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What are the Requirements for Appointment of an Expert Under International Criminal Law and What is the Law Regarding the Examination of an In-House Expert?

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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

ISSUES: WHAT ARE THE REQUIREMENTS FOR APPOINTMENT OF AN EXPERT UNDER INTERNATIONAL CRIMINAL LAW

and

WHAT IS THE LAW REGARDING THE EXAMINATION OF AN IN-HOUSE EXPERT?

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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I. INTRODUCTION

A. Scope

This memorandum surveys the requirements for appointment of an expert under international law, as well as the law regarding examination of an in-house expert.[*] While Cambodian courts utilize civil law, this memo examines the requirements of appointment of expert witnesses and requirements of impartiality in both common law countries and civil law countries. Also considered is the approach taken by previous international criminal tribunals (particularly the ICTY and ICTR).

B. Summary of Conclusions

1. The ECCC's Rules of Evidence do not address the qualifications or requirements for expert witnesses.

The Extraordinary Chambers in the Courts of Cambodia Internal Rule 31 governs expert witnesses. While the rule states that the Co-Investigating Judges or Chambers can request testimony from an expert witness, the rule is generally silent on any requirements for an individual to qualify as an expert in the Chambers. However, Internal Rule 87 provides that the Chambers has the ability to reject evidence that may be, among other factors, repetitive or irrelevant. While the Chambers rejected expert testimony in one case, it seemed to act pursuant to Internal Rule 87 rather than Internal Rule 31, removing the evidence because it was deemed unnecessary. Because of the lack of guidance in the Chambers' Internal Rules with regards to requirements for expert witnesses, the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia provides that international law can be examined to determine how the

[*] "What are the requirements for appointment of an expert under international criminal law? What is the law regarding the examination of an in-house expert?" Topic refined pursuant to contact with Prosecution's Office to determine the admissibility of in-house expert testimony, particularly with regards to the use of the Prosecution's Office Staff as expert witnesses.

Court should respond to such omissions by the Internal Rules. The evidentiary rules for the ICTY and ICTR, however, do allow for challenges to expert testimony by parties involved in the case, providing one set of rules in international law that can be looked to in determining how the court should rule in Cambodia.

2. Globally, international law has found that judges can find evidence inadmissible if the expert or the expert's techniques do not satisfy the judge.

While rules greatly vary from country to country over the admissibility of expert witness testimony, all countries allow for judges to exclude the testimony if it does not satisfy some standard established by the court.

As a common law country, the United States provides the *Daubert* standard as the seminal test in determining the admissibility of expert witness testimony. The *Daubert* standard, which applies to all expert testimony, asks the court to examine factors such as whether the methods employed could be tested, whether the research was peer reviewed, a consideration of the known or potential rate of error, the existence of and maintenance of standards controlling the technique's operation, and whether there is general acceptance in the scientific community. In Britain, another common law country, a more liberal approach is employed, requiring only that expert testimony be given by "competent" individuals, although the British have required the courts to examine the expert's credentials.

When looking to common law countries (of which Cambodia is a member), France has lists that can be utilized in selecting experts, and also recognizes particular rules governing the admissibility of expert testimony (such as the inadmissibility of expert testimony made by a minor or incompetent individual). The French courts will not allow minors or legally incompetent individuals to testify as witnesses, and some professions require national standards be met in order to testify before the courts. Korea generally requires that experts demonstrate

experience requisite to testifying about their expertise, and the typical expert witness possesses scholarship or licensure in the field in which he is testifying. Italian law requires that experts be impartial and be appointed by the court, while Japanese law allows the appointment of experts from provided lists and based upon recommendations from various professional organizations.

The ICTR and ICTY have held that four factors govern the admissibility of expert testimony: 1) Whether the subject matter is in itself proper for expert testimony, or if it is a matter that is already within the "knowledge and experience of the court;" 2) whether the evidence is relevant in assisting the Trial Chambers in determining the matter at hand; 3) if the expert has the "necessary qualifications and methods;" and 4) whether the expert is independent.

3. While many nations have required impartiality from their expert witnesses, the international criminal tribunals have not held that in-house experts for the prosecution were biased based solely upon their relationship with the prosecution.

The ICTR and ICTY have established that expert witnesses, upon taking an oath before the court, must act as "servants of the court," which requires an impartial and unbiased testimony. One court has held that a witness, who was scheduled to be brought before the same court for a matter related to the one on which he was to testify, could not qualify as a witness because of the inevitable conflict and potential to infringe upon the witness' rights. The Court has also precluded testimony from an individual who worked at the Office of the Prosecutor and assisted the prosecution in interview techniques. The court rejected this testimony on the grounds that the witness was inextricably linked to the prosecution, however, it still allowed factual testimony from that witness. The court has held on other occasions staff members of the prosecution to be viable expert witnesses, likely because they were not as involved in the work of the prosecution as that of the witness who assisted the prosecution in strategy.

The United States and England both state that the trier of fact should determine what

weight to give testimony that is potentially biased. However, both countries have allowed the court to intervene in instances where an overt bias prejudiced one side of the case, establishing what seems to be a very high threshold for judges to intervene in instances of obvious bias by an expert. German and Korean law, however, allow much more leniency in allowing the recusal of expert witnesses who are not impartial. These courts, which require the experts to act as agents of the court and of the judges, implement a model most similar to that of the ECCC which also provides for the Court's appointment of expert witnesses. As such, the German and Korean treatment of biased witnesses proves the most valuable for this analysis.

II. ECCC'S RULES OF EVIDENCE DO NOT ADDRESS THE QUALIFICATIONS OR REQUIREMENTS FOR EXPERT WITNESSES

The Extraordinary Chambers in the Courts of Cambodia (the Chambers, ECCC) are governed in part by the Court's Internal Rules.[1] The Internal Rules, however, are not comprehensive in addressing every question that may arise as to a matter of law. Because of this, the establishing documents of the ECCC provide that "If these existing procedure [*sic*] 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 standard, guidance may be sought in procedural rules established at the international level."[2]

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[1] *See* Extraordinary Chambers in the Courts of Cambodia Internal Rules, (revised Sept. 11, 2009), *available at* http://www.eccc.gov.kh/english/cabinet/fileUpload/121/IRv4-EN.pdf. [Reproduced in accompanying notebook at Tab 1].

[2] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, (revised Oct. 27, 2009), Article 33, *available at* http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf. [Reproduced in accompanying notebook at Tab 4]. *See also* Extraordinary Chambers in the Courts of Cambodia Internal Rules, *supra* note 1, at Rule 2 (stating that Article 33 is one of the articles that can govern in the event that an issue arises that is not codified within the Internal Rules).

