

# Annotated Cambodian Code of Criminal Procedure

Annotations to ECCC and  
Select International Jurisprudence

*Second edition, December 2015*



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Select International Jurisprudence

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*Annotated Cambodian Code of Criminal Procedure:  
Annotations to ECCC and Select International Jurisprudence*  
Second edition published in December 2015

# Table of Contents

<b>Table of Contents</b> .....	<b>i</b>
<b>Foreword</b> .....	<b>iv</b>
<b>Introduction</b> .....	<b>vi</b>
<b>Pre-Trial and General Rules</b> .....	<b>1</b>
Article 2. Criminal and Civil Actions .....	3
Article 7. Extinction of Criminal Actions .....	5
Article 12. Res Judicata .....	7
Article 13. Civil Action and Injury .....	10
Article 16. Civil Action of Victim's Successor .....	13
Article 44. Opening of Judicial Investigation .....	14
Article 93. Interrogation Records .....	16
Article 96. Police Custody.....	18
Article 121. Confidentiality of Judicial Investigation .....	22
Article 124. Introductory Submissions .....	24
Article 125. Scope of Complaint.....	26
Article 126. Placing Suspect under Judicial Investigation .....	28
Article 127. Investigation of Inculpatory and Exculpatory Evidence.....	29
Article 129. Roles of Court Clerks .....	31
Article 132. Investigative Actions Requested by Royal Prosecutor.....	33
Article 133. Investigative Actions Requested by Charged Persons.....	36
Article 134. Investigative Actions Requested by Civil Party.....	39
Article 137. Civil Party Application by Way of Intervention .....	42
Article 138. Complaint with Application to become Civil Party.....	45
Article 139. Delivery of Complaints to Prosecutor .....	47
Article 143. Notification of Placement under Judicial Investigation .....	49
Article 145. Presence of Lawyer during Interrogation.....	52
Article 150. Interview of Civil Party .....	55
Article 154. Oath of Witnesses .....	56
Article 156. Witness without Swearing.....	58
Article 157. Impossibility to Question Witness .....	59
Article 162. Necessity of Expert Reports .....	61
Article 165. Order to Appoint Expert(s).....	63
Article 169. Appointment of Multiple Experts.....	65
Article 170. Notification of Conclusions of Expert Reports.....	67
Article 197. Arrest Warrant and Opinion of Prosecutor .....	70
Article 198. Information Stated in Arrest Warrant .....	71
Article 203. Principle of Provisional Detention .....	73
Article 205. Reasons for Provisional Detention.....	78

Article 206. Statement of Charged Persons and Reasons for Provisional Detention .....	84
Article 210. Duration of Provisional Detention in Cases of Crimes against Humanity .....	88
Article 211. Extension of Provisional Detention.....	90
Article 217. Release upon Request of Charged Person .....	93
Article 223. Obligations under Judicial Supervision.....	96
Article 246. Final Submission of Royal Prosecutor .....	98
Article 247. Closing Order.....	100
Article 249. Provisions of Closing Orders in relation to Provisional Detention and Judicial Supervision .....	103
Article 250. Forwarding Case File for Trial .....	106
Article 252. Mandatory Rules.....	107
Article 253. Complaint to Investigation Chamber.....	108
Article 257. Registry of Appeals and Requests .....	110
Article 259. Examination of Case Files and Briefs.....	111
Article 260. Conduct of Hearings.....	113
Article 261. Examination of Regularity of Procedure .....	116
Article 266. Appeal against Orders of Investigating Judge by General Prosecutor attached to Court of Appeal and Royal Prosecutor.....	118
Article 267. Appeal against Orders of Investigating Judge by Charged Person .....	120
Article 268. Appeal against Orders of Investigating Judge by Civil Party ..	124
Article 271. Competence of Investigation Chamber .....	128
Article 278. Decision on Provisional Detention.....	129
Article 279. Inadmissibility of Requests for Annulment .....	131
Article 280. Effect of Annulment .....	133
<b>Trial.....</b>	<b>135</b>
Article 289. Jurisdiction of Court of First Instance .....	136
Article 291. Methods of Seizure .....	137
Article 297. Summons of Witnesses .....	140
Article 299. Joinder of Cases .....	141
Article 300. Appearance of Accused.....	142
Article 305. Appearance of Accused upon Indictment .....	143
Article 306. Automatic Release of Detained Accused .....	148
Article 307. Application for Release of Detained Accused.....	151
Article 311. Joining of Civil Party during Trial .....	154
Article 313. Assistance and Representation of Civil Party .....	157
Article 315. Appearance of Witnesses.....	158
Article 316. Public Nature of Trial Hearing and Confidentiality .....	160
Article 318. Establishment of Order in Hearing .....	163
Article 321. Evidence Evaluation by Court .....	167
Article 322. Rules Concerning Parties Present at Hearing.....	173
Article 325. Interrogation of Accused .....	175
Article 326. Hearing of Parties.....	178
Article 330. Assistance and Swearing of Interpreter/Translator .....	182
Article 332. Presentation of Exhibits .....	184
Article 339. Additional Investigation Ordered by Court.....	185

Article 342. Competence of Court with Respect to Objection.....	187
Article 350. Declaration of Guilt .....	188
Article 355. Judgment on Civil Remedy.....	190
<b>Appeal.....</b>	<b>192</b>
Article 375. Persons Entitled to Make Appeals.....	193
Article 399. Effect of Appeal by Accused Only.....	196
Article 401. Redetermination of Legal Qualification of Facts by Court of Appeal .....	198
Article 429. Extension of Time Limit for Writing Briefs.....	199
Article 436. Decisions on Questions of Law.....	200
Article 453. Reasons for Judgment.....	202
<b>Special Proceedings .....</b>	<b>204</b>
Article 503. Deduction of Duration of Provisional Detention.....	205
Article 508. Presentation of Detainee Upon Request .....	207
Article 556. Grounds for Challenging Judge .....	208
Article 557. Application for Disqualification.....	212
Article 558. Recipient of Application for Disqualification of Judge.....	214
Article 561. Examination of Application for Disqualification of Judge .....	215
Article 562. Decision on Application for Disqualification of Judge .....	217
Article 563. Activities Performed Before Notification of Challenge .....	219
<b>Table of Cases .....</b>	<b>220</b>
Extraordinary Chambers in the Courts of Cambodia .....	220
United Nations Human Rights Committee .....	234
European Court of Human Rights.....	239
French Court of Cassation.....	245
<b>Comparative Table: Code of Criminal Procedure and ECCC Internal Rules .....</b>	<b>253</b>
<b>Acknowledgements .....</b>	<b>275</b>

# Foreword

It is a distinct pleasure to provide a foreword for the second edition of the *Annotated Code of Criminal Procedure* (***Annotated Code***). The *Annotated Code* was the first publication in Cambodia's recent history to annotate a Cambodian codewith relevant national and international jurisprudence. While it might have been a groundbreaking resource for Cambodia, at the international level, the *Annotated Code* reflects a long-established tradition in both common and civil law traditions to produce annotated codes. Indeed, all over the world, annotated codes are considered to be indispensable tools, not only for legal practitioners but for anyone interested in knowing how the law is applied in practice.

Article 31 of the Cambodian Constitution directly incorporates all of the international human rights treaties to which Cambodia is a party into the national law. The *Annotated Code* is a concrete contribution towards the application of that article. Drawing on examples of jurisprudence from the Extraordinary Chambers in the Courts of Cambodia, the United Nations, Europe and France, it offers detailed guidance on how articles in the Code of Criminal Procedure can be interpreted in a way that is compliant with human rights standards. Because of the importance of the *Annotated Code* for legal practitioners, the Office of the High Commissioner for Human Rights in Cambodia decided to update it to ensure that the most recent jurisprudence from these bodies are reflected in the text.

I have no doubt that the second edition of the *Annotated Code* will continue encouraging a shift in Cambodian legal practice through enhanced legal reasoning, increased references to jurisprudence, and the future production of similar resources for other fields of law. I am certain that over the years, tools such as this will immeasurably improve the delivery of justice in Cambodia.

On behalf of the Office, I would like to acknowledge the generous support of the British Embassy in Phnom Penh, the United States Agency for International Development, as well as the East-West Management Institute, without which the *Annotated Code* would not have been possible. I would also like to acknowledge the support of the Raoul Wallenberg Institute for Human Rights and the Swiss Agency for Development and Cooperation (SDC), for making the publication of the second edition of the *Annotated Code* possible. Finally, I would like to

express appreciation to the countless organisations and individuals who worked tirelessly over the past several years to transform the idea of an Annotated Code into reality.

I urge Cambodian legal practitioners to use the *Annotated Code*, to discuss it and debate it, and to incorporate the useful concepts it offers into your legal arguments. You will find that in so doing, you will be challenging your counterparts to do the same. Over time, you will be helping every part of the judicial system to better understand and apply the Code of Criminal Procedure, which is so fundamental for the protection of human rights.



**Wan-Hea Lee**  
Representative

Office of the High Commissioner for Human Rights in Cambodia



# Introduction

In both civil law and common law systems, it is very common to find publications that annotate codes or statutes with jurisprudence from the courts and tribunals that apply them. Since codes and statutes are drafted at a high level of generality, jurisprudence can be a useful reference when applying them, as it can offer insight into how the codes and statutes can be interpreted and applied in different situations.

This *Annotated Cambodian Code of Criminal Procedure* follows in the tradition of annotated codes around the world. It annotates articles of the recently enacted Code of Criminal Procedure of the Kingdom of Cambodia (the **Code**) with relevant jurisprudence, including, in particular, that of the Extraordinary Chambers in the Courts of Cambodia (ECCC). ECCC jurisprudence is relevant because the ECCC Internal Rules were based substantially on the Code, and as such, the decisions of the ECCC in relation to questions of procedure are often very relevant to Code articles.

This *Annotated Code* takes into account all relevant decisions from the Extraordinary Chambers in the Courts of Cambodia in Case 1 (against Kaing Guek Eav *alias* Duch) up to and including the appeal judgment, as well as all relevant pre-trial and trial decisions in Case 2 (against Nuon Chea and Khieu Samphan, and previously against Ieng Sary, Ieng Thirith and Duch as well) as were publicly available at 30 May, 2015. Based on this jurisprudence, this *Annotated Code* has been able to produce annotations of 93 Code articles, and particularly several of the major articles at the pre-trial and trial stages.

Each article annotation begins with the text of the Code article for easy reference. It then sets out separate paragraphs each containing a distinct, relevant principle or finding contained in ECCC jurisprudence. Each of these paragraphs begins with an overview phrase, in bold, and is followed by a phrase explaining the relevant principle or finding. Immediately following the annotation paragraph is a

**Necessity to balance detention against liberty:** Courts must balance reasons for detention against right to personal liberty. Presumption of liberty requires detention to have basis in judicial decision, issued in accordance with statutory procedure and conditions.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, paras. 47 and 56.

short citation that indicates the source decision or decisions for the annotation. (See the box for an example annotation.) In addition, the annotations section is followed by a short paragraph identifying the corresponding rule or rules in the ECCC Internal Rules and describing any significant differences between those rules and the Code article.

Article 31 of the Constitution of Cambodia guarantees recognition and respect for human rights treaties to which Cambodia is a party. One of these treaties — the *International Covenant on Civil and Political Rights (ICCPR)* — sets out several principles that are widely considered to be cornerstones of criminal procedure. Therefore, to provide further guidance into the way in which Code articles may be interpreted and applied, the *Annotated Code* also includes supplementary annotations to the jurisprudence of the United Nations Human Rights Committee, which is the body monitoring the implementation of the ICCPR and whose decisions therefore frequently interpret and apply the ICCPR provisions relating to criminal procedure. In addition, the *Annotated Guide* includes annotations of the European Court of Human Rights, since the criminal procedure provisions in its governing *Convention for the Protection of Human Rights and Fundamental Freedoms* are largely identical to those under the ICCPR and the European Court of Human Rights has a particularly sophisticated and established body of jurisprudence.

In addition, the *Annotated Code* includes select annotations of the jurisprudence of the French Court of Cassation, the highest court in France. This is because the Code itself was based on the French Code of Criminal Procedure and as such, the interpretation and application of the French code by the Court of Cassation may offer additional insight into the way in which the Code may be interpreted and applied in Cambodia. It may also offer insight into the way in which the provisions of the Code are applied in more ordinary situations, which may be a useful perspective since the jurisprudence of the ECCC was developed in a very particular context.

The *Annotated Code* annotates the United Nations Human Rights Committee, European Court of Human Rights and French Court of Cassation jurisprudence up to the end of 2011. However, it should be noted that the annotations for this jurisprudence are not comprehensive. The *Annotated Code* has instead included only a selection of the jurisprudence considered to be most relevant to the Code articles and most illustrative of the way in which those Code articles could be interpreted and applied.

Finally, it should be noted that all of the cases cited in the *Annotated Code* are set out with full details in the Table of Cases at the back of the *Annotated Code*. In addition, a full copy of each decision can be found on the companion website

(available at <http://cambodia.ohchr.org>) with the exception of French Court of Cassation cases from prior to 1962 as these cases cannot be obtained online and are only contained in limited library collections.

# Pre-Trial and General Rules

This section contains annotations of the following articles in the *Cambodian Code of Criminal Procedure* (the Code):

- Article 2. Criminal and Civil Actions
- Article 7. Extinction of Criminal Actions
- Article 12. Res Judicata
- Article 13. Civil Action and Injury
- Article 16. Civil Action of Victim's Successor
- Article 44. Opening of Judicial Investigation
- Article 93. Interrogation Records
- Article 96. Police Custody
- Article 121. Confidentiality of Judicial Investigation
- Article 124. Introductory Submissions
- Article 125. Scope of Complaint
- Article 126. Placing Suspect under Judicial Investigation
- Article 127. Investigation of Inculpatory and Exculpatory Evidence
- Article 129. Roles of Court Clerks
- Article 132. Investigative Actions Requested by Royal Prosecutor
- Article 133. Investigative Actions Requested by Charged Persons
- Article 134. Investigative Actions Requested by Civil Party
- Article 137. Civil Party Application by Way of Intervention
- Article 138. Complaint with Application to become Civil Party
- Article 139. Delivery of Complaints to Prosecutor
- Article 143. Notification of Placement under Judicial Investigation
- Article 145. Presence of Lawyer during Interrogation
- Article 150. Interview of Civil Party
- Article 154. Oath of Witnesses
- Article 156. Witness without Swearing
- Article 157. Impossibility to Question Witness
- Article 162. Necessity of Expert Reports
- Article 165. Order to Appoint Expert(s)
- Article 169. Appointment of Multiple Experts
- Article 170. Notification of Conclusions of Expert Reports
- Article 197. Arrest Warrant and Opinion of Prosecutor
- Article 198. Information Stated in Arrest Warrant
- Article 203. Principle of Provisional Detention
- Article 205. Reasons for Provisional Detention
- Article 206. Statement of Charged Persons and Reasons for Provisional Detention

- Article 210. Duration of Provisional Detention in Cases of Crimes against Humanity
- Article 211. Extension of Provisional Detention
- Article 217. Release upon Request of Charged Person
- Article 223. Obligations under Judicial Supervision
- Article 246. Final Submission of Royal Prosecutor
- Article 247. Closing Order
- Article 249. Provisions of Closing Orders in relation to Provisional Detention and Judicial Supervision
- Article 250. Forwarding Case File for Trial
- Article 252. Mandatory Rules
- Article 253. Complaint to Investigation Chamber
- Article 257. Registry of Appeals and Requests
- Article 259. Examination of Case Files and Briefs
- Article 260. Conduct of Hearings
- Article 261. Examination of Regularity of Procedure
- Article 266. Appeal against Orders of Investigating Judge by General Prosecutor attached to Court of Appeal and Royal Prosecutor
- Article 267. Appeal against Orders of Investigating Judge by Charged Person
- Article 268. Appeal against Orders of Investigating Judge by Civil Party
- Article 271. Competence of Investigation Chamber
- Article 278. Decision on Provisional Detention
- Article 279. Inadmissibility of Requests for Annulment
- Article 280. Effect of Annulment

## Article 2. Criminal and Civil Actions

*Criminal and civil actions are two separate kinds of legal actions.*

*The purpose of a criminal action is to examine the existence of a criminal offense, to prove the guilt of an offender, and to punish this person according to the law.*

*The purpose of a civil action is to seek compensation for injuries to victims of an offense and with this purpose to allow victims to receive reparation corresponding with the injuries they suffered.*

### ***Application in the ECCC***

**Civil actions relate specifically to reparations:** Civil actions relate specifically to civil party claims for reparations for harm caused by crimes alleged in the criminal action.

DUCH CASE: JUDGMENT, ECCC, TC, 26 Jul 2010, para. 660.

**Corresponding ECCC Internal Rule(s):** Internal Rule 23, 23bis, 23quinquies and 100. Internal Rule 23 holds that the purpose of civil actions is in part to seek reparations. Internal Rule 23bis(5) provides that the abandonment of an action by a civil party does not affect the criminal case. Internal Rule 23quinquies requires that any reparations acknowledge the injury suffered by the civil party and address the harm from it. Internal Rule 100 implies that two judgments in the case shall be handed down, however, it does not keep them totally separate as in Article 2 because it requires the judgment on the civil action to be in line with the judgment on the criminal action.

### ***Application of Similar Articles in Other Jurisdictions***

#### ***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Victims as civil parties:** Victim of an offense may constitute itself as civil party.

No. 69-92311, CRIM. BULL. 182, FCC, 8 Jun 1971.

**Independence of actions:** Criminal and civil actions are independent.

No. 88-86499, CRIM. BULL. 441, FCC, 28 Nov 1989.

**Right to reparation for damage:** All those who have personally suffered damage resulting from offense have right to reparation from those who caused it.

No. 91-85925, CRIM. BULL. 349, FCC, 28 Oct 1992.

**When accused is acquitted before criminal court, civil court must look at offense committed:** This is to decide on victim's claim for reparation.

No.00-86244, CRIM. BULL.34, FCC, 19 Feb 2002.

**Link between prejudice and offense:** Prejudice alleged must be directly linked to offense prosecuted.

No. 02-81514, FCC, 26 Sep 2002.

**Corresponding Article(s) in French *Code of Criminal Procedure*:**Articles 1 and 2. These articles provide for the exercise of the public action for a crime, felony or misdemeanor (Article 1) and the exercise of the civil action because of the damage suffered by the victim (Article 2).

## Article 7. Extinction of Criminal Actions

*The reasons for extinguishing a criminal action are as follows:*

1. *The death of the offender;*
2. *The expiration of the statute of limitations;*
3. *A grant of general amnesty;*
4. *Abrogation of the criminal law;*
5. *The res judicata.*

*When a criminal action is extinguished a criminal charge can no longer be pursued or shall be terminated.*

### **Application in the ECCC**

**Amnesties cannot be a bar to prosecution of international crimes and human rights violations considered to be norms of *jus cogens*:** Domestic amnesties barring prosecution of international crimes are incompatible with states' obligations to provide victims of these crimes an effective remedy. Blanket amnesties for serious international crimes are in breach of international norms.

IENG SARY CASE: DECISION ON IENG SARY'S RULE 89 PRELIMINARY OBJECTIONS, ECCC, TC, 3Nov 2011, para. 42.

**The death of an accused extinguishes the criminal action against him:** Where a Chamber is in possession of the death certificate of an accused, it may extinguish the criminal action against him. This does not bar civil actions against the accused person.

IENG SARY CASE: TERMINATION OF PROCEEDINGS AGAINST THE ACCUSED IENG SARY, ECCC, TC, 14 Mar 2013, para.3; IENG SARY CASE: POST MORTEM DISMISSAL OF IENG SARY'S APPEALS, ECCC, SC 21 Mar 2013, para. 2.

...

**Alleged crimes must be manifestly the same as for previous conviction/acquittal: for *res judicata* to apply.** The principle of *res judicata* under Cambodian law bars institution of new proceedings for the same acts (as opposed to the same offense). This requires showing that alleged charges are manifestly the same as those for which the charged person was previously convicted or acquitted.

IENG SARY CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 17 Oct 2008, paras. 41-53. IENG SARY CASE: DECISION ON IENG SARY'S RULE 89 PRELIMINARY OBJECTIONS, ECCC, TC, 3Nov 2011, para.27; NUON CHEA AND KHIEU SAMPHAN CASE: DECISION ON KHIEU SAMPHAN REQUEST TO POSTPONE COMMENCEMENT OF CASE 002/02 UNTIL A FINAL JUDGMENT IS HANDED DOWN IN CASE 002/01 TC 21Mar 2014, para.8.

**Corresponding ECCC Internal Rule(s):** Internal Rule 89. This rule makes it clear that preliminary objections on any issue which would require the termination of prosecution can be raised no later than 30 days after the Closing Order has become final. Regarding the death of an accused, the ECCC Trial Chamber relied on Article 7 of the Cambodian Criminal Procedure Code to declare an accused person's death during the conduct of the trial.



### ***Application of Comparable Articles in Other Jurisdictions***

#### ***UN Human Rights Committee***

*Cambodia is a party to the International Covenant on Civil and Political Rights (ICCPR), which sets out international law principles on criminal procedure. Below are examples of how comparable ICCPR articles have been interpreted and applied by its implementing body, the UN Human Rights Committee.*

**Amnesties are generally incompatible with the duty to investigate acts of torture:** State parties are obliged to provide the victim with an effective remedy.

BASILIO LAUREANO ATACHAHUA V. PERU, UN HRC, 22 Mar 1996, para.10

should not relieve perpetrators from individual responsibility through the use of amnesties.

HUGO RODRIGUEZ V URUGUAY, UN HRC, 19 JUL 1994, para.12.4.

**Amnesties for gross human rights violations are incompatible with the ICCPR:** State parties

**Comparable Article(s) in the *International Covenant on Civil and Political Rights*:** Article 2 under which the State has an obligation to ensure that any person whose rights in the Covenant have been violated shall have the right to an effective remedy.

#### ***European Court of Human Rights***

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Amnesties are impermissible for the crimes of murder and torture:** Where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an “effective remedy” that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible.

ABDULSAMET YAMAN V. TURKEY, ECHR, 2 Nov 2004, paras.53-55; TUNA V. TURKEY, ECHR, 19 Jan 2010, paras.71; OULD DAH V. FRANCE, ECHR, 17 Mar 2009, (considering amnesty laws are generally incompatible with the duty of States to investigate acts of torture).

**Comparable Article(s) in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*:** Article 4 of Protocol No.7 must be read in conjunction with Article 13 of the Convention, as well as customary international law.

## Article 12. Res Judicata

*In applying the principle of res judicata, any person who has been finally acquitted by a court judgment cannot be prosecuted once again for the same act, even if such act is subject to different legal qualification.*

### **Application in the ECCC**

**Alleged crimes must be manifestly the same as for previous conviction/acquittal:** The principle of *res judicata* under Cambodian law bars institution of new proceedings for the same acts (as opposed to the same offense). This requires showing that alleged charges are manifestly the same as those for which the charged person was previously convicted or acquitted.

IENG SARY CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 17 Oct 2008, paras. 41-53. IENG SARY CASE: DECISION ON IENG SARY'S RULE 89 PRELIMINARY OBJECTIONS, ECCC, TC, 3Nov 2011, para.27; NUON CHEA AND KHIEU SAMPHAN CASE: DECISION ON KHIEU SAMPHAN REQUEST TO POSTPONE COMMENCEMENT OF CASE 002/02 UNTIL A FINAL JUDGMENT IS HANDED DOWN IN CASE 002/01 TC 21Mar 2014, para.8.

**Principle also known as *ne bis in idem*, etc.:** The principle *ne bis in idem* (that someone cannot be tried for crime for which he has already been acquitted or convicted) is also known in different legal systems by other names, such as *res judicata*, *autrefois acquit/autrefois convict*, and double jeopardy.

IENG SARY CASE: CLOSING ORDER APPEAL, ECCC, PTC, 11 Apr 2011, fn. 29.

***Ne bis in idem* not applicable in case of fundamental defects at trial:** Where fundamental defects exist in a national proceeding, the *ne bis in idem* principle does not apply.

IENG SARY CASE: DECISION ON IENG SARY'S RULE 89 PRELIMINARY OBJECTIONS, ECCC, TC, 3Nov 2011, para.7..

**Principle of *ne bis in idem* does not debar the prosecution of international crimes.** A State may not invoke *ne bis in idem* in order to decline to investigate crimes against humanity.,

IENG SARY CASE: DECISION ON IENG SARY'S RULE 89 PRELIMINARY OBJECTIONS, ECCC, TC, 3Nov 2011, paras 33-36..

***Res judicata* closely relates to *ne bis in idem*:** In provisional detention, *res judicata* can be a reason to dismiss criminal proceedings and *ne bis in idem* a jurisdictional block. If chamber sends person to trial, it is determining both that the action should not be dismissed and reaffirming its jurisdiction over the charged person, thus extinguishing claim of *ne bis in idem* or *res judicata*.

IENG SARY CASE: CLOSING ORDER APPEAL, ECCC, PTC, 11 Apr 2011, paras. 61-62 and 65-66.

**Reasoning not subject to *res judicata*:** Reasoning of decisions is not subject to *res judicata* since reasoning itself cannot be enforced or acted upon.

NUON CHEA CASE: CIVIL PARTY RECONSIDERATION REQUEST, ECCC, PTC, 26 Feb 2009, paras. 10-11.

**Preliminary determination not subject to *res judicata*:** Where chamber made only preliminary determination on legality of arrest warrant based on limited available information and provided defendant

opportunity to challenge issues at a later stage of proceedings, a final determination had not been made and defendant was not barred by *res judicata* from raising issues at a later stage.

IENG SARY CASE: CLOSING ORDER APPEAL, ECCC, PTC, 11 Apr 2011, para. 67.

**Reconsideration of convictions not subject to *res judicata*:** Article 12 precludes use of *res judicata* when reconsidering a conviction.

**Corresponding ECCC Internal Rule(s):** Internal Rule 49. This rule makes it clear that *res judicata* does not apply to decisions not to pursue a complaint.

IENG SARY CASE: CLOSING ORDER APPEAL, ECCC, PTC, 11 Apr 2011, paras. 123-124.

**Admissibility orders not subject to *res judicata*:** An order on admissibility of request is not an order on substance of request. Therefore an order on admissibility is not a final decision to which *res judicata* applies.

KHIEU SAMPHAN CASE: ANNULMENT REQUEST APPEAL, ECCC, PTC, 4 May 2010, para. 13.

### *Application of Comparable Articles in Other Jurisdictions*

#### ***UN Human Rights Committee***

*Cambodia is a party to the International Covenant on Civil and Political Rights (ICCPR), which sets out international law principles on criminal procedure. Below are examples of how comparable ICCPR articles have been interpreted and applied by its implementing body, the UN Human Rights Committee.*

**Person convicted of offense may not be tried again for it, especially in combination with other offenses:** This is a violation of fair trial rights and is compounded when the repeat charge is brought in combination with several more serious offenses because jury is exposed to prejudicial information that has no bearing on charges for which the person is rightly being tried.

BABKIN V. RUSSIAN FEDERATION, UN HRC, 3 Apr 2008, para. 13.6.

**No violation if acquittal reversed before it is final:** Right not to be tried twice for same offense not violated when higher tribunal reverses acquittal before it becomes final.

Therefore, cassation appeals do not violate the ICCPR.

BABKIN V. RUSSIAN FEDERATION, UN HRC, 3 Apr 2008, para. 13.5.

**Violation: Reversing acquittal through retroactive application of law:** Right not to be tried twice for same offense violated when court reverses acquittal based on retroactive application of law to facts that did not amount to criminal offense at time act/omission occurred.

SOBHRAJ V. NEPAL, UN HRC, 27 Jul 2010, para. 7.6.

**Comparable Article(s) in the *International Covenant on Civil and Political Rights*:** Article 14(7). This article sets out the right not to be tried twice for the same offense.

#### ***European Court of Human Rights***

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

***Res judicata* applies even when definition, nature and purpose of offense differ between**

**codes within same judicial system:** When two decisions have been based on the same conduct

leading to commission of single offense in both cases, *res judicata* is violated.

GRADINGER V. AUSTRIA, ECHR, 23 Oct 1995, para. 55.

**When single act constitutes various offenses, accused may be condemned for several offenses:** In such situations, there is no violation of *res judicata*. The greater penalty will incorporate the lesser one.

OLIVEIRA V. SWITZERLAND, ECHR, 30 Jul 1998, para. 26.

**Where single act constitutes various offenses, *res judicata* application depends on relationship between various offenses resulting from same conduct:** If various offenses resulting from same criminal act do not differ in their essential elements, accused cannot be tried for one offense and then subsequently tried for the other.

FRANZ FISCHER V. AUSTRIA, ECHR, 29 May 2001, para. 29.

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:** Article 4 of Protocol No. 7. This article establishes the principle of *res judicata*.

### **French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**French courts cannot restrict application of *res judicata* except where circumstances changing qualification of offense arrive after person already convicted:** It is impossible for French courts to prosecute person twice for same act, although this act can be qualified differently. However, when person has been convicted for offense prior to finding of circumstances changing qualification of such offense, he may be tried for newly qualified offense.

D. 1957. 33, FCC, 20 Mar 1956 (courts cannot restrict application of *res judicata*); CRIM. BULL. 121, FCC, 25 March 1954 (prosecuting person where circumstances change qualification of offense).

**Foreigners exempt from *res judicata* in France where offense committed in France:** When foreigner is convicted in his/her country following official denunciations from French authorities for criminal act he/she committed in France, *res judicata* does not apply in France. Thus, he/she may also be prosecuted in France.

NO. 98-80413, CRIM. BULL. 44, FCC, 17 Mar 1999.

***Res judicata* applies for offenses committed outside France:** Where persons tried abroad for an offense committed outside French territory.

NO. 97-82424, CRIM. BULL. 331, FCC, 3 Dec 1998.

**Comparable Article(s) in the French Code of Criminal Procedure:** Articles 6, 368 and 692. Those articles establish the principle of *res judicata* and the impossibility to prosecute the accused twice for the same act.

## Article 13. Civil Action and Injury

*A civil action can be brought by the victim of an offense. In order to be compensated, the injury must be:*

- *A direct consequence of an offense;*
- *Personal damage;*
- *Actually occurred and existed at the present time.*

*An injury can be damage to property or physical or psychological damage.*

### **Application in the ECCC**

**Injury need not be direct:** Injury in civil party application must be personal but need not be direct.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 83; DUCH CASE: APPEALS JUDGMENT, ECCC, SCC, 3 Feb 2012, para. 418.

**Civil actions through indirect injuries not limited to specific class of persons:** Not limited to, for example, family members, but may instead include common law spouses, distant relatives, friends, *de facto* adopters and adoptees, and beneficiaries.

DUCH CASE: APPEALS JUDGMENT, ECCC, SCC, 3 Feb 2012, para. 418.

**Proof of direct impact by indirect victims:** Indirect victims must show special bonds of affection and dependence connecting them emotionally, physically or economically to direct victims. Without such bonds, no injury would have resulted from commission of the crime.

DUCH CASE: APPEALS JUDGMENT, ECCC, SCC, 3 Feb 2012, para. 447.

**Injury must directly result from accused's conduct:** Civil party applicants must show injury directly results from conduct of accused who is under investigation.

DUCH CASE: JUDGMENT, ECCC, TC, 26 Jul 2010, para. 647.

**Dismissal of application failing to prove direct injury:** Investigating judges may dismiss civil party application if they determine it has failed to prove direct injury from alleged actions of charged person.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 27 Apr 2010, para. 48.

**Exercise of rights of indirect victims autonomous of rights of direct victims:** Thus, indirect victims may be granted civil party status even where direct victim is alive and does not pursue action him or herself.

DUCH CASE: APPEALS JUDGMENT, ECCC, SCC, 3 Feb 2012, para. 418.

**Victims alleging new facts:** Victims seeking civil party status may not allege new facts for purposes of investigation but can allege new facts likely to show causal link between harm suffered by victim and

at least one crime already alleged against charged person in existing indictment.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 42.

**Causal link to collectively charged persons may be enough:** In a claim against multiple charged persons both as individuals and collectively as group acting together in joint criminal enterprise (or other forms of liability), applicant may show causal link to collectively charged persons, rather than individually charged person.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, paras. 71-73.

**Psychological injury presumed for genocide, crimes against humanity, if applicant from targeted group:** In cases involving crimes such as genocide or crimes against humanity, when applicant is indirect victim (e.g., witness or person with knowledge of alleged crime), personal psychological injury presumed if applicant is more likely than not member of same targeted group or community as direct victim.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 93.

**Material injury:** Injury includes loss of property or income.

DUCH CASE: JUDGMENT, ECCC, TC, 26 Jul 2010, para. 641.

**Psychological injury:** Injury may include mental disorders or psychiatric trauma, such as post-traumatic stress disorder.

DUCH CASE: JUDGMENT, ECCC, TC, 26 Jul 2010, para. 641; NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 83.

**Psychological harm can result from crime against immediate family and broader range of people:** Psychological harm should not be interpreted narrowly as only resulting from crimes perpetrated against immediate family members; rather, a much broader range of people should be included such as extended family, friends and neighbors and those reflecting other bonds in Cambodian culture and society.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, paras. 49, 87 and 88.

**Psychological victimization must be considered in context:** In evaluating psychological injury for civil party application, it is essential to consider victimization within social and cultural context at time alleged crimes occurred.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, paras. 83 and 86.

**Corresponding ECCC Internal Rule(s):** Internal Rules 23 and 23*bis*. Internal Rule 23 sets forth the “general principles” of victim participation at the ECCC, stating that the purpose includes seeking collective and moral reparations. Internal Rule 23*bis* substantially similar to Article 13 in terms of the standard of admissibility of civil party applications, except it does not contain the requirement that the injury actually occurred and existed at the present time.

***Application of Comparable Articles in Other Jurisdictions******French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Injury alleged by victim must be directly linked to offense prosecuted:**In order to seek reparation.

No.00-86244, CRIM. BULL.34, FCC, 19 Feb 2002.

**All those who have personally suffered damage resulting from the offense have right to reparation:** This is no matter the nature of the damage or those who caused it.

No. 91-85925, CRIM. BULL. 349, FCC, 28 Oct 1992.

**Prejudice caused must be certain and exist at present time in order to obtain reparation:**However, courts may also decide to allow reparation for future damages caused by prejudice to victim.

No. 80-92326, CRIM. BULL. 58, FCC, 16 Feb 1981 (prejudice must be certain and exist at present time); No. 86-91206, CRIM. BULL.180, FCC, 6 May 1987 (future prejudice).

**Comparable Article(s) in the French Code of Criminal Procedure:**Article 2. This article establishes the right to civil action for the reparation of damage suffered because of a felony, misdemeanor or petty offense.

## Article 16. Civil Action of Victim's Successor

*In case of death of the victim, a civil action can be started or continued by his successor.*

### **Application in the ECCC**

**Successor may continue deceased's civil action:** Cambodian law allows successor of deceased civil party to continue civil action on behalf of the deceased.

DUCH CASE: DECEASED CIVIL PARTY, ECCC, TC, 13 Mar 2009, para. 10.

**Successor may proceed on own behalf if victim's death linked to offense:** If successor cannot prove victim filed civil party application prior to dying, successor may proceed on own behalf to seek reparation for personal damage arising

from death of victim so long as death is linked directly to an offense with which charged person has been charged.

DUCH CASE: DECEASED CIVIL PARTY, ECCC, TC, 13 Mar 2009, para. 12; NUON CHEA AND KHIEU SAMPHAN CASES: SUCCESSION OF DECEASED CIVIL PARTY VAN SARY IN CASE 002, ECCC, TC, 16 Sep 2013, paras 1-3; SUCCESSION OF DECEASED CIVIL PARTIES IN CASE 002 ECCC, TC, 21 May 2013, para 6; SUCCESSION OF DECEASED CIVIL PARTY MAO SON IN CASE 002, ECCC, TC, 23 Jan 2014, para3; NUON CHEA AND KHIEU SAMPHAN CASES: SUCCESSION OF DECEASED CIVIL PARTY MEAS THUN CHEY IN CASE 002, ECCC TC, 26 Feb 2014.

**Corresponding ECCC Internal Rule(s):** There is no corresponding Internal Rule in the ECCC Internal Rules. However, this principle has been established in ECCC case law.

### **Application of Comparable Articles in Other Jurisdictions**

#### **French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Successors may initiate civil actions:** Although successor of dead victim cannot directly request opening of public prosecution, he/shemay still start civil action.

No. 03-87065, CRIM. BULL. 96, FCC, 27 Apr 2004 (successor cannot request prosecution); No. 05-87379, CRIM. BULL.1, FCC, 9 May 2008 (may start civil action).

**Transmissibility of civil actions:** Civil action that has been opened by victim before his/her death is transmissible to his/her successors.

No. 84-90584, CRIM. BULL. 305, FCC, 9 Oct 1985.

**Comparable Article(s) in the French Code of Criminal Procedure:** Article 2. This article enables civil action rights for reparation of damage suffered because of a felony, a misdemeanor or a petty offense.



## Article 44. Opening of Judicial Investigation

*In the case of a felony, the Prosecutor shall open a judicial investigation. The judicial investigation shall be based upon the initial submission provided to the investigating judge. The judicial investigation may be opened against identified or unidentified individuals.*

*The initial submission (to be prepared by the Prosecutor) includes:*

- *A summary of the facts;*
- *A legal qualification of the facts;*
- *The indication of relevant provisions of the criminal and sanction for offense;*
- *The name(s) of the suspects, if known.*

*The initial submission shall be dated and signed.*

*These formalities shall be strictly complied with or the initial submission shall be void.*

### ***Application in the ECCC***

#### **Investigating judges have broad discretion over investigative actions:**

Investigating judges have authority to determine usefulness or opportunity to accomplish any investigative action.

NUON CHEA, IENG SARY, KHIEU SAMPHAN, IENG THIRITH AND DUCH CASES: FORCED MARRIAGE AND ENFORCED DISAPPEARANCES INTERVIEW APPEAL, ECCC, PTC, 21 Jul 2010, para. 14.

**Corresponding ECCC Internal Rule(s):** Internal Rule 53. This rule is similar to Article 44, except that it requires the prosecutors to inform the investigating judges of exculpatory materials.

### ***Application of Comparable Articles in Other Jurisdictions***

#### ***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Public action is adequately initiated by prosecutor's initial indictment:** This is even if corresponding civil party application has been declared inadmissible.

No. 83-92677, CRIM. BULL. 290, FCC, 8 Nov 1983.

**Limited scope of investigating judge:** Can only investigate facts expressly mentioned in indictment seising him/her.

No. 73-90372, CRIM. BULL. 217, FCC, 10 May 1973.

**Cancellation of introductory submissions:** Introductory submission can only be cancelled if

it does not satisfy essential legal conditions of its existence.

No. 01-87656, CRIM. BULL. 129, FCC, 5 Jun 2002.

**Investigating judge must charge person expressly mentioned in initial indictment:** If the investigating judge wants to hear him/her.

No. 83-94762, CRIM. BULL. 58, FCC, 14 Feb 1984.

**Indictments made by prosecutor in order to restrain scope of investigative judge referral during judicial investigation:** Such indictments are ineffective.

No. 76-91442, CRIM. BULL. 112, FCC, 24 Mar 1977.

**Comparable Article(s) in the French *Code of Criminal Procedure*:** Article 80. This article provides for the public action implementation during the pre-trial phase, including the scope of the investigation mentioned in the indictments made by the prosecutor.

## Article 93. Interrogation Records

*Judicial police officers may order to appear or bring any person who is suspected of committing an offense to their offices. Judicial police officers shall interrogate any such person.*

*For each interrogation, a written record shall be established.*

*The written record shall be an accurate account of the interrogated person's responses. If it is necessary, judicial police officers may use an interpreter/translator who shall take an oath according to his own religion or beliefs. The interpreter/translator shall not be chosen from among the police or military police or any person with a connection to the case.*

*The interrogated person shall sign or affix his finger-print to each page of the written record.*

*Before signing or affixing the finger-print on the written record, the interrogated person shall re-read the record. If necessary, a judicial police officer shall read the record aloud. Judicial police officers may call for an interpreter/translator. If the interrogated person refuses to sign or affix his finger-print on the written record, the judicial police officer shall so note on the written record.*

### ***Application in the ECCC***

**Requests for review for mistranslation errors:** Identified mistranslation does not necessitate review of all witness statements for errors. In addressing possible damage caused by mistranslation, chamber should balance available resources, size of possible review and demonstrated prejudice to party requesting review.

IENG THIRITH CASE: NOTIFICATION OF ERRORS IN TRANSLATION, ECCC, PTC, 17 Dec 2010, paras. 7-8 and 10-11.

**Charged person may review product, not procedure, of investigation:** Charged person has right to review results, or product, of investigation and not procedures used by investigating authorities.

IENG SARY CASE: ADMISSIBILITY OF APPEAL REGARDING EVIDENCE OBTAINED THROUGH TORTURE, ECCC, PTC, 10 May 2010, para. 31.

**Corresponding ECCC Internal Rule(s):** Internal Rules 25 and 62. Internal Rule 25 governs the recording of interviews and adds that, wherever possible, an interview with a suspect or charged person shall be recorded also via audio or video recording. Internal Rule 62 allows the investigating judges to delegate their investigatory powers to subordinate organs of the ECCC such as the judicial police, and requires judicial police to write a record of delegated investigatory actions.

### ***Application of Comparable Articles in Other Jurisdictions***

#### ***European Court of Human Rights***

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Interrogation is an investigative measure which serves the purpose of compiling evidence:** Such evidence determines framework in which charged offense will be considered at trial.

CAN V. AUSTRIA, ECHR, 12 Jul 1984, para. 50.

**Rights of interrogated person:** The person interrogated must be protected by fair trial rights such as right to legal assistance, right to remain silent, and right against self-incrimination.

IMBRIOSCIA V. SWITZERLAND, ECHR, 24 Nov 1993, para. 32-6 (fair trial rights, including the right to legal assistance, apply as soon as a criminal charge comes into being); JALLOH V. GERMANY, ECHR, 11 Jul 2006, para.100(the right to remain silent and the right against self-incrimination are fundamental to fair legal procedure).

**Legal advice fundamental during interrogations:** Assistance of lawyer should be provided from first interrogation of suspect unless there are compelling reasons to restrict this right.This right to legal assistance is even more important when the accused was not informed by competent authorities of his/her right to remain silent.

SALDUZ V. TURKEY, ECHR, 27 Nov 2008, para. 55 (assistance should be provided from first interrogation unless compelling reasons); BRUSCO V. FRANCE, ECHR, 14 Oct 2010, para.45 (failure to inform of right to remain silent).

**Right to be assisted by interpreter needs to be practical and effective:** Obligation of competent authorities is not limited to appointment of interpreter but may extend to degree of subsequent control over adequacy of interpretation provided.

HERMI V. ITALY, ECHR, 18 Oct 2006, para. 70.

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:** Article 6(1). This article protects various rights of the accused to a fair trial, including the right to a fair and public hearing within a reasonable time.

#### **French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Interrogation and subsequent acts shall not be void if interrogated person was heard in accordance with the necessary procedures before being put in custody:**This includes being given notice of his/her rights concerning this position.The truth behind the suspected offences has to be verified.

Nos. 95-84446/96-85915, CRIM. BULL. 66, FCC, 19 Feb 1997.

**Written record of interrogation shall be void when it records unwanted verbal statements:**These are statements that the person held in police custody did not agree to be included in the written record.

No. 07-80807, CRIM.BULL. 102, FCC, 3 Apr 2007.

**Comparable Article(s) in the French Code of Criminal Procedure:**Article 61. This article provides for police custody procedures during investigation, including, in particular, the process of taking verbal statements and recording them into written form.

## Article 96. Police Custody

*In order to respond to the needs of an inquiry, judicial police officers may remand in custody a person suspected of participating in the commission of an offense. Judicial police officers may also remand in custody individuals who may provide them with relevant facts if the following provisions are fulfilled:*

- *An individual who may provide information refuses to do so;*
- *A written authorization to keep the person in custody has been obtained from a Prosecutor.*

*Judicial police officers shall immediately report any measure of police custody to the Royal Prosecutor and shall deliver to him all relevant evidence that led the police to take the custodial action.*

*The maximum duration of any police custody is 48 (forty eight) hours. The duration shall commence from the time when the detained person arrives at the police or military police office.*

*In case of a felony, when there is evidence showing the detained person is guilty, the judicial police officer may extend the duration of the police custody if such measure is necessary to conduct the inquiry properly. Any extension shall be authorized beforehand by the Royal Prosecutor who has to examine whether the factual and legal conditions are fulfilled. The written authorization for an extension of the duration of the police custody with an explanation of the reasons shall be placed on the case file. The extension is an exceptional measure. An extension of the duration of the police custody shall not be longer than 24 (twenty four) additional hours, excluding the time necessary for the transportation of detained persons.*

*An extension is not permitted if the detained person is a minor.*

*In case of felony, a minor aged between 14 years old and less than 16 years old may not be placed in police custody for more than 36 hours.*

*In case of misdemeanor, a minor aged between 14 years old and less than 16 years old may not be placed in police custody for more than 24 hours.*

*In case of felony, a minor aged between 16 years old and less than 18 years old may not be placed in police custody for more than 48 hours.*

*In case of misdemeanor, a minor aged between 16 years old and less than 18 years old may not be placed in police custody for more than 36 hours.*

*A minor who is less than 14 years old may not be placed in police custody.*

### **Application in the ECCC**

**Release on humanitarian grounds:** Person may be released from custody on humanitarian grounds where evidence his/her health condition incompatible with detention.

KHIEU SAMPHAN CASE: PROVISIONAL DETENTION EXTENSION AND REQUEST REFUSAL APPEAL, ECCC, PTC, 3 Jul 2009, para. 81.

**Corresponding ECCC Internal Rule(s):** Internal Rule 51. This rule is substantially similar to Article 96, but also provides for specific booking procedures for health examinations and police custody

reports and limits custody to suspects, while Article 96 allows for police custody of witnesses, and provides special treatment to minors.

### *Application of Comparable Articles in Other Jurisdictions*

#### ***UN Human Rights Committee***

*Cambodia is a party to the International Covenant on Civil and Political Rights (ICCPR), which sets out international law principles on criminal procedure. Below are examples of how comparable ICCPR articles have been interpreted and applied by its implementing body, the UN Human Rights Committee.*

**Violation: arrest without warrant, no reasons, not brought promptly before judge:** Rights violated where accused arrested without warrant, not informed at arrest of reasons, and not brought promptly before judge following arrest.

WILSON V. PHILIPPINES, UN HRC, 30 Oct 2003, para. 7.5.

**Violation: held seven days without arrest warrant or brought before judge:** Rights of accused upon arrest to be informed promptly of charges against him and brought promptly before judge are breached when detained seven days without being served with arrest warrant or brought before judge.

KURBANOVA V. TAJIKISTAN, UN HRC, 6 Nov 2003, para. 7.2.

**Violation: held without warrant seven days beyond legal limit:** Rights to liberty and security and to be brought promptly before judge following arrest or detention arise when accused arrested without warrant and held seven days beyond legally prescribed 15-day period of detention.

CASAFRANCA DE GÓMEZ V. PERU, UN HRC, 22 Jul 2003, para. 7.2.

**Violation: warrant issued after legal deadline:** Right to liberty breached when warrant issued more than three days after suspect arrested, in contravention of domestic law requiring warrant issued within 72 hours of arrest.

GRIDIN V. RUSSIAN FEDERATION, UN HRC, 20 Jul 2000, para. 8.1.

**Violation: detention without reason beyond limit prior to indictment:** Prohibition of arbitrary detention violated when individual prior to indictment detained in excess of

timelegally provided without providing explanation as to necessity of prolonged detention.

BOLAÑOS V. ECUADOR, UN HRC, 26 Jul 1989, paras. 8.3 and 9.

**Violation: home raid and detention without arrest warrants:** Raid of private homes and subsequent detention of individuals violated rights due to absence of legally required search or arrest warrants.

CORONEL ET AL V. COLOMBIA, UN HRC, 24 Oct 2002, paras. 9.4 and 9.7.

**Violation: one month delay bringing accused before judge:** Delay of over one month in bringing accused before judge violates requirement that anyone arrested or accused be brought promptly before judge with the authority to determine the lawfulness of the accused's detention.

KELLY V. JAMAICA, UN HRC, 8 Apr 1991, para. 5.6.

**Violation: two-months' detention before brought before magistrate:** Bringing detained person before magistrate two months after arrest not prompt.

BIRINDWA & TSHISEKEDIV. ZAIRE, UN HRC, 4 Apr 1989, paras. 12.7 and 13(b).

**Violation: five-year detention before trial:** Detention for five years prior to initiating proceedings against individual violates right to be tried without undue delay.

BOLAÑOS V. ECUADOR, UN HRC, 26 Jul 1989, paras. 8.4 and 9.

**Violation: continued detention after release granted:** Violation of right to be free from deprivation of liberty outside of established legal procedure occurs where, after one year of

detention, judge grants detainee's conditional release, yet detention continues for additional year until trial begins.

BAZZANO v. URUGUAY, UN HRC, 15 Aug 1979, para. 10(i).

**Special protection of minors:** Accused minors should be afforded special measures of protection, including provisional release and efforts to ensure security and welfare.

LAUREANO ATACHAHUA v. PERU, UN HRC, 25 Mar 1996, para. 8.7.

**Comparable Article(s) in the *International Covenant on Civil and Political Rights*:** Articles 9(1), 9(2) and 17. Articles 9(1) and (2) protect the right to liberty and security and to be informed of the reasons for arrest and charges. Article 17 reinforces these by protecting people from arbitrary or unlawful interference.

### ***European Court of Human Rights***

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protectionsto the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

#### **Legal basis for deprivation of liberty required:**

The legal basis for deprivation of liberty shall be a sufficiently accessible and precise national law that defines the offense in order to avoid all risk of arbitrariness.

AMUUR v. FRANCE, ECHR, 25 Jun 1996, para. 50.

**Link to criminal proceedings:** Deprivation of liberty is only permitted in connection with criminal proceedings.

CIULLA v. ITALY, ECHR, 22 Feb 1989, para. 38.

**There must be reasonable suspicion that person remanded in custody has committed offense:** Reasonableness requirement presupposes existence of facts or information that would satisfy objective observer that person concerned may have committed the offense. What may be regarded as reasonable will depend upon all circumstances.

FOX, CAMPBELL & HARTLEY v. UNITED KINGDOM, ECHR, 30 Aug 1990, para. 32.

**Level of suspicion that person may have committed the offense:** Facts do not need to be

of the same level as those necessary to justify a conviction or even the bringing of a charge, which is the next stage of the investigation.

MURRAY v. UNITED KINGDOM, ECHR, 28 Oct 1994, para. 55.

**Duration of suspicion:** Suspicion that person committed offense must remain as long as person is held in custody. This is a requirement for continuation of custody.

STÖGMÜLLER v. AUSTRIA, ECHR, 10 Nov 1969, para.4; DE JONG, BALJET & VAN DEN BRINK v. NETHERLANDS, ECHR, 22 May 1984, para. 44.

**Promptly brought before legal authority:** Person held in custody must be automatically brought before the competent legal authority promptly. This is a safeguard against ill-treatment of person in custody and abuse of power by authorities. Degree of flexibility attached to the notion of promptness is limited.

McKAY v. UNITED KINGDOM, ECHR, 3 Oct 2006, para. 32. (promptness required, automatic review); BROGAN & OTHERS v. UNITED KINGDOM, ECHR, 29 Nov 1988, para. 59 (flexibility in promptness limited).

**Comparable Article(s) in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*:**Article 5(1). This article ensures the right to liberty and security of the person, including the right of a lawful arrest or detention of a person.

**French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Purpose of the police custody:** To interrogate person held by judicial police officers.

No. 94-82220, CRIM.BULL. 273, FCC, 11 Jul 1994.

**Not to place in custody those who did not or are not suspected of committing offenses:** The power of administrative police officers to perform identity checks cannot be extended to this point.

No. 72-90278, CRIM. BULL. 7, FCC, 5 Jan 1973.

**Person held in police custody can be heard about others facts than those that started the measure:** This is where such facts do not affect the modalities of the police custody measure in question.

No. 04-83030, CRIM. BULL. 16, FCC, 12 Jan 2005.

**Police custody is not necessary when person voluntarily appears before the police:** Such appearance must be in order to be heard for the needs of the inquiry.

No. 08-81771, CRIM. BULL. 138, FCC, 3 Jun 2008.

**Police custody is not excessive if it does not exceed the legal duration of 24 hours:** This is even if the only act to be performed in the period is hearing of the charged person.

No. 98-50007, CRIM. BULL. 257, FCC, 7 Jul 2000.

**For different facts, a person can be subject to police custody measures immediately successive and independent from each other:** However, the person cannot be held continuously for a period that will exceed statutory maximum.

No. 03-87739, CRIM. BULL. 69, FCC, 17 Mar 2004.

**Comparable Article(s) in the French Code of Criminal Procedure:** Articles 62 and 63. These articles provide for police custody procedures, including the nature and purpose of police custody and the possibility of extension of custody.



## Article 121. Confidentiality of Judicial Investigation

*The judicial investigation is confidential.*

*Persons who participate in the judicial investigation, especially prosecutors, judges, lawyers, court clerks, judicial police and military police officers, civil servants, experts, interpreters/translators, medical doctors and other persons mentioned in Article 95 (Technical or Scientific Examination) of this Code, shall maintain professional confidentiality.*

*However, such professional confidentiality may not be used as an obstacle to the right of self-defense.*

*Moreover, the Royal Prosecutor is entitled to make a declaration in public if he considers that false information in a case has been published.*

*A breach of confidentiality regarding a judicial investigation is a misdemeanor punishable under the Criminal Law in force.*

### **Application in the ECCC**

**Redaction of decision to ensure investigation not compromised:** Pre-Trial Chamber has right to redact excerpts from public version of decision to ensure investigation not compromised.

IENG THIRITH CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 9 Jul 2008, para. 25.

**Judicial investigations, evidence not public:** Judicial investigations shall not be conducted in public. Evidence in case file shall not be released to public. All persons participating in judicial investigation shall maintain confidentiality. However, trial itself shall be conducted in public.

KHIEU SAMPHAN CASE: PUBLIC HEARING REQUEST, ECCC, PTC, 3 Mar 2008, paras. 8-11.

**Corresponding ECCC Internal Rule(s):** Internal Rules 56 and 54. Internal Rule 56 is substantially similar to Article 121 but gives the investigating judges authority to grant non-parties limited access to the judicial investigation in exceptional circumstances. Additionally, Internal Rule 54 allows the prosecutors to provide the public with an objective summary of the information in the otherwise confidential introductory, supplementary and final submissions filed by the prosecutors.

### **Application of Comparable Articles in Other Jurisdictions**

#### **European Court of Human Rights**

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protectionsto the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Access to investigation file may be reserved to the lawyers:** This is because the accused and civil parties are private persons not subject to the confidentiality rule. However, where the accused has chosen not to be represented by a

lawyer, denying him/her access to the file will be a violation of his/her rights.

MENET v. FRANCE, ECHR, 14 Jun 2005, unreported (access may be reserved to lawyers); FOUCHER v. FRANCE, ECHR, 18 Mar 1997, para. 36 (where accused not represented).

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:**Article 6(1). This article provides for fair trial rights including the right of a fair and public hearing within a reasonable time.

### **French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Investigating judge may testify as witness in a case he/she investigated:**However, he/she must not reveal information on any other procedure other than the one in question, due to professional confidentiality obligations.

FCC, 5 Nov 1903.

**Inquiry and investigation confidentiality is breached by disclosure of documents unlawfully accessed:** This is so even if the matter has been dismissed.

No. 90-83520, CRIM. BULL. 200, FCC, 13 May 1991.

**Information allowing identification of persons involved in an inquiry shall not be disclosed:** This is considered gross negligence.

No. 96-16560, CIV. BULL. I. 84, FCC, 9 Mar 1999.

**Civil parties are not subject to professional confidentiality:** This principle has been established by the case law.

No. 76-92075, CRIM.BULL. 263, FCC, 9 Oct 1978.

**Lawyers must not breach confidence regarding professional confidentiality:**Lawyers must respect confidentiality of investigation, and e.g. cannot disclose details of case to third party even if client permits such disclosure.

No. 04-81513, CRIM. BULL. 259, FCC, 27 Oct 2004.

**Accused or suspect may not access the file directly but may request communication of copy of the documents included in the file submitted to the court:** This request must be through his/her lawyer and at his/her expense.

No. 96-80219, CRIM. BULL. 248, FCC, 12 Jun 1996.

**Comparable Article(s) in the French Code of Criminal Procedure:**Article 11. This article provides for the secrecy of the inquiry and investigation proceedings including the ambiguity between confidentiality of the investigation procedure and professional confidentiality.

## Article 124. Introductory Submissions

*In compliance with Article 44 (Commencement of Judicial Investigation) of this Code, a judicial investigation is opened by the introductory submission of the Royal Prosecutor.*

*As provided in the Article 44 (Commencement of Judicial Investigation), paragraph 2, a judicial investigation can be opened against one or more persons whose names are specified in the introductory submission or against unidentified persons.*

*An investigating judge may not conduct any investigative acts in the absence of an introductory submission.*

*When an investigative judge receives a complaint with an application to become a civil party, the investigating judge shall follow the procedures stated in Articles 139 (Delivery of Request to Prosecutor) and 140 (Payment of Deposits).*

*After receiving a normal complaint, an investigating judge shall forward it to the Royal Prosecutor.*

### **Application in the ECCC**

**Introductory submission must summarize investigative facts and charges:** Right to receive notice of charges is fundamental right of charged person. Introductory submission shall summarize investigative facts and types of offenses filed against charged person. Particulars of facts summarized in introductory submissions must be valid and plead in the closing order. This is to ensure the defense has sufficient notice of charges on which trial will proceed.

IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: JOINT CRIMINAL ENTERPRISE APPEAL, ECCC, PTC, 20 May 2010, paras. 92 and 95.

**Introductory submission seises investigating judge of case:** It simultaneously terminates the Prosecutor's authority to investigate the same facts.

NUON CHEA, IENG SARY AND IENG THIRITH CASE: ORDER ON INVESTIGATIVE REQUEST FOR EXCULPATORY EVIDENCE, ECCC, OCIJ, 19 Jun 2009, para. 14.

**Corresponding ECCC Internal Rule(s):** Internal Rules 53 and 55. Internal Rule 53(2) requires the prosecutors to submit all evidence (including exculpatory evidence) in the introductory submission. Rule 55 describes the relationship between the prosecutors and investigating judges.

### **Application of Comparable Articles in Other Jurisdictions**

#### **French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Nullity of introductory submission must be raised as preliminary objection:** That is, before any discussion on merits.

No.94-81397, FCC, 19 October 1995.

**Any non-dated submission will be voided:** This is because the date of the submission is essential to the act.

No. 70-92577, CRIM. BULL.115, FCC, 23 Apr 1971.

**Investigating judge may only investigate facts expressly indicated in act filed to him:** That is, in the introductory submission.

No. 73-90372, CRIM. BULL. 217, FCC, 10 May 1973; No. 95-84041, CRIM. BULL. 60, FCC, 6 Feb 1996.

**Investigating judge shall charge any person named in the submission:** In the event of an interrogation.

No. 83-94762, CRIM. BULL. 58, FCC, 14 Feb 1984.

**Comparable Article(s) in the French *Code of Criminal Procedure*:** Articles 80 and 82. Article 80 requires the investigating judge to conduct the investigation in accordance with the introductory submission, while Article 82 gives the prosecutor the right to request the investigating judges to perform certain acts as part of the investigation through the introductory submission.

## Article 125. Scope of Complaint

*The investigating judge is seized with the facts specified in the introductory submission. The investigating judge shall investigate only those facts.*

*If during a judicial investigation, new facts susceptible to be qualified as a criminal offense arise, the investigating judge shall inform the Prosecutor. The Prosecutor can ask the investigating judge to investigate the new facts by making a supplementary submission. If there is no such supplementary submission, the investigating judge has no power to investigate the new facts.*

*However, if the new facts only constitute aggravating circumstances of the facts already under judicial investigation, no supplementary submission is required.*

### **Application in the ECCC**

**Definition of request for investigative action:** Request for investigative action is defined as request for action to be performed by investigating judges or, upon delegation, by ECCC investigators or judicial police, to collect information conducive to ascertaining the truth.

IENG THIRITH CASE: APPEAL ON EVIDENCE POTENTIALLY OBTAINED BY TORTURE, ECCC, PTC, 18 Dec 2009, para. 18; KHIEU SAMPHAN CASE: APPEAL ON EVIDENCE POTENTIALLY OBTAINED BY TORTURE, ECCC, PTC, 27 Jan 2010, para. 16.

**All parties may request investigative action:** All parties have right to request investigative action. Requests shall be interpreted as requests for the investigating judges to take action to collect information conducive to ascertaining the truth.

IENG SARY CASE: EXCULPATORY EVIDENCE REQUEST APPEAL, ECCC, PTC, 12 Nov 2009, paras. 17 and 18.

**Investigating judges have broad discretion deciding requests for**

**investigative action:** They reserve right to decide on usefulness of evidence, or opportunity to accomplish any investigative action. A party can suggest, but not oblige, investigative judges undertake an investigation.

IENG SARY CASE: EXCULPATORY EVIDENCE REQUEST APPEAL, ECCC, PTC, 12 Nov 2009, para. 21; NUON CHEA, KHIEU SAMPHAN AND IENG THIRITH CASES: EXCULPATORY EVIDENCE REQUEST APPEAL, ECCC, PTC, 18 Nov 2009, paras. 17, 18 and 22 (broad discretion; a party can suggest, but not oblige, the CJs); NUON CHEA, IENG SARY, KHIEU SAMPHAN, IENG THIRITH AND DUCH CASES: FORCED MARRIAGE AND ENFORCED DISAPPEARANCES INTERVIEWS APPEAL, ECCC, PTC, 21 Jul 2010, para. 14 (ECCC, PTC shall not order investigative action).

**Review of material not in introductory submission:** Requests for review of material not specified in introductory submission shall be precise and relevant to ascertaining the truth.

IENG SARY CASE: EXCULPATORY EVIDENCE REQUEST APPEAL, ECCC, PTC, 12 Nov 2009, paras. 33, 44 and 45.

