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Justice Must be Re-Cast
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The Post's recent article "Investigation Flawed: 004 Suspect's Lawyers" deserves comment.

First, Ta An could not have a better lawyer representing him than Richard Rogers, who has deep experience not only in international law but also in Cambodia.

Rogers will ensure Ta An's right to a fair trial is protected — whatever that means at the ECCC or in the high-powered game of international criminal law.

Which beings me to my next comment: fair-trial rights in the politically high-stakes, professionally high-powered, institutionally high-priced, individually high-minded and self-righteous sphere of mass crimes and genocide are illusory at best, nonsensical at worst.

The international criminal law system is broken and in need of reform, beginning with how we employ fair-trial rights.

The fair-trial rights employed in the international sphere of mass crimes and genocide are imported wholesale from the national court system.

The first problem with this is one of rationale. In a domestic criminal-justice system, immense measures for the protection of the individual are marshalled to counterbalance the massive resources of the State.

The rationale is to shield the defending party (often an individual not versed in law) against potential abuse by the prosecuting party .

The raison d'etre for each fair-trial right principle should be viewed through this lens of resource/power imbalance concerns.

The rationale for arming the individual with these substantial fair-trial rights in the domestic justice system is best reflected in William Blackstone's maxim: "The law holds that it is better that 10 guilty persons escape than one innocent suffer."

The second problem is that these rights may be reasonable in the national court system, but the wholesale import of them is a slap in the face of victims in cases of mass crimes and genocide.

These cases are of a different nature and scope not adequately addressed by the domestic fair-trial rights principles.

To illustrate the inadequacy and inappropriateness, let's look at a few fair-trial principles that have been accepted as articles of faith in international criminal law, within the context of the Extraordinary Chambers in the Courts of Cambodia.

In April last year in this newspaper, I raised the illusory relevance of the well-known presumption-of-innocence principle in the ECCC.

I had lodged a complaint alleging serious criminal charges against Meas Muth and Sou Met of Case 003 and Ta An, Ta Tith and Im Chaem in Case 004.

The problem with mass crimes is that they produce majority victims in the minority public with the right to speak publicly about their claims.

And their claims are based not only on personal experience but substantiated by the countless testimonies of other victims and innumerable, legitimate pieces of information.

The ECCC's public affairs officer — an international lawyer — accused me of "mere speculation" with "no basis", and with violating the presumption-of-innocence principle.

Basically, he was asking me and other victims to suspend our reason, logic and knowledge of these materials relevant to our cases, as well as the substantiating testimony of other victims.

The problem with the wholesale import of the presumption-of-innocence principle from the domestic sphere into the international context is one of confusing the rights of mass victims with the obligations of court officials and the unaffected public.

This is not a simple murder in the neighbourhood by which the presumption-of-innocence principle is to be viewed through a very narrow local lens without incorporating the countless distinguishing factors associated with mass crimes of international renown.

The Equality of Arms principle states that defence counsel and the prosecutor should have equal status.

At the ECCC, serious allegations have been raised against the collusion (even if only the perception of it) between Judge Silvia Cartwright and international prosecutor Andrew Cayley in their ex-parte communication.

The right to an independent, impartial tribunal has been egregiously violated too

persistently and consistently, and been so well documented and so frequently spoken about, that it's unnecessary to dwell on it here.

The right to legal counsel is glaringly violated in the cases of Meas Muth, Sou Met, Ta Tith and Im Chaem.

The right of the defence to call and examine witnesses has been ignored, despite its constant calls for political leaders to appear before the tribunal.

The vision and legal incorporation of victims as a party in the criminal proceeding is commendable, and should be retained for future international criminal proceedings. But it is greatly in need of restructuring and reform.

Since the Nuremberg trials, and the explosion of international law in the 1990s, we have gained enough experience and learned enough lessons to re-structure the international justice system to deal with mass crimes.