



Inside guidelines of the phenomenal chambers in the courts of Cambodia (ECCC): Setting a case of the standard of law by overstepping the law?

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Abstract

This paper encapsulates an in-depth examination of the legality of the authority invoked by the Extraordinary Chambers in the Courts of Cambodia (ECCC) to create a set of rules of procedure and evidence known as the Internal Rules (IRs). In the void of public information pertaining to the ECCC's rationale for creating the IRs, this paper, in part, seeks to reconstruct the relevant judicial arguments and, to the greater extent, focuses on answering the question of which of the arguments put forward during the adoption process of the IRs should have been but were not entertained and accepted by the judicial panel to ensure the legality of the actions associated with the creation of the IRs. To this end, the paper extracts a statutory test which is used as the litmus test of the provisions of the IRs analyzed throughout the narrative. The application of this test, in the end, results in the separation of the provisions of the IRs *ab initio* identified as suspect into those for the adoption of which authority exists at the international level and those which the ECCC has invented *ultra vires* the law on the establishment of the ECCC and applicable international standards.

Keywords: Extraordinary chambers in the courts of Cambodia (ECCC), hybrid tribunals, *ultra vires* actions, internal rules (IRs), rules of procedure and evidence (RPE), international criminal law.

INTRODUCTION

What was to become a convoluted and politically charged process of prosecution of Cambodian Maoists, popularly known as the Red Khmers or the Khmer Rouge, began in 1979 at the inception of the People's Revolutionary Tribunal (hereinafter 'PRT') following the military takeover of Phnom Penh by Khmer Rouge defectors to Vietnam ushered in on the armor of a massive Vietnamese invasion force. The PRT convicted Democratic Kampuchea (official name of Cambodia during the Khmer Rouge regime) Prime Minister Pol Pot and Deputy Prime Minister for Foreign Affairs Ieng Sary of genocide,ⁱ and sentenced them to death and confiscation of property following a 3day proceeding held *in absentia* of the accused.ⁱⁱ Thereafter no significant efforts were mounted to prosecute the Khmer Rouge in a formal setting throughout the 1980s as the civil war between Democratic Kampuchea and the Vietnamese/Soviet-installed People's Republic of Kampuchea continued on.ⁱⁱⁱ During the negotiations which resulted in a peace agreement (1991) efforts were made not to use the terms 'genocide' and 'crimes' in reference to the Democratic Kampuchea period for fear of alienating the Democratic

Kampuchea group from the peace process.^{iv} As the peace agreement failed to end the civil war, a policy of encouragement of defections^v was engineered to weaken the Khmer Rouge militarily and politically. In 1997, as a matter of political expediency^{vi} - rather than that of justice - the then Co-Prime Ministers Norodom Ranariddh and Hun Sen^{vii} made a request to the United Nations for assistance in creating an international^{viii} tribunal to prosecute the Khmer Rouge. The UN responded to this by commissioning a expert report^{ix} on the conditions which existed in Cambodia to satisfy the Co-Prime Ministers' request and by beginning to change its language of reference to the impugned acts of the Khmer Rouge from "policies and practices of the past" to "serious violations of Cambodian and international law" and expressly attributing them to the Khmer Rouge.^x Following the coup d'état of July, 1997 and the deposition of Prince Norodom Ranariddh as Co-Prime Minister saw a weakening of the political will to prosecute the Khmer Rouge and the political necessity for this tapered off. Subsequently, the Cambodian government proposed a national tribunal funded from international sources to

which the UN objected arguing the array of weaknesses routinely attributed to the Cambodian judiciary as justification of its position.^{xi} A convoluted and emotionally charged process of negotiations followed and eventuated in a blueprint for a hybrid tribunal jointly funded by the Cambodian government and the United Nations and staffed with Cambodian (majority) and international (minority) personnel. This blueprint was originally codified as the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (hereinafter 'ECCC' or 'Extraordinary Chambers') for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (2001) and then amended to comply with the subsequently adopted 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 (2004). The eventual hammering-out of this blueprint paved the way for the establishment of the ECCC. The judges were sworn in in July 2006.

The process of adoption of the IRs commenced shortly after the swearing in of the ECCC judges^{xii} and resulted in a protracted debate which went on for eleven months^{xiii} and evinced a deep rift between the international judges of the ECCC and their Cambodian counterparts.^{xiv} The rift essentially developed around the measure of international standards which would be allowed to enter the canvass of the IRs.

This paper will posit that the measure of international standards in the ECCC proceedings were intended to be minimal and subject to a narrowly-crafted statutory test. To this end, this author will argue that the adoption of procedures which override the existing procedures established under Cambodian law can only be justified if such procedures have failed the statutory test set out in the law on the establishment of the ECCC. Consequently, it will be maintained that the Extraordinary Chambers have acted *ultra vires* in all instances where the creation of the new procedures was not necessitated by the existing one's inability to meet the requirements of the statutory test.

THE STATUTORY ADEQUACY TEST

The law on the establishment of the Extraordinary Chambers^{xv} stipulates that the proceedings before the Court be held on the basis of Cambodian law:

The procedure shall be in accordance with Cambodian law.^{xvi} And All Chambers of the Court] shall follow existing procedures in place.^{xvii}

This stipulation is reaffirmed in the ECCC IRs which from the outset restates the language of the law on the establishment:

Now therefore the ECCC have adopted the following Internal Rules, the purpose of which is to consolidate applicable Cambodian procedure for proceedings before the ECCC [...].^{xviii}

Foreseeing that the confines of existing Cambodian law might be stymieing for an endeavor such as the Extraordinary Chambers the law on the establishment provides for limited circumstances in which the application of international procedural standards is permissible:

Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may be also sought in procedural rules established at the international level.^{xx}

And

If these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards [the Chambers of the Court] may seek guidance in procedural rules established at the international level.^{xxi}

This regulatory approach to the limited circumstances in which resort to international procedures is permissible was expectedly corroborated in the ECCC IRs:

[...] and, pursuant to Articles 20 new, 23 new, and 33 new of the ECCC Law and Article 12(1) of the Agreement, to adopt additional rules where these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application, or if there is a question regarding their consistency with international standards.^{xxii}

Therefore, prior to resorting to the applicable procedural standards established at the international level, the law on the establishment mandates that the applicable means of Cambodian law be either exhausted or declared inadequate. The Extraordinary Chambers thus must satisfy a disjunctive statutory 3-prong test and demonstrate the existence of any one of the following circumstances: (a) the existing Cambodian procedure does not deal with the matter in question, (b) the Cambodian procedure deals with the matter in question, but there is uncertainty in the interpretation and/or application of the relevant procedures, (c) the Cambodian procedure deals with the matter in question, but the manner in which it does so is inconsistent with international standards.^{xxiii} The statutory construction of the statutory adequacy test evinces the legislature's intent to convey the political consensus^{xxiv} of granting primacy to Cambodian law while permitting a narrow window of resort to international standards confined to a set of enumerated circumstances.^{xxv} The authorization of resort to international standards raises, consequently, a question of the sources of international standards to which the Extraordinary Chambers is thus permitted to turn in case of a necessity justified by the test. The law on the establishment answers this question by expressly identifying the sources of international standards it understands as primary:

The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights.^{xxvi}

Due to the ambiguity of the term 'international standards', as envisaged by this law, it might be submitted that it exceeds the confines of the ICCPR and other relevant statutory instruments of international law, and thus is rendered sufficiently expansive to include such international non-statutory sources of criminal procedure as the rules of procedure and evidence of other international and hybrid tribunals, judicial doctrines relevant to criminal procedure, prominent academic writings, etc.^{xxvii}

This construction of the 'international standards' clause of this

law is problematic due to its expansiveness and potential diversity which, if unfettered, may engender the creation of rules and the issuance of decisions more often based on conflicting international authorities than not. This is, consequently, likely to adversely affect the intended^{xxviii} narrow construction of prong 3 of the adequacy test which permits resort to “international standards” in cases where the Cambodian procedure is inconsistent with such standards. In light of this and given the previously discussed underlying legislative intent of narrowness of the adequacy test, the only tenable interpretation of the meaning of the “international standards” clause left to a reasonable observer is that of a set of standards for which there is little or no contention at the international level and which have been broadly recognized as settled law.^{xxix}

The relative ease with which the foregoing resolves the issue of “inconsistency” accentuates the intricacies associated with the finding of a tenable interpretation for the “uncertainty of interpretation or application” clause of prong 2 of the adequacy test.

To attempt to achieve a resolution of the matter at hand it can be proffered that “uncertainty” can be viewed through the prisms of the objective and subjective tests.^{xxx} The objective test customarily entails a reasonable person’s attitude or action vis-à-vis the matter at hand, and as such is attributed to any person who comes into interaction with said matter. Applied to the circumstances of the “uncertainty of interpretation or application” clause, the objective test will determine whether a particular element of the Cambodian criminal procedure is so framed that it might arouse uncertainty of interpretation or application, if applied by a reasonable jurist. This can be, *inter alia*, ascertained through a baseline study of the particular suspect procedural element’s history of application. Such a study can be designed to determine whether uncertainty of the suspect procedural element’s interpretation or application has arisen in the past in the ordinary courts of Cambodia.^{xxxi}

The subjective test, on the contrary, routinely concerns itself with the beliefs and perceptions of the very persons who come into contact with the matter at hand, and who in the circumstances of the “uncertainty” clause are the judges of the Extraordinary Chambers. The subjective test therefore must examine whether in the opinion of such judges a particular element of the Cambodian criminal procedure is sufficiently ambiguous to raise concerns about the prospects of its efficacious application. Such concerns, however, cannot be raised by any number of judges short of a supermajority to maintain the general statutory rule of judicial decision-making^{xxxii} at the ECCC:

The judges shall attempt to achieve unanimity in their decisions. If this is not possible, the following shall apply:

- a) Decision by the Extraordinary Chamber of the trial court shall require the affirmative vote of at least four judges;
- b) A decision by the Extraordinary Chamber of the Supreme Court shall require the affirmative vote of at least five judges.^{xxxiii}

The Extraordinary Chambers therefore were in possession of two aforementioned tests whose conjunctive or disjunctive application could help determine whether the Court could satisfy itself with the existence of the circumstances of the “uncertainty” prong of the adequacy test. Barring such satisfaction the Extraordinary Chambers would remain confined to the impugned provision of the Cambodian criminal procedure.

Lastly and following the elected course of reverse order, it is submitted that the “existing Cambodian procedure does not deal with the matter in question” clause of prong 1 was intended to be read in the exact manner in which it appears in the law.

The scope of the matters which can be reasonably expected to be addressed in the Cambodian criminal procedure was by no means intended to be elastic, but limited to the matters of procedure a qualified observer would expect to find in a comparable judicial system (that is, a civil law system).^{xxxiv} It would thus be

abusive of the foregoing principle to attempt to supplement the existing Cambodian criminal procedure with the means of a judicial system alien to it (*i.e.*, a common law system).

THE COURT’S APPLICATION OF THE ADEQUACY TEST

Identification of the scope and substance of the analysis

The Extraordinary Chambers acknowledge the statutory adequacy test and its relevance to the ECCC IRs in the following:

Now therefore the ECCC have adopted the following Internal Rules, the purpose of which is to consolidate applicable Cambodian procedure for proceedings before the ECCC and, pursuant to Articles 20 new, 23 new, and 33 new of the ECCC Law and Article 12(1) of the Agreement, to adopt^{xxxvi} additional rules where these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application, or if there is a question regarding their consistency with international standards.^{xxxvii}

Given the Court’s admission of the statutory adequacy test as the underlying principle of the creation of the IRs, it is consequent to that admission that the Court is under an obligation to undertake a case-by-case analysis of the procedures under Cambodian law which are deemed suspect.

Relevant plenary sessions were held in 2006 and 2007^{xxxviii} the minutes of which were declared confidential^{xxxix} and not released to the public even after the adoption of the IRs on 12 June, 2007. The restriction of said minutes from the public domain can however be overcome, for the purposes of this examination, by adopting a piecemeal approach to the gathering of relevant information. The subsequent analysis will therefore draw from two principal sources: statements reported in the media and a comparative analysis of the IRs and the Cambodian criminal procedure.

The media covered the process of deliberations of the IRs somewhat sparsely particularly considering the length of this process.^{xl} A number of issues of contention were nonetheless revealed:

“We have resolved all of the matters that we indicated needed further discussion last November [2006]. One such complex issue has been how to ensure the rights and involvement of victims. While a familiar element of Cambodian law, this was not spelled out in detail in the ECCC Law and Agreement. [...] “We interpreted this to mean that victims have the right to join as civil parties. However, due to the specific character of the ECCC, we have decided that only collective, non-financial reparation is possible,” it added.^{xli}

A host of other broad areas of contention was revealed by the judges in an official statement and included the following:

How to integrate Cambodian law and international standards;
The role of the Defense Support Unit including the issue of how defense lawyers will be qualified;
The role of the Co-Prosecutors and its impact on the voting procedure;
How the Extraordinary court will operate within the Cambodian court structure.^{xlii}

In addition, another highly contentious issue arose toward the final stages of the deliberations of the IRs which was that of the membership fees^{xliii} imposed by the Bar Association of the Kingdom of Cambodia (hereinafter ‘BAKC’).^{xliiv}

In light of the above and in order to determine the substantive scope of the subsequent analysis, it is critical to note that the foregoing disagreements fall into two categories: (1) provisions of

the IRs associated with the institutional competence of the various organs of the Extraordinary Chambers, and (2) provisions of the IRs related to matters associated with the process. It is thus submitted that it is justifiable to exclude from this analysis matters of contention which fall within Category 1 on the ground of them dealing with the creation of court organs the existence of which is not envisaged by the Cambodian procedure, but is, arguably, prescribed by the law on the establishment. The remaining aspects of the disputed procedure for which there is corroboration from the sources selected for this examination therefore are limited to civil parties^{xlv}, rights and the rights of the accused in the process instituted by the ECCC. It is crucial to note at this stage that the subsequent analysis will include but will not be limited to the areas of judicial contention; as such, it will attempt to highlight every instance of discrepancy between the existing Cambodian procedure and the IRs.

The analysis

Civil parties' rights

This analysis will begin with an examination of a substantive area of contention established in the foregoing narrative, *i.e.*, civil party rights and civil party participation, and rights of the accused in the ECCC process.

