

BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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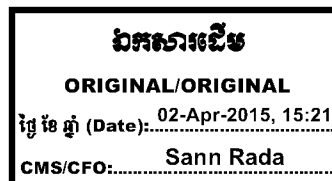
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**IM CHAEM'S APPEAL AGAINST THE INTERNATIONAL CO-INVESTIGATING
JUDGE'S DECISION TO CHARGE HER *IN ABSENTIA***

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I. INTRODUCTION

1. Ms. IM Chaem, through her Co-Lawyers (“the Defence”), pursuant to Rules 21 and 74(3)(a) of the Internal Rules (“Rules” or “Internal Rules”), hereby submits this appeal against the International Co-Investigating Judge’s Decision to Charge her *in Absentia*.¹
2. In the Impugned Decision, Judge Mark B. Harmon erred in law by exceeding his powers and charging Ms. IM Chaem *in absentia* when the Internal Rules require a suspect’s physical presence during charging. He relied on purported *lacunae* in the Internal Rules and Cambodian procedural law to circumvent the law applicable at the Extraordinary Chambers in the Courts of Cambodia (“ECCC”). As a result, he created a new procedure for charging suspects *in absentia* by cherry-picking legal requirements for general *in absentia* proceedings from other tribunals. Judge Harmon showed no reasoning for applying these legal requirements at the ECCC.² The Impugned Decision therefore violates Ms. IM Chaem’s right to legal certainty and contains errors of law requiring appellate intervention. Charging Ms. IM Chaem *in absentia* is *ultra vires*.
3. The Defence respectfully requests that the Pre-Trial Chamber a) admit this appeal; b) overturn paragraphs 39, 40, 42–46, 57–58, 73 in part³, and 76, relating to the charging of Ms. IM Chaem in the Impugned Decision, which err in law; and consequently c) rescind the Notification of Charges, which is *ultra vires*.
4. The Defence’s appeal on whether the International Co-Investigating Judge must reveal the nature of secret disagreements when acting alone is currently before the Pre-Trial Chamber.⁴ Judge Harmon unilaterally issued the Impugned Decision and the Notification of Charges on the basis of secret disagreements.⁵ The Defence reserves the right to file new or

¹ *Decision to Charge IM Chaem in Absentia*, 3 March 2015, D239 (“Impugned Decision”), attaching, *Confidential Annex: Notification of Charges against IM Chaem*, 3 March 2015, D239.1 (“Notification of Charges”).

² Impugned Decision paras. 58. See also, Impugned Decision, paras. 59-68.

³ Specifically, “... the International CIJ finds that charging Im Chaem *in absentia* is the only way to go to ensure the fair and expeditious conduct of the proceedings.”

⁴ See, *IM Chaem’s Appeal against International Co-Investigating Judge Harmon’s Decision on her Motion to Reconsider and Vacate her Summons dated 29 July 2014*, 23 March 2015, document number pending determination.

⁵ Impugned Decision, p. 1; Notification of Charges, p. 1.

supplemental arguments in relation to the Judge's competence to unilaterally charge Ms. IM Chaem when the Pre-Trial Chamber has decided on this matter.

5. The Defence files this Appeal in English first, while the Khmer translation will be filed at the earliest opportunity. There are exceptional circumstances justifying filing in only one language in the first instance as explained in the Defence request to file this Appeal in English.⁶

II. BACKGROUND

6. On 20 May 2014, the Co-Investigating Judges registered a disagreement,⁷ the subject of which is unknown to the Defence.
7. On 29 July 2014, Judge Harmon, noting the 20 May 2014 disagreement, summoned Ms. IM Chaem to appear at an initial appearance on 8 August 2014.⁸ She refused to sign the acknowledgement of service of the Summons.⁹
8. On 8 August 2014, Ms. IM Chaem did not attend the scheduled initial appearance.¹⁰
9. On 14 August 2014, Judge Harmon issued an arrest warrant (*mandat d'amener*) for Ms. IM Chaem to be brought at her initial appearance.¹¹ On 15 August 2014, the Arrest Warrant was delivered to the Cambodian Judicial Police to be executed.¹²
10. Between 15 September 2014 and 19 December 2014, Judge Harmon and other representatives from the Office of the Co-Investigating Judges held a number of meetings

⁶ See, *IM Chaem's Request to File her Charging in Absentia Appeal in English First*, 1 April 2015, document number pending determination. See also, E-mail from KORM Chanmony to Julianne Romy entitled "Re: Urgent request for translation", dated 30 March 2015.

⁷ Impugned Decision, para. 3.

⁸ *Summons to Initial Appearance*, 29 July 2014, A150 ("Summons"), p. 2.

⁹ *Written Report of Service of Summons*, 8 August 2014, A150/1, p. 2; Summons, p. 4.

¹⁰ See, *Judge Harmon's note*, 14 August 2014, A150/2.

¹¹ *Arrest Warrant*, 14 August 2014, C1 ("Arrest Warrant"). See also, Impugned Decision, para. 21. The Defence learned about the issuance of the Arrest Warrant against Ms. IM Chaem in the Impugned Decision dated 3 March 2015, and was given access to a copy of it on 4 March 2015. The Defence also notes that the Arrest Warrant was placed in the case file on 12 February 2015.

¹² *Accompanying Letter to the Arrest Warrant*, 15 August 2014, C1.1. See also, Impugned Decision, para. 21.

with a representative of the Judicial Police in relation to the execution of the Arrest Warrant.¹³

11. On 30 January 2015, Judge Harmon sent a letter—delivered on 8 February 2015—to the Chairman of the Security Commission for the ECCC in relation to the execution of the Arrest Warrant.¹⁴ Judge Harmon noted that if Ms. IM Chaem failed to appear at the ECCC before 18 February 2015, or was not arrested by that date, the International Co-Investigating Judge would issue a public decision charging her *in absentia*.¹⁵
12. On 3 March 2015, Judge Harmon, issued the Impugned Decision. The International Co-Investigating Judge found that the “law applicable at the ECCC permits charging *in absentia* when a suspect has refused to appear for an Internal Rule 57 initial appearance and when subsequent efforts to secure the presence of the suspect have been fruitless.”¹⁶ Judge Harmon therefore concluded that “all the legal requirements for charging *in absentia* [were] satisfied”¹⁷ and that charging Ms. IM Chaem *in absentia* was “the only way to ensure the fair and expeditious conduct of the proceedings.”¹⁸

III. ADMISSIBILITY

13. This appeal is admissible pursuant to the two following Rules:
 - a) Rule 21, which requires that suspects’ and charged persons’ interests must always be safeguarded when interpreting the ECCC provisions;¹⁹ and
 - b) Rule 74(3)(a), according to which parties may appeal decisions confirming ECCC jurisdiction.²⁰

¹³ Impugned Decision, paras. 23-24, 26, 28.

¹⁴ *Letter to the Chairman of the Security Commission for the ECCC*, 30 January 2015, D238. *See also*, Impugned Decision, para. 29.

¹⁵ *Letter to the Chairman of the Security Commission for the ECCC*, 30 January 2015, D238, p. 2.

¹⁶ Impugned Decision, para. 58.

¹⁷ Impugned Decision, para. 68.

¹⁸ Impugned Decision, para. 73.

¹⁹ Internal Rules (Rev. 9), Extraordinary Chambers in the Courts of Cambodia, 12 June 2007 (as revised on 16 January 2015) (“Internal Rules”), Rule 21(1).

Rule 21(1)

14. This Appeal is admissible pursuant to Rule 21(1) of the Internal Rules, which requires that suspects' and charged persons' interests must always be safeguarded when interpreting the ECCC provisions. The Pre-Trial Chamber has held that Rule 21 requires that it "adopt a broader interpretation of the Charged Person's right to appeal to ensure that the fair trial rights of the Charged Person are safeguarded."²¹
15. Suspects' and charged persons' interests must always be safeguarded so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the Court.²² The right to legal certainty requires that a law be predictable and clear as well as effectively implemented in such a way that it prevents arbitrary decisions.²³
16. The ECCC procedural law has to be applied predictably and clearly according to Article 12 of the Agreement.²⁴ Pursuant to the Agreement, i) the Internal Rules have primacy in determining procedure;²⁵ ii) the Cambodian procedural rules are only applicable if a question is unanswered in the Internal Rules,²⁶ and iii) Judges may seek guidance in international criminal procedural rules only if Cambodian laws do not deal with a matter, where there is a question regarding their interpretation, or a question regarding their consistency with

²⁰ Internal Rules, Rule 74(3)(a).

