Memorandum on the Application of International Standards of Due Process by the Extraordinary Chambers in the Courts of Cambodia

By David Scheffer

April 2006

OPEN SOCIETY
JUSTICE INITIATIVE

© 2006 by the Open Society Justice Initiative. All rights reserved.

Table of Contents

Page

Introduction……………………………………………………………………………..5
I. Primary Sources of International Standards of Due Process…………………………..5
II. General Application of the ICCPR to the Extraordinary Chambers………..……....8
III. Rights of Persons during Investigations……………………………………….......9
A. The status of the person of interest……………………………………......10
B. General rights of both witnesses and suspects during investigations...………11
i) The right not to incriminate oneself…………………………………...12
ii) The right not to be subjected to any form of coercion………………..12
iii) The right to an interpreter…………………………………………....13
iv) The right not to be subject to arbitrary arrest or detention…………...13
C. Additional rights of suspects during the investigations……..…………….....14
i) The right to be informed of grounds of culpability………………14
ii) The right to remain silent……………………………………...14
iii) The right to have legal assistance………………………………..15
IV. Right of Disclosure......………………………………………………………..16
V. Rights of the Accused during Trial Proceedings……………………………….....19
A. The presumption of innocence………………………………………………..19
i) The standard of treatment of the individual…………………………...19
ii) The burden of proof lies with the prosecution………………………..20
iii) The standard of guilt……………………………………………....21
B. The right to be judged by an independent and impartial tribunal…………....23
C. The right to a "fair and expeditious trial"...…………………………………....26
i) Equality of arms……………………………………………………….27
ii) Expeditiousness of trials……………………………………………...28
iii) The limitations of cumulative or alternative charges………………...29
iv) The right to have adequate time and facilities to prepare a defense…29
v) The right to be present at trial………………………………………...30
D. The right to confront witnesses and obtain their attendance…………………31
E. Admissibility of hearsay evidence..…………………………………….....32
F. Depositions……………………………………………………………….....33
G. Affidavits…………………………………………………………….....34
H. Witnesses at risk………………………………………………………..36
I. Unsworn statements by the accused……………………………………......36
J. Rights of the accused to appeal and revision……………………………...37
i) Double jeopardy……………………………………………………39
ii) Revision of judgment……………………………………………………40
K. Penalties…………………………………………………………………...40
L. Pardons and amnesties……………………………………………………....42
M. Rights of witnesses and victims..………………………………………….....44
Bibliography………………………………………………………………………..48
Appendix: Instruments Reflecting International Standards of Due Process during Pre-Trial and Trial Proceedings………………………………………………………49
1. The Universal Declaration of Human Rights (1948)………………………...49
2. 1966 International Covenant on Civil and Political Rights…………………49

3. 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms…………………………………………………....52
4. 1970 American Convention on Human Rights………………………………53
5. 1981 African Charter on Human and Peoples' Rights……………………….55
6. 1988 Body of Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment…………………………………………..56

Introduction

As the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (hereafter identified as the "Extraordinary Chambers" or abbreviated as "EC") are formed and begin to operate, a central issue frames the entire exercise: whether the Extraordinary Chambers will comply with international standards of due process. Since the EC are national courts in Cambodia, where issues of due process in the judicial procedures relating to criminal law have long been criticized as falling short of international standards of due process, it will be imperative for those standards to be implemented in the daily work of the Extraordinary Chambers. The unique structure and character of the EC—with international participation at all levels of the judicial process under a treaty arrangement with the United Nations—requires compliance with international standards of due process both as a matter of national and international law and as a practical reality if international support for the EC is to be sustained during the years of its operation. The Open Society Justice Initiative has dedicated resources and expertise to assisting the Cambodians with the development of the Extraordinary Chambers and other rule of law priorities in the country. This memorandum is another step by OSJI to provide constructive advice on how the Extraordinary Chambers can remain faithful to international standards of due process in its rules and practice.

This paper makes no attempt to compare the rules set forth in Cambodia's Law of Criminal Procedure with the international standards of due process, nor does it identify any "gaps" that might emerge from that exercise. The purpose of this memorandum is to understand the extent to which the special law and treaty governing the Extraordinary Chambers embrace international standards and how such standards have been established through international agreement and custom, particularly in recent decades. As the rules of procedure and evidence for the EC are prepared and finalized, whether by legislative means in Cambodia or by the EC judges, and as the casework of the Extraordinary Chambers proceeds in coming years, it may be worthwhile to factor into deliberations some of the points raised in this memorandum.

I. Primary Sources of International Standards of Due Process

There is no single international agreement that comprehensively or definitively establishes international standards of due process for criminal proceedings ("international standards"). Officials of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea must look to a variety of sources of law that together should provide a sufficient compilation of broadly recognized and enforceable standards within a modern context. This memorandum relies upon several key international and regional agreements and U.N. General Assembly resolutions, academic treatises (see the bibliography on page 48), and the statutes and jurisprudence of international criminal tribunals to confirm the relevant international standards of due process that should guide the work of the Extraordinary Chambers.

David Scheffer is a member of the New York and District of Columbia Bars.

As duly constituted courts of the Kingdom of Cambodia, the Extraordinary Chambers will apply, subject to the EC Law and UN/Cambodia Agreement described below, the rules of criminal procedure found under Cambodian law. Article 33new of 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 ("EC Law")[1] and Article 21(1) of the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea ("UN/Cambodia Agreement")[2] each recognize that in applying Cambodia's Law of Criminal Procedure,[3] "guidance" may be sought in procedural rules established at the international level, namely international standards, whenever 1) Cambodian law fails to address the issue at hand and there is, in effect, a "gap" between Cambodian law and the procedure for which a rule is required, or 2) existing Cambodian criminal procedure law is inconsistent with international standards. These "gap-filling" and normative exercises, which initially will occur in the drafting of the rules of procedures and evidence for the Extraordinary Chambers ("EC RPE"), also doubtless will take place in the daily operation of the EC as individual investigations, trials, and appeals unfold. Nonetheless, at this juncture there should be a better understanding of the extent to which the EC Law and the UN/Cambodia Agreement incorporate international standards.

In the critical domain of the rights of the accused, the EC Law and the UN/Cambodia Agreement contain provisions that are consistent with, albeit often by reference to or with partial incorporation of, the international standards set forth in key international and regional agreements and three particularly relevant U.N. General Assembly resolutions (extracts of these documents are set forth in the text of this memorandum and in the appendix beginning on page 49). These international and regional agreements and U.N. General Assembly resolutions are the following:

--Universal Declaration of Human Rights (U.N. General Assembly resolution 217 (III 1948) of 10 December 1948) ("UDHR");
--the 1966 International Covenant of Civil and Political Rights (in force 23 March 1976) (*Cambodia signed it on 17 October 1980 and acceded to it on 26 May 1992*) ("ICCPR");

---

[1] Available at: http://www.cambodia.gov.kh/krt/pdfs/ KR%20Law%20as%20amended%2027%20Oct%202004%20Eng.pdf.

[2] Available at: http://www.un.org/Depts/dhl/resguide/r57.htm [scroll down to A/RES/57/228B and the agreement appears as the annex to UNGA Resolution 57/228, which appears as the first page following A/RES/57/228B**]**.

[3] Available at: http://www.idli.org/texts/leg5597.pdf#search+'Cambodia%20Rules%20of%20Criminal%20Procedure. There are proposed revisions to the Law on Criminal Procedure that remain under consideration by the Cambodian Government as of the date of this memorandum. There also remains some uncertainty as to the extent to which the Provisions dated September 10, 1992, Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period as applied initially by the United Nations Transitional Authority in Cambodia (UNTAC) would apply in the procedures of the Extraordinary Chambers. Document available at: http://www.scu.edu/law/FacWebPage/VanSchaack/September%2010,%201992%20Criminal%20Law.htm)

--the European Convention on the Protection of Human Rights and Fundamental Freedoms (in force 1953) ("ECHR");
--the American Convention on Human Rights (in force 1978) ("ACHR");
--the African Charter on Human and People's Rights (in force 1986) ("AfCHR");
--the Basic Principles on the Independence of the Judiciary (U.N. General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985) ("U.N. Principles on the Judiciary"); and
--the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (UN General Assembly resolution 43/173 of 9 December 1988) ("UN Principles on Detention").

International standards of due process are also incorporated in the statutes and rules of evidence and procedure of the international criminal tribunals, which are referenced frequently in this memorandum:

--Statute of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and its rules of procedure and evidence ("ICTY RPE");
--Statute of the International Criminal Tribunal for Rwanda ("ICTR") and its rules of procedure and evidence ("ICTR RPE");
--Statute of the Special Court for Sierra Leone ("SCSL") and its rules of procedure and evidence ("SCSL RPE"); and
--Rome Statute of the International Criminal Court ("ICC St.") and its rules of procedure and evidence ("ICC RPE").

There is no Asian regional agreement on standards of due process from which to confirm a collective body of opinion among Asian governments that would demonstrate regional acceptance of the standards confirmed in the regional agreements promulgated in the Western Hemisphere, Europe, and Africa. However, Cambodia's participation in the ICCPR evidences that country's modern acceptance (since 1992 as a state party and from 1980 to 1992 in the capacity as and with the responsibility of a signatory) of the international agreement that remains the foundation for all regional agreements[4] and is repeatedly referenced in relevant international criminal cases. Furthermore, Cambodia's participation in the International Criminal Court ("ICC") since the country's ratification of the Rome Statute on 11 April 2002, a treaty which embodies extensive and sophisticated rules of criminal procedure and evidence drawn from international standards of due process, demonstrates an understanding of the importance of applying such standards to criminal trials of individuals accused of crimes that are part of the jurisdiction of both the EC and the ICC. As a state party to the ICC, Cambodia accepted the legal obligation that the ICC's rules of procedure and evidence and hence the international standards of due process embodied therein and in the ICC Statute would be applied in the event a Cambodian national ever were to be prosecuted before the ICC.

The most significant of the international and regional agreements—and the one that forms the basis for relevant agreements that followed—is the International Covenant

---

[4] JOHN R.W.D. JONES AND STEVEN POWLES, INTERNATIONAL CRIMINAL PRACTICE 578 (2003) [hereinafter "JONES AND POWLES"] ("The fundamental rights of an accused in a criminal trial have attained near-universal status through the adoption of international human rights instruments (ICCPR, ECHR, IACHR, etc.) in the past half century.")

on Civil and Political Rights, under which Cambodia is directly obligated. At a minimum, the EC Law and UN/Cambodia Agreement and, when completed, the EC RPE must confirm the relevancy and application of the ICCPR to the work of the Extraordinary Chambers.

There will be instances in the following discussion where it is more appropriate to refer to what will be described herein as "applied international standards," which have emerged from the practice of the international criminal tribunals and may not be explicitly described as such in any of the international or regional agreements, U.N. General Assembly resolutions, or statutes of the tribunals themselves. The Extraordinary Chambers should not overlook these applied international standards as they represent the progressive development of procedural rules at the international level.

Further, the crimes described in Articles 4 [genocide], 5[crimes against humanity], and 6 [grave breaches of the Geneva Conventions of 1949] of the EC Law are also found in the subject matter jurisdiction of the international criminal tribunals. For the sake of convenience and relevance, such crimes might best be collectively referred to as "atrocity crimes" and that term will be used occasionally in this memorandum.[5]

II. General Application of the ICCPR to the Extraordinary Chambers

Cambodia, as a state party to the ICCPR, is obligated to apply its provisions relating to pre-trial and trial proceedings and sentencing in the performance by the government of any judicial functions. In contrast to the application of substantive law for the subject matter jurisdiction of the EC or the determination of penalties for specific crimes, both of which are subject to the principles set forth in ICCPR Article 15, rules of procedure and evidence for criminal proceedings need not have been those that existed at the time when the act or omission being prosecuted was committed. The protection of the rights of the accused, in particular, can be further developed and codified long after a crime for which an individual stands accused in fact occurred. Therefore, Cambodian courts are required, in the Law of Criminal Procedure and the EC Law, to comply with the standards set forth in the ICCPR for any criminal trial of an individual regardless of when the underlying crime took place in Cambodian history.

Although the EC Law and the UN/Cambodia Agreement explicitly reference only Articles 14 and 15 of the ICCPR, Cambodia, as a ratified party of the ICCPR, is obligated to comply with all of the Covenant's provisions. Many of these other provisions, such as those found, for example, in Articles 6, 7, 9, 10, 21, and 26, may be relevant to the work of the Extraordinary Chambers and Cambodia will be expected to observe them.

UN/Cambodia Agreement Article 12(2) explicitly requires the Extraordinary Chambers to "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, to which Cambodia is a party."

---

[5] The term "atrocity crimes" is introduced and examined in David J. Scheffer, *The Future of Atrocity Law*, 25 SUFFOLK TRANS. L. REV. 389 (2002).

This provision of the UN/Cambodia Agreement also echoes the requirements of ICCPR Article 14(1) regarding a "fair and public hearing." UN/Cambodia Agreement Article 13(1) requires that "the rights of the accused enshrined in Article 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process." An illustrative list of those rights is set forth in Article 13(1) of the UN/Cambodia Agreement. The brevity of the illustrative list should *not* be interpreted as meaning that UN/Cambodia Agreement Article 13(1) should be read to exclude the other rights set forth in ICCPR Articles 14 and 15. Rather, Article 13(1) should be understood to incorporate by reference the totality of ICCPR Articles 14 and 15. UN/Cambodia Agreement Article 13(2) interprets provisions on the right of defense counsel in the EC Law (particularly Article 35(d)new) to "mean that the accused has the right to engage counsel of his or her own choosing as guaranteed by the International Covenant on Civil and Political Rights [namely, ICCPR Article 14(3)(d)]." Thus by the terms of the UN/Cambodia Agreement alone, the most fundamental international standards of due process, as required by the ICCPR, must be applied by the Extraordinary Chambers.

