT-06-90-AR73.2, *Decision on Ivan Čermak's Interlocutory Appeal against Trial Chamber's Decision on Conflict of Interest of Attorney Čedo Prodanović and Jadranka Sloković*, 29 June 2007 ("*Gotovina* Appeal Decision"), paras 16, 28. See also *Hadžiasanović* Decision, para. 45.



II. The Alleged Existence of a Factual Nexus between the Allegations against the Suspect and the Indictment against Ieng Sary

a. Roles of the Suspect and Ieng Sary at the times relevant to the Second Introductory Submission

100. The Suspect is alleged to have been Secretary of Division 164 of the Revolutionary Army of Kampuchea (“RAK”) at least between January 1976 and April 1978, and possibly between April 1975 and January 1979.¹⁹² Division 164 allegedly reported to the RAK General Staff, headed by Son Sen,¹⁹³ who was a member of the Standing Committee.¹⁹⁴ In addition, the Suspect is alleged to have been a member of the Central Committee of the Communist Party of Kampuchea (“CPK”), a circumstance confirmed by Khieu Samphan in an interview with the Co-Investigating Judges in Case 002.¹⁹⁵ The Suspect’s political responsibilities allegedly included, *inter alia*, the implementation of the CPK party line throughout the country and instructing zone and sector committees to carry out activities in accordance with the party line.¹⁹⁶

101. According to the Closing Order in Case 002, Ieng Sary was Deputy Prime Minister of Foreign Affairs of DK and a member of the Central Committee of the CPK. He was also a member of the Standing Committee, where he enjoyed “*full rights status*.”¹⁹⁷ The Closing Order in Case 002 characterised the Standing Committee as a body “*comprised of the highest tier of CPK cadre*” where effective power was exercised and the day-to-day affairs of the CPK were conducted.¹⁹⁸ According to the Closing Order, the CPK relied on a system of “*collective leadership*”, based on the principle of “*democratic centralism*”, meaning that at the Committee level decisions were taken collectively, not by single members.¹⁹⁹ Full rights members were entitled to consider, discuss, and join in decision making “*with regard to all matters*.”²⁰⁰ According to expert witness David Chandler in Case 002, minutes of the Standing Committee meetings were certainly distributed to all of its members.²⁰¹

b. Overlap between the cases against the Suspect and Ieng Sary

i. Overlap in the alleged crimes

102. A review of the Second Introductory Submission and the Closing Order in Case 002 shows objective overlap in the allegations against the Suspect and Ieng Sary. The Suspect is alleged to be responsible for the purge of Division 164 cadre and their arrest and transfer to S-21, together with Vietnamese, Thai, and other foreign nationals arrested by the DK Navy. Ieng Sary was indicted, *inter alia*, for the crimes committed at S-21.²⁰² The Suspect is also alleged to be responsible for crimes at the Kampong Chhnang airport and for crimes committed during attacks

¹⁹² *Second Introductory Submission*, para. 82.

¹⁹³ *Closing Order*, para. 124.

¹⁹⁴ *Closing Order*, para. 43.

¹⁹⁵ *Second Introductory Submission*, para. 83; Case File No. 003-D1.3.33.15, *Written Record of Interview with Charged Person (Khieu Samphan)*, p. 11.

¹⁹⁶ *Second Introductory Submission*, para. 83.

¹⁹⁷ *Closing Order*, paras 43, 1001-1004, 1124.

¹⁹⁸ *Closing Order*, para 41.

¹⁹⁹ *Closing Order*, para. 34.

²⁰⁰ *Closing Order*, para. 35.

²⁰¹ Case No. 002-E1/91.1, *Transcript*, 18 July 2012, p. 26.

²⁰² *Second Introductory Submission*, paras 43, 52-62, 86, 89; *Closing Order*, paras 424, 433.



into Vietnam territory carried out by Division 164 in 1977 and 1978. Ieng Sary was indicted for the same crimes.²⁰³

ii. Overlap in the alleged mode of liability: Joint Criminal Enterprise

103. Ieng Sary was alleged to be responsible for these crimes, *inter alia*, through his participation in a joint criminal enterprise. The Suspect, through his membership in the central committee and/or his position as Secretary of Division 164, is also among the alleged members of the joint criminal enterprise identified in the Closing Order in Case 002.²⁰⁴

iii. Prima facie evidence of common involvement in some of the overlapping allegations

104. Documentary evidence examined by the International CIJ suggests that both Ieng Sary and the Suspect were involved, in different capacities, in some of the overlapping allegations listed above.²⁰⁵ For instance, on 12 August 1977, Son Sen²⁰⁶ reported to Ieng Sary²⁰⁷ and other DK leaders, based on information received by “Comrade Mut”, about the arrest of four Thai fishermen.²⁰⁸ According to two newspaper articles, between 4 February and 1 April 1978 Ieng Sary was involved in negotiations to release a number of Thai fishermen which had been captured at sea by DK naval forces.²⁰⁹ On 1 April 1978, the Suspect reported to the DK top leaders, including Ieng Sary, about delays in the release of the “Siamese”.²¹⁰

