



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

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត
Office of the Co-Investigating Judges
Bureau des Co-juges d'instruction

Case File No.: 004/07-09-2009-ECCC-OCIJ

Before: **Judge YOU Bunleng**
Judge Mark B. HARMON

Date: **17 May 2013**

Original: **English**

Classification: **Public**

ឯកសារដើម
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception):
..... 17 / 05 / 2013
ម៉ោង (Time/Heure): 16 : 20
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé
du dossier: SANN RADA

**DECISION ON MOTION AND SUPPLEMENTAL BRIEF ON SUSPECT'S
RIGHT TO COUNSEL**

Distribution to:
Co-Prosecutors
CHEA Leang
Andrew CAYLEY

Notification to:
Civil Party Lawyers
CHET Vanly
HONG Kimsuon
KIM Mengkhy
LOR Chunthy
SAM Sokong
TY Srinna
VEN Pov

Annie DELAHAIE
Laure DESFORGES
Herve DIAKIESE

Ferdinand DJAMMEN-
NZEPA
Nicole DUMAS
Isabelle DURAND
Françoise GAUTRY
Martine JACQUIN
Emmanuel JACOMY
Christine MARTINEAU
Barnabe NEKUI
Lyma NGUYEN
Philippine SUTZ

Copy to:
Applicants
MOM Luch
Goran SLUITER
Richard ROGERS

DSS
Isaac ENDELEY

DDOA
Knut ROSANDHAUG



1. **Noting** the Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea, dated 6 June 2003 (the “ECCC Agreement”);
2. **Noting** the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, dated 27 October 2004 (the “ECCC Law”);
3. **Noting** Rules 11, 21, 22, 55, 57 and 72 of the ECCC Internal Rules, Rev.8 (the “Internal Rules”);
4. **Noting** Articles 1, 2, 5, 7 and 9 of the DSS Administrative Regulations (the “DSS Administrative Regulations”);
5. **Noting** the Third Introductory Submission, dated 20 November 2008, relating to Case File 004,¹ which was placed on the case file on 7 September 2009;²
6. **Noting** the judicial investigation opened in relation to alleged violations of the **1956 Penal Code**, the **Convention on the Prevention and Punishment of the Crime of Genocide** and **Crimes against Humanity**, punishable under Articles 3 (new), 4, 5, 29 (new) and 39 (new) of the ECCC Law; and Articles 209, 210, 500, 501, 503, 504, 505, 506, 507 and 508 of the 1956 Penal Code;
7. **Noting** the letter of the Co-Investigating Judges on *Defence rights in case File 003 and 004*, dated 23 September 2010³.
8. **Noting** the Co-investigating Judges (“CIJs”) *Decision on Request for Access to Case Files 003 and 004*, dated 5 April 2011;⁴
9. **Considering** the *Notification of Suspect Rights*, dated 24 February 2012 (D110)⁵ and the *Lawyer’s Recognition Decision*, dated 3 May 2012 (D111/5 – the “*Recognition Decision*”)⁶ handed down by Reserve International Co-Investigating Judge (“RICIJ”), Laurent Kasper-Ansermet;
10. **Noting** that, on 22 February 2013 and on 17 May 2013, Co-Investigating Judges You and Harmon signed Written Records of Disagreement concerning *inter alia* this matter;

¹ Case File No. 004-D1, *Co-Prosecutor’s Third Introductory Submission*, 20 November 2008.

² Case File No. 004-D1/1, *Acting International Co-Prosecutor’s Notice of Filing of the Second Introductory Submission*, 7 September 2009.

³ Case File No. 004-A1/2, *Response of the CIJs on Defence rights in Case File 003 and 004*, 23 September 2010.

⁴ Case File No: 004-D4/1, *Decision on Request for Access to Case Files 003 and 004*, 5 April 2011.

⁵ Case File No. 004-D110, *Notification of Suspect Rights*, 24 February 2012.

⁶ Case File No. 004-D111/5, *Lawyer’s Recognition decision*, 3 May 2012.



11. **Noting** the International Co-Investigating Judge's ("CIJ") *Decision on Urgent Request for Extension of Page Limit for Motion on Suspect's Right to Counsel*, dated 18 March 2013 (D122/1)⁷;
12. **Considering** the *Motion on Suspect's Right to Counsel* filed by Mom Luch, Richard Rogers and Goran Sluiter (the "Applicants") on 20 March 2013 (D122/2 - the "*Motion on Right to Counsel*")⁸;
13. **Considering** the *Supplemental Brief on Suspect's right to Counsel* filed by the Applicants on 12 April 2013 (D122/5)⁹;

DISCUSSION

Arguments of the Applicants and Relief Sought

14. The Applicant's *Motion on Right to Counsel* posits that "*the Suspect has the right to an effective defence through foreign counsel of his own choosing, free from unwarranted interference by court administrators*" and, accordingly, requests that the CIJs "*order the Office of Administration ("OA"), including the Defence Support Section ("DSS"), to issue a Legal Services Contract for Richard Rogers ("Rogers") as foreign co-lawyer for the Suspect*"¹⁰.
15. The request is based on a claim that both DSS and the OA have "*flouted*" a decision on 3 May 2012, whereby "*Reserve International Co-Investigating Judge Laurent Kasper-Ansermet ("RICIJ") issued a Lawyers' Recognition Decision ("Recognition Decision") declaring Rogers as having "been properly selected and retained as Counsel" by the Suspect and ordering the OA and DSS to "recognize the assignment of [...] Rogers" and provide "Rogers with the necessary resources to ensure effective representation."*"¹¹
16. The Applicants' *Supplemental Brief on Suspect's right to Counsel* states that new documents recently disclosed to ██████'s Lawyers raise new facts that were not known to them at the time they filed the *Motion on Suspect's Right to Counsel* on 20 March 2013.
17. According to the Supplemental Brief, the Deputy Director of the Office of Administration ("DDOA"), Knut Rosandhaug, knowingly attempted to mislead the CIJs, with respect to the process for selection and assignment of Rogers as a Foreign Co-Lawyer. The Supplemental Brief further asserts that the DDOA and the Chief of DSS, Isaac Endeley, did not act in good faith when dealing with this issue.

⁷ Case File No. 004-D122/1 *Decision on Urgent Request for Extension of Page Limit for Motion on Suspect's Right to Counsel*, 18 March 2013.

⁸ Case File No. 004-D122/2, *Motion on Suspect's Right to Counsel*, 20 March 2013.

⁹ Case File No. 004-D122/5, *Supplemental Brief on Suspect's right to Counsel*, on 12 April 2013.

¹⁰ Case File No. 004-D122/2, *Motion on Suspect's Right to Counsel*, 20 March 2013, para. 2.

