

BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 003/07-09-2009-ECCC/OCIJ**Party Filing:** The Co-Lawyers**Filed to:** The Office of Co-Investigating Judges**Original language:** ENGLISH**Date of document:** 23 April 2013**CLASSIFICATION****Classification of the document
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LEAVE TO EXCEED PAGE LIMITATION**&****CO-LAWYERS' RESPONSE TO INTERNATIONAL CO-PROSECUTOR'S
SUPPLEMENTARY SUBMISSIONS ON CONFLICT OF INTEREST OF CO-
LAWYERS-DESIGNATE**

Filed by:**Distribution to:****The Co-Lawyers:**

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International Co-Investigating**Judge:**

Judge Mark B. HARMON

International Co-Prosecutor:

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Copied to:**National Co-Investigating Judge:**

Judge YOU Bunleng




National Co-Prosecutor:

CHEA Leang

LEAVE

Mr. ANG Udom and Mr. Michael G. KARNAVAS (“the Co-Lawyers”) hereby seek leave to exceed the page limitation in filing their Response to the International Co-Prosecutor’s Supplementary Submissions on Conflict of Interest of Co-Lawyers–Designate. Should this leave be denied, the Co-Lawyers respectfully request an extension of one day to redact and edit the Response attached hereto. Given the urgency of the legal issues involved in these submissions, the Co-Lawyers respectfully request permission to file in English only, with the Khmer version to follow as soon as possible, in accordance with Article 7.2 of the Practice Direction on the Filing of Documents.

Respectfully submitted,



ANG Udom Michael G. KARNAVAS
Co-Lawyers

Signed in Phnom Penh, Kingdom of Cambodia on this **23rd** day of **April, 2013**

RESPONSE

Mr. ANG Udom and Mr. Michael G. KARNAVAS (“the Co-Lawyers”) pursuant to the International Co-Investigating Judge’s Second Decision and Re-Scheduling Order Concerning Request for Appointment of Co-Lawyers-Designate (“Second Decision and Re-Scheduling Order”)¹ hereby respond² to the International Co-Prosecutor’s Supplementary Submissions on Conflict of Interest of Co-Lawyers-Designate (“Supplementary Submission”).³ This Supplementary Submission, just as the International Co-Prosecutor’s Request that Appointment of Co-Lawyers Designate be Rejected on the Basis of Irreconcilable Conflict of Interest (“Request”),⁴ is made solely by International Co-Prosecutor Cayley without any indication as to the position held by National Co-Prosecutor Chea Leang on any of the legal and factual arguments advanced by her international counterpart.⁵ Similarly, the Second Decision and Re-Scheduling Order, just as the initial Scheduling Order,⁶ was issued solely by International Co-Investigating Judge Mark Harmon, without any indication as to the positions held by National Co-Investigating Judge You Bunleng.⁷ Because the modalities of the ECCC appear to permit the International Co-Prosecutor and the International Co-Investigating Judge to act independently from or in opposition to their respective Cambodian counterparts, the Co-Lawyers hereby respond. The Co-Lawyers were afforded 10 working days from the notification of the Supplementary Submission to file a responding submission. With the notification being 9 April 2013, and using the same method of calculation as International Co-Prosecutor Cayley, i.e., commencing the counting period from the day subsequent to notification (as opposed to the date of notification), the deadline for this filing is 26 April 2013; hence, the timeliness of this

¹ Second Decision and Re-Scheduling Order Concerning Request for Appointment of Co-Lawyers-Designate, 19 March 2013, D56/5.

² Hereinafter “Supplementary Response.”

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

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

⁵ Neither the Request nor the Supplementary Submission displays National Co-Prosecutor Chea Leang’s signature. In fact, the Request designates that she was merely copied to the submission, which, it would appear, denotes that International Co-Prosecutor Cayley and his international staff are acting devoid of any input or approval from his national counterpart.

⁶ Decision and Scheduling Order Concerning Request For Appointment of Co-Lawyers-Designate, 11 February 2013, D56/3. *See also* Re-Scheduling Order Concerning Request For Appointment of Co-Lawyers-Designate, 28 February 2013, D56/4.

⁷ None of the Decisions and Orders related to the conflict of interest issues raised by International Co-Prosecutor Cayley bear the signature of National Co-Investigating Judge You Bunleng. There is no available record as to whether Judge You Bunleng has expressed any views on this matter to his counterpart, International Co-Investigating Judge Harmon.

submission. The Co-Lawyers respectfully submit that the Supplementary Submission, which subsumes and supersedes the Request, should be rejected.

I. PRELIMINARY REMARKS

1. In his Supplementary Submission, International Co-Prosecutor Cayley raises a novel argument, which goes beyond the contours of the Second Decision and Re-Scheduling Order; one that is being advanced in addition to and not connected to the arguments made in support of his Request for Re-Scheduling.⁸ Whereas the Request had one overarching argument, namely, the existence of an irreconcilable conflict of interest,⁹ the Supplementary Submission also advances the added argument of “damaging public confidence in the ECCC and the administration of justice.”¹⁰ While International Co-Prosecutor Cayley is at liberty to raise whatever legal issues he deems appropriate in his quest to have the Co-Investigating Judges (“OCIJ”) reject the Defence Support Section’s (“DSS”) appointment of the Co-Lawyers to represent Mr. MEAS Muth in Case 003, if an argument is beyond the contours of an order, the usual and ethical practice is to seek leave to make the additional argument. Although the Co-Lawyers in this instance have been afforded the opportunity to respond, this sort of conduct calls into question the genuineness of International Co-Prosecutor Cayley’s Request to Reschedule. The Supplementary Submission is also, in part, a reply to the Co-Lawyers’ Response.¹¹ This was not one of the stated purposes for International Co-Prosecutor Cayley’s request to make supplemental submissions. Gaming the process should not be condoned, even when done by International Co-Prosecutor Cayley.

II. ARGUMENT

2. The arguments in this Supplementary Response sequentially track the Supplementary Submission, paragraph by paragraph; hence some unavoidable repetition in the arguments presented herein. For the sake of brevity, and because in the Supplementary Submission

⁸ International Co-Prosecutor’s Request to Reschedule Submissions (“Request to Reschedule”), 15 March 2013, D56/4/3.

⁹ The title of the Request (also reflected in the content) notes “basis,” meaning singular or one, as opposed to “bases” which is plural, meaning many. Had International Co-Prosecutor Cayley advanced more than one reason (basis) for the denial of appointment of the Co-Lawyers, he surely would have used the grammatically correct plural “bases.”