**Corresponding ECCC Internal Rule(s):** Internal Rules 53 and 55. These rules are substantially similar to Article 125, except that in addition to not requiring supplementary submissions where new facts only aggravate existing facts, they also do not require investigating judges to inform prosecutors about such new facts.

### ***Application of Comparable Articles in Other Jurisdictions***

#### ***European Court of Human Rights***

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protectionsto the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Any competent authority responsible for making judicial decisions at the investigative stage must be independent and impartial:**This

is whether they are a judge or prosecutor.

PANTEA V. ROMANIA, ECHR, 3 June 2003, para. 238.

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:**Article 6(1). This article provides for fair trial rights including the right of a fair and public hearing within a reasonable time.

#### ***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Investigating judge is generally limited to the facts identified within introductory submission:**However, if investigating judge comes to know new facts, he/she may, before any communication with prosecutor, include those in the records of the proceedings, and, if need be, urgently proceed to summary assessment of their likelihood. However, he/shemay not carry out coercive actsthatrequire involvement of the prosecution.

No. 95-84041, CRIM. BULL. 60, FCC, 6 Feb 1996.

**Necessary factors for justification of urgent acts:**They must not be coercive, must be completed within 3 days and must be included within record of proceedings.

No. 99-81426, CRIM. BULL. 176,FCC, 30 Jun 1999.

**Individuals not mentioned in the introductory submissions:**Such individuals must not be summoned or kept in custody.

No. 97-84372, CRIM.BULL. 124, FCC, 1 Apr 1998.

**Prosecutor may not restrict submission scope once investigation has started:**Investigating judge shall decide on all facts he has been seised of.

No. 76-91442, CRIM. BULL. 112, FCC, 24 March 1977.

**Situations in which investigating judge may investigate new facts included in civil party application:** Only if prosecutor decides to submit those facts to investigation.

No. 00-82017, CRIM. BULL.277, FCC, 26 Sep 2000.

**Comparable Article(s) in the French Code of Criminal Procedure:**Articles 80 and 82. Article 80 requires the investigating judge to conduct the investigation in accordance with the introductory submission, while Article 82 gives the prosecutor the right to request the investigating judges to perform certain acts as part of the investigation through the introductory submission.

## Article 126. Placing Suspect under Judicial Investigation

*An investigating judge has the power to place any person specified by the introductory submission under judicial investigation.*

*Moreover, an investigating judge may place any person under judicial investigation against whom there is precise and coherent evidence showing that such person is involved in the commission of the offense, even where that person is not indicated in the introductory submission.*

*The investigating judge may place such persons under judicial investigation as perpetrators, instigators or accomplices of the offense.*

### **Application in the ECCC**

**Placing under judicial investigation (charging) is a judicial decision based on evidence:** It is a judicial decision made by the investigating judge once they have found clear and consistent evidence of

criminal responsibility against a person. It is not a procedural formality.

NUON CHEA, IENG SARY, KHIEU SAMPHAN, IENG THIRITH AND DUCH CASES: ORDER REFUSING FURTHER CHARGING, ECCC, OCIJ, 16 Feb 2010, para. 13.

**Corresponding ECCC Internal Rule(s):** Internal Rule 55(4). This rule is substantially similar to Article 126, except that it refers to “charging” rather than “placing under judicial investigation”, requires the evidence to be “clear and consistent” instead of “precise and coherent”, and does not specify the different forms in which a person may be charged.

### **Application of Comparable Articles in Other Jurisdictions**

#### **French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Public action is adequately initiated by prosecutor’s initial indictment:** This is even if corresponding civil party application has been declared inadmissible.

No. 83-92677, CRIM. BULL. 290, FCC, 8 Nov 1983.

No. 73-90372, CRIM. BULL. 217, FCC, 10 May 1973.

**Cancellation of introductory submissions:** Introductory submission can only be cancelled if it does not satisfy essential legal conditions of its existence.

No. 01-87656, CRIM. BULL. 129, FCC, 5 Jun 2002.

**Limited scope of investigating judge:** Can only investigate facts expressly mentioned in indictment seising him/her.

**Comparable Article(s) in the French Code of Criminal Procedure:** Articles 80 and 80-1. Article 80 requires the investigating judge to conduct the investigation in accordance with the introductory submission while Article 80-1 requires investigating judges to place under investigation only those against whom there is “strong and concordant evidence” of their alleged participation.

## Article 127. Investigation of Inculpatory and Exculpatory Evidence

*An investigating judge, in accordance with the law, performs all investigations that he deems useful to ascertaining the truth.*

*An investigating judge has the obligation to collect inculpatory as well as exculpatory evidence.*

### **Application in the ECCC**

**May take any investigative action:** Investigating judges may take any investigative action to determine the truth. They reserve right to decide on usefulness of evidence, or opportunity to accomplish any investigative action.

IENG SARY CASE: EXCULPATORY EVIDENCE REQUEST APPEAL, ECCC, PTC, 12 Nov 2009, para. 21 (right to decide when action conducive to ascertaining truth); IENG SARY CASE: TRANSLATION RIGHTS APPEAL, ECCC, PTC, 20 Feb 2009, para. 19 (may take any action conducive to ascertaining truth).

**Duty to review all evidence:** Investigating judges have duty to review all evidence, including exculpatory evidence, before deciding to close an investigation.

IENG SARY CASE: EXCULPATORY EVIDENCE REQUEST APPEAL, ECCC, PTC, 12 Nov 2009, para. 35.

**Investigating judge must undertake sufficient investigation only:** They are not

required to go on “fishing expeditions” to search for exculpatory evidence.

NUON CHEA, IENG SARY AND IENG THIRITH CASE: ORDER ON INVESTIGATIVE REQUEST FOR EXCULPATORY EVIDENCE, ECCC, OCIJ, 19 Jun 2009, para. 15.

**Requests for investigation are requests for evidence:** Any requests for investigative actions should be construed as a request for the Co-Investigating Judges to collect and analyze evidence for purposes of determining the truth.

IENG SARY CASE: EXCULPATORY EVIDENCE REQUEST APPEAL, ECCC, PTC, 12 Nov 2009, paras. 18-19.

**Translation not investigative action:** Requests for evidence translations are not requests for investigative actions.

IENG SARY CASE: TRANSLATION RIGHTS APPEAL, ECCC, PTC, 20 Feb 2009, para. 25.

**Corresponding ECCC Internal Rule(s):** Internal Rule 55(5). This rule is substantially similar to Article 127, except that it also explains how investigating judges may perform these duties, including summoning and questioning suspects and charged persons, interviewing victims and witnesses, seizing exhibits, etc.

### **Application of Comparable Articles in Other Jurisdictions**

#### **UN Human Rights Committee**

*Cambodia is a party to the International Covenant on Civil and Political Rights (ICCPR), which sets out international law principles on criminal procedure. Below are examples of how comparable ICCPR articles have been interpreted and applied by its implementing body, the UN Human Rights Committee.*



**Violation: failure to produce police documents:**

Failure to produce police documents that may contain exculpatory evidence violates rights of the accused as it may impede preparation of his/her defense.

YASSEEN & THOMAS v. GUYANA, UN HRC, 30 Mar 1998, para. 7.10.

**Comparable Article(s) in the *International Covenant on Civil and Political Rights*:** Article 14. This article has been interpreted as requiring the production of exculpatory documents.

***European Court of Human Rights***

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protection to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Interceptions of telephone conversations must have a particularly precise legal basis:**

This is because they represent a serious interference with private life and correspondence. Laws on secret surveillance must be sufficiently clear to citizens to put citizens on notice as to when such surveillance may lawfully occur.

HUVIG v. FRANCE, ECHR, 24 Apr 1990, para. 32 (precision of law, serious interference); MALONE v. UNITED KINGDOM, ECHR, 2 Aug 1984, para.67 (citizens must be put on notice of law).

**Comparable Article(s) in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*:** Article 8(1). This article provides for the right to respect private life and family life including the respect of a person's home and correspondence.

***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Tapping and recording conversations of defendant held in screened room of remand prison:** Such acts may be ordered by investigating judge if they remain under his/her supervision and do not infringe rights of defense.

No. 00-83852, CRIM.BULL. 369, FCC, 12 Dec 2000.

**Tapping phone conversations:** Investigating judge may regularly require tapping of phone conversations and order their transcription.

No. 99-85045, CRIM. BULL. 210, FCC, 6 Oct 1999.

**Professional confidentiality of certain professions is general and absolute:** E.g. doctors. None can free them from their obligations. However, investigating judge may seize any evidence that he deems necessary for the investigation.

CRIM. BULL. 124, FCC, 8 May 1947 (professional confidentiality). No. 66-90067, CRIM.BULL.167, FCC, 8 Jun 1966 (seizure of evidence).

**Comparable Article(s) in the *French Code of Criminal Procedure*:** Article 81. This article enables the investigating judge to take any actions that he deems useful for the discovery of the truth. It obliges the investigating judge to find evidence of innocence as well as guilt.

## Article 129. Roles of Court Clerks

*The case file shall be kept by the clerk. If possible, the clerk shall make copies of each record. The clerk shall certify that the copied records are true copy of the original. The copies shall be kept in a reserve file.*

*The clerk shall assign code number for all records in a chronological order.*

*The original records and reserve copies of the records shall be stored in the clerk's office, in the investigating judge's office, or in any room of the court with sufficient security conditions.*

*The lawyer or his secretary may be authorized by the investigating judge to copy the record at his own cost under the supervision of the clerk.*

### **Application in the ECCC**

**Charged person's procedural rights in judicial investigation include viewing case file documents:** From beginning of judicial investigation, charged person enjoys procedural rights, which include the right to view documents so as to be informed of charges against them, prepare their defense and defend themselves.

NUON CHEA CASE: EXPERT APPOINTMENT APPEAL, ECCC, PTC, 22 Oct 2008, para. 25 and fn. 24.

**Charged person's lawyers may examine case file:** After issuance of closing order, if there is an indictment of their client, the charged person's lawyers may prepare for trial phase by examining evidence available to them, including case file kept by greffier.

IENG SARY CASE: ADMISSIBILITY OF APPEAL REGARDING EVIDENCE OBTAINED THROUGH TORTURE, ECCC, PTC, 10 May 2010, para. 33 and fn. 26.

**Corresponding ECCC Internal Rule(s):** Internal Rule 55(6). This rule is substantially similar to Article 129 except that the greffier of the investigating judges keeps a written case file. Additional Internal Rules supplement these provisions, including 10(4) which refers to the need to also maintain an electronic version of the case file; 9(5), which refers to the keeping of a case file database; and 14(2), 17(3) and 33(2), which reiterate these provisions.

### **Application of Comparable Articles in Other Jurisdictions**

#### **European Court of Human Rights**

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protectionsto the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**All parties to trial should have opportunity to know of and comment on all evidence adduced or observations filed:** This includes evidence/observations by an independent

member of the national legal service. This stems from the right to adversarial proceedings.

LOBO MACHADO V. PORTUGAL, ECHR, 20 Feb 1996, para. 31.

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:**Article 6(1). This article provides for fair trial rights including the rights to the equality of arms between the parties.

***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**All documents in file shall be numbered by court clerk as they are drafted or received by investigating judge:**Documents drafted by investigating judge and his/her delegates as well as documents submitted to him/her will be included in the file.

CRIM. BULL. 400, FCC, 19 May 1958.

**Clerk has to certify conformity of duplicated case file with original copy:** A photocopy of an act failing to show original signature of author of the act, and not certified by the clerk, lacks authenticity.

No. 87-85018, CRIM.BULL. 276, FCC, 17 Jun 1988.

**Comparable Article(s) in the French Code of Criminal Procedure:**Article 81. This article sets out detailed requirements for court clerks with respect to the maintenance of the case file.

## Article 132. Investigative Actions Requested by Royal Prosecutor

*At any time during a judicial investigation, the Royal Prosecutor may request the investigating judge to conduct any investigative act that he believes will be useful.*

*If the investigating judge refuses to follow the Prosecutor's request, he shall write a refusal order within 15 days. This order shall state the reasons for the refusal. The Royal Prosecutor shall be notified of this order without delay.*

*If the investigating judge has not decided within 15 days, the Royal Prosecutor can seize the Investigation Chamber who shall have the power to decide in the place of the investigating judge.*

### Application in the ECCC

**Request must contain reasons:** Request for investigative action must contain reasons supporting the necessity of the request.

IENG SARY CASE: EXCULPATORY EVIDENCE REQUEST APPEAL, ECCC, PTC, 12 Nov 2009, para. 43.

**Request must concern crime within court's jurisdiction:** Subject matter of request for investigative action must concern matter over which the court has jurisdiction.

NUON CHEA CASE: ELEVENTH INVESTIGATIVE REQUEST APPEAL, ECCC, PTC, 18 Aug 2009, para. 24.

**Request must be within investigation scope:** Request for investigative action only valid if action requested is within investigation scope dictated by introductory and/or supplementary submissions.

IENG THIRITH CASE: CHARGED PERSONS' PROPERTY INVESTIGATIVE REQUEST APPEAL, ECCC, PTC, 4 Aug 2010, para. 14.

**Request must clearly indicate action and reasons:** Request for investigative action must be specific enough to clearly indicate what actions to take and reasons for those actions. This requirement exists to ensure proceedings are not unduly delayed and

charged person's right to timely trial is protected.

NUON CHEA, IENG SARY AND KHIEU SAMPHAN CASES: EVIDENCE OF CHARGED PERSONS' CRIMINAL KNOWLEDGE APPEAL, ECCC, PTC, 27 Sep 2010, para. 53.

**Investigative acts are to collect evidence conducive to ascertaining the truth:** An investigative act is any act to be performed by investigating judge or delegated to judicial police in order to collect evidence conducive to ascertaining the truth.

IENG SARY CASE: TRANSLATION RIGHTS APPEAL, ECCC, PTC, 20 Feb 2009, paras. 20 and 23.

**Right of parties to know reason for decision:** Any investigating judge's order related to requests for investigative action must explain the reason for the decision.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: ADDITIONAL EVIDENTIARY MATERIAL REQUEST APPEAL, ECCC, PTC, 15 Jun 2010, paras. 23-26.

**Judges must provide representative sample of information supporting decision:** Requirement that judges issue reasoned decision when rejecting request for investigative action means judges must provide representative sample of

information supporting their decision, not explain every part.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 38.

**Investigating judge has discretion to decide on requests for investigative action:** Investigating judge is independent in the manner in which he/she conducts investigation. As such, where no specific requirement is given by law, investigating judge has discretion to determine usefulness of requested investigative action. Requests are suggestions, not commands.

IENG SARY CASE: EXCULPATORY EVIDENCE REQUEST APPEAL, ECCC, PTC, 12 Nov 2009, para. 21.

**Investigating judge must dismiss requests for investigative action that they do not consider to be conducive to ascertaining the truth:** This is because of their duty not to continue investigation beyond certain length in order to avoid infringing fairness of the trial.

NUON CHEA, IENG SARY AND IENG THIRITH CASE: ORDER ON INVESTIGATIVE REQUEST FOR EXCULPATORY EVIDENCE, ECCC, OCIJ, 19 Jun 2009, para. 10.

**Limitations on discretion other than relevancy impermissible:** Any limitation on judicial discretion in accepting or rejecting requests for investigative action, other than relevancy within scope of investigation, impermissible.

NUON CHEA, IENG SARY AND KHIEU SAMPHAN CASES: EVIDENCE OF CHARGED PERSONS' CRIMINAL KNOWLEDGE APPEAL, ECCC, PTC, 27 Sep 2010, paras. 60-62.

**Request for an order to place evidence on a case file is not request for investigative action:** Such request is a request for an order necessary for the investigation procedures.

NUON CHEA, IENG SARY AND KHIEU SAMPHAN CASES: EVIDENCE OF CHARGED PERSONS' CRIMINAL KNOWLEDGE APPEAL, ECCC, PTC, 27 Sep 2010, para. 7.

**Requests for non-investigatory future actions inadmissible:** Valid requests for investigatory actions should not seek to compel exercise of judicial discretion in future. If request does not seek either an order or an investigatory action but to bind investigating judges to perform certain non-investigatory action, it is inadmissible even if that action is done within investigatory context.

IENG SARY CASE: ANALYTICAL TABLE OF EVIDENCE REQUEST APPEAL, ECCC, PTC, 8 Jun 2010, paras. 1-4.

**Request after investigation closed admissible:** Request for further investigative action filed within 15 days after the close of investigation shall be permitted.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: ADDITIONAL EVIDENTIARY MATERIAL REQUEST APPEAL, ECCC, PTC, 15 Jun 2010, para. 13.

**Standard of review for investigative requests:** Proper standard of review that investigating judge uses in determining discretion to accept or reject request for investigative action is whether request is relevant within scope of investigation to ascertain truth.

NUON CHEA, IENG SARY AND KHIEU SAMPHAN CASES: EVIDENCE OF CHARGED PERSONS' CRIMINAL KNOWLEDGE APPEAL, ECCC, PTC, 27 Sep 2010, paras. 42-45.

**Specificity and relevance not enough to show misuse of discretion:** The fact that rejected request for investigative action satisfies requirements of specificity and relevance not enough to show rejection was misuse of judicial discretion.

NUON CHEA, IENG SARY AND KHIEU SAMPHAN CASES:  
EVIDENCE OF CHARGED PERSONS' CRIMINAL  
KNOWLEDGE APPEAL, ECCC, PTC, 27 Sep 2010,  
para. 57.

**Corresponding ECCC Internal Rule(s):** Internal Rules 55(10), 66(1) and 66(3). Internal Rule 55(10) is substantially similar to Article 132 but does not impose a 15 day time limit on refusal orders and explicitly provides that it is subject to appeal. Internal Rule 66(1) entitles the prosecutor to request further investigative actions following notice of the termination of the investigation, while Internal Rule 66(3) allows an appeal against the closing of the investigation.

### *Application of Comparable Articles in Other Jurisdictions*

#### **French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Parties cannot request witnesses to produce documents:** They can only request documents from other parties to the case.

No. 96-83118, CRIM. BULL. 118, FCC, 25 Mar 1997.

**Investigating judge has discretion to refuse party's application:** Court of Cassation cannot control this.

No. 96-83118, CRIM. BULL. 118, FCC, 25 Mar 1997.

**Where investigating judge does not make order in response to prosecutor's request:** Prosecutor may seize directly the Investigating Chamber.

No. 02-82017, CRIM. BULL. 91, FCC, 30 Apr 2002.

**Parties' lawyers may attend examination of expert by investigating judge following prosecutors' submissions:** This results from the principle of equality of arms.

No. 10-81313, CRIM. BULL. 78, FCC, 11 May 2010.

**Comparable Article(s) in the French Code of Criminal Procedure:** Articles 80-3 and 82. Article 80-3 establishes the eligible circumstances and procedure for the filing of a supplementary submission, while Article 82 sets out the process for the prosecution to make investigative requests to the investigating judge and have recourse to the Investigating Chamber in the event that no order is made.

## Article 133. Investigative Actions Requested by Charged Persons

*At any time during a judicial investigation, the charged person may ask the investigating judge to interrogate him, question a civil party or witness, conduct a confrontation or visit a site. The request shall be in writing with a statement of reasons.*

*If the investigating judge does not grant the request, he shall issue a rejection order within one month after receiving the request. This order shall state the reasons. The Prosecutor and the charged person shall be notified of the order without delay.*

*If the investigating judge has not decided within one month, the Royal Prosecutor can seize the Investigation Chamber who shall have the power to decide in the place of the investigating judge.*

### **Application in the ECCC**

**Request must be for action to collect information conducive to ascertaining the truth:** Request for investigative action by charged person must be request for action to be performed with purpose of collecting information conducive to ascertaining the truth.

IENG SARY CASE: ADMISSIBILITY OF APPEAL REGARDING EVIDENCE OBTAINED THROUGH TORTURE, ECCC, PTC, 10 May 2010, paras. 22-23.

**Request must be clear, specific and relevant:** Request for investigative action must identify specifically investigative action requested and explain reasons why he/she considers said action necessary for conduct of investigation.

IENG SARY CASE: EXCULPATORY EVIDENCE REQUEST APPEAL, ECCC, PTC, 12 Nov 2009, para. 43.

**Request must outline action and explain relevance; judges may decline if action similar to matter already investigated:** Request for investigative action must outline action to be taken in precise detail and thoroughly explain why requested action is relevant to ascertaining the truth (the *prima facie* relevance requirement). The *prima facie* relevance requirement has two sub requirements: (1) information

must fall within investigatory scope; and (2) there must be an obvious connection between action sought and matter under investigation, including crimes alleged. Degree of detail needed depends on particular facts of case, but must directly relate to charges at issue. Finally, judges may decline to act if they feel action requested is similar to matter already under investigation.

NUON CHEA, IENG SARY AND KHIEU SAMPHAN CASES: EVIDENCE OF CHARGED PERSONS' CRIMINAL KNOWLEDGE APPEAL, ECCC, PTC, 27 Sept 2010, paras. 47-52 and 57.

**Investigating judge must dismiss requests for investigative action that they do not consider to be conducive to ascertaining the truth:** This is because of their duty not to continue investigation beyond certain length in order to avoid infringing fairness of the trial.

NUON CHEA, IENG SARY AND IENG THIRITH CASE: ORDER ON INVESTIGATIVE REQUEST FOR EXCULPATORY EVIDENCE, ECCC, OCIJ, 19 Jun 2009, para. 10.

**Requests merely suggestions; review of refusal limited to whether discretion exercised sensibly and legally:** Requests do not compel investigation, and judges

have broad discretion to decide on usefulness and act upon such requests.

IENG SARY CASE: EXCULPATORY EVIDENCE REQUEST APPEAL, ECCC, PTC, 12 Nov 2009, paras. 21 and 26.

**Procedural defects, corruption inadmissible:** Request for investigative action cannot be used to investigate interference with the administration of justice or corruption within court.

IENG SARY CASE: NUON CHEA ELEVENTH INVESTIGATIVE REQUEST APPEAL, ECCC, PTC, 25 Aug 2009, paras. 25-26; NUON CHEA CASE: ELEVENTH INVESTIGATIVE REQUEST APPEAL, ECCC, PTC, 18 Aug 2009, para. 28.

**Only judges have power to undertake investigative action:** Parties are not permitted to engage in investigative acts, but may undertake preliminary inquiries necessary to determine whether to request an investigative action by the court, including review of potentially relevant public sources. However, parties are not allowed to inquire into non-public sources.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: ADDITIONAL EVIDENTIARY MATERIAL REQUEST APPEAL, ECCC, PTC, 15 Jun 2010, paras. 10-12.

**Corresponding ECCC Internal Rule(s):** Internal Rules 55(10), 58, 66(1) and 66(3). Internal Rule 55(10) is substantially similar to Article 133 but does not impose a 15 day time limit on refusal orders and explicitly provides that it is subject to appeal. Internal Rule 66(1) entitles the charged person to request further investigative actions following notice of the termination of the investigation, while Internal Rule 66(3) allows an appeal against the closing of the investigation.

### *Application of Comparable Articles in Other Jurisdictions*

#### ***UN Human Rights Committee***

*Cambodia is a party to the International Covenant on Civil and Political Rights (ICCPR), which sets out international law principles on criminal procedure. Below are examples of how comparable ICCPR articles have been interpreted and applied by its implementing body, the UN Human Rights Committee.*

**Violation: denying charged person relevant witnesses:** Although right to present evidence on one's behalf does not imply charged person has an *unlimited* right to examine witnesses on his/her behalf, denying charged person the right to have witnesses admitted that are relevant to the defense is a violation.

KHUSEYNOVA & BUTAEVA V. TAJIKISTAN, UN HRC, 20 Oct 2008, para. 8.5.

**May not deprive charged person of right to present, examine evidence:** Although State may establish rules of evidence in its legislation, domestic rules may not deprive a charged person of the right to compel the attendance of witnesses and cross-examine witnesses as is available to the prosecution.

IDIEVA V. TAJIKISTAN, UN HRC, 31 Mar 2009, para. 9.6.

**Comparable Article(s) in the International Covenant on Civil and Political Rights:** Article 14(3)(e). This article protects the charged person's right to examine the witnesses against him/her and to examine witnesses on his/her behalf.

#### ***European Court of Human Rights***

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protectionsto the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*



**Charged person has right to call, examine or have examined witnesses under same**

**conditions as prosecution:** This rule applies also during investigation proceedings.

BÓNISCH V AUSTRIA, ECHR, 6 May 1985, para. 33.

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:** Article 6(3). This article provides for fair trial rights including the rights of a charged person during the trial, including, in particular, the right to call, examine or have examined witnesses on his/her behalf under the same conditions as those against him/her.

### ***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Parties cannot request witnesses to produce documents:** They can only request documents from other parties to the case.

No. 96-83118, CRIM. BULL. 118, FCC, 25 Mar 1997.

No. 96-83118, CRIM. BULL. 118, FCC, 25 Mar 1997.

**Parties' lawyers may attend examination of expert by investigating judge following prosecutors' submissions:** This results from the principle of equality of arms.

**Investigating judge has discretion to refuse party's application:** Court of Cassation cannot control this.

No. 10-81313, CRIM. BULL. 78, FCC, 11 May 2010.

**Comparable Article(s) in the French Code of Criminal Procedure:** Article 82-1. This article grants parties the right to request investigative actions by the investigating judge and empowers the investigating judge to undertake those acts or refuse them by way of a reasoned decision.

## Article 134. Investigative Actions Requested by Civil Party

*At all the times during a judicial investigation, a civil party may request the investigating judge to question him, question witnesses, interrogate the charged person, conduct a confrontation or visit a site. The request shall be in writing with a statement of reasons.*

*If the investigating judge does not grant the request, he shall issue a rejection order within one month after receiving the request. The order shall state the reasons. The Prosecutor and the civil party shall be notified of the order without delay.*

*If the investigating judge has not decided within one month, the Royal Prosecutor can seize the Investigation Chamber who shall have the power to decide in the place of the investigating judge.*

### **Application in the ECCC**

**Preliminary inquiries of public sources permitted:** Parties may conduct preliminary inquiries of public sources as necessary for effective exercise of their right to request investigative action.

NUON CHEA, IENG SARY AND KHIEU SAMPHAN CASES: ADDITIONAL EVIDENTIARY MATERIAL REQUEST APPEAL, ECCC, PTC, 15 Jun 2010, paras. 11-12.

**Standing to request investigative action on new facts only if such facts are contained in a supplementary submission:** Civil parties and civil party applicants have no standing to request investigative actions of new facts on aggravating circumstances unless these are included by prosecutors in supplementary submission.

NUON CHEA, IENG SARY, KHIEU SAMPHAN, IENG THIRITH AND DUCH CASES: FORCED MARRIAGE AND ENFORCED DISAPPEARANCES INTERVIEWS APPEAL, ECCC, PTC, 21 Jul 2010, para. 11.

**Relevance: evidence must be within and linked to investigatory scope:** To establish a *prima facie* showing of relevance to ascertaining the truth for a requested investigative action, the requesting party must show that its request is (1) within scope of prosecution's

supplementary submissions and (2) conducive to ascertaining the truth. To show that the request is helpful to determining the truth, the request must draw a nexus between the information sought through the action and an issue that is within the scope of the investigation. Merely asserting relevance or necessity without more is insufficient.

NUON CHEA, IENG SARY AND KHIEU SAMPHAN CASES: EVIDENCE OF CHARGED PERSONS' CRIMINAL KNOWLEDGE APPEAL, ECCC, PTC, 27 Sep 2010, paras. 49-50.

**Investigating judges have broad discretion when deciding on requests for investigative actions:** Parties can suggest, but not oblige, investigating judges to undertake investigative actions that are conducive to ascertaining the truth.

IENG SARY CASE: EXCULPATORY EVIDENCE REQUEST APPEAL, ECCC, PTC, 12 Nov 2009, para. 21.

**Appropriate standard in determining whether request for investigative action is relevant to ascertaining the truth:** The standard in deciding whether such request is relevant is whether the request is relevant within the scope of investigation to ascertain the truth, not whether the

request relates to probative facts. In restricting consideration of requests to probative facts, investigating judges may exclude relevant material.

NUON CHEA, IENG SARY AND KHIEU SAMPHAN CASES: EVIDENCE OF CHARGED PERSONS' CRIMINAL KNOWLEDGE APPEAL, ECCC, PTC, 27 Sep 2010, paras. 60-61.

**Investigating judge must dismiss requests for investigative action that they do not consider to be conducive to ascertaining the truth:** This is because of their duty not to continue investigation beyond certain length in order to avoid infringing fairness of the trial.

NUON CHEA, IENG SARY AND IENG THIRITH CASE: ORDER ON INVESTIGATIVE REQUEST FOR EXCULPATORY EVIDENCE, ECCC, OCJ, 19 Jun 2009, para. 10.

**Possible factors on which investigating judges may base discretion to reject request for investigative action:** Factors include finding that request is not conducive to ascertaining the truth or that requested action has already been performed.

NUON CHEA, IENG SARY AND KHIEU SAMPHAN CASES: EVIDENCE OF CHARGED PERSONS' CRIMINAL KNOWLEDGE APPEAL, ECCC, PTC, 27 Sep 2010, paras. 56 and 57.

**Failure to satisfy one of the *prima facie* relevance requirements sufficient for rejection of request:** Valid request must precisely identify action requested and give detailed reasons why the action is relevant to ascertaining the truth. Failure

of requesting party to satisfy one of these requirements, although the other might be met, constitutes valid and sufficient reason for investigating judges to reject the request.

NUON CHEA, IENG SARY AND KHIEU SAMPHAN CASES: EVIDENCE OF CHARGED PERSONS' CRIMINAL KNOWLEDGE APPEAL, ECCC, PTC, 27 Sep 2010, paras. 47 and 52.

**Procedural defects, corruption inadmissible:** Request for investigative action cannot be used to investigate any procedural defects or corruption within the court.

IENG SARY CASE: NUON CHEA ELEVENTH INVESTIGATIVE REQUEST APPEAL, ECCC, PTC, 25 Aug 2009, para. 26; NUON CHEA CASE: ELEVENTH INVESTIGATIVE REQUEST APPEAL, ECCC, PTC, 18 Aug 2009, para. 28.

**Reasons for rejection required:** When rejecting request for investigative action, investigating judges must state reasons for rejection. This requirement exists to ensure that the parties are informed of the basis for the decision such that an aggrieved party will have sufficient information to determine whether to appeal and on what grounds.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: ADDITIONAL EVIDENTIARY MATERIAL REQUEST APPEAL, ECCC, PTC, 15 Jun 2010, paras. 23-24.

**Corresponding ECCC Internal Rule(s):** Internal Rules 55(10), 66(1) and 66(3). Internal Rule 55(10) is substantially similar to Article 133 but does not impose a 15 day time limit on refusal orders and explicitly provides that it is subject to appeal. Internal Rule 66(1) entitles civil parties to request further investigative actions following notice of the termination of the investigation, while Internal Rule 66(3) allows an appeal against the closing of the investigation.

***Application of Comparable Articles in Other Jurisdictions******French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Parties cannot request witnesses to produce documents:** They can only request documents from other parties to the case.

No. 96-83118, CRIM. BULL. 118, FCC, 25 Mar 1997.

**Civil party can request an investigative action only after the opening of the investigation:**

He/she cannot compel the investigating judge to undertake investigative acts where the prosecutor has received a complaint but has not yet issued any charges.

No. 05-82807, CRIM. BULL. 304, FCC, 22 Nov 2005.

**Investigating judge has discretion to refuse party's application:** Court of Cassation cannot control this.

No. 96-83118, CRIM. BULL. 118, FCC, 25 Mar 1997.

**Parties' lawyers may attend examination of expert by investigating judge following prosecutors' submissions:** This results from the principle of equality of arms.

No. 10-81313, CRIM. BULL. 78, FCC, 11 May 2010.

**Comparable Article(s) in the French Code of Criminal Procedure:** Article 82-1. This article grants parties the right to request investigative actions by the investigating judge and empowers the investigating judge to undertake those acts or refuse them by way of a reasoned decision.

## Article 137. Civil Party Application by Way of Intervention

*After the opening of a judicial investigation any persons who claim to be victims of an offense may, at any time, file a request to become civil party to the investigating judge.*

*No specific form shall be required for the request to become civil party by way of intervention.*

*When a civil party's request has been made in writing, the request shall be attached to the case file. When the request is made orally the investigating judge shall establish a written record of it.*

*The investigating judge shall notify the Prosecutor and the charged person about the civil party application.*

### ***Application in the ECCC***

**Victims' limited ability to allege new facts:** Victims seeking civil party status may not allege in applications new facts for purposes of investigation, but can allege new facts likely capable to show causal link between harm suffered by victim and at least one crime alleged against the charged person in the indictment.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 42.

**Investigating judge admits civil party if they find *prima facie* grounds to suggest applicant suffered harm relating to facts under investigation:** Investigating judge does not make final determination on harm suffered by victims; this will be made by the Trial Chamber.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY ADMISSIBILITY ORDER (KEP), ECCC, OCIJ, 25 Aug 2010, para. 9.

**Chamber must be satisfied of likely truth of supporting facts:** When considering admissibility of civil party applicant, the Pre-Trial Chamber must be satisfied that facts alleged in support of the application are more likely than not to be true.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 94.

**Each civil party application must receive specific, individualized decision:** Decision must demonstrate review of each individual application by investigating judges. Decision may be in short tabular form, but grounds provided cannot be identical for all and not specific to each application.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, paras. 37 and 39.

**Proof of identity flexible:** Flexible approach applied to requirement that all civil party applicants clearly prove their identity, e.g., statement from village elder or commune chief will be acceptable as proof of applicant's identity.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 95.

**Corresponding ECCC Internal Rule(s):** Internal Rule 23*bis*. This rule differs from Article 137 in that a victim who wishes to join a case as a civil party shall submit such application in writing no later than 15 days after the investigating judges notify the parties of the conclusion of the judicial investigation. Internal Rule 23*bis*(2) also qualifies that the investigating judges must notify the prosecutors and the charged person of the civil party application, but makes this requirement subject to the protection needs of victims.

### *Application of Comparable Articles in Other Jurisdictions*

#### **European Court of Human Rights**

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Where the accused is found not to have criminal liability, applicant will also be deprived of the right to sue for compensation in civil courts:** This applies to situations in which the applicant first initiates criminal proceedings to secure a conviction. The outcome of the criminal proceedings is directly decisive for establishing the applicant's right to compensation in criminal and civil forums.

ACQUAVIVA v. FRANCE, ECHR, 21 Nov 1995, para. 47.

**Right of victim to ensure criminal prosecution or sentencing of third parties cannot be separated from right to bring civil proceedings in domestic law:** Right to bring civil proceedings and to submit observations that

they consider relevant to the case falls within the scope of fair trial rights under the Convention. However, the Court cannot rule on problems that require interpretation of national legislation unless those laws infringe rights and freedoms protected by the Convention.

PÉREZ V. FRANCE, ECHR, 12 Feb 2004, paras. 70-72 and 80-84.

**State must ensure fair trial rights are respected:** This obligation extends to domestic procedure allowing for claims such as a complaint with civil party application.

ATANASOVA v. BULGARIA, ECHR, 2 Oct 2008, para. 46.

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:** Article 6(1). This article establishes various fair trial rights of the accused, and contemplates civil suits since it refers to the accused's civil obligations.

#### **French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Civil party application by way of intervention can be used for misdemeanors and petty offenses:** This applies during the inquiry of the prosecutor.

No. 74-91732, CRIM. BULL.304, FCC, 28 Oct 1974.

**Nothing shall prevent victim from filing civil party request:** This includes situations in which another victim already did so regarding the same facts.

No. 81-91392, CRIM. BULL.184, FCC, 9 Jul 1982.

**Civil party request shall only be accepted if it relies on relevant facts:** That is, within facts in introductory/supplementary submission.

No. 94-85057, CRIM. BULL. 345, FCC, 9 Nov 1995.

**Civil party request can be filed by simple letter:** This is as long as its authenticity stays unchallenged.

No. 78-93560, CRIM. BULL. 265, FCC, 2 Oct 1979.

**Plaintiff who did not file request before investigating judge may still do so before Investigation Chamber:** Only as long as investigations have not been closed.

DP. 1938, FCC, 25 Jun 1937.

**Civil party status upon filing:** Plaintiff obtains status of civil party as soon as he files his request before investigating judge.

No. 67-90121, CRIM. BULL. 176, FCC, 28 May 1968.

**Comparable Article(s) in the French *Code of Criminal Procedure*:** Article 87. This article permits civil party petitions to be filed at any time during the judicial investigation and sets out provisions in relation to the challenge of such petitions.

## Article 138. Complaint with Application to become Civil Party

*A victim of a felony or misdemeanor can file a complaint with a request to become a civil party with the investigating judge. The request may be lodged by a lawyer on behalf of a victim.*

### **Application in the ECCC**

**File before application deadline:** Civil party applications must be filed before deadline for applications has passed.

DUCH CASE: CIVIL PARTY APPLICATION EXTENSION REQUEST, ECCC, TC, 10 Mar 2009, para. 7.

**Civil party is a victim whose application is accepted:** Such acceptance by the investigating judges must be in accordance with the rules.

NUON CHEA CASE: CIVIL PARTY PROVISIONAL DETENTION HEARING PARTICIPATION, ECCC, PTC, 20 Mar 2008, para. 26; NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 83 (describing types of injuries sufficient to qualify as a civil party).

**Victims' limited ability to allege new facts:** Victims seeking civil party status may not on their own allege in applications new facts for purposes of investigation, but can allege new facts likely capable to show causal link between harm suffered by victim and at least one crime alleged against the charged person in the indictment.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 42.

**Causal link to collective charged persons may be enough:** When claim against multiple charged persons both as individuals and collectively as group acting together in joint criminal enterprise (and other forms of liability), applicant may show causal link to collective charged persons, rather than individual charged person.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, paras. 71-73.

**Proof of identity flexible:** Flexible approach applied to requirement that all civil party applicants clearly prove their identity, e.g., statement from village elder or commune chief will be acceptable as proof of applicant's identity.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 95.

**Corresponding ECCC Internal Rule(s):** Internal Rules 23*bis* and 23*ter*. However, the ECCC Internal Rules differ from Article 138 because Internal Rule 23*ter* requires that civil parties be represented by a lawyer, while Article 138 merely allows such representation.



### ***Application of Comparable Articles in Other Jurisdictions***

#### ***European Court of Human Rights***

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protectionsto the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Where the accused is found not to have liability, applicant will also be deprived of civil compensation:** This applies to situations in which the applicant initiating criminal procedure also wishes to claim compensation where the ruling in the criminal matter also disposes of liability in any civil proceedings, and is in accordance with fair trial rights.

ACQUAVIVA V. FRANCE, ECHR, 21 Nov 1995, para. 47.

**State must ensure fair trial rights are respected:** This obligation extends to domestic procedure allowing for claims such as a complaint with civil party application.

ATANASOVA V. BULGARIA, ECHR, 20Oct2008, para. 46.

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:** Article 6(1). This article establishes various fair trial rights of the accused, and contemplates civil suits since it refers to the accused's civil obligations.

#### ***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Person claiming to be victim may file complaint before investigating judge:** Such complaint has same effect as submission by prosecutor. However, this procedure is not possible for petty offenses.

DP.1907, FCC, 8 Dec 1906; No. 97-92180, CRIM. BULL.56, FCC, 21 Feb 1968 (same effect as submission by prosecutor); DP.1930.1.40, FCC, 18 Apr 1929 (invalidity of the rule regarding petty offenses).

**Civil party status is obtained by filing a complaint before the competent jurisdiction:** Such complaint must express deliberate intention to act as civil party. Complaint shall be filed with payment of deposit.

No. 83-91925, CRIM. BULL. 338, FCC, 13 Dec 1983 (need to file complaint). No. 69-93357, CRIM. BULL. 218, FCC, 25 Jun 1970 (no specific form required). No. 78-93560, CRIM. BULL. 265, FCC, 2 Oct 1979 (deliberate intention).

**Direct causality between alleged prejudice and crime must be considered at least possible:** In order for victim to initiate public action and investigations.

No. 66-91626, CRIM. BULL. 66, FCC, 13 Apr 1967.

**Investigating judge shall investigate every fact reported by victim in first or additional complaint:** This obligation stands even absent submissions by prosecution.

No. 95-82256, CRIM. BULL. 230, FCC, 4 Jun 1996.

**Comparable Article(s) in the French Code of Criminal Procedure:** Article 87. This article permits civil party petitions to be filed at any time during the judicial investigation and sets out provisions in relation to the challenge of such petitions.

## Article 139. Delivery of Complaints to Prosecutor

*The investigating judge confirms the reception of a complaint with an application to become a civil party in an order. The investigating judge sends this request to the Royal Prosecutor.*

*After seeing the complaint with an application to become a civil party, the Prosecutor files an introductory submission with the investigating judge. This introductory submission may be made against unidentified persons, even if the civil party names one or more persons.*

*The Royal Prosecutor may request the investigating judge not to investigate if the criminal action is extinguished or if the facts do not constitute a crime.*

*In case an investigating judge decides not to investigate, that judge shall immediately issue an order with the statement of reasons and notify the civil party without delay.*

*In case the investigating judge, contrary to the Royal Prosecutor's request, decides to continue to investigate, the investigating judge shall issue an order with a statement of reasons. The Prosecutor shall be notified of the order without delay.*

### **Application in the ECCC**

#### **Civil party participation occurs after initiation of judicial investigation:**

Participation is permitted at the point when a charged person has appealed a provisional detention order because at

this point the appeal is part of the criminal proceedings.

NUON CHEA CASE: CIVIL PARTY PROVISIONAL DETENTION HEARING PARTICIPATION, ECCC, PTC, 20 Mar 2008, para. 41.

**Corresponding ECCC Internal Rule(s):** Internal Rule 49. This rule makes it clear that the prosecution of crimes within the jurisdiction of the ECCC may be initiated only by the prosecutors, whether at their own discretion or on the basis of a complaint.

### **Application of Comparable Articles in Other Jurisdictions**

#### **French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Investigating judge shall investigate grounds in valid civil party notification, regardless of prosecutor's submissions:** This obligation ceases if alleged facts cannot be prosecuted or do not contain any legal qualification. Absence of investigative actions should be interpreted as refusal to investigate.

No. 98-84800, CRIM. BULL. 259, FCC, 16 Nov 1999 (obligation to investigate unless cannot be prosecuted, no legal qualification); No. 00-80748, CRIM. BULL. 5, FCC, 11 Jan 2001 (obligation to verify existence of the alleged facts and potential legal qualification); No. 99-83418, CRIM. BULL. 7, FCC, 11 Jan 2000 (absence of investigative actions interpreted as refusal to investigate).

**Invalid grounds for refuse to investigate:** Due to a factual element that should be verified in the investigation; due to elements from investigative procedure carried out in another case.

No. 69-91579, CRIM. BULL. 46, FCC, 3 Feb 1970 (factual element to be verified); No. 07-86077, CRIM. BULL. 8, FCC, 15 Jan 2008 (investigative procedure carried out in another case).

Valid grounds for refusal to investigate: Where no legal infractions can be observed from alleged facts; where, following investigative

actions, it is proved that the alleged facts have not been committed.

No. 79-90062, CRIM. BULL. 205, FCC, 12 Jun 1979 (no legal infractions observed); No. 09-80720, CRIM. BULL. 164, FCC, 6 Oct 2009.

**Where investigating judge wishes to proceed with investigation despite prosecutor's submission not to proceed:** In such situations, the investigating judge shall respond with reasoned order to prosecutor's submission.

No. 88-82856, CRIM. BULL. 278, FCC, 20 Jun 1988.

**Comparable Article(s) in the French Code of Criminal Procedure:** Article 86. This article sets out the role of the prosecutor to investigate a complaint filed by a civil party and respond by way of an introductory or supplementary submission. It also establishes the investigating judge's role to determine whether or not to proceed to investigation in response to the prosecution submissions made following the complaint.

## Article 143. Notification of Placement under Judicial Investigation

*When a charged person appears for the first time, the investigating judge shall check his identity, inform him of the imputed act and its legal qualification, and receive his statement after informing him of the right to remain silent. This notification shall be mentioned in the written record of the first appearance.*

*If the charged person is willing to answer, the investigating judge shall take the statement immediately.*

*The investigating judge shall inform the charged person of his rights to choose a lawyer or to have a lawyer appointed according to the Law on the Bar.*

*A charged person who is a minor shall always be assisted by a lawyer. If a charged person does not choose a lawyer, the court shall appoint a lawyer according to the Law on the Bar.*

*After his first appearance, a charged person who is released shall inform the investigating judge of his address. This charged person shall be required that:*

- *he shall notify the investigating judge of any change of address;*
- *all notifications made through the last address given by the charged person are deemed to be made to the charged person.*

*The above-mentioned notice and information on changes of address shall be recorded in the written record on the first appearance.*

### **Application in the ECCC**

**Right to know charges:** A charged person has the right to be informed promptly and in detail of the charges against him/her, in a language understood by him.

KHIEU SAMPHAN CASE: CLOSING ORDER SUPPORTING DOCUMENTS REQUEST, ECCC, PTC, 15 Dec 2010, para. 7.

**Right to silence:** A charged person shall be reminded at every stage of the proceeding against him/her of his/her entitlement to exercise this right.

DUCH CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 3 Dec 2007, paras. 9-10.

**Right to defense:** A charged person has right to be defended by a lawyer of his/her choice.

DUCH CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 3 Dec 2007, para. 11.

**Legal characterization of the facts is provisional only:** Legal characterization is always provisional at the judicial investigation stage.

NUON CHEA, IENG SARY, KHIEU SAMPHAN, IENG THIRITH AND DUCH CASES: ORDER ON CLARIFICATION OF CHARGES, ECCC, OCIJ, 20 Nov 2009, para. 10.

**Corresponding ECCC Internal Rule(s):** Internal Rules 21(1)(d) and 57. Internal Rule 21(1)(d) is substantially similar to the first paragraph of Article 143, but differs in that Article 143 only requires the investigating judges to inform the charged person of his/her right to remain silent at the initial hearing. Internal Rule 57 repeats these rights, and states that if the charged person agrees to be questioned at the initial appearance, the investigating judges shall take a statement immediately, but that the charged person has the right to consult with a lawyer first.

### ***Application of Comparable Articles in Other Jurisdictions***

#### ***UN Human Rights Committee***

*Cambodia is a party to the International Covenant on Civil and Political Rights (ICCPR), which sets out international law principles on criminal procedure. Below are examples of how comparable ICCPR articles have been interpreted and applied by its implementing body, the UN Human Rights Committee.*

**Errors in summons do not necessarily violate right to be informed of charges:** Factual errors in summons do not violate a person's right to be informed of charges against him/her if summons is promptly amended and there is no undue confusion. Person's right to be informed of the nature and cause of the charge against him consists of being informed of the relevant law he/she is alleged to have violated and the alleged general facts that give rise to the charge.

J.O. v. FRANCE, UN HRC, 23 Mar 2011, paras. 9.2-9.3.

**Right not to be compelled to give evidence against oneself:** Authorities may not subject person to direct/indirect physical, mental or emotional coercion to obtain confession from that person.

SHARIFOVA ET AL. v. TAJIKISTAN, UN HRC, 1 Apr 2008, para. 6.3; KHUSEYNOVA v. TAJIKISTAN, UN HRC, 20 Oct 2008, para. 8.3; IDIEVA v. TAJIKISTAN, UN HRC, 31 Mar 2009, para. 9.3; BUTOVENKO v. UKRAINE, UN HRC, 19 Jul 2011, para. 7.4.

**Justifying exception to the general rule that persons awaiting trial are not to be**

**detained:** The state must sufficiently describe concerns that would justify continued detention and why these concerns could not be addressed by bail requirements or other strict conditions of release.

SMANTSER V. BELARUS, UN HRC, 23 Oct 2008, para. 10.3.

**Protecting minors during criminal proceedings:** Special emphasis should be placed on protecting minors during criminal proceedings. Minor's parents or guardians should be informed of charges against minor. Minors are especially in need of assistance in preparing and presenting a defense. They should be afforded special measures of protection, including provisional release, and efforts should be taken to ensure their security and welfare.

SHARIFOVA ET AL. v. TAJIKISTAN, UN HRC, 1 Apr 2008, para. 6.6 (informed of charges, assistance in preparing defense); LAUREANO ATACHAHUA v. PERU, UN HRC, 25 Mar 1996, para. 8.7 (special measures of protection).

**Comparable Article(s) in the International Covenant on Civil and Political Rights:** Articles 9(3), 14(3)(a), 14(3)(b), 14(3)(g) and 14(4). Article 14(3)(a) establishes an individual's right to be "informed promptly" of the charges against him/her, 14(3)(g) sets out the right to remain silent, and 14(3)(b) establishes the right to communicate with counsel of his/her own choosing. Article 14(4) requires that the procedure take account of a minor's age and Article 9(3) requires that released persons who are under judicial investigation notify the investigating judge of any change of address.

#### ***European Court of Human Rights***

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Right to legal assistance is enforced for the entirety of the proceedings:** In particular, during judicial investigation.

IMBRIOSCIA v. SWITZERLAND, ECHR, 24 Nov 1993, para. 38 (Loper Rocha, J. dissenting).

**Accused must receive legal assistance from the earliest stage:** That is, at the start of police interrogation or police custody.

SALDUZ V. TURKEY, ECHR, 27 Nov 2008, para. 52 (lawyer assistance from earliest stage); DAYANAN V. TURKEY, ECHR, 13 Oct 2009, para.31 (start of police custody).

**Legal representation shall not be refused:** The accused must receive a practical and effective defense.

TWALIB V. GREECE, ECHR, 9 Jun 1998, para. 46 (legal representation); ARTICO V. ITALY, ECHR, 13 May 1980, para.33 (practical and effective defense).

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:** Article 6(1). This article provides for fair trial rights including the right to defend himself/herself through legal assistance of his own choosing, or, if he/she does not have the means for such assistance, to be given it free when the interests of justice so require.

## Article 145. Presence of Lawyer during Interrogation

*When a charged person has a lawyer, the investigating judge shall summons the lawyer at least five days before the interrogation takes place. During that period, the lawyer may examine the case file.*

*A charged person can be interrogated only in the presence of his lawyer. However, if the lawyer was properly summonsed but does not show up on the specified date and time, the investigating judge can question the charged person without the presence of his lawyer. The absence of the lawyer shall be noted in the written record of the charged person's interrogation.*

*Exceptionally, the investigating judge may interrogate the charged person without summoning the lawyer if the charged person expressly waives his right to his lawyer's presence. This waiver shall be noted in a separate written record of the charged person's interrogation and shall be signed by the charged person.*

*In case of urgency, the investigating judge may interrogate the charged person without summoning the lawyer. This urgency situation can only be caused by danger of death or by a risk of losing evidence. The type of urgency shall be written in the report.*

*The investigating judge may call on an interpreter/translator as provided in Article 144 (Assistance of Interpreter/Translator) of this Code.*

### **Application in the ECCC**

**Right to presence of a lawyer who must be notified in advance:** A charged person has the right to be interviewed in the presence of his/her lawyer if he/she has one. The lawyer must be notified five days

before the interview is to take place in order to review the case file and prepare for the interview.

NUON CHEA CASE: ANNULMENT REFUSAL APPEAL, ECCC, PTC, 26 Aug 2008, para. 46-49.

**Corresponding ECCC Internal Rule(s):** Internal Rules 58(1), 58(2), 58(3) and 30. Internal Rules 58(1) to 58(3) are substantially similar to Article 145, except that Internal Rule 58(3) allows the charged person to be interviewed in the absence of his lawyer in an emergency where there is a high probability that evidence will be irretrievably lost while awaiting the lawyer and requires the consent of the Charged Person in such a situation. Internal Rule 30's interpreting provisions are similar, except that any witness or party may also request an interpreter when needed.

### **Application of Comparable Articles in Other Jurisdictions**

#### **UN Human Rights Committee**

*Cambodia is a party to the International Covenant on Civil and Political Rights (ICCPR), which sets out international law principles on criminal procedure. Below are examples of how comparable ICCPR articles have been interpreted and applied by its implementing body, the UN Human Rights Committee.*

**Violation: not granting request for counsel:** The right to counsel is violated when the State interrogates a suspect without granting his/her request for access to legal counsel.

GRIDIN V. RUSSIAN FEDERATION, UN HRC, 20 Jul 2000, para. 8.5.

**Violation: direct/indirect physical or psychological pressure on accused:** Presence of any such pressure from investigating authorities on accused, with a view to obtaining confession of guilt, is a violation in that it compels defendant to testify against himself/herself or confess guilt.

KELLY V. JAMAICA, UN HRC, 8 Apr 1991, para. 5.5.

**Violation: interrogation without lawyer present:** Interrogation of accused without lawyer present and with total disregard for rules of due process prior to charges being brought against accused violates prohibition against arbitrary detention.

CHAPARRO ET AL. V. COLOMBIA, UN HRC, 29 Jul 1997, para. 8.7.

**Comparable Article(s) in the *International Covenant on Civil and Political Rights*:** Articles 9 and 14(3)(b). Article 9 prohibits arbitrary detention, while Article 14(3)(b) protects the charged person's right to communicate with counsel of his/her own choosing.

### ***European Court of Human Rights***

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Defense lawyer must have sufficient time for proper preparation:** For instance, two weeks to prepare a 17,000 page file was found by the Court to be insufficient.

ÖCALAN V. TURKEY, ECHR, 12 May 2005, paras. 142-144.

**Right to legal assistance is enforced for the entirety of proceedings:** In particular, during judicial investigation.

IMBRIOSCIA V. SWITZERLAND, ECHR, 24 Nov 1993, para. 38 (Loper Rocha, J. dissenting).

**Accused must receive legal assistance from the earliest stage:** That is, from police interrogation or police custody.

SALDUZ V. TURKEY, ECHR, 27 Nov 2008, para. 52 (lawyer assistance from earliest stage); DAYANAN V. TURKEY, ECHR, 13 Oct 2009, para. 31 (start of police custody).

**Legal representation shall not be refused:** The accused must receive a practical and effective defense.

TWALIB V. GREECE, ECHR, 9 Jun 1998, para. 46 (legal representation); ARTICO V. ITALY, ECHR, 13 May 1980, para. 33 (practical and effective defense).

**Comparable Article(s) in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*:** Article 6(1). This article provides for fair trial rights including the right to defend himself/herself through legal assistance of his own choosing, or, if he/she does not have the means for such assistance, to be given it free when the interests of justice so require.

### ***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Regularity of lawyer's summons:** This must be assessed the day it is issued.

No. 07-88451, CRIM. BULL. 49, FCC, 26 Feb 2008.

**Nullity of the lawyer's summons:** Where five working day period from lawyer's summons to interrogation is not respected, summons is void.

No. 86-93266, CRIM. BULL. 251, FCC, 2 Sep 1986.



**Violation: failure to summon lawyer for adversarial debate:** This violates the right of the accused to assistance in his/her defense.

No. 07-86794, CRIM. BULL. 297, FCC, 4 Dec 2007.

**Summons of lawyer is required every time the charged person is to be heard:** Summons does not have to specify subject.

No. 85-94010, CRIM. BULL. 288, FCC, 1 Oct 1985.

**Communication of case file:** This can only be done to parties' lawyers. To avoid nullity, case file must also be complete and contain all available procedural documents at time of communication.

No. 00-82215, FCC, 22 Jan 2002 (communication of case file to lawyers); DP.1937, FCC, 3 Aug 1935 (case file must be complete).

**Documents issued between day of communication of case file and interrogation:**

Given that judicial investigation is proceeding, documents issued between day of communication of case file and day of interrogation may be added to the case file as long as the charged person and his lawyer are informed beforehand.

No. 89-86666, CRIM. BULL. 86, FCC, 20 Feb 1990.

**Comparable Article(s) in the French Code of Criminal Procedure:** Article 114. This article provides for the rights of the accused, including the right to be assisted by a lawyer during interrogation.

## Article 150. Interview of Civil Party

*A civil party may be assisted by a lawyer.*

*In this case, the investigating judge shall summons the lawyer of the civil party at least 5 days before the interview. During that period, the lawyer may examine the case file.*

*A civil party may be interviewed only in the presence of his lawyer. However, if the lawyer was properly summonsed but does not show up on the specified date and time, the investigating judge may interview the civil party without the presence of his lawyer. The absence of the lawyer shall be noted in the written record of the civil party's interview.*

*Exceptionally, the investigating judge may interview the civil party without summonsing the lawyer if the civil party expressly waives his right to his lawyer's presence. This waiver shall be noted in a separate written record of the civil party's interview and shall be signed by the civil party.*

*In case of urgency, the investigating judge may interview the civil party without summonsing the lawyer. This urgency situation can only be caused by danger of death or by a risk of losing evidence. The type of urgency shall be written in the report.*

*The investigating judge may call on an interpreter/translator as provided in Article 144 (Assistance of Interpreter/Translator) of this Code.*

### **Application in the ECCC**

**Civil party applicants are interviewed according to civil party rules:** The rules governing the interview of civil parties also govern the interview of civil party applicants who, until final determination of their application, are treated as civil parties.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATION ADMISSIBILITY APPEAL (OPINION OF JUDGES NEY THOL, CATHERINE MARCHI-UHEL AND HUOT VUTHY IN RESPECT OF THE DECLARED INADMISSIBILITY OF ADMITTED CIVIL PARTIES), ECCC, PTC, 27 Apr 2010, para. 9.

**Corresponding ECCC Internal Rule(s):** Internal Rules are 59(1), 59(2), 59(3), 59(6) and 30. Internal Rule 59 is similar to Article 150 except that Internal Rule 59(3) allows the questioning of a civil party in the presence of other parties when the judge decides to confront a witness with another and Internal Rule 59(6) allows the judge to delegate his/her investigatory actions to investigators via rogatory letters. Internal Rule 30's interpreting provisions are similar to Article 150, except that any witness or party may also request an interpreter when needed.

## Article 154. Oath of Witnesses

*Before the interview, the witness shall take an oath affirming that he will tell the truth in accordance with his religion or beliefs. The form of the oath shall be conformed with the template annexed to this Code.*

### **Application in the ECCC**

**All witnesses must take oath:** Any person who appears as a witness must take an oath to tell the truth.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: TRIAL MANAGEMENT MEETING DIRECTIVES, ECCC, TC, 8 Apr 2011, p. 1.

**Corresponding ECCC Internal Rule(s):** Internal Rule 24. This rule is substantially similar to Article 154 except that it adds that a witness must swear an oath when testifying in chambers as well as before the interview.

### **Application of Comparable Articles in Other Jurisdictions**

#### **European Court of Human Rights**

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Anonymous informants may be used as sources during investigation:** However, subsequent use of their statements by court to establish conviction may raise some issues.

DOORSON v. NETHERLANDS, ECHR, 26 Mar 1996, para.69.

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:** Article 6(3). This article provides for fair trial rights including the right of a charged person to examine or have examined witnesses against him.

#### **French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Parents and allies of accused:** Must take oath before investigating judge.

No. 83-90217, CRIM. BULL. 87, FCC, 22 Mar 1983.

**Anonymity of witnesses:** Person who takes oath cannot remain anonymous.

No. 83-91283, CRIM. BULL. 244, FCC, 26 Jun 1984.

**Omitting to take an oath or taking an oath with delay:** Shall not be cause for nullity when did not harm rights of defense.

No. 90-84412, CRIM. BULL. 327, FCC, 2 Oct 1990.

**Where witness does not take oath before investigating judge:** This does not cancel the interview.

No. 80-94773, CRIM. BULL. 110, FCC, 31 Mar 1981;  
No. 83-90217, CRIM. BULL. 87, FCC, 22 Mar 1983.

**Comparable Article(s) in the French *Code of Criminal Procedure*:**Articles 103,108,109,113-7 and 153. These articles establish procedures for the hearing of witnesses, including the matter of a witness's oath.

## Article 156. Witness without Swearing

*The following witnesses may make a statement without having taken an oath:*

1. *The father, mother and ascendants of the charged person;*
2. *The sons, daughters and descendants of the charged person;*
3. *The brothers and sisters of the charged person;*
4. *The brother-in-laws and sister-in-laws of the charged person;*
5. *The husband or wife of the charged person, even if they have been divorced;*
6. *Any child who is less than 14 years old.*

### ***Application in the ECCC***

**Individuals exempted from oath may testify:** Such testimony shall be put before the chamber as evidence and assessed for relevancy and probative value.

DUCH CASE: JUDGMENT, ECCC, TC, 26 Jul 2010, para. 52.

**Corresponding ECCC Internal Rule(s):** Internal Rule 24. This rule is substantially similar to Article 156, except that Internal Rule 24(3) expressly requires the investigating judge to determine if a qualifying relationship exists. Internal Rule 24 includes the names relatives of the charged person as well as the accused and any civil party.

### ***Application of Comparable Articles in Other Jurisdictions***

#### ***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Oath of parents of the defendant:** Parents do not take an oath before the Trial Court but are not exempt from taking the oath during the investigation.

No. 83-90217, CRIM. BULL. 87, FCC, 22 Mar 1983.

**Minor under sixteen asked to take an oath:** This will not give rise to nullity.

CRIM. BULL. 427, FCC, 25 Aug 1953; CRIM. BULL. 285, FCC, 30 Aug 1900.

**Comparable Article(s) in the French Code of Criminal Procedure:** Articles 103, 108, 109, 113-7 and 153. These articles establish procedures for the hearing of witnesses, including the matter of a witness's oath.

## Article 157. Impossibility to Question Witness

*For the sake of respect of the rights to defense, the investigating judge may not call as a witness any person against whom there is inculpatory evidence indicating his involvement in the crime under investigation. In such a case, the judge shall follow the procedures provided in Article 143 (Notification of Placement Under Judicial Investigation) of this Code.*

### ***Application in the ECCC***

**Prohibition on calling forward witness against whom there is inculpatory evidence does not extend to previously convicted person:** This is even if conviction is under appeal. If appeal is not over by time person is to testify, chamber could still hear the testimony under specific instructions safeguarding witness's right to protect himself/herself against self-incrimination.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES, TRIAL MANAGEMENT MEETING DIRECTIVES, ECCC, TC, 8 Apr 2011, pp. 1-2.

**Person may testify to things seen or heard besides his/her involvement:** If testimony of person against whom there is inculpatory evidence is related to events or his/her acts during that time, witness does not have to answer or make any statement regarding that fact. However, he/she can provide other reasons - things seen or heard besides the personal acts of the witness.