¹¹ Case File No. 004-D122/2, *Motion on Suspect's Right to Counsel*, 20 March 2013, paras 3 and 4.



18. On these grounds, the Applicants request the CIJs to review the action of the DDOA and the Chief of DSS and to order the OA to issue a contract for Rogers.

Background

19. On 29 July 2010, Rogers, then Chief of DSS, filed a letter to the CIJs requesting access to Case Files 003 and 004 and other procedural rights stated to be guaranteed by Articles 21, 55(8) and 55(10) of the Internal Rules. According to the above mentioned letter, Rogers explained his concerns with regard to the situation of the Suspects in Cases 003 and 004, who were stated to be “*left without any form of legal representation or means of protecting their fair trial rights, despite being substantially affected by the investigation*”¹². Subsequently, by Letter dated 20 September 2010, DSS followed up with additional explanations.¹³
20. On 23 September 2010 the CIJs, in a letter to DSS, explained why the above mentioned request regarding access to Case Files 003 and 004 could not be granted. The CIJs stated *inter alia* that “*Defence rights are fully exercisable (and the equality-of-arms principle must be strictly upheld) once a person is charged and thereby becomes a party to the proceedings. However, as long as a person is not officially charged, his/her rights remain limited. This is the case in all procedural systems*”¹⁴.
21. Subsequently, the CIJs confirmed the above mentioned decision:
- a. on 5 April 2011, the CIJs rendered a *Decision on Request for Access to Case Files 003 and 004*, rejecting the Motion of provisionally assigned Counsel in Cases 003 and 004 requesting access to the Case Files,¹⁵
 - b. on 19 May 2011, the CIJs issued an *Order on Motion for Reconsideration of the Decision on the Defence Request for Access to Case Files 003 and 004 dated 5 April 2011*, in which they rejected the Motion for Reconsideration filed by the assigned Counsel in Cases 003 and 004¹⁶.
22. On 24 February 2012, RICIJ Kasper-Ansermet issued a *Notification of Suspect Rights* decision, which stated *inter alia* that the Suspect is a “*named suspect*” in the Introductory and Supplementary Submissions initiating Case 004, and notified him of the substance of the allegations against him. The Suspect was informed that, as a result, “*in accordance with Rules of the ECCC [Rule 21(1)(d)], procedural rights and guarantees attached to the status of Suspect notably include the right to be defended by a lawyer of his/her choice, to have access to the case*

¹² Case File No. 004-D4.1.29, *DSS letter on defence rights in case 003 and 004*, 29 July 2010.

¹³ Case File No. 004-A1/1, *Follow up to DSS letter on Defence rights in Case file 003 and 004*, 20 September 2010.

¹⁴ Case File No. 004-A1/2, *Response of the CIJs on Defence rights in Case File 003 and 004*, 23 September 2010.

¹⁵ Case File No: 004-D4/1, *Decision on Request for Access to Case Files 003 and 004*, 5 April 2011.

¹⁶ Case File No: 004-D4/2/1, *Order on Motion for Reconsideration of the Decision on the Defence Request for Access to Case Files 003 and 004 dated 5 April 2011*, 19 May 2011.



file (application, by analogy, of Rules 55(6), 55(1) and 58, except for the provisions of Rule 58(6) of the ECCC and to remain silent at every stage of the proceedings)".¹⁷

23. This decision created unique circumstances by notifying Suspect status to a person who was simply referred to by name in the Co-Prosecutors' Submissions¹⁸ and, with respect to whom, no decision to charge has been taken by the CIJs at any time. Furthermore, this decision attaches rights to such status beyond the provisions relating to suspect rights set forth in Internal Rule 21.
24. The *Notification of Suspect Rights* decision further invited the Suspect to contact DSS in order to provide the Suspect with *inter alia* "a list of counsels kept available for all those entitled to legal assistance before the ECCC",¹⁹ and the RICIJ then informed DSS of the *Notification of Suspect Rights* decision.²⁰ On 22 March 2012, DSS responded that it had contacted the Suspect and provided him with a list of lawyers.²¹
25. On 29 March 2012, the DSS Officer in Charge ("OIC"), ██████████, assigned Mom Luch as provisional Cambodian counsel to represent the Suspect on the basis of a "Form 7" request received from the Suspect. In addition, ██████████ informed the CIJs that the Suspect "*has selected a foreign co-lawyer, Richard Rogers, and that the DSS is initially requesting a legal consultancy contract for said lawyer, pending his admission to the Bar association of the Kingdom of Cambodia*".²² The Applicants affirm that, following DSS standard practice, Rogers had been included in the list provided to the Suspect by the DSS OIC on the basis that he met the relevant criteria, despite not yet being registered with the Bar Association of the Kingdom of Cambodia ("BAKC") at that time.²³
26. On ██████████, the DSS OIC, ██████████, left the employment of the ECCC.
27. On 1 April 2012, Mom Luch and Rogers wrote to the CIJs, stating that they had taken instructions from the Suspect concerning his decision to exercise his right to silence and requesting "*all the rights and privileges enjoyed by other defence teams at the ECCC, including access to the Case File...*".²⁴
28. On 17 April 2012, Isaac Endeley assumed the position of Chief of DSS.

¹⁷ Case File No.004-D110, *Notification of Suspect Rights*, 24 February 2012, paras. 1 and 4.

¹⁸ Case File No. 004-D1, *Co-Prosecutor's Third Introductory Submission*, 20 November 2008.

¹⁹ Case File No.004-D110, *Notification of Suspect Rights*, 24 February 2012, para. 3.

²⁰ Case File No.004-D111, 6 March 2012, para. 4.

²¹ Case File No.004-D111/1, *Letter from DSS to the CIJs*, 22 March 2012, para (1).

²² Case File No.004-D111/2, *Provisional Assignment of Mr. Mom Luch as Cambodian Co-Lawyer for case 004 Suspect* ██████████, 29 March 2012, paras. 7 and 8.

²³ Case File No.004-122/2, *Motion on Suspect's Right to Counsel*, paras 10-12.

²⁴ Case File No.004-D111/3, *Letter from the Defence to CIJ*, 1 April 2012.



