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Interim Appellate Review During Pre-Trial and Trial Proceedings in the Extraordinary Chambers in the Courts of Cambodia

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BACKGROUND

In international criminal proceedings, interlocutory appeals operate as a procedural check where the rights of a party to the proceedings are at risk of being violated.¹ Though this remedy is universally deemed exceptional in criminal proceedings,² many international criminal courts have permitted interim review of a wide range of issues, such as jurisdiction and judicial notice.³

In establishing the most appropriate regime for the ECCC, an examination of other international models of interim appellate review is constructive. Established international criminal courts have adapted their interim review regime over the years to accommodate the challenges of international criminal proceedings and the particular needs of that court. How these courts balance competing interests, namely the Defense’s right to a fair trial and right to an expeditious trial, may inform interim review at the ECCC. As such, this memo will explore the interlocutory appeal regime at the International Criminal Court (ICC), the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY/ICTR, known collectively as the Ad

¹ See, e.g., *The Prosecutor v. Dusko Tadic*, Case No. IT-94-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 6 (October 2, 1995) [hereinafter “*The Prosecutor v. Dusko Tadic*, 2 October 1995”] (“Such a fundamental matter as the jurisdiction of the International Tribunal should not be kept for decision at the end of a potentially lengthy, emotional and expensive trial.”); *Situation in the Democratic Republic of Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Prosecution Motion for Reconsideration and, In the Alternative, Leave to Appeal, ¶ 55 (June 23, 2006) [hereinafter “*The Prosecutor v. Lubanga*, June 23, 2006”] (stating that the redaction of the names of Prosecution sources could interfere with the Defense’s “procedural right to be aware and, as far as possible, to have a say in the disposition of the Prosecution motions seeking to restrict the disclosure prior to the confirmation hearing of evidence and materials, to which, as a general rule according to the Statute and the Rules, the Defence is entitled to have access.”); *The Prosecutor v. Milutinovic*, Case No. IT-99-37-PT, Decision on Defence Request for Certification of Appeal Against the Decision of the Trial Chamber on Motion for Additional Funds, ¶ 2 (July 16, 2003) [hereinafter “*The Prosecutor v. Milutinovic*, 16 July 2003”] (explaining that “questions relating to the legal representation of an accused may affect the conduct of a trial, and have implications for the statutory rights of the accused”).

² *Interlocutory Appellate Review of Early Decisions by the International Criminal Court* (Washington College of Law/War Crimes Research Office, Washington, D.C.), Jan. 2008, at 2 [hereinafter “*Interlocutory Appellate Review Report*”].

³ See, e.g., *The Prosecutor v. Dusko Tadic*, 2 October 1995, *supra* note 1, ¶ 6; *The Prosecutor v. Dragomir Milosevic*, Case No. IT-98-29/1-T, Decision on Defence and Prosecution Motions for Certification to Appeal Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts, ¶ 2 (May 3, 2007) [hereinafter “*The Prosecutor v. Dragomir Milosevic*, 3 May 2007”].

Hoc Tribunals), and the Special Court for Sierra Leone (SCSL). This memo will then explore the ECCC's interim appellate regime, its remedial capacity to ensure the Defense' right to a fair trial, and its suitability in light of the ECCC's *sui generis* construction.

EXECUTIVE SUMMARY

The ECCC's interim appeal regime provides insufficient protection for the rights of the Defense and is inconsistent with international practice. This memo examines a number of these concerns and explores some corrective measures the ECCC can adopt.

I. The ECCC's restrictive interim appeal regime is incompatible with its restrictive final appeal regime

According to Rule 74(3) of the ECCC Internal Rules, the Defense has enumerated rights to appeal orders of the Co-Investigating Judges during the pre-trial stage, while the Prosecution is afforded unlimited rights to appeal such orders. As such, fewer issues implicating the fairness of the proceedings can be independently raised for review by the Defense, in comparison to the Prosecution. Further, there is no mechanism for the Pre-Trial Chamber, at its discretion, to certify for interlocutory review issues that fall outside those enumerated rights, but nonetheless have great implications for the proceedings. Compounding these pre-trial concerns are the 2008 amendments to the Internal Rules, restricting access to appellate review of issues of law and fact at the final judgment stage. According to these amendments, only an error of law that invalidates a decision or an error of fact that occasioned a miscarriage of justice may be subject to review at the final judgment stage. Moreover, only those grounds of appeals adequately supported with arguments and authorities will meet the admissibility standard, a higher standard than what had been required in earlier versions of the Internal Rules. Coupling the restrictive interim review regime for the Defense with limited access to appeal at the final judgment stage creates a

appellate regime that will likely prevent adjudication of key fairness concerns, namely the Defense's right to an expeditious trial.

II. The ECCC's overall appellate review regime is inconsistent with international and national criminal practice

Though the French criminal system — from which Cambodian law and the ECCC Internal Rules in part derive — similarly limits the accused's right to appeal interim decisions, unlike the ECCC it couples its restrictive interim appeal regime with a permissive final appeal regime. In France, the Defense and the Prosecution are afforded the right to appeal all issues of fact and law at the final judgment stage. As a result, issues that could not be appealed at the interlocutory stage will likely be reviewed at the final judgment stage. This is characteristic of the French system's holistic approach to procedural fairness. Similarly, other international courts seem to take a holistic approach to appellate review. For instance, the ICC, which arguably operates under the most restrictive interim appeal regime of the courts herein examined, offers a final appeal regime that appears to be the most permissive. Procedural errors, errors of fact, errors of law, and any other ground that affects the fairness or reliability of the proceedings or decision may be reviewed at the final judgment stage.

III. The ECCC's Restrictive Approach to Interim Review Interferes with the Defense's Right to a Fair Trial

Fundamental to international criminal proceedings is the principle of equality of arms, which requires that each party be afforded an equal opportunity to present his case. However, the Defense's limited access to interlocutory review places it at a disadvantage in relation to the Prosecution. The following subsections explore two such situations.

The Defense's minor role in fact-finding coupled with its limited right to appeal investigative actions places it at a substantial disadvantage vis-à-vis the Prosecution

At the ECCC, the Defense is not permitted to conduct its own investigation. Though it may request that the Office of the Co-Investigating Judges undertake certain investigative actions or pursue additional expert reports, the investigating judges are not required to oblige. And though a refusal of the Defense's request may be appealed to the Pre-Trial Chamber, the Defense can not appeal the *manner* in which an executed investigative request is performed. This places the Defense at a substantial disadvantage in relation to the Prosecution, whose rights of appeal at the pre-trial stage are not similarly circumscribed.

The Defense's inability to challenge the Closing Order places it at a disadvantage vis-à-vis the Prosecution and is inconsistent with international criminal practice

An additional concern is the inability of the Defense to independently challenge the substance of the Closing Order, the functional equivalent of an indictment. This limitation does not extend to the Prosecution, which may challenge any order of the investigating judges. International courts give the Defense greater freedom to challenge the indictment and present contrary evidence through more permissive interlocutory appeal rules and through confirmation hearings.

IV. Correcting the Inequities in the Interlocutory Appeal Regime

By taking an intermediate approach to interlocutory appeals, one that is not overly permissive or unduly restrictive, the ECCC can correct some of the inequities and fairness concerns with its current regime. The ECCC can achieve this by amending the Internal Rules to allow the certification of appeal requests at the discretion of the Pre-Trial Chamber. Alternatively, or in addition to discretionary review, the ECCC can adopt a fast track mechanism similar to the one used by the Special Court of Sierra Leone. The fast track mechanism permits

fundamental issues of fairness to be referred directly to the SCSL Appeals Chamber without prior adjudication by the lower chamber. Finally, the ECCC may use a more expansive reading of its Internal Rules. Other courts have had success in employing broad interpretations of the rules when presented with fundamental issues of fairness.

DISCUSSION

I. The Right to Interlocutory Review: Three International Models

This section explores the interlocutory review regime operative at the ICC, the Ad Hoc Tribunals, and the SCSL. By independently exploring the interlocutory appeal review regime in these courts and the manner in which each court has balanced the competing rights of the Defense, this analysis seeks to construct a frame of reference for an assessment of the ECCC's interim review regime. The three models of interlocutory review, starting with the ICC, are discussed below.

A. The Restrictive Approach: The International Criminal Court

i. Article 82(1) of the Rome Statute

The interlocutory appeal scheme for the ICC can be found in Article 82(1) of the Rome Statute.⁴ A party may appeal:

- (a) A decision with respect to jurisdiction or admissibility;
- (b) A decision granting or denying release of the person being investigated or prosecuted;
- (c) A decision of the Pre-Trial Chamber to act on its own initiative under article 56, paragraph 3⁵;

⁴ Rome Statute of the International Criminal Court art. 82, July 7, 2002, U.N. Doc. A/CONF.183/9 [hereinafter "Rome Statute"].

⁵ Article 56(3) reads as follows: "(a) Where the Prosecutor has not sought measures pursuant to this article but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may take such measures on its own initiative. (b) A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis."

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.⁶

Whereas subparts (a) through (c) confer automatic rights to interim review, subpart (d) provides a mechanism for discretionary review. The standard for discretionary review involves a two-pronged conjunctive test.⁷ As to the first requirement of this test, the impugned decision must concern an issue that would significantly affect (a) the fair and expeditious conduct of the trial or (b) the outcome of the trial. Note that should the applicant opt to pursue part (a) (hereinafter the “first limb”), both the fairness and the expeditiousness of the proceedings must be affected;⁸ this is discussed further *infra*. Additionally, the appellant must meet a second requirement—a showing that the immediate resolution of the issue would materially advance the proceedings.⁹ Only where both the first and second requirements have been proven to the satisfaction of the Pre-Trial Chamber or Trial Chamber (hereinafter the “PTC” and “TC” respectively) may the appellant interlocutorily appeal the decision.¹⁰

In its first decision, the ICC PTC II set forth guidelines for the interpretation of Article

⁶ Rome Statute, *supra* note 4, art. 82(1)(a-d).

⁷ *Situation in Uganda*, Case No. ICC-02/04-01/05, Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Application for Warrants of Arrest under Articles 58, ¶ 21 (August 19, 2005) [hereinafter “*Situation in Uganda*, 19 August 2005”] (“...failure by the applicant to establish the first of such requirements will exempt the Chamber from considering whether the second has been met.”).

⁸ *See, e.g., Situation in Uganda* in the Case of *The Prosecutor v. Joseph Kony, et al.*, Case No. ICC-02/04-01/05-90, Decision on Prosecutor’s Applications for Leave to Appeal Dated the 15th day of March 2006 and to Suspend or Stay Consideration of Leave to Appeal Dated the 11th day of May 2006, ¶ 38 (July 10, 2006) [hereinafter “*The Prosecutor v. Joseph Kony*, 10 July 2006”] (discussing the “cumulative nature of the two conditions to be satisfied within the context of the first requirement of article 82.”); *Situation in Uganda*, 19 August 2005, *supra* note 7, ¶ 35. (“Failure by the Prosecutor to demonstrate that the ‘fairness tenet of the first limb of the first requirement of article 82 has been met would *per se* exonerate the Chamber from the need to assess the ‘expeditiousness’ tenet of the same limb.”).

