BEFORE THE CO-INVESTIGATING JUDGES

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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INTERNATIONAL RESERVE CO-PROSECUTOR'S REPLY CONCERNING CONFLICT OF INTEREST OF CO-LAWYERS-DESIGNATE

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I. INTRODUCTION

1. The International Reserve Co-Prosecutor ("Co-Prosecutor") submits this Reply to the Response ("Second Response") filed by Mr Ang Udom and Mr Michael Karnavas ("Co-Lawyers-Designate") on 23 April 2013[1] to the Co-Prosecutor's *Supplementary Submissions on Conflict of Interest of Co-Lawyers-Designate in relation to the former's appointment to represent Suspect Meas Muth in Case 003* ("Supplementary Submissions").[2] A full procedural history has been set out at paragraphs 1 and 2 of the Supplementary Submissions and is incorporated by reference. The briefing schedule in this matter was suspended by the International Co-Investigating Judge on 2 May 2013 and resumed on 2 October 2013; this Reply is submitted within five working days as prescribed in the *Order Resuming the Schedule for Filings on the Issue of the Alleged Existence of a Conflict of Interest in the Representation of Meas Muth.*[3]

2. For the purposes of this reply, the Co-Prosecutor addresses a number of mischaracterisations and misapplications of legal principle, reiterating and clarifying arguments set out in his underlying Request[4] and Supplementary Submissions. In sum, the Co-Prosecutor maintains that the representation of Suspect Meas Muth by the Co-Lawyers-Designate generates multiple conflicts of interest that cannot or have not been validly waived. The Co-Prosecutor requests the Co-Investigating Judges not to confirm the appointment of the Co-Lawyers-Designate in Case 003.

II. PRELIMINARY MATTERS

(i) Functional independence and decision-making of the Co-Prosecutors

3. In the introduction to the Response, the Co-Lawyers-Designate question the capacity of both the International Co-Investigating Judge and the International Co-Prosecutor to act with regard to this litigation in the absence of express agreement of their national counterparts,[5] further claiming that the International Co-Prosecutor "and his international staff are acting devoid of any input or approval from his national counterpart".[6] This allegation is withuot

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1 **D56/9** Leave to Exceed Page Limitation & Co-Lawyers' Response to International Co-Prosecutor's Supplementary Submissions on Conflict of Interest of Co-Lawyers-Designate, 23 April 2013 ("Second Response").

2 **D56/7** International Co-Prosecutor's Supplementary Submissions on Conflict of Interest of Co-Lawyers-Designate, 3 April 2013 ("Supplementary Submissions").

3 **D56/14** *Order Resuming the Schedule for Filings on the Issue of the Alleged Existence of a Conflict of Interest in the Representation of Meas Muth*, 2 October 2013.

4 **D56/1** Request that Appointment of Co-Lawyers-Designate be Rejected on the Basis of Irreconcilable Conflict of Interest, 24 December 2012 ("Request").

5 **D56/9** Second Response, *supra* note 1 at p. 1.

6 **D56/9** *Ibid.* at p. 1, note 5.

merit. In their prior submissions, the Co-Lawyers-Designate saw fit to "call into question"[7] the fact that "the National Co-Prosecutor [...] did not sign the Request and was, instead merely copied..."[8] and decry the fact that the International Co-Prosecutor has "provided no explanation.[9] As the international judges of the Pre-Trial Chamber have held, the decision-making of the Co-Prosecutors is a matter of wholly within the scope of their functional independence:

> *The matter of how the two Co-Prosecutors work together is, in our view, an internal issue of the independent Office of the Co-Prosecutors* [...] *the outside world can expect the Co-Prosecutors to work together and are therefore assumed to be aware of the actions of the other. Where necessary, they are capable of clearly and formally expressing their disagreement with a course of action proposed or taken by the other* [...] *It is not for the Co-Investigating Judges,* or anybody else*, to take up a supervisory role of the Office of the Co-Prosecutors* [...][10]

III. THE RESPONSE MISCHARACTERISES THE APPLICABLE LAW

(i) Burden of proof

4. The burden of proving a conflict of interest of Defence Counsel lies with the Co-Prosecutor.[11] The Co-Prosecutor submits, for the reasons below, that this burden has been fully discharged.

