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ជាតិ សាសនា ព្រះមហាក្សត្រ
Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des tribunaux cambodgiens

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

D56/19/38

In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea

Case File N° 003/07-09-2009-ECCC/OCIJ (PTC11)

Before: **Judge PRAK Kimsan, President**
Judge Rowan DOWNING
Judge NEY Thol
Judge Chang-ho CHUNG
Judge HUOT Vuthy

Date: **17 July 2014**

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du dossier: SANN RADA

PUBLIC (REDACTED VERSION)

DECISION ON [redacted]'S APPEAL AGAINST THE INTERNATIONAL CO-INVESTIGATING JUDGE'S DECISION REJECTING THE APPOINTMENT OF ANG UDOM AND MICHAEL KARNAVAS AS HIS CO-LAWYERS

Co-Prosecutors

CHEA Leang
Nicholas KOUMJIAN

Co-Lawyers for the Appellant

ANG Udom
Michael KARNAVAS

Defence Support Section

Isaac ENDELEY

Lawyers for the Civil Parties or Civil Party Applicants

HONG Kimsuon
KIM Mengkhy
KONG Phallack
MOCH Sovannary
SAM Sokong
TY Srinna
VEN Pov
Philippe CANONNE
Annie DELAHAIE
Laure DESFORGES
Ferdinand DJAMMEN-NZEPA
Nicole DUMAS
Isabelle DURAND
Françoise GAUTRY
Martine JACQUIN
Christine MARTINEAU
Mahdev MOHAN
Barnabe NEKUI
Lyma NGUYEN
Nushin SARKARATI

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the "ECCC") is seised of "[redacted]'s Appeal Against Co-Investigating Judge Harmon's Decision on the International Co-Prosecutor's Request to Reject the Appointment of the Co-Lawyers for [redacted] on the Basis of Irreconcilable Conflicts of Interest" filed by the Co-Lawyers on 12 March 2014 (the "Appellant" and the "Appeal", respectively).[1]

I. INTRODUCTION

1. The Appeal concerns a decision by the International Co-Investigating Judge ("ICIJ") granting a request by the International Co-Prosecutor to reject the appointment of Michael KARNAVAS and ANG Udom (the "Co-Lawyers") by the Defence Support Section (the "DSS") as Co-Lawyers for the Appellant given their past representation of IENG Sary in Case 002 before the ECCC (the "Impugned Decision").[2]

a. Background

2. On 7 September 2009, the then acting International Co-Prosecutor filed the Second Introductory Submission Regarding the Revolutionary Army of Democratic Kampuchea (the "Second Introductory Submission") with the Co-Investigating Judges wherein he requested the opening of a judicial investigation into crimes allegedly committed by the Appellant along with another suspect.[3]

3. In March 2012, the Head of the DSS informed the Appellant of his right to be represented by counsel[4] and, on 13 June 2012, the Appellant chose the Co-Lawyers to represent him in the proceedings against him before the ECCC, providing them with power of attorney.[5] On this date, IENG Sary and the Appellant both provided waivers of any potential conflict of interest arising out of their concurrent representation by the Co-Lawyers, since the Co-

[1] D56/19/24.
[2] Decision on the International Co-Prosecutor's Request to Reject the Appointment of the Co-Lawyers for [redacted] on the Basis of Irreconcilable Conflicts of Interest, issued in English on 10 January 2014 and in Khmer on 14 January 2014, D56/18 (the "Impugned Decision").
[3] Second Introductory Submission Regarding the Revolutionary Army of Democratic Kampuchea, 20 November 2008, D1; Acting International Co-Prosecutor's Notice of Filing of the Second Introductory Submission, 7 September 2009, D1/1.
[4] Letter from the Head of the DSS to the Co-Investigating Judges entitled "Assignment of Co-Lawyers to represent [redacted], a suspect in Case 003", 18 December 2012, D56 ("DSS Letter of 18 December 2012"), para. 2.
[5] Letter from [redacted] to the Head of the DSS entitled "Request for Assignment of Legal Assistance", 13 June 2012, D56/4/1.2; Form 7: Request for Engagement/Assignment of Co-Lawyers, signed by [redacted] on 18 June 2012, D56.

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Lawyers were also representing IENG Sary in Case 002 before the ECCC, which was at the trial stage.[6]

4. On 14 December 2012, the Head of the DSS assigned the Co-Lawyers to represent the Appellant and, on 18 December 2012, he invited the Co-Investigating Judges to "note the assignment".[7]

5. On 24 December 2012, the International Co-Prosecutor requested the Co-Investigating Judges to reject the appointment of the Co-Lawyers on the basis of "irreconcilable conflicts of interest" due to the then-concurrent representation by the Co-Lawyers of both IENG Sary in Case 002 and the Appellant in the present case (the "Request for Rejection").[8]

6. On 14 March 2013, IENG Sary died in custody during his trial and the proceedings against him were consequently terminated.[9] On 3 April 2013, the International Co-Prosecutor, through supplementary submissions, indicated that a conflict of interest still persists despite IENG Sary's death.[10]

7. On 10 January 2014, the ICIJ issued the Impugned Decision, where he found that it was "reasonably foreseeable" that the Co-Lawyers could be placed in situation of conflicts of interest given the factual nexus between the cases against the Appellant and IENG Sary and the *prima facie* superior-subordinate relationship between the two.[11] The ICIJ found a conflict of interest still existed despite IENG Sary's death, as the Co-Lawyers still had an obligation of loyalty toward him.[12] He also found that the conflict was "irreconcilable and [could not] be waived" because the conflict was of the nature that "could seriously prejudice both [the Appellant]'s right to a fair trial and the administration of justice."[13] The

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[6] [redacted]'s Notice of Intent to Exercise Right to Remain Silent and Waiver of Any Potential Conflict of Interest, 13 June 2012 (the "Appellant First Waiver"); IENG Sary's Waiver of Any Potential Conflict of Interest, 15 June 2012, D56/4/1.2 ("IENG Sary's Waiver").
[7] DSS Letter of 18 December 2012, paras 11 and 12.
[8] International Co-Prosecutor's Request that Appointment of Co-Lawyers-Designate be Rejected on the Basis of Irreconcilable Conflicts of Interest, 24 December 2012, D56/1 (the "Request for Rejection"), para. 1.
[9] Case 002/19-09-2007-ECCC-TC ("Case 002"), Termination of proceedings against the accused IENG Sary, 14 March 2013, E270/1 (D56/4/2.1.1).
[10] International Co-Prosecutor's Supplementary Submissions on Conflict of Interest of Co-Lawyers-Designate, 3 April 2013, D56/7 (the "International Co-Prosecutor's Supplementary Submissions").
[11] Impugned Decision, para. 129.
[12] Impugned Decision, paras 93-95, 129, 142.
[13] Impugned Decision, para 142. *See also* paras 131-136.

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ICIJ therefore granted the Request for Rejection and instructed the DSS to take the necessary steps to assign new Co-Lawyers as soon as practicable.[14]

8. When the Impugned Decision was issued, the Co-Lawyers had no access to the Case File in Case 003; only the Second Introductory Submission and a limited number of evidentiary documents had been disclosed to them by the ICIJ.[15] The Co-Lawyers were also prohibited, by order issued by the ICIJ on 11 February 2013, from communicating with the Appellant.[16] Despite this prohibition, the Appellant was not personally notified of the Impugned Decision.

9. On 13 January 2014, the Co-Lawyers filed, on behalf of the Appellant, a notice of appeal indicating their intention to appeal the Impugned Decision.[17]

10. On 22 January 2014, the ICIJ ordered "[the] DSS to provisionally assign counsel to [the Appellant] pending the conclusion of the appeal process."[18] Through a number of requests,[19] the Co-Lawyers asked the Pre-Trial Chamber to stay the order. On 11 February 2014, the Pre-Trial Chamber found that it had no jurisdiction over the Co-Lawyers' requests.[20] National and international provisional counsel were appointed by the DSS on 17 February 2014 and 21 May 2014, respectively.[21]

11. On 31 January 2014, the Pre-Trial Chamber stressed the need to obtain confirmation that the Appellant wanted to pursue the appeal against the Impugned Decision before the proceedings in the case proceed any further, lifted in part the order suspending

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[14] Impugned Decision, paras 145-146.
[15] Decision and Scheduling Order Concerning Request for Appointment of Co-Lawyers Designate, 11 February 2013, D56/3 ("ICIJ Order of 11 February 2013").
[16] ICIJ Order of 11 February 2013.
[17] [redacted]'s Notice of Appeal against the Decision on the International Co-Prosecutor's Request to Reject the Appointment of the Co-Lawyers for [redacted] on the Basis of Irreconcilable Conflicts of Interest, 13 January 2014, D56/19.
[18] Order to Provisionally Assign Lawyers to Suspect, 22 January 2014, D56/21, p. 3.
[19] [redacted]'s Co-Lawyers' amended urgent and expedited request to stay the execution of Co-Investigating Judge Harmon's confidential order to the DSS to assign new Co-Lawyers to represent [redacted], filed in its original version on 23 January 2014 and amended on 24 January 2014, D56/19/3 and D56/19/4, respectively; [redacted]'s Co-Lawyers' urgent request for the Pre-Trial Chamber to instruct the Defence Support Section to postpone acting on Co-Investigating Judge Harmon's order to assign new provisional counsel to [redacted] until a decision on the Defence's request for a stay of execution of the order has been issued by the Pre-Trial Chamber, 28 January 2014, D56/19/7; [redacted]'s Co-Lawyers' second urgent request to instruct the Defence Support Section to postpone the implementation of Co-Investigating Judge Harmon's order to assign provisional counsel, 3 February 2014, D56/19/11.
[20] Decision on Co-Lawyers' Request to Stay the Order for Assignment of Provisional Counsel to [redacted], 11 February 2014, D56/19/14.
[21] Decision on the Recognition of Counsel for Suspect in Case 003, 28 May 2014, D56/21/8/1.