A. Extraordinary Chambers in the Courts of Cambodia Internal Rule 31

ECCC Rule 31 addresses the role of experts within the tribunal.[3] An "expert" has been defined as "[a] person who, through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact finder."[4] Rule 31 provides that the Chambers or Co-Investigating Judges can appoint an expert to complete a specific task, as well as details the process by which the experts conduct such assignments.[5] However, Rule 31 is silent as to the requirements that must be met in order for a witness to qualify as an expert, stating only that "The Co-Prosecutors, the Charged Person or Accused, the Civil Party, or their lawyers may request the Co-Investigating Judges or the Chambers to appoint additional experts to conduct new examinations or to re-examine a matter already the subject of an expert report."[6]

B. ECCC Internal Rule 87

While the Chambers' Internal Rules are silent towards specific requirements of experts, Rule 87 provides some limiting rules with regards to admissible evidence. The Rule provides that the Chamber "may reject a request for evidence where it finds that it is: irrelevant or

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[3] *Id*. at 28-29.

[4] BLACK'S LAW DICTIONARY 619 (8th ed. 2004). [Reproduced in accompanying notebook at Tab 42]. *See also* Memorandum from Kimberly M. Miles to the Office of The Prosecutor for the Int'l Criminal Tribunal for Rwanda at 3-4 (2001) *available at* http://www.law.case.edu/War-Crimes-Research-Portal/memoranda/Kmiles.pdf (defining different forms of expert witnesses). [Reproduced in accompanying notebook at Tab 43].

[5] Extraordinary Chambers in the Courts of Cambodia Internal Rules, *supra* note 1, at 28-29. [Reproduced in accompanying notebook at Tab 1].

[6] *Id*. at 29.

repetitious, impossible to obtain within a reasonable time, unsuitable to prove the facts it purports to prove, not allowed under law, or intended to prolong proceedings or is frivolous."[7] This rule, while not expressly referring to expert witnesses, would seem to apply to expert testimony, as it would still deal with the admissibility of evidence before the Chambers, although in the form of testimony by an expert.

C. Application of Internal Rules in Pre-Trial Chambers Decision

Despite the Internal Rules' ambiguity towards the requirements of expert witnesses, the Pre-Trial Chamber has rejected the testimony of an expert regarding the health of a detainee.[8] The Chambers stated that, because the expert did not personally examine the health of the detainee in question, the only information that could be provided by the expert would be the general effect of prolonged detention on the human body.[9] The Chambers pointed out that the matter involved that of a "specific person and has to be treated as such," requiring any testimony related to such effects to be from experts who had personally examined the detainee.[10] While the testimony was excluded, the Chambers seemed to act pursuant to Internal Rules Rule 87 in declaring the testimony as irrelevant and repetitive, rather than involving Rule 31's expert witness provisions, as Rule 87 prohibits evidence that is irrelevant or repetitious.

D. International Criminal Tribunals for Rwanda and Former Yugoslavia Rules Governing Expert Witnesses

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[7] Extraordinary Chambers in the Courts of Cambodia Internal Rules, *supra* note 1, at 61. [Reproduced in accompanying notebook at Tab 1].

[8] *Prosecutor v. Sary*, Decision on Ieng Sary's Expedited Request for Dr. Paulus Falke to Give Expert Evidence During the Oral Hearing on Provential Detention on 2 April 2009, *available at* http://www.eccc.gov.kh/english/cabinet/courtDoc/278/C22_5_34_EN.pdf. [Reproduced in accompanying notebook at Tab 20].

[9] *Id*. at 4.

[10] *Id*.

Rule 31 differs from those of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia, which allow for the opposing party to challenge "the qualifications of the witness as an expert or the relevance of all or parts of the statement and/or report ...."[11] This is a marked difference, as the ECCC allows for additional examination of the facts where the ICTR/ICTY provide for opposing parties to directly challenge the qualifications of experts. Without this language, the only way within the Internal Rules of the ECCC to prevent an expert witness from testifying is under the Rule 87 prohibitions, as there is no mechanism within Rule 31 for parties to challenge an expert appointed by the Chambers.

III. SURVEY OF INTERNATIONAL LAW REGARDING THE ADMISSIBILITY OF EXPERT TESTIMONY

While the ECCC operates within the Cambodian court system, utilizing civil law mechanisms, its statute allows examination of "international law" in settling issues not addressed within the Internal Rules.[12] Given this ambiguous allowance, an examination of both common law nations and civil law nations is warranted to determine what, if any, standards have emerged under customary international law governing expert testimony. Additionally, precedent set by other international criminal tribunals, while governed by different rules and charters, can still prove instructive on international standards involving the admissibility of expert witness testimony.

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[11] International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia: Rules of Procedure and Evidence, (amended July 24, 2009) at 97, *available at* http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_Rev43_en.pdf. [Reproduced in accompanying notebook at Tab 3].

[12] *See* Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, *supra* note 2 at Rule 33. [Reproduced in accompanying notebook at Tab 4].

A. Admissibility of Expert Witness Testimony in Common Law Nations

This memo examines the admissibility of expert witnesses in two common law nations: the United States and England.[13]

1. United States Law Regarding the Admissibility of Expert Testimony[14]

The United States' law governing expert testimony is articulated by the United States Supreme Court's 1993 decision, *Daubert v. Merrell Dow Pharmaceuticals, Inc*.[15] The Supreme Court in *Daubert* overturned the predominant test of the time: the *Frye* "general acceptance" test, which required expert testimony to be excluded unless the techniques utilized by the expert were "generally accepted" as reliable by other experts in that area.[16] Citing the Federal Rules of Evidence, which had been enacted by Congress in the years since *Frye*, the Court outlined a new standard.[17] Under the *Daubert* standard, the Court should consider several factors in determining

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[13] *See* BLACK'S LAW DICTIONARY 293 (8th ed. 2004) (describing "common law" as "The body of law derived from judicial decisions, rather than from statutes or constitutions." [Reproduced in accompanying notebook at Tab 41].

[14] This portion of the paper is structured similar to Kimberly M. Miles, *supra* note 4, at 14-18, altered where appropriate to serve the purpose of analyzing the ECCC and its rules under the context of the United States' rules of admissibility of expert testimony. The insight provided by the previous memo is greatly appreciated in light of the helpful research provided by the previous memo's author. [Reproduced in accompanying notebook at Tab 43].

[15] *Daubert v. Merrell Dow Pharmaceuticals, Inc*. 509 U.S. 579 (1993). [Reproduced in accompanying notebook at Tab 6].

[16] *Frye v. United States*, 293 F. 1013, 1014 (1923). [Reproduced in accompanying notebook at Tab 7].

