

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

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

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Mr. MEAS Muth, through his Co-Lawyers (“the Defence”), pursuant to Co-Investigating Judge Harmon’s Order on MEAS Muth’s Request for Leave to Reply on Jurisdiction,¹ hereby replies to the International Co-Prosecutor’s Reply Concerning MEAS Muth’s Expedited Request for the OCIJ to Reconsider whether it has Jurisdiction to Determine Alleged Conflicts of Interest (“Response”).² This Reply is made necessary because the International Co-Prosecutor: **a.** errs in his interpretation of Internal Rule 11(6); **b.** offers a misleading interpretation of the *Decision on Motion and Supplemental Brief on Suspect’s Right to Counsel* filed in Case 004; **c.** incorrectly interprets and dismisses as *dicta* Pre-Trial Chamber jurisprudence concerning the OCP’s standing; **d.** overstates his standing to make submissions on alleged conflicts of interest; **e.** errs in his interpretation of the OCIJ’s jurisdiction to hear “stand alone” requests concerning conflicts of interest; and **f.** misunderstands the legal system applicable at the ECCC, misinterpreting recent Supreme Court Chamber jurisprudence and its relevance to the jurisdiction of the Defence Support Section (“DSS”) and the Bar Association of the Kingdom of Cambodia (“BAKC”) over conflicts of interest. The Reply tracks the order of the arguments made in the Response. Paragraphs of the Response that merely set out legal provisions or summarize the International Co-Prosecutor’s position without providing any additional support are not addressed.³ The Defence requests to file this Reply in English with the Khmer translation to follow because the Interpretation and Translation Unit cannot timely complete the translation.⁴

I. REPLY

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

1. In paragraph 7, the International Co-Prosecutor incorrectly asserts that Rule 11(6) affords the Co-Prosecutors the right to appeal. Rule 11(6) states:

The Head of the Defence Support Section shall make determinations on indigence and the assignment of lawyers to indigent persons based on the criteria set out in the Defence Support Section administrative regulations, subject to appeal to the Co-Investigating Judges or the Chamber before which the person is appearing at the time, within 15 (fifteen) days of receiving notification of the decision.

¹ Order on MEAS Muth’s Request for Leave to Reply on Jurisdiction, 19 December 2013, D56/16/3.

² International Co-Prosecutor’s Reply Concerning MEAS Muth’s Expedited Request for the OCIJ to Reconsider

² 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, 5 December 2013, D56/16/1.

³ Specifically, paragraphs 1-6, 12, and 16 will not be addressed.

⁴ See Email from Interpretation and Translation Unit to Defence, “Re: translation request,” 26 December 2013.

Nothing in the wording of Rule 11(6) provides the Co-Prosecutors with a right of appeal. This Rule is intended to provide persons claiming indigence with a right to appeal decisions concerning their indigence or the appointment of their lawyers.

2. The Pre-Trial Chamber has found that the Co-Prosecutors have no standing to respond to appeals filed under the Rules listed in Rule 73(c).⁵ The list of Rules set out in Rule 73(c) includes Rule 11(6).⁶ If the Co-Prosecutors have no standing to respond to appeals filed under Rule 11(6), it logically follows that they have no standing to file appeals under Rule 11(6).
3. If Rule 11(6) were read to provide the Co-Prosecutors with a right of appeal, this would violate the right of indigent suspects to equal treatment: it would allow the Co-Prosecutors to appeal the appointment of lawyers for indigent suspects under Rule 11(6), but not the appointment of lawyers for non-indigent suspects. Rule 11(6) cannot be interpreted in such a way that would allow the right to equal treatment to be violated – a fundamental fair trial right enshrined in the Cambodian Constitution,⁷ the Universal Declaration of Human Rights,⁸ the International Covenant on Civil and Political Rights,⁹ the Agreement,¹⁰ the Establishment Law,¹¹ and the Rules.¹² Also, according to Article 38

⁵ See para. 6(b) *infra*.

⁶ Rule 73(c) states: “In addition to its power to adjudicate disputes between the Co-Prosecutors or the Co-Investigating Judges, as set out in the Agreement and the ECCC Law, the Chamber shall have sole jurisdiction over: ... c) the appeals provided for in Rules 11(5) and (6); 35(6), 38(3) and 77bis of these IRs.”

