Standards of appellate review in the Supreme Court Chamber of the Extraordinary Chambers in the Courts of Cambodia

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BACKGROUND

The Supreme Court Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) "serve[s] as both appellate chamber and final instance" of the tribunal.[1] It is authorized to decide appeals against judgments or decisions of the Trial Chamber on the following grounds: "an error on a question of law invalidating the judgment or decision;"[2] or "an error of fact which has occasioned a miscarriage of justice."[3] The Supreme Court Chamber may "confirm, annul or amend decisions in whole or in part."[4] Its decisions are final, and therefore may not be sent back to the Trial Chamber.[5]

Although the ECCC's Internal Rules grant the Supreme Court Chamber only narrow jurisdiction, once it accepts an appeal, it technically has the power to revisit every phase of the proceedings. The Supreme Court Chamber may order additional investigations, which it may conduct "under the same conditions as the Co-Investigating Judges."[6] It may entertain applications by parties to call witnesses or admit new evidence.[7] Finally, for purposes of hearing

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[1] Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 9 new [hereinafter Law on ECCC]; *see also* Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea art. 3(2)(b) ("The Supreme Court Chamber . . . shall serve as both appellate chamber and final instance . . . .) [hereinafter ECCC Framework Agreement].
[2] Extraordinary Chambers in the Courts of Cambodia Internal Rules (revised Mar. 6, 2009) R. 104(1)(a) [hereinafter ECCC Internal Rules (rev. Mar. 6, 2009)].
[3] *Id.* R. 104(1)(b). *See also* Law on ECCC, *supra note* 1, art. 36 new ("[T]he Supreme Court Chamber shall make final decisions on both issues of law and fact . . . .").
[4] ECCC Internal Rules (rev. Mar. 6, 2009), *supra note* 2, R. 104(2).
[5] *Id.* R. 104(3).
[6] *Id.* R. 93.
[7] *Id.* R. 108(7).

appeals, the Supreme Court Chamber "may itself examine evidence and call new evidence to determine the issue."[8]

The overwhelming weight of persuasive authority urges the ECCC Supreme Court Chamber to set a high bar for both legal and factual appeals, as do the delays and funding problems that have dogged the ECCC so far. But the tribunal's unique, hybrid nature makes it unpredictable. In the absence of any rulings from the Supreme Court Chamber,[9] the standard of review that it will apply is unknown. This memorandum examines the civil- and common-law structures that influenced the ECCC's formation, as well as the case law of the *ad hoc* international criminal tribunals for Yugoslavia and Rwanda, to support the contention that a restrained approach to appellate review is most appropriate for the ECCC.

EXECUTIVE SUMMARY

The ECCC Supreme Court Chamber should not adopt civil-law standards of appellate review. Although the ECCC is influenced by civilian systems, it is *sui generis* and should operate in a manner consistent with its unique structure and mission. The Franco-Cambodian system of which the tribunal is technically a part applies standards of review particular to its court structure. Since the ECCC's structure is profoundly different, Franco-Cambodian standards of review are inappropriate for the ECCC Supreme Court Chamber.

Common-law standards, on the other hand, are well suited to the ECCC Supreme Court Chamber. The Supreme Court Chamber's largely corrective role means that the Trial Chamber is better positioned to judge questions of fact. Thus the Supreme Court Chamber should treat the Trial Chamber's factual findings with deference. This relationship is typical of common-law courts, which have developed nuanced jurisprudence on these questions. Notably, the

[8] *Id.* R. 104(1).
[9] As of August 2009.

ICTY/ICTR Appeals Chamber, which operates within a nearly identical structure to the ECCC, chose to adopt a common-law approach to appellate review of facts.

The ECCC has redrafted its rules on appellate review over time, making them essentially identical to those of the ICTY/ICTR. Therefore, the ECCC Supreme Court Chamber should adopt the ICTY/ICTR's narrow standards of review, which accords its Trial Chambers considerable deference on findings of fact, and sets a high bar for the admissibility of questions of law. In this way, the ECCC Supreme Court Chamber can avoid building a body of discordant jurisprudence on the same statutory language, which would make it harder for advocates to anticipate the Chamber's approach and best provide their clients with fair representation.

The ECCC Supreme Court Chamber should also strictly limit the use of evidence on appeal. This approach is most consistent with the text of the ECCC rules. The Supreme Court Chamber's power to grant motions for additional evidence on appeal is essentially identical to that of the ICTY/ICTR Appeals Chamber. It should be applied conservatively, as it is in the *ad hoc* Appeals Chamber. Similarly, the ECCC Supreme Court Chamber's power to call new evidence *proprio motu* mirrors ICTY/ICTR Appeals Chamber case law, and should be applied in the same way—only under extraordinary circumstances, to avoid a miscarriage of justice.

DISCUSSION

I. Although the ECCC uses civil-law procedures, its unique structure and purpose do not support the application of civil-law standards of appellate review

The ECCC is an essentially civilian tribunal, using the inquisitorial system familiar to civil lawyers, but it does not take part in any wider civilian system. Although the tribunal is technically a part of Cambodia's civil-law system of criminal justice, it is entirely self-contained, and has no interaction with Cambodian courts: it conducts its own prosecutions, investigations, trials, and appeals. Because the ECCC does not in any practical sense form a part of Cambodia's

national court system, the Supreme Court Chamber's work must be attentive to the tribunal's particular anatomy. This section examines the profound structural differences between the ECCC and national civilian courts, and argues that the ECCC Supreme Court Chamber should reject civilian standards of review in favor of standards more suitable for its unique structure and mission. (Because the Cambodian national judicial system is essentially identical to the French system, and because the French system receives vastly more academic attention than the Cambodian one, the French system will serve as an object lesson in civil law.)

A. The appellate approach used in the Franco-Cambodian civil-law system is tailored to its particular structure and procedures, and is not appropriate for the ECCC

Appeals in the Franco-Cambodian civil-law court system are characterized by parallel, rather than hierarchical, structures. Trial court findings are not generally reviewed by higher courts, but are supplanted by *de novo* trials in coordinate courts. The ECCC's simpler, hierarchical structure; single, limited appeal; and restricted, time-bound mission do not support the use of Franco-Cambodian appellate review.

i. Upon appeal in the Franco-Cambodian system, cases are retried by identical, coordinate courts

The French legal system uses two standards of appellate review: *appels* are appeals made as matter of right from the court of first instance; and *pourvois en cassation* are appeals brought before France's highest court, the Cour de Cassation.[10] The courts which hear *appels* try cases *de novo*, reviewing questions both of fact and of law.[11] The Cour de Cassation, on the other hand,

[10] Nicolas Marie Kublicki, *An Overview of the French Legal System from an American Perspective,* 12 B.U. INT'L L.J. 58, 63-64 (1994).
[11] *See* Nouveau code de procédure civile [N.C.P.C.] art. 561 (Fr.) ("An appeal challenges the already judged matter before the court of appeal so that it will freshly be judged upon its

reviews only questions of law; the word *cassation,* which is etymologically identical to the English word *quash,*[12] refers specifically to the suppression of a judgment made using a faulty interpretation of the law.[13] Cambodia's national courts use an essentially identical system.[14]

Appeals in France are initially heard using the broad *appel* standard because in the French criminal system, there is literally no difference between the court of first instance and the court of appeals. After the first assize court has made its ruling, the Cour de Cassation simply appoints another assize court to re-hear the case, under precisely the same conditions as the first trial,[15] with the exception that more votes are required for conviction.[16] It makes no sense, therefore, to speak of a "trial" and an "appellate" court in criminal matters. It is simply a matter of one court stepping in to review the same corpus of evidence, in the same way, as an

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factual and legal points."); Code de procédure pénale [French C.P.P.] art. 380-1 (Fr.) ("[An *appel*] is brought before another assize court, nominated by the criminal chamber of the Court of Cassation."). The English translations of both the French civil and criminal codes used here are provided by the French government at http://www.legifrance.gouv.fr/.

[12] The word *cassation* is based on the French word *casser.* Both the French *casser* and the English *quash* derive from the Old French *quaissier,* meaning "to break." *Oxford English Dictionary* (2d ed.).

