THE RIGHT TO APPEAL A JUDGMENT OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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In early 2007, we submitted a report to the Extraordinary Chambers in the Courts of Cambodia commenting on several aspects of its then-draft Internal Rules*, including whether the ECCC's envisaged appeal system adhered to international standards. The* Internal Rules *were adopted in June 2007, and then revised in February 2008, September 2008 and March 2009. That report, produced under the auspices of the Amsterdam International Law Clinic, is the basis for this article, which examines ECCC appellate procedure from the perspective of comparative criminal procedure, international human rights law and the appellate regimes applied at international criminal tribunals. The ECCC are no exception to the traditional tension between fairness and efficiency that exists in criminal proceedings across all legal systems. An additional dimension for the Chambers to consider, however, is the extreme pressure on achieving expeditious justice: pressure that comes about as a result of both the Chambers' limited resources and the extreme age of the accused. This article critically assesses whether the unique circumstances of the ECCC disproportionately affect the law of appeals.*

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I INTRODUCTION

The Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea ('ECCC') were established to try the senior leaders of the former Democratic Kampuchea, who

> were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.[1]

It is estimated that up to three million people died during this time.[2] Currently the ECCC's most prominent indictee is Kaing Guek Eav, also known as 'Duch', who is charged with crimes against humanity for his alleged overseeing of S-21, the interrogation and torture centre of the Khmer Rouge regime.[3] The case against Duch opened on 17 February 2009.

The Cambodian Government first approached the United Nations for assistance in prosecuting these trials in 1997, with an agreement being reached in June 2003 on the role that the UN and the international community would play.[4] This extended period of negotiation is indicative of the tensions that were at play between the two parties: Cambodia was keen to assert its sovereignty and have the trials proceed according to its national laws, while the international community did not want trials that bore its imprimatur to deviate too greatly from its rules and practice.[5] In the agreement that was finally reached, and the subsequent Cambodian legislation, the Extraordinary Chambers represent a hybrid of both Cambodian and international influences in its law, process and judicial make-up. The pertinent issue for the purposes of this article is that Cambodian criminal procedure was chosen for the conduct of the trials, with international standards to be used to fill any lacunae or clarify any uncertainty in

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1 *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*, signed 6 June 2003, 2329 UNTS 117 (entered into force 29 April 2005) ('*UN Agreement*').

2 ECCC, *Summary* (2009) <http://www.eccc.gov.kh/english/about_eccc.aspx>.

3 The Inaugural Session of the Pre-Trial Chamber was held on 13 June 2007.

4 For a detailed picture of the efforts to establish this Tribunal, see Helen Horsington, 'The Cambodian Khmer Rouge Trials: The Promise of a Hybrid Tribunal' (2004) 5 *Melbourne Journal of International Law* 462.

5 See, eg, Tom Fawthrop and Helen Jarvis, *Getting Away with Genocide?: Elusive Justice and the Khmer Rouge Tribunal* (2004) 233–4.

Cambodian law, or used as a guide where there is inconsistency between the two sets of laws.

This article primarily focuses on the interplay between Cambodian and international standards in the ECCC's *Internal Rules* and questions whether the ECCC' appellate proceedings have achieved the correct balance between these sources, in accordance with their obligations under the *UN Agreement* and the *ECCC Law*.[6] In making this assessment, we look at appellate rights in Cambodian law, international criminal jurisprudence and human rights law.

The right to, and scope of, appeals is an important procedural aspect of both domestic and international criminal justice. Considerations such as fairness, expediency and accuracy in both fact-finding and legal reasoning play vital but often competing roles. Striking the right balance is a difficult task, particularly when there is little guidance. This is also true of the ECCC, which have their own unique concerns. One such concern is that a broad and permissive right to appeal will delay proceedings to the degree that they may never be finalised: the accused at the ECCC are now in their 70s and 80s, and often in fragile health. It is also an aspect of international law and practice that is far from settled, and has troubled other international criminal tribunals. The relevant rule of the ECCC's *Internal Rules* has been tightened since the rules were first promulgated. As passed in June 2007, r 104 allowed for appeals 'on any issues of fact or law'.[7] However, the rule was tightened on 5 September 2008 and amended again on 6 March 2009, and now states:

> 1. The Supreme Court Chamber shall decide an appeal against a judgment or 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.
>
> Additionally, an immediate appeal against a decision of the Trial Chamber may be based on a discernible error in the exercise of the Trial Chamber's discretion which resulted in prejudice to the appellant.
>
> For these purposes, the Supreme Court Chamber may itself examine evidence and call new evidence to determine the issue.
>
> 2. The Supreme Court Chamber may either confirm, annul or amend decisions in whole or in part, as provided in Rule 110.
>
> 3. Decisions of the Chamber are final, and shall not be sent back to the Trial Chamber.
>
> 4. The following decisions of the Trial Chamber are subject to immediate appeal:
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> a) decisions which have the effect of terminating the proceedings;
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> b) decisions on detention and bail under Rule 82;
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> c) decisions on protective measures under Rule 29(4)(c);

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[6] *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea 2004* (Cambodia) art 4 ('*ECCC Law*'). This law was last amended 27 October 2004.

[7] ECCC, *Internal Rules* (12 June 2007) r 104 ('Jurisdiction of the Supreme Court Chamber').

> 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).
>
> Other decisions may be appealed only at the same time as an appeal against the judgment on the merits.
>
> Unless otherwise provided in the Internal Rules or decided by the Trial Chamber, an immediate appeal does not stay the proceedings before the Trial Chamber.[8]

In order to fairly assess the ECCC appellate system, we first look at the legal basis of the ECCC in Part II. We then offer a few observations on the divergent approaches towards appeals amongst the major legal traditions of civil and common law in Part III. These two systems of law compete for influence in international jurisprudence, and an outline of their different approaches on this issue is illuminative to understanding the genesis of current ECCC procedure.

Next, in Part IV, we describe the law regarding appeals under Cambodian law, being the stated primary source for ECCC procedure. In particular, we discuss whether the apparent curtailment of the Cambodian procedural right of the prosecutorial appeal is allowable. We also ask whether it is satisfactory that a more serious conviction or an increase in sentence can be substituted on appeal without the possibility of the convicted person appealing that more serious conviction or increase in sentence.

The right to appeal as a human right is the subject of analysis in Part V. The approach in international criminal procedure, another evaluative yardstick, is explored in Part VI. Finally, we assess the current ECCC approach towards the right to appeal in Part VII. We conclude that there are two key problems with the ECCC appellate system as it currently stands: first, that it effectively prevents prosecutorial appeals against acquittals; and second, that a person who has a more serious conviction or an increase in sentence substituted by the ECCC's Supreme Court Chamber has no ability to appeal that decision. We end with some conclusions in Part VIII, including possible solutions to the two key problems that we have identified with the ECCC appellate system.

II LEGAL BASIS OF THE ECCC

A *The Relevant Law*

The *UN Agreement* was ratified by Cambodia on 19 October 2004. In this Agreement, the Extraordinary Chambers represent a hybrid of both Cambodian and international influences in its law, process and judicial make-up. As well as the *UN Agreement*, the ECCC are governed by the *ECCC Law*, as enacted by the National Assembly of the Cambodian Parliament.

The *UN Agreement* states that its purpose is to regulate the basis for cooperation between the UN and the Cambodian Government. However, as Helen Horsington notes, it goes much further than merely regulating that cooperation and includes substantive provisions on the operation and powers of

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[8] *Internal Rules* (Rev 4) (11 September 2009) r 104.

the Chambers. She writes that the incorporation of the *UN Agreement* into Cambodian law through the *ECCC Law* was done by the Cambodian Government to ensure the Agreement's legal status on the ECCC.[9] The *ECCC Law* was passed by the National Assembly of the Cambodian Parliament and came into effect on 12 February 2001, and was later amended on 27 October 2004. It provides for, among other things, the purpose and jurisdiction of the ECCC. The *ECCC Law* also specifically states that, following its ratification, the *UN Agreement* applies as law throughout Cambodia.[10] We thus consider both the *UN Agreement* and the *ECCC Law* as the foundation documents of the ECCC — without *both* the *UN Agreement* and the *ECCC Law*, the ECCC would not have come into existence in its hybrid form. This is because, while the *UN Agreement* does not formally establish the ECCC (being primarily aimed at regulating cooperation between the UN and Cambodia), it expressly stipulates that the *ECCC Law* must implement the *UN Agreement*.[11]

The *UN Agreement* and *ECCC Law* make almost identical statements regarding the procedure to be used in the conduct of trials. Article 12 of the *UN Agreement* stipulates that:

> 1. 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 standards, guidance may also be sought in procedural rules established at the international level.
>
> 2. The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party.

In language that echoes that of the *UN Agreement*, art 33 of the *ECCC Law* states that the conduct of trials should be in accordance with 'existing [Cambodian] procedures in force' but that:

> If these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standard, guidance may be sought in procedural rules established at the international level.
>
> The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights.[12]

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9 Horsington, above n 4, 474.

10 *ECCC Law* art 47*bis*.

11 *UN Agreement*, above n 1, art 2(2).

12 Article 37 new states that art 33 new applies *mutatis mutandis* to proceedings before the Supreme Court: *ECCC Law* art 37 new.

Thus, both art 12(1) of the *UN Agreement* and art 33 of *ECCC Law* allow ECCC procedure to depart from Cambodian procedure. This departure is set out in the ECCC's *Internal Rules*, which state in the Preamble that, in accordance with the *ECCC Law* and the *UN Agreement*, their purpose is to consolidate applicable Cambodian procedure and adopt, in the circumstances set out in those documents, international legal procedures.[13] The extent to which the *Internal Rules* have departed from Cambodian procedure, and the validity of this departure, is discussed below.

B *The Legal Personality of the ECCC*

The legal status of the ECCC is unique and cannot be compared to any other tribunal in the family of international courts. Its legal personality is of importance for a range of issues, particularly the matter of applicable law. Compared with the Special Court for Sierra Leone ('SCSL'), which was also created by a bilateral agreement with the UN, the ECCC have not been endowed with separate legal personality of any sort; clearly, their operation was not intended to create a new subject of international law. Although the *UN Agreement* is intended to regulate cooperation between the UN and Cambodia in respect of the prosecution of international crimes by the Cambodian courts,[14] it is nonetheless clear that the Extraordinary Chambers remain part of the Cambodian court structure.[15] The SCSL, on the other hand, was set up as a new and separate treaty-based institution. Its creation follows directly from art 1(1) of the *SCSL Agreement*: 'There is hereby established a Special Court for Sierra Leone'.[16] The SCSL has been endowed with legal personality following from, inter alia, the independent capacity to negotiate treaties.[17] Furthermore, the initial case law of the SCSL consistently emphasises its international character, in light of both the initiating role of the Security Council and the position of the UN as a contracting party.[18]

It is interesting to see that the ECCC seem to claim a certain degree of similar autonomous legal personality. For example, r 5 of the *Internal Rule* may be regarded as endowing the ECCC with the power to conclude cooperation

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13 *Internal Rules* (Rev 4) (11 September 2009) preamble.

14 *UN Agreement*, above n 1, art 1.

