

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

**FILING DETAILS**

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**MEAS MUTH'S REQUEST TO ACCESS THE CASE FILE AND PARTICIPATE IN  
THE JUDICIAL INVESTIGATION**

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Mr. MEAS Muth, through his Co-Lawyers (“the Defence”), pursuant Rule 21 of the ECCC Internal Rules, hereby requests authorization to access the Case 003 Case File and to participate in the judicial investigation. This Request is made necessary in order to respect Mr. MEAS Muth’s right to adequate time and facilities to prepare his defence. This Request is admissible pursuant to Rule 21, which requires that “[t]he applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations *shall* be interpreted so as to always safeguard the interests of Suspects.... In this respect: a) ECCC proceedings shall be fair ... 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...” The Defence requests to file this Request in English with the Khmer translation to follow once it can be completed. This is necessary because the Interpretation and Translation Unit has indicated that it cannot complete translation in a timely manner (i.e. that it would take over one month to complete translation of this 13 page Request).<sup>1</sup>

## I. BACKGROUND

1. On 29 July 2010, the Defence Support Section (“DSS”) sent a letter to the Office of the Co-Investigating Judges (“OCIJ”) requesting access to Case Files 003 and 004.<sup>2</sup>
2. On 20 September 2010, DSS sent a follow-up letter to the OCIJ stating that it had received no response from the OCIJ and would be issuing a press release to inform the public about this matter.<sup>3</sup>
3. On 23 September 2010, the OCIJ sent a letter to DSS stating that access to the Case Files in Cases 003 and 004 could not be granted because “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.”<sup>4</sup>

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<sup>1</sup> See email from Interpretation and Translation Unit to Defence, “Re: Request for Translation,” 28 August 2013.

<sup>2</sup> Letter from DSS to OCIJ, “Defence Rights in Case Files 003 and 004,” 29 July 2010.

<sup>3</sup> Letter from DSS to OCIJ, “Follow-up to DSS Letter on Defence Rights in Case File 003 and 004,” 20 September 2010.

<sup>4</sup> According to Case File No. 004/07-09-2009-ECCC-OCIJ, Decision on Motion and Supplemental Brief on Suspect’s Right to Counsel. 17 May 2013, D122/6, para. 20. The Defence does not have access to this letter to DSS.

4. On 5 April 2011, the OCIJ issued a decision rejecting a motion filed by the provisionally assigned Counsel in Cases 003 and 004, Mr. Kong Sam Onn, requesting access to the Case File.<sup>5</sup>
5. On 19 May 2011, the OCIJ rejected a motion for reconsideration filed by Mr. Kong Sam Onn of the denial of access to the Case File.<sup>6</sup>
6. On 1 March 2012, International Reserve Co-Investigating Judge Laurent Kasper-Ansermet delivered a *Notification of Suspect Rights* to Mr. MEAS Muth, informing Mr. MEAS Muth that he is named as a Suspect in the ongoing judicial investigation and that he has certain rights, including access to the Case File.<sup>7</sup>
7. On 2 May 2012, the International Reserve Co-Investigating Judge issued a *Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect*, in which he stated that personal jurisdiction over Mr. MEAS Muth “has been established in a sufficient and reliable manner”<sup>8</sup> and “[t]he judicial investigation conducted by the [OCIJ] has thus established that [Mr. MEAS Muth] may be considered as one of the persons most responsible for the crimes enumerated in the Co-Prosecutors’ Second Introductory Submission.”<sup>9</sup>
8. On 13 June 2012, Mr. MEAS Muth requested DSS to assign Mr. Ang Udom and Mr. Michael G. Karnavas as his Co-Lawyers.<sup>10</sup>
9. On 14 December 2013, DSS 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

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<sup>5</sup> According to Case File No. 004/07-09-2009-ECCC-OCIJ, Decision on Motion and Supplemental Brief on Suspect’s Right to Counsel. 17 May 2013, D122/6, para. 21. The Defence does not have access to this letter to DSS.

<sup>6</sup> According to Case File No. 004/07-09-2009-ECCC-OCIJ, Decision on Motion and Supplemental Brief on Suspect’s Right to Counsel. 17 May 2013, D122/6, para. 21. The Defence does not have access to this letter to DSS.

<sup>7</sup> Notification of Suspect Rights [Internal Rule 21(1)(D) in Case File 003, 6 March 2012, D33, para. 3.

