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

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

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

D239/1/8

In the name of the Cambodian people and the United Nations and pursuant to the 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

Case File N° 004/07-09-2009-ECCC/OCIJ (PTC19)

Before: **Judge PRAK Kimsan, President**
Judge Olivier BEAUVALLET
Judge NEY Thol
Judge Steven J. BWANA
Judge HUOT Vuthy

Date: **01 March 2016**

CONFIDENTIAL

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

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the "ECCC") is seised of "IM Chaem's Appeal Against the International Co-Investigating Judge's Decision to Charge Her *In Absentia*" filed in English on 2 April 2015 and in Khmer on 11 May 2015 (the "Appeal").[1]

I – INTRODUCTION

1. This appeal concerns a decision of the International Co-Investigating Judge issued on 3 March 2015 to "charge IM Chaem *in absentia*" with crimes against humanity and violations of the 1956 Cambodian Penal Code, notifying her of the charges through a written notification served on her Co-Lawyers and granting her Co-Lawyers access to the case file (the "Impugned Decision").[2]

a. Background

2. On 7 September 2009, the Acting International Co-Prosecutor filed with the Office of the Co-Investigating Judges the Third Introductory Submission, where he alleged that IM Chaem is responsible for crimes within the jurisdiction of the ECCC.[3] Further allegations against her were submitted in two Supplementary Submissions, filed respectively on 18 July 2011[4] and 24 April 2014.[5]

3. On 20 May 2014, the Co-Investigating Judges registered a confidential disagreement pursuant to Internal Rule 72.[6]

4. On 29 July 2014, the International Co-Investigating Judge summoned IM Chaem for an initial appearance at the ECCC on 8 August 2014 (the "Summons").[7] On 31 July 2014, the

[1] IM Chaem's Appeal Against the International Co-Investigating Judge's Decision to Charge Her *In Absentia,* 2 April 2015, D239/1/2 ("Appeal").
[2] Decision to Charge IM Chaem *In Absentia*, 3 March 2015, D239 ("Impugned Decision"); Confidential Annex: Notification of Charges against IM Chaem, 3 March 2015, D239.1 ("Notification of Charges").
[3] Co-Prosecutors' Third Introductory Submission, 20 November 2008, D1; Acting International Co-Prosecutor's Notice of Filing of the Third Introductory Submission, 7 September 2009, D1/1.
[4] Co-Prosecutors' Supplementary Submission Regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 18 July 2011, D65.
[5] Co-Prosecutors' Supplementary Submission Regarding Forced Marriage and Sexual or Gender Based Violence, 24 April 2014, D191.
[6] Written Record of Disagreement, 20 May 2014.
[7] Summons to Initial Appearance, 29 July 2014, A150.

Summons was personally served on IM Chaem, who refused to sign the acknowledgement of the service.[8]

5. From 1 August 2014, the Co-Lawyers challenged the validity of the Summons before the Co-Investigating Judges and informed the International Co-Investigating Judge that they would decline to attend their client's initial appearance at this time,[9] arguing that the Co-Investigating Judges must first respond to their request of 26 July 2014, which sought clarification "as to whether the Co-Investigating Judges are in disagreement regarding the summonsing and charging of our client, and confirmation that the matter will be submitted for settlement pursuant to Rule 72 of the Internal Rules" (the "Request for Clarification").[10] On 6 August 2014, the International Co-Investigating Judge reiterated that the Summons was valid and that IM Chaem was legally required to appear at the ECCC on 8 August 2014.[11] On 8 August 2014, the International Co-Investigating Judge denied the Request for Clarification and reiterated that "[t]he conduct of the Co-Investigating Judges in Case 004 complie[d] fully with the relevant provisions and with the general spirit of the law governing investigations at the ECCC."[12]

6. On 8 August 2014, the Co-Lawyers further sought a stay of the execution of IM Chaem's Summons before the Pre-Trial Chamber.[13] The request was denied by the Pre-Trial Chamber on the same day.[14]

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[8] Written Report of Service of Summons, 8 August 2014, A150/1.
[9] Letter in Response to the International Co-Investigating Judge's Summons of Lawyers, 1 August 2014, A151/2; IM Chaem's Urgent Application to Seise the Pre-Trial Chamber with a Request for Annulment of Her and her Co-Lawyers' Summonses Dated 31 July 2014, 6 August 2014, D207 ("Application for Annulment").
[10] IM Chaem's Motion Requesting for Clarification Regarding Disagreements Between the Co-Investigating Judges, 25 July 2014, D204, p. 1. *See* also prior correspondance between the Co-Lawyers and the Co-Investigating Judges in respect of the procedure for charging: Request that all formal communications relating to Ms. IM Chaem include the two Co-Investigating Judges and request that disagreements regarding the summoning and charging of Ms. IM Chaem be referred to the Pre-Trial Chamber, 13 June 2014, A122, p. 2; Your letter requesting all formal communications re the Suspect include the two Co-Investigating Judges and requsting disagreements regarding the summoning and charging her be referred to the Pre-Trial Chamber, 26 June 2014, A122/1.
[11] International Co-Investigating Judge's Letter: Your Letter Dated 1 August 2014 Concerning Your Summons to the Initial Appearance of Your Client, 6 August 2014, A151/2/1.
[12] Decision on Suspect's Motion Requesting Clarification Regarding Disagreements Between Co-Investigating Judges, 8 August 2014, D204/2, para. 11. The Application for Annulment was dismissed on 18 August 2014, based on a lack of standing. *See* Order on IM Chaem's Urgent Application to Seise the Pre-Trial Chamber with a Request for Annulment of Her and Her Co-Lawyers' Summonses, 18 August 2014, D207/1, para. 32.
[13] IM Chaem's Urgent Request to Stay the Execution of Her Summons to an Initial Appearance, dated 7 August 2015 but filed on 8 August 2015, A122/6.1/1.
[14] Decision on IM Chaem's Request to Stay the Execution of Her Summons to an Initial Appearance, 8 August 2014, A122/6.1/2 (disposition) and 15 August 2014, A122/6.1/3 (reasons).

7. On 8 August 2014, IM Chaem did not attend the scheduled initial appearance.[15] On 8 August 2014, the Co-Lawyers informed the International Co-Investigating Judge that their client was not willing to appear in response to a summons signed by only one Co-Investigating Judge.[16]

8. On 14 August 2014, the International Co-Investigating Judge issued an arrest warrant to secure IM Chaem's attendance at an initial appearance at the ECCC (the "Arrest Warrant").[17] On 15 August 2014, the Arrest Warrant was delivered to the Cambodian Judicial Police for execution.[18]

9. On 30 January 2015, after a number of attempts to have the Arrest Warrant executed,[19] the International Co-Investigating Judge wrote a letter to the Chairman of the Security Commission for the ECCC, stating that, in light of the unacceptable risk that further delays could create, he would proceed to charge IM Chaem *in absentia* should she fail to appear at the ECCC before 18 February 2015 or if she was not arrested by that date.[20]

10. On 3 March 2015, with the 18 February 2015 deadline having passed without IM Chaem appearing before the ECCC or the Arrest Warrant being executed, the International Co-Investigating Judge issued the Impugned Decision, whereby he decided to charge IM Chaem *in absentia* and instructed the Greffier to take the necessary steps to give IM Chaem's Co-Lawyers access to Case File 004 as soon as possible. The International Co-Investigating Judge detailed the charges against IM Chaem, which include alleged violations of the 1956 Penal Code and a number of crimes against humanity, in a separate annex attached to the Impugned Decision.[21] The Impugned Decision, including the Notification of Charges, was served on the Co-Lawyers on 3 March 2015.

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[15] International Co-Investigating Judge's Note Concerning IM Chaem's Initial Appearance, 14 August 2014, A150/2.
[16] Email correspondence between the International Co-Investigating Judge and the International Co-Lawyer on 8 August 2014, 20 August 2014, A150/2/2.1.
[17] Arrest Warrant, 14 August 2014, C1.
[18] Report on service of the Arrest Warrant to the Judicial Police, 15 August 2014, C1.1.
[19] *See* Impugned Decision, paras 23-29.
[20] Letter to the Chairman of the Security Commission for the ECCC, 30 January 2015, D188, p. 2.
[21] Notification of Charges.

11. On 9 December 2015, the Pre-Trial Chamber unanimously dismissed IM Chaem's Appeal against the International Co-Investigating Judge's Decision on her Motion to Reconsider and Vacate her summons dated 29 July 2014 as inadmissible.[22]

b. The Appeal

12. The Co-Lawyers filed the Appeal in English on 2 April 2015, and in Khmer on 11 May 2015. On 27 May 2015, the Pre-Trial Chamber recognised the validity of the Appeal filed in Khmer out of time and the Appeal was placed in the case file and notified to the parties in both languages.[23] The Co-Lawyers submit that the Appeal is admissible pursuant to Internal Rules 21 and 74(3)(a) and that the International Co-Investigating Judge erred in law and acted *ultra vires* in charging IM Chaem *in absentia*.[24] The Co-Lawyers accordingly request the Pre-Trial Chamber to: a) admit the Appeal; b) overturn paragraphs 39, 40, 42-46, 57-58, 73 in part, and 76 of the Impugned Decision, relating to the charging of IM Chaem, which errs in law; and consequently c) rescind the Notification of Charges, which is *ultra vires*.[25]

13. The International Co-Prosecutor filed a response to the Appeal in English on 16 June 2015 and in Khmer on 29 June 2015 (the "Response"),[26] as previously authorised by the Pre-Trial Chamber.[27] The International Co-Prosecutor submits that the Appeal is admissible pursuant to Internal Rule 74(3)(a),[28] but that it is without merit as the Impugned Decision was correctly decided and is consistent with all relevant law.[29]

14. The Co-Lawyers filed a reply in English on 8 July 2015 and in Khmer on 29 July 2015 (the "Reply"),[30] as previously authorised by the Pre-Trial Chamber.[31]

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[22] Decision on IM Chaem's Appeal against the International Co-Investigating Judge's Decision on her Motion to Reconsider and Vacate Her Summons dated 29 July 2014, 9 December 2015, D236/1/1/8.
[23] The Co-Lawyers requested, on 2 April 2015, to be authorised to file the Appeal in English first, with a Khmer translation to follow. This request could not be considered at the time, as the Pre-Trial Chamber was not fully constituted.
[24] Appeal, para. 2.
[25] *Ibid.*
[26] International Co-Prosecutor's Response to IM Chaem's Appeal against the Decision to Charge Her *In Absentia*, 16 June 2015, D239/1/6 ("Response").
[27] Decision on International Co-Prosecutor's Request for Extension of Time to Respond to IM Chaem's Appeals and Defence's Related Requests, 9 June 2015, D239/1/5, p. 3.
[28] Response, para. 12.
[29] Response, para. 1.
[30] IM Chaem's Reply to International Co-Prosecutor's Response to IM Chaem's Appeal against the Decision to Charge Her *in Absentia*, 8 July 2015, D239/1/7 ("Reply").

