

**BEFORE THE CO-INVESTIGATING JUDGES
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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INTERNATIONAL CO-PROSECUTOR'S REQUEST THAT APPOINTMENT OF CO-LAWYERS-DESIGNATE BE REJECTED ON THE BASIS OF IRRECONCILABLE CONFLICTS OF INTEREST

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Suspect
MEAS Mut

Co-Lawyers-Designate for Suspect
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I. INTRODUCTION

1. The International Co-Prosecutor requests the Co-Investigating Judges to reject the appointment of Mr Ang Udom and Mr Michael Karnavas as Co-Lawyers for Suspect Meas Mut (“the Suspect”). Their concurrent representation of Accused Ieng Sary (“the Accused”) in Case 002 generates numerous, serious and irreconcilable conflicts of interest that would irreversibly prejudice the administration of justice before the ECCC. International rules establish that conflicts of this scope and gravity cannot be resolved by means of consent or waiver by either or both the Accused and the Suspect, and that representation of both is not only ill-advised, but impermissible.

II. PROCEDURAL HISTORY

2. On 14 December 2012, the Public Affairs Section of the ECCC issued a press statement (“Statement”) informing the public that the Defence Support Section (“DSS”) had assigned Mr. Ang Udom and Mr. Michael Karnavas (“Co-Lawyers-Designate”) as defence counsel for a Suspect in Case 003.¹ The Co-Lawyers-Designate currently represent Accused Ieng Sary in proceedings before the Trial Chamber (“Chamber”) in Case 002.
3. The Statement indicated that “this is the first time in the history of the ECCC that the DSS has assigned any lawyer to represent multiple suspects or accused persons *simultaneously*”,² and that the DSS had taken into consideration “all the applicable conflict waivers.”³
4. On 17 December 2012, based on an internal assessment of perceived conflict of interest, the International Co-Prosecutor requested that the Co-Investigating Judges suspend their consideration of any order confirming the appointment of the Co-Lawyers-Designate for a period of seven (7) calendar days (“Request for Suspension”), pending submission of detailed factual and legal considerations,⁴ including confidential information concerning the identity of a Trial Chamber witness which the International Co-Prosecutor could not disclose without prior authorisation.⁵ This submission was proposed as strictly confidential, with a filing instruction to copy both the Co-Lawyers-Designate and the Head of the DSS.
5. On 19 December 2012, the International Co-Prosecutor requested the Chamber to authorise the Co-Prosecutors to disclose the identity of TCW-425 (Meas Mut) to the Co-Investigating Judges, subject to such classification of information as may be ordered by the Co-

¹ Press Release, “Mr. Ang Udom and Mr. Michael G. Karnavas assigned as Defence Counsel to Represent a Suspect in Case 003”, 14 December 2012.

² *Ibid.* [emphasis added].

³ *Ibid.*

⁴ ‘International Co-Prosecutor’s Urgent Request to Suspend Consideration of any Order Confirming Appointment of Co-Lawyers-Designate’, 17 December 2012.

⁵ *Ibid.*

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Investigating Judges.⁶ While the identity of the Suspect is well known publically,⁷ it remains subject to a confidential classification by the Co-Investigating Judges and a duty of confidentiality binding upon the Co-Prosecutors.⁸

6. On 20 December 2012, the Chamber determined that it would be in the interests of justice to disclose the identity of TCW-425 (Meas Mut) to the Co-Investigating Judges, and authorised the International Co-Prosecutor to further disclose that the Chamber intends to summon Meas Mut to testify in proceedings in Case 002/01 in due course.⁹
7. In view of the short timeframes, the revision of the Khmer version of this Request could not be completed in advance of filing. Given the urgency and significance of the legal issues involved, both for Cases 002 and 003, the International Co-Prosecutor respectfully requests the Co-Investigating Judges to condone filing in English only, with the Khmer version to follow as soon as possible, in accordance with Article 7.2 of the Practice Direction on the Filing of Documents.

III. THE REQUEST IS ADMISSIBLE

8. The International Co-Prosecutor submits that the present Request is admissible before the Co-Investigating Judges either as an *appeal* under Internal Rule (“Rule”) 11(6); or, in the alternative, as a *self-standing request* concerning the exercise of the jurisdiction of the Co-Investigating Judges to admit and remove lawyers before the ECCC under Article 21(1) of the UN/RGC Agreement, read together with Articles 6.2 and 7.4 of the DSS Administrative Regulations.
9. Rule 11(6) provides:

*The Head of the Defence Support Section shall make determinations on [...] the assignment of lawyers to indigent persons [...] subject to appeal to the Co-Investigating Judges or the Chamber before which the person is appearing at the time , within fifteen (15) days of receiving notification of the decision. No further appeal shall be allowed.*¹⁰

⁶ **CF002-E236/2/4** Co-Prosecutor’s Urgent Request to Disclose the Identity of TCW-425 to the Co-Investigating Judges, 19 December 2012.