105. According to another news report, in June 1978 Ieng Sary had knowledge of the imprisonment of Thai fishermen in “*work camps*” and of the killing of Thai peasants by Khmer Rouge forces, and discussed these issues with representatives of the Thai government.²¹¹

106. On 1 April 1978, the Suspect informed the DK leaders, including Ieng Sary, about the capture and killing of 120 Vietnamese.²¹² In June 1978, Ieng Sary reportedly stated that Cambodia had “*ignominiously crushed*” Vietnamese invaders”.²¹³

107. The Co-Lawyers-Designate objected to the reliability of the newspapers articles reporting about Ieng Sary, stating that the lack of a by-line and of other contextual information makes it impossible to test the truthfulness of their content.²¹⁴ However, assessing the existence of possible conflicts of interest, especially at early stages of the proceedings, does not require conclusive proof, but rather a *prima facie* examination of the evidence. Should conclusive proof be required, the prevention of conflict of interests at early stages of the proceedings would not be

²⁰³ *Second Introductory Submission*, paras 47-51, 62, 96-97; *Closing Order*, paras 383-398, 836-840.

²⁰⁴ *Closing Order*, paras 156-159.

²⁰⁵ This is a *prima facie* assessment made solely for the purpose of assessing the existence of a conflict of interest in the Co-Lawyers-Designate’s representation of the Suspect.

²⁰⁶ While the report was made in the name of “Khieu”, the International CIJ is satisfied that Khieu was actually Son Sen. See Case 002-E3/70, *Written Record of Interview of Lonh Dos*, 5 December 2011, p. 7.

²⁰⁷ According to para. 1000 of the Closing Order, during the CPK regime Ieng Sary used the revolutionary alias “Van”.

²⁰⁸ Case 003-D1.3.34.23, *Telegram 18*, 12 August 1977.

²⁰⁹ Case 002-E3/1751, *Newspaper article titled “Thai trade with Cambodia”*, 10 February 1978, p. 4; Case 002-D108/28.222, *Newspaper article titled “Cambodia offer to release Thai fishermen”*, 30 March 1978, p. 6.

²¹⁰ Case 003-D1.3.30.25, *Confidential Telephone Message*, 1 April 1978.

²¹¹ Case 002-E3/1752, *International Media Report*, July 1978.

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ *Co-Lawyers-Designate’s Submissions*, para. 31.



possible. A review of international jurisprudence shows that international judges have, in other cases, found the existence of a conflict of interest based solely on the allegations contained in the indictment.²¹⁵ Based on the dates and contents of the articles, which are consistent with the information relayed by the Suspect to the DK leaders, the International CIJ is satisfied that, on a *prima facie* determination, they are reliable.

108. The evidence also shows a *prima facie* connection between the crimes alleged against the Suspect in Case 003 and the joint criminal enterprise alleged in Case 002. On 9 October 1976, during a meeting of Secretaries and Deputy Secretaries of DK Divisions and Independent Regiments, Son Sen²¹⁶ gave a speech on the importance of defeating enemies of the regime, stating that it is “*imperative to purge absolutely no-good elements*”.²¹⁷ When the Suspect took the floor, he praised activities aimed at uncovering “*traitors within the Party*”, and stated that “*no-good elements or enemies are still camouflaged and infiltrated in the rank-and-file*.” After declaring himself “*in total agreement and unity with the Party*” on the need to handle the enemy presence within the Party ranks, he stated:

“*[d]o whatever needs to be done not to allow the situation to get out of hand [...] and not to let them strengthen or expand themselves in the least.*”²¹⁸

109. On 31 December 1977, in a telegram to “Committee 870” (and copied, *inter alios*, to “Brother Van”, i.e. Ieng Sary) the Suspect confirmed the receipt of the Party’s guiding view on the Vietnamese and vowed to defend the Party and sweep cleanly away and without half measures the uncovered elements of the enemy, “*whether the Yuon or the other enemies*”.²¹⁹

110. Notably, the re-education of “*bad elements*” and killing of “*enemies*”, both inside and outside the CPK ranks, was one of the policies designed and implemented by DK leaders in furtherance of the joint criminal enterprise. This policy was, according to the Closing Order in Case 002, “*primarily carried out by members of the military and security forces (Santebal) of the CPK.*”²²⁰ The Suspect is alleged to be responsible for the crimes alleged in Case 003, *inter alia*, through his participation in a joint criminal enterprise.²²¹ The criminal plan of this alleged joint criminal enterprise was to “*identify members of the Revolutionary Army of Kampuchea (“RAK”) who were perceived to be enemies or traitors and to subject them to arbitrary arrest, unlawful detention, inhumane treatment, and, in many cases, torture and execution.*”²²²

111. There is therefore a *prima facie* connection between the alleged conduct of the Suspect and the joint criminal enterprise identified in the Closing Order in Case 002.