II – ADMISSIBILITY

15. The Co-Lawyers submit that the Appeal is admissible under Internal Rules 21(1) and 74(3)(a).[32] The International Co-Prosecutor concedes that the Appeal is admissible pursuant to Internal Rule 74(3)(a).

16. Pursuant to Internal Rule 74(3)(a), a "Charged Person" may appeal against a number of enumerated orders or decisions of the Co-Investigating Judges, including decisions "confirming the jurisdiction of the ECCC".

17. Internal Rule 21(1) entitled "Fundamental Principles" further provides, in its relevant part:

> "1. The applicable ECCC Law, Internal Rules, Practice Direction 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. In this respect:
>
> a) ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties. They shall guarantee separation between those authorities responsible for prosecuting and those responsible for adjudication."

The Pre-Trial Chamber previously held that the fundamental principles stated in this Rule, which reflect the fair trial requirements that the ECCC is duty-bound to apply pursuant to Article 13(1) 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 (the "Agreement"),[33] Article 35 *new* of the ECCC Law[34] and Article 14(3) of the International Covenant on Civil and Political Rights (the "ICCPR"),[35] may warrant adopting a liberal interpretation of the right to appeal to

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[31] Decision on International Co-Prosecutor's Request for Extension of Time to Respond to IM Chaem's Appeals and Defence's Related Requests, 9 June 2015, D239/1/5, para. 3.
[32] Appeal, para. 13.
[33] 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.
[34] 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, with amendments of 27 October 2004.
[35] *See, e.g.*, Case 002/19-09-2007-ECCC/OCIJ ("Case 002") (PTC64), Decision on IENG Sary's Appeal against Co-Investigating Judges' Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, 11 June 2010, A371/2/12 ("Decision on IENG Sary Audio/Video Recording Request"), paras 13-18 and 27.

ensure that the proceedings are fair and adversarial.[36] In the rare instances where the particular facts of a case raised issues of fundamental rights or serious issues of procedural fairness, the Pre-Trial Chamber has admitted appeals under Internal Rule 21[37] or has broadly construed the specific provisions of the Internal Rules which grant it jurisdiction.[38] That said, the Pre-Trial Chamber has frequently recalled that Internal Rule 21 does not open an automatic avenue for appeal, even where an appeal raises fair trial issues.[39] For the Pre-Trial Chamber to entertain an appeal under Internal Rule 21, the appellant must demonstrate that the situation at issue does not fall within the applicable rules and that the particular circumstances of the case require the Chamber's intervention to avoid *irremediable* damage to the fairness of the investigation or proceedings, or to the appellant's fundamental rights.[40]

18. The Pre-Trial Chamber will first examine whether the Appeal is admissible pursuant to Internal Rule 74(3)(a), which explicitly sets the grounds for appeals before the Pre-Trial Chamber, before considering its admissibility pursuant to Internal Rule 21, if necessary.

a. Internal Rule 74(3)(a)

19. The Co-Lawyers submit that the Impugned Decision is a decision "confirming jurisdiction of the ECCC" and is therefore appealable pursuant to Internal Rule 74(3)(a).[41] In particular, the Co-Lawyers contend that the International Co-Investigating Judge acted *ultra vires*

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[36] *See, e.g.*, Case 002 (PTC11), Decision on KHIEU Samphan's Appeal against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/I/20, para. 36; Case 002 (PTC71), Decision on IENG Sary's Appeal against the Decision of the Co-Investigating Judges Refusing to Accept the Filing of IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for a Stay of the Proceedings, 20 September 2010, D390/1/2/4 ("Decision on IENG Sary's Response"), para 13; Case 002 (PTC14), Decision on Defence Notification of Errors in Translation, 17 December 2010, D2 ("Decision on Translation Errors"), para. 3; Case 002 (PTC75), Decision on IENG Sary's Appeal against the Closing Order, 11 April 2011, D427/1/30, para. 49.

[37] *See, e.g.*, Case 002 (PTC42), Order Rejecting the Request for Annulment and the Request for Stay of Proceedings on the Basis of Abuse of Process Filed by IENG Thirith (D264/1), 10 August 2010, D264/2/6, paras 13-14; Decision on IENG Sary's Response, para. 13, and Decision on Translation Errors, paras 2-6.

[38] *See, e.g.*, Case 002 (PTC05), Decision on the Admissibility of the Appeal Lodged by IENG Sary on Visitation Rights, 21 March 2008, A104/II/4, para. 10.

[39] Decision on TA An's Appeal against the Decision Rejecting his Request for Information Concerning the Co-Investigating Judge's Disagreement of 5 April 2013, 22 January 2015, D208/1/1/2 ("Decision on Appeal concerning Disagreement"), para. 8; Case 003/07-09-2009-ECCC/OCIJ (PTC13), Decision on MEAS Muth's Appeal Against the International Co-Investigating Judge's Order on Suspect's Request Concerning Summons Signed by One Co-Investigating Judge, 3 December 2014, D117/1/1/2, para. 15.

[40] *See, e.g.*, Decision on Appeal concerning Disagreement, para. 8.

[41] Appeal, paras 19-20.

when he confirmed that he had personal, temporal and material jurisdiction over IM Chaem by issuing the Impugned Decision and charging her.[42]

20. The International Co-Prosecutor responds that, as IM Chaem is properly considered to be a Charged Person, the Appeal is admissible pursuant to Internal Rule 74(3)(a).[43]

21. The Pre-Trial Chamber finds the Co-Lawyers' argument unpersuasive. The Impugned Decision does not "confirm" the ECCC's jurisdiction *rationae personae, materiae, temporis* and *loci,* and the Appeal itself does not bring any challenge in this respect. The Pre-Trial Chamber will, nevertheless, examine whether the Appeal falls within the ambit of Internal Rule 74(3)(a) for other reasons.

22. The notion of jurisdictional challenge is generally understood to be a plea against the court's competence *rationae personae, materiae, temporis* and *loci.*[44] The international tribunals, however, have in some instances adopted a broader definition, to take into account the fact that i) the tribunals operate in a framework where the applicable law is less detailed than in domestic jurisdictions and has often not been subject to earlier interpretation.[45] And ii) they lack a centralised structure and rather operate as a self-contained system, which may result in fundamental issues being left unresolved until the very end of the proceedings.[46] In *Tadić*,[47] the Appeals Chamber of the ICTY held that "jurisdiction is not merely an ambit or sphere (better described in this case as 'competence'); it is basically – as is visible from the Latin origin of the word itself, *jurisdictio* – a legal power, hence necessarily a legitimate power, 'to state the law' (*dire le droit*) within this ambit, in an authoritative and final manner".[48] Adopting a broad interpretation of the notion of "jurisdiction", the ICTY Appeals Chamber found in *Tadić* that a challenge to the legality of the foundation of the tribunal amounts to an objection based on lack of jurisdiction.[49] At the ECCC, this Chamber has admitted, under Internal

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[42] Appeal, para. 20.
[43] Response, para. 12.
[44] Case 002 (PTC35), Decision on the Appeals against the Co-Investigating Judges Order on Joint Criminal Enterprise, 20 May 2010, D97/14/15 ("Decision on Joint Criminal Enterprise"), para. 22.
[45] *Ibid.*
[46] *Prosecutor v. Tadić,* Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeal Chamber, 2 October 1995, paras 6, 11.
[47] *Ibid.*
[48] *Ibid.*, para. 10.
[49] *Ibid.*, paras 6 and 12.

Rule 74(3)(a), appeals challenging a Co-Investigating Judges decision that was found to have, implicitly, confirmed ECCC's jurisdiction over modes of liability.[50]

23. The Pre-Trial Chamber notes that, in the Impugned Decision, the International Co-Investigating Judge sought to address a situation that he considered to be unforeseen in the rules that govern proceedings before the ECCC. It is therefore not surprising that the Impugned Decision does not fit squarely within the ECCC Internal Rules, which set out the Pre-Trial Chamber's appellate jurisdiction. It is further noted that the decision has been taken *proprio motu*, so these appellate proceedings are the first opportunity for the parties to present their views on the matter, which must be resolved as early as possible as it may impact the continuation of proceedings against IM Chaem. Taking into account the fundamental principles set out in Internal Rule 21, which states that the Internal Rules shall be interpreted so as to safeguard the interests of a Charged Person and ensure legal certainty and "fair and adversarial" proceedings, the Pre-Trial Chamber finds it appropriate in the present case to adopt a broad interpretation of the right to appeal under Internal Rule 74(3)(a)[51] and to examine the Appeal's admissibility in light of the definition of "jurisdiction" set out by the ICTY Appeals Chamber in *Tadić*.

24. In the Impugned Decision, the International Co-Investigating Judge examined how to proceed under the law to charge IM Chaem given the lack of explicit provisions addressing the consequences of her absence at the initial appearance. After seeking guidance in the procedural rules established at the international level, the International Co-Investigating Judge concluded that he had the power to charge IM Chaem '*in absentia*'. Given that the Impugned Decision examines the legal power of the International Co-Investigating Judge in circumstances where he identified a *lacuna* in the law applicable before the ECCC, the Pre-Trial Chamber finds that it amounts to a decision "confirming jurisdiction of the ECCC", when interpreted broadly.

25. Therefore, the Pre-Trial Chamber finds the Appeal admissible pursuant to Internal Rule 74(3)(a), interpreted in the light of Internal Rule 21.

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[50] *See, e.g.*, Decision on Joint Criminal Enterprise, paras 22-24.

[51] *See, e.g.*, STL, CH/AC/2010/02, Decision on Appeal of Pre-Trial Chamber Judge's Order Regarding Jurisdiction and Standing, Appeals Chamber, 10 November 2010, para. 54: "The Appeals Chamber will not normally consider interlocutory appeals outside the scope of the Rules but finds it necessary to do so here where a situation has arisen that was not foreseen by the Rules, and it is alleged that a jurisdictional error has been committed and injustice may result if such an error as is alleged were left uncorrected."

b. Internal Rule 21(1)

26. The Co-Lawyers also submit that the Appeal is admissible under Internal Rule 21(1) in order to safeguard IM Chaem's right to legal certainty.[52] They argue that the International Co-Investigating Judge has failed to apply the law predictably and clearly, as he has unlawfully resorted to "Cambodian law when the Internal Rules raise no unanswered questions and has subsequently unnecessarily sought guidance in international criminal procedure when Cambodian law clearly deals with the matter at stake", [53] in violation of Article 12 of the Agreement.

27. The International Co-Prosecutor did not respond to the arguments raised by the Co-Lawyers in respect of the admissibility of the Appeal under Internal Rule 21.[54]

28. Given its previous conclusion that the Appeal is admissible under Internal Rule 74(3)(a), the Pre-Trial Chamber finds that it does not need to consider admissibility arguments under Internal Rule 21.