⁹ Rome Statute, *supra* note 4, art. 82(1)(d).

¹⁰ *See, e.g., Situation in Uganda*, 19 August 2005, *supra* note 7, ¶ 52 (“Having found that neither the first nor the second limb of the first requirement for leave to appeal is satisfied, it would not be necessary for the Chamber to address the second requirement.”).

82(1)(d).¹¹ According to this decision, the determination of an applicant’s request for leave for discretionary appeal under 82(1)(d) must be rendered in accordance with the following principles:

- (a) the restrictive character of the remedy provided for in article 82(1)(d) of the Statute;
- (b) the need for the applicant to satisfy the Chamber as to the existence of the requirements enshrined in this provision; and
- (c) the irrelevance or non-necessity for the Chamber to address arguments relating to the merits or substance of the appeal.¹²

Of particular importance is part (a): the restrictive character of the remedy,¹³ for which the Court finds support in the drafting history of the Rome Statute and in other international courts.¹⁴ The Court has held that the “restrictive character of the ICC’s approach to discretionary interim review should be borne in mind in the interpretation of the criteria set forth in article 82, paragraph 1(d).”¹⁵ By and large, the Court has complied with this mandate. Particularly noteworthy are the Court’s restrictive interpretation of the notion of fairness, the cumulative nature of the first limb, and the high standard of proof required as to all elements of the

¹¹ *Situation in Uganda*, 19 August 2005, *supra* note 7, ¶ 15.

¹² *Id.*

¹³ *Situation in Uganda*, 19 August 2005, *supra* note 7, ¶¶ 20-21. Both the PTC I and PTC II apply a restrictive interpretation of Article 82(1)(d). *See, e.g., Situation in the Democratic Republic of Congo*, Décision relative à la requête sollicitant l’autorisation d’interjeter appel de la décision de la Chambre du 17 janvier 2006 sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6, ICC-01/04-135, ¶ 18 (March 31, 2006) [hereinafter “*Situation in the DRC*, 31 March 2006”]; *The Prosecutor v. Joseph Kony*, 10 July 2006, *supra* note 8, ¶¶ 16-18.

¹⁴ First, the Court found instructive the rejection of a proposal introduced during the drafting stage of the Rome Statute. *See Situation in Uganda*, 19 August 2005, *supra* note 7, ¶ 16. Rather than adopt the proposed language, which would have permitted unrestricted discretion, the drafters settled upon the Statute’s current provision, which limits the scope of the Chamber’s discretion. *See* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the Whole, Working Group on Procedural Matters, Proposal submitted by Kenya (Article 81, Appeal against interlocutory decisions), 3 July 1998, Doc. A/CONF.183/C.1/WGPM/L.46. Second, the Court looked to the evolution of interlocutory appeal regimes in other courts, specifically the ICTY, ICTR, and the SCSL. These courts, according to the Chamber, have progressed toward a more restrictive right to interlocutory appeal, which is of particular significance since the courts use similar provisions. *See Situation in Uganda*, 19 August 2005, *supra* note 7, ¶ 16, 18. Though the ad hoc tribunals and the SCSL have tended toward more restrictive statutory language, the application of the relevant provision in each court is nonetheless more permissive than that of the ICC. *See* subsequent sections for a more thorough discussion.

¹⁵ *The Prosecutor v. Joseph Kony*, 10 July 2006, *supra* note 8, ¶ 22.

provision.¹⁶ These aspects will be discussed in turn below.

a. Restrictive Interpretation of the Notion of Fairness

At the ICC, concerns of fairness, as they pertain to the first requirement for discretionary interlocutory review, have been found to largely implicate only one principle: the equality of arms.¹⁷ In its July 18, 2005 decision, the PTC II designated itself and the Office of the Registry as the appropriate organs to prepare and issue warrants to alleged members of the Lord's Resistance Army in Northern Uganda, thereby rejecting the Prosecution's request to assume those responsibilities.¹⁸ Though the Prosecution's fairness challenge to the underlying decision included concerns that the decision would "substantially alter[] the duties and responsibilities of the Prosecutor and the Pre-Trial Chamber" during the investigation phase, "disrupt or undermine protective measures or the ongoing cooperation with the Court," and "undermine an extremely precarious security situation," the PTC II rejected these concerns, finding it "hard to see how a merely procedural issue, such as the preparation and transmission of a request for arrest and surrender, might impair or otherwise adversely affect the fairness of the proceedings."¹⁹

According to the Court:

Fairness is closely linked to the concept of "equality of arms", or of balance, between the parties during the proceedings. As commonly understood, it concerns the ability of a party to a proceeding to adequately make its case, with a view to influencing the outcome of the proceedings in its favour.²⁰

¹⁶ The PT and TC also require that the decision implicate an "appealable issue." An appealable issue is one defined as an "identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination." See *Situation in the Democratic Republic of Congo*, Case No. ICC-01/04-168, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ¶ 9 (July 13, 2006). See also *Situation in the Democratic Republic of Congo*, Case No. ICC-01/04-01/06, Decision on the Defence Request for Leave to Appeal the Oral Decision on Redactions and Disclosure of 18 January 2008, ¶ 7 (March 6, 2008).

¹⁷ *Interlocutory Appellate Review Report*, *supra* note 2, at 9. See also *Situation in Uganda*, 19 August 2005, *supra* note 7, ¶ 30 ("[F]airness is closely linked to the concept of 'equality of arms'").

¹⁸ *Interlocutory Appellate Review Report*, *supra* note 2, at 27.

¹⁹ *Situation in Uganda*, 19 August 2005, *supra* note 7, ¶ 29.

²⁰ *Id.* ¶ 30.

Arguing, *inter alia*, that because the Registrar must consult the Prosecutor prior to proceeding, the Prosecutor's point of view would be duly considered, thereby mitigating equity concerns.²¹ The ICC PTC I also applies this restrictive interpretation. By likening fairness with "equilibrium, or balance" between the parties, PTC I similarly has limited the scope of fairness to implicate party equality.²² Restricting how fairness is construed prevents consideration of other issues, such as concerns with the duration of the proceedings. The failure to resolve these issues may hamper the Defense's or the Prosecution's ability to present its case.

b. Cumulative Nature of the Term "Fairness and Expeditiousness
of the Proceedings"

Consistent with its restrictive interpretation discretionary appeal, the phrase "fair and expeditious conduct of the proceedings" has been applied cumulatively.²³ In other words, the party requesting leave, must demonstrate that both the fairness of the proceedings and the expeditiousness of the proceedings have been implicated by the decision. This constraint, coupled with the restrictive interpretation addressed above, creates a high threshold for matters of discretionary interlocutory review and as such, few cases have reached the second requirement for consideration, and fewer still have been granted certification.²⁴ Notably, the other courts discussed herein, operate under broader notions of fairness and do not require a cumulative

²¹ *Id.* ¶ 33.

²² *Situation in DRC*, 31 March 2006, *supra* note 13, ¶ 38.

²³ *See, e.g., id.* ¶ 61 ("[T]he Chamber holds that since the first condition of the first requirement of [A]rticle 82(1)(d) has not been met, the Chamber need examine neither the second condition, relating the expeditiousness of the proceedings, nor the second requirement, consisting of reaching a determination as to whether the immediate resolution of the matter by the Appeals Chamber would materially advance the proceedings."); *Situation in Uganda*, 19 August 2005, *supra* note 7, ¶ 35 ("Failure by the Prosecutor to demonstrate that the "fairness" tenet of the first limb of the first requirement of article 82 has been met would *per se* exonerate the Chamber from the need to assess the "expeditiousness" tenet of the same limb.").

²⁴ *Interlocutory Appellate Review Report*, *supra* note 2, at 23-24.

application of the first limb.²⁵ These courts, as discussed below, tend to be more permissive in granting interim review.

c. A High Standard of Proof is Required for Article 82(1)(d)
Criteria

Unlike the ad hoc tribunals, the ICC requires a high standard of proof for demonstrating the elements for discretionary review.²⁶ In the *Situation in the Democratic Republic of Congo*, the Prosecutor challenged the PTC's decision to permit victim participation during the investigation stages, arguing that to do so would open "the door for direct – and unregulated – presentation of evidentiary or documentary material ('pièces') by victims to the Chamber during the investigative stage, thereby allowing for consideration by the Chamber of material collected *outside* the framework of the investigation conducted by the Prosecution in compliance with the requirements and safeguards of Article 54(1)."²⁷ The PTC I rejected this argument, citing the failure of the Prosecutor to provide "concrete evidence" that the fair and expeditious conduct of the trial would be affected. Similarly, the PTC II in the *Situation in Uganda* has stated that, "The determination that an issue may have a significant impact on the expeditiousness of the proceedings cannot be based on surmise or allegations which are not substantiated by specific information."²⁸ Neither the Rome Statute nor the ICC Rules of Procedure and Evidence

²⁵ *Id.*, at 9.

²⁶ *Id.*, at 8.

²⁷ *Situation in the Democratic Republic of Congo*, Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS, ICC-01/04-103, ¶ 16 (January 23, 2006). Article 54(1) of the Rome Statute provides that the "Prosecutor shall: (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally; (b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and (c) Fully respect the rights of persons arising under this Statute." Rome Statute, *supra* note. 4, art. 54(1).

²⁸ *Situation in Uganda*, 19 August 2005, *supra* note 7, ¶ 43.

(hereinafter “RPE”) demand such a high standard.²⁹ Further, such a showing is not required in other courts.³⁰

ii. *The restrictive approach limits the remedial capacity of interlocutory review*

As a result of the ICC’s restrictive approach to discretionary interlocutory review, few requests for interim review have been certified.³¹ This limitation excludes consideration of certain fair trial concerns and circumscribes the remedial capacity of interlocutory review. This is readily apparent in the PTC I’s January 29, 2007 decision to confirm charges against Thomas Lubanga Dyilo.³² Originally, Mr. Lubanga was charged with “[c]onscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities” *during a non-international armed conflict*,³³ in violation of Article 8(2)(e)(vii).³⁴ Subsequent to a confirmation hearing, the PTC I, on its own initiative, amended charges. The PTC determined that for a portion of the time that Mr. Lubanga was said to be in violation of the Rome Statute, the conflict was international, rather non-international in character. Therefore, the appropriate provision for the charge for that period of time was Article

²⁹ *Interlocutory Appellate Review Report*, *supra* note 2, at 39.

