



ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

Royaume du Cambodge
Nation Religion Roi

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

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

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Before: **The Co-Investigating Judges**

Date: **3 March 2015**

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DECISION TO CHARGE IM CHAEM *IN ABSENTIA*

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Noting the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, dated 27 October 2004 (“ECCC Law”);

Noting the Co-Prosecutors’ Third Introductory Submission, filed on 7 September 2009 (“Introductory Submission”);¹

Noting the Co-Prosecutors’ Supplementary Submission Regarding Sector 1 Crime Sites and Persecution of Khmer Krom, filed on 18 July 2011 (“2011 Supplementary Submission”);²

Noting the Co-Prosecutors’ Supplementary Submission Regarding Forced Marriage and Sexual or Gender-Based Violence, filed on 24 April 2014 (“2014 Supplementary Submission”);³

Noting the judicial investigation opened in relation to alleged violations of the **1956 Penal Code**, the **Convention on the Prevention and Punishment of the Crime of Genocide**, the **Geneva Conventions of 1949**, and **Crimes against Humanity**, punishable under Articles 3 (new), 4, 5, 6, 29 and 39 of the ECCC Law; and Articles 209, 210, 500, 501, 503, 504, 505, 506, 507 and 508 of the 1956 Penal Code;

Noting Article 23 new of the ECCC Law and Article 25 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 (“ECCC Agreement”);

Noting Rules 2, 15, 21, 45, 55, 62, 72, and 81 of the ECCC Internal Rules (“Internal Rules”);

Noting the Disagreements registered on 22 February 2013, 5 April 2013, and 20 May 2014;

PROCEDURAL HISTORY

1. On 7 September 2009, the Acting International Co-Prosecutor filed the Introductory Submission, where he alleged that Im Chaem is responsible for crimes under the jurisdiction of the ECCC. Further allegations were submitted with the 2011 Supplementary Submission and the 2014 Supplementary Submission, filed respectively on 18 July 2011 and 24 April 2014.
2. On 24 February 2012, the Reserve International Co-Investigating Judge (“RICIJ”) notified Im Chaem that she was named as a suspect in the ongoing investigation of Case 004. In the notification, the RICIJ informed Im Chaem, *inter alia*, of the crimes and modes of liability alleged by the International Co-Prosecutor. The RICIJ also informed Im Chaem of the capacity in which she was alleged to have committed these crimes between 1976 and 1979.⁴

¹ Case File No. 004-D1, *Co-Prosecutors’ Third Introductory Submission*, 20 November 2008 (“Third Introductory Submission”); Case File No. 004-D1/1, *Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission*, 7 September 2009.

² Case File No. 004-D65, *Co-Prosecutors’ Supplementary Submission Regarding Sector 1 Crime Sites and Persecution of Khmer Krom*, 18 July 2011.

³ Case File No. 004-D191, *Co-Prosecutors’ Supplementary Submission Regarding Forced Marriage and Sexual or Gender-Based Violence*, 24 April 2014.

⁴ Case File No. 004-D108, *Notification of Suspect’s Rights [Rule 21(1)(D)]*, 24 February 2012.



3. On 20 May 2014, the Co-Investigating Judges (“CIJs”) registered a confidential disagreement pursuant to Internal Rule 72.⁵
4. On 21 May 2014, Im Chaem’s Co-Lawyers filed a motion requesting access to Case File 004 (“Case File Access Motion”).⁶
5. On 4 June 2014, the International CIJ informed Mr John R.W.D. Jones, International Co-Lawyer for Im Chaem, that there was clear and consistent evidence to support the partial charging of Im Chaem and that he intended to summons her for an initial appearance between 25 and 26 June 2014. Mr Jones stated that personal obligations prevented him from attending an initial appearance on those days, to which the International CIJ responded that Mr Bit Seanglim, National Co-Lawyer, could attend the initial appearance.
6. On 4 June 2014, Mr Jones sent an email to the International CIJ requesting that the date of the initial appearance be rescheduled to the week of 14 July 2014.
7. On 13 June 2014, the Im Chaem’s Co-Lawyers sent a letter to the CIJs requesting, *inter alia*, clarification “*as to whether the Co-Investigating Judges are in disagreement regarding the summoning and charging of our client, and confirmation that the matter will be submitted for settlement pursuant to Rule 72 of the Internal Rules.*”⁷
8. On 26 June 2014, the International CIJ responded that the decision to refer disagreements to the Pre-Trial Chamber (“PTC”) is discretionary and that unless and until such referral is made, the content of the disagreement register remains a confidential matter internal to the Office of the Co-Investigating Judges (“OCIJ”). The International CIJ also stated that “[i]n respect of the disagreement referred to in your Letter, the 30 day period prescribed in sub-rule 72(3) has expired without any referral having been made to the PTC.”⁸ On the same day, the International CIJ informed Im Chaem’s Co-Lawyers that the Case File Access Motion would be answered in due course. He also informed the Co-Lawyers that, in accordance with the Internal Rules and as already explained in another decision in Case 004, suspects can access the Case File only upon being charged by the CIJs.⁹
9. On 27 June 2014, the International CIJ sent a letter to Im Chaem’s Co-Lawyers noting their unavailability for the initial appearance in June and informing them that the initial appearance had been rescheduled to 8 August 2014. The International CIJ also informed Im Chaem’s Co-Lawyers that a summons would be served on Im Chaem personally in due course unless they informed the OCIJ by 11 July 2014 that the Im Chaem had authorised them to accept service on her behalf.¹⁰

⁵ Written Record of Disagreement, dated 20 May 2014.

⁶ Case File No. 004-D201, *Im Chaem’s Motion Requesting Order for Access to the Case File*, 21 May 2014, placed on the Case File on 22 June 2014.

⁷ Case File No. 004-A122, *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, p. 2.