[13] *See* N.C.P.C., *supra* note 11, art. 604 (Fr.) ("The appeal in cassation shall tend to ask the Court of Cassation to quash the nonconformity of the judgment to the rules of law."); French C.P.P., *supra* note 11, art. 591 ("When made in the form prescribed by law, judgments of the investigating chamber and also decisions made at final instance by competent courts may only be quashed for a violation of the law."). *See also* Code de l'organisation judicaire art. 411-2 (Fr.) ("La Cour de Cassation ne connaît pas du fond des affaires, sauf disposition législative contraire." [roughly translated by the author, "The Cour de Cassation does not deal with cases on their merits, unless otherwise provided by law."]).

[14] *See* Code of Criminal Procedure of the Kingdom of Cambodia [Cambodian C.C.P.] art. 406 (Cambodia) ("If the Court of Appeal finds the judgment of the Court of First Instance is invalid, the Court of Appeal shall re-decide on the merits of the case in the same way that a Court of First Instance would."); art. 417 ("Decisions made by the Investigation Chamber, including extradition issues, and final appeal judgments issued by a Criminal Chamber of the Court of Appeal may be reviewed through a request for cassation."); art. 436 ("The Supreme Court shall make a decision on the questions of law which were raised by the requester and described in his briefs.").

[15] *See id.* art. 380-1.

[16] *Id.* art. 359.

identically situated court. In common law terms, the posture is somewhat analogous to a trial court reopening a case following a mistrial; the second trial court owes the first no deference.

Furthermore, appeals to France's highest court, the Cour de Cassation, are not final except in rare circumstances. *Pourvois en cassation* ask the Cour de Cassation to "quash the nonconformity of the [second] judgment to the rules of law."[17] Quashing judgments flawed by nullities is, for all intents and purposes, the extent of the Cour de Cassation's power. In criminal cases, a quashed judgment results in yet another *de novo* trial, conducted in yet another court of first instance (or in the case of errors at the investigation stage, by another investigating chamber).[18] Similarly, following *cassation* of a civil judgment, the case is taken up *de novo* by another civil *cour d'appel.*[19] The court that receives the case following *cassation* is not bound by the Cour de Cassation's decision.[20] The Cour de Cassation only renders final judgment on matters of both fact and law when a case sent back to the trial court is challenged again, on the same grounds.[21]

In every relevant respect, Cambodia's courts resemble France's. Criminal appeals, which are made as a matter of right,[22] are heard *de novo* by a Court of Appeal, which operates in the same way as the Court of First Instance.[23] An appeal to the Supreme Court of Cambodia is

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[17] *See* N.C.P.C., *supra* note 11, art. 604 (Fr.) ("The appeal in cassation shall tend to ask the Court of Cassation to quash the nonconformity of the judgment to the rules of law.").
[18] *See* French C.P.P., *supra* note 11, art. 609 (*de novo* trial results from *cassation* of judgments in petty matters); art. 609-1 (new investigation results from *cassation* of investigating chamber judgment on appeal from closing order); art. 610 (*de novo* proceedings follow *cassation* of judgments in felony matters).
[19] *See* Kublicki, *supra* note 10, at 66-67. France's civil court system differs significantly from its criminal court system in structure. However, *appels* are heard *de novo* in both systems.
[20] *See id.*
[21] *See* French C.P.P., *supra* note 11, art. 619.
[22] *See* Cambodian C.C.P., *supra* note 14, art. 375.
[23] *See id.* art. 406 ("If the Court of Appeal finds the judgment of the Court of First Instance

termed a "cassation."[24] As in France, the Cambodian Supreme Court's purview is limited to matters of law;[25] when the Supreme Court quashes a judgment, it sends the case back to an identical court for re-trial.[26] Like the Cour de Cassation, the Supreme Court can only render final judgment in plenary session, on cases that have already been quashed once.[27]

ii. The ECCC, unlike Franco-Cambodian courts, allows only one appeal within a hierarchical structure

As discussed above, Franco-Cambodian courts use a broad standard of review because the courts of first instance and the courts that handle *appels* are literally identical. Appeals in both systems are taken as a matter of right. Further, the highest courts of both Cambodia and France are barred in most cases from making final judgments. The structure of the ECCC is altogether different.

First, the ECCC has only one Trial Chamber, only one Supreme Court Chamber, and only one opportunity for appeal.[28] Whereas the national court systems of France and Cambodia can rely on extensive networks of coordinate courts to handle *appels,* the ECCC has but one Trial Chamber.[29] Thus, the fundamental premise of Franco-Cambodian *appel* review—that cases

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is invalid, the Court of Appeal shall re-decide on the merits of the case in the same way that a Court of First Instance would.").

[24] *See id.* art. 417 ("Decisions made by the Investigation Chamber, including extradition issues, and final appeal judgments issued by a Criminal Chamber of the Court of Appeal may be reviewed through a request for cassation.").

[25] *Id.* art. 436 ("The Supreme Court shall make a decision on the questions of law which were raised by the requester and described in his briefs.").

[26] *Id.* art. 439 ("If the Supreme Court reverses a contested decision, it shall return the case . . . to another Court of Appeal or to the same Court of Appeal [with different judges sitting.]").

[27] *Id.* art. 442.

[28] Ignoring, for present purposes, finalized cases reopened for review upon discovery of new evidence. *See* ECCC Internal Rules (rev. Mar. 6, 2009), *supra* note 2, R. 112 ("Review of Final Judgment").

[29] Although the ICTY and ICTR each have three Trial Chambers, they have still adopted narrow, common-law standards of appellate review. *See* Mark A. Drumbl & Kenneth S. Gallant, *Appeals*

are retried by identical courts—is a nullity in the ECCC. The same is true of Franco-Cambodian *pourvois en cassation.* Whereas the highest courts of France and Cambodia are limited to making nonbinding judgments on questions of law, the ECCC Supreme Court Chamber must dispose finally of cases both on facts and law.[30]

Second, appeals to the ECCC Supreme Court Chamber are not a matter of right. Appellants must allege either an error of law that "invalidates the decision or judgment," or an error of fact that "occasion a miscarriage of justice."[31] Parties wishing to appeal a Trial Chamber judgment must specifically allege an error in their notice of appeal, demonstrate that it was dispositive, and set forth arguments and authorities supporting their motion;[32] they are barred from raising any matters of fact or law not thus set forth.[33] The Supreme Court Chamber may refuse to hear appeals that it deems inadmissible.[34] These strict pleading and admissibility requirements for appeals shelter the bulk of the Trial Chamber's judgments and decisions from review, implying a measure of built-in deference for its findings.

Another important distinction is that the Supreme Court Chamber's broad powers are largely discretionary; it is *empowered* but not *required* to introduce new evidence and otherwise perform the functions of the Trial Chamber on appeal.[35] The appellate courts of Cambodia and France are required to conduct *de novo* trials, and are not allowed to amend the judgments of the courts of origin. Similarly, the *cassation* courts of both countries are statutorily required to limit

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in the Ad hoc International Criminal Tribunals: Structure, Procedure and Recent Cases, 3 J. APP. PRAC. & PROCESS 589, 606 (2001).

[30] *See* ECCC Internal Rules (rev. Mar. 6, 2009), *supra note* 2, R. 104(3).

[31] *Id.* R. 104.

[32] *Id.* R. 105(2)-(3).

[33] *Id.* R. 109(6).

[34] *Id.* R. 111(2).

[35] *See id.* R. 104(1) ("[T]he Supreme Court Chamber *may* itself examine new evidence and call new evidence . . . ." (Emphasis added.)).

themselves to questions of fact on first review. The ECCC Supreme Court Chamber may only address the dispositive errors that are within its jurisdiction; its broader powers should be used only in the service of that basic, corrective function.

