



Fair Trial Principles



TABLE OF CONTENTS

PART 1: Legal Actions against the Khmer Rouge since 1979	3
I. The Cambodian People’s Revolutionary Court	3
a. Structure	3
b. Judgments	3
II. Crimes Committed Against the Revolution	4
III. The Paris Agreement.....	4
IV. The Transitional Period	4
a. The Law Outlawing Support of Democratic Kampuchea (1994)	4
b. The Royal Decree of Amnesty for Ieng Sary (1996)	5
c. The Apologies of Nuon Chea and Khieu Samphan (1998)	5
V. Legal Action against the Khmer Rouge Leaders since 1993	6
a. The Arrests of Duch and Ta Mok (1999).....	6
b. The Law on the Duration of Pre-Trial Detention	6
c. The Attempt to Arrest Khieu Samphan, Ieng Sary, and Nuon Chea	6
VI. The ECCC and UN-Cambodian Negotiations.....	6
VII. Approval of the Law on the Establishment of ECCC	7
PART 2: The ECCC	
I. Introduction.....	7
II. Purpose of the Tribunal.....	8
III. An Overview of the Court	8
a. Structure of the Court	8
i. Office of Administration.....	9
b. Trial and Appeal	9
i. Trial Chamber	9
ii. Supreme Court Chamber	9
c. Selection of Judges and Prosecutors	10
i. Selection of Judges	10
ii. Selection of Prosecutors.....	10
IV. ECCC Jurisdiction	13
a. Temporal and Personal Jurisdiction.....	13
i. Temporal Jurisdiction	13
ii. Offenses Covered.....	13
iii. Personal Jurisdiction	13
b. Penalization and Amnesty.....	14
V. Procedure	16
a. Bringing a Suit.....	16
b. Investigation.....	17
c. Indictment	17



VI.	The Decision Making Process	19
a.	Chambers.....	19
b.	Pre-trial Chambers	19

PART 3: Standards of Due Process

I.	Due Process and Criminal Procedure	21
a.	Fair Trial Procedure.....	21
i.	Right to Receive Information.....	21
ii.	Right to be Heard.....	22
iii.	Right to Clear Communication	22
b.	Open Access	22
i.	Right to a Public Trial.....	22
ii.	Right to Avoid Duress.....	23
iii.	Duration of Procedure	23
iv.	Just Decisions.....	23
1.	Independence of the Judges.....	23
2.	Legality Principle.....	24
3.	Equality under Law	24
4.	The Presumption of Innocence	24
v.	Judgments	24
vi.	Non-Retroaction of Criminal Law	24
II.	Procedural Mechanisms Ensuring a Fair Trial.....	25
a.	Recusal	25
b.	Counterclaims	25
c.	Demurrer	25
d.	Appeal	25



PART 1

Legal Actions against the Khmer Rouge since 1979

I – The Cambodian People’s Revolutionary Court

On July 15, 1979, the Cambodian Revolutionary People’s Council signed into law Decree Law No. 1 on The Establishment of the People’s Revolutionary Court in Phnom Penh to Judge the Pol Pot – Ieng Sary Clique for Crimes of Genocide

On August 15, 1979 at the Chaktomuk conference hall, the Court’s first judgment was delivered. In attendance were representatives from the provinces, the clergy, the government, and foreign organizations. About 600 Cambodians and 50 foreigners witnessed the first attempt to assign guilt for the crimes committed from 1975-1979. The next two sections describe the structure of the Revolutionary Court and the contents of its decisions.

A – Structure

The single chamber Revolutionary Court was designed to render a quick judgment on the crimes committed during the Democratic Kampuchea period from April 17, 1975 to January 6, 1979. The President of the Court was Keo Chanda, a member of the Cambodian Revolutionary Council and Minister of Propaganda, Culture, and Information. Among the Judges and Counselors, several held degrees in law and had practiced prior to the Khmer Rouge regime.

B – Judgments

On August 19, 1979, the Revolutionary Court issued a default judgment against Pol Pot and Ieng Sary, who had been tried in absentia. The Court found the accused guilty of the following offenses:

- Genocide against the monkhood and their followers, tribal peoples, and children.
- Forced evacuation of the cities and dissolution of the national workforce.
- The destruction of the national economy, culture, educational system, health care system, and religion.
- Continuing to wage war after the Vietnamese overthrow of DK regime.

Pol Pot and Ieng Sary were convicted and sentenced to death, but they were never apprehended and the sentence never carried out.



II – Crimes Committed Against the Revolution

On May 15, 1980 the Revolutionary Council signed Decree No.2. The aims of this legislation were to protect the new government and to outlaw the return of the Khmer Rouge. It also provided for the continued pursuit, arrest, and trial of Khmer Rouge members. The law outlawed “betrayals of the revolution,” the defacement of public property, harm to foreign peoples or property, and general governmental corruption. Each offense was punishable by a minimum sentence of one year imprisonment and a maximum of death. Aggravating circumstances would be found where a person was the organizer or instigator of criminal activity under the Decree. Mitigation of sentences was allowed where a person confessed his guilt to the Revolutionary Council and performed community service to atone for his crimes.

III – The Paris Agreement (1991)

In 1989, political and military factions in Cambodia began brokering a peace agreement that would put an end to the decades of war. This culminated in the Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, and later in the Final Act of the Paris Conference on Cambodia (The Paris Peace Agreement). Signatories included King Norodom Sihanouk, Samdech Hun Sen, Royalist party representative Samdech Krom Preah Norodom Ranariddh, and Democratic Kampuchea representative Khieu Samphan.

The Agreement focused on achieving a cease-fire and preparing for national elections in 1993, to be administered by the United Nations. The Agreement also addressed human rights concerns, stating that the Cambodian government would adhere to existing international human rights standards.

These sentiments were then embodied in the 1993 Cambodian Constitution, which addresses human rights concerns in several sections. The Preface expresses the wish that Cambodia leave behind its violent past and become an “island of peace” based on democracy, liberty, the rule of law, and respect for human rights. Section 31 states that the Kingdom of Cambodia will recognize and obey human rights as defined in the United Nations Charter, the International Declaration on Human Rights, and other treaties and agreements related to human rights, women rights, and children rights.