III – STANDARD OF REVIEW

29. Pursuant to the Pre-Trial Chamber's established jurisprudence, "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".[55] Both the Co-Lawyers[56] and the International Co-Prosecutor[57] agree with this standard.

IV – MERITS

30. Upon deliberation, the Judges of the Pre-Trial Chamber could not reach a majority of votes for a decision on the merits of this appeal.

31. Therefore, while the decision of the Pre-Trial Chamber in respect of the admissibility of the Appeal is expressed in the preceding paragraphs, the separate opinions of the various

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[52] Appeal, para. 17.
[53] Appeal, para. 17.
[54] The International Co-Prosecutor solely discusses the legal requirements for admissibility under Internal Rule 21 pursuant to the Pre-Trial Chamber's case-law. *See* Response, para. 6.
[55] Decision on IENG Sary Audio/Video Recording Request, para. 22.
[56] Appeal, para. 29.
[57] Response, para. 11.

Judges of the Pre-Trial Chamber in respect of the merits of the appeal are appended, as required by Internal Rule 77(14).

V – DISPOSITION

FOR THESE REASONS, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:

1. **Finds** the Appeal admissible, pursuant to Internal Rule 74(3)(a), interpreted in the light of Internal rule 21;

2. **DECLARES** that it has not assembled an affirmative vote of at least four Judges to issue a decision on the merits of the Appeal.

Phnom Penh, 01 March 2016

President **Pre-Trial Chamber**

PRAK Kimsan Olivier BEAUVALLET NEY Thol Steven J. BWANA HUOT Vuthy

Judges PRAK Kimsan, NEY Thol and HUOT Vuthy append their opinion with regards to the Appeal.

Judges Olivier BEAUVALLET and Steven BWANA append their opinion with regards to the Appeal.

OPINIONS OF JUDGES PRAK KIMSAN, NEY THOL AND HUOT VUTHY

A. Procedural Bacground

1. On 2 April 2015 the Pre-Trial Chamber was seized of IM Chaem's Appeal Against the International Co-Investigating Judge's Decision to Charge her *in absentia* dated March 3, 2015 ("the Appeal").[58]

2. On 3 June 2015 the International Co-Prosecutor filed a request for extention of time to respond to IM Chaem's Appeal.[59] Consequently the Pre-Trial Chamber granted that request by authorizing an extension of 10 days for the Co-Prosecutor to file Responses to the Appeal by 16 June 2015.[60]

3. On 16 June 2015 the International Co-Prosecutor filed a response to IM Chaem's Appeal Against the International Co-Investigating Judge's Decision to Charge her *in absentia*.[61] On 8 July 2015 the Defence for IM Chaem filed a Reply to the International Co-Prosecutor's Response.[62]

B. Legality of the Appeal

4. The national judges will develop below opinion on the procedural issue at stake. However, we want for a start to clarify the sense we give to the publicity of the Pre-Trial Chamber decisions.

5. Pursuant to Article 3.12 of the ECCC Practice Direction, Ms. IM Chaem may propose that the PTC reclassify as "Public" a "Confidential" or "Strictly Confidential" document, in accordance with the provisions of the Practice Direction on the Classification and Management of Case-Related Information.

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[58] IM Chaem's Appeal Against the International Co-Investigating Judge's Decision to Charge her *in absentia*, 2 April 2015, D239/1/2.
[59] International Co-Prosecutor's Request for Extension of Time to Respond to IM Chaem's Appeals, 3 June 2015, D239/1/3.
[60] Decision on International Co-Prosecutor's Request for Extension of Time to Respond to IM Chaem's Appeals, 9 June 2015, D239/1/5.
[61] International Co-Prosecutor's Response to IM Chaem's Appeal Against the Decision to Charge her *in absentia*, 16 June 2015, D239/1/6.
[62] IM Chaem's Reply to International Co-Prosecutor's Response to Her Appeal against the Decision to Charge her *in* absentia, 8 July 2015, D239/1/7.

6. Sentence 2 of Article 3.12 of the ECCC Practice Direction prescribes: "Until the issuance of a Closing Order and the determination of any appeal against the Closing Order, the Co-Investigating Judges and the Pre-Trial Chamber, as appropriate, shall consider whether the proposed classification is appropriate and, if not, determine what is the appropriate classification."

7. For the forgoing reasons, the National Judges find that at the present time the reclassification from "Confidential" to "Public" is not yet necessary, and Ms. IM Chaem's rights and interest are not in jeopardy even if the documents remained confidential because she can still access them. The PTC should therefore consider reclassifying the documents upon the issuance of a Closing Order and the determination of any appeal against the Closing Order, pursuant to Sentence 2 of Article 3.12 of the ECCC Practice Direction.

8. The Defence for Ms. IM Chaem argued that the ordinary, good faith meaning of Rule 57 requires Ms. IM Chaem's physcial presence at an initial appearance as a pre-condition for Judge Harmon to charge her. A suspect may only be charged by the court "at the time of the initial appearance" 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."[63]

9. The Defence for Ms. IM Chaem also argued that it was irrelevant for Judge Harmon to refer to Artilces 333, 351, 361 and 362 of the Cambodian Code of Criminal Procedure, which are applicable only at the trial stage. 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 a language in one section but omit it in another. Furthermore, in civil law, which relies heavily on codified rules, exceptions must be construed narrowly.[64]

10. The Defence for Ms. IM Chaem further indicates that French law also states that suspects must be present when they are charged. Article 80-1, 80-2 and 116 of the French Code of Criminal Procedure are the core provisions of the charging process in French courts. Judge

[63] The Appeals, para. 34, D239/1/2.
[64] The Appeals, para. 47, D239/1/2.

Harmon erred in his reliance to these three articles. Under French procedural law, an investigating judge may charge a suspect only after the suspect has had his or her initial appearance and after the judge has interviewed him or her or given him or her the opportunity to make a statement. Such opportunity is made possible only if the suspect appears physically before the investigating judge. Only after the suspect has given their statement (or has chosen to remain silent), may the investigating judge decide whether or not to charge the suspect.[65]

11. Rule 57 of the Internal Rules states that at the time of the initial appearance the Co-Investigating Judges shall record the identity of the Charged Person and inform him or her of the charges, the right to a lawyer and the right to remain silent. The Charged Person has the right to consult with a lawyer prior to being interviewed and to have a lawyer present while the statement is taken. If the Charged Person agrees, the Co-Investigating Judge shall take the statement immediately.

12. Rule 57 unequivocally sets forth the requirement of initial and physical appearance of the Charged Person. It also obliges the Co-Investigating Judges to inform the Charge Person of the charges and his or her right to a lawyer and the right to remain silent.

13. Considering the specificity of the Court, suspects' and charged persons' interest must always be safeguarded so as to ensure legal certainty and transparency of the proceedings. The right to legal certainty requires that a law be predictable, clear and effectively implemented in such a way that it prevents arbitrary decisions.[66]

14. Article 12 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 states that the procedure shall be in accordance with Cambodian law. 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.

[65] The Appeals, para. 51, D239/1/2.
[66] The Appeals, para. 15, D239/1/2.

15. The ECCC procedural law must be predictable and clear according to Article 12 of the Agreement. The essence of the agreement includes i) the Internal Rules have primacy in determining the procedures; ii) the Cambodian procedural rules are only applicable if there is a question that the Internal Rules cannot address and iii) judges may seek guidance from international criminal procedural rules only if Cambodian laws are silent about any question regarding legal interpretation or conformity with international standards. Guidance may be sought from international procedural rules only when appropriate and necessary.[67]

16. The principle of fair and especially adversarial trial is envisaged in 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, the 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 and the Internal Rules of the ECCC. Based on this principle, Rule 57 of the Internal Rules requires the Charged Person appear in person before the Co-Investigating Judge during his or her initial appearance. In addition, the Co-Investigating Judges must charge him or her in his or her presence. It is, therefore, inappropriate if the Pre-Trial Chamber finds the Co-Investigating Judge's Decision acceptable while this decision violates a rule clearly defined in the ECCC laws and the Internal Rules.

17. Based on the foregoing arguments, laws and Rule 57 of the Internal Rules define clearly the procedure for the Co-Investigating Judges to charge the Charged Person in his or her *presence*. The Pre-Trial Chamber, therefore, finds it unnecessary to seek any guidance from the international laws or jurisprudence to apply in this matter. Furthermore, there is no any available procedure from the international jurisprudence to charge the Charge Person *in absentia*. The procedures could however be found for trial *in absentia*.

18. In addition, the International Co-Investigating Judge has not fully exercise the investigation power given by the internal rules to ensure the present of the charged person before his.

[67] The Appeals, para.16, D239/1/2.

19. The national judges, therefore, find that the International Co-Investigating Judge is not authorized to charge Ms. IM Chaem *in absentia*.

Phnom Penh, 01 March 2016

President PRAK Kimsan | Judge NEY Thol | Judge HUOT Vuthy

OPINION OF JUDGES BEAUVALLET AND BWANA (THE "UNDERSIGNED JUDGES") REGARDING MERIT OF THE APPEAL

1. We, the Undersigned judges, will develop below our opinion on the procedural issue at stake. However, we want for a start to clarify the sense we give to the publicity of the Pre-Trial Chamber decisions.

2. Internal Rule 78 provides that all decisions and default decisions of the Chamber, including any dissenting opinions, shall be published in full, except where the Chamber decides that it would be contrary to the integrity of the Preliminary Investigation or to the Judicial Investigation.

3. As such, in principle, the publicity of Chamber's decisions is required by Internal Rule 78 and Article 4(e) of the Practice Direction on Classification and Management of Case File Information. Therefore, the content of decisions or opinions which does not jeopardize the integrity of investigations should not be redacted.

4. We consider that any decision of the Chamber related to classification, diverging from the publicity principle set in Internal Rule 78, must be taken with sufficient authority to reverse the above mentioned principle.

5. Committed to the principle of publicity of the Pre-Trial Chamber's decisions as set forth in Internal Rule 78, we reserve the right to release, when appropriate, a public (redacted) version of this Opinion.

6. In the Impugned Decision, the International Co-Investigating Judge held 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".[68] In reaching this conclusion, the International Co-Investigating Judge first considered that Internal Rule 57 does not make an initial appearance a pre-condition for charging a suspect, but concluded that the Internal Rules do not address the procedure for charging a suspect who has refused to appear at an initial appearance and whose presence could not be secured by coercive means.[69] Turning to

[68] Impugned Decision, para. 58.
[69] Impugned Decision, para. 40.

