D56/7

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

FILING DETAILS

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INTERNATIONAL CO-PROSECUTOR'S SUPPLEMENTARY SUBMISSIONS ON CONFLICT OF INTEREST OF CO-LAWYERS-DESIGNATE

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D56/2

I. INTRODUCTION AND PROCEDURAL HISTORY

1. On 24 March 2013, Mr. Ang Udom and Mr. Michael Karnavas ("Co-Lawyers-Designate") filed their response ("Response")[1] to the International Co-Prosecutor's request ("Request")[2] to reject their appointment to represent Suspect Meas Muth in Case 003 on grounds of irreconcilable conflicts of interest and irreversible prejudice to the administration of justice. In the Decision and Scheduling Order of 11 February 2013 ("First Decision"), the International Co-Investigating Judge invited the Co-Lawyers Designate to disclose waivers obtained from the Suspect and Accused Ieng Sary within three working days; to make submissions within 10 working days; and invited the Co-Prosecutors to reply within five working days.[3] In the Re-Scheduling Order of 28 February 2013, the International Co-Investigating Judge noted the "lack of compliance"[4] of the Co-Lawyers-Designate with the terms of the Decision and Scheduling Order, and extended their filing deadlines to 4 March 2013. Although the Response was duly filed on 4 March 2013, it was notified to the Co-Prosecutors on 11 March 2013.

2. On 14 March 2013, Ieng Sary died in custody on the premises of the Khmer-Soviet Friendship Hospital[5] and proceedings against him in Case 002 were duly terminated by the Trial Chamber.[6] On 15 March 2013, the Co-Lawyers-Designate filed a notice to the Co-Investigating Judges asserting that the termination of proceedings against Ieng Sary "effectively renders moot" the Request.[7] On the same day, the International Co-Prosecutor requested a revised schedule of submissions to allow for adequate briefing on the change of circumstances occasioned by the death of Ieng Sary.[8] On 19 March 2013, the International Co-Investigating Judge rejected the Defence request and granted the International Co-Prosecutor's request, inviting his submissions by 3 April 2013 ("Second Decision").[9]

3. The International Co-Prosecutor files these Supplementary Submissions pursuant to the Second Decision, incorporating by reference the content of his previous Request.

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1 **D56/4/1** Leave to extend page limitation and submissions of the Co-Lawyers on potential conflict of interest in representation of Mr Meas Muth in Case 003, 4 March 2013.
2 **D56/1** International Co-Prosecutor's request that appointment of Co-Lawyers-Designate de rejected on the basis of irreconcilable conflicts of interest, 24 December 2012.
3 **D56/3** Decision and scheduling order concerning request for appointment of Co-Lawyers-Designate, 11 February 2013.
4 **D56/4** Re-scheduling order concerning request for appointment of Co-Lawyers-Designate, 28 February 2013.
5 **CF002-E270** Certificate of death of Ieng Sary, 14 March 2013.
6 **CF002-E270/1 [D56/4/2.1.1]** Termination of proceedings against the Accused Ieng Sary, 14 March 2013.
7 **D56/4/2** Notice of termination of proceedings against Ieng Sary in Case 002, 15 March 2013.
8 **D56/4/3** International Co-Prosecutor's Request to Reschedule Submissions, 15 March 2013.
9 **D56/5** Second Decision and Re-Scheduling Order Concerning Request for Appointment of Co-Lawyers Designate, 19 March 2013.

4. The International Co-Prosecutor submits, in summary, that the Co-Lawyers-Designates' obligations to, and affinity, for Ieng Sary creates irreconcilable conflicts of interest with their proposed representation of Meas Muth, particularly given the intrinsically interwoven proceedings against the clients. Furthermore, allowing the Co-Lawyers-Designate to represent Meas Muth under the circumstances would not only be detrimental to their continuing professional obligations to both Ieng Sary and Meas Muth, but would also be damaging to public confidence in the ECCC and the administration of justice. These are compelling interests that the Co-Investigating Judges have an inherent power and obligation to protect, and which provide additional and independent reasons not to confirm the appointment of the Co-Lawyers-Designate. In the alternative, should the Co-Investigating Judges find that Ieng Sary and Meas Muth could properly consent to the multiple conflicts of interest arising, the International Co-Prosecutor submits that the Co-Lawyers-Designate should not be appointed because the waivers provided are both procedurally and substantively unsound, and, after Ieng Sary's death, unable to be cured.

II. REQUESTS FOR LEAVE TO FILE INITIALLY IN ONE WORKING LANGUAGE AND TO EXCEED PAGE LIMITS

5. Pursuant to Article 7.2 of the applicable Practice Direction,[10] the International Co-Prosecutor respectfully requests the Co-Investigating Judges to permit the filing of the present Supplementary Submissions in English only, with the Khmer version to follow as soon as possible and likely within three working days. The death of Ieng Sary on 14 March 2014 amounted to a change of circumstances required extensive and complex legal research and comparative analysis of legal sources and the practices of multiple legal systems in order to provide adequate and accurate briefing. In addition, the special responsibilities of the Office of Co-Prosecutors to inquire into the cause of death of Ieng Sary[11] demanded the allocation of sustained and significant resources within this Office, culminating in the submission of a detailed report on 2 April 2013. In these exceptional circumstances, processes of translation, consultation and review of these Supplementary Submissions in the Khmer language could not be completed on time.

6. In addition, pursuant to Article 5.4 of the applicable Practice Direction, the International Co-Prosecutor respectfully requests that the Co-Investigating Judges to extend the applicable page limit for these Supplementary Submissions by 16 pages. The substance of the request engages distinct legal interests – those of the Suspect and the Co-Lawyers-Designate, those of

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[10] Practice Direction ECCC/2007/1/Rev.8, "Filing of documents before the ECCC" (7 March 2012).
[11] Internal Rule 32*bis*.

the Co-Prosecutors and broader institutional responsibilities to safeguard the good administration of justice. Adequate submissions on conflict of interest across two multi-accused cases, involving a current and a deceased client and concerning lawyers subject to dual deontology necessarily require analysis of legal sources from multiple international and domestic jurisdictions, as well as review of a comprehensive set of facts and factual allegations. Every effort has been made to restrict the length of the legal argument – which is simple and straightforward – to the minimum possible in these exceptional circumstances. Should leave to exceed page limits be withheld, the International Co-Prosecutor respectfully requests one (1) working day to comply and resubmit.

III. APPLICABLE LAW

1. DEFENCE COUNSEL OBLIGATIONS TO CURRENT, FORMER AND DECEASED CLIENTS

7. ***Defence counsel before the ECCC bear fiduciary obligations of the highest order to their current clients.*** Co-Lawyers, national and international alike, are bound by the Code of Ethics of the Bar Association of the Kingdom of Cambodia ("BAKC") as well as the rules of other jurisdictions to which they may be subject.[12] Internal Rule 22(4) subjects Defence counsel to the "recognised standards and ethics of the legal profession". These include an overarching "fiduciary duty"[13] towards a client – that is, a duty to act in the best interests of the client at all times.[14] This "highest"[15] fiduciary duty – *uberrima fides* – encompasses, in turn, duties of confidentiality,[16] loyalty,[17] due skill,[18] due diligence,[19] truthfulness[20] and disclosure to the client.[21]

8. ***The obligation of confidentiality extends beyond the death of a client.*** Under the BAKC Code of Ethics, counsel is "absolutely bound"[22] by the duty of confidentiality. Such a duty extends to deceased clients according to codes of ethics and conduct adopted across

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12 Internal Rules (Rev. 8). rule 22(4).
13 *Strother v. 3464920 Canada Inc.* [2007] SCC 24 (Supreme Court of Canada).
14 Code of Conduct of the Solicitors Regulation Authority (England and Wales), Principle 4 (describing 10 mandatory Principles as "all-pervasive…apply[ing] to all those we regulate and to all aspects of practice").
15 David Beck, Legal Malpractice in Texas (2nd Ed.), 50 Baylor L.Rev. 550,607 (1998).
16 Bar Association of the Kingdom of Cambodia, Code of Ethic for Lawyers Licensed, 15 November 1995 at art. 7.
17 *Ibid.* art. 7; Ibid.; International Bar Association ("IBA Principles"), International Principles on Conduct for the Legal Profession (2011); Council of Bars and Law Societies of Europe Code of Conduct ("CCBE"); Spincode Pty. Ltd. v Look Software Pty. Ltd. [2001] VSCA 248; Bolkiah v. K.P.M.G., House of Lords, 18 December 1998.
18 The Law Society of New South Wales of Australia, Revised Professional Conduct and Practice Rules 1995 ("NSW Revised Professional Conduct and Practice Rules"), art. 1.1.
19 *Ibid.*
20 *Employers Cas. Co. v Tilley*, 496 S.W.2d 948,506, 1973.
21 *Willis v Maverick*, 760 S.W.2d 642,645, 1988.
22 Bar Association of the kingdom of Cambodia, *supra* note 16 at art. 7.

continental Europe,[23] Australia,[24] England and Wales[25] and in the jurisprudence of the Supreme Court (United States of America).[26]

