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# ECCC Appeals

## Appraising the Supreme Court Chamber's Interventions

Sergey Vasiliev\*

### Abstract

*The appellate stage of the proceedings before the Extraordinary Chambers in the Courts of Cambodia (ECCC) has received more limited attention than its pre-trial and trial process. In order to partially remedy this gap, this article highlights the unique features of the ECCC appellate system and how the Supreme Court Chamber (SCC) has given them effect in practice. Firstly, I consider the SCC's restricted jurisdiction over immediate appeals and failed attempts by its judges to extend such appeals to jurisdictional questions. Secondly, I discuss the scope and powers of appellate review by the SCC in respect of alleged errors of law and fact, focusing on its innovative formulation of the standard of review of factual errors. This qualified deference standard has proven to be of broader import as it has informed the International Criminal Court Appeals Chamber's majority approach in the Bemba case. Thirdly, I focus on the SCC's intervention in one area, namely the ECCC's personal jurisdiction, and its reading of the 'most responsible' parameter as a non-jurisdictional and judicially unreviewable criterion. Taking cues from these landmark decisions, I appraise the SCC's role in delivering fair and expeditious justice and securing the viability of the ECCC's mission while acknowledging the more contentious aspects of its track record without which no account of its emerging legacy would be complete or balanced.*

### 1. Introduction

Some 13 years into the operation of the Extraordinary Chambers in the Courts of Cambodia (ECCC), the expectable question of whether its mandate is nearing the end admits no straightforward answer. The tribunal's progress has been unsteady and overshadowed by unparalleled challenges: unwieldy institutional

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structures, maladroitness decision-making and procedures for settling differences between the international and Cambodian officials, the need to translate across three working languages, and governmental interference in Cases 003 and 004. Contingencies related to the defendants' senior age and frail health, intra-tribunal struggles around the fate of contested cases, and chronic financial shortfalls make it ever harder to estimate when the ECCC will complete its work — or have to terminate it prematurely due to adversity.

In November 2018, the Trial Chamber (TC) delivered judgment in the second segment of the mammoth case (002/02) against the senior Khmer Rouge leaders Nuon Chea and Khieu Samphan, who were convicted of most charges and sentenced to life imprisonment for the second time.<sup>1</sup> Both had already received life sentences in the first portion of Case 002 (002/01), with the appeal judgment in that part of the case rendered two years earlier.<sup>2</sup> Following Nuon Chea's death on 4 August 2019, at the age of 93, Case 002/02 appeal proceedings in respect of him were terminated, precluding the finality of Case 002/02 trial judgment.<sup>3</sup> At the time of writing, the appeal against Case 002/02 judgment in respect of the surviving co-defendant, Khieu Samphan, is still pending before the ECCC's highest appellate instance, the Supreme Court Chamber (SCC). The entrenched disagreements between the international and national Co-Prosecutors (CPs), Co-Investigating Judges (CIJ), and Pre-Trial Chamber (PTC) Judges make it uncertain for how much longer the troubled Cases 003 (*Meas Muth*),<sup>4</sup> 004 (*Yim Tith*)<sup>5</sup> and 004/02 (*Ao An*)<sup>6</sup> will be allowed to continue, if at all.

- 1 Judgment, *Nuon Chea and Khieu Samphan* (Case 002/02), E465, Trial Chamber (TC), 16 November 2018. The written public version was made available in March 2019. For a comprehensive discussion of the main ECCC legal contributions, see in this symposium, E. Fry and E. van Sliedregt, 'Targeted Groups, Rape, and *Dolus Eventualis*: Assessing the ECCC's Contributions to Substantive International Criminal Law'.
- 2 Judgment, *Nuon Chea and Khieu Samphan* (Case 002/01), F36, Supreme Court Chamber (SCC), 23 November 2016 ('Case 002/01 appeal judgment').
- 3 Decision To Terminate Proceedings Against Nuon Chea, *Nuon Chea and Khieu Samphan* (Case 002/02), F46/3, SCC, 13 August 2019; Decision on Urgent Request concerning the Impact on Appeal Proceedings of Nuon Chea's Death Prior to the Appeal Judgment, *Nuon Chea* (Case 002/02), F46/2/4/2, SCC, 22 November 2019, §§ 30, 39–41, 69 and 83 (refusing to vacate Case 002/02 trial judgment and holding that Nuon Chea's death on appeal did not turn the finding of guilt at trial into a not guilty finding).
- 4 Closing Order, *Meas Muth* (Case 003), D267, International Co-Investigating Judge (ICIJ), 28 November 2018; ECCC Press Release, 'Co-Investigating Judges Issue Two Separate Closing Orders in the Case Against Meas Muth', 28 November 2018.
- 5 Closing Order, *Yim Tith* (Case 004), D382, ICIJ, 28 June 2019 ('*Yim Tith* closing order').
- 6 Cf. Closing Order (Indictment), *Ao An* (004/2), D360, ICIJ, 16 August 2018 and Order Dismissing the Case Against Ao An, *Ao An* (Case 004/2), D359, National Co-Investigating Judge (NCIJ), 16 August 2018; Considerations on Appeals against Closing Orders, *Ao An* (Case 004/2), D359/24 & D360/33, Pre-Trial Chamber (PTC), 19 December 2019. See also 'Statement of the Judges of the Trial Chamber of the ECCC Regarding Case 004/2 Involving Ao An', 3 April 2020, available online at <https://eccc.gov.kh/en/articles/statement-judges-trial-chamber-eccc-regarding-case-0042-involving-ao> (visited 28 April 2020).

The ECCC's emerging legacy occupied the minds of insiders and observers alike years before the finish line was in sight.<sup>7</sup> But the appellate phase at the ECCC and the SCC's role and contributions have received little attention as part of intermediate assessments. The size of the Chamber's docket has mirrored its circumscribed competence. The SCC only hears appeals from trial judgments, of which there have been three in total, and a narrow class of interlocutory — or, in the tribunal's procedural speak, 'immediate' — appeals. Having delivered two judgments (001 and 002/01)<sup>8</sup> and several dozen interlocutory appeal decisions, its output has remained fairly modest, at least in quantitative terms. Nevertheless, in the course of more than a decade, the Chamber has had the opportunity to weigh in on a plethora of issues at the heart of the ECCC's work and beyond. Besides, the SCC's distinctive features and its position as the highest judicial instance in the system with a final say on both legal and factual matters, call for a greater attention towards its performance and impact.

Without pretending to be comprehensive, this contribution casts a critical eye on some aspects of the track record of the SCC with a view to appraising its place as a part of the ECCC experiment. I start off by setting out the contours and oddities of its appellate regime as a *sui generis* system (Section 2). This is followed by a discussion of the SCC's jurisdiction and the issue of restricted scope of immediate appeals (Section 3). I then turn to the SCC's operationalization of appellate review, paying special attention to its powers on appeal and the applicable standard of review in respect of alleged factual errors (Section 4). In Section 5, I appraise the SCC's contribution in the area of personal jurisdiction, which is consequential for the ECCC's mandate and *raison d'être*. The SCC's interpretation of the 'most responsible' criterion and its stance on the judicial non-reviewability of suspect selection decisions warrant closer scrutiny. The final section concludes with tentative reflections on whether, on balance, the SCC's appellate interventions have positively promoted the orderly administration of justice in the ECCC system and the viability of its mission.

## 2. ECCC Appeals: Structure and Features

Unlike other international and special courts, the ECCC features a two-track appellate system consisting of the PTC with jurisdiction over appeals in the pre-trial stage,<sup>9</sup> and the SCC serving as 'both appellate chamber and final

7 S.M. Meisenberg and I. Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law* (T.M.C. Asser Press, 2016).

8 Appeal Judgment, *Kaing Guek Eav* (Case 001), F28, SCC, 3 February 2012 ('Duch appeal judgment'); Case 002/01 appeal judgment, *supra* note 2.