Indeed, the structure of the ECCC was designed and redesigned to deliver results efficiently. The Secretary-General's report had this to say about early drafts of the ECCC Framework Agreement:

> The structure of the [ECCC] . . . should be simplified in a number of respects. This would make it possible to establish the Chambers as early as possible, enable them to begin to function promptly and make their sustained operation more cost-effective and efficient. It would also enhance their credibility, by minimizing the scope for delay in the conduct of investigations, prosecutions and trials. . . . The Chambers should have a simple two-tier structure, consisting of a Trial Chamber and an Appeals Chamber. The draft that had previously been under discussion had provided for a more complex, three-tier structure, consisting of a Trial Court, an Appeals Court and a Supreme Court.[36]

As will be seen later,[37] the difference between two chambers and three is critical. The simpler, two-tiered structure adopted by the tribunal's framers was not only intended for efficiency; it also renders broad appellate review impracticable.

iii. The ECCC's specific mission and severe time limitations set it apart from Franco-Cambodian courts, requiring cases to be completed more expeditiously

The ECCC faces time pressures that do not affect national courts. At the ECCC's founding, it was assumed that all trials and appeals would be completed within three years after the Prosecutors began their work.[38] The ECCC's Office of the Co-Investigating Judges ordered

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[36] *Id.* ¶ 16(b).
[37] *See infra* Part I-B.
[38] The Secretary-General, *Report of the Secretary-General on Khmer Rouge Trials,* ¶ 56, *delivered to the General Assembly,* U.N. Doc. A/57/769 (Mar. 31, 2003) [hereinafter Secretary-General Report on Khmer Rouge Trials].

the provisional detention of Kaing Guek Eav, alias Duch, on July 31, 2007.[39] Exactly three years later, the Trial Chamber is marking the fiftieth day of Duch's trial, and is only expected to complete his trial by October or November.[40] At the end of its envisioned period of operation, the tribunal has yet to complete even one trial, much less its entire docket.

Meanwhile, as has been widely reported, the remaining defendants are in declining health and may not be fit to stand trial—assuming they are still alive by then.[41] Before the tribunal was launched the office of the United Nations Secretary-General reported that unless the ECCC operates "in an efficient . . . manner . . . the opportunity of bringing to justice those responsible for serious violations of Cambodian and international law during the period of Democratic Kampuchea might soon be lost."[42] Lengthy appeals would draw out the already dilatory proceedings, and could make the Secretary-General's warning come true.

B. The ECCC's appellate structure is closer to a common-law appellate structure, making deferential review the more appropriate approach

Although its procedures are undeniably civilian, the ECCC's structure and mission lend themselves far more readily to a common-law appellate approach. As discussed above, the civilian system from which the ECCC borrows uses broad appeals because of its particular division of labor: courts hearing *appels* retry cases from scratch, and owe each other no deference; whereas courts hearing *pourvois en cassation* ensure consistent application of the law, and only rarely issue final judgments. The ECCC's hierarchical structure, strictly limited appellate jurisdiction, and the finality of its appellate judgments sets up a wholly different

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[39] *See* Order of Provisional Detention, Case No. 001/18-07-2007/ECCC-TC, Office of the Co-Investigating Judges (July 31, 2007).
[40] ECCC website, *Summary: 50 first days of the "Duch"-trial* [sic], July 27, 2009, http://www.eccc.gov.kh/english/news.view.aspx?doc_id=300.
[41] *See, e.g.,* Ker Munthit, *Health of aging Khmer Rouge leaders raises concern about bring them to justice* [sic], AP Worldstream, Dec. 13, 2002.
[42] Secretary-General Report on Khmer Rouge Trials, *supra* note 38, ¶ 10(f).

relationship. The real question for the ECCC Supreme Court Chamber is, to what extent is it willing to substitute its judgment for that of the Trial Chamber?

This is a familiar question to any common lawyer. Common-law courts draw a bright line between the fact-finding function of juries and the legal function of judges. To many jurists and commentators, this firm distinction supplies the rationale for the deference accorded to fact-finders by common-law appellate courts.[43] A common-law trial court is "in a position to determine the facts superior to that of judges who . . . examine only a cold printed record," especially with regard to "matters of credibility—of determining who was telling the truth, who was exaggerating, whose memory was faulty . . . ."[44] This understanding is so engrained in American law that it is included in the American Federal Rules of Civil Procedure, which provide that "findings of fact . . . must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."[45] As the United States Supreme Court put it, trial on the merits is supposed to be "the main event . . . rather than a tryout on the road."[46]

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[43] A timely article about the nomination of Sonia Sotomayor for the United States Supreme Court illustrates this distinction when it comments that "her writings have often offered a granular analysis of every piece of evidence in criminal trials, and sometimes read as if she were retrying cases from her chambers. . . . [S]ome were critical of her style, saying it comes close to overstepping the traditional role of appellate judges, who give considerable deference to the judges and juries that observe testimony and are considered the primary finders of fact." Jerry Markon, *Uncommon Detail Marks Rulings by Sotomayor,* WASHINGTON POST, July 9, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/07/08/AR2009070804211_pf.html.

[44] Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis,* 58 HARV. L. REV. 70, 79 (1944). *See also* Lough v. Brunswick Corp., 103 F.3d 1517, 1522 (Fed. Cir. 1997) (Newman, J., dissenting) (Writing about review of findings of fact: "I am not in a position to evaluate and weigh these findings, some of which appear to be directly contrary to unchallenged testimony. Those who were present at the trial were surely better positioned to sort out the truth, weigh the evidence, and balance all of the circumstances.").

[45] Fed. R. Civ. P. 52(a)(6) (U.S.). Appellate deference to trial-court findings of fact also characterizes British appellate review; indeed, most of the discussion *infra* is also more or less

Civilian courts in the Franco-Cambodian model, however, draw little distinction between fact and law. Criminal judges are not limited, like common-law judges, to a narrow role in trials.[47] In fact, the French system technically conceives of an assize court (the court of first instance in criminal matters) as "comprising the court proper and the jury."[48] Accordingly, when it comes time to render a verdict in criminal trials, French judges deliberate and vote alongside the jury.[49] In criminal cases, judges, lawyers from both parties, the accused, civil parties, and jurors may all interrogate witnesses.[50] Almost every participant is allowed to help the judges and jurors who make up the "court" come to a decision on matters of both fact and law.

With its factual jurisdiction limited to grave errors only, and with only discretionary power to hear any evidence, the ECCC Supreme Court Chamber is positioned much more like a common-law appellate court than a civilian one. The Supreme Court Chamber cannot issue a brand-new judgment as under *appels,* nor quash and remand judgments as under *pourvois en*

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true of the British system. *See* Sofie M.F. Geeroms, *Comparative Law and Legal Translation: Why the Terms Cassation, Revision and Appeal Should Not Be Translated,* 50 AM. J. COMP. L. 201, 222 (2002) ("With regard to the facts of a case, the Court of Appeal [of England and Wales] overturns a decision only when it is not supported by the evidence or could not have been reached by a reasonable jury. The Court almost never uses its power to receive new evidence. The underlying policy behind this cautious practice is to enhance deference for decisions of the trial court, which should be accepted as final decisions. On the other hand, when reviewing questions of law, the Court of Appeal can freely substitute its own judgment for that of the trial court. Accordingly, the Court of Appeal now functions more to correct errors in the trial court than to provide a second stage in the trial of a case.").

[46] Wainwright v. Sykes, 433 U.S. 72, 90 (1977).

[47] *See* Kublicki, *supra* note 10, at 64.

[48] *See* French C.P.P., *supra* note 11, art. 240 ("The assize court comprises the court proper and the jury.").

[49] *See id.* art. 356 ("The court and the jury deliberate, then vote [on a verdict.]")

[50] *See id.* art. 311 ("The . . . jurors may put questions to the accused and to the witnesses after asking the president for leave to speak."); art. 312 ("[T]he public prosecutor and the parties' advocates may put questions directly to the accused, the civil party, witnesses or anyone else called to testify, by asking the president for permission to speak. The accused and the civil party may also ask questions through the intermediary of the president."); art. 328 ("The president interrogates the accused . . . ."); art. 332 ("After each statement, the president may ask questions of the witnesses.").

cassation, but can only "confirm, annul or amend" Trial Chamber judgments.[51] On factual matters, it is likely to examine very narrow factual findings without the benefit of hearing evidence itself. The Supreme Court Chamber operates, therefore, like a common-law appellate court: every one of its decisions must come at the cost of a Trial Chamber finding.