9. The Code of Conduct of the Solicitors Regulation Authority in the jurisdiction of England and Wales is particularly instructive as a recent code of professional ethics adopted and implemented by an independent regulatory body functionally separate from the any professional body of lawyers. This Code provides, "Protection of confidential information is a fundamental feature of your relationship with clients. It exists as a concept both as a matter of law and as a matter of conduct. This duty continues despite the end of the retainer and even after the death of the client."[27]

10. In similar terms, the apex court of Mr Karnavas' home jurisdiction has confirmed that counsel's obligation of confidentiality survives the death of client even in the particular context of criminal proceedings. In *Swindler v United States* (1998), the Supreme Court (United States) confirmed that a lawyer's duty of confidentiality continued after the death of the client. In particular, the Court referred to communications should remain confidential as knowing that information will remain confidential promotes disclosure by the client to the lawyer. Therefore, "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 a feared as disclosure during the client's lifetime."[28]

11. ***This obligation of confidentiality extends to all information relating to representation and cannot be waived by a client under Cambodian law.*** Under the BAKC Code of Ethics, "confidentiality cannot be waived by anyone, not even the client."[29] Exceptions to the duty of confidentiality do vary across jurisdictions – for example, in the interests of public safety or in course of litigation against the lawyer by the client – but are limited to narrow circumstances not relevant to the present proceedings. The International Bar Association's

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23 CCBE, *supra* note 17.
24 NSW Revised Professional Conduct and Practice Rules, *supra* note 18.
25 Solicitors Regulation Authority Code of England and Wales ("SRA"), 1 Jan 2013, Ch. 4.
26 *Swindler v United States* 524 U.S. 399; 118 S. Ct. 2081(1998).
27 SRA, *supra* note 27 at para. 2.
28 *Swindler v United States*, *supra* note 26.
29 Bar Association of the kingdom of Cambodia, *supra* note 16 at art. 7.

"International Principles on Conduct for the Legal Profession" (2011) establish a generally-accepted framework to inform domestic codes of conduct,[30] and are instructive in this regard:

> *the lawyer's ethical duty of confidentiality prohibits a lawyer from disclosing information relating to the representation of or advice given to a client from any source, not just to communications between the lawyer and client, and also requires the lawyer to safeguard that information from disclosure. The principle of confidentiality is greater in scope than the legal professional privilege. Matters that are protected by the legal professional privilege are also protected by the principle of confidentiality; the converse, however, is not true.*[31]

12. Thus, every instance of information protected by legal professional privilege will also be protected by the principle of confidentiality. In jurisdictions that recognise legal professional privilege as an evidentiary rule, this privilege also survives the death of the client. For example, the Evidence Code in the jurisdiction of California (United States of America) provides that the holder of "attorney-client privilege" is "the personal representative of the client even if the client is dead".[32]

13. ***The obligation of confidentiality to a deceased client in a related matter will necessarily affect the duty of loyalty and may impact other obligations owed to a current client.*** Counsel's duty of confidentiality to a deceased client also creates a "danger zone" for the unfettered exercise of the duty of loyalty owed to a current client in a related matter. As stated by the California Court of Appeals (United States of America): "Clients are entitled to vigorous and determined representation by counsel. It is difficult to believe that a counsel who scrupulously attempts to avoid the revelation of former client confidences – i.e., who makes every effort to steer clear of the danger zone – can offer the kind of undivided loyalty that a client has every right to expect and that our legal system demands [...]"[33] Further, a pre-existing duty of loyalty to a deceased client may well impact, in the course of ordinary professional relations, other obligations flowing from counsel's fiduciary duty to a current client, such as obligations of due skill and diligence. This is evident in the conclusion of both relevant academic commentary and jurisprudence in the jurisdiction of California (United States of America) that counsel would have, in such circumstances, a reduced ability to give

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30 IBA Principles, *supra* note 17 at p. 5.

31 IBA, Commentary on IBA International Principles on Conduct for the Legal Profession (2011) at p. 33 [emphasis added].

32 Evidence Code (California), s. 953

33 *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 620,

the current client "the professional judgement of a lawyer...free from compromising influences."[34]

14. ***A continuing obligation of loyalty extends beyond the death of a client.*** The duty of loyalty has been described clearly by the courts in Victoria (Australia) as "a duty not to place oneself in a position in which the fiduciary owes a duty to a client which is inconsistent with the duty owed to another client."[35] The commentary to the American Bar Association Model Rules of Professional Conduct, Rule 1.7, emphasises that "Loyalty is one of the most important aspects of a lawyer's relationship with his client." Thus, in the example of California (United States of America), it is a violation of that duty for an attorney to assume a position adverse or antagonistic to both present[36] and former clients.[37] The Supreme Court of Illinois (United States of America) has expressly held that a lawyer's duty of loyalty survives death of the client;[38] thus, the duty of loyalty to a deceased client bars a lawyer from representing adverse interests.[39]

15. ***The duty of loyalty survives the termination of the lawyer-client relationship independent of whether the lawyer thereby obtained confidential information material to a current client.***"Each client is entitled to, and is entitled to assume that he has, the undivided loyalty of the fiduciary he has engaged."[40] This "undivided loyalty" imposes self-standing obligations on counsel irrespective of whether any confidential information relevant to the subsequent representation may have been received in the course of the prior representation. This finding is supported across multiple jurisdictions including the home jurisdiction of Mr Karnavas. Among other examples, the Ontario Court of Appeal[41] (Canada), the Court of Appeal of the Victoria Supreme Court[42] (Australia), the Court of Appeals for the District of Columbia[43] and the United States District Court [44] (United States of America) have each held that the fiduciary duty of loyalty of counsel survives the termination of the lawyer-client relationship,

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34 Steven J. Hyman, Joint Representation of Multiple Defendants in a Criminal Trial: The Court's Headache (1977) 5 Hofstra L.Rev. 315 at 334, cited with approval in *People v. Mroczko* 35 Cal.3d. 86, 112.
35 Spincode, *supra* note 17.
36 Day v. Rosenthal (1985) 170 Cal.App.3d 1125, 1143, quoting Betts v. Allstate, Ins. Co. (1984) 154 Cal.App.3d 688, 714.
37 David Welch Co. v. Erskin & Tulley (1988) 203 Cal.App.3d 884, 891; Kallen v. Delug (1984) 157 Cal.App.3d 940, 950-951
38 In re Michal, 415 Ill. 150, 112 N.E.2d 603 (1953)
39 In re Williams, 57 Ill.2d 63, 309 N.E.2d 579 (1974)
40 Spincode, *supra* note 17.
41 *Ibid.*
42 *Ibid.*
43 *Ibid.*
44 *Ibid.*

whether or not confidential information relating to the representation of a former client was actually disclosed to a subsequent client.

16. ***Civil law systems recognise that the dignity, reputation, honour and privacy of deceased person are justiciable rights vested in the heirs***. Just as counsel owe continuing duties of confidentiality and loyalty to former deceased clients, both national and international jurisprudence support the position that the heirs of the deceased have a lawful basis to seek protection of the deceased's dignity, reputation and honour, as well as a limited subset of personality rights, in the face of potential or actual infringement. In *Swindler*, the Supreme Court (United States of America) recognised the legitimate concern of a client facing a Congressional investigation with potential harm to his reputation or friends and family after death.[45] Civil law systems including Germany and France recognise that legal interests in a deceased person's inviolable dignity (in Germany) and reputation, honour and privacy (in France) are vested and justiciable rights of the person's heirs.[46]

17. In the early case of *Mephisto* (1977), before the Federal Constitutional Court (*Bundesverfassungsgericht*, Germany), the applicant sought constitutional review of an injunction preventing the printing, distribution and publication of a novel that the respondent had alleged contained a "false and highly derogatory picture" of the respondent's deceased father. Whilst finding that the right to (legal) personality is extinguished upon death, the court extended the obligation of the State to protect the right to dignity of a deceased person, holding that "it would be inconsistent with the constitutional mandate of the inviolability of human dignity, which underlies all basic rights, if a person could be belittled and denigrated after his death."[47] The reasoning in *Mephisto* was followed by the Federal Supreme Court (*Bundesgerichtshof*) in *Dietrich* (1999), where the court held that the "commercial layer" of personality rights was inheritable under civil law, though not as a constitutional imperative, whilst purely moral rights were not.[48]

18. In *Éditions Plon v France* (2004), the European Court of Human Rights recognised as legitimate an interim injunction prohibiting the distribution of a book about the medical conditions and treatment of the deceased former president of France, François Mitterand, written by his treating doctor, which *prima facie* breached criminal code provisions and

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45 *Swindler v United States*, *supra* note 26.

46 Nonetheless, common law systems, including 28 states of the United States of America and Jamaica, also extend limited legal protection to certain commercial personality rights (or "publicity rights") after the death of the person concerned.