IV – The Transitional Period

A – The Law Outlawing Support of Democratic Kampuchea (1994)

On July 07, 1994, the Cambodian National Assembly approved the Law Outlawing support for Democratic Kampuchea. Section 2 of the law places any



political or military leaders of the DK movement in violation of the law. The Law was a reaction to violations of the Paris Peace Agreement. The Khmer Rouge Group was determined to have refused participation in the 1993 elections, to have committed acts of terrorism against the population and against UNTAC personnel, and to have continued to commit those crimes following the 1993 election. The law allowed for reintegration of former Khmer Rouge cadres into Cambodian society. It granted an amnesty period of six months for former members of the political or military branches of the DK regime to rejoin society; this amnesty did not extend, however, to Khmer Rouge leaders.

B – The Royal Decree of Amnesty for Ieng Sary (1996)

Ieng Sary, the Minister of State and Foreign Affairs under Democratic Kampuchea, received a pardon and amnesty from King Norodom Sihanouk on 15 August 1996. The Decree immunized him from punishment based on his conviction in the 1979 People's Revolutionary Court and on the Law Outlawing the Democratic Kampuchea Group, dated July 15, 1994.

C- The Apologies of Nuon Chea and Khieu Samphan (1998)

On [December 29, 1998](#), following a bargain with the government Nuon Chea surrendered as part of the last remnants of Khmer Rouge resistance; in a press conference after the deal he expressed a terse statement of sorrow for the suffering of [Cambodians](#), "Actually we are very sorry, not just for the lives of people, but also for the lives of animals that suffered in the war". The government under Prime Minister [Hun Sen](#) agreed to forsake attempts to prosecute Nuon Chea; a decision that was condemned by Cambodians and the international community.¹ Khieu Samphan surrendered at the same time, issuing his own letter to the government.

V – Legal Action against Khmer Rouge Leaders Since 1993

A – The Arrests of Duch and Ta Mok (1999)

Ung Choeun, alias Ta Mok, is former Regional Military Commander of the Southwest and Northwest Zones and was among the last Khmer Rouge hold-outs following the defections of Khieu Samphan and Nuon Chea. On March 6, 1999 he was arrested under the 1994 law outlawing support of Democratic Kampuchea. In May of the same year, Kaing Guek Iev, alias Duch, was arrested and detained under the same law. They are currently being held on the premises of the new Military court in Phnom Penh.

¹ Souce: http://en.wikipedia.org/wiki/Nuon_Chea



B- The Law on the Duration of Pre-Trial Detention

According to a Royal Decree dated August 26, 1999, the period of pre-trial detention must in no case exceed 4 months. However, upon the decision of a judge setting out the reasons, this period may be extended to 6 months if justified by the requirements of the investigation.

For crime of genocide, war crime and crime against humanity as stated in the conventions of the United Nations to which Cambodia is a signatory, the above pre-trial detention period may be extended for one year upon each review, but this period of extension must not exceed 3 years.

C- The Attempt to Arrest Khieu Samphan, Ieng Sary and Nuon Chea (2004)

On April 09, 2004, His Excellency, Hangrot Raken, Prosecutor-General of the Appeals Court notified prosecutors of his intention to arrest Khieu Samphan, Ieng Sary, and Nuon Chea pursuant to section 4 and 6 of the law outlawing Democratic Kampuchea. However, the intention is unfulfilled.

VI – The ECCC and UN-Cambodian Negotiations (1997 – 2003)

On June 21, 1997, the Cambodian Co-Prime Ministers sent a letter to the United Nations Secretary General, requesting UN support for a tribunal to try leaders of the DK regime. On March 15, 1999, the report of a group of international experts was issued, which recommended, among other things, an International Court to Prosecute Khmer Rouge Leaders. The report as presented to the Security Council and the United Nations General Assembly; however the recommendation to create a fully international court was never acted on by the Security Council.

Soon after, a new proposal was suggested to create a national court with international characteristics. Prime Minister Hun Sen requested technical assistance from the UN in drafting the Law. Formal negotiations began between the Office of Legal Affairs and the Royal Government Task Force on the Khmer Rouge Trials in August of 1999. On July 06, 2000, various problems were settled, although the sides did not quite reach 100% agreement; however, the negotiations provided the basis for the Draft Law later debated in the National Assembly..

On August 10, 2001, the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during Democratic Kampuchea passed the Cambodian National Assembly. Later that year the UN Office of Legal affairs expressed eleven points of concern regarding that law.



On February 08, 2002, after months of delay by the Cambodian government, the UN Secretary-General discontinued negotiations with the Royal Government of Cambodia on the Establishment of Khmer Rouge Trials. Negotiations recommenced on December 19, 2002, and an agreement was signed on June 6, 2003 establishing the Tribunal and outlining the means for financing and managing it.

The agreement between UN and Royal Government of Cambodia on the Judgment under Cambodia Law of Crimes Committed during Democratic Kampuchea embodies the following principles:

- The agreement will be implemented pursuant to Cambodian domestic laws, after the ratification by the Cambodian National Assembly of Penal Code and Code of Criminal Procedure.
- No further amnesties for former Khmer Rouge leaders will issue.
- The Courts will be composed of two levels, trial and appellate, in order to mitigate the costs of the trial.

VII –Approval of the Law on the Establishment of Extraordinary Chambers in the Court of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (2004)

In October of 2004 amendments to the 2001 Law were enacted and approved by Constitutional Council and the Agreement with the UN was ratified.

According to the Trial Task Force, the projected cost of the court will be \$56.3 million. Of that, \$13.3 million will be raised by the Royal Government of Cambodia and \$43 million by the UN.

Part 2

The Extraordinary Chambers in the Courts of Cambodia (ECCC)

I—Introduction

Even though Cambodia is now a peaceful, developing country, the history of Democratic Kampuchea still remains in Cambodians' minds. This genocidal regime committed many serious violations of Cambodian law and international human rights law.

Serious violations of human rights occurred in the past in many countries such as Germany, the former Yugoslavia, Sierra Leone, Rwanda, South Africa and East Timor. These countries have worked to bring their perpetrators to justice in international or hybrid (domestic/international) tribunals.