The Cambodian procedure has customarily allowed for relatively broad civil party participation which was further expanded by the adoption of the new criminal procedure code (hereinafter 'Criminal Procedure Code of the Kingdom of Cambodia' or 'CPCoC') -- which occurred concurrently with the adoption of the ECCC IRs -- which granted civil parties a right to file a complaint at two levels of criminal proceedings: the pre-trial^{xlvi} and trial^{xlvii} levels. By filing a complaint or becoming a civil party to criminal proceedings, an allegedly injured party gains access to the right to claim compensation conferred upon him or her in the circumstances of success of the prosecution's case.^{xlviii} In such circumstances the Cambodian procedure assigns the civil liability for a criminal offense in the following manner:

[...] persons who are found liable for the same offense shall have joint liability for compensation of damages.^{xlix}

The Cambodian procedure further provides for measures which can be taken by the civil party to assert his or her right to compensation in a circumstance where the party declared civilly liable by court is unwilling or unable to make the requisite payment:

Imprisonment in lieu of payment shall be applicable against a person who has been found guilty by the criminal court and has not paid:

- (a) Fines;
- (b) Proceeding taxes;
- (c) Compensation and any damages to a civil party.¹

Prior to requesting that the civilly liable party be

imprisoned in lieu of payment of the compensation, the civil party must exhaust the following remedies:

The civil party must provide evidence that he has used all means of enforcement provided in the law such as seizing personal or real property. The prosecutor may ask the civil party to take additional steps to try to obtain payment for damages or compensation.ⁱⁱ

If the prosecutor is satisfied that all available and effective remedies have been exhausted, he or she can order imprisonment in lieu of payment. The fact of the imposition and service of an appropriate term of imprisonment, however, does not extinguish the compensation owed to the civil party by the civilly liable party.ⁱⁱⁱ

Even though the convicted person has served the imprisonment in lieu of payment, he shall remain to be in debt for the amount due. Nevertheless, he may not be imprisoned again for the same debt.^{liii}

It must be noted that the Cambodian procedure confers the foregoing rights in a manner which makes no distinction between offenses based upon the gravity or number of potential civil parties affected by the forbidden act. Furthermore, the Cambodian legislature elected not to provide for an ECCC exception in this case *ipso facto* rendering any approximation arguments untenable. In fact in a circumstance where the legislature intended to create such an exception it did so by adroitly separating *jus cogens* from other grave offenses under Cambodian criminal law and altering certain procedural and substantive aspects associated with such separation.^{liv} The foregoing exception was adopted for the benefit of the then anticipated proceedings before the ECCC as no other prosecutions based on *jus cogens* were foreseen at the time of the passage of the exception in question which necessitated such legislative action.

The following renders it apparent that the ECCC IRs have rejected the foregoing civil parties' right to compensation and considerably narrowed the scope of civil party participation:

Subject to Article 39 of the ECCC Law, the Chambers may award only collective and moral reparations to Civil Parties. These shall be awarded against, and be borne by convicted persons [...] such award may take the following forms:

- (a) An order to publish the judgment in any appropriate news or other media at the convicted person's expense;
- (b) An order to fund any non-profit activity or service that is intended for the benefit of Victims; or
- (c) Other appropriate and comparable forms of reparation.^{lv}

The IRs' reference to Article 39 of the ECCC Law

represents the Court's implicit assertion that no resort to the international standards is warranted in this circumstance due to the existence of a satisfactory provision to the said effect in the Cambodian procedure. Such assertion of the Court is most curious and erroneous as it states the following:

Those who have committed any crime as provided in Articles 3 new, 4, 5, 6, 7 and 8 shall be sentenced to a prison term from five years to life imprisonment. In addition to imprisonment, the Extraordinary Chambers of the trial court may order the confiscation of personal property, money, and real property acquired unlawfully or by criminal conduct. The confiscated property shall be returned to the State.^{lvi}

Contrary to the Court's assertion, the text of the preceding article bears no insignia of regulating civil liability within the Extraordinary Chambers, but that of the substantive aspect of the punishment which the legislature sought to prescribe. On a closer examination it becomes unambiguous that the legislature in fact consciously eschewed regulating the issue of civil liability thus leaving it to the existing Cambodian procedure: (1) the aforementioned adequacy test's application is limited to the issues of procedure which renders the test inapplicable to the substantive aspect of punishment set out in the delimiting language of the "in addition to imprisonment" clause; (2) the legislature only sought to prescribe the confiscation of property which the Extraordinary Chambers could link to the offenses of which an accused has been convicted (the "acquired unlawfully or by criminal conduct"); this is different from a blanket prescription of confiscation of a convicted person's property in whole which is a measure the legislature refrained from prescribing; (3) the property "acquired unlawfully or by criminal conduct" may or may not be the extent of assets owned by a convicted person; in case the latter is the case, the legislature has implicitly permitted the civil parties to claim the remainder of the convicted person's property as civil compensation by leaving this matter to the existing Cambodian procedure and cognizant that the latter provided for such practice. The foregoing *ergo* renders the Court's reading of Article 39 setting out grounds for creating a bar to monetary compensation erroneous and untenable. It is further maintained that the Court's resort to the language of Article 39 was undertaken as an attempt to recompense for the absence of a statutory outlet to the international standards for substantive issues which the Court desperately sought for political reasons in order to circumvent the unambiguous effect of the Cambodian procedure which allows civil parties to seek monetary compensation without restrictions.^{lvii} Moreover, had the Court been able to satisfy one of the prongs of the statutory adequacy test which would have given it a reason to examine the rules which regulate the matter at the international level, it

would have found out that there is no support for the course it has chosen. In fact the opposite finds broad, *albeit* variegated, support in international practice. The International Criminal Court (hereinafter 'ICC') expressly permits individual reparations which may be ordered by the Court.^{lviii} International Criminal Tribunal for the former Yugoslavia (hereinafter 'ICTY'),^{lix} the International Criminal Tribunal for Rwanda ('ICTR'),^{lx} the Special Court for Sierra Leone ('SCSL'),^{lxi} and the Special Tribunal for Lebanon (hereinafter 'STL')^{lxii} statutorily permit seeking reparations on the basis of their decisions in domestic courts thus deferring to national governments for handling of the issue of reparations. In response to this the Rwandan courts have recognized the rightfulness of claims in a number of cases and awarded "several hundreds of millions of Rwandan francs" which "have never been paid"^{lxiii}, the fact which nonetheless legally does not undermine 2 findings: (1) that reparations claims were granted; and (2) that the awards of reparations remain valid until paid in full.

Other discrepancies

This section will examine whether there are unreported discrepancies between a combination of the law which established the Extraordinary Chambers and the Cambodian criminal procedure (hereinafter 'the statutory means') and the text of the IRs. To this effect, the subsequent narrative will undertake a bifurcated approach to the said discrepancies into the instances of the use of extrastatutory means to create additional organs of the Court, and the instances of the use of the same to supplant rules established by the Cambodian procedure with those adopted at the international level.

Instances of the use of extrastatutory means to create additional organs of the ECCC:

The first category has been instantiated in the creation of two organs of the Court the existence of which was not statutorily envisaged. These organs are the Defense Support Section (hereinafter 'DSS')^{lxiv} and the Victims Unit (hereinafter 'VU')^{lxv} which the Court decreed that be established by the Office of Administration (hereinafter 'OA'). It is hereby contested that the authority to create these organs cannot be reasonably derived from the institutional powers set out in the law on the establishment.

In light of the above contention, it is illuminative to examine the provisions of the law on the establishment which spell out the powers of the OA. The ECCC Agreement identifies such powers as coordination of the settlement procedure in cases of dispute between the Co-Investigating Judges (hereinafter 'CIJs') and the Co-Prosecutors (hereinafter 'CPs'), convening the Pre-Trial

Chamber (hereinafter 'PTC') in the foregoing circumstances and to the foregoing effect, publication of the PTC's decision in the foregoing circumstances, overall management, recruitment of all international staff and all administration of the international components of the Extraordinary Chambers, the PTC, the CIJs, and CPs and the OA. The ECCC Law grants similar but slightly more expansive powers to the OA which comprise the hiring of Cambodian staff for the chambers in consultations with the Cambodian judges, the CPs, recruitment and management of all international staff, coordination of the settlement procedure in cases of dispute between the CIJs, between the CPs, and between the CIJs and the CPs, convening the Pre-Trial Chamber (hereinafter 'PTC') in the foregoing circumstances and to the foregoing effect, publication of the PTC's decision in the foregoing circumstances, overall management, and administration of the United Nations Trust Fund. Based on the above there is nothing in the language of the law on the establishment which would lead a reasonable reader to believe that there exists an explicit or implicit statutory power conferred upon the OA to establish extrastatutory autonomous organs within the Extraordinary Chambers.

In the vacuum of relevant provisions vesting the power to establish autonomous organs of the Court in the OA, such power could have been acquired through delegation from another ECCC organ which is vested with such power statutorily.

This is, however, unfeasible in the instant case as none of the ECCC organs whose establishment is statutorily prescribed is vested with the power to create additional autonomous organs within the Court. This renders the power to create autonomous organs of the Court, such as the DSS and the VU, spelled out in the IRs without statutory foundation thus constituting the product of a judicial action to this effect *ultra vires* the law on the establishment.

The aforementioned must not be misconstrued as a postulation that the services provided by the said autonomous organs are superfluous or irrelevant to the process as the opposite is the projected effect of the foregoing postulation.

The services that these organs are mandated to provide under the relevant provisions of the IRs, however, are not statutorily envisaged to be within the province of the Extraordinary Chambers, but are amply provided for in the existing codified Cambodian procedure and custom. *Ipsa facto*, the services provided by the DSS pursuant to the IRs lie within the province of BAKC whose statute encompasses the provision of the services akin to those vested in the DSS by the IRs; the services provided by the VU pursuant to the IRs equally belong outside of the province of the Extraordinary Chambers and within the statutory mandate of relevant institutions of civil society in accordance with the existing Cambodian procedure.

Instances of the use of extrastatutory means to supplant rules established by the Cambodian procedure

The second category encompasses the instances of substitution of the rules established under the Cambodian procedure with those which objectively or subjectively^{lxxxix} exist at the international level.

These rules cover a wide array of rules ranging from the hiring procedures to those of appeal.

Role of civil parties vis-à-vis the prosecution

As previously established, the prosecution and civil parties are equally interested in the success of the prosecution's case, i.e. the obtaining of a conviction. It is observed, however, that nothing in the CPC KoC serves as an indication that "victims' lawyers [should] support the prosecution by helping [them] to establish their case".^{lxxxix} In contrast, the IRs expressly require (by categorizing this as 'purpose of Civil Party action') that civil parties "participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution".^{lxxxiii} As there is no such requirement in the Cambodian procedure, the ECCC had an obligation to justify this alteration by establishing that the relevant Cambodian procedure failed one of the prongs of the statutory adequacy test. However, as a pre-requisite to test-based analysis, the ECCC should have shown that a rule requiring that civil parties should work in concert with the prosecution is a matter of settled law at the international level. In fact, all existing evidence points to the contrary. The rules of procedure and evidence of the only^{lxxxiv} other two international and internationalized tribunals (the ICC and the Special Tribunal for Lebanon ('STL') which allow civil party participation, do not contain such a requirement, whether in letter or in spirit. Observers of international criminal proceedings argue that the ECCC IRs' requirement that civil parties support the prosecution undermines the rights of the accused and upsets the "balance between the rights of the parties" set out in Rule 21 (1) of the IRs.^{lxxxv} Others note that such a balance is compromised by the fact that the accused "would be forced to confront more than one party (which would be in clear violation of the principle of equality and would alter the balance of the process in many other respects)".^{lxxxvi} which is of particular gravity to the accused in an environment – such as that of the ECCC – where the civil parties' collaboration with the prosecution is mandated by law. Yet others warn about "the prejudicial effect which victims' participation might have on the fundamental rights of the defendants unless their involvement is subject to clear and strict limitations".^{lxxxvii} These demonstrate that there is no rule at the international level which mandates civil party

collaboration with the prosecution. This renders the statutory adequacy test inapplicable in this case, as in the absence of an international rule to support the ECCC's creation of the rule in point the question of satisfaction of a prong of the test is moot. Nor does this rule exist in the Cambodian criminal procedure. It thus becomes evident that the ECCC invented the impugned rule *proprio motu* and in a complete vacuum of justifiable necessity.

Qualification of lawyers:

As per the foregoing discussion, the IRs have supplanted the BAKC with the DSS as the main service-provider and rule-setter in the realm of retention of counsel for the purposes of the proceedings before the ECCC. In this function and pursuant to the relevant provision of the IRs^{lxxxviii} the DSS has set out its own rules of qualification of counsel^{lxxxix} which markedly differ from those of the BAKC. These two sets of qualification rules bear one apparent similarity which is that of differentiating between the criteria which apply to domestic counsel and those which apply to foreign counsel. Thus, to be admitted to the practice of law under the BAKC rules a domestic applicant must demonstrate the following:

- [that he or she] [has] Cambodian nationality^{xc}
- [that he or she] [has] a Bachelor of Law degree or a law degree declared equivalent^{xcii}
- [that he or she] [has] a certificate of professional skills of a lawyer [issued] by the Lawyer Training Center^{xciii}. No such certificate shall be required for persons who have received a Bachelor of Law degree and who have been working in the field for over 2 years, lawyers who originally had Cambodian nationality and who have been registered in the Bar of a foreign country, and those who have received a Doctorate of Law degree.^{xciiii}
- [that he or she] [has] never been convicted of any misdemeanor or felony, nor imposed any disciplinary action or administration penalty upon, such as removal from any function or dismissal for any act contrary to honor or any act of moral turpitude [nor] have been declared personally bankrupt by a court.^{xcv}

These qualifications are, however, insufficient for an applicant to be admitted to the practice of law before the Extraordinary Chambers. To effect such admission a domestic applicant must demonstrate the following:

- [that he or she] [has] not been convicted of a serious criminal or disciplinary offense considered to be incompatible with defending a suspect, charged [that he or she] [is] a member of the Bar Association of the Kingdom of Cambodia.^{xcvi}
- [that he or she] [has] established competence in criminal law at the national or international level.^{xcvii} The differences between the counsel qualification rules set out by the BAKC and those established by the DSS become more pronounced when the sets of such rules

which apply to foreign counsel are examined. Thus, to be admitted to the practice of law under the BAKC rules a foreign applicant must demonstrate the following:

- [that he or she is] registered by the Bar of a foreign country and [is] authorized by the country of [his or her] origin to practice the legal profession.^{xcviii}
- [that he or she] has sufficient qualifications.^{xcix}
- [that his or her] country of origin provides this same possibility to Cambodian lawyers.^c

The qualification rules set out by the DSS, however, did not build on those of the BAKC, but fully supplanted the latter with the requirement that foreign counsel demonstrate the following:

- [that he or she] [has] not been convicted of a serious criminal or disciplinary offense considered to be incompatible with defending a suspect, charged person or accused before the ECCC.^{ci}
- [that he or she] is a current member in good standing of a recognized association of lawyers in a United Nations member state.^{cii}
- [that he or she] has a law degree or an equivalent professional qualification.^{ciii}
- [that he or she] has at least ten years working experience in criminal proceedings as a lawyer, judge or prosecutor, or in some other similar capacity.^{civ}
- [that he or she] has established competence in criminal law at international or national level.^{cv}
- [that he or she] is fluent in Khmer, French or English.^{cvi}
- [that he or she] is authorized by the Bar Council of the Kingdom of Cambodia to practice before the ECCC.^{cvi}

The foregoing collation and analysis of qualification rules set out by the BAKC and the DSS, respectively, evince that the DSS qualification rules set out for domestic UNAKRT-List lawyers are markedly higher than those set out by the BAKC as the requirement for practice before the Cambodian courts; the DSS qualification rules for foreign UNAKRT-List counsel are notably higher than those set out by the BAKC as the requirement for practice of foreigners before the Cambodian courts and the DSS qualification rules set out for domestic UNAKRT counsel.