EC Law Article 33new requires that, "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." EC Law Article 34new requires public and open trials, but with abbreviated language from that found in ICCPR Article 14(1). EC Law Article 35new explicitly embraces ICCPR Article 14 in the context of "determining charges against the accused," and does so by setting forth a list of "minimum guarantees" which mirror ICCPR Article 14(2 & 3). EC Law Article 36new establishes the authority of the EC Supreme Court to "decide appeals made by the accused, the victims, or the Co-Prosecutors against the decision of the Extraordinary Chamber of the trial court. In this case, the Supreme Court Chamber shall make final decisions on both issues of law and fact, and shall not return the case to the Extraordinary Chamber of the trial court." This would appear consistent with but somewhat different in character from ICCPR Article 14(5), which establishes the affirmative right of everyone convicted of a crime to have his conviction and sentence "reviewed by a higher tribunal according to law." The affirmative right to appeal is not expressly stated in the EC Law, except insofar as it requires adherence with the totality of Articles 14 and 15 of the ICCPR. EC Law Article 36new infers the right of appeal in describing the authority of the EC Supreme Court. The right to appeal is not expressly set forth in the UN/Cambodia Agreement either, except insofar as it embraces the totality of Articles 14 and 15 of the ICCPR. UN/Cambodia Agreement Article 3(2)(b) infers the right of appeal in describing the composition and function of the EC Supreme Court Chamber. There would be no purpose to the existence of the EC Supreme Court Chamber as an explicitly designated "appellate chamber" (EC Law Article 9new and UN/Cambodia Agreement Article 3(2)(b)) without the right of appeal being available following a decision of the EC Trial Chamber.

III. Rights of Persons during Investigations

The EC Law and the UN/Cambodia Agreement briefly describe the rights of persons during the *investigative* stage of the criminal proceedings. The more extensive recitation

of rights is accorded for the accused during *trial* proceedings. EC Law Article 23new requires that Cambodia's "existing procedures in force" will guide the investigative stage, but if "these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, the Co-Investigating Judges may seek guidance in procedural rules established at the international level." Reliance on "procedural rules established at the international level" may prove frequent partly because the EC Law and the UN/Cambodia Agreement do not provide much additional guidance about the rights of persons during investigations.

The only rights explicitly associated with "Suspects" during investigations are found in EC Law Article 24new: "During the investigation, Suspects shall be unconditionally entitled to assistance of counsel of their own choosing, and to have legal assistance assigned to them free of charge if they cannot afford it, as well as the right to interpretation, as necessary, into and from a language they speak and understand." The Co-Investigating Judges "have the power to question suspects and victims, to hear witnesses, and to collect evidence" (EC Law Article 23new). They also may order the Co-Prosecutors to interrogate the witnesses (EC Law Article 23new). Other provisions dealing explicitly with the investigative stage address the composition, powers, and decision-making procedures of the Co-Investigating Judges—not the rights of persons *per se*. The incorporation of ICCPR Articles 14 and 15 in both documents is done explicitly in the context of the "accused" and trial proceedings, as distinguished from pre-trial investigative work.

The scarcity of provisions relating to the investigative stage in the EC Law and the UN/Cambodia Agreement should not be surprising, as the ICCPR and regional agreements also focus on the rights of the accused during trial proceedings.[6] However, the EC RPE should reflect a number of international standards arising from their repeated invocation in the statutes of the international criminal tribunals, particularly the Rome Statute of the ICC. The common pattern that is reflected in these statutes for the investigative phase reveals the following:

A. The status of the person of interest

There are three categories of individuals whose rights will need to be ensured by the EC RPE. In the first category are those persons who may be the object of questioning by the Co-Investigating Judges, but who are not yet "suspects." For the sake of clarity, this first category of individuals might best be described as "witnesses." "Suspects" constitute the second category of individuals. If the EC apply the definition set in ICTY RPE 2, then a "suspect" is a person about whom the Co-Investigating Judges possess reliable information and who may have committed a crime over which the Extraordinary Chambers have jurisdiction. This definition of "suspect" lacks precision and would leave to the discretion of the Co-Investigating Judges what constitutes "reliable information" and how such information "tends to show" commission of a crime by a particular

[6] CHRISTOPH J.M. SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE 56-63 (2001) [hereinafter SAFFERLING].

individual. The third category of individual—the "accused"—would be a suspect about whom the Co-Prosecutors have prepared an indictment for prosecution following the investigation by the Co-Investigating Judges and that has been approved. An analogous term for the "accused" would be the "indictee." The EC Law and UN/Cambodia Agreement explicitly reference the second ("suspects") and third ("accused") categories of individuals, thus leaving those persons who may be questioned but are not yet suspects ("witnesses") relying on Cambodian criminal procedure or, where there is a gap or inconsistency with international standards, "procedural rules established at the international level" (EC Law Article 23new, UN/Cambodia Agreement Article 12(1)).

Prior to the ICC RPE, the rules of other international criminal tribunals made no effort to establish the first category of individuals in contrast to the status of suspects and the accused, and thus referred to all individuals' rights during the investigative stage as the rights of either the "suspect" or of the "accused." ICC St. Article 55 and ICC RPE Rules 111 and 112 overcome this dilemma by distinguishing between persons during an investigation generally and the sub-category of such persons for whom "there are grounds to believe that a person has committed a crime within the jurisdiction of the court…" ICC St. Article 55(1) and ICC RPE Rule 111 establish rights that apply during investigations both to individuals for whom there are no grounds for believing they are responsible for a crime *and* to suspects (for whom there is such belief). The rights in ICC St. Article 55(1) are guaranteed for any person regardless of his or her future status before the court. ICC St. Article 55(2) and ICC RPE Rule 112 confirm particular additional rights that must be afforded *suspects* during an investigation. This is an innovative and logical development in the ICC Statute and reflects a more sophisticated understanding of the rights of persons before an international tribunal than has previously been the case. Such rights are natural extensions of long-established international standards embodied particularly in the ICCPR. The EC RPE would provide useful clarity if they were to adopt such a distinction.

B. General rights of both witnesses and suspects during the investigations phase (the right not to incriminate oneself, the right not to be subjected to any form of coercion, the right to an interpreter, and the right not to be subject to arbitrary arrest or detention)

EC Law Article 35(g)new embraces the right not to incriminate oneself, but does so in the express context of an *accused* and the "minimum guarantees: in accordance with Article 14 of the International Covenant on Civil and Political Rights…(g)not to be compelled to testify against themselves or to confess guilt." ICCPR Article 14(3)(g) requires that "[i]n the determination of any criminal charge against him, *everyone* shall be entitled to the following minimum guarantees, in full equality:…(g) Not to be compelled to testify against himself or to confess guilt" (emphasis added). ACHR Articles 8(2)(g) and 3 echo this requirement: "[2. …During the proceedings, every person in entitled, with full equality, to the following minimum guarantees:…(g) the right not to be a witness against himself or to plead guilty; 3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind." One might conclude that a *witness* should be entitled to four fundamental rights in respect of an investigation by the Extraordinary Chambers—rights that are clearly accorded to *suspects* and the *accused*. These rights are set forth with clarity in ICC St. Article 55(1) and in ICC RPE 111.

i) The right not to incriminate oneself. The first right is a person's right to silence, or the right "not to be compelled to incriminate himself or herself or to confess guilt." The other international criminal tribunals frame this right as one afforded to *suspects*. SL RPE 42(A)(iii), ICTY RPE 42(A)(iii), and ICTR RPE 42(A)(iii)) express the right somewhat differently: "The right to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence." However, ICC St. Article 55(1)(a) casts a wide net of protection for *any* person during *any* stage of an investigation. A mere witness is entitled to exercise this right and not be subject to having any information he or she might divulge (even if the witness is ignorant of the right) used against him or her in further proceedings.[7]

A related issue is associated with the right not to incriminate oneself, namely, the presumption of innocence. With the exception of ICC St. Article 66(1) (see below), international standards have not articulated an explicit right to the presumption of innocence prior to the accused being charged. The EC Law and UN/Cambodia Agreement refer only to the right of the *accused* in this respect, and not the right of the *witness* or *suspect*. It is thus at least open to question whether the presumption of innocence attaches to the investigative stage, unless one reads the ICC Statute as reflecting a modern international standard on the presumption of innocence. Legal scholars have argued that the right should be recognized prior to charges being filed.[8] Professor Zappala of the University of Florence has written recently: "Moreover, it may be suggested that if this is a right that is granted to the accused it should *a fortiori* be granted to a suspect. The presumption of innocence should indeed be even stronger in respect of a person against whom not even a *prima facie* case has been confirmed. First it would be totally illogical for the judge reviewing the charges to presume that the suspect is guilty. Secondly, if the presumption of innocence were not applicable before the confirmation of charges, irreparable prejudice could be done to the rights of the individual prior to confirmation (for example, through a campaign depicting the suspect as a criminal or by the adoption of asset-freezing measures). Thus, any subsequent protection would prove ineffective."[9] Of course in some legal systems the threshold of proof is different at each stage of the investigation and this may prove to be the case with the Extraordinary Chambers. For example, other legal systems have applied probable cause to search or arrest while applying proof beyond a reasonable doubt to convict a defendant.

ii) The right not to be subjected to any form of coercion. The second fundamental right a witness, as well as an individual who becomes a suspect, should be

---

[7] *See* STEFAN TRECHSEL, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS 340-359 (2005) [hereinafter TRECHSEL] ("The privilege against self-incrimination is certainly one of the most complex guarantees in the entire body of fundamental rights applicable in the context of criminal proceedings. While the basic problem is clear, many specific issues are contested and there is no agreement on the structure of the guarantee. This is evidenced by problems in finding the appropriate terminology….Expressions which are currently in favour include…'right to silence' or 'right not to incriminate oneself.' These expressions are so short that they risk distorting the meaning. What is meant is the right not to be *compelled* to incriminate oneself, to be protected against any pressure to make a statement." *Id.* at 341).
[8] SALVATORE ZAPPALA, HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS 84 (2003) [hereinafter ZAPPALA]. *See also* SAFFERLING, supra note 6, at 66-73.
[9] ZAPPALA, *supra* note 8, at 84-85.

afforded is the right not to be "subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment" (ICC St. Article 55(1)(b)). This right is not found as an explicitly stated right in any other statute or rule for other international criminal tribunals. However, it is a right that is part of international customary and treaty law with respect to all persons and thus may be viewed as redundant in the context of a criminal tribunal's governing rules. The fact that the ICC Statute applies this right explicitly reflects how important the right is to the protection of international human rights within the context of an international criminal proceeding.

iii) The right to an interpreter. The third right established in ICC St. Article 55(1)(c) is the right of a person (either witness or suspect) to an interpreter, or more specifically, "if questioned in a language other than a language the person fully understands and speaks, [such person shall] have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness." This right is similarly expressed in ICTY RPE 42(A)(ii), ICTR RPE 42(A)(ii), and SL RPE 42(A)(ii), but in relation to the "suspect." The ICTY, ICTR, and SL require that the suspect be questioned "in a language [the suspect] [he (*referring to suspect)*] speaks and understands." While the Trial Chambers of the ICTY have confirmed that the *accused* must always be able to understand the language of the interpretation (56), there are no tribunal decisions that specifically address the right of the witness or suspect to understand the language of interpretation. However, the necessity to understand the language of interpretation could be inferred from the right of the suspect to be questioned in his or her spoken or understood language. ICCPR Article 14(3)(f) requires that the *accused* "have the free assistance of an interpreter if he cannot understand or speak the language used in court." Similar rights are found in ECHR Article 6(3)(e) and ACHR Article 8(2)(b). But the availability of such a right for a *witness* or *suspect* being questioned is not explicitly addressed in the ICCPR, ECHR, or ACHR.[10]

iv) The right not to be subject to arbitrary arrest or detention. The fourth right established in ICC St. Article 55(1)(d) is the right of a person, in connection with an ICC investigation, and either as a *witness* or as a *suspect*, not to be subjected to arbitrary arrest or detention and not to be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in the ICC Statute. The right of personal liberty is firmly grounded in international instruments, including UDHR Articles 8 and 9, ICCPR Article 9, ACHR Article 7, ECHR Article 5, and AfCHR Article 6. Principle 38 of the U.N. Principles on Detention states, "A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial." Principle 39 of the U.N. Principles on Detention provides, "Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review." Common elements that are well established in international law "may be defined as: (a) the right in criminal cases of a detained person to be brought promptly

[10] *Id.* at 327-339.

before a judge and (b) the right of anyone deprived of liberty to challenge the lawfulness of detention and to be released if the detention is found to be unlawful."[11]

C. Additional rights of suspects during investigations (the right to be informed of grounds of culpability, the right to remain silent, the right to have legal assistance, and the right to be questioned in the presence of counsel)

ICC St. Article 55(2) establishes four specific rights (in addition to those listed in Article 55(1)) for *suspects* during the investigations phase. These rights are not explicitly replicated in the EC Law and UN/Cambodia Agreement with respect to suspects. In those documents, one can only look to the overall application of international standards and, specifically, ICCPR Articles 14 and 15 as referenced in EC Law Article 23new and UN/Cambodia Agreement Article 12 in order to derive the application of these rights for suspects. However, some of them are explicitly provided to *accused* before the Extraordinary Chambers and, accepting that international standards would not permit suspects to be denied rights granted to the accused, standards of fairness would require that such rights also be available to suspects.

i) The right to be informed of grounds of culpability. In ICC practice, the suspect ("[w]here there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned") must be informed of four separate rights prior to being questioned. ICC St. Article 55(2)(a) sets forth the first such right for a suspect: "To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court." EC Law Article 35(a)new mirrors ICCPR Article 14(3)(a) and Article 9(2) in requiring that an accused be informed "promptly and in detail…of the nature and cause of the charge against them."[12] ECHR Article 6(3)(a) and ACHR Article 8(2)(b) are similar provisions. But the EC Law has no comparable provision that requires *prior* notification to a suspect that he or she is being questioned because it is believed that he or she committed a relevant crime. The EC RPE might address this point.[13]

ii) The right to remain silent. ICC St. Article 55(2)(b) establishes the second explicit right for a suspect: "To remain silent, without such silence being a consideration in the determination of guilt or innocence." As distinguished from the privilege against self-incrimination, the right to silence "does not only protect against the pressure to make statements detrimental to the person concerned, but any declaration at all."[14] The EC RPE might provide that the suspect may remain silent during questioning in the

[11] ZAPPALA, *supra* note 8, at 68.

[12] *See* SAFFERLING, *supra* note 7, at 116-121.

[13] *See* TRESCHEL, *supra* note 7, at 192-207 ("The purpose of this clause seems clear: the right to defend oneself can only be exercised effectively, i.e. with a minimum chance of success, if the accused knows what he or she is accused of. Otherwise, a Kafkaesque situation arises." *Id.* at 193).