²¹ Case 002, *Decision on Ieng Sary's Appeal Against Co-Investigating Judge's Decision Refusing to Accept the Filing of IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of Proceedings*, 20 September 2010, D390/1/2/4, para. 13.

²² Internal Rules, Rule 21(1).

²³ D. Soulas de Russel and P. Raimbault, 'Nature et racines du principe de sécurité juridique : une mise au point' 55 *Revue Internationale de Droit Comparé* 1 (2003) 85-103, pp. 96-97.

²⁴ Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, 6 June 2003 ("Agreement"), Art. 12(1).

²⁵ Case 002, *Decision on Nuon Chea's Appeal against Order Refusing Request for Annulment*, D55/1/8, 26 August 2008 ("Nuon Chea Request for Annulment Appeal"), para. 14.

²⁶ Nuon Chea Request for Annulment Appeal, para. 15. *See also*, Case 002, *Decision on Khieu Samphan's Supplemental Application for Release*, C26/5/5, 24 December 2008, para. 17.

international standards.²⁷ Guidance may be sought in international procedural rules only when appropriate and necessary.²⁸

17. Judge Harmon failed to apply the law predictably and clearly according to these principles. He has unlawfully resorted to Cambodian laws when the Internal Rules raise no unanswered questions, and has subsequently inappropriately and unnecessarily sought guidance in international criminal procedure when Cambodian law clearly deals with the matter at stake. The Impugned Decision therefore violates Ms. IM Chaem's right to legal certainty, especially as Judge Harmon has misused the Article 12 process to usurp the Plenary and create a new charging *in absentia* procedure.
18. This Appeal is therefore admissible under Rule 21(1) because Judge Harmon violated Ms. IM Chaem's right to be legally certain that the plain meaning of Rule 57, as explained below, clearly does not allow *in absentia* charging. The Pre-Trial Chamber must intervene to prevent the irremediable damage of Ms. IM Chaem being charged using laws that do not apply and do not exist either in any ECCC legal instrument or Cambodian law.²⁹

Rule 74(3)(a)

19. Rule 74(3)(a) explicitly states that a Charged Person may appeal against orders or decisions of the Co-Investigating Judges confirming the jurisdiction of the ECCC. The Pre-Trial Chamber has previously held that only jurisdictional challenges, outlining the personal, temporal, and subject matter of the jurisdiction of the ECCC, may be raised under that Rule.³⁰

²⁷ Agreement, Art. 12(1); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the Period of Democratic Kampuchea, 27 October 2004 ("Establishment Law"), Art. 23 new.

²⁸ See, Case 002, *Decision on Nuon Chea's Preliminary Objection alleging the Unconstitutional Character of the ECCC Internal Rules*, 8 August 2011, E51/14, para. 7.

²⁹ Case 004, *Confidential Decision on TA An's Appeal against the Decision Rejecting his Request for Information Concerning the Co-Investigating Judges' Disagreement of 5 April 2013*, 22 January 2015, D208/1/1/2, para. 8.

³⁰ See, Case 002, *Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)*, 20 May 2010, D97/14/15, para. 21; Case 002, *Decision on Ieng Sary's Appeal against the Closing Order*, 11 April 2011, D427/1/30, paras. 45, 47.

20. By issuing the Impugned Decision and charging Ms. IM Chaem, the International Co-Investigating Judge wrongly confirmed that he has personal, temporal, and material jurisdiction over her. He does not have jurisdiction over Ms. IM Chaem because the charging *in absentia* procedure he created is not permitted at the ECCC, and renders the Notification of Charges *ultra vires*. This appeal should therefore be admissible pursuant to Rule 74(3)(a).

IV. APPLICABLE LAW

Fair trial rights

21. The Cambodian Constitution provides that Cambodia recognizes “covenants and conventions related to human rights.”³¹ Articles 12(2) of the Agreement and 33 new of the Establishment Law further state that the jurisdiction of the ECCC shall be exercised in accordance with international standards of justice, fairness and due process of law.
22. The Internal Rules provide that the applicable “[Establishment] 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 proceeding.”³²
23. The ICCPR provides: “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... a. to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; ... d. to be tried in his presence.”³³

³¹ The Constitution of the Kingdom of Cambodia (adopted 21 September 1993), Art. 31.

³² Internal Rules, Rule 21(1).

³³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (“ICCPR”), Art. 14(3). The ECCC must exercise jurisdiction in accordance with Article 14 of the ICCPR. *See*, Agreement, Art. 12(2).

Interpretation of ECCC applicable law

24. The Vienna Convention on the Law of Treaties³⁴ applies to the Agreement.³⁵ The Agreement also provides that “[w]here Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level.”³⁶
25. The Establishment Law provides that the Co-Investigating Judges shall “follow existing procedures. If these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, the Co-Investigating Judges may seek guidance in procedural rules established at the international level.”³⁷
26. The Internal Rules provide that if “in the course of ECCC proceedings, a question arises which is not addressed ... Co-Investigating Judges ... shall decide in accordance with Article 12(1) of the Agreement and Articles 20 new, 23 new, 33 new or 37 new of the [Establishment] Law as applicable, having particular attention to the fundamental principles set out in Rule 21 and the applicable criminal procedural laws. In such a case, a proposal for amendment ... shall be submitted to the Rules and Procedure Committee as soon as possible.”³⁸ In addition, Rule 3 governs the rules amendment procedure at the ECCC, and provides that requests for amendment may be made to the Rules and Procedure Committee and shall be submitted to the Plenary for adoption.³⁹

³⁴ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (1969) (“Vienna Convention on the Law of Treaties”).

³⁵ Agreement, Art. 2(2).

³⁶ Agreement, Art. 12(1).

³⁷ Establishment Law, Art. 23 new.

³⁸ Internal Rule, Rule 2.

³⁹ Internal Rules, Rules 3(1) and 3(2). *See also*, Internal Rules, Rules 18, 20.

Procedure for charging before the ECCC

27. The Internal Rules state: 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.”⁴⁰ The Charged Person has the right to be interviewed and if he or she “agrees, the Co-Investigating Judges shall take the statement immediately.”⁴¹
28. An “Accused shall be tried in his or her presence.”⁴² The Internal Rules further provide that “[w]here the Accused refuses to attend the proceedings, he or she shall be brought before the Chamber, by public force if necessary, where he or she shall be notified of the inalienable right to be assisted by a lawyer...”⁴³ and “[i]f the Accused, following an initial appearance and having been duly summoned to the subsequent hearing, continues to refuse or fails to attend the proceedings... the proceedings may continue in his or her absence.”⁴⁴

V. STANDARD OF REVIEW

29. Co-Investigating Judges’ decisions may be overturned if they are a) based on an error of law invalidating the decision; b) based on an error of fact occasioning a miscarriage of justice; or c) so unfair or unreasonable as to constitute an abuse of the judges’ discretion.⁴⁵

VI. ARGUMENT

Summary of arguments

30. The Internal Rules clearly provide that suspects must appear in person before the Co-Investigating Judges to be charged. The clarity of the Rules means that Judge Harmon may not resort to Cambodian law to determine whether he may charge *in absentia*. In any event,

⁴⁰ Internal Rules, Rule 57(1).

⁴¹ Internal Rules, Rule 57(1).

⁴² Internal Rules, Rule 81(1).

⁴³ Internal Rules, Rule 81(3).

⁴⁴ Internal Rules, Rule 81(4).