9 The PTC disposes of pre-trial appeals from decisions by the Co-Investigating Judges (CIJ) and other decisions: see Internal Rules (Rev. 9), as revised on 16 January 2015: Internal Rules 11(5) and (6), 29(8), 35(6), 38(3), 73(a) and (b), 74, and 77bis. Other than pre-trial appeals, the PTC's function is to settle disagreements between the Co-Prosecutors and between the Co-Investigating Judges: Internal Rules 71–72. For an analysis of the performance and purported dysfunctions of the PTC see, in this symposium, N. Naidu and S. Williams, 'The Function and

instance'.<sup>10</sup> The SCC exclusively hears appeals from judgments and a limited class of other decisions of the TC.<sup>11</sup> The Internal Rules carefully demarcate the jurisdiction of the two appellate instances based on the subject-matter, and their spheres of competence do not interlock. Even though the SCC is the final instance, the PTC decisions are also final and subject neither to appeal before the SCC nor to review by the TC.<sup>12</sup>

This setup creates a paradoxical and erratic situation. Firstly, the absence of a hierarchical relationship between the SCC and the PTC means that the SCC may not directly review and correct PTC legal interpretations. Accordingly, the PTC's (potential) errors of law would be allowed to stand unless somehow rectified or 'disapproved' (given that they cannot be formally reversed) by the SCC acting as the final instance when considering appeals from the trial judgment in the same case.<sup>13</sup> It would usually take years from the PTC's decision for the SCC to have an opportunity to revisit the PTC's statements of the law on specific issues — that is, if the case ever reaches the appellate stage.<sup>14</sup> Although this has not emerged as a problem in practice by the happenstance that the SCC has not disagreed with the PTC's interpretations much, it could well have turned out otherwise. The impossibility for the SCC to formally review the PTC's legal interpretations, and otherwise to address its legal errors prior to the appeal stage, can be regarded as a defect of the ECCC's procedural system. Secondly, the presence in the same judicial system of two coordinate instances enjoying the prerogative of finality, absent a doctrine of binding (supreme court) precedent to help prevent and resolve adjudicatory inconsistencies, also constitutes a flaw in the ECCC constitutional architecture. On both accounts, the SCC–PTC relationship (or rather the lack thereof) poses a risk of fragmentation of jurisprudence between the two appellate tracks.

The SCC is composed of seven (four Cambodian and three international) judges and passes decisions by an affirmative vote of at least five judges.<sup>15</sup>

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Dysfunction of the Pre-Trial Chamber at the Extraordinary Chambers in the Courts of Cambodia'.

10 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, 6 June 2003 (Agreement), Art. 3(2)(b); Law on the Establishment of the Extraordinary Chambers, as amended on 27 October 2004 (NS/RKM/1004/006) (ECCC Law), Art. 9 new.

11 ECCC Law, Art. 36 new; Internal Rules 29(8), 35(6), and 104.

12 Internal Rule 77(13); Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith, *Nuon Chea et al.* (Case 002), E50, TC, 16 February 2011, § 21.

13 I am grateful to the JICJ's anonymous reviewer for bringing this to my attention.

14 For example, it took six and a half years before the SCC got the chance to revisit — and note with approval — the PTC's finding, along with the underlying reasoning, that the extended form of joint criminal enterprise (JCE III) did not form part of customary international law in the 1970s. See Case 002/01 appeal judgment, *supra* note 2, §§ 791–809; Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), *Nuon Chea et al.* (Case 002), D97/15/9, PTC, 20 May 2010, §§ 75–88.

15 Agreement, Arts 3(2)(b) and 4(1)(b); ECCC Law, Art. 14 new (1)(b); Internal Rule 111(6).

The rationale of this ‘super-majority’ rule, which also governs the PTC and TC decision-making, is to safeguard the ECCC from domestic political interference.<sup>16</sup> A Chamber split along Cambodian/international lines can only render a decision if national judges persuade at least one international colleague to cast an affirmative vote.<sup>17</sup> Unlike TC decisions, SCC judgments are not subject to further review, except for the limited possibility of revision.<sup>18</sup> The SCC should dispose of the case definitively without remanding it to the TC.<sup>19</sup> It confers finality on trial judgments, which are not deemed final unless and until they have passed through the appellate review.<sup>20</sup>

The formula of ‘both appellate chamber and final instance’ departs from the two-tier appellate system in the Cambodian criminal procedure, which like in many other civil law jurisdictions, consists of appeal and cassation. The initial 2001 version of the ECCC Law also foresaw three levels of courts.<sup>21</sup> But during the negotiations on the Agreement, which were resumed in January 2003 upon the urging of the UN General Assembly,<sup>22</sup> the UN Secretary-General insisted on limiting appeals to one instance only.<sup>23</sup> After the ECCC Agreement was passed, changes were introduced in the Law to mirror the two-tier approach found in most of the international and special criminal jurisdictions, the only exception being the Kosovo Specialist Chambers.<sup>24</sup>

16 Report of the Secretary-General on Khmer Rouge trials, UN Doc. A/Res/57/769, 31 March 2003 (UNSG Report), § 29; UNGA Res. 57/225, UN Doc. A/57/225, 26 February 2003, § II.2 (‘Not[ing] with concern the continued problems related to the rule of law and the functioning of the judiciary resulting from, inter alia, corruption and interference by the executive with the independence of the judiciary’). On the issue of interference by the Cambodian Government into the ECCC proceedings, in particular case selection, see, in this symposium, D. Orentlicher, ‘“Worth the Effort”? Assessing the Khmer Rouge Tribunal’. See also the foreword by the symposium’s guest editors P. Lobba and N. Pons, ‘Rethinking the Legacy of the ECCC: Selectivity, Accountability, Ownership’.

17 UNSG Report, *supra* note 16, § 34.

18 Revision is based on newly discovered evidence, evidence that decisive proof was false or forged, or evidence of serious misconduct or grave breach of duty by CIJ or TC judges: Internal Rule 112(1).

19 ECCC Law, Art. 36 new; Internal Rule 104(3).

20 Decision on the Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Decision Concerning the Scope of Case 002/01, *Nuon Chea et al.* (Case 002/01), E163/5/1/13, SCC, 8 February 2013, § 24.

21 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 10 August 2001, NS/RKM/0801/12, Art. 2.

22 UNGA Res. 57/228: Khmer Rouge Trials, UN Doc. A/57/228, 27 February 2003, §§ 1 and 4(b) (emphasizing that the arrangements for the ECCC’s establishment should envisage an appellate chamber).

23 UNSG Report, *supra* note 16, § 16(b). While the Cambodian delegation was opposed to all of the other UN Secretary-General proposals to simplify the ECCC structure that would require changes to the 2001 ECCC Law, they were agreeable to reducing the number of instances from three to two: *ibid.*, §§ 17 and 20.

24 The Kosovo Specialist Chambers (KSC) mirrors the three-tier domestic judicial structure. Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, Republic of Kosovo, 3 August 2015 (KSC Law), Arts 45–48.

One aspect of conflating the two layers of review in a single instance of the SCC,<sup>25</sup> is that its regime still shows traces of functions of a Criminal Chamber of the Cambodian Court of Appeal, particularly when it comes to fact-finding competences. The SCC has the powers to examine evidence and call or admit new evidence to determine an issue,<sup>26</sup> as well as to decide upon the parties' requests for additional evidence that was unavailable at trial and could have been a decisive factor in reaching the trial decision.<sup>27</sup> These powers have not remained a dead letter. In order to secure the defendants' right to a fair trial, in particular the right to obtain the attendance and examination of witnesses, the SCC has not only sustained requests to admit and examine additional evidence,<sup>28</sup> but it has also engaged in limited additional investigations and appointed delegate judges to that end.<sup>29</sup>

Another aspect of collapsing two higher instances and remedies available under the Cambodian criminal process in one Chamber was that the ECCC appellate regime effectively became a *sui generis* system unmoored from its domestic reference point. The ECCC appeals are characterized by a degree of distancing from the Cambodian appellate standards and a stronger footing in the rules applicable in international criminal appeals, influenced substantially by the common law tradition. Absent a more detailed guidance on how the ECCC appellate system was to function, and given the express authorization in the legal framework to seek guidance in the standards established at the international level,<sup>30</sup> the SCC has been drawn to rely upon the UN ad hoc tribunals' jurisprudence when interpreting its standards and powers of appellate review.<sup>31</sup>

The solution championed by the UN Secretary-General of restricting ECCC appeals to one instance was primarily rooted in judicial economy and expediency considerations.<sup>32</sup> With the benefit of hindsight, this design feature made sense considering the age and life expectancy of the suspects. The reduction of judicial instances allowed expediting the proceedings as a whole and rendered

25 *Duch* appeal judgment, *supra* note 8, § 13 ('remedies available under Cambodian criminal procedure were conflated into one *sui generis* appellate system').

