

## BEFORE THE PRE-TRIAL CHAMBER

## EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**MEAS MUTH'S APPEAL AGAINST CO-INVESTIGATING JUDGE HARMON'S  
DECISION TO CHARGE MEAS MUTH *IN ABSENTIA***

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Judge PRAK Kimsan

Judge NEY Thol

Judge HUOT Vuthy

Judge Olivier BEAUVALLET

Reserve Judge Steven J. BWANA

Reserve Judge PEN Pichsaly

**Co-Prosecutors:**

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**All Civil Parties**

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Mr. MEAS Muth, through his Co-Lawyers (“the Defence”), pursuant to Rules 74(3)(a) and 21 of the ECCC Internal Rules (“Rules”), hereby appeals Co-Investigating Judge Harmon’s Decision to Charge MEAS Muth *In Absentia* (“Impugned Decision”), in which Co-Investigating Judge Harmon charged Mr. MEAS Muth *in absentia*, claiming it was the only way to ensure the fair and expeditious conduct of the proceedings.<sup>1</sup> This Appeal is made necessary because Co-Investigating Judge Harmon misconstrued the Rules and Cambodian and international procedural rules to reach a pre-determined outcome: charging Mr. MEAS Muth *in absentia* to enable the investigation to proceed. He acted *ultra vires* and violated Mr. MEAS Muth’s fair trial rights, in particular, his right to appear at a validly constituted initial appearance before both Co-Investigating Judges. The Defence submits this Appeal as a public document. It refers to no information that needs to be kept confidential. A public, oral hearing is requested.

## I. QUESTIONS PRESENTED

### ***Question One***

*The ECCC’s legal framework provides that the Co-Investigating Judges shall jointly conduct the judicial investigation, which includes charging Charged Persons under Rule 57. The Agreement, Establishment Law and Rules do not envisage a Charged Person being charged by only one of the Co-Investigating Judges. Did Co-Investigating Judge Harmon act ultra vires and err in unilaterally issuing the Impugned Decision, without the signature of Co-Investigating Judge You Bunleng?*

### ***Answer***

*Yes, because under the ordinary meaning of Article 5(4) of the Agreement and Article 23 new of the Establishment Law, Co-Investigating Judge Harmon cannot unilaterally charge Mr. MEAS Muth.*

### ***Question Two***

*The ECCC follows the civil law system, pursuant to which a Co-Investigating Judge cannot perform an act that is not set out in the Rules. Rule 57, and relevant Cambodian and international procedural rules, require in-person initial appearances of Charged Persons to enable the Co-Investigating Judges to take their statements, notify the Charged Persons of*

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<sup>1</sup> Decision to Charge MEAS Muth *In Absentia*, 3 March 2015, D128, para. 72.

*the charges being investigated, and inform them of their rights in relation to the investigation. Did Co-Investigating Judge Harmon act ultra vires and err in applying Rule 57 and Cambodian and international procedural rules when he charged Mr. MEAS Muth in absentia?*

***Answer***

*Yes, because under the ordinary meaning and provisions of Rule 57, and a reasonable interpretation of relevant Cambodian and international procedural rules, a Charged Person must be present for an initial appearance and cannot be charged in absentia.*

**II. BACKGROUND**

1. On 7 September 2009, the judicial investigation of Mr. MEAS Muth was initiated based on the Office of the Co-Prosecutor's 20 November 2008 Second Introductory Submission Regarding the Revolutionary Army of Kampuchea.<sup>2</sup>
2. On 7 and 22 February 2013, and again on 17 July 2014, the Co-Investigating Judges filed disagreements. Co-Investigating Judge Harmon informed the Defence that at least the first two disagreements were not brought before the Pre-Trial Chamber in accordance with the Rule 72 dispute settlement procedure.<sup>3</sup>
3. On 26 November 2014, Co-Investigating Judge Harmon summoned Mr. MEAS Muth and his Co-Lawyers to an initial appearance on 8 December 2014.<sup>4</sup> The Summons to Mr. MEAS Muth stated: "Should Meas Mut[h] fail to appear on the specified date, further measures taken in accordance with the ECCC Internal Rules shall be considered."<sup>5</sup>
4. On 2 December 2014, the Defence met with Mr. MEAS Muth to discuss the Summons. Mr. MEAS Muth did not consider the Summons to be valid since Co-Investigating Judge

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<sup>2</sup> Co-Prosecutors' Second Introductory Submission Regarding the Revolutionary Army of Kampuchea, 20 November 2008, D1.

<sup>3</sup> See Letter from Co-Investigating Judge Harmon to Defence, *Request for Information Concerning Disagreements Recorded on 7 February 2013 and 22 February 2013*, 22 July 2014, D82/3/2.

<sup>4</sup> Summons to Initial Appearance, 26 November 2014, A66; Written Record of Service of Summons, 5 December 2014, A66/1; Summons of Lawyer, 28 November 2014, A67.

<sup>5</sup> Summons to Initial Appearance, 26 November 2014, A66.

Harmon alone issued it. The Defence prepared a Notice of Non-Recognition of Summons to this effect for Mr. MEAS Muth.<sup>6</sup> It was filed the following day, 3 December 2014.

5. On 10 December 2014, Co-Investigating Judge Harmon issued an Arrest Warrant pursuant to Rule 42, ordering the Judicial Police to bring Mr. MEAS Muth before him for an initial appearance.<sup>7</sup>
6. On 12 December 2014, the Arrest Warrant was delivered to the Judicial Police.<sup>8</sup>
7. On 15 December 2014, unaware of the Arrest Warrant, the Defence filed an application to the Co-Investigating Judges requesting that they seize the Pre-Trial Chamber with a request to annul the Summons. The Defence argued that the Summons was procedurally defective, having been issued by Co-Investigating Judge Harmon alone.<sup>9</sup>
8. On 19 December 2014, Co-Investigating Judge Harmon issued a decision refusing to seize the Pre-Trial Chamber with a request to annul the Summons, finding that Rule 76(2) only allows *parties* to submit annulment applications and that Suspects are not parties.<sup>10</sup>
9. On 19 December 2014, two members of the staff of the Office of Co-Investigating Judges met with a representative of the Judicial Police to discuss execution of the Arrest Warrant.<sup>11</sup> The representative of the Judicial Police could not say when the Arrest Warrant would be executed, stating that the final decision on its execution rested with the ECCC's Security Commission ("ECSC").<sup>12</sup>
10. On 30 January 2015, Co-Investigating Judge Harmon wrote to the Chairman of the ECSC, stating that should Mr. MEAS Muth fail to appear at the ECCC or not be arrested before 18 February 2015, he would charge Mr. MEAS Muth *in absentia*.<sup>13</sup>

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<sup>6</sup> See Notice Concerning Mr. MEAS Muth's Decision not to Recognize Summons, 3 December 2014 ("MEAS Muth's Decision Regarding Summons"), A67/1; Notice of Non-Recognition of Summons, 2 December 2014 ("MEAS Muth's Notice"), A67/1.1.

<sup>7</sup> Arrest Warrant, 10 December 2014, C1, p. 3; Impugned Decision, para. 21.

<sup>8</sup> Impugned Decision, para. 21.

<sup>9</sup> MEAS Muth's Application to Seize the Pre-Trial Chamber with a Request for Annulment of Summons to Initial Appearance, 15 December 2014, A77.

<sup>10</sup> 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, A77/1, para. 13.

<sup>11</sup> Impugned Decision, para. 24.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*, para. 25. See ICIJ's Letter to H.E. Mr. Em Sam An, 30 January 2015, D127.

11. On 3 March 2015 at 4:30 pm, with 18 February 2015 having passed without Mr. MEAS Muth's appearance before the ECCC or the Judicial Police's execution of the Arrest Warrant, Co-Investigating Judge Harmon issued the Impugned Decision and accompanying Notification of Charges. Co-Investigating Judge Harmon found Mr. MEAS Muth had "wilfully and intentionally failed to appear" at an initial appearance, had therefore waived his right to appear, and all reasonable measures had been taken to ensure his appearance.<sup>14</sup> Considering that there was "complete uncertainty" as to when and whether the Arrest Warrant would be executed, the nature of the proceedings, Mr. MEAS Muth's fair trial rights, the victims' interests, and the ECCC's image, Co-Investigating Judge charged Mr. MEAS Muth *in absentia*.<sup>15</sup> The Notification of Charges sets out: Mr. MEAS Muth's identifying information; his alleged roles during the temporal jurisdiction of the ECCC; the alleged crimes; the modes of liability under which Mr. MEAS Muth is charged; and Mr. MEAS Muth's rights under the Rules, including his right to be represented by counsel of his choosing and his right to remain silent.<sup>16</sup>

12. On 3 March 2015, within minutes of notifying the Parties of the Impugned Decision and Notification of Charges, Co-Investigating Judge Harmon issued a press release setting out the charges and alleged crime sites under investigation, noting:

With the filing of these charges, the Internal Rules of the ECCC permit [Mr. MEAS] Muth, through his lawyers, to have access to the case file and to participate in the investigation, thus accelerating its progress. This will allow the investigation to proceed with full respect of the rights of all parties and to conclude it within a reasonable time with the issuance of a closing order.<sup>17</sup>

The contents of the press release were reported widely in both local and international newspapers.<sup>18</sup>

<sup>14</sup> Impugned Decision, paras. 59, 66.

<sup>15</sup> *Id.*, paras. 68-72, 75.

<sup>16</sup> Notification of Charges against MEAS Muth, 3 March 2015 ("Notification of Charges"), D128.1.

<sup>17</sup> Press Release, *Statement of the International Co-Investigating Judge regarding Case 003*, 3 March 2015.