⁷ Article 31 of the Cambodian Constitution provides in part that “[e]very Khmer citizen shall be equal before the law...” Constitution of the Kingdom of Cambodia dated 24 September 1993 Modified by Kram dated 8 March 1999 promulgating the amendments to Articles 11, 12, 13, 18, 22, 24, 26, 28, 30, 34, 51, 90, 91, 93 and other Articles from Chapter 8 through Chapter 14 of the Constitution of the Kingdom of Cambodia which was adopted by the National Assembly on the 4th of March 1999 (“Cambodian Constitution”).

⁸ Article 7 of the Universal Declaration of Human Rights states: “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

⁹ Article 14(1) states in part that “[a]ll persons shall be equal before the courts and tribunals.” Article 26 states in part that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law.” International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976 in accordance with Article 49, Arts. 14(1), 26.

¹⁰ Article 12(2) of the Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (“Agreement”) states: “The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party”; Article 13(1) states: “The rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process.”

¹¹ Article 33 new of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (“Establishment Law”) states:

of the Cambodian Constitution and as further specified by Rule 21(1), any doubt as to the correct interpretation of Rule 11(6) must be resolved in favor of Mr. MEAS Muth.

4. In paragraph 8, the International Co-Prosecutor misleadingly states that Co-Investigating Judge Harmon 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.”¹³ The International Co-Prosecutor omits the crucial wording: “The CIJ will thus limit his review of the RICIJ’s decision to the pertinence of any contestation....” Co-Investigating Judge Harmon referred to his jurisdiction to review a previous decision made by the former Reserve International Co-Investigating Judge Kasper-Ansermet, not his jurisdiction to review decisions made by DSS.¹⁴
5. In Case 004, Co-Investigating Judge Harmon was placed in the unique circumstance of reviewing a decision made by Reserve International Co-Investigating Judge Kasper-Ansermet to confirm the appointment of a lawyer who had been appointed by the previous Officer-in-Charge of DSS and whose request for a consultancy was later withdrawn by the new Head of DSS. Co-Investigating Judge Harmon found that he did not have the jurisdictional authority to review actions taken by DSS concerning the appointment of this lawyer.¹⁵
6. In paragraph 9, the International Co-Prosecutor incorrectly asserts that the Pre-Trial Chamber has merely stated in *dicta* that the standing of the Co-Prosecutors in procedures relating to interference with the administration of justice or misconduct of a lawyer is not automatic but must be demonstrated. Quite to the contrary, the Pre-Trial Chamber has

“The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights.”

¹² Rule 21(1)(b) states: “Persons who find themselves in a similar situation and prosecuted for the same offences shall be treated according to the same rules.”

¹³ Response, para. 8, quoting portions of 004/07-09-2009-ECCC-OCIJ, Decision on Motion and Supplemental Brief on Suspect’s Right to Counsel, 17 May 2013, D122/6, para. 82.

¹⁴ Paragraph 82 of 004/07-09-2009-ECCC-OCIJ, Decision on Motion and Supplemental Brief on Suspect’s Right to Counsel, 17 May 2013, D122/6 states (emphasis added): “The formal requirement for recognition will usually be satisfied by verifying that DSS has informed the CIJs that the lawyer in question complies with all the requirements laid down by the Internal Rules and the DSS Regulations. The CIJ will thus limit his review of the RICIJ’s decision to the pertinence of any contestation, based on objective criteria, such as the failure to obtain prior admission to the Cambodian Bar, the failure to satisfy relevant experience criteria and the existence of a conflict of interest.”

¹⁵ *Id.*, para. 80: “On these grounds, it does not come within the jurisdiction of the CIJs to review the action of the Chief of DSS and the DDOA, or to order the OA to issue a contract to Rogers.”

directly addressed the Co-Prosecutors' standing in matters not strictly related to the ongoing cases or the criminal investigation in at least four decisions:

- a. Most recently, in Case 003 ("Case 003 Decision"), the Pre-Trial Chamber considered whether the International Co-Prosecutor had standing to appeal the Co-Investigating Judges' order to retract a public statement he made about the ongoing proceedings in Case 003 and the application procedure to become Civil Parties and complainants. The International Co-Prosecutor argued that his appeal was admissible under Rules 74(2) or 21. The Pre-Trial Chamber found that:

Internal Rule 74(2) foresees the rights of appeal of the Co-Prosecutors in relation to such Orders of the Co-Investigating Judges Orders [sic] that are related to the criminal investigation. The nature of the impugned Order is not such that purely relates to the criminal investigation, it rather relates to an action from one of the officers of the court. Therefore, the Appeal under Internal Rule 74(2) would represent an incorrect mixture of the factual situation and the legal provision upon which the International Co-Prosecutor rely to establish jurisdiction for the Appeal.¹⁶

The Pre-Trial Chamber admitted the appeal as an appeal of a decision made under Rule 35 (Interference with the Administration of Justice).¹⁷

- b. In Case 002, the Pre-Trial Chamber considered whether the Co-Prosecutors had standing to appeal an order by the Co-Investigating Judges concerning Mr. IENG Sary's Co-Lawyers' alleged breach of confidentiality of the judicial investigation. The Co-Prosecutors asserted that "[t]he matter of interference in the administration of justice, similar to contempt in certain national and international jurisdictions, is principally an issue between the court and the alleged offender. The Co-Prosecutors, therefore, do not consider themselves as full parties to these proceedings but only as an 'interested party', being officers of this Court."¹⁸ The Pre-Trial Chamber observed that the OCIJ's Order was made on the basis of Rule 35 (Interference with the Administration of Justice) and Rule 38 (Misconduct of a Lawyer). It stated that "[t]he

¹⁶ Considerations of the Pre-Trial Chamber Regarding the International Co-Prosecutor's Appeal Against the Co-Investigating Judges' Order on International Co-Prosecutor's Public Statement Regarding Case 003, 24 August 2011, D14/1/3, para. 16.

¹⁷ *Id.*, para. 28.

¹⁸ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ(PTC), Observations on IENG Sary's Appeal Against the Co-Investigating Judges' Confidentiality Order, 27 March 2009, D138/1/5, para. 5.

role of the Prosecutor does not necessarily extend to cases related to the conduct included in Internal Rules 35 and 38.”¹⁹ The Pre-Trial Chamber explained:

[t]he role of the Co-Prosecutors of the ECCC in the Internal Rules is *strictly related* to the ongoing cases and investigations of crimes within the jurisdiction of the ECCC. The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea ... provides a list of the crimes under the jurisdiction of the ECCC. The conduct which is subject of the Co-Investigating Judges’ Confidentiality Order does not appear in that list of crimes.²⁰

Thus, the Pre-Trial Chamber found that the role of Co-Prosecutors does not automatically extend to procedures related to interference with the administration of justice and/or misconduct of a lawyer. The Pre-Trial Chamber noted that the Co-Prosecutors put forward two examples from the ICTY in support of the argument that they were interested parties. The Pre-Trial Chamber considered the Rules of Procedure and Evidence at the ICTY, ICTR, and ICC and concluded that “that the role of an investigator in contempt of court proceedings may be given to the Prosecutor during first instance proceedings.” However, the Pre-Trial Chamber found that in appellate proceedings, the prosecution *does not* play a role at these Tribunals because the ICTY and ICTR Rules concerning appeals in contempt proceedings do not follow the normal steps used in other appellate proceedings. The Pre-Trial Chamber noted that the ECCC’s Internal Rules similarly follow a different practice for appeals referred to in Rule 73(c) than for other appeals:²¹

[t]he ECCC Internal Rules do not foresee a role for the Co-Prosecutors in cases of appeals against orders issued under Internal Rules 35 and/or 38. Seeking guidance in the Rules of ICTY, ICTR and ICC as mentioned before, which do not foresee a role for the Prosecutor at the appellate stage of such proceedings, the Pre-Trial Chamber observes that this finding is in accordance with international procedures.²²

- c. In another Case 002 decision, the Pre-Trial Chamber considered whether the OCP had standing to file a joint response to Mr. IENG Sary’s and Mrs. IENG Thirith’s separate applications to disqualify Co-Investigating Judge Lemonde. The Pre-Trial Chamber

¹⁹ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ(PTC), Decision on Admissibility on “Appeal Against the Co-Investigating Judges’ Order on Breach of Confidentiality of the Judicial Investigation, 13 July 2009, D138/1/8, para. 13.

²⁰ *Id.*, para. 14 (emphasis added).

²¹ *Id.*, paras. 16-24. Quote at para. 20.