II—Purpose of the Tribunal:

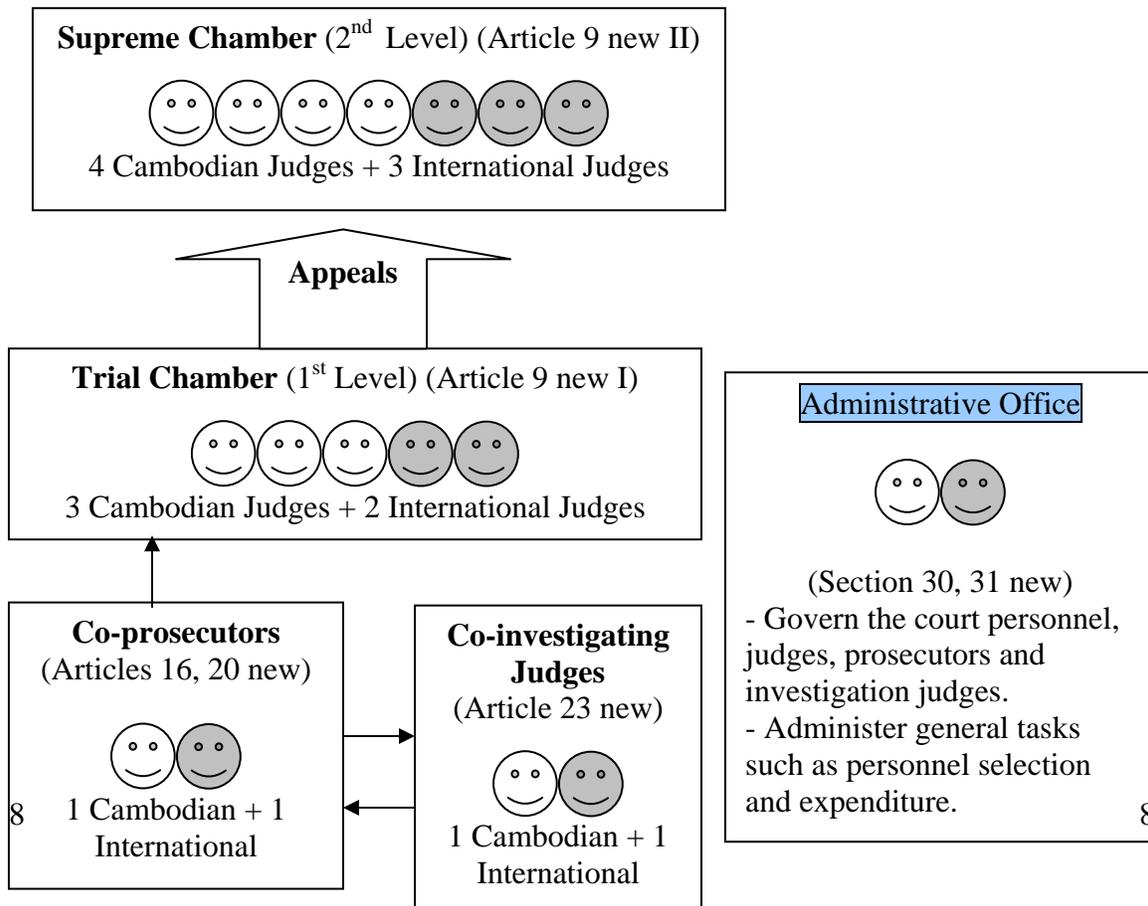
- To protect and prevent this from happening again
- To search for the historical truth
- To bring justice to the Cambodian people
- To be a model for the Cambodian courts and a contribution to the reform of the judicial system

III– An Overview of the Court

The ECCC will be a special “Mixed Court,” employing a mixture of domestic and international judges and prosecutors. The Chambers will be a part of the Cambodian court system, but will employ international staff and use some international law. The majority of the staff will be Cambodian, as will the majority of the judges.

The Trial will judge only top Khmer Rouge leaders and persons most responsible for serious violations of international and Cambodian law committed between April 17, 1975 and January 6, 1979.

A –Structure of the Court





1- Office of Administration

This office controls the general administrative activities of this tribunal in order to coordinate the tasks of judges, investigating judges and prosecutors. This office has one Khmer director, a foreign sub-director and several personnel, who will be hired as required by the office.

The administration office director is appointed by the Royal Government of Cambodia, and the sub-director is selected by the UN and appointed by the Royal Government of Cambodia. All Khmer personnel are suggested by the director and appointed by the Royal Government of Cambodia.

B – Trial and Appeal

The ECCC is divided in to two levels:

1 – Trial Chamber

The Trial Chamber makes judgments on the cases in the first instance. This chamber will consist of five judges, of which three are Khmer and two are foreign. In the courtroom, there will also be one or more clerks to record the hearing, and 2 co-prosecutors, one Khmer and one foreign, defence counsel, the defendants, members of the press, and a general audience .

The Trial Chamber will try its best to make unanimous decisions. If it is not possible to agree to a unanimous decision, 4 votes will be required for a decision to be made. If the Chamber cannot reach a decision (if four judges cannot agree on the same result) then the result will be an acquittal.

2 – Supreme Court Chamber

There is also a Supreme Chamber to hear cases when the judgments of the Trial Chamber are appealed. The Supreme Chamber will hear appeals of the Trial Chambers' decisions. The Supreme Chambers' decisions will be final decisions, and will not be sent back to the Trial Chamber.

The Supreme Chamber has seven judges, four Khmer and three foreign. The Supreme Court Chamber will try its best to make unanimous decisions. But, if it is not possible to agree to a unanimous decision, 5 votes will be required for a decision to be made.



C– Selection of Judges and Prosecutors

Many factors contribute to ensuring a fair and just trial. The selection of judges and prosecutors is one of the most important steps in ensuring fair trials.

Both Khmer and foreign judges and prosecutors must:

- Be people of high moral character, independent, fair, honest, and skilled in the field of criminal law or international law, such as International Humanitarian Law and Human Rights Law.
- Not accept instructions from any person, government or other source.
- Be judges in their own countries.

Khmer judges and prosecutors are appointed by the Supreme Council of the Magistracy. The Supreme Council of the Magistracy has nine members:

- King of the Kingdom of Cambodia
- Minister of the Ministry of Justice.
- Head of the Supreme Court.
- Prosecutor of the Supreme Court.
- Head of Appeals Court.
- Prosecutor of the Appeals Court.
- Three judges (elected by judges)

The Supreme Council of Magistracy will select an additional three reserve judges, who are elected by the judges in Cambodia. They will serve in the case of an absence of one of the judges.