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communications between the Co-Lawyers and the Appellant to allow communications concerning the appellate proceedings against the Impugned Decision and declared that the time period to appeal the Impugned Decision had been suspended.[22]

12. On 7 February 2014, the Pre-Trial Chamber received confirmation that the Appellant wished to appeal the Impugned Decision and to be represented by the Co-Lawyers.[23]

13. On 19 February 2014, the Pre-Trial Chamber "order[ed] the Co-Investigating Judges to grant the Co-Lawyers access to the Case 003 Case File, for the purpose of these appellate proceedings only, subject to any restriction that they consider legitimate to protect the integrity of the judicial investigation" and "direct[ed] that the Co-Lawyers have 15 days from the time they get access to the Case 003 Case File to file their submissions on Appeal."[24] On 24 February 2014, the ICIJ granted the Co-Lawyers access to the "confidential" portion of the Case File but denied access to the "strictly confidential" portion thereof.[25] On 5 March 2014, the Pre-Trial Chamber rejected a request by the Co-Lawyers to get access to the "strictly confidential" portion of the Case File.[26]

14. On 3 April 2014, the ICIJ, upon request by the International Co-Prosecutor, disclosed to the Co-Lawyers four confidential documents from Case 004/07-09-2009-ECCC-OCIJ concerning the appointment and recognition of three lawyers to suspects in this case which he deemed "*prima facie* relevant" to the current appellate proceedings.[27] On 10 April 2014, the Pre-Trial Chamber decided to make available to the Co-Lawyers its "Decision on the Appeal against Dismissal of Richard Rogers' Application to be Placed on the List

[22] Decision on Requests for Interim Measures, 31 January 2014, D56/19/8, paras 10, 11-13, 15-16 and 19.
[23] [redacted]'s Notice of Intent to Pursue Appeal Against Decision on the International Co-Prosecutor's Request to Reject Appointment of the Co-Lawyers for [redacted] on the Basis of Irreconcilable Conflicts of Interest, 7 February 2014, D56/19/13; Notice, [redacted]'s Intent to Appeal, 7 February 2014, D56/19/13.1 (the Appellant's Notice of Intent to Appeal"), p. 1. *See also* Second Decision on Requests for Interim Measures, 19 February 2014, D56/19/16 ("Second Decision on Interim Measures"), para. 5.
[24] Second Decision on Interim Measures.
[25] Order Granting Access to Case File 003 for Appeal Purposes, 24 February 2014, D56/24, para. 5.
[26] Decision on [redacted]'s Request to Be Provided with Strictly Confidential Documents on the Case 003 Case File, or for the Pre-Trial Chamber to Conduct an *In Camera* Review, 5 March 2014, D56/19/20.
[27] Decision on the International Co-Prosecutor's Request for Reclassification of Documents, 3 April 2014, D99.1, para. 8.

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of Foreign Co-Lawyers"[28] but dismissed the Co-Lawyers' request to get access to additional documents concerning the appointment of other counsel.[29]

b. The Appeal

15. On 12 March 2014, the Co-Lawyers filed the Appeal, on behalf of the Appellant, arguing that it is admissible under Internal Rule 11(6) or, in the alternative, under Internal Rule 21[30] and that the Impugned Decision contains errors of law and fact.[31] The Co-Lawyers therefore requested the Pre-Trial Chamber to "[reverse] the Impugned Decision and [order] the Co-Investigating Judges to confirm the Co-Lawyers' assignment to represent [the Appellant]."[32] On 27 March 2014, the Pre-Trial Chamber rejected the inclusion of two annexes that were originally included in the Appeal because they exceeded the allotted page limit, created an inequality of arms and were deemed immaterial to the determination of the Appeal in any event.[33]

16. On 10 April 2014, the International Co-Prosecutor, having been granted a time extension by the Pre-Trial Chamber,[34] filed his response to the Appeal (the "Response"),[35] in which he argued that the Appeal is inadmissible[36] and without merit,[37] and therefore requested that it be dismissed.[38]

17. On 9 May 2014, the Pre-Trial Chamber rejected the Co-Lawyers' request for a public oral hearing and held that the Appeal will be reviewed through written submissions only.[39] The Co-Lawyers were consequently invited to file a reply within five days.

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[28] Case 10-07-2013-ECCC/PTC, Decision on Appeal against Dismissal of Richard Rogers' Application to be placed on the List of Foreign Co-Lawyers, 6 February 2014, Doc. No. 8 ("*Rogers* Decision").
[29] Decision on [redacted]'s Request to Be Provided with Material from the Case 004 Case File, 10 April 2014, D56/19/29.
[30] Appeal, paras 2-9.
[31] Appeal, paras 10-84.
[32] Appeal, para. 85.
[33] Decision Rejecting Annexes to the Appeal Filed by the Co-Lawyers for [redacted], 27 March 2014, D56/19/25.
[34] Decision on [redacted]'s Request for Extension of Page Limit to Appeal and on International Co-Prosecutor's Request for Extension of Time to Respond to the Appeal, 5 March 2014, D56/19/23.
[35] International Co-Prosecutor's Response to the Appeal by the Co-Lawyers-Designate Against the International Co-Investigating Judge's Decision Refusing Their Appointment on the Basis of Irreconcilable Conflicts of Interest, 10 April 2014, D56/19/30 (the "Response").
[36] Response, paras 5-27.
[37] Response, paras 28-117.
[38] Response, para. 118.
[39] Decision to Determine the Appeal on the Basis of Written Submissions Alone and on the Co-Lawyers' Request for Extension of Time to File a Reply, 9 May 2014, D56/19/31.

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18. The Co-Lawyers filed their reply in English and Khmer on 12 May 2014 and 30 May 2014, respectively.[40]

c. The Request for clarification of the Co-Lawyers' standing to represent [redacted] pending decision on the Appeal

19. On 12 June 2014, the Co-Lawyers filed, on behalf of the Appellant, a request seeking clarification of their standing to represent the Appellant pending a final decision on the Appeal (the "Request for Clarification"),[41] given that the ICIJ stated in a letter dated 9 June 2014 that he considers the provisional counsel to be responsible for all aspects of the Appellant's defence at this time, that the Co-Lawyers have no standing to defend the Appellant and that he will reject any filings made by them unless such filings relate to the Appeal.[42] The Request for Clarification raises an issue largely similar to that raised in a separate appeal filed before the Pre-Trial Chamber by the Co-Lawyers, on behalf of the Appellant, against the ICIJ's "continuing refusal to place [the Appellant]'s submissions on the Case File and to act upon them" (the "Appeal on Filings")[43] where the Co-Lawyers argue that they have standing to represent the Appellant and file submissions on his behalf despite the ICIJ's decision rejecting their appointment and the appointment of provisional counsel. The International Co-Prosecutor responded jointly to the Request for Clarification and the Appeal on Filings on 20 June 2014,[44] and the Co-Lawyers replied on 25 June 2014.[45]

20. The Pre-Trial Chamber considers that the matter raised in the Request for Clarification, which was filed during the deliberation stage of the Appeal, is resolved by the disposition

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[40] [redacted]'s Reply to the International Co-Prosecutor's Response to [redacted]'s Appeal Against Co-Investigating Judge Harmon's Decision on the International Co-Prosecutor's Request to Reject the Appointment of the Co-Lawyers for [redacted] on the Basis of Irreconcilable Conflicts of Interest, 12 May 2014, D56/19/32 (the "Reply").

[41] [redacted]'s Urgent and Expedited Request for Clarification of the Co-Lawyers' Standing to Represent [redacted] Pending a Final Decision on Conflict of Interest, 12 June 2014, D56/19/33.

[42] Letter from the ICIJ addressed to the provisional counsel and copied to the Co-Lawyers and the DSS entitled "Legal Representation of Suspect [redacted] ("Suspect") in Case 003, 9 June 2014, A41.

[43] Case 003 (PTC12), [redacted]'s Appeal against Co-Investigating Judge Harmon's Continuing refusal to place [redacted]'s submissions on the Case File and to act upon them, 3 June 2014, D103/1.

[44] International Co-Prosecutor's Joint Response to the Co-Lawyers-Designates": (1) "Appeal against Co-Investigating Judge Harmon's Continuing Refusal to Place [redacted]'s Submissions on the Case File and to Act Upon Them"; and (2) "Urgent and Expedited Request for Clarification of the Co-Lawyers' Standing to Represent [redacted] Pending a Final Decision on Conflict of Interest", 20 June 2014, D103/2.

[45] [redacted]'s Reply to International Co-Prosecutor's Joint Response to the Co-Lawyers-Designates': (1) "Appeal against Co-Investigating Judge Harmon's Continuing Refusal to Place [redacted]'s Submissions on the Case File and to Act Upon Them"; and (2) "Urgent and Expedited Request for Clarification of the Co-Lawyers' Standing to Represent [redacted] Pending a Final Decision on Conflict of Interest", 25 June 2014, D56/19/35.

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of the Appeal, and does not require separate examination at this stage. Any outstanding issue as to the Co-Lawyer's standing to file submissions on behalf of the Appellant before the issuance of the present decision will be addressed through an examination of the Appeal on Filings.

d. The Disposition

21. On 30 June 2014, the Pre-Trial Chamber announced, in writing, its determination of the final disposition on the Appeal, indicating that the reasons for its decision will follow in due course.[46] The disposition reads as follows:

> **THE PRE-TRIAL CHAMBER HEREBY UNANIMOUSLY**
>
> ADMITS the Appeal under Internal Rule 21;
>
> GRANTS the Appeal on the merits;
>
> REVERSES the Decision on the International Co-Prosecutor's Request to Reject the Appointment of the Co-Lawyers for [redacted] on the Basis of Irreconcilable Conflicts of Interest issued on 10 January 2014;
>
> RECOGNISES the engagement of ANG Udom and Michael KARNAVAS as Co-Lawyers for [redacted].
>
> In accordance with Internal Rule 77(13), this decision is not subject to appeal.

22. The Pre-Trial Chamber hereby provides the reasons for this decision.

II. ADMISSIBILITY

i) Submissions of the Parties

23. The Co-Lawyers submit that the Impugned Decision is subject to appellate review under Internal Rules 11(6) and 73(c), as the ICIJ had no jurisdiction to reject their assignment by the DSS or to replace the Head of the DSS's decision with his own.[47] They argue that Internal Rule 11(6) must be interpreted in the light of Internal Rule 21, in a way that

[46] Decision on [redacted]'s Appeal against the International Co-Investigating Judge's Decision Rejecting the Appointment of ANG Udom and Michael KARNAVAS as his Co-Lawyers, 30 June 2014, D56/19/36.
[47] Appeal, para. 4.