⁷ The identity of Meas Mut was disclosed by both Meas Sophor, speaking on his father’s behalf, (‘KR Navy commander Meas Muth Requests Tribunal Lawyer’, *Cambodia Daily*, Wednesday August 15 2012, ERN 00871795-00871795 and Mr Ang Udom (‘Meas Muth requests counsel’, *Phnom Penh Post*, Thursday August 16 2012, ERN 00871796-00871796.

⁸ Practice Direction 004/2009, Classification and Management of Case-Related Information, 5 June 2009, Article 8.

⁹ **CF002-E236/2/4/1** Memorandum to the Office of Co-Prosecutors, “Request to disclose identity of witness”, 20 December 2012; see also **CF002-E236/2** Memorandum to the Parties, “Announcement of Upcoming Witnesses”, 26 November 2012: “In addition to those witnesses previously scheduled to testify as to military structures (E223), the Chamber will summon TCW-425 (E172) in due course.”

¹⁰ Internal Rule 11(6) [emphasis added].

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10. The Co-Prosecutors were notified of the Assignment Decision on 14 December 2012 and file the present Request within nine (9) calendar days,¹¹ thus within the period of fifteen (15) days prescribed by Rule 11(6).
11. Nothing in Rule 11(6) limits the right of appeal to the indigent person or, presumably, a lawyer on the UNAKRT list whose rights or legal interests are affected by the determination of the Head of the DSS. The Co-Prosecutors' duties as trustees of the public action before the ECCC¹² and judicial officers by virtue of Cambodian law¹³ confer the necessary standing to make submissions to the judicial chambers of the ECCC on all matters fundamental to the good administration of justice. The standing conferred upon the Co-Prosecutors in the investigative phase of proceedings is also demonstrated by their plenary right of appeal against all orders of the Co-Investigating Judges,¹⁴ in contrast to the appeal rights of Suspects, Charged Persons and Civil Parties.¹⁵
12. The International Co-Prosecutor further submits that this Request concerns the exercise of the jurisdiction – and judicial discretion – of the Co-Investigating Judges to admit, or to decline to admit, any lawyer who wishes to appear before them, pursuant to Article 21(1) of the UN/RGC Agreement which provides in the relevant part: “The counsel of a suspect or an accused *who has been admitted as such by the Extraordinary Chambers...*”¹⁶
13. Pursuant to Internal Rules 11(2)(d), 11(2)(i) and 22(1)(b), read with Articles 5-6 of the DSS Administrative Regulations, the DSS is responsible for the initial “selection”¹⁷ and “engagement/assignment”¹⁸ of Co-Lawyers from their list of lawyers qualified to represent indigent persons.¹⁹ Any such “engagement/assignment” of Co-Lawyers remains provisional pending *both* an “assessment of means”²⁰ *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 the Agreement.”²¹
14. Moreover, Article 7.4 of the DSS Administrative Regulations, titled “Removal of Lawyers”, provides that: “The ECCC may determine that a Co-Lawyer is no longer eligible to defend a

¹¹ Practice Direction ECCC/2007/1/Rev.8, Filing of documents before the ECCC, 7 March 2012, Article 8.5.

¹² UN/RGC Agreement, Article 6; ECCC Law, Article 16; Internal Rule 49.

¹³ Internal Rule 18(3)(a).

¹⁴ Internal Rule 74(2).

¹⁵ Internal Rules 74(3) and 73(4).

¹⁶ UN/RGC Agreement, Article 21(1) of [emphasis added].

¹⁷ DSS Administrative Regulations, Art. 5.

¹⁸ *Ibid.*, Art. 6.

¹⁹ *Ibid.*, Art. 1.2(a).

²⁰ *Ibid.*, Art. 6.2(a).

²¹ *Ibid.*, Art. 6.2(b) [emphasis added].

suspect, charged person or accused before the ECCC.” The Co-Prosecutors thus submit that the Co-Investigating Judges may properly consider this Request in the exercise of their judicial discretion to determine the eligibility of the Co-Lawyers to defend the Suspect, both at the time of initial appointment and in the event of conflicts of interest requiring the removal of counsel.

IV. THE RIGHT TO BE HEARD

15. The International Co-Prosecutor respectfully submits that principles of natural justice would require the Co-Investigating Judges to afford a right to be heard to the Co-Lawyers-Designate concerning the substance of the Request in their personal capacities, as individuals not party to the proceedings in Case 003 whose interests may be materially affected by the disposition of the Request. The Suspect also has a right to be heard.