DUCH CASE: TRIAL TRANSCRIPTS, Day 8, ECCC, TC, 20 Apr 2009, page 5, lns. 1-5.

**Corresponding ECCC Internal Rule(s):** Internal Rules 24 and 28. These rules are substantially similar to Article 157, except that Internal Rule 28 contains more detailed information on the witness's right not to incriminate himself/herself and factors to be considered in determining if the witness should be compelled to answer, including importance/uniqueness of the evidence and protection available to the witness.

### ***Application of Comparable Articles in Other Jurisdictions***

#### ***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Person against whom there is inculpatory evidence indicating his/her involvement in the crime under investigation shall not be called as witness once investigation has started:** However, he/she may be called for questioning, interviews, discussions, during preliminary investigation.

No. 86-93091, CRIM. BULL. 247, FCC, 20 Aug 1986.

**Investigating judge may indict a person only after gathering sufficient inculpatory evidence**

**of his/her participation in crime:** This evidence may be gathered through investigative processes including questioning the person as a witness, even though the person may incriminate himself/herself during questioning.

No. 02-88194, FCC, 21 Jan 2004.

**Situation in which person is heard as witness and then admits being author of the relevant criminal acts:** At this point, the interview is stopped immediately.

No. 70-92605, CRIM. BULL. 78, FCC, 24 Feb 1972.

No. 04-80753, CRIM. BULL. 102, FCC, 28 Apr 2004.

**Situations in which person in police custody on rogatory letter may be heard by judicial police officer:** Such persons may be heard after taking an oath, as long as there is not serious and corroborative evidence that he took part in the offences referred to the investigating judge and that his name does not appear in the introductory submission.

**Spontaneous incriminating declarations of witness:** Judicial police officer may collect serious evidence of participation in offences against person heard as witness, if questions only summarize spontaneous declarations of the person, and responses do not provide any new element.

Nos. 85-92518/87-83370, CRIM. BULL.308, FCC, 1 Sep 1987.

**Comparable Article(s) in the French *Code of Criminal Procedure*:**Articles 101 and 105. Article 101 provides for the questioning of witnesses, while Article 105 prohibits the questioning of people as witnesses against whom there is serious and corroborating evidence of participation in the relevant criminal acts.

## Article 162. Necessity of Expert Reports

*In case of technical questions, the investigating judge may issue an order to ask for an expert report either on his own motion or at the request of the Royal Prosecutor, the charged person, or a civil party.*

*Where the investigating judge denies a request for an expert report, his decision shall be supported by a justification. The order shall be made within five days if the request is from the Prosecutor and within one month if the request is from the charged person or from a civil party. The applicant shall be notified of the decision without delay.*

### ***Application in the ECCC***

**Technical questions include fitness of accused or charged person:** Expert may perform medical or psychological examination of accused or charged person to determine their fitness to stand trial. Accused or charged persons are entitled to have their capacity to effectively participate in the proceedings evaluated by an expert if their request for such evaluation is properly justified.

NUON CHEA CASE: EXPERT APPOINTMENT APPEAL, ECCC, PTC, 22 Oct 2008, paras. 18-19 and 26-27. NUON CHEA CASE: DECISION ON FITNESS TO STAND TRIAL AND DEFENSE MOTION FOR ADDITIONAL MEDICAL EXPERTISE: ECCC, TC, 15 Nov 2011, para. 14; IENG THIRITH CASE: DECISION ON FITNESS TO STAND TRIAL: ECCC, TC, 17 Nov 2011, para. 10; IENG SARY CASE: DECISION ON IENG SARY'S REQUEST FOR RECONSIDERATION OF THE TRIAL CHAMBER DECISION ON THE ACCUSED'S FITNESS TO STAND TRIAL: ECCC, TC, 19 Dec 2012, para. 9; NUON CHEA AND KHIEU SAMPHAN CASE: CASE 002/01 JUDGMENT, TC, 7 Aug 2014, paras 6-7.

**Investigating judges must respond to request to appoint an expert as soon as possible:** At minimum, such request must be ruled upon before the end of the investigation. Charged persons may take the request to the Investigative Chamber directly if an investigating judge fails to respond to a request to appoint an expert within 30 days.

IENG SARY CASE: PSYCHIATRIC EXPERT APPEAL, ECCC, PTC, 21 Oct 2008, paras. 21-22.

**Failure of investigating judge to timely rule on a request to appoint an expert may be interpreted as a constructive refusal:** If the delay in making a decision deprives the charged person of the possibility of obtaining the benefit he/she seeks, the delay amounts to a constructive refusal of the application, which may be appealed.

IENG SARY CASE: PSYCHIATRIC EXPERT APPEAL, ECCC, PTC, 21 Oct 2008, paras. 23-24.

**Corresponding ECCC Internal Rule(s):** Internal Rules 31(1), 31(10) and 55(5)(a). These rules are broader than Article 162 in that Internal Rule 31(1) stipulates that expert reports may be requested on any subject deemed necessary to investigations or proceedings before the ECCC. They are also more limiting in that Internal Rule 31(10) restricts requests of parties other than the investigating judges or chambers to experts who will conduct new examinations or re-examine matter already subject of expert report, while Internal Rule 55(5)(a) provides that the investigating judges may take any investigative action conducive to ascertaining the truth, including obtaining expert reports when appropriate.



### ***Application of Comparable Articles in Other Jurisdictions***

#### ***UN Human Rights Committee***

*Cambodia is a party to the International Covenant on Civil and Political Rights (ICCPR), which sets out international law principles on criminal procedure. Below are examples of how comparable ICCPR articles have been interpreted and applied by its implementing body, the UN Human Rights Committee.*

**Refusal to order crucial expert testimony violates fair trial rights:** When expert testimony would be of crucial importance to case, the

Court's refusal to order such testimony is a violation of fair trial rights.

GARCÍA FUENZALIDA V. ECUADOR, UN HRC, 12 Jul 1996, para. 9.5.

**Comparable Article(s) in the *International Covenant on Civil and Political Rights*:** Articles 14(3)(b) and 14(3)(e). Article 14(3)(b) requires the charged person to have adequate time and facilities for the preparation of his defense while 14(3)(e) provides the charged person with equal rights to obtain and examine witnesses.

#### ***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Release of request to appoint expert:** Requests by parties to the case do not have to be released to prosecutor.

may delegate to qualified person tasks similar to those of expert appointed by investigating judge.

No. 79-90313, CRIM. BULL. 100, FCC, 25 Mar 1980.

No. 05-84021, CRIM. BULL. 226, FCC, 14 Sep 2005.

**Prosecutorial delegation of expert-like tasks during preliminary investigation:** Prosecutor

**Comparable Article(s) in the *French Code of Criminal Procedure*:** Article 156. This article provides for the appointment of an expert to examine technical questions that arise on the motion of the relevant chamber, or an application of the prosecutor or one of the parties.

## Article 165. Order to Appoint Expert(s)

*An expert shall be appointed by an order of the investigating judge. The order shall specify the tasks of the expert and the duration of the assignment.*

*The assignment shall cover only the technical aspect of the case.*

*When it is appropriate, the investigating judge shall give some or all of the exhibits to the expert. He shall establish a written record on the hand-over of the seized exhibits. The expert may break the seal on the exhibits in order to perform his tasks as an expert. If an expert needs to damage or destroy the exhibits, the expert shall inform the investigating judge and request for an authorization from the investigating judge before beginning such action.*

### **Application in the ECCC**

**Technical questions include fitness of accused or charged person:** Expert may perform medical or psychological examination of accused or charged person to determine their fitness to stand trial. Accused or charged persons are entitled to have their capacity to effectively participate in the proceedings evaluated by an expert if their request for such evaluation is properly justified.

NUON CHEA CASE: EXPERT APPOINTMENT APPEAL, ECCC, PTC, 22 Oct 2008, paras. 18-19 and 26-27. NUON CHEA CASE: DECISION ON FITNESS TO STAND TRIAL AND DEFENSE MOTION FOR ADDITIONAL MEDICAL EXPERTISE: ECCC, TC, 15 Nov 2011, para. 14; . IENG THIRITH CASE: DECISION ON FITNESS TO STAND TRIAL: ECCC, TC, 17 Nov 2011, para..10; IENG SARY CASE: DECISION ON IENG SARY'S REQUEST FOR RECONSIDERATION OF THE TRIAL CHAMBER DECISION ON THE ACCUSED'S FITNESS TO STAND TRIAL: ECCC, TC, 19 Dec 2012, para..9; NUON CHEA AND KHIEU SAMPHAN CASE: CASE 002/01 JUDGMENT, TC, 7 Aug 2014, para 6.

**Amicus curiae briefs must be independent:** Amicus briefs may only be submitted by experts not affiliated with court or its offices. These briefs cannot serve as a substitute for international counsel.

DUCH CASE: AMICUS BRIEF REQUEST, ECCC, SCC, 9 Dec 2010, paras. 8-9.

**Where the age or capacity of an accused is at issue, medical experts can be appointed to investigate the fitness of the accused to stand trial;** where a medical expert is appointed, the principle for determination is whether the accused person is able to exercise effectively his rights in the case against him. Rights should include the right (1) to plead; (2) to understand the nature of the charges; (3) to understand the course of the proceedings; (4) to understand the details of the evidence; (5) to instruct counsel; (6) to understand the consequences of the proceedings and (7) to testify.

NUON CHEA CASE: DECISION ON FITNESS TO STAND TRIAL AND DEFENSE MOTION FOR ADDITIONAL MEDICAL EXPERTISE: ECCC, TC, 15 Nov 2011, para. 14; . IENG THIRITH CASE: DECISION ON FITNESS TO STAND TRIAL: ECCC, TC, 17 Nov 2011, para..10; NUON CHEA CASE: DECISION ON FITNESS OF THE ACCUSED NUON CHEA TO STAND TRIAL, ECCC, TC, 24 Apr 2014, para 6. KHIEU SAMPHAN CASE: DECISION ON FITNESS OF THE ACCUSED KHIEU SAMPHAN TO STAND TRIAL, ECCC, TC, 24 Apr 2014, para 6.

**Adequate reasons must exist to justify an additional inquiry into the fitness of an accused person:** where reassessment is sought, the onus rests on the moving party to demonstrate its necessity

NUON CHEA CASE: DECISION ON FITNESS TO STAND TRIAL AND DEFENSE MOTION FOR ADDITIONAL MEDICAL EXPERTISE: ECCC, TC, 15 Nov 2011, para. 20; NUON CHEA AND KHIEU SAMPHAN CASE: DECISION ON ACCUSED'S FITNESS TO STAND TRIAL AND ORDER ASSIGNING EXPERTS: ECCC, TC, 17 Feb 2014, para. 5; NUON CHEA AND KHIEU SAMPHAN

CASE: CASE 002/01 JUDGMENT, TC, 7 Aug 2014, para. 7. .

**Corresponding ECCC Internal Rule(s):** Internal Rules 31(3), 32 and 33. Internal Rule 31(3) is substantially similar to Article 165, except that it does not limit expert to technical aspects. Internal Rule 32 specifically allows for expert medical and psychological examination of an accused or charged person to determine whether such person is competent to stand trial or for any other reasons. Internal Rule 33(1) provides that the investigating judges or chambers may invite or grant leave to an organization or person to submit an *amicus curiae* brief.

### *Application of Comparable Articles in Other Jurisdictions*

#### **French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Completed psychiatric examination of charged person aimed at excluding his/her liability does not prevent an expert from examining the facts:** Expert may still consider accused's guilt and possibility of criminal penalty.

No. 91-80614, CRIM. BULL. 169, FCC, 9 Apr 1991.

**Expert must report to investigating judge suspicious facts noticed during examination of documents given to him:** The investigating

judge may take necessary measures including extending scope of expert's mission.

No. 66-90922, CRIM. BULL. 11, FCC, 10 Jan 1967.

**Where list of written documents already exists before documents given to expert:** In such circumstances, investigating judge need not produce such list.

No. 02-80721, CRIM. BULL. 111, FCC, 14 May 2002.

**Comparable Article(s) in the French Code of Criminal Procedure:** Articles 158, 159, 161 and 163. Article 158 defines the experts' role. Article 159 empowers the investigating judge to appoint an expert or multiple experts. Article 161 establishes procedures for the expert to be engaged, undertake his/her examination and produce his/her report. Article 163 relates to the transmission of evidence to the expert for examination.

## Article 169. Appointment of Multiple Experts

*If the circumstances so require, the investigating judge may appoint multiple experts. In this case, if the experts have different opinions, each expert shall put his own opinion or disagreement in writing.*

### **Application in the ECCC**

**Additional experts or counter-experts may be called by party to a case after contents of expert report known:** Counsel for parties may request additional experts to reexamine subject matter of expert reports previously submitted to the court. Parties may wish to exercise such right where they have concerns about an expert report.

IENG SARY CASE: ADDITIONAL DEMOGRAPHIC EXPERT REQUEST APPEAL, ECCC, PTC, 28 Jun 2010, para. 14; NUON CHEA CASE: ADDITIONAL DEMOGRAPHIC EXPERT REQUEST APPEAL, ECCC, PTC, 1 Jul 2010, para. 15.

**Additional expert request must be made in timely fashion:** If counsel wishes to modify an order appointing additional experts, counsel must raise its concerns shortly after issuance of the order.

NUON CHEA CASE: ADDITIONAL DEMOGRAPHIC EXPERT REQUEST APPEAL, ECCC, PTC, 1 Jul 2010, paras. 23-24 (denying request made almost one year after order). NUON CHEA CASE: DECISION ON FITNESS TO STAND TRIAL AND DEFENSE MOTION FOR ADDITIONAL MEDICAL EXPERTISE: ECCC, TC, 15 Nov 2011, paras. 36-37 (denying request made where an attempt was made to impeach an expert after his report had been submitted).

**Requests for additional medical experts should include *de facto* reasons for their need or new circumstances which support their inclusion:** Counsel cannot request additional experts in situations where a ruling has been made determining such experts were not necessary, where no new circumstances warrant their inclusion.

IENG SARY CASE: DECISION ON IENG SARY'S REQUEST FOR RECONSIDERATION OF THE TRIAL CHAMBER DECISION ON THE ACCUSED'S FITNESS TO STAND TRIAL: ECCC, TC, 19 Dec 2012, paras.9-10

**Corresponding ECCC Internal Rule(s):** Internal Rules 31(9) and 31(10). Internal Rule 31(9) is substantially similar to Article 169 except that it limits the number of experts to a reasonable number and requires that adissenting expert explain his/her reasoning. Internal Rule 31(10) allows parties to request additional experts to conduct new examinations or reexamine the subject matter of expert reports that are already before the court.

### **Application of Comparable Articles in Other Jurisdictions**

#### **French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Execution of task by only one of the two experts appointed may not violate the rights of**

**the defense:** Where there is tacit agreement of investigating judge.

No. 99-87081, CRIM. BULL. 49, FCC, 1 Feb 2000.

**When one of the two experts appointed dies in the course of their examination:** An examination report made by only expert cannot

be canceled if investigating judge was aware of situation and could control progress of examination. Decision to appoint second expert is not mandatory.

No. 02-83270, FCC, 24 Jul 2002.

**Comparable Article(s) in the French Code of Criminal Procedure:** Article 159. This article empowers the investigating judge to appoint an expert or multiple experts.

## Article 170. Notification of Conclusions of Expert Reports

*When the report of an expert has been submitted, the investigating judge shall inform the Royal Prosecutor of that report.*

*Any report by an expert shall be placed in the case file.*

*The investigating judge shall summons the charged person and his lawyer and inform them about the conclusions of the expert.*

*The investigating judge shall also summons all civil parties and their lawyers to inform them about the conclusions of the experts.*

*The investigating judge shall set a time limit within which the Royal Prosecutor, the charged person and the civil party can request for additional expertise or the appointment of a counter-expert. This time limit shall not be less than ten days. During this period, the lawyers may examine the case file that includes the report of the expert.*

*The request for additional expertise or counter-experts shall be in writing and shall be supported by reasonable reasons.*

*If the investigating judge does not grant the request, the decision shall be supported by reasonable reasons. The decision shall be made within five days if the request was made by the Royal Prosecutor and within one month if the request was made by a charged person or a civil party. The applicant shall be notified of the order without delay.*

*Any request for additional expertise or counter-experts that is submitted after the expiration of the time limit specified by the investigating judge shall be placed in the case file.*

*If the investigating judge receives a request to appoint an expert, a request for additional expertise or for counter-experts and the judge fails to make a decision within the time stated in paragraph 2 of Article 162 (Necessity of Expert Reports) of this Code or in this Article, the applicant can file a request directly to the Investigation Chamber, who shall decide instead of the investigating judge.*

### ***Application in the ECCC***

**Right of privacy of accused concerning medical information when fitness to stand trial at issue:** When accused challenges fitness to stand trial, right to keep medical information private is balanced against public's right to know the basis on which the fitness challenge will be determined. In such instances, all parties must have opportunity to support/oppose expert medical findings.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: MEMORANDUM TO COUNSEL FOR THE PARTIES, ECCC, TC, 6 Jul 2011, pp. 1 and 2.

**Investigating judges must respond to request to appoint an expert as soon as possible:** At minimum, such request must be ruled upon before the end of the investigation. Charged persons may take the request to the Investigative Chamber directly if an investigating judge fails to respond to a request to appoint an expert within 30 days.

IENG SARY CASE: PSYCHIATRIC EXPERT APPEAL, ECCC, PTC, 21 Oct 2008, paras. 21-22.

**Requests for additional/counter experts typically do not predate disclosure of initial expert report:** Article 170 implies that under Cambodian law, it is not usual for such requests to be submitted before filing of initial report. Rather, after initial expert report is filed, investigating judge will set a schedule for additional/counter experts.

IENG SARY CASE: ADDITIONAL EXPERT REQUEST APPEAL, ECCC, PTC, 14 Dec 2009, paras. 12-16.

**Challenges to qualifications of appointed expert:** Generally, challenges to qualifications of appointed expert are only permissible after disclosure of such expert's report.

IENG SARY CASE: ADDITIONAL EXPERT REQUEST APPEAL, ECCC, PTC, 14 Dec 2009, para. 17.

**Corresponding ECCC Internal Rule(s):** Internal Rules 31(7), 31(8), and 31(10). These rules are generally similar to Article 170, although the Internal Rules do not require the investigating judges to summon any parties to hear the results of an expert report and instead, investigating judges may inform the parties by simply adding the report to the case file or the record of proceedings (Internal Rules 31(7), 31(8)). Requests by the prosecution, defense, or civil parties for additional expert reports must be made in writing and simply "give reasons" (Internal Rule 31(10)). While there is also no precise time limit, Internal Rule 31(10) requires that either the investigating judges or the chambers rule upon the request as soon as possible and before the end of the investigation or the proceedings. Requests that are denied may be appealed in the Pre-Trial Chamber.

### *Application of Comparable Articles in Other Jurisdictions*

#### ***European Court of Human Rights***

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Opportunity to examine the relevant evidence:** Parties to case should have opportunity to know and comment on all evidence adduced or observations filed and attend experts' interviews.

RUIZ-MATEOS V. SPAIN, ECHR, 23 Jun 1993, para. 63 (know and comment on evidence or observations);  
MANTOVANELLI V. FRANCE, ECHR, 18 Mar 1997, para.3 (attending interviews).

**Change of expert opinion during trial:** Where expert for accused changes opinion during trial to position unfavorable towards accused and contrary to opinion in written report, right of accused to fair trial may be infringed.

G.B V. FRANCE, ECHR, 2 Oct 2001, para.68-70.

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:** Article 6(1). This article provides for fair trial rights including the right to a fair hearing and to have adequate time and facilities for the preparation of his/her defense.

#### ***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Despite investigating judge's obligation to notify party of conclusions of expert's report, lack of such notification does not violate**

**rights of person under examination:** This is because notification of termination of investigations gives parties the right, within 20

days, to request expertise (including counter or additional expertise).

No. 05-86773, CRIM. BULL. 46, FCC, 15 Feb 2006.

**Comparable Article(s) in the French *Code of Criminal Procedure*:** Article 167. This article establishes the processes for notification of conclusions of expert reports and for the requests of any additional expertise or counter expertise.



## Article 197. Arrest Warrant and Opinion of Prosecutor

*Before issuing an arrest warrant, the investigating judge shall ask for the opinion of the Royal Prosecutor. The investigating judge shall issue the arrest warrant with reasons which he shall specify after obtaining the opinion of the Royal Prosecutor.*

*The Royal Prosecutor shall guarantee the dissemination of the arrest warrant.*

### ***Application in the ECCC***

**Investigating judge is free to characterize facts as they see fit:** They are not bound by characterization of facts by Prosecutor, although they do have to make a decision about that characterization.

NUON CHEA, IENG SARY, KHIEU SAMPHAN, IENG THIRITH AND DUCH CASES: ORDER ON CLARIFICATION OF CHARGES, ECCC, OCIJ, 20 Nov 2009, para. 10.

**Corresponding ECCC Internal Rule(s):** Internal Rule 44. This rule is substantially similar to Article 197.

### ***Application of Comparable Articles in Other Jurisdictions***

#### ***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Investigating judge has power to issue arrest warrant:** It may do so after completion of all necessary investigations.

No. 83-94762, CRIM. BULL. 58, FCC, 14 Feb 1984.

**Comparable Article(s) in the French Code of Criminal Procedure:** Articles 80, 82 and 122. Article 80 requires the investigating judge to conduct the investigation in accordance with the introductory submission, while Article 82 gives the prosecutor the right to request the investigating judges to perform certain acts as part of the investigation through the introductory submission and Article 122 gives the investigating judge the power to issue an arrest warrant.

## Article 198. Information Stated in Arrest Warrant

*An arrest warrant shall include the following information:*

- *The identity of the involved person;*
  - *The charged offense, and the law which defines and punishes the offense;*
  - *The name and position of the judge who issued the arrest warrant.*
- An arrest warrant shall be dated, signed and sealed by the investigating judge.*

### **Application in the ECCC**

**Investigating judge is free to characterize facts as they see fit:** They are not bound by characterization of facts by Prosecutor, although they do have to make a decision about that characterization.

NUON CHEA, IENG SARY, KHIEU SAMPHAN, IENG THIRITH AND DUCH CASES: ORDER ON CLARIFICATION OF CHARGES, ECCC, OCIJ, 20 Nov 2009, para. 10.

**Legal characterization of the facts is provisional only:** Legal characterization is always provisional at the judicial investigation stage.

NUON CHEA, IENG SARY, KHIEU SAMPHAN, IENG THIRITH AND DUCH CASES: ORDER ON CLARIFICATION OF CHARGES, ECCC, OCIJ, 20 Nov 2009, para. 10.

**Corresponding ECCC Internal Rule(s):** Internal Rule 45. This rule is similar to Article 198, except that it specifies that identity information required includes, where possible, date of birth, address, and any other identifying information. Internal Rule 45 also requires several additional pieces of information be given: (1) a reference to any associated order or charge; (2) the location, date and time of the relevant hearing, where appropriate; and (3) an indication of any defence rights, including the right to legal assistance.

### **Application of Comparable Articles in Other Jurisdictions**

#### **UN Human Rights Committee**

*Cambodia is a party to the International Covenant on Civil and Political Rights (ICCPR), which sets out international law principles on criminal procedure. Below are examples of how comparable ICCPR articles have been interpreted and applied by its implementing body, the UN Human Rights Committee.*

**Violation: Arrested without arrest warrant, no reasons:** Right to liberty and security breached when accused was forcefully arrested without warrant nor adequate explanation for his arrest.

MEDJOUNE V. ALGERIA, UN HRC, 14 July 2006, para. 8.5.

**Violation: Despite legal basis, violation when arrested at gunpoint and detained without disclosing the reason for arrest:** Arrest deemed arbitrary despite legal basis for arrest when accused was not informed about it at time of arrest and was unnecessarily arrested at gunpoint by 20 policemen.

MARQUES V. ANGOLA, UN HRC, 29 Mar 2005, para. 6.1.

**Violation: Arrested without warrant and detained for 7 days without charge:** Arrest warrant issued 7 days after arrest and detention violated rights due to absence of legally required arrest warrant. Delay of 7 seven days before detained accused was charged violated his right to be brought promptly before judge following arrest.

SAFARMO KURBANOVA V. TAJIKISTAN, UN HRC, 6 Nov 2003, para. 7.2.

**Violation: Not informed of the reason of arrest and detention until brought before magistrate 8 months later:** Rights of accused upon arrest to be informed of reason for arrest and brought promptly before judge violated when accused was not promptly of reasons for his arrest and

brought before judge only after 218 days of incommunicado detention.

MEDJNOUNE V. ALGERIA, UN HRC, 14 Jul 2006, para. 8.6.

**Comparable Article(s) in the *International Covenant on Civil and Political Rights*:** Articles 9(1) and (2) and 14(3)(a). Article 9(1) establishes the general right to liberty and security of the person, provides that no-one may be arrested or detained arbitrarily and that deprivation of liberty may only be on grounds established by law, while 9(2) requires that person to be informed of the reasons for their arrest and the charges against them. Article 14(3)(a) establishes an individual's right to be "informed promptly" of the charges against him/her.

### ***European Court of Human Rights***

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protection to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Facts justifying arrest do not need to be on same level as the level needed for charging or conviction:** This is the next stage of the investigation.

MURRAY V. UNITED KINGDOM, ECHR, 28 Oct 1994, paras.55 and 78.

the reason of arrest/detention is not sufficiently upheld by mere reference to policy announcements or by providing the reason, orally, only after 76 hours of detention after arrest.

SAADI V. UNITED KINGDOM, ECHR, 29 Jan 2008, para. 84.

**Violation: Oral reasons, broad policy reasons insufficient:** Right to be promptly informed of

**Comparable Article(s) in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*:** Article 5(2). This article provides that everyone arrested shall be informed promptly and in a language they understand of the reasons for their arrest and any charges against them.

### ***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Investigating judge has power to issue arrest warrant:** It may do so after completion of all necessary investigations.

No. 83-94762, CRIM. BULL. 58, FCC, 14 Feb 1984.

**Comparable Article(s) in the *French Code of Criminal Procedure*:** Articles 80, 82 and 122. Article 80 requires the investigating judge to conduct the investigation in accordance with the introductory submission, while Article 82 gives the prosecutor the right to request the investigating judges to perform certain acts as part of the investigation through the introductory submission and Article 122 gives the investigating judge the power to issue an arrest warrant.

## Article 203. Principle of Provisional Detention

*In principle, the charged person shall remain at liberty. Exceptionally, the charged person may be provisionally detained under the conditions stated in this section.*

### **Application in the ECCC**

**Necessity to balance detention against liberty:** Courts must balance reasons for detention against right to personal liberty. Presumption of liberty requires detention to have basis in judicial decision, issued in accordance with statutory procedure and conditions.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, paras. 47 and 56. IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 80; IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 22. NUON CHEA CASE: SECOND DECISION ON NUON CHEA'S FITNESS TO STAND TRIAL, ECCC, TC, 2 Apr 2013, para.16; IENG THIRITH CASE: FITNESS TO STAND TRIAL (IMPLEMENTATION OF SUPREME COURT CHAMBER'S DECISION), ECCC, TC, 13 Mar 2013, para. 1; IENG THIRITH CASE: DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO RELEASE THE ACCUSED IENG THIRITH, ECCC, SC, 13 Dec 2011, paras 21-26 (noting that for a conditional stay of proceedings, the unconditional release of the person concerned is not the inevitable consequence); NUON CHEA AND KHIEU SAMPHAN CASE: CASE 002/01 JUDGMENT, TC, 7 Aug 2014, paras 6-7.

person. Specifically, the adversarial hearing gives the charged person the opportunity to respond to prosecutors while the interview is conducted for purposes of finding truth and obtaining a statement from the charged person that can be used against him.

**Presumption in favor of release:** This is the fundamental principle governing pre-trial detention.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, para. 56.

**Charged person may be provisionally detained only after adversarial hearing:** If provisional detention is not ordered after such hearing, charged person must be released. Adversarial hearing is distinct in purpose from interview of charged

NUON CHEA CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 20 Mar 2008, paras. 13, 17 and 32.

**Where a charged person is found unfit to stand trial, the presumption of liberty requires that she be released from detention:** Continued detention or enforced confinement in circumstances where it is unclear whether a trial will ever be convened violate the right to a fair trial and to liberty. Where an action has not been extinguished under Article 7 of this Code, the charged person may be placed under judicial supervision, until such time as s/he is fit to stand trial or the action is extinguished in accordance with the law.

IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 80; IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 22; IENG THIRITH CASE: DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO RELEASE THE ACCUSED IENG THIRITH, ECCC, SC, 13 Dec 2011, paras 21-26 (noting that for a conditional stay of proceedings, the unconditional release of the person concerned is not the inevitable consequence) IENG THIRITH CASE: FITNESS TO STAND TRIAL (Decision on Co-Prosecutors' Request for Stay of Release Order of Ieng Thirith) SCC, 17 Sep 2012, paras 7-8; IENG THIRITH CASE: FITNESS TO STAND TRIAL (Implementation of the Supreme Court Chamber's Decision) TC, 26 Mar 2013, para 1; IENG THIRITH: DEFENCE REQUEST FOR CLARIFICATION OF THE EXECUTION OF THE SUPREME COURT CHAMBER'S DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO UNCONDITIONALLY RELEASE THE ACCUSED IENG THIRITH, ECCC TC, 27 Jun 2013; IENG THIRITH CASE: DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO UNCONDITIONALLY RELEASE THE ACCUSED IENG THIRITH ECCC, SC, 14 Dec. 2012, paras. 37-39; NUON CHEA AND KHIEU SAMPHAN CASE: CASE 002/01 JUDGMENT, TC, 7 Aug 2014, para. 6.

**Corresponding ECCC Internal Rule(s):** There is no Internal Rule corresponding expressly to Article 203, although Internal Rule 63(3) lists substantially similar grounds on which provisional detention may be ordered as Article 205.

### *Application of Comparable Articles in Other Jurisdictions*

#### **UN Human Rights Committee**

*Cambodia is a party to the International Covenant on Civil and Political Rights (ICCPR), which sets out international law principles on criminal procedure. Below are examples of how comparable ICCPR articles have been interpreted and applied by its implementing body, the UN Human Rights Committee.*

**Pre-trial detention an exception:** Pre-trial detention should be an exception and as short as possible in duration.

CAGAS, BUTIN & ASTILLERO v. PHILIPPINES, UN HRC, 23 Oct 2004, para. 7.4.

**To justify detention, must show concerns that could not be addressed by bail/release conditions:** To justify pre-trial detention, the State must sufficiently describe concerns that would justify continued detention and why these concerns could not be addressed by bail requirements or other strict conditions of release. Concerns justifying pre-trial detention

include influence of witnesses, tampering with evidence or fleeing from the jurisdiction.

SMANTSER V. BELARUS, UN HRC, 23 Oct 2008, para. 10.3.

**Detention only lawful if alleged crime lawfully provides for confinement:** Charged person may not be detained unless the crime that the person is believed to have committed is one for which confinement is prescribed under State law.

LATIFULIN V. KYRGYZSTAN, UN HRC, 10 Mar 2010, para. 8.2.

**Justification required for extended detention:** Detention, including house arrest, may be deemed arbitrary if State cannot provide case-specific grounds to justify continued detention.

KWOK V. AUSTRALIA, UN HRC, 23 Oct 2009, para. 9.3;  
ABBASSI V. ALGERIA, UN HRC, 28 Mar 2007, para.8.4  
(house arrest).

**Remand in custody must be lawful, reasonable, and necessary:** Right to liberty requires circumstances of person's detention be lawful, reasonable, and necessary in all circumstances such as to prevent flight, interference with evidence, or recurrence of crime.

KULOV V. KYRGYZSTAN, UN HRC, 26 Jul 2010, para. 8.3.

**Accused must be tried as expeditiously as possible; compelling reasons required for excessive pre-trial delay:** When accused is denied bail due to seriousness of offense, absent compelling reasons otherwise, he/she must be tried as expeditiously as possible. Compelling reasons are required for significant delay, e.g., nearly six years.

MEJNOUNE V. ALGERIA, UN HRC, 14 Jul 2006, para. 8.9.

**Excessive detention violates presumption of innocence:** While denying bail does not *a priori* affect presumption of innocence, excessive pre-trial detention, e.g., exceeding nine years, does affect this right.

CAGAS, BUTIN & ASTILLEROV. PHILIPPINES, UN HRC, 23 Oct 2004, para. 7.3.

**Excessive detention violates fair trial rights:** Unjustified pre-trial detention in excess of nine years seriously affects fairness of trial and constitutes an unreasonable delay.

CAGAS, BUTIN & ASTILLERO V. PHILIPPINES, UN HRC, 23 Oct 2004, para. 7.4.

**Eighteen-month detention between arrest and trial not necessarily undue delay:** Unless evidence exists that pre-trial investigations could have been concluded faster or that accused complained of delay to authorities, a lapse of a year and a half between arrest and trial does not constitute an undue delay.

KELLY V. JAMAICA, UN HRC, 8 Apr 1991, para. 5.11.

**Evidence-gathering insufficient justification for prolonged detention:** While what constitutes a reasonable detention time is determined based on the circumstances of each particular case, considerations of evidence-gathering do not justify prolonged detention, e.g., four years.

FILLASTRE V. BOLIVIA, UN HRC, 5 Nov 1991, para. 6.5.

**Lack of resources insufficient justification for unreasonable delays:** Lack of adequate budgetary appropriations for the administration of criminal justice does not justify unreasonable delays in bringing accused to trial.

FILLASTRE V. BOLIVIA, UN HRC, 5 Nov 1991, para. 6.5.

**Written proceedings insufficient justification for unreasonable delays:** The fact that criminal investigation is carried out through written proceedings does not justify unreasonable delays in bringing accused to trial.

FILLASTRE V. BOLIVIA, UN HRC, 5 Nov 1991, para. 6.5.

**Violation: prolonged detention after release order:** Prolonging person's detention by a year following issuance of release order, including conditional release order, constitutes illegal detention.

TERÁN JIJÓN AND TERÁN JIJÓN V. ECUADOR, UN HRC, 26 Mar 1992, para. 6.3 (general principle); BAZZANO V. URUGUAY, UN HRC, 15 Aug 1979, paras.2 and 10(i) (conditional release orders).

**House arrest requires lawful procedures and grounds:** House arrest is a deprivation of liberty that must have a legal basis and must be carried out according to procedures established by law.

YKLYMOVA V. TURKMENISTAN, UN HRC, 20 Jul 2009, para. 7.2.

**House arrest not based on legal grounds constitutes a deprivation of liberty:** Placing a person under house arrest without providing written notice of legal reasons for such detention constitutes arbitrary detention and is a deprivation of a person's right to liberty.

ABBASSI V. ALGERIA, UN HRC, 28 Mar 2007, para. 8.2-8.3.

**Sufficient justification for pre-trial detention includes previous flight from the country, return through extradition:** Circumstances justifying pre-trial detention include the fact that the accused had fled the country in the past

and only returned through extradition process, not voluntarily.

BASSO V. URUGUAY, UN HRC, 19 Oct 2010, para. 10.2.

**Comparable Article(s) in the *International Covenant on Civil and Political Rights*:** Articles 9(1), 9(3), 9(4), 14(2) and 14(3)(c). Article 9(3), in particular, provides that it shall not be the general rule that persons awaiting trial should be detained in custody. Other provisions in Article 9 afford guarantees related to detention, while Article 14(2) establishes the presumption of innocence and 14(3)(c) protects the right to trial without undue delay.

### **European Court of Human Rights**

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Link to criminal proceedings:** Deprivation of liberty is only permitted in connection with criminal proceedings.

CIULLA V. ITALY, ECHR, 22 Feb 1989, para. 38.

**Deprivation of liberty shall be amenable to independent judicial scrutiny:** In order to protect persons against arbitrary deprivation of liberty, the act of deprivation is subject to independent judicial scrutiny, and authorities shall be accountable for such acts.

KURT V. TURKEY, ECHR, 25 May 1998, para. 123.

**Relevant and sufficient grounds required for lengthy provisional detention periods:** Reasonable suspicion of having committing an offense is a *conditio sine qua non* for the validity of continued detention, but after a certain

amount of time, this no longer suffices. The Court must then determine whether other grounds provided by authorities justify the continued deprivation of liberty. Where such grounds provided by authorities are deemed relevant and sufficient, the Court must also determine whether the authorities have displayed special diligence, which includes consideration of the complexity and special characteristics of the investigation. The gravity of the charges, the public reaction to them and the severity of a possible sentence can be taken into account in determining to detain an accused, but these reasons cannot by themselves justify long periods of detention.

TOMASI V. FRANCE, ECHR, 27 Aug 1992, para. 84;  
SULAOJA V. ESTONIA, ECHR, 15 Feb 2005, para. 62;  
LETELLIER V. FRANCE, ECHR, 26 Jun 1991, para. 35  
KHUDOROV V. RUSSIA, ECHR, 8 Nov 2005, para. 180.

**Comparable Article(s) in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*:** Article 5. This article provides for the right to liberty and security including the right to a lawful arrest or detention.

### **French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**New circumstances in case can justify provisional detention:** Charged person placed under judicial control can be, for same facts and in case of new circumstances, taken in provisional detention.

NO. 04-87392, CRIM. BULL. 73, FCC, 1 Mar 2005; NO. 07-87802, CRIM. BULL. 21, FCC, 29 Jan 2008.

**Decision not to detain provisionally charged person:** Such decision is discretionary.

No. 90-85415, CRIM. BULL. 364, FCC, 30 Oct 1990.

No. 97-82539, CRIM. BULL. 273, FCC, 16 Jul 1997;  
No. 95-82561, CRIM. BULL. 264, FCC, 8 Aug 1995.

**Reasons in decision to detain charged person:**  
These reasons must explain why judicial control is insufficient.

**Comparable Article(s) in the French *Code of Criminal Procedure*:** Article 137. This article provides for judicial supervision and pre-trial detention during the investigation, including remand in custody as a precautionary measure.



## Article 205. Reasons for Provisional Detention

*Provisional detention may be ordered when it is necessary to:*

1. *stop the offense or prevent the offense from happening again;*
2. *prevent any harassment of witnesses or victims or prevent any collusion between the charged person and accomplices;*
3. *preserve evidence or exhibits;*
4. *guarantee the presence of the charged person during the proceedings against him;*
5. *protect the security of the charged person;*
6. *preserve public order from any trouble caused by the offense.*

### **Application in the ECCC**

**Necessity to balance detention against liberty:** Courts must balance reasons for detention against right to personal liberty. Presumption of liberty requires detention to have basis in judicial decision, issued in accordance with statutory procedure and conditions.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, paras. 47 and 56. IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 80; IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 22. NUON CHEA CASE: SECOND DECISION ON NUON CHEA'S FITNESS TO STAND TRIAL, ECCC, TC, 2 Apr 2013, para.16; IENG THIRITH CASE: FITNESS TO STAND TRIAL (IMPLEMENTATION OF SUPREME COURT CHAMBER'S DECISION), ECCC, TC, 13 Mar 2013, para. 1; IENG THIRITH CASE: DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO RELEASE THE ACCUSED IENG THIRITH, ECCC, SC, 13 Dec 2011, paras 21-26 (noting that for a conditional stay of proceedings, the unconditional release of the person concerned is not the inevitable consequence).

**Charged person detained when first appearing:** Charged person held in detention at initial appearance before Trial Chamber shall remain in detention until Chamber renders judgment, as long as detention has lawful basis from judicial authority.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, para. 47-49.

**Detention conditions presumed satisfied where no request for release:** Where charged person has not filed request for release upon initial appearance before Trial Chamber, Chamber entitled to presume statutory conditions for detention remain satisfied.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, para. 49.

**Interference with witnesses, destruction of evidence support provisional detention:** Public statements and actions by charged person amounting to interference with witnesses or destruction of evidence (e.g., displays of hostility, suggestions of retaliation) support provisional detention.

IENG THIRITH CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 9 Jul 2008, paras. 43-52.

**Detention may be necessary for witness protection, even after case file disclosed:** Potential interference with witnesses does not stop once case file is disclosed to charged person. Provisional detention may still be necessary to prevent witness

harassment because witnesses may have to testify in later investigations or hearings and may still therefore be subject to fear or pressure.

DUCH CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 3 Dec 2007, paras. 35-36 (appearance even if previously testified and thus still subject to intimidation); NUON CHEA CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 20 Mar 2008, paras.60-64 (previous statements indicating may threaten witnesses).

**Witness protection to be viewed in context:** Witness protection, particularly regarding fear of testifying, must be viewed within Cambodian social context. Cambodia may have limited available witness protection measures and easily accessible weapons. Therefore, release of charged person from provisional detention may make witnesses fear revenge or pressure from charged person or his family and may prevent their testimony.

DUCH CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 3 Dec 2007, para. 33.

**Liberty may be unacceptable where charged person occupied senior position:** Charged person's presence in society may be unacceptable where they once occupied a senior position in a political movement and continue to exert influence on society, even if no longer holding such position. Presence of charged person may create fear, making witnesses unwilling to testify.

NUON CHEA CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 20 Mar 2008, para. 62; IENG THIRITH CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 9 Jul 2008, para.45; IENG SARY CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 17 Oct 2008, para.97 (position of power carries influence that does not stop after position ends); DUCH CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 3 Dec 2007, paras.31-34 (presence in society may assert pressure on witnesses; history of threatening potential witnesses with death).

**Basis for provisional detention met where there is risk of charged person**

**becoming unavailable for trial:** Basis for provisional detention met where record demonstrates risk of charged person becoming unavailable for trial and preventing speedy proceedings (by going into hiding, disregarding summons or being temporarily prevented from attending hearings). Trial Chamber must evaluate extent to which risk may be reduced by non-detention measures through proper examination of all relevant factors and facts presented in adversarial dispute.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, para. 54.

**Balance of charged person's proposed bail conditions and reasons for detention:** Provisional detention may be necessary where charged person's proposed bail conditions are outweighed by necessity for his/her detention.

IENG THIRITH CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 9 Jul 2008, para. 74; DUCH CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 3 Dec 2007, para. 59.

**Factors suggesting charged person may flee:** Factors include employing measures to conceal their past; using aliases; changing jobs or locations many times; providing false information; previous disappearances; living in area with many supporters and potential connections; frequent travels abroad; and/or financial means; and the stage of the proceedings and likelihood of conviction.

DUCH CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 3 Dec 2007, paras. 37-40 (false names and travel); IENG THIRITH CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 9 Jul 2008, paras.54-56 (living in area with many supporters and potential connections, frequent travel abroad, financial means); IENG SARY CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 17 Oct 2008, paras.102-104 (frequent travel abroad, financial means, known and suspected political connections).KHIEU SAMPHAN CASE: APPLICATION FOR IMMEDIATE RELEASE, ECCC, TC, 26 Apr 2013, para 32 (noting the accused may have more reason to flee the closer it gets to the end of the trial); KHIEU SAMPHAN CASE: APPLICATION FOR IMMEDIATE RELEASE, ECCC, SC, 22 Aug 2013, para 30-34.

**Lack of passport or financial means may not prevent fleeing:** Charged person not necessarily prevented from fleeing by lack of passport or financial means since can still hide within country or cross border illegally.

DUCH CASE: ECCC, PROVISIONAL DETENTION APPEAL, ECCC, PTC, 3 Dec 2007, para. 40 (previously hidden within Cambodia); NUON CHEA CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 20 Mar 2008, para.67 (lack of passport and risk of illegal border crossing).

**Age, spouse imprisonment, medical conditions may not prevent fleeing:** Advanced age of charged person, imprisonment of his/her spouse, or personal medical conditions may not outweigh likelihood of charged person fleeing.

IENG SARY CASE: PROVISIONAL DETENTION EXTENSION APPEAL, ECCC, PTC, 26 Jun 2009, para. 28 (no evidence elderly are not able to travel); IENG THIRITH CASE: SECOND PROVISIONAL DETENTION EXTENSION APPEAL, ECCC, PTC, 30 Apr 2010, para. 37 (medical conditions).

**Age, health, limited mobility not legitimate excuses for not fleeing:** If there is risk charged person will flee, court will not give charged person benefit of doubt. The Chamber will not accept charged

person's age, health, or limited mobility as legitimate excuse for not fleeing.

IENG SARY CASE: SECOND PROVISIONAL DETENTION EXTENSION APPEAL, ECCC, PTC, 30 Apr 2010, paras. 35-39.

**Arrest warrant power does not lessen risk of fleeing:** Power of authorities to issue arrest warrants does not lessen risk charged person will or will not flee.

IENG SARY CASE: SECOND PROVISIONAL DETENTION EXTENSION APPEAL, ECCC, PTC, 30 Apr 2010, paras. 35-39.

**Factors suggesting charged person may need to be detained for his/her protection:** Factors include public statements that indicate charged person's willingness to incriminate other individuals; fear, expressed by charged person or another institution, about charged person's safety; threats of revenge made by victims' families; guarding of charged person's house; or evidence of trauma or psychological impact on affected populations due to trial.

DUCH CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 3 Dec 2007, paras. 42-48 (willingness to incriminate others, fear for charged person's safety); NUON CHEA CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 20 Mar 2008, paras.71-72 (threats of revenge, guarding of charged person's house); IENG THIRITH CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 9 Jul 2008, paras.64-72 (evidence of trauma or psychological impact on affected populations due to trial).

**Expectation of specific threats to charged person needed:** Where there is no evidence that specific threats to security of charged person can be expected, charged person cannot be provisionally detained on this ground.

IENG THIRITH CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 9 Jul 2008, paras. 60-63.

**Detention to preserve or protect public order:** Provisional detention of charged person may be necessary to preserve or protect public order. To satisfy this ground, facts must show charged person's release would actually disturb public order. Here, provisional detention depends on public concern for alleged crimes, frequency of disturbances or violent crimes within society, and potential for politically-motivated instability.

NUON CHEA CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 20 Mar 2008, paras. 79-81; IENG THIRITH CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 9 Jul 2008, paras.64-72; IENG SARY CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 17 Oct 2008, paras.115-117 (daily crimes, political riots); DUCH CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 3 Dec 2007, paras. 50-56 (proceedings may cause existing anxieties within society to resurface); KHIEU SAMPHAN CASE: SECOND PROVISIONAL DETENTION EXTENSION APPEAL, ECCC, PTC, 30 Apr 2010, paras. 36-39 (trauma and psychological impact of proceedings on population as a whole; prevention of public disorder).

**Where a charged person is found unfit to stand trial, the presumption of liberty requires that she be released from detention:** Continued detention or enforced confinement in circumstances where it is unclear whether a trial will ever be convened violate the right to a fair trial

and to liberty. Where an action has not been extinguished under Article 7 of this Code, the charged person may be placed under judicial supervision, until such time as s/he is fit to stand trial or the action is extinguished in accordance with the law.

IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 80; IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 22; IENG THIRITH CASE: DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO RELEASE THE ACCUSED IENG THIRITH, ECCC, SC, 13 Dec 2011, paras 21-26 (noting that for a conditional stay of proceedings, the unconditional release of the person concerned is not the inevitable consequence) IENG THIRITH CASE: FITNESS TO STAND TRIAL (Decision on Co-Prosecutors' Request for Stay of Release Order of Ieng Thirith) SCC, 17 Sep 2012, paras 7-8; IENG THIRITH CASE: FITNESS TO STAND TRIAL (Implementation of the Supreme Court Chamber's Decision) TC, 26 Mar 2013, para 1; IENG THIRITH: DEFENCE REQUEST FOR CLARIFICATION OF THE EXECUTION OF THE SUPREME COURT CHAMBER'S DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO UNCONDITIONALLY RELEASE THE ACCUSED IENG THIRITH, ECCC TC, 27 Jun 2013; IENG THIRITH CASE: DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO UNCONDITIONALLY RELEASE THE ACCUSED IENG THIRITH ECCC, SC, 14 Dec. 2012, paras. 37-39.

**Corresponding ECCC Internal Rule(s):** Internal Rule 63(3). This rule is substantially similar to Article 205 except that under Internal Rule 63(3)(a), the first requirement for provisional detention is a well founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary Submission. Further, Internal Rule 63(3)(b) lists the preservation of public order as a reason for provisional detention, whereas Article 205 does not. Instead, Article 205 includes stopping or preventing the offense from happening again as a reason, where Internal Rule 63(3)(b) does not.

### *Application of Comparable Articles in Other Jurisdictions*

#### **UN Human Rights Committee**

*Cambodia is a party to the International Covenant on Civil and Political Rights (ICCPR), which sets out international law principles on criminal procedure. Below are examples of how comparable ICCPR articles have been interpreted and applied by its implementing body, the UN Human Rights Committee.*

**Provisional detention must be reasonable and necessary, not arbitrary:** Arbitrariness is not

to be equated with "against the law," but must be interpreted more broadly to include

elements of inappropriateness, injustice, lack of predictability and due process of law. Thus, provisional detention must be reasonable and necessary in all circumstances, such as to prevent flight or the recurrence of offense, or to preserve evidence.

MARQUES V. ANGOLA, UN HRC, 29 Mar 2005, para. 6.1; VAN ALPHEN V. NETHERLANDS, UN HRC, 23 Jul 1990, para. 5.8; MUKONG V. CAMEROON, UN HRC, 21 Jul 1994, para. 9.8; A. V. AUSTRALIA, UN HRC, 3 Apr 1997, para. 9.2; GORJI-DINKA V. CAMEROON, UN HRC, 17 Mar 2005, para. 5.1.

**When detention is not reasonable or necessary but punitive and thus arbitrary:** Where an accused charged with defamation was arrested by 20 armed police officers and subjected to 40 days of provisional detention, including 10 days in which the accused was held incommunicado, the arrest and detention was neither reasonable nor necessary, but was to an extent punitive and therefore arbitrary.

MARQUES V. ANGOLA, UN HRC, 29 Mar 2005, para. 6.1.

**Detention is not reasonable or necessary when charges filed with inadequate legal foundation and to influence other proceedings:** Detention is neither reasonable nor necessary and thus in violation of right to liberty and security of person where criminal charges were filed subsequent to second arrest, allegedly with inadequate legal foundation and with intent of influencing proceedings before military tribunal.

GORJI-DINKA V. CAMEROON, UN HRC, 17 Mar 2005, para. 5.1.

**Remand in custody must be lawful, reasonable, and necessary:** Right to liberty requires circumstances of person's detention be lawful, reasonable, and necessary in all circumstances such as to prevent flight, interference with evidence, or recurrence of crime..

KULOV V. KYRGYZSTAN, UN HRC, 26 Jul 2010, para. 8.3.

**Pre-trial detention should only be used in limited circumstances:** Pre-trial detention should not be used, and bail should be granted, except in circumstances where "the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party", or had fled overseas and was only returned through an extradition process.

HILL AND HILL V. SPAIN, UN HRC, 2 Apr 1997, para.12.3 (likelihood); BASSO V. URUGUAY, UN HRC, 19 Oct 2010, para.10.2 (extradition).

**States must justify continued detention over bail requirements or strict conditions of release:** To justify an exception to the general rule that persons awaiting trial are not to be detained in custody, a State party must sufficiently describe the concerns that would justify continued detention and why these concerns could not be addressed by bail requirements or other strict conditions of release.

SMANTSER V. BELARUS, UN HRC, 23 Oct 2008, para. 10.3.

**Comparable Article(s) in the *International Covenant on Civil and Political Rights*:** Articles 9(1) and 9(3). Article 9(1) establishes the general right to liberty and security of the person, provides that no-one may be arrested or detained arbitrarily and that deprivation of liberty may only be on grounds established by law. Article 9(3) provides, most relevantly, that it should not be the general rule that persons should be held in custody while awaiting trial.

### ***European Court of Human Rights***

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Danger of absconding can justify provisional detention:** Danger of absconding can justify provisional detention when sufficiently argued.

TOTH V. AUSTRIA, ECHR, 12 Dec 1991, paras. 71 and 72.

**Risk of pressure on witnesses, collusion between accomplices, disruption of public order and hazard of deterioration of evidence:** All are reasons that can justify provisional detention. Nevertheless, these motives decrease necessarily as time passes in detention.

TOMASI V. FRANCE, ECHR, 27 Aug 1992, paras. 85-99; LETELLIER V. FRANCE, ECHR, 26 Jun 1991, para.43; LABITA V. ITALY, ECHR, 6 Apr 2000, para. 163.

**Possibility of reoffending based on seriousness of charged crime:** The seriousness of the charged crime can support detention to prevent the possibility of reoffending, but the danger of reoffending must be plausible and the detention measures appropriate to the case circumstances and the past criminal history and personality of the accused.

CLOOTH V. BELGIUM, ECHR, 12 Dec 1991, paras. 38-40.

**Absence of societal ties insufficient to justify provisional detention:** Absence of fixed residence, job or family is insufficient to justify provisional detention.

SULAOJA V. ESTONIA, ECHR, 15 Feb 2005, para. 64.

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:** Article 5(1). This article provides for the rights of security and liberty including the right to a lawful arrest or detention.

#### **French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**New circumstances in case can justify provisional detention:** Charged person placed under judicial control can be, for same facts and in case of new circumstances, taken in provisional detention.

No. 04-87392, CRIM. BULL. 73, FCC, 1 Mar 2005; No. 07-87802, CRIM. BULL.21, FCC, 29 Jan 2008.

**Improper reasons for provisional detention can be substituted on appeal:** On appeal of decision of provisional detention, jurisdiction competent to confirm placement in provisional detention can substitute sufficient reasons to improper ones of first judges.

No. 09-87206, CRIM.BULL.8, FCC, 19 Jan 2010.

**Disruptions of public order:** These are not limited to those which take place in France.

No. 85-94474, CRIM.BULL.313, FCC, 15 Oct 1985.

**Disruptions of public order related to crime:** Relevant disruptions of public order are those created by the alleged crime.

No. 85-96526, CRIM. BULL. 94, FCC, 6 Mar 1986.

**Decisions to provisionally detain charged person in light of conviction at trial do not infringe presumption of innocence:** Decisions which observe existence of conviction by trial court and declare provisional detention as the only way to prevent pressure on witnesses and victims and guarantee that the person under judicial examination remains at disposal of law, do not infringe presumption of innocence.

No. 01-84736, CRIM. BULL.185, FCC, 19 Sep 2001.

**Comparable Article(s) in the French Code of Criminal Procedure:**Article 144. This article provides for pre-trial detention including the reasons to order or extend it.

## Article 206. Statement of Charged Persons and Reasons for Provisional Detention

*Where an investigating judge, either at his initiative or after a request by the Royal Prosecutor, envisages to provisionally detain a charged person, he shall inform the charged person accordingly and ask for his observations. If the charged person is assisted by a lawyer, the lawyer presents means of defense available to the charged person.*

*The investigating judge who orders the provisional detention of a charged person shall issue an order containing reasons. The investigating judge's reasons in the order shall be based on the provisions of Article 205 (Reasons for Provisional Detention) of this Code. The Royal Prosecutor and the charged person shall be immediately notified of the decision.*

*The investigating judge shall issue a detention order in accordance with the provisions stated in Articles 220 (Definition of Detention Order), 221 (Information Stated in Detention Order), and 222 (Execution of Detention Order) of this Code.*

### ***Application in the ECCC***

**Necessity to balance detention against liberty:** Courts must balance reasons for detention against right to personal liberty. Presumption of liberty requires detention to have basis in judicial decision, issued in accordance with statutory procedure and conditions.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, paras. 47 and 56. IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 80; IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 22. NUON CHEA CASE: SECOND DECISION ON NUON CHEA'S FITNESS TO STAND TRIAL, ECCC, TC, 2 Apr 2013, para.16; IENG THIRITH CASE: FITNESS TO STAND TRIAL (IMPLEMENTATION OF SUPREME COURT CHAMBER'S DECISION), ECCC, TC, 13 Mar 2013, para. 1; IENG THIRITH CASE: DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO RELEASE THE ACCUSED IENG THIRITH, ECCC, SC, 13 Dec 2011, paras 21-26 (noting that for a conditional stay of proceedings, the unconditional release of the person concerned is not the inevitable consequence).

**Charged person detained when first appearing:** Charged person held in detention when first appearing before Trial Chamber will remain in detention

until Chamber renders judgment, as long as detention has lawful basis.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, para. 47-49.

**Charged person may be provisionally detained only after adversarial hearing:** If provisional detention is not ordered after such hearing, charged person must be released. Adversarial hearing is distinct in purpose from interview of charged person. Specifically, the adversarial hearing gives the charged person the opportunity to respond to prosecutors while the interview is conducted for purposes of finding truth and obtaining a statement from the charged person that can be used against him.

NUON CHEA CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 20 Mar 2008, paras. 13, 17 and 32.

**Risk of accused becoming unavailable for trial may be mitigated by measures not based in detention:** Trial Chamber must evaluate the extent to which this risk may be lessened through

proper examination of all relevant factors and facts presented in adversarial dispute.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, para. 54.

**Presumption in favor of release:** This is the fundamental principle governing pre-trial detention.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, para. 56. IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 80.

**Defendant may request adjournment of case to later date if he/she believes his/her lawyer is depriving him/her of his/her rights:** When lawyer refuses to participate in proceedings and hinders defendant's right to representation or timely hearings, may be grounds for adjourning proceedings to later date.

KHIEU SAMPHAN CASE: PROVISIONAL DETENTION APPEAL ADJOURNMENT, ECCC, PTC, 23 Apr 2008, paras. 9-11.

**Where a charged person is found unfit to stand trial, the presumption of liberty requires that she be released from detention:** Continued detention or enforced confinement in circumstances where it is unclear whether a trial will ever be convened violate the right to a fair trial and to liberty. Where an action has not been extinguished under Article 7 of this Code, the charged person may be placed under judicial supervision, until such time as s/he is fit to stand trial or the action is extinguished in accordance with the law.

IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 80; IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 22; IENG THIRITH CASE: DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO RELEASE THE ACCUSED IENG THIRITH, ECCC, SC, 13 Dec 2011, paras 21-26 (noting that for a conditional stay of proceedings, the unconditional release of the person concerned is not the inevitable consequence) IENG THIRITH CASE: FITNESS TO STAND TRIAL (Decision on Co-Prosecutors' Request for Stay of Release Order of Ieng Thirith) SCC, 17 Sep 2012, paras 7-8; IENG THIRITH CASE: FITNESS TO STAND TRIAL (Implementation of the Supreme Court Chamber's Decision) TC, 26 Mar 2013, para 1; IENG THIRITH: DEFENCE REQUEST FOR CLARIFICATION OF THE EXECUTION OF THE SUPREME COURT CHAMBER'S DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO UNCONDITIONALLY RELEASE THE ACCUSED IENG THIRITH, ECCC TC, 27 Jun 2013; IENG THIRITH CASE: DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO UNCONDITIONALLY RELEASE THE ACCUSED IENG THIRITH ECCC, SC, 14 Dec. 2012, paras. 37-39; NUON CHEA AND KHIEU SAMPHAN CASE: CASE 002/01 JUDGMENT, TC, 7 Aug 2014, para. 6.

**Corresponding ECCC Internal Rule(s):** Internal Rules 63(1), 63(2), 63(5) and 63(7). These rules are similar to Article 206 except that 63(1)(b) contains more detailed provisions for the charged person to prepare his/her defense and 63(2) specifies that the provisional detention order must set out the legal and factual basis for detention, the maximum initial period for detention, and the charged person's rights.

### *Application of Comparable Articles in Other Jurisdictions*

*UN Human Rights Committee*



*Cambodia is a party to the International Covenant on Civil and Political Rights (ICCPR), which sets out international law principles on criminal procedure. Below are examples of how comparable ICCPR articles have been interpreted and applied by its implementing body, the UN Human Rights Committee.*

**Pre-trial detention an exception:** Pre-trial detention should be an exception and as short as possible in duration.

CAGAS, BUTIN & ASTILLERO V. PHILIPPINES, UN HRC, 23 Oct 2004, para. 7.4.

**To justify detention, must show concerns that could not be addressed by bail/release conditions:** To justify pre-trial detention, the State must sufficiently describe concerns that would justify continued detention and why these concerns could not be addressed by bail requirements or other strict conditions of release. Concerns justifying pre-trial detention include influence of witnesses, tampering with evidence or fleeing from the jurisdiction.

SMARTSER V. BELARUS, UN HRC, 23 Oct 2008, para. 10.3.

**Detention only lawful if alleged crime lawfully provides for confinement:** Even if substantial grounds to believe criminal offense has been committed, person may not be detained unless the crime that the person is believed to have committed is one for which confinement is prescribed under State law.

LATIFULIN V. KYRGYZSTAN, UN HRC, 10 Mar 2010, para. 8.2.

**Justification required for extended detention:** Detention, including house arrest, may be deemed arbitrary if State cannot provide case-specific grounds to justify continued detention.

KWOK V. AUSTRALIA, UN HRC, 23 Oct 2009, para. 9.3; ABBASSI V. ALGERIA, UN HRC, 28 Mar 2007, para. 8.4 (house arrest).

**Comparable Article(s) in the International Covenant on Civil and Political Rights:** Articles 9(1), 9(3), 9(4), 14(2) and 14(3)(c). Article 9(3), in particular, provides that it shall not be the general rule that persons awaiting trial should be detained in custody. Other provisions in Article 9 afford guarantees related to detention, while Article 14(2) establishes the presumption of innocence and 14(3)(c) protects the right to trial without undue delay.

### **European Court of Human Rights**

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Detained person is entitled to an adversarial hearing before a judge who decides if provisional detention is necessary:** Adversarial hearing involves legal representation and possibility of calling and questioning witnesses.

KAMPANIS V. GREECE, ECHR, 13 Jul 1995, paras. 46-47; HUSSAIN V. UNITED KINGDOM, ECHR, 21 Feb 1996, para. 60; SINGH V. UNITED KINGDOM, ECHR, 21 Feb 1996, para. 68; SVIPSTA V. LATVIA, ECHR, 9 Mar 2006, para. 129(g).

**Nature of tribunal in which charged person may contest legality of detention:** Detention must be subject to the review of an authority

possessing judicial power, independent from the executive and the parties to the case. The review must be prompt.

NEUMEISTER V. AUSTRIA, ECHR, 27 Jun 1968, pp. 39-40, para. 24.

**Appeals of provisional detention orders must be adversarial:** Charged person has the right to be heard.

SANCHEZ-REISSE V. SWITZERLAND, ECHR, 21 Oct 1986, para. 51; TOTH V. AUSTRIA, ECHR, 12 Dec 1991, para. 84.