<sup>18</sup> See, e.g., Holly Robertson, *KR Tribunal Charges Navy Commander, District Chief*, CAMBODIA DAILY, 4 March 2015; Stuart White et al., *KRT charges two more*, THE PHNOM PENH POST, 4 March 2015; Stuart White et al., *Khmer Rouge duo charged*, PHNOM PENH POST, 3 March 2015; Kong Sothnarith, *Two Former Khmer Rouge Cadre Charged by Tribunal*, VOA KHMER, 3 March 2015; Prak Chan Thul, *U.N.-Cambodia tribunal charges two more ex-Khmer Rouge cadres*, REUTERS, 3 March 2015; Lindsay Murdoch, *Tribunal charges ex-Khmer Rouge commander with crimes against humanity*, SYDNEY MORNING HERALD, 4 March 2015; Elizabeth LaForgia, *Cambodia Khmer Rouge tribunal charges 2 new suspects*, JURIST, 3 March 2015; Tu Thanh Ha, *Khmer Rouge official charged in 1978 killing of Canadian Stuart Glass*, GLOBE AND MAIL, 3 March 2015; Lauren Crothers, *Two more Khmer Rouge cadre charged in Cambodia*, ANADOLU AGENCY, 3 March 2015; *Cambodia's Khmer*

### III. PRELIMINARY MATTERS

#### A. Admissibility of the Appeal

##### 1. Rule 74(3)(a)

13. Rule 74(3)(a) provides that: “The Charged Person or the Accused may appeal against the following orders or decisions of the Co-Investigating Judges: a) confirming the jurisdiction of the ECCC.” This Appeal is admissible under Rule 74(3)(a).

14. With the Impugned Decision, Co-Investigating Judge Harmon determined he has the jurisdiction<sup>19</sup> to unilaterally charge Mr. MEAS Muth for, *inter alia*, National Crimes and Grave Breaches, under theories of Joint Criminal Enterprise (“JCE”) and Command Responsibility<sup>20</sup> – without Co-Investigating Judge You Bunleng’s signature. The Defence disputes this determination.<sup>21</sup>

15. As the Appeals Chamber at the International Criminal Tribunal for the former Yugoslavia (“ICTY”) has held:

[J]urisdiction is not merely an ambit or sphere (better described as ‘competence’); it is basically – as is visible from the Latin origin of the word itself, *jurisdiction* – a legal power, hence necessarily a legitimate power, ‘to state the law’; (*dire le droit*) within this ambit, in an authoritative and final manner.<sup>22</sup>

Through the Impugned Decision, Co-Investigating Judge Harmon considers he has the legal power to authoritatively “state the law”<sup>23</sup> by charging Mr. MEAS Muth *in absentia*. His decision confirms the ECCC’s jurisdiction.

16. Rule 74(3)(a) must be construed broadly to admit appeals on jurisdictional issues. A narrow conception of jurisdiction – one limited to appeals based on subject matter, and temporal and personal jurisdiction – is not warranted here. As a court applying international law, the ECCC is a “self-contained system”, rather than an “integrated

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*Rouge tribunal charges 2 new suspects*, ASSOCIATED PRESS, 3 March 2015; *Two more Khmer Rouge suspects charged with crimes against humanity*, AGENCE FRANCE-PRESS, 3 March 2015.

<sup>19</sup> Black’s Law Dictionary broadly defines “jurisdiction” as “[a] court’s power to decide a case or issue a decree.” BLACK’S LAW DICTIONARY 927 (9<sup>th</sup> ed. 2004) (“BLACK’S LAW DICTIONARY”).

<sup>20</sup> Impugned Decision, para. 75; Notification of Charges.

<sup>21</sup> See *infra* Section IV.A for further submissions as to Co-Investigating Judge Harmon’s inability to unilaterally issue the Impugned Decision.

<sup>22</sup> *Prosecutor v. Tadić*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 10. This Decision addressed the *Tadić* Defence’s argument that the ICTY was not validly constituted and, as such, did not have jurisdiction over Mr. Tadić.

<sup>23</sup> *Id.*

judicial system operating an orderly division of labour among a number of tribunals,”<sup>24</sup> as in a domestic judicial system. Decisions that go to the heart of a Judge’s or Chamber’s competence to charge or prosecute a person at the ECCC must be subject to appellate review. The Impugned Decision is such a jurisdictional decision. The Defence challenges Co-Investigating Judge Harmon’s unilateral determination that he has the jurisdiction and competence to charge Mr. MEAS Muth *in absentia*. The Defence incorporates by reference all submissions on admissibility under Rule 74(3)(a) made in its Appeal Against Co-Investigating Judge Harmon’s Notification of Charges.<sup>25</sup>

## 2. Rule 21

17. Rule 21 sets out the fundamental principles governing all ECCC proceedings,<sup>26</sup> of which a central component is the “overriding consideration” of fairness of the proceedings.<sup>27</sup> The Pre-Trial Chamber may, on a case-by-case basis, admit an appeal under Rule 21 where: **a.** the appeal raises matters that cannot be rectified by the Trial Chamber; or **b.** not allowing the appeal would “irreparably harm” the Charged Person’s fair trial rights.<sup>28</sup> Where, on balance, the facts and circumstances of the appeal require a broader interpretation of the right to appeal under Rule 21, the Pre-Trial Chamber will permit such an appeal.<sup>29</sup> A broader interpretation of the right to appeal is required here.
18. This Appeal raises matters that cannot be rectified by the Trial Chamber. It challenges Co-Investigating Judge Harmon’s interpretation and application of ECCC, Cambodian, and international procedural rules relating to initial appearances. As an initial appearance is a pre-trial hearing, it is not a matter that the Trial Chamber can address or rectify. The Trial Chamber has previously held that it is not an appellate or review body in relation to

<sup>24</sup> See *id.*, para. 11, in which the ICTY Appeals Chamber states: “International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others.”

<sup>25</sup> See MEAS Muth’s Appeal Against Co-Investigating Judge Harmon’s Notification of Charges against MEAS Muth, 12 June 2015, forthcoming.

<sup>26</sup> Rule 21 provides (emphasis added): “The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations *shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency* in light of the inherent specificity of the ECCC, as set out in the ECCC Law and Agreement.”

<sup>27</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ (PTC75), Decision on IENG Sary’s Appeal against the Closing Order, 11 April 2011, D427/1/30, paras. 48-49.

<sup>28</sup> *Id.*, para. 48.

<sup>29</sup> *Id.*, para. 49. The Pre-Trial Chamber referred to its past decisions admitting an appeal against the Office of the Co-Investigating Judges’ denial of a request to stay the proceedings based on an abuse of process and an appeal as to whether a Charged Person received sufficient notice of the charges of JCE as a mode of liability.



measures taken by other judicial entities during the investigation phase.<sup>30</sup> Were the Defence to wait until the trial stage to make submissions on the Impugned Decision, the Trial Chamber would simply uphold its own precedent and refuse to hear any challenge to the Impugned Decision. Further, where a decision violates Mr. MEAS Muth's fair trial rights – as does the Impugned Decision – relief should not be delayed until the trial stage, which may be more than one year away. The Impugned Decision affects Mr. MEAS Muth *now* and must be rectified now.

19. Not allowing this Appeal would irreparably harm Mr. MEAS Muth's fair trial rights. Unilaterally charging Mr. MEAS Muth violates his right to a valid initial appearance, held before *both* Co-Investigating Judges.<sup>31</sup> Charging Mr. MEAS Muth *in absentia* violates his right to be present at such an initial appearance.<sup>32</sup> The Defence challenges Co-Investigating Judge Harmon's analysis and application of the Rules and Cambodian and international procedural rules. Unilaterally charging a Charged Person is not permitted under the ECCC's legal framework. Charging a Charged Person *in absentia* is not permitted under Rule 57 or Cambodian law. *Even if* charging *in absentia* is permitted under Rule 57 or Cambodian procedural rules, international procedural rules establish that such an act may *only* be permitted where specific conditions are met.<sup>33</sup> These conditions were not met here. In choosing expediency over his duty to safeguard Mr. MEAS Muth's interests,<sup>34</sup> Co-Investigating Judge Harmon violated Mr. MEAS Muth's rights to a validly constituted initial appearance and to be present at such a hearing.
20. Should the Pre-Trial Chamber find this Appeal inadmissible under Rule 74(3)(a), there would be no other avenue of appeal open to Mr. MEAS Muth. This Appeal must be admitted under a broad interpretation of Rule 21 to rectify errors in the Impugned Decision and prevent continuing, irreparable harm to Mr. MEAS Muth's fair trial rights.

<sup>30</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation (E221, E223, E224, E224/2, E234, E234/2, E241 and E241/1), 7 December 2012, E251, para. 22; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Decision on NUON Chea Motions Regarding Fairness of Judicial Investigation (E51/3, E82, E88 and E92), 9 September 2011, E116, para. 18.

<sup>31</sup> See *infra* Section IV.A for further submissions as to Mr. MEAS Muth's right to a validly constituted initial appearance.

<sup>32</sup> See *infra* Section IV.B.4 for further submissions as to Mr. MEAS Muth's right to be present at a validly constituted initial appearance.

<sup>33</sup> See *infra* Sections IV.B.4 and V.B.5 discussing whether the conditions for an *in absentia* proceeding were met.

<sup>34</sup> See Impugned Decision, para. 69.

## B. Standard of Review

21. The Impugned Decision may be vacated if it is: **a.** based on an incorrect interpretation of governing law invalidating the decision; **b.** based on a patently incorrect conclusion of fact occasioning a miscarriage of justice; or **c.** so unfair or unreasonable as to constitute an abuse of discretion.<sup>35</sup>

## IV. LAW AND ARGUMENT

### A. Co-Investigating Judge Harmon acted *ultra vires* and erred in unilaterally issuing the Impugned Decision

#### 1. The ECCC's legal framework envisages the Co-Investigating Judges jointly conducting an initial appearance under Rule 57

22. Article 5(4) of the Agreement<sup>36</sup> provides, in relevant part: "The co-investigating judges shall cooperate with a view to arriving at a common approach to the investigation." Article 23 new of the Establishment Law<sup>37</sup> reiterates this requirement, providing in relevant part: "All investigations shall be the joint responsibility of two investigating judges...."

23. In determining the intent of Articles in the Agreement and the Establishment Law, the Office of the Co-Investigating Judges and the Pre-Trial Chamber must apply the principles of statutory interpretation set out in the Vienna Convention on the Law of Treaties ("VCLT").<sup>38</sup> The VCLT expressly applies to interpretation of the Agreement.<sup>39</sup> The Establishment Law also must be interpreted in accordance with the VCLT.<sup>40</sup>

<sup>35</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC64), Public Redacted Decision on IENG Sary's Appeal against Co-Investigating Judges' Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, 11 June 2010, A371/2/12, para. 22. With regard to the abuse of discretion standard, the decision or order must be so unreasonable as to "force the conclusion that the Co-Investigating Judges failed to exercise discretion judiciously." *Id.*

<sup>36</sup> Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea ("Agreement").