15 *ECCC Law* art 2.

16 *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, signed 16 January 2002, 2178 UNTS 137 (entered into force 12 April 2002) ('*SCSL Agreement*').

17 Cf ibid art 11 ('Juridical Capacity').

18 *Prosecutor v Taylor (Appeals Chamber)* Case No SCSL-2003-01-I (31 May 2004) [35]–[42] (Decision on Immunity from Jurisdiction); *Prosecutor v Fofana (Appeals Chamber)* Case No SCSL-2004-14-AR72(E) (25 May 2004) [22]–[29] (Decision on Preliminary Motion on Lack of Jurisdiction Materiae: Illegal Delegation of Powers by the United Nations); *Prosecutor v Kallan (Appeals Chamber)* Case Nos SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E) (13 March 2004) [12]–[15] (Decision on Challenge to Jurisdiction: Lomé Accord Amnesty).

agreements directly with states.[19] However, neither the *UN Agreement* nor the *ECCC Law* provide for a basis of adoption of *Internal Rules*, especially when they go beyond the internal functioning of the ECCC. The ECCC are clearly envisaged as being part of the Cambodian court structure and as such any treaty-making power with foreign states is clearly the remit of the Kingdom of Cambodia.

Identifying the ECCC as part of the Cambodian court structure and possessing no distinct legal personality does not fully clarify the matter of applicable law, however. Although clearly Cambodian law is applicable to such an institution, the *UN Agreement* and *ECCC Law* are *leges speciales*, which means that the ECCC derogate from the ordinary situation. Articles 12 and 13 of the *UN Agreement* unequivocally state that the ECCC must apply human rights law as set out in the *ICCPR*[20] (making direct reference to arts 14 and 15), as well as the law of international criminal procedure (as discussed below). In addition, art 12(1) of the *UN Agreement* refers to 'international standards' with which ECCC procedure must be in conformity. These standards must consist of the entire body of internationally-recognised human rights law, including other provisions of the *ICCPR* and customary international law. If any inconsistency arises, the international standards shall prevail.

These international and human rights law influences on Cambodian procedure do not, however, alter the character of the ECCC as a part of the Cambodian domestic court structure.

III APPEALS IN CRIMINAL PROCEEDINGS: THE COMMON LAW/CIVIL LAW DICHOTOMY

Appeals in criminal proceedings are said to serve three interests:

> The first two could properly be called 'jurisprudential' goals: consistency of verdicts, meaning that similar cases receive similar treatment, and orderly development of law, meaning that novel questions of law receive uniform answers from a single authoritative body. … The third interest served by an appellate court is case-specific: the pursuit of justice in the individual case. The public aversion

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[19] *Internal Rules* (Rev 4) (11 September 2009) r 5 ('International Judicial Cooperation and Financial Assistance'):

> 1. The ECCC may invite States not party to the Agreement to provide judicial assistance on the basis of *ad hoc* agreements or any other appropriate means.
> 2. Where any State fails to provide such assistance, the Co-Prosecutors, the Co-Investigating Judges or the Chambers seised of the matter may take appropriate action, through the Office of Administration, including a request for assistance from the Secretary-General of the United Nations and/or the Royal Government of Cambodia.
> 3. Pursuant to Article 44(4) new of the ECCC Law, the ECCC may receive additional assistance for their expenses from other voluntary funds contributed by foreign governments, international institutions, non-governmental organizations, and other persons wishing to assist the proceedings.

[20] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

> to convicting the innocent supports a level of review adequate to ensure that procedures are properly followed and the law is correctly applied.[21]

While these views are generally shared among criminal justice systems, there exist fundamental and structural differences between the major legal families — the civil law and common law legal traditions. A proper understanding of the appellate systems in these diverging models of criminal procedure is facilitated by the rigorous analysis performed by Damaška in his authoritative study, *The Faces of Justice and State Authority*.[22] On the basis of this study, civil law criminal procedure can be equated to hierarchical decision-making. For criminal law appellate proceedings, this means that 'the reviewing stage is conceived not as an extraordinary event but as a sequel to original adjudication to be expected in the normal run of events'.[23] Generally, in civil law systems

> [h]ierarchical review is not only regular, it is also comprehensive. There are few aspects of lower authority's decision making that are accorded immunity from supervision: fact, law, and logic are all fair game for scrutiny and possible correction.[24]

Therefore, in civil law systems, it is considered right and appropriate that the prosecution has equivalent appeal rights to those of the defence.

In contrast with the hierarchical civil law model stands the coordinate and horizontal decision-making model that is the common law tradition, which has 'lay' decision-making as one of its central features. In this coordinate and horizontal model, appellate proceedings are regarded as exceptional: 'Anglo-American jurisdictions still display an attachment to the ideal of one-level adjudication'.[25] As a result,

> [b]ecause of the extraordinary character of superior review, it still makes sense to treat the original judgment as res judicata and to permit its enforcement. The sporadic appeal is merely a ground on the basis of which execution can be postponed.[26]

In this light, it is not surprising that in the common law tradition — contrary to the civil law system — prosecutorial appeals against acquittals are perceived as unfair and amounting to double jeopardy, rather than, as they are viewed in the civil law system, a continuation of the original examination.[27]

Certainly the above is a simplified comparison which does not capture either the divergences between the civil and common law models or their similarities. However, it still aids us in understanding the significant differences between these two systems' perception of the object and purpose of appellate proceedings in criminal law.

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21 Mark C Fleming, 'Appellate Review in the International Criminal Tribunals' (2002) 37 *Texas International Law Journal* 111, 114.

22 Mirjan R Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (1991).

23 Ibid 48.

24 Ibid 48–9.

25 Ibid 60.

26 Ibid 59.

27 Ibid.

What does the above mean in practical terms? In civil law criminal justice systems, appellate proceedings are not regarded as exceptional but as the continuation of a trial. As a result, appeals in these systems are open to both the accused and the prosecutor and can be triggered on multiple grounds — including questions of fact and law — with the appeal hearing often amounting to a trial *de novo*.[28] It is true that in many civil law criminal justice systems, the imperative demands of judicial economy have resulted in reforms that limit both the right to appeal and the scope of appellate proceedings. Appellate proceedings for petty offences are often restricted to a single instance. The scope of appeals can also be reduced: for example, a recent change in Dutch legislation states that appeals should focus on appellate grounds rather than holding a trial *de novo*.[29] But these trends have not yet affected the fundamental notions underpinning appeals in civil law criminal justice systems.

In contrast, the traditional 'hostility' towards appeals in adversarial criminal justice systems has — not surprisingly — resulted in more restricted and circumscribed appellate proceedings. While there are important divergences among states, the following three commonalities can be mentioned. First, appeals are open as a fundamental right to the accused against a conviction; however, the prosecution cannot appeal an acquittal, at least as far as the facts are concerned.[30] This is in order to uphold the double jeopardy protection.[31] Second, appellate grounds are not as abundant as in civil law jurisdictions. A frequently-encountered restriction is confining an appeal to questions of law. In addition, the hearing of an appeal is often conditional on first obtaining leave to appeal. Third, appellate proceedings in common law jurisdictions tend to be confined exclusively to the lawfully-raised appellate grounds, thus ensuring that the appeal is not trial *de novo*.[32]

An understanding of these diametrically-opposed approaches is important when assessing the decisions that the drafters of the ECCC's *Internal Rules* have made. Their choices would have to be made in light of a number of factors, including the civil law/common law dichotomy.

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28 For an overview of appellate proceedings in civil law countries, see the country reports concerning Argentina, France, Germany and Spain in Craig M Bradley (ed), *Criminal Procedure: A Worldwide Study* (1999) 47–52, 178–85, 211–16, 392–3.

29 See art 415(2) of the Dutch *Code of Criminal Procedure*, according to which the appellate procedure will concentrate on 'objections raised by the accused and the prosecution service': *Wetboek van Strafvordering* [*Code of Criminal Procedure*] (Netherlands); see also G J M Corstens, *Het Nederlands strafprocesrecht* (2008) 756.

30 For example, in Canada the prosecutor may appeal questions of law and stays of proceedings as of right, and the fitness of the sentence with leave.

31 On this protection's functioning, see Lord Wilberforce's judgment in *The Ampthill Peerage* [1977] AC 547, 569:

> Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility, and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interests of peace, certainty and security, it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: those values cannot always coincide.

32 But note that in England and Wales, appeals from the Magistrates' Courts to the Crown Court take the form of a full rehearing of the case before a circuit judge or recorder and two lay magistrates: see Bradley, above n 28, 133.

IV THE APPEALS PROCESS OF THE ECCC

A *The Cambodian Criminal Justice System*

To adequately discuss the Cambodian criminal appellate system as it currently stands, it is necessary to first sketch a brief legal history of the country. The Cambodian legal system has not long been in its current form: legal institutions and professionals were one of the many targets of the Khmer Rouge regime, which decimated almost all of Cambodia's institutional structures. Estimates of the number of legally-trained people left in Cambodia in early 1979, when the People's Republic of Kampuchea was proclaimed, range from six to 10, including five judges.[33] This had wide-ranging effects for the reconstruction of Cambodia's legal system: as late as 1993, the country was deciding what kind of substantive, procedural and judicial legal systems it would adopt.[34]

Prior to the advent of the Khmer Rouge, Cambodia had a legal system that was influenced by both its indigenous law and that of its former colonial power, France. Khmer dispute resolution mechanisms, operating from a village basis up, have existed for centuries and continue to operate in tandem with the more formal legal system.[35] In addition, the 80 years in which Cambodia was a French Protectorate saw its legal system gain French legislation and aspects of the French civil law system. The period of both Khmer Rouge control, and the subsequent Vietnamese-sponsored People's Republic of Kampuchea, saw a socialist influence on the legal system — though the Khmer Rouge period is more noteworthy for its dissolution of rule of law institutions than its creation of them.[36] The Cambodian legal system also has a measure of common law influence, mainly from the pre-1975 and post-1989 periods.[37] The law from the 18-month period from February 1992 until September 1993, during which Cambodia was under the transitional authority of the UN,[38] is also an influence. This time of UN control came about after a series of international conferences on the country's future,[39] and was a direct rejection of any concept

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33 Dolores A Donovan, 'The Cambodian Legal System: An Overview' in Frederick Brown (ed), *Rebuilding Cambodia: Human Resources, Human Rights, and Law* (1993) 69.

34 Ibid 70.

35 Ibid 69.

36 For a discussion of the period of the People's Republic of Kampuchea, see Steven Heder and Judy Ledgerwood, 'Politics of Violence: An Introduction' in Steven Heder and Judy Ledgerwood (eds), *Propaganda, Politics, and Violence in Cambodia: Democratic Transition under United Nations Peace-Keeping* (1996) 3.

37 For a more detailed discussion of the history of influences on the Cambodian legal system, see International Human Rights Law Group, *Criminal Law in Cambodia* (2000) ch 2, 50–5 <http://www.globalrights.org/site/DocServer/Cambodia_Ch2.pdf?docID=188>.

38 The United Nations Transitional Authority in Cambodia ('UNTAC') was established by SC Res 745, UN SCOR, 47th sess, 3057th mtg, UN Doc S/RES/745 (28 February 1992).