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safeguards the Appellant's fundamental right to counsel of his own choosing.[48] The Co-Lawyers further argue that the Appeal is admissible under Internal Rule 21 alone, as it concerns the Appellant's fair trial rights.[49]

24. The International Co-Prosecutor argues that the Appeal is not only inadmissible under Internal Rule 11(6), but that the said rule explicitly bars it. He argues that the ICIJ, who was properly seized of the proceedings at all relevant time, "conducted a judicial review of the DSS determination on the Co-Lawyers' assignment, which determination was appealed by the [then] International Co-Prosecutor under Rule 11(6)"[50], thus the single avenue of appeal allowed under Internal Rule 11(6) has now been exhausted.[51] Furthermore, the International Co-Prosecutor submits that Internal Rule 21 cannot serve to either interpret Internal Rule 11(6) nor on a standalone basis for the admissibility of the Appeal. In this respect, he argues that the Impugned Decision does not infringe the Appellant's fair trial rights as the right to counsel of choice is not unlimited and one's preferred choice of counsel can be overridden by the Court in the interests of justice.[52] The International Co-Prosecutor also argues that Internal Rule 21 cannot be interpreted to turn a prohibition against an appeal into a right of further appeal.[53]

25. In their Reply, the Co-Lawyers assert that the International Co-Prosecutor misinterpreted Internal Rule 11(6), as it is not intended to create an avenue for the Prosecution to appeal against decisions on appointment of counsel.[54] The Co-Lawyers submit that the Impugned Decision was not issued pursuant to Internal Rule 11(6), but rather on the basis of the ICIJ's asserted "inherent power" to consider issues of conflicts of interest that may impair fairness of the proceedings.[55]

ii) Analysis

26. Internal Rule 11(6) provides:

> 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

[48] Appeal, paras 7-8.
[49] Appeal, para. 9.
[50] Response, para. 8.
[51] Response, paras 6-7.
[52] Response, paras 12 and 20.
[53] Response, para. 20. *See also* paras 24-27.
[54] Reply, para. 2.
[55] Reply, para. 5.

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> Defence Support Section administrative regulations, subject to appeal to the Co-Investigating Judges or the Chamber before which the person is appearing at the time, within 15 (fifteen) days of receiving notification of the decision. No further appeal shall be allowed.

27. At the outset, the Pre-Trial Chamber finds that the International Co-Prosecutor's argument that Internal Rule 11(6) constitutes a bar to the admissibility of the Appeal is misplaced. The proceedings in this case were triggered by a request from the International Co-Prosecutor asking the Co-Investigating Judges to reject the appointment of the Co-Lawyers on the basis of irreconcilable conflicts of interest.[56] The International Co-Prosecutor argued that the Request for Rejection was admissible before the Co-Investigating Judges "either as an *appeal* under Internal 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 and 7.4 of the DSS Administrative Regulations."[57] The ICIJ justifiability chose the second option.

28. It is clear from the Impugned Decision that the ICIJ did not conduct an appellate review of the DSS Decision under Internal Rule 11(6). Not only there is no reference to Internal Rule 11(6) as a source for the ICIJ's jurisdiction in the Impugned Decision, but the reasoning and conclusion thereto[58] demonstrate that the ICIJ did not engage in an appellate review. The ICIJ examined the request to reject the appointment of counsel independently, on the basis of his authority to accept or deny the appointment of counsel pursuant to Article 21(1) of the ECCC Agreement,[59] Articles 6.2 and 7.4 of the DSS Administration Regulations[60] and to safeguard the integrity and fairness of the judicial investigation, which falls within the ICIJ's mandate under Article 23(new) of the ECCC Law.[61]

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[56] Request for Rejection, para. 1.
[57] Request for Rejection, para. 8 (emphasis added).
[58] *See* Impugned Decision, paras 143-146, where there is no reference to the DSS Decision being quashed or otherwise reversed.
[59] 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, 6 June 2003 (the "ECCC Agreement").
[60] DSS Administrative Regulations, RS-9.7.07.
[61] Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 27 October 2004 (the "ECCC Law"). See Impugned Decision, paras 80; 82 and 88.

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29. The ICIJ's approach was correct because Internal Rule 11(6) would not have constituted a legal basis for him to address the matter raised in the Request for Rejection. Internal Rule 11(6) applies to appeals against decisions of the Head of the DSS on "assignment of lawyers to indigent persons *based on the criteria set out in the Defence Support Section administrative regulations*" (emphasis added), which concern experience and qualification of counsel but do not include any consideration of conflict of interest. The role of the DSS, when appointing counsel to an indigent suspect or charged person before the ECCC, is limited to examining whether the criteria and requirements set forth in the DSS Administrative Regulations are fulfilled.[62] As previously held by the Pre-Trial Chamber, "[t]he Head of DSS has no statutory power, under the applicable laws, to make any determinations related to conflict of interest issues in the process of the assignment of lawyers to represent Suspects, Charged Persons or Accused before the ECCC."[63] Consequently, a judicial review of the DSS administration decision under Internal Rule 11(6) was not an avenue to address the issue of conflicts of interest raised in the Request for Rejection.[64]

30. Having rejected the International Co-Prosecutor's objection to the admissibility of the Appeal on the basis of Internal Rule 11(6), the Pre-Trial Chamber will now determine whether a decision rejecting the appointment of counsel issued, in first instance, by the ICIJ is open to appellate scrutiny under Internal Rule 21.

31. The Impugned Decision is not based in any explicit provision of the rules governing proceedings before the ECCC but rather relies on the ICIJ's inherent duty to ensure fairness of the proceedings.[65] Determination of the admissibility of an appeal against the Impugned Decision shall therefore not be limited to a strict examination of the rules granting the Pre-Trial Chamber jurisdiction to hear appeals over certain decisions of the Co-Investigating Judges which are specifically listed, but rather take into account the general principles of the appellate process expressed thereof. In this respect, the Pre-Trial Chamber previously held that where the particular facts and circumstances of a case

[62] *See*, in particular, DSS Administrative Regulations, Arts 2.1, 2.2, 4.1, 5, 6 and 6.1.
[63] *Rogers* Decision, para. 79.
[64] Appellate scrutiny of a DSS decision under Internal Rule 11(6) involves a judicial review of an administrative decision and is therefore limited to an examination of whether the Head of the DSSS "a) complied with the relevant legal requirements; b) observed the basic rules of natural justice or acted with procedural fairness; c) took into account irrelevant material or failed to take into account relevant material or d) arrived at a conclusion that no reasonable person could have reached on the material before him." *See Rogers* Decision, para. 30.
[65] *See* Impugned Decision, paras 81 and 88.

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required, it may assume jurisdiction under Internal Rule 21 over appeals that do not fall within its explicit jurisdiction but raise issues of fundamental rights or "serious issue[s] of fairness."[66]

32. This Appeal raises an issue concerning the Appellant's right to counsel of choice. The fact that the Appellant sought to be represented by counsel appointed under the ECCC legal assistance scheme on account of his indigence may limit or hinder his ability to secure preferred counsel;[67] it does not, however, entirely negate his fair trial right to be represented by counsel of choice, which is guaranteed by the Cambodian Constitution,[68] the International Covenant on Civil and Political Rights (the "ICCPR"),[69] the ECCC Agreement,[70] the ECCC Law[71] and the Internal Rule 21. Even in case of publicly funded counsel, the Court must take into account the preferences of the defendant and such preferences may only be overridden "when there is relevant and sufficient ground for maintaining that it [is] necessary in the interest of justice."[72] Since the Appellant has chosen to be represented by the Co-Lawyers, and that the Head of the DSS has appointed them, after having found that they meet the requirements under the ECCC legal assistance scheme, the Impugned Decision, by removing the Co-Lawyers, impairs the Appellant's right to counsel of choice. The Co-Lawyers' assertion that this limitation is not legally justified warrants appellate scrutiny as the "appointment to act as defence counsel could

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[66] *See, e.g.,* Case 002 (PTC42), Decision on IENG Thirith's Appeal Against the Co-Investigating Judges' Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process, 10 August 2010, D264/2/6, paras 13-14; Case 002 (PTC71), Decision on IENG Sary's Appeal against Co-Investigating Judges' Decision Refusing to Accept the Filing of IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of Proceedings, 20 September 2010, D390/1/2/4, para. 13 *and* Case 002 (PTC14), Decision on Defence Notification of Errors in Translations, 17 December 2010, Doc. No. 2, paras 2-6.

[67] *See, e.g., Prosecutor v. Prlić et al.,* IT-04-74-AR73.1, Decision on Appeal by Bruno Stojić Against Trial Chamber's Decision on Request for appointment of Counsel, 24 November 2004, Appeals Chamber ("*Prlić* Appeal Decision"), para. 19; *Prosecutor v. Kambanda,* ICTR-97-23-A, Appeals Chamber Judgement, 19 October 2000, para. 33 ; *Prosecutor v. Akayesu*, ICTR-96-4-A, Appeals Chamber Judgement, 1 June 2001, paras 61-62; *Prosecutor v. Blagojević et al,* IT-02-60-AR73.4, Decision on Vidoje Blagojevic's Request for Review, 15 July 2008, Appeals Chamber, para. 17; *Prosecutor v. Mejakić et al,* IT-02-65-AR73.1, Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simic, 6 October 2004, Appeals Chamber, para. 8.

[68] Constitution of the Kingdom of Cambodia, 4 March 1999, Art. 31.

[69] ICCPR, Art. 14(3)(d) .

[70] ECCC Agreement, Art. 31(1).

[71] ECCC Law, Art. 24 (new).

[72] *Prlić* Appeal Decision, para. 19. *See also Prosecutor v. Ntakirutimana*, ICTR-96-10-T and ICTR-96-17-T, Decision on the motions of the Accused for replacement of assigned counsel/Corr, 11 June 1997, Trial Chamber, p. 2 *et seq. and* European Court of Human Rights ("ECtHR"), *Croissant v. Germany*, Application No. 13611/88, Judgement, 25 September 1992 ("*Croissant* Judgement"), paras. 29; 33-34 ("When appointing defence counsel the national courts must certainly have regard to the defendant's wishes. However, they may override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interest of justice.").

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and should only be revoked when its purpose – that is, to ensure that the accused will be adequately defended and the proceedings properly conducted – is seriously endangered."[73] In this respect, the Pre-Trial Chamber notes that requests for certification to appeal decisions rejecting the appointment of counsel have generally been granted at the International Criminal Tribunal for the Former Yugoslavia ("ICTY").[74]

33. The Pre-Trial Chamber therefore finds the Appeal admissible under Internal Rule 21.

III. STANDARD OF REVIEW

34. The Parties disagree on the standard that should be applied to review the Impugned Decision. The International Co-Prosecutor argues that the decision involves the exercise of a discretionary power and consequently requests the Pre-Trial Chamber to apply the Chamber's settled test for this type of review.[75] The Co-Lawyers argue that the Pre-Trial Chamber should give no deference to the ICIJ's decision, as the issue decided thereto did not relate to a judicial investigation.[76]

35. The Appeals Chamber of the ICTY held in *Gotovina* that decisions on assignment of counsel involve the exercise of discretion, which is reviewed under deferential standard.[77] The Pre-Trial Chamber finds no reason in this case to depart from this principle. Thus, the Impugned Decision may only be overturned if the Pre-Trial Chamber finds the decision to be (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of ICIJ's discretion.[78]

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[73] *Croissant* Judgement, para. 10.
[74] *Prosecutor v. Gotovina et al.*, IT-06-90-AR73.2, Decision on Ivan Čermak Interlocutory Appeal Against Trial Chamber's Decision on Conflict of Interest of Attorneys Čedo Prodanović and Jadranka Sloković , 29 June 2007, ("*Gotovina* Appeal Decision"), para. 11; *Prlić* Appeal Decision, para 21.
[75] Response, para. 28.
[76] Reply, para. 14.
[77] *Gotovina* Appeal Decision, para. 11.
[78] *See, e.g.,* Case 002 (PTC24), Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence on the Shared Materials Drive, 18 November 2009, D164/4/13, para. 26, *referring to Milošević v. Prosecutor,* IT 02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, Appeals Chamber, 1 November 2004, paras 9-10.