<sup>37</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea ("Establishment Law").

<sup>38</sup> Vienna Convention on the Law of Treaties, adopted 23 May 1969, 1155 UNTS 331 (1969).

<sup>39</sup> Agreement, Art. 2(2).

<sup>40</sup> At the ICTY and International Criminal Tribunal for Rwanda ("ICTR"), for example, the Rules of Procedure and Evidence ("RPE") are interpreted in accordance with the VCLT because **a.** they derive from the ICTY and ICTR Statutes, which are treaties subject to the VCLT; and **b.** the VCLT's statutory interpretation rules reflect customary international law. *See, e.g., Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001, para. 67; *Prosecutor v. Kanyabashi*, ICTR-96-15-A, Decision on the Defense Motion for Interlocutory Appeal on the Jurisdiction of the Trial Chamber I, Joint Separate and Concurring Opinion Judge Wang Tieya and Judge Rafael Nieto-Navia, 3 June 1999, para. 11.

24. Article 31 of the VCLT provides:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of the object and purpose of the treaty.
2. The context for the purpose of interpretation of a treaty shall comprise, in addition to the text, including its preambles and annexes:
  - a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
  - b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - a) Any subsequent agreement between the parties regarding the interpretation of the treaty or its provisions;
  - b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties relating to its interpretation;
  - c) Any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Where the ordinary meaning of a term is ambiguous or obscure, or leads to a manifestly absurd or unreasonable result, recourse may be had to supplementary means of interpretation.<sup>41</sup> The VCLT aligns with civil law statutory interpretation rules.<sup>42</sup>

25. In looking at the ordinary meaning of Article 5(4) of the Agreement and Article 23 new of the Establishment Law, the Co-Investigating Judges must presume that the drafters of the Rule said what they meant and meant what is said.<sup>43</sup> The ordinary meaning of these Articles demonstrates that the Co-Investigating Judges are to work together during the judicial investigation stage. One Co-Investigating Judge cannot charge a person alone.

26. *Cooperate* as used in Article 5(4) of the Agreement means “to work together” or “to work with another person or group to do something.”<sup>44</sup> *Joint* as used in Article 23 new of the

<sup>41</sup> VCLT, Art. 32.

<sup>42</sup> See Claire M. Germain, *Approaches to Statutory Interpretation and Legislative History in France*, 13 DUKE J. COMP. & INT’L L. 195, 201-02 (2003).

<sup>43</sup> *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (internal citations omitted): “[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. ... [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’”

<sup>44</sup> See the definition of *cooperate* in the online Oxford English Dictionary: “[t]o work together, act in conjunction (*with* another person or thing, *to* an end or purpose, or *in* a work),” available at <http://www.oed.com/view/Entry/41036?rskey=TfSQ4H&result=2&isAdvanced=false#eid>. See also the definition of *cooperate* in the online Merriam-Webster Dictionary, available at <http://www.merriam-webster.com/dictionary/cooperate>.

Establishment Law means “[p]ut together, joined, combined, [or] united.”<sup>45</sup> The ordinary meaning of these words is unambiguous and clear.

27. The context in which the Agreement and the Establishment Law were created further supports a finding that the Co-Investigating Judges must cooperate in charging a person. The Agreement and Establishment Law establish a dualistic system at the ECCC: as with the Co-Investigating Judges, two Co-Prosecutors “shall cooperate with a view to arriving at a common approach to the prosecution.”<sup>46</sup> Within the Office of Administration, a Cambodian Director and an international Deputy Director “shall cooperate in order to ensure an effective and efficient functioning of the administration.”<sup>47</sup> The Pre-Trial, Trial, and Supreme Court Chambers comprise national and international Judges who “shall attempt to achieve unanimity in their decisions.”<sup>48</sup>
28. The Rules similarly support a finding that the Co-Investigating Judges must cooperate and work together by requiring “clear and consistent evidence” to charge a Suspect.<sup>49</sup> A disagreement between the Co-Investigating Judges as to the existence of clear and consistent evidence indicates that such evidence *does not* exist; i.e., that reasonable judges differ as to the assessment of the evidence.<sup>50</sup> In such a case, it would be improper for one Co-Investigating Judge to charge a Suspect on his own.
29. Article 5(4) of the Agreement provides that where the Co-Investigating Judges are “unable to agree whether to proceed with an investigation,” the investigation shall proceed unless the Article 7 dispute resolution process is followed. Article 23 new of the Establishment Law mirrors this language.<sup>51</sup>

<sup>45</sup> See the definition of *joint* in the Oxford English Dictionary, available at <http://www.oed.com/view/Entry/101546?rskey=uGvvbc&result=3&isAdvanced=false#eid>. See also the definition of *joint* in the online Merriam-Webster Dictionary: “done by or involving two or more people” or “doing something together,” available at <http://www.merriam-webster.com/dictionary/joint>.

<sup>46</sup> Agreement, Art. 6(4). See also Establishment Law, Art. 16.

<sup>47</sup> Agreement, Art. 8(3)-(4).

<sup>48</sup> *Id.*, Art. 4(1); Art. 3(1)-(2). See also Establishment Law, Art. 9 new, Art. 14 new.

<sup>49</sup> Rule 55(4).

<sup>50</sup> Where there is any doubt as to whether the evidence is clear and consistent, the Cambodian Constitution requires such doubt to be resolved in favor of Mr. MEAS Muth. Constitution of the Kingdom of Cambodia dated 24 September 1993 Modified by Kram dated 8 March 1999 promulgating the amendments to Articles 11, 12, 13, 18, 22, 24, 26, 28, 30, 34, 51, 90, 91, 93 and other Articles from Chapter 8 through Chapter 14 of the Constitution of the Kingdom of Cambodia, adopted by the National Assembly on 4 March 1999, Art. 38.

<sup>51</sup> Article 23 new states (emphasis added): “In the event of disagreement between the Co-Investigating Judges the following shall apply: *The investigation shall proceed* unless the Co-Investigating Judges or one of them requests within thirty days that the difference shall be settled in accordance with the following provisions....”

30. The drafters of Article 5(4) of the Agreement and Article 23 new of the Establishment Law are presumed to have acted intentionally in drafting these Articles. These Articles relate to disagreements about whether an *investigation* can proceed. Charging a person under Rule 57 does not relate to whether the investigation will proceed; it relates to whether an eventual *trial* will proceed. The Agreement and Establishment Law do not address disagreements in relation to whether an eventual *trial* will proceed.
31. The ordinary meaning of Article 5(4) of the Agreement and Article 23 new of the Establishment Law requires that both Co-Investigating Judges charge a Suspect. The Impugned Decision constitutes an *ultra vires* act<sup>52</sup> that fundamentally impacts Mr. MEAS Muth's right to a validly constituted initial appearance.

## **2. The scope of Rule 72 cannot be expanded to encompass the Impugned Decision**

32. The Pre-Trial Chamber, in Case 004, held a Co-Investigating Judge may issue a Summons alone if he has complied with Rule 72.<sup>53</sup> The Pre-Trial Chamber has not held that one Co-Investigating Judge may charge a Charged Person under Rule 57 without the other Co-Investigating Judge's consent.
33. Co-Investigating Judge Harmon has unilaterally, without reasoned analysis, extended the Pre-Trial Chamber's limited jurisprudence to find that he has the authority to schedule an initial appearance and to charge Mr. MEAS Muth alone. There is no indication that Co-Investigating Judge You Bunleng delegated his charging power to Co-Investigating Judge Harmon.<sup>54</sup> Without Co-Investigating Judge You Bunleng's approval, Co-Investigating Judge Harmon cannot schedule an initial appearance or charge Mr. MEAS Muth.

## **3. Conclusion**

34. The ECCC's legal framework envisages the Co-Investigating Judges jointly conducting

<sup>52</sup> To act *ultra vires* means to act beyond the powers delegated in a law or statute. BLACK'S LAW DICTIONARY, at 1662.

<sup>53</sup> See, e.g., 004/07-09-2009-ECCC/OCIJ (PTC09), Decision on [REDACTED] Urgent Request [REDACTED], 15 August 2014, A122/6.1/3, para. 14 (the Case 003 Case File number is D117/1.2). The Defence does not concede the applicability of the Pre-Trial Chamber's Decision to Case 003, as this Decision may have been limited to the facts in Case 004. The Defence is unable to make this determination because the Decision has been redacted.

<sup>54</sup> Rule 14(4) provides that a decision to delegate power must be made jointly by the Co-Investigating Judges: "Except for action that must be taken jointly under the ECCC Law and these IRs, the Co-Investigating Judges may delegate power to one of them, by a joint written decision, to accomplish such action individually."

the judicial investigation. It does not permit one Co-Investigating Judge to unilaterally charge a Suspect under Rule 57. In engaging in an act that is not permitted by the Agreement, Establishment Law or Rules, Co-Investigating Judge Harmon has acted *ultra vires* and committed an error of law that invalidates the Impugned Decision.

**B. Assuming, *arguendo*, that Co-Investigating Judge Harmon could unilaterally issue the Impugned Decision, he acted *ultra vires* and erred in applying Rule 57 and Cambodian and international procedural rules when he charged Mr. MEAS Muth *in absentia***

**1. Co-Investigating Judge Harmon acted *ultra vires* in charging Mr. MEAS Muth *in absentia***

35. Co-Investigating Judge Harmon is required to apply existing procedures in force at the ECCC.<sup>55</sup> Rule 57 contains no procedure for charging a person *in absentia*. Nevertheless, in charging Mr. MEAS Muth *in absentia* under Rule 57, Co-Investigating Judge Harmon held that all the legal requirements for charging *in absentia* had been satisfied.<sup>56</sup> He cited three factors: **a.** Mr. MEAS Muth was informed of the scheduled initial appearance but wilfully and intentionally failed to appear, thereby waiving his right to be present; **b.** Mr. MEAS Muth had expressed his unwillingness to appear before the ECCC at any other date; and **c.** all reasonable steps had been taken to ensure Mr. MEAS Muth's appearance before the ECCC.<sup>57</sup> Co-Investigating Judge Harmon created and applied a procedure that is neither provided for nor authorized in the Rules. In so doing, he acted *ultra vires*.

