2016

Drawing an Adverse Interest against the Accused for Refusal to Answer Questions

Emily Sherwood

CASE WESTERN RESERVE UNIVERSITY
SCHOOL OF LAW

Memorandum for the Office of the Prosecutor
Extraordinary Chamber in the Courts of Cambodia

ISSUE: DRAWING AN ADVERSE INTEREST AGAINST THE ACCUSED FOR REFUSAL TO ANSWER QUESTIONS

Prepared by Emily Sherwood
J.D. Candidate, 2017
Spring Semester 2016

Table of Contents

BIBLIOGRAPHY

Statutes, Charters, Agreements, Treaties, and Rules

1. Agreement Between the United Nations and the Royal Government of Cambodia Concerning Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, G.A. res. 57/228(B), entered into force April 29, 2005, *available at* http://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf [Electronic copy provided in accompanying USB flash drive at Source 1]

2. Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8), revised on August 3, 2011, *available at* http://www.eccc.gov.kh/sites/default/files/legal-documents/ECCC%20Internal%20Rules%20%28Rev.8%29%20English.pdf [Electronic copy provided in accompanying USB flash drive at Source 2]

3. International Covenant on Civil and Political Rights, *opened for signature December16, 1966*, G.A. res. 2200A (XXI), 999 U.N.T.S. 171, entered into force March 23, 1976, *available at* https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf [Electronic copy provided in accompanying USB flash drive at Source 3]

4. International Criminal Court Rules of Procedure and Evidence, ICC-ASP/1/3, adopted September 9, 2002, entered into force September 9, 2002, *available at* https://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RulesProcedureEvidenceEng.pdf [Electronic copy provided in accompanying USB flash drive at Source 4]

5. International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/REV.1 (1995), entered into force on June 29, 1995, amended on May 13, 2015, *available at* http://unictr.unmict.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf [Electronic copy provided in accompanying USB flash drive at Source 5]

6. International Criminal Tribunal for the former Yugoslavia Rules of Procedure and Evidence, IT/32/Rev. 44, adopted December 10, 2009, *available at* http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev44_en.pdf [Electronic copy provided in accompanying USB flash drive at Source 6]

7. Rome Statute of the International Criminal Court, U.N. Doc A/CONF.183/9, entered into force on July 1, 2002, *available at* https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf [Electronic copy provided in accompanying USB flash drive at Source 7]

8. Special Court for Sierra Leone Rules of Procedure and Evidence, amended on May 28, 2010, *available at* https://www1.umn.edu/humanrts/instree/SCSL/Rules-of-proced-SCSL.pdf [Electronic copy provided in accompanying USB flash drive at Source 8]

9. Special Tribunal for Lebanon Rules of Procedure and Evidence, adopted on March 20, 2009, corrected on April 3, 2014, *available at* https://www.stl-

tsl.org/images/RPE/20140403_STL-BD-2009-01-Rev-6-Corr-1_EN.pdf [Electronic copy provided in accompanying USB flash drive at Source 9]

Other UN Documents

10. Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f32&Lang=en [Electronic copy provided in accompanying USB flash drive at Source 10]

Cases

11. Bykov v. Russia, 2009 Eur. Ct. H.R. [Electronic copy provided in accompanying USB flash drive at Source 11]

12. Gäfgen v. Germany, 2010 Eur. Ct. H.R. [Electronic copy provided in accompanying USB flash drive at Source 12]

13. Jalloh v. Germany, 2006 Eur. Ct. H.R. [Electronic copy provided in accompanying USB flash drive at Source 13]

14. O'Halloran and Francis v. The United Kingdom, 2007 Eur. Ct. H.R. [Electronic copy provided in accompanying USB flash drive at Source 14]

15. Salduz v. Turkey, 2008 Eur. Ct. H.R. [Electronic copy provided in accompanying USB flash drive at Source 15]

Law Review Articles

16. C. R. Williams, *Silence and the Unsworn Statement: An Accused's Alternatives to Giving Sworn Evidence*, 10 Melb. U. L. Rev. 481 (1975-1976) [Electronic copy provided in accompanying USB flash drive at Source 16]

17. E. K. Quansah, *Unsworn Statement from the Dock and the Accused Person in Botswana*, 43 J. Afr. L. 234, 243 (1999) [Electronic copy provided in accompanying USB flash drive at Source 17]

18. Guiliano Turone, *The Denial of the Accused's Right to Make Unsworn Statements in Delalic*, 2 J. Int'l Crim. Just. 455 (2004) [Electronic copy provided in accompanying USB flash drive at Source 18]

19. Marie Montesano, *Current International Efforts in Cambodia: Developing a Court System to Protect Human Rights*, 11 J. L. & Soc. Challenges 71, 108 (2009) [Electronic copy provided in accompanying USB flash drive at Source 19]

20. Mikah K. Story Thompson, *Methinks the Lady Doth Protest Too Little: Reassessing the Probative Value of Silence*, Vol. 47 University of Louisville L. Rev., 21 (2008) [Electronic copy provided in accompanying USB flash drive at Source 20]

21. William S. Laufer, *The Rhetoric of Innocence*, 70 Wash. L. Rev. 329 (1995) [Electronic copy provided in accompanying USB flash drive at Source 21]

22. Wolfgang Schomburg, *The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights*, Vol. 8 Northwestern Journal of International Human Rights, 1 (2009), *available at* http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1091&context=njihr [Electronic copy provided in accompanying USB flash drive at Source 22]

Books

23. 1 Jones on Evidence § 5:11 (7th ed.) [Electronic copy provided in accompanying USB flash drive at Source 23]

24. 3A Wigmore, Evidence § 1042 (Chadboum rev. 1970) [Electronic copy provided in accompanying USB flash drive at Source 24]

Other

25. Dovydas Vitaukas and Grigoriy Dikov, *Protecting the right to a fair trial under the European Convention on Human Rights*, Council of Europe, Strasbourg (2012), *available at* http://www.coe.int/t/dgi/hr-natimplement/Source/documentation/hb12_fairtrial_en.pdf [Electronic copy provided in accompanying USB flash drive at Source 25]

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

a. Scope

The question asked by the Co-Prosecutor's Office of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") was if an adverse inference could be drawn against an accused who fails to answers questions after testifying on his or her own behalf.[*] This memo answers that question by analyzing three distinct issues. First, to draw an adverse inference, the accused's refusal to answer questions must be relevant to the determination of guilt. Second, drawing an adverse inference must not conflict with the accused's right to a presumption of innocence. Finally, drawing an adverse inference must not violate the right against self-incrimination and therefore must not amount to coercion. Additionally, this memo briefly discusses the scope of and limitations associated with drawing an averse inference against the accused.

b. Summary of Conclusions

i. The silence of the accused should be viewed as relevant to the determination of guilt by the court.