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IV. MERITS OF THE APPEAL

A) Applicable Law

i) Submissions of the Parties

36. In the First Ground of Appeal, the Co-Lawyers argue that the ICIJ committed an error of law by finding that the ECCC legal compendium and Cambodian law do not address the procedure for removal of counsel (*i.e.* the jurisdiction to address issues of conflicts of interest and the situations where conflict of interest arise) and for seeking guidance in the procedural rules established at the international level.[79] The Co-Lawyers submit that the situations where there are conflicts of interest are explicitly set out in Article 25 of the Bar Association of the Kingdom of Cambodia (the "BAKC") Code of Ethics and Article 9 of the DSS Administrative Regulations, which provide that it is for the lawyers to first assess whether a conflict of interest exists and then withdraw or obtain informed written consent from the potentially affected clients.[80] The Co-Lawyers further submit that the DSS, "in conjunction with the BAKC", is responsible for removing counsel in situation of conflict of interest, pursuant to Internal Rule 11(2), Article 7.4 of the DSS Administrative Regulations and Article 19 of the 1995 Law on the Statutes of the Bar,[81] and that the Co-Investigating Judges have consequently no jurisdiction over this matter.[82]

37. The International Co-Prosecutor responds that judicial review of the DSS's decision appointing the Co-Lawyers was explicitly within the Co-Investigating Judges' competence pursuant to Internal Rule 11(6),[83] as well as within their inherent jurisdiction and duties to ensure the proper administration of justice and the integrity of the proceedings, which clearly vest them with the power to oversee the assignment of counsel.[84] The International Co-Prosecutor submits that the ECCC legal framework and Cambodian Law do not set the "legal test applicable to such judicial review" and that there are questions about the consistency of the existing procedures pertaining to the appointment of counsel with

[79] Appeal, paras 10-21.
[80] Appeal, paras 12-15.
[81] Appeal, paras 10-11; 15.
[82] Appeal, paras 17-18. *See also* para. 21.
[83] Response, para. 32.
[84] Response, paras 33-36 and 42.

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international standards, thus the ICIJ correctly sought guidance in the rules established at the international level.[85]

ii) Analysis

38. The ICIJ sought guidance in the procedural rules established at the international level to determine whether he had jurisdiction to remove counsel on the basis of conflicts of interest and to determine whether counsel may be removed. He did so as he considered that although the ECCC legal framework "contain[s] general provisions requiring counsel to act, *inter alia*, in accordance with recognized standards and ethics of the legal profession" and "regulate[s] counsel's obligations in the presence of a conflict of interest," the rules "are silent on the removal of conflicted counsel by the judicial authority in charge of ensuring the fairness and integrity of the proceedings."[86]

a. Jurisdiction to remove counsel

39. The rules applicable before the ECCC envisage that conflicts of interest arising from the representation of defendants before the ECCC may, to some extent, be considered by the BAKC, given that the lawyers appearing before the ECCC are subject to its authority and bound by its Statute.[87] Complaints before the BAKC in respect of conflicts of interest may lead to disciplinary proceedings.[88] The jurisdiction of the BAKC to act upon complaints related to conflicts of interest, however, does not exclude all possibility for ECCC judicial bodies to also address the issues when fairness of the proceedings before them is at stake.

40. International criminal tribunals have generally recognized that conflicts of interest may impair the effectiveness of representation by counsel and, therefore, jeopardize the overall fairness of the proceedings. Given the Courts' inherent duty to ensure fairness of their proceedings, it has been found that "the issue of qualification, appointment and assignment of counsel, when raised as a matter of procedural fairness and proper administration of

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[85] Response, paras 37-39.
[86] Impugned Decision, para. 88.
[87] *See* ECCC Agreement, Art. 21(3) *and* Internal Rule 22(4).
[88] *See* Arts 59 and 60 of the Law on the Statutes of the Bar, 1995, which state, in their relevant part:
Article 59:
"Any lawyer who abuses the rules of the profession or commits any act affecting the ethics or honor of the lawyers shall be subject to disciplinary sanction [...]."
Article 60:
"A charge shall be made either directly to the Bar Council or upon complaint from a third person or from the General Prosecutor to the Appeal Court."

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justice, is open to judicial scrutiny."[89] The Pre-Trial Chamber sees no error in the ICIJ seeking guidance in these principles when assessing his own jurisdiction, as a judicial body similarly bound to safeguard the fairness of his judicial investigation, to examine the issue of conflict of interest raised in the Request for Rejection. The ICIJ's power to review the DSS's decision on assignment of counsel[90] is not only inherent to his duty to ensure fairness of the proceedings, but it also is echoed in the rules governing proceedings before the ECCC. Indeed, a conflict of interest is certainly a legitimate reason for an ECCC judicial body not to admit counsel to represent a defendant before the ECCC under Article 21(1) of the ECCC Agreement[91] or to remove him or her under Article 7 of the DSS Administrative Regulations.[92] The concurrent jurisdiction of the BAKC to deal with complaints in respect of conflicts of interest, under a disciplinary procedure, does not undermine the ECCC's jurisdiction to address issues of conflict of interest if "[they] affect, or [are] likely to affect, the right of the accused to a fair and expeditious trial or the integrity of the proceedings."[93] In practical terms, ECCC judicial bodies are in the best position to examine conflicts of interest that may impair fairness of their proceedings, given their familiarity with the cases.

41. The Pre-Trial Chamber therefore finds that the matter raised in the Request for Rejection fell within the purview of the ICIJ's jurisdiction.

b. Test for removing counsel

42. The DSS Administrative Regulations and the BAKC Code of Ethics both prevent counsel from representing a client when he or she has a conflict of interest. These rules and

[89] *Prlić* Appeal Decision, para. 21. *See also, e.g., Gotovina* Appeal Decision, para. 16; *Prosecutor v. Hadzihasanovic et al.*, IT-01-47-PT, Decision on Prosecution's Motion for Review of the Decision of the Registrar to Assign Mr. Rodnez Dixon as Co-Counsel to the Accused Kubura, Trial Chamber, 26 March 2002 ("*Hadzihasanovic* Decision"), para. 21 (where this principle was first stated); *Prosecutor v. Delić*, IT-04-83-PT, Decision on Motion Seeking Review of the Registry Decision Stating that Mr. Stephane Bourgon Cannot be Assigned to Represent Rasim Delić, Trial Chamber, 10 May 2005. At the ICC, *see Prosecutor v. Bemba*, ICC-01/05-01/08, Decision on the Prosecution's Request to Invalidate the Appointment of Legal Consultant to the Defence Team, Trial Chamber, 7 May 2010, paras 39 and 41. *See also, e.g.*, in the United States, *U.S. v. Alvarez*, 580 F.2d 1251 (1978) (United States Court of Appeals, Fifth Circuit) ("*Alvarez* Decision"), p. 1254 ("where defense counsel in a criminal trial represents one of several clients with conflicting interests, his effectiveness as a vigorous advocate for a particular defendant may be impaired by his commitment to other clients.")

[90] *See* Internal Rules 11(2)(e), (g) and (6).

[91] Art. 21(1) of the ECCC Agreement states, in its relevant part: "The counsel of a suspect or an accused *who has been admitted as such by the ECCC* [...]."

[92] Contrary to the Co-Lawyers' assertion, reference to the ECCC in Article 7 of the DSS Administration Regulations is understood to refer to ECCC judicial bodies, not to the DSS. *See, e.g.*, Art. 7.1 of the DSS Administrative Regulations, which refers to "order" of the ECCC. In addition, it is noted that the Regulations use the expression "DSS" when referring to this specific entity.

[93] *Hadzihasanovic* Decision, para. 23.

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regulations, however, do not provide explicit guidance on whether the facts in the present case give rise to a conflict of interest.

43. Indeed, the DSS Administrative Regulations prohibit counsel from representing a defendant before the ECCC when they have a conflict of interest, for instance where their duty to put the client's interests first is compromised. The DSS Administrative Regulations, however, does not identify which situations place counsel in a conflict of interest. Article 9 states:

> **Article 9 – Conflicts of interest**
>
> 9.1 A Co-Lawyer shall not engage in activity that is incompatible with the discharges of his duties as the legal representative of the accused. In particular, a Co-Lawyer shall neither seek nor accept instructions regarding his representation of the Accused from any Government.
>
> 9.2 Co-Lawyers shall exercise all care to ensure that no conflict of interest arises. *They shall put the client's interests before their own or those of any other person*, organisation or state, *having due regard to the provisions of the Law on the ECCC, the Internal Rules, these Administrative Regulations and any Code of Conduct to which they are bound.*
>
> 9.3 *Where a conflict of interests arises*, a co-lawyer shall at once inform all potentially affected clients of the existence of the conflict and *either withdraw* from the representation of one or more clients *or seek the full and informed consent* in writing of all potentially affected clients to continue representation. (emphasis added)

44. Similarly, Article 25 of the BAKC Code of Ethics prevents lawyers from representing clients in a number of situations where it is presumed that they will not be able to act in the best interests of their client as a direct result of representing another client with adverse interests. These rules, however, focus on private matters, in which the two clients seeking to be represented by the same counsel may be "opposing parties" in the proceedings and do not specifically address the present situation:

> Article 25. Conflict of Interest
>
> A lawyer shall not accept the following cases:
> - A case in which the lawyer or his/her law group has already assisted the opposing party by providing consultation or agreed to represent the opposing party;

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- When the interest of a client conflicts with the interest of another client in the case that the lawyer or his/her law group is working on;

- When two clients are the disputing parties of the same case;

- When a client wants to engage the lawyer or his/her law group but the lawyer or the law group has provided services to the opposing party in the other case or the lawyer has agreed to continue providing legal consultation unless the last case that the lawyer or the law group engaged has already passed two (2) years.

- A case in which the lawyer or law group act as the arbitrator, mediator, or conciliator in the Alternative Dispute Resolution.

In case that the lawyer or his/her law group is the counsel or used to be the counsel for many clients, the lawyer can accept the case and protect the interest of a client, provided that he/she informs the other parties and receive the consent thereto and shall exert great diligence not to lose dignity, reputation, and confidentiality of the profession.

