

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

FILING DETAILS

Case No: 003/07-09-2009-ECCC/OCIJ **Party Filing:** The Defence for MEAS Muth

Filed to: Co-Investigating Judges

Original language: ENGLISH

Date of document: 11 July 2016

CLASSIFICATION

**Classification of the document
suggested by the filing party:** PUBLIC



**Classification by OCIJ
or Chamber:** សាធារណៈ/Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

**MEAS MUTH'S COMBINED RESPONSE TO *AMICI CURIAE* SUBMISSIONS ON
THE QUESTION OF WHETHER UNDER CUSTOMARY INTERNATIONAL LAW
IN 1975-1979 AN ATTACK BY A STATE OR ORGANIZATION AGAINST ITS OWN
ARMED FORCES COULD AMOUNT TO AN ATTACK DIRECTED AGAINST A
CIVILIAN POPULATION FOR PURPOSES OF ARTICLE 5 OF THE
ESTABLISHMENT LAW**

TABLE OF AUTHORITIES

Filed by:

The Co-Lawyers:

ANG Udom

Michael G. KARNAVAS

Distribution to:

Co-Investigating Judges:

Judge YOU Bunleng

Judge Michael BOHLANDER

Co-Prosecutors:

CHEA Leang

Nicholas KOUMJIAN

All Civil Parties

Case 004 Defence Teams

Cambodian Law

1. Cambodian Order related to War Counsel (25 July 1973), Arts. 3-4 – *Attachment 1*.

ECCC Law – ECCC Legal Compendium

2. Agreement, Art. 9.
3. Establishment Law, Art. 5.

ECCC Filings and Jurisprudence – Already on the Case File

4. *Case of KAINING Guek Eav*, 001/18-07-2007-ECCC/TC, Judgement, 26 July 2010, E188, para. 304.
5. *Case of KAINING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, paras. 89-91, 95-96, 233.
6. *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Case 002/01 Judgement, 7 August 2014, E313, paras. 185-86.
7. Call for Submissions by the Parties in Cases 003 and 004 and Call for *Amicus Curiae* Briefs, 19 April 2016, D191, para. 9.
8. MEAS Muth's Application to Seize the Pre-Trial Chamber with a Request for Annulment of Charges of Grave Breaches, 29 July 2015, D146.
9. MEAS Muth's Submissions on the Question of Whether under Customary International Law in 1975-1979 an Attack by a State or Organization Against its Own Armed Forces Could Amount to an Attack Directed Against a Civilian Population for Purposes of Article 5 of the Establishment Law, 19 May 2016, D191/2, paras. 3-7, 13, 16-23, 25; n. 13.
10. *Amicus Curiae* Brief in Cases 003 and 004 – Professor Ben Saul, 19 May 2016, D191/3, paras. 3(d), 4-14, 16-22; n. 30 – *See also Annex A*.
11. *Amicus Curiae* Brief for Cases 003 and 004, 19 May 2016, D191/4, paras. 1(a), 3-21 – *See also Annex A*.