[14] *Id*. at 342. See SAFFERLING, *supra* note 6, at 121-124 ("This is a 'landmark' in the development of procedural guarantees, rejecting the former practice of questioning the accused under oath to obtain both evidence and confessions. This right to silence stems from the privilege against self-incrimination, *neo tenetur se ipsum prodere*. To properly safeguard this privilege against self-incrimination, the suspect must be informed of his right to remain silent. If this right is not disclosed, it is of no value at all to the person who should benefit from it." *Id*. at 121).

investigative stage and that the suspect's silence cannot be used to consider guilt or innocence.

iii) The right to have legal assistance. ICC St. Article 55(2)(c) affords a suspect with the right, "[t]o have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it." This right mirrors the right of the *accused* in EC Law Article 35(d)new and in UN/Cambodia Agreement Article 13, as well as ICCPR Article 14(3)(d), ECHR Article 6(3), and ACHR Article 8.[15] Again, however, the ICC Statute explicitly addresses the right of the *suspect* to such legal assistance. Interestingly, the U.N. Principles on Detention would provide the suspect (simply "detained person") with the right to counsel provided the suspect ("detained person") has been arrested. Principle 17 of the U.N. Principles on Detention, well reflected in ICC St. Article 55(2)(c), states with respect to a "detained person":

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.
2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

In addition, Principle 18 of the U.N. Principles on Detention states with respect to either a "detained or imprisoned person":

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.
2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel…

The EC RPE might find guidance in these provisions in clarifying the right to counsel for suspects.[16]

ICC St. Article 55(2)(d) requires that a suspect enjoy the right, "[t]o be questioned in the presence of counsel *unless the person has voluntarily waived his or her right to counsel*" (emphasis added). Neither the EC Law nor the UN/Cambodia Agreement explicitly addresses the issue of voluntary waiver of the right to counsel. The ICCPR also fails to address the waiver option. The right to be questioned in the presence of

[15] *See* TRESCHEL, *supra* note 7, at 250-251, 282-285, and 288-90.

[16] *See* SAFFERLING, *supra* note 6, at 104-107 for a discussion of the right to counsel during pre-trial proceedings ("It seems clear, however, that every suspect has the right to counsel of his own choosing, if he has the necessary means. He must be given this possibility at all costs….A second statement of Art. 14 ICCPR is clear in principle: if the suspect does not have sufficient means, he will receive free legal assistance, if the interests of justice so require. This principle comes into force in cases involving difficult legal or factual issues." *Id*. 109 & 111).

counsel unless that right is waived, however, should be inferred from the right of the accused (and hence of the suspect as well) "to defend himself in person or through legal assistance of his choosing" (ICCPR Article 14(3)(d)).[17] The EC RPE might further clarify this point.

It remains significant to consider, however, that in light of the particular circumstances surrounding the history and purpose of the Extraordinary Chambers and the context in which justice will be rendered—complex facts, extremely serious charges relating to atrocity crimes, the time that has expired since alleged crimes were committed, the advanced age of possible defendants, United Nations commitment to international standards of due process throughout the proceedings, the need for efficient use of time during pre-trial and trial proceedings—the need for provision of legal assistance to each defendant probably will be compelling.

IV. Right of Disclosure

A fundamental rule of national criminal systems of adversarial or inquisitorial character is the right of disclosure to the defense of material and information that the prosecution will introduce into trial. The practice of the regional human rights courts and *ad hoc* international criminal tribunals has not only strengthened this rule as an international standard,[18] but the prosecutor may be required to submit summaries of previous witness statements to the trial judges so that, *inter alia*, they can examine the extent to which the prosecutor has explored exculpatory evidence.[19]

Neither the EC Law nor the UN/Cambodia Agreement directly addresses the rights of the accused regarding disclosure of evidence. However, EC Law Article 35(e)new provides a nuanced approach to the issue with its requirement that the accused be "equally entitled" to ICCPR Article 14 minimum guarantees. Thus EC Law Article 35(e)new provides the accused with the right "to examine evidence against them and obtain the presentation and examination of *evidence on their behalf* under the same conditions as evidence against them" (emphasis added). ICCPR Article 14(2)(e) references the right of the accused to "obtain the attendance and examination of *witnesses on his behalf* under the same conditions as witnesses against him" (emphasis added). Though the distinction between "evidence" and "witnesses" may be an unintentional and irrelevant one, particularly as EC Law Article 35new mostly recites minimum guarantees "in accordance with Article 14 of the International Covenant on Civil and Political Rights," the EC RPE might follow the lead of EC Law 35(e)new and elaborate the equal entitlement that the accused must have with respect to exculpatory evidence.

The ICTY, ICTR, and SCSL include in their respective rules numerous and nearly identical provisions relating to disclosure of evidence to the accused and defense counsel (ICTY RPE 66-70, ICTR RPE 66-70, SCSL RPE 66-70). No one can doubt that international standards as they have been developed in the rule-making and practice of

[17] *See* TRECHSEL, *supra* note 7, at 251-252, 263-266.
[18] *Id*. at 92-94.
[19] *See* Geoffrey Nice QC & Philippe Vallières-Roland, *Procedural Innovations in War Crimes Trials*, 3 J. INT'L CRIM. JUST. 354 (2005).

the international criminal tribunals point toward a comprehensive set of procedures that are intended fully and fairly to disclose evidence, including exculpatory evidence, to the defendant. The implementation by the ICTY and ICTR of the principle of equality of arms on evidence was further developed and consolidated in the ICC Rules of Procedure and Evidence. The ICC rules should be viewed as representing the current body of international standards on disclosure of evidence, in large part because they draw heavily on rules that are now well established in the work of the ICTY, ICTR, and SCSL. It thus would be beneficial for the EC RPE to draw from the ICC RPE for rules on disclosure of evidence.

ICC RPE 76-84 offer a template for the EC RPE. These rules can be summarized as follows:

1. The prosecutor must provide the defense with full information (names and copies of prior statements) regarding prosecution witnesses.
2. The defense may inspect all evidentiary material held by the prosecutor which is material to the preparation of the defense or intended for use by the prosecutor.
3. The prosecutor may inspect all evidentiary material held by the defense and intended for use by the defense.
4. The defense must notify the prosecutor of its intent to raise the existence of an alibi or a ground for excluding criminal responsibility under Article 31(1) of the ICC Statute (mental disease, intoxication, self-defense, duress).
5. The defense must notify the prosecutor of its intent to raise any other ground for excluding criminal responsibility, which Article 31(3) of the ICC Statute permits (provided such ground for excluding criminal responsibility is found within the applicable law of the ICC).
6. There is no mandatory disclosure of reports, memoranda, or other internal documents prepared by a party in connection with the investigation or preparation of the case. The prosecutor may seek a ruling to stop disclosure of material or information that may prejudice other investigations. Information shielded by confidentiality privileges shall not be disclosed other than in accordance with statutory procedures, and witnesses who may be endangered by any such disclosure must be so informed in advance. The court must take necessary steps to ensure the confidentiality of information and to protect the safety of witnesses and victims and members of their families. Where material or information in the possession or control of the prosecutor or defense is withheld for the security of a witness or his or her family, such material or information cannot be introduced into evidence during trial proceedings without prior disclosure to the other party.
7. The prosecutor may not introduce into evidence material or information protected by rules of confidentiality under the ICC Statute without prior consent of the provider of the material or information and adequate prior disclosure to the accused. Other restrictions on disclosure of confidential material or information must be followed.

8. The prosecutor's obligation to disclose to the defense any exculpatory evidence in the possession or control of the prosecutor should, if in doubt in any particular circumstance, be dealt with and ruled on by the court as soon as practicable at the prosecutor's request.
9. The court must make any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence, with strict time limits kept under review by the court.

ICC St. Article 54(1)(a) obligates the prosecutor to search for exculpatory evidence: "In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally." The ICTY, ICTR, and SCSL Statutes do not establish an explicit obligation on the part of the prosecutor to pro-actively *search* for exculpatory evidence. But with considerable detail, ICTY RPE 68, ICTR RPE 68, and SCSL RPE 68 require the prosecutor to disclose exculpatory evidence "known to the Prosecutor," in other words, discovered by the prosecutor. The duty to disclose exculpatory evidence, however obtained, has been emphasized repeatedly in tribunal jurisprudence and has been characterized as a duty "as important as the obligation to prosecute."[20] Thus, in the case of the Extraordinary Chambers, were this obligation to be incorporated in the EC RPE, the Co-Investigating Judges and the Co-Prosecutors must be knowledgeable of the evidence in their possession or control and the nature of such evidence so as to determine whether any of it is exculpatory. If the standard established by the ICC and tribunal jurisprudence is embraced, then the EC RPE might obligate the Co-Prosecutors and Co-Investigating Judges to pro-actively search for and make available exculpatory evidence to the defense.

ICC St. Article 54(1)(a) is a modern international standard that can serve as the foundation for the rules. It already is well established in national civil law systems where it is commonly known as the principle of objectivity.[21] In the common law system the prosecutor is obligated to seek truth and justice. There should be nothing left in the evidence that would cast doubt on the validity of a conviction. The ICC prosecutor is obligated to demonstrate his impartiality by pursuing both incriminating and exculpatory evidence throughout every stage of the case. But there is no duty requiring the collection of equal quantities of incriminating and exculpatory evidence. Three standards—objectivity, the truth, and the determination of criminal responsibility—direct the extent to which the Co-Prosecutors and Co-Investigating Judges of the Extraordinary Chambers might seek and disclose exculpatory evidence. Objectivity in the investigation and examination of evidence is of paramount importance to the exercise.

The requirements of the principle of objectivity may point to the need for protocols to the EC RPE that would establish in considerable detail how the Co-Investigating Judges and Co-Prosecutors would ensure that exonerating circumstances

[20] ICTY Appeals Chamber Decision on Motions to Extend Time-limit for Filing of Appellants' Briefs, *Prosecutor v. Kordic and Cerkez*, 11 May 2001, para. 14.
[21] *See* SAFFERLING, *supra* note 6, at 74-76.

are investigated to establish the truth and assess criminal responsibility, as well as ensure proper record-keeping and storing and reviewing of documents so that challenges to compliance with the disclosure requirements can be met with documentary proof of compliance. Guidance in this respect could be sought from the ICC prosecutor.

V. Rights of the Accused during Trial Proceedings

International standards of due process have evolved in a manner showing that most of the rights of the witness and of the suspect during the investigative and pre-trial proceedings will follow the accused into and through the trial proceedings. Indeed, such rights typically are associated with the accused and then, as shown above, there is great importance attached in associating those rights as well with the witness and the suspect prior to trial proceedings.

A. The presumption of innocence

EC Law Article 35new provides: "The accused shall be presumed innocent as long as the court has not given its definitive judgment." UN/Cambodia Agreement Article 13(1) requires that the accused have the right "to be presumed innocent until proved guilty." Both documents incorporate ICCPR Article 14(2), which confirms the international standard of the presumption of innocence: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."[22] UDHR Article 11 articulated long ago the rule that "[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial." Thereafter, in addition to the ICCPR, international instruments such as ECHR Article 6(2), ACHR Article 8(2), AfCHR Article 7(1)(b), and ICTY Article 21(3), ICTR Article 20(3), SCSL Article 17(3), and ICC St. Article 66 have embraced the right to a presumption of innocence.[23] ICC St. Article 66(1), for example, provides that, "Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law." The reference to "everyone" in the ICC Statute serves to explicitly extend the presumption of innocence beyond the accused to witnesses and suspects as well. Principle 36 of the U.N. Principles on Detention clearly applies to suspects as well as the accused in this respect: "A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense." Significantly, the presumption of innocence is a right found in national criminal codes.

There are three main consequences of the presumption of innocence:[24]

i) The standard of treatment of the individual. The individual—as a witness, suspect, or accused—should not be treated by the judicial and administrative organs of the court in a manner that challenges the presumption of innocence. It is to be expected that in the Extraordinary Chambers the Co-Prosecutors, for obvious reasons, will argue

---

[22] *See* TRESCHEL, *supra* note 7, at 153-166.
[23] JONES AND POWLE, *supra* note 4, at 580-581.
[24] *Id.* at 85-100.

the culpability of the accused. But the communications of the court's other organs with the media, in particular, must not convey the impression that the individual is or has been found guilty.[25] For example, use of the term "war criminal," without a finding of guilt of the witness, suspect, or accused, could be highly prejudicial and a clear violation of the presumption of innocence. Importantly, the principle of the presumption of innocence also comes into play when the accused refuses to enter a plea of guilty or not guilty, and thus declines to declare his innocence or guilt. In that situation, the court should enter a plea of not guilty on behalf of the accused in order to preserve the presumption of innocence. A guilty plea should be properly regulated by the rules of the court so that it remains consistent with the presumption of innocence. If the mandate of a criminal court—international or national—is to investigate and render judgment on atrocity crimes of the most serious character, the presentation of evidence and the ascertainment of the truth should not necessarily be sacrificed (perhaps forever) to the convenience of a guilty plea. The interests of victims, who search for the most complete truth of what occurred, may be severely undermined in the result. It is also true that guilty pleas can lead to plea bargaining and efforts to reduce sentences—outcomes that may be inappropriate for the perpetrators in the leadership ranks responsible for atrocity crimes.

ICC St. Article 65 sets forth detailed provisions balancing the interests of efficient and cost-effective justice with the presumption of innocence and seeking to ensure, in particular, that an innocent person does not erroneously plead guilty. The EC RPE could embrace at least some of the ICC St. Article 65 principles and procedures to strengthen the EC's adherence to the presumption of innocence. The presumption of innocence reinforces the right of witnesses, suspects, and accused to remain silent, a right that is widely embraced by international criminal tribunals and, for the Extraordinary Chambers, should derive from the incorporation of ICCPR Article 14 in the EC Law and UN/Cambodia Agreement. A witness who is compelled to answer a Prosecutor's questions should be shielded by the exclusionary rule for any incriminating statement made strictly as a witness in the event such individual is indicted and thereafter is entitled to the right to remain silent and to the presumption of innocence. This rule extends to the sentencing of a convicted defendant, a phase of the proceedings that should be sharply divided from the trial and rendering of judgment. Any testimony by the defendant during those proceedings should not bleed over into the sentencing hearing where mitigating and aggravating circumstances will need to be examined separately, without any taint of unjustified self-incrimination by the convicted defendant. That is one reason why it will be important for the EC RPE to ensure that the Extraordinary Chambers hold a separate sentencing hearing so as to protect the convicted defendant's right to avoid self-incrimination throughout the judicial proceedings.

ii) The burden of proof lies with the prosecution. Both the adversarial and inquisitorial systems in national courts require the prosecutor to prove the guilt of the accused, rather than the accused prove his or her innocence.[26] However, before the

---

[25] *See* TRESCHEL, *supra* note 7, at 177-178 ("Media publicity can have particularly dangerous consequences for presumption of innocence. While it is certainly legitimate to inform the public about criminal proceedings, even sometimes during the preparatory stages, it is nevertheless essential that statements presenting the accused as guilty are avoided. It is essential that the judge makes it clear that he or she will not be influenced by a press campaign and gives a clear warning…to that effect." *Id*. at 177).