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:** Article 5. This article provides for a person's rights of liberty and security including the right to a

lawful detention or arrest. Article 5(4), in particular, provides a charged person the right to take proceedings for the speedy assessment of the lawfulness of his/her detention.

### **French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Provisional detention order must be justified by facts of the case:**An order which only reproduces the Code of Criminal Procedure in general terms, or a previous decision without referring to the case, is void.

No. 71-91006, CRIM. BULL. 209, FCC, 24 Jun 1971 (General terms of the Code); No. 84-93516, CRIM. BULL. 291, FCC, 9 Oct 1984 (reference to previous case).

**Reasoning in provisional detention order:**Order shall contain legal and factual reasons on insufficiency of judicial control.

No. 97-82539, CRIM. BULL. 273, FCC, 16 Jul 1997;  
No. 97-83425, CRIM. BULL. 296, FCC, 16 Sep 1997.

**When provisional detention order void:**Only in case of substantial error or where the proceedings establishing the provisional detention order were not adversarial. If necessary, such proceedings may occur outside office of investigating judge.

No. 03-81482, CRIM. BULL. 112, FCC, 3 Jun 2003 (substantial error); No. 90-84129, CRIM. BULL. 317, FCC, 19 Sep 1990, No. 85-94010, CRIM. BULL. 288, FCC, 1 Oct 1985 (debate must be adversarial); No. 05-80014, CRIM. BULL. 87, FCC, 15 Mar 2005 (hearings outside the office).

**Non-adversarial debate may be justified:**Only where there are insurmountable circumstances.

No. 00-85227, CRIM. BULL. 314, FCC, 25 Oct 2000.

**Comparable Article(s) in the French Code of Criminal Procedure:**Article 145. This article provides for pre-trial detention including for the proceedings to remain in custody during the investigation.

## Article 210. Duration of Provisional Detention in Cases of Crimes against Humanity

*In case of crimes against humanity, genocide or war crimes, provisional detention shall not exceed one year for each of these offenses. However, when this time period ends, the investigating judge may extend a provisional detention for another year by an order with a proper and express statement of reasons.*

*The extension can only be made twice.*

### Application in the ECCC

**Detention extensions are independent of provisional detention limit for crimes against humanity:** Four-month extension of provisional detention issued with closing order is independent of three-year maximum time limit set out for provisional detention in connection with genocide, war crimes and crimes against humanity and additional four-month period of provisional detention that may be ordered by Pre-Trial Chamber in case of an appeal against indictment.

IENG SARY CASE: RELEASE REQUEST, ECCC, TC, 12 May 2011, para. 10.

**Necessity to balance detention against liberty:** Courts must balance reasons for detention against right to personal liberty. Presumption of liberty requires detention to have basis in judicial decision, issued in accordance with statutory procedure and conditions.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, paras. 47 and 56. IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 80; IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 22. NUON CHEA CASE: SECOND DECISION ON NUON CHEA'S FITNESS TO STAND TRIAL, ECCC, TC, 2 Apr 2013, para. 16; IENG THIRITH CASE: FITNESS TO STAND TRIAL (IMPLEMENTATION OF SUPREME COURT CHAMBER'S DECISION), ECCC, TC, 13 Mar 2013, para. 1; IENG THIRITH CASE: DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO RELEASE THE ACCUSED IENG THIRITH, ECCC, SC, 13 Dec 2011, paras 21-26 (noting that for a conditional stay of proceedings, the unconditional release of the person concerned is not the inevitable consequence).

**Criteria to be examined by investigating judges when considering whether length of provisional detention reasonable:** Include effective length of detention; length of detention in relation to nature of crime; physical and psychological consequences of detention on detainee; complexity of case and investigations; and conduct of entire procedure. Additionally, relationship between length of time defendant spends in detention and diligence displayed in conduct of investigations is relevant.

KHIEU SAMPHAN CASE: PROVISIONAL DETENTION EXTENSION AND REQUEST REFUSAL APPEAL, ECCC, PTC, 3 Jul 2009, paras. 68-70. KHIEU SAMPHAN CASE: APPLICATION FOR IMMEDIATE RELEASE, ECCC, TC, 26 Apr 2013, para 32 (noting the accused may have more reason to flee the closer it gets to the end of the trial).

**Where a charged person is found unfit to stand trial, the presumption of liberty requires that she be released from detention:** Continued detention or enforced confinement in circumstances where it is unclear whether a trial will ever be convened violate the right to a fair trial and to liberty. Where an action has not been extinguished under Article 7 of this Code, the charged person may be placed under judicial supervision, until such time as s/he is fit to stand trial or the action is extinguished in accordance with the law.

IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 80; IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 22; IENG THIRITH CASE: DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO RELEASE THE ACCUSED IENG THIRITH, ECCC, SC, 13 Dec 2011, paras 21-26 (noting that for a conditional stay of proceedings, the unconditional release of the person concerned is not the inevitable consequence) IENG THIRITH CASE: FITNESS TO STAND TRIAL (Decision on Co-Prosecutors' Request for Stay of Release Order of Ieng Thirith) SCC, 17 Sep 2012, paras 7-8; IENG THIRITH CASE: FITNESS TO STAND TRIAL (Implementation of the Supreme Court Chamber's Decision) TC, 26 Mar 2013, para 1; IENG THIRITH: DEFENCE REQUEST FOR CLARIFICATION OF THE EXECUTION OF THE SUPREME COURT CHAMBER'S DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO UNCONDITIONALLY RELEASE THE ACCUSED IENG THIRITH, ECCC TC, 27 Jun 2013; IENG THIRITH CASE: DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO UNCONDITIONALLY RELEASE THE ACCUSED IENG THIRITH ECCC, SC, 14 Dec. 2012, paras. 37-39; NUON CHEA AND KHIEU SAMPHAN CASE: CASE 002/01 JUDGMENT, TC, 7 Aug 2014, para. 6.

**Corresponding ECCC Internal Rule(s):** Internal Rules 63(6), 63(7) and 82. These rules are substantially similar, except that 63(7) expressly provides that the charged person and his/her lawyer are to have an opportunity to submit objections to the investigating judges.

### *Application of Comparable Articles in Other Jurisdictions*

#### ***European Court of Human Rights***

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protectionsto the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**When particularly extended length of detention may be justified:** Where case is exceptionally complex.

WEMHOFF V. GERMANY, ECHR, 27 Jun 1968, para.17.

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:** Article 5. This article provides for the rights of liberty and security including a lawful arrest or detention.

## Article 211. Extension of Provisional Detention

*If an investigating judge envisages to extend provisional detention, he shall inform the charged person accordingly and ask for his observations. If the charged person is assisted by a lawyer, the lawyer presents means of defense available to the charged person.*

*The investigating judge shall extend provisional detention by issuing an order with a statement of reasons. The investigating judge shall refer to the provisions of Article 205 (Reasons for Provisional Detention) of this Code. The charged person shall be notified of the order without delay.*

### ***Application in the ECCC***

**Necessity to balance detention against liberty:** Courts must balance reasons for detention against right to personal liberty. Presumption of liberty requires detention to have basis in judicial decision, issued in accordance with statutory procedure and conditions.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, paras. 47 and 56. IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 80; IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 22. NUON CHEA CASE: SECOND DECISION ON NUON CHEA'S FITNESS TO STAND TRIAL, ECCC, TC, 2 Apr 2013, para. 16; IENG THIRITH CASE: FITNESS TO STAND TRIAL (IMPLEMENTATION OF SUPREME COURT CHAMBER'S DECISION), ECCC, TC, 13 Mar 2013, para. 1; IENG THIRITH CASE: DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO RELEASE THE ACCUSED IENG THIRITH, ECCC, SC, 13 Dec 2011, paras 21-26 (noting that for a conditional stay of proceedings, the unconditional release of the person concerned is not the inevitable consequence).

**Presumption in favor of release:** This is the fundamental principle governing pre-trial detention.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, para. 56.

**Criteria to be examined by investigating judges when considering whether length of provisional detention**

**reasonable:** Include effective length of detention; length of detention in relation to nature of crime; physical and psychological consequences of detention on detainee; complexity of case and investigations; and conduct of entire procedure. Additionally, relationship between length of time defendant spends in detention and diligence displayed in conduct of investigations is relevant.

KHIEU SAMPHAN CASE: PROVISIONAL DETENTION EXTENSION AND REQUEST REFUSAL APPEAL, ECCC, PTC, 3 Jul 2009, paras. 68-70. KHIEU SAMPHAN CASE: APPLICATION FOR IMMEDIATE RELEASE, ECCC, TC, 26 Apr 2013, para 32 (noting the accused may have more reason to flee the closer it gets to the end of the trial).

**Where a Chamber is reviewing the reasons for keeping a charged person in provisional detention, the grounds cited to continue to justify the deprivation of liberty must be reassessed in light of the stage of proceedings:** the court must establish that the grounds cited continue to exist and why they justify the deprivation of liberty.

KHIEU SAMPHAN CASE: DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S DECISION ON KHIEU SAMPHAN'S APPLICATION FOR IMMEDIATE RELEASE, ECCC, SCC, 23 Aug 2013, para. 34.

**Provisional detention order following closing order independent:** Order to

extend provisional detention following issuance of closing order is independent of any other time limit imposed on provisional detention.

IENG SARY CASE: RELEASE REQUEST, ECCC, TC, 12 May 2011, para. 10; NUON CHEA AND IENG THIRITH CASES: DECISION ON IMMEDIATE APPEALS BY NUON CHEA AND IENG THIRITH ON URGENT APPLICATIONS FOR IMMEDIATE RELEASE, ECCC, SC, 3 June 2011, para. 37

**Where a charged person is found unfit to stand trial, the presumption of liberty requires that she be released from detention:** Continued detention or enforced confinement in circumstances where it is unclear whether a trial will ever be convened violate the right to a fair trial and to liberty. Where an action has not been extinguished under Article 7 of this Code, the charged person may be placed under judicial supervision, until such time as s/he is fit to stand trial or the action is extinguished in accordance with the law.

IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 80; IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 22; IENG THIRITH CASE: DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO RELEASE THE ACCUSED IENG THIRITH, ECCC, SC, 13 Dec 2011, paras 21-26 (noting that for a conditional stay of proceedings, the unconditional release of the person concerned is not the inevitable consequence) IENG THIRITH CASE: FITNESS TO STAND TRIAL (Decision on Co-Prosecutors' Request for Stay of Release Order of Ieng Thirith) SCC, 17 Sep 2012, paras 7-8; IENG THIRITH CASE: FITNESS TO STAND TRIAL (Implementation of the Supreme Court Chamber's Decision) TC, 26 Mar 2013, para 1; IENG THIRITH: DEFENCE REQUEST FOR CLARIFICATION OF THE EXECUTION OF THE SUPREME COURT CHAMBER'S DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO UNCONDITIONALLY RELEASE THE ACCUSED IENG THIRITH, ECCC TC, 27 Jun 2013; IENG THIRITH CASE: DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO UNCONDITIONALLY RELEASE THE ACCUSED IENG THIRITH ECCC, SC, 14 Dec. 2012, paras. 37-39; NUON CHEA AND KHIEU SAMPHAN CASE: CASE 002/01 JUDGMENT, TC, 7 Aug 2014, para. 6.

**Corresponding ECCC Internal Rule(s):** Internal Rule 63(7). This rule has substantially similar provisions to 211, except that it specifies that all orders extending provisional detention are subject to appeal and indicates that upon notification of an extension by the investigating judges, charged person has fifteen days to submit his or her objections.

### *Application of Comparable Articles in Other Jurisdictions*

#### **UN Human Rights Committee**

*Cambodia is a party to the International Covenant on Civil and Political Rights (ICCPR), which sets out international law principles on criminal procedure. Below are examples of how comparable ICCPR articles have been interpreted and applied by its implementing body, the UN Human Rights Committee.*

**Detention an exception:** Pre-trial detention should be an exception and as short as possible.

CAGAS ET AL. V. PHILIPPINES, UN HRC, 23 Oct 2004, para. 7.4.

by bail requirements or other strict conditions of release.

SMANTSER V. BELARUS, UN HRC, 23 Oct 2008, para. 10.3.

**To justify detention, must show concerns that could not be addressed by bail/release conditions:** To justify exception to general rule that persons awaiting trial are not to be detained, State must sufficiently describe concerns that would justify continued detention and why these concerns could not be addressed

**Detention only lawful if alleged crime lawfully provides for confinement:** Even if substantial grounds to believe criminal offense has been committed, person may not be detained unless the charged crime provides for confinement under State's laws.

LATIFULIN v. KYRGYZSTAN, UN HRC, 10 Mar 2010, para. 8.2.

case-specific grounds to justify continued detention.

**Justification required for extended detention:** Detention, including house arrest, may be deemed arbitrary if State cannot provide

KWOK v. AUSTRALIA, UN HRC, 23 Oct 2009, para. 9.3;  
ABBASSI v. ALGERIA, UN HRC, 28 Mar 2007, para.8.4 (house arrest).

**Comparable Article(s) in the *International Covenant on Civil and Political Rights*:** Articles 9(1), 9(3), 9(4), 14(2) and 14(3)(c). Article 9(3), in particular, provides that it shall not be the general rule that persons awaiting trial should be detained in custody. Other provisions in Article 9 afford guarantees related to detention, while Article 14(2) establishes the presumption of innocence and 14(3)(c) protects the right to trial without undue delay.

### ***European Court of Human Rights***

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Provisional detention must be in accordance with fair trial rights:** Consequently, when national authorities fail to provide grounds for detention, court will find violation of fair trial

rights. The same applies to continuation of provisional detention.

KURT v. TURKEY, ECHR, 25 May 1998, para. 122.

**Comparable Article(s) in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*:** Article 5. This article provides for a person's rights of liberty and security including the right to a lawful detention or arrest. Article 5(4), in particular, provides a charged person the right to take proceedings for the speedy assessment of the lawfulness of his/her detention.

## Article 217. Release upon Request of Charged Person

*The charged person may submit a request for release at any time. The investigating judge shall send the application to the Royal Prosecutor immediately for his examination of the case file and observations. The Prosecutor shall make his observations without delay. The investigating judge shall decide on the application within a maximum of 5 days after forwarding the case file to the Royal Prosecutor.*

*The charged person may re-submit a request for release to the investigating judge or to the Investigation Chamber within one month after a decision denying the previous application. The investigating judge or the Investigation Chamber shall decide on such request within 5 days from the date the request was received.*

*An order not to release a charged person shall contain a statement of reasons.*

*If the investigating judge fails to decide within 5 days, the charged person may directly seize the Investigation Chamber which shall decide instead of the investigating judge.*

### **Application in the ECCC**

**Reasons for detention present:** When seeking release of detained person, defense must demonstrate that reasons supporting detention are no longer present.

KHIEU SAMPHAN CASE: PROVISIONAL DETENTION EXTENSION AND REQUEST REFUSAL APPEAL, ECCC, PTC, 3 Jul 2009, paras. 21-22. KHIEU SAMPHAN CASE: APPLICATION FOR IMMEDIATE RELEASE, ECCC, TC, 26 Apr 2013, paras 8-10.

**Criteria to be examined by investigating judges when deciding whether length of provisional detention is reasonable:**

Include effective length of detention; length of detention in relation to nature of crime; physical and psychological consequences of detention on detainee; complexity of case and investigations; and conduct of entire procedure. Additionally, relationship between length of time defendant spends in detention and diligence displayed in conduct of investigations is relevant.

KHIEU SAMPHAN CASE: PROVISIONAL DETENTION EXTENSION AND REQUEST REFUSAL APPEAL, ECCC, PTC, 3 Jul 2009, paras. 68-70.

**When charged person's health is incompatible with detention:** If defense can demonstrate charged person's state of health is incompatible with detention, he/she may be released on humanitarian grounds.

KHIEU SAMPHAN CASE: PROVISIONAL DETENTION EXTENSION AND REQUEST REFUSAL APPEAL, ECCC, PTC, 3 Jul 2009, paras. 76 and 81-82.

**Delay of defense does not affect legality of detention:** Delay caused by inactivity of defense does not affect the legality of provisional detention so as to justify release.

KHIEU SAMPHAN CASE: PROVISIONAL DETENTION EXTENSION AND REQUEST REFUSAL APPEAL, ECCC, PTC, 3 Jul 2009, para. 30.

**Duration of provisional detention:** Length and duration of a detained person's provisional detention must be balanced against the risk of an unreasonably long or indefinite deprivation of liberty. The reasonableness of continued detention must be assessed in the light of the circumstances of each case.



KHIEU SAMPHAN CASE: APPLICATION FOR IMMEDIATE  
RELEASE, ECCC, TC, 26 Apr 2013, para. 15.

**Corresponding ECCC Internal Rule(s):** Internal Rule 64. This rule is substantially similar to Article 217, except that it (i) requires the charged person to wait at least three months after the final determination of an application for release before submitting any further applications for release; (ii) permits additional applications for release only where an applicant's circumstances have changed since his or her previous application; and (iii) expressly states, under 64(2), that orders issued by the investigating judges in response to such applications are appealable.

### ***Application of Comparable Articles in Other Jurisdictions***

#### ***UN Human Rights Committee***

*Cambodia is a party to the International Covenant on Civil and Political Rights (ICCPR), which sets out international law principles on criminal procedure. Below are examples of how comparable ICCPR articles have been interpreted and applied by its implementing body, the UN Human Rights Committee.*

#### **Appeal before prosecutor alone a violation:**

Limiting person's ability to challenge lawfulness of his/her detention to filing appeal with prosecutor amounts to violation of that person's right to challenge lawfulness of his/her detention.

UMAROVA V. UZBEKISTAN, UN HRC, 19 Oct 2010, para. 8.6.

**Review by judicial authority required:** Review of lawfulness of person's detention must be completed by judicial authority able to order release of person being detained if it determines that his/her detention is unlawful.

YKLYMOVA V. TURKMENISTAN, UN HRC, 20 Jul 2009, para. 7.4; ABOUSSEDR A V. LIBYAN ARAB JAMAHIYIYA, UN HRC, 25 Oct 2010, para. 7.6.

**Requirement for effective judicial review of prosecutorial decisions:** Lawfulness of detention must be subject to review by court. Where challenge to lawfulness is denied by prosecutor, availability of judicial review of prosecutor's decision may still violate detainee's rights if detainee can show such judicial review would be ineffective.

KULOV V. KYRGYZSTAN, UN HRC, 26 Jul 2010, para. 8.5.

**Comparable Article(s) in the *International Covenant on Civil and Political Rights*:** Article 9(4). This article provides that anyone deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court to examine the lawfulness of such detention.

#### ***European Court of Human Rights***

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protectionsto the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Reevaluation of the legitimacy of provisional detention by courts:** Such reevaluation shall be made promptly.

TOMASI V. FRANCE, ECHR, 27 Aug 1992, paras. 84 and 102; KOVÁČIK V. SLOVAKIA, ECHR, 29 Feb 2012, paras.65 and 77.

**Nature of tribunal in which charged person may contest legality of detention:** Detention must be subject to the review of an authority

possessing judicial power, independent from the executive and the parties to the case. The review must be prompt.

NEUMEISTER V. AUSTRIA, ECHR, 27 Jun 1968, pp. 39-40, para. 24.

**Optional second level of review of detentions subject to same requirements:** States are not required to establish a second level of review of applications for release from detention.

However, if a State does establish such a second level of review, it must ensure detainees have same guarantees on appeal as at first instance.

TOTH V. AUSTRIA, ECHR, 12 Dec 1991, para. 84.

**Implications of release from provisional detention:** Release does not mean detention was unlawful.

STEPHENS V. MALTA (NO. 1), ECHR, 21 Apr 2009, para. 102.

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:** Article 5(4). This article provides for the right of liberty and security including the right for someone who is deprived of his liberty by arrest or detention to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

#### **French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Definition of five-day period for deciding application for release of detained person:** The day on which investigating judge sends request to prosecutor shall not count towards the five-day period.

No. 85-90391, CRIM. BULL. 114, FCC, 19 Mar 1985.

**Basis of decision on request for release:** Decision must be based on just law and fact considerations.

No. 97-82683, CRIM. BULL. 276, FCC, 22 Jul 1997.

**Where charged person cannot seize investigating chamber directly:** Where charged person had not presented his/her request for

release in the proper form to the investigating judge who subsequently did not answer.

No. 02-86030, CRIM. BULL. 208, FCC, 19 Nov 2002.

**Ordering communication of request for release:** Judge must order them as promptly as possible.

No. 85-90523, CRIM. BULL. 122, FCC, 25 Mar 1985.

**When decision regarding request for release not made according to period provided:** Detained person can directly seize the Investigating Chamber.

No. 06-87705, CRIM. BULL. 2, FCC, 9 Jan 2007.

**Comparable Article(s) in the French Code of Criminal Procedure:** Article 148. This article provides for pre-trial detention including the possibility for the person remanded in custody to request his release before the judge.

## Article 223. Obligations under Judicial Supervision

*An investigating judge may place a charged person under judicial supervision if the charged person is under investigation for an offense punishable by imprisonment.*

*Judicial supervision has the effect of subjecting a charged person at liberty to one or more of the following obligations: (1) not to go outside the territorial boundaries determined by the investigating judge; (2) not to change residence without the authorization of the investigating judge; (3) not to go to certain places determined by the investigating judge; (4) not to go to certain places determined by the investigating judge; (5) to respond to a summons from any person appointed by the investigating judge; (6) to provide all identity documents to the clerk's office; (7) not to drive motor vehicles; (8) not to receive or meet certain people identified by the investigating judge; (9) to deposit a bail in an amount and for a duration of payment determined by the investigating judge based on the wealth of the charged person; (10) not to possess or bear any weapon and shall turn in all weapons under his possession to the clerk of the court; (11) to undergo a medical examination and/or treatment under the medical supervision in the hospital; (12) to refrain from certain specified professional activities.*

*In implementing item 12 above, the investigating judge may not prohibit parliamentary activities or any kind of union activities.*

### ***Application in the ECCC***

**At any stage in the proceedings, where a charged person is found unfit to stand trial, s/he may be placed under judicial supervision.** The effect of judicial supervision is to suspend the proceedings against the charged person until such time as his/her fitness is restored, so that proceedings can resume, or the proceedings are terminated for a reason as specifically expressed under Article 7 of this Code (i.e. ultimately at death).

IENG THIRITH CASE: DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO UNCONDITIONALLY RELEASE THE ACCUSED IENG THIRITH ECCC, SC, 14 Dec. 2012, paras. 37-39; IENG THIRITH CASE: DEFENCE REQUEST FOR CLARIFICATION OF THE EXECUTION OF THE SUPREME COURT CHAMBER DEFENCE REQUEST FOR THE CLARIFICATION OF THE SUPREME COURT CHAMBERS'S DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO UNCONDITIONALLY RELEASE THE ACCUSED IENG THIRITH, 27 Jun 2013, para. ECCC, SC, 14 Dec. 2012, NUON CHEA AND KHIEU SAMPHAN CASE: CASE 002/01 JUDGMENT, TC, 7 Aug 2014, para 6.

**When assessing the measures to be put in place in order to give effect to judicial supervision, judges must apply the principles of necessity and proportionality:** Once a judge has determined the necessity of such provisions, the proportionality requirement considered the relationship between the restriction's scope and its

objectives. Accordingly, measures of judicial supervision may never be capricious or excessive and where a more lenient measure is possible that measure must be applied.

IENG THIRITH CASE: DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO UNCONDITIONALLY RELEASE THE ACCUSED IENG THIRITH ECCC, SC, 14 Dec. 2012, para.57; NUON CHEA AND KHIEU SAMPHAN CASE: CASE 002/01 JUDGMENT, TC, 7 Aug 2014, para 6.

**Necessity of measures must be balanced against the rights of the accused:** The implementation of measures under Article 223(11) for judicial supervision should take into account a charged person's right to freedom of movement and to privacy, as protected under Articles 12 and 17 of the International Covenant on Civil and Political Rights.

**Corresponding ECCC Internal Rule(s):** Internal Rule 65(1). The French and Khmer versions of this rule refer specifically to judicial supervision, despite the fact that in the English version, the term adopted is bail orders. (Namely a judicial order that an accused person remain at liberty or be released from detention, pending trial judgment, on condition that he or she pay a bail bond and/or respect specific conditions set out in the order).

IENG THIRITH CASE: DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO UNCONDITIONALLY RELEASE THE ACCUSED IENG THIRITH ECCC, SC, 14 Dec. 2012, para.58.

**Any act objectively consisting of a violation of the terms of judicial supervision needs to be tested for the presence of subjective elements:** in the case of a person with impaired cognitive function responsibility for such violations is conditioned upon the practical ability to comprehend and control one's actions at the time of the impugned omission.

IENG THIRITH CASE: DECISION ON IMMEDIATE APPEAL AGAINST THE DECISION ON REQUESTS BY THE TRIAL CHAMBER AND THE DEFENCE FOR IENG THIRITH FOR GUIDANCE AND CLARIFICATION, ECCC, SC, 31 Dec. 2013, para.14.

### *Application of Comparable Articles in Other Jurisdictions*

#### ***UN Human Rights Committee***

*Cambodia is a party to the International Covenant on Civil and Political Rights (ICCPR), which sets out international law principles on criminal procedure. Below are examples of how comparable ICCPR articles have been interpreted and applied by its implementing body, the UN Human Rights Committee.*

#### ***European Court of Human Rights***

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**In cases where an accused is unlikely to ever become fit to stand trial, orders to suspend proceedings will not be considered a violation of the right to be tried within a reasonable time:** A breach in the reasonable time requirement under Article 6(1) of the European Convention on Human Rights requires that the

delays are attributable to the courts and not to the accused person's health.

KRAKOLING V AUSTRIA, ECHR, 10 May 2012, paras. 7 and 10; NICHITAYLOV V UKRAINE, ECHR, 15 Jan 2010, para.36. See also ANTOINE V UNITED KINGDOM, ECHR, 13 May 2010.

## Article 246. Final Submission of Royal Prosecutor

*When an investigating judge considers that the judicial investigation is terminated, he shall notify the Royal Prosecutor, the charged person, the civil parties and the lawyers.*

*Two days later, the investigating judge sends the case file to the Royal Prosecutor for examination.*

*If the Prosecutor considers that further investigative measures are necessary, the Royal Prosecutor shall act in compliance with the provisions stated in Article 132 (Investigative Actions Requested by Prosecutor) of this Code.*

*Within 15 days, if a charged person is detained and within one month if not, the Royal Prosecutor shall return the case file to the investigating judge together with his final submission. This time period shall be calculated from the date the Prosecutor receives the case file.*

*The Prosecutor will issue a written final submission with a statement of reasons if he agrees with the investigating judge that the judicial investigation is terminated. The Prosecutor may request the investigating judge to issue an indictment against the charged person or to issue a non-suit order.*

### **Application in the ECCC**

**No further evidence may be placed on the case file after notice of termination of judicial investigation given:** If investigating judge determines it is necessary to place further evidence on the case file after notice given, they are

required to file a new notice of termination of judicial investigation.

NUON CHEA, IENG SARY, KHIEU SAMPHAN, IENG THIRITH AND DUCH CASE: ORDER ON CERTAIN PROCEDURAL MEASURES, ECCC, OCIJ, 25 Nov 2009, para. 9.

**Corresponding ECCC Internal Rule(s):** Internal Rule 66. This rule is substantially similar to Article 246, except that it (i) expressly requires that a decision to terminate an investigation be made public; (ii) allows all parties to make additional investigative requests, not just the Prosecutor, and for appeals to be made against decisions not to undertake those additional investigative acts; and (iii) gives a longer period for the Prosecutor to file a final submission.

### **Application of Comparable Rules in Other Jurisdictions**

#### **French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Termination of investigation:** Investigating judge has right and duty to terminate investigation when he/she considers it complete.

No. 65-92493, CRIM. BULL. 246, FCC, 23 Nov 1965.

**When preparing closing order, investigating judge must consider all parties' submissions:** Investigating judge should not simply copy prosecutor's final submission.

No. 10-85678, CRIM. BULL. 1, FCC, 15 Jun 2012.

**Comparable Article(s) in the French Code of Criminal Procedure:** Article 175. This article outlines procedures which should take place from the termination of the investigation, including the issuance of a final submission by the prosecutor.

## Article 247. Closing Order

*An investigating judge terminates the judicial investigation by a closing order. This order may be an indictment or a non-suit order.*

*If the judge considers that the facts constitute a felony, a misdemeanor or a petty offense, he shall decide to indict the charged person before the trial court. The order shall state the facts being charged and their legal qualifications.*

*The investigating judge shall issue a non-suit order in the following circumstances:*

1. *The facts do not constitute a felony, misdemeanor or petty offense;*
2. *The perpetrators of the committed acts remain unidentified.*
3. *There is insufficient evidence for a conviction of the charged person.*

*A closing order shall always be supported by a statement of reasons. The investigating judge is not obliged to conform with the final submission of the Prosecutor. The order may combine an indictment for certain facts and a non-suit order for other facts.*

*The Royal Prosecutor, the charged person and the civil parties shall be informed of a closing order without delay.*

### ***Application in the ECCC***

**Closing order must be limited to facts under investigation:** Investigating judges can either dismiss the case based on these facts or send case to trial, but in either case, decision must be supported by reasons.

DUCH CASE: CLOSING ORDER APPEAL, ECCC, PTC, 5 Dec 2008, paras. 37-38.

**Pre-Trial Chamber can add offenses, modes of liability to closing orders:** In deciding whether to include offenses and modes of liability requested by prosecutors, Pre-Trial Chamber has right to decide independently on legal characterization of acts that are part of investigation. However, Pre-Trial Chamber is bound by same rules as investigating judges and by investigatory scope.

DUCH CASE: CLOSING ORDER APPEAL, ECCC, PTC, 5 Dec 2008, paras. 40 and 43-44.

**Closing orders are subject to appeal on jurisdictional grounds only:** Issuance of closing orders by investigating judges are subject to appeal by charged person or

accused. Jurisdictional challenges are the only admissible appeals at this stage. Substantive challenges, such as challenges to definition and application of elements of crimes charged, and challenges alleging defects in form of indictment are inadmissible in pre-trial phase.

NUON CHEA AND IENG THIRITH CASES: CLOSING ORDER APPEAL, ECCC, PTC, 15 Feb 2011, paras. 59-63; IENG SARY CASE: CLOSING ORDER APPEAL, ECCC, PTC, 11 Apr 2011, paras. 44-47.

**Trial Chamber may be seized despite defects in order on appeal of closing order:** Trial Chamber is seized of case upon notification of Pre-Trial Chamber's determination of appeal of closing order. This result is not altered by Pre-Trial Chamber's deferral of reasons of decision on closing order appeal where all other time requirements are satisfied.

IENG SARY CASE: RELEASE REQUEST, ECCC, TC, 12 May 2011, paras. 10-12.

**Pre-Trial Chamber may deliver an unreasoned final disposition followed by**

**reasons at later date:** Pre-Trial Chamber may do so without offending any detention-related rules, so long as reasons follow within time period allowed by Internal Rules for delivery of reasoned decision.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, paras. 22 and 37.

**Investigating judges must provide reasons:** While investigating judges are not required to indicate view on all factors considered in their decision-making process, they must provide the reasons for their decisions, so that applicant may be able to determine whether to appeal and upon what grounds, and so that Pre-Trial Chamber can conduct effective appellate review.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 38.

**“Sufficient evidence” to issue indictment requires probability of guilt:** According to a consideration of international and national practices, determining if there is “sufficient evidence” to issue an indictment requires a probability of guilt;

**Corresponding ECCC Internal Rule(s):** Internal Rule 67. This rule is substantially similar to Article 247, except that 67(4) notes the investigating judges’ right not only to send parts of the case to trial but also to send the case to trial only in respect of some people and to dismiss it as it pertains to others.

### *Application of Comparable Articles in Other Jurisdictions*

#### ***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Termination of investigation:** Investigating judge has right and duty to terminate investigation when he/she considers it complete.

that is, evidence sufficiently serious and corroborative to provide a certain level of probative force.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CLOSING ORDER, ECCC, OCIJ, 15 Sep 2010, paras. 1323 and 1326.

**Closing order cures defects during the investigative phase:** provided substantial procedural guarantees have been in place throughout the conduct of the investigation in order to safeguard the interests of the accused and guarantee the ascertainment of the truth, and provided the parties have been given ample opportunity during the pre-trial phase to address any defects in the investigation, the Trial Chamber will not consider procedural defects alleged to have occurred during the investigative phase as these are deemed to have been cured by the Closing Order,

NUON CHEA, IENG SARY AND KHIEU SAMPHAN CASES: DECISION ON DEFENCE REQUESTS CONCERNING IRREGULARITIES ALLEGED TO HAVE OCCURRED DURING THE JUDICIAL INVESTIGATION ECCC, TC, 15 Dec 2012, para. 21; NUON CHEA, AND KHIEU SAMPHAN CASES: CASE 002/01 JUDGMENT, TC, 7 Aug 2014, para. 42.

No. 65-92493, CRIM. BULL. 246, FCC, 23 Nov 1965.



**Investigating judge not required to file charge before issues non-suit order:**Where it clearly appears to him/her person is not guilty.

No. 65-92493, CRIM. BULL. 246, FCC, 27 Nov 1963.

**When investigating judge thinks investigation is over:**He/she may communicate closing order despite an appeal.

No. 65-90127, CRIM. BULL. 150, FCC, 17 May 1966.

**Consequences of absence of closing order before judge decides to indict person before court:**This allows defendant to claim investigation procedure is invalid.

No. 02-85180/03-83598, CRIM. BULL. 80, FCC, 30 Mar 2004.

**Order which only rejects facts' qualification in prosecutor's submission cannot be considered discharge order:** Tribunals are not bound by qualification given by investigating judge to facts.

CRIM. BULL. 10, FCC, 12 Jan 1954.

**When preparing closing order, investigating judge must consider all parties' submissions:** Investigating judge should not simply copy prosecutor's final submission.

No. 10-85678, CRIM. BULL. 1, FCC, 15 Jun 2012.

**Comparable Article(s) in the French *Code of Criminal Procedure*:**Articles 175, 177 and 180. These articles establish processes at the conclusion of the investigation, including the issuing of a closing order.

## Article 249. Provisions of Closing Orders in relation to Provisional Detention and Judicial Supervision

*The closing order terminates provisional detention. Article 276 (Release of a Detained Charged Person) of this Code shall apply.*

*However, by a separate decision issued together with the closing order, the investigating judge may order to keep the charged person in provisional detention until the time he is called to appear before the trial court. In his order, the investigating judge shall refer to the conditions defined in Article 205 (Reasons for Provisional Detention) of this Code.*

*The decision to keep the charged person in provisional detention ceases to be effective after four months. If the charged person is not called to appear before the trial court within these four months, the charged person shall be automatically released.*

*The closing order terminates judicial supervision.*

*If the investigating judge had ordered the charged person to pay bail or to deliver identity documents or weapons, if the latter was not used to commit the offense, the court clerk shall return the bail, identity documents or weapons to the charged person upon acknowledgement of receipt.*

*However, by a separate decision issued together with the closing order, the investigating judge may order to keep the charged person under judicial supervision until such time he is called to appear before the trial court.*

### **Application in the ECCC**

**Provisional detention order following closing order independent:** Four-month time limit on provisional detention following issuance of closing order is counted separately from other time limits on detention.

IENG SARY CASE: RELEASE REQUEST, ECCC, TC, 12 May 2011, para. 10.

**Detention order must contain reasons:** When order to extend detention accompanies closing order, the order must contain reasons for the extension of detention. If order does not contain reasons, rights of charged person are violated.

IENG SARY CASE: RELEASE REQUEST, ECCC, TC, 12 May 2011, paras. 11-12.

**Immediate release might not cure failure to include reasons:** When order to extend detention does not contain reasons, this error of law might not necessarily be cured by immediate release. Remedies can be considered at end of trial.

IENG SARY CASE: RELEASE REQUEST, ECCC, TC, 12 May 2011, para. 12.

**In issuing an order to extend provisional detention, not all Article 205 factors need be present:** An order to extend detention is not improper merely because some such factors do not apply to the extension period.

DUCH CASE: CLOSING ORDER APPEAL, ECCC, PTC, 5 Dec 2008, paras. 145-147.

**Previous decisions may be consulted regarding continuing detention:** When determining whether facts in a case constitute valid reasons to continue provisional detention, chamber may consult previous decisions.

IENG SARY CASE: CLOSING ORDER PROVISIONAL DETENTION APPEAL, ECCC, PTC, 21 Jan 2011, para. 32.

**Necessity to balance detention against liberty:** Courts must balance reasons for detention against right to personal liberty. Presumption of liberty requires detention to have basis in judicial decision, issued in accordance with statutory procedure and conditions.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, paras. 47 and 56. IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 80; IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 22. NUON CHEA CASE: SECOND DECISION ON NUON CHEA'S FITNESS TO STAND TRIAL, ECCC, TC, 2 Apr 2013, para.16; IENG THIRITH CASE: FITNESS TO STAND TRIAL (IMPLEMENTATION OF SUPREME COURT CHAMBER'S DECISION), ECCC, TC, 13 Mar 2013, para. 1; IENG THIRITH CASE: DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO RELEASE THE ACCUSED IENG THIRITH, ECCC, SC, 13 Dec 2011, paras 21-26 (noting that for a conditional stay of proceedings, the unconditional release of the person concerned is not the inevitable consequence).

**Corresponding ECCC Internal Rule(s):** Internal Rule 68. This rule is substantially similar to Article 249, although it also expressly provides for situations in which the accused cannot appear before the chamber due to exceptional circumstances while Article 249 contains more detailed provisions concerning the return of bail, identity documents and weapons.

### ***Application of Comparable Articles in Other Jurisdictions***

#### ***UN Human Rights Committee***

*Cambodia is a party to the International Covenant on Civil and Political Rights (ICCPR), which sets out international law principles on criminal procedure. Below are examples of how comparable ICCPR articles have been interpreted and applied by its implementing body, the UN Human Rights Committee.*

**Violation: prolonged detention after release order:** Prolonging person's detention by a year following issuance of release order, including conditional release order, constitutes illegal detention.

TERÁN JIJÓN & TERÁN JIJÓN V. ECUADOR, UN HRC, 26 Mar 1992, para. 6.3 (general principle). BAZZANO V. URUGUAY, UN HRC, 15 Aug 1979, paras.2 and 10(i) (conditional release orders).

**Violation: four-year unexplained delay between indictment and first instance judgment:** Four-year delay between issuance of indictment and rendering of first instance judgment without explanation as to complexity of case necessitating such delay violates requirement that accused be tried without undue delay.

FILLASTRE V. BOLIVIA, UN HRC, 5 Nov 1991, para. 6.6.

**Comparable Article(s) in the International Covenant on Civil and Political Rights:** Articles 9(1), 9(3) and 14(3)(c). Article 9(1) prohibits arbitrary detention and while Article 9(3) requires that a detained person be brought before a judge promptly. Article 14(3)(c) requires that a person be tried without undue delay.

#### ***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Decision that keeps charged person in provisional detention after investigation is**

**closed is void after two months:**This period begins the day the closing order is issued, even if it is appealed.

No. 10-83656, CRIM. BULL.125, FCC, 18 Aug 2010; Nos. 01-80234/04-82857, CRIM. BULL.179, FCC, 8 Jul 2004; No.71-92789, CRIM. BULL. 336, FCC, 2 Dec 1971.

**Charged person's detention ends as soon as two month period is over:**And if charged person has not appeared before the court.

No. 02-86951,FCC, 15 Jan 2003.

**Investigating judge is the only one who can order end or prorogation of provisional detention:** He/she may do so when he/she transmits the case to the correctional court.

**Comparable Article(s) in the French *Code of Criminal Procedure*:**Articles 179 and 181. These articles establish the requirements of the closing order including the relationship of the closing order to provisional detention and judicial supervision.

No. 85-95517, CRIM. BULL. 27, FCC, 21 Jan 1986.

**When seised court postpones audience to a later date, charged person kept in provisional detention by investigating judge shall be released:** Nevertheless, court can keep him in detention if it decides and justifies so.

No. 77-92579, CRIM. BULL. 92, FCC, 13 Mar 1978.

**Automatic review of provisional detention following indictment:** Charged person provisionally detained shall appear before a criminal court or be object of prorogation one year from the day the indictment order becomes final.

No. 05-86295, CRIM. BULL. 303, FCC, 22 Nov 2005.

## Article 250. Forwarding Case File for Trial

*After the judge has issued an indictment, he shall send the case file immediately to the trial court president who shall fix a date for trial.*

### ***Application in the ECCC***

**Trial Chamber's access to case file during appeal of closing order:** If closing order including indictment is appealed, Trial Chamber may access case file during appeal in order to prepare for trial, despite the fact that Trial Chamber is not seized of case until issuance of decision on appeal of closing order.

DUCH CASE: JUDGMENT, ECCC, TC, 26 Jul 2010, para. 37.

**Material considered evidence only after identification in court and satisfaction of minimum standards:** Material in case file

is not considered evidence, even after forwarded to Trial Chamber, until it (i) is read out or otherwise appropriately identified in court, and (ii) passes minimum standards of evidence.

DUCH CASE: JUDGMENT, ECCC, TC, 26 Jul 2010, paras. 40-41.

**Data in case file may be added to:** This is so even after the case file is forwarded to Trial Chamber.

DUCH CASE: JUDGMENT, ECCC, TC, 26 Jul 2010, para. 40.

**Corresponding ECCC Internal Rule(s):** Internal Rule 69. This rule is similar to Article 250 except that it also refers the procedures if a dismissal order is issued. Also, Internal Rule 69 states that case files will be sealed if no appeal is filed, while Article 250 is silent on the matter.

## Article 252. Mandatory Rules

*The rules and procedures stated in the following Articles regarding general provisions are mandatory and shall be complied with, otherwise the activities shall be null and void.*

- 122 (Commencement of Judicial Investigation);
- 123 (Territorial Jurisdiction);
- 124 (Introductory Submission), paragraph 3;
- 125 (Scope of the Complaint), paragraphs 1 and 2; and
- 128 (Assistance of Court Clerks) of this Code.

*Proceedings shall also be null and void if the violation of any substantial rule or procedure stated in the Code or any provisions concerning criminal procedure affects the interests of the concerned party. Especially, rules and procedures which intend to guarantee the rights of the defense have a substantial nature.*

### ***Application in the ECCC***

**Court has duty to safeguard fairness of proceedings:** This mandates, in part, equal treatment before the court of people in similar positions.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 35.

**Corresponding ECCC Internal Rule(s):** Internal Rule 21. This rule relates generally to Article 252, providing that proceedings shall be fair and adversarial and preserve a balance between the rights of the parties and that persons who find themselves in a similar situation and who are prosecuted for the same offenses shall be treated according to the same rules.

## Article 253. Complaint to Investigation Chamber

*Only the Investigation Chamber has the authority to annul parts of the proceedings.*

*If the investigating judge considers that any part of the proceedings is null and void, he seizes the Investigation Chamber by means of an order, including a statement of relevant reasons and informs the Prosecutor, the charged person and the civil party.*

*If the Royal Prosecutor considers that any part of the proceedings is null and void, he seizes the Investigation Chamber with a request for annulment, including a statement of the relevant reasons and informs the investigating judge.*

*If the charged person or the civil party considers that any part of the proceedings is null and void, they seize the Investigation Chamber with a request for annulment, including a statement of the relevant reasons and inform the investigating judge. The request may be made by the lawyer of the charged person or of the civil party.*

*The requests provided for in this article shall be registered with the court clerk of the Investigation Chamber. The court clerk shall immediately request the investigating judge to provide him with the case file.*

*An order against which an appeal may be made cannot be subject to a request for annulment.*

### ***Application in the ECCC***

**Request must identify defective portion of proceedings and provide evidence of infringement:** Requests for annulment must not only cite procedural defect but also provide evidence that such defect has caused an infringement of rights of applying party. Request must also identify allegedly defective portion of proceedings and provide grounds for such assertion.

NUON CHEA CASE: ANNULMENT REFUSAL APPEAL, ECCC, PTC, 26 Aug 2008, paras. 34-35; NUON CHEA AND IENG SARY CASE: APPEAL AGAINST OCIJ ORDER TO SUMMONS WITNESSES, ECCC, PTC, 8 Jun 2010, para. 38; NUON CHEA, IENG SARY AND KHIEU SAMPHAN CASE: REQUEST FOR A RULE 35 INVESTIGATION REGARDING INCONSISTENCIES IN THE AUDIO AND WRITTEN RECORDS OF OCIJ WITNESS INTERVIEWS, ECCC, TC, 13 March 2012, paras 10-14.,

**Requests for annulment of portions of the case-file should be made at the investigating stage:** Defects in the investigation can only be considered at the trial stage where the party in question can show it did not have the opportunity to

detect the alleged portion requiring annulment before the opening of trial.

NUON CHEA, IENG SARY AND KHIEU SAMPHAN CASE: REQUEST FOR A RULE 35 INVESTIGATION REGARDING INCONSISTENCIES IN THE AUDIO AND WRITTEN RECORDS OF OCIJ WITNESS INTERVIEWS, ECCC, TC, 13 March 2012, para. 7.

**Violations of rights enumerated in the ICCPR:** Such violations may qualify as procedural defect.

NUON CHEA CASE: ANNULMENT REFUSAL APPEAL, ECCC, PTC, 26 Aug 2008, para. 40.

**If right violated when evidence acquired, evidence not automatically inadmissible:** Rather, court will weigh various factors, e.g., evidence's reliability and potential impact on case, before deciding on its admissibility.

NUON CHEA CASE: ANNULMENT REFUSAL APPEAL, ECCC, PTC, 26 Aug 2008, para. 41.

**Determining whether material constitutes “any part of the proceedings”:** Under Article 253, “any part of the proceedings” may be subject to a request for annulment. This is an imprecise translation of the French term, *pièces de la procédure*, which should instead be applied. “*Pièces de la procédure*” stem solely from acts carried out by an investigating judge or a representative of judicial authority. Materials submitted by parties or witnesses do not constitute

*pièces de la procédure* and are hence not subject to annulment under Article 253.

DUCH CASE: ADMISSIBILITY OF EVIDENCE, ECCC, TC, 26 May 2009, paras. 9-11.

**Requests for annulment of entire investigation:** Such requests are inadmissible.

KHIEU SAMPHAN CASE: ANNULMENT REQUEST APPEAL, ECCC, PTC, 4 May 2010, para. 24.

**Corresponding ECCC Internal Rule(s):** Internal Rules 48, 73(b), 76(1), 76(2), 76(3) and 76(4). These rules are substantially similar to Article 253, except that Internal Rule 48 expressly limits applications to instances where the requesting party’s rights have been infringed by the defect, and Internal Rule 76(2) requires that such orders be issued as soon as possible and before the issuance of the closing order and also explicitly mentions that such orders are appealable.

### *Application of Comparable Articles in Other Jurisdictions*

#### **French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Subject of request for annulment filed before Investigation Chamber:** Such request must involve a part of the procedure and be based on breach of procedural requirement.

No. 08-83261, CRIM. BULL. 67, FCC, 7 Apr 2009.

**Implications of declaration of annulment:** Proof of complaint from applicant, and proven actual harm to interests of defense.

No. 99-82369, CRIM. BULL. 304, FCC, 14 Dec 1999.

**Situations which may justify nullity:** Lack of impartiality of investigation; non-availability of entire case file to the defense when requested;

failure to notify lawyer of debate on extension of detention; irregularity of act relating to third party where that act has nevertheless harmed applicant’s interests.

No. 08-80483, CRIM. BULL. 115, FCC, 14 May 2008 (impartiality of investigation). No. 81-94393, CRIM. BULL. 171, FCC, 9 Feb 1982, (availability of entire file). No. 07-86794, CRIM. BULL. 297, FCC, 4 Dec 2007 (notice of lawyer). No. 06-84869, CRIM. BULL. 208, FCC, 6 Sep 2006 (acts relating to third party).

**Breach of reasonable time requirement:** Such breach does not invalidate the proceedings.

No. 92-83443, CRIM. BULL. 57, FCC, 3 Feb 1993.

**Comparable Article(s) in the French Code of Criminal Procedure:** Articles 172 and 173. These articles provide for referral to the Investigation Chamber of a request for annulment and the admissibility of such request.



## Article 257. Registry of Appeals and Requests

*The registry of appeals and requests shall be established at the office of the court clerk of the Investigation Chamber. After receiving an appeal or a request, the court clerk of the Investigation Chamber shall immediately notify the investigating judge.*

*When the Investigation Chamber receives a request directly, the court clerk of the Investigation Chamber shall request the clerk of the investigating judge to deliver the case file or a safeguard copy to him.*

### ***Application in the ECCC***

**Only parties may be heard:** Only parties to case have right to be heard in appeal before Pre-Trial Chamber. Non-named parties do not have right to make submissions in appeal.

DUCH CASE: IENG SARY REQUEST TO MAKE SUBMISSIONS ON JCE, ECCC, PTC, 6 Oct 2008, paras. 10 and 14.

**May withdraw appeal without leave:** Appellant may withdraw appeal at any time prior to closing of arguments. Even though this right is not stated in the Internal Rules or in the Cambodian Code of Criminal Procedure, it is the custom and practice of Cambodian courts and international tribunals.

KHIEU SAMPHAN CASE: WITHDRAWAL OF APPEAL, ECCC, PTC, 15 Oct 2008, paras. 10-11.

**Corresponding ECCC Internal Rule(s):** Internal Rule 77(2). This rule is similar to Article 257, except that it allows five days for notification of the investigating judges.

## Article 259. Examination of Case Files and Briefs

*The General Prosecutor of the Court of Appeal and lawyers may examine the case file until the beginning of the hearing.*

*The General Prosecutor of the Court of Appeal shall provide a written submission to the court clerk at least one day before the hearing date.*

*Parties and their lawyers may submit their briefs to the court clerk.*

*The written submission and the brief, if any, shall be dated, stamped and immediately placed on the case file by the clerk.*

*The Parties and their lawyers shall be permitted to submit their briefs until the commencement of the hearing.*

### **Application in the ECCC**

**Only parties have standing:** Must be party to case in order to have standing to file motion.

IENG SARY AND DUCH CASES: AMICUS DISQUALIFICATION MOTION, ECCC, PTC, 14 Oct 2008, paras. 3-6.

**Civil parties are allowed to participate in all aspects of proceedings once they are admitted:** Once civil parties are admitted, they need not demonstrate any special interest in a particular stage of the proceedings, but may participate in all.

NUON CHEA CASE: CIVIL PARTY PROVISIONAL DETENTION HEARING PARTICIPATION, ECCC, PTC, 20 Mar 2008, paras. 41 and 49.

**Prosecution, defense response to *amicus curiae* briefs:** When *amicus curiae* brief is filed in case, both prosecutor and defense must be given opportunity to file response with the court.

DUCH CASE: REQUESTS FOR LEAVE TO FILE RESPONSES TO AMICUS CURIAE BRIEFS, ECCC, PTC, 26 Oct 2007.

**Corresponding ECCC Internal Rule(s):** Internal Rules 77(4) and 23. Internal Rule 77(4) is similar to Article 259 although it leaves it to the Practice Direction on filing of documents to determine many details. Internal Rule 23 makes it explicit that “parties” includes civil parties and that such civil parties would have the same right to examine files and submit briefs as the charged person does once admitted as civil parties. However, this is only possible after the commencement of a judicial investigation, and in effect, after an order has been made under Internal Rule 63 (on provisional detention).

### **Application of Comparable Articles in Other Jurisdictions**

#### **European Court of Human Rights**

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Access to case file by accused representing himself/herself:** Such persons must be given access to the case file.

FOUCHER V. FRANCE, ECHR, 18 Mar 1997, paras. 35-36.

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:** Article 6. This article provides for fair trial rights including the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal established by law.

### **French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Consequence of non-observance of requirement to examine of case files and briefs:** This does not lead to nullity unless defense rights have been violated.

No. 73-91411, CRIM. BULL. 273, FCC, 3 Oct 1974.

**Contents of case file:** All acts of investigation and all procedural documents. However, documents seized by investigating judge and filed as evidence are not part of the case file.

No. 89-81334, CRIM. BULL. 207, FCC, 18 May 1989;  
Nos. 95-85279/95-85289, CRIM. BULL. 7, FCC, 9 Jan 1996.

**Entire case file must be submitted to the prosecutor:** This is to respect defense rights. New documents submitted to Investigation Chamber before appeal hearing must also be communicated.

No. 06-85657, FCC, 19 Sep 2006.

**Submitting statements:** Only parties and their lawyers are allowed to submit statements.

No. 07-87882, CRIM. BULL. 172, FCC, 2 Sep 2008.

**Form by which brief may be submitted:** Brief does not have to be filed by lawyer in person, but cannot be sent by simple letter, unless brief is sent by detainee.

No. 98-81428, CRIM. BULL. 216, FCC, 4 Aug 1998 (not necessary by the lawyer); No. 96-83647, CRIM. BULL. 216, FCC, 3 Jun 1997 (not by letter); No. 07-82392, CRIM. BULL. 159, FCC, 13 Jun 2007 (unless detainee).

**Briefs to which the Investigation Chamber refers and responds:** Only those produced and given during the procedure.

No. 89-84226, CRIM. BULL. 194, FCC, 15 May 1990.

**Comparable Article(s) in the French Code of Criminal Procedure:** Articles 194 and 196. These articles establish the requirements for proceedings before the Investigation Chamber, including the examination of case files and briefs.

## Article 260. Conduct of Hearings

*Hearings shall take place in-camera.*

*After the President of the Investigation Chamber has made his report, the General Prosecutor of the Court of Appeal and the lawyers present their summarized observations.*

*The Investigation Chamber may summons the parties, including a detained charged person, to appear in person, and may also order the presentation of evidence.*

*When the hearing is finished, the Investigation Chamber shall discuss the matter in the absence of the General Prosecutor attached to the Court of Appeal, the parties and the lawyers.*

*The decision shall be announced at the in-camera hearing, either on the same day or one of the following. The decision shall state reasons and contain the essential elements for the Supreme Court's review. The decision shall be signed by the President of the Investigation Chamber.*

*The General Prosecutor of the Court of Appeal shall be orally notified of the decision without delay. The court clerk shall note the date of notification in the margin of the decision. The General Prosecutor shall sign in the margin of the notification as acknowledgement.*

*The parties and lawyers shall also be notified as provided in Article 238 (Notification of Orders to Charged Person) of this Code.*

### ***Application in the ECCC***

#### **Time allocated for oral submissions based on balancing rights of parties:**

Length of time that Pre-Trial Chamber allocates to each party for oral submissions is based on balancing of rights of the parties. No principle requires all parties to receive equal amount of time for oral submissions, e.g., that civil party is making oral submissions in support of prosecutor may be relevant to determining time allocated for prosecutor's submission. Pre-Trial Chamber may allocate additional time if deemed necessary and may curtail time where submissions are irrelevant or repetitive.

IENG SARY CASE: CIVIL PARTY OBSERVATIONS ADMISSIBILITY, ECCC, PTC, 24 Jun 2008, para. 6.

#### **Length of time for oral statements depends on relative positions of parties:**

For example, when civil party has direct

interest separate from interests of prosecutor and charged person, chamber may grant civil party greater amount of time for oral submission than otherwise appropriate.

IENG SARY CASE: PRELIMINARY MATTERS ON PROVISIONAL DETENTION APPEAL, ECCC, PTC, 1 Jul 2008, paras. 5-6.

**Postponement possible when supported by balance of interests, including expeditiousness of trial:** When ruling on request for postponement of hearing, court must consider interests of parties, including interest in receiving expeditious trial.

IENG THIRITH CASE: POSTPONEMENT OF PROVISIONAL DETENTION APPEAL, ECCC, PTC, 1 Apr 2008, para. 5.

**Civil parties may participate in investigative phase of criminal proceedings:** Civil party participation in investigative phase of criminal proceedings is proper under the Criminal Procedure Code and Internal Rules, and it does not conflict with international law and practice.

NUON CHEA CASE: CIVIL PARTY PROVISIONAL DETENTION HEARING PARTICIPATION, ECCC, PTC, 20 Mar 2008, paras. 21-36.

**Civil party may be allowed to appear before Pre-Trial Chamber without lawyer if may otherwise possibly lose right to**

**bring claim:** Internal Rule 23 gives civil parties the right to appear before Pre-Trial Chamber. This right is subject to limitations in Internal Rule 77(10), which states that only *lawyers* of civil parties have right to make oral statements before Pre-Trial Chamber. Where a civil party has no lawyer, these rules are in conflict, and enforcement of Internal Rule 77(10) could prevent civil parties from bringing otherwise allowable claims.

IENG SARY CASE: CIVIL PARTY REQUEST TO PERSONALLY ADDRESS THE COURT, ECCC, PTC, 3 Jul 2008, para. 3 (Downing J. dissenting).

**Corresponding ECCC Internal Rule(s):** Internal Rules 77(5), 77(6), 77(12) and 77(14). These rules are substantially similar to Article 260, except that Internal Rule 77(6) affords any judge and party the right to request all or part of a hearing be in public, in particular where the case may be brought to an end by the decision and the chamber considers it to be in the interests of justice and not affecting any public order or protective measures.

### *Application of Comparable Articles in Other Jurisdictions*

#### ***UN Human Rights Committee***

*Cambodia is a party to the International Covenant on Civil and Political Rights (ICCPR), which sets out international law principles on criminal procedure. Below are examples of how comparable ICCPR articles have been interpreted and applied by its implementing body, the UN Human Rights Committee.*

**Right to public hearing does not apply to pre-trial decisions:** Right to public hearing applies to trial proceedings but not to pre-trial

decisions rendered by prosecutors and public authorities.

KAVANAGH V. IRELAND, UN HRC, 4 Apr 2001, para. 10.4.

**Comparable Article(s) in the International Covenant on Civil and Political Rights:** Articles 14(1) and 14(3)(d). Article 14(1) provides that while a person is entitled to a fair and public hearing, hearings may be in camera where necessary for reasons of morals, public order, national security, privacy or special circumstances. Article 14(3)(d) guarantees a person the right to be tried in his/her presence and defend himself/herself in person.

#### ***European Court of Human Rights***

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Accused's right to have his case heard publicly is fundamental but not absolute:** Where a case takes place *in camera*, it is

essential that individuals involved in case be able to request a public hearing.

HAKANSSON & STURESSON V. SWEDEN, ECHR, 21 Feb 1990, para.66 (right to have case heard

fundamental); GÜLMEZ V. TURKEY, ECHR, 20 May 2008, para.35 (public hearing not an absolute right); BOCELLARI & RIZZA V. ITALY, ECHR, 13 Nov 2007, paras.37 and 41 (ability to request public hearing).

**When absence of accused during procedure is acceptable:** Trial in absentia is sufficient where the accused has waived his/her right to appear and defend himself/herself or has intended to evade justice. Otherwise, when the prosecutor is present at hearing but not the accused or

his/her lawyer, this is a violation of the principle of equality of arms.

SEJDOVIC V. ITALY, ECHR, 1 Mar 2006, para. 82 (waiver and evasion of justice); GODDI V. ITALY, ECHR, 9 Apr 1984, paras.27 and 30-31; NEŠTÁK V. SLOVAKIA, ECHR, 27 Feb 2007, paras.81-83; SERIFIS V. GREECE, ECHR, 2 Nov 2006, para.40 (prosecutor present but not charged person or his/her attorney).

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:** Articles 5 and 6. Those articles provide for liberty and security rights and fair trial rights.

### **French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Final word:** Accused must have the last word when he/she is present at debates.

No. 83-93215, CRIM. BULL. 312, FCC, 28 Sep 1983.

**Reading of summons of prosecutor during hearing is required:** If this requirement is not observed, the decision is void.

No. 84-95418, CRIM. BULL. 214, FCC, 4 Jun 1985.

**Secrecy unless request for public hearing granted:** Hearing and delivery of decision shall be secret. However, where person under judicial examination or his/her lawyer requests it, the

Chamber may order debates to take place and decision be made in public hearings.

No. 94-83697, CRIM. BULL. 322, FCC, 11 Oct 1994 (secrecy); No. 90-83668, CRIM. BULL. 312, FCC, 5 Sep 1990 (ordering public hearings).

**Appearance in person of parties is not *de jure*:** This decision is left to Chamber's discretion and is not subject to control by Court of Cassation.

No. 96-84634, CRIM. BULL. 469, FCC, 17 Dec 1996.

**Comparable Article(s) in the French Code of Criminal Procedure:** Articles 199, 200 and 216. These articles provide for the conduct of hearings before the Investigation Chamber.

## Article 261. Examination of Regularity of Procedure

*Every time it is seized, the Investigation Chamber shall examine the regularity and assure itself of the proper conduct of the proceedings.*

*If the Investigation Chamber finds grounds for annulling all or part of the proceedings, it may, on its own motion, annul such proceedings. The Investigation Chamber shall act in compliance with Article 280 (Effect of Annulment) of this Code.*

### **Application in the ECCC**

**Closing order appeal limited to its specific points:** When closing order is appealed on procedural grounds, Pre-Trial Chamber should limit scope of review to specific points of appeal.

DUCH CASE: CLOSING ORDER APPEAL, ECCC, PTC, 5 Dec 2008, para. 29.

**Corresponding ECCC Internal Rule(s):** Internal Rules 76(1), 76(2) and 76(4). These rules are similar to Article 261, except that Internal Rules 76(1) and 76(2) allow both the investigating judges and parties to submit requests to the Investigative Chamber to review of the regularity of procedure, whereas Article 261 is silent on who can seek review by the Investigative Chamber. Furthermore, Internal Rule 76 articulates the availability of appeals of Investigative Chamber rulings on the regularity of procedure, while Article 261 is silent on the matter.

### **Application of Comparable Rules in Other Jurisdictions**

#### **European Court of Human Rights**

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Appointment of counsel for accused does not alone ensure effective assistance to accused:** The counsel must actively try to ensure effective exercise of these rights.

TALAT TUNÇ V. TURKEY, ECHR, 27 Mar 2007, para. 61.

**Where judge knows lawyer cannot fulfil his role:** Judge must take all positive and appropriate measures, including adjourning hearing or appointing a replacement.

ARTICO V. ITALY, ECHR, 13 May 1980, para. 36;  
SANNINO V. ITALY, ECHR, 27 Apr 2006, paras. 43 and 49.