²¹⁵ *Prlić* Pre-Trial Decision, paras 29-30; *Mejakić* Appeal Decision, para. 12; *Prlić* Appeal Decision, paras 23-24; *Delić* Decision, pp. 2-3.

²¹⁶ One of Son Sen’s alias was Brother 89. See Case 001-D99, *Closing Order*, 12 August 2008, para. 2.

²¹⁷ Case No. 003-D1.3.27.20 (public exhibit in Case No. 002-E3/152), *Minutes of Meeting of Secretaries and Deputy Secretaries of DK Divisions and Independent Regiments*, 9 October 1976, ERN 00183987.

²¹⁸ *Ibid.*, ERN 00183990.

²¹⁹ Case File No. 003-D1.3.34.60, *DK Military Telegram from Meas Muth to Committee 870*, 31 December 1977. The language used by the Suspect in this telegram mirrors the language used in the Revolutionary Flag, a propaganda publication used to reflect the CPK policies on a monthly basis; see *Closing Order*, paras 101, 190.

²²⁰ *Closing Order*, paras 156-159, 178, 182.

²²¹ *Second Introductory Submission*, paras 33-41.

²²² *Ibid.*, para. 33.



iv. *Evidence of a superior-subordinate relationship between the Suspect and Ieng Sary*

112. Documentary evidence indicates that, between 1977 and 1978, either directly or through Son Sen, the Suspect reported to DK leaders, including Ieng Sary, about matters at the heart of the allegations against the Suspect, such as the capture and killing of 120 Vietnamese and the arrest of Thai fishermen.²²³ Ieng Sary himself, in an interview with Elizabeth Becker dated 22 July 1981, stated that Son Sen reported to the Standing Committee on security matters, that Son Sen relied on “*regional people*” for these reports, and that he, Ieng Sary, heard reports on security matters.²²⁴

113. According to the Co-Lawyers-Designate, the fact that Ieng Sary was listed amongst the recipients of telegrams sent by the Suspect (or by Son Sen conveying information received by the Suspect) is not proof that Ieng Sary actually received them. While this evidence may not constitute conclusive proof, the International CIJ is satisfied that, on a *prima facie* basis, it shows that the reports examined above were received by Ieng Sary.

114. The International CIJ has also considered an interview given by the Suspect in July 1991, where he stated:

*“If you want to know everything about that time, just go and ask Ieng Sary. Do not ask me or low ranking officials. Ieng Sary was a leader. [...] For me there is no problem with the court. I will say everything: what I know and what I did, the low ranks had to respect the orders.”*²²⁵

115. According to the International Co-Prosecutor, in this interview the Suspect directly assigns responsibility to Ieng Sary and seeks to absolve himself from any responsibility. The International CIJ notes that the text of the interview, extrapolated from its context, is in part ambiguous. It is unclear whether the Suspect is referring to specific crimes for which both are - or were, in the case of Ieng Sary - alleged to be responsible. However, the Suspect does refer to Ieng Sary as a “*leader*”, while he appears to be characterising himself as a “*low ranking official*.” This constitutes an indication, together with the telegrams considered above, of a superior-subordinate relationship between the two. It also provides an indication of a possible defence strategy that the Suspect could decide to pursue in his defence case, should he be charged and indicted for the crimes alleged in the Second Introductory Submission.

v. *Conclusion on the existence of a factual nexus and of a prima facie superior-subordinate relationship between Ieng Sary and the Suspect*

116. Based on the overlaps in the allegations against the Suspect and Ieng Sary, and considering the evidence examined above, the International CIJ finds that there is a close factual nexus between the cases of the Suspect and Ieng Sary.

117. The International CIJ has also considered Ieng Sary’s membership in the Standing Committee, which was at the top of DK’s institutional framework. According to the Closing Order in Case 002, the Standing Committee created policies which included the elimination of

²²³ Case File No. 003-D1.3.30.25, *Confidential Telephone Message*, 1 April 1978; Case 003-D1.3.34.23, *Telegram 18*, 12 August 1977.

²²⁴ Case File No. 003-D4.1.1032 [also in evidence in Case File No. 002 as E3/94], *Interview of Ieng Sary by Elizabeth Becker*, 22 July 1981, p. 3.

²²⁵ Case File No. 003-D1.3.33.16, *Interview of Meas Mut by Christine Chameau*, July 1991, pp. 1-2.



the enemies of the CPK. The evidence indicates that the Suspect pledged to implement this policy. Moreover, the International CIJ has considered that the Suspect, who headed Division 164 of the RAK, sent reports, either directly or through Son Sen, to Ieng Sary, and that in an interview he referred to the former as a “leader”. The International CIJ finds that these elements establish, *prima facie*, the existence of a relatively close superior-subordinate relationship between the Suspect and Ieng Sary.