12. Attachment 28 to *Amicus Curiae* Brief for Cases 003 and 004, 19 May 2016, D191/4.1.28, referring to p. 3, 140-41, of the original judgement.
13. Attachment 29 to *Amicus Curiae* Brief for Cases 003 and 004, 19 May 2016, D191/4.1.29, p. 3, referring to p. 1982, 1986, and 1988 of the original judgement.
14. *Amicus Curiae* Brief, 19 May 2016, D191/5, paras. 1-10, 12, 14-16, 18-22; n. 15, 34, 35 – *See also Annex A.*
15. *Amicus Curiae* Brief of Professors Robinson, deGuzman, Jalloh and Cryer on Crimes Against Humanity (Cases 003 and 004), 17 May 2016, D191/6, paras. 4-21 – *See also Annex A.*
16. Brief of Ido Rosenzweig, 19 May 2016, D191/7, p. 3-6 – *See also Annex A.*
17. Brief of Dr. Joanna Nicholson as *Amicus Curiae* in Support of Neither Party, 19 May 2016, D191/8, p. 1-6 – *See also Annex A.*
18. *Amicus Curiae* for International Co-Investigating Judge, 17 May 2016, D191/9, paras. 15-24 – *See also Annex A.*
19. *Amicus Curiae* Brief in Response to Call for Submissions [sic] by the Parties in the Cases 003 and 004 and Call for *Amicus Curiae* Briefs, 19 May 2016, D191/10, paras. 5, 8-9, 16, 18-19, 21 – *See also Annex A.*
20. *Amicus Curiae* Brief Filed by Drs Williams and Grey in Response to Call for *Amicus Curiae* Briefs in Cases 003 and 004 Dated 19 April [sic] 2016, 19 May 2016, D191/11, paras. 3, 6, 10-17, 19-22, 25-27, 29; n. 17 – *See also Annex A.*
21. Brief Filed by the Center for International and Comparative Law, University of Baltimore School of Law on the Legality of Targeting Members of One's Own Military, 18 May 2016, D191/12, paras. 1, 3-5, 7-20, 23 – *See also Annex A.*
22. Queen's University Belfast Human Rights Centre Response to the ECCC Office of the Co-Investigating Judges' 'Call for Submissions by the Parties in Cases 003 and 004 and Call for *Amicus Curiae* Briefs', 12 May 2016, D191/13, paras. 3-9, 12-15, 18 – *See also Annex A.*

23. Order on Request to Obtain English Translations of Three German Decisions and One Dutch Decision, 21 June 2016, D191/16/1.
24. MEAS Muth's Appeal Against the International Co-Investigating Judge's Decision on MEAS Muth's Request for Clarification Concerning Crimes Against Humanity and the Nexus with Armed Conflict, 1 July 2016, D87/2/1.7/1/1/2.

International Conventions

25. Universal Declaration of Human Rights, U.N.G.A. Res. 217 A (III), 10 December 1948, Art. 11(2) – *ECCC Legal Compendium*.
26. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N.G.A. Res. 39/46, 10 December 1984, Arts. 4-5 – *ECCC Legal Compendium*.
27. International Covenant on Civil and Political Rights, U.N.G.A. Res. 2200A(XXI), 16 December 1966, Art. 15 – *ECCC Legal Compendium*.
28. Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, 75 UNTS 287, Art. 67 – *ECCC Legal Compendium*.
29. International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977, Arts. 43, 50 – *ECCC Legal Compendium*.
30. International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609, Art. 1(1) – *ECCC Legal Compendium*.
31. Draft Code of Offences against the Peace and Security of Mankind, II Yearbook of the International Law Commission (1954), Art. 2(11) – *Available at http://legal.un.org/docs/?path=../ilc/publications/yearbooks/english/ilc_1954_v2.pdf&lang=E*.

UNGA Resolutions and other International Material

32. Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, II Yearbook of the International Law Commission (1950) 374-78, Principle 6(c) – *Available at* http://legal.un.org/docs/?path=../ilc/publications/yearbooks/english/ilc_1950_v2.pdf&lang=E.
33. Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc S/1994/674 Annex (1994), para. 77 – *Available at* http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf
34. U.N. General Assembly, Int'l Law Comm'n Rep (ILC), *First Report on Crimes Against Humanity*, para. 135, U.N. Doc. A/CN.4/680, (Feb. 17 2015) – *Available at* <http://legal.un.org/docs/?symbol=A/CN.4/680>.
35. Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, UN Doc. A/51/22, 1996, para. 86 – *Attachment 2*.
36. Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II, UN Doc. A/51/22, 1996, p. 65-69 – *Attachment 3*.
37. Report of the Study Group of the International Law Commission, Fragmentation of International Law, UN Doc. A/CN.4/L.682, 13 April 2006, para. 57 – *Available at* http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf.
38. International Law Commission, Memorandum of the UN Secretary-General, The Charter and Judgement of the Nürnberg Tribunal: History and Analysis, UN Doc. A/CN.4/5, 1949, p. 65-66 – *Available at* http://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_5.pdf&lang=E.

International Tribunals' Statutes and Jurisprudence

WWII-Era

39. Charter of the International Military Tribunal, Annex to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (adopted and entered into force 8 August 1945) 82 UNTS 279, Art. 6(c) – *ECCC Legal Compendium*.

