

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

FILING DETAILS

Case No: 003/07-09-2009-ECCC/OCIJ

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**MEAS MUTH'S NOTICE THAT HE INTENDS TO EXERCISE HIS RIGHT TO
REMAIN SILENT AND ANY CONTACT WITH HIM MUST BE MADE THROUGH
HIS CO-LAWYERS**

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Co-Investigating Judges:
Judge YOU Bunleng
Judge Mark B. HARMON

Co-Prosecutors:
Chea LEANG
Nicholas KOUMJIAN

All Civil Parties

Mr. MEAS Muth, through his Co-Lawyers (“the Defence”), pursuant to Rule 21 of the ECCC Internal Rules (“Rules”), hereby notifies the Co-Investigating Judges that Mr. MEAS Muth does not intend to communicate with the Co-Investigating Judges or any investigator, analyst, legal officer, or judicial police acting under the Co-Investigating Judges’ direction. This Notice is made necessary because the Co-Investigating Judges have no legal authority to communicate with Mr. MEAS Muth without the presence of his Co-Lawyers: **a.** Mr. MEAS Muth has the right to remain silent and intends to exercise this right; **b.** Mr. MEAS Muth has the right to be represented by the Co-Lawyers of his choice and intends to exercise this right; and **c.** the OCIJ must respect Mr. MEAS Muth’s fair trial rights. Any contact that the OCIJ intends to have with Mr. MEAS Muth must therefore be made through his Co-Lawyers. The Defence requests to file this Notice in English with the Khmer translation to follow because the Interpretation and Translation Unit cannot timely complete the translation due to other priorities.¹

I. BACKGROUND

1. On 13 June 2012, Mr. MEAS Muth requested the Head of DSS Mr. Isaac Endeley to assign Mr. Ang Udom and Mr. Michael G. Karnavas as his Co-Lawyers.² Mr. MEAS Muth provided DSS with a notice that he intended to exercise his right to remain silent and did not intend to answer questions as a witness or a suspect in any case at the ECCC. He also provided a waiver of any potential conflict of interest that might arise due to the Co-Lawyers’ representation of Mr. IENG Sary.
2. On 14 December 2012, six months after Mr. MEAS Muth requested legal representation, Mr. Endeley appointed Mr. Ang Udom and Mr. Michael G. Karnavas as Mr. MEAS Muth’s Co-Lawyers on a *pro bono* basis, with the understanding the Co-Lawyers would be retroactively remunerated under the ECCC’s Legal Assistance Scheme should Mr. MEAS Muth be determined to be indigent.³ On this same date, DSS issued a press release stating that “[i]n making the assignment, the DSS took into consideration the Suspect’s expressed preferences; the lawyers’ overall experience in international criminal and humanitarian law; their level of familiarity with the prevailing rules, practices and

¹ See Email from Interpretation and Translation Unit to Defence, “RE: translation request,” 4 November 2013, which includes a chart of deadlines to complete translation request indicating that the Defence’s latest translation requests will not be completed until the end of March 2014.

² Determination of Your Claim of Indigence and Decision on Your Request for the Remuneration of Counsel under the ECCC’s Legal Assistance Scheme, 30 April 2011, D56/11, para. 1.

³ *Id.*, para. 4.

procedures at the ECCC; their knowledge of the historical and political context of the Democratic Kampuchea era; and all the applicable conflict waivers.”⁴

3. On 24 December 2012, in response to this press release, International Co-Prosecutor Andrew Cayley requested the OCIJ to reject the appointment of the Co-Lawyers, claiming that there was an irreconcilable conflict of interest due to the Co-Lawyers’ concurrent representation of Mr. IENG Sary in Case 002.⁵ On 11 February 2013, Co-Investigating Judge Harmon imposed a ban on communications between the Co-Lawyers and Mr. MEAS Muth and issued a scheduling order for a response and reply.⁶ On 4 March 2013, the Defence submitted its Response and attached the Notice and Waiver that Mr. MEAS Muth provided to DSS on 13 June 2012.⁷ On 19 March 2013, the scheduling order was revised following the changed circumstances arising from Mr. IENG Sary’s death.⁸
4. On 23 April 2013, the Defence filed its second Response concerning the alleged conflict of interest.⁹ A week later, on 30 April 2013, Mr. Endeley determined that Mr. MEAS Muth was not indigent and that remuneration of the Co-Lawyers in whole or in part would not be authorized under the ECCC’s Legal Assistance Scheme.¹⁰ Based on this Determination, Co-Investigating Judge Harmon, on his own, on 2 May 2013, notified the Parties that Co-Prosecutor Cayley need not file his reply to his submission on the alleged conflict of interest issue until a decision was made by Mr. MEAS Muth concerning his legal representation.¹¹