III. Whether it is reasonably foreseeable that the factual nexus and the *prima facie* superior-subordinate relationship will give rise to conflicts of interest

118. Where a lawyer represents a client in a case that is substantially related to another case in which he or she represented another client, the lawyer must be able to pursue the best interests of the present client in a manner that does not compromise the interests of the former client. In the context of a criminal investigation and a criminal trial, counsel must be able to advise the client of all the options available to him and to pursue zealously and without limitation strategies, defences, investigations, and lines of examination that are in the client’s best interest.²²⁶ Anything less renders ineffective the duty owed by a lawyer to a client. At the same time, the lawyer has an obligation not operate to the detriment of the former client.

119. Considering the conclusions reached above on the existence of a factual nexus and *prima facie* superior-subordinate relationship, the International CIJ will now examine whether it is reasonably foreseeable that conflicts of interest could arise in Case 003. In carrying out this assessment, the International CIJ will consider the stance taken in Case 002 by the Co-Lawyers-Designate in defending Ieng Sary, where they sought to distance their client from the “Party Centre” and to show that he was not involved in the crimes committed at S-21.²²⁷ The possible mitigating effect of superior orders and duress,²²⁸ as well as of cooperation with the prosecution and the judicial authority,²²⁹ will also be taken into account in this assessment.

a. Co-Lawyers-Designate’s ability to pursue all possible investigative avenues and defence strategies

120. In the context of international crimes, it is not uncommon for persons suspected or accused of crimes to deflect blame to a superior in an attempt to exclude their own responsibility. In addition, pleading duress and/or superior orders may have the effect of mitigating possible

²²⁶ See *Mejakić* Appeal Decision, para. 15.

²²⁷ Case File No. 002-E1/61.1, *Transcript*, 9 April 2012, pp. 98-119; Case File No. 002-E1/95.1, *Transcript*, 24 July 2012, pp. 63-67.

²²⁸ *Duch Trial Judgment*, paras 607-608. This consideration was later confirmed in Case 001, Supreme Court Chamber, *Prosecutor v. Kaing Guek Eav alias Duch* (“Duch Appeal Judgment”), 3 February 2012, para. 360. See also ICTY, Trial Chamber, *Prosecutor v. Erdemović*, *Sentencing Judgment*, 5 March 1998, para. 17; ICTY, Trial Chamber, *Prosecutor v. Krstić*, *Judgment*, 2 August 2001, para. 714; ICTY, Trial Chamber, *Prosecutor v. Todorović*, *Sentencing Judgment*, 31 July 2001, paras 111-112; ICTY, Appeals Chamber, *Prosecutor v. Jelisić*, *Judgment*, 5 July 2001, para. 101; ICTR, Trial Chamber, *Prosecutor v. Rutaganira*, *Judgment*, 14 March 2005, para. 161. See also ICC Statute, article 33; ICTY Statute, article 7(4); ICTR Statute, article 6(4); SCSL Statute, article 6(4); STL Statute, article 3(3).

²²⁹ *Duch Trial Judgment*, para. 609; *Duch Appeal Judgment*, para. 366; ICC, Rules of Procedure and Evidence, Rule 145(2)(a)(ii); ICTY Rules of Procedure and Evidence, Rule 101(B)(ii); ICTR Rules of Procedure and Evidence, Rule 101(B)(ii); and SCSL Rules of Procedure and Evidence, Rule 101(B)(ii). See also ICTY, Appeals Chamber, *Prosecutor v. Galić*, *Judgment*, 30 November 2006, para. 434; ICTY, Trial Chamber, *Prosecutor v. Blaškić*, *Judgment*, 3 March 2000, para. 774.



punishment. The tangible benefits of utilizing such strategies are quite significant, particularly in the context of sentencing, and are well recognized by international criminal tribunals.²³⁰

121. Considering the close factual nexus between the allegations against the Suspect and Ieng Sary, the relatively close *prima facie* superior-subordinate relationship between them, and Ieng Sary's high ranking position in the CPK, it is reasonably foreseeable that the Suspect could avail himself to a defence strategy aimed at shifting the blame upwards and that in so doing he could implicate Ieng Sary in the crimes alleged in Case 003. The Suspect could also decide to challenge the ECCC's jurisdiction, which is limited to the "senior leaders of DK" and "those who were most responsible" for the crimes committed between 17 April 1975 and 6 January 1979, by attempting to minimise the level of his contribution in the alleged crimes and augment the responsibility of the members of the Standing Committee, of which Ieng Sary was a member.²³¹ The Suspect's July 1991 interview, discussed above, provides an indication that he could decide to adopt these lines of defence.

122. However, pursuing a defence strategy implicating Ieng Sary in the crimes alleged against the Suspect would create a conflict of interest for the Co-Lawyers-Designate, who are bound by a duty of loyalty to their former client.²³²

123. This conflict of interest could have several implications at different stages of the proceedings against the Suspect. At the investigative stage, it could limit the Co-Lawyers-Designate's ability to request the Co-Investigating Judges to interview witnesses or pursue specific avenues of investigation that could implicate the higher echelon of DK in the crimes alleged in Case 003. This is particularly problematic in the context of the ECCC, where failing to obtain certain evidence during the investigation may prejudice a party's right to have that evidence admitted at trial.²³³ Further, should the Co-Investigating Judges decide to organise a confrontation, the Co-Lawyers-Designate could be limited in their ability to suggest questions that might implicate their former client. Likewise, should the Suspect be indicted and sent to trial, the Co-Lawyers-Designate's duty of loyalty to Ieng Sary may limit their ability to consider, recommend, or carry out certain defence strategies, including calling certain witnesses and pursuing specific lines of examination.²³⁴

b. Cooperation with the ECCC

124. In addition to duress and superior orders, cooperation with the ECCC may also constitute a mitigating factor. The provision or clarification of information unknown to the prosecutor,²³⁵

²³⁰ See *supra* n. 228.

