

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

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**INTERNATIONAL CO-PROSECUTOR'S REPLY
CONCERNING MEAS MUTH'S EXPEDITED REQUEST FOR THE OCIJ TO RECONSIDER
WHETHER IT HAS JURISDICTION TO DETERMINE ALLEGED CONFLICTS OF INTEREST**

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Suspect
MEAS Muth

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ANG Udom
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003/07-09-2009-ECCC/OCIJ

I. INTRODUCTION

1. The International Co-Prosecutor (“Co-Prosecutor”) submits this Reply to the Expedited Request (“Request”) filed by Mr Ang Udom and Mr Michael Karnavas (“Co-Lawyers-Designate”) on 26 November 2013¹ to the OCIJ to *Reconsider Whether it has Jurisdiction to Determine Alleged Conflicts of Interest*. This Reply is submitted within five working days as prescribed in the *Order on Meas Muth’s Expedited Request on OCIJ Jurisdiction to Determine Conflicts of Interest*.²
2. For the purposes of this reply, the Co-Prosecutor addresses a number of mischaracterisations and misapplications of legal principle. In sum, the International Co-Prosecutor maintains that the Co-Investigating Judges have jurisdiction to determine if a conflict of interest exists in the continuing representation of Suspect Meas Muth by the Co-Lawyers-Designate, either during Internal Rule 11(6) proceedings or, in the alternative, on the basis of Article 21(1) of the UN/RGS Agreement and Article 42(3) of the ECCC Law, as further regulated in the DSS Administrative Regulations. In accordance with applicable international standards, the President of the Bar Association of the Kingdom of Cambodia does not have exclusive or even concurrent jurisdiction with the Co-Investigating Judges in this regard. The International Co-Prosecutor reaffirms his request that the Co-Investigating Judges not confirm the appointment of the Co-Lawyers-Designate in Case 003 on the basis of irreconcilable conflict of interest.

II. APPLICABLE LAW

3. Rule 11(6) provides:

*The Head of the Defence Support Section shall make determinations on [...] the assignment of lawyers to indigent persons [...] subject to appeal to the Co-Investigating Judges or the Chamber before which the person is appearing at the time, within fifteen (15) days of receiving notification of the decision. No further appeal shall be allowed.*³

4. Article 21(1) of the UN/RGC Agreement provides:

The counsel of a suspect or an accused who has been admitted as such by the Extraordinary Chambers shall not be subjected by the Royal Government of

¹ **D56/17** *Meas Muth’s Expedited Request for the OCIJ to Reconsider Whether it has Jurisdiction to Determine Alleged Conflicts of Interest*, 26 November 2013. (“Request”).

² **D56/16** *Order on Meas Muth’s Expedited Request on OCIJ Jurisdiction to Determine Conflicts of Interest*, 29 November 2013. (“Order”).

³ Internal Rule 11(6) [emphasis added].

003/07-09-2009-ECCC/OCIJ

*Cambodia to any measure which may affect the free and independent exercise of his or her functions under the present Agreement.*⁴

This provision is repeated *verbatim* in Article 42(3) of the ECCC Law.

5. The DSS Administrative Regulations provide:

*6.2 With respect to lawyers selected from the UNAKRT list, the Defence Support Section shall: [...] b. Forward Form 7: Request for Engagement/Assignment of Co-Lawyers to the Investigating Judges or the relevant chamber to issue an order confirming the provisional assignment of the lawyer to be admitted as such by the Extraordinary Chambers in the terms of Article 21(1) of the Agreement.*⁵

*7.1 Subject to any order of the ECCC, Co-Lawyers shall conduct the case to finality.*⁶

*7.4 Removal of lawyers. The ECCC may determine that a Co-Lawyer is no longer eligible to defend a suspect, charged person or accused before the ECCC.*⁷

III. ARGUMENT

(i) Jurisdiction in appeal or review proceedings under Internal Rule 11(6)