The silence of the accused should be viewed by the court as relevant. The ECCC Internal Rules indicate that the court has very inclusive evidence procedures. Most tribunals require that evidence be excluded if the probative value is substantially outweighed by the need to ensure a fair trial. However, unlike other tribunals and international courts, the ECCC does not require this exclusion. Additionally, while most other tribunals require evidence to be relevant, the ECCC requires that irrelevant evidence be excluded. The lack of the fair trial requirement and the phrasing of the relevance requirement in the negative both signal a more inclusive policy toward evidence. Therefore the silence of the accused is likely to be admitted by the court if the

[*] Can an adverse inference be drawn against an accused who fails to answer questions any or particular questions after testifying on his or her own behalf in international criminal law? If so, what does drawing an adverse inference mean?

silence is found to have probative value. The probative value of silence may be limited given that the accused may be silent to assert his or her power, but the probative value is not destroyed and thus should be admitted as evidence of knowledge of wrongdoing or guilt.

ii. The presumption of innocence places the burden of proof on the prosecution, and drawing an adverse inference against the accused does not shift the burden of proof to the accused.

The presumption of innocence, as defined by the International Covenant on Civil and Political Rights ("ICCPR") and the Human Rights Committee, serves as a burden shifting mechanism that shifts the burden of proof to the prosecution. The Human Rights Committee has stated that bringing the accused into the courtroom in shackles or allowing media coverage to influence the outcome of the trial would violate the right to a presumption of innocence and *de facto* shift the burden of proof to the accused. The adverse inference would be taken from the silence of the accused in court after the accused chooses to give sworn testimony. The inference would be drawn from evidence presented in court, and the accused would have control over the presentation of that evidence. Therefore, drawing an adverse conclusion via an inference from the accused's silence after a voluntary testimony does not shift the burden of proof to the accused and drawing an adverse inference would not violate the right to a presumption of innocence.

iii. Neither the right to remain silent nor the right against self-incrimination are infringed by drawing an adverse inference against the accused because drawing such an inference should not be considered coercive.

While witnesses are afforded the right against self-incrimination by the Internal Rules, the accused is given this right through the ICCPR. Because the roles of the accused and the witness are radically different within the inquisitorial system and because the right is derived from different places for the two different roles, the accused's right against self-incrimination is

very different from the witness's right. The accused also has the advantage of being able to give unsworn testimony as well as sworn testimony. Once the accused has chosen to give either type of testimony, they have waived their right to remain silent and any statements made may be used against them. Additionally, the accused should not be allowed to benefit from the higher probative value of sworn testimony if the accused refuses to submit to cross-examination because the probative value of sworn testimony is at least partially derived from the ability of the prosecution to cross-examine the witness.

Instead, the right to remain silent and the right against self-incrimination in relation to the accused must be conceived as primarily existing to prevent coercion. To determine if an adverse inference is coercive, the court must consider the nature and degree of the compulsion to obtain evidence, the weight of the public interest in the investigation and the punishment at issue, and the existence of any relevant safeguards in the procedure and the use to which any material so obtained is put. An adverse inference should not be considered coercive because it is not physically coercive, does not require the accused to give information beyond the scope of their own testimony, and there is a strong public interest in convicting the perpetrators of war crimes. To avoid accusations of coercion and therefore an infringement of the rights of the accused, the accused must simply be warned before taking the stand that a failure to answer the prosecution's questions will lead to an adverse inference being drawn against them.

iv. <u>The accused's failure to testify should considered circumstantial evidence of guilt.</u>

The silence of the accused should be considered circumstantial evidence of the accused's knowledge of wrongdoing or guilt. Silence may indicate knowledge of wrongdoing, may be evidence that prosecution has a strong case, or may be a way for the accused to exert power over

the court. Thus, the scope and meaning of the adverse inference could vary drastically depending on the circumstances surrounding the silence and the judgement of the court. If the prosecution argues that the judges should draw an adverse inference, then they should argue that the facts indicate that the silence is motivated by a knowledge of wrongdoing and the strength of the prosecution's case.

II. FACTUAL BACKGROUND

The ECCC was established through an agreement between the United Nations and the Cambodian government to prosecute the most serious crimes committed under the Democratic Kampuchea regime from 1975 to 1979.[1] The document outlining the agreement references both Cambodian law and international law, blending the two to form ECCC law.[2] The ECCC is therefore unique in that its procedure blends aspects of the adversarial system with the inquisitorial system. The Internal Rules of the ECCC lay out the rights and procedures of the court, guiding the court as it navigates its unique combination of procedures.[3] However, the Internal Rules fail to comprehensively outline the rights of the accused or the procedures in place that should be used to protect them. For example, the ECCC has allowed the accused to make unsworn testimony which is allowed by the inquisitorial system and, at the same time, the accused may also choose not to take the stand at all which is a right derived from the ICCPR.[4] Neither of these rights are addressed by the Internal Rules. Yet, while the rights of the accused to