⁸ Case File No. 004-A122/1, *Your letter requesting all formal communications re the Suspect include the two Co-Investigating Judges and requesting disagreements regarding summoning and charging her be referred to the Pre-Trial Chamber*, 26 June 2014.

⁹ Case File No. 004-D201/1, *Response to Im Chaem’s Motion Requesting Order for Access to the Case File*, 26 June 2004. See Case File No. 004-D121/4, *Decision on the [REDACTED] Defence Request to Access the Case File and Take Part in the Judicial Investigation*, 31 July 2013, paras 36-39.

¹⁰ Case File No. 004-A122/2, *Preparation of Initial Appearance of Suspect*, 27 June 2014.



10. On 25 July 2014, Im Chaem's Co-Lawyers filed a motion requesting the CIJs to provide clarification on "*their understanding of Rule 72, governing settlement of disagreements between them, as well as their position as to any disagreement they have in Case 004*" ("Clarification Motion").¹¹
11. On 31 July 2014, a summons was personally served on Im Chaem for an initial appearance at the ECCC on 8 August 2014 ("Summons").¹² Im Chaem's Co-Lawyers were also summonsed to attend the initial appearance,¹³ and were issued a courtesy copy of the Summons on 1 August 2014.¹⁴ In both summonses, the International CIJ noted that a disagreement had been signed on 20 May 2014.
12. On 1 August 2014, Im Chaem's Co-Lawyers requested access to the Case File prior to Im Chaem's initial appearance ("First Letter").¹⁵ Im Chaem's Co-Lawyers further requested that the date of the initial appearance be postponed in light of the minimum five-day period of access to the Case File required by the Internal Rules.¹⁶
13. On the same day, the International CIJ responded to the First Letter informing Im Chaem's Co-Lawyers that their client would not be interviewed during the initial appearance and that access to the Case File would be granted after the initial appearance. The International CIJ also informed Im Chaem's Co-Lawyers that he was available to discuss a date for the interview of Im Chaem.¹⁷
14. In a subsequent letter dated 1 August 2014 ("Second Letter"), Im Chaem's Co-Lawyers reiterated the position taken in the Clarification Motion, namely that they did not regard a summons signed by one of the Co-Investigating Judges as valid.¹⁸ Im Chaem's Co-Lawyers added that so long as the Clarification Motion was not ruled upon, their "*ability to provide full and informed advice to [Im Chaem] in a timely manner is severely impaired, in particular in light of the proposed schedule for the initial appearance*".¹⁹ As a result, they declined the International CIJ's summons to attend the scheduled initial appearance.²⁰
15. On 6 August 2014, in his response to the Second Letter, the International CIJ stressed that Im Chaem and her Co-Lawyers were legally required to appear at the ECCC on 8 August 2014.²¹ The International CIJ reiterated that the PTC had acknowledged the validity of a summons signed by one Co-Investigating Judge. He reminded Im Chaem's Co-Lawyers that,

¹¹ Case File No. 004-D204, *Im Chaem's Motion Requesting Clarification Regarding Disagreements Between the Co-Investigating Judges*, 25 July 2014, p. 1.

¹² Case File No. 004-A150, *Summons to Initial Appearance*, 29 July 2014.

¹³ Case File No. 004-A151, *Summons of Lawyer*, 29 July 2014, filed 31 July 2014.

¹⁴ Case File No. 003-A122/6, *Response Concerning Modalities of Service of Im Chaem's Summons*, 1 August 2014, filed 4 August 2014.

¹⁵ Case File No. 004-A151/1, *Letter requesting access to the Case File prior to Ms. Im Chaem's proposed initial appearance and requesting that her initial appearance be rescheduled at a later date*, 1 August 2014.

¹⁶ *Ibid.*, p. 4.

¹⁷ Case File No. 004-A151/1/1, *International CIJ's response to letter requesting access to the case file prior to the proposed initial appearance on Im Chaem*, 1 August 2014.

¹⁸ Case File No. 004-A151/2, *Response to our summons to attend Ms. IM Chaem's proposed initial appearance on 8 August 2014*, 1 August 2014.

¹⁹ *Ibid.*, p. 1.

²⁰ *Ibid.*, p. 2.

²¹ Case File No. 004-A151/2/1, *ICIJ's Letter: Your Letter Dated 1 August 2014 Concerning Your Summons To The Initial Appearance of Your Client*, 6 August 2014, para. 2.



should they disagree with this position, it was their right to seek legal remedy within the framework of the Internal Rules but that non-compliance with a judicial order on the basis of the Co-Lawyers' disagreement therewith was not an available remedy.²²

16. On the same day, Im Chaem's Co-Lawyers filed an urgent application requesting the CIJs to seize the PTC with a request to annul both their and Im Chaem's summonses ("Urgent Application").²³ In the Urgent Application, Im Chaem's Co-Lawyers submitted, *inter alia*, that it could be readily inferred that there was a disagreement between the CIJs, and that the National CIJ did not intend to charge Im Chaem.²⁴ They further submitted that, if that inference were to be incorrect, the National CIJ would correct that perception.²⁵
17. In a letter dated 7 August 2014 received by the International CIJ on 8 August 2014, Im Chaem's Co-Lawyers informed the International CIJ of, *inter alia*, their intention to file an urgent appeal with the PTC for a stay of execution of the Summons ("Urgent Request").²⁶ The Co-Lawyers additionally informed the International CIJ that they were not in a position to advise whether Im Chaem would attend the initial appearance, pending a decision by the PTC on their Urgent Request.²⁷
18. On 8 August 2014, the International CIJ denied the Clarification Motion and reiterated that "[t]he conduct of the CIJs in Case 004 complie[d] fully with the relevant provisions and with the general spirit of the law governing investigations at the ECCC(...)" ("Clarification Decision").²⁸ On the same day, the PTC dismissed the Urgent Request ("PTC Decision"),²⁹ stating that "*the Pre-Trial Chamber previously confirmed that one Co-Prosecutor or Investigating Judge can act alone when a disagreement has been registered within the Office of the Co-Prosecutors or the Co-Investigating Judges, as appropriate, and the period for bringing a disagreement before the Pre-Trial Chamber has elapsed*".³⁰
19. On the same day, Im Chaem's International Co-Lawyer both emailed and called the International CIJ to inform him that, in light of the PTC Decision and having exhausted her legal remedies, Im Chaem would attend an initial appearance.³¹ As a result, the initial