<sup>8</sup> Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect, 2 May 2012, D48, para. 10.

<sup>9</sup> *Id.*, para. 27.

<sup>10</sup> Letter from Mr. Endeley to Mr. MEAS Muth, titled “Determination of Your Claim of Indigence and Decision on Your Request for Remuneration of Counsel under the ECCC’s Legal Assistance Scheme,” 30 April 2013, D56/11, para. 1.

should Mr. MEAS Muth be determined to be indigent).<sup>11</sup> The Co-Lawyers have, to date, not been granted access to the Case File.

## II. LAW & ARGUMENT

10. Mr. MEAS Muth requests access to the Case 003 Case File and to be accorded the right to participate in the judicial investigation in order to exercise his fundamental fair trial right to adequate time and facilities to prepare a defence. Mr. MEAS Muth was notified that he has the right to access the Case 003 Case File, yet such access has thus far been denied.
11. The OCIJ is denying Suspects access to the Case File on the basis that a Suspect's rights are limited; only upon being formally charged can a Suspect fully exercise his rights.<sup>12</sup> This view of a Suspect's rights is overly narrow and does not fit the present situation because: **a.** Mr. MEAS Muth has a right to adequate time and facilities to prepare a defence, and this right applies at all stages of the proceedings, or, at the very least, when his interests have begun to be affected by the proceedings; **b.** Mr. MEAS Muth has officially learned of the judicial investigation and his interests are affected by it; **c.** Denying Mr. MEAS Muth his fair trial rights simply because the OCIJ has failed to formally charge him impermissibly places form over substance; and **d.** Mr. MEAS Muth's right to equal treatment will be violated if he is not afforded access to the Case File and the right to participate in the judicial investigation.
12. Mr. MEAS Muth *must* be authorized to access the Case File and participate in the judicial investigation at this point. The investigation into Case 003 has already been ongoing for several years and there may not be much time left for him to influence the judicial investigation. This is especially important since under the Civil Law system, Mr. MEAS Muth has no right to conduct his own investigations.

**A. Mr. MEAS Muth has a right to adequate time and facilities to prepare a defence, and this right applies at all stages of the proceedings, or, at the very least, when his interests have begun to be affected by the proceedings**

<sup>11</sup> *Id.*, para. 4.

<sup>12</sup> *Case File No. 004/07-09-2009-ECCC-OCIJ*, Decision on Motion and Supplemental Brief on Suspect's Right to Counsel, 17 May 2013, D122/6, para. 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'."

13. Article 14(3)(b) of the International Covenant on Civil and Political Rights (“ICCPR”) states: “In the determination of any criminal charge against him, *everyone* shall be entitled to the following minimum guarantees, in full equality: ... (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing...”<sup>13</sup> This right is guaranteed to Mr. MEAS Muth through the Cambodian Constitution,<sup>14</sup> the Agreement,<sup>15</sup> the Establishment Law,<sup>16</sup> and the Rules.<sup>17</sup>
14. Mr. MEAS Muth’s right to adequate time and facilities includes access to the Case File. The Human Rights Committee, a body of independent experts that monitors the implementation of the ICCPR by State parties (such as Cambodia),<sup>18</sup> defines the right to “adequate facilities” as encompassing the right to access documents and other evidence.<sup>19</sup>
15. According to 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

<sup>13</sup> 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 (emphasis added).

<sup>14</sup> Article 31 of the Cambodian Constitution states, “The Kingdom of Cambodia shall 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.” Article 38 states, “Every citizen shall enjoy the right to defense through judicial recourse.”

<sup>15</sup> Article 12(2) of 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 (“Agreement”) states: “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”; Article 13(1) states: “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 a fair and public hearing; to be presumed innocent until proved guilty; to engage a counsel of his or her choice; to have adequate time and facilities for the preparation of his or her defence; to have counsel provided if he or she does not have sufficient means to pay for it; and to examine or have examined the witnesses against him or her.”

<sup>16</sup> Article 33 new of the 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”) states: “The Extraordinary Chambers of the trial court 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”; Article 35 new states: “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. ... b. to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing...”

<sup>17</sup> Rule 21(1) provides in part that: “[t]he applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement....”

<sup>18</sup> 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](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#3).