V. APPLICABLE LAW: CONFLICTS OF INTEREST AND WAIVERS

a. The ECCC framework obligates Co-Lawyers to avoid conflicts of interest

16. The Internal Rules themselves are silent on the issues of conflict of interest and waiver in the representation of Suspects, Charged Persons and Accused.²² The DSS Administrative Regulations, subordinate to Internal Rule 22(4), regulate the professional duty of care of Co-Lawyers and their obligation to “exercise all care to ensure that no conflict of interest arises.”²³ Consistent with this obligation, in the event a conflict does arise, Co-Lawyers are required to immediately “inform all potentially affected clients”²⁴ and either withdraw representation or “seek the full and informed consent of all potentially affected clients to continue representation.”²⁵

b. The BAKC Code provides guidance limited to representation of multiple parties in the same case or process

17. Co-Lawyers, national and international alike, are bound by the Code of Ethics of the Bar Association of the Kingdom of Cambodia,²⁶ which provides:

If the lawyer is retained by multiple clients for the same case or process, the lawyer is prohibited from favouring the interests of any one of them. The lawyer informs the parties of the situation. The lawyer may not advise, assist, represent, or defend multiple parties if a conflict of interest arises between them. If such a conflict arises while the lawyer is or was counsel to multiple parties, the lawyer may not represent the interests of one of the parties until after he or she has advised the others while

²² Compare Internal Rule 23ter(3)(c) relevant to representation of Civil Parties.

²³ DSS Administrative Regulations, Art. 9.2.

²⁴ *Ibid.*, Art. 9.3.

²⁵ *Ibid.*

²⁶ Internal Rule 22(4).

*remaining under the strict obligation to compromise neither tact nor professional confidences.*²⁷

The BAKC Code is silent on the scope and modalities of waiver once parties have been “advised” of a conflict of interest, and neither commentary nor jurisprudence is available to illustrate, in practice, the scope of the obligation to uphold “tact” and “professional confidences.”

c. French law does not allow written consent as a valid basis for dual representation where certain forms of conflict of interest are foreseeable

18. In the French system, from which Cambodian procedural law is derived, the relevant provisions of the National Code of Professional Conduct for Lawyers (“National Code”) reflect a 2011 Decree regulating ethical standards in the legal profession, and provide that, unless there is a written agreement from the parties, counsel must refrain from involvement in the affairs of all affected clients where: (1) there is a conflict of interest; (2) when secrecy may be breached; (3) when counsel’s independence may be impaired.²⁸ Furthermore, counsel cannot represent a new client if confidential information provided by a former client may be violated or when the lawyer's knowledge of the affairs of the former client promotes the interests of the new client.²⁹
19. The National Code defines “conflict of interest” as arising: (1) when a lawyer obliged to provide a complete and fair information cannot fulfil this mission without compromising the interests of one or more parties; or (2) if the *defence* of several parties by the same lawyer *would lead that lawyer to adopt different strategies to those he would otherwise adopt if representing only one accused.*³⁰ There will be a “serious risk” of conflict of interest when a lawyer fears that either of these situations is foreseeable.³¹ Ruling on a conflict of interest arising when a lawyer who previously represented a couple in an abandoned joint divorce application subsequently acted for one spouse in a fault-based divorce claim against the other, the *Cour de Cassation* confirmed that there would be an impermissible conflict of interest even if the former client was aware of the conflict and signed a written agreement.³²

²⁷ Code of Ethics For Lawyers Licensed with The Bar Association of the Kingdom of Cambodia,, Article 19.

²⁸ Décret n°2005-790 du 12 juillet 2005 relatif aux règles de déontologie de la profession d'avocat, version updated on 30th December 2011, Article 7; Article 4.1 of the National Code of Professional Conduct for Lawyers incorporates the exact same content.

²⁹ *Ibid.*

³⁰ Article 4.2 of the National code of Professional Conduct for Lawyers adds the definition of conflict of interest. [emphasis added]

³¹ *Ibid.*

³² Cour de Cassation, Chambre Civile 1, Pourvoi no. 91-1554820, Janvier 1993, Bulletin 1993 I N° 22 p. 14.
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d. Guidance may properly be sought from international procedural rules

20. The purpose of the Internal Rules is to “consolidate applicable Cambodian procedure, supplemented by international standards where necessary and appropriate.”³³ The Internal Rules are silent on the issue of conflict of interest arising in the representation of Suspects, Charged Persons or Accused. Accordingly, the Co-Prosecutors submit that guidance should be sought from procedural rules established at the international level, particularly in the Rules of Procedure and Evidence and jurisprudence of international criminal tribunals, pursuant to the authority of the Co-Investigating Judges under Article 23 new of the ECCC Law.
21. Before all international criminal tribunals, an Accused has the fundamental right to defend himself or herself through legal assistance of his or her own choosing.³⁴ However, this right is not without limits. Actual or potential conflicts of interest are a recognised limit upon the accused’s choice.³⁵ Indeed, counsel has a duty of loyalty to existing clients and a duty to the Tribunal to act with independence in the interest of justice.³⁶ Therefore, counsel must refrain from representing a client when such representation affects or can affect the representation of another client.³⁷
22. International tribunals limit the circumstances in which clients can waive or consent to conflicts of interest. The ICC allows counsel to resolve conflicts of interest by obtaining “full and informed consent in writing of all potentially affected clients to continue their representation, only if such consent, in the best judgement of Counsel, is unlikely to prejudice in any way the administration of justice.”³⁸ Before the ICTR, consent is recognised “so long as Counsel is able to fulfill all other obligations.”³⁹ Before the ICTY, counsel are barred from representing multiple clients with conflicting interests, even if such clients have provided “full and informed consent,” where “such consent is likely to irreversibly prejudice the administration of justice.”⁴⁰
23. In *Mejakić*, counsel Jovan Simić undertook representation of both the accused and another accused, Dragoljub Prać in the *Kvočka* case. Each accused consented in writing to be represented by Mr Simić “under the full awareness of [their] legal, material and moral responsibility.” As the Prosecutor had made a request for Prać to be called as a witness in