¹⁰ Supplementary Submission, paras. 4, 70-77. The Request does make reference to the prejudice of the administration of justice, but in a different and limited context. *See* Request, paras. 52 and 53; Co-Lawyers’ 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 (“Response”), D56/4/1, paras. 42-44.

¹¹ *See, e.g.*, Supplementary Submission, paras. 35-44.

International Co-Prosecutor Cayley makes the same arguments as in the Request, the Co-Lawyers incorporate by reference all factual and legal arguments advanced in their Response to the Request. The Supplemental Response should be considered in conjunction with the Response as one overarching response.

A. Response to Applicable Law

3. The Applicable Law section of the Supplementary Submission is a mixture of descriptive law and argument. International Co-Prosecutor Cayley, with strands and patches from a variety of sources, stitches a tenuous and improbable thesis that there are irreconcilable conflicts of interest barring the Co-Lawyers from representing anyone at the ECCC in either Cases 003 or 004,¹² but especially Mr. MEAS Muth in Case 003. While some of the law cited may be informative, very little of it is applicable to the instant factual situation or actually binding on the ECCC. Employing theoretical and abstract constructs, International Co-Prosecutor Cayley suggests that the Co-Lawyers *intend* – or *must* – violate the duty of confidentiality owed to Mr. IENG Sary if permitted to represent Mr. MEAS Muth. International Co-Prosecutor Cayley does this by alluding to the modes of liability of command responsibility and joint criminal enterprise (“JCE”).¹³ As will be argued more fully below, International Co-Prosecutor Cayley provides no evidence, just a mixture of arguments made almost entirely out of whole cloth. He relies on speculation, innuendo, and irrelevant sources (such as the IENG Sary Defence website and newspaper quotes) in a scattershot attempt to *poison the well*.

1. Defence Counsel Obligations to Current and Former / Deceased Clients

4. International Co-Prosecutor Cayley merely re-argues in paragraphs 7-18 of the Supplementary Submission (although with additional authority) what he already presented in the Request in paragraphs 16-18 and 20-22. When considering the overall arguments advanced by the Co-Lawyers in the Response, there is considerable agreement as to what obligations are owed to client by lawyers.¹⁴
5. Paragraph 7: There is no dispute that a lawyer has fiduciary obligations to his client.

¹² International Co-Prosecutor Cayley implicitly, if not explicitly, makes this argument in the Supplementary Submission, para. 70.

¹³ Supplementary Submission, paras. 57-62.

¹⁴ See, e.g., Response, para. 4.

6. Paragraphs 8-12: There is no dispute that fiduciary obligations, which include confidentiality, extend beyond the death of a client.
7. Paragraph 13: There is no dispute that the obligation of confidentiality may – but *not necessary will* – impact a lawyer’s ability to meet his fiduciary obligations towards his past clients and present clients. International Co-Prosecutor Cayley cites no authority holding that, in each and every circumstance, no matter what the facts or theories of the cases and defences may be, there is a universal legal principle that confidentiality *must* be breached in order to provide competent and robust legal representation to a present client who is alleged to be connected to conduct or acts to which a past client was also alleged to have been connected.
8. International Co-Prosecutor Cayley knows from his experience as a prosecutor at the International Criminal Tribunal for the former Yugoslavia (“ICTY”) (as does his Honor, International Co-Investigating Judge Harmon), that defence counsel have been assigned in multiple cases, such as the Srebrenica cases,¹⁵ where their past and present clients are alleged to have been involved in the same events and where JCE and / or command / superior responsibility are alleged as modes of liability.¹⁶ Not surprisingly, International Co-Prosecutor Cayley fails to mention, let alone address, these ICTY cases which undercut his arguments. Notably, International Co-Prosecutor Cayley also fails to address his own involvement at the ICTY in *Gotovina*, as well as that of his fellow former ICTY prosecutors, as argued more fully below.
9. The obligation of confidentiality, as with all other fiduciary obligations, also applies to former prosecutors who later become defence counsel for accused in cases where, as prosecutors, they would have had direct or indirect involvement and inside knowledge.¹⁷

¹⁵ International Co-Prosecutor Cayley’s profile on Wikipedia claims, among other things, that he was “Placed on loan service in 1995, as a military prosecutor, by the Foreign & Commonwealth Office and the Ministry of Defence to the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’) he investigated and prosecuted the cases of ...the Prosecutor v. General Radoslav Krstic (Srebrenica)and ... [i]n 2001 he was appointed a Senior Trial Attorney ... [and] [i]n that capacity he was responsible for the case against General Ratko Mladic.” See Wikipedia page, available at http://en.wikipedia.org/wiki/Andrew_Cayley. International Co-Investigating Judge Harmon was also part of the trial team in the *Prosecutor v. Krstić* (Srebrenica) case and has worked in various capacities in other related Srebrenica cases. Hence, International Co-Investigating Judge Harmon is well acquainted with the facts and of the defence counsel who have represented multiple accused in the Srebrenica cases as well as other cases at the ICTY.

¹⁶ See Response, para. 21.

¹⁷ It is a notorious fact at the ICTY that before indictments are issued, prosecutors are asked to participate in reviewing panels. As such, prosecutors who may not appear to be part of a prosecuting team in a particular case, would in fact be involved in and privy to inside information which may never be disclosed to the defence or even the Chambers, (see, e.g., Article 18(2) of the ICTY Statute and Rules 39, 54*bis* and especially 70 of the ICTY Rules of Procedure and Evidence), strategies, analytical reports deemed confidential, work product, etc.