Such discrepancies between the two foregoing sets of counsel qualification rules are the upshot of the deviations from the BAKC rules introduced to the counsel selection process by the DSS. As there is no evidence of explicit statutory authorization of such deviations, the grounds for their introduction must be sought in the aforementioned statutory adequacy test. As the existing Cambodian procedure clearly deals with the matter of qualification rules of legal counsel and there seems to be no foreseeable uncertainty of the interpretation or application of such rules, it leaves the DSS the harbor of prong 3 of the test which authorizes the foregoing of the relevant provisions of the Cambodian procedure if they

are inconsistent with international standards. To ascertain whether the resort to prong 3 is tenable it is salient to examine the counsel qualification rules established at the international level.

To this effect, the defense counsel qualification rules of the five currently existing international and hybrid tribunals will be examined and include the qualification rules of the following tribunals: the ICTY, the ICTR, the ICC, the SCSL, and the STL.

The ICTY defense counsel qualification rules have undergone a series of amendments since the Tribunal's establishment in 1993. Pursuant to the qualification rules set out in the current version of the ICTY Directive on the Assignment of Counsel an applicant must demonstrate that:

- [he or she] is admitted to the practice of law in a State, or is a university professor of law;
- [he or she] has written or oral proficiency in one of the two working languages of the Tribunal^{cxviii};
- [he or she] possesses established competence in criminal law and/or international criminal law/international humanitarian law/international human rights law^{cxix};
- [he or she] possesses at least seven years of relevant experience, whether as a judge, prosecutor, attorney or in some other capacity, in criminal proceedings;
- [he or she] has not been found guilty or otherwise disciplined in relevant disciplinary proceedings against him [or her] in a national or international forum, including proceedings pursuant to the Code of Conduct, unless the Registrar deems that, in the circumstances, it would be disproportionate to exclude such counsel;
- [he or she] has not been found guilty in relevant criminal proceedings;
- [he or she] has not engaged in conduct whether in pursuit of his profession or otherwise which is dishonest or otherwise discreditable to counsel, prejudicial to the administration of justice, or likely to diminish public confidence in the International Tribunal or the administration of justice, or otherwise bring the International Tribunal into disrepute;
- [he or she] has not provided false or misleading information in relation to his qualifications and fitness to practice and has not failed to provide relevant information;
- [he or she] has indicated his or [or her] ability and willingness to be assigned as counsel by the Registrar to - any suspect or accused who lacks the means to remunerate counsel, under the terms set out in this Directive; and
- [he or she] is a member in good standing of an association of counsel practicing at the Tribunal.^{cx}

The tribunal with which the ICTY is often compared in the literature, the ICTR, has adopted a significantly less inclusive set of qualification rules pursuant to which an applicant must demonstrate that:

- [he or she] is admitted to practice law in a State, or is a

professor of law at a university or similar academic institution and has at least ten years' relevant experience;

- [he or she] speaks one of the working languages of the Tribunal, namely French or English;
- [he or she] agrees to be assigned as Counsel by the Tribunal to represent a suspect or accused;
- [his or her] name has been included in the list envisaged in Rule 45 (A) of the Rules; and
- [he or she] undertakes to appear before the Tribunal within a reasonable time, as specified by the Registrar.^{cxii}

The SCSL, whose statutory prescription has linked it to the Rules of Procedure and Evidence of the ICTR^{cxiii}, has, however, adopted a different set of qualification rules than that of the ICTR pursuant to which an applicant must demonstrate that:

- [he or she] speaks fluent English;
- [he or she] is admitted to the practice of law in any State;
- [he or she] has at least 7 years of experience as Counsel^{cxiiii};
- [he or she] possesses reasonable experience in criminal law, international law, international humanitarian law or international human rights law;
- [he or she] has indicated [his or her] willingness and availability to be assigned by the Special Court to an Accused or Suspect; and
- [he or she] has no record of professional or other misconduct, which may include criminal convictions.^{cxv}

The ICC, anticipated by many to become a model of criminal justice^{cxvi}, has set out the counsel qualification rules pursuant to which an applicant must demonstrate that:

- [he or she possesses] established competence^{cxvii} in international or criminal law and procedure^{cxviii};
- [he or she possesses] the necessary relevant experience in criminal proceedings, whether as a judge, prosecutor, advocate or in another similar capacity^{cxviii}; the necessary relevant experience as described in Rule 22 must amount to at least ten years.^{cxix}
- [he or she possesses] excellent knowledge of and [is] fluent in at least one of the working languages of the Court^{cxx};
- [he or she] should not have been convicted of a serious criminal or disciplinary offense considered to be incompatible with the nature of the office of counsel before the Court.^{cxxii}

The most recently established hybrid tribunal, the STL, has established the following qualification rules for counsel:

- [he or she] is admitted to the practice of law in a recognized jurisdiction or, as co-counsel, is a professor of law;

- [he or she] has written and oral proficiency in English or French;
- [he or she] has not been found guilty or otherwise disciplined in relevant disciplinary proceedings against him in a national or international forum, including proceedings pursuant to the Code of Professional Conduct for Counsel, unless the Head of Defense deems that, in the circumstances, it would be disproportionate to exclude such counsel on this basis;
- [he or she] has not been found guilty in criminal proceedings that were fair and impartial and met the requirements of due process, unless the Head of Defense Office deems that, in the circumstances, it would be disproportionate to exclude such counsel on this basis;
- [he or she] has not engaged in conduct, whether in pursuit of his profession or otherwise, which is dishonest and otherwise discreditable to a counsel, prejudicial to the administration of justice, likely to diminish public confidence in the Tribunal or the administration of justice, or otherwise brings the Tribunal into disrepute;
- [he or she] has not provided false or misleading information in relation to his qualifications and fitness to practice or intentionally sought to conceal relevant information, unless the Head of Defense Office deems that, in the circumstances, it would be disproportionate to exclude such counsel on this basis;^{cxxxiii}
- [he or she] possesses established competence in criminal law and/or international criminal law, or other relevant competence;
- [he or she] for purposes of assignment as lead counsel and co-counsel, possesses at least ten years and seven years of relevant experience respectively, whether as a judge, prosecutor, attorney or in some other relevant capacity; and
- [he or she] has indicated [his or her] availability and willingness to be assigned by the Tribunal to any person detained under the authority of the Tribunal lacking the means to remunerate counsel under the terms set out in the Directive on the Assignment of Defense Counsel.^{cxxiv}

It is important to begin the comparative part of this analysis by noting that the ECCC has thus far been the only international or hybrid criminal tribunal to set out separate qualification rules for domestic and foreign counsel. This is of particular importance to the subsequent analysis due to the foregoing finding which has identified express and vast differences between the two sets of counsel qualification rules established by the ECCC and designed to place a notably heavier burden of qualifications upon the foreign applicants. The qualification rules established by the DSS for domestic counsel therefore are marginally higher than those established by the BAKC, but palpably lower than those established at the international level for the reason of having elected not to set the minimum experience requirement for domestic counsel, the opposite of which is the customary practice

of the other tribunals in question, as evinced by the foregoing. This contention, however, is moot for the purposes of this analysis as the counsel qualification rules established by the BAKC equally do not have an experience requirement to practice law before the ordinary Cambodian courts.

Nor do the BAKC qualification rules require “established competence in criminal law” to represent suspects and the accused in criminal cases. The DSS, however, has chosen not to abide by the principle of non-imposition of such rule enshrined in the Cambodian procedure in which case the Section did not err as most^{cxxv} international and hybrid criminal tribunals have set out a requirement of “established”^{cxxvi} or “reasonable”^{cxxvii} competence in some form of criminal law^{cxxviii} thus justifying the Section’s availing itself of the grant of prong 3 of the adequacy test.

On the contrary, no such justification can be found at the international level for the exclusion of professors of law and other legal academics, foreign or domestic, from the ECCC process. In fact the counsel qualification rules established by the BAKC exempt doctorate of law holders from the legal certification requirement^{cxxix} in which manner they resonate with the rules established at the international level which allow “university professors of law”^{cxxx} and “professors of law at universities and similar academic institutions”^{cxxxi} to practice law before the respective tribunals as independent counsel^{cxxxii} or assist such counsel^{cxxxiii} thus creating a healthy preponderance in favor of such practice. The DSS’s opting out of a compliant provision of the existing Cambodian procedure and electing to resort to the minority practice at the international level has effectively rendered the resort to the grant of prong 3 of the adequacy test fatal.

Further, the DSS has ignored the BAKC’s *quid pro quo* rule for qualification of foreign counsel which permits the admission of foreign counsel to the practice of law in Cambodia only if the states of nationality of such counsel grant the same privilege to Cambodian lawyers.^{cxxxiv} It is important to note that in order to determine whether the DSS’s resort to international standards was warranted in this circumstance an acknowledgement of the fact that no other tribunal has placed itself within the purview of a national bar association with the exception of the SCSL.

The latter therefore is presently the sole source of authority on the international standard in question. Thus, the DSS’s choice of non-inclusion of the said requirement in its counsel qualification rules is justified by the international precedent established to the same effect by the SCSL which equally had eschewed such requirement. The foregoing discussion demonstrates that in the prevailing circumstance the DSS’s resort to the grant of prong 3 of the adequacy test was justified by the existence of an international standard to the contrary of the Cambodian procedure.

Finally, the DSS Administrative Regulations have altered the BAKC Statute’s language barring persons

found guilty or responsible in virtually any type of legal or administrative proceedings (including personal bankruptcy) to limit such grounds for rejection of placement on the DSS list of counsel to “serious criminal or disciplinary offense[s] considered incompatible with defending a [client]”. There consensus or approximation has been reached on this matter at the international level where positions of different tribunals range from one which bears significant resemblance to the inclusive language of the BAKC^{CXXXV} to one with a similar content but including a proportionality test which vests the authority of determining whether the particular offense is of sufficient gravity to merit a rejection the applicant’s request of placement on the list of counsel^{CXXXVI} to that which virtually verbatim restates the aforementioned language of the DSS.^{CXXXVII} It is thus posited that the articulation of the international standard, as it presently stands, on the matter in question is inconclusive which renders it uncondusive to extraction and placement in a position of primacy in domestic or hybrid jurisdictions vis-à-vis the relevant principles developed to this effect at the domestic level.

Determination of indigence:

Under the existing Cambodian procedure indigence of a suspect or an accused is determined in the following manner:

“The determination of “poverty” shall be accomplished by the Chief Judge of the Courts and the Chiefs of the Court Clerks following an on-site investigation”.^{CXXXVIII}

Under the Administrative Regulations of the DSS, however, the authority of determining indigence is vested in the Head of the DSS whose competence, *inter alia*, is defined as follows:

“The Head of the Defense Support Section shall make determinations on indigence [...]”.^{CXXXIX}

The investigating judges nonetheless continue playing a role in the structure for determination of indigence established by the IRs:

[...] determinations of indigence [...] [are] subject to appeal to the Co-Investigating Judges or the Chamber before which the person is appearing at the time [...].^{CXL}

The question of whether a resort to international standards was warranted in the instant circumstance can be ascertained through the application of the statutory adequacy test. Prong 1 of the adequacy test is instantaneously rendered fatal as the foregoing evidences that the existing Cambodian procedure does deal with the matter in question. There is no reason to believe that the issue of uncertainty of the interpretation and/or

application of the said procedure has been raised to activate prong 2 of the test. The question of consistency with international standards of prong 3 therefore remains the last justifiable outlet to international standards which may render the relevant Cambodian procedure inapplicable.

The ICTY vests the power to determine indigence of a suspect or an accused in the Registrar:

Any person indicted for or charged with contempt shall, if that person satisfies the criteria for determination of indigence established by the Registrar, be assigned counsel in accordance with Rule 45.^{CXLI}

And

Any person indicted for or charged with false testimony shall, if that person satisfies the criteria for determination of indigence established by the Registrar, be assigned counsel in accordance with Rule 45.^{CXLII}

This practice has been met with the concurrence of the ICTR and the ICC:

The criteria for determination of indigence shall be established by the Registrar and approved by the Judges.^{CXLIII}

And

The Registrar shall enquire into the financial means of the suspect of accused and determine whether the criteria of indigence are met^{CXLIV} [...] if he [Registrar] decides that the criteria are met, he shall assign counsel from the list [...]^{CXLV}

And

Where a person applies for legal assistance to be paid by the Court, the Registrar shall determine the applicant’s means and whether he or she shall be provided with full or partial payment of legal assistance.^{CXLVI}

Similarly, the STL procedure grants the authority to determine indigence to the Registrar which is evident if the following is read in combination:

After examining the declaration of means and any relevant information obtained pursuant to article 13, the Registrar shall determine, without 120 days of the request to open the inquiry by the Head of the Defense Office, whether and to what extent the suspect or accused is able to remunerate counsel^{CXLVII}

And

The Registrar shall notify the suspect or accused and the Head of Defense Office of his determination.^{CXLIX}

In contrast, the SCSL’s procedural construct vests the authority to determine indigence in its chambers:

The designated Judge or Judge shall [...] satisfy himself that the right of the accused to counsel is respected, and in doing so, shall question the accused with regard to his

means and instruct the Registrar to provide legal assistance to the accused as necessary, unless the accused elects to act as his own counsel or refuse representation.^{cl}

The foregoing demonstrates that *albeit* there is no unanimity concerning the international standard which assigns the authority of determining a suspect or an accused's indigence (thus making such person eligible for court-funded legal assistance) there exists a strong preponderance of placing such authority within the purview of the Registrar. The minority practice of the same established at the international level vests such authority in the judicial chambers thus creating a rule akin to that of the BAKC to the same effect. It is therefore found that neither the relevant majority nor minority practice established at the international level resonates the practice instituted by the ECCC bearing a consequence of failing to satisfy prong 3 of the adequacy test.