[17] The Court found that Federal Rule of Evidence 702 spoke directly to the issue of expert testimony, providing that "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." The Court found that this new standard did not include the "general acceptance" rule propagated by the *Frye* decision, thus rendering *Frye* superseded by the Federal

whether to admit expert testimony, including: Whether the methods employed could be tested, whether the research was peer reviewed, a consideration of the known or potential rate of error, the existence of and maintenance of standards controlling the technique's operation, and whether there is general acceptance in the scientific community (utilizing the *Frye* "general acceptance" test as one of the factors to be examined, but not conclusive in itself).[18] Under this method, the judge acts as a "gatekeeper" who is charged with allowing in scientific evidence, so long as it is relevant as well as reliable.[19]

Daubert was further expanded by the Court's decision in *Kumho Tire Co., Ltd. v. Carmichael*.[20] While *Daubert* applied its new standard to "scientific" testimony, the Court extended *Daubert* to apply to all expert testimony, as the Court recognized that Fed. R. Evidence 702 does not distinguish between "scientific" knowledge and "other specialized" knowledge.[21] The Court further elaborated on the *Daubert* factors, explaining that the listed factors were intended to be "helpful, not definitive."[22] The factors discussed in *Daubert* should be examined

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Rules of Evidence.

[18] *Daubert*, 509 U.S. at 593-95. [Reproduced in accompanying notebook at Tab 6]. The Court also stated that Fed. R. Evidence 104(a) required the testimony to include "scientific knowledge that [can] assist the trier of fact to understand or determine a fact in issue," essentially reinforcing a relevancy standard for such testimony.

[19] Gia E. Barboza & Lynn M. Goedecke, *Can Federal Oversight of Forensic Science Reduce the Incidence of Wrongful Convcitions?*, 45 No. 5 CRIM. LAW BULL. Art. 7. [Reproduced in accompanying notebook at Tab 33].

[20] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). [Reproduced in accompanying notebook at Tab 10].

[21] *Id*. at 147-49.

[22] *Id*. at 151.

when "they are reasonable measures of the reliability of expert testimony."[23] The Court in *Kumho* made certain to stress this point, as the *Daubert* standard was intended to ensure that the proffered expert testimony was relevant and reliable.[24]

The *Daubert* standard is very similar to the ECCC's Internal Rule 87, which as discussed before[25] allows the exclusion of evidence that is "irrelevant or repetitious." However, Rule 87 does *not* make any mention of a "reliable" standard for evidence. However, such a reliable standard may be important in cases involving alleged bias, or a lack of impartiality on the part of an expert witness. This issue is addressed in detail in section IV of the memo, detailing the standards of international law with regard to impartiality and potential bias of expert witnesses.

While *Daubert* is similar to Internal Rule 87 with regard to exclusion of irrelevant expert testimony, there is a striking difference in the contexts in which these experts make their testimony. In the United States, while judges are able to appoint their own expert witnesses, such occurrences have been considered "rare," despite difficulties in quantifying such appointments.[26] Traditionally, such appointments are made by the litigants in U.S. cases, whereas the expert witnesses in the ECCC are appointed by the judges, who request of the

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[23] *Id*. The goal, according to the Court, is "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."

[24] *See* Paul Giannelli & Edward Imwinkelried, *Scientific Evidence: The Fallout from Supreme Court's Decision in Kumho Tires,* 14 CRIM. JUST. 12 (2000) (expressing how the judges may approach these evaluations with different forms of testimony). [Reproduced in accompanying notebook at Tab 37].

[25] *Supra*, note 7 and accompanying text.

[26] Ellen E. Deason, *Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference,* 77 OR. L. REV. 59, 78 (1998). [Reproduced in accompanying notebook at Tab 30].

experts certain information.[27] This contextual difference greatly changes the policy reasons behind the rules, as the ECCC judges are in a position to better control what witness testimony comes before the court by appointing it from the outset. It is therefore unlikely that "irrelevant" testimony would be brought before the judges, as well as lessening the likelihood that unreliable testimony would make its way before the Chambers.

Pursuant to Fed. R. Evidence 702, a U.S. Court can allow the admission of a witness as an expert based upon experience, rather than upon formal training.[28] When considering the admission of an expert based on such experience, the Court should consider the number of experiences the expert has, the similarity of those experiences, and the resemblance of the witness' experiences to those in the instant case.[29] These factors again seem to be stressing the need for "reliability" on the part of the expert testimony.

2. English Common Law Regarding the Admissibility of Expert Testimony

With English common law, opinion evidence is inadmissible unless it meets one of three exceptions, including an "expert-opinion evidence exception."[30] This exception allows the admission of evidence of "proved matters of specialized knowledge, on which the court would

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[27] *See* Extraordinary Chambers in the Courts of Cambodia Internal Rules, *supra* note 1, at 28. [Reproduced in accompanying notebook at Tab 1].

[28] *See* Gregory R. Henrikson, *Dimond, Not Daubert: Reviving the Discretionary Standard of Expert Admission in Alaska*, 25 ALASKA L. REV. 213, 216 (2008) (discussing the history of *Daubert* and change necessitated by Fed. R. Evidence 702). [Reproduced in accompanying notebook at Tab 34].

[29] Kimberly M. Miles, *supra* note 4, at 18. [Reproduced in accompanying notebook at Tab 43].

[30] M. Neil Browne et al., *The Perspective Nature of Expert Testimony in the United States, England, Korea, and France*, 18 CONN. J. INT'L L. 55, 76-77 (2002). [Reproduced in accompanying notebook at Tab 35].

be unable properly to reach a conclusion unaided."[31] The experts are limited in that they can testify only as to the facts they actually perceived.[32] These experts can work as assessors, court-appointed experts, or adversarial experts, only requiring that the Court deem the experts as "competent."[33] While this standard is noticeably vague and seemingly liberal in application (as "competency" is hard to define, and does not seem to set forth a high threshold for admittance), the Court has been urged to investigate the expert witness' "true credentials" before admitting their testimony, as well as urged not to accept testimony "unquestioningly."[34] This requirement, much like *Daubert*, seems to be focused on ensuring the reliability of expert testimony brought before the English courts (albeit a less strenuous test in ensuring such reliability than that imposed by *Daubert* and its progeny).

Under English common law, the tribunal of law determines the admissibility of expert witness testimony, while the weight granted to admitted evidence is evaluated by the tribunal of fact.[35] The English courts are able to limit the expert testimony in some ways, such as disallowing experts' testimony when it deals with "common sense" or information within the knowledge ordinary people.[36] While limiting the testimony of these witnesses, English common

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[31] *Id*. at 77.

[32] Kimberly M. Miles, *supra* note 4, at 6. [Reproduced in accompanying notebook at Tab 43].

[33] M. Neil Browne, *supra* note 30, at 77. [Reproduced in accompanying notebook at Tab 35].

[34] *Id*.

