



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

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

Case File No: 003/07-09-2009-ECCC-OCIJ

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DECISION TO CHARGE MEAS MUTH *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’ Second Introductory Submission, filed on 7 September 2009 (“Introductory Submission”);¹

Noting the International Co-Prosecutor’s Supplementary Submission Regarding Crime Sites Related to Case 003, filed on 31 October 2014 (“Supplementary Submission”);²

Noting the judicial investigation opened in relation to alleged violations of the **1956 Penal Code, the Geneva Conventions of 1949, and Crimes against Humanity**, offences defined and punishable under Articles 3 (new), 5, 6, 29 and 39 of the ECCC Law; and Articles 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 7 and 22 February 2013;

PROCEDURAL HISTORY

1. On 7 September 2009, the Acting International Co-Prosecutor filed the Introductory Submission, where he alleged that Meas Muth was responsible for crimes under the jurisdiction of the ECCC. Further allegations were submitted in the Supplementary Submission of 31 October 2014.
2. On 9 June 2010, International Co-Investigating Judge (“International CIJ”) Marcel Lemonde issued a Rogatory Letter for the judicial investigation into crime sites identified in the Introductory Submission.³ On 29 April 2011, the Co-Investigating Judges (“CIJs”) issued the Notice of Conclusion of Judicial Investigation notifying the Co-Prosecutors that they considered the investigation in Case 003 to have been concluded pursuant to Internal Rule 66.⁴
3. On 2 December 2011, Reserve International Co-Investigating Judge Laurent Kasper-Ansermet (“RICIJ”) ordered the resumption of the judicial investigation,⁵

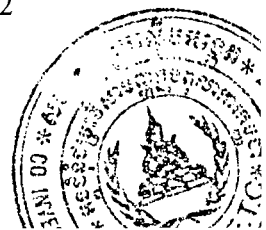
¹ Case File No. 003-D1, *Co-Prosecutors’ Second Introductory Submission Regarding the Revolutionary Army of Kampuchea*, 20 November 2008; Case File No. 003-D1/1, *Acting International Co-Prosecutor’s Notice of Filing of the Second Introductory Submission*, 7 September 2009.

² Case File No. 003-D120, *International Co-Prosecutor’s Supplementary Submission Regarding Crime Sites Related to Case 003*, 31 October 2014.

³ Case File No. 003-D2, Rogatory Letter, 9 June 2010.

⁴ Case File No. 003-D13, *Notice of Conclusion of Judicial Investigation*, 29 April 2011.

⁵ Case File No. 003-D28, *Order on Resuming the Judicial Investigation*, 2 December 2011.



grounding his decision to do so in, *inter alia*, the interests of justice, fairness to the parties to the proceedings, and the wider public interest in the case.⁶

4. On 24 February 2012, the RICIJ notified the Suspect Meas Muth that he was “*named as a suspect in the ongoing judicial investigation initiated by the Co-Prosecutor’s Introductory Submission dated 20 November 2008*” and informed him of the allegations brought against him in the Introductory Submission.⁷
5. On 2 May 2012, the RICIJ issued a public redacted decision finding that the Suspect was “*to be considered as one of those most responsible for crimes committed during the period from 17 April 1975 to 6 January 1979*”.⁸
6. On 7 February 2013, the CIJs registered a disagreement regarding Case File 003.⁹
7. Since 29 August 2013 and until the issuance of this decision, Meas Muth, through his Co-Lawyers, submitted various requests, motions and appeals to the International CIJ and Pre-Trial Chamber (“PTC”) regarding access to the Case File and participation in the judicial investigation.¹⁰
8. On 17 July 2014, the CIJs registered a disagreement regarding Case 003.¹¹
9. On 13 August 2014, Meas Muth filed a pre-emptive request querying, hypothetically, the validity of a summons issued by one Co-Investigating Judge for the purpose of charging a suspect.¹²
10. On 26 September 2014, the International CIJ confirmed that summonses issued by one Co-Investigating Judge are valid pursuant to Articles 5 and 7 of the ECCC Agreement, Article 23 *new* of the ECCC Law, and Internal Rule 72.¹³ The International CIJ also referred the Suspect’s Co-Lawyers to the finding of the PTC, in another case, that the CIJs’ “*power to issue a valid summons to a Suspect alone is ‘expressed in clear terms in the ECCC legal compendium and the Pre-*

⁶ *Ibid*, paras. 8, 11.