<sup>19</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, para. 33.

authorities substantially affect the suspect.”<sup>20</sup> Indeed, the Pre-Trial Chamber, in a different context, has affirmed that the rights in the ICCPR apply at *all* stages of the proceedings.<sup>21</sup>

16. Similarly, the European Court of Human Rights (“ECtHR”), whose jurisprudence has frequently been cited approvingly by the OCIJ,<sup>22</sup> has found that the rights guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) (the Article of the ECHR which corresponds to Article 14 of the ICCPR) applies before a person has been formally charged, as soon as the actions of the authorities substantially affect the Suspect.<sup>23</sup>
17. In *Kangasluoma v. Finland*, the ECtHR considered whether the right to trial within a reasonable time was violated. To do this, it had to determine when the proceedings began. The applicant Kangasluoma argued that proceedings began as soon as the police interrogated him in 1990, even though he was not placed in detention at the time. The government argued that proceedings did not begin until 1994, when Kangasluoma was formally charged with criminal offenses starts from an official notification.<sup>24</sup> The ECtHR stated that the period to be taken into account “given to an individual by the competent

<sup>20</sup> 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](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).

<sup>21</sup> 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.

<sup>22</sup> See, e.g., *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, Consolidated Response by Co-Investigating Judge Marcel Lemonde to Applications to Disqualify Filed on Behalf of IENG Sary and KHIEU Samphan, 5 November 2009, 4; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, Order on Translation Rights and Obligations of the Parties, 19 June 2008, A190, n. 5, 7, 13.

<sup>23</sup> Professor Michail Wladimiroff, discussing the distinction between Suspects and Accused at the *ad hoc* tribunals, states: “Article 21 of the Statute of the ICTY and Article 20 of that of the ICTR grant the accused the right to be informed promptly of the nature of the charge against him, whereas both Conventions confer that right to *everyone*.... In this context it should be noted that neither the ECHR nor the ICCPR makes such a distinction between the suspect and the accused. Although both Conventions require that there be a criminal charge, it is important to note that this requirement does not have the formal meaning it has in the Statutes. The European Court of Human Rights has ruled, with respect to the concept of a fair trial as referred to in Article 6 of the ECHR, that the requirement of a criminal charge is met as soon as a person can reasonably deduce from the actions of the judicial authorities that he will be prosecuted.” 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](http://www.wlaws.com/The_Rights_of_Suspects_and_Accused.pdf) (internal citations omitted).

<sup>24</sup> *Kangasluoma v. Finland*, 14 June 2004, paras. 24-25.

authority of an allegation that he has committed a criminal offence or some from other act which carries the implication of such an allegation and which likewise substantially affects the situation of the suspect.” It stated that “[a]ccording to the Court’s constant case-law, a person has been found to be subject to a ‘charge’, *inter alia*, when a preliminary investigation has been opened in his case and, although not under arrest, the applicant has officially learned of the investigation or has begun to be affected by it.”<sup>25</sup> The ECtHR found that the period began in 1990, as soon as Kangasluoma officially learned of the investigation.<sup>26</sup>

**B. Mr. MEAS Muth has officially learned of the judicial investigation and his interests are affected by it**

18. Mr. MEAS Muth was notified that he is a Suspect.<sup>27</sup> International Reserve Co-Investigating Judge Kasper-Ansermet found and notified Mr. MEAS Muth that the ECCC has personal jurisdiction over him.<sup>28</sup> International Reserve Co-Investigating Judge Kasper-Ansermet also found that Mr. MEAS Muth “is to be considered as one of those most responsible for crimes committed during the period from 17 April 1975 to 6 January 1979.”<sup>29</sup> Therefore, Mr. MEAS Muth can reasonably deduce from the actions of the OCIJ that he will be prosecuted. This situation is unlike Case 004, to the knowledge of the Defence, where there has been no publicly filed document from the OCIJ stating that the Suspects come under the jurisdiction of the ECCC and are considered to be among those most responsible for crimes committed from 1975-1979.

<sup>25</sup> *Id.*, para. 26.

<sup>26</sup> *Id.*, paras. 26, 28. *See also Foti et al. v. Italy*, 10 December 1982, para. 52 (internal citations omitted): “one must begin by ascertaining from which moment the person was ‘charged’; this may have occurred on a date prior to the case coming before the trial court..., such as the date of the arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when the preliminary investigations were opened.... Whilst ‘charge’, for the purposes of Article 6 § 1 (art. 6-1), may in general be defined as ‘the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence’, it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect....” *See also Eckle v. Germany*, 15 July 1982, para. 73.