29. On 25 April 2012, Isaac Endeley withdrew the previous request for a legal consultancy for Rogers on the basis of “i) an apparent conflict of interest resulting from Mr Rogers’ previous position as Chief of the DSS; ii) perceived procedural irregularities in the assignment process; and iii) the fact that Mr Rogers had not yet been admitted to the BAKC and, therefore, was not eligible or qualified to represent indigent persons appearing before the ECCC”.²⁵
30. On 3 May 2012, DSS informed the CIJs that the Suspect had insufficient means to pay for his own defence, requested the CIJs to “note Mr. MOM Luch’s permanent assignment as the Cambodian Co-Lawyer” for the Suspect and noted that “the process of assigning a Foreign Co-Lawyer ... is ongoing”.²⁶
31. Also on 3 May 2012, RICIJ Kasper-Ansermet issued the *Recognition Decision* declaring that “Mr. Mom Luch and Mr. Richard Rogers have been properly selected and retained as Counsel by [the Suspect], according to his right to counsel of choice”.²⁷ Noting that the UNAKRT administration had “failed to issue the contract to Richard Rogers or provide reasons to the Investigating Judges for having not done so”, the RICIJ ordered the OA, including DSS, to “recognise the assignment of Mr MOM Luch and Mr Richard Rogers, unless and until their representation is withdrawn by [the Suspect] or the appropriate Chamber / judicial authority”.
32. On 4 May 2012, RICIJ Kasper-Ansermet ended his tenure as the International Co-Investigating Judge at the ECCC.
33. The Applicants note that Rogers was sworn in at the Cambodian Court of Appeal on 11 May 2013.²⁸
34. On 18 May 2012, the DDOA, Knut Rosandhaug, filed a Memorandum entitled *Clarification Regarding the "Lawyer's Recognition Decision"* (“Memorandum”) with the CIJs noting that there was some ambiguity as to whether Rogers had been retained as counsel or simply as a legal consultant, and stating that “[a]s of the date of the “Lawyer’s Recognition Decision”, Mr. Rogers had not yet met the criteria, was not enrolled on the list and, therefore, was not eligible to represent a Suspect or an Accused Person before the ECCC. It remains unclear how [the Suspect] came to know about Mr. Rogers or why their arrangement would be deemed to fall under the Legal Assistance Scheme”.²⁹

²⁵ See Case File No. 004-D111/6, *Memorandum of the Office of Administration to the CIJs, Clarification Regarding the "Lawyer's Recognition Decision"*, 18 May 2012, para. 17 and Annex XII (D111/6.12).

²⁶ Case File No.004-D111/4, *Letter of the Defense Support Section*, 3 May 2012.

²⁷ Case File No.004-D111/5, *Lawyer’s Recognition Decision*, dispositive.

²⁸ Case File No. 004-D122/2, *Motion on Suspect’s Rights*, para. 18, 20 March 2013.

²⁹ Case File No. 004-D111/6, *Memorandum of the Office of Administration to the CIJ, Clarification Regarding the "Lawyer's Recognition Decision"*, 18 May 2012.



35. On 22 May 2012, International Co-Prosecutor Andrew Cayley sent the DDOA an e-mail advising of his concern that the principles of fairness and the right to be heard required the Memorandum to be notified to Rogers.
36. On 23 May 2012, the DDOA filed a further Memorandum entitled *Clarification Regarding the "Lawyer's Recognition Decision" - Concerns of International Co-Prosecutor* to the CIJs, copying the above mentioned email from the International Co-Prosecutor.³⁰
37. On 30 May 2012, the Chief of DSS informed Rogers that he had declined to place his name on the list of eligible Foreign Co-Lawyers, on the basis that he lacked the requisite working experience in criminal proceedings and his concerns about actual or potential conflicts of interest and ethical conflicts.³¹
38. On 5 October 2012, after having informed the Suspect on 7 May 2012 that Rogers would not be assigned to him,³² the Chief of DSS notified the CIJs that the Suspect had selected Goran Sluiter as his Foreign Co-Lawyer and that, having been sworn in by the Appeal Court of the Kingdom of Cambodia on that date, Goran Sluiter was assigned as the Foreign Co-Lawyer to represent the Suspect before the ECCC in Case 004.³³
39. On 22 October 2012, Mom Luch submitted a letter to the CIJs introducing the Defence Team for the Suspect, claiming that the Suspect was represented by both Goran Sluiter and Rogers, and requesting *inter alia*: “[t]hat the Co-Investigating Judges ensure that suspects before the ECCC enjoy all their fair trial rights, that these rights must not be theoretical and illusory but real and effective”.³⁴
40. On 14 December 2012, the Applicants filed an *Urgent Motion Requesting an Order for Access to the Case File* in the name of the “Charged Person”, recalling that “the Charged Person has been informed by the RICIJ that he has the right to access the case file”.³⁵
41. On 20 December 2012, the Applicants submitted a letter regarding ██████’s *Right to information as to the nature and cause of the charge against him and his right to adequate facilities to prepare his defence*, noting that victims had been informed of the scope of the investigation with “little or no effort being made to

³⁰ Case File No. 004-D111/7, *Memorandum of the Office of Administration to the CIJ, Clarification Regarding the "Lawyer's Recognition Decision" - Concerns of International Co-Prosecutor*, 23 May 2012.

³¹ Case File No. 004-D122/2.1.50, *Letter from the Head of DSS to Rogers*, 30 May 2012, para. 14: “While the lack of relevant experience highlighted above prevents your inclusion on the list, there are also a number of problems related to actual or potential conflicts of interest that weigh against your appointment as a Co-Lawyer.”

³² See Case File No. 004-D111/6, *Memorandum the Office of Administration to the CIJ, Clarification Regarding the "Lawyer's Recognition Decision"*, 18 May 2012, para. 21 and Annex XIV (D111/6.12).

³³ Case File No. 004-D111/8, *DSS Letter, Assignment of Foreign Co-Lawyer*, 5 October 2012.

³⁴ Case File No. 004- D122/2.1.41, *Letter from the Defence to the CIJ*, 22 October 2012.

³⁵ Case File No. 004-D121, *Urgent Motion Requesting Order for Access to the Case File*, 14 December 2012.



*inform him of the content of the allegations and the nature of developments in the proceedings against him”.*³⁶

42. On 14 January 2013, the Applicants filed an *Urgent Request for Extension of Page Limit for Motion on Suspect’s Right to Counsel*, which was granted on 19 March 2013,³⁷ after the signature of a Written Record of Disagreement between the CIJs on 22 February 2013. The *Motion on Suspect’s Right to Counsel* was filed by the Applicants on 20 March 2013.
43. On 3 April 2013, the Applicants filed a notification of intention to submit a further brief on the Suspect’s right to counsel and, on 12 April 2012, the *Supplemental Brief on Suspect’s Right to Counsel* was filed.

REASONS FOR THE DECISION

Power to Reconsider Previous Decisions of the CIJs

44. The CIJ notes the inherent power of judges,³⁸ including ECCC Judges,³⁹ to reconsider a decision previously rendered in the event of a change of circumstances (new facts, new arguments) but also where the previous decision was erroneous or could cause an injustice.⁴⁰

Basis for the Motion – a Suspect’s right to counsel

a) The applicable law

³⁶ Case File No. 004-D121/1, [REDACTED]’s *Right to information as to the nature and cause of the charge against him and his right to adequate facilities to prepare his defence*, 20 December 2012.