Cambodian law,[70] the International Co-Investigating Judge found that the Cambodian Code of Criminal Procedure ("CCPC") contains no explicit provisions regulating charging *in absentia*.[71] Consequently, the International Co-Investigating Judge elected to seek guidance in the procedural rules established at the international level, pursuant to Article 12(1) of the Agreement, Article 23 *new* of the ECCC Law and Internal Rule 2.[72] In so doing, he found that *"[i]n absentia* proceedings are admissible under human rights law in the presence of certain circumstances, such as the refusal of the person subject to criminal proceedings to appear before the competent court"[73] and that "[p]rocedural rules established at the international level allow for *in absentia* proceedings when a person has waived expressly and in writing his or her right to be present or when all reasonable steps have been taken to secure his or her apperance before the competent court and to inform him or her of the charges, but these efforts have been unsuccessful".[74]

7. The International Co-Investigating Judge then found that the legal requirements to "charge IM Chaem *in absentia*" were fulfilled in the present case, given that i) IM Chaem was aware of the date and time of the initial appearance but wilfully failed to appear, thereby waiving her right to be present;[75] ii) IM Chaem expressed her unwilligness to appear before the ECCC at any other date;[76] and iii) "all reasonable steps have been taken to ensure the appearance of IM Chaem at the ECCC for an initial appearance pursuant to Internal Rule 57".[77] On this last point, the International Co-Investigating Judge declared himself satisfied that "IM Chaem is not in hiding; that the Judicial Police know where IM Chaem resides; that the Judicial Police have the material means to execute the Warrant; and that they have failed to discharge their responsibilities as mandated by the ECCC Agreement, ECCC Law, and the Internal Rules."[78] The International Co-Investigating Judge further found that charging IM Chaem *in absentia* was the only way to ensure the fair and expeditious conduct of the proceedings, more particularly to avoid that the proceedings come to a

[70] Impugned Decision, paras 41-42.
[71] Impugned Decision, paras 43-45.
[72] Impugned Decision, para. 46.
[73] Impugned Decision, para. 57(c).
[74] Impugned Decision, para. 57(d). *See* also paras 50-56.
[75] Impugned Decision, paras 59-62.
[76] Impugned Decision, paras 61-62.
[77] Impugned Decision, para. 67.
[78] Impugned Decision, para. 67. *See* also paras 63-66 describing the measures that have been taken to secure the judicial police's cooperation.

"standstill"[79] and to allow IM Chaem to exercise the rights specifically granted to "Charged Persons" by the Internal Rules during the judicial investigation.[80] Consequently, the International Co-Investigating Judge decided to "charge IM Chaem *in absentia*" and notified her of the charges through a written notification served on her Co-Lawyers.

8. The Co-Lawyers submit that the International Co-Investigating Judge erred in law and exceeded his powers in charging IM Chaem *in absentia.*[81] Firstly, the Co-Lawyers submit that the Internal Rules clearly do not allow charging *in absentia*,[82] as Internal Rule 57 requires the physical presence of the suspect at an initial appearance to charge him or her,[83] record his or her identity and, if applicable, take a statement.[84] In turn, the Co-Lawyers submit that Article 143 of the CCPC, similar to Internal Rule 57, governs the procedure to charge a suspect and requires his or her physical presence at an initial appearance[85] and that Articles 333, 351, 361, and 362 of the CCPC are irrelevant as they are only applicable at the trial stage.[86] The Co-Lawyers further argue that French Law similarly does not allow charging *in absentia.*[87]

9. Secondly, the Co-Lawyers contend that the International Co-Investigating Judge circumvented the law applicable before the ECCC in seeking guidance in the rules established at the international level and creating a new *in absentia* proceeding based on rules from other international tribunals that are not applicable to the ECCC.[88] In particular, the Co-Lawyers argue that the procedural rules of the Special Tribunal for Lebanon (the "STL") are not applicable at the ECCC because the STL is a unique hybrid tribunal designed to accommodate *in absentia* proceedings at the pre-trial stage.[89] The rules of the International Criminal Tribunal for the former Yugoslavia (the "ICTY"), the International Criminal Tribunal for Rwanda (the "ICTR") and the International Criminal Court (the "ICC"), in which the International Co-Investigating Judge sought guidance, are equally

[79] Impugned Decision, para. 70.
[80] Impugned Decision, para. 71.
[81] Appeal, para. 3.
[82] Appeal, paras 31-43.
[83] Appeal, para. 33.
[84] Appeal, para. 36.
[85] Appeal, paras 44-46.
[86] Appeal, para. 47.
[87] Appeal, paras 50-53.
[88] Appeal, para. 2.
[89] Appeal, para. 58 *referring to* Rules 105*bis* and 76*bis* of the STL Rules of Procedure and Evidence.

not applicable here as they apply to different procedural steps.[90] The Co-Lawyers further argue that at the international level, proceedings *in absentia* are only permissible if the accused is absconding,[91] or if "reasonable attempts" have been made to formally notifiy the charges to the accused, which include attempted service at the last known location of the accused, service through his or her workplace, using family addresses and widespread circulation by the media.[92] The Co-Lawyers argue that the International Co-Investigating Judge has fallen short of these requirements as he has not taken all the reasonable steps to notify IM Chaem of the charges against her in person, although he knows where she lives,[93] or by publication in the media.[94] They further submit that "Judge Harmon has also not explored the option of charging Ms. IM Chaem in her home province, as he did for Mr. AO An".[95] Consequently, the Co-Lawyers ask the Pre-Trial Chamber to a. overturn paragraphs 39, 40, 42-46, 57-58, 73 in part, and 76, relating to the charging of IM Chaem in the Impugned Decision, which errs in law, and b. rescind the Notification of Charges, which is *ultra vires*,[96] as recalled above.

10. The International Co-Prosecutor responds that IM Chaem's failure to comply with a legally binding Summons and the failure to execute the Arrest Warrant raise a question that is "directly contrary to the factual situation foreseen by the Internal Rules",[97] which envisage that summons will be complied with[98] and arrest warrants executed.[99] Similarly, the International Co-Prosecutor contends that there are no existing procedures in the CCPC that deal with the existing factual situation.[100] The International Co-Prosecutor therefore submits that it was appropriate for the International Co-Investigating Judge to consider the procedural rules established at the international level.[101] In this respect, the International Co-Prosecutor submits that, because of her active participation in the proceedings through counsel of her own choosing, IM Chaem would be deemed to have already appeared in these proceedings or to have waived her right to appear under the rules applicable before

[90] Appeal, paras 62-68.
[91] Appeal, para. 67.
[92] Appeal, paras 60-61.
[93] Appeal, paras 61 and 67.
[94] Appeal, para. 61.
[95] Appeal, para. 61.
[96] Appeal, para. 2.
[97] Response, paras 13-16.
[98] Response, para. 14.
[99] Response, para. 15 *referring to* Internal Rule 45(2).
[100] Response, paras 17-18.
[101] Response, para. 18.

the STL and human rights law. Therefore, her charging would not be considered "*in absentia*".[102] The International Co-Prosecutor contends that a hearing on confirmation of charges at the ICC, which is similar to the notification of charges at the ECCC, may be held *in absentia* under Article 61 of the Rome Statute if all reasonable steps have been taken to secure the suspect's physical apperance. The International Co-Prosecutor concludes that the Co-Investigating Judge correctly considered the relevant procedural rules at the international level.[103]

11. The International Co-Prosecutor submits that IM Chaem has unequivocally waived her right to be present during proceedings as she has made numerous public comments to media outlets stating her intention not to appear before the ECCC, which demonstrates that she is voluntarily absent.[104] The International Co-Prosecutor contends that the International Co-Investigating Judge has taken all reasonable steps to notify IM Chaem in person and, failing that, has notified her of the charges through her counsel,[105] which would effectively fulfil the conditions to proceed to a confirmation of charges hearing *in absentia* at the ICC. The International Co-Prosecutor concludes that, even if an error had occurred in the Co-Investigating Judge's decision to proceed *in absentia,* that error would not have caused prejudice to IM Chaem who, as a result of the Impugned Decision, now enjoys the right to participate in the investigation and has access to the case file.[106] The International Co-Prosecutor accordingly requests that the Appeal be dismissed on the merits.

12. The Co-Lawyers reply that non-cooperation was foreseen when concluding the Agreement and a contingency plan that did not allow for the adoption of expanded charging powers was created that excluded *in absentia* proceedings.[107] They submit that no question has been left unanswered under Cambodian Law as the CCPC sets forth the procedure to follow when a Judicial Police officer has difficulties in executing an order.[108] Further, the Co-Lawyers reply that IM Chaem's failure to appear at the initial appearance cannot be interpreted as a waiver of her right to appear thereto as this would require that she was

[102] Response, paras 19-31.
[103] Response, para. 34.
[104] Response, paras 29 and 31.
[105] Response, paras 32-33.
[106] Response, paras 34-37.
[107] Reply, paras 2 and 9-14 *referring to* Article 28 of the Agreement; Report of the Secretary General on Khmer Rouge trials, UN Doc. A/57/769, 31 March 2003, para. 15.
[108] Reply, para. 15 *referring to* CCPC, Art. 192.

"sufficiently aware" of the proceedings, through a proper notification.[109] Finally, they assert that the standard of review to be applied is whether or not the reasoning to charge *in absentia* constitutes an error in law that invalidates the Impugned Decision,[110] and it is therefore irrelevant if IM Chaem suffered prejudice.

a. Preliminary Remarks

13. The Undersigned Judges note that the expression "charging *in absentia*" in the Impugned Decision may have created confusion. *In absentia* means "in the absence of". In law, this latin expression is generally used to designate "trial *in absentia*", *i.e.* the determination of the guilt or innocence of an accused and the imposition of penalty in his or her absence. Firstly, it is emphasised that the proceedings in the present case are currently at the pre-trial stage and the charging procedure under Internal Rule 55(4) does not involve any determination of guilt or innocence.[111] Hence, any reference to procedural rules regulating trials *in absentia* must be made with circumspection, taking into account the difference in the stage of proceedings and the impact on the defendant. Secondly, the mere use of the expression "*in absentia*" in the present case is inapposite, as explained below.

14. Under Cambodian law, which allows judgment to be passed in the absence of the accused, trials are not considered to be *in absentia* when the accused has knowledge of the proceedings.[112] In this respect, Article 361 of the CCPC provides:

> "If the accused does not appear for trial, but had knowledge of his citation or summons, the judgement shall be deemed to be a non-default judgement as far as he is concerned.