47 Mephisto, BVerfGE 30, 173, 24 February 1977 at para. 6.

48 Mephisto, 1 ZR 49/97, Entscheidungen des BGH in Zivilsachen, 1 December 1999, 143, 214.

professional ethical obligations on medical confidentiality.[49] French law,[50] Cambodian law[51] and the BAKC Code[52] enshrine similar penal sanctions and ethical obligations to uphold legal confidentiality as with medical confidentiality. The court reasoned that the interim injunction fulfilled a legitimate aim and was otherwise necessary in a democratic society "to protect the late President's honour, reputation and privacy" and that the "national courts' assessment that these "rights of others" were passed on to his family on his death" was not in any way "unreasonable or arbitrary".[53]

2. DEFENCE COUNSEL'S OBLIGATION TO AVOID CONFLICTS OF INTEREST

19. ***Defence counsel before the ECCC bear a positive obligation to avoid conflict of interest, by withdrawal or consent.*** 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."[54] Consistent with this obligation, in the event a conflict does arise, Co-Lawyers are required to immediately "inform all potentially affected clients"[55] and either withdraw representation or "seek the full and informed consent of all potentially affected clients to continue representation."[56]

20. ***Reasonable foresight of conflict of interest between former and present assignment of counsel is sufficient to disallow representation.*** The standard of proof for judicial disqualification of counsel for reasons of conflict of interests in the pre-trial stage is reasonable foresight that a conflict of interest could arise. While the wording of the DSS Administrative Regulations may appear to suggest deference to counsel's assessment of the existence of a conflict of interest, ICTY jurisprudence mandates close judicial scrutiny of: (i) the existence or risk of conflict of interest; (ii) the circumstances and sufficiency of the consent obtained from potentially affected clients; or (iii) the prospect that consent to a given conflict of interest would irreversibly prejudice the administration of justice.[57]

21. In the unanimous Decision of the ICTY Appeals Chamber in *Prlić et al.*, cited in both the Request and the Response, a majority of three (Judges Shahabuddeen, Schomburg and Weinberg de Roca) issued a joint Declaration specifically on the issue of standard of proof.

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49 *Éditions Plon v France*, Application No. 58148 (18 May 2004).
50 Criminal Code of France (Revised 12 October 2005), arts. 226-13.
51 Criminal Code of the Kingdom of Cambodia as promulgated on 5 November 2010, at art. 314.
52 Bar Association of the kingdom of Cambodia, *supra* note 16 at art. 7.
53 *Éditions Plon v France*, at para. 34.
54 Defense Support Section Administrative Regulations ("DSS") of ECCC, at art. 9.2.
55 *Ibid*, Art. 9.3.
56 *Ibid.*
57 ICTY Professional Conduct for Counsel Appearing Before the International Tribunal, Article 14 (E). ("ICTY Professional Conduct")

Their findings are directly relevant to conflict-of-interest proceedings during the initial assignment of counsel in the pre-trial phase, as the impugned Trial Chamber decision concerned the initial appointment of counsel, two years before the start of trial. The judges found that:

> *In a case of this kind, it appears that a distinction may usefully be drawn between reasonable foresight and mere speculation, and that* reasonable foresight is a sufficient basis of decision. *The facts indicate that, at his trial, the appellant-accused could be taking a position which will be at variance with that of another accused who is also represented by the same counsel [...] The fact that the appellant-accused, for any reason deemed sufficient to him, nevertheless agreed to common representation does not relieve the Appeals Chamber of its responsibility to ensure that,* in the interests of justice, *his case can be put forward,* as from its very commencement, without any kind of inhibition resulting from retaining the same counsel.[58]

This decision in *Prlić* refers to the "principle" behind rule 7 of the Dutch Code of Conduct of Advocates 1992 ("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"), a provision cited in the initial Request, as a "reasonable basis for determining what is required by the interests of justice; it admits reasonable foresight."[59]

22. Two years prior to the Appeal Chamber's disposition in *Prlić et al.*, a Trial Chamber in *Hadžihasanović* required proof of a "real possibility [of] conflict of interest between the former and present assignment of counsel",[60] but nonetheless upheld the principle of independent judicial scrutiny of the risk of conflict of interest in circumstances where counsel and the Registrar, as the appointing authority, were clearly professionally satisfied that no conflict existed or was even probable. The Trial Chamber concluded that the "real possibility" test was appropriate as a Chamber could not "wait until foreseeable harm is done to the proceedings" but must rather "prevent such foreseeable harm".[61] The National Code (France) also applies a standard of foreseeability to guide lawyers in determining whether a "serious risk" of conflict of interest exists.[62]

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58 *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, at Declaration at paras. 2-3.

59 *Prosecutor v. Jadranko Prlić et al.*, *supra* note 64, at Declaration at para. 4.

60 *Prosecutor v Enver Hadzihasanovic*, Case No. 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 accused Kubura (ICTY Trial Chamber II), 26 March 2002, para. 56.

61 *Ibid.*

62 National Code of Professional Conduct for Lawyers (France), art 4.1. ("National Code")

23. ICTY jurisprudence clearly establishes that the subjective beliefs of counsel – even one with "over 30 years of domestic and international criminal defence experience"[63] – cannot insulate a situation of potential conflict of interest and effectiveness of consent from judicial scrutiny and, where appropriate, disqualification of counsel. A similar principle has been applied in both the federal[64] and state[65] courts in the home jurisdiction of Co-Lawyer-Designate Michael Karnavas. As held by the United States Court of Appeals for the Eighth Circuit, albeit in the context of joint not subsequent representation: "It is not enough to rely upon counsel, who may not be totally disinterested, to make sure that each of his joint clients has made an effective waiver."[66] In this same case, the court held that the standard of proof to disallow representation required only a "minimal showing [...] to establish the substantial possibility of a conflict of interest."[67]

3. Circumstances in Which Conflicts of Interests Arise

24. ***A conflict of interest arises where two matters are substantially related and it is reasonably foreseeable that the interests of a former and current client are materially adverse.*** At the international level, the Code of Conduct and Disciplinary Procedure of the International Criminal Bar ("ICB"),[68] and International Bar Association ("IBA"),[69] both provide that a counsel who has formerly represented a client in a matter shall not then represent another client in a substantially related matter whose interests are materially adverse to the former client's interests. Across domestic systems, the National Rules (France),[70] the American Bar Association Model Rules ("ABA Rules"),[71] the Federation of Bar Associations Rules (Japan)[72] and the Legal Professional Rules (Singapore)[73] all provide that a lawyer must refrain from representing a new client in a substantially related case whose interests are

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63 DSS, *supra* note 60.

64 *United States v Lawriw*, 568 F.2d, United States Court of Appeals Eighth Circuit, 30 December 1977.

65 *State v Celikoski, 866 P.2d 139, The Court of Appeals of the State of Alaska, 01 July 1994.*

66 *United States v Lawriw* 568 F.2d at p. 104.

67 *Ibid.* at para. 44.

68 Code of Conduct and Disciplinary Procedure of the International Criminal Bar (2003). ("ICB")

69 IBA Principles, *supra* note 17, at p. 18.

70 Règlement Intérieure National de la Profession D'avocat ("RIN"), at art. 4.1 states "a counsel must refrain from all affaires related to the representation of clients where there is a conflict of interest, when professional confidentiality is at risk of being violated."

71 American Bar Association Model Rules for Professional Conduct ("Model Rules"), rule 1.9(a).

72 Japan Federation of Bar Associations, Basic Rules on the Duties of Practicing Attorneys (2004), at art. 28 states that unless client's consent to the undertaking, an attorney shall not undertake a matter where the interests of one client conflicts with those of another client.

73 Singapore Legal Profession (Professional Conduct) Rules, at rule 31(1): "who has acted for a client in a matter shall not thereafter act against the client (or against persons who were involved in or associated with the client in that matter) in the same or any related matter;" rule 24 of the Professional Conduct Rules state "(1) An advocate and solicitor shall not in any way, directly or indirectly (a) disclose any confidential information which the advocate and solicitor receives as a result of the retainer; or (b) disclose the contents of the papers recording such instructions, unless with the consent of the client or is required by law or order of court."

materially adverse to those of a former client. The scope of ABA Rule 1.9(a) was recently confirmed by the United States District Court (United States of America) in *Fredericks v. Atlantic City Board of Education.*[74] In this case, the court held that the requirements to establish a conflict of interest for the purpose of disqualifying a lawyer from representing a current client would depend on the existence of a past attorney-client relationship, where the interest of a former client was materially adverse to the interests of a current client.[75]

25. The threshold of establishing a substantially related case is outlined by the ABA Model Rules. "Substantial" is defined as denoting the degree or extent to which a material matter has weighty importance.[76] However, "knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation"[77] is enough to establish the "weighty importance" of a conflict of interest. An even lower threshold was established by the High Court (Singapore) in *Vorobiev Nikolay v Lush John Frederick Peters:* "where the matters are obviously related, the solicitor cannot act even if no confidential information is at risk."[78]

26. ***A conflict of interest arises where it is reasonably foreseeable that confidential information related to the representation of the former client may be material to the defence of a current client and disadvantage the interests of the former client.*** Where the use of confidential information relating to the representation of a former client may reasonably be foreseen to be useful to the defence of a current client, but to disadvantage the former client, a conflict of interest arises. The International Bar Association,79 the International Criminal Bar80 and similarly, the American Bar Association Model Rules for Professional Conduct81 establish the obligation of the lawyer not to use or reveal information relating to the former

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[74] *Fredericks v. Atlantic City Board of Education* (in the United States District Court for the District of New Jersey Camden Vicinage).