[1] Agreement Between the United Nations and the Royal Government of Cambodia Concerning Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, G.A. res. 57/228(B), 1 [Electronic copy provided in accompanying USB flash drive at Source 1]
[2] Agreement Between the United Nations and the Royal Government of Cambodia Concerning Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, G.A. res. 57/228(B); Art. 12 at 8 [Electronic copy provided in accompanying USB flash drive at Source 1]
[3] Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8) as revised on August 3, 2011 at 6 [Electronic copy provided in accompanying USB flash drive at Source 2]
[4] International Covenant on Civil and Political Rights, *opened for signature December16, 1966*, G.A. res. 2200A (XXI), 999 U.N.T.S. 171, entered into force March 23, 1976; Art. 14 Sec. 2 at 176 [Electronic copy provided in accompanying USB flash drive at Source 3]

not take the stand and to make unsworn testimony has been well-established, the right of the accused to refuse to answer questions from the prosecution once the accused has taken the stand is not addressed directly by the Internal Rules and has not yet been addressed by the court. Currently, the accused may choose to give sworn testimony and then refuse to submit to cross-examination. The prosecution is therefore unable to impeach the accused as a witness or fully develop a narrative using the testimony of the accused. Without the assistance of an adverse inference against the accused based on their silence, the prosecution will be at a disadvantage every time an accused decides to give sworn testimony and benefit from its advantages.

III. LEGAL DISCUSSION

a. Relevance

The first question raised by the drawing of an adverse inference against an accused is if the accused's refusal to answer the prosecution's questions is relevant to the determination of guilt. The primary rule governing relevance within the ECCC is Rule 87 of the ECCC Internal Rules.[5] The rule appears to favor admissibility, stating that "all evidence is admissible" unless otherwise provided in the rules.[6] The rule also states that evidence will be excluded if it is found to be "irrelevant or repetitious."[7] However, "irrelevant" is not defined anywhere within the Internal Rules but part of the definition seems to include evidence that is found to be "unsuitable to prove the facts that it purports to prove" as stated in Section 3(c).[8] Notably absent from Rule

[5] Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8) as revised on August 3, 2011; Rule 87 at 65 [Electronic copy provided in accompanying USB flash drive at Source 2]
[6] Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8) as revised on August 3, 2011; Rule 87 Sec. 1 at 65 [Electronic copy provided in accompanying USB flash drive at Source 2]
[7] Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8) as revised on August 3, 2011; Rule 87 Sec. 3(a) at 65 [Electronic copy provided in accompanying USB flash drive at Source 2]
[8] Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8) as revised on August 3, 2011; Rule 87 Sec. 3(c) at 65 [Electronic copy provided in accompanying USB flash drive at Source 2]

87, though, is the exclusion of evidence that's probative value is substantially outweighed by the need to ensure a fair trial.

The International Criminal Tribunal for the former Yugoslavia ("ICTY")'s Rules of Procedure and Evidence contains Rule 89 which states that any relevant evidence may be submitted which is deemed to have "probative value."[9] The rule then qualifies this requirement and adds that the Chamber "may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial."[10] There is a nearly identical provision in the Special Tribunal for Lebanon ("STL") Rules of Procedure and Evidence.[11] Rule 149 states that the Chamber may admit evidence "which it deems to have probative value."[12] However, again, evidence may be excluded where the "probative value is substantially outweighed by the need to ensure a fair trial."[13] The Rules of Procedure and Evidence for the International Criminal Tribunal for Rwanda ("ICTR") also give the court the power to exclude evidence if the "probative value is substantially outweighed by the need to ensure a fair trial."[14]

Unlike the ICTY and ICTR evidence rules where the "need to ensure a fair trial" is not clarified, STL Rule 149 specifically states within the rule that using evidence "gathered in

[9] International Criminal Tribunal for the former Yugoslavia Rules of Procedure and Evidence, IT/32/Rev. 44, adopted December 10, 2009; Rule 89 Sec. (C) at 88 [Electronic copy provided in accompanying USB flash drive at Source 5]
[10] International Criminal Tribunal for the former Yugoslavia Rules of Procedure and Evidence, IT/32/Rev. 44, adopted December 10, 2009; Rule 89 Sec. (D) at 88 [Electronic copy provided in accompanying USB flash drive at Source 5]
[11] Special Tribunal for Lebanon Rules of Procedure and Evidence, adopted on March 20, 2009, corrected on April 3, 2014; Rule 149 at 142-43 [Electronic copy provided in accompanying USB flash drive at Source 9]
[12] Special Tribunal for Lebanon Rules of Procedure and Evidence, adopted on March 20, 2009, corrected on April 3, 2014; Rule 149 Sec. (C) at 142 [Electronic copy provided in accompanying USB flash drive at Source 9]
[13] Special Tribunal for Lebanon Rules of Procedure and Evidence, adopted on March 20, 2009, corrected on April 3, 2014; Rule 149 Sec. (D) at 143 [Electronic copy provided in accompanying USB flash drive at Source 9]
[14] International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/REV.1 (1995), entered into force 29 June 1995, amended on May 13, 2015; Rule 70(F) at 70 [Electronic copy provided in accompanying USB flash drive at Source 5]

violation of the rights of…the accused" would qualify as unfair.[15] While the ICTR rule does not define the "need to ensure a fair trial" within Rule 70, a later rule states that evidence shall not be admissible if it was "obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings."[16] The Rules of Procedure and Evidence for the Special Court for Sierra Leone ("SCSL") expansively include all relevant evidence like the ECCC Internal Rules, but the rules also contain a provision which states evidence will not be admitted "if its admission would bring the administration of justice into serious dispute."[17] [18] Only the International Criminal Court mentions that the prejudice to the accused may be taken into account when determining the admissibility of evidence.[19] Instead, the tribunals focus on the need to ensure a fair trial.