³⁰ *The Prosecutor v. Théoneste Bagosora*, Case No. ICTR-98-41-T, Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses, ¶ 9 (July 21, 2005) [hereinafter “*The Prosecutor v. Bagosora*, 21 July 2005”] (“The consequences predicted by the Defence would undoubtedly have a significant effect on the fairness and expeditiousness of proceedings. The point of contention is whether those consequences will actually ensue. In its decision, the Chamber considered the dangers raised by the Defence to be remote in light of the secrecy of the role of the asylum-seeker in proceedings, and the confidentiality of any testimony which might reveal their identity. Nevertheless, the Chamber recognizes that this is a question which may affect a considerable number of Defence witnesses. If the Chamber’s interpretation of the witness protection orders is incorrect, then the effect on the Defence would be profound.”).

³¹ *Interlocutory Appellate Review Report*, *supra* note 2, at 23.

³² *Situation in the Democratic Republic of the Congo* in the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06, ¶ 9 (January 29, 2007) [hereinafter “*The Prosecutor v. Lubanga*, 29 January 2007”].

³³ Rome Statute, *supra* note 4, at Art. 8(2)(e)(vii). Article 8 reads, in part: “(2) For the purpose of this Statute, ‘war crimes’ means: ... (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: ... (vii) Conscription or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.”

³⁴ Document Containing the Charges, *The Prosecutor v. Lubanga*, ICC-01/04-01/06 (28 August 2006).

8(2)(e)(xxvi), not 8(2)(e)(vii).³⁵

Both the Defense and the Prosecution challenged the PTC's actions. The Defense argued that the PTC's conclusion involved a legal issue that "would have transformed the nature of the submissions of the parties" and that a failure to heed the Defense's right to be heard was a violation of the Accused's right to a fair trial.³⁶ The Defense also argued that the PTC exceeded its statutory authority.³⁷ Article 61(7) expressly requires that the Chamber adjourn the hearing and request the Prosecutor to consider amending the charges where the evidence is insufficient to support that charge.³⁸ Therefore, the Chamber's failure to act accordingly was arguably in violation of the Rome Statute. The Prosecution was similarly opposed to the PTC's actions, stating that the Prosecution would be "forced to proceed with a crime that it had already determined, after careful examination of the evidence in its possession, should not be charged, and to devote time and resources to supplement that evidence, if possible, in order to adequately substantiate at trial."³⁹

In its decision dismissing these arguments, the PTC Chamber suggested that because the TC, at the behest of either party, could later decide to reconsider the legal characterization of the facts, interlocutory review of the decision would be unnecessary.⁴⁰ However, this ignores two key issues. First, the propriety of the PTC's alleged *ultra vires* actions will not be examined

³⁵ *The Prosecutor v. Lubanga*, 29 January 2007, *supra* n. 32, at 156-57.

³⁶ *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-836, Version publique expurgée de la requête de la Défense en autorisation d'interjeter appel de la Décision de la Chambre Préliminaire I du 29 janvier 2007 sur la confirmation des charges en conformité avec les décisions de la Chambre Préliminaire du 7 et 16 février 2007, ¶ 61, 71 (February 22, 2007) [hereinafter "*The Prosecutor v. Lubanga*, 22 February 2007"].

³⁷ *Id.*, ¶ 16.

³⁸ Rome Statute, *supra* note 4, art. 61(7).

³⁹ *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo*, Prosecutor's Application for Leave to Appeal Pre-Trial Chamber I's 29 January 2007 Décision sur la confirmation des charges, ICC-01/04-01/06, ¶ 1-2 (February 5, 2007) [hereinafter "*The Prosecutor v. Lubanga*, 5 February 2007"].

⁴⁰ *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Prosecution and Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges, ¶ 44 (May 24, 2007) [hereinafter "*The Prosecutor v. Lubanga*, 24 May 2007"].

before the court and the other concerns of the Prosecution and the Defense will go unconsidered.⁴¹ Second, any subsequent changes to the legal characterization of the facts during the trial phase will likely entail significant delays, in excess of those caused by interlocutory appellate proceedings.⁴²

Issues approved for discretionary interlocutory review have largely addressed the same topic: the Prosecutor's disclosure duties.⁴³ Thus, access to interlocutory appeal at the ICC has *de facto* been limited to decisions affecting evidentiary disclosure⁴⁴ and those afforded automatic appellate review: decisions on jurisdiction or admissibility, decisions granting or denying release of the accused or investigated party from custody, and decisions of the Pre-Trial Chamber ordering preservation measures for evidence considered necessary for the defense at trial.⁴⁵ By operating under such a restrictive interlocutory review regime, the ICC may be signaling its concerns with the expeditiousness of criminal proceedings, particularly those of the Ad Hoc Tribunals. However, as this example illustrates, the ICC's limited interlocutory appeal regime, in effect, excludes consideration a number of other fairness concerns. Its restrictive approach is perhaps, too restrictive.

B. *The Permissive Approach: The Ad Hoc Tribunals*

i. Rules 72 & 73 of the ICTY & ICTR Rules of Procedure and Evidence

The ICTY and the ICTR operate under identical interim appeal regimes. According to Rule 72(b)(i) of the ICTY and ICTR RPEs, appeals of issues concerning jurisdiction are

⁴¹ *Interlocutory Appellate Review Report*, *supra* note 2, at 35.

⁴² *Id.*, at 35-7 (Whereas interlocutory review would require "little factual analysis" and would assist the parties in efficiently preparing their cases, amending the characterization of facts in accordance with Regulation 55 would entail "the re-evaluation of facts presented at the confirmation hearing and possibly the suspension of proceedings.").

⁴³ *Interlocutory Appellate Review Report*, *supra* note 2, at 24.

⁴⁴ *Id.*

⁴⁵ Rome Statute, *supra* note 4, 82(1)(a-c).

permitted as of right.⁴⁶ All other issues may be appealed upon certification by the Trial Chamber.⁴⁷ The provision governing discretionary appeals for both Tribunals, reads as follows:

Decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.⁴⁸

Though the same general directive on discretionary review is used at the ICC, the Ad Hoc Tribunals apply the provision more permissively. The practice at the Ad Hoc Tribunals differs from the ICC in three key ways. Each will be discussed in turn.

a. Expansive Interpretation of Fairness

The ad hoc tribunals' treatment of "fairness" within the scope of interlocutory review is more expansive than that by the ICC. In addition to concerns involving the equality of arms, the court has found that where the "statutory rights guaranteed to the Accused" are implicated, there is a clear concern for the fairness of the proceedings.⁴⁹ Such statutory rights have included: issues regarding funding for pre-trial preparation and therefore the legal representation of the accused,⁵⁰ issues involving the rights owed to the accused in a joint trial,⁵¹ and the admissibility or use of a prior statement of an accused.⁵²

⁴⁶ ICTY Rules of Procedure and Evidence (revised July 24, 2009) R. 72(B)(i) [hereinafter "ICTY RPE (rev. 24 July 2009)"] ("Decisions on preliminary motions are without interlocutory appeal save in the case of motions challenging jurisdiction."); ICTR Rules of Procedure and Evidence (revised March 14, 2008) R. 72(B)(i) [hereinafter "ICTR RPE (rev. 14 March 2008)"] ("Decisions on preliminary motions are without interlocutory appeal, save: in the case of motions challenging jurisdiction, where an appeal by either party lies as of right.").

⁴⁷ ICTY RPE (rev. 24 July 2009), *supra* note 46, R. 72(B)(ii) & 73(B); ICTR RPE (rev. 14 March 2008), *supra* note 46, R. 72(B)(ii) & R. 73(B).

⁴⁸ ICTY RPE (rev. 24 July 2009), *supra* note 46, R. 73(B) & ICTR RPE (rev. 14 March 2008), *supra* note 46, R. 73(B).

⁴⁹ *The Prosecutor v. Halilovic*, Case No. IT-01-48-T, Decision on Motion for Certification (June 30, 2005) [hereinafter *The Prosecutor v. Halilovic*, 30 June 2005"].

⁵⁰ *The Prosecutor v. Milutinovic*, 16 July 2003, *supra* note 1, ¶ 2 ("[Q]uestions relating to the legal representation of an accused may affect the conduct of a trial, and have implications for the statutory rights of the accused"). *Also See The Prosecutor v. Gotovina, et al.*, Case No. IT-06-90-PT, Decision on Request for Certification to File

b. The Term “Fairness and Expeditiousness of the Proceedings”

Does Not Operate Cumulatively

Unlike the ICC, which considers “the fair and expeditious conduct of the proceedings” to be a cumulative term, requiring a finding that both the fairness and the expeditiousness of the proceedings are implicated, the Ad Hoc Tribunals treat the requirement as a single unit. For instance, in the ICTY’s June 30, 2005 decision, granting interlocutory review of the decision to admit into evidence a record of the Accused’s interview, the Court stated:

the issue of the admission into evidence of the Accused's interview is an important one, that clearly has a bearing on the fairness of the proceedings, as it involves a number of statutory rights guaranteed to the Accused, and that the requirement that the "decision involves an issue that would significantly affect the fair [...] conduct of the proceedings", is met; moreover, the admission into evidence of the record of the interview may have consequences for "the outcome of the trial" that could be significant; therefore the first criteria set out in Rule 73 (B) has been satisfied[...]⁵³

Notably, the court does not separately mention the expeditiousness of the proceedings.⁵⁴ Also, in

Interlocutory Appeal Against Trial Chamber’s Decision on Conflict of Interest of Attorney Miroslav Separovic and on Request for Certification to File Interlocutory Appeal Against Trial Chamber’s Decision on Finding of Misconduct of Attorney Miroslav Separovic, ¶ 3 (March 13, 2007) (“[T]he Impugned Decisions involve the issue of the assistance of counsel of choice which would significantly affect the fair and expeditious conduct of the proceedings.”).

⁵¹ *The Prosecutor v. Tolimir, et al.*, Case No. IT-04-80-PT, Decision on Motion for Certification of Joinder Decision for Interlocutory Appeal, ¶ 11 (October 6, 2005) [hereinafter “*The Prosecutor v. Tolimir*, 6 October 2005”] (“The first requirement of Rule 73(B) is met because the Decision involves an issue -- the right of an accused to be accorded the same rights in a joint trial as he would have if tried separately -- which significantly affects the fair and expeditious conduct of the proceedings.”).

⁵² *The Prosecutor v. Nyiramasuhuko & Ntahobali*, Case No. I-97-21-T, Decision on Ntahobali’s Motion for Certification to Appeal the Chamber’s Decision Granting Kanyabashi’s Request to Cross-Examine Ntahobali Using 1997 Custodial Interviews, ¶ 27 (June 1, 2006) (“Chamber is of the view that the admissibility of an accused’s interviews is an important matter that could have a bearing on the fairness of the proceedings, as it affects the fundamental rights of the accused.”).

⁵³ *The Prosecutor v. Halilovic*, 30 June 2005, *supra* note 49.