1 – Selection of Judges:

- The Supreme Council of Magistracy will appoint at least seven Khmer judges and reserve judges as needed and also appoint the president of Extraordinary Chamber from among the Khmer judges. Besides appointing judges, the Supreme Council of Magistracy also appoints the Khmer investigating judges, members of the pre-trial chamber and the reserve Khmer judges.
- The Supreme Council of Magistracy appoints at least five foreign judges and two reserve foreign judges, as well as one foreign investigating judge and one reserve. These appointments will be made from a list submitted to the Supreme Council by the United Nations Secretary General and submitted to the Royal Government of Cambodia.

Each judge shall be appointed for the entire period of the proceedings.

2 – Selection of Prosecutors:



The Prosecutor is a representative of the state who charges the suspects with a crime, files the suit, and presents the case in court against an individual suspect accused of breaking the law.

The ECCC's prosecutors are appointed by:

- The Supreme Council of Magistracy appoints prosecutors or deputy prosecutors from the professional Khmer judges.
- The Supreme Council of Magistracy appoints one foreign prosecutor and a reserve prosecutor from a list chosen by the United Nations Secretary General and submitted to the Royal Government of Cambodia.

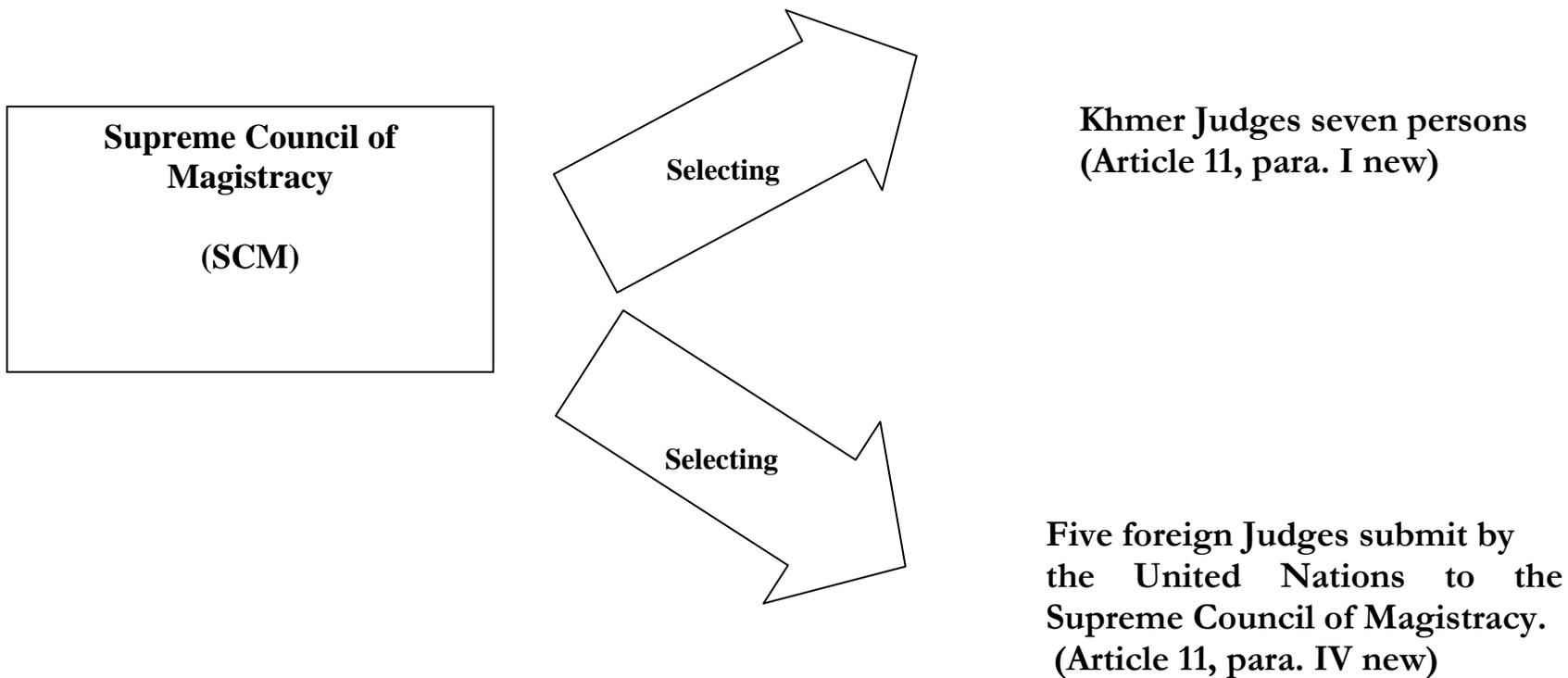
According to the Agreement with the UN, the prosecutors must persons of high moral character and integrity and must be experienced in conducting investigations and prosecutions in criminal cases. The co-prosecutors shall be independent in the performance of their functions and shall not seek or accept instructions from any government or any other source.

The Agreement also states that the co-prosecutors (Khmer and international) shall enjoy equal status and conditions of service according to each level of the Extraordinary Chambers. Co-prosecutors shall have the right to choose one or more deputy prosecutors to assist them. A deputy foreign prosecutor shall be appointed by the foreign co-prosecutor from the list provided by the UN Secretary General.

Each co-prosecutor shall be appointed for the entire period of the proceedings.



Judges Selection:





The law on the establishment of ECCC and the agreement between the Royal Government of Cambodia and the United Nations clearly state the crimes under the court’s jurisdictions, the time period during which crimes occurred that can be tried, and the kinds of individuals who can be held liable.

A – Temporal and Personal Jurisdiction:

1 – Temporal

This court is authorized to try senior leaders of Democratic Kampuchea and others who the court finds are the ones most responsible for the crimes committed from April 17, 1975 to January 6, 1979.

According to the 1956 Cambodian Penal Code, criminal offenses under Cambodian law can be tried up to 10 years after their commission. Under the Law on the Establishment of the Extraordinary Chambers, the statute of limitations set forth in the 1956 Penal Code shall be extended for an additional 30 years for the crimes which are within the jurisdiction of the Extraordinary Chambers. So, in total, the statute of limitations on these crimes will be extended to 40 years after the commission of the crime.