[75] *Ibid.*, at pp. 5-6.

[76] Model Rules, *supra* 78, at Rule 1.0, "Terminology".

[77] *Ibid.* rule 1.9, at comment [3].

[78] *Vorobiev Nikolay v. Lush John Frederick Peters* [2010] SGHC 290.

[79] IBA Principles, *supra* note 17, at Ch. 3, at para 3.2 "Explanatory note:" "A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not use information relating to the representation to the disadvantage of the former client except when permitted by applicable law or ethics rules."

[80] ICB, *supra* note 75, at art. 7: states Counsel who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: i) use information relating to the representation to the disadvantage of the former client except as Article 6 would permit or require with respect to a client, or when the information has become generally known; where article 6(2) of the Code states: "Counsel may reveal such information, but only to the extent counsel reasonably believes necessary: a) to prevent the client from committing a criminal act that counsel believes is likely to result in imminent death or substantial bodily harm; or b) to establish a defence to a criminal charge or civil claim against counsel based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning counsel's representation of the client".

[81] Model Rules, *supra* 78, at Rule 1.9.

representation of a client to the former client's disadvantage.82 The Code of Conduct of the Bar of England imposes a similar duty upon barristers: without the former client's consent (or otherwise as permitted by law), barristers are prohibited from revealing confidential information or using such information to that client's detriment.[83]

27. ***A conflict of interest arises where it is reasonably foreseeable that knowledge obtained from a former client may advantage the interests of the current client.*** According to the National Code (France), counsel cannot accept to represent a client when his or her knowledge of the affairs of a former client promotes the interests of the new client.[84] Similarly, according to the CCBE Code (Europe), "a counsel shall not accept a new client if there is a risk of a violation of confidentiality regarding information previously given by a former client, or when knowledge obtained by counsel from a former client will advantage the new client." [85] In the Family Court (Australia), the Court of Appeal found that the question was whether the Appellant's previous lawyer, who was also acting for the Respondent, held confidential information that could advantage the case of the Respondent. The Court of Appeal held that indeed the Respondent's lawyer did and ordered the termination of the lawyer-client relationship.86 The Code of Conduct of the Bar of England also prohibits the use of confidential information concerning a former client to a current client's advantage.[87]

28. ***A conflict of interests arises where it is reasonably foreseeable that confidential information related to the representation of the former client may be material to the defence of a current client and the interests of both clients are materially adverse.*** The Code of Conduct of the Solicitors Regulation Authority (England and Wales) provides as succinct statement in this regard: "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

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82 *Ibid.* at Rule 1.9(c)(1): " a lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client."

83 Code of Conduct of the Bar of England, § 702. ("Bar of England")

84 *Ibid.*

85 CCBE, *supra* note 17, at art. 3.2.

86 *Manner v Manner* [2012] FamCAFA 6.

87 Bar of England, *supra* note 90.

be expected to be material and (b) that client has an interest adverse to the first-mentioned client or former client."[88]

29. ***A conflict of interest may also arise where there is a significant risk that representation of the current client will materially limited by a lawyer's obligations to a former client.*** According to the IBA Code, a conflict of interest may also arise "where 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, a former client, a third person or by a personal interest of the lawyer."[89]

30. ***Cambodian Law, with reference to French Law, does not allow written consent as a valid basis to waive confidentiality or certain forms of foreseeable conflict of interest.*** As set out above, the duty of confidentiality is absolute and cannot be waived under Cambodian law, even by a client.[90] Cambodian law is nonetheless silent on the validity of written consent of former and current clients as a basis to waive a potential conflict of interest involving other interests of either client. In the French system, from which Cambodian framework for legal ethics 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.[91] 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.[92]

31. 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

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88 Code of Conduct of the Solicitors Regulation Authority 2011, rule 4.03, "Confidentiality and Disclosure, Solicitor Regulatory Authority." http://sra.org.uk/solicitors/handbook/code/part2/rule4/content.page (last visited Apr. 21, 2012).

89 "IBA Principles, at Ch. 3, at para 3.1 "General principles," "A lawyer shall not assume a position in which a client's interests conflict with those of the lawyer, another lawyer in the same firm, or another client, unless otherwise permitted by law, applicable rules of professional conduct, or, if permitted, by client's authorization;" at para 3.2, "Explanatory note:" [a] conflict of interest exists if 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, a former client, a third person or by a personal interest of the lawyer.

90 Bar Association of the kingdom of Cambodia, *supra* note 16 at art. 7.

91 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; National Code, *supra* note 69, at art. 4.1, incorporates the exact same content.

92 *Ibid.*

would lead that lawyer to adopt different strategies to those he would otherwise adopt if representing only one accused.[93]

4. CLIENT'S RIGHT TO WAIVE A CONFLICT OF INTERESTS LIMITED CIRCUMSTANCES

32. International tribunals allow for clients to waive less pronounced conflicts of interests through full and informed consent. The purpose of the Internal Rules is to "consolidate applicable Cambodian procedure, supplemented by international standards where necessary and appropriate."[94] 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.

33. 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.[95] However, this right is "not absolute".[96] Actual or potential conflicts of interest are a recognised limit upon the accused's choice.[97] 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.[98] Therefore, counsel must refrain from representing a client when such representation affects or can affect the representation of another client.[99]

34. In his initial Request, the International Co-Prosecutor submitted that international tribunals limit the circumstances in which clients can waive or consent to conflicts of interest. Indeed, the ICC, ICTY and ICTR permit counsel to attempt to resolve conflicts of interest by seeking "the full and informed consent in writing of all potentially affected clients to continue their

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93 National Code, *supra* note 69, adds the definition of conflict of interest. [emphasis added]

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

95 *See* e.g. Statute of the International Criminal Tribunal for the Former Yugoslavia (Adopted 25 May 1993 By Resolution 827), at art. 21(4)(b); Statue of the International Tribunal for Rwanda, at art. 20(4)(b); Rome Statute of the International Criminal Court, 17 July 1998, at art. 67(1)(b); and 1. Law on the Establishment of the Extraordinary Chamber in the Court of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 27 October 2004, at art. 35(2)(b).

96 Procecutor v Prlic, Appeals Chamber Decision, (separate opinion of Judge Mumba.), 24 December 2004.

97 ICTY Professional Conduct, *supra* note 63, Article 14 (B).

98 *Ibid.*, Article 14 (A).

99 *Ibid.*, Article 14.

representation."[100] Before the ICTR, consent is recognised "so long as Counsel is able to fulfill all other obligations."[101]

35. The Co-Lawyers-Designate, in their Response, correctly cite Article 16(3) of the ICC Code of Professional Conduct ("ICC Code") in this regard: a conflicted attorney is permitted to "[s]eek the full and informed consent in writing of all potentially affected clients to continue representation".[102] However, this analysis fails to encapsulate the totality of the legal regime regulating conflict of interest of counsel before the ICC. Other articles of the ICC Code demonstrate that even when a conflict waiver is executed correctly with truly "full and informed consent", which has not been demonstrated here, such waivers should be allowable only in very limited and tightly circumscribed circumstances.

36. For instance, principles and obligations that counsel perform his or her duties "freely" and with "respect for professional secrecy"[103] are at odds with conflicted representation. Article 12 states that "[c]ounsel shall not represent a client in a case [...] if the case is the same as or substantially related to another case in which counsel or his or her associates represents or formerly represented another client and the interests of the client are incompatible with the interests of the former client, unless the client and the former client consent after consultation."

37. Article 12 further states that that Article is "without prejudice to Article 16"[104]. Article 16's first principle is that "Counsel shall exercise all care to ensure that no conflict of interest arises. Counsel shall put the client's interests before counsel's own interests or those of any other person, organization or State, having due regard to the provisions of the Statute, the Rules of Procedure and Evidence, and this Code." As noted above however, Article 16 then goes on to permit counsel to "[s]eek the full and informed consent in writing of all potentially affected clients to continue representation." Thus, although the ICC Code permits waiver, it is clear that other principles and goals of the ICC caution against allowing conflicted representation even where valid waivers have been obtained.

38. The International Co-Prosecutor further respectfully refers the Co-Investigating Judges to the analysis of ICTY jurisprudence in his initial Request. In their Response, the Co-Lawyers-Designate attempt to distinguish this case law, principally based on alleged factual differences

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100 Code of Professional Conduct for Counsel Before the International Criminal Court, at art. 16(3) ("ICC Code"); ICTY Professional Conduct, *supra* note 63, at art. 14 (E); ICTR Code of Profession Conduct for Defence Counsel, at art. (9)(5)(b)(ii) ("ICTR Code").

