

Procedural Justice: A Exploration of the ECCC’s Interim Appellate Review Regime

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The legitimacy of proceedings at the Extraordinary Chambers in the Courts of Cambodia (ECCC) will be judged, in large part, on its ability to ensure procedural justice, not just for the victims of the Khmer Rouge, but for the accused as well. The ability of the parties to a proceeding to request an interlocutory appeal is an important component of procedural fairness. An interlocutory appeal, also referred to as interim review, is an appeal of a non-final decision while the proceedings are still in progress. In international criminal proceedings, interlocutory appeals operate as a procedural check where the rights of a party to the proceedings are at risk of being violated by a decision of the court. Though this remedy is universally deemed exceptional in criminal proceedings, many international criminal courts have permitted the parties to request interim review of a wide range of issues.

In establishing rules for interlocutory review, or an interim review regime, international and hybrid national/international courts must, not only, make accommodations for the unique challenges present in international criminal proceedings, but they must also balance competing interests, namely the Defense’s right to a fair trial and right to an expeditious trial. However, the ECCC’s interim appeal regime provides insufficient protection for the rights of the Defense and is inconsistent with international practice. This article examines a number of these concerns and explores some corrective measures the ECCC could adopt.

1. The ECCC’s should not have a restrictive interim appeal regime and a restrictive final appeal regime

At the ECCC, the Defense only has limited rights to appeal interim decisions.

Defendants at the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR, collectively known as the “Ad Hoc Tribunals”), and the Special Court for Sierra Leone (SCSL) have greater rights of appeal. The ECCC’s restrictive regime is not well suited for the its similarly restrictive regime for appellate review of *final decisions*. To ensure that all decisions involving issues of fairness can be reviewed, without unduly delaying proceedings, a permissive interim appeal regime should be coupled with a restrictive final appeal regime, or vice versa.

Before the amendments to the ECCC Internal Rules in 2008, the accused could request an appeal at judgment of “any issues of fact and law, against decisions of the Trial Chamber.” However, after these amendments, this broad right to appeal was considerably restricted. Currently, the Supreme Court Chamber will only hear final

appeals on the following grounds: “a) an error on a question of law invalidating the judgment or decision; or b) an error of fact which has occasioned a miscarriage of justice.” Additionally, the amended rules call for higher standards of admissibility for appeals at the final judgment stage. No longer can the accused submit a brief request, containing the reasons for the appeal; the new provisions require that the accused either specify the alleged error of law *and* demonstrate how it invalidates the decision or specify the alleged error of fact *and* demonstrate how it occasioned a miscarriage of justice. Each ground of appeal must be supported with arguments and authorities.

This move toward a restrictive approach to appeals at the final judgment stage should have triggered a more permissive approach to interim appellate review for the Defense. Where there is no right during the trial or after the trial to request a review of a matter involving the fundamental rights of the accused, the legitimacy of the entire proceedings may be questioned. Matters concerning the Defense’s right to an expeditious trial and the interference with the Defense’s ability to develop a defense strategy, among others, may not be afforded appellate review at any stage of the proceedings.

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

The ECCC limits the Defense’s right to appeal interim decisions, but does not limit the Prosecution’s rights. Neither the ICTY, the ICTR, the SCSL, nor the International Criminal Court (ICC) limit the appeal rights of the accused with the respect to those granted the Prosecution. Further, none of these other courts uses a regime for appellate review of *final judgments* that is as restrictive and inflexible as the one in place at the ECCC. Instead they appear to approach appellate review holistically, by permitting appellate review of fundamental issues at the final judgment stage where it is unavailable at the interlocutory stage.

For example, the ICC, which has the most restrictive interim review regime, appears, at least facially, to take the most permissive approach to appeals at the final judgment stage. Its regime for final appellate review permits appeals of the following: (i) procedural error, (ii) error of fact, (iii) error of law, or (iv) any other ground that affects the fairness or reliability of the proceedings or decision. A requirement that the error of law invalidate the decision and that the error of fact occasion a miscarriage of justice might be considered a heightened standard for errors of law and fact. Unlike the ECCC, the ICC does not require this heightened standard. Moreover, the ICC permits appellate review of procedural errors and *any other ground* affecting the proceedings fairness and reliability, a term that can be interpreted quite broadly.

The other courts discussed in this article also have more permissive final appellate regimes. The SCSL, for instance, permits the review of procedural errors, in addition to the grounds permitted under the ECCC. Though the Ad Hoc Tribunals also require that the error of law invalidate the decision and that the error of fact occasion a miscarriage of justice, they differ from the ECCC in one important way. The ICTY and ICTR Appeals Chambers (AC) are allowed to vary the grounds for final appeals, upon a good showing.