There is no statute of limitations for crimes against humanity and genocide.

2 – Offenses Covered

The offenses include:

- Violations of the 1956 Penal Code crimes such as homicide, torture and religious persecution.
- Violations of the 1948 Convention Against Genocide: “genocide is defined as acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as killing members of group, causing serious bodily or mental harm to members of group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or part, etc.”
- Crimes against humanity: “crimes against humanity are acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds such as murder, extermination, enslavement, torture...”
- Grave violations of the 1949 Geneva Convention, such as willful killing, torture or inhuman treatment...
- Violations of the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict
- Violations of the 1961 Vienna Convention on Diplomatic Relations.

3 – Personal Jurisdiction



There are two groups of people that the court can bring to trial: senior leaders of Democratic Kampuchea and those most responsible for serious crimes. Only the court can decide who were the senior leaders or the ones most responsible for the crimes committed during Democratic Kampuchea. Senior leaders and the ones most responsible are called the “suspects.”

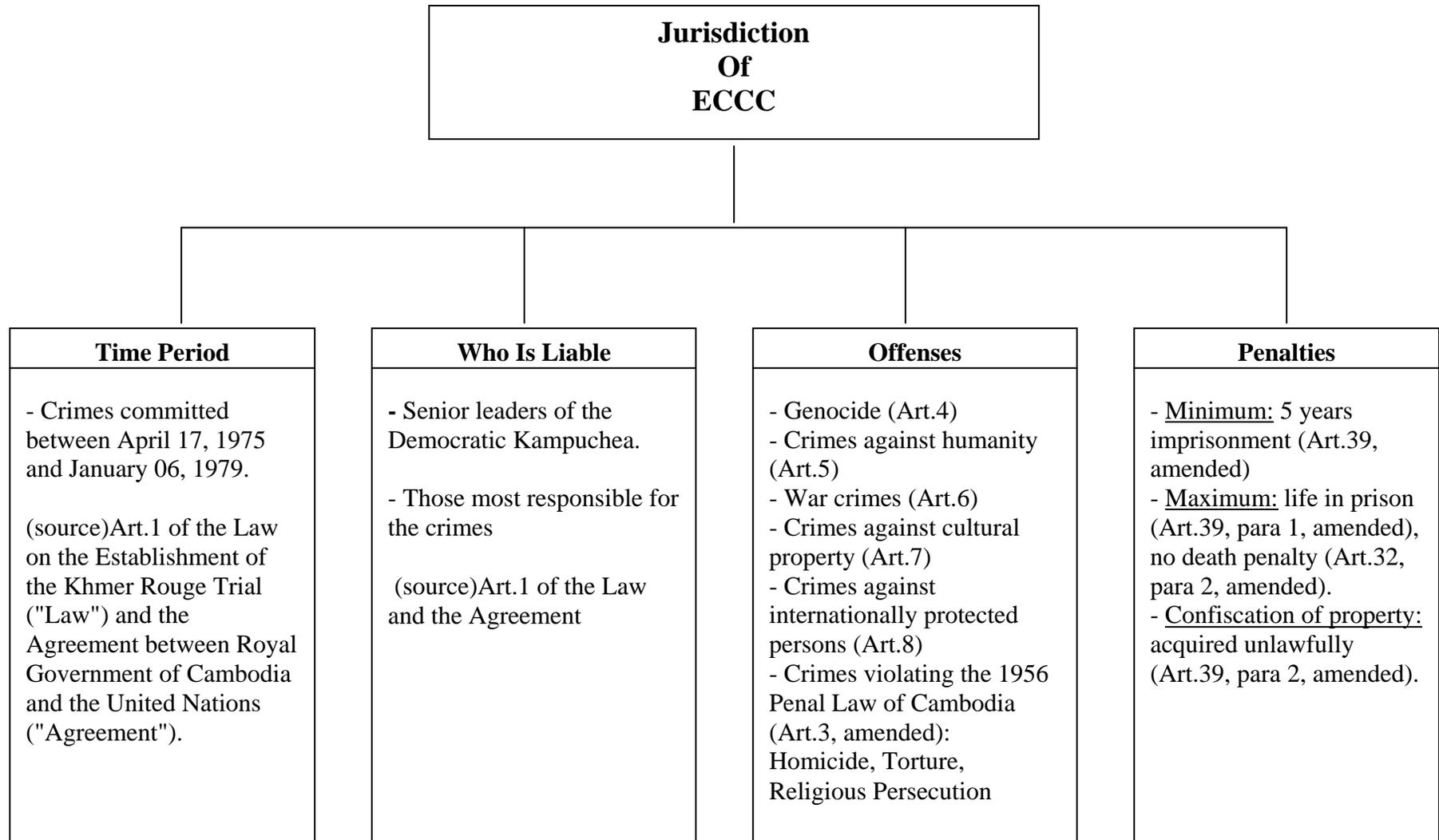
The law on the Establishment of the ECCC states that suspects who planned, instigated, ordered, aided and abetted or committed crimes will be held individually responsible. The position or rank of any suspect will not relieve such person of criminal responsibility or mitigate punishment. Even if a suspect acted pursuant to an order of the Government of the Democratic Kampuchea or of a superior, this will not relieve him of individual criminal responsibility.

The law also addresses the issue of superior responsibility--superior responsibility (sometimes called command responsibility) involves the failure of a civilian or military commander to take reasonable measures to prevent atrocities or to punish atrocities by his or her subordinates.

B– Penalization and Amnesty

The possible penalties, as stated in the ECCC Law, will be prison terms from five years to life imprisonment and confiscation of property acquired unlawfully. In accordance with section 23 of the Constitution of the Kingdom of Cambodia, and as restated in Articles 38 and 39 (new) of the EC law, there is no **death sentence**.

The law on the establishment of the Khmer Rouge trial and the agreement between the Royal Government of Cambodia and United Nations does not allow the Royal Government of Cambodia to request an amnesty or pardon.



*Note: The statute of limitations set out in the 1956 Penal Code is 30 years, so it will be possible to prosecute for these crimes until January 06, 2019.