26 Internal Rules 104(1), 93 and 104 *bis*.

27 Internal Rule 108(7).

28 Decision on Part of Nuon Chea's Requests to Call Witnesses on Appeal, *Nuon Chea and Khieu Samphan* (Case 002/02), F2/5, SCC, 29 May 2015, § 26; Decision on Khieu Samphan's Request for Admission of Additional Evidence, *Nuon Chea and Khieu Samphan* (Case 002/02), F51/3, SCC, 6 January 2020.

29 Interim Decision on Part of Nuon Chea's First Request to Obtain and Consider Additional Evidence in Appeal Proceedings in Case 002/01, *Nuon Chea and Khieu Samphan* (Case 002/01), F2/4/3, SCC, 1 April 2015, §§ 24–25 (appointing two delegate judges to conduct an investigation under Internal Rule 93 including the power to interview witnesses in the absence of the parties and, where necessary, by means of audio and video-link technology).

30 Art. 33 new ECCC Law; *Duch* appeal judgment, *supra* note 8, §§ 12–13.

31 *Duch* appeal judgment, *supra* note 8, §§ 14–20; Case 002/01 appeal judgment, *supra* note 2, §§ 85–90.

32 UNSG Report, *supra* note 16, § 16(b) and 26 (envisaging a 'simple two-tier structure, consisting of a Trial Chamber and an Appeals Chamber' to facilitate the ECCC's prompt establishment and make their sustained operation more cost-effective).

completion of the cases more probable. The main rationale for retaining a three-tier system, such as in the context of the Kosovo Chambers, is to safeguard the right of appeal against a second-instance judgment reversing an acquittal and entering a new conviction on appeal.<sup>33</sup> However, compliance with the right to review by a higher court in a two-tier system can also be safeguarded by limiting the power of the appellate instance to amend the first-instance acquittal verdict. Since the SCC may only modify the TC's findings but not the disposition in case of a successful prosecution appeal against an acquittal,<sup>34</sup> the ECCC has been able to benefit from the resource-saving effects of a two-tier system without unacceptably compromising the right to appeal.

### 3. SCC's Jurisdiction and Immediate Appeals

The SCC's appellate jurisdiction extends over appeals from TC judgments and immediate appeals. The former decisions may be appealed on the grounds of: (a) an error on a question of law invalidating the judgment or decision; and (b) an error of fact which occasioned a miscarriage of justice.<sup>35</sup> Appeals in relation to any part of trial judgment may be filed by the CPs and the Accused; civil parties may only appeal decisions on reparations as of right, the verdict only if the CPs have appealed, and never the sentence.<sup>36</sup> As the SCC observed in *Duch*, grounds of appeal against a trial judgment encompass the grounds to request cassation before the Supreme Court of Cambodia and track the well-established appellate grounds in the statutes and practice of international tribunals.<sup>37</sup>

The second component of the SCC's appellate jurisdiction, the immediate appeals, is limited to four categories of decisions: (a) having the effect of terminating the proceedings; (b) on detention and bail under Internal Rule 82; (c) on protective measures under Internal Rule 29(4)(c); and (d) on interference with the administration of justice under Internal Rule 35(6).<sup>38</sup> Appeals from all other TC decisions may only be brought as part of the appeal against the final judgment.

Notably, the scope of immediate appeals before the ECCC is considerably more circumscribed than that in any other international or special criminal jurisdiction. Elsewhere parties may lodge interlocutory appeals from decisions on jurisdiction and certain other matters as of right, i.e. directly with an Appeals Chamber without certification by the trial court.<sup>39</sup> Parties may also

33 International Covenant on Civil and Political Rights, 16 December 1966, New York, 999 UNTS 171, Art. 14(5). See Art. 47(1) KSC Law.

34 Internal Rule 104(4).

35 Internal Rules 104(1) and 105(3).

36 Internal Rule 105(1).

37 *Duch* appeal judgment, *supra* note 8, § 13.

38 Internal Rule 104(4).

39 Rules 11*bis*(I), 15*bis*(D), 65(D), 72(B)(i) ICTY RPE; Rules 11*bis*(H), 15*bis*(D), 65(D), and 72(B)(i) ICTR RPE; Rules 11*bis*(G), 65(E) and 72(E) SCSL RPE; Art. 82(1)(a) ICCSt.; Art. 45(2) KSC Law.



apply for leave of the TC to appeal against any decisions involving an ‘issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which . . . an immediate resolution by the [Appeals Chamber] may materially advance the proceedings’.<sup>40</sup>

The most probable reason to limit the admissibility of immediate appeals to four types of decisions at the ECCC was to expedite its proceedings and preclude delays and uncertainties in a trial pending the SCC’s consideration of an appeal. This is also likely why immediate appeals do not have a suspensive effect.<sup>41</sup> However, concentrating all appeals except for the categories mentioned above in the post-trial, is not a self-evident way to achieve expedition and efficiency. Firstly, this solution renders the appellate process tail-heavy by design. Parties are expected to postpone appeals on issues not admissible in immediate appeals until the issuance of trial judgment. Secondly, the SCC is then expected to deal with a plethora of issues as part of the appeal from the final judgment, as opposed to resolving many of those in the course of the trial stage. The latter would have been particularly appropriate for jurisdictional questions, which cast doubt on whether the proceedings rest on a solid foundation.

The matter of immediate appeals proved to be contentious in the context of considering possible amendments to the Internal Rules. On two occasions in 2011, the SCC seized the Plenary of judges with proposals to expand the categories of decisions subject to immediate appeals.<sup>42</sup> At the February 2011 session, none of the two proposed amendments bearing upon the SCC jurisdiction and process met with the Plenary’s approval.<sup>43</sup> The second attempt undertaken during the August 2011 Plenary to amend Internal Rule 104(4) also proved unsuccessful,<sup>44</sup> even though the same Plenary adopted, upon the TC’s initiative, a new Internal Rule 108(4*bis*), which imposed time limits on the consideration of immediate appeals. One of the SCC’s proposals for that Plenary session purported to make ‘decisions concerning the jurisdiction of the Trial Chamber’ appealable immediately, subject to leave of the SCC (rather than the TC) and provided that the appellant shows how the immediate resolution by the SCC may materially advance the trial proceedings.<sup>45</sup>

The SCC judges put forward several institutional, procedural and resource-related arguments in favour of the extension of the scope of interlocutory appeals to jurisdictional matters. First, this would allow expediting both the

40 Rule 72(B)(ii) ICTY and ICTR RPE; Rule 72(F) SCSC RPE; Art. 82(1)(d) ICCSt.; Art 45(2) KSC Law.

41 Internal Rule 104(4).

42 Draft Agenda, Plenary Session of Judges of the ECCC, 21–23 February 2011, at 2 (including the agenda item entitled ‘Supreme Court related proposed amendments: Internal Rules 104 (Jurisdiction of the Supreme Court Chamber) and 107 (Time Limits for Appeal)’); Summary of Proposed Changes to the Internal Rules and the Practice Direction on Filing for consideration at the 10th Session of the ECCC Plenary 1–3 August 2011 (both on file with the author).

43 Cf. Internal Rules (Rev. 7), as revised on 23 February 2011, Internal Rules 104(4) and 107 (not amended).

44 Cf. Internal Rules (Rev. 8), as revised on 3 August 2011, Internal Rule 104(4) (not amended).

45 Summary of Proposed Changes, *supra* note 42, at 2.

trial and appellate proceedings in the large Case 002, featuring elderly accused persons in frail health. The SCC jurisdictional ruling during the trial would be final and relieve the TC from the need to receive submissions and settle that issue in its judgment.<sup>46</sup> An immediate jurisdictional appeal would neither suspend the trial nor create additional work for the TC, given that requests for leave would be decided by the SCC.<sup>47</sup> It would also reduce the complexity of appeals remaining for the SCC's resolution after the trial judgment.<sup>48</sup> Secondly, allowing parties to bring immediate appeals against decisions on jurisdiction would, the SCC judges argued, prevent legal errors invalidating trial judgment. The interests of procedural economy and fairness demand that contentious jurisdictional issues be settled authoritatively, definitively and as early as possible.<sup>49</sup> Rectifying the TC's jurisdictional errors during the appellate stage would be 'nearly impossible'.<sup>50</sup> Finally, the SCC judges rejected the concern that their proposal could have adverse budgetary implications, as inability to bring immediate appeals in fact has the effect of prolonging the overall life of the ECCC.<sup>51</sup>