[26] *Id.* at 167-168; *See also* SAFFERLING, supra note 6, at 257-259.

advent of the ICC, there was no codified international standard to this effect. The ICTY and ICTR fail to provide any explicit requirement in their respective statutes. But ICTY RPE 98-bis strongly points to such a requirement in the context of the ICTY Trial Chamber's power at the close of the prosecutor's case, "by oral decision and after hearing the oral submissions of the parties, [to] enter a judgment of acquittal on any count if there is no evidence capable of supporting a conviction." That decision point can only be reached if the prosecutor has not carried the burden of proving the guilt of the accused with evidence that is "capable of supporting a conviction." The ICTY Appeals Chamber ruled in the *Jelisić* case that the test for whether the burden has been met by the prosecutor requires that "evidence must be insufficient for any reasonable trier of fact to find that guilt has been proved beyond reasonable doubt."[27]

The ICC Statute is unambiguous on the burden of proof: ICC St. Article 66(2) states: "The onus is on the Prosecutor to prove the guilt of the accused." ICC St. Article 67(1)(i) strengthens this principle by requiring, as a matter of full equality, "[n]ot to have imposed on [the accused] any reversal of the burden of proof or any onus of rebuttal." This provision contrasts with the practice of the ICTY and ICTR where certain reversals of the burden of proof have been justified, particularly by ICTY and ICTR RPE 92 ("A confession by the accused given during questioning by the Prosecutor shall, provided the requirements of Rule 63 were strictly complied with, be presumed to have been free and voluntary unless the contrary is proved."). In the context of the right to detain an individual and how the burden of proof is established for that decision, ICCPR Article 9(3) does not impose a very heavy burden of proof on the detainee in order to secure release pending trial: "It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment." The burden of proof, however, shifts more clearly to the accused before the ICTY, ICTR, and SCSL. ICTY, ICTR and SCSL RPE 65 require the accused to prove that "he will appear for trial and…will not pose a danger to any victim, witness or other person." But the Trial Chamber of the international criminal tribunals exercises complete discretion as to whether release will take place regardless of whether the accused demonstrates that these conditions for provisional release have been met.

In a number of civil law countries, written police statements are accorded greater evidentiary weight than those of private citizens. However, such practice would not be appropriate for an international criminal tribunal or one, such as the Extraordinary Chambers, which has adopted a quasi-international character. It will be important with respect to the Extraordinary Chambers that the Co-Prosecutors and Co-Investigating Judges not be entitled to submit reports that may be presumed, under Cambodian law, to be true or of an unbalanced evidentiary weight before the EC judges. Any such presumption would challenge the international standard of presumption of innocence to which the defendant is entitled.

iii) The standard of guilt. EC Law Article 35new provides, "The accused shall be presumed innocent as long as the court has not given its definitive judgment." EC Law Articles 33new and 35new as well as UN/Cambodia Agreement Articles 12 and 13

[27] ICTY Appeals Chamber Judgement, *Jelisić* (IT-95-10-A), 5 July 2001, para. 37.

require adherence with ICCPR Articles 14 and 15. ICCPR Article 14(2) requires, "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law." The method of proving guilt must be in accordance with law. Professor Zappala writes, "This does not only mean that any 'crystal ball' method is banned—it also implies that legal argumentative and interpretative techniques must be adopted by the Prosecution to demonstrate guilt and by the judges to give reasons for their decision. Moreover, the provision implies that respect for procedural rules has overriding importance in international criminal trials."[28] The ICCPR standard—"presumed innocent until proved guilty according to law"—is most closely followed by ICC St. Article 66(1): "Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law."

ICC St. Article 21 sets forth the applicable law of the ICC, including the ICC RPE, applicable treaties and the principles and rules of international law, and when needed the "general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards." ICTY Article 21 and ICTR Article 20 establish a narrower standard, namely that "[the] accused shall be presumed innocent until proved guilty according to the provisions of the present Statute." SCSL Article 17(3) mirrors this narrow standard: "The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute." The "according to law" standard established in the ICCPR would point to a broader application of legal requirements to establish guilt for the Extraordinary Chambers than is the case for the ICTY, ICTR, and SCSL. Indeed, the EC Law does *not* point to the narrow standard of these international tribunals—"the provisions of the present Statute"—and instead simply looks to the "definitive judgment" of the court before arriving at a determination of guilt. Therefore, the EC RPE should look to the ICCPR and the ICC Statute as the appropriate standards for legal procedure in this respect.

The standard of proof required for a determination of guilt by judges of international criminal tribunals is "beyond a reasonable doubt," which defies precise definition.[29] Again, the ICC Statute articulates the modern international standard for proof of guilt. ICC St. Article 66(3) requires: "In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt." Professor Zappala explains, "The rule does not imply that *any doubt* must be interpreted to the advantage of the accused, and may thus indicate that the judges must reach a determination of guilt in accordance with reasoning essentially based on a probabilistic analysis of the evidence submitted at trial. Only a 'doubt' that renders the commission of the crime by the accused unlikely, according to an assessment based on the evaluation of probabilities, can thus be 'reasonable doubt.'"[30] The Statutes of the ICTY, ICTR, and SCSL do not contain a provision comparable to ICC St. Article 66(3); neither does the EC Law nor the UN/Cambodia Agreement.

[28] ZAPPALA, *supra* note 8, at 97.
[29] SAFFERLING, *supra* note 6, at 259-260.
[30] ZAPPALA, *supra* note 8, at 98.

However, in their rulings, the ICTY and ICTR have adopted the standard of "beyond reasonable doubt." For example, the ICTY Appeals Chamber has ruled that "[i]t may overturn the Trial Chamber's finding of fact only where the evidence relied on could not have been accepted by any reasonable tribunal or where the evaluation of the evidence is wholly erroneous."[31] Professor Zappala concludes that "arguably proof of guilt in accordance with law and beyond reasonable doubt means that the judge must reach a finding based on the *highest probability* that a certain sequence of acts led to the commission of the crime by the accused. It is precisely the assessment of this probability that is influenced by the reasonable doubt standard as opposed to the '*intime conviction,*' which does not mean that the judge can rely on a balance of probabilities, but rather that guilt is affirmed by excluding all other reasonable probabilities….[T]he determination of guilt should be reached through a trial conducted in accordance with the rules of procedure and subsequently affirmed by applying legal rules and juridical interpretative techniques."[32] The fact that judges rather than a jury are arriving at the determination of guilt or innocence elevates the importance of the standard and points toward the need for a reasoned decision in writing that adheres strictly to the requirement of "beyond a reasonable doubt."

B. The right to be judged by an independent and impartial tribunal

A well-established international standard supporting the rule of law at the national and international level is the requirement that judges and courts be independent and impartial in the administration of justice. This standard is firmly embedded in the constitutive instruments of the Extraordinary Chambers. EC Law Article 10new ("The judges…shall have high moral character, a spirit of impartiality and integrity, and experience….Judges shall be independent in the performance of their functions, and shall not accept or seek any instructions from any government or any other source.") and UN/Cambodia Agreement Article 3(3) ("The judges shall be persons of high moral character, impartiality and integrity….They shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.") require the independence and impartiality of the judges of the Extraordinary Chambers.

These provisions reflect the international standards evident in ICCPR Article 14(1) ("everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law"), UDHR Article 10 ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."), ECHR Article 6(1) ("In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."), ACHR Article 8(1) ("Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor,

---

[31] *Id.* at 99.
[32] *Id.*

fiscal, or any other nature."), and AfCHR Article 7(d) ("the right to be tried within a reasonable time by an impartial court or tribunal").[33]

One particular template for international standards in this respect is the U.N. Principles on the Judiciary. The following extracts of principles are emblematic of the international standards that have long evolved in this respect:

> 2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason….
>
> 4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law….
>
> 6. The principle of the independence of the judiciary entities and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
>
> 7. It is the duty of each [U.N.] Member State to provide adequate resources to enable the judiciary to properly perform its functions….
>
> 10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory….
>
> 15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

Among the international criminal tribunals, each embraces the international standard of impartiality with respect to the qualifications of judges albeit with slightly varied wording: ICC St. Articles 36(3)(a) ("The judges shall be chosen from among persons of high moral character, impartiality and integrity…") and 40(1) ("The judges shall be independent in the performance of their functions."), SCSL St. Article 13(1) ("The judges shall be persons of high moral character, impartiality and integrity who….shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government or any other source."), ICTY St. Articles 12(1) (all judges must be "independent") and 13 (all judges "shall be persons of high moral

---

[33] *See* SAFFERLING, *supra* note 6, at 86-97; TRESCHEL, *supra* note 7, at 45-52.

character, impartiality and integrity"), and comparable language in ICTR Articles 11(1) and 12.[34]

The independence of the judges "in the performance of their duties" should encompass a critical international standard, namely, the independence[35] and impartiality[36] of the judges in judging individual cases. Nothing should prevent the Extraordinary Chambers, in light of this statutory requirement, from holding judges to a high standard of independence and impartiality during the course of any trial. The failure to meet this standard could trigger the remedy of disqualification which, since it is not addressed in either the EC Law or the UN/Cambodia Agreement, should be addressed in the EC RPE. All of the international criminal tribunals, including the ICC, set forth extensive disqualification criteria and procedures in their respective statutes and rules.

The standards set forth in ICC St. Articles 41 and 42 and ICC RPE 34 are most instructive: A judge must not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge must be disqualified from a case if that judge has previously been involved in any capacity in that case before the ICC or in a related criminal case at the national level involving the person being investigated or prosecuted. With respect to the Extraordinary Chambers, the Co-Prosecutors or the person being investigated or prosecuted should be able to request the disqualification of a judge. Any question as to the disqualification of a judge should be decided by the judges (which presumably would require a super-majority vote of the judges of the Extraordinary Chambers, excluding any participation by the challenged judge).

ICC St. Article 42(7) prohibits the ICC prosecutor or ICC deputy prosecutor from participating "in any matter in which their impartiality might reasonably be doubted on any ground." They are disqualified from a case if they previously have been involved "in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted." ICC RPE 34 adds four other standards for disqualification: "(a) Personal interest in the case, including a spousal, parental or other close family, personal or professional relationship, or a subordinate relationship, with any of the parties; (b) Involvement, in his or her private capacity, in any legal proceedings initiated prior to his or her involvement in the case, or initiated by him or her subsequently, in which the person being investigated or prosecuted was or is an opposing party; (c) Performance of functions, prior to taking office, during which he or she could be expected to have formed an opinion on the case in question, on the parties or on their legal representatives that, objectively, could adversely affect the required impartiality of the person concerned; (d) Expression of opinions, through the communications media, in writing or in public actions, that, objectively, could adversely affect the required impartiality of the person concerned."

The ICTY Appeals Chamber in the *Furundžija* case held that a judge must be disqualified if it is shown that actual bias exists or there is an appearance of bias. The appearance of bias can arise when "a Judge is a party to the case, or has a financial or proprietary interest in the outcome of the case, or if the Judge's decision will lead to the

[34] JONES AND POWLE, *supra* note 4, at 581-583.
[35] *See* TRESCHEL, *supra* note 7, at 53-61.
[36] *Id*. at 61-80.

promotion of a cause in which he or she is involved, together with one of the parties."[37] There also should be disqualification when "the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias."[38] The standard is "whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the actual circumstances to make a reasonable judgment) would be that [the Judge in question]…might not bring an impartial and unprejudiced mind."[39]

C. The right to a "fair and expeditious trial"

The EC Law explicitly embraces a core international standard of due process that requires a "fair and expeditious trial."[40] EC Law Article 33new states: "The Extraordinary Chambers of the trial court shall ensure that trials are *fair and expeditious* and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses" (emphasis added). UN/Cambodia Agreement Article 12(2) articulates the same point by reference to the ICCPR: "The Extraordinary Chambers 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, to which Cambodia is a party." ICCPR Articles 14(1) and 14(3) establish several requirements: "1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law….3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality…(c) To be tried without undue delay."

---

[37] ICTY Appeals Chamber Judgment, *Furundžija* (IT-95-17/1-A), 21 July 2000, para. 189.
[38] *Id.*
[39] ICTY Appeals Chamber Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge, *Brdjanin and Talić* (IT-99-36-PT), 18 May 2000, para. 15. *See* ZAPPALA, *supra* note 8, at 104-109.
[40] *See* SAFFERLING, *supra* note 6, at 21-31 ("It is soon clear from reading the texts of the human rights treaties, Art. 14 ICCPR in particular, that 'fair trial' does not just comprise one peculiar right. It consists of a whole range of different rights and obligations. Nevertheless it is one concept: how to make a trial 'fair.' Several positions are meant to be indispensable to achieve this aim as they are outlined in the human rights treaties. We can differentiate between three different components that are inherent in what we call 'fair trial.' Amongst these are, first, institutional guarantees, such as the independence and impartiality of the tribunal or court. These address, first of all, the legislator. He is called upon to establish the institutions needed in a way compatible with human rights. Secondly, there are moral principles that should preside over each step of the procedure, like the presumption of innocence or the principle of equality of arms. These principles are certainly to be closely complied with by the legislator when forming procedural systems; perhaps their main impact lies however within the interpretation and application of the law to the individual case. In particular, in difficult cases with conflicting interests, the solution has to be found according to these legal principles….Finally, there are rights, conceived of in a classically narrow manner, as legal claims to be free of something or to be given something, like the right not to be arbitrarily detained or the right to counsel. Some of these rights are of overall validity and are precise enough to be called 'self-executing.' They are not a merely accidental reflex, but grant the individual a realizable legal claim. All three concepts, institutional guarantees, moral principles, and individual rights, are compiled in one 'right': the right to procedural 'fairness.' The individual is entitled to have all three components verified in his confrontation with the penal system. In that sense the individual has a 'right' to a 'fair trial.'" *Id*. at 30-31). *See also* TRESCHEL, *supra* note 7, at 81-89.