³⁷ Case File No. 004-D122/1, *Decision on Urgent Request for Extension of Page Limit for Motion on Suspect’s Right to Counsel*, 19 March 2013.

³⁸ ICTY, *Prosecutor v. Galic*, IT-98-29-A, Appeals Chamber, *Decision on Defence’s Request for Reconsideration*, 16 July 2004, p.2; ICTY, *Milosevic v. Prosecutor*, IT-02-54-AR73.7, Appeals Chamber, *Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Appointment of Defense Counsel*, 1 November 2004, para. 9-10; quoted in ECCC Case File No. 002/PTC-D164/4/13, *Decision on Appeal Against the Co-Investigating Judges’ Order on Request to Seek Exculpatory Evidence in the Shared Material Drive*, 18 November 2009, para. 26.

³⁹ Where the Internal Rules and Cambodian law do not deal with a particular matter, guidance may be sought in international practice [Article 12(1) of the ECCC Agreement, Article 23 of the ECCC Law]; the PTC has already reconsidered previous decisions: ECCC CF002/19-09-2007-ECCC/PTC-C22/1/68, *Decision on Application for Reconsideration of Civil Party’s Rights to Address Pre-Trial Chamber in Person*, 28 August 2008, para. 25; and ECCC CF002/19-09-2007- ECCC/PTC-D364/1/6, *Decision on the Reconsideration of the Admissibility of Civil Party Applications*, 1 July 2011, para.9.

⁴⁰ ICTY, *Prosecutor v. Milosevic*, IT-02-54-T, Trial Chamber, *Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses Mitar Balevic, Vladislav Jovanovic, Vukasin Andric, and Dobre Aleksovski and Decision proprio motu Reconsidering Admission of Exhibits 837 and 838 Regarding Evidence of Defence Witness Barry Lituch*, 17 May 2005, paras. 7-8; ICTY, *Prosecutor v. Galic*, IT-98-29-AR73, Appeals Chamber, *Decision on Application by Prosecution for Leave to Appeal*, 14 December 2001, para. 13; ICTY, *Prosecutor v. Mucic et al.*, IT-96-21-Abis, Appeals Chamber, *Judgement on Sentence Appeal*, 8 April 2003, para. 49; ICTY, *Prosecutor v. Milutinovic et al.*, IT-05-87-T, Trial Chamber, *Decision on Prosecution Motion for Reconsideration of Decision on Prosecution Motion for Additional Trial Related Protective Measures for Witness K56*, 9 November 2006, para. 2.



45. The question arising in the present case is at what point in the judicial investigation, if any, the rights of suspects as defined in Internal Rule 21(d) attach to a specific person. Underlying the *Motion on Right to Counsel* is the notion that the Suspect has the right to legal representation in Case 004 despite not having been formally charged by the CIJs.
46. Both the ECCC Law and the Internal Rules include provisions relating to a suspect's right to a lawyer. Article 24 new of the ECCC Law is a general statement in respect of international standards, and provides that “[d]uring the investigation, Suspects shall be unconditionally entitled to assistance of counsel of their own choosing, and to have legal assistance assigned to them free of charge if they cannot afford it, as well as the right to interpretation, as necessary, into and from a language they speak and understand”.⁴¹
47. The Glossary to the Internal Rules clarifies that a “Suspect” is “a person whom the Co-Prosecutors or the Co-Investigating Judges consider may have committed a crime within the jurisdiction of the ECCC, but has not yet been charged”, whereas “Charged Person” refers to “any person who is subject to prosecution in a particular case, during the period between the Introductory Submission and Indictment or dismissal of the case”.
48. Internal Rule 21(d) sets forth the rights to which a Suspect is entitled. It provides that “[e]very 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.”
49. Article 14 of the 1966 International Covenant on Civil and Political Rights (“ICCPR”), which is directly applicable before the ECCC pursuant to Article 12 of the ECCC Agreement,⁴² provides in relevant part:

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

[...]

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

⁴¹ However, the ECCC does not provide any relevant definition of the term “Suspect” in the context of this decision.

⁴² ECCC Agreement, Article 12, par 1. (...) “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”.



b) The previous decisions by the CIJs regarding Suspects' rights

50. In recognising the Suspect's right to be defended by a lawyer of his/her choice the *Notification of Suspect Rights* decision overruled a series of previous decisions by the CIJs refusing to grant defence rights to the persons named in the Introductory Submission,⁴³ without providing any reasons beyond citing Internal Rule 21, and giving this provision a particularly broad interpretation. The CIJs are thus empowered to review these apparently conflicting decisions in order to determine the applicable principles.

51. The provisions of the Internal Rules relating to the rights of Charged Persons,⁴⁴ which mirror the 2007 Cambodian Code of Criminal Procedure on this point,⁴⁵

⁴³ Case File No. 004-A1/2, *Response of the CIJs on Defence rights in Case File 003 and 004*, 23 September 2010, para. 3: "Defence rights are fully exercisable (and the equality-of-arms principle must be strictly upheld) once a person is charged and thereby becomes a party to the proceedings. However, as long as a person is not officially charged, his/her rights remain limited. This is the case in all procedural systems"; para.4: "In this instance, the Internal Rules specify the rights of suspects, for example where they are called as witnesses (Rules 24-4 and 28), are in police custody (Rule 51) or subject to search (Rule 61). In such instances, the "unnamed suspects" you refer to are afforded full benefit of the rights in question. However, they cannot claim the same rights as parties to the proceedings, which are set out, inter alia, in Rules 55(8), 55(10), 55(11), 57 and 58, if only because, at this point, no one can predict what the outcome of the ongoing investigations will be".

Case File No: 004-D4/1, *Decision on Request for Access to Case Files 003 and 004*, 5 April 2011 [confirmed on appeal: Case File N° 004/29-07-2011-ECCC/(PTC 01), *Pre-Trial Chamber Decision on Defence Support Section Request for Stay in Case 004 Proceedings before the Pre-Trial Chamber and for Measures Pertaining to the Effective Representation of Suspects in Case 004*, 20 February 2012]: "Mr. Kong Sam Onn is not entitled to represent the five Unnamed Suspects before the Co-Investigating Judges at this stage in the proceedings" (para. 2); "the Unnamed Suspects at this stage where they have not been officially informed of the criminal proceedings, have not been substantially affected by the investigations, wherefore the legal threshold for being entitled to defence counsel has not been reached" (para. 3); "none of the Unnamed Suspects identified in the respective Introductory Submissions have been approached, interviewed, subjected to any search and seizure actions, detained, or been in any other way affected by the investigation of the Co-Investigating Judges in a manner which could be said to have attained the threshold of substantially affecting them" (para.8); "that the interests of the five Unnamed Suspects' have not been substantially affected by the investigations" (para. 11).