²² *Id.*, para. 25.

consider[ed] that the Co-Prosecutors have no standing as of right in respect of this kind of application. If the Pre-Trial Chamber considers the Co-Prosecutors may be an interested party, they may participate or they may be otherwise called upon to assist by commenting or filing submissions in cases where the Chamber feels it appropriate to have views expressed. The Pre-Trial Chamber finds that in the present case, it may be assisted by the Co-Prosecutors and therefore accepts the Response.²³

- d. In a strictly confidential decision in Case 002, the Pre-Trial Chamber considered the Co-Prosecutors' request for an extension of time to file a response to a submission made by the IENG Sary Defence requesting reclassification of some strictly confidential material. The Pre-Trial Chamber found that the IENG Sary Defence's request was separate from the ongoing proceedings and that the OCP did not have standing to respond to it. The Pre-Trial Chamber noted that it accepted previous submissions by the OCP concerning the matter the IENG Sary Defence sought to reclassify because the Pre-Trial Chamber considered that the Co-Prosecutors may help shed light on a specific matter before it.²⁴
7. These four decisions indicate that the Pre-Trial Chamber did not merely find that the Co-Prosecutors' standing in Rule 35 and 38 proceedings is not automatic. The Pre-Trial Chamber has consistently held that the Co-Prosecutors' standing is limited: **a.** Rule 74(2) *only* allows the Co-Prosecutors to appeal matters that strictly relate to the ongoing cases or the criminal investigation; **b.** the Co-Prosecutors have no role as interested parties in appellate proceedings under Rules 35 or 38; and **c.** the Pre-Trial Chamber may choose to accept submissions from the Co-Prosecutors if it considers that such submissions would assist it. The Pre-Trial Chamber did not state, as the International Co-Prosecutor claims, that the Co-Prosecutors' standing, when not automatic, must be demonstrated. Even where the Co-Prosecutors may claim an interest in a matter, the Pre-Trial Chamber *may* accept submissions *if* it considers that it will be assisted, *not* because of the Co-Prosecutors' claimed interest.
8. The Pre-Trial Chamber's findings concerning the Co-Prosecutors' standing were not *dicta*. The findings were essential to determining the admissibility of the appeal in the Case 003 Decision, and to a determination of whether to accept the Co-Prosecutors'

²³ 002/11-12-2009-ECCC(PTC (07), Decision on Ieng Sary's and on Ieng Thirith Applications Under Rule 34 to Disqualify Judge Marcel Lemonde, 15 June 2010, Doc. 6, para. 20.

²⁴ 002/14-12-2009-ECCC/PTC (08), Decision on the Co-Prosecutors' Request for an Extension of Time to File Their Response to IENG Sary's Request to Reclassify All PTC08 Documents as Public, 8 April 2011.

submissions in other three decisions. Thus, they form the *ratio decidendi* of the decisions; not of the ultimate issues decided by the Pre-Trial Chamber, but of preliminary decisions concerning admissibility. According to Pre-Trial Chamber Judges Downing and Chung:

With regard to the binding character of the Pre-Trial Chamber's decisions on the Co-Investigating Judges, we consider that the principles of legal certainty and equality before the law, enshrined in the Internal Rules and forming part of international standards, require the Co-Investigating Judges to follow, as a matter of principle, the *ratio decidendi* of decisions of the Pre-Trial Chamber, that is the legal principle on which a decision is based and which shall apply in similar or substantially similar cases. This is supported by the jurisdictional hierarchy of the Pre-Trial Chamber over the Co-Investigating Judges under the ECCC legal system...²⁵

9. In paragraph 10, the International Co-Prosecutor overstates his standing to make submissions on alleged conflicts of interest, incorrectly asserting that his duty to conduct prosecutions confers standing to make submissions on all matters fundamental to the administration of justice. The International Co-Prosecutor points out that the Co-Prosecutors are entitled to vote on amendments to the Internal Rules. As the Pre-Trial Chamber jurisprudence set out above demonstrates, the Co-Prosecutors *do not* have standing to appeal all matters that they may consider to be fundamental to the administration of justice. A Chamber may accept responses concerning a matter that is not strictly related to the ongoing cases and investigation if such responses would assist it (for example if the Co-Prosecutors possess information which could shed light on a particular issue before the Chamber). However, the Co-Prosecutors *do not* have independent standing to appeal such issues *unless* their own conduct is directly involved (as in the Case 003 Decision). The Co-Prosecutors' ability to vote on Rule amendments is irrelevant. It does not confer standing to appeal.
10. In paragraph 11, the International Co-Prosecutor overstates his standing to make submissions on alleged conflicts of interest, erroneously asserting that the alleged conflict of interest is related to the ongoing cases and the investigation of crimes simply because Mr. MEAS Muth is on the witness list in Case 002 and is a suspect in Case 003. Further, the International Co-Prosecutor incorrectly relies on ICTY jurisprudence to demonstrate the prosecution's interest in conflict of interest proceedings.