²² *Ibid.*, para. 3, referring to Case File No. D208/1/1/2, *Decision on [REDACTED] Appeal against the Decision Rejecting his Request for Information Concerning the Co-Investigating Judges' Disagreement of 5 April 2013*, 22 January 2015.

²³ Case File No. 004-D207, *Im Chaem's Urgent Application to Seize the Pre-Trial Chamber with a Request for Annulment of her and her Co-Lawyers' Summonses dated 31 July 2014*, 6 August 2014.

²⁴ Urgent Application, para. 24.

²⁵ *Ibid.*

²⁶ Case File No. 004-A151/4, *Meeting convened by International Co-Investigating Judge Harmon on 6 August 2014*, 7 August 2014, filed on 8 August 2014, p. 2.

²⁷ *Id.*

²⁸ Case File No. 004-D204/2, *Decision on Suspect's Motion Requesting Clarification Regarding Disagreements Between the Co-Investigating Judges*, 8 August 2014, para. 11.

²⁹ Case File No. 004-A122/6.1/2, *Decision on Im Chaem's Request to Stay the Execution of her Summons to an Initial Appearance*, 8 August 2014.

³⁰ Case File No. 004-A122/6.1/3, *Decision on Im Chaem's Urgent Request to Stay the Execution of her Summons to an Initial Appearance*, 15 August 2014, para. 14.

³¹ Case File No. 004-A150/2, *ICIJ's Note Concerning Im Chaem's Initial Appearance*, 14 August 2014; Case File No. 004-A150/2.1, *Email correspondence between International CIJ and John Jones on 8 August 2014*, 20 August 2014.



- appearance scheduled for 8 August 2014 and legal action resulting from Im Chaem's failure to appear were deferred.³²
20. On 12 August 2014, Im Chaem's Co-Lawyers informed the International CIJ that their client was not willing to appear in response to a summons signed only by the International CIJ.³³
 21. On 14 August 2014, following Im Chaem's failure to comply with the Summons, the International CIJ issued an arrest warrant (*mandat d'amener*) to secure her attendance at an initial appearance at the ECCC ("Warrant").³⁴ On 15 August 2014, the Warrant was delivered to the Cambodian Judicial Police for its execution.³⁵
 22. On 18 August 2014, the International CIJ denied the Urgent Application on the basis that Im Chaem, as a suspect, lacked standing to move the CIJs to file applications for annulment of investigative action.³⁶ Furthermore, the request to stay the summons was declared moot in light of Im Chaem's wilful failure to appear at the scheduled initial appearance, her Co-Lawyers' notice that she would not appear voluntarily at the ECCC, and the PTC's denial of a stay.³⁷
 23. On 15 September 2014, the International CIJ met with a representative of the Judicial Police for an update on the progress in the execution of the Warrant. The Judicial Police representative asked the International CIJ whether the Warrant, which was not signed by the National Co-Investigating Judge, was valid. The International CIJ, after reminding the representative that he had already confirmed the validity of the Warrant on 14 August 2014, explained the basis for the validity of the Warrant and provided him with a redacted copy of the PTC Decision, where the International CIJ's power to issue unilateral orders was confirmed. The Judicial Police representative stated that he would send a copy of the PTC Decision to the Chairman of the Security Commission for the ECCC. He further stated that the Security Commission for the ECCC might contact the National Co-Investigating Judge to inquire about the validity of the Warrant. The International CIJ concluded the meeting by asking the Judicial Police representative to inform him promptly of any other issue that could impact on the prompt execution of the Warrant. The representative answered that there were no other issues and that the Warrant would be executed once its validity had been confirmed.
 24. On 17 October 2014, the International CIJ held a second meeting with the representative of the Judicial Police who informed the International CIJ that the security situation in Im Chaem's area of residence was problematic. He suggested that outreach activities be conducted in the area by the OCIJ in order to reassure the local population that the OCIJ did not intend to carry out mass arrests in the area. The Judicial Police representative also added that the fact that the Warrant was only signed by the International CIJ did not constitute an impediment to its execution.
 25. On 21 October 2014, the International CIJ received a message from the Judicial Police representative which identified the areas where outreach activities should be conducted.

³² *Ibid.*, para. 4.

³³ *Ibid.*, para. 6.

³⁴ Case File 004-C1, *Arrest Warrant*, 14 August 2014.

³⁵ Case File 004-C1.1, *Report on service of the Arrest Warrant to the Judicial Police*, 15 August 2014.

³⁶ Case File No. 004-D207/1, *Order on Im Chaem's Urgent Application to Seize the Pre-Trial Chamber with a Request for Annulment of her and her Co-Lawyers' Summonses*, 18 August 2014.

³⁷ *Ibid.*, para. 35.



