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Whether the adoption of civil criminal justice system as opposed to the common law criminal justice system in ECCC is a correct decision. Specifically addressing the pros and cons of both legal systems

Lulu Jing

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CASE WESTERN RESERVE
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MEMORANDUM FOR THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

ISSUE: WHETHER THE ADOPTION OF CIVIL CRIMINAL JUSTICE SYSTEM AS OPPOSED TO THE
COMMON LAW CRIMINAL JUSTICE SYSTEM IN ECCC IS A CORRECT DECISION

SPECIFICALLY ADDRESSING THE PROS AND CONS OF BOTH LEGAL SYSTEMS

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Fall Semester, 2017

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I. Introductory

A. Scope

Contrary to the principle of the procedure laid down in the Internal Rules that “the ECCC proceeding shall be...adversarial,”¹ The ECCC adopted current Cambodia legal procedure, which follows civil law tradition.² This memorandum discusses whether it is a correct decision for the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) to use the civil criminal justice system as opposed to the common law criminal justice system? Why or why not? Specifically, this memorandum considers the pros and cons of the various aspects of the tribunal adopting civil law tradition instead of common law traditions in a hybrid court as ECCC in the Cambodian context.

B. Summary of Conclusion

- a. It is a correct decision for the ECCC to adopt the civil criminal justice tradition as opposed to the common law criminal justice tradition in most aspects of the proceeding;
- b. To make the tribunal fully functional, the ECCC should make adjustments on civil law traditions when circumstances require;
- c. Being a hybrid court in the context of Cambodia, the ECCC has been and would likely continue to be vulnerable to domestic political interference, compromising its judicial independence. No matter which criminal law system the tribunal adopts.

II. Factual Background

A. Overview of Cambodian legal system

¹ *Extraordinary Chambers in the Courts of Cambodia: Internal Rules*, Rev.9, as revised 16 January 2015 (“Internal Rules”), Rule 21 (1)(a). [Electronic copy provided in accompanying USB flash drive at Source 3]

² *Id.* Preamble.

i. The history of Cambodian legal system

The Cambodian legal system has evolved from unwritten customary law to late more formal and written statutory law.³ French colonization of Cambodia had a great impact on the whole country of Cambodia from 1863 to 1953, including its legal system.⁴ The current Code of Criminal Procedure was promulgated in 2007 and based on the French system.⁵

During the Khmer Rouge regime from 1975 to 1979, the entire Cambodia legal system was overthrown.⁶ The dictatorial regime not only dismantled the then existing laws and judicial framework, it also prosecuted legal professionals during this national purging, making sure to eradicate the old legal system and make room for the new radical communist revolution.⁷

Following the Khmer Rouge regime purging, Cambodian legal system was in vacuum situation.⁸ On January 7th, 1979, Vietnam started invasion of Cambodia. During Vietnam occupation, the then newly shaped legal system of Cambodia was greatly influenced by the Vietnamese legal system.⁹

In February 1992, the United Nations Transitional Authority in Cambodia (“UNTAC”) was established.¹⁰ As its name indicates, UNTAC was intended for a transitional period. With

³ Hor Peng, Kong Phallack & Jörg Menzel, *Introduction to Cambodian Law*, at 7. [Electronic copy provided in accompanying USB flash drive at Source 10]

⁴ *Id.*

⁵ *Id.* at 442.

⁶ *Id.* at 7.

⁷ *Id.* at 8.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

foreign aid assistance, a number of laws were promulgated and enacted during this period of time, criminal law and judicial law were among them.¹¹

ii. Current Cambodian legal system

The history shaped the current legal system of Cambodia. It is easy to see the current legal system as an amalgamation of Cambodian customs, the civil legal tradition (an influence from French colonization), and the common law tradition, which was an effect of foreign assistance to Cambodia's legal reform.¹²

B. Khmer Rouge period in Cambodia

The Khmer Rouge regime took control of Cambodia on April 17, 1975 and ruled the country until January 1979. While the Khmer Rouge was in power, 1.5 to 1.7 million Cambodians died from diseases, starvation, execution or exhaustion from overwork,¹³ it was about between a quarter and a third of the entire population of Cambodia at that time.¹⁴ It is by far the second largest casualty figure resulting from genocide since the Holocaust, which is estimated six million European Jews.¹⁵ The late conducted trials in the ECCC are the largest international trial since the Nuremberg trial on terms of victims.

C. establishment of the ECCC

¹¹ *Id.*

¹² *Id.*

¹³ The number is still under debate, a multiple reports catalogued at <http://www.mekong.net/cambodia/demcat.htm>. (last visited on Oct. 21, 2017).

¹⁴ Phillip Alston, *International Legal Responses to the Holocaust and Genocide after Nuremberg*, 8 B.C.Third World L. J. 47, 52 (1988). [Electronic copy provided in accompanying USB flash drive at Source 11]

¹⁵ Documenting numbers of victims of the Holocaust and Nazi Persecution, Holocaust Encyclopedia, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10008193>. (last visited Oct. 27, 2017) [Electronic copy provided in accompanying USB flash drive at Source 44]

The Cambodian government requested assistance from the United Nations to bring to trial the leaders of Democratic Kampuchea and those most responsible for the crimes committed during the Khmer Rouge regime period from 17 April 1975 to 6 January 1979.¹⁶ On December 18, 2002, the General Assembly of the United Nations issued its resolution 57/228 recognizing the concern of the Cambodian government and its efforts to bring justice and reconciliation to the nation following the Democratic Kampuchea.¹⁷

Different concerns of the Cambodian government and the UN made the following negotiation protracted and many times at the verge of collapse.¹⁸ UN's concern was the Tribunal should apply international standards of justice and due process, while the Cambodian government insisted that the Tribunal should employ the Cambodian domestic legal structure and Cambodian domestic criminal law.¹⁹ Finally, UN and Cambodian government came to terms with each other, the Extraordinary Chambers in the Courts of Cambodia was established in 2004. The tribunal was designed to be a hybrid domestic court, encompassing both national and international elements in the structure and various judicial proceedings.²⁰

The Cambodian government and UN also adopted documents laying out the mission of the Tribunal and how the Tribunal will be operating. One document is Agreement Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic

¹⁶ *Internal Rules*, Preamble.

¹⁷ *Id.*

¹⁸ *Report of the Secretary-General on Khmer Rouge Trials*, UN Doc. No. A/57/769, 31 Mar. 2003, para. 7. [Electronic copy provided in accompanying USB flash drive at Source 45]

¹⁹ Jessica Peake, *A Spectrum of International Criminal Procedure: Shifting Patterns of Power Distribution in International Criminal Courts and Tribunals*, 26 Pace Int'l L. Rev., 182, 221 (2014). [Electronic copy provided in accompanying USB flash drive at Source 12]

²⁰ *Id.* at 222-223.

Kampuchea, U.N.-Cambodia, June 6, 2003 (“UN/Cambodia Agreement”),²¹ the other is Law on the Establishment of Extraordinary Chamber in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, October 27, 2004 (“Law”).²²

According to the Agreement, the jurisdiction of the ECCC is over the “senior leaders of Democratic Kampuchea and those who were most responsible” for the crimes committed between January 7, 1975 and April 20, 1979.²³ Specifically, the ECCC law grants the Tribunal power to prosecute person who, from 17 April 1975 to 6 January 1979, committed (1) crimes under the 1956 Penal Code;²⁴ (2) crimes of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948;²⁵ (3) crimes against humanity;²⁶ (4) or ordered the commission of grave breaches of the Geneva Conventions of 12 August 1949;²⁷ (5) destruction of cultural property during armed conflict to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict;²⁸ (6) crimes against

²¹ *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*, resolution 57/228 of December 2002. (“UN/Cambodia Agreement”) [Electronic copy provided in accompanying USB flash drive at Source 1]

²² *Law on Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the Period of Democratic Kampuchea*, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) (“ECCC Law”). [Electronic copy provided in accompanying USB flash drive at Source 2]

²³ *UN/Cambodia Agreement*, art. 1.

