

2011

What are the Common Forms of Lawyer Misconduct Likely to Occur before the ECCC, and How Can the ECCC Address and Sanction such Misconduct?

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Case Western Reserve University
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MEMORANDUM FOR THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

ISSUE: WHAT ARE THE COMMON FORMS OF LAWYER MISCONDUCT LIKELY TO OCCUR BEFORE
THE ECCC, AND HOW CAN THE ECCC ADDRESS AND SANCTION SUCH MISCONDUCT?

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Fall Semester, 2011-2012

ECCC LAWYER MISCONDUCT

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I. Introduction

a. Issue¹

This memo presents the most common forms of court order breaches, misconduct, and unethical behavior by lawyers likely to occur before the Extraordinary Chambers in the Courts of Cambodia (ECCC). This memo then analyzes the range of options the Trial Chambers have to sanction lawyer misconduct based on a survey of how the International Criminal Courts (ICC), International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), Special Court for Sierra Leone (SCSL), and Special Tribunal for Lebanon (STL) (collectively, sister courts) define and sanction lawyer misconduct. Finally, this memo presents a legal argument template that the ECCC may use in exercising its authority to address and sanction lawyer misconduct.²

b. Summary of Conclusions

The most likely forms of lawyer misconduct to come before the ECCC are tampering with witnesses³ and disobeying court orders.⁴

The ECCC's Articles of Agreement (ECCC Agreement) coupled with its Internal Rules (ECCC IRs) permit the ECCC to investigate possible lawyer misconduct and sanction lawyer

¹ The question originally received was: "What power does the ECCC Trial Chamber have to sanction counsel whether prosecution, defense, or civil party lawyers for failing to comply with court orders, misconduct or unethical behavior? In your answer, please explain the most common forms of court order breaches, misconduct or unethical behavior likely to occur and provide the range of options the Trial Chambers has to sanction such conduct."

² See Section III (B)(ii) and Appendix C.

³ *Prosecutor v. Simic, Case No. IT-95-9-R77, Judgment in the Matter of Contempt Allegations Against an Accused and His Counsel* (Jun 30, 2000). Electronic copy provided in accompanying USB flash drive at Source # 2.1.3.

⁴ See *Nshogoza v the Prosecutor*, ICTR-2007-91-A, App. Ch. (Mar. 15, 2010). Electronic copy provided in accompanying USB flash drive at Source # 2.2.1.

misconduct when the ECCC finds such misconduct beyond a reasonable doubt. However, in comparison to other international criminal courts, the ECCC's current rules do not anticipate all potential types of lawyer misconduct. The ECCC has authority to fill these gaps by adopting the rules and standards recognized by Cambodia and other international criminal courts.

Despite this clear authority to sanction misconduct, the ECCC's sanctioning guidelines are vague. The ECCC does not have sanctioning guidelines or limits as many of its sister courts do. When the ECCC finds lawyer misconduct it should consider the maximum penalties and sanctioning regimes that its sister courts have adopted, and refer to policy considerations such as retribution and deterrence.

c. Roadmap

In Section II, Factual Background, this memo presents a brief summary of the lawyer misconduct most likely to present itself before and within the ECCC by providing a brief overview of lawyer misconduct and a survey of misconduct cases at the ECCC's sister courts. This memo begins Section III, Legal Discussion, by surveying how the ECCC's sister courts' rules, sanctions, and case law deal with misconduct. Section III then contrasts the ECCC's misconduct rules with those of its sister courts to offer a legal argument template that the ECCC may use to address and sanction suspected lawyer misconduct. This memo's appendices contain three charts which respectively summarize the sister courts' misconduct rules, sanctions, and the legal argument template this memo recommends.

II. Factual Background

a. A Brief Overview of Lawyer Misconduct

Lawyer misconduct before a court occurs when the lawyer violates the law, rules, or standards of professionalism that a court recognizes.⁵ Public perceptions of lawyer misconduct before a court result in an assumption of illegitimacy of the court's actions by the public, inaccurate judicial and party decisions, and flawed trial outcomes. Courts should therefore aggressively address and sanction suspected lawyer misconduct to deter and punish misconduct.

Since the ECCC's inception, the ECCC has experienced corruption and bias allegations. Because of this history and because it is human nature to be tempted by misconduct, the ECCC should aggressively monitor, investigate and sanction lawyer misconduct. Such action will deter lawyer misconduct, promote accurate outcomes, and help maintain the legitimacy of the ECCC in the eyes of Cambodians and the international community.

b. Types and Examples of Lawyer Misconduct:

i. Types of Lawyer Misconduct

This memo limits its analysis to counsel, which includes prosecutors, civil lawyers and defense lawyers, as well as members of the lawyer's legal staff, but excludes judges.

Contempt of court is a blanket term which common law courts use to describe behavior by any person found to disobey the court's orders or interfere with the administration of justice.⁶ In civil law systems, courts apply specific inference with the administration of justice statutes rather than apply the common law concept of contempt. Though contempt has a longer history as a common law concept than it does in civil law systems, both legal systems are keenly interested

⁵ Professional Misconduct; Corpus Juris Secundum; 7A C.J.S. Attorney & Client § 78 (Sept. 2011) Electronic copy provided in accompanying USB flash drive at Source # 3.5.

⁶ BLACKS LAW DICTIONARY, Contempt (9th ed. 2009); Fatema E. Fallahnejad Burkey, *The Prosecutor V. Aleksovski*, 30 May 2001, *Judgment On Appeal By Anto Nobilo Against Finding Of Contempt: A Critical Analysis Of The ICTY Appeals Chamber's Abandonment Of Witness Protection Measures*, 82 Wash. U. L.Q. 297 (Spring 2004) ("it is justice itself which is flouted by a contempt of court, not the individual court or judge who is attempting to administer justice"). Electronic copy provided in accompanying USB flash drive at Source # 3.2.

in the honest, reliable and just administration of the courts.⁷ For instance, France's Nouveau Code Pénal makes suborning witnesses an offense to the court.⁸ Both the ICTY and SCSL have separately held that though contempt has been codified in many states, such as the United Kingdom, courts hold a broad non-statutory power within their "inherent jurisdiction" as common law courts to hold persons in contempt of the court.⁹ In civil law systems (such as the ECCC) however, contemptuous conduct is defined by statutes¹⁰ that describe interference with the administration of justice.¹¹ The following sub-section demonstrates examples of interference with justice (also known as contempt) that have manifested itself through witness tampering, conflicts of interest, and other abusive practices in the ECCC's sister courts.

ii. Examples of Lawyer Misconduct in the ECCC's Sister Courts

For a sense of the lawyer misconduct most likely to present itself before the ECCC, this memo draws the ECCC's attention to actual cases before the ICTY, the ICTR, and the SCSL.

⁷ Silvia D'Ascoli, *Sentencing Contempt of Court in International Criminal Justice*, 5 J. Int'l Crim. Just. 735 (2007). Electronic copy provided in accompanying USB flash drive at Source # 3.3.

⁸ Le Nouveau Code Pénal Art. 434-15 (Fr). Electronic copy provided in accompanying USB flash drive at Source # 1.8.

⁹ *Prosecutor v. Tadic*, Case No. IT-94-A-R77, *Judgment on Allegations of Contempt Against Prior Counsel- Milan Vujin*, (Jan 31, 2000). Electronic copy provided in accompanying USB flash drive at Source # 2.1.1. International Criminal Bar Association, *Code of Conduct and Disciplinary Procedure of the International Criminal Bar, Subcommittee on Ethics of the International Criminal Bar* (2003). Electronic copy provided in accompanying USB flash drive at Source # 2.3.1

¹⁰ ECCC Internal Rules, Rev. 8, Rule 35, Aug. 12, 2011 (hereinafter ECCC IRs). Electronic copy provided in accompanying USB flash drive at Source # 1.7.2. *See also* § III (B) of this memo.

¹¹ *Prosecutor v. Tadic*, Case No. IT-94-A-R77, *Judgment on Allegations of Contempt Against Prior Counsel- Milan Vujin*, (Jan 31, 2000). Electronic copy provided in accompanying USB flash drive at Source # 2.1.1. *See also* John R. B. Palmer, *Collateral Bar and Contempt: Challenging a Court Order After Disobeying*, 88 Cornell L. Rev. 215 (2002) ("Although it is deeply ingrained in common law thinking, the contempt power is alien to most civil law countries, which tend to view it as both unnecessary and contrary to basic notions of governance."). Electronic copy provided in accompanying USB flash drive at Source # 3.4.

The ICTY investigated alleged misconduct by defense counsel Branislav Avramovic in a contempt of court proceeding for knowingly and willfully interfering with the administration of justice by threatening and bribing witnesses.¹² Specifically, a witness alleged that Avramovic used intimidation and bribery in an attempt to coerce the witness into falsely testifying as to the defendant's whereabouts.¹³ The ICTY did not find contempt in this instance because the witness's uncorroborated testimony did not provide evidence beyond a reasonable doubt as to the truth of alleged misconduct.¹⁴

The ICTY also investigated alleged contempt of the Tribunal by Anto Noblio for disclosing the identity of a protected witness in violation of a court order.¹⁵ Ultimately, the Appeals Chamber overturned the Trial Chamber's finding. The Appeals Chamber found that Noblio did not disclose the identity in knowing violation of a court order because Noblio did not have actual knowledge and he was not willfully blind of the order that protected this witness' identity.¹⁶ Consequently, the Appeals Chamber ordered the ICTY Registrar to repay the 10,000 Dutch guilders fine (5,583 in 2011 USD) that the Trial Chamber had ordered Noblio to pay.¹⁷

The ICTY found Milan Vujin, a defense counsel for Tadić, in contempt of the court for alleged witness interference via threatening conduct and testimony shaping outside of court, e.g.,

¹² *Prosecutor v. Simic*, Case No. IT-95-9-R77, Judgment in the Matter of Contempt Allegations Against an Accused and His Counsel (Jun 30, 2000). Electronic copy provided in accompanying USB flash drive at Source # 2.1.3.