For the reasons discussed earlier, an appellate court in such a position should treat lower-court findings with deference. In the ECCC, as in common-law courts, the Trial Chamber is indeed "in a position to determine the facts superior to that of judges who . . . examine only a cold printed record."[52] The Appeals Chamber of the ICTY, which has the same jurisdiction and powers as the ECCC Supreme Court Chamber, decided to treat Trial Chamber findings deferentially partly because "two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence."[53] In this sense, it is partly a matter of professional comity to treat lower-court findings with deference. Finally, as Judge Mohamed Shahabuddeen wrote in an early ICTY opinion, while to some extent "the Appeals Chamber is also a judge of fact, . . . it must take account of its disadvantage in that, unlike the Trial Chamber, it cannot assess the witnesses first hand."[54]

Indeed, the power of the ECCC Supreme Court Chamber to review questions of fact may have less to do with *appels* review than with the fact that it is the ECCC's only appellate recourse. The Appeals Chamber of the International Criminal Court (ICC), which performs a similar function to the ECCC Supreme Court Chamber, is an object lesson in this logic. Like the

[51] ECCC Internal Rules (rev. Mar. 6, 2009), *supra* note 2, R. 104(2).
[52] Stern, *supra* note 44, at 79.
[53] Prosecutor v. Tadić, Case No. IT-94-1-A, Appeal Judgment, ¶ 64 (July 15, 1999).
[54] *Tadić* Appeal Judgment, ¶ 29 (separate opinion of Judge Shahabuddeen).

ECCC, the ICC has only two chambers to try cases: a trial chamber and an appeals chamber.[55] Also like the ECCC Supreme Court Chamber, the ICC Appeals Chamber may hear appeals based on errors of both fact and law,[56] and may avail itself of all of the powers of the Trial Chamber.[57] In an early draft of the Rome Statute, the International Law Commission reported that "the [ICC] Appeals Chamber combines some of the functions of *appel* in civil law systems with some of the functions of *cassation*. This was thought desirable, having regard to the existence of only a single appeal from decisions at trial."[58]

But while the ECCC Supreme Court Chamber, like the ICC Appeals Chamber, may arguably perform some functions of both *appel* and *cassation,* a deeper understanding of the ECCC's basic parameters shows that civilian review is inappropriate for it. Common-law review is a better fit. The questions that the ECCC Supreme Court Chamber will face are venerable, workaday matters for common lawyers and common-law courts, and common-law jurisprudence has developed nuanced mechanisms in response. Moreover, common-law review has delivered results in the ICTY/ICTR Appeals Chamber. The ECCC Supreme Court Chamber should take advantage of this successful internationalized jurisprudence.

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[55] Rome Statute of the International Criminal Court art. 34, July 7, 2002, U.N. Doc. A/CONF.183/9 [hereinafter Rome Statute].
[56] *Id.* art. 81.
[57] *Id.* art. 83.
[58] International Law Commission, *Report of the International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994,* 127, U.N. Doc. A/49/10 (1994).

II. In the interest of meeting international standards and ensuring fairness, the ECCC Supreme Court Chamber should adopt the ICTY/ICTR Appeals Chamber's restrained approach to appellate review

The ECCC's structure and rules are modeled closely on those of the International Criminal Tribunals for the former Yugoslovia (ICTY) and Rwanda (ICTR).[59] The drafting history of the ECCC rules suggests that the tribunal's judges deliberately aligned them with those of the other international criminal courts. The ECCC's founding treaty directs it to look to "procedural rules established at the international level" to resolve procedural uncertainties;[60] indeed, one purpose of the ECCC's Internal Rules is to fill the gaps in Cambodian procedures where "there is a question regarding their consistency with international standards."[61] The most logical place to look for international guidance is ICTY/ICTR jurisprudence, which favors narrow appeals and deference to their Trial Chambers.[62]

A. The ECCC Internal Rules with regard to appellate jurisdiction are almost identical to those of the *ad hoc* international criminal tribunals, and should be applied similarly in order to ensure fairness and consistency

A review of the drafting history of the ECCC's Internal Rules reveals that, over time, the ECCC rewrote the rules governing the Supreme Court Chamber to bring them in line with the

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[59] The Special Court for Sierra Leone (SCSL) Statute is also essentially identical. However, the Appeals Chamber for the SCSL is required to look to the ICTY and ICTR appellate jurisprudence for guidance. Statute of the Special Court for Sierra Leone, art. 20(3) [hereinafter SCSL Statute]. Thus, this section directs its attention exclusively to those two courts.

[60] ECCC Framework Agreement, *supra* note 1, art. 12(1).

[61] ECCC Internal Rules (rev. Mar. 6, 2009), *supra* note 2, preamble (citing Law on ECCC, *supra* note 1, arts. 20 new, 23 new, and 33 new; ECCC Framework Agreement, *supra* note 1, art. 12(1)).

[62] A detailed examination of how the doctrine of *stare decisis* operates in the *ad hoc* tribunals is outside the scope of this memorandum. Suffice it to say that the ICTY/ICTR Appeals Chamber decided, upon careful consideration of the matter, that fair trial rights and international jurisprudence would be best served by regarding case law as binding. It considers its approach compatible with both the civil- and common-law traditions. See Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeal Judgment, ¶¶ 92-115 (Mar. 24, 2000), for a learned, carefully reasoned discussion of the matter.

rules of the *ad hoc* tribunals.[63] The earliest draft of the Rules allowed the Supreme Court Chamber to decide appeals against the Trial Chamber "on *any* issues of fact and law"[64] (emphasis added.) In the second revision, the drafters added the current language changing the Chamber's jurisdiction to mirror the more limited jurisprudence of the Appeals Chambers of the ICTY and ICTR, and allowing it to examine evidence.[65] The third revision added interlocutory appeals on a number of grounds.[66] Although interlocutory appeals will not be examined in this memorandum, their addition to the ECCC rules is further evidence that the tribunal has been revamped to follow the ICTY and ICTR.[67] Over time, the ECCC's judges have crafted for themselves a Supreme Court Chamber that is in many ways identical to the Appeals Chambers of the *ad hoc* international criminal tribunals.

This drafting history would appear to suggest that the Supreme Court Chamber will make use of ICTY and ICTR case law, as it did ICTY and ICTR statutory law. While the ICTY/ICTR rules are not, of themselves, perfect, it is likely that the ECCC judges imitated them in order to establish a predictable baseline for themselves and for lawyers appearing before them. One commentator suggests that the drafting history of the ICTY Statute (which preceded the ICTR

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[63] All past revisions of the ECCC Internal Rules are available at http://www.eccc.gov.kh/english/internal_rules.aspx.
[64] Extraordinary Chambers in the Courts of Cambodia Internal Rules 104(1) (June 12, 2007) [hereinafter ECCC Internal Rules (June 12, 2007)].
[65] Extraordinary Chambers in the Courts of Cambodia Internal Rules (revised Sep. 5, 2008) R. 104(1) [hereinafter ECCC Internal Rules (rev. Sep. 5, 2008)]. *See* Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended) art. 25(1) [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda (as amended) art. 24(1) [hereinafter ICTR Statute]; SCSL Statute, *supra* note 59, art. 20(1).
[66] ECCC Internal Rules (rev. Mar. 6, 2009), *supra* note 2, R. 104(4).
[67] *See* International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Yugoslavia since 1991 Rules of Procedure and Evidence 116, U.N. Doc. IT/32/Rev. 42 (Nov. 4, 2008) [hereinafter ICTY Rules]. *Accord* International Criminal Tribunal for Rwanda Rules of Procedure and Evidence 117 (Mar. 14, 2008) [hereinafter ICTR Rules]; Special Court for Sierra Leone Rules of Procedure and Evidence 117 (May 27, 2008) [hereinafter SCSL Rules].

Statute) "reveals that the Security Council did not turn its attention to many of the thorny issues surrounding appellate review," but settled for a "compromise of principles that superficially gave everyone what they asked for."[68] However sound or unsound this assessment may be, it is indisputable that the appellate jurisdiction granted in the final Statute was a compromise between myriad competing visions.[69] The ECCC's adoption of this compromise jurisdiction seems to evince a regard for the way the *ad hoc* Appeals Chambers have used it—or, in other words, for the jurisprudence of the *ad hoc* Appeals Chambers.