Between 2014 and 2015, the SCC judges put forward a comparable set of Internal Rule 104(4) amendments, albeit more modest in purport. However, those were also turned down due to the TC judges' opposition. In their view, the expanded scope of immediate appeals risked slowing down the process and disrupting the trial, while the process before other judicial instances already afforded adequate protection to the rights of the accused.<sup>52</sup>

The judicial contention regarding the scope of immediate appeals spilled over from the legislative to the adjudicative domain following Ieng Sary's December 2011 appeal against the TC's dismissal of his preliminary objection. The SCC majority ruled his appeal inadmissible on the ground that Internal Rule 104(4)(a) only contemplates appeals against decisions with the effect of terminating the proceedings, as opposed to decisions regarding jurisdiction.<sup>53</sup> Two of the three international SCC judges dissented, however, seizing this opportunity to take issue, albeit indirectly, with the reasons underlying the repeated rejection by the Plenary of the SCC amendment proposals. Judge Klonowiecka-Milart and Judge Jayasinghe anchored a more expansive interpretation of the SCC jurisdiction over immediate appeals to the statutory possibility of drawing guidance from the procedural rules at

46 Proposal to amend Rule 104(4) of the ECCC Internal Rules, Memorandum by the SCC judges to the Plenary, 24 May 2011 (on file with the author), § 1.1.

47 *Ibid.*, §§ 1.2 and 1.3.

48 *Ibid.*, § 1.4.

49 *Ibid.*, §§ 2.1–2.3.

50 *Ibid.*, § 2.3.

51 *Ibid.*, §§ 4.1–4.2.

52 Email correspondence with the guest editors (on file with the author).

53 Decision on Ieng Sary's Appeal Against Trial Chamber's Decision on Ieng Sary's Rule 89 Preliminary Objections (*Ne Bis In Idem* and *Amnesty* and *Pardon*), *Nuon Chea et al.* (Case 002), E51/15/1/2, SCC, 20 March 2012, at 2 (holding that this was not inconsistent with equality of arms as the accused would be able to appeal on this issue as part of appeal against the trial judgment and that there was no general right to interlocutory appeal).

the international level.<sup>54</sup> Insofar as their arguments echo the debates at the 2011 Plenary sessions, they merit closer consideration.

The dissenting SCC judges regarded the scope of Internal Rule 104(4) to be ‘inexplicably narrow’ and inconsistent, among others, with the practice of all other tribunals, the needs of a fair and expeditious trial, and the rights of the accused.<sup>55</sup> Their central concern was that the appeals which could not be brought under Internal Rule 104(4), however urgent their resolution, would be delayed for several years until the trial judgment.<sup>56</sup> During that entire period, the accused would be suffering a serious prejudice, especially if held in custody. The risk of violating the defendant’s right to liberty in the event of the SCC’s ultimate finding that the trial should not have taken place, would require clearing this issue on appeal ‘at the earliest possible juncture’.<sup>57</sup> Furthermore, an immediate appellate resolution would have allowed reducing the length and complexity of the appeal judgment and saving resources, particularly if the trial decision were to be overturned.<sup>58</sup>

The dissenters’ proposed solution of expanding the Internal Rule 104(4) list of immediate appeals with jurisdictional issues by a SCC fiat had no traction with the rest of the Chamber and it was never adopted in subsequent appellate practice. Understandably so, as the law on the point was clear: jurisdictional appeals were inadmissible at this stage and the SCC’s previous attempts to have Internal Rule 104(4) amended in the Plenary had proven unsuccessful. The admission of such an appeal through the backdoor of SCC discretion would have been unlawful and arbitrary. It would have undermined the consistency and stability of ECCC jurisprudence and it would have been inappropriate as a matter of appellate policy.

That said, judges Klonowiecka-Milart and Jayasinghe’s reasoning as to why jurisdictional questions should be subject to immediate appeals, which largely mirrored arguments advanced during the 2011 plenary sessions, is rather compelling, unlike the countervailing rationales for rejecting the SCC’s proposals. The argument that the rights of accused are sufficiently safeguarded in the ECCC’s lower instances and do not require an additional layer of protection in the SCC is hard to square with the prejudicial effects of delaying the final settlement of jurisdictional issues until after the delivery of the trial judgment. One struggles to find a plausible explanation for the TC’s entrenched opposition to expanding the scope of immediate appeals other than that an inter-Chamber ‘turf war’ may have been behind it. It appears as if the TC were protective of its realm and reluctant to grant the SCC a broader competence to

54 Dissenting Opinion of Judges Klonowiecka-Milart and Jayasinghe, *ibid.*, §§ 1 and 6 (the SCC should be able to hear ‘any immediate appeal which concerns an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Supreme Court Chamber may materially advance the proceedings’).

55 *Ibid.*, § 3.

56 *Ibid.*, § 2.

57 *Ibid.*, § 4.

58 *Ibid.*, § 5.

intervene on jurisdictional matters while the trial was still ongoing, despite the good procedural and institutional policy reasons to do so.

In sum, there are neither plausible legal grounds nor a precedential basis in the law and practice of other international and special criminal courts for the appeals on jurisdictional issues to be reserved until after the appellate stage. On the contrary, the SCC should have been able to settle definitively and as early as possible any question casting a shadow on the TC's competence to try the accused, who would otherwise be subjected to lengthy and costly proceedings vitiated by — a potentially fatal — jurisdictional uncertainty. Concomitantly, the SCC's consideration of immediate appeals on jurisdiction during the trial phase would have not caused delays in the trial, given their lack of suspensive effect. Finally, it would have done the ECCC good to use the SCC's capacity more fully during the trial stage while reducing the scope and complexity of eventual appeals against the trial judgment.

#### 4. Appellate Review Standards and Powers

In this section, I turn to the standards and powers of appellate review at the ECCC and the question of how the SCC has given them effect in its practice. The merger of appellate and cassation functions in one instance and the strong influence of international criminal procedure on the ECCC appeals necessitated fairly liberal review standards and broad prerogatives on appeal. As elsewhere, the scope and intensity of the SCC's review depends on whether it concerns an alleged error of law or fact, as well as on the subject-matter of the decision and the appealing party.

On the issues of law, the SCC has a far-reaching review competence, being the 'final arbiter of the law applicable before the ECCC'. As such, it is bound to apply a rigorous standard of whether the TC's legal findings are *correct* as opposed to merely *reasonable*.<sup>59</sup> In order to trigger the appellate review of legal errors, the appellant should identify the alleged error and explain how it invalidates the judgment; hence not every error warrants a reversal.<sup>60</sup> The burden of proof is not 'absolute' in respect of legal errors: if the appellant's arguments are insufficient to support the contention, the SCC may still find an error for other reasons.<sup>61</sup> The SCC's finding of a legal error in the trial judgment will lead it to determine the correct legal standard and review the TC's factual findings, i.e. apply said standard to the evidentiary record and determine whether it is convinced, based on the applicable standard of proof, by the factual finding in issue before confirming it on appeal.<sup>62</sup>

Contrastingly, on the issues of fact the ambit of the SCC's review powers is more circumscribed. It will normally show deference to TC findings and apply the standard of *reasonableness* rather than *correctness*. The accused's appeals

59 *Duch* appeal judgment, *supra* note 8, § 14; Case 002/01 appeal judgment, *supra* note 2, § 85.

60 Internal Rule 105(3). *Duch* appeal judgment, *supra* note 8, § 16.

61 *Duch* appeal judgment, *supra* note 8, § 15.

62 *Ibid.*, § 16.

against a conviction must show that the TC committed a factual error creating a reasonable doubt as to the guilt, while an appeal against an acquittal is required to identify an error eliminating all reasonable doubt as to the guilt.<sup>63</sup> As the formulation of appellate grounds makes clear, not every factual error warrants reversal or amendment of the TC judgment, but only that which crosses a high threshold of occasioning a miscarriage of justice, i.e. a ‘grossly unfair outcome in judicial proceedings’.<sup>64</sup> The appellate review of alleged factual errors in the ECCC warrants a closer look, not least because this issue has proven controversial in the practice of other courts, e.g. the International Criminal Court (ICC).