<sup>27</sup> Notification of Suspect Rights [Internal Rule 21(1)(D) in Case File 003, 6 March 2012, D33, para. 3.

<sup>28</sup> Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect, 2 May 2012, D48, para. 10: “The Co-Prosecutors’ Second Introductory Submission alleges that Suspect ██████ held, within the temporal frame of the ECCC’s jurisdiction, the position of Secretary of Division 164 of the Revolutionary Army of Kampuchea from April 1975 until January 1979, and was also responsible for the control of the city of Kampong Som. In light of the evidence made available to the Co-Investigating Judges during the judicial investigation, the personal jurisdiction of the ECCC over Suspect ██████ a ‘Khmer Rouge official’, is established in a sufficient and reliable manner.”

<sup>29</sup> *Id.*, p. 14.

19. Mr. MEAS Muth's situation has been substantially affected by the judicial investigation, personally and legally. His friends, family, and community are aware that he is under investigation; the fact that he is considered a Suspect has been widely publicized.<sup>30</sup> He has been faced with intrusive investigations into his personal finances (including interviews with relatives and neighbors and phone calls from people purportedly interested in purchasing his property)<sup>31</sup> and intrusive media coverage (including at least one situation in which Mr. MEAS Muth was forced to "flee" and to "hide" in his own residence in order to avoid unwanted media attention).<sup>32</sup>
20. Mr. MEAS Muth's legal interests are affected because the OCP and Civil Parties have access to the Case 003 Case File<sup>33</sup> and can influence the judicial investigation, while Mr. MEAS Muth cannot. Allowing the OCP and Civil Parties to influence the investigation but prohibiting Mr. MEAS Muth from doing so violates his right to equality of arms.<sup>34</sup> Recognizing this potential inequality, in France, a person named in a Civil Party application, as Mr. MEAS Muth has been,<sup>35</sup> may be heard as an "assisted witness."<sup>36</sup>

<sup>30</sup> See, e.g., Abby Seif, *Faulty Link Reveals Khmer Rouge Court's Secret Documents*, PHNOM PENH POST, 26 December 2012, available at <http://www.phnompenhpost.com/national/faulty-link-reveals-khmer-rouge-courts-secret-documents>: "Though the names of all five mid-ranking cadres listed as suspects in the government-opposed cases 003 and 004 are widely known and have appeared in the public domain for years, the court has refused to publicly release them."

<sup>31</sup> See Deloitte & Touche Financial Advisory Services Pte Ltd, *Provision of Financial Investigation Services: DRAFT Report of Findings and Recommendations of Phase One*, 19 March 2013, D56/11/3/1.1; Deloitte & Touche Financial Advisory Services Pte Ltd, *Provision of Financial Investigation Services: DRAFT Report of Findings of Phase Two*, 24 April 2013, D56/11/3/1.3.

<sup>32</sup> David Eimer, *Khmer Rouge Killers Live in Contented Retirement as Cambodia Struggles with the Legacy of Pol Pot*, TELEGRAPH, 21 July 2013, available at <http://www.telegraph.co.uk/news/worldnews/asia/cambodia/10192536/Khmer-Rouge-killers-live-in-contented-retirement-as-Cambodia-struggles-with-the-legacy-of-Pol-Pot.html>.

<sup>33</sup> See Lawyer's Recognition Decision Concerning All Civil Party Applications on Case File No.003, 26 February 2013, D58, para. 13; Lawyer's Recognition Decision Regarding KONG Phallack and Mahdev MOHAN on Case File 003, 1 July 2013, D66, p. 3.

<sup>34</sup> *Equality of arms* is "the principle in law that, in a trial, the defence and the prosecution must have procedural equality to ensure that the conduct of judicial proceedings is fair." *Case of KAIING Guek Eav*, 001/18-07-2007-ECCC/TC, Decision on IENG Sary's Request to Make Submission in Response to the Co-Prosecutors' Request for the Application of Joint Criminal Enterprise, 3 July 2009, D288/6.90, para. 4. The Trial Chamber in Case 001 has confirmed that "the fundamental nature of this principle is acknowledged in the Internal Rules..." *Id.* This principle is fundamental to various international human rights instruments, including the ICCPR, which, in accordance with Article 31 of the Cambodian Constitution, the ECCC must respect. According to Article 14(1) of the ICCPR: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal..."