39 The international conferences were the First Paris International Conference on Cambodia (July – August 1989); and the Second Paris International Conference on Cambodia (October 1991).

of power-sharing by the different factions in the then ongoing civil war.[40] The *Agreement on a Comprehensive Settlement of the Cambodian Conflict* states that UNTAC was necessary in order 'to ensure a neutral political environment conducive to free and fair elections'.[41] The Agreement also sets out UNTAC's mandate,[42] and prescribed the principles for a new constitution,[43] among other things. All of these differing legal traditions continue to influence the Cambodian legal system.

The *Constitution of the Kingdom of Cambodia* was passed by the newly-elected Constitutional Assembly in 1993.[44] The *Cambodian Constitution* explicitly states that the Kingdom of Cambodia 'shall recognize and respect human rights as set out in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights'.[45] It also provides certain legal protections including that an 'accused shall be considered innocent until the court has judged finally on the case' and that in the 'case of doubt, it shall be resolved in favor of the accused'.[46] In addition, the *Cambodian Constitution* prescribes that '[l]aws and decisions by the State institutions shall have to be in strict conformity with the Constitution'.[47]

Up until the enactment of the new *Code of Criminal Procedure* on 7 June 2007,[48] the bulk of Cambodian criminal law was found in the *UNTAC Code*,[49] and the *Law on Criminal Procedure 1993* of the State of Cambodia.[50] While the new *Code of Criminal Procedure* has done much in streamlining and harmonising domestic law of criminal procedure, it does not contain significant

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40 This idea stemmed from a plan originally mooted by Australia, and backed by China, the United States and the Soviet Union. For a comprehensive background, see Heder and Ledgerwood, above n 36, 6–12.

41 *Agreement on a Comprehensive Political Settlement of the Cambodia Conflict*, 1663 UNTS 27 (signed and entered into force 23 October 1991) art 6. This Agreement, together with three other key documents, forms the *Paris Peace Accords*.

42 Ibid annex 1 (*UNTAC Mandate*).

43 Ibid pt VII, which prescribed that the new constitution would incorporate principles of human rights and fundamental freedoms.

44 *Constitution of the Kingdom of Cambodia 1993* ('*Cambodian Constitution*').

45 *Cambodian Constitution* art 31.

46 *Cambodian Constitution* art 38.

47 *Cambodian Constitution* art 131.

48 *Code of Criminal Procedure of the Kingdom of Cambodia* (Cambodia) ('*Code of Criminal Procedure*').

49 *Provisions relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period* (Decision of the Supreme National Council, 10 September 1992) ('*UNTAC Code*').

50 International Human Rights Law Group, above n 37, 56. The State of Cambodia is the renamed People's Republic of Kampuchea, and the largest of the four warring parties to sign the *Paris Peace Accords*: see above n 41; Heder and Ledgerwood, above n 36, 9, 257; Caroline Hughes, 'UNTAC in Cambodia: The Impact on Human Rights' (Institute of Southeast Asian Studies, Occasional Paper No 92, 1996) 1.

innovations from the law regarding appeals of the *UNTAC Code* and the *Law on Criminal Procedure 1993*.

B *The Cambodian Appellate System*

Cambodia has a three-tier court system that allows for extensive rights of appeal. This has only been the case since fairly recently: in 1993, for example, the State of Cambodia court system was two-tier, and there was no right of appeal from courts of first instance to the Supreme Court, meaning that there was no ability to appeal a hearing.[51] Presently, the Criminal Chamber of the Court of Appeal can hear appeals from both the prosecutor and the convicted person, as well as civil parties regarding civil aspects of the case.[52] Where the Court of Appeal finds the trial judgment is invalid, it can redecide the case on its merits, with the same powers of the court of first instance.[53] There is also no limitation in the *Code of Criminal Procedure* as to what matters may be appealed to the Court of Appeal. If the appeal is by the accused, the Court of Appeal cannot impose a more serious penalty than that person received at first instance.[54] However, an appeal by the Prosecutor leads to a 'review of the criminal part of the trial judgment'.[55] The Court of Appeal can then dismiss or affirm judgment from trial, including both acquittals and convictions.[56]

The Supreme Court can grant requests for appeal on a broad range of issues of fact and law from the Court of Appeal.[57] It can also refuse a request for appeal.[58] A reporting judge produces a statement setting out the facts and law of the case and suggesting a solution to the appeal points.[59] The appeal is then heard by the Supreme Court, which will only hear from the parties personally (rather than their lawyers), if the President of the Criminal Chamber of the Supreme Court so orders.[60] The Supreme Court may only decide on legal questions raised in the appeal,[61] and thus it appears that the Court can hold a trial *de novo* only in very

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51 This was justified due to the lack of legal personnel and a government desire for efficiency: see Donovan, above n 33, 85.

52 *Code of Criminal Procedure* art 375.

53 *Code of Criminal Procedure* art 406.

54 *Code of Criminal Procedure* art 399.

55 *Code of Criminal Procedure* art 400.

56 *Code of Criminal Procedure* arts 400, 406.

57 *Code of Criminal Procedure* art 419, listing the grounds of appeal:

> for illegal composition of the trial panel; for lack of jurisdiction of the court; for abuse of power; for breaching the law or for misapplication of the law; for violations or failure to comply with procedure causing nullity; for failure to decide on a request made by the Prosecutor or a party, given it was unambiguous and made in writing; for manipulation of facts; for lack of reasons; for contradiction between holding and ruling.

58 *Code of Criminal Procedure* art 439.

59 *Code of Criminal Procedure* art 431.

60 *Code of Criminal Procedure* art 434.

61 *Code of Criminal Procedure* art 436.

limited circumstances (as discussed below). The Supreme Court may reverse or uphold the decision of the Court of Appeal, in whole or in part.[62] If a decision is reversed, it is returned to a different Court of Appeal (or if the same Court of Appeal, with an order that it be differently-constituted).[63] A decision that has been reversed is not returned to the Court of Appeal only where 'the charged act was not an offence'.[64] If that Court of Appeal does not follow the judgment of the Supreme Court, the final judgment on issues of fact and law may be made by the Supreme Court in plenary session.[65] This would appear to be the only scenario in which the Supreme Court can hold a trial *de novo*. It also appears to be the only situation where an accused is not able to appeal a new conviction: where the Supreme Court enters a conviction after two different or differently-constituted Courts of Appeal acquitted an accused, the second acquittal being in contradiction of Supreme Court findings.

In addition, appeals may be heard by the Supreme Court in plenary even where the matter is considered *res judicata* where:

> sufficient evidence appears to permit the belief that the [murder] victim is still alive; where two accused have been convicted for the same crime and the two judgments are not consistent with each other; where any witness was convicted for giving false testimony against the accused; where new facts, documents, or other new evidence lead to reasonable doubt as to the guilt of a convicted person.[66]

Cambodian criminal law thus allows for an extensive appellate system in which both the prosecutor and accused have considerable appeal rights.

C *Assessment of the ECCC Appellate System*

As stated above, the ECCC are governed by both the *UN Agreement* and the *ECCC Law*. The *Internal Rules* prescribe a system of criminal procedure that is significantly different from its Cambodian counterpart. The most obvious departure is the reduction of Cambodia's three-tier appellate system to the ECCC's two-tier system of Trial Chamber and Supreme Court Chamber. This departure was made not through the *Internal Rules* but through the *ECCC Law* itself. The change was made by Cambodia's legislature: when first enacted, the *ECCC Law* used the Cambodian approach of Trial Chamber, Appeals Court and Supreme Court Chamber.[67] In the version that was amended by the National Assembly, the Appeals Court was abolished so as to reflect, according to

62 *Code of Criminal Procedure* art 439.
63 *Code of Criminal Procedure* art 439.
64 *Code of Criminal Procedure* art 440.
65 *Code of Criminal Procedure* art 442.
66 *Code of Criminal Procedure* art 445.
67 *ECCC Law* art 9.

Horsington, 'the tribunal structure as contemplated [by the *UN Agreement*]'.[68] Certainly there are practical reasons for making this change, the primary one being the length of trials.

The ECCC appeal system is as follows. Appeals from the Trial Chamber may be made to the Supreme Court Chamber on errors of law that invalidate the judgment or decision, as well as errors of fact that have occasioned a miscarriage of justice. Appeals may be filed by the Co-Prosecutors, the accused or the civil parties in respect of their civil interest where the Co-Prosecutors have also appealed.[69] This is a significant tightening on the right to appeal as envisaged by the *Internal Rules* in their first incarnation, in which appeals could be heard on any issue of fact or law.[70] The Supreme Court Chamber may either confirm, annul or amend, in whole or in part, the decision of the Trial Chamber,[71] and its decisions 'are final, and shall not be sent back to the Trial Chamber'.[72] Where the appeal is by the accused, the Supreme Court Chamber may not increase their sentence and may only amend the judgment to the benefit of the accused.[73] Where an appeal is made by the Co-Prosecutors, the Chamber may acquit the accused or amend the judgment or sentence. It may only modify an acquittal judgment if 'it considers the judgment erroneous, but cannot modify the disposition of the Trial Chamber judgment'.[74] The wording of this rule, and in particular the use of the word 'disposition', is ambiguous. We take 'disposition' in this context to mean that the Appeals Chamber may amend parts of the judgment but cannot overturn an acquittal, thus using 'disposition' in the sense of a final settlement.[75] This means that the Co-Prosecutors cannot effectively appeal the acquittal of an accused.

In exceptional circumstances, the Supreme Court Chamber may also 'revise' a final judgment where new evidence is found in relation to a conviction, decisive evidence against a convicted person found to be false, or one or more of the judges found guilty of serious misconduct.[76]

ECCC procedure thus allows for several significant departures from Cambodian procedure. The most serious departures are as follows: When the Cambodian Supreme Court reverses a decision, it must return the matter to the Appeals Court to reconsider the matter. In contrast, the ECCC's Appeals

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68 Horsington, above n 4, citing: 'Cambodian National Assembly Ratifies Law on Khmer Rouge Tribunal', *Agence France Presse Newsfeed*, 4 October 2004; Ker Munthit, 'Cambodia's Legislature Approves Amendments to Khmer Rouge Tribunal Law', *The Associated Press Newsfeed*, 5 October 2004.

69 *Internal Rules* (Rev 4) (11 September 2009) r 105.

70 *Internal Rules* (12 June 2007) r 104.

71 *Internal Rules* (Rev 4) (11 September 2009) r 104(2).

72 *Internal Rules* (Rev 4) (11 September 2009) r 104(3).

73 *Internal Rules* (Rev 4) (11 September 2009) r 110(3).

74 *Internal Rules* (Rev 4) (11 September 2009) r 110(4).

75 The French translation states (emphasis added):

> Cependant, en cas d'appel des Co-Procureurs contre le jugement d'acquittement de la Chambre de première instance, la Chambre de la Cour suprême ne peut modifier que les motifs de la décision de la Chambre de première instance si elle considère que ce jugement est erroné, *sans pouvoir modifier le dispositif du jugement de la Chambre de première instance*.

76 *Internal Rules* (Rev 4) (11 September 2009) r 112.