The common thread throughout the international tribunal rules of procedure and evidence when considering the admissibility of evidence appears to be the relevance of the evidence and if the admission of certain evidence will affect the integrity of the court. The possible prejudice to the accused plays little to no role in the determination of admissibility in any court other than the ICC which may be due, in part, to the lack of a jury in tribunal proceedings.[20] Because judges serve as the fact finders in tribunal proceedings, the rules may have been drafted under the assumption that professional judges, unlike a lay jury, would be unaffected by extremely prejudicial evidence. Additionally, the ECCC Internal Rules do not contain any "fair trial"

[15] Special Tribunal for Lebanon Rules of Procedure and Evidence, adopted on March 20, 2009, corrected on April 3, 2014; Rule 149 Sec. (D) at 143 [Electronic copy provided in accompanying USB flash drive at Source 9]
[16] International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/REV.1 (1995), entered into force 29 June 1995, amended on May 13, 2015; Rule 95 at 114 [Electronic copy provided in accompanying USB flash drive at Source 5]
[17] Special Court for Sierra Leone Rules of Procedure and Evidence, amended on May 28, 2010; Rule 89 at 45 [Electronic copy provided in accompanying USB flash drive at Source 8]
[18] Special Court for Sierra Leone Rules of Procedure and Evidence, amended on May 28, 2010; Rule 95 at 48 [Electronic copy provided in accompanying USB flash drive at Source 8]
[19] International Criminal Court Rules of Procedure and Evidence, ICC-ASP/1/3, adopted September 9, 2002, entered into force September 9, 2002; Rule 72 Sec. 2 at 23 [Electronic copy provided in accompanying USB flash drive at Source 4]
[20] *Id*. [Electronic copy provided in accompanying USB flash drive at Source 4]

provision like the other tribunals, indicating a very inclusive threshold for the admissibility of evidence.[21] Therefore, the silence of the accused only needs to have minimal probative value and to not affect the integrity of the court to be considered admissible. The question then becomes if the silence of the accused is probative when used to prove the guilt of the accused.

As previously stated, all of the other tribunals require that evidence be "relevant." Yet, the ECCC Internal Rules frame this requirement differently, stating that only "irrelevant" evidence must be excluded.[22] The phrasing of this requirement in the negative serves as another indicator that the ECCC standard for admissibility is extremely inclusive and possibly that the ECCC is more likely to admit evidence than the other tribunals. Wigmore, an evidence scholar, states that, "A failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact."[23] In essence, this means that a failure to deny guilt is equivalent to an assertion of guilt. Yet, an argument can be made that the silence of the accused as no probative value when used as evidence of a knowledge of wrongdoing or guilt.[24] But many arguments against the probative value of silence rely on premises that would not apply to the accused after they had already chosen to take the stand.

Silence may be a natural response to the prosecution's questions if the accused does not want to help the prosecution build their case.[25] For example, the accused may think that they will

[21] Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8) as revised on August 3, 2011 [Electronic copy provided in accompanying USB flash drive at Source 2]
[22] Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8) as revised on August 3, 2011; Rule 87 Sec. 3(a) at 65 [Electronic copy provided in accompanying USB flash drive at Source 2]
[23] 3A Wigmore, Evidence § 1042 (Chadboum rev. 1970), quoted in Baxter, 425 U.S. at 319 n.3. in Mikah K. Story Thompson, *Methinks the Lady Doth Protest Too Little: Reassessing the Probative Value of Silence*, Vol. 47 University of Louisville Law Review 21 (2008), 27 [Electronic copy provided in accompanying USB flash drive at Source 23]
[24] Mikah K. Story Thompson, *Methinks the Lady Doth Protest Too Little: Reassessing the Probative Value of Silence*, Vol. 47 University of Louisville Law Review 21 (2008), 21 [Electronic copy provided in accompanying USB flash drive at Source 20]
[25] Mikah K. Story Thompson, *Methinks the Lady Doth Protest Too Little: Reassessing the Probative Value of Silence*, Vol. 47 University of Louisville Law Review 21 (2008), 36 [Electronic copy provided in accompanying USB flash drive at Source 20]

not be believed.[26] That particular argument against the probative value of silence is easily rebutted because the accused would have already taken the stand provide sworn testimony. The court can reasonably infer that the accused expected to be believed when he or she took the stand. Another argument against the probative value of silence puts forward the theory that silence simply serves as a way for the accused to assert their power and to remain in control of the process. In the context of ECCC proceedings, this theory is more likely to hold weight but, while the accused is likely to desire control, the silence of the accused is equally likely to indicate knowledge of wrongdoing. Thus, the probative value of the silence of the accused may be reduced but not destroyed if the court takes this power dynamic into consideration. Enough probative value would exist to allow the silence of the accused to serve as evidence.

b. **The Presumption of Innocence**

The next question that drawing an adverse inference presents is if drawing an adverse inference from the silence of the accused would violate the presumption of innocence. Rule 21 of the ECCC Internal Rules states that one of the fundamental principles of the ECCC is that the accused "shall be presumed innocent as long as her/her guilt has not been established."[27] The Agreement Between the United Nations and the Royal Government of Cambodia Concerning Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea also articulates this principle, stating that the accused will be presumed innocent in accordance with the ICCPR.[28] The ICCPR lays out the right to the presumption of innocence in

[26] *Id*. at 39 [Electronic copy provided in accompanying USB flash drive at Source 20]
[27] Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8) as revised on August 3, 2011; Rule 21 Sec. 1(d) at 20 [Electronic copy provided in accompanying USB flash drive at Source 2]
[28] Agreement Between the United Nations and the Royal Government of Cambodia Concerning Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, G.A. res. 57/228(B); Art. 13 Sec. 1 at 9 [Electronic copy provided in accompanying USB flash drive at Source 1]

Article 14, stating that "everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."[29]

The ICCPR fails to define this right within Article 14, but the Human Rights Committee has elaborated on what this right actually entails.[30] General Comment No. 32 defines the presumption of innocence as a mechanism that imposes the burden of proof on the prosecution.[31] The comment cautions against prejudging the outcome of the trial and asks courts to avoid presenting the accused in a negative light in court by bringing him or her into the courtroom in shackles or by allowing new media coverage to influence the decision-making process. Every issue mentioned by the Human Rights Committee indicates that the primary concern in relation to the presumption of innocence is that a court official will pre-judge the outcome of the trial based on factors other than evidence presented in court. By pre-judging the outcome, the court officials would be *de facto* shifting the burden of proof onto the accused. The presumption of innocence serves to guard against these types of shifts in the burden of proof.[32] Drawing an adverse inference against the accused based on the accused's silence would not qualify as pre-judgement, and therefore would not shift the burden of proof.