45. By contrast, international tribunals have developed specific rules to assess whether concurrent and consecutive representation in criminal proceedings arising from the same armed conflict gives rise to conflicts of interest and affects fairness of the proceedings. The codes of conduct for counsel at the ICTY, the International Criminal for Rwanda ("ICTR"), the International Criminal Court ("ICC"), the Special Tribunal for Lebanon ("STL") and the Special Court for Sierra Leone ("SCSL") *all* instruct that there is a conflict of interest when counsel seeks to represent a client in a case that is the same or "substantially related" to another matter in which counsel had formerly represented another client ("former client") if the interests of the client "are materially adverse to"[94], or "incompatible with"[95], the interests of the former client, subject to the possibility for the client(s) to consent. This principle is also reproduced in the International Criminal Bar Code of Conduct and Disciplinary Procedure of the International Criminal Bar.[96]

46. Absent any clear guidance in the BAKC Code of Ethics and the DSS Administrative Regulations to determine if the particular situation at hand triggers a conflict of interest,

[94] *See* ICTY, Code of Professional Conduct for Counsel Appearing before the International Tribunal, Rev. 3, 22 July 2009 (the "ICTY Code of Conduct"), Art. 14(d)(iii); ICTR, Code of Professional Conduct for Defence Counsel, 14 March 2008 (the "ICTR Code of Conduct"), Art. 9(3)(C)(iii); STL, Code of Professional Conduct for Defence Counsel and Legal Representatives of Victims appearing before the Special Tribunal for Lebanon, 14 December 2012 (the "STL Code of Conduct"), Art. 11(D)(i) and SCSL, Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone, 13 May 2006 (the "SCSL Code of Conduct"), Art. 15(C).
[95] *See* ICC, Code of Professional Conduct for Counsel, 2 December 2005 (the "ICC Code of Conduct"), Art. 12.
[96] *See* Art. 7(3)(a).

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the Pre-Trial Chamber finds that the ICIJ was correct in seeking guidance in the procedural rules established at the international level, where the rules in this respect have a wider consideration and represent a relevant international standard. The ICIJ's approach did not depart from or contradict Cambodian law; it substantiated it by reference to rules that address the specific facts of this case, in accord with Article 23(3) of the Agreement, which provides that lawyers representing defendants before the ECCC are bound to apply "recognized standards and ethics of the legal profession".

B) Test for removing counsel on the basis of conflict of interest

i) Submissions of the Parties

47. In the Second Ground of Appeal, the Co-Lawyers submit that, if it was necessary to consider procedural rules established at the international level, the ICIJ failed to properly consider them and consequently incorrectly concluded that the "reasonable foresight" test purportedly derived from the ICTY jurisprudence should be applied to assess conflicts of interest at the pre-trial stage.[97] In the Co-Lawyers' view, the correct standard to assess conflicts of interest in cases of successive representation of two defendants in criminal cases is the one set out in Article 14(D)(iii) of the ICTY Code of Conduct and reproduced in several other codes, which requires two criteria to be considered: "a. whether the matter is same or substantially related; and b. whether the interests of the former client and current client are materially adverse."[98] In respect of the second prong, the Co-Lawyers argue that "the concern with such conflicts of interest is mainly that confidential information gained from the former client could be used to his detriment in the representation of the new client."[99]

48. The International Co-Prosecutor responds that the ICIJ's reliance on the ICTY jurisprudence was appropriate, since the ICTY has considered conflicts of interest issues and the principles set forth in its Code of Conduct mirror those set forth in a number of international codes.[100] The International Co-Prosecutor argues that the ICIJ correctly applied the test in Article 14(D)(iii) of the ICTY Code of Conduct in determining whether

[97] *See* Appeal, paras 22-45 *and* Reply, para. 23.
[98] Appeal, para. 45.
[99] Appeal, para. 45. *See also* Reply, para. 26.
[100] Response, para. 46.

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the representation of the Appellant by the Co-Lawyers creates a conflict of interest,[101] before turning to examine whether there is a "reasonable foresight" that the interests of justice could be prejudice by such conflict,[102] as dictated by the general principles emanating from the ICTY jurisprudence.[103]

ii) Analysis

49. Both the Co-Lawyers and the International Co-Prosecutor are of the view that pursuant to the procedural rules established at the international level, the Co-Lawyers would have a conflict of interest and be prevented from representing the Appellant if i) the matter is the same or substantially related to the matter in which they previously represented IENG Sary in Case 002 and ii) the interests of the Appellant are materially adverse to those of IENG Sary.[104] The points of contention are i) whether the ICIJ applied this test[105] and if so, whether he applied it correctly; and ii) whether a "reasonable foresight" that a conflict of interest could arise and prejudice the interest of justice is sufficient to disallow representation[106] or an *actual* conflict is required.[107]

50. In the Impugned Decision, the ICIJ rejected the appointment of the Co-Lawyers on the basis that it is "reasonably foreseeable" that their ability to represent the Appellant's best interests may be impaired by their former representation of IENG Sary.[108] This conclusion is based upon the ICIJ's finding of a factual nexus between the cases against the Appellant and IENG Sary and *prima facie* evidence of a superior-subordinate relationship between the two. More specifically, the ICIJ found:

> The factual nexus between the cases against the Suspect and IENG Sary, including the *prima facie* superior-subordinate relationship between the two, renders their interests materially adverse. Because of the Co-Lawyers-Designate's duty of loyalty to IENG Sary, it is reasonably foreseeable that they could be in a position wherein they would be unable to advise the Suspect on, and to pursue, defence strategies that, while possibly beneficial to him, may be detrimental to IENG Sary. Consequently, it is reasonably foreseeable that they may be 'compelled to compromise [their] duty of loyalty or zealous advocacy to [the

[101] Response, paras 47-51.
[102] Response, para. 57.
[103] Response, paras 53-55.
[104] Appeal, paras 44-45; Response, paras 47-51.
[105] Reply, paras 25 and 30.
[106] Response, paras 57-59.
[107] Appeal, paras 44 and 45.
[108] Impugned Decision, paras 89-92; 96-99 and 118.

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> Suspect] by choosing between or blending the divergent or competing interests of a former or current client.[109]

The ICIJ found that "the Co-Lawyers-Designate have an irreconcilable conflict of interest in the representation of the Suspect which cannot be cured by the client's consent to representation."[110]

51. The test applied by the ICIJ, although not clearly defined,[111] echoes the principle set forth in Article 14(D)(i) of the ICTY Code of Conduct, which concerns conflicts of interest arising from *concurrent* representation of two defendants, as interpreted in the jurisprudence of the ICTY Trial and Appeals Chambers. Indeed, the ICIJ has essentially based his reasoning upon case law from the ICTY involving cases of concurrent representation and applied the principles set forth thereto,[112] a process vigorously disputed by the Co-Lawyers. Article 14(D)(i) of the ICTY Code of Conduct, which is reproduced in the codes of conduct for counsel of the ICTR, SCSL and STL,[113] prevents counsel from representing two defendants *at the same time* if representation of a client "will be, *or may reasonably be expected to be*, adversely affected by representation of another client." Based on this provision, the ICTY Appeals Chamber held that counsel should be prevented from representing two defendants at the same time if it is "reasonably foreseeable" that, due to the circumstances, he or she may be reluctant to pursue a line of defence, to adduce certain items in evidence or to plead certain mitigating factors at the sentencing stage, in order to avoid prejudicing the interests of another client.[114] Application of this standard has led the ICTY Trial and Appeals Chambers to prevent counsel from representing simultaneously two accused charged in relation to similar or the same criminal acts where they were alleged to have had a "relatively closed" superior/subordinate relationship, even in circumstances where the respective position of each accused was still undefined.[115] In

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[109] Impugned Decision, para. 130.
[110] Impugned Decision, para. 136.
[111] The ICIJ referred to a number of definitions of conflicts of interest but did not explicitly define the test or criteria for determining whether representation of a former client, particularly if he has passed away, places counsel in situation of conflict of interest when seeking to represent a new client. *See, inter alia*, paras 89-99 of the Impugned Decision.
[112] *See* paras 96-99; 108; 118; 122-123; 125-126; 129; 132; 134-135; 138 and 140 of the Impugned Decision and related footnotes.
[113] *See* Art. 9(3)(a) and (b) of the ICTR Code of Conduct; Art. 15(C)(i) of the SCSL Code of Conduct and Art. 11(B) of the STL Code of Conduct for Defence and Victims Counsel.
[114] *Gotovina* Appeal Decision, paras 23-25. *See also Prlić* Appeal Decision, Declaration, para.
[115] *See Prlić* Appeal Decision, para. 25; *Gotovina* Appeal Decision, paras 22, 23, 27 and 28; *Prosecutor v. Delić*, IT-04-83-PT, Decision on Motion Seeking Review of the Registry Decision Stating that Mr. Stephane Bourgon Cannot be Assigned to Represent Rasim Delić, 10 May 2005, Trial Chamber, p. 3; *Prosecutor v. Mejakić*

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these cases, the consent(s) by one or both clients have not been considered capable of removing the conflict or otherwise allowing the appointment of counsel.[116]

52. The test for determining if counsel is allowed to represent a new client before an international or internationalized criminal tribunal *when representation of a former client has ended* is expressed in significantly different terms in the procedure established at the international level, including at the ICTY. The test in these circumstances is not whether counsel's judgment is likely to be affected by representation of another client, as applied in the Impugned Decision, but whether "the matter is the same or substantially related to another matter in which counsel or his firm had formerly represented another client ("former client") and the interests of the client *are* materially adverse to the interests of the former client" (emphasis added), as set forth above.[117] In case of consecutive representation, it is the fact that the interests of the present and former clients *are* materially adverse that creates a risk that the counsel's judgment be negatively affected; otherwise, there is no reason to expect that counsel's judgement would be affected by the representation of a former client.[118]

53. In this respect, the Pre-Trial Chamber emphasises that the scope of counsel's obligations toward a client is more limited after termination of the retainer such that a conflict of interest is less likely to arise when representation of a client has ended.[119] Whereas counsel's duty of confidentiality remains unaffected by the end of the retainer, the survival

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and al., IT-02-65-AR73.1, Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simic, 6 October 2004, paras 12-15. Only in a case where the superior-subordinate was considered "quite remote" did the Trial Chamber allow dual representation of two accused charged of the same or similar criminal acts. *See Prosecutor v. Prlić and al.*, Case IT-04-74-PT, Decision on Requests for Appointment of Counsel, Trial Chamber, 30 July 2004, paras 43 and 52.