(ii) Standard of proof

5. In their Response, the Co-Lawyers-Designate do not dispute that the standard for determining whether a conflict of interest exists or may arise is an objective standard, not a subjective determination for the lawyers concerned. They do not challenge the authorities cited by the Co-Prosecutor at paragraphs 26 to 28 of the Supplementary Submissions, which demonstrate that the applicable legal test is that of "reasonable foreseeability."[12] The Co-Lawyers-Designate further acknowledge that "a conflict of interest would arise where there is a 'significant risk' that due to representing a past client the current client would be adversely impacted."[13]

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7 **D56/4/1** Leave to Exceed 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 at p. 1, note 5 ("First Response").
8 **D56/4/1** *Ibid.*
9 **D56/4/1** *Ibid.*
10 **D20/4/4** Considerations of the Pre-Trial Chamber regarding the International Co-Prosecutor's Appeal against the Decision on Time Extension Request and Investigative Requests regarding Case 003 (Opinion of Judges Lahuis and Downing), 2 November 2011 at para. 8 [emphasis added].
11 **D56/9** Second Response, *supra* note 1 at para. 15.
12 **D56/9** Second Response, *supra* note 1 at para 19.
13 **D56/9** *Ibid.* at para. 20.

6. However, the Response then applies a subjective test, arguing in effect that a conflict of interest will not be established as long as they considered themselves personally satisfied that no such conflict exists and personally assert that no such conflicts would arise. For example, at paragraph 17, the Response states:

> *In any event, the Co-Lawyers have more than a good faith basis for asserting that no knowledge gained from Mr. IENG Sary will be used to assist Mr. MEAS Muth to the detriment of Mr. IENG Sary. Similarly, the Co-Lawyers have more than a good faith basis for asserting that no knowledge gained from Mr. MEAS Muth will be used to protect Mr. IENG Sary to the detriment of Mr. MEAS Muth. These representations are made based on the respective theories of the cases under which both Mr. IENG Sary and Mr. MEAS Muth have instructed the Co-Lawyers to proceed, after careful consultation, advice and deliberation.*

7. The Co-Lawyers-Designate appear to advance the view that conflicts of interest are by nature so case-specific, and so tenuous, that no meaningful categories or "danger zones"[14] can be identified.[15] As set out in the Supplementary Submissions, ethical codes and standards across multiple jurisdictions confirm that conflicts of interest will arise in at least five concrete situations relevant to Case 003:

   (a) where it is reasonably foreseeable that that two clients' interests are materially adverse in substantially-related proceedings;

   (b) where it is reasonably foreseeable that confidential information concerning a former client is material to the current client but disadvantageous to the former client;

   (c) where it is reasonably foreseeable that knowledge obtained from a former client may be advantageous to the interests of the current client;

   (d) where it is reasonably foreseeable that confidential information is material to the defence of the current client and the interests of both clients are materially adverse; and

   (e) where there is a significant risk that representation of the current client will be materially limited by a lawyer's continuing obligations to a former client.[16]

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14 See **D56/7** Supplementary Submissions, *supra* note 2, at para. 13, citing *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 620.

15 See e.g. **D56/9** Second Response, *supra* note 1 at paras. 17 and 20.

16 **D56/7** Supplementary Submissions, *supra* note 2 at para. 22.

(iii) Sufficiency of prima facie *evidence of a superior-subordinate relationship required to establish conflict of interest*

8. The Co-Prosecutor reiterates that whether a conflict of interest is "reasonably foreseeable" does not require conclusive proof, but rather an examination of the *prima facie* evidence. The standard of *prima facie* evidence equally applies to the proximity of the superior-subordinate relationship between two clients that is likely to generate a conflict of interest. In *Jadranko Prlić*,[17] the ICTY Trial Chamber held that "a conflict of interest is likely to arise, if not already existing, between the two accused" by the mere fact that "both accused are charged with the same criminal acts and were allegedly linked by a relatively close superior-subordinate relationship at the relevant time."[18] In this case, one of the defendants (Ivica Rajić) faced charges by way of the mode of liability of superior responsibility, on the basis of his command and control of several Croatian Defence Council units. The other defendant (Bruno Stojić) was charged as the head of the HVO department (later Ministry) of Defence in relation to the same criminal acts.[19] The Trial Chamber found that a close superior-subordinate relationship was established between the two accused, despite the Defence submission that no point of contact existed between them[20] due to their respective positions in the hierarchy, i.e. that Rajić was charged in a military capacity as an army commander whilst Stojić was charged as a civilian authority.[21] The Trial Chamber rejected this Defence submission, reasoning that "the mere fact that one accused is charged as a civilian authority while the other is charged as a military authority does not exclude the existence of a superior-subordinate relationship between them."[22]