⁴⁵ Case 002, *Public Redacted Decision on IENG Sary’s Appeal against Co-Investigating Judges’ Order Denying Request to Allow Audio/Video Recording or Meetings with IENG Sary at the Detention Facility*, 11 June 2010, A317/2/12, para. 22.

Cambodian law also requires suspects to appear in person before an investigating judge to be charged. There is no uncertainty or question regarding the consistency of Cambodian rules with international standards that allows Judge Harmon to seek guidance in international criminal procedure rules. In any event, international procedural rules provide no guidance on *in absentia* charging, and Judge Harmon has failed to justify why he may import these rules to the ECCC. Lastly, he has exceeded his powers and usurped the role of the Plenary in creating a new *in absentia* charging procedure that violates Ms. IM Chaem's right to legal certainty. Therefore, Judge Harmon's conclusion that the law applicable at the ECCC permits charging *in absentia* constitutes an error of law, and charging Ms. IM Chaem *in absentia* is *ultra vires*.

A. The Internal Rules clearly do not allow charging *in absentia*

31. The Internal Rules “constitute the primary instrument to which reference should be made in determining procedures before the ECCC.”⁴⁶ The ECCC charging process, as laid out in Rule 57, is clear: the Internal Rules require suspects to be present when charged. Judge Harmon therefore erred in law in concluding that the actual appearance of a suspect is not necessary.⁴⁷

a. Rule 57 makes the actual appearance of a suspect a necessary pre-condition for the Co-Investigating Judges to charge him or her⁴⁸

32. International criminal tribunals have an established practice of interpreting their internal rules of procedure according to Articles 31 and 32 of the Vienna Convention on the Law of Treaties.⁴⁹ The International Criminal Tribunal for the former Yugoslavia and Rwanda (“ICTY” and “ICTR”, respectively) rules of procedure and evidence are interpreted this way

⁴⁶ Nuon Chea Request for Annulment Appeal, para. 14.

⁴⁷ See, Impugned Decision, para. 40.

⁴⁸ Contrary to Judge Harmon's reasoning. See, Impugned Decision, para. 40.

⁴⁹ *Prosecutor v. Slobodan Milošević* (IT-02-54-A), *Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder*, 18 April 2002, para. 16; *Prosecutor v. Jelisić* (IT-95-10-A), *Judgement*, 5 July 2001, para. 35; *Prosecutor v. Erdemović* (IT-96-22-A), *Judgement*, Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, para. 3; *Prosecutor v. Joseph Kanyabashi* (ICTR-96-15-A), *Decision on the Defense Motion for Interlocutory Appeal on the Jurisdiction of the Trial Chamber I (Appeal Chamber Decision)*, Joint Separate and Concurring Opinion Judge Wang and Judge Nieto-Navia, 3 June 1999, para. 11.

because they derive from the ICTY or ICTR Statute, which are validated by international treaty.⁵⁰ More generally, the ICTY Appeals Chamber has confirmed that the Vienna Convention on the Law of Treaties interpretation provisions reflect customary international law.⁵¹

33. The ECCC Internal Rules should also be interpreted according to the Vienna Convention on the Law of Treaties because they also derive from a treaty, namely the Agreement.⁵² Therefore, pursuant to Article 31 of the Vienna Convention on the Law of Treaties, the Internal Rules must be interpreted in good faith, in accordance with their ordinary meaning in their context and in light of their object and purpose.⁵³
34. The ordinary, good faith meaning of Rule 57 requires Ms. IM Chaem's physical presence at an initial appearance as a pre-condition for Judge Harmon to charge her. A suspect may only be charged "at the time of the initial appearance,"⁵⁴ which is defined in the Internal Rules' glossary as the "hearing during which a Charged Person appears for the first time before the Co-Investigating Judges."⁵⁵
35. The ordinary meaning of *to appear* is that a person must be physically present. Dictionaries all define *appear* similarly, such as "to be present,"⁵⁶ "to show up,"⁵⁷ "to attend or be

⁵⁰ *Prosecutor v. Joseph Kanyabashi* (ICTR-96-15-A), *Decision on the Defense Motion for Interlocutory Appeal on the Jurisdiction of the Trial Chamber I (Appeal Chamber Decision)*, Joint Separate and Concurring Opinion Judge Wang and Judge Nieto-Navia, , 3 June 1999, para. 11

⁵¹ *Prosecutor v. Delalić et al.* (IT-96-21-A), *Judgement*, 20 February 2001, para. 67, citing *Case concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, *Judgment* (1994), I.C.J. Reports, p. 21, para. 41, endorsed in *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Jurisdiction and Admissibility), *Judgment* (1995), I.C.J. Reports, p. 18, para. 33. See also, *Kasikili/Sedudu Island* (Botswana/Namibia), *Judgment* (1999) I.C.J. Reports, p. 1059, para. 18.

⁵² Agreement, Art. 2(2).

⁵³ Vienna Convention on the Law of Treaties, Art. 31(1).

⁵⁴ Internal Rules, Rule 57(1). The Defence notes that Rule 57 of the Internal Rules is entitled "Notification of Charges".

⁵⁵ See, Internal Rules, Glossary p. 84.

⁵⁶ Cambridge Dictionaries Online, "appear", accessed on 24 March 2015, available at: <http://dictionary.cambridge.org/dictionary/british/appear>.

⁵⁷ Merriam-Webster Dictionary, "appear", accessed on 24 March 2015, available at: <http://www.merriam-webster.com/dictionary/appear>.

present,”⁵⁸ or “to come into sight or view.”⁵⁹ This interpretation is supported even more emphatically by the specific legal definitions of the words *appear* and *appearance*; which include “to be present in court,”⁶⁰ “coming into court,”⁶¹ “to stand in the presence of some authority, tribunal,”⁶² “present oneself formally in court,”⁶³ or “to come formally before an authoritative body.”⁶⁴ Under no definition can *to appear* or *appear before a judge* ordinarily, and in good faith, mean that the person is not physically present.

36. The ordinary meaning of the procedures under Rule 57 also requires that Ms. IM Chaem be physically present during charging. The Co-Investigating Judges must “record the identity of the Charged Person”⁶⁵ at the initial appearance and take the suspect’s statement “immediately” if he or she agrees.⁶⁶ In particular, Judge Harmon confirmed that suspects have the right to make a statement during their initial appearance.⁶⁷ These cannot be done without the suspect being present. The Co-Investigating Judges followed these procedures according to their ordinary meaning when charging Duch, Mr. NUON Chea, Mr. IENG Sary, and Mr. AO An,⁶⁸ all of whom were physically present as required under Rule 57. In

⁵⁸ Dictionary.com, “appear”, accessed on 24 March 2015, available at:

<http://dictionary.reference.com/browse/appear>.

⁵⁹ Collins Dictionary, “appear”, accessed on 24 March 2015, available at:

<http://www.collinsdictionary.com/dictionary/english/appear?showCookiePolicy=true>.

⁶⁰ Collins Dictionary, “appear”, accessed on 24 March 2015, available at:

<http://www.collinsdictionary.com/dictionary/english/appear?showCookiePolicy=true>.

⁶¹ Garner et al, Black’s Law Dictionary (WEST, Ninth ed., 2009) Definition of “appearance”.

⁶² Webster Dictionary, “appear”, accessed on 24 March 2015, available at:

<http://www.webster-dictionary.org/definition/Appear>.

⁶³ Oxford Dictionaries, “appear”, accessed on 24 March 2015, available at:

<http://www.oxforddictionaries.com/definition/english/appear>.

⁶⁴ Merriam-Webster, “appear”, accessed on 24 March 2015, available at:

<http://www.merriam-webster.com/dictionary/appear>.

⁶⁵ Internal Rules, Rule 57(1).

⁶⁶ Internal Rules, Rule 57(1).

⁶⁷ See, *Written Record of Initial Appearance of Ao An* (Khmer version), 27 March 2015, p. 8.

