

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



FILING DETAILS

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**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 Rules 11, 21, and 22 of the ECCC Internal Rules (“Rules”), hereby requests the Co-Investigating Judges to consider or reconsider whether they have jurisdiction to decline to recognize the Co-Lawyers due to an alleged conflict of interest. This Request is made necessary because the Co-Investigating Judges do *not* have jurisdiction to determine such matters. Matters 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. The Defence requests to file this Request in English with the Khmer translation to follow due to the urgent nature of this Request, and because the Interpretation and Translation Unit cannot timely complete the translation due to other priorities.¹

I. PRELIMINARY ISSUE: Timing of the Request and the Co-Investigating Judges’ authority to consider the Request

1. Subsequent to the Defence’s submissions to the OCIJ in response to an alleged conflict of interest, Co-Investigating Judge Harmon issued a Decision in Case 004 holding, *inter alia*:
 - “The freedom of choice of a lawyer is a fundamental right that may only be restricted under certain clearly defined circumstances ... and following clearly defined processes.”²
 - “[N]o role is envisaged for the CIJs beyond formal recognition of lawyers once all of the requirements have been satisfied. Neither French Laws nor the Cambodian Law on the Bar and Code of Ethics for Lawyers appear to provide for a right of judicial authorities to determine whether the freedom of choice of a Suspect regarding his lawyer should be restricted or not.”³
 - “Under the Internal Rules, the role of determining whether freedom of choice of a lawyer must be restricted is shared between the BAKC and the ECCC’s internal body, the DSS.”⁴

¹ See Email from Interpretation and Translation Unit to Defence, “RE: translation request,” 26 November 2013.

² 004/07-09-2009-ECCC-OCIJ, Decision on Motion and Supplemental Brief on Suspect’s Right to Counsel, 17 May 2013, D122/6, para. 76.

³ *Id.*, para. 77.

⁴ *Id.*, para. 78.

- “Administrative Regulation 9 provides for issues of conflict of interest to be determined by DSS.”⁵
 - “Appeals against the determinations by these bodies lie to the ECCC Pre-Trial Chamber under Internal Rules 11(5) and 22(1)(f).”⁶
 - “On these grounds, it does not come within the jurisdiction of the CIJs to review the action of the Chief of DSS...”⁷
 - “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 [Reserve International Co-Investigating Judge Kasper-Ansermet’s] decision to the pertinence of any contestation, based on objective criteria, such as ... the existence of a conflict of interest.”⁸
2. This Decision makes several holdings relevant to the jurisdiction of the Co-Investigating Judges over the alleged conflict of interest issue in Case 003. These holdings were unavailable at the time the Defence filed its submissions.
3. Co-Investigating Judge Harmon confirmed that he has inherent power “to reconsider a decision previously rendered in the event of a change of circumstances (new facts, new arguments) but also where the previous decision was erroneous or could cause an injustice.”⁹ Co-Investigating Judge Harmon has yet to issue a formal decision on the alleged conflict of interest,¹⁰ though, effectively, he is exercising jurisdiction – as if he had rendered a decision. This is manifested by his various scheduling orders, his order prohibiting the Co-Lawyers from communicating with their client and by his letter to the Co-Lawyers, informing them he will not consider the Defence’s legal submissions until the alleged conflict of interest issue raised by former International Co-Prosecutor Andrew Cayley is resolved.

⁵ *Id.*

⁶ *Id.*, para. 79.

⁷ *Id.*, para. 80.

⁸ *Id.*, para. 82.

⁹ *Id.*, para. 44.

¹⁰ Co-Investigating Judge Harmon thus far has acted alone concerning all matters related to the alleged conflict of interest raised by former International Co-Prosecutor Cayley.

4. Because the Co-Investigating Judges do not have jurisdiction over the alleged conflict of interest issue, and because of the effective decision by Co-Investigating Judge Harmon to exercise jurisdiction erroneously, the Co-Investigating Judges have the inherent power, and indeed the obligation in the interest of justice, to reconsider and reverse this impugned decision. Failure to reconsider Co-Investigating Judge Harmon's exercise of jurisdiction may impinge Mr. MEAS Muth's fundamental right to counsel of his own choice and to communicate with his counsel.