9. Another ICTY Trial Chamber adopted similar reasoning in *Rasim Delić*.[23] Here, the Trial Chamber agreed with the Registrar that there was a "real possibility" that the defence of the accused in two separate cases may become "opposed," where it was alleged that one of the accused was a direct subordinate of the other accused.[24] The Trial Chamber considered that the fact at both accused were charged with the "same criminal acts" and were linked by a "relatively close superior-subordinate relationship at the relevant time" provided a reasonable

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17 *Prosecutor v Jadranko Prlić et al.*, Case No. IT-04-74-PT, Decision on Request for Appointment of Counsel (ICTY Trial Chamber), 30 July 2004 ("*Prlić* Trial Chamber Decision").
18 *Ibid*, at para. 29.
19 *Ibid*, at para. 18-19.
20 *Ibid*, at para. 20.
21 *Ibid*. at para 20.
22 *Ibid*. at para. 29.
23 *Prosecutor v Rasim Delić*, Case No. IT-04-83-PT, Decision on Motion Seeking Review of the Registry Decision Stating that Mr. Stéphane Bourgon Cannot be Assigned to Represent Rasim Delić (ICTY Trial Chamber), 10 May 2005.
24 *Ibid.*

basis for the Registrar to conclude "that a conflict of interests [was] a *possibility* in this case" and to disallow dual representation.[25]

10. Following *Jadranko Prlić* and *Rasim Delić*, once the facts in the indictment give rise to a *prima facie* close superior-subordinate relationship, this will more than suffice to support a finding that the interests of accused in one or multiple cases may become materially adverse, generating a conflict of interest in which dual representation would be impermissible.

(iv) Relevance of defence theories in assessing conflict of interest

11. The Co-Lawyers-Designate have submitted that they are satisfied that no conflict of interest exists or could arise between Ieng Sary and Meas Muth.[26] The Response suggests that no such risks exist "*based on the respective theories of the cases* under which both Mr Ieng Sary and Mr Meas Muth have instructed the Co-Lawyers to proceed, after careful consultation, advice and deliberation." In this respect, the Response is cursory and demonstrates no meaningful consideration of the prospect of evolution of lines of defence in the course of a judicial investigation, particularly one that remains at an early stage. The Trial Chamber in *Jadranko Prlić* accepted that actual or possible theories or strategies of defence are not stagnant and often evolve during the course of proceedings:

> *Finally, the mere fact that both accused intend to plead their complete innocence is not in itself a guarantee against conflict of interest. Innocence can be pleaded in many different ways and the line of defence may, and often does, evolve in the course of the case. It is the duty of counsel to take this factor into consideration when assessing the potential for conflict of interest.*[27]

12. Similarly, at paragraph 22 of the Response, the Co-Lawyers-Designate assert that "their representation of Mr Meas Muth would not lead them to adopt different theories or strategies to those they would otherwise adopt if they had not represented Mr Ieng Sary."[28] This assertion is not relevant to determining reasonable foreseeability of conflict of interest on account of conflicting obligations of confidentiality or loyalty to Ieng Sary and loyalty to Meas Muth. The core issue is not whether the theories or strategies of counsel would have differed were it not for the prior representation. The core issue is whether it is reasonably foreseeable to an objective decision-maker that the continuing duties of loyalty and confidentiality to a deceased client – duties that the Co-Lawyers-Designate do not dispute[29] – may limit the right of the new client to the "undivided loyalty" [30] of counsel, to

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25 *Ibid* [emphasis added].
26 **D56/9** Second Response, *supra* note 1 at para. 53.
27 *Ibid*. at para. 29.
28 **D56/9** Second Response, *supra* note 1 at para. 22.
29 **D56/9** *Ibid*, at paras. 4-7.

"pursue, without any restriction, the interests of his client,"[31] given their duty to uphold the interests of their former client. The Co-Prosecutor has already made a specific showing of how such a conflict is more than reasonably likely to arise in the course of the judicial investigation.[32]

13. The Co-Prosecutor further submits, on the basis of factual allegations addressed at paras. 24-34, below, that the proximity of the superior-subordinate relationship between Ieng Sary and Meas Muth is as close or closer than that of the co-accused in *Jadranko Prlić*, where the ICTY Trial Chamber accepted that counsel would be in a position "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"[33] While Ieng Sary and Meas Muth are not co-accused in the same proceedings, the proximity of their superior-subordinate relationship is such that their interests are reasonably foreseeable to be or become adverse in any ongoing proceedings against Meas Muth. The Co-Lawyers-Designate do not contest their continuing duty of loyalty to Ieng Sary.[34] In these circumstances, the Co-Prosecutor submits that the risk of conflict of interest is, in the very least, reasonably foreseeable.