In other words, former prosecutors of the ICTY have fiduciary obligations to their former employer / client, the ICTY Office of the Prosecution ("ICTY-OTP"). International Co-Prosecutor Cayley is fully aware of this given his long association with the ICTY-OTP, and the challenges the OTP has made in attempting to prevent former prosecutors from being assigned as defence counsel on ICTY cases.¹⁸

10. International Co-Prosecutor Cayley was himself involved as a defence counsel in *Gotovina*,¹⁹ which also prominently featured two other former ICTY-OTP colleagues of his (and of His Honor, International Co-Investigating Judge Harmon) as defence counsel – these defence counsel, incidentally, also created a website on behalf of their client, General Ante Gotovina.²⁰
11. *Gotovina* serves as a particularly apt example. International Co-Prosecutor Cayley, Gregory Kehoe and Payam Akhavan were privately retained by the accused as defence counsel, even though these former high-level members of the ICTY-OTP had direct and / or indirect specific knowledge and / or involvement in related cases that touched upon the events in *Gotovina*.²¹ International Co-Prosecutor Cayley may have only played a secondary or tertiary role,²² but he would not have been insulated from breaching confidentiality or any of his other fiduciary obligations. Mr. Kehoe played the prominent role of co-counsel, although for all intents and purposes, he was acting as the lead trial lawyer during the trial proceedings. *Gotovina* proves the absurdity and hypocrisy of International Co-Prosecutor Cayley's generalized assertion: that it is a forgone conclusion that in all instances the confidentiality of a past client *will* or *must* be breached for defence counsel to properly and vigorously represent a present client.
12. Paragraphs 14-18: Effectively these paragraphs are a repetition of paragraph 8. The references to "dignity, reputation, honour and privacy" in paragraph 16 and the case law

See, e.g., Prosecutor v. Blagojević & Jokić, IT-02-60, Decision on Vidoje Blagojević's Motion to Compel the Prosecution to Disclose its Notes from Plea Discussions with the Accused Nikolic & Request for an Expedited Open Session Hearing, 13 June 2003.

¹⁸ See Response, para. 22, discussing *Prosecutor v. Hadžihasanović & Kubura*.

¹⁹ International Co-Prosecutor Cayley worked on the defence team for accused Ivan Čermak.

²⁰ See www.antegotovina.com.

²¹ See Response, para. 18.

²² As International Co-Prosecutor Cayley's profile on Wikipedia claims, after departing the International Criminal Court ("ICC"), International Co-Prosecutor Cayley "was immediately instructed by Mr. Ivan Čermak to defend him." In his profile for Doughty Street Chambers, where he is listed as an associate tenant, International Co-Prosecutor Cayley seems more modest as to his actual role in that case, although he does seem to covet credit for the acquittal result, even though he abandoned the team midway through the trial to take up his current position. See Doughty Street Chambers website, available at http://www.doughtystreet.co.uk/barristers/associate_tenants/tenant_details.cfm?iTenantID=346.

that follows in paragraphs 17-18 are also redundant: *dignity, reputation, honor* and *privacy* are part and parcel of a defence counsel's fiduciary obligations, as noted in paragraph 7.

2. Defence Counsel's Obligation to Avoid Conflicts of Interests

13. Paragraph 19: There is no dispute that a lawyer before the ECCC – or in any court for that matter, whether national or international – has an obligation to avoid conflicts of interest by withdrawal or consent. While the Co-Lawyers do not believe that any conflicts of interests exist in representing Mr. MEAS Muth as a result of having represented Mr. IENG Sary, out of abundance of caution, and after careful and thorough consultations with both clients, the Co-Lawyers obtained waivers.²³
14. Paragraphs 20-23: There is no dispute that a lawyer should exercise reasonable foresight in discerning whether there is an irreconcilable conflict of interest requiring withdrawal from a case. Presumably, International Co-Prosecutor Cayley and his former OTP colleagues, exercising reasonable foresight, were able to conclude that they could abide by their fiduciary obligations towards their former employer/client, the ICTY-OTP, and their respective clients in *Gotovina*.²⁴ The same would hold true for all defence counsel with similar obligations, such as those in the Srebrenica cases.²⁵
15. As noted *supra*, there is no universal principle that a conflict of interest axiomatically mandates automatic disqualification of counsel in instances such as the present case. In paragraph 23, International Co-Prosecutor Cayley cites cases from the United States. While these cases may be interesting, they are not controlling at the ECCC. Not surprisingly, International Co-Prosecutor Cayley minimizes the value or instructiveness of ICTY cases, such as *Hadžihasanović*, which do not support his thesis.²⁶ In *Hadžihasanović*, the ICTY Trial Chamber required proof of a “real” conflict of interest. The onus was placed on the OTP to provide the “real” proof. Conjecture and speculation were deemed insufficient. In this instance, as in *Hadžihasanović*, the onus is on

²³ See Response, paras. 6, 10, 23, 25, 35.

²⁴ To the best knowledge of the Co-Lawyers, the ICTY-OTP never filed any requests – at least publicly – to have International Co-Prosecutor Cayley, Mr. Kehoe or Mr. Akhavan removed from the case due to any irreconcilable conflict of interest.

²⁵ Again, there is no record that any formal submissions were made concerning irreconcilable conflict of interest issues with the defence lawyers who were assigned to and participated in the Srebrenica cases, or *Mladić*, which, inclusive in the indictment, are the events of Srebrenica, with accused Ratko Mladić being at the apex of alleged responsibility – as a member of the JCE and under superior/command responsibility – for the crimes committed.

²⁶ Supplementary Submission, para. 22.

International Co-Prosecutor Cayley to present demonstrable proof that a “real” conflict of interest exists. Other than notional counterfactual assertions, International Co-Prosecutor Cayley presents no “real” evidence of an irreconcilable conflict of interest.

16. The Co-Lawyers fully recognize their fiduciary obligations towards Mr. IENG Sary and Mr. MEAS Muth, inclusive of which are confidentiality, loyalty, diligence, truthfulness and disclosure. At no time did the Co-Lawyers advance any legal arguments or make any factual assertions that they owed no duty of confidentiality to Mr. IENG Sary or Mr. MEAS Muth. Similarly, the Co-Lawyers have never claimed that the duty of confidentiality owed to Mr. IENG Sary terminated upon his death.

3. Circumstances in Which Conflicts of Interest Arise

17. Paragraph 24: There is no dispute that in some jurisdictions there are professional rules that call upon a lawyer to refrain from representing a client where the interests of the past and present clients are materially adverse. What constitutes a materially adverse interest is case/client specific, as reflected in the Srebrenica cases and *Gotovina*.
18. Paragraph 25: International Co-Prosecutor Cayley cites national rules and Singaporean case law to suggest that it is reasonably foreseeable that knowledge of specific facts gained in a prior representation that relate to a matter in the representation of a present client would amount to an automatic conflict and require automatic withdrawal or disqualification. This is not correct. A lawyer can gain specific facts from the case file or from the testimony of witnesses. The issue is whether the knowledge came from the former client, which would otherwise not be available to the lawyer, and whether this knowledge will subsequently be used to assist the present client to the detriment of the former. Again, the Srebrenica cases, as well as *Gotovina*, debunk the general proposition of law that International Co-Prosecutor Cayley seems to suggest. 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.