⁷ Case File No. 003-D30, *Notification of Suspect’s Rights [Rule 21(1)(D)]*, 24 February 2012, para. 1.

⁸ Case File No. 003-D48, *Decision on Personal Jurisdiction and Investigative policy Regarding Suspect Meas Mut*, 2 May 2012.

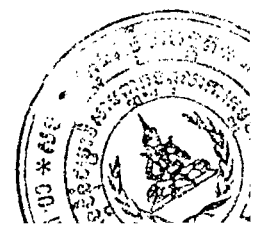
⁹ Written Record of Disagreement, dated 7 February 2013.

¹⁰ See Case File No. 003-D82, *Meas Muth’s Request to Access the Case File and Participate in the Judicial Investigation*, 29 August 2013; Case File No. 003-D82/2, *Request to be provided with the full Introductory Submission and Supporting Material*, 26 September 2013; Case File No. 003-D82/3/1, *Request for Information concerning Disagreements recorded on 7 February 2013 and 22 February 2013*, 17 July 2014; Case File No. 003-D82/3/5, *Meas Muth’s Submission on Reconsideration of RICIJ’s Personal Jurisdiction Decision and Decision to Grant Access to the Case File in the Notification of Suspect’s Rights*, 30 July 2014; Case File No. 003-D82/3/3/1, *Meas Muth’s Motion to Strike International Co-Prosecutor’s Response to Notification Concerning the Suspect’s Requests to Access the Case File, Participate in the Judicial Investigation and Receive the full Introductory Submission*, 22 August 2014; Case File No. 003-D82/4/1, *Meas Muth’s Appeal against the Co-Investigating Judge’s Constructive Denial of his Motion to Strike and Request to Access Case File and Participate in Judicial Investigation*, 17 November 2014; Case File No. 003-D122/1/1, *Meas Muth’s Appeal against Co-Investigating Judge Harmon’s Denial of his Request to Access Case File and Participate in Judicial Investigation*, 17 December 2014.

¹¹ Written Record of Disagreement, dated 17 July 2014.

¹² Case File No. 003-D117, *Request for information concerning the validity of a summons issued by one Co-Investigating Judge*, 13 August 2014.

¹³ Case File No. 003-D117/1, *Order on Suspect’s Request Concerning Summons signed by one Co-Investigating Judge*, 26 September 2014, para. 3.



Trial Chamber's jurisprudence".¹⁴ The Suspect's Co-Lawyers appealed this order on 27 October 2014.¹⁵

11. Between 15 September and 17 October 2014, the International CIJ met with a representative of the Judicial Police to discuss the execution of an arrest warrant for a suspect in another case. The Judicial Police representative suggested that outreach activities in specified regions be conducted in order to reassure the local population that the Office of the Co-Investigating Judges ("OCIJ") did not intend to carry out mass arrests in the area.
12. Nine separate outreach programs were conducted by OCIJ staff members and the International CIJ between 11 and 21 November 2014 in the provinces of Oddar Meanchey, Battambang, and Pailin, including Samlot, the town where Meas Muth resides.¹⁶
13. On 26 November 2014, the International CIJ summonsed Meas Muth to the ECCC for an initial appearance on 8 December 2014, in accordance with Internal Rule 57.¹⁷
14. On 28 November 2014, the summons was personally served on Meas Muth by an OCIJ Investigator at his residence.¹⁸ After being informed of the contents of the summons, Meas Muth declared that he would not present himself at the ECCC in accordance therewith and refused to sign the Acknowledgement of Service.¹⁹
15. On 28 November 2014, Meas Muth's Co-Lawyers were summonsed to attend his initial appearance.²⁰ They were also separately notified that if charged at the end of the appearance, Meas Muth would receive the rights and entitlements of a charged person under the Internal Rules.²¹
16. On 2 December 2014, Meas Muth notified the International CIJ in writing that he does not recognise as valid a summons not signed by the National CIJ.²² He also insisted that his lawyers be granted access to the Case File and be permitted to participate in the judicial investigation and stated that he intended to exercise his right to remain silent.²³