(v) Accuracy of the Response concerning ICTY practice in appointment of defence counsel

14. In the Response, the Co-Lawyers-Designate submit that counsel have been assigned in multiple cases (such as the Srebrenica cases at the ICTY) where past and present clients are alleged to have been involved in the same events,[35] to support the proposition that prior practice at the ICTY (and the ECCC) suggest that counsel may properly represent a number of former superiors and subordinates across different cases. This proposition does not detract from the objective standard of proof applicable in assessing conflict of interest. The Co-Lawyers-Designate merely describe – with material errors – the status of counsel in each particular case.

15. For instance, the Co-Lawyers-Designate affirm that in ICTY proceedings, Nenad Petrušić served as lead counsel for General Krstić, who was under the overall command of General Mladić. Mr Petrušić is then claimed to have become co-counsel for General Miletić, who was

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30 **D56/7** Supplementary Submissions, *supra* note 2 at para. 13, citing *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 620.
31 *Prlić* Trial Chamber Decision, *supra* note 24 at para. 29.
32 See **D56/7** Supplementary Submissions, *supra* note 2, at paras. 57-64.
33 *Prlić* Trial Chamber Decision, *supra* note 24 at para. 29.
34 **D56/9** Second Response, *supra* note 1 at para. 16.
35 **D56/9** *Ibid.*, at para. 8

another subordinate of General Mladić. They furthermore state that Mr Petrušić is presently one of the principal members of General Mladić's legal team.[36] No specific source or authority is given by the Co-Lawyers-Designate to support these affirmations. In fact, Mr. Petrušić is not designated as co-counsel for General Miletić.[37] The ICTY Registrar's decision, upheld on review before Trial Chamber II,[38] disallowed Mr Petrušić's representation of General Militić on grounds of conflict of interest given his former representation of General Krstić and, as such, would be contrary to the interests of justice.[39] Furthermore, as the Co-Lawyers-Designate acknowledge at footnote 39 to their Response, Mr. Petrušić is neither assigned as counsel nor co-counsel for General Mladić.

16. The Co-Lawyers-Designate further claim that the participation of the former International Co-Prosecutor, Andrew Cayley QC, together with Mr Gregory Kehoe and Mr Payam Akhavan, as Defense Counsel in *Gotovina* discredits the "generalized assertion: that it is a forgone conclusion that in all instances the confidentiality of a past client *will* or *must* be breached for defense counsel to properly and vigorously represent a present client".[40] The Co-Prosecutor has never asserted that breach of confidentiality is a foregone conclusion in all cases of subsequent representation. Rather, such a breach is *reasonably foreseeable* in the specific circumstances in which the Co-Lawyers-Designate have chosen to place themselves. In *Gotovina*, the Deputy Registrar and the Trial Chamber determined that neither Mr Cayley[41] nor Mr Kehoe[42] could be said to have been either personally or substantially involved in the matter at hand, clearly not the situation in the current case.

(vi) Accuracy of the Response concerning ICTY and ECCC jurisprudence

17. In the Co-Prosecutor's submission, the Response either misstates or mischaracterises the jurisprudence of the ICTY and the ECCC. The Response fails to distinguish between ICTY cases where the counsel previously served with the Office of the Prosecutor from cases involving counsel representing multiple accused who are indicted for similar facts. A review of ICTY jurisprudence supports the position that the standard of proof for conflicts of interest justifiably differs in these two scenarios.

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36 **D56/9** *Ibid.*, at para. 37.
37 *Prosecutor v Tolimir et al.*, Decision on Appointment of Co-Counsel for Radivoje Miletić, Case No. IT-05-88-PT, 28 September 2005.
38 *Ibid.* at para 38.
39 *Ibid.* at para 4.
40 **D56/9** Second Response, *supra* note 1 at para. 11.
41 *Prosecutor v Ante Gotovina et al.*, Case No. IT-06-90-PT, Public Decision, 13 November 2007, at p. 5.
42 *Prosecutor v Ante Gotovina et al.*, Case No. IT-06-90-PT, Decision on Ivan Cermak's and Mladen Markac's joint motion to resolve conflict of interest regarding attorney Gregory Kehoe, 29 November 2007, at p. 10.