19. Paragraphs 26-28: International Co-Prosecutor Cayley effectively offers nothing that has not been previously discussed, other than to cite more professional rules from national jurisdictions and voluntary legal associations (such as the International Bar Association and International Criminal Bar), and national case law. As represented by the Co-Lawyers in the previous paragraph, the interests of Mr. IENG Sary and Mr. MEAS Muth will not be compromised; neither will suffer any disadvantage should DSS's assignment of the Co-Lawyers to represent Mr. MEAS Muth be accepted. If anything, Mr. MEAS Muth, in particular, stands to benefit from the Co-Lawyers' general appreciation of the events that fall within the temporal jurisdiction of the ECCC, their knowledge of the massive amount of evidence contained in the Case File in 002 and their thorough understanding of the jurisprudence and procedure applicable at the ECCC, amassed in representing Mr. IENG Sary for over five years. Indeed, these were factors considered by DSS in approving the assignment.²⁷
20. Paragraph 29: The Co-Lawyers 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. However, as noted *supra*, this situation is case specific and very much dependent on a variety of factors, including the theories of defence. Spurious and fanciful hypothetical assertions contrived by International Co-Prosecutor Cayley based on *his* interpretations of the events alleged is not proof that a *real* "significant risk" exists to either Mr. IENG Sary or Mr. MEAS Muth, should the Co-Lawyers represent Mr. MEAS Muth in Case 003.
21. Paragraphs 30-31: There is no prohibition of written waivers of conflicts of interests. International Co-Prosecutor Cayley knows that waivers, such as the ones presented by Mr. IENG Sary and Mr. MEAS Muth, are routinely accepted at the ICTY or other international tribunals.²⁸
22. International Co-Prosecutor Cayley acknowledges that there is no express prohibition of waivers in Cambodian law. Moreover, he provides no binding ECCC legal authority which holds that waivers, such as the ones presented by Mr. IENG Sary and Mr. MEAS Muth, are either prohibited or lacking in form or substance. Although the ECCC is not bound by French law or other codes of conduct, a careful reading of this legal authority

²⁷ See ECCC Press Release titled "Mr. ANG Udom and Mr. Michael G. Karnavas assigned as defence counsel to represent a suspect in Case 003", 14 December 2012, available at <http://www.eccc.gov.kh/en/articles/mr-ang-udom-and-mr-michael-g-karnavas-assigned-defence-counsel-represent-suspect-case-003>.

²⁸ See Supplementary Submission, para. 48. See also *infra* para. 27.

does not call for an outright prohibition of waivers. The French law/code definition of what constitutes a conflict of interest, as International Co-Prosecutor Cayley sets out in paragraph 31, is very much in keeping with what has been previously discussed; redundancy adds no real value. In any event, the Co-Lawyers: (1) are fully able and willing to provide complete and fair information and advice to Mr. MEAS Muth without compromising the interests of Mr. IENG Sary; and (2) 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. Any assertions to the contrary by International Co-Prosecutor Cayley are baseless and contrived.

4. Client's Right to Waive a Conflict of Interest

23. Paragraphs 32-44: There is no dispute that waivers by clients are limited to circumstances. International Co-Prosecutor Cayley offers no *real* proof in these paragraphs – which are a mixture of law and argument (reply) – showing that the waivers obtained in this case were not properly obtained, that the clients involved were not fully informed and advised, or that they were not aware of the nature of the events to which they were being tried or investigated. International Co-Prosecutor Cayley is entitled to his own arguments, but not his own facts.
24. Once again, International Co-Prosecutor Cayley indulges in speculation and innuendo, spuriously likening the present case with the facts and circumstances in *Mejakić*, while continuing to make references to *Prlić* (as if it is more persuasive because Mr. Karnavas represented Dr. Prlić). Although International Co-Prosecutor Cayley mentions *Gotovina*, here, as elsewhere, he conveniently fails to explain his own involvement or to counter the arguments raised by the Co-Lawyers in the Response.²⁹ International Co-Prosecutor Cayley's selectivity in addressing all relevant conflict of interest issues in *Gotovina*, particularly when he and his colleagues from the ICTY-OTP were involved, is intellectually bereft.
25. The ECCC is not bound by the ICTY Directive on Assignment of Defence Counsel; the ECCC has its own procedure. As for conduct that would diminish public confidence in the ECCC or the administration of justice, this applies to all lawyers *and prosecutors* appearing before the ECCC.

²⁹ See Response, paras. 9, 18.

26. Paragraphs 46-47: Essentially, these paragraphs repeat what is stated in paragraph 45. As for the so-called Mechanism for International Criminal Tribunals (“MICT”), this is nothing other than a continuation of the existing regime at the ICTY and International Criminal Tribunal for Rwanda (“ICTR”). It is part of what is commonly referred to as the “residual mechanisms” in dealing with the spillover work expected past the formal termination of these two *ad hoc* tribunals. Referencing MICT adds no value.
27. Paragraph 48: Acknowledging that waivers are in use at the ICTY, International Co-Prosecutor Cayley cites *Prlić* for the proposition that the judicial authority must be convinced that certain criteria are met before accepting waivers. That is the principle at the ICTY. Although there is no comparable jurisprudence at the ECCC, as represented by the Co-Lawyers, all necessary criteria in obtaining the waivers from both Mr. IENG Sary and Mr. MEAS Muth were met. International Co-Prosecutor Cayley seems to suggest that in order for the reviewing authority to be satisfied, either: (a) the Co-Lawyers will need to divulge attorney-client privileged information; or (b) Mr. MEAS Muth, who is being investigated for the purposes of determining whether he should be indicted, arrested and prosecuted, must reveal the specifics of the legal advice provided to him as well as his “defence strategy” / theory of defence. This is an absurdity and is not supported by any applicable ECCC jurisprudence. International Co-Prosecutor Cayley should not be permitted to use Mr. MEAS Muth’s request to have the Co-Lawyers represent him as a means of having the International Co-Investigating Judge compel either the Co-Lawyers to violate their fiduciary duties of lawyer-client privilege / confidentiality, or Mr. MEAS Muth to relinquish his constitutional rights to remain silent and not to incriminate himself.
28. International Co-Prosecutor Cayley cites an ethics opinion from the District of Columbia Bar to suggest that someone such as Mr. MEAS Muth could not appreciate the nature of the waiver and therefore the Co-Lawyers had a duty to steer Mr. MEAS Muth to outside counsel for advice. Again, there is nothing in ECCC jurisprudence which requires that which the District of Columbia Bar suggests in the ethics opinion. In any event, in a case as large and complex as Case 003, it is unclear how and under what circumstances a second opinion could be properly given without knowing a modicum of the facts, circumstances and alleged conduct, not only for Mr. MEAS Muth but also for Mr. IENG Sary. Additionally, outside counsel may be motivated to impair an existing lawyer-client relationship for the purpose of gaining the confidence of the client and assignment to the case. There are a myriad of troubling issues with this proposal that is *now* being

suggested by International Co-Prosecutor Cayley. Suffice it to say, there is no evidence – at least not publicly available evidence – that in *Gotovina* the respective clients were required to get independent advice or that International Co-Prosecutor Cayley, Mr. Kehoe or Mr. Akhavan sought or made any efforts on their own to seek the sort of independent advice suggested by the District of Columbia Bar.