⁶⁸ The written records of initial appearances of the three suspects in cases 001 and 002 explicitly mention the following: “Having been presented to us and having provided information regarding personal identity as follows”, followed by the suspects’ confirmation of their identity. See, *Written Record of Initial Appearance of Duch*, 31 July 2007, E3/915, pp. 1-2; *Written Record of Initial Appearance of Nuon Chea*, 19 September 2007, E3/54, pp. 1-2; *Written Record of Initial Appearance of Ieng Sary*, 12 November 2007, E3/92, pp. 1-2. Mr. Ao An was also requested to provide his identity. See, *Written Record of Initial Appearance of Ao An* (Khmer Version), 27 March 2015, D242, p. 5. In addition, the written records of initial appearances of the four suspects show that they were offered to make a statement after having been informed of their right to remain silent and to consult with a lawyer

charging Ms. IM Chaem *in absentia*, Judge Harmon failed to record her identity and take her statement immediately.

37. Lastly, Rule 57(3) requires the charged person to tell the Co-Investigating Judges his or her address if he or she is “not detained after the initial appearance.” That the Rule envisages a person’s release after the initial appearance is nonsensical unless the person is physically present to be released.

38. Therefore, Judge Harmon erred in charging Ms. IM Chaem *in absentia* when the ordinary meaning of Rule 57 requires her to be present when charged.⁶⁹

b. The drafters of the Internal Rules did not intend any exception to the requirement that suspects must have an initial appearance

39. The Internal Rules, read as a whole, make it clear that the drafters intended that a suspect must be present during the initial appearance without exception.⁷⁰ Provisions that refer to exceptions to a general rule must be given a restrictive interpretation.⁷¹ The drafters of the Internal Rules should be presumed to act intentionally and purposely when they include an exception in one section but omit in another. Thus, when the drafters of the Internal Rules provided restrictions to the requirement to be present under Rule 81 at trial, they acted intentionally and purposely by not providing any similar restrictions to the presence requirement under Rule 57 for charging.

prior to being interviewed. All four records of initial appearance explicitly state that should they wish to make a statement, the Co-Investigating Judges would record those remarks immediately. *See, Written Record of Initial Appearance of Duch*, 31 July 2007, E3/915, p. 3; *Written Record of Initial Appearance of Nuon Chea*, 19 September 2007, E3/54, p. 4; *Written Record of Initial Appearance of Ieng Sary*, 12 November 2007, E3/92, pp. 3-4; *Written Record of Initial Appearance of Ao An* (Khmer version), 27 March 2015, pp. 7-8. The Defence notes that it does not have access to the written records of initial appearance of Mr. KHIEU Samphan and Ms. IENG Thirith.

⁶⁹ Impugned Decision, para. 40.

⁷⁰ The meaning of provisions must be interpreted taking into account the construction and context of the legal instrument as a whole. *See, Prosecutor v. Dusko Tadić* (IT-94-1-AR72), *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, para. 90.

⁷¹ *See, e.g., Witold Litwa v. Poland* (Application no. 26629/95), ECtHR, 4 April 2000, para. 59; *Nationality Decrees Issued in Tunis and Morocco (Advisory Opinion)*, Permanent Court of International Justice, 7 February 1923, p. 25.

40. Rule 81(4) supports this interpretation by reiterating, in the context of discussing exceptions allowing proceedings with an absent accused, that an initial appearance⁷² must still always take place. The provision provides that a trial may proceed *in absentia* under certain conditions provided that the accused had “an initial appearance and [has] been duly summoned to the subsequent hearing.”⁷³
41. This intention to allow no exceptions to attending an initial appearance is also clear when examining the preparatory discussions of the Internal Rules. Reference to the preparatory discussions is an established interpretive principle according to Article 32 of the Vienna Convention on the Law of Treaties. It allows the use of “supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of [A]rticle 31” of the said Convention. During the drafting of the Rules, the Plenary discussed whether *in absentia* proceedings shall be provided for in the Rules, and agreed that trial proceedings may continue in the absence of the accused “provided [he or she] makes an initial appearance before the ECCC.”⁷⁴
42. Lastly, this interpretation is also supported by ECCC practice and case law. As mentioned above, the ECCC record shows that the charging of Duch, and Messrs. NUON Chea, IENG Sary, and AO An occurred at the time of their respective initial appearances before the Co-Investigating Judges.⁷⁵

⁷² The Defence notes that Judge Harmon wrongly referred to the initial appearance cited in Rule 81(4) as an “initial hearing” in the Impugned Decision. *See*, Impugned Decision, para. 39.

⁷³ Internal Rules, Rule 81(4).

⁷⁴ ‘Update on the ECCC; David Scheffer coming to Cambodia’, Wikileaks, 22 January 2007, para. 5, available at: http://search.wikileaks.org/plusd/cables/07PHNOMPENH103_a.html [“Another sticking point centers on *in absentia* trials, which are permitted under Cambodian law but not considered good international practice. The Cambodian judges have insisted that *in absentia* trials be permitted. Scheffer confirmed that the Cambodian and international judges on January 19 agreed that – provided a client makes an initial appearance before the ECCC, defense counsel subsequently may represent their clients in the courtroom, and audio/video feed can be provided in the detainee’s cell to follow the proceedings. The point of disagreement, noted Scheffer, appears to no longer be relevant”].

⁷⁵ *Written Record of Initial Appearance of Duch*, 31 July 2007, E3/915; *Written Record of Initial Appearance of Nuon Chea*, 19 September 2007, E3/54; *Written Record of Initial Appearance of Ieng Sary*, 12 November 2007, E3/92; *Written Record of Initial Appearance of Ao An* (Khmer version), 27 March 2015. The Defence does not have access to the written records of initial appearance of Mr. KHIEU Samphan and Ms. IENG Thirith.

43. The ECCC charging process is therefore abundantly clear that Ms. IM Chaem must be present to be charged at the time of her initial appearance before the Co-Investigating Judges. Judge Harmon may only turn to Cambodian law if a question arises that is not addressed by the Internal Rules.⁷⁶ The Internal Rules clearly do not allow for charging *in absentia*; therefore Judge Harmon may not resort to Cambodian law. Nonetheless, even if he were allowed to resort to Cambodian law, neither the Cambodian Code of Criminal Procedure nor Cambodian practice allows charging *in absentia* either.

B. Cambodian procedural law clearly does not allow charging *in absentia*

a. Article 143 of the Cambodian Code of Criminal Procedure requires the physical presence of a person to be charged

44. Judge Harmon erred in law in concluding that the Cambodian Code of Criminal Procedure does not contain provisions regulating the charging of a suspect *in absentia*.⁷⁷ Cambodian procedural law contains a provision regulating the process for charging a suspect, which clearly requires that he or she be physically present at a first appearance.

45. Article 143 of the Cambodian Code of Criminal Procedure⁷⁸ governs the charging process in Cambodian law. In considering whether *in absentia* charging is provided for under Cambodian law, Judge Harmon failed to mention or consider Article 143, even though it clearly prohibits charging an absent suspect.

46. The Cambodian Code of Criminal Procedure should be interpreted according to general civil law rules of interpretation because it is largely based on the French Code of Criminal Procedure.⁷⁹ This means that, when a text is clear, provisions must be given their literal

⁷⁶ See, Nuon Chea Request for Annulment Appeal, para. 15. See also, Case 002, *Decision on Khieu Samphan's Supplemental Application for Release*, 24 December 2008, C26/5/5, para. 17.

⁷⁷ Impugned Decision, paras. 43, 46.

⁷⁸ Code of Criminal Procedure of the Kingdom of Cambodia, adopted 7 June 2007 ("Cambodian Code of Criminal Procedure"), Art. 143 al. 1 ["When a charged person appears for the first time, the investigating judge shall check his identity, inform him of the imputed act and its legal qualification, and receive his statement after informing him of the right to remain silent. This notification shall be mentioned in the written record of the first appearance"].