Adversarial proceedings:

The inquisitorial system has lain at the heart of the contemporary Cambodian judicial process since its creation in the early 20th century. The nuanced differences between the inquisitorial and adversarial systems are well-documented in the literature^{cli} and need not be repeated in this narrative with the exception of the few which cumulatively constitute the core of the Cambodian judicial system:

- The office of investigating judges is part of the court system; investigating judges are independent in their conduct of office but cannot initiate investigations in the absence of an introductory submission filed by the prosecutor^{clii} with the goal of ascertaining the truth;^{cliii}
- The proceedings are sitting judge-centered: the sitting judge is first to question the accused;^{cliv} all subsequent questions are asked with the sitting judge's permission and sometimes through the sitting judge;^{clv} the sitting judge makes determinations of all procedural matters during trial;^{clvi} the sitting judge makes a determination of the guilt of the accused.^{clvii}

Contrary to the foregoing the IRs stipulate that "ECCC proceedings shall be [...] adversarial"^{clviii} bearing no reference to the inquisitorial nature of the Cambodian judicial process. The choice between the adversarial system and the inquisitorial one is not that of quality versus inferiority (for which reason the statutory adequacy test was designed as the drafters of the law which established the Extraordinary Chambers had anticipated that in some aspects the Cambodian law would be inferior to the standards of justice adopted at the international level) but a choice between the two dominant systems of justice which currently exist in the world, and which Cambodia made – or rather the choice was made

for Cambodia by France -- some hundred years ago in favor of the civil law system. This fact places the issue of choice of a judicial system in the realm of *fait accompli* and makes it immune to the statutory adequacy test (regarding which it is important to bear in mind that this test was created to avoid the application of inferior procedures in the ECCC proceedings, and not to be of assistance to the judicial officers in determining whether the hundred years of tradition in the inquisitorial (civil law) system in Cambodia can be sidelined in favor of the introduction of the adversarial (common law) system in the ECCC process).^{clx}

Common lawyers of civil parties:

Civil action is integral to the concept of the Cambodian criminal justice and is understood by many as the ultimate remedy conferred upon the civil party by the criminal process.^{clxi} The current criminal procedure guarantees the right to a lawyer to civil parties at all stages of the proceedings, although it falls short of guaranteeing the right to a lawyer provided at government expense in case of indigence of a civil party.^{clxii} Conversely, the ECCC IRs guarantee the right to a lawyer which will be provided to a civil party at the expense of the court and upon request. This privilege is, however, only granted on condition of the civil party pursuing his or her action through a common lawyer designated by the CIJs or the Chambers,^{clxiii} as opposed to prosecuting a self-initiated and self-sustained action. In addition, regardless of the civil party's ability to afford a counsel, the CIJ and the Chamber nonetheless retain the right to impose a format upon the civil parties in which the selection of a common counsel to represent such parties is mandatory:

The Co-Investigating Judges or the Chambers may request a group of Civil Parties to choose a common lawyer within a set time limit.^{clxiv}

And

Where the interests of justice so require, the Co-Investigating Judges or the Chambers may, after consulting the Victims Unit, designate a common lawyer for such a group of Civil Parties.^{clxv}

As per the foregoing, the right to participation in criminal proceedings as a civil party is generally understood as a right the exercise of which is individual rather than collective in its nature. Furthermore, the existing Cambodian procedure does not vest the authority of imposing mandatory class action or providing incentives for such in any organ of the court thus leaving this option to the freewill of the civil parties to a particular case to initiate and enter into such a compact. The Court's election to superimpose a mandatory class action requirement on the existing Cambodian procedure which it justifies by the existence of "interests of justice" which so require is untenable due to the general uncertainty of

the benefit of aggregation of civil party claims.^{clxvii} In addition, the Cambodian procedure - which is by no means oblivious to mass crimes such as those within the subject-matter jurisdiction of the Court^{clxviii} - does not prescribe mandatory aggregation of civil party claims in cases before Cambodian courts and regardless of the nature of the crimes which form the bases of such claims.

It is thus proffered by the foregoing that there are no bases for the satisfaction of prongs 1 and 2 of the statutory adequacy test, as the matter in question is clearly dealt with in the existing procedure and there is no reason to believe that there is a lack of clarity as to its interpretation and/or application. This leaves the grant of prong 3 the satisfaction of which requires an examination into the international standards which may exist regarding this matter.

It was recently found that the right to reparation, which includes compensation, is “the logical corollary of the right to an effective remedy”^{clxix} expressly set out in a number of international instruments.^{clxx} Although these instruments do not explicitly state that the content of the right to reparation must be construed as having an individual rather than collective nature, an inference to this effect can be drawn from the nature of the first two generations of rights^{clxxi} which are understood as conferred upon individuals and whose exercise therefore is not contingent on an individual’s participation in any form of association^{clxxii} with others as expressed in the following:

[...] right derive from the inherent dignity of the human person.^{clxxiii}

And

[...] the ideal of free human being enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone^{clxxiv} may enjoy his civil and political rights, as well as his economic, social and cultural rights.^{clxxv}

And

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant^{clxxvi}

It, however, must be noted that the right to individual compensation within the jurisdiction of the court^{clxxvii} has not been granted by the existing international and hybrid criminal tribunal and those of the past with the exception of the ICC whose statute has explicitly recognized, *inter alia*, the civil parties’ right to compensation:

The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may [...] determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.^{clxxviii}

And

The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.^{clxxx}

And

Taking into account the scope and extent of any damage, loss or injury, the Court may award reparation on an individualized basis, or where it deems it appropriate, on a collective basis or both.^{clxxxii}

Given the foregoing it is important to note that although the ICC has granted itself a significant scope of discretion in determining whether the basis of reparations in a particular case should be individualized or collective, the Court has imposed no stipulation of mandatory class action, as it is the case with the ECCC.

It is consequently concluded that the relevant standards established at the international level offer no support for the ECCC-imposed class action requirement in the reparation process thus resulting in the fatality of the application of prong 3 of the statutory adequacy test which, *ipso facto*, renders the judicial action by which it was created illegal.

Audio-video testimony:

The issue of the use of audio and video technology to present witness testimony to the court is unaddressed in the existing Cambodian procedure. The physical presence of a witness in court is nonetheless routinely required unless the witness is incapacitated in a manner which makes it impossible for him or her to travel to the seat of the court:

Any person who has been summonsed by the investigating judge [or the court] as a witness must appear.^{clxxxii}

And

If the witness is sick or cannot travel, the investigating judge and the clerk may visit his residence or the place where the witness stays to take the statement of the witness.^{clxxxiii}

The Cambodian procedure juxtaposes the foregoing with the right of the accused to confrontation which provides for no circumstances in which the exercise of the right to confrontation can be legally restricted:

At any time during the judicial investigation, the charged person may ask the investigating judge to [...] conduct a confrontation.^{clxxxv}

The IRs endorse the physical presence requirement of the Cambodian procedure stipulating that

The testimony of a witness [...] during a judicial investigation or at trial shall be given in person, whenever

possible.^{clxxxvi}

Pursuant to the IRs the use of said technology can be excluded from the proceedings if there is reason to believe that such use is “seriously prejudicial to or inconsistent with defense rights”.^{clxxxvii} Insofar as the defense rights are not adversely affected by the use of audio and video technology, the IRs grant limited discretion to the CIJs and the Chambers in identifying circumstances in which the use of such technology is appropriate:

The Co-Investigating Judges and the Chambers may allow a witness to give testimony by means of audio and video technology, provided that such technology permits the witness to be interviewed by the Co- Investigating Judges or the Chambers, and the parties, at the time the witness so testifies.^{clxxxviii}

Therefore, although the existing Cambodian procedure does not expressly authorize the use of audio and video testimony, it equally does not impose a bar to such use. Consequently, the present statutory position of the Cambodian procedure falls within the ambit of prong 1 of the statutory adequacy test (that is “the existing procedure does not deal with the matter in question”) which enables a resort to international standards.

A cursory look at the procedures established at the international level shows that, as a general rule, testimony by means of video and audio-link technology is permitted. A further examination, however, evinces that there are notable differences in the manner in which such technology is permitted. These differences are instantiated in the variations which exist between the rules regulating the deposition of witnesses in the various international and hybrid criminal tribunals. Some of these tribunals have set out deposition rules which allow organs of such tribunals to conduct deposition of witnesses unburdened by the obligation to justify the favoring of a deposition over the presence of the witness in court:

A deposition can be taken for use at trial, whether or not the person whose deposition is sought is able physically to appear before the Tribunal to give evidence.^{clxxxix}

Other tribunals have only allowed a resort to depositions in a set of circumstances statutorily confined to the tests of “exceptional circumstances”,^{cxci} and “interests of justice”.^{cxcii} The option of deposition by means of audio and video link, in one of the foregoing cases, can only be resorted to insofar as the use of such technology is not “prejudicial to or inconsistent with the rights of the accused”.^{cxci}

The question of the use of technology in witness testimony has been fairly recently addressed by the US Supreme Court which was presented with a challenge of a decision of a lower court which held that recorded testimony does not violate the Confrontation Clause of the US Constitution^{cxci}. Overruling the decision of the

lower court, the US Supreme Court held:

Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation.^{cxci}

It is, however, important to note that in this instance the Court had to deal with recorded testimony which by the nature of such technology renders a cross-examination impossible. This is not the case with the provision of the ECCC IRs in question which regulates the use of a much more flexible technology conducive to confrontation and cross-examination and manifested in the “permits the witness to be interviewed [...] at the time the witness testifies”^{cxci} clause of such provision.

The foregoing thus demonstrates that the ECCC did not err in principle in resorting to the standards of admissibility of audio and video testimony adopted at the international level. It must, however, be pointed out that the relative unanimity of endorsement of such a practice as a whole by the international tribunals is yet to be reached, particularly regarding the underpinning procedural elements of this practice. The ECCC’s choice of aligning its provision on the use of audio and video technology in witness testimony with that of the ICC therefore represents the abidance by the minority rule, rather than that of the majority, which in this case is represented by the ICTR and the SCSL.

Amicus curiae briefs:

Solicitation of *amicus curiae* briefs by courts or any other similar format of non-party participation is unknown to the Cambodian judicial process. The ECCC IRs, conversely, grants the Co- Investigating Judges and the Chambers the authority to solicit *amicus* briefs at every stage of the proceedings.^{cxviii} The fact that the existing Cambodian procedure does not deal with the issue of *amicus* briefs activates prong 1 of the statutory adequacy test and allows resort to relevant international standards.

The practice of solicitation of *amicus* briefs as such has been embraced by all currently existing international and hybrid tribunals. There is a general consensus among such tribunals^{cxix} that their respective chambers “may grant leave to a State, organization or person” to submit an *amicus* brief on a designated issue.

There is, however, a divergence of opinion concerning the chambers’ authority to engage *amicus*. in other aspects of the work of the tribunals. The said divergence is instantiated in the engagement of *amicus* in matters pertaining to the procedures of contempt of the tribunal and false testimony under solemn declaration, in which some of the tribunals in question permit such engagement^{cci} and others do not.^{ccii}

Given the foregoing the ECCC did not err in selecting an appropriate international standard of collaboration with *amici*. which it has accomplished by adopting the modes

of such cooperation for which there is a consensus at the international level while eschewing the incorporation of those for which there exists a divergence of opinion.

Additional powers of the PTC:

The Pre-Trial Chamber (PTC) of the ECCC was vested in narrowly tailored statutory authority limited to the adjudication of disputes between the two CPs^{cciii} and the two CIJs,^{cciv} and the office of co-prosecutors (OCP) and the Office of Co-Investigating Judges (OCIJ).^{ccv}

The IRs have elected to expand the foregoing powers statutorily vested in the PTC to include appeals against decisions of the CIJs,^{ccvi} applications to annul investigative action,^{ccvii} appeals provided for the placement on the list of counsel^{ccviii} and the list of victim associations,^{ccix} appeals of decision on willful interference with administration of justice,^{ccx} appeals of foreign counsel against whom disciplinary action has been taken,^{ccxi} appeals of pre-trial detention ordered by the CIJs.^{ccxii} No authority for such expansion expressly exists or can be reasonably deduced from the law on the establishment. Nor can guidance be found in the existing Cambodian procedure since the structure of ordinary Cambodian courts does not contain pre-trial chambers. The absence of such provisions in the Cambodian procedure and the law on the establishment complicates the creation of powers beyond those expressly provided statutorily.

For a resort to relevant international standards to be legally effected one of the prongs of the disjunctive test of statutory adequacy must be satisfied. It is posited that the first two prongs of the said test are rendered insurmountable due to the existence of relevant provisions for the creation of a pre-trial chamber within the ECCC in the Cambodian procedure and the fact that no concerns of the application or interpretation of such procedure have been reported to have been raised by the Extraordinary Chambers.

This leaves the grant of prong 3 of the adequacy test to demonstrate the existence of more expansive powers of pre-trial chambers at the international level in comparison with those granted to the Pre-Trial Chamber of the ECCC by the law on the establishment thus justifying the necessity of the expansion of such powers prescribed by the IRs.