²⁴ *ECCC Law*, art. 3.

²⁵ *Id.* art. 4.

²⁶ *Id.*, art. 5.

²⁷ *Id.* art. 6.

²⁸ *Id.* art. 7.

internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations.²⁹

Like all other judicial system, the Tribunal was composed of trial court and appellate court, but the composition of these courts demonstrates the unique feature of this hybrid international institution. The Trial Chamber composed of five judges, of whom three are Cambodian judges and two foreign judges.³⁰ The Supreme Court Chamber serves as both appellate and the highest final court. It is composed of seven judges, of whom four are Cambodian judges and three foreign judges.³¹

The Internal Rules which the ECCC has adopted consolidate relevant Cambodian rules of procedure and evidence before the Tribunal. The Internal Rules allow the Tribunal to look beyond Cambodian procedure “where these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application, or if there is a question regarding their consistency with international standards.”³²

From the intended mixed composition of the Tribunal’s judicial structure and the Internal Rules it adopted, it is easy to conclude that the ECCC was neither designed nor operated as a pure civil law tribunal; instead, the designer adopted Cambodia legal system, which is civil law system, as the primary operating system. As other international criminal tribunals, the ECCC also borrows some international law and legal standards.³³ It is the position of this memorandum

²⁹ *Id.* art. 8.

³⁰ *Id.* art. 9.

³¹ *Id.*

³² *Internal Rules*, preamble.

³³ *Id.*

that this it is a right decision to choose civil law system as the primary system and common law as supplementary if needed. The reason will be laid out in the following.

III. Law and Analysis

Most of the nations around of the world have adopted civil law tradition, while a relatively small number of nations follow the common law tradition which evolved in England.³⁴ Basically, the civil law system adopts an inquisitorial model while the common law system an adversarial model.³⁵ These two legal systems differ not only structurally but also procedurally.³⁶ Furthermore, the civil law system focuses on finding the objective truth, while the common law system the just outcome.³⁷

Historically being distinguished and contrasted in various respects, but as noted by many legal scholars, the distinctions between the current civil and common law are less apparent than in the past, as they borrow from each other.³⁸ It is hardly an innovation that the merging of civil and common law traditions in the international arena.³⁹

³⁴ William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 684 (1999). [Electronic copy provided in accompanying USB flash drive at Source 13]

³⁵ Peake, *Supra* note19, at 191.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *See generally Democrat? Freedom? Justice? Law? What's all this?* Economist, Dec. 31, 1999. [Electronic copy provided in accompanying USB flash drive at Source 43]; Richard. H. Helmholz, *Continental Law and Common Law: Historical Strangers or Companions?*, 1990 Duke Law Journal 1207 (1990) [Electronic copy provided in accompanying USB flash drive at Source 14]; Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 Stan. L. Rev. 1009, 1026 (1974). [Electronic copy provided in accompanying USB flash drive at Source 15]

³⁹ Robert Christensen, *Getting to Peace by Reconciling Notions of Justice: The Importance of Considering Discrepancies between Civil and Common Legal Systems in the Formation of the International Criminal Court*, 6 UCLA J. Int'l L. & Foreign Aff. 391, 400 (2001). [Electronic copy provided in accompanying USB flash drive at Source 16]

As discussed in prior text, the ECCC, a hybrid institution, has adopted civil law system as the primary legal system. The following discussions demonstrate that the participants, their designated roles in the whole process and the unique procedural devices make the civil law system a better choice than common law system in the context of Cambodia; the more flexible evidence rules also add to the appeal of civil law system.

A. Prosecutor

i. Prosecutor: civil law vs. common law

A prosecutor in civil law system is tasked with investigating both inculpatory and exculpatory evidence,⁴⁰ which is in line with their mission of finding the objective truth.⁴¹ During investigation, prosecutors have limited investigatory power and are often subject to judicial supervision.⁴²

In pure traditional civil law system, the prosecutor initiates an inquiry and later passes it to an investigating judge, who then pursues the inquiries with his judicial discretion with almost no restriction.⁴³ In less traditional civil law system, the prosecutor discharges his investigatory power under judicial monitoring.⁴⁴ The prosecutorial discretion a prosecutor has is much restricted.⁴⁵ For example, guilty plea is never an option in civil law system, as the prosecution must take place whenever sufficient evidence exists to prove the guilt of the accused.⁴⁶ The

⁴⁰ Peake, *Supra* note 19, at 195.

⁴¹ *Id.*

⁴² Goldstein, *supra* note 38, at 1019.

⁴³ *Id.*

⁴⁴ Peake, *Supra* note 19, at 192.

⁴⁵ Yehonatan Givati, *the Comparative Law and Economics of Plea Bargaining: Theory and Evidence*, at 2. [Electronic copy provided in accompanying USB flash drive at Source 17]

⁴⁶ *Id.*

confession of the accused can be admitted as evidence, but it is the court that determines guilt, not the defendant or the prosecution.⁴⁷In common law system, the court still must accept the guilty plea and determine guilt.

In contrast to his counterpart in civil law system, a prosecutor in common law system enjoys much broader discretionary powers, often without any internal or external review or supervision.⁴⁸ It is rightly noted that it is not an exaggeration that in many American jurisdictions, the prosecutor is the criminal system.⁴⁹

A prosecutor in common law is not obligated to investigate exculpatory evidence for the defense, but he does have a duty to disclose favorable evidence to the defense under the *Brady*⁵⁰ rule, stemming from defense's constitutional rights to due process.⁵¹ Instead, the prosecution and defense both investigate their case, collect and present evidence, interview witnesses in order to prove guilty or innocence of the defense.⁵² All these activities are conducted independently and in a partisan fashion.⁵³

⁴⁷ Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1, 11 (2004). [Electronic copy provided in accompanying USB flash drive at Source 18]

⁴⁸ Erik Luna and Marianne Wade, *Prosecutors as Judges*, 67 Wash. & Lee L. Rev. 1413, 1415 (2010). [Electronic copy provided in accompanying USB flash drive at Source 19]

⁴⁹ *Id.*

⁵⁰ *Brady v. Maryland*, 373 U.S. 83 (1963).

⁵¹ *Id.* at 87.

⁵² See generally Mirjan R. Damaska, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L. 847 (1997). [Electronic copy provided in accompanying USB flash drive at Source 20]

⁵³ William Van Caenegem, *Advantages and disadvantages of the adversarial system in criminal proceedings*, Law Faculty Publications. Paper 224, at 69 (1999). [Electronic copy provided in accompanying USB flash drive at Source 21]

ii. Co-Prosecutors in the ECCC

The UN/Cambodia Agreement provides a Cambodian prosecutor and an international prosecutor serve as Co-Prosecutors in the ECCC.⁵⁴ They are required to act independently and not allowed to “accept or seek instructions from any government or any other source.”⁵⁵ Nevertheless, they are allowed to “seek the assistance of the Royal Government of Cambodia if such assistance would be useful to the prosecution, and such assistance shall be provided.”⁵⁶

While ECCC Law provides all investigations are the responsibility of Co-Investigating Judges,⁵⁷ the Co-Prosecutors are tasked with “preliminary investigations” to determine “whether evidence indicates that crimes within the jurisdiction of the ECCC have been committed and to identify Suspects and potential witnesses.”⁵⁸ Once the Co-Prosecutors “have reason to believe that crimes within the jurisdiction of the ECCC have been committed, they shall open a judicial investigation by sending an Introductory Submission to the Co-Investigating Judges.”⁵⁹ The Co-Prosecutors are also required to “disclose to the Co-Investigating Judges any material that...may suggest the innocence or mitigate the guilt of the Suspect or the Charged Person or affect the credibility of the prosecution evidence.”⁶⁰ This requirement reflects the prosecution’s obligation in civil law tradition—seeking the truth, instead of adopting the partisan approach.