6. The International Co-Prosecutor reaffirms his position that the pending proceedings concerning conflict of interest of the Co-Lawyers-Designate are admissible under Internal Rule (“Rule”) 11(6). The Co-Investigating Judges exercise exclusive appellate jurisdiction over the administrative determinations of DSS concerning the appointment of counsel. In the alternative, the International Co-Prosecutor submits that the Co-Investigating Judges have the inherent discretion to exercise powers of judicial review of DSS administrative action.
7. First, the Co-Lawyers-Designate err in submitting that Rule 11(6) affords a right of appeal only for persons claiming indigence.⁸ Nothing in Rule 11(6) limits appellate rights to indigent persons. On an ordinary meaning of the Rule, the Co-Prosecutors are also afforded recourse to appeal.
8. Second, as recognised by the Co-Lawyers-Designate,⁹ the International Co-Investigating Judge determined in Case 004 that he has jurisdiction to “review...any contestation, based on objective criteria, such as...the existence of a conflict of interest.”¹⁰

⁴ Article 21, UN/RGC Agreement [emphasis added].

⁵ DSS Administrative Regulations, RS-9.7.07, Regulation 6.2. [emphasis added].

⁶ DSS Administrative Regulations, RS-9.7.07, Regulation 7.1 [emphasis added].

⁷ DSS Administrative Regulations, RS-9.7.07, Regulation 7.4 [emphasis added].

⁸ **D56/17** Request at para .35.

⁹ **D56/17** Request at p. 2.

¹⁰ **D122/6** *Decision on Motion and Supplemental Brief on Suspect’s Right to Counsel*, 17 May 2013, at para. 82.

003/07-09-2009-ECCC/OCIJ

9. The Co-Lawyers-Designate further err by suggesting that the only permissible avenue for appeal open to the International Co-Prosecutor from the start of an investigation is under Rule 74(2), which “only allows OCP to appeal orders related to the criminal investigation,” and not procedures related to the administration of justice.¹¹ Rule 74(2) states that the “[t]he Co-Prosecutors may appeal against all orders by the Co-Investigating Judges.”¹² The Pre-Trial Chamber has held that “the role of the Co-Prosecutors does not automatically extend to procedures related to interference with the administration of justice and/or misconduct of a lawyer.”¹³ This *dictum* recognises the fact that the Co-Prosecutors’ standing in Rule 35 and Rule 38 proceedings is not automatic and must be demonstrated. The pending litigation does not concern Rules 35 and 38.
10. The Co-Lawyers-Designate fail to acknowledge that the Co-Prosecutors’ duties to conduct prosecution at the ECCC¹⁴ confer standing to make submissions to the Co-Investigating Judges on all matters fundamental to the administration of justice. In recognition of their status as judicial officers under Cambodian law, the Co-Prosecutors are, for example, entitled to vote on the amendment of parts of the Internal Rules.¹⁵ Thus, contrary to the Co-Lawyers-Designate’s submissions, the International Co-Prosecutor has authority to challenge the appointment of the Co-Lawyers-Designate due to a conflict of interest as an appeal under Rule 11(6).
11. The Co-Lawyers-Designate further err in characterising the pending conflict of interest proceedings as “not strictly related to the ongoing cases or the investigation of crimes.” and thus not subject to appeal.¹⁶ The representation of the suspect in Case 003 who remains on the Trial Chamber’s Case 002 witness list concerns both “ongoing cases” and the “investigation of crimes.” Moreover, ICTY jurisprudence on record amply demonstrates the interest of the prosecution in such proceedings, both as a party and in the exercise of institutional responsibilities to promote the good administration of justice.¹⁷

¹¹ **D56/17** Request at para. 33.

¹² Internal Rule 74(2).

¹³ **D138/1/8** *Decision on Admissibility on Appeal Against the Co-Investigating Judges’ Order on Breach of Confidentiality of the Judicial Investigation*, 13 July 2009, paras. 13-14 [emphasis added].

¹⁴ UN/RGC Agreement, Article 6; ECCC Law, Article 16, Internal Rule 49.

¹⁵ Internal Rule 18(3)(a).

¹⁶ **D56/17** Request at para 38.