5. Jurisdictional issues may be raised at any point in the proceedings where a decision on jurisdiction could end the proceedings.¹¹ The proceedings against Mr. MEAS Muth would not be terminated should the Co-Investigating Judges find that they do not have jurisdiction to determine the alleged conflict issue. However, the conflict of interest proceedings *would* be terminated should the Co-Investigating Judges find that they do not have jurisdiction. As argued below in paragraphs 26-31, the proper authorities for determining conflicts of interest (DSS and BAKC) have already determined that no conflict exists. Should the Co-Investigating Judges consider that the Request may not be raised as a free-standing request at this stage, in the alternative, the Defence respectfully requests to submit this Request as a supplementary submission to its conflict of interest filings, as permitted by ECCC jurisprudence.¹²

¹¹ *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, paras. 30-35. According to paragraph 31: "the concept of a preliminary objection to jurisdiction must be understood in relation to the nature of the jurisdictional defect being challenged. The alleged lack of jurisdiction may be of the kind that does not preclude proceedings *in limine*, such as, for example, another court is competent to try the case. The parties might then be restricted from raising objections to such jurisdictional defects after the commencement of the trial (or another statute-prescribed deadline). The reason for this restriction is that the parties are deemed to have submitted to the jurisdiction of the court while the defect has been cured by virtue of the advancement of proceedings. If, however, the alleged want of jurisdiction would, if successful, nullify the proceedings, the parties may raise an objection to such jurisdictional defects at any time in the proceedings, including for the first time on appeal. While Cambodian criminal procedure is silent on this distinction in jurisdictional defects, French law, which can be used to interpret Cambodian law, indicates that [a deadline set out in the Internal Rules] should not apply to objections to jurisdiction that could nullify the proceedings." This is similar to United States federal jurisdiction in which "jurisdictional objections can be raised for the first time quite late in the proceedings... [J]urisdictional issues can be raised on appeal, by any party or by the court on its own motion, even when the issues have not been mentioned at trial or at any earlier appeal. It is not infrequent in federal jurisdictional decisions for an issue to arise for the first time before the United States Supreme Court, and for that issue to be considered on its merits and to be dispositive, rendering meaningless all the litigation on the merits that has occurred in the lower courts." Martha A. Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 683 (1981), available at <http://scholarship.law.wm.edu/wmlr/vol22/iss4/5>.

¹² The Supreme Court Chamber has recently found that the "processes for the admission of additional submissions are not uncommon at the international level, provided that leave for the admission of such materials is sought before or alongside the filing thereof." It considered that the importance of the issues at stake

II. BACKGROUND

6. On 13 June 2012, Mr. MEAS Muth requested DSS to assign Mr. Ang Udom and Mr. Michael G. Karnavas as his Co-Lawyers.¹³ Mr. MEAS Muth provided DSS with a waiver of any potential conflict of interest that might arise due to the Co-Lawyers' representation of Mr. IENG Sary.¹⁴
7. On 12 July 2012, the Head of DSS, Mr. Isaac Endeley, met with Mr. MEAS Muth to discuss this request.¹⁵
8. On 14 December 2012, Mr. Endeley appointed Mr. Ang Udom and Mr. Michael G. Karnavas as Mr. MEAS Muth's Co-Lawyers on a *pro bono* basis, with the understanding the Co-Lawyers would be retroactively remunerated under the ECCC's Legal Assistance Scheme should Mr. MEAS Muth be determined to be indigent.¹⁶ On this same date, DSS issued a press release stating that "[i]n making the assignment, the DSS took into consideration the Suspect's expressed preferences; the lawyers' overall experience in international criminal and humanitarian law; their level of familiarity with the prevailing rules, practices and procedures at the ECCC; their knowledge of the historical and political context of the Democratic Kampuchea era; and all the applicable conflict waivers."¹⁷
9. On 18 December 2012, Mr. Endeley submitted a letter to the Co-Investigating Judges informing them of his decision to appoint the Co-Lawyers on a *pro bono* basis pending a determination on indigence. Mr. Endeley stated, *inter alia*:

I met with Mr. Meas Muth on 12 July 2012 to verify his selection of Co-Lawyers. He confirmed that he wished to be represented by Mr. Ang Udom and Mr. Michael G. Karnavas, that he had made this decision freely, and that he understood that the same lawyers were already representing another person before the ECCC. He further confirmed that he understood the meaning of the waiver

warranted accepting supplemental submissions in the interest of justice. *See Case of NUON Chea et al.*, 002-19-09-2007-ECCC-TC/SC(28), Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002, 25 November 2013, E284/4/8, paras. 13-14.

¹³ Determination of Your Claim of Indigence and Decision on Your Request for the Remuneration of Counsel under the ECCC's Legal Assistance Scheme, 30 April 2011, D56/11, para. 1.

¹⁴ *See* 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 A.

¹⁵ Determination of Your Claim of Indigence and Decision on Your Request for Remuneration of Counsel under the ECCC's Legal Assistance Scheme, 30 April 2013, D56/11, para. 1.

¹⁶ *Id.*, para. 4.