Whether or not such consistency was the goal of the ECCC's revisions, is certainly of the highest importance in the ECCC's work. As the ICTY Appeals Chamber wrote,

> The need for coherence is particularly acute in the context in which the ICTY operates, where the norms of international humanitarian law and international criminal law are developing, and where, therefore, the need for those appearing before the Tribunal, the accused and the Prosecution, to be certain of the regime in which cases are tried is even more pronounced.[70]

The very existence of appellate jurisprudence in international criminal law is an innovation. Unlike the International Military Tribunals at Nuremberg and Tokyo, which both lacked appellate chambers, today's international criminal tribunals—including the ECCC—are "contributing to the growth of international law both in international fora and in the domestic

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[68] Mark C. Fleming, *Appellate Review in the International Criminal Tribunals,* 37 TEX. INT'L. L.J. 111, 116, 120 (2002).

[69] *See, e.g., id.* at 118 ("[A] group of rapporteurs appointed by the Conference of Security and Co-operation in Europe suggested an unlimited right of appeal for the defense, but appeal only on questions of law for the prosecution. . . . [But] France altogether opposed the creation of a special appeals chamber, but recommended that an appeal procedure be available in the nature of cassation, or review on questions of law only.").

[70] Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeal Judgment, ¶ 113(iii) (Mar. 24, 2000).

courts of many nations."[71] That role is best served by taking advantage of the work of existing courts.

The fairness of the ECCC's proceedings would also be best served by consistent, predictable application of its rules. As Judge Zoričič wrote early in the history of the International Court of Justice,

> it is quite true that no international court is bound by precedents. But there is something which this Court is bound to take into account, namely the principles of international law. If a precedent is firmly based on such a principle, the Court cannot decide an analogous case in a contrary sense, so long as the principle retains its value.[72]

This principle applies *a fortioti* to the ECCC Supreme Court Chamber. Adopting rules identical to those of the *ad hoc* tribunals without being guided by their case law it would produce conflicting readings of the same laws, upending settled interpretations that should guide the work of lawyers before the ECCC.

B. The ICTY/ICTR Appeals Chamber case law establishes a narrow standard of review for all appeals

The Appeals Chambers of both *ad hoc* tribunals have the same basic jurisdiction as the ECCC Supreme Court Chamber: errors of fact occasioning a miscarriage of justice, and errors of law invalidating a judgment or decision.[73] The two Appeals Chambers, which, in addition to using near-identical statutes, share the same judges and (at first) prosecutors,[74] march in lockstep with regard to standards of review. Their judgments on appellate review all favor the same, deferential attitude to the work of their Trial Chambers, when examining alleged errors either of

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[71] Drumbl & Gallant, *supra* note 29, at 590.
[72] Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion 1950 I.C.J. 65 (Mar. 30) (dissenting opinion of Judge Zoričič).
[73] *See* ICTY Statute, *supra* note 65, art. 25(1); ICTR Statute, *supra* note 65, art. 24(1); SCSL Statute, *supra* note 59, art. 20(1).
[74] Drumbl & Gallant, *supra* note 29, at 590.

fact or of law. (Because of the near identity of the relevant case-law, and the frequency with which the Appeals Chamber cites its own decisions across tribunals, this discussion will treat the ICTY/ICTR Appeals Chamber as one body, providing parallel citations where possible.)

i. ICTY/ICTR standard of review: errors of fact

The ICTY/ICTR Appeals Chamber's standard of review for factual errors accords their Trial Chambers considerable deference.[75] The Appeals Chamber "will not lightly disturb findings of fact by a Trial Chamber."[76] Its reasons are, roughly speaking, twofold. First, the Appeals Chamber may only overturn Trial Chamber decisions for errors of fact which occasion "a miscarriage of justice,"[77] which it has defined as "a grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."[78] Second, "Trial Chambers are best placed to hear, assess and weigh the evidence, including witness testimonies, presented at trial"[79]—an unambiguously common-law standard.[80]

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[75] *See, generally,* Prosecutor v. Kvočka, Case No. IT-98-30/1-A, Appeal Judgment, ¶¶ 18-20 (Feb. 28, 2005) (summarizing standards of review); GEERT-JAN ALEXANDER KNOOPS, THEORY AND PRACTICE OF INTERNATIONAL AND INTERNATIONALIZED CRIMINAL PROCEEDINGS (Kluwer Law International 2007).

[76] Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Appeal Judgment, ¶ 37 (July 21, 2000); *accord* Musema v. Prosecutor, Case No. ICTR-96-13-A, Appeal Judgment, ¶ 18 (Nov. 16, 2001) (citing *Furundžija* Appeal Judgment, ¶ 37).

[77] ICTY Statute, *supra* note 65, art. 25(1); *accord* ICTR Statute, *supra* note 65, art. 24(1).

[78] *Furundžija* Appeal Judgment, ¶ 37 (citing BLACK'S LAW DICTIONARY (7th ed. 1999)); *accord Musema* Appeal Judgment, ¶ 17 (citing *Furundžija* Appeal Judgment, ¶ 37).

[79] Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeal Judgment, ¶ 63 (Mar. 24, 2000) (citing Prosecutor v. Tadić, Case No. IT-94-1-A, Appeal Judgment, ¶ 64 (July 15, 1999)); *accord* Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-A, Appeal Judgment, ¶ 187 (June 1, 2001) ("The Trial Chamber is best placed to hear, assess and weigh the evidence, including witness testimonies presented at trial.") (citing *Aleksovski* Appeal Judgment, ¶ 63).

[80] *See* Stern, *supra* note 44, at 79 (A common-law trial court is "in a position to determine the facts superior to that of judges who . . . examine only a cold printed record," especially with regard to "matters of credibility—of determining who was telling the truth, who was exaggerating, whose memory was faulty . . . ."). *See also supra* Part I-B (explaining the different bases for civil- and common-law standards of review).

Accordingly, the ICTY/ICTR Appeals Chamber has held that appellate review in the *ad hoc* tribunals is "corrective and does not give rise to a *de novo* review of the case."[81] Rather, it uses a deferential reasonableness standard in determining errors of fact: "Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is 'wholly erroneous' may the Appeals Chamber substitute its own finding for that of the Trial Chamber."[82] It operates on the assumption that reasonable judges can come to different conclusions on the same evidence.[83] The standard, thus articulated, appears to combine two different common-law review standards: in United States parlance, the "clearly erroneous" standard applied to factual findings by judges, and the more deferential "reasonableness" standard applied to factual findings by juries.[84]

The burden of meeting these high standards is on the appellant. Under the Rules of Procedure and Evidence for both the ICTR and the ICTY, parties wishing to appeal a judgment must give notice "indicat[ing] the substance of the alleged errors and the relief sought."[85] The Appeals Chamber has held that an appellant "must show that the Trial Chamber did indeed commit the error, and, if it did," according to the stringent definition relied upon in *Furundžija,*

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[81] Prosecutor v. Vasiljević, Case No. IT-98-32-A, Appeal Judgment, ¶ 5 (Feb. 25, 2004). *See also Furundžija* Appeal Judgment, ¶ 40 ("This Chamber does not operate as a second Trial Chamber."); *accord Musema* Appeal Judgment, ¶ 17 ("The Appeals Chamber stresses . . . that an appeal is *not* an opportunity for a party to have a *de novo* review of their case.").

[82] Prosecutor v. Kvočka, Case No. IT-98-30/1-A, Appeal Judgment, ¶¶ 18-20 (Feb. 28, 2005) (quoting Prosecutor v. Kupreškić, Case No. IT-95-16-A, Appeal Judgment, ¶ 30 (Oct. 23, 2001)); *accord Musema* Appeal Judgment, ¶ 17 ("[T]he Appeals Chamber confirms that the standard to be applied is that of reasonableness.").

[83] *Musema* Appeal Judgment, ¶ 92 ("[T]wo judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.") (quoting *Tadić* Appeal Judgment, ¶ 64).

[84] *See, e.g.,* Stern, *supra* note 44, at 85 ("There are a number of reasons why a trial judge's findings [of fact] should not be accorded the same deference as those of a jury . . . why 'clearly erroneous' permits a broader review than [reasonableness]."); *see also supra* text accompanying notes 46-49.