⁵⁴ *UN/Cambodia Agreement*, art. 6 (1).

⁵⁵ *Id.* art. 6(3).

⁵⁶ *ECCC Law*, art. 20.

⁵⁷ *Id.* art. 23.

⁵⁸ *Internal Rules*, Rule 55 (1).

⁵⁹ *Id.* Rule 53(1).

⁶⁰ *Id.* Rule 53(4).

The Co-Prosecutors are required to “prosecute in accordance with existing procedures in force.”⁶¹ As explained in prior text, the existing procedures in Cambodia are modeled after civil law system, as a result, the Co-Prosecutors are required to follow the civil law prosecution procedures. Like other international tribunals, the ECCC Law adds international elements in the prosecution by allowing the Co-Prosecutors to seek guidance from established procedure rules at international level if necessary.⁶²

Recall that the establishment of the ECCC is to bring the senior leaders of Democratic Kampuchea and those most responsible for the violations of domestic and international criminal laws to trial. This whole proceedings before the ECCC should be an objective-truth-finding process. While the prosecutor in common law, whose image is always a zealous advocate of government, carrying its partisan goal of convicting the accused for the alleged crime or some crime through plea bargain. The ECCC is better equipped to achieve the overall goal by adopting civil law prosecution, which is more in line with the ultimate goal of the ECCC. Having the prosecution being impartial, instead of partisan, is very important in achieving this goal.

Another benefit of placing prosecution in a neutral position is to insure a fair trial. The time lapse between the commission of the crimes and bringing of these crimes to trial is a big challenge for all parties. It is time and resource consuming to collect all evidences and witness for cases which happened almost 40 years ago. Compared with individual defendant and civil parties, prosecution has more resources from Cambodia government and international community, the dramatic imbalance of resources of opposing parties would very likely impair

⁶¹ *ECCC Law*, art. 20.

⁶² *Id.* (the ECCC Law allows the international references under three situations “if these existing procedures do not deal with a particular matters, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards.”)

the defense effectively defending his case. Impartial Co-Prosecutors could remedy this potential undesired impact.

Adopting an impartial prosecution system is also a more economical way of conducting effective, thorough investigation in the Cambodian background. If the ECCC let the defense do their own investigation, collect evidence, interview witness and invite expert, to accomplish a fair trial, the government and the international community would be obligated to finance these activities. As will be discussed later, the ECCC has always been dealing with financial strain, having a neutral investigation organ to conduct all the investigation is a more practical and sensible design for the ECCC.

Judicial control over the prosecutorial discretion is another appeal of civil law tradition. The ECCC has set multiple mechanism to make sure the decision to indict and prosecute an individual is the result of thorough investigation and deliberation. The supervision from other judicial organs, like chamber judges and investigating judges can greatly reduce the chances of any arbitrary or false prosecution.

B. Judicial investigation—Co-Investigating Judges

The Office of Co-Investigating Judge is an independent judicial office in the ECCC.⁶³ The main component of the Office is Co-Investigating Judges.⁶⁴ Like the Co-Prosecutors, there are also two Investigating Judges, one Cambodian and one International.⁶⁵ The ECCC removed

⁶³ *Internal Rules*, Rule 14(1).

⁶⁴ *Id.*

⁶⁵ *UN/Cambodia Agreement*, art. 5(1).

most of the investigatory power from the Co-Prosecutors and defense and placed it in the hands of the Co-Investigating judges.⁶⁶

As the Co-Prosecutors, the Co-Investigating Judges are also required to identify both inculpatory and exculpatory evidence.⁶⁷ Even though tasked with carrying out most of the investigatory power, the investigation of Co-Investigating Judges is limited to “the facts set out in an Introductory Submission or a Supplementary Submission” prepared by the Co-Prosecutors.⁶⁸ If the Co-Investigating Judges uncover new facts they must refer the facts to Co-Prosecutors and ask for a Supplementary Submission.⁶⁹ The Co-Investigating Judges have the power to charge any suspects named in the Introductory Submission or anyone against whom there is “clear and consistent evidence” that this individual responsible for the crimes alleged in the Submissions.⁷⁰ Like the Co-Prosecutors, the Co-Investigating Judges are also allowed to look beyond the current Cambodian procedures within the same framework laid down for Co-Prosecutors.⁷¹

Finally, the Co-Investigating Judges close the investigation by either indicting a charged person or dismissing the case.⁷² In this regard, the Co-Investigating Judges share the role of Grand Jury in US criminal system. The Co-Investigating-Judges’ final decision is not bound by

⁶⁶ *ECCC Law*, art. 23.

⁶⁷ *Id.*

⁶⁸ *Internal Rules*, Rule 55 (2).

⁶⁹ *Id.* Rule 55(3).

⁷⁰ *Id.* Rule 55 (4).

⁷¹ *ECCC Law*, art. 23.

⁷² *Id.* art. 67(1).

the Co-Prosecutor's submission.⁷³ Again, this shows the much limited prosecutorial discretion of prosecution in civil law tradition and in the ECCC. Unlike the common law tradition, the Co-Prosecutors and Co-Investigating Judges jointly participate in the investigation and the exercise of prosecutorial discretion, with more power allocated to the Co-Investigating Judges.

Like the Co-Prosecutors, the Co-Investigating Judges benefit the ECCC in the same way, which will not be repeated here.

C. Pre-Trial Chamber

In the ECCC, the Pre-Trial Chamber is consisted of five judges, three Cambodians and two Internationals. Among all its obligations in the ECCC, one is to settle the differences between the Co-Prosecutors and Co-Investigating Judges while a case is still under investigation.⁷⁴ The other jurisdiction of the Pre-Trial Chamber include Co-Prosecutor's appeals against decisions of the Co-Investigating Judges, applications to annual investigative action, and other appeals.⁷⁵ The Pre-Trial Chamber also hears motions and appeals against orders issued by the Co-Investigating Judges in investigating stage, but there is no appeal against the decision of the Pre-Trial Chamber regarding the dispute settlement between the Co-Investigating Judges.⁷⁶ And any decisions of the Pre-Trial Chamber requires an affirmative vote of at least four out of five judges.⁷⁷

⁷³ *Id.*

⁷⁴ *UN/Cambodia Agreement*, art. 7(1).

⁷⁵ *Internal Rules*, Rule 73.

⁷⁶ *Id.* Rule 73, 74(1).

⁷⁷ *UN/Cambodia Agreement*, art. 7(4).

Obviously, the Pre-Trial Chamber functions partly to reduce the prosecutorial discretion of prosecution and to review the Co-Investigating Judges' decisions and orders on investigation issues arising during the investigation. The Pre-Trial Chamber is like an appeal court in common law, but more focus on factual issues. I think the adoption of Pre-Trial Chamber serves the ECCC well. It provides the investigating office and prosecutors an avenue to solve some disagreements in early stage of the proceeding, instead of keeping them waiting until trial. It serves the channel function of legal resources of the ECCC while saving time.

D. The Trial Chamber Judges

i. Judge: civil law vs. common law

The role of judge in civil law system is probably the most drastic departure from the common law system. Unlike a judge in common law system, often described as “passive umpire”, judges in civil law system play a more active role in the whole proceeding.⁷⁸ With the assistance of prosecutor and investigating officials, judge not only participates in, but also directs investigation and administrative processes, “assuring that the merits of guilt and penalty are correctly assessed.”⁷⁹ The civil law judge decides both fact and law, there is no jury.⁸⁰ The civil law advocates “have no power of initiative after they have presented the claims and defense in the pleadings, except with the consent of the judge.”⁸¹

⁷⁸ Peake, *Supra* note 19, at 189.