Of the presently existing international and hybrid criminal tribunals the only two other tribunals which contain a pre-trial chamber are the ICC and the STL.^{ccxiii} Pursuant to the provisions delineating the structure of the ICC the Pre-Trial Chamber of the Court has exclusive competence in the

following areas: protection of the right of the defense,^{ccxiv} issuing orders and warrants required for the purposes of investigations,^{ccxv} provision of assistance in the preparation of a suspect or accused's provision of protection to civil parties and

defense,^{ccxvi}

witnesses,^{ccxvii} preservation of evidence and national security information,^{ccxviii} protection of summonsed

persons,^{ccxix} decision on prosecutorial powers within a non-cooperative State-Party,^{ccxx} seeking the cooperation of States-Parties,^{ccxxi} authorization of prosecutorial investigations,^{ccxxii} determination of challenges of admissibility,^{ccxxiii} confirmation of charges,^{ccxxiv} and determination of representation of an absconded or missing suspect or accused.^{ccxxv}

The Pre-trial Judge of the STL's exclusives areas of competence comprise the following: testing indictments on prima facie requirement, confirmation or dismissal of indictment following such testing,^{ccxxvi} issuance of arrest and transfer warrants upon request of the Prosecutor,^{ccxxvii} ordering release or handover to the Lebanese authorities of suspects,^{ccxxviii} communications with the Lebanese government regarding deferral,^{ccxxix} issuing summonses to appear to suspects, accused, or witnesses,^{ccxxx} granting of the victim status upon application,^{ccxxxi} preparation and implementation of the working plan,^{ccxxxii} evidence gathering in exceptional cases,^{ccxxxiii} questioning of anonymous witness in exceptional circumstances,^{ccxxxiv} and hearing cases of false testimony.^{ccxxxv}

A comparison between the list of powers of the Pre-Trial Chamber of the ICC and the Pre-Trial Judge of the STL and that of the Pre-Trial Chamber of the ECCC unequivocally evinces that an extremely limited number of these powers overlap. In fact, on a closer examination of this limited number, it becomes apparent that even the extremely limited areas of overlap functionally differ too significantly for a meaningful comparison.

It is thus posited that no authority for the said expansion of the ECCC PTC could be reasonably derived from the rules established by the ICC and the STL which in this case represent the standards established on the matter at the international level.

Therefore, in the void of any support for the aforementioned expansion of the powers of the ECCC PTC, either at the national or international level, it is reasonable to conclude that the ECCC acted *ultra vires* the applicable domestic and international standards in authorizing such an expansion.

Timeline for appeal of judgment:

Setting out rules for the appeal of judgments, the IRs have established that such appeal must follow a prescribed timeline. Pursuant to such timeline the IRs have permitted to file appeals against judgments within a 30 day period after the pronouncement or notification of the relevant judgment^{ccxxxvi} which conforms to the procedure established to the same effect in Cambodian law.^{ccxxxvii} Both sets of procedures provide for an exception to the foregoing rule in case of detention of the convicted person at the time of lodging of an appeal.^{ccxxxviii} There is, however, a disagreement about the extent to which a convicted person's detention should expedite the filing of an appeal by the prosecution. The

Cambodian criminal procedure thus stipulates that in such cases the prosecution has 48 hours to appeal,^{ccxxxix} whereas the IRs allow a period of 15 days for the same.^{ccxi} Given the significance of this discrepancy it is salient to explore the reasons for which the IRs elected to so notably deviate from the relevant pronouncement of the Cambodian procedure.

As it was previously noted the law on the establishment does not permit discretionary resort to international standards beyond the authority expressed through the means of the statutory adequacy test. In considering justification for a resort to international standards in the matter at hand no use can be made of the first two prongs of the test as the existing Cambodian procedure does deal with the issue of prosecutorial appeal of the judgment (prong 1) and the clarity of such procedure is enhanced by relevant numerical indicators (prong 2). The test, however, still permits resort to international standards, if the existing procedure does not conform to procedures established to the same effect at the international level (prong 3). A detailed examination of the relevant international procedures is thus necessitated to establish whether the IRs' foregoing deviation from the Cambodian procedure is justified by pertinent and divergent international standards.

The ICTY and the ICTR have set out similar standards of the timeline for appeal. Both of these tribunals grant a 30-day window to file a notice of appeal regardless of which party is appealing.^{ccxli}

A party seeking to appeal a judgment shall, not more than thirty days from the date on which the judgment was pronounced, file a notice of appeal, setting forth the grounds.^{ccxlii}

The SCSL has adopted a similar provision to those of the ICTY and the ICTR however narrowing the window to file a notice of appeal to 14 days.^{ccxliii}

The ICC approached the issue of appeal by introducing a detention rule upon appeal:

Unless the Chamber orders otherwise, a convicted person shall remain in custody pending an appeal.^{ccxliv}

The ICC then stipulates that, as a general rule, an appeal should be filed "no later than 30 days from the date the party filing the appeal is notified of the decision, the sentence or reparation order".^{ccxlv} This provision, however, allows for some flexibility with the set timeline for appeals:

The Appeals Chamber might extend the time limit set out in sub-rule 1 [the above provision], for good cause, upon the application of the party seeking to file the appeal.^{ccxlv}

And finally, the STL similarly provides for a generous 30-day window of appeal, *albeit* with no discretion granted to the Appeals Chamber to extend it.^{ccxlvii}

The foregoing analysis demonstrates that there is no agreement (albeit the preponderance is on 30 days) at the international level concerning the timeline for appeal

with the term for such varying from 14 to 30 days with a possibility of extension of unspecified length. This divergence notwithstanding there exists unarticulated clarity that the status of detention of the convicted person has no affect on the statutorily prescribed limits of application for appeal. This is particularly instructive for the purposes of the instant analysis if viewed in contrast with the existing Cambodian procedure described at the outset of this section. The IRs' provision to this effect has curiously found itself neither conforming to the letter of the Cambodian procedure, nor to any of the divergent existing international standards. It can be argued that the ECCC IRs' pronouncement regarding the time for appeal fails prong 3 of the statutory adequacy test for the following reasons: (1) the fact that there is no uniformity of approach to this matter established at the international level; and (2) as there is no uniformity at the international level, the ECCC is under no obligation to conform to what constitutes a panoply of opinions, rather than a rule; the relevant rule of the Cambodian procedure is therefore yet another opinion in this panoply which exists in a position of coordination rather than that of subordination to the rest. As such, it is submitted that the ECCC had no justifiable reason to alter the Cambodian procedure on the matter in question by inventing a new standard to supplant an existing and unimpugned one.

Effects of prosecutorial appeal:

From the outset of the drafting process it was resolved to create Extraordinary Chambers by replicating the existing Cambodian court structure. This structure was to include the three levels native to the Cambodian system (trial, appeal, supreme court) coupled with one alien one (pre-trial). Resulting from the subsequent amendment^{ccxlviii} the level known as "Appeal Chamber" was removed from the design of the Extraordinary Chambers thus centralizing all matters of post-trial appeal in the level of the ECCC structure known as "the Supreme Court Chamber" (hereinafter 'SCC'). The existing Cambodian procedure statutorily applicable to the appeal before the ECCC, however, remained bifurcated into the first instance of appeal (the Court of Appeals) and the second and final instance of appeal or cassation (the Supreme Court). Hence, the framers of the IRs were presented with the task of either reconciling the separate procedures set out for the first and second instances of appeal in Cambodian law or deciding on the procedural attachment of the SCC of the ECCC to one of such instances. In the void of an illuminating statement of the Court to this effect, this analysis will draw comparisons between the IRs and the procedures established by the both aforementioned instances of appeal in the domestic system.

One of the most poignant points of discrepancy in the appeal rules framed in the IRs seems to be that of the effects of the prosecutorial appeal. The Cambodian procedure permits prosecutorial appeal which has the

effect of triggering “a review of the criminal part of the trial judgment”.^{cclxix} The IRs presumably agree with this initial effect of prosecutorial appeal, although there is no express statement indicating such an agreement. Under the Cambodian procedure, the first instance of appeal can proceed by dismissing the acquittal judgment or overruling the guilty judgment.^{ccli} The IRs, to this effect, articulate the powers of the SCC as being limited to the acquittal of a convicted person thus eschewing^{ccli} any mention of the Chamber’s power of quashing an acquittal judgment handed down in the first instance.^{cclii} In fact the scope of the power of the SCC in the instance of a prosecutorial appeal against a judgment of acquittal, as set forth in the IRs, is limited to the introduction of alterations to the judgment handed down in the first instance.^{ccliii}

Furthermore, the Cambodian procedure permits a far more invasive review of both acquittal and conviction judgments handed down in the first instance than do the IRs. This is manifested in the Cambodian procedure’s provision of a possibility of having a judgment of the first instance declared invalid upon appeal which triggers a re-decision of the merits of the entire case at the appellate level.^{ccliv} No power to the same effect is granted to the SCC by the IRs.

The foregoing analysis demonstrates the existence of two key discrepancies in the procedures regulating the prosecutorial appeal in the Cambodian procedure and the IRs. Such key discrepancies encapsulate the IRs’ non-inclusion of the instances of appeal’s power to quash acquittal decisions handed down at first instance and the non-inclusion of the power of the same to invalidate and re-decide judgments appealed from the first instance.

The existence of international standards contrary to the Cambodian procedure’s elucidation of these two matters may serve, pursuant to prong 3 of the statutory adequacy test, as justification for the IRs’ deviation from the procedures expressly prescribed by Cambodian law.

The ICTY, the ICTR and the SCSL do not limit the power of their respective instances of appeal in any way *ergo* permitting the full extent of review at the appellate level:

The Appeal Chamber may affirm, reverse^{cclv} or revise the decisions taken by the Trial Chambers.

In addition, the ICTY permits re-trial of a convicted person which may be ordered by the ICTY Appeals Chambers “in appropriate circumstances [and] according to law”.^{cclvi}

The law which established the ICC provides no clear guidance as to its instance of appeal’s power to overrule acquittal judgments at first instance.^{cclvii} The issue of the ICC instance of appeal’s power to invalidate and re-decide judgments rendered in the first instance equally lacks express prescription. The ICC Statute nonetheless prescribes that in certain instances the appellate instance

must have the same powers as the first instance.^{cclviii} The ICC Statute further provides for remand powers which are vested in its appellate instance and applicable to certain circumstances,^{cclix} which may be interpreted as the appellate instance’s power to invalidate, but fall short of the category of powers to re-decide judgments rendered in the first instance.

The instant analysis of the relevant standards adopted at the international level evinces that no unanimity presently exists on the matter. However, it must be noted that the majority of other international and hybrid criminal tribunals permit the quashing of any decisions rendered at first instance which consequently includes the quashing of acquittal decisions. Contrastingly, it is only the minority of the standards analyzed which permits re-trial by the appellate instance. The existence of such minority is nonetheless of relevance to the instant argument as it demonstrates the support for the existing Cambodian procedure rendered at the international level.

In sum, the IRs had no justifiable reason, in light of the statutory adequacy test, to exclude the appellate instance’s power to quash acquittal decisions handed down in the first instance.

The IRs’ decision to not include the appellate instance’s power to invalidate and re-decide judgments rendered at first instance may seem less clear-cut as per the foregoing analysis. However, it is maintained that the non-inclusion of such power in the IRs was not necessitated by the “inconsistent with international standards” clause of prong 3 of the statutory adequacy test as no consistency on the matter existed at the international level concomitantly with the drafting and adoption of the IRs. Hence, acknowledging the statutory mandate that in any circumstance of opting out of the Cambodian procedure the burden of proving the necessity of such action is placed squarely on the ECCC it is further maintained that the ECCC had no means of proving such necessity due to the absence of a clear and consistent standard on the matter at the international level.

Effects of procedural defects:

Annulment of an action for procedural violations is a powerful check on the judicial system granted to the defense. The existence of such power of the defense in the existing Cambodian procedure cannot be reasonably called into question. This power, in fact, exists at the earliest stages of the judicial process and includes police investigation and investigation conducted by an investigating judge. For reasons of the powers of the police being limited to the enforcement and not including investigation, any analysis of such powers falls outside the purview of the subsequent narrative. This narrative will thus focus exclusively on the effects of procedural defects at the investigating judge level.

The existing Cambodian procedure has taken a

pronouncedly aggressive approach to the annulment of actions for procedural errors. This, *inter alia*, applies to the procedural errors imputed to investigating judges.

The scope of annulment-triggering errors is in fact inclusive of such broad areas as the functions assigned to investigating judges as all actions associated with the commencement of an investigation,^{cclx} territorial jurisdiction,^{cclxi} introductory submissions,^{cclxii} the scope of a complaint,^{cclxiii} and the assistance of court clerks.^{cclxiv} In addition, the scope of annulment-triggering errors extends far beyond the aforementioned enumerated categories and bears the potential of divergence of its interpretation:

Proceedings shall also be null and void if the violation of any important rule or procedure stated in the Code or any provision concerning criminal procedure affects the interests of the concerned party.^{cclxv}

The content of this definition of annulment-triggering errors is further exemplified by a reference a particular type of “interests of the concerned party”:

For instance, rules and procedures of important nature are those which intend to guarantee the rights of the defense.^{cclxvi}

The foregoing is the single annulment-triggering error to which the IRs limit themselves:

Investigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application.^{cclxvii}

To justify this deviation from the Cambodian procedure the ECCC could potentially argue the statutory over breadth which permits a resort to relevant international standards (prong 2 of the statutory adequacy test) which the ECCC could utilize in search of authority for the sought narrowness.

A thorough analysis of the relevant procedures established at the international level demonstrates that there is no expressly articulated standard of the scope of errors which are capable of triggering the annulment of an investigative action. Such lack of a clear standard was implicitly recognized in *Barayagwiza* where the ICTR Appeals Chamber had to construct piecemeal an argument for release an accused for the lack of an express statutory provision to justify this type of judicial action.

In light of the foregoing, the position the ECCC has chosen to assume vis-à-vis the relevant national and international standards is crystallized. This position, analyzed by a reasonable observer, represents neither the adherence to the relevant national standard, nor the international one, a judicial attitude which places the ECCC, yet again, in the environment of self-invented

procedural standards.

Conclusion

The drafting of the ECCC IRs aroused a notable degree of interest among members of civil society who responded to the Court’s call to submit comments and observations on the then developing draft. The comments contributed^{cclxxx} as a result of this solicitation, cumulatively addressed a range of issues of interest to their respective authors, regrettably, eschewing the question of the source from which the Court had derived authority to create such IRs *ab initio*. This omission might particularly strike a reasonable observer as inconsequential considering the amount of expertise in the area of international criminal justice some of the authors writing on behalf of Cambodian and international civil society demonstrated. This expertise of these authors, however, failed to result in an observation that all other international and hybrid criminal tribunals derived the authority to establish their respective rules of procedure and evidence from the relevant statutory pronouncements whose authorship and endorsement were not those of the judicial officers of these tribunals but the legislators.^{cclxxi} This silence on the part of civil society, by design or omission, has resulted in the broad endorsement of the Court’s most notable action *ultra vires* the law to date. This upshot of the process of advocacy before the ECCC mounted by the various groups of civil society is particularly unfortunate if seen against the backdrop of these groups’ proclaimed anticipation of this Court’s contribution to the building of the rule of law in Cambodia. Furthermore, it is particularly ironic that while extolling the positive effects the Court is expected to have on the Cambodian system of criminal justice, none of these groups have made a single reference to the existing Cambodian legal procedure in their comments.