26. On 24 October 2014, the International CIJ met again with a representative of the Judicial Police and agreed on the dates for the outreach activities. Nine separate outreach programs were conducted by OCIJ staff members, including the International CIJ, between 11 and 21 November 2014 in the provinces of Oddar Meanchey, Battambang, and Pailin.³⁸
27. On 14 November 2014, Im Chaem's Co-Lawyers filed the *Supplemental Arguments to Im Chaem's Motion Requesting Order for Access to the Case File* ("Supplemental Case File Access Submissions"). The Co-Lawyers, after noting that the Case File Access Motion had not yet been ruled upon, stated that an answer to that request was urgent in light of two developments: the publication of the ECCC Completion Plan's proposed timetable, which purportedly showed that Im Chaem had little time left to participate in the investigation, and the fact that the International CIJ had summonsed Im Chaem to an initial appearance, which according to the Co-Lawyers demonstrated that, "*in all but formality*", Im Chaem fulfilled the conditions for a charged person entitled to access the Case File.³⁹
28. On 19 December 2014, two OCIJ staff members met with a representative of the Judicial Police to discuss progress on the execution of the Warrant. They were informed that the Judicial Police had not yet carried out a post outreach survey. The Judicial Police representative was not in a position to state when the Warrant could be executed. The representative of the Judicial Police stated that the final decision in this regard rested with the Security Commission for the ECCC.
29. On 30 January 2015, the International CIJ wrote a letter to the Chairman of the Security Commission for the ECCC which was delivered on 8 February 2015. In the letter, the International CIJ noted that efforts to secure the attendance of Im Chaem and another suspect at initial appearance hearings at the ECCC had not been successful, even though more than two months had passed since the outreach programs had been carried out. The International CIJ also noted that it was unclear when the Warrant would be executed, and that further delays would be inimical to the interests of justice and to Im Chaem's rights under Article 14 of the 1966 International Covenant on Civil and Political Rights ("ICCPR"), including her rights to participate in the judicial investigation and to be tried without undue delay. He stated that further delays would also adversely affect the rights of victims and the Cambodian people to obtain justice for the crimes committed during the period of Democratic Kampuchea. The International CIJ stated that in light of the unacceptable risks that further delays could create, if Im Chaem failed to appear at the ECCC before 18 February 2015, or was not arrested by that date, he would proceed to charge her *in absentia*. The International CIJ informed the Chairman that he considered this to be the only prudent course of action in the face of the inaction of the Judicial Police.⁴⁰
30. The 18 February 2015 date has passed without Im Chaem having appeared before the ECCC or the Warrant having been executed.

³⁸ See ECCC Court Report, December 2014, p. 3, <http://www.eccc.gov.kh/en/publication/court-report-december-2014>.

³⁹ Case File No. 004-D201/2, *Supplemental Arguments to IM Chaem's Motion Requesting Order for Access to the Case File*. 14 November 2014, para. 2.

⁴⁰ Case File No. 004-D238, *Letter to the Chairman of the Security Commission for the ECCC*, 30 January 2015, filed on 25 February 2015.



APPLICABLE LAW

Procedural rules applicable to judicial investigations at the ECCC

31. Article 23 new of the ECCC Law states, in its relevant parts, that:

“All investigations shall be the joint responsibility of two investigating judges, one Cambodian and another foreign, hereinafter referred to as Co-Investigating Judges, and shall follow existing procedures in force. If these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, the Co-Investigating Judges may seek guidance in procedural rules established at the international level.”

The Royal Government of Cambodia’s obligation to provide assistance to the CIJs

32. Article 25 of ECCC Agreement states that:

“The Royal Government of Cambodia shall comply without undue delay with any request for assistance by the co-investigating judges, the co-prosecutors and the Extraordinary Chambers or an order issued by any of them, including, but not limited to:

- a. identification and location of persons;
- b. service of documents;
- c. arrest or detention of persons;
- d. transfer of an indictee to the Extraordinary Chambers.”

33. Article 23 new of the ECCC Law states, in its relevant part, that:

“In carrying out the investigations, the Co-Investigating Judges may seek the assistance of the Royal Government of Cambodia, if such assistance would be useful to the investigation, and such assistance shall be provided.”

The Judicial Police’s obligation to provide assistance to the CIJs

34. Internal Rule 15 states, in its relevant parts, that:

“The Judicial Police are auxiliary officers of the ECCC. They carry out inquiries under the sole instructions of the Co-Prosecutors and Co-Investigating Judges, and where appropriate, the Chambers, throughout the territory of Cambodia, as set out in these IRs. The Judicial Police shall neither seek nor take orders from any other person in carrying out their functions.

The Co-Prosecutors shall direct and coordinate the action of the Judicial Police until a judicial investigation has been initiated. Once such a judicial investigation has been initiated, the Judicial Police shall carry out their duties as instructed by the Co-Investigating Judges.”

35. Internal Rule 45 states, in its relevant part, that:

“All Arrest Warrants, Detention Orders an Arrest and Detention Orders shall be executed by the Judicial Police. The original warrant or order shall be given immediately to a Judicial Police officer who shall be under the duty to execute it. In case of emergency, the



warrant or order may be notified by all available means to the Judicial Police, who must be provided with the original within 48 (forty-eight) hours.”

36. Internal Rule 62 states, in its relevant part, that:

“The Co-Investigating Judges may issue a Rogatory Letter requiring any Investigator from their Office, or the Judicial Police, to conduct investigative action. However, only the Judicial Police shall have the power to undertake any coercive action.”

Charging a suspect in a judicial investigation at the ECCC

37. Internal Rule 21(1)(d) states that:

“Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established. Any such person has the right to be informed of any charges brought against him/her, to be defended by a lawyer of his/her choice, and at every stage of the proceedings shall be informed of his/her right to remain silent.”

38. Internal Rule 55(4) states that:

“The Co-Investigating Judges have the power to charge any Suspect named in the Introductory Submission. They may also charge any other person 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 person were not named in the submission. In the latter case, they must seek the advice of the Co-Prosecutors before charging such person.”