101 *Ibid.* (ICTR Code), at art. (9)(5)(b)(ii).

102 ICC Code, at art. 16(3).

103 ICC Code, at art. 5, 6.

104 ICC Code, at art. 12(4).

concerning the closeness of the superior-subordinate relationship. The factual assertions in the Response are addressed in **Section IV**, below. Insofar as these cases provide direct examples of the applicable law and international standards on conflict of interest, the relevance of their legal reasoning is demonstrated here.

39. The Co-Lawyers-Designate cite to an ICTY Trial Chamber decision approving counsel's representation of two parties because the relationship between the two parties was "remote"[105], and claim a similar situation here. Reference to the Trial Chamber's decision, however, shows that that relationship was more remote than the instant one. The Trial Chamber noted as evidence of the remoteness that the name of the second party "did not come up during" the trial of the first party[106]. In the instant case, not only did Meas Muth's "come up" in the course of Case 002, but he is selected to be called as a witness

40. In arguing that the *Mejakić et al.* decision is distinguishable,[107] the Co-Lawyers-Designate argue that because "Mr. Ieng Sary is not alleged to be Mr. Meas Muth's direct superior"[108] and, because "Mr. Meas Muth has invoked his right to remain silent in both Case 002 and Case 003"[109] *Mejakić* does not apply. A review of the *Mejakić et al.* decision, however, shows its relevance. As noted elsewhere, Meas Muth's statement that he would not testify in Cases 002, 003 or 004 as part of his waiver highlights, rather than quells, the Co-Lawyer-Designates' conflict. This principle is reflected in the *Mejakić* decision, where it points out that a client with a conflicted attorney cannot be adequately counseled regarding whether or not he should testify.[110] Also, the Appeals Chamber stated its concern about precisely the situation that could obtain should the Co-Lawyers-Designate be admitted to represent Meas Muth, as such representation would be likely to affect Ieng Sary's protected interests.[111]

41. Although in the particular circumstances of *Mejakić et al.* there was an allegation of direct command responsibility between the two clients, the Appeals Chamber demonstrated its disquiet regarding how the evidence and interests of the two would conflict more broadly, noting that one of the clients "may give evidence on the command structure" of the camp that the second client headed, "as well as on the particular offenses committed in this camp" and

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105 **D56/4/1** Leave to Extend Page Limitation & Submissions of the Co-Lawyers on Potential Conflict of Interest in Representation of Mr. Meas Muth in Case 003, at para. 17. ("**D56/4/1** Meas Muth Potential Conflict of Interest")

106 *Prosecutor v. Jadranko Prlic et al.*, Case No. IT-04-74-PT, Decision on Requests for Appointment of Counsel, 30 July 2004, para. 43.

107 *Prosecutor v. Zeljko Mejakic et al.*, Case No. IT-02—65-AR73.1, Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simic, 6 October 2004.

108 **D56/4/1** Meas Muth Potential Conflict of Interest, *supra* note 115, at para. 13.

109 *Ibid.*

110 *Prosecutor v. Zeljko Mejakic et al. supra* note 110, at para. 13.

111 *Ibid.*, para. 15.

as a result "may therefore have a significant impact" on the second client's interests.[112] In this situation, the representation of the two clients "is likely to irreversibly prejudice the administration of justice."[113] The same is true here.

42. In attempting to distinguish *Prlić et al.*, proceedings with which Mr Karnavas is well familiar, the Co-Lawyers-Designate again focus on the superior-subordinate relationship.[114] But particular factual scenarios between cases, which will inevitably differ, do not serve to undercut directly relevant and applicable legal holdings. The Appeals Chamber was clear that "[a] conflict of interests between an attorney and a client arises in any situation where, by reason of certain circumstances, representation by such an attorney prejudices, or could prejudice, the interests of the client and the wider interests of justice."[115] And furthermore, the Appeals Chamber did not limit its finding of conflict to the superior-subordinate relationship. It held more broadly that the Trial Chamber was correct in finding that a prohibitive conflict existed where counsel "may not be able to diligently and promptly protect his clients' best interests as expected and required of counsel: to suggest compromise rather than to pursue, without any restriction, the interests of his clients, is in contradiction with the counsel's professional obligations."[116]

43. In regards to *Gotovina,* the Co-Lawyers-Designate again claim that a lack of a similar superior-subordinate relationship is dispositive, and that the Co-Lawyers-Designate "will not be limited in their defence strategies with respect to either client".[117] The *Gotovina* decision itself, however, emphasizes the expansive situations where conflict could arise, noting that "while it is true that such conflicts of interest are more obvious in cases where counsel represents two accused who are, at least partly, charged with the same criminal acts, committed during the same period of time and in the same area, this is clearly not the only situation where a conflict of interest may arise. ... [W]hat is prohibited is a simultaneous representation that will, or may reasonably be expected to, adversely affect the representation of either client."[118] This includes where counsel's duty of loyalty would cause them to

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112 *Prosecutor v. Zeljko Mejakic et al. supra* note 110, at para. 14.
113 *Ibid.*, at para. 15.
114 **D56/4/1** Meas Muth Potential Conflict of Interest, *supra* note 115, at para. 14.
115 *Prosecutor v. Jadranko Prlic et al.*, *supra* note 109, at para. 22 [emphasis added].
116 *Ibid.*, at para. 30.
117 **D56/4/1** Meas Muth Potential Conflict of Interest, *supra* note 115, at para. 19.
118 *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, paras. 24, 25.

"exclude any defence strategy that would result in implicating" the other client "regardless of whether [the other client] is currently being prosecuted for such crimes."[119]

44. Finally, the International Co-Prosecutor notes that the Co-Lawyers-Designate rely on a Trial Chamber decision in *Martic*, being an appeal from a Registry decision on appointment of counsel. That decision made no ultimate holding regarding whether, under the circumstances, a conflict existed, but instead remanded to the Registry for a new decision because the decision they were reviewing was factually and substantively deficient including that it "does not provide any information as to the nature of the conflict of interest which in the opinion of the Registry exists; that the decision does not refer to the concrete sub-paragraph of Article 9 of the Code of Conduct on which the second Registry Decision relies; [...] that it provides no information on the underlying facts of the case; that it considers only 'that an assignment of Mr. Kastratovic to the accused could, under the current circumstances, lead to adverse impacts on the rights of the accused and the suspect'; that this decision, however, does not explain the nature and scope of the 'current circumstances' and the 'adverse impacts' on the rights of the accused".[120] This decision therefore does not provide support for the Co-Lawyers-Designate position.

45. ***International tribunals recognise the power of the court itself in protect public confidence and the administration of justice in appointing Defence counsel.*** The ICTY's Directive on the Assignment of Defence Counsel considers as one of the prerequisites for assignment as counsel whether the appointment is "likely to diminish public confidence in the International Tribunal or the administration of justice".[121]

46. ***International tribunals admit a category of irreconcilable conflicts where any consent to representation would irreversibly prejudice the administration of justice.*** 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."[122] This rule expressly applies to both current and former clients[123] Appeals Chamber made precisely such a finding in *Mejakić et*

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119 *Ibid.*, at para. 27.

120 *Prosecutor v. Milan Martic*, Case No. IT-95-11-PT, Decision on Appeal Against Decision on Registry, 2 August 2002, p. 5.

121 ICTY Directive on Assignment of Defence Counsel, Directive No. 1/94, as Amended 28 July 2004, IT/73/Rev.19, Article 14(A)(vii).

122 ICTY Professional Conduct, *supra* note 63, at art. 14 (E).

123 *Ibid.*, at 14(E)(1) ("[C]ounsel shall promptly and fully inform each potentially affected present and former client...").

al.,[124] while in *Prlić et al.*, the same Chamber recognized that a conflict of interest arises not only because of the potential prejudice to the interests of a client, but also the risk of prejudice to the "wider interests of justice".[125] The plain meaning of Article 14(E)(2)(ii) of the ICTY Code is that "full and informed consent" cures a conflict of interest "unless such consent is likely to irreversibly prejudice the administration of justice". The implication of a finding of irreversible prejudice – a judicial assessment on an objective test – will be that no consent from the client is possible in such circumstances. Simply put, such conflicts are irreconcilable.

47. The newly-established Mechanism for International Criminal Tribunals (MICT), whose establishment extends into the future certain functions of both the ICTY and ICTR, and whose legal framework has been informed by the operational experience of previously-established tribunals, also admits a category of irreconcilable conflicts of interest arising from the representation of both current and former clients. The Code of Conduct for Defence Counsel appearing before the Mechanism, which entered into force as recently as November 2012, adopts a legal standard identical to Article 14(E)(2)(ii) of the ICTY Code.[126]

48. ***International tribunals recognise that general or open-ended waivers do not cure potential conflicts of interest.*** As the Appeals Chamber in *Prlić* observed, a waiver consenting to a conflict of interest will be ineffective where the reviewing judicial authority cannot be convinced that the individual providing the waiver "was conscious of all possible implications and possible limitations that [counsel's] simultaneous representation of [one client] could impose upon [a second client's] defence strategy."[127] This includes the implications for rights, such as the lawyer-client privilege, that survive death.[128] Similarly, a legal ethics opinion delivered by the Bar of Washington, D.C. (United States of America) determined that "the less specific the circumstances considered by the client and the less sophisticated the client, the less likely that an advance waiver will be valid."[129] Some

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124 *Prosecutor v. Zeljko Mejakic et al. supra* note 110.