This paper sought to rectify these inadequacies of expert participation in the proceedings before the ECCC. To this effect, a thorough statutory test-based analysis of the IRs was undertaken with the intention of identifying every instance in which the ECCC acted *ultra vires* the law to create the relevant provision of the IRs in deviation from the existing Cambodian procedure. The foregoing narrative reflects the particulars of such analysis which has identified a large number of instances of *ultra vires* action of the Court for which, in most cases, there is no viable justification which can be found in relevant international standards. It is thus concluded that the Court has created its IRs by altering a significant number of provisions of the Cambodian procedure with no statutory authority to do so and in defiance of the principle of legal certainty which, in part, is based on the certainty of which law will be applied to each particular type of proceedings. The Court’s trampling of the principle of legal certainty is of particular concern due to

these proceedings being of criminal nature in which the state places individuals' liberty in jeopardy.

Besides making this misstep on what was anticipated by many to be the road to the rule of law for Cambodia, the process of creation of the IRs *ultra vires* the law has had a palpable effect on the Court's ability to live up to its timeline. Furthermore, it must be noted that the exorbitant consumption of time and resources which were expended to create the foregoing *ultra vires* rules of the Court are a direct root cause of the ongoing financial constraints which have existed at the Court for the past years as well as the Court's extension of its mandate far beyond the originally stipulated 3-year period.^{cclxxii} In addition, this has exacerbated the length of detention for at least five suspects^{cclxxiii} and placed the brunt of living in constant anticipation of arrest and detention on many others in an environment created by the supplantation of the principle of legal certainty with unbridled and rampant judicial activism.

It is equally critical to note that the judges' frequent and often unwarranted resort to the international standards in the IRs, as well as an *ad hoc* basis in the course of the proceedings "to solve these conflicts [between Cambodian procedure and international procedure] [...] will surely encourage the defense lawyers, with quite good cause, to argue discrepancies and inconsistencies in the application of the law as well as protest against policy considerations guiding judicial decisions" which, yet again, will cost the Court time thus adversely affecting the right of the accused to a speedy trial, and ratcheting up the overall cost of these proceedings. Most important, perhaps, the presently impugned decision of the ECCC to create the IRs – with no statutory mandate to that effect – and take a generous amount of time to iron out the internal differences they aroused has stripped many of those Cambodians who are advanced in years of the opportunity to live to see the conclusion of the most disputed period of their country's recent history.

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ⁱ It is important to note that the definition of 'genocide' applied by the PRT significantly differed from that of the Convention on Prevention and Punishment of the Crime of Genocide (1948). In addition, the nature of the proceedings was more political and hortatory than legal which is borne out by the fact that the PRT did not apply an element-based approach to determine whether the alleged offenses amounted to genocide (under PRT's own definition of this offense that is).

ⁱⁱ The PRT proceedings are detailed in the following titles: (1) Howard J. De Nike, Genocide in Cambodia: Documents from the Trial of Pol Pot and Ieng Sary, (Pennsylvania Studies in Human Rights) (2000); (2) Valentin V. Shubin, History Condemns Genocide Conducted under Pol Pot: Based on the Proceedings of the People's Revolutionary Tribunal of the People's Republic of Kampuchea, (Novosti Press Agency Publishing House) (1985).

ⁱⁱⁱ Inside Cambodia there is evidence of punishment meted out to individuals following the PRT and based on the post-Khmer Rouge criminal law (1980). This punishment, however, was mostly meted out in extrajudicial settings and seems not to have extended much further than the immediate aftermath of the invasion period. There is evidence of foreign advocacy for prosecution of the Khmer Rouge of which the most prominent example is, perhaps, that of a group established by three American academics known as the Campaign to Oppose the Return of the Khmer Rouge ('CORKR') and established in 1982.

^{iv} The agreement which de jure ended the Cambodian civil war (The Agreement on Comprehensive Political Settlement of the Cambodian Conflict (1991)) referred to the acts previously qualified as genocide by the PRT as "policies and practices of the past" the "non-return" of which the Agreement sought to ensure.

^v This policy was made into law in 1994 with the official title of the statute being The Law to Outlaw the Democratic Kampuchea Group.

^{vi} This matter received a fairly comprehensive treatment in the following title: Harish C. Mehta & Julie B. Mehta, Hun Sen: Strongman of Cambodia, (Graham Brash) (1999).

^{vii} The co-prime ministership was created as a result of the UN-sponsored 1993 election, the winner of which was Norodom Ranariddh's party which effectively made him prime minister. However, Hun Sen and his party refused to give up power following the election and forced Norodom Ranariddh and his party into the power-sharing situation of co-prime ministership.

^{viii} The original request contained the following wording: "We are aware of similar efforts to respond to the genocide and crimes against humanity in Rwanda and the former Yugoslavia, and ask that similar assistance be given to Cambodia" (Letter to the UN Secretary General, June 21, 1997 (on file with the author)).

^{ix} This report was assigned to a group of international scholars referred to as The Group of Experts in UN documents and further in this text.

^x G.A. Res. 53/145, U.N. GAOR, 53rd Sess., U.N. Doc A/RES/53/145 (1999).

^{xi} Group of Experts' Report to the Secretary General (*Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution*, G.A. Res. 52/135 ¶¶102-111, U.N. Doc. A/53/850, U.N. Doc S/1999/231 (1999) stated that domestic trials of the Khmer Rouge under Cambodian law were "not feasible and should not be supported by the United Nations" for the following reasons (most of them attributable to the various weaknesses of the Cambodian judiciary): (1) "the enormity of Khmer Rouge atrocities and the effect they appear to have had on every household means that it would be difficult to find a judge free of the appearance of bias or prejudice" (p. 46); (2) "the infrastructure of the Cambodian legal system is poor even for the developing world" (p. 47); (3) "Cambodia still lacks a culture of respect for an impartial criminal justice system" (p. 47); (4) concerns over the security of trials (p. 47); and (5) "no Cambodian proceeding would be accepted by the people" as fair (p. 48).

^{xii} July 3, 2006.

^{xiii} The Drafting Committee for the Internal Rules was established in July, 2006 and the Internal Rules were adopted a year later, in June, 2007.

^{xiv} The Cambodian ECCC Co-Investigating Judge described the situation in the following terms:

"They [ECCC international judges] demanded international standards without considering adapting Cambodia's procedures to international standards in a way acceptable to both sides." (*Interview with You Bun Leng, Co-Investigating Judge, ECCC, Somne Thmey* (English translation by Development Weekly) June 4, 2007).

^{xv} "The law on the establishment of the Extraordinary Chambers" or in shorthand "the law on the establishment", for the purposes of this narrative, must be understood as a combination 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 (hereinafter “the ECCC Agreement”) and the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea (hereinafter ‘the ECCC Law’).

^{xvi} ECCC Agreement, art. 12.

^{xvii} ECCC Law (amended: 2004), arts. 20 new, art. 23 new, art. 33 new.

^{xviii} ECCC Internal Rules (Rev.5, Feb 9, 2010), Preamble.

^{xx} *Ibid.*

^{xxi} *Ibid.*

^{xxii} *Ibid.*

^{xxiii} It is important to note that the law on the establishment does not permit a choice between the Cambodian procedure and the international one unless the existence of an incurable flaw is established in the relevant Cambodian procedure.

^{xxiv} *Hun Sen’s Interview with Kyodo News* (Aug, 1999), at http://www.cnv.org.kh/cnv_html_pdf/CNV20.PDF

^{xxv} As stated above, primacy of Cambodian law in the ECCC proceedings was one of the pivotal points of the Cambodian government’s position in its negotiations with the UN regarding the legal foundation of the ECCC. However, it would be fair to acknowledge that like any other international treaty, the ECCC Agreement is subject to the Vienna Convention on the Law of Treaties (1969) and as such is subject to the Vienna Convention’s guidelines on the interpretation of international treaties (Vienna Convention, sec. 3. Interpretation of Treaties). Although the Vienna Convention does not expressly vest domestic or international courts with the authority of interpreting international treaties, it does not expressly preclude the exercise of such authority, either. In light of this and the fact that courts are often perceived as the most natural institutions of treaty interpretation, it can be argued that the ECCC can interpret the text of the Agreement insofar as it does so “in good faith” and “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose” (Vienna Convention, sec. 3, art. 31 (1)). While there is a possibility of judicial interpretation of the ECCC Agreement, no such possibility exists for the ECCC Law to which the Vienna Convention does not apply for two reasons: (1) the reason of it being a domestic statute, rather than an international treaty; and (2) the reason that the Cambodian Constitution’s grant of interpretation of laws is expressly limited to the Cambodian Constitutional Council (hereinafter ‘CCC’) (Cam Const, art. 117). Therefore, to interpret any part of the law which established the ECCC (ECCC Agreement + ECCC Law), the ECCC – which under the Vienna Convention may have the power to interpret the ECCC Agreement – and the CCC – which has the power to interpret the ECCC Law – will need to agree on a single interpretation of a particular provision for it to be authoritative and applicable in the ECCC proceedings. As such, observers note that through rules of procedure and evidence judges of international tribunals are permitted to “clarify various sensitive issues that were left unsolved by the treaty drafters” (Salvatore Zappala, *The Rights of Victims v. the Rights of the Accused*, 8 JICJ (2010), 137, 139), it must be noted that in addition to the ECCC Law and the ECCC Agreement, the legal basis of the ECCC is predicated upon a full-fledged code of criminal procedure (Code of the Criminal Procedure of the Kingdom of Cambodia, 2007) which in a great number of occurrences obviates the necessity of judicial elucidation which is often necessary in courts founded solely on international treaties.

^{xxvi} *Supra* 17, art. 33 (new).

^{xxvii} The situation of primacy of national law in international or internationalized proceedings is virtually unprecedented (in fact the two earlier established international criminal tribunals were founded on the exact opposite, i.e. the primacy of international law (the competence of the ICTY and the ICTR was limited to “international humanitarian law” (ICTY/ICTR Statute, art.1); a hybrid tribunal for Sierra Leone implied primacy of international law by expanding the tribunal’s competence to two specific area of Sierra Leonean law (SCSL Statute, art.5)). As such, while the deep reach into international law – including international rules of procedure – by the other international and internationalized tribunals is organic, the extent and content of this reach remain largely undetermined within the ECCC due to the lack of clarity of whether art. 33 (new) of the ECCC Law limits the meaning of “international standards of justice, fairness, and due process” to arts. 14 and 15 of the ICCPR or whether a broader construction of these principles was intended (this lack of clarity manifested itself, for instance, in PTC judges referring to a popular magazine article – selected by the prosecution -- as an authority on a very

controversial issue (*Prosecutor v. Kaing*, Decision on Appeal against Provisional Detention Order of Kaing Guek Iev alias “Duch, 001/18-07-2007-ECCC-OCIJ (PTC01), December 3, 2007, ¶50).

^{xxviii} For all future references relevant to ‘narrowness’, see *Supra*. 23, 24.

^{xxix} *Contra* Liesbeth Zegveld, *Victims’ Reparations Claims and International Courts. Incompatible Values?* 8 JICJ, 79, 103 (2010); where the author argues that “the national law notions may need to be transformed so as to adjust [them] to the exigencies and basic principles of international law” basing it on the Separate and Dissenting Opinion of Judge Cassese in *Prosecutor vErdemovic* (IT-06-22-A; Appeals Chamber, 7 October, 1997); contrary to the author’s opinion, there is no support in international law – or in common law at large – for deriving a rule of law from *obiter dicta* (persuasiveness of these statements notwithstanding), leave alone a single *obiter dictum* which is the case in point.

^{xxx} It is salient to note here that these tests are not part of the statutorily prescribed method of interpretation of “inconsistency” but a method employed by this author as a measure of last resort and in what he sees as the void of statutory interpretational tools and the *travaux préparatoires* from which such tools could be derived (in the environment of the Cambodian judicial system which brooks no judicial interpretation).

^{xxxi} This might seem to be a lengthy procedure which some might argue has no timeline in the work of the Extraordinary Chambers. This argument would, however, be untenable for two reasons: (1) it is meant to be a short study with the objective limited to determining whether issues of uncertainty of the application or interpretation of a particular procedural element have been reported before; (2) considering the legislatively intended narrowness of the adequacy test the number of cases in this category will be relatively insignificant which will result in a relatively small number of studies necessitated by the application of the objective test; (3) the Court recently undertook a study of an international-level doctrine (Joint Criminal Enterprise (‘JCE’)) in a very similar manner. *Contra*. Guido Acquaviva, *New Paths in International Criminal Justice?* 6 JICJ, 129, 131-132 (2008): the author argues that “at least international staff and internationally appointed judicial officers will work on the assumption that the IRs form a sort of ‘code’ of its own [...] [prompting] the [international] staff to work with international standards in mind [...]” which, if correct, will only show the international staff’s unfamiliarity with the law on the establishment and the legislative intent behind this law, not a divergent perspective on a contentious matter, as implied by this observation.

^{xxxii} It is important to note that the law on the establishment does not differentiate between voting standards for different types of judicial decisions, and as such provides for a uniform standard of voting for each Chamber based on the principle of supermajority and the number of judges in the particular Chamber.

^{xxxiii} *Supra* 17, art. 14 (new).

^{xxxiv} Although admittedly there is no express statutory stipulation to this effect, the Cambodian negotiating position with the UN bore a clear orientation to Cambodian law and the Cambodian judicial system. In fact, any deviation from Cambodian law or the structure of the Cambodian judicial system would present a breaking point in the negotiations as it would be faced with opposition from the Cambodian negotiators.

^{xxxvi} It is important to note that at no point does the law on the establishment use the term “adopt rules” but rather “seek guidance in procedural rules established at the international level”. Consequently, this author argues that the language of “seek guidance” was changed to “adopt rules” by the ECCC judges who sought statutory authority for the IRs and upon finding little or none in the law on the establishment impermissibly altered the statutory language to create such authority.