³³ **CF002-E51/14** Decision on Nuon Chea’s preliminary objection alleging the unconstitutional character of the ECCC Internal Rules, 8 August 2011 at para. 7.

³⁴ See e.g. ICTY Statute, Article 21(4)(b); ICTR statute, Article 20(4)(b); Rome Statue, Article 67(1)(b); and ECCC Law, Article 35(2)(b).

³⁵ ICTY Professional Conduct for Counsel Appearing Before the International Tribunal, Article 14 (B).

³⁶ *Ibid.*, Article 14 (A).

³⁷ *Ibid.*, Article 14.

³⁸ Code of Professional Conduct for Counsel Before the International Criminal Court, Article (8)(6)(b)(ii).

³⁹ ICTR Code of Profession Conduct for Defence Counsel Article (9)(5)(b)(ii).

⁴⁰ ICTY Professional Conduct for Counsel Appearing Before the International Tribunal, Article 14 (E).

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the *Mejakić* case, the Trial Chamber found that a conflict of interest would arise were Prcać called to testify, as “it would be difficult for Mr Simić, as counsel of both Accused, to reconcile his duty to protect the best interests of each Accused; indeed, he would have to cross-examine Mr Prcać.” However, because it was not yet known whether Prcać would be called to testify, the Trial Chamber held that it was “not appropriate at this stage ... to make a determination as to whether the consent of the Accused would irreversibly prejudice the administration of justice.”⁴¹

24. The Appeals Chamber reversed that decision, finding that a conflict of interest did exist at the given stage of the proceedings.⁴² *Mejakić* was alleged to have been the direct superior of Prcać, and was charged with crimes committed at the same location through his participation in a joint criminal enterprise *and* based on his command responsibility at that crime site. Further, Prcać had made incriminating statements regarding *Mejakić* in a prior interview. The Appeals Chamber concluded that the conflict of interest was of such importance that the representation of both Accused would “irreversibly prejudice the administration of justice”:

*the conflict of interest may influence the Defence strategy of Mr Mejakić, for example, by preventing his counsel from calling certain witnesses in order not to prejudice the interests of Mr Prcać. There is finally the risk that Mr Simić might withdraw in the course of the trial because of the conflict of interest, thus delaying the proceedings.*⁴³

On this basis, the Appeal Chamber ordered the Registrar to withdraw Mr Simić’s assignment to one of the two cases.

25. In *Prlić*,⁴⁴ in which Co-Lawyer-Designate Karnavas served as assigned counsel for one of the accused, the Appeals Chamber addressed the simultaneous representation of defendants Ivica Rajić and Bruno Stojić by lawyer Zeljko Olujić. The Chamber first concluded that “there is a substantial conflict of interests,” based on the fact that “both accused are charged with the same criminal acts, and were allegedly linked by a relatively close superior-subordinate relationship at the relevant time.”⁴⁵ The Appeals Chamber further concluded that the conflict of interest was not resolved by the client’s waiver, as the Chamber was not convinced the client was “conscious of all possible implications and possible limitations that Mr. Olujić’s

⁴¹ *Prosecutor v. Željko Mejakić et al.*, Case No. IT-02-65-PT, Decision on Prosecution Motion to Resolve Conflict of Interest Regarding Attorney Jovan Simić (ICTY Trial Chamber), 18 September 2003.

⁴² *Prosecutor v. Željko Mejakić et al.*, Case No. IT-02-65-AR73.1, Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simić (ICTY Appeals Chamber), 6 October 2004 at para. 12.

⁴³ *Ibid.* at paras 14-15.

⁴⁴ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.1, Decision on Appeal by Bruno Stojic Against Trial Chamber’s Decision on Request for Appointment of Counsel (ICTY Appeals Chamber), 24 November 2004.