¹³ *See ICTY Press Release*, MILAN SIMIĆ and BRANISLAV AVRAMOVIĆ, IT-95-9-R77 (Jun 30, 2000). Electronic copy provided in accompanying USB flash drive at Source # 2.1.4.

¹⁴ *Id.*

¹⁵ *Le Procureur c/Aleksovski*, Concerning Allegations Against Anto Nobilo, IT-95-14/1 (Dec. 11, 1998) (Fr). Electronic copy provided in accompanying USB flash drive at Source # 2.1.9.

¹⁶ *Prosecutor v. Aleksovski*, Concerning Allegations Against Anto Nobilo, IT-95-14/1, App. Ch. (May 30, 2001). Electronic copy provided in accompanying USB flash drive at Source # 2.1.10.

¹⁷ *Id.* at ¶ 57.

at a police station.¹⁸ Vujin was sanctioned, under a theory of retribution and deterrence, with removal from the ICTY's list of eligible counsel and a fine of 15,000 Dutch guilders (\$9,390 2011 USD).¹⁹

In its early days, the ICTY also quickly reacted to and prohibited fee splitting between defense council and defendants (or their family and agents) on the policy that defendants should not profit from their/ alleged crimes.²⁰

The ICTR found defense lawyer Léonidas Nshogoza in contempt for violating a witness protection order because he disclosed a protected witness's identity in violation of a court order.²¹ Nshogoza was also found to have attempted to bribe and induce prosecution witnesses into providing false testimony.²² The ICTR held so even while recognizing mitigating factors, e.g, that the witness revealed themselves willingly to Nshogoza and that such a ruling might stifle future defense efforts, Nshogoza otherwise clean record.²³ The ICTR imprisoned Nshogoza for 10 months.²⁴

¹⁸ *Prosecutor v. Tadic*, Case No. IT-94-A-R77, Judgment on Allegations of Contempt Against Prior Counsel- Milan Vujin, (Jan 31, 2000). Electronic copy provided in accompanying USB flash drive at Source # 2.1.1.

¹⁹ *Id.*

²⁰ *ICTY Press Release*, Legal Aid to Accused Zoran Zigic Withdrawn Following the Completion of a Financial Investigation by the Registry (Jul. 8, 2002). Electronic copy provided in accompanying USB flash drive at Source # 2.1.12.

²¹ *Nshogoza v. the Prosecutor*, ICTR-2007-91-A, App. Ch. (Mar. 15, 2010). Electronic copy provided in accompanying USB flash drive at Source # 2.2.1.

²² *Id.*

²³ *Id.* at §§ 66, 67.

²⁴ In the *Nshogoza* Appeals Judgment the dissent argued the majority did not adequately consider mitigating circumstances and therefore entered an overly harsh sanction. Electronic copy provided in accompanying USB flash drive at Source # 2.2.1.

The SCSL has sanctioned a lawyer for physically hitting staff members by issuing a public reprimand and a fine of 1,000,000 Sierra Leone Leones (\$226 2011 USD) and striking him from the list of counsel eligible to practice law at the SCSL.²⁵ The SCSL considered mitigating factors such as the counsel's subsequent apology.²⁶

The ECCC should also be aware of the possibility of a breach of the duty of loyalty to clients when a single lawyer represents multiple clients in the same or substantially related issues. The duty of loyalty to a client typically is breached, or vulnerable to breach, where the same attorney represents two different clients in the same case. In this situation, the lawyer may potentially, unintentionally, or purposefully put one client's interests ahead of another client's interests.²⁷

The ICTY has addressed such possible conflicts of interest by acting prospectively. For instance, where a defense counsel represented multiple defendants in the same case or controversy by assigning different lawyers for the different defendants to remove the conflict of interest.²⁸ Dragoljub Prac was listed as a possible witness in Zeljko Mejakic's trial.²⁹ The same lawyer represented both Prac and Mejakic. Finding that the situation could result in Prac's not having appropriate access to his full legal options, such as in negotiations with the prosecution,

²⁵ *Independent counsel v. M.F. Brima, N.B. Bah Jalloh, E. Kamara and A Kamara*, Sentencing Judgment in Contempt Proceedings, SCSL-2005—2/SCSL-2005-3 (Sep 21, 2005). Electronic copy provided in accompanying USB flash drive at Source # 2.3.1.

²⁶ *Id.* at 8.

²⁷ Gregory G. Sarno, *Circumstances giving rise to prejudicial conflict of interests between criminal defendant and defense counsel—federal cases*, 53 A.L.R. Fed. 140 (1981). Electronic copy provided in accompanying USB flash drive at Source # 2.3.6.

²⁸ *Prosecutor v. Mejakić et al.*, IT-02-65-AR73.1, Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simić, (October 6, 2004). Electronic copy provided in accompanying USB flash drive at Source # 2.1.5.

²⁹ *Id.*

the ICTY directed the Registry to reassign either Prac's or Mejakic's case to another attorney.³⁰ Because there was no alleged wrong doing by the lawyer there was no need to determine guilt or levy sanctions. In *The Prosecutor v. Ante Gotovina*, the ICTY similarly held that since a conflict of interest could result where two defendants are represented by the same lawyer in two separate cases but there was a likelihood that one defendant would be called as a witness in the other's trial, one of that lawyer's cases should be reassigned.³¹

III. Legal Discussion

a. Sister Courts

To hold individuals accountable for crimes, the law must define transgressions and then provide reasonable expectations of the consequences of breaking the law. Likewise, to sanction lawyer misconduct, courts must have standards, or at least boundaries of acceptable lawyer conduct to which lawyers can adapt their behavior. Furthermore, there should be foreseeable consequences for breaches of the standards. With this in mind, this subsection examines the ECCC's sister courts' recognized standards and boundaries of conduct and sanctions for misconduct.

i. International Criminal Court

The ICC has rules and standards in place that apply generally to individuals before the court and to lawyers specifically. The ICC's approach to lawyer misconduct is grounded in the Rome Statute (ICC Statute). The ICC defines lawyering standards in its Code of Professional

³⁰ *Id.*

³¹ *The Prosecutor v. Ante Gotovina*, IT-01-45-AR73.1 (Aug. 25, 2005). Electronic copy provided in accompanying USB flash drive at Source # 2.1.6.

Conduct for counsel (ICC Code). The ICC’s Regulations of the Court explain how the ICC will apply these standards.

The ICC Statute, the genesis of the ICC, codifies contempt in Article 70 “Offenses against the administration of justice”³² and does not limit it to lawyers. In defining “Offenses against the administration of justice” Article 70 includes presenting false evidence or testimony, as well as impeding, intimidating, or corruptly influencing a court official or witness.

The ICC Statute outlines sanctions for Offenses against the administration of justice specifically, and sanctions for misconduct before the court generally. Paragraph 3 of Article 70 states “[i]n the event of conviction” for offenses against the administration of justice “the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.” However, Article 71(1) of the ICC Statute bounds “Sanctions for misconduct before the Court” as “administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.”³³

Turning to standards and rules written specifically to direct lawyer behavior, the ICC Code addresses many of the most common lawyer misconduct issues, such as conflicts of interest³⁴, and duties such as candor toward the Court.³⁵ The ICC Code defines lawyer misconduct as a violation, or inducing a violation, of any provision of “the Code, The Statute, the Rules of Procedure and Evidence and the Regulations of the Court or of the Registry in force

³² Rome Statute of the International Criminal Court art. 70, July 17, 1998, [hereinafter ICC Statute]. Electronic copy provided in accompanying USB flash drive at Source # 1.1.1

³³ *Id. at* 71(1).

³⁴ ICC Code of Professional Conduct for Counsel, UN Doc. ICC-ASP/4/Res.1, art. 7(1) (Dec. 2, 2005) (hereinafter ICC Code). Electronic copy provided in accompanying USB flash drive at Source # 1.2.1.

³⁵ *Id. at* art. 24.

imposing a substantial ethical or professional duty” on counsel³⁶ or failure to comply with a disciplinary decision.³⁷ Additionally, The ICC Code explicitly creates counsel liability for the misconduct of counsel assistants and other staff.³⁸

The ICC Code defines a specific range of sanctions for lawyer misconduct. ICC sanctions for misconduct range from admonishment, public reprimand and documentation in the counsel’s personal file, fine up to 30,000 Euros, through suspension of the right to practice before the ICC for no more than two years and ultimately to a permanent ban on practice before the ICC and disqualification from the list of counsel.³⁹ The ICC Code does not include imprisonment as a possible sanction for lawyer misconduct.