The right to a public hearing or trial, which is an international standard of due process, is also reflected in ECHR Article 6(1) and ACHR Article 8(5).[41] Principle 38 of the U.N. Principles on Detention further provides, "A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial." Several of the provisions of the EC Law (particularly Articles 33new-37new) and the UN/Cambodia Agreement (particularly Articles 12 and 13) can be viewed as supporting the overall principle of a fair and expeditious trial.

The "fair and expeditious" requirement is found, and further developed with express rights, in the statutes of the international criminal tribunals and thus can be viewed as a broadly accepted international standard of due process. ICTY Article 21 and ICTR Article 20 require: "The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses." ICC St. Article 67(1) articulates a more detailed set of requirements which include fairness and expeditiousness: "In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:…(c) To be tried without undue delay." SCSL Article 17(2 & 4) embraces the principle in a similar vein with the requirements that, "2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses….4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality…c. To be tried without undue delay…"[42]

Among the rights that a "fair and expeditious trial" should protect in accordance with the requirements generally associated with an international standard of due process are the following:

i) Equality of arms. One of the more significant developments in the operation of the international criminal tribunals has been the evolving principle that both prosecution and defense must be offered every opportunity to achieve "equality of arms," namely that the resources and access to evidence available to one party also should be offered on equal terms to the other party.[43] This principle has been advanced with considerable vigor in the international criminal tribunals and can be viewed as a

---

[41] *See id*. at 117-133.

[42] *See* SAFFERLING, *supra* note 6, at 227-237 (regarding public hearings and public pronouncements of judgments). *See also* JONES AND POWLE, *supra* note 4, at 579-580.

[43] *See* SAFFERLING, *supra* note 6, at 265-268 ("The principle of the procedural equality of arms is a product of the overall principle of a 'fair trial.' It is not found explicitly in general human rights treaties, but is believed to be a general principle of law. The reference to 'equality before the courts' in Art. 14(1) ICCPR establishes the general principle of equality (Art. 26) for special treatment before courts….Equality thus does not mean equity of powers and rights but rather the balancing of the powers and rights of each participant according to the specific differences in their procedural roles. Each party must have the opportunity to present its case, both with respect to fact and to law. Each must furthermore have the opportunity to comment on the opponent party's case." *Id*. at 265). *See also* TRESCHEL, *supra* note 7, at 96 ("equality of arms" in a criminal case means that "each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent.").

fundamental standard of due process at the international level.[44] The ICTY and ICTR and now the SCSL have developed over the years a methodology of trial preparation and practice that embraces a growing application of equality of arms with the related principle of objectivity, as discussed above. The ICTY Appeals Chamber firmly embraced the principle of equality of arms in the *Tadić* judgment: "The Appeals Chamber is of the view that under the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. This principle means that the Prosecution and the Defense must be equal before the Trial Chamber. It follows that the Chamber must provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case."[45] In practice, this fundamental principle applies in large part to ensure that the defendant must be placed on an equal footing with the prosecution, and not necessarily vice versa.

ii) Expeditiousness of trials. It already has been noted that the EC Law (Article 35(c)new) and, by reference to ICCPR Article 14, the UN/Cambodia Agreement (Articles 12(2) and 13(1)) require trials to be held "without undue delay." ICCPR Article 14(3), ECHR Article 6(1), and ACHR Article 8(1) mirror this requirement.[46] This standard has taken on increased significance during the last decade as trials before the ICTY and ICTR have stretched into years of pre-trial preparation and trial proceedings.[47] In the result, both tribunals have rendered rulings strengthening the principle of expeditious trials. By virtue of that experience in a series of cases, the international standard for an expeditious trial stands on firm ground for application by the Extraordinary Chambers.[48] The tools that have emerged from ICTY and ICTR decisions (albeit not necessarily consistently between Trial and Appeals Chambers) include 1) denying the Prosecutor the right to amend the indictment, an action that, if permitted, could delay the trial; 2) the requirement of "dossiers" of witness statements that are submitted before trial and enable the judges to focus on relevant issues, thereby saving time at trial; 3) narrowing the list of witnesses; 4) the admission into evidence of other proceedings' transcripts; and 5) the oversight of the judges in the preparation for trial through pre-trial conferences with the prosecutor and defense counsel and to manage the flow of evidence, including information sought by the judges prior to trial. The ICTY and ICTR must employ these tools with discretion. Their respective RPE reflect a range of judicial oversight responsibilities aimed in significant part at expediting trial proceedings.[49] That such developments greatly modify the adversarial model of

---

[44] *See* JONES AND POWLE, *supra* note 4, at 579, 589-592; TRESCHEL, *supra* note 7, at 94-102 ("Although there is no express reference to the equality of arms in either Article 6 § 1 of the ECHR or Article 14 § 1 of the ICCPR, it is nevertheless generally agreed that it is an essential element of a fair trial. The first sentence of Article 14 of the ICCPR sets out a general guarantee of equality before the courts and tribunals, while Article 8 § 2 of the ACHR introduces the rights of the defence with the words 'with full equality.' Some authors in fact link equality of arms to the general guarantee of non-discrimination, but, in my view, such a connection is incorrect." *Id*. at 94-95).

[45] ICTY Appeals Chamber Judgment, *Tadić* (IT-94-1-A), 15 July 1999, paras. 48-49.

[46] *See* TRESCHEL, *supra* note 7, at 134-149 ("In one of its first judgments the [European] Court [of Human Rights] clearly and convincingly set out the purpose of the right to be tied within a reasonable time: 'the precise aim of this provision in criminal matters is to ensure that accused persons do not have to lie under a charge for too long and that the charge is determined.'" *Id*. at 135).

[47] *See* JONES AND POWLE, *supra* note 4, at 585-588.

[48] *See* ZAPPALA, *supra* note 8, at 115; SAFFERLING, *supra* note 6, at 250-256.

[49] *See* ZAPPALA, *supra* note 8, at 118.

prosecution by engaging the judges and educating them about the evidence before the trial begins—and thus incorporating some of the inquisitorial system—has left a permanent mark on the procedures of the international criminal tribunals.

iii) The limitations of cumulative or alternative charges. There is a natural tendency in the prosecution of atrocity crimes to frame charges in an indictment in multiple fashion, so that the same criminal act is cast as, for example, both genocide and crimes against humanity. In the event an atrocity crime is being charged, it is because the international community would expect no less. It would be intolerable to allow a particular atrocity crime to escape prosecution simply because the crime might also be described in other terms. These crimes of great magnitude can cross several areas of substantive law and thus suggest that a range of possible crimes might be found. The ICTY Appeals Chamber has found that "reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if such statutory provision involved has a materially distinct element not contained in the other."[50] Therefore, where the facts point to two or more defined atrocity crimes having been committed, the prosecutor is strongly encouraged to charge the multiple, or cumulative, charges.

The practice of the ICTY and ICTR also points to the framing of alternative charges, namely, that where the prosecutor is unsure which criminal count the facts will support once proven, he or she may charge both counts in the alternative. One might find alternative charging as more desirable than cumulative charging because the former rests on the premise that if one count is not proven beyond a reasonable doubt, another count covering essentially the same event might be proven beyond a reasonable doubt and thus lead to a conviction. However, it is often the case that the same set of facts gives rise to two different crimes, each of which is grave and worthy of cumulative charging.

In any event, the international standard of due process embraces both cumulative and alternative charging in an indictment provided there is a distinguishable element to be proven with each charge. The defendant is entitled to be fully informed about each charge, including each of those charges that are cumulative in character. The fact that such full disclosure of overlapping information may not occur until the sentencing stage remains contentious in international tribunal practice. None of the rules of procedure and evidence for the international criminal tribunals satisfactorily iron out the potential hazards of cumulative or alternative charges. One can conclude, then, that the international standard is limited to the fundamental principle that cumulative charges are permitted provided there is a distinguishing evidentiary feature among any two of the charges.[51]

iv) The right to have adequate time and facilities to prepare a defense. UN/Cambodia Agreement Article 13(1) requires that the accused is "…to have adequate time and facilities for the preparation of his or her defence…" EC Law Article 35new requires that the accused have "adequate time for the preparation of their defence…"

---

[50] *Id.* at 121.
[51] *See* GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 178-183 (2005) [hereinafter WERLE] (particularly the discussion of charges, convictions, and sentencing).

Both documents affirm compliance with ICCPR Article 14, which stipulates in sub-section 3(b) the minimum guarantee of the accused "[t]o have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing." This requirement is common to ECHR Article 6(3)(a) and ACHR Article 8(2)(b) and to the statutes of the international criminal tribunals (ICTY Article 21(4)(b), ICTR Article 20(4)(b), SCSL Article 17(4)(b), and ICC St. Article 67(1)(b)). It reflects an international standard of due process that must be balanced against the right to a trial "without undue delay." The rights that should be made available include the right of the accused to communicate with defense counsel and the provision of office space for defense counsel.[52]

v) The right to be present at trial. EC Law Article 35new entitles the accused "to be tried in their presence…" Both the EC Law and the UN/Cambodia Agreement confirm compliance with ICCPR Article 14(3), which requires that, "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:…(d)To be tried in his presence…" This explicit right is repeated in the statutes of the international criminal tribunals (ICTY Article 21(4)(d), ICTR Article 20(4)(d), ICC St. Article 67(1)(d), and SCSL Article 17(4)(d)) and is an international standard of due process.[53] Although *in abstentia* trials are permitted in some civil law systems, including the courts of Cambodia, and the justification for such trials may lie in advancing the interests of justice despite the indictee's defiance of the authority of the court and its arrest warrants, there is an international standard of due process that clearly endorses the requirement that the accused be present for his or her trial, and that standard is explicitly applied to the Extraordinary Chambers by the EC Law and required by the UN/Cambodia Agreement through application of ICCPR Article 14.

However, the standard is not so rigid as to disallow the absence of the defendant under certain circumstances, such as when "the accused, being present before the Court, continues to disrupt the trial, [in which case] the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required" (ICC St. Article 63(2)). ICTY and ICTR RPE 80(b) establish the basis for denying the accused of the right to be present under certain circumstances in the courtroom: "The Trial Chamber may order the removal of an accused from the courtroom and continue the proceedings in the absence of the accused if the accused has persisted in disruptive conduct following a warning that such conduct may warrant the removal of the accused from the courtroom." SCSL RPE 80(b) also confirms this procedure but adds the feature of a video link if necessary to keep the accused informed of the proceedings: "The Trial Chamber may order the removal of the accused from the proceedings and continue the proceedings in his absence if he has persisted in disruptive conduct following a warning that he may be removed. In the event of removal, where possible, provision should be made for the accused to follow the proceedings by video link." Additionally at the ICTR, if the accused refuses to appear for trial following his or her initial appearance, then the

---

[52] *See* TRESCHEL, *supra* note 7, at 208-241.
[53] *Id*. at 252-263; SAFFERLING, *supra* note 6, at 241-250.

trial may proceed in the absence of the accused provided he is represented by counsel (ICTR RPE 82-bis). A similar rule is available under SCSL RPE 60 and ICC St. Article 63.

D. The right to confront witnesses and obtain their attendance

UN/Cambodia Agreement Article 13(1) entitles the accused "to examine or have examined the witnesses against him or her." The broader commitment to comply with ICCPR Article 14 that is made in UN/Cambodia Agreement Article 13(1) and EC Law Articles 33new and 35new points to the ICCPR Article 14(3)(e) requirement that the minimum guarantees of an accused must include the right "[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." This right is also found in ECHR Article 6(3)(d) and ACHR Article 8(2)(f). The international standard to examine and cross-examine witnesses is reinforced in the statutes and rules of the international criminal tribunals. ICTY Article 21.4(e), ICTR Article 20.4(e), and ICC St. Article 67(1)(e) grant to the accused the right "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions of witnesses against him."[54] SCSL Article 17(e) varies slightly: "To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her…" Thus a right and obligation have been repeatedly affirmed: the right of the accused to cross-examine witnesses testifying against him or her, and the obligation of the court to facilitate the attendance of witnesses requested by the defense.[55]

An important element associated with the right to cross-examine witnesses is whether any such witness may remain anonymous to the defendant and his or her counsel for reasons of personal security and as a protective measure for witnesses.[56] The competing principles of fairness and publicity would point to full public disclosure of the identities and the testimony of all witnesses. Yet, as discussed above, protection of witnesses is a key feature of international criminal tribunals and must co-exist with the greatest possible transparency of the proceedings. While the ICTY and ICTR have determined in individual cases that the identity of certain witnesses can be withheld from the public, there has been more internal disagreement among the judges over whether a witness' identity can be withheld, and thus remain anonymous, from the defendant and defense counsel. One can confidently conclude that an international standard has been established regarding the protection from public knowledge of the identities of witnesses at risk. But it would be premature to conclude that an international standard has been created that shields a witness with anonymity from the defendant and defense counsel.[57] There may arise exceptional circumstances where anonymity might be deemed justifiable, particularly if the testimony of the anonymous witness is only one of many testimonies and the burden of proving guilt beyond a reasonable doubt can be successfully carried with other evidence.

[54] *See* JONES AND POWLE, *supra* note 4, at 592-594.
[55] *See* TRESCHEL, *supra* note 7, at 291-312.
[56] *Id*. at 312-322.
[57] *See* ZAPPALA, *supra* note 8, at 130-132.

E. Admissibility of hearsay evidence

A rule permitting some hearsay testimony is emerging in the practice of the international criminal tribunals.[58] This stands in contrast to the adversarial, common law system where criminal trials require the judgment of a jury. In the adversarial system, the practice of trial by jury has rejected hearsay evidence as beyond the capabilities of the jury members to properly evaluate. Hearsay is barred even in common law trials where the judge is a fact-finder. The exclusion of hearsay evidence in such trials results in the main from the fact that common law systems often have more developed and differentiated evidentiary rules and standards than other legal systems. Exclusionary rules thus prevent such evidence from being successfully introduced. But in civil law systems and in the international criminal tribunals, hearsay testimony is subject to scrutiny by judges and its relative merits weighed by them. There are no exclusionary rules specifically targeting such testimony.