B. Response to Relevant Facts

29. Paragraphs 49-53: International Co-Prosecutor Cayley reiterates what he has already presented in the Request,³⁰ although he does provide added spin and advocacy in promoting his thesis that Mr. MEAS Muth is guilty. International Co-Prosecutor Cayley has been engaged in or associated with a very public campaign to garner international pressure in motivating the OCIJ to indict and arrest the targeted suspects in Cases 003 and 004.³¹ This, of course, is relevant to Mr. MEAS Muth's knowledge, understanding and beliefs as to International Co-Prosecutor Cayley's *real* intentions in seeking his prosecution and conviction and why it is not in Mr. MEAS Muth's best interest to forsake any of his constitutional rights.
30. Paragraph 54: International Co-Prosecutor Cayley makes a gratuitous reference to what was reported in the press about the reception received by the Co-Lawyers at the cremation ceremony of Mr. IENG Sary and the gift of a photograph given to the family members of Mr. IENG Sary. This bears no relevance, other than to show that the family was appreciative of what was done by the Co-Lawyers on behalf of their father, and that there was mutual respect between counsel and client. These matters are being mentioned to show that, because of the Co-Lawyers' commitment to representing Mr. IENG Sary, it *must* follow that they *will* in fact work *against* the interests of their current client, Mr. MEAS Muth. If anything, this event shows the level of commitment the Co-Lawyers bring to bear when undertaking legal representation of a suspect or accused. It demonstrates the sort of representation Mr. MEAS Muth can expect to receive from the Co-Lawyers. Underlying all of this may be the fact that International Co-Prosecutor

³⁰ See Request, paras. 35-41.

³¹ See *generally* International Co-Prosecutor's press releases *available at* <http://www.eccc.gov.kh/en/media-center/press-releases>.

Cayley and his subordinate and occasional Acting International Co-Prosecutor Smith simply wish to conveniently get rid of a contentious legal team.³²

31. Paragraphs 55-56: International Co-Prosecutor Cayley makes reference to the website set up by the Co-Lawyers for Mr. IENG Sary's case. International Co-Prosecutor Cayley attempts to mislead his Honor, International Co-Investigating Judge Harmon, by suggesting that the website, and the quote cited in paragraph 56 of the Supplementary Submission, is something new.
32. International Co-Prosecutor Cayley knows (or should know) that the website has been in existence since 2009.³³ The quote cited was the mission statement of the original website, prominently featured on the home / opening page.³⁴ This website was set up for transparency purposes in light of certain systemic weaknesses and predilections for opacity at the ECCC.³⁵ The new website is merely an upgraded version of the old / original one. The only real difference is that the new website is more user-friendly to those who are interested in doing research. There is nothing nefarious about the website. As for the quoted text, it offers nothing to the issue at hand. International Co-Prosecutor Cayley raises the website as proof of the continuing loyalty the Co-Lawyers have for Mr. IENG Sary, which, it must follow, impedes their ability or willingness to ethically and professionally meet their fiduciary obligations towards Mr. MEAS Muth. This is ridiculous. International Co-Prosecutor Cayley is simply engaging in a casually presented veiled *ad hominem* attack to inflame and prejudice the International Co-Investigating Judge.

C. Response to Argument

1. A Conflict of Interest Does Not Exist

³² Acting International Co-Prosecutor Smith has on numerous occasions expressed the view that the IENG Sary Defence, and, in particular, Mr. Karnavas, are relentless, even to the point of expressing compliments at the high quality and large volume of work generated by the IENG Sary Defence Team.

³³ See previous website for the IENG Sary Defence team, available at <https://sites.google.com/site/IENGsarydefence/>. See also on website: Defence Press Release on OCIJ Order on Breach of Confidentiality, 4 March 2009; Defence Press Release on Removal of Defence Filings from Website, 8 March 2009.

³⁴ See previous website for the IENG Sary Defence team, available at <https://sites.google.com/site/IENGsarydefence/>.

³⁵ *Id.* See Defence Press Release on OCIJ Order on Breach of Confidentiality, 4 March 2009; Defence Press Release on Removal of Defence Filings from Website, 8 March 2009. See also International Co-Lawyer Michael G. Karnavas's letter to the Alaska Bar Association in response to a grievance filed by the Office of the Co-Investigating Judges, titled "Response to grievance concerning *Order of Breach of Confidentiality of the Judicial Investigation* which the Alaska Bar Association received on March 12, 2009 from the Extraordinary Chambers in the Courts of Cambodia", 24 April 2009, available at www.iengsarydefence.org.