This not only gives the court some flexibility, but it also appears to permit the appeal of certain issues at the final judgment stage that were not appealable during the trial.

Appellate review at the ECCC is also inconsistent with the practice in the French system. French courts “look at the fairness of procedures globally, allowing the absence of one guarantee to be counterbalanced by the existence of another.” Though, like the ECCC, the French criminal system restricts the accused’s right to interim review, what distinguishes the French civil system from the ECCC is that both the Prosecution and the Defense can initiate a full review of the facts and law of the case at the final judgment stage. This would be like getting a new trial. Issues that could not be reviewed during the first trial, will be reviewed at the second. This counter-balancing is absent from the ECCC’s appellate regime.

III. The ECCC’s restrictive approach to interim review interferes with the defense’s right to a fair trial

Historically, efforts by defense lawyers to provide adequate representation for their clients in international criminal proceedings have been obstructed by a lack of human and economic resources compared to those afforded the prosecution. Hence, at the “heart” of modern international criminal justice is the principle of equality of arms, a component of the right to a fair trial. The principle implies that “each party must be afforded a reasonable opportunity to present his case — including his evidence — under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.” The following subsections will explore two instances in the ECCC’s pre-trial proceedings where the Defense’s restricted access the interim appellate review places it at a disadvantage in relation to the Prosecution.

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

At the ECCC, the Defense is not permitted to conducted its own investigation; it may only request that the Office of the Co-Investigating Judges (OCIJ) undertake certain investigative actions or pursue additional expert reports on its behalf. Though the OCIJ is not required to pursue these requests, the Defense is given a right to appeal the refusal. However the Defense has no right to challenge the *manner* in which the request, if accepted, is satisfied.

According to the ECCC Internal Rules, the OCIJ may delegate investigative tasks to the Judicial Police or the ECCC Investigators. The Judicial Police operates under the *sole instructions* of the Co-Prosecutors during the preliminary investigation stage, the OCIJ during the judicial investigation stage, and the Pre-Trial Chamber (PTC) during supplementary investigations. The Judicial Police are not permitted to seek or take orders from any other person in carrying out their investigative functions. Nor are the Judicial Police permitted to question the accused. Similarly, the ECCC Investigators are to conduct their investigations in accordance with the requests of the Co-Prosecutors or the OCIJ, depending upon the stage of the proceedings, and are not permitted to question the

accused.

Should the Defense request that the OCIJ pursue a particular investigative action and should the OCIJ agree to pursue that lead, there is no guarantee that the lead will be pursued in a manner most helpful to the accused. Moreover, there is no remedy to through which the Defense can seek an expanded or altered focus for the investigative action. Without a more expansive right to interim appellate review, the Defense's ability to present its case is compromised.

The ability of the Defense to influence the investigation or the evidence upon which the trial will be based is greater at international courts. At the ICC, the Defense is also not involved in pre-trial investigations. Nonetheless, it may fully challenge the evidence and provide its own evidence during the confirmation hearing. It may also request approval to appeal any pre-trial decision that "would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial." Similarly, the Ad Hoc Tribunals do not permit the Defense to participate in the investigation; however, the Defense may request an interlocutory appeal to challenge the investigative action.

Notably, the lack of control over the manner in which an investigation is conducted is a common criticism of the French criminal system, upon which Cambodian Law and Internal Rules are based. Though the investigating police are operating under the judge's orders, even the judge "cannot ensure that such orders are fully complied with." The ECCC's adoption of this French law feature without adapting it to address the investigative challenges of international proceedings and the heightened necessity for equality of arms in international criminal proceedings is problematic.

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

At the ECCC, the Closing Order is functionally equivalent to an indictment. The Closing Order contains the material facts of the indictment, their legal characterization, the relevant criminal provisions, and the nature of the accused's criminal responsibility.

While the Prosecution is permitted to appeal the Closing Order issued by the OCIJ, the Defense cannot. This places the Defense on unequal footing with the Prosecution and hampers the Defense's ability to adequately prepare its case.