⁴ Press Release, Mr. Ang Udom and Mr. Michael G. Karnavas Assigned as Defence Counsel to Represent a Suspect in Case 003, 14 December 2013.

⁵ International Co-Prosecutor’s Request that Appointment of Co-Lawyers-Designate be Rejected on the Basis of Irreconcilable Conflict of Interest, 24 December 2012, D56/1.

⁶ Decision and Scheduling Order Concerning Request for Appointment of Co-Lawyers-Designate, 11 February 2013, D56/3. On 28 February 2013, the deadline for submissions was extended through Rescheduling Order Concerning Request for Appointment of Co-Lawyers-Designate, 28 February 2013, D56/4.

⁷ Request for Leave to Extend Page Limitation and Submissions of the Co-Lawyers on Potential Conflict of Interest in Representation of Mr. MEAS Muth in Case 003, 4 March 2013, D56/4/1.

⁸ Second Decision and Re-scheduling Order Concerning Request for Appointment of Co-Lawyers Designate, 19 March 2013, D56/5.

⁹ Leave to Exceed Page Limitation & Co-Lawyers’ Response to International Co-Prosecutor’s Supplementary Submissions on Conflict of Interest of Co-Lawyers-Designate, 23 April 2013, D56/9.

¹⁰ Determination of Your Claim of Indigence and Decision on Your Request for the Remuneration of Counsel under the ECCC’s Legal Assistance Scheme, 30 April 2011, D56/11.

¹¹ Decision on Communication Between Co-Lawyers-Designate and Suspect, 2 May 2013, D56/12.

5. On 17 May 2013, the Defence appealed Mr. Endeley's Determination that Mr. MEAS Muth was not indigent.¹² On 29 July 2013, Co-Investigating Judge Harmon issued a decision vacating the Determination and ordered Mr. Endeley to reassess the question of Mr. MEAS Muth's indigence.¹³ On 23 September 2013, Mr. Endeley ultimately found that Mr. MEAS Muth was indigent and his legal assistance would be paid through the ECCC's Legal Assistance Scheme. Mr. Endeley also requested Co-Investigating Judge Harmon to lift the ban on communications between the Co-Lawyers and Mr. MEAS Muth.¹⁴ Co-Investigating Judge Harmon thus far has refused. On 2 October 2013, Co-Investigating Judge Harmon issued an order resuming the schedule for filings on the alleged conflict of interest,¹⁵ prompting the International Reserve Co-Prosecutor to file a reply (signed only by Deputy Co-Prosecutor William Smith) on 11 October 2013.¹⁶ To date, no decision has been made on the alleged conflict of interest, which was first raised by the former International Co-Prosecutor Cayley nearly one year ago.
6. Between 29 August 2013 and 28 October 2013, the Defence filed 14 submissions to the OCIJ.¹⁷ To the knowledge of the Defence, only the first of these submissions has been

¹² MEAS Muth's Appeal Against Determination of Claim of Indigence and Decision on Request for Remuneration of Counsel Under the ECCC's Legal Assistance Scheme, 17 May 2013, D56/11/2. The Defence appealed without being provided with the supporting material DSS had used in reaching its Determination. On 20 May 2013, considering "the principle of fundamental fairness," the International Co-Investigating Judge ordered DSS to provide the Defence with the requested material in a redacted form to protect the identity of any witnesses. The International Co-Investigating Judge decided that the Defence would have 15 days to make supplemental submissions upon receipt of the material. See Interim Order Concerning Appeal Against DSS' Determination on Indigence of MEAS Muth, 20 May 2013, D56/11/3, paras. 26-27, 33-34, 37. On 21 May 2013, DSS provided the Defence with two Reports prepared by Deloitte & Touche and one appendix of media articles. The two Reports were minimally redacted. On 5 June 2013, the Defence filed supplementary submissions including a revised supplementary annex. MEAS Muth's Supplemental Submissions to Support His Appeal Against Determination of Claim of Indigence and Decision on Request for Remuneration of Counsel Under the ECCC's Legal Assistance Scheme, 5 June 2013, and attached annex.