⁷⁹ Impugned Decision, fn. 48.

meaning.⁸⁰ Under Article 143, an investigating judge may only charge a suspect when he or she appears for the first time. The Khmer word for “appear” [“បង្ហាញ ឬ ធ្វើឲ្យឃើញ”] means to be “physically present”.⁸¹ Similar to Rule 57 of the Internal Rules, the procedures under Article 143 entail that a person is present, because, during the first appearance, the investigating judge must check the person’s identity, take a statement immediately if the person agrees, and take the person’s address if the person is released after his or her first appearance.⁸² Article 143 therefore requires a suspect’s presence during charging, meaning that Judge Harmon may not charge Ms. IM Chaem *in absentia*.

47. It was irrelevant for Judge Harmon to refer to Articles 333, 351, 361, and 362 of the Cambodian Code of Criminal Procedure, which are applicable only at the trial stage.⁸³ These provisions show, in fact, that the drafters of the Cambodian Code of Criminal Procedure did not intend there to be any exception to the requirement that a suspect is present when charged. As mentioned above, drafters should be presumed to act intentionally and purposely when they include language in one section but omit in another. Furthermore, in civil law, which relies heavily on codified rules,⁸⁴ exceptions must be construed narrowly.⁸⁵ While these four provisions imply exceptions to the requirement that the accused is present at trial, the drafters provided no similar exceptions at the charging stage.

⁸⁰ See, e.g., C.M. Germain, ‘Approaches to Statutory Interpretation and Legislative History in France’, 13 *Duke Journal of Comparative & International Law* 195 (2003), p. 201.

⁸¹ 54. CHHEANG V. and ORN H., ‘Dictionary of Legal Terminology, English-Khmer’, 2013, p. 31. The Khmer term “ឡើងបង្ហាញខ្លួន ឬ ចូលខ្លួន” means, in English, “physically appear” or “physically presenting oneself before” someone.

⁸² Cambodian Code of Criminal Procedure, Art. 143 al. 1.

⁸³ Impugned Decision, para. 43, *referring to* Article 333; Impugned Decision, fn. 45, *referring to* Articles 333, 351, 361, and 362 of the Cambodian Code of Criminal Procedure.

⁸⁴ See, e.g., Decision no. 2006-540 DC, 27 July 2006, French *Conseil Constitutionnel*, « Loi relative au droit d'auteur et aux droits voisins dans la société de l'information (DADVSI) », para. 9 [« Considérant qu'il incombe au législateur d'exercer pleinement la compétence que lui confie la Constitution et, en particulier, son article 34 ... [lui impose] d'adopter des dispositions suffisamment précises et des formules non équivoques ; qu'il doit en effet prémunir les sujets de droit contre une interprétation contraire à la Constitution ou contre le risque d'arbitraire, sans reporter sur des autorités administratives ou juridictionnelles le soin de fixer des règles dont la détermination n'a été confiée par la Constitution qu'à la loi »].

⁸⁵ See, generally, *Witold Litwa v. Poland* (Application no. 26629/95), ECtHR, 4 April 2000, para. 59; *Nationality Decrees Issued in Tunis and Morocco (Advisory Opinion)*, Permanent Court of International Justice, 7 February 1923, p. 25.

48. Judge Harmon was “not able to access records of *in absentia* proceedings in the courts of the Kingdom of Cambodia”,⁸⁶ and instead cited cases reported in the media.⁸⁷ Unofficial reports are not reliable and do not show any reasoning. Even if the reported facts are taken at face value, they all involve people who fled or, at the very least, could not be located. Opposition leader Sam Rainsy was convicted *in absentia* because he lived in exile in France;⁸⁸ the person convicted for shooting three garment workers was a fugitive on the run;⁸⁹ and the six people convicted *in absentia* for murdering a journalist were at large and could not be located by the authorities.⁹⁰
49. Therefore, these reported cases can be distinguished from Ms. IM Chaem’s case. The authorities and Judge Harmon can and have located Ms. IM Chaem. She is not in hiding and the judicial police officers know where she lives.⁹¹ So does Judge Harmon, whose investigator has served the Summons on her at her home address.⁹² Judge Harmon also participated in an outreach session in Anlong Veng, Ms. IM Chaem’s hometown, after he had issued the Summons and the Arrest Warrant.⁹³

⁸⁶ Impugned Decision, para. 44.

⁸⁷ Impugned Decision, para. 44, fn 47.

⁸⁸ ‘Cambodia: Opposition Leader Convicted in Absentia’, The New York Times, 23 September 2010, available at: http://www.nytimes.com/2010/09/24/world/asia/24briefs-Cambodia.html?_r=0.

⁸⁹ ‘Former Cambodia governor jailed in absentia for shooting three factory workers’, South China Morning Post, 26 June 2013, available at: <http://www.scmp.com/news/asia/article/1268733/ex-cambodian-official-convicted-absentia>; ‘Cambodian Court Upholds Fugitive Ex-Governor’s Conviction’, Radio Free Asia, 4 November 2013, available at: <http://www.rfa.org/english/news/cambodia/appeal-11042013143446.html>.

⁹⁰ ‘One Arrested for Murder of Journalist in Kompong Chhnang’, The Cambodia Daily, 16 October 2014, available at: <https://www.cambodiadaily.com/news/one-arrested-for-murder-of-journalist-in-kompong-chhnang-69988>; ‘Court Sentences Six, Five in Absentia, for Journalist’s Murder’, The Cambodia Daily, 12 November 2014, available at:

<https://www.cambodiadaily.com/news/court-sentences-six-five-in-absentia-for-journalists-murder-72121>.

⁹¹ Impugned Decision, para. 67.

⁹² Summons; *Written Report of Service of Summons*, 8 August 2014, A150/1.

⁹³ See, ‘ECCC Court Report’, ECCC, December 2014, p.3, available at: <http://www.eccc.gov.kh/sites/default/files/publications/The%20Court%20Report%20issue%2080%20on%20Decem ber%202014.pdf>;

b. French law, as cited by Judge Harmon to guide interpretation of Cambodian law, does not allow charging *in absentia*

50. Judge Harmon also referred to French law in an attempt to support his position but incorrectly drew the conclusion that *in absentia* charging is allowed when it is generally not.⁹⁴ His basis for citing French law is that the Cambodian Code of Criminal Procedure is largely based on the French Code of Criminal Procedure and can “provide useful guidance” in interpreting the Cambodian procedural provisions.⁹⁵ Cambodian law finds its roots in French civil law tradition,⁹⁶ and Judge Harmon has, himself, recognized that French jurisprudence, “although not directly applicable or binding may provide useful guidance in the interpretation of the Internal Rules”,⁹⁷ notably in the context of clarifying the charging process.

51. French law also shows that suspects must be present when they are charged. Articles 80-1, 80-2, and 116 of the French Code of Criminal Procedure constitute the core articles relevant to the charging process in France. Judge Harmon failed to cite any of them. Under French procedural law, an investigating judge may charge a suspect only after he has proceeded with his or her initial appearance⁹⁸ and after he has interviewed him or her or given him or her the

⁹⁴ Impugned Decision, fn. 48.

⁹⁵ Impugned Decision, fn. 48.

⁹⁶ See, Case 002, *Decision on Ieng Sary's Appeal against Co-Investigating Judge's Decision Refusing to Accept the Filing of IENG Sary's response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of Proceedings*, 20 September 2010, D390/1/2/4, para. 17; Case 002, *Decision on Civil Party Lead Co-Lawyers' Requests Relating to the Appeals in Case 002/01*, 26 December 2014, F10/2, para. 13.

⁹⁷ Case 004, *Decision on the TA An Defence Requests to Access the Case File and Take Part in the Judicial Investigation*, 31 July 2013, D121/4, para. 44.