Chamber is the final arbiter. The central provisions as to what the ECCC appellate system means for the accused are contained in r 110:

> 1. The scope of the appeal shall be limited to the issues raised in the notice, and the status of the appellant.
>
> 2. In all cases, the Chamber may change the legal characterisation of the crime adopted by the Trial Chamber. However, it shall not introduce new constitutive elements that were not submitted to the Trial Chamber.
>
> 3. Where the only appeal filed is by the Accused, the Chamber shall not increase the sentence. It may only amend the judgment for the benefit of the Accused. In such cases, the Chamber shall not increase any reparations in favour of the Civil Parties.
>
> 4. In case of appeal by the Co-Prosecutors, the Chamber may acquit the Accused, or amend the sentence handed down at first instance. It may also impose any compulsory incidental sentence that the Trial Chamber failed to order. However, in case of appeal by the Co-Prosecutors against an acquittal judgment at first instance, the Chamber may only modify the findings of the Trial Chamber's decision if it considers the judgment erroneous, but cannot modify the disposition of the Trial Chamber judgment.[77]

Read together, the provisions of r 110 are ambiguous and raise several questions. On first glance, r 110(3) appears to be very positive for the accused, namely that when an accused appeals they can never be 'worse off' on appeal. But this must be weighed against r 110(4) regarding appeals from the Co-Prosecutors.

These provisions are problematic for a number of reasons. First, given that the r 110(3) protection applies solely where the only appeal is from the accused, we would expect that the Co-Prosecutors would soon develop a policy of consistently joining an appeal by the accused in order to reduce the number of appeals. Without such a policy, r 110(3) presents a very strong invitation for an accused to appeal every conviction. Second, it seems that a prosecutorial appeal against an acquittal cannot result in a change in disposition of the Trial Chamber judgment. This may seem sympathetic to an accused — and appears inspired by common law reluctance to allow prosecutorial appeals against acquittals — but it also implies that there is no possibility to repair potentially serious errors of Trial Chambers in acquitting certain accused. Read together with art 36 new of the *ECCC Law*,[78] which states that the Supreme Court Chamber cannot return cases to the trial court, r 110(3) and (4) mean that the ECCC are hamstrung: a prosecutor may appeal an acquittal (as they can do in Cambodian procedure) but

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77 *Internal Rules* (Rev 4) (11 September 2009) r 110.

78 *ECCC Law* art 36 new states:

> The Extraordinary Chamber of the Supreme Court shall decide appeals made by the accused, the victims, or the Co-Prosecutors against the decision of the Extraordinary Chamber of the trial court. In this case, the Supreme Court Chamber shall make final decisions on both issues of law and fact, and shall not return the case to the Extraordinary Chamber of the trial court.

the Supreme Court Chamber cannot appear to change the final 'disposition' of the Trial Chamber, nor can it return the matter to the Trial Chamber. This is a radical departure from Cambodian criminal procedure where acquittals may be properly appealed by prosecutors. It is also in contrast to the practice of international criminal tribunals as discussed below. We believe that Cambodian society, as well as Khmer Rouge victims, may be unreasonably affected by this change.

Finally, r 110(4) allows for a situation in which, on appeal, a new conviction can be entered. For example, if the Co-Prosecutor appeals a conviction for a less serious crime and argues that the conviction should be for a more serious crime — as they can do under r 110(2) — it can be argued that they are not appealing an acquittal, but rather a conviction is being appealed in favour of a more serious conviction. It is unclear how this is to be dealt with under r 110(4). It may result in a situation in which an accused is not able to appeal a new (and most problematically, a potentially more serious) conviction entered against them by the Supreme Court Chamber. We deal with this in more detail below in our exploration of the ability of an accused to appeal a conviction in international law.

According to the *UN Agreement* and the *ECCC Law*, these departures can only be justified by reference to international standards. We discuss the relevant international standards below.

V THE RIGHT TO APPEAL: A FUNDAMENTAL HUMAN RIGHT?

The appeal options in the ECCC's *Internal Rules* raise two distinct questions regarding human rights. The first relates to the ECCC's curtailment of the ability in Cambodian law to launch prosecutorial appeals against acquittals, which effectively ensures a double jeopardy protection. The first question is thus whether allowing prosecutorial appeals against acquittals is contrary to human rights law, that is, whether it breaches the *ne bis in idem* protection. The second question is whether the right to appeal a criminal conviction and sentence is a fundamental human right.

A Ne Bis In Idem

The first issue that is raised by allowing prosecutorial appeals following an acquittal is whether this infringes an individual's right not to be subjected to a second prosecution for the same offence. From a common law point of view, where the double jeopardy protection is close to absolute and almost never allows for prosecutorial appeals against acquittals, these appeals are troubling. However, the doctrine is treated significantly differently under international law. For while the major treaties, including the *ICCPR*,[79] *Protocol No 7 to the*

[79] *ICCPR*, above n 20, art 14(7): 'No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country'.

ECHR[80] and the *American Convention on Human Rights* ('*ACHR*')[81] all provide the *ne bis in idem* protection, these provisions very clearly do not exclude prosecutorial appeals against acquittals.

There are two approaches to prosecutorial appeals. The *ICCPR* and *Protocol No 7 to the ECHR* appear to offer a wide margin of discretion to states to determine when an acquittal is final, thus leaving open the possibility of prosecutorial appeal. This conclusion is drawn in light of the phrase 'in accordance with the law and penal procedure' of the state concerned.[82] Similarly, the *ACHR* directly refers to 'a nonappealable judgment'. Further, the Human Rights Committee in a General Comment on art 14(7) of the *ICCPR* has held that it need not be strictly interpreted:

> In considering State reports differing views have often been expressed as to the scope of paragraph 7 of article 14. Some States parties have even felt the need to make reservations in relation to procedures for the resumption of criminal cases. It seems to the Committee that most States parties make a clear distinction between a resumption of a trial justified by exceptional circumstances and a re-trial prohibited pursuant to the principle of *ne bis in idem* as contained in paragraph 7. This understanding of the meaning of *ne bis in idem* may encourage States parties to reconsider their reservations to article 14, paragraph 7.[83]

There is, to our knowledge, no case law available from either the Human Rights Committee or the European Court of Human Rights in which the possibility of a prosecutorial appeal against an acquittal that has not reached finality is challenged.

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80 *Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 22 November 1984, ETS No 177 (entered into force 1 November 1988) art 4, as amended by *Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby*, opened for signature 11 May 1994, ETS No 155 (entered into force 1 November 1998) ('*Protocol No 7 to the ECHR*'):

> 1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
>
> 2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
>
> 3. No derogation from this Article shall be made under Article 15 of the Convention.

81 Opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) art 8(4): 'An accused person acquitted by a nonappealable judgment, shall not be subjected to a new trial for the same cause'.

82 *ICCPR*, above n 20, art 14(7); *Protocol No 7 to the ECHR*, above n 80, art 4.

83 Human Rights Committee, *General Comment 13: Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Art 14)*, UN Doc HRI/GEN/1/Rev.6 (12 April 1984) [19].

B *The Right to Appeal a Criminal Conviction*

The right to appeal a criminal conviction is one that is found in many international treaties and jurisprudence, including the *ICCPR*, *Protocol No 7 to the ECHR* and the *ACHR*.

The relevant *ICCPR* provision states that 'everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law'.[84] The right to appeal is also contained in the *ACHR* which enshrines 'the right to appeal the judgment to a higher court'.[85] In contrast, *Protocol No 7 to the ECHR* contains a significant exception to this right 'in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal'.[86]

The authoritative and binding nature of the arts 14 and 15 of the *ICCPR* on the ECCC is unproblematic, given that Cambodia is a party to the *ICCPR*,[87] and in light of both art 33 new of the *ECCC Law* and art 13(1) of the *UN Agreement*, which specifically states that '[t]he rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process'. The jurisprudence of regional treaties such as *Protocol No 7 to the ECHR* and the *ACHR* can also be considered, for, while Cambodia is not a signatory to either treaty, they are of persuasive authority in relation to the ECCC trials. This derives from their influence on the development of international customary law, as was stated in the ICTR case, *Barayagwiza v Prosecutor*:

> The International Covenant on Civil and Political Rights is part of general international law and is applied on that basis. Regional human rights treaties, such as the European Convention on Human Rights and the American Convention on Human Rights, and the jurisprudence developed thereunder, are persuasive authority which may be of assistance in applying and interpreting the Tribunal's applicable law. Thus, they are not binding of their own accord on the Tribunal. They are, however, authoritative as evidence of international custom.[88]

1 *Jurisprudence of the* ICCPR

The Human Rights Committee of the *ICCPR* has developed unequivocal case law on the content of the right to appeal a criminal conviction. In *Larrañaga v Philippines*,[89] the author of the communication had been denied the review of his death sentence by a higher tribunal according to law, after being convicted of rape and murder by the Supreme Court of the Philippines following his acquittal at first instance. The Committee found that this was in violation of art 14(5).[90]

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84 *ICCPR*, above n 20, art 14(5).

85 *ACHR*, above n 81, art 8(2)(h).

86 *Protocol No 7 to the ECHR*, above n 80, art 2(2) .

87 Signed 17 October 1980; ratified 26 May 1992.

88 *Barayagwiza v Prosecutor (Appeals Chamber)* Case No ICTR 97-19-AR72 (3 November 1999) [40]. For more detail on the applicability of human rights law to international criminal tribunals, see Göran Sluiter, 'International Criminal Proceedings and the Protection of Human Rights' (2003) 37 *New England Law Review* 935.

89 *Larrañaga v Philippines*, Human Rights Committee, Communication No 1421/2005, UN Doc CCPR/C/87/D/1421/2005 (24 July 2006).

90 Ibid [7.8].

On another matter, it found that art 14(5) not only requires that the judgment be placed before a higher court, but that where a person is convicted on appeal against an acquittal, they have the right to a second review of both their conviction and sentence by a higher court, even where they have already been convicted of less serious offences.[91] The content of this obligation on states parties requires that they allow for substantial review of the sufficiency of both the evidential and legal basis of the conviction and the sentence.[92] In addition, the fact that a conviction entered at first instance was made by the highest domestic criminal court cannot circumvent the right to review by a higher tribunal: the Committee found that 'this circumstance alone cannot impair the defendant's rights to review of his conviction and sentence'.[93] The findings of the Human Rights Committee thus emphatically state that art 14(5) requires that both criminal convictions and sentences can be reviewed by a higher court, and that this right is not limited to serious cases.

However, this right cannot be viewed as a firmly-established element of the human rights *corpus juris*. This is because a significant number of states have made reservations to this provision, usually to protect the practice of not allowing an appeal at all,[94] or not allowing an appeal for convictions entered after an initial acquittal.[95] Importantly for these purposes, Cambodia has not made such a reservation to art 14(5) of the *ICCPR*.