Charging a suspect *in absentia*

Internal Rules

39. Internal Rule 81(1) lays down the principle that “*the Accused shall be tried in his or her presence*”, except in the specific circumstances enumerated in Internal Rule 81. This amounts to an implicit restriction on the general acceptance of *in absentia* trials under Cambodian criminal procedure.⁴¹ However, this restriction is limited in nature, since it only applies to *accused* persons at the trial stage of the proceedings (*i.e.*, any person who has been indicted by the Co-Investigating Judges or the Pre-Trial Chamber).⁴² Internal Rule 81 only requires the presence of the Accused at an initial hearing before the Trial Chamber, as specified in Rule 81(4). Internal Rule 81(3) makes it clear that the Accused’s presence at the initial hearing before the Trial Chamber is a necessary requirement for the continuation of the trial.
40. The Internal Rules do not contain an equal restriction in relation to the investigative phase of criminal proceedings before the ECCC. Internal Rule 57 does not make the actual appearance of a suspect a necessary pre-condition for the CIJs to proceed with his or her charging. However, the Internal Rules do not contain any provision regulating the charging of a suspect who has refused to attend an initial appearance pursuant to Internal Rule 57 and whose presence could not be secured by coercive means.
41. While the Internal Rules constitute the primary procedural source at the ECCC, when a matter is not regulated by the Internal Rules the CIJs shall determine whether the matter is

⁴¹ See Articles 333, 351, 361 and 362 of the Cambodian Code of Criminal Procedure.

⁴² See the Glossary to the ECCC Internal Rules.



regulated by Cambodian law.⁴³ The CIJs may seek guidance in procedural rules established at the international level where, in the course of the investigation, a question arises which is not addressed by either the Internal Rules or Cambodian law, in case of uncertainty regarding their interpretation or application, or concerning their consistency with international standards.⁴⁴

42. Therefore, when considering charging Im Chaem *in absentia*, the International CIJ will examine whether this procedure is regulated by Cambodian law. Then, if necessary, further guidance shall be sought in procedural rules established at the international level.

Cambodian Code of Criminal Procedure (“CCCP”)

43. The CCCP does not contain provisions expressly regulating charging *in absentia*. However, it allows for and contains express provisions regulating *in absentia* trials and judgments.⁴⁵ Among these provisions, Article 333 of the CCCP, entitled “*Seeking the Truth in Absence of Accused*”, provides that “[e]ven if the accused is absent, the court shall seek the truth, listen to the answers of the other parties and witnesses, and examine the exhibits.” The search for truth is also the primary task under the responsibility of the CIJs during investigations at the ECCC.⁴⁶
44. The International CIJ has not been able to access records of *in absentia* proceedings in the courts of the Kingdom of Cambodia. However, a review of newspaper articles published between 2010 and 2014 shows that criminal proceedings *in absentia* are in fact held in national courts.⁴⁷ The International CIJ has relied on these newspaper articles for the sole purpose of ascertaining that *in absentia* proceedings are conducted in Cambodia.
45. On the basis of the CCCP and court practice, the International CIJ is satisfied that proceedings *in absentia* are allowed by Cambodian law.⁴⁸

⁴³ Case File 002-D55/I/8, *Decision on Nuon Chea's Appeal against Order Refusing Request for Annulment* 26 August 2008 paras. 14-15.

⁴⁴ Agreement between the United Nations and the Royal Government of Cambodia (“ECCC Agreement”), Article 12(1); ECCC Law Article 23 new; Rule 2 of the Internal Rules; *See also* Case File No. 001-E188 *Judgement* 26 July 2010, para. 35.

⁴⁵ *See* Cambodian Code of Criminal Procedure, Articles 333, 351, 361 and 362.

⁴⁶ *See* Article 23 new of the ECCC Law and Internal Rule 55(5).

⁴⁷ The Cambodia Daily, *Court Sentences Six, Five in Absentia, for Journalist's Murder*, 12 November 2014, <https://www.cambodiadaily.com/news/court-sentences-six-five-in-absentia-for-journalists-murder-72121/>; Radio Free Asia, *Cambodian Court Upholds Fugitive Ex-Governor's Conviction*, 4 November 2013, <http://www.rfa.org/english/news/cambodia/appeal-11042013143446.html>; The New York Times, *Cambodia: Opposition Leader Convicted in Absentia*, 23 September 2010, http://www.nytimes.com/2010/09/24/world/asia/24briefs-Cambodia.html?_r=0; South China Morning Post *Former Cambodia governor jailed in absentia for shooting three factory workers* 25 June 2013 <http://www.scmp.com/news/asia/article/1268733/ex-cambodian-official-convicted-absentia>

⁴⁸ This conclusion is consistent with French law, which albeit not applicable in Cambodia, can provide useful guidance in the interpretation of the CCCP (Cambodian Criminal Procedure is largely based on the French Code of Criminal Procedure). In France, following a reported fruitless search, a suspect may be charged in his or her absence. *See* French Code of Criminal Procedure Article 134: “*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.*” *See* Article 176 of the same Code: “*Le juge d'instruction examine s'il existe contre la personne mise en examen des charges constitutives d'infraction, dont il détermine la qualification juridique.*”



46. Although *in absentia* trials are possible under Cambodian law, neither the Internal Rules nor the CCCP contain provisions expressly regulating charging a suspect *in absentia*. The International CIJ will therefore seek guidance in procedural rules established at the international level.