⁵⁴ The Trial Chamber’s approach is further supported by the Appeals Chamber’s statements in its May 25, 2001 Decision in *The Prosecutor v. Miroslav Kvocka*: “The Appeals Chamber has a primary obligation to ensure that the accused has a fair and expeditious trial - a fundamental guarantee - as set out in Articles 20(1) and 21(4) of the Statute and embodied in the major international human rights instruments. The right to an expeditious trial is an inseparable and constituent element of the right to a fair trial.” *The Prosecutor v. Kvocka, et. al.*, Case No. IT-98-30/1-A, Decision on Interlocutory Appeal by the Accused Zoran Zigic Against the Decision of Trial Chamber I dated 5 December 2000, ¶ 20 (May 25, 2001).

Prosecutor v. Tolimir, the TC stated, “The first requirement of Rule 73(B) is met because the Decision involves an issue—the right of the accused to be accorded the same rights in a joint trial as he would have if tried separately—which *significantly affects the fair and expeditious conduct of the proceedings.*” (emphasis added).⁵⁵

c. Lower Standard of Proof Permitted on Interim Review

Further, the ad hoc tribunals demand a lesser standard of proof to demonstrate the statutory requirements.⁵⁶ While the ICC PTC requires “concrete proof” and “specific terms,”⁵⁷ the Trial Chambers of the Ad Hoc Tribunals are willing to certify decisions for which the impact on the fairness or outcome of the proceedings is only speculative. In its February 3, 2004 decision, responding to the Prosecutor’s challenge to the invalidation of the indictment, the ICTR TC asserted:

[S]hould the Appeals Chamber overrule the Trial Chamber's Decision, perhaps on the basis that the Indictment was indeed specific enough in all the circumstances of the case to allow the Trial Chamber to accept the evidence relating to the acts committed by the Accused Casimir Bizimungu in Ruhengeri préfecture and that the Trial Chamber erred on this point, this may indeed significantly affect the outcome of the Trial and materially advance the proceedings.⁵⁸

⁵⁵ *The Prosecutor v. Tolimir*, 6 October 2005, *supra* note 51, ¶ 11. See also *The Prosecutor v. Slobodan Milosevic*, Case No. IT-02-54-T, Decision on Prosecution's Application for Certification Under Rule 73(b) Concerning Rule 70, (August 29, 2002) (“[T]he nature of Rule 70 evidence, its origin and the manner in which the Trial Chamber is to apply it, impacts significantly on both the fair and expeditious conduct of proceedings and possibly the outcome of the trial.”); *The Prosecutor v. Théoneste Bagosora*, 21 July 2005, *supra* note 30, ¶ 9 (“The consequences predicted by the Defence (i.e. “many potential defence witnesses will decline to present themselves for testimony”) would undoubtedly have a significant effect on the fairness and expeditiousness of proceedings.”); *The Prosecutor v. Théoneste Bagosora*, Case No. ICTR-98-41-T, Certification of Appeal Concerning Access to Protected Defence Witness Information, ¶ 8, (July 29, 2005) [hereinafter “*The Prosecutor v. Bagosora*, 29 July 2005”] (“The Chamber acknowledges that denying automatic access to protected information by all employees of the Office of the Prosecutor may make compliance with Rule 68, and sharing of evidence relevant to other trials, somewhat more burdensome. Extra effort will be required by trial teams who wish to exchange salient information without disclosing protected witness identities... Consequently, the Chamber accepts that the restriction “involves an issue that would significantly affect the fair and expeditious conduct of the proceedings”).

⁵⁶ *Interlocutory Appellate Review Report*, *supra* note 2, at 8.

⁵⁷ *Situation in DRC*, 31 March 2006, *supra* note 13, ¶ 44 (Rejecting the argument put forth by the Prosecutor, in part, because the OTP had not provided “concrete evidence” that the decision would affect the fairness of the proceedings.).

⁵⁸ *The Prosecutor v. Casimir Bizimungu, et al.*, Decision on The Prosecution Motion For Certification To Appeal The Chamber's Decision of 3 February 2004, Case No. ICTR-99-50-T, ¶ 12 (February 20 2004).

Here, the Trial Chamber indicates its willingness to explore mere possibilities and grant certification to appeal based on nothing more than speculation.⁵⁹

ii. *The permissive approach may enhance the remedial capacity of interlocutory review; however, it is less able to ensure an expeditious trial*

In the absence of a restrictive mandate like the one employed by the ICC⁶⁰, the ICTY and the ICTR have permitted appellate review of a wide range of issues.⁶¹ In addition to issues directly affecting the equality of arms, such as the accused's right to adequate trial preparation time,⁶² other issues affecting the defense's general right to a fair trial have been granted interim review. This includes decision involving the expeditiousness of the proceedings, such as judicial notice⁶³ as well as other decisions that may infringe on the fundamental or statutory rights of the

⁵⁹ See also *The Prosecutor v. Bagosora*, 21 July 2005, *supra* note 30, ¶ 9 (After acknowledging that the consequences predicted by the Defense would be "remote," the Chamber stated that, should they occur, the consequences "would undoubtedly have a significant effect on the fairness and expeditiousness of proceedings. The point of contention is whether those consequences will actually ensue." The court granted interim review.).

⁶⁰ The ICC also imposes additional non-statutory restrictions. *Situation in Democratic Republic of the Congo*, Case No. ICC-01/04, Decision on the OPCD's Application for Leave to Appeal the "Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by Applicants a/0189/06 to a/0198/06, a/0200/06 to a/0202/06, a/0204/06 to a/0208/06, a/0210/06 to a/0213/06, a/0215/06 to a/0218/06, a/0219/06, a/0223/06, a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08 (November 28, 2008) ("For the Chamber to grant leave to appeal under article 82(l)(d) of the Statute, the issue identified by the appellant must: (i) have been dealt with in the relevant decision; and (ii) meet the following two cumulative criteria: a. it must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and b. an immediate resolution by the Appeals Chamber may materially advance the proceedings. In addition, this Chamber has followed the criteria originally set forth by Pre-Trial Chamber II concerning the purpose of appeals made pursuant to article 82(l)(d) of the Statute: Pre-Trial Chamber II states in its decision that the Prosecutor's Application must be examined in the light of the following three principles: the restrictive character of the remedy provided for in article 82 (1) (d) of the Statute; the need for the applicant to satisfy the Chamber as to the existence of specific requirements stipulated by this provision; the irrelevance of or non-necessity at this stage for the Chamber to address arguments relating to the merit or substance of the appeal. At the outset, the Single Judge recalls that the Appeals Chamber has defined an "issue" which may form the subject of an interlocutory appeal as follows: An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.").

⁶¹ *Interlocutory Appellate Review Report*, *supra* note 2, at 55.

⁶² *The Prosecutor v. Bagosora*, Case No. ICTR-98-41-T, Decision on Certification of Interlocutory Appeal From Decisions on Severance and Scheduling of Witnesses (September 11, 2003) (granting leave to file interlocutory appeal of a decision implicating the accused's right to adequate trial preparation time).

⁶³ *The Prosecutor v. Dragomir Milosevic*, 3 May 2007, *supra* note 3, ¶ 2 ("[T]he very objective of judicially noticing adjudicated facts, involving as it does the concepts of judicial economy and expeditiousness, is relevant to the fair

accused, as discussed above.

While this approach has resulted in a wide range of decisions certified on appeal, the drawback of such permissiveness is that interim review of a large number of decisions will contribute to pre-existing delays. Indeed, the Ad Hoc Tribunals have been widely criticized for their protracted pre-trial proceedings.⁶⁴ This is a clear interference with the Defense's right to an expeditious trial.

C. The Intermediate Approach: The Special Court of Sierra Leone

i. Rules 72 & 73 of the SCSL Rules of Procedure and Evidence

The interlocutory appeal regime at the SCSL holds little resemblance to that of ad hoc Tribunals or the ICC. What most distinguishes the SCSL's interlocutory appeal regime from that of the other courts is that in addition to an interlocutory appeal mechanism, it has a unique "fast-track" provision for preliminary motions. This "fast-track" provision allows the Trial Chamber to refer an issue directly to the Appeals Chamber (hereinafter "AC") and receive "authoritative interpretations" on crucial preliminary matters without first ruling on the issue.⁶⁵ Because referral precedes any adjudication of the motion's merits, the possibility that these issues will be litigated in the TC and then re-litigated before the AC is eliminated.⁶⁶ Consequently, the fast-

and expeditious conduct of the proceedings.").

⁶⁴ See, e.g., Gillian Higgins, *Fair and Expeditious Pre-Trial Proceedings*, 5 J. Int'l Crim. Just. 394, 394 (2007) ("In the past decade, the length of time taken by international tribunals to try those accused of war crimes has been the subject of fierce criticism."); Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. Pa. L. Rev. 1, 92 (2002) ("The considerable length and cost of Tribunal trials has generated much criticism and consequently spurred reform."); Ralph Zacklin, *The Failings of Ad Hoc Tribunals*, 2 J. Int'l Crim. Just. 541, 543-44 (2004) ("The delays in bringing detainees to trial--and the trials themselves--have generally been so lengthy that questions have been raised as to the violation by the tribunals of the basic human rights guarantees set out in the International Covenant on Civil and Political Rights (ICCPR) [sic]. Justice delayed is justice denied, which also raises the question of whether justice has been done to the victims.").

⁶⁵ *Interlocutory Appellate Review Report*, *supra* note 2, at 53.

⁶⁶ *The Prosecutor v. Norman, et al.*, Case No. SCSL-2003-08-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, ¶ 12 (November 4, 2003) [hereinafter, "*The Prosecutor v. Norman*, 4 November 2003"].

track mechanism is believed by the Court to “enhance rather than undermine the basic right to expeditious justice.”⁶⁷

Under SCSL RPE Rule 72, preliminary motions may be directly referred to the AC via the fast-track provision in two instances: (a) on “serious” issues of jurisdiction⁶⁸ and (b) on issues that “significantly affect the fair and expeditious conduct of the proceedings or the outcome of a trial.”⁶⁹ In neither instance is referral automatic. In the former case (a), it is within the Trial Chamber’s discretion to determine (1) whether the objection raises a jurisdictional concern and (2) whether that concern is “serious” within the meaning of the provision.⁷⁰ The discretionary standard for the latter instance (b) reads as follows:

Preliminary motions made in the Trial Chamber prior to the Prosecutor’s opening statement which, in the opinion of the Trial Chamber, raise an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of a trial shall be referred to a bench of at least three Appeals Chamber Judges, where they will proceed to a determination as soon as practicable.⁷¹

In addition to the fast-track mechanism, non-preliminary issues, “in exceptional circumstances and to avoid irreparable prejudice to a party,” are permitted interim appellate review under the SCSL RPE Rule 73(B).⁷² Note that this rule operates cumulatively: where an

⁶⁷ *Id.* ¶ 30 (“[I]n order to get on with the trial, at the very least to have it begin within a reasonable time of a defendant’s arrest, we are firmly of the view that the fast-track mechanism of Rule 72 is necessary and will serve to enhance rather than undermine the basic right to expeditious justice.”).

⁶⁸ Special Court of Sierra Leone Rules of Procedure and Evidence (revised May 27, 2008) R. 72(E) [hereinafter “SCSL RPE (rev. 27 May 2008)”].