[35] *Id*.

[36] *R. v. Turner*, [1975] Q.B. 834, 841 (Eng.). [Reproduced in accompanying notebook at Tab 23].

law still provides a "much lower threshold for the admission of novel scientific evidence" than the United States law.[37]

B. Admissibility of Expert Witness Testimony in Civil Law Nations

Cambodian law has adopted a civil law tradition.[38] Therefore, it is instructive to view the admissibility of expert witnesses in other civil law nations, particularly in light of many civil law nations' propensity to allow the judges (as is the case in Cambodia) rather than the adverse parties to appoint expert witnesses.

1. French Law Regarding the Admissibility of Expert Testimony

Today, French law allows the appointment of an expert witness in three ways: 1) Any party may request that the court appoint an expert to establish or preserve certain facts; 2) the court may appoint an expert on its own volition; or 3) the judge may be required to appoint an expert under statute.[39] When an occasion arises where a party wishes to appoint an expert, both sides submit motions and present an oral argument before the judge, who makes the ultimate decision.[40]

In France, lists are maintained of both regional experts and national experts, with experts maintaining a position on a regional list for three years prior to becoming eligible for a place on

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[37] M. Neil Browne, *supra* note 30, at 80 n.129. [Reproduced in accompanying notebook at Tab 35].

[38] Alan S. Gutterman & Robert L. Brown, *Going Global: A Guide to Building an International Business*, 1 GOING GLOBAL § 2:3 (2009). [Reproduced in accompanying notebook at Tab 28].

[39] M. Neil Browne, *supra* note 30, at 96 n. 271 (citing different instances under the Civil Code in which the appointment of an expert is required). [Reproduced in accompanying notebook at Tab 35].

[40] *Id*. at 96.

the national list.[41] While the judges do not have to select experts from these lists, they are precluded from selecting minors and individuals who are considered legally incompetent.[42] Additionally, some professions require witnesses in that field to meet national standards in order to qualify.[43] These requirements, like those provided by the *Daubert* test and other requirements found globally, test the reliability of the evidence. After the judge has selected an expert and assigned a specific task for the expert, the parties can request a hearing to comment on the expert's task.[44]

There are three different types of expert testimony in France, the first being *constatations* in which the witness provides answers to specific technical questions and is prohibited from giving an opinion about the consequences of the finding.[45] Another type of expert testimony is the consultation, which is an opinion normally given orally that is more than simple fact-finding, but not qualified as expertise under French law.[46] The final variation of expert testimony is expertise, which requires experts "to research and present an opinion on a particular issue."[47]

2. Korean Law Regarding the Admissibility of Expert Testimony

In Korea, the law requires a judge to appoint an expert, stipulating that the appointed

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[41] *Id*.

[42] *Id*.

[43] *Id*. at 97.

[44] *Id*. at 98.

[45] *Id*. at 97.

[46] *Id*. at 98.

[47] *Id*. *See also id.* at 98 n. 291-93 (describing the three different types of expertise: expertise amiable, expertise officieuse, and expertise judiciare).

individual have the "erudition and/or experience necessary for giving expert testimony."[48] The typical expert witness possesses "advanced scholarship in a particular field or discipline," or works in an occupation that requires certification or licensure.[49] Individuals qualified to serve as expert witnesses have been described "as either 'men of letters' or specialized professionals who can serve as court assistants."[50] Korean law is very flexible as to the manner in which experts are appointed, allowing either party to petition the court seeking the appointment of an expert.[51] Additionally, the Court may ask the parties to select an expert from a list or unilaterally select an individual to serve as an expert, should it decide that expertise is required.[52] Pursuant to Korean law, individuals who are qualified to give expert testimony before the court are required to do so.[53]

Much like experts appointed pursuant to the ECCC's Internal Rules, the Korean experts are assigned a task by the court.[54] Such an assignment can include the expert clarifying certain facts involved in the case, or giving an opinion on an ultimate issue in the case.[55] The expert prepares a report for the court, which is then distributed to the parties (again very similar to the

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[48] *Id*. at 92-93.

[49] *Id*. at 93.

[50] Eric Ilhyung Lee, *Expert Evidence in the Republic of Korea and Under U.S. Federal Rules of Evidence: A Comparative Study*, 19 LOY. L.A. INT'L & COMP. L.J. 585, 605-06 (1997). [Reproduced in accompanying notebook at Tab 32].

[51] M. Neil Browne, *supra* note 30, at 93. [Reproduced in accompanying notebook at Tab 35].

[52] *Id*.

[53] Eric Ilhyung Lee, *supra* note 50, at 606. [Reproduced in accompanying notebook at Tab 32].

[54] M. Neil Browne, *supra* note 30, at 93. [Reproduced in accompanying notebook at Tab 35].

[55] *Id*. at 93-94.

report requirement found in the ECCC's Internal Rule 32).[56] The report includes information about the expert (such as qualifications to act as an expert), a summary of the task appointed, lists of materials reviewed by the expert, and the expert's analysis and conclusions based on the information provided.[57]

3. Italian Law Regarding the Admissibility of Expert Testimony

When needed, a judge in Italy has the ability, as in the ECCC and Korea, to appoint an expert who "must be impartial, and, subject to the rules of abstention and disqualification, which are decided by the judge."[58] The judge is not bound to the expert's findings, but must give reasons for not following them should the judge choose not to.[59] While the parties in Italy are unable to appoint experts, each side has the right to appoint technical consultants, who also act as experts in non-judicial fields.[60]

4. Japanese Law Regarding the Admissibility of Expert Testimony

In Japan, the primary purpose of the expert witness is to serve the court, although parties can hire their own experts.[61] However, experts are typically identified as being predisposed to one side if hired by a party.[62] In the past, Japanese courts took an approach similar to other civil

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[56] *Id*. at 94.

[57] *Id*.

[58] *Id*. at 83 n. 144.

[59] *Id*.

[60] *Id*.

[61] Eric A. Feldman, *Law, Society, and Medical Malpractice Litigation in Japan*, 8 WASH. U. GLOBAL STUD. L. REV. 257, 270 (2009). [Reproduced in accompanying notebook at Tab 31].

[62] *Id*.

law countries, allowing the judge to select an expert from a list provided by one of the parties (although these lists were able to be challenged by the opposing party), or taking recommendations for professional and academic organizations.[63] However, Japan has introduced a new form of expert different from those traditionally found in court systems. These experts are actually a group of "expert commissioners" who can be called directly by the court to support judges in "identifying and analyzing disputed issues, facilitating settlement, rendering opinions on technical issues, and evaluating evidence, among other functions."[64]

The Japanese system in general is much more similar to that of the United States than it is to those of the ECCC or Korea, as it provides a more adversarial approach to appointing witnesses. However, the group of "expert commissioners" resembles those systems found in France, Italy, and Korea in allowing judges to select the experts, as well as seeing these experts as serving the court rather than the litigants.