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:** Article 6. This article affords the accused a variety of fair trial rights, including, under Article 6(3)(c), the right to legal assistance, even where the accused does not have the means to pay for such assistance.

#### **French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Investigation Chamber has sole authority to check its legality:** During investigation, under the control of the Court of Cassation.

No. 04-84922, CRIM. BULL. 242, FCC, 13 Oct 2004.

**Investigation Chamber decides whether acts or procedural documents are irregular and the extent of any annulment:** It does so at its sole discretion and given the elements of the file. It may decide whether such annulment relates only to certain investigative acts or must extend to all/part of further procedures.

No. 96-80686, FCC, 6 May 1996 (power to decide irregularity at sole discretion); No. 83-91676, CRIM. BULL. 201, FCC, 28 June 1983 (extent of annulment).

**After annulment of contested measures, Investigation Chamber either transfers the case to itself or refers the case to the initial or another investigating judge:** Such transfer or referral is limited to review of concerned order.

No. 98-81213, CRIM. BULL. 218, FCC, 21 Jul 1998.

**Article(s) in the French Code of Criminal Procedure:** Article 206. This article provides for the conduct of hearings before the Investigation Chamber, in particular the examination by the chamber of the lawfulness of the proceedings of which it is seised.



## Article 266. Appeal against Orders of Investigating Judge by General Prosecutor attached to Court of Appeal and Royal Prosecutor

*The General Prosecutor attached to the Court of Appeal or the Royal Prosecutor shall be entitled to appeal against any order issued by investigating judges.*

### **Application in the ECCC**

**In evaluating appeal of provisional detention order, factors Pre-Trial Chamber should examine:** Include procedure of investigating judges prior to order being issued; sufficiency of facts for ordering provisional detention; whether circumstances on which order was based still exist today; and exercise of discretion by investigating judges in applying Internal Rule 63(3).

NUON CHEA CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 20 Mar 2008, para. 9; IENG THIRITH CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 9 Jul 2008, para. 15.

**Judges may consider non-enumerated appeal grounds in exceptional circumstances:** Where rule enumerates permissible grounds for appeal from order of investigating judges, Pre-Trial Chamber may consider non-enumerated grounds for appeal where necessary to ensure compliance with fundamental principles underlying judicial system, but only in exceptional cases where particular facts and circumstances require broader interpretation of right to appeal.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: MOTION ON CONFIDENTIALITY, EQUALITY AND FAIRNESS APPEAL, ECCC, PTC, 29 Jun 2011, para. 10; NUON CHEA AND IENG THIRITH CASES: CLOSING ORDER APPEAL, ECCC, PTC, 15 Feb 2011, paras. 71 and 73.

**Appeals from closing orders limited to jurisdictional questions:** These appeals include challenges relating to principle of

legality. By contrast, challenges relating to specific contours of substantive crime or mode of liability must be addressed at trial.

IENG SARY CASE: CLOSING ORDER APPEAL, ECCC, PTC, 11 Apr 2011, paras. 44-47; NUON CHEA AND IENG THIRITH CASES: CLOSING ORDER APPEAL, ECCC, PTC, 15 Feb 2011, paras. 59-62.

**Jurisdictional challenges to investigative judge orders appealable before the Pre-Trial Chamber:** These include, but are not limited to, challenges to an order of investigating judge based on: violation of principle that accused may not be tried twice for same crime; lack of subject matter jurisdiction over charged person for national crimes; and lack of effect of amnesty and pardon on court's ability to prosecute.

IENG SARY CASE: CLOSING ORDER APPEAL, ECCC, PTC, 11 Apr 2011, paras. 45, 61 66, and 76.

**Admissibility of evidence not appealable:** Pre-Trial Chamber has no general jurisdiction to review matters related to evaluation or admissibility of evidence. Rather, parties may object to admissibility of evidence at trial stage.

IENG SARY CASE: ADMISSIBILITY OF APPEAL REGARDING EVIDENCE OBTAINED THROUGH TORTURE, ECCC, PTC, 10 May 2010, para. 24; IENG THIRITH CASE: APPEAL ON EVIDENCE POTENTIALLY OBTAINED BY TORTURE, ECCC, PTC, 18 Dec 2009, para. 26; KHIEU SAMPHAN CASE: APPEAL ON EVIDENCE POTENTIALLY OBTAINED BY TORTURE, ECCC, PTC, 27 Jan 2010, para. 18.

**Challenges alleging defects in form of the indictment are non-jurisdictional:** Thus, they cannot be raised before Pre-Trial Chamber in form of appeal against closing order.

IENG SARY CASE: CLOSING ORDER APPEAL, ECCC, PTC, 11 Apr 2011, para. 47. IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: JOINT CRIMINAL ENTERPRISE APPEAL, ECCC, PTC, 20 May 2010, paras. 33-34 and 90-97 (examining indictment to verify that charged person received adequate notice of nature of alleged crime).

**Denial of request for information about possible bias of investigating judge's staff not appealable:** Pre-Trial Chamber has no jurisdiction to hear appeal from decision of investigating judge denying accused's request for information regarding apparent bias and potential existence of conflict of interest of investigating judge's staff because such appeal is not contemplated in the Internal Rules.

IENG SARY CASE: INFORMATION ABOUT DAVID BOYLE, ECCC, PTC, 28 Aug 2008, paras. 1 and 17.

**Review standard on appeal — *de novo* for errors of law and reasonableness for errors of fact:** Under international jurisprudence, alleged errors of law are

reviewed *de novo* and alleged errors of fact are reviewed under reasonableness standard to determine whether no reasonable trier of fact could have reached fact finding at issue.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATION ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 34.

**Order valid until appeal decision made:** Order of investigating judge shall be considered valid and effective until decision on appeal is made.

KHIEU SAMPHAN CASE: PROVISIONAL DETENTION EXTENSION AND REQUEST REFUSAL APPEAL, ECCC, PTC, 3 Jul 2009, para. 29.

**Should not challenge decision in order by re-submitting request:** Proper procedure to file appeal of order by investigating judge with Pre-Trial Chamber is appeal against answer in order, not through subsequent request reiterating initial request already addressed in order.

IENG SARY CASE: ADMISSIBILITY OF APPEAL REGARDING EVIDENCE OBTAINED THROUGH TORTURE, ECCC, PTC, 10 May 2010, para. 20.

**Corresponding ECCC Internal Rule(s):** Internal Rule 74(2). This rule is substantially similar to Article 266.

### *Application of Comparable Articles in Other Jurisdictions*

#### ***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**An appeal by prosecutor through statement to clerk of investigating judge:** Such appeal is admissible.

No. 08-81582, CRIM. BULL. 126, FCC, 20 May 2008.

**Comparable Article(s) in the French Code of Criminal Procedure:** Article 185. This article provides for appeals filed against rulings by the investigating judge and the liberty and custody judge, including the prosecutor's right to file an appeal.

## Article 267. Appeal against Orders of Investigating Judge by Charged Person

*The charged person shall be entitled to appeal against the following orders:*

- *An order denying an application for investigative action as stated in paragraph 2 of Article 133 (Investigative Actions Requested Charged Person);*
- *An order denying the return of seized items as stated in Articles 161 (Return of Items Seized by Investigating Judge) and 248 (Return of Seized Items);*
- *An order denying an application for an expert report as stated in paragraph 2 of Article 162 (Necessity of Expert Reports);*
- *An order denying an application for additional expert reports or for counter-expert reports as stated in paragraph 7 of Article 170 (Notification of Conclusions of Expert Reports); and*
- *Orders related to provisional detention or judicial supervision as provided for in Section 5 (Provisional Detention) and Section 7 (Judicial Supervision) of Chapter 3 (Security Measures) of Title 1 of this Book and of Article 249 (Provisions of Closing Orders in relation to Provisional Detention and Judicial Supervision) of this Code.*

### **Application in the ECCC**

**Delay in ruling on request may constitute constructive refusal; appealable:** Failure of investigating judge to rule on request as soon as possible constitutes appealable refusal in circumstances where such delay deprives accused of benefit he would have gained had request been granted. Such delay constitutes constructive refusal of application.

IENG SARY CASE: PSYCHIATRIC EXPERT APPEAL, ECCC, PTC, 21 Oct 2008, para. 24; IENG SARY CASE: JURISDICTIONAL HEARING ADJOURNMENT REQUEST, ECCC, PTC, 2 Jul 2008, para. 5.

**Party may appeal decision by investigating judge refusing requests for expert reports:** Thus, charged person may, e.g., appeal denial of request that investigating judge appoint expert to assess charged person's fitness to stand trial and capacity to participate effectively in his/her defense.

NUON CHEA CASE: EXPERT APPOINTMENT APPEAL, ECCC, PTC, 22 Oct 2008, paras. 1, 12, and 16.

**In evaluating appeal of provisional detention order, factors Pre-Trial Chamber should examine:** Include procedure of investigating judges prior to order being issued; sufficiency of facts for ordering provisional detention; whether circumstances on which order was based still exist today; and exercise of discretion by investigating judges in applying Internal Rule 63(3).

NUON CHEA CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 20 Mar 2008, para. 9; IENG THIRITH CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 9 Jul 2008, para. 15.

**Judges may consider non-enumerated appeal grounds in exceptional circumstances:** Where rule enumerates permissible grounds for appeal from order of investigating judges, Pre-Trial Chamber may consider non-enumerated grounds for appeal where necessary to ensure compliance with fundamental principles underlying judicial system, but only in exceptional cases where particular facts

and circumstances require broader interpretation of right to appeal.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: MOTION ON CONFIDENTIALITY, EQUALITY AND FAIRNESS APPEAL, ECCC, PTC, 29 Jun 2011, para. 10; NUON CHEA AND IENG THIRITH CASES: CLOSING ORDER APPEAL, ECCC, PTC, 15 Feb 2011, paras. 71 and 73.

**Appeals from closing orders limited to jurisdictional questions:** These appeals include challenges relating to principle of legality. By contrast, challenges relating to specific contours of substantive crime or mode of liability must be addressed at trial.

IENG SARY CASE: CLOSING ORDER APPEAL, ECCC, PTC, 11 Apr 2011, paras. 44-47; NUON CHEA AND IENG THIRITH CASES: CLOSING ORDER APPEAL, ECCC, PTC, 15 Feb 2011, paras. 59-62.

**Jurisdictional challenges to investigative judge orders appealable before the Pre-Trial Chamber:** These include, but are not limited to, challenges to an order of investigating judge based on: violation of principle that accused may not be tried twice for same crime; lack of subject matter jurisdiction over charged person for national crimes; and lack of effect of amnesty and pardon on court's ability to prosecute.

IENG SARY CASE: CLOSING ORDER APPEAL, ECCC, PTC, 11 Apr 2011, paras. 45, 61 66, and 76.

**Admissibility of evidence not appealable:** Pre-Trial Chamber has no general jurisdiction to review matters related to evaluation or admissibility of evidence. Rather, parties may object to admissibility of evidence at trial stage.

IENG SARY CASE: ADMISSIBILITY OF APPEAL REGARDING EVIDENCE OBTAINED THROUGH TORTURE, ECCC, PTC, 10 May 2010, para. 26; IENG THIRITH CASE: APPEAL ON EVIDENCE POTENTIALLY OBTAINED BY TORTURE, ECCC, PTC, 18 Dec 2009, para. 20; KHIEU SAMPHAN CASE: APPEAL ON EVIDENCE POTENTIALLY OBTAINED BY TORTURE, ECCC, PTC, 27 Jan 2010, para. 18.

**Challenges alleging defects in form of the indictment are non-jurisdictional:** Thus, they cannot be raised before Pre-Trial Chamber in form of appeal against closing order.

IENG SARY CASE: CLOSING ORDER APPEAL, ECCC, PTC, 11 Apr 2011, para. 47. IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: JOINT CRIMINAL ENTERPRISE APPEAL, ECCC, PTC, 20 May 2010, paras. 33-34 and 90-97 (examining indictment to verify that charged person received adequate notice of nature of alleged crime).

**Denial of request for information about possible bias of investigating judge's staff not appealable:** Pre-Trial Chamber has no jurisdiction to hear appeal from decision of investigating judge denying accused's request for information regarding apparent bias and potential existence of conflict of interest of investigating judge's staff because such appeal is not contemplated in the Internal Rules.

IENG SARY CASE: INFORMATION ABOUT DAVID BOYLE, ECCC, PTC, 28 Aug 2008, para. 1 and 17.

**Review standard on appeal — de novo for errors of law and reasonableness for errors of fact:** Under international jurisprudence, alleged errors of law are reviewed *de novo* and alleged errors of fact are reviewed under reasonableness standard to determine whether no reasonable trier of fact could have reached fact finding at issue.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATION ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 34.

**Order valid until appeal decision made:** Order of investigating judge shall be considered valid and effective until decision on appeal is made.

KHIEU SAMPHAN CASE: PROVISIONAL DETENTION EXTENSION AND REQUEST REFUSAL APPEAL, ECCC, PTC, 3 Jul 2009, para. 29.

**Should not challenge decision in order by re-submitting request:** Proper procedure to file appeal of order by investigating judge with Pre-Trial Chamber is appeal against answer in order, not through subsequent request reiterating initial request already addressed in order.

IENG SARY CASE: ADMISSIBILITY OF APPEAL REGARDING EVIDENCE OBTAINED THROUGH TORTURE, ECCC, PTC, 10 May 2010, para. 20.

**Cases with multiple charged persons: right of appeal:** In such cases, each charged person may appeal any order of investigating judge that affects that charged person, regardless of whether order was in response to request submitted by that charged person or whether request was referred to in order.

IENG SARY CASE: ADMISSIBILITY OF APPEAL REGARDING EVIDENCE OBTAINED THROUGH TORTURE, ECCC, PTC, 10 May 2010, para. 18; KHIEU SAMPHAN CASE: APPEAL ON EVIDENCE POTENTIALLY OBTAINED BY TORTURE, ECCC, PTC, 27 Jan 2010, para. 14.

**Trial Chamber may evaluate if validly seized by Pre-Trial Chamber decisions on closing order:** Even though Trial Chamber has no competence to review decisions of Pre-Trial Chamber, it has a duty to evaluate whether it has been validly seized of case file by Pre-Trial Chamber decisions on closing order confirming indictment against accused, and whether these decisions contain procedural defects that may affect lawfulness of accused's detention pursuant to detention portion of these decisions.

NUON CHEA, KHIEU SAMPHAN AND IENG THIRITH CASES: URGENT APPLICATIONS FOR IMMEDIATE RELEASE, ECCC, TC, 16 Feb 2011, para. 21.

**Corresponding ECCC Internal Rule(s):** Internal Rules 63, 65 and 74. Internal Rule 74(3) is substantially similar to Article 267, except that it permits a charged person or accused to appeal orders and decisions by the investigating judges confirming the jurisdiction of the ECCC, refusing an application to seize the chamber for annulment of investigative action, relating to protective measures, and declaring a civil party application admissible. The right of a charged person to appeal against an order for provisional detention to the Pre-Trial Chamber is also found in Internal Rule 64(4), and the right of a charged person to appeal a bail order is also found in Internal Rule 65(1).

### ***Application of Comparable Articles in Other Jurisdictions***

#### ***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**General rejection of appeals against orders of dismissal or removal:** Such appeals shall be rejected unless they are complex.

No. 65-90080, CRIM. BULL. 176, FCC, 15 Jul 1965, (orders of dismissal); No. 70-91964, CRIM. BULL. 8, FCC, 12 Jan 1971 (removal orders).

**Admissibility of appeal against complex referral order:** Examples of admissible appeals include order implicitly rejecting request for expert and order implicitly admitting civil party whose admission had been contested.

No. 66-93616, CRIM. BULL. 143, FCC, 2 May 1967 (complex referral order, rejection of request for expert); No. 82-90109, CRIM. BULL. 288, FCC, 14 Dec 1982 (admission of civil party).

**President of Investigation Chamber's power to make non-admission order:** President may make such orders on own motion of an appeal against an order of the investigating judge.

No. 98-80446, CRIM. BULL. 207, FCC, 24 Jun 1998.

**Orders by President of Investigation Chamber generally cannot be subject to appeal:** This is so unless the relevant decision may be tainted with abuse of power.

No. 03-85240, CRIM. BULL.222, FCC, 26 Nov 2003 (President's orders not subject to appeal); No. 07-80929, CRIM. BULL.107, FCC, 4 Apr 2007 (abuse of power).

**Comparable Article(s) in the French *Code of Criminal Procedure*:** Article 186. This article empowers the charged person to appeals against rulings by the investigating judge and the liberty and custody judge.

## Article 268. Appeal against Orders of Investigating Judge by Civil Party

*A civil party shall be entitled to appeal against the following orders:*

- *An order denying an application for investigative action as stated in paragraph 2 of Article 134 (Investigative Actions Requested by Civil Party);*
- *An order denying the investigative action as stated in paragraph 4 of Article 139 (Delivery of Complaint to Prosecutor);*
- *An order determining the amount of deposit as stated in paragraph 1 of Article 140 (Payment of Deposits);*
- *An order denying an application to become a Civil Party as stated in paragraph 4 of Article 140 (Payment of Deposits) of this Code;*
- *An order punishing a civil party as stated in Article 141 (Abusive and Dilatory Requests);*
- *An order denying the return of seized items as stated in Articles 161 (Return of Items Seized by Investigating Judge) and 248 (Return of Seized Items);*
- *An order refusing an application for an expert report as stated in paragraph 2 of Article 162 (Necessity of Expert Reports);*
- *An order denying an application for additional expert reports or for counter-expert reports as stated in paragraph 7 of Article 170 (Notification of Conclusions of Expert Reports); and*
- *A closing order as stated in Article 247 (Closing Order) of this Code.*

### **Application in the ECCC**

**Delay in ruling on request may constitute constructive refusal; appealable:** Failure of investigating judge to rule on request as soon as possible constitutes appealable refusal in circumstances where such delay deprives accused of benefit he would have gained had request been granted. Such delay constitutes constructive refusal of application.

IENG SARY CASE: PSYCHIATRIC EXPERT APPEAL, ECCC, PTC, 21 Oct 2008, para. 24; IENG SARY CASE: JURISDICTIONAL HEARING ADJOURNMENT REQUEST, ECCC, PTC, 2 Jul 2008, para.5; IENG SARY CASE: THIRD INVESTIGATIVE REQUEST APPEAL, ECCC, PTC, 22 Dec 2009, para. 9.

**Reconsidering civil party applications; specific arguments required:** In application for reconsideration of admissibility of civil party applicants,

general arguments, e.g., lawyer's mere assertion that his/her client was victim of persecution without specific arguments in relation to individual applicants, are not sufficient to determine applicant's admissibility.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATION RECONSIDERATION, ECCC, PTC, 1 Jul 2011, para. 10.

**Reconsideration appeals may be decided jointly even where appeals are filed on different grounds:** In interests of justice and judicial efficiency, appeals to Pre-Trial Chamber from dismissal of civil party applications by investigating judges can be examined and decided jointly, even where appeals were originally filed on different grounds, if fundamental errors being

appealed exist and are relevant to all rejected civil party applicants and significant injustice would occur to rejected civil parties who did not raise the errors identified by Pre-Trial Chamber.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATION ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 35.

**Party may appeal decision by investigating judge refusing requests for expert reports:** Thus, charged person may, e.g., appeal denial of request that investigating judge appoint expert to assess charged person's fitness to stand trial and capacity to participate effectively in his/her defense.

NUON CHEA CASE: EXPERT APPOINTMENT APPEAL, ECCC, PTC, 22 Oct 2008, paras. 1, 12, and 16.

**In evaluating appeal of provisional detention order, factors Pre-Trial Chamber should examine:** Include procedure of investigating judges prior to order being issued; sufficiency of facts for ordering provisional detention; whether circumstances on which order was based still exist today; and exercise of discretion by investigating judges in applying Internal Rule 63(3).

NUON CHEA CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 20 Mar 2008, para. 9; IENG THIRITH CASE: PROVISIONAL DETENTION APPEAL, ECCC, PTC, 9 Jul 2008, para. 15.

**Judges may consider non-enumerated appeal grounds in exceptional circumstances:** Where rule enumerates permissible grounds for appeal from order of investigating judges, Pre-Trial Chamber may consider non-enumerated grounds for appeal where necessary to ensure compliance with fundamental principles underlying judicial system, but only in exceptional cases where particular facts

and circumstances require broader interpretation of right to appeal.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: MOTION ON CONFIDENTIALITY, EQUALITY AND FAIRNESS APPEAL, ECCC, PTC, 29 Jun 2011, para. 10; NUON CHEA AND IENG THIRITH CASES: CLOSING ORDER APPEAL, ECCC, PTC, 15 Feb 2011, paras. 71 and 73; IENG THIRITH CASE: STAY OF PROCEEDINGS APPEAL, ECCC, PTC, 10 Aug 2010, para. 14.

**Appeals from closing orders limited to jurisdictional questions:** These appeals include challenges relating to principle of legality. By contrast, challenges relating to specific contours of substantive crime or mode of liability must be addressed at trial.

IENG SARY CASE: CLOSING ORDER APPEAL, ECCC, PTC, 11 Apr 2011, para. 44-47; NUON CHEA AND IENG THIRITH CASES: CLOSING ORDER APPEAL, ECCC, PTC, 15 Feb 2011, paras. 59-62.

**Jurisdictional challenges to investigative judge orders appealable before the Pre-Trial Chamber:** These include challenges to an order of investigating judge based on: violation of principle that accused may not be tried twice for same crime; lack of subject matter jurisdiction; and lack of effect of a pardon on court's ability to prosecute.

IENG SARY CASE: CLOSING ORDER APPEAL, ECCC, PTC, 11 Apr 2011, paras. 45, 61, 66 and 76.

**Admissibility of evidence not appealable:** Pre-Trial Chamber has no general jurisdiction to review matters related to evaluation or admissibility of evidence. Rather, parties may object to admissibility of evidence at trial stage.

IENG SARY CASE: ADMISSIBILITY OF APPEAL REGARDING EVIDENCE OBTAINED THROUGH TORTURE, ECCC, PTC, 10 May 2010, para. 24; IENG THIRITH CASE: APPEAL ON EVIDENCE POTENTIALLY OBTAINED BY TORTURE, ECCC, PTC, 18 Dec 2009, para. 24; KHIEU SAMPHAN CASE: APPEAL ON EVIDENCE POTENTIALLY OBTAINED BY TORTURE, ECCC, PTC, 27 Jan 2010, para. 18.



**Challenges alleging defects in form of the indictment are non-jurisdictional:** Thus, they cannot be raised before Pre-Trial Chamber in form of appeal against closing order.

IENG SARY CASE: CLOSING ORDER APPEAL, ECCC, PTC, 11 Apr 2011, para. 47. IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: JOINT CRIMINAL ENTERPRISE APPEAL, ECCC, PTC, 20 May 2010, paras. 33-34 and 90-97 (examining indictment to verify that charged person received adequate notice of nature of alleged crime).

**Denial of request for information about possible bias of investigating judge's staff not appealable:** Pre-Trial Chamber has no jurisdiction to hear appeal from decision of investigating judge denying accused's request for information regarding apparent bias and potential existence of conflict of interest of investigating judge's staff because such appeal is not contemplated in the Internal Rules.

IENG SARY CASE: INFORMATION ABOUT DAVID BOYLE, ECCC, PTC, 28 Aug 2008, para. 1 and 17.

**Reconsideration of civil party applications are reviewed *de novo*:** In reviewing application for reconsideration of admissibility of civil party applicants, Pre-Trial Chamber reviews original applications *de novo* to determine whether applicants allege harm as result of crime alleged in indictment.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATION RECONSIDERATION, ECCC, PTC, 1 Jul 2011, para. 10.

**Reversal of admissibility orders permitted for errors of fact, law:** Pre-Trial Chamber may reverse orders of

investigating judges on admissibility of civil party applicants if it finds error of fact and/or error of law.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 34.

**Unopposed reconsideration of civil party applications may take into account common fundamental errors:** Where appeals from rejection of applications for civil party status are not opposed by parties, reviewing court may take into account fundamental errors common to all rejected applicants, whether or not particular applicant raised particular error, to avoid significant injustice and ensure similar persons are treated equally.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 35.

**Order valid until appeal decision made:** Order of investigating judge shall be considered valid and effective until decision on appeal is made.

KHIEU SAMPHAN CASE: PROVISIONAL DETENTION EXTENSION AND REQUEST REFUSAL APPEAL, ECCC, PTC, 3 Jul 2009, para. 29.

**Should not challenge decision in order by re-submitting request:** Proper procedure to file appeal of order of investigating judge with Pre-Trial Chamber is appeal against answer in order, not through subsequent request reiterating initial request already addressed in order.

IENG SARY CASE: ADMISSIBILITY OF APPEAL REGARDING EVIDENCE OBTAINED THROUGH TORTURE, ECCC, PTC, 10 May 2010, para. 20.

**Corresponding ECCC Internal Rule(s):** Internal Rule 74(4). Internal Rule 74(4) is substantially similar to Article 268. However, unlike Article 268, Internal Rule 74(4) permits civil parties to appeal a dismissal order where the prosecutors have appealed, an order refusing an application to seize the

chamber for annulment of investigative action, and an order relating to protective measures. By contrast, Internal Rule 74(4) does not allow Civil Parties to appeal a Closing Order, orders relating to the payment of deposits by civil parties or orders punishing a civil party for abusive and dilatory requests (in the latter case because such orders are not contemplated under the Internal Rules).

### ***Application of Comparable Articles in Other Jurisdictions***

#### ***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Civil party may appeal any order of investigating judge affecting his/her civil interests:** This includes orders declaring civil parties inadmissible; orders must be legal rather than administrative in nature.

D. 1933. 1.127, FCC, 4 Mar 1932 (order affecting civil interests); No. 92-84778, CRIM. BULL. 147, FCC, 6 Apr 1993.

**Order must cause direct injury to civil party:** Only such orders are eligible.

No. 69-91612, CRIM. BULL. 362, FCC, 23 Dec 1969.

**Comparable Article(s) in the French Code of Criminal Procedure:** Article 186. This article empowers civil parties to appeal against rulings by the investigating judge and the liberty and custody judge.

## Article 271. Competence of Investigation Chamber

*Appeals shall be heard by the Investigation Chamber of the Court of Appeal.*

### ***Application in the ECCC***

**Trial Chamber cannot determine necessity, reasonableness of Pre-Trial Chamber proceedings:** Trial Chamber has no jurisdiction to determine whether proceedings filed before Pre-Trial Chamber are unnecessary or unreasonable.

NUON CHEA, IENG SARY, KHIEU SAMPHAN, AND IENG THIRITH CASES: REQUEST FOR DISCLOSURE OF ALL PTC 08 DOCUMENTS, ECCC, PTC, 15 Jul 2011, para. 5.

**Review standard on appeal: *de novo* for errors of law and reasonableness standard for errors of fact:** Under international jurisprudence, alleged errors of law are reviewed *de novo* and alleged errors of fact are reviewed under

reasonableness standard to determine whether no reasonable trier of fact could have reached fact finding at issue.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATION ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 34.

**Cannot order additional actions:** Role of Pre-Trial Chamber is limited to determining appeals; it has no authority to order additional investigative actions.

NUON CHEA, IENG SARY, KHIEU SAMPHAN, IENG THIRITH AND DUCH CASES: FORCED MARRIAGE AND ENFORCED DISAPPEARANCES INTERVIEWS APPEAL, ECCC, PTC, 21 Jul 2010, para. 14.

**Corresponding ECCC Internal Rule(s):** Internal Rule 73. This rule is similar to Article 271 although it includes a consolidated list of all types of admissible appeals.

## Article 278. Decision on Provisional Detention

*In case of provisional detention, the decision shall be issued within 15 days of the receipt of the file by the Investigation Chamber. At the expiry of the fifteen-day period, the charged person shall be released except if further investigative action has been ordered or if there are unforeseeable or insurmountable circumstances obstructing the pronouncement of the decision within this period.*

*When the Investigation Chamber orders provisional detention, the order shall state reasons with reference to the provision of Article 205 (Reasons for Provisional Detention) of this Code. In this case, the President of the Investigation Chamber issues a detention order.*

*The case file shall be immediately returned to the investigating judge following the execution of the decision.*

### Application in the ECCC

**Necessity to balance detention against liberty:** Courts must balance reasons for detention against right to personal liberty. Presumption of liberty requires detention to have basis in judicial decision, issued in accordance with statutory procedure and conditions.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, paras. 47 and 56. IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 80; IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 22. NUON CHEA CASE: SECOND DECISION ON NUON CHEA'S FITNESS TO STAND TRIAL, ECCC, TC, 2 Apr 2013, para. 16; IENG THIRITH CASE: FITNESS TO STAND TRIAL (IMPLEMENTATION OF SUPREME COURT CHAMBER'S DECISION), ECCC, TC, 13 Mar 2013, para. 1; IENG THIRITH CASE: DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO RELEASE THE ACCUSED IENG THIRITH, ECCC, SC, 13 Dec 2011, paras 21-26 (noting that for a conditional stay of proceedings, the unconditional release of the person concerned is not the inevitable consequence).

**Charged person detained when first appearing:** Charged person held in detention at initial appearance before Trial Chamber shall remain in detention until Chamber renders judgment, as long as detention has lawful basis from judicial authority.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, para. 47-49.

**Extension of provisional detention after closing order independent:** Order to extend provisional detention following issuance of closing order is independent of any other time limit imposed on provisional detention. There is no absolute three-year maximum time limit on provisional detention.

IENG SARY CASE: RELEASE REQUEST, ECCC, TC, 12 May 2011, para. 10.

**Detention order must contain reasons:** Order to extend detention, when accompanying closing order, must contain reasons. Charged person's fundamental fair trial rights breached by delay in providing reasons.

IENG SARY CASE: RELEASE REQUEST, ECCC, TC, 12 May 2011, paras. 12.

**Immediate release might not cure delay of reasons:** When order to extend detention does not contain reasons, immediate release may not be appropriate remedy for this error of law. Remedies may be considered at end of trial.

IENG SARY CASE: RELEASE REQUEST, ECCC, TC, 12 May 2011, para. 12.

**Separate issuance of decision and reasons may not be a violation:** Whether the court's delivery of decision first and reasons later constitutes procedural violation is considered only if both

decision and reasons were issued outside of period allowed under Internal Rules. If both decision and reasons were issued within allowed period, issue of their separation is moot.

NUON CHEA AND IENG THIRITH CASE: IMMEDIATE APPEALS ON URGENT APPLICATIONS FOR IMMEDIATE RELEASE, ECCC, SCC, 3 Jun 2011, para. 31.

**Corresponding ECCC Internal Rule(s):** Internal Rules 68(2), 77(14) and 77(15). Internal Rule 77(15) is substantially similar to Article 278, except that it is limited to situations in which the investigating judges order the release of the charged person or dismiss a case and the prosecutors request a stay. In other situations, either Internal Rule 68(2) (detention when indictment appealed) or Internal Rule 77 generally (other appeals of provisional detention orders) apply. Internal Rule 77(14) provides that all Pre-Trial Chamber decisions have to be reasoned.

### *Application of Comparable Articles in Other Jurisdictions*

#### *UN Human Rights Committee*

*Cambodia is a party to the International Covenant on Civil and Political Rights (ICCPR), which sets out international law principles on criminal procedure. Below are examples of how comparable ICCPR articles have been interpreted and applied by its implementing body, the UN Human Rights Committee.*

**Justification required for extended detention:** Detention, including house arrest, may be deemed arbitrary if State cannot provide case-specific grounds to justify continued detention.

KWOK v. AUSTRALIA, UN HRC, 23 Oct 2009, para. 9.3;  
ABBASSI v. ALGERIA, UN HRC, 28 Mar 2007, para. 8.4 (house arrest).

**Remand in custody must be lawful, reasonable, and necessary:** Right to liberty requires circumstances of person's detention be lawful, reasonable, and necessary in all circumstances such as to prevent flight, interference with evidence, or recurrence of crime.

KULOV v. KYRGYZSTAN, UN HRC, 26 Jul 2010, para. 8.3.

**Comparable Article(s) in the *International Covenant on Civil and Political Rights*:** Articles 9(1), 9(3), 9(4), 14(2) and 14(3)(c). Article 9(3), in particular, provides that it shall not be the general rule that persons awaiting trial should be detained in custody. Other provisions in Article 9 afford guarantees related to detention, while Article 14(2) establishes the presumption of innocence and 14(3)(c) protects the right to trial without undue delay.

#### *French Court of Cassation*

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Extending pre-trial detention:** Liberty and custody judge must justify reasons for extending pre-trial detention.

No. 92-85534, CRIM. BULL. 32, FCC, 20 Jan 1993.

**Comparable Article(s) in the *French Code of Criminal Procedure*:** Article 145-1. This article provides for pre-trial detention including the reasons for extending pre-trial detention.

## Article 279. Inadmissibility of Requests for Annulment

*The Investigation Chamber may declare any request for annulment inadmissible if:*

- *the request does not contain reasons;*
- *the request is related to an order that is subject to appeal;*
- *the request is obviously unfounded.*

*The decision of the Investigation Chamber is not subject to appeal.*

*When the request is declared inadmissible, the case file shall immediately be returned to the investigating judge.*

### ***Application in the ECCC***

#### **Content of requests for annulment:**

Requests for annulment must cite procedural defect; such defect must infringe on applicant's rights.

NUON CHEA CASE: ANNULMENT REFUSAL APPEAL, ECCC, PTC, 26 Aug 2008, paras. 34-35, NUON CHEA AND IENG SARY CASE: APPEAL AGAINST OCIJ ORDER TO SUMMONS WITNESSES, ECCC, PTC, 8 Jun 2010, para. 38; NUON CHEA, IENG SARY AND KHIEU SAMPHAN CASE: REQUEST FOR A RULE 35 INVESTIGATION REGARDING INCONSISTENCIES IN THE AUDIO AND WRITTEN RECORDS OF OCIJ WITNESS INTERVIEWS, ECCC, TC, 13 March 2012, paras 10-14.,

**Violations of ICCPR rights:** Violations of rights recognized in ICCPR qualify as procedural defects and may annul investigative or judicial action.

NUON CHEA CASE: ANNULMENT REFUSAL APPEAL, ECCC, PTC, 26 Aug 2008, para. 40.

**Where no legal violation, must show harm:** Where procedural defect not prescribed void in Internal Rules and where there is no violation of right under ICCPR, applicant must show interests were harmed by procedural defect.

NUON CHEA CASE: ANNULMENT REFUSAL APPEAL, ECCC, PTC, 26 Aug 2008, para. 42; IENG THIRITH

CASE: INVESTIGATION ANNULMENT REQUEST APPEAL, ECCC, PTC, 25 Jun 2010, para. 21.

#### **Evidence not automatically inadmissible:**

If evidence acquired through methods that violate right, evidence is not automatically inadmissible. Factors that must be considered include manner in which evidence was obtained, reliability of evidence, and effect on integrity of proceedings.

NUON CHEA CASE: ANNULMENT REFUSAL APPEAL, ECCC, PTC, 26 Aug 2008, para. 41.

**Requests for annulment of all investigative and prosecutorial actions denied:** Annulment procedure is designed to nullify specific portions of proceedings that harmed charged person's interests, not to nullify investigations in general.

KHIEU SAMPHAN CASE: ANNULMENT REQUEST APPEAL, ECCC, PTC, 04 May 2010, para. 24. NUON CHEA, IENG SARY AND KHIEU SAMPHAN CASE: REQUEST FOR A RULE 35 INVESTIGATION REGARDING INCONSISTENCIES IN THE AUDIO AND WRITTEN RECORDS OF OCIJ WITNESS INTERVIEWS, ECCC, TC, 13 March 2012, paras 10-14,

**Corresponding ECCC Internal Rule(s):** Internal Rules 76(4) and 76(7). Internal Rule 76(4) is substantially similar to Article 279, except that Internal Rule 76(4) further specifies that applications are not admissible if they do not contain "sufficient" reasons. Internal Rule 76(7) requires that

requests for annulment be submitted before the Closing Order, after which point procedural defects shall be considered cured and requests for annulment will be invalid.

## Article 280. Effect of Annulment

*When the Investigation Chamber is seized with a request for annulment of a particular part of the proceedings, a decision to annul shall include whether the annulment also affects other documents or proceedings.*

*Parts of the proceedings which have been nullified shall be removed from the case file and filed separately by the court clerk of the Investigation Chamber.*

### **Application in the ECCC**

**Remedy of annulled proceedings that are substantial:** Annulled parts of proceedings that are substantial may affect entirety of proceedings and may lead to annulment of all investigations. Pre-Trial Chamber will determine remedy for proven procedural defect on case-by-case basis. Annulment of entire investigation does not prevent new and untainted material resulting from new investigation to be placed in file.

IENG THIRITH CASE: INVESTIGATION ANNULMENT REQUEST APPEAL, ECCC, PTC, 25 Jun 2010, paras. 26-27.

**Requests for annulment of all investigative and prosecutorial actions denied:** Annulment procedure is designed to nullify specific portions of proceedings that harmed charged person's interests, not to nullify investigations in general.

KHIEU SAMPHAN CASE: ANNULMENT REQUEST APPEAL, ECCC, PTC, 04 May 2010, para. 24. NUON CHEA, IENG SARY AND KHIEU SAMPHAN CASE: REQUEST FOR A RULE 35 INVESTIGATION REGARDING INCONSISTENCIES IN THE AUDIO AND WRITTEN RECORDS OF OCIJ WITNESS INTERVIEWS, ECCC, TC, 13 March 2012, paras 10-14.

**Corresponding ECCC Internal Rule(s):** Internal Rule 76(5). This rule is substantially similar to Article 280 except that Internal Rule 76(5) provides that when an annulment is only partial, the annulled portion will be recognized as cancelled only after a certified copy is made of the original, complete order or action and that it is prohibited to draw any inference against the parties from such annulled actions or orders or from the cancelled parts thereof, with any party who engages in such activities being subject to disciplinary proceedings.

### **Application of Comparable Articles in Other Jurisdictions**

#### **French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Investigation Chamber must identify all proceedings that have causal link with impugned procedure:** It must annul all acts arising out of acts declared null and void.

No. 69-91071, CRIM. BULL. 186, FCC, 4 Jun 1969.

**Effect of annulment of preliminary investigation:** This does not lead to annulment

of introductory submissions based on other procedural documents.

No. 94-83490, CRIM. BULL. 313, FCC, 4 Oct 1994.

**Effect of nullification of one act or order on other parts of procedure:** Investigation Chamber may decide independently of the act or order the necessary investigative measures.



No. 86-93988, CRIM. BULL. 270, FCC, 6 Oct 1986.

No. 01-81054, FCC, 16 Jan 2002.

**Annulled acts are removed from the file:**Information cannot be drawn from these acts during the hearings.

**Comparable Article(s) in the French *Code of Criminal Procedure*:**Articles 174 and 206. Those articles provide for the conduct of hearings before the investigation chamber including the proceedings and the effects in case of annulment.

# Trial

This section contains annotations of the following articles in the *Cambodian Code of Criminal Procedure* (the Code):

- Article 289. Jurisdiction of Court of First Instance
- Article 291. Methods of Seizure
- Article 297. Summons of Witnesses
- Article 299. Joinder of Cases
- Article 300. Appearance of Accused
- Article 305. Appearance of Accused upon Indictment
- Article 306. Automatic Release of Detained Accused
- Article 307. Application for Release of Detained Accused
- Article 311. Joining of Civil Party during Trial
- Article 313. Assistance and Representation of Civil Party
- Article 315. Appearance of Witnesses
- Article 316. Public Nature of Trial Hearing and Confidentiality
- Article 318. Establishment of Order in Hearing
- Article 321. Evidence Evaluation by Court
- Article 322. Rules Concerning Parties Present at Hearing
- Article 325. Interrogation of Accused
- Article 326. Hearing of Parties
- Article 330. Assistance and Swearing of Interpreter/Translator
- Article 332. Presentation of Exhibits
- Article 339. Additional Investigation Ordered by Court
- Article 342. Competence of Court with Respect to Objection
- Article 350. Declaration of Guilt
- Article 355. Judgment on Civil Remedy

## Article 289. Jurisdiction of Court of First Instance

*The Court of First Instance shall judge upon felonies, misdemeanors and petty offenses. Three judges of the Court of First Instance shall sit en banc to judge upon a felony (and if applicable, on any related misdemeanors and petty offenses).*

*Otherwise, the Court of First Instance shall try misdemeanors and petty offenses by a single judge.*

### ***Application in the ECCC***

**Trial Chamber cannot determine necessity, reasonableness of Pre-Trial Chamber proceedings:** Trial Chamber has no jurisdiction to determine whether proceedings filed before Pre-Trial Chamber are unnecessary or unreasonable.

NUON CHEA, IENG SARY, KHIEU SAMPHAN, AND IENG THIRITH CASES: REQUEST FOR DISCLOSURE OF ALL PTC 08 DOCUMENTS, ECCC, PTC, 15 Jul 2011, para. 5.

**Tribunal must decline jurisdiction where trial would be repugnant to rule of law; abuse of process doctrine narrowly**

**construed:** Abuse of process requiring tribunal to decline to exercise jurisdiction is limited to cases where illegal conduct would make rule of law repugnant to put accused on trial. When violations not attributable to international tribunal, doctrine has been confined to instances of torture or serious mistreatment and usually applied to arrest and transfer processes.

DUCH CASE: RELEASE REQUEST, ECCC, TC, 15 Jun 2009, para. 33.

**Corresponding ECCC Internal Rule(s):** There are no Internal Rules directly corresponding to Article 289. However, Internal Rule 79 describes the General Provisions of proceedings before the Trial Chamber and excludes any appellate role over Pre-Trial Chamber proceedings.

## Article 291. Methods of Seizure

*In a criminal case the Court of First Instance can be seized through:*

- *the investigating judge's order or the Investigation Chamber's decision to forward the case for trial(indictment);*
- *the citation of the Royal Prosecutor; or*
- *the written record of immediate appearance submitted by the Royal Prosecutor.*

*Any person who is brought before the court through any of the above procedures shall be an accused.*

*Any victim of an offence may apply to join the proceedings as a civil party before the trial court, even if he fails to do so during the judicial investigation.*

*Civil defendants are those who shall be legally liable to compensate for damages caused to the victim.*

### ***Application in the ECCC***

**No basis for Trial Chamber to grant any amendments to indictment:** Neither can it take into consideration procedural defects in process of investigation.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: TRIAL MANAGEMENT MEETING DIRECTIVES, 8 Apr 2011, p. 2.

**Trial Chamber may be seized even while closing order appeal pending:** Deferral by Pre-Trial Chamber of reasons of decision on closing order appeal does not affect Trial Chamber's finding that it is validly seized of the indictment of accused where all other time requirements are satisfied.

IENG SARY CASE: RELEASE REQUEST, ECCC, TC, 12 May 2011, paras. 10-12.

**Injury need not be direct:** Injury in a civil party application must be personal but need not be direct.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 83.

**Injury to family members:** Injury must be personal, but under certain circumstances may be caused by injury to family member.

DUCH CASE: JUDGMENT, ECCC, TC, 26 Jul 2010, para. 641.

**Proof of direct impact by extended family members:** In exceptional circumstances, extended family members of victim may show direct impact of criminal act if kinship and special bonds are shown.

DUCH CASE: JUDGMENT, ECCC, TC, 26 Jul 2010, para. 643.

**Injury must directly result from accused conduct:** Civil party applicants must show injury directly results from conduct of accused who is under investigation.

DUCH CASE: JUDGMENT, ECCC, TC, 26 Jul 2010, para. 647.

**Dismissal of application failing to prove direct injury:** Investigating judges may dismiss a civil party application if it is determined the civil party has failed to prove direct injury from alleged actions of the charged person.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 27 Apr 2010, para. 48.

**Victims alleging new facts:** Victims seeking civil party status may not allege new facts for purposes of investigation, but can allege new facts likely to show causal link between harm suffered by victim and at least one crime already alleged against charged person in existing indictment.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 42.

**Causal link to collectively charged persons may be enough:** In a claim against multiple charged persons, both as individuals and collectively as group acting together in joint criminal enterprise (or other forms of liability), applicant may show causal link to collectively charged persons, rather than individually charged person.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, paras. 71-73.

**Psychological injury presumed for genocide, crimes against humanity, if applicant from targeted group:** In a case involving crimes such as genocide or crimes against humanity, when the applicant is the indirect victim (e.g., witness or person with knowledge of alleged crime) personal psychological injury is presumed if applicant is more likely than not a member of the same targeted group or community as direct victim.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, paras. 93.

**Material injury:** Injury includes loss of property or income.

DUCH CASE: JUDGMENT, ECCC, TC, 26 Jul 2010, para. 641.

**Psychological injury:** Injury may include mental disorders or psychiatric trauma, such as post-traumatic stress disorder.

DUCH CASE: JUDGMENT, ECCC, TC, 26 Jul 2010, para. 641; NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 83.

**Psychological harm can result from a crime against immediate family and broader range of people:** Psychological harm should not be interpreted narrowly as only resulting from crimes perpetrated against immediate family members; rather, a much broader range of people should be included such as extended family, friends and neighbors and those reflecting other bonds in Cambodian culture and society.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, paras. 49, 87 and 88.

**Psychological victimization must be considered in context:** In evaluating psychological injury for civil party application, it is essential to consider victimization within social and cultural context at the time the alleged crimes occurred.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, paras. 83 and 86.

**Corresponding ECCC Internal Rule(s):** Internal Rule 79. This rule provides that the Trial Chamber is seized by indictment from the investigating judges or Pre-Trial Chamber. Unlike other Cambodian courts, the ECCC may not be seized in other ways. Also, in the ECCC, civil parties may only apply to

participate in proceedings up to 15 days after the end of the judicial investigation (Internal Rule 23 bis).

### ***Application of Comparable Articles in Other Jurisdictions***

#### ***European Court of Human Rights***

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Eligible civil parties to a trial:** These include persons seeking fair and public hearing, not persons only seeking repressive aims as private vengeance; persons alleging ill-treatment by agents of the State.

PÉREZ V. FRANCE, ECHR, 12 Feb 2004, paras. 74-75 (civil parties seeking fair and public hearing); SIGALAS V. GREECE, ECHR, 22 Sep 2005, para. 27 (civil action not repressive); AKSOY V. TURKEY, ECHR, 18 Dec 1996, para. 92 (infractions committed by agents of State).

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:** Article 6(1). This article provides for fair trial rights including the right for everyone charged with a criminal offense to a fair and public trial within a reasonable time before an impartial and independent tribunal established by law.

#### ***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Even where the court is not competent to repair damage suffered by accused, may admit civil party:** May do so where the civil party

wishes to establish criminal guilt of the accused in order to support their civil action.

NO. 69-92311, CRIM. BULL. 182, FCC, 8 Jun 1971.

**Comparable Article(s) in the French Code of Criminal Procedure:** Articles 231, 388, 418 and 531. These articles establish the methods by which different courts in the French system may be seised, and detail the scope of their competences and the rights of civil parties in each case.

## Article 297. Summons of Witnesses

*Inculpatory witnesses who have never been confronted by the accused shall be summonsed to testify at the trial hearing.*

### ***Application in the ECCC***

**Where written transcripts or statements go to proof of the acts and conduct of the accused, the opportunity to test the evidence must be afforded to him/her:** Where an opportunity to test the evidence of witnesses has not been availed to the accused during the conduct of the judicial investigation, particularly when relevant to the acts or conduct of the accused, the Trial Chamber must afford the accused a direct opportunity to test this evidence at trial.

NUON CHEA, IENG SARY AND KHIEU SAMPHAN CASES: CO-PROSECUTORS' RULE 92 SUBMISSION REGARDING THE ADMISSION OF WITNESS STATEMENTS & ORS, ECCC, TC, 12 June 2012, paras 21-25; NUON CHEA, IENG SARY AND KHIEU SAMPHAN CASES: DECISION ON DEFENCE REQUESTS CONCERNING IRREGULARITIES ALLEGED TO HAVE OCCURRED DURING THE JUDICIAL INVESTIGATION TC, 7 Dec 2012, para. 26. NUON CHEA AND KHIEU SAMPHAN CASES: DECISION ON OBJECTIONS TO THE ADMISSIBILITY OF WITNESS, VICTIM AND CIVIL PARTY STATEMENTS AND CASE 001 TRANSCRIPTS PROPOSED BY THE CO-PROSECUTORS AND CIVIL PARTY LEAD CO-LAWYERS, TC, 12 August 2013 at para. 17. FINAL DECISION ON WITNESSES, EXPERTS AND CIVIL PARTIES TO BE HEARD IN CASE 002/01, ECCC TC, 7 Aug 2014, paras. 22-26; NUON CHEA AND KHIEU SAMPHAN CASES: CASE 002/01 JUDGMENT, ECCC, TC, 7 Aug 2014, paras 50-53.

**Corresponding ECCC Internal Rule(s):** Rule 41 and Rule 84. Rule 84 of the ECCC's internal rules makes the right of an accused to summons a witness at trial absolute in the instance where s/he has not had the opportunity to examine the witness during the pre-trial stage.

## Article 299. Joinder of Cases

*When the court has been seized with several related cases, it may issue an order to join them.*

### **Application in the ECCC**

**Reconsideration appeals may be decided jointly even where appeals are filed on different grounds:** In interests of justice and judicial efficiency, appeals to Pre-Trial Chamber from dismissal of civil party applications by investigating judges can be examined and decided jointly, even where appeals were originally filed on different grounds, if fundamental errors being

appealed exist and are relevant to all rejected civil party applicants and significant injustice would occur to rejected civil parties who did not raise the errors identified by Pre-Trial Chamber.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATION ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 35.

**Corresponding ECCC Internal Rule(s):** There is no corresponding ECCC Internal Rule.

### **Application of Comparable Articles in Other Jurisdictions**

#### **French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Link between offenses necessary to join them:** Judges must establish such link in order to join cases. However, they do not need to establish an absence of such link in decisions not to join them.

No. 92-81941, FCC, 27 Sep 1995 (link necessary);  
No.91-82210, CRIM. BULL.150, FCC, 7 Apr 1992  
(absence not necessary for decisions not to join).

**Joinder of proceedings is an administrative measure that generally cannot be subject to nullity:** Exception is if there is violation of defense rights.

CRIM. BULL. 296, FCC, 3 Jun 1959.

**Comparable Article(s) in the French Code of Criminal Procedure:** Article 203. This article provides for the joinder of cases when offences are related including the enumeration of what related offences can be.



## Article 300. Appearance of Accused

*The accused shall appear in person during the hearings at the court. The accused may be assisted by a lawyer chosen by himself. He may also make a request to have a lawyer appointed for him in accordance with the Law on the Bar.*

### **Application in the ECCC**

**An accused has a qualified right to be physically present during proceedings:** he or she may opt to participate in proceedings remotely, provided she/he has adequate legal representation during proceedings.

IENG SARY CASE: FITNESS TO STAND TRIAL, ECCC, TC, 26 Nov 2012, para. 19. IENG SARY CASE: DECISION ON THE IENG SARY DEFENCE REQUEST TO AUDIO AND/OR VIDEO RECORD IENG SARY IN THE HOLDING CELL, ECCC, TC, 16 Jan 2013, para. 13-15

**The absence of an accused from trial does not confer on that accused a right to be recorded in his/her cell:** the voluntary absence of an accused from proceedings after proper medical assessment regarding his fitness to stand trial has concluded that he is fit, does not confer on him the right to be audio or video recorded in his cell in order to re-establish his lack of fitness, provided other measures are in place to ensure his health is being closely monitored.

IENG SARY CASE: DECISION ON THE IENG SARY DEFENCE REQUEST TO AUDIO AND/OR VIDEO RECORD IENG SARY IN THE HOLDING CELL, ECCC, TC, 16 Jan 2013, para. 13-15.

**Reasonable efforts must be made in order to accommodate physical ailments suffered by an accused in order to ensure his/her participation in the trial.** Where an accused person is fit to stand trial but is nonetheless frail or suffering from physical or mental ailments, the Trial Chamber should make all reasonable efforts to ensure his/her participation in trial.

NUON CHEA CASE: SECOND DECISION ON NUON CHEA'S FITNESS TO STAND TRIAL, ECCC, TC, 2 Apr 2013, para. 28.

**The presiding judge can sanction the misconduct of defence counsel or refuse audience to a lawyer after giving a warning if the lawyer's conduct is offensive or abusive:** he may additionally refer the lawyer's misconduct to the appropriate professional body.

NUON CHEA, CASE: DECISION ON NUON CHEA DEFENCE COUNSEL MISCONDUCT ECCC, TC, 29 June 2012, para. 3.

**Corresponding ECCC Internal Rule(s):** Rule 22. The ECCC's internal rules have lengthy provisions pertaining to the inclusion of foreign lawyers in the ECCC's legal teams, and the manner in which lawyers should perform their duties.

## **.Article 305. Appearance of Accused upon Indictment**

*Where the court has been seized by an indictment, the accused will remain free to present himself unless the investigating judge or the President of the Investigation Chamber decides to provisionally detain him.*

*The Prosecutor shall take the necessary measures to have public forces bring the accused who is in detention to the hearing.*

*According to Article 249 (Provisions of Closing Orders in Relation to Provisional Detention and Judicial Supervision) of this Code, the order to keep the accused in provisional detention will expire after four months. If the accused has not been brought before the court within this period, the accused shall be automatically released.*

*A judgment on the merits of the case shall be made within a reasonable time period.*

*The accused who is in detention during a criminal trial shall remain in detention until the judgment on the merits of the case is rendered, except for a release ordered by the court.*

### **Application in the ECCC**

**Necessity to balance detention against liberty:** Courts must balance reasons for detention against right to personal liberty. Presumption of liberty requires detention to have basis in judicial decision, issued in accordance with statutory procedure and conditions.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, paras. 47 and 56. IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 80; IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 22. NUON CHEA CASE: SECOND DECISION ON NUON CHEA'S FITNESS TO STAND TRIAL, ECCC, TC, 2 Apr 2013, para.16; IENG THIRITH CASE: FITNESS TO STAND TRIAL (IMPLEMENTATION OF SUPREME COURT CHAMBER'S DECISION), ECCC, TC, 13 Mar 2013, para. 1; IENG THIRITH CASE: DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO RELEASE THE ACCUSED IENG THIRITH, ECCC, SC, 13 Dec 2011, paras 21-26 (noting that for a conditional stay of proceedings, the unconditional release of the person concerned is not the inevitable consequence).

**Charged person detained when first appearing:** A charged person held in detention when first appearing before Trial Chamber will remain in detention until

Chamber renders judgment, as long as detention has lawful basis.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, para. 47-49.

**Must read article in light of presumption of liberty:** The Cambodian legal system is fundamentally protective of the right to liberty, and Articles 305 to 307 must be read in light of presumption of liberty.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, para. 46.

**The presumption that conditions originally warranting provisional detention continue is factual and rebuttable presumption:** It is not binding on Trial Chamber. If Trial Chamber evaluates lawfulness of detention, on own initiative or at request of accused, its review must be meaningful.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, paras. 48-49.

**Onus is on accused to challenge persistence of grounds for detention:** From first appearance before Trial Chamber until Trial Chamber renders its decision, onus is on accused to challenge persistence of grounds of his/her detention in request to Trial Chamber.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, para. 48.

**Supreme Court Chamber may rely on presumption of continued conditions of detention:** Where Trial Chamber provides insufficient reasoning to establish lawfulness of the accused's detention, Supreme Court Chamber may nonetheless uphold validity of detention based upon rebuttable presumption of continued conditions for detention.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, para. 54.

**Accused must substantiate bail circumstances, conditions:** Accused bears burden of substantiating factual circumstances and conditions advocating for bail. Only when the accused meets this burden must court assess adequacy of release on bail.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, para. 57.

**When Trial Chamber's decision to deny bail will be upheld:** Where the accused fails to provide Trial Chamber with details as to means of otherwise securing his/her presence in court.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, paras. 57-58.

**Corresponding ECCC Internal Rule(s):** Internal Rule 82(1) and 68(3). Internal Rule 82(1) is substantially similar to the first and final provisions in Article 305. Internal Rule 68(3) is substantially similar to Article 249, establishing the four-month expiration of provisional detention unless within that time period the accused has been brought before the trial court to stand trial.

### *Application of Comparable Articles in Other Jurisdictions*

#### ***UN Human Rights Committee***

*Cambodia is a party to the International Covenant on Civil and Political Rights (ICCPR), which sets out international law principles on criminal procedure. Below are examples of how comparable ICCPR articles have been interpreted and applied by its implementing body, the UN Human Rights Committee.*

**Violation: indictments pending for several years without final adjudication:** In this situation, where there is no explanation by the State justifying procedural delays, it is a violation of the right to trial without undue delay.

KANKANAMGE V. SRI LANKA, UN HRC, 27 Jul 2004, para. 9.2.

**Violation: situation where case complexities do not justify delay of four years and four months between start of trial and sentencing:** A violation of right to be tried without undue delay arises where complexity of the case did

not justify a delay of four years and four months from the start of investigation (or three years and 2 months from preparation of forensic medical report) to trial court's sentencing decision.

FILIPOVICH V. LITHUANIA, UN HRC, 4 Aug 2003, para. 7.1.

**Violation: over six-year delay from an order of retrial until retrial appeal dismissed:** Procedural delay of over six years from the time a re-trial is ordered until appeal on the retrial is dismissed is unreasonable and violates defendant's rights to be tried without delay and

to have conviction and sentence reviewed by higher court according to law.

KENNEDY V. TRINIDAD & TOBAGO, UN HRC, 26 Mar 2002, para. 7.5.

**Administrative backlog not justification:** State cannot justify lengthy procedural delay by citing inadequate staffing and general administrative backlog.

INTERIGHTS V. TRINIDAD & TOBAGO, UN HRC, 21 Mar 2002, para. 10.5; LUBUTO V. ZAMBIA, UN HRC, 31 Oct 1995, para. 7.3.

**Defendant must be tried as expeditiously as possible when denied bail:** Pursuant to the rights of trial without undue delay and to release upon procedural delay, the defendant must be tried as expeditiously as possible when he/she is denied bail in cases with serious charges such as homicide or murder.

SEXTUS V. TRINIDAD & TOBAGO, UN HRC, 16 Jul 2001, para. 7.2.

**Violation: 22-month pre-trial delay justified by general problems/instabilities following coup attempt:** Rights to trial without undue delay and to release upon procedural delay are breached where a defendant remains in detention throughout a 22-month pre-trial delay and the State justifies the delay solely based on “general problems and instabilities following a coup attempt.”

SEXTUS V. TRINIDAD & TOBAGO, UN HRC, 16 July 2001, para. 7.2.

**Violation: appeal unresolved three years after acquitted case reopened:** Right to trial without undue delay violated when the appeal remains unresolved three years after prosecutors reopened eight-year-old acquittal.

ARREDONDO V. PERU, UN HRC, 27 Jul 2000, para. 10.6.

**Comparable Article(s) in the *International Covenant on Civil and Political Rights*:** Articles 9 and 14(3)(c). Article 9 protects the right to liberty and in particular provides, under Article 9(3), for the right to trial within a reasonable time or release. Article 14(3)(c) reinforces the right to trial without undue delay.

### **European Court of Human Rights**

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Release of accused pending trial is a presumption:** Thus, detention is an exception.

MCKAY V. UNITED KINGDOM, ECHR, 3 October 2006, paras. 41.

**When provisional release required during trial:** Once detention stops being reasonable.

NEUMEISTER V. AUSTRIA, ECHR, 27 Jun 1968, para. 4.

**When period of provisional detention stops:** Day of judgment at first instance.

WEMHOFF V. GERMANY, ECHR, 27 Jun 1968, paras. 18-19

**Reasonable suspicion that person arrested committed offense is a *sine qua non* for**

**continued detention, but may not be enough:** After certain period, Court must establish whether other grounds given by judicial authorities justify the deprivation of liberty.

SULAOJA V. ESTONIA, ECHR, 15 Feb 2005, para. 62; YAGCI & SARGIN V. TURKEY, ECHR, 8 Jun 1995, para. 50; LETELLIER V. FRANCE, ECHR, 26 Jun 1991, para. 35.

**Method of assessing reasonableness of provisional detention:** Assessed case by case. Detention justified only if public interest prevails over presumption of innocence.

WEMHOFF V. GERMANY, ECHR, 27 Jun 1968, para.5 (assessment case by case); W. V. SWITZERLAND, ECHR, 26 Jan 1993, para.30 (public interest prevails on presumption of innocence).

**Comparable Article(s) in the European *Convention for the Protection of Human Rights and Fundamental Freedoms*:**Articles 5(1) and (4). These articles provide for liberty and security of the person including a lawful arrest or detention and to bring proceedings to speedily assess the lawfulness of his/her detention.

**French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Decision that keeps charged person in provisional detention after investigation is closed is void after two months:** This period begins the day the closing order is issued, even if it is appealed.

No. 10-83656, CRIM. BULL.125, FCC, 18 Aug 2010;  
Nos. 01-80234/04-82857, CRIM. BULL.179, FCC, 8 Jul 2004; No.71-92789, CRIM. BULL. 336, FCC, 2 Dec 1971.

**Charged person's detention ends as soon as two month period is over:** And if charged person has not appeared before the court.

No. 02-86951, FCC, 15 Jan 2003.

**Extension of provisional detention after indictment:** In exceptional circumstances,

Investigating Chamber may extend detention of accused beyond one year from date on which indictment final.

No. 09-83950, CRIM. BULL. 148, FCC, 2 Sep 2009.

**Maximum length of pre-trial detention:** Must not exceed reasonable time as determined by the Investigating Chamber.

No. 02-84980, FCC, 1 Oct 2002.

**Reduction of length of pre-trial detention:** Judge must not reduce length of pre-trial detention to less than provided by law.

No. 06-86937, CRIM. BULL.291, FCC, 21 Nov 2006.

**Comparable Article(s) in the French Code of Criminal Procedure:** Articles 318, 319, 320, 179(4), 179(5), 181 and 144-1. Articles 318, 319 and 320 provide for the appearance of an accused upon indictment before a court, including in the case of refusal to appear, where Article 320 provides for the use of force to compel the accused's appearance. Articles 179(4), 179(5), 181 and 144(1) provide for the appearance of an accused upon indictment in case of provisional detention and the period during which the accused can be kept in custody before being brought to court.