18. Where counsel previously served in the Office of the Prosecutor, ICTY Trial Chamber III found that a conflict of interest would be established where counsel "worked for the Prosecution on the very same case against this very accused."[43] However, this is not the case for counsel representing multiple accused in subsequent proceedings, where the applicable standard, as demonstrated above, remains *reasonable foreseeability of conflict*. As argued above, defence strategies involving multiple accused indicted for similar facts will be intrinsically complex and often evolving.[44] Theories disputing criminal responsibility often depend upon aggrandising the responsibilities of other accused vis-à-vis the responsibilities of one's own client. As such, accused charged on the basis of similar facts are more likely to implicate one other when advancing a defence strategy.

19. The Co-Lawyers-Designate also attempt to demonstrate the acquiescence of the ECCC in conflicts of interest by re-litigating the settled issue of the movement of staff from the Office of the Co-Prosecutors to the Office of the Co-Investigative Judges.[45] The Co-Investigating Judges in May 2009[46] and April 2010[47] specifically directed Mr Ang Udom and Mr Michael Karnavas to refrain from further submissions on this matter

20. An application for the disqualification of Stephen Heder and David Boyle, was found inadmissible by the Pre-Trial Chamber on 22 September 2009.[48] The Pre-Trial Chamber later dismissed a request for annulment of all investigative acts performed by or with assistance of Stephen Heder and David Boyle. The Pre-Trial Chamber held: "In view of all the foregoing elements, there are no grounds for seising the Pre-Trial Chamber, as absent any procedural defect, none of the Defense's rights under the International Covenant on Civil and Political Rights have been infringed."[49]

(vii) Irreconcilability of existing or potential conflicts of interest

21. The Co-Lawyers-Designate do not appear to dispute the submission that a waiver will not be effective where a conflict of interests is irreconcilable. As previously submitted by the Co-Prosecutor, the legal test for whether a conflict of interests can be waived or is irreconcilable

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43 *Prosecutor v Enver Hadžihasanović*, 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, at para. 56

44 *Prlić* Trial Chamber Decision, *supra* note 24 at para. 29.

45 **D56/9** Second Response, *supra* note 1 at para. 38.

46 **CF002-A252/2**, Letter titled "Your Request for Information Concerning Mr. Stephen Heder", 29 May 2009.

47 **CF002-D377/1**, Letter "Re: Request to Limit the Scope of Duties of OCU Investigator Stephen Heder", 29 April 2010.

48 **CF002-3 (PTC)**Decision on the Charged Person's Application for Disqualification of Drs. Stephen Heder and David Boyle, 22 September 2009.

49 **CF002-D402**, Order refusing Ieng Sary's Requests for Annulment (**D381 and D387**), 3 September 2007, at para 12.

is a separate issue to establishing reasonable foreseeability of a conflict of interests.[50] The test consists of assessing whether representation would irreversibly prejudice the administration of justice

22. The Co-Lawyers-Designate allege that the Co-Prosecutor's Supplementary Submission argument on the conflict raising issues of public confidence in the administration of justice constituted a new argument argument unconnected to the Request.[51] This is incorrect. The impact of dual representation by counsel on public confidence in the administration of justice is one of the factors to be considered in assessing whether a particular conflict of interest is irreconcilable. This argument was first advanced in the Co-Prosecutor's initial Request.[52]

IV. THE RESPONSE MISAPPLIES THE LAW TO THE FACTS

(i) Prima facie *evidence of foreseeability of multiple conflicts of interests*

23. As argued above, ICTY jurisprudence has established that the objective test for conflict of interest requires reasonable foreseeability, not actual proof. In taking into account whether a conflict of interest is reasonably foreseeable, judicial authorities view the totality of *prima facie* evidence. The Co-Lawyers-Designate adopt a piecemeal strategy in responding to the facts cited by the Co-Prosecutor that demonstrate the existence or reasonable foreseeability of multiple conflicts of interest. To this end, the Co-Lawyers-Designate allege that certain facts cited by the International Co-Prosecutor – principally concerning a press statement of Meas Muth and the website of the Ieng Sary Defence team – are speculative.[53] None of these claims target the core of the Co-Prosecutor's evidence that a conflict of interest exists or may be reasonably foreseen. This evidence is based upon factual allegations in the Case File.[54]