The ICC Regulations of the Court expound on the Court’s ability to remove counsel from the list of counsel where he “has been permanently banned from practicing before the Court as a result of disciplinary proceedings,”⁴⁰ has committed “an offence against the administration of justice” per ICC Statute Article 70 paragraph 1⁴¹ counsel may be temporarily suspended from the list of counsel in accordance with temporary suspension related to a disciplinary proceeding.⁴²

ii. ICTY

³⁶ *Id. at art. 31(a), (b).*

³⁷ *Id. at art. 31(c).*

³⁸ *Id. at art. 32.*

³⁹ *Id. at art. 42.*

⁴⁰ ICC Regulations of the Court, ICC-BD/01-02-07 Reg (May 26, 2007). Electronic copy provided in accompanying USB flash drive at Source # 1.2.2.

⁴¹ *Id. at Reg 71(1)(c)*

⁴² *Id. at Reg 71(2)*

The ICTY's Rules of Procedure and Evidence (ICTY Procedure) and its Code of Professional Conduct for Counsel Appearing Before the International Tribunal (ICTY Code) create guidelines for counsel behavior and sanctions for lawyer misconduct and incompetence.

ICTY Procedure Rule 77 "Contempt of the Tribunal" finds contempt where individuals "knowingly and willfully interfere with its administration of justice"⁴³ and includes a list of possible transgressions. ICTY Procedure Rule 77 specifically includes two instances of failure to comply with court orders as contemptuous: disclosure of information in knowing violation of an order and failure to comply with an order to produce documents before a Chamber.⁴⁴ ICTY Procedure Rule 77 contemplates finding lawyers in contempt because 77(I) begins with "if a counsel is found guilty of contempt".⁴⁵ Thus the ICTY may reasonably use its specific examples of contempt, or analogous conduct, to sanction violating a court order; the standard laid out in 77(A) seeks to prevent knowing and willful interference with the administration of justice, but may be used to find contempt where counsel violates *any* court order.

The ICTY limits contempt sanctions to no more than 7 years in prison or a 100,000 Euro fine or both⁴⁶. Additionally, the ICTY may determine that a lawyer "is no longer eligible to represent a suspect or accused before the Tribunal" or that his or her conduct amounts to misconduct deserving sanctions under ICTY Procedure Rule 46, or both.⁴⁷ The ICTY Code

⁴³ Int. Crim. Trib. for the Former Yugoslavia, Rules of Procedure and Evidence, IT/32/Rev. 45, Rule 77(a) (Dec 2010) (hereinafter ICTY Procedure).. Electronic copy provided in accompanying USB flash drive at Source # 1.3.2.

⁴⁴ *Id.* at Rule 77(A)(ii), (iii)

⁴⁵ *Id.* at Rule 77(I)

⁴⁶ *Id.* at Rule 77(G).

⁴⁷ *Id.* at Rule 77(I).

outlines standards for lawyer practice including competence⁴⁸, confidentiality,⁴⁹ and candor before the Tribunal.⁵⁰ The ICTY Code bars defending frivolous proceedings or actions.⁵¹ ICTY Code Article 35's misconduct definition includes lawyer conduct involving dishonesty, fraud, deceit or misrepresentation⁵² or conduct that is "prejudicial to the proper administration of justice"⁵³.

ICTY Procedure Rule 46 is "Misconduct of Counsel".⁵⁴ ICTY Rule 46(a) defines sanctions for a specific class of lawyer misconduct. It states that when counsel behavior is offensive, abusive, or obstructs the proper conduct of the proceedings, or when counsel "fails to meet the standard of professional competence" the ICTY may refuse audience to that counsel or determine that that lawyer is no longer eligible to represent "a suspect or an accused" before the Tribunal per Rule 44 Appointment, Qualification and Duties and Rule 45 Assignment of Counsel.⁵⁵ Additionally, ICTY Procedure Rule 45 permits "Interim Suspension from Practice" at any time after a complaint if there are reasonable grounds to conclude that the alleged misconduct is likely to cause immediate and irreparable harm.⁵⁶ The ICTY may also

⁴⁸ Int. Crim. Trib. for the Former Yugoslavia, Code of Professional Conduct for Counsel Appearing Before the International Tribunal, IT/125 REV. 3, Article 10 (Aug 2009) (hereinafter ICTY Code). Electronic copy provided in accompanying USB flash drive at Source # 1.3.1.

⁴⁹ *Id.* at Article 11.

⁵⁰ *Id.* at Article 23.

⁵¹ *Id.* at Article 25.

⁵² *Id.* at Article 35(iii).

⁵³ *Id.* at Article 35(iv).

⁵⁴ ICTY Procedure Rule 46. Electronic copy provided in accompanying USB flash drive at Source # 1.3.1.

⁵⁵ *Id.* at Rule 46(A).

⁵⁶ *Id.* at Rule 45(A).

communicate the misconduct to the appropriate body in the counsel's State of admission.⁵⁷ This referral practice is common among the sister courts and the ECCC.

Thus, the ICTY may address lawyer misconduct specifically under its lawyer misconduct rules as well as its generally applicable contempt rules.

This memo will now examine how the ICTY has used its rules and standards to address incidences of alleged lawyer misconduct. In *Prosecutor v. Radoslav Brdjanin Concerning Allegations Against Milka Maglov*, Maglov, one of Brdjanin's co-counsel, was accused of contempt of court for allegedly intimidating a witness and disclosing the identity of the witness in violation of a court order. The ICTY opened a proceeding based on ICTY Procedure Rule 77 and, on "the Tribunal's [uncodified but] inherent power to hold in contempt those who knowingly and willfully interfere with the Tribunal's administration of justice by threatening or intimidating a witness who is to give evidence in proceedings before a Chamber, or by disclosing information relating to those proceedings in knowing violation of an order of a Chamber."⁵⁸ However, the ICTY vacated this inquiry without explanation in December 2004.⁵⁹

In a separate case, the ICTY found Milan Vujin in contempt for witness interference, fined him, and directed the Registrar to consider striking Vujin from the list of counsel eligible to practice at the ICTY.⁶⁰ The ICTY found Vujin's misconduct based on a breach of the professionalism required by the ICTY Code of Professional Conduct for Defense Counsel

⁵⁷ *Id.* at Rule 46(B).

⁵⁸ *Prosecutor v. Radoslav Brdjanin*, Concerning Allegations Against Milka Maglov, IT-99-36/R77 (Apr. 2003). Electronic copy provided in accompanying USB flash drive at Source # 2.1.7. *citing Prosecutor v. Tadic*, Case No. IT-94-A-R77, Judgment on Allegations of Contempt Against Prior Counsel- Milan Vujin, ¶¶ 26(a), 39-42 (Jan 31, 2000). Electronic copy provided in accompanying USB flash drive at Source # 2.1.1.

⁵⁹ *Prosecutor v. Radoslav Brdjanin*, Concerning Allegations Against Milka Maglov, IT-99-36/R77 (Apr. 2003). Electronic copy provided in accompanying USB flash drive at Source # 2.1.7.

⁶⁰ *Id.*

Appearing before the Tribunal. The ICTY selected these sanctions because “contempt requires punishment which serves not only as *retribution* for what has been done but also as *deterrence* of others who may be tempted to act in the same way.”⁶¹ The ICTY noted that ICTY Procedure Rule 77 sets maximum fines and imprisonment, and found authority for Vujin’s sanctions even though “[t]he Code [for Defense Counsel] does not itself provide for any sanction where counsel is guilty of professional misconduct, although reference is made to Rule 46 (“Misconduct of Counsel”) of the Tribunal’s Rules of Procedure and Evidence. However, that Rule (which permits a Chamber to refuse audience to counsel where, in its opinion, the conduct of that counsel obstructs the proper conduct of the proceedings) is not applicable where counsel is no longer appearing as counsel before the Chamber.”⁶² Vujin, though no longer practicing law at the ICTY, was still on the list of eligible counsel and the ICTY and had practiced before the ICTY when he committed his misconduct. Therefore, the ICTY found authority to fine him and strike him from the list of eligible attorneys. Thus the ICTY has initiated misconduct proceedings for lawyers currently and no longer before it.

iii. ICTR

The ICTR has Rules of Evidence and Procedure (ICTR Procedure), a Code of Professional Conduct (ICTR Code) that applies to lawyers, Prosecutor’s Regulations, and a Code of Professional Conduct for Defense Counsel (ICTR Defense Counsel Code) that together define the expectations for lawyers at the ICTR. The ICTR Procedure explains under what

⁶¹ *ICTY Press Release*, Judgment in the Case the Prosecutor v. Beqa Beqaj (May 5, 2005). Electronic copy provided in accompanying USB flash drive at Source # 2.1.13.

⁶² *Id.*

circumstances misconduct will be found and offers a limited spectrum of possible sanctions.

Overall, the ICTR approach is very similar to that of the ICTY.

ICTR Procedure Rule 77 “Contempt of the Tribunal” defines contempt and offers examples of contempt that are consistent with the ICTY rules. In the ICTR, contempt includes actions that intimidate, injure, bribe or interfere with evidence or witnesses, and actions that violate Chamber orders of non-disclosure.⁶³ These provisions apply broadly to lawyers and non-lawyers.