C. Challenges to Expert Testimony Under International Criminal Law

The ICTY has generally held that any evidence demonstrating relevance and probative value should be deemed admissible, so long as there is no reason to question the evidence's reliability.[65] International tribunals have held that initial challenges to expert testimony can open if there is a question as to one of several different factors. One question is whether the subject matter is in itself proper for expert testimony, or if it is a matter that is already within the

[63] *Id.*

[64] *Id.*

[65] Sean D. Murphy, *Developments in International Criminal Law: Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT'L. L. 57, 80 (1999). [Reproduced in accompanying notebook at Tab 39].

"knowledge and experience of the court."[66] If the question is already within the purview of the court's knowledge and experience, then the evidence is inadmissible.[67]

Another question the court must ask is whether the evidence is relevant in assisting the Trial Chambers in determining the matter at hand. The ICTY has held that it will not admit expert "testimony it considers to be cumulative and/or irrelevant ...."[68]

The Court must also determine if the expert had the "necessary qualifications and methods," as witnesses lacking these qualifications cannot be considered "experts."[69] In *The Prosecutor v. Bizimungu et al.*, the Trial Chamber found that the Prosecution's witness was not qualified to testify as an expert on Rwandan constitutional law.[70] The Court found that the witness could not demonstrate any specialized education involving constitutional law, nor could the witness show any consultancies dealing with the narrow constitutional issue involved in the case.[71] Additionally, the witness had been called upon to determine the constitutionality of certain laws and decrees only approximately five times over a twenty year period, leaving the Trial Chamber dissatisfied with the witness' qualifications.[72] This provides a more rigorous standard than is found in England, which simply required that expert witnesses be "competent,"

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[66] RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE 199 (2002). [Reproduced in accompanying notebook at Tab 26].

[67] *Id*.

[68] *Prosecutor v. Slobodan Milosevic*, IT-02-54-T, Omnibus Order on Matters Related to the Defence List of Proposed Expert Witnesses and Prosecution Motion on the Management of the Defence Case and Addendum Thereto. [Reproduced in accompanying notebook at Tab 22].

[69] RICHARD MAY, *supra* note 66 at 199. [Reproduced in accompanying notebook at Tab 26].

[70] *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Oral Decision on Qualification of Prosecution Expert Jean Rubaduka. [Reproduced in accompanying notebook at Tab 13].

[71] *Id*.

[72] *Id*.

but it is difficult to determine if the standard is as rigorous as the *Daubert* standard, since the Court has not definitively outlined in detail what is required to meet the "qualifications" requirement.

Despite the *Bizimungu* decision, some courts have elected to admit evidence that might come from unqualified experts, and then allow issues pertaining to the witness' qualifications to weigh against the relevancy of the testimony.[73]

The ICTR has also precluded expert testimony when it is introduced outside of the time limitations outlined in the Rules of Procedure and Evidence when there is a lack of "need."[74] In one such case, the court stated that by attempting to introduce the expert past the time limitations, the Prosecutor must "demonstrate such need" and "relate the expert evidence to specific evidence in the indictment," effectively placing the burden on the introducing party to show such requirements are met.[75]

Finally, the last question the ICTR and ICTY must examine is whether the expert is independent.[76] This issue will be discussed in Section IV.

IV. ADMISSIBILITY OF IN-HOUSE EXPERT TESTIMONY AND BIASED EXPERT TESTIMONY AT INTERNATIONAL LAW

A. Bias and Impartiality in International Criminal Tribunals

The ICTR and ICTY Trial Chambers are not bound to accept the evidence of any expert,

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[73] RICHARD MAY, *supra* note 66 at 199. [Reproduced in accompanying notebook at Tab 26].

[74] Kimberly M. Miles, *supra* note 4, at 25. [Reproduced in accompanying notebook at Tab 43].

[75] *The Prosecutor v. Alfred Musema*, ICTR-96-13-T, Decision on the Prosecutor's Request for Leave to Call Six New Witnesses, *available at* http://trim.unictr.org/webdrawer/rec/10273/view/MUSEMA%20-%20Decision%20on%20the%20prosecutors%20request%20for%20leave%20to%20call%20six%20new%20witnesses.PDF. [Reproduced in accompanying notebook at Tab 12].

[76] RICHARD MAY, *supra* note 66 at 199. [Reproduced in accompanying notebook at Tab 26].

as the Chambers may make its own decision whether to accept or reject various expert evidence presented before it.[77] Additionally, the ICTY has stated that "from the moment they make the solemn declaration at the latest, the witnesses must no longer be considered witnesses of either of the parties to the trial but only as witnesses of justice."[78] Because of this, experts have been described as "servants of the court" each of whom, following the solemn declaration, becomes "a witness of truth before the Tribunal and, inasmuch as he or she is required to contribute to the establishment of truth, not strictly a witness for either party."[79] The experts are asked to "provide impartial and neutral evidence to enhance the tribunal's understanding of events."[80] The Court has stated that, "[j]ust as for any other evidence presented, it is for the Trial Chamber to assess the reliability and probative value of the expert report and testimony."[81]

1. Impartiality of Witnesses Who Are Charged With Related Crimes

The ICTR examined the impartiality requirement in *The Prosecutor v. Jean-Paul*

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[77] *Id*. at 203.

[78] *Prosecutor v. Jeslisic*, IT-95-10-T, Decision on Communication Between Parties and Witnesses, *available at* http://www.icty.org/x/cases/jelisic/tdec/en/81211WG113147.htm. [Reproduced in accompanying notebook at Tab 17]. *See also* ICTY, Decision on Communication Between Parties and Witnesses Judicial Supplement, http://www.icty.org/x/file/Legal%20Library/jud_supplement/supp1-e/jelisic.htm (last visited Oct. 31, 2009) (holding that "allowing the parties to communicate with witnesses regarding the content of their testimony after the start of the testimony in Court might render questionable the integrity of the testimony or the credibility of the witness," and requiring opposing parties and the Victims and Witnesses Unit be informed of any such communication with a witness). [Reproduced in accompanying notebook at Tab 9].

[79] Melanie Klinkner, *Proving Genocide? Forensic Expertise and the ICTY*, 6 J. INT'L CRIM. JUST. 447, 458 (2008). [Reproduced in accompanying notebook at Tab 36].

[80] *Id*.

[81] *Prosecutor v. Popovic et al.*, IT-05-88-AR73.2, Decision on Joint Defense Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness at ¶ 20 n. 79. [Reproduced in accompanying notebook at Tab 19].