²⁵ Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant [REDACTED], Opinion of Judges Chung and Downing, 13 February 2013, D11/3/4/2, para. 17.

11. The International Co-Prosecutor's interpretation of a matter that is "strictly related to the ongoing cases and investigations of crimes within the jurisdiction of the ECCC" is overly broad. In the Case 003 Decision, the OCIJ ordered the International Co-Prosecutor to retract a public statement he made to provide information to victims, Civil Parties, complainants, and the general public about the ongoing proceedings in Case 003. The International Co-Prosecutor's statement obviously related to the ongoing investigation. The statement was about the status of the investigation. Nonetheless, the Pre-Trial Chamber found that "[t]he nature of the impugned Order is not such that *purely* relates to the criminal investigation" but it instead related to the conduct of an officer of the court.²⁶ The other Pre-Trial Chamber decisions discussed in paragraph 6 above similarly dealt with the conduct of lawyers or a Co-Investigating Judge and not the criminal investigation. In this case, the issue the International Co-Prosecutor seeks to appeal is the alleged conflict of interest of Mr. MEAS Muth's Co-Lawyers. This matter relates to the Co-Lawyers' prior affiliations and *not* the ongoing cases or the criminal investigation.
12. The Co-Prosecutor disingenuously argues that the alleged conflict of interest relates to the ongoing cases because Mr. MEAS Muth's name was on the Case 002 witness list. Mr. MEAS Muth has expressed his intention to exercise his right to remain silent and has stated that he has no intentions of acting as a witness in Case 002.²⁷ The Trial Chamber originally intended Mr. MEAS Muth to testify during the early trial segments of 002/01.²⁸ Whether in recognition of his Notice or for other reasons, the Trial Chamber chose not to call him as a witness. There is no indication that the Trial Chamber would now decline to respect Mr. MEAS Muth's right to remain silent should Case 002/02 actually proceed to trial.²⁹

²⁶ Considerations of the Pre-Trial Chamber Regarding the International Co-Prosecutor's Appeal Against the Co-Investigating Judges' Order on International Co-Prosecutor's Public Statement Regarding Case 003, 24 August 2011, D14/1/3, para. 16 (emphasis added).

²⁷ Request for 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, D56/4/1, Annex.

²⁸ See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, Next Group of Witnesses, Civil Parties and Experts to be Heard in Case 002/01, 17 February 2011, E172, p. 3. Mr. MEAS Muth is referred to in this Trial Chamber memorandum as TCW-425.

²⁹ The Trial Chamber in Case 002 has recently indicated that the scope of 002/02 as yet to be determined, let alone the start date of the trial. Should the trial start after the judgment in 002/01, it is likely to begin after the investigation in Case 003 has concluded. See Press Release, Trial Chamber Outlines Way Forward For Case 002/02, 24 December 2013.

13. ICTY jurisprudence cannot be relied upon in this instance, as explained in paragraph 20 *infra*. Furthermore, neither of the two cases cited by the International Co-Prosecutor support the proposition that the Co-Prosecutors have an interest in conflict of interest proceedings. In the *Hadžihasanović* decision cited by the International Co-Prosecutor, the Chamber was addressing the issue of former members of the Office of the Prosecutor becoming defence counsel. This does not support the argument that the prosecution has an interest when former members of their staff are not involved in an alleged conflict of interest. In the *Prlić* decision cited, the Prosecution filed submissions concerning conflict of interest, but the Chamber did not address the role or interest of the prosecution.³⁰

Jurisdiction under Article 21(1) of the Agreement / Article 42(3) of the Establishment Law

14. In paragraph 13, the International Co-Prosecutor misleadingly asserts that admission of Co-Lawyers is not a simple procedural matter insulated from judicial scrutiny because their assignment is provisional pending an assessment of means and an order confirming the assignment. The Defence did not assert that DSS's decisions concerning the assignment of Co-Lawyers are insulated from judicial scrutiny. A person who DSS determines is not indigent or for whom DSS will not appoint lawyers under the ECCC's Legal Assistance Scheme may appeal this decision, as provided in Rule 11(6). This does not provide the OCIJ with jurisdiction to determine alleged conflicts of interest. DSS's Administrative Regulations task DSS with this function.
15. In paragraph 14, the International Co-Prosecutor misleadingly asserts that the Co-Investigating Judges may consider the conflict of interest because Regulation 7.4 of the DSS Administrative Regulations provides that "[t]he ECCC may determine that a Co-Lawyer is no longer eligible to defend a suspect, charged person or accused before the ECCC." This assertion does not support the OCP's position. Regulation 7.4 says nothing about the role or jurisdiction of the OCIJ. It refers to the "ECCC." The Regulation is part of DSS's Administrative Regulations and would not set out the jurisdiction of the OCIJ.