<sup>35</sup> See Press Release by Civil Party Applicant Theary Seng, *Civil Party Applicant Theary Seng Appealing ECCC Decision Regarding Meas Muth and Sou Met of Case 003, Lodging Another Application Against CPK Secretaries Madam Im Chaem, Ta An, Ta Tith of Case 004*, 5 May 2011, available at <http://www.cambodiatribunal.org/images/CTM/pressreleaseecc003-004may5.pdf>: "In this one application, I publicly named and expressly hold Khmer Rouge military commanders Meas Muth and Sou Met directly, personally, individually responsible to me for the Crimes against Humanity (including the legal elements of murder, extermination, enslavement, imprisonment, torture, political persecution) in their roles as commanders



This is a status where a person is not formally charged but is considered to have a particular knowledge of the alleged facts. This status allows the “assisted witness” to have a lawyer and to have access to the Case File.<sup>37</sup>

21. Mr. MEAS Muth’s legal interests are also affected because his right to counsel is not meaningful if his counsel do not have access to the Case File and therefore cannot fully act on his behalf. As explained by the Open Society Justice Initiative, “[t]he purpose of access to the case file and participation in the investigation is to allow counsel for a charged person to protect basic fair trial rights and to enhance the efficiency and effectiveness of the investigative and trial process. Defense counsel cannot adequately fulfill these functions if they are not allowed to access the file or to participate until an investigation is nearly over.”<sup>38</sup>
22. Since Mr. MEAS Muth cannot access the Case File, he is not notified of filings in Case 003 and cannot respond to parties’ submissions and appeal against judicial investigations made during the judicial investigation. As explained by International Pre-Trial Chamber Judges Katinka Lahuis and Rowan Downing, “[t]he requirement of notification is meant to ensure that the knowledge of documents filed in the course of proceedings is directly provided *to all those affected by these proceedings*. This formality is not only essential to the integrity of the proceedings, it is also a vital principle of fairness and of due process as

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of the Navy and Air Force of Democratic Kampuchea, respectively, and for their material contribution in developing and implementing the common design and purpose of a joint criminal enterprise which impacted the whole of Cambodia.”

<sup>36</sup> Article 113-2 of the French Code of Criminal Procedure states: “Any person mentioned by name in a complaint or implicated by the victim may be heard as an assisted witness.”

<sup>37</sup> “The current legislation seeks to divert suspects against whom there is less strong suspicion, into the category of *témoign assisté*, whilst still preserving their defence rights. The status of *témoign assisté* was created in 1987 and attached to a person named as the perpetrator in a complaint. This recognised that there was not sufficient evidence against them to place them under formal investigation, but on the other hand, neither were they a simple witness.” Jacqueline Hodgson, *Suspects, Defendants and Victims in the French Criminal Process: The Context of Recent Reform*, 51 INT’L CRIM. L. Q. 781, 808 (2002). Article 113-3 of the French Code of Criminal Procedure states: “The assisted witness benefits from the right to be assisted by an advocate, who is informed prior to the hearings and who has access to the case file, in accordance with the provisions of articles 114 and 114-1.” See also Cass. Crim., 24 May 1971, Bull. Crim. n. 171: “Un individu, qui a été mis personnellement en cause par la partie civile et contre lequel le Ministère public a requis, nommément, l’ouverture d’une information, est partie à l’instance. Il doit être, en conséquence, considéré comme ‘inculpé’ au sens de l’article 114 du Code de procédure pénale (1) encore qu’il n’ait pas été entendu par le magistrat instructeur dans les conditions prévues par ledit article.”

<sup>38</sup> Heather Ryan, Open Society Justice Initiative, *Troubled Khmer Rouge Investigation Raises New Transparency Concerns*, 6 August 2013, available at <http://www.opensocietyfoundations.org/voices/troubled-khmer-rouge-investigation-raises-new-transparency-concerns>.

it prevents a judicial body from operating in secret from parties *and individuals affected by its decisions.*<sup>39</sup>

23. It is vitally important that Mr. MEAS Muth participate<sup>40</sup> in the judicial investigation. It is at the investigative stage that the OCIJ will determine whether Mr. MEAS Muth will ultimately be sent to trial. Mr. MEAS Muth's future depends very much upon the results of the judicial investigation. At the investigative stage, the defence plays a critical role, by reviewing material on the Case File and making investigative requests where it considers that certain issues should be more fully examined.<sup>41</sup> This is particularly important in the civil law system, where defence teams are prohibited from conducting their own investigations.<sup>42</sup> Defence counsel must also use this time to familiarize themselves with the material on the Case File in order to prepare in the event the case goes to trial.