¹⁷ Press Release, Mr. Ang Udom and Mr. Michael G. Karnavas Assigned as Defence Counsel to Represent a Suspect in Case 003, 14 December 2013.

letter that he had signed regarding any potential conflict with the other person represented by his lawyers.... In examining the request for the assignment of counsel, I have considered Mr. Meas Muth's expressed preferences; the lawyers' overall experience in international criminal and humanitarian law; their level of familiarity with the prevailing rules, practices and procedures at the ECCC; their knowledge of the historical and political context of the Democratic Kampuchea era; and all the applicable conflict waivers.¹⁸

10. On 24 December 2012, International Co-Prosecutor Cayley filed a Request to the OCIJ that the appointment of the Co-Lawyers be rejected on the basis of an irreconcilable conflict of interest, due to the Co-Lawyers' concurrent representation of Mr. IENG Sary in Case 002 ("Cayley Request").¹⁹ The International Co-Prosecutor copied DSS in his submission, but did not raise the issue before DSS or the BAKC.
11. On 11 February 2013, Co-Investigating Judge Harmon issued a Decision and Scheduling Order: **a.** ordering the Co-Lawyers not to communicate with Mr. MEAS Muth until a decision on the confirmation of their appointment has been made; **b.** ordering them to disclose the waivers of any potential conflict of interest signed by Mr. IENG Sary and Mr. MEAS Muth; **c.** providing the Co-Lawyers with the Introductory Submission for the purposes of responding to the International Co-Prosecutor's Request; and **d.** inviting the Co-Lawyers to file a response and the OCP to reply.²⁰
12. On 4 March 2013, the Co-Lawyers responded to the Cayley Request.²¹ They asserted that there is neither a close factual nexus between the alleged conduct of Mr. IENG Sary and Mr. MEAS Muth, nor is there an irreconcilable conflict of interest militating against the assignment of the Co-Lawyers to Case 003.
13. On 15 March 2013, the International Co-Prosecutor requested the OCIJ to reschedule submissions due to the change in circumstances caused by Mr. IENG Sary's death on 14

¹⁸ Assignment of Co-Lawyers to Represent Mr. Meas Muth, a Suspect in Case 003, 18 December 2012, D56, paras. 4, 10.

¹⁹ International Co-Prosecutor's Request that Appointment of Co-Lawyers-Designate be Rejected on the Basis of Irreconcilable Conflict of Interest, 24 December 2012, D56/1.

²⁰ Decision and Scheduling Order Concerning Request for Appointment of Co-Lawyers-Designate, 11 February 2013, D56/3. On 28 February 2013, the deadline for submissions was extended through Rescheduling Order Concerning Request for Appointment of Co-Lawyers-Designate, 28 February 2013, D56/4.

²¹ 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.

March 2013.²² He requested a “reasonable period” to submit a revised request and for the new schedule to allow the Co-Lawyers to respond and the OCP to reply.

14. On 19 March 2013, Co-Investigating Judge Harmon issued a new Decision and Scheduling Order, noting that the circumstances had changed since Mr. IENG Sary’s death, inviting the OCP to file new submissions, and providing that the Co-Lawyers may respond and the OCP may reply.²³
15. On 3 April 2013, the International Co-Prosecutor filed his supplementary submissions, arguing again that the Co-Lawyers’ appointment should be rejected due to a conflict of interest arising from their former representation of Mr. IENG Sary.²⁴
16. On 23 April 2013, the Co-Lawyers filed their Response to the supplementary submissions.²⁵ The Co-Lawyers again asserted that no conflict of interest exists which would prevent them from being able to diligently represent Mr. MEAS Muth.
17. On 30 April 2013, Mr. Endeley issued a Determination stating that Mr. MEAS Muth was not indigent and remuneration of the Co-Lawyers in whole or in part would not be authorized under the ECCC’s Legal Assistance Scheme.²⁶
18. On 2 May 2013, Co-Investigating Judge Harmon issued a decision suspending the schedule for pleadings on the alleged conflict of interest issue pending a decision by Mr. MEAS Muth concerning his legal representation.²⁷
19. On 17 May 2013, the Defence appealed DSS’s Determination that Mr. MEAS Muth was not indigent.²⁸

²² International Co-Prosecutor’s Request to Reschedule Submissions, 15 March 2013, D56/4/3.

²³ Second Decision and Re-scheduling Order Concerning Request for Appointment of Co-Lawyers Designate, 19 March 2013, D56/5.

²⁴ International Co-Prosecutor’s Supplementary Submissions on Conflict of Interest of Co-Lawyers-Designate, 3 April 2013, D56/7.