[85] *See* ICTY Rules, *supra* note 67, R. 108; *accord* ICTY Rules, *supra* note 67, R. 108; SCSL Rules, *supra* note 67, R. 108.

"he must go on and show that the error resulted in a miscarriage of justice."[86] In order to establish that a miscarriage of justice "resulted" from an error, an appellant "must establish that the error of fact was critical to the verdict reached by the Trial Chamber, thereby resulting in a grossly unfair outcome in judicial proceedings . . . ."[87]

The ICTY/ICTR Appeals Chamber observes these pleading requirements strictly. In an ICTY judgment, it put appellants on notice that it will summarily dismiss defective appeal motions.

> [The Chamber] will dismiss, without providing detailed reasons, those Appellants' submissions . . . which are evidently unfounded. Objections will be dismissed without detailed reasoning where:
>
> 1. the argument of the appellant is clearly irrelevant;
>
> 2. it is evident that a reasonable trier of fact could have come to the conclusion challenged by the appellant; or
>
> 3. the appellant's argument unacceptably seeks to substitute his own evaluation of the evidence for that of the Trial Chamber.[88]

Further, the Chamber requires appellants to provide "exact references to paragraphs in judgments, transcript pages, exhibits or any authorities . . . ."[89]

Although the Appeals Chamber of the Special Court for Sierra Leone (SCSL) is only required to "be guided" by decisions of the ICTY/ICTR Appeals Chamber,[90] it appears to have wholly adopted the ICTR/ICTY Appeals Chamber's approach to errors of fact. The SCSL Appeals Chamber has held:

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[86] *Furundžija* Appeal Judgment, ¶ 37 (quoting Serushago v. Prosecutor, Case No. ICTR-98-39-A, Reasons for Judgment, ¶ 22 (Apr. 6, 2000)).
[87] *Kupreškić* Appeal Judgment, ¶ 29.
[88] Prosecutor v. Vasiljević, Case No. IT-98-32-A, Appeal Judgment, ¶ 11 (Feb. 25, 2004) (quoting Prosecutor v. Kunarac, Case No. IT-96-23-A & IT-96-23/1-A, Appeal Judgment, ¶ 48 (June 12, 2002)).
[89] Prosecutor v. Kvočka, Case No. IT-98-30/1-A, Appeal Judgment, ¶ 425 (Feb. 28, 2005).
[90] *See* SCSL Statute, *supra* note 59, art. 20(3).

> On appeal where errors of fact are alleged . . . the [SCSL] Appeals Chamber will not lightly overturn findings of fact reached by a Trial Chamber. Where it is alleged that the Trial Chamber committed an error of fact, the Appeals Chamber will give a margin of deference to the Trial Chamber that received the evidence at trial. This is because it is the Trial Chamber that is best placed to assess the evidence, including the demeanor of witnesses. The Appeals Chamber will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous.[91]

ii. ICTY/ICTR standard of review: errors of law

The ICTY/ICTR Appeals Chamber has set a similarly high bar for admitting appeals based on errors of law. The Appeals Chamber's jurisdiction is limited by both the ICTY and ICTR statutes to "errors on a question of law invalidating the decision."[92] It has defined such errors as those "which, if proven, would have an effect on the verdict of guilty."[93] One scholarly survey of the case law has identified instances where errors of law were found to invalidate Trial Chamber decisions:

> Use of an improper definition of a crime that disadvantaged a party—whether prosecution or accused—is one ground for invalidating a decision. Multiple convictions for crimes with materially similar elements arising out of the same conduct will invalidate all but one conviction for each act and will require resentencing. An indictment that does not fairly inform the accused of the charges against him or her will invalidate a conviction. . . . Use by the court of improper evidence at sentencing (for example, considering the accused's silence at trial) has invalidated a sentence and required resentencing.[94]

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[91] Prosecutor v. Fofana & Kondewa, Case No. SCSL-04-14-A, Appeal Judgment, ¶ 33 (May 28, 2008) (citing ICTY and ICTR cases); *see also id.* ¶ 34 ("The Appeals Chamber adopts the statement of general principle contained in the ICTY Appeals Chamber decision in *Kupreškić* [concerning deference to Trial Chamber findings of fact].").

[92] ICTY Statute, *supra* note 73, art. 25(1)(a); ICTR Statute, *supra* note 73, art. 24(1)(a).

[93] Prosecutor v. Akayesu, Case No. ICTR-96-4, Appeal Judgment, ¶ 18 (June 1, 2001); *accord* Prosecutor v. Krnojelac, Case No. IT-97-25-A, Appeal Judgment, ¶ 6 (Sept. 17, 2003) ("Article 25(1) [of the ICTY Statute] refers only to errors of law . . . which, if proven, affect the guilty verdict.").

[94] Drumbl & Gallant, *supra* note 29, at 623-24 (citing Prosecutor v. Kupreškić, Case No. IT-95-16-A, Appeal Judgment, ¶ 26 (Oct. 23, 2001); Prosecutor v. Tadić, Case No. IT-94-1-A, Appeal Judgment, ¶¶ 68-144 (July 15, 1999); Prosecutor v. Delalić, Case No. IT-96-21-A, Appeal Judgment, ¶¶ 412-32 (Feb. 20, 2001)).

These are all instances of fundamental, irredeemable error. Less grave errors will not result in invalidation; the Chamber may reject appeals alleging errors of law that have "no chance of changing the outcome of a decision . . . ."[95]

Even where the ICTY/ICTR Appeals Chamber finds errors of law made by the Trial Chambers, it will leave factual findings alone. Instead, it applies a "corrected legal standard" to "factual findings already made by the Trial Chamber."[96] The Appeals Chamber "should first look to the findings made by the Trial Chamber because in many instances the Trial Chamber will already have made the factual findings necessary to satisfy the corrected legal standard."[97] It will then "determine whether it itself is satisfied beyond reasonable doubt as to the verdict of guilt."[98]

The Appeals Chamber also reserves the right to take up appeals on a discretionary basis that "raise an issue of general importance for the case law or functioning of the tribunal."[99] The Chamber exercises this right *proprio motu,*[100] without regard to whether or not they are technically within its jurisdiction, would effect the Trial Chamber verdict, are properly pleaded, or indeed, are formally raised at all by the parties.[101] Although this may appear to be overreaching, given the Chamber's strict statutory jurisdiction, one scholar comments that "[u]nlike domestic trial courts, which are permanent in character and can, therefore, expect particular issues to recur, the limited docket of the ICTY and ICTR makes it undesirable to wait

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[95] Prosecutor v. Krajišnik, Case No. IT-00-39-A, Appeal Judgment, ¶ 5 (Mar. 17, 2009).
[96] Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-A, Appeal Judgment, ¶ 3 (Dec. 17, 2004) (separate opinion of Judge Weinberg De Roca).
[97] *Id.*
[98] *Kordić & Čerkez* Appeal Judgment, ¶ 24.
[99] *Krnojelac* Appeal Judgment, ¶ 7; *accord Akayesu* Appeal Judgment, ¶ 23 ("[The Appeals Chamber] may deem it necessary to pass on issues of general importance if it finds that their resolution is likely to contribute substantially to the development of the Tribunal's jurisprudence.").
[100] *Akayesu* Appeal Judgment, ¶ 17 (citing Prosecutor v. Erdemović, Case No. IT-96-22-A, Appeal Judgment, ¶ 16 (Oct. 7, 1997)).
[101] *See Erdemović* Appeal Judgment, ¶ 16.

until an issue is squarely presented in another case."[102] The ICTR Appeals Chamber, however, has warned that "the Appeals Chamber will not consider all issues of general significance. Indeed, the issues raised must be of interest to legal practice [sic] of the Tribunal and must have a nexus with the case at hand."[103]

III. Like the ICTY/ICTR Appeals Chamber, the ECCC Supreme Court Chamber should examine evidence on appeal only in extraordinary circumstances, where it meets the Chamber's threshold for jurisdiction

The ECCC Supreme Court Chamber's power to entertain requests for additional evidence on appeal is identical to that of the Appeals Chambers in the *ad hoc* tribunals. The jurisprudence of the ICTY/ICTR Appeals Chamber has already established a successful, working model for how additional evidence should be used on appeal; for the reasons stated above, ICTY/ICTR case law should guide the ECCC. Unlike the other Appeals Chambers, however, the ECCC Supreme Court Chamber may, on its own motion, "examine evidence and call new evidence to determine the issue."[104] However, this power would be most properly read as consistent with the Chamber's narrow jurisdiction, in accordance with ICTY/ICTR Appeals Chamber case law.