125 *Prosecutor v. Jadranko Prlic et al., supra* note 109, at para. 22

126 Code of Conduct for Counsel appearing before the Mechanism, MICT/6 (14 November 2012).

127 *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, para. 27.

128 See *Swidler & Berlin et al. v. United States*, 124 F.3d 230, June 25, 1998 (noting that the privilege persists because "[c]lients may be concerned about reputation, civil liability, or possible harm to friends or family").

129 DC Bar, Opinion 309: Advanced Waivers of Conflict of Interest, available at: http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion309.cfm.

jurisdictions in the United States of America also require that a lawyer seeking a waiver from a client advise the client to obtain outside counsel.[130]

IV. RELEVANT FACTS

49. The crimes to be investigated in Case 003 that directly concern Meas Muth include the arrest and transfer of purged Division 164 cadres to S-21,[131] as well as the arrest by the DK Navy of Vietnamese, Thai and other foreign nationals who were sent to S-21.[132] RAK personnel were sent to S-21 from all of the RAK regular divisions, including Division 164.[133] The largest group of prisoners at S-21 were purged RAK cadres, including members of Division 164.[134] OCP has identified 396 cadres of Division 164 who were imprisoned at S-21.[135] Meas Muth is also to be investigated in Case 003 for the participation of Division 164 in military attacks into Vietnam in late 1977 and 1978,[136] and is alleged to bear criminal responsibility for participating in a joint criminal enterprise to commit crimes at the Kampong Chhnang airport construction site.[137] Meas Muth is alleged to have been both a member of the Central Committee and the head of a Party Centre military division.[138] The Case 003 Introductory Submission alleges that the General Staff reported to the Military Committee, which was a sub-committee of the Standing or Central Committee.[139]

50. Ieng Sary was charged with crimes committed at S-21,[140] at the Kampong Chhnang airport construction site,[141] and the crimes committed by the military on Vietnamese territory

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130 See, *e.g.*, Oregon Rules of Professional Conduct, as amended 1 January 2013, Rule 1.8(a)(2) Conflict of Interest: Current Clients: Specific Rules ("A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless: ... the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction.").

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

132 **D1** *Ibid.*, at paras. 60, 61.

133 **D1** *Ibid.*, at para. 43.

134 **D427** Closing Order at paras. 424.

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

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

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

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

139 **D1** *Ibid.*,at para. 13.

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

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

between mid-1977 and 1978.[142] Ieng Sary has admitted that the Military Committee reported to the Standing Committee after receiving reports from the base.[143]

51. Ieng Sary and Meas Muth were both members of the Party's Central Committee. Meas Muth's membership in the Central Committee was testified to by Khieu Samphan, a fellow member of that Committee.[144] 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.[145]

52. 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."[146] 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.[147]

53. Additionally, the Co-Investigating Judges have noted that Thai fishermen were arrested by DK division 164 officers under the command of Meas Muth, and then were either killed, disappeared, or subjected to forced labor.[148] Subsequently, on 4 February 1978, Ieng Sary, on request from the Thai Minister of Foreign Affairs, promised the Thai government that Thai prisoners would be released after consultation with Cambodian officials. On approximately 28 March 1978, Khmer Rouge officials informed the Thai Foreign Minister that they were ready to release the five Thai fishermen between 27 and 29 March 1978. On 1 April, Meas Muth allegedly reported by telephone that there were delays in releasing "the Siamese", which message was transcribed and copied to, among others Ieng Sary (under the alias "Uncle Van"). A newspaper later reported, on 31 July 1978 that a month earlier ten Thai fishermen had allegedly been killed by the Khmer Rouge, and also reports on the promise that Ieng Sary made to the Thai government that the Khmer Rouge would stop killing Thai

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142 *Ibid.*, at paras. 836-840.

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

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

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

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

147 **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.

148 **D56/3** Decision and Scheduling Order Concerning Request for Appointment of Co-Lawyers Designate, 11 February 2013, para. 22.

peasants, and that the fate of 33 Thai fishermen detained in Cambodian work camps would be resolved on a case-by-case basis.[149]

54. On 22 March 2013, after Ieng Sary's death and after the Trial Chamber's ruling that proceedings against him had been terminated[150], a Cambodian newspaper reported that the Co-Lawyers-Designate had attended the cremation of Ieng Sary.[151] The article noted that the Co-Lawyers-Designate brought a gift of a framed photograph of them with Ieng Sary in court to Ieng Sary's son, who greeted them "warmly". Mr Karnavas was quoted as saying: "The photo encapsulates my relationship with Ieng Sary. ... After five years and five months of intensely working on this case, one of my most difficult ever, it's very difficult not to become attached to the client." [152]

55. On 28 March 2013, after Ieng Sary's death and after the Trial Chamber's ruling that proceedings against him had been terminated[153], an email was sent from Mr Karnavas's email address to various ECCC staff, trial monitors and other NGO personnel, media outlets and others attaching a "press release from the Ieng Sary Defence announcing the launch of our new website."[154] The press release announced that "[t]oday, 28 March 2013, the Ieng Sary Defence launched its new website." It noted that "[t]he website is a work in progress" and also claimed that "[t]hroughout its representation of Mr. Ieng Sary, the Ieng Sary Defence has robustly endeavored to protect and promote Mr. Ieng Sary's human and fair trial rights, to protect his human dignity, and to encourage sunlight and transparency in every aspect of the proceedings. This website is the continuation of that endeavor."

56. The "About Us" section of the website contains the biographies of both of the Co-Lawyers-Designate. It states that the website "has been created and is operated by the Defence team representing Mr. Ieng Sary before the Extraordinary Chambers in the Courts of Cambodia" because, in the words of the Co-Lawyers-Designate:

> *...the current practice by the Judicial Chambers and Co-Investigating Judges at the ECCC, of suppressing Defence filings which may be embarrassing or which call into question the legitimacy and judiciousness of acts and decisions of the judges, all under the fig leaf that these are necessary measures to protect the supposed confidentiality and integrity of the investigation or judicial decision-making process, must be*

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149 **D56/3** Decision and Scheduling Order Concerning Request for Appointment of Co-Lawyers Designate, 11 February 2013, para. 22.

150 **E270/1** Termination of the Proceedings Against the Accused Ieng Sary, 14 March 2013.

151 The Cambodia Daily, *Ieng Sary Cremated in Elaborate Funeral Ceremony*, 22 March 2013

152 The Cambodia Daily, *Ieng Sary Cremated in Elaborate Funeral Ceremony*, 22 March 2013

153 **E270/1** Termination of the Proceedings Against the Accused Ieng Sary, 14 March 2013.

154 Email from Michael Karnavas, signed by Tanya Pettay, "Press Release from Ieng Sary Defence – launch of new website", 28 March 2013.

> *discontinued without exception. Submissions which are solely the work of the Defence team and which do not relate to the substance of the ongoing judicial investigation but relate solely to legal issues, must be debated under the watchful eye of the public. To allow non-confidential issues to be debated behind closed doors not only deprives Mr. IENG Sary of a fair and public trial but also deprives Cambodia of a demonstration of how complex trials for the most serious crimes can be conducted openly and transparently.*[155]

V. ARGUMENT

1. CONFLICTS OF INTEREST EXIST

57. **The prior proceedings against Ieng Sary and the current proceedings relevant to Meas Muth are substantially related**. The proceedings against Ieng Sary in Case 002 and the alleged facts concerning Meas Muth to be investigated in Case 003 are closely connected in terms of relevant crime sites and substantive crimes and modes of liability charged or alleged. Both were allegedly implicated in the same joint criminal enterprise. There is evidence that both were members of the same senior party structure of the CPK.