When the ICTR concludes that there is contempt, the maximum penalty is five years imprisonment “or a fine not exceeding USD 10,000, or both.”⁶⁴ Additionally, the Chamber may find that a contemptuous lawyer is “no longer eligible to represent a suspect or accused before the Tribunal or such conduct amounts to misconduct” under Rule 46.⁶⁵

ICTR Procedure Rule 46 defines “Misconduct of Counsel” as, when after a warning, counsel continues behavior which is “offensive or abusive, obstructs the proceedings, or is otherwise contrary to the interest of justice.”⁶⁶ According to the expectations of common law systems ICTR Procedure only intimates but does not specify what sanctions lawyer misconduct may bring. For instance, it states that the President of the Bureau may take “appropriate action under this rule.”⁶⁷ Rule 45(I) states that counsel who fail to “represent the accused and conduct the case to finality” without just cause approved by the Chamber may be forced to forfeit their

⁶³ ICTR Procedure Rule 77. Electronic copy provided in accompanying USB flash drive at Source # 1.4.2.

⁶⁴ *Id. at* 77(G).

⁶⁵ *Id. at* Rule 77(I).

⁶⁶ *Id. at* Rule 46(A).

⁶⁷ *Id. at* Rule 46(D).

fees⁶⁸. Rule 45(H) states that “under exceptional circumstances” counsel may be replaced.⁶⁹ Rule 46(C) outlines circumstances where counsel may be refused counsel and thus must be reassigned under Rule 45.⁷⁰

Item 2 of the ICTR Prosecutor’s Regulations expects lawyers to behave according to certain standards, including “maintain[ing] the honor and dignity of their profession”⁷¹, to not knowingly “make an incorrect statement of material fact... or offer evidence which prosecution counsel knows to be incorrect or false” to the Tribunal⁷² and “not disclos[e] information which may jeopardize the safety of victims and witnesses.”⁷³

The much lengthier ICTR Defense Counsel Code requires defense counsel to act with “competence, dignity, skill, care, and loyalty,”⁷⁴ “render open and honest advice,” and “never be influenced by improper or patently dishonest” client behavior.⁷⁵ The ICTR Defense Counsel Code categorically prohibits fee splitting arrangements between counsel and their clients, or their clients agents and family,⁷⁶ it offers guidance regarding confidentiality and conflicts of interests,⁷⁷ and it states “counsel must... maintain the integrity of evidence.”⁷⁸ Article 20 of the

⁶⁸ *Id.* at Rule 45(I).

⁶⁹ *Id.* at Rule 45(H).

⁷⁰ *Id.* at Rule 46(C).

⁷¹ ICTR Prosecutor’s Regulation No. 2 (b). Electronic copy provided in accompanying USB flash drive at Source # 1.4.3.

⁷² *Id.* at No. 2 (e).

⁷³ *Id.* at No. 2 (b).

⁷⁴ ICTR Code of Professional Conduct for Defense Counsel Article 5(a). Electronic copy provided in accompanying USB flash drive at Source # 1.4.1.

⁷⁵ *Id.* at Article 5(b).

⁷⁶ *Id.* at Article 5bis (1).

⁷⁷ *Id.* at Article 8.

Defense Counsel Code defines misconduct as violating or attempting to violate the Defense Counsel Code or knowingly inducing or assisting another to violate the code.⁷⁹ The ICTR Defense Counsel Code requires defense counsel to comply with ICTR orders.

The ICTR found Léonidas Nshogoza, a Rwandan lawyer and former ICTR defense investigator in contempt for violating a witness identity protection order.⁸⁰ Here, Nshogoza, after being contacted by a witness whose identity Nshogoza knew was protected by an ICTR order, Nshogoza repeatedly met with the witness and disclosed the witness' identity. Nshogoza offered that the witness had disclosed his or her identity and therefore Nshogoza reasonably concluded that protective order no longer applied. The Appeals Chamber disagreed and upheld the Trial chamber's 10-month imprisonment sanction. In considering the sanctions for his act the ICTR considered mitigating factors including his otherwise blank criminal record, his voluntary surrender, and noted evidence of his good character.⁸¹ The Appeals court affirmed the Trial Chamber's 10 month sentence because of the imperative concern for witness safety and protection. The two dissenting judges noted that in consideration of his actions and the cases and policies of its sister courts, the sentence was excessive and in "stark contrast" to the practices at the ICTY and ICTR.⁸² In his dissent, Judge Robinson wrote that at most the sanction should have been a \$1,000 fine and a reprimand.

iv. Special Court of Sierra Leone

⁷⁸ *Id.* at Article 14.

⁷⁹ *Id.* at Article 20(a).

⁸⁰ See *Nshogoza v. the Prosecutor*, ICTR-2007-91-A, App. Ch. (Mar. 15, 2010). Electronic copy provided in accompanying USB flash drive at Source # 2.2.1.

⁸¹ *Id.* at ¶ 107.

⁸² *Id.* at Judge Guney Parial Dissent ¶2, Judge Robinson Dissent.

The SCSL Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone (SCSL Code) and the SCSL Articles of Agreement (SCSL Agreement) combine to form a conduct regime that is consistent with the ICTY's and ICTR's approaches to contempt of court and lawyer misconduct.

The SCSL Code provides boundaries for “Integrity of Evidence,”⁸³ “Duty towards the Special Court,”⁸⁴ “Conflict of Interest,”⁸⁵ prohibiting financial arrangements between counsel and clients,⁸⁶ and prohibiting fee splitting⁸⁷ among other guidance. Breaching these boundaries is misconduct. Article 27 of the SCSL Code defines misconduct as violating, or inducing violations of the SCSL Code and refusal to conform to sanction orders issued by the SCSL's disciplinary Panel.⁸⁸ Article 34 of the SCSL Code permits the imposition of a single selection or combination of admonishment, public reprimand, restitution, a fine no greater than 2 million Leones, and temporary or permanent refusal of audience before the Special Court.⁸⁹ Additionally, the SCSL may communicate misconduct to the professional body regulating the counsel's conduct in

⁸³ Code of Professional Conduct for Counsel with the right of Audience before the Special Court for Sierra Leone, Article 6, *adopted on* May 14, 2005 (hereinafter SCSL Code). Electronic copy provided in accompanying USB flash drive at Source # 1.5.1.

⁸⁴ *Id. at* Article 8.

⁸⁵ *Id. at* Article 15.

⁸⁶ *Id. at* Article 21.

⁸⁷ *Id. at* Article 22.

⁸⁸ *Id. at* Article 27.

⁸⁹ *Id. at* Article 34.

counsel's State of admission.⁹⁰ Under the SCSL Code, SCSL Disciplinary Panels "shall order that that reasonable costs of the proceedings be borne by counsel" where misconduct is found.⁹¹

The SCSL Agreement provides counsel "immunity from personal arrest or detention"⁹² and "immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed in his or her capacity as counsel,"⁹³ However, with its straight forward misconduct rules and standards the SCSL clearly contemplates waiving immunity where lawyers are guilty of misconduct.⁹⁴

By 2005, the SCSL recognized that though its rules set maximum penalties for contempt, there is no minimum guideline and therefore the court has "inherent" power to fashion an appropriate sanction.⁹⁵ Additionally, the SCSL has determined, by first considering the gravity of the act or omission and, in conformance with SCSL Rule 101(B), then mitigating factors such as the individual circumstances of the individual and the context of their actions, e.g., forethought, previous criminal, contemptuous acts, guilty pleas, remorse.⁹⁶ Later that year, the SCSL dealt with its first instances of lawyer misconduct where one lawyer hit an SCSL staff member. In the more notable of the two instances in 2005, the SCSL found this lawyer in violation of Article 7

⁹⁰ *Id.* at Article 34.

⁹¹ *Id.* at Article 34(C).

⁹² Agreement Between The United Nations And The Government Of Sierra Leone On The Establishment Of A Special Court For Sierra Leone, Article 14(2)(a), Aug. 14, 2000 (hereinafter SCSL Agreement). Electronic copy provided in accompanying USB flash drive at Source # 1.5.4.

⁹³ *Id.* at Article 14(2)(c).

⁹⁴ *Independent Counsel Against Brima, Jallo, Kamara*, 21 September 2005, SCSL (where SCSL sanctions counsel for actions, without reference to his immunity). Electronic copy provided in accompanying USB flash drive at Source # 2.3.1.

⁹⁵ *Id.* at ¶19.

⁹⁶ *Id.* at ¶30-34.

of the SCSL Code.⁹⁷ After considering the seriousness of the lawyer's actions, and mitigating factors such as remorse, the SCSL permanently barred him from practicing before the SCSL, issued a public reprimand and fined him the maximum fine allowed.⁹⁸ The SCSL did not imprison this lawyer or even discuss the immunity clause of the SCSL Articles.

v. Special Tribunal for Lebanon

The STL has released "A Code of Professional Conduct for Counsel Appearing before the Tribunal" (STL Code). The STL's Rules of Procedure and Evidence (STL Procedure) implement sanctions for violations of the STL Code. The STL's approach to lawyer misconduct differs from those of the other courts discussed in this memo only in that the standards and sanctions are more specific.