¹⁷ **D56/7** *International Co-Prosecutor’s Supplementary Submissions on Conflict of Interest of Co-Lawyers-Designate*, 3 April 2013; *See also* ICTY Professional Conduct for Counsel Appearing Before the International Tribunal, Article 14 (E); Prosecutor v. Plić 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; *Prosecutor v. Enver Hadzihasanovic*, Case No. IT-01-47-PT,

*(ii) Jurisdiction under Article 21(1) of the UN/RGC Agreement
and Article 42(3) of the ECCC Law*

12. In the alternative, the International Co-Prosecutor submits that the pending proceedings concerning conflict of interest of the Co-Lawyers-Designate are admissible as a self-standing request under Article 21(1) of the UN/RGC Agreement and Article 42(3) of the ECCC Law, as further regulated by Articles 6.2 and 7.4 of the DSS Administrative Regulations. The Co-Investigating Judges exercise exclusive jurisdiction over such requests at first instance level.
13. Contrary to the assertion of the Co-Lawyers-Designate the admission of lawyers before the ECCC is not a “simple procedural matter” insulated from judicial scrutiny.¹⁸ Pursuant to Internal Rules 11(2)(d), 11(2)(i) and 22(1)(b), read with Articles 5-6 of the DSS Administrative Regulations, the DSS is responsible for the initial “selection”¹⁹ and “engagement/assignment”²⁰ of Co-Lawyers from their list of lawyers qualified to represent indigent persons.²¹ Any such “engagement/assignment” of Co-Lawyers remains provisional pending *both* an “assessment of means”²² *and* a request by the DSS to the Co-Investigating Judges or relevant Chamber for “an order *confirming* the provisional assignment of the lawyer to be *admitted* as such by the Extraordinary Chambers in accordance with Article 21(1) of the Agreement.”²³
14. Moreover, Article 7.4 of the DSS Administrative Regulations, titled “Removal of Lawyers”, provides that: “The ECCC may determine that a Co-Lawyer is no longer eligible to defend a suspect, charged person or accused before the ECCC.” The International Co-Prosecutor thus submits that the Co-Investigating Judges may properly consider this Request in the exercise of their judicial discretion to determine the eligibility of the Co-Lawyers to defend the Suspect, both at the time of initial appointment and in the event of conflicts of interest requiring the removal of counsel. Regulation of conflict of interest by judicial authorities is a well-recognised limitation on a suspect’s freedom of choice of lawyer.

(iii) No basis for jurisdiction of the BAKC President

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.

18

D56/17 Request at para 40.

19

DSS Administrative Regulations, Art. 5.

20

Ibid., Art. 6.

21

Ibid., Art. 1.2(a).

22

Ibid., Art. 6.2(a).

23

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


003/07-09-2009-ECCC/OCIJ

15. The Co-Lawyers-Designate submit that conflict of interest issues may only be addressed by DSS and the President of the Bar Association of the Kingdom of Cambodia (BAKC), with recourse to appeal before the Pre-Trial Chamber.²⁴ The Co-Prosecutor contests this position. As the Supreme Court Chamber has recently held, in the context of the principle of mandatory prosecution, procedures mandated by Cambodian and French law will not automatically be applicable before the ECCC, where such domestic regulation or practice diverges from international procedural standards.²⁵ The International Co-Prosecutor has already demonstrated how ICTY rules and jurisprudence regulate conflict of interest proceedings at the international level,²⁶ and the role of the *bâtonnier* in French civil law does not, on the test adopted by the Supreme Court Chamber, “directly derive from rights, is not an international standard of justice and, in the Cambodian legal system, does not enjoy any privileged status.”²⁷ Any claim that the President of the BAKC has an exclusive role in regulating conflicts of interest for Co-Lawyers at the ECCC has no express basis in Cambodian law, and is not demonstrated on the provisions cited by the Co-Lawyers-Designate.²⁸

IV. REQUESTED RELIEF

16. For these reasons, the Co-Prosecutor respectfully requests the Co-Investigating Judges to dismiss the Request in full and rule on the pending request of the Co-Prosecutor concerning conflict of interest in the continuing representation of Suspect Meas Muth.

Respectfully submitted,

Date	Name	Place	Signature
5 December 2013	Nicholas KOUMJIAN International Co-Prosecutor	Phnom Penh	

²⁴ D56/17 Request at p. 1.

²⁵ E284/4/8 Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002, 25 November 2013, paras. 61-62.

²⁶ *Supra*, note 17.

²⁷ E284/4/8 Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002, 25 November 2013, at para. 62, [noting that Cambodian law does not expressly provide for mandatory prosecution].

²⁸ D56/17 Request, para. 27.