Case File No: 004-D4/2/1, *Order on Motion for Reconsideration of the Decision on the Defence Request for Access to Case Files 003 and 004 dated 5 April 2011*, 19 May 2011, (para 5): "The Assigned Counsel once again makes the speculative assumption as to the identities of the Unnamed Suspects contained in Case Files 003 and 004, but nonetheless proceeds to submit that the filing of the civil party applications has caused these individuals prejudice. However, for the Counsel to assert that a suspect he does not even know has been caused prejudice is obviously nonsensical"; and Case File N° 004 (PTC 01), *Decision on the Defence Support Section ("DSS") Request for Stay in Case 004 Proceedings before the Pre-Trial Chamber and for Measures Pertaining to the Effective Representation of Suspects in Case 004*, 20 February 2012, paras. 10-12.

⁴⁴ Articles 21, 55, 57 and 58 of the Internal Rules:

⁴⁵ Internal Rule 21: "(...) d) 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"; IRs Rule 57: "1. At the time of the initial appearance the Co-Investigating Judges shall record the identity of the Charged Person and inform him or her of the charges, the right to a lawyer and the right to remain silent. The Charged Person has the right to consult with a lawyer prior to being interviewed and to have a lawyer present while the statement is taken. If the Charged Person agrees, the Co-Investigating Judge shall take the



raise the issue of compliance with international standards concerning the rights of Suspects *before* they are charged.

52. The OCIJ case law cited in paragraphs 20 and 21 above, restricting defence rights, was based notably on the finding that a Suspect cannot be considered to be a “Charged Person”, implying full defence rights, until the CIJs have brought the person before them and officially informed him or her, under Internal Rule 55(4) and 57, that there is clear and consistent evidence indicating that they may be criminally responsible for the commission of a crime alleged in the OCP submission, whether or not such person is named in that submission.⁴⁶
53. Indeed, the fundamental right to counsel under ICCPR Article 14, as interpreted by Human Rights Committee General Comment No. 32,⁴⁷ is limited to persons against whom there is a criminal *charge*.⁴⁸ The provisions of Article 6 of the European Convention of the Human Rights (“ECHR”) are substantively the same as the provisions of Article 14 of the ICCPR.
54. In this instance, the Suspect has not been officially charged, and consequently, is not a Party to the proceedings. It is on this ground that the past decisions of the CIJs refused to grant the Suspect access to the Case File and the other rights granted to actual Parties to the proceedings.⁴⁹
55. However, in this case, the RICIJ decided to notify the person named in the Introductory and Supplementary Submissions initiating Case 004, of his status as a Suspect. In the same decision, the Suspect was informed, as a result, that “*in accordance with Rules of the ECCC [Rule 21(1)(d)], procedural rights and guarantees attached to the status of Suspect notably include the right to be defended by a lawyer of his/her choice, to have access to the case file (application, by analogy, of Rules 55(6), 55(1)⁵⁰ and 58, except for the provisions*

statement immediately. A written record of the statement shall be placed in the case file. 2. Where the Charged Person is in detention he or she shall have the right to raise any issues relating to the execution or procedural regularity of the provisional detention”.

⁴⁶ Case File No. 004-A1/2, *Response of the CIJs on Defence rights in Case File 003 and 004*, 23 September 2010; Case File No: 004-D4/1, *Decision on Request for Access to Case Files 003 and 004*, 5 April 2011; Case File No: 004-D4/2/1, *Order on Motion for Reconsideration of the Decision on the Defence Request for Access to Case Files 003 and 004 dated 5 April 2011*, 19 May 2011; for extracts of these decisions see note 43 above.

⁴⁷ Human Rights Committee, Ninetieth session, Geneva, 9 to 27 July 2007, *General Comment No. 32*. par.1 This general comment replaces general comment No. 13 (twenty-first session). <http://daccess-ods.un.org/access.nsf/Get?Open&DS=CCPR/C/GC/32&Lang=E> (last visited 7 February 2013).

⁴⁸ Moreover, ECCC Law Article 35 new, which incorporates these standards only recognises them to “the accused”.

⁴⁹ Case File No. 004-A1/2, *Response of the CIJs on Defence rights in Case File 003 and 004*, 23 September 2010: “*Defence rights are fully exercisable (and the equality-of-arms principle must be strictly upheld) once a person is charged and thereby becomes a party to the proceedings. However, as long as a person is not officially charged, his/her rights remain limited. This is the case in all procedural systems”.*

⁵⁰ Noting that the French version of the *Notification of Suspect's Rights* (D110) refers to Internal Rule 55(11), whereas the (original) English and Khmer versions refer to Internal Rule 55(1).



of Rule 58(6) of the ECCC) and to remain silent at every stage of the proceedings".⁵¹

56. The question, under the specific circumstances of this case, is thus to determine the rights, if any, to which the person so notified is entitled.

c) The consequences of the *Notification of Suspect Rights*

57. The CIJ considers that the *Notification of Suspects' Rights* decision bestowed upon Suspect the rights expressly set forth in Internal Rule 21(1)(d): to be presumed innocent as long as his/her guilt has not been established; 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 to be informed of his/her right to remain silent.
58. The application of these rights, in the unique context of the present judicial investigation, is consistent with international standards of fairness.
59. The CIJ notes, however, that the *Notification of Suspects' Rights* decision bestowed upon the Suspect additional rights not identified in Internal Rule 21 without providing any legal grounds for doing so. To the extent that it did so, it is premature to make any findings in this Decision and the CIJ declines to do so.

Indigent person's right to counsel of choice

60. Internal Rule 22(1) provides that any person entitled to a lawyer under the Internal Rules shall have the right to the assistance of a national lawyer, or a foreign lawyer in collaboration with a national lawyer, of their own choosing.⁵²
61. Moreover, indigent Suspects, Charged Persons and Accused Persons are entitled to representation at ECCC expense pursuant to the Internal Rules and the DSS Administrative Regulations.⁵³
62. The CIJ notes in this respect that DSS has determined that the Suspect qualifies for the assistance of counsel at ECCC expense.⁵⁴

Lawyers whose names are included in the list of counsel must be qualified

63. Having established, under the particular circumstances of this case, that the Suspect has the right to be defended by a lawyer of his choice, the question arises whether this requires the CIJs to grant the relief sought in the *Motion on Right to*

⁵¹ Case File No.004-D110, *Notification of Suspect Rights*, 24 February 2012.

⁵² Case File No.004-D111/2, *Letter from Defence Support Section: Provisional Assignment of Mr. Mom Luch as Cambodian Co-Lawyer for Case 004 Suspect* [REDACTED], 29 March 2012

⁵³ Internal Rules 22(1)(b); DSS Administrative regulations, Article 11.