In line with the established ICTY jurisprudence, which the SCC quoted at length in *Duch*, the TC’s factual finding shall not be disturbed unless it is such that no reasonable trier of fact could have reached it.<sup>65</sup> What exactly is ‘reasonable’, how it is to be gauged by an appeal court, and what expectations this test entails in terms of the reliability of fact-finding and the robustness of evidentiary assessments by a trial court, is open to interpretation. Importantly, in Case 002/01 the SCC held that the measure of reasonableness of TC factual findings is the quality of the reasoning provided with regard to the relevant evidentiary items. Where evidence is conflicting or of inherently low probative value (such as in case of out-of-court statements), the SCC would expect the TC to provide more in terms of the reasoning supporting a given factual conclusion.<sup>66</sup>

As noted, the SCC set the threshold for a reversible factual error in an appeal against conviction at the ability of the error to create a reasonable doubt as to the guilt.<sup>67</sup> Although it does not say so, upon closer scrutiny the formula used by the SCC to enunciate the standard allows for a subtle departure from the traditionally high deference standard of ‘no reasonable trier of fact could convict’ followed at the ad hoc tribunals. In my view, the SCC signalled a lower threshold for appellate intervention, which enables it to probe the TC’s factual findings more rigorously, as a matter of methodology. The SCC will determine whether the TC made a factual finding that was reasonable considering the evidence before it and whether an alleged factual error gives rise to a reasonable doubt as to the guilt inconsistent with conviction, as opposed to merely answering a more abstract and speculative question whether ‘no reasonable

63 *Ibid.*, § 18; Case 002/01 appeal judgment, *supra* note 2, § 91.

64 *Ibid.*, § 19.

65 *Ibid.*, § 17, quoting *inter alia* Appeal Judgment, *Kupreškić et al.* (IT-95-16-A), Appeals Chamber (AC), 23 October 2001, §§ 30, 32.

66 Case 002/01 appeal judgment, *supra* note 2, § 90 (‘when faced with conflicting evidence or evidence of inherently low probative value (such as out-of-court statements or hearsay evidence), . . . the Trial Chamber’s explanation as to how it reached a given factual conclusion based on the evidence in question will be of great significance for the determination of whether that conclusion was reasonable. As a general rule, where the underlying evidence for a factual conclusion appears on its face weak, more reasoning is required than when there is a sound evidentiary basis’). On the ECCC contribution to the law of evidence see, in this symposium, Y. McDermott, ‘The ECCC’s Approach to Evidence and Proof’.

67 *Duch* appeal judgment, *supra* note 8, § 18; Case 002/01 appeal judgment, *supra* note 2, § 91.

trier of fact could convict' on the basis of the evidence. The notion of an appellate court holding the evidence at trial to be conflicted and weak may entail a more intrusive review in practice than that implied by the general deference standard.

The qualified deference standard requires the SCC to verify whether guilt is the only reasonable conclusion based on the evidence before the TC and whether a conviction has been properly reached under the 'beyond reasonable doubt' standard of proof at trial. This may necessitate tighter scrutiny of the TC's factual findings and its reasoning related to evidence. On another possible interpretation, the standard of review nominally remained the same as at the ad hoc tribunals but the methodology for verifying the 'reasonableness' of the TC's factual findings became more rigorous so as to enable the SCC to trace the steps of the TC's reasoning more closely, if warranted by the sub-par quality of evidence. In my view though, the standard of review and the methodology used to apply it in a specific evidentiary context are not insulated categories, but rather communicating vessels linked through the central 'reasonableness' concept. The modification to one necessarily impacts the other.

It will not escape one's attention that a similar, more stringent approach to appellate review of alleged factual errors was adopted by the ICC Appeals Chamber majority, which acquitted Jean-Pierre Bemba Gombo in June 2018. Judges Morrison and Van den Wyngaert explained their reasons for this disposition in the following terms, which among others underscored a connection between the standard and the method, or level of intensity, of review:

We strongly believe that the Appeals Chamber cannot turn a blind eye to such obvious evidentiary problems on the basis of a deferential standard of review. The deferential standard set out in the jurisprudence of the Court does not require judges of the Appeals Chamber, if they come to the conclusion that a particular finding by the Trial Chamber fails to meet the "beyond a reasonable doubt" threshold, to ignore this and to refrain from drawing the necessary conclusions. Anything less would make appellate review a pointless rubberstamping exercise, which is not what articles 81 and 83 of the Statute plainly require.<sup>68</sup>

Similarly, in the *Bemba* judgment, the ICC Appeals Chamber held that 'the idea of a margin of deference to the factual findings of the trial chamber must be approached with extreme caution' and quoted a passage from the Case 002/01 appeal judgment on this exact issue.<sup>69</sup> The Appeals Chamber majority reasoned that the (qualified) deference standard entitles the appeals court to interfere with the TC's findings not 'only in the case where it cannot discern how the Chamber's conclusion could have reasonably been reached from the

68 Separate opinion of Judge Christine Van den Wyngaert and Judge Howard Morrison, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", *Bemba* (ICC-01/05-01/08-3636-Anx2), AC, 8 June 2018 ('*Bemba* appeal judgment'), § 14.

69 *Bemba* appeal judgment, *supra* note 68, §§ 38 and 43, quoting Case 002/01 appeal judgment, § 90.

evidence before it’, but also ‘whenever the failure to interfere may occasion a miscarriage of justice’.<sup>70</sup> In effecting this departure from its previous formulations of the applicable threshold, the Appeals Chamber did not (explicitly) take cue from the SCC, although its approach to the review of alleged factual errors strongly aligned with the SCC’s method.

According to the *Bemba* Appeals Chamber’s majority, it was not warranted to constrain its discretionary power by ‘t[ying] its own hands against the interest of justice’, particularly in the lack of the statutory requirement of appellate deference or the duty to apply its specific interpretation.<sup>71</sup> That said, this standard stops short of allowing a *de novo* assessment of evidence. The purpose is not to determine whether the Appeals Chamber would have reached the same factual conclusion as the TC did, but ‘whether a reasonable trial chamber properly directing itself [to the applicable standard of proof] could have been satisfied beyond reasonable doubt as to the finding in question, based on the evidence that was before it’.<sup>72</sup>

Interestingly, the *Bemba* Appeals Chamber majority drew heavily upon the SCC’s reasoning in formulating the standard of reasonableness of factual findings, as in the test of whether a factual finding could be made by a ‘reasonable trial chamber’. Referring to the Case 002/01 appeal judgment as persuasive, the Appeals Chamber held that it would have regard not only to the evidence the TC had relied upon, but also to its reasoning and analysis of that evidence, in determining whether ‘the evidence was such as to allow a reasonable trial chamber to reach the finding it did beyond reasonable doubt’. If the supporting evidence is *prima facie* weak or contradictory and the TC’s reasoning for treating that evidence as persuasive deficient, the Appeals Chamber might conclude that the respective factual finding was ‘such that no reasonable trier of fact could have reached’.<sup>73</sup> For the ICC Appeals Chamber, this more rigorous method for the assessment of the reasonableness of the impugned factual findings, which is in line with the SCC’s approach, is a matter of the correct application of the standard of proof, not substitution of its own factual findings for those of the TC.<sup>74</sup>

In Case 002/01 appeal, the deference standard of review for factual errors came to be challenged by the defence on institutional grounds. Nuon Chea argued that since the SCC combined the functions of both appellate chamber and final instance, it must perform a more incisive, *de novo* review of the TC’s factual findings, thereby tracking the Cambodian criminal procedure more closely than the common law influenced deferential approach.<sup>75</sup> The SCC

70 *Ibid.*, §§ 39–40. Cf. Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, *Lubanga* (ICC-01/04-01/06-3121-Red), AC, 1 December 2014, § 21; Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled “Judgment pursuant to article 74 of the Statute”, *Ngudjolo* (ICC-01/04-02/12-271-Corr), AC, 7 April 2015, § 22.

71 *Bemba* appeal judgment, *supra* note 68, § 41.

72 *Ibid.*, § 42.

73 *Ibid.*, §§ 44–45.

74 *Ibid.*, § 46.