2 *Jurisprudence of the European Court of Human Rights*

In contrast with the *ICCPR*, *Protocol No 7 to the ECHR* contains a clear exception for the right to appeal a criminal conviction, where that conviction was pursuant to an appeal following an acquittal. This exception was applied in *Botten v Norway*,[96] which concerned a defendant first acquitted, then convicted, by the Norwegian Supreme Court following a prosecutor's appeal. The decision of the Supreme Court was final. The applicant alleged, among other things, that Norway had breached his right to have his conviction reviewed by a higher court; this argument was deemed inadmissible by the Commission due to the clear exception.[97] The European Court of Human Rights did note however that the appeal system in Norway had since been reformed into a three-stage process. They quoted an opinion that accompanied the Bill that affected that change:

> The present system, where the Supreme Court acts as the ordinary second instance in criminal cases, is internationally unique. This arrangement has enabled a speedy hearing of appeal cases and has given the Supreme Court a considerable

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91 *Gomaríz v Spain*, Human Rights Committee, Communication No 1095/2002, UN Doc CCPR/C/84/D/1095/2002 (22 July 2005).

92 *Aliboeva v Tajikistan*, Human Rights Committee, Communication No 985/2001, UN Doc CCPR/C/85/D/985/2001 (18 October 2005).

93 *Terrón v Spain*, Human Rights Committee, Communication No 1073/2002, UN Doc CCPR/C/82/D/1073/2002 (5 November 2004) [7.4].

94 For petty offences and specific jurisdiction over crimes committed in office by members of parliament, judges, and other important civil servants.

95 The following states have made reservations of this kind to art 14(5) of the *ICCPR*: Austria, Belgium, Denmark, France, Germany, Luxembourg, the Netherlands, Norway, the Republic of Korea, Switzerland, and Trinidad and Tobago.

96 *Botten v Norway* (1996) I Eur Court HR 123.

97 Ibid 139.

> influence on the practice of criminal law. However … it does not fulfil the standards of legal safeguards which ought to be met and … the arrangement creates working conditions in the Supreme Court which prevent it from performing its functions in a fully satisfactory manner. The Supreme Court [needs] the opportunity to concentrate its work to a greater extent on cases where its decision will concern matters of principle.[98]

Commentators have also expressed discomfort with the situation of allowing a conviction after an acquittal without any possibility of appeal, and contend that there is reluctance from the European Court of Human Rights in applying this exception in practice.[99] There is not a strong basis for such a view, however, in light of the clear language of the exceptions.

3 *Which Standard Applies?*

The *ICCPR* contains an apparently unconditional right to have both conviction and sentence reviewed by a higher tribunal, while *Protocol No 7 to the ECHR* allows signatory states to limit this right in certain circumstances, including where an accused person is convicted on an appeal following an acquittal. The *ACHR* does not contain the *Protocol No 7* exception, however it does appear to be more flexible than that of the *ICCPR*. Which treaty approach should then be preferred in relation to the ECCC trials? Is the right to appeal a criminal conviction a fundamental human right, or can an exception be made where a conviction is entered following a prosecutorial appeal against an acquittal or lesser conviction?

Protocol No 7 to the ECHR is a more recent codification of human rights law than the *ICCPR*,[100] and could be said to strike a more recent and realistic balance between the right to a fair trial and the demands of expedient and efficient justice. However, the clear language and jurisprudence of art 14(5) of the *ICCPR*, coupled with its direct effect on the ECCC by virtue of the *Cambodian Constitution*, *ECCC Law* and the *UN Agreement*, means that it is the preferred construction on this issue.

In addition, one of the key principles regarding international protection of human rights is that when there are diverging international standards, the highest shall prevail. Prior to amendment by *Protocol No 11*,[101] art 60 of the *ECHR*[102] stipulated as follows:

> Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.

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98 Ibid 138–9.

99 Stefan Trechsel, *Human Rights in Criminal Proceedings* (2005) 371.

100 The *ECHR* dates from 1950, the *ICCPR* from 1966 and the *Protocol No 7 to the ECHR* from 1984.

101 *Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby*, opened for signature 11 May 1994, ETS No 155 (entered into force 1 November 1998) ('*Protocol No 11*').

102 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*ECHR*').

On this basis, it must be concluded that the *Internal Rules*, by allowing a situation in which a more serious conviction can be substituted for a less serious one following a prosecutorial appeal, is arguably in violation of art 14(5) of the *ICCPR*. The diverging international and regional rules on this point mean that the approach adopted in the *Internal Rules* cannot be said to be inconsistent with the entire human rights *corpus juris* on this point, however the inconsistency with art 14(5) is insurmountable.

VI BETWEEN PRAGMATISM AND IDEALISM: ORGANISING APPEALS IN INTERNATIONAL CRIMINAL TRIALS

The second international standard that is able to influence ECCC procedure is that of international criminal procedure. In addressing the question of whether the law of appeals in recent international criminal tribunals has been taken into account by the drafters of the *Internal Rules*, we predominately confine our analysis to the two prevailing models of international criminal procedure: that of the ad hoc tribunals (such as the International Criminal Tribunal for the Former Yugoslavia, the ICTR and the SCSL); and that of the International Criminal Court. Other internationalised tribunals are of limited relevance because they build upon the law of these tribunals and the ICC and add little in terms of innovative developments. In addition, there is very limited practice as far as the right and scope to appeal is concerned, for example at the Special Panels for Serious Crimes in East Timor and the SCSL.

A *Appeals at International Criminal Law: Rationale*

The possibility of appeals in international criminal proceedings is by no means as assured as it is in domestic systems. There are four primary reasons against their inclusion. First, as the exception to the rule: ad hoc international criminal tribunals can be seen as already constituting the highest available tribunal for the crimes being tried and thus constitute one of the exceptions concerning the right to appeal. Second, practice: appeals are not widely available within international tribunals. Third, precedent: the first international criminal tribunals, Nuremberg and Tokyo, explicitly ruled out the possibility of appeals.[103] Finally, policy: that there is a particular interest for international criminal tribunals to deal in expeditious justice.[104]

Nevertheless, the right to appeal for both accused and prosecutor is now firmly part of international criminal law and its jurisprudence. Its place in the pantheon owes both to the development of the right to appeal as an important human right, as well as to the function that appeals play in the development of law. We set out the applicable law and cases analysis below.

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[103] Appeals in international criminal tribunals are a recent phenomenon. Both the Nuremberg and Tokyo Tribunals excluded the right to appeal; convicted persons could only apply for pardon. A few Japanese convicted war criminals have tried to 'appeal' their conviction and sentence to the US Supreme Court, but this was dismissed.

[104] For these first three grounds, see Salvatore Zappalà, *Human Rights in International Criminal Proceedings* (2003) 159–60.

B *The Right to Appeal at International Criminal Tribunals*

The right to appeal was not in the charter of either the Nuremberg or Tokyo Tribunals. Article 26 of the *Nuremberg Charter* did not leave open any chance of appealing a decision of the Tribunal: 'The judgment of the Tribunal as to the guilt or the innocence of any Defendant … shall be final and not subject to review'.[105] Similarly, art 17 of the *Charter of the Tokyo Tribunal* provided only for alteration of the judgment by lodging a request with the Supreme Commander for the Allied Powers, who in practice upheld all sentences and verdicts.[106]

The rules of the ad hoc tribunals (the ICTY, ICTR and SCSL)[107] represent a departure from this previous practice. The Appeals Chamber hears appeals from the prosecutor or convicted persons on errors of law or fact which have occasioned a miscarriage of justice.[108] It may then affirm, reverse or revise a decision of the Trial Chamber and may, in hearing an appeal, base a judgment on additional evidence. It can also order a retrial.[109] In practice, the ICTY and ICTR have both ordered retrials after reversing a trial chamber acquittal, thereby protecting the right to appeal in the sense of art 14(5) of the *ICCPR*, and direct and final modification by the Appeals Chamber itself, both concerning new convictions and more severe sentencing.

The *Rome Statute of the International Criminal Court*[110] provides for appeals against procedural error, fact and law by both the prosecutor and the convicted

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105 *Charter of the International Military Tribunal*, annexed to the *Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 82 UNTS 280 (signed and entered into force 8 August 1945) art 26 ('*Nuremburg Charter*').

106 *Charter of the International Military Tribunal for the Far East*, annexed to *Special Proclamation by the Supreme Commander for the Allied Powers: Establishment of an International Military Tribunal for the Far East* (19 January 1946) art 17 ('*Charter of the Tokyo Tribunal*'):

> The judgment will be announced in open court and will give the reasons on which it is based. The record of the trial will be transmitted directly to the Supreme Commander for the Allied Powers for his action thereon. A sentence will be carried out in accordance with the order of the Supreme Commander for the Allied Powers, who may at any time reduce or otherwise alter the sentence except to increase its severity.

107 We mention specifically the articles and rules of the ICTY. When no reference is made to ICTR and SCSL articles and rules, this means that they are virtually identical to the ICTY provisions.

108 *Statute of the International Criminal Tribunal for the Former Yugoslavia*, adopted by SC Res 827, UN SCOR, UN Doc S/RES/827 (25 May 1993) and subsequently amended ('*ICTY Statute*') art 25 ('Appellate Proceedings'):

> 1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
>
> a) an error on a question of law invalidating the decision; or
>
> b) an error of fact which has occasioned a miscarriage of justice.
>
> 2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

109 *ICTY Rules of Procedure and Evidence* r 117.

110 Opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 81 ('*Rome Statute*').

person, and for the latter, it also allows appeals on 'any other ground that affects the fairness or reliability of the proceedings or decision'. The Appeals Chamber may reverse or amend the decision or sentence or order a retrial before a different Trial Chamber. It may also remand a factual issue to the original Trial Chamber for a determination, or call evidence itself on the matter.[111] While the Appeal Chamber may hear new evidence, it is not a trial *de novo*, though a retrial may be ordered pursuant to art 83(2)(b).[112] When an appeal is heard for procedural error, it must be in accordance not only with the Court's rules, but also with 'the procedural standards generally recognised by the international community'.[113]

Likewise, the East Timor Special Panels provide for any party to appeal to the Court of Appeal for a violation of the rules of procedure, procedural or substantive rights of the accused, as well as for inconsistency within the grounds of the decision or a material error of fact or law.[114] The Court of Appeal may then confirm, overrule or modify the original decision, or order a new trial.[115] The appeals procedure proceeds in principle on the basis of the record of evidence of the District Court; however, new evidence can be adduced in some circumstances.[116]

It is plain, therefore, that international criminal tribunals allow for appeals by both accused and prosecutor. Furthermore, and in direct contradiction of art 14(5) of the *ICCPR*, all international criminal tribunals allow for new convictions to be entered by the Appeals Chamber, even after acquittal at first instance, without a possibility for review. This is perhaps balanced by ICTY, ICTR and SCSL provisions, stating that '[i]n appropriate circumstances the Appeals Chamber may order that the accused be retried according to law',[117] and the ability of the East Timor Special Panels and the ICC to order retrials.

In contrast, the ECCC do not effectively allow for appeals against acquittals by the Co-Prosecutors. They do, however, allow a situation in which a new and non-appealable conviction can be entered by the Supreme Court Chamber, with no possibility of remand from the Supreme Court Chamber to the Trial Chamber.

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111 Ibid art 83.

112 Alphons Orie, 'Accusatorial v Inquisitorial Approach in International Criminal Proceedings prior to the Establishment of the ICC and in the Proceedings before the ICC' in Antonio Cassese, Paola Gaeta and John R W D Jones (eds), *The Rome Statute of the International Criminal Court* (2002) vol 2, 1439, 1491.