36. Where a question arises that is not addressed by the Rules, a proposal to amend the Rules “shall be submitted to the Rules and Procedure Committee as soon as possible.”<sup>58</sup> At a Plenary Session, the Co-Investigating Judges, the Judges of the Chambers, and, where permitted, the Co-Prosecutors, will review and amend the Rules as necessary.<sup>59</sup> Unless otherwise indicated, an amendment to a Rule enters into force when published by the Office of Administration and no later than 10 days after the Plenary adopts identical versions in Khmer, English, and French.<sup>60</sup>

<sup>55</sup> Agreement, Art. 12(1); Establishment Law, Art. 23 new; Rule 2.

<sup>56</sup> Impugned Decision, para. 67.

<sup>57</sup> *Id.*, paras. 59, 66.

<sup>58</sup> Emphasis added.

<sup>59</sup> See Rules 3(2), 18(2)-(4), 18(6)(a).

<sup>60</sup> Rule 3(3).

37. Rule 57 has not been amended since the Rules were adopted at the first Plenary Session held on 12 June 2007. There is no indication that Co-Investigating Judge Harmon submitted a proposal to the Rules and Procedure Committee requesting amendment of Rule 57 prior to issuing the Impugned Decision. Even if he had made such a proposal, he must continue to apply Rule 57 in its current form unless and until the Rule is amended. To do otherwise would violate the principle of legality.
38. The judiciary applies the law made by the legislature; it cannot legislate. This separation of powers is important when considering the protections of the principle of legality. Montesquieu describes the separation of the three State powers in his treatise *De l'esprit des lois* (1748). First, there is the power of lawmaking, to be distributed to parliament as the representative of the people (the legislature). Second, there is the executive power, which effectuates the laws (the executive). Finally, there is the judging power, which settles disputes (the judiciary):<sup>61</sup> judges are “the mouth that speaks the law”: “*la bouche qui prononce les paroles de la loi.*”<sup>62</sup> In the civil law tradition: “it is the legislator – government, parliament – who in general defines crimes, where it is the judge who in a concrete case may qualify certain behaviour of a certain person as criminal.... The judge is not allowed to fill in gaps in the rules that are left by the legislator.”<sup>63</sup>
39. Rather than following Rule 57, or requesting that Rule 57 be amended to permit charging a person *in absentia*, Co-Investigating Judge Harmon created his own procedure. He unreasonably usurped the executive authority exercised in a Plenary Session. In acting *ultra vires*, he has erred in law and abused his discretion.

## **2. Co-Investigating Judge Harmon erred in his interpretation of the Rules in light of the ECCC’s civil law underpinnings**

### **a. Co-Investigating Judge Harmon misunderstood and misinterpreted Rule 57**

40. Co-Investigating Judge Harmon erroneously interpreted Rule 57 in finding that it does not require a Charged Person’s in-person appearance before the Co-Investigating Judges, and

<sup>61</sup> ROELOF HAVEMAN ET AL., SUPRANATIONAL CRIMINAL LAW: A SYSTEM *SUI GENERIS* 51-52 (Intersentia 2003) (“HAVEMAN ET AL.”).

<sup>62</sup> MACHTELD BOOT, NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT: GENOCIDE, CRIMES AGAINST HUMANITY, AND WAR CRIMES 83 (Intersentia 2002).

<sup>63</sup> HAVEMAN ET AL., at 52.

that the Rules do not address charging a Charged Person who refuses to appear and whose appearance cannot be coercively secured.<sup>64</sup> He improperly compared Rule 57 to Rule 81; incorrectly inferring that, because Rule 81 contains provisions on trials *in absentia*, Rule 57's lack of explicit permission for *in absentia* initial appearances means the matter is not regulated by the Rules.<sup>65</sup>

41. The Cambodian Code of Criminal Procedure (“CCPC”)<sup>66</sup> applies only where “a question arises which is not addressed by the Internal Rules.”<sup>67</sup> The Co-Investigating Judges may look to international procedural rules only where Cambodian law does not deal with a particular matter, or there is uncertainty regarding the relevant rule of Cambodian law, or there is potential inconsistency with international standards.<sup>68</sup> In applying procedural rules, the Co-Investigating Judges must always comply with Rule 21.<sup>69</sup> As ECCC procedures must be in accordance with Cambodian procedures, which are based in civil law, the Rules always must be interpreted keeping in mind the civil law context.
42. In a civil law jurisdiction, reliance is placed on legal codes that specify matters that can be brought before a court, the applicable procedural rules, and the penalties for enumerated offenses.<sup>70</sup> Judges operate within the procedural parameters in the codes; deducing from statutory provisions the acts that may be performed.
43. In determining the intent of any Rule, and as set out *supra* in paragraphs 23-24, the Co-Investigating Judges and the Pre-Trial Chamber must apply the principles of statutory interpretation set out in the VCLT. As the Rules are derived from the Agreement, which is subject to the VCLT, they also must be interpreted in accordance with the VCLT.

<sup>64</sup> Impugned Decision, para. 36.

<sup>65</sup> See *id.*, paras. 35-37.

<sup>66</sup> Criminal Procedure Code of Kingdom of Cambodia, 2007.

<sup>67</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 06), Decision on NUON Chea's Appeal against Order Refusing Request for Annulment, 26 August 2008 (“Decision on NUON Chea's Appeal Against Annulment Order”), D55/I/8, para. 15. See also *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 15), Decision on Khieu Samphan's Supplemental Application for Release, 24 December 2008, C26/5/5, para. 17, finding that the provisions of the CCPC “are not applicable as the Internal Rules clearly address the issue of the jurisdiction on applications for provisional release.”

<sup>68</sup> Agreement, Art. 12(1). See also Establishment Law, Art. 23 new; Rule 2.

<sup>69</sup> Rule 2.

<sup>70</sup> JAMES G. APPLE, ET AL., A PRIMER ON THE CIVIL LAW SYSTEM 37 (Federal Judicial Center, 1995): “In the civil-law tradition, the reasoning process is deductive, proceeding from stated general principles or rules of law contained in the legal codes to a specific solution. In common-law countries the process is the reverse – judges apply inductive reasoning, deriving general principles or rules of law from precedent or a series of specific decisions and extracting an applicable rule, which is then applied to a particular case.” Available at [http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/\\$file/CivilLaw.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf).



44. The Rules must be interpreted in good faith in accordance with their ordinary meaning in their context and in light of the object and purpose of the Rules.<sup>71</sup> The Co-Investigating Judges therefore first must look to the ordinary meaning of Rule 57. They must presume that the drafters of the Rules said what they meant and meant what is said, including any exceptions to the Rules. The ordinary meaning of Rule 57 illustrates that, unlike a trial under Rule 81, an in-person appearance is required for an initial appearance. There is no need to look to Cambodian or international rules.
45. An *initial appearance* is “the hearing during which a Charged Person *appears for the first time before* the Co-Investigating Judges, and is notified of the charges.”<sup>72</sup> The ordinary meaning of the word *appear* indicates that it means to be present in a place, e.g., *to show up*<sup>73</sup> or *to attend or be present*.<sup>74</sup> The legal meaning of the word *appear* or *appearance* means *coming into court as a party or interested person*,<sup>75</sup> *to stand in the presence of some authority, tribunal*,<sup>76</sup> or *to present oneself formally in court*.<sup>77</sup> The ordinary meanings of these words are unambiguous and clear.
46. The provisions of Rule 57 further confirm that the initial appearance is to be carried out in person. “At the time of the initial appearance,”<sup>78</sup> the Co-Investigating Judges record the Charged Person’s identity, inform him of the charges, and of his rights to a lawyer and to remain silent.<sup>79</sup> Vitally, the Co-Investigating Judges “shall take [a] statement immediately” if the Charged Person agrees.<sup>80</sup> A Charged Person may invoke his right to

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<sup>71</sup> VCLT, Art. 31(1).

<sup>72</sup> Rules, Glossary (emphasis added).

<sup>73</sup> See the definition of *appear* in the Merriam-Webster Dictionary, available at <http://www.merriam-webster.com/dictionary/appear>.

<sup>74</sup> See the definition of *appear* at Cambridge Dictionaries Online, available at <http://dictionary.cambridge.org/dictionary/british/appear>.

<sup>75</sup> BLACK’S LAW DICTIONARY, at 113.

<sup>76</sup> See the definition of *appear* in the Webster Dictionary, available at <http://www.webster-dictionary.org/definition/Appear>.

<sup>77</sup> See the definition of *appear* in the Oxford Dictionaries, available at <http://www.oxforddictionaries.com/definition/english/appear>. See also the definition of *appear* in the Collins Dictionary, available at <http://www.collinsdictionary.com/dictionary/english/appear?showCookiePolicy=true>.

<sup>78</sup> Rule 57(1).

<sup>79</sup> These procedures were followed by the Co-Investigating Judges, for example, when Mr. KANG Guek Eav alias Duch, Mr. NUON Chea, and Mr. IENG Sary were charged under Rule 57 after in-person initial appearances. *Case of KANG Guek Eav alias Duch*, 001/18-07-2007/ECCC/OCIJ, Written Record of Initial Appearance of KANG Guek Eav alias Duch, 31 July 2007, E3/915; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, Written Record of Initial Appearance of NUON Chea, 19 September 2007, E3/54; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, Written Record of Initial Appearance of IENG Sary, 12 November 2007, E3/92.

<sup>80</sup> Rule 57(1).

remain silent at his initial appearance and refuse to give a statement, as is his right under Rule 57. This refusal does not negate the requirement that the Charged Person first must appear before the Co-Investigating Judges. The Charged Person also must give his address to the Co-Investigating Judges if he is not detained after the initial appearance.<sup>81</sup> If an in-person appearance is not required, there would be no reason to have drafted Rule 57 to include the right to make an immediate statement and the requirement to inform the Co-Investigating Judges of one's address.