²⁵ Request for 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, D56/9.

²⁶ Determination of Your Claim of Indigence and Decision on Your Request for the Remuneration of Counsel under the ECCC’s Legal Assistance Scheme, 30 April 2011, D56/11.

²⁷ Decision on Communication Between Co-Lawyers-Designate and Suspect, 2 May 2013, D56/12.

²⁸ MEAS Muth’s Appeal Against Determination of Claim of Indigence and Decision on Request for Remuneration of Counsel Under the ECCC’s Legal Assistance Scheme, 17 May 2013, D56/11/2. The Defence appealed without being provided with the supporting material DSS had used in reaching its Determination. On 21 May 2013, DSS provided the Defence with two Reports prepared by Deloitte & Touche and one appendix of media articles. The two Reports were minimally redacted. On 5 June 2013, the Defence filed supplementary

20. On 29 July 2013, Co-Investigating Judge Harmon issued a decision finding that there were shortcomings in the procedure through which the Determination was reached and the substance of the Determination was flawed. He therefore vacated DSS's Determination and ordered DSS to reassess the question of Mr. MEAS Muth's indigence.²⁹
21. On 23 September 2013, DSS issued new Determination finding that Mr. MEAS Muth was indigent and his legal assistance would be paid through the ECCC's Legal Assistance Scheme. Mr. Endeley stated: "I am aware that Mr. Ang Udom and Mr. Michael G. Karnavas are still restrained by order of the International Co-Investigating Judge from having any contact with you until further notice. I am hereby respectfully requesting the Honorable Judge to consider lifting the order, as appropriate, to allow the Co-Lawyers to consult with you regarding the implications of the present decision."³⁰
22. Between 29 August 2013 and 28 October 2013, the Defence filed 14 submissions to the OCIJ addressing a number of important substantive legal and procedural issues.³¹

submissions including a revised supplementary annex. MEAS Muth's Supplemental Submissions to Support His Appeal Against Determination of Claim of Indigence and Decision on Request for Remuneration of Counsel Under the ECCC's Legal Assistance Scheme, 5 June 2013, D56/11/4, and attached annex.

²⁹ Decision on Appeal against the Determination by DSS on the Question of MEAS Muth's Indigence, 29 July 2013, D56/11/7.

³⁰ Final Determination of Your Claim of Indigence and Decision on Your Request for the Remuneration of Counsel under the ECCC's Legal Assistance Scheme, 23 September 2013, D56/13, para. 12.

³¹ MEAS Muth's Request to Access the Case File and Participate in the Judicial Investigation, 29 August 2013, D82; MEAS Muth's Request for Information Concerning the OCIJ's Investigative Approach and Methodology, 2 October 2013; MEAS Muth's Notice of Objection to Stephen Heder Having any Further Involvement in Case 003 and Request for the Work Product of Stephen Heder, 9 October 2013; MEAS Muth's Notice of Objection to David Boyle Having any Further Involvement in Case 003 and Request for the Work Product of David Boyle, 9 October 2013; MEAS Muth's Request to be Provided with Correspondence from the Head of the OCIJ Legal Unit to the United Nations Secretary General and all Related Material and to have this Material Placed on the Case File, 9 October 2013; MEAS Muth's Request for Clarification of Whether the OCIJ Considers Itself Bound by Pre-Trial Chamber Jurisprudence that Crimes Against Humanity Requires a Nexus With Armed Conflict, 17 October 2013; MEAS Muth's Request for the OCIJ to Place Full Transcripts of all Witness Interviews on the Case File, 17 October 2013; MEAS Muth's Request for the Work Product of OCIJ Investigators Involved in Improper Investigative Practices in Case 002, 2 October 2013; MEAS Muth's Request for the OCIJ's Criteria Concerning "Senior Leaders of Democratic Kampuchea and Those Who Were Most Responsible", 17 October 2013; MEAS Muth's Request for the OCIJ to Compel the OCP to Provide the Defence With its Criteria Concerning "Senior Leaders of Democratic Kampuchea and Those Who Were Most Responsible", 17 October 2013; MEAS Muth's Request for Clarification Concerning Whether the Defence may Conduct Investigations at the Current Stage of the Proceedings, 2 October 2013; MEAS Muth's Motion Against the Application of Crimes Listed in Article 3 New of the Establishment Law (National Crimes), 24 October 2013; MEAS Muth's Request for the OCIJ to Re-Interview Witnesses, 24 October 2013; MEAS Muth's Motion Against the Application of JCE III, 28 October 2013.