^{xxxvii} *Supra* 18, Preamble.

^{xxxviii} The Committee on the Rules of Procedure composed of three Cambodian and two international judges was established on July 3, 2006. The Committee drafted a 110-rule Internal Rules which was communicated to the rest of the ECCC judges, the Co-Prosecutors, the Principal Defender, the Office of Administration, and interested organizations and individuals. A weeklong plenary session was convened on November 20, 2006, but failed to produce the IRs. The plenary issued a release citing “substantive disagreement” among the judges. The Committee, now made up of five Cambodian and four international judges, resumed work on January 15, 2007. On January 26, 2007 the Internal Rules Review Committee convened a two-week session to discuss the disagreement which had arisen in the November plenary. The Internal Rules Review Committee convened a two-week session to renew the discussion of

the draft IRs. The Committee reported on March 16, 2007 that all remaining disagreements had, for the most part, been resolved. In March, 2007 the international judges objected to the “extortionate” fees imposed by the Bar Association of the Kingdom of Cambodia (BAKC) on the international lawyers and issued a statement declaring the earlier planned April plenary on the IRs impossible. The BAKC relented on 28 April, 2007. The IRs were finally adopted on 13 June, 2007, 11 months after the establishment of the Committee.

^{xxxix} In fact the entire process of deliberations of the IRs was closed to the public, an ECCC decision which was opposed by the Cambodian Human Rights Action Committee (CHRAC), a coalition of 23 Cambodian rights NGOs, who demanded that “more transparency in the rules drafting process” be incorporated into the process (Cambodian Human Rights Action Committee, Press Release, Civil Society Deeply Concerned about the ECCC Draft Internal Rules (24 January, 2007) at <http://209.85.175.104/search?q=cache:KIT61sy600cJ:www.licadho.org/press/files/138CHRACPRECCCImpasse07.pdf+ECCC+Internal+Rules&hl=en&ct=clnk&cd=30> (last viewed: 10 October, 2008); UN News Center, Judges at UN-backed Khmer Rouge trials agree on internal court rules (13 June, 2007) at <http://www.un.org/apps/news/story.asp?NewsID=22893> (last viewed: 10 October, 2008).

^{xl} 11 months.

^{xli} *Roundup: ECCC Overcomes Complexity, Adopts Internal Rules for DK Trials*, Xinhua News Agency, June 13, 2007

at http://english.peopledaily.com.cn/200706/13/eng20070613_383831.html

^{xlii} *Joint Statement by National and International Judicial Officers of the ECCC* (November 25, 2006), at

http://www.eccc.gov.kh/english/cabinet/press/15/PRESSRELEASE_PLENARY_in_ENG_FRENCH_.pdf

^{xliii} The Bar Association of the Kingdom of Cambodia set a locally unprecedented membership fee of \$4,900 for international lawyers to be admitted to practice before the ECCC. The UN side of the ECCC argued that the fee was exorbitant and “ten times the going rate for such situations”. The UN raised an argument of access to legal representation which it felt would be undermined should this fee requirement stand; BAKC responded that the amount of the fee was to serve the purpose of building a law library which would be used by the foreign lawyers and to close the income gap between the Cambodian and international lawyers practicing before the ECCC. The fee was later brought down to \$500 (ten times less than the original requirement as pointed out by the UN side of the ECCC) which was accepted by the ECCC thus resolving the dispute.

^{xliv} *Statement of the Review Committee of the Extraordinary Chambers in the Courts of Cambodia* (March 16, 2007),

at http://www.eccc.gov.kh/english/cabinet/press/21/16_Mar-Review_Committee_Statement.pdf.

^{xlv} The term ‘civil party’ is used throughout this text in reference to participation in the proceedings of persons who have alleged to have been injured, directly or indirectly, by the actions of the accused alleged in the indictment. Unfortunately, the texts of the IRs and the Cambodian Criminal Procedure Code have not been fully sensitized to the rights of the accused and in a number of instances continue to refer to civil parties as ‘victims’ in the environment prior to the conviction confirming the accused’s responsibility for the injury sustained by the civil parties reaching the status of *res judicata*. The use of the term ‘victim’ in said environment creates an appearance of bias inimical to the accused’s right to presumption of innocence (Salvatore Zappala, *The Rights of Victims v. the Rights of the Accused*), 8 JICJ, 137, 147 (2010): “although the participation of victims is not per se in conflict with the presumption of innocence, there is at least one aspect of victim participation which creates a potential prejudice: the mere fact of victim participation entails an underlying presumption that the events (the crimes) are considered to have occurred in given circumstances and that certain people were the victims”.

^{xlvi} Criminal Procedure Code of the Kingdom of Cambodia, art.

^{xlvii} *Ibid.*, art. 311.

^{xlviii} *Ibid.*, art. 356. It is, however, argumentative to what extent the civil parties should be allowed to precipitate the prosecution’s success by being actively involved in the proceedings on the prosecution’s side. This issue will be treated in full further in this text.

^{xlix} *Ibid.*, art. 355.¹

Ibid., art. 523.

Ibid., art. 533.

^{li} There is palpably room for declaring this provision “inconsistent with the international standards” as set out in prong 3 of the statutory adequacy test and

due to the fact that the current procedure in place does not grant relief to convicted persons even after they have made every effort to pay the court-ordered compensation and even after they have served the punitive time for the inability to pay such compensation. This makes rehabilitation of convicted persons and their reintegration into society virtually impossible.

^{liii} *Ibid.*, art. 532.

^{liv} Cambodian Parliament passed a law on temporary detention (1999) which made the contemporaneous ordinary detention procedure inapplicable to the offenses of genocide, war crimes and crimes against humanity; a separate procedure was established for these offenses, as a result.

^{lv} *Supra* 18, R. 23 *quiquies* (1&2).

^{lvi} *Supra* 17, art. 39.

^{lvii} The phrase “without restrictions” here must be read without prejudice to the procedural restrictions on the victim’s right to seek monetary compensation set out in Cambodian law.

^{lviii} ICC Rules of Procedure and Evidence (adopt. Sept 3-10, 2002), R. 97.

^{lix} ICTY Rules of Procedure and Evidence (), R. 106 (A&B).

^{lx} ICTR Rules of Procedure and Evidence (), R. 106 (A&B).

^{lxi} SCSL Rule of Procedure and Evidence (), R. 105 (A&B).

^{lxii} STL Statute, art. 25.

^{lxiii} Kerstin McCourt, *Judicial Defenders: Their Role in Postgenocide Justice and Sustained Legal Development*, 3(2) IJTJ, 272, 281 (2009).

^{lxiv} *Supra* 18, R. 11.

^{lxv} *Ibid.*, R. 12.

^{lxxi} For the purposes of this narrative “rules which objectively exist at the international level” are those for the application and interpretation of which there is agreement and relative uniformity among the International Tribunals, and which are considered to be settled law (see *supra* 29); the “rules which subjectively exist at the international level” are those for the existence, application or interpretation of which there is no agreement or relative uniformity among the International Tribunals, but the preeminence of which has been asserted by the ECCC.

^{lxxxii} Kate Gibson Daniella Rudy (2009), *A New Model of International Procedure? The Progress of the Duch Trial at the ECCC*, 7 JICJ, 1005, 1016. ^{lxxxiii} *Supra* 18, R. 23 (1) (as amended Feb 9, 2010).

^{lxxxiv} For the sake of complete accuracy on the matter it must be noted that although none of the other international or internationalized tribunals – with the exception of the ICC and the STL -- past or present, allow victim for participation, the statutes of some of them (ICTY and ICTR) envisage a possibility of obtaining reparations through the national courts on the basis of decisions of the international tribunals. An observer (*Supra*, 29, p. 88) notes that “In its Resolution 827 (1993) of 25 May, 1993 adopting the Statute of the ICTY, the Security Council decided that “the work of the International Tribunal shall be carried out without prejudice to the right of victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law”. Rule 106 of the Rule [of Procedure and Evidence] of both Tribunals [ICTY and ICTR] stipulates that victims seeking compensation must apply to a national court or other competent body. In these domestic proceedings the victims may avail themselves of judgments of the ICTY and ICTR”.

^{lxxxv} *Supra* 82.

^{lxxxvi} Salvatore Zappala, *The Rights of Victims v. the Rights of the Accused*, 8 JICJ, 137, 162 (2010).

^{lxxxvii} Guenaël Mettraux, *Victims’ Participation in International Criminal Law*, Symposium Forword, 8 JICJ, 75, 75 (2010).

^{lxxxviii} *Supra* 18, R. 11 (2 (a) (i & ii)).

^{lxxxix} DSS Administrative Regulations (July 9, 2007).

^{xc} *Supra* 79, art. 31.

^{xcii} *Ibid.*

^{xciii} *Ibid.*

^{xciv} *Ibid.*, art. 32.

^{xcv} *Ibid.*

^{xcvi} *Ibid.*, A (2.1) (i).

^{xcvii} *Ibid.*, A (2.1) (ii). It is important to note that this requirement is lifted for lawyers included in the non-UNAKRT List (A (3.1.)) which contains lawyers whose services are not remunerated by the UNAKRT, but paid by their clients or other sources, or who provide such services pro bono (*Ibid.*, A (1.2.)). To the best of this author’s knowledge none of the lawyers currently representing charged persons before the ECCC are paid by other sources than the UNAKRT or represent their clients pro bono.

^{xcviii} *Supra* 89, arts. 5 & 7 which state that the “practice of the legal profession”

is hereby defined as practice limited to assisting Cambodian lawyers and that which does not advertise the service of a foreign lawyer.

^{xcix} *Ibid*, art. 6.

^c *Ibid*.

^{ci} *Supra* 89.

^{cii} *Ibid*, A (2.2.(i)).

^{ciii} *Ibid*, A (2.2.(ii)).

^{civ} *Ibid*, A (2.2. (iii)).

^{cv} *Ibid*, A (2.2. (iv)).

^{cvi} *Ibid*, A (2.2. (v)).

^{cvi} *Ibid*, A (2.2. (vi)); this is the sole qualification rule to be admitted to the practice of law before the ECCC for non-UNAKRT List lawyers, i.e. those lawyers who are not remunerated by the UNAKRT and whose fees are paid from other sources or those who provide such services pro bono (*Ibid*, A (1.2.)).

^{cviii} If an applicant does have written and oral proficiency in either of the two languages of the Tribunal but speaks a language of the territory over which the Tribunal has jurisdiction, such person can be included in the list of counsel at the Registrar's discretion and assigned as a co-counsel (never a principal counsel), provided he or she satisfies the counsel qualification rules of art. 14 (A) of the ICTY Directive on the Assignment of Counsel (art. 14 (C)).

^{cix} The Registrar may refer an applicant for admission to the lists of counsel to a panel composed of senior legal officers in chambers, and/or counsel who have already been admitted to the list of counsel of the Tribunal and who possess a minimum of 15 years experience in criminal proceedings, to interview the applicant and make a recommendation to the Registrar on his or her application (art. 15 (B) of the ICTY Directive on the Assignment of Counsel). ^{cx} ICTY Directive on the Assignment of Counsel (11th Revision, 2006), art. 14 (A).

^{cx} *Ibid*, 73, art. 13.

^{cxii} SCSL Statute, art. 14 (1).

^{cxiii} The experience requirement is reduced to 5 years if the counsel is retained by the suspect or accused (SCSL Rules of Procedure and Evidence, R. 44 (A)).

^{cxiv} SCSL Directive on the Assignment of Counsel (2003), art. 13 (B).

^{cxv} William W. Burke-White, Proactive Complimentarity: The International Criminal Court and National Courts in the Rome System of Justice (U of Penn Law School, Public Law Working Paper No. 07-08), (2007); Human Rights Watch, International Criminal Court: Making the International Criminal Court Work (A Handbook for Implementing the Rome Statute), Human Rights Watch (2001); Rosemary Byrne, Promises of Peace and Reconciliation: Previewing the Legacy of the International Criminal Tribunal for Rwanda, European Review, (Cambridge University Press), (2006).

^{cxvi} Counsel can be assisted by other persons with relevant expertise, including professors of law (ICC Rules of Procedure and Evidence, R. 21 (1)).

^{cxvii} ICC Rules of Procedure and Evidence, R. 22 (1).

^{cxviii} *Ibid*.

^{cxix} ICC Regulations, Reg. 67.

^{cx} *Supra* 77.

^{cxii} *Supra* 79.

^{cxiii} STL Rule of Procedure and Evidence (amend. June 5, 2009), R. 58 (A).

^{cxiv} *Ibid*, R. 59 (B).

^{cxv} With the exception of the ICTR.

^{cxvi} ICTY, ICC, STL.

^{cxvii} SCSL.

^{cxviii} In addition to criminal law such qualification rules have included a wide range of areas of law set out to count on a par with the competence in criminal law. These are international humanitarian law, international human rights law, and generally international law.

^{cxix} *Supra* 79, art. 32.

^{cxx} ICTY, ICC, STL.

^{cxxi} ICTR.

^{cxxii} ICTY, ICTR.

^{cxxiii} ICC, STL.

^{cxxiv} *Supra* 79, art. 6.

^{cxxv} The relevant rule of the SCSL.

^{cxxvi} The relevant rule of the ICTY.

^{cxxvii} The relevant rule of the ICC.

^{cxxviii} *Supra* 79, art. 30.

^{cxxix} *Supra* 89, R. 11 (7).

^{cxli} *Ibid*.

^{cxli} *Supra* 58, R. 77 (F) (amend. Dec 13, 2001).

^{cxli} *Ibid*, R. 91 (E) (amend. Dec 13, 2001).

^{cxliii} *Supra* 59, R. 45 (B).

^{cxliv} *Ibid*, R. 45 (C) (ii).

^{cxlv} *Ibid*, R. 45 (C) (iii).

^{cxlvi} *Supra* 82, Reg. 84.

^{cxlvii} STL Directive on the Assignment of Defense Counsel (amend. Oct 30, 2009), arts. 14 (B).

^{cxlix} *Ibid*, art. 14 (C).

^{cl} *Supra* 60, R. 61 (i) (amend. May, 13 2006).

^{cli} Adhemar Esmein, Rene Garraud, Carl Joseph Anton Mittermaier, A History of Continental Criminal Procedure, with Reference to France (Little, Brown, and company) (1913); Joseph D. Grano, Confessions, Truth, and the Law (University of Michigan Press) (1996); Anne Strick, Injustice for All (Putnam's Sons) (1977); John Henry Merryman, Rogelio Perez-Perdomo, The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America 127-128 (Stanford University Press) (2007).