Akayesu, where the Chambers held that a witness must be "impartial" in order to qualify as an expert witness.[82] The Court held that, because the witness was being charged before the tribunal for "crimes related to those [with] which Akayesu is charged," the impartiality of the witness could not be assured and thus the Chamber precluded the testimony.[83] The Chamber also pointed out the potential prejudice caused to the witness in compelling testimony before the very Chamber where he was later to stand trial, creating a possibility that the witness' fundamental rights would be violated.[84] While the court precluded testimony in this case, this seems to be an extreme form of "bias," as the "expert" was to come before the tribunal at a later time for related crimes. Such bias not only favors one side, but creates a potential conflict of interest through the witness hoping to protect his own interests.

2. Impartiality of Staff Member of the Office of the Prosecutor

The Court has also explicitly held that a certain staff member of the Office of the Prosecutor was unable to qualify as an expert before the Chambers. In *Prosecutor v. Milutinovic et al.*, the Court stated that Philip Coo, witness for the Prosecution, was unable to qualify as a witness given his extensive work with the Office of the Prosecutor.[85] Mr. Coo had worked with the Office of the Prosecutor since the beginning of the investigations being tried, providing the

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[82] *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Judgment of 2 Sept., 1998 at ¶ 26. [Reproduced in accompanying notebook at Tab 16]. *See also* RICHARD MAY, *supra* note 66 at 199 (Defense sought to call another accused before the ICTR as an historical expert, intending to counter evidence of a previous historical evidence called by the Prosecution).

[83] *Jean-Paul Akayesu,* ICTR-96-4-T at ¶ 26. [Reproduced in accompanying notebook at Tab 16].

[84] *Id*.

[85] *Prosecutor v. Milutinovic et al.*, IT-05-87-T, Decision on Prosecution Request for Certification of Interlocutory Appeal of Decision on Admission of Witness Philip Coo's Expert Report, *available at* http://www.icty.org/x/cases/milutinovic/tdec/en/060830.pdf. [Reproduced in accompanying notebook at Tab 18].

Office of the Prosecutor with advice on how to best form the case against the accused while also advising them on the best methods for conducting interviews with the accused and military personnel.[86] Additionally, Mr. Coo's "expert" report to the court included not just factual information garnered from his investigation, but also opinions regarding Mr. Coo's impressions on how the facts related to the criminal culpability of the accused. [87] The Chambers found that Mr. Coo could serve as a fact witness and present any results from the investigations he conducted, but that his opinions should not be admitted.[88] Because the limitation on testimony allowed by Mr. Coo would not "significantly affect the fair and expeditious conduct of the proceeding or the outcome of the trial," there were no grounds for appealing the decision.[89] As in *Akayesu*, this expert witness had many connections with one of the parties involved in the case. The witness not only worked with the Office of the Prosecutor, but also helped develop the prosecution's strategy with reference to interviewing the accused and military personnel. This inextricable connection between the witness and the prosecution led the court to prevent any testimony dealing with the witness' opinion from being admitted into court. But even with these close ties the witness was allowed to testify with regard to facts the witness had personally investigated.

In a different ICTY proceeding, the Judge stated to the expert witness that "you are under oath now, and -- but you are a staff member of the OTP. Obviously you can continue working at

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[86] *Id*. at ¶ 10. *See also* Sam Muller, *Immunities of ICTY Staff Members, Assets and Archives before the ICTY*, *in* ESSAYS ON ICTY PROCEDURE AND EVIDENCE, 439 (Richard May et al., eds., 2001) (providing information on the immunity of ICTY staff members that can also prohibit their testimony in some instances). [Reproduced in accompanying notebook at Tab 27].

[87] *Milutinovic et al*., at ¶ 10. [Reproduced in accompanying notebook at Tab 18].

[88] *Id*. at ¶ 11.

[89] *Id*. at ¶ 13.

the OTP, but you are absolutely not allowed to speak to anyone about your current testimony. ... So you're not to mention your testimony to anyone."[90] At the hearing, the Prosecutor informed the Judge that the expert witness would not be returning to work while the testimony was ongoing, and that the Prosecutor had prohibited the witness' contact with any other members of the Office of the Prosecution, which the Judge stated to be a "better" solution.[91] The judge in this case was most concerned with preventing any impropriety through one side's influencing the testimony of the expert; but the judge did not believe that the witness' working relationship with the Office of the Prosecutor created an insurmountable bias or conflict that would preclude the testimony.

In still another ICTY case, a defendant contested the admission of expert testimony partially on the grounds that the witness "might not objective, as he worked for the Prosecution as an 'in-house expert.'"[92] The Trial Chamber rejected this argument, stating that the fact an expert witness works for the Office of the Prosecutor does not mean that the witness must lack objectivity.[93] The Trial Chamber elected to take into account the expert witness' work with the Prosecution in determining what weight to grant the testimony, rather than ruling the testimony inadmissible as a result of the relationship.[94]

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[90] *Prosecutor v. Seselj*, IT-03-67, Transcript, at 3721. [Reproduced in accompanying notebook at Tab 21].

[91] *Id*.

[92] *Prosecutor v. Blagojevic & Jokic*, IT-02-60-T, Decision on Prosecution's Motions for Admission of Expert Statements, at ¶ 36, *available at* http://www.icty.org/x/cases/blagojevic/tdec/en/031107.htm#68. [Reproduced in accompanying notebook at Tab 14].

[93] *Id*. at ¶ 37.

[94] *Id*.

The ICTY generally has allowed testimony of staff members of the Office of the Prosecution. With the exception of the *Milutinovic* case, the Chambers have allowed such staff to be admitted as expert witnesses. In *Milutinovic*, as in *Akayesu*, the link to one party was so inextricable as to render the testimony inherently biased and partial. Yet in *Milutinovic*, while the Court would not allow the witness to be admitted as an expert, it did allow the witness to testify as a fact witness with regard to the investigation the witness personally conducted. The key to the determination of admissibility of staff members of each party as expert witnesses before the international tribunals seems to be how involved the staff member was with developing the actual case. If a staff member did not work on the strategy of the case, for example, it is likely that the Court would hold that person's testimony admissible as expert testimony.

3. Impartiality of Expert Witnesses Who Receive Payment for Their Testimony Before the Court

The courts have generally not considered the payment of witnesses as compromising to the impartiality or integrity of the witnesses.[95] The ECCC Internal Rule 31 provides "monetary compensation to any experts appointed by the Co-Investigating Judges or the Chambers," with rates established by the Office of Administration.[96] The Special Court for Sierra Leone has adopted a comprehensive set of guidelines governing what expenses the Court can compensate,

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[95] *See Prosecutor v. Brdanin*, IT-99-36-T, Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown, *available at* http://www.icty.org/x/cases/brdanin/tdec/en/030603.htm ("the mere fact that an expert witness is employed by or paid by a party does not disqualify him or her from testifying as an expert witness"). [Reproduced in accompanying notebook at Tab 15].