[116] *See Prlić* Appeal Decision, paras 26-30 *and Gotovina* Appeal Decision, para. 35. In the other cases reported above, there is no mention of consents having been provided by the clients.

[117] *See* para. 45 above.

[118] *See, e.g.,* Art. 9(3)(c) of the ICTR Code of Conduct, which states that "Counsel's professional judgement on behalf of the client will be, or may reasonably be expected to be, adversely affected" if "the matter is the same or substantially related to another matter in which Counsel had formerly represented another client (the former client); and the interests of the client are materially adverse to the interests of the former client, unless the former client consents after consultation".

[119] *See, e.g., Perillo v. Jonhson*, 205 F. 3d 775 (United States Court of Appeal, Fifth Circuit) ("*Perillo* Decision") pp. 798-799 ("Where the prior representation has not unambiguously been terminated, or is followed closely by the subsequent representation, there is more likely to be a conflict arising from defense counsel's representation of the first client. Where, on the other hand, defence counsel's representation unambiguously terminated before the second representation began, the possibility that defence counsel's continuing obligation to his former client will impede his representation of his current client is generally much lower."); *Enoch v. Gramley*, 70 F.3d 1490 (1995) (United States Court of Appeal, Seventh Circuit) ("*Enoch* Decision"), p. 1496 ("Conflicts typically arise where a lawyer engages in simultaneous representation of codefendants in a criminal case because exculpating one client may depend on inculpating the other. However, they may also arise in cases of successive representation, though 'it is generally more difficult to demonstrate an actual conflict resulting from successive representation'").

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of the obligation is highly controversial.[120] Clearly, after termination of the mandate of representation, counsel has no longer a duty to *act* in the best interests of a former client.[121] At most, in criminal matters, counsel may be prevented from causing prejudice to a former client by undermining the work performed on his or her behalf.[122] The rationale for this ethical duty is twofold. First, the retainer creates an expectation for the client that counsel will not later undermine the work for which he or she has been hired.[123] Secondly, the fact that counsel acts against a former client may create "an appearance of impropriety" which may cause the public to lose confidence in the justice system.[124] The obligation of loyalty, as so defined, may persist after the client's death if the specific interests that counsel had previously been retained to represent continue to exist.[125]

54. The fact that the risk of conflict of interest in case of consecutive representation is more remote commands the application of a higher threshold of evidence to remove counsel in

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[120] For instance, in the United Kingdom, the obligation of loyalty totally extinguishes with the end of the retainer. *See Prince Bolkiah v. KPMG*, [1992] 2 A.C. 222 (House of Lords), p. 235 ("The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence.")

[121] *See Spincode v. Look Software*, [2001] VSCA 248 (Australia, Supreme Court of Victoria) ("*Spincode* Decision"), para. 53 (The Court identified a "negative obligation not to act *against the former client in the same matter*", that it distinguishes from the solicitor's active duties to perform for the client before representation has ended.); *Enoch* Decision, p. 1498 (The Court highlighted that counsel's obligation of loyalty toward a former client should not be confused with an obligation to "protect" his interest when representation has ended.)

[122] *Spincode* Decision, paras 38; 42-43; 54-57. *See also, e.g, Perillo* Decision, p. 803 (where representation of a new client would lead counsel to undermine the work product resulting from his prior representation and expose his former client to perjury); *Church v. Sullivan*, 942 F.2d 1501 (1991) (United States Court of Appeals, Tenth Circuit), p. 1511 (where counsel sought to represent a defendant whilst he had previously represented a co-defendant who was testifying against him); *Gotovina* Appeal Decision, paras 44-48 (The ICTY Appeals Chamber held that the obligation of loyalty would not extinguish when counsel ceases to represent a defendant in criminal proceedings so that counsel would have a conflict of interest if representation of a new client puts him at risk of undermining the defence of a former one.)

[123] *See Spincode* Decision, paras 54-57.

[124] *Steel v. General Motors Corp.*, 912 F.Supp. 724 (1995), p. 740.

[125] *See, e.g., State ex rel. S.G.*, 175 N.J. 132 (2003) (The Supreme Court of New Jersey found that counsel had a conflict of interest in representing an accused in a murder case due to his firm's past representation of the victim in the same case, prior to her death. The Court emphasised that the conflict arose from the fact that the firm had represented both the assailant (although not charged at the time) and the victim for a number of weeks and that counsel's obligations toward the victim had not entirely ceased. In particular, the Court held that "a deceased client continues to have interests that are entitled to the protection of the attorney-client relationship *until the representation is terminated* consistent with our professional and procedural rules," which in this case, meant at the expiry of the final judgement on the murder charges. The Court also took into consideration that the victim had a right of action under the Survival Act.) Significantly, the two cases referred to by the ICIJ in footnote 183 of the Impugned Decision to support his holding that the obligation of loyalty survives the death of the client both involve situations where counsel had represented individuals in making their posthumous arrangements and later sought to undermine these while representing the heirs. Obviously, in these cases where clients retained counsel to ensure that their wishes will be respected after their death, they retain an interest in counsel not undermining the work they had done. *See In re Williams*, 57 Ill. 2d 63 (1974) (Supreme Court of Illinois) and *In re Michal*, 415 Ill. 150 (1953) (The Supreme Court of Illinois held that loyalty to his former client should have prevented counsel from attacking the documents he had prepared on his behalf after his death).

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these circumstances, as reflected by the language used in provisions regarding consecutive representation in the codes of conduct of international and internationalised tribunals. Similarly, other international institutions and domestic jurisdictions require a "significant," "real" or "serious" risk of conflict of interest to remove counsel when consecutive representation is involved.[126] It also justifies giving more weight to the consent or waiver provided by the concerned clients when assessing the existence of a conflict of interest or the possibility that it may be waived. In this respect, it is noted that provisions addressing consecutive representation of defendants at the ICTR, SCSL and ICC specifically provide for the possibility of the concerned clients to consent to representation in this particular situation. The same principle is reflected in a number of other international and domestic jurisdictions.[127]

55. The jurisprudence of the ICTY illustrates how the application of a different test in situation of consecutive representation leads to apprehend the matter differently. In cases involving *consecutive* representation, the ICTY did not apply the standard it applied in cases involving *concurrent* representation, set out above and applied by the ICIJ. In the *Martić* case, which dealt with the appointment of counsel after representation of another defendant had ended, an ICTY Trial Chamber insisted that conflict of interest *could only*

[126] For instance, the International Criminal Bar recommends the "materially adverse interests test" as set forth in the codes of conduct of the international and internationalized tribunals and specifically allows consent (*see* Art. 7(3)(a) of the International Criminal Bar Code of Conduct and Disciplinary Procedure of the International Criminal Bar). The International Bar Association considers that "[a] conflict of interest exists if the representation of one client *will be directly adverse* to another client; or there is a *significant risk* that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, a third person or by a personal interest of the lawyer" (*see* Principle 3 of the International Bar Association's ("IBA") International Principles for the Conduct of the Legal Profession). The Hague Principles on Ethical Standards for Counsel Appearing Before International Courts and Tribunals provides that "counsel may not represent a new client in proceedings where a former client is party to the same or closely related proceedings and *there exists a material risk of breach of confidentiality*, except with the express authorisation of the former client" (*see* Art. 4.2). In Cambodia, Article 25 of the BAKC Code of Ethics prevents counsel from representing the "opposing party" for a period of two years, unless the new and former clients give their authorisation. As to the United States, they apply exactly the same test as the one set out before international tribunals described above (*See* Rule 1.9(a) of the American Bar Association's Model Rules for Professional Conduct and the Alaska Code of Professional Conduct, by which Michael KARNAVAS is bound. *See also* Rule 1.7(a)(2), which further provides that a lawyer shall, in principle, not represent a client if "there is a *significant risk* that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer"). France only prevents counsel from representing a new client if representation of a former one puts at risk the counsel's obligation of confidentiality towards the former client (*see* Article 4.1 of the *Règlement intérieur de la profession d'avocat and* Art. 7 of the Décret No. 2005-790 of 12 July 2005). The same holds true for the Code of Conduct for European Lawyers (*see* Principle C and Article 3.2 of the Code of Conduct for European Lawyers, adopted by the Council of Bars and Law Societies of Europe). In other jurisdictions, such as in the UK and in The Netherlands, conflicts of interests are only envisaged if counsel represents two clients at the same time (*see* Glossary and Chapter 3 of the UK Solicitors Regulation Authority Code of Conduct 2011 *and* Rule 7 of the Dutch Code of Conduct of Advocates 1992).

[127] *See* references in the precedent footnote.

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exist if "the matter is the same or substantially related to another matter in which Counsel had formerly represented another client and the interests of the client are materially adverse to the interests of the former client."[128] Although most of the cases involving consecutive representation dealt with at the ICTY concern appointment of co-counsel and legal consultants and the reasoning in these decisions is often scarce, the case-law demonstrates that completion of the proceedings against one of the clients or the remote possibility of further charges have played a determinant role in addressing issues of conflict of interest.[129] In none of these cases did the ICITY find the allegation of a superior-subordinate relationship between a former and a new clients or of their alleged roles a co-perpetrators for the crimes charged sufficient to prevent counsel, co-counsel or legal assistant to represent a new client or participate in his or her the defence.[130] Rather, the ICTY appears to have required concrete evidence of divergent interests between defendants prosecuted in respect of similar or related crimes.[131] Furthermore, in these cases, the ICTY gave due consideration to the consent given by the new and/or former clients to be represented by the same counsel.[132] In the *Martić* case for instance, the ICTY Trial Chamber emphasised that Article 14(D)(iii) of the ICTY Code of Conduct allows representation where the former client consents and held that "a consent provided by a

[128] *Prosecutor v. Martić*, IT-95-11-PT, Decision on Appeal against Decision of Registry, Trial Chamber, 2 August 2002 ("*Martić* Decision"). *See also Prosecutor v. Perišić*, IT-04-81-PT, Decision by the Registrar assigning Mr. Slijepcevic as Co-Counsel, Deputy Registrar, 7 April 2006 ("*Perišić* Decision"), p. 2 (where the Deputy Registrar considered that given the fact that the cases of Perišić and Obrenović were "substantially related" as there is a "factual nexus" between the charges against Perišić in relation to the events at Srebrenica and the charges for which Obrenović had been convicted, the issue at stake was whether Perišić's interests "are materially adverse to those of Obrenović or are likely to become materially adverse in the future" and ultimately confirmed appointment of counsel given that he was "satisfied that the interests of the Accused are not materially adverse *now* and that the possibility of those interests becoming materially adverse in the future is acceptably low"). *Compare with Gotovina* Appeal Decision, para. 24 (where the Appeals Chamber emphasised that "the provisions of Article 14(D)(i) and (ii) of the Code of Conduct [which concerns simultaneous representation] do not require that there be a substantial relationship between matters in which the current clients are represented – what is prohibited is simultaneous representation that will, or may reasonably be expected to, adversely affect the representation of either client").