The presumption of innocence may also be thought of as another way of stating that the accused must be found guilty beyond a reasonable doubt.[33] The accused must be seen as having a

[29] International Covenant on Civil and Political Rights, *opened for signature December16, 1966*, G.A. res. 2200A (XXI), 999 U.N.T.S. 171, entered into force March 23, 1976; Art. 14 Sec. 2 at 176 [Electronic copy provided in accompanying USB flash drive at Source 3]
[30] Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), 9 [Electronic copy provided in accompanying USB flash drive at Source 10]
[31] *Id*. [Electronic copy provided in accompanying USB flash drive at Source 10]
[32] William S. Laufer, *The Rhetoric of Innocence*, 70 Wash. L. Rev. 329, 345 (1995) [Electronic copy provided in accompanying USB flash drive at Source 21]
[33] John A. Andrews & Michael Hirst, Criminal Evidence 89 (1986) *quoted in* William S. Laufer, *The Rhetoric of Innocence*, 70 Wash. L. Rev. 329, 341 (1995) [Electronic copy provided in accompanying USB flash drive at Source 21]

"'clean slate'"—with no evidence against him" when the proceedings begin.[34] By drawing an adverse inference from in-court proceedings, the court is not affecting the "clean slate" with which the accused began the proceedings. Inferences are constantly drawn about evidence, and using the silence of the accused as evidence of guilt should be no different. There is no shift in the burden of proof, and therefore the presumption of innocence does not prohibit the court from drawing an adverse inference against the accused when the inference is based in the accused's refusal to answer questions. In fact, unlike being brought into the courtroom in shackles or negative media coverage, the silence of the accused is completely within the control of the accused. When the accused fails to answer questions but has voluntarily testified, knowing the risks, few would argue that the accused could violate his or her own right to a presumption of innocence.

c. **The Right to Remain Silent and the Right against Self Incrimination**

Similar issues arise in regards to the right to remain silent and the right against self-incrimination because the accused has voluntarily taken the stand. However, to be properly analyzed, this issue must be subdivided further into how witnesses are classified and how their rights differ from the accused, the effect of sworn versus unsworn testimony, and if drawing an adverse inference may be considered coercive.

i. Classification of Witnesses

The ECCC Internal Rules very clearly state that witnesses have a right against self-incrimination.[35] The rule states that the witness "may object to making any statement that might tend to incriminate him or her."[36] The question then becomes if the accused may claim this right

[34] 1 Jones on Evidence § 5:11 (7th ed.) [Electronic copy provided in accompanying USB flash drive at Source 21]
[35] Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8) as revised on August 3, 2011; Rule 28 Sec. 1 at 65 [Electronic copy provided in accompanying USB flash drive at Source 2]
[36] *Id.*

when they serve as a witness during their own trial. The same rule that provides witnesses with the right against self-incrimination also gives judges the right to require a witness to answer questions.[37] While a process and tests are outlined that precede a judge requiring a witness to answer, the power to require an answer is nonetheless available.[38] The rule also states that, after consultation with the Co-Prosecutors, the witness must be informed that the information provided will not be used either directly or indirectly against the witness.[39]

Rule 28 serves as proof that the accused cannot be treated like a witness, and therefore the same right against self-incrimination cannot apply. The assurances outlined in Section 3 of Rule 28, that the information given on the stand will not be used against the witness, simply cannot be given to the accused once they take the stand.[40] Even if the accused is allowed to not answer any of the prosecution's questions, the testimony of the accused may still be used against him or her. Rule 28 was drafted under the assumption that the accused would not be afforded the same rights as a witness. In fact, the civil-law tradition views the status of "witness" as being distinct and "radically different" from the status of "accused."[41] Additionally, there are separate rules for interviewing a charged person versus interviewing a witness, and these rules provide different guidelines for the two different kinds of testimony.[42] Outside of the rule detailing the right against self-incrimination for witnesses, the right against self-incrimination for the accused is not mentioned. Instead, the right against self-incrimination must be inferred from its inclusion

[37] *Id.*
[38] Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8) as revised on August 3, 2011; Rule 28 at 65 [Electronic copy provided in accompanying USB flash drive at Source 2]
[39] Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8) as revised on August 3, 2011; Rule 28 Sec. 3(a) at 65 [Electronic copy provided in accompanying USB flash drive at Source 2]
[40] Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8) as revised on August 3, 2011; Rule 28 Sec. 3 at 65 [Electronic copy provided in accompanying USB flash drive at Source 2]
[41] Guiliano Turone, *Denial of the Accused's Right to Make Unsworn Statements in Delalic, The*, 2 J. Int'l Crim. Just. 455 (2004), 457 [Electronic copy provided in accompanying USB flash drive at Source 18]
[42] Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8) as revised on August 3, 2011; at 47 [Electronic copy provided in accompanying USB flash drive at Source 2]

in the ICCPR which states that the accused shall be entitled "[n]ot to be compelled to testify against himself or to confess guilt."[43] The Human Rights Committee explains that this right should be framed in terms of coercion, though, and not as protection for the accused against his or her in court statements being used against them.[44]

ii. Sworn versus Unsworn Testimony

The right against self-incrimination and the right to remain silent may also be executed significantly differently in the ECCC in comparison to other tribunals because the accused is allowed to give unsworn testimony.[45] The ECCC utilizes an inquisitorial system that allows this kind of testimony while other tribunals are adversarial which means that the accused may only testify if that testimony is sworn and the accused submits to cross-examination.[46] The ICTY and the ICTR utilize the adversarial model, and their rules do not allow for unsworn testimony.[47] The accused may either testify and submit to cross-examination or remain silent.[48] The inquisitorial system allows the accused to make statements on any relevant subject at any time, and there is no penalty for false statements, although these statements may be used as evidence either for or against the accused.[49] The International Criminal Court also allows this kind of unsworn testimony, although the rules fail to clarify how much probative value may be assigned to these