47. Co-Investigating Judge Harmon interprets Rule 81 in such a way as to support his pre-existing conclusion that Rule 57 does not require an in-person initial appearance. Rule 81(4) permits trials *in absentia* when the accused, “*following an initial appearance*,” refuses, or fails to attend, or is expelled from, the proceedings. Rule 81 thus makes an initial appearance a *pre-condition* to holding a trial *in absentia*.
48. Rule 81 and Rule 57 relate to different stages of the proceedings: Rule 81 relates to the trial stage and Rule 57 to the pre-trial stage. The exceptions in Rule 81 cannot be used to infer the existence or lack of procedural rules at the pre-trial stage. Statutory exceptions must be construed narrowly, especially in civil law systems, which rely on codified rules and procedures.<sup>82</sup> An initial appearance must be held in person. There is no exception.

**b. Harmon erred in his application and interpretation of  
Cambodian procedural rules**

49. The CCPC only applies where a question arises that is not addressed by the Rules.<sup>83</sup> As demonstrated above, that is not the case here. The Rules, when properly interpreted in light of the ECCC's civil law nature, do not permit charging *in absentia*. Co-Investigating Judge Harmon erred in considering the CCPC.<sup>84</sup>

50. Co-Investigating Judge Harmon cites CCPC provisions relating to the trial stage of

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<sup>81</sup> Rule 57(3).

<sup>82</sup> French Constitutional Council, 27 July 2006, Decision No. 2006-540 DC, *Review of constitutionality of the Act pertaining to copyrights and related rights in the information society*, para. 9 (official translation): “Parliament must exercise to the full the powers vested in it by the Constitution ...; the full exercise of this power ... place[s] it under a duty to enact provisions which are sufficiently precise and unequivocal; protection must be afforded to all from interpretations which run counter to the Constitution or from the risk of arbitrary decisions, without leaving it to Courts of law or Administrative authorities to lay down rules which the Constitution provides should be the sole preserve of statute law.” Available at [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2006540DCen2006\\_540dc.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2006540DCen2006_540dc.pdf).

<sup>83</sup> Decision on NUON Chea's Appeal Against Annulment Order, para. 15.

<sup>84</sup> Impugned Decision, para. 39.

proceedings to support his conclusion that initial appearances can be held *in absentia*.<sup>85</sup> Such references are improper. Procedural rules relating to the trial stage cannot be extended by analogy to the investigative stage.<sup>86</sup>

51. Co-Investigating Judge Harmon ignores CCPC provisions that address initial appearances. These provisions provide that where a suspect is validly summoned to an initial appearance, such an appearance must be done in person. Article 143 of the CCPC relates to a person making an initial appearance before an investigating judge. It parallels Rule 57, providing, in relevant part:

*When an accused person appears for the first time, the investigating judge shall check his/her identity, inform him/her of the act which has been charged and the type of offense as defined by law. The investigating judge shall tell the accused person that he/she is free whether to answer or not. The notation on the statement shall be written in the record on the first appearance.*

*If the accused person wants to answer, the investigating judge shall take the statement immediately.*<sup>87</sup>

52. The ordinary meaning of Article 143 requires an in-person initial appearance, primarily to allow the investigating judge to take the accused person's statement immediately, if necessary. Article 241, regarding the first appearance record, supports this interpretation of Article 143. Article 241 requires that the investigating judge, court clerk, and the "concerned person" sign each page of the first appearance record. The record must note the accused's address and that the accused was informed of the charges and his right to make a statement. Any statement by the accused as to the charges also is recorded. Article 143, when read together with Article 241, conclusively envisages an accused person making his first appearance *in person* before the investigating judge.

53. There is no provision in the CCPC for proceeding with an initial appearance *in absentia* where an arrest warrant has not been executed and the Judicial Police have not notified

<sup>85</sup> See, e.g., CCPC, Arts. 333, 351, 361-62.

<sup>86</sup> The prohibition against analogy stems from the principle *nullem crimen sine lege, nulla poena sine lege* (no crime without law, no punishment without law), forming part of legislative and interpretive principles that require criminal statutes to be: "drafted with precision (the principle of specificity), to be strictly construed without extension by analogy, and to have ambiguities resolved in favor of the accused (the principle of lenity or *in dubio pro reo*)." Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 119 GEORGETOWN L.J. 121 (2008), available at <http://georgetownlawjournal.org/files/pdf/97-1/VanSchaack.PDF>.

<sup>87</sup> Emphasis added.

the investigating judge of any difficulties in performing their mission.<sup>88</sup> The drafters of the CCPC must be presumed to have acted intentionally when drafting the CCPC. When the CCPC is properly interpreted in light of its civil law underpinnings<sup>89</sup> and the purpose of an initial appearance, the only reasonable conclusion is that the CCPC does not permit initial appearances *in absentia*.

54. Co-Investigating Judge Harmon refers to irrelevant Cambodian newspaper articles regarding trials *in absentia*.<sup>90</sup> Newspaper articles are not a source of ECCC or Cambodian law or procedure<sup>91</sup> and are readily distinguishable from Mr. MEAS Muth's situation. Unlike the accused in the articles, Mr. MEAS Muth has not absconded or fled.

55. Co-Investigating Judge Harmon has misinterpreted and misapplied the CCPC. A careful, comprehensive reading indicates that (validly constituted) initial appearances must be held in person and that a suspect cannot be charged *in absentia*. Co-Investigating Judge Harmon erred in law in his interpretation and application of the Cambodian rules.

**c. Co-Investigating Judge Harmon misinterprets French criminal procedural rules regarding initial appearances**

56. Co-Investigating Judge Harmon found that his conclusion that *in absentia* proceedings are permitted in Cambodia is consistent with French law. He interpreted Articles 134<sup>92</sup> and 176 of the FCCP<sup>93</sup> as providing that, after a reported fruitless search by the police, a suspect may be charged in his absence.<sup>94</sup> His interpretation of the FCCP is incorrect.

57. Co-Investigating Judge Harmon elides the distinction in the FCCP between an initial appearance and being placed under judicial examination, which are two separate

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<sup>88</sup> CCPC, Art. 199.

<sup>89</sup> See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC71), Decision on IENG Sary's Appeal against CIJ's Decision refusing to accept the filing of IENG Sary's response to the Co-Prosecutors' Rule 66 Final Submission and additional observations, and request for stay of proceedings, 20 September 2010, D390/1/2/4, para. 17. See also *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/SCC, Decision on Civil Party Lead Co-Lawyers' Requests Relating to the Appeals in Case 002/01, 26 December 2014, F10/2, para. 13.

<sup>90</sup> Impugned Decision, para. 40.

<sup>91</sup> Co-Investigating Judge Harmon appears to acknowledge this by stating that he relied on these articles for the sole purpose of ascertaining that trials *in absentia* have occurred in Cambodia. *Id.*

<sup>92</sup> Article 134 of the FCCP provides, where a person cannot be arrested in connection with an arrest warrant, "an official report of the fruitless search is sent to the judge who issued the warrant. The person concerned is then considered to be placed under judicial examination for the purposes of article 176."

<sup>93</sup> Code of Criminal Procedure, updated as of January 2006 (official translation), available at [www.legifrance.gouv.fr/content/download/1958/13719/.../Code\\_34.pdf](http://www.legifrance.gouv.fr/content/download/1958/13719/.../Code_34.pdf).

<sup>94</sup> Impugned Decision, para. 41, n. 44.

processes.<sup>95</sup> An initial appearance under the FCCP is akin to the Rule 57 initial appearance. Being placed under judicial examination, in contrast, is akin to issuance of a Closing Order under Rule 67. When a person is placed under judicial examination, the investigating judge examines whether there exist charges that constitute an offense and the legal qualification of the offense.<sup>96</sup> Initial appearances must occur in person, whereas a person may be placed under judicial examination *in absentia*, under certain conditions.

58. Article 80-1 of the FCCP addresses the process of placing a person under judicial examination, providing, in relevant part:

[The investigating judge] may proceed with the placement under judicial examination *only after* having previously heard the observations of the person or having given him the opportunity to be heard, when accompanied by his advocate, either in the manner provided by article 116 on questioning at first appearance, or as an assisted witness under the provisions of articles 113-1 to 113-8.<sup>97</sup>

The investigating judge may notify a person in writing that he will be called for an Article 116 initial appearance. This notification shall “[make] plain that a placement under judicial examination *may not take place until after the person’s first appearance before the investigating judge.*”<sup>98</sup>

59. Article 116 of the FCCP mirrors Rule 57 in its intent and purpose. At the initial appearance, the investigating judge confirms the person’s identity and informs him of the charges for which placement under judicial examination is being contemplated, as well as his rights to an advocate, to remain silent, and to make a statement or be interrogated.<sup>99</sup> After recording the person’s statements or carrying out an interrogation, and hearing from the advocate, the investigating judge informs the person either: **a.** he is not placed under judicial examination (in which case the person will have the rights of an assisted witness as the investigation continues);<sup>100</sup> or **b.** he is placed under judicial examination (in which case he will be informed of his rights in relation to the judicial investigation).<sup>101</sup> As with

<sup>95</sup> See, e.g., Article 116 of the FCCP as compared to Articles 80-1 and 176 of the FCCP.

<sup>96</sup> FCCP, Art. 176.

<sup>97</sup> Emphasis added. Pursuant to Article 80-1, first paragraph, a person may be placed under judicial examination only when “there is strong and concordant evidence making it probable that they may have participated, as perpetrator or accomplice, in the commission of the offences [the investigating judge] is investigating.”

<sup>98</sup> FCCP, Art. 80-2 (emphasis added).

<sup>99</sup> *Id.*, Art. 116, paras. 2, 4.

<sup>100</sup> The status of *assisted witness* does not exist at the ECCC. An assisted witness is any person named in a prosecutor’s initial or subsequent submission, or in a complaint, and who is not under judicial examination. FCCP, Art. 113-1, 113-2.

<sup>101</sup> *Id.*, Art. 116, para. 5.

Rule 57, the primary purpose of the initial appearance is to allow the investigating judge to hear the suspect's observations as to the charges being investigated.

60. While a person may be placed under judicial examination *in absentia* (provided the police have submitted a report of fruitless search to the judge), the person must still make an initial appearance before the investigating judge. Co-Investigating Judge Harmon erred in his interpretation of the FCCP.