¹³ Decision on Appeal against the Determination by DSS on the Question of MEAS Muth's Indigence, 29 July 2013, D56/11/7.

¹⁴ Final Determination of Your Claim of Indigence and Decision on Your Request for the Remuneration of Counsel under the ECCC's Legal Assistance Scheme, 23 September 2013, D56/13.

¹⁵ Order Resuming the Schedule for Filings on the Issue of the Alleged Existence of a Conflict of Interest in the Representation of MEAS Muth, 2 October 2013, D56/14.

¹⁶ International Reserve Co-Prosecutor's Reply concerning Conflict of Interest of Co-Lawyers-Designate, 11 October 2013, D56/15.

¹⁷ MEAS Muth's Request to Access the Case File and Participate in the Judicial Investigation, 29 August 2013, D82; MEAS Muth's Request for Information Concerning the OCIJ's Investigative Approach and Methodology, 2 October 2013; MEAS Muth's Notice of Objection to Stephen Heder Having any Further Involvement in Case 003 and Request for the Work Product of Stephen Heder, 9 October 2013; MEAS Muth's Notice of Objection to David Boyle Having any Further Involvement in Case 003 and Request for the Work Product of David Boyle, 9 October 2013; MEAS Muth's Request to be Provided with Correspondence from the Head of the OCIJ Legal Unit to the United Nations Secretary General and all Related Material and to have this Material Placed on the Case File, 9 October 2013; MEAS Muth's Request for Clarification of Whether the OCIJ Considers Itself Bound by Pre-Trial Chamber Jurisprudence that Crimes Against Humanity Requires a Nexus With Armed

placed on the Case File. These submissions were intended to address defects in the judicial investigation that could impact on Mr. MEAS Muth's fair trial rights and to clarify the applicable law.

7. On 25 October 2013, Co-Investigating Judge Harmon sent a letter to the Defence stating that he was in receipt of the Defence's submissions and: "Given the possible implications of the conflict of interest alleged in the *International Co-Prosecutor's Request that Appointment of Co-Lawyers Designate Be Rejected on the Basis of Irreconcilable Conflicts of Interest* (D56/1) the above mentioned filings will be dealt with in due course, subject to the outcome of the decision on this matter."¹⁸ On 4 November 2013, the Defence appealed this constructive denial of the 14 submissions, asserting that a decision on the alleged conflict of interest in no way impacts the decisions which must be made on each of the 14 submissions.¹⁹

II. LAW AND ARGUMENT

8. The OCIJ has no legal authority to communicate with Mr. MEAS Muth without the presence of his Co-Lawyers because: **a.** Mr. MEAS Muth has the right to remain silent and intends to exercise this right; **b.** Mr. MEAS Muth has the right to be represented by the Co-Lawyers of his choice and intends to exercise this right; and **c.** the OCIJ must respect Mr. MEAS Muth's fair trial rights.

Conflict, 17 October 2013; MEAS Muth's Request for the OCIJ to Place Full Transcripts of all Witness Interviews on the Case File, 17 October 2013; MEAS Muth's Request for the Work Product of OCIJ Investigators Involved in Improper Investigative Practices in Case 002, 2 October 2013; MEAS Muth's Request for the OCIJ's Criteria Concerning "Senior Leaders of Democratic Kampuchea and Those Who Were Most Responsible", 17 October 2013; MEAS Muth's Request for the OCIJ to Compel the OCP to Provide the Defence With its Criteria Concerning "Senior Leaders of Democratic Kampuchea and Those Who Were Most Responsible", 17 October 2013; MEAS Muth's Request for Clarification Concerning Whether the Defence may Conduct Investigations at the Current Stage of the Proceedings, 2 October 2013; MEAS Muth's Motion Against the Application of Crimes Listed in Article 3 New of the Establishment Law (National Crimes), 24 October 2013; MEAS Muth's Request for the OCIJ to Re-Interview Witnesses, 24 October 2013; MEAS Muth's Motion Against the Application of JCE III, 28 October 2013.