24. There is sufficient evidence before the Co-Investigating Judges to establish reasonable foreseeability of conflict of interest based on the facts as alleged in the indictment and supported in the Case File. Both Meas Muth and Ieng Sary are alleged to have participated in crimes involving the transfer of purged RAK Division 164 cadres and Thai, Vietnamese and western sailors to S-21.[55] Further, they are both alleged to have participated in the same joint criminal enterprise and been members of the same high-level committee of Democratic

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50 **D56/7** Supplementary Submissions, *supra* note 2 at paras 70-77.
51 **D56/9** *Ibid.* at para. 1.
52 **D56/1** Request, *supra* note 3 at paras 22 and 52-53.
53 **D56/9** Second Response, *supra* note 1 at paras. 31-32, 34-35, 46-49.
54 **D56/7** Supplementary Submissions, *supra* note 2 at paras. 49-69.
55 **D56/7** *Ibid.* at paras 49-50 and 58.

Kampuchea.[56] There is *prima facie* evidence that Ieng Sary was one of the people to whom Meas Muth reported.[57] Meas Muth was the Secretary of Division 164, which operated the navy of Democratic Kampuchea.[58] In this position, he reported directly to the Chief of the General Staff (and Standing Committee member) Son Sen *alias* Khieu.[59] In turn, Son Sen reported to the other members of the Standing Committee.

25. For example, a secret military telegram dated 12 August 1977 and authenticated by Case 002 witness Meas Vouen[60] concerning the arrest of four Thai and one Khmer national off Koh Kong includes the following annotation by Son Sen that provides *prima facie* evidence of a reporting line between Meas Muth and the senior leaders of Democratic Kampuchea, including Ieng Sary: "(1) To Angkar for information. (2) Based on the oral report of Comrade Mut, yesterday we caught a boat…"[61] Messenger Pean Khean testified in Case 002 that: "Back then, the word 'Angkar' referred to the leaders of revolutionary Kampuchea […] in 1976 I came to know those senior leaders. They included […] Ieng Sary."[62]

26. Similarly, a record of a secret military telephone call from Meas Muth reporting on the execution of 120 Vietnamese nationals and continuing detention of Thai ("Siamese") nationals is copied directly to "Brother Van", Ieng Sary's known alias.[63] This provides *prima facie* evidence of a direct, incriminatory communication from Meas Muth to Ieng Sary. There is also evidence that Ieng Sary was copied on other instances of incriminatory correspondence from Meas Muth.[64]

27. At all material times to Case 003, Ieng Sary was one of the five full-rights members of the Standing Committee, attending its meetings and named in the minutes thereof.[65] Referring to a meeting of the Standing Committee in which Ieng Sary participated,[66] expert David Chandler inferred that "decisions […] were made collectively by the organization itself – in

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56 *Ibid.* at para 59. See also **D1** Second Introductory Submissions Regarding the Revolutionary Army of Democratic Kampuchea, 20 November 2008 at para. 3 ("Second Introductory Submissions").

57 **D56/7** Supplementary Submissions, *supra* note 2 at para. 60.

58 **D1** Second Introductory Submission, *supra* note 68, at paras. 14, 82 and cited evidentiary sources.

59 See **CF002-E1/130.1** Transcript, 4 October 2012 at p. 34, ln. 21-23, where witness Meas Vouen (no relation to Meas Muth) testified in Case 002 that "at the General Staff level, Khieu referred to Son Sen".

60 **CF002-E1/130.1** Transcript, 4 October 2012 at pp. 32-35.

61 **D1.3.34.23 [CF002-E3/1031]** Telegram 28 on 12 August 1977 at ERN 00233655.

62 **CF002-E1/71.1** Transcript, 19 September 2012 at p. 69, ln. 15-16, 25 and p. 70, ln. 1.

63 **D56/3.4** Secret Telephone dated 1 April 1978; see also **D54/8** Dol Song OCIJ Witness Statement at KHM 00936681 [no Engilsh translation available].

64 **D56/7** Supplementary Submissions, *supra* note 2 at paras. 52, 60; **D.1.3.34.60** DK Military Telegram by Meas Muth entitled "Telegram 00-Radio Band 354-Respectfully Presented to the Office 870 Committee"; see **D4.1.635** Confidential Telephone Call on 1 April 1978; see also **D54/11** Meu Ret OCIJ Statement, at KHM 00936712 [no English translation available].