**C. Denying Mr. MEAS Muth his fair trial rights simply because the OCIJ has failed to formally charge him impermissibly places form over substance**

24. To deny Mr. MEAS Muth access to his Case File because he is a "Suspect" and not a "Charged Person" simply because the OCIJ has not formally notified him of charges would be impermissibly placing form over substance.<sup>43</sup> In *Adolf v. Austria*, the EtCHR explained that:

<sup>39</sup> Case File No. 004/07-09-2009-ECCC/OCIJ (PTC 02), Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant Robert Hamill, 14 February 2012, D5/2/4/3, para. 11 (emphasis added).

<sup>40</sup> As stated by former ICTY and ICTR Appeals Chamber Judge Schomburg, "The international community has come to accept that an accused must never become the mere object of criminal proceedings." See Fundamentally Dissenting Opinion of Judge Schomburg on the Right to Self-Representation, para. 3, in *Prosecutor v. Krajišnik*, IT-00-39-A, Decision on Momčilo Krajišnik's Request to Self-Represent, on Counsel's Motions in Relation to Appointment of Amicus Curiae, and on the Prosecution Motion of 16 February 2007, 11 May 2007.

<sup>41</sup> See Rule 55(10).

<sup>42</sup> See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, Letter from the OCIJ to the NUON Chea Defence, Response to your letter dated 20 December 2007 concerning the conduct of the judicial investigation, 10 January 2008, A110/1, p. 2: "Before this Court, the power to conduct judicial investigations is assigned solely to the two independent Co-Investigating Judges and not to the parties. There is no provision which authorizes the parties to accomplish investigative action in place of the Co-Investigating Judges, as may be the case in other procedural systems."

<sup>43</sup> "This attitude was nicely summed up in the writings of Aristotle. His description of judicial discretion, which he called 'equity,' is classical... Legal rules, he pointed out, are necessarily general, designed to meet the average situation, but the circumstances of most actual cases are particular. Human rulemakers cannot lay down in advance rules which will fit all particular cases thereafter arising. *Wherefore the rules of law must often be modified in their application. Where the provisions of the law would result in injustice, owing to the special circumstances of a particular case, the law must be supplemented and adjusted by equity.*" GEORGE C. CHRISTIE, JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW, AMERICAN CASEBOOK SERIES 714 (West Publishing Co., St. Paul, Minnesota, 1973) (emphasis added). See also Special Tribunal for Lebanon,

[t]he prominent place held in a democratic society by the right to a fair trial favours a ‘substantive’, rather than a ‘formal’, conception of the ‘charge’...; it impels the Court to look behind the appearances and examine the realities of the procedure in question in order to determine whether there has been a ‘charge’.... In particular, the applicant’s situation under the domestic legal rules in force has to be examined in the light of the object and purpose of Article 6 (art. 6), namely the protection of the rights of the defence.<sup>44</sup>

25. Even though the Rules do not clearly state at what point a person becomes a party or is authorized to access his Case File, this lack of clarity does not prevent the OCIJ from granting access to the Case File. Rule 21 requires the OCIJ to interpret the Establishment Law and Internal Rules in such a way so as to always safeguard the interests of Suspects, Charged Persons, and Accused. The OCIJ has the authority and, indeed, the obligation to authorize access to the Case File where such access is necessary to protect fundamental fair trial rights. Granting access to the Case File would cause no prejudice to the ongoing investigation or to the OCP or Civil Parties. Since there is no reason *not* to grant Mr. MEAS Muth access to his Case File at this stage and it would protect his fair trial rights to grant access, such access must be granted. The International Reserve Co-Investigating Judge’s decision granting Mr. MEAS Muth access to the Case File recognized this. This decision must be upheld and implemented.<sup>45</sup>

**D. Mr. MEAS Muth’s right to equal treatment will be violated if he is not afforded access to the Case File and the right to participate in the judicial investigation**

26. Mr. MEAS Muth must be treated equal to the persons prosecuted in Cases 001 and 002. The right to equal treatment before the law is enshrined in the Cambodian Constitution,<sup>46</sup>

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Order Assigning Matter to the Pre-Trial Judge, CH/PRES/2010/01, 15 April 2010, para. 16. In this Order, Judge Cassese found that rules of form may be relaxed in “international *criminal* proceedings to the extent that such application (i) is not made to the detriment of the fundamental rights of the accused, the victims or the witnesses or any other person appearing before international criminal courts, and (ii) does not amount to a serious infringement of strict procedural provisions aimed at safeguarding the principle of fair and expeditious justice.”