¹⁸ Letter from OCIJ to Defence, *Submissions Filed by the Co-Lawyers-Designate in CF003*, 25 October 2013, D87. On 28 October 2013, Co-Investigating Judge Harmon sent a follow-up letter confirming that he was also in receipt of MEAS Muth's Motion Against the Application of JCE III and one other motion that the Co-Investigating Judge had omitted from the list set out in his first letter. Letter from OCIJ to Defence, *Corrigendum and Addition to the Letter Titled "Submissions Filed by the Co-Lawyers-Designate in CF003," Dated 25 October 2013*, 28 October 2013, D87/1.

¹⁹ MEAS Muth's Appeal against the Co-Investigating Judges' Constructive Denial of Fourteen of MEAS Muth's Submissions to the OCIJ, 4 November 2013, no document number yet assigned.

A. Mr. MEAS Muth has the right to remain silent

9. Mr. MEAS Muth has the fundamental fair trial right to remain silent. Article 14(3)(g) of the International Covenant on Civil and Political Rights (“ICCPR”), which must be respected in accordance with the Cambodian Constitution,²⁰ provides: “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... [n]ot to be compelled to testify against himself or to confess guilt.”²¹ Applicable ECCC law mandates recognition and respect for this fundamental fair trial right.
10. Specifically, Article 12(2) of the Agreement provides: “The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party.”
11. Article 35 new (g) of the Establishment Law provides: “In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the International Covenant on Civil and Political Rights. ... not to be compelled to testify against themselves or to confess guilt.”
12. Rule 21(1)(d) provides: “Every person suspected or prosecuted ... at every stage of the proceedings shall be informed of his/her right to remain silent.”
13. The International Criminal Court (“ICC”) similarly requires respect for the right to remain silent. Article 67(1)(g) of the ICC Statute provides that an accused shall have the right: “[n]ot to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt of innocence.”

²⁰ Article 31 of the Cambodian Constitution requires the ECCC to “recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women’s and children’s rights.” Constitution of the Kingdom of Cambodia dated 24 September 1993 Modified by Kram dated 8 March 1999 promulgating the amendments to Articles 11, 12, 13, 18, 22, 24, 26, 28, 30, 34, 51, 90, 91, 93 and other Articles from Chapter 8 through Chapter 14 of the Constitution of the Kingdom of Cambodia which was adopted by the National Assembly on the 4th of March 1999 (“Cambodian Constitution”).

²¹ Rule 21(1)(d) provides: “Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established. Any such person has the right to be informed of any charges brought against him/her, to be defended by a lawyer of his/her choice, and at every stage of the proceedings shall be informed of his/her right to remain silent.”

14. Article 21(4)(g) of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) provides: “In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: ... not to be compelled to testify against himself or to confess guilt.” In *Prosecutor v. Mrkšić et al.*, the ICTY Pre-Trial Chamber explained that “[t]hroughout the proceedings, the accused will enjoy the right to request to be heard in person by the Trial Chamber.... The right to speak himself is only an option for the accused. It is his own choice whether or not to make use of it in general or from time to time, or to make use of his right to remain silent.”²² If an accused exercises the right to remain silent, no adverse inferences may be drawn from the exercise of this fair trial right.²³
15. Mr. MEAS Muth notified the ECCC that he intends to exercise his right to remain silent by providing a signed Notice to DSS on 13 June 2012. This notice was also provided to International Co-Investigative Judge Harmon.²⁴ This Notice remains in effect. There is no dilemma: Mr. MEAS wishes to exercise his constitutionally guaranteed right to remain silent. As the Defence noted in the Response and Supplemental response, Mr. MEAS Muth harbors no illusions concerning the OCP’s intentions to have him charged, arrested, tried, convicted and die in prison: “Mr. MEAS Muth is aware of his constitutional right not to testify in a proceeding where the effective purpose – at least for the prosecution – is to elicit incriminating evidence that can be of assistance to the OCIJ as it conducts its investigation, and / or for prosecution.”²⁵ The Trial Chamber in Case 002/01 implicitly recognized the validity of this Notice by deciding not to call Mr. MEAS Muth as a witness after previously including him in the witness list. The OCIJ must similarly

²² *Prosecutor v. Mrkšić et al.*, IT-95-13/1-PT, Order for Filing Motions and Related Matters, 28 November 2003, p. 1.