²³¹ Article 1, ECCC Law.

²³² See *Gotovina* Appeal Decision, paras 27-28.

²³³ Internal Rule 55(10) allows the parties to request the Co-Investigating Judges to undertake investigative action that they consider useful for the conduct of the investigation. Pursuant to Rule 87(4), at the trial stage of the proceedings an accused can make requests to admit new evidence, but it must satisfy the Trial Chamber that the evidence was not available at the investigative phase of the proceedings.

²³⁴ These factors were considered by the ICTY Appeals Chamber in assessing whether a conflict of interest was likely to irreversibly prejudice the administration of justice. See *Mejakić* Appeal Decision, para. 15; *Gotovina* Appeal Decision, paras 27-28; *Prlić* Pre-Trial Decision, para. 15.

²³⁵ ICTR, Trial Chamber, *Prosecutor v. Serugendo, Judgement*, 12 June 2006, paras 61-62. See also *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-S, Sentencing Judgment (TC), 18 December 2003, para. 253, (in which the accused provided "detailed and extensive information about crimes and perpetrators in his municipality, as well as their relationship to leadership figures and objectives); *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-S, Sentencing Judgment (TC), 30 March 2004, paras 242-260, (in which the accused provided unique and



admitting facts,²³⁶ helping to organise operations leading to the arrest of other suspects,²³⁷ pleading guilty,²³⁸ and agreeing to testify in other proceedings have been considered to constitute cooperation.²³⁹

125. The Co-Lawyers-Designate submitted that, “*as indicated by their waivers, neither client possesses any knowledge that could impact on the other.*”²⁴⁰ However, the Suspect’s waiver does not specifically address his knowledge of Ieng Sary’s role and conduct.²⁴¹ The International CIJ is also in receipt of a notice from the Suspect of his decision to exercise his right to remain silent in both Cases 002 and 003.²⁴² This choice is fully within the Suspect’s rights. However, persons who initially do not wish to cooperate with judicial authorities may later decide to do so. Similarly, a lawyer’s advice to his client may change, for instance, on the basis of previously unavailable evidence. This is especially true at the early stages of the proceedings. As observed by the USSC, cited with approval by the ICTY Appeals Chamber in the *Gotovina* Appeal Decision:

“The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials. It is a rare attorney who will be fortunate enough to learn the entire truth from his own client, much less be fully apprised before trial of what each of the [...] witnesses will say on the stand. A few bits of unforeseen testimony or a single previously unknown or unnoticed document may significantly shift the relationship between multiple defendants. These imponderables are difficult enough for a lawyer to assess, and even more difficult to convey by way of explanation to a criminal defendant untutored in the niceties of legal ethics.”²⁴³

126. The Co-Lawyers-Designate are under an obligation to advise the Suspect on all the available options, including his truthful and thorough cooperation in Cases 002 and 003.²⁴⁴ This

corroborative information to the Prosecution on previously unknown crimes and perpetrators, along with original documentation relating to war commissions); *Prosecutor v. Erdemovic*, Case No. IT-96-22-T, Sentencing Judgment, 29 November 1998, p. 17. (in which the accused provided the Prosecution with new information on perpetrators and crimes, identified commanders and fellow executioners, proffered information on the military structure leading to the issuance of arrest warrants); *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, Sentencing Judgment, 2 April 2007, pp. 18-36 (in which the accused provided information on crimes not contained in the indictment and elaborated on their discriminatory intent); *Prosecutor v. Obrenović*, Case No. IT-02-60/2-S, Sentencing Judgment, 10 December 2003, pp. 37-39 (in which the accused provided information on the inner workings of the leadership, allowed investigators to conduct a search of brigade property despite the risk of their finding incriminatory evidence, made weapons available to the investigators for testing, and met numerous times with the Prosecution).

²³⁶ ICTR, Trial Chamber, *Prosecutor v. Musema*, *Judgement and Sentence*, 27 January 2000, para. 1007.

²³⁷ ICTR, Trial Chamber, *Prosecutor v. Serushago*, *Sentence*, 5 February 1999, para. 32.