V - Procedure

The ECCC will draft the Rules of Procedure and Evidence for the Chambers. In doing so, the Chambers will draft Rules of Procedure and Evidence specific to the Chambers' needs, following Cambodian rules of drafting. In the event that the Chambers' Rules leave a gap in procedure, they will look initially to Cambodian laws and then to International norms for guidance. The laws enumerated below may act as guides in case of gaps in the Chambers' own rules.

- Cambodian Law:
 - + Constitution of the Kingdom of Cambodia 1993
 - + UNTAC Penal Law for Cambodia 1992
 - + Penal Code 1956
 - + Law on Penal Procedure 1993
 - + Law on the Duration of Pre-Trial Detention August 26, 1999
 - + The Law Establishing the ECCC

- International Laws
 - + International Covenant on Civil and Political Rights (Art.14)
 - + International Criminal Court Statute (Rome Statue)
 - + Rules of Procedure and Evidence for the ICC

A – Bringing a Suit

In a criminal case, the prosecutor acts as the plaintiff. This means that the prosecutor is responsible for presenting the case against an individual suspected of breaking the law. Article 131 of the Cambodian constitution (amended) states that only the prosecutor can file a criminal suit. In the ECCC, there are co-prosecutors who are responsible for filing criminal suits against Khmer Rouge leaders, and those most responsible for committing crimes between April 17, 1975 and January 06, 1979.

In a case in the ordinary courts the criminal proceeding will end if:

- + The accused dies
- + The statute of limitations expires
- + General amnesty is granted
- + The victim withdraws the complaint

However, in the ECCC the procedures will probably be different -- for instance, it will probably not matter whether or not victims file individual complaints or withdraw complaints that are filed.

At the ECCC, it will probably be the case that the two co-prosecutors will collect evidence and decide whom to charge and with what crimes. The co-prosecutors will then pass a case to the two investigating judges through an investigative request.



B – Investigation

Investigation is the step-by-step process used to find the evidence necessary to bring a suit against a suspect. Investigating judges interrogate suspects, interview witnesses, review documents, and collect physical evidence. If there is enough evidence gathered, the case will proceed to trial. In the ECCC, there are co-investigating judges: one Khmer judge and one foreign judge. Each judge shall be appointed for the period of the proceedings.

During the investigation, the suspect has the right to ask for interpretation or translation into his own language. The official languages of the Tribunal are Khmer, English and French. Suspect also have the right to have a lawyer.

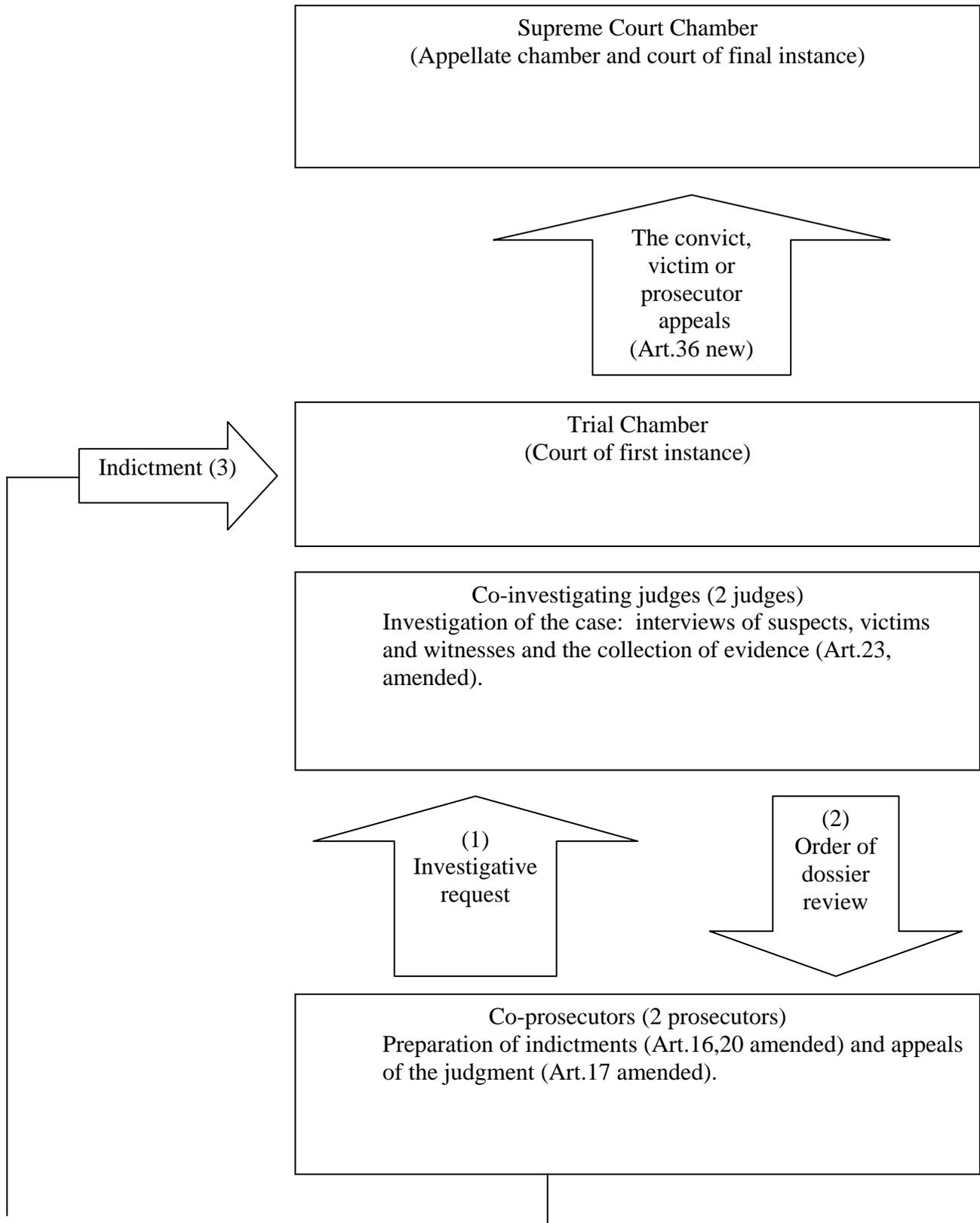
In the current Cambodian procedural law, states that the Investigating Judge starts the investigation after receiving a warrant from the prosecutor. Once the investigating judges have enough information, they deliver the case back to the prosecutor through an order of dossier review. It is probably the case that these same rules will apply at the ECCC.