23. On 2 October 2013, Co-Investigating Judge Harmon issued an order resuming the schedule for filings on the alleged conflict of interest.³²
24. On 11 October 2013, the International Reserve Co-Prosecutor filed a reply (signed only by Deputy Co-Prosecutor William Smith).³³
25. On 25 October 2013, Co-Investigating Judge Harmon sent a letter to the Defence stating that he was in receipt of the submissions and: “Given the possible implications of the conflict of interest alleged in the *International Co-Prosecutor’s Request that Appointment of Co-Lawyers Designate Be Rejected on the Basis of Irreconcilable Conflicts of Interest* (D56/1) the above mentioned filings will be dealt with in due course, subject to the outcome of the decision on this matter.”³⁴

III. LAW AND ARGUMENT

A. DSS is the ECCC body charged with determining conflict of interest issues

26. Mr. MEAS Muth has the fundamental fair trial right recognized by the Cambodian Constitution,³⁵ the Agreement,³⁶ the Establishment Law,³⁷ and the Rules³⁸ to be assisted

³² 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, D56/14.

³³ International Reserve Co-Prosecutor’s Reply concerning Conflict of Interest of Co-Lawyers-Designate, 11 October 2013, D56/15.

³⁴ Letter from OCIJ to Defence, *Submissions Filed by the Co-Lawyers-Designate in CF003*, 25 October 2013, D87. On 28 October 2013, Co-Investigating Judge Harmon sent a follow-up letter confirming that he was also in receipt of MEAS Muth’s Motion Against the Application of JCE III and one other motion that the Co-Investigating Judge had omitted from the list set out in his first letter. Letter from OCIJ to Defence, *Corrigendum and Addition to the Letter Titled “Submissions Filed by the Co-Lawyers-Designate in CF003,” Dated 25 October 2013*, 28 October 2013, D87/1.

³⁵ Article 31 of the Cambodian Constitution requires the ECCC to “recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women’s and children’s rights.” 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. The International Covenant on Civil and Political Rights is one such convention. Article 14(3)(d) provides: “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... to defend themselves in person or with the assistance of counsel of their own choosing...” 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.

³⁶ Article 13(1) 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”) provides: “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. Such rights shall, in particular, include the right: ... to engage a counsel of his or her choice....”

by lawyers of his choice. Co-Investigating Judge Harmon confirmed that matters concerning alleged conflicts of interest are to be resolved by DSS.³⁹ “The freedom of choice of a lawyer is a fundamental right that may only be restricted under certain clearly defined circumstances.... Concerning such matters, no role is envisaged for the CIJs beyond formal recognition of lawyers once all of the requirements have been satisfied.”⁴⁰ This is in accordance with Cambodian law, in which it is the Bar Council that makes such determinations. 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.”

27. This is also in accordance with French law. In France, as in Cambodia, the Bar Association President (bâtonnier) is tasked with mediating professional disputes between the members of the Bar Association and investigating third party/prosecutor complaints concerning conflicts of interest. Article 187 of the “Décret n°91-1197 du 27 novembre 1991 organisant la profession d’avocat” (updated 29 July 2013) describes the professional ethics inquiry (“enquête déontologique”) led by the President. This article provides that the President can, after a complaint by the prosecutor or applicant, or on his own initiative, hold an inquiry concerning an alleged conflict of interest. The President has the discretionary authority to decide that no inquiry is required. Upon the conclusion of his inquiry, the President or prosecutor can then seize the Bar Association disciplinary council, which will issue a decision. The President’s inquiry power has been confirmed by the Cour de Cassation.⁴¹

³⁷ Article 24 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”) provides: “During the investigation, Suspects shall be unconditionally entitled to assistance of counsel of their own choosing...” Article 35 new (d) provides: “In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the International Covenant on Civil and Political Rights.... to defend themselves in person or with the assistance of counsel of their own choosing....”

³⁸ Rule 21(1)(d) provides: “Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established. Any such person has the right to be informed of any charges brought against him/her, to be defended by a lawyer of his/her choice, and at every stage of the proceedings shall be informed of his/her right to remain silent.” Rule 22(1) provides: “Any person entitled to a lawyer under these IRs shall have the right to the assistance of a national lawyer, or a foreign lawyer in collaboration with a national lawyer, of their own choosing...”

³⁹ 004/07-09-2009-ECCC-OCIJ, Decision on Motion and Supplemental Brief on Suspect’s Right to Counsel, 17 May 2013, D122/6, para. 78.

⁴⁰ *Id.*, para. 77.

⁴¹ Cass. 1e civ. Oct 17 2012, pourvoi n°11-17.999, Bull. civ. 2012, I, n° 203, No. Jurisdata 2012-023285.