[96] Extraordinary Chambers in the Courts of Cambodia Internal Rules, *supra* note 1, at 29. [Reproduced in accompanying notebook at Tab 1].

as well as what other provisions can be made to experts (such as meals and accommodations).[97]

B. Role of Impartiality and Bias of Expert Witnesses in International Law

1. Impartiality and Bias in United States Law

In the United States, it has been held that expert testimony should not be ruled inadmissible solely because the expert may be biased. In one Fifth Circuit case, an expert witness' "expertise and impartiality were vigorously attacked, but the degree to which his testimony was thus impugned was for the jury to evaluate."[98] The Second Circuit has further stressed that it is the province of the jury to determine the credibility of any witness.[99] The Court determined that the expert's testimony turned on credibility issues, as a study of the testimony indicated it was "open and fair," with no evidence that would lead the Court to believe the expert would neglect to give an honest opinion.[100] These circuits indicate a willingness to allow any testimony as expert testimony, so long as it conforms to the Federal Rules of Evidence. Because the jury is the proper determiner of a witness' credibility, the Courts seem unwilling to overturn such a determination by the jury absent strong evidence that the expert testimony was not "open and fair."

As stated previously, judges in the United States have the power to appoint their own experts in addition to the experts brought in by the adverse parties. While this option may seem

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[97] *See* Special Court for Sierra Leone, Practice Direction on Allowances for Witnesses and Expert Witnesses, (2004) *available at* http://www.sc-sl.org/LinkClick.aspx?fileticket=CGHrGDs4nk4%3D&tabid=176. [Reproduced in accompanying notebook at Tab 5].

[98] *Gideon v. Johns-Manville Sales*, 761 F.2d 1129, 1136 (5th Cir. 1985). [Reproduced in accompanying notebook at Tab 8].

[99] *Scott v. Spanjer Bros.*, 298 F.2d 928, 931-32 (2nd Cir. 1962). [Reproduced in accompanying notebook at Tab 25].

[100] *Id*.

less inherently biased, there is still great opportunity for bias to surface in any expert testimony given by expert witnesses appointed by a judge.[101] Given the *Gideon* and *Scott* decisions, the Court would likely relate any questions of bias regarding these witnesses back to the jury for proper weighing with the facts of the case, as such questions would deal with the witnesses' credibility.

2. Impartiality and Bias in German Law

Under German law, the Bundesgerichtshof (federal court of justice) has stated that the Court has a duty to examine the language of the opinion given by expert witnesses.[102] In looking at the language, the court can search for "bias or a lack of impartiality on the part of the expert witness."[103] German law requires that "fresh, independent and objective expert opinion must be obtained" if any indication of bias is found.[104] This is due in part to "the duty of judges to control the reliability and verifiability of opinions of experts."[105] An example of such bias in the case the Bundesgerichtshof was hearing involved the use of pejorative terms by the expert

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[101] *See* Ellen E. Deason, *supra* note 26 (describing how some experts still maintain partisan views, experts still interpret data in light of their own beliefs, and many fields of science still generate much controversy). [Reproduced in accompanying notebook at Tab 30]. *See also* Ralph Slovenko, *Discrediting the Expert Witness on Account of Bias*, 21 PSYCHIATRIC TIMES (2004) ("The partiality of the impartial expert is masked. The adversary system of calling witnesses for each side and then examining them by direct and cross-examination has evolved specifically for the purpose of exposing shortcomings and biases and probing the accuracy and veracity of the opposition witnesses' testimony."). [Reproduced in accompanying notebook at Tab 38].

[102] Antonio K. Esposito & Christoph J.M. Safferling, *Report – Recent Case Law of the Bundesgerichtshof (Federal Court of Justice) in Strafsachen (Criminal Law)*, 9 GERMAN L.J. 683, 697 (2008). [Reproduced in accompanying notebook at Tab 29].

[103] *Id*.

[104] *Id*.

[105] *Id*.

witness when referring to the defendant in the case.[106] This is much different from the rulings in the United States, where the courts have emphasized that it is the place of the jury to determine the bias, and subsequent credibility, of witnesses.[107] While the United States would allow the court to rule on the inadmissibility of expert testimony because of bias in extreme situations (where the testimony would not be "open and fair"), the German court stresses that the judges have a duty to ensure there is no indication of bias. This standard allows the courts much more latitude in controlling the testimony of individuals that may be biased when attempting to testify as expert witnesses.

3. Impartiality and Bias in English Law

English law allows an examination of expert witness' objectivity in determining whether evidence should be admissible. In *Preece v. HM Advocate*, Preece was convicted of murder following testimony by the prosecution's expert that seminal stains on the murder victim's pants were of the same blood group as the defendant.[108] The expert, however, neglected to inform the court that the victim also had blood from the same blood group, which would have given credence to the argument that the stains were actually from the victim's own blood.[109] Additionally, the Court found that the prosecution's expert utilized a scientific method for examining the secretions that was not recognized in scientific journals, casting more doubt on the

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[106] *Id*.

[107] This is likely due at least in part to the lack of a jury within the German courts. *See* Stephen Ross Levitt, *The Life and Times of a Local Court Judge in Berlin*, 10 GERMAN L. J. 169, 198 n. 159 (2009) [Reproduced in accompanying notebook at Tab 40].

[108] *Preece v. HM Advocate*, [1981] H.C.J. (Eng.). [Unreported case, abstract and summary reproduced in accompanying notebook at Tab 11].

[109] *See* M. Neil Browne, *supra* note 30, at 84 n. 153 (describing the facts of the *Preece* case). [Reproduced in accompanying notebook at Tab 35].

expert's testimony.[110] As a result, the Court held that the expert witness had not acted objectively, and overturned the original conviction.[111] Following cases similar to *Preece* that demonstrated problems with England's expert witness rules, a commission indicated that examination of expert witnesses is often exploited "in such a way as to give to the evidence a slant that is neither objective nor scientific. All too often, expert evidence is given orally by witnesses in order, it would seem, to enhance the value of the evidence in the eyes of the jury."[112]

The British approach, much like that of the United States (which also practices common law), allows the court to intervene if an expert obviously lacks objectivity. However, as has been discussed previously, the British state that the weight afforded the evidence is to be determined by the "tribunal of fact."[113] It seems that the British approach is much like the United States', prohibiting the testimony if it is so biased that it is not "open and fair," but generally allowing the testimony and letting the tribunal of fact determine the proper weight that the evidence should be afforded.

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[110] *Id*.

[111] *Id*. at 84.