[43] International Covenant on Civil and Political Rights, *opened for signature December16, 1966*, G.A. res. 2200A (XXI), 999 U.N.T.S. 171, entered into force March 23, 1976; Art. 14 Sec. 3(g) at 177 [Electronic copy provided in accompanying USB flash drive at Source 3]
[44] Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), 13 [Electronic copy provided in accompanying USB flash drive at Source 10]
[45] Wolfgang Schomburg, *The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights*, Vol. 8 Northwestern Journal of International Human Rights, 1 (2009), 23 [Electronic copy provided in accompanying USB flash drive at Source 22]
[46] Guiliano Turone, *Denial of the Accused's Right to Make Unsworn Statements in Delalic, The*, 2 J. Int'l Crim. Just. 455 (2004), 455[Electronic copy provided in accompanying USB flash drive at Source 18]
[47] Wolfgang Schomburg, *The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights*, Vol. 8 Northwestern Journal of International Human Rights, 1 (2009), 17 [Electronic copy provided in accompanying USB flash drive at Source 22]
[48] *Id*. [Electronic copy provided in accompanying USB flash drive at Source 22]
[49] Guiliano Turone, *Denial of the Accused's Right to Make Unsworn Statements in Delalic, The*, 2 J. Int'l Crim. Just. 455 (2004), 455 [Electronic copy provided in accompanying USB flash drive at Source 18]

statements.[50] The accused may therefore still chose to testify under oath to take advantage of the added credibility and the consequent added probative value.

An argument may be made that, because the accused may make unsworn statements without being subject to cross-examination, he or she should also be allowed to make sworn statements without being subject to cross-examination and without suffering consequences for refusing cross-examination. This arguments fails to take into account the relative advantages of sworn versus unsworn testimony. Unsworn testimony allows the accused to avoid cross-examination and to attack the character of witnesses without repercussion.[51] However, unsworn statements may be thought of as "persuasive rather than evidential."[52] While the trier of fact is entitled to assign the weight to the statements that they see fit, the unsworn testimony will obviously hold less weight when weighed against sworn testimony because there is no mechanism in place to ensure the truth of the statements such as cross-examination or the threat of perjury.[53] Therefore, sworn testimony may be assigned more probative value, providing an incentive for the accused to give sworn rather than unsworn testimony. The accused should not be allowed to have access to the advantages of sworn testimony without subjecting themselves to cross-examination because to do so would be to have the advantages of both sworn and unsworn testimony. The probative value of sworn testimony partially relies on the ability of the prosecution to question the accused and draw out inconsistencies in the testimony. If the prosecution is not allowed to cross-examine the witness, then the probative value of the

[50] Rome Statute of the International Criminal Court, U.N. Doc A/CONF.183/9, entered into force on July 1, 2002; Art. 67 Sec. 1(g) at 46 [Electronic copy provided in accompanying USB flash drive at Source 7]
[51] C. R. Williams, *Silence and the Unsworn Statement: An Accused's Alternatives to Giving Sworn Evidence*, 10 Melb. U. L. Rev. 481 (1975-1976), 495 [Electronic copy provided in accompanying USB flash drive at Source 16]
[52] E. K. Quansah, *Unsworn Statement from the Dock and the Accused Person in Botswana*, 43 J. Afr. L. 234, 243 (1999), 236 [Electronic copy provided in accompanying USB flash drive at Source 17]
[53] *Id*. at 235 [Electronic copy provided in accompanying USB flash drive at Source 17]

accused's sworn testimony should be appropriately decreased through the use of an adverse inference.

The right to remain silent and to not have that silence used against the accused is also at issue. While a judge may not traditionally comment on the silence of the accused, this right to silence only applies when the accused refuses to give either sworn or unsworn testimony.[54] In both the inquisitorial and the adversarial systems, the accused waives their right to remain silent as soon as they make any statements, and these statements, sworn or unsworn, may be used against them.[55] The accused has not just chosen to be silent, but has made an active choice to refuse to answer questions which may be thought of as a version of testimony. Some Australian provinces have used the silence of the accused as evidence of guilt where a *prima facie* case against them already exists.[56] In *R. v. Corrie and Watson*, an Australian case, the judge stated that the jury was allowed to draw an adverse inference where an explanation could have been given and a *prima facie* case had been established. [57] Several Australian provinces and England have also allowed the judge to comment when an accused makes an unsworn statement but fails to make a sworn statement.[58] Making a sworn statement, but refusing to submit to cross-examination falls somewhere between an unsworn and sworn statement. The testimony of the accused under oath is more reliable than unsworn testimony, but the refusal to answer the prosecution's questions deprives the statement of some of its probative value. Accordingly, the

[54] C. R. Williams, *Silence and the Unsworn Statement: An Accused's Alternatives to Giving Sworn Evidence*, 10 Melb. U. L. Rev. 481 (1975-1976), 482 [Electronic copy provided in accompanying USB flash drive at Source 16]
[55] Wolfgang Schomburg, *The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights*, Vol. 8 Northwestern Journal of International Human Rights, 1 (2009), 24 [Electronic copy provided in accompanying USB flash drive at Source 22]
[56] C. R. Williams, *Silence and the Unsworn Statement: An Accused's Alternatives to Giving Sworn Evidence*, 10 Melb. U. L. Rev. 481 (1975-1976), 484 [Electronic copy provided in accompanying USB flash drive at Source 16]
[57] *Id*. at 485 [Electronic copy provided in accompanying USB flash drive at Source 16]
[58] *Id*. at 504 [Electronic copy provided in accompanying USB flash drive at Source 16]

judge should be allowed to take note of this silence as they would with the failure to make sworn testimony.