⁹⁸ French Code of Criminal Procedure, Art. 116 al. 1-2 [« Lorsqu'il envisage de mettre en examen une personne qui n'a pas déjà été entendue comme témoin assisté, le juge procède à sa première comparution ... Le juge d'instruction constate l'identité de la personne et lui fait connaître expressément, en précisant leur qualification juridique, chacun des faits dont il est saisi et pour lesquels la mise en examen est envisagée »]. See also, French Code of Criminal Procedure, Art. 116 al. 5 [« Après avoir, le cas échéant, recueilli les déclarations de la personne ou procédé à son interrogatoire et entendu les observations de son avocat, le juge d'instruction lui notifie ... soit qu'elle n'est pas mise en examen ... soit qu'elle est mise en examen ; le juge porte alors à la connaissance de la personne les faits ou la qualification juridique des faits qui lui sont reprochés, si ces faits ou ces qualifications diffèrent de ceux qui lui ont déjà été notifiés »]. See also, French Code of Criminal Procedure, Art. 80-2 al. 1 [La convocation de la personne qui la reçoit « précise que la mise en examen ne pourra intervenir qu'à l'issue de la première comparution de la personne devant le juge d'instruction »].

opportunity to make a statement.⁹⁹ Such opportunity is made possible only if the suspect appears physically before the investigating judge. Only after the suspect has been heard (or has chosen to remain silent) may the investigating judge decide whether or not to charge the suspect.¹⁰⁰

52. Like in Cambodian law, *in absentia* proceedings do exist in French law. However, the limited circumstances in which *in absentia* proceedings apply are not relevant to the charging process. Judge Harmon referred to Articles 134 and 176 of the French Code of Criminal Procedure¹⁰¹ and misconstrued them. Article 134 has to be read in conjunction with Article 176 and both provisions, read together, apply at the time of the issuance of the closing order. An arrest warrant issued during the investigation stage, that is fruitless, does not confer the status of “charged person” to the suspect until the closing order. It applies at that time because that is when investigating judge determines the legal qualification of the charges for the purpose of sending that person to trial.¹⁰² Article 134 therefore does not apply during the course of the investigation, even less so when such investigation has not even been concluded.

53. This interpretation is supported by French case law. The French *Cour de Cassation* has held that the sole issuance of an arrest warrant during the investigation is not sufficient to consider the person against whom it is issued as a charged person.¹⁰³ The High Court further reasoned

⁹⁹ French Code of Criminal Procedure, Art. 80-1 al. 2 [Le juge d’instruction « ne peut procéder à la mise en examen qu’après avoir préalablement entendu les observations de la personne ou l’avoir mise en mesure de les faire, en étant assistée par son avocat, soit dans les conditions prévues par l’article 116 relatif à l’interrogatoire de première comparution » soit en tant que témoin assisté].

¹⁰⁰ French Code of Criminal Procedure, Art. 116 al. 5 [« Après avoir, le cas échéant, recueilli les déclarations de la personne ou procédé à son interrogatoire et entendu les observations de son avocat, le juge d’instruction lui notifie ... soit qu’elle n’est pas mise en examen ... soit qu’elle est mise en examen »].

¹⁰¹ Impugned Decision, fn. 48.

¹⁰² See, French Code of Criminal Procedure, Art. 134 al. 3 [« Si la personne ne peut être saisie, un procès-verbal de perquisition et de recherches infructueuses est adressé au magistrat qui a délivré le mandat. La personne est alors considérée comme mise en examen pour l’application de l’article 176 »]; and Art. 176 [« Le collège de l’instruction examine s’il existe contre la personne mise en examen des charges constitutives d’infraction, dont il détermine la qualification juridique »]. See also, C. Guéry, ‘Mandats’ in *Répertoire Pénal Dalloz*, September 2012, para. 100.

¹⁰³ Cass. Crim. 14 May 2002, French *Cour de Cassation*, Bull. Crim. No. 111 [La « délivrance d’un mandat d’arrêt par le juge d’instruction ne confère pas, au cours de l’information, à celui qui en est l’objet, la qualité de personne mise en examen. »].

that the person against whom an arrest warrant has been issued, but has not appeared before the investigating judge, cannot be qualified as having been charged.¹⁰⁴

C. International procedural rules do not allow charging *in absentia* at the ECCC

54. According to Article 12 of the Agreement, Judge Harmon may only seek guidance at the international level if Cambodian law does not deal with a particular matter, where there is uncertainty in application of a Cambodian law, or where there is a question regarding the consistency of such a rule with international standards.
55. The Internal Rules and Cambodian law—and the French law from which it developed—require suspects to be present when charged. There is no uncertainty in the interpretation or application of these rules, neither is there a question regarding the consistency of such rules with international standards. Judge Harmon was, therefore, not allowed to seek guidance on this issue at the international level.¹⁰⁵
56. In any event, the procedural rules established at the international level do not provide guidance to the charging procedure at the ECCC. The international procedural rules do not apply to the specific stage of charging in this case or even to the unique pre-trial features of this Court. Judge Harmon has not justified or explained why he is allowed to cherry-pick the particular procedural laws he cited and import them, out of context, to the ECCC.
57. Even assuming that guidance may be sought from these international procedural rules, they do not apply to Ms. IM Chaem's case. The procedural rules from other international courts allow *in absentia* proceedings in strictly limited circumstances and Ms. IM Chaem's case does not fall within any of these circumstances.

¹⁰⁴ Cass. Crim. 17 December 2002, French *Cour de Cassation*, Bull. Crim. No. 230 [« Les dispositions des articles 6 et 13 de la Convention Européenne de sauvegarde des Droits de l'Homme ne sont pas applicables en cas de recours formé contre un mandat d'arrêt, dont le seul objet est d'assurer la représentation en justice de la personne à l'encontre de laquelle il est délivré afin, notamment, de permettre son interrogatoire par le juge d'instruction ; en outre ... l'intéressé, qui n'a pas comparu devant le juge d'instruction, n'a pas la qualité de personne mise en examen ... »].

¹⁰⁵ See, Impugned Decision, para. 46.

a. Procedural rules applicable at the Special Tribunal for Lebanon (“STL”)

58. Just as the ECCC Internal Rules form a “self-contained regime of procedural law related to the unique circumstances of the ECCC,”¹⁰⁶ the STL is a unique hybrid tribunal, applying a self-contained regime of procedural rules based on Lebanese criminal law.¹⁰⁷ Unlike the ECCC, the STL is a court that was designed to accommodate *in absentia* proceedings.¹⁰⁸ The STL legal instruments explicitly give its judges the power to hold *in absentia* proceedings at the pre-trial stage.¹⁰⁹ The STL marks a departure from previous tribunals including the ECCC, which do not have similar provisions.¹¹⁰ Just because a newer tribunal was created with powers to hold *in absentia* pre-trial proceedings does not mean that Judge Harmon can retrospectively import such powers to the ECCC.

59. Even assuming that Judge Harmon may seek guidance in the STL *in absentia* provisions, he has not taken all the reasonable steps required to charge Ms. IM Chaem *in absentia* according to STL standards. The STL limits *in absentia* proceedings to three specific situations laid down in Article 22(1) of the STL Statute.¹¹¹ The Appeals Chamber identified essential legal requirements to proceed with a trial *in absentia*,¹¹² and with regard to the notification of charges in particular, it confirmed:

¹⁰⁶ Nuon Chea Request for Annulment Appeal, para. 14.

¹⁰⁷ Statute of the Special Tribunal for Lebanon, adopted 30 May 2007 (“STL Statute”), Art. 2.

¹⁰⁸ See, e.g., M. Gardner, ‘Reconsidering trials *in absentia* at the Special Tribunal for Lebanon: An application of the Tribunal’s early jurisprudence’, 43 *George Washington International Law Review* 91 (2011), p 105; M. Wahlisch, ‘Introductory note to the Special Tribunal for Lebanon Appeals Chamber decisions on the legality of the Special Tribunal for Lebanon and trials *in absentia*’, 52 *International Legal Materials* 163 (2013), p 164.

¹⁰⁹ STL Rules of Procedure and Evidence, Rules 105*bis* and 76*bis*.