¹⁴ *Ibid*, para. 4, citing 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.

¹⁵ Case File No. 003-D117/1/1/1, *Meas Muth's Appeal against the International Co-Investigating Judge's Order on Suspect's Request concerning Summons signed by one Co-Investigating Judge*, 27 October 2014.

¹⁶ See ECCC Court Report, December 2014, p. 3, <http://www.eccc.gov.kh/en/publication/court-report-december-2014>.

¹⁷ Case File No. 003-A66, *Summons to Initial Appearance*, 26 November 2014.

¹⁸ Case File No. 003-A66/1, *Written Record of Service of Summons*, 5 December 2014.

¹⁹ *Ibid*, p. 3.

²⁰ Case File No. 003-A67, *Summons of Lawyer*, 28 November 2014.

²¹ Case File No. 003-D82/5, *Notification on Suspect's Request to Access the Case File, Take Part in the Judicial Investigation and Strike the International Co-Prosecutor's Submissions*, 28 November 2014, paras. 15-17.

²² Case File No. 003-A67/1.1, *Meas Muth's decision not to recognise summons*, 2 December 2014 ("Meas Muth's Notice").

²³ Meas Muth's Notice, pp. 1-2.



17. On 3 December 2014, the PTC rejected Meas Muth's appeal of 27 October 2014 and confirmed that summonses issued by one CIJ are within the ambit of the CIJs' authority.²⁴
18. On 4 December 2014, the International CIJ responded to the Meas Muth's notice of 2 December reiterating the PTC's decision filed the previous day.²⁵ In relation to the Meas Muth's expressed intention not to appear at the ECCC, the International CIJ informed Meas Muth that his failure to appear "*will constitute a direct violation of a legally binding order*" and that the International CIJ would "*consider further measures available under the law applicable at the ECCC to ensure his attendance*".²⁶
19. On 5 December 2014, Meas Muth's Co-Lawyers notified the International CIJ that "*notwithstanding [their] client's intent not to comply with the summons*" it was "*never [their] intention to disregard [the] Summons*" for appearing before the International CIJ.²⁷
20. On 8 December 2014, Meas Muth wilfully failed to present himself for the scheduled initial appearance before the International CIJ.²⁸ At the hearing of initial appearance, Meas Muth's National Co-Lawyer declared that Meas Muth refused to appear on the ground that he did not recognise as valid a summons issued by a single CIJ, notwithstanding the 4 December Notification.²⁹ The National Co-Lawyer also requested access to Case File 003, which was denied by the International CIJ. As a result of Meas Muth's absence, the International CIJ adjourned the initial appearance.³⁰
21. On 10 December 2014, the International CIJ issued an arrest warrant (*mandat d'amener*, "Warrant") for Meas Muth pursuant to Internal Rule 42 and ordered "*[t]he judicial police [to] bring Meas Muth before the International Co-Investigating Judge for an Initial Appearance*" pursuant to Internal Rule 15(2).³¹ The Warrant was delivered to the Judicial Police on 12 December 2014.³²
22. On 15 December 2014, Meas Muth's Co-Lawyers lodged an application to seize the PTC with a request to annul Meas Muth's summons, arguing, *inter alia*, that the summons should have been issued jointly by the CIJs.³³

²⁴ Case File No. 003-D117/1/1/2, *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 ("PTC Decision"), para. 16.