[129] *See, e.g., Prosecutor v. Tolimir et al*, IT-05-88-PT, Decision on Appointment of Co-Counsel for Radivoje Miletić, Trial Chamber II, 28 September 2005, paras 31 and 35. *See also Prosecutor v. Popović et al*, IT-05-88-T, Decision on Third Request for Review of the Registry Decision on the Assigment of Co-Counsel for Radivoje Miletić, 20 February 2007 ("*Popović* Third Trial Chamber Decision"), p. 3, *quoting* Decision on Request for Review of the Registry Decision on the Assignment of Co-Counsel for Radivoje Miletić, Trial Chamber, 16 November 2006.

[130] *See Prosecutor v. Delalić*, IT-96-21-A, Order Regarding Esad Landzo Requet for Removal of John Ackman as Counsel on Appeal for Zenjil Delalić, Appeals Chamber, 6 May 1999 ("*Delalić* Decision"); *Perišić* Decision; *Martić* Decision. *See also Prosecutor v. Martić*, IT-95-11-PT, Decision, Deputy Registrar, 16 August 2002 (which ultimately confirm the appointment of counsel).

[131] *See Delalić and Martić* Decisions.

[132] *See Martić* Decision, *Popović* First Trial Chamber Decision, paras 32-33 and 35 *and* Third Trial Chamber Decision; *Perišić* Decision and *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on Accused's Request for Judicial Review of the Registry Decision on the Assignment of Mr. Marko Sladojević as Legal Associate, Trial Chamber, 20 April 2009 ("*Karadžić* Decision"), para. 5.

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potentially affected client or former client to remove a conflict of interest upon consultation with the Counsel should generally be regarded as fully informed in the absence of indication to the contrary."[133]

56. Another indication that the ICTY has applied a higher threshold for removing counsel where past activities are involved is found in *Hadziasanovic*, which was held before the adoption of Article 14 of the ICTY Code of Conduct. In this case, the ICTY Trial Chamber was concerned with the fact that counsel, who sought to represent Hadziasanovic, was previously employed by the ICTY Prosecution Office. Absent of any provision at the time on the issue, the Chamber developed a test based on its "duty to ensure the integrity of the proceedings"[134] and held that counsel cannot represent an accused before the Court where there is "a *real possibility* [...] that there is a conflict of interest between the former and present assignment of counsel."[135] The Chamber held that the "probability test would be too high a standard as the harm from an erroneous assignment may be too great to redress for the integrity and expediency of the proceedings and the interests of witnesses and victims," especially "in light of the very complex and often considerable time-consuming trials this Tribunal normally faces."[136] The Pre-Trial Chamber disagrees with the ICIJ's holding that this decision is not relevant to the present case[137] and finds that this decision constitutes a further indication that concrete evidence substantiating at least a "real possibility" of conflict of interest is necessary to remove counsel on the basis of his or her past activities.

57. In the light of the foregoing, the Pre-Trial Chamber finds that the ICIJ committed an error of law in grounding his decision on the principles set forth by the ICTY in cases involving concurrent representation of two defendants and, to a large extent, applying the test set forth in Article 14(D)(i) of the ICTY Code of Conduct, given the fact that IENG Sary has now passed away. Not only does the "reasonable foresight" test applied by the ICIJ find no support in the jurisprudence of the ICTY for cases involving consecutive representation, but the "reasonable foresight" test uses a much lower standard than the one set forth in the rules established at the international level in these circumstances, which requires a "real," "significant" or "serious" risk of conflict of interest. As reflected by the jurisprudence of

[133] *Martić* Decision.
[134] *Hadziasanovic* Decision, para. 56. *See also*, paras 36 and 44.
[135] *Hadziasanovic* Decision, para. 56 (emphasis added).
[136] *Hadziasanovic* Decision, para. 56.
[137] Impugned Decision, para. 98.

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the ICTY, the fact that two defendants are prosecuted for the same criminal acts or in respect of the same events, even if there is an alleged relation of superior-subordinate relationship between the two, does not necessarily render their interests materially adverse.[138] Their interest would only be adverse if one of the defendants intends to shift the blame on the other or otherwise seeks to implicate the other in the alleged crimes. This situation may be difficult to anticipate at the early stage of the proceedings, where the lines of defence of each defendant are still undefined or unknown. The Pre-Trial Chamber appreciates that in cases of mass atrocity crimes such as the ones heard before the ECCC, given the complexity and length of the proceedings, as well as the need to deliver justice within a reasonable time, the interests of justice may require that conflicts of interest be anticipated and prevented from materializing. At the same time, the Court must remain cognizant of the defendants' fundamental right to be represented by counsel of their own choosing. Balancing these competing interests and in the light of the procedural rules established at the international level, the Pre-Trial Chamber finds that ECCC judicial bodies may only disallow representation of a defendant by counsel who has, in the past, represented another defendant before the ECCC in a substantially related case if there is a real risk that the interests of the new client become materially adverse to that of the former client. In conducting this assessment, the Court should not speculate about the defence strategies that may or may not be adopted; it must examine whether there is concrete evidence that the two defendants intend to present defences that are adverse or otherwise implicate each other in the alleged crimes. In this regard, the Court shall give due consideration to any statement or consent given by the concerned client(s), which may be indicative of the way they perceive their own interests or of the way they anticipate to

[138] *See* references in footnote 130. *See also Alvarez* Decision, p. 1255 ("[J]oint representation of codefendants is not a *per se* violation of the Sixth Amendment. In other words, an actual, not merely hypothetical or speculative conflict must be demonstrated before it can be said that an accused has been deprived of effectice representation of counsel."); *United States v. Turner*, 594 F.3d 946 (2010) (United States Court of Appeal, 7th Circuit) (The 7th Circuit Court of Appeals held that a potential for conflict of interest arising from the concurrent representation of two defendants in a criminal case was not enough to justify the lawyer's disqualification upon allegation by the Prosecution that it may lead to ineffective representation of a defendant.); *State v. Jimenez*, 175 N.J. 474, 486 (2003) (Supreme Court of New Jersey); *State v. Acuna*, A-5382-12T2, 2014 WL 1875359, 12 May 2014 (N.J. Super. Ct. App. Div.)(unreported) (In examining whether counsel had a conflict of interest in representing two defendants in respect of separate indictments involving similar allegations brought by the same victims, the Superior Court of New Jersey engaged in "a fact sensitive" inquiry to determine whether the attorney's representation of each defendant impairs his ability to perform his adversarial role in representing the other defendant. In dismissing the Prosecutor's argument that a defence attorney with undivided loyalty might point to the other defendant as the perpetrator of crimes alleged by the victims, the court held that such a defence was not viable in this case and an effective counsel would forego such a defence. In considering multiple factors such as the charges against the two defendants, the facts alleged against them and the retained attorney's ability to cross-examine one of the victims, the court concluded that the prosecution and the lower court's [illegible] conflict of interest were more "hypothetical" than real.)

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build their defence. Finally, the Pre-Trial Chamber emphasises that the decision to remove counsel is not mechanical and requires a holistic examination of the circumstances of the case, and a balancing of factors to ultimately determine whether the interest of justice warrants limiting the defendant's right to counsel of choice.[139]

58. Having found that the ICIJ did not apply the correct test, the Pre-Trial Chamber, exercising its corrective jurisdiction, must examine whether the test identified above is met in the present case. It is noted that the parties do not dispute the ICIJ's conclusion that there is a factual nexus between the crimes alleged against the Appellant in the Second Introductory Submission and the crimes for which IENG Sary was formerly prosecuted in Case 002.[140] Hence, it is sufficient for the Pre-Trial Chamber to examine whether the interests of the Appellant are "materially adverse" to those of IENG Sary, or if there is a real risk, based on concrete evidence, that they so become, before examining whether the circumstances of the case warrant disallowing the Co-Lawyers to represent the Appellant.

C) Examination of the case in the light of the correct test

i) Submissions of the Parties

59. The Co-Lawyers submit in their Third Ground of Appeal that "Mr. IENG Sary's and [the Appellant]'s interests are not materially adverse" and that "the material relied upon by the [ICIJ] does not demonstrate a prima facie conflict of interest."[141] The Co-Lawyers argue that because IENG Sary bears no risk of further prosecution, "[t]he only interest Mr. IENG Sary retains at this point is the confidentiality of information he provided to the Co-Lawyers."[142]

60. In his Response, the International Co-Prosecutor submits in general terms that the ICIJ has correctly examined and concluded that the interests of IENG Sary were materially adverse to that of the Appellant. He does not elaborate on how IENG Sary's interests may be prejudiced if the Co-Lawyers were to represent the Appellant.[143]

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[139] For instance, US Courts have insisted that "any categorical treatment of when an actual conflict exists is difficult" and that "the determination of actual conflict and adverse effect is tightly bound to the particular facts of the case at hand". *See Perillo* Decision, p. 782. *See also, e.g., Silver Chrysler Plymouth v. Chrysler Motors Corp.*, 518 F2d 751 (1975) (United States Court of Appeals, Second Circuit), p. 752.
[140] Appeal, para. 47.
[141] Appeal, para. 46.
[142] Appeal, para. 75.
[143] Response, para. 69, *referring to* paras 48-51.

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ii) Analysis

61. The proceedings against IENG Sary have been terminated upon his death.[144] Hence, IENG Sary can never be convicted for the crimes alleged against him in the Closing Order nor be held liable to any civil reparation[145] and will always be presumed innocent. Likewise, he can no longer be called as a witness nor be accused of perjury. There is no issue in this case arising from the obligation of confidentiality by which the Co-Lawyers remain bound, as the ICIJ held that there is no evidence that the Co-Lawyers "are in possession of information, provided confidentially by IENG Sary, which could be material to [the Appellant]'s defence."[146] Legally, IENG Sary (or his estate) has no longer any interest in the proceedings in Case 002.

62. The Impugned Decision suggests that IENG Sary would retain interests in the proceedings before the ECCC stemming from the preservation of his rights to reputation and dignity, which would have passed on to his heirs. However, the ICIJ does not concretely examine how these interests come into play in the present circumstances.[147] At the outset, the Pre-Trial Chamber clarifies that the Co-Lawyers' representation of the Appellant does not *per se* put them at risk of impairing IENG Sary's "right to reputation", as may be understood from the Impugned Decision. The right to reputation protects individuals against "unlawful attacks" on their reputation, *i.e.* "untrue allegations made intentionally."[148] As there is no reason to think that the Co-Lawyers' representation of the Appellant would lead to such behaviour, IENG Sary's "right to reputation" is not at stake. Rather, it is more appropriate in this case to consider, in more abstract terms, an interest in preserving IENG Sary's reputation, in a common sense, by avoiding the social stigma associated with being blamed for criminal acts, or to uphold the presumption of innocence. Only IENG Sary's next of kin may have such interests, as explained below.