⁶⁹ *Id.* R. 72(F).

⁷⁰ See *The Prosecutor v. Norman, et al.*, Case No. SCSL-2003-08-PT, Decision on the Defence Preliminary Motion on Lack of Jurisdiction: Command Responsibility, ¶ 18 (October 15, 2003) (explaining that “this Sub-Rule provides for the reference of preliminary motions to “the Appeals Chamber” in cases where the preliminary motion raises a “serious issue of jurisdiction”. It is therefore within the inherent power of “the Chamber”, in order to provide for the reference of a preliminary motion to “the Appeals Chamber”, to assess whether such preliminary motion objects to lack of jurisdiction and, more particularly, if the substance of such objection is verified, whether such objection could be deemed as “serious.”).

⁷¹ SCSL RPE (rev. 27 May 2008), *supra* note 68, R. 72(F).

⁷² *Id.* R. 73(B).

exceptional circumstance is not found, no consideration must be made to whether a party faces irreparable harm.⁷³

Combined, Rules 72 and 73 create a regime wherein preliminary matters are addressed via the fast-track mechanism only and where non-preliminary concerns may be addressed via the fast-track mechanism or via interim appellate review. The Court has stated that this interlocutory appeal regime “is more restrictive in comparison with that applied by the International Criminal Tribunal for Rwanda and the International Tribunal for the Former Yugoslavia,”⁷⁴ in the “interests of expeditiousness and the peculiar circumstances of this Court’s limited mandate.”⁷⁵ Even so, the SCSL has granted interim appellate review for a wider range of issues under this provision than has the ICC under Article 82(1)(d).⁷⁶ As a result, the SCSL takes an intermediate approach to interim review; one that is less permissive than the ad hoc tribunals,⁷⁷ and more permissive than the ICC.⁷⁸

ii. The intermediate approach best balances the right to an expeditious trial and the right to a fair trial

The SCSL has been unambiguous about the motivating force behind its current rules governing interlocutory appeals. At the Court’s inception, its rules of the procedure and evidence were inherited from the ICTR,⁷⁹ which permitted interlocutory appeals “as of right where the decision went to jurisdiction and by way of certified leave if the decision involved an

⁷³ *The Prosecutor v. Brima*, Case No. SCSL-04-16-PT-017, Decision on Prosecution's Application For Leave to File An Interlocutory Appeal Against The Decision on The Prosecution Motions For Joinder, ¶ 18 (February 13, 2004) (“[H]aving found that no exceptional circumstances have been articulated by the Prosecution to warrant additional comments, it would not be necessary to address the question of irreparable prejudice given that the test is conjunctive.”).

⁷⁴ *The Prosecutor v. Brima*, Case No. SCSL-04-16-PT-090, Decision on Prosecution Application for Leave to file an Interlocutory Appeal Against Decision on Motion for Concurrent Hearing of Evidence Common to Case SCSL-2004-15-PT and SCSL-2004-16-PT, ¶ 22 (June 1, 2004).

⁷⁵ *Id.*

⁷⁶ *Interlocutory Appellate Review Report*, *supra* note 2, at 54.

⁷⁷ *The Prosecutor v. Brima*, 1 June 2004, *supra* note 74, ¶ 22.

⁷⁸ *Interlocutory Appellate Review Report*, *supra* note 2, at 54.

⁷⁹ *The Prosecutor v. Norman*, 4 November 2003, *supra* note 66, ¶ 6.

issue which would significantly affect the fair and expeditious conduct of the trial.”⁸⁰ However, at the Court’s first plenary session, the judges unanimously sought to amend the statute, citing the adopted regime’s interference with the Court’s obligation to guarantee an expeditious trial.⁸¹ The amended regime, designed to give “full force and effect” to the right to an expeditious trial,⁸² is believed to have augmented the Defense’s right to a fair trial,⁸³ despite the substantial influx in the number of preliminary motions referred directly to the AC.⁸⁴ The intermediate approach does not unduly restrict the adjudication of fundamental issues implicating concerns of fairness. Further, it is not so permissive as to violate the Defense’s right to an expeditious trial. The subsequent section will explore why a similar intermediate approach to interim review is the better approach for the ECCC.

II. Interim Appellate Review Under the ECCC

A. Applicable Law: The ECCC’s Procedural Directive

A preliminary matter before exploring any aspect of the ECCC’s procedural regime is the question of applicable law. The ECCC’s procedural directive can be found in Article 12 of the 2003 Agreement between the United Nations and the Royal Government of Cambodia (hereinafter “UN-RGC Agreement”).⁸⁵ Paragraph 1 of Article 12 reads as follows:

The procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Interlocutory Appellate Review Report, supra* note 2, at 52 (stating that “within seven months of the Prosecution’s filing of its initial indictments in March 2003, 17 of the 21 preliminary motions filed by the Defense were referred directly to the Appeals Chamber.”) (citing Nina H. B. Jorgensen, *The Early Jurisprudence of the Special Court for Sierra Leone from the Perspective of the Rights of the Accused*, 5 ERA-Forum 545, 547 (December 2004)).

⁸⁵ 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. 12(1) (2003). [hereinafter “UN-RGC Agreement, 2003”].

standards, guidance may also be sought in procedural rules established at the international level.⁸⁶

Prior to the adoption of the new Cambodian Criminal Procedure Code (hereinafter “CPC”) in 2007,⁸⁷ there existed considerable uncertainty as to which Cambodian law would govern.⁸⁸ Outside of the 1993 Constitution, there were two primary sources of Cambodian criminal procedure: the 1992 Statute of the United Nations Transitional Authority in Cambodia (hereinafter the “UNTAC Law”) and the 1993 State of Cambodia Law on Criminal Procedure (hereinafter the “SOC Law”).⁸⁹ Some argued that the subsequent adoption of the SOC Law extinguished the UNTAC Law’s authority.⁹⁰ Others questioned the very validity of the SOC Law, as the National Assembly was not then authorized to adopt legislation.⁹¹ Despite these uncertainties, the SOC Law continued to be used in Cambodian courts⁹²

The contemporaneous adoption of the ECCC Internal Rules (hereinafter “Internal Rules”) and the new CPC added clarity to some of these issues.⁹³ The Internal Rules, adopted on June 12, 2007,⁹⁴ were drafted with the intention of “consolidat[ing] applicable Cambodian procedures for proceedings before the ECCC” and “adopt[ing] additional rules where these existing procedures do not deal with a particular matter.”⁹⁵ However, this does not abrogate the CPC’s role in the ECCC proceedings. Where the Internal Rules do not address a particular issue, resort

⁸⁶ *Id.*

⁸⁷ Suzannah Linton, *Putting Cambodia’s Extraordinary Chambers into Context*, 11 S.Y.B.I.L. 195, 237 (2007).

⁸⁸ Göran Sluiter, *Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers*, 4 J. Int’l Crim. Just. 314, 319 (2006).

⁸⁹ *Id.* See also *Law on Criminal Procedure adopted by the State Assembly of Cambodia on January 28, 1993 at the 24th Session of the First Legislature*, Kram dated 8 February 1993.

⁹⁰ Sluiter, *supra* note 88, at 319.

⁹¹ *Id.*

⁹² *Id.*

⁹³ Linton, *supra* note 87, 237.

⁹⁴ Case File No. 002/19-09-2007-ECCC/OCIJ (PTC06), Decision on Nuon Chea’s Appeal Against Order Refusing Request for Annulment, ¶ 13 (August 26, 2008) [hereinafter “ECCC Nuon Chea Decision, 26 August 2008”] (“On 12 June 2007, the Plenary Session of national and international judicial officers adopted the Internal Rules of the ECCC. These Rules came into force on 20 June 2007.”).

⁹⁵ Extraordinary Chambers in the Courts of Cambodia Internal Rules (rev. March 6, 2009) preamble [hereinafter “ECCC Internal Rules (rev. 6 March 2009)”].

to the CPC is required.⁹⁶ Nonetheless, since the Internal Rules appear to fully address appellate review of non-final decisions, the Internal Rules alone will govern.

B. Interim appellate review during the pre-trial phase

According to Rule 74(3) of the ECCC Internal Rules, the Defense has enumerated rights to appeal orders of the Co-Investigating Judges (hereinafter “CIJ”) during the pre-trial phase.

Those orders include the following:

- a) confirming the jurisdiction of the ECCC
- b) refusing requests for investigative action
- c) refusing request for the restitution of seized items
- d) refusing requests for expert reports
- e) refusing requests for additional expert investigation
- f) relating to provisional detention or bail
- g) refusing an application to seise the Chamber for annulment of investigative action; or
- h) relating to protective measures.⁹⁷

All other orders are without appeal.⁹⁸ A cursory examination of this pre-trial appellate review regime reveals a few similarities with other international models. The most significant of which are the rights to challenge the jurisdiction of the court and detention and bail matters. As these decisions concern the dignity and liberty of the accused, statutory protections and procedural safeguards conferred via appellate review are critical.⁹⁹ There are, however, a number of inconsistencies between the ECCC regime and those operative in other international courts. This will be discussed in Section III.

C. Interim appellate review during the trial phase

⁹⁶ ECCC Nuon Chea Decision, 26 August 2008, *supra* note 94, ¶ 15.

⁹⁷ ECCC Internal Rules (rev. 6 March 2009) R. 74(3)(a-f).

⁹⁸ *Id.* Pursuant to Rule 104 of the Internal Rules, the Supreme Court will only hear appeals against the judgment or decision of the Trial Chamber. ECCC Internal Rules (rev. 6 March 2009) R. 104.

⁹⁹ See e.g., ICTY/ICTR Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on Authority of the Tribunal (IT/38/Rev.9), 10 October 2005.

During the trial phase, a “discernible error in the exercise of the Trial Chamber’s discretion which resulted in prejudice to the appellant” may be appealed to the Supreme Court. However, the error must implicate one of the following five decisions:¹⁰⁰

- a) decisions which have the effect of terminating the proceedings;
- b) decisions on detention and bail under Rule 82;
- c) decisions on protective measures under Rule 29(4)(c);
- d) decisions on interference with the administration of justice under Rule 35(6);
- and
- e) decisions declaring the application of a civil party inadmissible under Rule 23(4).¹⁰¹

All other decisions meeting the grounds set forth in Rule 104(1) may be appealed at the final judgment stage.¹⁰² Like most other interlocutory appellate review regimes, decisions involving detention and protective measures may be submitted to a higher appellate chamber for review.¹⁰³ Protection of these rights is particularly important as they directly implicate the statutory rights of the accused.¹⁰⁴ However, unlike other regimes, the above provision dramatically limits the discretion of the Trial Chamber in certifying matters for appeal and therefore severely limits which rights of the accused may be protected via appellate review.