²⁵ Case File No. 003-A67/1/1, *Response to the Notice concerning Mr Meas Muth's Decision not to Recognise Summons dated 3 December 2014*, 4 December 2014 ("Response to Meas Muth's Notice"), para. 4, citing the PTC Decision.

²⁶ Response to Meas Muth's Notice, para. 5.

²⁷ Case File No. 003-A67/2, *Notice concerning attendance at scheduled initial appearance 8 December 2014*, 5 December 2014 ("Notice by Co-Lawyers"). See also Case File No. 003-A67/2/1, *Response to the Notice concerning Attendance at Scheduled Initial Appearance 8 December, dated 5 December 2014*, 5 December 2014.

²⁸ Case File No. 003-D122, *Written Record of Initial Appearance*, 8 December 2014, filed 11 December 2014.

²⁹ *Ibid.*

³⁰ *Ibid.*, p. 3.

³¹ Case File No. 003-C1, *Arrest Warrant*, 10 December 2014.

³² Case File 003-C1.2, *Report on service of the Arrest Warrant to the Judicial Police*, 12 December 2014.

³³ Case File No. 003-A77, *Meas Muth's Application to Seize the Pre-Trial Chamber with a Request for Annulment of Summons to Initial Appearance*, 15 December 2014.



23. On 19 December 2014, the International CIJ denied Meas Muth's application on the ground that he lacked standing.³⁴ The International CIJ recalled that, consistent with Cambodian law, Internal Rule 76 permitted "parties" to proceedings to submit requests for annulment of investigative action, reiterating that suspects did not fall within the ambit of this description.³⁵
24. 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.
25. 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. The International CIJ noted, *inter alia*, that efforts to secure the attendance of Meas Muth at an initial appearance hearing at the ECCC had not been successful. The International CIJ remarked, with concern, that it was unclear when the Warrant would be executed. He added that further delays were inimical to the interests of justice and to the rights of Meas Muth under international law, including his rights to participate in the judicial investigation and to be tried without undue delay. He also noted that further delays would adversely impact the rights of victims and the Cambodian people to attain justice for the crimes committed during the period of Democratic Kampuchea. The International CIJ stated that, in light of the unacceptable risks created by further delays, should Meas Muth fail to appear at the ECCC or not be arrested before 18 February 2015, he would proceed to charge him *in absentia*. The International CIJ informed the Chairman that he considered this to be the only prudent course of action in the face of inaction by the Judicial Police.³⁶
26. The previously mentioned 18 February 2015 date has passed without Meas Muth having appeared before the ECCC or the Warrant having been executed.

APPLICABLE LAW

Procedural rules applicable to judicial investigations at the ECCC

27. 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

³⁴ Case File No. 003-A77/1, *Decision on Meas Muth's Application to Seize the Pre-Trial Chamber with a Request for Annulment of Summons to Initial Appearance*, 19 December 2014, filed 22 December 2014.

³⁵ *Ibid*, para. 13. On 14 January 2015, Meas Muth's Co-Lawyers impugned the International CIJ's decision before the PTC. See Case File No. 003-A77/1/1/1, *Meas Muth's Appeal against Co-Investigating Judge Harmon's Denial of his Application to Seize the Pre-Trial Chamber with a Request for Annulment of Summons to Initial Appearance*, 14 January 2015. At the time of filing this decision, the PTC had not ruled on the appeal.

³⁶ Case File No. 003-D127, *Letter to the Chairman of the ECCC Security Commission for the ECCC*, 30 January 2015.



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

28. 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.”

29. 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

30. 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.”

31. 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.”

32. 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

33. 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.”

34. 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

35. 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.³⁷ 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).³⁸ 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.
36. 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.
37. 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 regulated by Cambodian law.³⁹ 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

³⁷ See Articles 333, 351, 361 and 362 of the Cambodian Code of Criminal Procedure.