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[109] Reply, para. 19.
[110] Reply, para. 22.
[111] *Prosecutor v. Rajić,* IT-95-12-R61, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, Trial Chamber, 13 September 1996 ("*Rajić* Decision"), para. 3: "A Rule 61 proceeding is not a trial *in absentia*. There is no finding of guilt in this proceeding [...] No penalty is imposed on the accused in a Rule 61 proceeding".
[112] The principle is the same in, *inter alia,* Italy, Bulgaria and Switzerland. *See* European Court of Human Rights ("ECtHR"), *Sejdovic v. Italy*, Application no. 56581/00, Judgement, 10 November 2004, para. 24, *referencing* Article 175(2) of the Italian Code of Criminal Practice, which provides that an individual who refused to apprise himself of the steps taken in the proceedings does not have a right of appeal out of time, as is granted for persons convicted *in absentia*; ECtHR, *Demebukov v. Bulgaria*, Application no. 68020/01, Judgment, 28 February 2008, paras 30-31, *referencing* Article 423(1) of the Bulgarian Code of Criminal Procedure 2006, which allows for the reopening of criminal cases heard *in absentia* but, as established in the domestic case of решение № 882 от 07.11.2006 г. по н.д.№ 331/2006 г., I н.о. на ВКС, does not apply to people who knew of the proceedings against them but chose not to participate; ECtHR, *Medenica v. Switzerland*, Application No. 20491/92, Judgment, 14 June 2001, para. 42, *referencing* Article 331 of the Canton of Geneva Code of Criminal Procedure, under which persons convicted in absentia may apply to have their conviction set aside if they show that through no fault of their own they were unaware of the summons to appear or unable to attend the trial.

> The accused shall be notified by writ of notification of the so deemed non-default judgement, which is subject to appeal."

By contrast, Article 362 of the CCPC provides:

> "If the accused does not appear for trial and there is no proof that he had knowledge of his citation or summons, a default judgment shall be issued in his absence.
>
> The accused shall be notified by writ of notification of the default judgment. This judgment can be opposed against (See Article 365)."

15. The same holds true at the international level. At the STL, which is the only international criminal tribunal where trials *in absentia* are allowed, the proceedings are not considered *in absentia* when the accused has appointed counsel to represent him or her.[113]

16. Likewise, under human rights law, an accused who fails to appear at trial is deemed to have waived his or her right to be present if he or she i) has been duly informed of the proceedings;[114] ii) had been notified of the proceedings at an earlier stage but had later brought about a situation that made him or her unavailable to be informed of and to participate in the criminal proceedings;[115] or iii) is represented by counsel of his or her own choosing.[116] When the accused is deemed to have waived his or her right to be present, the

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[113] Rule 104 of STL Rules of Procedure and Evidence.
[114] Human Rights Committee, *Mbenge v. Zaire,* Communication 16/1977, UN Doc. CCPR/C/OP/2, p. 76 (1990), para. 14.1 (holding that there would be no violation of the right to be present "when the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his right to be present"); ECtHR, *Medenica v. Switzerland*, Application No. 20491/92, Judgment, 14 June 2001, paras 56-59 (The ECtHR found no violation of the right to be present at trial when the applicant, who had been informed of the proceedings and was represented at trial by counsel who he had appointed, "largely contributed to bringing about a situation that prevented him from appearing." In that case, the applicant, who claimed that he could not attend his trial in Switzerland as he was subject to an order preventing him from leaving the United States, "had misled the American court by making equivocal and even knowingly inaccurate statements – notably about Swiss procedure – with the aim of securing a decision that would make it impossible for him to attend his trial". The Court found that the situation had been orchestrated by the accused as a way to legitimise his absence at trial and seek a continuance); ECtHR, *Lala v. The Netherlands,* Application no. 14861/89, Judgment, 22 September 1994, para. 30 (stressing that the applicant, who was informed of the proceedings and was represented by counsel, "had not availed himself of his right to attend").
[115] ECtHR, *Demebukov v. Bulgaria,* Application No. 6802/01, 28 February 2008, paras 56-59 (holding that "the applicant had brought about a situation that made him unavailable to be informed of and to participate in, at the trial stage, the criminal proceedings against him", given that he had initially been notified of the charges against him; had appointed counsel to represent him; had been subject to an order restricting his movements and had moved, without informing the authorities, soon after having been informed of the results of the preliminary investigation).
[116] *See* ECtHR, *Medenica v. Switzerland*, Application No. 20491/92, Judgment, 14 June 2001, paras 56 and 59; ECtHR, *Lala v. The Netherlands,* Application no. 14861/89, Judgment, 22 September 1994, para. 30; ECtHR, *Demebukov v. Bulgaria,* Application No. 6802/01, 28 February 2008, para. 57.

proceedings are not considered *in absentia* and, therefore, it is not necessary to afford the accused a right to a rehearing in order to comply with Article 6(3)(c) of the European Convention on Human Rights (the "ECHR") or Article 14(3)(d) of the ICCPR.

17. In the present case, the charging proceedings were not conducted in IM Chaem's "absence" within the meaning of Cambodian and international law. IM Chaem was represented by Co-Lawyers who she had appointed and she has been duly notified of her Summons to an initial appearance but has communicated her intention not to appear, through her Co-Lawyers and directly in the media, as detailed below. Further, the International Co-Investigating Judge decided to charge IM Chaem without holding an initial appearance in her presence, and notified her of the charges through a written notification served on her Co-Lawyers. No hearing was held in IM Chaem's absence.

18. Against this background, the Undersigned Judges consider that the present situation calls for an examination *in concreto* of the charging procedure by the Co-Investigating Judge. This procedure is two-fold: first, the Co-Investigating Judge made a decision to charge IM Chaem pursuant to Internal Rule 55(4) and then he informed IM Chaem of the charges through a written notification formally notified to her Co-Lawyers and without holding an initial appearance under Internal Rule 57. The Undersigned Judges will examine whether the International Co-Investigating Judge committed an error of law in this process, irrespective of his reference to a "decision to charge IM Chaem *in absentia*". More specifically, the Undersigned Judges will first examine whether the International Co-Investigating Judge committed an error of law in finding that an initial appearance is not a pre-condition for charging a suspect under the ECCC Internal Rules and that the ECCC legal compendium do not address the procedure for charging a suspect whose presence at an initial apperance cannot be secured. The Undersigned Judges will then examine whether the International Co-Investigating Judge erred in seeking guidance in the rules established at the international level and its interpretation of the said rules. Finally, the Undersigned Judges will consider whether the International Co-Investigating Judge erred in finding that the circumstances of the present case warranted the decision to charge IM Chaem without holding an initial appearance in her presence and notifying her of the charges through her lawyers.

b. Alleged Error in the Interpretation of the Internal Rules and Cambodian Law

19. Pursuant to Internal Rule 55(4), the "Co-Investigating Judges have the power to charge any Suspects named in the Introductory Submission". Internal Rule 55(4) further provides that the Co-Investigating Judges "may also charge any other persons against whom there is clear and consistent evidence indicating that such person may be criminally responsible for the commission of a crime referred to in an Introductory Submission or a Supplementary Submission, even where such persons were not named in the submission. In the latter case, they must seek the advice of the Co-Prosecutors before charging such persons." The rules set no pre-conditions for the Co-Investigating Judges to decide to charge a suspect named in an Introductory Submission nor any procedural step that would be required to be taken before a decision to charge is made. In this respect, it is noted that the International Co-Investigating Judge previously held that he must first be satisfied that there is sufficient evidence before deciding to charge a suspect, even if named in an introductory submission.[117] However, it was clear that this determination would be made *ex parte*, and that the suspect will only participate in the proceedings after being formally charged at an initial appearance.[118]

20. In turn, Internal Rule 57 provides that the Charged Person is *notified* of the charges when he or she appears before the Co-Investigating Judges at an initial appearance:

> 1. At the time of the initial appearance the Co-Investigating Judges shall record the identity of the Charged Person and inform him or her of the charges, the right to a lawyer and the right to remain silent. The Charged Person has the right to consult with a lawyer prior to being interviewed and to have a lawyer present while the statement is taken. If the Charged Person agrees, the Co-Investigating Judge shall take the statement immediately. A written record of the statement shall be placed in the case file.
>
> 2. Where the Charged Person is in detention he or she shall have the right to raise any issues relating to the execution or procedural regularity of the provisional detention.

[117] *See, e.g.,* Decision on the TA An Defence Requests to Access the Case File and Take Part in the Judicial Investigation, 31 July 2013, D121/4 ("Decision on TA An Defence Requests on Participation"), para. 44.
[118] *See, e.g., Ibid.*, para. 26, where the Co-Investigating Judge noted that "the Internal Rules clearly distinguish between a Suspect and a Charged Person, and grant the latter a broader set of rights." The Co-Investigating Judges go on, at para. 59, to outline the rights of a Suspect as limited to representation by counsel, information of the allegations against him and the right to remain silent, with a Suspect not granted the right to participate in the judicial investigation until such a time as he or she is formally charged.

3. Where the Charged Person is not detained after the initial appearance, he or she shall inform the Co-Investigating Judge of his or her address. The Charged Person shall be informed that:

   a) He or she must notify the Co-Investigating Judge of any change of address;

   b) All service or notification at the last address provided will be deemed to be valid.

4. This information shall be recorded in the case file.

Internal Rule 57 sets the principle that a suspect should be notified of the charges against him or her when they appear for the first time before the Co-Investigating Judges, *i.e.* at his or her initial appearance. The Undersigned Judges agree with the Co-Lawyers that an initial appearance shall be held in the presence of the suspect. This does not, however, impact on the question at issue. In the present case, the International Co-Investigating Judge did not hold an initial appearance in IM Chaem's absence but rather decided that holding an initial appearance was not a pre-condition for charging her under the Internal Rules and to notify her of the charges by other means. The Undersigned Judges shall therefore examine if this process is contrary to the Internal Rules.

21. The Internal Rules do not make an initial appearance a pre-condition for the Co-Investigating Judges to *decide* to charge a suspect and clearly express that this decision is independent from the actual notification of the charges, which happens thereafter. It is clear from Internal Rules 55(4) and 57 that the decision to charge a suspect named in an introductory submission is taken *ex parte* by the Co-Investigating Judges, or one of them in case of disagreement between them. The suspect has no right to be heard prior to this decision being made. At the initial appearance, the suspect is simply *notified* of the charges. In this respect, the Undersigned Judges note that the opportunity for the "Charged Person" to make a statement does not entail that he or she may be heard prior to a decision to charge being made. Rather, the statement envisaged in paragraph 1 of Internal Rule 57 is the first opportunity for the Charged Person to present his or her account of the facts as part of the judicial investigation. The Undersigned Judges note that the Internal Rules reflect Cambodian law[119] and the French Code of Criminal Procedure.[120] This conclusion is

[119] Similar to the Internal Rules, Art. 126 the CCPC grants the investigating judge the power to charge a suspect named in an introductory submission and Article 143 provides for the notification of charges during an initial appearance.

supported by the constant practice of the ECCC, including in this case, where defendants appearing for the first time before the Co-Investigating Judges (or one of them) were first informed that they had been charged for a number of criminal acts and then asked to make a statement, without any debate about whether they should be charged.[121] Finally, the Undersigned Judges note that the Co-Lawyers do not claim that IM Chaem should have been heard before a decision to charge her was made. They rather focus their arguments on the process for the notification of charges, which the Undersigned Judges will now address.