²³⁸ ICTR, Trial Chamber, *Prosecutor v. Rugambarara*, Sentencing Judgment 16 Nov 2007, para. 30 (“A guilty plea may have a mitigating effect on the sentence by: the showing of remorse, repentance, the contribution to reconciliation, the establishment of the truth, the encouragement of other perpetrators to come forward, the sparing of a lengthy investigation and a trial and thus time, effort and resources, and the fact that witnesses are relieved from giving evidence in court.”) See also ICTR, Trial Chamber, *Prosecutor v. Serugendo*, Sentencing Judgment, 12 June 2006, paras 32, 34, 52, 55, 57; ICTR, Trial Chamber, *Prosecutor v. Nzabirinda*, Sentencing Judgment, 23 February 2007, para. 65; ICTR, Trial Chamber, *Prosecutor v. Bisengimana*, Sentencing Judgment, 13 April 2006, para. 126.

²³⁹ ICTR, Trial Chamber, *Prosecutor v. Serushago*, *Sentence*, 5 February 1999, para. 33; ICTY, Trial Chamber, *Prosecutor v. Todorović*, *Sentencing Judgment*, 31 July 2001, para. 84.

²⁴⁰ Case No. 003-D56/4/1, *Leave to Exceed Page Limitations & Submissions of the Co-Lawyers on Potential Conflict of Interest in Representation of Mr. Meas Muth in Case 003*, 4 March 2013, para 35.

²⁴¹ Case File No. 003-D56/4/1.2, *Meas Muth’s Notice of Intent to Exercise Right to Remain Silent and Waiver of any Potential Conflict of Interest*, 13 June 2012.

²⁴² *Ibid.*

²⁴³ See *Gotovina* Appeal Decision, para. 33, n. 98. See also *Prlić* Pre-Trial Decision, para. 29.

²⁴⁴ See *Mejakić* Appeal Decision, para. 13.



cooperation, however, may reasonably be expected to include discussing the role of Ieng Sary within the Standing Committee and in relation to the crimes alleged in Case 003. Similarly, should the Suspect be called to testify in Case 002/2,²⁴⁵ and should he conclude that it is in his best interest to testify, it is reasonably foreseeable that he will be asked questions on the role of Ieng Sary, who, albeit no longer an accused, is still named in the Closing Order in Case 002 as a member of a joint criminal enterprise with the Accused Khieu Samphan and Nuon Chea.²⁴⁶ Notably, some of the crimes which may form part of Case 002/2 overlap with the crimes alleged against the Suspect in Case 003.²⁴⁷

127. Should circumstances arise where it would be in the interest of the Suspect to waive his right to remain silent and cooperate with the judicial authorities, the Co-Lawyers-Designate's duty of loyalty to Ieng Sary could limit their ability to provide the Suspect with advice that would foster his best interests. It is such a result that representation by non-conflicted counsel would avoid.

c. Co-Lawyers-Designate's duty of confidentiality to Ieng Sary

128. The International Co-Prosecutor argues that conflicts of interest could also arise in relation to confidential information that Ieng Sary may have provided to the Co-Lawyers-Designate, which might be useful to the Suspect but adverse to Ieng Sary's interests. According to the Trial Chamber in the *Hadžihasanović* case, the party seeking disqualification of counsel bears the burden to prove the existence of a conflict of interest.²⁴⁸ In the *Jean-Pierre Bemba Gombo* case, Trial Chamber III of the International Criminal Court required "proof" that counsel was in possession of confidential information which could give rise to a conflict of interest.²⁴⁹ In the case at hand, the International Co-Prosecutor has not offered proof that the Co-Lawyers-Designate are in possession of information, provided confidentially by Ieng Sary, which could be material to the Suspect's defence.

d. Conclusion on the existence of conflicts of interest

129. The factual nexus between the cases against the Suspect and Ieng Sary, including the *prima facie* superior-subordinate relationship between the two, renders their interests materially adverse. Because of the Co-Lawyers-Designate's duty of loyalty to Ieng Sary, it is reasonably foreseeable that they could be in a position wherein they would be unable to advise the Suspect on, and to pursue, defence strategies that, while possibly beneficial to him, may be detrimental to Ieng Sary. Consequently, it is reasonably foreseeable that they may be "*compelled to*

²⁴⁵ On 25 November 2013, the Supreme Court Chamber ordered that the evidentiary hearings in Case 002/2 commence as soon as possible after closing submissions in Case 002/1, see Case No. 002-E284/4/8, *Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002*, 25 November 2013, para. 76.

²⁴⁶ One of the elements of the doctrine of joint criminal enterprise is the existence of a "plurality of persons" who acted in furtherance of the common plan. For this reason, Ieng Sary's conduct will still be relevant in Case 002/2.

²⁴⁷ See Case No. 002-E284, *Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013*, 26 April 2013, pp. 71-74 and Second Introductory Submission, pp. 14-21. See also *Mejakić* Appeal Decision, para. 13.

²⁴⁸ ICTY, Trial Chamber, *Prosecutor v. Hadžihasanović et al.*, IT-01-47-PT, *Decision on Prosecution's Motion for Review of the Decision of the Registrar to Assign Mr. Rodney Dixon as Co-Counsel for the Accused Kubura*, 26 March 2002 ("*Hadžihasanović* Decision"), para. 53.