²³ The ICTY *Čelebići* Appeals Chamber held: “Neither the Statute nor the Rules of this Tribunal expressly provide that an inference can be drawn from the failure of an accused to give evidence. At the same time, neither do they state that silence should not ‘be a consideration in the determination of guilt or innocence.’ Should it have been intended that such adverse consequences could result, ... an express provision and warning would have been required under the Statute, setting out the appropriate safeguards. Therefore ... an absolute prohibition against consideration of silence in the determination of guilt or innocence is guaranteed within the Statute and the Rules....” *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001, para. 783.

²⁴ See *supra* note 7.

²⁵ Leave to Exceed Page Limitation & Co-Lawyers’ Response to International Co-Prosecutor’s Supplementary Submissions on Conflict of Interest of Co-Lawyers-Designate, 23 April 2013, D56/9, para. 44. See also Request for Leave to Extend Page Limitation and Submissions of the Co-Lawyers on Potential Conflict of Interest in Representation of Mr. MEAS Muth in Case 003, 4 March 2013, D56/4/1, paras. 13, 38-39; Leave to Exceed Page Limitation & Co-Lawyers’ Response to International Co-Prosecutor’s Supplementary Submissions on Conflict of Interest of Co-Lawyers-Designate, 23 April 2013, D56/9, paras. 29, 44-45.

recognize the validity of the Notice by channeling its intended communication with Mr. MEAS Muth through his chosen Co-Lawyers.

B. Mr. MEAS Muth has the right to counsel of his choice

16. Mr. MEAS Muth has the fundamental fair trial right to be defended by counsel of his choice. This right is enshrined in the ICCPR.²⁶ Article 14(3)(d) provides: “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... to defend themselves in person or with the assistance of counsel of their own choosing...” The Cambodian Constitution requires that the ECCC respect the fair trial rights enshrined in the ICCPR.²⁷
17. Article 13(1) of the Agreement provides: “The rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process. Such rights shall, in particular, include the right: ... to engage a counsel of his or her choice...”²⁸
18. Article 35 new (d) of the Establishment Law provides: “In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the International Covenant on Civil and Political Rights. ... to defend themselves in person or with the assistance of counsel of their own choosing...”²⁹
19. Rule 21(1)(d) provides: “Every person suspected or prosecuted ... has the right ... to be defended by a lawyer of his/her choice...”
20. This right is also recognized by international and hybrid criminal tribunals,³⁰ regional human rights conventions,³¹ and many domestic courts.³²

²⁶ International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976 in accordance with Article 49.

²⁷ Article 31 of the Cambodian Constitution requires the ECCC to “recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women’s and children’s rights.”

²⁸ Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (“Agreement”).

²⁹ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (“Establishment Law”).

³⁰ See ICC Statute, Art. 67(1)(b), which states: “Rights of the Accused 1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing

21. In *Hanževački v. Croatia*, the European Court of Human Rights held that “the right of everyone charged with a criminal offence to be effectively defended by a lawyer is one of the fundamental features of a fair trial. A person charged with a criminal offence who does not wish to defend himself in person *must* be able to have recourse to legal assistance of his own choosing.”³³ The Human Rights Committee, a body of independent experts that monitors the implementation of the ICCPR by State parties (such as Cambodia),³⁴ has stated that the right to counsel of one’s choice may be violated where “the court or other relevant authorities hinder appointed lawyers from fulfilling their task effectively.”³⁵

conducted impartially, and to the following minimum guarantees, in full equality: ... (b) to have adequate time and facilities for the preparation of the defense and to communicate freely with counsel of the accused’s choosing in confidence”; ICTY Statute, Art. 21(4), which states: ““In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: ... (b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing; ... (d) ... to defend himself in person or through legal assistance of his own choosing”; International Criminal Tribunal for Rwanda Statute, Art. 20(4), Special Court for Sierra Leone Statute, Art. 17(4) (similar language).