Admissibility of *in absentia* proceedings under human rights law

47. Pursuant to Article 14 of the 1966 International Covenant on Civil and Political Rights (“ICCPR”),⁴⁹ an accused has the right to be present at trial and has the right to a defence either in person or through legal assistance of his or her choosing. However, in exceptional circumstances, proceedings *in absentia* may be conducted. The Human Rights Committee (“HRC”) held that the right to be present at trial:

“[...] cannot be construed as invariably rendering proceedings in absentia inadmissible irrespective of the reasons for the accused person's absence. Indeed, proceedings in absentia are in some circumstances (for instance, when the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his right to be present) permissible in the interest of the proper administration of justice.”⁵⁰

48. The HRC also specified that “[w]hen exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defence is all the more necessary.”⁵¹

49. The compatibility of *in absentia* proceedings with human rights law has also been confirmed by the European Court of Human Rights (“ECtHR”),⁵² which stressed that when a person is tried *in absentia*, he or she ought to be adequately represented by counsel and enjoy an effective defence.⁵³

Procedural rules established at the international level

a. Special Tribunal for Lebanon

50. Article 16 of the Statute of the Special Tribunal for Lebanon (“STL”) states that an accused has the right “to be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing [...]”⁵⁴ The STL Statute also allows for the possibility of holding trials *in absentia*, under certain conditions.⁵⁵

51. Article 22(1) of the STL Statute provides that trial proceedings in the absence of the accused are possible when one of the following conditions is satisfied:

- a) the accused has expressly and in writing waived his or her right to be present;

⁴⁹ Articles 14 and 15 of the ICCPR are directly applicable at the ECCC pursuant to Article 12(2) of the ECCC Agreement. The Kingdom of Cambodia is also a party to the ICCPR, which it ratified on 26 May 1992.

⁵⁰ Human Rights Committee, *Daniel Monguya Mbenge v. Zaire*, UN Doc CCPR/C/18/D/16/1977, 25 March 1983, para. 14.1.

⁵¹ Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), para. 11.

⁵² See ECtHR, *Sejdovic v Italy*, 1 March 2006, para. 86.

⁵³ See ECtHR, *Lala v. The Netherlands*, 22 September 1994, para.33; See also ECtHR, *Krombach v. France*, 13 May 2001, para. 84. The ECtHR added that “the ‘crucial’ importance of defending the accused should prevail over the ‘capital’ importance of their appearing at the trial.” See ECtHR, *Sejdovic v Italy*, 1 March 2006, para. 69.

⁵⁴ STL Statute, Article 16.

⁵⁵ STL Statute, Article 22; STL Rules of Procedure and Evidence, Rule 105 *bis*.



- b) the accused has not been handed over to the Tribunal by the State authorities concerned; or
 - c) the accused 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.”⁵⁶
52. Pursuant to Article 22(2) of the STL Statute, when hearings are conducted in the absence of the accused, the STL shall ensure that:
- a) the accused has been notified, or served with the indictment, or notice has otherwise been given of the indictment through publication in the media or communication to the State of residence or nationality;
 - b) the accused has designated a defence counsel of his or her own choosing, to be remunerated either by the accused or, if the accused is proved to be indigent, by the Tribunal;
 - c) whenever the accused refuses or fails to appoint a defence counsel, such counsel has been assigned by the Defence Office of the Tribunal with a view to ensuring full representation of the interests and rights of the accused.”
53. Rule 106(A) of the STL Rules of Procedure and Evidence mirrors Article 22(1) of the STL Statute. Rule 106(B) states that where the accused is not present on account of the failure or refusal of the relevant State to hand him over, before deciding to conduct proceedings *in absentia*, the Trial Chamber shall:
- a) consult with the President and ensure that all necessary steps have been taken with a view to ensuring that the accused may, in the most appropriate way, participate in the proceedings; and
 - b) ensure that the requirements of Article 22(2) of the Statute have been met.
54. In application of these criteria, the STL Trial Chamber issued two decisions to hold trials *in absentia*. The Trial Chamber was satisfied that the accused had “*absconded or otherwise cannot be found and all reasonable steps have been taken to secure [their] appearance (...) and to inform [them] of the charges (...)*.”⁵⁷ Consequently, the Chamber in *Prosecutor v. Ayyash et al.* concluded that the four accused “[do] not wish to participate in a trial.”⁵⁸ and, in *Prosecutor v. Merhi*, found that the accused “*must have elected not to attend the trial and has therefore waived his right to be present.*”⁵⁹
- b. International Criminal Tribunal for the former Yugoslavia (“ICTY”) and International Criminal Tribunal for Rwanda (“ICTR”)*

⁵⁶ STL Statute, Article 22, STL Rules of Procedure and Evidence, Rule 106.

⁵⁷ See STL-11-01/I/TC, *Prosecutor v. Ayyash et al. Decision to hold Trial in absentia*, 1 February 2012 paras. 107-110; See also STL-13-04/I/TC, *Prosecutor v. Merhi Decision to hold Trial in absentia*, 20 December 2013 paras. 4, 111; See also STL-11-01/PT/AC/ARI26.1 *Prosecutor v. Ayyash et al., Decision on Defence Appeals against Trial Chamber's Decision on Reconsideration of the Trial in absentia*, 1 November 2012, paras 46 and 51.

⁵⁸ STL-11-01/I/TC, *Prosecutor v. Ayyash et al. Decision to hold Trial in absentia*, 1 February 2012 para. 111.

⁵⁹ STL-13-04/I/TC, *Prosecutor v. Merhi Decision to hold Trial in absentia*, 20 December 2013 para. 109; See also STL-11-01/PT/AC/ARI26.1, *Prosecutor v. Ayyash et al. Decision on Defence Appeals against Trial Chamber's Decision on Reconsideration of the Trial in absentia*, 1 November 2012 para. 31.