58. Meas Muth, as Secretary of Division 164 (the DK Navy), is alleged to have had knowledge of, and directly participated in crimes involving the transfer of purged RAK Division 164 cadres and Thai, Vietnamese and western sailors to S-21.[156] Ieng Sary was charged with these same crimes relating to S-21 in Case 002.[157] Meas Muth is also to be investigated in Case 003 for the participation of Division 164 in military attacks into Vietnam in late 1977 and 1978,[158] and is alleged to bear criminal responsibility for participating in a joint criminal enterprise to commit crimes at the Kampong Chhnang airport construction site.[159] Ieng Sary was charged for atrocities committed at the same crimes site[160] and with "Crimes committed by the Revolutionary Army of Kampuchea on Vietnamese territory" during the time period from mid-1977 to 1978.[161] The existence of these common or overlapping crimes was expressly referenced in paragraph 5 of the Case 003 Introductory Submission.[162]

59. Meas Muth 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

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155 See http://www.iengsarydefence.org/about-us.html, last visited 3 April 2013.
156 D1 *Ibid.*, at paras. 89-93.
157 **CF002-D427** Closing Order, 28 September 2012 at paras. 424, 433.
158 **D1** Second Introductory Submission Regarding the Revolutionary Army of Democratic Kampuchea, 20 November 2008 at para. 62.
159 **D1** *Ibid.*, at paras. 47-51, 96-97.
160 **CF002-D427** Closing Order, 28 September 2012 at paras. 383-398.
161 *Ibid.*, at paras. 836-840.
162 **D1** Second Introductory Submission Regarding the Revolutionary Army of Democratic Kampuchea, 20 November 2008 at paras. 5.

including the "members of the Central Committee" and "heads of the Party Centre military divisions".[163] Meas Muth is alleged to have been both a member of the Central Committee and the head of a Party Centre military division.[164]

60. As Secretary of Division 164, Meas Muth 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 Standing or Central Committee.[165] Ieng Sary has admitted that the Military Committee reported to the Standing Committee after receiving reports from the base.[166] Contemporaneous reports cited in **Section IV**, above, also establish that Ieng Sary was copied on multiple instances of incriminatory correspondence from Meas Muth.[167] For these reasons, the International Co-Prosecutor submits that the proceedings concerning Ieng Sary and Meas Muth are substantially related and, indeed, wholly interconnected.

61. ***The legal interests of Ieng Sary and Meas Muth are materially adverse in substantially related proceedings, generating multiple conflicts of interest.*** The International Co-Prosecutor submits that the crystallised legal interests of Ieng Sary, and the legal interests of Meas Muth are, at present, materially adverse. During the course of trial proceedings in Case 002, during their examination of Kaing Guek Euv *alias* Duch, the Co-Lawyers-Designate consistently pursued a strategy of defence that Ieng Sary was not responsible for decisions to send purged cadres or other perceived "enemies" to S-21, or accountable for military activities of the regime of Democratic Kampuchea.[168] Meas Muth, however, made the following statements in a press interview while Ieng Sary remained in effective control of Khmer Rouge territory in the north of Cambodia, and at least four years before his surrender to the government as a precursor to the Royal Pardon and Amnesty:

> *[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.* [...]

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

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

165 **D1** *Ibid.*,at para. 13.

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

167 **D1.3.34.60** DK Military Telegram by Meas Mut entitled "Telegram 00-Radio Band 354-Respectfully Presented to the Office 870 Committee"; **IS18.59** Confidential Telephone Message on 1/4/78: Report about Total number of arrested and fired Vietnamese enemy, 28 April 2008. See also **D4.1.635**.

168 See e.g. **E1/61.1** Transcript, 9 April 2012, pp. 80-81, 88-89, 99-107 and 110.

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.[169]

62. Thus, Meas Muth's prior statements disclose a position directly relevant to any prospective defence of superior orders or a plea of superior orders in mitigation of any potential sentence, and his direct characterisation of Ieng Sary as a "leader" who knew "everything" and himself as a "low ranking official". By comparison, in examining Duch, Mr Karnavas consistently advanced a defence that Ieng Sary knew nothing about "concerning any of the arrests,"[170] asking "is there anything you can point to concretely, something that would show that Mr Ieng Sary was actually informed that someone was going to S-21 [...]"[171] Meas Muth's legal interests in advancing pivotal lines of defence are materially adverse to those advanced in favour of Ieng Sary, in wholly interconnected proceedings. These facts alone put the Co-Lawyers-Designate in a current conflict of interest and render not merely foreseeable, but virtually certain, the emergence of multiple conflicts of interest as the investigation develops.

63. Given this interconnected factual matrix, it is further reasonable foreseeable that the confidential information (i.e. as addressed in **Section III**, any information relating to the representation of Ieng Sary, even beyond the scope of material protected by legal professional privilege) – would be relevant and potentially exculpatory for the proper representation of Meas Muth. For example, while remaining silent in court, in accordance with his legal rights, Ieng Sary would likely have provided firsthand information about his experience of the reporting lines of the CPK to the Co-Lawyers-Designate, leading them to question Duch extensively about difference between "how things were in principle and in practice".[172] A lawyer holding such information from a former client would violate confidentiality by relying, directly or indirectly, on such information in defence of a current client with materially adverse interests. Even if a lawyer could somehow consciously shut his or her mind to such information, that lawyer would breach fiduciary duties of disclosure, candour, openness and honesty to the current client by not using such information as part of the defence.

64. For these reasons, the International Co-Prosecutor submits that it is at least reasonably foreseeable that confidential information relating to the representation of Ieng Sary would be used to disadvantage Ieng Sary's interests, or advantage Meas Muth's defence, in

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169 **D1.3.33.16** Interview of Meas Mut by Christine Chameau, July 1991, at ERN-EN 00089661 (p. 1)
170 **E1/61.1** Transcript, 9 April 2012 at p. 96, ln. 8-9.
171 **E1/61.1** *Ibid.* at p. 96, ln. 11-13.
172 **E1/61.1** *Ibid.* at p. 97, ln. 14-17.

circumstances where their respective interests are materially adverse. This would generate a further conflict of interest in the course of the representation of Meas Muth.

65. ***The Co-Lawyers-Designate continue to advocate for the interests of Ieng Sary despite the termination of their mandate, materially limiting the free exercise of their fiduciary duties to Meas Muth.*** The actions of the Co-Lawyers-Designate, individually and jointly, demonstrate not only their continuing loyalty to Ieng Sary, but the direct promotion of his continuing legal interests, including safeguarding of his reputation and dignity and the welfare of his family. As established in **Section IV**, above, Mr Karnavas has given statements to the press about the importance of preserving Ieng Sary's dignity and described how he is "attached" to his former client.[173]

66. Also following the death of Ieng Sary and the termination of their mandates, the Co-Lawyers-Designate promoted an advocacy website for Ieng Sary with the stated "justification and rationale" being the "current practice by the Judicial Chambers and Co-Investigating Judges of the ECCC, of suppressing Defence filings which may be embarrassing or call into question the legitimacy and judiciousness of acts and decisions of the judges...depriv[ing] Mr Ieng Sary of a fair trial."[174] The Co-Lawyers-Designate remain directly associated with this website and its content, both through the circulation of a notice of its launch by Mr Karnavas[175] and the prominent placement of their photographs, biographical information and statements of motivation and purpose as well as direct advocacy on this website.[176]

67. This website clearly represents one element of a coordinated legal strategy in defence of the legal interests of Ieng Sary both within and outside the courtroom to challenge the legitimacy of decisions of the judges in the broader political context of the Royal Pardon and Amnesty granted to Ieng Sary. This is confirmed by Ieng Sary's own statements at the outset of trial proceedings in Case 002 that "Because the Trial Chamber is not acting correctly, I am of the opinion that I should not participate in this trial until the Supreme Court Chamber has ruled on the Royal Pardon and Amnesty."[177]

68. Such "robust[ ]"[178] advocacy of the Co-Lawyers-Designate on behalf of Ieng Sary, both prior to and following his death, materially limits the fiduciary duty of the Co-Lawyers-Designate

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173 *Supra* note139 above.
174 See www.iengsarydefence.org/about-us.html.
175 Email from Michael Karnavas to the Parties, "Press release from the Ieng Sary Defence – launch of a new website", 28 March 2013.
176 *Supra* note 177, www.iengsarydefence.org/about-us.html
177 **E1/15.1** Transcript, 23 November 2011 at p. 4, ln. 22-24.
178 Press release from the Ieng Sary Defence, "Launch of a new website", 28 March 2013 at p. 1.

to Meas Muth to act solely in his best interests. As demonstrated in **Section III**, above, Meas Muth is entitled to counsel entirely free to offer legal advice based on independent professional judgment. For example, should Meas Muth wish, at any time, to consider or pursue a defence strategy of cooperation with the judicial investigation, in the least by demonstrating compliance with the legal requirement of confidentiality of the judicial investigation, it is evident that the Co-Lawyer-Designate could not but be circumspect in advising him. In the circumstances, the Co-Lawyers-Designate cannot be independent of the legal interests of Ieng Sary, to whom they owe a continuing duty of loyalty and for whom they have a stated personal affection. To advise Meas Muth to comply fully with the confidentiality of the judicial investigation would be to compromise not only their continued duty of loyalty to Ieng Sary, but to undermine the perception of veracity of the claims made on their own website dedicated to his defence, thereby undermining, also, their personal interests in their respective professional reputations.

69. For these reasons, the International Co-Prosecutor submits that there the exists conflict of interest as defined in Rule 3.1 of the IBA Code, cited above,[179] as there is demonstrably a "significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to [...] a former client [...] or by a personal interest of the lawyer."[180]

2. THESE CONFLICTS OF INTEREST CANNOT BE WAIVED

70. ***In the circumstances, condoning consent to representation would irreversibly prejudice the administration of justice.*** In addition to the harm the conflict creates to the representation of Meas Muth and Ieng Sary, the institution of the ECCC, and the proceedings before it, would also be harmed by appointing the Co-Lawyers-Designate under the circumstances. Specifically, the actual and perceived conflict that would arise from the Co-Lawyers-Designates' representation of Meas Muth would prejudice the administration of justice at the ECCC because of the deleterious effect it would have on the real and perceived integrity of proceedings in Cases 002 and 003 and possibly Case 004.