<sup>44</sup> *Adolf v. Austria*, 26 March 1982, para. 30 (internal citations omitted).

<sup>45</sup> The Defence notes that it does not have access to the actual Notification of Suspect Rights issued by International Reserve Co-Investigating Judge Kasper-Ansermet, but only to a letter Judge Kasper-Ansermet sent to DSS, informing DSS of this Notification. The Defence therefore does not have the benefit of examining the legal reasoning provided by Judge Kasper-Ansermet. However, even should this Notification lack legal reasoning, by stating that Mr. MEAS Muth has the right to access his Case File, Judge Kasper-Ansermet was simply giving expression to Mr. MEAS Muth’s fair trial rights provided by the Cambodian Constitution, the Agreement, the Establishment Law, and the International Covenant on Civil and Political Rights. Such fundamental fair trial rights do not rely on an exercise of judicial discretion to become applicable. Mr. MEAS Muth’s right to adequate time and facilities to prepare his defence applies at all stages, or, at a minimum, from the point where he became aware of and affected by the judicial investigation. *See* Argument A *supra*.

<sup>46</sup> Article 31 of the Cambodian Constitution provides that “[e]very Khmer citizen shall be equal before the law....”

a number of international<sup>47</sup> and regional instruments,<sup>48</sup> and in the Constitutions of many States.<sup>49</sup> In Cases 001 and 002, charging occurred shortly after the OCIJ became seized with the case.<sup>50</sup> In contrast to Cases 001 and 002, Mr. MEAS Muth has been investigated by the OCIJ for nearly 4 years<sup>51</sup> without allowing him to access the Case File and participate in the investigation during this period.

27. International Pre-Trial Chamber Judges Katinka Lahuis and Rowan Downing have commented on this disparate treatment:

[f]rom the opening to the announcement of the closing of the judicial investigation and until now, the Co-Investigating Judges have not formally notified the charges to, nor informed of the existence of the judicial investigation, the persons named as Suspects in the Second Introductory Submission. This approach departs from that taken for Case 001 and Case 002 whereby the persons named in the First Introductory Submission were brought before the Co-Investigating Judges within the months that followed the filing of the Introductory Submission in order to be formally informed of the charges against them through an initial appearance held in pursuance to Internal Rule 57. Although the Co-Investigating Judges enjoy certain discretion in their decision to formally notify of charges a person named in an introductory submission, no explanation has ever been provided by the Co-Investigating Judges in the case file or otherwise as to why their practice in Case 003 differs from the preceding cases and why the Suspects have not been notified of such status in the investigation. This may be perceived as questionable given the requests made by the International Co-Prosecutor, which have not been determined and no explanation for such course of action has been given.<sup>52</sup>

<sup>47</sup> Article 7 of the Universal Declaration of Human Rights provides that “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” Article 14(1) of the ICCPR provides that “[a]ll persons shall be equal before the courts and tribunals.” Article 26 of the ICCPR provides that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”

<sup>48</sup> See Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms; Inter-American Convention on Human Rights, Art. 24.

<sup>49</sup> See, e.g., United States Constitution, 14<sup>th</sup> amendment; French Constitution, adopted 1958, Art. 1; Constitution of the Federal Republic of Austria, Art. 7; New Zealand Bill of Rights Act of 1990, Part 2, para. 27; Constitution of the Republic of Poland, 2 April 1997, Art. 32; Constitution of the Democratic Socialist Republic of Sri Lanka, Art. 12; First Draft Constitution of the Republic of Zambia, 30 April 2012, Art. 45.