28. Mr. MEAS Muth freely chose his Co-Lawyers. DSS considered the issue of whether an alleged conflict of interest would preclude the Co-Lawyers' representation of Mr. MEAS Muth, as required by Cambodian law and Regulation 9 of the DSS Administrative Regulations. The Chief of DSS personally met with Mr. MEAS Muth. He reviewed the applicable conflict waivers. He found these waivers to have been made "voluntarily, knowingly and unequivocally."⁴² Finally, he found no conflict of interest which would preclude the Co-Lawyers from representing Mr. MEAS Muth. DSS was never requested to reconsider this decision. When making its final determination on indigence, DSS was fully aware of the conflict of interest filings by the former International Co-Prosecutor; it was copied in all relevant filings. Yet, DSS took no action to reconsider its decision. On the contrary, the Chief of DSS encouraged Co-Investigating Judge Harmon to lift the communication ban.
29. Assuredly, had DSS considered that a conflict of interest precluded the Co-Lawyers' representation of Mr. MEAS Muth, it would have acted. DSS retains control to reconsider its decisions concerning counsel, a matter Mr. Endeley has demonstrated in Case 004 by, on his own motion, removing⁴³ Mr. Rogers' name from the list of eligible foreign counsel and withdrawing a legal consultancy DSS had requested for him, due, *inter alia*, to Mr. Endeley's concern that there may be a conflict of interest.⁴⁴
30. In Case 004, Co-Investigating Judge Harmon noted that he could review decisions on the appointment of Co-Lawyers where there is "any contestation, based on objective criteria, such as ... the existence of a conflict of interest."⁴⁵ In support of this proposition, Co-Investigating Judge Harmon cited one French case, *Cour d'appel Pau, 1e ch., Jan. 14, 1998*; a Regional Court of Appeals of Pau Decision, affirmed by the Cour de Cassation.⁴⁶ However, a close reading of this case, even if it were directly applicable as binding

⁴² See 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 A.

⁴³ According to the background to the Case 004 Decision on Motion and Supplemental Brief on Suspect's Right to Counsel, Mr. Endeley "declined to place [Mr. Rogers'] name on the list." However, the previous Officer-in-Charge of DSS had already confirmed that Mr. Rogers' name was already included on the list. See 004/07-09-2009-ECCC-OCIJ, Decision on Motion and Supplemental Brief on Suspect's Right to Counsel, 17 May 2013, D122/6, paras. 25, 37.

⁴⁴ *Id.*, paras. 25-37.

⁴⁵ 004/07-09-2009-ECCC-OCIJ, Decision on Motion and Supplemental Brief on Suspect's Right to Counsel, 17 May 2013, D122/6, para. 82.

⁴⁶ *Id.*, note 63, citing *Cour d'appel de Pau, Chambre 1, 14 Janvier 1998*, No JurisData: 1998-970294; (confirmed by the decision of the French Cour de Cassation, Chambre civile 1, 27 mars 2001, numero de pourvoi 98-16508).

authority at the ECCC – a matter the Defence contests, does not support the proposition advanced by Co-Investigating Judge Harmon, i.e., that the Co-Investigating Judge has jurisdictional authority to review DSS’s decisions concerning conflict of interest.

31. The *Cour d’appel Pau, 1e ch., Jan. 14, 1998* case was decided under the former Bar Association law.⁴⁷ It deals with a situation where a commercial company seized the Pau Bar Association with a motion alleging a conflict of interest, after its own lawyer in previous proceedings represented its former chairman in a matter in which the commercial company alleged that the chairman had harmed it. The President of the Pau Bar Association issued a notice to seize the Order Council,⁴⁸ but no action was taken for several months. The commercial company then appealed to seize an emergency judge (Juge des référés) with the matter. The Regional Court of Appeals of Pau decided that the emergency judge has jurisdiction where the normal procedure before the Bar Association is ineffective. This decision was affirmed by the Cour de Cassation.⁴⁹ This case is unlike the present situation. The former International Co-Prosecutor did not first raise the issue of conflict of interest with DSS or the BAKC. There has been no evidence that DSS’s appointment procedure was ineffective. There is nothing to suggest that DSS did not carry out its obligations in considering any potential conflicts of interest when assigning counsel.