### **3. Co-Investigating Judge Harmon erroneously and selectively applied international jurisprudence and procedural rules**

#### **a. The International Covenant on Civil and Political Rights ("ICCPR") and the European Convention on Human Rights ("ECHR")**

61. Co-Investigating Judge Harmon cites commentary and jurisprudence from the Human Rights Committee ("HRC")<sup>102</sup> and the European Court of Human Rights ("ECtHR")<sup>103</sup> to find that the ICCPR<sup>104</sup> and the ECHR<sup>105</sup> permit trials *in absentia* under certain circumstances. The commentary and jurisprudence are irrelevant. They relate solely to the trial stage, and are of no merit regarding the procedures for a pre-trial initial appearance at the ECCC.
62. Co-Investigating Judge Harmon quotes from the HRC's General Comment 13, replaced in 2007 by General Comment 32,<sup>106</sup> to state "[w]hen exceptionally for justified reasons trials *in absentia* are held, strict observance of the rights of the defence is all the more necessary."<sup>107</sup> This quote relates to the importance of an accused's right to defend himself at trial through counsel. It is not instructive as to whether a person can be charged in his

<sup>102</sup> Impugned Decision, paras. 43-44, citing *Mbenge v. Zaire*, 25 March 1983 ("Mbenge Decision"), U.N. Doc. CCPR/C/18/D/16/1977, para. 14.1, and Human Rights Committee, General Comment No. 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev.1 at 14 (1994), para. 11.

<sup>103</sup> Impugned Decision, para. 45, citing *Lala v. The Netherlands*, Eur. Ct. H.R. 14681/89, 22 September 1994 ("Lala v. The Netherlands"), para. 33; *Krombach v. France*, Eur. Ct. H.R. 29731/96, 13 May 2001 ("Krombach v. France"), para. 84; and *Sejdovic v. Italy*, Eur. Ct. H.R. 56581/00, 1 March 2006 ("Sejdovic v. Italy"), para. 69.

<sup>104</sup> International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976 in accordance with Article 49.

<sup>105</sup> European Convention on Human Rights, entry into force 12 September 1970, as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13.

<sup>106</sup> See Human Rights Committee, General Comment No. 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, U.N. Doc. CCPR/C/GC/32, 23 August 2007, para. 1: "This general comment replaces general comment No. 13 (twenty-first session)."

<sup>107</sup> Impugned Decision, para. 44.

absence, regardless of whether counsel is present.

63. None of the cases cited by Co-Investigating Judge Harmon address the question of whether an initial appearance can be held in the absence of the suspect. *Mbenge v. Zaire* addresses whether the State took sufficient measures to notify the complainant of two trials prior to holding the trials *in absentia*, convicting him, and twice sentencing him to death.<sup>108</sup> *Lala v. The Netherlands* and *Krombach v. France* address whether an accused has the right to be represented by counsel during a trial or hearing held in his (voluntary) absence.<sup>109</sup> *Sejdovic v. Italy* addresses whether, where an accused has not been officially notified, he can be regarded as having been sufficiently aware of his prosecution and trial to decide to waive his right to appear in court, or to evade justice.<sup>110</sup>

## **b. The *ad hoc* tribunals and the ICC**

### **i. The Special Tribunal for Lebanon (“STL”)**

64. Co-Investigating Judge Harmon cites STL procedures and jurisprudence permitting trials *in absentia* under certain conditions.<sup>111</sup> He fails to consider the STL’s unique context and cites procedural rules irrelevant to whether an initial appearance can be held *in absentia*.

65. The STL was created to investigate and prosecute alleged perpetrators of a 14 February 2005 bombing that killed the former Lebanese Prime Minister, Rafik Hariri.<sup>112</sup> From the start, the United Nations (“UN”) and the then Lebanese Prime Minister faced significant obstacles from within Lebanon and from Syria.<sup>113</sup> The UN Security Council had to unilaterally establish the STL.<sup>114</sup> Hezbollah leadership publicly denounced the STL, refusing to allow its members to appear before the tribunal.<sup>115</sup> The STL Statute and the

<sup>108</sup> *Mbenge* Decision, paras. 14.1-14.2.

<sup>109</sup> *Lala v. The Netherlands*, paras. 25-26, 30; *Krombach v. France*, para. 69.

<sup>110</sup> *Sejdovic v. Italy*, para. 98.

<sup>111</sup> Impugned Decision, paras. 46-50, citing Article 22 of the STL Statute and Rule 106 of the STL RPE.

<sup>112</sup> U.N. Security Council Resolution 1757 (2007), U.N. Doc. S/RES/1757 (30 May 2007). The mandate was eventually expanded to include 17 other terrorist acts that occurred before and after the 14 February 2005 bombing. U.N. Secretary General, Letter dated 12 July 2007 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2007/424 (12 July 2007).

<sup>113</sup> Syria exerted considerable, heavy-handed political influence within the Lebanese government, “going beyond the reasonable exercise of cooperative or neighbourly relations.” Report of the Fact-Finding Mission to Lebanon Inquiring into the Causes, Circumstances and Consequences of the Assassination of Former Prime Minister Rafik Hariri, 24 March 2005, p. 2. Syrian President Bashar Al-Assad warned the UN Secretary-General that establishing the STL would have “grave consequences that could not be contained within Lebanon.” William Harris, *Lebanon’s Day in Court*, FOREIGN AFFAIRS, 30 June 2011.

<sup>114</sup> U.N. Security Council Resolution 1757 (2007), U.N. Doc. S/RES/1757 (30 May 2007).

<sup>115</sup> See, e.g., Erich Follath, *New Evidence Points to Hezbollah in Hariri Murder*, DER SPIEGEL, 23 May 2009, p. 4: “The leader of [Hezbollah], which, despite its formal recognition of the democratic rules of the game, remains

Rules of Procedure and Evidence (“RPE”) were drafted in this context and, with these pre-existing obstacles in mind, included explicit provisions for trials *in absentia*.<sup>116</sup>

66. In contrast to other hybrid and internationalized tribunals, the STL has a unique provision relating to an accused’s absence because of the failure of State authorities to deliver him to the STL.<sup>117</sup> The STL also does not require that an accused be personally served with notice of an indictment but permits service by publication in local media or communication to the accused’s State of residence or nationality.<sup>118</sup>
67. The STL’s indictment procedures conflict with HRC and ECtHR jurisprudence. In *Maleki v. Italy*, the State’s assumption that the complainant’s lawyer (the only person the State notified) informed him of the impending trial was found to be inadequate. The HRC found it “incumbent on the court ... to verify that the author had been informed of the pending case before proceeding to hold trial *in absentia*.”<sup>119</sup> In *Mbenge v. Zaire*, while acknowledging that there are limits to the efforts required of State authorities to contact an accused, the HRC found a violation of the ICCPR where a summons was issued three days before the trial, with no effort to send it to the accused’s known address, and the State did not challenge the complainant’s contention that he learned of the trial only through post-trial press reports.<sup>120</sup> “Serving” an accused with an indictment by way of publication in local media or delivery to the State of residence is insufficient without evidence that the accused knew of the pending trial and his right to waive his presence.
68. At the STL, an accused need not have appointed counsel to represent him before a trial proceeds *in absentia*.<sup>121</sup> If the accused is deemed to have refused or failed to appoint counsel, the STL’s Defence Office can appoint a lawyer (regardless of whether the lawyer

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on the US’s list of terrorist organizations, probably anticipates forthcoming problems with the UN tribunal. In a speech in Beirut, Nasrallah spoke of the tribunal’s ‘conspiratorial intentions’; Nicholas Blanford, *Lebanon tribunal makes risky bid to try Hezbollah for Hariri killing*, CHRISTIAN SCIENCE MONITOR, 15 January 2014: “Hezbollah has slammed the tribunal as a Western and Israeli plot to ‘tarnish the image’ of the party because of its anti-Israel credentials. It has refused to turn over the five Hezbollah men: Mustapha Badreddine, Salim Ayyash, Hussein Oneissi, Assad Sabra, and Hassan Merhi.”

<sup>116</sup> See STL Statute, Art. 22(1); STL RPE, Rule 106.

<sup>117</sup> In such a case, before holding a trial *in absentia* the Trial Chamber must: **a.** consult with the President and ensure that all necessary steps have been taken to ensure the accused’s participation in the proceedings; and **b.** ensure that the requirements of Article 22(2) of the STL Statute have been met. STL RPE, Rule 106(B).

<sup>118</sup> STL Statute, Art. 22(2)(a); STL RPE, Rule 76 *bis*.

<sup>119</sup> *Maleki v. Italy*, 15 July 1999, U.N. Doc. CCPR/C/66/D/669/1996, para. 9.4.

<sup>120</sup> *Mbenge* Decision, para. 14.2. See also *Sejdovic v. Italy*, paras. 89, 99-101.

<sup>121</sup> STL Statute, Art. 22(2)(a).



has spoken to or met with the accused).<sup>122</sup>

69. Accused before the STL are being tried without ever appearing in court, likely without appointing or meeting with their defence counsel, with notification of the trial deemed to have occurred simply because the indictment was published in a local newspaper.<sup>123</sup> STL procedures are unique and must be limited to the Lebanese context.
70. The STL is the only example of a modern hybrid or internationalized tribunal or international court where an accused can be tried and convicted without appearing in court.<sup>124</sup> The International Criminal Court (“ICC”) and ICTY prohibit trials *in absentia*.<sup>125</sup> The ICTR and the Special Court for Sierra Leone (“SCSL”) – like the ECCC – permit trials *in absentia* under certain conditions, *provided the accused has made an initial appearance before a judge*.<sup>126</sup> The STL’s *in absentia* procedures are a poor example and cannot – and should not – be extended to the ECCC.
71. Co-Investigating Judge Harmon cites three decisions from the STL Trial Chamber and Appeals Chamber permitting trials *in absentia*.<sup>127</sup> These decisions are irrelevant to Mr. MEAS Muth. They relate to the trial phase, not to the pre-trial phase, and are easily distinguishable from Mr. MEAS Muth’s situation. In *Prosecutor v. Ayyash et al.* and *Prosecutor v. Merhi*, the Trial Chamber held that the trials could proceed *in absentia* because the accused had absconded and all reasonable steps had been taken to inform them of the proceedings and secure their appearance in court.<sup>128</sup>
72. Mr. MEAS Muth has not absconded. Co-Investigating Judge Harmon confirmed as much in finding that he “is satisfied that [Mr. MEAS] Muth is not in hiding.”<sup>129</sup> Mr. MEAS Muth’s place of residence is known to Co-Investigating Judge Harmon and to the Judicial

<sup>122</sup> *Id.*, Art. 22(2)(c).