33. Paragraphs 57-69: International Co-Prosecutor Cayley repeats, *ad nauseum*, the speculative assertions advanced in the Request. International Co-Prosecutor Cayley has no insight as to how the Co-Lawyers intend to represent Mr. MEAS Muth. He certainly knows nothing of the theory of the case and strategies selected by Mr. MEAS Muth based on his consultations with the Co-Lawyers. International Co-Prosecutor Cayley has not been privy to any attorney-client communications; he is simply constructing a belief.
34. Based on nothing more than self-serving conjecture, International Co-Prosecutor Cayley asserts that the legal interests of Mr. IENG Sary and Mr. MEAS Muth are “materially adverse” and that there are “multiple conflicts of interests.” He quotes what was reported in a newspaper and attributed to Mr. MEAS Muth to suggest that this is proof of a materially adverse legal interest. International Co-Prosecutor Cayley asserted this point in the Request;³⁶ repeating it or putting a more speculative spin on it is unpersuasive. What exactly was said, in what context and for what reasons are unknown to International Co-Prosecutor Cayley. He can only *know* if it is both *true* and *knowable*. Simply suggesting that some dated newspaper quote should be given serious weight or consideration, especially given all of the unknowns, is nonsense.
35. As argued *supra*, International Co-Prosecutor Cayley’s assertion that the new website somehow is evidence that the Co-Lawyers are continuing to advocate Mr. IENG Sary’s case and cause – and axiomatically work against the interest of Mr. MEAS Muth (paragraphs 65-66) – is absurd. The website has been a work in progress in that it takes time and resources to upload all of the submissions that have been filed over the past five years (nearly 450 submissions, not including non-confidential correspondence such as emails, letters and memoranda). As noted *supra*, and as is rather obvious from viewing the website, it is a research tool and can be viewed as part of the legacy of the ECCC. The website informs the public of what the Co-Lawyers filed and submitted in representing Mr. IENG Sary in Case 002. Although the website does contain a few articles and press releases, the website does not advocate on behalf of Mr. IENG Sary. As confidential filings and submissions are reclassified as “public”, some uploading may be required so that a full archive is available to the public. International Co-Prosecutor Cayley’s assertions concerning the website are whimsical.

2. The Conflicts of Interest Can Be Waived

³⁶ Request, para. 43.

36. Paragraph 70: International Co-Prosecutor Cayley's assertions that the involvement of the Co-Lawyers in Cases 003 (and 004) will have a "deleterious effect" and would prejudice the administration of justice are unfounded. It is difficult to fathom how the robust representation Mr. MEAS Muth is likely to receive (based on what is known about the advocacy for which the Co-Lawyers are known, and as recognized by Deputy International Co-Prosecutor Smith),³⁷ will impact public perception or have any real – *as opposed to imaginary* – "deleterious effects" on the image of the ECCC or the administration of justice. These assertions are unsound, irresponsible, and verge on the personal.³⁸
37. As noted *supra*, at the ICTY there are a plethora of examples where defence lawyers have been involved in representing multiple clients in cases that are factually related. The Srebrenica cases are a good example. It is a matter of public record, and more specifically, International Co-Prosecutors Cayley and Smith are both aware of the lawyers who are currently engaged in defending Mladić and their previous involvement in other Srebrenica cases. For example, Defence Counsel Nenad Petrušić was lead counsel for General Krstić, the effective commander of the Drina Corps, which was under the overall command of General Mladić. Mr. Petrušić then became co-counsel for General Miletić, who was associated with the Main Staff overseeing the Drina Corps and who was a subordinate of General Mladić. Presently, Mr. Petrušić is one of the principle members of General Mladić's legal team.³⁹ Mr. Petrušić is not alone. As noted in the Response, General Mladić is also represented by two other lawyers who played major

³⁷ See *infra* note 32.

³⁸ International Co-Prosecutor Cayley may simply be acting out of vindictiveness in making such assertions against the Co-Lawyers because of their submissions concerning International Co-Prosecutor Cayley's repeated *ex parte* communications. See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, IENG Sary's Request for Investigation Concerning *Ex Parte* Between the International Co-Prosecutor, Judge Cartwright and Others, 24 November 2011, E137/3; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, IENG Sary's Appeal Against the Trial Chamber's Decision on Motions for Disqualification of Judge Silvia Cartwright, 5 January 2012, E137/5/1/1; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, IENG Sary's Rule 34 Application for Disqualification of Judge Cartwright Or, in the Alternative, Request for Instruction and Order to Cease *Ex Parte* Communications & Request for Disclosure of *Ex Parte* Communications, 27 April 2012, E191. Also noteworthy is a private conversation International Co-Prosecutor Cayley had sometime in November 2012 with one of his colleagues from the United Kingdom, during which noted that he had a message that he wished to be passed on to Karnavas, that he was going to get him kicked off Case 003 for trying to represent one of the suspects who was also on the list of witnesses in Case 002. International Co-Prosecutor Cayley has acknowledged to Mr. Karnavas that this conversation did in fact take place, but that he was drinking at the time, which may account for this indiscretion.

³⁹ Though Mr. Petrušić is not Counsel or Co-Counsel of record, he still has fiduciary obligations to his past clients General Krstić and General Miletić. As such, despite the title of his position in General Mladić's legal team, he is not free to divulge any confidential information obtained while representing General Krstić and General Miletić, and he certainly should not be engaged in assisting in a defence that would benefit General Mladić to the detriment of General Krstić and General Miletić.

roles in other Srebrenica cases.⁴⁰ The OTP raised “deleterious effects” concerns in these cases.

38. International Co-Prosecutor Cayley is quick to claim “deleterious effects” to the ECCC were the Co-Lawyers to represent Mr. MEAS Muth. Neither he nor the OCP as an institution expressed any alarm at having one of their analysts responsible for drafting the Case 002 Introductory Submission then move to the OCIJ, where he served as an analyst in the investigation of that same Introductory Submission.⁴¹ International Co-Prosecutor Cayley similarly expressed no alarm (although hubris was noticeably manifested) as to the “deleterious effects” over his continuing *ex parte* communications with a Trial Chamber Judge, even after the ECCC Supreme Court Chamber noted that his conduct gave rise to an asymmetrical relationship, fostering a public perception that the OCP was working in tangent with the Trial Chamber to the disadvantage of the Accused.⁴² International Co-Prosecutor Cayley expressed no alarm over his very public attack on the OCIJ’s real or perceived irregularities by then-International Co-Investigating Judge Blunk and National Co-Investigating Judge You Bunleng in Cases 003 and 004.⁴³
39. Paragraph 71: International Co-Prosecutor Cayley indulges in conjecture when asserting that the mission of the ECCC will be compromised were the Co-Lawyers to represent Mr. MEAS Muth. A striking example belying International Co-Prosecutor Cayley’s supposed concerns that suspects and accused should have “every opportunity for a full defence” is International Co-Prosecutor Smith’s repeated interventions during the examination of Duch in Case 002/01, where he misrepresented that there was a potential

⁴⁰ See Response para. 21.

⁴¹ See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, IENG Sary’s Request for Information Concerning TCE-33, 11 December 2012, E236/2/2; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, Co-Prosecutors’ Request to Hear a Further 2 Experts and 13 Witnesses in the First Phase of the Trial and Notice of Intention to Put 7 Video-Clips Relating to Nuon Chea Before the Trial Chamber Pursuant to Rule 87(4), 5 July 2011, E93/7, para. 9; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, Request for Information Concerning Potential Conflict of Interest, 10 January 2008, A121; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, OCIJ Letter to the Defence titled Request for Information Regarding an Eventual Conflict of Interest, 24 January 2008, A121/I, p. 1.