71. The ECCC has legitimate institutional interests in not unnecessarily compromising the mission of the court and in having proceedings before it to be not only actually, but perceived to be, as fair as possible. This includes ensuring that Suspects and Accused persons have counsel that will have the flexibility to fully defend their client in all appropriate ways and

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179 See note 96.
180 *Ibid.*

under any circumstances that might arise, so that any confirmation of charges, conviction, or sentences that may result are seen as legitimate due to the substantive and procedural rigor of the litigation that preceded. The Court, and the Co-Prosecutors, have an interest in ensuring that those investigated and, potentially, tried before it have had every opportunity for a full defence.

72. In light of the applicable law in **Section III**, and as argued in **Section IV(a)**, above, the Co-Lawyers-Designate, by reasons of their conflict, would not be able to provide the requisite thorough defence. That limitation would actually, or be perceived to, result in a less-than-full representation of Meas Muth, potentially casting a pall over any potential Closing Order that commits an accused person to trial on any charges, as well as any subsequent convictions.

73. In addition to the real and perceived effects on the administration of justice in Case 003, the appointment of the Co-Lawyers-Designate as counsel for Meas Muth would also have deleterious effects on the real and perceived integrity of proceedings in Case 002. As previously noted by the International Co-Prosecutor[181], Meas Muth is scheduled to appear as a witness in Case 002. The appointment of the Co-Lawyers-Designate as his legal counsel would give the former counsel for a Co-Accused in Case 002 direct access to, and influence over, a witness in Case 002.

74. The Co-Lawyers-Designate would continue to have an interest in the outcome of Case 002 because of their continuing obligations of confidentiality and loyalty, as well as their stated personal affection for their former client[182], who was a member of the Standing Committee and alleged to have been involved in a JCE with the two remaining Co-Accused in Case 002. The Co-Lawyers-Designate will also have a personal interest in seeing arguments they espoused in Case 002 vindicated, and publicly-stated opinions validated.[183] For these reasons, their access and influence over a witness in Case 002 would potentially be detrimental to the proceedings in fact, and also negatively affect the perception of the integrity of the proceedings in Case 002.

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181 **D56/1** International Co-Prosecutors' Request that Appointment of Co-Lawyers-Designate be Rejected on the Basis of Irreconcilable Conflicts of Interest, 24 December 2012, para. 52.

182 See The Cambodia Daily, *Ieng Sary Cremated in Elaborate Funeral Ceremony*, 22 March 2013 ("Also among the guests were members of Ieng Sary's legal defense team from the ECCC in Phnom Penh. National defense lawyer Ang Udom and his international counterpart Michael Kamavas were greeted warmly by Ieng Sary's son Ieng Vuth, whom they presented with a gift- a framed photograph of lawyer and client together in court. "The photo encapsulates my relationship with Ieng Sary," Mr. Karnavas said. "One of the things we tried to do was ensure throughout the process that there was human dignity in the way he was treated." "After five years and five months of intensely working on this case, one of my most difficult ever, it's very difficult not to become attached to the client" he added.).

183 See The Toronto Star, *Why Cambodia's Khmer Rouge war crimes trial is endless – and useless*, 31 March 2013 ("By and large, the bench is incompetent. None of the judges — not a single one of them — have the sort of experience, knowledge and background for these kinds of cases.").

75. The Co-Lawyers-Designate have argued that because Meas Muth has indicated that he does not intend to testify in Case 002, or any potential Cases 003 or 004, that no conflict arises on that basis. In fact, this only serves to confirm the concerns of the International Co-Prosecutor and provides demonstrable proof that the Co-Lawyers-Designate are already harming the administration of justice.

76. As part of the same document in which Meas Muth executes a waiver, he also states that he has "no intentions of answering any questions as a witness in Case 002, as a suspect in Case 003, or as a witness in Case 004."[184] In addition to the fact that this statement was made as part of the waiver, the Co-Lawyers-Designates' submissions make clear that this statement was included in order to diminish the possibility of a conflict.[185] Thus, in the pursuit of being appointed counsel, the Co-Lawyers-Designate have already affected the proceedings in Cases 002, 003 and 004, even before confirmation of their appointment. It is impossible to know if Meas Muth would have taken the same position regarding testimony had it not been for the needs of the Co-Lawyers-Designate to attempt to remove this glaring aspect of their conflict, but it is equally impossible to ignore the fact that the interests of the Co-Lawyers-Designate militate in favour of Meas Muth not testifying. And again, should Meas Muth abide by his declaration regarding his willingness to provide testimony, the perception that he made that choice with counsel not because it was in his best interests, but rather because it served the interests of his counsel, would be overwhelming and "diminish public confidence" in the ECCC and the administration of justice.

77. Therefore, in addition to the inherent unwaiverability of the instant conflict between Ieng Sary and Meas Muth, the International Co-Prosecutor submits that the Co-Investigating Judges should refuse to confirm the appointment as part of their inherent power to protect the interests of the ECCC as an institution. This is especially so where there is no dearth of competent counsel available to be assigned by DSS that would have no impact on any proceedings before the Court, nor bring the proceedings into suspicion.

3. WAIVERS ARE INEFFECTIVE

78. ***In the alternative, the consent obtained from both clients is ineffective and Ieng Sary's waiver can no longer be cured.*** Should the Co-Investigating Judges disagree with the International Co-Prosecutor that the conflict is unwaiverable, and/or that the harm to the

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184 **D56/4/1.2** at p. 2.

185 **D56/4/1** at p. 1 ("Mr. Meas Muth has also provided written notice of his intention to invoke his right to remain silent in Case 002 (should he be summoned to give evidence) and Case 003 (should he be requested to be questioned by the Office of Co-Investigating Judges ...)."; *ibid.* para. 34; *ibid.* para. 40;

ECCC as an institution prohibits the Co-Lawyers-Designates' appointment, the International Co-Prosecutor submits that nevertheless the Co-Lawyers-Designate should not be appointed because the Co-Lawyers-Designate have not produced adequate waivers from Meas Muth and Ieng Sary sufficient to ensure the Judges that the individuals were fully informed of the details and consequences of their waivers, and also sufficient to withstand any subsequent challenges.

79. The waivers provided are too general and broad as to the matters covered to satisfy the applicable standard, stating only that the individuals "voluntarily, knowingly and unequivocally waive any conflict of interest that might exist"[186], and therefore do not display full and informed consent. This generality is troubling because there is no indication that the individuals were fully informed of the specific ways in which conflict might arise, or how the conflict might affect the Co-Lawyers-Designates' representation of them. This is particularly problematic in a case of this complexity and at a point in proceedings where many facts, both incriminatory and exculpatory, have yet to be uncovered, and therefore where the full nature of the conflict may be difficult to ascertain.

80. The waivers not only are deficient in not providing sufficient demonstration that Meas Muth and Ieng Sary were fully informed of all of the facets of the conflict, but also in failing to demonstrate that the individuals were informed of and consented to how the various conflicts would be resolved—that is to say which of the individuals' interests would be abrogated to resolve the conflict. As just one example, Ieng Sary's waiver does not demonstrate his consent to waive his right to confidentiality of legally-privileged information, which right survives his death.

81. Furthermore, the lack of specificity in Ieng Sary's waiver, signed 15 June 2012, is particularly problematic because at the time of signing Ieng Sary would have known that he always had the power to withdraw his waiver and/or terminate the Co-Lawyers-Designates' representation of him as various conflict matters arose and resolutions were proposed. Now, due to his death, Ieng Sary no longer retains this control over his rights and interests.

82. In addition to failing to contain sufficient substantive specificity, the waivers also fail to demonstrate sufficient procedural safeguards in arriving at the waivers validly. In particular, neither waiver indicates that the two individuals were advised by outside counsel in signing these waivers, nor informed that they should do so by the Co-Lawyers-Designate or the DSS.

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[186] **D56/4/1.2** pp. 2, 6. Ieng Sary's waiver is worded slightly differently in the relevant passage "voluntarily, knowingly and unequivocally waive any potential conflict of interest which might arise".

83. Appointing counsel without appropriate waivers is not only ethically prohibited, but also, in regards to Meas Muth, would fail to guard against any claim of ineffective assistance of counsel later in proceedings because the Accused may claim he did not fully understand all the potential conflicts. For these reasons, and because the fatal flaws of the waiver signed by Ieng Sary are no longer curable due to his death, the conflicted representation should not be allowed to proceed.

VI. REQUESTED RELIEF

84. For these reasons, the International Co-Prosecutor respectfully requests the Co-Investigating Judges to **admit** and **uphold** his Request of 24 December 2012 and the instant Supplementary Submissions; 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; 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
3 April 2013	Andrew CAYLEY Co-Prosecutor	Phnom Penh	