113 Robert Roth and Marc Henzelin, 'The Appeal Procedure of the ICC' in Antonio Cassese, Paola Gaeta and John R W D Jones (eds), *The Rome Statute of the International Criminal Court* (2002) vol 2, 1535, 1490.

114 United Nations Transitional Administration of East Timor ('UNTAET'), *On Transitional Rules of Criminal Procedure*, Doc No UNTAET/REG/2000/30 (25 September 2000) s 40.1 ('Appeal from Final Decisions'), as amended by *On the Amendment of the UNTAET Regulation No 2000/11 on the Organization of Courts in East Timor and UNTAET Regulation No 2000/30 on the Transitional Rules of Criminal Procedure*, Doc No UNTAET/REG/2001/25 (14 September 2001) ('*UNTAET Regulation*').

115 Ibid s 41.4.

116 Ibid s 41.2.

117 ICTY, *Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia* (Rev 43), UN Doc IT/32/Rev.43 (24 July 2009) r 117(C) ('*ICTY Rules of Procedure and Evidence*').

C *Scope of the Right to Appeal*

We will now briefly explore the scope of the right to appeal in international criminal proceedings. Given that the ICC has not yet issued any judgment — let alone a judgment on appeal — there is no practice regarding the scope of appeals relating to judgments.[118] We therefore concentrate on the law and practice of the ICTY and ICTR, which best illustrates the approach adopted in international criminal proceedings.

Generally the grounds for appeal are restricted to errors of law that invalidate the decision or errors of fact that have occasioned a miscarriage of justice,[119] though there may be an appeal on factual issues where the Trial Chamber 'has drawn unreasonable inferences from the evidence'.[120] The appeal hearing is generally not a hearing *de novo*.[121] While the Appeals Chamber is able to order a retrial, it usually makes a decision on the issues based on the trial record without ordering a retrial.[122] It must give a 'margin of deference' to findings of fact reached by a Trial Chamber.[123]

The statutes and settled jurisprudence of the international tribunals provide different standards of review with respect to errors of law and errors of fact. These standards are well-established in the jurisprudence of the tribunals. Where a party contends that a Trial Chamber has made an error of law, the Appeals Chamber must determine whether an error of substantive or procedural law was in fact made. However, the Appeals Chamber is empowered only to reverse or revise a Trial Chamber's decision when there is an error of law 'invalidating the decision'.[124]

A party alleging an error of law must advance arguments in support of that contention and explain how the error invalidates the decision. The Appeals Chamber may also step in and, for other reasons, find in favour of the contention that there is an error of law. If the Appeals Chamber finds that an alleged error of law arises from the application of a wrong legal standard by a Trial Chamber, it is open to the Appeals Chamber to articulate the correct legal standard and to review the relevant findings of the Trial Chamber accordingly. In doing so, the Appeals Chamber not only corrects a legal error, but applies the correct legal standard to the evidence contained in the trial record. It then must, in the absence of additional evidence, determine whether it is convinced beyond reasonable doubt as to the fact-finding in question. Therefore, not every error of law leads to a reversal or revision of a decision of a Trial Chamber.

The standard applied by the Appeals Chamber for errors of fact has been that of reasonableness, namely whether the conclusion of guilt beyond reasonable doubt is one which no reasonable trier of fact could have reached. Only errors of

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118 There is significant practice regarding interlocutory appeals and appeals against confirmation decision, but this falls outside the scope of this article.

119 See, eg, *ICTY Statute*, above n 108, art 25(b).

120 *Prosecutor v Aleksovski (Appeals Chamber)* Case No IT-95-14/1-A (24 March 2000) [74] (Judgment).

121 According to Orie, the wording of r 111 of the *ICTY Rules of Procedure and Evidence* 'indicates that the appeal is not a trial *de novo*': Orie, above n 112, 1474.

122 Ibid.

123 *Prosecutor v Tadić (Appeals Chamber)* Case No IT-94-1-A (15 July 1999) [64] (Judgment).

124 *ICTY Statute*, above n 108, art 25(1)(a).

fact which have 'occasioned a miscarriage of justice' will result in the Appeals Chamber overturning the Trial Chamber's decision. The appealing party alleging an error of fact must demonstrate not only the alleged error of fact but also that the error caused a miscarriage of justice, defined as '[a] grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime'.[125] The responsibility for the findings of facts and the evaluation of evidence resides primarily with the Trial Chamber.

In regards to sentencing, Trial Chambers are vested with a broad discretion to determine an appropriate sentence because of their obligation to individualise penalties to fit the circumstances of the accused and the gravity of the crime. As a general rule, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a discernible error in exercising its discretion or has failed to follow the applicable law. It is for the appellant to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing their sentence. The Appeals Chamber in *Nikolić* summarised the standard of review to be met in regards to sentencing. It found that both art 24 of the *ICTY Statute* and r 101 of the *ICTY Rules of Evidence and Procedure* contain general guidelines for a Trial Chamber that amount to an obligation to take into account the following factors in sentencing: the gravity of the offence; the individual circumstances of the convicted person; the general practice regarding prison sentences in the courts of the former Yugoslavia; and aggravating and mitigating circumstances.[126]

Appeals against sentence, as appeals from a trial judgment, are appeals *stricto sensu*: they are of a corrective nature and are not trials *de novo*. Pursuant to art 25 of the *ICTR Statute*, the role of the Appeals Chamber is again limited to correcting errors of law invalidating a decision and errors of fact which have occasioned a miscarriage of justice. These criteria are well-established in the jurisprudence of the ad hoc tribunals.

In practice, most appeals are brought by defendants and encompass a broad range of grounds. The Prosecution has, in some instances, taken the opportunity of appealing on grounds which have no impact on culpability or sentencing, with the aim of contributing to the Tribunal's developing jurisprudence.[127] Most appeals are dismissed, particularly those appeals made by defendants, though there are examples where the Appeals Chamber has reversed decisions. The following is not a comprehensive list but rather designed to give a detailed outline of Appeals Chamber practice in regards to defendant appeals.

In *Musema*, the Appeal Chamber quashed one of many convictions in a decision but upheld the sentence.[128] The appeal in *Krstić* saw a number of convictions set aside with the effect that Radislav Krstić was found guilty of lesser charges of aiding and abetting genocide, rather than the principal crime

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125 *Prosecutor v Furundzija (Appeals Chamber)* Case No IT-95-17/1-A (21 July 2000) [37].

126 *Prosecutor v Nikolić (Appeals Chamber)* Case No IT-02-60/1-A (8 March 2006) [6] (Judgment on Sentencing Appeal) ('*Nikolić*').

127 See, eg, *Prosecutor v Akayesu (Appeals Chamber)* Case No ICTR-96-4-A (1 June 2001) [425]–[483] (Judgment).

128 *Musema v Prosecutor (Appeals Chamber)* Case No ICTR-96-13-A (16 November 2001) [399] (Judgment) ('*Musema*').

itself.[129] In *Vasiljević*, the appeal overturned convictions of persecution, crimes against humanity (murder and inhumane acts) and murder, a violation of the laws or customs of war. All other appeals against convictions were dismissed.[130] In *Ntakirutimana*, the Appeals Chamber both quashed a number of convictions as well as entering additional convictions.[131]

The Appeals Chamber in *Blaškić* found several legal errors invalidating certain parts of the trial judgment. In particular, it reversed convictions for responsibility for ordering crimes committed in other parts of the Vitez municipality of central Bosnia on the basis that the Trial Chamber applied an incorrect standard of *mens rea*.[132] In *Kordić*, the Appeals Chamber dropped the convictions for Dario Kordić and Mario Čerkez in relation to forcible transfer and expulsion of Bosnian Muslim civilians after finding that the indictment was defective in relation to these allegations.[133] In *Kvočka*, the defendant's appeal as it related to his conviction as a co-perpetrator of persecution for rape and sexual assault was allowed and his conviction for persecution in so far as this conviction related to rape and sexual assault was also reversed.[134]

The Appeals Chamber in *Jokić* vacated several of the appellant's convictions that were based on a finding of the appellant's superior responsibility and dismissed all further grounds of appeal filed by the appellant. However, the sentence of seven years imprisonment was affirmed.[135]

Based on our analysis, prosecutorial appeals, while being less numerous, appear to have a higher success rate than those from defendants. It would be wrong, however, to draw any conclusions to this effect, as these appeals form only a small subset of total appeals. It also must be borne in mind that different considerations underlie the prosecutor's decision whether or not to appeal a judgment. Scarce resources, for example, will always ensure that the prosecutor carefully considers whether these resources should be invested in appellate proceedings, or in new investigations and trials. Defendants, on the other hand, are not generally concerned with this particular dilemma when considering whether they will exercise their right to appeal. The following represents a sample of prosecutorial appeals.

In *Rutaganda*, the Appeals Chamber allowed the appellant's ground of appeal against his conviction for murder as crime against humanity, and by majority allowed the prosecution's appeal of his acquittal for murder as violation of art 3

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129 *Prosecutor v Krstić (Appeals Chamber)* Case No IT-98-33-A (19 April 2004) (Judgment) ('*Krstić*').

130 *Prosecutor v Vasiljević (Appeals Chamber)* Case No IT-98-32-A (25 February 2004) [87]–[147] (Judgment) ('*Vasiljević*').

131 *Prosecutor v Ntakirutimana (Appeals Chamber)* Case Nos ICTR-96-10-A and ICTR-96-17-A (13 December 2004) (Judgment) ('*Ntakirutimana*').

132 *Prosecutor v Blaškić (Appeals Chamber)* Case No IT-95-14-A (29 July 2004) [161]–[166], [423]–[481] (Judgment) ('*Blaškić*').

133 *Prosecutor v Kordić (Appeals Chamber)* Case No IT-95-14/2-A (17 December 2004) (Judgment) ('*Kordić*').

134 *Prosecutor v Kvočka (Appeals Chamber)* Case No IT-98-30/1-A (28 February 2005) (Judgment) ('*Kvočka*').