⁴² *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, Decision on IENG Sary’s Appeal Against the Trial Chamber’s Decision on Motions for Disqualification of Judge Silvia Cartwright, 17 April 2012, E137/5/1/3, para. 24.

⁴³ See, e.g., Press Releases by International Co-Prosecutor Cayley, Statement from the International Co-Prosecutor Regarding Case File 003, 9 May 2011; Statement by the International Co-Prosecutor, Statement by the International Co-Prosecutor Regarding Case File 003 Regarding Case File 004, 5 August 2011; Appeal by the International Co-Prosecutor Regarding the Rejection of Investigative Requests in Case File 003, 19 August 2011. The identity of Mr. MEAS Muth as one of the suspects in Case 003 was at this time discussed in the press. See, e.g. James O’Toole, *Cayley in the Crosshairs*, PHNOM PENH POST, 13 May 2011.

that Duch could be further prosecuted, thus arguing (and, in effect, coaching Duch) that Duch's invocation of his right against self-incrimination should be granted.⁴⁴ The supreme irony and hypocrisy followed shortly thereafter, when International Co-Prosecutors Cayley and Smith pressed the Trial Chamber to issue a cautionary instruction to witnesses that they need not fear prosecution, since the possibility was virtually nil.⁴⁵

40. It is rather rich for International Co-Prosecutor Cayley to express concern for the fair trial rights of Mr. MEAS Muth. As the record in Case 002 makes rather clear, when it is to the OCP's convenience, International Co-Prosecutor Cayley was all too amenable to personally or indirectly through some of his subordinates, employ questionable tactics in encroaching on Mr. IENG Sary's fair trial rights. International Co-Prosecutor Cayley is an advocate, having convicted Mr. MEAS Muth in the press. It thus follows that the furthest thing International Co-Prosecutor Cayley wants in Case 003 is a relentless and contentious defence team representing Mr. MEAS Muth.
41. Paragraph 72: International Co-Prosecutor Cayley provides further general and unfounded assertions that somehow – based on the case law cited – Mr. MEAS Muth will not receive a robust defence because of some real or perceived incapability of the Co-Lawyers. These cases are fact specific and not relevant to the present facts.
42. Paragraph 73: International Co-Prosecutor Cayley asserts that, were the Co-Lawyers to represent Mr. MEAS Muth, the integrity of Case 002 would also come into question since Mr. MEAS Muth was placed on the Case 002 witness list. It bears highlighting that International Co-Prosecutor Cayley has publicly placed Mr. MEAS Muth in the cross-hairs of the ECCC prosecutorial apparatus.
43. International Co-Prosecutor Cayley has publicly declared that Mr. MEAS Muth falls within the jurisdictional framework of the ECCC. He has been associated with public complaints that efforts by internal (ECCC) and external (Cambodian Government) actors are being made to shield the suspects of Cases 003 and 004 from prosecution.⁴⁶ These

⁴⁴ See, e.g., *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, Transcript, 3 April 2012, E1/58.1, p. 74.

⁴⁵ See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, Co-Prosecutors' Request for Leave to Provide Assurances with Respect to Non-Prosecution for Witnesses, 30 May 2012, E200; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, IENG Sary's Response to the Co-Prosecutors' Request for Leave to Provide Assurances with Respect to Non-Prosecution for Witnesses, 20 June 2012 E200/1.

⁴⁶ *Supra*, note 31. See also Letter to US Secretary of State, Hillary Rodham Clinton, 27 July 2011, available at <https://sites.google.com/site/IENGsarydefence/>; Letter to Editor, FOREIGN POLICY, 27 July 2011, available at <https://sites.google.com/site/IENGsarydefence/>. See also Open Society Justice Initiative, *Recent Developments*

matters were hotly debated in public and Cambodian news (press, radio, television) outlets. Mr. MEAS Muth is under no illusions or misconceptions of the real possibility of his indictment, arrest and prosecution.

44. Mr. MEAS Muth is aware of his constitutional right not to testify in a proceeding, where the effective purpose – at least for the prosecution – is to elicit incriminating evidence that can be of assistance to the OCIJ as it conducts its investigation, and /or for future prosecution. Mr. MEAS Muth is also aware that Duch cooperated and testified during his trial/change of plea hearing, for which the prosecution offered nothing in exchange. This was a bitter complaint that was publicly made by his then-International Co-Lawyer, Francois Roux.⁴⁷ On appeal, International Co-Prosecutor Cayley was present when the OCP argued for an augmentation of Duch's sentence. All of this was played out in the press, thus fully apprising Mr. MEAS Muth what to expect from the OCP, and, in particular, International Co-Prosecutor Cayley and Deputy International Co-Prosecutor Smith.
45. With all of the above in mind, Mr. MEAS Muth gave clear and unequivocal notice of his invocation of his constitutional right not to testify in Case 002. It is simply unfounded to suggest that the Co-Lawyers have attempted or will attempt to influence the outcome of Case 002 in representing Mr. MEAS Muth in Case 003. Moreover, it is absurd for International Co-Prosecutor Cayley to assert that mitigation of Mr. MEAS Muth's sentence is on the horizon if only the Co-Lawyers would step aside and let other defence lawyers with purer intentions properly advise Mr. MEAS Muth.
46. Paragraph 74: International Co-Prosecutor Cayley continues with more unfounded speculation that the Co-Lawyers have a personal interest in the outcome of Case 002 despite Mr. IENG Sary's death. The Co-Lawyers do have continuing fiduciary obligations towards Mr. IENG Sary, as acknowledged herein. These continuing fiduciary obligations *do not*, however, encompass a "personal interest in seeing arguments they espoused in Case 002 vindicated and publicly stated opinions validated," as suggested by International Co-Prosecutor Cayley. This is preposterous and perverse.
47. International Co-Prosecutor Cayley cites as authority a quote from Mr. Karnavas that appeared in the Toronto Star newspaper, which adds nothing to support the absurdity that the Co-Lawyers are on a continuing quest to vindicate arguments made in Case 002.

at the Extraordinary Chambers of the Courts of Cambodia, February 2012, available at <http://www.soros.org/sites/default/files/cambodia-eccc-20120233.pdf>.

⁴⁷ See Response, paras. 37-38.