## Article 306. Automatic Release of Detained Accused

*At any time the court may order the release of a detained accused or order that a detention be continued for the accused according to Article 205 (Reasons for Provisional Detention) of this Code.*

*The court shall decide after hearing the accused, his lawyer and the Royal Prosecutor.*

### **Application in the ECCC**

**Necessity to balance detention against liberty:** Courts must balance reasons for detention against right to personal liberty. Presumption of liberty requires detention to have basis in judicial decision, issued in accordance with statutory procedure and conditions.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, paras. 47 and 56. IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 80; IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 22. NUON CHEA CASE: SECOND DECISION ON NUON CHEA'S FITNESS TO STAND TRIAL, ECCC, TC, 2 Apr 2013, para.16; IENG THIRITH CASE: FITNESS TO STAND TRIAL (IMPLEMENTATION OF SUPREME COURT CHAMBER'S DECISION), ECCC, TC, 13 Mar 2013, para. 1; IENG THIRITH CASE: DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO RELEASE THE ACCUSED IENG THIRITH, ECCC, SC, 13 Dec 2011, paras 21-26 (noting that for a conditional stay of proceedings, the unconditional release of the person concerned is not the inevitable consequence.

**Charged person detained when first appearing:** Charged person held in detention at initial appearance before Trial Chamber shall remain in detention until Chamber renders judgment, as long as detention has lawful basis from judicial authority.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, para. 47-49.

**Must read article in light of presumption of liberty:** The Cambodian legal system is

fundamentally protective of the right to liberty, and Articles 305 to 307 must be read in light of presumption of liberty.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, para. 46.

**The presumption that conditions originally warranting provisional detention continue is a factual and rebuttable presumption:** It is not binding on the Trial Chamber. If the Trial Chamber evaluates lawfulness of detention, on its own initiative or at the request of an accused, its review must be meaningful.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, paras. 48-49.

**Onus is on accused to challenge persistence of grounds for detention:** From first appearance before Trial Chamber until Trial Chamber renders its decision, onus is on accused to challenge persistence of grounds of his/her detention in request to Trial Chamber.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, para. 48.

**Supreme Court Chamber may rely on presumption of continued conditions of detention:** Where Trial Chamber provides insufficient reasoning to establish lawfulness of accused's detention, Supreme Court Chamber may nonetheless

uphold validity of detention based upon rebuttable presumption of continued conditions for detention.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, para. 54.

**Accused must substantiate bail circumstances, conditions:** Accused bears burden of substantiating factual circumstances and conditions advocating for bail. Only when accused meets this burden must court assess adequacy of release on bail.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, para. 57.

**When Trial Chamber's decision to deny bail will be upheld:** Where accused fails to provide Trial Chamber with details as to means of otherwise securing his/her presence in court.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, paras. 57-58.

**Where a charged person is found unfit to stand trial, the presumption of liberty requires that she be released from detention:** Continued detention or enforced confinement in circumstances where it is unclear whether a trial will ever be convened violate the right to a fair trial and to liberty. Where an action has not been extinguished under Article 7 of this Code, the charged person may be placed under judicial supervision, until such time as s/he is fit to stand trial or the action is extinguished in accordance with the law.

IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 80; IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17

Nov 2011, para. 22; IENG THIRITH CASE: DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO RELEASE THE ACCUSED IENG THIRITH, ECCC, SC, 13 Dec 2011, paras 21-26 (noting that for a conditional stay of proceedings, the unconditional release of the person concerned is not the inevitable consequence) IENG THIRITH CASE: FITNESS TO STAND TRIAL (Decision on Co-Prosecutors' Request for Stay of Release Order of Ieng Thirith) SCC, 17 Sep 2012, paras 7-8; IENG THIRITH CASE: FITNESS TO STAND TRIAL (Implementation of the Supreme Court Chamber's Decision) TC, 26 Mar 2013, para 1.

**The standard for determining whether an accused is fit to stand trial is that of meaningful participation:** Whether an accused can exercise his/her fair trial rights to such a degree that he/she is able to participate effectively in the trial and has an essential understanding of proceedings. In making this decision, the Chamber shall consider all pertinent material and relevant factors, including the availability of practical measures mitigating the negative effects of any impairment

IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC SCC, 13 Dec. 2011, para.37; IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 55; IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 22; IENG SARY CASE: FITNESS TO STAND TRIAL, ECCC TC, 28 Nov 2012, para 18. NUON CHEA CASE: SECOND DECISION ON NUON CHEA'S FITNESS TO STAND TRIAL, ECCC, TC, 2 Apr 2013, para. 13; NUON CHEA CASE: DECISION ON FITNESS OF THE ACCUSED NUON CHEA TO STAND TRIAL, ECCC, TC, 24 Apr 2014, para 6. KHIEU SAMPHAN CASE: DECISION ON FITNESS OF THE ACCUSED KHIEU SAMPHAN TO STAND TRIAL, ECCC, TC, 24 Apr 2014, para 6; IENG THIRITH CASE: DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO UNCONDITIONALLY RELEASE THE ACCUSED IENG THIRITH ECCC, SC, 14 Dec. 2012, paras. 37-39.

**Corresponding ECCC Internal Rule(s):** Internal Rule 82(2). This rule is substantially similar to Article 306, except that it requires that the prosecutors, accused or his/her lawyers be heard before such decision is made.



### ***Application of Comparable Articles in Other Jurisdictions***

#### ***European Court of Human Rights***

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Judicial authority must examine all reasons for and against a genuine public interest justifying the continued detention of the accused:** When there are no reasons justifying the detention, the judicial authority must have

the power to order the immediate release of the detained accused.

ASSENOV & OTHERS V. BULGARIA, ECHR, 28 Oct 1998, para.146 and 154.

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:** Article 5. This article protects the liberty and security of the accused, and, for example, protects the accused's right to be brought promptly before a judge and to be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

#### ***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Reasonable duration of provisional detention:** This is within the Investigation Chamber's jurisdiction.

No. 02-84980, FCC, 1 Oct 2002.

**Comparable Article(s) in the French Code of Criminal Procedure:** Article 144-1. This article provides for the appearance of an accused before a court in case of provisional detention and the "reasonable time" during which the accused can be kept in custody before being brought to court.

## Article 307. Application for Release of Detained Accused

*An accused who is in detention may request the court to release him by either orally at a hearing or in writing, to be submitted to the court clerk.*

*An application for a release may be made by the lawyer of the accused who is in detention by oral request at the hearing or by a written request submitted to the court clerk.*

*If the request for release is made orally, the court clerk shall record it in the hearing record. If the request is made in writing, the court clerk shall note the date of receipt of the written request and send it immediately to the Court President.*

*The court shall decide after hearing the accused, his lawyer, and the Royal Prosecutor. The court shall decide without delay, but in any case within 10 days after receiving the oral or written request.*

### **Application in the ECCC**

**Necessity to balance detention against liberty:** Courts must balance reasons for detention against right to personal liberty. Presumption of liberty requires detention to have basis in judicial decision, issued in accordance with statutory procedure and conditions.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, paras. 47 and 56. IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 80; IENG THIRITH CASE: FITNESS TO STAND TRIAL, ECCC, TC, 17 Nov 2011, para. 22. NUON CHEA CASE: SECOND DECISION ON NUON CHEA'S FITNESS TO STAND TRIAL, ECCC, TC, 2 Apr 2013, para.16; IENG THIRITH CASE: FITNESS TO STAND TRIAL (IMPLEMENTATION OF SUPREME COURT CHAMBER'S DECISION), ECCC, TC, 13 Mar 2013, para. 1; IENG THIRITH CASE: DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO RELEASE THE ACCUSED IENG THIRITH, ECCC, SC, 13 Dec 2011, paras 21-26 (noting that for a conditional stay of proceedings, the unconditional release of the person concerned is not the inevitable consequence)..

**Charged person detained when first appearing:** Charged person held in detention at initial appearance before Trial Chamber shall remain in detention until Chamber renders judgment, as long as

detention has lawful basis from judicial authority.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, para. 47-49.

**Must read article in light of presumption of liberty:** Cambodian legal system is fundamentally protective of right to liberty, and Articles 305 to 307 must be read in light of presumption of liberty.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, para. 46.

**The presumption that conditions originally warranting provisional detention continue is factual and rebuttable presumption:** It is not binding on the Trial Chamber. If the Trial Chamber evaluates lawfulness of detention, on its own initiative or at the request of the accused, its review must be meaningful.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, paras. 48-49.

**Onus is on accused to challenge persistence of grounds for detention:**

From first appearance before Trial Chamber until Trial Chamber renders its decision, onus is on accused to challenge persistence of grounds of his/her detention in request to Trial Chamber.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, para. 48.

**Supreme Court Chamber may rely on presumption of continued conditions of detention:** Where Trial Chamber provides insufficient reasoning to establish lawfulness of accused's detention, Supreme Court Chamber may nonetheless uphold validity of detention based upon rebuttable presumption of continued conditions for detention.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, para. 54.

**Accused must substantiate bail circumstances, conditions:** Accused bears burden of substantiating factual circumstances and conditions advocating

**Corresponding ECCC Internal Rule(s):** Internal Rule 82(3). This rule is substantially similar to Article 307, except that under Internal Rule 82(3), the time limit provided for the court's decision on releasing the accused is as soon as possible and in any event no later than 30 days after receiving the oral request or application, unless circumstances justify a greater period.

### *Application of Comparable Articles in Other Jurisdictions*

#### ***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Definition of five-day period for deciding application for release of detained person:** The day on which investigating judge sends request to prosecutor shall not count towards the five-day period.

No. 85-90391, CRIM. BULL. 114, FCC, 19 Mar 1985.

**Justification for refusal of request for release:** Must be based on facts of the case.

for bail. Only when accused meets this burden must court assess adequacy of release on bail.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, para. 57.

**When Trial Chamber's decision to deny bail will be upheld:** Where accused fails to provide Trial Chamber with details as to means of otherwise securing his/her presence in court.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, paras. 57-58.

**Extension of time limit for decision on release from detention in exceptional circumstances:** Trial Chamber granted 45 day extension of time limit for decision on request for release from detention due to necessary part of case file being sent for translation and two lengthy previous court recesses.

DUCH CASE: TRANSCRIPT OF THE HEARINGS, Day 11, ECCC, TC, 23 Apr 2009, pp. 1-2, ln. 1.

No. 85-94597, CRIM. BULL. 94, FCC, 6 Mar 1986.

**Reasonable time for provisional detention:** Investigation Chamber solely decides, when seized, whether provisional detention exceeds reasonable time. Period runs from day of detention or arrest, not date of request for release.

No. 86-95501, CRIM. BULL.386, FCC, 23 Dec 1986  
(Investigation Chamber determines

reasonableness);No. 85-94597, CRIM. BULL. 94, FCC,  
6 Mar 1986.

**Comparable Article(s) in the French *Code of Criminal Procedure*:**Article 148. This article provides for the request for release of a detained accused and the necessary proceedings to consider such application.

## Article 311. Joining of Civil Party during Trial

*During the trial hearing, a civil party application can be addressed to the court clerk. Such fact shall be noted in the hearing's record.*

*A civil party application will not be admissible after the Royal Prosecutor made his final observations on the merits of the case.*

*A victim who has already submitted his civil party application during the judicial investigation is not required to comply with this procedure again before the trial court.*

### **Application in the ECCC**

**Injury need not be direct:** Injury in civil party application must be personal but need not be direct.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 83; DUCH CASE: APPEALS JUDGMENT, ECCC, SCC, 3 Feb 2012, para. 418.

**Civil actions through indirect injuries not limited to specific class of persons:** Not limited to, for example, family members, but may instead include common law spouses, distant relatives, friends, *de facto* adopters and adoptees, and beneficiaries.

DUCH CASE: APPEALS JUDGMENT, ECCC, SCC, 3 Feb 2012, para. 418.

**Proof of direct impact by indirect victims:** Indirect victims must show special bonds of affection and dependence connecting them emotionally, physically or economically to direct victims. Without such bonds, no injury would have resulted from commission of the crime.

DUCH CASE: APPEALS JUDGMENT, ECCC, SCC, 3 Feb 2012, para. 447.

**Injury must directly result from accused's conduct:** Civil party applicants must show injury directly results from conduct of accused who is under investigation.

DUCH CASE: JUDGMENT, ECCC, TC, 26 Jul 2010, para. 647.

**Dismissal of application failing to prove direct injury:** Investigating judges may dismiss civil party application if they determine it has failed to prove direct injury from alleged actions of charged person.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 27 Apr 2010, para. 48.

**Exercise of rights of indirect victims autonomous of rights of direct victims:** Thus, indirect victims may be granted civil party status even where direct victim is alive and does not pursue action him or herself.

DUCH CASE: APPEALS JUDGMENT, ECCC, SCC, 3 Feb 2012, para. 418.

**Victims alleging new facts:** Victims seeking civil party status may not allege new facts for purposes of investigation but can allege new facts likely to show causal link between harm suffered by victim and at least one crime already alleged against charged person in existing indictment.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 42.

**Causal link to collectively charged persons may be enough:** In a claim against multiple charged persons both as individuals and collectively as group acting together in joint criminal enterprise (or other forms of liability), applicant may show causal link to collectively charged persons, rather than individually charged person.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, paras. 71-73.

**Psychological injury presumed for genocide, crimes against humanity, if applicant from targeted group:** In cases involving crimes such as genocide or crimes against humanity, when applicant is indirect victim (e.g., witness or person with knowledge of alleged crime), personal psychological injury presumed if applicant is more likely than not member of same targeted group or community as direct victim.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 93.

**Material injury:** Injury includes loss of property or income.

DUCH CASE: JUDGMENT, ECCC, TC, 26 Jul 2010, para. 641.

**Psychological injury:** Injury may include mental disorders or psychiatric trauma, such as post-traumatic stress disorder.

DUCH CASE: JUDGMENT, ECCC, TC, 26 Jul 2010, para. 641; NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 83.

**Psychological harm can result from crime against immediate family and broader range of people:** Psychological harm should not be interpreted narrowly as only resulting from crimes perpetrated against immediate family members; rather, a much broader range of people should be included such as extended family, friends and neighbors and those reflecting other bonds in Cambodian culture and society.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, paras. 49, 87 and 88.

**Psychological victimization must be considered in context:** In evaluating psychological injury for civil party application, it is essential to consider victimization within social and cultural context at time alleged crimes occurred.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, paras. 83 and 86.

**Corresponding ECCC Internal Rule(s):** Internal Rule 23bis(2). This rule is similar to Article 311 except that it provides that civil party applications before the ECCC must be submitted within 15 days following the conclusion of the judicial investigation.

### ***Application of Comparable Articles in Other Jurisdictions***

#### ***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Civil party claims when prosecution was initiated by civil party complaint:** In such situations, any person who claims to have been

harmed by offense may bring civil action in court by way of intervention.

No. 07-88222, CRIM. BULL. 227, FCC, 12 Nov 2008.

**Comparable Article(s) in the French *Code of Criminal Procedure*:**Articles 418, 419, 420 and 421. These articles provide for civil party petitions and their consequences including the joinder of civil parties during trial.

## Article 313. Assistance and Representation of Civil Party

*A civil party may be assisted by a lawyer of his choice. A civil party may also be represented by a lawyer, his spouse, or by a direct-line relative. A representative who is not a lawyer shall produce a written delegation of power.*

### ***Application in the ECCC***

**Trial Chamber permitted, but not required, to approve civil party representation:** However, it does not usually oversee the assignment or change in representation, so it is not necessary for

civil parties to address this matter with the Trial Chamber.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY REPRESENTATION, ECCC, TC, 6 Apr 2011, p. 1.

**Corresponding ECCC Internal Rule(s):** Internal Rule 23ter. This rule differs from Article 313 by *requiring* that all civil parties be represented by a lawyer by the issuance of the closing order and providing that civil parties may form groups and choose to be represented by a common lawyer, and that the investigating judges or the chambers may organize such common representation.

### ***Application of Comparable Articles in Other Jurisdictions***

#### ***European Court of Human Rights***

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Access to investigation files:** Denying access to investigation files to civil party without lawyer does not infringe on his/her fair trial rights.

MENET V. FRANCE, ECHR, 14 Jun 2005, para. 52.

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:** There is no comparable Article.



## Article 315. Appearance of Witnesses

*Witnesses shall appear before the court in compliance with the summons. The court may use public forces in order to force the witness to appear.*

### **Application in the ECCC**

**Use of witness pseudonyms, confidential witness list:** Trial Chamber decided to use witness pseudonyms to avoid difficulties. Reminded that witness list was confidential document given to defense, accused, prosecutors and civil party lawyers.

DUCH CASE: TRIAL TRANSCRIPTS, Day 4, ECCC, TC, 6 Apr 2009, p. 53, lns. 2-8.

**Parties engaged in the conduct of an investigation can be called as**

**expertwitnesses:** Where the interest of justice require, the Trial Chamber may call as an expert witness a party previously engaged in the conduct of the investigation: However, any weight attributed to the witness' testimony must be considered in light of his/her involvement in the investigation .

NUON CHEA AND KHIEU SAMPHAN CASES: DECISION ON DESIGNATION OF TCE-33,ECCC, TC, 26 Apr 2013, para.14..

**Corresponding ECCC Internal Rule(s):** Internal Rule 80(1). This rule provides that the prosecutors must submit to the greffier a list of witnesses and experts they intend to summon 15 days from the date the indictment becomes final and makes provision for the submission of additional lists.

### **Application of Comparable Articles in Other Jurisdictions**

#### ***UN Human Rights Committee***

*Cambodia is a party to the International Covenant on Civil and Political Rights (ICCPR), which sets out international law principles on criminal procedure. Below are examples of how comparable ICCPR articles have been interpreted and applied by its implementing body, the UN Human Rights Committee.*

**Component rights of right to fair trial:** Include, but are not limited to, right to public trial presided over by non-anonymous judges who may be challenged; right to communicate with lawyer; right to challenge witnesses whose statements were part of police investigation;

and right to call investigating police officers as witnesses.

CARRANZA ALEGRE V. PERU, UN HRC, 28 Oct 2005, para. 7.5.

**Comparable Article(s) in the *International Covenant on Civil and Political Rights*:** Article 14. This article provides fair trial rights which are ensured in part by Article 315.

#### ***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Witnesses are in same position:** Witness who appears voluntarily, under oath is in same

situation as one summoned and may be similarly penalized for ultimately refusing to testify.

No. 70-91953, CRIM.BULL. 301, FCC, 4 Nov 1971.

**Witness regularly notified who did not present himself/herself at opening of session but then appeared later in hearing does not cease to be part of hearing:** He/she may be heard under oath.

DP. 1888.1.45, FCC, 6 Jun 1887.

**Civil party cannot be heard as witness, but he/she may appear before court when he/she has been summoned as such:** If he/she does not appear without excuse, civil party is considered a defaulting witness.

DP 1913.1.275, FCC, 7 Jun 1912.

**When court can skip testimony of witness who did not appear despite warrant:** When hearing of this witness is not essential to disclose truth.

Nos.87-80056/87-80057, CRIM.BULL. 453, FCC, 9 Dec 1987.

**Comparable Article(s) in the French Code of Criminal Procedure:** Articles 109, 326(1) and 326(2). These articles provide for the appearance of witnesses during investigation (Article 109) and before assize courts (Article 326).

## Article 316. Public Nature of Trial Hearing and Confidentiality

*Trial hearings shall be conducted in public.*

*However, the court may order a complete or partial in-camera hearing, if it considers that a public hearing will cause a significant danger to the public order or morality. The court shall decide by a written decision separate from the judgment on the merits or by a special section within the judgment on the merits.*

*The decision of the court to hold an in-camera hearing is not subject to appeal.*

### **Application in the ECCC**

**Exclusion of civil parties:** Civil parties may be excluded from *in camera* trial management meetings.

DUCH CASE: TRIAL TRANSCRIPTS, Day 19, ECCC, TC, 21 May 2009, p. 1, ln.12 - p.2, ln. 2.

**Corresponding ECCC Internal Rule(s):** Internal Rule 79. This rule is similar to Article 316 in that it also allows the court to hold an *in-camera* hearing according to a reasoned decision which is not subject to appeal, however, unlike Article 316, it also provides that where the purpose of in-camera proceedings could be defeated by the attendance of the parties, the chamber may, by reasoned decision having consulted the parties, limit the participation of the parties to those essential to the proceedings and their necessary representatives.

### **Application of Comparable Articles in Other Jurisdictions**

#### **UN Human Rights Committee**

*Cambodia is a party to the International Covenant on Civil and Political Rights (ICCPR), which sets out international law principles on criminal procedure. Below are examples of how comparable ICCPR articles have been interpreted and applied by its implementing body, the UN Human Rights Committee.*

**Limited application of right to public hearing:** Right applies to trial proceedings but does not apply to pre-trial decisions rendered by prosecutors and public authorities.

KAVANAGH V. IRELAND, UN HRC, 4 Apr 2001, para. 10.4.

**Importance of public hearing:** Public nature of trial proceedings is important part of right to a fair trial.

KARTTUNEN V. FINLAND, UN HRC, 23 Oct 1992, para. 7.2.

**Trial must neither exclude public from proceedings nor employ anonymous**

**judges:** Doing so would fail to guarantee fundamental rights to fair trial, presumption of innocence, and independence and impartiality of tribunal.

POLAY V. PERU, UN HRC, 6 Nov 1997, para. 8.8.

**Component rights of fair trial:** Include, but are not limited to, right to public trial presided over by non-anonymous judges who may be challenged; right to communicate with lawyer; right to challenge witnesses whose statements were part of police investigation; and right to call investigating police officers as witnesses.

CARRANZA ALEGRE V. PERU, UN HRC, 28 Oct 2005, para. 7.5.

**Comparable Article(s) in the *International Covenant on Civil and Political Rights*:** Article 14(1). This article provides the right to a public hearing except in limited circumstances, including for reasons of morals, public order, national security or in special circumstances.

### ***European Court of Human Rights***

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Principle of public hearings fundamental and required in any court or tribunal:** It is essential to fair trial, contributes to protection of the litigant and strengthens confidence in justice.

HAKANSSON & STURESSON V. SWEDEN, ECHR, 21 Feb 1990, para.66 (principle fundamental); FISCHER V. AUSTRIA, ECHR, 26 Apr 1995, para. 27 (required in any court or tribunal); OYMAN V. TURKEY, ECHR, 20 Feb 2007, para.18 (essential to fair trial, etc.).

**Before court of first and only instance, right to a “public hearing” entails an entitlement to an “oral hearing”:** This is so unless there are exceptional circumstances.

JACOBSSON V. SWEDEN (NO. 2), ECHR, 19 Feb 1998, para. 46.

**Not absolute:** Right to public hearing is not absolute.

HELMERS V. SWEDEN, ECHR, 29 Oct 1991, para. 36.

**Absence of public debates at procedural level:** Such absence shall be compensated by public debates during another phase.

ALBERT & LE COMPTE V. BELGIUM, ECHR, 10 Feb 1983, para. 29.

**Justifiability of absence of public debates from second, third level of review:** Such absence may be justifiable when public debates were held at first instance and depending on the

specific features of the procedure at second or third level.

ANDERSSON V. SWEDEN, ECHR, 29 Oct 1991, para. 27.

**When failure of public hearing at appeal level may violate right to fair hearing:** Where Court of Appeal is seized of question of fact and law and issue of procedure has certain gravity for the applicant.

CONSTANTINESCU V. ROMANIA, ECHR, 27 Jun 2000, para. 53.

**Juvenile offenders:** In cases involving young offenders that may attract a high level of public attention, it is essential that proceedings be held in such a way as to minimize the juvenile's feelings of inhibition and intimidation. The general interest in the open and public administration of justice may be satisfied in the case of juvenile offenders through modified procedures providing for selected attendance rights and judicious reporting.

T. V. UNITED KINGDOM, ECHR, 16 Dec 1999, paras. 85-87

**Person may voluntarily waive, expressly or implied, right to public hearing:** Such waiver shall be unequivocal and not run counter to any important public interest.

ALBERT & LE COMPTE V. BELGIUM, ECHR, 10 Feb 1993, para. 35.

**Comparable Article(s) in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*:** Article 6(1). This article provides for fair trial rights including the right to a fair and public hearing and judgment.

### ***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Camera is an exception to principle of public hearings:** Cessation and return to publicity does not affect defense rights.

No. 99-85061, CRIM. BULL. 156, FCC, 19 Apr 2000.

**Recording of in camera hearings:** Such recordings are prohibited.

No. 04-80530, CRIM. BULL. 26, FCC, 3 Feb 2004.

**Declaration of publicity of debate as dangerous to public order or morals:** Court has the sole prerogative to declare publicity of debate as dangerous to public order or morals.

No. 85-93351, CRIM. BULL. 57, FCC, 12 Feb 1986.

**Right to oppose order for in camera hearing:** Such measures exceptional and is exclusively reserved for the person who possesses qualities of victim and civil party.

No. 85-92109, CRIM. BULL. 337, FCC, 30 Oct 1985.

**Every civil party has right to obtain in camera hearing:** This applies even when there are many civil parties.

No. 02-80369, FCC, 23 Oct 2002.

**Comparable Article(s) in the French Code of Criminal Procedure:** Article 306. This article provides for the publicity of the debates unless this publicity would be dangerous for order and morality (including cases involving juveniles or victims of rape, torture or acts of barbarity).

## Article 318. Establishment of Order in Hearing

*The presiding judge shall conduct and lead the trial hearing. The presiding judge shall guarantee the free exercise of the right to defense. However the presiding judge may exclude from the hearing everything he deems to unnecessarily delay the trial hearing without being conducive to ascertaining the truth.*

*The presiding judge shall have the power to maintain the order during the trial hearing.*

*The presiding judge may prohibit some or all minors from entering the court room.*

*The presiding judge may order any person who causes disorder to leave the court room.*

*In the performance of his duties, the presiding judge may use public forces.*

### **Application in the ECCC**

**Situation in which judges have discretion to reject requests from parties for investigative action:** When request is non-specific. Requirement that such requests be precise ensures proceedings are not unduly delayed and that charged person's right to be tried within reasonable time is protected.

IENG SARY CASE: EXCULPATORY EVIDENCE REQUEST APPEAL, ECCC, PTC, 12 Nov 2009, paras. 40 (discretion to reject requests) and 43 (requirement that requests be precise to ensure proceedings not unduly delayed); NUON CHEA, KHIEU SAMPHAN AND IENG THIRITH CASES: EXCULPATORY EVIDENCE REQUEST APPEAL, ECCC, PTC, 18 Nov 2009, paras. 41 (investigating judges must assess whether request sufficiently specific to assess if reasonable without unduly delaying proceedings) and 44 (specific requests allow assessment whether request is relevant, respect of charged person's ICCPR rights).

**Cannot insist or repeat matter in hearing:** Chamber did not allow party to proceed with same matter without any further questions other than insisting on or repeating a matter.

DUCH CASE: TRIAL TRANSCRIPTS, Day 9, ECCC, TC, 21 Apr 2009, p. 69, lns.24-25 and p. 70, lns.1-2.

**Sequence of presentation of facts, testimony, questioning:** Trial shall follow sequence of facts in Closing Order. Parties will be informed of facts scheduled for trial day approximately two weeks in advance. On any given fact, Chamber will first hear the accused, then give the floor to the parties to ask questions to the accused. Thereafter the Chamber will call civil parties, witnesses and experts pertaining to specific facts for questioning.

DUCH CASE: TRIAL TRANSCRIPTS, Day 4, ECCC, TC, 6 Apr 2009, p. 2, lns.9-17.

**Cross-examination not suitable for civil law systems:** Cross-examination is manner of questioning typical of common law systems. Proceedings before the ECCC are governed by primarily civil law system. Cross-examination as manner of questioning is not suitable for civil law system.

DUCH CASE: TRIAL TRANSCRIPTS, Day 4, ECCC, TC, 6 Apr 2009, p. 3, lns.6-10.

**Significance of Pre-Trial Chamber decisions:** While Trial Chamber always notes decisions issued by Pre-Trial Chamber with great interest, it is not bound by these decisions.

DUCH CASE: TRIAL TRANSCRIPTS, Day 4, ECCC, TC, 6 Apr 2009, p. 5, lns. 3-11.

**Provision, confidentiality of witness list:**

For proper administration of justice, parties should be provided with list of witnesses called to appear before court, while recalling that while these witnesses have not yet appeared, their names should remain confidential.

DUCH CASE: TRIAL TRANSCRIPTS, DAY 4, ECCC, TC, 6 Apr 2009, p. 52, ln. 22 - p.53, ln. 1.

**Additional time for questioning:** Parties are to use appropriately the opportunity given to ask questions. If parties feel time given inappropriate, Chamber may decide to allow further questions at later date.

DUCH CASE: TRIAL TRANSCRIPTS, Day 5, ECCC, TC, 7 Apr 2009, p. 110, lns.1-6.

**Witness with poor eyesight permitted to identify accused on screen:** Identification was done by having camera zoom-in for the witness to be able to see accused on his screen.

DUCH CASE: TRIAL TRANSCRIPTS, Day 7, ECCC, TC, 9 Apr 2009, p. 52, lns.10-12.

**Parties must make clear whether they have a question:** This is so that chamber can understand and manage proceedings.

DUCH CASE: TRIAL TRANSCRIPTS, Day 23, ECCC, TC, 28 May 2009, p. 99, ln. 25 - p. 100, ln. 3.

**The accused does not have an absolute right to request the Chamber to call witnesses:** In the case of exculpatory evidence a balance must be struck between the accused person's fair trial rights and the efficiency of proceedings.

NUON CHEA, IENG SARY AND KHIEU SAMPHAN CASES: CO-PROSECUTORS' RULE 92 SUBMISSION REGARDING THE ADMISSION OF WITNESS STATEMENTS& ORS, ECCC, TC, 12 June 2012, paras 18-21; NUON CHEA AND KHIEU SAMPHAN CASES: FINAL DECISION ON WITNESSES, EXPERTS AND CIVIL PARTIES TO BE HEARD IN CASE 002/01, ECCC TC, 7 Aug 2014, paras.22-26.

**The presiding judge can sanction the misconduct of defence counsel or refuse audience to a lawyer after giving a warning if the lawyer's conduct is offensive or abusive:** he may additionally refer the lawyer's misconduct to the appropriate professional body.

NUON CHEA, CASE: DECISION ON NUON CHEA DEFENCE COUNSEL MISCONDUCT ECCC, TC, 29 June 2012, para. 3.

**Victim impact statements can form part of civil party statements, provided the defence is given the right to respond:** Civil parties are entitled to make statements that encompass their entire experience of suffering. However, such statements should not include new allegations against an accused person. Additionally, the accused person should always have the right to challenge these statements, particularly as they relate to inculpatory evidence. Such challenges should be made in the absence of the civil party to avoid additional suffering.

NUON CHEA AND KHIEU SAMPHAN CASES: DECISION ON REQUEST TO RECALL CIVIL PARTY TCCP-187, FOR REVIEW OF PROCEDURE CONCERNING CIVIL PARTIES' STATEMENTS ON SUFFERING AND RELATED MOTIONS AND RESPONSES, TC, 2 MAY 2013 paras.19-22.

**Corresponding ECCC Internal Rule(s):** Internal Rules 37, 38, 84(1) and 85. Internal Rule 85 is substantially similar to Article 318, except that it requires that the Chamber first issue a warning to the disruptive person, that if the disruptive person removed from the courtroom is an accused, he/she should be permitted to observe the trial over closed-circuit television where possible, and may at all times remain in telephone contact with his/her lawyer and that when a disruption consists of

deliberate refusal to comply with an oral or written direction of a Chamber, and that direction is accompanied by a warning of sanctions in case of breach, the Chamber may order sanctions in line with Cambodian law. Internal Rule 38 covers misconduct by a lawyer and refers specifically to how the court can deal with a disruptive lawyer. These methods include warning the lawyer, imposing sanctions, and reporting the lawyer to the proper authorities.

### ***Application of Comparable Articles in Other Jurisdictions***

#### ***UN Human Rights Committee***

*Cambodia is a party to the International Covenant on Civil and Political Rights (ICCPR), which sets out international law principles on criminal procedure. Below are examples of how comparable ICCPR articles have been interpreted and applied by its implementing body, the UN Human Rights Committee.*

**Violation: failure to control hostile atmosphere or pressure created by public presence:** Such environment denies defense counsel adequate opportunity to cross-examine witnesses and present his/her case.

GRIDIN V. RUSSIAN FEDERATION, UN HRC, 20 Jul 2000, para. 8.2.

**Violation: severe and summary penalty without reasoned explanation (e.g., one-year penalty of imprisonment with hard labor ordered for petitioner's repetitious filing of motions, refusing to apologize for raising voice in court):** Such penalty exceeded court's power to maintain orderly proceedings and constituted an arbitrary deprivation of liberty.

FERNANDO V. SRI LANKA, UN HRC, 31 Mar 2005, para. 9.2.

**Violation: high-ranking officials making widely disseminated public statements of suspect's guilt before trial outcome:** Such statements made in prejudgment of trial outcome violate right to presumption of innocence.

GRIDIN V. RUSSIAN FEDERATION, UN HRC, 20 Jul 2000, para. 8.3.

**No violation: where accused fails to move to postpone hearing to secure legal representation where law provides this right:** Although person must be informed of his/her right to counsel and to have adequate time and facilities for preparation of his/her defense, this

right is not violated if State's criminal procedures allow accused to move for postponement of hearing and granting of additional time to secure legal representation and accused fails to avail himself/herself of these remedies.

BABKIN V. RUSSIAN FEDERATION, UN HRC, 3 Apr 2008, para. 13.4.

**No violation: where accused's counsel fails to make good use of time available for preparation of defense:** Person's right to adequate time and facilities to prepare defense not violated when lack of appropriate defense is due to failure of person's counsel to make good use of time available for preparation of defense, rather than because of any action by State.

J.O. V. FRANCE, UN HRC, 23 Mar 2011, para. 9.4.

**Right of accused to be tried without undue delay protects accused from unnecessary uncertainty about his/her fate and from being detained for longer than necessary:** States have an obligation to organize their judicial systems in such a way that ensures that cases are disposed of fairly and expeditiously. Delay of more than eight years between conviction and sentence and appellate review is unreasonable.

LUMANOG & SANTOS V. PHILIPPINES, UN HRC, 20 Mar 2008, paras. 8.3 - 8.6; SOBHRAJ V. NEPAL, UN HRC, 27 Jul 2010, para. 7.4.

**Comparable Article(s) in the International Covenant on Civil and Political Rights:** Article 6(1). This article provides for fair trial rights including the right to a fair and public hearing and judgment.

#### ***European Court of Human Rights***

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political*



*Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Principle of public hearings is fundamental and required in any court or tribunal:** It is essential to fair trial, contributes to protection of the litigant and strengthens confidence in justice.

HÅKANSSON & STURESSON V. SWEDEN, ECHR, 21 Feb 1990, para.66 (principle fundamental); FISCHER V. AUSTRIA, ECHR, 26 Apr 1995, para. 27 (required in

any court or tribunal); OYMAN V. TURKEY, ECHR, 20 Feb 2007, para.18 (essential to fair trial, etc.).

**Not absolute:** Right to public hearings is not absolute.

HELMERS V. SWEDEN, ECHR, 29 Oct 1991, para. 36.

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:** Article 6(1). This article provides for fair trial rights including the publicity of the debates and the publicity of the judgment. Nevertheless, the media and the public can be excluded for limited reasons.

### **French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Measures judge may take to maintain order in the hearing:** Expulsion of people disturbing the debate; refusal to ask question to witness on request of civil party because it is not related to the case and will lead to delay without being conducive to ascertaining the truth; refusal to include document produced by defense because

it will delay the trial without being conducive to ascertaining the truth.

No. 84-90673, CRIM. BULL.318, FCC, 24 Oct 1984 (expulsion); No. 92-86470, CRIM. BULL. 251, 26 Jul 1993 (refusal to question witness on request of civil party); No. 96-82498, CRIM. BULL. 381, FCC, 12 Nov 1997.

**Comparable Article(s) in the French Code of Criminal Procedure:** Article 309. This article provides that the President of the court has the power to maintain order in court and conduct the proceedings.

## Article 321. Evidence Evaluation by Court

*Unless it is provided otherwise by law, in criminal cases all evidence is admissible. The court has to consider the value of the evidence submitted for its examination, following the judge's intimate conviction.*

*The judgment of the court may be based only on the evidence included in the case file or which has been presented at the hearing.*

*A confession shall be considered by the court in the same manner as other evidence. Declaration given under the physical or mental duress shall have no evidentiary value.*

*Evidence emanating from communications between the accused and his lawyer is inadmissible.*

### **Application in the ECCC**

**Decisions on admissibility of evidence made at trial proceedings:** Pre-Trial Chamber lacks jurisdiction to review matters relating to evaluation of evidence by investigating judges, as decisions as to admissibility of evidence are made at trial stage of proceedings.

IENG SARY CASE: ADMISSIBILITY OF APPEAL REGARDING EVIDENCE OBTAINED THROUGH TORTURE, ECCC, PTC, 10 May 2010, para. 24.

**Can reject illegal requests:** Trial Chamber can reject requests for evidence when fulfilling such requests would not be allowed by law.

IENG SARY CASE: ADMISSIBILITY OF APPEAL REGARDING EVIDENCE OBTAINED THROUGH TORTURE, ECCC, PTC, 10 May 2010, para. 35.

**Trial Chamber will dismiss requests where have already made decision on the matter:** Although defense requested Trial Chamber to review its approval on the dissemination of prosecutors' document on ground of bias, Trial Chamber dismissed request because it had already made a decision regarding the matter.

DUCH CASE: TRIAL TRANSCRIPTS, Day 11, ECCC, TC, 23 Apr 2009, p. 29, Ins. 12-13 and p. 38, Ins.12-16.

**Court is bound by provisions of Article 15 of Torture Convention:** Article 15 of the Torture Convention requires States not to invoke statements made as a result of torture as evidence. This provision is reflected in Article 38 of the Cambodian Constitution.

DUCH CASE: TRIAL TRANSCRIPTS, Day 23, ECCC, TC, 28 May 2009, p. 9, Ins.1-6.

**Contents of confession made under torture cannot be accepted as truthful statement:** If any party wishes to refer to truthfulness of contents of confession, it will be necessary first to establish if confession was made under torture or threat of torture. For that reason, parties should consider whether an examination of the contents of confession is sufficiently important to seek inquiry concerning circumstances under which the confession was made.

DUCH CASE: TRIAL TRANSCRIPTS, Day 23, ECCC, TC, 28 May 2009, p. 9, Ins. 1-11; NUON CHEA, KHIEU SAMPHAN AND IENG SARY CASE: DECISION ON OBJECTIONS TO DOCUMENTS PROPOSED TO BE PUT BEFORE THE CHAMBER ,ECCC, TC, 9Apr 2012, para. 21.

**When document put before court, any party has right to object to its admissibility for any valid reason:** This is

a precondition to its admissibility. Parties also have right to seek further information or clarification concerning document that any party seeks to put before court.

DUCH CASE: TRIAL TRANSCRIPTS, DAY 18, ECCC, TC, 20 May 2009, p. 5, Ins. 18-22; NUON CHEA, KHIEU SAMPHAN AND IENG SARY CASE: DECISION CONCERNING NEW DOCUMENTS AND OTHER RELATED ISSUES, ECCC, TC, 30Apr 2012, para. 18.

**Trial Chamber may admit new material not originally on case file:** May do so either on own motion or at request of party.

DUCH CASE: JUDGMENT, ECCC, TC, 26 Jul 2010, para. 40; NUON CHEA, KHIEU SAMPHAN AND IENG SARY CASE: DECISION CONCERNING NEW DOCUMENTS AND OTHER RELATED ISSUES, ECCC, TC, 30Apr 2012, para. 17;

**Material in case file is not considered evidence until put before chamber and subjected to examination:** Material is considered put before chamber if its contents have been summarized, read out in court or appropriately identified. Material may be considered to have been subjected to examination where opportunity has been provided for adversarial argument, even where parties do not avail themselves of this opportunity.

DUCH CASE: ADMISSIBILITY OF ADDITIONAL EVIDENCE, ECCC, TC, 28 Oct 2009, para. 2; DUCH CASE: TRIAL TRANSCRIPTS, Day 18, ECCC, TC, 20 May 2009, p. 4, ln. 23 – p.5, ln. 12.

**Only those parts of documents which have been summarized are considered put before court:** E.g., if only one chapter of book is summarized, only this part is considered put before court. However, if discussion of document extends beyond initial summary, entire discussion is available for Trial Chamber decision.

DUCH CASE: TRIAL TRANSCRIPTS, DAY 18, ECCC, TC, 20 May 2009, p. 5, Ins.6-12.

**When putting a document before chamber, party should specify whether or not it seeks consideration of entire document:** If party seeks to introduce only part of document, it should specify which part is relevant.

DUCH CASE: ADMISSIBILITY OF ADDITIONAL EVIDENCE, ECCC, TC, 28 Oct 2009, para. 3; DUCH CASE: TRIAL TRANSCRIPTS, Day 18, ECCC, TC, 20 May 2009, p. 5, Ins. 13-16. NUON CHEA, KHIEU SAMPHAN AND IENG SARY CASE: DECISION CONCERNING NEW DOCUMENTS AND OTHER RELATED ISSUES, ECCC, TC, 30Apr 2012, para. 18.

**Documents listed in annex of expert's report do not need to be individually summarized:** Such documents can be seen as an integral part of the report. Where opposing parties acknowledge that report including documents listed in its annex are put before chamber and do not contest this report it is therefore sufficient to put report before chamber and unnecessary to summarize every document in annex.

DUCH CASE: TRIAL TRANSCRIPTS, Day 19, ECCC, TC, 21 May 2009, p. 2, ln. 17 – p.3, ln. 4.

**Probative value and weight of evidence:** This is ultimately assessed by chamber. There is no *prima facie* assumption to the probative value, relevance or reliability of evidence included in the case-file.

DUCH CASE: JUDGMENT, ECCC, TC, 26 Jul 2010, para. 42. NUON CHEA, KHIEU SAMPHAN AND IENG SARY CASE: DECISION ON OBJECTIONS TO DOCUMENTS PROPOSED TO BE PUT BEFORE THE CHAMBER, ECCC, TC, 9Apr 2012, para.34; NUON CHEA AND KHIEU SAMPHAN CASE: CASE 002/01 JUDGMENT, ECCC, TC, 7Aug 2014, paras. 22-26.

**Circulation of documents, photographs by parties:** All parties have right to compile documents, photographs to circulate to Trial Chamber and other parties to facilitate hearing procedure.

DUCH CASE: TRIAL TRANSCRIPTS, Day 12, ECCC, TC, 27 Apr 2009, p. 30, lns. 16-24.

**Helpful for parties to advise greffiers if wish to put document before chamber:**

This is not mandatory. This is something that the parties may do if they wish.

DUCH CASE: TRIAL TRANSCRIPTS, Day 12, ECCC, TC, 27 Apr 2009, p. 31, lns. 14-20.

**Victim impact statements can form part of evidence admitted by civil parties, provided the defence is given the right to respond:**

Civil parties are entitled to make statements that encompass their entire experience of suffering. However, such statements should not include new allegations against an accused person. Additionally, the accused person should always have the right to challenge these statements, particularly as they relate to inculpatory evidence. Such challenges should be made in the absence of the civil party to avoid additional suffering.

NUON CHEA AND KHIEU SAMPHAN CASES: DECISION ON REQUEST TO RECALL CIVIL PARTY TCCP-187, FOR REVIEW OF PROCEDURE CONCERNING CIVIL PARTIES' STATEMENTS ON SUFFERING AND RELATED MOTIONS AND RESPONSES, TC, 2 MAY 2013 paras.19-22.

**Evidence conducive to ascertaining the truth is admissible:** A Trial Chamber may admit all evidence that it considers relevant, reliable and authentic and is conducive to ascertaining the truth. A Trial Chamber may reject the inclusion of evidence that it finds repetitious, impossible to obtain within a reasonable

time, or unsuitable for the facts it seeks to prove.

NUON CHEA AND KHIEU SAMPHAN CASES: DECISION ON CIVIL PARTY REQUEST TO PUT NEW EVIDENCE BEFORE THE CHAMBER AND KHIEU SAMPHAN'S RESPONSE TC, 14 JUNE 2013 para. 3; NUON CHEA CASE: DECISION ON NUON CHEA REQUEST TO ADMIT NEW DOCUMENTS, TO INITIATE AN INVESTIGATION AND TO SUMMONS MR ROB LEMKIN, TC 24 Jul 2013 at para 10 (evidence which is repetitious or impossible to obtain within a reasonable time will not be admitted); NUON CHEA AND KHIEU SAMPHAN CASES: DECISION ON CO-PROSECUTOR'S REQUEST FOR RECONSIDERATION OF THE DECISION REGARDING ADMISSION OF NEWLY AVAILABLE UNITED STATES DIPLOMATIC CABLES (E282/2/1) AND KHIEU SAMPHAN'S RESPONSE (E282/2/1/1) TC 1 Aug 2013, at paras 4-5; NUON CHEA AND KHIEU SAMPHAN CASES: THIRD DECISION ON OBJECTIONS TO DOCUMENTS PROPOSED FOR ADMISSION BEFORE THE TRIAL CHAMBER, TC, 12 Aug 2013, at paras 20-21; NUON CHEA AND KHIEU SAMPHAN CASES: DECISION ON OBJECTIONS TO THE ADMISSIBILITY OF WITNESS, VICTIM AND CIVIL PARTY STATEMENTS AND CASE 001 TRANSCRIPTS PROPOSED BY THE CO-PROSECUTORS AND CIVIL PARTY LEAD CO-LAWYERS TC 15 Aug 2013 at para 17 (transcripts and statements may be admitted where they are relevant to proof of matters other than the acts or conduct of the accused)..

**In order to convict an accused, all reasonable inferences that may be drawn from the evidence must be consistent with the guilt of the accused.** Additionally certain evidence admitted for a limited purpose such as proof that a statement was obtained through torture, may be relied upon only for that limited purpose and not as to the truth of the statement.

NUON CHEA AND KHIEU SAMPHAN CASES: CASE 002/01 JUDGMENT, TC, 7 AUG 2014 para.36.

**Corresponding ECCC Internal Rule(s):** Internal Rule 87. This rule is similar to Article 321 in stating that, unless provided otherwise by law, all evidence is admissible. However, unlike Article 321, Internal Rule 87 specifies several reasons that a chamber may refuse to admit evidence, such as where it finds the material to be irrelevant or repetitious, impossible to obtain within a reasonable time, unsuitable to prove the facts it purports to prove, not allowed under the law, or intended to prolong proceedings or is frivolous. In addition, Internal Rule 87 makes clear that any decision of the Chamber shall be based only on evidence that has been put before the Chamber and subjected to examination, and that evidence from the case file is only considered put before the Chamber if its content has been summarized, read out, or appropriately identified in court. Internal Rule 87 also differs from Article 321 in that it permits the Chamber to exclude evidence that is not allowed under the law, and states that the Chamber may consider facts stipulated to by the parties as proven.

### *Application of Comparable Articles in Other Jurisdictions*

#### **UN Human Rights Committee**

*Cambodia is a party to the International Covenant on Civil and Political Rights (ICCPR), which sets out international law principles on criminal procedure. Below are examples of how comparable ICCPR articles have been interpreted and applied by its implementing body, the UN Human Rights Committee.*

**Violation: failure to present evidence that may affect verdict/sentence:** In criminal trial, failure of court to allow any evidence to be presented to jury that is available to the court and, where presented, may have affected verdict or sentence of accused, is denial of justice and violation.

WRIGHT V. JAMAICA, UN HRC, 27 Jul 1992, para.8.3.

**Documentary or medical evidence of ill-treatment required:** In order to find as true allegations of ill-treatment while in custody, author of communication must corroborate charges through documentary or medical evidence.

WRIGHT V. JAMAICA, UN HRC, 27 Jul 1992, para. 8.6.

**Violation: State-imposed obstacles to attorney-client communication:** State is deemed to have violated person's right to communicate with counsel of their own choosing if State imposes substantial obstacles that would effectively impair attorney-client communication, even if there is no official ban on such communications.

ENGO V. CAMEROON, UN HRC, 22 Jul 2009, para. 7.8.

**Violation: denying accused right to present relevant witnesses:** Although right to present evidence on one's behalf does not imply that accused has *unlimited* right to examine witnesses on his/her behalf, denying accused right to present *relevant* witnesses and evidence is a violation of accused's rights.

KHUSEYNOVA & BUTAEVA V. TAJIKISTAN, UN HRC, 20 Oct 2008, para. 8.5.

**Domestic evidence rules cannot deprive person of right to present or examine evidence:** Although primary responsibility for developing rules of evidence resides with States who are afforded some freedom to develop domestic rules of evidence, such rules may not deprive person of right to present evidence on

his/her own behalf or to examine evidence against him/her.

IDIEVA V. TAJIKISTAN, UN HRC, 31 Mar 2009, para. 9.6.

**May not coerce person to obtain confession:** Right not to be compelled to give evidence against oneself means that authorities may not subject person to physical, mental or emotional coercion, whether direct or indirect, to obtain confession from that person.

SHARIFOVA, SAFAROV & BURKHONOV V. TAJIKISTAN, UN HRC, 1 Apr 2008, para. 6.3; KHUSEYNOVA & BUTAEVA V. TAJIKISTAN, UN HRC, 20 Oct 2008, para. 8.3; IDIEVA V. TAJIKISTAN, UN HRC, 31 Mar 2009, para. 9.3; BUTOVENKO V. UKRAINE, UN HRC, 19 Jul 2011, para. 7.4.

**Torture cannot be used for investigation:** Right not to be forced to confess guilt prohibits use of torture during investigatory phase of criminal proceeding. Furthermore, State is obligated to impartially investigate any and all complaints about torture and other forms of ill-treatment.

SHARIFOVA, SAFAROV & BURKHONOV V. TAJIKISTAN, UN HRC, 1 Apr 2008, para. 6.2; ISAEVA V. UZBEKISTAN, UN HRC, 20 Mar 2009, para. 9.2; DUNAEV V. TAJIKISTAN, UN HRC, 30 Mar 2009, para. 7.3; SATTOROVA V. TAJIKISTAN, UN HRC, 30 Mar 2009, para. 8.4; IDIEVA V. TAJIKISTAN, UN HRC, 31 Mar 2009, para. 9.3; TOLIPKHUZHAEV V. UZBEKISTAN, UN HRC, 22 Jul 2009, para. 8.3; KIRPO V. TAJIKISTAN, UN HRC, 27 Oct 2009, paras. 6.2 - 6.3; PUSTOVALOV V. RUSSIAN FEDERATION, UN HRC, 23 Mar 2010, para. 8.2; USAEV V. RUSSIAN FEDERATION, UN HRC, 19 Jul 2010, paras.9.2 - 9.3.

**Burden of proof on State to show statements made freely and voluntarily:** If person has made substantiated allegation that he/she was compelled to give evidence against himself/herself, burden shall rest with State to prove that statements were made freely and voluntarily because individual will not necessarily have equal access to evidence and State is frequently only party that has access to relevant information.

SHARIFOVA, SAFAROV & BURKHONOV V. TAJIKISTAN, UN HRC, 1 Apr 2008, para. 6.3; IDIEVA V. TAJIKISTAN, UN HRC, 31 Mar 2009, para. 9.3 (State must prove statements made freely and voluntarily); DUNAEV V. TAJIKISTAN, UN HRC, 30 Mar 2009, para. 7.3; BUTOVENKO V. UKRAINE, UN HRC, 19 Jul 2011, para. 7.3 (burden of proof on State due to uneven access to information).

**States must corroborate no torture, statements made voluntarily:** States must be able to produce corroborating documentation to demonstrate accused was not subjected to torture and demonstrate that statements were made voluntarily.

IDIEVA V. TAJIKISTAN, UN HRC, 31 Mar 2009, para. 9.3; BUTOVENKO V. UKRAINE, UN HRC, 19 Jul 2011, para. 7.4.

**Appropriate remedies for confessions obtained by torture:** Where person has been convicted on basis of confession obtained by torture or another form of coercion, retrial consistent with guarantees provided by the ICCPR is an appropriate remedy, as is release.

DUNAEV V. TAJIKISTAN, UN HRC, 30 Mar 2009, paras. 7.3 - 9.

**Comparable Article(s) in the *International Covenant on Civil and Political Rights*:** Articles 14(1), 14(3)(e), 14(3)(g) and 7. Article 14(1) provides the right to a fair and public hearing, 14(3)(e) protects the accused's right to examine and have examined witnesses under the same conditions as witnesses against him/her, 14(3)(g) protects the right of the accused not to be compelled to testify against himself or confess guilt and 7 prohibits torture or cruel, inhuman or degrading treatment or punishment.

#### ***European Court of Human Rights***

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Accused's statement obtained in custody using ill-treatment:** Such statement shall not be used as main evidence in the trial.

ÖZEN V. TURKEY, ECHR, 12 Apr 2007, paras. 102-105.

**Comparable Article(s) in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*:** Articles 6(1) and 6(3)(d). Article 6(1) provides the right to a fair trial, while 6(3)(d) protects the accused's right to examine and have examined witnesses under the same conditions as witnesses against him/her.

#### ***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Judge may be able to base his/her decision on documents from another criminal procedure:** Where those have been submitted to adversarial discussion between the parties.

No.73-90224, CRIM. BULL. 480, FCC, 19 Dec 1973.

JCP 1961.II.12157, FCC, 16 Mar 1961 (recorded tape); No. 91-86067, CRIM. BULL. 66, FCC, 11 Feb 1992 (evidence obtained unlawfully or disloyally); No. 97-83196, FCC, 28 Jan 1998 (confessions); No.91-86843, CRIM. BULL.112, FCC, 12 Mar 1992 (lawyer's correspondence).

**Examples of admissible evidence:** Includes recorded tape; evidence obtained unlawfully or disloyally; confessions; correspondence between lawyer and his client where likely to prove lawyer's participation in offense.

**When lawyer cannot raise argument of confidentiality concerning file:** Where those documents may lead to his own inculpation.

No. 98-80007, CRIM. BULL. 206, FCC, 5 Oct 1999.

**Appeal courts' examination of evidence:**May examine evidence produced and disregarded by the first instance jurisdiction.

No.97-84260, CRIM. BULL.20, FCC, 16 Feb 1999.

**Comparable Article(s) in the French *Code of Criminal Procedure*:**Articles 427, 428 and 432.These articles relate to the presentation of the evidence at trial, including the appreciation of each type of evidence during trial.

## Article 322. Rules Concerning Parties Present at Hearing

*The court clerk shall call the names of the accused, civil parties, civil defendants, victims, witnesses and experts and verify the identity of those persons.*

*If a civil party is represented by his spouse or by a direct-line relative, the court clerk shall verify the identity of those representatives and verify the validity of their delegation of power. Representatives of civil defendants shall be subject to the same requirements. In case of necessity, the court clerk shall ask for the opinion of the presiding judge.*

*All parties shall sit at their designated places in the court room.*

*The accused shall not be allowed to communicate with each other.*

*The experts and witnesses shall retreat and move to the waiting room prepared for them, from which they cannot see or hear anything in the court room.*

*While in the waiting room during the hearing, the witnesses are not allowed to communicate with each other.*

### ***Application in the ECCC***

**Witnesses cannot sit in courtroom or public gallery:** People whose names appear on the witness list are not allowed to sit in the public gallery to observe proceedings because doing so contradicts Internal Rules relating to witnesses. Witnesses in the courtroom or public gallery have the obligation to leave before being called to testify.

DUCH CASE: TRIAL TRANSCRIPTS, Day 5, ECCC, TC, 7 Apr 2009, p. 1, ln. 24 - p. 2, ln. 9.

**Accused person is entitled to waive his right to be present during trial proceedings:** An accused person cannot be compelled to remain in court. However, it is up to his legal counsel to advise him fully regarding the consequences, including that he may not be able to effectively challenge the evidence against him.

IENG SARY CASE: TRIAL CHAMBER RESPONSE TO IENG SARY'S 'OBSERVATIONS' OF 14 OCTOBER 2011 (E130), ECCC, TC, 28 October 2011, paras. 2-3.

**Corresponding ECCC Internal Rule(s):** Internal Rule 88. This rule similarly provides for the appearance of the parties before the Trial Chamber. However, Internal Rule 88(2) specifically provides that witnesses and experts shall stay in a separate room where they are not allowed to see or hear the proceedings and they are not allowed to communicate with each other.

### ***Application of Comparable Articles in Other Jurisdictions***

#### ***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*



**Absence of the accused:**His absence does not cause any nullity.

No. 68-93194, CRIM. BULL. 152, FCC, 6 May 1969.

**Witness who is to be heard twice:**Such witness may stay in courtroom after his/her first statement.

No.77-91896, CRIM. BULL. 397, FCC, 14 Dec 1977.

**Comparable Article(s) in the French *Code of Criminal Procedure*:**Articles 331-1,331-2, 334 and 406. These articles establish rules concerning the present parties at trial before assize's court (Articles 331 and 334) and the court for misdemeanors (Article 406).

## Article 325. Interrogation of Accused

*The presiding judge shall inform the accused of the charges that he is accused of and conduct the questioning of the accused. The presiding judge shall ask any questions which he believes to be conducive to ascertaining the truth. The presiding judge has a duty to ask the accused both inculpatory and exculpatory questions.*

*After the presiding judge's questions, the Royal Prosecutor, the lawyers and all the parties may be authorized to question the accused. All questions shall be asked with the authorization of the presiding judge. Except for questions asked by the Royal Prosecutor and the lawyers, all questions shall be asked through the presiding judge. In case of objection to a question, the presiding judge decides whether the question should be asked.*

### **Application in the ECCC**

**Questioning rights:** Chamber Judges are obliged to ask the accused questions relevant to the proceedings, regardless of whether such questions tend to prove or disprove the guilt of the accused.

DUCH CASE: JUDGMENT, ECCC, TC, 26 Jul 2010, para. 51.

**Sequence of presentation of facts, testimony, questioning:** Trial shall follow sequence of facts in Closing Order. Parties will be informed of facts scheduled for trial day approximately two weeks in advance. On any given fact, Chamber will first hear the accused, then give the floor to the parties to ask questions to the accused. Thereafter the Chamber will call civil parties, witnesses and experts pertaining to specific facts for questioning.

DUCH CASE: TRIAL TRANSCRIPTS, Day 4, ECCC, TC, 6 Apr 2009, p. 2, lns. 9-17.

**Confrontation with written witness statements:** Accused should only be confronted with written witness statements after witnesses have been heard, provided these witnesses can be brought to Court.

DUCH CASE: TRIAL TRANSCRIPTS, Day 4, ECCC, TC, 6 Apr 2009, p. 2, lns. 19-21.

**Parties directed not to repeat same questions:** Questions to the accused should not be repeated, unless necessary to clarify the response of the accused.

DUCH CASE: TRIAL TRANSCRIPTS, DAY 6, ECCC, TC, 8 Apr 2009, p. 21, ln. 24 – p. 22, ln. 2.

**Cannot limit to yes/no answers:** Counsel cannot direct answers of the accused by forcing him to limit his responses to “yes” or “no”.

DUCH CASE: TRIAL TRANSCRIPTS, Day 6, ECCC, TC, 8 Apr 2009, p.2, ln. 29 – p. 3, ln.4.

**Questions must not yet have been asked and must be precise:** Questions previously raised by the Chamber and relevant parties should not be repeated, unless the repeated question is sufficiently precise so as to elicit a more specific response.

DUCH CASE: TRIAL TRANSCRIPTS, Day 6, ECCC, TC, 8 Apr 2009, p. 16, lns.12-15.

**Accused need not respond to irrelevant questions:** Accused may preserve his right not to respond to irrelevant questions or questions that involve evidence not admitted.

DUCH CASE: TRIAL TRANSCRIPTS, Day 22, ECCC, TC, 27 May 2009, p. 51, lns. 2-4.

**Closed questions permitted:** While closed questions such as "is it true to say," "is it right to say," "do you agree with me that," are not common in common law, Trial

Chamber permitted them, as the longer the question, the longer the answer.

DUCH CASE: TRIAL TRANSCRIPTS, Day 13, ECCC, TC, 28 Apr 2009, p. 57, ln. 18 – p. 58, ln. 16.

**Corresponding ECCC Internal Rule(s):** Internal Rules 89*bis* and 90. Internal Rule 89*bis* is similar to Article 325 except that it charges the Greffier, rather than the presiding judge, with reading the charges against the accused and permits the prosecutor to make an opening statement to which the Defense may respond before the Accused is questioned. Internal Rule 90 is substantially similar to Article 325 except that it expressly states that the presiding judge shall inform the Accused of his rights prior to questioning.

### ***Application of Comparable Articles in Other Jurisdictions***

#### ***European Court of Human Rights***

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Relying on suspicions of person's guilt incompatible with the presumption of innocence:** Where court relies on statements related to suspicions of a person's guilt, even after final acquittal, to undertake its own assessment of guilt in a subsequent case, the right to presumption of innocence is violated.

SEKANINA V. AUSTRIA, ECHR, 25 Aug 1993, para. 30.

**Public officials shall respect the presumption of innocence:** They should not make declarations that encourage the public to believe

person is guilty before accused's guilt has been duly established by the court, especially when person has not yet been charged with any crime.

BUTKEVIČIUS V LITHUANIA, ECHR, 26 Mar 2003, para.53 (presumption of innocence by public officials); ALLENET DE RIBEMONT V. FRANCE, ECHR, 10 Feb 1995, para. 41 (declaration of guilt by police prior to being charged with a crime); LAVENTS V. LATVIA, ECHR, 28 Nov 2002, para.125 (guilt must be duly established by the court).

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:** Article 6(2). This article provides for fair trial rights including the right for everyone charged with criminal offence to be presumed innocent until proved guilty according to law.

#### ***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Premature declarations of accused's guilt:** Presiding judge shall not declare anything related to accused being guilty before he/she has been judged.

CRIM. BULL. 476, FCC, 14 Jun 1958.

accused, or of previous conviction of the accused, not prohibited.

No. 91-82115, CRIM. BULL.442, FCC, 20 Nov 1991, (joint offender); No.91-85775, CRIM. BULL.209, FCC, 25 May 1992 (accused's previous conviction).