STL Procedure Rule 60 *bis* "Contempt and Obstruction of Justice" defines contempt as knowingly and willfully interfering with the STL's administration of justice. This includes disclosing information in violation of an STL order and interfering with, corrupting or intimidating evidence and witnesses.⁹⁹ As in the ICTY the "maximum penalty that may be imposed on a person found to be in contempt of the Tribunal shall be a term of imprisonment not exceeding seven years, or a fine not exceeding 100,000 Euros, or both."¹⁰⁰

Turning to the STL's expectations of lawyers, the STL Code differs from many of its sister courts in that the STL Code lays out specific expectations of lawyerly professionalism. For

⁹⁷ *Brima Samura*, Judgement in Contempt Hearings (Oct. 26 2005) (finding a violation of SCSL Code Article 7, the SCSL did not examine whether he violated Articles 5(i) and 5(iii), and Article 8(B). Electronic copy provided in accompanying USB flash drive at Source # 2.3.2.

⁹⁸ *Id.* at 8

⁹⁹ Special Tribunal for Lebanon Rules of Procedure and Evidence, 60*bis*, Nov. 10, 2010 (hereinafter STL Procedure). Electronic copy provided in accompanying USB flash drive at Source # 1.6.2.

¹⁰⁰ *Id.* at 60*bis* (I).

instance, the STL Code requires counsel to “always be courteous and civil to other counsel, including opposing counsel,”¹⁰¹ and to refrain from being influenced by personal animosity¹⁰².

The STL Code even provides guidance for “Comments Made *about* Other Counsel.”¹⁰³

The STL Code also differs from other codes in that it provides specific guidance regarding counsel statements to the media. When counsel make statements to the media, the STL Code requires counsel to state that they do not speak for the whole tribunal.¹⁰⁴ In addition to what the STL specifically orders, counsel shall not make statements that are false, misrepresent the situation, disrespect the presumption of innocence or disclose confidential information.¹⁰⁵

The STL Procedure Rule 60 “Misconduct of Prosecutor, Defense Counsel or Legal Representative of Victims” is the most explicit misconduct rule among the international criminal courts this memo has surveyed because Rule 60 explicitly includes prosecutors and civil lawyers. Under the STL Rules, the STL may find counsel misconduct where conduct is “offensive, abusive or obstructs the proper conduct of the proceedings, or [when] counsel is negligent or otherwise fails to meet the acceptable standards of professional competence and/or ethics in the performance of his duties”.¹⁰⁶

The STL Rules identify sanctions for counsel misconduct as formal warnings, deferral, suspension, refusing audience for that counsel, or withdrawing counsel’s ability to practice in the

¹⁰¹ Special Tribunal for Lebanon Code of Professional Conduct for Counsel Appearing Before the Tribunal, #9, Feb 28, 2011 (hereinafter STL Code) . Electronic copy provided in accompanying USB flash drive at Source # 1.6.1.

¹⁰² *Id.* at #10.

¹⁰³ *Id.* at #5 (emphasis original).

¹⁰⁴ *Id.* at #44.

¹⁰⁵ *Id.* at #45.

¹⁰⁶ STL Procedure Rule 60(A). Electronic copy provided in accompanying USB flash drive at Source # 1.6.1.

STL.¹⁰⁷ The STL may also “communicate any misconduct of counsel to the professional body regulating the conduct of counsel in the counsel’s national jurisdiction.”¹⁰⁸

vi. Summary of Standards

In sum, each of the ECCC’s sister courts has rules and standards for lawyer misconduct that define contempt, specifically prohibit the most common classes of misconduct, and offer a sanction regime which includes a maximum fine, maximum imprisonment, and dismissal from practicing before the court. Appendix A and B respectively present the rules and sanctions of the ECCC and its sister courts in charts for easy reference.

b. Extraordinary Chambers in the Courts of Cambodia

i. Contrasting the ECCC’s Rules and Sanctions with its Sister Courts’ Rules and Sanctions

With its internal rules and its authority to adopt recognized international standards, the ECCC has the authority to address many of the most common types of lawyer misconduct likely to arise before it. Primarily, the ECCC takes its authority to act on lawyer misconduct from its Articles of Agreement (ECCC Agreement) and its Internal Rules (ECCC IRs). Secondly, the ECCC takes guidance from Cambodian law and legal standards and looks to recognized standards of the legal profession to supplement the ECCC’s overall regime.¹⁰⁹

¹⁰⁷ *Id.* at Rule 60(A)(i)-(iii).

¹⁰⁸ *Id.* at Rule 60(B).

¹⁰⁹ 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, Article 12 (1) and (2), Jun. 6, 2003 (guidance may also be sought from recognized standards) and Article 21(3)) (hereinafter ECCC Agreement) . Electronic copy provided in accompanying USB flash drive at Source # 1.7.1.

Specifically, the ECCC IRs subject lawyers¹¹⁰ to “relevant provisions of the Agreement, the ECCC Law, these IRs, ECCC Practice Directions and administrative regulations, as well as the Cambodian Law on the Statutes of the Bar and recognized standards and ethics of the legal profession. ECCC lawyers have an obligation to promote justice and the fair and effective conduct of proceedings.”¹¹¹ This particular rule is significantly more specific than the standards at other international courts in the degree to which it names sources of law, e.g. such as Cambodian Statutes of the Bar. However, it may also unfairly subject foreign lawyers to Cambodian law that they have little notice of because it is inaccessible to them when not translated from Khmer to English or French.¹¹² Therefore, the ECCC may consider relying primarily on those Cambodian laws that are also found in international standards.

Consistent with other international criminal courts, ECCC IRs Rule 35(1), “Interference with the Administration of Justice” warns counsel that the ECCC “may sanction or refer to the appropriate authorities any person who knowingly and willfully interferes with the administration of justice”.¹¹³ As we have noted above, interference with the administration of justice is a form of contempt.¹¹⁴ Additionally, the wording of this rule closely tracks the contempt rules at the STL and ICTY with its use of ‘knowing’, ‘willful’ and its standards to measure such interference. In addressing contempt, the ICTY has referred to the inherent power

¹¹⁰ The ECCC defines Lawyer as any person admitted to practice law by the BAKC or by a relevant authority in another United Nations Member State and registered by the BAKC to practice before the ECCC. ECCC IRs at 81, 22(4). Electronic copy provided in accompanying USB flash drive at Source # 1.7.2.

¹¹¹ *Id.* at Rule 22(4).

¹¹² For example, the author of this memo was unable to find any translation, treatise or other treatment of Cambodian law that this rule may implicate in a well-known language such as French or English.

¹¹³ ECCC IRs Rule 35(1). Electronic copy provided in accompanying USB flash drive at Source # 1.7.2.

¹¹⁴ See Section II (b) (i) Types of Lawyer Misconduct of this memo.

it has as a court to address conduct that interferes with the administration of justice. Rule 35(1) includes lawyer misconduct because it does not exclude lawyers and because Rule 35(5) states “if a lawyer is found” to have violated 35(1) then Co-Investigating Judges or the Chambers may also determine whether there is wrongdoing under Rule 38 “Lawyer Misconduct.”

Moreover, the ECCC contempt rule provides examples of ‘interference with the administration of justice’, in Rule 35(1)(a)-(g), including any person who violates a court order by disclosing confidential information,¹¹⁵ violates a court order to produce evidence,¹¹⁶ tampers with evidence,¹¹⁷ “threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with a witness” or potential source of evidence,¹¹⁸ or tries to prevent another person from complying with an order¹¹⁹, or a person who “incites or attempts to commit any of the acts set out above.”¹²⁰ Thus, the ECCC has broad authority to address court order violations by lawyers and their agents. The ECCC, like its sister courts, has a flexible framework for finding lawyers in contempt of court for a wide range of misconduct.

When the ECCC finds that an interference with the administration of justice (contempt) under ECCC IRs Rule 35 may have occurred, the ECCC may “deal with the matter summarily”¹²¹; conduct further investigations to deem whether there are sufficient grounds to

¹¹⁵ ECCC IRs Rule 35(1)(a). Electronic copy provided in accompanying USB flash drive at Source # 1.7.2.

¹¹⁶ *Id.* at Rule 35(1)(b).

¹¹⁷ *Id.* at Rule 35(1)(c).

¹¹⁸ *Id.* at Rule 35(1)(d).

¹¹⁹ *Id.* at Rule 35(1)(e).

¹²⁰ *Id.* at Rule 35(1)(g).

¹²¹ *Id.* at 35(2)(a). Blacks Law Dictionary defines summary as “short, concise” or without the usual formalities. Blacks Law Dictionary defines “summarily” as “immediate; done without delay.”

instigate proceedings¹²²; or “refer the matter to the appropriate authorities of the Kingdom of Cambodia or the United Nations.”¹²³

Turning to lawyer-specific expectations and rules, Article 6 of the ECCC Agreement requires “high moral character,” “high level of professional competence,”¹²⁴ and independence¹²⁵ of prosecutors. In contrast, the ICTR requires a broader set of expectations including “Maintenance of the Integrity of the Profession” and professional competence.¹²⁶ The STL reaches toward even more basic tenants of professionalism by requiring lawyers to “always be courteous.”¹²⁷ As the ECCC evaluates lawyers behavior that is not within the shadow of misconduct, the ECCC may refer to the codes of conducts of its sister courts, especially the STL’s Code.