⁴⁵ *Ibid.* at para 24.

simultaneous representation of the Appellant could impose upon Mr. Ivica Rajić's defence strategy."⁴⁶ The Trial Chamber had found that the conflict of interest had created a situation where counsel "may be reluctant to pursue a line of defence, to adduce certain items in evidence, or to plead certain mitigating factors at the sentencing stage, in order to avoid prejudicing another client," and thus may be "prevented from providing full and complete assistance to his client."⁴⁷

26. In *Gotovina*, the Appeals Chamber considered conflicts relating to the representation of two accused in different proceedings, where one client was a potential witness in the other client's case. The Chamber concluded that, regardless of whether the second client was ever called to testify as a witness, dual representation gave rise to a conflict of interest because the "duty of loyalty" would prevent counsel from making arguments incriminating one client in order to defend the other.⁴⁸ The Chamber also confirmed that *such a conflict would irreversibly prejudice the administration of justice and could not be resolved by conflict waivers* from the clients, citing with approval the *Prlić* decision and a US Supreme Court case which held:

*The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials ... 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 on the niceties of legal ethics.*⁴⁹

27. By contrast, in the *Perišić* case,⁵⁰ the ICTY Deputy Registrar concluded that the possibility of conflicts of interest was "acceptably low" where: (1) one accused was to be represented subsequent to the conclusion of representation of the first accused; (2) there was evidence of a "remote" superior-subordinate relationship between them; and (3) the two clients were "not charged with the same acts or omissions." The Deputy Registrar therefore approved such assignment where the client consented in writing after being fully informed of the effect that the prior representation would have on counsel's ability to act in the present case.

e. The codes of conduct of domestic legal systems

28. The codes of conduct of other countries contain similar rules precluding the representation of multiple clients with conflicting interests. For example, in **Germany**, section 146 of the

⁴⁶ *Ibid.* at para 27.

⁴⁷ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, Decision on Requests for Appointment of Counsel (ICTY Trial Chamber), 30 July 2004, at para. 15.

⁴⁸ *Prosecutor v. Gotovina*, Case No. IT-06-90-AR73.2, Decision on Ivan Čermark's Interlocutory Appeal Against Trial Chamber's Decision on Conflict of Interest of Attorney's Čedo Prodanović and Jadranka Sloković, (ICTY Appeals Chamber), 29 June 2007, paras 21 & 27-28.

⁴⁹ *Ibid.*, paras 33,35&55, cited *Wheat v. United States*, 486 U.S.153, 162-163.

⁵⁰ *Prosecutor v. Perišić*, Case No. IT-04-81 PT, Decision (ICTY Deputy Registrar), 7 April 2006.

Code of Criminal Procedure provides that defence counsel may not appear simultaneously for more than one person accused of the same offence, nor may they appear in a single proceeding simultaneously for more than one person accused of different offences.

29. In the **Netherlands**, Rule 7 of Dutch Code of Conduct of Advocates (1992) provides that: “Advocates may not look after the interests of two or more parties if their interests conflict, or if developments are likely to bring them into conflict.”
30. In the **United Kingdom**, Rule 3.01(2) of the Solicitor’s Code of Conduct states that a conflict of interest exists “if you owe, or your firm owes, 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.” Rule 4.03 further provides that: “If you hold, or your firm holds, confidential information in relation to a client or former client, you must not risk breaching confidentiality by acting, or continuing to act, for another client in a matter where: (a) that information might reasonably be expected to be material; and (b) that client has an interest adverse to the first-mentioned client or former client.”
31. Rule 3.2 of Code of Conduct for Lawyers in the **European Union** states that: “A lawyer may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of a conflict, between the interests of those clients. A lawyer must cease to act for both clients when a conflict of interest arises between those clients and also whenever there is a risk of a breach of confidence or where his independence may be impaired.”
32. In the **United States of America**, conflicts of interests relating to current clients are addressed in Rule 1.7 of the American Bar Association’s Model Rules of Professional Conduct. Rule 1.7(a) provides that a conflict of interest exists if either “the representation of one client will be directly adverse to another client” or “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client [or] former client.” Rule 1.7(b) sets out four cumulative conditions that must be satisfied in order for an attorney to simultaneously represent clients with conflicting interests: “(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.”

33. The official commentary to ABA Model Rule 1.7 explains the meaning and intent of these rules, and gives illustrations of application in practice. It notes that “some conflicts are *nonconsentable*, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent.”⁵¹ In reference to the limitation set forth in Rule 1.7(b)(1), “[c]onsentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest.”⁵² As an example of representation prohibited by law under Rule 1.7(b)(2), the comments note that “in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients.”⁵³ In regards to the prohibition of Rule 1.7(b)(3) against representation of multiple clients with adverse interests in the same proceeding, the commentary states: “the potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant.”⁵⁴
34. Finally, in regards to the requirement of “informed consent” under Rule 1.7(b)(4), the ABA comments require that “each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client.”⁵⁵ It is also noted that a “client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time.”⁵⁶