⁵⁴ Case File No.004-D111/2, *Provisional Assignment of Mr. Mom Luch as Cambodian Co-Lawyer for Case 004 Suspect* [REDACTED], 29 March 2012; Case File No.004-D111/2.1, *Request for Engagement/Assignment of Co-Lawyers*, 26 March 2012.



Counsel and “order the Office of Administration (“OA”), including the Defence Support Section (“DSS”), to issue a Legal Services Contract for Richard Rogers (“Rogers”) as foreign co-lawyer for the Suspect”⁵⁵ and to “review the actions of Rosandhaug and Endeley”.⁵⁶

64. Notwithstanding the right of a Suspect to counsel of his/her choice, the Internal Rules and Administrative Regulations identify procedures by which the eligibility of counsel to represent Suspects, Charged Persons and Accused Persons are regulated.
65. An essential element of the ECCC legal representation scheme, designed to ensure that Suspects, Charged Persons and Accused persons receive effective representation, is that lawyers representing those individuals meet clearly defined professional standards. Lawyers who do not meet those standards are not eligible to do so.
66. Internal Rule 11(2)(c) requires DSS to maintain a list of national and foreign lawyers eligible to represent persons before the ECCC.
67. In addition, as regards indigent persons, Internal Rule 11(2)(d)(ii) requires DSS to compile and maintain *inter alia* a sub-list of foreign lawyers admitted to the Bar in a United Nations Member State who have been registered by the BAKC and who meet DSS criteria, as set out in its Administrative Regulations, for defending indigent persons before the ECCC.
68. To this end, sub-part 1.5 of the Administrative Regulations provides that DSS shall determine whether candidates are qualified to be included on the list, either fully or provisionally.
69. The CIJ takes note of the DSS practice of including in its lists the names of lawyers who are not yet registered in Cambodia in order to avoid needless expense due to the cost of registering with the BAKC.⁵⁷ Leaving aside the question whether this pragmatic practice (which the Applicants rely upon to explain the inclusion of Rogers in the list given to the Suspect) is in breach of

⁵⁵ Case File No. 004-D122/2, *Motion on Suspect's Right to Counsel*, 20 March 2013.

⁵⁶ Case File No. 004-D122/5, *Supplemental Brief on Suspect's right to Counsel*, 12 April 2013.

⁵⁷ Case File 004/07-09-2009-ECCC-OCIJ, D122/2, *Motion on Suspect's Right to Counsel*, para 10: “Following the established practice at the ECCC, Rogers did not register with the Bar Association of the Kingdom of Cambodia (“BAKC”) at that stage. As a result of the high fees demanded by the BAKC for registration, the DSS has – since the very first case – maintained a list of lawyers pre-approved by DSS but not yet registered with the BAKC. This DSS list has always represented the pool of lawyers from which the suspects have chosen. According to this established practice, after a foreign co-lawyer has been selected and assigned to the case his/her application for registration is forwarded to the BAKC. At the point of registration, the foreign lawyer has satisfied all the formalities. Following selection but prior to being sworn-in, the selected foreign co-lawyer is contracted under a legal consultancy contract; once registered, the contract is converted into a ‘permanent’ legal services contract. This procedure has been followed throughout the life of the ECCC, from the first foreign co-lawyer, Francois Roux. The Investigating Judges, BAKC, and OA have - explicitly or implicitly - endorsed this procedure”.



DSS obligations under the Internal Rules, it is clear that inclusion in the list is predicated on a number of objective criteria that must be satisfied.

70. In particular, the criteria for inclusion in the DSS list for defending indigent persons before the ECCC in Internal Rule 11(4)(c)(iii) and Administrative Regulation 2.2(iii) require, *inter alia*, that a Foreign Co-Lawyer have at least ten years working experience in criminal proceedings, as a lawyer, judge, or prosecutor or in some other capacity.
71. In addition, Administrative Regulation 9 lays down rules concerning conflicts of interest, since the existence of a conflict of interest may be deleterious to the interests of a Suspect, Charged Person or Accused. According to Article 9 of the DSS Administrative Regulations:

“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”.

72. According to Article 1.7 of the DSS Administrative Regulations, a candidate included in a list shall be removed if he/she no longer satisfies the qualifications as outlined in the Internal Rules, ECCC Practice Directions and Administrative Regulations, as well as the Cambodian Law on the Statutes of the Bar and recognised standards and ethics of the legal profession.⁵⁸

A Suspect’s selection of a lawyer from the list must be an informed one

73. Internal Rule 22(1)(b) provides that indigent persons entitled to representation under the Rules shall have the right freely to choose from amongst national lawyers and foreign lawyers included in the list provided in Internal Rule 11(2)(d).
74. DSS Administrative Regulation 5.1 requires that a Suspect, Charged Person or Accused be provided with a list with *sufficient information* to allow the Suspect, Charged Person or accused to make an *informed choice* as to legal representation.

⁵⁸ In addition, according to Article 7.4 of the DSS Administrative Regulations, the ECCC may determine that a Co-lawyer is no longer eligible to defend a Suspect, a Charged Person or an Accused.



To be meaningful, the above-mentioned rules and regulations require that only qualified counsel appear on the list.

75. Accordingly, the failure to inform a Suspect, Charged Person or Accused of all relevant material facts relating to the qualifications of a lawyer on the list and of potential conflicts of interest can impact adversely on an indigent person's ability to make an informed choice as to legal representation, thereby undercutting his/her right to the effective assistance of counsel.

The authority of the CIJs to recognize a Suspect's choice of a lawyer

76. The freedom of choice of a lawyer is a fundamental right that may only be restricted under certain clearly defined circumstances (set out above for the ECCC) and following clearly defined processes.
77. Concerning such matters, no role is envisaged for the CIJs beyond formal recognition of lawyers once all of the requirements have been satisfied. Neither French Law⁵⁹ nor the Cambodian Law on the Bar and Code of Ethics for Lawyers appear to provide for a right of judicial authorities to determine whether the freedom of choice of a Suspect regarding his lawyer should be restricted or not.⁶⁰
78. Under the Internal Rules, the role of determining whether freedom of choice of a lawyer must be restricted is shared between the BAKC and the ECCC's internal body, the DSS. The BAKC is responsible for verifying the conditions for registration in Cambodia and DSS is responsible, *inter alia*, for determining whether the criteria for defending indigent persons have been met, as set out in Internal Rule 11(4). In addition, Administrative Regulation 9 provides for issues of conflict of interest to be determined by DSS.
79. Appeals against the determinations by these bodies lie to the ECCC Pre-Trial Chamber under Internal Rules 11(5)⁶¹ and 22(1)(f).⁶² According to Rules 11(5):

⁵⁹ JurisClasseur Procédure pénale ; App. Art. 53 à 73, Fasc. 20 : Garde A Vue, Jacques Leroy, Professeur agrégé des facultés de droit, para. 164, in : <http://www.lexisnexus.fr/lnjpro>, last visited 20 March 2013; Article 63-3-1, al. 5, of French Code of criminal procedure (réd. L. 14 avr. 2011)".