Though the ECCC permits interim review of a number of preliminary and trial decisions, the regime offers little to no flexibility, unlike the Ad Hoc Tribunals and the SCSL. As such, some fundamental concerns not enumerated in the statute, like those implicating the expeditiousness of the proceedings, may not be reviewable at the pre-trial, trial, or, as discussed below, the final judgment stage. An intermediate approach to interim review is likely to better address the inconsistencies and restrictions discussed in the above subsections. The next section

¹⁰⁰ ECCC Internal Rules (rev. 6 March 2009), *supra* note 95, R. 104(1, 4).

¹⁰¹ *Id.* R. 104(4).

¹⁰² *Id.* (“The Supreme Court Chamber shall decide an appeal against a judgement or a decision of the Trial Chamber on the following grounds: a) an error on a question of law invalidating the judgment or decision; or b) an error of fact which has occasioned a miscarriage of justice.”)

¹⁰³ *Id.*

¹⁰⁴ UN-RGC Agreement, 2003, *supra* note 85, art. 13(1).

will explore this argument.

III. The ECCC Should Adopt an Intermediate Approach to Interim Review

The task of the following subsections is to explore why an intermediate approach like that followed by the SCSL best suits the ECCC in light of its unique structural and procedural features and obligation to ensure the Defense a fair trial. Section IV will describe how the ECCC might achieve a more intermediate approach to interlocutory review.

A. The ECCC's restrictive interim appeal regime is incompatible with its restrictive final appeal regime

The Defense only has enumerated rights to appeal interim decisions. This restrictive regime is ill-suited for the ECCC's similarly restrictive regime for appellate review of final decisions.¹⁰⁵ The ECCC, at its inception, permitted appeals at the final judgment stage by the accused on "any issues of fact and law, against decisions of the Trial Chamber."¹⁰⁶ However, pursuant to the amendments of September of 2008, this broad right to appeal general issues of law and fact was considerably restricted.¹⁰⁷ After the amendment, the Supreme Court Chamber was only allowed to hear final appeals on the following grounds: "a) an error on a question of law invalidating the judgment or decision; or b) an error of fact which has occasioned a

¹⁰⁵ See ECCC Internal Rules (rev. 6 March 2009), *supra* note 95, R. 74(3) ("The Charged Person may appeal against the following orders of the Co-Investigating Judges: a) confirming the jurisdiction of the ECCC; b) refusing requests for investigative action; c) refusing request for the restitution of seized items; d) refusing requests for expert reports; e) refusing requests for additional expert investigation; f) relating to provisional detention or bail; g) refusing an application to seize the Chamber for annulment of investigative action; or h) relating to protective measures."); ECCC Internal Rules, R. 104(4) ("The following decisions of the Trial Chamber are subject to immediate appeal: a) decisions which have the effect of terminating the proceedings; b) decisions on detention and bail under Rule 82; c) decisions on protective measures under Rule 29(4)(c); d) decisions on interference with the administration of justice under Rule 35(6); and e) decisions declaring the application of a civil party inadmissible under Rule 23(4).").

¹⁰⁶ ECCC Internal Rule (rev. 12 June 2007) R. 104(1) ("The Supreme Court Chamber shall decide appeals, on any issues of fact and law, against decisions of the Trial Chamber.").

¹⁰⁷ Compare ECCC Internal Rules (rev. 1 February 2008), *supra* note 95, R. 104 with ECCC Internal Rules (rev. 6 March 2009), *supra* note 95, R. 104.

miscarriage of justice.”¹⁰⁸

Moreover, the amended rules call for higher standards of admissibility for appeals at the final judgment stage. No longer is the appellant allowed to submit a brief merely containing the reasons for the appeal; the new provisions require that the appellant either specify the alleged error of law *and* demonstrate how it invalidates the decision or specify the alleged error of fact *and* demonstrate how it occasioned a miscarriage of justice.¹⁰⁹ Each ground of appeal must be supported with arguments and authorities.¹¹⁰

This move toward a restrictive approach to appeals at the final judgment stage should have triggered a more permissive approach to interim appellate review for the Defense. Where there is no provision at the interlocutory stage or at the final judgment stage to adjudicate a matter implicating the fundamental rights of the accused, the legitimacy of the entire proceedings may be questioned. Matters concerning the Defense’s right to an expeditious trial, the admissibility of prejudicial evidence, and the interference with the Defense’s ability to develop a defense strategy, among others, may not be afforded appellate review at any stage of the proceedings. An intermediate approach would better complement the restrictive final appeal regime by permitting interim appellate review of issues like these.

B. The ECCC’s overall appellate review regime is inconsistent with international and national criminal practice

Of the international courts herein examined, none circumscribes the appeal rights of the accused with the respect to appeal rights granted the Prosecution. Further, none uses a regime for appellate review of final judgments that is as restrictive and inflexible as the one in place at the ECCC. International courts appear to approach appellate review holistically, by permitting

¹⁰⁸ ECCC Internal Rules (rev. 6 March 2009), *supra* note 95, R. 104.

¹⁰⁹ *Id.* R. 105(2)

¹¹⁰ *Id.* R. 105(3)

appellate review of fundamental issues at the final judgment stage where it is unavailable at the interlocutory stage. For example, the ICC, which has the most restrictive interim review regime, appears, at least facially, to take the most permissive approach to appeals at the final judgment stage. Its regime for final appellate review permits appeals of the following: (i) Procedural error, (ii) Error of fact, (iii) Error of law, or (iv) Any other ground that affects the fairness or reliability of the proceedings or decision.¹¹¹ A requirement that the error of law invalidate the decision and that the error of fact occasion a miscarriage of justice might be considered a heightened standard for errors of law and fact. Unlike the ECCC, the ICC does not require this heightened standard. Moreover, the ICC permits appellate review of procedural errors and *any other ground* affecting the proceedings fairness and reliability, a term that can be construed quite extensively.¹¹² The other courts discussed in this memo likewise operate under more permissive final appellate regimes, however, not to the extent that the ICC does. This is perhaps appropriate as the other courts, have more permissive interim review regimes. The SCSL, for instance, permits the review of procedural errors, in addition to the grounds permitted under the ECCC.¹¹³ Though the Ad Hoc Tribunals also require that the error of law invalidate the decision and that the error of fact occasion a miscarriage of justice, they differ from the ECCC in one important way.¹¹⁴ Pursuant to Rule 108 of the ICTY and ICTR RPEs, the AC is authorized to vary the grounds for final appeals, upon a good showing.¹¹⁵ This not only adds a dimension of flexibility not

¹¹¹ Rome Statute, *supra* note 4, art 81(1)(b).

¹¹² Rome Statute, *supra* note 4, art 81(1)(b)(i, iv).

¹¹³ Statute of the Special Court for Sierra Leone, art. 20(1). [hereinafter “SCSL Statute”]. See also SCSL RPE (rev. 27 May 2008) R. 106(A). Note that though the SCSL Statute, art. 20(3) requires that the Appeals Chamber use the practice of the Ad Hoc Tribunals as guidance, the SCSL permits review of procedural errors, whereas the Ad Hoc Tribunals do not.

¹¹⁴ Updated Statute of the International Criminal Court for the Former Yugoslavia, as amended July 7, 2009, art. 25(1) [hereinafter “ICTY Statute”] & Statute of the International Criminal Court for the Rwanda, art. 24(1) [hereinafter “ICTR Statute”].

¹¹⁵ ICTY RPE (rev. 24 July 2009), *supra* note 46, R. 108 & ICTR RPE (rev. 14 March 2008), *supra* note 46, R. 108. (“The Appeals Chamber may, on good cause being shown by motion, authorise a variation of the grounds of

available at the ECCC, but it also appears to permit the adjudication of matters not appealable during the interlocutory stage.

Appellate review at the ECCC is also inconsistent with the practice in the French system. French courts “look at the fairness of procedures globally, allowing the absence of one guarantee to be counterbalanced by the existence of another.”¹¹⁶ Though, like the ECCC, the French criminal system restricts the accused’s access to interim review,¹¹⁷ what distinguishes the French civil system from the ECCC in this regard is that both the Prosecution and the Defense can initiate a full review of the facts and law of the case at the final judgment stage.¹¹⁸ This counterbalancing is absent from the ECCC’s appellate regime.

C. The ECCC’s Restrictive Approach to Interim Review Interferes with the Defense’s Right to a Fair Trial

Historically, efforts by defense lawyers to provide adequate representation for their clients in international criminal proceedings have been stymied by a lack of human and economic resources with respect to those afforded the prosecution.¹¹⁹ These inequities are compounded by a lack of institutional status and organization for the Defense.¹²⁰ Hence, at the “heart” of modern international criminal justice is the principle of equality of arms,¹²¹ a

appeal.”).

¹¹⁶ Catherine Elliott, French Criminal Law 11 (2001).

¹¹⁷ See Valérie Dervieux, *The French System*, in European Criminal Procedures 218, 271-72 (Mireille Delmas-Marty and J.R. Spencer, eds., 2002) (The accused may only appeal against: “ordonnances establishing the competence of the *juge d’instruction*; the admissibility of the constitution of the *partie civile*; bail conditions; remands in custody; requests for expert reports, additional expert reports or ‘second opinions’; requests for a medical or psychological examination; requests for a hearing, a questioning or confrontation; requests for a visit to the scene of the crime; or for the production of exhibits.”).

¹¹⁸ See Elliott, *supra* note 116, at 49.

¹¹⁹ Stefania Negri *Equality of Arms – Guiding Light or Empty Shell?*, in International Criminal Justice: A Critical Analysis of Institutions and Procedures 13, 45 (Michael Bohlander, ed., 2007).

¹²⁰ Göran Sluiter, *Adversarial v. Inquisitorial Model*, in The Oxford Companion to International Criminal Justice 230, 233 (Antonio Cassese, ed., 2009).

¹²¹ Negri, *supra* note 119, at 14.

component of the right to a fair trial.¹²² The equality principle's role as a litmus test for procedural legitimacy¹²³ denotes its significance to the field of criminal justice. International jurisprudence on the equality principal is commonly traced back to the European Commission of Human Rights (hereinafter "ECommHR").¹²⁴ ECommHR initially interpreted the principle narrowly, requiring only that the Defense be afford the right to be heard *if* the same was afforded the Prosecution.¹²⁵ This interpretation was subsequently adopted, but expanded by the European Court of Human Rights (hereinafter "ECHR") and modern international criminal courts.¹²⁶ Today, the principle implies that "each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent."¹²⁷ The following subsections will explore two such instances in the ECCC's pre-trial proceedings where the Defense's restricted access the interim appellate review places it at a disadvantage in relation to the Prosecution.

i. The Defense's minor role in fact-finding coupled with its limited right to appeal investigative actions places it at a substantial disadvantage vis-à-vis the Prosecution

At the ECCC, the Defense, unlike the Prosecution, is not permitted to conduct its own investigation; it may only request that the Office of the Co-Investigating Judges (hereinafter

¹²² Christoph Safferling, *Equality of Arms*, in The Oxford Companion to International Criminal Justice, *supra* note 120, at 311 (stating that the principle of equality of arms is generally accepted as "a corollary of the right to a 'fair trial'").