VI. THERE IS A CLOSE FACTUAL NEXUS BETWEEN THE ALLEGED CONDUCT OF IENG SARY AND MEAS MUT

a. The Accused and Suspect are alleged to bear criminal responsibility for the same acts or omissions

35. The crimes to be investigated in Case 003 include the arrest and transfer of purged Division 164 cadres to S-21,⁵⁷ as well as the arrest by the DK Navy of Vietnamese, Thai and other foreign nationals who were sent to S-21.⁵⁸ RAK personnel were sent to S-21 from all of the RAK regular divisions, including Division 164.⁵⁹ Meas Mut, as Secretary of Division 164

⁵¹ Comments on Rule 1.7 of ABA Model Rules of Professional Conduct, at para. 14.

⁵² *Ibid.* at para. 15.

⁵³ *Ibid.* at para. 16.

⁵⁴ *Ibid.* at para. 23.

⁵⁵ *Ibid.* at para. 18.

⁵⁶ *Ibid.* at para. 21.

⁵⁷ **D1** Second Introductory Submission Regarding the Revolutionary Army of Democratic Kampuchea, 20 November 2008 at paras. 43, 52.

⁵⁸ D1 *Ibid.*, at paras. 60, 61.

⁵⁹ D1 *Ibid.*, at para. 43.

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(the DK Navy), is alleged to have had knowledge of, and directly participated in these crimes.⁶⁰

36. Ieng Sary is charged with these same crimes relating to S-21 in Case 002.⁶¹ The largest group of prisoners at S-21 were purged RAK cadres, including members of Division 164.⁶² OCP has identified 396 cadres of Division 164 who were imprisoned at S-21.⁶³
37. Meas Mut is also to be investigated in Case 003 for the participation of Division 164 in military attacks into Vietnam in late 1977 and 1978,⁶⁴ and is alleged to bear criminal responsibility for participating in a joint criminal enterprise to commit crimes at the Kampong Chhnang airport construction site.⁶⁵ Ieng Sary has been charged in Case 002 with the very same crimes at the Kampong Chhang airport site⁶⁶ and with “Crimes committed by the Revolutionary Army of Kampuchea on Vietnamese territory” during the time period from mid-1977 to 1978.⁶⁷ The existence of these common or overlapping crimes was expressly referenced in paragraph 5 of the Case 003 Introductory Submission.⁶⁸

b. The Accused and Suspect are alleged to have participated in the same joint criminal enterprise

38. Meas Mut is alleged to have participated in the same joint criminal enterprise for which Ieng Sary is charged, the membership of which is described in the Case 002 Closing Order as including the “members of the Central Committee” and “heads of the Party Centre military divisions”.⁶⁹ The International Co-Prosecutor alleges that Meas Mut was both a member of the Central Committee and the head of a Party Centre military division,⁷⁰ as set forth below.

c. The Accused and Suspect were in a close hierarchical and functional relationship

39. As Secretary of Division 164, Meas Mut reported to the Chief of the General Staff (and Standing Committee member) Son Sen, who in turn reported to the rest of the Standing Committee. At all times relevant to Case 003, Ieng Sary was one of five full rights members of the Standing Committee. Specifically, the Case 003 Introductory Submission alleges that the General Staff reported to the Military Committee, which was a sub-committee of the

⁶⁰ D1 *Ibid.*, at paras. 89-93.

⁶¹ **CF002-D427** Closing Order, 28 September 2012 at paras. 424, 433.

⁶² D427 *Ibid.*, at paras. 424.

⁶³ **D1.3.11.3** List of arrestees from Division 164, 20 November 2008.

⁶⁴ **D1** Second Introductory Submission Regarding the Revolutionary Army of Democratic Kampuchea, 20 November 2008 at para. 62.

⁶⁵ **D1** *Ibid.*, at paras. 47-51, 96-97.

⁶⁶ **CF002-D427** Closing Order, 28 September 2012 at paras. 383-398.

⁶⁷ *Ibid.*, at paras. 836-840.

⁶⁸ **D1** Second Introductory Submission Regarding the Revolutionary Army of Democratic Kampuchea, 20 November 2008 at paras. 5.

⁶⁹ **CF002-D427** Closing Order, 28 September 2012 at paras. 159.

⁷⁰ **D1** Second Introductory Submission Regarding the Revolutionary Army of Democratic Kampuchea, 20 November 2008 at paras. 3.