³⁸ See the Glossary to the ECCC Internal Rules.

³⁹ Case File No. 002-D55/I/8, *Decision on Nuon Chea’s Appeal against Order Refusing Request for Annulment*, 26 August 2008, paras. 14-15.



or Cambodian law, in case of uncertainty regarding their interpretation or application, or concerning their consistency with international standards.⁴⁰

38. Therefore, when considering charging Meas Muth *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”)

39. 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.⁴¹ 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.⁴²
40. 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.⁴³ The International CIJ has relied on these newspapers articles for the sole purpose of ascertaining that *in absentia* proceedings are conducted in Cambodia.
41. On the basis of the CCCP and court practice, the International CIJ is satisfied that *in absentia* proceedings are allowed by Cambodian law.⁴⁴
42. 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.

⁴⁰ 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.

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

⁴² *See* Article 23 new of the ECCC Law and Internal Rule 55(5).

⁴³ 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>.

⁴⁴ 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*”.



Admissibility of *in absentia* proceedings under human rights law

43. Pursuant to Article 14 of the 1966 International Covenant on Civil and Political Rights (“ICCPR”),⁴⁵ 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:

“[C]annot 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”.⁴⁶

44. 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”.⁴⁷

45. The compatibility of *in absentia* proceedings with human rights law has also been confirmed by the European Court of Human Rights (“ECtHR”),⁴⁸ 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.⁴⁹

Procedural rules established at the international level

a. Special Tribunal for Lebanon

46. 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 [...]”.⁵⁰ The STL Statute also allows for the possibility of holding trials *in absentia*, under certain conditions.⁵¹

47. 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 are satisfied:

- a) the accused has expressly and in writing waived his or her right to be present;
- b) the accused has not been handed over to the Tribunal by the State authorities concerned; or

⁴⁵ 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.

⁴⁶ Human Rights Committee, *Daniel Monguya Mbenge v. Zaire*, UN Doc CCPR/C/18/D/16/1977, 25 March 1983, para. 14.1.

⁴⁷ Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), para. 11.

⁴⁸ See ECtHR, *Sejdovic v Italy*, 1 March 2006, para. 86.

⁴⁹ 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.

⁵⁰ STL Statute, Article 16.

⁵¹ STL Statute, Article 22; STL Rules of Procedure and Evidence, Rule 105 *bis*.



- 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”.⁵²
48. 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.”
49. 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.
50. 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 [...]*”.⁵³ Consequently, the Chamber in *Prosecutor v. Ayyash et al.* concluded that the four accused “[*do*] not wish to participate in a trial”,⁵⁴ 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*”.⁵⁵

⁵² STL Statute, Article 22, STL Rules of Procedure and Evidence, Rule 106.

⁵³ See *Prosecutor v. Ayyash et al.*, STL-11-01/I/TC, Decision to hold Trial *in absentia*, 1 February 2012, paras. 107-110; See also *Prosecutor v. Merhi*, STL-13-04/I/TC, Decision to hold Trial *in absentia*, 20 December 2013, paras. 4, 111; See also *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/ARI26.1, Decision on Defence Appeals against Trial Chamber's Decision on Reconsideration of the Trial *in absentia*, 1 November 2012, paras. 46, 51.

⁵⁴ *Prosecutor v. Ayyash et al.*, STL-11-01/I/TC, Decision to hold Trial *in absentia*, 1 February 2012, para. 111.

⁵⁵ *Prosecutor v. Merhi*, STL-13-04/I/TC, Decision to hold Trial *in absentia*, 20 December 2013, paras. 103-109; See also *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/ARI26.1, *supra*, para. 31.



b. *International Criminal Tribunal for the former Yugoslavia (“ICTY”) and International Criminal Tribunal for Rwanda (“ICTR”)*

51. 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.⁵⁶ 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.⁵⁷ 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”.⁵⁸

c. *International Criminal Court (“ICC”)*

52. 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”.⁵⁹

Conclusion

53. 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

⁵⁶ 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 A/51/292; S/1996/665 General Assembly Fifty-first session Report of the ICTY, 16 August 1996, paras. 50-61.