³⁰ See *Prosecutor v. Hadžihasanović et al.*, IT-01-47-PT, Decision on Prosecution's Motion for Review of the Decision of the Registrar to Assign Mr. Rodney Dixon as Co-Counsel to the Accused Kubura, 26 March 2002; *Prosecutor v. Prlić et al.*, IT-04-74-AR73.1, Decision on Appeal by Bruno Stojić Against Trial Chamber's Decision on Request for Appointment of Counsel, 24 November 2004.

16. Although Regulation 7.4 is silent as to which ECCC body is in charge of removal of lawyers, ECCC precedent demonstrates that it is DSS that is responsible for removals/withdrawals. For example, when Philippe Greciano wished to withdraw from his representation of KHIEU Samphan, it was DSS that decided on the withdrawal: “According to precedent at the ECCC, the Officer-in-Charge of the DSS makes an administrative decision based on the request or communication, and notifies the relevant Chamber of the decision.... Having considered the grounds and Mr. Khieu Samphan’s right to effective representation, I accept Me. Greciano’s withdrawal from the case against Mr. Khieu Samphan.... I hereby notify the Trial Chamber of my decision....”³¹ Similarly, when KAINING Guek Eav requested to have François Roux withdrawn, DSS informed the Trial Chamber. President Nil Nonn simply issued a half-page notification of Mr. Roux’s withdrawal in the form of a memorandum. He issued no decision as to whether Mr. Roux could withdraw.³²
17. The examples of Mr. Greciano and Mr. Roux were “withdrawals” under Administrative Regulation 7.3 rather than “removals” under Administrative Regulation 7.4. However, each sub-regulation refers to “the ECCC.” The meaning of the term “the ECCC” in each sub-regulation must refer to the same entity,³³ in this case DSS. Just as DSS is charged with the withdrawal/removal of lawyers (with only a cursory notification role played by the relevant Chamber), it is similarly DSS that is tasked with appointing lawyers after determining that they meet all requisite qualifications and that there is no conflict of interest.³⁴
18. Were another organ of the Court³⁵ permitted to remove lawyers from a case, the Internal Rules would explicitly state this. Instead, even in cases of misconduct, the Co-Investigating Judges and the Chambers do not have the power to remove a lawyer. Rule 38 provides that they may impose sanctions, refuse audience, and/or refer such cases of misconduct to the appropriate professional body. It is then the BAKC that may take

³¹ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, Re: Withdrawal of International Co-Lawyer Philippe Greciano, 20 May 2011, E90, paras. 4, 8, 10.

³² *Case of KAINING Guek Eav*, 001/18-07-2007-ECCC-TC, Notification of Withdrawal of Designation of Co-Lawyer, 9 July 2010, E186/1.

³³ “A term appearing in several places in a statutory text is generally read the same way each time it appears.” *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). See also *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995).

³⁴ See DSS Administrative Regulations 6, 9.

³⁵ Note that DSS is listed as a separate organ of the Court on the ECCC’s website. According to Rule 11, DSS is established by the Office of Administration, but is autonomous with regard to substantive defence functions.

disciplinary action against the lawyer, which may include de-certification – striking the lawyer from the list of lawyers approved to appear before the ECCC.³⁶ This demonstrates The BAKC’s authority concerning matters related to the legal profession at the ECCC.