75 Case 002/01 appeal judgment, *supra* note 2, § 92.

dismissed this on the ground that the ECCC Law established a 'distinct review procedure' not covered by the Cambodian Code and more attuned with the international rules embodied in the ICTY and ICTR appellate law and practice.<sup>76</sup>

According to the SCC, the breadth and complexity of trials regarding international crimes render the idea of the appeal as a *de novo* hearing 'both impracticable and undesirable', not least because this would have the effect of prolonging the process. Moreover, the unavailability of appeal from the SCC judgments in the two-tier system precludes it from entering a new conviction and sentence on appeal, as a matter of ensuring expeditiousness and protecting defence rights. Since the SCC is also barred from remanding the case back to the TC, the appellate review can only have a modest corrective function. It must be limited to verifying whether the factual conclusions of the TC as the principal fact-finder are not manifestly unreasonable; hearing evidence *de novo* and substituting its own factual findings for those of the TC cannot be afforded.<sup>77</sup>

The SCC refusal to adopt a more stringent *de novo* review standard in relation to alleged factual errors, which would have enabled it to engage in a wholesale reassessment of evidence in Case 002/01, is justified. This is so considering the mere corrective purpose of the ECCC appellate review, the potentially prejudicial effects of the *de novo* examination, and the need to preserve efficiency given the ECCC's limited lifespan and resources. Even though the SCC has extensive fact-finding powers on appeal and may call and examine evidence,<sup>78</sup> turning the appellate stage into a trial *de novo* is neither necessary nor something the ECCC system could afford, given the size of the case, finite resources, and defendants' life expectancy.

In Case 002/01 judgment, the SCC's analysis of the evidence relied upon by the TC was no *de novo* assessment. In fact, the SCC proceeded, at least nominally, under the traditional 'no reasonable trier of fact' standard, as multiple references to it in the judgment's analytical sections attest. That said, the SCC's undeniably also applied a fairly rigorous method of review of the TC's factual findings based on respective evidence. This led it on a number of occasions to establish that the TC's findings rested on a weak evidentiary basis and therefore fell short of the standard of 'reasonableness'.<sup>79</sup> As a result, the SCC reversed convictions for some of the most serious charges, such as the crimes against humanity of extermination, murder and persecution on political grounds.<sup>80</sup>

<sup>76</sup> *Ibid.*, § 93.

<sup>77</sup> *Ibid.*, § 94.

<sup>78</sup> See notes 26–29.

<sup>79</sup> Case 002/01 appeal judgment, *supra* note 2, §§ 537, 631, 884, 891, 904, 914, 922, 960, 965–970.

<sup>80</sup> Case 002/01 appeal judgment, *supra* note 2, §§ 529–541, 560–562, 972 (reversing convictions for the crime against humanity of extermination).



## 5. Personal Jurisdiction, ‘Most Responsible’ and Judicial Review

In appraising the SCC’s track record, numerous subject-matter areas in which it has made important contributions would warrant consideration. Suffice it to mention its role in determining Case 002’s structure,<sup>81</sup> decisions on continuance or termination of proceedings,<sup>82</sup> its role at sentencing,<sup>83</sup> and, more problematically, its decision not to grant remedy for the violation of the right to liberty not attributable to the ECCC.<sup>84</sup> Rather than purporting to revisit these segments of SCC adjudication in any detail, this section is directed to the Chamber’s intervention in relation to questions of personal jurisdiction, prosecutorial focus on those ‘most responsible’, and the scope of judicial review of discretionary decisions regarding the selection of suspects. The reason for this choice is two-fold. First, this is an essential, even existential, area of SCC jurisprudence, which is determinative of broader issues, such as the scope of the ECCC’s mandate and its *raison d’être*. Secondly, it is in this domain that the ECCC’s constitutional problems touched upon in Section 2 above, namely the lack of a doctrine of binding appellate precedent and the risk of inconsistent jurisprudence, have come to the fore.

In *Duch* the SCC was seized of the question whether the defendant fell within the ECCC’s personal jurisdiction.<sup>85</sup> The defence argued that Duch did not, on the following grounds. The parameters of ‘senior leaders of Democratic Kampuchea’ and ‘most responsible for crimes’, stipulated yet not defined in the ECCC constituent documents,<sup>86</sup> should be read as referring to one category of suspects, i.e. senior leaders who were most responsible for the crimes. Since

81 E.g. Decision on the Co-Prosecutor’s Immediate Appeal of the Trial Chamber’s Decision Concerning the Scope of Case 002/01, *Nuon Chea et al.* (Case 002/01), E163/5/1/13, SCC, 8 February 2013; Decision on Immediate Appeals against Trial Chamber’s Second Decision on Severance of Case 002, *Nuon Chea and Khieu Samphan* (Case 002/02), E284/4/8, SCC, 25 November 2013; Decision on Civil Parties Immediate Appeal Against the Trial Chamber’s Decision on the Scope of Case 002/02 in relation to the Charges of Rape, *Nuon Chea and Khieu Samphan* (Case 002/02), E306/7/3/1/4, SCC, 12 January 2017; Decision on Khieu Samphan’s Immediate Appeal against the Trial Chamber’s Decision on Additional Severance of Case 002 and Scope of Case 002/02, *Nuon Chea and Khieu Samphan* (Case 002/02), E301/9/1/1/3, SCC, 29 July 2014.

82 Decision on Immediate Appeal against the Trial Chamber’s Order to Release the Accused Ieng Thirith, *Nuon Chea et al.* (Case 002), E138/1/7, SCC, 13 December 2011 (‘*Ieng Thirith* release appeal decision’).

83 *Duch* appeal judgment, *supra* note 8, §§ 363–383.

84 *Ibid.*, §§ 389–405 and Partially Dissenting Joint Opinion of Judges Agnieszka Klonowiecka-Milart and Chandra Nihal Jayasinghe. See F.C. Eckelmans, ‘The *Duch* Case: The ECCC Supreme Court Chamber’s Review of Case 001’, in Meisenberg and Stegmiller (eds), *supra* note 7, 159–180.

85 *Duch* appeal judgment, *supra* note 8, §§ 21 *et seq.*

86 ‘[S]enior leaders of Democratic Kampuchea and those 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’. See Arts 1, 5(3), and 6(3) Agreement; Arts 1 and 2 new ECCC Law.

Duch did not qualify as a senior leader of Khmer Rouge, the ECCC had no jurisdiction.<sup>87</sup> However, the TC ruled that the two categories of ‘senior leaders’ and ‘most responsible’ constituted personal jurisdiction requirements and referred to two distinct groups, concluding that Duch was the one ‘most responsible’ and thus properly within the ECCC jurisdiction.<sup>88</sup>

In reviewing the latter set of findings, the SCC undertook a survey of the ECCC’s legislative history.<sup>89</sup> It found that the notion of ‘senior leaders of Democratic Kampuchea and those who were most responsible for the crimes’ refers to two non-dichotomous categories of Khmer Rouge officials: senior *and* non-senior Khmer Rouge leaders who were among the most responsible.<sup>90</sup> Being a senior leader, the SCC ruled, cannot be the sole reason for a person to qualify as an ECCC suspect. This is a pragmatic but not necessarily the most textual interpretation of the legislative formula, which on the face of it does not exclude senior leaders *not* among the most responsible. According to the SCC, the dual common denominator for both categories of eligible suspects is, firstly, belonging to the Khmer Rouge officials (senior or otherwise) and, secondly, being among the most responsible for the crimes — the two cumulative, rather than disjunctive, criteria.<sup>91</sup>

The second issue was to determine whether the ‘senior leaders and those most responsible’ constitutes a personal jurisdictional requirement. The SCC relied upon the interpretive rules of the 1969 Vienna Convention on the Law of Treaties.<sup>92</sup> It inquired whether the common-denominator characteristics of ECCC suspects — ‘Khmer Rouge officials’, ‘those among the most responsible’ and ‘senior leaders’ — are justiciable, or proper for judicial determination. The qualification of ‘Khmer Rouge official’ was found to be a jurisdictional requirement, being ‘a question of historical fact that is intelligible, precise, and leav[ing] little or no room for the discretion of the Trial Chamber’.<sup>93</sup> By contrast, the ‘most responsible’ parameter was deemed a non-justiciable matter of investigative and prosecutorial policy.<sup>94</sup> The SCC held that construing it otherwise would not comport with the object and purpose of the ECCC Agreement and lead to an unreasonable result.

87 *Duch* appeal judgment, *supra* note 8, § 23.

88 Judgment, *Kaing Guek Eav* (Case 001), E188, TC, 26 July 2010, §§ 14–25.

89 *Duch* appeal judgment, *supra* note 8, §§ 46–51 and 53–56.

90 *Ibid.*, §§ 52 (given the ‘intention of the United Nations and the Royal Government of Cambodia to focus finite resources on the criminal prosecution of certain surviving officials of the Khmer Rouge’, ‘the term excludes persons who are not officials of the Khmer Rouge’) and 57.