^{clii} *Supra* 45, art. 44.

^{cliii} *Ibid*, art. 127.

^{cliv} *Ibid*, art. 325.

^{clv} *Ibid*, art. 326.

^{clvi} *Ibid*, art. 318.

^{clvii} *Ibid*, art. 357.

^{clviii} *Supra* 18, R. 21 (1) (a).

^{clx} It is curious to note that the IRs' establishment of the adversarial system notwithstanding, it has failed to introduce some of the most fundamental practices associated with the adversarial system, such as, for instance, plea bargaining. It is, however, presumed that such was not done for political rather than utilitarian reasons (which lies at the core of the system of plea bargaining).

^{clxi} Author's interviews with civil parties to criminal non-ECCC proceedings in Cambodia.

^{clxii} *Supra* 45, arts. 138, 150, 313, and 355.

^{clxiii} *Supra* 18, R. 23 (8) (f).

^{clxiv} *Ibid*, R. 23 (8) (a).

^{clxv} *Ibid*, R. 23 (8) (c).

^{clxvii} It has been noted on numerous occasions in the literature that besides the fairly sizable number of advantages aggregation has an equal number of disadvantages of which the low payout is the most oft-cited one. For the purposes of the ECCC, however, the question of payout is moot due to an existing bar to such (which does not find any justification in Cambodian or international practice (see p. 25-26 of this narrative). In the absence of a possibility of payout, the only remaining reason for civil party participation in the proceedings before the ECCC, as it seems, is that of a search of personal non-monetary satisfaction. Therefore, if the latter is taken out of the equation by a judicial decision, there hardly will be any measure of interest left for the civil parties to continue prosecuting their claims.

^{clxviii} *Supra* 45, art. 9.

^{clxix} International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* (pursuant to Security Council Resolution 1564 of Sept. 18, 2004) (2005) ¶ 596.

^{clxx} To this effect the International Commission of Inquiry on Darfur cites the following international instruments: art. 2 (3) of the UN Covenant on Civil and Political Rights (ICCPR); art. 6 of the Convention on the Elimination of Racial Discrimination (CERD); art. 14 of the Convention Against Torture (CAT); art. 39 of the Convention on the Rights of the Child (CRC); art. 19 (3) and 68 (3) of the Statute of the International Criminal Court (ICC); art. 8 of the Universal Declaration of Human Rights (UDHR).

^{clxxi} The First Generation of rights: civil and political rights; the Second Generation of rights: economic, social and cultural.

^{clxxii} Although it is appreciated that due to the nature of mass crimes there necessarily needs to be a number of persons targeted by them (In *Akayesu*, for example, the ICTR found that "the murder of a particular individual" may be understood as genocide if this murder was committed as part of "the realization of an ulterior motive which is to destroy, in whole or in part, the group of which the individual is just one element (*Prosecutor v Akayesu*, Judgment, ICTR-96-4-T (Sept 2, 1998), ¶522; in dissonance to this, in *Krstic* the ICTY found that "the intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it" (*Prosecutor v Krstic*, Judgment, IT-98-33-T (Aug 2, 2001) ¶590)), successfully or unsuccessfully, there can be no obligation for these persons to associate with one another when acting as civil parties in criminal proceedings.

^{clxxiii} Preamble to the ICCPR.

individuals within it” (*Prosecutor v Krstic*, Judgment, IT-98-33-T (Aug 2, 2001) ¶590)), successfully or unsuccessfully, there can be no obligation for these persons to associate with one another when acting as civil parties in criminal proceedings.

^{clxxxiii} Preamble to the ICCPR.

^{clxxxiv} Emphasis added.

^{clxxxv} *Supra* 171.

^{clxxvi} *Ibid.*

^{clxxxvii} The other tribunals have recognized the right to reparation, and within the right to compensation, however, eschewing the process of effecting such reparations within their respective jurisdictions. The ICTY, for example, has provided that the Tribunal will share guilty judgments based upon which victims can bring an action in a national court to obtain compensation on the basis of the national law of the state in which the claim is made (ICTY RPE, R. 106 (A&B); the ICTR and the SCSL have identical provisions to this effect (ICTR RPE, R. 106 (A&B); SCSL RPE, R. 105 (A&B), and the STL, differently in letter but similar in spirit, has a provision to the same effect (STL Statute, art. 25). Due to such remand of the compensation process to the appropriate national jurisdictions the said tribunals have not set rules indicating whether compensation, the pursuit of which is only guaranteed by the appropriate national legislations, can be claimed on an individual basis or whether it is restricted to class actions.

^{clxxxviii} ICC Statute, art. 75 (1).

^{clxxxix} *Ibid.* art. 75 (2).

^{clxxxxi} *Supra* 57, R. 97 (1).

^{clxxxvii} *Supra* 45, arts. 153, 315.

^{clxxxviii} *Ibid.* art. 158.

^{clxxxv} *Ibid.* art. 133.

^{clxxxvi} *Supra* 18, R. 26 (1).

^{clxxxvii} *Ibid.* R. 26 (2).

^{clxxxviii} *Ibid.*

^{clxxxix} *Supra* 101, R. 71 (A), *Supra* 122, R. 123 (A).

^{cxci} *Supra* 103, R. 71 (A); *Supra* 60, R. 71 (A); *Supra* 175, art. 69 (2); *Supra* 57 Rs, 67 & 68.

^{cxcl} *Supra* 103, R. 71 (A); *Supra* 60, R. 71 (A).

^{cxclii} *Supra* 132, art. 69 (2).

^{cxcliv} Crawford v. Washington, 541 U.S. 36 (2004).

^{cxclvi} *Ibid.*, Syllabus.

^{cxclvii} *Supra* 18 R. 26 (1).

^{cxclviii} *Supra* 18, R. 33.

^{cxclix} *Surpas.* 58, 59, 60, R. 74 (A); *Supra* 57, R. 103.

^{ccci} *Contempt of the Tribunal: Surpas.* 58, 59, 60, R. 77 (note: the SCSL does not use the term ‘amicus curiae’ but uses the term ‘independent counsel’ in its stead; the function of the two vis-à-vis the contempt procedures is believed to be the same, however); *False Testimony Under Solemn Declaration: Surpas.* 58, 59, 60, R. 91.

^{cccii} *Contempt of the Tribunal: ICC; False Testimony Under Solemn Declaration: SCSL, ICC.*

^{cccliii} *Supra* 16, art. 7; *Supra* 17, art. 20new.

^{cccliv} *Ibid.*, art. 7; ECCC Law, art. 23new.

^{ccclv} *Ibid.*, art. 7; Note: no provision exists in the ECCC Law vesting authority to settle dispute between the Co-Prosecutors and the Co-Investigating Judges in the Pre-Trial Chamber.

^{ccclvi} *Supra* 18, R. 74.

^{ccclvii} *Ibid.*, R. 76.

^{ccclviii} *Ibid.*, R. 11 (5 & 6; R. 23 (7)).

^{ccclix} *Ibid.*, R. 23 (9).

^{ccclx} *Ibid.*, R. 35 (6).

^{ccclxi} *Ibid.*, R. 38 (3).

^{ccclxii} *Ibid.*, R. 63 (4).

^{ccclxiii} The statutory construct of the STL allows for the creation of a position of a Pre-Trial Judge, not a full Pre-Trial Chamber (STL Statute, *Supra* 61 art. 7 (a)).

^{ccclxiv} *Supra* 132, Art. 56.

^{ccclxv} *Ibid.*, Art. 57/3/a.

^{ccclxvi} *Ibid.*, Art. 57/3/b.

^{ccclxvii} *Ibid.*, Art. 57/3/c.

^{ccclxviii} *Ibid.*; *Ibid.*, Art. 72.

^{ccclxix} *Supra* 165.

^{ccclxx} *Ibid.*, Art. 57/3/d.

^{ccclxxi} *Ibid.*, Art. 57/3/e.

^{ccclxxii} *Ibid.*, Art. 15/3; Art. 18/2.

^{ccclxxiii} *Ibid.*, Art. 19/6.

^{ccclxxiv} *Ibid.*, Art. 61/2.

^{ccclxxv} *Ibid.*, Art. 61/2/b.

^{ccclxxvi} *Supra* 61, art. 18 (1).

^{ccclxxvii} *Ibid.*, art. 18 (2).

^{ccclxxviii} *Supra* 122, R. 17 (B) (i).

^{ccclxxix} *Ibid.* R. 17 (D&G).

^{ccclxxx} *Ibid.*, R. 78 (A).

^{ccclxxxi} *Ibid.* R. 86 (A).

^{ccclxxxii} *Ibid.* R. 91.

^{ccclxxxiii} *Ibid.*, R. 92.

^{ccclxxxiv} *Ibid.*, R. 93.

^{ccclxxxv} *Ibid.*, R. 152 (F).

^{ccclxxxvi} *Supra* 18, R. 107 (1).

^{ccclxxxvii} *Supra* 45, arts. 381, 382.

^{ccclxxxviii} *Supra* 18, R. 107 (3), *Supra* 45, art. 384.

^{ccclxxxix} *Supra* 45, art. 384.

^{cxcli} *Supra* 18, R. 107 (3).

^{cxcli} The only difference identified in the law between prosecutorial appeal and that of other parties lies in the requirement to file a declaration stating that “disclosure has been completed with respect to the material available to the Prosecutor at the time of filing the brief” (*Supra* 58, R. 111 (B); *Supra* 59, R. 111 (B)).

^{cxcliii} *Supra* 58, R. 108; *Supra* 59, R. 108.

^{cxcliiii} *Supra* 60, R. 108.

^{cxcliv} *Supra* 175, art. 81 (3) (a).

^{cxclv} *Supra* 57, R. 150 (1).

^{cxclvi} *Ibid.*, R. 150 (2).

^{cxclvii} *Supra* 122, R. 177.

^{cxclviii} 2004, *Supra* 17.

^{cxclix} *Supra* 45, art. 400.

^{ccli} *Ibid.*; art. 405, 439, 440.

^{ccli} The IRs applicable to the proceedings before the SCC contain a provision which indicates that “the Supreme Court Chamber may either confirm, annual or amend decisions in whole or in part” (R. 104 (2)). However, this pronouncement does not have the effect of universality of application to all categories of appeal which is instantiated in the reference restricting the foregoing competences to the separate scopes of the SCC competence set out for each category of appellants in R. 110.

^{cclii} *Supra* 18, R. 110 (4).

^{ccliii} *Ibid.*

^{ccliv} *Supra* 45, art. 406.

^{cclv} ICTY Statute, art. 25 (2); ICTR Statute, art. 24 (2); SCSL Statute, art. 20 (2); STL Statute, art. 26 (2).

^{cclvi} *Supra* 101, R. 117.

^{cclvii} The ICC Statute stipulates that its Appeals Chamber may reduce the sentence rendered at first instance (art. 81 (2) (c) and set aside a conviction judgment (art. 81 (2) (b)), however, it does not contain a similar stipulation regarding the setting aside of acquittal judgments. The ICC Statute nonetheless contains a provision which deals with the appeal of conviction judgments by the prosecution in which case the Statute stipulates that the judgment not be amended to the convicted person’s detriment (art. 83 (1) (b)). However, the problem of interpretation and application of this provision lies in the fact that it creates an uncustomary relationship of agency between the prosecution and the convicted person as framed in “when the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person’s behalf, it cannot be amended to his or her detriment” (Art. 83 (1) (b)).

^{cclviii} *Supra* 175, art. 83 (1).

^{cclix} *Ibid.*, 84 (2) (a,b,c).

^{cclx} *Supra* 45, art. 252.

^{cclxi} *Ibid.*

^{cclxii} *Ibid.*

^{cclxiii} *Ibid.*

^{cclxiv} *Ibid.*

^{cclxv} *Ibid.*

^{cclxvi} *Ibid.*

^{cclxvii} *Supra* 18, R. 48.

^{cclxx} Human Rights Watch Comments on the ECCC IRs (2006), at <http://www.dccam.org/Tribunal/Documents/HRW-ECCCRules.pdf> (last visited: May 12, 2010); Documentation Center of Cambodia, DC Comments on the ECCC Draft Internal Rules (2006), at

<http://www.dccam.org/Tribunal/Documents/DCCam%20Comments%20on%20ECCC%20Draft%20Internal%20Rules%202%20of%202.pdf> (last visited: May 12, 2010); International Center for Transitional Justice, Comments on Draft Internal Rules for the Extraordinary Chambers in the Courts of Cambodia (2006), at

<http://www.dccam.org/Tribunal/Documents/ICTJ%20Comment%20on%20ECCC%20Internal%20Rules%20FINAL.pdf> (last visited: May 12, 2010); Cambodian Human Rights Action Committee, Comments on the ECCC Internal Rules (2006), at <http://www.licadho.org/reports/files/97CHRACPaperCmmentsECCCIInternalRules06.pdf> (last visited: May 12, 2010); Avocats sans Frontieres, Observations of “Avocats sans Frontieres” on the ECCC Internal Rules (2006), at http://www.asf.be/publications/observations_ASF_ECCC.pdf (last visited: May 12, 2010).

^{celxxi} ICC Statute, art. 21; ICTY Statute, art. 15; ICTR Statute, art. 14; SCSL Statute, art. 14; STL Statute, art. 28. The legislator in all these cases was the United Nations Security Council with the exception of the ICC where it was a conference of interested states convened under the aegis of the United Nations General Assembly.

^{celxxii} The original length of the ECCC proceedings announced and broadly distributed by the Cambodian government’s preparatory body known as the Cambodian Royal Government’s Khmer Rouge Trial Task Force was set at 3 years (with a caveat that “no precise estimate [was] possible at the time” (*see* http://www.cambodia.gov.kh/krt/english/introduction_eng/index.htm) which at the time (years preceding the establishment of the ECCC) was explained to be a minor adjustment)). At the time of writing the ECCC has been in operation for 4 years during which period it has managed to conduct a trial of one individual for which the Trial Chamber’s judgment has yet to be handed down. ^{celxxiii} Kaing Guek Iev was detained for 8 years on orders of the Military Tribunal of Phnom Penh in anticipation of the inception of the ECCC. The transfer of Kaing to the custody of the ECCC did not take place until after the adoption of the IRs by the ECCC.