More broadly, ECCC IRs Rule 22(4) states that lawyers shall be subject to the “relevant provisions of the ECCC Agreement, ECCC Law, these [ECCC IRs], ECCC Practice Directions, administrative regulations and Cambodian Law on the Statues of the Bar, and recognized standards and ethics of the legal profession.”¹²⁸ Thus the ECCC IRs put lawyers on notice that their conduct is subject to scrutiny from a broad range of vantages. However, ECCC IRs Rule 22 provides little specific guidance to lawyers on its own. Additionally, the ECCC documents it

¹²² ECCC Internal Rules 35(2)(b). Electronic copy provided in accompanying USB flash drive at Source # 1.7.2.

¹²³ *Id.*

¹²⁴ ECCC Agreement Article 6(2)d. Electronic copy provided in accompanying USB flash drive at Source # 1.7.1.

¹²⁵ *Id. at* Article 6(3).

¹²⁶ ICTR Code, Part II Article 5. Electronic copy provided in accompanying USB flash drive at Source # 1.4.1.

¹²⁷ STL Code #43. Electronic copy provided in accompanying USB flash drive at Source # 1.6.1.

¹²⁸ ECCC IRs Rule 22(4). Electronic copy provided in accompanying USB flash drive at Source # 1.7.2.

references for further guidance also do not provide adequate specificity. Therefore, the ECCC should refer to the BAKC and recognized international standards to fill these gaps.

One important gap is conflicts of interests such as those addressed in the ICTY.¹²⁹ The SCSL's conflict of interest rule also defines conflicts of interests and permits a lawyer to proceed if his conflicting clients provide informed consent.¹³⁰ The International Criminal Bar has published a "Code of Conduct and Disciplinary Procedure" (ICB Code) whose scope is limited to practice at the ICC. The ICB Code relies heavily on the ICC Statute, the Codes of the ECCC's sister courts, and other codes of conduct from across the world.¹³¹ The ICB Code's rules on conflict of interest provide flexibility to lawyers who represent different clients whose interests may be adverse because it permits concurrent representation if client provide knowing consent.¹³²

The BAKC advises Cambodian lawyers on matters of conflicts of interests. The BAKC code of ethics provides that lawyers who have "counseled, assisted, or represented a party may not, in the same matter or a connected matter, intervene on behalf of an adverse" party.¹³³ In terms of contempt, the BAKC code teaches that lawyers are "strictly prohibited from engaging in disloyal and disruptive conduct, especially with regard to objections."¹³⁴ The BAKC code offers similar fraternal and professional expectations of inter-lawyer relationships as other codes discussed in this memo.¹³⁵ Where the ECCC might remove a lawyer it may consider BAKC

¹²⁹ See Section II (b) (ii) Examples of Misconduct in the ECCC's Sister Courts.

¹³⁰ SCSL Code #15. Electronic copy provided in accompanying USB flash drive at Source # 1.5.1.

¹³¹ ICB Code at 50. Electronic copy provided in accompanying USB flash drive at Source # 3.1.

¹³² *Id.* at 7, 33(1), 39(4) (out of court statements that may endanger witnesses or clients).

¹³³ Code of Ethics for Lawyers Licensed with the BAKC Article 20. Electronic copy provided in accompanying USB flash drive at Source # 1.7.3.

¹³⁴ *Id.* at Article 24.

¹³⁵ *Id.* at Article 25, 27.

Code Article 28 for guidelines on “substitution of a lawyer.” The ECCC should request from the BAKC additional documents. The only relevant document that this author was able to procure in English is the BAKC code of ethics. Additionally, standards for counsel statements to the media, in the absence of specific ECCC orders are not addressed by the ECCC. Instead, the ECCC would need to look to the standards recognized by its sister courts, like the STL’s media rules.¹³⁶

The ICB Code expects lawyers to monitor staff members’ work and make sure that staff work is in keeping with the code. For instance, lawyers must make sure their staffs comply with the Code’s expectations of attorney-client confidentiality.¹³⁷ Like the ICTY, the ICB code prevents lawyers and their staffs from fee splitting with clients and their families, and expects lawyers to review such accounts.¹³⁸

Turning to possible sanctions for lawyers at the ECCC, under Rule 38(a) the ECCC may “after a warning, impose sanctions against or refuse audience to a lawyer if, in their opinion, his or her conduct is considered offensive or abusive, obstructs the proceedings, amounts to abuse of process, or is otherwise contrary to Article 21(3) of the Agreement”¹³⁹ or if a lawyer’s conduct violates ECCC IRs Rule 35(1)¹⁴⁰. The ICTY also has a warning requirement.¹⁴¹ Because Rule 38(4) contemplates lawyers being “struck off the list lawyers approved to appear before the ECCC” as a result of a disciplinary action, the ECCC may sanction a lawyer by barring him or

¹³⁶ STL Code #44-45. Electronic copy provided in accompanying USB flash drive at Source # 1.6.1.

¹³⁷ International Criminal Bar Association, *Code of Conduct and Disciplinary Procedure of the International Criminal Bar, Subcommittee on Ethics of the International Criminal Bar*, 6(1) (2003) (hereinafter ICB Code). Electronic copy provided in accompanying USB flash drive at Source # 3.1

¹³⁸ *Id* at 24 (5) and (6).

¹³⁹ See ECCC Agreement Article 21(3). Electronic copy provided in accompanying USB flash drive at Source # 1.7.1.

¹⁴⁰ ECCC IRs Rule 35(5). Electronic copy provided in accompanying USB flash drive at Source # 1.7.2.

¹⁴¹ ICC Procedure 80(B). Electronic copy provided in accompanying USB flash drive at Source # 1. 2.1.

her from further practice before the ECCC.¹⁴² The ECCC may also refer misconduct matters to bodies outside the Chambers, including “to the appropriate professional body” in Cambodia or abroad.¹⁴³ The ICB Code offers a range of sanctions some of which are less onerous than those suggested by the sister courts. That range of sanctions is:

“a) make a recommendation regarding counsel’s future conduct. b) Recommend that counsel complete a specific course or courses before being authorized to accept mandates as defined in Article 2 (2) of the Code. c) Recommend that counsel be supervised by another counsel for a determined period of time not exceeding 1 year. d) Reprimand counsel and if necessary, order the publication of the reprimand. e) When assets have been misappropriated by counsel, make an order for restitution. f) Suspend counsel’s ability to accept or complete mandates as defined in Article 2 (2) of the Code for a determined period of time not exceeding 2 years. g) Order that counsel be prohibited from accepting or completing mandates as defined in Article 2 (2) of the Code. h) Order counsel to pay costs.”¹⁴⁴

A major gap in the ECCC’s IRs and related materials regarding lawyer sanctions, especially when contrasted with those of the ECCC’s sister courts, is that the ECCC does not provide maximum sanctions or a specific spectrum of possible sanctions outside of barring the lawyer from practice and referring the matter to his or her home country.¹⁴⁵ Notably, though the ICC does not offer lawyers immunity for misconduct, it does explicitly state that imprisonment may not be included among possible sanctions for lawyer misconduct.¹⁴⁶ Thus, the ECCC might refer to its sister courts sanctions as summarized above and in Appendix A and recommended in section IV(b)(ii)(6) of this memo.

¹⁴² ECCC IRs Rule 38(4). Electronic copy provided in accompanying USB flash drive at Source # 1.7.2.

¹⁴³ *Id at* Rule 38(2) (The Co-Investigating Judges or the Chambers may also refer such misconduct to the appropriate professional body.)

¹⁴⁴ ICB Code at 70. Electronic copy provided in accompanying USB flash drive at Source # 3.1.

¹⁴⁵ *See* Appendix A and B.

¹⁴⁶ ICC Statute art. 71(1). Electronic copy provided in accompanying USB flash drive at Source # 1.1.1.

ii. Legal Argument Template

In exerting its authority to examine and sanction alleged lawyer misconduct, the ECCC could rely on the following legal argument template¹⁴⁷:

1. Establish In Personam Jurisdiction
2. Determine that Immunity is Unavailable
3. Respond to Alleged Misconduct with a Warning or Proceedings to Examine Interference with the Administration of Justice
4. Investigate the Alleged Interference with the Administration of Justice
5. Conduct Trial
6. Determine Sanctions
7. Consider Appeal

1. Establish In Personam Jurisdiction

First, the ECCC should establish that the lawyer whose conduct is being examined is a prosecutor, defense, or civil lawyer before the court or if he is a non-party that his conduct nevertheless interferes with the ECCC's administration of justice. The ECCC's sister courts have brought individuals not practicing or otherwise before the court for contempt of court.¹⁴⁸ Thus, the ECCC may import these recognized standards of bringing non-parties before an international criminal court for violating an order of the court (and thus interfering with justice) to sanction lawyers not practicing before the ECCC.

2. Determine that Immunity is Unavailable

The ECCC should rule that lawyer immunity under the ECCC Agreement does not apply to lawyer misconduct because, read as a whole, the ECCC Agreement and IRs do not intend to turn a blind eye to lawyer conduct.

¹⁴⁷ Appendix C supplies a flow chart for easy digestion of the legal argument template.

¹⁴⁸ The ICTY found two journalists in contempt of court for knowingly violating a witness protection order by publishing a witness's identification when their source, who was bound by the order notified the journalists, and they published their awareness that a witness non-disclosure order applied to this witness's identity. *Judgement, Marijacic and Rebic* IT-95-14-R77.2 (September 2006). Electronic copy provided in accompanying USB flash drive at Source # 2.1.11.