The rules of procedure and evidence of the international criminal tribunals establish a wide perimeter beyond which hearsay evidence cannot be admitted. SCSL RPE 89 provides that in cases not provided explicitly in the rules of evidence (e.g., hearsay), "a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law." The rule also specifies, in part (c), that, "A Chamber may admit any relevant evidence."

ICTY and ICTR RPE 89 have similar wording. ICTY RPE 89(C) elaborates that, "A Chamber may admit any relevant evidence which it deems to have probative value." ICTY RPE 89(D) provides, "A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial." And ICTY RPE 89(E) ensures that, "A Chamber may request verification of the authenticity of evidence obtained out of court." ICTR RPE 89 mirrors these provisions.

SCSL RPE 95 further requires: "No evidence shall be admitted if its admission would bring the administration of justice into serious disrepute." ICTY and ICTR RPE 95 expand this principle: "No evidence shall be obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings."

The ICC Statute and RPE offer a fuller picture of how hearsay evidence could be considered for the rules of procedure and evidence of the Extraordinary Chambers. ICC St. 69(4) reads: "The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence." ICC RPE 63(2) vests authority in an ICC Chamber "to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69 [general rules of

[58] *See* SAFFERLING, *supra* note 6, at 306-309.

evidence].” ICC RPE 63(4) further establishes that, “a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence.” ICC RPE 64(2) requires, “A Chamber shall give reasons for any rulings it makes on evidentiary matters.”

Thus, a “flexibility rule” has been applied by the international criminal tribunals. Almost any evidence is admissible provided the judges determine it is of probative value and its admission would not prejudice a fair trial or seriously damage the integrity of the proceedings. Furthermore, the exclusion of evidence can take place up to the moment of judgment as the judges weigh the merit of such evidence. Nonetheless, the ICTY has taken a studied approach to the prosecutor’s recent practice of submitting to the judges prior to trial “dossiers” of written witness statements, some of which include hearsay evidence. Whether such practice can be regarded as constituting an international standard remains problematic, particularly in light of how constrained the admission of hearsay evidence remains in common law systems.

F. Depositions

There has been a growing practice by the international criminal tribunals to admit depositions of witnesses into evidence provided certain criteria are met. ICTY RPE 71(A) provides that, “where it is in the interests of justice to do so, a Trial Chamber may order, *proprio motu* or at the request of a party, that a deposition be taken for use at trial, whether or not the person whose deposition is sought is physically able to appear before the Tribunal to give evidence.” ICTR RPE 70 also permits depositions, but with less explicit flexibility: “At the request of either party, a Trial Chamber may, in exceptional circumstances and in the interests of justice, order that a deposition be taken for use at trial, and appoint, for that purpose, a Presiding Officer.” SCSL RPE 71 uses nearly identical language. ICC RPE 68 avoids use of the term, “depositions,” but addresses the same right with alternative language: “When the pre-Trial Chamber has not taken measures under article 56 [Pre-Trial Chamber regulates the prosecutor’s request to seize a unique investigative opportunity prior to trial], the Trial Chamber may, in accordance with article 69, paragraph 2 [permitting testimony in recorded form], allow the introduction of previously recorded audio or video testimony of a witness, or the transcript of other documented evidence of such testimony, provided that: (a) If the witness who gave the previously recorded testimony is not present before the Trial Chamber, both the Prosecutor and the defense had the opportunity to examine the witness during the recording; or (b) If the witness who gave the previously recorded testimony is present before the Trial Chamber, he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defense and the Chamber have the opportunity to examine the witness during the proceedings.”

The “interests of justice” that might merit a deposition could be the illness of a judge who is unable to attend the trial proceeding where a witness would testify or the inability of a particular witness to travel to the courtroom for live testimony. The deposition allows for extensive examination (effectively cross-examination) by opposing counsel of the witness and thus remains faithful to that fundamental international standard of due process, as well as being superior to admission of hearsay evidence. Given the preponderance of opportunities in the international criminal tribunals for the

taking of depositions, there would appear to be an applied international standard of due process and the EC RPE would be expected to provide for the taking of depositions.

G. Affidavits

The ICTY and ICTR explicitly permit the admission of affidavits as evidence. ICTY and ICTR RPE 92-bis ("Proof of Facts Other Than by Oral Evidence") provides that, "a Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment." Although ICTY and ICTR RPE 92-bis provide a thorough set of provisions protecting the rights of the accused in the use of an affidavit, neither the general right nor the specific protective measures have been utilized much by the tribunals. Nonetheless, given the temporal jurisdiction of the Extraordinary Chambers (reaching back to 1975) and the nature of the crimes that would be investigated by the Extraordinary Chambers, there may be considerable utility in permitting the use of affidavits. Also, given the advancing age and health of many survivors of the actions in the late 1970s and the documentary records already made of their recollections, there may be a need by the Extraordinary Chambers to examine affidavits to support other evidence before the Chambers. Therefore, it is useful to record in detail how the "proof of facts other than by oral evidence" can be set forth in the rules of procedure and evidence. ICTR RPE 92-bis offers a useful example:

> ICTR RPE 92-bis
> *Proof of Facts Other Than by Oral Evidence*
> (A) A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.
> (i) Factors in favour of admitting evidence in the form of a written statement include, but are not limited to, circumstances in which the evidence in question:
> (a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts;
> (b) relates to relevant historical, political or military background;
> (c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates;
> (d) concerns the impact of crimes upon victims;
> (e) relates to issues of the character of the accused; or
> (f) relates to factors to be taken into account in determining sentence.
> (ii) Factors against admitting evidence in the form of a written statement include whether:
> (a) there is an overriding public interest in the evidence in question being presented orally;
> (b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or

(c) there are any other factors which make it appropriate for the witness to attend for cross-examination.

(B) A written statement under this Rule shall be admissible if it attaches a declaration by the person making the written statement that the contents of the statement are true and correct to the best of that person's knowledge and belief and
(i) the declaration is witnessed by:
(a) a person authorised to witness such a declaration in accordance with the law and procedure of a State; or
(b) a Presiding Officer appointed by the Registrar of the Tribunal for that purpose; and
(ii) the person witnessing the declaration verifies in writing:
(a) that the person making the statement is the person identified in the said statement;
(b) that the person making the statement stated that the contents of the written statement are, to the best of that person's knowledge and belief, true and correct;
(c) that the person making the statement was informed that if the content of the written statement is not true then he or she may be subject to proceedings for giving false testimony; and
(d) the date and place of the declaration.
The declaration shall be attached to the written statement presented to the Trial Chamber.

(C) A written statement not in the form prescribed by paragraph (B) may nevertheless be admissible if made by a person who has subsequently died, or by a person who can no longer with reasonable diligence be traced, or by a person who is by reason of bodily or mental condition unable to testify orally, if the Trial Chamber:
(i) is so satisfied on a balance of probabilities; and
(ii) finds from the circumstances in which the statement was made and recorded that there are satisfactory *indicia* of its reliability.

(D) A Chamber may admit a transcript of evidence given by a witness in proceedings before the Tribunal which goes to proof of a matter other than the acts and conduct of the accused.

(E) Subject to any order of the Trial Chamber to the contrary, a party seeking to adduce a written statement or transcript shall give fourteen days notice to the opposing party, who may within seven days object. The Trial Chamber shall decide, after hearing the parties, whether to admit the statement or transcript in whole or in part and whether to require the witness to appear for cross-examination.

The Extraordinary Chambers likely would modify some of this wording in the EC RPE, particularly in deference to Cambodian criminal procedure, but the inclusion of such a provision should facilitate the collection of additional valuable evidence by all parties in a case.

H. Witnesses at risk

The Extraordinary Chambers may be confronted with two particular difficulties that have been addressed by the ICTY. The first is the need for witness testimony from individuals who fear their own arrest if brought to the courtroom for live testimony. The ICTY has employed the use of "safe conduct" passes for those individuals. The second problem has been individuals who fear reprisals from another ethnic group. In those cases, the ICTY classified such individuals as "court witnesses," or "witnesses for the truth" so that they would not be identified with testifying for any party or ethnic group.[59] These procedures are not international standards of due process, but may help ensure the fairness of the proceedings. UN/Cambodia Agreement Article 22, however, addresses both issues in the following manner: "Witnesses and experts appearing on a summons or a request of the judges, the co-investigating judges, or the co-prosecutors shall not be prosecuted, detained or subjected to any other restriction on their liberty by the Cambodian authorities. They shall not be subjected by the authorities to any measure which may affect the free and independent exercise of their functions." This provision should provide ample scope for specific procedures relating thereto in the EC RPE.

I. Unsworn statements by the accused

There also may arise occasion before the Extraordinary Chambers to invoke another procedure which appears explicitly in the ICTY and ICC rules of procedure and evidence. This would be the right of an accused to make unsworn statements before the court. ICTY RPE 84-bis entitles the accused to make an unsworn statement at the beginning of the trial without being challenged through cross-examination. But it is up to the ICTY judges to regulate the exercise of this right and to determine the probative value, if any, of the unsworn statement of the accused. ICC St. Article 67(1)(h) entitles the accused "[t]o make an unsworn oral or written statement in his or her defence…" In contrast to the ICTY practice, however, the ICC Statute theoretically would permit such unsworn statements at any point in the trial. In trials of the magnitude and political significance as those of the international criminal tribunals, and one might imagine of the Extraordinary Chambers, there will be considerable pressure to permit defendants to make unsworn statements that to some may appear self-serving, propagandistic, and revisionist when confronted with the historical record. While there is no international standard of due process requiring the admission of unsworn statements, there is sufficient practice at the ICTY and in the legal framework of the ICC to consider the value of such evidence for the Extraordinary Chambers and to make provision for them in the EC RPE.

---

[59] *See* ZAPPALA, *supra* note 8, at 140.

J. Rights of the accused to appeal and revision

EC Law Articles 36new and 37new provide for the right of appeal and for adherence to all of the rights of the accused that are available before the Trial Chamber. EC Law Article 36 (new) provides: "The Extraordinary Chamber of the Supreme Court shall decide appeals made by the accused, the victims, or the Co-Prosecutors against the decision of the Extraordinary Chamber of the trial court. In this case, the Supreme Court Chamber shall make final decisions on both issues of law and fact, and shall not return the case to the Extraordinary Chamber of the trial court." EC Law Article 37new ensures that the accused remains entitled during the appeal proceedings to all of the rights he or she possessed during the trial proceedings. Other than confirming the EC Law's creation of a Supreme Court chamber available to consider appeals and render decisions on them, the UN/Cambodia Agreement does not explicitly set forth any right to appeal. Without more, it would have to be inferred from the existence of the Supreme Court chamber and its designated function as well as the joint application of both the EC Law and the UN/Cambodia Agreement and Cambodian criminal procedure. The right of appeal, however, is fully embraced by the Extraordinary Chambers through the confirmation of compliance with ICCPR Article 14 in both the EC Law and the UN/Cambodia Agreement. ICCPR Article 14(5) states: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

There is ample proof that the right of appeal is an international standard of due process.[60] In addition to the ICCPR, ECHR Optional Protocol 7, Article 2, ACHR Article 8.2, and AfCHR Article 7(1)(a) also confirm the right to appeal. Each of the statutes and rules of procedure and evidence of the international criminal tribunals, including the ICC, firmly provide for the right of appeal and a court structure to accommodate it. A large number of national court systems provide for the right of appeal. Today, the right can be viewed as a fundamental tenet of national and international criminal procedure.

In drafting its rules of procedure and evidence, the Extraordinary Chambers will need to consider three types of appeal in light of the experience of the international criminal tribunals and the ICC RPE: interlocutory appeals, appeals against judgement, and appeals against sentence. All three categories of appeal are permitted, albeit with varied procedures and latitude, by the ICTY, ICTR, SCSL, and ICC. Given the technical diversity among the tribunals on how to handle each of the three categories of appeal, international standards of due process beyond the general right of appeal in each category would be very difficult to establish.

The ICTY, for example, has five classes of interlocutory appeals, the ICTR has fewer opportunities for interlocutory appeals, and the ICC provides in ICC St. Article 82 and ICC RPE 154 and 156 for a narrowly-drawn and highly regulated procedure for interlocutory appeals that requires the Chamber (Trial or Pre-Trial) rendering the original decision to give leave to appeal. SCSL RPE 72 also provides for preliminary motions to the SCSL Appeals Chamber on issues of jurisdiction or "an issue that would significantly

---

[60] *See* SAFFERLING, *supra* note 6, at 331-339; TRESCHEL, *supra* note 7, at 360-371.

affect the fair and expeditious conduct of the proceedings or the outcome of a trial…" (SCSL RPE 72(F)). Motions for interlocutory appeals are a balancing act between fairness and efficiency and should be designed to facilitate the acceleration of trial proceedings by disposing of points of procedural or substantive dispute with final decisions by appeals judges. But no international standard has emerged that plots a singular pathway for a right to interlocutory appeals.

An international standard has developed regarding appeals against judgment that allows for cases to be reviewed for errors of fact or of law at the appeals level. EC Law Article 36new reflects that standard, as do each of the statutes of the international criminal tribunals. (See ICTY Article 25, ICTR Article 24, SCSL Article 20, and ICC St. Article 81(1).) The standards for review of an error of fact have not been entirely consistent in ICTY and ICTR practice, but a basic rule of reasonableness has been applied. "The [ICTY] Appeals Chamber has consistently held that a decision of a Trial Chamber on facts can be overturned only where it is proven that such decision was based on an assessment of facts that no reasonable person could endorse….This standard, however, is very hard to apply in practice and the Appeals Chamber oscillates between a very restrictive approach and a broader one."[61] Neither EC Law 36new nor ICC Article 81(1) qualifies an appeal on error of fact with the common requirement of the ICTY, ICTR, and SCSL that the error of fact "has occasioned a miscarriage of justice." The international standard does not confirm that the emergence of an important *new* fact (perhaps significant additional evidence) that points to "a miscarriage of justice" rather than an error of an existing fact in the case in fact would permit an appeal.

The ICTY, ICTR, and SCSL statutes require that an error of law must be one that on appeal would be found to invalidate the decision of the Trial Chamber. While this might elucidate the international standard of a right of appeal on an error of law, it would be premature to conclude that the standard requires a persuasive basis for arguing invalidation of the decision in order for the error of law to be appealed. The criteria are simply not set for that conclusion and, in any event, neither the EC Law nor the ICC Statute so limits the basis for an appeal on error of law. Since it may be extremely difficult to deny any appeal on an error of law until it has been appealed and the Supreme Court chamber can review it on the merits, qualifying the basis for appeal may be an unnecessary exercise in the EC RPE. There is certainly no international standard that would require conditioning an appeal on error of law with the finding that the error must *prima facie* invalidate the decision before it can be appealed.