⁶⁰ Code Of Ethics For Lawyers Licensed, With The Bar Association Of The Kingdom Of Cambodia, Chapter Iv: Client Relations, Article 19: multiple clients, in: http://en.bakc.org.kh/Law_For_Lawyer/Code%20of%20Ethics_En.pdf, last visited 26/03/2013, "*If the lawyer is retained by multiple clients for the same case or process, the lawyer is prohibited from favoring the interests of any one of them. The lawyer informs the parties of the situation. The lawyer may not advise, assist, represent, or defend multiple parties if a conflict of interest arises between them. If such a conflict arises while the lawyer is or was counsel to multiple parties, the lawyer may not represent the interests of one of the parties until after he or she has advised the others while remaining under the strict obligation to compromise neither tact nor professional confidences*".

In the absence of direct precedent from Cambodian Law, it may be noted that under French Law, it is generally the President of the Bar Association (*Bâtonnier*) who resolves any question of conflict of interest of lawyers, whether it is raised by a party to the proceedings or by the judicial authorities (Article 21 of *Loi n° 71-1130 du 31 décembre 1971 Portant réforme de certaines professions judiciaires et juridiques*).

⁶¹ In the case in hand, the Applicants do not appear on the face of the filings to have exercised their appellate rights against the DSS decision to reject Rogers' request to be placed on the DSS list of



“Any lawyer or assistant whose request to be placed on the lists of lawyers for indigent persons referred to in sub-rules 2(d) and 2(i) above is refused or has not been examined within 30 (thirty) days of receipt by the Defence Support Section, or who is excluded from the list, may appeal to the Pre-Trial Chamber within 15 (fifteen) days of receiving notification of the decision of the Head of the Defence Support Section or the end of the 30 (thirty) day period, as appropriate. The decision of the Pre-Trial Chamber shall not be subject to appeal. (...).

80. On these grounds, it does not come within the jurisdiction of the CIJs to review the action of the Chief of DSS and the DDOA, or to order the OA to issue a contract to Rogers.

Review of the Recognition Decision

81. However, the Applicants have based their *Motion on Right to Counsel* and *Supplemental Brief on Suspect's right to Counsel* with the CIJs on the fact that the RICIJ had *already* issued a *Recognition Decision* with respect to Rogers.

82. The formal requirement for recognition will usually be satisfied by verifying that DSS has informed the CIJs that the lawyer in question complies with all the requirements laid down by the Internal Rules and the DSS Regulations. The CIJ will thus limit his review of the RICIJ's decision to the pertinence of any contestation, based on objective criteria, such as the failure to obtain prior admission to the Cambodian Bar, the failure to satisfy relevant experience criteria and the existence of a conflict of interest.⁶³

83. In the case at hand, the Applicants affirm that Rogers was included in the list of counsel provided to the Suspect. On 3 May 2012, the RICIJ issued a *Recognition Decision* in which he declared that Rogers had “*been properly selected and retained as Counsel by the Suspect*” and, *inter alia*, ordered the OA, including DSS, to recognize the assignment of Rogers unless and until the appropriate Chamber/judicial authority withdrew his assignment.⁶⁴

84. However, DSS does not appear to have officially confirmed to the RICIJ that Rogers had satisfied all the requirements to be recognised as foreign counsel for the Suspect.⁶⁵ Following the departure of DSS OIC ██████████, Isaac Endeley,

Foreign Co-Lawyers eligible to represent persons before the ECCC. The Applicants appear to have preferred to attempt to resolve this issue, first through the UN Administrative Judge (“UNAJ”), then by filing their *Motion on Right to Counsel* and a *Supplemental Brief on Suspect's right to Counsel* with the CIJs.

⁶² Internal Rule 22(1)(f), relating to refusal of registration by the BAKC, is not relevant to the circumstances of this case.

⁶³ Cour d'appel de Pau, Chambre 1, 14 Janvier 1998, Numéro JurisData : 1998-970294 ; [confirmed by the decision of the French Cour de Cassation, Chambre civile 1, 27 mars 2001, numéro de pourvoi 98-16508].

⁶⁴ Case File No. 004-D111/5, *Lawyer's Recognition decision*, 3 May 2012.

⁶⁵ On 29 March 2012, the former Officer in Charge (OIC) of the Defense Support Section (DSS), ██████████, informed the Reserve International Co-Investigating Judge (RICIJ) that the Suspect had selected Mom Luch and Rogers as his Co-Lawyers; however, as regards Rogers, she informed the CIJs



the new Chief of DSS, concluded that Rogers was ineligible to be placed on the DSS list of Foreign Co-Lawyers for the following reasons:⁶⁶

1. Rogers did not possess the requisite experience under Internal Rule 11(4);
2. The existence of a potential conflict of interest between Rogers's former position as Head of DSS and his desire to become a Defence Co-Lawyer at the ECCC; and
3. An ethical conflict of interest arising from Roger's relationship with the former Officer in Charge, [REDACTED]

85. In addition, notwithstanding the conformity of the purported DSS practice of not requiring lawyers to have registered with the BAKC at the time the Suspect selected Rogers as his Foreign Co-Lawyer, Rogers had still not been sworn in as a member of the BAKC at the time of the *Recognition Decision* and should not have been recognised until all requirements had been fully satisfied; that is, after he was sworn in at the Cambodian Court of Appeal on 11 May 2012.⁶⁷
86. Accordingly, the CIJ finds that when the *Recognition Decision* was issued on 3 May 2012, the RICIJ was unaware that Rogers may have had insufficient relevant legal experience to qualify to represent indigent persons before the ECCC and may have had conflicts of interest in respect of representing the Suspect. Moreover, Rogers had not yet been sworn in at the time of the *Recognition Decision*. These defects vitiate the *Recognition Decision*.
87. The CIJ recalls that providing a list to a Suspect, Charged Person or Accused that includes the name of a lawyer who may not meet the qualifications set forth in Internal Rule 11(4)(c)(iii) and Administrative Regulation 2.2(iii), and with respect to whom there may be a conflict of interest, impairs the ability of the Suspect, Charged Person or Accused to make an informed decision about the selection of counsel.
88. Given the changed factual circumstances since the previous decision, the CIJ is not in a position to determine whether Rogers has now satisfied all of the

that “DSS is initially requesting a legal consultancy contract for said lawyer, pending his admission to the Bar association of the Kingdom of Cambodia”: Case File No.004-D111/2, *Provisional Assignment of Mr. Mom Luch as Cambodian Co-Lawyer for case 004 Suspect [REDACTED]*, 29 March 2012, paras. 7 and 8.