ECCC Agreement Articles 19 and 20 set forth the immunities for individuals working at the ECCC. Article 19 provides immunity from arrest or detention for defense and civil lawyers or lower level prosecutors.¹⁴⁹ Article 20 provides Cambodian personnel and the Cambodian co-prosecutor immunity from legal process in respect of their performance in their official capacity.¹⁵⁰ Article 20 provides international personnel immunity from legal process.¹⁵¹ Article 21 states that counsel “shall not be subjected by the Royal Government of Cambodia to any measure that may affect the free and independent exercise” of their functions as counsel.¹⁵² Article 21 also immunizes counsel from arrest and detention¹⁵³ and “immunity from criminal or civil jurisdiction” in respect of their acts in official capacity as counsel.¹⁵⁴

Although the ECCC Agreement does not *explicitly* state any exceptions to these immunities, read as a whole, the ECCC Agreement does not afford unaccountability to counsel. Article 21(3) states that any defense counsel must act in accordance with the Agreement, the Cambodia Law on the Statutes of the Bar and recognized standards of and ethics of the legal profession. Because Article 21 gives defense counsel immunity and requires these standards of conduct, the Agreement does not intend to permit defense counsel to breach those standards without consequence. More specifically, for prosecutors, the Articles require certain morality and competence as a condition of becoming a prosecutor.¹⁵⁵ The Articles cannot be reasonably

¹⁴⁹ See ECCC Agreement Article 19. Electronic copy provided in accompanying USB flash drive at Source # 1.7.1.

¹⁵⁰ *Id.* at Article 20(1).

¹⁵¹ *Id.* at Article 20(1).

¹⁵² *Id.*

¹⁵³ *Id.* at Article 21(2)(a).

¹⁵⁴ *Id.* at Article 21(2)(c).

¹⁵⁵ *Id.* at Article 6(2)-(3).

interpreted to levy a standard of performance without also levying some consequence, or sanction for breach of the standard. Civil lawyers are not given explicit immunity under the ECCC Articles. However they might be construed as ECCC personnel or defense counsel. In either case, read as a complete document, the Articles are not intended to provide such immunity. Additionally, the preamble of the ECCC Agreement clearly states that the Agreement is undertaken “in the pursuit of justice and national reconciliation, stability, peace, and security.”¹⁵⁶ Failure to act on lawyer misconduct, as laid out in the factual background, would detract from this goal. Thus the ECCC is not bound to grant immunity to counsel whose misconduct detracts from its goals and role as a court. Moreover, the ECCC may import the recognized standards of its sister courts. For instance, although the SCSL provides some level of immunity for lawyers,¹⁵⁷ it has still conducted disciplinary proceedings and sanctioned lawyer misconduct.

3. Respond to Alleged Misconduct with a Warning or Proceedings to Examine Interference with the Administration of Justice

The ECCC may respond to misconduct in two ways. After a warning, the ECCC may sanction a lawyer for continued misconduct. Or, where alleged misconduct is an interference with the administration of justice, the Co-Investigating judges may examine the matter under the ECCC’s normal criminal procedure.

The ECCC procedures dictate that “The Co-Investigating Judges or the Chambers may, *after a warning*, impose sanctions against or refuse audience to a lawyer if, in their opinion, his or her conduct is considered offensive or abusive, obstructs the proceedings, amounts to abuse of

¹⁵⁶ *Id. at* Preamble.

¹⁵⁷ SCSL Agreement Article 12. Electronic copy provided in accompanying USB flash drive at Source # 1.5.4.

process or is otherwise contrary to Article 21(3)”.¹⁵⁸ This rule attaches only after the lawyer has received a warning. Thus, where the ECCC could not or did not warn the lawyer, the ECCC should follow the procedure outlined in the following paragraph. Under the ‘after a warning’ procedure, the ECCC may impose sanctions for continuing lawyer misconduct without an investigation or the proceedings found in the balance of this template. The ECCC’s sister courts have little record of such events or how sanctions might be levied. However, such misconduct could include inundating the ECCC or the lawyer’s adversaries with papers to pursue a strategy of distracting or wasting another party’s resources, violating ECCC temporal or quantity filing requirements, as well as lapses in professionalism such as disrespectful demeanor toward the Chambers or other lawyers during a trial. Rule 38(1) ambiguously directs the ECCC to “impose sanctions against or refuse audience” to a lawyer. The ECCC might consider offering a small, iterative sanction and an additional warning for continued misconduct. For example, a lawyer’s As misconduct continues, the ECCC might levy increasingly serious sanctions with increasingly visible warnings— rather than issue the ultimate sanction upon the first instance of continued misconduct. Though, the ECCC’s sister courts offer little guidance for such intermediary sanctions, the ECCC should carefully consider the ICB’s sanction spectrum as discussed above.¹⁵⁹ Additionally, the ECCC might consider such sanctions as temporarily disallowing a sanctioned lawyer from presenting orally before the court or temporarily not accepting submissions under the sanctioned lawyer’s signature, or requiring a public apology in addition to fines and temporary suspension from the court.

¹⁵⁸ ECCC IRs Rule 38(1) (emphasis added). Electronic copy provided in accompanying USB flash drive at Source # 1.7.2.

¹⁵⁹ *See supra* note 158.

When the alleged misconduct can be construed as interference with the administration of justice under ECCC IRs Rule 35 a warning is not required. ECCC IRs Rule 35(2) states “the Co-investigating Judges of the Chambers... may... conduct further investigations to ascertain whether there are sufficient grounds for instigating proceedings” *or* refer the matter to a national authority in Cambodia or abroad.¹⁶⁰ Therefore the Co-Investigating Judges must examine the alleged misconduct according to ECCC IRs Part C- Judicial Investigations. If the Co-investigating Judges find sufficient grounds, the matter should then be transferred to the Trial Chambers of the ECCC and proceedings should be administered in conformance with ECCC IRs Part E- Proceedings Before the Trial Chamber. The ECCC should consider following this procedure where lawyer misconduct could not have been warned when it occurred, is later discovered, or it rises to the level of interfering with the administration of justice.

4. Investigate the Alleged Interference with the Administration of Justice

In instances where the Co-Investigating Judges must investigate the alleged misconduct and determine whether there are sufficient grounds to proceed, the Co-Investigating Judges may determine whether the alleged misconduct may be classified as lawyer misconduct under one of the following misconduct categories.

a. Interference with Justice/Contempt of Court

As indicated in this memo’s factual background and throughout this memo’s legal discussion, contempt, or ‘interference with the administration of justice’ is an expansive concept that includes most types of foreseeable lawyer misconduct. When the ECCC finds that alleged

¹⁶⁰ ECCC IRs Rule 35(2)(b), (c). Electronic copy provided in accompanying USB flash drive at Source # 1.7.2.

misconduct violates an ECCC order, or constitutes interference with the administration of justice under ECCC IRs Rule 35(1) the ECCC should examine the act as contempt.

In the event a lawyer disrupts proceedings, say, by continually speaking out of turn, or otherwise obstructing oral proceedings, the ECCC may examine the matter both as “interference with the administration of justice” and as disrupting the proceedings under ECCC Procedure Rule 37 and Rule 38. Rule 38 prohibits obstructing the proceedings or other abuses of process contrary to ECCC Agreement Article 21(3). The Disruption of Proceedings rules do not explicitly define “disrupting the proceedings” or what “proceedings” includes. The Internal Rules drafters probably intended to limit the conduct covered by Rule 37 to include acts committed in the courtroom. However, a reasonable person could conclude that a lawyer disrupts the proceedings with actions or omission outside of the court, e.g., statements to the media, or interactions with witnesses or evidence. Alternatively, the ECCC may address such lawyer misconduct within the warning/sanctions process discussed above.

In the event that the Chambers finds that a witness has provided false testimony under Solemn Declaration,¹⁶¹ it should also determine whether lawyers before the ECCC induced the false testimony. If so, the inducement can aptly be considered interference with the administration of justice under several of the analogs provided via ECCC IRs Rule 35(g) “incit[ing]” “any of the acts set out above”. The ECCC may also draw from the recognized standard at the ICC of imputing a lawyer’s staff’s misconduct to that lawyer.¹⁶²

b. Breaches of Ethics and Professionalism

¹⁶¹ See ECCC IRs Rule 36.

¹⁶² ECCC Agreement Article 12 . Electronic copy provided in accompanying USB flash drive at Source # 1.7.1.

Ostensibly, a lawyer's breach of ethics and professionalism may be construed as interference with the administration of justice because the ECCC IRs and Agreement require lawyers to comport themselves according to the standards of the legal profession. In addition, the appearance of impropriety that arises from breaches of ethics or lack of professionalism can easily delegitimize and therefore *interfere* with the ECCC's important work of *administering justice*. Therefore, the ECCC should aggressively monitor, address, and investigate alleged lawyer misconduct.

However, there may be circumstances where lawyer misconduct, though it is egregious, does not rise to a Rule 35(1) offense. One example might be interpersonal diatribes between ECCC lawyers and others. In these cases, the ECCC may consider whether the misconduct is contrary to ECCC Agreement Article 21(3) and the recognized standards of professionalism at the sister courts, especially the STL.

5. Conduct Trial

Once the Co-Investigating Judges determine that there are sufficient grounds for proceeding, then the Trial Chamber should begin its duties per Part C of the ECCC IRs. The Trial Chamber must use "beyond a reasonable doubt" as its standard of proof in lawyer misconduct cases. After all, ECCC IRs Rule 87(1), which applies to all matters before the ECCC, states that "In order to convict the accused, the Chamber must be convinced of the guilt of the accused beyond reasonable doubt."