⁷⁹ *Id.*

⁸⁰ Geoffrey C. Hazard, *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 *Notre Dame L. Rev.* 1017, 1019 (1998). [Electronic copy provided in accompanying USB flash drive at Source 22]

⁸¹ *Id.* at 1020.

While in common law, judges are not responsible for uncovering the truth, but to “decide between competing presentations of evidence and law that are tendered by the advocates.”⁸²

ii. Trial Chamber Judges in the ECCC

The Trial Chamber is composed of five judges, of whom three Cambodian judges and two International judges.⁸³

At the beginning of the trial phase—the initial hearing, the Trial Chamber has very broad discretion over the management of the proceeding. For example, the Chamber may reject the request to summon certain witnesses where it “considers that the hearing of a proposed witness or expert would not be conducive to the good administration of justice.”⁸⁴

During the trial, on its own initiative, the Chamber judge can “summon or hear any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth.”⁸⁵ Another mechanic the Chamber judges could use to manage the proceeding is by reducing the scope of the trial. Internal Rules allow the Chamber to exclude certain facts set out in the Indictment, as long as the remaining facts are representative of the scope of the indictment.⁸⁶

⁸² *Id.*

⁸³ *ECCC Law*, art. 9.

⁸⁴ *Internal Rules*, Rule 80 *bis.* (2).

⁸⁵ *Id.* Rule 87(4).

⁸⁶ *Id.* Rule 89 *quarter* (1).

Furthermore, during the trial, the defense could be questioned by Co-Prosecutors and other participating parties and their lawyers, subject to the permission of the President, who is one of the judge in the Chamber.⁸⁷

The Chamber judges hear the civil parties, witnesses and experts, not in the order prescribed by the parties, but in the order it deems useful.⁸⁸

The Trial Chamber may order additional investigations when it deems necessary.⁸⁹ For the additional investigation, the Chamber judges can:

- a) Go anywhere within the territorial jurisdiction of the ECCC;
- b) Interview witnesses;
- c) Conduct searches;
- d) Seize any evidence; or
- e) Order expert opinions.⁹⁰

The activities covered in the list demonstrate the much expanded role of trial judge in the ECCC.

In the judgement, as long as no new constitutive elements being introduced, the Chamber may even change the legal characterization of the crime in the indictment.⁹¹

A conviction in the ECCC requires “the affirmative vote of at least four judges.”⁹² The accused must be acquitted if the required majority is not reached.⁹³ This is much like jury

⁸⁷ *Id.* Rule 90(2).

⁸⁸ *Id.* Rule 91(1).

⁸⁹ *Id.* Rule 93(1).

⁹⁰ *Id.* Rule 93(2).

⁹¹ *Id.* Rule 98(2).

⁹² *Id.* Rule 98(4).

⁹³ *Id.*

verdict, except the latter one is composed of lay people and requires unanimity to convict an accused.

It is easy to see that the judges in the Trial Chamber play a much active role in the trial, which is in line with their judicial task of ascertaining the truth, instead of overseeing the partisan play of the prosecution and defense. This mode fits the ECCC better in the context of the Cambodia. First, it is in line with the whole civil law tradition which requires judges being more active in the whole legal proceeding; second, it is sensible to have judge as both the fact-finder and law decider, which will be explained in later text; third, as discussed later, due to the fact that there is only one appellate court in the ECCC, it is reasonable to assign more authority to the Trial Chamber and have case more thoroughly litigated during trial as the Trial Chamber deems necessary.

E. The Supreme Court Chamber

i. Appellate court: civil law vs. common law

The right to appeal, either statutory or constitutional, against criminal conviction and sentence is increasingly common now around the world.⁹⁴ The modern right to appeal primarily serves to protect against miscarriage of justice.⁹⁵ Due to historical reasons, under civil law tradition, appellate court review is regarded as a continuation of the trial process.⁹⁶ Accordingly, in criminal case, the appeals against acquittals would not raise the controversy of double jeopardy.⁹⁷ When a party decides to appeal, the execution of the judgement of the lower court

⁹⁴ Peter D. Marshall, *A Comparative Analysis of the Right to Appeal*, 22 *Duke J. Comp. & Int'l L.* 1,1 (2011-2012). [Electronic copy provided in accompanying USB flash drive at Source 23]

⁹⁵ *Id.* at 3.

⁹⁶ *Id.* at 11-14.

⁹⁷ *Id.* at 15.

will automatically be stay.⁹⁸ In addition, the appellate judges in civil law have more discretions than its common law counterparts.⁹⁹ Unlike common law, the civil appellate court values justice in a particular case over certainty.¹⁰⁰

The common law appellate courts limit the review scope in various aspects: generally acquittals cannot be appealed; it is rather difficult to challenge factual findings in appellate court; appellate courts do not review the case de novo, but identify errors of the lower court; the appellate courts only consider evidence submitted to the lower court; last, the appellate courts are not necessarily looking for “truth”, but correct any identifiable error.¹⁰¹

ii. Appellate court in the ECCC

In the ECCC, the Supreme Court Chamber is the only and final appeal court. The Supreme Court Chamber can hear appeal on the grounds of error of law, error of fact and “discernible error in the exercise of the Trial Chamber’s discretion which results in prejudice to the appellant.”¹⁰² To discharge its obligation, the Supreme Court Chamber may examine evidence and call new evidence.¹⁰³ The Supreme Court Chamber even may change the legal characterization of the crime adopted by the Trial Chamber.¹⁰⁴

Like the civil law appellate court, the Supreme Court Chamber is granted great discretion to not only review the lower court’s decision and evidence presented before the Trial Chamber,

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 16.

¹⁰² *Internal Rules*, Rule 104(1).

¹⁰³ *Id.*

¹⁰⁴ *Id.* Rule 110(3).

but also conduct their own investigation when necessary. I think the civil law tradition works better than common law for appeal in the ECCC. The Supreme Court Chamber continues the truth-finding task of the Trial Chamber when it start its review, this is in align with the ultimate goal of civil law tradition. In addition, the cases before the ECCC is complicated and the Cambodian people and the international community set high expectation over the ECCC, it is sensible to grand the appellate court in the ECCC broad discretion to conduct the review and investigation if needed to reach the ultimate goal of the tribunal. Further, the Supreme Court Chamber is the only and last appellate court for many issues in a case, it should be granted more discretion to thoroughly review and investigate any issue it deems necessary to discharge its duty.

F. Defense

i. Defense: civil law vs. common law

A defendant in civil law system is just a target of the investigation. Generally, they need not take out any investigation action, the official investigators are required to provide the exculpatory evidence to the defense. The defense can also request the official investigator to gather evidence on its behalf.

In France, upon the request of the investigating magistrate, a person suspected of criminal acts could be detained up to 24 hours or even 48 hours.¹⁰⁵ Until recently, the suspect had no right to legal advice during the detention.¹⁰⁶ Conversely, it has long been recognized as common law right against self-incrimination in the face of police interrogation both in the United States and

¹⁰⁵ Bron McKillop, *Anatomy of a French Murder Case*, 45 Am. J. Comp. L. 527, 532 (1997). [Electronic copy provided in accompanying USB flash drive at Source 24]

¹⁰⁶ *Id.*

England. The United States Supreme Court has held that any criminal suspect who is subject to custodial interrogation has to be informed of his right to remain silent and right to counsel, his silence is not subject to adverse inference;¹⁰⁷ while in England, a suspect has right to remain silent, but subject to adverse inference at trial.¹⁰⁸

ii. Defense in the ECCC

The ECCC recognized the rights of the accused listed in the 1966 International Covenant on Civil and Political Rights, specifically Article 14 and 15.¹⁰⁹ Among those rights are right

“to a fair and public hearing; to be presumed innocent until proven guilty; to engage a counsel of his or her choice; to have adequate time and facilities for the preparation of his or her defense; to have counsel provided if he or she does not have sufficient means to pay for it; and to examine or have examined the witnesses against him or her.”¹¹⁰

Internal Rules provide that “[e]very person suspected or prosecuted...at every stage of the proceedings shall be informed of his/her right to remain silent.”¹¹¹ During trial, with the permission of the Chamber, the Co-Prosecutors and all other parties and their lawyers have the right to question the accused.¹¹² The accused shall also be called upon by the President of the Chamber to make his/her closing statements.¹¹³

G. Evidence rules

¹⁰⁷ *Miranda v. Arizona*, 384 U.S. 436, 467-68 (1966).