**Reading of other/previous convictions:** Reading of conviction of joint offender of the

**When omitting to question accused is cause for nullity:** Only if it is established that he/had not been able to defend

himself/herself in any way after the debate following the report.

No. 67-91505, CRIM. BULL. 208, FCC, 26 Jun 1968.

**Comparable Article(s) in the French *Code of Criminal Procedure*:**Articles 327, 329 and 442. Those articles provide for the interrogation of the accused during trial including the possibility for each party to question him through the President (Article 442).

## Article 326. Hearing of Parties

*The presiding judge shall listen to the statements of civil parties, civil defendants, victims, witnesses and experts in the order which he deems useful. The presiding judge can hear judicial police officers and judicial police agents who conducted the enquiry as witnesses.*

*The Royal Prosecutor, the lawyers and all the parties may be authorized to ask questions. All questions shall be asked with the authorization of the presiding judge. Except for questions asked by the Royal Prosecutor and the lawyers, all questions shall be asked through the presiding judge. In case of objection to a question, the presiding judge decides whether the question should be asked.*

### ***Application in the ECCC***

**Trial Chamber endeavors to call each witness only once, but may decide to hear again from witnesses relevant to more than one fact:** For witnesses relevant to more than one fact, Chamber will decide on case-to-case basis whether they shall be heard at one time with regards to all facts or recalled afterwards.

DUCH CASE: TRIAL TRANSCRIPTS, Day 4, ECCC, TC, 6 Apr 2009, p. 2, ln. 22 - p.3, ln. 5.

**Scheduling hearing of civil parties at trial:** Trial Chamber will hear those civil parties who have knowledge of specific facts at time when the Chamber deals with these facts. All other civil parties will be heard at same time towards end of trial proceeding.

DUCH CASE: TRIAL TRANSCRIPTS, Day 4, ECCC, TC, 6 Apr 2009, p. 3, lns. 11-17.

**Chamber will provide scheduling of the hearing of civil parties, witnesses and experts two weeks in advance, except where they live abroad:** Where civil parties, witnesses and experts live abroad, Chamber will endeavor to provide the schedule at least four weeks in advance. It will be helpful for scheduling of civil parties, witnesses and experts who live abroad if Trial Chamber is informed as

soon as possible of any dates when they are available or unavailable.

DUCH CASE: TRIAL TRANSCRIPTS, Day 4, ECCC, TC, 06 Apr 2009, p. 3, ln. 19 - p. 4, ln. 1

**To ensure proper conduct of proceedings, parties are not to pose repeated or irrelevant questions to accused, witnesses, experts or civil parties:** Where party representatives take turns questioning a person, they should obtain information from previous party representatives in order to avoid repeated questions. Questions which are not relevant to the facts should not be posed. Finally, questions should be prepared so as to be time-efficient (e.g., do not speak for five to ten minutes only to ask a single question). This is in order to ensure proper conduct of the proceedings.

DUCH CASE: TRIAL TRANSCRIPTS, Day 7, ECCC, TC, 9 Apr 2009, p. 40, ln. 11 - p. 41, ln. 1.

**Questions should be straightforward and short:** This is so that the witness can understand the question and respond appropriately. Counsel should also be aware that responses may be restricted by a certain limit of recollection where, for example, the relevant facts took place over 30 years ago.

DUCH CASE: TRIAL TRANSCRIPTS, Day 7, ECCC, TC, 9 Apr 2009, p. 41, lns. 3-10.

ON NUON CHEA'S FITNESS TO STAND TRIAL, ECCC, TC, 2 Apr 2013, para.16.

**Witnesses or experts are not to be asked questions that require an answer that is not, or is beyond, their expertise:** Such questions will not be allowed, and the witness or expert will not have to respond.

DUCH CASE: TRIAL TRANSCRIPTS, Day 23, ECCC, TC, 28 May 2009, p. 44, lns. 4-5 and lns.17-19; p. 45, lns.4-7 and lns.14-20.

**Trial Chamber and parties are not bound by indication given to the parties on scope of testimony it intends to seek from expert:** Trial Chamber and parties may ask any question Trial Chamber considers relevant. When answering such questions, expert is not bound by his/her previous written statement or report.

DUCH CASE: TRIAL TRANSCRIPTS, Day 17, ECCC, TC, 19 May 2009, p. 31, ln. 22 - p.32, ln. 2.

**Trial Chamber may seek expert opinion on any subject deemed necessary to proceedings:** where a Chamber deems the testimony of a particular expert as not being conducive to the administration of justice, it can reject a request that the person be summonsed.

NUON CHEA, IENG SARY AND KHIEU SAMPHAN CASES: DECISION ON ASSIGNMENT OF EXPERTS, ECCC, TC, 5 Jul 2012, para. 14.

**An accused has a qualified right to be physically present during proceedings:** he or she may opt to participate in proceedings remotely, provided she/he has adequate legal representation.

IENG SARY CASE: FITNESS TO STAND TRIAL, ECCC, TC, 26 Nov 2012, para. 19. IENG SARY CASE: DECISION ON THE IENG SARY DEFENCE REQUEST TO AUDIO AND/OR VIDEO RECORD IENG SARY IN THE HOLDING CELL, ECCC, TC, 16 Jan 2013, para. 13-15. NUON CHEA CASE: SECOND DECISION

**Parties engaged in the conduct of an investigation can be called as expert witnesses:** Where the interest of justice require, the Trial Chamber may call as an expert witness a party previously engaged in the conduct of the investigation: However, any weight attributed to the witness' testimony must be considered in light of his/her involvement in the investigation .

NUON CHEA AND KHIEU SAMPHAN CASES: DECISION ON DESIGNATION OF TCE-33, ECCC, TC, 26 Apr 2013, para.14..

**Victim impact statements can form part of civil party statements, provided the defence is given the right to respond:** Civil parties are entitled to make statements that encompass their entire experience of suffering. However, such statements should not include new allegations against an accused person. Additionally, the accused person should always have the right to challenge these statements, particularly as they relate to inculpatory evidence. Such challenges should be made in the absence of the civil party to avoid additional suffering.

NUON CHEA AND KHIEU SAMPHAN CASES: DECISION ON REQUEST TO RECALL CIVIL PARTY TCCP-187, FOR REVIEW OF PROCEDURE CONCERNING CIVIL PARTIES' STATEMENTS ON SUFFERING AND RELATED MOTIONS AND RESPONSES, TC, 2 May 2013 paras.19-22.

**Accused person has the fundamental right to remain silent:** The judge should remind the accused person of this right at the start of the proceedings.

NUON CHEA AND KHIEU SAMPHAN CASES: CASE 002/01 JUDGMENT, TC, 7 Aug 2014, paras. 27-29.

**Corresponding ECCC Internal Rule(s):** Internal Rule 91. This rule is substantially similar to Article 326 except Internal Rule 91 permits the judges to ask any questions without limitation and provides that the witness shall remain at the disposal of the Trial Chamber after questioning until the Chamber decides that his/her presence is no longer needed.

### ***Application of Comparable Articles in Other Jurisdictions***

#### ***UN Human Rights Committee***

*Cambodia is a party to the International Covenant on Civil and Political Rights (ICCPR), which sets out international law principles on criminal procedure. Below are examples of how comparable ICCPR articles have been interpreted and applied by its implementing body, the UN Human Rights Committee.*

**Violation: written proceedings denying accused right to oral hearing in person/ represented by counsel and being able to introduce evidence, examine witnesses:** Violation of right to fair trial occurs when accused is convicted and sentenced through proceedings conducted only in writing and therefore is denied the right to an oral hearing at which he may appear in person or be represented by counsel and have the opportunity to introduce evidence and examine witnesses.

RODRÍGUEZ OREJUELA V. COLOMBIA, UN HRC, 23 Jul 2002, para. 7.3.

**Violation: weight given to State's witness whom accused does not cross-examine and unjustified refusal of accused's request to summon expert, call additional witnesses:** Equality between defense and prosecution in producing evidence violated and denial of justice occurs where court places "very considerable weight" upon evidence of State's witness who inexplicably could not be located

for trial, thereby denying accused the opportunity for cross-examination, and where court fails to provide a basis for refusing accused's request to summon an expert and call additional witnesses.

DUGIN V. RUSSIAN FEDERATION, UN HRC, 5 Jul 2004, para. 9.3.

**Violation: denying accused right to present relevant witnesses:** Although right to present evidence on one's behalf does not imply that accused has *unlimited* right to examine witnesses on his behalf, denying accused right to present *relevant* witnesses is a violation of the accused's rights. The accused shall have the same right as the prosecution in producing evidence, compelling the attendance of witnesses, and questioning and challenging witnesses against them.

IDIEVA V. TAJIKISTAN, UN HRC, 31 Mar 2009, para. 9.6; KHUSEYNOVA & BUTAEVA V. TAJIKISTAN, UN HRC, 20 Oct 2008, para. 8.5 (right to present relevant witnesses).

**Comparable Article(s) in the *International Covenant on Civil and Political Rights*:** Articles 14(1), 14(3)(e) and 14(3)(g). Article 14(1) admonishes that a defendant is entitled to a "fair" hearing. Article 14(3)(e) protects the accused's right to examine and have examined witnesses under the same conditions as witnesses against him, while Article 14(3)(g) protects the right of the accused not to be compelled to testify against himself or confess guilt.

#### ***European Court of Human Rights***

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Persons who give police statements that are placed before the court:** These persons, such as victim of the offense, are to be regarded as witnesses, even if they do not testify in court.

DELTA V. FRANCE, ECHR, 19 Dec 1990, para. 34.

**Non-attendance at trial of witnesses who give testimony against accused:** Where applicant's conviction is not attributable to their testimony, the absence of witnesses who give testimony against accused outside of court, e.g., in depositions, raises no issue of violation of fair trial rights.

KAMASINSKI V. AUSTRIA, ECHR, 19 Dec 1989, paras. 89-91.

**Statements that are admissible in determining innocence or guilt of accused:** Include statements of co-accused, unless defense has no opportunity to question these co-accused during the proceedings, and statement of witness

obtained at pre-trial stage where defense's right to challenge and question witness was respected..

CRAXI V. ITALY, ECHR, 5 Dec 2002, paras. 88-89 (statements of co-accused); ASCH V. AUSTRIA, ECHR, 26 Apr 1991, para.27 (statement of witness at pre-trial stage).

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:** Articles 6(1) and (3). These articles provides for fair trial right including the right for everyone charged with criminal offence to a fair and public trial and the equality of arms for each party.

#### ***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Defense's questioning of witnesses:** Defense must not reinforce his/her questions with statements which are likely to influence witness or distort his/her testimony.

No. 85-91259, CRIM. BULL. 92, FCC, 5 Mar 1986.

**Questioning of victim by accused and his/her counsel:** This is permitted during the hearing.

No. 00-81594, FCC, 25 Oct 2000.

**Comparable Article(s) in the French Code of Criminal Procedure:** Articles 311 and 312. These articles provide for the hearing of the parties during trial including the possibility for the parties to question the accused through the president of the court.



## Article 330. Assistance and Swearing of Interpreter/Translator

*If necessary, the presiding judge may seek the assistance of an interpreter/translator. The interpreter/translator shall swear according to his belief or religion that he will assist the court and interpret the answers faithfully. In no circumstances can the interpreter/translator be chosen from amongst judges, court clerks, judicial police, military police, parties to the case or witnesses.*

*The provision of Article 156 (Witness without Swearing) of this Code shall apply.*

### **Application in the ECCC**

**Trial Chamber refused to treat Khmer version of document as authoritative version because it was a translation from English:** The original language version considered the authoritative version. Chamber will request

professional translator to compare the authoritative original to the Khmer translation.

DUCH CASE: TRIAL TRANSCRIPTS, Day 22, ECCC, TC, 27 May 2009, p. 78, lns. 16–20.

**Corresponding ECCC Internal Rule(s):** Internal Rule 30. Internal Rule 30 is similar to Article 330 but extends the right to request an interpreter/translator to the prosecutors, investigating judges, witnesses and other parties, in addition to the judges.

### **Application of Comparable Articles in Other Jurisdictions**

#### **UN Human Rights Committee**

*Cambodia is a party to the International Covenant on Civil and Political Rights (ICCPR), which sets out international law principles on criminal procedure. Below are examples of how comparable ICCPR articles have been interpreted and applied by its implementing body, the UN Human Rights Committee.*

**If defendant and his/her witnesses can adequately understand and express themselves in the official court language, there is no violation by not providing an interpreter:** This is so even if the official court language is not their mother tongue, the

language in which they normally express themselves, or their preferred language.

CADORET & LE BIHAN V. FRANCE, UN HRC, 11 Apr 1991, paras. 5.6 and 5.7; GUESDON V. FRANCE, UN HRC, 25 Jul 1990, paras. 10.2-10.3; BARZHIG V. FRANCE, UN HRC, 11 Apr 1991, para. 4.5-4.6.

**Comparable Article(s) in the International Covenant on Civil and Political Rights:** Article 14(3)(f), which is similar to Article 330, except that it expressly specifies this right is exercisable by a defendant, for free, where he or she cannot understand or speak the language used in court. Article 330 similarly allows for the presence of an interpreter in the courtroom.

#### **European Court of Human Rights**

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Costs of interpreter:** A convicted person shall not bear costs of interpreter.

LUEDICKE, BELKACEM & KOÇ V. GERMANY, ECHR, 28 Nov 1978, para. 42.

**Appointment and control of interpreter:** Judges are to appoint an interpreter and may extend a certain degree of control over the adequacy of interpretation provided if they are put on notice of this need.

KAMASINSKI V. AUSTRIA, ECHR, 19 Dec 1989, para. 74.

**Level of interpretation assistance:** The level of interpretation assistance provided to

accused should enable him/her to have knowledge of the case and defend himself/herself by presenting his/her version of events.

LAGERBLOM V. SWEDEN, ECHR, 14 Jan 2003, para. 61.

**Presiding judge shall ensure that assistance is sufficient:** A violation occurred when, after made aware that counsel was experiencing difficulty communicating with the defendant, the judge allowed the defendant's brother to act as an informal interpreter.

CUSCANI V. UNITED KINGDOM, ECHR, 24 Sep 2002, paras. 38-39.

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:** Article 6(3). This article provides for fair trial rights including the possibility to have a free assistance of an interpreter if the accused cannot understand or speak the language used in court.

#### ***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Effect of designation of interpreter at opening of debates instead of during designation of jury:** No nullity results from this.

CRIM. BULL. 1, FCC, 4 Jan 1917.

**Validity of interpreter's oath:** Oath at opening of debates is valid until end of case.

No. 86-96736, CRIM. BULL. 364, FCC, 22 Oct 1987.

**When more than one accused or witness does not speak language of court:** Their statements have to be translated into language they speak and understand and into language of court.

No. 89-86557, CRIM. BULL. 253, FCC, 20 Jun 1990.

**Comparable Article(s) in the French Code of Criminal Procedure:** Article 344. This article provides for the appointment of an interpreter to assist a party during trial before assize courts.

## Article 332. Presentation of Exhibits

*The presiding judge may order that exhibits be presented during the hearing.*

### ***Application in the ECCC***

**Requests for evidence to be presented in court:** Chamber can call upon parties to submit requests for evidence to be presented in court.

DUCH CASE: ADMISSIBILITY OF ADDITIONAL EVIDENCE, ECCC, TC, 28 Oct 2009, para. 1.

**Excerpts of documents on the case file may be requested for inclusion into evidence:** Chamber rejected defense objection that the prosecution's request to put an excerpt of the case file was inappropriate as it was not a document in the case record.

DUCH CASE: TRIAL TRANSCRIPTS, Day 12, TC, 27 Apr 2009, p. 1, lns. 23 - p. 11, ln. 1.

**A trial chamber has the right to reclassify as public documents which were confidential during the course of the investigations at the close of trial:** Where the chamber or the presiding judge determines that there no longer exists a reason for these documents to remain confidential and it is in the public interest to make them public, then those documents can be re-classified as public for that purpose.

NUON CHEA AND KHIEU SAMPHAN CASE: CASE 002/01 JUDGMENT, TC, 7Aug 2014, para. 39.

**Corresponding ECCC Internal Rule(s):** Internal Rule 87(8). This rule is substantially similar to Article 332.

## Article 339. Additional Investigation Ordered by Court

*The court may order additional investigations, if it believes this to be necessary.*

*The persons who can be authorized to conduct additional investigations are:*

- *the presiding judge;*
  - *any of the judges of the bench, if applicable;*
  - *All other judges of the Court of First Instance.*
- An order for additional investigations shall appoint a specific judge. This judge, under the same conditions as an investigating judge, may:*
- *conduct field visits anywhere within the territorial jurisdiction of the court or to any part of the national territory;*
  - *question witnesses;*
  - *conduct searches;*
  - *seize items;*
  - *issue orders for expert reports.*

*In order to implement additional investigations, the judge may issue rogatory letters.*

### **Application in the ECCC**

**Request of an additional expert:** Defense's appeal of the denial of its request for the appointment of additional expert not admissible where the original appointed expert had not yet filed his report with the court.

IENG SARY: ADDITIONAL EXPERT REQUEST APPEAL, ECCC, PTC, 14 Dec 2009, paras. 21-22.

**Balancing fairness and expeditiousness:** When considering whether to order an additional investigation, a Chamber may consider balancing the need to ensure the fairness of proceedings against the expeditiousness of the trial.

NUON CHEA AND KHIEU SAMPHAN CASES: DECISION ON CIVIL PARTY REQUEST TO PUT NEW EVIDENCE BEFORE THE CHAMBER AND KHIEU SAMPHAN'S RESPONSE TC, 14 JUNE 2013 para. 3; NUON CHEA CASE: DECISION ON NUON CHEA REQUEST TO ADMIT NEW DOCUMENTS, TO INITIATE AN INVESTIGATION AND TO SUMMONS MR ROB LEMKIN, TC 24 Jul 2013 at para 19..

**Where the age or capacity of an accused is at issue, medical experts can be appointed to investigate the fitness of the accused to stand trial;** where a medical expert is appointed, the principle for determination is whether the accused person is able to exercise effectively his rights in the case against him. Rights should include the right (1) to plead; (2) to understand the nature of the charges; (3) to understand the course of the proceedings; (4) to understand the details of the evidence; (5) to instruct counsel; (6) to understand the consequences of the proceedings and (7) to testify.

NUON CHEA CASE: DECISION ON FITNESS TO STAND TRIAL AND DEFENSE MOTION FOR ADDITIONAL MEDICAL EXPERTISE: ECCC, TC, 15 Nov 2011, para. 14; IENG THIRITH CASE: DECISION ON FITNESS TO STAND TRIAL: ECCC, TC, 17 Nov 2011, para.10. NUON CHEA CASE: SECOND DECISION ON NUON CHEA'S FITNESS TO STAND TRIAL, ECCC, TC, 2 Apr 2013, para.13.

**Corresponding ECCC Internal Rule(s):** Internal Rule93(2). This rule is substantially similar to Article 339 except that Article 339 goes into more detail as to the type of judges who are authorized to conduct investigations.

### *Application of Comparable Articles in Other Jurisdictions*

#### **French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Exercise of right to proceed to supplementary investigations:** This is at the discretion of the president of the assize court.

No. 66-93479, CRIM. BULL. 160, FCC, 15 May 1968.

No. 65-92650, CRIM. BULL. 45, FCC, 15 Feb 1966 (compatibility with detention); CIV. BULL. 394, Civil Chamber 2, 10 Apr 1962 (interrogation and appearance).

**Medical examinations of accused are not supplementary information:** This is so whether they are to verify accused's compatibility with detention or to cope with interrogation and appearance before court.

**Additional questioning of witnesses:** Presiding judge of assize court can hear new witnesses and those already heard at time of written investigation.

DP 1899.1.462, FCC, 31 Jan 1895.

**Comparable Article(s) in the French Code of Criminal Procedure:** The French Code of Criminal Procedure does not have a similar article to Article 346. However, Articles 315 and 459 do refer to the statements of private parties.

## Article 342. Competence of Court with Respect to Objection

*The court seized with a criminal case is entitled to decide on any objection raised by parties unless the law provides otherwise.*

*The court is entitled to decide on any objection regarding the annulment of the procedure, except in cases where the court has been seized by an indictment.*

### **Application in the ECCC**

**Objections to the jurisdiction of the court admissible at pre-trial proceedings even after issuance of Closing Order:** As jurisdictional appeals expressly identified as one of the limited grounds of appeal allowed in pre-trial proceedings, accused permitted to raise objection to court's subject matter jurisdiction even after

issuance of Closing Order but before the commencement of trial. The consideration of this matter at the pre-trial stage supports the efficient proceedings.

IENG SARY CASE: CLOSING ORDER APPEAL, ECCC, PTC, 11 Apr 2011, para. 56; *See also* IENG SARY CASE: DECISION ON IENG SARY'S RULE 89 PRELIMINARY OBJECTIONS, ECCC, TC, 3 Nov 2011, paras. 1-10..

**Corresponding ECCC Internal Rule(s):** ECCC Internal Rules 80(4), 89 and 91. Internal Rule 80(4) provides that objections that the parties may have regarding the admissibility of exhibits or documents that the parties propose to offer or put in the case may be in writing within a prescribed time period after the initial hearing. Internal Rule 89 addresses types of preliminary objections that may be raised after the Closing Order becomes final and addresses the timing for the Chamber to issue its reasoned decision in regard to these objections. Internal Rule 91 allows the prosecutors, parties and their lawyers to object to the continued hearing of the testimony of any witnesses if they consider such testimony is not conducive to ascertaining the truth.

### **Application of Comparable Articles in Other Jurisdictions**

#### **French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Objections raised by judge on his/her own initiative:** Such statements shall only the competence of court.

No. 90-81383, CRIM. BULL. 94, FCC, 25 Feb 1991.

**Objections related to nullity:** These have to be presented before any debates on the merits.

No. 09-80516, CRIM. BULL. 24, 16 Feb 2010; No. 06-87787, CRIM. BULL. 18, FCC, 23 Jan 2008.

**Comparable Article(s) in the French Code of Criminal Procedure:** Article 283. This article provides for the optional or exceptional steps that the President can take to ascertain the truth, including any additional investigation that he deems useful.

## Article 350. Declaration of Guilt

*The court shall examine whether:*

- *the facts constitute a felony, a misdemeanor, or a petty offense;*
- *the accused committed the crime of which he has been accused or not.*

*If the accused is found guilty, the court shall sentence the accused in accordance with the law.*

*If the court considers that the act is not an offense or that the accused is not guilty, it acquits the accused.*

### ***Application in the ECCC***

**Trial Chamber to determine whether facts set out in indictment can be legally characterized as relevant crimes:** It is for the Trial Chamber to determine whether facts set out in the Closing Order can be legally characterized as crimes pursuant to 1956 Penal Code, and such determination bears no effect on the jurisdiction of the

ECCC to send the accused for trial in relation to these crimes.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 80; IENG SARY CASE: CLOSING ORDER APPEAL, ECCC, PTC, 11 Apr 2011, para. 296.

**Corresponding ECCC Internal Rule(s):** Internal Rules are 98(3), 98(5) and 98(6). These rules are substantially similar to Article 350.

### ***Application of Comparable Articles in Other Jurisdictions***

#### ***European Court of Human Rights***

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Principle of presumption of innocence is fundamental:** It is an element of right to fair trial.

DEWEER V. BELGIUM, ECHR, 27 Feb 1980, para. 56.

**Burden of proof is on prosecution:** Any doubt should benefit accused.

BARBERÀ, MESSEGUÉ & JABARDO V. SPAIN, ECHR, 6 Dec 1988, para.77.

**Public officials shall respect the presumption of innocence:** They should not make declarations that encourage the public to believe person is guilty before accused's guilt has been

duly established by the court, especially when person has not yet been charged with any crime.

BUTKEVIČIUS V LITHUANIA, ECHR, 26 Mar 2003, para. 53 (presumption of innocence by public officials); ALLENET DE RIBEMONT V. FRANCE, ECHR, 10 Feb 1995, para.41 (declaration of guilt by police prior to being charged with a crime); LAVENTS V. LATVIA, ECHR, 28 Nov 2002, para.125 (guilt must be duly established by the court).

**Violation of right to presumption of innocence of acquitted:** When court orders him/her to bear costs of proceedings as well as prosecutors' compensation.

MINELLI V. SWITZERLAND, ECHR, 25 Mar 1983, paras. 36-37.

**Relying on suspicions of person's guilt incompatible with the presumption of innocence:** Where court relies on statements

related to suspicions of a person's guilt, even after final acquittal, to undertake its own assessment of guilt in a subsequent case, the right to presumption of innocence is violated.

SEKANINA V. AUSTRIA, ECHR, 25 Aug 1993, para. 30.

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:** Article 6. This article provides for fair trial rights including the right for everyone charged with criminal offence to be presumed innocent until proved guilty according to law.

#### ***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Timing on decisions of guilt and if so, penalty:** Jurors and court must make such decisions at same time.

NO. 08-85224, CRIM. BULL. 36, FCC, 11 Feb 2009; NO. 60-12917, CRIM. BULL. 279, FCC, 18 Oct 1962.

**Comparable Article(s) in the French Code of Criminal Procedure:** Articles 362, 363, 464, 539 and 540. These articles provide for declarations of guilt and their consequences (Articles 362 and 363 before the assize court, Article 464 before the correctional court for misdemeanors and Article 539 before the police or neighborhood court).



## Article 355. Judgment on Civil Remedy

*In the criminal judgment, the court shall also decide upon civil remedies. The court shall determine the admissibility of the civil party application and also decide on the claims of the civil party against the accused and civil defendants. If a judgment for remedies in the civil matter cannot yet be made, the court may attribute a tentative amount of compensation and adjourn the final decision to a subsequent hearing.*

*Persons who are found liable for the same offense shall have joint liability for compensation of damages.*

### **Application in the ECCC**

**Injury need not be direct:** An injury for purposes of a civil party application must be personal, but it need not be direct.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 83; DUCH CASE: APPEALS JUDGMENT, ECCC, SCC, 3 Feb 2012, para. 418; NUON CHEA AND KHIEU SAMPHAN CASES: CASE 002/01 JUDGMENT, ECCC, TC, 7 Aug 2014, paras. 1149-1150.

**Psychological victimization must be considered in context:** In evaluating psychological injury for civil party applications, it is essential to consider victimization within social and cultural context at time alleged crimes occurred.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, paras. 83 and 86.

**Psychological injury presumed for genocide, crimes against humanity, if applicant from targeted group:** In cases involving crimes such as genocide or crimes against humanity, when applicant is indirect victim (e.g., witness or person with knowledge of alleged crime), personal psychological injury presumed if applicant is more likely than not member of same targeted group or community as direct victim.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 93.

**Psychological injury:** Injury may include mental disorders or psychiatric trauma, such as post-traumatic stress disorder.

DUCH CASE: JUDGMENT, ECCC, TC, 26 Jul 2010, para. 641; NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 83.

**Proof of identity flexible:** Flexible approach applied to requirement that civil party applicants clearly prove their identity, e.g. statement from village elder or communal chief acceptable as proof of applicant's identity.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: CIVIL PARTY APPLICATIONS ADMISSIBILITY APPEAL, ECCC, PTC, 24 Jun 2011, para. 95.

**Harm suffered by civil parties can include physical suffering as well as psychological trauma:** economic loss, loss of dignity and grief arising from the loss of family members or close relations to the civil party can also be considered as harm.

NUON CHEA AND KHIEU SAMPHAN CASES: CASE 002/01 JUDGMENT, ECCC, TC, 7 Aug 2014, para. 1150.

**Corresponding ECCC Internal Rule(s):** Internal Rules 23, 23*bis* and 100. Internal Rules 23 and 23*bis* set out detailed requirements for the admission of civil parties. Internal Rule 100 is similar to Article 355 except that it specifies that the Chamber shall not hand down judgment on the Civil Party action that is in contradiction with the judgment on the criminal action in the same case, and grants the Chamber a wider discretion to delay decisions on civil party claims, where appropriate.

***Application of Comparable Articles in Other Jurisdictions***

***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Judge's considerations when ruling on civil claim when accused has been found guilty:**

Must follow relevant civil law principle; must remain within limit of submissions made to him/her.

No. 75-91154, CRIM. BULL. 164, FCC, 17 May 1976 (relevant civil law principle); No. 03-80039, CRIM. BULL. 173, FCC, 30 Sep 2003 (limit of submissions made).

**Amount of reparations due to civil party:**

Judges are sovereign in assessing and determining this amount.

No. 65-93378, CRIM. BULL. 177, FCC, 28 Jun 1966.

**Rule on civil action after deciding on public action:**

Court may do so if it has reserved this power in a decision.

No. 92-82543, CRIM. BULL. 87, FCC, 24 Feb 1993.

**Court may refer case when it cannot decide, at that time, on request for damages:** This referral must be made on specified date and court shall fix term after which case will be called again.

No. 77-90185, CRIM. BULL. 333, FCC, 7 Nov 1977.

**Victims who received reparation for their damages in first instance:** Such victims are not entitled to intervene as civil parties before referral court.

No. 87-90447, CRIM. BULL. 156, FCC, 13 Apr 1988.

**Comparable Article(s) in the French Code of Criminal Procedure:** Articles 371 (assize court), 464 (correctional court) and 539 (police court). These articles establish processes for the issuing of judgments on civil remedies.

# Appeal

This section contains annotations of the following articles in the *Cambodian Code of Criminal Procedure* (the Code):

- Article 375. Persons Entitled to Make Appeals
- Article 399. Effect of Appeal by Accused Only
- Article 401. Redetermination of Legal Qualification of Facts by Court of Appeal
- Article 429. Extension of Time Limit for Writing Briefs
- Article 436. Decisions on Questions of Law
- Article 453. Reasons for Judgment

## Article 375. Persons Entitled to Make Appeals

*An appeal may be filed by:*

- *the Royal Prosecutor of the Court of First Instance and the General Prosecutor attached to a Court of Appeal;*
- *the convicted person;*
- *the civil party, regarding the civil matter of the case;*
- *the civil defendant, regarding the civil matter of the case.*

### **Application in the ECCC**

**Civil parties' right to appeal is limited to their interest in civil claims:** Civil parties do not have a right to appeal or intervene in the sentencing of the accused.

DUCH CASE: CIVIL PARTY STANDING ON SENTENCING, ECCC, TC, 9 Oct 2009, paras. 28, 29 and 40.

**Civil parties may appeal rejections of civil party applications contained in Trial Chamber final trial judgment:** In such situations, a decision on the application is considered part of the final judgment.

DUCH CASE: CIVIL PARTY STATUS DETERMINATIONS IN TRIAL JUDGMENT, ECCC, SCC, 30 Sep 2010, paras. 4-5.

**Corresponding ECCC Internal Rule(s):** Internal Rule 105. Internal Rule is similar to Article 375, but explains in greater detail the procedure of filing an appeal. Internal Rule 105 also limits the ability of civil parties to appeal only to reparations and, if the prosecutors have already appealed, to the verdict. Civil parties are explicitly prohibited from appealing the sentence.

### **Application of Comparable Articles in Other Jurisdictions**

#### **UN Human Rights Committee**

*Cambodia is a party to the International Covenant on Civil and Political Rights (ICCPR), which sets out international law principles on criminal procedure. Below are examples of how comparable ICCPR articles have been interpreted and applied by its implementing body, the UN Human Rights Committee.*

**Convicted person entitled to a written judgment of his/her conviction without undue delay:** Furthermore, he/she need not affirmatively request the judgment; it is the judicial authority's responsibility to provide the written judgment because without it, the defendant cannot exercise his/her right to review. Delay of 45 months in rendering written judgment constitutes undue delay.

PRATT & MORGAN V. JAMAICA, UN HRC, 6 Apr 1989, paras. 13.4-13.5.

**Failure to notify a convicted person of a ruling in the first instance is a violation:** Such failure effectively denies the person his/her right to appeal his/her conviction to a higher tribunal.

J.O. v. FRANCE, UN HRC, 23 Mar 2011, para. 9.7.

**Once convicted, person has a right to a "full evaluation of evidence and conduct of trial" at appellate stage:** This includes the right to a hearing; a judicial review solely on the matters of law is not sufficient.

DOMUKOVSKY ET AL. V. GEORGIA, UN HRC, 6 Apr 1998, para. 18.11.

**In order to effect a criminal defendant's right to appeal a conviction, a sentence must be made available to him/her without undue delay:** All stages of judicial proceedings should

take place without undue delay, both in the first instance and on appeal.

PRATT & MORGAN V. JAMAICA, UN HRC, 6 Apr 1989, para. 13.3.

**Risk factors that may undermine a convicted person's right to have his/her sentence reviewed:** Include lack of impartiality in courts, undue delay in appellate proceedings, and infringements on the right to defense.

SOBHRAJ V. NEPAL, UN HRC, 27 Jul 2010, para. 7.5.

**Right to have one's conviction reviewed requires that trial and appellate courts render duly reasoned judgments:** Where the court provides no substantive reason as to why the appeal is denied, the convicted person is effectively prevented from exercising his right to review.

ABOUSHANIF V. NORWAY, UN HRC, 17 Jul 2008, para. 7.2.

**Reviewing court must be able to examine sufficiency of evidence presented at trial:** The review must not be limited to merely verifying whether the evidence presented at trial was

"lawful," but rather should assess the sufficiency of the evidence in relation to the facts.

UCLÉS V. SPAIN, UN HRC, 22 Jul 2009, para. 11.3; KATSORA ET AL. V. BELARUS, UN HRC, 25 Oct 2010, para. 7.3; GAYOSO MARTINEZ V. SPAIN, UN HRC, 19 Oct 2009, para. 9.3.

**Violation: extradition in violation of stay order; inability of accused to appeal adverse decision:** Where accused was extradited to the United States despite obtaining a stay order from the administrative court, a violation occurred. Similarly, the accused's inability to appeal an adverse decision of the regional court was also a violation.

WEISS V. AUSTRIA, UN HRC, 3 Apr 2003, para. 9.6.

**Right to adequate time and facilities for preparation of his/her defense applies during appellate proceedings:** Convicted person must be able to access trial transcripts, duly reasoned judgment of trial court, and other documents necessary to lodge an appeal.

MENNEN V. NETHERLANDS, UN HRC, 27 Jul 2010, para. 8.2 - 8.4.

**Comparable Articles in the *International Covenant on Civil and Political Rights*:** Articles 2(3), 14(1), 14(3)(c) and 14(5). Article 14(5) is similar to Article 375 in that it gives a convicted person the right to appeal to a higher tribunal according to law. In addition, Article 2(3) protects a person's right to have an effective and enforceable remedy; Article 14(1) protects a person's right to equality before courts and tribunals; and Article 14(3)(c) protects a person's right to be tried without undue delay.

### ***European Court of Human Rights***

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**States permitted autonomy in appeal procedures but must legitimately justify any restriction to the right of appeal:** Although States enjoy a wide margin of freedom in crafting appeal procedures (e.g., whether the appellate court will review only matters of law,

or whether a defendant must seek permission to appeal), any restriction on the right to make an appeal must be justified by a legitimate aim.

KROMBACH V. FRANCE, ECHR, 13 Feb 2001, para. 96.

**Comparable Article(s) in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*:** Article 2 of Protocol 7. This article provides for the right of appeal in criminal matters including the exceptions regarding offences of a minor character and as prescribed by law.

**French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Effect of accused lodging appeal against criminal, not civil, part of decision:** Civil party is not authorized to lodge an appeal against a decision concerning his/her civil interests.

No.02-80003, CRIM. BULL. 10, FCC, 23 Jan 2002.

**Appeals against decisions of acquittal:**These are open solely to the prosecutor general. Where he/she does not lodge such appeal, appeal is open to civil party solely concerning civil claims.

No. 02-84335, CRIM. BULL. 145, FCC, 26 Jun 2002 (open solely to prosecutor general); DA.108, FCC, 26 Jan 1944 (civil claims).

**Filing of appeal by prosecutor general:**May be filed either by him/her in person or through one of his/her substitutes.

No. 03-87030, CRIM. BULL. 223, FCC, 26 Nov 2003.

**List of persons allowed to lodge an appeal:**This list is a limitative one.

No. 83-94291, CRIM. BULL. 12, FCC, 10 Jan 1984.

**When the tribunal of first instance has been seized on the basis of only one complaint involving several misdemeanors:**Tribunal may examine all complaints together and sum the fines due in order to decide whether there is a right to appeal or not.

D. 1949. 421, FCC, 5 May 1949.

**Comparable Article(s) in the French Code of Criminal Procedure:**Articles 380(2), 497 and 546. These articles provide for the persons entitled to appeal decision released by the assize court (380-2), the correctional court (497) and the police or neighborhood court (546).

## Article 399. Effect of Appeal by Accused Only

*If an appeal has only been received from the accused, the Court of Appeal may not aggravate the sentence. It may modify the judgment only in favor of the accused. The Court of Appeal may not add an incidental sentence to the principal sentence.*

*The Court of Appeal may requalify the offense found by the Court of First Instance with another offense, by may not aggravate the sentence imposed upon the accused.*

*If the Court of First Instance fails to declare any incidental sentence that was mandatory, the Court of Appeal shall annul the judgment and decide on the sentence itself.*

*If an appeal has only been received from the accused, the Court of Appeal may not raise the amount of money ordered as compensation of damages to be paid to the civil party.*

### ***Application in the ECCC***

**May not find additional grounds for detention on appeal:** Appellate court may not use occasion of an appeal by accused against order for provisional detention to find additional grounds for such detention, where appeal is limited solely to

grounds for detention relied upon by first instance decision.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, para. 52.

**Corresponding ECCC Internal Rule(s):** Internal Rules 110(3) and 110(4). These rules are similar to Article 399, except that Internal Rule 110(3) also stipulates that the Chamber shall not increase any reparations in favour of the accused, while Internal Rule 110(4) provides that the Chamber may impose any compulsory incidental sentence that the Trial Chamber failed to order, without stipulating, as Article 399 does, that they shall annul the judgment.

### ***Application of Comparable Articles in Other Jurisdictions***

#### ***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Violation: aggravating sentence on appeal:** Assize Court of Appeal's decision replacing life imprisonment by thirty years of imprisonment and an enhanced sentence consisting in loss of ten years of civic, civil and family rights shall be considered as aggravating and illegal.

No. 02-85064, CRIM. BULL. 78, FCC, 26 Mar 2003.

**Violation: extending overall duration of penalty on appeal in case of misdemeanor:** Addition, in appeal, of suspended penalty is an

aggravation when overall duration of penalty is extended compared with first instance decision.

No. 01-82335, CRIM. BULL. 242, FCC, 21 Nov 2001;  
No. 68-90940, CRIM. BULL. 193, FCC, 13 Jun 1968.

**Appeal Court does not aggravate situation of the accused when it transforms suspended penalty into suspended penalty with probation:** Such modification only concerns implementation of the sentence, not its duration.

No. 01-84625, CRIM. BULL. 78, FCC, 4 April 2002.

**Comparable Article(s) in the French *Code of Criminal Procedure*:**Articles 380(3), 380(6) and 515. These articles provide for the effect of appeal by the accused only, including the impossibility for the court seised on appeal by the accused only to pronounce a more severe sentence than the one pronounced at first instance.



## Article 401. Redetermination of Legal Qualification of Facts by Court of Appeal

*The Court of Appeal may alter the legal qualification of the facts adopted by the Court of First Instance, but may not add any new element that was not submitted to the Court of First Instance to decide upon.*

### **Application in the ECCC**

**May substitute reasoning but only for issues that have been appealed and where factual findings are available that enable that correction:** Appellate court may substitute its own reasoning for flawed reasoning of lower court's decision, but only if the issue has been appealed and factual findings are available that enable this correction.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, para. 52.

**May not find additional grounds for detention on appeal:** Appellate court may not use occasion of an appeal by accused against order for provisional detention to find additional grounds for such detention, where appeal is limited to sole grounds for detention relied upon by first instance decision.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, para. 52.

**Standard of review – reasonableness:** In reviewing legal qualifications of facts by trial court, standard of reasonableness is

applied, not whether the finding of fact is correct. Wide margin of deference is given to a trial court, whose findings of fact will not be lightly disturbed. Generally, an appellate court may only substitute its findings where no reasonable trier of fact could have accepted the relevant evidence or the finding was wholly erroneous.

DUCH CASE: APPEALS JUDGMENT, ECCC, SCC, 3 Feb 2012, para. 17.

**Substituting conviction for single crime with convictions for several different crimes:** Supreme Court Chamber substituted Trial Chamber's conviction of a single crime with convictions of six distinct crimes. It held that the Trial Chamber had erred in subsuming five additional crimes under the original crime when the five additional crimes each had one materially distinct element from the original crime, and where there was a need to separately address the injury to distinct societal interests through separate convictions.

DUCH CASE: APPEALS JUDGMENT, ECCC, SCC, 3 Feb 2012, paras. 331 and 335-6.

**Corresponding ECCC Internal Rule(s):** Internal Rule 110(2). This rule is substantially similar to Article 401.

## Article 429. Extension of Time Limit for Writing Briefs

*If the twenty-day period is insufficient, any party may request an extension from the President of the Criminal Chamber. The duration of the extension shall not exceed ten days.*

### ***Application in the ECCC***

**Requests for extension of time filed after deadline:** Such requests will not usually be granted.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: EXTENSION OF TIME REQUEST, ECCC, TC, 9 Jun 2011, p. 2.

**request and no prejudice will result:** Trial Chamber granted such extension where the defense filed expedited request for extension, several significant filing deadlines fall on pre-extension deadline, and no prejudice will result from extension.

**Fifteen-day extension for filing document and exhibit list granted where expedited**

IENG SARY CASE: EXTENSION OF TIME REQUEST, ECCC, TC, 27 Jul 2011, p. 2.

**Corresponding ECCC Internal Rule(s):** Internal Rule 39. Internal Rule 39 is similar to Article 429 except that it also allows investigating judges and Chambers judges to extend time limits on their own motion and authorizes extensions of any time limit at the discretion of the investigating judges or Chambers judges.

## Article 436. Decisions on Questions of Law

*The Supreme Court shall make a decision on the questions of law which were raised by the requester and described in his briefs.*

### **Application in the ECCC**

**Supreme Court Chamber standard of review:** As final court of appeal, Supreme Court Chamber reviews lower court decisions within grounds of appeal and consistent with the direction of the appeal.

KHIEU SAMPHAN CASE: IMMEDIATE APPEAL ON APPLICATION FOR RELEASE, ECCC, SCC, 6 Jun 2011, para. 52.

**Quality of pleadings:** Written pleadings may be inadmissible on procedural

grounds due to incoherence or lack of specificity. Decisive question is whether appellant has pleaded his case in manner that enables opposing party to know the case he has to meet, and enables the Chamber to identify and rule upon the issues in dispute. This will depend on the circumstances, particularly the nature of the challenge to the trial judgment.

DUCH CASE: APPEALS JUDGMENT, ECCC, SCC, 3 Feb 2012, para. 42.

**Corresponding ECCC Internal Rule(s):** Internal Rule 110(1). This rule is substantially similar to Article 436.

### **Application of Comparable Articles in Other Jurisdictions**

#### **European Court of Human Rights**

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**States have a large margin of appreciation to determine how legal review is to be exercised in their jurisdiction:** Any restriction shall be

legitimate and shall not infringe right of review on law and facts, or law only.

KROMBACH V. FRANCE, ECHR, 13 Feb 2001, para. 96.

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:** Article 2 of Protocol 7. This article provides for the right of appeal in criminal matters including the grounds on which it can be exercised by law.

#### **French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Cassation application is valid only if filed against decision potentially violating law:** This is regardless of filing party.

No. 81-93489, CRIM. BULL. 269, FCC, 29 Nov 1982.

**Must be filed against judgment rendered in final instance:** Otherwise, cassation application inadmissible.

No. 05-84275, CRIM.BULL. 240, FCC, 28 Sep 2005.

**Only the parties to final instance judgment eligible:** They may file cassation application or intervene before Court of Cassation.

No.68-93573, CRIM. BULL. 281, FCC, 4 Nov 1969.

**When civil parties should file cassation application:**Against prejudicial disposals to their civil interests.

No. 78-93482, CRIM. BULL. 168, FCC, 2 Jun 1980;  
CRIM. BULL.47, FCC, 5 Feb 1926.

**Cassation applications by prosecutor:** Prosecutor can file cassation application against any annulment decision that it would find illegal. Their application should only be admissible against prejudicial decision to public interest.

No. 62-92075, CRIM. BULL.268, FCC, 20 Oct 1964  
(can file against any annulment decision); CRIM. BULL.254, FCC, 20 Jun 1946(prejudicial decision to public interest).

**Comparable Article(s) in the French Code of Criminal Procedure:**Articles 567 and 591. These articles provide for Court of Cassation applications including by stipulating that cassation can only be raised for violations of the law.

## Article 453. Reasons for Judgment

*The judgment shall include reasons. It shall be declared in public.*

### *Application in the ECCC*

**Separate issuance of decision and reasons may not be a violation:** Whether the court's delivery of decision first and reasons later constitutes procedural violation is considered only if both decision and reasons were issued outside of period allowed under Internal Rules. If both decision and reasons were issued within allowed period, issue of their separation is moot.

NUON CHEA AND IENG THIRITH CASES: IMMEDIATE APPEALS ON URGENT APPLICATIONS FOR IMMEDIATE RELEASE, ECCC, SCC, 3 Jun 2011, para. 31.

**fundamental right:** the extent of the duty to provide reasons varies according to the nature of the decision and must be determined in light of the circumstances of the case.

KHIEU SAMPHAN CASE: IMMEDIATE APPEALS ON URGENT APPLICATIONS FOR IMMEDIATE RELEASE, ECCC, SCC, 22 August 2013, para. 30.

### **The right to a reasoned decision is a**

**Corresponding ECCC Internal Rule(s):** Internal Rules 101 and 111. Internal Rule 101, which applies to the Trial Chamber (but which applies to the Supreme Court Chamber via Internal Rule 111is similar to Article 453, except that it expressly clarifies that the reasons must include both factual and legal reasons.

### *Application of Comparable Articles in Other Jurisdictions*

#### **European Court of Human Rights**

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Public nature of hearings is fundamental fair trial right:** However, this principle is not absolute and hearings can be held in private in order to protect private life or in the interest of justice.

DIENNET V. FRANCE, ECHR, 26 Sep 1995, para. 33.

**Publicly pronounced should not be interpreted literally:** It does not necessarily mean judgments shall be read out loud. Many States resort to a registry where the public can access decisions. Each State has a margin of appreciation to apply these principles in its

system. Such practice therefore does not contravene the Convention.

SUTTER V. SWITZERLAND, ECHR, 22 Feb 1984, paras.32-34 (not to be interpreted literally, margin of appreciation); MOSER V. AUSTRIA, ECHR, 21 Sep 2006, paras.103-104 (example where decision violates fair trial by being neither pronounced publicly nor sufficiently available to public).

**If a sentence is to be decided by a lay jury, the fact that the judgment is not reasoned does not violate the Convention:** However, a verdict shall be understandable. When a trial is

conducted by professional judges, reasons must be given with sufficient clarity.

TAXQUET V. BELGIUM, ECHR, 16 Nov 2010, paras. 89-91.

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:** Articles 6(1) and 45. Article 6 provides for fair trial rights and Article 45 provides for the reasons for judgment and decisions declaring applications admissible or inadmissible including the possibility for a judge to write a separate opinion when the judgment does not represent the unanimous opinion of the judges.

# Special Proceedings

This section contains annotations of the following articles in the *Cambodian Code of Criminal Procedure* (the Code):

- Article 503. Deduction of Duration of Provisional Detention
- Article 508. Presentation of Detainee Upon Request
- Article 556. Grounds for Challenging Judge
- Article 557. Application for Disqualification
- Article 558. Recipients of Application for Disqualification of Judge
- Article 561. Examination of Application for Disqualification of Judge
- Article 562. Decision on Application for Disqualification of Judge
- Article 563. Activities Performed Before Notification of Challenge

## Article 503. Deduction of Duration of Provisional Detention

*The duration of any provisional detention shall be deducted from the sentence decided by the court or the total duration of the sentences that has been imposed following the consolidation of sentences.*

### **Application in the ECCC**

**Supreme Court Chamber reversed Trial Chamber's 5-year sentence reduction for illegal detention:** The trial court had reduced Duch's sentence for serving illegal detention by 5 years and for credit for provisional detention. Supreme Court Chamber rejected that the mitigating

circumstance of his illegal detention should play a role in Duch's sentence, given the gravity of his crimes. Supreme Court therefore did not give Duch credit for his provisional sentence.

DUCH CASE: APPEAL JUDGMENT, ECCC, SCC, 3 Feb 2012, para 33-35.

**Corresponding ECCC Internal Rule(s):** Internal Rules 63(1)(b), 99(1) and 99(2). Internal Rule 63(1)(b) provides that temporary periods of detention ordered while the charged person is preparing his/her defense to an order of immediate detention should be deducted from any orders of provisional detention. Internal Rule 99(1) is similar to Article 503 except that it applies only to cases of acquittal or where the sentence handed down is less than or equal to provisional detention already served; in those instances, Internal Rule 99(1) provides for the immediate release of the accused. Internal Rule 99(2) is similar to Article 503 since its reference to decisions on "continuing detention" implies that any period of provisional detention should be taken into account in sentencing decisions.

### **Application of Comparable Articles in Other Jurisdictions**

#### **European Court of Human Rights**

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Court may refuse to deduct duration of provisional detention from final sentence:** When the contested deprivation of liberty has been lawful and in accordance with procedure prescribed by law.

MONNELL & MORRIS V. UNITED KINGDOM, ECHR, 2 Mar 1987, para.50.

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:** There is no equivalent to Article 503 in the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the European system, the primary legal basis for the deduction of duration of provisional detention from final sentences is Article 33, Recommendation 2006(13) of the Council of Europe on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuses.



**French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Such provision does not concern cases of detention spent outside France:** That is, it does not include any sentence pronounced by foreign judicial authorities.

No.94-85994, FCC, 24 Oct 1995.

**Comparable Article(s) in the French Code of Criminal Procedure:** Article 716(4). This article provides for the deduction of the duration of pre-trial detention from the final sentence.

## Article 508. Presentation of Detainee Upon Request

*An administrative agent of prisons or detention centers shall present every detainee to a judge or to a judicial police officer performing his mission through a delegation of power by the judicial authority, if they so request.*

### ***Application in the ECCC***

**Scheduled detention interviews not mandatory once Trial Chamber seized:** Although tribunal rule applicable to judicial investigations stage requires that charged person in provisional detention be brought before investigating judges every four months to discuss detention conditions and treatment, these scheduled detention interviews are not mandatory once the Trial Chamber is seized of case because defendant can raise concerns

about detention conditions through oral and written submission to court; thus, scheduled detention interviews are not necessary to safeguard defendant's right to be detained in humane and dignified conditions.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: RESUMPTION OF DETENTION INTERVIEW REQUEST, ECCC, TC, 11 May 2011, paras. 4-6.

**Corresponding ECCC Internal Rule(s):** Internal Rule63(8). This rule is similar to Article 508, except that it sets a time limit of at least every four months so as to give the charged person an opportunity to discuss his or her treatment and conditions during provisional detention.

### ***Application of Comparable Articles in Other Jurisdictions***

#### ***European Court of Human Rights***

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**The role and responsibility of the officer assessing legitimacy of detention:** Officer should hear detainee in person. If detention not justified, officer shall have power to order individual's release.

MAMEDOVA V. RUSSIA, ECHR, 1 Jun 2006, paras. 80-81 (officer shall hear the accused in person); NIKOLOVA V. BULGARIA, ECHR, 25 Mar 1999, paras.49-50 (role and qualities of officer, officer has power to order release).

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:** Articles 5(1) and (3). These articles provide for liberty and security of the person, including the right to lawful detention or arrest and to be brought promptly before a court.

## Article 556. Grounds for Challenging Judge

*An application for disqualification is admissible only if it is directed against a judge. Every judge may be challenged on the following grounds:*

- *If the judge or his spouse, regardless of any possible divorce, is one of the parties;*
- *If the judge is linked with one of the parties by parental link up to the sixth degree or by alliance up to the third degree or was formerly linked by alliance up to the third degree;*
- *If the judge is a guardian of one of the parties;*
- *If there is a pending litigation between the judge and one of the parties;*
- *If the judge is a witness or was called to witness as expert in the case;*
- *If the judge is or was a representative or assistant to one of the parties; or*
- *If the judge has participated in the decision on the case:*
  - *As an arbitrator;*
  - *At the Court of First Instance in the matter;*
  - *At the Court of Appeal in the matter; or*
  - *Has given legal opinion in the matter.*

### ***Application in the ECCC***

**Both actual bias and appearance of bias acceptable basis for application to disqualify:** For purposes of an application for disqualification, requirement of judicial impartiality is violated not only by existence of actual bias but also by appearance of bias.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: JUDGE YOU OTTARA DISQUALIFICATION, ECCC, TC, 9 May 2011, para. 11; IENG THIRITH CASE: JUDGE SOM SEREYVUTH DISQUALIFICATION, ECCC, SCC, 3 Jun 2011, para. 10; NUON CHEA AND IENG SARY CASES: JUDGE SILVIA CARTWRIGHT DISQUALIFICATION, ECCC, TC, 2 Dec 2011, para. 13; NUON CHEA, IENG SARY, AND KHIEU SAMPHAN CASES: JUDGE SILVIA CARTWRIGHT DISQUALIFICATION, ECCC, TC, 9 Mar 2012, para. 11. IENG SARY CASE: JUDGE SILVIA CARTWRIGHT DISQUALIFICATION, ECCC, TC, 4 Jun 2012 para. 12.

**Ways to establish appearance of bias:**By showing (a) judge is party to the case, or has financial or proprietary interest in outcome of the case, or judge's decision will promote cause in which he/she is involved, or (b) circumstances would lead

reasonable observer, properly informed, to reasonably apprehend bias.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: JUDGE YOU OTTARA DISQUALIFICATION, ECCC, TC, 9 May 2011, para. 11; IENG THIRITH CASE: JUDGE SOM SEREYVUTH DISQUALIFICATION, ECCC, SCC, 3 Jun 2011, para. 10; NUON CHEA AND IENG SARY CASES: JUDGE SILVIA CARTWRIGHT DISQUALIFICATION, ECCC, TC, 2 Dec 2011, para. 13; NUON CHEA, IENG SARY, AND KHIEU SAMPHAN CASES: JUDGE SILVIA CARTWRIGHT DISQUALIFICATION, ECCC, TC, 9 Mar 2012, para. 12; IENG SARY CASE: JUDGE SILVIA CARTWRIGHT DISQUALIFICATION, ECCC, TC, 4 Jun 2012 para. 13.

**Definition of reasonable observer, whose reasonable apprehension of judge's bias warrants disqualification of judge:**An informed person, with knowledge of all of relevant circumstances, including traditions of integrity and impartiality that form part of background, and appraised also of fact that impartiality is one duty judges swear to uphold.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: JUDGE YOU OTTARA DISQUALIFICATION, ECCC, TC, 9 May 2011, paras. 11-12; IENG THIRITH CASE: JUDGE SOM SEREYVUTH DISQUALIFICATION, ECCC, SCC, 3 Jun 2011, para. 10; NUON CHEA AND IENG SARY CASES: JUDGE SILVIA CARTWRIGHT DISQUALIFICATION, ECCC, TC, 2 Dec 2011, para. 14; NUON CHEA, IENG SARY, AND KHIEU SAMPHAN CASES: JUDGE SILVIA CARTWRIGHT DISQUALIFICATION, ECCC, TC, 9 Mar 2012, para. 12; IENG SARY CASE: JUDGE SILVIA CARTWRIGHT DISQUALIFICATION, ECCC, TC, 4 Jun 2012 para. 13.

**Third party opinions generally insufficient:** When assessing merit of an application for judicial disqualification, third party opinions are generally insufficient on their own to establish reasonable apprehension of bias.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: JUDGE YOU OTTARA DISQUALIFICATION, ECCC, TC, 9 May 2011, para. 15.

**Party seeking disqualification of judge for bias must demonstrate judge's inability to rule fairly with respect to the specific issues or parties before him:** Bias demonstrated in prior case does not automatically require disqualification.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: JUDGE YOU OTTARA DISQUALIFICATION, ECCC, TC, 9 May 2011, paras. 12-13; NUON CHEA, IENG SARY AND KHIEU SAMPHAN CASES: DECISION ON APPLICATION FOR IMMEDIATE ACTION PURSUANT TO RULE 35, ECCC, TC, 22 Nov 2012 paras.9-14; NUON CHEA CASE: DECISION ON NUON CHEA'S IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER DECISION ON APPLICATION FOR IMMEDIATE ACTION PURSUANT TO RULE 35, ECCC, SC, 22 Mar 2013 paras. 20-24.

**Prior biased decision by multiple judges cannot support application for disqualification of one of those judges:** This is the case where the challenged judge was only one member of multi-judge panel that issued biased decision, and views of individual members of panel are not disclosed.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: JUDGE YOU OTTARA DISQUALIFICATION, ECCC, TC, 9 May 2011, para. 16; IENG THIRITH CASE: JUDGE SOM SEREYVUTH DISQUALIFICATION, ECCC, SCC, 3 Jun 2011, paras. 11-12.

**When alleging judicial bias in application for disqualification, insufficient to argue that judge's legal reasoning in a prior unrelated decision was arbitrary or unconvincing:** This alone would not show, or reasonably be perceived to show, a pre-disposition against the accused.

IENG THIRITH CASE: JUDGE SOM SEREYVUTH DISQUALIFICATION, ECCC, SCC, 3 Jun 2011, para. 13.

**Ex parte communications do not constitute prima facie grounds for establishing bias:** Where a judge, a prosecutor and members of the court's administration are communicating regarding administrative matters, the mere fact that the communications occurred is not in and of itself grounds for establishing bias.

NUON CHEA AND IENG SARY CASES: JUDGE SILVIA CARTWRIGHT DISQUALIFICATION, ECCC, TC, 2 Dec 2011, para. 16; IENG SARY CASE: JUDGE SILVIA CARTWRIGHT DISQUALIFICATION, ECCC, TC, 4 Jun 2012 para. 15; NUON CHEA AND IENG SARY CASES: JUDGE SILVIA CARTWRIGHT DISQUALIFICATION, ECCC, SC, 17 Apr 2012, SCC para. 23.

**Statements made by public officials to the media may violate the presumption of innocence, but do not in and of themselves prove improper influence of a judge in a case:** Where a public official is seen to be publicly asserting the guilt of an accused, criminal sanctions will only apply where s/he knowingly and willfully interferes or attempts to interfere with the administration of justice.

NUON CHEA, IENG SARY AND KHIEU SAMPHAN CASES: DECISION ON RULE 35 APPLICATIONS FOR SUMMARY ACTION, ECCC, TC, 11 May 2012 paras. 19-22; NUON CHEA, IENG SARY AND KHIEU SAMPHAN CASES: DECISION ON RULE 35 REQUEST CALLING FOR SUMMARY ACTION AGAINST MINISTER OF AFFAIRS HOR NAMHONG (E219), ECCC, TC, 22 Nov. 2012

paras. 8-10; NUON CHEA CASE: DECISION ON NUON CHEA'S RULE 35 APPLICATIONS FOR SUMMARY ACTION ECCC, SC, 14 Sep. 2012, paras 33-38.

**Corresponding ECCC Internal Rule(s):** Internal Rule 34(2) and 35. This rule is similar to Article 556, but provides broader grounds for disqualification than Article 556. Under Internal Rule 34(2), a judge may be disqualified from any case in which the judge has a personal or financial interest or concerning which the Judge has, or has had, any association which objectively might affect his or her impartiality, or objectively give rise to the appearance of bias. Rule 35 applies to persons who knowingly and willfully interfere with the administration of justice and includes judges but is not limited to them.

### *Application of Comparable Articles in Other Jurisdictions*

#### *UN Human Rights Committee*

*Cambodia is a party to the International Covenant on Civil and Political Rights (ICCPR), which sets out international law principles on criminal procedure. Below are examples of how comparable ICCPR articles have been interpreted and applied by its implementing body, the UN Human Rights Committee.*

**Meaning of judicial impartiality:** This principle, an important aspect of the right to a fair trial, means that judges must not harbor preconceptions about matter put before them, and must not act in ways that promote the interests of one of the parties.

KARTTUNEN V. FINLAND, UN HRC, 23 Oct 1992, para. 7.2.

**Participation of a judge in cassation appeal who previously sat on panel in case involving the same accused does not necessarily raise issues of impartiality:** There are no such issues if subject matter of the latter does not form part of cassation appeal.

BABKIN V. RUSSIAN FEDERATION, UN HRC, 3 Apr 2008, para. 13.3.

**Violation: evidence evaluation that is clearly arbitrary or tantamount to a denial of justice:** Although it is generally up to State to evaluate facts and evidence in particular case, such evaluation will violate judicial impartiality requirements if it can be shown that the evaluation was clearly arbitrary or tantamount to a denial of justice.

SHARIFOVA, SAFAROV & BURKHONOV V. TAJIKISTAN, UN HRC, 1 Apr 2008, para. 6.5.

**Comparable Article(s) in the International Covenant on Civil and Political Rights:** Article 14(1). This article guarantees a defendant a fair trial in front of an impartial tribunal, but does not provide specific factors on the basis of which impartiality can be challenged or what procedure must be followed to do so.

#### *European Court of Human Rights*

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**Two elements in requirement of judicial impartiality:** Subjective and objective element.

PIERSACK V. BELGIUM, ECHR, 1 Oct 1982, para. 30.

**Subjective element: personal impartiality, i.e., no judge should hold any personal prejudice or predilection on the case:** Thus, judge cannot have any link with one of the parties or a reason to favour or disfavour one of them; must be mentally impartial. However, judge's impartiality is presumed until proof of the contrary.

DAKTARAS V. LITHUANIA, ECHR, 10 Oct 2000, para. 30 (definition of subjective impartiality); LE COMPTE, VAN LEUVEN & DE MEYERE V. BELGIUM, ECHR, 23 Jun 1981, para. 58 (judge's impartiality presumed).

**Objective element: whether or not guarantees offered by judge are sufficient to exclude any legitimate doubt relating to his/her impartiality:** Consequently, involvement of same judge at different stages of criminal proceedings raises an issue regarding his/her impartiality. Any judge in respect of whom there is legitimate reason to fear lack of impartiality must withdraw.