22. The Undersigned Judges concur with the International Co-Investigating Judge that the procedural rules at the ECCC do not regulate the procedure for charging a suspect who has refused to appear before the Court and whose presence could not be secured by coercive means,[122] insofar as this conclusion relates to the *notification* of charges. The Internal Rules provide that the Co-Investigating Judges may secure the presence of a suspect at an initial appearance by issuing a summons, an arrest warrant or an arrest and detention order.[123] They further provide that summons shall be complied with[124] and arrest warrants executed by the Judicial Police.[125] Pursuant to Internal Rule 45(3), "[t]he Judicial Police shall notify the Co-Investigating Judges or the Chambers of any difficulty in performing their mission." Ultimately, the Agreement and the ECCC Law provide that the Royal Government of Cambodia shall provide assistance to the Co-Investigating Judges to, *inter alia*, execute arrest warrants.[126] There is no further provision addressing the situation where an arrest warrant is not executed through the assistance of the Royal Government of Cambodia.

23. In turn, there can be no doubt that the inability to hold an initial appearance pursuant to Internal Rule 57 does not halt the proceedings. It is clear under the Internal Rules that the

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[120] According to the French Code of Criminal Procedure (art.116 al. 4 and 5), during an initial appearance, the investigating judge informs the person of his right to remain silent, to make a statement, or to be interrogated. After that notification, irrespective of whether the person remained silent, gave a statement or was fully interrogated, the investigative judge notifies his decision either to charge the person or not to do so.

[121] *See, e.g.,* Written Record of Initial Appearance of KAING Guek-Eav, 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 IENG Thirith, 12 November 2007, E3/664; Written Record of Initial Appearance of KHIEU Samphan, 19 November 2007, D42; Written Record of Initial Appearance of AO An, 27 March 2015, D242: in which the identity of the Suspect was confirmed, the charges against the Suspect were read and confirmed, and the subsequent "Charged Person" was invited to make an initial statement.

[122] Impugned Decision, para. 40.

[123] *See* Internal Rules 41, 42 and 44 and 55(5).

[124] *See* Internal Rule 41(4).

[125] *See* Internal Rule 45(2).

[126] Art. 25(c) of the Agreement; Art. 23 *new* of the ECCC Law.

Co-Investigating Judges have an obligation to conduct a judicial investigation when seised of an introductory submission[127] and to reach a conclusion that the case should either be dismissed or sent to trial.[128] Hence, the absence of an alternative way to proceed when an initial appearance cannot be held does not indicate that an initial appearance is the only lawful way to notify charges. Rather, the *lacuna* in the Internal Rules calls for an examination of Cambodian law.[129]

24. In Cambodian domestic law, when an investigating judge cannot secure the presence of a suspect at an initial appearance through a subpoena,[130] an order to bring[131] (equivalent to an "arrest warrant" in ECCC Rules)[132] or an arrest warrant[133] (equivalent to an "Arrest and Detention Order" in the ECCC Rules),[134] the proceedings continue in the absence of the suspect up until the issuance of a judgment.[135] The subpoena, the order to bring, and the arrest warrant shall contain a notification of charges, which is similar to the one that occurs at an initial appearance.[136] A defendant is considered a "Charged Person" from the time of the issuance of an order to bring, at the latest.[137] It is clear that an initial appearance is not necessary for a person to be considered a "Charged Person" under Cambodian law and the proceedings to continue. Cambodian law is less explicit, however, when it comes to defining the conditions for the proceedings to continue *in absentia* after the issuance of an arrest warrant. The CCPC provides that arrest warrants may be published to police and military units as well as internationally, if necessary.[138] Article 199 of the CCPC further provides that the judicial police must "notify the investigating judge of any difficulty in the

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[127] Internal Rule 55(1).
[128] Internal Rule Internal Rule 67(1).
[129] *See* Case 002 (PTC06) Decision on NUON Chea's Appeal against Order Refusing Request for Annulment, 16 August 2008, D55/1/8 at para. 15, in which the Pre-Trial Chamber held that "Provisions of the CPC (Cambodian Criminal Procedure Code) should only be applied where a question arises which is not addressed by the Internal Rules," but, in the case of uncertainty, should be refered to first before guidance is sought at the international level, as per the ECCC Agreement.
[130] CCPC, Art. 185-188.
[131] CCPC, Art. 185; 189-194.
[132] Internal Rule 42.
[133] CCPC, Art. 185; 195-202.
[134] Internal Rule 44.
[135] *See* CCPC Articles 333 ("seeking the truth in the absence of accused"), 351 ("absence of the accused"), 360 ("non-default judgement"), 361 ("judgement deemed as non-default") and 362 ("default judgement").
[136] Article 191 of the CCPC provides that the order to bring shall include the "charged offense, and the law which defines and punishes the offense", whereas Article 143 states that a charged person shall be notified, at the initial appearance, of "imputed act and its legal qualification". *See* also Art. 198 for arrest warrants and 187 for subpoenae.
[137] Pursuant to Art. 190 of the CCPC, an order to bring a suspect before Court may be issued against "a charged person or any person against whom there is evidence of guilt".
[138] Articles 199 and 200 of the CCPC.

performance of their mission". If the failure to execute an arrest warrant results from a Judicial Police Officer's misconduct, the CCPC provides for disciplinary actions against that officer[139] but does not set out the requirements for continuing proceedings.

25. In this respect, the French Code of Criminal Procedure, upon which the CCPC was inspired, provides some insight. Article 134 provides that if an arrest warrant cannot be executed, "an official report of the fruitless search is sent to the judge who issued the warrant." It further provides that "[t]he person concerned is then considered charged *for the purpose of closing the investigation*".[140] Similar to the procedure under Cambodian law, the proceedings continue in the absence of the defendant up until the issuance of a judgment.[141] Under French law, a person cannot claim the rights afforded to charged persons if he or she refuses to appear before the Court.[142]

26. In light of the foregoing, the Undersigned Judges find that the International Co-Investigating Judge correctly concluded that an initial appearance is not a pre-condition for charging a suspect before the ECCC but the Internal Rules do not explicitly address the situation where such an initial appearance cannot take place. Contrary to the International Co-Investigating Judge's finding,[143] Cambodian law does provide some guidance in this respect, insofar as it allows for the charging of a suspect through a summons, an order to bring or an arrest warrant and the continuation of proceedings until the conclusion of the judicial investigation in the absence of the charged person.

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[139] Articles 64 and 66 of the CCPC require the investigating judge or Royal Prosecutor attached to the Court of Appeal to report all cases of misconduct of a judicial police officer during his duties to the General Prosecutor attached to the Court of Appeal, who can either i) report the matter to the Minister of Interior for disciplinary action or ii) temporarily or permanently prohibit the Judicial Police Officer from performing his duty.

[140] Article 134 reads:
« L'agent chargé de l'exécution d'un mandat d'amener, d'arrêt et de recherche ne peut s'introduire dans le domicile d'un citoyen avant 6 heures ni après 21 heures. Il en est de même lorsque l'agent est chargé de l'arrestation d'une personne faisant l'objet d'une demande d'extradition ou d'un mandat d'arrêt européen.
Il peut se faire accompagner d'une force suffisante pour que la personne ne puisse se soustraire à la loi. La force est prise dans le lieu le plus proche de celui où le mandat doit s'exécuter et elle est tenue de déférer aux réquisitions contenues dans ce mandat.
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. »

[141] Art. 379-2 of the French Code of Criminal Procedure.

[142] Crim. Cass., Bull. Crim. 2002, No. 111, p. 372 (rejecting an appeal as inadmissible on the grounds that the appellant, who failed to appear before the Court following the issuance of an arrest warrant, does not have the status of "charged person"); Crim. Cass., Bull. Crim. 2002, No. 230, p. 843 (holding that a person who has not appeared before the Court does not have standing to request the annulment of the arrest warrant issued against her).

[143] Impugned Decision, para. 46.

27. In the present case, the judicial police have not reported any difficulty in executing the Arrest Warrant, or issued a report of a fruitless search, despite the fact that the Arrest Warrant was issued more than a year ago. Therefore, the Undersigned Judges find that Cambodian law cannot assist in determining whether sufficient efforts had been made to secure IM Chaem's presence at an initial appearance before the International Co-Investigating Judge decided to notify her of the charges in writing, through her lawyers. This *lacuna* in Cambodian law, when applied for the purposes of ECCC proceedings, reflects one of the particularities faced by internationalised criminal tribunals who lack their own law enforcement forces and rely upon State cooperation to execute arrest warrants. Pursuant to Article 12(1) of the Agreement, Article 23*new* of the ECCC Law and Internal Rule 2, the International Co-Investigating Judge was correct in seeking guidance in the procedural rules established at the international level.

28. The Undersigned Judges further find that it was appropriate for the International Co-Investigating Judge to examine more generally the rules of other international tribunals on exceptional measures to advance proceedings at the pre-trial stage when an arrest warrant is not executed or a suspect cannot be notified, in person, of the charges.

c. Alleged Errors in the Application of Human Rights Law and the Procedural Rules Established at the International Level

29. The Undersigned Judges emphasise that, unlike the ECCC, none of the international criminal tribunals apply the inquisitorial system and conduct judicial investigations. The Undersigned Judges agree with the Co-Lawyers that because the international tribunals do not have a procedural step equivalent to the "*mise en examen*" (litteraly, "placement under investigation"), the rules of these tribunals cannot be applied *mutadis mutandis* at the ECCC. That said, the ECCC may seek guidance in the general principles set forth therein, particularly insofar as they provide for alternative ways to continue proceedings when an arrest warrant is not executed within a reasonable time. The Undersigned Judges emphasise that, given the present proceedings are not conducted *in absentia* and no hearing has been held in IM Chaem's absence, the purpose of reviewing international law here is not to examine whether *in absentia* proceedings are "permissible" *per se*. Rather, the Undersigned Judges consider that the procedural rules established at the international level may provide

guidance as to the conditions for charging a suspect without holding an initial appearance and alternative ways to notify charges.

30. At the ICTY, ICTR, Special Court of Sierra Leone ("SCSL") and STL, an accused shall, in principle, be served with the indictment in person when first taken into custody,[144] or otherwise reached by the competent authorities,[145] and then be formally charged by the competent judicial authority when he or she first appears before the tribunal or court.[146] Similarly, at the ICC, domestic authorities execute arrest warrants, and are required to inform the accused of the charges against them at the time of the arrest.[147] The accused is notified of the charges by the Court at the initial appearance.[148] Service of the indictment is not completed until the charges are confirmed, which occurs after the initial appearance.[149] Of particular interest to the present case, the ICC, ICTY, ICTR and STL all provide for exceptional measures to avoid the proceedings being stalled when service of an indictment cannot be made in person as envisaged in the applicable rules or when an arrest warrant is not executed.