¹⁰⁸ Chris Blair, *Miranda and the Right to Silence in England*, 11 *Tulsa J. Comp. & Int'l L.* 1,16 (2003). [Electronic copy provided in accompanying USB flash drive at Source 25]

¹⁰⁹ *UN/Cambodia Agreement*, art. 13.

¹¹⁰ *Id.*

¹¹¹ *Internal Rule*, Rule 21(d).

¹¹² *Id.* Rule 90(2).

¹¹³ *Id.* Rule 94(1).

i. Evidence rules: civil law vs. common law

As discussed above, civil law judges are tasked with eliciting relevant evidence and uncovering truth. To discharge the judicial responsibility, civil law judges have broad discretion over evidence. They, unlike their counterparts in common law, do not have to wait for the parties to present evidence to the court, they can introduce evidence at their own initiative and may also order parties to disclose relevant evidence in their possession.¹¹⁴ Furthermore, instead of waiting for parties to bring in expert, civil law judges have authority to appoint experts themselves.¹¹⁵

Subject to a few restrictions, any evidence in civil law is admissible as long as it helps judge finding the truth.¹¹⁶ In contrast, due to the jury in criminal trial, the admission of evidence in common law are subject to detailed and complicated evidence rules.¹¹⁷ Common law judges must confine themselves to evidence presented by parties,¹¹⁸ they are also responsible to make sure the evidence rules are being followed by prosecution and defense.

As explained by a scholar, the distinctive approaches of the two systems derive from the difference between them:

In adjudicating guilt, [civil law] criminal proceedings turn upon the findings of either a single judge, a panel of judges or a ‘mixed panel’ of both professional and lay jurists. As a result, the determination of law and fact, along with guilt and punishment, are unified in one body. This provides a marked contrast to trial proceedings in the adversarial system where the presiding judge

¹¹⁴ Caslav Pejovic, *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, 32 Victoria U. Wellington L. Rev. 817,831 (2001). [Electronic copy provided in accompanying USB flash drive at Source 26]

¹¹⁵ Gillian K. Hadfield, *the Quality of Law in Civil and Common Law Regimes: Judicial Incentives, Legal Human Capital and the Evolution of Law*, University of Southern California CLEO Research Paper No. C07-3 (2007). [Electronic copy provided in accompanying USB flash drive at Source 27]

¹¹⁶ Pejovic, *supra* note 114, at 833.

¹¹⁷ *Id.*

¹¹⁸ Hadfield, *supra* note 115, at 11.

decides questions of law and guilt determination is normally the obligation of a jury, whose composition embodies members of the general public.¹¹⁹

ii. Evidence in the ECCC

a. Evidence collection

Following civil law tradition, defense and civil party in the ECCC have no obligation to gather evidence for their case themselves; the obligation falls onto the Co-Prosecutors and Co-Investigating Judges.

During the preliminary investigation, Judicial Police Officers or Investigators of ECCC may search for and gather relevant evidence at the request of the Co-Prosecutors.¹²⁰ After the case being passed to Co-Investigating Judges, the power of collecting evidence passes to the Co-Investigating Judges.¹²¹ Even the accused has no obligation to collect evidence for his case, he does have right “to examine evidence against them and obtain the presentation and examination of evidence on their behalf under the same conditions as evidence against them.”¹²² Note that the Co-Prosecutors have statutory duty in their Introductory Submissions to disclose to the Co-Investigating Judges any material that the Co-Prosecutors know “may suggest the innocence or mitigate the guilt of the Suspect or the Charged Person or affect the credibility of the prosecution evidence.”¹²³ In the same vein, the Co-Investigating Judges share the same duty. They are required to “conduct their investigation impartially, whether the evidence is inculpatory or

¹¹⁹ Megan Fairlie, *The Marriage of Common and Continental Law at the ICTY and its Progeny, Due Process Deficit*, 4 Int'l Crim. L. Rev. 243, 256 (2004). [Electronic copy provided in accompanying USB flash drive at Source 28]

¹²⁰ *Internal Rules*, Rule 50(2).

¹²¹ *ECCC Law*, art.23.

¹²² *Id.*, art. 35(e).

¹²³ *Internal Rules*, Rule 53(4).

exculpatory.”¹²⁴ Although not taking out the investigation themselves, the Charged Person and the civil party do have right to ask the Co-investigating Judges to collect evidence for them. They may “request the Co-Investigating Judges to interview... question witnesses, go to a site, order expertise or collect other evidence on [their] behalf.”¹²⁵ The Co-Investigating Judges may deny the request, and the denial could be appealed to the Pre-Trial Chamber.¹²⁶

The Co-Investigating Judge and the Chamber may seek expert opinion,¹²⁷ other parties, including their representing lawyers and Co-Prosecutors may request the Co-Investigating Judges or the Chamber to “appoint additional experts to conduct new examinations or to re-examine a matter already the subject of an expert report.”¹²⁸ The Co-Investigating Judges or the Chamber may deny the request.¹²⁹ The denial of the Chamber is final; while the denial of the Co-Investigating Judge could be appealed to the Pre-Trial Chamber.¹³⁰

b. Admissibility of evidence

As in other civil law jurisdictions, the ECCC enjoy broad judicial discretion in regard to evidence admission.

¹²⁴ *Id.* Rule 55(5).

¹²⁵ *Id.* Rule 58(6), 59(5).

¹²⁶ *Id.*

¹²⁷ *Id.* Rule 31(1).

¹²⁸ *Id.* Rule 31(10).

¹²⁹ *Id.*

¹³⁰ *Id.*

The Internal Rules provide that all evidence is admissible unless prohibited by the rules.¹³¹ The trial Chamber may reject a request for evidence when it finds the proposed evidence is:

- a. Irrelevant or repetitious;
- b. Impossible to obtain within a reasonable time;
- c. Unsuitable to prove the facts it purports to prove;
- d. Not allowed under the law; or
- e. Intended to prolong proceedings or is frivolous.¹³²

During trial, the Chamber enjoys great judicial discretion in regard to evidence. To discharge their duty of ascertaining the truth, the Chamber, “on its own initiative or at the request of a party,” may call or hear any person as a witness before the Chamber or admit any new evidence they deem conducive to finding the truth.¹³³

In align with the civil law tradition and its goal of finding the truth, the confessions of the Charged Person shall be given the same evidentiary consideration as other forms of evidence.¹³⁴

There is no jury in the ECCC, judges from the Chambers play the role of gatekeeper, factfinder and adjudicator of law during trial. Many evidence rules, including exclusionary rule, authentication rules, hearsay rules, which serve mainly jury trial in common law tradition, have long been criticized in various legal literatures.¹³⁵ Dean Wigmore blamed the exclusionary rule

¹³¹ *Id.* Rule 87(1).

¹³² *Id.* Rule 87(3).

¹³³ *Id.* Rule 87(4).

¹³⁴ *Id.* Rule 87(5).