C - Indictment

An indictment is a formal charge of having committed a serious criminal offense. The Law on the Establishment of ECCC Art.16 states that all the indictments shall be the responsibility of the co-prosecutors.



Special Procedures For The ECCC





VI – The Decision Making Process

There are two chambers in which decision-making takes place:

A – Trial Chamber and Supreme Chamber

The judges in both of the Chambers will try to reach a common decision.

The trial chamber has five judges, three Khmer judges and two international judges. In order to make a decision that a defendant is guilty four judges must agree. That means that at least one international judge must agree in order for any of the defendants to face punishment. However if it is not possible for four judges to agree, then the defendants will not face punishment. That means that if the Cambodian judges decide not punish someone, they will not be punished, regardless of what the international judges decide.

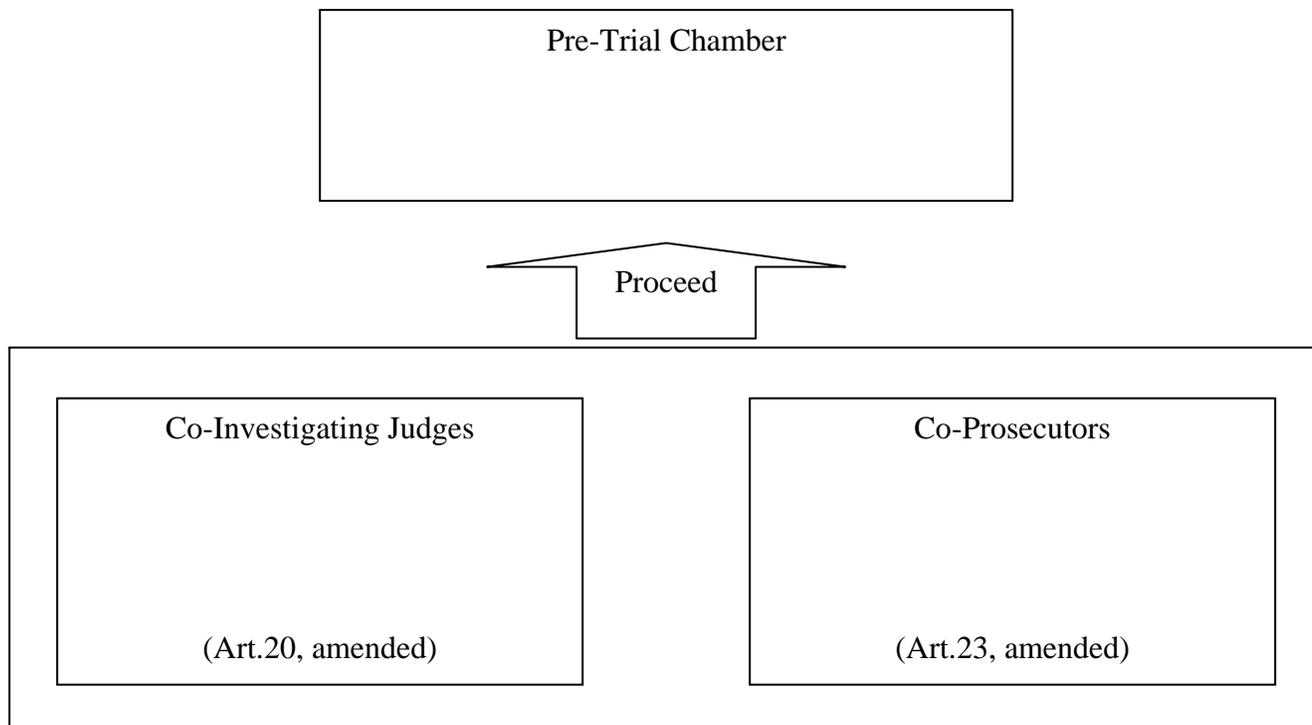
The supreme chamber has seven judges. In order to make a decision that a defendant is guilty at least five judges must agree. That means, as in the Trial Chamber, at least one international judge must agree in order for any of the defendants to face punishment. However if it is not possible for five judges to agree, then the defendants will not face punishment. Just like in the trial chamber, that means that if the Cambodian judges decide not punish someone they will not be punished, regardless of what the international judges decide.

B – Pre-Trial Chamber

The Pre-Trial Chamber settles differences of opinion between the two co-prosecutors and between the two co-investigating judges. The Pre-Trial Chamber has five judges: 3 Khmer judges and 2 foreign judges. The pre-trial decision must be agreed on by at least four of the five judges.



**Procedure for the Settlement of Differences between Co-Prosecutors
And Co-Investigating Judges**





Part 3

Standards of Due Process

The results of a survey on the Khmer Rouge Regime and the ECCC conducted in August 2004 by the Khmer Institute of Democracy shows that 61.3% of 536 Cambodians expected that the upcoming ECCC will bring justice to the country. One aspect of justice is a fair trial.

In general, a fair trial depends on several factors. Court structure, the process of selecting judges, judicial transparency, and court procedure must adhere to principles of Due Process.

It is necessary to observe Due Process from beginning to end. That means court proceedings must be supervised before, during, and after trial. The trial discussed here refers only to criminal cases.

If any part of the ECCC procedures fails to meet the standards of Due Process, justice has failed and either party may challenge the legitimacy of the proceedings.

I – Due Process and Criminal Procedure

Criminal Procedure refers to the rules for making complaints, performing investigations, conducting trials, issuing and implementing decisions, and filing appeals.

A – Fair trial Procedure:

In order to call a judgment fair, both parties must have equal opportunity to present evidence and examine witnesses before the court, and to communicate with the Court. That means that the defense must have the same opportunity to make their case as the prosecution. Each party will need access to information related to the proceedings from the judge and from the other parties in order to prepare their case. Likewise, a party must be ready to share important information of their own with the judges and the other parties.

1 – Right to receive information:

Any party has the right to access information relevant to their case. For example, if a party is accused of an offense, that party may request to see all documents related to the proceedings against him. Those may include reports made by the police, evidence gathered from witnesses, or any other relevant documents.

Judges shall provide each party with the same opportunities for discovery and enforce equivalent duties to disclose information relevant to another party's case.



Additionally, the accused has the right to be notified immediately of the allegations against him, as well as the reasons for his conviction. At all times, the accused should be addressed in a language he understands.