55. The Rules of Procedure and Evidence of the ICTY and ICTR provide for *in absentia* proceedings in case of failure to execute an arrest warrant.⁶⁰ Such measures are invoked if “*all reasonable steps*” have been taken in order to secure the arrest of an accused and to ascertain his or her whereabouts.⁶¹ The ICTY’s Trial Chamber expressed the importance of such mechanism by underlining that “[i]nternational criminal justice, which cannot accommodate the failures 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 responsibility.”⁶²

c. International Criminal Court (“ICC”)

56. Article 61(2) of the Rome Statute of the ICC and Rule 125 of the ICC’s Rules of Procedure and Evidence, allow for a confirmation of charges hearing *in absentia* if the Accused “[w]aived his or her right to be present” in writing or “[f]led 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 hearing to confirm those charges will be held.”⁶³

Conclusion

57. Based on this review of Cambodian law and rules of procedure established at the international level, and having taken into consideration the differences in the procedures applicable at the ECCC and in the international courts where these rules of procedure have been established, the International CIJ concludes that:

- a) The Internal Rules, while envisaging a charging process in the presence of the suspect, do not make the presence of the suspect at an initial appearance a necessary pre-condition to proceed with charging. The Internal Rules are silent on the procedure to follow when charging a suspect who has failed to attend an initial appearance.
- b) *In absentia* proceedings are permitted under Cambodian law;
- c) *In 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;
- d) Procedural 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 appearance before the competent court and to inform him or her of the charges, but these efforts have been unsuccessful; and

⁶⁰ This includes re-confirmation of the indictment, and the possibility for the Prosecution to submit supporting or additional evidence. Such hearing aims to rule on the sufficiency of the *prima facie* evidence submitted by the Prosecution, and determine whether there are reasonable grounds for believing that the accused committed any or all of the crimes charged. See U.N. Doc. A/51/292-S/1996/665 *General Assembly Fifty-first session Report of the ICTY*, 16 August 1996, paras 50-61.

⁶¹ ICTY and ICTR Rules of Procedure and Evidence, Rule 61.

⁶² IT-95-5-R61 and IT-95-18-R61, *Prosecutor v. Radovan Karadzic and Ratko Mladic*, Review of the Indictments pursuant to Rule 61 of the rules of Procedure and Evidence, 11 July 1996, para. 3.

⁶³ Rome Statute, Article 63(2); ICC Rules of Procedure and Evidence Rule 124(1). See ICC-02/05-03/09, *Prosecutor v. Abdallah Banda Abaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision on issues related to the hearing on the confirmation of charges, 17 November 2010.



- e) When holding *in absentia* proceedings, a court needs to ensure that the absent accused or charged person is adequately and effectively represented.

58. The International CIJ is therefore satisfied 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.

DISCUSSION

Fulfillment of the legal requirements to charge Im Chaem *in absentia*

Im Chaem was aware of the date and time of her initial appearance

59. The International CIJ has determined that there exists clear and consistent evidence that Im Chaem may be responsible for certain crimes alleged in the Introductory Submission.⁶⁴ Accordingly, on 29 July 2015 the International CIJ issued the Summons that was served personally on Im Chaem on 31 July 2014.
60. Im Chaem's Co-Lawyers were informed of the scheduled initial appearance, and from communications between the Co-Lawyers and the International CIJ on 8 and 12 August 2014, it is clear that the Co-Lawyers had been in contact with and received instructions from Im Chaem during this time period. For instance, on 12 August 2014 Im Chaem's International Co-Lawyer informed the International CIJ that his client was not willing to appear in response to a summons signed only by the International CIJ.⁶⁵
61. Im Chaem's awareness of the initial appearance scheduled for 8 August 2014, as well as her wilful refusal to comply with the Summons, is also evidenced by media reports. On 9 August 2014, the online edition of the *Phnom Penh Post* published an article in which it reported excerpts of an interview with Im Chaem. The *Post* reported that Im Chaem stated that she did not intend to appear before the ECCC.⁶⁶ On 18 August 2014, *Voice of America Khmer* reported that Im Chaem stated that she had recently refused to sign or accept "an indictment" delivered to her "by officials from the tribunal."⁶⁷
62. The International CIJ is satisfied that these circumstances unequivocally demonstrate that Im Chaem was informed of the initial appearance scheduled for 8 August 2014 but wilfully failed to appear, thereby waiving her right to be present. The International CIJ is also satisfied that Im Chaem expressed her unwillingness to appear before the ECCC at any other date.

Steps to secure Im Chaem's appearance have not been successful

63. On 14 August 2014, pursuant to Article 25(c) of the ECCC Agreement and Internal Rule 15 and following Im Chaem's wilful failure to appear before the ECCC, the International CIJ

⁶⁴ See the Notification of Charges attached to this decision.

⁶⁵ Communications between Im Chaem's Co-Lawyers and the International CIJ in relation to the possible charging of Im Chaem are set out in detail in the Procedural History section of this decision.

⁶⁶ See *Phnom Penh Post*, *After verdict, KR suspect remains defiant*, 9 August 2014, <http://www.phnompenhpost.com/post-weekend/after-verdict-kr-suspect-remains-defiant>

⁶⁷ See *Voice of America*, *Khmer Rouge Suspect Refuses To Go Along With Tribunal*, 18 August 2014, <http://www.voacambodia.com/content/khmer-rouge-suspect-refuses-to-go-along-with-tribunal/2417173.html>



issued the Warrant and requested the Judicial Police to bring Im Chaem before him for an initial appearance.

64. Between 14 August 2014 and the date of this Decision, the International CIJ has liaised with the Judicial Police, requesting updates on the execution of the Warrant and, between 11 and 21 November 2014, carried out nine separate outreach programs in the areas suggested by the Cambodian authorities.
65. During a meeting on 19 December 2014, a representative of the Judicial Police informed OCIJ staff members that no progress had been made on the execution of the Warrant, and that he was unable to provide a reliable estimate on when it will be executed. He further stated that the final decision on when the Warrant would be executed rested with the Security Commission for the ECCC. Following this meeting, the International CIJ sent a letter to the Chairman of the Security Commission for the ECCC, informing him that should Im Chaem not appear or be brought to the ECCC by 18 February 2015, he would proceed to charge her *in absentia*.⁶⁸
66. The International CIJ received no response to the letter sent to the Chairman of the Security Commission for the ECCC. The 18 February 2015 date set forth therein has now passed without either Im Chaem appearing at the ECCC or the Judicial Police executing the Warrant. The International CIJ notes that the Warrant remains in force.
67. The International CIJ is satisfied that Im Chaem is not in hiding;⁶⁹ 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. The International CIJ is therefore satisfied that 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.
68. The International CIJ therefore finds that all the legal requirements for charging *in absentia* are satisfied.