¹³⁵ Karl H. Kunert, *Some Observations on the Origin and Structure of Evidence Rules under the Common Law System and the Civil Law System of Free Proof in the German Code of Criminal Procedure*, 16 *Buff. L. Rev.* 122, 127-128 (1966) [Electronic copy provided in accompanying USB flash drive at Source 29]; *see also* Edmund M. Morgan, *The Jury and the Exclusionary Rules of Evidence*, 3 *Current Legal Thought* 448, 453 (1937). [Electronic copy provided in accompanying USB flash drive at Source 30]

not helping the truth, but a game-rules for setting aside the verdict.¹³⁶As a tribunal without jury, the ECCC does not need those evidentiary rules created in the consideration of the frailty of jurors' mind.

The lapse of time between the Khmer Rouge regime 1975 to 1979 and the start of the operation of the ECCC around 2006 cause a lot concerns in regard to the evidence before the tribunal. During Case 002, the 11th Plenary Session of the ECCC made some amendments to the Internal Rules to expedite the case.¹³⁷ One of the amendment is to “allow the Trial Chamber to reduce the scope of the trial by excluding certain facts set out in the indictment, as long as the remaining facts...are representative of the scope of the indictment.”¹³⁸ This amendment understandably caused stir among the Civil Parties who were in fear that their victims' stories and their sufferings would not be heard in trial.¹³⁹Nevertheless, the ECCC's decision is justified to expedite the trial in consideration of the deteriorating health condition of the accused in Case 2, Khieu Samphan and Nuon Chea. I think the trial judges in an international criminal court should be granted the discretion to exclude certain facts as evidence. Usually, the cases before the international tribunal involve hundreds of thousands victims, it would be extremely time and resource consuming to present and admit all evidence presented by the victims before court.

Conducting trial without jury is probably the most noticeable different tradition of civil law from common law. There is only a handful of nations around the world have adopted jury

¹³⁶ Kunert, *Supra* note 135, at 128.

¹³⁷ *ECCC Plenary Session Amends Rules to Expedite Trials*, *Cambodia Tribunal Monitor*, Jan. 24, 2015. Available <http://www.cambodiatribunal.org/2015/01/24/eccc-plenary-session-amends-rules-to-expedite-trials/>. (last visited Nov.5, 2017) [Electronic copy provided in accompanying USB flash drive at Source 46]

¹³⁸ *Internal Rules*, Rule 98 *quarter* (1).

¹³⁹ *ECCC Plenary Session Amends Rules to Expedite Trials*, *supra* note 137.

trial.¹⁴⁰I think it is also the best option to manage the trial in such large scale. Even a jury trial is attempted, it would be tremendously difficult to empanel an unbiased jury from Cambodia due to the infamous history of Khmer Rouge regime, the publicity of the case and the trial. Some scholars do recommend trained international jury for international criminal tribunal though.¹⁴¹ But the conceivable difficulties would make it attainable: the already limited fund of the ECCC, the reluctant Cambodian government to lose more autonomy of the trial; even these difficulties are solved, the time needed to train those international jury would put further strain on the ECCC which had already taken measures to expedite the trial, in addition, there is no readily available procedure or experience to follow for the training.

All in all, I think the civil law tradition regarding evidence fits the ECCC better than common law tradition. Granting judge more authority and discretion to deal with evidence makes the whole legal proceeding more manageable and expeditious if justice so requires.

H. Victim participation

Victim participation is an area where practice differs significantly from jurisdiction to jurisdiction, not strictly distinguishable between common law or civil law tradition.¹⁴² The United Nations have laid out principles and guideline recognizing the victims' rights of international crimes, one is UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA Res A/RES/40/34, 29 November 1985 ("UN Victims'

¹⁴⁰ See generally Valerie P. Hans, *Jury Systems around the World*, 4 ANN. REV. L & SOCIAL SCI. 257 (2008). [Electronic copy provided in accompanying USB flash drive at Source 31]

¹⁴¹ See generally David Scheffer, Ashley Cox, *The Constitutionality of the Rome Statute of the International Criminal Court*, 98 J. Crim. L. & Criminology 983 (2007-2008). [Electronic copy provided in accompanying USB flash drive at Source 32]

¹⁴² See generally *Victim Participation in Criminal Procedures: A Report to assist Redress*. Oxford Pro Bono Publico, Apr., 2015. [Electronic copy provided in accompanying USB flash drive at Source 47]

Declaration”), the other is UN Basic Principles and Guidelines on the Rights to Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law, UNGA Res 60/147, 16 December 2004 (“UN Basic Principles on Remedy and Reparation”).

i. Civil party

UN Basic Principles on Justice for Victims of Crime provide that the judicial process should allow “the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.”¹⁴³ While the text does not indicate what an “appropriate stages of proceedings” should be, it is conceivable it varies among nation’s legal practices.

The International Criminal Tribunals for the former Yugoslavia (“ICTY”) and International Criminal Tribunals for Rwanda (“ICTR”), both ad hoc tribunals failed to adequately address victims participation issues. Victims from both tribunals are neither allowed to participate in the proceeding nor entitled to reparations for damages suffered from the crime tried before the tribunals.¹⁴⁴ Realize the limitation of excluding victims from the criminal proceedings, Rome Statute of the International Criminal Court and Rules of Evidence and Procedure of International Criminal Court added expansive victim participatory rights in international criminal proceedings, which was widely applauded by legal scholars and

¹⁴³ *UN Declaration of Basic Principles on Justice for Victims of Crime and Abuse of Power*, A/RES/40/34, principle 6(b). [Electronic copy provided in accompanying USB flash drive at Source 48]

¹⁴⁴ Gerard J. Mekjian, Mathew C. Varughese, *Hearing the Victim's Voice: Analysis of Victims' Advocate Participation in the Trial Proceeding of the International Criminal Court*, 17 Pace Int'l L. Rev. 1, 11 (2005). [Electronic copy provided in accompanying USB flash drive at Source 33]

international community.¹⁴⁵ It was the first time that victims are given the most comprehensive participatory rights in criminal proceeding.¹⁴⁶ Those rights including right to

make opening and closing statements, question a witness, and have their views taken into account in a host of matters, these matters include the initiation of an investigation, decision to hold a hearing on confirmation of charges on the absence of the defendant, whether to amend the charges, whether to conduct joint or separate trials, and how to evaluate an admission of guilt.¹⁴⁷

Domestic jurisdictions allowing victims joined as civil parties often grant them extensive rights in trial proceedings. In France, civil parties have rights to “request expert evidence, to ask questions or make observations during interrogations, cross-examinations, and hearings, to cross-examine the accused, to request transfer of the case to another jurisdiction or disqualification of the Judge.”¹⁴⁸ Criminal Procedure Code of Cambodia, which borrowed and modeled after French criminal procedures, also provides extensive participatory rights for victims, such as request the investigating judge to “interview him/her, interview witnesses, interview the accused person, cross examination or go to the site;”¹⁴⁹ summons of a witness;¹⁵⁰ right to be represented and

¹⁴⁵ See generally Adrian Di Giovanni, *The Prospect of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence?*, 2 J. INT'L L. & INT'L REL. 25, 26(2006) [Electronic copy provided in accompanying USB flash drive at Source 34]; Carsten Stahn et al., *Participation of Victims in Pre-Trial Proceedings of the ICC*, 4 J. INT'L CRIM. JUST. 219 (2006) [Electronic copy provided in accompanying USB flash drive at Source 35].

¹⁴⁶ Mekjian, *Supra* note 144, at 15.