²⁴⁹ ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, *Decision on the Prosecution's Request to Invalidate the Appointment of Legal Consultant to the Defence Team*, 7 May 2010, Case no. ICC-01/05-01/08, para. 45.



*compromise [their] duty of loyalty or zealous advocacy to [the Suspect] by choosing between or blending the divergent or competing interests of a former or current client.*²⁵⁰

130. To conclude, the International CIJ finds that, should the appointment of the Co-Lawyers-Designate be confirmed, it is reasonably foreseeable that several conflicts of interest could arise in their representation of the Suspect.

IV. Whether the conflicts can be waived

131. Both the Suspect and Ieng Sary have filed written waivers waiving any potential conflict of interest that might exist as a result of being represented by the Co-Lawyers Designate.²⁵¹

132. The International CIJ has a duty to ensure that the rights of suspects to be effectively assisted by counsel and the integrity of proceedings are not endangered. If it is determined that the risks stemming from an actual or potential conflict are such as to jeopardize the right of a suspect or charged person to a fair and expeditious judicial investigation or trial,²⁵² or jeopardize the proper administration of justice, the International CIJ may take preventative measures, including ordering the withdrawal of counsel or refusing to confirm his or her appointment, even in the presence of a waiver of the conflict of interest. In other words, the implications of certain conflicts may be such that they cannot be waived by the affected clients.²⁵³

133. The case against the Suspect is quite complex as was the case against Ieng Sary. The crimes described in the Second Introductory Submission are alleged to have been committed over a period of almost three years, in the context of two contemporaneous international armed conflicts, at a number of different crime sites, and to have involved thousands of victims.²⁵⁴ The Second Introductory Submission also contains allegations concerning the functioning of the RAK and its links with DK's central governing organs.²⁵⁵ Finally, the Suspect is alleged to be criminally responsible through seven different modes of liability.²⁵⁶

134. During the course of judicial proceedings, should the Suspect consider that the Co-Lawyers-Designate are not in a position to advise him on, and pursue, lines of defence which he considers to be beneficial to him, such circumstances being exceptional, he could withdraw his waiver and he would be entitled to change Co-Lawyers.²⁵⁷ It is not uncommon that an

²⁵⁰ *Gotovina* Appeal Decision, para. 45.

²⁵¹ Case File No. 003-D56/4/1.2, *Meas Muth's Notice of Intent to Exercise Right to Remain Silent and Waiver of any Potential Conflict of Interest*, 13 June 2012.

²⁵² See Article 14 of the International Covenant on Civil and Political Rights of 1966 which is applicable at the ECCC pursuant to Article 13 of the ECCC Agreement

²⁵³ *Prlić* Appeal Decision, paras 16, 27; *Prlić* Appeal Decision, Declaration, para. 3; *Mejakić* Appeal Decision, paras 8, 14-15; *Gotovina* Appeal Decision, paras 16, 35, 55. See also Article 7.4 of DSS Administrative Regulation.

²⁵⁴ *Second Introductory Submission*, paras 28-32, 42-66.

²⁵⁵ *Second Introductory Submission*, paras 12-17.

²⁵⁶ These modes are: planning, instigating, ordering, aiding and abetting, committing (either individually or through his participation in a joint criminal enterprise). Further, the Suspect is alleged to be responsible as superior of the subordinates who committed them (command responsibility). See *Second Introductory Submission*, paras 96-98.

²⁵⁷ Article 7.2 of the DSS Administrative Regulations provides that a suspect, charged person, or accused may be permitted to change Co-Lawyers in exceptional circumstances. According to ICTY jurisprudence, a client can withdraw a waiver at any point in time. See *Prosecutor v. Prlić et al.*, IT-04-74-PT, *Decision on Request for Appointment of Counsel*, 30 July 2004, para. 20. The possibility for a client to withdraw consent and terminate the lawyer's representation is also acknowledged in paragraph 20 of the Commentary to Rule 1.7 of the Model Rules of Professional Conduct of the American Bar Association.



individual's assessment of what is in his best interests can and will change markedly depending on the evidence that emerges during the course of judicial proceedings. Likewise, the Co-Lawyers-Designate may move to withdraw from their representation of the Suspect during the judicial investigation or in the course of any future trial. This could happen if the Co-Lawyers-Designate find themselves in the position of being unable to provide advice to the Suspect without violating their concomitant duty of loyalty to Ieng Sary, or if they are unable to pursue possible defence strategies that would be exclusively in the Suspect's best interests.²⁵⁸

135. The preservation of expeditious proceedings and the interests of victims and witnesses have been considered to be relevant factors in determining whether a conflict of interest can be waived.²⁵⁹ In a case of such complexity and magnitude, the Suspect's withdrawal of his waiver to be represented by the Co-Lawyers Designate, or the withdrawal of counsel at a late stage of the judicial investigation, or during any future trial, would significantly extend the duration of the proceedings. Time would be needed for the selection and appointment of new Co-Lawyers who, in turn, would need time to become familiar with the case file or the trial record and to consult with the Suspect in order to develop a defence strategy. In such circumstances, the prejudice to the Suspect, to the victims and witnesses, and to the administration of justice would be consequential.