HAUSCHILD V. DENMARK, ECHR, 24 May 1989, para. 48-49 (definition of objective element, involvement at different stages); DE CUBBER V. BELGIUM, ECHR, 26 Oct 1984, para. 26 (judge must withdraw if there is legitimate reason to fear lack of impartiality).

**Civilians can rightfully fear lack of impartiality if bench of second trial court**

**contains army officers:** This is even if civilian judges sit amongst them. Bench could be influenced by elements unrelated to the case facts, which violates fair trial rights.

BAŞKAYA & OKÇUOĞLU V. TURKEY, ECHR, 8 Jul 1999, para. 79.

**Statements made by a judge to the press can violate the right of an applicant to a fair hearing if shown to exhibit a lack of impartiality:** Remarks made by a judge to the press which imply he/she has already formed an unfavourable view of an applicant can be shown to violate the applicant's fair trial rights. An objective test as to the actual bias or appearance thereof may be supplemented by a subjective test in which the judges' personal convictions are assessed.

BUSCEMI V ITALY, ECHR, 16 Sep 1999, para. 68; OLUJIC V CROATIA, ECHR, 5 May 2009, para 58-60 (noting that judges must exercise maximum discretion in cases in which they deal in order to uphold the impartiality required by the office); LAVENTS V LATVIA, ECHR, 28 Nov 2002, para 118-120 (subjective test of a judge or court's bias may be applied in certain instances); KYPRIOANOU V CYPRUS, ECHR, 15 Dec 2005, para. 119 (noting analysis of a judge's personal convictions when making an assessment of bias).

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:** Articles 6 and 21. Article 6 provides for fair trial rights including the right of a person to be tried before an independent and impartial tribunal established by law. Article 21 establishes criteria for judicial office (namely, high moral character and qualifications).

## Article 557. Application for Disqualification

*The party who wishes to apply for disqualification of a judge shall file the application as soon as he becomes aware of the causes. Failure to do so shall cause the application to be inadmissible.*

*In no case can an application for disqualification be made after the closing of the hearing.*

### **Application in the ECCC**

**Rules for an application for disqualification must be read cumulatively:** The application must be filed within proper time limits specified by the rules.

IENG THIRITH CASE: JUDGE SOM SEREYVUTH DISQUALIFICATION, ECCC, SCC, 3 Jun 2011, para.

4 (read cumulatively); NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: JUDGE NIL NONN, SILVIA CARTWRIGHT, YA SOKHAN, JEAN-MARC LAVERGNE AND THOU MONY DISQUALIFICATION, ECCC, TC, 23 March 2011, para. 7 (filing within time limits).

**Corresponding ECCC Internal Rule(s):** Internal Rule 34(4). This rule is substantially similar to Article 557 except that it is more specific as to the situations in which and the persons against whom an application may be submitted.

### **Application of Comparable Articles in Other Jurisdictions**

#### **European Court of Human Rights**

*The European Convention for the Protection of Human Rights and Fundamental Freedoms contains substantially similar criminal procedure protections to the International Covenant on Civil and Political Rights, to which Cambodia is a party. Below are examples of how comparable European Convention articles have been interpreted and applied by its court, the European Court of Human Rights.*

**When there are doubts on impartiality of judge and judge did not withdraw, accused may apply for judge's disqualification:** While the right of the accused to apply for disqualification may be waived, any such waiver must be established in unequivocal manner.

DE CUBBER V. BELGIUM, ECHR, 26 Oct 1984, para. 26 (judge must withdraw if there is a legitimate reason to fear impartiality); PFEIFER & PLANKL V. AUSTRIA, ECHR, 25 Feb 1992, para.37 (waiver must be established in unequivocal manner); OBERSCHLICK V. AUSTRIA, ECHR, 23 May 1991, para.51 (waiver must be established in unequivocal manner).

**Comparable Article(s) in the European Convention for the Protection of Human Rights and Fundamental Freedoms:** Article 6(1). This provides for fair trial rights. Although interpretation of Article 6(1) by case law of the European Court on Human Rights gives the accused the right to challenge the composition of the court in which he/she is judged, matters relative to the way the accused can do so fall within the scope of the criminal procedure legislation of each State.

**French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Form of application for disqualification:** chamber constitutes application for disqualification.  
 Application in which person under judicial examination claims strong suspicion of impartiality of judge sitting in accusation

No. 76-92090, CRIM. BULL. 343, FCC, 25 Nov 1976.

**Comparable Article(s) in the French Code of Criminal Procedure:**Articles 669 and 670. These articles provides for challenges to the impartiality of judges, including by permitting applications for disqualification of judges.



## Article 558. Recipient of Application for Disqualification of Judge

*The party shall file the application to:*

- *The President of the Court of Appeal if it is directed against the President or a judge of the Court of First Instance;*
- *The President of the Supreme Court if it is directed against a judge of the Supreme Court, the President or a judge of the Court of Appeal.*

*The application for disqualification shall clearly state the grounds for the challenge, supported by evidence, otherwise the application is inadmissible.*

### ***Application in the ECCC***

**To file an application for disqualification, applicant must have appeal pending before Supreme Court Chamber:** When filing application for disqualification of judge on Supreme Court Chamber on basis of judicial bias, applicant must have appeal pending before that Chamber so

that it can be said that legal interest has been affected if Chamber does not consider the application.

IENG THIRITH CASE: JUDGE SOM SEREYVUTH DISQUALIFICATION, ECCC, SCC, 3 Jun 2011, para. 4.

**Corresponding ECCC Internal Rule(s):** Internal Rule34(3). This rule is substantially similar to Article 558.

## Article 561. Examination of Application for Disqualification of Judge

*For the examination of the application no hearing of the parties or the relevant judge is necessary.*

*If the challenge is accepted, a new judge replacing the recused judge shall be appointed.*

*If the challenge is rejected, the applicant for disqualification may be fined 200,000 Riels, without prejudice to any damage payable to the challenged judge.*

### **Application in the ECCC**

#### **Application for disqualification of judge can be decided without public hearing:**

This is because the interest in transparency can be adequately safeguarded by making relevant filings available to public.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: JUDGE YOU OTTARA DISQUALIFICATION, ECCC, TC, 9 May 2011, para. 9; IENG THIRITH CASE: JUDGE SOM SEREYVUTH DISQUALIFICATION, ECCC, SCC, 3 Jun 2011, para. 7-8.

**Where rules do not specify otherwise, a public hearing on an application to disqualify a judge for lack of independence is not required:** Thus, the application may be decided on written submissions alone.

IENG THIRITH CASE: JUDGE SOM SEREYVUTH DISQUALIFICATION, ECCC, SCC, 3 Jun 2011, para. 8. NUON CHEA CASE: DECISION ON IMMEDIATE APPEAL BY NUON CHEA AGAINST THE TRIAL CHAMBER'S DECISION ON FAIRNESS OF JUDICIAL INVESTIGATION, ECCC, SCC, 27 Apr, 2012, para. 26.

**Corresponding ECCC Internal Rule(s):** Internal Rules 34 and 109(1). Internal Rule 34 addresses the substance and procedure for recusal and disqualification of judges, but unlike Article 561, does not address explicitly whether an oral hearing is required in disqualification proceedings. Internal Rule 34(7) states that an application for disqualification shall be considered by the Chamber judges, and Internal Rule 34(8) allows for the application to be heard by remote means when necessary. Nowhere does Internal Rule 34 mention, however, whether the applicant is entitled to make his or her case orally in the presence of the judges.

### **Application of Comparable Articles in Other Jurisdictions**

#### **UN Human Rights Committee**

*Cambodia is a party to the International Covenant on Civil and Political Rights (ICCPR), which sets out international law principles on criminal procedure. Below are examples of how comparable ICCPR articles have been interpreted and applied by its implementing body, the UN Human Rights Committee.*

**Where convicted person appeals his/her conviction on the basis that one judge on panel of judges should have been disqualified, he/she is entitled to an oral hearing:** This is because this procedure enables the appellate body to re-examine all evidence adduced at trial

and to determine whether the procedural flaw affected trial's outcomes.

KARTTUNEN V. FINLAND, UN HRC, 23 Oct 1992, para. 7.3.

**Comparable Article(s) in the *International Covenant on Civil and Political Rights*:**Article 14(1). This article guarantees a defendant a fair trial in front of an impartial tribunal; however, it does not provide specific factors on the basis of which impartiality can be challenged or what procedure must be followed to do so.

***French Court of Cassation***

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**First President of Court of Cassation decides on discretionary basis amount of fine due by applicant in case of challenge dismissed:**It has to be between €75 and €750,however, the fact that he/she may determine amount ensures

respect of principles of legality and individualization of penalties.

No. 11-82861, CRIM. BULL. 157, FCC, 6 Jul 2011.

**Comparable Article(s) in the French *Code of Criminal Procedure*:**Article 673. This article provides for the examination of applications for disqualification.

## Article 562. Decision on Application for Disqualification of Judge

*The authority specified in Article 558 (Recipients of Application for Disqualification of Judge) of this Code shall decide on the challenge by an order which is not subject to appeal. The relevant judge and the applicant for disqualification shall be notified of the order by the court clerk.*

### **Application in the ECCC**

**Prior biased decision by multiple judges cannot support application for disqualification of one of those judges:** This is the case where the challenged judge was only one member of multi-judge panel that issued biased decision, and views of individual members of panel are not disclosed.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: JUDGE YOU OTTARA DISQUALIFICATION, ECCC, TC, 9 May 2011, para. 16; IENG THIRITH CASE: JUDGE SOM SEREYVUTH DISQUALIFICATION, ECCC, SCC, 3 Jun 2011, paras. 11-12.

**that judge's legal reasoning in a prior unrelated decision was arbitrary or unconvincing:** This alone would not show, or reasonably be perceived to show, a pre-disposition against the accused.

**When adjudicating application for disqualification, starting point for any determination is presumption of impartiality:** This is based on the judge's oath of office and qualifications for their appointment; this presumption imposes a high threshold on the applicant who bears the burden of displacing that presumption.

IENG THIRITH CASE: JUDGE SOM SEREYVUTH DISQUALIFICATION, ECCC, SCC, 3 Jun 2011, para. 10; NUON CHEA AND IENG SARY CASES: JUDGE SILVIA CARTWRIGHT DISQUALIFICATION, ECCC, TC, 2 Dec 2011, para. 14. NUON CHEA, IENG SARY, AND KHIEU SAMPHAN CASES: JUDGE SILVIA CARTWRIGHT DISQUALIFICATION, ECCC, TC, 9 Mar 2012, para. 12; IENG SARY CASE: JUDGE SILVIA CARTWRIGHT DISQUALIFICATION, ECCC, TC, 4 Jun 2012 para. 13.

**When alleging judicial bias in application for disqualification, insufficient to argue**

IENG THIRITH CASE: JUDGE SOM SEREYVUTH DISQUALIFICATION, ECCC, SCC, 3 Jun 2011, para. 13.

**Ex parte communications do not constitute prima facie grounds for establishing bias.** Where a judge, a prosecutor and members of the court's administration are communicating regarding administrative matters, the mere fact that the communications occurred is not in and of itself grounds for establishing bias.

NUON CHEA, IENG SARY AND KHIEU SAMPHAN: JUDGE SILVIA CARTWRIGHT DISQUALIFICATION, ECCC, TC, 2 Dec 2011, para. 16; NUON CHEA, IENG SARY, AND KHIEU SAMPHAN CASES: JUDGE SILVIA CARTWRIGHT IENG SARY CASE: JUDGE SILVIA CARTWRIGHT DISQUALIFICATION, ECCC, TC, 4 Jun 2012 para. 15.

**When adjudicating an application for disqualification, each ground for disqualification must be considered as it relates to the factual allegations alleged:** Stand-alone reasons for each ground for which a judge has been alleged to appear biased must be provided by the authority considering the application for disqualification. NUON CHEA CASE: DECISION ON IMMEDIATE APPEAL BY NUON CHEA AGAINST THE TRIAL CHAMBER'S DECISION ON FAIRNESS OF JUDICIAL INVESTIGATION, ECCC, SCC, 27 Apr, 2012, paras. 27 - 28.

**Corresponding ECCC Internal Rule(s):** Internal Rule 34. This rule governs the substance and procedure for the recusal and disqualification of judges in the ECCC.

## Article 563. Activities Performed Before Notification of Challenge

*Any activities performed by the challenged judge prior to the notification of an application for disqualification shall not be affected.*

### **Application in the ECCC**

**All prior decisions deemed valid:** Any decision issued prior to the determination of an application for disqualification is deemed valid.

NUON CHEA, IENG SARY, KHIEU SAMPHAN AND IENG THIRITH CASES: JUDGE YOU OTTARA DISQUALIFICATION, ECCC, TC, 9 May 2011, para. 3.

decisions issued prior to determination of application for disqualification are deemed valid applies even when application for disqualification is pending at time decision is rendered.

NUON CHEA CASE: JUDGE NEY THOL DISQUALIFICATION, ECCC, PTC, 4 Feb 2008, para. 5.

**Decisions valid even when disqualification pending:** The rule that

**Corresponding ECCC Internal Rule(s):** Internal Rule 34(9). This rule differs from Article 563 in that under Internal Rule 34(9), actions by the challenged judge remain valid so long as they predate a determination that the judge should be disqualified.

### **Application of Comparable Articles in Other Jurisdictions**

#### **French Court of Cassation**

*The Cambodian Code of Criminal Procedure was based on the French Code of Criminal Procedure. Below are examples of how comparable French code articles have been interpreted and applied in the highest court in France, the Court of Cassation.*

**Notification of challenge performed against judge shall not void all acts performed by this judge:** Only the proven violation of impartiality requirement could lead to such result.

Nos. 02-82676/07-82110, CRIM. BULL.44, FCC, 20 Feb 2008.

**Comparable Article(s) in the French Code of Criminal Procedure:** There is no equivalent to Article 563 in the French Code of Criminal Procedure. However, this can be deduced from Article 674 which provides for the application for disqualification proceedings including activities performed before notification.

# Table of Cases

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- DUCH CASE: TRIAL TRANSCRIPTS, DAY 5** (Transcript of Proceedings - “Duch” Trial Public), Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case No. 001/18-07-2007-ECCC/TC, Doc. No. E1/9.1, Trial Day 5, 7 Apr 2009.
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## Comparative Table: Code of Criminal Procedure and ECCC Internal Rules

This table compares the Code of Criminal Procedure of the Kingdom of Cambodia to the ECCC Internal Rules (Revision 8). It sets out only those articles in the Code of Criminal Procedure for which there is at least one ECCC Internal Rule which is broadly comparable. In addition, wherever a Code of Criminal Procedure article has been annotated in this *Annotated Cambodian Code of Criminal Procedure*, it is shown in bold.

It is noted that there are frequently differences between the Code of Criminal Procedure article and corresponding Internal Rules. Therefore, readers are encouraged to refer to the Code of Criminal Procedure and ECCC Internal Rules themselves to check the language of the relevant article and Internal Rules. In addition, where there is an annotation of the Code of Criminal Procedure article in this *Annotated Cambodian Code of Criminal Procedure*, readers are referred to the “Corresponding ECCC Internal Rule(s)” section of the relevant article annotation. This section contains a high-level explanation of the key similarities and differences between the Code of Criminal Procedure article and its corresponding ECCC Internal Rule.

Code of Criminal Procedure Article	Corresponding ECCC Internal Rule(s)
<b>CODE OF CRIMINAL PROCEDURE BOOK ONE: CRIMINAL AND CIVIL ACTIONS</b>	
<b>TITLE 1: GENERAL PRINCIPLES</b>	
<b>Article 2. Criminal and Civil Actions</b> ( <i>see annotation</i> )	Rule 23. General Principles of Victims Participation as Civil Parties Rule 23 <i>bis</i> . Application and Admission of Civil Parties Rule 23 <i>quinquies</i> . Civil Party Claim Rule 100. Judgment on Civil Party Claims
<b>TITLE 2: CRIMINAL ACTIONS</b>	
Article 4. Initiation of Actions by Prosecution	Rule 53. Introductory Submissions
Article 5. Criminal Actions Initiated by Victims	Rule 23 <i>bis</i> . Application and Admission of Civil Parties
Article 6. Complaints by Victims	Rule 23 <i>bis</i> . Application and Admission of Civil Parties
<b>Article 7. Extinction of Criminal Actions</b> ( <i>see annotation</i> )	Rule 32 <i>bis</i> . Inquiry into the cause of death of a person in custody. Rule 89. Preliminary Objections. Rule 112. Revision of final judgment.



<b>Code of Criminal Procedure Article</b>	<b>Corresponding ECCC Internal Rule(s)</b>
<b>Article 12. Res Judicata</b> <i>(see annotation)</i>	Rule 49. Exercising Public Action
<b>TITLE 3: ACTIONS</b>	
<b>Article 13. Civil Action and Injury</b> <i>(see annotation)</i>	Rule 23. General Principles of Victims Participation as Civil Parties Rule 23 <i>bis</i> . Application and Admission of Civil Parties
Article 14. Compensation for Injury	Rule 23 <i>quinquies</i> . Civil Party Claim
Article 15. Plaintiff in Civil Action	Rule 23. General Principles of Victims Participation as Civil Parties
Article 21. Defendant in Civil Action	Rule 23. General Principles of Victims Participation as Civil Parties
Article 22. Relationship of Jurisdictions of Civil and Criminal Courts	Rule 23 <i>bis</i> . Application and Admission of Civil Parties
Article 23. Declaration Prior to Conviction	Rule 23 <i>quinquies</i> . Civil Party Claim
Article 25. Waiver and Withdrawal of Action of Victim	Rule 23 <i>bis</i> . Application and Admission of Civil Parties
<b>CODE OF CRIMINAL PROCEDURE BOOK TWO: AUTHORITIES ENTRUSTED WITH PROSECUTION, INVESTIGATION AND INTERROGATION</b>	
<b>TITLE 1: PROSECUTION</b>	
<b>Chapter 1: General Provisions</b>	
Article 27. Roles of Prosecution	Rule 13. Operation of the Office of the Co-Prosecutors Rule 50. Preliminary Investigations Rule 51. Police Custody Rule 53. Introductory Submissions
Article 28. Prosecutors	Rule 13. Operation of the Office of the Co-Prosecutors
Article 30. Oral Statements	Rule 13. Operation of the Office of the Co-Prosecutors
<b>Chapter 2: Functions of General Prosecutor Attached to Supreme Court</b>	
Article 31. Representation of Prosecutors at Supreme Court	Rule 13. Operation of the Office of the Co-Prosecutors
Article 32. Role of General Prosecutor at Supreme Court	Rule 104. Jurisdiction of the Supreme Court Chamber Rule 105. Admissibility
<b>Chapter 3: Functions of General Prosecutor Attached to Court of Appeal</b>	
Article 33. Representation of General Prosecutor at Court of Appeal	Rule 13. Operation of the Office of the Co-Prosecutors

<b>Code of Criminal Procedure Article</b>	<b>Corresponding ECCC Internal Rule(s)</b>
Article 35. Powers of General Prosecutor at Court of Appeal	Rule 15. Judicial Police
<b><i>Chapter 4: Functions of Prosecutors at Courts of First Instance</i></b>	
Article 36. Representation of Prosecution at Court of First Instance	Rule 13. Operation of the Office of the Co-Prosecutors
Article 37. Powers of Prosecutors	Rule 15. Judicial Police Rule 62. Rogatory Letters
Article 39. Territorial Competence of Royal Prosecutors	Rule 49. Exercising Public Action Rule 53. Introductory Submissions
Article 40. Processing of Criminal Proceedings	Rule 49. Exercising Public Action Rule 50. Preliminary Investigations Rule 53. Introductory Submissions
Article 41. File Without Processing	Rule 49. Exercising Public Action
Article 43. Criminal Proceedings	Rule 55. General Provisions Concerning Investigations
<b>Article 44. Opening of Judicial Investigation (see annotation)</b>	Rule 53. Introductory Submissions
<b>TITLE 2: INVESTIGATING JUDGE</b>	
<b><i>Unitary Chapter: Investigating Judge</i></b>	
Article 54. Mandatory Abstention	Rule 34. Recusal and Disqualification of Judges
<b>TITLE 3: INVESTIGATION CHAMBER</b>	
<b><i>Unitary Chapter: Investigation Chamber</i></b>	
Article 55. Special Composition of Investigation Chamber of Court of Appeal	Rule 34. Recusal and Disqualification of Judges Rule 73. Additional Jurisdiction of the Pre-Trial Chamber
<b>TITLE 4: JUDICIAL POLICE</b>	
<b><i>Chapter 1: General Provisions</i></b>	
Article 56. Missions of Judicial Police	Rule 15. Judicial Police Rule 45. Formalities Relating to Summonses and Orders for Arrest and Detention
Article 58. Coordination of Judicial Police	Rule 15. Judicial Police
Article 59. Supervision of Judicial Police	Rule 15. Judicial Police
<b><i>Chapter 2: Judicial Police Officers</i></b>	
<b><i>Section 2: Misconduct Committed during Performance or Duty</i></b>	
Article 64. Disciplinary Procedure	Rule 15. Judicial Police
<b><i>Section 3: Territorial Jurisdiction of Judicial Police Officers</i></b>	
Article 67. Scope of Territorial Authority	Rule 15. Judicial Police

<b>Code of Criminal Procedure Article</b>	<b>Corresponding ECCC Internal Rule(s)</b>
Article 68. Extension of Territorial Jurisdiction	Rule 15. Judicial Police
Article 70. Orders of Judicial Authorities	Rule 15. Judicial Police
<b>Section 4: Missions of Judicial Police Officers</b>	
Article 71. Records of Offenses	Rule 15. Judicial Police Rule 50. Preliminary Investigations Rule 62. Rogatory Letters
<b>Chapter 5: Officials and Other Public Agents with Special Accreditation to Enquire into Offense</b>	
Article 82. Accreditation of Other Civil Servants and Public Agents	Rule 35. Interference with the Administration of Justice
<b>CODE OF CRIMINAL PROCEDURE BOOK THREE: POLICE INQUIRY</b>	
<b>TITLE 1: GENERAL PROVISIONS</b>	
<b>Unitary Chapter: General Provisions</b>	
Article 83. Confidentiality of Inquiry	Rule 30. Interpreters Rule 31. Experts Rule 35. Interference with the Administration of Justice Rule 54. Public Information by the Co-Prosecutors
<b>TITLE 2: ENQUIRY OF FLAGRANTE DELICTO CASES</b>	
<b>Chapter 2: Inquiry Measures</b>	
Article 91. Searches	Rule 50. Preliminary Investigations Rule 61. Search and Seizure
<b>Article 93. Interrogation Records</b> <i>(see annotation)</i>	Rule 25. Recording Interviews Rule 62. Rogatory Letters
<b>Chapter 3: Police Custody</b>	
<b>Article 96. Police Custody</b> <i>(see annotation)</i>	Rule 51. Police Custody
Article 97. Record of Police Custody	Rule 51. Police Custody
Article 98. Assistance of Lawyers during Police Custody	Rule 51. Police Custody
Article 99. Assistance of Medical Doctors during Police Custody	Rule 51. Police Custody
Article 101. Registry of Police Custody	Rule 15. Judicial Police Rule 62. Rogatory Letters
Article 102. Final Report of Police Custody	Rule 15. Judicial Police Rule 62. Rogatory Letters
<b>Chapter 4: Handing Over of Person in Police Custody</b>	

<b>Code of Criminal Procedure Article</b>	<b>Corresponding ECCC Internal Rule(s)</b>
Article 103. Handing Over of Person in Police Custody	Rule 15. Judicial Police Rule 62. Rogatory Letters
Article 104. Period of Handing Over	Rule 15. Judicial Police Rule 62. Rogatory Letters
<b>Chapter 5: Rules of Inquiry of Flagrant Offenses</b>	
Article 105. Prohibition of Listening	Rule 52. Prohibition of Interception of Communications
<b>TITLE 3: PRELIMINARY INQUIRY</b>	
<b>Unitary Chapter: Preliminary Inquiry</b>	
Article 111. Commencement of Preliminary Inquiry	Rule 50. Preliminary Investigations
Article 113. Searches	Rule 50. Preliminary Investigations
Article 114. Order to Appear - Preliminary Inquiry	Rule 50. Preliminary Investigations
Article 115. Record of Interrogation - Preliminary Inquiry	Rule 30. Interpreters
Article 116. Police Custody of Suspect	Rule 51. Police Custody
Article 117. Mandatory Rules	Rule 51. Police Custody
<b>TITLE 4: RETURN OF ITEMS SEIZED DURING INQUIRY</b>	
<b>Unitary Chapter: Return of Items Seized during Inquiry</b>	
Article 119. Competent Authority to Order Return of Seized Items	Rule 50. Preliminary Investigations
Article 120. Return of Seized Items	Rule 50. Preliminary Investigations
<b>CODE OF CRIMINAL PROCEDURE BOOK FOUR: JUDICIAL INVESTIGATIONS</b>	
<b>TITLE 1: INVESTIGATING JUDGE</b>	
<b>Chapter 1: General Provisions</b>	
<b>Article 121. Confidentiality of Judicial Investigation</b> <i>(see annotation)</i>	Rule 54. Public Information by the Co-Prosecutors Rule 56. Public Information by the Co-Investigating Judges
Article 122. Commencement of Judicial Investigation	Rule 55. General Provisions Concerning Investigations
<b>Article 124. Introductory Submissions</b> <i>(see annotation)</i>	Rule 53. Introductory Submissions Rule 55. General Provisions Concerning Investigations
<b>Article 125. Scope of Complaint</b> <i>(see annotation)</i>	Rule 53. Introductory Submissions Rule 55. General Provisions Concerning Investigations

<b>Code of Criminal Procedure Article</b>	<b>Corresponding ECCC Internal Rule(s)</b>
<b>Article 126. Placing Suspect under Judicial Investigation</b> <i>(see annotation)</i>	Rule 55. General Provisions Concerning Investigations
<b>Article 127. Investigation of Inculpatory and Exculpatory Evidence</b> <i>(see annotation)</i>	Rule 55. General Provisions Concerning Investigations
Article 128. Assistance of Court Clerks	Rule 14. Operation of the Office of the Co-Investigating Judges
<b>Article 129. Roles of Court Clerks</b> <i>(see annotation)</i>	Rule 55. General Provisions Concerning Investigations
Article 130. Travel to Sites by Investigating Judges and Court Clerks	Rule 55. General Provisions Concerning Investigations
Article 131. Rogatory Letters	Rule 62. Rogatory Letters
<b>Article 132. Investigative Actions Requested by Royal Prosecutor</b> <i>(see annotation)</i>	Rule 55. General Provisions Concerning Investigations Rule 66. Notification of Conclusion of Judicial Investigation
<b>Article 133. Investigative Actions Requested by Charged Persons</b> <i>(see annotation)</i>	Rule 55. General Provisions Concerning Investigations Rule 58. Interview of a Charged Person Rule 66. Notification of Conclusion of Judicial Investigation
<b>Article 134. Investigative Actions Requested by Civil Party</b> <i>(see annotation)</i>	Rule 55. General Provisions Concerning Investigations Rule 66. Notification of Conclusion of Judicial Investigation
Article 135. Transmission of Case File to Royal Prosecutor	Rule 55. General Provisions Concerning Investigations
Article 136. Presence of Prosecutor during Investigative Acts	Rule 58. Interview of a Charged Person Rule 59. Interview of a Civil Party Rule 60. Interview of Witnesses
<b>Article 137. Civil Party Application by Way of Intervention</b> <i>(see annotation)</i>	Rule 23 <i>bis</i> . Application and Admission of Civil Parties
<b>Article 138. Complaint with Application to Become Civil Party</b> <i>(see annotation)</i>	Rule 23 <i>bis</i> . Application and Admission of Civil Parties Rule 23 <i>ter</i> . Representation of Civil Parties
<b>Article 139. Delivery of Complaints to Prosecutor</b> <i>(see annotation)</i>	Rule 49. Exercising Public Action
<b>Chapter 2: Investigation by Investigating Judge</b>	
<b>Section 1: Notification of Placement under Judicial Investigation</b>	

<b>Code of Criminal Procedure Article</b>	<b>Corresponding ECCC Internal Rule(s)</b>
<b>Article 143. Notification of Placement under Judicial Investigation</b> <i>(see annotation)</i>	Rule 21. Fundamental Principles Rule 57. Notification of Charges
Article 144. Assistance of Interpreter/Translator	Rule 30. Interpreters
<b>Article 145. Presence of Lawyer during Investigation</b> <i>(see annotation)</i>	Rule 30. Interpreters Rule 58. Interview of a Charged Person
<b>Section 2: Interrogation of Charged Person</b>	
Article 146. Questioning with Authorisation of Investigating Judge	Rule 58. Interview of a Charged Person
Article 147. Confrontation	Rule 58. Interview of a Charged Person
<b>Section 3: Interview of Civil Party</b>	
<b>Article 150. Interview of Civil Party</b> <i>(see annotation)</i>	Rule 30. Interpreters Rule 59. Interview of a Civil Party
Article 151. Questioning with Authorisation of Investigating Judge	Rule 59. Interview of a Civil Party
Article 152. Confrontation	Rule 59. Interview of a Civil Party
<b>Section 4: Interview of Witnesses</b>	
Article 153. Interview of Witnesses	Rule 26. Live Testimony by Means of Audio or Video Link Technology Rule 60. Interview of Witnesses
<b>Article 154. Oath of Witnesses</b> <i>(see annotation)</i>	Rule 24. Witnesses
Article 155. Assistance of Interpreter/Translator	Rule 30. Interpreters
<b>Article 156. Witness without Swearing</b> <i>(see annotation)</i>	Rule 24. Witnesses
<b>Article 157. Impossibility to Question Witness</b> <i>(see annotation)</i>	Rule 24. Witnesses Rule 28. Right Against Self-Incrimination of Witnesses
Article 158. Visiting Residence of Witness	Rule 26. Live Testimony by Means of Audio or Video Link Technology
<b>Section 5: Search and Seizure of Exhibits</b>	
Article 159. Rules of Search	Rule 61. Search and Seizure
Article 160. Sealing of Exhibits	Rule 61. Search and Seizure
Article 161. Return of Items by Investigating Judge	Rule 61. Search and Seizure
<b>Section 6: Expert Reports</b>	

<b>Code of Criminal Procedure Article</b>	<b>Corresponding ECCC Internal Rule(s)</b>
<b>Article 162. Necessity of Expert Reports</b> <i>(see annotation)</i>	Rule 31. Experts Rule 55. General Provisions Concerning Investigations
<b>Article 165. Order to Appoint Expert(s)</b> <i>(see annotation)</i>	Rule 31. Experts Rule 32. Medical Examination of the Charged Person or Accused Rule 33. <i>Amicus Curiae</i> Briefs
Article 166. Supervision of Performance of Experts by Investigating Judge	Rule 31. Experts
Article 167. Activities Necessary for Performing Expert's Tasks	Rule 31. Experts
Article 168. Report of Expert	Rule 31. Experts
<b>Article 169. Appointment of Multiple Experts</b> <i>(see annotation)</i>	Rule 31. Experts
<b>Article 170. Notification of Conclusions of Expert Reports</b> <i>(see annotation)</i>	Rule 31. Experts
Article 171. Cost of Expert Reports	Rule 31. Experts
<b>Section 8: Rogatory Letters</b>	
Article 173. Rogatory Letters	Rule 62. Rogatory Letters
Article 174. Content of Rogatory Letter	Rule 62. Rogatory Letters
Article 176. Rogatory Letter Issued to Judicial Police Officer	Rule 62. Rogatory Letters
Article 177. Execution of Rogatory Letter by Judicial Police Officer	Rule 62. Rogatory Letters
Article 178. Written Record of Research and Finding	Rule 62. Rogatory Letters
Article 179. Rules for Interrogation by Judicial Police Officer	Rule 60. Interview of Witnesses
Article 180. Interrogation that Cannot be Done by Judicial Police	Rule 58. Interview of a Charged Person
Article 181. Search and Seizure Conducted by Judicial Police Officer	Rule 61. Search and Seizure Rule 62. Rogatory Letters
Article 182. Police Custody under Rogatory Letter	Rule 51. Police Custody Rule 62. Rogatory Letters
Article 183. Listening to Telephone Conversations under Rogatory Letter	Rule 62. Rogatory Letters
Article 184. Written Records Established by Judicial Police Officers	Rule 62. Rogatory Letters
<b>Chapter 3: Security Measures</b>	

<b>Code of Criminal Procedure Article</b>	<b>Corresponding ECCC Internal Rule(s)</b>
<b><i>Section 2: Subpoena</i></b>	
Article 186. Subpoena	Rule 41. Summonses
Article 187. Information Stated in Subpoena	Rule 45. Formalities Relating to Summonses and Orders for Arrest and Detention
Article 188. Notification of Subpoena	Rule 45. Formalities Relating to Summonses and Orders for Arrest and Detention
<b><i>Section 4: Arrest Warrants</i></b>	
Article 195. Arrest Warrants Issued by Investigating Judge	Rule 42. Arrest Warrants
Article 196. Arrest Warrants	Rule 42. Arrest Warrants Rule 44. Arrest and Detention Orders Rule 45. Formalities Relating to Summonses and Orders for Arrest and Detention
<b>Article 197. Arrest Warrant and Opinion of Prosecutor</b> <i>(see annotation)</i>	Rule 55. General Provisions Concerning Investigations
<b>Article 198. Information Stated in Arrest Warrant</b> <i>(see annotation)</i>	Rule 45. Formalities Relating to Summonses and Orders for Arrest and Detention
Article 199. Execution of Arrest Warrant	Rule 45. Formalities Relating to Summonses and Orders for Arrest and Detention
Article 200. International Dissemination of Arrest Warrant	Rule 44. Arrest and Detention Orders
Article 201. Appearance Pursuant to Arrest Warrant	Rule 45. Formalities Relating to Summonses and Orders for Arrest and Detention
Article 202. Deduction of Duration of Provisional Detention	Rule 45. Formalities Relating to Summonses and Orders for Arrest and Detention
<b><i>Section 5: Provisional Detention</i></b>	
<b>Article 203. Principle of Provisional Detention</b> <i>(see annotation)</i>	Rule 63. Provisional Detention
<b>Article 205. Reasons for Provisional Detention</b> <i>(see annotation)</i>	Rule 63. Provisional Detention
<b>Article 206. Statement of Charged Persons and Reasons for Provisional Detention</b> <i>(see annotation)</i>	Rule 63. Provisional Detention
Article 209. Duration of Provisional Detention in Case of Misdemeanour	Rule 63. Provisional Detention



<b>Code of Criminal Procedure Article</b>	<b>Corresponding ECCC Internal Rule(s)</b>
<b>Article 210. Duration of Provisional Detention in Cases of Crimes against Humanity</b> <i>(see annotation)</i>	Rule 63. Provisional Detention Rule 82. Provisional Detention of an Accused and Bail
<b>Article 211. Extension of Provisional Detention</b> <i>(see annotation)</i>	Rule 63. Provisional Detention
Article 215. Release of Charged Person by Investigating Judge	Rule 64. Release of a Charged Person
Article 216. Release of Charged Person upon Request of Prosecutor	Rule 64. Release of a Charged Person
<b>Article 217. Release upon Request of Charged Person</b> <i>(see annotation)</i>	Rule 64. Release of a Charged Person
Article 218. Notification of Release Order	Rule 64. Release of a Charged Person
<b>Section 6: Detention Orders</b>	
Article 219. Issuance of Detention Orders by Investigating Judge	Rule 43. Detention Orders
Article 220. Definition of Detention Order	Rule 43. Detention Orders
Article 221. Information Stated in Detention Order	Rule 45. Formalities Relating to Summonses and Orders for Arrest and Detention
Article 222. Execution of Detention Order	Rule 45. Formalities Relating to Summonses and Orders for Arrest and Detention
<b>Section 7: Judicial Supervision</b>	
<b>Article 223. Obligations under Judicial Supervision</b> <i>(see annotation)</i>	Rule 32. Medical Examination of the Charged Person or Accused
Article 225. Receipt of Documents	Rule 65. Bail Orders
Article 226. Order for Judicial Supervision	Rule 65. Bail Orders
Article 227. Request for Change in Judicial Supervision by Investigating Judge	Rule 65. Bail Orders
Article 228. Request for Change in Judicial Supervision by Prosecutor	Rule 65. Bail Orders
Article 229. Request for Change in Judicial Supervision by Charged Person	Rule 65. Bail Orders
Article 230. Evasion from Obligation under Judicial Supervision by Charged Person	Rule 65. Bail Orders
<b>Chapter 4: Summons and Notification</b>	
<b>Section 1: General Provisions</b>	

<b>Code of Criminal Procedure Article</b>	<b>Corresponding ECCC Internal Rule(s)</b>
Article 231. Common Time Period	Rule 39. Time Limits and Conditions for Filing Documents
Article 232. Method of Summons	Rule 41. Summons
Article 233. Summons of Charged Person in Detention	Rule 41. Summons
Article 234. Summons of Lawyer	Rule 41. Summons
Article 235. Contents of Summons in Case File	Rule 41. Summons
Article 236. Notification of Orders to Lawyer	Rule 46. Notice of Orders
Article 237. Notification of Orders to Royal Prosecutor	Rule 46. Notice of Orders
Article 238. Notification of Orders to Charged Person	Rule 46. Notice of Orders
Article 239. Serving Summons or Other Orders	Rule 45. Formalities Relating to Summonses and Orders for Arrest and Detention
<b><i>Section 2: Special Rules</i></b>	
Article 240. Compulsory Information in Written Records of Investigating Judge	Rule 55. General Provisions Concerning Investigations
Article 242. Rules for Establishment of Written Records	Rule 55. General Provisions Concerning Investigations
Article 243. Compulsory Information in Order of Investigating Judge	Rule 45. Formalities Relating to Summonses and Orders for Arrest and Detention
<b><i>Chapter 5: Closing Order</i></b>	
<b>Article 246. Final Submission of Royal Prosecutor</b> <i>(see annotation)</i>	Rule 66. Notification of Conclusion of Judicial Investigation
<b>Article 247. Closing Order</b> <i>(see annotation)</i>	Rule 67. Closing Orders by the Co-Investigating Judges
Article 248. Return of Seized Items	Rule 67. Closing Orders by the Co-Investigating Judges
<b>Article 249. Provisions of Closing Orders in Relation to Provisional Detention and Judicial Supervision</b> <i>(see annotation)</i>	Rule 68. Effects on Provisional Detention and Bail Orders
<b>Article 250. Forwarding Case File for Trial</b> <i>(see annotation)</i>	Rule 69. Forwarding the Case File Following a Closing Order
Article 251. Re-opening of Judicial Investigation	Rule 70. Re-opening Judicial Investigations
<b><i>Chapter 6: Nullities of Judicial Investigations</i></b>	

<b>Code of Criminal Procedure Article</b>	<b>Corresponding ECCC Internal Rule(s)</b>
<b>Article 252. Mandatory Rules</b> <i>(see annotation)</i>	Rule 21. Fundamental Principles
<b>Article 253. Complaint to Investigation Chamber</b> <i>(see annotation)</i>	Rule 48. Procedural Defects Rule 73. Additional Jurisdiction of the Pre-Trial Chamber Rule 76. Applications Concerning Procedural Defects
Article 254. Renunciation of Party's Right to Nullify Parts of Procedure	Rule 76. Applications Concerning Procedural Defects
Article 255. Continuation of Investigation in Case of Request to Investigation Chamber	Rule 76. Applications Concerning Procedural Defects
Article 256. Clearing Nullities by Closing Order	Rule 76. Applications Concerning Procedural Defects
<b>TITLE 2: INVESTIGATION CHAMBER</b>	
<b>Chapter 1: General Provisions</b>	
<b>Article 257. Registry of Appeals and Requests</b> <i>(see annotation)</i>	Rule 77. Procedure for other Pre-Trial Appeals and Applications
Article 258. Notification of Hearing Date	Rule 77. Procedure for other Pre-Trial Appeals and Applications
<b>Article 259. Examination of Case Files and Briefs</b> <i>(see annotation)</i>	Rule 23. General Principles of Victims Participation as Civil Parties Rule 77. Procedure for other Pre-Trial Appeals and Applications
<b>Article 260. Conduct of Hearings</b> <i>(see annotation)</i>	Rule 77. Procedure for other Pre-Trial Appeals and Applications
<b>Article 261. Examination of Regularity of Procedure</b> <i>(see annotation)</i>	Rule 76. Applications Concerning Procedural Defects
<b>Chapter 2: Appeals against Orders of Investigating Judge</b>	
<b>Article 266. Appeal against Orders of Investigating Judge by General Prosecutor Attached to Court of Appeal and Royal Prosecutor</b> <i>(see annotation)</i>	Rule 74. Grounds for Pre-Trial Appeals
<b>Article 267. Appeal against Orders of Investigating Judge by Charged Person</b> <i>(see annotation)</i>	Rule 63. Provisional Detention Rule 65. Bail Orders Rule 74. Grounds for Pre-Trial Appeals
<b>Article 268. Appeal against Orders of Investigating Judge by Civil Party</b> <i>(see annotation)</i>	Rule 74. Grounds for Pre-Trial Appeals

<b>Code of Criminal Procedure Article</b>	<b>Corresponding ECCC Internal Rule(s)</b>
Article 269. Appeal against Order Denying Return of Seized items	Rule 74. Grounds for Pre-Trial Appeals

<b>Code of Criminal Procedure Article</b>	<b>Corresponding ECCC Internal Rule(s)</b>
Article 270. Time Period of Appeal	Rule 75. Notice of Appeal and Submissions on Appeal before the Pre-Trial Chamber
<b>Article 271. Competence of Investigation Chamber</b> <i>(see annotation)</i>	Rule 73. Additional Jurisdiction of the Pre-Trial Chamber
Article 272. Forms of Declaration of Appeal	Rule 75. Notice of Appeal and Submissions on Appeal Before the Pre-Trial Chamber
Article 273. Forwarding of Case File to Investigation Chamber	Rule 77. Procedure for other Pre-Trial Appeals and Applications
Article 274. Safeguard Copies of Case Files	Rule 77. Procedure for other Pre-Trial Appeals and Applications
Article 275. Continuation of Investigation in Case of Appeal	Rule 77. Procedure for other Pre-Trial Appeals and Applications
Article 276. Release of Detained Charged Person	Rule 77. Procedure for other Pre-Trial Appeals and Applications
Article 277. Appeal against Non-Suit Order	Rule 77. Procedure for other Pre-Trial Appeals and Applications
<b><i>Chapter 2: Appeals against Orders of Investigating Judge</i></b>	
<b>Article 278. Decision on Provisional Detention</b> <i>(see annotation)</i>	Rule 68. Effects on Provisional Detention and Bail Orders Rule 77. Procedure for other Pre-Trial Appeals and Applications
<b>Article 279. Inadmissibility of Requests for Annulment</b> <i>(see annotation)</i>	Rule 76. Applications Concerning Procedural Defects
<b>Article 280. Effect of Annulment</b> <i>(see annotation)</i>	Rule 76. Applications Concerning Procedural Defects
Article 281. Consequence of Annulment	Rule 76. Applications Concerning Procedural Defects
<b>CODE OF CRIMINAL PROCEDURE BOOK FIVE: JUDGMENTS</b>	
<b>TITLE 1: JUDGMENT OF COURT OF FIRST INSTANCE</b>	
<b><i>Chapter 1: Jurisdiction and Access to Court</i></b>	
<b><i>Section 1: General Provisions</i></b>	
Article 288. Incompatibility of Judicial Profession	Rule 34. Recusal and Disqualification of Judges
<b><i>Section 2: Territorial Jurisdiction and Subject-Matter Jurisdiction</i></b>	
<b>Article 289. Jurisdiction of Court of First Instance</b> <i>(see annotation)</i>	Rule 79. General Provisions
<b><i>Section 3: Seizing Court of First Instance</i></b>	

<b>Code of Criminal Procedure Article</b>	<b>Corresponding ECCC Internal Rule(s)</b>
<b>Article 291. Methods of Seizure</b> <i>(see annotation)</i>	Rule 79. General Provisions
Article 292. Setting Hearing Dates	Rule 80. Preparation of the Trial
Article 293. Common Time Period	Rule 39. Time Limits and Conditions for Filing Documents
Article 294. Summons of Parties for Trial in Case of Indictment	Rule 41. Summonses Rule 80. Preparation of the Trial
Article 295. Summons of Parties in Case of Citation	Rule 41. Summonses Rule 80 <i>bis</i> . Initial Hearing
<b>Article 297. Summons of Witnesses</b> <i>(see annotation)</i>	Rule 41. Summonses Rule 84. Appearance of Witnesses and Experts
Article 298. Summons of Witnesses by Accused and Civil Party	Rule 84. Appearance of Witnesses and Experts
<b>Chapter 2: Appearance of Accused</b>	
<b>Section 1: Appearance of Accused</b>	
<b>Article 300. Appearance of Accused</b> <i>(see annotation)</i>	Rule 22. Lawyers
Article 301. Assistance of Lawyers	Rule 81. Presence of the Accused and Defence Lawyers
<b>Article 305. Appearance of the Accused upon Indictment</b> <i>(see annotation)</i>	Rule 68. Effects on Provisional Detention and Bail Orders Rule 82. Provisional Detention of an Accused and Bail
<b>Article 306. Automatic Release of Detained Accused</b> <i>(see annotation)</i>	Rule 82. Provisional Detention of an Accused and Bail
<b>Article 307. Application for Release of Detained Accused</b> <i>(see annotation)</i>	Rule 82. Provisional Detention of an Accused and Bail
Article 308. Continuation of Detention until Lapse of Appeal	Rule 82. Provisional Detention of an Accused and Bail
Article 309. Accused Who Cannot Appear Before Court	Rule 82. Provisional Detention of an Accused and Bail
Article 310. Order to Bring Issued by Court	Rule 81. Presence of the Accused and Defence Lawyers
<b>Section 2: Appearance of Civil Party</b>	
<b>Article 311. Joining of Civil Party During Trial</b> <i>(see annotation)</i>	Rule 23 <i>bis</i> . Application and Admission of Civil Parties

<b>Code of Criminal Procedure Article</b>	<b>Corresponding ECCC Internal Rule(s)</b>
Article 312. Incompatibility of Status of Civil Party and Witness	Rule 23. General Principles of Victims Participation as Civil Parties
<b>Article 313. Assistance and Representation of Civil Party</b> <i>(see annotation)</i>	Rule 23 <i>ter</i> . Representation of Civil Parties
<b>Section 4: Appearance of Witnesses</b>	
<b>Article 315. Appearance of Witnesses</b> <i>(see annotation)</i>	Rule 80. Preparation of the Trial
<b>Chapter 3: Trial Hearing</b>	
<b>Section 1: Public Nature of Trial Hearing and Conduct of Trial</b>	
<b>Article 316. Public Nature of Trial Hearing and Confidentiality</b> <i>(see annotation)</i>	Rule 79. General Provisions
Article 317. Announcement of Judgment	Rule 79. General Provisions Rule 102. Announcement of Judgment at a Public Hearing
<b>Article 318. Establishment of Order in Hearing</b> <i>(see annotation)</i>	Rule 37. Disruption of Proceedings Rule 38. Misconduct of a Lawyer Rule 84. Appearance of Witness & Experts Rule 85. Conduct of Hearings
Article 319. Examining Case Files	Rule 86. Access to Case Files
Article 320. Offense Committed during Hearing	Rule 37. Disruption of Proceedings
<b>Section 2: Rules of Evidence</b>	
<b>Article 321. Evidence Evaluation by Court</b> <i>(see annotation)</i>	Rule 87. Rules of Evidence
<b>Section 3: Conduct of Trial Hearings</b>	
<b>Article 322. Rules Concerning Parties Present at Hearing</b> <i>(see annotation)</i>	Rule 88. Appearance Before the Trial Chamber
Article 324. Hearing of Witness Not Summoned by Court	Rule 84. Appearance of Witnesses and Experts
<b>Article 325. Interrogation of Accused</b> <i>(see annotation)</i>	Rule 89 <i>bis</i> . Substantive Hearing Rule 90. Questioning of the Accused
<b>Article 326. Hearing of Parties</b> <i>(see annotation)</i>	Rule 91. Hearing of Other Parties and Witnesses
Article 327. Objection to Hearing of Witness	Rule 91. Hearing of Other Parties and Witnesses
<b>Article 330. Assistance and Swearing of Interpreter/Translator</b> <i>(see annotation)</i>	Rule 30. Interpreters

<b>Code of Criminal Procedure Article</b>	<b>Corresponding ECCC Internal Rule(s)</b>
Article 331. Deaf and Mute Person	Rule 27. Deaf/Mute Persons
<b>Article 332. Presentation of Exhibits</b> <i>(see annotation)</i>	Rule 87. Rules of Evidence
Article 334. Submission of Statement until End of Trial Hearing	Rule 92. Written Submissions
Article 335. Right to Speak at Conclusion of Hearing	Rule 94. Closing Statements
Article 336. Oral Submission of Royal Prosecutor	Rule 94. Closing Statements
Article 337. Deliberation of Court	Rule 96. Deliberation of the Trial Chamber
<b>Article 339. Additional Investigation Ordered by Court</b> <i>(see annotation)</i>	Rule 93. Additional Investigations by the Trial Chamber
Article 340. Adjournment of Hearing	Rule 95. Adjournment of Proceedings
Article 341. Establishing Hearing Record	Rule 97. Record of Proceedings
<b>Section 4: Objections</b>	
<b>Article 342. Competence of Court with Respect to Objection</b> <i>(see annotation)</i>	Rule 80. Preparation of the Trial Rule 89. Preliminary Objections Rule 91. Hearing of Other Parties and Witnesses
<b>Chapter 4: Decision</b>	
<b>Section 1: Announcement of Judgment</b>	
Article 347. Announcement of Judgment	Rule 98. The Judgment
Article 348. Scope of Seizure of Court (Regarding Facts)	Rule 98. The Judgment
Article 349. Scope of Seizure of Court (Regarding Persons)	Rule 98. The Judgment
<b>Article 350. Declaration of Guilt</b> <i>(see annotation)</i>	Rule 98. The Judgment
Article 352. Termination of Judicial Supervision	Rule 99. Effect of the Judgment
Article 353. Detention Order and Arrest Warrant Issued by Court	Rule 45. Formalities Relating to Summonses and Orders for Arrest and Detention
<b>Article 355. Judgment on Civil Remedy</b> <i>(see annotation)</i>	Rule 23. General Principles of Victims Participation as Civil Parties Rule 23 <i>bis</i> . Application and Admission of Civil Parties Rule 100. Judgment on Civil Party Claims
Article 357. Writing of Judgment: Holding and Ruling	Rule 101. Form of the Judgment



<b>Code of Criminal Procedure Article</b>	<b>Corresponding ECCC Internal Rule(s)</b>
Article 359. Announcement of Judgment in Public Hearing	Rule 102. Announcement of Judgment in a Public Hearing Rule 79. General Provisions
<b>TITLE 2: APPEALS AGAINST JUDGMENTS</b>	
<b><i>Chapter 1: Authority of Criminal Chamber of Court of Appeal</i></b>	
Article 373. Jurisdiction of Criminal Chamber of Court of Appeal	Rule 104. Jurisdiction of the Supreme Court Chamber
Article 374. Abstention of Certain Judges or Prosecutors	Rule 34. Recusal and Disqualification of Judges
<b><i>Chapter 2: Admissibility of Appeals</i></b>	
<b>Article 375. Persons Entitled to Make Appeals (see annotation)</b>	Rule 105. Admissibility
Article 376. Formalities of Appeals by Prosecutor, Convicted Person, Civil Party and Civil Defendants	Rule 106. Notices of Appeals and Briefs
Article 379. Formalities of Appeal by General Prosecutor	Rule 107. Time Limits for Appeal
Article 381. Time Period for Appeal by Prosecutor and General Prosecutor	Rule 107. Time Limits for Appeal
Article 382. Time Period for Appeal by Convicted Person, Civil Party and Civil Defendants	Rule 107. Time Limits for Appeal
Article 383. Additional Time Period for Appeal: Incidental Appeal	Rule 107. Time Limits for Appeal
Article 384. Time Period for Appeal by Prosecutor or Convicted Person in Case of Detention	Rule 107. Time Limits for Appeal
Article 385. Appeal against Interlocutory Judgment	Rule 107. Time Limits for Appeal
<b><i>Chapter 3: Procedures of Court of Appeal</i></b>	
Article 386. Forwarding Case Files to Court of Appeal	Rule 108. Procedure for Appeal before the Supreme Court Chamber
Article 387. Setting Hearing Dates and Trial Period	Rule 108. Procedure for Appeal before the Supreme Court Chamber
Article 388. Notification and Summons to Hearing	Rule 108. Procedure for Appeal before the Supreme Court Chamber
Article 390. Report of Appeal	Rule 108. Procedure for Appeal before the Supreme Court Chamber Rule 109. Appeal Hearings

<b>Code of Criminal Procedure Article</b>	<b>Corresponding ECCC Internal Rule(s)</b>
Article 391. Consultation of Case File and Submission of Briefs	Rule 108. Procedure for Appeal before the Supreme Court Chamber
Article 392. Public Hearing and In Camera Hearing	Rule 109. Appeal Hearings
Article 393. Interrogation of Accused	Rule 109. Appeal Hearings
Article 394. Hearing of Civil Party, Civil Defendants, Experts and Witnesses	Rule 109. Appeal Hearings
Article 395. Order of Speech	Rule 109. Appeal Hearings
Article 396. Extension of Procedural Rules Applicable to Court of First Instance to Court of Appeal	Rule 104 <i>bis</i> . Rules Applicable before the Supreme Court Chamber
<b>Chapter 4: Effects of Appeals</b>	
Article 397. Devolving Effect of Appeals	Rule 110. Effects of the Appeal
<b>Article 399. Effect of Appeal by Accused Only</b> <i>(see annotation)</i>	Rule 110. Effects of the Appeal
Article 400. Effect of Appeal by Royal Prosecutor and General Prosecutor	Rule 110. Effects of the Appeal
<b>Article 401. Redetermination of Legal Qualification of Facts by Court of Appeal</b> <i>(see annotation)</i>	Rule 110. Effects of the Appeal
Article 402. Effects of Appeal by Civil Party or Civil Defendants	Rule 110. Effects of the Appeal
Article 403. Form and Signature of Judgments of Court of Appeal	Rule 111. The Appeal Judgment
Article 404. Inadmissible Judgments	Rule 111. The Appeal Judgment
Article 405. Reversal of Judgment	Rule 111. The Appeal Judgment
Article 406. Appeal Court's Right to Replace Judgment of Court of First Instance	Rule 111. The Appeal Judgment
Article 407. Detention Order or Arrest Warrant Issued by Court of Appeal	Rule 111. The Appeal Judgment
<b>CODE OF CRIMINAL PROCEDURE BOOK SIX: SUPREME COURT</b>	
<b>TITLE 1: REQUEST FOR CASSATION TO SUPREME COURT</b>	
<b>Unitary Chapter: Request for Cassation to Supreme Court</b>	
Article 417. Decisions Subject to Request for Cassation	Rule 112. Revision of Final Judgment
Article 418. Persons Entitled to Request for Cassation	Rule 112. Revision of Final Judgment

<b>Code of Criminal Procedure Article</b>	<b>Corresponding ECCC Internal Rule(s)</b>
Article 419. Grounds for Request of Cassation	Rule 112. Revision of Final Judgment
Article 422. Forms of Request for Cassation	Rule 112. Revision of Final Judgment
Article 427. Time Limits for Writing Briefs	Rule 107. Time Limits for Appeal
Article 428. Presentation of Case Files for Examination	Rule 108. Procedure for Appeal before the Supreme Court Chamber
Article 430. Appointment of Reporting Judge	Rule 108. Procedure for Appeal before the Supreme Court Chamber
Article 431. Written Report	Rule 108. Procedure for Appeal before the Supreme Court Chamber
Article 433. Notification of Hearing Date to Parties	Rule 108. Procedure for Appeal before the Supreme Court Chamber
Article 434. Public Hearing	Rule 109. Appeal Hearings
<b>Article 436. Decision on Questions of Law</b> <i>(see annotation)</i>	Rule 110. Effects of the Appeal
Article 439. Categories of Judgments of Supreme Court	Rule 110. Effects of the Appeal
Article 440. Reversal Judgment without Returning of Case	Rule 104. Jurisdiction of the Supreme Court Chamber
<b>TITLE 2: MOTION FOR REVIEW OF PROCEEDING</b>	
<b><i>Unitary Chapter: Motion for Review of Proceeding</i></b>	
Article 443. Motion for Review	Rule 112. Revision of Final Judgment
Article 445. Cases of Review of Proceeding	Rule 112. Revision of Final Judgment
Article 446. Persons Entitled to Make Motion for Review	Rule 112. Revision of Final Judgment
Article 447. Registration of Motion for Review and Examination of Case File	Rule 106. Notices of Appeals and Briefs
Article 448. Procedure of Review: Time Limit	Rule 108. Procedure for Appeal before the Supreme Court Chamber
Article 451. Notification of Hearing Date and Public Hearing	Rule 108. Procedure for Appeal before the Supreme Court Chamber
<b>Article 453. Reasons for Judgment</b> <i>(see annotation)</i>	Rule 101. Form of the Judgment Rule 111. The Appeal Judgment
<b>CODE OF CRIMINAL PROCEDURE BOOK SEVEN: CITATIONS, SUMMONS AND NOTIFICATIONS</b>	
<b>TITLE 1: CITATIONS</b>	
<b><i>Unitary Chapter: Citations</i></b>	
Article 456. Citation: Form	Rule 41. Summonses
Article 458. Delivery of Citation by Prosecutor	Rule 41. Summonses

<b>Code of Criminal Procedure Article</b>	<b>Corresponding ECCC Internal Rule(s)</b>
Article 459. Delivery of Citation by Bailiff	Rule 41. Summonses
<b>TITLE 2: SUMMONS OF ACCUSED TO HEARING</b>	
<i><b>Unitary Chapter: Summons of Accused to Hearing</b></i>	
Article 465. Form of Summons	Rule 41. Summonses
<b>TITLE 3: SUMMONS ORDERING PERSONS OTHER THAN ACCUSED TO HEARING</b>	
<i><b>Unitary Chapter: Summons Ordering Persons Other Than Accused to Hearing</b></i>	
Article 475. Summons to Civil Party	Rule 45. Formalities Relating to Summonses and Orders for Arrest and Detention
Article 476. Summons to Victim	Rule 45. Formalities Relating to Summonses and Orders for Arrest and Detention
Article 477. Summons to Witness	Rule 45. Formalities Relating to Summonses and Orders for Arrest and Detention
Article 478. Summons to Expert	Rule 45. Formalities Relating to Summonses and Orders for Arrest and Detention
Article 479. Summons to Interpreter/Translator	Rule 45. Formalities Relating to Summonses and Orders for Arrest and Detention
Article 480. Summons to Civil Defendant	Rule 45. Formalities Relating to Summonses and Orders for Arrest and Detention
<b>TITLE 4: WRIT OF NOTIFICATION OF COURT DECISIONS</b>	
<i><b>Unitary Chapter: Writ of Notification of Court Decisions</b></i>	
Article 482. Purpose of Writ of Notification	Rule 46. Notice of Orders
Article 483. Information Stated in Writ of Notification	Rule 47. Form of Notice of Orders
Article 484. Writ of Notification Served by Prosecutor	Rule 46. Notice of Orders
Article 485. Writ of Notification Served by Bailiff	Rule 46. Notice of Orders
<b>TITLE 5: COMMON PROVISIONS</b>	
<i><b>Unitary Chapter: Common Provisions</b></i>	
Article 495. Signature and Finger Print	Rule 40. Signatures
<b>CODE OF CRIMINAL PROCEDURE BOOK EIGHT: ENFORCEMENT PROCEDURE</b>	
<b>TITLE 1: GENERAL PROVISIONS</b>	
<i><b>Unitary Chapter: General Provisions</b></i>	
Article 496. Execution of Sentence and Civil Part of Judgment	Rule 113. Enforcement of Sentences and Civil Reparation
Article 497. Final Decision	Rule 113. Enforcement of Sentences and Civil Reparation

<b>Code of Criminal Procedure Article</b>	<b>Corresponding ECCC Internal Rule(s)</b>
Article 499. Use of Public Forces	Rule 113. Enforcement of Sentences and Civil Reparation
Article 501. Request for Consolidation of Sentences	Rule 113. Enforcement of Sentences and Civil Reparation
<b>TITLE 2: CARRYING OUT PROVISIONAL DETENTION AND PUNISHMENT DEPRIVING OF FREEDOM</b>	
<b>Chapter 1: Rules Governing Detention</b>	
<b>Article 503. Deduction of Duration of Provisional Detention</b> <i>(see annotation)</i>	Rule 63. Provisional Detention Rule 99. Effect of the Judgment
<b>Article 508. Presentation of Detainee upon Request</b> <i>(see annotation)</i>	Rule 63. Provisional Detention
<b>CODE OF CRIMINAL PROCEDURE BOOK NINE: SPECIAL PROCEEDINGS</b>	
<b>TITLE 1: PROVISIONS CONCERNING PERSONS</b>	
<b>Chapter 1: Judges</b>	
<b>Section 1: Self Recusal</b>	
Article 555. Legitimate Reasons for Self Recusal	Rule 34. Recusal and Disqualification of Judges
<b>Section 2: Challenge of Judge</b>	
<b>Article 556. Grounds for Challenging Judge</b> <i>(see annotation)</i>	Rule 34. Recusal and Disqualification of Judges
<b>Article 557. Application for Disqualification</b> <i>(see annotation)</i>	Rule 34. Recusal and Disqualification of Judges
<b>Article 558. Recipient of Application for Disqualification of Judge</b> <i>(see annotation)</i>	Rule 34. Recusal and Disqualification of Judges
Article 560. Report of Challenged Judge	Rule 34. Recusal and Disqualification of Judges
<b>Article 561. Examination of Application for Disqualification of Judge</b> <i>(see annotation)</i>	Rule 34. Recusal and Disqualification of Judges Rule 109. Appeal Hearings
<b>Article 562. Decision on Application for Disqualification of Judge</b> <i>(see annotation)</i>	Rule 34. Recusal and Disqualification of Judges
<b>Article 563. Activities Performed Before Notification of Challenge</b> <i>(see annotation)</i>	Rule 34. Recusal and Disqualification of Judges

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