91 *Ibid.*, §§ 57 and 60.

92 *Ibid.*, § 59, referring to Arts 31(1) and 32 of the Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, 1155 UNTS 331. The SCC’s application of the VCLT as such — as opposed to its rules, which have acquired the status of customary international law governing the interpretation of treaties such as the Agreement — was erroneous. The VCLT only applies to the interpretation of certain treaties between states and not to treaties between states and international organizations: see Art. 2(1)(a) and 3 VCLT.

93 *Duch* appeal judgment, *supra* note 8, § 61 and fn 115.

94 *Ibid.*, § 63. See also *ibid.*, §§ 69, 74, and 79.

Firstly, the SCC held, the TC lacks ‘an objective method ... to decide on, compare, and then rank the criminal responsibility of all Khmer Rouge Officials’. Secondly, such a jurisdictional requirement would be contrary to the principle that the position or rank shall neither relieve one of criminal responsibility nor mitigate punishment as that would be tantamount to indirectly permitting a superior orders defence in breach of Article 29 of the ECCC Law. Thirdly, unlike the temporal and subject-matter jurisdiction parameters which are verifiable and ‘involve pure questions of law or fact that are eminently suitable for legal determination’, the ‘most responsible’ criterion entails a large amount of discretion and is anything but ‘sharp-contoured, abstract and autonomous’.<sup>95</sup> The determination of whether a person is among the ‘most responsible’ can properly be made by the CIJs and the CPs in the exercise of their competences.<sup>96</sup> Having reached its conclusion, the SCC felt compelled to go out of its way and provide further justifications for its stance on ‘most responsible’ as an element of ‘investigatorial and prosecutorial policy’ in an *obiter dictum* drawing parallels with the interpretation and operation of the same parameter in other tribunals.<sup>97</sup>

The third related notion, ‘senior leader’, was found not to be sharp-contoured and precise enough for a jurisdictional criterion. Senior leadership was not limited to former functionaries of the CPK Central and/or Standing Committees, which would, by contrast, have been justiciable as ‘a precise question of historical fact’.<sup>98</sup> Flexible and hence not suitable to serve as a jurisdictional requirement, the ‘senior leader’ parameter is rather a matter of investigative and prosecutorial policy guiding the exercise of discretion by the CPs and CIJs considering the resource constraints and the mandate of the ECCC.<sup>99</sup>

The only (‘extremely narrow’) ground for the TC’s review of the CPs and the CIJs’ decisions on the selection of suspects is the exercise of discretion ‘in bad faith or according to unsound professional judgment’.<sup>100</sup> The TC’s power to review investigative and prosecutorial discretion on this ground is limited as a consequence of those officials’ independence and broad discretion in the performance of their statutory duties. Therefore, the SCC concluded, the TC need not even inquire into whether Duch was a senior leader or among the most responsible and Duch’s ground of appeal on personal jurisdiction was untenable.<sup>101</sup> But instead of correcting the TC’s legal error which occasioned its review of non-justiciable issues and which encroached on the CPs and CIJs’ prerogatives, the SCC pronounced — going against its own logic — that the

95 *Ibid.*, § 62.

96 *Ibid.*, §§ 64–65 (the PTC’s role in settling disagreements does not render ‘most responsible’ a jurisdictional requirement) and 70.

97 *Ibid.*, §§ 69 and 71–73, discussing Rules 11*bis* and 28 ICTY and ICTR RPE, Art. 1(1) SCSLSt., and related jurisprudence.

98 *Ibid.*, § 76.

99 *Ibid.*, § 78.

100 *Ibid.*, § 80.

101 *Ibid.*, § 81.

TC's analysis was correct on the merits and demonstrated that the case satisfied the applicable policy criteria.

How the SCC's rationales on this matter fared in later cases and before the judges down the ECCC hierarchy is indicative of its role and impact as the 'final instance'. In Case 004/1, in a rare show of agreement, the CIJs dismissed charges against Im Chaem, having concluded that she fell outside of the ECCC's personal jurisdiction.<sup>102</sup> Interestingly, the CIJs took issue with the SCC's reasoning in part of the high threshold it set for the judicial review of prosecutorial discretion in the selection of suspects, its statement of irrelevance of comparisons among suspects to determine those 'most responsible', and the qualification of personal jurisdiction parameters as non-jurisdictional.<sup>103</sup> According to the CIJs' (somewhat inchoate) rationales, the margin of appreciation to be accorded to the CPs and CIJs in their selection policies was 'wide but not entirely non-justiciable'. Nevertheless, CIJs decided to follow the substance of SCC case law 'by reason of practical judicial deference to the Court's supreme appellate body' and in the interest of 'clarity and uniformity of the law in the environment as closed as that of the ECCC'.<sup>104</sup> They did so decidedly not out of a sense of legal obligation to follow the SCC's *ratio decidendi*.

When seized of the International CP's appeal against the *Im Chaem* closing order, the PTC nominally adopted the SCC's deferential test for the review of discretionary decisions on the selection of 'those most responsible'. However, without much discussion or analysis, it essentially recast that high threshold into a standard enabling a more intrusive judicial review.<sup>105</sup> In applying that standard to determine whether Im Chaem was among those most responsible considering the gravity of crimes and the level of responsibility, the international PTC judges further found that CIJs had failed to fully investigate her alleged crimes and to take into account the full magnitude of their gravity and of her role and responsibilities in the regime.<sup>106</sup> This led them to disagree with the CIJs' conclusion that Im Chaem fell outside the ECCC personal jurisdiction and they held instead that she should have been committed for trial.<sup>107</sup>

At the heart of this difference of views lies the ubiquitous conundrum about the criteria for choosing targets for international prosecution, as well as the appropriate scope of judicial review over such discretionary decisions. The

102 Closing Order (Reasons), *Im Chaem* (Case 004/1), D308/3, OCIJ, 10 July 2017 ('*Im Chaem* closing order'), §§ 1 and 325.

103 *Ibid.*, §§ 9–10 (the threshold of 'abuse of discretion' based on bad faith or unsound professional judgement implies the existence of justiciable boundaries for distinguishing good faith and sound judgement from arbitrariness).

104 *Ibid.*, § 10. See also *Yim Tith* closing order, *supra* note 5, §§ 27–32 (adopting the SCC's reasoning in Case 001, as qualified or supplemented by considerations set out in the *Im Chaem* closing order, *supra* note 102, §§ 992–999).

105 Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), *Im Chaem* (Case 004/1), D308/3/1/20, PTC, 28 June 2018, §§ 20–21 ('While the flexibility of these terms inherently requires some margin of appreciation on the part of the [CIJs], this discretion is not unlimited and does not exclude control by the appellate court').

106 *Ibid.*, Opinion of Judges Baik and Beauvallet, §§ 321–338.

107 *Ibid.*, § 339.

question of who falls within the category of those bearing the ‘greatest responsibility’ for the purpose of selecting suspects or determining gravity as part of admissibility of (potential) cases, is the subject of extensive jurisprudence of the ad hoc tribunals, the Special Court for Sierra Leone (SCSL) and the ICC as well as of eternal policy debates.<sup>108</sup> The ‘most responsible’ criterion everywhere serves as prosecutorial guidance rather than a jurisdictional requirement, in line with the SCC’s finding.

A related question is whether laying down some justiciable and objectively verifiable yardsticks for determining the category of individuals falling within that class is possible. At the ICC, the notion of those bearing greatest responsibility gradually took contours, leading to some shared understanding,<sup>109</sup> even though its practical application (and that of ‘gravity’) has not been without controversy, as attested by the tug of war between the ICC PTC and the Prosecutor in the *Registered Vessels*.<sup>110</sup> Nonetheless, demarcating the class of ‘most responsible’ by having recourse to some general and objective criteria, is not impossible.<sup>111</sup> Although the definition may be thin, requiring a case-by-case determination based on the evidence and falling short of a precise and calculable threshold, it will still be sufficiently objective and sharp-contoured so as to be justiciable.