¹²³ Negri, *supra* note 119, at 14.

¹²⁴ *Kaufman v. Belgium*, App. 10938/84, Eur. Comm'n H.R. 50 DR 98, 115 (1986).

¹²⁵ Christoph Safferling, *Equality of Arms*, in The Oxford Companion to International Criminal Justice, *supra* note 120, at 311-12.

¹²⁶ *Id.* at 311 ("In more recent decisions the ECHR has substantially expanded the ambit of the equality principle."). See also *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Judgement: First Ground of Appeal by the Defence: Inequality of Arms Leading to Denial of Fair Trial, ¶ 52 (July 15, 1999) [hereinafter "*The Prosecution v. Dusko Tadic*, 15 July 1999] ("[T]he Appeals Chamber is of the view that under the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts.").

¹²⁷ *Ankerl v. Switzerland*, App. 17748/91, Eur. Ct. H.R. 1567, 38 (1996).

“OCIJ”) undertake certain investigative actions or pursue additional expert reports on its behalf.¹²⁸ The OCIJ is not obliged to comply with these requests. Though a refusal by the OCIJ to undertake these investigative actions or to pursue additional expert reports is appealable to the PTC, the Defense has no authority to challenge the manner in which the request, if accepted, is satisfied. Without a more expansive right to appellate review, the Defense’s ability to present its case is compromised.

Per Rule 55(9) of the Internal Rules, the OCIJ may delegate investigative tasks to the Judicial Police or the ECCC Investigators via a Rogatory Letter.¹²⁹ The Judicial Police operate under the *sole instructions* of the Co-Prosecutors during the preliminary investigation stage, the OCIJ during the judicial investigation stage, and the PTC during supplementary investigations.¹³⁰ The Judicial Police are not permitted to seek or take orders from any other person in carrying out their investigative functions.¹³¹ Nor are the Judicial Police permitted to question the accused.¹³² Similarly, the ECCC Investigators are to conduct their investigations in accordance with the requests of the Co-Prosecutors or the OCIJ, depending upon the stage of the proceedings,¹³³ and are not permitted to question the accused.¹³⁴

Should the Defense request that the OCIJ pursue a particular investigative action and should the OCIJ agree to pursue that lead, there is no guarantee that the lead will be pursued in a manner most conducive to the interests of the accused. Indeed, according to Article 5 of the UN-RGC Agreement, the investigating judges are independent and “shall not accept or seek

¹²⁸ ECCC Internal Rules (rev. 6 March 2009), *supra* note 95, R. 55(10) & R. 31(10).

¹²⁹ *Id.* R. 55(9).

¹³⁰ *Id.* R. 15(1-2).

¹³¹ *Id.* R. 15(1).

¹³² *Id.* R. 62(3)(b).

¹³³ *Id.* R. 50(2) & R. 55(9).

¹³⁴ *Id.* R. 62(3)(b).

instructions from any Government or any other source.”¹³⁵ Moreover, there is no remedy to which the Defense can resort to ask for an expanded or altered focus for the investigative action.¹³⁶

One may argue that the interests of the accused are sufficiently protected by the Prosecution, who is required, prior to passing the case file to the OCIJ, to investigate inculpatory and exculpatory matters equally.¹³⁷ However, the relevant provision only obliges the Prosecution to disclose material to the OCIJ that in the “actual knowledge” of the Prosecution may suggest the innocence or mitigate the guilt of the accused.¹³⁸ This standard falls short of requiring the Prosecution to actively pursue exculpatory leads. Comparatively, the truth seeking mandate given to the ICC Prosecutor is arguably broader and perhaps more beneficial to the accused:

The Prosecutor shall: (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally [...].¹³⁹

The ability of the Defense to influence the investigation or the evidence upon which his trial will be based is greater at other international courts. For instance, at the ICC, the Defense is also not involved in pre-trial investigations.¹⁴⁰ Nonetheless, it may fully challenge the evidence and provide its own evidence during the confirmation hearing.¹⁴¹ As discussed above, it may also request leave to appeal any pre-trial decision that “would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.”¹⁴² Similarly, the Ad Hoc

¹³⁵ UN-RGC Agreement, 2003, *supra* note 85, art. 5(3).

¹³⁶ ECCC Internal Rules (rev. 6 March 2009), *supra* note 95, R. 74(3).

¹³⁷ *Id.* R. 53(4).

¹³⁸ *Id.* R. 53(4).

¹³⁹ Rome Statute, *supra* note 4, art. 54(1).

¹⁴⁰ *Id.* art. 54 & 55.

¹⁴¹ *Id.* art. 61(6).

¹⁴² *Id.* art. 82(1)(d).

Tribunals do not permit the Defense to participate in the investigation;¹⁴³ however, the Defense may lodge an interlocutory appeal at the pre-trial stage pursuant to Rule 72(B)(ii) of the ICTY and ICTR RPEs.¹⁴⁴

Notably, the lack of control over the manner in which an investigation is conducted is a noted criticism of the French criminal system,¹⁴⁵ upon which Cambodian Law and the Internal Rules are based. Though the investigating police are operating under the judge's orders, even the judge "cannot ensure that such orders are fully complied with."¹⁴⁶ The ECCC's adoption of civil law features without suitable adaptations to the investigative challenges and the heightened necessity for equality of arms in international criminal proceedings is problematic.¹⁴⁷ However, if the ECCC's interlocutory appeal regime operated less restrictively, permitting the Defense to challenge the performance of an investigative request, not only would the modification promote the equality of arms, it would also enable the Defense to better prepare its case.

ii. The Defense's inability to independently challenge the substance of the Closing Order places it at a disadvantage vis-à-vis the Prosecution and is inconsistent with international criminal practice

¹⁴³ ICTY RPE (rev. 24 July 2009), *supra* note 46, R. 39.

¹⁴⁴ *Id.* R. 72(B)(ii)

¹⁴⁵ See Elliott, *supra* note 116, at 38.

¹⁴⁶ *Id.*

¹⁴⁷ Modern international criminal courts apply the equality of arms principle more liberally in light of the particular investigative challenges in international criminal proceedings. See *The Prosecution v. Dusko Tadic*, 15 July 1999, *supra* note 126, ¶ 52 ("[T]he Appeals Chamber is of the view that under the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts."); *The Prosecutor v. Ferdinand Nahimana, et. al.*, Case No. ICTR-99-52-T, Decision on the Motion to Stay the Proceedings in the Trial of Ferdinand Nahimana, ¶ 5 (June 5, 2003) (stating that "the Chamber concurs with the reasoning in the Tadic Appeal that 'under the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts'").

At the ECCC, a Closing Order can function as the equivalent of an indictment.¹⁴⁸ If it sends an accused to trial, the Closing Order contains the material facts of the charges, their legal characterization, the relevant criminal provisions, and the nature of the Accused's criminal responsibility.¹⁴⁹ While the Prosecution is permitted to appeal the Closing Order issued by the OCIJ, the Defense cannot.¹⁵⁰ This places the Defense on unequal footing with the Prosecution and hampers the Defense's ability to adequately prepare its case.

By way of background, the Closing Order is issued after a series of submissions between the Prosecution and the OCIJ. Upon completion of its investigation, the OCIJ is required to notify all parties and their lawyers. The parties may request additional investigative actions.¹⁵¹ The refusal of such a request is subject to appeal to the PTC.¹⁵² If no appeals are lodged, the OCIJ must forward the case file to the Co-Prosecutors, who then return the case file and a final submission to the OCIJ upon a determination that the Co-Prosecutors' investigation has been concluded.¹⁵³ Though the OCIJ may heed the Co-Prosecutors' request to indict or dismiss, the OCIJ is not bound by their submissions.¹⁵⁴ The OCIJ's final determination as to indictment or dismissal will be reflected in its Closing Order.¹⁵⁵

Errors in the Closing Order with the potential to vastly alter the nature of the subsequent proceedings and the legal strategies of the parties ought to be remedied by interim review. However, under the Internal Rules, only the Prosecution is authorized to lodge a complaint against these types of errors. This is problematic as it offsets the equality of arms between the

¹⁴⁸ ECCC Internal Rules (rev. 6 March 2009), *supra* note 95, R. 67(1) ("The Co-Investigating Judges shall conclude the investigation by issuing a Closing Order, either indicting a Charged Person and sending him or her to trial, or dismissing the case.").

¹⁴⁹ *Id.* R. 67(2).

¹⁵⁰ *Id.* R. 67(5) & R. 74.

¹⁵¹ *Id.* R. 66(1).

¹⁵² *Id.* R. 66(1).

¹⁵³ *Id.* R. 66(4-5).

¹⁵⁴ *Id.* R. 67(1).

¹⁵⁵ *Id.*

parties and prevents the Defense from independently challenging the competence of the OCIJ and the accuracy of its conclusions.

The indictment procedures at international criminal courts shed light on the significance of the Defense's inability to question the contents of the Closing Order at the ECCC. At the ICC, the charges against the accused must be confirmed in a hearing before he can be brought to trial.¹⁵⁶ However, prior to the confirmation hearing, the Defense must receive a copy of the document containing the charges against him and information regarding the evidence to be used in support of those charges.¹⁵⁷ At the confirmation hearing, the Defense may: (a) object to the charges, (b) challenge the evidence presented by the Prosecutor, and (c) present new evidence.¹⁵⁸ On the basis of the hearing, the PTC will then determine whether the evidence is sufficient to support the charges.¹⁵⁹ Note that at the ICC, the Defense must be notified of all amendments to the charges prior to the hearing. In other words, no amendments can be made to the charges without the Defense being afforded adequate notice and the opportunity to challenge the charges and supporting evidence and to present his or her own evidence to the PTC.¹⁶⁰

The indictment process takes a different form at the ICTY and ICTR. Upon a finding that a *prima facie* case exists against the accused, the Prosecutor submits charging documents and supporting evidence to a Duty Judge for review.¹⁶¹ If satisfied that a *prima facie* case is adequately established, the Duty Judge will confirm the charges.¹⁶² However, where the Defense believes that the form of the indictment is flawed, it may challenge the indictment via a

¹⁵⁶ Rome Statute, *supra* note 4, art. 61.

¹⁵⁷ *Id.* art 61(3).

¹⁵⁸ *Id.* art 61(6).

¹⁵⁹ *Id.* art 61(7).

¹⁶⁰ *Id.* art 61(4).

¹⁶¹ ICTY Statute, *supra* note 114, art. 18(4); ICTR Statute, *supra* note 114, art. 17(4); ICTY RPE (rev. 24 July 2009), *supra* note 46, R. 47(B); ICTR RPE (rev. 14 March 2008), *supra* note 46, R. 47(B).