<sup>123</sup> See Chris Jenks, *Notice Otherwise Given: Will in Absentia Trials at the Special Tribunal for Lebanon Violate Human Rights?*, 33 FORDHAM L. J. 57, 66-67 (2009).

<sup>124</sup> Article 12 of the 1945 Charter of the International Military Tribunal at Nürnberg permitted proceedings to occur in a person’s absence “if [the person] had not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.”

<sup>125</sup> Rome Statute, Art. 63(1); Updated Statute of the International Criminal Tribunal for Yugoslavia (“ICTY Statute”), Art. 20, 21(4)(d); ICTY RPE, Rule 80(B).

<sup>126</sup> ICTR RPE, Rule 82 bis; SCSL RPE, Rules 60-61.

<sup>127</sup> Impugned Decision, para. 50, n. 54-55.

<sup>128</sup> *Prosecutor v. Ayyash et al.*, STL-11-01/I/TC, Decision to Hold Trial *In Absentia*, 1 February 2012, paras. 25, 68-70, 107-111; *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; *Prosecutor v. Mehri*, STL-13-04/I/TC, Decision to Hold Trial *In Absentia*, 20 December 2013, paras. 85, 111.

<sup>129</sup> Impugned Decision, para. 66.

Police.<sup>130</sup> The measures taken by Co-Investigating Judge Harmon to secure Mr. MEAS Muth's appearance before him do not approach in scope or number the measures taken by the STL and Lebanese authorities.<sup>131</sup> Co-Investigating Judge Harmon erred in law in his interpretation and application of STL procedural rules and jurisprudence.

## ii. The ICTY and the ICTR

73. Co-Investigating Judge Harmon cites Rule 61 of the ICTY and ICTR RPE to find that *in absentia* proceedings are possible at these tribunals.<sup>132</sup> Under Rule 61, a Trial Chamber reviews and confirms an indictment (*after* the indictment was confirmed by a Judge under Rule 47) when an arrest warrant has been issued for an accused but not yet executed. Rule 61 is irrelevant to an initial appearance at the ECCC.

74. A Rule 61 hearing *is not* the equivalent of an initial appearance; it would more closely resemble a hearing before the ECCC Trial Chamber to confirm the Closing Order.<sup>133</sup> Before a Rule 61 hearing can be held, all reasonable steps must have been taken to execute the arrest warrant<sup>134</sup> and to ascertain the whereabouts of the accused if they are unknown.<sup>135</sup> At a Rule 61 hearing, the Prosecutor submits the indictment to the Trial Chamber together with all of the evidence presented to the Judge who initially confirmed the indictment.<sup>136</sup> Witnesses may be summoned to appear and testimony taken.<sup>137</sup> If the indictment is confirmed, the case proceeds to trial. In *Nikolić*, for example, the Rule 61 hearing lasted for five days, during which time 15 witnesses were called to testify.<sup>138</sup> At the *Karadžić and Mladić* Rule 61 hearing, the Trial Chamber confirmed the indictment after "review[ing] all the evidence submitted to the Confirming Judge, as well as the additional material produced during the hearing" and "the witnesses who had been called

<sup>130</sup> See *id.*, paras. 62, 66.

<sup>131</sup> See *infra* Section V.B.5 for a more detailed discussion of Co-Investigating Judge Harmon's efforts to secure Mr. MEAS Muth's appearance before him.

<sup>132</sup> Impugned Decision, para. 51.

<sup>133</sup> The Rules do not provide for such a hearing at the ECCC, further illustrating the differences between (and resulting irrelevance of) ICTY and ICTR procedures compared to ECCC procedures.

<sup>134</sup> ICTY RPE, Rule 61(A)(i); ICTR RPE, Rule 61(A)(i).

<sup>135</sup> ICTY RPE, Rule 61(A)(ii); ICTR RPE, Rule 61(A)(ii).

<sup>136</sup> ICTY RPE, Rule 61(B); ICTR RPE, Rule 61(B).

<sup>137</sup> ICTY RPE, Rule 61(B); ICTR RPE, Rule 61(B).

<sup>138</sup> United Nations General Assembly, *Report of the [ICTY]*, U.N. Doc. A/51/292, S/1996/665, 51<sup>st</sup> session, 16 August 1996, para. 51, available at [http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual\\_report\\_1996\\_en.pdf](http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_1996_en.pdf).

and interviewed by the Prosecutor and two amici curiae.”<sup>139</sup>

75. At the ECCC, there is no similar hearing for a Rule 57 initial appearance. No witnesses are called to testify. The Office of the Co-Prosecutors presents no evidence. The Co-Investigating Judges do not review all of the evidence. The only person who gives a statement is the Charged Person, if he so chooses. After an initial appearance, the judicial investigation continues. The case does not automatically proceed to trial.

76. A Rule 61 confirmation of indictment hearing cannot be analogized to a Rule 57 initial appearance and does not support charging a suspect *in absentia*. Co-Investigating Judge Harmon has yet again misapplied international procedural rules and erred in law.

### iii. The ICC

77. Co-Investigating Judge Harmon cites procedures relating to confirmation of charges hearings at the ICC as support for charging persons *in absentia* at the ECCC.<sup>140</sup> Co-Investigating Judge Harmon misconstrues and misapplies the Rome Statute and ICC RPE.<sup>141</sup>

78. Co-Investigating Judge Harmon wholly ignores Article 60 of the Rome Statute, which refers to *initial proceedings* before the court and closely resembles a Rule 57 initial appearance at the ECCC. Under Article 60, a person makes his first appearance before a Pre-Trial Chamber either voluntarily or pursuant to a summons or execution of an arrest warrant.<sup>142</sup> The Pre-Trial Chamber satisfies itself that the person has been informed of the alleged crimes and his rights,<sup>143</sup> and sets a date for the confirmation of charges hearing.<sup>144</sup>

<sup>139</sup> *Prosecutor v. Karadžić & 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. 2. *See also Prosecutor v. Karadžić & Mladić*, IT-95-5-R61 and IT-95-18-R61, Transcript, 11 July 1996, p. 919. As Co-Investigating Judge Harmon himself has noted in relation to the *Karadžić and Mladić* Rule 61 hearing: “A Rule 61 hearing is not intended to be a trial in absentia. It is a hearing to satisfy your Honours that there are reasonable grounds for believing that both of the accused have committed any or all of the crimes alleged in the respective indictments and, if satisfied, to take steps necessary to secure the eventual appearance of [the Accused]...” *Prosecutor v. Karadžić & Mladić*, IT-95-5-R61 and IT-95-18-R61, 8 July 1996, Transcript, p. 893.

<sup>140</sup> Impugned Decision, para. 52. *See* Rome Statute, Art. 61; ICC RPE, Rules 124-25.

<sup>141</sup> The ICC’s legal framework cannot be wholly inserted into the ECCC context. As with the STL, ICTY, and ICTR, the ICC reflects common law principles. For example, the Prosecutor directs investigations and may interview suspects. Rome Statute, Art. 42(1), 54(3)(b).

<sup>142</sup> Rome Statute, Art. 60(1). As Rule 121(1) of the ICC RPE provides: “A person subject to a warrant of arrest or a summons to appear under article 58 *shall appear before* the Pre-Trial Chamber, in the presence of the Prosecutor, promptly upon arriving at the Court.”

<sup>143</sup> Rome Statute, Art. 60(1). *See also Prosecutor v. Ruto et al.*, ICC-01/09-01/11, Decision on the Motion by Legal Representative of Victim Applicants to Participate in Initial Appearance Proceedings, Pre-Trial Chamber

79. As Pre-Trial Chamber Judge Fernández de Gurmendi observed: “[The initial appearance] is not a trial nor is it a confirmation hearing. No evidence shall be taken nor shall it be presented. Neither will there be issues of guilt or innocence.”<sup>145</sup> *After an in-person initial appearance*, the case proceeds to the Article 61 confirmation of charges hearing, which indeed may be held *in absentia* under certain circumstances.<sup>146</sup>
80. Co-Investigating Judge Harmon disregarded relevant provisions of the Rome Statute and ICC RPE. Neither the Rome Statute nor the ICC RPE permits an initial appearance to be carried out *in absentia*. In applying irrelevant ICC procedural rules to the ECCC, Co-Investigating Judge Harmon committed an error of law.

**4. Assuming, *arguendo*, that the ECCC legal framework permits charging *in absentia*, Mr. MEAS Muth did not waive his right to be present at a validly constituted initial appearance**

81. Co-Investigating Judge Harmon found Mr. MEAS Muth was “informed of his initial appearance schedule ... but wilfully and intentionally failed to appear, thereby waiving his right to be present.”<sup>147</sup> Co-Investigating Judge Harmon erroneously construed the Notice of Non-Recognition of the Summons<sup>148</sup> as a waiver of the right to be present.
82. Mr. MEAS Muth did not waive his right to appear at an (validly constituted) initial appearance through the Notice of Non-Recognition of the Summons. The Notice of Non-Recognition of Summons records Mr. MEAS Muth’s objections to the validity of the Summons.<sup>149</sup> The primary purpose of making a record is to preserve errors for appeal, as “if it is not in the record, it did not happen.”<sup>150</sup> Mr. MEAS Muth’s exercise of his right to

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II, 30 March 2011, para. 6; *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Decision on Setting the Date for the Initial Appearance and Related Issues, Pre-Trial Chamber II, 22 March 2013, para. 9; *Prosecutor v. Kony et al.*, ICC-02/04-01/05, Decision on Setting the Date for the Initial Appearance of Dominic Ongwen and the Date for a Status Conference, Pre-Trial Chamber II, 21 January 2015, para. 6.

<sup>144</sup> ICC RPE, Rule 121(1).

<sup>145</sup> *Prosecutor v. Blé Goudé*, ICC-02/11-02/11, Initial Appearance Transcript, Pre-Trial Chamber I, 27 March 2014, p. 4-5.

<sup>146</sup> Rome Statute, Art. 61(2).

<sup>147</sup> Impugned Decision, para. 59.