Errors in the Closing Order with the potential to vastly alter the nature of the proceedings and the legal strategies of the parties ought to be remedied by interim review. However, under the Internal Rules, only the Prosecution is authorized to challenge these types of errors. The practice in other international criminal courts with respect to the indictment and procedures for confirming charges sheds light on the significance of the Defense's inability to question the contents of the Closing Order at the ECCC. At the ICC, the charges against the accused must be confirmed in a hearing before he or she can be brought to trial. However, prior to the confirmation hearing, the Defense must receive a copy of the document containing the charges and information regarding the evidence to

be used in support of those charges. At the confirmation hearing, the Defense may: (a) object to the charges, (b) challenge the evidence presented by the Prosecutor, and (c) present new evidence. At the ICTY and ICTR, the Defense may challenge the form or substance of the indictment via interlocutory appeal.

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

IV. How might the ECCC correct these concerns?

As discussed above, the ECCC's approach to interlocutory review may be compromise the legitimacy and fairness of the proceedings. However, if the ECCC were to shift from its current position to a more intermediate one, some of these concerns, such as the equity between the Prosecution and the Defense, could be addressed and possibly eliminated.

This section will explore three ways in which the ECCC can achieve a more intermediate approach to interlocutory appeal: the adoption of discretionary review, the adoption of the fast-track mechanism, and the use of broad statutory interpretation.

(a) Adopt a provision for discretionary review

Absent from the ECCC rules, but available at all international courts is a mechanism for discretionary interlocutory appeals — appeals that are granted based on the judgment, or opinion, of the chamber. The ICC and the Ad Hoc Tribunals use similar language to grant discretionary power to the Appellate Chamber to review decisions involving issues that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of Chamber, an immediate resolution may materially advance the proceedings may be accepted for appeal. The SCSL employs two separate standards, depending upon whether the issue arises from a pre-trial decision (preliminary) or a trial decision (non-preliminary).

Preliminary issues that “significantly affect the fair and expeditious conduct of the proceedings or the outcome of a trial” may be referred directly to the Appeals Chamber for adjudication. Non-preliminary decisions, “in exceptional circumstances and to avoid irreparable prejudice to a party,” may be subject to interlocutory appeal. A number of critical issues have been certified for appeal via these provisions, including the statutory rights guaranteed to the accused and the admission of evidence.

The ECCC would similarly benefit from the addition of discretionary review. Discretionary review would give the ECCC greater flexibility to address many of the fairness concerns discussed in the previous section.

(b) Adopt a fast-track mechanism

The ECCC could also adopt the fast-track mechanism of the SCSL, which allows the Trial Chamber (TC) to refer an issue directly to the AC and receive “authoritative interpretations” on crucial preliminary matters without first ruling on the issue. Because referral precedes any judgment on the issue, the parties do not have to present these issues at the TC, only to present them again at the AC. As a result, the fast-track mechanism is believed by the SCSL to “enhance rather than undermine the basic right to expeditious justice.”

(c) Employ Flexible Statutory Interpretation

Alternatively, or in addition to the above methods, the ECCC could broadly interpret its Internal Rules on appellate review. The ICTY and the SCSL have relied on broad interpretations of their interlocutory review rules when presented with an issue of fundamental fairness. For instance, the ICTY’s first request for interlocutory review in *Prosecutor v. Tadic*, challenged the very foundation and legality of the court. Typically, these matters would not involve questions of jurisdiction — subject matter, personal, or otherwise. The court, nonetheless, approved the request under a rule that permitted interim review of jurisdictional issues. This broad interpretation of the notion of jurisdiction gave the court the flexibility to settle with finality a fundamental matter.

Though the ICTY has since used a stricter interpretation of jurisdiction, the initial flexible interpretation was critical for establishing the legitimacy and the proper functioning of the court.

The proceedings at the ECCC could similarly benefit from flexible statutory interpretation where it is necessary to uphold the fairness of the proceedings. This is particularly true where investigative action is concerned. As indicated above, the Defense has limited rights during the investigation phase and may only appeal certain OCIJ orders. The disadvantage the Defense experiences as a consequence could be worsened by the PTC’s intention to interpret the term “investigative action” strictly.

However, if the term were broadened to refer to not just the action itself (eg. request to interview a witness), but also to the manner in which the action is performed (eg. request to interview a witness *and* pursue a particular line of questioning), then the ECCC could move closer to satisfying the principle of the equality of arms.

V. Conclusion

From a Defense perspective, the ECCC’s current interlocutory appeal regime is restrictive and inflexible. Because the restrictiveness of the regime limits the ECCC’s ability to adequately respond to the needs of the Defense and because the regime is internally inconsistent, the fairness and legitimacy of the proceedings may be in jeopardy.

However, with the adoption of discretionary review or the fast-track mechanism or the use of more permissive statutory interpretation, the ECCC can better address issues of fairness.