65 **D1** Second Introductory Submission, *supra note 68*, at paras. 122; **D4.1.1032 [CF002-E3/94]** Interview of Ieng Sary by Elizabeth Becker, 22 July 1981, ERN 00342500-00342504.

66 **D1.3.27.6 [CF002-E3/221]** Minutes of the Meeting of the Standing Committee, 14 May 1976.

other words, the people who were at the meeting."[67] He further testified that the members of the Standing Committee "certainly" received copies of minutes of the Standing Committee.[68]

28. In sum, on the available evidence at this early stage in the investigation, the most logical inference is that Meas Muth reported both directly and indirectly to Ieng Sary.

29. The Co-Prosecutor has already made a specific showing of how Ieng Sary and Meas Muth's interests are currently materially adverse (or are reasonably likely to become so) in the course of proceedings in which they were both alleged to be participants in the same joint criminal enterprise and members of same high-level committee of the CPK.[69] The Co-Prosecutor has also demonstrated how information obtained by the Co-Lawyers-Designate in the course of their representation of Ieng Sary – particularly concerning the application of CPK policies in practice, and knowledge of arrests, detention, purges, and reporting lines – may be material to the defence of Meas Muth[70] but disadvantageous to the Ieng Sary's legal interests in his reputation, dignity and privacy, which vest in his heirs after death;[71] or may otherwise advantage Meas Muth, limit obligations owed to Ieng Sary through his heirs,[72] or limit the unfettered loyalty owed by the Co-Lawyers-Designate to Meas Muth.[73]

30. For these reasons, the International Co-Prosecutor reaffirms his position that all five "danger zones"[74] and conflicts of interest arising therefrom are reasonably foreseeable in the circumstances.

31. The Co-Lawyers-Designate characterise Meas Muth's statement attributing responsibility to Ieng Sary as "some dated newspaper quote."[75] To the contrary, in this article, Meas Muth directly assigns responsibility to Ieng Sary and seeks to absolve himself from any form of responsibility. Whilst the Defence is free to contest the accuracy of this statement, Meas Muth's own words, as reported, provide *prima facie* evidence that his interests and those of Ieng Sary are materially adverse at present. It is clearly in the interests of Ieng Sary to discredit Meas Muth's statement, while if true, the statement absolves Meas Muth of responsibility. The conflict of interest for counsel is clear. As in *Mejakić*, if the conflict is not

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67 **CF002-E1/91.1**Transcript, 18 July 2012 at p. 42, ln. 18-21.
68 **CF002-E1/91.1** *Ibid,* at p. 26, ln. 14-15.
69 **D56/7** Supplementary Submissions, *supra* note 2 at paras. 58-60.
70 **D56/7** *Ibid.* at para. 63.
71 **D56/7** *Ibid.* at paras. 16-18.
72 **D56/7** *Ibid.* at paras. 68.
73 **D56/7** *Ibid.*
74 *Supra* note 21.
75 **D56/9** Second Response, *supra* note 1 at para. 34.

resolved now "the administration of justice may be irreversibly prejudiced",[76] It will affect any decision by Meas Muth to give evidence to the Co-Investigating Judges in Case 003 and the Trial Chamber in Case 002. There is also a risk that Mr Udom and Mr Karnavas "might withdraw in the course of the [investigation] because of the conflict of interest, thus delaying the proceedings."[77]

32. The Response defends the constitutional right to silence of Meas Muth in connection with this decision not to testify in Case 002.[78] The Co-Prosecutor has not submitted that the *reasons* for Meas Muth's unwillingness to testify are at all relevant to the issues in dispute. What is relevant is that the Trial Chamber has identified Meas Muth as witness it intends to call in Case 002, and that Meas Muth remains a potential witness in Case 002/02 which according to the Trial Chamber's tentative plan will include Grave Breaches charges and findings on the treatment of the Vietnamese, which are overlapping issues with the scope of the investigation in Case 003.[79] This issue considered by the ICTY in *Mejakić*.[80] The Appeals Chamber upheld the Trial Chamber's decision that there was a conflict where the accused's counsel represented another accused who was called to testify at the accused's trial. Whilst the Appeals Chamber noted that the decision to testify lay with the potential witness, it was of the opinion that counsel had placed himself in a conflict of interest, elaborating as follows:

> *As counsel for Mr. Prcać,* [Counsel] *Mr. Simić is under an obligation to consider what benefits Mr. Prcać might derive from cooperation with the Prosecution by voluntarily giving evidence against Mr. Mejakić. On the other hand, as counsel for the accused Mejakic, Mr. Simić is under an obligation to ensure that Mr. Mejakić's best interests are protected. This may include taking every legal step possible to ensure that either Mr. Prcać's evidence is not heard or that it does not implicate Mr. Mejakić.*[81]

33. The Co-Prosecutor does not speculate as to why Meas Muth did not testify in Case 002, nor the specifics of the advice provided by the Co-Lawyers-Designate to Meas Muth on this issue. As counsel for Ieng Sary with admitted ongoing professional and ethical duties to him, the Co-Lawyers-Designate would have striven to protect Ieng Sary's interest at all times, just as expected of counsel in *Mejakić*. They would have done so even when they advised Meas

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76 *Prosecutor v Željko Mejakić et al.*, Case No. IT-02-65-AR73.1, Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simić (ICTY Appeals Chamber), 6 October 2004 at para. 15.

77 *Ibid.*

78 **D56/9** *Ibid.* at para. 45.

79 **CF002-E284** Decision on the Severance of Case 002 following Supreme Court Chamber Decision on 8 February 2013, 26 April 2013 at p. 72.

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

81 *Ibid.* at para. 13.

Muth, during ongoing proceedings against Ieng Sary, as to whether Meas Muth should testify in Case 002. In doing so, it is reasonable to conclude that they could not have provided fully independent legal advice to Meas Muth to participate in the proceedings in Case 002, even with the benefit of protections against self-incrimination in Internal Rule 28. On these facts, a conflict of interest has indeed already arisen. As Case 002 is ongoing and additional evidence is anticipated for future phases of the trial, the danger continues that Meas Muth's prior statements or evidence could be used to implicate the central leadership, contrary to the interests of Ieng Sary. The possibility exists that Meas Muth could be invited to testify. In any of these scenarios the conflict of interest of counsel who represented Ieng Sary now advising and representing Meas Muth is apparent and may irreversibly prejudice the administration of justice.

(ii) Waiver

34. The Co-Lawyers-Designate argue that assessment of the nature and scope of any waiver of conflict of interest would require them to divulge the privileged information and require Meas Muth to must reveal specifics of legal advice provided to him as well as his "defence strategy".[82] They further allege that forced disclosure of such information would interfere with Meas Muth's right to remain silent and his right not to be compelled to incriminate himself.[83] The Response affirms that it is sufficient that the head of DSS met Meas Muth privately, and ensured that: (a) Meas Muth in fact requested the assignment of the Co-Lawyers-Designate; (b) executed the waiver and notice; and presumably (c) [indicated to the head of DSS] "the circumstances under which the waiver and notice were provided."[84] Concerning the waiver provided by Ieng Sary, the Response asserts that the law as advanced by the Co-Prosecutor implies that "waivers by clients would automatically cease to be valid upon their deaths."[85]

35. In contrast, the Co-Prosecutor's submission has been,[86] and remains, that the lack of specificity in the waivers by Meas Muth and Ieng Sary – considered in light of their close superior-subordinate relationship and the degree of complexity of Cases 002 and 003 – provides a reasonable basis to conclude that neither client gave *full and informed consent* to his waiver.. Deficient waivers have serious consequences for the rights of the Suspect but

82 **D56/9** Second Response, *supra* note 1 at para. 27.
83 **D56/9** *Ibid.* at paras. 27.
84 **D56/9** *Ibid.*at para. 51 [it is difficult to discern the import of point (c) from the text of the Response as submitted].
85 **D56/9** *Ibid.*at para. 27.
86 **D56/7** Supplementary Submissions, *supra* note 2 at paras. 79-80.

also raise the prospect of claims of ineffective assistance of counsel on appeal or review.[87] The Co-Lawyers-Designate in no way dispute that domestic and international procedural rules require full and informed consent to waive conflict of interest.[88]

V. REQUESTED RELIEF

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

Respectfully submitted,

Date	Name	Place	Signature
11 October 2013	William SMITH Deputy Co-Prosecutor	Phnom Penh	

[87] **D56/7** *Ibid.* at para. 81.
[88] **D56/1** Request, *supra* note 3 at paras. 22, 33-34.