Though its IRs and Agreement do not require it, the ECCC should also be sure to be transparent about the investigation of lawyer misconduct and the result. Records and transcripts should be made public in order to maintain the legitimacy and sacrosanctity of the ECCC in the eyes of the public. However, the ECCC should consider carefully to what extent proceedings are

made publicly accessible. As an illustration of its dangers, the United States often has heavily publicized trials about which the general public then forms an opinion. Then, when justice has been administered contrary to the public's popular opinion, a wave of delegitimizing public outcry inundates the courts.¹⁶³ Therefore, as the ECCC aggressively investigates and addresses lawyer misconduct, it should balance its interest in transparently providing the public with the status of such proceedings with its interest in administering justice unclouded by the media.

6. Determine Sanctions

ECCC IRs Rule 35(4) demands “Cambodian Law shall apply in respect of sanctions imposed on a person found to have committed any act set out in 35(1).”¹ However, Rule 35(4) is not in keeping with the recognized standards of other international criminal courts. Unlike the sister courts, 35(4) might hold foreign and domestic lawyers accountable to domestic laws and it sets out neither a fine nor an imprisonment limit. Therefore, the ECCC may consider focusing on those standards and laws that a reasonable and diligent lawyer before the ECCC would have notice of that also occur in Cambodian law and standards.

In determining sanctions for lawyer misconduct the ECCC should refer to its sister courts' standards. ECCC IRs Rule 35(5) directs the ECCC to Rule 38, Misconduct of a Lawyer, to determine sanctions for lawyer misconduct. However, as noted throughout this memo, ECCC IRs Rule 38 does not in its sum or its parts offer much specificity. Rule 38(1) states the ECCC “may, after a warning impose sanctions against or refuse audience” to a lawyer. Rule 38(4) states a lawyer guilty of misconduct may be “struck off the list of lawyers” eligible to appear before the ECCC. Thus, though it is clear that lawyers may be temporarily and permanently dismissed from the ECCC for misconduct, and the matter may be referred to their home jurisdiction, what other

¹⁶³ Refer to the O.J. Simpson Trial. *For example* Letter to the Editor, Race and Reaction, N.Y. TIMES, Oct 6, 1995. Electronic copy provided in accompanying USB flash drive at Source # 3.5.

consequences the ECCC may impose is unclear. Therefore, it is appropriate for the ECCC to consider recognized international standards of lawyer sanctions from its sister courts.

The ICTY, ICTR, SCSL, STL, and the ICC have all codified maximum fines and maximum imprisonment for contempt or ‘interference with justice’ and they contemplate public reprimands.¹⁶⁴ Although, the ECCC does not have similar caps on fines and imprisonment, the ECCC should consider limiting fines payable by the guilty lawyer to deter future misconduct and punish the misconduct before it in addition to dismissal from practice before the ECCC.

Only the ICTR has imprisoned a lawyer found guilty of misconduct. None of the ECCC’s other sister courts, including the SCSL where a lawyer slapped a court staffer, have imprisoned lawyers for misconduct though each of their rules might permit such an action. ICC Statute Article 71 disallows imprisoning a lawyer for misconduct before the ICC. Thus, the ECCC may adapt its sister courts election not to imprison lawyers guilty of misconduct as an international standard. Of course, the ECCC may consider imprisoning guilty lawyers if the results of a lawyer’s misconduct are sufficiently grave, e.g., death. In any case, the ECCC should rely on international standards recognized by its sister courts which its lawyers, staff and the international community have notice of as a bench marks of the types of sanctions it may levy on lawyers guilty of misconduct.

As discussed above, the ECCC might consider creative sanctions that are short of striking from the lists of eligible attorneys and heavy fines. The ECCC may wish to study the ICB’s Code’s sanction spectrum.¹⁶⁵ There are a variety of reasons for taking iterative measures. Consider, for instance, the already small pool of eligible Cambodian lawyers. If the ECCC too

¹⁶⁴ See Appendix B.

¹⁶⁵ ICB Code at 70. Electronic copy provided in accompanying USB flash drive at Source # 3.1. See also *supra* note 137, 144.

readily strikes too many Cambodian lawyers from the list of eligible attorneys then the ECCC may run into a lawyer shortage problem. Thus, the ECCC may instead consider sanctioning misconduct with temporary partial bar from practicing before the Chambers, e.g. a lawyer may be barred from presenting orally for two weeks.

7. Appeals

Under ECCC IRs Rule 35(6), appeals will be before the Pre-Trial Chamber or the Supreme Chamber as appropriate with filing deadlines for each defined in Rule 35(6), and Rules 105(2) and 105(7) respectively. Appeals from the Trial Chamber go to the Supreme Court Chamber, and should be conducted in conformance with ECCC Rules Part F- Appeals from the Chamber.

IV. Conclusion

In sum the ECCC may rest on its primary authority, found in its Articles of Agreement and Internal Rules, and draw on its secondary authority which permits it to refer to recognized international standards to address and sanction lawyer misconduct. Firstly, based on its rules, sister courts's standards, and its inherent authority the ECCC has the authority to construe a broad range of lawyer misconduct as interference with administration of justice. Secondly, because of the significant risks that lawyer misconduct may pose to the ECCC's stature, the ECCC should freely reference standards of professionalism both in Cambodia and the ECCC's sister courts to fill in the gaps of the ECCC Agreement and IRs. Thus, the ECCC will be able to draw on its primary and secondary authority to identify, address, and sanction a broad range of lawyer misconduct.

Appendix

Appendix A: Sanctions Options at the Sister Courts and the ECCC

Appendix B: Misconduct at the Sister Courts and the ECCC

APPENDIX A								INTERNATIONAL C
SANCTION	ICC	ICTY	ICTR	SCSL	STL	ECCC	BAR	
Warning			Rules of Evidence and Procedure 46	Code of Professional Conduct for Counsel with the Right of Audience before the SCSL 34	Rules of Procedure and Evidence 60	Articles of Agreement 21; Rules of Evidence and Procedure 35, 38		
Admonishment/Reprimand	Code of Professional Conduct for counsel 42			Code of Professional Conduct for Counsel with the Right of Audience before the SCSL 34				
Temporary Refusal of Audience (Suspension)	Code of Professional Conduct for counsel 42; ICC Regulations of the Court 71	Rules of Procedure and Evidence 44, 45, 45	Rules of Evidence and Procedure 45, 46, 77	Code of Professional Conduct for Counsel with the Right of Audience before the SCSL 34	Rules of Procedure and Evidence 60	Rules of Evidence and Procedure 35, 38		
	Code of Professional Conduct for counsel 42; ICC Regulations of the Court 71	Rules of Procedure and Evidence 44, 45, 45	Rules of Evidence and Procedure 45, 46, 77	Code of Professional Conduct for Counsel with the Right of Audience before the SCSL 34	Rules of Procedure and Evidence 60	Rules of Evidence and Procedure 35, 38		
Permanent Refusal of Audience				Code of Professional Conduct for Counsel with the Right of Audience before the SCSL 34				
Maximum Fine	Code of Professional Conduct for counsel 42	Rules of Procedure and Evidence 77	Rules of Evidence and Procedure 46, 77	Code of Professional Conduct for Counsel with the Right of Audience before the SCSL 34				
Forfeit Fee			Rules of Evidence and Procedure 45					
Restitution				Code of Professional Conduct for Counsel with the Right of Audience before the SCSL 34	Rules of Procedure and Evidence 60	Rules of Evidence and Procedure 35, 38		
Referral to Home Jurisdiction		Rules of Procedure and Evidence 46						
Maximum Imprisonment		Code of Professional Conduct 10, 11, 23, 25, 35	Rules of Evidence and Procedure 77	Code of Professional Conduct for Counsel with the Right of Audience before the SCSL 34				
Costs of the Proceedings								
Misc.							Code of Conduct 70	

APPENDIX B							
Offense	ICC	ICTY	ICTR	SCSL	STL	ECCC	INTERNATIONAL C
Incompetence	Rome Statute Article 70; Code of Professional Conduct for counsel 16, 24, 31, 32, 42	Code of Professional Conduct 46	Rules of Evidence and Procedure 77; Code of Professional Conduct for Defense Counsel 8, 14, 20	Code of Professional Conduct for Counsel with the Right of Audience before the SCSL 6, 8, 15, 21, 22.	Rules of Procedure and Evidence 60, 60b/6; Code of Professional Conduct for Counsel Appearing before the Tribunal 5, 9, 10, 44, 45; Rules of Procedure and Evidence 60	Article of Agreement 12, 21; Rules of Evidence and Procedure 35, 38	
Contempt/Interference with Justice	24, 31, 32, 42	77					
Professionalism Standards	Rome Statute Article 70; Code of Professional Conduct for counsel 16, 24, 31, 32, 42	Code of Professional Conduct 10, 11, 23, 25, 35	Prosecutor's Regulation 2; Code of Professional Conduct for Defense Counsel 5;			Articles of Agreement 6, BAKC Code of Ethics 20, 24, 25, 27	Code of Conduct 7, 33,

APPENDIX C. Legal Argument Template Flow Chart