31. At the ICC, Article 61(2) of the Rome Statute allows the confirmation of an indictement to proceed in the absence of the suspect when his or her presence at the hearing cannot be secured. To proceed in the suspect's absence, the Pre-Trial Chamber must be satisfied that the person has:

    (a) Waived his or her right to be present; or

    (b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a

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[144] *See* Rule 53 *bis* of the ICTY Rules of Procedure and Evidence; Rule 53 *bis* of the ICTR Rules of Procedure and Evidence; Rule 52 of the SCSL Rules of Procedure and Evidence.
[145] Rule 76(B) of the STL Rules of Procedure and Evidence.
[146] *See* Rule 62(A)(ii) of the ICTY Rules of Procedure and Evidence; Rule 62(ii) of the ICTR Rules of Procedure and Evidence ; Rule 61(ii) of the SCSL Rules of Procedure and Evidence; Rule 98(A)(ii) of the STL Rules of Procedure and Evidence.
[147] Under Article 59(2) of the Rome Statute:
"A person arrested shall be brought before the competent judicial authority in the custodial State which shall determine, in accordance with the law of the State, that:
(a) The warrant applied to that person;
(b) The person has been arrested in accordance with the proper process; and
(c) The person's rights have been respected."
[148] Art. 60(1) of the Rome Statute of the ICC.
[149] Art. 61 of the Rome Statute of the ICC.

hearing to confirm those charges will be held.[150]

As to the first condition, it is noted that to waive the right to be present, the person concerned must be "available to the Court" and make a request to this effect to the Pre-Trial Chamber. The Chamber must be satisfied that "the person concerned understands the right to be present at the hearing and the consequences of waiving this right".[151] As to the second condition, the Pre-Trial Chamber shall ensure that "all reasonable measures have been taken to locate and arrest the person".[152] During this process, the Pre-Trial Chamber may hold consultations with the Prosecutor, in the presence of the counsel of the accused if she or he has appointed one.[153] The Chamber shall notify its decision, "if possible, to the person concerned or his or her counsel".[154]

32. At the ICTY and ICTR, Rule 61 of the Rules of Procedure and Evidence provides for a hearing to "reconfirm the indictment"[155] in the absence of the accused "when a warrant of arrest has not been executed, and personal service of the indictment has consequently not been effected." If satisfied that there are reasonable grounds for believing that the accused has commited the alleged offences, the Trial Chamber can read the indictment in open court in the absence of the accused, issue an international arrest warrant, and, in case of a failure from the State to cooperate, refer the matter to the Security Council.[156] To so proceed, the Trial Chamber must be satisfied that:

i) the Registrar and the Prosecutor have taken all reasonable steps to secure the arrest of the accused, including recourse to the appropriate authorities of the State in whose territory or under whose jurisdiction and control the person to be served resides or was last known to them to be; and

[150] Art. 61(2) of the Rome Statute.
[151] Rule 124 of the ICC Rules of Procedure and Evidence.
[152] Rule 123 of the ICC Rules of Procedure and Evidence.
[153] Rule 123 of the ICC Rules of Procedure and Evidence.
[154] Rule 125(2) of the ICC Rules of Procedure and Evidence.
[155] In *Prosecutor v. Karadžić and Mladić*, IT-95-5-R61 and IT-95-18-R61, Review of the Indictments pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996 ("*Karadžić and Mladić* Decision") at para. 3, the Trial Chamber found that the purpose of Rule 61(1)(A) hearings is to allow the proceedings to continue by reconfirming the indictment in the absence of the accused.
[156] Rule 61(C-E) of the ICTY Rules of Procedure and Evidence.

ii) if the whereabouts of the accused are unknown, the Prosecutor and the Registrar have taken all reasonable steps to ascertain those whereabouts, including by seeking publication of advertisements pursuant to Rule 60.[157]

Pursuant to Rule 60:

> At the request of the Prosecutor, a form of advertisement shall be transmitted by the Registrar to the national authorities of any State or States, for publication in newspapers or for broadcast via radio and television, notifying publicly the existence of an indictment and calling upon the accused to surrender to the Tribunal and inviting any person with information as to the whereabouts of the accused to communicate that information to the Tribunal.

33. The ICTY Trial Chamber has held hearings to reconfirm the indictment where it found that the failure to effect personal service of the indictment was attributable to the refusal of the State to cooperate with the Tribunal.[158] The Trial Chamber considered, *inter alia,* evidence that the accused persons were on the State's territory but were not arrested despite numerous requests by the President of the ICTY and that the indictments were published in newspapers with wide circulation.[159]

34. Under Article 22 of the Statute of the STL, proceedings can be conducted in the absence of the accused if her 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.[160]

The STL Statute further provides that, when hearings are conducted in the absence of the accused, the Tribunal must be satisfied that the accused "has been notified, or served with the indictment, or notice has otherwise been given of the indictment through publications in

[157] Rule 61(1)(A) of the ICTY Rules of Procedure and Evidence.
[158] *Karadžić and Mladić* Decision, para. 101; *Rajić* Decision, para. 70.
[159] *Karadžić and Mladić* Decision, paras 98-99; *Rajić* Decision, paras 63 and 65-66.
[160] Art. 22(1) of the STL Statute.

the media or communication to the State of residence or nationality".[161] Rules 76 and 76 *bis* allow service of an indictment to be effected by public advertisement,[162] in lieu of personal service, where "reasonable attempts have been made to serve the indictment" in person.[163] The Tribunal has elaborated in *Prosecutor v. Ayyash et al.*[164] that to establish service by public advertisement, there must be evidence that the advertisement has likely reached the accused.[165] Significantly for the present case, the procedural steps required by Article 22 above are not necessary when the accused has appointed counsel to represent him or her.[166]

35. In assessing whether all reasonable measures had been taken to secure the accused appearance before the Tribunal, the STL Trial Chamber held that "[a] definition of 'all reasonable steps' cannot exist in customary international law; it must be determined according to the circumstances particular to each individual situation, meaning that the question can be determined, not in the abstract, but rather by examining the totality of the prevailing circumstances".[167] In *Prosecutor v. Ayyash et al.,* the STL Trial Chamber stressed that by all accounts, the local authorities were cooperating and attempting to locate the accused. Lebanese authorities submitted reports on the progress made in locating the accused at various intervals. The Trial Chamber concluded that all reasonable steps had been taken to serve the accused, where these steps included: i) repeated attempts (between 32 and 46 for each accused) at service at the last known addresses of each accused, their work addresses and the addresses of close family members; ii) attempted service through the relevant *mukhtars*; iii) affixing the indictment to the last known place of residence for each accused; iv) publication of "Wanted Posters" in Lebanese media, which were then widely publicised; v) publication of an "open letter" to the accused from the President of the STL; and vi) delivery, via similar methods, of the Head of Defense Office's decision

[161] Art. 22(2)(a) of the STL Statute.
[162] Rule 76 *bis* of the STL Rules of Procedure and Evidence.
[163] Rule 76(E) of the STL Rules of Procedure and Evidence.
[164] *Prosecutor v. Ayyash et al.*, STL-11-01/I/TC, Decision to hold Trial *in absentia*, Trial Chamber, 1 February 2012 ("*Ayyash et al.* Decision").
[165] In this case, the Tribunal concluded, at para. 105, that "[a]ll the evidence available to the Trial Chamber suggests that the four Accused have not left Lebanon," as none of the defendants "have been seen at their last known places of residence since at least June 2011 when their names were publicised in connection with the indictment." In any case, the Tribunal also found that "massive if not blanket coverage was given in the Lebanese media both to the indictment itself and to connecting (the suspects) with the indictment" such that the accused can reasonably be thought to be aware of the proceedings.
[166] Rule 104 of the STL Rules of Procedure and Evidence.
[167] *Ayyash et al.* Decision, para. 28.

assigning counsel.[168] The Trial Chamber reached a similar conclusion in *Prosecutor v. Merhi,* where similar measures had been taken.[169]

36. In the light of the foregoing, the Undersigned Judges find that the procedural rules established at the international level allow for exceptional measures to be taken in order to advance proceedings at the pre-trial stage when: i) a person has waived expressly and in writing his or her right to be present; or ii) when all reasonable steps have been taken to secure his or her appearance before the competent court and to inform him or her of the charges, but these efforts have been unsuccessful, as held by the International Co-Investigating Judge.[170]

37. As to the waiver of the right to be present, the Undersigned Judges note that the rules established at the international level require the accused to have previously been notified of the proceedings and to explicitly, and in writing, give the waiver. Under the rules of international tribunals, an implicit waiver will not be sufficient for the court to decide to further proceed in the absence of the accused; the court would still need to take all reasonable steps to ensure the presence of the accused. There is a distinction to be made between the conditions under which exceptional measures can be taken under the rules of international criminal tribunals following a failure to execute an arrest warrant, and the conditions that must be met to ensure that the right, under human rights law, to be present at trial is respected. The former are more stringent than the latter. That said, absent an express waiver, the jurisprudence of human rights bodies remains useful to determine whether the tribunal has taken all reasonable steps to notify the accused of the proceedings, as more amply discussed below.

38. Regarding the sufficiency of measures taken to secure the arrest of the accused and notify him or her of the charges, the Undersigned Judges note that the requirement to proceed in the absence of the accused is not that the national authorities have taken all reasonable measures, but rather that the tribunal itself has taken all reasonable measures. In the context of international tribunals, it is recognised that the difficulty in executing an arrest warrant may come from a lack of cooperation of the State in whose territory or under whose jurisdiction and control the concerned person resides or was last known to be. Reasonable

[168] *Ayyash et al.* Decision.
[169] *Prosecutor v. Merhi,* STL-13-04/I/TC, Decision to hold Trial *in absentia*, Trial Chamber, 20 December 2013.
[170] Impugned Decision, para. 57(d). *See* also paras 50-56.

steps in these circumstances include attempts to secure the concerned State's cooperation, which may fall short of actually obtaining it. Significantly, the tribunal is not required to await for an official report from the national law enforcement authorities to proceed. Rather, the absence of a report by the State authorities after a reasonable time is deemed a failure to execute an arrest warrant.[171]

39. There are no specific requirements under international law to determine if reasonable steps have been taken to secure the presence of the accused; each case shall be examined in the light of the totality of the circumstances. In this respect, the Undersigned Judges note that publication of the indictment in the media is envisaged only when the whereabouts are unknown or the accused is absconding;[172] it is not required, for instance, when the accused is represented by counsel that he or she has appointed.[173] Further, the court may consider that "certain established facts might provide an unequivocal indication that the accused is aware of the existence of the criminal proceedings against him and of the nature and the cause of the accusation and does not intend to take part in the trial or wishes to escape prosecution", [174] even if he or she has not been formally notified of the charges against him or her. As held by the European Court of Human Rights in *Sejdovic v. Italy*, "[t]his may be the case, for example, where the accused states publicly or in writing that he does not intend to respond to summonses of which he has become aware through sources other than the authorities, or succeeds in evading an attempted arrest, or when materials are brought to the attention of the authorities which unequivocally show that he is aware of the proceedings pending against him and of the charges he faces."[175]

40. The Undersigned Judges find that the procedural rules established at the international level provide useful guidance to resolve the present case, insofar as they determine the conditions for continuing proceedings without holding an initial appearance. Given that the principles do not conflict with Cambodian law but rather complement it to address the particularity of proceedings before the ECCC, the Co-Lawyers' argument that the

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[171] *See* Rule 59 of the SCSL Rules of Procedure and Evidence, entitled "Failure to Execute a Warrant of Arrest or Transfer Order".
[172] *See, e.g.*, Rule 61(1)(A) of the ICTY and ICTR Rules of Procedure and Evidence.
[173] *See, e.g.*, Rule 104 of the STL Rules of Procedure and Evidence.
[174] ECtHR, *Sejdovic v. Italy*, Application no. 56581/00, Appeal Judgement, Grand Chamber, 1 March 2006, para. 99 (references omitted).
[175] *Ibid. See* also para. 98, where the ECtHR distinguishes Sejdovic's case from that of Medenica, who "had been informed in good time of the proceedings against him and of the date of his trial" and "also had the assistance of and was in contact with a lawyer of his own choosing".