¹¹⁰ See, e.g., M. Gardner, ‘Reconsidering trials *in absentia* at the Special Tribunal for Lebanon: An application of the Tribunal’s early jurisprudence’, 43 *George Washington International Law Review* 91 (2011), pp 91-92; C. Aptel, ‘Some innovations in the Statute of the Special Tribunal for Lebanon’, 5 *Journal of International Criminal Justice* 1107 (2007), p 1121; P. Gaeta, ‘Trial *in absentia* before the Tribunal’, in A. Alamuddin et al., *The Special Tribunal for Lebanon: Law and practice* (Oxford University Press, 2014), p 231.

¹¹¹ STL Statute, Art. 22(1) reads “[t]he Special Tribunal shall conduct trial proceedings in the absence of the accused, if he or she: (a) Has expressly and in writing waived his or her right to be present; (b) Has not been handed over to the Tribunal by the State authorities concerned; (c) Has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges confirmed by the Pre-Trial Judge”.

¹¹² *Prosecutor v. Ayyash et al.* (STL-11-01/PT/AC/AR126.1), *Decision on Defence Appeals against Trial Chamber’s Decision on Reconsideration of the Trial in Absentia Decision*, 1 November 2012 (“STL Decision on Appeal against *in Absentia* Decision”), paras. 50-54.

[W]hile Lebanese procedural law requires a specific set of formal steps to achieve ‘notification’, the [STL] Statute and Rules [of Procedure and Evidence], read in light of international human rights law and jurisprudence from the international criminal tribunals require in addition proof of effective notification of the indictment to the accused.¹¹³

60. In order to conclude that the authorities had taken all reasonable steps to notify the four *Ayyash et al.* defendants of the charges against them, the relevant trial chamber had reviewed the Lebanese authorities’ numerous attempts to locate them,¹¹⁴ despite the sensitive political and security situation in Lebanon.¹¹⁵ Attempts included service via last known address, family address, work address, and circulation of photographs and names of the defendants in the media.¹¹⁶ Despite numerous attempts, the four defendants could not be personally served. Proceedings against them therefore proceeded *in absentia*.

61. These steps, which Judge Harmon has not taken, show that he has fallen short of the requirements to conduct proceedings *in absentia* by STL standards. He has failed to serve the Impugned Decision and the Notification of Charges personally on Ms. IM Chaem,¹¹⁷ despite knowing where she is. In addition, Judge Harmon filed those the Impugned Decision and the Notification of Charges as “confidential,” showing his lack of intention to notify Ms. IM Chaem of the charges, even by media dissemination.¹¹⁸ By way of further example of not taking all reasonable steps, Judge Harmon has also not explored the option of charging Ms. IM Chaem in her home province, as he did for Mr. AO An.

¹¹³ STL Decision on Appeal against *in Absentia* Decision, para. 37, citing, *Prosecutor v. Ayyash et al.* (STL-11-01/I/TC), *Decision to Hold Trial in Absentia*, 1 February 2012 (“STL *in Absentia* Decision”), paras. 28-39.

¹¹⁴ STL *in Absentia* Decision, paras. 83-104.

¹¹⁵ See, STL *in Absentia* Decision, paras. 116-117. The Defence notes that Judge Harmon was informed that “the security situation in [Ms.] IM Chaem’s area of residence was problematic.” See, Impugned Decision, para. 24.

¹¹⁶ STL *in Absentia* Decision, paras. 83-104; STL Decision on Appeal against *in Absentia* Decision, para. 44.

¹¹⁷ See, Impugned Decision, ‘Procedural History’ paras. 1-30.

¹¹⁸ Judge Harmon had said he would issue the *in absentia* decision publicly in his letter to the Chairman of the Security Commission for the ECCC. See, *Letter to the Chairman of the Security Commission for the ECCC*, 30 January 2015, D238, p. 2.

b. Procedural rules applicable at the ICTY and ICTR

62. The UN Secretary General made it clear that trials in the absence of the accused shall not be provided for in the Statute of the ICTY.¹¹⁹ As a result, the Statutes of the ICTY and ICTR do not allow trials *in absentia*, and require the presence of the accused at trial.¹²⁰
63. Rules 61 of the ICTY and ICTR Rules of Procedure and Evidence do not support Judge Harmon's conclusion that "the law applicable at the ECCC permits charging *in absentia*."¹²¹ Rule 61 does not provide for a charging *in absentia* or a trial *in absentia*.¹²² Judges at the ICTY have been explicit in differentiating between Rule 61 and *in absentia* proceedings.¹²³ Rather, Rule 61 provides for a hearing to seek reconfirmation of the indictment¹²⁴ and to satisfy a judge that further steps should be taken to ensure the appearance of the accused at trial, as Judge Harmon, then an ICTY prosecutor, himself confirmed:

¹¹⁹ 'Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993)', UN Doc. S/25704, 3 May 1993, para. 101, available at:

http://www.icty.org/x/file/Legal%20Library/Statute/statute_rc808_1993_en.pdf ["A trial should not commence until the accused is physically present before the International Tribunal. There is a widespread perception that trials *in absentia* should not be provided for in the statute as this would not be consistent with article 14 of the International Covenant on Civil and Political Rights ... which provides that the accused shall be entitled to be tried in his presence."].

¹²⁰ Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 7 July 2009), adopted 25 May 1993 ("ICTY Statute"), Art. 20 and 21(4)(d); Statute of the International Criminal Tribunal for Rwanda (as amended on 31 January 2010), adopted 8 November 1994 ("ICTR Statute"), Art. 19 and 20(4)(d).

¹²¹ Impugned Decision, para. 58.

¹²² See, United Nations General Assembly, 'Report of the expert group to conduct a review of the effective operation and functioning of the International Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda', Doc. A/54/634, 22 November 1999, para. 60; United Nations Security Council, 'Second annual report of the international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991', Doc. A/50/365-S/1995/728, 23 August 1995, para. 197.

¹²³ See e.g. *Prosecutor v. Rajić* (IT-95-12-R61), *Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence*, 13 September 1996, para. 3; *Prosecutor v. Dragan Nikolić*, (IT-94-2-R61), *Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence*, 20 October 1995, para. 3.

¹²⁴ See, *Prosecutor v. Rajić* (IT-95-12-R61) *Rule 61 Decision*, Separate Opinion of Judge Sidhwa, 5 July 1996, para. 27: "where it was noted that Rule 61 proceedings are *ex parte* proceedings. They are only intended to seek a reconfirmation of the earlier confirmation order. They are not *ex parte* proceedings in any form of *in absentia* trial of the accused. The object of the Rule 61 proceedings is merely to re-demonstrate the existence of a *prima facie* case against the accusedsubject to public attention and scrutiny. It is not to sentence the accused *in absentia* in any way."

MR. HARMON: ... A Rule 61 hearing is not intended to be a trial in absentia. It is a hearing to satisfy your Honours that there are reasonable grounds for believing that both of the accused have committed any or all of the crimes alleged in the respective indictments and, if satisfied, to take steps necessary to secure the eventual appearance of Dr. Karadzic and General Mladic before this Tribunal so that they might stand trial for the monstrous crimes each is alleged to have committed in Bosnia and Herzegovina.¹²⁵ (Emphasis added)

64. Judge Harmon cannot rely on Rule 61 of the ICTY and ICTR Rules of Procedure and Evidence to charge Ms. IM Chaem *in absentia*. He is using it not request the Judges to take additional steps to ensure Ms. IM Chaem's appearance at trial, but to justify charging her *in absentia* "to complete the investigation in Case 004",¹²⁶ which serves a fundamentally different purpose.

c. Procedural rules applicable at the International Criminal Court ("ICC")

65. Trials *in absentia* were discussed at length during the *Travaux Préparatoires* of the Rome Statute.¹²⁷ As a result of discussions, they were rejected, and Article 63 of the Rome Statute states that the "accused shall be present during the trial."¹²⁸

66. Article 61(2) of the Rome Statute does not support Judge Harmon's conclusion that "the law applicable at the ECCC permits charging *in absentia*."¹²⁹ At the ICC, the purpose of a confirmation of charges hearing is to assess whether the evidence resulting from the investigation is sufficient to proceed to trial,¹³⁰ so as "to distinguish those cases that should

¹²⁵ *Prosecutor v. Radovan Karadžić and Ratko Mladić* (IT-95-18-R61 and IT-95-5-R61), ICTY, Transcript, 8 July 1996, p. 893.