B. The former International Co-Prosecutor’s arguments concerning the Co-Investigating Judges’ jurisdiction over conflict of interest issues are erroneous

32. Former International Co-Prosecutor Cayley alleges that the Co-Investigating Judges have jurisdiction to consider the Cayley Request “either as an *appeal* under Internal Rule (‘Rule’) 11(6); or, in the alternative, as a *self-standing request* concerning the exercise of the jurisdiction of the Co-Investigating Judges to admit and remove lawyers before the ECCC under Article 21(1) of the UN/RGC Agreement, read together with Articles 6.2

⁴⁷ The case refers to, *inter alia*, Article 809 Code of Civil Procedure, and Article 155 of the Décret du 27 novembre 1991. At that time, these articles referred to conflicts of interest. These articles are now Article 4.1 of the National Rules applicable to the Profession of Lawyer (“Règlement Intérieur National de la Profession d’Avocat – RIN”) and Article 7 Décret n°2005-790 du 12 juillet 2005 relatif aux règles de déontologie de la profession d’avocat, version updated on 30 December 2011 (“Décret du 12 juillet 2005”).

⁴⁸ The Order Council (Conseil de l’Ordre) was the former disciplinary body, before the Disciplinary Council was created in 2004. It was created by the loi n°2004-130 du 11 février 2004 and Décret n°2005-531 du 24 mai 2005.

⁴⁹ Cass. 1e civ., Mar. 27, 2001, No pourvoi 98-16.508.

and 7.4 of the DSS Administrative Regulations.”⁵⁰ Neither of these possibilities provide the Co-Investigating Judges with jurisdiction to decide on the alleged conflict of interest.

1. Admissibility as an Appeal under Rule 11(6)

33. Rule 74(2) states that “[t]he Co-Prosecutors may appeal against all orders by the Co-Investigating Judges.” The Pre-Trial Chamber has held (when considering whether the International Co-Prosecutor had standing to appeal an Order ordering him to retract a public statement made in Case 003) that this Rule *only* allows the OCP to appeal orders related to the criminal investigation.⁵¹ In a different decision, in Case 002, the Pre-Trial Chamber held that:

[t]he role of the Prosecutor does not necessarily extend to cases related to the conduct included in Internal Rules 35 and 38 [interference with the administration of justice and misconduct of a lawyer]. The 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 Pre-Trial Chamber finds 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.⁵²

34. Rule 11(6) does not specify who may appeal under this Rule. It simply 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

⁵⁰ Cayley Request, para. 8 (emphasis in original).

⁵¹ “The Pre-Trial Chamber notes that, once read in context and in conjunction with Internal Rule 73, it is clear 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 that are related to the criminal investigation.” 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.

⁵² *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, paras. 13-14 (emphasis added). The Pre-Trial Chamber has similarly explained that the OCP’s role is limited in other situations which do not involve the ongoing cases and investigations of crimes within the jurisdiction of the ECCC. See 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, para. 4; 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: “The Pre-Trial Chamber considers that the Co-Prosecutors have no standing as of right in respect of this kind of application [concerning disqualification of a Judge due to alleged bias].” The OCP has itself previously recognized its limited role in such situations (in the context of responding to an appeal against a warning by the OCIJ): “[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.” *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.

the time, within 15 (fifteen) days of receiving notification of the decision. No further appeal shall be allowed.⁵³

35. This Rule is intended to provide *persons claiming indigence* with a right to appeal decisions made by DSS. It is *not* intended to provide the OCP with a right to appeal. It applies only to decisions on the assignment of lawyers to indigent persons. Were Mr. MEAS Muth *not* indigent, former Co-Prosecutor Cayley would have no right under this Rule to appeal a decision appointing the Co-Lawyers. It would be illogical to suggest that the OCP's standing to appeal conflict of interest issues should turn on Mr. MEAS Muth's indigence.
36. The issue of the alleged conflict of interest is *not* an issue strictly related to the ongoing cases and investigation of crimes within the jurisdiction of the ECCC. Rule 11(6) is not intended to grant any appellate rights to the OCP. Thus, former International Co-Prosecutor Cayley had no standing to bring the issue before the Co-Investigating Judges as an appeal under Rule 11(6).

2. Admissibility as a “self-standing request”

37. As an alternative to admissibility as an appeal under Rule 11(6), former International Co-Prosecutor Cayley argues that the Co-Investigating Judges could assume jurisdiction over the conflict of interest decision based on a “self-standing request” concerning the exercise of the jurisdiction of the Co-Investigating Judges to admit and remove lawyers before the ECCC under Article 21(1) of the Agreement, read together with DSS Administrative Regulations 6.2 and 7.4. This argument is equally unsustainable.
38. As discussed above, the Pre-Trial Chamber is clear that the OCP may only appeal issues strictly related to the ongoing cases or the investigation of crimes within the jurisdiction of the ECCC. The OCP should similarly be restricted from raising “self-standing requests” to the OCIJ where such requests are not strictly related to the ongoing cases or the investigation of crimes.
39. Article 21(1) of the Agreement, like Article 42(3) of the Establishment Law (not cited by former International Co-Prosecutor Cayley), simply refers to “[t]he counsel of a suspect or an accused *who has been admitted as such by the Extraordinary Chambers...*”⁵⁴

⁵³ Emphasis added.