Other considerations warranting charging Im Chaem *in absentia*

69. Suspects are not parties to the proceedings in Case 004. As such, they are not entitled to access the case file, to take part in the judicial investigation,⁷⁰ to confront witnesses,⁷¹ or to move the CIJs to seise the PTC with requests for annulment of investigative action.⁷² Suspects can exercise these rights only if they are charged. Only after all parties, including

⁶⁸ These communications are summarised in the Procedural History section of this decision.

⁶⁹ Im Chaem was interviewed by *Voice of America* on 18 August 2014, see *Voice of America, Khmer Rouge Suspect Refuses to Go Along with Tribunal*, 18 August 2014, <http://www.voacambodia.com/content/khmer-rouge-suspect-refuses-to-go-along-with-tribunal/2417173.html>. Im Chaem also attended and spoke at the outreach program carried out by the International CIJ on 12 November 2014 in Anlong Veng, Anlong Veng District, Oddar Meanchey Province, Cambodia.

⁷⁰ See Internal Rule 55(5) and 55(10) and the Glossary of the Internal Rules. See also Case File 004-D121/4, *Decision on the [REDACTED] Defence Request to Access the Case File and Take Part in the Judicial Investigation*, 31 July 2013, paras 36-39, 62.

⁷¹ See Internal Rule 60(2).

⁷² See Internal Rule 76(2). See also Case File No. 004-D207/1, *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; Case File 004-D185/1, *Decision on [REDACTED] Motion for Annulment of Investigative Action pursuant to Internal Rule 76*, 22 April 2014, para. 33.



charged persons, have had the opportunity to participate in the investigative process, and once the CIJs consider that the investigation is concluded, may the CIJs give notice of the conclusion of the investigation.⁷³ Such notice triggers further procedural steps which will eventually lead to the issuance of a Closing Order to either dismiss the charges or indict the charged person and send him or her for trial.⁷⁴

70. A wilful failure by Im Chaem to appear at an initial appearance or a failure by the Judicial Police, without undue delay, to execute an arrest warrant to bring her before the ECCC cannot be allowed to bring the judicial investigative process to a standstill, thus preventing the CIJs from fulfilling their responsibility to complete the investigation of Case 004. Such conduct would cede to Im Chaem and to the Judicial Police the ability to determine whether judicial investigations at the ECCC can proceed and would thwart the intended purpose of the law which is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for crimes committed between 17 April 1975 and 6 January 1979.
71. Additional delays will also prejudice Im Chaem's fair trial rights, including the right to have adequate time and facilities to participate in the investigation and prepare her defence, to request the attendance of witnesses by filing investigative requests with the CIJs, and to a reasonable duration of the proceedings against her.⁷⁵
72. Moreover, further delays by the Judicial Police in bringing Im Chaem before the ECCC, or a failure to bring her at all, will prejudice the right of victims and the Cambodian people and could engender disrespect for the ECCC, which forms a unique and vital part of the Cambodian Judiciary.

Conclusion

73. Considering that there is complete uncertainty on when – and whether – the Warrant will be executed, the International CIJ finds that charging Im Chaem *in absentia* is the only way to ensure the fair and expeditious conduct of the proceedings. With the issuance of this decision, Im Chaem's status shall change from "suspect" to "charged person" and, as such, Im Chaem will be able to exercise all the rights to which charged persons are entitled under the Internal Rules. The change in Im Chaem's status renders the Case File Access Motion and the Supplemental Case File Access Submissions moot, as access to Case File 004 will be granted without delay upon issuance of this decision.
74. The International CIJ notes that Im Chaem is already represented by Co-Lawyers of her own choosing.⁷⁶

⁷³ See Internal Rule 66.

⁷⁴ See Internal Rule 67.

⁷⁵ Pursuant to Internal Rule 55, only charged persons and the other parties can access the case file and participate in the judicial investigation. Suspects, as non-parties, do not enjoy these rights. See also Case File 004-D121/4 Decision on the [REDACTED] Defence Requests to Access the Case File and Take Part in the Judicial Investigation, 31 July 2013, paras 36-39, 62.

⁷⁶ Case File No. 004-D122/11, Decision on the Recognition of Lawyer for Im Chaem, 24 February 2014, filed on 3 March 2014; Case File No. 004-D122/13/1, Decision on the Recognition of International Co-Lawyer for Im Chaem, 2 May 2014.



75. The cause and nature of the charges against Im Chaem, as well as her personal details and other relevant information are specified in the Notification of Charges attached to this decision.


FOR THE FOREGOING REASONS, I, MARK B. HARMON, HEREBY:

76. **DECIDE** to charge Im Chaem *in absentia* as specified in the Notification of Charges attached to this decision.

77. **INSTRUCT** the Greffier to take the necessary steps to ensure that Im Chaem’s Co-Lawyers are given access to Case File 004 as soon as practicable.

78. **DECLARE** that the Case File Access Motion and the Supplemental Case File Access Submissions are moot.

Dated 3 March 2014, Phnom Penh



Judge Mark B. Harmon
 គូបចៅក្រមស៊ើបអង្កេតអន្តរជាតិ
 International Co-Investigating Judge
 Co-juge d’instruction international