¹²⁶ Impugned Decision, para. 70.

¹²⁷ See, e.g., 'Report of the International Law Commission on the work of its forty-fifth session (3 May-23 July 1993)', Doc. A/48/10, 1993, available at: http://legal.un.org/ilc/documentation/english/A_48_10.pdf, pp. 119-20; 'United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (15 June-17 July 1998)', Doc. A/CONF.183/13(Vol.III), 2002, available at: http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v3_c.pdf, pp. 53-54, 297-99, 303-04.

¹²⁸ Rome Statute of the International Criminal Court, adopted on 17 July 1998 ("Rome Statute"), Art. 63(1).

¹²⁹ Impugned Decision, para. 58.

¹³⁰ *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang* (ICC-01/09-01/11), *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 January 2012, paras. 51-53; *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali* (ICC-01/09-

go to trial from those that should not got to trial”.¹³¹ In the event the charges are confirmed, the relevant pre-trial chamber “demarcates the subject-matter of the case and thus, designs the legal and factual framework for subsequent trial proceedings.”¹³² As such, Article 61 of the Rome Statute constitutes an oral equivalent to the written indictment procedure at the ECCC and does not provide guidance on whether a suspect may be charged in his or her absence for the purpose of completing an investigation.

67. In addition, the confirmation of charges hearing in the absence of the person applies in exceptional circumstances only.¹³³ To hold such procedure, the person must have i) waived his or her right to be present at the hearing; or ii) fled or cannot be found.¹³⁴ The first situation implies that the person has already been informed of the charges against him or her and waives his or her right to be present at that particular confirmation of charges hearing.¹³⁵ In the second situation, the relevant pre-trial chamber must be satisfied that all reasonable steps have been taken to ensure the person’s appearance and to inform him or her of the charges.¹³⁶ In other words, holding a confirmation of hearing *in absentia* always requires that the person has been informed of the charges or that all the reasonable steps were taken to do so, prior to such a hearing. As previously argued, Ms. IM Chaem has not fled and Judge Harmon knows where she is, but he has failed to notify Ms. IM Chaem of the charges against her. As such, he has not fulfilled the requirements to apply the procedure *in absentia* laid down in Article 61(2) to Ms. IM Chaem’s case.

02/11), *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 January 2012, paras. 63-65.

¹³¹ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07), *Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules*, 25 April 2008, para. 6.

¹³² *Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (ICC-01/09-01/11), *Decision on the “Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute”*, 16 August 2013, para. 25.

¹³³ *Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06 OA7), *Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”*, Separate Opinion of Judge Georghios M. Pikis, 13 February 2007, para. 2.

¹³⁴ Rome Statute, Article 61(2).

¹³⁵ *See*, Rome Statute, Art. 60(1) and 61(1), 61(2).

¹³⁶ Rome Statute, Art. 61(2)(b).

d. Conclusion on procedures from other international tribunals

68. Judge Harmon applied *in absentia* procedures from other international criminal courts and tribunals that provide no guidance to the ECCC charging procedure. The STL, ICTY, ICTR, and ICC *in absentia* procedures were drafted in a different context to the ECCC and refer to different stages of the proceedings. These *in absentia* procedures, which are different at each tribunal, reflect that there is no generally accepted practice of charging *in absentia*. Judge Harmon erred in law in selecting disparate legal elements from various tribunals to override the requirement in Rule 57 of the Internal Rules that a suspect be present when charged. In effect, he created a new *in absentia* charging procedure that radically departs from the ordinary meaning of Rule 57 and is contrary to the intention of the drafters of the Internal Rules. This amounts to an excess of power violating Ms. IM Chaem's right to legal certainty.

D. Judge Harmon exceeded his power and usurped the role of the Plenary by creating a new *in absentia* charging procedure

69. The creation of an *in absentia* charging procedure that does not exist either in ECCC or Cambodian law was neither appropriate nor necessary.¹³⁷ The Internal Rules clearly mean to prohibit charging *in absentia*. If Judge Harmon believed there was a *lacuna* in the Rules regarding *in absentia* charging and sought to amend the existing legal framework, he is required to submit an amendment proposal to the Rules and Procedure Committee.¹³⁸ In creating new charging powers, Judge Harmon has therefore usurped the role of the Plenary.¹³⁹

70. His conclusion that *in absentia* charging is permitted at the ECCC bypasses all the procedural requirements and safeguards for creating or amending rules. The ECCC practice is that Court organs, including the Defence, must be given the opportunity to submit their comments

¹³⁷ See, Case 002, *Decision on Nuon Chea's Preliminary Objection alleging the Unconstitutional Character of the ECCC Internal Rules*, 8 August 2011, E51/14, para. 7.

¹³⁸ See, Case 002, *Decision on Defence Requests Concerning the Filing of Material in Preparation for Trial and Preliminary Objections*, 4 April 2011, E35/2, para. 10. See also, Internal Rules, Rule 2, 3, 20(2).

¹³⁹ See, Agreement, Art. 12(1); Establishment Law, Art. 23 new; Internal Rules, Rules 2, 20.

and observations on any proposed rule amendments.¹⁴⁰ The proposed rule amendment must then be discussed at a Plenary Session pursuant to the procedure set forth in Rule 18, and in light of the parties' submissions, for adoption.¹⁴¹

71. Judge Harmon, relying on purported *lacunae* in the Rules,¹⁴² interpreted Cambodian and French laws as well as international procedural rules to such an extent that he generated a new *in absentia* charging procedure. In defining this new procedure, he arbitrarily imported legal criteria for its application from other tribunals.¹⁴³ These legal criteria on various types of *in absentia* proceedings do not relate to the charging stage, as defined in ECCC procedure, or indeed to the ECCC unique features at all. Importing these external rules violates Ms. IM Chaem's right to legal certainty, which requires that she must be able to rely on the ECCC Rules that do clearly require a suspect's presence during charging.

72. Judge Harmon erred in law in concluding that the law applicable at the ECCC permits charging *in absentia*;¹⁴⁴ and charging Ms. IM Chaem *in absentia*¹⁴⁵ is *ultra vires*.

¹⁴⁰ The Defence notes that such was the case, for example, at the last and 11th Plenary Session at the ECCC, where the Co-Prosecutors' Rules 55 and 89ter Amendment Proposals were discussed. The Rule and Procedure Committee invited the parties to provide their comments on the Co-Prosecutors' rules amendment proposals. *See*, E-mail from PHAN Theoun to Isaac Endeley, entitled 'applications', dated 13 March 2014. *See also*, E-mail from Lars Olsen to Isaac Endeley, entitled 'Proposed rule amendments to RPC', dated 18 March 2014. Defence teams submit their observations on rules amendment proposals to Isaac Endeley, Head of the Defence Support Section, who represents them at the Plenary Sessions.

¹⁴¹ *See*, Internal Rules, Rule 18(1).

¹⁴² Impugned Decision, para. 43.

¹⁴³ Impugned Decision, paras. 58-68.

¹⁴⁴ Impugned Decision, para. 58.

¹⁴⁵ Impugned Decision, para. 76; Notification of Charges.

VII. RELIEF REQUESTED

For all the reasons above, the Defence respectfully requests the Pre-Trial Chamber to a) admit this appeal; b) overturn paragraphs 39, 40, 42–46, 57–58, 73 in part¹⁴⁶, and 76, relating to the charging of Ms. IM Chaem in the Impugned Decision, which err in law; and consequently c) rescind the Notification of Charges, which is *ultra vires*.

Respectfully submitted,



BIT Seanglim



John R.W.D. JONES QC

Co-Lawyers for Ms. IM Chaem
Signed on this 2nd day of April, 2015

¹⁴⁶ Specifically, "... the International CIJ finds that charging Im Chaem *in absentia* is the only way to go to ensure the fair and expeditious conduct of the proceedings."