¹⁴⁷ Timothy K. Kuhner, *the Status of Victims in the Enforcement of International Criminal Law*, 6 Or. Rev. Int'l L. 95, 147 (2004). [Electronic copy provided in accompanying USB flash drive at Source 36]

¹⁴⁸ *Victim Participation in Criminal Law Proceedings: Survey of Domestic Practice for Application to International Crimes Prosecutions*. Institute for Security Studies, Sept. 2015, at 67. [Electronic copy provided in accompanying USB flash drive at Source 49]

¹⁴⁹ *Criminal Procedure Code of Cambodia 2007*, art. 134. [Electronic copy provided in accompanying USB flash drive at Source 5]

¹⁵⁰ *Id.* art. 298.

accompanied by a lawyer before court;¹⁵¹right to ask questions and raise objections;¹⁵²right to make written submission attached to the dossier;¹⁵³right to make closing statement;¹⁵⁴right to file challenge against trial judge.¹⁵⁵

As discussed above, the ECCC functions within the existing Cambodian court structure, correspondingly, the Cambodian procedural rules regarding victim participation apply in the ECCC. In fact, the Internal Rules promulgated relevant provisions to make sure the same principles would be recognized and carried out in the ECCC.¹⁵⁶Considering the nature of the crime before the ECCC and concern of opening a floodgate of victim complains, the Internal Rules adopted two mechanisms, one is Victims Support Section; the other is Civil Party Lead Co-Lawyer's Section.¹⁵⁷These rules mirror the rules on common legal representation adopted in the Rules of Procedure and Evidence of the International Criminal Court.¹⁵⁸ It is noted that victim participatory rights in the ECCC is broader than any other international criminal proceedings.¹⁵⁹

¹⁵¹ *Id.* art 313.

¹⁵² *Id.* art. 326 and 327.

¹⁵³ *Id.* art. 334.

¹⁵⁴ *Id.* art.335.

¹⁵⁵ *Id.* art.557.

¹⁵⁶ *Internal Rules*, Rule 23, 23 *bis.*, 23 *ter.*, 23 *quater.* 23 *quinquies.*

¹⁵⁷ *Id.* Rule 12.

¹⁵⁸ *Rules of Procedure and Evidence, the International Criminal Court*, Rule 90. [Electronic copy provided in accompanying USB flash drive at Source 4]

¹⁵⁹ Cedric Ryngaert, *Victim Participation and Bias in the Cambodian Courts: The Pre-Trial Chamber's Decisions in the Case against Nuon Chea*, Hague Justice Journal 68, 69 (2008). [Electronic copy provided in accompanying USB flash drive at Source 37]

Including victims as civil party into the ECCC proceeding is in line with Cambodia domestic criminal practice also trend of international criminal proceedings. It not only meets the expectation of Cambodian people, as it is the procedure currently employed in Cambodia, but also meets the international standard. Furthermore, the mechanisms adopted by the ECCC facilitate the trial proceedings while making the victim participation more manageable. Distinguishable from ICTY and ICTR, both of which were located outside of the countries where the crimes tried took place.¹⁶⁰This arrangement “creates a number of challenges and difficulties, principally involving making the trial accessible and meaningful to those victims in whose name justice is pronounced....it will not be accessible to those who should in the first instance be able to attend.”¹⁶¹

Unfortunately, the broad victim participation would add more financial burden on the ECCC which often faces financial constraints. The ECCC has repeatedly expressed their concerns of the quality of the tribunal work due to financial constraints. In one instance, the ECCC had to reduce the weekly hearing days and only conduct proceedings from Monday to Wednesday.¹⁶² The ECCC had repeated communicated to relevant UN bodies “of the difficulties it is experiencing as a consequence pf not having enough staff to conduct work in an efficient and thorough manner.”¹⁶³Both Victims Support Section and Civil Party Lead Co-Lawyer’s

¹⁶⁰ ICTY was located in The Hague, Netherland, while the crimes took place in the territory of former Yugoslavia; ICTR was located in Arusha, Tanzania, while the crimes tried took place in Rwanda.

¹⁶¹ David Cohen, *Hybrid Justice in East Timor, Sierra Leone, and Cambodia: Lessons Learned and Prospects for the Future*, 43 Stan. J. Int'l L. 1, 5 (2007). [Electronic copy provided in accompanying USB flash drive at Source 38]

¹⁶² *Trial Chamber reduces number of weekly hearings in Case 002/1*, <https://www.eccc.gov.kh/en/articles/trial-chamber-reduces-number-weekly-hearing-days-case-0021> (last visit October 23, 2017). [Electronic copy provided in accompanying USB flash drive at Source 50]

¹⁶³ *Id.*

Section, the two main mechanism managing victim participation need funding to make sure they adequately work for the interests of the victims. But the quality of the work would surely had and continue to suffer due to the constant financial constraints.

ii. Reparation

Reparation for a criminal victims is recognized in both domestic and international criminal proceedings. UN Basic Principles on Remedy and Reparation includes five reparation measures: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.¹⁶⁴

The practice of victim's reparation varies from nation to nation. The way of how compensation is computed varies from jurisdiction to jurisdiction. Ireland and USA have a narrower definition as the compensation relates to actual expenses rather than pain or suffering; while Australia, Denmark, England and Wales, Germany include damages for pain and suffering.¹⁶⁵

The Internal Rules make it clear that the purposes of bring victims before the ECCC are to “support the prosecution” and to “seek collective and moral reparations.”¹⁶⁶ In limiting the reparation to “collective and moral,” the Internal Rules in effect forbid victims to claim individual or material reparations before the ECCC. The Internal Rule provides the cost of the reparations “shall be borne by the convicted person,” or by an external project which has been

¹⁶⁴ *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. UNGA Res 60/147, 16 Dec.2004, para. 18. [Electronic copy provided in accompanying USB flash drive at Source 51]

¹⁶⁵ Victim Participation in Criminal Law Proceedings, *Supra* note 148, at 92.

¹⁶⁶ *Internal Rules*, Rule 23(1).

“designed or identified in cooperation with the Victim Support Section and have secured sufficient external funding.”

In Case 001, the ECCC has granted two of civil parties’ requests, one is their names be included in the final judgment, with specification of their connection with the crimes committed at S-21¹⁶⁷; the other is a request for the compilation and publication of the apologies made by the accused Kaing Guek Eav during the trial.¹⁶⁸ The ECCC rejected all other requests made by civil parties by of either lacking specificity, or beyond the scope of available reparations before the ECCC.¹⁶⁹ The trial chamber’s approach of reparations in Case 001 disappointed many victim groups and has been strongly criticized by international human rights organizations.¹⁷⁰

In order to provide a meaningful reparations, the ECCC should refine their understanding and definition of “reparation” to include a wide range of reparation measures recognized and applied in international courts. Furthermore, the ECCC should recognize all eligible projects under Internal Rules 23 *quinquies* 3(b) and permit innovate projects, for example, voluntary monetary donations, to fulfill the goal of reparations.

IV. A brief review of other international criminal tribunals

There has been three international criminal tribunals which the ECCC could draw lessons from their operation. They are International Military Tribunal at Nuremberg (“IMT at

¹⁶⁷ A security center located on the outskirts of Phnom Penh, Cambodia. In 1976, the Khmer Rouge turned it into a torture, interrogation and execution center, see <http://www.killingfieldsmuseum.com/s21-victims.html>. (last visited on October 23, 2017). [Electronic copy provided in accompanying USB flash drive at Source 59]

¹⁶⁸ Summary of Judgement, Case File 001/18-07-2007/ECCC/TC (KAING Guek Eav), at 12 (26 July 2010). [Electronic copy provided in accompanying USB flash drive at Source 52]

¹⁶⁹ *Id.*

¹⁷⁰ *The ECCC at a Crossroad: Making Victim Participation Meaningful ahead of the Second Trial*, <https://www.fidh.org/en/region/asia/cambodia/eccc/The-ECCC-at-a-Crossroad-Making>. (last visited on October 23, 2017). [Electronic copy provided in accompanying USB flash drive at Source 53]

Nuremberg”), International Criminal Tribunal for Rwanda (“ICTR”), International Criminal Tribunal for the Former Yugoslavia (“ICTY”), Special Courts in Sierra Leone (“SCSL”) and Special Courts in Lebanon (“SCL”)

i. International Military Tribunal at Nuremberg

The first time the international community confronted with the question of civil or common law tradition perhaps was the negotiation and creation of International Military Tribunal in 1945.¹⁷¹ The four-power in the London Conference discussing the proposal of setting up IMT at Nuremberg were the United States of America, Great Britain, France and Soviet Union.