⁶⁶ Case File No. 004-D122/2.1.50, *Letter from Isaac Enderly, Head of DSS to Richard Rogers*, 30 May 2012 (the “DSS Letter”); The CIJ notes that sub-part 1.7 of the Administrative Regulations authorizes DSS to remove a candidate included in a list where the candidate, *inter alia*, no longer satisfies the qualifications outlined in the Internal Rules and Administrative Regulations: Admin Reg 7.4: “*Removal of Lawyers: The ECCC may determine that a co-lawyer is no longer eligible to defend a suspect, charged person or accused before the ECCC*”.

⁶⁷ The CIJ notes that this was the procedure followed by Goran Sluiter, whose nomination was only communicated to the CIJs by DSS after he was sworn in on 5 October 2012: Case File No. 004-D111/8, *Letter from the Head of DSS*, 5 October 2012.



requirements for inclusion on the list of lawyers approved to defend cases before the ECCC.

Procedural fairness

89. The *Motion on Suspect's Rights to Counsel* alleges that the Chief of DSS failed to act with procedural fairness by failing to provide the Suspect with a summary of the evidence supporting his conclusions as to the conflict of interests, the ethical conflict and the lack of experience in order to allow Rogers an opportunity to submit materials in relation to these issues.
90. The CIJ notes that Internal Rule 11(4)(a) requires the procedure for inclusion in the DSS list for defending indigent persons before the ECCC to be fair, transparent and expeditious.

Alleged prejudice to the Suspect

91. Internal Rule 21(1) requires the applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations to be interpreted so as to always safeguard the interests of Suspects.
92. Administrative issues are not generally of a nature to be determined by the CIJs, unless it can be shown that they have resulted in denial of effective enjoyment of rights to the parties.⁶⁸
93. According to the Applicants' *Motion on Suspect's Right to Counsel* (para. 103), Mom Luch lacks experience in international criminal law whereas Goran Sluiter has expertise in that field⁶⁹. Given these circumstances, it is unnecessary to address the issue of whether the Suspect should be granted the right to two Co-Foreign Lawyers in this Decision.
94. The Applicants have stated that they would not object to a ruling by the CIJs ordering the *Motion on Suspect's Right to Counsel* to be distributed to the Chief of DSS and the DDOA (Paragraph 7 of the said Motion).

THE INTERNATIONAL CO-INVESTIGATING JUDGE FINDS:

95. That in the unique circumstances of this case, the RICIJ designated an individual identified in the OCP's Introductory Submission and Supplementary Submission

⁶⁸ *Artico v. Italy*, Application No 6694/74, 13 May 1980, para. 33 ; Case File No. 002-D390/1/2/4, *Decision of the PTC on Ien Sary's appeal against the CIJs' decision refusing to accept the filing of his response to the Co-Prosecutors' Rule 66 Final submission*, 20 September 2010, para 13.

⁶⁹ Case File No. 004-D111/8, *Assignment of a Foreign Co-Lawyer to represent* [REDACTED], 5 October 2012; Case File No. 004-D122/2, *Motion on suspect's right to counsel*, 20 March 2013, para. 103.



as a Suspect and therefore that person is entitled to the rights set forth in Article 21(1)(d);⁷⁰

96. That Internal Rule 21 requires that the applicable ECCC Law, Internal Rules, Practice Directives and Administrative Regulations to be interpreted so as to always safeguard the interests of Suspects;
97. That the Chief of DSS has the responsibility of maintaining a list of lawyers who are eligible to represent indigent persons before the ECCC at the Court's expense and is responsible for ensuring that said lawyers are registered by the BAKC and meet DSS criteria as set out in its Administrative Regulations;
98. That there has been no contestation of the eligibility of Mom Luch to act as the Cambodian Lawyer for the Suspect;
99. That after a review by the OCIJ of the situation of Goran Sluiter as a former consultant to a Defence team in Case 002 and the prior academic research provided to the OCIJ under his supervision, there is no reason to raise any issue of potential conflict of interest or confidentiality;
100. That there has been no contestation of the eligibility of Goran Sluiter to act as the Foreign Co-Lawyer for the Suspect;
101. That in the event a lawyer appears on the list of those lawyers eligible to represent indigent Suspects who does not satisfy the qualifications outlined in the Internal Rules, ECCC Practice Directions and Administrative Regulations, the Chief of DSS is obliged to remove that person from the list of lawyers;
102. That based on a re-examination of the qualifications of Rogers by the Chief of DSS, Isaac Endeley concluded that Rogers did not have sufficient qualifications to represent the Suspect and had disqualifying conflicts of interest;
103. That at the time the RICIJ issued the *Recognition Decision* and declared that Rogers had been "*properly selected and retained as counsel*", he was unaware of the factors identified in the DSS letter;
104. That the factors identified in the DSS letter could impact on the interests of the Suspect to be effectively represented before the ECCC and could be contrary to the interests of justice;
105. That Rogers disputes the disqualifying factors set forth in the DSS letter;

⁷⁰ To the extent that the RICIJ's Notification of Suspects Rights bestowed rights on the Suspect beyond those set forth in Internal Rule 21(1)(d), the validity of that grant of rights will be the subject of a future Decision. .



- 106. That the principles of fairness require that Rogers be given an opportunity to present evidence to DSS that would establish his qualifications to represent indigent persons at UNAKRT expense before the ECCC;
- 107. That it does not come within the jurisdiction of the CIJs to rule on disputes regarding whether a lawyer should be placed on a DSS list;

FOR THESE REASONS I, MARK B. HARMON, HEREBY:

- 108. **Confirm** the 3 May 2012 *Recognition Decision* in respect of Mom Luch;
- 109. **Recognize** Goran Sluiter as the foreign Co-Lawyer for the Suspect;
- 110. **Vacate** the 3 May 2012 *Recognition Decision* in respect of Richard Rogers;
- 111. **Remand** the matter to DSS to re-consider the eligibility of Richard Rogers to be placed on the DSS list of Foreign Co-Lawyers;
- 112. **Invite** Richard Rogers to submit materials to DSS in respect of the three factors identified in the DSS letter which resulted in his ineligibility to be included on the list within 10 (ten) days of this Decision; and
- 113. **Decide** to provide a copy of the Motion, Supplemental Brief and this Decision to the Chief of DSS and to the DDOA.

Phnom Penh, on 17 May 2013



Mark B. Harmon

សហចៅក្រមស៊ើបអង្កេតអន្តរជាតិ

**International Co-Investigating Judge
Co-Juge d'Instruction International**