⁵⁴ Emphasis added.

Article 21(1) does *not* state which organ of the ECCC is responsible for admitting Co-Lawyers. In contrast, Rule 11 is explicit that it is DSS is responsible for establishing the criteria and procedure for assigning Co-Lawyers, maintaining the list of eligible Co-Lawyers, and entering into contracts with the Co-Lawyers. The only mention Rule 11 makes of other organs of the Court (apart from Rule 11(6) discussed above) concerns presenting the list of eligible Co-Lawyers to the Suspect/Charged Person/Accused,⁵⁵ and the jurisdiction of the Pre-Trial Chamber to consider appeals of decisions not to place Co-Lawyers on the list (in Rule 11(5)). Other Rules, such as Rule 81(5), refer to DSS assigning lawyers and make no mention of a requirement of confirmation of the assignment by the OCIJ or Chambers.

40. The sole mention of a requirement of confirmation of appointment is found in DSS's own Administrative Regulations. Regulation 6.2 states that DSS shall "[f]orward 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." This Regulation says nothing about the possibility of rejecting the assignment. It provides for a simple procedural matter and cannot provide the Co-Investigating Judges with jurisdiction to overturn DSS's decisions on appointment.
41. Article 21(1) of the Agreement is not a basis for making a "self-standing request" to the Co-Investigating Judges. The Rules state that DSS is in charge of the appointment procedure. Thus, the Co-Investigating Judges cannot assume jurisdiction based on a "self-standing request" made by former International Co-Prosecutor Cayley.

IV. CONCLUSION AND RELIEF REQUESTED

42. The Co-Investigating Judges have no jurisdiction to consider the Cayley Request. DSS was tasked with determining whether any conflict of interest precluded the Co-Lawyers' representation of Mr. MEAS Muth. Mr. Endeley, after thoroughly considering the matter, decided to appoint the Co-Lawyers. He has never reconsidered this position, despite being made fully aware of the former International Co-Prosecutor's position. The former International Co-Prosecutor was not entitled to appeal DSS's decision to the OCIJ under

⁵⁵ Rule 11(2)(e) states that DSS will: "Under the supervision of the Co-Prosecutors, Co-Investigating Judges or the Chambers, as appropriate, present the lists of lawyers ... to persons entitled to a defence lawyer...."

Rule 11(6), nor can the OCIJ assume jurisdiction of a “self-standing request” based on Article 21(1) of the Agreement.

43. Co-Investigating Judge Harmon has found that the Co-Investigating Judges have no role beyond formal recognition of lawyers once all requirements have been satisfied. The Co-Investigating Judges must not give more deference to DSS’s decisions concerning counsel in Case 004 than they give to such decisions in Case 003. This would violate Mr. MEAS Muth’s right to equal treatment.⁵⁶

WHEREFORE, for all of the reasons stated herein, the Defence respectfully requests the Co-Investigating Judges to:

A. CONSIDER / RECONSIDER whether they have jurisdiction to decide conflict of interest issues; and

B. DETERMINE that they lack jurisdiction to decide on the Cayley Request.

Respectfully submitted,



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Michael G. KARNAVAS

Co-Lawyers for Mr. MEAS Muth

Signed in Phnom Penh, Kingdom of Cambodia on this **26th** day of **November, 2013**

⁵⁶ Mr. MEAS Muth has the fundamental right to be treated equally before the law. This right is guaranteed to him by Article 31 of the Cambodian Constitution, which provides in part that “[e]very Khmer citizen shall be equal before the law....” This right is also enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, both of which the ECCC must respect pursuant to the Article 31 of the Cambodian Constitution, Article 12(2) of the Agreement, and Article 33 new of the Establishment Law. 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). Article 14(1) of the International Covenant on civil and Political Rights 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. This right is also set out in the statute of the International Criminal Tribunal for the former Yugoslavia and features prominently in a number of regional instruments and in the Constitutions of many States. See ICTY Statute, Art. 21(1); Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms; Inter-American Convention on Human Rights, Art. 24; United States Constitution, 14th amendment; French Constitution, adopted 1958, Art. 1; Constitution of the Federal Republic of Austria, Art. 7; Constitution of the Republic of Poland, 2 April 1997, Art. 32. Mr. MEAS Muth’s right to equal treatment before the ECCC would be violated by treating him differently from a suspect in Case 004, considering that the issues raised in each case are substantially similar; i.e the authority of the OCIJ over decisions made by DSS concerning counsel.