Jurisdiction of the BAKC President

19. In paragraph 15, the International Co-Prosecutor misapplies Supreme Court Chamber jurisprudence and erroneously asserts that ICTY rules and jurisprudence regulate conflict of interest proceedings at the international level.³⁷ The International Co-Prosecutor misconstrues the legal system applicable at the ECCC.
20. According to the Establishment Law, the procedure that is to be followed is the existing procedure in force. This is due to the ECCC’s status as an extraordinary chamber established within the existing court structure.³⁸ It is only where the existing procedures “do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standard”³⁹ that guidance may be sought in procedural rules established at the international level.
21. The Internal Rules and the DSS Administrative Regulations deal directly with the role of the BAKC and DSS concerning the appointment of lawyers and conflicts of interest.⁴⁰ Cambodian law also directly addresses the role of the BAKC concerning conflicts of

³⁶ According to Rule 38: “1. The Co-Investigating Judges or the Chambers may, after a warning, impose sanctions against or refuse audience to a lawyer if, in their opinion, his or her conduct is considered offensive or abusive, obstructs the proceedings, amounts to abuse of process, or is otherwise contrary to Article 21(3) of the Agreement. 2. The Co-Investigating Judges or the Chambers may also refer such misconduct to the appropriate professional body. 3. Any foreign lawyer practising before the ECCC who is subject to disciplinary action by the BAKC may appeal to the Pre-Trial Chamber within 15 (fifteen) days of receiving notification of the decision of the BAKC. Such appeal shall suspend enforcement of the decision unless the Pre-Trial Chamber decides otherwise. The decision of the Pre-Trial Chamber shall not be subject to appeal. 4. Where, as a result of any such disciplinary action, a person is struck off the list of lawyers approved to appear before the ECCC, the lawyer shall transmit all related material to the appropriate unit within the Office of Administration, so that it may ensure continuity of representation.”

³⁷ The International Co-Prosecutor also asserts that any claim that the BAKC President has an exclusive role in regulating conflicts of interest has no express basis in Cambodian law. This assertion will not be addressed, as the Defence never made the claim that the BAKC President has an exclusive role in regulating conflicts of interest. The Defence asserted that “[m]atters concerning conflict of interest are to be determined by the Defence Support Section (‘DSS’), the Bar Association of the Kingdom of Cambodia (‘BAKC’), and, on appeal, the Pre-Trial Chamber.” See Expedited Request, opening. See also paras. 26, 42.

³⁸ See Establishment Law, Art. 2.

³⁹ *Id.*, Arts. 20 new, 23 new, 33 new.

⁴⁰ See Rule 11; DSS Administrative Regulations 1-7, 9.

interest.⁴¹ The International Co-Prosecutor has not claimed that the interpretation of these Rules, Administrative Regulations, or Cambodian law is uncertain, nor that they are inconsistent with international standards of justice. Thus, there is no basis for turning to procedural rules at the international level. The International Co-Prosecutor is not entitled to engage in situational ethics: advocating for ICTY procedure to be adopted simply because he finds it more favorable in achieving his desired results.

22. The Supreme Court Chamber's Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002, cited by the International Co-Prosecutor, *does not* support his argument that ICTY rules and jurisprudence regulate conflict of interest proceedings at the international level. The Supreme Court Chamber's Decision dealt with the possibility of withdrawing or terminating charges after they have been accepted for trial.

23. In this Decision, the Supreme Court Chamber found that nothing in the rules of Cambodian criminal procedure applicable at the ECCC provides for the possibility of withdrawing or judicially terminating charges. It then found that at international and hybrid tribunals, a decision to withdraw charges has traditionally been an act of prosecutorial discretion. It found that the ECCC's legal framework also requires prosecutorial discretion, because its jurisdiction is limited to senior leaders and those most responsible. "Considering that prosecutorial legalism does not directly derive from rights, is not an international standard of justice, and, in the Cambodian legal system, does not enjoy any privileged legal status," the Supreme Court Chamber found that it may be possible to withdraw charges in certain circumstances.⁴² This situation is unlike the present situation because the applicable law is not silent; it expressly sets out the role of the BAKC and DSS.

⁴¹ According to Article 19 of the 1995 Law on the Statutes of the Bar, "[t]he Bar Council shall examine and resolve all problems concerning the conduct of the legal profession."


⁴² *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC/SCC(28), Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002, 25 November 2013, E284/4/8, paras. 61-62.

II. RELIEF REQUESTED

WHEREFORE, for all of the reasons stated herein, the Co-Investigating Judges should **REJECT** the arguments made by the International Co-Prosecutor and **GRANT** the relief sought in MEAS Muth's Expedited Request for the OCIJ to Reconsider Whether it Has Jurisdiction to Determine Alleged Conflicts of Interest.

Respectfully submitted,







ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. MEAS Muth

Signed in Phnom Penh, Kingdom of Cambodia on this 27th day of **December, 2013**