³¹ See European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6(3)(c), which states: “Everyone charged with a criminal offence has the following minimum rights: ... (c) to defend himself in person or through legal assistance of his own choosing...”; American Convention on Human Rights, Art. 8(2)(d), which states: “Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: ... d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel...”; African Banjul Charter on Human and Peoples’ Rights, Art. 7(1), which states: “Every individual shall have the right to have his cause heard. This comprises: ... (c) the right to defence, including the right to be defended by counsel of his choice....”

³² For example, the United States Supreme Court recognized, in *Powell v. Alabama*, that “the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice.” *Powell v. Alabama*, 287 U.S. 45, 53 (1932). Similarly, according to Article 7 of the criminal procedure code of Bosnia and Herzegovina, “[t]he suspect or accused has a right to present his own defense or to defend himself with the professional aid of a defense attorney of his own choice.”

³³ *Hanževački v. Croatia*, Eur. Ct. H.R., Judgment, 16 April 2009, para. 21 (emphasis added). See also para. 28: “Having regard to the purpose of the Convention, which is to protect rights that are practical and effective, and to the prominent place the right to a fair administration of justice holds in a democratic society within the meaning of the Convention, the Court considers that any restrictive interpretation of Article 6 would not correspond to the aim and the purpose of that provision.”

³⁴ See Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, website, available at <http://www2.ohchr.org/english/bodies/hrc/>. Cambodia signed the ICCPR on 17 October 1980 and acceded to it on 26 May 1992. See United Nations Treaty Collection, website, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#3.

³⁵ Human Rights Committee, General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, 23 August 2007, U.N. Doc. CCPR/C/GC/32, available at <http://www1.umn.edu/humanrts/gencomm/hrcom32.html>, citing Communication No. 917/2000, Arutyunyan v. Uzbekistan, para. 6.3.

22. Mr. MEAS Muth has exercised his right to be defended by counsel of his choice by informing DSS of his choice of counsel and requesting that they be appointed.³⁶ DSS has appointed the Co-Lawyers. The OCIJ's formal recognition of the Co-Lawyers is not a prerequisite to the exercise of Mr. MEAS Muth's fundamental fair trial rights. The Co-Lawyers will be unable to fulfill their tasks effectively if they are not informed of and included in any communications the OCIJ intends to have with Mr. MEAS Muth. The OCIJ must respect Mr. MEAS Muth's right to be represented by chosen counsel.
23. Nothing in the Agreement or the Establishment Law provides that the OCIJ must formally recognize co-lawyers prior to their representation of a suspect. The only reference in the Agreement or the Establishment Law to the recognition of co-lawyers is the phrase "[t]he counsel of a suspect or an accused *who has been admitted as such by the Extraordinary Chambers.*"³⁷ Rule 11 of the ECCC Internal Rules specifies that it is DSS that establishes the criteria and procedures for assigning Co-Lawyers. It is DSS that enters into contracts with the Co-Lawyers. It is the "Head of the Defence Support Section [that] shall make determinations on ... the assignment of lawyers to indigent persons..." Other Rules dealing with counsel for suspects/charged persons/accused (for example Rule 81(5)) refer to DSS and make no mention of confirmation by the OCIJ or Chambers. The only reference to confirmation by the OCIJ is in DSS's own administrative regulations, formulated by DSS itself.³⁸ These administrative regulations can in no way limit Mr. MEAS Muth's fundamental fair trial right to be represented by counsel of his choice by requiring the OCIJ's pre-approval of counsel.

C. The OCIJ must respect Mr. MEAS Muth's fair trial rights

24. As set out above, Mr. MEAS Muth has the fundamental fair trial rights to remain silent and be defended by counsel of his choice. The Pre-Trial Chamber has affirmed that the rights enshrined in the ICCPR apply at *all* stages of the proceedings.³⁹ According to

³⁶ See Determination of Your Claim of Indigence and Decision on Your Request for the Remuneration of Counsel under the ECCC's Legal Assistance Scheme, 30 April 2011, D56/11, para. 1.