135 *Prosecutor v Jokić (Appeals Chamber)* Case No IT-01-42/1-A (30 August 2005) (Judgment on Sentencing Appeal) ('*Jokić*').

common to the *Geneva Conventions*,[136] reversing Georges Rutaganda's acquittal on these counts. His convictions for genocide and extermination as a crime against humanity were affirmed, as was the single sentence of life imprisonment handed down.[137]

In *Jelistić*, the Appeals Chamber allowed a number of appeals that had no impact on sentencing. The majority allowed one of the Prosecution's assertions that 'the Trial Chamber erred in law by adopting the standard of guilt beyond a reasonable doubt'[138] in relation to r 98*bis*. Another ground of appeal related to intent to commit genocide: this was allowed in part after finding that the Trial Chamber was in error in holding that its evidence was insufficient to sustain a conviction for genocide. However, the Appeals Chamber, by majority,[139] considered that it was not appropriate to order that the case be remitted for further proceedings and declined to reverse the acquittal. The Chamber allowed a cross-appellant's second ground of appeal relating to a guilty plea to a specific murder, but affirmed the sentence of 40 years of imprisonment as imposed by the Trial Chamber.[140]

Similarly, in *Tadić*, the Appeals Chamber dismissed several appellant grounds but allowed some grounds of prosecution appeals reversing relevant decisions.[141] In *Seromba*, the Appeals Chamber partially granted one of Athanase Seromba's appeal points but dismissed all others. In relation to the Prosecution appeal, the Appeals Chamber, among other decisions, overturned a conviction for aiding and abetting genocide, replacing it with a conviction for committing genocide. It also increased Seromba's sentence from 15 years to life imprisonment.[142]

Thus it appears that the Appeals Chamber has limited statutory discretion in regards to Trial Chamber findings, and its practice suggests that it is not willing, or feels it is not necessary, to go much beyond this. This could well be interpreted as a vote of confidence in the work of the Trial Chamber. However, given the small body of appeal cases, this might also be a reflection of the type of cases that have come to the Appeals Chambers: that is, appeals that are mostly on convictions and sentencing issues, rather than along miscarriage of justice lines. However, there have also been some prosecution appeals that had been

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136 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (collectively, '*Geneva Conventions*').

137 *Rutaganda v Prosecutor (Appeals Chamber)* Case No ICTR-96-3-A (26 May 2003) (Judgment) ('*Rutaganda*').

138 *Prosecutor v Jelisić (Appeals Chamber)* Case No IT-95-10-A (5 July 2001) (Judgment) ('*Jelisić*').

139 Judge Shahabuddeen and Judge Wald dissenting.

140 *Jelisić (Appeals Chamber)* Case No IT-95-10-A (5 July 2001) (Judgment).

141 *Prosecutor v Tadić (Appeals Chamber)* Case No IT-94-1-A and IT-94-1-A*bis* (26 January 2000) (Judgment in Sentencing Appeals) ('*Tadić*').

142 *Prosecutor v Seromba (Appeals Chamber)* Case No ICTR-2001-66-A (12 March 2008) (Judgment) ('*Seromba*').

launched with the apparent intention of adding to the Tribunal's jurisprudence on specific issues. What is apparent from its practice is that, while the Appeals Chamber seems to exercise restraint in relation to the substantive elements of a case, it is even more reluctant in the area of amending sentencing.

The following conclusions may be drawn on the basis of the above overview of the scope of appeal:

1 All international criminal tribunals underline that the appeal procedure is not a trial *de* novo; practice demonstrates considerable deference to findings by the Trial Chamber;

2 Appeals in international criminal law need to be based on specific grounds, including issues of law and issues of fact; and

3 There is equality as to grounds for appeal between the defendant and the prosecutor, with the exception of the ICC.[143]

This practice recognises that the complex and voluminous cases that accompany the prosecution of international crimes require expeditious treatment, in the interests of both justice and the individual being tried. The appeals procedure envisaged in the *Internal Rules* when first promulgated allowed appeals that amounted to a trial *de novo*, as is the practice of Cambodian law.[144] The narrowing of appeal grounds that occurred in the September 2008 second revision brought the ECCC into line with international practice on this point.

D *The Debate in the Appeals Chamber of the Ad Hoc Tribunals*

Whether or not a new trial should be ordered after reversing a trial chamber acquittal or sentence has become a recurring point of disagreement between Judge Pocar and his colleagues of the Appeals Chamber of the ICTY/ICTR. Judge Pocar strongly dissented in favour of remitting the case back to the Trial Chamber for further determination in the appeals of *Rutaganda*,[145] *Semanza*,[146] and *Galić*.[147] It is worth quoting his argument, as most recently expressed in the *Galić* appeal, when the accused's sentence of 20 years imprisonment was

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143 In the context of the ICC, only the accused enjoys the benefit of appealing on 'any other ground that affects the fairness or reliability of the proceedings or decision': *Rome Statute*, above n 110, art 81(1)(b)(iv).

144 *Internal Rules* (12 June 2007) r 104.

145 *Rutaganda (Appeals Chamber)* Case No ICTR-96-3-A (26 May 2003) (Dissenting Opinion of Judge Pocar).

146 *Semanza v Prosecutor (Appeals Chamber)* Case No ICTR-97-20-A (20 May 2005) (Dissenting Opinion of Judge Pocar) ('*Semanza*').

147 *Prosecutor v Galić (Appeals Chamber)* Case No IT-98-29-A (30 November 2006) (Judgment) ('*Galić*').

modified into a life sentence on appeal:

> the Appeals Chamber is bound to uphold an accused's right of appeal enshrined in international law as reflected in Article 14(5) of the [*ICCPR*]. Thus … the Appeals Chamber's intervention … to correct errors committed by a Trial Chamber must be interpreted so as to comply with the fundamental human rights principle that any conviction *and or* sentence must be capable of review by a higher tribunal according to law. While Article 25(1) of our Statute affords the Prosecution the possibility of lodging an appeal that seeks an increase in sentence, this provision does not allow for an exception to the Appeals Chamber's obligation to guarantee the fundamental right of appeal under Article 14(5) of the ICCPR. As stated by the Human Rights Committee of the ICCPR, although the applicable law in a jurisdiction may allow for a person to be convicted and sentenced at first instance by the higher court in that jurisdiction, 'this circumstance alone cannot impair the defendant's right to review of his conviction and sentence by a higher court.'[148]

Judge Pocar, citing the Appeals Chamber's decision in *Čelebići* to quash and remit the original sentence back to the Trial Chamber rather than substitute a sentence itself,[149] held that the only option available to the Appeals Chamber was to follow this approach, particularly because the sentence in question had to be 'wholly reassessed' and so must be done by the Trial Chamber in its role as the primary evaluator of evidence. In addition, he stated that such a complete reassessment of a sentence 'makes it all the more imperative that the resulting sentence be subject to review by a higher court'.[150] Judge Pocar's position is that, as a matter of principle and fairness, art 14(5) as interpreted by the Human Rights Committee should be fully respected. He also states that this is especially required when the Trial Chamber's judgment or sentence is significantly modified, such as in *Galić* where a *de novo* assessment was required as to what constitutes an appropriate sentence. When the modification of the Trial Chamber's judgment or sentence would be the result of an identifiable error of law or fact, this could be regarded as less problematic following the reasoning of Judge Pocar.

The Appeals Chamber of the ICTY/ICTR has never addressed the objections of Judge Pocar in substance, and apparently regarded its right to enter new convictions or impose higher sentences as self-evident. It is also a matter that has not yet been fully addressed from the defence side. This may seem obvious because there is no possibility of appeal against this new conviction, but a defendant confronted with an appeal by the prosecutor against an acquittal could pre-emptively object to any potential new conviction that could be entered without corresponding appeal rights. This observation similarly applies to the ECCC.

Judge Shahabuddeen has, in his separate opinions, reacted to Judge Pocar's objections.[151] He did so most recently in the *Galić* case.[152] His position appears

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148 *Galić (Appeals Chamber)* Case No IT-98-29-A (30 November 2006) [2] (Partially Dissenting Opinion of Judge Pocar) (emphasis in original, citations omitted).

149 Ibid [4].

150 Ibid.

151 *Rutaganda (Appeals Chamber)* Case No ICTR-96-3-A (26 May 2003) (Separate Opinion of Judge Shahabuddeen); *Semanza (Appeals Chamber)* Case No ICTR-97-20-A (20 May 2005) (Separate Opinion of Judge Shahabuddeen and Judge Güney).

to hinge on three central points: first, the *ICCPR* is not formally applicable to the ICTY;[153] second, art 14(5) of the *ICCPR*, as interpreted by the Human Rights Committee, is — from a substantive perspective — not indispensable to fairness. Further, doubts as to whether it belongs in the 'core' of fair trial rights may be implied from the considerable number of reservations to the provision; and thus, third, applying art 14(5) would result in unnecessary waste of judicial resources. In addition, the exit strategies of these tribunals call for cases to be dealt with expeditiously; this is certainly an important factor in this debate. Remitting a case to a Trial Chamber would obviously jeopardise that strict timetable envisaged.

This stand-off at the ICTY and ICTR is unlikely to be resolved in the near future, particularly because the issue is not openly debated. Judge Pocar continues to dissent, and he observes, with certain frustration, that the ICTY and ICTR Appeals Chambers have never justified their departure from art 14(5) of the *ICCPR*.[154] A major issue currently missing in this discussion is whether the specific mandates of the ad hoc tribunals, and especially that governing the role of the Appeals Chamber, would justify a departure from the standard of art 14(5) of the *ICCPR*.[155] We find that these arguments regarding the non-applicability of that instrument to the ICTY and ICTR are utterly unconvincing.[156] Judge Pocar offered a strong response in his very recent dissenting opinion in the *Mrkšić* case of 5 May 2009.[157] His 'deconstruction' of the arguments put forward by Judge Shahabuddeen is particularly convincing, because it underlines that the ICTY and ICTR belong to the same UN family as the *ICCPR*: 'As a direct expression of the very same international organization which instigated and unanimously endorsed the *ICCPR*, the International Tribunal is not entitled to avoid the application of the principles enshrined therein'.[158]

In addition, the right to appeal is even more important given that the mandate of the tribunals is to deal with the most serious crimes. In this respect, it is ironic that Judge Shahabuddeen mentions that the Tribunal cannot become a party to the *Optional Protocol to the ICCPR* as a reason to diminish the authority of the views of the Human Rights Committee.[159] The absence of the possibility to complain about the Tribunal's noncompliance with human rights standards is all the more reason to carefully protect an individual's right to appeal.

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152 *Galić (Appeals Chamber)* Case No IT-98-29-A (30 November 2006) (Separate Opinion of Judge Shahabuddeen).

153 Ibid [25].

154 *Prosecutor v Mrkšić (Appeals Chamber)* Case No IT-95-13/1-A (5 May 2009) [3] (Partially Dissenting Opinion of Judge Pocar) ('*Mrkšić*').

155 On this topic, see Masha Fedorova and Göran Sluiter, 'Human Rights as *Minimum* Standards in International Criminal Proceedings' (2009) 3 *Human Rights and International Legal Discourse* 9.

156 Furthermore, it is inconsistent with case law which has embraced the applicability of the *ICCPR*: see above n 63.

157 *Mrkšić (Appeals Chamber)* Case No IT-95-13/1-A (5 May 2009) [7]–[11] (Partially Dissenting Opinion of Judge Pocar).

158 Ibid [8].

159 *Galić (Appeals Chamber)* Case No IT-98-29-A (30 November 2006) [25] (Separate Opinion of Judge Shahabuddeen), citing the *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 302 (entered into force 23 March 1976) ('*Optional Protocol to the ICCPR*').

Judge Shahabuddeen's analysis also fails to make a distinction between the different reversals open to the Appeals Chamber. Judge Pocar makes an attempt in this regard, by underlining that a far-reaching modification, requiring a consideration *de novo*, should especially be remitted.[160] A similar argument may also be developed for matters which are primarily within the competence of the Trial Chamber, such as issues of fact. One could thus imagine that reversals on questions of law may result in a direct conviction or increase in sentence by the Appeals Chamber, whereas reversals on questions of fact need to be remitted to the Trial Chamber. The relevance of this distinction has been explored above in respect of the scope of appeal.