Information must be provided in a timely manner, so that each party has time to mount an effective case.

The Court must be cooperative with each party, and Court personnel must be available for support and consultation.

2 – Right to Be Heard:

The accused has an equal right to state his case, present evidence, request testimony from the other parties or witnesses, and cross-examination of the opposite party's witnesses.

Witnesses will receive subpoenas from the Investigating Judge, and must appear before the Judge for interrogation.

The witness shall appear after having received the subpoena. If the witness fails to appear in front of the judge, the witness must offer a reasonable excuse for their delinquency, such as sickness or being otherwise unable to travel. In this case judges, with a clerk, can go to the witness to hear and record his testimony.

3 – Right to Clear Communication:

In the investigative stage, the Investigating Judges ensure that relations between the parties are based on mutual respect and that equality of rights is protected. For example, they should provide translators and legal aid, both during and before the trial. The accused must also be able to speak freely with their attorney at all times.

Legal aid should be provided when the accused cannot afford to retain counsel, when the accused is blind, mute, or otherwise impaired in such a way as to require specialized legal assistance, or when the accused faces trial for a crime in which he cannot adequately defend himself.

4 – Right to a Public Trial:

An additional condition for justice is that the legal process be open to public scrutiny. The court hearings will be open to both participants and spectators to observe and monitor the proceedings.

In general, a public trial is a one where participation is possible for the public and the media. Furthermore, it means that people are able to sit inside the courtroom and observe court proceedings. After the trial, the judgment must be publicly announced. At the end of the hearing



judges have to read the judgment aloud to the parties and publish their reasoning behind specific holdings.

In cases requiring particular sensitivity, trials will be modified to provide protection to the affected parties. Rape or divorce cases, which might threaten participants with negative stigmatization or other consequences, will be conducted behind closed doors, but the judgment still be publicly announced.

5 – Right to Avoid Duress:

In the process of finding a fair solution, the court should rely on truthful information, voluntarily offered. Information extracted by torture, or other forms of duress, will be inadmissible as evidence.

Fair procedures prohibit the threatening, mistreatment, or torturing of the accused, as well as the admission of evidence gained by prohibited methods.

Those who threaten or intimidate a witness shall be punished.

6 – Duration of Procedure

The timing of a trial is important. All parties must have an opportunity to conduct investigations, prepare a case, disclose relevant information and to process information disclosed to them, and to present their cases at trial. But this time for preparation and presentation must be balanced against the need for a speedy and efficient trial.

Pre-trial detention is permitted, and should not exceed four months, except in cases where a judge finds reason for further investigation (in which case detention may be extended to six months). There is also a three year pre-trial detention period permitted only for the crimes of genocide, crimes against humanity and war crimes.

To avoid delays in proceedings, the Supreme Council of Magistracy shall appoint replacement for absent judges and prosecutors.

While recognizing the defense right to an efficient trial, the judges shall provide enough time to the accused for speaking and arguing, and shall offer translation as legal aids during the hearing.

8 – Independence of the judges:

A fair trial requires the independence of the judges. Judges shall be fair and removed from political influence, and shall impartially issue a judgment based on the facts and the law.



9 – Legality Principle

The commission of a crime is not possible unless the behavior of the accused was prohibited by legislation. *Nulla poena sine lege* is a Latin phrase embodying this concept, and is incorporated into the codes of all international criminal tribunals. Without a prohibiting law – national and international – currently in force in the Kingdom of Cambodia, passed by the National Assembly, an action is not criminal.

This also means that laws cannot be applied retroactively to crimes that occurred before the law existed. Offenses which were committed during the time of the old code should be punished by the old code; they shall not be punished by the new code. For example, the 1992 Criminal Law cannot be used to punish the crimes committed during Democratic Kampuchea because this law was enacted after the crimes were committed.

10 – Equality under Law

All citizens shall be punished equally under the law. Defendants cannot be punished differently, or afforded fewer rights, based on differences of race, ethnicity, religion, gender, or sexual orientation, among other things.

11 – The Presumption of Innocence

All suspects and accused shall be presumed innocent until a judgment specifically assigns guilt.

Furthermore, at trial, if there is any reasonable doubt as to a person's guilt or innocence, that person must be found innocent.

12 – Double Jeopardy

A person shall not be tried more than once for the same crime committed against the same party, even if a new criminal code is enacted. That means that if a person is tried and found not-guilty of a particular crime, and all of the appeals are finished, then they cannot be re-tried for that same crime at a later time.

13 -Judgments

Judgments shall be issued without delay following the closing of a trial.

The court's judgment shall be balanced and just. The judgment must refer to the facts of the case and the defendant's actions, witnesses, and arguments, and must cite reasons for the holding. The judgment shall not disproportionately encumber or force an undue obligation on the losing party.



II – Procedural Mechanisms Ensuring a Fair Trial

Judges, prosecutors and defense attorneys have a responsibility to ensure that violations of Due Process do not occur. Examples of such violations are:

- Non-disclosure of one party's documents to the other party.
- Recognition of the accuser's confession, obtained through torture.
- Evidence of bias in the judge's decisions.
- Omission of reasoning in a judge's opinion.

In the above cases prosecutors and defense attorneys can file a motion for the judges to modify procedure or take action to rectify the situation. Usually, the Clerk of Court records all claims and decisions for future use in appeal. Procedural mistakes that have not been adequately addressed in the court of first instance may be addressed in appeals court.

Some complaints related to mistaken procedure are:

A - Recusal

A prosecutor or defense attorney can file a motion for the judge to recuse himself (meaning not participate in a case) if a party to the proceedings suspects the judge of having a personal, economic, or political interest in the case that would interfere with his/her ability to impartially deliver justice. Examples of such connections include:

- A judge's family member having a personal relationship with the defendant.
- A judge's family member, friend, or business partner being the defendant.
- A judge's having been previously in conflict with the defendant.
- A judge's being in a position of potentially serving as a witness.

B – Demurrer

A demurrer is a written argument for the dismissal of a case on the basis of the case having no legal merit. A hearing will be held to determine the whether to grant a demurrer.

C – Appeal

An appeal is an argument with the decision of the court and a request that the court proceedings be re-examined. Defense counsel can formulate an appeal within 2 months of the judgment being issued.