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Standing or Central Committee.⁷¹ Ieng Sary has admitted that the Military Committee reported to the Standing Committee after receiving reports from the base.⁷²

40. The close reporting relationship between Ieng Sary and Meas Mut is evidenced by a number of contemporaneous documents. For example, a 31 December 1977 telegram from Meas Mut to Committee 870 is copied to Pol Pot, Nuon Chea, Ieng Sary, Vorn Vet and Son Sen. In that telegram, Meas Mut confirms his receipt of the Party's guiding view on the Vietnamese and vows to "defend the Party" and to "[sweep] cleanly away and without half-measures the uncover[ed] elements of the enemy, whether the Yuon or other enemies."⁷³ A report from Meas Mut dated 1 April 1978, copied to Pol Pot, Nuon Chea and Ieng Sary, discusses the capture and execution of 120 Vietnamese.⁷⁴
41. In addition to their superior-subordinate relationship, Ieng Sary and Meas Mut were both members of the Party's Central Committee. Meas Mut's membership in the Central Committee was testified to by Khieu Samphan, a fellow member of that Committee.⁷⁵ The Central Committee was defined by the CPK Statute as the "highest operational unit throughout the country," and was responsible to implement the Party line, instruct the Zones and Sectors, and govern the Party members.⁷⁶

VII. THE APPOINTMENT OF THE CO-LAWYERS-DESIGNATE WOULD GENERATE IRRECONCILABLE CONFLICTS OF INTEREST

42. The close factual nexus between the crimes for which Ieng Sary and Meas Mut are alleged to be responsible, as described above, would result in numerous, serious and irreconcilable conflicts of interest for the Co-Lawyers-Designate. The International Co-Prosecutor submits that such conflicts would materially affect their ability to effectively represent both the Accused and the Suspect, particularly in terms of: (1) the ability to pursue certain lines of defense and cross-examination; (2) the duty to disclose privileged information; and (3) the ability to advise properly on factors in mitigation of any eventual sentence.

a. Ability to pursue specific lines of defence and cross examination

43. As the Accused and Suspect are alleged to be responsible for the same criminal acts or omissions, the Co-Lawyers-Designate would be unable to vigorously and fully pursue certain

⁷¹ **D1** *Ibid.*, at para. 13.

⁷² **D1** *Ibid.*, at paras. 122; **E3/94** Interview of Ieng Sary by Elizabeth Becker, 22 July 1981, ERN00342500-00342504; **D4.1.1032 in CF003**.

⁷³ **D1.3.34.60** DK Military Telegram by Meas Mut entitled "Telegram 00-Radio Band 354-Respectfully Presented to the Office 870 Committee".

⁷⁴ **IS18.59** Confidential Telephone Message on 1/4/78: Report about Total number of arrested and fired Vietnamese enemy, 28 April 2008. See D4.1.635.

⁷⁵ **D1.3.33.15** Written Record of Interview of Charged Person (Khieu Samphan), p. 11.

⁷⁶ **CF002-E3/28** Communist Party of Kampuchea Statute, 30 April 2009, Arts. 7(1), 23.

lines of defence and cross-examination on behalf of one client, without potentially damaging the interests of their other client. For example, the Co-Lawyers-Designate in Case 002 would be unable to pursue lines of questioning that sought to establish the responsibility of RAK military divisions (rather than Ieng Sary) for certain crimes, without compromising the interests of their client in Case 003. Similarly in Case 003, the Co-Lawyers-Designate would be unable to pursue a defence that sought to put responsibility for the crimes on Meas Mut's superiors, without compromising the interests of Ieng Sary. In public statements, Meas Mut has sought to defect blame to his former superiors, including Ieng Sary.⁷⁷

44. These conflicts are further compounded by the decision of the Trial Chamber to call Meas Mut as a witness in Case 002/01, in circumstances where his right against self-incrimination would evidently be at issue. As held by the ICTY Appeals Chamber in *Mejakić*, the conflict that arises here is not limited to the potential need for the Co-Lawyers-Designate to cross-examine their own client, but also extends to the decision of Meas Mut on whether to cooperate and respond to questions in Case 002.

b. Access to privileged information where interests conflict

45. As counsel for the Accused or Suspect, the Co-Lawyers-Designate may obtain privileged information from one of their clients that relates to their other client. If such information was to potentially exculpate one client in some way, but incriminate the other, the Co-Lawyers-Designate would be unable to act in the best interest of both of their clients.
46. The broader prejudice to the administration of justice is amply demonstrated by the statement of the lawyer conflicted out of the *Prlić* case: when asked whether he could properly defend both clients, he argued that he would act as a “mediator” between those clients, “coordinating” their defences and “ensuring that the two clients are not asked to be witnesses against each other.”⁷⁸

c. Ability to properly advise on mitigating factors.

47. Under Cambodian law, directly applicable before the ECCC, mitigating factors may play a role in sentencing.⁷⁹ As such, there are a number of mitigating factors concerning which Meas Mut and Ieng Sary may require the assistance of counsel, in circumstances where the interests of one could potentially be detrimental to the other.

⁷⁷ **D1.3.33.16** Interview of Meas Mut by Christine Chameau, July 1991, at ERN-EN 00089661 (p. 1): “[I]f 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.”

⁷⁸ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, Decision on Requests for Appointment of Counsel (ICTY Trial Chamber), 30 July 2004, at para. 29.