40. Charter of the International Military Tribunal for the Far East, General Order 1, General Headquarters Supreme Commander of the Allied Forces (19 January 1946) 4 Bevans 20 (as amended 26 April 1946, 4 Bevans 27), Art. 5(c) – *ECCC Legal Compendium*.
41. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, 3 Official Gazette Control Council for Germany 50-55 (1946), Art. II – *ECCC Legal Compendium*.
42. *In re Pilz*, Special Court of Cassation, 5 July 1950 – Available in Annex B and on Case 003 Case File at D191/2.1.3.

ICTY – Available on ICTY website

43. Updated Statute of the International Criminal Tribunal for the former Yugoslavia (September 2009), Art. 5.
44. *Prosecutor v. Martić*, IT-95-11-A, Judgement, 8 October 2008, paras. 291-314.
45. *Prosecutor v. Tadić*, IT-94-1-T, Judgement, 7 May 1997, para. 643.
46. *Prosecutor v. Kunarac*, IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, paras. 468-71.
47. *Prosecutor v. Deronjić*, IT-02-61-A, Judgement, 20 July 2005, para. 97.
48. *Prosecutor v. Galić*, IT-98-29-A, Judgement, 30 November 2006, para. 144, and Separate and Partially Dissenting Opinion of Judge Schomburg, para. 21.
49. *Prosecutor v. Jelisić*, IT-95-10-T, Judgement, 14 December 1999, para. 54.
50. *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004, paras. 103-16.
51. *Prosecutor v. Mrkšić et al.*, IT-95-13/1-A, Judgement, 5 May 2009, paras. 20-33.
52. *Prosecutor v. Krstić*, IT-98-33-T, Judgement, 2 August 2001, paras. 549, 554, 558-68, 591, 594.

ICTR – Available on ICTR website

53. Statute of the International Criminal Tribunal for Rwanda (31 January 2010), Art. 3.
54. *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgement, 2 September 1998, para. 582.
55. *Prosecutor v. Kayishema & Ruzindana*, ICTR-95-1-T, Judgement, 21 May 1999, paras. 127, 172.
56. *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Judgement, 28 November 2007, para. 1029.

SCSL – Available on SCSL website

57. Statute of the Special Court for Sierra Leone, adopted by U.N. Security Council Resolution 1315, (14 August 2000), Art. 2.
58. *Prosecutor v. Norman*, SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, Dissenting Opinion of Justice Robertson, paras. 9, 12, 14.
59. *Prosecutor v. Fofana et al.*, SCSL-04-14-A, Judgement, 28 May 2008, para. 260.

East Timor – Available on ECCC Legal Compendium

60. Regulation on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, adopted by U.N. Transitional Administration in East Timor, U.N. Doc. UNTAET/REG/2000/15 (6 June 2000), Section 5.1.

ICC – Available on ECCC Legal Compendium

61. Rome Statute of the International Criminal Court, done at Rome on 17 July 1998, in force on 1 July 2002, 2187 UNTS 38544, Art. 7.

ICJ – Available on ICJ website

62. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, para. 25.
63. *Fisheries Case (United Kingdom v. Norway)*, ICJ Reports (1951), p. 138-39.

64. *North Sea Continental Shelf Cases*, ICJ Reports (1969), para. 74.

65. *Nicaragua v. US*, (Merits), ICJ Reports (1986), para. 207.

ECHR – Available on ECHR website

66. *Engel and Others v. The Netherlands*, no. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, 8 June 1976, § 54 and Joint Separate Opinion of Judges O’Donoghue and Pedersen, Series A no. 22.

Foreign Domestic Law and Jurisprudence

67. Army Act [United Kingdom] 1955, 3 & 4 ELIZ. 2 Ch. 18, §§ 24-143, 205-13 – Available at http://www.legislation.gov.uk/ukpga/1955/18/pdfs/ukpga_19550018_en.pdf.

68. MANUAL ON MILITARY LAW 208, paras. 1-2, n. (a) (War Office, 5th ed., 1907) – Available at <https://ia800203.us.archive.org/4/items/manualofmilitary00greauoft/manualofmilitary00greauoft.pdf>.

69. 1969 Romanian Criminal Code, Art. 358(1), (3) – Available at www.selec.org/doc/present_Criminal_Code.doc.