¹⁶² ICTY Statute, *supra* note 114, art. 19; ICTR Statute, *supra* note 114, art. 18; ICTY RPE (rev. 24 July 2009), *supra* note 46, R. 47(B); ICTR RPE (rev. 14 March 2008), *supra* note 46, R. 47(B).

preliminary motion to the Trial Chamber pursuant to Rule 72(A)(ii) of the ICTY and ICTR RPEs.¹⁶³ Challenges to the substance of the indictment, outside of jurisdictional issues, may also be made at the preliminary stage via interlocutory appeal.¹⁶⁴

In contrast to these courts, the Defense at the ECCC is not authorized to independently challenge the substance of the Closing Order before the PTC.¹⁶⁵ The PTC has acknowledged the importance of holding the Closing Order to international standards, and it appears that a prerequisite for any remedial action by the Chamber is an appeal against the Closing Order.¹⁶⁶ However, pursuant to Rule 74 of the Internal Rules, only the Co-Prosecutors may appeal the Closing Order.¹⁶⁷

Because substantive challenges to a Closing Order may only be initiated by the Prosecution, the Defense is in a disadvantaged position. Further, not only is the Defense's access to judicial remedies limited in relation to the Prosecution, but the Defense's ability to prepare an effective defense may also be compromised without the power of appeal. The consensus in criminal proceedings is that where the indictment is found to be vague or lacking in specificity, the Defense's ability to adequately prepare his case may be handicapped.¹⁶⁸ Where access to a remedy in such a case hinges on the discretion of the opposing party, the principle of equality of arms cannot be guaranteed.

IV. Achieving the Intermediate Approach at the ECCC

¹⁶³ ICTY RPE (rev. 24 July 2009), *supra* note 46, R. 72(A)(ii); ICTR RPE (rev. 14 March 2008), *supra* note 46, R. 72(A)(ii).

¹⁶⁴ ICTY RPE (rev. 24 July 2009), *supra* note 46, R. 72(B)(ii); ICTR RPE (rev. 14 March 2008), *supra* note 46, R. 72(B)(ii).

¹⁶⁵ ECCC Internal Rules (rev. 6 March 2009), *supra* note 95, R. 74(3).

¹⁶⁶ Case No. 001/18-07-2007-ECCC/OCIJ, Decision on Appeal Against Closing Order Indicting Kiang Guek Eav Alias "Duch", ¶ 41 (December 5, 2008).

¹⁶⁷ ECCC Internal Rules (rev. 6 March 2009), *supra* note 95, R. 74(2) & R. 67(5)

¹⁶⁸ Negri, *supra* note 119, at 41.

As discussed above, the ECCC’s approach to interlocutory review may be compromising the legitimacy and fairness of the proceedings. However, if the ECCC were to shift from its current position to a more intermediate one, some of these concerns, such as the equity between the Prosecution and the Defense, could be addressed and possibly eliminated. This section will explore three ways in which the ECCC can achieve a more intermediate approach to interlocutory appeal: the adoption of discretionary review, the adoption of the fast-track mechanism, and the use of broad statutory interpretation. While the first and second methods require amendments to the Internal Rules, the third does not. Each method will be discussed in turn.

A. Adopt a Provision for Discretionary Review

Absent from the ECCC, but present in all other courts herein examined is a provision for discretionary interlocutory appeals. The ICC and the Ad Hoc Tribunals use similar language to grant discretionary power to the certifying chamber: decisions that involve issues that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of Chamber, an immediate resolution may materially advance the proceedings may be certified for appeal.¹⁶⁹ The SCSL employs two separate standards, depending upon whether the issue is a preliminary or non-preliminary. Preliminary issues that “significantly affect the fair and expeditious conduct of the proceedings or the outcome of a trial” may be referred directly to the Appeals Chamber for adjudication.¹⁷⁰ Non-preliminary decisions, “in exceptional circumstances and to avoid irreparable prejudice to a party,” may be subject to interlocutory appeal.¹⁷¹ A number of critical issues have been certified for appeal via

¹⁶⁹ Rome Statute, *supra* note 4, art. 82(1)(a-d).

¹⁷⁰ SCSL RPE (rev. 27 May 2008), *supra* note 68, R. 72(F).

¹⁷¹ *Id.* R. 73(B).

these provisions, including issues involving judicial notice,¹⁷² judicial independence,¹⁷³ the statutory rights guaranteed to the Accused,¹⁷⁴ and the admissibility of broad categories of evidence.¹⁷⁵

The ECCC would similarly benefit from the addition of discretionary review.

Discretionary review would instill the ECCC with greater flexibility to address those issues that do not fall within the enumerated decisions for review. It would also permit the court to address a great deal of the fairness concerns discussed in the previous section.

B. Adopt a Fast-Track Mechanism

The ECCC could also adopt the fast-track mechanism of the SCSL. However, it must be noted that the mechanism has not avoided criticism. One commentator has argued that the SCSL's "fast-track" innovation is potentially incompatible with international fair trial standards and practice.¹⁷⁶ In the *Hinga Norman et al.* case, the Appeal Chamber was referred an issue concerning whether the crime of child recruitment was a crime at the time in which it was allegedly committed.¹⁷⁷ Because the Appeal Chamber adjudicated this issue, which directly concerns whether the facts alleged constitute a crime, the Defense was not able to take advantage

¹⁷² *The Prosecutor v. Dragomir Milosevic*, 3 May 2007, *supra* note 3, ¶ 2 ("[T]he very objective of judicially noticing adjudicated facts, involving as it does the concepts of judicial economy and expeditiousness, is relevant to the fair and expeditious conduct of the proceedings.").

¹⁷³ *The Prosecutor v. Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Laws of Jurisdiction (Judicial Independence), (March 16, 2004).

¹⁷⁴ *The Prosecutor v. Halilovic*, 30 June 2005, *supra* note 49.

¹⁷⁵ *The Prosecutor v. Bagosora*, 29 July 2005, *supra* note 55, ¶ 2. See also *The Prosecutor v. Bizimungu, et al.*, Case No. ICTR-99-50-T, Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses Rule 73(b) of the Rules of Procedure and Evidence, (September 28, 2005) (same).

¹⁷⁶ Alison Smith, *Child Recruitment and the Special Court for Sierra Leone*, 2 J. Int'l Crim. Just. 1141, 1150 (2004).

¹⁷⁷ *The Prosecutor v. Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) [hereinafter "*The Prosecutor v. Norman*, 31 May 2004"].

of the two-tier appellate process.¹⁷⁸ However, international standards for appellate review do not extend to interim decisions.¹⁷⁹

Still, the SCSL scheme is beneficial in a number of ways. First, the fast-track mechanism does not prevent other issues affecting the fairness of the proceedings to receive interim review; issues that may cause irreparable harm may be granted interlocutory review under Rule 73(B) of the SCSL RPE.¹⁸⁰ Second, the Appeals Chamber reserves the right to refer any issue back to the Trial Chamber for adjudication.¹⁸¹ The fast-track mechanism does not entirely eliminate the two-tier appellate review process for decisions significantly affecting the fair and expeditious conduct of the trial. Finally, the fast-track mechanism was designed to ensure that the Defense's right to an expeditious trial is protected. This right is a component to the Defense's overall right to a fair trial.

C. Employ Flexible Statutory Interpretation

Alternatively, or in addition to the above methods, the ECCC could employ broader interpretations of its Internal Rules on appellate review. The ICTY and the SCSL have relied on expansive interpretations of their interlocutory review statutes when the court was presented with a fundamental issue. For instance, the ICTY's first request for interlocutory review in *Prosecutor v. Tadic*, challenged the very foundation and legality of the court.¹⁸² Typically, these matters would not implicate questions of jurisdiction — subject matter, personal, or otherwise. The court, nonetheless, certified the request under the Rule 72(B), which permitted interim

¹⁷⁸ Smith, *supra* note 176.

¹⁷⁹ See International Covenant on Civil and Political Rights, art. 14(5) [hereinafter "ICCPR"] ("Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.").

¹⁸⁰ SCSL RPE (rev. 27 May 2008), *supra* note 68, R. 73(B).

¹⁸¹ *The Prosecutor v. Norman*, 4 November 2003, *supra* note 66, ¶ 14.

¹⁸² *The Prosecutor v. Dusko Tadic*, 2 October 1995, *supra* note 1, ¶ 2 ("Before the Trial Chamber, Appellant had launched a three-pronged attack: a) illegal foundation of the International Tribunal; b) wrongful primacy of the International Tribunal over national courts; c) lack of jurisdiction *ratione materiae*.").

review of jurisdictional issues.¹⁸³ This broad interpretation of the notion of jurisdiction¹⁸⁴ gave the court the flexibility to settle with finality a fundamental matter, one that required adjudication before the court could legitimately proceed with the case.¹⁸⁵ Though the ICTY has since limited the manner in which jurisdiction can be construed,¹⁸⁶ this initial flexible interpretation was critical for the legitimacy and the proper functioning of the court. The SCSL has also construed jurisdiction broadly.¹⁸⁷

The proceedings at the ECCC could similarly benefit from flexible statutory interpretation where it is necessary to uphold the fairness of the proceedings. This is particularly true where investigative action is concerned. As indicated above, the Defense has limited rights during the investigation phase and may only appeal the OCIJ orders listed in Rule 74(3). This includes a refusal by the OCIJ to perform the investigative action as requested by the Defense.¹⁸⁸ The disadvantage the Defense experiences as a consequence could be compounded by the PTC's intention to construe the term "investigative action" strictly.¹⁸⁹ However, if the term were broadened to refer to not just the action itself (eg. request to interview a witness), but also to the manner in which the action is performed (eg. request to interview a witness *and* pursue a particular line of questioning), then the ECCC could move closer to satisfying the principle of the equality of arms.

¹⁸³ ICTY RPE (rev. 30 January 1995), *supra* note 46, R. 72(B) ("The Trial Chamber shall dispose of preliminary motions *in limine litis* and without interlocutory appeal, save in the case of dismissal of an objection based on lack of jurisdiction.").

¹⁸⁴ John Hocking, *Interlocutory Appeals before the ICTY*, in *Essays On ICTY Procedure and Evidence In Honour Of Gabrielle Kirk McDonald*, International Humanitarian Law Series, 465 (Richard May, *et al.*, eds., 2001). *See also Interlocutory Appellate Review Report*, *supra* note 2, at 47.

¹⁸⁵ Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal For Rwanda*, 553-54 (1997).

¹⁸⁶ ICTY RPE (rev. 4 November 4 2008) R. 72(D).

¹⁸⁷ *See The Prosecutor v. Norman*, 31 May 2004, *supra* note 177.

¹⁸⁸ ECCC Internal Rules (rev. 6 March 2009), *supra* note 95, R. 74(3).

¹⁸⁹ Case File No. 002/19-09-2007-ECCC/OCIJ, Decision on Khieu Samphan's Appeal Against the Order on Translation Rights and Obligations of the Parties, ¶ 28 (February 20, 2009) (The Chamber declined to define the term "investigative action" broadly enough to encompass the Defendant's translation rights. The term is limited to "requests for action to be performed by the Co-Investigating Judges or, upon delegation, by the ECCC investigators or the judicial police, with the purpose of collecting information conducive to ascertaining the truth.").