International Co-Investigating Judge acted *ultra vires* in "creating a new *in absentia* procedure for charging"[176] is without merit. Likewise, the Undersigned Judges find that, contrary to the Co-Lawyers' assertion,[177] the International Co-Investigating Judge did not have to refer the matter to the Plenary for a rule amendment; he had to decide on the matter before him first and then could, for future purposes, propose a rule amendment, as clearly expressed by Internal Rule 2.

d. Alleged Error in the Application of the Law to the Present Case

41. The Undersigned Judges note that the Co-Lawyers do not dispute the fact that IM Chaem was duly summonsed to the initial appearance scheduled for 8 August 2014 and that she failed to appear. They do not present a valid excuse for this failure to appear. The Co-Lawyers do not dispute the International Co-Investigating Judge's conclusion that IM Chaem is not willing to appear before the ECCC on any other date. In this respect, the Co-Lawyers take issue with the fact that the Co-Investigating Judge did not explore the possibility to charge IM Chaem in her home province. However, they have shown no indication of IM Chaem's willigness to take part in an initial appearance held in these exceptional conditions, contrary to AO An.[178] Further, the Co-Lawyers do not contend that the measures to execute the Arrest Warrant were insufficient or otherwise suggest that additional efforts must be made in this respect. In effect, the Co-Lawyers claim a right for IM Chaem to appear in person at an initial appearance while she, herself, prevents that initial appearance from taking place. The Arrest Warrant remains unexecuted after more than one year, despite numerous attempts by the International Co-Investigating Judge to obtain the cooperation of the Judicial Police, both directly and through the Chairman of the Security Commission for the ECCC.[179] Given these circumstances, the Undersigned Judges find that the Co-Investigating Judge did not err in concluding that all reasonable steps had been taken to secure IM Chaem's presence at an initial appearance. The Undersigned Judges will now turn to examine whether the Co-Investigating Judge erred in deciding to notify the charges by way of a written notification served on her Co-Lawyers.

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[176] Appeal, para. 69.
[177] Appeal, paras 69-72.
[178] *See* Written Record of Initial Appearance of AO An, 27 March 2015, D242, in which the International Co-Investigating Judge noted that "assuming AO An chose to comply with the summons to his initial appearance, AO An's Co-Lawyers requested the ICIJ that the Initial Appearance take place in Battambang [illegible]" and a subsequent communication from the Co-Lawyers that they would attend the scheduled Initial Appearance in Battambang.
[179] *See* Impugned Decision, paras 21-30.

42. Faced with IM Chaem's failure to appear before the ECCC, the International Co-Investigating Judge could have set out the charges in the Arrest Warrant and continued the investigation until its conclusion without IM Chaem's participation, as provided under Cambodian law. The International Co-Investigating Judge decided to do otherwise and to formally notify IM Chaem of the charges, in order for her to be afforded the right to participate in the investigation and for her Co-Lawyers to access the case file. Although this procedure is unusual, it responds to a factual situation that is, equally, unusual. In this respect, it is noted that IM Chaem has appointed two lawyers to represent her since 30 March 2014.[180] The Co-Lawyers have requested access to the case file since 21 May 2014.[181] The International Co-Investigating Judge has previously held that these rights are only available to "Charged Persons", *i.e.* those persons who have been formally charged.[182] Having reached a point in his investigation where he considered that there was sufficient evidence to charge IM Chaem, the International Co-Investigating Judge proceeded to grant her the status of "Charged Person" and the rights attached to it. The Undersigned Judges find that this objective is in line with the spirit of the Internal Rules, which envisage that individuals prosecuted before the ECCC take part in the investigation, and their fundamental principles, which require that the Internal Rules "be interpreted so as to always safeguards the interests of the Suspects and Charged Persons".[183] Further, allowing IM Chaem to participate in the investigation is conducive to ascertaining the truth. Pursuant to Internal Rule 55(5), "the Co-Investigating Judges may take any investigative action conducive to ascertaining the truth" and, to that end, may "issue such orders as may be necessary to conduct the investigation". Therefore, the Undersigned Judges find that in the particular circumstances of the present case, the International Co-Investigating Judge had the power and was justified to explore alternative ways to notify IM Chaem of the charges against her so that she could thereafter be considered as a Charged Person and enjoy the rights attached to this status.

43. As to the way chosen by the International Co-Investigating Judge to notify IM Chaem of the charges against her, the Undersigned Judges note that pursuant to Internal Rule 46, "[a]ll orders of the Co-Investigating Judges or the Chambers shall be notified to the parties

[180] *See* Form 7: Request for Engagement/Assignment of Co-Lawyers, 30 March 2014, D122/3.5.1.
[181] IM Chaem's Motion Requesting Order for Access to the Case File, 21 May 2014, D239.
[182] *See, for example*, Decision on TA An Defence Requests on Participation.
[183] Internal Rule 21(1).

or their lawyers". However, notification of charges is done directly to the concerned person[184] as this is normally the first time that he or she becomes aware of the proceedings. Arguably, attempts could have been made to serve the documents entitled "Notification of Charges" on IM Chaem personally. That said, the Undersigned Judges find that notification to the Co-Lawyers was legitimate and appropriate in the exceptional circumstances of the present case. In this respect, the Undersigned Judges note that IM Chaem has previously refused to acknowledge service of her Summons[185] and generally refused to have any interaction with the Court, stating that she did not intend to appear before the ECCC.[186] Instead, IM Chaem has communicated with the Court through her Co-Lawyers, including to discuss her attendance at the initial appearance.[187] The Co-Lawyers have also previously requested to be provided with a courtesy copy of documents served on IM Chaem.[188] Furthermore, IM Chaem is currently the subject of an arrest warrant but refuses to surrender to the Court. In these circumstances, personal service of the Notification of Charges on IM Chaem may have created additional tension in the case without achieving any meaningful results. It is also noted that the objective of notifying IM Chaem of the charges has been achieved through notifying her Co-Lawyers. Indeed, it is not alleged that IM Chaem has not received the said document; rather, the fact that she has lodged the present Appeal to challenge the Notification of Charges confirms that she has been made aware of it and that the Co-Lawyers have fulfilled their ethical duties to provide her with a copy or otherwise inform her of the content of the document. In any event, nothing prevents the Co-Investigating Judges, or one of them, from eventually notifying IM Chaem of the charges in person, should she appear before the Court.

44. Finally, the Undersigned Judges find that notification through the Co-Lawyers was undoubtfully a more appropriate means of service than via the media, as suggested by the Co-Lawyers. As mentioned above,[189] this solution is envisaged when the location of the

[184] Internal Rule 57. *See also, e.g.*, Rule 53 *bis* of the ICTY Rules of Procedure and Evidence; Rule 53 *bis* of the ICTR Rules of Procedure and Evidence; Rule 52 of the SCSL Rules of Procedure and Evidence; Rule 76(B) of the STL Rules of Procedure and Evidence.
[185] Written Report of Service of Summons, 8 August 2014, A150/1.
[186] *See* Impugned Decision, para. 61, *quoting* a news paper article containing excepts from an interview with IM Chaem: Phnom Penh Post, *After Verdict, KR suspect remain defiant,* 9 August 2014.
[187] International Co-Investigating Judge's Note Concerning Im Chaem's Initial Appearance, 14 August 2014, A150/2; Email correspondance between the International Co-Investigating Judge and the International Co-Lawyer, 20 August 2014, A150/2/2.1.
[188] *See* Defence's Letter Regarding Modalities of Service of Summons, 18 July 2014, A150/3.
[189] *See supra*, para. 32, *referring to* Rule 61(1)(A) of the ICTY and ICTR Rules of Procedure and Evidence.

suspect is unknown, not when he or she is represented by counsel. Given that IM Chaem's location is known, and that she is represented by counsel who she has appointed, service of the Notification of Charges on the Co-Lawyers is a much more direct way of ensuring she is notified of the charges. It also ensures respect for the confidentiality of the charging document, which is not public at this stage of the proceedings.

45. In light of the foregoing, the Undersigned Judges find that the International Co-Investigating Judge did not err in deciding to charge IM Chaem without holding an initial appearance under Internal Rule 57 and to notify her of the charges against her in a written document served on the Co-Lawyers. This exceptional procedure was a lawful and appropriate way to address the present situation, which is unusual and unprecedented and therefore unforeseen in the law applicable at the ECCC. Far from violating IM Chaem's rights, the charging procedure adopted by the International Co-Investigating Judge ensures that IM Chaem's interests are safeguarded during the judicial investigation, notably by allowing her to have access to the case file, through her Co-Lawyers,[190] to request investigative actions,[191] to confront witnesses[192] and to seek annulment of proceedings.[193] It is also in line with Cambodian law and the procedural rules established at the international level, which allow for exceptional measures to be taken when an arrest warrant is not executed despite all reasonable steps being taken by the tribunal. Furthermore, by allowing IM Chaem to participate in the judicial investigation through exceptional measures, which take into account her limited availability to the Court, *i.e.* solely through her appointed counsel, the International Co-Investigating Judge pursued his mandate to ascertain the truth about the crimes committed between 17 April 1975 and 6 January 1979 in Democratic Kampuchea and, as such, acted within the purview of his competence and, more generally, in the interests of justice. As recalled by the ICTY Trial Chamber, "[i]nternational criminal justice, which cannot accommodate the failure of individuals or States, must pursue its mission of revealing the truth about the acts perpetrated and suffering endured, as well as identifying and arresting those accused of responsibililty".[194] The Undersigned Judges conclude that the Impugned Decision contains no error that would warrant their intervention.

[190] Internal Rule 55(5).
[191] Internal Rule 55(10).
[192] Internal Rule 60(2).
[193] Internal Rule 76.
[194] *Karadžić and Mladić* Decision, para. 3.

46. Therefore, the Undersigned Judges find that the Appeal is without merit and that the Impugned Decision shall be upheld.

Phnom Penh, 01 March 2016

Olivier BEAUVALLET **Steven J. BWANA**