This inevitably raises a question about the validity of, and reasons for, the SCC’s qualification of the ‘most responsible’ parameter as non-justiciable and its reluctance to lay down the criteria to guide that assessment. The SCC did not seek to assert a broader judicial prerogative to have a say on the selection of suspects, espousing instead a *laissez faire* attitude to CPs and CIJs’

108 Rules 11bis and 28 ICTY RPE; Art. 1(1) SCSLSt.; Arts 17(1)(d) and 53(1)(c) ICCSt.; Reg. 34(1) of the Regulations of the ICC Office of the Prosecutor (OTP); ICC OTP, Strategic Plan 2019–2021, 17 July 2019, § 24. See further C.C. Jalloh, ‘Prosecuting Those Bearing “Greatest Responsibility”: The Lessons of the Special Court for Sierra Leone’, 96 *Marquette Law Review* (2013) 863; J. Rikhoff, ‘Who Are the Most Responsible in International Criminal Law?’ 3 *PKI Global Justice Journal* (2019) 77.

109 ICC OTP, *Policy Paper on Preliminary Examinations*, November 2013, §§ 42, 54, 49, 66, 103; ICC OTP, *Policy paper on case selection and prioritization*, 15 September 2016, §§ 42–44; Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d’Ivoire, *Situation in Côte d’Ivoire* (ICC-02/11-14-Corr), PTC III, 3 October 2011, §§ 204–205 (‘the individuals likely to be the focus of the Prosecutor’s future investigations are high-ranking political and military figures who allegedly played a role in the violence’); Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan, *Situation in the Islamic Republic of Afghanistan* (ICC-02/17-33), PTC II, 12 April 2019, §§ 80–86; Décision relative à l’exception d’irrecevabilité pour insuffisance de gravité de l’affaire soulevée par la défense, *Al Hassan* (ICC-01/12-01/18-459), PTC I, 27 September 2019, §§ 50–52.

110 Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia* (ICC-01/13-34), PTC I, 16 July 2015, §§ 21–24.

111 *Policy paper on case selection and prioritization*, *supra* note 109, § 43 (‘the extent of responsibility of any identified alleged perpetrator(s) will be assessed on the basis of, inter alia, the nature of the unlawful behaviour; the degree of their participation and intent; the existence of any motive involving discrimination; and any abuse of power or official capacity’).

discretionary decisions. Thus it has opened itself to the criticism of abdicating judicial control and succumbing to *Realpolitik*. The CIJs did not say so in the *Im Chaem* closing order, but the sentiment lurks between the lines.<sup>112</sup> Hence, the critique goes, the SCC deliberately circumvented an essentially *legal*, albeit politically charged, issue of whether someone is among the ‘most responsible’ — whereon the fate of the contested Cases 003-004 would rest — by holding it non-reviewable judicially.

However, such reading of the SCC’s motivations would hardly be fair, let alone most charitable. The legal, cognitive and other practical difficulties of performing judicial control in respect of discretionary decisions to charge and prosecute, to which the SCC alluded, must readily be acknowledged. Even if spelling out the meaning of ‘greatest responsibility’ in objective, clear and precise terms is possible, judicial review would not necessarily be the best vehicle to gauge and apply it. It will be inherently challenging for the judges to meaningfully review the CIJs and CPs’ discretionary decisions to target someone for prosecution. Such decisions are not only case-dependent and fact- and evidence-rich, but often also essentially extra-legal, policy- and resource-based, determinations, which judges are not best placed to make.

Furthermore, there are significant uncertainties as to how any objective (and unavoidably thin) criteria of the ‘most responsible’ should be operationalized in judicial review. Comparable figures or crimes will typically serve as points of reference in order to determine the relative gravity or level of responsibility.<sup>113</sup> The selection of such points of comparison and delimitation of a larger universe of actors and criminality within which gravity of a specific case is assessed, will inevitably be a matter of prosecutorial discretion. Having no access to the results of a broader investigation and thus missing that fuller picture, the judges will be operating under serious cognitive constraints when attempting to verify the prosecuting organ’s ‘most responsible’ finding. Having regard to these difficulties, other than a disconcerting manifestation of judicial restraint, the SCC’s deferential standard of judicial review of investigative and prosecutorial discretion in determining the ‘most responsible’ persons, should be seen rather as a tribute to judicial pragmatism.

## 6. Conclusion

For as long as the ECCC lingers in its dusk years and far beyond, there will be a need for a critical appraisal of its mixed legacies. Its unique experience is a source of valuable procedural and institutional lessons both present and future international and special criminal jurisdictions will do well to learn from. The ECCC’s in-built design flaws and less than ideal circumstances in which it has carried out its mandate are on the record. It would be unfair if the history

112 E.g. *Im Chaem* closing order, *supra* note 102, § 9 (‘The SCC cannot have had in mind an entirely free-wheeling selection policy approach by the OCP or OCIJ’).

113 *Ibid.* (‘disagree[ing] in principle with the argument that comparisons to other persons are not appropriate or feasible’).

judged this tribunal too harshly. To its credit, the ECCC has demonstrated a remarkable resilience working through its uneasy docket in the face of adversity. All things considered, and to the extent that comparisons with other international courts residing in the relative comfort of financial stability hold, the ECCC track record is rather formidable.

The SCC as its appellate and final instance should be credited with playing a part in these accomplishments. Granted, the positions the SCC occasionally took are not unimpeachable and have been subject to contestation, including from within the ECCC's judiciary. On balance, however, the SCC has enriched the ECCC adjudication and international criminal jurisprudence at large. A reader of the SCC's case law will not fail to notice its consistently high calibre. A degree of sophistication, solid reasoning, erudite referencing to judicial rationales elsewhere, and rootedness in judicial restraint and pragmatism are the trademark characteristics of its style. In terms of the quality of appellate jurisprudence, international and hybrid justice has arguably known worse.<sup>114</sup>

The overly narrow scope of interlocutory (immediate) appeals, wherefrom the appeals on jurisdiction were excluded, is one outstanding element of the SCC's appellate regime that would not be advisable to replicate in future hybrid jurisdictions. It not only departs from the appellate law and practice elsewhere, but it is also potentially prejudicial to the rights of the defendant and inconsistent with the efficiency concerns, which all militate in favour of an early and definitive disposition of jurisdictional appeals. The SCC's repeated attempts to have the Internal Rule amended in order to acquire the immediate competence over such appeals have been to no avail. The clear benefits for the ECCC system notwithstanding, the TC judges did not wish the SCC to be able to rule on jurisdiction prior to the trial judgment and their persistent objections effectively blocked the SCC's rule amendment initiatives. Given the lack of compelling reasons for such an opposition, I am led to think that it was fuelled by a struggle for docket — a counterproductive power dispute of the kind that at times besets judiciaries in the international and hybrid courts.

The SCC's approach to the appellate review of the alleged errors of fact, which arguably departs from the common law based approach in the ad hoc tribunals requiring an appellate court's greater deference to the trial court's factual findings, may be exemplary of a larger imprint the Chamber has had on international criminal jurisprudence. The deference test it articulated demands the trial court to provide stronger reasoning where evidence relied upon for conviction is weak or deficient. This qualified standard enables the appellate instance to interfere with the factual findings at trial not just when no reasonable trier of fact could have reached the relevant finding, but when the alleged factual error gives rise to a reasonable doubt as to the guilt inconsistent with conviction, in order to prevent a miscarriage of justice. With its inquisitive approach to assessing 'reasonableness' based on the evidence at

114 See e.g. S. Vasiliev, 'Cure Worse than Disease? Comments on Four Final Decisions of the Court of Appeal of East Timor Concerning Serious Crimes', available online at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1718572](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1718572) (visited 28 April 2020).

hand, the SCC heralded the trend of a more rigorous appellate review of errors of fact. It may have thereby sowed the seeds of the ICC's move away from the unqualified deference principle which sealed the outcome of the *Bemba* appeal.

Finally, one contentious aspect of the SCC's track record is its stance on the non-justiciability of the 'most responsible' parameter, which it held to constitute a guideline for discretionary selection decisions as opposed to a personal jurisdiction criterion. That position may be censured as manifesting an excessive judicial restraint or even judicial timidity. It may be considered to have been shaped by the desire to stay away — and disengage the ECCC judiciary — from the politically sensitive determinations consequential for the Tribunal's caseload and institutional prospects. The concern about judges making decisions on the selection of suspects and thus opening themselves to (the criticism of) politicization may indeed have played a role. But it is at least as equally plausible that the SCC simply did not deem it realistic or appropriate for the judges to legislate, let alone enforce, some sharp-relief contours of the 'most responsible' class. With judicial pragmatism having lately come to be associated with suspect dealings and unholy compromises in international criminal justice, the SCC's would appear to be a more principled and less objectionable of its forms.