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[144] Case 002, Termination of the Proceedings against the Accused IENG Sary, 14 may 2013, E270/1, *referring to* Article 7 of the Cambodian Code of Criminal Procedure.
[145] Art. 24 of the Cambodian Code of Criminal Procedure would make it possible under Cambodian domestic law for civil parties to continue their "civil action" after the death of the accused, against his successors. However, the Trial Chamber found that "within the unique legal framework of this Court, the Civil Party Lead Co-Lawyers file a single claim for collective and moral reparations on behalf of the single, consolidated group *(see* Internal Rules 23, 23*bis,* 23*ter,* 23*quinquies).* The determination of this claim is dependent upon a criminal conviction (Internal Rule 23*quinquies).* Thus extinction of a criminal action at the ECCC necessarily also extinguishes any civil action."
[146] Impugned Decision, para. 128.
[147] Impugned Decision, para. 126. *See also* para. 142.
[148] Manfred Nowak, *U.N. Covenant on Civil and Political Rights – CCPR Commentary*, Engel, 1993, pp. 292, 305 and 306.

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63. IENG Sary is, himself, materially and legally not capable of suffering any injury as a result of being blamed, after his death, for the crimes prosecuted in Case 002 or alleged in Case 003. Under Cambodian law, "[n]atural persons shall acquire legal capacity by birth, and shall lose it by death".[149] "Personal rights" may only be exercised during the lifetime of an individual[150] and are not inheritable.[151] Absent of any injury before IENG Sary's passing, his heirs do not have a right of action to claim prejudice on his behalf.

64. In these circumstances, the Pre-Trial Chamber can only identify a potential interest on behalf of IENG Sary's next of kin to preserve their memory of the deceased, based on principles set forth in French and Human Rights case law which do not appear to contradict Cambodian law. In this respect, the French Court of Cassation held that under French law, heirs cannot claim a right of action on behalf of a deceased if the prejudice arose after his or her death but next of kin may act to protect their memory of the deceased, in case they suffer a personal harm.[152] Similarly, the ECtHR held that heirs or next of kin cannot claim a violation of a right guaranteed by the European Convention on behalf of a deceased;[153] they must demonstrate that they were "*directly affected* in some

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[149] Art. 8 of the Cambodian Civil Code.

[150] *See* Arts 6, 8 and 10 of the Cambodian Civil Code (Art. 6 states that "[a]ll natural persons are entitled to have rights and assume obligations in their name"). Likewise, the provisions which set forth the right to claim compensation for a violation of a personality right or to seek an injunction to put an end to the violation specifically state that these remedies are opened to the "right holder" or the "person who has suffered an unlawful infringement of a personality right". *See* Arts 11, 12, 13 757(3) and 762 of the Cambodian Civil Code.

[151] *See*, in addition to the provisions quoted in the precedent footnote, Art. 1147(1) of the Cambodian Civil Code, which provides that "[a]s of the commencement of the succession, a successor succeeds to all of the rights and obligations pertaining to the property of the decedent, except such as were entirely personal to the decedent."

[152] *See* Civ. Cass., 1 July 2010, Bull. Crim. 2010, I, no. 151*and* Civ. Crim., 22 October 2009, Bull. Crim. 2009, I, no. 211), *referred to* in footnote 184 of the Impugned Decision, where the French Court of Cassation explicitly excluded the possibility, under French law, for an heir or family member to claim a violation of the rights to privacy or image of a deceased person if the violation happened after his or her death. The Court of Cassation found in these cases that next of kin of a deceased may only oppose to the publication of the image of the deceased, or claim compensation for the publication of such, if they can demonstrate a *personal harm* resulting from the violation of the memory or respect due to the deceased after death. *See also* ECtHR, *Éditions Plon v. France*, Application No. 58148/00, Judgement, 18 May 2004 ("*Editions Plon* Judgement"), discussed in the following footnote.

[153] *See* ECtHR, *Practical Guide on Admissibility Criteria*, 2011, p. 13, para. 32; Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, Oxford: Oxford University Press, 2d ed., 2009 ("*Harris*"), pp. 798-799. The *Éditions Plon* Judgement, referred to in footnote 184 of the Impugned Decision, does not set a precedent supporting the survival of the right to reputation after death under the European Convention of Human Rights as inferred by the ICIJ. Rather, this decision examines whether it was reasonable for French Courts, based on their domestic law, to limit the Applicant's freedom of expression in order to ensure respect of the late President Mitterrand's rights to reputation and dignity, which have passed on to his heirs *because the damage was caused prior to his death*. Significantly, the Paris Court of Appeal had found "inadmissible the action brought by the Mitterrand family in so far as it concerned the protection of President Mitterrand's private life, pointing out in that connection that 'the possibility for anyone to prohibit any form of disclosure about [their private life] is only open to the living'."(*see* para. 15)

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way by the matter complained of."[154] The ECtHR has recognized that next of kin or, in particular circumstances, heirs, may be directly affected by the violation of a fundamental right of a deceased and allowed them to bring claim, on their own name, when they could demonstrate that they suffer a personal harm.[155]

[redacted]The remote interests of IENG Sary's next of kin in the proceedings before the ECCC could potentially place the Co-Lawyers in situation of conflict of interest if there is concrete indication that the Appellant intends to raise a line of defence aimed at shifting the blame for the crimes alleged in the Second Introductory Submission on IENG Sary such that the Co-Lawyers may be exposed to undermining the defence they have put forward on IENG Sary's behalf. [redacted]

[redacted]

The Pre-Trial Chamber agrees with the ICIJ that, if it correctly reported, the statement made by the Appellant in this newspaper article, although "ambiguous", may "provide an indication of a possible defence strategy that the Suspect could decide to pursue in his defence case, should he be charged and indicted for the crimes alleged in the Introductory Submission."[156] The Appellant and the Co-Lawyers, however, have indicated in recent statements that they do not intend to adopt such line of defence.

66. On 13 June 2012, while the Co-Lawyers were concurrently representing IENG Sary, the Appellant in his consent statement indicated that "[he] was not a member of the Ministry of Foreign Affairs and did not report to that Ministry" and that "IENG Sary was neither

[154] *Harris*, p. 790. *See also, inter alia,* ECtHR, *Makris and others v. Greece*, Application No. 5977/03, Decision on Admissibility, 24 March 2005, p. 4.
[155] *See, e.g., Nolkenbockhoff v. Germany*, Application No. 10300/83, Judgment, 25 August 1987, para. 33(The ECtHR held that a widow had "a moral interest, on behalf of herself and of the family, in having her late husband exonerated from any finding of guilt" and therefore found admissible her application alleging violation of the presumption of innocence under Article 6(2) of the European Convention.); *Brudnicka and others v. Poland*, Application No. 54723/00, Jugement, 3 June 2005 (The ECtHR found admissible the complaints lodged by heirs of deceased sailors alleging that the commission of inquiry charged with establishing the cause of a shipwreck, and which have attributed, in part, responsibility to the sailors, was not independent.) The ECtHR has, in other cases, rejected claims brought by next of kin on the basis that the rights involved where so imminently attached to the deceased that they were not "transferable". *See, e.g., Sanles Sanles v. Spain,* Application No. 48335/99, Decision on Admissibility, 26 October 2000, p. 7.
[156] Impugned Decision, para. 115.

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[his] superior nor [his] subordinate." He also expressed his intention to exercise his right to remain silent in all cases before the ECCC.[157] The Appellant reiterated, on 6 February 2014, that despite the findings contained in the Impugned Decision, he wished to be represented by the Co-Lawyers because of their "previous experience" with the Office of the Co-Investigating Judges. The Appellant explained that there was "no close factual nexus between the crimes" because "Mr. IENG Sary was not [his] superior and had no involvement with military affairs."[158] The Appellant added that he had "no reason to believe or suspect that [the Co-Lawyers] will sacrifice [his] interest in order to protect their former client Mr. IENG Sary – or the opposite; that [the Co-Lawyers] will sacrifice Mr. IENG Sary's interest for [his] sake."[159] Whereas it is true that the Appellant's statements do not exclude all possibility that he possesses knowledge that could impact on IENG Sary and eventually decide to testify,[160] these statements indicate that the Appellant does not intend, at this time, to raise a defence that would implicate IENG Sary. The consent also shows that the Appellant is willing to take the risks attached to the fact that his counsel have previously represented IENG Sary. Given the low risk that a conflict of interest in this case may affect fairness of the proceeding or otherwise discredit the administration of justice, the Appellant's consent must be taken into consideration.[161]

67. Furthermore, the Co-Lawyers assert that there is no incompatibility in the defence raised by IENG Sary and the position asserted thus far by the Appellant. Although not decisive, this statement warrants consideration given that the Co-Lawyers are in the best position to evaluate whether the interests of a former and a new client are materially adverse and it is to be presumed that they make this assessment with due consideration to their ethical duties.[162]

68. Likewise, the consent given by IENG Sary prior to his death for the Co-Lawyers to concurrently represent the Appellant in Case 003 indicates that he did not perceive his interests as adverse to that of the Appellant.

69. In the light of the foregoing, the Pre-Trial Chamber finds that the evidence on record contains no indication that the Appellant's interests are materially adverse to the remote

[157] *See* Appellant First Waiver.
[158] Appellant Notice of Intent to Appeal, p. 3.
[159] *Ibid.*
[160] *See* Impugned Decision, para. 125.
[161] *Martić* Decision; *Popović* Third Trial Chamber Decision, p. 3; *Karadžić* Decision, para. [illegible].
[162] *See, e.g., Enoch* Decision, p. 1498 *and Perišić* Decision, p. 2.

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interests that IENG Sary's next of kin may have in the proceedings before the ECCC. There is no real risk that the Co-Lawyers' representation of the Appellant would place them in a position that would undermine their retainer with IENG Sary, nor place them in a precarious situation to choose between the interest of their past and current clients in such a way that would render them ineffective counsel for the Appellant. The possibility of a conflict of interest in this case is too hypothetical and speculative to jeopardize the interests of justice or outweigh the Appellant's right to be represented by counsel of his own choosing.

V. CONCLUSION

70. For all these reasons, the Pre-Trial Chamber decided as announced on 30 June 2014.

Phnom Penh, 17 July 2014

President **Pre-Trial Chamber**

PRAK Kimsan **Rowan DOWNING** **NEY Thol** **Chang-ho CHUNG** **HUOT Vuthy**

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