EC Law Article 36new does not, on its face, prohibit an appeal on a sentencing decision. The ICTY, ICTR, and SCSL statutes also do not explicitly provide for an appeal on sentencing. However, in practice the ICTY and ICTR have entertained appeals on sentencing as an implicit right, usually as joint appeals of conviction and sentencing. ICC St. Article 81(2) explicitly addresses the issue of appeal on sentencing: "(a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence…" If there is an appeal against a conviction only, ICC St. Article 81(2)(c) permits the Court to invite the Prosecutor and the convicted person to submit

[61] *See* ZAPPALA, *supra* note 8, at 166.

grounds for considering reduction of sentence. Given the practice of the ICTY and ICTR as well as the statutory provisions of the ICC, one could argue the existence of an applied international standard regarding appeals on sentencing.

A case that has been appealed on issues of law or fact cannot, according to EC Law 36new, be returned to the EC Trial Chamber. This prohibition may be tested by the practice of the international criminal tribunals where, despite the absence of any explicit right to do so, cases have been remitted to the Trial Chamber for decision on several issues, including sentencing. ICC St. Article 83(2) narrowly draws the right of remand to the ICC Trial Chamber, permitting the ICC Appeals Chamber to "remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly…", but only when the Appeals Chamber is exercising its rather limited power, namely to reverse or amend the decision or sentence or order a new trial before a different Trial Chamber. There appears to be no international standard, then, that would challenge the prohibition on remand found in EC Law 36new. Neither is there an international standard that would prohibit the EC Supreme Court Chamber from remanding a case on appeal back to the EC Trial Chamber for decision on a particular issue. The fact that the EC Supreme Court Chamber is explicitly empowered to render decisions on appeal from the EC Trial Chamber would appear to satisfy the international standard.

i) Double jeopardy. ICCPR Article 14(7), which is applied to the Extraordinary Chambers by EC Law Articles 33new and 35new and UN/Cambodia Agreement Articles 12(2) and 13(1), prohibits double jeopardy with the requirement that, "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country." The rule against double jeopardy also is found in ECHR Protocol No. 7, Article 4, and ACHR Article 8(4).[62] The fact that civil law systems, in contrast to common law systems, generally permit the prosecutor to appeal an acquittal was no mystery to the drafters of the ICCPR. The ICCPR Article 14(7) language stresses the final judgment in a particular country as the barrier to any further prosecution in that country. What constitutes final judgment, however, can vary between national judicial systems and between civil and common law systems. The fact that a trial chamber acquittal is not necessarily considered a final judgment if the prosecutor decides to appeal it to the appeals chamber would be a natural development in a civil law system like that existing in Cambodia. EC Law Article 17new explicitly permits appeal by the Co-Prosecutors: "The Co-Prosecutors in the Trial Chamber shall have the right to appeal the verdict of the Extraordinary Chamber of the trial court." The judgment of the EC Supreme Court Chamber in such a situation (where the Co-Prosecutors have appealed an EC Trial Chamber decision (presumably an acquittal)) then would be considered final for purposes of ICCPR Article 14(7).

The international standard on double jeopardy aligns itself with the civil law approach as conditioned by ICCPR Article 14(7).[63] There may be good reason to critically examine the merits of granting the Co-Prosecutors (in the case of the

---

[62] *See* TRESCHEL, *supra* note 7, at 381-402.
[63] *See* SAFFERLING, *supra* note 6, at 319-331.

Extraordinary Chambers) too broad a power of appeal and to address that issue in the EC RPE. For example, the range of error of facts for appeal of an acquittal might be narrowly drawn. But there is no apparent prohibition in international standards to appeals of acquittals provided ICCPR Article 14(7) is observed. Clearly, the EC Law does not necessarily regard an acquittal by the Trial Chamber as a final judgment immune from appeal by the Co-Prosecutors.

ii) Revision of judgment. Only by virtue of applying ICCPR Article 14 does the EC Law and the UN/Cambodia Agreement incorporate, indirectly, the right by a convicted person to revision of the judgment rendered against him or her. This would be permitted in the event "that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice…" (ICCPR Article 14(6)). ICTY Article 26 and ICTR Article 25 develop this right in their respective statutes: "[W]here a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal an application for review of the judgment." SCSL Article 21 mirrors these provisions. The RPE of the ICTY (Rules 119-122), ICTR (Rules 120-123), and SCSL (Rules 120-122) set out procedures for revision. But in many respects there are weaknesses in the ICTY, ICTR, and SCSL rules that may require greater vigilance for the protection of the rights of the convicted individual.[64] Progress has been made with ICC St. Article 84 and ICC RPE 159-161, which deny the Prosecutor a right to seek revision except when it is in the interests of the convicted individual; they also provide a more complex formula for revision of a conviction or sentence. But the ICC provisions may not be so firmly established yet as to be equated with an international standard, particularly in light of their variance in some respects with those of the other international criminal tribunals. That variance may have been eclipsed with views by some ICTY judges who have regarded the ICC Statute as representing a codification of rules on international criminal procedure.[65] Nonetheless, the fact that both the EC Law and the UN/Cambodia Agreement are silent on the right of revision (other than the implicit right accorded by ICCPR Article 14(6)) may leave the EC RPE with far less to work with in this respect than has been the case with the international criminal tribunals and, in particular, the ICC.

K. Penalties

EC Law Articles 38 and 39 provide for penalties. EC Law Article 38 requires, "All penalties shall be limited to imprisonment." EC Law Article 39 requires that sentences shall range from five years to life imprisonment and that, in addition to imprisonment, "the Extraordinary Chamber 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." UN/Cambodia Agreement Article 10 simply requires that, "The maximum penalty for conviction for crimes falling within the jurisdiction of the Extraordinary Chambers shall be life imprisonment." UN/Cambodia Agreement Articles 12(2) and 13(1) and EC Law Article

[64] *See* ZAPPALA, *supra* note 8, at 181-194.
[65] *Id.* at 194.

33new also pledge compliance with ICCPR Article 15, which provides in full: "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."

The EC Law and UN/Cambodia Agreement embrace the applied international standard of due process that limits the maximum penalty for even atrocity crimes to life imprisonment. While the death penalty continues to be applied in many national jurisdictions, it cannot be regarded as an international standard of due process and has found no place in the penalties provisions of the international criminal tribunals, all of which use the maximum penalty of life imprisonment.

UDHR Article 11(2) and ICCPR Article 15(1) confirm the general principle of certainty in the punishment of crimes, or *nulla poena sine lege*. UDHR Article 11(2) reads: "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed." ICCPR Article 15(1) uses nearly identical words and adds, "If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby." Therefore, since life imprisonment is the maximum penalty available to the Extraordinary Chambers, any prior law permitting the application of the death penalty in Cambodia for the commission of any of the crimes falling within the subject matter jurisdiction of the Extraordinary Chambers would not be applicable or enforceable with respect to any individual convicted of a crime by the Extraordinary Chambers.

Each of the crimes within the subject matter jurisdiction of the EC Law and UN/Cambodia Agreement must have been a criminal offence at the time the crime was actually committed and the penalty must not exceed the penalty for such crime when it in fact was committed. Since there is no legislated or codified set of penalties at the international level, the international standard defers to national legal requirements within the overall principle that the court remain faithful to the penalties that existed at the time of the commission of the crime. ICTY Article 24 and ICTR Article 23 explicitly look to domestic national law in their respective jurisdictions for determination of penalties. SCSL Article 19(1) looks to the practice of the ICTR and the national courts of Sierra Leone for guidance on penalties. (The SCSL thus tilts toward use of an emerging international standard on penalties that might be associated with the practice of the ICTR.) The Extraordinary Chambers do not explicitly invoke the practice of Cambodian courts but their penalty provisions presumably are consistent with Cambodian law and comply with the international standard of deferral to national systems expressed in ICCPR Article 15.

Missing from the EC Law and the UN/Cambodia Agreement is the requirement found in ICTY Article 24(2), ICTR Article 23(2), and SCSL Article 19(2) that, "In imposing the sentences, the Trial Chamber[s] should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person." ICC St. Article 78(1) in a similar vein requires the ICC to "take into account such factors as the gravity of the crime and the individual circumstances of the convicted person." A decision by the ICC on the penalty of life imprisonment can only be justified based upon "the extreme gravity of the crime and the individual circumstances of the convicted person" (ICC St. Article 77(1)(b)). The criteria at the ICC for determining "the gravity of the crime" and "the individual circumstances of the convicted persons" are set forth in some detail in ICC RPE 145. Additional provisions, albeit less detailed than ICC RPE 145, exist in RPE 101 for the ICTY, ICTR, and SCSL. Because there is no underlying requirement in the EC Law and UN/Cambodia Agreement to consider "gravity" and "individual circumstances" in the determination of penalties, the applied international standard that considers both of these factors in weighing the length of imprisonment as a penalty may be warranted for the EC RPE, particularly if these factors are not firmly applied under Cambodian law.

An important point to consider in this respect will be the practice of the ICTY and ICTR to date in stressing the individualization of the sentencing phase. In other words, with crimes of such magnitude as those being prosecuted before the international criminal tribunals, it is critical that the court punish the convicted individual for the acts he or she is responsible for and not impose a sentence on that individual that is actually designed to punish an entire government or group of individuals. The "individual circumstances" that the international criminal tribunals should examine with respect to a convicted individual should, as a matter of fairness, include this requirement.

It is perhaps significant with respect to the Extraordinary Chambers that the EC Law and the UN/Cambodia Agreement apply ICCPR Article 15(2). This particular international standard might become necessary to implement where a dispute arises over whether any of the crimes charged under Articles 3new, 4, 5, 6, 7, or 8 of the EC Law in fact were not enforceable under Cambodian law at the time during the temporal jurisdiction of the Extraordinary Chambers, namely 17 April 1975 to 6 January 1979. If it can be established that any such crime existed as an international crime ("according to the general principles of law recognized by the community of nations") during the period of the Pol Pot regime but was not recognized as a crime of such character under Cambodian criminal law at the time, then ICCPR Article 15(2) would enable the Extraordinary Chambers to consider adjudication of the crime without violating international standards. But ICCPR Article 15(2) would appear to leave it to the discretion of the Extraordinary Chambers, as a national court, to permit prosecution of such an international crime. The EC RPE could clarify the issue by empowering the judges explicitly to adjudicate all designated crimes in the EC Law as sourced either in Cambodian law during the late 1970's or in international law as it existed at the time.

L. Pardons and amnesties

Despite the enormous amount of international interest in the legality and morality of amnesties and pardons, particularly for atrocity crimes, there are no well established

international standards of due process associated with an international criminal tribunal's approach to pardons or amnesties that may pertain to an accused or convicted individual.[66] The international criminal tribunals approach this issue from the vantage point of the state in which the convicted person already is imprisoned and the effect that a national pardon or commutation of sentence would have on the tribunal judges and their exercise of authority (ICTY Article 28, ICTR Article 27, and SCSL Article 23). There are no provisions that address the effect of amnesties in the ICTY and ICTR statutes. But SCSL Article 10 explicitly denies the enforceability of any relevant amnesty: "An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 [crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, and other serious violations of international humanitarian law] of the present Statute shall not be a bar to prosecution." The SCSL Statute does not explicitly address the issue of pardons.

The EC Law and UN/Cambodia Agreement address the issue from a different vantage point, namely by prohibiting amnesties or pardons for anyone under investigation by the Extraordinary Chambers and leaving it to the judges of the Extraordinary Chambers to determine the legal effect of past amnesties and pardons, namely, any issued prior to enactment of the EC Law. This distinction between how the international criminal tribunals and the Extraordinary Chambers deal with the issue is important to bear in mind when examining the very explicit provisions on amnesties and pardons in the EC Law and UN/Cambodia Agreement. EC Law Article 40new states, "The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in Articles 3, 4, 5, 6, 7 and 8 of this law. The scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers."

UN/Cambodia Agreement Article 11 reads: "1. The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in the present Agreement. 2. This provision is based upon a declaration by the Royal Government of Cambodia that until now, with regard to matters covered in the law, there has been only one case, dated 14 September 1996, when a pardon was granted to only one person with regard to a 1979 conviction on the charge of genocide. The United Nations and the Royal Government of Cambodia agree that the scope of this pardon is a matter to be decided by the Extraordinary Chambers."

Because the decision on the scope of the apparently one and only pardon at issue has been relegated to the Extraordinary Chambers, the EC judges effectively have been empowered to consider any relevant international standards in considering the status of that pardon under both Cambodian law and international law. There is no international standard of due process thus contravened by the procedure established for the Extraordinary Chambers. The EC Law and UN/Cambodia Agreement deny the possibility of pardons and amnesties being relevant beyond those granted prior to the enactment of the EC Law, and the only relevant pardon is the one dated 14 September 1996. Any prior official amnesty and those individuals who took advantage of it and

[66] *See* SAFFERLING, *supra* note 6, at 363-365; WERLE, *supra* note 53, at 65-66.

benefited from its provisions would need to be considered. One would have to examine whether any of the individuals who qualify under the personal jurisdiction of the Extraordinary Chambers and ultimately are charged by the Co-Prosecutors took advantage of any official amnesty program. Nonetheless, if the issue were to arise, the judges of the Extraordinary Chambers would determine the scope of any amnesty granted before enactment of the EC Law. But there is no international standard of due process that necessarily would dictate or even substantially influence the outcome of any such determination by the Extraordinary Chambers.

It may be useful to note that the ICC Statute and RPE do not explicitly address the issue of amnesties at all, although it is entirely possible that a particular national amnesty could be factored into the ICC prosecutor's discretionary decisions and in how the ICC prosecutor and the ICC judges implement the principle of complementarity. ICC St. Article 80, however, may have some influence in ICC practice on how any relevant national amnesty might be evaluated: "Nothing in this Part [Penalties] affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part." But there is no international standard *per se* that arises from this provision.

M. Rights of witnesses and victims

There are a number of provisions in both the EC Law and the UN/Cambodia Agreement that pertain to the use and rights of witnesses and victims (some individuals can be identified as both witness and victim) during the investigative and trial proceedings of the Extraordinary Chambers. In many respects, these provisions conform to international standards of due process[67] but there also are explicit requirements to follow "existing procedures in force" under Cambodian law.