The quoted text is obviously cited to inflame the International Co-Investigating Judge. Both International Co-Prosecutor Cayley and Deputy International Co-Prosecutor Smith have during a number of private discussions with Mr. Karnavas expressed similar views. Although trivial and irrelevant to the issues concerning the alleged irreconcilable conflicts of interest, this vignette is merely presented to demonstrate the supreme hypocrisy of International Co-Prosecutor Cayley and Deputy International Co-Prosecutor Smith in gratuitously offering the quoted text from the Toronto Star interview. There is nothing probative, let alone relevant, in recounting the expressed views of these International Co-Prosecutors on the competency of the Trial Chamber. Similarly, there is nothing probative, let alone relevant, in quoting from Toronto Star. International Co-Prosecutor Cayley merely attempts to inflame and prejudice the International Co-Investigating Judge.

48. Paragraphs 75-77: International Co-Prosecutor Cayley accused the Co-Lawyers of acting unethically and harming the administration of justice through the notice provided by Mr. MEAS Muth invoking his rights. First, International Co-Prosecutor Cayley assumes that, but for the Co-Lawyers, Mr. MEAS Muth would be testifying in Case 002. No objective evidence is provided as to what Mr. MEAS Muth's intentions were prior to seeking legal advice and the representation of the Co-Lawyers. Second, International Co-Prosecutor Cayley provides no objective evidence that Mr. MEAS Muth was unaware of his constitutional right to remain silent, despite the ongoing proceedings at the ECCC and Deputy International Co-Prosecutor Smith's public display of coming to the aid of Duch and in effect encouraging Duch not to answer questions that he considered self-incriminating. Third, the function of defence lawyers is to provide legal advice. This includes advice on a suspect's constitutional fair trial rights. Given all that is known about the Duch case, as noted *supra*, the alleged involvement of Mr. MEAS Muth as reflected in the publicly available Closing Order, and International Co-Prosecutor Cayley's very public, aggressive pursuit of Mr. MEAS Muth, no competent and diligent lawyer would fail to advise Mr. MEAS Muth, were he or she in the Co-Lawyers' position, of his constitutional right against self-incrimination. To do otherwise is sheer malpractice.
49. Constitutional rights are meant to be exercised. It is unfounded and utterly ludicrous to assert that, when a defence lawyer informs and advises a client as to his or her fair trial rights and a client exercises these rights upon such information and advice, this amounts to an interference of the administration of justice. International Co-Prosecutor Cayley

provides no objective, credible evidence showing that the Co-Lawyers unduly influenced or pressured Mr. MEAS Muth. As argued *supra*, it is fanciful for International Co-Prosecutor Cayley to assume that Mr. MEAS Muth, knowing that he was being investigated to be indicted and prosecuted, and knowing what had happened to Duch and the general allegations against him in Case 003, would be testifying in Case 002, but for the Co-Lawyers.

3. The Waivers are Effective

50. Paragraphs 78-84: International Co-Prosecutor Cayley asserts that the waivers are inadequate because, effectively, they do not reveal the actual attorney-client privileged information related to the waivers. International Co-Prosecutor Cayley speculates that somehow there will be a need to further consult Mr. IENG Sary and, since he is now deceased, his present waiver is insufficient. Waivers, by their nature, do not contain specific facts about a case or about what exactly was discussed. Part and parcel of obtaining a waiver is the necessary task of thoroughly advising the client of the law, their rights and the facts and circumstances of the case. This was done by the Co-Lawyers in this case. Waivers, such as the ones provided in this case, are used and accepted by national courts and international tribunals, such as the ICTY.
51. Other than conjecture, International Co-Prosecutor Cayley offers no objective evidence showing that Mr. IENG Sary and / or Mr. MEAS Muth were not properly advised before signing their waivers. There is no requirement at the ECCC that DSS assign independent lawyers to seek a second or independent opinion from either Mr. IENG Sary or Mr. MEAS Muth. What is unequivocal is that the Head of DSS, who is a lawyer and who has practiced before the ICTR, met with Mr. MEAS Muth, privately and not in the presence of the Co-Lawyers, to ensure *inter alia* that Mr. MEAS Muth: (a) was in fact requesting the assignment of the Co-Lawyers; (b) he had executed the waiver and notice; and (c) the circumstances under which the waiver and notice were provided.
52. As for the assertion that, with Mr. IENG Sary passing away, the waiver becomes insufficient, this is yet another instance where International Co-Prosecutor Cayley simply grasps at straws. There is no jurisprudence before the ECCC which supports this position. If, in fact, the controlling law is what International Co-Prosecutor Cayley is now asserting, then waivers by clients would automatically cease to be valid upon their deaths. Conjecture that there may be some remote possibility where the Co-Lawyers




would need to seek additional instructions and consent from Mr. IENG Sary is an insufficient basis to declare the present waiver invalid or insufficient.

III. CONCLUSION AND RELIEF REQUESTED

53. Mr. MEAS Muth has the fundamental fair trial right to mount a defence with the assistance of counsel of his choosing.⁴⁸ Mr. MEAS Muth has a constitutional right to abstain from giving evidence in Case 002/01, particularly when considering that he is a targeted suspect under investigation by the OCIJ in Case 003. There can be no doubt that, were Mr. MEAS Muth to testify in Case 002, International Co-Prosecutor Cayley would seek to have Mr. MEAS Muth incriminate himself. The Co-Lawyers have discussed with Mr. IENG Sary and Mr. MEAS Muth any potential conflicts of interests that might arise in their cases as a result of the Co-Lawyers' dual representation. The Co-Lawyers are, Mr. IENG Sary was and Mr. MEAS Muth is, satisfied that no actual or potential conflicts of interests exist between the two cases. The International Co-Prosecutor has not made a sufficient showing and has provided no real proof that irreconcilable conflicts of interest exist that merit denying the Co-Lawyers' appointment to represent Mr. MEAS Muth in Case 003.

WHEREFORE, for all the reasons stated herein, the Co-Lawyers respectfully request the International Co-Investigating Judge to **REJECT** the International Co-Prosecutors' Request and Supplementary Submission, and to **CONFIRM** DSS's appointment of the Co-Lawyers.

Respectfully submitted,

ANG Udom Michael G. KARNAVAS

Co-Lawyers

Signed in Phnom Penh, Kingdom of Cambodia on this **23rd** day of **April, 2013**

⁴⁸ Cambodian Constitution, Art. 38; Agreement, Art. 13(1); Establishment Law, Art. 35 new (d).