iii. Coercion

As previously stated, the Human Rights Committee has indicated that the ICCPR right against self-incrimination should be "understood in terms of the absence of any direct or indirect physical or undue psychological pressure."[59] The primary goal of instituting the right to remain silent and the right against self-incrimination within the Cambodian legal system was to prevent forced confession which had previously been common practice.[60] The accused must testify of their own free well. If the accused knows that an adverse inference will be drawn against them, he or she may be induced into answering the prosecution's questions and giving up their silence. Therefore, the question then becomes if drawing this adverse inference against the accused if they refuse to submit themselves to cross-examination can be considered coercive. The European Court of Human Rights has developed a three factor test to determine if testimony has been coerced. The factors are the nature and degree of the compulsion to obtain evidence, the weight of the public interest in the investigation and the punishment at issue, and the existence of any relevant safeguards in the procedure and the use to which any material so obtained is put.[61] [62] The European Court of Human Rights clearly indicated in their opinion in Jalloh, where the court held that forcing the accused to regurgitate a bag of cocaine violated his right against self-

[59] Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), 13 [Electronic copy provided in accompanying USB flash drive at Source 10]
[60] Marie Montesano, *Current International Efforts in Cambodia: Developing a Court System to Protect Human Rights*, 11 J. L. & Soc. Challenges 71, 108 (2009), 106 [Electronic copy provided in accompanying USB flash drive at Source 19]
[61] Dovydas Vitaukas and Grigoriy Dikov, *Protecting the right to a fair trial under the European Convention on Human Rights*, Council of Europe, Strasbourg (2012), 62 [Electronic copy provided in accompanying USB flash drive at Source 25]
[62] Jalloh v. Germany, 2006 Eur. Ct. H.R., 27 [Electronic copy provided in accompanying USB flash drive at Source 13]

incrimination, that the free will and bodily integrity of the accused is the primary concern when judging if a measure used to obtain testimony is coercive.[63]

1. *Nature and Degree of the Compulsion to Obtain Evidence*

The nature and the degree of the compulsion to obtain evidence appears to refer to the methodology used to obtain evidence from the accused either in the form of testimony or in the form of physical evidence. In Jalloh, the case in which the court created the test, the defendant was forced to taken an emetic which induced vomiting and produced the drugs that the accused had attempted to hide. [64] This method for obtaining evidence was found to be sufficiently coercive to violate the right against self-incrimination.[65] Jalloh dealt more with the way the right against self-incrimination has traditionally been viewed: a way to prevent the accused from being tortured or physically forced into a confession of guilt. However, drawing an adverse inference against the accused involves procedural rather than physical coercion. Salduz involved a more procedural right because the defendant was questioned without a lawyer present and the court found that the right to a lawyer was essential to protect against coercion.[66] The court therefore demonstrated that procedural coercion could be just as much of a violation as physical coercion and thus that an adverse inference could be coercive even though drawing an inference does not involve any physical violence. In O'Halloran, the defendants were told that, as the registered owners of their vehicles, they must provide the names and addresses of the drivers of their vehicles at the time of a traffic violation.[67] The penalty for noncompliance was a large fee and

[63] *Id*. [Electronic copy provided in accompanying USB flash drive at Source 13]
[64] *Id*. at 28 [Electronic copy provided in accompanying USB flash drive at Source 13]
[65] *Id*. [Electronic copy provided in accompanying USB flash drive at Source 13]
[66] Salduz v. Turkey, 2008 Eur. Ct. H.R., 13 [Electronic copy provided in accompanying USB flash drive at Source 15]
[67] O'Halloran and Francis v. The United Kingdom, 2007 Eur. Ct. H.R., 17 [Electronic copy provided in accompanying USB flash drive at Source 14]

possible disqualification from driving.[68] The court found that this did not amount to coercion in part because the information requested was limited and the penalty was "moderate."[69] The procedural coercion of drawing an adverse inference is more like the penalty in O'Halloran than the lack of a lawyer in Salduz. Like the penalty for silence in O'Halloran, the information being "coerced" would be limited and the penalty for the accused's silence would not be severe. In fact, the scope of the prosecution's questions would be limited by the accused's testimony meaning that the accused would have control over the scope of the information requested. Additionally, the only penalty for the silence of the accused would be the adverse inference, and an adverse inference cannot be considered a severe punishment when its probative value may be considered minimal depending on the surrounding circumstances.

2. *Weight of the Public Interest*

The weight of the public interest involved is also taken into consideration. In Jalloh, the state's interest was prosecuting a minor drug offense, and this interest was outweighed by the public interest in providing a fair trial.[70] Gäfgen presents a more compelling case because the primary issue was if the police were allowed to threaten a suspect with torture to locate a child.[71] The court held that the use of the threat of torture did not violate the defendant's right against self-incrimination.[72] The public interest was framed by the court as the state's interest in "having the murderer of an abducted child convicted" and this interest was assigned "serious weight."[73] The way the interest was framed by the court is notable because the interest was not in saving the child, but in convicting the murderer. In cases before then ECCC, the public interest may be

[68] *Id*. at 18 [Electronic copy provided in accompanying USB flash drive at Source 14]
[69] *Id*. at 18-19 [Electronic copy provided in accompanying USB flash drive at Source 14]
[70] Jalloh v. Germany, 2006 Eur. Ct. H.R., 31 [Electronic copy provided in accompanying USB flash drive at Source 13]
[71] Gäfgen v. Germany, 2010 Eur. Ct. H.R., 28 [Electronic copy provided in accompanying USB flash drive at Source 12]
[72] *Id*. at 53 [Electronic copy provided in accompanying USB flash drive at Source 12]
[73] *Id*. at 44 [Electronic copy provided in accompanying USB flash drive at Source 12]

framed as an interest in convicting the perpetrators of war crimes which are widely considered to be more egregious than murder. The weight of the public interest alone may be sufficient for the court to find that drawing an adverse inference, a procedural safeguard and not a form of physical intimidation, is coercive.