<sup>50</sup> For example, Mr. IENG Sary and Mrs. IENG Thirith were charged on 12 November 2007, less than four months after the Introductory Submission was filed and the judicial investigation began. See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, Police Custody Decision, 12 November 2007, C14, p. 2; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, Police Custody Decision, 12 November 2007, C15, p. 2

<sup>51</sup> Co-Prosecutors’ Second Introductory Submission Regarding the Revolutionary Army of Kampuchea, 20 November 2008, D56/3.1. According to Lawyer’s Recognition Decision Concerning All Civil Party Applications on Case File No.003, 26 February 2013, D58, para. 3, this Introductory Submission was not placed on the Case File until 7 September 2009 through Acting International Co-Prosecutor’s Notice of Filing of the Second Introductory Submission, 7 September 2009.

<sup>52</sup> Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant Robert Hamill, 24 October 2011, D11/2/4/4, para. 3.

28. The OCIJ has had several years to investigate Case 003. Irrespective of the OCIJ's approach concerning when it will exercise its Rule 57 charging authority, failure to authorize Mr. MEAS Muth to access his Case File and participate in the judicial investigation after this lengthy period creates the appearance that the OCIJ is purposefully trying to prevent Mr. MEAS Muth from exercising his fair trial rights<sup>53</sup> (or is having problems with political interference, which also affects Mr. MEAS Muth's fair trial rights<sup>54</sup>). To wait until the OCIJ is ready to issue a Closing Order indicting Mr. MEAS Muth before actually charging him (which appears to be the course the OCIJ is taking) would be a clear violation of Mr. MEAS Muth's rights, since he would be precluded from participating in the judicial investigation.
29. Concerning participation of victims, International Pre-Trial Chamber Judges Rowan Downing and Chang-Ho Chung explained that "[r]efusing to victims the possibility to participate in the investigation can deprive the Co-Investigating Judges of significant information in the search for the truth, leading to an incomplete investigation and raising doubts about its impartiality."<sup>55</sup> This is even more the case when denying a Suspect the possibility to participate in his investigation.<sup>56</sup>

### III. CONCLUSION AND RELIEF REQUESTED

30. Mr. MEAS Muth must be granted access to the Case 003 Case File and afforded the opportunity to participate in the ongoing judicial investigation. Anything less will be a violation of Mr. MEAS Muth's fair trial rights and will not conform with international standards of justice.

<sup>53</sup> See Jacqueline Hodgson, *Suspects, Defendants and Victims in the French Criminal Process: The Context of Recent Reform*, 51 INT'L CRIM. L. Q. 781, 808 (2002): "The benefits which accrue to the accused at one level make it advantageous to be *mis en examen* [a Charged Person]. *To do otherwise could be seen as maintaining her disadvantaged position*" (emphasis added).

<sup>54</sup> See Heather Ryan, Open Society Justice Initiative, *Troubled Khmer Rouge Investigation Raises New Transparency Concerns*, 6 August 2013, available at

<http://www.opensocietyfoundations.org/voices/troubled-khmer-rouge-investigation-raises-new-transparency-concerns>: "While there may be a perfectly legitimate reason for the co-investigating judges not to formally charge the persons under investigation, delaying a decision on charging and refusing access to the investigation by suspects for such an extended period of time raises suspicion that the delay is the result of ongoing political problems surrounding the investigation. Such reasons, if they exist, would be improper and have a potentially negative impact on the fair-trial rights of the suspects and the legacy of the court."

<sup>55</sup> Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant ██████, 13 February 2013, D11/3/4/2, para. 4.

<sup>56</sup> Judges Lahuis and Downing also "emphasi[zed] that failure to conduct a complete and impartial investigation would inevitably be detrimental to the rights of the Suspects, the Victims and the Co-Prosecutors, *especially in the context where they have not thus far been afforded the possibility to effectively participate in the said investigation.*" Considerations of the Pre-Trial Chamber Regarding the International Co-Prosecutor's Appeal Against the Decision on Re-Filing of Three Investigative Requests, 15 November 2011, D26/1/3, para. 16 (emphasis added).

**WHEREFORE**, for all the reasons stated herein, the Defence respectfully requests the Office of the Co-Investigating Judges to AUTHORIZE Mr. MEAS Muth and his Defence team to access the Case 003 Case File and to participate in the judicial investigation.

Respectfully submitted,



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ANG Udom

Co-Lawyers for Mr. MEAS Muth

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Michael G. KARNAVAS

Signed in Phnom Penh, Kingdom of Cambodia on this **29<sup>th</sup>** day of **August, 2013**