³⁷ This phrase is found in Article 21 of the Agreement and Article 42(3) of the Establishment Law. Emphasis added.

³⁸ DSS Administrative Regulation 6.2 refers to a form that DSS submits to the OCIJ or relevant Chamber to request the issuance of an order confirming the Co-Lawyers' assignment.

³⁹ See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ(PTC42), Decision on IENG Thirith's Appeal Against the Co-Investigating Judges' Order Rejecting the Requests for Stay of Proceedings on the Basis of Abuse of Process (D264/1), 10 August 2012, D264/2/6, para. 13: "For the purposes of this court the provisions of Articles 14 and 15 of the International Covenant on Civil and Political Rights ('the ICCPR') are applicable at all stages of proceedings before the ECCC."

Professor Wladimiroff, “[t]he prevailing opinion is that Article 14 of the ICCPR, guaranteeing the right to a fair trial, applies from the moment the actions of the authorities substantially affect the suspect.”⁴⁰ The European Court of Human Rights, in *Artico v. Italy*, affirmed that fair trial rights must not be “theoretical or illusory” but must be “practical and effective,” particularly “in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive.”⁴¹

25. Rule 57 of the ECCC Internal Rules expressly provides the right to have one’s counsel present and to remain silent during an initial appearance. Mr. MEAS Muth has expressed the intention to exercise these rights. The OCIJ must therefore respect Mr. MEAS Muth’s right to remain silent and to be defended by the Co-Lawyers. It *must* channel all communication with Mr. MEAS Muth through his assigned Co-Lawyers.
26. The Co-Investigating Judges’ failure to formally recognize the Co-Lawyers cannot be used as a basis to communicate with Mr. MEAS Muth without his Co-Lawyers’ presence. The Human Rights Committee stated that Article 14(3)(b) of the ICCPR requires that counsel must be able to act on behalf of his or her client “without restrictions, influence, pressure or undue interference from any quarter.”⁴² The Pre-Trial Chamber in Case 002 relied upon this statement by the Human Rights Committee to overturn a decision by the OCIJ which interfered with Mr. IENG Sary’s communication with his International Co-Lawyer.⁴³ Mr. MEAS Muth’s Co-Lawyers cannot act on Mr. MEAS Muth’s behalf without restriction or interference if they are excluded from communications between the OCIJ and their client.

⁴⁰ Michail Wladimiroff, *Rights of Suspects and Accused*, in INTERNATIONAL CRIMINAL JUSTICE: A CRITICAL ANALYSIS OF INSTITUTIONS AND PROCEDURES 417, 432 (Michael Bohlander, ed., 2007), available at http://www.wlaws.com/The_Rights_of_Suspects_and_Accused.pdf, citing N.A. Noor Mohammad, *Due Process of Law for Persons Accused of a Crime*, in THE INTERNATIONAL BILL OF RIGHTS 145-46 (Louis Henkin ed., Columbia Press 1981); and M. NOVAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 245 (N.P. Engel Publishers 1993). In France, too, the right to be assisted by counsel of one’s own choosing applies even before a person has been charged with a crime. See French Criminal Procedure Code. 63-4, para. 1.

⁴¹ *Artico v. Italy*, Eur. Ct. H.R., Judgment, 13 May 1980, para. 33.

⁴² Human Rights Committee, General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, 23 August 2007, U.N. Doc. CCPR/C/GC/32, available at <http://www1.umn.edu/humanrts/gencomm/hrcom32.html>.

⁴³ See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ(PTC64), Decision on IENG Sary’s Appeal against the Co-Investigating Judges’ Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, 11 June 2010, A371/2/12, para. 38.

27. Should the Co-Investigating Judges intend to meet with Mr. MEAS Muth for any reason without the presence of Mr. MEAS Muth's chosen Co-Lawyers, the Defence respectfully requests to be informed of this intention in advance. This will allow the Defence the opportunity to seek appellate review prior to any violation of Mr. MEAS Muth's fair trial rights.

Respectfully submitted,



ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. MEAS Muth

Signed in Phnom Penh, Kingdom of Cambodia on this 11th day of **November, 2013**