EC Law Article 23new vests in the Co-Investigating Judges the power "to question suspects and victims, to hear witnesses, and to collect evidence, in accordance with existing procedures in force. In the event the Co-Investigating Judges consider it necessary to do so, they may issue an order requesting the Co-Prosecutors also to interrogate the witnesses." The power of the Co-Investigating Judges to question suspects and victims derives from the civil law tradition and is compatible with international standards.

EC Law 33new states in part: "The Court shall provide for the protection of victims and witnesses. Such protection measures shall include, but not be limited to, the conduct of *in camera* proceedings and the protection of the victim's identity." UN/Cambodia Agreement Article 23 uses nearly identical language, but specifies the "co-investigating judges, the co-prosecutors and the Extraordinary Chambers" as being obligated to protect victims and witnesses. UN/Cambodia Agreement Article 24 casts an even wider net of protection: "The Royal Government of Cambodia shall take all effective and adequate actions which may be required to ensure the security, safety and protection of persons referred to in the present Agreement. The United Nations and the Government agree that the Government is responsible for the security of all accused,

---

[67] *See* SAFFERLING, *supra* note 6, at 276-291.

irrespective of whether they appear voluntarily before the Extraordinary Chambers or whether they are under arrest."

EC Law 34new permits the closure of proceedings before the Extraordinary Chambers "in exceptional circumstances…for good cause in accordance with existing procedures in force where publicity would prejudice the interests of justice." Such exceptional circumstances could involve protection of the identity and/or physical presence of witnesses in the courtroom. EC Law 36new entitles victims to appeal a case to the Supreme Court Chamber. As discussed above, both EC Law Article 35(e)new and UN/Cambodia Agreement Article 13(1) confirm the right, as the latter states, of the accused "to examine or have examined the witnesses against him or her."

UN/Cambodia Agreement Articles 22 and 24 require additional protection for witnesses, experts, and victims not found in explicit terms in the EC Law. UN/Cambodia Agreement Article 22 provides: "Witnesses and experts appearing on a summons or a request of the judges, the co-investigating judges, or the co-prosecutors shall not be prosecuted, detained or subjected to any other restriction on their liberty by the Cambodian authorities. They shall not be subjected by the authorities to any measure which may affect the free and independent exercise of their functions." This protection is comparable to the safe-conduct that has been ordered from time to time by the ICTY and has been recognized under the general authority of the ICTY Trial Chamber pursuant to ICTY RPE 54. The safe-conduct protection effectively immunizes the witness or expert from prosecution or restrictions on personal liberty during travel to and from the trial and during the trial for acts he or she allegedly committed prior to departure for the trial. No international standard could be claimed for such protection, particularly one such as UN/Cambodia Agreement Article 22, which seemingly distinguishes between witnesses and experts who appear following a summons rather than voluntarily at the request of one of the parties. But the explicit incorporation of this protection for witnesses and experts embraces, at a minimum, the practice of the ICTY.[68]

Nothing in the EC Law or UN/Cambodia Agreement addresses the possibility of the Extraordinary Chambers using videoconference testimony, or depositions, from witnesses and experts in the courtroom. This type of testimony has been used by the ICTY and ICTR in accordance with ICTY and ICTR RPE 71(d), and SCSL RPE 71(d) also permits it. ICC St. Article 69(2) and ICC RPE 68 provide the most detailed procedures for recorded testimony of a witness. Thus there would appear to be an applied international standard permitting the use of videoconference testimony provided key guidelines for the taking of depositions are recognized and enforced (as required by ICTY, ICTR, and SCSL RPE 71 and ICC RPE 68). Given the uniformity of acceptance of such testimony in the international criminal tribunals, it might be expected that the Extraordinary Chambers also would provide for this opportunity in the EC RPE.

Other precedents of witness protection that have emerged from the practice of the ICTY and ICTR and may be regarded as applied international standards include "confidentiality measures" which serve, for example, to keep certain data about a witness undisclosed to the public, disguising or distorting the image and voice of the witness

---

[68] *See* ZAPPALA, *supra* note 8, at 235.

during testimony, limiting the public character of the trial itself, and prohibiting public photography and recording in the courtroom. The precedents demonstrate a conservative approach to such measures, thus limiting them only to what is necessary under the circumstances and ensuring that the rights of the accused are not impaired. ICC St. Article 68 offers detailed confidentiality or protective measures and the important role that the ICC Victims and Witnesses Unit plays in the process of advising on such measures. There are thus ample precedents among the international criminal tribunals for the Extraordinary Chambers to draw upon for preparing procedures to guide the protection of witnesses in connection with the trial proceedings.

With respect to the protection of witnesses and victims, the ICTY and ICTR Statutes and RPE provide considerable guidance, and the ICC Statute and RPE provide the most extensive set of provisions in this respect. ICTY Article 22 and ICTR Article 21 read: "The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity." Article 15 of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, concluded on 16 January 2002, provides: "Witnesses and experts appearing from outside Sierra Leone on a summons or a request of the judges or the Prosecutor shall not be prosecuted, detained or subjected to any restriction on their liberty by the Sierra Leonean authorities. They shall not be subjected to any measure which may affect the free and independent exercise of their functions. The provisions of article 14, paragraph 2(a) [immunity from personal arrest or detention and from seizure of personal baggage] and (d) [immunity from any immigration restrictions during his or her stay as well as during his or her journey to the Court and back], shall apply to them."[69]

ICTR RPE 69 also serves as a useful example to consider:

ICTR RPE 69

Protection of Victims and Witnesses

(A) In exceptional circumstances, either of the parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise.
(B) In the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witness Support Unit.
(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed within such time as determined by Trial Chamber to allow adequate time for preparation of the Prosecution and the Defense.

Given the character of atrocity crimes and the volatile political interests sometimes found at stake in high-profile international criminal trials, much practice has evolved in the international criminal tribunals to address the critical issue of protection of witnesses whose attendance at trial is required. In light of the practice of the last decade, there are applied international standards of due process pertaining to protection of

[69] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (16 January 2002), http://www.sc-sl.org/scsl-agreement.html.

witnesses which may be relevant during the trial proceedings of the Extraordinary Chambers. Whether there are gaps on this account that will need to be filled between Cambodian criminal procedure and international standards of protection will need to be ascertained. The EC RPE could be drafted in such a way as to maximize the application of protective measures known to the international criminal tribunals, including particularly the ICC which has the most extensive body of witness protection provisions (See ICC St. Article 68 and ICC RPE 87).

The Extraordinary Chambers may be confronted with one or more witnesses who refuse to answer questions. On the assumption that Cambodian criminal procedure anticipates the penalty of contempt of court if this occurs, then the EC RPE might simply reiterate or expand upon the penalties that are already found in Cambodian law for this type of contempt of court. The international criminal tribunals have established in their rules of procedure and evidence the right to establish penalties for such contempt of court. In practice the tribunals have conditioned their own power to compel such testimony. ICTY RPE 90(E), for example, entitles a witness to "object to making any statement which might tend to incriminate him." But the trial chamber may still compel answers from a witness on the condition that the answers are not used against the witness. Communications between lawyers and clients, including witnesses, remain privileged (see ICTY and ICTR RPE 97). There are ample provisions in the rules of procedure and evidence of all of the international criminal tribunals, including the ICC, for the Extraordinary Chambers to draw upon in this respect.

Bibliography

ARCHBOLD INTERNATIONAL CRIMINAL COURTS: PRACTICE, PROCEDURE AND EVIDENCE (Rodney Dixon, Karim A.A. Khan & Judge Richard May eds., 2003).

BRUCE BROOMHALL, INTERNATIONAL JUSTICE & THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW (2003).

CHRISTOPH J.M. SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE (2001).

CLAIRE DE THAN & EDWIN SHORTS, INTERNATIONAL CRIMINAL LAW AND HUMAN RIGHTS (2003).

CRIMINAL PROCEDURE: A WORLDWIDE STUDY (Craig M. Bradley ed., 1999).

GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW (2005).

HUMAN RIGHTS WATCH, GENOCIDE, WAR CRIMES, AND CRIMES AGAINST HUMANITY: TOPICAL DIGESTS OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (2004).

INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW: CURRENT DEVELOPMENTS (Horst Fischer, Claus Kreß & Sascha Rolf Lüder eds., 2001).

JOHN R.W.D. JONES AND STEVEN POWLES, INTERNATIONAL CRIMINAL PRACTICE (2003).

SALVATORE ZAPPALA, HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS (2003).

STEFAN TRECHSEL, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS (2005).

THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE (Roy S. Lee ed., 2001).

THE PROTECTION OF HUMAN RIGHTS IN THE ADMINISTRATION OF CRIMINAL JUSTICE: A COMPENDIUM OF UNITED NATIONS NORMS AND STANDARDS (M. Cherif Bassiouni ed., 1994).

Appendix

Instruments Reflecting International Standards of Due Process during Pre-Trial and Trial Proceedings

The "Notes" associated with certain provisions are explanatory notes by the author of this memorandum.

1. The Universal Declaration of Human Rights (1948), U.N. G.A. Res. 217 (III 1948) ("UDHR")

Note: Articles 9, 10, and 11 articulate fundamental principles for criminal proceedings.

UDHR Article 9
No one shall be subjected to arbitrary arrest, detention or exile.

UDHR Article 10
Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

UDHR Article 11
1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

2. **1966 International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, *entered into force* 1976 ("ICCPR")** (Cambodian signature: 1980; Cambodian ratification: 1992)

Note: Article 9 of the ICCPR sets forth fundamental principles regarding arrest and detention.

ICCPR Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Note: Article 14 of the ICCPR provides an extensive recitation of international standards of due process for pre-trial and trial proceedings.

ICCPR Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of

justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Note: Article 15 of the ICCPR affirms the principles of nullum crimen sine lege (prohibiting ex post facto application of criminal law) and nulla poena sine lege, (limiting the imposition of penalties to ones that are no more severe than when the crime was committed).

ICCPR Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

3. <u>1950 European Convention for the Protection of Human Rights and Fundamental Freedoms</u>, 213 U.N.T.S. 222, *entered into force* 1953 ("ECHR")

ECHR Article 5 – Right to liberty and security (excerpts)

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a) the lawful detention of a person after conviction by a competent court;

b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;

c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so…

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Note: While Article 6 of the ECHR mirrors much of Article 14 of the ICCPR, the former contains neither the privilege against self-incrimination (although the European Court of Human Rights has recognized it), nor any express norm on the right of the accused to be present.

ECHR Article 6 – Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the

extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b) to have adequate time and facilities for the preparation of his defence;

c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

ECHR Article 7 – No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

4. 1970 American Convention on Human Rights, 9 I.L.M. 673 (1970), *entered into force* 1978 ("ACHR")

ACHR Article 7. Right to Personal Liberty (excerpts)

1. Every person has the right to personal liberty and security.

2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

3. No one shall be subject to arbitrary arrest or imprisonment.

4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies…

Note: Article 8 of the ACHR conforms in large part with the ICCPR, but the former adds the requirement that the tribunal must have been established prior to the commission of the alleged crime. There also is no provision granting the right to a public trial, although Article 8(5) requires public proceedings "except insofar as may be necessary to protect the interests of justice."

ACHR Article 8. Right to a Fair Trial

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;

b. prior notification in detail to the accused of the charges against him;

c. adequate time and means for the preparation of his defense;

d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;

f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;

g. the right not to be compelled to be a witness against himself or to plead guilty; and

h. the right to appeal the judgment to a higher court.

3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

4. An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.

5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

ACHR Article 9. Freedom from *Ex Post Facto* Laws

No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

5. 1981 African Charter on Human and Peoples' Rights, 21 I.L.M. 59 (1981), *entered into force* 1986 ("AfCHR")

AfCHR Article 6

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

AfCHR Article 7

1. Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defense, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

6. <u>1988 Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment</u> (G.A. Res. 43/173, annex, 43 UN G.A.O.R. Supp. (No. 49) at p. 298, UN Doc. A/43/49 (1988)) ("U.N. Principles on Detention")

U.N. Principles on Detention: Principle 17 ("excerpts"?)

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.

2 If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

U.N. Principles on Detention: Principle 18 (excerpts)

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.
2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel…

U.N. Principles on Detention: Principle 36

1. A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
2. The arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of the administration of justice on grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden.

U.N. Principles on Detention: Principle 37

A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody.

U.N. Principles on Detention: Principle 38

A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.

U.N. Principles on Detention: Principle 39

Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.

OPEN SOCIETY
JUSTICE INITIATIVE

The Open Society Justice Initiative, an operational program of the Open Society Institute (OSI), pursues law reform activities grounded in the protection of human rights, and contributes to the development of legal capacity for open societies worldwide. The Justice Initiative combines litigation, legal advocacy, technical assistance, and the dissemination of knowledge to secure advances in the following priority areas: national criminal justice, international justice, freedom of information and expression, and equality and citizenship. Its offices are in Abuja, Budapest, and New York.

The Justice Initiative is governed by a Board composed of the following members: Aryeh Neier (Chair), Chaloka Beyani, Maja Daruwala, Anthony Lester QC, Juan E. Méndez, Diane Orentlicher, Wiktor Osiatyński, András Sajó, Herman Schwartz, Christopher E. Stone, Abdul Tejan-Cole and Hon. Patricia M. Wald.

The staff includes James A. Goldston, executive director; Robert Varenik, director of programs; Zaza Namoradze, Budapest office director; Kelly Askin, senior legal officer, international justice; David Berry, senior officer, communications; Sandra Coliver, senior legal officer, freedom of information and expression; Julia Harrington, senior legal officer, equality and citizenship; Katy Mainelli, administrative manager; Chidi Odinkalu, senior legal officer, Africa; and Martin Schönteich, senior legal officer, national criminal justice.

E-mail: info@justiceinitiative.org

New York	Budapest	Abuja
400 West 59th Street New York, NY 10019 USA Phone: +1 212-548-0157 Fax: +1 212-548-4662	Oktober 6. u. 12 H-1051 Budapest, Hungary Tel: +36 1 327-3100 Fax: +36 1 327-3103	Plot 1266/No.32, Amazon Street Maitama, Abuja, Nigeria Phone: +234 9 413-3771 Fax: +234 9 413-3772

www.justiceinitiative.org

OPEN SOCIETY INSTITUTE