⁵⁷ ICTY and ICTR Rules of Procedure and Evidence, Rule 61.

⁵⁸ *Prosecutor v. Radovan Karadžić and Ratko 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, para. 3.

⁵⁹ Rome Statute of the International Criminal Court, Article 61(2); ICC Rules of Procedure and Evidence Rule 124(1). See *Prosecutor v. Abdallah Banda Abaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09, Decision on issues related to the hearing on the confirmation of charges, 17 November 2010.



or her appearance before the competent court and to inform him or her of the charges, but these efforts have been unsuccessful; and

- e) When holding *in absentia* proceedings, a court needs to ensure that the absent accused or charged person is adequately and effectively represented.
54. 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

Fulfilment of the legal requirements to charge Meas Muth *in absentia*

Meas Muth was aware of the date and time of his initial appearance

55. The International CIJ has determined that there exists clear and consistent evidence that Meas Muth may be responsible for certain crimes alleged in the Introductory Submission.⁶⁰ Accordingly, on 26 November 2014 the International CIJ issued the Summons, which was served personally on Meas Muth on 28 November 2014. Meas Muth's Co-Lawyers were also informed and summonsed to attend the scheduled initial appearance.
56. On 4 December 2014, the Suspect informed the International CIJ, in writing, that he did not recognise as valid the summons issued by a single CIJ and reiterated his request for access to the Case File through his designated Co-Lawyers.
57. From their 5 December 2014 Notice, it is clear that the Co-Lawyers had contact with and received instructions from Meas Muth in relation to the scheduled initial appearance. Notably, they informed the International CIJ that Meas Muth had no intention of complying with the Summons but that counsel would appear for the initial appearance hearing scheduled for 8 December 2014.
58. Despite the validity of the summons issued by a single CIJ being confirmed both by the International CIJ and the PTC, Meas Muth continued to abide by his erroneous and self-serving interpretation of the procedural rules as the pretext to not present himself for the initial appearance. The initial appearance hearing was conducted on 8 December 2014 and attended by Meas Muth's National Co-Lawyer and Senior Legal Consultant.
59. The International CIJ is satisfied that these circumstances unequivocally demonstrate that Meas Muth was informed of the initial appearance scheduled for 8 December 2014 but wilfully and intentionally failed to appear, thereby waiving his right to be present. The International CIJ is also satisfied that Meas Muth clearly expressed his unwillingness to appear before the ECCC at any other date.

Steps to secure Meas Muth's appearance have not been successful

60. On 10 December 2014, pursuant to Article 25(c) of the ECCC Agreement and Internal Rule 15, and following Meas Muth's wilful failure to appear before the ECCC, the International CIJ issued the Warrant wherein he directed the Judicial Police to bring Meas Muth before him for an initial appearance.

⁶⁰ See Notification of Charges annexed to this decision.



61. Between 15 September 2014 and the issuance of this decision, the International CIJ liaised with the Judicial Police, requesting updates on the execution of an arrest warrant for another suspect.
62. Between 11 and 21 November 2014, members of the OCIJ, including the International CIJ, conducted nine separate outreach programs as suggested by the Cambodian authorities, including one program in the town of Meas Muth's residence.
63. On 19 December 2014, a representative of the Judicial Police informed OCIJ staff members that he was unable to provide a reliable estimate on when the Warrant would be executed. He further stated that the final decision on when the arrest warrants would be executed rested with the Security Commission of the ECCC.
64. On 30 January 2015, the International CIJ sent a letter to the Chairman of the Security Commission for the ECCC, informing him that should Meas Muth not appear or be brought to the ECCC by 18 February 2015, he would proceed to charge him *in absentia*.⁶¹
65. 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 in the aforementioned letter passed without either Meas Muth appearing at the ECCC or the Judicial Police executing the Warrant. The International CIJ notes that the Warrant remains in force.
66. The International CIJ is satisfied that Meas Muth is not in hiding; that the Judicial Police know where Meas Muth 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 Meas Muth at the ECCC for an initial appearance pursuant to Internal Rule 57.
67. The International CIJ therefore finds that all the legal requirements for charging *in absentia* are satisfied.