3. *Existence of Any Relevant Safeguards and the Use to Which Any Material so Obtained is Put*

The court also looks at the procedural safeguards put in place to protect the legal rights of the defendant.[74] In Jalloh, the court determined that German domestic law required that medical procedures be carried out by a physician in a hospital and that such procedures should only be carried out if there was no risk to the defendant's health.[75] The court determined that these safeguards were insufficient to defend against a bodily intrusion, and, because the defendant could only communicate in broken English, there was a lack of proper examination to determine the defendant's ability to withstand the procedure.[76] Bykov focused more on the procedural safeguards in place because the defendant protested the use of taped materials where defendant was recorded hiring a man to murder a former business associate.[77] There were very few procedural safeguards in place to protect the defendant in Bykov, and the use of the technique was "open to arbitrariness and was inconsistent with the requirement of lawfulness."[78]

The use of an adverse inference, while there are not formal regulations regarding its use, would not be subject to this criticism. The use of the adverse inference would not be arbitrary; it could only be used once the accused voluntarily chose to give sworn testimony and refused to

[74] Jalloh v. Germany, 2006 Eur. Ct. H.R., 27 [Electronic copy provided in accompanying USB flash drive at Source 13]
[75] *Id*. at 31 [Electronic copy provided in accompanying USB flash drive at Source 13]
[76] *Id*. [Electronic copy provided in accompanying USB flash drive at Source 13]
[77] Bykov v. Russia, 2009 Eur. Ct. H.R., 3 [Electronic copy provided in accompanying USB flash drive at Source 11]
[78] *Id*. at 19 [Electronic copy provided in accompanying USB flash drive at Source 11]

submit to cross-examination. If the court was concerned that the adverse inference lacked procedural safeguards, the court could make a policy of informing the accused that their decision to testify and not answer questions would be subject to the adverse inference process. This pre-testimony notification would allow for the informed consent of the accused before the inference is drawn. As for the use to which the material will be put, the adverse inference would not be key evidence and would only serve to tip the scales slightly. The use of an adverse inference cannot be considered coercive, and therefore would not infringe on the right against self-incrimination.

d. **Meaning and Scope of an Adverse Inference**

The meaning and scope of an adverse inference will largely be up to the court and how the judges choose to interpret the silence of the accused. The silence of the accused should be treated by the court as circumstantial evidence of the accused's knowledge of wrongdoing. The degree of probative value assigned to the silence will depend on a number of factors. The judges must determine the accused's probable motivation for remaining silent. First, the strength of the prosecution's case should be taken into account. [79]Theoretically, an accused that perceives the prosecution as having a strong case against him or her may be less likely to submit themselves to cross-examination so as to deprive the prosecution of the opportunity to further build their case.[80] [81] As previously stated, the judge should also consider if the accused is simply asserting his or her power. Phycologists have noted that silence may be used as a tool to combat "unwelcome probing."[82] In that case, the judge may still draw an adverse inference, but the probative value of such an inference will be reduced. An accused who feels they are innocent may also use silence

[79] C. R. Williams, Silence and the Unsworn Statement: An Accused's Alternatives to Giving Sworn Evidence, 10 Melb. U. L. Rev. 481 (1975-1976), 486 [Electronic copy provided in accompanying USB flash drive at Source 16]
[80] *Id*. [Electronic copy provided in accompanying USB flash drive at Source 16]
[81] Mikah K. Story Thompson, Methinks the Lady Doth Protest Too Little: Reassessing the Probative Value of Silence, Vol. 47 University of Louisville L. Rev., 21 (2008), 36 [Electronic copy provided in accompanying USB flash drive at Source 20]
[82] *Id*. at 45 [Electronic copy provided in accompanying USB flash drive at Source 20]

to express anger with the proceedings, although guilty parties have also been shown to feign anger.[83] The scope and meaning of the adverse inference could vary drastically depending on the circumstances surrounding the silence and the judgement of the court. If the prosecution argues that the judges should draw an adverse inference from the silence of the accused, then they must argue that the facts indicate that the silence is motivated by a knowledge of wrongdoing and the strength of the prosecution's case.

IV. CONCLUSION

The ECCC should allow for an adverse inference to be drawn against the accused when the accused gives sworn testimony but refuses to submit to cross-examination. The silence of the accused passes the basic threshold of relevance because this evidence of guilt may be assigned at least some probative value, although the degree of probative value is an extremely fact dependent determination. Additionally, drawing an adverse inference would not violate the rights of the accused or affect the integrity of the court. The presumption of innocence serves as a burden shifting mechanism, and drawing an adverse inference would not *de facto* shift the burden of proof to the accused. Instead, the silence of the accused would serve as evidence, and the adverse inference would be drawn from that evidence as it would be with any other circumstantial evidence. The judges should be allowed to draw adverse inferences from the accused's refusal to answer questions. In fact, because professional judges serve as the finders of fact within the ECCC system, an adverse inference is extremely unlikely to be coercive. Unlike a lay jury, professional judges are more able to draw an inference and give that inference the appropriate weight based on the surrounding circumstances. The right to remain silent is also not violated because the accused has voluntarily chosen to give sworn testimony. Once the accused has chosen to speak, the right to remain silent is waived because the accused has elected to not

[83] *Id*. at 46 [Electronic copy provided in accompanying USB flash drive at Source 20]

remain silent. The right against self-incrimination is also preserved primarily because drawing an adverse inference should not be viewed by the court as coercive if the ECCC chooses to apply the test used by the European Court of Human Rights.[84] If the accused is notified that an adverse inference will be drawn if the accused refuses to submit to cross-examination, then the decision to not answer the prosecution's question is an active choice to risk an adverse inference being drawn. In essence, the accused is making a voluntary choice to testify and benefit from the credibility that accompanies a sworn statement. The accused must accept the disadvantages of sworn testimony along with the advantages, or the distinction between sworn and unsworn testimony will be lost.

[84] Jalloh v. Germany, 2006 Eur. Ct. H.R., 27 [Electronic copy provided in accompanying USB flash drive at Source 13]