A. The ECCC Internal Rules with regard to additional evidence on appeal are almost identical to those of the *ad hoc* international criminal tribunals, and should be applied similarly in order to ensure fairness and consistency

Like its jurisdiction, the ECCC Supreme Court Chamber's power to admit new evidence mirrors the powers of the Appeals Chambers of the *ad hoc* tribunals. In appeals before the ECCC Supreme Court Chamber, according to the ECCC Internal Rules, parties "may submit a request

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[102] Fleming, *supra* note 68, at 131; *accord Krnojelac* Appeal Judgment, ¶ 7 ("[The] role of final arbiter of the law applied by the Tribunal should be seen in the light of the Tribunal's specific character and, in particular, of its *ad hoc*, temporary nature."). *See also* KNOOPS, *supra* note 75, at 294-95.
[103] *Akayesu* Appeal Judgment, ¶ 24.
[104] ECCC Internal Rules (rev. Mar. 6, 2009), *supra* note 2, R. 104(1).

to the Chamber for additional evidence provided it was unavailable at trial and could have been a decisive factor in reaching the decision at trial."[105] Such motions must "clearly identify the specific findings of fact made by the Trial Chamber to which the additional evidence is directed.[106] The rules of the *ad hoc* tribunals are nearly identical: parties "may apply by motion to present additional evidence before the Appeals Chamber;"[107] if the Appeals Chambers then find "that the additional evidence was not available at trial and is relevant and credible, [they] will determine if it could have been a decisive factor in reaching the decision at trial."[108] The ECCC rule on additional evidence is simply a condensed version of the rule for the *ad hoc* tribunals.

As with the rules governing appellate jurisdiction, the ECCC appears to have redrafted its rules over time to mirror those of the *ad hoc* tribunals. The Chamber's power to entertain motions for additional evidence was only added in the most recent revision. Neither version of the rules preceding the most recent one included any such provision.[109] Again, adopting identical rules to the *ad hoc* tribunals but promulgating discordant jurisprudence would only serve to confuse practitioners before the ECCC, undermining the fairness of the ECCC rules.

B. The ICTY/ICTR Appeals Chamber treats motions for additional evidence in keeping with its fundamental jurisdiction, granting them only where the new evidence would be dispositive

The ICTY/ICTR Appeals Chamber interprets its power to grant motions for additional evidence narrowly, in line with its narrow jurisdiction. Rule 115, the rule granting the Appeals

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[105] *Id.* R. 108(7).
[106] *Id.*
[107] ICTY Rules, *supra* note 67, R. 115(A). *Accord* ICTR Rules, *supra* note 67, R. 115(A); SCSL Rules, *supra* note 67, R. 115(A).
[108] ICTY Rules, *supra* note 67, R. 115(B). *Accord* ICTR Rules, *supra* note 67, R. 115(B); SCSL Rules, *supra* note 67, R. 115(B).
[109] *See* ECCC Internal Rules (June 12, 2007), *supra* note 61, R. 108; ECCC Internal Rules (rev. Sep. 5, 2008), *supra* note 65, R. 108.

Chambers this power, is a mechanism to address "the situation where a party is in possession of material that was not before the court of first instance and which is additional evidence of a fact or issue litigated at trial."[110] Parties seeking to admit additional evidence must show that the evidence "was not available at trial and is relevant and credible."[111]

In order to meet the requirement of unavailability at trial, parties must show that evidence was "not available . . . at trial in any form,"[112] and, moreover, that it could not have been discovered during trial through the exercise of due diligence.[113] Due diligence in this regard involves making "appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence . . . before the Trial Chamber."[114] To meet the due diligence requirement, a lawyer must "apprise the Trial Chamber of all the difficulties he or she encounters in obtaining the evidence in question,

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[110] Prosecutor v. Barayagwiza, Case No. ICTR-99-52-A, Appeal Decision on Appellant Jean-Bosco Baray Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, ¶ 4 (Dec. 8, 2006) [hereinafter *Barayagwiza* Rule 115 decision] (quoting Prosecutor v. Kupreškić, Case No. IT-95-16-A, Appeal Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94(B), ¶ 5 (May 8, 2001) [hereinafter *Kupreškić* Rule 115 decision).

[111] ICTY Rules, *supra* note 67, R. 115(B). *Accord* ICTR Rules, *supra* note 67, R. 115(B); SCSL Rules, *supra* note 67, R. 115(B).

[112] Prosecutor v. D. Milošević, Case No. IT-98-29/1-A, Appeal Decision on Dragomir Milošević's Motion to Present Additional Evidence, ¶ 6 (Jan. 20, 2009) [hereinafter *D. Milošević* Rule 115 decision].

[113] Prosecutor v. Ntagerura, Case No. ICTR-99-46-A, Appeal Decision on Prosecution Motion for Admission of Additional Evidence, ¶ 9 (Dec. 10, 2004) (citing Prosecution v. Tadić, Case No. IT-94-1-A, Appeal Decision on Appellant's Motion for Extension of Time Limit and Admission of Additional Evidence, ¶¶ 35-45 (Oct. 15, 1998) [hereinafter *Tadić* Rule 115 decision]); Prosecutor v. Kupreškić, Case No. IT-95-16-A, Appeal Judgment, ¶ 50 (Oct. 23, 2001); Prosecution v. Delić, Case No. IT-96-21-R-R119, Appeal Decision on Motion for Review, ¶ 10 (Apr. 25, 2002); Prosecutor v. Krstić, Case No. 99-33-A, Appeal Decision on Application for Admission of Additional Evidence on Appeal, ¶ 3 (Aug. 5, 2003) [hereinafter *Krstić* Rule 115 decision].

[114] *Ntagerura* Appeal Decision, ¶ 9 (citing *Tadić* Rule 115 decision, *supra* note 113, ¶¶ 40, 44-45, 47; *Kupreškić* Appeal Judgment, ¶ 50).

including any problems of intimidation, and his or her inability to locate certain witnesses."[115] Additional evidence is considered credible if it "appears to be reasonably capable of belief or reliance."[116]

The ICTY/ICTR Appeals Chamber's tests for the relevance of additional evidence are closely related to its tests for jurisdiction. Appellants seeking to admit additional evidence must also show that the evidence "could have been a decisive factor in reaching the decision at trial."[117] The Appeals Chamber has held that "to satisfy this requirement, the evidence must be such that it could have had an impact on the verdict,"[118] essentially the same threshold test it applies with regard to its jurisdiction over errors of law.[119] Similarly, the Chamber may admit evidence that fails to meet the ordinary tests "in order to avoid a miscarriage of justice,"[120] the same standard governing its jurisdiction over errors of fact.[121]

Motions for additional evidence, like notices of appeal, are subject to strict pleading requirements. The burden is on the applicant to show how the added evidence would have affected the Trial Chamber decision.[122] The evidence itself "must be directed at a specific finding of fact related to a conviction or to the sentence,"[123] which must be clearly identified in the

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[115] *Id.*
[116] *Barayagwiza* Rule 115 decision, *supra* note 110, ¶ 5 (citing *Kupreškić* Rule 115 decision, *supra* note 110, ¶ 28).
[117] ICTY Rules, *supra* note 67, R. 115(B).
[118] *Barayagwiza* Rule 115 decision, *supra* note 110, ¶ 6 (citing *Kupreškić* Appeal Judgment, ¶ 68; *Krstić* Rule 115 decision, *supra* note 113, ¶ 3).
[119] *See* Prosecutor v. Akayesu, Case No. ICTR-96-4, Appeal Judgment, ¶ 18 (June 1, 2001); *accord* Prosecutor v. Krnojelac, Case No. IT-97-25-A, Appeal Judgment, ¶ 6 (Sept. 17, 2003) ("Article 25(1) [of the ICTY Statute] refers only to errors of law . . . which, if proven, affect the guilty verdict.").
[120] *Milošević* Rule 115 decision, *supra* note 112, ¶ 10.
[121] ICTY Statute, *supra* note 65, art. 25(1)(b). *Accord* ICTR Statute, *supra* note 65, art. 24(1)(b); SCSL Statute, *supra* note 59, art. 20(1)(c).
[122] *Milošević* Rule 115 decision, *supra* note 112, ¶ 8.
[123] *Barayagwiza* Rule 115 decision, *supra* note 110, ¶ 6.

motion.[124] Rule 115 motions that fail to meet these requirements "may . . . be summarily rejected."[125] These requirements mirror the Chamber' requirement that notices of appeal provide "exact references to paragraphs in judgments" allegedly containing errors.[126]

The Appeals Chamber's case law on additional evidence is closely related to its case law on jurisdiction. In both instances, it takes a "corrective" approach to Trial Chamber decisions,[127] rather than trying cases *de novo*. Accordingly, it has set a high bar for granting Rule 115 motions: unless the evidence is highly material and was not available at trial, the Chamber will not admit it. With the same statutory power and jurisdiction, the ECCC Supreme Court Chamber should adopt the ICTY/ICTR Appeals Chamber approach to additional evidence.