Other considerations warranting charging Meas Muth *in absentia*

68. Suspects are not parties to the proceedings in Case 003. As such, they are not entitled to access the case file, to take part in the judicial investigation,⁶² to confront witnesses,⁶³ or to move the CIJs to seize the PTC with requests for annulment of investigative action.⁶⁴ Suspects can exercise these rights only if they are charged. Only after all parties, including 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.⁶⁵ Such notice triggers further procedural steps which will

⁶¹ These communications are summarised in the Procedural History section of this Decision.

⁶² See Internal Rule 55(6) and 55(10) and the Glossary of the Internal Rules. See also 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 36-38.

⁶³ See Internal Rule 60(2).

⁶⁴ See Internal Rule 76(2). See also Case File No. 004-207/1, *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; Case File No. 004-D185/1, *Decision on [REDACTED] Motion for Annulment of Investigative Action pursuant to Internal Rule 76*, 22 April 2014, para. 33.

⁶⁵ See Internal Rule 66.



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.⁶⁶

69. A wilful failure by Meas Muth to appear at an initial appearance or a failure by the Judicial Police, without undue delay, to execute an arrest warrant to bring him 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 003. Such conduct would cede to Meas Muth 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.
70. Additional delays will also prejudice Meas Muth's fair trial rights, including the right to have adequate time and facilities to participate in the investigation and prepare his defence, to request the attendance of witnesses by filing investigative requests with the CIJs, and to a reasonable duration of the proceedings against him.⁶⁷
71. Moreover, further delays by the Judicial Police in bringing Meas Muth before the ECCC, or a failure to bring him 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

72. Considering that there is complete uncertainty on when – and whether – the Warrant will be executed, the International CIJ finds that charging Meas Muth *in absentia* is the only way to ensure the fair and expeditious conduct of the proceedings. With the issuance of this decision, Meas Muth's status shall change from "suspect" to "charged person" and, as such, he will be able to exercise all the rights to which charged persons are entitled under the Internal Rules.
73. The International CIJ notes that Meas Muth is already represented by Co-Lawyers of his own choosing.⁶⁸
74. The cause and nature of the charges against Meas Muth, as well as his 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:

75. **DECIDE** to charge Meas Muth *in absentia* as specified in the Notification of Charges attached to this decision; and

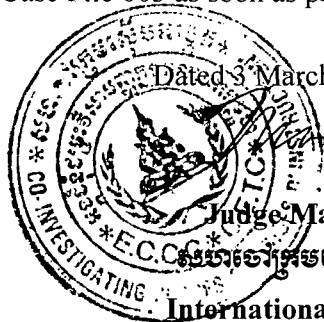
⁶⁶ See Internal Rule 67.

⁶⁷ 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 No. 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.

⁶⁸ Case File No. 003-D56/19/38, *Decision on Meas Muth Appeal Against the International Co-Investigating Judge's Decision Rejecting the Appointment of Ang Udom and Michael Karnavas as his Co-Lawyers*, 17 July 2014.



76. **INSTRUCT** the Greffier to take necessary steps to ensure that Meas Muth's Co-Lawyers are given access to Case File 003 as soon as practicable.



Dated 3 March 2015, Phnom Penh

Judge Mark B. Harmon

អធិបតីអន្តរជាតិសម្រាប់ការស៊ើបអង្កេត
International Co-Investigating Judge
Co-juge d'instruction international