<sup>148</sup> MEAS Muth’s Decision Regarding Summons; MEAS Muth’s Notice.

<sup>149</sup> See, e.g., MEAS Muth’s Notice.

<sup>150</sup> *Protect Our Water et al. v. County of Merced*, 110 Cal. App. 4th 362, 364 (2003). See also The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, Commission on Human Rights, *Note Verbale Dated 24 August 1984 from the Permanent Representative of the Netherlands to the United Nations Office at Geneva Addressed to the Secretary General*, 28 September 1984, U.N. Doc. E/CN.4/1985/4, para. 70, providing that “an adequate record of the proceedings shall be kept in all cases.”

make a record cannot be construed as waiving his fundamental right to be present at an initial appearance that is validly constituted, i.e., held by *both* Co-Investigating Judges.

83. The right to be present at an initial appearance belongs to Mr. MEAS Muth alone and is his alone to waive. Any waiver may be express or implied, but must be unequivocal.<sup>151</sup> There is no such waiver in the Notice of Non-Recognition of Summons. Where a waiver is implied, Mr. MEAS Muth must have been able to reasonably foresee the consequences of failing to appear.<sup>152</sup> Mr. MEAS Muth could not have reasonably foreseen that, in making a record of his objections to an invalid Summons, he would be deemed to have waived his right to appear for a valid initial appearance and would be charged *in absentia*. Co-Investigating Judge Harmon misconstrued the Notice of Non-Recognition of the Summons. He reached a patently incorrect conclusion that constitutes an error of fact.

**5. Assuming, *arguendo*, that the ECCC permits charging *in absentia*, Co-Investigating Judge Harmon did not take all reasonable measures to secure Mr. MEAS Muth's appearance**

84. Co-Investigating Judge Harmon found that he took all reasonable steps to ensure Mr. MEAS Muth's in-person initial appearance.<sup>153</sup> A review of Mr. MEAS Muth's situation and the Impugned Decision demonstrates the absurdity of this finding.

85. Where proceedings are permitted *in absentia*, all reasonable measures must be taken to secure an accused's appearance *where the accused has absconded or cannot be found*.<sup>154</sup> Here, Co-Investigating Judge Harmon knows where Mr. MEAS Muth resides<sup>155</sup> and does not consider that Mr. MEAS Muth is in hiding.<sup>156</sup> Mr. MEAS Muth has not absconded and can be found. He cannot be charged *in absentia*.

86. The Defence considers the measures cited by Co-Investigating Judge Harmon:

a. Between 15 September 2014 and the issuance of the Impugned Decision (on 3 March

<sup>151</sup> *Poitrimol v. France*, Eur. Ct. H.R. 14032/88, 23 November 1993, para. 31. *See also Prosecutor v. Nahimana et al.*, ICTR-99-59-A, Judgement, 28 November 2007, para. 109; *Mbenge* Decision, para. 14.1.

<sup>152</sup> *Sejdovic v. Italy*, para. 87 (internal citations omitted): "[B]efore an accused can be said to have implicitly, through his conduct, waived an important right under Article 6 of the [ECHR], it must be shown that he could reasonably have foreseen what the consequences of his conduct would be."

<sup>153</sup> Impugned Decision, para. 66.

<sup>154</sup> *See, e.g.*, Rome Statute, Art. 61(2).

<sup>155</sup> Impugned Decision, para. 12.

<sup>156</sup> *Id.*, para. 66.

2015), he liaised with the Judicial Police, requesting updates on the execution of an arrest warrant *for another Charged Person*,<sup>157</sup>

- b. Between 11 and 21 November 2014, *before Mr. MEAS Muth was served with the Summons for the initial appearance*<sup>158</sup> *and the Arrest Warrant was issued*,<sup>159</sup> Co-Investigating Judge Harmon and members of his staff conducted nine outreach programs as suggested by the Judicial Police, including in Mr. MEAS Muth's town;<sup>160</sup>
- c. On 30 January 2015, in response to the Judicial Police's statement that the decision on execution of the Arrest Warrant lay with the ECSC, Co-Investigating Judge Harmon wrote to the Chairman that Mr. MEAS Muth would be charged *in absentia* if he did not appear, or the Arrest Warrant was not executed, by 18 February 2015;<sup>161</sup>
- d. On 3 March 2015, having received no response to his letter and with the arrest warrant unexecuted, Co-Investigating Judge Harmon issued the Impugned Decision.

87. Only one of the steps that Co-Investigating Judge Harmon took (writing to the ECSC) occurred *after* Mr. MEAS Muth was served with the Summons and the Arrest Warrant was issued. Co-Investigating Judge Harmon improperly relied upon acts carried out in another case to justify acts in Mr. MEAS Muth's case. It is wholly inappropriate to use conduct in one case to assume facts and outcomes in another case.

88. The only step Co-Investigating Judge Harmon took that directly relates to Mr. MEAS Muth was writing to the ECSC regarding the Judicial Police's failure to execute the Arrest Warrant.<sup>162</sup> There is no indication in the Rules that sending this letter was Co-Investigating Judge Harmon's only recourse.

89. The Co-Investigating Judges could have travelled to Mr. MEAS Muth's town to hold the initial appearance in person. Co-Investigating Judge Harmon previously travelled to Mr.

<sup>157</sup> *Id.*, para. 61.

<sup>158</sup> The Summons was issued on 26 November 2014 and served upon Mr. MEAS Muth on 28 November 2014 at his residence. *See* Summons to Initial Appearance, 26 November 2014, A66; Written Record of Service of Summons, 5 December 2014, A66/1.

<sup>159</sup> The Arrest Warrant was issued on 10 December 2014. Arrest Warrant, 10 December 2014, C1.

<sup>160</sup> Impugned Decision, para. 62.

<sup>161</sup> *Id.*, paras. 63-65. *See also* ICIJ's Letter to H.E. Mr. Em Sam An, 30 January 2015, D127.

<sup>162</sup> The ECSC is the liaison between the ECCC and the Cambodian National Police. *See, e.g.*, Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Extraordinary Chambers in the Courts of Cambodia, Rule 12(7), in relevant part: "In an emergency the Chief of Detention may request assistance from the National Police through the Extraordinary Chambers Security Commission (ECSC)."

MEAS Muth's town to hold an outreach program.<sup>163</sup> There is no reason both Co-Investigating Judges could not have returned for an initial appearance.<sup>164</sup>

90. The Co-Investigating Judges could complained to the General Prosecutor of the Court of Appeal about the Judicial Police. The Judicial Police are auxiliary officers of the ECCC: members of the Cambodian Judicial Police or Gendarmerie assigned to the ECCC.<sup>165</sup> The Cambodian Judicial Police are under the purview of the General Prosecutor attached to the Court of Appeal.<sup>166</sup> Under the CCPC, any misconduct by the Judicial Police shall be reported by the prosecutor or investigating judge to the General Prosecutor for action.<sup>167</sup>
91. Once an Arrest Warrant has been given to the Judicial Police for execution, the Judicial Police must execute it or notify the Co-Investigating Judges of any difficulty in performing their mission.<sup>168</sup> There is no indication that Co-Investigating Judge Harmon received a report from the Judicial Police of any such difficulty. A statement from a Judicial Police representative that the ECSC renders the final decision regarding execution of the Arrest Warrant<sup>169</sup> is not an official report. There is no indication that either of the Co-Investigating Judges lodged a formal complaint with the General Prosecutor of the Court of Appeal.
92. *All* reasonable measures must be taken before a judge can proceed *in absentia*. Having failed to take all reasonable steps to secure Mr. MEAS Muth's appearance, Mr. MEAS Muth could not be charged *in absentia*. To do so was a patently incorrect conclusion of fact and an error of law.

## 6. Conclusion

93. Rule 57 does not permit a Suspect to be charged *in absentia*. The ordinary meaning of Rule 57 requires an in-person initial appearance. There is no *lacunae*, uncertainty, or inconsistency in Rule 57 that requires looking to Cambodian or international procedural rules. Cambodian and international procedural rules do not support Co-Investigating

<sup>163</sup> Impugned Decision, para. 12.

<sup>164</sup> Rule 55 permits Co-Investigating Judges to conduct on-site investigations; interviews of Suspects or Charged Persons are neither expressly nor impliedly excluded from the scope of these investigations.

<sup>165</sup> Rule 15(1); Rules, Glossary, definition of *Judicial Police*, p. 84.

<sup>166</sup> CCPC, Art. 59.

<sup>167</sup> *Id.*, Art. 64.

<sup>168</sup> Rule 45(3). This Rule mirrors Article 199 of the CCPC.


<sup>169</sup> *See* Impugned Decision, para. 24.

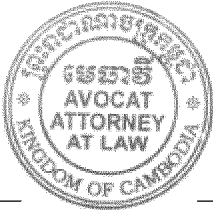
Judge Harmon's actions. The CCPC requires an in-person initial appearance. International rules relating to trials *in absentia* are irrelevant and, where such trials are permitted, require an accused to first make an initial appearance. Even if charging *in absentia* is permitted at the ECCC, Co-Investigating Judge Harmon could not so charge Mr. MEAS Muth. Mr. MEAS Muth has not absconded or fled. Co-Investigating Judge Harmon failed to take all reasonable measures to secure Mr. MEAS Muth's appearance before issuing the Impugned Decision. Co-Investigating Judge Harmon has acted *ultra vires*, erred in law, and reached patently incorrect conclusions constituting errors in fact. The Impugned Decision is invalid and must be vacated.

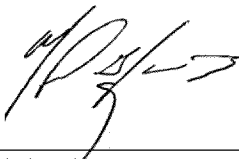
**WHEREFORE**, for all the reasons stated herein, the Defence respectfully requests the Chamber to:

- A. ADMIT this Appeal;
- B. FIND that Co-Investigating Judge Harmon erred in unilaterally issuing the Impugned Decision; and/or
- C. FIND that Co-Investigating Judge Harmon erred in charging Mr. MEAS Muth *in absentia*; and
- D. VACATE the Impugned Decision.

Respectfully submitted,

  
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 ANG Udom



  
 \_\_\_\_\_  
 Michael G. KARNAVAS

Co-Lawyers for Mr. MEAS Muth

Signed in Phnom Penh, Kingdom of Cambodia on this 16<sup>th</sup> day of **June, 2015**