C. The ECCC Supreme Court Chamber's power to call new evidence on its own motion most appropriately operates within the limits of its narrow jurisdiction

The ECCC Supreme Court Chamber may examine evidence and call new evidence on its own motion, a power that is not included in the rules of the *ad hoc* Appeals Chambers. However, a close reading of the ECCC's internal rules shows that they do not grant the Supreme Court Chamber the power to conduct trials *de novo*, but simply enable it to operate fairly within its jurisdiction. Further, the ECCC Supreme Court Chamber's power is simply an explicit version of a power that ICTY/ICTR Appeals Chamber found implicit in its own rules. The ICTY/ICTR Appeals Chamber extended its power only in extraordinary circumstances, to avoid a miscarriage of justice; the ECCC Supreme Court Chamber should adopt the same restrained approach.

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[124] *See* ICTY Rules, *supra* note 67, R. 115(A) (Rule 115 motions "shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed."). *Accord* ICTR Rules, *supra* note 67, R. 115(B); SCSL Rules, *supra* note 67, R. 115(B).
[125] *Milošević* Rule 115 decision, *supra* note 112, ¶ 8.
[126] Prosecutor v. Kvočka, Case No. IT-98-30/1-A, Appeal Judgment, ¶ 425 (Feb. 28, 2005).
[127] Prosecutor v. Vasiljević, Case No. IT-98-32-A, Appeal Judgment, ¶ 5 (Feb. 25, 2004).

i. The text of the ECCC Rules is best interpreted as allowing the Supreme Court Chamber to call evidence on its own motion only where it would resolve errors within the Chamber's jurisdiction

Strict attention to the text of the ECCC Internal Rules shows that the Supreme Court Chamber may call new evidence on its own motion only if the evidence will dispose of one of the questions within the Chamber's jurisdiction. The relevant portion of the rules is reproduced for analysis:

> The Supreme Court Chamber shall decide an appeal against a judgment or decision of the Trial Chamber on the following grounds:
>
> a) an error of on a question of law invalidating the judgment or decision; or
>
> b) an error of fact occasioning a miscarriage of justice.
>
> * * *
>
> For these purposes, the Supreme Court Chamber may itself examine evidence and call new evidence to determine the issue.[128]

The Supreme Court Chamber's power to examine evidence and call new evidence operates only for the "purposes" referred to in Rule 104(1). In other words, the Chamber can only examine or call evidence to determine whether a question of law invalidates a Trial Chamber decision, or whether an error of fact has occasioned a miscarriage of justice. In this way, the Supreme Court Chamber's strict jurisdictional limitations limit the admissibility of evidence introduced *proprio motu.*

ii. The ECCC Supreme Court Chamber's power to call new evidence is based on ICTY/ICTR Appeals Chamber decisions crafting a similar power for itself; ICTY/ICTR jurisprudence should, therefore, guide its application

The power of the Supreme Court Chamber to bring in evidence *proprio motu* was added in the second revision of the rules, again as part of the ECCC's redrafting of its rules in the image of the *ad hoc* tribunals'. Although the ICTY/ICTR Appeals Chamber is not granted the

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[128] ECCC Internal Rules (rev. Mar. 6, 2009), *supra note* 2, R. 104(1).

power to admit evidence *proprio motu,* it has crafted a similar power for itself through case law. The ECCC rule is simply a distillation of the ICTY/ICTR case law, and should be applied similarly.

Although the ICTY/ICTR Appeals Chamber is not explicitly allowed to call new evidence on its own motion, it does so under extraordinary circumstances, in order to avoid a miscarriage of justice.[129] The Appeals Chamber has justified this expansion of its jurisdiction as "pursuant to its inherent power to hear evidence in order to avoid a miscarriage of justice."[130] In *Kupreskic,* the Chamber explained the development of this rule in both the ICTY and ICTR:

> The *Tadic* Rule 115 Decision emphasized that the principle of finality of decisions does not "prevent the admission of evidence that would assist in determining whether there could have been a miscarriage of justice." In *Semanza*, the Appeals Chamber of the ICTR interpreted this to mean that the "principle [of finality] may exceptionally be rendered less absolute by the need to avoid a miscarriage of justice." . . . [T]he Appeals Chamber of the ICTY in *Jelisic* confirmed the applicability of this principle to ICTY appellate proceedings on the merits. In that case, the Appeals Chamber held that it "maintains an inherent power to admit such evidence even if it was available at trial, in cases in which its exclusion would lead to a miscarriage of justice."[131]

The ICTR Appeals Chamber held in *Barayagwiza* that a similar restriction on review of final judgments was "directory in nature. In adopting such a position, the Chamber has regard to the circumstance that the Statute itself does not speak to this issue."[132]

The rule allowing the ECCC Supreme Court Chamber to call evidence on its own motion simply corrects this defect. Where the ICTY/ICTR Appeals Chamber had to reach to an

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[129] *Milošević* Rule 115 decision, *supra* note 112, ¶ 10.
[130] *Id.* ¶ 10.
[131] Prosecutor v. Kupreškić, Case No. IT-95-16-A, Appeal Judgment, ¶ 58 (Oct. 23, 2001) (citing *Tadić* Rule 115 decision, *supra* note 113, ¶ 72; Prosecutor v. Semanza, Case No. ICTR-97-20-A, Appeal Decision, ¶ 41 (May 31, 2000); Prosecutor v. Jelisić, Case No. IT-95-10-A, Appeal Decision on Request to Admit Additional Evidence, ¶ 3 (Nov. 15, 2000).).
[132] Barayagwiza v. Prosecutor, Case No. ICTR-99-52-A, Appeal Decision (Prosecutor's Request for Review or Reconsideration), ¶ 65 (Mar. 31, 2000).

interpretive "inherent power," the ECCC Supreme Court Chamber can rely on an explicit grant of power. The ECCC Supreme Court Chamber's explicit power, however, is the same power that the ICTY/ICTR Appeals Chamber has claimed for itself, and should be applied in the same way: under extraordinary circumstances, where a miscarriage of justice would otherwise result. An overly broad application of this power could result in *de novo* trial of facts, upending the Supreme Court Chamber's narrowly drawn jurisdiction.

CONCLUSION

Appellate review is a corrective mechanism, and cannot, by its nature, operate in a vacuum. The standards of appellate review applied in both civil- and common-law jurisdictions have grown slowly, in tandem with their court systems. The appellate courts of both systems have evolved over time into specialized organisms that complement their lower courts, filling the gaps and smoothing the edges peculiar to their national systems. The ECCC, as a new court, does not have the luxury of honing its appellate standards by deciding thousands of cases. Instead, in deciding which standard of review to apply, the ECCC Supreme Court Chamber should attend closely to the structure of the tribunal. Scrutiny of the ECCC shows that civilian standards of appellate review would be a foreign transplant within the overall structure. The standards used by the ICTY/ICTR Appeals Chamber, which has had time to refine its approach within nearly identical parameters, is the logical choice. Its restrained approach to appellate review best serves the ECCC's structure and mission.