70. Argentine Criminal Code (Law No. 11.179 (1984)), Arts. 80(2)-(4), 81(b), 144bis, 144ter – Available at http://www.wipo.int/wipolex/en/text.jsp?file_id=283801.

71. Central Court of Instruction, Summary 19/97, “Condor Operation,” Order, 3 December 1998, p. 40 – Available at http://elclarin.cl/fpa/pdf/p_031298_en.pdf.

72. Law No. 15/2003 of November 25, 2003 amending the Penal Code, also called Organic Law No. 10/1995 of November 23, 1995 – Available at http://www.wipo.int/wipolex/en/text.jsp?file_id=267081.

73. *R Case*, StS 19/48, Decisions in Criminal Cases of the Supreme Court for the British Zone, Vol. 1, 27 July 1948, 46-48 – Available on Case 003 Case File at D191/3.1.1 and Annex B.

74. *P and Others*, StS 111/48, Decisions in Criminal Cases of the Supreme Court for the British Zone, Vol. 1, 7 December 1948, 224-28 – Available on Case 003 Case File at D191/3.1.1 and Annex B.
75. *H Case*, StS 309/49, Decisions in Criminal Cases of the Supreme Court for the British Zone, Vol. 2, 18 October 1949, 233, 238, 246 – Attachment 4 and Annex B.

Books, Articles, and Miscellaneous

76. ANTONIO CASSESE, THE HUMAN DIMENSION OF INTERNATIONAL LAW, SELECTED PAPERS 466 (2008) – Attachment 5.
77. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 87, 104 (Oxford University Press, 3rd ed., 2013) – Attachment 6.
78. CAPTAIN THOMAS FREDERICK SIMMONS, R.A, REMARKS ON THE CONSTITUTION AND PRACTICE OF COURTS MARTIAL 404, para. 1097 (J. Murray, 1863) – Available at <https://ia902607.us.archive.org/24/items/remarksonconsti00simmgoog/remarksonconsti00simmgoog.pdf>.
79. Susan Lamb, Nullum Crimen, Nulla Poena Sine Lege in *International Criminal Law*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 743, 745-46 (Cassese et al., eds., 2002) – Available on Shared Materials Drive at English ERNs 00697935, 00697937-00697938.
80. Beth van Schaack, Crimen Sine Lege: *Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEORGETOWN L. J. 119, 121-25, 182 (2008) – Attachment 7.
81. THE FEDERALIST, No. 84, *Certain General and Miscellaneous Objections to the Constitution Considered and Answered* (28 May 1788) – Available at http://avalon.law.yale.edu/18th_century/fed84.asp.
82. Egon Schwelb, *Crimes against Humanity*, 23 BRIT. Y. B. INT'L L. 178, 190, 194-95 (1946) – Attachment 8.
83. David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85, 104 (2004) – Available at <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1165&context=facpub>.

84. Hansdeep Singh, *Critique of the Mrkšić Trial Chamber (ICTY) Judgment*, 8 LAW & PRAC. INT'L CTS. & TRIB. 247 (2009) – Available at https://www.icaadglobal.org/files/files/Int__1_Courts___Tribunals-_Crimes_Against_Humanity.pdf.
85. Emily Haslam, *Neddermeier*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 840 (Antonio Cassese, ed., Oxford University Press 2009) – Available on Case 003 Case File at D191/2.1.11.
86. Salif Nimaga, *The International Criminal Law Regime and International Human Rights Law: Theoretical and Empirical Explorations*, in ETHICS AND HUMAN RIGHTS IN A GLOBALIZED WORLD 104-05 (2009) – Attachment 9.
87. DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 94 (University of Chicago Press 1991) – Attachment 10.
88. Dr. Joanna Nicholson, “Is the Requirement That Crimes Against Humanity Be Committed Against a ‘Civilian Population’ Really Necessary?”, *Opinio Juris*, 4 July 2016 – Available at http://opiniojuris.org/2016/07/04/is-the-requirement-that-crimes-against-humanity-be-committed-against-a-civilian-population-really-necessary/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29.
89. Merriam-Webster Dictionary – Available at <http://www.merriam-webster.com/dictionary/population>.
90. *Dictionnaire de l'Académie française* – Attachment 11.