⁷⁹ Article 93 of the 2009 Penal Code.

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48. In the Case 001 Judgment, the Trial Chamber deemed that the Accused's cooperation with the ECCC served as a mitigating factor,⁸⁰ as it provided substantial information regarding the crimes committed within S-21, facilitated the proceedings of the Chamber and assisted in the pursuit of national reconciliation.⁸¹ This cooperation was taken into account in sentencing.⁸²
49. As such, in order to best serve their clients' interests, the Co-Lawyers-Designate may need to advise their clients to accept responsibility for some or all of the charges laid against them, and/or provide self-incriminatory testimony. Any such evidence could also implicate the other client represented by the Co-Lawyers-Designate, given the close factual nexus of the two cases. In such circumstances, it would impossible for the Co-Lawyers-Designate to act in the best interests of, and in accordance with their duty of loyalty to both clients.
50. Moreover, as observed by the Trial Chamber in Case 001, the statutes of the ICTY, ICTR and SCSL specifically permit superior orders to be considered in mitigation of punishment.⁸³ Subject to certain criteria, a subordinate who establishes the existence of superior orders "may be subject to a less severe sentence".⁸⁴ Duress may also serve as a mitigating factor.⁸⁵ Accordingly, it may be in the interests of Meas Mut to establish that he acted under duress or based on the orders of the Standing Committee (including Ieng Sary) in any eventual submissions on mitigation. However, any such advice from the Co-Lawyers-Designate would potentially incriminate Ieng Sary, in direct violation of their ethical duty to put the interests of their client above that of any other person.

d. Consent of the clients does not resolve the conflicts at hand

51. The conflicts that would arise from representing both Ieng Sary and Meas Mut are too numerous and pervasive to be resolved by conflict waivers from the clients. Given the complexity of these proceedings and the numerous conflicts that exist now and may potentially arise in the future, a situation akin to the *Prlić* case exists where it is highly doubtful the clients can be fully informed and aware of all the potential implications and limitations arising from the proposed simultaneous representation. In this situation, the risk is too great that an Accused, if convicted, will claim he did not fully understand all the potential conflicts and seek to appeal such conviction on grounds of ineffective counsel.

⁸⁰ Rule 145(2)(a)(ii) of the ICC RPE ("convicted persons conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the court" may be considered a mitigating factor); *see also* Rules 101(B)(ii) of the ICTY, ICTR and SCSL RPE.

⁸¹ **CF001-E188** Judgment, 26 July 2010, at para 606.

⁸² **CF001-E188** *Ibid.*, , at para. 609.

⁸³ **CF001-E188** *Ibid.*, at para. 607, *see* Article 7(4) of the ICTY Statute, Articles 6(4) of the ICTR and SCSL Statutes.

⁸⁴ *Ibid.*

⁸⁵ **CF001-E188** Judgment, 26 July 2010, at para. 608.


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52. Moreover, as set forth in the **Section V**, particularly in the *Mekajić* and *Gotovina* cases, waiver or consent of clients is not sufficient to permit dual representation which would irreversibly prejudice the administration of justice. The appointment of the Co-Lawyers-Designate to represent Meas Mut would irreparably harm the integrity of the trial proceedings in Case 002, where he is scheduled to appear as a witness and the same counsel would be obligated to cross-examine him. The rules of the ECCC preclude parties from having any contact with potential witnesses.⁸⁶ The appointment of the Co-Lawyers-Designate to act for Meas Mut would give the Ieng Sary Defence direct access to, and influence over, a witness in the Case 002 trial proceedings.
53. The administration of justice would also be irreversibly prejudiced because an Accused in Case 002, and a Suspect in Case 003, would be empowered to substantially delay future proceedings in those cases simply by revoking their consent to counsel and forcing their removal and replacement. The Case 002/01 trial is at a critical stage where any significant delay would threaten the timely conclusion of those proceedings. Ieng Sary has already demonstrated a ready willingness to withdraw previously given waivers, where such action suits his strategic interests.⁸⁷ Neither he nor Meas Mut should be armed with the tactical means to delay these proceedings.

VIII. REQUESTED RELIEF

54. For these reasons, the International Co-Prosecutor respectfully requests the Co-Investigating Judges to **admit** and **uphold** the instant Request in full; to **reject** the appointment of the Co-Lawyers-Designate; and to **direct** the DSS to notify the Suspect accordingly and assist him in the exercise of his right to counsel as appropriate.

Respectfully submitted,

Date	Name	Place	Signature
24 December 2012	Andrew CAYLEY Co-Prosecutor	Phnom Penh	

⁸⁶ Internal Rule 35 (1)(d).

⁸⁷ **CF002-E249** Ieng Sary's Notice of Withdrawal of Waivers of Right to be Present During the Testimony of Certain Witness and Civil Parties, 6 December 2012.