136. Based on the foregoing, the International CIJ finds that the Co-Lawyers-Designate have an irreconcilable conflict of interest in the representation of the Suspect which cannot be cured by the client's consent to representation.

V. Validity of the waivers submitted by the Co-Lawyers-Designate

137. Having found that the conflict of interest is an irreconcilable one, it is not necessary to examine whether the Suspect and Ieng Sary's waivers are valid. However, considering the lack of applicable rules or jurisprudence at the ECCC on the requirements of a valid waiver, the International CIJ finds it in the interest of justice to briefly address the issue.

138. Consent to representation provided by a potentially affected client should generally be regarded as fully informed in the absence of indications to the contrary. However, this principle must be balanced with the International CIJ's duty to ensure the fairness and integrity of the proceedings. The International CIJ must be satisfied that the Suspect and Ieng Sary were aware of all possible implications that concurrent (or subsequent) representation by the Co-Lawyers-Designate could entail.²⁶⁰

139. The waivers provided by the Co-Lawyers-Designate are insufficiently detailed to satisfy the International ICJ that all possible implications of the conflict have been thoroughly discussed with the clients, and that therefore their consent is, or was in the case of Ieng Sary, informed.

140. In this regard, the International CIJ disagrees with the Co-Lawyers-Designate's argument that, in order for the waivers to be more detailed, the Suspect would have to reveal defence strategies or otherwise reveal information which would be prejudicial to him. Recording in the waiver the limitations that a conflict of interest could have on certain defence strategies

²⁵⁸ The possible withdrawal of counsel and consequent delay in the proceedings was one of the factors considered by the ICTY Appeals Chamber in finding that a conflict could irreversibly prejudice the administration of justice, *see Mejakić* Appeal Decision, para. 15.

²⁵⁹ *Hadžihasanović* Decision, paras 44-45; *Mejakić* Appeal Decision, paras 7, 15; *Prlić* Pre-Trial Decision, para. 15.

²⁶⁰ *Prlić* Appeal Decision, para. 27; *Gotovina* Appeal Decision, paras 32-33.



does not imply revealing what defence strategies the client will in fact decide to adopt. This is supported by international case law which required waivers to contain a discussion of all possible implications and limitations that the conflicts of interest could have on the Suspect's defence strategies.²⁶¹

141. In cases where conflicts of interest can be waived, the level of detail of waivers may have important implications. In the presence of an insufficiently detailed waiver, a convicted person could claim that he or she did not fully understand all the implications of the waived conflict and appeal his or her conviction on the basis of ineffective assistance of counsel.²⁶²

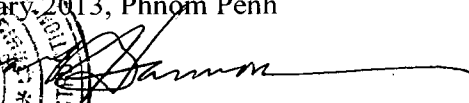
F. CONCLUSION

142. Based on the close factual nexus that exists between the cases against the Suspect and Ieng Sary, the International CIJ has found that the matter in which the Co-Lawyers-Designate represent the Suspect is substantially related to the matter in which they represented Ieng Sary. There are also indications of a relatively close superior-subordinate relationship between the two. Even after Ieng Sary's death, the Co-Lawyers-Designate still have a duty of loyalty toward him, which includes safeguarding his dignity and reputation. Because of this duty, it is reasonably foreseeable that conflicts of interest could arise and that the Co-Lawyers-Designate may not be in a position to advise the Suspect on, and to pursue, lines of defence which, while possibly beneficial to the Suspect, could implicate Ieng Sary in the crimes alleged in Case 003. The implications of the conflicts of interest which could foreseeably arise in Case 003 are such that they could seriously prejudice both the Suspect's right to a fair trial and the administration of justice. For these reasons, the International CIJ finds that these conflicts are irreconcilable and cannot be waived.

FOR THE FOREGOING REASONS, I, MARK B. HARMON, HEREBY:

143. **FIND** the Request for Rejection to be admissible;
144. **GRANT** leave to exceed the page limit and to file in English with the Khmer version to follow;
145. **GRANT** the Request for Rejection;
146. **REQUEST** DSS to take the necessary steps to assign new Co-Lawyers to the Suspect as soon as practicable.

Dated: 10 January 2013, Phnom Penh



Judge Mark B. Harmon
 តេចនិកស្រីបេអ៊ែបអន្តរជាតិ
 International Co-Investigating Judge

²⁶¹ *Ibid.*

²⁶² The need for assistance of counsel to be "effective" has been affirmed by the European Court of Human Rights in *Arctico v. Italy*, Application no. 6694/74, 13 May 1980, para. 33. See also *Poitrimol v. France*, Application no. 14032/88, 23 November 1993, paras 34, 38. According to the ICTY Trial Chamber, ineffective assistance of counsel which caused a miscarriage of justice can constitute a ground of appeal against conviction, see *Prosecutor v. Krajišnik*, IT-00-39-A, Appeal Judgement, 17 March 2009, para. 42.