VII ASSESSING THE APPEALS PROCEDURE AT THE ECCC

A *Applicability of International Tribunal Standards to the ECCC*

The following analysis should be read in light of the fact that there have not been any hearings by the Supreme Court Chamber as of October 2009. The *Internal Rules* of the ECCC provide for appeals, both by a convicted person or the prosecutor, on grounds of an error of law that invalidates the decision or an error of fact which has occasioned a miscarriage of justice.[161] Article 36 new of the *ECCC Law* rules out the remittance of cases to a Trial Chamber:

> The Extraordinary Chamber of the Supreme Court shall decide appeals made by the accused, the victims, or the Co-Prosecutors against the decision of the Extraordinary Chamber of the trial court. In this case, the Supreme Court Chamber shall make final decisions on both issues of law and fact, and shall not return the case to the Extraordinary Chamber of the trial court.

When this article is read in conjunction with r 110(3) and (4) of the *Internal Rule* as has been discussed above — it is not excluded that an individual can face a new conviction and increase in sentence imposed by the Supreme Court Chamber, without the possibility of further review.

This possible eventuality for the ECCC finds support in both the law and practice of international criminal courts and tribunals; that is, the examined law and practice of the ICTY/ICTR and the procedural design for the ICC. In respect of the latter, Orie writes that Western Europe's general preference is for 'procedural economy', making it 'more common to *reverse* the judgment and issue a *new decision*; only a relatively small number of cases are remanded to the original court'.[162] Roth and Henzelin write that given this state of affairs, the Appeals Court should be able to re-examine the evidence.[163]

However, we wonder what the authority of international criminal procedure's approach to appeals is in the particular context of the ECCC, and what its effects in light of art 12(1) of the *UN Agreement* should be.

First, in the law of the ICTY, ICTR and ICC there is discretion in all situations for an Appeals Chamber to remit a case to the Trial Chamber, thereby

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160 *Mrkšić (Appeals Chamber)* Case No IT-95-13/1-A (5 May 2009) [38] (Partially Dissenting Opinion of Judge Pocar).

161 *Internal Rules* (Rev 4) (11 September 2009) r 104.

162 Orie, above n 112, 1556.

163 Roth and Henzelin, above n 113.

granting Appeals Chambers the discretion to guarantee the right of appeal. As a result of art 36 of the *ECCC Law*, this is not possible at the ECCC. While the latter provision will result in a practice that is generally supported in the law of international criminal tribunals, the very exclusion of the possibility to remit a case on appeal to a Trial Chamber is clearly inconsistent with the law of international criminal tribunals. Hence, art 36 of the *ECCC Law* is already inconsistent with international standards, and can be challenged having regard to the wording of art 12(1) of the *UN Agreement*.

Second, the *practice* of the ICTY/ICTR Appeals Chamber in reversing an acquittal and entering a conviction and/or increasing the sentence is subject to controversy in the form of the dissenting opinions of Judge Pocar. It becomes, as a result of these strong dissents, more difficult to say what the 'international standards' amount to. The ICC is unhelpful, as there is not yet any practice on this matter; but in the ICTY/ICTR context, entering new convictions or increasing sentences on appeal, without the possibility of subsequent review, has consistently been challenged by one of the ICTY's most prominent judges and its former President. This casts an important shadow over the authority of the practice at the ICTY/ICTR. This is especially so because the reasons provided in favour of the ICTY/ICTR approach regarding the right to appeal — as advanced by Judge Shahabuddeen — are unconvincing.

Third, related to the previous point, the reasons offered to depart from *ICCPR* case law are not convincing. Indeed it appears that the compelling demands of the exit strategy are behind the increasing use by the Appeals Chamber of its power to convict and sentence, which is at the cost of the accused's right to have their new conviction or sentence reviewed.

B *Consistency of* ECCC Law *on Appeals with International Human Rights Law*

As already discussed, the ECCC are fully and unconditionally bound by the *ICCPR* on the basis of Cambodia's treaty obligations and according to the important references to the *ICCPR* in the *UN Agreement*, particularly to art 14 of the *ICCPR* which deals with the right to a fair trial. In this respect, there is a significant distinction between the ECCC and the ICTY/ICTR. In the latter tribunals' case law regarding the right to appeal, it has never been denied that their practice is inconsistent with the requirements of art 14(5) of the *ICCPR*; rather, it is acknowledged that those requirements are not formally binding on international criminal tribunals as they are not parties to this instrument. This consideration is clearly irrelevant in regards to the ECCC. On the basis of art 13 of the *UN Agreement*, *lex specialis* is to be applied by the ECCC, and thus art 14 is directly applicable to ECCC proceedings.

We do not see how we can reconcile art 36 new of the *ECCC Law* and r 110(4) of the *Internal Rules* with the right to appeal as protected in the *ICCPR*. The latter is fully applicable — no reservations are in place — and the Human Rights Committee's views on the scope of the right to appeal are very clear. The only way to remedy the inconsistency is to prohibit on appeal a new conviction or (significant) increase in sentence. Thus, only if *reformation in pejus* was ruled out beforehand, would art 36 new of the *UN Agreement* and r 110(4) of the *Internal Rules* not be problematic from a human rights perspective. In this

regard, we must bear in mind the content and scope of r 110(3) and (4) of the *Internal Rules*, which were discussed above. It follows from these provisions that while appeals from the accused cannot result in an increase of sentence, it is possible that in case of an appeal by the prosecutor the accused will face a new conviction or increase in sentence.

We understand r 110(4) of the *Internal Rules* to mean that it is possible that an appeal by the prosecution can result in the trial judgment and sentence being modified adversely to the accused. In this way, the mere fact that an appeal against an acquittal cannot result in the modification of the Trial Chamber's disposition does not sufficiently guarantee the accused's rights. The prosecutor can still appeal a sentence and conviction, including where the prosecution believes a conviction should be substituted for a more serious offence. As stated above, we believe this contravenes the *ICCPR* obligations.

The only way to prevent this problem — as the appellate judges would be well-advised to do — is not to make use of this discretion. Defence counsel could submit this argument prior to any appeal and thereby compel the appellate bench to justify any departure from art 14(5). This would be the approach desired by Judge Pocar.[164]

We are well aware that, due to the age of the accused, there is an urgent need to expedite proceedings and minimise delay. But this can never be done in a manner which is inconsistent with the accused's fundamental rights. It would clearly set the wrong example, particularly because an ancillary purpose of the ECCC is for it to be a role model for domestic proceedings in Cambodia. It is worth repeating the words of Special Representative of the UN Secretary-General, Peter Leuprecht, in respect of the proposed ECCC:

> It is hoped that the establishment of a transparent process that complies with international standards will have an educational effect on existing formal institutions and create better awareness amongst the general population of the facts about Cambodia's tragic past and further demand for a well functioning judicial system.[165]

VIII CONCLUDING REMARKS

In drafting rules on international criminal procedure, the matter of appellate proceedings tends to receive scant attention. Just like matters of sentencing and enforcement of sentences, it is not considered a pressing issue when these courts are being set up, and other matters are put higher on the agenda. We have sought to address some important questions regarding appellate proceedings at the ECCC at this relatively early stage, with a view to avoiding unpleasant surprises in the future.

On the basis of our research and analysis, we conclude that the ECCC approach towards appeals could amount to a violation of human rights obligations. In particular, the provision indicating that cases cannot be sent back

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164 See *Mrkšić (Appeals Chamber)* Case No IT-95-13/1-A (5 May 2009) (Partially Dissenting Opinion of Judge Pocar).

165 Peter Leuprecht, Special Representative of the Secretary-General for Human Rights in Cambodia, *Situation of Human Rights in Cambodia*, UN ESCOR, 16th sess, Agenda Item 19 UN Doc E/CN.4/2004/105 (19 December 2003) [19].

to the trial chamber is a significant risk. It means that either no new convictions can be entered on appeal and sentences cannot be increased — an approach that satisfies human rights norms but may offend our sense of justice — or it means that new convictions and higher sentences can be entered, thereby violating human rights norms.

The approach adopted towards appeals in art 36 new of the *ECCC Law* and r 110(4) of the *Internal Rules* may be justified as corresponding with the practice of the ICTY/ICTR, as well as contributing significantly to expeditious justice. However, it has no legal basis. It is not predicated on Cambodian law, it may be in violation of the fully applicable *ICCPR*, and it is inconsistent with the law of international criminal tribunals which at least allows for remittance of a case to the trial chamber. The effect of this can only be that the ECCC appeal judges will restrain from entering any new convictions or increases in sentence. As the clear object and purpose of art 36 new of the *ECCC Law* and r 110(4) of the *Internal Rules* are to expedite proceedings, the intended effect of these would be thus reversed. But with a situation in which, according to human rights law, no new conviction can be entered, and according to art 36 new of the *ECCC Law*, the case cannot be sent back to a trial chamber for a new decision, there is every incentive to appeal. The possible risk in an appeal — namely that the appellate bench sees things differently, also to the detriment of the accused — is no longer there. This could result in every convicted person appealing their conviction.[166]

We also think it is problematic that in organising appeals, art 12(1) of the *UN Agreement* was not properly applied. In the rush to ensure expeditious trials, the drafters of the *ECCC Law* and the *Internal Rules* did not live up to the task in art 12(1) of the *UN Agreement*. This provision clearly calls for Cambodian law to be the primary source of ECCC procedure: we fail to see in what way Cambodian law is defective in organising appeals. It may be a complicated process to ensure this happens, but how does it make it problematic in terms of art 12(1) of the *UN Agreement*? In addition, we fail to see how the newly adopted approach of art 36 new of the *ECCC Law* can validly follow from art 12(1) of the *UN Agreement*.

The possible risks of the current approach are not only that appellate proceedings may be ineffective or in violation of human rights law, but also that there is a very real question about whether the currently adopted approach towards appeals is consistent with the *UN Agreement*. It could be argued that the law regarding appeals in the new *ECCC Law* and *Internal Rules* is invalid and that ordinary Cambodian law should be applied instead. All these problems may be prevented with a few amendments, the most important being that in cases where more serious convictions are being entered on appeal or there are large increases in sentences, the case should be sent back to the trial chamber for further resolution. This change would bring the *ECCC Law*'s appeal provisions in conformity with both human rights law and the law of international criminal tribunals.

Finally, the inability of the Co-Prosecutors to effectively appeal the acquittal of an accused represents a significant and unwarranted shift from Cambodian law. While the current ECCC procedure on this point is an approach that is

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166 Although we acknowledge that this is likely to happen in case of harsh sentences in any event.

almost second nature to common law systems, it is not the approach of either human rights law, *ICCPR* obligations, the law and practice of international criminal tribunals or the civil law system. There is, therefore, no justification for its lack of inclusion in the procedure of the ECCC. Appeal rights are not just the remit of the accused. The curtailment of the Co-Prosecutor's ability to appeal is an anomaly: it signals that while a trial chamber may make mistakes when convicting people or imposing their sentence, when it acquits an accused it is infallible. The ability to properly appeal an acquittal would ensure that Cambodian society's right to pursue justice for the worst crimes of the Khmer Rouge regime is better protected.