After long debating and compromising, all delegates agreed to adopt the adversarial system, which was later noted was better “suitable for duly protecting the rights of the accused” compared to civil law system advocated by France and Soviet Union.¹⁷² Nevertheless, the IMT opted for the more flexible civil law rules of evidence. In IMT Charter, it declared “[t]he Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value.”¹⁷³ The later International Military Tribunal for the Far East allowed even broader admission of evidence. Its Charter provides “[t]he Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have

¹⁷¹ Fairlie, *Supra* note 19, at 260.

¹⁷² *Id.* at 261.

¹⁷³ *United Nations, Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement")*, 8 Aug. 1945. [Electronic copy provided in accompanying USB flash drive at Source 54]

probative value. All purported admissions or statements of the accused are admissible”¹⁷⁴ The right of the accused to a fair trial, which played a significant role for IMT to adopt common law as its primary operating system has developed tremendously following World War II. The right to a fair trial was recognized as a basic human rights, in both international and regional levels.¹⁷⁵

ii. ICTY, ICTR and SCSL

Like IMT, although widely acknowledged to be adversarial in nature, the ICTY implemented a continental evidentiary approach and active judiciary in its Rules of Procedure and Evidence.¹⁷⁶ The Rules of Procedure and Evidence of ICTY has been of great influence over the later established international criminal tribunals. Pursuant to the ICTR Statute, the ICTR adopted the almost identical Rules of Procedure and Evidence of ICTY as its own rules.¹⁷⁷ In addition, the Statute of the SCSL provides that “[t]he Rule of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable mutatis mutandis to the conduct of the legal proceedings before the Special Court.”¹⁷⁸

The judges of the SCSL Appeals Chamber are required to follow the guidance by the decisions of the Appeals Chamber of both ICTY and ICTR.¹⁷⁹ But there was no binding precedents and the decision from the appeal chambers are not binding upon other trial for both

¹⁷⁴ *Tokyo Charter of International Military Tribunal for the Far East*, art. 13(a). [Electronic copy provided in accompanying USB flash drive at Source 55]

¹⁷⁵ David Harris, *The Right to a Fair Trial as a Human Right*, 16 *International & Comparative Law Quarterly* 352, 352 (1967). [Electronic copy provided in accompanying USB flash drive at Source 39]

¹⁷⁶ Fairlie, *Supra* note 119, at 243.

¹⁷⁷ *ICTR Statute*, art. 14. [Electronic copy provided in accompanying USB flash drive at Source 6]

¹⁷⁸ *SCSL Statute*, art. 14. [Electronic copy provided in accompanying USB flash drive at Source 7]

¹⁷⁹ *Id.* art. 20.3.

ICTY and ICTR.¹⁸⁰ With no doubt, the lack of binding precedent in a predominately common law system would not be fair to defendant.

It has been suggested that ICTY's adoption of adversarial system was due to the fact that the main drafter of the statutes of the ICTY were from common law countries.¹⁸¹ The drafter of the ICTY Rules of Procedure and Evidence were also from common law jurisdictions.¹⁸² The international community's newly recognized human right also played a role in ICTY's adoption of common law tradition. As discussed earlier, after World War II, the right of the accused to a fair trial was included into basic human rights, many critics agreed that the adversarial system was more suitable to offering protection to the right of the accused.¹⁸³ But there are many other mechanism could be used to prevent the official abuse and to protect the right of the accused, including "holding offending officials civilly and criminally liable, subjecting law enforcement activity to prosecutorial oversight and enforcing strict internal discipline"¹⁸⁴ The neutrality associated with the pre-trial investigation of civil law also add protection to the accused's right, for example, the requirement of prosecution seeking not only inculpatory, but also exculpatory evidence and the judicial supervision of prosecution's investigation.¹⁸⁵ Unfortunately, the ICTY

¹⁸⁰ Scott T. Johnson, *On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia*, 10 *International Legal Perspectives* 111, 119 (1998). [Electronic copy provided in accompanying USB flash drive at Source 40]

¹⁸¹ Vladimir Tochilovsky, *The Nature and Evolution of the Rules of procedure and Evidence*, 2. [Electronic copy provided in accompanying USB flash drive at Source 58]

¹⁸² *Id.* at 3.

¹⁸³ *Fairlie, supra* note 119, at 269.

¹⁸⁴ *Id.* at 285.

¹⁸⁵ *Id.* at 291.

selected civil law's evidence rules, but the safeguards in civil law system described above were absent in the ICTY.¹⁸⁶

iii. Special Courts in Lebanon (“SCL”)

Like Cambodia, Lebanon was a colony of France, and the judicial and legal system of Lebanon has adopted French civil law tradition.¹⁸⁷ The SCL Statute provides that the domestic criminal code and criminal procedure be adopted by the Tribunal.¹⁸⁸ Pursuant to the statute, the domination of domestic rules does not exclude international standard, instead, the statute provides “the judges shall be guided...by the Lebanese Code of Criminal Procedure, as well as by other reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial.”¹⁸⁹ It is indicated that the “reference materials” include the rules of procedure and evidence of other international criminal tribunals: ICTY, ICTR, SCSL and ICC.¹⁹⁰ So like ECCC, SCL is also a hybrid tribunal with civil law tradition as its primary operating system.

V. Conclusion

Although the *ad hoc* international criminal tribunals share some common features, the unique context of different tribunals proved that different legal structures work. Except the well-recognized advantages of the legal systems, other factors influence the adoption of civil or

¹⁸⁶ *Id.*

¹⁸⁷ Chibli Mallat, *the Lebanon Legal System*. [Electronic copy provided in accompanying USB flash drive at Source 57]

¹⁸⁸ *Special Tribunal for Lebanon Statute*, art.2, 28. [Electronic copy provided in accompanying USB flash drive at Source 59]

¹⁸⁹ *Id.* art.28.

¹⁹⁰ Matthew Gillett, Matthias Schuster, *The Special Tribunal for Lebanon Swiftly Adopts Its Rules of Procedure and Evidence*, 7 J. Int'l Crim. Just. 885,887 note 12 (2009). [Electronic copy provided in accompanying USB flash drive at Source 41]

common law system, as noted above, include the legal system of the countries where the tribunals are located; countries who participated in negotiating and setting up the tribunals; the relative political power of those participating countries; the development of international human rights.

Some *ad hoc* courts work well with common law system, like ICTY and ICTR and SCSL; but others, like SCL, civil law work wonderfully as well. It is this memorandum's position that the ECCC's adoption of civil law as its main operating system is a better option than common law system in the context of Cambodia. As in other international criminal tribunals, most of the legal proceedings before the ECCC has followed the civil law tradition, but as we can see from the above analysis, the common law elements could be seen along the whole proceedings, or the combination of both legal traditions.

No matter which legal tradition a tribunal follows, it should be aimed to achieve the ultimate objectives of the tribunals. As one scholar rightly noted "in interpreting a provision that reflects a feature of a particular system, it would be incorrect to import that feature wholesale into the Tribunal without first testing whether this would promote the object and purpose of a fair and expeditious trial in the international setting of the Tribunal."¹⁹¹

¹⁹¹ Patrick. L. Robinson, *Ensuring Fair And Expeditious Trials At The International Criminal Tribunal For The Former Yugoslavia*, 11 EJIL 569, 579 (2000). [Electronic copy provided in accompanying USB flash drive at Source 42]