[112] *Id*. at 86 n. 177. The commission recommended that, in order to combat this disregard for objectivity, "where the expert evidence is agreed, it should be presented to the jury as clearly as possible, normally by written statement." *See also R. v. Ward*, [1993] 96 Cr. App. R. 1 (Eng.) (stating "For the future is it important to consider why the scientists acted as they did. For lawyers, jurors and judges a forensic scientist conjures up the image of a man in a white coat working in a laboratory, approaching his task with cold neutrality, and dedicated only to the pursuit of scientific truth. It is a sombre thought that the reality is sometimes different. Forensic scientists may become partisan. The very fact that the police seek their assistance may create a relationship between the police and the forensic scientists. And the adversarial character of the proceedings tends to promote this process. Forensic scientists employed by the government may come to see their function as helping the police. They may lose their objectivity."). [Reproduced in accompanying notebook at Tab 24].

[113] M. Neil Browne, *supra* note 30, at 77. [Reproduced in accompanying notebook at Tab 35].

4. Impartiality and Bias in Korean Law

Under Korean law, the courts have the freedom to accept and reject portions of expert testimony at the court's discretion.[114] Additionally, such experts are assistants to the court and are not afforded an "aura of infallibility."[115] Not only can a judge elect which portions of the testimony to accept (if any at all), but the judge can also question the expert on the report, as well as request another expert opinion.[116] As in the common-law nations, Korean judges can determine what weight to grant the expert opinion, but they also are allowed this extra latitude in seeking further information if they deem it necessary.

Litigants in the case are able to challenge the appointment of experts.[117] Korean law establishes a vague standard for challenging such experts, stating: "In cases where there are such circumstances as preventing an expert witness from giving expert testimony faithfully, the parties may challenge him."[118] Such challenges are often made by parties alleging that an expert is biased or has an interest in the outcome of the case.[119] The laws of Korea allow a denial of a challenge to be immediately appealed, rather than requiring the parties to wait until after the trial's conclusion.[120] Again, Korean law provides for a vague standard in challenging an expert, and does not speak directly to a prohibition on expert testimony based on a bias. This vague

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[114] *Id*. at 94.

[115] *Id*.

[116] *Id*.

[117] Eric Ilhyung Lee, *supra* note 50, at 608. [Reproduced in accompanying notebook at Tab 32].

[118] *Id*. at 608-09.

[119] *Id*. at 609.

[120] *Id*.

standard seems to follow the standard outlined by the courts in the United States and England, which provide for the rejection of expert testimony that crosses the line so much that it is no longer "open and fair," although the rule as written seems to require the judge to examine each challenge based on the facts and circumstances of the individual case.

5. Impartiality and Bias in French Law

Following the appointment of an expert by the French court, litigants can object to the appointment, alleging prejudice, bias, or conflict of interest with a timely-filed motion to recuse.[121] When a motion to recuse is not filed in a timely manner, the court is free to consider the information provided by the expert in determining the probative value of the expert's report to the court.[122] In cases where an expert realizes that the facts would preclude him/her from making an impartial analysis and testimony, the expert is required to withdraw as a witness and the court is then able to appoint a different expert.[123] This procedure is different from that in countries with an adversarial system, as those countries allow testimony from such witnesses and exclude their testimony only in cases where the witness demonstrates an extreme bias.

Because experts under French law are considered officers of the Court, they are not allowed to accept "money, gifts, food, or any type of benefit from the parties."[124] Additionally, French experts must keep confidential any information gained during their service with the court, and are prohibited from granting interviews relating information about the expert's court-

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[121] M. Neil Browne, *supra* note 30, at 97. [Reproduced in accompanying notebook at Tab 35]. *See also id*. at 97 n. 280 (describing eight different grounds for dismissal of an expert witness).

[122] *Id*. at 97.

[123] *Id*.

[124] *Id*. at 99.

assigned mission.[125]

V. CONCLUSION

As has been previously discussed[126], the Internal Rules of the ECCC do not discuss the qualifications required for an expert witness to testify before the Chambers, nor does it discuss any requirements of impartiality on the part of the witness. Common law nations have varied requirements for expert witnesses. England requires that experts, at the least, be "competent," while the United States has the comprehensive *Daubert* test that requires judges to weigh several factors in coming to a decision. While the United States' Federal Rules of Evidence allows for judges to appoint experts, the U.S. courts generally waive that right and hear experts presented by the parties. Civil law nations follow contrasting procedures, as they typically allow the judges to select the experts, often incorporating lists of experts for the courts to utilize, or requiring experts to maintain licensure or certification in certain fields. International criminal tribunals observe four factors in determining if a witness can qualify as an expert: 1) Whether the subject matter is in itself proper for expert testimony, or if it is a matter that is already within the "knowledge and experience of the court;" 2) whether the evidence is relevant in assisting the Trial Chambers in determining the matter at hand; 3) if the expert had the "necessary qualifications and methods;" and 4) whether the expert is independent. All four of these factors are similar to requirements of other courts, and should prove instructive to the ECCC.

While international tribunals have precluded expert testimony from witnesses who are inextricably linked to procedures of the court (such as a defendant in a related incident, or an individual who worked for years with and advised the prosecution), the tribunals have generally

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[125] *Id*.

[126] *Supra*, notes 1-11 and accompanying text.

allowed expert testimony of in-house experts. As long as these expert witnesses do not work closely with the prosecution or defense during the time that they are testifying, the court has traditionally found no conflict.

Common law countries, such as the United States and England, allow the court to intervene in instances of overt bias by an expert witness. However, these countries typically leave such questions of bias for the trier of fact to weigh when considering the evidence. Civil law countries, which typically require judges to work more closely with the witnesses (as is the case with the ECCC), require the courts to exercise firmer control in excluding biased witnesses. In France, experts are required to recuse themselves if they feel they are not able to demonstrate impartiality. The German courts also require experts to be dismissed if they demonstrate a bias and for new experts to be appointed in their stead, while Korean law allows judges to challenge expert testimony and seek additional information (in addition to challenges made by the parties involved in the case). These approaches are most instructive in regards to the ECCC, given the ECCC's role in assigning judges specific assignments. The judges in the ECCC should be given the same discretion for removing expert witnesses as the international courts that exercise similar systems are allowed.

ECCC staff would likely qualify as an expert witness before the tribunal so long as the expert meets the ICTY and ICTR requirements that the expert the expert have the "necessary qualifications and methods" and act independently. As to whether the expert is independent, the ECCC will likely examine the facts of the case at hand and compare them with those of the *Milutinovic* case. The key to the determination of admissibility of staff members of each party as expert witnesses before the international tribunals seems to be how involved the staff member was with developing the actual case. If a staff member did not work on the actual strategy of the

case, this would seem to improve the likelihood that such a witness would be considered independent to the ECCC.